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KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT

FOURTH SESSION (2011)

**THE CONSTITUTIONAL IMPLEMENTATION OVERSIGHT
COMMITTEE**

REPORT

**ON THE APPROVAL OF DR. WILLY M. MUTUNGA FOR
APPOINTMENT TO THE OFFICE CHIEF JUSTICE, MS. NANCY M.
BARAZA FOR APPOINTMENT AS DEPUTY CHIEF JUSTICE AND
MR. KERIAKO TOBIKO FOR APPOINTMENT AS DIRECTOR OF
PUBLIC PROSECUTIONS**

Clerk's Chambers,
Parliament Buildings,
NAIROBI.

JUNE, 2011

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Mr. Speaker Sir,

The Constitutional Implementation Oversight Committee is a select committee established under Section 4 of the Sixth Schedule of the Constitution with a mandate of overseeing the implementation of the Constitution and which among other things:-

- (a) *Shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning—*
- (i) *the preparation of the legislation required by this Constitution and any challenges in that regard;*
 - (ii) *the process of establishing the new commissions;*
 - (iii) *the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff;*
 - (iv) *the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and*
 - (v) *any impediments to the process of implementing this Constitution;*
- (b) *coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of the legislation required by this Constitution; and*
- (c) *take appropriate action on the reports including addressing any problems in the implementation of this Constitution.*

COMMITTEE MEMBERSHIP

The Committee as constituted by the House on 5th October, 2010 comprise of the following members:-

1. The Hon. Hussein Mohammed Abdikadir, M.P. Chairperson
2. The Hon. Millie Odhiambo-Mabona, M.P. Vice-Chairperson
3. The Hon. Beth Mugo, EGH, M.P.
4. The Hon. Chirau Ali Mwakwere, EGH, M.P.
5. The Hon. Martha Wangari Karua, EGH, M.P.
6. The Hon. (Prof.) Phillip Kaloki, M.P.
7. The Hon. (Dr.) Kilemi Mwiria, M.P.
8. The Hon. Charles Kilonzo, M.P.
9. The Hon. Ekwere Ethuro, EBS, M.P.
10. The Hon. Cecily Mbarire, M.P.
11. The Hon. (Dr.) Eseli Simiyu, M.P.

12. The Hon. Moriasi Ombui, M.P.
13. The Hon. Amina Abdalla, M.P.
14. The Hon. David M. Ngugi, M.P.
15. The Hon. Ababu Namwamba, M.P.
16. The Hon. Danson Mwazo, M.P.
17. The Hon. Sophia Abdi, M.P.
18. The Hon. (Dr.) Joyce Laboso, M.P.
19. The Hon. Joseph Kasaine Nkaiserry, M.P.
20. The Hon. Charles Onyancha, M.P.
21. The Hon. Alfred Khang'ati, M.P.
22. The Hon. John Mbadi, M.P.
23. The Hon. Elizabeth Ongoro, M.P.
24. The Hon. Rev. Julius Murgor, M.P.
25. The Hon. Lucas K. Chepkitony, M.P.
26. The Hon. Benedict Fondo Gunda, M.P.
27. The Hon. Rachel Shebesh, M.P.

Mr. Speaker Sir,

On the 18th May 2011 you informed the House that H.E the President had after consultation with the Right Hon. Prime Minister nominated for approval by the National Assembly the following persons pursuant to the provisions of Article 166(1) (a), 262 and 157(2) read together with Section 24(2) of the Six Schedule of the Constitution.:-

- i). Dr. Willy Munywoki Mutunga as Chief Justice;
- ii). Ms. Nancy Makokha Baraza as Deputy Chief Justice; and
- iii). Mr. Keriako Tobiko as Director of Public Prosecutions.

You then directed that the names and Curriculum Vitae of the nominees be referred to the relevant Departmental Committee.

