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THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT – THIRD SESSION – 2024

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REPORT OF THE SELECT COMMITTEE INVESTIGATING
THE PROPOSED DISMISSAL OF HON. FRANKLIN
MITHIKA LINTURI AS THE CABINET SECRETARY FOR
AGRICULTURE AND LIVESTOCK DEVELOPMENT

Rt. Hon. Speaker
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 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 13 MAY 2024	
DAY: MONDAY	
TABLED BY:	HON. NAAMI WAQO, CBS, MP CHAIR, SELECT COMMITTEE
CLERK AT THE TABLE:	GERTRUDE CHEBET

CLERK'S CHAMBERS
NATIONAL ASSEMBLY
PARLIAMENT BUILDINGS
NAIROBI

MAY 2024

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LIST OF ABBREVIATIONS AND ACRONYMS

CBS	-	Chief of the Order of the Burning Spear
CJ	-	Chief Justice
COO	-	Chief Operations Officer
CS	-	Cabinet Secretary
DCI	-	Directorate of Criminal Investigations
DPP	-	Director of Public Prosecutions
EGH	-	Elder of the Order of the Golden Heart
Hon.	-	Honourable
KALRO	-	Kenya Agricultural and Livestock Research Organization
KIAMIS	-	Kenya Integrated Agriculture Management Information System
KEBS	-	Kenya Bureau of Standards
KEPHIS	-	Kenya Plant Health Inspectorate Service
KNTC	-	Kenya National Trading Corporation
MD	-	Managing Director
MP	-	Member of Parliament
NCPB	-	National Cereals and Produce Board
NFSP	-	National Fertilizer Subsidy Program
NPK	-	Nitrogen, Phosphorus, Potassium
Rt.	-	Right
SAGA	-	Semi-Autonomous Government Agency
SC	-	Senior Counsel
SMS	-	Short Message Service

LIST OF STATUTES

1. The Anti-Corruption and Economic Crimes Act, Cap 65
2. The Crops Act, Cap 318
3. The Ethics and Anti-Corruption Commission Act, Cap 7H
4. The Evidence Act, Cap 80
5. The Fair Administrative Action Act, Cap 7L
6. The Fertilizer and Animal Foodstuffs Act, Cap 345
7. The Leadership and Integrity Act, Cap 185C
8. The National Cereals and Produce Board Act, Cap 338
9. The Parliamentary Powers and Privileges Act, Cap 6
10. The Penal Code, Cap 63
11. The Public Finance Management Act, Cap 412A
12. The Public Officers Ethics Act, Cap 185B
13. The Public Procurement and Asset Disposal Act, Cap 412C
14. The Standards Act, Cap 496

LIST OF AUTHORITIES

1. Anarita Karimi Njeru v Republic [1979] eKLR
2. Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others [2017] eKLR
3. Kenya Planters Co-operative Union Limited v Kenya Co-operative Coffee Millers and Another (2016) eKLR.
4. Martin Nyaga Wambora and 30 Others v the County Assembly of Embu and 4 Others (Constitutional Petitions Nos. 7 and 8 of 2014)
5. Mukhisa Biscuits Manufacturing Ltd vs West end Distributors Ltd Civil Appeal No. 9 of 1969 (1969) EA 696
6. Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya, Petition 4 of 2020; [2022] KESC 16 (KLR)
7. Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & another (Petition No 1 of 2017)Subramaniam Vs Public Prosecutor (1956) WLR 965
8. Kinyatti vs. Republic (1984) eKLR
9. Burunyi & Another Vs. Uganda Cv. Appeal No. 1968 EA 123 Sir Udo Udoma, CJ

LIST OF ANNEXURES

- Annexure 1: Adoption Schedule
- Annexure 2: Minutes
- Annexure 3: Communications from the Chair
- Annexure 4: Notice of Motion for the dismissal of Hon. Franklin Mithika Linturi, Cabinet Secretary for Agriculture and Livestock Development and supporting documents
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- Annexure 7: Invitations to the Parties
- Annexure 7a: Invitation to the Sponsor of the Special Motion to appear before the Committee
- Annexure 7b: Invitation to the Cabinet Secretary to appear before the Committee
- Annexure 7c: Letters from the Clerk of the National Assembly inviting the Sponsor of the Special Motion and the Cabinet Secretary for the pre-hearing conference
- Annexure 8: Rules on Conduct of the Investigation
- Annexure 9: Hansard Record of the Hearings

CHAIRPERSON'S FOREWORD

This report documents the proceedings of the Select Committee on its investigation into the proposed dismissal of Hon. Franklin Mithika Linturi as Cabinet Secretary for Agriculture and Livestock Development following the submission of a Special Motion by the Member for Bumula Constituency, the Hon. Jack Wanami Wamboka, MP on three grounds, namely: gross violation of the Constitution or any other law; serious reasons to believe that the Cabinet Secretary has committed a crime under national law; and gross misconduct.

On Tuesday 30th April 2024, the Honourable Speaker of the National Assembly issued a communication regarding receipt of a special Motion dated 24th April 2024 by the Member of Parliament for Bumula Constituency, the Hon. Jack Wanami Wamboka, MP, pursuant to Article 152(6) of the Constitution, and Standing Orders 64 and 66. The Notice of the Special sought a resolution of the House for the dismissal of the Hon. Franklin Mithika Linturi as the Cabinet Secretary for Agriculture and Livestock Development. Consequently, the Hon. Speaker permitted the Member to give notice of the Motion for the dismissal of the Cabinet Secretary for Agriculture and Livestock Development in accordance with the requirements of Standing Order 47 (4A) of the National Assembly Standing Orders.

The Special Motion was approved by the House on Thursday, 2nd May 2024 and resulted in the constitution of a Select Committee to investigate the matter. While referring the matter to the Committee, the Honourable Speaker directed that the Committee undertakes its investigations and report to the House, within ten (10) days, on whether the allegations against the Cabinet Secretary have been substantiated or otherwise in accordance with Article 152(9) of the Constitution and Standing Order 66(5)(b) of the National Assembly Standing Orders. In line with the Speaker's directive, the Committee held its first meeting on Thursday, 2nd May 2024 at 6.00 pm, in the Mini Chamber, 1st Floor, County Hall, Parliament Buildings, Nairobi. Subsequently, the Committee held twelve sittings to investigate the proposed dismissal of the Cabinet Secretary for Agriculture and Livestock Development.

The Clerk of the National Assembly wrote to the Sponsor of the Special Motion and the Cabinet Secretary for Agriculture and Livestock Development vide letters, dated 4th May 2024 notifying them of the referral of the Special Motion to the Committee and inviting them to attend the hearings on Wednesday, 8th May

Report of the Select Committee Investigating the Proposed Dismissal of Hon. Franklin Mithika Linturi as Cabinet Secretary for Agriculture and Livestock Development

2024 either in person or by a legal representative or both. The Sponsor and the Cabinet Secretary appeared before the Committee on 8th, 9th and 10th May 2024. Thereafter, the Committee considered the submissions from both parties in accordance with the Constitution, the relevant laws, the National Assembly Standing Orders and its Rules on the Conduct of the Investigation.

Committee Recommendation

In accordance with Article 152(7), the Committee conducted the hearings to investigate the matters alleged in the Special Motion seeking the dismissal of the Hon. Franklin Mithika Linturi, Cabinet Secretary for Agriculture and Livestock Development on three grounds: Allegations of gross violation of the Constitution or any other law; serious reasons to believe that the Cabinet Secretary has committed a crime under national law; and gross misconduct of the Cabinet Secretary and recommends to the National Assembly that pursuant to Article 152(9)(a) of the Constitution and Standing Order 66(7)(a), the Committee having found that the allegations against the Cabinet Secretary for Agriculture and Livestock Development are **unsubstantiated**, there be no further proceedings on the matter.

Acknowledgement

The Select Committee wishes to thank the Offices of the Speaker of the National Assembly and the Clerk of the National Assembly for the support extended to the Committee in the execution of its mandate.

The Committee further extends its appreciation to the Sponsor of the Special Motion, Hon. Jack Wanami Wamboka, MP, and the Cabinet Secretary for Agriculture and Livestock Development, Hon. Franklin Mithika Linturi, for cooperating with the Committee during the Hearings. The Select Committee also appreciates the media for the coverage of its proceedings during the investigation.

Finally, I wish to express my appreciation to the Honourable Members of the Committee and the Committee Secretariat who sat for long hours and made useful contributions towards the preparation and production of this report.

On behalf of the Select Committee, it is my pleasant privilege to present to this House the Report of the Select Committee on the Investigation into the Proposed

Report of the Select Committee Investigating the Proposed Dismissal of Hon. Franklin Mithika Linturi as Cabinet Secretary for Agriculture and Livestock Development

Dismissal of Hon. Franklin Mithika Linturi as Cabinet Secretary for Agriculture and Livestock Development.

HON. NAOMI JILLO WAQO, CBS, MP

CHAIRPERSON

SELECT COMMITTEE INVESTIGATING THE PROPOSED DISMISSAL OF HON. FRANKLIN MITHIKA LINTURI, EGH AS CABINET SECRETARY FOR AGRICULTURE AND LIVESTOCK DEVELOPMENT

EXECUTIVE SUMMARY

This report documents the proceedings of the Select Committee investigating the proposed dismissal of Hon. Franklin Mithika Linturi as Cabinet Secretary for Agriculture and Livestock Development following the tabling of a Special Motion by the Member for Bumula Constituency, the Hon. Jack Wanami Wamboka, MP.

Chapter one of the report details the introductory information on the establishment of the Select Committee and its membership pursuant to Article 152(7) of the Constitution and Standing Order 66(5) (a) of the National Assembly Standing Orders. The Select Committee was comprised of eleven Members and it was mandated to investigate the allegations leveled against the Cabinet Secretary and report its findings to the House within ten days following its establishment.

Chapter two of the report contains the background information including the legal framework guiding the investigation, Rules of Conduct of Investigation of the Select Committee, meetings held, invitations to the parties, proceedings of the pre-hearing conference, particulars of the allegations and hearing of evidence.

Chapter three of the report details the proceedings of the hearings, evidence adduced by the parties and their witnesses, cross-examination, re-examination, clarification by the Committee members and closing statements.

Chapter four of the report documents the analysis of the evidence on all grounds as alleged by the Sponsor of the Special Motion.

Chapter five summarizes the Committee's observations, while Chapter six highlights the findings. Chapter seven contains the Committee's recommendations.

The Report has annexures to support the evidence as adduced. These annexures include: Minutes of the Select Committee, Communications from the Chair, Notice of Motion for the dismissal of the Cabinet Secretary, Order Paper and Supplementary Order Paper dated Thursday, 2nd May, 2024 under which the Special Motion for the dismissal of the Cabinet Secretary was listed, invitations to Appear for the two parties, Rules on Conduct of Investigation together with a compendium of Hansard records of the hearings.

CHAPTER ONE

1 INTRODUCTION

1. On Tuesday 30th April 2024, the Honourable Speaker of the National Assembly issued a communication regarding receipt of a special Motion dated 24th April 2024 by the Member of Parliament for Bumula Constituency, the Hon. Jack Wanami Wamboka, MP, pursuant to Article 152(6) of the Constitution, and Standing Orders 64 and 66. The Notice of the Special sought a resolution of the House for the dismissal of the Hon. Franklin Mithika Linturi as the Cabinet Secretary for Agriculture and Livestock Development on the following grounds:
 - 1) gross violation of the Constitution or of any other law;
 - 2) serious reasons to believe that the Cabinet Secretary has committed a crime under national law; and
 - 3) gross misconduct.

2. The Speaker was guided by the provisions of Article 152(6) of the Constitution, and Standing Orders 64 and 66. Article 152(6) of the Constitution provides that *"a member of the National Assembly, supported by at least one-quarter of all the members of the Assembly, may propose a motion requiring the President to dismiss a Cabinet Secretary:*
 - a) *on the ground of a gross violation of a provision of the Constitution or of any other law;*
 - b) *where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or*
 - c) *for gross misconduct."*

3. Procedurally, Standing Order 66(1) provides that *"before giving notice of motion under Article 152(6) of the Constitution, a Member shall deliver to the Clerk a copy of the proposed motion in writing:*
 - a) *stating the grounds and particulars in terms of Article 152(6) of the Constitution upon which the proposed motion is made;*
 - b) *signed by the Member; and*
 - c) *signed in support by at least one-quarter of all the Members of the Assembly."*

4. Additionally, Standing Order 64(1A) provides as follows on the admissibility of grounds for removal from office:

“(1A) The grounds specified in a motion under this Standing Order shall be admissible if—

- a) framed clearly to particularize and disclose a gross violation of the Constitution or other written law, where gross violation of the Constitution or other written law is indicated as a ground for the intended removal;*
- b) stating with precision, the provisions of the Constitution or other written law that are alleged to have been grossly violated, where gross violation of the Constitution or other written law is indicated as a ground for the intended removal; and*
- c) accompanied by necessary evidence, including annexures or sworn testimonies in respect of the allegations.”*

5. Standing Order 47(3)(b) and (e) places an obligation on the Honourable Speaker to make a determination on whether any proposed Motion is contrary to the Constitution or contains allegations which the mover cannot substantiate.

6. The Honourable Speaker examined the constitutional and procedural requirements of processing special motions for the removal of persons from office to determine whether the proposed Special Motion met the required threshold as to form and the admissibility of the grounds contained in the proposed Motion.

7. In determining the first issue as to whether the proposed motion met the requirements of the Constitution and Standing Orders as to form and the threshold required to move such a motion, the Honourable Speaker guided that the proposed Motion by the Member for Bumula met the requirements of Article 152 (6) of the Constitution as to form and threshold.

8. Consequently, the Honourable Speaker found that the proposed Special Motion was in the prescribed form and met the threshold because it—

- a) was signed by 110 Members of the National Assembly in support;
- b) was in writing;
- c) stated the grounds and particulars upon which the sponsor proposed dismissal of the Cabinet Secretary; and
- d) was signed by the Member for Bumula Constituency.

9. On second issue on the admissibility of the grounds specified in the Special Motion, the Honourable Speaker, guided that the grounds as contained in the proposed Motion complied with the requirements of Standing Orders 64(1A) and 66 as the grounds in the proposed motion –
- a) were framed clearly to particularize and disclose a gross violation of the Constitution or other written law, where gross violation of the Constitution or other written law is indicated as a ground for the intended removal;
 - b) were stating with precision, the provisions of the Constitution or other written law that are alleged to have been grossly violated, where gross violation of the Constitution or other written law is indicated as a ground for the intended removal; and
 - c) accompanied by necessary evidence, including annexures or sworn testimonies in respect of the allegations.
10. Having found that the proposed Motion met the required threshold as to form and the admissibility of the grounds contained in the Special Motion, the Honourable Speaker notified the House of the admissibility of the Special Motion and allowed its Sponsor to give the Notice of Motion during the afternoon sitting of the House held on Thursday, 2nd May 2024.

1.1 The Special Motion

11. The contents of the Special Motion were as follows:

DISMISSAL OF HON. MITHIKA LINTURI AS THE CABINET SECRETARY FOR AGRICULTURE AND LIVESTOCK DEVELOPMENT (*The Hon. Jack Wamboka, M.P.*)

THAT, pursuant to the provisions of Article 152(6) of the Constitution and Standing Orders 64(1A) and 66, this House RESOLVES that the President DISMISSES the Hon. Franklin Mithika Linturi from the office of Cabinet Secretary for the Ministry of Agriculture and Livestock Development on the following grounds—

1. Gross violation of the Constitution:

(a) Violation of Articles 2 and 10(1)(c) of the Constitution

THAT, the Hon. Franklin Mithika Linturi, acting as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, Report of the Select Committee Investigating the Proposed Dismissal of Hon. Franklin Mithika Linturi as Cabinet Secretary for Agriculture and Livestock Development

appears to have committed gross violation of these constitutional provisions by—

- (i) not undertaking public participation with leaders, stakeholders, or even departments within the Ministry in the implementation of far-reaching policy decisions on the procurement and distribution of fertilizer therefore violating the provisions of the Constitution on national values and principles of good governance in so far as he acted as a State officer to make and implement a public policy to approve the procurement and distribution of fake fertilizer contrary to recommendations of the National Cereals and Produce Board, an agency in the Ministry; and
- (ii) approving procurement and distribution of fake fertilizer by the National Cereals and Produce Board, discloses a gross violation of national values and principles of good governance in so far as he acted as a State officer to make and implement a public policy to approve the procurement and distribution of fake fertilizer contrary to **Article 10(1)(b) of the Constitution.**

(b) Gross violation of Article 46 of the Constitution

THAT, one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, appears to be in gross violation of this constitutional provision by—

- (i) infringing on consumers' right to goods and services of reasonable quality and to the protection of their health, safety, and economic interests by approving the procurement and distribution of fake fertilizer; and
- (ii) approving the budgets for procurement and distribution of fake fertilizer by the National Cereals and Produce Board thereby violating consumer's right to goods and services of reasonable quality and to the protection of their health, safety, and economic interests as he approved the procurement and distribution of fake fertilizer contrary to **Article 46 of the Constitution.**

(c) Gross violation of Article 73 of the Constitution

THAT, the conduct of one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, appears to be a gross violation of this constitutional provision in so far as the public trust was exercised in a manner that is inconsistent with the purposes and objects of the Constitution. He failed to demonstrate respect for the people, failed to bring honour to the nation, dignity to the office, and failed to promote public confidence in the integrity of the office contrary to **Article 73(1)(a)(i), (ii), (iii) and (iv) of the Constitution**.

(d) Gross violation of Article 201 of the Constitution

THAT, one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, appears to have committed a gross violation of this constitutional provision by approving the procurement and distribution of fake fertilizer by the National Cereals and Produce Board. This amounts to a gross violation of principles on public finance in so far as public money is concerned and that public money was not applied in a prudent and responsible way when he approved the procurement and distribution of fake fertilizer contrary **Article 201(d) of the Constitution**.

(e) Gross violation of Article 232 of the Constitution

THAT, the Hon. Franklin Mithika Linturi, the Cabinet Secretary for Agriculture and Livestock Development, appears to have committed a gross violation of this constitutional provision where, he outlined in his written submission as a response to the fertilizer subsidy programme to the Departmental Committee on Agriculture and Livestock, misleading information that the National Cereals and Produce Board (NCPB) signed an Agency Agreement with 51 Capital Africa Diatomite Industries on 31st March 2022 for supply and distribution of GPC diatomaceous for its commercial function, and that the product was not sold as a chemical fertilizer but as a soil conditioner, violating the values and principles of public service, duty to use resources efficiently, effectively and economically contrary to **Article 232 of the Constitution**.

2. **2. Serious reasons for believing that the Cabinet Secretary has committed a crime under national law:**

(a) Serious reasons for believing the Cabinet Secretary has committed a crime under sections 100 and 101 of the Penal Code, Cap. 63

THAT, one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary for the Ministry of Agriculture and Livestock Development, issued a directive to officials of KELS Chemicals to attend a press conference and issue a statement from the National Cereals and Produce Board. His subsequent closure of the factory and declaration of it as a crime scene due to the company's refusal to participate in the staged press conference, discloses grounds that there are serious reasons for believing that the Cabinet Secretary has committed a crime under national law, including but not limited to offences involving abuse of office and false claims by a person employed in the public service contrary to **sections 100 and 101 of the Penal Code, Cap 63.**

(b) Serious reasons for believing that the Cabinet Secretary has committed a crime under sections 353 and 355 of the Penal Code, Cap. 63

THAT, one Franklin Mithika Linturi, the Cabinet Secretary for the Ministry of Agriculture and Livestock Development, is currently under investigation by the Director of Public Prosecutions and the Director of Criminal Investigations, and is facing arrest, charging, prosecution and institution of criminal proceedings in relation to six pending civil, commercial and family suits. This discloses grounds that there are serious reasons for believing that the Cabinet Secretary has committed a crime under national law, including but not limited to offences involving uttering false documents and procuring execution of documents by false pretences, contrary to **sections 353 and 355 of the Penal Code, Cap 63.**

3. **Gross misconduct**

THAT, one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, by approving procurement and distribution of fake fertilizer by the National Cereals and Produce Board, in so far as being a State officer—

- (i) *has failed to exercise public trust in the best interest of the people of Kenya and this amounts to gross misconduct contrary to **section 8 of the Leadership and Integrity Act, Cap 185C;***
- (ii) *has failed in the performance of his duties to the best of his ability to carry out the duties of the office efficiently and honestly, and to carry out the duties in a transparent and accountable manner, and this amounts to gross misconduct contrary to **section 10(a) & (b) of the Leadership and Integrity Act, Cap 185C;***
- (iii) *has failed to demonstrate professionalism in carrying out duties of the office in a manner that maintains public confidence in the integrity of the office and this amounts to gross misconduct contrary to **section 11(a) of the Leadership and Integrity Act, Cap 185C;** and*
- (iv) *misled the public by submitting false information to a Departmental Committee of the National Assembly that GPC diatomaceous was distributed as a soil conditioner and not as a fertilizer, and this amounts to gross misconduct contrary to **section 29 of the Leadership and Integrity Act, Cap 185C.***

12. Article 152(7) of the Constitution provides that—

"152(7) If a motion under clause (6) is supported by at least one-third of the members of the National Assembly—

- (a) the Assembly shall appoint a select committee comprising eleven of its members to investigate the matter; and*
- (b) the select committee shall, within ten days, report to the Assembly whether it finds the allegations against the Cabinet Secretary to be substantiated."*

13. The House became seized of the matter when the Special Motion was supported by 149 Members of the National Assembly hence stood approved by the House.

