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~~Pat~~ SNA
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REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FIFTH SESSION

DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND
INNOVATION

REPORT ON THE CONSIDERATION OF A PETITION REGARDING REMOVAL OF
MS. TABITHA MUTEMI AS A MEMBER OF THE MEDIA COUNCIL OF KENYA

DIRECTORATE OF DEPARTMENTAL COMMITTEES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

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LIST OF ABBREVIATIONS AND ACRONYMS

AG	Attorney General
CoK	Constitution of Kenya
ICT	Information, Communication and Technology
IEBC	Independent Electoral and Boundaries Commission
KCA	Kenya Correspondents Association
KEG	Kenya Editors Guild
KUJ	Kenya Union of Journalists
MCK	Media Council of Kenya
HOPS	Head of Public Service

ANNEXTURES

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CHAIRPERSON'S FOREWORD

The Petition by Mr. Muriuki Muriungi, an advocate, regarding removal of Ms. Tabitha Mutemi as a Member of the Media Council of Kenya was conveyed by Hon. Speaker to the House on 11th March, 2021 and consequently referred to the Departmental Committee on Communication, Information and Innovation for consideration by the Committee and tabling in the House within seven days in accordance with the provisions of Section 14 (3) of the Media Council Act (No. 46 of 2013).

On Thursday, 25th March 2021, the Committee sought and obtained approval of the House to extend the period for consideration by a further fourteen (14) days with effect from 29th March, 2021. This was done in view of the fact that the statutory period of seven (7) days would lapse on 29th March, 2021 without the Committee having completed the consideration of the submissions received. The House was also scheduled to proceed on a short recess; from 12th to 22nd March, 2021.

The Committee held two meetings to consider the Petition, analyse the submissions and finalize the report.

May I take this opportunity to thank all the Members of the Committee and the stakeholders for their input and valuable contributions during consideration of the Petition. The Committee also takes this opportunity to thank the Offices of the Speaker and the Clerk of the National Assembly for the technical support accorded to it during the exercise.

On behalf of the Departmental Committee on Communication, Information and Innovation, and pursuant to Section 14 (3) of the Media Council Act (No. 46 of 2013) and the provisions of Standing Order 199(6), it is now my pleasant duty to table the Report of the Committee on the consideration of the Petition regarding the removal of Ms. Tabitha Mutemi as a Member of the Media Council of Kenya.

Hon. William Kisang M.P

Chairperson, Departmental Committee on Communication, Information and Innovation

EXECUTIVE SUMMARY

This report presents details of the proceedings of the Departmental Committee on Communication, Information and Innovation in its consideration of the Petition by Mr. Muriuki Muriungi regarding the removal of Ms. Tabitha Mutemi as a member of the Media Council of Kenya.

The Petitioner avers that Ms. Tabitha Mutemi was ineligible for appointment as a member of the Media Council of Kenya, by dint of Section 16 of the IEBC Act, as read with Section 2(1) of the Fourth Schedule thereof, which stipulates that IEBC employees shall not be eligible for appointment to another public office. The Petitioner contends that Ms. Tabitha Mutemi's appointment to the Media Council of Kenya was also in violation of Circular No. OP/CAB.9/1A dated the 18th October, 2019, from the Executive Office of the President, which prohibits the appointment of public officers to serve as independent members of Boards, unless the enabling law specifically provides for the same. Further, Article 77(1) of the Constitution restricts full-time State officers from participating in any other gainful employment.

The other ground advanced by the Petitioner for the removal of Ms. Tabitha Mutemi is that of gross misconduct, based on the allegation that Ms. Tabitha Mutemi defied advice from the Principal Secretary, Ministry of ICT, Innovation and Youth Affairs by a letter dated 16th September 2020, that she could not hold the two public offices and that she had to choose one by 30th September 2020. Without providing further particulars, the Petitioner also alleges, in support of the gross misconduct ground, that Ms. Tabitha Mutemi defied lawful instructions from the Office of the Chief of Staff and the Head of the Public Service, the Office of the Attorney General and the IEBC Chairperson.

The Petitioner therefore prayed that the:

- a) Petition be dealt with immediately in view of the urgency and gravity of the issues raised; and,
- b) National Assembly within seven days (7) from the date of receipt of the Petition, considers the complaint and if satisfied that it discloses the grounds for removal, to submit the complaint together with the recommendations to the Cabinet Secretary for suspension of Ms. Tabitha Mutemi and the appointment of a Tribunal to consider and if it discloses sufficient grounds for removal, recommend to the Cabinet Secretary to remove Ms. Tabitha Mutemi from office in accordance with section 14 of the Media Council Act.

In considering the Petition, the Committee wrote to the various stakeholders requesting them to provide written responses on issues raised by the Petitioner. The submissions were required to be submitted to the Committee on or before Tuesday 23rd March, 2021. The Committee received submissions from the Attorney General, the Head of Public Service, Ms. Tabitha Mutemi, Kenya Editors Guild, the Kenya Union of Journalists, the Independent Electoral and Boundaries Commission (IEBC) and Kenya Correspondents Association.

Based on the submissions received, the Committee noted that the Petition discloses sufficient grounds for removal from office for Ms. Tabitha Mutemi on the basis of her ineligibility for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission; in breach of written laws, the Constitution and government policy in her

appointment; and gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority.

In response to the prayers, the Committee therefore recommends that the complaint be submitted to the Cabinet Secretary, Ministry of Information, Communication and Technology and Youth Affairs for appropriate action in accordance with the provisions of section 14(3) and (4) of the Media Council Act, no. 46 of 2013.

