

**EVIDENCE TAKEN BEFORE THE SENATE SPECIAL COMMITTEE
INVESTIGATING THE PROPOSED REMOVAL FROM OFFICE BY
IMPEACHMENT OF THE GOVERNOR AND DEPUTY GOVERNOR OF
EMBU COUNTY HELD ON THURSDAY, 13TH FEBRUARY, 2014, AT
THE AMPITHEATRE, KENYATTA INTERNATIONAL CONVENTION
CENTRE AT 10.35 A.M.**

[The Chairperson - Sen. (Dr.) Khalwale]

SENATORS PRESENT

Sen. Kipchumba Murkomen	-	Vice Chairperson
Sen. Kimani Wamatangi		Sen. Zipporah Kittony
Sen. (Prof.) Wilfred Lesan		Sen. Naisula Lesuuda
Sen. Peter Mositet		Sen. James Orengo
Sen. Boy Juma Boy		Sen. (Eng.) Hargura Godana
Sen. Judith Sijeny		Sen. Mutula Jnr.

SECRETARIAT

Mr. Jeremiah Nyegenye	-	Clerk of the Senate
Ms. Eunice Gichangi	-	Director, Legal Services
Mr. Anthony Njoroge	-	Director, Litigation & Compliance
Mr. Boniface Lenairoshi	-	Principal Clerk Assistant I
Mr. Zakoyo Mogere	-	Principal Clerk Assistant I
Mr. Ahmed Hassan Odhwa	-	Senior Research Officer

IN ATTENDANCE

GOVERNOR'S TEAM

Hon. Martin Nyaga Wambora	-	The Governor of Embu County
Mr. Wilfred Nyamu	-	Advocate
Mr. Peter Wanyama	-	Advocate

DEPUTY GOVERNOR'S TEAM

Ms. Dorothy N. Muchungu	-	Deputy Governor, Embu County
Mr. Julius Njoroge	-	Advocate
Mr. Kibe Mungai	-	Advocate

COUNTY ASSEMBLY TEAM

Hon. Kariuki Mate	-	The Speaker, Embu County Assembly
Hon. Ibrahim Swaleh	-	Deputy Speaker, Embu

	County Assembly
George Ng'ang'a Mbugua	- Advocate
Charles Njenga	- Advocate

(The Committee convened at 10.35 a.m.)

Prayers

(The Chairperson (Sen. (Dr.) Khalwale) introduced himself and other Members of the Committee)

The Chairperson (Sen. (Dr.) Khalwale): I wish to call this meeting to order. Ladies and gentlemen, welcome to our final session. I want to thank you for last night. You demonstrated a lot of commitment. I believe all parties are here and ready.

Counsel for the Assembly, are you ready?

Mr. Charles Njenga: Yes, Mr. Chairman, Sir.

The Chairperson (Sen. (Dr.) Khalwale): What about the counsel for the Deputy Governor, are you ready?

Mr. Kibe Mungai: Very ready.

The Chairperson (Sen. (Dr.) Khalwale): And the counsel for the Governor?

Mr. Wilfred Nyamu: We are ready.

The Chairperson (Sen. (Dr.) Khalwale): Very good. We are expecting that this morning the Assembly will have the first shot.

Counsel for the Assembly, we are very strict this morning. You must indicate how much time you will need.

Mr. Charles Njenga: We had indicated that we needed 45 minutes yesterday.

The Chairperson (Sen. (Dr.) Khalwale): Then after that, we will give Mr. Kibe Mungai. How much time do you need, Mr. Kibe?

Mr. Kibe Mungai: We had indicated two hours, which we were sharing with the Deputy Governor.

The Chairperson (Sen. (Dr.) Khalwale): Can you indicate whether your client will be making any statement?

Mr. Kibe Mungai: Mr. Chairman, Sir, it is a statement. After we have heard the evidence, she will make the statement. We are sharing our time.

The Chairperson (Sen. (Dr.) Khalwale): You are sharing within the two hours?

Mr. Kibe Mungai: Precisely.

The Chairperson (Sen. (Dr.) Khalwale): That is very good.

Hon. Members, there is something which has touched my heart and which I revisited. I was looking at the HANSARD this morning and I noticed there was a plea from the Governor at the very last minute, to say something, he even stood up. Then I asked him to sit down and I told him I would make a ruling on that request. I did not give him the chance. It is my decision that if that remains hanging, it is not good for PR. At the end of this matter, we will allow the Governor to say what it is that he wanted to say. It will not kill us even if he does it in five minutes or so. I notice that the Governor is not here, I am directing the counsel to ensure that if the Governor so wishes to say what he wanted to say, he comes and says it itself.

Sen. Orengo: Mr. Chairman, Sir, can the word “PR” from your statement be expunged from your record (*off record*)?

The Chairperson (Sen. (Dr.) Khalwale): Sorry. I think I put it badly. I have never been desperate for English words. I do not know why I ran short of the right one. We will, as a matter of procedure remember that I had not made that ruling. I have now made it and given you that window. So ensure that you do the needful. The word “PR” has no relevance here whatsoever. These are the signs of overstretching us. The word “PR” is withdrawn.

Counsel, do you need one, two or three minutes to do it? Do you remember you were burning last night? Do you know what I am talking about? How much time do you need?

Mr. Wilfred Nyamu: Hon. Members, the Governor would only need between five and ten minutes.

The Chairperson (Sen. (Dr.) Khalwale): Very good. That is in order, between five and ten minutes.

Mr. Wilfred Nyamu: Could we get some indications as to what time he needs to come?

The Chairperson (Sen. (Dr.) Khalwale): Let us put it at 12.30 p.m.

Mr. Wilfred Nyamu: Much obliged, Mr. Chairman, Sir.

Sen. Sijeny: Suppose the other people want to respond. Is the Governor not anywhere nearby?

The Chairperson (Sen. (Dr.) Khalwale): There will be no response because he just wanted to say something when we had ended the matter.

The counsel had tried to say something then, to emphasis the seriousness of what he wanted to do, he shot up in his place.

County Assembly, let us proceed.

Mr. Charles Njenga: Mr. Chairman, Sir, and other Members of the Committee, when counsel for the Deputy Governor was making his opening remarks, he raised an important issue of jurisdiction. His primary contention was that this Committee has no jurisdiction whatsoever to be seized of this matter, being the mater of the proposal for the removal of the Deputy Governor from the office of Deputy Governor, Embu County.

In response to that particular contention, the County Assembly's position is that this Committee has all the jurisdiction provided for by the law, clearly and expressly provided by statute and that it is properly and correctly seized of the matter before it.

The County Assembly's position is founded, first of all, on Article 96 of the Constitution that provides for the role of the Senate. Article 96(4) provides for the Senate's role in participating in the oversight of state officers by considering and determining any resolution to remove the President or the Deputy President from office in accordance to Article 45. The reason I refer to Article 96 is to simply show that even the jurisdiction of this Committee to receive the articles of impeachment in respect to the office of Governor is not provided for expressly in the Constitution under the role of the Senate. So the idea and notion that the Senate can only exercise jurisdiction expressly conferred by the Constitution only is false. The Senate can exercise jurisdiction either expressly provided for under the Constitution, under the letter of the Constitution or even by such legislation that has been developed under this Constitution. Our submission is that we are here and the composition and institution of this Committee is under the power and the role of the Senate conferred to it under the County Governments Act, which is an Act of Parliament that has been developed and legislated upon by Parliament and the powers donated by this Constitution.

Allow me to refer to Article 200(2)(c) which says:

“Parliament shall enact legislation providing for all matters necessary or convenient to give effect to this Chapter.

(2) In particular, provision may be made with respect to-

(c) the manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualification of voters and candidates;”

Our contention is that the office of Deputy Governor is an office in the county governments. The Constitution thereby enjoins the legislature to make and provide law that can provide for the manner in which the holder of the office of the Deputy Governor can either be removed or any other way in which such an office shall be administered.

Our contention is that the County Governments Act is one of the Acts that has been made pursuant and under the basis of Article 200 of the Constitution. It is the County Governments Act at Section 33 that provides for the institution of the Senate to receive articles of impeachment with respect to the office of the Governor.

It is our submission that a plain, ordinary, word for word, phrase by phrase reading of the whole length and breadth of Section 33 will clearly show that it is provided clearly and expressly for the process of the removal of the Deputy Governor from office by way of a resolution of the Assembly. I say so because the plain reading of Section 33(10) of the County Governments Act which proceeds thus:-

“A vacancy in the office of the Governor or Deputy Governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.”

The statute is saying that under Section 33, it is appropriated within the procedure, both the manner in which a Governor and a Deputy Governor can be removed. The statute expresses itself very clearly in no equivocal terms that a vacancy can occur and can arise under the provisions of Section 33 in respect to the office of the Deputy Governor. The entire procedure provided for from subsection (1) leading up to (8) that applies in respect to the office of Governor is incorporated by reference, it is borrowed by reference, to the same proposal with respect to the office of the Deputy Governor. So, there is no gap or lacuna in law. The law has expressed itself clearly that there is procedure, basis and a clear jurisdiction given to this Committee under Section 33 to receive and act upon articles of impeachment with respect to the office of the Deputy Governor.

Mr. Chairman, Sir, our contention is if you read Section 33(10) to the end, it says:-

“A vacancy in the office of the Governor or Deputy Governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.”

Article 182, which is referred to in this particular section anticipates a position where both the office of the Governor and Deputy Governor can be vacant at the same time. Therefore, the reference to Article 182 is only to the extent that where such an event occurs, then the manner of the filling of those two offices is as provided for under Article 182 of the Constitution.

Article 182(4) states that:

“If a vacancy occurs in the office of county governor and that of deputy county governor, or if the deputy county governor is unable to act, the speaker of the county assembly shall act as county governor.”

It clearly foresees and presupposes that there can be a situation, anticipated for by the Constitution, where both the office of the Governor and the Deputy Governor are vacant. Therefore, the notion that this article only applies in respect to the Deputy when she is

acting as Governor is wrong. It refers to the office of the Deputy Governor in her own right.

Section 33 of the County Governments Act refers to Article 181 of the Constitution. Our submission in that respect is that the reference to Article 181 is only to the extent that it borrows or appropriates those parameters set out under Article 181 to a consideration for the removal of the Deputy Governor from office by way of a resolution of the County Assembly.

Mr. Chairman, Sir, in consideration of all these provisions read together even in their literal sense, plain ordinary reading clearly shows that this Committee under the provisions of Section 33 is properly seized of this matter.

Now, in respect to the case of the County Assembly against the Deputy Governor, our submission is that the case heavily relies on how this Committee will interpret this Constitution. It is a test of how and to what extent this Committee will bring out the principles which have been set out in this Constitution.

Allow me to refer to Article 259 of the Constitution that provides for the manner in which this Constitution should be interpreted, the Article says:-

“This Constitution shall be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law, human rights, fundamental freedoms in the Bill of Rights, permits the development of law and contributes to good governance”.

That is the Constitution, inviting any person, any user of this Constitution to these interpretations. In looking at what the Constitution says, you have to have this at the back of your mind. You have to have this as the context in which you are interpreting the Constitution. These purposes, values and principles are set out under Article 10.

I want to refer the Committee to Article 10(2) (c). This is the national values and principles---

The Vice Chairperson (Sen. Murkomen): Sorry Counsel, you read Article 259 (1) (a) (b) (c) and (d).

Mr. Charles Njenga: Yes, Sir.

The Vice Chairperson (Sen. Murkomen): I thought you added (3). That is okay. Continue; we will find out later.

Mr. Charles Njenga: I did not want to read the whole section, but it is all about interpretation.

The Vice Chairperson (Sen. Murkomen): Can you read Section 3(d)?

Mr. Charles Njenga: Gladly. Article 259 (3) (d) reads:-

“A reference in this Constitution to an office, body or organization is if the office, body or organization has ceased to exist, a reference to its successor or to the equivalent office, body or organization”.

I was at Article 10 (2) (c). These are the national values and principles of good governance. The Constitution provides that the national values and principles of governance in this Article shall bind all State organs, all State officers, public officers and all persons whenever any of them---

That is on the interpretation.

Sub-section (2) reads:-

“The national values and principles of governance include (c):- Good governance, integrity, transparency and accountability”

Accountability is a national value that enjoins all State organs, all State officers and all public officers.

The Vice Chairperson (Sen. Murkomen): Sorry, Counsel. When I told you to read Article 259 (3), I did not mean (d), I meant (c). If you have considered Article 259 (3) (c). I am saying this for the record because this is what I meant.

Mr. Charles Njenga: Okay. The one that says:-

“A reference in this Constitution to an office, State organ or locality named in this Constitution shall be read with any formal alteration necessary to make it applicable in the circumstances”.

Now, having set out those particular provisions, our submission is that the office of the Deputy Governor has clear roles which have been set out in the Constitution. I will start with Section 179 (2). Where in respect to county executive committees, the Constitution says:-

“The executive authority of the county is vested in and exercised by a County Executive Committee which consists of (a) The County Governor and the Deputy County Governor and (b) lists the other members”.

Therefore, we see the office of the Deputy Governor coming in as a functional office under the Constitution in respect to county executive committees. The same Article, in (4), the County Governor and the Deputy County Governor are the chief executive and the deputy chief executive of the county respectively. This is not just a deputy of a Governor in the person of a Governor. This is a deputy chief executive of the county. Her responsibility is not restricted to the Governor but to the entire county as a level of devolution.

Section 30 of the County Governments Act sets out the functions of the Governor and Section 32 provides for the functions of the Deputy Governor. It first starts by saying:-

“The Deputy Governor shall take and subscribe to an oath of affirmation as set out in the Schedule and the Deputy Governor shall deputize for the Governor in the execution of the Governor’s functions. The Governor may assign the Deputy Governor any other responsibility or portfolio as a member of the county executive committee”.

So, here, we see the statute clearly providing for the functions of the Deputy Governor but there are no specific functions given. There is no Schedule saying that the Deputy Governor shall do a, b, c and d. There is no list of day to day activities that the Deputy Governor is supposed to do. For example, sign particular documents or execute particular instruments. It is not set out; neither here nor in the Constitution, but it clearly states that the Deputy Governor shall deputize for the Governor in the execution of the Governor’s functions.

Therefore, as the County Assembly, we are saying that the evaluation of the Deputy Governor’s functions cannot be done independently of the Governor’s functions. They have to be considered together. They have to be looked at in the same context. They have to be read together because it is one office, but executed by the two State officers; one being the principal and the other one being the deputy but taking up the same functions. So, there cannot be a delimitation line. There cannot be a cut-off line. There cannot be a boundary as to where the Governor’s functions end and where the Deputy Governor’s functions start.