14. Subsequently, the House resolved to appoint a Select Committee to investigate the allegations contained in the Special Motion pursuant to the provisions of Article 152(7)(a) and Standing Order 66(5)(b) and report to the National Assembly within ten (10) days of its appointment on whether it finds the

allegations to have been substantiated or otherwise in accordance with Article 152(7) and (9) of the Constitution.

1.2 Establishment of the Committee

15. Article 152(7) (a) of the Constitution and Standing Order 66(5)(a) provides for the appointment of a select committee comprising eleven members to investigate the allegations contained in the Special Motion.
16. Further, Article 152 (7) (b) provides that the select committee shall report to the House whether it finds the allegations against the Cabinet Secretary to be substantiated or otherwise.

1.3 Committee Membership

17. Following the Communication by the Speaker of the National Assembly requesting the parliamentary parties to submit names of the members for appointment to the Select Committee, the parliamentary parties submitted the names of the members on 2nd May 2024.
18. Subsequently, on 2nd May 2024 the House established the Select Committee pursuant to Article 152(7) and Standing Order 66 (5) comprising—
 1. Hon. Naomi Waqo, CBS, MP
 2. Hon. Robert Mbui, CBS, MP
 3. Hon. (Dr.) Rachael Nyamai, CBS, MP
 4. Hon. Samuel Chepkong'a, CBS, MP
 5. Hon. George Murugara, CBS, MP
 6. Hon. T. J. Kajwang', MP
 7. Hon. Malulu Injendi, MP
 8. Hon. Tandaza Sawa, MP
 9. Hon. Catherine Omanyoo, MP
 10. Hon. Jane Maina, MP
 11. Hon. Yussuf Mohamed, MP

1.4 Committee Secretariat

19. The Select Committee was supported in the execution of its mandate by a Secretariat comprised of:

- | | | |
|---------------------------|---|--------------------------------------|
| 1. Mrs. Vane Akama | - | Director, Legal Services |
| 2. Mr. Sheriffsam Mwendwa | - | Director, Litigation and Compliance |
| 3. Mr. Nicholas Emején | - | Deputy Director, AA & GPC |
| 4. Mr. Rana Tiampati | - | Deputy Director, L & P |
| 5. Mr. Michael Karuru | - | Deputy Director, Legal Services |
| 6. Mr. Adan Gindicha | - | Principal Clerk Assistant II |
| 7. Mr. Samuel Kalama | - | Principal Clerk Assistant II |
| 8. Ms. Sophie Otieno | - | Principal Legal Counsel II |
| 9. Mr. Joseph Okong'o | - | Principal Media Relations Officer II |
| 10. Mr. Andrew Shangarai | - | Principal Serjeant-at-Arms |
| 11. Ms. Jemimah Waigwa | - | Senior Legal Counsel |
| 12. Ms. Emma Essendi | - | Senior Legal Counsel |
| 13. Ms. Lynette Otieno | - | Senior Legal Counsel |
| 14. Ms. Sheila Chebotibin | - | Senior Serjeant-at-Arms |
| 15. Ms. Esther Nginyo | - | Clerk Assistant I |
| 16. Ms. Getrude Chebet | - | Clerk Assistant I |
| 17. Ms. Laureen Wesonga | - | Clerk Assistant I |
| 18. Mr. Fredrick Otieno | - | Clerk Assistant I |
| 19. Mr. Josephat Kuyioni | - | Legal Counsel I |
| 20. Mr. Leonard Bett | - | Hansard Reporter I |
| 21. Ms. Fiona Musili | - | Research Officer I |
| 22. Mr. Geoffery Sore | - | Legal Counsel II |
| 23. Ms. Noelle Chelagat | - | Media Relations Officer III |
| 24. Ms. Vivienne Ogega | - | Research Officer III |
| 25. Mr. Amos Kimanathi | - | ICT Officer III |
| 26. Ms. Josephine Osiba | - | Hansard Reporter III |
| 27. Mr. Benson Muthui | - | Serjeant-at-Arms |
| 28. Mr. Peter Mutethia | - | Audio Assistant |
| 29. Ms. Rehema Koech | - | Audio Assistant |
| 30. Ms. Beatrice Mwinzi | - | Legal Intern |

CHAPTER TWO

2 BACKGROUND INFORMATION

2.1 Legal Framework

20. Article 152(6) of the Constitution provides that *"a member of the National Assembly, supported by at least one quarter of all the members of the Assembly, may propose a motion requiring the President to dismiss a Cabinet Secretary-*
- (a) on the ground of a gross violation of a provision of the Constitution or of any other law;*
 - (b) where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or*
 - (c) for gross misconduct."*
21. Procedurally, Standing Order 66(1) provides that *"before giving notice of motion under Article 152(6) of the Constitution, a Member shall deliver to the Clerk a copy of the proposed motion in writing—*
- (a) stating the grounds and particulars in terms of Article 152(6) of the Constitution upon which the proposed motion is made;*
 - (b) signed by the Member; and*
 - (c) signed in support by at least one-quarter of all the Members of the Assembly."*
22. Additionally, Standing Order 64(1A) provides as follows on the admissibility of grounds for removal from office:
- "(1A) The grounds specified in a motion under this Standing Order shall be admissible if—*
- (a) framed clearly to particularize and disclose a gross violation of the Constitution or other written law, where gross violation of the Constitution or other written law is indicated as a ground for the intended removal;*
 - (b) stating with precision, the provisions of the Constitution or other written law that are alleged to have been grossly violated, where gross violation of the Constitution or other written law is indicated as a ground for the intended removal; and*
 - (c) accompanied by necessary evidence, including annexures or sworn testimonies in respect of the allegations."*

23. Standing Order 47(3)(b) and (e) places an obligation on the Honourable Speaker to make a determination on whether any proposed Motion is contrary to the Constitution or contains allegations which the mover cannot substantiate.
24. Additionally, the Committee was guided by the Constitution and the following statutes among others as it executed its mandate:
- 1) The Parliamentary Powers and Privileges Act, Cap 6;
 - 2) The Penal Code, Cap 63;
 - 3) The Evidence Act, Cap 80;
 - 4) The Public Officer Ethics Act, Cap 185B;
 - 5) The Leadership and Integrity Act, Cap 185C;
 - 6) The National Cereals and Produce Board, Cap 338;
 - 7) The Fertilizer and Animal Foodstuffs Act, Cap 345;
 - 8) The Public Finance and Management Act, Cap 412A;
 - 9) The Public Procurement and Asset Disposal Act, Cap 412C; and
 - 10) The Fair Administrative Action Act, Cap 711.
25. The Committee was also guided by the National Assembly Standing Orders and its Rules on Conduct of Investigation.

2.2 Speaker's Communication and Referral of the Special Motion

26. Pursuant to Standing Order 66(1) as read together with Standing Order 64 of the National Assembly Standing Orders, the Speaker vide Communication No. 021 of 2024 dated Tuesday 30th April 2024 directed that the Special Motion be disposed of expeditiously within three days of receipt of the Notice of Motion.–Further, the Speaker directed that the Committee be guided by Standing Orders 64 and 66 as amended at the end of the Eleventh Parliament to comply with the prescribed thresholds for admissibility in impeachment motions as guided by precedents of the House in a Communication issued on 22nd October 2015 and the High Court's decision in **Martin Nyaga Wambora and 30 Others v the County Assembly of Embu and 4 Others (Constitutional Petitions Nos. 7 and 8 of 2014)**.
27. The Honourable Speaker vide Communication No. 025 of 2024 dated Thursday 2nd May 2024 directed that the Committee must operate within the requirements of the Constitution, relevant statutes and the provisions of the Standing Orders. The Speaker reiterated that proceedings relating to

removing persons from office are quasi-judicial and require judicious attention and sobriety.

28. Additionally, the Speaker instructed the Clerk of the National Assembly to formulate draft Rules on the conduct of investigation which accord with existing constitutional and statutory provisions on the principles of natural justice, fair hearing and fair administrative action for consideration by the Committee.
29. Pursuant to Article 152(7)(b) as read with Articles 259(5) and 259(7) of the Constitution, the Speaker further directed that the Committee should conclude its investigations and submit its report to the House within ten (10) days of its appointment and not later than Monday 13th May 2024.
30. The Communications from the Speaker are attached to this report as **Annexure 3**.

2.3 Conduct of Committee Proceedings

2.3.1 Rules on Conduct of Investigation

31. In accordance with the directions of the Honourable Speaker, the Clerk of the National Assembly prepared draft Rules on the Conduct of Investigation which the Committee adopted on Thursday 2nd May 2024 during its first sitting. The Rules are attached to this report as **Annexure 8**.

2.3.2 Meetings of the Select Committee

32. Following its establishment on Thursday 2nd May 2024, the Select Committee held its First Sitting on the same day at 6.00pm. Pursuant to Standing Order 179(1) the Committee elected the Chairperson and Vice-Chairperson. The Hon. Naomi Waqo, CBS, MP and the Hon. Robert Mbui, CBS, MP were unanimously elected as the Chairperson and Vice Chairperson of the Committee respectively.
33. The Committee considered and adopted the Rules on the Conduct of Investigation and its workplan. Further, according to Rule 3(1) on the Conduct of Investigation, the Committee appointed Wednesday 8th and Thursday 9th May 2024 as the dates for the hearing of evidence for the investigations.

2.3.3 Invitations to Appear

34. The Committee observed that Article 152(8) of the Constitution provides for the right of the Cabinet Secretary to appear and be represented before the Select Committee during its investigations.
35. The Committee further observed that Rule 3(1) on the Conduct of Investigation provides that:
"Upon the appointment of a date for the commencement of the hearing of the evidence for the purposes of the investigation, the Committee shall invite the Sponsor of the Special Motion for dismissal of the Cabinet Secretary and the Cabinet Secretary to appear and be represented before the Committee during its investigations."
36. Having made these observations, and taking into account the strict constitutional timelines, the Committee at its first meeting held on Thursday 2nd May 2024, resolved to invite the Sponsor of the Special Motion and the Cabinet Secretary to appear before the Committee for the hearing of evidence. The Invitations to Appear are attached to this report as **Annexures 7a and 7b**.
37. Pursuant to Rule 4(4) on the Conduct of Investigation, the Invitation to Appear sent to the Sponsor of the Special Motion required him to file with the Office of the Clerk of the National Assembly by Tuesday 7th May 2024, documentation:
- a) indicating the mode of appearance before the Select Committee; whether in person, by Advocate, or in person and by Advocate;
 - b) indicating the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence; and
 - c) specifying any other evidence to be relied on.
38. Pursuant to Rule 4(3) on the Conduct of Investigation, the Invitation to Appear served on the Cabinet Secretary required him to indicate whether he would exercise his right to appear before the Committee. If he chose to exercise that right, the Cabinet Secretary was informed that he would be required to file an answer to the charges with the Office of the Clerk of the National Assembly by Tuesday 7th May 2024 in which the Cabinet Secretary would set out:
- a) the Cabinet Secretary's response to the particulars of the allegations;

- b) how the Cabinet Secretary proposed to appear before the Select Committee; whether in person, by Advocate, or in person and by Advocate;
- c) the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
- d) any other evidence to be relied on.

2.3.4 Pre-Hearing Conference

39. Pursuant to Rule 11 on the Conduct of Investigation, the Committee vide letters dated 4th May 2024, invited the Sponsor of the Special Motion and the Cabinet Secretary to a pre-hearing conference on Tuesday 7th May 2024 at 5.00 pm at the Mini Chamber, County Hall, Parliament Buildings. The letters are annexed to this report as **Annexure 7c**.
40. To this end, the Sponsor of the Special Motion and the Cabinet Secretary accompanied by their Advocates attended the pre-hearing conference on Tuesday 7th May 2024. The purpose of the conference was to confirm the documentation and evidence served and received, be apprised of the applicable procedure and consider any preliminary questions relating to the proceedings of the Committee.
41. During the pre-hearing conference, the Sponsor of the Motion indicated that he would be calling eight (8) witnesses comprising six (6) farmers and two (2) experts while the Advocates of the Cabinet Secretary indicated that they would be calling one (1) witness, the Cabinet Secretary.
42. The parties exchanged their respective documents together with the evidence to be relied upon. The documents presented by the Sponsor of the Motion and Cabinet Secretary were marked Volume Two and Volume Three respectively and are annexed to this report.

2.3.5 Reading of particulars of the allegations

43. Pursuant to Rule 7(5) on the Conduct of Investigation, at the commencement of the hearing, the Clerk read out, verbatim, the particulars of the allegations against the Cabinet Secretary as appearing in the Special Motion. In response to the allegations, the Cabinet Secretary denied all the allegations.

2.3.6 Hearing of Evidence

44. The Committee held sittings on Wednesday 8th, Thursday 9th and Friday 10th May 2024 to hear the evidence and submissions of the parties. The verbatim evidence adduced is as recorded in the Hansard is attached to this report as **Annexure 9**.

45. The parties called witnesses to testify during the hearing as follows:

- 1) On 8th May 2024, the Sponsor of the Special Motion gave evidence and called five (5) other witnesses namely:
 - a) Mr. Titus Kiprotich;
 - b) Mr. Benard Kuria;
 - c) Mr. David Maina Ndegwa;
 - d) Mr. Sammy Kiptum Birgen; and
 - e) Mr. Hosea Rutto.

- 2) The Cabinet Secretary for Agriculture and Livestock Development, Hon. Franklin Mithika Linturi, EGH testified on 9th May 2024.

46. Parties made their closing statements on 10th May 2024.

CHAPTER THREE

3 CONDUCT OF PROCEEDINGS

3.1 Pre-Hearing Conference of Parties

3.1.1 Preliminary Issues

48. On Tuesday 7th May 2024, the Committee held a pre-hearing conference of parties to confirm the documentation and evidence served and received, be apprised of the applicable procedure and consider any preliminary questions relating to the proceedings of the Committee.
49. The Sponsor of the Special Motion made oral submissions in support of a letter dated Tuesday, 7th May 2024 requesting the Committee to invoke its powers to summon:
- 1) the then Principal Secretary (PS) for the State Department for Agriculture (name) to shed light on issues emanating from documents that the PS had authored; and
 - 2) Mr. Devesh Kumar Patel, the Chief Operations Officer (COO) of KEL Chemicals Limited to shed light on a letter from the firm of Messrs. Ahmednasir Abdullahi and Co. Advocates and a press release on KEL Chemicals.
50. Additionally, the Sponsor of the Special Motion requested for additional security alleging safety concerns since the adoption of the Motion by the House.
51. The Cabinet Secretary, through his Advocate, submitted that they had written to the Committee requesting an extension of time as follows:
- 1) an extension of the time of opening and closing statements from thirty (30) to sixty (60) minutes; and
 - 2) extension of time for cross-examination from ten (10) minutes to thirty (30) minutes.

3.1.2 Preliminary Objections

52. During the pre-hearing conference, the Cabinet Secretary, through his Advocates, raised the following preliminary objections:

- 1) That the Motion is incompetent having been supported by a defective affidavit.
- 2) That the Sponsor of the Motion had filed additional documents that constituted new evidence which were not part of the Motion as adopted by the National Assembly. He argued that this is contrary to Article 50(2)(j) of the Constitution on the right to a fair hearing. He argued that the Sponsor of the Special Motion should not have introduced new evidence and that the Motion should be presented as approved by the House in accordance with Standing Order 64 of the National Assembly. Furthermore, the Advocates submitted that allowing the Motion as presented to the Committee would amount to a breach of the rules of natural justice and be in contravention of Article 47 of the Constitution as read with the Fair Administrative Action Act, Cap 7L; Standing Order 64 of the National Assembly Standing Orders; and Rule 7 on the Conduct of Investigation.
- 3) That the request of the Sponsor of the Special Motion to summon the Principal Secretary for the State Department for Agriculture and the Chief Operating Officer (COO) of KEL Chemicals Limited was an afterthought not contemplated in the Notice of Motion and, if allowed, would prejudice the Cabinet Secretary.
- 4) That the Sponsor of the Motion and his Advocates had been holding press conferences on the subject matter of the Motion contrary to Standing Order 86 of the National Assembly Standing Orders and the Speaker's directions which preclude any party from discussing in public Committee proceedings before it tables its report to the House.

3.1.3 Determination on Preliminary Issues

53. The Committee deliberated on the issues raised and by a majority of its Members determined as follows:

1) On the admissibility of the Special Motion

- a) The question of whether the sworn statement is defective or not is one which relates to the question of admissibility of the Motion.

- b) Pursuant to Standing Orders 47(4A), 64 and 66, it is the exclusive authority of the Speaker of the National Assembly to determine the question of admissibility of a proposed Special Motion for dismissal of a Cabinet Secretary.
- c) In a Communication delivered on 30th April, 2024, the Rt. Honourable Speaker made the determination on the admissibility of the Special Motion by the Hon. Jack Wanami Wamboka, MP.
- d) Consequently, the question of admissibility had been determined by the Speaker of the National Assembly. To this end, the issue of admissibility having been determined by the Speaker, it had been overtaken by events.
- e) Further, reopening the issue of admissibility of the Motion under the present proceedings would amount to an appeal of a decision of the Speaker. The Committee relied on the case of **Kenya Planters Co-operative Union Limited Vs Kenya Co-operative Coffee Millers Limited and Another (2016) eKLR (Use Standing Orders)**
- f) It is noteworthy that the remit of the Select Committee under Article 152 (7) of the Constitution is to conduct the investigation on the allegations against the Cabinet Secretary and does not extend to reviewing rulings or decisions made by the Speaker of the House or by the full House. Once a motion is approved by the House, it is beyond the scope of the Committee to question or revisit the procedural or substantive aspects of that decision.
- g) In any event, Standing Order 64 (1A) provides that, in addition to other requirements, the grounds specified in a motion for dismissal of a Cabinet Secretary shall be admissible **if accompanied by necessary evidence, including annexures or sworn testimonies in respect of the allegations.**
- h) From a reading of Standing Order 64(1A), the use of the disjunctive word "or" means the grounds in a Motion may be accompanied by annexures or sworn testimonies.
- i) From the dictionary and judicial precedents, the word "or" is ordinarily used to introduce another possibility or alternative, that is either or.

