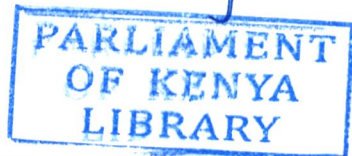


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THE COMMITTEE
CHAIR HON WILLIAM
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PARLIAMENT OF KENYA

THE NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – SECOND SESSION

DEPARTMENTAL COMMITTEE ON JUSTICE AND
LEGAL AFFAIRS

REPORT ON:

VETTING OF HON. JUSTICE MOHAMED ABDULLAHI
WARSAME FOR APPOINTMENT AS A MEMBER OF
THE JUDICIAL SERVICE COMMISSION

Directorate of Committee Services,
National Assembly,
Parliament Buildings,
NAIROBI.

April, 2018

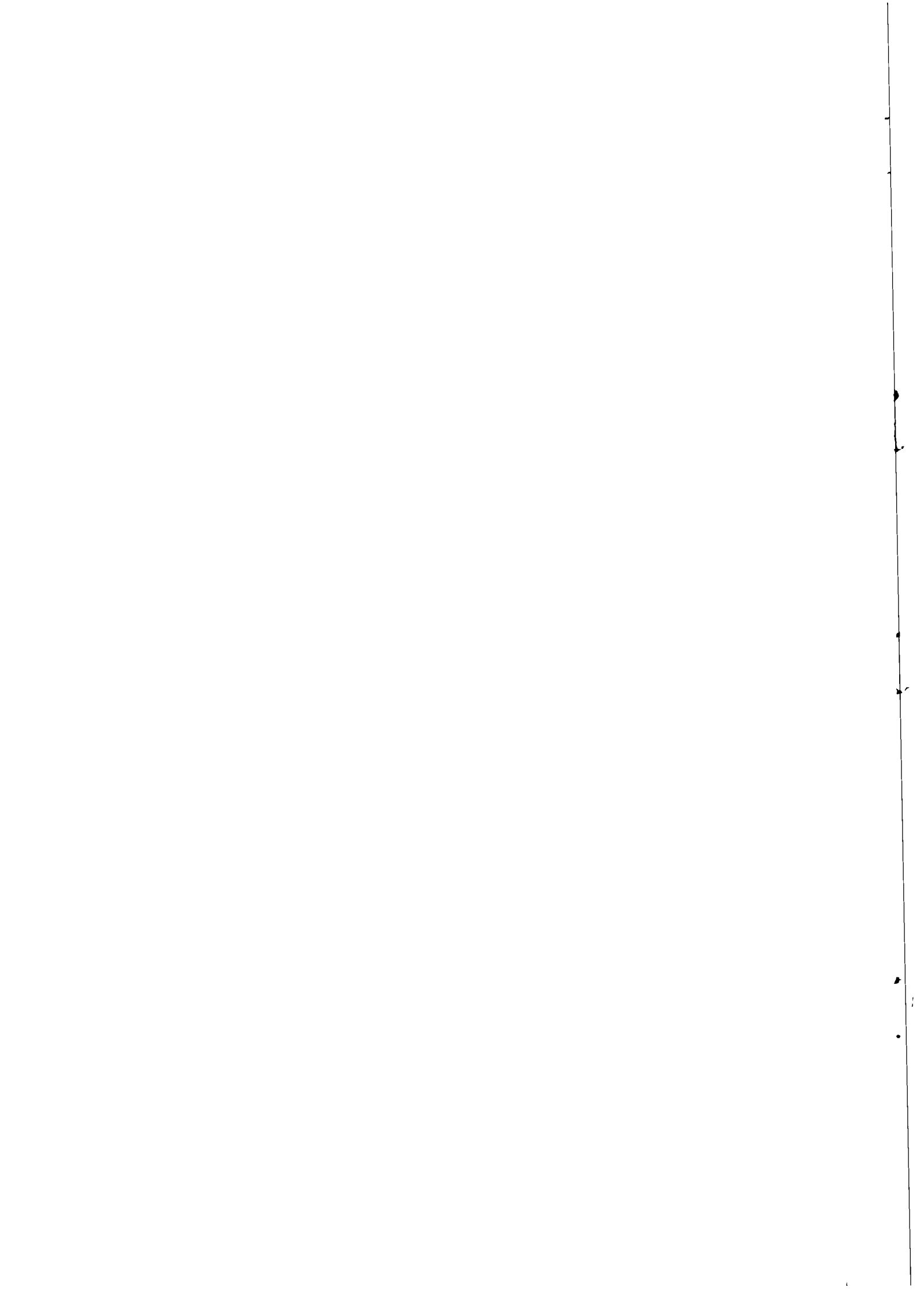
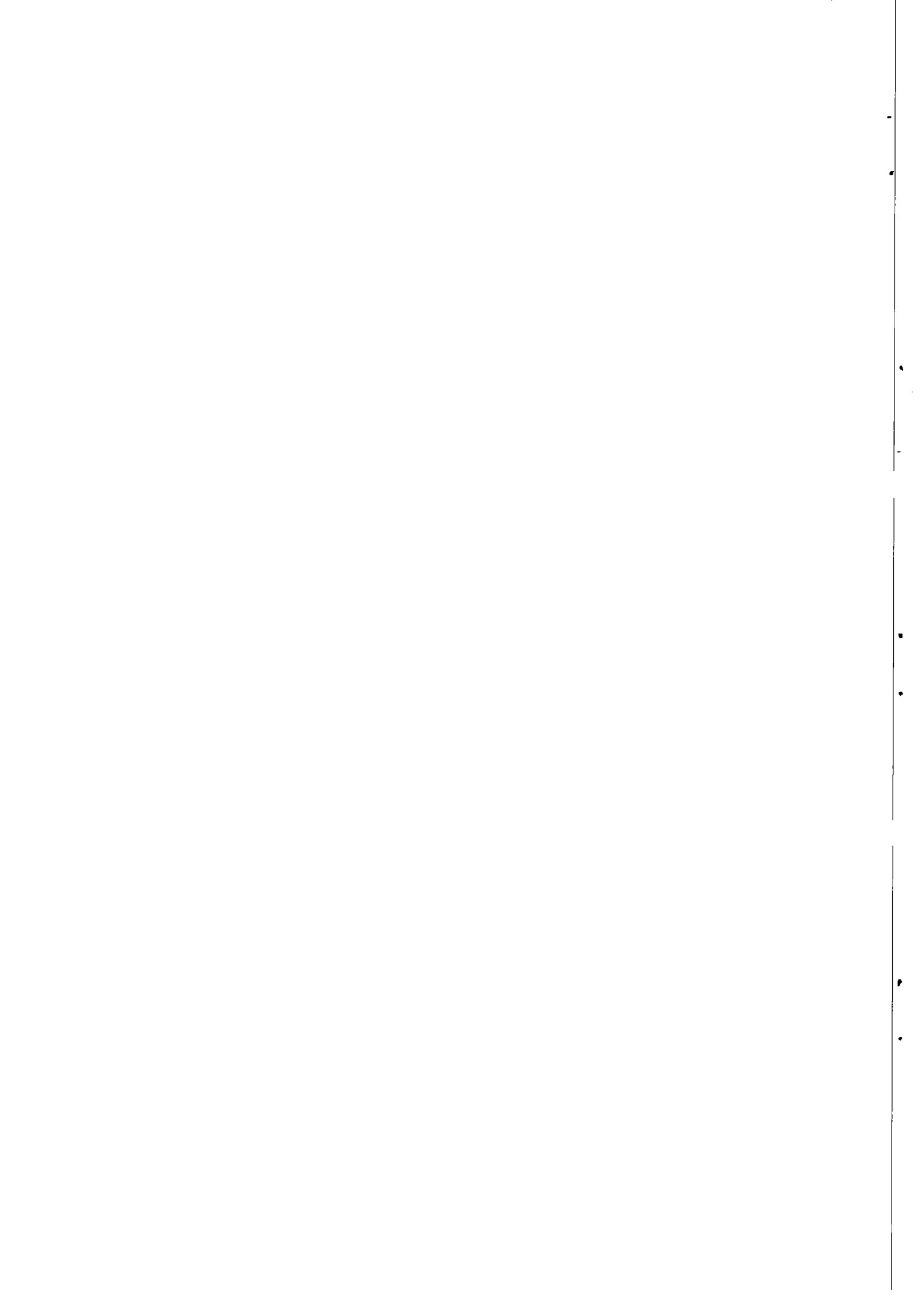


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CHAIRPERSON'S FOREWORD

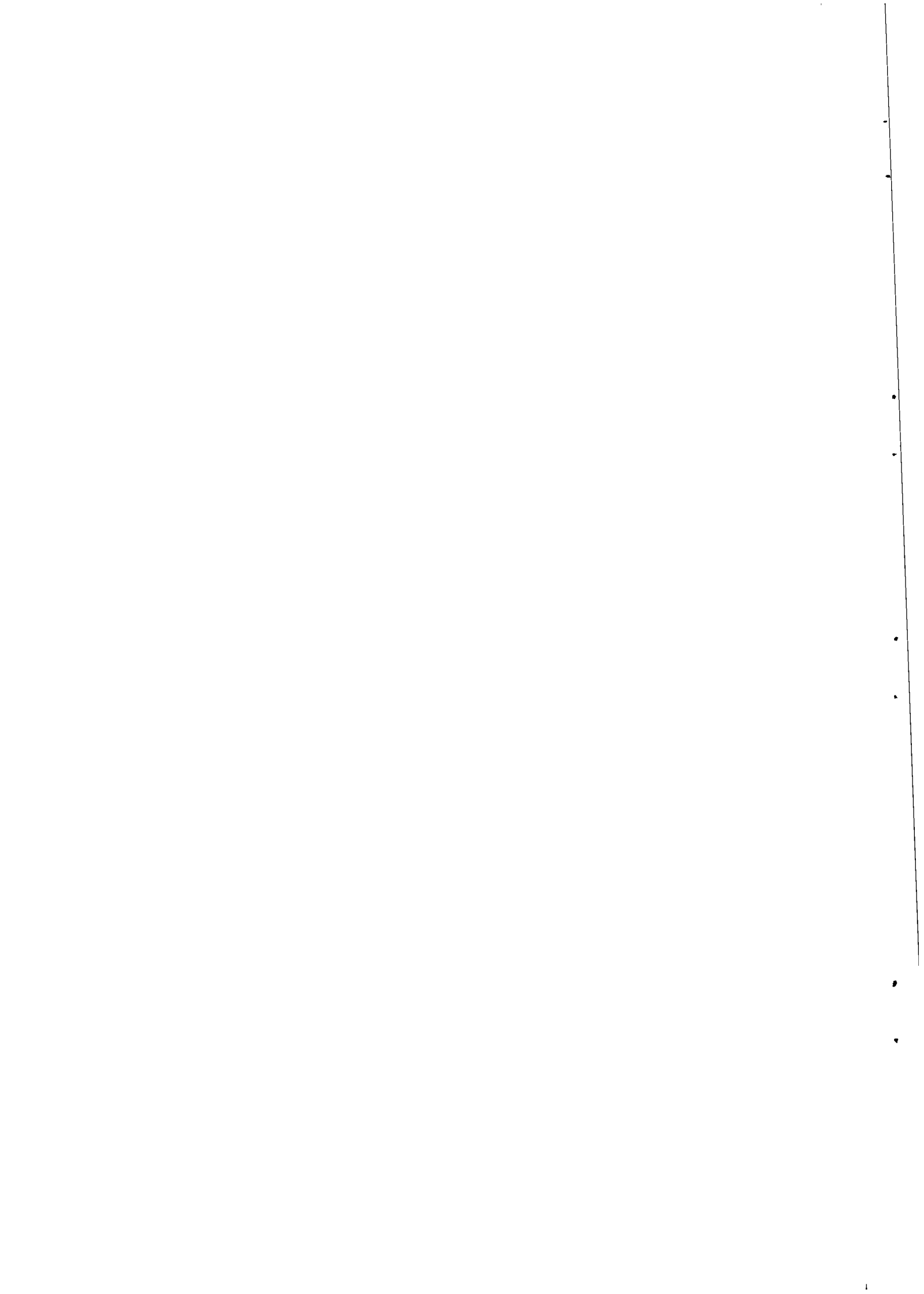
Pursuant to the provisions of Articles 171(2)(c) and 250(2) (b) of the Constitution of Kenya as read together with Sections 3 and 5 of the Public Appointments (Parliamentary Approval) Act, 2011, His Excellency the President of the Republic of Kenya on 15th of March, 2018 forwarded to the Speaker of the National Assembly, a notification of nomination containing the name of Hon. Justice Mohamed Abdullahi Warsame, JA, as a nominee for appointment as a member of the Judicial Service Commission.

Pursuant to the provisions of Standing Order 42(1) of the National Assembly Standing Orders, the Honourable Speaker on 20th of March, 2018 conveyed to the House the message from His Excellency the President effectively committing the nominee to the Departmental Committee on Justice and Legal Affairs for vetting in line with the provisions of Standing Order 45(1).

Section 8 of the Public Appointments (Parliamentary Approval) Act, 2011 gives the Committees a timeline of fourteen (14) days within which the Committee must vet nominees and submit reports to the House. The fourteen (14) days include seven (7) days of public participation during which the public is given the opportunity of submitting memoranda contesting the suitability of a nominee for appointment to a position.

Pursuant to the provisions of Section 8 of the Public Appointments (Parliamentary Approval) Act, 2011, the deadline for the Committee to submit its report to the House was on the 3rd of April, 2018 during which day the House was on short recess as per the Calendar of the National Assembly (2018). In this regard, the Committee sought and was granted extension of time by the House by a further period of fourteen (14) days from the 3rd of April, 2018 through a motion moved by the Chairperson on 28th March, 2018.

At its sitting of 29th March, 2018, the Committee scheduled to vet the nominee on 11th April, 2018 at 10.00 a.m. However, on the same day after the meeting, the Committee was advised to suspend the vetting pursuant to a court order served on 28th March, 2018 prohibiting the vetting of the nominee until the case filed is concluded. As a result, whether or not the Committee vets the nominee will be determined by the outcome of the court case.



May I take this opportunity to express gratitude to Committee Members for their resilience and committee to duty which made deliberations and production of a report on this matter successful. May I also take this opportunity to thank and commend the Offices of Speaker and Clerk of the National Assembly for providing direction and the secretariat for exemplary performance in providing technical and logistical support.

On behalf of the Committee and pursuant to the provisions of Standing Order 199(6) of the National Assembly Standing Orders, it is my pleasant privilege to present to the House the Committee's report on the vetting of Hon. Justice Mohamed Abdullahi Warsame, JA, for approval for appointment as a member of the Judicial Service Commission.



Signed.....

HON. WILLIAM CHEPTUMO, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs

Date.....

11th April 2018



EXECUTIVE SUMMARY

In line with the provisions of Articles 171(2)(c) and 250(2) (b) of the Constitution of Kenya as read together with Sections 3 and 5 of the Public Appointments (Parliamentary Approval) Act, 2011, His Excellency the President of the Republic of Kenya on 15th of March, 2018 submitted to the Speaker of the National Assembly, a notification of nomination containing the name of Hon. Justice Mohamed Abdullahi Warsame, JA as a nominee for approval by the House for appointment as a member of the Judicial Service Commission.

Section 8 of the Public Appointments (Parliamentary Approval) Act, 2011 gives Committees a timeline of fourteen (14) days within which they should vet nominees and submit reports to the House. The fourteen (14) days include seven (7) days of public participation during which the public is given the opportunity to submit memoranda contesting the suitability of a nominee for appointment to a position. The deadline for the Committee to submit its report to the House was on the 3rd of April, 2018 during which day the House would be on a short recess. In this regard, the Committee sought and was granted extension of time by the House by a further period of fourteen (14) days from the 3rd of April, 2018 through a motion moved by the Chairperson on 28th March, 2018.