That is why the mandate given to the two offices is the same. They are elected together. There is no election for the Deputy Governor. People do not line up to vote for the Deputy Governor. People line up to vote for a team. A team constituted two persons who have determined in themselves and offered themselves to the public to perform and to execute the office and the functions of Governor, so that when you are voting for the Governor, you are also voting for the Deputy Governor. Therefore he or she can now not say that I have works and responsibilities that are outside those of the Governor and, therefore, if the office of the Governor fails, it is him alone. It is not us. From here hence, we are not a team. Let him carry his own cross. I have done nothing. “The Constitution says that I am just a deputy and the statute says that I am just a deputy”. She has stated that in her affidavit. This affidavit is in the supplementary list of documents which we supplied.

Mr. Kibe Mungai: Mr. Chairman, Sir, I have an objection to that. Not that I would care for the moment. The affidavit being referred to is an affidavit that the Deputy Governor has done in support of her case before the court in Kerugoya. If the reading of your Standing Orders is the same, I wonder on what basis one would choose to say that you are using the affidavit, bring the whole petition and give your response to the whole petition and we canvass the issue before the Senate. But to say that one would be referring to a petition and we have asked on what basis and even in the letter that we wrote, we have said that we are filing a matter for interpretation and the Senate should hold on to the process, but the Senate did not. So, when our case is pending, would it be right for the same matter to be made the subject of Senate proceedings? As I said, the Deputy Governor stands by what she has said in the affidavit. Would it be proper that the

matter pending in court as of now and after we have specifically said that let this process stop, let us hear what the court says.

The Chairman (Sen. (Dr.) Khalwale): Before I comment on that, maybe clarify to my mind: What was the intention of including that affidavit?

Mr. Kibe Mungai: It is not in our documents. It is them who are giving supplementary documents and including our affidavit in that petition. I am saying, since we made a specific request to the Senate, let us hold the process to allow the court to complete its work. If that has not been rejected, then on what basis would parts of the same petition be introduced for consideration by a Committee of the Senate? That is where the concern is.

The Chairman (Sen. (Dr.) Khalwale): Counsel, so that we respect the standing orders of the Senate, it would be useful if you steer clear of that matter. We will open unnecessary questions and queries against us.

Mr. Charles Njenga: Mr. Chairman, Sir, an affidavit is a sworn statement by a party, it is evidence wherever. We are not referring to arguments, prayers or justifications or submissions. All that we are saying is that she has not denied. We are not saying that her petition has no merit, but this is what she has said and these are the documents that we submitted on 9th February when we were invited to submit documents that would support our case against the Governor and the Deputy Governor. We are not in any way going to the merits of these cases. All we are saying is that she has said that the Governor has not assigned her any functions since she came into office and it is in her affidavit. We are not saying that she has no right to go to the constitutional court. We are also parties in that suit. We have not gone to the arguments. We shall argue that before the High Court.

Mr. Kibe Mungai: She has already placed what she wants in the record of the HANSARD which is okay. Since this is her affidavit and we are not in the business of denying anything that has been said on oath, the concern would be this; that we have arisen here to say that we believe that there is no jurisdiction. We have gone to court and this matter remains unresolved. With a lot of protestations, we are before you. He has already stated what the issue is. Let him move on, we shall handle the issue. There is no problem, let him move on. I withdraw my objection.

The Chairman (Sen. (Dr.) Khalwale): You are withdrawing the objection---

Mr. Kibe Mungai: It is already on record. I have withdrawn the objection.

The Chairman (Sen. (Dr.) Khalwale): Your withdrawing the objection does not change the Senate Standing Orders. So, Counsel, I will still request you to desist from referring to that matter because what you are saying might very well be canvassed in court. You are a very brilliant young man, the way I have seen you from the beginning. I know you have a way of going round it and achieving the same result.

Mr. Charles Njenga: I stand guided. Now, if I may refer to the Deputy Governor's response submitted to this Committee on 8th February, you will see her specific responses to all the charges. Without setting them out verbatim, I am sure you will have occasion to go through them. All that she said is that all these things were taken out by the Governor. I have never had any specific role ascribed to me whether in writing or by any other instrument or in any other way by the Governor. I have never exercised the office of Governor since I took the oath of office. I have never been responsible for anything in the county. So, the question that poses immediately and that is a very basic simple question that the Deputy Governor must answer is that; since 28th March, 2013 when she took the oath of office and became the Deputy Governor, Embu County, from that day, every month she is drawing a top dollar salary, she has a body guard, a 4x4 wheel drive vehicle, security, air time and all these privileges that are given to what counsel was referring to as high offices, what has she been doing?

If you read her response, it says:-

“I have never deputized the Governor. I have never been assigned any responsibility to do from the time I came to office”.

So, every day she reports to the office from 8.00 a.m. to 5.00 p.m., or whatever time, what does she do?

Mr. Kibe Mungai: Could my learned colleague read the sections of our response that say that? Otherwise, the HANSARD will be misleading. Could he read the relevant part of the response that states what he is saying?

The Chairperson (Sen. (Dr.) Khalwale): Yes, counsel, that is legitimate. You can refer us to where you got that instruction.

Mr. Charles Njenga: Mr. Chairman, Sir, for example, in respect to the report of the Auditor-General at page 7 of her response, she simply says:-

“There is nothing in the report of the Auditor-General attached as CA3 that indicts the Deputy Governor for any violation of law or corruption or financial impropriety. The said report cannot be used against her”.

If you go to page 4 which is in respect to procurement on the first line, which is a response to her first charge, she says:-

“The said annexures show that the Deputy Governor was not involved in the illegal appointment of four members of the tender committee and, in fact, the County Assembly of Embu, Implementation Committee did not require her to give an explanation for the alleged wrong doing and violation”

The Deputy Governor adds under Section 26 of the Public Procurement and Disposal Act Regulation 7, she is not responsible. In view of the above, she could not fail and or neglect to observe the threshold of procurement under (3). The last line states:-

“The Deputy Governor was not involved in the procurement process in any way at any stage”.

Article 4(4), the last line says:-

“The Deputy Governor has not served as the accounting officer at any time within the meaning of Section 27(5). The Deputy Governor did not superintend over the procurement of motor vehicles. She is not aware of any details of the motor vehicles”.

Violation of the Public Finance Management Act, on the last paragraph:-

“The Deputy Governor is neither responsible for the appointment of a tender committee. She has not directed or approved public funds. Indeed, no evidence has been tendered to implicate the Deputy Governor “.

At page 7, she comments in respect to violations of Section 156. At page 6, the Deputy Governor is not a member of the County Treasury. She says that she cannot be held responsible for the alleged failure by the County Government to submit quarterly reports. On page 8 with respect to the illegality of the jobs advertised, she says she cannot be held responsible for the alleged illegality or wrong doing concerning the appointment or advertisement of positions in the county executive.

On the last line, she says she was not responsible for appointment of any person. This is a basic denial of all violations premised on the basis that none of these functions point to her directly as an office. That is why we are saying---

Sen. Orengo: I am sorry to interfere with your very articulate presentation. But on page 4, I do not know what to make of this and I would wish to know your view about this. At the top, the said annexures 1 and 2 show that the Deputy Director was not involved in the legal appointment of four members of the tender committee. I do not know whether that is a confirmation. What do you make of that?

Mr. Charles Njenga: Well, the County Assembly’s position is that there was never a tender committee in the first place. She brings the dimension that there seems to have been a tender committee, but in her estimation, it was illegal. So, as they prosecute their response, we would also very much want to hear and see the particulars of this particular averment as stated. Our case as set out as we were prosecuting the initial resolution is that there is no evidence, of there having been in existence, of a tender committee properly constituted in the manner anticipated for by the law. But there appears to be an admission that there may have been a committee of four members of the tender committee but the Deputy Governor thinks that it was illegal. Maybe she will give us the particulars of that illegality. But there is a clear admission in the face of the allegations against---

The Chairman (Sen. (Dr.) Khalwale): There is something I want you to help me to understand more. As evidence kept on coming in over the last three days, there was the issue of: “Where does the buck stop”? Several people have spoken to it, including the Auditor-General who felt that the buck stops at the door step of the Governor. If that is

the case, how then does it also stop at the door step of the Deputy Governor? Help us to understand that.

Mr. Charles Njenga: The County Assembly's position is very clear; if you look at the charges, the buck stops in those two offices which are joined together by the law to perform and execute the functions of the office of Governor. As much as the buck stops at the office of the Governor, it similarly stops with the office of the Deputy Governor.

My last submission, because I also want to invite my colleague to make use of the remaining ten minutes according to my watch ---.

The Vice Chairperson (Sen. Murkomen): You only have five minutes more.

The Chairperson (Sen. (Dr.) Khalwale): For purposes of the record, I want to be clear. My question is not intended to connect what was canvassed in the Governor's case to this one. It is just that I have remembered. I am not trying to connect the two. Do not take it that I am there for saying what was canvassed in the Governor's case connects to this one. It is just that I have remembered. I am not trying to connect the two.

Mr. Charles Njenga: You are right because the charge against the Deputy Governor is that in the wrong doings alleged by the County Assembly against the Governor, then the Deputy Governor, by virtue of her office and functions as set out in the Constitution and statute as has been so clearly submitted on, then by operation of the law, she is similarly enjoined. That is why we have gone to the functions to show that she has no more functions than those of the office of the Governor but in the capacity of a deputy. This capacity of a deputy includes ensuring that all the functions as set out in Section 30 are properly executed and if there is failure in their execution, she cannot run away from that failure. She cannot now say that the Governor should carry his own cross and that this is his bill to pay and that she is clear. We came to office together, we were sworn in together, we campaigned together, people voted for us together, even if there was an election petition against the office of Governor and it succeeds, even the Deputy Governor goes by operation of the law. So, for practical purposes, that is why we are inviting the Committee's interpretation of this Constitution to be purposive. You cannot delineate the two offices.

The Chairperson (Sen. (Dr.) Khalwale): If you can conclude, because your time is up.

Mr. Charles Njenga: I am concluding, but I think I have five minutes for my colleague to say something unless I timed myself wrongly.

The Chairperson (Sen. (Dr.) Khalwale): You have squandered all the 45 minutes you were given.

Mr. Charles Njenga: In your small interjections, I think you took some of it. My last statement is that it would, in my submissions be very absurd for this Committee to interpret this Constitution in a manner that says that there is an office provided for by the

Constitution that has clear provisions on how a person can become an occupant to that office and yet the same Constitution has no provision for the removal of a person from that office. That would be a very absurd interpretation of the law. It would also be absurd for this Committee to interpret the Constitution to mean or to find that there is a public office that has no roles, executes no mandate, takes no responsibility, yet enjoys the benefits and the attendant privileges that come with that office. That would be a very absurd interpretation of this Constitution and we urge this Committee not to adopt it as urged by the Deputy Governor.

Kindly, for five minutes, indulge my colleague---

The Chairperson (Sen. (Dr.) Khalwale): Before you go away, there is one burning question from Sen. Lesuuda. Just for purposes of record, I think he made a very serious allegation which possibly in future would even have an impact in this particular office, when attributing that the Deputy Governor was doing nothing in office. She just used to come and sit in the office and yet there are all these resources assigned to that office. Then the counsel asked – from her submissions – whether he could point out and then he just went ahead to show that she has denied having been involved in any of the violations. How does that really show that there was nothing she was doing when she was in office?

Mr. Charles Njenga: The response has to be read together with the particulars. The violations refer to day to day workings of the functions of the Governor and the county officers under the office of the Governor. When a member of the County Executive Committee in response to all the allegations comes and says: “I did not, I know nothing” in respect to all of them that relate to the entire breath of the county government operation from its inception to the 30th of June as per the audit. All that she says in response to that audit report is that there is no allegation by the Auditor-General against her as a person. So the question we pose is; in the doings and the workings of this CEC as has been clearly espoused by the documents that we have interrogated over time, in which capacity does she appear if her only response is that there is nothing specific against herself?

The Chairperson (Sen. (Dr.) Khalwale): I think, Sen. Lesuuda, you should not just abandon it as yet. When the Deputy Governor comes, it would be interesting for you to repeat the question to her. Given that in your own statement, you have said that you have not been assigned any duties, could you tell this Committee what work you do. You can hold on that one. She will shed light.

The Vice Chairperson (Sen. Murkomen): Mr. Chairman, Sir, just for the record, I know there was a discussion about *sub judice* and, generally, inability to discuss pleadings that are in the courts. But is it an absolute provision? I am asking myself; suppose someone swears an affidavit saying that it in company “x” it is me who stole those goods and not that man, can then that affidavit be used by the manager to sack that employee or the employee can hide under that affidavit and say that those are pleadings in court? Suppose a man swears an affidavit in court and says that, actually, that other lady is also my wife

or my girlfriend, can the wife of that man use that affidavit to commence divorce proceedings? An affidavit is an averment of an individual saying that this is what I believe in and it should be believed that when he is telling the court, he is telling the whole world that I stand by these provisions. I think we need to find a clear cut decision, especially with regard to the affidavit.

Mr. Charles Njenga: If I may comment, if you look at our documents, we only annexed the affidavit because an affidavit is a person stating what she or he believes, in relation to a set of facts. That averment is true in whatever context; whether it is in Parliament, court or the village. You can take a person to task having sworn on certain facts. But we did not delve into arguments or pleadings because then, those are subjective. They relate to certain contexts.

Mr. Chairman, Sir, I hope that that interjection has not eaten into my five minutes.

The Chairperson (Sen. (Dr.) Khalwale): We are allowing him to come. Mr. Kibe, remember that you have room to comment. You can do it later in your time.

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, thank you for this opportunity. We want to, first, comment on the preliminary point that has been raised in the response by the Deputy Governor and it relates to the jurisdiction because it is at the centre of these proceedings. The point that has been raised by the Deputy Governor in her response seems to make a suggestion that it is only the courts that can exclusively interpret the Constitution. It is my very humble submission that, that might just be a misnomer. We are talking about a plain reading of Article 10 of the Constitution. The Senate as a State organ, a State office or even an individual can indeed interpret the Constitution. So, when we are before you, we are before you to undertake an impeachment process that clearly has been spelt out under the Constitution and to which the power to conduct that impeachment process has been exclusively given to the Senate.

So, you will be perfectly within your jurisdiction to interpret the Constitution and satisfy yourself that under Article 181 as read together with Section 33(10) of the County Governments Act that, indeed, you do have jurisdiction, so that whereas we have highest regard and esteem for courts of law, and as an officer who practices in those courts, I have the highest regard and esteem for orders of the court. It cannot have merit for one to suggest, even for a moment, that only the courts can exclusively determine a question of jurisdiction.

It is, therefore, our very humble submission that the fact that there could be pending proceedings before another institution does not take away that which the Constitution has exclusively conferred jurisdiction to you on a matter of impeachment.

