

REPUBLIC OF KENYA



THE SENATE

TWELFTH PARLIAMENT

**THE REPORT OF THE SPECIAL COMMITTEE ON THE PROPOSED
REMOVAL FROM OFFICE, BY IMPEACHMENT, OF HONOURABLE
GRANTON GRAHAM SAMBOJA, THE GOVERNOR OF TAITA TAVETA
COUNTY**

24TH OCTOBER, 2019

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PREFACE

Mr. Speaker Sir,

Honourable Senators will recall that at the sitting of the Senate held on Tuesday, 15th October, 2019, the Honourable Speaker of the Senate, by way of a Communication from the Chair, informed the Senate that he had received correspondence from the Speaker of the County Assembly of Taita Taveta communicating the approval of a Motion by the County Assembly of Taita Taveta to remove from office, by impeachment, the Governor of Taita Taveta County.

Mr. Speaker Sir,

On Tuesday, 15th October, 2019, the Senate Majority Leader gave Notice of the following Motion-

***THAT, WHEREAS,** pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 9th October, 2019, the County Assembly of Taita Taveta approved a Motion “to remove from office, by impeachment,” the Governor of Taita Taveta County;*

***AND FURTHER, WHEREAS** by letter Ref. No. TTCA/CS/7/Vol.1 (085) dated 9th October, 2019, received in the Office of the Speaker of the Senate on Friday, 11th October, 2019, the Speaker of the County Assembly of Taita Taveta informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate, documents in evidence of the proceedings of the Assembly;*

AND WHEREAS, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 75(1)(b) of the Senate, the Senate by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

NOW THEREFORE, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 75(1)(b), the Senate resolves to establish a special committee comprising the following Senators –

1. Senator George Khaniri, MGH, MP;
2. Senator Njeru Ndwiga, EGH, MP;
3. Senator (Dr.) Ochillo Ayacko, EGH, MP;
4. Senator (Dr.) Agnes Zani, CBS, MP;
5. Senator Aaron Cheruiyot, MP;
6. Senator Charles Kibiru, MP;
7. Senator Boniface Kabaka, MP;
8. Senator (Dr.) Lelegwe Ltumbesi, MP;
9. Senator Beatrice Kwamboka, MP;
10. Senator (CPA) Farhiya Ali, MP; and
11. Senator (Canon) Naomi Waqo, MP.

to investigate the proposed removal from office of the Governor of Taita Taveta County and to report to the Senate within ten (10) days, pursuant to standing order 75 (2), of its appointment, on whether it finds the particulars of the allegations to have been substantiated.

Mr. Speaker Sir,

The Senate Majority Leader moved the Motion on Tuesday, 15th October, 2019. Following debate on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. *Senator George Khaniri, MGH, MP;*
2. *Senator Njeru Ndwiga, EGH, MP;*
3. *Senator (Dr.) Ochillo Ayacko, EGH, MP;*
4. *Senator (Dr.) Agnes Zani, CBS, MP;*
5. *Senator Aaron Cheruiyot, MP;*
6. *Senator Charles Kibiru, MP;*
7. *Senator Boniface Kabaka, MP;*
8. *Senator (Dr.) Lelegwe Ltumbesi, MP;*
9. *Senator Beatrice Kwamboka, MP;*
10. *Senator (CPA) Farhiya Ali, MP; and*
11. *Senator (Canon) Naomi Waqo, MP.*

to investigate the proposed removal from office of the Governor of Taita Taveta County and to report to the Senate within ten (10) days of its appointment on whether it finds the Particulars of the Allegations to have been substantiated.

Mr. Speaker Sir,

Section 33(4) of the County Governments Act, 2012, standing order 75(2) and rule 2 (Part 2) of the Fifth Schedule to the Senate Standing Orders mandate the Special Committee to-

- (a) investigate the matter; and*
- (b) report to the Senate within ten days on whether it finds the Particulars of the Allegations against the Governor to have been substantiated*

The Committee, in the execution of its mandate, was guided by these provisions of the law and the Standing Orders.

Mr. Speaker Sir,

Following its establishment, the Special Committee held its first meeting on Wednesday, 16th October, 2019. Pursuant to standing order 193 and rule 3(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders, the Clerk of the Senate conducted the election for the position of Chairperson and Vice-Chairperson. Senator Njeru Ndwiga, EGH, MP and Senator (Dr.) Ochillo Ayacko, EGH, MP were elected to the positions of Chairperson and Vice-Chairperson of the Committee, respectively.

Mr. Speaker Sir,

Section 33(5) of the County Governments Act, standing order 75(3) and rule 4(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders provide that the Governor shall have the right to appear and be represented before the Special Committee during its investigations. Rule 4(b) of Part 2 of the Fifth Schedule to the Senate Standing Orders further accords the County Assembly the right to appear and be represented before the Special Committee during its investigations. Pursuant to these provisions of the law, the Special Committee invited both the Governor and the County Assembly to appear and be represented before the Special Committee.

The County Assembly was represented by M/s Muchoki, Kangata, Njenga & Co. Advocates in the proceedings. In the case of the Governor, by a letter dated 14th October, 2019 (sic) and received in the Office of the Clerk of the Senate on 17th October, 2019, M/s Havi and Co. Advocates stated that their client, the Governor of Taita Taveta County, would not appear before the Special Committee or respond to the Particulars of Allegations against him on the strength of an Order which had been

issued restraining the Senate from deliberating, discussing, hearing and/or otherwise continuing with the impeachment of his client and that the Order had been served on the Senate.

However, Mr. Nelson Havi of M/s Havi and Co. Advocates, the Advocates for the Governor, appeared before the Special Committee on Tuesday, 22nd October, 2019 and requested to raise a preliminary matter. The Committee allowed the Advocate to raise the preliminary matter. The preliminary matter raised by the Advocate was to the effect that the Governor was not given an opportunity to be heard by the County Assembly, was never served with particulars of allegations by the Senate and that the matter was *sub-judice* as provided for under standing order 98(2) of the Senate Standing Orders, which preliminary issues were considered by the Committee.

Thereafter the Advocate for the Governor stated that he would not participate in the proceedings but would observe the proceedings. Pursuant to rule 10 of Part 2 of the Fifth Schedule to the Senate Standing Orders, this fact was recorded by the Committee and the Committee proceeded with its investigations.

Mr. Speaker Sir,

The Special Committee wishes to thank the Offices of the Speaker of the Senate and the Clerk of the Senate for the support extended to the Committee in the execution of its mandate. The Committee further extends its appreciation to the County Assembly of Taita Taveta County and its Advocates, M/s Muchoki, Kangata, Njenga and Co. Advocates and M/s Havi and Co. Advocates, the Advocates representing the Governor, for their submissions in this matter. The Special Committee also appreciates the media for the coverage of its proceedings during the course of the investigations.

Mr. Speaker Sir,

It is now my pleasant duty and privilege, on behalf of the Special Committee, to present and commend to the Senate this Report of the Special Committee on the Proposed Removal from Office of Hon. Granton Graham Samboja, the Governor of Taita Taveta County.

SIGNED:

SEN. NJERU NDWIGA, EGH, MP

**CHAIRMAN, SPECIAL COMMITTEE ON THE PROPOSED REMOVAL
FROM OFFICE OF THE GOVERNOR OF TAITA TAVETA COUNTY.**

24TH OCTOBER, 2019

1. **INTRODUCTION**

1. Pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, No. 17 of 2012, on 9th October, 2019, the County Assembly of Taita Taveta approved a Motion “*to remove from office, by impeachment,*” the Governor of Taita Taveta County.

2. Article 181 of the Constitution provides as follows-

Removal of a county governor

(1) *A county governor may be removed from office on any of the following grounds—*

(a) gross violation of this Constitution or any other law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c) abuse of office or gross misconduct; or

(d) physical or mental incapacity to perform the functions of office of county governor.

(2) *Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).*

3. Section 33 of the County Governments Act provides as follows-

Removal of a governor

(1) *A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.*

(2) *If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—*

(a) the speaker of the county assembly shall inform the Speaker of the

- Senate of that resolution within two days; and*
- (b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.*
- (3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—*
- (a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and*
- (b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.*
- (4) A special committee appointed under subsection (3)(b) shall—*
- (a) investigate the matter; and*
- (b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.*
- (5) The governor shall have the right to appear and be represented before the special committee during its investigations.*
- (6) If the special committee reports that the particulars of any allegation against the governor —*
- (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or*
- (b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.*
- (7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*
- (8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county*

assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.

(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.

4. By a letter dated 9th October, 2015 (*Ref: TTCA/CS/7/Vol. 1 (085)*) which was received in the Office of the Speaker of the Senate on 11th October, 2019, the Speaker of the County Assembly of Taita Taveta informed the Speaker of the Senate of the approval of the Motion for the removal from office of the Governor of Taita Taveta County by the County Assembly and further forwarded to the Speaker of the Senate various supporting documents which are together with the letter attached as ***Annex 2***.
5. In terms of section 33(3)(a) of the County Governments Act and standing order 75(1)(a) of the Senate Standing Orders, the Speaker of the Senate is required, *within seven days after receiving notice of a resolution from the Speaker of a County Assembly, to convene a meeting of the Senate to hear charges against the governor.*
6. In accordance with these provisions of law, at a sitting of the Senate held on 15th October, 2019, the Speaker of the Senate, by way of a Communication from the Chair, informed the Senators that he had received communication from the Speaker of the County Assembly of Taita Taveta relating to the approval of the

Motion by the County Assembly of Taita Taveta for the removal from office of the Governor of Taita Taveta County. The Order Paper of that sitting and the Communication made by the Speaker of the Senate on that day are attached as *Annex 3* and *Annex 4*, respectively.

7. Thereafter, the Senate Majority Leader gave Notice of the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 9th October, 2019, the County Assembly of Taita Taveta approved a Motion “to remove from office, by impeachment,” the Governor of Taita Taveta County;

AND FURTHER, WHEREAS by letter Ref. No. TTCA/CS/7/Vol.1 (085) dated 9th October, 2019, received in the Office of the Speaker of the Senate on Friday, 11th October, 2019, the Speaker of the County Assembly of Taita Taveta informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate, documents in evidence of the proceedings of the Assembly;

AND WHEREAS, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 75(1)(b) of the Senate, the Senate by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

NOW THEREFORE, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 75(1)(b), the Senate resolves to establish a special committee comprising the following Senators –

1. *Senator George Khaniri, MGH, MP;*
2. *Senator Njeru Ndwiga, EGH, MP;*
3. *Senator (Dr.) Ochillo Ayacko, EGH, MP;*
4. *Senator (Dr.) Agnes Zani, CBS, MP;*
5. *Senator Aaron Cheruiyot, MP;*
6. *Senator Charles Kibiru, MP;*
7. *Senator Boniface Kabaka, MP;*
8. *Senator (Dr.) Lelegwe Ltumbesi, MP;*
9. *Senator Beatrice Kwamboka, MP;*
10. *Senator (CPA) Farhiya Ali, MP; and*
11. *Senator (Canon) Naomi Waqo, MP*

to investigate the proposed removal from office of the Governor of Taita Taveta County and to report to the Senate within ten (10) days, pursuant to standing order 75 (2), of its appointment, on whether it finds the particulars of the allegations to have been substantiated.