At its sitting of 29th March, 2018, the Committee scheduled to conduct approval hearing of the nominee on 11th April, 2018 at 10.00 a.m. However, on the same day after the meeting, the Committee was advised to suspend the vetting pursuant to a court order served on 28th March, 2018 prohibiting the National Assembly from vetting the nominee. The suit in reference here is Petition No. 106 of 2018 filed in the Constitutional and Human Rights Division of the High Court of Kenya by the Law Society of Kenya (LSK) against the National Assembly, the Attorney-General and others and it seeks to stop the vetting of the nominee on the following grounds *inter-alia*-

- (i) The nomination of Hon. Justice Mohamed Abdullahi Warsame by the President and subsequently subjecting him to vetting by the National Assembly is *ultra vires* the Constitution and the law and is a violation of Article 171(2)(c) of the Constitution of Kenya; and
- (ii) The nomination of Hon. Justice Mohamed Abdullahi Warsame and subjecting him to vetting by the National

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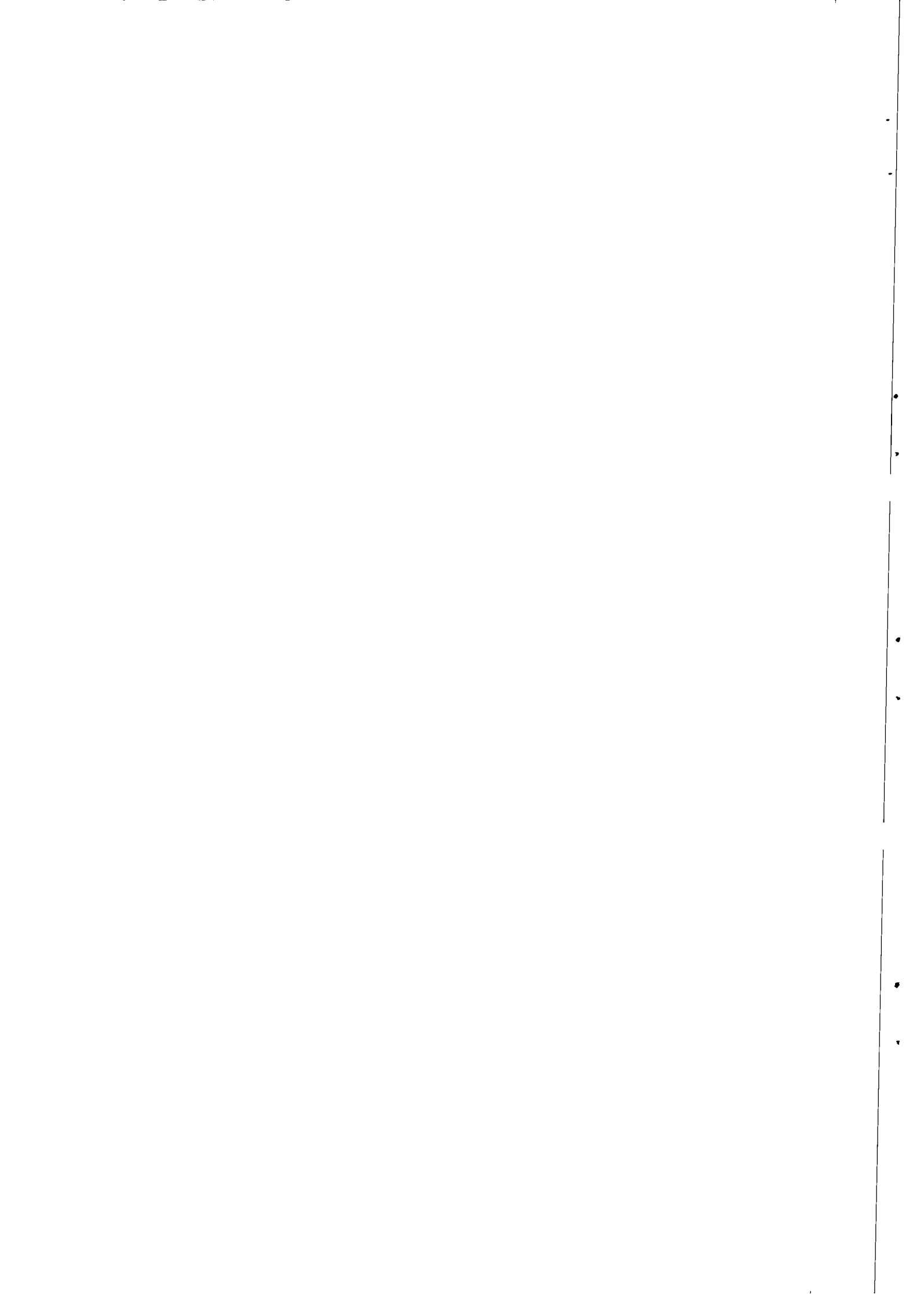
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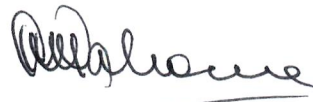
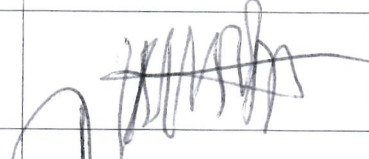
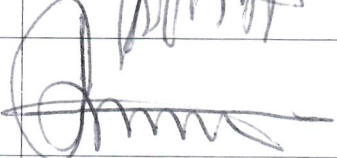
Assembly is *ultra vires* and is a violation of Section 15(2) of the Judicial Service Act.

In view of the conservatory orders issued by the High Court on 26th March, 2018, the Committee cannot proceed with the vetting until the case is heard and finally determined.




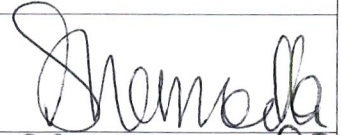


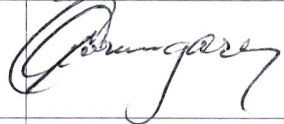
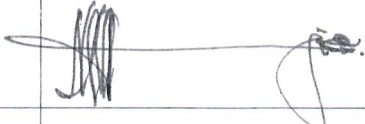
ADOPTION OF THE REPORT OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS ON THE VETTING OF HON. JUSTICE MOHAMED ABDULLAHI WARSAME AS A NOMINEE FOR APPOINTMENT AS A MEMBER OF THE JUDICIAL SERVICE COMMISSION

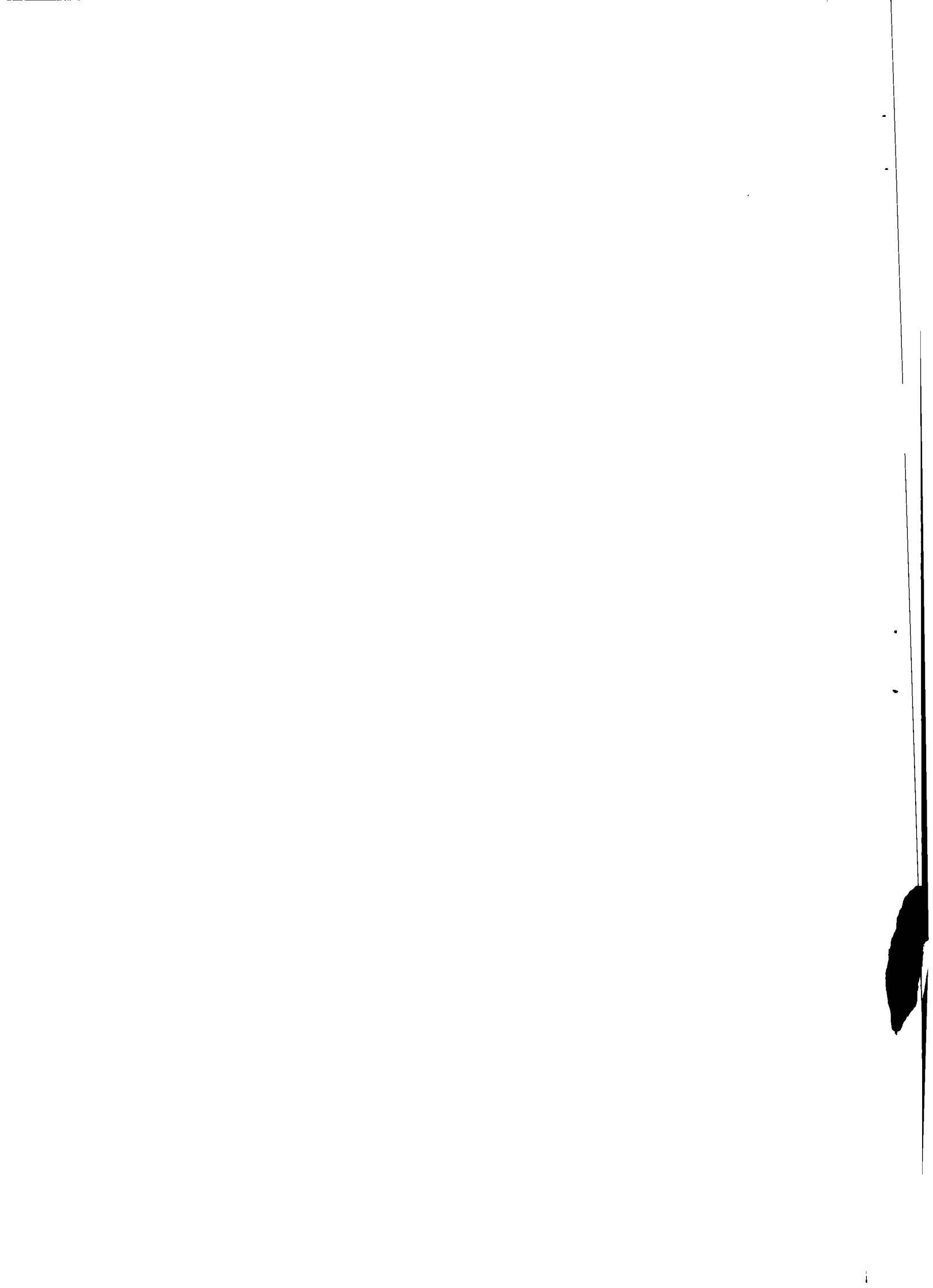
We the Honourable Members of the Departmental Committee on Justice and Legal Affairs today the 11th day of April, 2018 do hereby affix our signatures to this report to affirm our approval, support, accuracy, credibility and authenticity.

No.	NAME OF MEMBER	SIGNATURE
1.	Hon. William Cheptumo, M.P. – <i>Chairperson</i>	
2.	Hon. Alice Muthoni Wahome, M.P. – <i>Vice Chairperson</i>	
3.	Hon. John Olago Aluoch, M.P.	
4.	Hon. Roselinda Soipan Tuya, M.P.	
5.	Hon. Charles Gimose, M.P.	
6.	Hon. Johana Ng'eno Kipyegon, M.P.	
7.	Hon. William Kamoti Mwamkale, M.P.	
8.	Hon. Ben Orori Momanyi, M.P.	

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9.	Hon. Peter Opondo Kaluma, M.P.	
10.	Hon. Beatrice Adagala, M.P.	
11.	Hon. Jennifer Shamalla, M.P.	
12.	Hon. Gladys Boss Shollei, CBS, M.P.	
13.	Hon. John Munene Wambugu, M.P.	
14.	Hon. George Gitonga Murugara, M.P.	
15.	Hon. Anthony Githiaka Kiai, M.P.	
16.	Hon. Japheth Mutai, M.P.	
17.	Hon. John Kiarie Waweru, M.P.	
18.	Hon. Adan Haji Yussuf, M.P.	
19.	Hon. Zuleikha Hassan, M.P.	



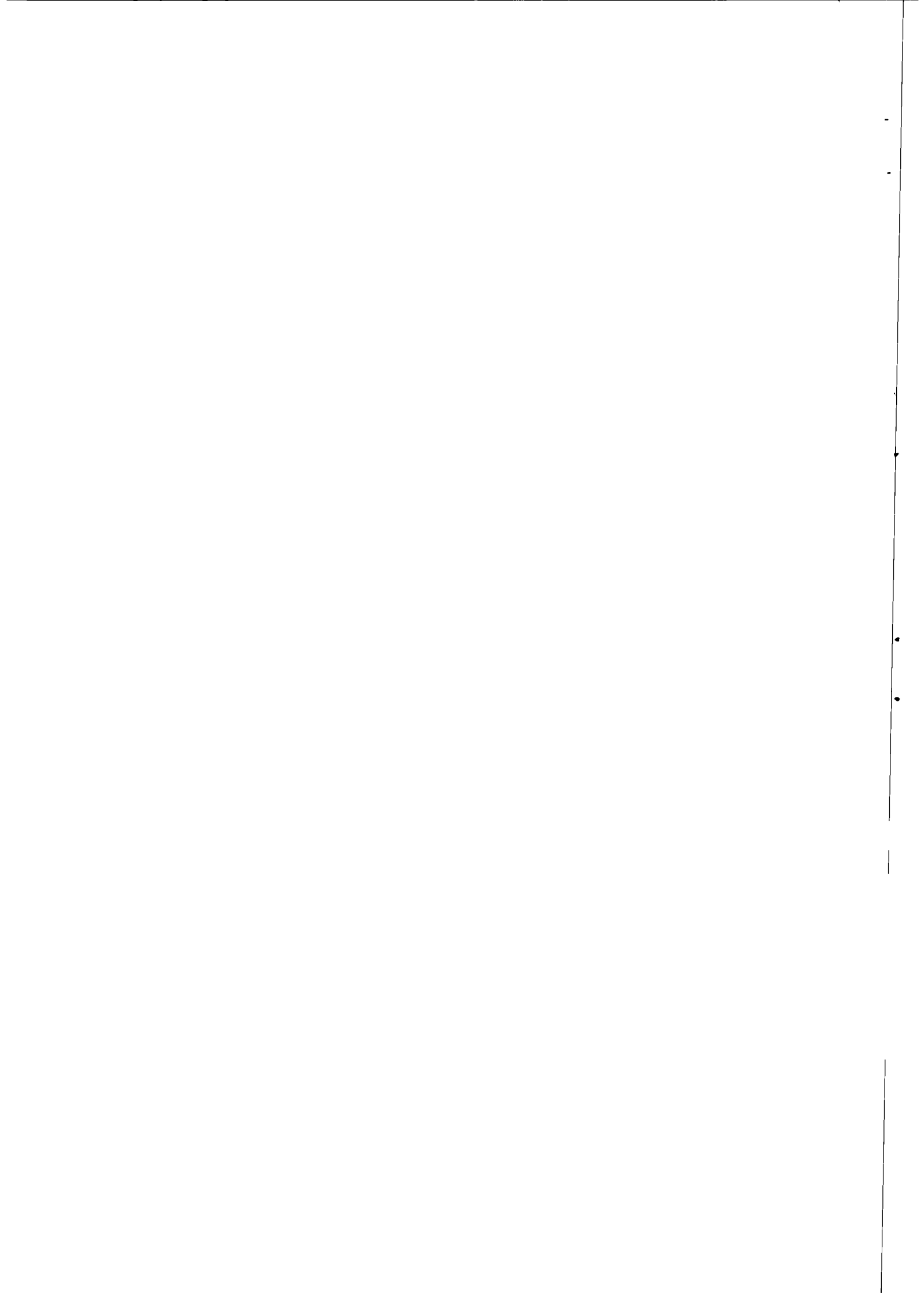
PART 1

1. PREFACE

1.1. Mandate of the Committee

The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-

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



The Second Schedule of the Standing Orders on Departmental Committees further outlines the Subjects of the Committee, as follows-

- (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.

1.2. Committee Membership

The Committee was constituted on Thursday, 14th December, 2017 and comprises the following Honourable Members-

Hon. William Cheptumo, M.P.	-	<i>Chairperson</i>
Hon. Alice Muthoni Wahome, M.P.	-	<i>Vice Chairperson</i>
Hon. John Olago Aluoch, M.P.		
Hon. Roselinda Soipan Tuya, M.P.		
Hon. Charles Gimose, M.P.		
Hon. Johana Ng'eno, M.P.		
Hon. William Kamoti Mwamkale, M.P.		
Hon. Ben Orori Momanyi, M.P.		
Hon. Peter Opondo Kaluma, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Beatrice Adagala, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
Hon. John Munene Wambugu, M.P.		
Hon. George Gitonga Murugara, M.P.		
Hon. Anthony Githiaka Kiai, M.P.		
Hon. John Kiarie Waweru, M.P.		
Hon. Japheth Mutai, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. Zuleikha Hassan, M.P.		

1.3. Committee Secretariat

Mr. George Gazemba	-	Senior Clerk Assistant and Head of Secretariat
Mr. Denis Abisai	-	Principal Legal Counsel I
Ms. Doreen Karani	-	Legal Counsel II
Ms. Halima Hussein	-	Clerk Assistant III
Ms. Fiona Musili	-	Research Officer III



Mr. Omar Abdirahim	-	Fiscal Analyst III
Mr. James Macharia	-	Media Liaison Officer
Ms. Roselyne Ndegi	-	Serjeant-at-Arms
Mr. Richard Sang'	-	Serjeant-at-Arms
Mr. Ian Otieno	-	Audio Officer

Minutes of sittings of the Committee in respect of the approval process are attached to this report as annexure 1.



PART 2

2. INTRODUCTION AND BACKGROUND

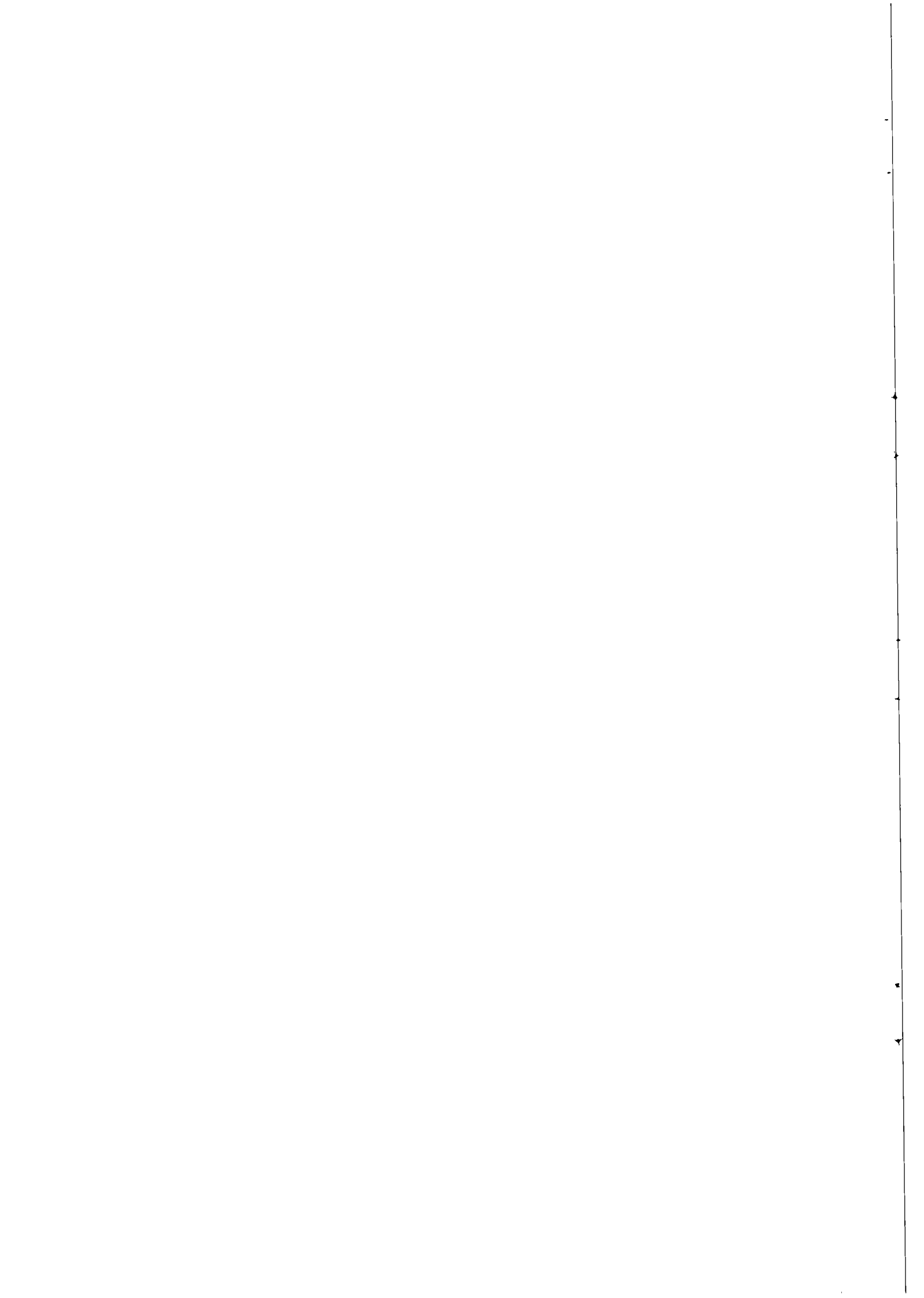
2.1. Establishment of the Judicial Service Commission

The Judicial Service Commission (JSC) is established under Article 171 of the Constitution of Kenya.