Mr. Chairman, Sir, before I exhaust my five minutes, please, just allow me to just draw a link between the complaints or violations that we have stated in the charge sheet as regards the Deputy Governor (DG). The DG – and this is without a doubt – is a member of the County Executive Committee (CEC) together with the Governor. It did come out

in evidence from the county executive committee member for finance that matters in relation to the procurement at the centre of these proceedings, were reported and indeed discussed before the executive committee. The DG sits in that committee, not in exercise of any delegated responsibility of the Governor. She does not discuss matters before the CEC with the mind of the Governor. She has an independent mind. So, when a report is made about a procurement that does not comply with the law and may very well be suspect, it behooves the Deputy Governor, in exercise of her functions under Sections 31 and 32, to take proactive steps to arrest that which she might consider not to be in line with the law. The case of the county assembly is that, that information having come to the floor of the executive committee where she sat, she had a duty and obligation to take steps that would ensure that anything that would threaten the prudent use of resources within the county is arrested.

Reading her response: "It was not me. I was not a member of the tender committee." Yes, we agree that even the Governor was not, but these matters were debated. What did she do? Are there any minutes to show that when these matters were tendered or brought before the floor of the CEC she took a position? Did she protest or do a dissent? Did she take a position; that "look, we may be taking matters or discussing this issue in this matter, but my position is this?"

Mr. Chairman, Sir, the office of the Deputy Governor is an executive office. The case by the Deputy Governor is that the relation is that of a principal servant. I am taking that from page 3 of the defence. The long and short of it is that the relationship between the Governor and the Deputy Governor is that of a principal subordinate; an attempt to create a master-servant relationship. It does not operate that way. The relationship is not that of a master-servant. Why do we say that? Can that Governor fire the Deputy Governor? Certainly, not! So, she has executive powers and can take a position whether or not it is a position that her boss or the Governor has taken. So, she has an independent mind and duty of accountability, the same way the Governor has. So, when we say that she is equally responsible, it is because she sat through and saw these matters happen. An indictment from the Auditor-General came out very clearly about these matters. What did she do? To use the words of the Governor, what did she do in the wake of this maize fiasco? Did she just watch?

Mr. Chairman, Sir, the point that we are raising is: Under Sections 31 and 32, she shares that obligation of accountability and cannot run away from it.

The Chairperson (Sen. (Dr.) Khalwale): You should be winding up now.

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, as I wind up, the DG as a state officer - and under the interpretative section of the Constitution, she is a state officer - is enjoined under Article 10 of the Constitution, when implementing policy decisions. So, when a matter is tabled before the CEC, the CEC takes a policy decision, where she sits as a member. Now, she is enjoined to ensure that those decisions are taken in a manner that promotes good governance, integrity and transparency. Can a statement that it was

not me suffice to show that she acted in a manner that promoted good governance, integrity and transparency? Certainly not!

It is the humble submission of the Assembly, as I wind up, because I am now making the last sentence---

Sen. Orengo: Mr. Chairman, Sir, I plead with you that we have got to be very strict about time.

The Chairperson (Sen. (Dr.) Khalwale): I have warned you and you do not seem to want---

Sen. Orengo: We have our responsibility later.

Mr. George Ng'ang'a Mbugua: I am winding up, Mr. Chairman, Sir. I beg for just one minute.

The Chairperson (Sen. (Dr.) Khalwale): Please, make that statement as a conclusion.

Mr. George Ng'ang'a Mbugua: Having said what we have said as a County Assembly, the Deputy Governor cannot run away from her obligation to be accountable. It is our humble submission that we have substantiated, through the evidence that was tendered in the case of the Governor, that the Deputy Governor is equally liable and responsible. Those violations have been substantiated as by law required and you proceed to recommend that she should be removed from her office as the Deputy Governor of the County of Embu.

That is all.

The Chairperson (Sen. (Dr.) Khalwale): Thank you. Mr. Kibe, I will now invite you, but indicate how you would want to use that time. Do you want to bring the Deputy Governor first or she will come after you?

Mr. Julius Njoroge: I would like the Deputy Governor to go first. I believe that it will be 20 to 25 minutes. Then I will have the rest of the two hours.

The Chairperson (Sen. (Dr.) Khalwale): Clerk, if you can administer---

Mr. Julius Njoroge: No, it is not an oath; she is presenting part of the response.

The Chairperson (Sen. (Dr.) Khalwale): What is she coming to do?

Mr. Julius Njoroge: Under the rules that were made, she had a right to appear alone, by her advocate alone or herself in conjunction with an advocate. So, we are sharing our responsibility.

The Chairperson (Sen. (Dr.) Khalwale): So, she is not here as a witness?

Mr. Julius Njoroge: No! She is not a witness, absolutely!

Sen. Orengo: But we can ask her questions?

The Chairperson (Sen. (Dr.) Khalwale): Yes, of course.

Sen. Orengo: We understand that, that statement is not under oath. So---

Mr. Julius Njoroge: Yes, it is not under oath; the same as the first statement of the Governor.

The Chairperson (Sen. (Dr.) Khalwale): But that does not mean that she misleads or lies to us, even if she is not under oath.

Mr. Julius Njoroge: I do not think that she intends to lie and she can be challenged if she lies.

The Chairperson (Sen. (Dr.) Khalwale): Can you start by introducing yourself?

(The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu before the Committee)

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Thank you, Mr. Chairman, Sir, and hon. Members of the special Committee of the Senate. My name is Dorothy Nditi Muchungu, Deputy Governor, Embu County.

Mr. Chairman, Sir, I am the Deputy Governor of Embu County and a member of the County Executive Committee of the County of Embu. I was elected to the position of Deputy Governor during the elections which were held on 4th March, 2013, alongside the Governor of Embu, hon. Martin Nyaga Wambora. We were jointly elected on the TNA party and I assumed office on 27th March, 2013. Since then, I have discharged my legal and political responsibilities as an elected leader, in accordance with the laws of Kenya. In my office as the Deputy Governor of Embu and to the best of my knowledge and belief, there is no complaint that has been made against me in any forum or by any person, in any form, in relation to my functions as the Deputy Governor.

Mr. Chairman, Sir, when this impeachment Motion was passed against me, I agonized quite a bit about it. I was at a loss on the way to handle the issue. I was asking myself: Is this a legal or political trial? I tried to understand what impeachment meant. In my simple understanding, impeachment is to bring legal proceedings against a public official, asserting that because he or she has committed some offence, she needs to be removed from office.

I have looked at the charges against me by the County Assembly of Embu and my response addresses those particular charges. I am not running away. I do not think that

theory applies here. I have discharged lots of duties for the County Government of Embu. Those are not in contention. They are not before this Committee. So, I have addressed myself only to the charges that the County Assembly has preferred against me. They are the ones that I have been replying to.

Mr. Chairman, Sir, if it helps my case, because it is me facing impeachment proceedings here--- I think that the Committee has helped me to understand that this is really not a trial, but an investigation. According to my understanding, in an investigation, this Committee seeks to establish the truth. I am endeavoring to give that truth as regards the charges preferred against me by the County Assembly of Embu.

Mr. Chairman, Sir, as a Deputy Governor and Deputy Chief Executive of Embu County, which is properly stated in Article 179 (4), I would want to submit the following. I am not saying this because I do not respect my Governor or want to paint him in bad light. I am not even saying it because I want to apportion blame to anybody. I am just stating facts as they are. I am endeavoring to do just that.

Mr. Chairman, Sir, as I have said, I am the Deputy Chief Executive Officer of Embu County because Article 179 (4) says so. However, in practice, I have not truly served as Deputy Chief Executive Officer (CEO) of Embu. This is because, one, in instances where maybe a particular portfolio could have been assigned to me, as Deputy Governor, that has not happened.

Regarding the charges against me and the evidence that was given here yesterday and the day before, I do not think that there was any allegation by anybody, including the Governor himself, that this duty was given to the Deputy Governor and she did not do it as I had directed that she does it. I think that, that needs to come out.

I wish to also add that I am pleading and not complaining against my Governor. This is because what I am alleging and saying is a cry that has been with all Deputy Governors in this country. We have even had meetings, talked and even tried to talk to the Senate to address these issues. I do not think that Governors or Deputy Governors in this county are being proper--- The optimal use of Deputy Governors in this country has really not come out. I will refer to one of the meetings that we held as Deputy Governors, just to air our views. The following morning, there was a funny caricature in one of the local dailies, depicting us as some funny little creatures with a small begging bowl, trying to cry out for some action from the big masters. That was not only demeaning for someone that went into an election, but I think that it also sort-of painted the office of the Deputy Governor as not so important---

The Chairperson (Sen. (Dr.) Khalwale): Order! Order! Do not rely on the media, because it is against our Standing Orders. If you felt offended by what the media did, you have the option of going to court and suing them for damages.

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): I stand guided, Mr. Chairman, Sir.

Under Section 32 (2) of the County Governments Act, I deputize the Governor in the execution of the Governor's duties. Further, by virtue of Sections 32 and 33 of the County Governments Act, the Governor may assign me any other responsibility or portfolio as a member of the County Executive.

I wish to confirm that, that has not happened in Embu County. I do not have a special assignment, but I respect the fact that this is in the legislation. The Governor is at his discretion to either or not give me that responsibility. That is stated properly in Section 33 of the County Governments Act.

It is important to note that after assumption of office on 27th March, 2013, I had a discussion with the Governor, because I thought that maybe to fully participate in the affairs of Embu County, I could have served in one of those portfolios – we have ten of them but that was not assigned to me. I, again, respected the discretion of the Governor and went on to discharge other duties in the county as need arose.

I later noticed that there was a gap in the Executive because there was no CEC member that was assigned duties to do with administration, human resources and matters of devolution. We had serious gaps and I pointed this out. This is even minuted in one of the County Executive Meetings. If I can remember correctly, it was on 31st October, 2013. I even indicated in the meeting that if other people were overwhelmed, whether they would consider giving this to me, because we had serious issues. That was not granted. Again, I respected the discretion of the Governor and did not take offence – no hard feelings.

To my knowledge, the office of the Governor holds both administrative and ceremonial or political functions, as the leader of the county and Chief Executive Officer. In my recollection, I have ordinarily deputized my honourable Governor in the discharge of his ceremonial or political roles such as representing the County Government of Embu in various meetings, attending formal meetings of the county executive and other functions. For example, there are statutory functions or duties of the county government, like the budget making process. That I did not wait for the Governor to assign me. I think that even the county assembly knows that I led that process without a formal assignment. I think that we were one of the counties that did a very good budget that was not contested in the formative stages of our government, and there are many others like that. Those that are statutory, I have taken the liberty to just move ahead and do them. But for those that are not clearly within my control, I have had the reservation, because the Governor has not been officially out of office for me to take them on, like the ones that I am being accused of by the County Assembly of Embu in these impeachment proceedings.

The few times when administrative responsibilities were delegated to me are not a subject of this investigation by this honourable Committee.

I have been accused of being quiet when things were being done wrongly. When you look at the HANSARD from the County Assembly of Embu, the thing that came out clearly was that I did not talk and knew what was happening. I want to put it to this

Committee that I was not quiet. I talked about these issues in the Cabinet, with individual County Executive members---

Mr. Charles Njenga: Chair, jus for direction. We are told that this is a statement, but the content of this statement has clear and factual implications which are not supported by way of a document and we have no capacity, whatsoever, to either cross-examine on or verify as to its authenticity. So, we need a clear direction by the Committee as to how to treat facts that are now being spoken from the podium.

The Chairperson (Sen. (Dr.) Khalwale): Yes, Counsel for the Governor. Sen. Orengo, another Counsel wants to speak to it and then we shall comment.

Sen. Orengo: Mr. Chairman, Sir, the Deputy Governor has been summoned to appear and when she appears, she can choose how to respond either in writing or in person or orally. I think that we cannot limit her. Even if she wants to make a statement or give evidence on oath, that is really her choice. But just to tread carefully, if they are statements of fact, then when it comes to asking you questions, you may be in a difficult position, because you have not quite told us whether you are making just a statement or giving us unsworn evidence to support your case.

The Chairperson (Sen. (Dr.) Khalwale): Counsel for the Governor, can I hear you?

Mr. Wilfred Nyamu: Thank you very much, Mr. Chairman, Sir. We are concerned that in her statement, she is actually almost casting aspersions against the Governor and we are in a tricky position, since she has not taken oath and it is difficult to cross-examine her. So, we may need directions in that regard, as whatever she is saying here is going on HANSARD and it is going to be considered at the end.

The Vice Chairperson (Sen. Murkomen): Let me speak as a Member of this Committee. I think that what she is saying is relevant for this Committee. I like it and would like it to go on record that certain issues that relate to the complications of the position of the Deputy Governor are relevant to explaining why she could not take certain responsibility. I think that it is important for this Committee in two ways; one, in making the decision here, but, two, in the understanding of the office of the Deputy Governor.

When it comes to the question of weight and admissibility, it is the responsibility of this Committee to know that, one, she is not on oath. So, it is just information. Two, it will be weighed against the whole evidence that we have received. Three, we know very well that the Governor does not have an opportunity to respond to that and so, we will put that in that context. Most importantly, we are not discussing the case of the Governor. We will only take what she says in regard to her own case. We are not going to transfer proceedings of this session - we are now in a different session completely - to what has already been completed. If we do that, we will do what the counsel of the Deputy Governor was saying earlier; that it looks like we are jumbling up the two cases. This is a different case.

So, we want to give the assurance that we will just look at her case as her own case. Lastly, the counsel of the county assembly will have an opportunity to reply later to all these issues that have been said.

Mr. Kibe Mungai: Mr. Chairman, Sir, just for purposes of clarification, the County Assembly should not take a moral high ground; that they have presented affidavits and evidence--- What they have presented are statements for practical purposes. If you present me a statement, I can counter it with a second statement. Even their so-called statements contain facts. They are not in any affidavit. If you say that you are co-superintending, she is the only one who can say: Was I in the same position of a Governor? Therefore, I thank the decision taken by the Vice-Chairman and Sen. Orengo; that, that cannot be taken away from her. These are statements equally that we are facing – nothing on oath, absolutely.

The Chairperson (Sen. (Dr.) Khalwale): We will allow you to continue, but you should be summing up because we are running out of time.

For the counsel of the County Assembly, we have noted what you have said. We are aware that she is giving material facts when she is not on oath and will remember this. At the end of it, I will give you an opportunity to comment on some of the things that you think are necessary to be commented on.