CHAPTER ONE

1.0 PREFACE

1.1 Establishment of the Committee

1. The Departmental Committee on Communications, Information and Innovation is established under Standing Order 216 whose mandate pursuant to the Standing Order 216 (5) is as follows;
 - a. Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
 - b. Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
 - c. Study and review all legislation referred to it;
 - d. Study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
 - e. Investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
 - f. Vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);
 - (fa) examine treaties, agreements and conventions;
 - g. make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
 - h. consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
 - i. Examine any questions raised by Members on a matter within its mandate

1.2 Committee Subjects

2. In accordance with Second Schedule of the Standing Orders, the Committee is mandated to oversee Communication, Information, media and broadcasting (except for broadcast of parliamentary proceedings), Information Communications Technology (ICT) development and advancement of technology and modernization of production strategies.
3. In executing its mandate, the Committee oversees the following Departments;
 - a. State Department of Broadcasting and Telecommunications
 - b. State Department of ICT & Innovation

1.3 Committee Membership

4. The Departmental Committee on Communication, Information and Innovation was constituted by the House in December 2017 and comprises of the following Members-

Chairperson

Hon. Kisang William Kipkemoi, M.P
MP for Marakwet West Constituency

Jubilee Party

Vice-Chairperson

Hon. Jane Wanjiku Njiru
MP for Embu County

Jubilee Party

Hon. George Theuri, MP
M.P for Embakasi West Constituency

Jubilee Party

Hon. Gertrude Mbeyu , MP
MP for Kilifi County

Orange Democratic Party

Hon. Alfah O. Miruka, MP
M.P for Bomachoge Chache Constituency

Kenya National Congress

Hon. Anthony Kiai, MP
MP for Mukurweini Constituency

Jubilee Party

Hon. Annie Wanjiku Kibeh, MP
MP for Gatundu North Constituency

Jubilee Party

Hon. (Eng.) Mark Nyamita Ogola, MP
MP for Uriri Constituency

Orange Democratic Party

Hon. Joshua Kimilu, Kivinda, MP
MP for Kaiti Constituency

Wiper Democratic Party

Hon. Victor Munyaka, MP
MP for Machakos Town Constituency

Jubilee Party

Hon. Marwa Kitayama Maisori, MP
MP for Kuria East Constituency

Jubilee Party

Hon. Erastus Nzioka Kivasu, M.P.
MP for Mbooni

New Democrats Party

Hon. Mwambu Mabongah, MP
MP for Bumula Constituency

Independent

Hon. Innocent Momanyi Obiri, MP
Bobasi Constituency

People's Democratic Party

Hon. Maritim Sylvanus, MP
MP for Ainamoi Constituency

Jubilee Party

Hon. Godfrey Osotsi Atieno, MP
Nominated

African National Congress

Hon. Mwangaza Kawira, MP
MP for Meru County

Independent

Hon. Anthony, Tom Oluoch, MP
MP for Mathare Constituency

Orange Democratic Party

Hon. Jonah Mburu, MP
MP for Lari Constituency

Jubilee Party

1.4 Committee Secretariat

5. The secretariat comprises -

Head of the Secretariat

Ms. Hellen Kina
Clerk Assistant II

Ms. Ella Kendi
Clerk Assistant II

Mr. Donald Manyala
Research Officer II

Mr. Salem Lorot
Legal Counsel II

Mr. Thomas Ogwel
Fiscal Analyst II

CHAPTER TWO

2.0 INTRODUCTION

2.1 The Petition

6. The Petition regarding removal of Ms. Tabitha Mutemi as a member of the Media Council of Kenya was conveyed by the Hon. Speaker to the House on Thursday 11th March, 2021.
7. The Petitioner wished to draw the attention of the House of the following; that:
 - (i) The Media Council of Kenya (MCK) is established by the Media Council Act No. 20 of 2013. It sets media standards as provided for in Article 34(5) of the Constitution of Kenya. Under section 23 of the Act, the Council receives “*such monies as may be allocated by the National Assembly*” By dint of receipt of public funds and establishment by an Act of Parliament, the Council is bound by existing laws, regulations, circulars and opinions issued to guide publicly funded organizations;
 - (ii) Ms. Tabitha Mutemi was gazetted as a member of the Media Council of Kenya for a period of three years vide Gazette Notice 9506 from 31st October, 2019. Her tenure is expected to lapse on 2nd October 2022 as per section 12(1) of the MCK Act;
 - (iii) Article 260 of the Constitution defines public office to mean “*an office in the national government, a county government of the public office, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament*”;
 - (iv) The IEBC is an independent commission identified in Chapter 15 and established under Article 88 of the CoK. The IEBC draws funds from the Exchequer as set out under section 17 of the IEBC Act. Similarly, the MCK is a public office established under the provisions of section 5 of the MCK Act. Section 16 of the MCK Act provides that the Chairperson and the members of the Council shall be paid allowances as the Salaries and Remuneration Commission shall determine;
 - (v) It is not in contention that Ms. Tabitha Mutemi is a full time employee of the IEBC serving as a manager in charge of Corporate Communications. Therefore, by virtue of Article 260 of CoK, the IEBC is a public office and that it follows that Ms. Tabitha Mutemi is a public officer by dint of her position as an employee of the IEBC;
8. The Petitioner further provided the following as the grounds for removal of Ms. Tabitha Mutemi;
 - a) **Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member**
9. Section 2(1) of the Fourth Schedule to the IEBC Act prohibits members and employees of the Commission from holding a political or another public office as it provides that a member or employee of the Commission shall not during tenure of office be eligible for appointment or nomination to a political office or appointment to another public office.
10. Section 16 of the IEBC Act 2011 provides that the members and the employees of the Commission shall prescribe to the code of conduct prescribed under the Fourth Schedule.
11. Ms. Tabitha Mutemi is bound by the Code of Conduct under the Fourth Schedule which means that as long as she remained an employee of the IEBC, she was/is ineligible for appointment

to any political or public office such as Board member of the MCK. Her purported appointment was therefore made oblivious and in total disregard of the IEBC Act 2011.