- j) This interpretation is supported by the **Supreme Court's** interpretation of section 83 of the Election Act, 2012, a provision with the disjunctive word "or". The **Supreme Court** stated that "**the use of the word "or" clearly makes the two limbs disjunctive under our law. It is, therefore, important that, while interpreting Section 83 of our Elections Act, this distinction is borne in mind.**"- (see *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 4 Others & Attorney General & another*, petition No 1 of 2017).
- k) Clearly, under Standing Order 64(1A), a Motion may be accompanied by annexures **or** sworn testimonies. The filing of an affidavit to support the motion is not mandatory and where there is no supporting affidavit, the motion would still stand if annexures have been attached to the motion. Accordingly, if the supporting affidavit is found to be defective, and is struck out, the same would have no effect on the competence of the motion, in view of Standing Order 64 (1A).
- l) In this case, the Motion presented by Hon. Wamboka is already supported by various annexures.
- m) Further, the Constitution under Article 152 (6) and (7) outlines a multistage process for the impeachment of Cabinet Secretaries. At each stage, the motion is scrutinized before proceeding to the next. The approval of said motion by the National Assembly signifies that it has undergone and passed several procedural and substantial assessments.
- n) These **multi-tiered** stages are purely geared towards **scrutinizing the probative value of any averments made and evidence given in support of the Special Motion** including the investigation being undertaken by the Committee.
- o) The House, having already deliberated and allowed the motion to proceed to the Committee, has by implication resolved any issues pertaining to sufficiency of form and substance of the motion, including its supporting documents.
- p) Further, whereas the Advocates for the Cabinet Secretary have quoted various court cases on the matter, it is instructive to note that we are also guided by Article 159(2)(d) of the Constitution which

requires **justice to be administered without undue regard to procedural technicalities.**

- a) Finally, the question of whether the sworn statement is defective or not is founded not only on a pure point of law since it invites the Committee to ascertain facts. The objection therefore does not fully comply with the description of a preliminary objection as envisaged in the ***Mukhisa Biscuits Manufacturing Ltd vs West end Distributors Ltd Civil Appeal No. 9 of 1969 (1969) EA 696.***
- r) Consequently, the Committee shall proceed to hear the matter and discharge its mandate as required in Article 152(7) of the Constitution.

2) On the introduction of new witnesses

- a) On whether the Sponsor can call before the Committee witnesses whose statements were not initially part of the Motion as passed by the house, the Committee observed that Standing Order 64 primarily concerns procedural matters and does not prescribe the specific evidence to be presented before the Committee.
- b) What is important is that the investigations by the Committee should and will not go outside the allegations in the Special Motion.
- c) The Committee noted that the allegations against the Cabinet Secretary as set out in the Special Motion all relate to the fake fertilizer. The Committee will not entertain any witness or evidence that is not relevant to or that purports to introduce new allegations outside the allegations as passed by the National Assembly. To do otherwise would be *ultra vires* since the National Assembly appointed the Committee with a clear mandate including the specific allegations in the Special Motion.
- d) It is important to clarify that determining the relevance of evidence remains the mandate of the Committee. The parties may object as to the relevance of any evidence at the time of the production and the Committee shall make a decision on the same.
- e) Consequently, the Committee shall allow any Party to invite witnesses or produce new evidence provided the evidence strictly relates to the allegations contained in the Motion.

- f) The Committee will not entertain any witness or evidence that is not relevant to or that purports to introduce new allegations outside the allegations as passed by the National Assembly.

3) On the request to Summon the Principal Secretary

- a) The letters that the Sponsor of the Motion had initially submitted to the Committee were incomplete. However, the Committee allowed the Hon. Wanami Wamboka to submit complete documents of which the Committee received the letters and proceeded to examine the same vis-à-vis the evidence that was presented to the Committee by both Parties.
- b) The Committee observed that Article 125 of the Constitution as read with section 18 of the Parliamentary Powers and Privileges Act and Standing Order 191 gives power to the Committee to summon any person to appear before it for purposes of giving evidence or providing any information as the Committee may determine.
- c) Rule 5(3) of the Rules of Procedure of the Committee provides that **"The Committee may, at the request of the Cabinet Secretary or the Member, invite or summon any person to appear and give evidence before the Committee"**.
- d) In interpreting the aforementioned provisions of law, the courts in **Julius Makau Malombe v Charity Kaluki Ngilu & 2 Others [2017] eKLR**, held as follows:
"The summons under the section can either issue to witnesses sought to be called by the parties, or to any person who appears to the Court to have been concerned in the elections in question. How is such an impression that a person was concerned in the elections to be established? In my view this can only be by way of evidence that is brought before the Court, and a party who wishes to call a person who is not his witness to give evidence in an election petition must first establish a basis by showing their involvement in the elections."
- e) From the foregoing, the Committee directed that the Sponsor should first provide the evidence as per the Motion to demonstrate the need for the Committee to summon the Principal Secretary for the State

Department for Agriculture and the Managing Director for KEL Chemicals Limited.

- f) Upon examining the letters as resubmitted by the Sponsor of the Motion, the Committee observed that the letters as presented were self-explanatory and needed no further elucidation. Consequently, it was the considered ruling of the Committee that the Sponsor of the Motion did not lay sufficient basis for the request, for the Committee to summon the witness in accordance with the afore-stated provisions of the law.

4) On the request to Summon the Managing Director for KEL Chemicals Limited, Mr. Devesh Kumar Patel

- a) From the documents submitted to the Committee, the Chief Operations Officer for KEL Chemicals Limited, Mr. Devesh Kumar, had already been charged in Court as evidenced by the charge sheet presented to the Committee which indicated that he was arrested on 3rd May, 2024 and formally presented to court on 6th May, 2024.
- b) The critical question that therefore arose was whether in light of the active criminal proceedings against the person, the Committee could still proceed to invite the witness to provide information to the Committee.
- c) Standing Order 89 provides for the *sub judice* rule which bars any Member from referring to any matter that is *sub judice*. Under Standing Order 89(2) a matter is considered *sub judice* if it refers to active criminal proceedings. Standing Order 89(3) provides that criminal proceedings **shall be deemed to be active when a charge has been made or a summons to appear has been issued.**
- d) The Committee observed that the person in question had already been charged and appeared in court on 6th May, 2024. In this regard, for the purposes of Standing Order 89, the criminal proceedings were active.
- e) Consequently, pursuant to Standing Order 89, the Committee found that the matters were *sub judice* and it would be in violation of Standing Order 89 to call a witness when there are active criminal proceedings touching on the issue of distribution of substandard fertilizer a matter that is also the basis of the investigation.

- f) Whereas Standing Order 89(5) as read with various rulings by former Speakers of the House, indicate that the sub-judice rule can be exempted in the case of public interest, it is notable the matter also touches on the right to fair hearing of the witness under Article 50 of the Constitution which may not be limited.
- g) Save for the letter by Ahmednasir Abdullahi, SC and the unsigned press release alleged by the witness, there was no other evidence that was presented to the Committee relating to the witness. The Committee did not invite the author of the letter. In this regard, the evidence presented to the Committee was hearsay evidence which could not be corroborated.
- h) Inviting a witness at the tail end of the proceedings would also be in violation of Article 50 of the Constitution on the right to fair hearing and rules of natural justice which requires one to give adequate notice to a witness.
- i) The request further goes against the Evidence Act, Cap 80 on burden of proof which states that he who alleges a fact must prove it. The burden of proof in this case was with the Sponsor of the Motion to produce the witnesses.
- j) The Sponsor of the Motion did not tender any evidence to the Committee to demonstrate that he had indeed attempted to invite the witnesses.

5) On holding press conferences on the subject matter under consideration by the Committee

- a) Article 33(1) and (3) as read with Article 117 of the Constitution guarantees the right to freedom of expression and the freedom of speech and debate in Parliament. However, in exercising this right, every person shall do so in a manner that respects the rights and reputation of others. Relating to Parliamentary proceedings, Articles 33 and 117 are limited in Standing Order 86 which precludes Members from referring to the subject matter of the proceedings of a Select Committee before the Committee tables its report to the House.
- b) Furthermore, Rule 10 on the Conduct of Investigation only restrains Members of the Committee from referring to proceedings before the

Committee. Therefore, parties are not subject to this provision. However, the Committee noted that to safeguard the dignity, integrity and good order of the proceedings it would be prudent and in the interest of justice for the Parties to restrain themselves from commenting on and premature release of information pertaining to Committee proceedings.

- c) The Committee echoed the precedents of the House in a Communication dated Wednesday 4th June 2014 titled 'Premature Disclosure of Committee Evidence' on the underpinning of Standing Order 86 where the Speaker observed that the disclosure of certain information held by Committees such as in-camera evidence or other confidential documents had a real potential to interfere with the work of Parliamentary Committees by undermining the operations of Committees and should be taken seriously.
- d) In addition, in a Communication dated Wednesday 11th March 2015 titled 'Commenting on and Premature Release of Committee Proceedings', the Speaker observed that committees were established on the authority of Article 124 of the Constitution. One of the objectives of Standing Order 86 is to safeguard against abuse of that privilege as provided under the Parliamentary Privileges Act. Particularly as some of the comments or remarks on matters before Committees by Members amounted to defamation since they were made away from Committee sittings, or in the Chamber and were, therefore, not privileged and consequently actionable.
- e) Resultantly, the Committee urged all parties to restrain themselves from referring to the substance of the proceedings of the Select Committee before the Committee has made its report to the House.

6) On extension of time

- a) Vide a letter dated 4th May, 2024 addressed to the Clerk of the National Assembly the Advocate for the Cabinet Secretary, the firm of Muthomi and Karanja wrote to the Clerk of the National Assembly requesting the following adjustments to the Tentative Hearing Programme:
 - i. Increase the time for Opening Statements to 60 minutes;
 - ii. Increase the time for Closing Statements to 60 minutes; and
 - iii. Increase the time for Cross-examination to at least 60 minutes for each witness.

- b) In assessing the request made, the Select Committee takes into consideration the following:
 - i. The limited constitutional timelines given to the Committee to investigate the matter pursuant to Article 152(7) of the Constitution.
 - ii. The Rules on the Conduct on Investigation of the Select Committee relating to time allocation of proceedings.
 - iii. The right to a fair hearing and right to be heard as espoused in Article 50 of the Constitution.

- c) During the conduct of the proceedings, Rule 7(2) states that, "*the Committee shall, before the commencement of the hearing of the evidence, allocate time for the hearing of the case by the Sponsor of the Special Motion and the Cabinet Secretary.*"

- d) Further, Rule 7 (7) states that, "*an opening statement made under sub-rule (6) shall be limited to a maximum of forty minutes, unless the Committee otherwise permits.*"

- e) Also Rule 7 (16) states that "*a closing statement made under sub-rule (15) shall be limited to a maximum of thirty minutes, unless the Committee otherwise resolves.*"

- f) The Rules therefore give the Committee a leeway to adjust the timelines as prescribed in the rules after taking into consideration the factors in outlined in paragraph 2 of this document and circumstances of the request. The Committee must be reasonable, balance the time needs of all parties and ensure that any time allocated is applied equally and uniformly across board.

- g) After careful consideration of the request made on time adjustment, the Committee adjusted the time allocation as follows:
 - i. Opening Statements be limited to forty (40) minutes;
 - ii. Cross-examination of the Sponsor and the Cabinet Secretary be limited to sixty (60) minutes and twenty (20) minutes for any other witness; and
 - iii. Closing Statements for both the Sponsor and the Cabinet Secretary be limited to one (1) hour each.

7) On the request by the Hon. Jack Wanami Wamboka, MP for enhancement of his personal security

- a) The Committee referred the matter to the Parliamentary Service Commission under whose mandate matters relating to provision of security to Members lies.
- b) Additionally, the Committee informed the meeting that the Clerk of the National Assembly had since liaised with the Inspector-General of Police and the personal security of the Sponsor had been enhanced accordingly.

3.2 Opening Statements

54. In line with its hearing programme, the Committee invited the two parties to make their opening statements.

3.2.1 Sponsor of the Special Motion, Hon. Jack Wanami Wamboka, MP

55. The Sponsor submitted that agriculture is the backbone of the country's economy and impacted directly on the health and well-being of the nation. In addition, the matter under consideration by the Committee concerned gross violations of the Constitution and gross misconduct in ministerial responsibility. It was his opinion that consumer rights had been grossly violated hence the need for accountability from the Cabinet Secretary as head of the Ministry of Agriculture and Livestock Development.
56. Further, Hon. Wamboka noted that the Cabinet Secretary had a duty to provide accurate information to Kenyans. However, the Cabinet Secretary had given conflicting statements to the public concerning the fake fertilizer, therefore making him unfit to hold public office. It was his opinion that the fertilizer would have long-term effects on the health of the Kenyan people and he was awaiting medical reports on the same. The Sponsor submitted that there was a looming catastrophe with regard to food supply in the country owing to the fertilizer scandal, as such, this raised moral questions concerning the Cabinet Secretary.
57. Dr. John Khaminwa, Counsel for the Sponsor of the Motion, stated that corruption had been a big challenge to the country since independence and the matter before the Committee was substantially similar to the matter in the Goldenberg scandal that afflicted the country in the 1990s. He was of

the opinion that the matter at hand was one of perception and that even without evidence, the public had taken a position on the matter.

58. Dr. Khaminwa, stated that Hon. Franklin Mithika Linturi had been appointed to the office of Cabinet Secretary for Agriculture and Livestock Development, perhaps the most powerful Ministry in Government given its role in making the country food secure, placing responsibility of all policy matters on him. It was his submission that the Committee should not determine the matter under investigation purely on technicalities, citing the need for a much broader consideration. He added that in a quasi-judicial process, the Committee was expected to look at the matter, taking into account the social and economic context in which the Motion was introduced.
59. Ms. Asha Bashir, Counsel for the Sponsor of the Motion, submitted that the Cabinet Secretary had a mandate to appoint members of the Fertilizer and Animal Foodstuffs Board as provided for in the Fertilizer and Animal Foodstuffs Act, Cap 345 and failure to do so by Cabinet Secretary amounted to gross violation of the law as alleged in the Motion. It was her submission that due to the omission by the Cabinet Secretary to carry out his duties, the issue of fake fertilizer had negatively impacted Kenyans contrary to the socio-economic rights guaranteed in the Constitution.

3.2.2 Hon. Franklin Mithika Linturi, the Cabinet Secretary for Agriculture and Livestock Development

60. Dr. Muthomi Thiankolu, Counsel for the Cabinet Secretary, made the opening statement on behalf of the Cabinet Secretary. He stated that the Motion before the Committee had three allegations relating to a violation of provisions of the Constitution, an alleged crime in breach of the laws of Kenya and gross misconduct. He further stated that the witness statements submitted by the Sponsor did not contain sufficient evidence to prove the allegations.
61. It was his opinion that the evidential threshold that must be satisfied when seeking to remove a State officer from office on the grounds before the Committee must be particularized by a specific act of omission or commission attributable to the Cabinet Secretary.
62. Further, Dr. Muthomi submitted that a nexus should be established between whatever evidence was adduced and the issues raised in the Motion. In addition, the evidence adduced should clearly show the linkage between

the Cabinet Secretary and the procurement process given that all approvals relating to procurement must always be in writing. It was his submission that the Cabinet Secretary had taken steps as per document number 21 presented to the Committee to remind the relevant semi-autonomous government agency that they had to procure fertiliser that met the specifications and standards set by the Kenya Bureau of Standards.

63. In his statement, Dr. Muthomi indicated that the issues raised under allegation 2, were personal disputes between Hon. Linturi and the Member for Aldai Constituency. It was his submission that all the cases relating to family, criminal, civil, and commercial disputes, were matters that the House had considered when it was carrying out the approval process for the appointment of Hon. Linturi as the Cabinet Secretary for Agriculture and Livestock Development.
64. Further, concerning the allegation that Hon. Linturi had stormed a factory and ordered its closure, the Counsel for the Cabinet Secretary stated that the allegation was only supported by a letter authored by Ahmednasir Abdullahi, SC who had not been included as a witness.
65. It was his opinion that the Motion before the Committee did not disclose any single act of omission on the part of Hon. Linturi.
66. The Cabinet Secretary for Agriculture and Livestock Development, Hon. Mithika Linturi stated that he considered the Motion before the House a continuation of the persecution he had been subjected to over the past five (5) years. He urged the Committee to determine the matter based on the evidence adduced and not hearsay.

3.3 Evidence by the Sponsor of the Special Motion

3.3.1 Witness 1: Hon. Jack Wanami Wamboka, MP (Bumula Constituency) Sponsor of the Special Motion

67. On Wednesday, 8th May 2024, the Sponsor of the Special Motion took oath and adopted his statement together with the Motion approved by the National Assembly and stated as follows, that:
 - 1) The Cabinet Secretary, had by his omission, caused fake fertilizer to be distributed across the country negatively impacted the growth of crops and farmers' produce in violation of Articles 2, 10, 46, 73 and 75 of the Constitution.

- 2) The Cabinet Secretary had failed to discharge his constitutional and statutory mandate to appoint the Fertilizer and Animal Foodstuffs Board established under the Fertilizers and Animal Foodstuffs Act, Cap 345 which is mandated to ensure the provision of quality fertilizer to farmers.
- 3) He was relying on information obtained from the Departmental Committee of Agriculture and Livestock as submitted by the Kenya Bureau of Standards (KEBS) and requested the Committee to summon the Chief Operating Officer of KEL Chemicals Limited and the Principal Secretary, State Department for Agriculture, to establish the nexus between the Cabinet Secretary and the allegations.
- 4) The Cabinet Secretary, as evidenced by audio-visual clips played before the Committee, had given conflicting information in the media on fake fertilizer, casting aspersions on his character as a person and a State Officer. Further, in his capacity as a State officer, he had breached public trust by providing inaccurate and/or false information.
- 5) The fake fertilizer had been procured from the NCPB which is meant to be a trusted agency under the Ministry of Agriculture and Livestock Development headed by the Cabinet Secretary. Further, the fake fertilizer distributed by the NCPB had not only affected his constituents in Bumula but also other constituencies in Central and Western Kenya thereby confirming that the fake fertilizer was a national issue hence the overwhelming support of the Motion by other Members of the National Assembly, representatives of the people of Kenya.
- 6) The issuance of fake fertilizer had jeopardized the Government's Agenda on food security.
- 7) Following a visit by the Principal Secretary, State Department for Agriculture and staff to the NCPB, he had directed the discontinuance of the distribution of NPK fertilizer signifying the deception by the Cabinet Secretary in his assertion that that there was no fake fertilizer.
- 8) There were sufficient grounds for stating that the Cabinet Secretary had engaged in unbecoming conduct as evidenced by the videos adduced as evidence where he had been seen referring to one, Mr. Allan Namu, as a 'crook';

- 9) The Cabinet Secretary had breached the law and acted in an *ultra vires* manner in appointing a Fertilizer Committee instead of operationalizing the Fertilizer and Animal Foodstuffs Board.

3.3.1.1 Cross-examination of the Sponsor

68. The Advocates of the Cabinet Secretary conducted cross-examination of the witness who responded as follows:

- 1) On the allegation in the Motion concerning a breach of the Fertilizer and Animal Foodstuffs Act, Cap 345, the Cabinet Secretary had failed to discharge his constitutional and statutory mandate to appoint the Fertilizer and Animal Foodstuffs Board mandated to ensure the provision of quality fertilizer to farmers as provided under the Fertilizers and Animal Foodstuffs Act, Cap 345. He further observed that the Cabinet Secretary had breached the law and acted in an *ultra vires* manner in appointing a Fertilizer Committee instead of operationalizing the Fertilizer and Animal Foodstuffs Board.
- 2) On the issue that there was no allegation in the Motion concerning a breach of the Fertilizer and Animal Foodstuffs Act, the Cabinet Secretary, had by his omission, caused fake fertilizer to be distributed across the country negatively impacting the growth of crops and farmers' produce in violation of Articles 2, 10, 46, 73 and 75 of the Constitution on the national values and principles of governance, consumer rights, responsibilities on leadership and the conduct of State officers.
- 3) With regards to the question that procurement approvals must be dated, in writing, documented and filed yet no such written document had been provided by the Sponsor of the Special Motion, the witness states that he was relying upon information obtained from the Departmental Committee of Agriculture and Livestock as submitted by the Kenya Bureau of Standards (KEBS) and requested the Committee to summon the Chief Operating Officer of KEL Chemicals Limited and the Principal Secretary, State Department for Agriculture, to establish the nexus between the Cabinet Secretary and the allegations. Further, he stated that the fake fertilizer had been procured from the NCPB which was meant to be a trusted agency under the Ministry of Agriculture and Livestock Development headed by the Cabinet Secretary.

3.3.1.2 Re-examination of the Sponsor

69. On re-examination, the Advocates of the Sponsor noted that the courts had on several occasions ruled that violation of Article 10 of the Constitution amounted to gross violation.