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Thank you, Mr. Chairman, Sir. Like I said, I plead that this Committee understands me. I am not casting aspersions on anyone. I am answering to the charges leveled against my person. It is me on trial here; it is me who faces impeachment proceedings; it is me at the risk of losing an office that I hold and it is me at the risk of carrying the tag of corruption on my neck. At my age, it is me that cannot hold office if this Committee finds me guilty of offences that I am clearly stating that I did not commit.

Mr. Chairman, Sir, the implications of impeachment, if I understand them correctly, are serious. Ladies do not usually say their age, but I will say that I am 42 years old. At 42 years, if I cannot hold any office and cannot get a job in Government for the next ten years, because I have been accused of something that I did not do, the next time that I can purport to earn a living to support my child, I will be 52 years old; Probably I will be dead, God forbid!

Mr. Chairman, Sir, I was addressing the fact that I am accused of not having talked about some of these things. In my position as Deputy Governor and considering that this was the formative stage of the County Government of Embu, I did not want to start making noise from the beginning out there. So, I directed my discontent to the county executive meetings, and it is on record that I stated some of these things. It can be demonstrated if you had access to the minutes of some of our meetings. I raised some of these issues, because I thought that I had a responsibility as a leader to my county to do this.

Mr. Chairman, Sir, I wish to humbly inform this Special Committee of the Senate that I am aggrieved by the resolution of the County Assembly of Embu to impeach me. I have read Article 18` of the Constitution and having consulted with my advocates, I am convinced that as Deputy Governor, I cannot be removed from office in exercise of my function as Deputy Governor.

I also want to address just one or two things before I close with regard to the specific charges against me. I did not – and I am going to repeat here – get or facilitate airtime for the county secretary to go to a local FM Station, *Wimwaro*, to defend herself when the County Assembly of Embu recommended that she be removed from office. I did not even know that she was going to *Wimwaro*. I only heard it like all the other residents of Embu.

I am also accused of having failed to act when the Governor defended the county secretary. When the press statement that was read in defence of the county secretary was done, I was not invited to that press conference. All other members of the county executive were present – I was not. I did not participate.

Mr. Chairman, Sir, Article 33 of the County Governments Act, expressly states that as Deputy Governor, in exercising my duties as Deputy Governor, I cannot exercise the function of hiring or firing of staff. That is in the law. Even if I needed to assert myself, I would only have asserted myself within the confines of the law. I could not have acted on the county secretary of Embu.

I have also been accused of superintending over buying of vehicles. That is how the charge reads. I did not oversee or authorize the purchase of the said motor vehicles.

On the trip to Rwanda, I was not consulted or even given a copy of the letter inviting the MCAs to Rwanda. The only evidence that I have, that something like that happened, is an SMS that my personal assistant (PA) sent me on learning that there was something like that happening; a message that had been sent by the secretary to the Governor, to the MCAs. I was not part of that decision and I am stating it here that I was not consulted.

On the allegation about the issue of staff in the county, I want to say it here and now – and I am sure that the Governor would also attest to it if he was here – that I have never been consulted on issues of recruitment. When I realized that it is not within my mandate, I did not argue about it. This is because it was clearly not provided for in the County Governments Act. So, I would have been arguing about something that clearly, in law, is not my mandate.

I want to also respond to the issue of procurement. In all county executive meetings of Embu County, there was never any one time that issues of procurement were discussed. That is not true. Issues of policy, yes. We sat and agreed on what needs to be done, but on the issues of procurement, that never ever came to the county executive meetings and the same was said yesterday.

Mr. Chairman, Sir, as I wind up, I want to thank this Special Committee for having found it fit for me to come and speak for myself. This is because when I read the laws, one of the things that I was really agonizing about was that there was provision for the Governor to come and defend himself in the Senate, but I had not seen anything explicit about the Deputy Governor. So, I want to very humbly thank this Committee.

I also want to make a plea to the Senate - because I am not sure that I will get a chance to sit with Senators again--- Now that I have this chance let me just point out this: There are certain things that clearly need to be amended, especially in the County Governments Act as regards the duties of Deputy Governors in this country.

Thank you very much.

The Chairperson (Sen. (Dr.) Khalwale): Hon. Members, do you want to raise your issues now when she is still fresh?

Yes, Boy Juma Boy!

Sen. Boy Juma Boy: Madam Deputy Governor, it was alleged that you were drawing salary, having all the privileges and actually doing nothing. Is that true? Can you affirm to this Committee that, that is not the fact?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, it is not true that I was doing nothing. I stated in my statement that I was doing other political functions of the office of the Deputy Governor and there were also instances where I have participated in statutory functions of the county government, like the budget making process, County Integrated Development Plan (CIDP) and all those. I have participated in those actively. So, I think that I justifiably earned my salary.

Sen. Sijeny: Madam Deputy Governor, you have referred even to your last statement, that you have attended various meetings and attended certain ceremonial functions delegated by the Governor. Were you not able to get even minutes of such meetings or something to show that what you are telling us is nothing but the truth?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Thank you, Senator. I did not bring such minutes. For example, if you are sent to a public forum on behalf of the Governor, I am sure that we do minutes for such sort of meetings.

Sen. Sijeny: For clarification, like budget making.

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Those are there.

The Chairperson (Sen. (Dr.) Khalwale): Deputy Governor, the County Assembly has referred to Article 179(2) (a) about the statement that you and your Governor sit on the CEC during the meetings. Can you confirm that you have consistently been sitting in these meetings?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, I have been in CEC meetings. Actually on two occasions, I was away and I am minuted as “absent with apology” because I had been sent by the Governor to attend meetings outside the county. However, our meetings, as it was pointed out yesterday, have not been very consistent.

The Chairperson (Sen. (Dr.) Khalwale): Decisions made in those CEC meetings, which you have confirmed that you were attending, occasioned audit queries. They were pointed out by the Auditor General yesterday. Did you support those decisions? If you did not, can you give us evidence to that effect that will divorce you from those decisions that led to those audit queries?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, I would not, in this instance, remember all the ones that I raised queries but if I could just put it straight, and I think it was also stated yesterday, issues of policy is what we discussed in the CEC meetings. The actual implementation was not within the county executive meeting discussions.

The Chairperson (Sen. (Dr.) Khalwale): County Assembly advocates have said that out of the 33 positions that were advertised, 28 of them required approval by the County Assembly. During the CEC meetings, did you remind the Governor that he was by law required to seek approval of the County Assembly?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, if my recollection serves me right, what was in contention was that we were operating without an approved structure. After we read Article 46, I think it was again realized that it was necessary for the County Assembly to do approval for the structure. I think that was withdrawn, I recollect.

The Chairperson (Sen. (Dr.) Khalwale): Have you gotten my question? We are not talking about the structure but the 33 positions for hiring various officers. There were 28 of them which required that the County Assembly approves and that was not done. So, I am asking, as a member of the CEC, did you advice either the CEC or the Governor that they were breaching the law?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, I think I have stated that matters to do with recruitment were never discussed with me at any one time. That did not happen. Even in the appointment of the executive members, I did not, at any one time in Embu County, either propose anybody or even discuss issues of recruitment in Embu County and that is a statement of fact.

The Chairperson (Sen. (Dr.) Khalwale): That is okay but to tie my question to that one of Sen. Sijeny, it would help you a lot if you ask for time so that you give us some form of evidence showing that you had different opinion, contrary to what the others have said, but in the absence of that, then you are not helping your case.

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, I was not very sure that it is right to bring the minutes of the County Executive of Embu to this sitting but I decided to carry some of them just in case. In the minutes of 31st October, 2013 and again this was limited---

Mr. Charles Njenga: Mr. Chairman, Sir, we are going to run into serious problems here because she is now introducing another set of serious documents that go to core of the charges that challenge the essence of what the County Assembly stated against the Deputy Governor. They had all the time, they filed a response, they said they are not calling witness but just to come here to say that the committee did not have jurisdiction - We are now being led through a set of minutes, is it really fair? Does it not undermine the fairness of this Committee to the County Assembly?

Sen. Mositet: Mr. Chairman, Sir, you had indicated from day one that this is not a trial but an investigation. So any material which can assist the accused or the person who is being impeached can be considered. For example, if the minutes she is talking about; if they are authenticated, I do not see any problem with that.

The Vice Chairperson (Sen. Murkomen): Let us be very clear because we do not have time. That is not evidence that can be admitted no matter what we can say here because we have already rejected several times in the previous cases about introduction of evidence. It was the strategy of the Deputy Governor and her lawyer that they did not want to introduce any evidence, affidavits and so forth. This should remain so. I do not think that it helps in any way, in the first place. So, because of time and for fairness and justice, we should not admit that evidence. She should be concluding actually.

Mr. Kibe Mungai: Mr. Chairman, Sir---

The Chairperson (Sen. (Dr.) Khalwale): Relax, Mr. Kibe.

Sen. Boy Juma Boy: Mr. Chairman, Sir, she is not introducing evidence. She was asked by Sen. Sijeny or whatever to show what happened. She is not saying that she is introducing evidence. She is responding to a question that she was asked and she is responding with hesitation. She says that she is not sure whether to bring evidence. She is only trying to respond to a question put to her by one of our Committee Members.

The Chairperson (Sen. (Dr.) Khalwale): What are you saying, Senator?

Sen. Boy Juma Boy: I am saying that she is responding to something that came from us.

The Chairperson (Sen. (Dr.) Khalwale): I have heard you, I have also heard Sen. Mositet and Sen. Murkomen.

Mr. Kibe Mungai: Mr. Chairman, Sir, for purposes of fairness, I actually agree with my learned colleague that as far as their document stand, there is no single accusation against

her and against the county executive committee. Their evidence has been given against the Governor. So until you bring specific allegations against her, accusing her as a member of that committee she failed to discharge her duties---. So, on what basis were we going to bring the minutes? There are also the questions of law. Are these minutes the kind of things that you can come and introduce? That is why she is talking about doubt because the questions of law were not clear.

Mr. Chairman, Sir, your questions assume that the case being presented today at the podium is the same case that has been presented in the papers of the County Assembly. We shall be submitting. In their papers, a case against the Governor has been presented. When they come here without giving additional evidence, they pretend that the evidence can apply to the Deputy Governor. It is that which informed this. There is no evidence and the HANSARD speaks for itself.

The Chairperson (Sen. (Dr.) Khalwale): Maybe you should withdraw the word “pretend”. You can say “they proceeded on the assumption”.

Mr. Kibe Mungai: Yes, with the assumption that those same documents can apply to her.

The Chairperson (Sen. (Dr.) Khalwale): I think I now understand why you people say the law is an ass.

Madam, I think if you had started off with these documents, it would have strengthened your case but because, if I allow you, it would be unfair to the other parties, I am constrained to allow you. So, we will make a decision appropriately at the right time. So, you continue and avoid introducing evidence.

Mr. Kibe Mungai: She has not sought to give any evidence.

The Chairperson (Sen. (Dr.) Khalwale): We have ruled on that. The agitation arose because she now brought a whole file of documents. So, we proceed. Anybody else with a question?

Sen. Kittony: Mr. Chairman, Sir, since she had decided to come without witnesses and documents, if she had evidence, she would have tabled for us to look at them in advance. So, I think it is a bit late.

Mr. Wilfred Nyamu: Mr. Chairman, Sir, we will be in a difficult place if documents are introduced now. On Monday, when we came in, we actually served all parties with the documents that we endeavoured to rely on including the Deputy Governor. So, if they are introducing those documents, we ought to have had them and ought to have used them during our proceedings.

The Chairperson (Sen. (Dr.) Khalwale): Counsel; that is exactly what we have ruled.

Mr. Kibe Mungai: We have not sought to do that.

The Chairperson (Sen. (Dr.) Khalwale): We have ruled to that effect and do not feel mistreated because an attempt by the Governor to introduce some documents this morning was also rejected. Remember the photocopies and so on. So live with it.

Sen. Wamatangi: Deputy Governor, you have told us in as many words how difficult it is to be a deputy governor in this Republic. One would almost sympathize. I would shy away from being a deputy governor if that was the reality. Just to ascertain the extent of that circumstantial incapacity, for example, in the case of Embu County, when a serious matter like the procurement of maize seeds which failed to germinate, to use the word of one of the counsel, was a “fiasco”---. In the matter of, for example, the upgrading of the stadium where a lot of taxpayers’ money is alleged to have been misappropriated, in your position, and I assume you have an office within the county government, in your capacity, sitting in your office, when that kind of act was committed. I am sure you must have received information or correspondence, what did you practically do on a matter of that magnitude? To what extent did you act to show that you did something?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, on the matter of the maize specifically, I learnt about it like everybody else; that maize seeds failed to germinate. I summoned the county executive member in charge of agriculture and we sat down and he did his report to the County Assembly of Embu. I am in possession of that document. We discussed that and the response was done appropriately to the County Assembly. What I was accused by the County Assembly of is not having talked about it but I do not think, it was in order for me to start talking about it publicly; but within the county executive, we made a response when the member was summoned by the Assembly on the same allegation.

Sen. Wamatangi: So, what you are saying, contrary to evidence that was adduced here earlier is that the subject of the maize was indeed discussed during your cabinet meeting. Was it?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): It was done in my private capacity as Deputy Governor and the county executive member. It was not discussed in the cabinet. Just for the record, I think since these things started, we have not had a formal meeting of the county executive committee, and I do not think I can compel the Governor to call for a meeting of the county executive committee. I can only request but not compel.

The Chairperson (Sen. (Dr.) Khalwale): Members, I am going to cut all of you because of time. I now invite Mr. Kibe. I stand you down.

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, before I go and before my counsel comes, I think I need to be understood here. I had almost forgotten. It is my very humble plea that this Committee absolves me of the blame that has been apportioned to me by the County Assembly of Embu and to

also state that I understand this is a political office as well as executive. I am comfortable serving the people of Embu in my capacity as Deputy Governor for the remaining part of the term if only that chance is availed to me and that stands with this Committee absolving me of the blame apportioned to me in matters that were clearly not of my own making. I do not have any ambitions beyond being the Deputy Governor of Embu County for this term.

The Chairperson (Sen. (Dr.) Khalwale): Madam, I am under a lot of pressure from the Vice Chairman because he wants to shoot one question.

The Vice Chairperson (Sen. Murkomen): I just want to ask the same question I asked the Governor. Listening to the story from the County Assembly, to yourself, to the county secretary, is there a government running in Embu? I am just asking myself, can you, for example, instruct anyone below you to do anything and do they respect your directives? Do they even answer to you? The question I am asking myself as a Senator because Article 96 says that it is our responsibility to protect the interest of the counties, we want the County Government of Embu to work but the story we have heard for the last four days is like everyone for himself and God of us all. You came to office because of the vision for the county. Do you, people, have a vision for the county and is it ingrained in everybody? Are you moving in the same direction? The reason why we are here is a matter of governance.