12. Her appointment was in violation of law, such appointment was a *nullity ab initio* even without being declared as such by a court of law as she was ineligible for appointment. On this ground Ms. Tabitha Mutemi ought to be removed from office since her continued occupation of the office is a continued breach of the law.

b) Breach of written laws, the Constitution and Government Policy in the appointment

13. Besides the express provisions of the IEBC Act, 2011 set out in the foregoing paragraph, on 3rd February, 2016 the Chief of Staff and Head of Public Service issued a Government Circular OP/CAB.9/1A with respect to appointment of State Officers and Public Officers to Boards of State Corporations. The circular communicated that state officers and public officers shall not be appointed to Boards of State Corporations on their individual capacities in compliance with the provisions of Article 77 of the Constitution.
14. This opinion was shared by the office of the Chief of Staff and Head of the Public, the Office of the Attorney General, the Principal Secretary Ministry of ICT and Youth Affairs and the Chairperson of the IEBC.

c) Gross Misconduct

15. The Principal Secretary, Ministry of ICT and Youth Affairs, through a letter dated 16th September, 2020 advised Ms. Mutemi that she could not lawfully hold both public positions and should by 30th September, 2020 decide either to remain an MCK Council Member or an IEBC employee. Indeed, by continuing to receive emoluments from both institutions, Ms. Mutemi was in breach of the law and ought to make refunds already received illegally. That Ms. Mutemi has defied lawful instructions and advisory from the office of Chief of Staff and Head of Public Service, Office of the Attorney General, the Principal Secretary Ministry of ICT and Youth Affairs and the Chairperson IEBC, hence subjecting the Kenyan public to uncertainty and unnecessary litigation. This amounts to gross misconduct and insubordination which also is a ground for her removal under Section 14 of the MCK Act.
16. The Petition concludes with a prayer that the said Ms. Tabitha Mutemi be removed from the office as a Member of the MCK pursuant to section 14(1) (a) of MCK Act on the grounds that her continued tenureship is illegal and that she was ineligible for appointment as council member and for violation of the Constitution and other written laws including contravention of Chapter Six of the Constitution, Section 26(2) of the Leadership and Integrity Act and Section 2(1) of the Fourth Schedule of the IEBC Act, 2011.
17. The removal of Ms. Tabitha Mutemi is to be carried out within the parameters of the Constitution and the provisions of the MCK Act which empowers the House to consider the grounds raised.
18. That the removal of Ms. Mutemi and issues in respect to which the Petition is made are not pending before any court of law, constitutional or legal body.

CHAPTER THREE

3.1 LEGAL FRAMEWORK

3.1.1 The Constitution of Kenya

The Constitution of Kenya is the supreme law of Kenya. The Petition therefore seeks the removal of Ms. Tabitha Mutemi on the basis of her alleged violation of the following provisions of the Constitution:

- (a) Article 77(1) of the Constitution, which restricts full-time State officers from participating in any other gainful employment; and,
- (b) Article 201 (d) of the Constitution regarding prudent use of public funds;

Other Constitutional provisions that provided a legal basis in determination of the Petition include:

- a) Article 260 of the Constitution which defines “**public service**” as “*the collectivity of all individuals, other than State officers, performing a function within a State organ*” while a State organ is defined as “*a commission, office, agency or other body established under this Constitution*”.
- b) Article 260 further defines “**public office**” as “*an office in the national government, a county government or the public service, if the remuneration and benefits of the office are payable directly from the Consolidated Fund or directly out of money provided by Parliament*”.
- c) Article 260 of the Constitution defines a “**public officer**” as follows:
 - (a) *any State officer; or*
 - (b) *any person, other than a State Officer, who holds a public office.*

3.1.2 The Media Council Act, 2013

19. Section 14 of the Media Council Act, No. 46 of 2013 hereinafter the “MCA” regulates the removal of a chairperson or member of the Board of the Media Council of Kenya.

20. The section provides as follows:

“(1) The chairperson or a member of the Council shall be removed from office on any of the following grounds—

- (a) *violation of the Constitution or any other written law, including contravention of Chapter Six of the Constitution;*
- (b) *gross misconduct;*
- (c) *physical or mental incapacity that leads to inability to perform the functions of office;*
- (d) *incompetence or neglect of duty;*
- (e) *bankruptcy;*

- (f) absence from three consecutive meetings of the Council without justifiable cause;
- (g) if the chairperson or a member becomes a director of any media enterprise or holds shares or has any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in a conflict of interest with the officer's official duties; or
- (h) if the chairperson or member is convicted of a criminal offence and sentenced to imprisonment for a period of more than six months without the option of a fine.

(2) A person desiring the removal of the chairperson or a member of the Council on any ground specified in subsection (1) may present a Petition, in writing, to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall, within seven days, consider the complaint and if satisfied that it discloses a ground under subsection (1) submit the complaint together with its recommendations to the Cabinet Secretary.

(4) On receiving the recommendation made under subsection (3), the Cabinet Secretary shall suspend the member from office pending determination of the Petition and shall appoint a tribunal comprising of—

- (a) a chairperson who shall be qualified to hold office as a Judge of the High Court;
- (b) two persons one man and one woman competent to assess and determine the Petition.

(5) The tribunal shall consider the Petition and if satisfied that it discloses sufficient grounds for removal, recommend to the Cabinet Secretary to remove the member from office.

(6) In determining the Petition, the tribunal shall be guided by the principles of fair administrative justice set out in Article 47 of the Constitution.

(7) The Cabinet Secretary shall be bound by the recommendation made by the tribunal under this section."

21. Section 14(2) of the MCA Act provides that the National Assembly shall, within **seven** days, **consider the complaint and if satisfied that it discloses a ground** for removal of a chairperson or a member of the Council submit the complaint together with its recommendations to the Cabinet Secretary.

