

PARLIAMENT OF KENYA



**THE NATIONAL ASSEMBLY
ELEVENTH PARLIAMENT
FOURTH SESSION**

**THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL
AFFAIRS**

REPORT

**ON THE PETITION FOR REMOVAL OF THE CHAIRPERSON AND
MEMBERS OF THE INDEPENDENT ELECTORAL AND
BOUNDARIES COMMISSION**

**CLERK'S CHAMBERS,
PARLIAMENT BUILDINGS,
NAIROBI.**

JULY, 2016

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1.0 CHAIR'S FOREWORD

On 16th June, 2016 pursuant to Standing Order 225, the Speaker conveyed to the House a Petition regarding the removal of Ahmed Isaack Hassan – Chairperson, Lillian Mahiri – Zaja – Vice Chairperson and Members Eng. Abdullahi Sharawe, Thomas Letangule, Mohammed Alawi Hussun, Albert Camus Onyango Bwire, Kule Galma Godana, Amb.Yusuf A.Nzibo and J.Muthoni Wangai as Independent Electoral and Boundaries Commission (IEBC) Commissioners.

The Petition dated 7th June, 2016 is addressed to the National Assembly and signed by Mr. Barasa Kundu Nyukuri. The petitioner prays that the National Assembly finds the above mentioned members of the Independent Electoral and Boundaries Commission as being incompetent and lacks integrity to continue serving as Chairperson and Members of the Commission.

The Committee's Report contains observations, findings and recommendations that there is no prima facie case established to warrant formation of a Tribunal to investigate the Chairperson and Members of IEBC for removal from office on grounds of incompetence and lack of integrity.

The Petitioner draws the attention of the National Assembly to a number of issues as presented in the Petition. Some of the issues are as follows;

1. The Independent Electoral and Boundaries Commissioners were incompetent in the Management of 2013 General Elections.
2. The Commissioners lack integrity as they are vulnerable to influence by political actors.
3. The IEBC has the sole and ultimate responsibility to ensure that each action, procedure and decision related to the electoral process is in accordance with the Constitution and Statute laws.
4. The IEBC is responsible for the counting and announcement of results, certification through a public notice in the Kenya Gazette and declaration of the winner at various levels of the elections.
5. The Constitution of Kenya, IEBC Act and the Elections Act vests the IEBC with extensive powers over the conduct and management of elections.
6. The Commission did not recruit staff through a competitive process.
7. The Chairperson of the Commission was personally involved in procurement, failed to inform the commission on reservations from ICT experts on impending malfunction of EVIDS.
8. The Chairperson failed to heed the Attorney General's advice on BVR procurement.
9. The Chairperson failed to provide leadership on policy direction of the commission.

10. The Commissioners collectively failed to ensure adherence to a procurement plan to guide procurement.

The Petitioner relies heavily on the Special Audit Report of the Auditor General on Electronic Voting Devices for 2013 and the Parliamentary Public Accounts Committee Report.

The Petition was committed to the Departmental Committee on Justice and Legal Affairs pursuant to provisions of Standing Order 230(3). In considering the petition, the committee took into account the grounds prescribed in the Constitution.

On behalf of the committee I wish to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate. Furthermore, the committee appreciates the input by members of the public made through submissions.

Finally, pursuant to Standing Order 216(5), it is my pleasure and duty to present to the House, the Report on the Petition for removal of the Chairperson and members of the Independent Electoral and Boundaries Commission (IEBC).

Hon. Samuel Chepkong'a, M.P

2.0 MANDATE OF THE COMMITTEE

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing order 216(5) which defines functions of the Committee as being:

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all legislation referred to it;
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;
- e) To investigate and inquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister;
- f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those understanding order 204 (Committee on appointments); and
- g) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In accordance with Second Schedule of the Standing Orders, the Committee is mandated to consider:-

- a) Constitutional Affairs
- b) The administration of law and justice
- c) The Judiciary
- d) Public prosecutions
- e) Elections
- f) Ethics ,Integrity and anti-corruption and
- g) Human rights.

The Committee oversees the following Ministries/Departments:

- a) State Law Office
- b) The Judiciary
- c) Ethics and Anti-Corruption Commission

Departmental Committee on Justice and Legal Affairs Report on the Removal of the Chairperson and Eight Members of the Independent Electoral and Boundaries Commission

- d) Independent Electoral and Boundaries Commission
- e) Commission on Administrative Justice

The Committee also has oversight mandate over all matters relating to political parties.

3.0 MEMBERS OF THE COMMITTEE

Chairperson	Hon. Samuel Chepkong'a, M.P.
Vice Chairperson	Hon. Priscilla Nyokabi, M.P.
Members	Hon. Njoroge Baiya, M.P.
	Hon. Muriithi Waiganjo, M.P.
	Hon. Ndirangu Waihenya, M.P.
	Hon. Florence Kajuju, M.P.
	Hon. Kang'ata Irungu, M.P.
	Hon. Benson Mutura, M.P.
	Hon. John Njoroge Chege, M.P.
	Hon. William Cheptumo, M.P.
	Hon. Mohamed Abdi Haji, M.P.
	Hon. Bitok Kirwa, M.P.
	Hon. Sammy Koech, M.P.
	Hon. Moses Cheboi, M.P.
	Hon. Paul Bii, M.P.
	Hon. Charles Gimose, M.P.
	Hon. Johana Ng'eno, M.P.
	Hon. Boniface Otsiula, M.P.
	Hon. David Ouma Ochieng, M.P.
	Hon. Neto Agostinho, M.P.
	Hon. Kaluma Peter, M.P.
	Hon. Fatuma Ibrahim Ali, M.P.
	Hon. Ben Momanyi Orori, M.P.
	Hon. T. J. Kajwang', M.P.
	Hon. (Bishop)Mutua Mutemi, M.P.
	Hon. Olago Aluoch, M.P.
	Hon. Christine Oduor Ombaka, M.P.
	Hon. Benjamin Andayi, M.P.

Hon. Mwamkale William Kamoti, M.P

4.0 COMMITTEE SECRETARIAT

First Clerk Assistant	Mr. Abenayo Wasike,
Third Clerk Assistant	Ms. Mary Luka,
Second Clerk Assistant	Mr. Ahmed Salim
Legal Counsel	Mr. Dennis Abisai,
Research Officer	Ms. Clare Jerotich,

5.0 BACKGROUND

5.1 Independent Electoral and Boundaries Commission

The Independent Electoral and Boundaries Commission is established under Article 88 of the Constitution consisting of nine members.