3.3.1.3 Clarifications by the Committee

70. On clarifications from the Members, the Sponsor of the Motion responded that:

- 1) The Fertilizers and Animal Foodstuffs Act, Cap. 345 mandates the Fertilizers and Foodstuff Board of Kenya to license or withdraw licences of fertilizer manufacturers and this is therefore not the Cabinet Secretary's role to withdraw licences of fertilizer manufacturers;
- 2) With regards to the Committee inviting the Principal Secretary for the State Department of Agriculture to the meeting, it was important for the PS to appear before the Committee to clarify the issues in the letters signed by him that he had submitted to the Committee;
- 3) He had made the request to the Select Committee to invite Mr. Devesh Kumar Patel, Chief Operations Officer, KEL Chemicals Limited because his efforts to call Mr. Patel as a witness were not successful since he had been in and out of DCI offices, and therefore unable to honour the invite. Mr. Patel began receiving invitations by DCI officers after approval of the Special Motion to establish the Select Committee; and
- 4) The Member was not acting on behalf of anyone and had submitted the Special Motion pursuant to Article 152(6) of the Constitution in the interest of the public.

3.3.2 Witnesses of the Sponsor of the Motion

71. In support of his Motion, the Sponsor of the Special Motion called the following witnesses:

3.3.2.1 Witness II: Titus Kiprotich

72. The witness took oath pursuant to Section 17(a) of the Oaths and Statutory Declarations Act, Cap 15. The Committee confirmed that the witness had attained the age of majority and hence was competent to testify.

73. He informed the Committee that he had purchased fifteen (15) bags of NPK 10:26:10 from the NCPB depot at Kipkelion which he used to plant maize on eight (8) acres of land but the maize did not grow to a height above the knees.
74. He added that the fake fertilizers affected his land and that his yields may be low for the next several years. He indicated that the use of the fake fertilizer had resulted in a loss estimated at Ksh. 70,000. The witness produced, as evidence, a sample of the fertilizer to the Committee.
75. On cross-examination, he confirmed that he had not read the Motion and was only testifying about the fake fertilizer.

3.3.2.2 Witness III: Mr. Benard Kuria

76. The witness took oath pursuant to Section 17(a) of the Oaths and Statutory Declarations Act, Cap 15. The Committee confirmed that the witness had attained the age of majority and hence was competent to testify.
77. The witness informed the Committee that he had purchased seven (7) bags of Mavuno Fertilizer from the NCPB depot in Githunguri. He added that he used six and a half bags of the fertilizer to plant coffee, maize and Irish potatoes. However, the yields from this farm remained low and he attributed that to the poor quality of the fertilizer. The witness availed as evidence six empty sacks and half a bag of fertilizer to the Committee.
78. On cross-examination, he confirmed that he had not read the Motion and was only testifying about the fake fertilizer.

3.3.2.3 Witness IV: Mr. David Maina Ndegwa

79. The witness took oath pursuant to Section 17(a) of the Oaths and Statutory Declarations Act, Cap 15. The Committee confirmed that the witness had attained the age of majority and hence was competent to testify.
80. The witness averred that he had been requested for an interview by a Ms. Cynthia Gichiri of Africa Uncensored on GPC Organic Plus Fertilizer in November 2023, which he had agreed to. He stated that he had seen bags of GPC Organic Plus Fertilizer at the NCPB depot at Kiganjo but did not purchase any because he believed it would not suit his needs.

81. He had obtained a report of an analysis of the GPC Organic Plus Fertilizer from Ms. Cynthia and upon comparing it to an analysis of his soil, the latter had more nutrients than the GPC Organic Plus Fertilizer.
82. On cross-examination, he confirmed that he had not authored the reports, he was not a registered beneficiary of the National Fertiliser Subsidy Program (NFSP) and that he had not read the Motion.

3.3.2.4 Witness V: Mr. Sammy Kiptum Birgen

83. The witness took oath pursuant to Section 17(a) of the Oaths and Statutory Declarations Act, Cap 15. The Committee confirmed that the witness had attained the age of majority and hence was competent to testify.
84. The witness testified that he had bought bags of Mavuno Fertilizer that he used for planting maize on his five (5) acres piece of land. He indicated that the fertilizer did not dissolve when put in water as expected. He added that the growth of the maize had been stunted and attributed it to the fertilizer used.
85. On cross-examination, he confirmed that he had not read the Motion.

3.3.2.5 Witness VI: Mr. Hosea Rutto

86. The witness took oath pursuant to Section 17(a) of the Oaths and Statutory Declarations Act, Cap 15. The Committee confirmed that the witness had attained the age of majority and hence was competent to testify.
87. He stated that he had purchased eight (8) bags of subsidised fertilizer from the NCPB at Ziwa and used it to plant maize on his seven (7) acres of land but the growth of the maize had been stunted and produced yellow kernels. He produced as evidence, his witness statement and text messages from E-subsidy indicating a voucher number that he redeemed to obtain the fertilizer.
88. The witness also submitted that the fertilizer had ruined the soil on his farm and occasioned losses that resulted in a lack of income to pay school fees.
89. On cross-examination, he stated that he had not read the Motion.

3.4 Evidence by the Cabinet Secretary, Hon. Franklin Mithika Linturi

90. On Thursday 9th May 2024, the Cabinet Secretary took oath and adopted his Replying Affidavit and stated before the Committee as follows:

- 1) That the mover of the Special Motion had not disclosed how he had violated the law but had based his allegations on perception. It was his opinion that the Honourable Member for Aldai Constituency, the adverse party to the thirty-two (32) court cases submitted as evidence in support of allegation 2, was the proxy behind the Special Motion.
- 2) That since the previous regime, the media had been sponsored to spread propaganda meant to taint his reputation as part of a campaign to politically intimidate him. As an example, he submitted a video clip from a broadcast by *Citizen Television* on 2nd May 2024 stating that he had been summoned and arrested by the Directorate of Criminal Investigations (DCI) which was not true.
- 3) On the subsidized fertilizer, that farmers across all parts of the country had received planting and top-dressing fertiliser and had realized good yields and were pleased with the Ministry of Agriculture and Livestock Development. He adduced the audio-visuals documenting the transformative journey of the Ministry in realizing the Government's agenda on food security.
- 4) That, at the date of giving his testimony, approximately three million bags of fertilizer had already been distributed to farmers. He noted that out of that batch of fertilizer, only three thousand bags had been determined to be sub-standard.
- 5) That he was neither a distributor nor a manufacturer of the impugned fertiliser. As Cabinet Secretary, he was not the accountable officer for the procurement, distribution and testing of fertilizer. As Cabinet Secretary, he could only rely on the advice from the relevant agencies and officers on the matter in question.
- 6) The subsidized fertilizer was only available to Kenyan farmers who had registered with the Ministry through the Kenya Integrated Agriculture Management Information System (KIAMIS). It was his submission that a person outside the territorial jurisdiction of Kenya could not obtain the subsidized fertilizer provided by the Ministry of Agriculture and Livestock Development as alleged by the Sponsor.

- 7) That he did not have any pending cases before the courts as alleged in the Motion as the courts had already dispensed with all the matters. It was his view that the Committee could not consider matters already heard and determined in courts of law. Further, on bad public perception he stated that this had been created by a section of the media and was not sufficient ground for removal from office.
- 8) The witness pleaded with the Committee to dismiss the Motion as no allegation had been substantiated.

3.4.1 Cross-examination of the Cabinet Secretary

91. The Advocates of the Sponsor of the Special Motion cross-examined the Cabinet Secretary whose response was to the effect that upon realization of the distribution of sub-standard fertilizer, he had instructed the Principal Secretary, State Department for Agriculture to stop the distribution of the NPK fertilizer for investigations to be conducted. He had directed KEPHIS and KALRO to test the alleged sub-standard fertilizer and report back to him.
92. It was his submission that the NCPB, a semi-autonomous government agency within the Ministry of Agriculture and Livestock Development had advertised and procured fertilizer on behalf of government and the supplier was expected to comply with the standards set out in the tender document. The NCPB was headed by a Managing Director who is the accounting officer in accordance with the National Cereals and Produce Board Act, Cap 338. Although, the Managing Director of NCPB is appointed by the Cabinet Secretary upon recommendation by the Board, the Cabinet Secretary did not interfere in the running of the NCPB. However, he had held several meetings with the Managing Director of the NCPB to ascertain the quality of the distributed fertilizer.
93. On who was to be blamed for the distribution of the fake fertilizer, the Cabinet Secretary was of the opinion that no one in the Ministry of Agriculture and Livestock Development could be blamed for the distribution of sub-standard fertilizer as the procurement had been done in accordance with the provisions of the Public Procurement and Asset Disposal Act, Cap 412C.
94. On what he had done to remedy the situation, it was his submission that he had been trying to remedy the negative effects of the sub-standard fertilizer by distributing fertilizer with more nitrogen. Further, although the suppliers of sub-standard fertilizer had been paid, their bank accounts had been frozen to prevent further loss of public money.

3.4.2 Re-examination of the Cabinet Secretary

95. The Advocates for the Cabinet Secretary decided not to reexamine him.

3.4.3 Clarifications by the Committee

96. On clarifications from the Members, the Cabinet Secretary responded that:

- 1) The establishment of the Fertilizers and Animal Foodstuffs Board of Kenya was work in progress and that on the interim the Cabinet Secretary had tasked the Director for Crops and the Director for Veterinary Services to assume the role of the Board. The decision to establish the Board had to be referred to Cabinet given the plans by the government to collapse some Boards.
- 2) On the basis under which NCPB received money to purchase the subsidized fertilizer given that the funds were approved under the State Department for Agriculture and not NCPB in the budget estimates for the year ended 30th June 2024 and whether the Ministry had the power to transfer money from one department to another. The Cabinet Secretary submitted that the practice was that money has always been transferred to NCPB as received to purchase fertilizer and account for it.
- 3) As regards to the question on what informed the decision to transfer the function of purchase and distribution of fertilizer from KNTC to NCPB; the Cabinet Secretary explained that NCPB was easily accessible to farmers and hence was better placed to undertake the function.

3.5 Closing Statements

3.5.1 Closing Statement by the Hon. Jack Wamboka, MP- The Sponsor of the Motion

97. In his closing statement, Hon. Jack Wanami Wamboka, MP expressed his dissatisfaction with the decision of the Committee not to summon the Principal Secretary and the COO of KEL Chemicals Limited, who in his view were relevant players in the matter before the Committee.

98. He added that his motivation for sponsoring the Motion was fueled by the fact that the negative impacts of the fake fertilizer had affected farmers all over the country and that the Cabinet Secretary should take responsibility for the failures of the Ministry, not just its successes.

99. Additionally, he submitted that the fake fertilizer could damage the soil, cause severe health risks such as cancer and lead to lack of food and income. He stated that these had endangered farmers' economic well-being. He had, therefore, taken it upon himself, at personal cost, to seek justice for the farmers.
100. Ms. Asha Bashir, Advocate of the Sponsor of the Motion, submitted that the Motion was premised on the failure of the Cabinet Secretary to properly discharge his duties in accordance with the law by not establishing the Fertilizer and Animal Foodstuffs Board to ensure that Kenyans received the accepted quality of fertilizer.
101. She submitted that the Cabinet Secretary, in his capacity as a State officer, had failed to adhere to the guiding principles of leadership and integrity of selfless service based solely on public interest. She stated that the Cabinet Secretary had contravened Article 73(2) of the Constitution on impartiality and transparency in the execution of public duties by providing contradictory information relating to the quality of fertilizer.
102. It was her submission that the Motion was in public interest and urged the Committee to consider the facts of the investigation devoid of their political affiliations and uphold the rule of law. She concluded by stating that Kenya heavily depends on agriculture and the effects of the impugned fertilizer would subsequently affect the country's economy.
103. Dr. John Khaminwa, Advocate for the Sponsor, submitted that Articles 1(2), 2(5) and 201 of the Constitution had to be upheld. He stated that Article 2 of the Constitution delegated the sovereignty of the people to their elected representatives. The Motion for the dismissal of the Cabinet Secretary had been supported by one hundred and forty-nine Members of the National Assembly. It was important for the Committee to uphold their wishes on the matter.
104. Further, the Counsel stated Cabinet Secretary had failed to discharge his duties as a Minister in charge of food security as there had been no accountability on his part with regard to the fake fertilizer. He submitted that this was contrary to Article 201 of the Constitution which sets out the principles of public finance including openness and accountability.

105. He also noted that portfolio corruption is a global issue and deeply rooted in Kenya. He encouraged the Committee to use the instant case to set a good precedent for curbing corruption.

3.5.2 Closing Statement by the Cabinet Secretary, Hon. Franklin Mithika Linturi

106. Dr. Muthomi Thiankolu, Advocate for the Cabinet Secretary, submitted that this was a groundbreaking process for the National Assembly as the outcome of the process would set the tone for future impeachment processes.

107. He noted that the Committee should draw lessons from the process and establish official rules of procedure for impeachment. He also stated that it was important for the Committee to settle the issue of the place of personal vendetta in a process anchored on Article 152 of the Constitution.

108. He further submitted that the Impeachment Motion against the Cabinet Secretary was the result of five years of character assassination as part of a political campaign against the Cabinet Secretary. In his view, therefore, there was no merit in the allegations and the evidence placed before the Committee did not meet the threshold as envisioned in Sections 55 and 57 of the Evidence Act, Cap 80.

109. He reiterated that the Constitution provides for the right to be presumed innocent until proven guilty and persuaded the Committee not to be swayed by public perceptions but to focus on the evidence adduced before it. Counsel further reiterated that the Committee needed to satisfy itself that the evidence provided by the Sponsor had satisfactorily substantiated the allegations against the Cabinet Secretary.

110. Mr. Boniface Mawira, Advocate for the Cabinet Secretary, submitted that resignation is not akin to impeachment as implied by the Counsel for the Sponsor. Impeachment would disqualify the Cabinet Secretary from holding any other State office in the future. Hence, the high evidentiary threshold.

111. It was his submission, that the witnesses of the Sponsor of the Motion had not adduced evidence relevant to the Motion thereby failing to satisfy the required standard of burden of proof. He urged the Committee to dismiss the Motion.

CHAPTER FOUR

4 ANALYSIS OF THE EVIDENCE

4.1 Background

112. The Committee examined the evidence put forth and the arguments presented by all parties involved. The Committee was guided by the constitutional imperatives enshrined in Kenya's legal framework, including principles of fair hearing, fair administrative action, natural justice, good governance, and the overarching consideration of public interest.
113. In accordance with the provisions of Article 152(9) of the Constitution, the Committee is mandated to recommend the dismissal from office of a Cabinet Secretary if the allegations in the Motion are **substantiated**. As such, the deliberations of the Committee were centered on the crucial question of whether the allegations as levelled by the Sponsor have been sufficiently proven.
114. The grounds for the dismissal of a Cabinet Secretary from office are laid down in Article 152(6) of the Constitution as follows—
"152(6). A member of the National Assembly, supported by at least one-quarter of all the members of the Assembly, may propose a motion requiring the President to dismiss a Cabinet Secretary—
(a) on the ground of a gross violation of a provision of this Constitution or of any other law;
(b) where there are serious reasons for believing that the Cabinet Secretary has committed a crime under national or international law; or
(c) or gross misconduct"
115. The Sponsor of the Motion seeks a resolution to have the Cabinet Secretary dismissed on the following grounds –
a) Gross violation of the Constitution or any other law;
b) Serious reasons for believing that the Cabinet Secretary has committed a crime under national law; and
c) Gross misconduct.

4.1.1 Ground One: Gross Violation of the Constitution or any other law

116. Before examining the allegations under the ground of gross violation of the Constitution, the Committee explored what amounts to gross violation of the Constitution.

117. A plain reading of the phrase '**gross violation**' reveals that the ground is **not merely violation of the Constitution but gross violation**. In other words, not every violation of the Constitution is considered a ground for removal. It is therefore imperative, at the outset, to determine what amounts to gross violation of the Constitution.

118. The Court of Appeal in the case of **Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR** held as follows with regard to gross violation:

*"We note that the **Constitution** does not define gross-violation. What amounts to gross violation must be considered on a case-by-case basis taking into account the peculiar facts and circumstances of each case. We concur with High Court's statement that whether conduct is gross or not will depend on the facts of each case and not every violation of the **Constitution** or other law is gross violation. The Nigerian Supreme Court in the case of **Hon. Muiywa Inakoju & Others – vs- Hon. Abraham Adaeleke, S.C.272/2006** opined as follows:*

The following constitute grave violation or breach of the Constitution:

- a) interference with the constitutional functions of the legislature and the judiciary by an exhibition of over constitutional executive power;*
- b) abuse of the fiscal provisions of the Constitution;*
- c) abuse of the Code of Conduct for public officers;*
- d) disregard and breach of the provisions on fundamental rights;*
- e) interference with local government funds and stealing from the funds, pilfering of the funds...for personal gains;*
- f) instigation of military rule and military government; and*
- g) any other subversive conduct which is directly inimical to the implementation of some other major sectors of the Constitution.*

119. A related issue for consideration on constitutes violation of the Constitution is specificity and precision. This test was explained in the locus classicus of **Anarita Karimi Njeru v Republic [1979]eKLR**, as follows,

"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision

that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

120. The Committee examined the allegations under the ground of violation of the Constitution using the aforementioned tests.

4.1.1.1 Allegation 1(a): Violation of Articles 2 and 10(1)(c) of the Constitution

121. The Sponsor alleges that the Hon. Franklin Mithika Linturi, acting as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, appears to have committed gross violation of these constitutional provisions by—

- 1) not undertaking public participation with leaders, stakeholders, or even departments within the Ministry in the implementation of far-reaching policy decisions on the procurement and distribution of fertilizer therefore violating the provisions of the Constitution on national values and principles of good governance in so far as he acted as a State officer to make and implement a public policy to approve the procurement and distribution of fake fertilizer contrary to recommendations of the National Cereals and Produce Board, an agency in the Ministry; and
- 2) approving procurement and distribution of fake fertilizer by the National Cereals and Produce Board, discloses a gross violation of national values and principles of good governance in so far as he acted as a State officer to make and implement a public policy to approve the procurement and distribution of fake fertilizer contrary to Article 10(1)(b) of the Constitution.

Part (i) of the Allegation

122. The first part of the allegation on gross violation of the Constitution is that the Cabinet Secretary failed to carry out public participation in the implementation of the policy decisions on procurement and distribution of fertilizer and therefore appears to have violated Articles 2 and 10(1)(c) of the Constitution.

123. In response to the issue of public participation, the Cabinet Secretary submitted that the fertilizer subsidy is a Kenya Kwanza policy and was part of the Kenya Kwanza Election Manifesto, which was ratified by voters in the

2022 General Election. He also submitted that no mode of public participation can conceivably rank higher than putting an issue to the electorate in a General Election which is the free exercise of the will of the People.

124. He also indicated that the policy of subsidized fertilizer had been implemented by previous administrations. In sum, it was the Cabinet Secretary's contention that it would be unfair to vilify one person on account of a government policy.
125. Public participation is a theme that runs through the Constitution and various laws. Article 10 of the Constitutions lists public participation as one of the national values and principles of governance. Article 10(1)c of the Constitution provides –

*"The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them— (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) **makes or implements public policy decisions.**"*

Part (ii) of the Allegation

126. On the second part of the allegation on approving procurement and distribution of fake fertilizer by the National Cereals and Produce Board (NCPB), the Cabinet Secretary submitted that he was not the officer in charge of procurement and distribution of fertilizer under the NCPB which is a semi-autonomous government entity. He noted that the NCPB had advertised the procurement of fertilizer on Tender for Supply of Fertilizer on Consignment Basis dated 21st November 2023 as an annexure to his Replying Affidavit.
127. It was the evidence of the Cabinet Secretary that Section 69(1) of the Public Procurement and Asset Disposal Act provides that all approvals relating to procurement shall be in writing and that no documentary evidence had been adduced before the Select Committee to show that he had a role in the procurement of the fertilizer under investigation.
128. The Cabinet Secretary also stated that Section 48 of the Public Procurement and Asset Disposal Act provides for an Inspection and Acceptance Committee and that the Cabinet Secretary was not a part of the Tender

Evaluation Committee or the Inspection and Acceptance Committee for the procurement of the fertilizer in question.

