

**PARLIAMENT
OF KENYA
LIBRARY**

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT – SECOND SESSION - 2014

SELECT COMMITTEE ON DELEGATED LEGISLATION

**REPORT ON THE
NATIONAL TRANSPORT AND SAFETY AUTHORITY
(OPERATION OF PUBLIC SERVICE VEHICLES)
REGULATIONS, 2014**

**NATIONAL ASSEMBLY,
PARLIAMENT BUILDINGS,
NAIROBI**

July, 2014

*Paper laid
By the Hon. w. Omburo,
Chair on Thurs 24/7/14
[Signature]*

1.0 PREFACE

The Select Committee on Delegated Legislation was constituted on 21st May, 2013 and comprises of the following members:-

- | | | |
|--|---|-------------------------|
| 1. Hon. William Cheptumo, M.P | - | Chairperson |
| 2. Hon. Joseph Gitari, M.P | - | Vice Chairperson |
| 3. Hon. Kabando wa Kabando, M.P | | |
| 4. Hon. Mohamed Aden Huka, M.P | | |
| 5. Hon. Ngikor Nicholas Nixon, M.P | | |
| 6. Hon. Michael Kiso Manthi, M.P | | |
| 7. Hon. Ibrahim Abdi Saney, M.P | | |
| 8. Hon. Zainabu Chidzuga, M.P | | |
| 9. Hon. John Waiganjo, M.P | | |
| 10. Hon. Yussuf Hassan, M.P | | |
| 11. Hon. Paul Koinange, M.P | | |
| 12. Hon. George Theuri, M.P | | |
| 13. Hon. Elisha Busienei, M.P | | |
| 14. Hon. Alfred Keter, M.P | | |
| 15. Hon. Eusilah Jepkosgei, M.P | | |
| 16. Hon. Paul Bii, M.P | | |
| 17. Hon. William Kisang, M.P | | |
| 18. Hon. Bernard Shinali, M.P | | |
| 19. Hon. Eng. Shadrack Manga, M.P | | |
| 20. Hon. Charles Gimose, M.P | | |
| 21. Hon. Vincent Musau, M.P | | |
| 22. Hon. Peter Kaluma, M.P | | |
| 23. Hon. Rachael Ameso, M.P | | |
| 24. Hon. Simba Arati, M.P | | |
| 25. Hon. Neto Agostinho, M.P | | |
| 26. Hon. Wetangula Timothy Wanyonyi, M.P | | |
| 27. Hon. Marcus Mutua Muluvi, M.P | | |
| 28. Hon. Tom J. Kajwang, M.P | | |
| 29. Hon. Hassan Aden, M.P | | |

1.1 Committee's Mandate

The Committee on Delegated Legislation is a Select Committee established pursuant to provisions of the Standing Order No. 210 whose mandate is to consider in respect of any statutory instrument whether it:-

- Is in accordance with the provision of the Constitution, the Act pursuant to which it is made or other relevant written laws;

- b. Infringes on fundamental rights and freedoms of the public;
- c. Contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
- d. Contains imposition of taxation;
- e. Directly or indirectly bars the jurisdiction of the court;
- f. Gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
- g. Involves expenditure from the consolidated fund or other public revenues;
- h. Is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
- i. Appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
- j. Appears to have had unjustifiable delay in its publication or laying before Parliament;
- k. Makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
- l. Makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
- m. Inappropriately delegates legislative powers;
- n. Imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- o. Appears for any reason to infringe on the rule of law;
- p. Inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and;
- q. Accords to any other reason that the Committee considers fit to examine.

Standing Order No. 210 (4) provides that if the Committee:-

- a. Resolves that the statutory instrument, be acceded to, the Clerk shall convey that resolution to the relevant state department or the authority that published the statutory instrument;
- b. Does not acceded to the statutory instrument, the Committee may recommend to the House that the Assembly resolves that all or part of the statutory instrument be annulled;
- c. The Clerk shall submit the resolution under paragraph 4(b) above to the relevant state department or the authority that published the statutory instrument.

1.2 The National Transport and Safety Authority Regulations, 2014

The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 (hereinafter "the Regulations") were submitted to the National Assembly on 18th March 2014 by the Cabinet Secretary for Transport and Infrastructure. The overall objective of the Regulations is to regulate the operation of public service vehicles in order to enhance compliance with the law and improve safety on the roads.