2.2. Membership of the Commission

Article 171(2) of the Constitution of Kenya provides that the Commission shall consist of-

- (i) *the Chief Justice who shall be the chairperson of the Commission;*
- (ii) *one Supreme Court Judge elected by Judges of the Supreme Court;*
- (iii) *one Court of Appeal Judge elected by Judges of the Court of Appeal*
- (iv) *one High Court Judge and one Magistrate, one a woman and one a Judge elected by members of the Association of Judges and Magistrates;*
- (v) *the Attorney-General;*
- (vi) *two Advocates, one a woman and one a man, each of whom has at least fifteen years' experience elected by the statutory body responsible for the professional regulation of advocates;*
- (vii) *one person nominated by the Public Service Commission; and*
- (viii) *one woman and one man to represent the public not being lawyers appointed by the President with the approval of the National Assembly.*



2.3. Functions of the Commission

Article 172 of the Constitution provides for the functions of the Commission as follows-

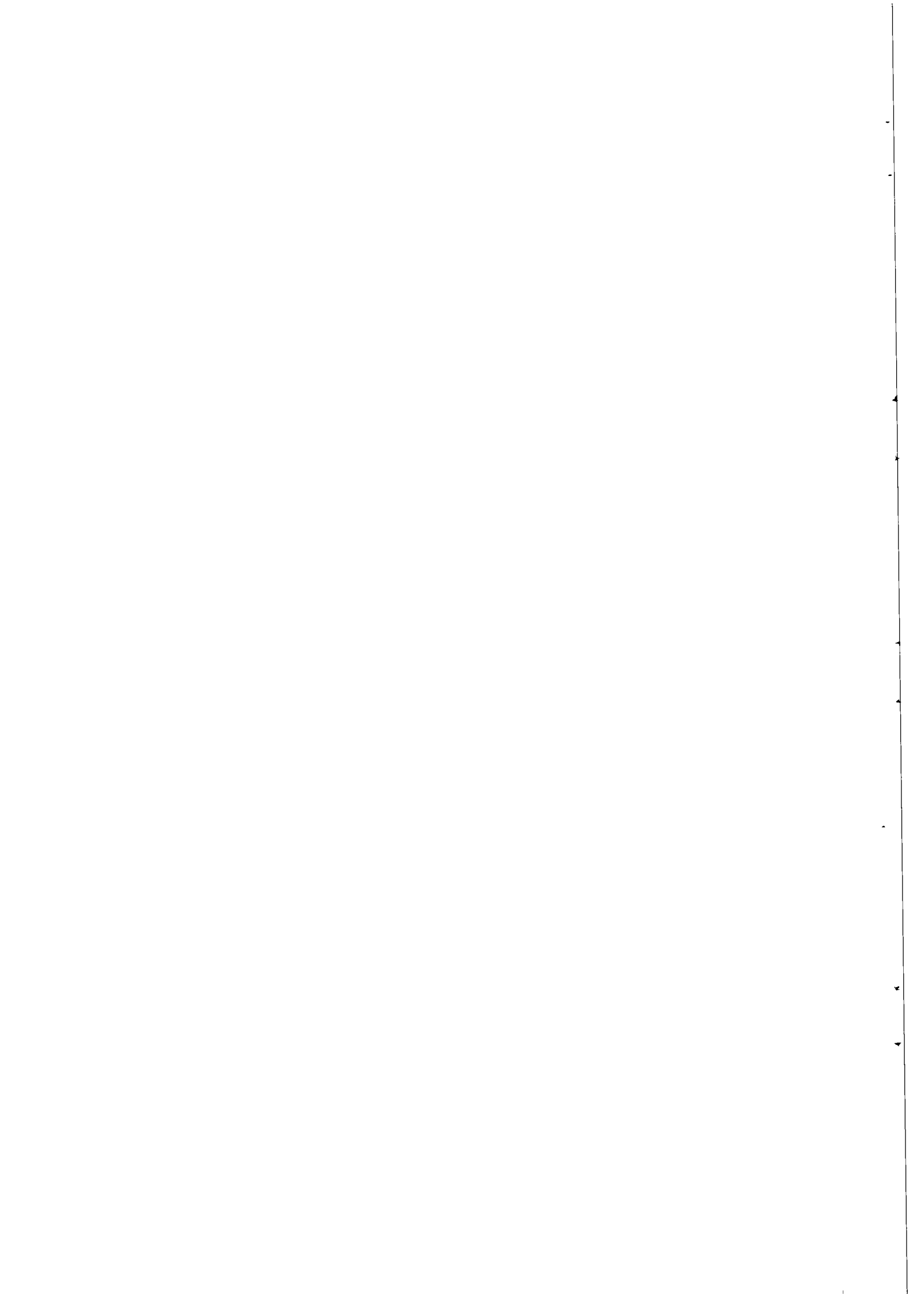
The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall –

- (a) recommend to the President persons for appointment as judges;*
- (b) review and make recommendations on the conditions of service of –
 - (i) judges and judicial officers, other than their remuneration; and*
 - (ii) the staff of the judiciary**
- (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary, in the manner prescribed by an Act of Parliament.*
- (d) prepare and implement programmes for the continuing education and training of judges and judicial officers; and*
- (e) advise the national government on improving the efficiency of the administration of justice*

2.4. Notification of nomination to the House

Pursuant to the provisions of Articles 171(2)(c) and 250(2) (b) of the Constitution of Kenya as read together with Sections 3 and 5 of the Public Appointments (Parliamentary Approval) Act, 2011, His Excellency the President of the Republic of Kenya vide a letter dated 15th March, 2018 as per annexure 2 forwarded to the Speaker of the National Assembly, a notification of nomination containing the name of Hon. Justice Mohamed Abdullahi Warsame, JA as a nominee for appointment as a member of the Judicial Service Commission.

The letter was received by the Speaker's Office on the 20th of March, 2018.



2.5. Committal of the nominee to the Departmental Committee on Justice and Legal Affairs for vetting

Pursuant to the provisions of Standing Order 42(1)(3) of the National Assembly Standing Orders, the Honourable Speaker on the 20th of March, 2018 conveyed to the House the message from His Excellency the President of the Republic of Kenya on the nominee effectively committing him to the Departmental Committee on Justice and Legal Affairs for vetting.

2.6. Public participation in the vetting process

Article 118 (1) (b) of the Constitution provides as follows-

“Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees”

Section 6(9) of the Public Appointments (Parliamentary Approval) Act of 2011 provides as follows-

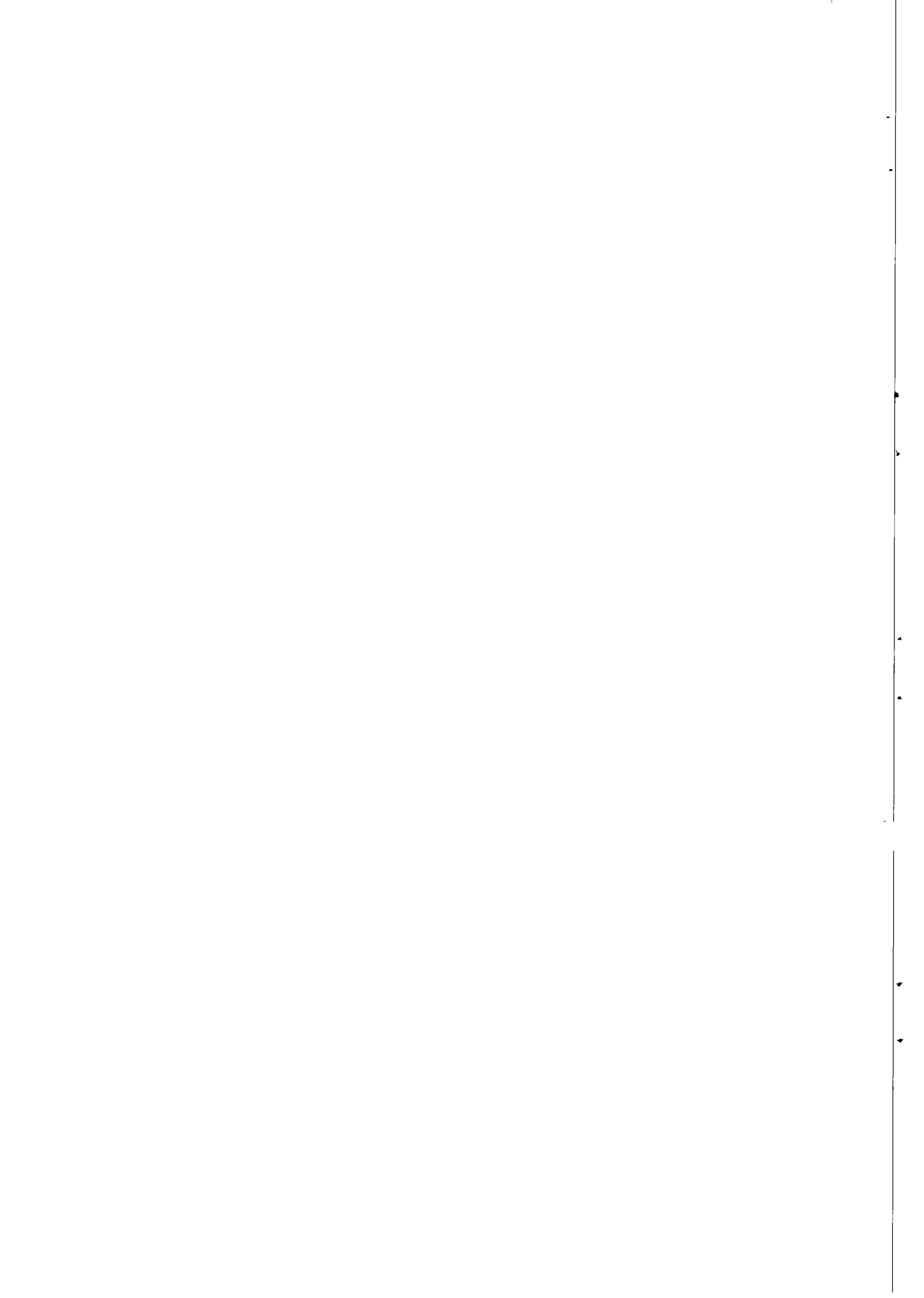
“Any person may, prior to the approval hearing, and by written statement on oath, provide the Clerk with evidence contesting the suitability of candidate to hold the office to which a candidate has been nominated”

On Wednesday, the 21st March, 2018 and Thursday, the 22nd of March, 2018, the Clerk of the National Assembly through advertisement in the local daily newspapers of *Daily Nation*, *The Star*, *The Standard* and *People Daily*, a copy of which is attached as annexure 3 invited the public to submit memoranda by way of written statements on oath (affidavit) contesting the suitability of the nominee to be appointed as a member of the Judicial Service Commission.

2.7. Extension of time for vetting the nominee

The Committee had fourteen (14) days within which to vet the nominee and report to the House as provided for by the provisions of Section 8(1) of the Public Appointments (Parliamentary Approval) Act, 2011. The fourteen (14) days which included seven (7) days of public participation were to lapse on 3rd April, 2018.

In view of the fact that the fourteen (14) days were to expire when the House was on short recess from 30th March to 9th April, 2018, it meant



that the Committee would be unable to table its report in the House within statutory timeline, unless time was extended. In this regard, the Committee sought and was granted by the House extension of time by a further fourteen (14) days from the 3rd of April, 2018 thereby setting a new deadline of 17th April, 2018.

2.8. Notification of approval hearings to the nominee and the public

Section 6(3) of the Public Appointments (Parliamentary Approval) Act, 2011, provides as follows-

‘‘The Clerk shall notify a candidate of the time and place of holding an approval hearing’’

The National Assembly Standing Order 45(3) states as follows-

‘‘Before holding an approval hearing, a Committee to which proposed appointments have been referred shall notify the candidate and the public of the time and place for the holding of the approval hearing at least seven days before the hearing’’

Section 6(4) of the Public Appointments (Parliamentary Approval) Act, 2011, provides as follows-

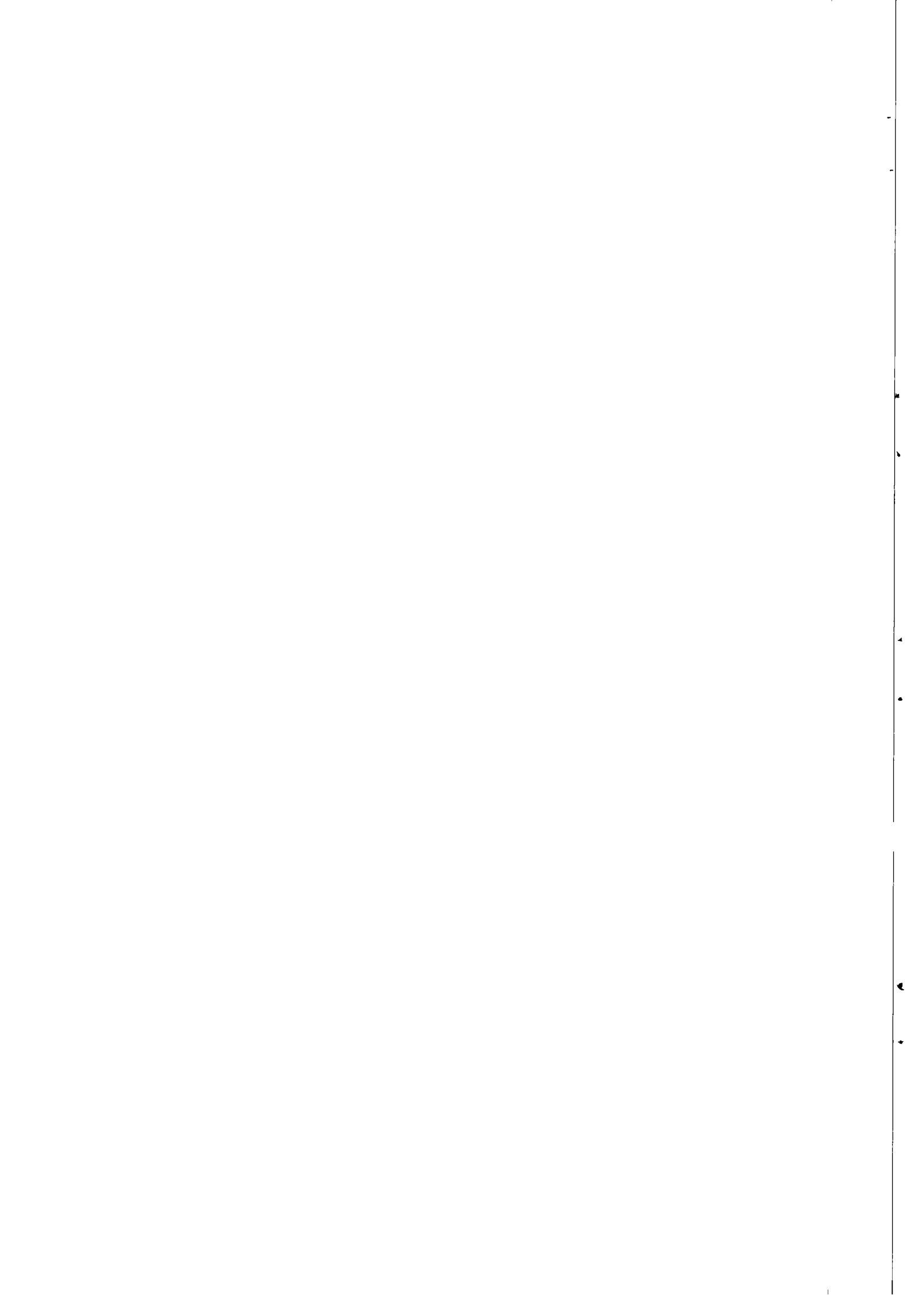
The Committee shall notify the public of the time and place for holding an approval hearing at least seven days prior to the hearing’’

These processes were not undertaken as the National Assembly was served with a court order on the 28th of March, 2018 prohibiting it from vetting the nominee pending the outcome of the court case. The court order also prohibited the nominee from appearing for vetting.

2.9. Clearance requirements

By letters dated 22nd March, 2018, the Clerk of the National Assembly requested for information regarding the nominee from the Ethics and Anti-Corruption Commission (EACC), the Kenya Revenue Authority (KRA), the Directorate of Criminal Investigation (DCI), the Higher Education Loans Board (HELB) and the Registrar of Political Parties (RPP). The information requested sought to establish the status of the nominee on the following issues-

- (i) Integrity



- (ii) Tax compliance
- (iii) Criminal record
- (iv) Educational loan repayment records
- (v) Political parties' affiliation

The HELB and ORPP responded to the letter before the court order was served while the rest were yet to respond.



PART 3

3. COURT CASE SEEKING TO STOP THE NATIONAL ASSEMBLY FROM VETTING THE NOMINEE

The case was filed by LSK in the High Court of Kenya at Nairobi, Constitutional and Human Rights Division against the National Assembly as the 1st Respondent and the Attorney-General of the Republic of Kenya as the 2nd Respondent. Hon. Justice Mohamed Abdullahi Warsame is listed as the 1st Interested Party, while the Judicial Service Commission the 2nd Interested Party. The court order and pleadings are annexed to this report as annexure 4.