The Commission is responsible for conducting or supervising referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament and, in particular for:

- (a) the continuous registration of citizens as voters.
- (b) the regular revision of the voters roll.
- (c) the delimitation of the constituencies and wards.
- (d) the regulation of the process by which parties nominate candidates for elections.
- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results.
- (f) the registration of candidates for election
- (g) voter education
- (h) the facilitation of the observation, monitoring and evaluation of elections.
- (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election.
- (j) The development of a code of conduct for candidates and parties contesting elections
- (k) The monitoring of compliance with legislation required by Article (82)(1)(b) relating to nomination of candidates by parties.

The Constitution further provides under Article 88(5) that the Commission shall exercise its powers and perform its functions in accordance with the Constitution and national legislation.

5.2 Removal from office of members of a commission

The removal of a member of a commission is provided for pursuant to Article 251 (1) of the Constitution. The said provision states that:

- (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for –
 - (a) Serious violation of this constitution or any other law, including a contravention of Chapter Six;

- (b) Gross misconduct, whether in the performance of the member's or the office holder's functions or otherwise;
 - (c) Physical or mental incapacity to perform functions of office;
 - (d) Incompetence; or
 - (e) Bankruptcy
- (2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.
- (3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the president
- (4) On receiving a petition under clause (3), the president –
- (a) May suspend the member or the office holder pending the outcome of the complaint; and
 - (b) Shall appoint a tribunal in accordance with clause (
- (5) The tribunal shall consist of –
- (a) A person who holds or has held office as a judge of a superior court, who shall be the chair person;
 - (b) At least two persons who are qualified to be appointed as High Court judges; and
 - (c) One other member who is qualified to assess the facts in respect of the particular ground for removal.
- (6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.
- (7) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.

5.3 Recruitment Process of the Current Commissioners.

- i. The IIEC was established as successor to ECK and was mandated under Article 41A of the former Constitution to reform the electoral process and management among others.
- ii. The IEBC is established pursuant to Article 88 (1) of the Constitution and the IEBC Act No.9 of 2011

- iii. The IEBC replaced the Interim Independent Electoral Commission (IIEC) and the defunct Interim Independent Boundaries Review Commission of Kenya (IIBRC) which was established by Article 41B of the former Constitution
- iv. Vacancies in the office of IEBC were declared in local dailies on 11/8/2011
- v. 430 applicants applied for the position of member and 4 applied for the Chairperson's position.
- vi. In July, 2011, Parliament approved the appointment of the selection panel to the IEBC. The selection panel was mandated to shortlist applicants and forward three persons for appointment as Chairperson and thirteen persons for appointment as member.
- vii. The panel conducted interviews and forwarded to H.E the President the three and thirteen names for the position of chairperson and members respectively
- viii. The President after consultation with the Right Hon. Prime Minister nominated nine persons for consideration by the National Assembly as Chairperson and members of the IEBC –Speaker's communication on 25/10/2011
- ix. The names and curriculum vitas were forwarded to the Constitutional implementation oversight committee of the National Assembly.
- x. The House approved the nomination of the nine persons as per the Committee's recommendations, namely Ahmed Isaack Hassan – Chairperson, Lillian Mahiri – Zaja – Vice Chairperson and Members Eng.Abdullahi Sharawe, Thomas Letangule, Mohammed Alawi Hussun, Albert Camus Onyango Bwire, KuleGalmaGodana, Amb.Yusuf A.Nzibo and J.Muthoni Wangai.

6.0 PETITION FROM MR. BARASA NYUKURI KUNDU

6.1 Submissions by the Petitioner Mr. Barasa Nyukuri

Mr. Barasa Nyukuri Kundu presented a petition for the removal of the following officials of the Independent Electoral and Boundaries Commission (IEBC):

1. Ahmed Isaack Hassan – Chairperson
2. Lillian Mahiri – Zaja – Vice Chairperson
3. Eng. Abdullahi Sharawe - Member
4. Thomas Letangule - Member
5. Mohammed Alawi Hussun - Member
6. Albert Camus Onyango Bwire- Member
7. Kule Galma Godana - Member
8. Amb. Yusuf A. Nzibo - Member
9. J. Muthoni Wangai - Member

The grounds of the petition are as follows: -

- i. Incompetence in management of the IEBC and its mandate.
- ii. Lack of integrity

The facts constituting incompetence as alleged by the Petitioner are as follows: -

1. The IEBC was not able to procure election materials and equipment on time until the Government stepped in to help in procurement. The internal procurement process for election equipment took a period of about 12 months before it collapsed thus paving way for the last minute government to government procurement.
2. The IEBC chose wrong technology on electoral equipment i.e BVR, EVIDS, ERTS.
3. The Commission failed to clear the register of dead voters.
4. The Commission hired incompetent staff without sufficient knowledge in information and technology.
5. The Commission's lack of cohesiveness led to hiring of partisan staff which had divided loyalty between the Chairperson and CEO/Secretary, Mr. James Oswago.
6. The Chairperson acting on the request by the head of the Public Service Commission approved the donation of BVRs to Burundi without subjecting his decision to the Commission for endorsement or otherwise.

7. The IEBC failed to implement the Supreme Court decision on treatment of voters in the Bungoma Senatorial election Petition case. It could not act to enforce the order to deregister the respondent in the Petition.
8. Delimitation of wards and Constituencies attracted over one hundred suits, a clear indication that the Commissioners were not competent to handle diverse challenges across the Country.
9. The Commission failed to ensure we had an accurate and verifiable principal register of voters in good time and instead engaged in quarrels with the civil society over conduct of voter education exercise.
10. The Secretariat mismanaged the procurement process because of abdication of duty by commissioners who failed to ensure that the IEBC procurement plan was adhered to.
11. The procurement process was poorly handled to the extent that some election materials were delivered a day to the elections and some were not even used.
12. The Commission exhibited inconsistencies in declaration of results at different levels of the election at ward or County level. There were multiple irregularities and malpractices during the March elections in 2013.
13. The top leaders in the grand coalition government managed to influence the IEBC to make last minute procurement of the BVR,EVID and RTS kits despite the IEBC being aware that time had run out for the voter registration and thus not prudent and cost effective to procure, test and train election staff on the new technology before election day.
14. The Commissioners did not adhere to procurement plan to guide the procurement process of the commission.
15. Members of the public were not given sufficient time to inspect the register to raise issues from an informed position.
16. The IEBC failed to meet its statutory timelines on voter registration.
17. The Commissioners failed to correctly interpret and internalize and effectively execute the powers and functions of IEBC as stipulated under Article 88 of the Constitution of Kenya 2010
18. The Commissioners failed to execute their post-election mandates like evaluating its operations, organization assessment and promoting electoral reforms.
19. The Commissioners did not discharge their role as enshrined in Article 88 (4) of the Constitution.
20. Demonstrated inability to regulate political parties during campaigns and enforcement of election laws especially code of conduct.