1.3 Committee Meetings

The Committee held a number of sittings during which the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 were considered in accordance to the Constitution, the Standing Orders 210(4) of the National Assembly, the provisions of the Statutory Instruments Act (Act No. 23 of 2012) and other relevant written laws.

The Committee finds that the Statutory Instrument (The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014, is not in accord with the mandatory requirements of the provisions of the Constitution, Statutory Instruments Act, 2013, the parent Act to which it is made and other relevant written laws.

Pursuant to Standing Order 210(4) (b) and the provisions of the Statutory Instruments Act, 2013, the Committee recommends to the House that the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 be annulled.

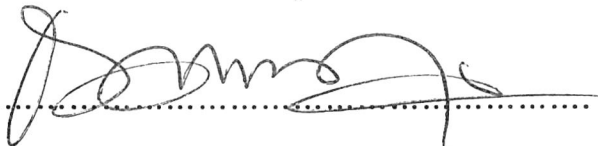
1.4 Acknowledgement

The Committee wishes to sincerely thank the Offices of the Speaker and the Clerk of the national Assembly for the necessary support extended to it in the execution of its mandate.

The Chairperson of the Committee takes this opportunity to thank all the Members of the Committee for their useful and immense contribution in scrutinizing the National Transport

The Committee further wishes to record its appreciation for the services rendered by the staff of the National Assembly that enabled the production of this Report.

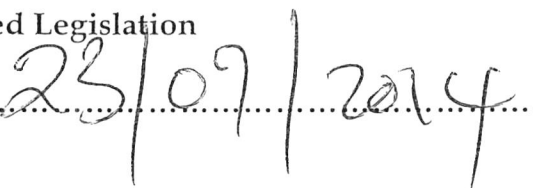
Finally it is my pleasant duty and privilege, on behalf of the Select Committee on Delegated Legislation to introduce this report to the House.

Signed.....

Hon. William Cheptumo, M.P

(Chairperson)

Committee on Delegated Legislation

Date.....

- **Section 19** provides that in cases where Parliament has adopted a report or a resolution that a statutory instrument be revoked, the statutory instrument shall stand revoked and the regulation making authority shall publish the revocation within fourteen days.
- **Section 24(1)** provides that a statutory instrument shall not be inconsistent with the provisions of the enabling legislation or of any Act. Such a statutory instrument shall be void to the extent of the inconsistency.
- **Section 24 (5)** provides that there may be annexed to the breach of a statutory instrument a penalty not exceeding twenty thousand shillings or imprisonment for a term not exceeding six months or both which the regulation-making authority may think fit.
- **Section 25(1)** provides that a statutory instrument may provide for the imposition of fees and charges on any matter for which such provision is made in the enabling legislation.

(ii) *The Interpretation and General Provisions Act*

- **Section 36 (1)** allows the President, by an order to transfer the exercise of a power or performance of a duty to a Cabinet Secretary where the exercise of a power or performance of a duty has been conferred on the President by an Act of Parliament.
- **Section 37** deals with the execution of duties of a Cabinet Secretary or public officer during periods of their temporary absence from office or inability to perform such duties. It provides that such powers and duties shall be performed by a Cabinet Secretary designated by the President, or a person named by, or by the public officer holding an office designated by the Cabinet Secretary. The Cabinet Secretary or the person or public officer so designated shall have and exercise those powers and shall perform those duties subject to such conditions, exceptions and qualifications as the President or Cabinet Secretary may direct.
- **Section 38** deals with delegation of powers. It provides that where an Act of Parliament confers the exercise of a power or the performance of a duty on the President, the Attorney-General or a Cabinet Secretary, the President, the Attorney-General or the Cabinet Secretary, may, unless by law expressly prohibited from doing so, delegate the exercise of the power or the performance of the duty by notice in the Gazette to a person by name or to the person for the time holding an office specified in the notice subject to such conditions,

exceptions or qualifications as the President, the Attorney-General or the Cabinet Secretary may specify on the notice.

(iii) Provisions which empower the Cabinet Secretary to make the Regulations

The Regulations are made pursuant to the powers conferred to the Cabinet Secretary under section 54 of the National Transport and Safety Authority Act, No. 33 of 2012 ("the Act") which allows the Cabinet Secretary to in consultation with the Board, to make regulations for the better carrying into effect of the provisions of this Act.

