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THE NATIONAL ASSEMBLY
ELEVENTH PARLIAMENT
FIRST SESSION (2013)

REPORT

OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL
AFFAIRS

ON THE APPROVAL FOR APPOINTMENT OF LADY JUSTICE
KAPLANA HASMUKHRAI RAWAL TO THE POSITION OF
DEPUTY CHIEF JUSTICE OF THE REPUBLIC OF KENYA

Clerk's Chambers,
Parliament Buildings,
NAIROBI.

28TH MAY, 2013

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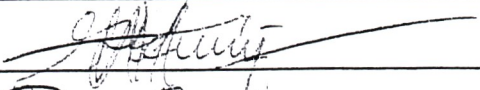
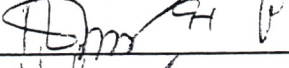


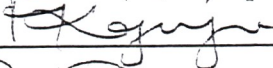


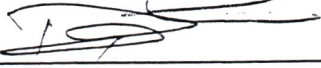


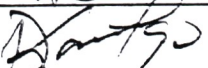

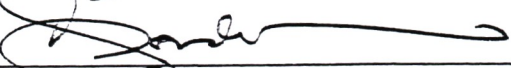

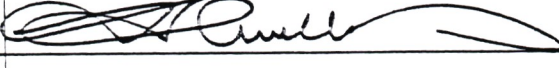

THE NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

ATTENDANCE REGISTER

ADOPTION OF TITLE
REPORT

DATE...28/5/13

	NAME	SIGNATURE
1	Samuel K. CHEPKWIA	
2	TOSES K. CHEBOI	
3	J. M. WAIGANJO	
4	Bishop Mutemi	
5	Fatma Ibrahim	
6	PRISCILLA NYOKARI	
7	FLORENCE KAJUJU	
8	BEN MUMMANI	
9	JOHN WILSON ABISI	
10	DAVID OCHIENG	
11	PAUL K. BUI	
12	JOHN NYIROGE	
13	Kangogo Bowen	
14	BENSON MUIURA	
15	PSISA KADUMA	
16	WILHELMUS KILIAN	
17	Sammy Iseli	
18	B. O. OISIJA	

1.0 PREFACE

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order No. 199, it is my pleasure and duty to present to the House, the Committee's Report on the vetting of the Deputy Chief Justice nominee, Hon. Lady Justice Rawal Hasmukhrai Kalpana

1.1 Committee Membership

The Committee on Justice and Legal Affairs was constituted by the House on Thursday 16th May, 2013 comprising of the following members:

1. **Hon. Samuel Chepkonga, M.P.,.....Chairperson**
2. Hon. Priscilla Nyokabi, M.P.....Vice-Chairperson
3. Hon. Muriithi Waiganjo, M.P
4. Hon. Ndirangu Waihenya, M.P
5. Hon. Florence Kajuju, M.P
6. Hon. Kang'ata Irungu, M.P
7. Hon. Benson Mutura, M.P
8. Hon. Olago Aluoch, M.P
9. Hon. John Njoroge M.P
10. Hon. William Cheptumo, M.P
11. Hon. Njoroge Baiya, M.P
12. Hon. Mohamed Abdi, M.P
13. Hon. Kangongo Bowen, M.P
14. Hon. Sammy Koech, M.P
15. Hon. Moses Cheboi, M.P
16. Hon. Paul Bii, M.P
17. Hon. Charles Gimose, M.P
18. Hon. Johanna Ngeno, M.P
19. Hon. Boniface Otsiula, M.P
20. Hon. David Ouma Ochieng, M.P
21. Hon. Neto Agostinho, M.P
22. Hon. Dr. Christine Olumbaka, M.P
23. Hon. Kaluma Peter, M.P
24. Hon. Fatuma Ibrahim, M.P
25. Hon. Ben Momanyi Orori, M.P
26. Hon. Munuve Mati John, M.P
27. Hon. Ken Okoth, M.P
28. Hon. T.J Kajwang', M.P
29. Hon. Mutua Mutemi, M.P