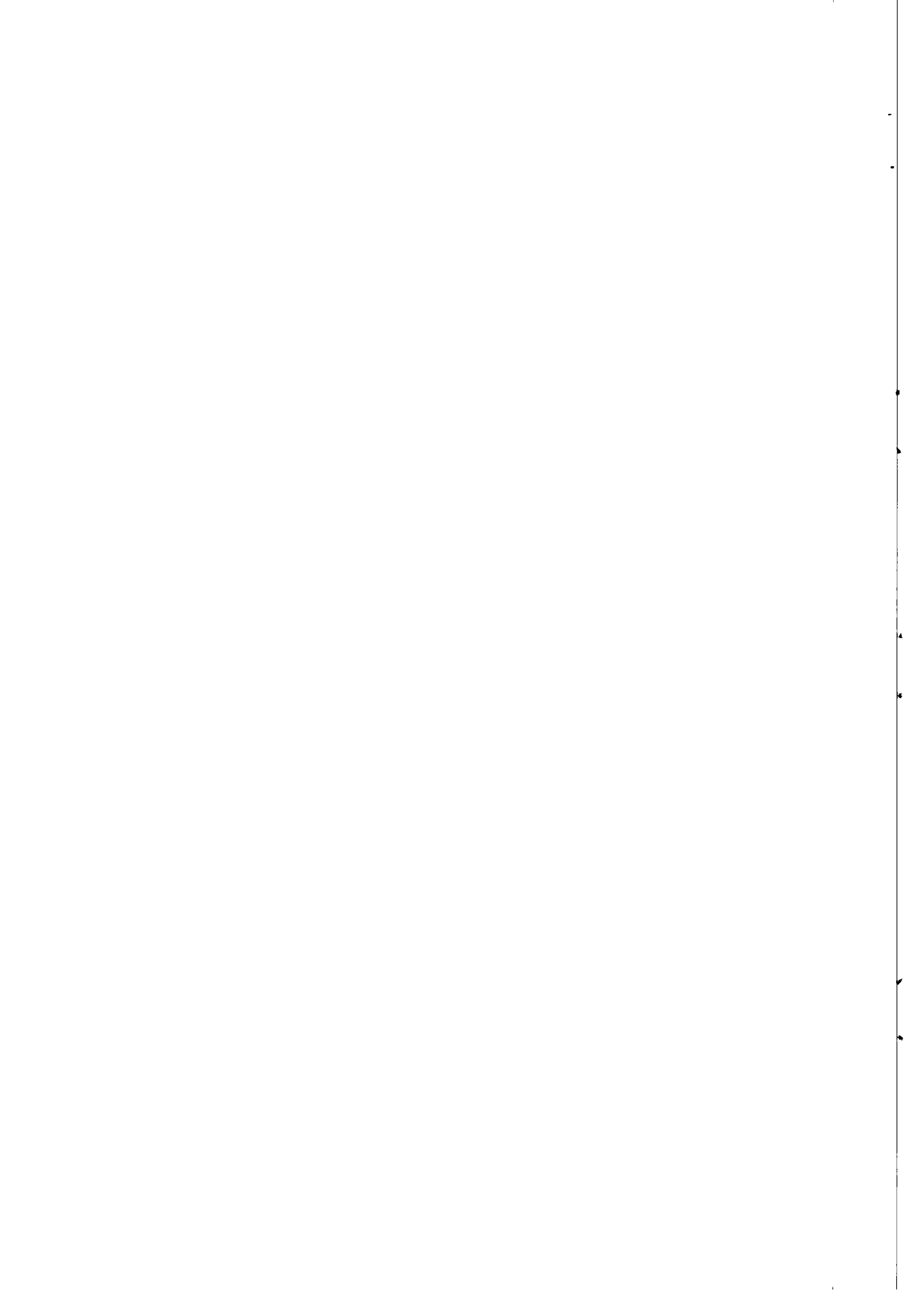
The case seeks to stop the vetting on the following grounds *inter-alia*-

- (i) The nomination of Hon. Justice Mohamed Abdullahi Warsame and subjecting him to vetting by the National Assembly is ultra vires and is a violation of Article 171(2)(c) of the Constitution of Kenya.

Pursuant to the Article, Hon. Justice Mohammed Abdullahi Warsame was elected by Court of Appeal Judges to represent them in the Commission and did not require any vetting for appointment.

- (ii) The nomination of Hon. Justice Mohamed Abdullahi Warsame and subjecting him to vetting by the National Assembly is ultra vires and is a violation of Section 15(2) of the Judicial Service Act.

Pursuant to the Section, the President was required to nominate Hon. Justice Mohamed Abdullahi Warsame within three (3) days of receiving his name but did not do so.



PART 4

4. COMMITTEE OBSERVATIONS FINDINGS AND CONCLUSIONS

Upon analysing the court ruling, the Committee makes the following observations, findings and conclusions-

- (i) The National Assembly was on 28th March, 2018 duly served with the ex-parte conservatory orders in ***Petition No. 106 of 2018 - Law Society of Kenya versus the National Assembly of Kenya, the Attorney-General and Others-***
 - (a) Suspending the notice inviting the public to submit representations to the National Assembly concerning the vetting of Hon. Justice Mohamed Abdullahi Warsame, the 1st Interested Party;
 - (b) Prohibiting the National Assembly from vetting the 1st Interested Party for appointment as a member of the Judicial Service Commission; and
 - (c) Prohibiting the 1st Interested Party from appearing before the National Assembly for vetting;
- (ii) The National Assembly had obeyed the court orders and instructed its Litigation Department to defend the case.
- (iii) The inter-parties hearing of the application for conservatory orders in the matter is scheduled for hearing on the 23rd of May, 2018;
- (iv) Standing Order 89 prohibits Members from referring to particular matters which are *sub judice*. The order provides that a matter shall be considered to be *sub judice* when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination.

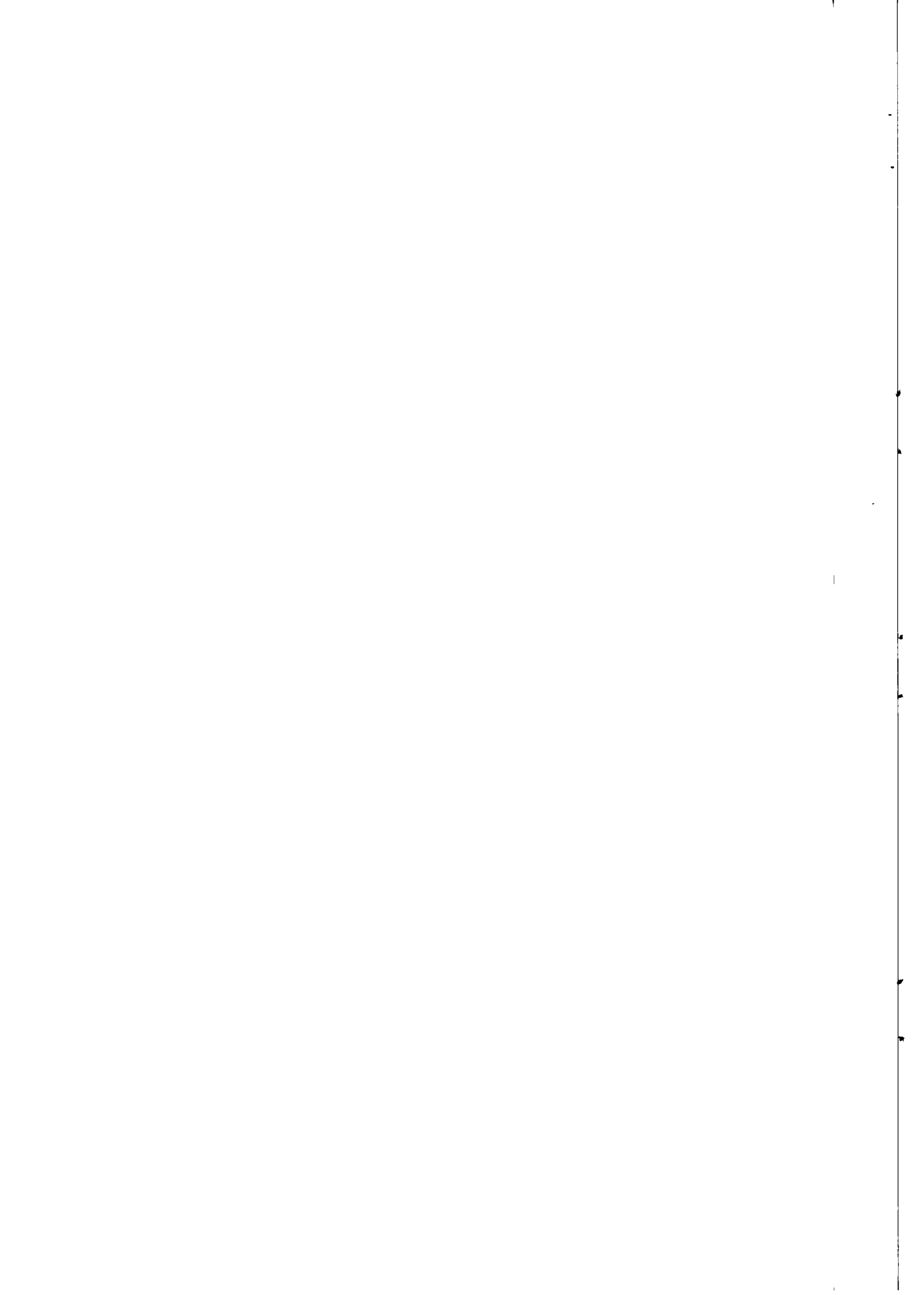


PART 5

5. RECOMMENDATIONS

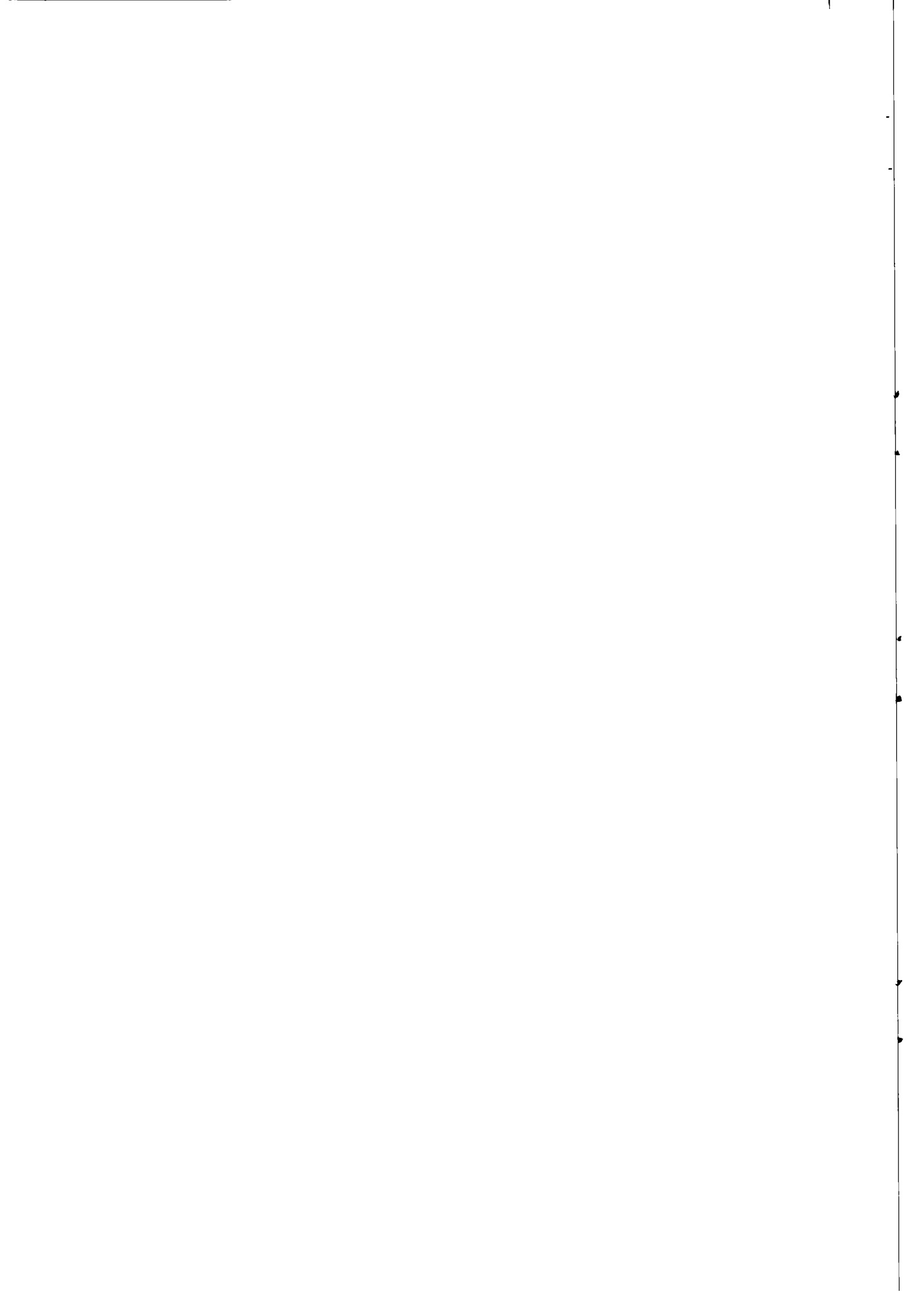
The Committee urges the House to resolve as follows-

- (i) **THAT**, in light of the *ex-parte* conservatory High Court orders prohibiting the National Assembly from vetting Hon. Justice Mohamed Abdullahi Warsame, JA, for appointment as a member of the Judicial Service Commission, the Committee is not in a position to vet him and submit a report to the House on his suitability or otherwise as required by Section 8 (1) of the Public Appointments (Parliamentary Approval) Act, 2011 pending the outcome of the court case;
- (ii) **THAT** further in light of the court orders, the House is not in a position to pronounce itself on the approval or otherwise on the nomination of Hon. Justice Mohamed Abdullahi Warsame for appointment as a member of the Judicial Service Commission as contemplated under 250(2)(b) of the Constitution of Kenya; and
- (iii) **THAT** the matter of the vetting of Justice Mohamed Abdullahi Warsame be deemed to be *sub judice* pursuant to the provisions of Standing Order 89 pending the outcome of the court case.



ANNEXURE 1

(Minutes of Committee sittings)



**MINUTES OF THE THIRTIETH SITTING OF THE DEPARTMENTAL
COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON
WEDNESDAY, 11TH APRIL, 2018 AT NOON IN COMMITTEE ROOM 7,
MAIN PARLIAMENT BUILDING**

PRESENT-

Hon. William Cheptumo, M.P.	-	Chairperson
Hon. Alice Muthoni Wahome, M.P.	-	Vice Chairperson
Hon. Peter O. Kaluma, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P.		
Hon. George G. Murugara, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. Japheth Mutai, M.P.		
Hon. John M. Wambugu, M.P.		
Hon. Charles Gimose, M.P.		
Hon. Johana Ng'eno, M.P.		

ABSENT WITH APOLOGIES

Hon. John Olago Aluoch, M.P.
Hon. Beatrice Adagala, M.P.
Hon. Anthony G. Kiai, M.P.

ABSENT-

Hon. Ben Momanyi Orori, M.P.
Hon. William K. Mwamkale, M.P.
Hon. Roselinda Soipan Tuya, M.P.
Hon. Zuleikha Hassan, M.P.
Hon. John Kiarie Waweru, M.P.

IN ATTENDANCE

COMMITTEE SECRETARIAT

Mr. George Gazemba	-	Senior Clerk Assistant
Ms. Emma Essendi	-	Legal Counsel II
Ms. Roslyne Ndegi	-	Serjeant-at-Arms



Omar Abdirahim

- Fiscal Analyst

MIN No. 107/2018: PRELIMINARIES

The Chairperson called the meeting to order at 11:00 a.m. which was followed by a word of prayer from himself.

MIN No. 108/2018: CONSIDERATION AND ADOPTION OF REPORT ON THE VETTING OF HON. JUSTICE MOHAMED ABDULLAHI WARSAME FOR APPOINTMENT AS A MEMBER OF THE JUDICIAL SERVICE COMMISSION

The Committee considered and unanimously adopted its report on the vetting of Hon. Justice Mohamed Abdullahi Warsame for appointment as a member of the Judicial Service Commission with the following recommendations-

- (i) **THAT**, in light of the ex-parte conservatory High Court orders prohibiting the National Assembly from vetting Hon. Justice Mohamed Abdullahi Warsame, JA, for appointment as a member of the Judicial Service Commission, the Committee is not in a position to vet him and submit a report to the House on his suitability or otherwise as required by Section 8 (1) of the Public Appointments (Parliamentary Approval) Act, 2011 pending the outcome of the court case;
- (ii) **THAT** further in light of the court orders, the House is not in a position to pronounce itself on the approval or otherwise on the nomination of Hon. Justice Mohamed Abdullahi Warsame for appointment as a member of the Judicial Service Commission as contemplated under 250(2)(b) of the Constitution of Kenya; and
- (iii) **THAT** the matter of the vetting of Justice Mohamed Abdullahi Warsame be deemed to be *sub judice* pursuant to the provisions of Standing Order 89 pending its determination.