The functions of the Authority under the Act are:

- (a) advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety;
- (b) implement policies relating to road transport and safety;
- (c) plan, manage and regulate the road transport system in accordance with the provisions of this Act;
- (d) ensure the provision of safe, reliable and efficient road transport services; and
- (e) administer the Act of Parliament set out in the First Schedule and any other written law.

3.0 COMMITTEE OBSERVATIONS

Upon scrutiny with reference to the considerations set out in the Statutory Instruments Act, the Interpretation and General Provisions Act and the enabling provisions of the National Transport and Safety Authority Act set out above, the Committee noted that:-

- (a) there was no explanatory memorandum attached to the Regulations contrary to section 11 (2) of the Statutory Instruments Act, 2013;
- (b) in light of (a) above, there is no evidence of the preparation of a regulatory impact statement as provided for under section 6 of the Statutory Instruments Act nor of consultation with stakeholders as provided for under section 5 (1) of the Statutory Instruments Act;
- (c) in the absence of an explanatory memorandum, the Committee was unable to decipher whether there was public participation as envisaged by Article 118 (1) (b) of the Constitution;

(d) proposed regulation 5 (1) and 6 which requires a person desirous of operating public service vehicles to be a member of a body corporate contravenes article 36 (2) of the Constitution. Article 36 (2) of the Constitution states that: "A person shall not be compelled to join an association of any kind."

In addition, regulation 5 (2) gives the Authority too wide a discretion to determine who to licence and, therefore, creates an avenue for corruption and abuse by the Authority;

(e) by providing for a penalty exceeding twenty thousand shillings and an imprisonment term exceeding six months, regulation 15 (1) of the Regulations contravenes section 24 (5) of the Statutory Instruments Act and is, therefore *ultra vires*;

(f) regulation 2 of the Regulations dealing with definitions is defective in its drafting contrary to section 13 (h) of the Statutory Instruments Act. There are no margin notes reflecting the Chapter Numbers accompanying the words "city, public service vehicle and urban area;"

(g) regulation 9 of the Regulations extends criminal liability to the operator of a commuter service vehicle for acts committed by a driver, conductor or other member of staff. This is against the rules of natural justice which require for a person to be individually responsible for any criminal acts they commit.

In addition, it contravenes section 2 of the Employment Act (Cap 226) which recognizes an employee as a person employed for wages or a salary and a casual employee as a person whose terms of engagement provide for his payment at the end of each day and who is not engaged for a period longer than twenty four hours yet an operator of a public service vehicle is not allowed to engage staff on commission basis;

(h) regulation 10 of the Regulations does not outline the criteria to be used in granting or refusing to grant a licence in order to operate a long distance night time passenger service and, therefore, contravenes Standing Order 210 (3) (i) in that it appears to make unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

(i) regulation 11 (e) and (f) of the Regulations are in contravention of Standing Order 210 (3) (i) in that it appears to make unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made. This is because it disallows the use of carriers by public service vehicles and thus

limits and inconveniences passengers who may not be able to afford other means of transporting their goods.

This is also in contravention of article 46 (1) (d) of the Constitution which safeguards the rights of consumers to the protection of their health, safety and economic interests. The economic interests of both the public service vehicles and passengers are limited by these provisions;

- (j) regulation 12 (1) (a) of the Regulation does not spell out the criteria to be used by the Authority to certify drivers to ply a particular route and the Committee may not be able to determine the appropriateness of this provision in the absence of the information;

4.0 COMMITTEE RECOMMENDATIONS

In view of the Committee's observations under 3 (a) to (j) above, the Committee finds that the Statutory Instrument (The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014), is not in accord with the mandatory requirements of the provisions of the Constitution, Statutory Instruments Act, 2013, the parent Act to which it is made and other relevant written laws.

Pursuant to Standing Order 210(4) (b) and the provisions of the Statutory Instruments Act, 2013, the Committee recommends to the House that the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 be annulled.

*****END*****

PARLIAMENT
OF KENYA
LIBRARY



Handwritten: *Lucid 18.12.2010*

MEMBERS LIST	
Speaker N. A.	
Deputy Speaker	
Clerk N. A.	
Deputy Clerk	
P. C. A.	