The facts constituting lack of integrity as alleged by the petitioner are as follows;

The Petitioner submitted that;

1. Most of the current permanent staff at management level and those in the field including Directors, Managers, Regional Coordinators and Constituency Election Coordinators were not recruited through a very competitive and transparent criteria and system.
2. The staff that was recruited by the Commission on the grounds of favoritism and nepotism cannot be purely professional and immune to manipulations and internal conflicts of interest.
3. The IEBC Commissioners failed to uphold the principles and values of good governance as read together with chapter six of the Constitution of Kenya 2010 on leadership and integrity.
4. The former CEO Mr. James Oswago had interest in one of the four shortlisted companies known as 4G which the Tender Evaluation Committee headed by Ms. Decimah M'mayi, the current Director of Research and Development recommended should be given the contract.
5. The Commission incurred huge legal fees paid to law firms procured under unclear and irregular circumstances contrary to Article 227 of the Constitution of Kenya 2010 and the Public Procurement and Disposal Act 2005 and its amendments and regulations thereto.
6. The Commission paid huge and exaggerated legal fees with discrepancies to law firms and individual lawyers in total disregard to Article 226 of the Constitution and the Advocates Remuneration guidelines that regulates remuneration of Advocates.
7. There was no justification for the Commission to pay one lawyer Ahmed Abdullahi Nassir 50 million shillings for representing the Chairman of IEBC alone, while the lead lawyer in election petitions for IEBC Mr. Aurelio Rabelo representing the Commission and supervising a team of 15 lawyers was paid 25 million shillings only.
8. There is no clear information on the criteria used by the chairs and the Tender Committee members for the BVR, EVIDS and ERTS Kits to award the tender to Face Technologies, whose local contact is a proxy company associated with Hon. Mohammed Shidiye, the brother in law to the IEBC chairperson.
9. The Commission through its Secretariat hired GOK lorries to transport strategic materials from the Jomo Kenyatta international airport to the Commissions warehouses in industrial area at the cost of ksh.560,000/= per trip.

6.2 Submissions by the Auditor General

The Committee invited the Auditor General in a meeting held on 30th June, 2016 for him to share with members on the Special Audit Report of 6th June 2014 on matters of procurement of electronic voting devices for the 2013 elections by the IEBC.

Members sought to know the responsibility apportioned to the IEBC and the responsible parties. The Auditor General submitted as follows;

- i. The audit was not planned as it was specifically requested by the Public Accounts Committee.
- ii. The former CEO Mr. James Oswago is responsible for causing the commission to resort to Government to Government sourcing which was a costly option. He also mentioned Mr. Edward Karisa-finance manager, Richard Nyacheo-head of procurement and Willy Kamanga as part of the staff to take responsibility.
- iii. The Tender Committee was in breach of the Public Procurement Act.
- iv. The Commission allowed Mr. Tim Colby to attend commission meeting that set the ground for single sourcing of BVR kits by the Government.
- v. The amount of money spend by the commission did not improve the conduct of the election.
- vi. The Auditor General was not aware of any disciplinary action taken against any member of staff.
- vii. At the time of the Special Audit a procurement plan had not been submitted by IEBC.
- viii. The payment of 258 million shillings by the current CEO was for clearance of pending bills as advised by the National Treasury. These were bills incurred by his predecessor. He had to make decisions based on inherited processes and therefore he is not part of the report under consideration.
- ix. The Commission usurped the role of the Tender Committee.
- x. There is collective responsibility that all at IEBC must share due to unclear strategy, planning, budgeting and execution of the March 14, 2013 elections. IEBC as an institution shoulders the residual responsibility of the shortcomings observed in the 2013 elections as most of the procurements were done in ad hoc manner.

6.3 Response by the Independent Electoral and Boundaries Commission (IEBC)

The Committee through the office of the Clerk of the National Assembly wrote to the Chairperson and eight members of the Commission for their response to the Petition.

The Chairperson and the Commissioners appeared before the Committee on 12th July, 2016 and responded as follows;

1. It is curious that the Petitioner also seeks to initiate for the removal of the Secretariat staff of the Commission (the Chief Executive Officer/Secretary of the Commission and Directors of the Eight Directorates of the IEBC). Whereas members of the Commission are state officers appointed under the Constitution and are subject to Article 251 (2) of the Constitution, the Secretariat is established by the IEBC Act No.9 of 2011. They are thus public officers.
2. The disciplinary procedure with regard to the Secretariat of IEBC is governed by a separate legal regime and not in the manner attempted by the Petitioner.
3. It is the view of the Commission that the Petition is incompetent, misconceived, and bad in law and filed in bad faith and therefore an abuse of a legitimate process vested in the National Assembly by the Constitution.
4. The Commissioners response is specific to the issues raised as per the documents served by the Clerk of the National Assembly though they are aware through media reports that the Committee had received further information and documentation with regard to the Petition.
5. The Petition is not specific and as drafted, is a blatant violation of Article 251 (2) of the Constitution which provides as follows-

“A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (i) may present a petition to the National Assembly setting out the alleged facts constituting the ground”
6. The Departmental Committee on Justice and Legal Affairs in its Report on the Petition for the Removal of the Chairperson and Members of the IEBC of 17th July 2014, took the position that-

“On alleged serious violation of the Constitution and the Laws of Kenya, the Committee by Majority found that the Petition does not specifically set out the functions of the Chairperson and Members of the Commission failed to perform or which Article of the Constitution or any other law they have violated”
7. The attempt by the Petitioner to have the Committee consider a Petition against the Members of the Commission collectively is therefore illegal and in blatant disregard of the Constitutional right of the members to a fair trial under Article 50 as read with Article 25 of the Constitution and the above stated finding of this Committee.
8. The Petitioner has not presented to the Committee any evidence in support of his allegations as stated in the Petition that the Chairperson and Members of the Commission violated any law or Constitution in discharge of their duties in preparation and management of the last General Elections.
9. The Petitioner has completely failed to discharge his burden to prove all allegations leveled against the Members of the Commission.