The adoption of the report was proposed by Hon. John Wambugu and seconded by Hon. George Murugara

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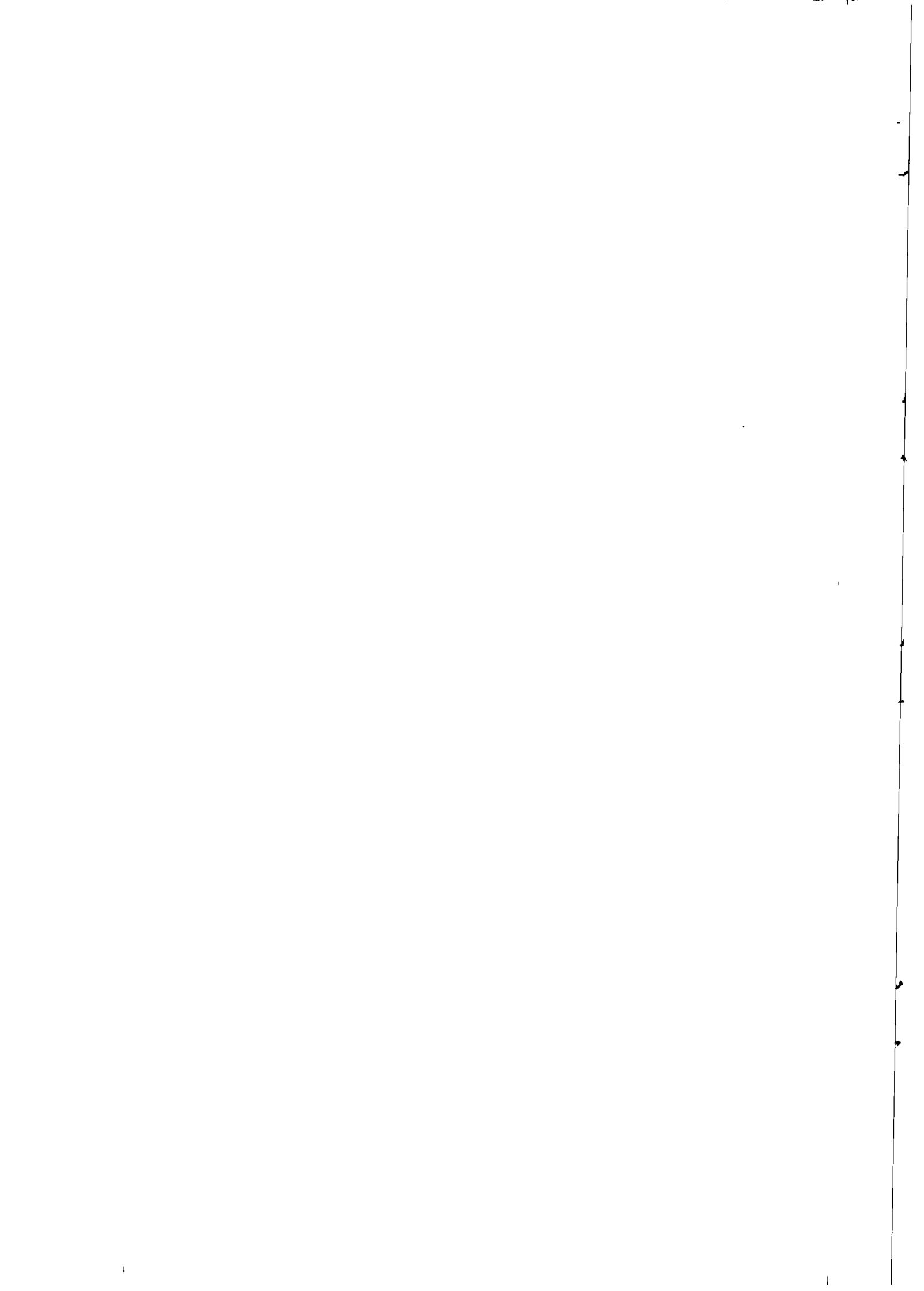
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MIN No. 109/2018: ADJOURNMENT

There being no other business to transact, the Chairperson adjourned the meeting at 1.05 p.m. until Tuesday, 17th April, 2018 at 10.00 a.m. at a venue to be communicated.

Signed.....
Chairperson

Date.....
11th April 2018



**MINUTES OF THE TWENTY NINTH SITTING OF THE
DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS
HELD ON TUESDAY, 10TH APRIL, 2018 AT 11.00 A.M. IN THE
BOARDROOM ON 5TH FLOOR, CONTINENTAL HOUSE, PARLIAMENT
BUILDINGS**

PRESENT-

Hon. William Cheptumo, M.P.	-	Chairperson
Hon. Alice Muthoni Wahome, M.P.	-	Vice Chairperson
Hon. John Olago Aluoch, M.P.		
Hon. Peter O. Kaluma, M.P.		
Hon. Gladys Boss Shollei, CBS, M.P		
Hon. John M. Wambugu, M.P.		
Hon. Beatrice Adagala, M.P		
Hon. John Kiarie Waweru, M.P.		
Hon. George G. Murugara, M.P.		
Hon. Jennifer Shamalla, M.P.		
Hon. Anthony G. Kiai, M.P.		
Hon. Adan Haji Yussuf, M.P.		
Hon. Japheth Mutai, M.P.		

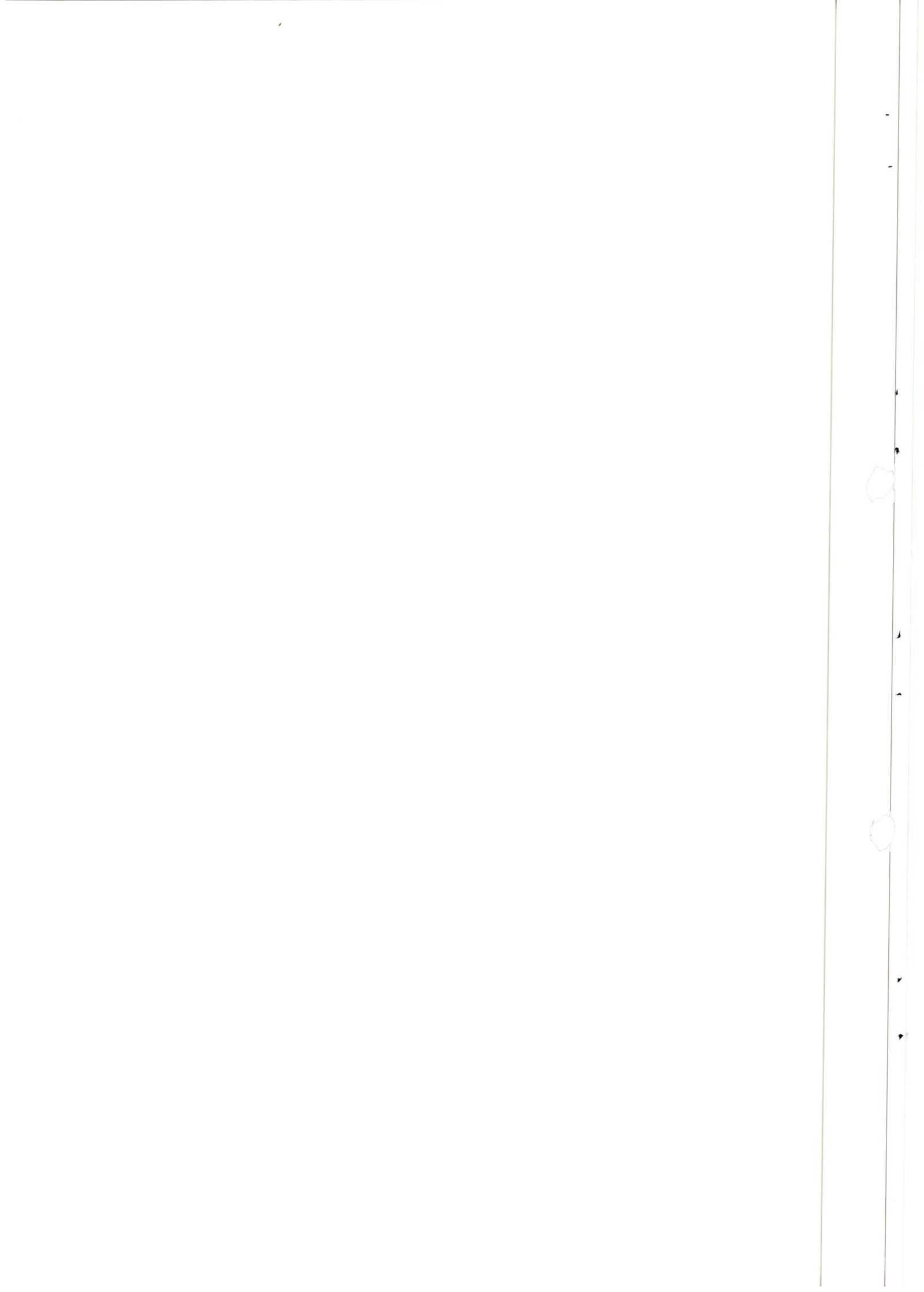
ABSENT-

Hon. Charles Gimose, M.P.
Hon. Ben Momanyi Orori, M.P.
Hon. William K. Mwamkale, M.P.
Hon. Johana Ng'eno, M.P.
Hon. Roselinda Soipan Tuya, M.P.
Hon. Zuleikha Hassan, M.P.

IN ATTENDANCE

COMMITTEE SECRETARIAT

Mr. George Gazemba	-	Senior Clerk Assistant
Mr. Denis Abisai	-	Principal Legal Counsel
Ms. Doreen Karani	-	Legal Counsel II
Ms. Halima Hussein	-	Clerk Assistant III



PETITIONER

Mr. Allen Waiyaki - Advocate of the High Court of Kenya

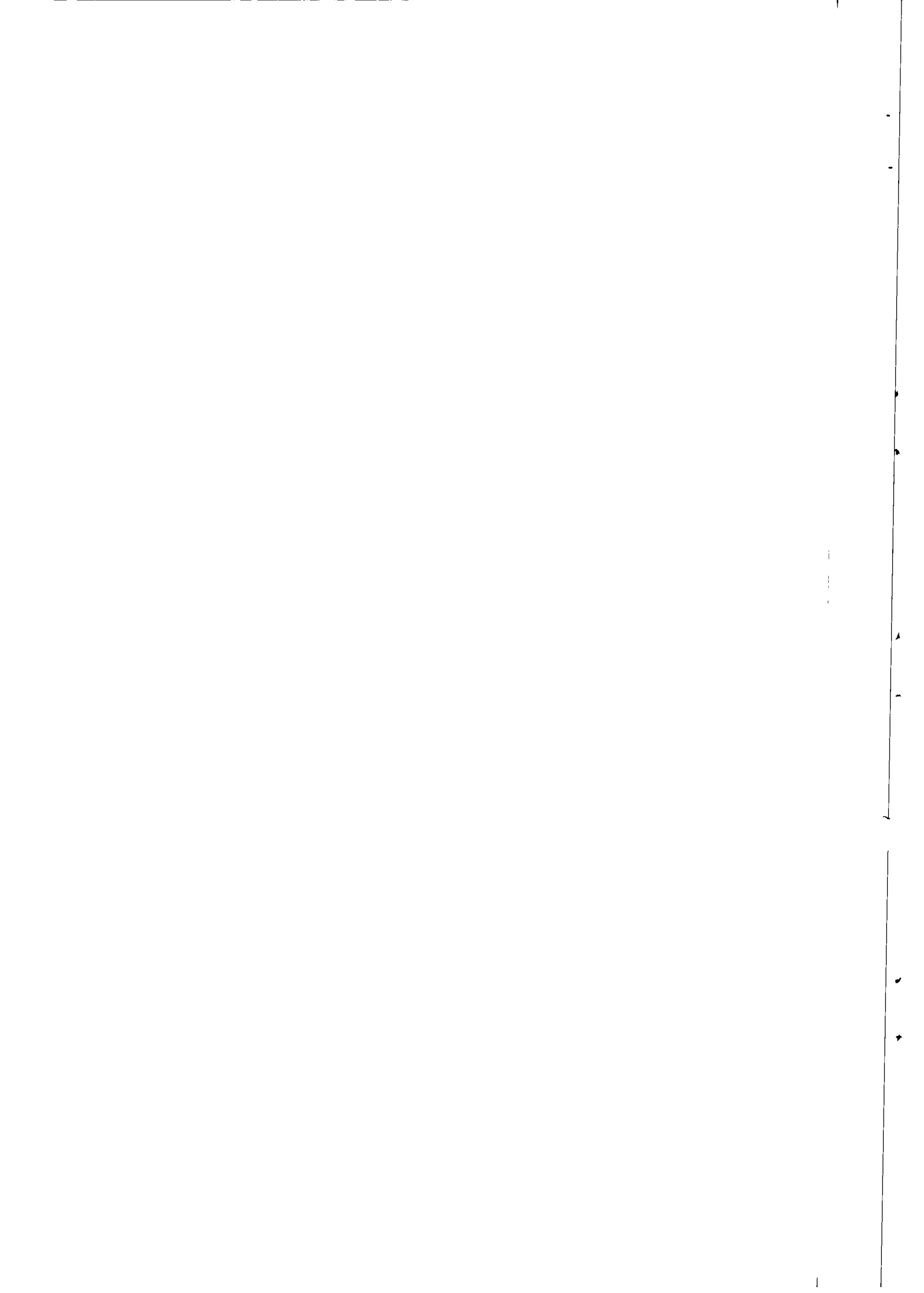
MIN No. 103/2018: PRELIMINARIES

The Chairperson called the meeting to order at 11:00 a.m. which was followed by a word of prayer from the Vice Chairperson.

MIN No. 104/2018: CONSIDERATION OF A PETITION BY ALLEN WAIYAKI GICHUHI, ADVOCATE ON ENACTMENT OF ANTI-FRAUD LEGISLATION

Mr. Allen Waiyaki Gichuhi, an Advocate of the High Court of Kenya and Chairperson of the Law Society of Kenya appeared before the Committee and argued a case in support of his petition seeking the National Assembly's enactment of anti-fraud legislation. He cited the following reasons in support of his petition-

- (i) The inherent limitations of the Penal Code, Cap 63, Laws of Kenya in respect of offences of fraud, fraudulent activities and conspiracy to defraud;
- (ii) The inadequacies of the Penal Code in preventing and prosecuting persons who set up companies with the sole intention of defrauding innocent both in private and public capacities;
- (iii) The increasing number of cases pending before courts where persons registered companies with the sole intention of perpetrating fraud on entities both legal and natural especially creditors including national and county taxation authorities and judgement debtors of companies;
- (iv) The need to hold directors of companies engaging in fraudulent activities personally criminally liable for the said criminal actions and omissions;
- (v) The need to provide prosecutors with increased powers in respect of tracing and recovery of assets and properties obtained, misappropriated, disposed, transferred or otherwise dealt with by the directors of companies fraudulently with a view to defeating the ends of justice.



The Committee was satisfied that the Petitioner's case for enactment of anti-fraud legislation had merit and resolved to meet the Attorney-General and Kenya Law Reform Commission with a view to agreeing on a process of developing draft legislation for enactment.

The Petitioner in his capacity as the chairperson of the Law Society of Kenya underscored the need for the Society and the Committee to enhance synergy and submitted that he will organize a forum for the Committee and the Society to deliberate on how to realize this objective.

MIN No. 105/2018: APPROVAL HEARING ON THE VETTING OF JUSTICE MOHAMED ABDULLAHI WARSAME FOR APPOINTMENT AS A MEMBER OF THE JUDICIAL SERVICE COMMISSION

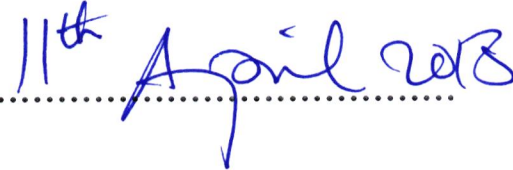
The meeting was informed that the National Assembly had been served and complied with a court order prohibiting it from vetting the nominee. The order further prohibited the nominee from appearing for vetting.

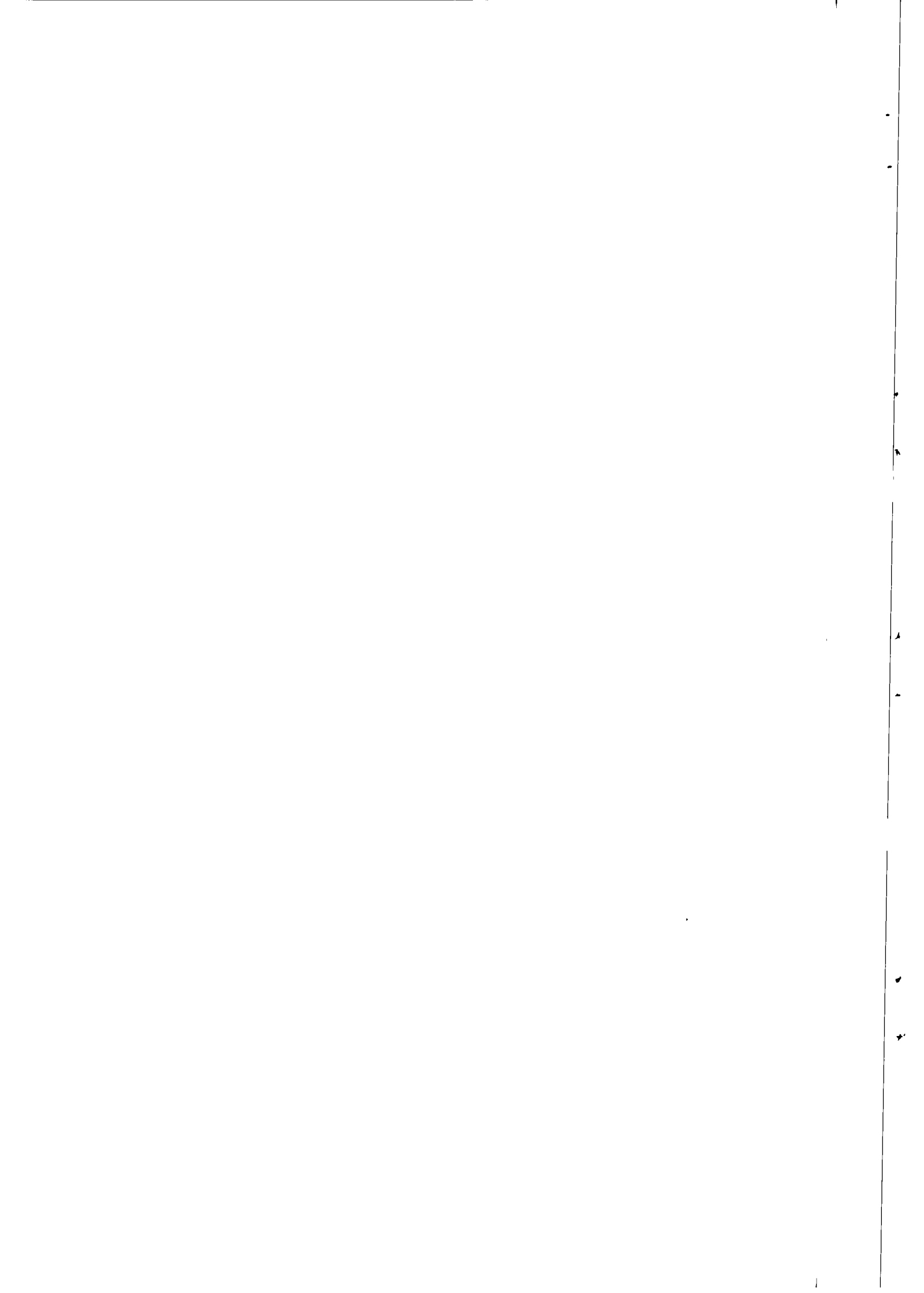
The Committee deliberated on the court order and observed that in view of the fact that the National Assembly had complied with the order, vetting could not proceed on 11th April, 2018 as scheduled, pending the outcome of the case filed. In this regard, it was agreed that the Committee tables a report in the House on the status of the vetting and that a meeting be held on Wednesday, 11th April, 2018 to consider and adopt the report for tabling.