REPUBLIC OF KENYA
KENYA NATIONAL ASSEMBLY
TENTH PARLIAMENT-FOURTH SESSION

REPORT
OF THE SELECT COMMITTEE ON EQUAL
OPPORTUNITY

ON
THE RECRUITMENT OF THE MANAGING DIRECTOR,
KENYA BUREAU OF STANDARDS

December, 2010

1.0 PREFACE

Mr. Speaker Sir, on behalf of the Members of the Select Committee on Equal Opportunity, I would like to take this Opportunity to present to the House, the Committee's Report on the recruitment of the Managing Director, Kenya Bureau of Standards.

The membership of the Committee comprise of the Following:-

- (i) The Hon. Mohammed Affey, MP - **(Chairperson)**
- (ii) The Hon. Joseph Lekuton, MP - **(Vice-Chairperson)**
- (iii) The Hon. Maison Leshoomo, MP
- (iv) The Hon. Chesebe Fred Kapondi, MP
- (v) The Hon. Luka Kipkorir Kigen, MP
- (vi) The Hon Francis Chachu Ganya, MP
- (vii) The Hon. Millie Odhiambo- Mabona, MP
- (viii) The Hon. Raphael Letimalo, MP
- (ix) The Hon. Eng. Ephraim Maina, MP

The Mandate of this Select Committee as established under Standing Order No. 192 are:-

- (i) Monitor and promote measures designed to enhance the equalization of opportunities and improvement in the quality of life and status of

all persons including groups who are marginalized persons on the basis of gender, age, disability, health status ethnic, racial, cultural or religious background or affiliation or any other such ground;

- (ii) Investigate, inquire into and report on all matters relating to discrimination or marginalization of the groups referred to under sub-paragraph (a);
- (iii) make proposals to the House including legislative proposals for the protection, equalization of opportunities and promotion of the welfare of the groups referred to under sub-paragraph (a) and;
- (iv) examine the activities and administration of all Ministries, departments and statutory bodies in so far as they relate to the rights and welfare of the groups referred to under paragraph (a);

Mr. Speaker Sir,

The Kenya Bureau of Standards (KEBS) was established in July 1974 and falls within the Ministry of Industrialization. The Committee on Equal Opportunity, in line with its mandate which cuts across all the Ministries took up this matter arising from an impasse in the selection process for the Managing Director of the Kenya Bureau of Standards (KEBS) with a view that all Kenyans had not been given an equal opportunity.

The Committee held meetings with the following in getting facts on the matter:-

1. The Minister for Industrialization
2. The Permanent Secretary, Ministry of Industrialization
3. The National Standards Council
4. The Chief Executive, KPMG
5. The National Cohesion and Integration Commission

Mr. Speaker Sir, on behalf of the Select Committee on Equal Opportunity, I have the honour and pleasure to present the Committee's Report and recommendation on the appointment of the Managing Director, Kenya Bureau of Standards for consideration and adoption by the House.

Thank you.

Signed..........

Hon. Mohammed Affey, M.P.

Chairman,
Select Committee on Equal Opportunity.

Date.....15/12/2010.....

2.0. INTRODUCTION

The Kenya Bureau of Standards was established in July 1974 through an Act of Parliament.

2.1. Chapter 496 of the Standards Act is an Act of Parliament to promote the standardization of the specification of commodities and to provide for the standardization of commodities and codes of practice; to established Kenya Bureau of Standards, to define its functions and provide for its management and control; and for matters incidental to, and connected with, the foregoing...

2.2. Section 6(1) establishes the National Standard Council.

Part (2) of that section states that the Council shall subject to the provisions of subsection

(3) consist of the following members;

(a) A chairman appointed by the Minister;

(b) A secretary who shall be the Director of the Bureau;

(c) Not more than seven persons appointed by the Minister who shall be public officers;

(d) Not more than eight persons appointed by the Minister who shall possess knowledge of industrial or commercial standards or other matters likely to be of assistance to the Bureau.

2.3. Section 7 (i) provides that the Council shall have power - (b) to advise and obtain advice from the Minister in regard to any matter within his purview under this Act;

(c) To formulate matters of policy for the purpose of providing general or specific guidance to the Institute for the better performance of its functions under this Act;

(d) To do all things necessary for the better carrying out of the provisions and purposes of this Act except whether otherwise provided.