12. The Senate Majority Leader moved the Motion on Tuesday 15th October, 2019. Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. *Senator George Khaniri, MGH, MP;*
2. *Senator Njeru Ndwiga, EGH, MP;*
3. *Senator (Dr.) Ochillo Ayacko, EGH, MP;*
4. *Senator (Dr.) Agnes Zani, CBS, MP;*
5. *Senator Aaron Cheruiyot, MP;*
6. *Senator Charles Kibiru, MP;*
7. *Senator Boniface Kabaka, MP;*
8. *Senator (Dr.) Lelegwe Ltumbesi, MP;*
9. *Senator Beatrice Kwamboka, MP;*

- 10. Senator (CPA) Farhiya Ali, MP; and*
11. Senator (Canon) Naomi Waqo, MP

to investigate the proposed removal from office of the Governor of Taita Taveta County and to report to the Senate within ten (10) days of its appointment on whether it finds the Particulars of the Allegations to have been substantiated.

2. METHOD OF WORK

13. In the execution of its mandate, the Committee conducted a number of activities which are set out below.

2.1. Meetings of the Special Committee

14. Following its establishment on Tuesday, 15th October, 2019, the Special Committee held its first meeting on Wednesday, 16th October, 2019. Pursuant to standing order 193 and rule 3(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders, at that meeting, the Clerk of the Senate conducted the election of the Chairperson and Vice-Chairperson of the Committee. Senator Njeru Ndwiga, EGH, MP was elected, unopposed, as the Chairperson of the Committee while Senator (Dr.) Ochilo Ayacko, EGH, MP was similarly elected unopposed as the Vice-Chairperson of the Committee. Further, pursuant to rule 3(b) of Part 2 of the Fifth Schedule to the Senate Standing Orders, the Special Committee appointed Tuesday, 22nd October, 2019 as the date for the commencement of the hearing of evidence for the purposes of the investigations.
15. On Monday, 21st October, 2019, the Special Committee held a pre-hearing meeting where members considered the documentation received from the parties, the rules of procedure to be followed by the Committee in discharging its mandate

as set out in Part 2 of the Fifth Schedule to the Senate Standing Orders and the hearing programme.

16. The Minutes of the meetings held by the Committee are attached at **Annex 1**.

2.2. Indicative Programme of Events

17. At the first meeting of the Committee, the Committee adopted an Indicative Programme of Events which is attached as **Annex 5**. The Committee observed that in terms of section 33(4)(b) of the County Governments Act and standing order 75(2) of the Senate Standing Orders, the Committee had only ten days within which to investigate the matter in respect of the allegations against the Governor and thereafter to report to the Senate on whether or not it found the Particulars of the Allegations against the Governor to have been substantiated.
18. It was evident to the Committee that, bearing in mind the nature of the proceedings anticipated in the hearing for the removal from office of the Governor, the Committee had the onerous task of ensuring that the statutory timelines were adhered to.

2.3. Invitations to Appear

19. The Committee observed that section 33(5) of the County Governments Act and standing order 75(3) of the Senate Standing Orders provided that “*the governor shall have the right to appear and be represented before the special committee during its investigations*”. The Committee further observed that rule 4(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders provided that “*upon the appointment of a date for the commencement of the hearing of the evidence for the purposes of the investigation, the Committee shall invite the Governor to appear and be represented before the special committee during its investigations*”.

20. The Committee also observed that rule 4(b) of Part 2 of the Fifth Schedule to the Senate Standing Orders provided that *“upon the appointment of a date for the commencement of the hearing of the evidence for the purposes of the investigation, the Committee shall notify the County Assembly of the date for the commencement of the investigation and invite the Assembly to designate the members of the Assembly, being not more than three members, if any, who shall appear before the Committee to represent the Assembly during the investigation”*.
21. Having made these observations, and taking into account the limited time available, at its first meeting held on Wednesday, 16th October, 2019, the Committee resolved to invite the County Assembly and the Governor to appear before the Committee for the hearing of the evidence. Copies of the Invitations to Appear are attached as ***Annex 6***.
22. The parties were represented at the hearing as follows-
- (a) Mr. Charles Njenga of M/s Muchoki, Kangata, Njenga & Company Advocates appeared on behalf of the County Assembly; and
 - (b) at the preliminary stage only, Mr. Nelson Havi of M/s Havi & Company Advocates raised preliminary issues on behalf of the Governor.
23. The Invitation to Appear served on the County Assembly required the Assembly, where it chose to appear before the Committee, to file with the Office of the Clerk of the Senate by 5:00 pm on Saturday, 19th October, 2019 documentation-
- (a) designating the Members of the County Assembly, being not more than three, if any, who would attend and represent the Assembly in the proceedings before the Special Committee;

- (b) indicating the mode of appearance before the Special Committee; whether in person, by Advocate, or in person and by Advocate;
 - (c) indicating the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
 - (d) specifying any other evidence to be relied on.
24. The Invitation to Appear served on the Governor required him to indicate whether he would exercise his right to appear before the Committee. If he chose to exercise that right, the Governor was informed that he would be required, to file an answer to the charges with the Office of the Clerk of the Senate by 5:00 pm on Saturday, 19th October, 2019 in which the Governor would set out-
- (a) the Governor's response to the Particulars of the Allegations;
 - (b) how the Governor proposed to appear before the Special Committee; whether in person, by Advocate, or in person and by Advocate;
 - (c) the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
 - (d) any other evidence to be relied on.
25. Following the service of the Invitations to Appear, the County Assembly filed a Response to the Invitation to Appear on 19th October, 2019 to which was attached various annexures and which is marked as *Annex 7*.
26. The Governor did not file a Response to the Invitation to Appear. The Committee however took note a letter dated 14th October, 2019 from M/s Havi & Company Advocates addressed to the Senate. The letter indicated that their client, the Governor of Taita Taveta County, would not appear before the Special Committee or respond to the Particulars of Allegations against him on the strength of an Order

which had been issued restraining the Senate from deliberating, discussing, hearing and/or otherwise continuing with the impeachment of his client. A Copy of the letter and its attachment is marked as *Annex 8*.

2.4. Hearing

27. The Committee met on 22nd October, 2019 to hear evidence for the purposes of the investigations in accordance with its Hearing Programme which is attached at *Annex 9*. The Hansard record of the hearing is also attached at *Annex 10*.

2.5. Working Retreat

28. The Committee held a Working Retreat on 23rd and 24th October, 2019 where the Committee considered the charges, the particulars of allegations and documentation received in the matter. The Committee also considered the submissions of the County Assembly and drafted, considered and approved its Report.

3. THE CONFERENCE OF PARTIES

29. The Committee convened a Conference of the Parties on 22nd October, 2019 at 10.00 a.m. This provided an opportunity for the formal introduction of the members to the Special Committee and the Counsel for the County Assembly and the Counsel for the Governor.
30. During the Conference of Parties, the Chairperson of the Committee gave Opening Remarks which are attached as *Annex 11*.

4. READING OF THE CHARGES

31. Pursuant to rule 15 of Part 2 of the Fifth Schedule to the Senate Standing Orders, at the commencement of the hearing, the Clerk read out, verbatim, the Particulars of the Allegations against the Governor. The Charges appear at *Annex 2*.

5. PRELIMINARY ISSUES

32. Mr. Nelson Havi of Havi and Co. Advocates, the Advocates on record for the Governor, appeared and raised a preliminary objection to the effect that the Governor was not given an opportunity to be heard by the County Assembly, was never served with particulars of allegations by the Senate and that the matter was *sub-judice* as provided under standing order 98(2) of the Senate Standing Orders.
33. The Committee noted that by a notice issued on 17th October, 2019, the Senate served the Governor and the County Assembly with Invitations to Appear before this Special Committee today, Tuesday, 22nd October, 2019. The parties were required to file their documentation with the Office of the Clerk of the Senate by 5:00 p.m., Saturday, 19th October, 2019 setting out –
- a) the mode of appearance before the Special Committee: whether in person, by advocate or in person and by advocate;
 - b) for the County Assembly, the designation of not more than three Members of the County Assembly who would attend and represent the Assembly in the proceedings before the Special Committee;
 - c) the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
 - d) any other evidence to be relied on.
34. The Committee observed that, M/s Havi and Company Advocates, acting for the Governor of Taita Taveta County, by a letter dated 14th October, 2019 and received in the Office of the Clerk of the Senate on 17th October, 2019, indicated that their client, the Governor of Taita Taveta County, would not appear before the Special Committee or respond to the Particulars of Allegations against him on the strength of an Order which had been issued by the High Court restraining the

Senate from deliberating, discussing, hearing and/or otherwise continuing with the impeachment of his client and that the Order had been served on the Senate.

35. The Committee took cognisance of Rule 10 of Part 2 of the Fifth Schedule to the Senate Standing Orders, which provides that *where the County Assembly or the Governor chooses not to appear before the Committee, that fact shall be recorded by the Committee and the Committee shall proceed with its investigation without further reference to the Assembly or the Governor, but the Committee may, for exceptional reasons to be recorded, permit a later appearance before the Committee by the Assembly or the Governor.*
36. The Committee, in light of the said standing order and despite the letter from Havi & Co. Advocates indicating that they would not appear, allowed the Advocates for the Governor to raise the preliminary objection.
37. In the preliminary objection, Mr. Havi stated-
 - a) that the Governor had not been given a chance to be heard during the hearing of the charges at the County Assembly of Taita Taveta and that the Particulars of Allegations had not been served upon the Governor by the Senate; and
 - b) that the matter was before the High Court in Petition No. 402 of 2019 and that the matter was therefore *sub judice*, and could not proceed on account of standing order 98(2) of the Senate Standing Orders.
38. The Advocate for the County Assembly, in response to the preliminary objection stated that by the time the Court Order was served on the County Assembly, the Orders stated therein had been overtaken by events as the County Assembly had already submitted to the Senate the Resolution of the County Assembly. The Advocate for the County Assembly further sought the directions of the Committee

on the matter of the First Order issued by the High Court on 11th October, 2019 in which the Court stayed the Resolution of the County Assembly.

39. On the matter of whether the proceedings were *sub judice*, the Advocate for the County Assembly made reference to standing order 98(5) and observed that this standing order gave the Speaker of the Senate discretion to determine whether or not to proceed with a matter on which *sub judice* was claimed.
40. The Committee noted that the procedure before the County Assembly was a substantive matter and that the Committee would address it in its investigation of the allegations before the Committee.
41. The Committee noted that on 16th October, 2019, M/s Havi and Company Advocates, who had indicated that they were acting for the Governor of Taita Taveta County, were served with an Invitation to Appear before the Special Committee, which invitation contained the motion passed by the County Assembly and all other documentation received from the County assembly. Thereafter on 17th October, 2019 at 9:30am, the Governor was served with the same Invitation to Appear together with the attached documentation.
42. On 19th October, 2019, the County Assembly filed their Particulars of Allegations and supporting documentation with the Senate. The Committee noted that the offices of M/s Havi and Company Advocates were closed from the time of receipt of the documents, being Saturday evening, and remained closed till Tuesday, 22nd October, 2019. The Committee observed that the Advocates were, on the morning of 21st October, 2019 when they opened their offices, served with the Particulars of Allegations and all other documentation filed by the County Assembly. The Affidavits of Service for all these services are attached as **Annex 12**.