10. That certain issues contained in the Petition are Res Judicata as they have already been determined by other entities with the constitutional and statutory competence to do so, these are ;
- The Supreme Court determined in Raila Odinga & 5 others versus IEBC & 3 others that there was no sufficient evidence to disclose any profound irregularity in the management of the electoral process.
 - The Departmental Committee on Justice and legal Affairs received and considered a Similar Petition by Mr. Wafula Buke and did not find a prima facie case where the Petitioner relied on procurement of BVR and EVID equipment, discrepancies in IEBC elections data and use of multiple non gazette election voter registers on the date of the election.
11. That the Committee recommended to the House that the Petitioner did not provide evidence against the Chairperson and the eight Commissioners on violation of the law as alleged in the Buke Petition.
12. Members of the Commission are exposed to double jeopardy. It is trite law that a person should not be subjected to different processes on similar allegations based on similar facts and stated that;
- Whereas the Commission responds fully to the Petition, they are cognizant of the fact that there has been constituted a joint Select Committee of Parliament whose terms of reference include an inquiry into the allegations against the Members of the Commission.
 - The Commission has in the past also appeared before the Public Accounts Committee on allegations which form the substratum of this Petition.
 - In the circumstances, the commissioners are of the opinion that these parallel processes will expose them to double jeopardy. This is so especially where there is a real risk of the separate entities arriving at different conclusions.
 - Members of the Commission are in a quandary as to which process they should submit themselves to.
13. The Commissioners comments on the Special Report by the Auditor General on the Procurement of Electronic Voting Devices for 2013 of 6th June 2014;
- The Special Investigations Report on the Procurement of Electronic Voting Devices for 2013 General Election of 6th June 2014 was prepared by the Auditor General for tabling before the National Assembly pursuant to Article 229(7) of the Constitution.

- Upon receipt of the Special Investigations Report, the Commission's Chairperson filed a Constitutional Petition (Constitutional Petition No. 356 of 2014 Ahmed Isaack Hassan –v- The Auditor General) dated 21st July, 2014 seeking inter alia, an order directing the Respondent to delete the information in the second row of Page 28 in the Special Investigation Report on the Procurement of Electronic Voting Devices for 2013 General Election of 6th June 2014 that adversely mentions the Chairperson and any other information in the said report that adversely mentions him.
- The Constitutional Petition was majorly founded on the fact that the Auditor General had made adverse findings and conclusions about the Chairperson, in his official capacity, in the said Special Investigations Report, without according him the opportunity to be heard and to respond to the issues raised against him.
- The Court on 29th May, 2015 directed the Auditor General to delete the information in the second row of Page 28 in the said Special Investigation Report that adversely mentioned the Commission Chairperson and any other information in the said report that adversely mentions him.
- The same principle should be applicable to the entire Commission and Secretariat adversely mentioned in the Special Investigations Report.
- The Auditor General is yet to execute this Order of the High Court yet the Petitioner has relied on the same.

The Commissioners submitted judgment and Decree of the High Court Constitutional Petition No. 356 of 2014 Ahmed Hassan -v- The Auditor General in support of their response.

1. On the Public Accounts Committee Report the Commissioners submitted that;
 - a) They noted with concern that the Petition has placed inordinate reliance on the Public Accounts Committee Report which was tabled in National Assembly but is yet to be adopted.
 - b) When the IEBC commissioners appeared before this Committee to respond to the Public Account Committee Report, they were informed that the same had not been adopted by the National Assembly and subsequently, the Committee would not interrogate the details of the Report.
 - c) That With that intimation in mind, the Committee should not rely on the said Public Accounts Committee Report.
2. On the Petitioner, the Commissioners stated that;

- a) The IEBC is completely unaware of the Petitioner's expertise in electoral matters. He is neither nationally, regionally nor internationally renowned as alleged. The Petitioner's name is absent from all known databases of regional and international electoral experts (ACE Network, UNDP, African Union/European Union, IGAD, COMESA/EAC, IEBC). As such, the Commission has never engaged his services as an expert, consultant or otherwise. They are not aware of any gainful employment the Petitioner is engaged in.
 - b) The Petitioner's involvement in the Bungoma Senatorial election as an expert in *Musikari Nazi Kombo v Moses Masika Wetangula & 2 others* was discredited after the Court's finding that his evidence was inclined towards arguing the Petitioner's case rather than helping the court to analyse the electoral process that was employed in question.
 - c) It is Curious that the Petitioner's lawyer, Mr. Alfred Ndambiri is a former Commissioner of the defunct Electoral Commission of Kenya and was the Advocate on record for the Petitioner (*Musikari Kombo*) in the *Wetangula* case.
 - d) The Commissioner's opinion is that the Petitioner is a busy-body whose claim to fame is the instant Petition and crafting unfounded allegations against the IEBC.
3. The Mandate of the Independent Electoral and Boundaries Commission, the Commissioners submitted as follows;
- a) Article 88(1) of the Constitution establishes the Independent Electoral and Boundaries Commission. The Commission is recognised as a Constitutional Commission in Chapter 15 of the Constitution. Pursuant to Article 249(2), it is subject only to the Constitution and the Law and is independent and not subject to the direction or control by any person or authority.
 - b) Article 88 (4) of the Constitution as read with Section 4 of the Independent Electoral and Boundaries Act confers upon the Commission the exclusive responsibility to conduct or supervise referenda and elections to any elective body or office established by this Constitution, and any other elections as prescribed by an Act of Parliament.

In particular, Article 88(4) provides for the mandate of the Commission with regards to:

- (a) the continuous registration of citizens as voters;
- (b) the regular revision of the voters' roll;
- (c) the delimitation of constituencies and wards;
- (d) the regulation of the process by which parties nominate candidates for elections;

- (e) the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results;
 - (f) the registration of candidates for election;
 - (g) voter education;
 - (h) the facilitation of the observation, monitoring and evaluation of elections;
 - (i) the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election;
 - (j) the development of a code of conduct for candidates and parties contesting elections; and
 - (k) the monitoring of compliance with the legislation required by Article 82 (1) (b) relating to nomination of candidates by parties.
- (l)
4. On the grounds for the removal, the commissioners stated that;
- a) article 251 (1) of the Constitution provides for the grounds upon which a member of a Commission may be removed and that the Petitioner has alleged two grounds for their removal. The Petitioner alleges Incompetence and Lack of Integrity on the part of Commissioners.
 - b) the Petitioner alleges that the Commissioners are incompetent and lack integrity, the commissioners pointed out that point out that there has been no finding on the lack of integrity of any member of the IEBC by the body constitutionally mandated to make such a finding.
 - c) the allegation of incompetence cannot be leveled against the Commissioners collectively. It can only be made as against an individual, with the necessary evidence in support of the same.
5. On the employment and recruitment of staff, the committee was informed that:
- a) The Commission relied on findings in the Report of the Independent Review Committee (Kriegler Report) on recruitment of staff which recommended recruitment of returning officers only.
 - b) The finding above informed the decision to amend Section 41(a) of the Former Constitution thereby giving the Interim Independent Electoral Commission (IIEC) the exclusive authority to establish an effective and efficient secretariat.
 - c) It is with this background that the IIEC embarked upon the recruitment of senior staff through a competitive and transparent process which process was facilitated by the globally respected recruitment firm, KPMG. Subsequently,

the IEBC employed the services of PriceWaterhouseCoopers in filling vacancies in top-level management.