3.0. RECRUITMENT PROCESS

- 3.1. The position of Managing Director, Kenya Bureau of Standards fell vacant when the Managing Director was removed from the office due to inappropriate conduct. In accordance with the mandate conferred to the National Standards Council, on 21st December, 2009, the council initiated a recruitment process, and hence agreed to engage an external human resource firm to help in the exercise. Through a competitive process KPMG was awarded the contract at a cost of **Kshs.1, 500,000/=** with a down payment of 40%.
- 3.2. KPMG was mandated to carry out the short listing of 14 Candidates and later provide the council with 6 names. Instead the KPMG submitted 4 names and 2 for comparative purposes which were questioned by the Board. This raised some disagreements prompting the Board to demand for the full list and details of all the applicants, which KPMG declined to give. This led to a stalemate resulting to the non-payment of the 60%.
- 3.3. In the submissions to the Committee, the Chief Executive, KPMG informed the members of an attempt by the Minister to interfere with the process by sending emissaries to his staff, however the two affidavits submitted to support the claim contradict one another.
- 3.4. In consultation with the Ministry the Council embarked on a fresh recruitment process which was to be done by the Board itself. Rules and guidelines of the process were agreed upon by the members with the interview having 70% oral and 30% written interview. It was also agreed that the written examination was to be marked by an external

examiner. The council formed an adhoc committee to shortlist and code all the candidates.

3.5. The council advertised the position in the Nation and Standard newspapers at a cost of **Kshs.1,794,659.00/=**

3.6. The council shortlisted 15 candidates including 3 from the Kenya Bureau of Standards. 11 candidates turned up for the interview held between the 14th and 15th September 2010. The marks were then tallied from number 1 to 11 awaiting the scores from the written interview. The council agreed that the first 5 candidates were material for the job.

3.7. Disagreements in the council developed when the written scores came in with some members wanting only the top 5 candidates to be subjected to the external examiners marks while others wanted the whole list of the 11 candidates. At this stage there was no agreement on what criterion to be used to get the three names to be forwarded to the Minister for selection.

3.8. The Minister received an unsigned report from an adhoc committee giving names and scores of the first five candidates with the following scores as follows:-

1. Abdi Kadir Omar Aden	70%
2. Eva Adega Oduor	66%
3. John Mtuta Mruttu	64%
4. Joseph K. Kosgey	62%
5. Eng. Michael Ochieng Owino	53%

After consideration, the Minister felt that the board had not reached a final vetting conclusion and then selected candidate number four (Joseph K. Kosgey) as the new MD for Kenya Bureau of Standards.

3.9. The recruitment exercise of the new Managing Director cost the Council a total of **Kshs.16,528,519.55/=**, with **Kshs.15,990,401.55** in allowances of the Board members, having paid KPMG a down payment of **Kshs. 538,118.00/=**.

4.0 COMMITTEE'S OBSERVATIONS

- The Committee was concerned that the advertisement notice did not give Kenyans sufficient time to apply and also observed that there was lack of an equal opportunity to gender.
- In its deliberations after gathering information from all the parties the committee unanimously agreed that the Minister and the Permanent Secretary have contradictory views which endanger the operation of the institution considering that the Managing Director reports to the Permanent Secretary. In the present scenario the appointed MD has no official appointing letter.
- The Committee in its findings noted that the score sheets from the Board and the ones used by the Minister having been received from the adhoc committee were different. The committee also noted that the report to the Minister was not signed and so not authentic.
- The National Standards Council may not have had the capacity to carry out the recruitment task.
- The advertisement of the position did not clarify if the people who worked for KEBS were eligible to apply or not leading to subjecting the candidates to a futile exercise.
- The National Standard Council misled and misinformed the Minister by giving two different lists of nominees one forwarded by the Chairman of the council through the Permanent Secretary and another by some members of the Adhoc Committee.

5.0 COMMITTEE'S RECOMMENDATIONS

- 5.1. That the advertisements be specific on the requirements and the people eligible for the position to avoid subjecting others to a futile process, especially if the applicants include the staff at Kenya Bureau of Standards.
- 5.2. The Committee recommends that due to irredeemable disagreements among the board Members, the Minister and the Permanent Secretary on the process and the outcome, the board to be dissolved with immediate effect and the Minister undertakes afresh recruitment process for the post of Managing Director Kenya Bureau of Standards.
- 5.3. The Committee met the National Cohesion and Integration Commission deliberated its findings and attached are the Commission recommendations for the house.
- 5.4. The Committee recommends further investigation regarding the prudent use of taxpayer's money **14,195,742.35** which was used in the recruitment exercise.