43. Taking into account the mandate of the Special Committee as set out in section 33 of the County Governments Act, 2012 and standing order 75 of the Senate Standing Orders, and further taking into account the directive by the Deputy Speaker of the Senate and the judgement of the Supreme Court in the Wambora case (supra), the Special Committee, upon comprehensive deliberations, dismissed the preliminary objection and resolved to proceed with the hearing in accordance with the Hearing Programme. The decision of the Committee, delivered by the Chairperson of the Committee, Sen. Njeru Ndwiga, EGH, MP on 22nd October, 2019, is attached as **Annex 13**.

6. **THE CHARGES AGAINST THE GOVERNOR OF TAITA TAVETA COUNTY, HON. GRANTON GRAHAM SAMBOJA**

5.1 **CHARGE 1: MISAPPROPRIATION OF FUNDS CONTRARY TO SECTION 196 OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012.**

44. The Particulars of this Charge are as follows-

(1) **Allegation 1: Expenditure on Unbudgeted Projects.**

45. The County Assembly in the Particulars of Allegations stated that the Governor had implemented projects that were never budgeted for and that substantial funds had been utilized for such projects. These included the purchase of a water rig, the construction of a fire station and the shipping of three paramedic ambulances. The construction of the fire station had stalled with some funds already expended. The County Assembly stated that the implementation of unbudgeted projects meant that payment for projects with budgetary allocation remained outstanding even after completion. The County Assembly provided a document listing the county projects completed with payment pending, which appears at **page 116** of **Annex 7**.

The document indicates that the projects were budgeted for in the 2018/2019 financial year, awarded to contractors and completed. The County Assembly also provided the county development budget for the 2018/2019 financial year which appears at **Page 119** of **Annex 7**.

46. According to the County Assembly, section 196 of the Public Finance Management Act, 2012 forbids expenditure without authorization by National or County Legislation. Section 196 of the Public Finance Management Act provides as follows –

196. (1) A public officer shall not spend public money otherwise than authorized by the Constitution, an Act of Parliament or County legislation.

(2) ...

(3) A public officer shall not enter into any obligation that has financial implications for the national government budget or a county government budget unless the obligation is authorised by the Constitution, an Act of Parliament or an Act of a County Assembly.

(4) ...

(5) A public officer shall not direct another public officer to do an act that constitutes a contravention of, or a failure to comply with, this Act, the Constitution or any other written law.

(6) A public officer who contravenes this section commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both.

(7) Where a national government entity or a county government entity—

(a) engages in an action that it is prohibited from doing by this Act;
or

(b) fails to comply with an obligation imposed on it by this Act,

a public officer who assisted or facilitated the act, or who was a party to, or contributed to, the failure, commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both in addition to provisions under Article 226(5) of the Constitution.

47. Article 226(5) of the Constitution on the other hand states that –

(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.

48. In respect of the drilling rig, the County Assembly, in the Particulars of Allegations, also stated that its procurement by the County Executive was done without a budget and the county assembly was only involved when payment was due. The County executive introduced it in a supplementary budget, in which it provided for Kshs. 45,000,000/- for the drilling rig whereas the procurement plan provided for a total sum of Kshs. 42,893,922/-. This meant that the amounts paid exceeded those in the procurement plan by Kshs. 2,106,078/-. In its submission before the Committee, the County Assembly made reference to the extract of the county budget for the 2018/2019 financial year, appearing from **Page 119 - 145** of **Annex 7** and stated that the procurement of a drilling rig was not provided for in the budget.

49. The County Assembly, in the Particulars of Allegations, further stated the following with respect to the procurement of the drilling rig-

- a) the tender period for the procurement of the drilling rig was extended without sufficient reasons provided;

- b) one member of the tender opening committee did not sign the minutes;
 - c) the acceptance letter was stamped with a rubber stamp with a different address from the one in the award letter which meant that acceptance was signed by a different person from the one who was awarded;
 - d) no security bond (10% of the contract price) was received by the county government contrary to clause 5.1 of the contract, which appears at **Page 148 of Annex 7**, on performance security;
 - e) the tender processing committee included the County Executive Committee Member for Water and Sanitation and two political leaders defeating the purpose of checks and balance and oversight within the Executive;
 - f) there was no log book to show ownership of the vehicle; and
 - g) the supplier's invoice had indicated the amount to be paid to a KCB Bank account. Some payment was made to that KCB Bank account but a substantial part of the payment was made to another account in Diamond Trust Bank without documentation supporting the change.
50. On the unbudgeted shipping of three paramedic ambulances by the County Executive, the County Assembly, in the Particulars of Allegations, stated as follows-
- a) the available budget was for purchase of two ambulances but the project was cancelled after an unsuccessful procurement process;
 - b) the same funds were applied for shipping and clearing the three ambulances donated without the approval of the County Assembly therefore in breach of the Public Finance Management Act on budgetary compliance;

- c) there was no documentary evidence on how the County Executive sourced for the three ambulances from Huron Valley Ambulances in the United States of America;
 - d) that Relief for Africa Foundation was not competitively sourced by the county government for services of handling and transportation in violation of the Public Finance and Management Act and the Public Procurement and Asset Disposal Act; and
 - e) that a total of Kshs. 14,528,427/- might have been paid in which case value for money could not be achieved as the amount could have bought two brand new ambulances from Kenya.
51. In its submission before the Committee, the County Assembly made reference to the extract of the county budget for the 2018/2019 financial year, appearing from **Page 119 - 145** of **Annex 7** and stated that the shipping of three paramedic ambulances was not provided for in the budget.
52. The County Assembly also submitted that it continually asked the County Executive for documents on financial and other matters of the county in the exercise of its oversight mandate but the County Executive ignored its requests.

Observations of the Committee

53. On the matter of the drilling rig, the Committee observed that according to the extract of the county budget supplied by the County Assembly (**page 123** of **Annex 7**), the supplementary budget made provision for funds to be used for a Water Improvement Program – Drilling Equipment - to the tune of Kshs. 45,000,000/-. The Committee further noted that the County Assembly had

provided a copy of a contract for the supply and delivery of a drilling truck, appearing on **Page 146** of **Annex 7**, for a contract price of Kshs. 45,000,000/-.

54. The County Assembly, in its Particulars of Allegations, claimed that the procurement plan for the County provided for the procurement of the drilling truck for Kshs. 42,893,922/-. The Committee observed that the County Assembly did not provide a copy of the County procurement plan for the Committee to verify the claim.
55. On the matter of the County Fire Station, the Committee observed that according to the County budget supplied by the County Assembly (**Page 120** of **Annex 7**), the County budget provided Kshs. 8,000,000/- for the construction and equipping of a County fire station but a supplementary budget reduced the budget to Kshs. 3,000,000/-. Although in the Particulars of Allegations the County Assembly stated that the construction and equipping of the fire station was done without a budget, the documentation presented by the County Assembly, however, seems to suggest otherwise and the County Assembly in its submissions before the Committee did not shed more light on the matter.
56. On the matter of the shipping of three paramedic ambulances, the Committee observed that the County Assembly did not provide supporting evidence in respect of the allegations it made that-
 - a) the available budget was for purchase of two ambulances but the project was cancelled after an unsuccessful procurement process;
 - b) the same funds were applied for shipping and clearing the three ambulances donated without the approval of the County Assembly therefore in breach of the Public Finance Management Act on budgetary compliance;

- c) there was no documentary evidence on how the County Executive sourced for the three ambulances from Huron Valley Ambulances in the United States of America;
 - d) Relief for Africa Foundation was not competitively sourced by the county government for services of handling and transportation in violation of the Public Finance and Management Act and the Public Procurement and Asset Disposal Act; and
 - e) a total of Kshs. 14,528,427/- might have been paid in which case value for money could not be achieved as the amount could have bought two brand new ambulances from Kenya.
57. The Committee observed that no evidence was provided by the County Assembly in support of the following allegations-
- (a) that the advertisement for the deadline for submission of tender document was extended from 7th Feb 2018 13th Feb 2018 without due process;
 - (b) that one member of the tender opening committee did not sign the minutes;
 - (c) that the acceptance letter was stamped with a rubber stamp of a different address compared to that contained in the award letter;
 - (d) that no security bond (10% of the contract price) was received by the county government contrary to the contract;
 - (e) that the tender processing committee included the County Executive Committee Member for water and sanitation and two political leaders;
 - (f) that there was no log book to show ownership of the vehicle; and
 - (g) that whereas the supplier invoice indicated that payment be made through a KCB Bank account, a substantial portion of the payment was made through a Diamond Trust Bank account.

(2) **Allegation 2: Unwarranted Formation of Taskforces**

58. The County Assembly alleges that since coming into office, the Governor had formed a number of taskforces which had spent millions of county funds without tangible output. The findings of the taskforces, which have always differed with the Auditor General's reports, have never been implemented. The County Assembly alleges that the taskforces were formed with malice, ill-will and vendetta and had been turned into a political tool against the previous Governor with the same being populated by the Governor's campaigners as a reward.
59. In the Particulars of Allegations, the County Assembly stated that the Governor established two taskforces in 2017 after taking office. One, led by Mr. Philemon Mwaisaka reported on 5th February, 2018 on the verification of projects carried out from 2013 to 2017 while the second one reported in June 2018 on pending bills. The recommendation of the report on pending bills is different from the report of the Auditor General on the same in that the Auditor General cleared pending bills amounting to Kshs. 414,000,000/- whereas the taskforce cleared pending bills amounting to Kshs. 21,552,528/- for payment, Kshs. 271,860,813 for payment subject to meeting set conditions and determined pending bills amounting to Kshs. 541,052,588 as unpayable.
60. The County Assembly, in its submissions before the Committee, stated that the Governor had established a plethora of taskforces but only one had submitted a report. It provided a copy of a report of a Committee on Pending Bills established by the Governor, dated June, 2018 and which appears at **Page 159 of Annex 7**. The County Assembly submitted that it had attempted to procure the status of the taskforces from the County Executive but its efforts did not bear fruits.

61. The County Assembly, in the Particulars of Allegations, stated that the taskforce recommendations have never been implemented. The County Assembly also stated that information regarding the financial expenditure of the taskforces were never disclosed to the County Assembly as required by the law. The budgets for the taskforces have also never been approved by the County Assembly.
62. The County Assembly, in its submissions, stated that some taskforces were not necessary with no value for money. It provided the example of the taskforce on pending bills which performed the same task that was undertaken by the Auditor General.