You spoke on behalf of deputy governors. We know that many governors in this country would never have been elected without the deputy governor. In my own argument, in many counties, there might be two dominant communities, the election of the governor and the deputy was a coalition but it looks like nobody consults the deputy governors. What is your take on that? I am now interested in not you being charged but the policy position of the deputy governor and the leadership question in Embu County.

The Chairperson (Sen. (Dr.) Khalwale): Then sum it up by clarifying what you mean by your last remark. It has thrown me off balance. You were saying, by implication, that if the position of Governor became vacant, you would wish to have nothing to do with it and yet this Constitution demands that if that happened, you would be asked to assume office without any other process. What did you mean?

The Deputy Governor of Embu County (Hon. Dorothy Nditi Muchungu): Mr. Chairman, Sir, I will start with the question of the vice chairperson. We have a very good working relationship with the county executive committee members of Embu County. I talk to them, we prepare cabinet memos, although I think they should be county executive committee memos and we consult at that level, even before we go to the formal meeting. At least they give me copies, we discuss them before we go into the formal meeting.

I do not think that the County Government of Embu is not working *per se* but clearly, since this whole thing started, we are not on a very good footing, that is the truth. I can only do justice to this process by speaking the truth. As we speak now, I am not sure

things are okay in Embu County because nobody is there. We are running up and down in court and all that.

However, I also want to be understood on this. I am not saying it because I want to victimize anybody, I personally pointed out in county executive meeting that I think the working relationship of the county secretary and the members of the county government of Embu is not right. I pointed it out and that is the truth. On the matter that the Chairman has asked, I think I will just leave it at that.

The Chairperson (Sen. (Dr.) Khalwale): Sen. Orengo, since you are on HANSARD, I think it is important that I give you an opportunity because the HANSARD is going to hang.

Sen. Orengo: I was not on HANSARD.

The Chairperson (Sen. (Dr.) Khalwale): You were not on HANSARD. I will remind you when we are eating *mandazis*.

The Vice Chairperson (Sen. Murkomen): The HANSARD will say there was noise from the background.

Mr. Kibe Mungai: Mr. Chairman, Sir, thank you for giving the Deputy Governor time to express herself.

Sen. Orengo: You do not have to spend those two hours if you can---

Mr. Kibe Mungai: It is one-and-a-half hours.

The Chairperson (Sen. (Dr.) Khalwale): No. no. You have 40 minutes to go. You were doing together with the Deputy Governor, so you have 40 minutes.

Mr. Kibe Mungai: She did her presentation in 30 minutes but the rest has been taken up by the Committee.

The Chairperson (Sen. (Dr.) Khalwale): You are not the time keeper. The time keeper is here. So, you have 40 minutes, please organize yourself accordingly.

Mr. Kibe Mungai: Mr. Chairman, Sir, we have had about 40 hours. We have just taken about one-and-a-half hours for our case. How am I going to respond to these charges and feel that I am doing justice to our case?

The Chairperson (Sen. (Dr.) Khalwale): Counsel, you had three hours.

Mr. Kibe Mungai: I had six hours.

The Chairperson (Sen. (Dr.) Khalwale): Can you relax and respect the institution of the Senate? You had three hours, you used some time yesterday, you were timed, I have consulted and I have been advised that you have 40 minutes. Try and condense your work and if at the end, you are pressed for an extra five minutes or so, you will apply. Why should we exchange?

Mr. Kibe Mungai: I do not want us to exchange but I am sure I cannot finish in 40 minutes.

The Chairperson (Sen. (Dr.) Khalwale): Proceed.

Mr. Kibe Mungai: Mr. Chairman, Sir, let us start with some of the pending responses that yesterday I was required to give but this was not granted.

To Sen. Orengo, the question arose as to the issue of whether Article 181 of the Constitution expressly provides for impeachment of the governor, in the same way Article 145 provides for the impeachment of the president. It is my submission that Parliament and the County Assembly of Embu have not been in any doubt as to what Article 181 of the Constitution provides for. It is an Article that provides for impeachment. What is the proof of that? The proof is in the proceedings and the Motion that was moved. It was a Motion for impeachment and the invitations by the Senate to us still talked about impeachment proceedings that had been commenced by the County Assembly of Embu. Therefore, it is my submission that there is no doubt that, to the extent that the Constitution provides for impeachment, it provides for it three times and, not a single of those times does it refer to the deputy governor.

There was the second issue that arose from Article 179(2) and (4) of the Constitution. It is our position that when Article 179(2) gives the compositions of the county executive committee, all that it does is that it makes the governor and the deputy governor a member of that committee. That is not in dispute but that does not mean that each of these persons do not have their constitutional obligations. Therefore, to tie up to impeachment or any other procedure for removal, you would be removed for what you have done for the position that the Constitution has given you and in this case we are saying, if the deputy governor has done anything, let us be held responsible in accordance with the law for what she has done in the discharge of her mandate. In this mandate, there is no confusion anywhere in our laws, unless one was to be introduced like the concept of co-superintending, which is seeking to persuade this Committee to do; to confuse the mandate that has been given by the law.

As regards, Article 40 of the Constitution, it was the argument of Sen. Orengo yesterday, which is in the HANSARD, that in Article 40, there is a sense in which the Constitution prohibits what should not be done and there is no similar prohibition. In reading the Constitution, it should be read, first of all, by what it says in its own terms. Article 181 provides for the constitutional power of impeachment. It is not an article that provides for a prohibition in the manner in which Article 40 does on what Parliament cannot do with relations to the right to property. So, when that is understood, then it does not become

necessary to juxtapose Article 40 and Article 181 for purposes of determining what Article 181 provides for in plain English.

In this case, were it even to be posed to a first year law class; is there a provision; what does Article 181 provide for? The question is clear because it is about the removal of a governor. The counsel for the County Assembly was here. We have seen all provisions of the Constitution being referred to. Article 96 and Article 182 to justify that somewhere in-between the lines, one is able to trace and say that there is an Article for impeachment of the deputy governor. I urge the Committee that there was avoidance by Mr. Njenga of one simple issue, that when we go to Article 181, it speaks for itself. It is the governor and nobody else. I urge this Committee that for purpose of exercising its mandate, it must be limited to what it says.

We have Motions before us.

Sen. (Prof.) Lesan: Mr. Chairman, Sir, while the counsel is still on the issue he is dealing with, I would like him to also refer and interpret for us Article 259(3) (b) in the Constitution. I think I have assigned it somewhere and I will be coming to that. Those are some of the things I have noted.

The Chairperson (Sen. (Dr.) Khalwale): On that note, Members, because we are trying to control his time, let us leave him to go and only note down the issues that he is not clear on.

Mr. Kibe Mungai: Mr. Chairman, Sir, I was saying that we were faced here with a specific Motion. These documents that came from the County Assembly of Embu were served upon the deputy governor by the Senate. The Motion talks about Article 181 of the Constitution read with Section 33 of the County Governments Act. If the Senate serves us with the documents that we are coming to answer to an impeachment article based on Article 181 of the Constitution, it cannot be that we can arrive before this Special Committee and be told that, probably, after all you are not coming under Article 181, you are probably coming somewhere in-between in a provision that is supposed to be deduced. Nothing express says that these are the provisions that allow us to have impeachment proceedings against the deputy governor.

It is my submissions that this would not be the proper reading of the law. It would ultimately be prejudicial because the Senate, if it has jurisdiction whatsoever, the same has been invoked by its own letter and on the basis of the County Assembly because this is initiated by the County Assembly. The process did not commence in the Senate. It commenced and the Senate had to deal with it under Section 33 of the County Governments Act. It stands or falls on a simple decision of the Senate. Does Article 181 which was cited permit the impeachment of a deputy county governor? I am submitting; it does not in any way that one may read Article 181. They did not cite Article 182 and they did not read Article 96. That is the truth of the matter.

There is a question raised by Sen. Murkomen on Article 200 and I believe Article 182. Article 200 is a simple issue. Article 200 just provides for legislations to be provided that may permit for the removal of any person working in the county government. It is important to note that the legislations envisaged in Article 200 have already been enacted by Parliament. As it has been enacted by Parliament, there is nowhere that it says; this is the procedure for the removal of a deputy governor. That action has been acted upon. Again as we shall be saying, and as we have already said in our first presentation, it is not that there is no procedure for the removal of anybody, and I will come back to that, for purposes of the law, there are such provisions but distinctions must be made on whether the removal of a specific person necessarily means that the Senate should remove that person. Those would be two different questions of the law. The Senate can only remove those that the Constitution says the Senate can remove but not to usurp jurisdiction and say any person where it is not clear who removes them, the Senate will be removing them. That would not be a proper reading of the law.

On Article 182 of the Constitution, it deals with the issues of the consequences for what happens in the event of impeachment of a governor and that one is provided. To understand Article 182 of the Constitution, it would be important to remember that where the Constitution provides for the removal of president by way impeachment, it has what it says on the consequences, that is, what happens to filling that office. When it deals with the deputy president, there is what it says on the vacancy in the office of the deputy president. So, I urge you that you read Article 181 and 182 together. Article 181 – remove the governor and Article 182 deal with the consequences for removing the governor. But to read those two and say we can remove both of them, it would be acting in accordance with the Constitution of Kenya. It would be to stretch the meaning of the law.

Mr. Chairman, Sir, we go to two important questions raised by Sen. Wamatangi. Sen. Wamatangi raised the question whether we are creating an impression in which the Office of---

The Chairperson (Sen. (Dr.) Khalwale): Order, counsel. The Vice Chair has a small comment.

The Vice Chairperson (Sen. Murkomen): You are an officer of the court so when you say that, also you help us by citing the record. You said Article 181 talks about removal of governor but also Article 182 talks about replacement of a removed deputy governor. I just want you to look at Article 182(5).

Mr. Kibe Mungai: Thank you for that. It clarifies a major confusion that I have noticed. Article 182(5) says that if a vacancy occurs in the circumstances contemplated by Clause 4, an election to the office of the county governor shall be held within 60 days after the Speaker assumes the Office of County Governor.

The Vice Chairperson (Sen. Murkomen): Article 182(4) says that if a vacancy occurs in the office of the county governor and that of deputy governor or if a deputy governor is

unable to act, the Speaker of the County Assembly shall act as the county governor. Your submissions were that Article 181 talks about only the removal of governor and Article 182 talks about replacement of governor but also talks about situations where the deputy governor is unable to be in office or actually removal of deputy governor. I wanted you not to be economical.

Mr. Kibe Mungai: I am happy with that and I was not trying to be economical, just pressure of time. The issue is this and this is our submission; this probably should go to the same issue that I am answering from Sen. Wamatangi; that a deputy governor is removable by way of impeachment by a process initiated in the county assembly in conjunction with the Senate. It is important that we confine ourselves to the law. That removal would be because you have acted or discharged the functions and the powers of a governor under Article 179(5) or secondly, if you remove the governor and as the deputy, you are the occupant of that position and you exercise those powers, you cannot be removed. You cannot read provisions that you are reading to say that Article 181 permits your removal by way of impeachment. We are saying that the target for the removal of a deputy governor would be because you have exercised the functions of a governor or exercise those powers but there is no procedure like it is with the deputy president.

Sen. Orengo: Please, when you are addressing us avoid the comments like “this is also clear to a first year student at the university”. We can do away with such comments. Otherwise, we will not be grappling with this problem with a sense of decorum.

Section 33 of the County Governments Act sub-section 10 says that a vacancy in the office of the governor or deputy governor arising under this section – and the section deals with the removal of a governor – shall be filled in the manner provided by Article 182 of the Constitution. Now is the removal of deputy governor under Section 33 implied? That is a problem we have got to deal with.

Mr. Kibe Mungai: Mr. Chairman, Sir, I urge that the sections to be read with Section 33(1). The constitutional basis for Section 33 is actually Article 181. If Parliament makes a law that presupposes that there can be a vacancy on the basis that you are invoking, this law for purposes of Section 33, has been written because Article 181(2) which says that Parliament shall provide a procedure. The procedure that is supposed to be created under Article 181(2) is a procedure for the removal of the governor. It is precisely why in the constitutional case that we have filed, one of the issues that have an issue is Section 33(10) which deals with questions of vacancy. Vacancy under the constitution arises under Article 182. So purposes of talking about vacancy, it is something that the Constitution basis for it is Article 182 and not Article 181.

Sen. Orengo: Mr. Kibe, I just want you to address that section because at the end of the day, we have to resolve that problem. It says that a vacancy arising under that section and not under the Constitution.

The Vice Chairperson (Sen. Murkomen): And do not confine yourself to Article 182 because Article 200 gives Parliament power to provide procedure for removal of any elected officer at the county level.

Mr. Kibe Mungai: Precisely, and I am submitting that the procedure that has been permitted by the Constitution--- The first issue that we begin with is; does the Constitution provide for the removal of deputy governor by way of impeachment? If the answer to that is yes, then it is the duty of those who prefer these positions to point out which are these provisions of the Constitution but there is none.

Sen. Orenko: I want to ask this question for the last time. It says “arising under this section”; that is the only problem I want you to resolve. It looks like that section is self-contained. It is like telling that for purposes of removal of the deputy governor, do not look anywhere else because that vacancy is arising under Section 33. Then it says that if you want to fill it, then go to the Constitution. Otherwise as far as the vacancy is concerned, it is arising under Section 33. If you can resolve that problem for me, I will be okay.

Mr. Kibe Mungai: Sen. Orenko, one of the reasons regarding the issue of resolving Section 33, the deputy governor has taken the position that Section 33(10) would have no constitutional basis. She has taken the issues to court for purposes of determining the constitutional basis of Section 33(10), for example.

The first obligations of this Committee, having been notified, and we did this formally that the constitutionality of Section 33(10) because the Constitution itself, does not permit the removal---

Sen. Orenko: So, you are saying that the section is unconstitutional so far as it relates to the deputy governor?

Mr. Kibe Mungai: That is the first thing that we are saying. The second thing---

The Chairperson (Sen. (Dr.) Khalwale): Order! I think Members we should move on. It is quite clear that Kibe has a very strong position on that particular issue and we are not under any obligation to share with him or agree with him in that manner. Now that you are saying Section 33 is unconstitutional, I am yet to hear of any Kenyan including yourself who has gone to court to challenge the constitutionality of that article.

Mr. Kibe Mungai: The Deputy Governor has gone to court to challenge Section 33(10). That is what we are saying. It is pending in court.

The second thing, because this is important for the HANSARD, that would also be worth noting is that the issue needs to be resolved at this particular stage that despite the fact that the Constitution itself does not provide for that power, because the power cited under Section 33 is for the removal of a governor, the Senate still found it fitting that Section 33

gives it authority even in the absence of a clear expression of the Constitution. The one that has been cited is Article 181 so that if the two could go together---

The Chairperson (Sen. (Dr.) Khalwale): Counsel, with utmost respect, that is an argument by yourself and I have allowed you, it is on record. Just carry on.