000

MINUTES OF THE TWENTY NINTH SITTING OF THE
COMMITTEE ON EQUAL OPPORTUNITY HELD ON TUESDAY,
26TH OCTOBER, 2010 IN CONFERENCE ROOM, 2ND FLOOR,
CONTINENTAL BUILDING AT 9.00 A.M

PRESENT

Hon. Mohammed Affey, M.P. - (Chairman)
Hon. Joseph Lekuton, M.P. - (Vice-Chairman)
Hon. Luka Kigen, M.P.
Hon. Chachu Ganya, M.P.
Hon. Maison Leshoomo, M.P.
Hon. Millie Odhiambo, M.P.

ABSENT WITH APOLOGY

Hon. Raphael Letimalo, M.P.
Hon. Ephraim Maina, M.P.

Hon. Fred Chesebe Kapondi, M.P.

IN ATTENDANCE - KENYA NATIONAL ASSEMBLY

Hon. Rachel Shebesh, M.P.

IN ATTENDANCE - MINISTRY OF INDUSTRIALIZATION

Hon. Henry Kosgey - Minister for Industrialization

KENYA NATIONAL ASSEMBLY

Ms. Rose Mudibo - Committee Secretary
Mr. Abdullahi Aden - Third Clerk Assistant

MIN. NO.120/ 2010

PRAYER AND INTRODUCTION

The meeting was called to order at 9.30 a.m. with a word of prayer. The Chairman then introduced the Members of the Committee to the Minister.

MIN. NO.121/ 2010

BRIEFING BY THE CHAIRMAN

The Chairman briefed the Minister on the Mandate of the Committee under Standing Order 192 and

why he had been invited to meet the Committee highlighting the issue of the recruitment of the Managing Director of Kenya Bureau of Standards.

MIN. NO. 122/ 2010

BRIEFING BY THE MINISTER

The Minister informed the Committee that the recruitment of the Managing Director of the Kenya Bureau of Standards began on 21st December, 2009 after the former MD was sacked in public interest. The following steps were then taken by the National Standards Council (NSC):-

- Between 15th March to 21st May, the NSC contracted a consulting firm, KPMG to carry out initial process having won the tender at Kshs1,495,000/=.
- That the advertisement attracted 115 applicants and 14 were shortlisted for an interview.
- KPMG then informed the Board that they wanted to interview another 7 additional applicants which meant an additional cost of Kshs.500,000/=.
- Upon receipt of the final report the NSC requested the original documents for the audit but KPMG declined to surrender the same. Because of this and other reasons the NSC terminated the contract and resolved to restart the process afresh.
- In consultation with the Ministry, the NSC was permitted to undertake the process of the recruitment on 5th August 2010.
- The position was re-advertised on 2nd and 17th August 2010 in the Standard and Nation dailies and KEBs website with a deadline of 2nd September 2010.
- The re-advertisement attracted 74 applicants and 15 candidates were short listed.
- The interview was split into both oral 70% and written 30% and the candidates coded. An external examiner was contracted to mark the written examination.
- Out of the eleven candidates, the board cleared the first five candidates fit for the job
- On 16th September 2010 the board was to do further vetting to be left with three candidates

who were to be forwarded to the Minister for consideration.

- On 16th September 2010, the Chairman of the Board changed his mind and decided that the board goes with the first three candidates. The board then set up an adhoc committee to prepare a report recommending the first three and forward the same to the Minister. Eight members out of thirteen members reacted to that decision in contrary on the same day.
- The Minister received the names of the first three candidates from the Chairman recommending the same.
- The Minister also received a report from the adhoc committee giving a list of the first five candidates and the marks they attained in the interview. Simultaneously, he received a protest note from eight council members including one of the adhoc committee members claiming that the council was not in agreement of the way the process had been conducted.
- The Minister informed the Committee that due to the wrangles amongst the board members, he was of the opinion that candidate number four (Joseph K. Kosgey) was qualified, but still gave the council a chance to deliberate on the matter. Going by the guidelines on terms and conditions of service for state corporations, chief executive officers, chairmen and board members, management staff and unionisable staff on page 16 gives guidelines of the salary scale he had to make a decision on the matter.
- That the Chairman of the Board went to the press on the matter even though the board was to meet on the 6th October, 2010 while the Minister continued to get from different quarters.

MIN. NO. 123/2010

COMMITTEE'S CONCERNS

The Committee not having been satisfied raised the following concerns to the Minister:-

- Were the candidates given a chance to accept the offered salary?
- Were all Kenyans who applied given an equal opportunity?