In view of the operational challenges facing the Departmental Committee on Justice and Legal Affairs on 2nd June, 2011, you directed that the Constitutional Implementation Oversight Committee (CIOC) take up the matter for consideration and report to the House. Further, given the provisions of Standing Order No.180 which allows public access to proceedings of Committees and, in order to comply with the provisions of Article 73(2)(d) of the Constitution which underscores accountability to the public for decisions and actions taken, you urged members of the public who wished to submit memoranda to do so to the Committee in respect of the three nominees.

As directed, the Committee took up the matter and put up paid advertisements in the dailies inviting members of the public to make representations on the three nominees. The Committee held public hearings where 42 persons gave their views on the nominees. The list of persons who appeared and made oral submissions to the Committee is attached to this report (*Appendix 1*). This is in addition to 41 memoranda on the nominees that the Committee received. The list of persons who sent memoranda to the Committee is attached to this report (*Appendix 2*). The Committee also had a meeting with the nominees where they were asked to clarify issues arising from the public hearings. In total the Committee held eight (8) sittings to deliberate on the suitability of the nominees for appointment to the respective offices.

Mr. Speaker Sir,

The Committee deliberated on the issues raised during the public hearings together with the submissions made by the nominees and now recommends that the nominees be appointed to the respective offices to which they have been nominated; with some members expressing reservations on the nomination of the DPP and with Honourable John Mbadi and Honourable Ababu Namwamba registering his specific objection on the nomination of the DPP.

The Committee further recommended that the approval of the Director of Public Prosecutions be subject to further investigations on the outstanding issues with objections by Hon. Mwakwere and Hon. Ombui.

The Committee also recommends that future nominations submitted to Parliament for approval be accompanied by an explanatory report setting out the criteria and methodology used by the interviewing body in settling for such nominees. This information would enrich the deliberations of the relevant vetting committee of Parliament and the House as a whole.

Acknowledgements

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate. The Committee also appreciates the media for live coverage of its proceedings during the vetting process. Further, the Committee thanks members of the public who made submissions, orally and in writing, to the Committee.

Mr. Speaker Sir,

It is my pleasant duty and privilege, on behalf of Constitutional Implementation Oversight Committee, to present and commend this report on the approval to the

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offices of the Chief Justice, Deputy Chief Justice and Director of Public Prosecutions, to the House for adoption pursuant to the Communication from the Chair made on 2nd June, 2011 and in accordance with Section 4 of the Sixth Schedule to the Constitution.

SIGNED.....



HON. ABDIKADIR HUSSEIN MOHAMED, M.P
CHAIRPERSON

DATE:

14th JUNE 2011

BACKGROUND

1. Section 24 (1) of the Sixth Schedule to the Constitution provides that the Chief Justice in office before the effective date shall, within six months after the effective date vacate office. The effective date being 27th August, 2010, the then Chief Justice vacated office on 27th February, 2011.
2. On 28th January, 2011, the office of the President announced names of four nominees for the constitutional offices of Chief Justice (CJ), Attorney General (AG), Director of Public Prosecutions (DPP), and Controller of Budget. Shortly thereafter, the Right Honourable Prime Minister asserted that the said nominations had been done without the requisite consultation with his office, as required by the National Accord and Reconciliation Act, 2008.
3. The matter raised considerable public outcry, with different groups issuing press statements on the same, including the Commission for the implementation of the Constitution (CIC) and the Judicial Service Commission (JSC). The matter also found its way to the House and the High Court (*Nairobi High Court Petition No 16 of 2011*).
4. The Honourable Speaker made a ruling on 17th February, 2011 to the effect that the nominations were unconstitutional.
5. On 22nd February, 2011 H.E the President withdrew the list of nominees to constitutional offices and directed that the appointment of the Chief Justice and the Deputy Chief Justice be done by the Judicial Services Commission (JSC). He also stated that he would hold consultations with the Rt. Honourable Prime Minister on the nomination of the Attorney General and thereafter appoint a panel to advertise and interview candidates for the position of Director of Public Prosecutions.
6. On 4th March, 2011 the Judicial Service Commission through *Gazette Notice No. 2061* advertised the vacancy in the position of Chief Justice and the Deputy Chief Justice and invited the public to make applications. Twenty six persons applied for the position of Chief Justice while fourteen others applied for position of Deputy Chief Justice. Soon thereafter, ten applicants were short-listed and interviewed for the position of Chief Justice while eight applicants were short-listed and interviewed for the position of Deputy Chief Justice.
7. On 13th May, 2011 the Judicial Service Commission nominated Dr Willy Mutunga and Ms. Nancy Baraza as Chief Justice and Deputy Chief Justice respectively. The JSC then forwarded the names to the President for formal nomination and eventual approval by Parliament.