1.2 Mandate of the Committee

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing Order No. 216 (5) which outline 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 the 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 Cabinet Secretary;
- f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments); and
- g) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.
- h) In accordance with Second Schedule of the Standing Orders, the Committee is mandated to consider:-
 - i. Constitutional Affairs
 - ii. The administration of Law and Justice
 - iii. The Judiciary
 - iv. Public prosecutions
 - v. Elections
 - vi. Ethics, Integrity and anti-corruption and
 - vii. Human rights

1.3 Nomination of the Deputy Chief Justice

Pursuant to Article 166 (1) (a) of the Constitution as read with section 24 (2) of the sixth Schedule thereto, H.E the President, through the Secretary to the Cabinet and Head of the Public Service forwarded to the Clerk of the National Assembly, the name of **Hon. Lady Justice Rawal Hasmukhrai Kalpana** vide letter dated the 28th of February, 2013, for vetting by the Departmental Committee on Justice and Legal Affairs and consideration for approval by the National Assembly for appointment as Deputy Chief Justice of the Republic of Kenya.

On Wednesday 15th May, 2013, the Honourable Speaker in a Communication to the House, informed the House that the Clerk of the National Assembly had by a letter dated 28th February, 2013 by Head of the Public Service received the name of **Hon. Lady Justice Kaplana Hasmukhrai Rawal** and directed that the name and Curriculum vitae of the said nominee be referred to the Departmental Committee on Justice and Legal Affairs for vetting and reporting to the House on or before Tuesday 28th May, 2013

1.4 Committee Meetings

The Committee held seven sittings during which the said nominee appeared before the Departmental Committee on Justice and legal Affairs on Friday 24th May, 2013 and was vetted in accordance with the Public Appointments (Parliamentary Approval) Act No.33 of 2011 for appointment to the position of Deputy Chief Justice of the Republic of Kenya.

1.5 Acknowledgements

- a. The Committee wishes to sincerely thank the Offices of the Speaker and the Clerk of the National Assembly for the necessary support extended to it in the execution of its mandate.
- b. The Chairperson of the Committee takes this opportunity to thank all Members of the Committee for their patience, sacrifice, endurance and Commitment to Public Service under tight schedules which enabled us to complete the task within the stipulated period.
- c. The Committee wishes to record its appreciation for services rendered by the staff of the National Assembly attached to the Committee. Their efforts and input made the work of the Committee and production of this Report possible.
- d. Finally, it is now my pleasant duty, on behalf of the Departmental Committee on Justice and Legal Affairs, to present and recommend this report on the nomination of **Hon. Lady Justice Kaplana Hasmukhrai Rawal** to the House for adoption pursuant to Standing Orders of the National Assembly and other enabling provisions of the Law.

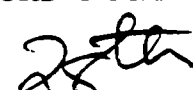
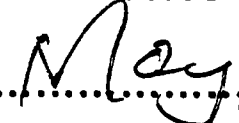
Thank you.

Signed.....

The Hon. Samuel Chepkon'ga, M.P

(Chairperson)

Departmental Committee on Justice and Legal Affairs

Dated this  day of , 2013

2.0 BACKGROUND

2.1 Establishment of the Departmental Committee on Justice and Legal Affairs

The Departmental Committee on Justice and Legal Affairs is one of the Departmental Committees established under Standing Order No.216 (1) with the Mandate to consider for approval by the House, appointments of the Chief Justice and Deputy Chief Justice under Article 166(1) (a) of the Constitution. The said Article requires H.E the President to nominate and with the approval of the National Assembly, appoint the Chief Justice and the Deputy Chief Justice in accordance with the recommendations of the Judicial Service Commission Section 7(10) of the Public Appointments (Parliamentary Approval) Act 2011, provides that;

“Where the nomination of a candidate is rejected by Parliament, the appointing authority may submit to the relevant House the name of another candidate, and the procedure for approval specified in this Act shall apply accordingly’.

The position of Deputy Chief Justice is established under Article 161 (2) (b) of the Constitution of Kenya, 2010. The Article provides that;

“There is established the office of Deputy Chief Justice, who shall be the Deputy Head of the Judiciary and.....”

Under Article 163 (1) (b) of the Constitution, the Deputy Chief Justice is designated as playing the role to deputise the Chief Justice and be the Vice-President of the Supreme Court.