Observations of the Committee

63. The Committee observed that the County Assembly had neither provided the number nor the particulars of the taskforces that it alleged that the Governor had established nor evidence of the costs associated with such taskforces. The Committee could not therefore make an informed determination on the matter.
64. The Committee further observed that the role of Counties to verify payable pending bills is a role that is distinct from the mandate of the Auditor General on pending bills. Indeed, the Governor as the Chief Executive Officer of the County, is duty bound to verify pending bills as he is accountable for any payment made by the County Executive.
65. The Committee also observed that the Report provided by the County Assembly, which appears at **Page 159 of Annex 7**, states that it is a report of a Committee on Pending Bills and not a taskforce. It further observed that according to the Report of the Committee on Pending Bills (**Page 162 of Annex 7**), a taskforce had earlier been formed to verify county projects and that on completion of its work, the

Governor had then established the Committee on Pending Bills to establish the financial obligations of the County.

(3) **Allegation 3: Stalled Projects**

66. The County Assembly alleged that the County Executive had stalled projects that were initiated during the tenure of the first County Government as it shifted focus to implement other projects. The stalled projects include the construction of Moi Stadium and the County Headquarters.
67. In the Particulars of Allegations, the County Assembly stated that the Moi Stadium project had been ongoing and had a budget of Kshs. 94,000,000/-. The contractor was on site but the contract was terminated. The County Assembly provided a 'Form of Agreement' for the stadium project entered into on 13th June, 2017 and which appears at **Page 155** of **Annex 7** together with a letter issuing notification for the award of the tender, appearing in at **Page 158** of **Annex 7** and a letter accepting the award which appears at **Page 157** of **Annex 7**.
68. Further, the County Assembly stated that implementation of the County Headquarters project began with the ground breaking and fencing of the land during the tenure of the first County government but had stalled to date.
69. The County Assembly alleged that the refusal by the Governor to have projects initiated by the previous regime completed was political as the several allegations of corruption in the awarding of such tenders have never been substantiated and investigations have so far not revealed that there was corruption in their procurement.

Observations of the Committee

70. In the Particulars of Allegations, the County Assembly stated that the construction of Moi Stadium had stalled. However, the Committee observed that in support of this allegation, the County Assembly in its submissions made reference to an agreement (**Page 155 of Annex 7**) which provides for the construction of Voi Podium and not the construction of Moi Stadium. The Committee did not therefore receive any evidence with regard to the construction of Moi Stadium which is cited in the Particulars of Allegations.

71. In respect of the construction of County Headquarters, the County Assembly, in the Particulars of Allegations, stated that the tender for its construction had been awarded by the previous County Executive and that the construction had stalled. The Committee observed that the County Assembly did not provide documentation in support of this allegation.

(4) Allegation 4: Failure to Prudently Implement the County Development Budget.

72. The County Assembly alleges that according to the Auditor General's report, whereas the county budget for the financial year 2017/2018 was Kshs. 1,631,479,048/- only Kshs. 356,844,798/- was spent leaving a whopping Kshs. 1,274,634,256/- worth of development projects undone. Further, only 21% of the projects were contracted leaving a total of 79% of development projects not contracted or performed.

73. The County Assembly alleges that failure to deliver projects in time adversely affected service delivery to county residents. Further, the implementation cost of the projects may escalate due to inflation. This is in contravention of section 149(1) of the Public Finance Management Act, 2012 which states as follows -

(1) An accounting officer is accountable to the county assembly for ensuring that the resources of the entity for which the officer is designated are used in a way that is—

(a) lawful and authorised; and

(b) effective, efficient, economical and transparent

74. The County Assembly alleges that the County Executive was in breach of the law and that the development objectives of the planned projects may not be achieved. The County Assembly noted that the recurrent expenditure for the county was settled up to 98% meaning the County Executive was not development conscious.
75. The County Assembly provided an extract of the Auditor General's report for the year ended 30th June, 2018, which appears at **Page 166** of **Annex 7** and which shows the County's under-absorption of Kshs. 1,274,634,256/- in the development vote.

Observations of the Committee

76. The Committee noted that indeed the Report of the Auditor General (**Page 166** of **Annex 7**) indicated that the County Executive had not absorbed a substantial portion of its development budget, amounting to Kshs. 1,274,634,256/-.

5.2 CHARGE 2: FAILURE TO SUBMIT TO THE COUNTY ASSEMBLY AN ANNUAL REPORT ON THE IMPLEMENTATION STATUS OF THE COUNTY POLICIES AND PLANS

- (1) **Allegation: Failure to Submit to the County Assembly an Annual Report on the Implementation Status of the County Policies and Plans as Required by Section 30(2)(J) of the County Governments Act.**

77. The County Assembly alleges that the Governor has never submitted an annual report on the implementation status of the County policies and plans as provided under section 30(2)(j) of the County Governments Act, 2012. Section 30(2)(j) of the County Governments Act states as follows-

(2) Subject to the Constitution, the governor shall—

(j) submit to the county assembly an annual report on the implementation status of the county policies and plans;

78. The County Assembly alleges that the Governor has never submitted the annual report as prescribed thus making it difficult for the County Assembly to keep track of the developments and service delivery in the County. This failure has equally denied the County a common direction towards service delivery and programs implementation in the quest to deliver the development agenda to the people of Taita Taveta County.

79. The County Assembly further alleges that the non-submission of the report has resulted in lack of accountability by the County Executive Committee members to the Governor which has led to lack of accountability in service delivery and non-implementation as well as non-completion of key projects in the County.

80. The County Assembly provided a statement which appears at **Page 170** of **Annex 7** by the Clerk of the Assembly confirming that the Governor had never submitted to the County Assembly an annual report on the implementation status of the County policies and plans as required by the law.

Observations of the Committee

81. The Committee observed that indeed section 30(2)(j) of the County Governments Act, 2012 requires the Governor to submit an annual report on the implementation

status of the county policies and plans to the County Assembly. The Governor's non-submission of the county policies and plans is a violation of the law. The Committee observes that the Governor's failure to submit the annual report on the implementation of the county policies and plans is a contravention of the law.

82. The Committee noted that the County Assembly had provided a signed statement by the Clerk of the Assembly confirming that the Governor had never submitted to the County Assembly an annual report on the implementation status of the county policies and plans (*Page 170 of Annex 7*).
83. The Committee further observed that the Constitution empowers County Assemblies to have oversight over the County Executive and the non-compliance with section 30(2)(j) of the County Governments Act by the Governor interferes with this mandate of the County Assembly.

CHARGE 3: FAILURE TO DELIVER THE ANNUAL STATE OF THE COUNTY ADDRESS

Allegation: Failure to Deliver the Annual State of the County Address as Required by Section 30(2)(K) of the County Governments Act.

84. The County Assembly alleges that the Governor had never delivered the State of the County Address since the inception of the Second County Assembly of Taita Taveta. This had led to lack of direction in the County development agenda with the County Assembly in particular and the public in general being in the dark about the County Executive's development agenda. This is also in breach of section 30(2)(k) of the County Governments Act which states as follows-

(2) Subject to the Constitution, the governor shall—

(k) deliver annual state of the county address containing such matters as may be specified in county legislation;

85. The County Assembly provided a statement by the Clerk of the Assembly, appearing at **Page 170** of **Annex 7**, confirming that the Governor had never delivered the State of the County Address as required by the law.

Observations of the Committee

86. The Committee observed that indeed section 30(2)(k) of the County Governments Act, 2012 requires the Governor to deliver an annual state of the county address. The Committee noted that the County Assembly had provided a signed statement by the Clerk of the Assembly confirming that the Governor had not, in the past two years, delivered an annual state of the county address (**Page 170** of **Annex 7**). The Committee observed that this was in violation of section 30(2)(k) of the County Governments Act, 2012.

5.3 CHARGE 4: FAILURE TO REMIT STATUTORY DEDUCTIONS TO THE RELEVANT INSTITUTIONS

Allegation: Failure to Remit Statutory Deductions to the Relevant Institutions, Including the Kenya Revenue Authority (KRA), the National Hospital Insurance Fund (NHIF) and the National Social Security Fund (NSSF) contrary to the Income Tax Act, Cap 470, the National Hospital Insurance Fund Act, Cap 255 and the National Social Security Fund Act, Cap 258 Laws of Kenya.

87. The County Assembly in the Particulars of Allegations stated that the Governor had for several months failed to ensure that statutory deductions are remitted upon deduction from the salaries of the county employees. As the Chief Executive

Officer of the County Government, he had failed to ensure that the County Department of Finance and Economic Planning remitted the monthly contributions upon deduction. The County Assembly submitted two NHIF Employer Data Summaries under the names Taita Taveta County Casuals-ECD and the County Government of Taita Taveta in support of their allegation. This appears at **Pages 173, 174 & 175 of Annex 7.**

88. According to the County Assembly, due to lack of remittance of the statutory deductions, county health workers had continuously gone on strike and other county workers had been unable to access medical services using the NHIF subscription in private hospitals. This had led to pain, suffering and death of some citizens due to lack of medical attention. The County Assembly submitted a copy of a joint seven day strike notice dated 13th September, 2019 by the Kenya Union of Nurses (KNUN), the Kenya Medical Practitioners, Pharmacists and Dentists Union (KMPDU), the Kenya County Government Workers Union (KCGWU), the Kenya National Union of Medical Laboratory Officers (KNUMLO), the Kenya Health Professionals Society (KHPS) and the Kenya Union of Clinical Officers(KUCO), Taita Taveta County Branch, addressed to the County Secretary of Taita Taveta County Government, which appears at **Page 176 of Annex 7.** The strike notice highlights a number of unresolved issues affecting Taita Taveta County, among them, the delay or late remittance of statutory deductions.

89. Further, in support of this allegation, the County Assembly submitted a copy of a Petition by Public Servants of Taita Taveta County Government addressed to the County Assembly of Taita Taveta, which appears at **Page 178 of Annex 7.** The petitioners drew the attention of the Assembly to a number of issues, among them the delay in remittance of statutory deductions i.e NHIF, NSSF and PAYE.

90. The County Assembly stated that the Governor's failure to remit NHIF deductions had resulted in a penalty of Ksh.38 Million in the financial year 2018/2019, which is a penalty imposed by law against employers who fail to submit the monthly deductions. The County Assembly submitted a Taita Taveta Payment Report as at 30th June, 2019, which appears at *Page 173* of *Annex 7*, in support of this allegation.
91. The County Assembly stated that the Governor in failing to remit statutory deductions to the relevant institutions had contravened section 3(2)(a)(ii) of the Income Tax Act, section 15 read together with section 17 of the National Hospital Insurance Fund Act, Cap 255 and section 19 read together with section 20 of the National Social Security Fund Act Cap 258. These sections of the law obligate an employer to make the relevant contributions to specific institutions on behalf of an employee.

Observations of the Committee

92. The Committee observed that the County Assembly had provided various documents in relation to late remittance of funds to the National Hospital Insurance Fund (NHIF). However, the authenticity of the NHIF Payment Report as at 30th June, 2019 (*Page 173* of *Annex 7*) indicating the penalties accrued by the County Government could not be ascertained. Further, there is no indication of the author of the document and neither was the document signed.
93. The Committee further observed that the County Assembly did not adduce evidence to support the allegation that the County Government had not remitted employee contributions to the Kenya Revenue Authority and the National Social Security Fund.