8. On 17th May, 2011 H.E the President and the Right Honourable Prime Minister endorsed the nominees for the posts of Chief Justice, Deputy Chief Justice and Director of Public Prosecution, paving the way for vetting by Parliament.
9. Owing to the challenges facing the Departmental Committee of Justice and Legal Affairs, on 2nd June 2011 the Honourable Speaker in a communication to the House referred the names of the three nominees to the Constitution Implementation Oversight Committee for vetting.
10. The Honourable Speaker directed the Constitution Implementation Oversight Committee to submit its recommendations on the nomination to the House on Wednesday, 8th June 2011. On that date, the Committee reported progress and requested an extension of time to enable the Committee to conclude its work. The Honourable Speaker then directed the Committee to table its report on Tuesday 14th June 2011.
11. In conducting the vetting process, the Committee examined the candidates against the criteria set out in the Second Schedule of the *Commission for the Implementation of Constitution Act, 2010* (Criteria for vetting/approval of nominees for appointment to public office by the National Assembly). That criteria requires the nominees to disclose information on their personal and professional life including their political affiliations, tax compliance and potential conflict of interests. Issues raised by members of the public during public hearings and memoranda presented to the Committee were also put to the nominees.

CONSIDERATION OF THE NOMINEES BY THE COMMITTEE

NOMINATION OF DR. WILLY MUNYWOKI MUTUNGA FOR THE POSITION OF CHIEF JUSTICE

Qualifications

The qualifications for appointment to the office of Chief Justice are set out in several provisions of the Constitution. Article 166(1)(a) provides that the President shall appoint the Chief Justice and Deputy Chief Justice "in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.

Article 166(2) further requires that each judge of a superior court (of whom the Chief Justice is a part) shall be appointed from among persons who-

- (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under sub-Articles (3) to (5) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Article 166(3)(a) provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.

Section 24(2) of the Sixth Schedule to the Constitution provides that "a new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly.

Section 29 also applies to the appointment of the Chief Justice. It provides that-

- (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.
- (2) Unless this Schedule provides otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.

Views Received by the Committee

In supporting Dr. Willy Mutunga's nomination, members of the public made the following submissions:-

- i). He is highly qualified, highly trained with critical and objective judgment, attributes which will enable him to serve in the position.
- ii). He has been a mentor to many.
- iii). He has for a long time been devoted to issues of access to justice for all and has tirelessly fought for a democratic, free, just and transparent Kenya and for a new constitution.
- iv). He has the necessary competence, he is reform minded and is a mentor to many.
- v). He has been involved in a lot of community development issues while at the Ford Foundation such as spear-heading the provision of housing to the less fortunate members of society in slums areas.
- vi). He is recognized nationally and internationally as a person of integrity who is principled.
- vii). He is humble, understanding and patriotic person who interacts with all persons especially the poor and he has fought against human rights violations and oppression.
- viii). He is an intellectual and an institution builder. He was instrumental in the formation of the University of Nairobi Staff Union, the Kenya Human Rights Commission and the Citizens Coalition for Constitutional Change (4Cs).