- Did the Minister ever meet the Board to know the cause of the wrangles?
- Why the lady (Eva Adega Oduor) was not considered and when did her integrity issues come up.
- The Committee wanted to know if the Minister felt that the Board Members were people of integrity and had the capacity to carry out the recruitment process.
- Did the Minister ever see the letter of Mr. Aden claiming that he was flexible on his remuneration considering that he wanted to come back home.
- Was the Permanent Secretary for any particular candidate?

MIN. NO.124/2010

MINISTERS RESPONSE

The Minister gave the following reasons which made him reach his decision:-

- That after analyzing and eliminating on account of salary and agreement by the Board that they needed new blood to head the institution.
- That having given the Board another chance to meet on the 6th October 2010, they again disagreed prompting the Minister to exercise his powers as the appointing authority.
- The Minister stated that the Board had been working very well until this particular incident.
- The Minister stated that Mr. Aden had accepted a salary of Kshs.900,000/= from 1,084,000.
- The Minister claimed that he never got an answer as to why the employees of Kenya Bureau of Standards were not advised not to apply for the job.
- The Minister's opinion is that the Chairman of the Board scuttled the whole process and since he was the appointing authority he then exercised his powers.

MIN. NO.125/2010

COMMITTEES RECOMMENDATIONS

The Committee observed that there were too many loopholes in the whole process and agreed to call other players involved and agreed to call the Minister if need be.

MIN. NO. 126/2010

ADJOURNMENT

There being no other business, the Chairman adjourned the meeting at 10.55a.m

SIGNED:.....*Alley*.....

(CHAIRPERSON)

DATE:.....*16/11/2010*.....

MINUTES OF THE THIRTIETH SITTING OF THE
COMMITTEE ON EQUAL OPPORTUNITY HELD ON
TUESDAY, 26TH OCTOBER, 2010, IN THE COMMITTEE
ROOM ON 2ND FLOOR, CONTINENTAL HOUSE,
PARLIAMENT BUILDINGS AT 11.00 A.M.

PRESENT

The Hon. Mohamed Abdi Affey, M.P. (Chairman)

The Hon. Luka Kigen, M.P.

The Hon. Francis Chachu Ganya, M.P.

The Hon. Fred Chesebe Kapondi, M.P.

The Hon. Maison Leshoomo, M.P.

ABSENT WITH APOLOGY

The Hon. Joseph Lekuton, M.P. - (Vice Chairman)

The Hon. Ephraim Maina, M.P.

The Hon. Millie Odhiambo, M.P.

The Hon. Raphael Letimalo, M.P.

IN ATTENDANCE - PERMANENT SECRETARY MINISTRY OF
INDUSTRIALIZATION

Dr. (Eng.) Karanja Kibicho - Permanent Secretary

Mr. Erastus N. Kiruri - NSC Member representing the
Permanent Secretary

KENYA NATIONAL ASSEMBLY

Ms. Rose Mudibo - Secretary

Mr. Abdullahi Aden - Clerk Assistant

MIN NO. 127/2010

PRAYER

The Chairman called the meeting to order at
11.15 a.m. followed by a word of prayer.

MIN NO. 128/2010

INTRODUCTION

The Chairman introduced the Members of the Committee to the delegation and gave the Permanent Secretary a chance to do the same of the accompanying delegation.

MIN NO. 129/2010

BRIEFING BY THE CHAIRMAN

The Chairman welcomed the Members of the Committee and the delegation from the Ministry of Industrialization. The Chairman also took the delegation through the mandate of the Committee and why the meeting had been called highlighting the issue of the recruitment of the Managing Director, Kenya Bureau of Standards.

MIN NO. 130/2010

BRIEFING BY THE PERMANENT SECRETARY

The Permanent Secretary informed the Committee that he joined the Ministry in June 2010 and found the process of recruitment having been started in March, 2010. He stated the following steps were undertaken by the council and the Ministry:-

- That KPMG was contracted by the National Standards Council to assist in the recruitment on 18th March, 2010.
- The Contract was later cancelled due to some disagreements between the board and KPMG leading to the Board to re-advertise for the position in the daily newspapers.
- Interviews were to be carried out both in written and oral.
- That the council felt some interference from elsewhere.
- That all the 15 candidates and the board members were coded and that during the written examinations no names were given.
- The Board then got a credible person to assist in marking of the written examination.
- That he addressed the Council on integrity and had a problem with the 50/ 50 marks

- The PS also noted that in normal similar circumstances the council forwards three names to the Minister who then communicates to the Permanent Secretary to gazette and do an appointment letter to the appointee.