94. The Committee also observed that a petition by public servants of Taita Taveta County Government had been submitted to the County Assembly of Taita Taveta on 16th August, 2019, (*Page 178 of Annex 7*) drawing the attention of the Assembly, to various issues, among them the late remittance of statutory deductions. The Assembly did not indicate whether it considered the Petition and if it did, what it had recommended with regard to the issues raised and what action, if any, had then been taken.

5.4 CHARGE 5: MISLEADING THE PEOPLE OF TAITA TAVETA COUNTY

Allegation: Misleading the People of Taita Taveta County contrary to Section 19 of the Public Officer Ethics Act, Cap 183 Laws of Kenya as read with Articles 73 and 260 of the Constitution of Kenya, 2010.

95. The County Assembly submitted that on 2nd July, 2019, the Governor addressed a crowd outside his office and announced that he would seek to have the County Government of Taita Taveta suspended owing to the budget stalemate between the County Executive and the County Assembly for the reasons he had advanced in his memorandum to the County Assembly. The County Assembly produced as its evidence a Video Clip in support of this allegation.
96. The County Assembly stated that the Governor's Memorandum to the County Assembly had no explanation as to why he could not assent to the budget and was circulated by the Office of the Governor through social media. Further, that the Memorandum contained the following misleading information-
- (a) that the County Assembly had allocated itself a sum equivalent to 11.6% of the total County Budget while the same was legally provided for in the County Allocation of Revenue Act; and

(b) that Members of the County Assembly had mutilated the County Budget and allocated Ksh. 830 Million to each Ward. This was totally untrue since if the figure were to be multiplied by the number of the wards in the County the total would be Ksh. 16.6 Billion while the total County Budget stood at Ksh. 5.4 Billion.

97. The County Assembly further stated that based on the false and misleading information, the voters of Taita Taveta appended their signatures in support of the petition to suspend the County Government of Taita Taveta.
98. For the above reasons, the County Assembly was of the view that the Governor had contravened section 19 of the Public Officer Ethics Act which prohibits a public officer from knowingly giving false or misleading information to members of the public or to any other public officer and Article 73 of the Constitution which outlines the responsibilities and guiding principles of leadership.

Observations of the Committee

99. With regard to the allegation of misleading the people of Taita Taveta County that the County Assembly had allocated itself a sum equivalent to 11.6% of the total County Budget while the same was legally provided for in the County Allocation of Revenue Act, in its submissions the County Assembly relied on the allocations made under the Fourth Schedule to the County Allocation of Revenue Act, 2019. The Committee observed that the Act stipulates the ceilings on recurrent expenditure for County Executives and County Assemblies as opposed to ceilings on the whole budgetary allocation. No further evidence was provided to support the allegation with regard to the total county budget.

100. With regard to the allegation of misleading the people of Taita Taveta County that that Members of the County Assembly had mutilated the County Budget and allocated Ksh. 830 Million to each Ward, the County Assembly stated in its submissions that this was untrue and unfathomable. The Committee however observed that no evidence was submitted to support the claim by the County Assembly.

5.5 CHARGE 6: MISLEADING THE MEMBERS OF TAITA TAVETA COUNTY ASSEMBLY

(1) **Allegation: Misleading the Members of Taita Taveta County Assembly contrary to Section 19 of the Public Officer Ethics Act, Cap 183 Laws of Kenya as read with Article 260 of the Constitution of Kenya, 2010.**

101. The County Assembly stated that on 28th June, 2019, the Governor sent a memorandum to the County Assembly which appears at *Page 185* of *Annex 7*, giving reasons as to why he could not assent to the 2019/2020 Budget. In the view of the County Assembly, the following reasons advanced in the memorandum were misleading-

(a) The allocation of Kshs. 274 Million for Casual Workers which appears at *Page 188* of *Annex 7*; and

(b) The use of Ksh. 120 Million being road maintenance from the Fuel Levy Funds which appears at *Page 201* of *Annex 7*.

102. According to the County Assembly, the Governor had insinuated that if the whole of 274 Million was not budgeted for casual workers, County Health and Education services would be crippled while the same budgetary item had been allocated only 31 Million in the last financial year 2018/19.

103. The County Assembly stated that the number of casuals in the County had escalated as compared to the previous regime while the hiring of most of them was not done by the County Public Service Board as required and most of them were the Governor's campaigners. The County Assembly was concerned with the allocation of Kshs. 274 million for wages for casuals as compared to Kshs. 31 million in the previous financial year.
104. On the use of Ksh. 120 Million being Road Maintenance from the Fuel Levy Equalization funds which appears at *Page 185* of *Annex 7*, the County Assembly stated that the Governor had insinuated that the funds should be used to purchase County graders or hire National Youth Service (NYS) graders towards improving the County road network. In this, the Governor misled the County Assembly to the effect that the County could use the funds in the purchase of graders while the law provides that the funds can only be used in the maintenance of unclassified roads.
105. The Advocate for the Governor during the hearing further indicated that the Governor's proposal was without legal basis and misleading to the public as funds committed by Statute cannot be used otherwise.
106. For the above reasons, the County Assembly was of the view that the Governor had contravened section 19 of the Public Officer Ethics Act.

Observations of the Committee

107. With respect to the allegations relating to the Governor misleading the Members of the County Assembly through the Memorandum of the Governor to the County Assembly submitted by a letter dated 28th June, 2019, (*Page 183* of *Annex 7*) the Committee notes that this was a memorandum to the County Assembly for its consideration as part of the budget process provided for in law. The Committee

observed that in the forwarding letter, the Governor stated that the memorandum was submitted to the County Assembly for its “debate and consideration before the proposed budget for the financial year 2019/2020 is assented to”. The Committee further observes that indeed the County Assembly’s Budget, Finance and Appropriations Committee considered the Governor’s memorandum and prepared a report which was laid in County Assembly on 2nd February, 2019.

5.6 CHARGE 7: GROSS MISCONDUCT

108. The Particulars of this Charge are as follows-

(1) Allegation 1: Failure to Adhere to the County Assembly Resolution on the Ratification of Mr. Davis Mwangoma as the Acting County Executive Committee Member for Finance and Economic Planning.

109. The County Assembly submitted that on 17th May, 2019, the Governor dismissed the County Executive Committee Member for Finance and Economic Planning and appointed Mr. Davis Mwangoma as the County Executive Committee Member for Agriculture and Livestock in an acting capacity in the Finance and Economic Planning docket, which appointment was forwarded to the County Assembly for ratification.

110. The County Assembly granted the ratification with conditions to the effect that Mr. Davis Mwangoma shall act as the County Executive Committee Member for Finance and Economic Planning for a period of two calendar months only, within which the Governor was to appoint a qualified person as the substantive County Executive Committee Member for Finance and Economic Planning. The ratification was conditional since the County Assembly realized that the County

would stall without a County Executive Committee Member in charge of Finance and Economic Planning. Communication of the Resolution of the County Assembly to the Governor was done via a letter dated 28th May, 2019, Ref. TTCA/CS/7/VOL. 1/(073) which appears at **Page 221** of **Annex 7**.

111. The County Assembly submitted that to date, almost five months from the date of the said ratification, the Governor was yet to nominate a County Executive Committee Member for Finance and Economic Planning for vetting by the County Assembly and that further, the Governor had not sought to highlight to the County Assembly challenges faced so far, if any, while Mr. Davis Mwangoma continues to act as the CECM for Finance and Economic Planning.
112. In this regard, the County Assembly was of the view that the Governor had failed to honour the resolution of the County Assembly of 28th May, 2019 intentionally which had exposed county funds to misappropriation hence the County had now plunged in a budgetary stalemate without an appropriate person in office to help the County out.

Observations of the Committee

113. The Committee observed that there was indeed a Resolution of the County Assembly (**Page 221** of **Annex 7**) to ratify the nomination of Mr. Davis Mwangoma as the Acting County Executive Committee Member for Finance and Economic Planning for a period not exceeding two months from the date of the resolution, within which time a substantive head of County Treasury was to be appointed. The Committee further noted that on 20th September, 2019, as appears on (**Page 249** of **Annex 7**), the Hon. Joyce Mwangoji requested for a statement from the Committee on Budget and Appropriation to inform the Assembly why the nominee for the position of CEC Finance was yet to be vetted by the Assembly.

114. From the request for statement by Hon. Mwangoji, it appears to be the case that indeed as at 20th September, 2019, the position of County Executive Committee Member for Finance and Economic Planning had not been substantively filled in line with the Resolution of the County Assembly.

(2) **Allegation 2: Misrepresentation of Facts to the Public with an Aim of inciting the Public against the County Assembly**

115. The County Assembly stated that on the 2nd day of July, 2019 the Governor rolled out a drive to collect signatures in support of a petition to the President to suspend the County Government of Taita Taveta. The roll out ceremony was conducted within the Governor's office grounds which confirmed that the same was a government function.

116. After rolling out the exercise, the Governor handed over the exercise to his former campaigners some of whom are now County staff who proceeded to collect the signatures without conducting public participation or sensitization, causing the public to append their signatures without the necessary information. This is against the principles of Governance as outlined in Article 10 of the Constitution of Kenya, 2010.

Observations of the Committee

117. The Committee noted that in the Particulars of Allegations, the County Assembly did not indicate the specific facts which it alleged the Governor had misrepresented to the public.

(3) **Allegation 3: Collapse of County Government Devolved Structures**

118. The County Assembly submitted that the Governor being the County Chief Executive Officer had failed to maintain the established devolved structures as outlined in Part VI of the County Governments Act, 2012 on account of political insecurity, as most administration officers were recruited by the County Public Service Board during the tenure of the previous regime. Part VI of the County Governments Act, 2012 establishes decentralized units within the county and various offices to administer the units.
119. The County Assembly further submitted that the County Government did not have Sub-County Administrators and Ward Administrators which had manifested a gap in the delivery of services. This had rendered the County Government incapable of providing services efficiently for lack of administrative avenues in the County Government.
120. The County Assembly stated that towards the end of the year 2017, the County Executive sought to advertise vacancies in the Offices of Sub-County Administrators and Ward Administrators. Following the advertisement, the officers who were almost completing their contracts in the positions advertised ran to Court to stop the intended recruitment on grounds that their appointments ought to have been converted to permanent and pensionable terms by the County Public Service Board which had offered them this option. The matter was still in Court and it was the view of the County Assembly that the County Executive had not offered alternative solutions to this matter. This statement appears in at **Page 252** of **Annex 7**.
121. Further, the County Assembly stated that the position of County Secretary did not have a substantive appointee even after the position was advertised twice and suitable candidates placed their application. More than ten directorates did not also have substantive appointees. Copies of advertisements for shortlisted candidates

for various positions and the position of county secretary appears at *Pages 253-256* of *Annex 7*.