3.1.3 The Independent Electoral and Boundaries Commission Act, 2011

Section 2(1) of the Fourth Schedule to the IEBC Act, 2011 prohibits members and employees of the IEBC from holding another public office. The said provision stipulates as follows:

“A member or employee of the Commission shall not, during tenure of office be eligible for—

- (a) Appointment or nomination to a political office; or*
- (b) Appointment to another public office”.*

3.2 SUBMISSIONS

22. The Committee through letters dated 17th and 19th March, 2021 requested for written submissions from key stakeholders to aid it in making a determination on the Petition for removal of Ms. Tabitha Mutemi as a member of the Media Council of Kenya.
23. The stakeholders were to confine their submissions on the grounds set out in the Petition which included:
 - a) Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC);
 - b) Breach of written laws, the Constitution and government policy in her appointment; and,
 - c) Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority.

3.2.1 MS. TABITHA MUTEMI

24. The Committee sought a written response on the issues raised in the Petition, from the defendant, Ms. Tabitha Mutemi via a letter dated 17th March, 2021 referenced NA/DCS/CII/2021/(007).
25. The Committee received a written response by way of submission on 23rd March, 2021. Ms Tabitha Mutemi made a detailed submission with annexures (*See Annexure 5*). This report however, confines itself to the submissions that directly respond the grounds set out in the Petition which include:
 - a) Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC);
 - b) Breach of written laws, the Constitution and government policy in her appointment; and,
 - c) Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority.
26. Ms. Tabitha Mutemi’s submission responded to the following grounds in the Petition.

Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC)

27. The defendant, Ms. Tabitha Mutemi, averred that following an advisory from the Attorney General that public officers could serve on the Board of the Media Council of Kenya, there was a re-advertisement of vacancies in the position of members of the council and chairperson on 24th July 2019. In the advertisement, the Cabinet Secretary listed persons that would not be qualified for appointment, of which she does not fall within any of the categories of public officers who do not qualify to be members of the council.

28. The defendant further submitted that she disclosed that she was an employee of the IEBC in both her applications as Chairperson and member of the MCK. Further, she submitted that during interviews, the issue of her employment with IEBC was asked. In her response to the selection panel during the interview, she pointed out a precedent set by a member of the IEBC who was also appointed as a member of the Salaries Review Commission (SRC), Ms. Sellestine Kiuluku in December 2019. The defendant noted that there was no objection raised to Ms. Kiuluku holding the two positions.
29. Thus the defendant stated that it was not true that she holds two public offices, she had not violated Articles 77(1) and Article 201(d) of the Constitution of Kenya. Further she submitted that she had not contravened schedule II of the IEBC Act. Further she averred that Section 12(2) of the Media Council Act provides that the Chairperson and members of the Council serve on part-time basis. The Council meets four times annually, and membership of the Council is not a full-time engagement. She averred that the role of the Council as envisaged by the Act is that of oversight and not day to day management.
30. The defendant further submitted that based on a decision of the High Court in the case of *Katiba Institute & Another Vs Attorney General & Another* [2020] (Kenya Law Reports), State Corporations and Parastatals are not offices in the public service because they are neither offices in the national government nor county government as defined by the Constitution. She noted that the remuneration of chairpersons and members of Boards of State Corporations and Parastatals are not directly drawn from the Consolidated Fund or directly provided by Parliament. The positions of chairpersons and members of the Boards of State Corporations and Parastatals are not offices in the public service.

On Breach of written laws, the Constitution and government policy in her appointment

31. Ms. Tabitha Mutemi submitted that prior to presentation of its report to the Cabinet Secretary, the Selection Panel through the exercise of an abundance of caution, sought the advisory of the Attorney General on whether public officers could serve on the Board of the Council. She averred that the advisory of the Attorney General to the Cabinet Secretary in the letter dated 18th August 2020 is contradictory to the advisory presented to the Selection Panel that conducted her recruitment in 2019 which confirmed that public officers could serve on the Council.

Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority

32. Ms. Tabitha Mutemi submitted that the letter dated 3rd February, 2016 from the Chief of Staff and the Head of the Public Service advised the Attorney General and the Cabinet Secretary, among others, that state officers and public officers would not be appointed to Boards of State Corporations except where the legal instruments establishing the State Corporation provided otherwise, recognizes that the advice was subject to the law establishing a State Corporation or Parastatal.
33. Ms. Tabitha Mutemi further averred that the letter from the Chief of Staff and the Head of the Public Service was written in 2016, three years before the advisory of the Attorney General to the Selection Panel in 2019. The advisory of the Attorney General to the Selection Panel came

late in time, was made pursuant to the Media Council Act, did not violate the Media Council Act and took precedence to the letter dated 3rd February, 2016.

3.2.2 OFFICE OF THE ATTORNEY GENERAL

34. The Committee received submissions from the Office of the Attorney General by way of a letter dated 26th March 2021 and referenced AG/CONF/6/B/18/1 (*See Annexure 6*). In his submissions, the Attorney General averred that:

On Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC)

35. The Office of the Attorney General submitted that “public service” is defined in Article 260 of the Constitution as the collectivity of all individuals, other than State officers, performing a function within a State organ while a “state organ” is defined as a commission, office, agency or other body established under this Constitution. Consequently, by working for the IEBC and holding office as an independent member of the Media Council of Kenya, Ms. Mutemi, was holding two public offices and (in that context) Ms. Mutemi’s holding of two public offices was in contravention of the IEBC Act (*see annexure 6* “*letter by the AG to the National Assembly dated 26th March, 2021*”).