129. It was the evidence of the Cabinet Secretary that the procurement department under the NCPB organisational structure on page 55 of his written response to the Motion indicated that the Procurement Manager is the top most person responsible for matters to do with procurement at the NCPB .
130. It was further the evidence of the Cabinet Secretary that the invitation for tender and advertisement to supply fertilizer was done by the Managing Director of the National Cereals and Produce Board as evidenced in page 63 of the Cabinet Secretary's written response.
131. The Cabinet Secretary stated that he had written a letter dated 20th December 2023 on page 367 of his written response addressed to the CEO NCPB to exercise caution because of the sensitivity of the docket and the need to ensure that there was quality fertilizer in the market, by undertaking test analysis of the fertilizers deposited with them.
132. The Cabinet Secretary submitted that the actual procedure for inviting tenders was handled by the Managing Director of the NCPB.
133. The questions before the Committee on this allegation is whether the Cabinet Secretary was involved in the procurement process and whether the Cabinet Secretary breached public trust bestowed upon him under Section 8 of the Leadership and Integrity Act.
134. **Section 8 of the Leadership and Integrity Act** provides that, *"a State office is a position of public trust and the authority and responsibility vested in a State officer shall be exercised by the State officer in the best interest of the people of Kenya."*
135. The duties and responsibilities of a State officer are encapsulated under the provisions of Article 73 of the Constitution as follows:

"Responsibilities of leadership

73. (1) Authority assigned to a State officer — (a) is a public trust to be exercised in a manner that — (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honor to the nation and dignity to the office; and (iv) promotes

public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include — (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections; (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favoritism, other improper motives or corrupt practices; (c) selfless service based solely on the public interest, demonstrated by — (i) honesty in the execution of public duties; and (ii) the declaration of any personal interest that may conflict with public duties; (d) accountability to the public for decisions and actions; and (e) discipline and commitment in service to the people."

136. Under the **Public Procurement and Asset Disposal Policy, 2019**, the responsibilities of the Cabinet with respect to Public Procurement and Asset Disposal include the following:

- i) approve public procurement and asset disposal policy;
- ii) set government strategic priorities in public procurement and asset disposal;
- iii) approve public procurement and asset disposal legislative proposals before submission to Parliament;
- iv) approve budget proposals before submission to Parliament.

4.1.1.2 Allegation 1 (b): Gross Violation of Article 46 of the Constitution

137. Under this allegation, the Sponsor alleges that the Cabinet Secretary appears to be in gross violation of this constitutional provision by:

- (i) infringing on consumers' right to goods and services of reasonable quality and to the protection of their health, safety, and economic interests by approving the procurement and distribution of fake fertilizer; and
- (ii) approving the budgets for procurement and distribution of fake fertilizer by the National Cereals and Produce Board thereby violating consumer's right to goods and services of reasonable quality and to the protection of their health, safety, and economic interests as he approved the procurement and distribution of fake fertilizer contrary to Article 46 of the Constitution.

138. The Sponsor alleges that the Cabinet Secretary appears to have committed a gross violation of this Constitutional provision by infringing on consumer rights to goods and services of reasonable quality and to the protection of their health, safety and economic interest by approving the procurement and distribution of fake fertilizer.
139. According to the Sponsor, some farmers bought fake fertilizer and hence their rights as consumers were violated. He also alleged that some farmers received SMS messages to collect their fertilizer only to be given fake fertilizer having paid for it.
140. The Sponsor presented four witnesses who described themselves as farmers, who had bought fake fertilizer from the NCPB. They presented before the Committee what they alleged to be samples of the fake fertilizer. They also indicated that their crop had failed as a result of the use of the fake fertilizer and they had incurred losses in the process.
141. In response, the Cabinet Secretary submitted that the procurement and distribution of the fertilizer was carried out by a semi-autonomous public agency, NCPB, and that it was not proper to attribute the alleged infringement on him.
142. The Cabinet Secretary asserted that he did not engage in the manufacturing or distribution of any goods or services that could potentially violate consumer rights. He emphasized that as Cabinet Secretary he relies on the advice of independent technical agencies of the State to ensure the quality of goods and services and protect consumer interests.
143. The Cabinet Secretary also stated that on 20th December 2023, he wrote a letter to the NCPB requesting them to ensure that they ascertain the quality and composition of fertilizers before delivery to ensure that farmers get the right fertilizer to suit their planting requirements and boost agricultural productivity. In the letter, he also requested the NCPB to ask the suppliers to confirm in writing the fertilizer chemical composition they will supply before delivery.
144. Regarding the alleged failure by independent technical agencies to detect substandard fertilizer consignments, which in any event comprised a negligible fraction of the total supply, the Cabinet Secretary deemed the proposed sanction of dismissing a Cabinet Secretary as disproportionate and unreasonable.

145. In responding to the issue involving the substandard fertilizer from Batch Number 03/2024, the Cabinet Secretary pointed out that products are assigned batch and serial numbers for traceability and recall purposes, as seen in this case. He concluded that the National Cereals and Produce Board (NCPB) had ability to track, trace, and recall the affected bags of substandard fertilizer.

146. Section 7(3) of the Leadership and Integrity reads,

“(3)In carrying out the duties of the office, a State officer shall not violate the rights and fundamental freedoms of any person unless otherwise expressly provided for in the law and in accordance with Article 24 of the Constitution.”

147. Further, the Fertilizer and Foodstuffs Board of Kenya established under section 2A of the Fertilizer and Foodstuff Act, CAP 345 is charged with the following functions:

2B. Functions of the Board

The functions of the Board shall be to—

- (a) **regulate the fertilizers** and animal foodstuffs industry in Kenya including the **production**, manufacture, packaging, importation and marketing of fertilizers and animal foodstuffs;*
- (b) regulate the importation of raw materials for the manufacture of animal foodstuffs;*
- (c) promote the manufacture of fertilizers and animal foodstuffs;*
- (d) **advise the national and county governments** on—*
 - (i) **the procurement, importation and efficient and timely distribution of subsidized fertilizers** and animal foodstuffs;*
 - (ii) establishment of retail outlets of fertilizers and animal foodstuffs in the counties; and*
 - (iii) **development of policies related to the manufacture and distribution of fertilizer and animal foodstuffs;***
- (e) **inspect and test fertilizers** and animal foodstuffs to ensure their quality and safety;*
- (f) **license manufacturers, distributors and retailers of fertilizers** and animal foodstuffs on the recommendation of the Director of Agriculture and the Director of Veterinary Services;*
- (g) promote, in collaboration with stakeholders in the agriculture industry, research on fertilizer and animal foodstuffs;*

(h) ensure that fertilizers and animal food stuffs imported, manufactured or distributed in Kenya meet the standards of quality and safety as prescribed by law.

148. Section 2C(1) of the Act states that:

"The Board shall consist of the following persons appointed by the Cabinet Secretary—"

4.1.1.3 Allegation 1(c): Gross Violation of Article 73 of the Constitution

149. The Sponsor alleges that the conduct of one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, appears to be a gross violation of this constitutional provision in so far as the public trust was exercised in a manner that is inconsistent with the purposes and objects of the Constitution. He failed to demonstrate respect for the people, failed to bring honour to the nation, dignity to the office, and failed to promote public confidence in the integrity of the office contrary to Article 73(1)(a)(i), (ii), (iii) and (iv) of the Constitution.

150. According to the Sponsor, in so far as the public trust was exercised in a manner that is inconsistent with the purposes and objects of this Constitution, the Cabinet Secretary contravened Article 73 of the Constitution. The Sponsor alleges that the Cabinet Secretary failed to demonstrate respect for the people and to bring honour to the nation and dignity to the office.

151. To augment this allegation, the Sponsor produced electronic evidence of a video in which the Cabinet Secretary called a journalist a crook. Further, the Sponsor presented two other excerpts of video recordings to demonstrate that the Cabinet Secretary was inconsistent in his explanation on the existence of the fake fertilizer.

152. In his response, the Cabinet Secretary testified that there was no sworn witness statement by the journalist and neither was the journalist invited to testify. Further he decried that a section of the media had painted him in bad light leading the public to have a bad image of him. In sum, the Cabinet Secretary submitted that the allegations were mere hearsay and are not admissible.

153. On the press statement issued by the President of the Law Society of Kenya, the Cabinet Secretary submitted that the same was not admissible as the author had neither sworn a statement nor was she a witness.

154. Article 73(1) of the Constitution states,

(1) Authority assigned to a State officer—

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

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

(ii) demonstrates respect for the people;

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

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

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

155. Further, section 11 of the Leadership and Integrity Act states:

A State officer shall—

(a) carry out duties of the office in a manner that maintains public confidence in the integrity of the office;

(b) treat members of the public and other public officers with courtesy and respect;

(c) not discriminate against any person, except as is expressly provided by the law;

(d) to the extent appropriate to the office, maintain high standards of performance and level of professionalism within the organisation; and

(e) if the State officer is a member of a professional body, observe and subscribe to the ethical and professional requirements of that body in so far as the requirements do not contravene the Constitution or this Act.

156. The above provisions are mirrored in Section 9 of the Public Officer Ethics Act.

4.1.1.4 Allegation 1 (d): Gross Violation of Article 201 of the Constitution

157. The allegation against the Cabinet Secretary is that one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, appears to have committed a gross violation of this constitutional provision by approving the procurement and distribution of fake fertilizer by the National Cereals and Produce Board. This amounts to a gross violation of principles on public finance in so far as public money is concerned and that public money was not applied in a

prudent and responsible way when he approved the procurement and distribution of fake fertilizer contrary Article 201 (d) of the Constitution.

158. The Sponsor alleges that the Cabinet Secretary appears to have committed a gross violation of Article 201 of the Constitution by approving the procurement and distribution of fake fertilizer by the National Cereals and Produce Board. According to the Sponsor, this amounts to a gross violation of principles on public finance in so far as public money is concerned and that public money was not applied in a prudent and responsible way when he approved the procurement and distribution of fake fertilizer.
159. The Sponsor claimed that the Cabinet Secretary approved the purchase and distribution of fake fertilizer. This resulted in farmers in Kenya and Uganda purchasing fake fertilizer, thus violating their consumer rights. Further, this resulted in loss of public funds contrary to Article 201 of the Constitution.
160. Additionally, the Cabinet Secretary contended that the text of the Agency Agreement signed between the National Cereals and Produce Board (NCPB) and 51 Capital Africa Diatomite Industries on March 31, 2022, was prior to his appointment as a Cabinet Secretary, and further the agreement does not classify GPC Diatomaceous as a fertilizer. He stated that the Sponsor had failed to provide any evidence to support the claim that he misled the Departmental Committee on Agriculture and Livestock by presenting GPC Diatomaceous as a soil conditioner.
161. The Cabinet Secretary reiterated that the procurement and distribution of the substandard fertilizer was done by a semi-autonomous government entity, NCPB. He stated that NCPB has an accounting officer who is responsible for procurement. He further stated that no written approval had been presented to the Select Committee to show that he was responsible for the approval. He stated that all approvals relating to any procurement procedures should be in writing.
162. Further, the Cabinet Secretary informed the Committee that bank accounts of the responsible entities had been frozen and assured that there would be no loss of money in the event that there were any claims made. The Cabinet Secretary also told the Select Committee that it was impossible for him to commit the alleged violation since as a Cabinet Secretary, he cannot approve the procurement of fertilizers.

163. The Cabinet Secretary also told the Committee that the subsidized fertilizer was meant for Kenyan farmers who are registered using their National Identity Cards and Mobile Phone Numbers under the KIAMIS. There was therefore no way Ugandans could access the fertilizer as alleged by the Sponsor of the Motion.

164. Article 201 of the Constitution provides for the principles of public finance including prudent use of public funds.

165. Article 226(5) provides that—

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

166. Section 69(1) of the Public Procurement Act states—

"All approvals relating to any procedures in procurement shall be in writing and properly dated, documented and filed."

4.1.1.4 Allegation 1 (e): Gross violation of Article 232 of the Constitution

167. The Sponsor alleges that the Hon. Franklin Mithika Linturi, the Cabinet Secretary for Agriculture and Livestock Development, appears to have committed a gross violation of this constitutional provision where, he outlined in his written submission as a response to the fertilizer subsidy programme to the Departmental Committee on Agriculture and Livestock, misleading information that the National Cereals and Produce Board (NCPB) signed an Agency Agreement with 51 Capital Africa Diatomite Industries on 31st March 2022 for supply and distribution of GPC diatomaceous for its commercial function, and that the product was not sold as a chemical fertilizer but as a soil conditioner, violating the values and principles of public service, duty to use resources efficiently, effectively and economically contrary to **Article 232 of the Constitution**.

168. The Sponsor claimed that the Cabinet Secretary had breached Article 232 of the Constitution through his response on the fertilizer subsidy program to the National Assembly Departmental Committee on Agriculture and Livestock. The Sponsor alleged that the Cabinet Secretary, in his statement before the Departmental Committee, asserted that the product was not sold as chemical fertilizer but as a soil conditioner. The Sponsor argued that

this statement was deceptive, as the product was distributed as chemical fertilizer which turned out to be fake.

169. On the issue of soil conditioner, the Cabinet Secretary indicated that there was no evidence before the Select Committee and that the Sponsor was misleading the Select Committee. In paragraph 50 (b) of his Replying Affidavit, the Cabinet Secretary states that:

*"as already explained, the text of the Agency Agreement signed between the NCPB and 51 Capital Africa Diatomite Industries on **31st March 2022** (long before my appointment as a CS) does not state that GPC Diatomaceous is a fertilizer. Further, and in any event, the Mover of the Special Motion has not adduced any evidence to substantiate the accusation that I misled the Departmental Committee that GPC Diatomaceous is a soil conditioner."*

170. Article 232 of the Constitution provides for the values and principles of public service. These include high standards of professional ethics; (b) efficient, effective and economic use of resources; (c) responsive, prompt, effective, impartial and equitable provision of services; (d) involvement of the people in the process of policy making; (e) accountability for administrative acts; (f) transparency and provision to the public of timely, accurate information; (g) fair competition and merit as the basis of appointments and promotions; (h) representation of Kenya's diverse communities; and (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of men and women; the members of all ethnic groups; and persons with disabilities.

171. These values and principles are binding to all state organs and state corporations.

4.1.2 Ground Two: Serious Reasons for Believing that the Cabinet Secretary has Committed a Crime under National Law

4.1.2.1 Allegation 2 (a): Serious reasons for believing that the Cabinet Secretary has committed a crime under section 100 and 101 of the Penal Code Act, 63 of the Laws of Kenya

172. The particulars of the allegation are that one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary for the Ministry of Agriculture and Livestock Development, issued a directive to officials of KEL Chemicals to attend a press conference and issue a statement from the National Cereals

and Produce Board. His subsequent closure of the factory and declaration of it as a crime scene due to the company's refusal to participate in the staged press conference, discloses grounds that there are serious reasons for believing that the Cabinet Secretary has committed a crime under national law, including but not limited to offences involving abuse of office and false claims by a person employed in the public service contrary to **sections 100 and 101 of the Penal Code, Cap 63.**

173. **Section 100 of the Penal Code** states:

"100. False claims by persons employed in the public service Any person who, being employed in the public service in such a capacity as to require him or to enable him to furnish returns or statements touching any sum payable or claimed to be payable to himself or to any other person, or touching any other matter required to be certified for the purpose of any payment of money or delivery of goods to be made to any person, makes a return or statement touching any such matter which is, to his knowledge, false in any material particular is guilty of a felony".

174. **Section 101(1) of the Penal Code** states that, "Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony."

175. In support of this allegation, the Sponsor of the Motion attached a letter dated Friday 19th April, 2024, by Ahmednasir Abdullahi, SC addressed to Amin Mohammed Ibrahim, the Director of Criminal Investigations titled; **"Manufacture and Distribution of Fertilizers – KEL Limited"**.

176. In summary, the said letter was requesting the Director of Criminal Investigations to "asses individual responsibility in light of the overall evaluation of complicity, the conduct and involvement of Mr. Franklin Mithika Linturi, the Cabinet Secretary, Ministry of Agriculture and Livestock and Mr. Joseph Kimote, the Managing Director, National Cereals and Produce Board, should be scrutinized".

177. Other salient issues arising out of the letter dated 19th February, 2024 are that:
1) KEL Chemicals Limited had informed Mr. Ahmednasir Abdullahi, SC that there were attempts by the two public officers to distort the correct account of what had transpired, and to present a counter - narrative whose end was to incriminate KEL Chemicals Limited

through intimidation and threats and to absolve other parties that had been adversely mentioned in the scandal.

- 2) It was also alleged in the letter that Mr. Mithika Linturi had made calls to Mr. Devesh Kumar Patel on 10th April at around 9:30am directing him that KEL Chemicals Limited was required to attend a press conference in Jacaranda hotel and confirmed the need for him to use the statement as shared with him by Mr. Kimote, the Managing Director, National Cereals and Produce Board (NCPB) at the Press conference.
- 3) It was further stated in the letter that Mr. Devesh Kumar declined to appear at Jacaranda hotel which resulted in the hastily planned and convened inspection by the Cabinet Secretary on 12th April, 2024 at KEL Chemical Limited plant in Thika and, his subsequent issuance of the orders closing the factory and declaring it a crime scene.

178. The Sponsor of the Motion attached the following document to the letter which he also sought to rely upon:

- 1) Printed impressions of screenshots of calls by Hon. Mithika Linturi, Cabinet Secretary for Agriculture and Livestock Development; Mr. Joe Kimote, Mr. John Matiri, the General Manager NCPB.
- 2) Two alleged Press releases on KEL Chemicals/ MEMS Limited Substandard Fertilizer distribution.

179. In response to the allegations, the Cabinet Secretary in his replying affidavit sworn on 6th May 2024 stated that the letter by Ahmednasir Abdullahi, SC is inadmissible hearsay to the extent that Ahmednasir Abdullahi, SC did not receive or otherwise participate in any of the alleged telephone calls or witness the alleged factory visit.

180. That further the printed impressions of the screenshots attached to the letter by Ahmednasir Abdullahi, SC had not been authenticated by the police, mobile telecommunication services or any other credible source or authority.

181. The legal issues arising out of this allegation are:

- 1) Whether the letter dated Friday 19th April, 2024, by Ahmednasir Abdullahi, SC is admissible.
- 2) Whether the evidence was corroborated to make it admissible.

- 3) Whether the contents of the letter are hearsay evidence.
- 4) Whether the call logs as attached to the letter are admissible as electronic evidence.

The Law on Hearsay Evidence

182. Hearsay refers to a testimony given in court by a person other than the one who perceived it. As a general rule hearsay evidence is inadmissible and is contrary to section 63 of the Evidence Act, Cap 80.
183. The rule against Hearsay is "a statement made by a person not called as a witness which is offered in evidence to prove the truth of the fact contained in the statement is hearsay and it is not admissible. If however, the statement is offered in evidence, not to prove the truth of the facts contained in the statement but only to prove that the statement was in fact made it is not hearsay and it is admissible." This was the holding of **Justice De Silva, In Subramaniam v Public Prosecutor (1956) WLR 965.**
184. **Article 50(4) of the Constitution** provides that "Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of the evidence would render the trial unfair, or otherwise be detrimental to the administration of justice."
185. Further, **section 63 of the Evidence Act** provides that;
 - "63. Oral evidence must be direct.
 - 1) Oral evidence must in all cases be direct evidence.
 - 2) For purposes of subsection (1) of this section, "direct evidence" means –
 - a) With reference to a fact which could be seen, the evidence of a witness who says he saw it;
 - b) With reference to a fact which could be heard, the evidence of a witness who says he heard it;
 - c) With reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;
 - d) with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds."

186. Given that oral evidence must be direct, **when one is dealing with documents, it is required that the author of the document presents that document in court.** The reason why the author of the document should produce the documents they seek to rely upon in court, is to ensure that other parties in the trial can have an opportunity to cross-examine them.

187. In the classic case of **Kinyatti vs. Republic (1984) eKLR**, the Court of Appeal stated as follows with regards to hearsay evidence:

"Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying, offered as evidence of the truth that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence and is inadmissible.

The rule against hearsay is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of a stated fact.

*The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay. **It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement.** It is not hearsay and is not admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."*

188. Also in **Burunyi & Anor vs Uganda Cr. Appeal No. 1968 EA 123**, Sir Udo Udoma the then CJ held –

"It is not the duty of the court to stage-manage cases for the prosecution nor is it the duty of the court to endeavor to make a case against an accused where there is none. In a criminal case, the court cannot enter into the arena. The only duty of the court is to hold the scale to see that justice is done according to law on the evidence before it.