Observations of the Committee

122. The Committee observed that the County Assembly, in the Particulars of the Allegations, made reference to a pending court matter relating to the recruitment of sub-county administrators and ward administrators. This being a matter that is pending before a court, the manner in which the matter shall be dispensed with, including possible reference to alternative dispute resolution, is a matter for determination by the court.
123. On the matter of filling of critical senior positions in the County Executive, the Committee observed from the evidence provided that the County Public Service Board of Taita Taveta had indeed advertised for the positions on 28th August, 2018 and 4th October, 2017 (*Page 253-256* of *Annex 7*). Noting that the County Public Service Board is, under section 59 of the County Governments Act, 2012, mandated to “establish and abolish offices in the county public service” and to “appoint persons to hold or act in offices of the county public service ... within the county and to confirm appointments”, the Committee observed that the function of recruiting for the County Executive is a function of the County Public Service Board and not the Governor.
124. The Committee observes that the County Assembly did not provide evidence to establish a nexus established between the Governor and the allegations made.
- (4) **Allegation 4: Failure to Provide Leadership in the Current Budget Stalemate.**
125. The County Assembly submitted that the Governor had on numerous occasions refused to have the current budget stalemate resolved amicably by simply finding

out the County Assembly's thinking on the budget proposal through dialogue, leading to the deepening crisis and delay in the passing of the supplementary budget, following the enactment of the County Allocation of Revenue Act, 2019.

126. The County Assembly further stated that the Clergy, county leaders and national leaders had called for dialogue to settle the crisis bedevilling the County but the Governor had jeopardized all efforts thus holding the entire county hostage. This had plunged the county's development roadmap into great uncertainty as the county continued to incur recurrent expenditure at the expense of development, as no development program was running at the moment.
127. The County Assembly states that the County Government of Taita Taveta had been faced with numerous challenges ranging from industrial unrest, deteriorating basic public services, among others.
128. The County Assembly states that instead of addressing these issues, the Governor had resorted to holding weekly radio rumba shows on Milele FM, some of which were recorded on video and shared on social media, including the Milele FM official facebook account. The County Assembly states that this was demeaning to the office that the Governor holds and contravenes Article 75 of the Constitution which provides that-

(1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids-

(a) any conflict between personal interests and public or official duties;

(b) compromising any public or official interest in favour of a personal interest;

(c) demeaning the office the officer holds.

(2) A person who contravenes clauses (1), or Article 76, 77 or 78(2)-

(a) shall be subject to the applicable disciplinary procedure for the relevant office; and

(b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.

Observations of the Committee

129. The Committee observes that there have been numerous attempts at mediation on the issues arising in Taita Taveta County, including intervention by the Senate Standing Committee on Devolution and Intergovernmental Relations.

7. FAIR TRIAL BEFORE THE COUNTY ASSEMBLY OF TAITA TAVETA

130. On 22nd October, 2019, the Advocate acting for the Governor raised a preliminary issue pursuant to Rule 13 of Part 2 of the Fifth Schedule to the Senate Standing Orders. He submitted that the County Assembly of Taita Taveta purported to pass a resolution to approve a motion seeking impeachment of the Governor without according him the right to be heard. The Governor argued that the County Assembly had acted unconstitutionally and urged the Special Committee to first establish, at the outset, whether the action of the Assembly adhered to the requirements of due process and fair hearing set out under the Constitution.

131. When asked to comment on whether or not the Governor had been given an opportunity to be heard at the County Assembly on the Motion for his proposed removal, the Advocate for the County Assembly informed the Committee as follows-

Mr. Chairman, Sir, with regard to the direct question on whether the County Governor was invited to the County Assembly to respond to the allegations and having the benefit of the HANSARD and the minutes of the approval meted by the House Business Committee of Taita/Taveta County Assembly, you will see them at Page 87 on the bundle.

You will see that the Motion to remove the Governor from office was expedited under a Procedural Motion. You will see that on Page 87, it was approved and moved on 9th October, 2019.

Therefore, we do confirm that, indeed, the County Governor was not summoned to the County Assembly and to the Plenary. However, we are alive to the provisions of Section 33 of the County Governments Act that provides for the statutory basis of removal under Article 181.

Section 33 is complete in its provision for the procedure under Article 181 and it provides that the forum for which the Governor shall be heard is the forum which we are in today. It is the forum before the Senate; the Special Committee or the Plenary. That is the forum provided for hearing of the County Governor under Section 33 of the County Governments Act.

The Assembly was conscious of that fact that the removal process does not end at the County Assembly. It forwards proposals or allegations and it is then for the County Governor to appear before this House through either its Committee or in the Plenary, to answer to them, respond to the allegations and if this House finds that they have not been substantiated, then off he goes.

If the House finds that they are substantiated, then an appropriate recommendation is made which can be adopted by the whole House. Therefore, the requirement of natural justice and the right of hearing are properly accommodated within the law. That is our response in that regard.

132. The Senate has traditionally avoided going behind the veil of a resolution of a County Assembly to interrogate if a County Assembly followed its own rules of procedure and therefore determine if the resolution was arrived at in a proper manner. In so doing the Senate has followed the prerogative of every Legislature as stated by Seerval, H. M. in his treatise where he observes that the declaration in Article 9 of the Bill of Rights (1688) involved the right of each House to be the **sole judge of the lawfulness of its own proceedings even where the procedure of a House, or the right of its members to take part in its proceedings was dependent on statute.** For such purposes, the House can as stated by May in his treatise, ‘practically change or practically supersede the law’. It is important to note that this refers to instances where a House of Parliament resolves to follow a procedure notwithstanding the provisions of its own Standing Orders.
133. The Special Committee is however conscious of the provisions of Article 3(1) of the Constitution which states that “**Every person has an obligation to respect, uphold and defend this Constitution.**” Neither the national Legislature nor a County Assembly can by resolution override the express provisions of the Constitution. Thus, so long as there is no clear violation of the Constitution by the County Assembly of Taita Taveta, the Special Committee cannot question the lawfulness of the proceedings before the County Assembly vis-à-vis its Standing Orders and rules of procedure. However, it is incumbent upon the Special Committee to determine if there was any violation of the Constitution once such an allegation is brought before it.

134. The Special Committee notes that in High Court Constitutional Petition no. 458 of 2015 **Mwangi wa Iria & others –v- Speaker of Muranga County Assembly & others**, in his ruling on the Governor’s application for conservatory orders to restrain the Senate from proceedings with the impeachment of the Governor, Justice J. L. Onguto ruled as follows:

“I take cognizance of the fact that the Senate is truly, what I may call, the Impeachment Court. The Senate is expected to not only investigate the nexus of the allegations to the 1st Petitioner (the Governor). The Senate must also interrogate the entire process as it scurried through the County assembly. I have seen no law that restrains the Senate from returning a verdict that the process was not conducted as detailed under the Constitution or any law for that matter. Pray, the Senate rises to the occasion and is practical and realistic in its investigations.”

135. The special committee further noted that Article 25(c) of the Constitution guarantees the right to a fair trial to all persons. Article 47 of the Constitution further guarantees persons the right to administrative action that is lawful, reasonable and procedurally fair. In **Petition No. 3 of 2014, Hon Martin Nyagah Wambora & County Assembly of Embu & Another** , the High Court of Kenya held as follows—

“ ... the right to a hearing must be accorded to a Governor at any time that the motion proposing removal from office is being debated before it is approved and rejected.”

136. The Court of Appeal in **Onyango Oloo –v- Attorney General (1986-1989) EA 456** stated as follows with regard to the principle of natural justice:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard ... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide the manner he decided.”

137. In its determining whether the Governor was granted a fair hearing at the County Assembly, the special committee notes the findings of the High Court in Constitutional Petition no. 458 of 2015 **Mwangi wa Iria & others –v- Speaker of Muranga County Assembly & others** where the court held as follows:

“84. With regard to the right to be heard, my judgment does not favour the Petitioners’ (Governor) approach.

85. The 1st Petitioner, at one remove states and raises the fact that there was no fairing; and at another remove engages and admits that the 1st Petitioner was invited to state his case but opted to give a written response. Again, at one remove the 1st Petitioner complains and states that he was unable to attend as he was not afforded the opportunity; and

at another remove the 1st Petitioner states that he asked for more time and to supplied with documents to help prepare his defence which time was allegedly declined.

86. In my judgment and without making a final finding, it is apparent that there was an invite to the 1st Petitioner to state his side of the story. It was for the 1st Petitioner to attend. It was his call. He opted not to attend. The 1st and 2nd Respondents appeared to be very cautious and even informed the 1st Petitioner that he was entitled to a fair hearing. He was also assure of fair administrative action. Whether this happened cannot be ascertained with finality at this stage.

87. It may be necessary to interrogate further whether the time afforded to the 1st Petitioner would adequately satisfy the requirement that opportunity be afforded to an accused person to prepare his defence. It may also be necessary to interrogate whether the time was generally adequate. I however take cognizance of the fact that the time set for the process, even at the Senate level, appears to heap pressure on the parties. For the 2nd Respondent to have given the Petitioner seven days to prepare his defence, would in the circumstances of the case and in view of the statutory provisions not be too enormous or unconstitutional.”

Observations of the Committee

138. The Committee observes that the Senate has traditionally been hesitant to make a thoroughgoing inquiry into the impeachment process at the County level. This has been so because the Senate is reluctant to make itself a court of first instance in the matter of the impeachment of a Governor and to substitute its own findings of fact for those of the concerned County Assembly.
139. The Committee is however keen to observe that a delicate balance needs to be struck between the need for the Senate to avoid a miniscule interrogation of

County Assembly processes and the Senate's constitutional obligation together with all other persons to respect and uphold the Constitution.

140. The County Assembly, by its own admission, failed to accord Governor Granton Graham Samboja an opportunity to know the charges preferred against him, the evidence in support of those charges and the opportunity to confront the charges. The right to be heard is a cardinal tenet of the rules of natural justice that finds expression in our Constitution and which the courts have jealously safeguarded.
141. The Committee is unable to agree with the position taken by the County Assembly that the opportunity to be heard available to the Governor before the Senate is adequate and obviates the need to accord the Governor a similar hearing at the County Assembly prior to the Assembly making a decision on whether or not to remove the Governor from office.
142. The Committee is of the position that the right to be heard is a right that is mandatory and must be availed to a person at every forum before which a decision is to be made that affects their rights. In analogous terms, it is not open to a Magistrate's Court or the High Court to say to a party to a matter before it that he or she will not be heard at that court because a right exists to be heard later at the High Court, the Court of Appeal or the Supreme Court, as the case may be.
143. The Committee observes that an impeachment process in which the person sought to be impeached is denied an opportunity to be heard at the County Assembly is so gravely and fatally flawed that the Senate cannot lend its stamp of approval on it. From this perspective, the present impeachment process probably collapsed *ab initio*.

144. The Committee is therefore of the view that the Senate's mandate in the impeachment process of the Governor will extend to consideration of the process undertaken at the County Assembly if the fundamental provisions of the Constitution or the law are alleged to have been violated or contravened and it is therefore open to either party to canvass this point before the Special Committee of the Senate or the Senate in Plenary.

8. IMPEACHMENT GENERALLY

145. Article 96(1) of the Constitution provides that the "*the Senate represents the counties and serves to protect the interests of the counties and their governments*" Impeachment is one of the mechanisms by which the Senate exercises its role of protection of the Counties and their Governments.