On Breach of written laws, the Constitution and government policy in her appointment

36. The Office of the Attorney General submitted that the said legal opinion concerned the question whether the prohibition on multiple directorships in *Mwongozo* applies to persons serving in County Governments. The legal opinion made it clear that it did not “*address the instruments establishing a state corporation because [the] inquiry [was] of a general nature and [had] not singled out a specific state corporation.*” The legal opinion advised that “*other than limitations against gainful employment for state officers serving in a county government and the limitation on multi-directorships in state corporations, there is no provision in law or in administrative procedures that prohibits the appointment of a person serving in a county government as a chairperson or a member of a Board of a state corporation.*” A study of the letter would confirm that the opinion was never meant, and did not attempt, to answer the question whether an employee of the IEBC could hold a position in the Media Council of Kenya (*see annexure 6: letter by the AG to the National Assembly dated 26th March, 2021*).

37. Further, the Office of the Attorney General submitted that the “public service” is defined in Article 260 of the Constitution as the collectivity of all individuals, other than State officers, performing a function within a State organ while a “state organ” is defined as a commission, office, agency or other body established under this Constitution. Consequently, by working for the IEBC and holding office as an independent member of the Media Council of Kenya, Ms. Tabitha Mutemi, was holding two public offices and (in that context) was in contravention of the IEBC Act (*see annexure 6: letter by the AG to the National Assembly dated 26th March, 2021*).

38. The Attorney General also submitted that subsequent to their opinion, the High Court had delivered a decision in the case of *Katiba Institute & another v Attorney General & another*

[2020] eKLR that creates a level of uncertainty on the place of State Corporations in the public sector. While the Court phrased one of the questions before it as being whether positions of chairpersons and members of Boards of State Corporations and parastatals are offices in the public service, it proceeded, in its analysis, to apply the test of whether these were public offices, and held that these positions were not public offices. The Office of the Attorney General is, in this regard, considering applying for a review of this decision to obtain clarity on the matter.

On Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority

39. The Office of the Attorney General submitted that by working for the IEBC and holding office as an independent member of the Media Council of Kenya, Ms. Mutemi, was holding two public offices and (in that context) was in contravention of the IEBC Act (*see annexure 6: letter by the AG to the National Assembly dated 26th March, 2021*).

3.2.3 KENYA CORRESPONDENTS ASSOCIATION

40. Kenya Correspondents Association (KCA) is one of the stakeholder bodies that nominates a member to the Selection Panel for the recruitment of the chair and Board members of the Media Council of Kenya and members of the Complaints Commission as provided for in Part II Section 7 and Part IV of the Media Council Act 2013. The association submitted that it participated in the selection process of the said Board member of the Media Council of Kenya as provided for in the law

41. Through a letter dated March 22nd 2021, the Kenya Correspondents Association (KCA) (*See Annexure 7*) submitted the following as regards the grounds for removal of Ms. Tabitha Mutemi:

On Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC)

42. In its submission, KCA averred that in their reading and understanding of the Media Council Act 2013 and Article 34(5) of the Constitution 2010, the MCK is the independent media regulatory body contemplated in the Constitution and is therefore not a state body or corporation and that the support from public funds does not take away its independence or make it a State Corporation. The Association therefore urged the Committee to establish if there was any law barring a public or state officer from serving on its Board.

On Breach of written laws, the Constitution and government policy in her appointment

43. KCA participated in the selection process of the current Board members, as such they averred that the selection process was guided by the Ministry of ICT according to the law and when there were concerns over the conflict on process on the provisions of the law and a circular from the Head of Public Service on the eligibility of applicants serving in state or public bodies, the Selection Panel, through the Ministry, obtained an advisory from the Attorney General that

guided the repeat process that led to the selection of Ms. Tabitha Mutemi and others who may have been serving in public positions.

On Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority

44. KCA did not make any direct submission on this ground set out in the Petition.

3.2.4 THE KENYA EDITORS GUILD (KEG)

45. The Kenya Editors Guild (KEG) is the professional body that brings together editors from private, public and community media with a view to safeguarding media independence and through peerage promoting media professionalism and excellence while promoting public good.

46. KEG submitted to the Committee that it was therefore engaging on the issue of the public Petition from a public interest perspective, speaking for the sector, specifically the professional journalists whose practice is tangential on the existence and performance of a truly independent media regulator as per the Constitution.

47. KEG further submitted that as a stakeholder in the industry it was part of the Selection Panel that recruited the impugned member of the Council; and as subjects of the Media Council Act, 2013, being one of the media stakeholders recognized in the written law as to section 7 (2) (b) and section 7 (3) (c).

48. Through a letter dated March 23rd 2021, the Kenya Editors Guild (KEG) (*See Annexure 8*) submitted the following as regards the grounds for removal of Ms. Tabitha Mutemi:

On Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC)

49. In their submission, KEG noted that the grounds raised in the Petition lays emphasis on matters outside the Media Council Act 2013, matters which have more alignment to the Independent Electoral and Boundaries Commission (IEBC) Act. They further observed that in order to protect the Media Council's independence, the law expressly lists persons who may not serve in the Council at Section 8(2); whose clear meaning is that those not so listed have a right to serve should they so wish and if they are found suitable by the Selection Panel set up for that purpose.

On Breach of written laws, the Constitution and government policy in her appointment

50. In their submissions, KEG noted that the current Media Council Board comprising the chairperson and 7 members was duly appointed by the Cabinet Secretary of Information Communication and Technology, Mr. Joe Mucheru, as per section 7(10) of the Media Council Act, 2013 vide a Gazette Notice 9506 on 5th October 2019. This was after a selection process

that was not challenged including the suitability of Ms. Tabitha Mutemi, who is serving as an employee of IEBC.

On Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority

51. KEG noted that it was an undeniable fact that the chairperson and members of the Media Council Board must be seen to act independent of any influence, especially from the Secretariat, the government, the industry, or indeed any political entities.