MIN No. 106/2018: ADJOURNMENT

There being no other business to transact, the Chairperson adjourned the meeting at 12:25 p.m. till Wednesday, 11th April at 11.00 a.m. at a venue to be communicated.

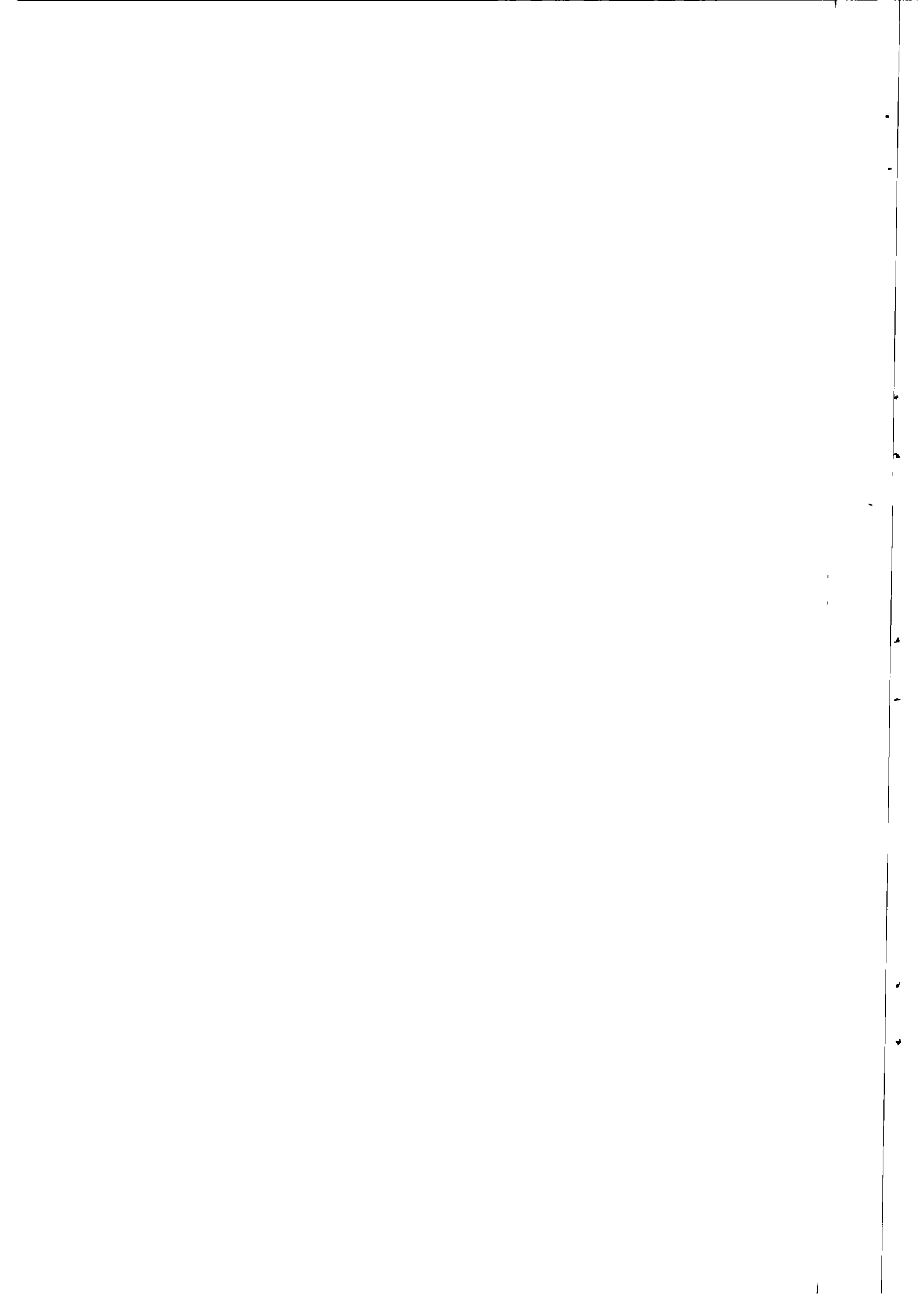
Signed.....
Chairperson

Date.....



ANNEXURE 2

(Letter from the Office of the President
conveying the name of the nominee to
the National Assembly for vetting)



VERY URGENT



D. Kinyua

THE PRESIDENCY
EXECUTIVE OFFICE OF THE PRESIDENT
CHIEF OF STAFF AND HEAD OF THE PUBLIC SERVICE

Telegraphic Address
Telephone: +254-20-2227436
When replying please quote

STATE HOUSE
P.O. Box 40530-00100
Nairobi, Kenya

Ref. No.

OP/CAB:1/40A

15th March, 2018²⁰.....

Hon. Justin Muturi, EGH
Speaker
The National Assembly
Parliament Building
NAIROBI

Noted. CNA to prepare the necessary communication.

[Signature]
SNA
20/3/18

Dear *Hon. Muturi,*

RE: NOMINEE FOR THE POSITION OF MEMBER OF THE JUDICIAL SERVICE COMMISSION [JSC]

We refer to the above subject matter.

Pursuant to Article 171(2) (c) of the Constitution of Kenya the Judges of the Court of Appeal on the 9th of March, 2018 elected Hon. Justice Mohamed Abdullahi Warsame, JA, as a member of the Judicial Service Commission.

Pursuant to Article 250 (2) (b), on behalf of His Excellency the President, I forward herewith the said nominee, Justice Mohamed Abdullahi Warsame, JA, for approval by the National Assembly.

Yours *Sincerely*
[Signature]

RECEIVED
20 MAR 2018
CLERK'S OFFICE

NATIONAL ASSEMBLY
RECEIVED
20 MAR 2018
SPEAKER'S OFFICE
P. O. Box 41842, NAIROBI.

JOSEPH K. KINYUA, EGH
HEAD OF THE PUBLIC SERVICE




RECEIVED
- 9 MAR 2018
OFFICE OF THE CHIEF
JUSTICE

FORM C
(Rule 10.7 of the Court of Appeal Election Rule, 2018)

CERTIFICATE OF ELECTION

TO THE CHIEF JUSTICE AND PRESIDENT OF THE SUPREME COURT
REPUBLIC OF KENYA
NAIROBI

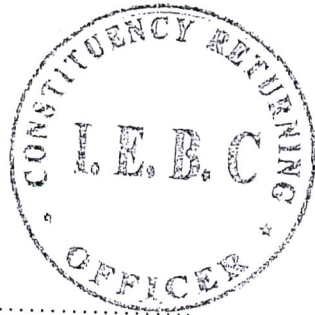

Hon. for Justice

I, BETRICE KAU HEREBY CONFIRM that MUHAMMAD WARSAME has been duly elected ~~President of the Court of Appeal~~/Representative of the Court of Appeal to the Judicial Service Commission* on the 9th day of MARCH 2012.

Dated at NAIROBI This 9th day of MARCH 2012.

Signed



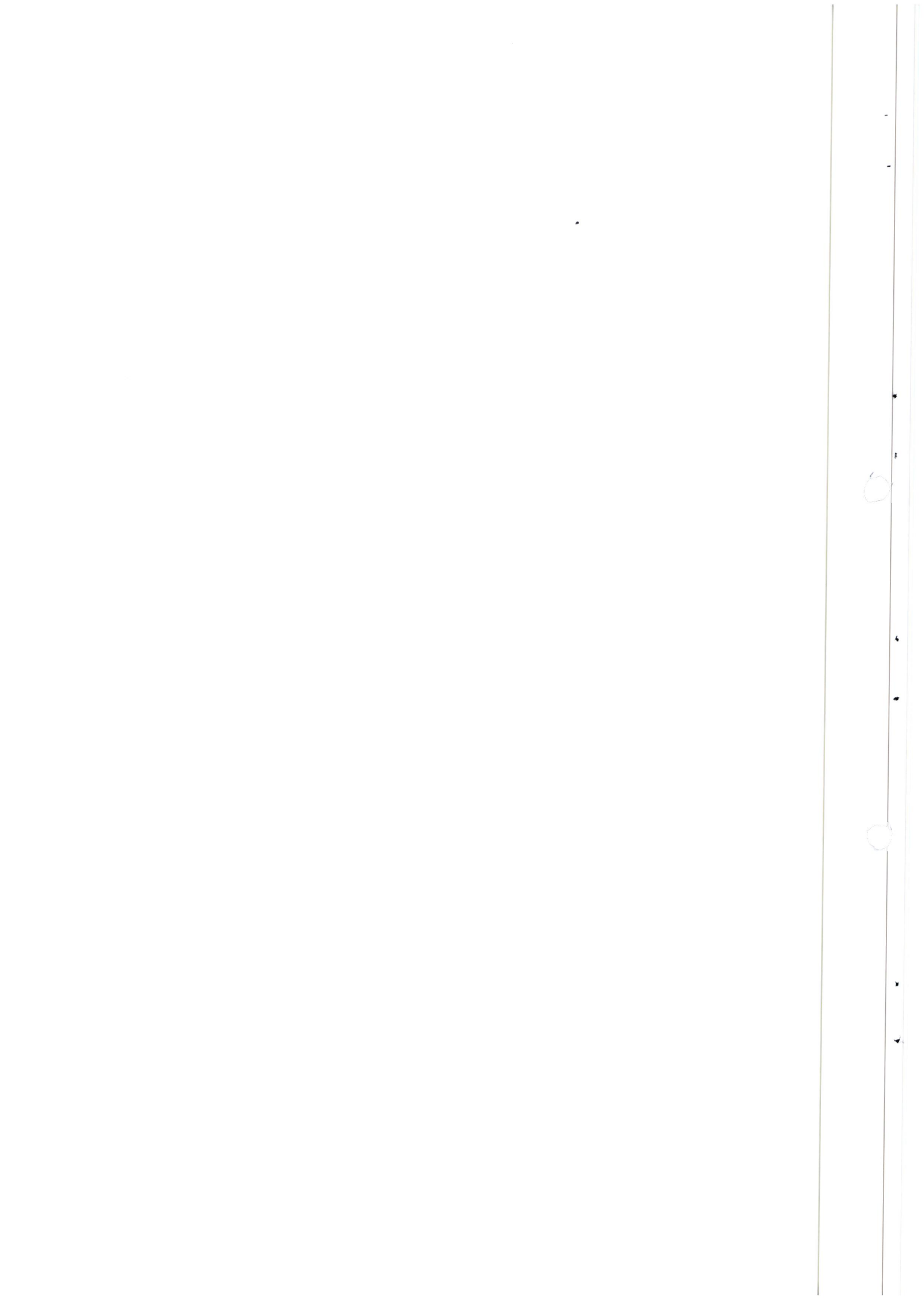


Independent Electoral and Boundaries Commission




ANNEXURE 3

(Newspaper advertisement inviting the public to submit memoranda on the suitability of the nominee for appointment)



REPUBLIC OF KENYA



**NATIONAL ASSEMBLY
TWELFTH PARLIAMENT – SECOND SESSION**

**In the Matter of Approval by the National Assembly of the
person nominated for appointment as a member of the
Judicial Service Commission**

SUBMISSION OF MEMORANDA

Pursuant to the provisions of Article 171(2)(c), the Court of Appeal has elected the **Hon. Justice Mohamed Abdullahi Warsame** as its representative in the Judicial Service Commission. Subsequently and in accordance with provisions of Article 250(2)(b) of the Constitution of Kenya as read together with Sections 3 and 5 of the Parliamentary Appointments (Parliamentary Approval) Act, 2011, His Excellency the President has forwarded the name of **Hon. Justice Mohamed Abdullahi Warsame** to the National Assembly for approval for appointment as a member of the Judicial Service Commission.

Following the receipt of the nomination, the **Departmental Committee on Justice and Legal Affairs** is mandated to vet and consider the suitability of the said Judge for appointment as a member of the Judicial Service Commission.

Pursuant to Section 6(9) of the Public Appointments (Parliamentary Approval) Act, 2011, the Departmental Committee on Justice and Legal Affairs now invites interested members of the public to submit any representations by written statement on oath (**affidavit**), that they may have contesting the suitability of the said nominee for appointment as a member of the Judicial Service Commission. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; hand-delivered to the **Office of the Clerk, Main Parliament Buildings, Nairobi**; or emailed to clerk@parliament.go.ke; to be received on or before **Wednesday, 28th March, 2018 at 5.00pm.**

**MICHAEL R. SIALAI, EBS
CLERK OF THE NATIONAL ASSEMBLY**

Jubilee
INSURANCE

HEAD OFFICE: P.O. BOX 30376-00100 GPO NAIROBI

LOSS OF LIFE POLICY DOCUMENT
POLICY NO: 206807
I.N.O. DANIEL NTAWUASA KUTATOI

Request has been made to this Company for the issue of duplicate of the above numbered policy, the original having been reported as lost or misplaced. Notice is hereby given that unless objection is lodged to the contrary at the Office of the Company within thirty days from the date of this notice, duplicate policy document will be issued, which will be the sole evidence of the contract.

Dated at Nairobi, 19th March, 2018.

[Signature]
**LYNETTE BOP
LIFE DEPARTMENT**

Jubilee
INSURANCE

HEAD OFFICE: P.O. BOX 30376-00100 GPO NAIROBI

LOSS OF LIFE POLICY DOCUMENT
POLICY NO: IL201100021006
I.N.O. DAVID MWANIKI MUGO

Request has been made to this Company for the issue of duplicate of the above numbered policy, the original having been reported as lost or misplaced. Notice is hereby given that unless objection is lodged to the contrary at the Office of the Company within thirty days from the date of this notice, duplicate policy document will be issued, which will be the sole evidence of the contract.

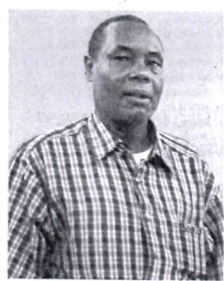
Dated at Nairobi, 19th March, 2018.

[Signature]
**LYNETTE BOP
LIFE DEPARTMENT**

Visit us at: Longonot Place,
8th Floor, Kijabe Street, Nairobi
or email: peopleads@mediamax.co.ke



Celebration of a life well lived



MR. JACKSON WANJOHI MUKINYI

It's with great sorrow that we announce the sudden death of **Mr. Jackson Wanjohi Mukinyi**.

Until his death, he was a loving son, dedicated father, caring friend to many and a hardworking businessman.

He was the son to the late Mr. John Mukinyi and Mrs. Mary Njoki Mukinyi.

Father to Ms. Rita Njoki, Ms. Matilda Wamboi and Mr. Richard Mukinyi.

He was the brother to Hannah Wangui, Charles Muthee, the late James Kariuki, Anthony Gethaiga, Esther Wanjiru, Amos Nyaga, Virginia Wanjiku, Monica Mumbi, Grace Wamboi.

Friends and family will be meeting at Jocham Hospital to view and pick the body at 10am today, Wednesday 21st March, 2018 and will thereafter, proceed to Mbaraki Cemetery in Mombasa where the service will be done and the body laid to rest.