The Law on Admission of Electronic Evidence

189. Section 78A (1) and (4) of the Evidence Act on the admissibility of electronic and digital evidence. It states that:

"78A. (1) In any legal proceedings, electronic messages and digital material shall be admissible as evidence.

(4) Electronic and digital evidence generated by a person in the ordinary course of business, or a copy or printout of or an extract from the electronic and digital evidence certified to be correct by a person in the service of such person, is on its mere production in any civil, criminal, administrative or disciplinary proceedings under any law, the rules of a self-regulatory organization or any other law or the common law, admissible in evidence against any person and rebuttable proof of the facts contained in such record, copy, printout or extract."

190. Further, section 106B (1) and (4) of the Evidence Act provides for Admissibility of Electronic Records and states that:

"106B. Admissibility of electronic records

(1) Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

- (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
- (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;
- (c) dealing with any matters to which conditions mentioned in subsection (2) relate; and
- (d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the or the management of the relevant activities (whichever is appropriate), shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it."

191. Section 106H states as follows:

"106H. Presumption as to electronic signature certificates

A court shall presume, unless the contrary is proved, that the information listed in an electronic signature certificate is correct, except for information, which has not been verified, if the certificate was accepted by the subscriber.

192. Section 106I states as follows:

"106I. Presumption as to electronic messages

A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such a message was sent."

193. The law outlines the **considerations to be taken in determining the probative value of such evidence**. These factors include the consistency with which the evidence was stored, generated or communicated, as well as the consistency with which the evidence's integrity was maintained and the method in which the evidence creator was identified.

4.1.2.2 Allegation 2 (b): Serious Reasons for Believing that the Cabinet Secretary has Committed a Crime under section 353 and 355 of the penal code cap 63 laws of Kenya.

194. The particulars of the allegation are that one Franklin Mithika Linturi, the Cabinet Secretary for the Ministry of Agriculture and Livestock Development, is currently under investigation by the Director of Public Prosecutions and the Director of Criminal Investigations, and is facing arrest, charging, prosecution and institution of criminal proceedings in relation to six pending civil, commercial and family suits. This discloses grounds that there are serious reasons for believing that the Cabinet Secretary has committed a crime under national law, including but not limited to offences involving uttering false documents and procuring execution of documents by false pretences, contrary to sections 353 and 355 of the Penal Code, Cap 63.

195. Section 353 of the Penal Code provides for the offence of uttering false documents:

"Any person who knowingly and fraudulently utters a false document is guilty of an offence of the same kind and is liable to the same punishment as if he had forged the thing in question."

196. Section 355 provides for the offence of procuring execution of documents by false pretences as follows:

"Any person who knowingly utters as and for a subsisting and effectual document any document or electronic record which has by any lawful authority been ordered to be revoked, cancelled or suspended, or the operation of which has ceased by effluxion of time, or by death, or by the happening of any other event, is guilty of an offence of the same kind, and is liable to the same punishment, as if he had forged the document."

197. In the Special Motion, the Sponsor stated that Franklin Mithika Linturi in his role as the Cabinet Secretary responsible for Agriculture and Livestock Development and the findings of the court's judgment in *Hon. FML& 2 Others v Director of Public Prosecutions & 3 Others; Registrar of Companies & 10 Others (Interested Parties) [2021] eKLR delivered on 30th November, 2021* resulted in the fact that the Cabinet Secretary is currently under investigation by the Director of Public Prosecutions and the Director of Criminal Investigations, and facing arrest, charging, prosecution and institution of criminal proceedings in relation to six pending civil, commercial and family suits.

198. The Sponsor alleges that the six pending civil, commercial and family suits disclose grounds that there are serious reasons for believing that the Cabinet Secretary has committed a crime under national law, including but not limited to offences listed under Chapter XXXV against forgery involving offences against uttering false documents and procuring execution of documents by false pretenses, contrary to sections 353 and 355 of the Penal Code, Cap 63.

199. In the allegations, the Sponsor stated that the Cabinet Secretary was under criminal investigations concerning forgery of bank documents used to obtain credit facilities from the Family Bank Limited, fraudulent removal of directors of Atticon Limited and fraudulent opening and operation of a bank account at Gulf African Bank on behalf of Atticon Limited.

200. The Sponsor further alleged that the investigation was based on an advisory issued in the letter dated 13th February, 2020 from the Director of Public Prosecutions to the Director of Criminal Investigations as a result of which, the Cabinet Secretary is facing arrest, charge and prosecution and institution of criminal proceedings in relation to all pending civil, commercial and family namely:

- 1) *High Court of Kenya at Nairobi (Commercial Division) Civil Suit No. E138 of 2018; Barons Estate Ltd vs. Atticon Ltd & 6 Others;*
- 2) *High Court of Kenya AT Nairobi (Family Division) Civil Suit 17 of 2019 (OS) (previously High Court of Kenya at Meru (Family Division) Civil Suit No. 37 of 2018; MJK vs FML;*
- 3) *High Court of Kenya at Nairobi (Commercial Division) Civil Suit No. E086 of 2019; Gulf African Bank Limited vs. Atticon Limited & 4 Others;*
- 4) *High Court of Kenya at Nairobi (Commercial Division) Civil Suit No. E316 of 2020; Linkit Limited vs. Brenda Mithika Mwenda;*
- 5) *High Court of Kenya at Nairobi (Commercial Division) Civil Suit No. E029 of 2019; Noniko Holdings Limited & 2 Others vs. Atticon Limited & 6 Others;*
- 6) *Milimani Commercial Chief Magistrate's Court Miscellaneous Civil Suit No. 1044 of 2018; MJK vs. FML; and*
- 7) *Milimani Commercial Chief Magistrate's Divorce Cause No. 272 of 2019 (Previously, Meru Chief Magistrate's Divorce Cause No. 26 of 2018); MJK vs FML.*

201. In response to the allegations raised by the Sponsor, the Cabinet Secretary in his Replying Affidavit sworn on 6th May, 2024, contended that:

- 1) Although the Sponsor wanted him dismissed from office for the acts and omissions of third parties, his spouse was charged with fraud on the same day that he was prosecuting the Special Motion before the House. He adduced a copy of a Charge Sheet that the ODPP has preferred against the Sponsor's spouse.

- 2) The Sponsor had deliberately misrepresented the Judgment delivered in High Court (Milimani) Constitutional Petition No. E068 of 2021 *Hon. FML& 2 Others v Director of Public Prosecutions & 3 Others; Registrar of Companies & 10 Others (Interested Parties) [2021]* eKLR delivered on 30th November 2021. The Cabinet Secretary, through his Advocates, informed the Committee that the courts in this judgment together with other judicial decisions made in his favour of the Cabinet Secretary. That the Sponsor had seriously mischaracterised the judgment of 30th November 2021, as he was found innocent of allegations on altering false documents, execution of documents through false pretenses, and forgery and fraud.
- 3) After the delivery of the Judgment of 30th November 2021, *the Police fully investigated* the criminal acts alleged in the Special Motion. The Police thereafter *forwarded the file to the Office of the Director of Public Prosecutions ("the ODPP")* for review and advice. *The ODPP thoroughly reviewed the investigation file and recommended that it be closed with no further police action.* He attached copy of a letter from the Directorate of Criminal Investigations Ref. DCI/IB/SCU/SEC/2/1/11/VOL.XI/59 dated 31st May, 2023 regarding an "Inquiry into the criminal complaint by the Directors of Barons Estate Limited and Family Bank Limited (Related to the proceedings in High Court Civil Case No. 138 of 2018; *Barons Estate Limited versus Atticon Limited & 5 Others* and HCC No. E029 of 2019 *Noniko Holdings Limited and 6 Others*).
- 4) The letter informed the Cabinet Secretary that the investigations in those matters were conducted by the DCI and the resultant file forwarded to the Office of the Director of Public Prosecutions (ODPP) for perusal and advice. The letter also informed the Cabinet Secretary that the ODPP, via a letter Ref. ODPP/CAM/1 dated 11th May, 2023 advised that the file be closed with no further police action.
- 5) All the cases that were referred to in the Motion about serious reasons to believe that he has committed a crime under national law relate to private affairs and they predate his appointment as Cabinet Secretary. Further, these are matters that were disclosed to the Committee on Appointments during his vetting for appointment as Cabinet Secretary for Agriculture and Livestock Development. He

stated that the matters could not have arisen as a result of the performance or the execution of duties of the CS.

Status of the Cases mentioned in the Special Motion

(a) *Hon. FML & 2 Others versus Director of Public Prosecutions & 3 Others; Registrar of Companies & 10 Others (Interested Parties) [2021] eKLR;*

202. The court in its judgment found that the ODPP and DCI had overlooked the petitioners' concerns through their various communication even in light of the fact found that the DCI had not fully acted or investigated the petitioners' complaint lodged with him (calling for investigation into the fraudulent changes in Atticon Limited's directorship, shareholding and share capital) and directed the DCI to act on the same and forward his findings to the ODPP within 90 days. The Court also directed that during the 90 days the ODPP and the DCI not to charge or arrest the petitioners (the CS included). Save for this, the court found no merit in the petition and dismissed it with costs.

(b) *High Court Commercial Suit No. E086 of 2019; Gulf African Bank Limited versus Atticon Limited, Douglas Kailanya & 3 Others;*

203. The suit involved claims of fraudulent actions involving the opening and operation of a bank account to obtain credit facilities on behalf of Atticon Limited (in which the Cabinet Secretary was a director).

204. The court found that the bank had been negligent in the manner that it allowed the subject account to be opened and the loan to be disbursed and failed to take reasonable steps to stop the fraudulent transactions. Consequently, the court held that Atticon was entitled to recover Kshs. 21,846,607.25 from the Plaintiff and the 2nd to 4th Defendants jointly and severally.

(c) *M. J. K versus F. M. L (MCDC No. 272 of 2019);*

205. This was a divorce suit.

(d) *High Court of Kenya at Nairobi (Family Division) Civil Suit 17 of 2019 (OS) (previously High Court of Kenya at Meru (Family Division) Civil Suit No. 37 of 2018; MJK vs FML*

206. Similarly, this was a family court dispute.

- (e) *HCCC No. E138 of 2018; Barons Estate Limited versus Atticon Limited & 5 Others eKLR; and High Court of Kenya at Nairobi (Commercial Division) Civil Suit No. E029 of 2019; Noniko Holdings Limited & 2 Others vs. Atticon Limited & 6 Others;*

207. The claims concerned a charge dated 26th June, 2017 that Family Bank created over the Linkit Limited's property whereby it advanced the Atticon Limited a sum of Kshs. 7,200,000/=.

208. Via a Ruling of the High Court issued on 4th July, 2021 this matter was consolidated with Civil Case No. E 201 of 2021; Arnold Kipkirui Langat v Atticon Limited & 7 others [2021] eKLR and HCCC No. E 029 of 2019, Noniko Holdings Ltd & 2 Others vs Atticon Ltd & 6 Others. Civil Case No. E201 of 2021 is the lead file.

209. In this regard, the Committee considered the issue on whether it can sit on judgments of the Court. The committee took note of the following:

- 1) The court system in Kenya, as in many other jurisdictions, is designed to provide a separate and distinct mechanism for addressing grievances against judicial decisions. The court system is designed to ensure that decisions are made based on the law and the facts of the case, and that these decisions can only be appealed and reviewed by higher courts.
- 2) Parliament, on the other hand, is primarily responsible for making laws and overseeing the executive branch of government. It does not hear appeals from court decisions, which is a function of the judicial branch.
- 3) The Select Committee could therefore not sit and preside on appeal over matters determined and reserved for the courts.

210. Whether the Committee can sit on appeal against the decision of the House when it approved the appointment of the Hon. Franklin Mithika Linturi as the Cabinet Secretary for the Ministry of Agriculture and Livestock Development:

- 1) During the vetting of the Hon. Franklin Mithika Linturi for appointment to the position of Cabinet Secretary for the Ministry of Agriculture and Livestock Development the Committee on Appointments considered the question on allegations of forgery by the Cabinet Secretary, that he

had obtained loan facilities from a financial institution through forgery and fraud.

- 2) The Cabinet Secretary brought before the Committee on appointments two judgments exonerating him of any wrongdoing with regards to forgery of signatures of shareholders relating to securing of loans without the consent of shareholders in his companies. According to the Committee Report, the two judgments presented before it were;
- 3) *High Court Civil Case No. E138 OF 2018; Barons Estate Limited versus Atticon Limited, Franklin Mithika Linturi & 4 Others (2019) eKLR; and*
- 4) *High Court Constitutional Petition No. E068 of 2021; Hon. Franklin Mithika Linturi, Emily Nkirote Buntai and Atticon Limited & 2 Others versus Director of Public Prosecutions, Director of Criminal Investigations, the Attorney General & MJK.*
- 5) Thus, regarding his suitability as a nominee the Committee on Appointments of the National Assembly considered the issue of fraud and forgery, and observed that the Hon. Franklin Mithika Linturi had been charged in a court of law but had never been convicted.
- 6) There was a minority opinion by some Members of the Committee on Appointments rejecting the nomination of Hon. Franklin Mithika Linturi as the Cabinet Secretary for the Ministry of Agriculture and Livestock Development. One of the grounds for his rejection was on the fraud and forgery allegations in which the Members, according to the Report, found him unsuitable to hold public office due to the gravity of the allegations and the court cases against him, the integrity questions that the cases raised and the unsatisfactory responses that he provided to the Committee. Consequently, the minority Members rejected his nomination to the Cabinet.
- 7) The First Report of the Committee on Appointments on the Vetting of Nominees for Approval as Cabinet Secretaries, the Secretary to the Cabinet and the Attorney General was laid on the Table of the House on 25th October, 2022 for consideration and adoption.
- 8) Notably, the House deliberated on the Report of the Committee, including the minority opinion on 25th and 26th October, 2022 after which it voted and adopted the majority recommendation in favour of the

appointment of Hon. Franklin Mithika Linturi as the Cabinet Secretary for the Ministry of Agriculture and Livestock Development.

- 9) This Select Committees is not empowered to sit in appeal against a decision made by the House itself. The House remains the supreme decision-making body in the parliamentary system.

4.1.3 Ground Three: Gross Misconduct

211. The particulars of the allegation are that one Franklin Mithika Linturi, acting in his role as the Cabinet Secretary responsible for the Ministry of Agriculture and Livestock Development, by approving procurement and distribution of fake fertilizer by the National Cereals and Produce Board, in so far as being a State officer:

- 1) has failed to exercise public trust in the best interest of the people of Kenya and this amounts to gross misconduct contrary to **section 8 of the Leadership and Integrity Act, Cap 185C;**
- 2) has failed in the performance of his duties to the best of his ability to carry out the duties of the office efficiently and honestly, and to carry out the duties in a transparent and accountable manner, and this amounts to gross misconduct contrary to **section 10(a) & (b) of the Leadership and Integrity Act, Cap 185C;**
- 3) has failed to demonstrate professionalism in carrying out duties of the office in a manner that maintains public confidence in the integrity of the office and this amounts to gross misconduct contrary to **section 11(a) of the Leadership and Integrity Act, Cap 185C;** and
- 4) misled the public by submitting false information to a Departmental Committee of the National Assembly that GPC diatomaceous was distributed as a soil conditioner and not as a fertilizer, and this amounts to gross misconduct contrary to **section 29 of the Leadership and Integrity Act, Cap 185C.**

212. The phrase 'gross misconduct' is not defined in the Constitution, or in any other legislation within the Kenyan jurisdiction; and that there is no conventionally accepted legal definition of 'gross misconduct'. However, both courts and scholars have attempted to define what constitutes 'gross misconduct'.

213. The Supreme Court in **Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya**, Petition 4 of 2020; [2022] KESC 16 (KLR) (**Muya Case**) defined gross misconduct as:

"438. The Tribunal adopts a definition of gross misconduct or misbehaviour that infers more seriousness in the case of the former and less serious infractions amounting to the latter. The framing of gross misconduct or misbehaviour under the Kenyan Constitution and the Judicial Code of Conduct (2003) requires the possibility of sanctioning a variety of contravening behaviour."

214. In his book *Kenya's Constitution: An Instrument for Change*, Professor Yash Pal Ghai defined the term "gross misconduct" to mean 'generally atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking'. These words express some extreme negative conduct whether a conduct is gross or not will depend on the matter as exposed by the facts".

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

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

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

(a) be serious, substantial and weighty.

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

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

216. In the Supreme Court Nigerian Case of **Hon. Muyiwa Inakoju & others -vs- Hon. Abraham Adeolu Adedeke and 3 others S.C. 272 of 2006**; quoted and relied upon by the Supreme Court of Kenya in the case of **Martin Nyaga Wambora & 4 others -vs- Speaker of the Senate & 6 others [2014] eKLR** the court observed as follows:

"It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organized vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office.

The point I am struggling to make out of this light statement on a playful side is that Section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the Governor or Deputy Governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as a human being, cannot always be right and he cannot claim to be right always. That explains why Section 188 talks about gross misconduct. Accordingly, where a misconduct is not gross, the Section 188 weapon of removal is not available to the House of Assembly."

217. Drawing from the above, gross misconduct should encapsulate acts that:

- a) exhibit a flagrant violation of the Constitution or statutory duty;
- b) undermine the essence of public trust and integrity expected from Cabinet Secretaries;
- c) constitutes a fundamental dereliction of duties in a manner that suggests intentional, reckless, or grossly negligent conduct; and
- d) involves actions that are radically inconsistent with the ethical standards and responsibilities outlined in Chapter Six of the Constitution.

218. The Committee will be guided by the above test in assessing whether the alleged actions or omissions of Cabinet Secretary Hon. Franklin Mithika Linturi, if proved, amount to gross misconduct.

4.1.3.1 Allegation 3(a): Violation of Section 8 of the Leadership and Integrity Act, Cap 185C

219. The Sponsor alleged that the Cabinet Secretary has failed to exercise public trust in the best interest of the people of Kenya and this amounts to gross misconduct contrary to **section 8 of the Leadership and Integrity Act, Cap 185C**.
220. The Sponsor of the Motion testified that by approving procurement and distribution of fake fertilizer by the National Cereals and Produce Board the Cabinet Secretary breached section 8 of the Leadership and Integrity Act, Cap 185C.
221. The Sponsor of the Motion stated that the Cabinet Secretary had responsibility for procurement in the Ministry being the overall head of the Ministry and further drew the attention of the Committee to page 367 of the Cabinet Secretary's written response.
222. In response to the allegation, the Cabinet Secretary submitted that under section 48 of the Public Procurement and Asset Disposal Act, Cap 412C the Cabinet Secretary has little or no role in the procurement process as described in paragraph 6 of his Replying Affidavit.
223. The issue of whether the Cabinet Secretary has violated Section 8 of the Leadership and Integrity Act, Cap 185C as alleged, has been dealt with comprehensively at paragraphs 126 to 136 of this report.

4.1.3.2 Allegation 3(b): Violation of section 10(a) & (b) of the Leadership and Integrity Act, Cap 185C

224. The Sponsor of the Motion alleged that the Cabinet Secretary has failed in the performance of his duties to the best of his ability to carry out the duties of the office efficiently and honestly, and to carry out the duties in a transparent and accountable manner, and this amounts to gross misconduct contrary to **section 10(a) & (b) of the Leadership and Integrity Act, Cap 185C**.
225. The Sponsor of the Motion further alleged that the Cabinet Secretary, by approving procurement and distribution of fake fertilizer by the National Cereals and Produce Board, had violated section 10(a) & (b) of the Leadership and Integrity Act, Cap 185C.