3.2.5 KENYA UNION OF JOURNALISTS (KUJ)

52. Through a letter dated March 23rd 2021, the Kenya Union of Journalists (KUJ) (*See Annexure 9*) submitted the following as regards the grounds for removal of Ms. Tabitha Mutemi:

On Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC)

53. In their submission, KUJ averred that the sole factual basis for the stated grounds upon which the Petition was founded was that at the time of her recruitment as a member of the Media Council, Ms. Tabitha Mutemi was an employee of the Electoral and Boundaries Commission where she served and continues to serve as the Director of Communications.

54. KUJ submitted that the Petition for removal of Ms Tabitha Mutemi was based on the erroneous assumption that the Media Council of Kenya is a State Corporation established and controlled by the Executive Arm of the Government. KUJ thus submitted that the Media Council is a statutory body, whose establishment, composition and functions are based exclusively on the Media Council Act and Article 34(5) of the Constitution. KUJ further submitted that the fact had been affirmed by the Supreme Court in the case of *Royal Media Services & Others vs the Communications Authority [2014]eKLR*.

55. Further, KUJ submitted that it was instructive to note that members of the Council are not fulltime employees of the Council and do not exercise executive function. They indicated that Section 12 of the Media Council Act provides that members of the Council shall serve on a part time basis.

On Breach of written laws, the Constitution and government policy in her appointment

56. KUJ did not make any direct submission on this ground set out in the Petition

On Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority

57. KUJ did not make any direct submission on this ground set out in the Petition

3.2.6 INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION (IEBC)

58. IEBC vide a letter dated 22nd March 2021, referenced IEBC/ADM/5/29/VOL.II (3) (See Annexure 10) submitted as regards the grounds for removal of Ms. Tabitha Mutemi as follows:

On Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC)

59. That Ms. Tabitha Mutemi was currently a full-time employee of the Commission, working as Manager Corporate Communications Affairs.
60. Section 16 of the IEBC Act states that members and employees of the Commission shall subscribe to the code of conduct prescribed under the Fourth Schedule. Further, Section 2(1)(b) of the Fourth Schedule prohibits members and employees of the Commission from holding other public offices during their tenure of office with the Commission.
61. IEBC submitted that they were also guided by Article 77(1) of the Constitution as expounded by Section 52(1) and (2) of the Leadership and Integrity Act which prohibits a full time state or public officer from participating in other gainful employment.
62. Therefore, it was their submission that Ms. Tabitha Mutemi's appointment as Board Member to MCK was not viable while still in employment of the IEBC as pronounced by the law.

On Breach of written laws, the Constitution and government policy in her appointment

63. IEBC did not make any direct submission on this ground set out in the Petition

On Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority

64. IEBC did not make any direct submission on this ground set out in the Petition

3.2.7 THE HEAD OF PUBLIC SERVICE

65. In a letter dated 23rd March 2021, the Head of Public Service (HOPS), Dr. Joseph Kinyua made a written submission to the Committee in response to the request. The Head of Public Service averred that:

On Ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC)

66. The Head of Public Service submitted that Public officers only sit in the Boards of state corporations by dint of specific statutory provisions requiring the offices they hold to be represented on the Board of a State Corporation. These include for example representative of public universities, or specifically designated statutory bodies. Such Membership can be occupied either by specific one holder who is substantive member or by alternate members who is appointed in writing for that purposes by the substantive Member.

67. Ms. Tabitha Mutemi was indicated as being an employee of the IEBC and as such in the service of the National Government. The IEBC is not specifically listed as a Member of the Board of

MCK and Ms. Tabitha Mutemi is not designated as representative thereof. Consequently, and by virtue of the Mwongozo Code of Governance and Circular No. O/CAB.9/1A of 3rd February 2016, Ms. Tabitha Mutemi would be ineligible to serve as an independent Member of MCK.

On Breach of written laws, the Constitution and government policy in her appointment

68. The Head of Public Service submitted that Article 260 of the Constitution defines a public officer to mean an office in the national government, county government or public office service if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament. The IEBC is an independent Commission as identified in Chapter Fifteen and established under Article 88 of the Constitution of Kenya. It draws its funds from the Exchequer as provided by section 17 of the IEBC Act.
69. Ms. Tabitha Mutemi was indicated as being an employee of the IEBC and as such in the service of the National Government. The IEBC is not specifically listed as a Member of the Board of MCK and Ms. Tabitha Mutemi is not designated as representative thereof. Consequently, and by virtue of the Mwongozo Code of Governance and Circular No. O/CAB.9/1A of 3rd February 2016, Ms. Tabitha Mutemi would be ineligible to serve as an independent Member of MCK.

On Gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority

70. The Head of Public Service submitted that the appointment of Ms Mutemi as an independent member of the Board of the Media Council of Kenya is untenable. Consequently, the respective Cabinet Secretary would be expected to take the necessary action to regularise the same and secure an appropriate appointment in line with section 7(2) of the Media Council Act.