- d) The Commission also adopted a Human Resource Policy to govern the recruitment processes of all other secretariat employees.
 - e) The Commission Policy is that the secretariat staffs were to be employed from their constituency whereupon the member of staff then becomes a public officer deployable anywhere in the country. The decision of the Commission to deploy the Constituency Elections Coordinator back to their home counties (not the individual's constituency) during the recently concluded mass voter registration exercise, was aimed at boosting voter registration as it was noted that the staff were able to aptly communicate with the members of the public during the voter registration campaigns and mobilize people to register as voters and not to rig elections as alleged.
 - f) The Commissioners dismissed the assertion by the Petitioner that Directors, Managers, Regional Coordinators and Constituency Election Coordinators were not recruited through a very competitive and transparent criteria and system.
6. On legal representation, the committee was informed that:
- a) The Commissioners responded to assertion by the Petitioner that exaggerated legal fees were paid to some preferred/favoured law firms during election petitions, especially the Presidential Election Petition.
 - b) The Commission has a pre-qualified list of legal service providers developed in accordance with the Public Procurement and Disposal Act from which it instructs lawyers to represent it in the various court matters. It is from this pre-qualification list that the Commission engaged the services of the Advocates to represent it in the Petitions. Where there is dearth of expertise, the Commission resorts to the pre-qualification lists of other public bodies in accordance with Section 32 of the Public Procurement and Disposal Act.
 - c) The procurement of legal services was conducted within the statutory provisions governing procurement of services by public bodies. An audit of the process was conducted and the procurement process was vindicated. As a result, legal fees due to the suppliers of legal services and consultancy were duly settled.
7. On election date, the committee was informed that:
- a) The decision of the IEBC to set the date of the election under the 2010 Constitution was informed by the decision of the High Court of Kenya in Constitutional Petition No. 65 of 2011 between John Harun Mwau & 3 others v

Attorney General & 2 others [in which matter an interpretation of Articles 101, 136(2) (a) 177(1) (a) and 180(1) of the Constitution which deal with the general elections was sought.

- b) The High Court held that the mandate of determining the date of the first election under this Constitution lies squarely with the IEBC.
 - c) It is on the basis of the High Court decision that the IEBC, in its capacity as the constitutional successor of the IIEC, determined and declared that the date of the general election was 4th of March, 2013.
8. On election results, the Commissioners informed the committee that;
- a) IEBC is mandated by Article 86 (b) and (c) of the Constitution to ensure that the votes cast at an election are counted, tabulated and the results announced promptly by the presiding officer at each polling station.
 - b) results from the polling stations are then openly and accurately collated and promptly announced by the returning officer. This position was affirmed by the Supreme Court of Kenya in Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others when it held that the declaration of results is by the Returning Officer.
 - c) the Commission published the results pursuant to Article 86 (b) and (c) and Article 138 (3) (c) and (10) of the Constitution. All stakeholders were constantly informed of the procedures leading up to the announcement of the results of the general elections. This process also involved party agents.
 - d) there were slight variances between the valid votes cast for the presidential elections and those cast in other elective positions. For instance, as regards the valid votes cast for Member of County Assembly, the variance was occasioned by the fact that there were twelve (12) uncontested County Assembly Wards and thus no ballot papers were printed for those wards.
 - e) The elections in three (3) County Assembly Wards were postponed for various reasons.(which ones)
 - f) Donation of BVR and other equipment to Burundi

On allegations by the Petitioner that the Chairperson solely transferred BVR Kits to Burundi, the commissioners stated that:

- i. The Commission transferred 150 laptops to the Ministry of Foreign Affairs. The laptops were obtained from the stock of 30,000 laptop-based EVIDs.

- ii. The Commission approved the transfer in principle and with directions to the Disposal Committee who approved the disposal on the basis that the devices were in any event obsolete and would not serve the Commission in the future elections.
- iii. *Obsolescence* does not mean unusable but rather ‘not fit for purpose’. The laptops were in good working condition but not fit for conducting elections in 2017. That is the reason why the Commission is in process of procuring new EVIDs to ensure credible 2017 General Elections.
- iv. The Secretariat followed the public procurement and disposal procedure that prescribes transfer to another public entity as one of the methods of disposal pursuant to Section 129 (3a) Of the Public Procurement and Disposal Act, 2005.
- v. The Commission made the decision independently after taking into consideration all the necessary factors including consultations with the Government of Kenya.
- vi. In addition, the systems software (AFIS – Automatic Fingerprint Identification System) and applications were removed from the laptops. The equipment transferred to the Ministry of Foreign Affairs was therefore empty shells without any data or software in them.
- vii. It is not uncommon for Election Management Bodies in Africa to share election material and equipment. The transfer may include transfer of election material, equipment and human capital. In SADC, the South African Electoral Commission shares electoral material with the Democratic Republic of Congo, Angola, Namibia, Mozambique and Botswana. In ECOWAS, Nigeria and Ghana also assist smaller Election Management Bodies in the region. Naturally in the East African Community, IEBC is looked up to provide electoral support to our neighbors, through the EAC Electoral Commission Forum which brings together all EMBs in the region.
- viii. The donation was made under the framework of the East African Community, through the forum of Electoral Management Bodies (EMBs), to support partner states in technical electoral assistance in furtherance of the EAC’s ultimate goal of attaining political federation. Other countries in EAC were also approached by Burundi for support.

- ix. That it is therefore common practice and not a sign of incompetence or lack of integrity as alleged by the Petitioner.

9. Investigation and prosecution of electoral offenders

The Commissioners stated that:

- a) The Commission is constitutionally mandated to investigate and prosecute election offences by candidates, political parties or their agents pursuant to Article 157(12) as read with Article 252 of the Constitution. This role is operationalized by Section 107 (2) of the Elections Act which empowers the Commission to prosecute any offence(s) under the Elections Act 2011 and impose sanctions against persons who commit such offences.
- b) The Commission discharges its mandate by close collaboration with the Office of the Director of Public Prosecution (ODPP) and the National Police Service which entities are bestowed with the primary roles of prosecution and investigations respectively. The investigatory and prosecutorial role of the IEBC is thus residual.
- c) Despite the minimal resources available for the execution of this mandate, this collaborative effort resulted in the handling of a total of 86 cases during the March 4th General Elections.
- d) With regards to the Wetangula case, the Supreme Court of Kenya in Petition No. 12 of 2014 between Moses Masika Wetangula and Musikari Nazi Kombo & 2 Others made a finding that Moses Masika Wetangula, committed the election offence of bribery and treating during the March 4th General Election. The report of the above finding of the Supreme Court was gazetted by the Speaker of the Senate in Gazette Notice No. 7852 of 23rd October, 2015.
- e) Pursuant to Section 87(3) of the Elections Act (the Act), upon the said gazettment, the Commission was mandated to consider the report and delete from the register of voters, the name of the person who is disqualified from being registered in that register of voters. They emphasized that this was the first time an Electoral Management Body was discharging this role in the history of the Republic. The lack of clarity in the governing legislation has informed the push by the Commission and parliament to push amendments to the governing legislation.