146. To assist the Committee make an informed decision on the proposed impeachment, it looked at the origin and history of impeachment of public officials.

147. In England, impeachment originated in the 14th century, when it became a means of initiating criminal proceedings based on clamour, or outcry. Among the first recognized cases of impeachment was that of William, 4th Baron Latimer, who had been closely associated with the government of King Edward III. The charges against Latimer were oppression in Brittany; that he had sold the castle of Saint-Sauveur to the enemy, and impeded the relief of Bécherel, a British garrison under siege, in 1375; that he had taken bribes for the release of captured ships, and retained fines paid to the king, and the city of Bristol; and finally, that in association with Robert Lyons, he had obtained money from the crown by the repayment of fictitious loans. Baron Latimer was subsequently impeached by Parliament.

148. Subsequent subjects of impeachment were often political figures, usually royal ministers. Latimer's case also marks the point at which impeachment became not merely a means of initiating criminal proceedings but also a method of trial.
149. After the mid-15th century, impeachment fell out of use until the 17th century, when it was revived as a means by which Parliament could get rid of unpopular ministers. The use of impeachment gradually waned as the 18th century progressed, mainly because it proved to be a political instrument by which to attack the king's ministers.
150. In the early 19th century the acceptance of the principle that cabinet ministers are responsible to Parliament, rather than to the sovereign, made impeachment unnecessary, and the procedure fell into disuse after the unsuccessful trial of Lord Melville in 1806.
151. In the United States, Alexander Hamilton, the Chief of Staff for George Washington and one of the interpreters and promoters of the US Constitution, wrote that impeachment is "*a method of national inquest into the conduct of public men*".
152. Senator William Blount of the United States was in 1797-1799 impeached by the House of Representatives for the alleged incitement of two Indian tribes to mount a military expedition against neighboring Spanish territories for purposes of capturing the same for Great Britain. The Senator was however removed by the Senate using its own internal procedures before he could be tried in the Senate.
153. Sometimes impeachment is not based on criminal activity but rather morality and professional conduct. For instance, in July 2014, a member of the Missouri House

of Representatives filed articles of impeachment against Governor Jay Nixon (D) for ordering Missouri's Department of Revenue to accept joint tax returns filed by same-sex couples who have been legally married in other states. The Missouri Constitution prohibits the state from recognizing same-sex marriages.

154. In 1929, the Oklahoma legislature impeached Henry Johnston, seventh governor of Oklahoma, after convicting him of general incompetency.
155. In Nigeria, several Governors have been impeached based on corrupt practices. After setting up the anti-graft agency, the Economic and Financial Crimes Commission (EFCC), the Nigerian Government started targeting corrupt officials such as Governor Ayodele Fayose and his deputy from Ekiti State who were both impeached for corruption. The Governor of Bayelsa State, Diepreye Alamieyeseigha was also impeached for corruption and money laundering.
156. Abdulkadir Musa, the first Nigerian State Governor to ever be impeached met his fate because he was unable to form a cabinet. He had been elected on a platform of the People's Redemption Party (PRP) when the dominant party in the House was the National Party of Nigeria, whose members he refused to nominate.
157. In Nigeria, incompetence is not a crime yet, for non-delivery and as a betrayal of public trust, it is an impeachable offense. Inability to govern is also not a crime yet it is grounds for impeachment.
158. During the Senate's consideration of the report of the special committee investigating the proposed removal from office of the Governor of Kericho County, the Senate adopted with approval the exposition of Senator Miriam Defensor Santiago of the Senate of the Philippines who in a keynote address at a workshop said that, "**an impeachment trial is a unique process, because it is a**

hybrid. Impeachment is both quasi-judicial and quasi-political. It is neither a civil case nor a criminal case. A criminal case is designed to punish an offender and to seek retribution. In contrast, impeachment is the first step in a process that tries to remedy a wrong in governance. It has been said that the purpose of impeachment is not personal punishment, but rather to maintain constitutional government, through the removal of an unfit official from a position of public trust.”

159. The Court of Appeal of Kenya in Civil Appeal No. 21 of 2014 **Hon. Martin Nyaga Wambora & others –v- The Speaker of the Senate & others** stated as follows concerning impeachment of Governors in Kenya:

“Our reading and interpretation of Article 181 of the Constitution as read with section 33 of the County Governments Act shows that removal of a Governor is a constitutional and political process; it is a *sui generis* process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility. Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate’s constitutional mandate to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There

are three sequential steps to be followed; first is intuition of a motion to remove the Governor by a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly's resolution to the Senate for hearing of the charges against the Governor... The Constitutional and statutory mandate to initiate and consider a motion to remove a County Governor is vested in the County Assembly and the Senate.”

160. It is therefore clear that the purpose of impeachment is not to apportion culpability, criminal or otherwise as that is for the courts. The purpose of impeachment is to ensure that the people of a county are governed in a manner consistent with the Constitution and laws of Kenya. Impeachment is all about accountability, political governance as well as policy and political responsibility.
161. The Senate therefore has the responsibility to set and maintain the standard for impeachment that bears the proper hallmarks of impeachment: due process, fairness and justice. This the Senate has endeavored to do in the previous impeachments that it has undertaken as evidenced by the reports of its Special Committees in:-
- (a) The 1st impeachment of the Governor of Embu County - the report is dated 14th February 2014;
 - (b) The 2nd impeachment of the Governor of Embu County - the report is dated 13th May 2014;
 - (c) The impeachment of the Governor of Kericho County - the report is dated 3rd June 2014;

- (d) The impeachment of the Deputy Governor of Machakos County - the report is dated 15th August 2014;
- (e) The impeachment of the Governor of Murang'a County – the report is dated 6th November, 2015; and
162. The 7th impeachment was that of the Governor of Nyeri County which was conducted in plenary.
163. It is noteworthy, for record purposes, that so far the Senate has found the charges in support of removal from office of a Governor substantiated in only one case, namely that of the Governor of Embu County. The Senate found the charges unsubstantiated in the case of the Governor of Kericho County, the case of the Deputy Governor of Machakos County, the case against the Governor of Murang'a County and the Governor of Nyeri County.
164. The Governor of Embu County was impeached for grossly violating the provisions of the Public Procurement and Disposal Act, the Public Finance and Management Act as well as the Constitution of Kenya.

9. THRESHOLD FOR IMPEACHMENT

165. The Special Committee shall, after hearing all the evidence tendered before it and taking all matters into consideration, need to decide whether it is Constitutional, lawful, pragmatic and in the interests of the County of Taita Taveta for the Governor to be removed from office.
166. On the threshold or standard of proof for impeachment, Yale Law professor Charles Black Jr. in "Impeachment: A Handbook" states as follows:

“Weighing the factors, I would be sure that one ought not to be satisfied, or anything near satisfied, with the mere ‘preponderance’ of an ordinary

civil trial, but perhaps must be satisfied with something less than the 'beyond a reasonable doubt' standard of the ordinary criminal trial, in the full literal meaning of that standard. 'Overwhelming preponderance of the evidence' comes perhaps as close as can to denoting the desired standard.'

167. Micheal J. Gerhardt, visiting Professor of Law, Duke University, in “The Special Constitutional Structure of the Federal Impeachment Process”, while reviewing the impeachment trial of then US President Bill Clinton states as follows on the issue of threshold-

The first such feature of the constitutional allocation of power for impeachment and removal is that it facilitates and rewards a pragmatic or flexible analysis and impedes a formalistic analysis of the fundamental questions at the core of President Clinton’s impeachment proceedings- whether his misconduct constituted a “high crime or misdemeanor”. A pragmatic analysis of this issue entails balancing various practical considerations or factors, including the magnitude of harm that an impeachable official’s misconduct has caused society or the constitutional order, the nexus between the official’s duties and his misconduct, public opinion, and other possible avenues of redress, such as electoral process or legal proceedings. In contrast, a formalist analysis employs rigid criteria for, or extremely well-defined elements of impeachable offences, such as treating every violation of the federal criminal law or every breach of the public trust as justifying removal. By vesting the impeachable authority in the politically accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of officials well versed in pragmatic decision

making. Members of Congress are pragmatists who can be expected to decide or resolve issues, including the appropriate tests, by recourse to practical rather than formalist, calculations. In fact, members of Congress decide almost everything pragmatically, and decisions about impeachment and removal are not exception. The vesting of impeachment authority in political branches necessarily implies the discretion to take various factors, including possible consequences, into consideration in the course of exercising such authority....

Moreover, if formalist reasoning were the norm in impeachment proceedings, many questions posed by the President's misconduct would not have been nearly as heart-wrenching or politically divisive as they were. Removal would have been extremely easy and straightforward. In addition, the American people flatly rejected the strict liability notion of impeachment; most Americans acknowledged that the President had broken the law, but still did not regard his misconduct as constituting an impeachable offence or as justifying his removal. Most Americans favoured a less rigid approach that balanced the harm and wrongfulness of the President's misconduct against the public interest or welfare.

168. In the Supreme Court of Nigeria case of Hon. Muyiwa Inakoju & others –v- Hon. Abraham Adeolu Addeke S.C. 272 of 2006, it was held as follows:

“A Governor as a human being cannot always be right and he cannot claim to be always right. That explains why section 188 talks about gross violations. Accordingly, where a misconduct is not gross, then section 188 weapon of removal is not available to the House of Assembly.”

169. It is useful to note the various meanings of the word “gross” in relation to violation. Gross violation is a flagrant violation, a glaring error, nasty, unpleasant, vulgar or crass. It must be a severe transgression of the Constitution or a law.
170. In Kenya it is useful to note the provision of Article 73 of the Constitution which deals with the responsibilities of leadership:

Responsibilities of leadership

73. (1) *Authority assigned to a State officer—*

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) *The guiding principles of leadership and integrity include—*

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

(c) selfless service based solely on the public interest, demonstrated by—

(i) honesty in the execution of public duties; and

(ii) the declaration of any personal interest that may conflict with public duties;

(d) accountability to the public for decisions and actions; and

(e) discipline and commitment in service to the people.

171. In Petition No. 3 of 2014 **Hon. Martin Nyagah Wambora & 4 others –v- The Speaker of the Senate and 5 others**, the High Court held as follows:

“To our minds therefore, whether a conduct is gross or not will depend on the facts of each case having regard to the Article of the Constitution or any written law alleged to have been violated. We find that it is not every violation of the Constitution or written law that can lead to the removal of Governor, it has to be a gross violation.

The question therefore is how to measure what constitutes gross violation. We are of the view that the standard to be used does not require a mathematical formula, but it must take into account the intendment of Article 181(1) of the Constitution. In our view therefore whatever is alleged against a Governor must;

(a) be serious, substantial and weighty.

(b) there must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.

The charges as framed must state with a degree of precision the Article(s) or even Sub-Articles(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.”