CHAPTER FOUR

4.0 COMMITTEE OBSERVATIONS

71. The Committee made the following observations:
72. Section 14 of the Media Council Act, No. 46 of 2013 regulates the removal of a member of the Board of the Media Council.
73. Section 14(1) provides that the grounds for removal of a chairperson or a member of the Council shall be on any of the following grounds—
- (a) violation of the Constitution or any other written law, including contravention of Chapter Six of the Constitution;
 - (b) gross misconduct;
 - (c) physical or mental incapacity that leads to inability to perform the functions of office;
 - (d) incompetence or neglect of duty;
 - (e) bankruptcy;
 - (f) absence from three consecutive meetings of the Council without justifiable cause;
 - (g) if the chairperson or a member becomes a director of any media enterprise or holds shares or has any other interest in a corporation, partnership or other body, directly or through another person, if holding those shares or having that interest would result in a conflict of interest with the officer's official duties; or
 - (h) if the chairperson or member is convicted of a criminal offence and sentence to imprisonment for a period of more than six months without the option of a fine.
74. Section 14(2) of the Act provides that a person desiring the removal of the chairperson or a member of the Council on any ground specified in Subsection (1) may present a Petition, in writing, to the National Assembly setting out the alleged facts constituting that ground.
75. Section 14 (3) provides that the National Assembly shall, within seven days, consider the complaint and if satisfied that it discloses a ground under subsection (1) submit the complaint together with its recommendations to the Cabinet Secretary.
76. The Petition by Mr. Muriuki Muriungi regarding removal of Ms. Tabitha Mutemi as a member of the Media Council of Kenya was conveyed for consideration by the Departmental Committee on Communication, Information and Innovation and the House within seven days in accordance with the provisions of Section 14 (3) of the Media Council Act (No. 46 of 2013) by the Hon. Speaker to the House on 11th March, 2021.
77. The Media Council of Kenya (MCK) is established by the Media Council Act No. 20 of 2013. It sets media standards as provided for in Article 34(5) of the Constitution of Kenya. Under section 23 of the Act, the Council receives "*such monies as may be allocated by the National Assembly*" by dint of receipt of public funds and establishment by an Act of Parliament, the Council is bound by existing laws, regulations, circulars and opinions issued to guide publicly funded organizations.

78. Ms. Tabitha Mutemi was gazetted as a Member of the Media Council of Kenya for a period of three years vide Gazette Notice 9506 from 31st October, 2019. Her tenure is expected to lapse on 2nd October 2022 as per Section 12(1) of the MCK Act;
79. Article 260 of the Constitution defines public office to mean “*an office in the national government, a county government of the public office, if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament*”.
80. The Petition submits three grounds for the removal of the Ms Tabitha Mutemi, namely, (a) ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC); (b) breach of written laws, the Constitution and government policy in her appointment; and (c) gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority.
81. With respect to the first ground relating to ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC) the Committee observed that:
- (i) Ms. Tabitha Mutemi submitted that State Corporations and Parastatals are not offices in the public service, because they are neither offices in the national government nor county government as defined by the Constitution. The remuneration of chairpersons and members of Boards of State Corporations and Parastatals are not directly drawn from the Consolidated Fund or directly provided by Parliament and therefore, the positions of chairpersons and members of the Boards of State Corporations and Parastatals are not offices in the public service (**see annexure 5: Written submissions by Ms Tabitha Mutemi**).
 - (ii) The Office of the Attorney General submitted that “public service” is defined in Article 260 of the Constitution as the collectivity of all individuals, other than State officers, performing a function within a State organ while a “state organ” is defined as a commission, office, agency or other body established under this Constitution. Consequently, by working for the IEBC and holding office as an independent member of the Media Council of Kenya, Ms. Mutemi, was holding two public offices and (in that context) Ms. Mutemi’s holding of two public offices was in contravention of the IEBC Act (**see annexure 6: letter by the AG to the National Assembly dated 26th March, 2021**).
 - (iii) The Head of Public Service submitted that Ms. Tabitha Mutemi was indicated as being an employee of the IEBC and as such in the service of the National Government. The IEBC is not specifically listed as a Member of the Board of MCK and Ms. Tabitha Mutemi is not designated as representative thereof. Consequently, and by virtue of the Mwongozo Code of Governance and Circular No. O/CAB.9/1A of 3rd February 2016, Ms. Tabitha Mutemi would be ineligible to serve as an independent Member of MCK. (**see annexure 11: letter by the HOPS to the National Assembly dated 23rd March, 2021**
 - (iv) The Independent Electoral Boundaries Commission submitted that section 16 of the IEBC Act states that members and employees of the Commission shall subscribe to the

code of conduct under the fourth schedule. Section 2(1)(b) of the Fourth Schedule prohibits members and employees of the Commission from holding other public offices during the tenure of their office with the Commission. The Commission is also guided by Article 77(1) of the Constitution as expounded by Section 52(1) and (2) of the Leadership and Integrity Act prohibits a full-time state or public officer from participating in other gainful employment. Consequently, Ms. Tabitha Mutemi's appointment as Board member to MCK is not viable while still in the employment of the IEBC as pronounced by the laws (*see annexure 10: letter by the IEBC to the National Assembly dated 22nd March, 2021*).

82. Pursuant to Section 14(3) of the MCA, the Committee having considered the complaint, is satisfied that the submissions of the Office of the Attorney General, the Public Service and the Independent Electoral Boundaries Commission disclose a ground for removal from office for Ms. Tabitha Mutemi on the basis of ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission.

83. With respect to the second ground relating to breach of written laws, the Constitution and government policy in her appointment, the Committee observed:

- (i) Ms Tabitha Mutemi submitted that prior to presentation of their report to the Cabinet Secretary, the Selection Panel through the exercise of an abundance of caution, sought the advisory of the Attorney General on whether public officers could serve on the Board of the Council. The Attorney General in an advisory referred in the Report of the Selection Panel confirmed that public officers could serve on the Council and submitted the "Report of the Selection Panel for the positions of chairperson and member of the Media Council of Kenya" (*see annexure 5: Written submissions by Ms Tabitha Mutemi*).
- (ii) The Office of the Attorney General submitted that the said legal opinion concerned the question whether the prohibition on multiple directorships in *Mwongozo* applies to persons serving in County Governments. The legal opinion made it clear that it did not "*address the instruments establishing a state corporation because [the] inquiry [was] of a general nature and [had] not singled out a specific state corporation.*" The legal opinion advised that "*other than limitations against gainful employment for state officers serving in a county government and the limitation on multi-directorships in state corporations, there is no provision in law or in administrative procedures that prohibits the appointment of a person serving in a county government as a chairperson or a member of a Board of a state corporation.*" A study of the letter would confirm that the opinion was never meant, and did not attempt, to answer the question whether an employee of the IEBC could hold a position in the Media Council of Kenya (*see annexure 6: letter by the AG to the National Assembly dated 26th March, 2021*).
- (iii) Further, the Office of the Attorney General submitted that the "public service" is defined in Article 260 of the Constitution as the collectivity of all individuals, other than State officers, performing a function within a State organ while a "state organ" is defined as a commission, office, agency or other body established under this Constitution. Consequently, by working for the IEBC and holding office as an

independent member of the Media Council of Kenya, Ms. Tabitha Mutemi, was holding two public offices and (in that context) was in contravention of the IEBC Act (*see annexure 6: letter by the AG to the National Assembly dated 26th March, 2021*).