Mr. Kibe Mungai: We come to the questions raised on the second aspect by Sen. Wamatangi. Is the deputy governor a sitting duck? I think she has spoken for herself, she has said what she does within the law and she has discharged her mandate as a deputy governor. She has carried out her mandate as deputy governor.

First, we have not received facts to show that she has committed any wrong. To the contrary, they are saying and acknowledging that these are actions by the governor but we would like them to be imputed to the deputy governor. Can this be done? To me, this would be the first thing that the Senate must provide. Even when the counsel for the County Assembly came to make their presentations, you did not see an attempt to link the facts that they came with to say, this is how these facts apply to the deputy governor. Therefore, I am urging the Committee because the Committee is aware of Article 50 of the Constitution: The right to fair hearing is; the right that you are punishable for your own violations. Where the act is for your own violations, evidence is given on how you have committed the violations. This issue needs to be resolved at this particular stage.

Despite the fact that the Constitution does not provide for that power - the power under Section 33 is for the removal of the Governor –the Senate still found it fitting that Section 33 gives it authority even in the absence of a clear expression of the Constitution. The one that has been cited is 181.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, with utmost respect, that is an argument by yourself. I have allowed you and it is on record. Just carry on.

Mr. Kibe Mungai: We come to the questions raised on the second aspect by Sen. Wamatangi. Is the Deputy Governor a sitting duck? I think she has spoken for herself. She has said what she does within the law and she has discharged her mandate as a Deputy Governor.

The mandate she has discharged as a Deputy Governor, action “a”, omission “a”, we have not received facts to show that she has committed any wrongs. To the contrary and this is what needs to be borne in mind, they are saying and acknowledging that these are actions by the Governor but we would like them to be imputed to the Deputy Governor. Can this be done?

For me, this would be the first thing that the Senate must provide. When the County Assembly came to make their presentations, you did not see an attempt to link the facts and they did not come to say that this is how the facts apply to the Deputy Governor. I am urging the Committee, because it is aware of Article 50 of the Constitution; the right to fair hearing is the right that you are punishable for your own violations. For your own

violations, evidence is given on how you have committed the violations. This would not be right and it would be the first time that it is happening for anybody to say that they have given evidence of “a” and should be related to evidence “b.” That cannot happen and I urge you---

Sen. Wamatangi: Mr. Chairman, Sir, I am the one who had raised that question. For clarity, I was asking the question in relation to the constitutional provision which says that the Deputy Governor shall deputise the Governor.

Yesterday, in your presentation, you said that as long as the Governor is in office, the Deputy Governor is, for lack of a better word, incapacitated. That is why I asked that question. With that provision, does that mean that as long as we have a Governor sitting in the Office, despite that provision, the Deputy Governor is unable to act?

Mr. Kibe Mungai: Sen. Wamatangi, if such an impression was created, then it was the wrong impression. The position is – this is in our notes and what we have officially submitted – is that in her capacity as the Deputy Governor, she had discharged her powers. However, in her capacity, for example, on if she has reported to the County Assembly, have you done this or the other, we have demonstrated, in our response that in statutory obligation, the person responsible for finance shall do this or the other. If it is about appointments, that is expressly stated in the Constitution.

When she rose to speak, she said that there are provisions under the law where you can give a portfolio or assign other responsibilities. There are provisions under the County Governments Act where these are formal decisions. This has not been done. If it was to be done, then we would do that. However, before that happens, we can only do what the law says, which is to deputise.

She has said that she has deputized. However, to take this to mean that with regard to issues of appointment, where the Constitution is very clear that even if she was to act under Article 179(5) of the Constitution, she would not deal with matters of appointments and dismissal. It is the Constitution that says that. Therefore, there are limits. There are limits because she is the Deputy Governor. Those limits are express limits by the law itself. One cannot be faulted in that.

As she has concluded, if there is a gap in law, the gap may be dealt with but it cannot, otherwise, be the case.

In this case, to complete the sessions on that particular issue, I need to say that when it comes to the question that has been repeated over and over, the opening statement for the counsel for the County Assembly, the issue has been relevant that there is probably a need to assert jurisdiction to either this or the other group. However, to members of the Special Committee, this is what we are saying.

The law has already provided for that jurisdiction. That jurisdiction encompasses when you may need with a Governor under the limited circumstances that the Governor can be

brought under your jurisdiction. Why do I say this? This is because the Leadership and the Integrity, one law that is envisaged by Parliament for purposes of removal - I have it here - provides for a mechanism so that anybody failing in his offices for purposes of these allegations that have been made may be held into account. That holding into account would result into issues of removal because of violations of the law. This is expressed in the Constitution under Article 75 and 80 of the Constitution. There is a specific law. What we urge the Senate is this; if there is a law that Parliament has made with regard to a certain issue, why should the jurisdictions---

Sen. Orengo: Just some clarity. That specific law also applies to the Governor although there are specific provisions in the Constitution with regard to removal and not the Deputy Governor as you are saying. However, this other law applies to the Governor. Does it not?

Mr. Kibe Mungai: Yes, Sen. Orengo. However, there is this rider. This is where we started yesterday and that is why I thought it was important. Impeachment is a special procedure for removal for the time being, restricted to three offices. Saying that together means that impeachment is an additional mechanism. But this Senate would be acting grossly, out of jurisdiction, if it was to say that the Constitution, having limited it to three offices, that procedure for removal should be extended to other offices.

Mr. Chairman, I share a concern that may have been made by one of the advocates for the Governor. Because of the procedure envisioned *per se* under Chapter 6 for removal is a procedure that is for other state officers including those three. That procedure is disciplinary in nature.

Therefore, I urge the Senate. The Constitution has said that the Senate is the tiger. The Senate removes those who need a tiger to be removed. Why should the Senate – I see no possibility – extension of jurisdictions would be that powers whose nature are of a disciplinary committee would be asserted. That would be wrong. That, in my submissions, would trifle the importance of these important constitutional jurisdictions of impeachment because it is not meant for every other state officer. There is already a provision. It is for the most important. That is our submission.

Sen. Wamatangi: Mr. Chairman, Sir, if you will permit, there is something very interesting, counsel. However, this is just for the sake of us understanding. Just like Sen. Orengo has said, he has advanced a very important line of thought especially in terms of what needs to be corrected in law.

If you remember the statement by the Deputy Governor – in my mind, you have made a good case why the two should be separated – however, as much as you have belaboured to it, the Deputy Governor made a very interesting point when she said; “for somebody who has been elected---“

That is a very pregnant statement because it seeks to enjoin the two because they are elected in the same election with the Governor. Definitely, the implication of responsibility is also carried out in the statement.

Mr. Kibe Mungai: I agree with you 100 percent, hon. Wamatangi, however, with this rider, that as an elected leader, just like the Speaker - the Speakers occupy extremely important state offices. However, the Constitution does not say that you can remove the Speaker through impeachment. We are dealing with one procedure; the procedure of impeachment for violations of the law. The problem would be, in this case, if the law did not deal with that matter. However, it has dealt with the matters of Deputy Governors and other equally important people; state officials. However, with regard to impeachment, that is a restricted power.

When that is understood and when there is no confusion, then one would not feel as if they are losing anything. This is a definite political choice. I can say like in America that there is a broader jurisdiction of impeachment. This broader jurisdiction of impeachment is because it is expressly provided for in their Constitution.

In future, and probably this is one of the take homes for this Committee, it may be possible that Parliament and following the procedures for amendment of the Constitutions, may wish to extend the jurisdiction of impeachment beyond what it exists as of now. But that would have to be done, expressly, by the Constitution. Therefore, the point is, to exercise power that has already been given in person "a" if there is a gap anywhere, that gap cannot be properly exercised by usurpations of jurisdictions. It can only be made by a formal amendment if there is a gap. But as we had said, there is no gap whatsoever---

That is a deliberate design that you can hold the Governor to account under impeachment for exercising those powers. The powers do not exist merely because you are a Governor. The powers exist because of the nature of powers that you exercise. Therefore, there would be no contradictions. There is a procedure for removal. It does not have to be impeachment and the Constitution does not say that.

To come now to the issues raised by Mr. Njenga, we have already prefaced them by pointing out, our understanding from the schedule we were given was that a case to prove these charges would be made against us. It is our respectful submissions that that has not taken place. To the contrary, what has taken place is an attempt to say that the evidence that was preferred against the Governor may somehow be related to her on the basis that she is the Deputy Chief Executive Officer and on the basis that she is the Deputy Governor.

If we were to go this route and I listened to them because I was here throughout when evidence of the case that was presented, then this Committee would have the obligation to do two things. I understood the case against the Governor to be this. The law – provisions were cited – says that you are the Chief Executive Officer, there are express functions that the Constitution has given you, express powers and has even gone ahead to

say that for purposes of exercising necessary powers, you can exercise so that your powers are not only those that are enumerated but include such other necessary powers to do your job.

Mr. Chairman, there are no simple provisions in the Constitution, for example, in the County Governments Act that talk about what is known as the powers of the Deputy Governor. There are only functions of the Deputy Governor. You may be assigned this role or something of that nature. However, there are functions and powers of the Governor. It is to those powers that impeachment speaks to.

When the makers of this Constitution provided the important device for impeachment, they had a target. The target was powers that are vested in certain state officials. It is not just the occupant of the office but the nature of the powers that they exercise. I persuade you to hold that if the Senate gets jurisdictions to deal with these powers, what powers would it be addressing itself to when it comes to the Deputy Governor? The law does not give her powers independent of her.

Sen. Orenge: If your argument is right, can you demonstrate that in relation to the Deputy President? For purposes of the Office of the Deputy President, first of all, remember that a political choice has been made. That is to say, the Deputy President occupies an important executive office for purposes of the Office of the President and enumerates the powers that he exercises.

You have made a very powerful argument which is very attractive. I want you to correlate it to the Deputy President.

Mr. Kibe Mungai: The Constitution – this is my understanding – for the purpose of the President says; the President is the Head of State and the Head of Government. For purposes of being the Head of State and the Head of Government, his Deputy is the Deputy President and this has gone on to require, in the oath of allegiance to say that the responsibility to enforce the Constitution, protect the laws, ensure justice and to protect the sovereignty of this country is done by two people and they are given an oath. This is the oath of allegiance to do that. When it comes to the Deputy Governor and the oath of office – we dealt with this yesterday – for purposes of the oath that the Deputy Governor takes, he takes an oath not to do anything that the Governor is permitted to do but to advise the Governor.

The relationship should be read to Sen. Orenge although he knows the history behind it; the term was attributed to him. Under the current scheme of law, the role of a Deputy Governor for all practical purposes would be analogous to the former Constitutions of Kenya where you are a presumptive heir for all practical purposes where one had to look at the key ingredients of it.

But for the purpose of the Deputy President, and by deliberate design and this is why there is deliberate impeachment on that, those powers are also given to the Office of the Deputy President. That is a key distinction.

Sen. Orengo: You made a very attractive argument. When you look at the functions of the Deputy Governor; these are enumerated as functions but not powers. When you look at the Governor's you will see enumerated powers and functions. But if you look at the Office of the President, there are enumerated powers and functions just like you said. However, when I look at the Office of the Deputy President, I cannot find, under the relevant Articles, enumerated powers.

Mr. Kibe Mungai: I persuade you, Sen. Orengo, that when you look at what they say about the authority of the President, Article 131---

Sen. Orengo: Article 147 talks about functions of the Deputy President. This does not talk about the powers of the Deputy President. Just like in the relation to the Deputy Governor, there are no enumerated powers. I am saying this because you have made a very powerful argument that this impeachment process is in relation to the three offices. It is targeting powers as opposed to functions.

Mr. Kibe Mungai: I have now understood you. When you look at Article 147(2) and 147(3), it is envisaged that the Deputy President shall perform, by this Constitution any other functions as the President may assign.

When you go to Article 134, when the President is absent and during any other period, the Deputy President shall act as President.

The Chairperson (Sen. (Dr.) Khalwale): Mr. Kibe, you have spent most of your time, successfully, I hope. Let me bring you back. You are remaining with six minutes. You have also tried to demonstrate why we do not have jurisdiction over this matter. Now, assuming that we decide that we have jurisdiction on it, can you spend the balance of your time, telling us why you think, that based on the charges against your client, we should find that she is not culpable.

We will go to the charges now. You have six minutes.

Mr. Kibe Mungai: I cannot do that in six minutes, Mr. Chairman, Sir.

The Chairperson (Sen. (Dr.) Khalwale): But you chose to spend most of your time on jurisdiction. I could not talk on you.

Mr. Kibe Mungai: Mr. Chairman, Sir, if it is possible and if you can find it in your heart to extend the same kind of - not the same because time has run out - but just to appreciate that we need to speak to the issues that have been raised against us. We raised the issues of time; we were the first ones to say that we would not find time to do anything and you said; relax, Mr. Kibe, the Committee will do that. Now, I am asking you because you told us to relax.

In 25 minutes, I will do what you want me to do.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, because this is being transmitted to Kenya, live, do not mislead the public. You have not started this morning. The public does not know that when the cameras went off in the night, we were on for one hour. You have six minutes. Would you like me to add you some little time and how much would that be?

Mr. Kibe Mungai: I need 25 minutes which may not be enough but I will try to do something with it.

The Chairperson (Sen. (Dr.) Khalwale): Okay, 25 minutes it is. Kibe, you are starting to lose your cool. Relax; I am your good old friend. Things have not changed.

Mr. Kibe Mungai: I am relaxed. I have to be, for her sake.

Mr. Chairman, Sir, violations in relation to the Public Procurement and Disposal Act have been made. This is dealt with in – I believe that you have the response so that I save time –pages 3 to 5 of the response.

In this response, we want to emphasise that, for instance, CAE1 is a report of the County Public Service Board that bears out the county officials deemed by the County Assembly as responsible for the alleged violations. The evidence that was tendered in support of this charge, relating to the Public Procurement and Disposal Act is CAE1 which is a report of the County Public Service Board and CAE2, one of them is the minutes of the Implementations Committee and two, the county officials.

In both the said two pieces of evidence that were introduced - in our respectful submissions - relate to the Executive Member for Finance and Planning and the County Secretary. It is not by accident that those pieces of documents relate to them. This is because the nature of the functions that they were carrying out, they said that those were their functions. Therefore, that cannot be evidence because the presumption was – they confirmed it – the law provides that it is them. Then, you cannot stretch that and say that this is--- They gave this in relation to the Governor because the County Secretary answers to the Governor and the same case applies to the Executive Committee Member, Finance.