2.2 Appointment Process of the Deputy Chief Justice Nominee

- 1) The Position of Deputy Chief Justice fell vacant after the resignation of Hon. Lady Justice Nancy Makokha Barasa following recommendations made by a Tribunal appointed by the President on

the advice of the Judicial Service Commission Section to inquire into her suitability to continue serving as Deputy Chief Justice.

- 2) The position of Deputy Chief Justice of the Republic of Kenya was declared vacant by the Judicial Service Commission and advertised under advert No.14/2012.
- 3) The Judicial Service Commission received a total of eighteen (18) applications for the advertised position of Deputy Chief Justice.
- 4) The names of all the applicants for the position of Deputy Chief Justice and the shortlisted candidates were published in the print media on January 23rd, 2013 and oral interviews conducted from 18th to 20th February, 2013 at the Hon. Chief Justice's Boardroom, on ground floor, Supreme Court Building, Taifa/City Hall Way.
- 5) Oral interviews were conducted for five (5) shortlisted candidates only.
- 6) A letter from the Office of the Permanent Secretary, Secretary to the Cabinet and Head of Public Service dated 28th February, 2013, to the Clerk of the National Assembly indicated that His Excellency the President has nominated the **Hon. Lady Justice Kaplana Hasmukhrai Rawal** to be considered for appointment as the Deputy Chief Justice of the Republic of Kenya.
- 7) On May 15, 2013, the Honourable Speaker in a communication to the House referred the name of the nominee to the Departmental Committee on Justice and Legal Affairs for vetting and directed the Committee to submit its recommendations on the nominee to the House on or before Tuesday 28th May, 2013.
- 8) The Public was expected to participate in the vetting process through submission of memoranda (affidavit) on the suitability or otherwise of the nominee. On 17th May, 2013, the Clerk of the National Assembly placed an advertisement in the print media inviting the public to submit memoranda by Thursday 23rd May, 2013 at 5.30 p.m on the suitability or otherwise of the said nominee pursuant to section 6(9) of the public Appointments (parliamentary Approval) Act 2011.

- 9) The Committee resolved that the Judicial service Commission should submit its report on the interview of the applicants to the position of Deputy Chief Justice for perusal and consideration by the Committee.
- 10) The Committee received the report from the Chief Registrar of the Judiciary on Thursday 23rd May; 2013. The report had information from Ethics and Anti-corruption Commission, Higher Education Loans Board (HELB), National Intelligence Services (NIS), Criminal Investigation Department (CID) and the Kenya Revenue Authority (KRA).

3.0 VETTING OF THE DEPUTY CHIEF JUSTICE NOMINEE

In conducting the vetting process, the Departmental Committee on Justice and Legal Affairs examined the nominee against the following criteria, amongst others, in accordance with the Public Appointments (Parliament Approval) Act No.33 of 2011.

- (i) Academic qualifications
- (ii) Employment record
- (iii) Professional affiliations
- (iv) Potential conflict of interest
- (v) Knowledge of the relevant subject
- (vi) Overall suitability for the position
- (vii) Tax compliance
- (viii) Integrity and morality
- (ix) Jurisprudence
- (x) Vision, leadership and judicial reforms
- (xi) Access to justice
- (xii) Expectations and key priorities

During its sitting held on Friday 24th May, 2013, the committee conducted vetting of the nominee for appointment as Deputy Chief Justice.

3.1 Appearance before the Committee by the Nominee

The Hon. Lady Justice Rawal Hasmukhrai Kalpana appeared before the Justice and Legal Affairs Committee on Friday 24th May, 2013 and was informed by the Chairperson that despite inviting Memoranda from the Public on her suitability or otherwise for appointment to Judicial office other than an affidavit supporting her nomination by Hon. Lady Justice

Roselyn Nambuye representing the Kenya Women Judges Association. The nominee was also informed that the Committee received a letter with adverse allegations by a former Member of Parliament; Hon. Gor Sunguh M.P. The letter was rejected by the Committee for want of compliance with the law. The nominee responded to questions put to her by Members of the Committee as follows;

On self introduction, knowledge, experience, qualification and Context within the Judiciary;

She informed the Committee that the position of Deputy Chief Justice is a top judicial position requiring a person who is well grounded in law. She previously served at the Bar as the first female advocate to set up a private legal practice in Kenya, Commissioner of assize, High Court Judge and currently she is a Judge of the Court of Appeal of Kenya thus qualified to serve at the highest level.