172. The issue of the threshold for impeachment is complex and does not contain a simple mathematical formula. During the Senate’s consideration of the report of the Special Committee investigating the removal of the Governor of Kericho on 3rd June 2014 the Senate adopted the Committee’s recommendation that the threshold for impeachment should take into account the following considerations-

- (i) *The allegations must be serious, substantial and weighty;*
- (ii) *The violation must be a flagrant and glaring violation;*
- (iii) *There must be a nexus between the violation and the Governor;*
- (iv) *The violation must have led to harm, loss or damage to society;*
- (v) *The violation must have led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to carry out the functions of that office with integrity and accountability.*

173. The threshold was also used by the Senate in the subsequent consideration of the proposed removal from office, by impeachment, of Honourable Mwangi wa Iria, the Governor of Murang'a County in November, 2015.

174. This Special Committee adopts the above threshold for removal of a Governor as adopted by the Senate on 3rd June 2014.

10. OTHER OBSERVATIONS AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE

175. In the course of its investigation of this matter, the Special Committee has observed a number of issues which though outside the specific charges made against the Governor of Taita Taveta County, are germane to the totality of the situation of the Taita Taveta County and merit the attention of the Senate.

(1) Toxic environment

176. The Committee observes that the proceedings before it have exposed a deep chasm between the County Assembly on the one hand and the County Governor on the other that threatens to grind the County to a halt. It is inconceivable that in these circumstances the people of Taita Taveta County can be enjoying the benefits of

devolved government that the Constitution of Kenya avails. Urgent measures require to be taken to bring the two protagonists to the table to find an amicable.

177. In this respect, cognizant of the Senate's role as the custodian of the interests of the counties and their governments, the Committee recommends that the Senate, through its relevant organs, immediately assumes jurisdiction and invites the County Assembly and the County Governor to a consultative process that will restore a functioning government to the people of Taita Taveta County. This process should commence and be concluded and a report made to the Senate within ninety days.

(2) Conduct of the Governor

178. The Committee is unimpressed and must express its reservations on the pattern of conduct of the Governor that it has perceived on the basis of the material brought before it. For example, while it is open to the Governor to indulge in musical extravaganzas or other social activities, it is an uninspiring and disturbing picture when the Governor cannot similarly find time to appear before the County Assembly to present the annual State of the County address nor to submit the annual report on the implementation status of County policies and plans.
179. The Governor appears to require to be reminded of the high calling of his office and the responsibilities of leadership as set out at Article 73 in the Leadership and Integrity Chapter of the Constitution.

(3) The investigation by the Special Committee

180. The Committee observes that the impeachment process before the Senate or the Special Committee, as in the present case, is a solemn quasi-judicial process. The Committee is cognizant of the rights of parties to determine the manner in which they shall appear before the Committee or indeed if they shall appear at all.

181. If the parties choose to appear, it will assist the Committee if they are prepared for such appearance and they avail to the Committee such material as will enable the Committee to reach a fair determination of the matter. The Committee is adversarial rather than inquisitorial in its orientation and can only rely on such evidence, including witnesses, as is presented or as appear before it. Where documents are referred to but not produced or promised but not availed, the Committee has no recourse other than to rely on only what is availed.

(4) Further investigations by relevant bodies

182. The Committee observes that the impeachment process is not a panacea for all incidents of maladministration or criminal conduct. Where allegations are made of a criminal nature, it may be the case that while the Committee has neither the time nor the resources to make a conclusive finding, the matter is nevertheless serious in nature and may require the relevant organs of Government to pursue. The Committee's view is that some of the allegations made in the present impeachment process merit such consideration. These include allegations relating to violation of procurement laws and failure to remit statutory deductions.

(5) Statutory timelines for conclusion of the impeachment process

183. It can hardly be gainsaid and the Committee observes, that the impeachment process provided for in Article 181 of the Constitution is one requiring utmost judiciousness and circumspection. A ten-day period from the reporting of charges for the investigation or hearing, the analysis of evidence and decision and report-writing and presentation to the Senate and its deliberations is not adequate. The Senate needs to give urgent consideration to the need for an amendment to the law for the enlargement of this period.

11. FINDINGS OF THE SPECIAL COMMITTEE

184. Having considered all these matters, it then fell to the Special Committee to discharge its mandate under section 33 of the County Governments Act, standing order 75 and Part 2 of the Fifth Schedule to the Senate Standing Orders. Section 33(4) of the County Governments Act, standing order 75(2) and rule 2 of Part 2 of the Fifth Schedule to the Senate Standing Orders mandates the Special Committee to-

- (1) investigate the matter; and
- (2) report to the Senate within ten days on whether it finds the Particulars of the Allegations against the Governor to have been substantiated.

185. The Committee takes the position, in line with the precedents of the Senate in impeachment proceedings, that in order to find that any charge is substantiated, a determination needs to be made both that evidence has been adduced pointing to wrong-doing in the manner alleged in the Charge but also that the threshold for an in impeachable offence has been attained.

186. The thrust of the jurisprudence in successive impeachment proceedings before the Senate, which the Committee upholds, has been that it is not every aberration, even if established, that will lead to the impeachment of a Governor.

187. The Committee finds as follows on each of the Charges-

9.1 THE CHARGES

188. **Charge 1: Misappropriation of Funds contrary to Section 196 of the Public Finance Management Act, 2012;**

- (1) *Allegation 1: Expenditure on Unbudgeted Projects*

189. The Committee finds that the allegation was not proved and was therefore not substantiated.

(2) Allegation 2: Unwarranted Formation of Taskforces

190. The Committee finds that the allegation was not proved and therefore not substantiated.

(3) Allegation 3: Stalled projects

191. The Committee finds that the allegation was not proved and was therefore not substantiated.

(4) Allegation 4: Failure to prudently implement the development budget

192. The Committee found that as evidenced by the Report of the Auditor General, the County Executive, which the Governor heads, had not absorbed a substantial portion of its development budget, amounting to Kshs. 1,274,634,256/-. The Committee therefore determines that this allegation was proved. The Committee however also determines that this failure to absorb a portion of the development budget does not rise to the threshold for impeachment of the Governor.

193. **The Committee therefore finds that Charge 1 on Misappropriation of Funds contrary to Section 196 of the Public Finance Management Act, 2012 has not been substantiated.**

194. **Charge 2: Failure to Submit to the County Assembly an Annual Report on the Implementation Status of the County Policies and Plans as Required by Section 30 (2)(J) of the County Governments Act, 2012**

195. The Committee finds that this allegation was proved in so far as evidence was adduced to show that the Governor had indeed failed to submit an annual report on the implementation status of the county policies and plans to the County Assembly in accordance with section 30(2)(j) of the County Governments Act, 2012. The Committee however determines that this violation does not meet the threshold for impeachment of the Governor and the particulars of the allegation are therefore not substantiated.
196. **The Committee therefore finds that Charge 2 on Failure to Submit to the County Assembly an Annual Report on the Implementation Status of the County Policies and Plans as Required by Section 30 (2)(J) of the County Governments Act, 2012 has not been substantiated.**
197. **Charge 3: Failure to Deliver an Annual State of the County Address as Required by Section 30(2)(K) of the County Governments Act, 2012**
198. The Committee finds that in so far as section 30(2)(k) of the County Governments Act, 2012 requires the Governor to deliver an annual state of the county address and in so far as evidence was adduced to show that the Governor had not, in two years, delivered such address, this was a violation of the law by the Governor.
199. The Committee however determines that the violation does not meet the threshold for impeachment and the particulars of the allegation are therefore not substantiated.
200. **The Committee therefore finds that Charge 3 on Failure to Deliver an Annual State of the County Address as Required by Section 30(2)(K) of the County Governments Act, 2012 has not been substantiated.**

201. **Charge 4: Failure to Remit Statutory Deductions to the Relevant Institutions, Including the Kenya Revenue Authority (KRA), the National Hospital Insurance Fund (NHIF) and the National Social Security Fund (NSSF) contrary to the Income Tax Act, Cap 470, the National Hospital Insurance Fund Act, Cap 255 and the National Social Security Fund Act, Cap 258 Laws of Kenya**
202. The Committee finds that this allegation was not proved and was therefore not substantiated.
203. **The Committee therefore finds that Charge 4 on Failure to Remit Statutory Deductions to the Relevant Institutions, Including the Kenya Revenue Authority (KRA), the National Hospital Insurance Fund (NHIF) and the National Social Security Fund (NSSF) contrary to the Income Tax Act, Cap 470, the National Hospital Insurance Fund Act, Cap 255 and the National Social Security Fund Act, Cap 258 Laws of Kenya has not been substantiated**
204. **Charge 5: Misleading the People of Taita Taveta County contrary to Section 19 of the Public Officer Ethics Act, Cap 183 Laws of Kenya as read with Articles 73 and 260 of the Constitution of Kenya, 2010**
205. The Committee finds that this allegation was not proved and was therefore not substantiated.
206. **The Committee therefore finds that Charge 5 on Misleading the People of Taita Taveta County contrary to Section 19 of the Public Officer Ethics Act, Cap 183 Laws of Kenya as read with Articles 73 and 260 of the Constitution of Kenya, 2010 has not been substantiated.**

207. **Charge 6: Misleading the Members of Taita Taveta County Assembly contrary to Section 19 of the Public Officer Ethics Act, Cap 183 Laws of Kenya as read with Article 260 of the Constitution of Kenya, 2010.**
208. The Committee finds that this allegation was not proved and was therefore not substantiated.
209. **The Committee therefore finds that Charge 6 on Misleading the Members of Taita Taveta County Assembly contrary to Section 19 of the Public Officer Ethics Act, Cap 183 Laws of Kenya as read with Article 260 of the Constitution of Kenya, 2010 has not been substantiated.**

Charge 7: Gross Misconduct

- (1) *Allegation 1: Failure to Adhere to the County Assembly Resolution on the Ratification of Mr. Davis Mwangoma as the Acting County Executive Committee Member for Finance and Economic Planning.*
210. The Committee finds on the evidence adduced that there was Resolution of the County Assembly to ratify the nomination of Mr. Davis Mwangoma as the Acting County Executive Committee Member for Finance and Economic Planning for a period not exceeding two months from the date of the Resolution, within which time a substantive head of County Treasury was to be appointed. The Committee finds further that evidence has been adduced to prove that the position of County Executive Committee Member for Finance and Economic Planning had not been substantively filled in line with the Resolution of the County Assembly.
211. The Committee however finds that this failure to abide by the Resolution of the County Assembly does not rise to the threshold for impeachment of the Governor.

(2) Allegation 2: Misrepresentation of Facts to the Public with an Aim of Inciting the Public against the County Assembly

212. The Committee finds that the allegation was not proved and was therefore not substantiated.

(3) Allegation 3: Collapse of County Government Devolved Structures

213. The Committee finds that the allegation was not proved and was therefore not substantiated.

(4) Allegation 4: Failure to Provide Leadership in the Current Budget Stalemate

214. The Committee finds that the allegation was not proved and was therefore not substantiated.

215. **The Committee therefore finds that Charge 7 on Gross Misconduct has not been substantiated.**

12. CONCLUSION

216. The Committee having investigated the matter in accordance with its mandate under section 33(4) of the County Governments Act and standing order 75(2) of the Senate Standing Orders reports to the Senate that it finds none of the Particulars of the Allegations against the Governor to have been substantiated.