**KAZI
MPANGO**

MON - FRI 10am-2pm

**Tujenge biashara,
familia na tuangazie
afya zetu.**



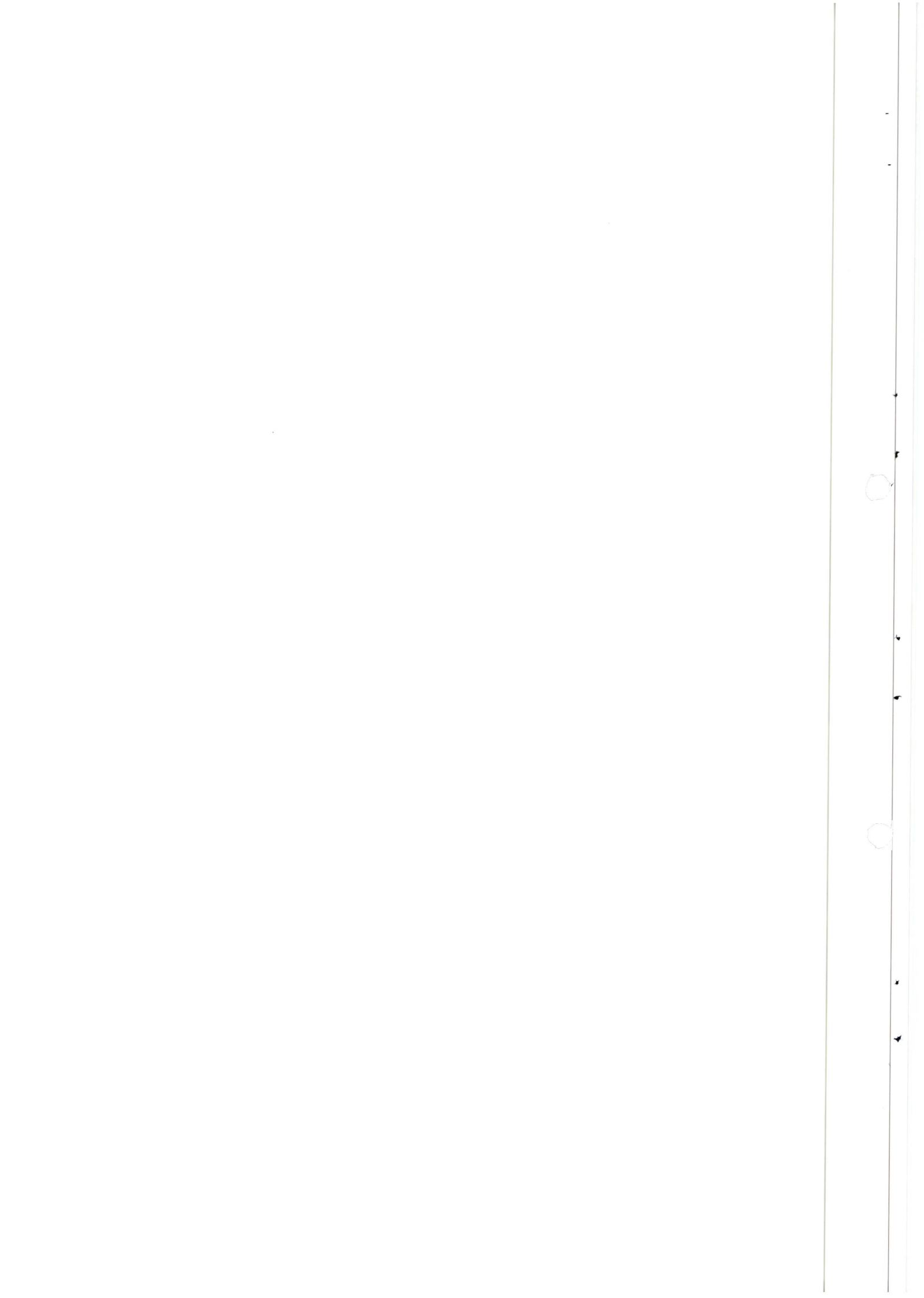
**MAMONI
Freshi
mile**

**LET YOUR
ADVERT BE
SEEN
HERE...**



ANNEXURE 4

(Court order and pleadings)



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 106 OF 2018

LAW SOCIETY OF KENYA.....PETITIONER
VERSUS
NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
HON. JUSTICE MOHAMMED ABDULAHI WARSAME.....1ST INTERESTED PARTY
JUDICIAL SERVICE COMMISSION.....2ND INTERESTED PARTY

IN CHAMBERS ON 26TH MARCH, 2018
BEFORE THE HON. LADY JUSTICE R. E. ABURILI

ORDER

UPON READING the application dated 23rd March 2018 and presented to this Court on the same day by counsel for the Petitioner/Applicant brought under rule 3 of the High Court (Practice and Procedure) Rules, 1964; Rule 17 of the High Court (Organisation and Administration) (General) Rules, 2016 and under the Vacation Rules and under Article 22 of the constitution of Kenya, 2010 AND UPON READING the Affidavit in Support of MERCY WAMBUA sworn on 22nd March 2018 together with the annexures thereto AND WHEREAS this matter coming up for exparte in Chambers;

IT IS HEREBY ORDERED:-

1. THAT the application be and is hereby certified as urgent and to be heard ex parte in the first instance.
2. THAT pending hearing of this Application inter partes a conservatory order be and is hereby issued suspending the Notice inviting the members of the public to submit representations to the National Assembly concerning the vetting of the members of the National Assembly by the DIRECTORATE OF LITIGATION & COMPLAINTS.
3. THAT pending the hearing of this Application inter partes a conservatory order do issue prohibiting: the 1st Respondent from purporting to summons or vet the 1st Interested Party as a member of the Judicial Service Commission. Equally, the 1st Interested Party be and is hereby prohibited from appearing before the 1st Respondent for vetting as a member of the Judicial Service Commission.
4. THAT the Petitioner/Applicant to serve all the parties affected by the Petition and the interim orders herein for inter partes mention on 4th April 2018 before Hon. Justice Chacha Mwita, Presiding Judge of the Court for direction/further orders.

RECEIVED FOR
SPEAKER/CLERK OF THE
NATIONAL ASSEMBLY
28 MAR 2018
BY THE DIRECTORATE OF LITIGATION & COMPLAINTS

GIVEN under my Hand and Seal of the Honourable Court at Nairobi this 26th day of March, 2018.

ISSUED at Nairobi this 27th day of MARCH 2018

hmmravabbe
DEPUTY REGISTRAR
HIGH COURT OF KENYA, NAIROBI
PENAL NOTICE

I CERTIFY THIS IS TRUE
COPY OF THE ORIGINAL
DATED: 27/3/2018
hmmravabbe
DEPUTY REGISTRAR

TAKE NOTICE that in the event of non-compliance with the above orders, you will be liable for contempt of Court punishable by imprisonment for a term not exceeding 6 months and/or fine or both. NAIROBI

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 106 OF 2018

LAW SOCIETY OF KENYA. PETITIONER
AND
NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA 1ST RESPONDENT
ATTORNEY GENERAL. 2ND RESPONDENT
HON JUSTICE MOHAMMED ABDULAHI WARSAME 1ST INTERESTED PARTY
JUDICIAL SERVICE COMMISSION. 2ND INTERESTED PARTY

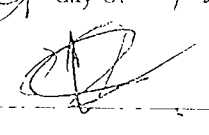
CERTIFICATE OF URGENCY

(Under the Vacation Rules and under Article 22 of the Constitution of Kenya, 2010)

I, LEMPAA SUYIANKA, Advocate of the High Court of Kenya who has the conduct of this matter on behalf of the Petitioner, do hereby certify that the Application filed urgently requires hearing at the earliest opportunity because

1. By dint of Article 171(2)(c), on 9th March, 2018 the 1st Interested Party was elected to represent the Court of Appeal at the Judicial Service Commission. Still the President has purported to nominate, and the 1st Respondent to summon or schedule for vetting, the 1st Interested Party as a member of the Judicial Service Commission.
2. The Petition seeks to invalidate the purported appointment by the President, of 1st Interested Party, as a member of the Judicial Service Commission. The Petitioner also seeks, both in the Application and in the Petition, to prohibit the scheduled vetting of the 1st Interested Party, by the 1st Respondent as a member of the Judicial Service Commission contrary to Article 171(2)(c).
3. Both the Application and Petition will be rendered nugatory if this Application is not certified urgent and duly brought before the Recess Duty Judge for directions because the 1st Interested Party would already have been subjected to an *unconstitutional vetting exercise* by the 1st Respondent - whatever the outcome. Moreover, the vetting once, conducted cannot be undone and would be a permanent blot on the Constitution. The Petition would be academic even the more if the 1st Interested Party is vetted by the 1st Respondent and found unfit while this Petition is pending. The funds and public resources spent on the illegal vetting exercise would never be recovered.

Dated at Nairobi this 23rd day of March 2018


LEMPAA SUYIANKA
ADVOCATE FOR THE PETITIONER

DRAWN AND FILED BY

Mugera, Lempaa & Karuki Advocates LLP
Vison Tower, 1st Floor
26th Muthithu Road
PO Box 59543-00200
NAIROBI
Email info@mkklawcoke

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 196 OF 2018

LAW SOCIETY OF KENYA PETITIONER
AND
NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
HON JUSTICE MOHAMMED ABDULAHI WARSAME 1ST INTERESTED PARTY
JUDICIAL SERVICE COMMISSION. 2ND INTERESTED PARTY

CHAMBER SUMMONS

*(Rule 3 of the High Court (Practice And Procedure) Rules, 1964; Rule 17 of the High Court
(Organisation and Administration) (General) Rules, 2016)*

LET PARTIES attend the Honourable Court in chambers the . . . day of . . . 2018 at
9:00 o'clock in the forenoon or soon thereafter as the Applicants may be heard on their application
FOR ORDERS.

- 1 That this Application be certified as urgent and fit to be heard *ex parte* in the first instance;
- 2 That leave be granted for this cause to be heard during this court's Easter recess
- 3 That the Respondents bear the Petitioner's costs of this Application

WHICH APPLICATION IS MADE ON THE GROUNDS THAT:

- 1 On 9th March, 2018 the 1st Interested Party was elected by the judges of the Court of Appeal as a member of the Judicial Service Commission. However, the President has purported to *nominate* the 1st Interested Party as a member of the Judicial Service Commission
- 2 Flowing from the above, on 21st April, 2018 the 1st Respondent purported to issue a public notice in the People Daily calling for Submission of Memoranda toward the vetting and ~~consideration of suitability of the 1st Respondent~~ for appointment as a member of the Judicial Service Commission notwithstanding his election by the clear terms of Article 171(2)(c)
- 3 The Petition seeks to invalidate the purported appointment by the President, of 1st Interested Party, as a member of the Judicial Service Commission. The Petitioner also seeks, both in the Application and in the Petition, to prohibit the scheduled vetting of the 1st Interested Party, by the 1st Respondent as a member of the Judicial Service Commission contrary to Article 171(2)(c)
- 4 The Applicant has hence filed a Notice of Motion application for conservatory orders

5. Both the Application and Petition will be rendered nugatory if this Application is not certified urgent and duly brought before the Recess Duty Judge for directions during the recess because the 1st Interested Party would already have been subjected to an *unconstitutional vetting exercise* by the 1st Respondent - whatever the outcome. Moreover, the vetting once conducted cannot be undone and would be a permanent blot on the Constitution.

AND WHICH application is supported by the annexed affidavit of MERCY WAMBUA and by such other grounds, reasons and arguments as may be advanced at the hearing of the Application.

Dated at Nairobi this

23rd day of March

2018


LEMPAA SUYIANKA
ADVOCATE FOR THE PETITIONER

DRAWN AND FILED BY:-

Mugeria, Lempaa & Kariuki Advocates LLP
Vision Tower, 1st Floor
26th Muthithi Road
P.O. Box 59543-00200
NAIROBI
Email: info@mlklaw.co.ke

TO BE SERVED UPON:

1. NATIONAL ASSEMBLY
2. THE ATTORNEY-GENERAL,
OFFICE OF THE ATTORNEY GENERAL,
SHERIA HOUSE,
P.O. BOX 40112 – 00100,
NAIROBI.
3. HON JUSTICE MOHAMMED ABDULAHI WARSAME
4. JUDICIAL SERVICE COMMISSION

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 106 OF 2018

LAW SOCIETY OF KENYA.....PETITIONER
AND
NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
HON JUSTICE MOHAMMED ABDULAHI WARSAME.....1ST INTERESTED PARTY
JUDICIAL SERVICE COMMISSION.....2ND INTERESTED PARTY

NOTICE OF MOTION

(Under the Vacation Rules and under Article 22 of the Constitution of Kenya, 2010)

TAKE NOTICE that this Honourable Court shall be moved on the day of
2018 at 9:00 o'clock in the forenoon or soon thereafter as the Applicants may be heard on their
application FOR ORDERS:

1. That this Application be certified as urgent and fit to be heard *ex parte* in the first instance.
2. That pending the hearing of this Application *inter partes*, a conservatory order do issue suspending the Notice inviting the members of the public to submit representations to the National Assembly concerning the vetting of the 1st Interested Party.
3. That pending the hearing of this Application *inter partes* a conservatory order do issue prohibiting: the 1st Respondent from purporting to summon or vet the 1st Interested Party as a member of the Judicial Service Commission. Equally, the 1st Interested Party be and is hereby prohibited from appearing before the 1st Respondent for vetting as a member of the Judicial Service Commission.
4. That pending the hearing and determination of the Petition a conservatory order do issue suspending the Notice inviting the members of the public to submit representations to the National Assembly concerning the vetting of the 1st Interested Party.
5. That pending the hearing and determination of the Petition a conservatory order do issue prohibiting: the 1st Respondent from summoning or vetting the 1st Interested Party as a member of the Judicial Service Commission. Equally, the 1st Interested Party be and is hereby prohibited from appearing before the 1st Respondent for vetting as a member of the Judicial Service

Commission.

6. That the Respondents bear the Petitioner's costs of this Application.

WHICH APPLICATION IS MADE ON THE GROUNDS THAT:

1. Under Article 171(2)(c) the Commission, among others, consists of one Court of Appeal judge *elected* by the judges of the Court of Appeal;
2. On 9th March, 2018 the 1st Interested Party was elected by the judges of the Court of Appeal as a member of the Judicial Service Commission
3. However, the President has purported to *nominate* the 1st Interested Party as a member of the Judicial Service Commission.
4. Flowing from the above, on 21st March, 2018 and again on 22nd March 2018 the 1st Respondent purported to issue a public notice in the People Daily and the Daily Nation newspaper respectively calling for Submission of Memoranda toward the vetting and consideration of suitability of the 1st Respondent for appointment as a member of the Judicial Service Commission – notwithstanding his election by the clear terms of Article 171(2)(c).
5. The 1st Respondent became a Commissioner of the Judicial Service Commission by operation of Article 171(2)(c) and no person or body can purport to effect his membership in the Judicial Service Commission through a process that is outside Article 171(2)(c). The Petition therefore seeks to invalidate the purported appointment by the President, of 1st Interested Party, as a member of the Judicial Service Commission because it is ultra vires the Constitution and the law. The Petitioner also seeks, both in the Application and in the Petition, to prohibit the scheduled vetting of the 1st Interested Party, by the 1st Respondent as a member of the Judicial Service Commission contrary to Article 171(2)(c) because in purporting to seek to vet the 1st Interested Party, the 1st Respondent is acting outside the constitution and without legal authority.
6. Both the Application and Petition will be rendered nugatory if this Application is not certified urgent and duly brought before the Recess Duty Judge for directions because the 1st Interested Party would already have been subjected to an *unconstitutional vetting exercise* by the 1st Respondent - whatever the outcome. Moreover, the vetting once conducted cannot be undone and would be a permanent blot on the Constitution.
7. The Petition would be academic even the more if the 1st Interested Party is vetted by the 1st

Respondent and found unfit while this Petition is pending. The funds and public resources spent on the illegal vetting exercise would never be recovered.

8. Such an outcome would occasion great prejudice to the Petitioner, the 1st Interested Party, the public and the rule of law in general. It will also occasion unnecessary use of public funds through a process that would legitimately be arrested through issuance of conservatory orders.
9. One of the orders sought in the Petition is a mandatory injunction prohibiting the 1st Respondent from summoning or vetting the 1st Interested Party as a member of the Judicial Service Commission.
10. As a result, the Petitioner gravely fears that if the vetting of the 1st Interested Party is allowed to proceed during the pendency of this Petition, the *status quo* sought to be protected by the timely institution of this action *would* have been totally wiped out rendering the Petition nugatory. The court's decision on the main Petition would be academic and of no use to the Petitioner and the public interest.
11. Thus, unless a conservatory order is issued pending the hearing and determination of this Petition the Petition will be rendered nugatory because the vetting sought to be restrained would have occurred despite the success of the Petition.
12. If the 1st Respondent and 1st Interested Party are not restrained as prayed, they would foist a *fait accompli* upon the court before delivery of its judgment. As the vetting once done cannot be reversed, a return to the *status quo* would be impossible, success of the petition notwithstanding.
13. That apart, allowing the vetting to continue at this stage, would render the question of the constitutionality of the exercise academic thus defeating the administration of justice by way of effective exercise of judicial authority and scrutiny of a vetting exercise said to have been undertaken under the Constitution. The vetting would have been carried out in continued violation of the Constitution.
14. Failure to issue a conservatory order would ultimately make the Court's final decision a *chimera* as there can be no use of a favourable determination to the Petitioner if the proceedings continue and the 1st Interested Party is unlawfully vetted by the 1st Respondent while this Petition is pending determination in Court.
15. There is no prejudice to be borne by the 1st Respondent if the vetting is delayed through a conservatory order so as to preserve the *status quo* in the short period it takes to hear and determine this Petition.

16. Any prejudice caused by the conservatory order can be mitigated by an expedited hearing of the Petition as the facts are uncontroversial and no witnesses are likely to be called. In any case, the 1st Respondent's haste in concluding the vetting is subservient to the public interest in the determination of the constitutionality of the impugned exercise.

AND WHICH application is supported by the annexed affidavit of MERCY WAMBUA and by such other grounds, reasons and arguments as may be advanced at the hearing of the Application.

Dated at Nairobi this 28th day of March 2018


LEMPAA SUYIANKA
ADVOCATE FOR THE PETITIONER

DRAWN AND FILED BY:-

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TO BE SERVED UPON:

5. NATIONAL ASSEMBLY
6. THE ATTORNEY-GENERAL,
OFFICE OF THE ATTORNEY GENERAL,
SHERIA HOUSE,
P.O. BOX 40112 – 00100,
NAIROBI.
7. HON JUSTICE MOHAMMED ABDULAHI WARSAME
8. JUDICIAL SERVICE COMMISSION

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 115 OF 2018

IN THE MATTER OF VIOLATION OF THE CONSTITUTION OF KENYA, 2010
AND
IN THE MATTER OF ARTICLES 2, 3, 10, 165, 171, 172, 232, 233, 249 AND 259 OF THE
CONSTITUTION
AND
IN THE MATTER OF THE PURPORTED VETTING OF HON JUSTICE MOHAMMED
ABDULAHI WARSAME AS A MEMBER OF THE JUDICIAL SERVICE COMMISSION
BETWEEN
LAW SOCIETY OF KENYA. PETITIONER
AND
NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA 1ST RESPONDENT
ATTORNEY GENERAL 2ND RESPONDENT
HON JUSTICE MOHAMMED ABDULAHI WARSAME 1ST INTERESTED PARTY
JUDICIAL SERVICE COMMISSION 2ND INTERESTED PARTY

PETITION

(Under the Vacation Rules and under Article 22 of the Constitution of Kenya, 2010)

TO THE HIGH COURT OF KENYA:

The Petition of Law Society of Kenya, whose address of service for the purposes of this Petition shall be:

Mugeria, Lempaa & Kariuki Advocates LLP
Viston Tower, 1st Floor
26th Muthithi Road
PO Box 59543 00200
NAIROBI
Email: info@mklaw.co.ke

A. Parties

1 The Petitioner is a statutory body established by the Law Society of Kenya Act, 2011 with a statutory mandate under section 4 to assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya, uphold the Constitution of Kenya and advance the rule of law and the administration of justice, and to protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law. The Petitioner brings this Petition on its own behalf, on behalf of its members and in the public interest.