- f) The IEBC Dispute Resolution Committee accorded Mr. Moses Masika Wetangula a hearing before the Committee in a bid to safeguard his unalienable right to be heard.
- g) The said Committee did not take action against Mr. Wetangula for lack of clarity in legislation and the relevant jurisprudence.

10. On delimitation of boundaries, the committee was informed that:

- a) The Petition does indeed acknowledge the IEBC's exclusive role to review electoral boundaries as provided by Article 89(2) & (3) of the Constitution mandates IEBC to review electoral boundaries.
- b) The criteria for delimitation are captured in Article 89(5) of the Constitution.
- c) The Commission successfully undertook boundary delimitation of 1450 Wards and 290 Constituencies. This was after extensive public participation throughout the Country pursuant to Article 89(7) of the Constitution. Out of the 1740 boundaries that were delimited, only 145 were challenged. Some challenges were on such minor issues as the name of the ward/constituency.
- d) The mere fact that a few people may have been dissatisfied with the manner in which electoral boundaries were delimited by the IEBC, in and of itself, does not render the IEBC incompetent.
- e) The exclusive role of IEBC in boundaries delimitation was emphasized by the Court of Appeal in *Shaban Mohamud Hassan & 2 others v Shaban Mohamud Hassan & 3 others* that it was the province of IEBC alone mandated to subject proposals on boundaries to the yardstick enumerated under Article 89 (5)

The above decision on the mandate of the IEBC on delimitation of boundaries was also affirmed in *Republic v Independent Electoral and Boundaries Commission & another Ex-Parte Councillor Eliot Lidubwi Kihusa & 5 others*.

- f) Pursuant to Article 89(2) of the Constitution, constituency boundaries can only be reviewed at intervals of not less than eight years, and not more than twelve years. The next delimitation of constituency boundaries is therefore expected to take place in the year 2020 at the earliest after the Census to be conducted in the year 2019.
- g) Upon gazetting its Final Report on Delimitation of boundaries on 6th March, 2012, the IEBC became *functus officio* as regards boundaries delimitation. It

cannot therefore engage in activities that suggest a possible review of boundaries as the Petitioner seems to suggest.

11. Voter Registration and updating of a Principal Register of Voters

On this mandate the Commissioners responded as follows;

- a) The Constitution of Kenya mandates the IEBC to carry out continuous registration of citizens as voters and regular revision of the voters' roll with an objective of establishing a comprehensive, accurate and complete Principal Register.
- b) In the run up to the March, 2013 General Elections, the IEBC registered 14,388,781 voters (14,352,545 biometric and 36,236 non-biometric) in 24,563 registration centres (2637 in Diaspora – East African Community) in 30 days. This is the principal register of voters after the inspection which was used in the 2013 General elections and all other subsequent by-elections. In doing so, the IEBC deployed the Biometric Voter Registration (BVR) System during voter registration in exercise of its mandate under Articles 86 and 88(4) of the Constitution, and Section 4(m) of the Independent Electoral and Boundaries Commission Act, to adopt appropriate technology in the performance of its functions
- c) The Principal Register of Voters was opened to the Public for inspection and upon verification, was certified by the Commission on 18th February, 2013 in Gazette Notice No. 2222 of 18th February, 2013
- d) Contrary to the Petitioner's assertion, the EVID System was deployed for the sole purpose of providing an additional layer of efficiency and integrity in the electoral processes and not to replace the legally required manual system of voter identification.
- e) The Commission ensured that eligible citizens of Kenya are able to register as voters, and able to vote during elections pursuant to Articles 10(a), 10(b), 38(3)(a), 88(4)(a), 138(3)(a) of the Constitution, which also express the values and principles of democracy and the participation of the people.
- f) This clarification on the issue of the Principal Register of Voters was readily accepted and endorsed by the Supreme Court during the Presidential Election Petition between Raila Odinga –v- IEBC & 4 others.
- g) The register used during the March 2013 General Election does not impute any culpability on the part of the Commission. The Supreme Court of Kenya gave the Voter Register a clean bill of health. Voter registration was thus

conducted in full compliance with the provisions of the Constitution, the Elections Act, and the Elections (Registration of Voters) Regulations, 2012.

- h) The allegation that there were multiple registers is thus unfounded. It is the Commission's position that there is only one Principal Register of Voters as per Section 4 of the Elections Act which is comprised of Poll Register, Ward Register, Constituency Register, County Register and Register of Voters residing outside Kenya
- i) The Institute of Education and Democracy (IED) requested for a Principal Register of Voters to conduct an audit. After conducting its audit and analysis, the IED registered the Principal Register of Voters as 99.8% accurate.
- j) Registration of voters is a continuous process and regular revision of the Voters Register is on course pursuant to Article 88 (4) (b) of the Constitution.
- k) Before certification, the register will be subjected to inspection in August 2016. The changes will then be incorporated and as a continuous process it will be concluded within the provisions of the law.

12. Procurement of Election materials

The commissioners noted that the Petitioner has heavily relied on the Public Accounts Committee Report and stated that;

- a) They are aware that the procurement of the BVR kits was executed on a Government to Government basis between the Government of Kenya and the Government of Canada. This was therefore beyond the Commission's mandate.
- b) The procurement function of the IEBC falls within the mandate of the Secretariat, headed by the Chief Executive Officer/ Commission Secretary pursuant to Articles 226 (2), 227 and 250 (12) of the Constitution, Sections 10, 11, 12 and 13 of the IEBC Act, Sections 66 & 68 the Public Finance Management Act and Sections 27, 38 and 44 the Public Procurement and Disposal Act. The Petitioner has heavily relied on the Public Accounts Committee Report and the Commission has had occasion to share its views on the same.
- c) The role of the Commission in procurement is limited to approval of the budget and procurement plan. The Accounting Officer of the Commission is the Chief Executive Officer who is also the Head of the Secretariat.
- d) There are ongoing investigations as acknowledged by the petitioner on the procurement by the IIEC of Ballot Papers for the Shinyalu, Bomachoge, South Mugirango and Matuga Parliamentary and Civic By-Elections and the

Referendum, Voter Registration Cards, OMR Correction and Nomination Forms, Elector's Card Pouches and Ultra violet lights and Other Parliamentary and Civic Ballot Papers. This investigation is being conducted by the Ethics and Anti-Corruption Commission in collaboration with Britain's Serious Fraud Office. The Commissioners refrained from commenting on the ongoing investigations so as not to prejudice the said investigations

13. Irregularities in the Elections of 4th March, 2013

The IEBC faced certain challenges in the conduct of the said General Elections. The EVID and ERTS experienced some challenges. However, the challenge faced by the EVID system did not compromise the integrity of the voting process since voters were identified using the printed register. The ERTS did not work to optimal standard. The challenges did not affect the credibility of the said elections and the IEBC have since put in place measures to address the challenges.