She further informed the Committee that she is an experienced Judge and not only an insider in the Judiciary but also an insider to the Bar. The Judiciary is undergoing a transformation and as an insider it's an advantage to the institution. The Structure of the Judiciary which has seven directorates need to be reviewed and expansion of the Supreme Court is worth considering.

In addition, the Judiciary has a vibrant team led by the Chief Justice and the Chief Registrar of the Judiciary among other People she can work with for an improved and reformed Judiciary.

The however stated that Backlog of Cases is ailing the Judiciary. 'This is a global problem and Kenya is not an exception and should not be an excuse and therefore there is need for concerted efforts to continue pursuing collective measures towards expeditious disposal of cases through an effective case management system', she said.

On Vision and reforms she explained as follows:

- Alternative dispute resolution should be taken seriously to decongest the court system. Mediation as a method of settlement of disputes

was incorporated in the Civil Procedure Act 2010 with her input while serving on the Rules Committee.

- Traditional or cultural methods of settlement of disputes are key in promoting alternative disputes methods.
- Legal training need to be properly designed to maintain Standards. Continuous reading of legal literature is one of the best ways to maintain standards of members of legal fraternity.
- Review of terms of service for judicial officers is key towards instilling integrity in the institution. The Judiciary is in dire need of a transparent policy to come up with measures to address the plight of lower cadres of the institution. She floated the need for a policy to have a pool of vehicles to be deployed to offer transport services to Magistrates.

On competence, demeanour, presentation, Jurisprudence, integrity and Morality, the Nominee informed the Committee as follows:

First, the Judiciary need to balance the interests of the Society. She is a Pragmatic lawyer backed by her legal philosophy of judicious activism rather than judicial activism.

Secondly, the Vetting Board of Judges and Magistrates probed her on most of the issues being raised by the Committee and was acquitted on all of them and recommended as fit to continue serving on the Bench.

Thirdly she stated that a Judge at times studiously makes decisions that are meant to avert calamities in a given Society. She made an order to exhume a body without a prayer for the same in that particular case and qualifies it in a manner that at times courts have to embrace judicial activism. On reflection, she may do it differently in another forum.

With regard to integrity, she stated that Kenya as a Society is not prone to integrity and perhaps that is why corruption thrives in our institutions. Credibility is key to judicial officials and that People's perceptions cannot be changed especially when a Judge make Judgment unfavourable to some litigants.

In addition, she is firm and steadfast this has been seized by her critics to paint her as temperamental and yet her stance is simply meant to confront advocates tricks and delaying tactics.

In the Supreme Court, 'law is law' and the Judges are not bound to give a popular judgment or ruling but in accordance to the law. One School of thought is not static but rather dynamic because it varies from one branch of law to another depending on the Subject matter of the issues for determination.

She has also made contribution on social matters especially to the development of Children's law through her decision on parental responsibility as a joint responsibility as opposed to a mother's responsibility was incorporated in the Children's Act.

On controversial cases presided by the Nominee, she responded as follows;

The case instituted by Mr. George Oraro, SC against a former Member of Parliament, Hon. Gor Sunguh, M.P was about defamation of Character in a statement made by the former honourable Member of Parliament at a time he was the Chairman of a Parliament Committee probing the disappearance and subsequent murder of former Foreign Affairs Minister Dr.Robert Ouko. This was a simple case of defamation given that the Statement was not made within the precincts of Parliament.

She has also presided over sensitive matters such as the murder of Dr. Odhiambo Mbai and chaired a Commission of inquiry into the circumstances that led to the helicopter crash that killed former Minister for Internal Security Hon. Prof. George Saitoti, M.P and his assistant Hon. Orwa Ojode, M.P their aides and the two pilots. The fact that she has had an opportunity to be appointed in such critical matters does not in any way imply that she is a gate keeper of the Executive.