226. The Sponsor of the Motion testified that section 2B of the Fertilizers and Animal Foodstuffs Act states that the functions of the Fertilizer and Animal Foodstuffs Board of Kenya are to regulate fertilizer and the animal foodstuffs industry in Kenya, including the production, manufacture, packaging, importation and marketing.
227. The Sponsor of the Motion also stated that had the Minister established the Fertilizer and Animal Foodstuffs Board of Kenya under section 2A of the Fertilizers and Animal Foodstuffs Act, then the issue of procurement of fake fertilizer would not have arisen as the rightful body would have undertaken the procurement distribution or any other aspect related to subsidised fertilizer.
228. It was the evidence of the Sponsor of the Motion that under section 2C of the Fertilizer and Animal Foodstuffs Act, it is the responsibility of the Cabinet Secretary to appoint the Fertilizer and Animal Foodstuffs Board of Kenya and he had violated the law and failed to discharge his duty as set out in the functions of the CS to establish Boards as set out in paragraph 6 of the Cabinet Secretary's affidavit.
229. The Sponsor therefore testifies that the Cabinet Secretary did not fulfill his duties under Section 2C of the Fertilizer and Animal Foodstuffs Act, thereby failing in his role under Section 10 of the Leadership and Integrity Act.
230. In his response, the Cabinet Secretary submitted that the breach of the Fertilizer and Animal Foodstuffs Act or any other law was not an allegation in the Motion. It was unfair to bring that issue as it was not one of the issues before the Committee and was irrelevant to the proceedings.
231. The Cabinet Secretary also submitted that the Fertilizer and Animal Foodstuffs Act was an old Act that dated back to 1965 and amended in 2015. When it was amended, it introduced the aspect of a board. For purposes of implementation, it has been a work in progress because as a Ministry they tasked the Directors for Crops and Veterinary Services to, in the meantime, be dealing with the issue.
232. The Cabinet Secretary also stated that a taskforce was formed when he was not the Cabinet Secretary. He also testified that there were a number of technical challenges that needed to be addressed. He also stated that the taskforce was in the process of coming up with a report.

233. Further, the Cabinet Secretary stated that the Principal Secretary appointed a Fertilizer Monitoring Committee to handle issues of fertilizer.

234. Section 10 of the Leadership and Integrity Act, Cap 185C provides that:

A State officer shall, to the best of their ability—

(a) carry out the duties of the office efficiently and honestly;

(b) carry out the duties in a transparent and accountable manner;"

235. Given the legal responsibilities outlined Section 2A of the Fertilizer and Animal Foodstuffs Act, Cap 345, the issue for determination by the Committee is whether the measures taken by the Cabinet Secretary suffice as compliance with the statutory requirement for setting up the Board and ensuring its functionality.

236. The question therefore before the Committee is what constitutes 'sufficient action' under the law and whether interim measures are acceptable as compliance with these statutory mandates.

4.1.3.3 Allegation 3(c): Violation of section 11(a) of the Leadership and Integrity Act, Cap 185C

237. The Sponsor of the Motion alleged that the Cabinet Secretary had failed to demonstrate professionalism in carrying out duties of the office in a manner that maintains public confidence in the integrity of the office and this amounts to gross misconduct contrary to **section 11(a) of the Leadership and Integrity Act, Cap 185C**.

238. The Sponsor of the Motion further alleged that the Cabinet Secretary had engaged in a public spat with journalists. He adduced the press Statement by the President of the Law Society of Kenya as evidence on the same.

239. The Sponsor of the Motion also alleged that the Cabinet Secretary had stormed into a manufacturing plant and purported to revoke licenses, all without conducting proper investigations or providing any clear policy decisions from the Ministry on the matter. In this regard the Sponsor referred to a press statement by the President of the Law Society of Kenya.

240. In his response, the Cabinet Secretary stated that the President of the Law Society of Kenya had not sworn any witness statement before the Committee and the press statement was, therefore, inadmissible as it was hearsay evidence contrary to section 63 of the Evidence Act, Cap 80.

241. The issue of admissibility of hearsay evidence has been dealt with comprehensively in paragraphs 182 to 188 of this report.
242. Hearsay is generally inadmissible unless it falls within the stipulated exceptions. The Evidence Act, Cap 80 sets forth this general rule but also details several exceptions under which hearsay evidence may be admissible. The exceptions include; admissions and confessions, statements in public documents, statements under special provisions, dying declarations, statements in previous testimony, statements of experts and statements against interest.
243. The question for determination is whether the press statement by the President of the Law Society of Kenya can be tied to any of the exceptions stipulated above.

4.1.3.4 Allegation 3(d): Violation of section 29 of the Leadership and Integrity Act, Cap 185C

244. The Sponsor of the Motion alleged that the Cabinet Secretary misled the public by submitting false information to a Departmental Committee of the National Assembly that GPC diatomaceous was distributed as a soil conditioner and not as a fertilizer, and this amounts to gross misconduct contrary to **section 29 of the Leadership and Integrity Act, Cap 185C**.
245. It was the testimony of the Sponsor of the Motion that the Cabinet Secretary had submitted false information in his written submission to the Departmental Committee of the National Assembly on Agriculture and Livestock.
246. In support of this allegation, the Sponsor of the Motion adduced excerpts of three video recordings as evidence to demonstrate that the Cabinet Secretary said that the substance that was termed as fake fertilizer was a soil conditioner. He also added that what was alleged to be fake fertilizer was actually three thousand bags which had been determined to be sub-standard.
247. The Cabinet Secretary, in response to the allegation, stated that there was no evidence that the product was not a soil conditioner or that the product described in the contract submitted was different. He also stated the contract was signed before his tenure, therefore had no involvement in the terms of that agreement.

248. **Section 29** of the Leadership and Integrity Act, Cap 185C provides that a State officer shall not knowingly give false or misleading information to any person.
249. To establish a violation of Section 29 of the Leadership and Integrity Act, it is critical to prove that the Cabinet Secretary knowingly provided false information with the intent to mislead.
250. Admissibility and weight of the video evidence showing the Cabinet Secretary's statements are crucial. The Committee would typically examine whether these statements were accurately represented and contextualized.

CHAPTER FIVE

5 COMMITTEE OBSERVATIONS

5.1 General Observations

251. The Committee having undertaken investigations on the proposed dismissal of the Cabinet Secretary for Agriculture and Livestock Development, Hon. Franklin Mithika Linturi observed that there is need to provide a comprehensive framework for the conduct of the proceedings of a Select Committee appointed under Article 152(6) of the Constitution.

5.2 Specific Observations

252. Having considered the allegations in light of the applicable law, the evidence before the Committee and the presentations by the parties, the Committee made the following observations :

5.2.1 Ground One: Gross Violation of the Constitution or any other law

5.2.1.1 Allegation 1(a): Gross Violation of Article 2 and 10(1)(c) of the Constitution

253. The Committee observed that public participation in the formulation and implementation of the policy had been undertaken. This was done through the publicization of the Kenya Kwanza Manifesto which included: the issue of the fertilizer subsidy program; the meetings held between the Cabinet Secretary and various County Executive Committee Members; during the process of appropriating funds to the Ministry by the National Assembly; and sensitization meetings held by the Ministry across the country.
254. The Committee observed that section 44 of the Public Procurement and Asset Disposal Act, Cap 412C, provides that an accounting officer of a public entity shall be primarily responsible for ensuring that the entity complies with the Act. The Cabinet Secretary, therefore, had no role in the procurement of fertilizer by the National Cereals and Produce Board.
255. The Committee observed that section 69(1) of the Public Procurement and Asset Disposal Act provides that all approvals relating to procurement shall be in writing and dated. In this regard, there was no documentary evidence adduced before the Select Committee to show that the Cabinet Secretary had a role in the procurement of the fertilizer.

5.2.1.2 Allegation 1(b): Gross Violation of Article 46 of the Constitution

256. The Committee observed that the procurement and distribution of the fertilizer was done by a semi-autonomous public agency, the National Cereals and Produce Board, and the Cabinet Secretary did not participate in the manufacturing or distribution of any goods or services that could potentially violate consumer rights.

5.2.1.3 Allegation 1(c): Gross Violation of Article 73 of the Constitution

257. The Committee observed that section 35 of the Evidence Act, Cap. 80 codifies the rule against hearsay. This rule aims to maintain the reliability of evidence by excluding statements that have not been subjected to cross-examination or other tests of credibility. The Committee therefore could not rely on hearsay evidence.

5.2.1.4 Allegation 1(d): Gross Violation of Article 201 of the Constitution

258. The Committee observed that the Agency Agreement signed between the National Cereals and Produce Board (NCPB) and 51 Capital Africa Diatomite Industries on March 31, 2022, was made and executed prior to the appointment of Hon. Mithika Linturi as a Cabinet Secretary for Agriculture and Livestock Development, and further the agreement did not classify GPC Diatomaceous as a fertilizer.

259. The Committee also observed that the subsidized fertilizer was meant for Kenyan farmers who are registered using their National Identity Cards and Mobile Phone Numbers under the Kenya Intergrated Agriculture Management Information System (KIAMIS). Therefore there was no way that Ugandan farmers or any other person not registered under KIAMIS could benefit from the fertilizer subsidy program.

5.2.1.5 Allegation 1(e): Gross Violation of Article 232 of the Constitution

260. The Committee observed that the Agency Agreement signed between the NCPB and 51 Capital Africa Diatomite Industries on **31st March 2022** did not state that GPC Diatomaceous is a fertilizer.

5.2.2 Ground Two: Serious Reasons for Believing that the Cabinet Secretary has Committed a Crime under National Law

5.2.2.1 Allegation 2 (a): Serious reasons for believing that the Cabinet Secretary has committed a crime under section 100 and 101 of the Penal Code Act, 63 of the Laws of Kenya

261. The Committee observed that:

- 1) The Sponsor of the Motion sought to rely on the letter by Ahmednasir Abdullahi, SC, Ref: MMA/DBM/KCL/014/2024 & AA/6717/2024 dated 19th April 2024 who was not one of the witnesses of the Sponsor of the Motion.
- 2) The Sponsor did not call Ahmednasir Abdullahi, SC who authored the letter as a witness neither was any affidavit attached to corroborate the content of the letter.
- 3) In the absence of the said affidavit, and the witness statement of Ahmednasir Abdullahi, SC, the contents of the letter by Ahmednasir, SC dated 19th April 2024 is hearsay evidence, is inadmissible and contrary to the provisions of section 63 of the Evidence Act.

5.2.2.2 Allegation 2 (b): Serious reasons for believing that the Cabinet Secretary has Committed a Crime Under Section 353 and 355 of the Penal Code Cap 63 Laws of Kenya

262. The Committee observed that:

- 1) The Judgment issued by the Court in *High Court Commercial Suit No. E086 of 2019; Gulf African Bank Limited versus Atticon Limited, Douglas Kailanya & 3 Others* was in favour of Atticon Limited. The Cabinet Secretary was not a party to this suit, however, he was a Director of Atticon Limited, the Plaintiff.

HCCC No. E138 of 2018; Barons Estate Limited versus Atticon Limited & 5 Others eKLR; and High Court of Kenya at Nairobi (Commercial Division) Civil Suit No. E029 of 2019; Noniko Holdings Limited & 2 Others vs. Atticon Limited & 6 Others; are now consolidated with Civil Case No. E 201 of 2021; Arnold Kipkirui Langat v Atticon Limited & 7 others [2021] eKLR with Civil Case No. E201 as the lead file. These consolidated suits are pending before the High Court at Nairobi as they are scheduled for part-heard hearing in the Judiciary e-filing public information kiosk.

2) The other cases mentioned by both the Sponsor and the Cabinet Secretary were civil suits in which no charges were proffered on the Cabinet Secretary as they are family matter disputes namely:

- i). *High Court of Kenya at Nairobi (Family Division) Civil Suit 17 of 2019 (OS) (previously High Court of Kenya at Meru (Family Division) Civil Suit No. 37 of 2018; MJK vs FML;*
- ii). *Civil Appeal Application No. E068 of 2022; Marianne Jebet Kitany versus Franklin Mithika Linturi & Atticon Limited; and*
- iii). *Milimani Commercial Chief Magistrate's Divorce Cause No. 272 of 2019 (Previously, Meru Chief Magistrate's Divorce Cause No. 26 of 2018); MJK vs FML)*

5.2.3 Ground Three: Gross Misconduct

263. The Committee observed that:

- 1) there was no nexus between the Cabinet Secretary and the alleged gross misconduct;
- 2) the allegations as framed do not state with a degree of precision the Article(s) or even Sub-Articles(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated;
- 3) Section 44 of the Public Procurement and Asset Disposal Act, Cap 412C, provides that an accounting officer of a public entity shall be primarily responsible for ensuring that the entity complies with the Act. The Cabinet Secretary, therefore, had no role in the procurement of fertilizer by NCPB; and
- 4) Section 69(1) of the Public Procurement and Asset Disposal Act provides that all approvals relating to procurement shall be in writing and dated. In this regard, there was no documentary evidence adduced before the Select Committee to show that the Cabinet Secretary had a role in the procurement of the fertilizer.

CHAPTER SIX

6 COMMITTEE FINDING

264. The Committee finds that the allegations under Ground One on Gross Violation of the Constitution or any other law; Ground Two on Serious Reasons for Believing that the Cabinet Secretary has Committed a Crime under National Law; and Ground Three on Gross Misconduct as outlined in the Special Motion **are unsubstantiated..**

CHAPTER SEVEN

7 COMMITTEE RECOMMENDATION


265. Having considered the provisions of Article 152 of the Constitution, the relevant statutes and Standing Orders, the Committee **RECOMMENDS** to the House as follows:

THAT pursuant to Article 152(9)(a) of the Constitution and Standing Order 66(7)(a), the Committee having found that the allegations against the Cabinet Secretary for Agriculture and Livestock Development are **unsubstantiated**, there be no further proceedings on the matter.

SIGNED.......... DATE..........

HON. NAOMI JILLO WAQO, CBS, MP
CHAIRPERSON

SELECT COMMITTEE INVESTIGATING THE PROPOSED DISMISSAL OF HON.
FRANKLIN MITHIKA LINTURI, EGH AS CABINET SECRETARY FOR AGRICULTURE
AND LIVESTOCK DEVELOPMENT

 THE NATIONAL ASSEMBLY	
DATE:	13 MAY 2024
	DAY MONDAY
TABLED BY:	HON. NAOMI WAQO, CBS, MP CHAIRPERSON, SELECT COMMITTEE
CLEAR AT THE TABLE:	GERTRUDE CHEBET

MINORITY/DISSENTING OPINION ON THE REPORT OF THE SELECT COMMITTEE INVESTIGATING THE PROPOSED DISMISSAL OF HON. FRANKLIN MITHIKA LINTURI AS CABINET SECRETARY FOR AGRICULTURE AND LIVESTOCK DEVELOPMENT

266. Pursuant to Standing Order 199 (5) and (6) the following Members of the Committee recorded a minority/dissenting opinion against the Report of the Select Committee Investigating the proposed Dismissal of Hon. Franklin Mithika Linturi as Cabinet Secretary for Agriculture and Livestock Development:

- 1) The Hon. Robert Mbui, CBS, MP;
- 2) The Hon. T. J. Kajwang, MP;
- 3) The Hon. Catherine Omanyoo, MP; and
- 4) The Hon. Yussuf Mohamed, MP.

267. They noted that the dissent from the minority is based on Constitutional principles and are largely informed by the understanding and appreciation of the role and mandate of the Committee and which forms the first basis of departure.

An Inquisitorial Investigative Committee Vis-à-vis an Adversarial Judicial Court

268. The Minority averred that the Majority are treating this Committee as a strictly adversarial judicial body. The Minority dissent that the Committee is sitting like judges in a Court of law.

269. According to the Minority, Article 94(4) of the Constitution provides that:

- 4) *Parliament shall protect this Constitution and promote the democratic governance of the Republic.*

270. Under Article 95 of the Constitution, the National Assembly oversees national revenue and expenditure by state organs. The Minority avers that the role of oversight by the National Assembly exists whether the Members are sitting in the plenary or a Committee of the House.

271. They add that that oversight role exists even in the absence of a Motion by a Member of Parliament or a Petition from the Public. According to the Minority, the National Assembly cannot abdicate its oversight role by citing technicalities even where the National Assembly can go out of its way to establish the position.

272. The Minority aver that the inquisitorial nature of a Committee of the National Assembly or any of its Committee is reflected under;

a. Article 125 of the Constitution which states,
(1) *Either House of Parliament, and any of its committees, **has power to summon any person to appear before it for the purpose of giving evidence or providing information.***

(2) *For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court— (a) to **enforce the attendance of witnesses and examine them on oath, affirmation or otherwise; (b) to compel the production of documents; and (c) to issue a commission or request to examine witnesses abroad.***

b. Standing Order Number 191 provides;

191. (1) **Committees shall enjoy and exercise all the powers and privileges bestowed on Parliament by the Constitution and statute,** including the power to-

- a. summon any person to appear before it for the purposes of giving evidence or providing information;
- b. enforce the attendance of witnesses and examine them under oath, affirmation or otherwise; (c) compel the production of documents; (d) request for and receive papers and documents from the Government and the public; and
- b. (e) issue a commission or request to examine witnesses abroad.

273. They aver that the very Rules on the Conduct of the Investigations adopted by the Committee also reflect the inquisitorial nature of the Committee.

274. The Minority opine that this power to summon witnesses and call for documents shows that Kenyans empowered the National Assembly to go beyond what is presented before it in the exercise of oversight.

275. The Minority observed that it will be a dereliction of duty for the Committee to fail to get to the bottom of an issue and cite adversarial technicalities as justification.

276. The Minority therefore find that by restricting itself to the material before it in an adversarial way, the Committee through the majority abdicated their duty and failed to exercise a power donated to it by the Constitution.

Emphasizing Evidence on Common/Undisputed issues

277. The Minority aver that where an issue is common and is not in contest, there is no justification to disregard a testimony on account of the nature of the evidence adduced.
278. To this end, the Minority aver that the most salient facts of the motion are not in controversy and all the Committee needed to do is apply the law to the same. The minority identified some of the undisputed issues as: -
- a. Fake/substandard fertilizer was distributed;
 - b. The fake/substandard fertilizer was procured and distributed by the NCPB;
 - c. The Cabinet Secretary has not constituted the Fertilizer and Foodstuff Board under Section 2A of the Fertilizer and Foodstuff Board;
 - d. Farmers in Kenya suffered loss as a result of the fake fertilizer.
279. According to the Minority these issues and others do not require evidence and the Majority's insistence of a lack of an expert to test if the fertilizer is fake/substandard or not is unnecessary.

DISSENT ON ANALYSIS OF THE GROUNDS BY THE SPONSOR

280. The Minority dissented on the analysis of the grounds. According to the Minority, the analysis of the allegations and grounds set out in the Motion should take the approach below.

I. Did the omission to operationalize the Fertilizer and Animal Foodstuffs Board of Kenya amount to gross violation of the Constitution or any other Law?

281. The Minority aver that the primary statute for the Fertilizer Subsidy programme is the Fertilizer and Animal Foodstuffs Act CAP 345. They considers that it is the only Act of Parliament where the term "**subsidized fertilizers**" is used. This is therefore the primary statute for the fertilizer subsidy programme.
282. Section 2A of the Fertilizers and Animal Foodstuffs Act, Cap 345, provides for the establishment of a Board and it is the sole duty of the Cabinet Secretary to operationalize the same.

283. The functions of the Board are set out under section 2B and include among others-

(d) **advising** the national and county governments on-

- I. the **procurement, importation and efficient and timely distribution of subsidized fertilizers** and animal foodstuffs;
- II. **establishment of retail outlets of fertilizers** and animal foodstuffs in the counties; and
- III. **development of policies related to the manufacture and distribution of fertilizer and animal foodstuffs.**

284. It is clear from the above provision that procurement and distribution of subsidized fertilizer falls squarely within the ambit of the Board and no other entity.

285. Therefore, any other entity that purports to procure and distribute subsidized fertilizer is illegal. It is unfortunate that since the CS assumed office in 2022, the Board has never been operationalized as required by law. The Law has been in place from 2015.

286. The Cabinet Secretary acknowledged that he had not established the Board and that it was work in progress.

287. In his Replying Affidavit, the CS outlines his duties as the CS for Agriculture and Livestock Development to include-

(e) appoint board members of public institutions falling under the Ministry and the state departments in consultation with the Executive Office of the President in accordance with their respective enabling statutes;

288. By dint of the above paragraph, the CS acknowledges that indeed it is his duty to appoint boards. The mere fact that the CS failed to operationalize the **Fertilizer and Animal Foodstuffs Board** but instead went ahead to establish, through his Ministry, an illegal entity, the National Fertilizer Monitoring Committee, demonstrates *intention* on the part of the Cabinet Secretary. Ignorance of the law i.e. the Fertilizer and Foodstuffs Act, is not a defence.