On allegations that party agents were thrown out of the tallying centre, the Commissioners clarified that party agents were actually given a room to work from and not ejected from the tallying centre as alleged.

14. On administrative Issues, the Commission has undertaken structural reviews to improve efficiency and productivity. These are nevertheless not informed by the rumors perpetrated by the Petitioner in any way.

Members of the Commission submitted further written information addressing the following issues;

- a. Management of Political Parties and Political Party Nominations
- b. Voter Education
- c. Voter Observation and Monitoring
- d. Comments on the Audit Report by the Auditor General
- e. Electronics Results Transmission System
- f. Universal Polling Kits
- g. Electronic Voter Identification (EVIDS)
- h. Exchange Rate Conversion date
- i. Biometric Voter Registration (BVR)
- j. The IEBC Report indicating that findings of the Auditor General on the Tender Committee members were not correct.

4.0 Consideration of the Petition by the Committee

- i). The Committee held four (4) sittings and deliberated on the petition by Mr. Nyukuri Barasa Kundu.
- ii). The Committee through the Office of the Clerk of the National Assembly put an advert in the mainstream media on Thursday, June 23, 2016 for submission of written memoranda and submissions pertaining to the Petition.
- iii). The Committee received written memoranda, affidavits and/or letters from the following:
 - Mr. Murimi Karani
 - Mr. Antony Kimondo Munuhe
 - Mr. Tim Colby
- iv). Pursuant to the provisions of Article 251 of the Constitution, Petition to Parliament (Procedure) Act and the relevant provisions of the Standing Orders, the Committee considered the Petition, the written and oral presentations and materials hereinabove.

7.0 OBSERVATIONS

The mandate of the Committee and the National Assembly on this matter is as prescribed in Article 251 of the Constitution and Standing Order 230(4).

It is neither for the Committee nor the National Assembly to find and determine the issue concerning removal of the Commissioners. To the contrary, the Committee and the National Assembly merely considers the Petition and the supporting documents and/or information to determine whether the petition discloses grounds for removal to warrant it being remitted to the President to establish a tribunal to undertake full investigations.

The grounds for removal from office of members of the Independent Electoral and Boundaries Commission are provided for under Article 251(1) of the Constitution, which provides as follows: -

“251. (1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for –

- (a) serious violation of this constitution or any other law, including a contravention of Chapter Six;
- (b) gross misconduct, whether in the performance of the member’s or the office holder’s functions or otherwise;
- (c) physical or mental incapacity to perform functions of office;
- (d) incompetence; or
- (e) bankruptcy.

The said petition is premised upon the grounds stipulated under Article 251(a), (b) and (d) of the Constitution.

The procedure for removal of a member of the Independent Electoral and Boundaries Commission is prescribed under Article 251(2) of the Constitution which provides that: -

- “(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.
- (3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the president
- (4) On receiving a petition under clause (3), the president –
 - (a) may suspend the member or the office holder pending the outcome of the complaint; and
 - (b) shall appoint a tribunal in accordance with clause (5).

- (5) The tribunal shall consist of –
- (a) a person who holds or has held office as a judge of a superior court, who shall be the chair person;
 - (b) at least two persons who are qualified to be appointed as High Court judges; and
 - (c) one other member who is qualified to assess the facts in respect of the particular ground for removal.
- (6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days.
- (7) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.”

The President upon receipt of the petition from the National Assembly is obligated to establish the tribunal to investigate the member of the Commission sought to be removed. The President however exercises discretion on the matter of suspension of the affected Commissioner(s) pending determination of the matter.

The National Assembly received the petition from Mr. Nyukuri Barasa Kundu seeking removal from office members of the IEBC.

In the discharge of its mandate over the matter, the Committee put an advertisement in the media inviting members of the public to submit written presentations and submissions pertaining to the petition.

Following the advertisement, the Committee received the following written representations: -

1. Mr. Murimi Karani
2. Mr. Antony Kimondo Munuhe
3. Mr. Tim Colby
4. Royal Media Services

The Committee wrote letters inviting the Petitioner to appear before the Committee to prosecute his petition and for the Commissioners to appear before the Committee and present their response. The Chairperson of the Commission delivered written presentations on behalf of the Commission to which all the Commissioners appended their signatures to confirm that they were bound by its contents.

The Committee moved a procedural motion seeking the indulgence of the House for the Committee to be given additional days to investigate the matter.

Following the above application, the Committee was given additional ten (10) days over and above fourteen (14) days allocated to them. The rationale for enlargement of time was to give the Committee sufficient time for consultations and deliberation on the matter.

Mr. Murimi Karani in his affidavit dated 1st July 2016 opposed the removal of all commissioners and submitted that;

1. The removal of the commissioners would not only derail plans for the 2017 general elections but would provide precedence for discontinuity of electoral reforms in Kenya.
2. Article 251 of the Constitution provides for the removal of members on an individual level which is the manner in which they were appointed. The onus of proof lies with the petitioner on personal involvement and failures of individual commissioners.
3. The Petitioner has also relied on his testimony in the Senator Moses Wetangula Senatorial case in Bungoma. This is suspicious on account of conflict of interest following his testimony in the said case as a witness.
4. The Chairperson of the Commission, Mr. Isaack Hassan and two commissioners Mr. Thomas Letangule and Mohammed Alawi should be removed because they were adversely mentioned in the Parliamentary Public Accounts Committee Report.

Mr. Antony Kimondo Munuhe's Submissions are proposals to improve the appointment process of IEBC commissioners.

The Royal Media Services through their Chairman Mr. S.K. Macharia submitted a memoranda stating that the chairman of IEBC lacked integrity for failure to pay him for services rendered in conducting voter registration sensitization programme in 2012.

Mr. Tim Colby commented on the Auditor General's Report as follows;

- a. The Audit Report is of low quality in terms of presentation, format and content.
- b. The Kenyan Government used the cheaper loan rate to borrow as much as possible and cannot be charged against BVR Kits as the Auditor General attempts to do.
- c. The Report suggests impropriety but without evidence to prove the same.
- d. The Auditor traveled all the way to Canada without first interviewing Canadian officials in Kenya nor did he seek to interview key individuals in the BVR procurement process including him.