On Administration, management and good governance the nominee stated that;

An appointment as Deputy Chief Justice to serve on a male dominated Supreme Court Bench should not be interpreted as a disadvantage but rather an advantage to the Supreme Court because she considers herself as a Judge rather than a woman. The role of a Judge is like a handmaiden and thus should be construed as such in so far as technical and substantive nature of the law is concerned.

The Judiciary is in a transformative era where the High Court is being decentralised to all Counties and the Court of Appeal is being decentralised on regional basis across the Country and that is why the input of the Departmental Committee on Justice and legal affairs is needed to support whatever policy proposals made towards this goal.

The Judges remuneration is protected in the Constitution and she is only ready to take a pay-cut so long it is channelled to support a charitable cause and can be accounted for.

The Nominee observed that job description of the Deputy Chief Justice is provided for under the Constitution and that is to deputise the Chief Justice.

4.0 COMMITTEE'S OBSERVATIONS

The Committee having considered the curriculum vitae of Hon. Lady Justice Rawal Kalpana Hasmukhrai and having heard her submissions during the vetting, made the following observations on her nomination:-

- i). That Hon. Lady Justice Rawal Kalpana Hasmukhrai was born in India on 15th January, 1946 and is a Kenyan Citizen by Marriage. She has over forty (40) years legal experience.
- ii). She holds a Bachelors degree in arts (B.A)-first class from St.Xaviers College, Ahmedabad, Bachelors degree in Law (LLB) (Hon) from Gujarat University, New Law College, Ahmedabad and Masters in Law (LL.M)-Distinction from Gujarat University, New College. She also attended a specialized training course in administrative Law at Pitt University, Pennsylvania.
- iii). She is currently a Judge of the Court of Appeal of Kenya after being appointed in January 2012,
- iv). She has previously served as Vice-Chairperson of the Kenya Women Judges Association, Chairperson of the Judiciary Equality Programme for Women and Children under the auspices of the Kenya Women Judges Association, Chairperson of the Sub-Committee on Improvement of Criminal Justice System, Member of the Expeditious Disposal of Cases Committee, Member of the Rules Committee established under the Civil Procedure Act, Presiding Judge in Criminal and Family Divisions, Duty Judge in Civil Division of the High Court, Liaison Judge for Kenya in the International Criminal Court, International Hague Network of Judges, assisted International Criminal Court in recording witness statements and most recently was appointed to Chair the Commission of Inquiry into the causes and circumstances leading to a fatal accident involving an aircraft in Kibiko, Ngong Forest.

- v). She has served with determination in expeditious disposal of cases. For example; she delivered a record number of judgments in a year in the High Court of Kenya and helped improve the efficiency of several High Court Divisions.
- vi). She has fully complied with his tax obligations to the State and has never been dismissed from office for contravention of provisions of Article 75 of the Constitution which deals with conduct of state officers or adversely mentioned in any investigatory report of Parliament or any Commission of Inquiry;
- vii). She is not a member of any political party and does not expect any conflict of interest to arise;
- viii). She has never been charged in a court of law for any offence;
- ix). The Nominee holds an opinion inconsistent with Article 167 of the Constitution on retirement and holds that it should be seventy four (74) years. However the correct retirement age is 70 year
- x). The Nominee did not demonstrate a clear view of, human rights and was not clear on her legal philosophy.
- xi). There seems to be no succession plan because both the Chief Justice and the Nominee herein will attain retirement age at the same time.
- xii). The Committee observed that whereas the nominee demonstrated understanding of administration and Management, she could not reconcile the same with the strategic plan of the Judiciary.
- xiii). The Committee found the Nominee to be honest in her responses.
- xiv). The Committee found her suitable and qualified for appointment as Deputy Chief Justice.

5.0 RECOMMENDATIONS OF THE COMMITTEE

THAT Pursuant to Article 166 (1) (a) of the Constitution and Standing Order No.199, the Committee recommends that:-

1. This House approves the Hon. Lady Justice Kalpana Hasmukhrai Rawal for appointment by H.E the President as Deputy Chief Justice of the Republic of Kenya.
2. Noting that the Chief Justice and the Deputy Chief Justice will exit office almost at the same time, a transitional plan should be put in place to provide for seamless transition.

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