- ix). He is an individual with a morally upright character whose family life was interfered with during detention while fighting for constitutional change.
- x). His nomination was arrived at following an open and competitive process.
- xi). He would restore institutional confidence in the Judiciary,
- xii). He would dispense justice without fear or favour.
- xiii). He advocates for the marginalized communities, believes in constitutionalism and is not a tribalist.
- xiv). He is an Independent minded person who would be guided by the Constitution and the law.

In opposing Dr. Mutunga's nomination, members of the public made the following submissions-

- i). He did not meet the threshold under Article 166 (2)(c) on high moral standards.
- ii). He champions for the rights of homosexuals and was the advocate on record in the registration of the Kenya Gays and Lesbians Trust (KEGALE).
- iii). He has been unable to manage his family affairs and cannot therefore be entrusted with the management of the judiciary.
- iv). He does not uphold family values.
- v). He would not be a role model to young Kenyans particularly owing to the ear stud that he dons.
- vi). He works for an institution that advocates for aggressive population control.

The Observations of the Committee

The Committee having considered the curriculum vitae of Dr. Mutunga and the representations made by members of the public and having interviewed the nominee made the following observations on the nomination of Dr. Mutunga to the position of Chief Justice-

a. The Process of Nomination

The Committee reflected and deliberated on the process that was followed in the nomination of the Chief Justice in the light of the provisions of Articles 166(1)(a) and 172 of the Constitution and section 24(2) and 29 of Sixth Schedule to the Constitution. Two schools of thought emerged.

On the one hand, some members expressed the view that the Constitution at section 24(2) and 29 of the Sixth Schedule to the Constitution made specific provisions as to how a Chief Justice is to be nominated in the transitional period pending the next General Elections. Consequently, in their view, Articles 166(1)(a) and 172 were, in so far as the appointment of the Chief Justice pending the next General Elections was concerned, suspended. The view was therefore taken that in the transitional period before the next General Elections, the Judicial Service Commission did not have any role to play in the process of nomination of a Chief Justice. It was therefore argued that in these circumstances the process of nomination of the Chief Justice had not strictly complied with the requirements of the Constitution.

Other members expressed the view that the transitional provisions under sections 24(2) and 29 of the Sixth Schedule to the Constitution were not to be read in isolation but as "explanatory notes" or provisions whose objective was to aid the interpretation and application of the substantive provisions of Articles 166(1)(a) and 172 of the Constitution which were not suspended and were therefore applicable. Such members argued that the nomination process was therefore in order and that the involvement of the Judicial Service Commission in the nomination process was in tandem with the requirements of the Constitution.

Members observed that the two different interpretations on the nomination process for the Chief Justice had been debated at several fora and had been raised by members of the public in their representations to the Committee. Notwithstanding the two different interpretations on the process of nomination of the Chief Justice, the Committee resolved to proceed with the consideration of the candidate.

The Committee observed that notwithstanding the different interpretations, the executive had forwarded the names to Parliament. The Committee therefore left the issue of interpretation to the courts of law.

b) The Educational Qualifications of the Nominee

Article 166(2)(a) of the Constitution which sets out the educational qualifications for judges of superior courts requires that they be appointed from amongst members who "hold a law degree from a recognized university or are advocates of the High Court of Kenya or possess an equivalent qualification in a common-law jurisdiction".

It was observed that Dr. Mutunga is the holder of a Bachelor of Laws (LL.B) Degree and a Master of Laws (LL.M) Degree both awarded by the University of Dar es Salaam, Tanzania in 1971 and 1974 respectively and a Doctor of Jurisprudence (JSD)

awarded by Osgoode Hall Law School, Toronto in 1992. The Committee was satisfied that the nominee met the educational requirements stipulated in Article 166(2)(a) of the Constitution.

c) Experience

Article 166(2)(b) and (3) of the Constitution stipulate the experience required of a person seeking to be appointed Chief Justice. Article 166(2)(b) requires that a judge of a superior court be appointed from among persons who “possess the experience required under sub-Articles (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction”.

Article 166(3)(a) of the Constitution provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in aggregate, to fifteen years.