- e. The commission meeting he attended was a simple exploration of ideas of how it could be possible to proceed with a government to government procurement with Canada.
- f. In the commission meeting, he informed the commission that Canada would consider a request and noted how the basic functions of the different Canadian entities work. (CIDA; DFAIT; EDC; CCC) and also noted that we have Canadian companies who supply BVR equipment.
- g. He did not make any offer to support as was expressed by the Auditor General Report.
- h. The conclusion that single sourcing was done is erroneous because even the report notes that French government was contacted.
- i. The auditor report contains misrepresentations of fact as he seems not to have been well versed with the contents of the contract.

The Petitioner has relied on the following documents to support grounds of incompetence and lack of integrity;

- i. The Special Audit Report of 6th June, 2014 by the Auditor General
- ii. The Parliamentary Public Accounts Committee Report
- iii. The Bungoma Senatorial Election Petition Case

The Auditor General's Special Audit Report on Procurement of Electronic Voting Devices by the Independent Electoral and Boundaries Commission.

The Special audit was conducted between July 2013 and March 2014.

The Petitioner has relied on the Special Audit Report on Procurement of Electronic Voting Devices by the Independent Electoral and Boundaries Commission.

The Report was carried out pursuant to a request from the Public Accounts Committee (PAC) through the office of the Clerk of the National Assembly on 3rd June, 2013.

The Chairperson of the IEBC, Mr. Isaack Hassan filed a Petition in the Constitutional and Human Rights Division of the High Court of Kenya in Petition No.356 of 2014 challenging the said Special Audit Report.

The High Court issued an Order directing the Auditor General to delete the information in the second row of page 28 in the Special Investigation Report on the Procurement of Electronic Voting Devices for 2013 General Elections that adversely mentions the Petitioner and any other adverse information therein.

The Parliamentary Public Accounts Committee Report

This is a Report by the National Assembly's Public Accounts Committee. The recommendations of this Report are based on the findings of the Special Audit Report by the Auditor General.

The PAC Report was tabled in the House for consideration and adoption thereto.

Departmental Committee on Justice and Legal Affairs Report on the Removal of the Chairperson and Eight Members of the Independent Electoral and Boundaries Commission

The Bungoma Senatorial Election Petition Case

The Supreme Court of Kenya in Petition No.12 of 2014 between Moses Masika Wetangula and Musikari Nazi Kombo & 2 Others made a finding that Moses Masika Wetangula committed the election offence of bribery and treating during the General Election in March 2013.

The Speaker of the Senate gazzetted the Report of the findings of the Supreme Court vide Gazette Notice No.7852 of 23rd October, 2015.

Pursuant to section 87 (3) of the Elections Act, upon gazettelement, the Commission was mandated to consider the report and delete from the register of voters, the name of the person who is disqualified from being registered in that register of voters.

The Supreme Court further directed to have urgent legislative realignment to cure the lack of clarity in the Elections Act.

Members also observed that the decision by the Commission's Disputes Resolution Committee was never challenged by any party by way of review or appeal.

8.0 FINDINGS

1. On allegations of incompetence based on procurement as contained in Special Audit Report the Committee by Majority found that;
 - a. The Report by the Auditor General was not fair to members of the Commission as they were not given an opportunity to present their views. This is against the principle of *audi alteram partem*, one of the most cherished and sacrosanct principle of law.
 - b. The Auditor General was in total violation of the commissioners' fundamental rights under Articles 25 (c) and 50 of the Constitution on the right to fair trial and hearing.
2. On allegations of incompetence based on the Bungoma Petition case between Moses Masika Wetangula and Musikari Nazi Kombo the Committee finds that the Dispute Resolution Committee (DRC) of the Commission was a demonstration of the IEBC ability and capacity in matters of dispute resolutions.
3. On reliance by the Petitioner on the Parliamentary Public Accounts Committee Report, the Committee finds that the Report is a product of the Special Audit Report and is still pending in the National Assembly and therefore cannot used as an authority in this Petition.
4. On allegations of fraudulent employment and recruitment of staff, the Committee finds that the process was facilitated by globally respected recruitment firm, KPMG and PriceWaterhouseCoopers in filling vacancies in top-level management.
5. On allegations that the Chairperson of the commission personally appointed lawyers to represent the commission in election disputes and paid exaggerated fees, the Committee by Majority found that the Commission has a pre-qualified list of legal service providers developed in accordance with the Public Procurement and Disposal Act.
6. On allegations by the Petitioner on lack of competence and capacity to deal with future electoral offences relating to bribery and treatment of voters, the Committee finds that the Commission implemented the directive by the Supreme and proposed an amendment to the Elections Act.

Upon due considerations and review of the presentations and materials availed to the Committee, the Committee did not find a *prima facie* case established against the Chairperson and eight Members of the Independent Electoral and Boundaries Commission for incompetence and lack of integrity or violation of any laws and resolved to recommend to the House that the matter together with the petition should not be recommended to the President to appoint a Tribunal.

9.0 RECOMMENDATIONS

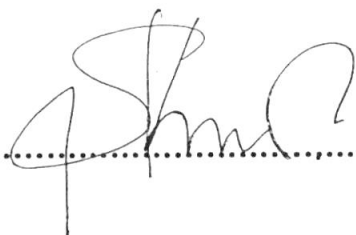
Having considered the provisions of Articles 82, 83, 88 and 251 of the Constitution; and having considered the provisions of Chapter six of the Constitution; the Elections Act; IEBC Act; the Public Procurement and Disposals Act; and the provisions of the Petitions to Parliament (Procedure) Act; the Judgement in the High Court Petition No. 356 of 2014 expunging adverse references in the special audit report date 6th June 2014, and Standing Order No.230 of the National Assembly, the Committee recommends to the House that:

1. The Petition does not disclose grounds for removal of the following members of the Commission;

1. Ahmed Isaack Hassan	–	Chairperson
2. Lillian Mahiri – Zaja	–	Vice Chairperson
3. Eng.Abdullahi Sharawe	-	Member
4. Thomas Letangule	-	Member
5. Mohammed Alawi Hussun	-	Member
6. Albert Camus Onyango Bwire-		Member
7. KuleGalmaGodana	-	Member
8. Amb.Yusuf A.Nzibo	-	Member
9. J.Muthoni Wangai	-	Member

2. Accordingly, the Committee recommends to the House to dismiss the Petition for the removal of Ahmed Isaack Hassan – Chairperson, Lillian Mahiri – Zaja – Vice Chairperson and Members Eng.Abdullahi Sharawe, Thomas Letangule, Mohammed Alawi Hussun, Albert Camus Onyango Bwire, Kule Galma Godana, Amb.Yusuf A.Nzibo and J.Muthoni Wangai.

Signed



Date

19th July, 2016

Hon. Samuel Chepkong'a, M.P

Chairperson, Departmental Committee on Justice and Legal Affairs