There is no evidence that has been tendered to show that the officials of procurement are answerable to the Deputy Governor. If that were to be the case, the second question would be; in terms of the relations of the facts that you are saying, which makes the Governor responsible, what did you say and what has this Committee heard when it comes to the Deputy Governor?

Zero evidence has been heard on how this can possibly relate to the Deputy Governor. I also wish to point out to one of the annexure, something that happened because it was raised by one of your Members. I would like the Committee to look at CAE2. CAE2 is a letter dated 16th January, 2013 relating to the implementation of resolutions of Embu County Assembly.

In the minutes that you see under CAE 2, this was raised with regard to our submissions; the submissions being that we had confirmed that there was illegal appointment of the tender officials. Our submission is this. It is the case of the County Assembly that CAE2 confirms that they considered that there were no tender officials because they were not regularly appointed and with its disapproval.

If CAE2 says that tender committees had not been regularly appointed and even gave evidence. All that the Deputy Governor can do is – since these are allegations on appointment under the Public Procurement and Disposal Act - the County Secretary said that this was her statutory mandate. She said that it was her statutory mandate. Who supervises her? It is the Governor.

In the absence of any confirmation saying that they were responsible to the Deputy Governor, one cannot link this piece of evidence to her even on the alleged illegality. The allegations of illegality came from the County Assembly. When it comes to – I invite the Committee to look at the answers that we gave – issues of violations of the Public Finance Management Act, the relevant provisions as far as we are concerned are Articles 161 and 265 of the Constitution. The position is this. What is the evidence that has been given?

For purposes of these particular violations, again, the evidence that was given was the same case of CAE1 and CAE2. Those two pieces of evidence do not relate in any way whatsoever to the Deputy Governor. More importantly is that for purposes of Article 226(5) of the Constitution, if a holder of a public office has been responsible for the loss of public money, then such an official may be held responsible.

There is no evidence before this Committee that points out to show that the Deputy Governor directed any persons to do anything that offends this law or she, herself, participated in an action or omission. If she was responsible by way of an omission, then the omission arises because the law says that you should do this with these set of facts and you failed to do it. Therefore, you cannot hold such a person responsible.

We now come to the issues of violations of Section 166 of the Public Finance Management Act. Section 166(4) provides that it is the responsibility, by statute, of the County Treasury---

I want to invoke your experience in this with regard to matters that concern public finances at the Treasury to exercise certain powers because it is National Treasury, either under the Constitution or under certain executive legislations.

In a similar manner, for purposes of the County Governments, the Public Finance Management Act establishes and creates a County Treasury. The members of this County Treasury are the County Executive Member for Finance, the Chief Finance Officer and the persons in those departments responsible for finance and fiscal matters. These particular officials under 161 are responsible in doing certain things in relation to these reports to the County Assembly. If these are not given, it is our submission that they are

responsible for that being a statutory function. How can you relate it to the Deputy Governor?

If evidence was led to show that you have this power to compel them to do this and yet you did not exercise it, for one, there is no such power and two; no attempt was made in the absence of power for her to do that. More importantly, it is important to remember one of the dangerous submissions that have been made for purposes of the Deputy Governor.

An argument has been made which I consider very dangerous. When it comes to the Governor, you can safely present his case by saying that the law required him to do this but he failed to do it. However, what we understand to be the case against the Deputy Governor, when you read the charges, is that despite the fact that the law does not expressly say you were supposed to do this, nonetheless, you should have found a way of finding it your responsibility and to have done something about it. I urge that it would be dangerous to accept that as a basis for responsibility for any public official. One of the basis upon which the charge of abuse of power is based on is this; that, even when the law did not give you the power to do something, you pretended that you could do it.

Therefore, the basis for action is the law. You cannot, in the absence of law, permit someone to do something, nonetheless. You will find yourself going to court on the basis of abuse of power. The basis of that is that there is no law that permitted you to do that. An act of omission is also based on the same issue, that although the law required you to do this, you did not do it.

Therefore, I urge this Committee to accept the normal basis upon which liability, criminal or otherwise, or even political responsibility would attach---. Luckily, what they have cited are violations of specific provisions of the law.

We go to the next charge, the Report of the Auditor-General. The Auditor-General was here. I heard what he had to say and I have read the Report. The answer of the Deputy Governor is complete. This Report says expressly that when we looked at the affairs of the Embu Government, we found this or the other that was wrong. Now, it has been introduced as evidence by the County Assembly. We have read it and it has not pointed out the impropriety or the wrong doing that belongs to the Deputy Governor.

In the absence of that wrong doing, it is not possible that one can convict. The recommendation of this Committee, ultimately, would be, convict these persons for these violations and a vote would be taken by the Senate. I submit that you cannot convict in the absence of that Report saying that we found something wrong with you. What about action which is outside the charge but which has arisen and so we cannot help it? What about action on that Report?

Mr. Chairman, with your intervention when the Auditor-General spoke, he said that the action point is the County Assembly. Therefore, as the Deputy Governor, when this Report says that someone has done something wrong, she is not supposed to do

something under the law. However, when the County Assembly considers the Report, it may decide to do something. It may say it is the Governor or the Deputy Governor or another Member of the County Executive Committee. It may recommend that the persons should correct this or the other or even go to prison because of a specific violation. This has not happened and, therefore, such evidence cannot be attached in relation to the Deputy Governor.

With regard to the violations of the County Governments Act, I will be very short. These violations relate to matters of appointment. In relation to these matters, she has said that the Constitution – even when she acts as Governor – does not allow her to exercise those powers.

Therefore, there are no circumstances under which something wrong with appointment – and I believe the makers of the Constitution were wise to say that the President is going to make these appointments at national level; and at this other level, the County Governor. They did not make this a shared responsibility. So, what the law has not made it a shared responsibility, I urge the Committee to find that it is not possible for the County Assembly to go to Embu and find that it is a shared responsibility, even though that is not what the law provides for. Because the law must, first of all, make it a shared responsibility for somebody to fail to do something.

It is our submissions that the rule of law – which is one of the mandates of Parliament and every state official to ensure that it is upheld – would require at a very minimum this to be done; that if you are going to bring order in public management, we are going to protect public interest; then it would be important that this responsibility be based on the law so that we can speak on authority. Because we only speak on the authority when we are saying “this is the law that you violated;” but to step outside the law and say “there is responsibility,” then it would make a mockery of why, in the first place, the people of Kenya passed a new Constitution and, secondly, why Parliament deliberately by the choice of Members of Parliament (MPs), you make a law and say “The Governor will do this alone as a responsibility of the Governor.” Therefore, I urge this Committee not to find these extensions of responsibility – I do not know whether--- Okay; that is okay.

I note that---

The Chairperson (Sen. (Dr) Khalwale): You have four minutes.

Mr. Kibe Mungai: I thought I had 10 minutes.

The Chairperson (Sen. (Dr) Khalwale): Sorry; you have nine minutes.

Mr. Kibe Mungai: Thank you.

In this particular case because under these allegations that have been made, it is that for purposes of responsibility of leadership – and this is the good thing with the kind of laws that have been made by Parliament recently; they have gone into very great details. One

of these details appears in Section 30(3)(b), where the County Governments Act says as follows:-

“In performing the functions under subsection (2), the governor shall—

(b) provide leadership to the county executive committee and administration based on the county policies and plans;”

However one wishes to see this, this is a statutory and legal responsibility. This responsibility has not been shared, but there can be a basis for sharing this responsibility. In this, I want the Committee to note what the Deputy Governor said; that under the law, it is possible as the law stands today, for the Governor under Article 175(5) of the Constitution to say you can act as Governor for purposes of these powers. You can assign those functions. The only requirement is; these decisions that will be made are formal decisions; that I have assigned this particular responsibility, so that for every public official, you are able to know that when it comes to administration, supervision of matters of procurement, the person responsible ultimately – where the buck can rest – would be my deputy. So, if the law provides for such a thing to happen, can the Deputy Governor be held responsible that it has not happened?

I submit that all that the law can be able to do, even with the best of intentions, is to say: “If the weight of the Government of Embu---“And in this, I have the questions by Sen. Murkomen; why does there appear to be so much confusion? I believe that it was not going to be possible; it would not make sense in my understanding of the law to say that to give certain responsibilities to A and B, you will start fighting over who is the boss; where the buck should stop.

Even it would confuse the Senate in asserting its jurisdictions in a certain matter. But what the law can be able to do is that, the law can say you can assign; somebody may act in certain circumstances. Ultimately, the law says who can be able to do that; it is the person that the law has vested the responsibility. Therefore, an omission that the Deputy Governor cannot be able to do anything with cannot be read as her omission also. And for this Committee to be told she ought to have been more assertive because she is the Deputy Chief Executive, the first thing is that today we would be defending her in the Anti-Corruption Court or anywhere else for abuse of office, because you would be challenged and people nowadays have read the law! You are accountable to who? To the Governor or to the President? So, how do you poke your nose into everybody else’s mandate when the law does not say it is your responsibility? But it can be made your responsibility by simple assignment, which is provided for by the law.

I go to the next charge. This is the charge--- And, of course, much of these other things, I believe, the Committee will read them. To the charge that relates to violations of the Constitution---

The Chairperson (Sen. (Dr) Khalwale): You have five minutes.

Mr. Kibe Mungai: I note that.

The charge that relates to the violations of the Constitution is that the day--- It is my understanding that this charge is based on a serious misunderstanding of the Constitution and the law. It is based on the notion that the Deputy Governor is the Chief Executive Officer (CEO) and, therefore, the Members of the Executive Committee are also responsible to her in the performance of their powers. If that interpretation is to hold water before this Special Committee, it would be necessary for this Committee to ignore the provisions of the law that expressly says that you are accountable to the Governor. Therefore, it is my submissions – and this is done every day by magistrates – before you can even read a charge that somebody is responsible for this, you look at; does the charge comply with the law? So, it is my submissions that as a preliminary issue, this Special Committee cannot entertain a charge that clearly is based on a misunderstanding of the law or that would require this Committee to ignore the law in order to exercise any mandate over it. Therefore, if you say that I am responsible because they are accountable, the law says they are not accountable to you.

There is also the issue that arises from here when it comes to the particulars that – I think she has spoken to a number of these, So I will speak generally about it – that she failed or neglected to stop the rehabilitation of Embu Stadium and purchase of maize seeds. Now, if a procurement process where the CS signed an agreement or gave authority in relation to what she said was her powers under the Public Procurement and Disposal Act, then it would be a contradiction in terms for the same County Assembly to turn around and say that the Governor is somehow responsible because this person who is under her did not do this or the other. Because there is nothing being pointed out under any law that if procurement goes wrong, can you stop it? The clear provisions of the law is that you can stop it; the clear provisions of the law is that if something is wrong, it would have to be dealt with by those who have been given responsibility to do that; and that responsibility is legal. It is not imagined. Therefore, I ask the Committee not to uphold that any person can imagine authority or because authority is conferred by the law. If the law confers on me authority, I have nothing to assert; I have nothing to invoke.

Coming to the charge in relationship to the abuse of office, first of all, the important question that was raised about *Wimwaro*; the charge was made that when something went wrong, this is a failure to do the right thing in accordance with the resolutions of the County Assembly. This is with regard to the CS.

Now, for purposes of admitting that a Governor, as Governor, proposes to go and hold a meeting or a press conference to defend Mr. So-and-So, even by the terms of the Constitution itself, there is a CEO; he has made a decision that we are going to defend so-and-so, to now turn around and say the Deputy Governor should have stopped the CEO – that is assuming it is in her knowledge – because even with knowledge, when you prefer a charge that presupposes knowledge, you must give the particulars of this knowledge. Those particulars of knowledge have not been given. But even assuming that she knew because somehow the press conference was called and you have to be invited to a press conference, it is the Governor's press conference and he wants to say a certain thing. I urge this Committee; this would reduce – and I am sorry to use the word; I do not know whether it is unparliamentary, but I am using it in order to make the point as we

understand it in courts of law – that if the Senate is going to exercise its jurisdictions with the correct dignity and decorum, then it must be expected that its responsibility of everybody--. This is a drastic power; it is an important power. Let it be exercised when you can be able to say “This law permits this; you did not do this; you are answerable this way.” but you cannot be able to proceed in the manner in which they are proceeding; something that you do not even know about and you are held responsible for it. The final charge of abuse of office---

The Chairperson (Sen. (Dr) Khalwale): Sorry; you have now overshot your time by one minute.

Mr. Kibe Mungai: I urge you to give me five minutes.

The Chairperson (Sen. (Dr) Khalwale): So, because we had given you an extra 25 minutes, I must control you.

Mr. Kibe Mungai: I want to talk about abuse of office; I have said nothing about it. It is an express charge.

The Chairperson (Sen. (Dr) Khalwale): You have two minutes.

Mr. Kibe Mungai: On abuse of office, first of all, the charge of abuse of office, I invite this Committee to read that if the Deputy Governor had done all these things that the County Assembly found her responsible of; to do things without mandate, to interfere with this or the other one with the procurement when it says they should do this; to try to do this or the other one, should would have been perfectly guilty of abuse of office, because that was not within her mandate. The law requires her to do that which the law requires of you. What do you make of it now; of the charge that was actually preferred? We were told that the abuse charge is based on Article 39(1). It was corrected to say “of the County Governments Act;” I do not even mind the correction. Even if now you look at that provision of the law, it says:-

“The members of the county executive committee are individually and collectively accountable to the governor in the exercise of their powers and performance of their duties and responsibilities.” So that were we told how, when the law says you are individually and collectively responsible to the Governor and you are not? The evidence that would have been given, if there is any abuse because of lack of responsibility to the Governor, the persons to testify that should have been the Governor! That despite the express provisions of law, you are not responsible to this office.

Finally, the conclusions, I say this. These proceedings, Mr. Chairman, Sir, have been prefaced--- You talked about the fact that people are supposed to talk about public domain. We are in public domain now and a lot of other issues are happening in public domain. There are two things for the Deputy Governor and for this Special Committee, as we stand here today. For the Deputy Governor, it is not just about her; it is about all Deputy Governors. She is just the first one; that despite what we are saying that the law does not expressly provide; that you can be held responsible through the procedure of

impeachment, we are nonetheless here. In exercising this power and bearing in mind that the interpretations of these issues that have already been raised is pending before the court, I would urge this Committee and the Senate to be extremely slow in trying to say that where the law does not expressly say you can be able to do this, that you can nonetheless do it. Because it is my submission that if the Senate and the constitutional trust that has been imposed on the Senate, this trust is--- I do not know, the makers of the Constitution decided it; that nobody else but the Senate can remove elected officials – three of them – from office because of violations of the law; for this Committee and the Senate to deserve this trust, I urge---

Let me make this, because it is a concluding submission.