2. The Petition is filed against the 1st Respondent, the National Assembly for its alleged violation of the Constitution giving rise to this cause of action
3. The Attorney General established under Article 156 of the Constitution as principal legal adviser of the Government, and representative of the National Government in Court or in any other proceedings, which the National Government is a party, is sued as the 2nd Respondent. He is also sued on behalf of the President who has violated the constitution by purporting to nominate the 1st Respondent when he has no power or authority to do so.
4. Hon Justice Mohammed Abdulahi Warsame the subject of the purported vetting exercise is joined as having a legitimate stake and identifiable interest in the Petition.
5. The Judicial Service Commission, whose independence is implicated by this Petition, is also joined as an Interested Party.
6. Having been duly elected under Article 171(2)(c), this Petition questions the constitutional validity of the President's purported appointment, and the 1st Respondent's purported vetting, of the 1st Interested Party as a member of the Judicial Service Commission.
7. First, the President's purported nomination of the 1st Interested Party is assailed as *ultra vires* Article 171(2)(c) of the Constitution. Second, the vetting of the 1st Interested Party is also faulted as a violation of Article 171(2)(c) of the Constitution. Third, the procedure adopted by the Respondents is impugned as *ultra vires* section 15(2) of the Judicial Service Act. Fourth, the constitutionality of section 15(2) is contested in so far as purports to give the President a role in the appointment of the members of the Judicial Service Commission appointed under made by bodies specified under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution.

B. Statutory and Constitutional Foundation of the Petition

8. The Preamble to the Constitution of Kenya, 2010 proclaims the aspiration of Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.
9. Through the concept of popular sovereignty in Article 1(1) the Constitution locates all sovereign power in the people of Kenya to be exercised only in accordance with the Constitution, including directly by the people.
10. Under Article 2, the Constitution is the supreme law of the land and it binds all persons and all State organs at both levels of government. In addition, no person may claim or exercise State

authority except as authorised under the Constitution. Ultimately, any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.

11. Articles 2(5) and (6) of the Constitution also expressly import the general rules of international law and treaties ratified by Kenya as part of our law.
12. Article 3 of the Constitution behoves the Respondents like all Kenyans and State organs to respect, uphold and defend the Constitution.
13. Article 4 establishes Kenya as a sovereign Republic and a multi-party democratic State founded on the national values and principles of governance in Article 10.
14. The national values and principles of governance enumerated in Article 10 bind all State Organs as well as everyone who applies or interprets the Constitution or any law or performs any public duty. The national values and principles of governance pertinent to this Petition include: the rule of law, democracy, participation of the people, equity, social justice, good governance, integrity, transparency and accountability.
15. Nevertheless, as the list of national values and principles of governance under Article 10 is inclusive rather than closed, the Petitioner contends that separation of powers as well as judicial independence are both national values and principles of governance under Article 10.
16. Under Article 94(1) of the Constitution, at the national level, the legislative authority of the Republic, derived from the people, is vested in and exercised by Parliament. Article 94(4) of the Constitution therefore obligates Parliament to protect the Constitution and to promote the democratic governance of the Republic.
17. Article 95(2), empowers the National Assembly, ~~aside from exercising oversight of State organs,~~ to deliberate on and resolve issues of concern to the people and to review the conduct of the President, the Deputy President and other State Officers, in office and to initiate the process of removing them from office.
18. Under Article 129, executive authority derives from the people of Kenya and must be exercised in accordance with the Constitution. Executive authority must also be exercised in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit.

19. Under Article 131, the President must:

- (a) respect, uphold and safeguard the Constitution;
- (b) safeguard the sovereignty of the Republic;
- (c) promote and enhance the unity of the nation;
- (d) promote respect for the diversity of the people and communities of Kenya; and
- (e) ensure the protection of human rights and fundamental freedoms and the rule of law.

20. Article 159 decrees that judicial authority is derived from the people, and vests in courts and tribunals established by or under the Constitution. Courts and tribunals in exercise of judicial authority must be guided by the following principles:

- (a) justice shall be done to all, irrespective of status;
- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);
- (d) justice shall be administered without undue regard to procedural technicalities; and
- (e) the purpose and principles of this Constitution shall be protected and promoted.

21. Article 160 guarantees the independence of the Judiciary and provides that in the exercise of judicial authority, the Judiciary, as constituted by Article 161, is subject only to the Constitution and the law and is not subject to the control or direction of any person or authority.

22. Under Article 165 (3)(d)(ii) of the Constitution, the High Court has jurisdiction to hear any question relating to the interpretation of the Constitution, including the determination of a question regarding whether any nomination is inconsistent with, or in contravention of the Constitution.

23. In the appointment of the Chief Justice and other judges, the Judicial Service Commission and the President have their roles balanced out under Article 166 as follows:

- (1) The President shall appoint -
- (a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly, and
- (b) all other judges, in accordance with the recommendation of the Judicial Service Commission

24 Article 248 stipulates that Chapter 15 applies to constitutional commissions including the Judicial Service Commission and independent offices *except to the extent that the Constitution provides otherwise*

25 To this end, Article 171(2) which is a *lex specialis* on the composition of the Judicial Service Commission and spells out its membership as follows

- (2) The Commission shall consist of -
- (a) the Chief Justice, who shall be the chairperson of the Commission,
- (b) one Supreme Court judge elected by the judges of the Supreme Court,
- (c) *one Court of Appeal judge elected by the judges of the Court of Appeal,*
- (d) one High Court judge and one magistrate, one a woman and one a man, elected by the members of the association of judges and magistrates,
- (e) the Attorney General,
- (f) two advocates, one a woman and one a man, each of whom has at least fifteen years' experience, elected by the members of the statutory body responsible for the professional regulation of advocates,
- (g) one person nominated by the Public Service Commission, and
- (h) one woman and one man to represent the public, not being lawyers, appointed by the President with the approval of the National Assembly

26. Comparatively, within this scheme of reference, beside the JSC, the Constitution expressly sets out the membership of certain constitutional commissions including the Commission on Revenue Allocation under (Article 215) and the Salaries and Remuneration Commission (Article 240); Public Service Commission (Article 233); National Police Service Commission (Article 246); the Controller of Budget (Article 228(2)) and the Auditor-General (Article 229(2)).

27. Otherwise, the *lex generalis* set out in Article 250(1) to (3) as to the composition and membership of constitutional commissions is as follows:

- (1) Each commission shall consist of at least three, but not more than nine, members.
- (2) The chairperson and each member of a commission, and the holder of an independent office, shall be—
 - (a) *identified and recommended for appointment in a manner prescribed by national legislation;*
 - (b) approved by the National Assembly; and
 - (c) appointed by the President.
- (3) To be appointed, a person shall have the specific qualifications required by this Constitution or national legislation.

28. The Petitioner posits that, by way of example, the National Land Commission and Teachers Service Commission are established by Article 67 and 237, respectively, but their specific composition and qualifications are amenable to the *lex generalis* in Article 250.

Judicial Service Act, 2011

29. However, Section 15(2) which contradicts the clear terms of Article 171 as to the 1st Respondent's mode of appointment in the following terms:

- (2) Where the nominations are to be made by bodies specified under Article 171(2)(b), (c), (d), (f) and (g) of the Constitution—
 - (a) the respective nominating body shall submit the name of its nominee to the President; and
 - (b) the President shall, within three days of receipt of the names, appoint the nominees as members of the Commission.

B. FACTS

30 On 9th March, 2018 the 1st Interested Party was elected by the Judges of the Court of Appeal as a member of the Judicial Service Commission

31 However, the President has purported to *nominate* the 1st Interested Party as a member of the Judicial Service Commission

32 Flowing from the above, on 21st March, 2018 the 1st Respondent purported to issue a public notice in the People Daily and again on March 22, 2018 in the Daily Nation calling for Submission of Memoranda toward the vetting and consideration of suitability of the 1st Respondent for appointment as a member of the Judicial Service Commission - notwithstanding his election by the clear terms of Article 171(2)(c)

33 The Petition therefore seeks to invalidate as unconstitutional the purported appointment by the President, of 1st Interested Party, as a member of the Judicial Service Commission together with the 1st Respondent's purported vetting of the 1st Interested Party, a member of the Judicial Service Commission by *election*, contrary to Article 171(2)(c)

C. Particulars of Unconstitutionality

(a) *"Nomination" and "vetting" of the 1st Interested Party contrary to Article 171(2)(c)*

34 First, the Petitioner asserts that the purported "appointment" of the 1st Interested Party, a duly elected member of the Judicial Service Commission under Article 171(2)(c), violates Article 171(2)(c) of the Constitution which only provides for his *election*.

35. Second, the Petitioner abnegates the National Assembly's purported intended vetting of the 1st Respondent by the clear terms of Article 171(2)(c) there is neither constitutional necessity nor provision for such vetting.

36 Third, the 1st Respondent having in the recent past rightly or wrongly waived the vetting of re-appointed public officials, to purport to vet the 1st Interested Party on his re-election to the Judicial Service Commission is discriminatory and arbitrary hence unconstitutional

37 Fourth, assuming section 15(2) were not invalid as pleaded below, the President's failure to nominate the 1st Interested Party, within three days of receipt of his name, as a member of the Commission is *ultra vires* section 15(2)(c)

(b) *Constitutionality of Section 15 of the Judicial Service Act,*

38 In so far as section 15(2) of the Judicial Service Act, 2011 purports to give the President any

role in the nomination and appointment of a person elected under Article 171(2)(b), (c), (d), and (f) and by extension allows for and the 3rd Respondent a role in the approval of the members of the Judicial Service Commission under Article 171(2)(b), (c), (d) and (f) of the Constitution the same is null and void and of no effect in law.

(c) *Constitutional Supremacy, Judicial Independence and Separation of Powers*

39. As a result, the purported nominations of the 1st Interested Party amounts to a claim or exercise of state authority, contrary to the Constitution, which is invalid and of no effect in law. The Petitioner submits that the list of national values and principles of governance is not closed and includes separation of powers and judicial independence. The move as conceived and carried out blurs the separation of powers between the Executive and the Judiciary and constitutes a direct threat to judicial independence secured under Articles 160(1) and 172(1) through the Judicial Service Commission.
40. The Petitioner submits that the Respondents' actions attacks the tenets of separation of powers and judicial independence, lying at the heart of the Constitution and which if left unchecked would destroy the foundation of Kenya's sovereignty and nationhood.
41. Also the nominations as conceived are meant to and indeed do interfere with the 1st Interested Party's status, function and public perception as a member of an independent constitutional commission by *election*.
42. All in all, the substantive defects in procedure and fundamental omissions in the purported nomination and vetting of the 1st Interested Party, a member of the Judicial Service Commission, by election, renders the various omissions and processes individually and cumulatively unconstitutional and irreparably flawed.

D. Reliefs

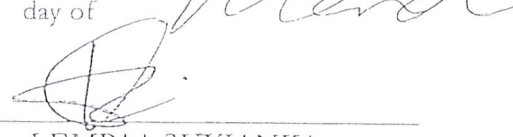
43. As a consequence of which your humble Petitioner pleads with the Court to be granted the following:

- (a) A declaration be and is hereby issued that the purported nomination and vetting of the 1st Interested Party, by the President and the 1st Respondent respectively, as a member of the Judicial Service Commission is unconstitutional and invalid;
- (b) A declaration that the 1st Interested Party automatically became a member of the Judicial Service Commission by operation of Article 171(2)(c) upon his election by the

judges of the Court of Appeal.

- (c) A declaration that to the extent that in purpose and/or effect Section 15(2) of the Judicial Service Act, 2011 purports to give the President any role in the nomination and appointment of a person elected under Article 171(2)(b), (c), (d), and (f) and in effect allows the 3rd Respondent a role in the approval of the members of the Judicial Service Commission elected under Article 171(2)(b), (c), (d) and (f) of the Constitution the same is null and void and of no effect in law.
- (d) A permanent injunction do issue prohibiting the 1st Respondent from purporting to vet the 1st Interested Party.
- (e) An Order do issue invalidating the purported nomination by the President of the 1st Interested Party as a member of the Judicial Service Commission.
- (f) The 1st and 2nd Respondents bear the Petitioner's costs while the Interested Parties can each bear their own costs.

Dated at Nairobi this 28th day of March 2018


LEMPAA SUYIANKA
ADVOCATE FOR THE PETITIONER

DRAWN AND FILED BY:-

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TO BE SERVED UPON:

1. NATIONAL ASSEMBLY
2. THE ATTORNEY-GENERAL,
OFFICE OF THE ATTORNEY GENERAL,
SHERIA HOUSE,
P.O. BOX 40112 - 00100,
NAIROBI.
3. HON JUSTICE MOHAMMED ABDULAHI WARSAME
4. JUDICIAL SERVICE COMMISSION

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 106 OF 2018

LAW SOCIETY OF KENYA.....PETITIONER
AND
NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA.....1ST RESPONDENT
ATTORNEY GENERAL.....2ND RESPONDENT
HON JUSTICE MOHAMMED ABDULAHI WARSAME.....1ST INTERESTED PARTY
JUDICIAL SERVICE COMMISSION.....2ND INTERESTED PARTY

AFFIDAVIT IN SUPPORT OF THE PETITION AND APPLICATIONS

I, MERCY WAMBUA, an adult person of sound mind, a citizen of the Republic of Kenya of P.O. Box 72219-00200 NAIROBI do solemnly make oath and state as follows:

1. I am the Secretary to the Petitioner's Council and the Chief Executive Officer of the Petitioner herein, duly authorized and familiar with the facts in issue and hence competent to swear this affidavit.
2. On 9th March, 2018 the 1st Interested Party was elected by the judges of the Court of Appeal as a member of the Judicial Service Commission.
3. However, the President has purported to *nominate* the 1st Interested Party as a member of the Judicial Service Commission.
4. Flowing from the above, on 21st March, 2018 and on 22nd March 2018 the 1st Respondent purported to issue a public notice in the People Daily and the Daily Nation respectively calling for Submission of Memoranda toward the vetting and consideration of suitability of the 1st Respondent for appointment as a member of the Judicial Service Commission – notwithstanding his election by the clear terms of Article 171(2)(c). *I annex copies of the notice published in the People Daily and Daily Nation marked as "MW-1 and MW-2.*
5. The Petition therefore seeks to invalidate as unconstitutional the purported appointment by the President, of 1st Interested Party, as a member of the Judicial Service Commission together with the 1st Respondent's purported vetting of the 1st Interested Party, a member of a member of the Judicial Service Commission by *election*, contrary to Article 171(2)(c).
6. The Petition seeks to invalidate the purported appointment by the President, of 1st Interested Party, as a member of the Judicial Service Commission. The Petitioner also seeks, both in the Application and in the Petition, to prohibit the scheduled vetting of the 1st Interested Party, by the 1st Respondent as a member of the Judicial Service Commission contrary to Article 171(2)(c).

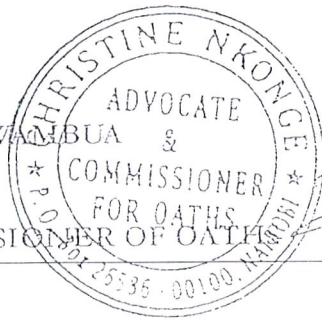
7. The Petitioner asks questions the constitutionality of Section 16(2) of the Judicial Service Act to determine whether that provision purports to curtail the President's powers to nominate persons elected to be members of the Judicial Service Commission under Article 167(2)(b), (c), (d) and (f).
8. Both the Application and Petition will be rendered nugatory if this Application is not certified urgent and duly brought before the Recess Day Judge for directions because the 1st Interested Party would already have been subjected to an *unconstitutional vetting exercise* by the 1st Respondent - whatever the outcome. Moreover, the vetting once conducted cannot be undone and would be a permanent blot on the Constitution.
9. The Petition would be academic even the more if the 1st Interested Party is vetted by the 1st Respondent and found unfit while this Petition is pending. The funds and public resources spent on the illegal vetting exercise would never be recovered.
10. Such an outcome would occasion great prejudice to the Petitioner, the 1st Interested Party, the public and the rule of law in general. It will also occasion unnecessary use of public funds through a process that would legitimately be arrested through issuance of conservatory orders.
11. One of the orders sought in the Petition is a mandatory injunction prohibiting the 1st Respondent from summoning or vetting the 1st Interested Party as a member of the Judicial Service Commission.
12. As a result, the Petitioner gravely fears that if the vetting of the 1st Interested Party is allowed to proceed during the pendency of this Petition, the *status quo* sought to be protected by the timely institution of this action *would* have been totally wiped out rendering the Petition nugatory. The court's decision on the main Petition would be academic and of no use to the Petitioner.
13. Thus, unless a conservatory order is issued pending the hearing and determination of this Petition the Petition will be rendered nugatory because the vetting sought to be restrained would have occurred despite the success of the Petition.
14. If the 1st Respondent and 1st Interested Party are not restrained as prayed, they would tout a *fait accompli* upon the court before delivery of its judgment. As the vetting once done cannot be reversed, a return to the *status quo* would be impossible, success of the petition notwithstanding.
15. That apart, allowing the vetting to continue at this stage, would render the question of the constitutionality of the exercise academic thus defeating the administration of justice by way of

effective exercise of judicial authority and scrutiny of a vetting exercise said to have been undertaken under the Constitution. The vetting would have been carried out in continued violation of the Constitution.

16. Failure to issue a conservatory order would ultimately make the Court's final decision a *chimera* as there can be no use of a favourable determination to the Petitioner if the proceedings continue and the 1st Interested Party is unlawfully vetted by the 1st Respondent while this Petition is pending determination in Court.
17. There is no prejudice to be borne by the 1st Respondent if the vetting is delayed through a conservatory order in order to preserve the *status quo* in the short period it takes to hear and determine this Petition.
18. Any prejudice caused by the conservatory order can be mitigated by an expedited hearing of the Petition as the facts are uncontroversial and no witnesses are likely to be called. In any case, the 1st Respondent's haste in concluding the vetting is subservient to the public interest in the determination of the constitutionality of the impugned exercise.
19. I depose this affidavit in support of the Petition as well as the Notice of Motion application for conservatory orders in preservation of the status quo, pending the hearing and determination of the Petition, based on facts within my knowledge and believing it to be in accordance with the Oaths and Statutory Declarations Act, Cap 20.

Sworn at Nairobi this 22nd day of March 2018

MERCY WAMBUA
COMMISSIONER OF OATHS



DEPONENT

DRAWN AND FILED BY:

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