The Committee observed that Dr. Mutunga was the Regional Representative, Ford Foundation a position he had held from April 2009. Prior to that, between 2004 and March 2009, he had held the positions of Acting Regional Representative and Program Officer in the same organization. Dr. Mutunga had also served as the Executive Director of the Kenya Human Rights Commission between 1998 and 2004. He also served as the Acting Executive Director of the Legal Advice Centre between 1992 and 1993 and was a lecturer and a senior lecturer between 1974 and 1982 at the Faculty of Law, University of Nairobi.

The Committee found that Dr. Mutunga had extensive experience in academia and in the field of human rights and social justice. The Committee therefore concluded that Dr. Mutunga satisfied the educational requirements stipulated under Article 166(2)(b) and (3) of the Constitution.

Some concern was raised on the fact that the nominee had not previously served in the judiciary and would be a new-comer to the judiciary. In this regard, the Committee observed that Article 166(3) of the Constitution made provision for the appointment of a Chief Justice who had either served as a superior court judge, or who had served as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal fields. The Committee further observed that

Chief Justices had been appointed from outside of judiciary in Kenya and in countries such as South Africa (Arthur Chaskalson was appointed First President of South Africa's new Constitutional Court in 1994 having left a legal practice to become a human rights lawyer), the United States of America (Earl Warren was appointed the 14th Chief Justice of the United States Supreme Court in 1953. Prior to that he had a highly successful career in politics), Trinidad and Tobago (In 1995 Michael de la Bastide was appointed Chief Justice straight from private practice) and Hong Kong (in 2010, Geoffrey Ma was appointed as Chief Justice. Before that he was a barrister at law in Singapore).

d) Moral character, integrity and impartiality

Article 166(2)(c) of the Constitution requires that each judge of a superior court shall be appointed from among persons who "have a high moral character, integrity and impartiality". The Committee received a number of representations concerning the moral character of the nominee. Questions were raised concerning the sexuality of the nominee and his ear stud. The Committee put each of these issues to the nominee during his interview and the nominee responded to the issues to the satisfaction of the Committee.

Regarding his marital status and family values, various concerns had been raised before the Committee. The nominee informed the Committee that he was married, separated and that he had filed for divorce a process he described as painful and difficult. The nominee further informed the Committee that he had children. The Committee was satisfied with the responses of the nominee on his marital status and family values.

Representations were also made to the Committee regarding the perceived liberal views of the nominee and the impact that this would have if he were to be appointed Chief Justice. Some described the nominee as an activist and expressed concern that this would impact his performance in the judiciary. Others however expressed the view that the nominee's past involvement in activism would enrich his performance in the judiciary.

Representations were also made to the Committee that the ideals and principles of the nominee's employer would impact negatively on the nominee's execution of his functions as Chief Justice and as a member of the Supreme Court. In response to these concerns, the nominee informed the Committee that despite his personal views and beliefs on various matters, if appointed Chief Justice he would strictly observe and operate within the confines of the Constitution and would be guided by the Constitution in the execution of his functions.

On the whole, the Committee was satisfied with the responses of the nominee on matters of moral character, integrity and impartiality and therefore found that the nominee satisfied the requirements of Article 166(2)(a) of the Constitution.

NOMINATION OF MS. NANCY MAKOKHA BARAZA FOR THE POSITION OF DEPUTY CHIEF JUSTICE

Qualifications

The qualifications for appointment to the office of Deputy Chief Justice are set out in Article 166(1)(a) of the Constitution which provides that the President shall appoint the Chief Justice and the Deputy Chief Justice "in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.

Article 166(2) further requires that each judge of a superior court, of whom the Deputy Chief Justice is a part, shall be appointed from among persons who-

- (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under sub-Articles (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Article 166(3)(a) provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.

Section 29 also applies to the appointment of the Chief Justice. It provides that-

- (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.
- (2) Unless this Schedule provides otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President