I urge the Senate to be clear, to stay within the law and to be within the law is, as we submit, to confine itself to the various officials that the Constitution says it should do it. The second comment that we need to make here is this; the case, as prosecuted by the County Assembly and matters in the public domain is; there may be a need for Senate to assert itself. That was then.

Mr. Chairman, Sir, your response was very good, and I want to use it in our defense. You said this; the Senate does not need to assert itself; its powers are clear under the Constitution and under the law. I say that they are clear only with regard to three State officials – President, Deputy President and the County Governor.

I urge you, Mr. Chairman, Sir, and your Committee, that in considering these issues, as Wole Soyinka said, “A tiger does not need to proclaim its tigrity; it is already a tiger.” Therefore, if the Senate is already a tiger, as Mr. Chairman says, there is nothing that would require this honorable Senate to assert its self jurisdiction of a disciplinary nature over other officials such as the Deputy Governor; that Parliament has already made legislations that says you may be removed in this particular way. But as regards this, is there some kind of other jurisdictions against the Deputy Governors? Of course, there is; and they all know that the day you come to act as Governor, you are responsible to the Senate. You are Governors in waiting; and as Governors in waiting or acting as Governors, you are ultimately responsible to the Senate.

I urge the Committee to uphold the law, particularly the important question of law. And for purposes of the charges, clearly, there is no evidence. I urge the Senate to disregard the invitation being made, that what we said against the Governor, apply it to the Deputy Governor.

Thank you very much.

The Chairperson (Sen. (Dr) Khalwale): Thank you, Mr. Kibe. Thank you very much. You may go and rest for now.

What are you agitating for, counsel?

Mr. George Ng'ang'a Mbugua: Thank you, Mr. Chairman, Sir. There are two very pressing points that we feel as a County Assembly we can address if given five minutes – the one on the alleged unconstitutionality of Section 33(10) and another one point, very kindly.

The Chairperson (Sen. (Dr) Khalwale): Okay, but I have got only one problem; you are not the defense. The moment you raise those issues in five minutes, again the defense might ask me to respond. So, I want to ask Members, because we are the ones who are pressed for time – we have collected most of the evidence we want – would you allow me to allow him?

Hon. Senators: Five minutes.

The Chairperson (Sen. (Dr) Khalwale): Five minutes.

Mr. George Ng'ang'a Mbugua: Thank you for your kindness, Mr. Chairman, Sir.

Mr. Chairman, Sir, because I have only got five minutes, my learned friend that I have tremendous respect for, has made or has attempted to make a case for unconstitutionality of Section 33(10).

Mr. Chairman, Sir, the problem with that argument is this; that Article 200 is the one that provides for the framework that informed section 33(10). So, if my learned friend wants to make a submission that Section 33(10) is unconstitutional, if you take that argument to the logical conclusion, he is telling this Committee that Article 200 is unconstitutional.

Number two, Mr. Chairman, Sir, it must be understood that the Constitution provides for a general framework for rules and regulations so that when you look at Article 200, it is the one that now informs the legislative framework that provides for the removal of the Deputy Governor. It cannot be a correct proposition of law that if the Constitution does not speak about the foundation of an office, then no legislation can legislate on that point. That would not be correct, with due respect to my learned friend.

Number two, Mr. Chairman, Sir, so that I make my last comment, to use counsel's words, he said "impeachment must be for important offices;" the words he used is "important." I want to take that argument as not suggesting that the office of the Deputy Chief Executive Officer of a county is not an important office. The County Assembly considers it to be very important.

Lastly, Mr. Chairman, Sir, on the functions, and I want to make this last argument when I juxtapose the position held by the Deputy Governor and that of the Deputy President. So that the Deputy President is impeachable; the Deputy Governor is also impeachable, as we have seen from a plain reading of legislation, which is Article 33. If you look at the functions that both are supposed to discharge, it is about deputizing, and we did not read any reference or anything that refers to a power that they exercise.

Lastly, Mr. Chairman, Sir – and I invite hon. Senators just to turn to that section because it is vague – the oath of office that is subscribed by the Deputy Governor, which we shall see at the back of the County Governments Act. If you look at Section 32 – as I wind up because I am now about to sit down – read together with the content of the oath of office that a Deputy Governor subscribes to, Article 32 says as follows:-

“The deputy governor shall take and subscribe to the oath or affirmation as set out in the Schedule to this Act before assuming office.”

What are the contents of the oath that she is called upon to subscribe?

Mr. Chairman, Sir, I call upon you to look at the oath of office she takes. I will not read the entire oath; it is at the back, at page 862 of the County Governments Act. The Deputy Governor took a solemn oath to do the following:-

“that I shall diligently discharge my duties and perform my functions in the said office, to the best of my judgment; that I shall at all times, when so required, faithfully and truly give my counsel and advice to the Governor---”

She has an obligation that stems from her oath of office to give counsel on matters that are before this Committee for inquiry; matters of procurement; matters of alleged breach of the law. That is not an obligation that is delegated or assigned to her by the Governor so as to say “I was not assigned them.” It behooves her office as the Deputy Governor to deliberately give counsel and advice: “It is wrong here; you cannot do it, Governor.” That is the case of the County Assembly; and thank you for your indulgence.

Mr. Kibe Mungai: Mr. Chairman, Sir, there is a misleading bit for purposes of the HANSARD. If you read the oath of office, it says that:-

“when so required”

You do not give advice by force or by coercion; you advise whenever so required.

Mr. George Ng’ang’a Mbugua: Mr. Chairman, Sir, does it mean that when the Deputy Governor then sees something that is in breach of the law, if she is not required, she cannot give counsel? I leave that to the Committee to determine.

The Chairperson (Sen. (Dr) Khalwale): Okay; thank you. We have heard both parties. We will make a determination.

We are coming to the end and I notice that the Governor of Embu has just arrived.

Governor, yesterday you got my eye when you were saying that “Just a moment, Chairman.” So, I have invited you to give you that one minute and, please, it will be one minute, because you asked for one minute.

(Hon. Martin Nyaga Wambora spoke off record)

The words that you have said when you are walking, you will have to put them on HANSARD because where you were, you were not speaking through the microphone. We do not know what you were saying.

The Governor for Embu County (Hon. Martin Nyaga Wambora): Thank you, Mr. Chairman and hon. Members of the Senate Committee. I am exceptionally grateful for getting this opportunity to just clarify one or two things. I will not take more than five minutes because there are exceptionally important issues. One of them is that I wanted to clarify the issue of members of the tender committee. The list of witness Munyaka yesterday and my list on page 1 and 2 in the big document; and I just wanted to comment that in both lists, the names the Committee will note are the seven names of Committee Members on Tender Committee List 1 on page 1 and that of Munyaka; and on List 2 on page 2; there are six because Wachira left for Nairobi, the interim ICT Manager. So, the lists are still consistent. We had a challenge compiling this list because some papers had been plucked out of the files in the procurement committee. So, the lists were being compiled on a Friday, very fast, from the minutes. So, if there are any small omissions, you will bear with us, but I wanted to make that very clearly. May I just take my notes here – I just forgot my notes, Njoroge – so that I can be very fast. I do not want to digress. So, the list of tender committee, I have made a point there.

Number two, there is an area which was also not very clear about the violation of Public Procurement and Disposal Act. I have just heard what the counsel for my deputy was saying; that I did not give the Deputy Governor a chance to appoint. Indeed, the Governor does not do appointments; this is the world---

The Chairperson (Sen. (Dr) Khalwale): Order! Order, Governor! You cannot come now and go into these proceedings of today---

The Governor for Embu County (Hon. Martin Nyaga Wambora): No, I will leave it.

The Chairperson (Sen. (Dr) Khalwale): We are aware you were here yesterday, with all due respect.

The Governor for Embu County (Hon. Martin Nyaga Wambora): *Nitawacha hiyo kabisa!*

I have made the point of Embu County Tender Committee, comprising of seven plus the Secretary being the eighth; and that one is consistent between my list and the list of witness Munyaka.

Two, the supreme law of the land, the Constitution of Kenya Article 226(5) still is very clear as well as the Public Finance Management Act, Sections 148 and 149. Me, as the Governor of Embu, still insist, hon. Members, that I am not culpable and I cannot be held responsible for mistakes done by others in the implementation of financial issues and on procurement issues. I will never involve myself in those fields. I will still continue with

policy level because I must follow the law. The moment I get involved is when you will impeach me for abuse of office.

Three, violation of County Governments Act, especially on the issue of advertisement of the positions which the County Assembly wants to put the blame on me. The advertisement of 9th August, 2013, is not by the Governor; it is not by the County Secretary (CS); it is by the Secretary of the County Public Service Board (CPSB), which is a body corporate as per Section 47 of the County Governments Act. If the County Assembly thinks this body corporate made a mistake, let them not go for the neck of the Governor; let them go for the board; I am not a member of the board.

Two, it is clear in the same County Governments Act, Section 59(1) that it is the CPSB which establishes offices, which abolishes offices, which appoints offices, including even for our personal staff. My cook, driver, gardener and even those ones of the Deputy Governor, we could not appoint them; they had to appoint them themselves. Of course, they asked me: "Are you comfortable with this cook?" *Nikasema* "that one can kill me or can poison me; give me one who is not educated but whom I trust." I had to intervene there because it is my personal health and my survival. Otherwise, up to now, we have not even agreed on that; I am still paying my cook because I have not managed to convince the CPSB, which employs, which appoints---

Mr. George Ng'ang'a: Mr. Chairman, Sir---

The Governor for Embu County (Hon. Martin Nyaga Wambora): As I finish, I---

The Chairperson (Sen. (Dr) Khalwale): Order! Order! Order, Governor!

The Governor for Embu County (Hon. Martin Nyaga Wambora): Is the time over?

Mr. George Ng'ang'a: Mr. Chairman, Sir, we thought these were just remarks---

The Governor for Embu County (Hon. Martin Nyaga Wambora): But that is what I am doing!

Mr. George Ng'ang'a: Mr. Chairman, Sir, we thought these were just remarks for the honor of the Governor. But he is now making a supplementary submission. He is going to the law; he is going to the facts; we have done this---

The Chairperson (Sen. (Dr) Khalwale): Governor, that is a valid point of order. You are now inviting them to respond to what you are saying, and we do not want to go there.

The Governor for Embu County (Hon. Martin Nyaga Wambora): I will not go that way now. May I just say, as I finish, that yesterday, I tabled a record where we submitted certified copies of the record in respect of the motor vehicle, KBU 683T from the Kenya Revenue Authority (KRA) clearly indicating the ownership details and registration being Embu County Government; and I tabled this record. This is the original.

I think for the rest, I better leave it because my legal team argued quite capably, which left no doubt that I am not culpable or liable for all the five charges I have been accused with.

I thank you, hon. Senators, for giving me the opportunity and I expect justice. *Asante sana*; thank you.

The Chairperson (Sen. (Dr) Khalwale): Okay---

The Governor for Embu County (Hon. Martin Nyaga Wambora): Mr. Chairman, Sir, am I in order to--- There is a document which was returned yesterday from the Transition Authority (TA), which has been certified now. It is certified---

The Chairperson (Sen. (Dr) Khalwale): No, we will not go that way.

The Governor for Embu County (Hon. Martin Nyaga Wambora): *Sawa sawa*.

The Chairperson (Sen. (Dr) Khalwale): So, ladies and gentlemen, we now want to formally call for closure and before I make the closing remarks, I want to acknowledge the presence of the Vice Chairperson of the Committee. Vice Chairperson, do you want to say good bye?

The Vice Chairperson (Sen. Murkomen): Mr. Chairman, Sir, I was just laughing because you were saying that you are acknowledging my presence as if I had just arrived.

Mr. Chairman, Sir, on behalf of all of us – and I know you will say this - I really want to thank the parties for being here, particularly the public. I saw old men being here up to 2.00 a.m. in the morning; that means that people are very interested in this process. I saw the media also spending a lot of time to try to tell the public what is going on – and I wish they would do more – but what they have done is commendable.

Mr. Chairman, Sir, on behalf of all of us, I would like to basically say that I appreciate the process. It has been a wonderful learning process for all of us, but also it has been a process where we have also learnt a lot, other than just our mandate about governance in the counties, but also the knowledge for us also in discharging our other functions.

So, I know, Mr. Chairman, Sir, that you will thank the specific persons, but for me overall, I just want to say thank you very much. We are very grateful as a Committee and now as we retreat to consider all that you told us, it is only truth and justice that will guide us.

Thank you very much.

The Chairperson (Sen. (Dr) Khalwale): You are welcome, Mr. Vice Chairperson. As I said at the beginning of this session, this was neither a civil matter nor a criminal matter.

We are here purely in the interest of the people of Kenya whose sovereign power they have donated to us. We are here to ensure that we promote the democratic governance of the Republic of Kenya. I am, therefore, very concerned that one would want to think otherwise. However harsh, however hard we have been on any party, it is only because we were focused on that one goal.

The Governor of Embu, Martin Wambora, and the Deputy Governor of Embu, Madam Dorothy Nditi, you came here to be heard. I am satisfied that you have been heard and you were heard in the full view of the entire Republic of Kenya. I, therefore, want to thank you for co-operating and coming before us. I believe you came not just because you wanted to be heard, you came because you were seeking for justice; and justice you will get, I can assure you. The Members here have sworn to ensure that they uphold the commitment of the organ of Senate to give justice a chance in Embu. Thank you so much.

As for the advocates, I was so excited that one of the advocates is only one year older than my son, and I could see how intelligent the youth were able to appear before us and it was exciting that the interface and interaction between the youthful lawyers and the ones who are not so youthful in the other – I do not have Kibe in mind – it has been very successful.

I also want to thank the advocates on this Committee; you have been very useful; there has been no shouting and it has been an intelligent exchange of ideas. I want to thank members of the press with an apology that the Secretariat of the Senate had not arranged for your health breaks on day one, and this was corrected; and you worked very hard.

I want to end by appealing to the people of Embu to be patient. We are now retreating to go and make a deliberation and, therefore, a determination. Tomorrow at precisely 4.00 p.m., the decision of this Committee will be tabled before the Senate of the Republic of Kenya. You are all welcome to come and witness the tabling of that report. Because I am provoked by the closing remarks of the Deputy Governor, Dorothy, I want to assure you that all of us who are in this Committee, we are all men and women of the Republic of Kenya; and we know you are making use of this opportunity to speak to the people of Embu. They have heard and we have also heard; please, the people of Embu, do not resort to the--- If there are any ethnic differences that are forcing you to take positions, do not resort to them. Be guided by the law.

Thank you very much. We will meet some other day.

The sitting is now adjourned.

The Committee adjourned at 2.15 p.m.