289. The National Fertilizer Monitoring Committee which the Cabinet Secretary established lacks any mandate when it comes to procurement and distribution of subsidized fertilizer. It has no basis in law.

290. A close reading of the functions of the NCPB at section 4 of the National Cereals and Produce Board Act, Cap 338, reveals that none of its functions include procurement and distribution of subsidized fertilizer.
291. Interestingly, none of NCPB's functions relate to fertilizer.
292. Executive Order No. 23 on the Organization of the Government of the Republic of Kenya at pages 49-50, lists the NCPB as an institution under the State Department for Agriculture but is not granted powers to procure and distribute subsidized fertilizer.
293. Upon being questioned by the Committee, the Cabinet Secretary stated that operationalization of the Board is work in progress implying that he admits that a Board should actually be in place. Section 2C of the Act provides that the members of the Board "shall" be appointed by the Cabinet Secretary.
294. The ordinary and literal meaning of the word "shall" is an imperative command, usually indicating that certain actions are mandatory and not permissive. It therefore goes without saying that the Board should have already been operationalized and should have been the entity handling procurement and distribution of fertilizer under the National Fertilizer Subsidy Programme.
295. Failure by the Cabinet Secretary to appoint the Board shows willful gross violation of the law or gross incompetence. This is a violation of Article 73 of the Constitution.
296. The Minority therefore finds that to that extent, the ground of gross violation of the Constitution and the Law is substantiated.

Did the Cabinet Secretary provide misleading/false information to a Committee of Parliament, and if so, does it amount to gross violation of the Law?

297. The Minority aver that the CS had the responsibility of giving Kenyans accurate information once the fake fertilizer scandal was unearthed. Instead, as evidenced by audio-visual clips played before the Committee and the record of the Departmental Committee on Agriculture and Livestock, the CS blatantly went before the media on various occasions giving conflicting accounts and misleading Kenyans even further.

298. Accordingly, it is not disputed that the Cabinet Secretary told the Committee on Agriculture and Livestock Development that what was distributed was not meant to be a chemical fertilizer but a soil conditioner. It is part of the record of this House.

299. The CS, as the head of the Ministry, had the responsibility of setting the record straight but he failed to thereby violating the public trust bestowed upon him by the people of Kenya contrary to Article 73 of the Constitution and Section 7(3) of the Leadership and Integrity Act.

300. In view of the above, further, the charge on failing in the performance of his duties to the best of his ability to carry out the duties of the office efficiently and honestly, and to carry out the duties in a transparent and accountable manner have been substantiated.

II. Violation of Article 201 - Principles of Public Finance

301. Article 201(d) of the Constitution provides thus:

The following principles shall guide all aspects of public finance in the Republic-

(e) public money shall be used in a prudent and responsible way;

302. The CS, applied funds from the exchequer to the National Cereals and Produce Board for purposes of procurement and distribution of fake fertilizer under the National Fertilizer Subsidy Programme. **(Letter)**.

303. This is clearly an instance of misappropriation of tax payers' money since the NCPB lacks such mandate. The CS breached the law by not only failing to establish and operationalize the right entity, that is, the Fertilizer and Animal Foodstuffs Board, but channeled funds meant for the board to a wrong entity, the NCPB.

304. The CS grossly violated Article 201(d) in so far as public money is concerned in that public money was not applied in a prudent and responsible manner.

305. The Budget for subsidized fertilizer was approved under the department of crops. However, the CS misappropriated the budget to NCPB without a legal instrument. This offends the principle of ministerial responsibility in so far as implementation of the budget is concerned.

306. The Court of Appeal in the case of **Martin Nyaga Wambora & 3 others v Speaker of the Senate & 6 others [2014] eKLR** held as follows with regard to gross violation.

*We note that the **Constitution** does not define gross-violation. What amounts to gross violation must be considered on a case-by-case basis taking into account the peculiar facts and circumstances of each case. We concur with High Court's statement that whether conduct is gross or not will depend on the facts of each case and not every violation of the **Constitution** or other law is gross violation. The Nigerian Supreme Court in the case of **Hon. Muyiwa Inakoju & Others – vs- Hon. Abraham Adaolu Adeleke, S.C.272/2006** opined as follows:*

The following constitute grave violation or breach of the Constitution:

- h) interference with the constitutional functions of the legislature and the judiciary by an exhibition of over constitutional executive power;*
- i) **abuse of the fiscal provisions of the Constitution;***
- j) abuse of the Code of Conduct for public officers;*
- k) **disregard and breach of the provisions on fundamental rights;***

307. Abuse of fiscal provisions of the Constitution amounts to gross violation of the Constitution.

308. In view of the above, we find that the charge on failing to exercise public trust in the best interest of the people of Kenya contrary to Article 73 of the Constitution and section 8 of the Leadership and Integrity Act has been substantiated. We further find that the charge on gross violation of Article 201(d) on the prudent and responsible use of public money has been substantiated.

e. Gross violation of Article 46 of the Constitution

309. The Minority aver as hereunder.

310. Article 46 provides for consumer rights and sub-article 1(a),(c)&(d) respectively state that consumers have the right to goods and services of reasonable quality; to the protection of their health, safety and economic interests; and to compensation for loss or injury arising from defects in good and services.

311. Article 43 further provides that every person has the right to be free from hunger, and to have adequate food of acceptable quality. From the CS's testimony before the Committee, it is not in dispute that fake fertilizer was procured and distributed. In his testimony, the CS stated that out of a batch of approximately 3,000,000 bags of subsidized fertilizer that had already been distributed, only 3,000 bags of fake fertilizer had found their way into the market.
312. He further stated that the incident was unfortunate and that the affected farmers were directed to return the fake fertilizer to NCPB depots for compensation. Farmers were exposed to fake fertilizer and their health as well as Kenyans' right to food security was put at risk. This is unacceptable.
313. Article 153 provides for the decisions, responsibility and accountability of the Cabinet. Sub-article 2 states that cabinet secretaries are accountable individually and collectively to the President for the exercise of their powers and the performance of their functions.
314. It is our submission that despite the fact that the CS repeatedly claims he was not responsible, he is estopped by this Article from running away from ultimate responsibility. We further considers that it is not enough that the fake fertilizer was recalled or that farmers were or are being compensated; someone must be held responsible and by virtue of the principle of ministerial responsibility, that person is none other than the CS.
315. It is rather amusing that in his defence, the CS tendered as evidence videos of his Ministry's achievements in relation to the Government's agenda on food security. If the CS can take credit of the positive aspects of the discharge of his functions, then he should bite the bullet and take responsibility of this failure called fake fertilizer.
316. It is rather curious that during the proceedings, the CS feigned ignorance and maintained that he does not know which company was responsible for the manufacture of the fake fertilizer.
317. In as much as the CS is excluding himself from liability and stating that he is not involved in procurement and distribution of fertilizer, Executive Order No. 23 on the Organization of the Government of the Republic of Kenya at pages 49-50, the NCPB, which was responsible for the distribution of the fake fertilizer, is an institution under the State Department for Agriculture which

falls under the Ministry and therefore is under the ultimate authority of the CS.

318. As stated in the Wambora case above, **disregard and breach of the provisions on fundamental rights** amounts to gross violation of the Constitution.
319. In view of the above, we find that the charge on gross violation of Article 46(1)(a),(c)&(d) and by extension 43(1)(c) as well as Article 10(1)(c)& 2(d) on making or implementing public policy decisions and the national values and principles on good governance, integrity, transparency and accountability has been substantiated.

SUBSTANTIVE INFRACTIONS IN THE PROCEEDINGS/OBSTRUCTION OF JUSTICE

Summoning of Key Witnesses

320. On 7th May, 2024, the Sponsor of the Motion Hon. Jack Wanami Wamboka, wrote to the Committee through the Chair requesting for summons to be issued for two key witnesses namely Mr. Davesh Patel, Chief Operations Officer, KEL Chemicals Limited as well as the Principal Secretary, State Department for Agriculture, Dr. Paul Kiprono Ronoh.
321. The two individuals had been mentioned in the Motion and Hon. Wamboka, together with his legal team, had reason to believe that if invited, would provide information that would shed more light on the investigations.
322. The Chair advised Hon. Wamboka that the witnesses would be summoned if, in the course of the proceedings, his legal team laid a basis for the same. Indeed, in the course of the proceedings, the two were mentioned adversely and Hon. Wamboka's legal team ably established a basis by demonstrating their involvement in the matter and hence the need to be called as witnesses.
323. The Chairperson then informed the Sponsor his request would be considered after hearing the Cabinet Secretary.
324. However, on the last day of the proceedings, Friday 10th May, 2024, the Chair called for closing statements from the parties before a determination on the request had been made.

325. The Hon. TJ Kajwang objected to the closing statements until the issue is determined. It was then that the issue was subjected to a vote with the net effect of the majority voting against such summoning.
326. The Hon. Catherine Omanyo and Hon. Robert Mbui voted in support of calling the Principal Secretary.
327. The Hon. Robert Mbui, the Hon. T.J. Kajwang, the Hon. Catherine Omanyo and the Hon. Yusuf Farah voted in support of calling the Managing Director of KEL Limited.
328. According to Hon. Catherine Omanyo and Hon. Robert Mbui, the request for the summons for PS Dr. Paul Kiprono Ronoh was warranted because in his testimony, the CS maintained that he was not responsible for the procurement and distribution of fake fertilizer and that the accounting officer was instead the one responsible.
329. The two considered that this necessitated the need for the adversely mentioned parties to be accorded an opportunity to be heard based on Articles 47 on fair administrative action as well as Article 50 on fair hearing.
330. They aver that their position is in line with various Speaker's Communications in the Speakers' Considered Rulings and Guidelines (2017-2022), specifically:
- a) Reconsideration of a House Resolution by the Committee on Implementation dated 5th December, 2019 at page 143.
 - b) Reconsideration of a House Resolution, Thursday, 30th August 2018.
331. On summoning of Mr. Davesh Patel, the Minority considers that, there were depositions around communications by the CS to the KEL Chemicals Limited Chief Operations Officer, Mr. Davesh Patel.
332. Further at pages 36 and 37, the Minority observe, that there are copies of press statements that, according to Mr. Davesh, he was being forced to make admissions essentially exonerating the CS of any liability under the fake fertilizer scandal and instead incriminating himself. In the depositions, the said Mr. Davesh claims he was harassed, arrested and even had his factory forcefully shut down.
333. The minority observe that if these allegations are true, then it shows blatant abuse of state office.

334. Since the CS does not possess powers or authority to revoke licenses and subsequently shut down such factories. In any event, section 2B(f) of the Fertilizers and Animal Foodstuffs Act states that it is a function of the Board to license manufacturers, distributors and retailers of fertilizer. This is therefore not a mandate of the CS. At the time of requesting for the summons, Mr. Davesh had been apprehended and has since been charged in a court of law, for among other charges, fraud in relation to the fake fertilizer scandal.
335. In agreeing that the witnesses should be summoned as requested, the Secretariat indeed concurred with Rule 6 of the Rules of Procedure of the Committee as well as section 15 of the National Assembly (Powers & Privileges) Act, Cap 6 which requires attendance of witnesses to be procured through summons.
336. The Majority maintains that the matter is *sub judice* pursuant to Standing Order 89(2)&(3) yet the issue under inquiry is the constitutional removal of the CS and not the criminal charges currently being faced by Mr. Davesh.
337. On the issue of *sub judice*, the Minority considers that the Speaker Kenneth Marende while ruling on the re-appointment of Justice Aaron Ringera as KACC Director, granted an exception for discussion of the matter although it was in court because of immense public interest (See Speakers' Considered Rulings, Guidelines and Orders: National Assembly of Kenya 10th and 11th Parliaments).
338. Further, the Committee stated that apart from the letter authored by AhmedNasir Abdullahi, Mr. Davesh is not mentioned anywhere else in the Motion and therefore such evidence only amounts to hearsay evidence. We find such reasoning problematic because this is a quasi-judicial process and therefore legal rules should not be applied strictly at the expense of losing out on crucial evidence. As a Committee that is constituted to investigate the matter at hand, we should strive to do nothing short of that. The Committee should seek to find answers to a number of questions including:
- i. What transpired between the CS and Mr. Davesh and not concern itself with the charges facing Mr. Davesh in the courts of law?
 - ii. Whether it is true that indeed KEL Chemicals Limited's license was revoked and the factory subsequently shut down?
 - iii. Whether the alleged calls were actually made and what they were about, whether KELS Chemicals Limited was a supplier of the NPK 10:26:10 fake fertilizer?

iv. Whether Mr. Davesh was actually harassed and threatened?

339. The Minority view is that unless the two witnesses are summoned as requested, the Committee is unable to determine whether or not there is gross misconduct or violations of the Constitution or any other laws. Failure to summon the witnesses is tantamount to obstruction of justice. The Committee is therefore unable to determine if indeed the CS exceeded his authority.

340. As such the Minority's view is that, the Committee is unable to return a verdict on whether the allegation is unsubstantiated.

Advocates' disappearance

341. The Minority took issue with the way the Chairperson dealt with the issue of two advocates who disappeared without notice.

342. During the afternoon session of the Committee proceedings on Thursday, 9th May 2024, two advocates namely Mwangale Robert Wanyonyi and Dome from Senior Counsel (S.C) Khaminwa's legal team went missing under mysterious circumstances.

343. The two disappeared from the premises just before the commencement of the afternoon session whereby they were scheduled to cross-examine the CS. The Minority are rather concerned by the manner in which the Committee handled the matter after the same being brought to its attention by S.C Khaminwa and highlighted as a possible security issue. The matter was taken lightly yet the Committee did not know the whereabouts of the two counsels to date.

Disposition

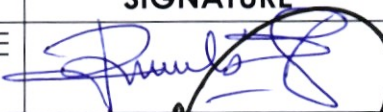



344. In sum, the Minority, the Hon. Robert Mbui, the Hon. Catherine Omanyo, the Hon. T.J Kajwang, the Hon. Yusuf Farah dissent with opinion of the Majority to the extent elaborated in this Minority Opinion.

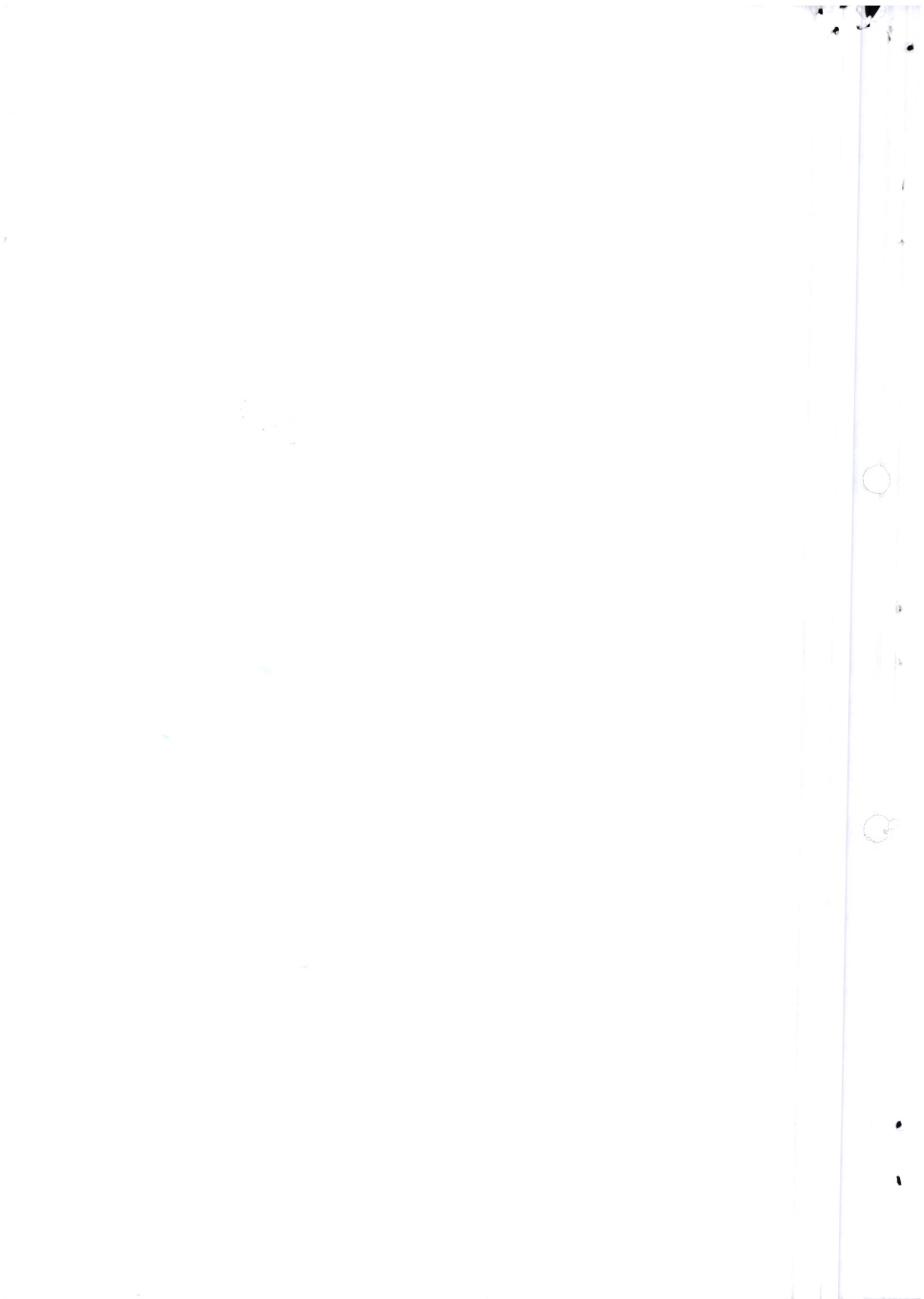
345. The Minority make the findings that:

- A. The allegation that the Cabinet Secretary for Agriculture and Livestock Development, the Hon. Franklin Mithika Linturi, has grossly violated provisions of the Constitution and of other Laws has been **substantiated**;

B. The allegation that the Cabinet Secretary for Agriculture and Livestock Development, the Hon. Franklin Mithika Linturi, has committed acts and omissions amounting to gross misconduct has been **substantiated**.

SIGNED BY

	NAME	SIGNATURE
1.	HON. ROBERT MBUI CBS, MP (VICE CHAIRPERSON)	
2.	HON. FRANCIS KAJWANG TOM JOSEPH MP	
3.	HON. CATHERINE OMANYO, MP	
4.	HON. YUSSUF M. FARAH, MP	





THE NATIONAL ASSEMBLY
THIRTEENTH PARLIAMENT - THIRD SESSION - 2024

SELECT COMMITTEE INVESTIGATING THE PROPOSED DISMISSAL OF THE CABINET
SECRETARY FOR AGRICULTURE AND LIVESTOCK DEVELOPMENT

ADOPTION SCHEDULE

We, the undersigned Honorable Members of the Select Committee Investigating the Proposed Dismissal of Hon. Franklin Mithika Linturi, EGH as Cabinet Secretary for Agriculture and Livestock Development today Monday, 13th May 2024 do hereby affix our signatures to this **Report of the Select Committee Investigating the Proposed Dismissal of Hon. Franklin Mithika Linturi, EGH on the Investigation of a Special Motion Seeking Resolution to Dismiss Hon. Franklin Mithika Linturi as Cabinet Secretary for Agriculture and Livestock Development** to affirm our approval and confirm its accuracy, validity and authenticity: -

S/NO.	NAME	SIGNATURE
1.	THE HON. NAOMI WAQO, CBS, M.P. (CHAIRPERSON)	
2.	THE HON. ROBERT MBUI, CBS, M.P. (VICE-CHAIRPERSON)	
3.	THE HON. (DR.) RACHAEL NYAMAI, CBS, M.P.	
4.	THE HON. SAMUEL CHEPKONGA, CBS, M.P.	
5.	THE HON. GEORGE MURUGARA, CBS, M.P.	
6.	THE HON. T. J. KAJWANG', M.P.	
7.	THE HON. MALULU INJENDI, M.P.	
8.	THE HON. TANDAZA SAWA, M.P.	
9.	THE HON. CATHERINE OMANYO, M.P.	
10.	THE HON. JANE MAINA, M.P.	
11.	THE HON. YUSSUF MOHAMED, M.P.	