(iv) The Head of Public Service submitted that Article 260 of the Constitution defines a public officer to mean an office in the national government, county government or public office service if the remuneration and benefits of the office are payable directly from the consolidated fund or directly out of money provided by Parliament. The IEBC is an independent Commission as identified in Chapter Fifteen and established under Article 88 of the Constitution of Kenya. It draws its funds from the Exchequer as provided by section 17 of the IEBC Act. Ms. Tabitha Mutemi was indicated as being an employee of the IEBC and as such in the service of the National Government. The IEBC is not specifically listed as a Member of the Board of MCK and Ms. Tabitha Mutemi is not designated as representative thereof. Consequently, and by virtue of the Mwongozo Code of Governance and Circular No. O/CAB.9/1A of 3rd February 2016, Ms. Tabitha Mutemi would be ineligible to serve as an independent Member of MCK. (*see annexure 11: letter by the HOPS to the National Assembly dated 23rd March, 2021*).

84. Pursuant to Section 14(3) of the MCK Act, the Committee having considered the complaint, is satisfied that the submissions of the Office of the Attorney General, and the Public Service Commission disclose a ground for removal from office for Ms. Tabitha Mutemi on the basis of breach of written laws, the Constitution and government policy in her appointment.

85. With respect to the third ground relating to gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority, the Committee observed:

- (i) Ms. Tabitha Mutemi submitted that the letter from the Chief of Staff and the Head of the Public Service was written in 2016, three years before the advisory of the Attorney General to the Selection Panel in 2019. The advisory of the Attorney General to the Selection Panel came late in time, was made pursuant to the Media Council Act, did not violate the Media Council Act, and took precedence to the letter dated 3rd February, 2016 (*see annexure 5: Written submissions by Ms Tabitha Mutemi*).
- (ii) The Office of the Attorney General submitted that by working for the IEBC and holding office as an independent member of the Media Council of Kenya, Ms. Mutemi, was holding two public offices and (in that context) was in contravention of the IEBC Act (*see annexure 6: letter by the AG to the National Assembly dated 26th March, 2021*).
- (iii) The Head of Public Service submitted that the appointment of Ms Mutemi as an independent member of the Board of the Media Council of Kenya is untenable. Consequently, the respective Cabinet Secretary would be expected to take the necessary action to regularise the same and secure an appropriate appointment in line with section 7(2) of the Media Council Act. (*see annexure 11: letter by the Head of Public Service*)

86. Pursuant to Section 14(3) of the MCK Act, the Committee having considered the complaint, is satisfied that the submissions of the Office of the Attorney General and Public Service disclose a ground for removal from office for Ms. Tabitha Mutemi on the basis of gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority.
87. Hon. Godfrey Osotsi Atieno, MP, submitted, (in his opinion) that pursuant to Article 95(2) of the Constitution of Kenya, the Cabinet Secretary should overlook the process provided for under section 14 of the Media Council Act, no. 46 of 2013 regulating removal of member of the Board of the Media Council of Kenya and initiate a mediation process with the objective of ensuring that the parties co-exist.
88. The Committee having analysed the opinion under paragraph 87, observed that the grounds advanced by Hon. Godfrey Osotsi Atieno, MP, contradicted the provisions regulating removal of member of the Board of the Media Council of Kenya as provided under section 14 of the Media Council Act, no. 46 of 2013.

4.1 REPORT ON MINORITY VIEWS

89. Pursuant to provisions of Standing Order 199 (5) Hon. Godfrey Osotsi Atieno, MP, submitted (in his minority opinion) that pursuant to Article 95(2) of the Constitution of Kenya, the Cabinet Secretary, Ministry of ICT and Youth Affairs should overlook the process provided for under Section 14 of the Media Council Act No. 46 of 2013 regulating removal of member of the Board of the Media Council of Kenya and initiate a mediation process with the objective of ensuring that the parties co-exist.

CHAPTER FIVE

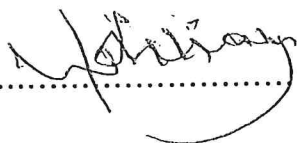
5.0 COMMITTEE RECOMMENDATION

90. Pursuant to Section 14 (3) of the MCA Act, having considered the Petition, detailed submissions and evidence presented in writing, the Committee is satisfied and *finds* that the complaints contained in the Petition relating to:

- (a) ineligibility of Ms. Tabitha Mutemi for appointment as Council Member by dint of being an employee of the Independent Electoral and Boundaries Commission (IEBC);
- (b) breach of written laws, the Constitution and government policy in her appointment; and,
- (c) gross misconduct for failure to adhere to lawful directions by her superiors and appointing authority under Subsection (1),

discloses grounds for removal of a member of the Board of Media Council of Kenya and *recommends* that the complaint be submitted to the Cabinet Secretary, Ministry of Information, Communication and Technology and Youth Affairs for appropriate action in accordance with the provisions of Section 14(3) and (4) of the Media Council Act, no. 46 of 2013.

SIGNED



DATE

26 / 03 / 2021

HON. WILLIAM KISANG, M.P
CHAIRPERSON
DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND
INNOVATION