MIN NO.131/2010

COMMITTEES CONCERNS

The Committee raised the following concerns to the Permanent Secretary:-

- The Committee needed to know how much was spent on the whole process of recruitment.
- Was the Minister advised by the council at any point?
- What was the origin of the report sent to the Minister?
- Was the council competent enough to handle the recruitment process?

MIN NO.132/2010

PERMANENT SECRETARY'S RESPONSE

The Committee was informed as follows:-

- That the KPMG contract was for Kshs.1,400,000/= having paid 40% and agreed to pay the remainder upon completion of the job.
- Advertisement in Daily Nation and Standard of half page each cost approximately half a million Kenya shillings.
- The PS informed the Committee that candidate number four and five were never decoded and so they were not known.
- On advising of the Minister the PS claims that even before receiving the report from the council he had done the appointment.
- It was noted that the adhoc committee report that the Minister acted upon was a loose sheet not signed by any members.
- On competence to recruit the committee was informed that the council underwent training on how to do the same by the Public Service Commission.

MIN. NO. 133/2010

COMMENTS FROM THE COMMITTEE

The Committee resolved to meet with the other parties involved in order to make an informed decision.

MIN. NO. 1134/2010

ADJOURNMENT

There being no other business, the Chairman adjourned the meeting at 12.30 p.m.

SIGNED:.....

Atey
(CHAIRPERSON)

DATE:.....

12/11/2010

MINUTES OF THE THIRTY FIRST SITTING OF THE COMMITTEE ON
EQUAL OPPORTUNITY HELD ON THURSDAY, 28TH OCTOBER, 2010 IN
SMALL DINING, MAIN PARLIAMENT BUILDINGS AT 9.00 A.M.

PRESENT

Hon. Mohammed Afey, M.P. - (Chairman)
Hon. Joseph Lekuton, M.P. - (Vice-Chairman)
Hon. Luka Kigen, M.P.
Hon. Chachu Ganya, M.P.

ABSENT WITH APOLOGY

Hon. Raphael Letimalo, M.P.
Hon. Ephraim Maina, M.P.
Hon. Fred Chesebe Kapondi, M.P.
Hon. Maison Leshoomo, M.P.
Hon. Millie Odhiambo, M.P.

IN ATTENDANCE - KPMG EAST AFRICA

Mr. Josphat Mwaura

KENYA NATIONAL ASSEMBLY

Ms. Rose Mudibo - Committee Secretary
Mr. Abdullahi Aden - Third Clerk Assistant

MIN. NO. 135/ 2010 PRAYER AND INTRODUCTION

The meeting was called to order at 9 15 a.m. with a word of prayer. The Chairman introduced the Members of the Committee to the C.E.O., KPMG.

MIN. NO. 136 /2010 BRIEFING BY THE CHAIRMAN

The Chairman briefed Mr. Mwaura on the Mandate of the Committee under Standing Order 192 and why he had been invited to meet the Committee highlighting the issue of the recruitment of the Managing Director of Kenya Bureau of Standards.

MIN. NO.137/ 2010 BRIEFING BY THE C.E.O

The C.E.O of KPMG informed the committee as follows:-

- That on the 19th January 2010, KPMG submitted a proposal to the recruitment of the MD Kenya bureau of Standards through a competitive process.
- That on 22nd January KPMG was advised by KEBS that they had got the job and on 16th February they entered into negotiations and

had a contract with KEBS to assist in the recruitment process.

- Work commenced on 19th March 2010 and worked closely with the National Standards Council.
- That the role of KPMG was to carry out the preliminary selection and recommend suitable candidates to the NSC.
- A total of 115 applications were received and 14 candidates shortlisted for initial interviews in consultation with the NSC.
- Noted that the candidate who has been appointed was not one of the candidates that had been shortlisted for interview and was never interviewed by KPMG.
- The 14 shortlisted candidates were further short listed to 9 who went through additional selection processes to arrive at the final candidates recommended to the NSC for consideration and final selection.
- KPMG gave a full list of all the candidates who had applied and submitted the scores of the 14 candidates.
- Vide a letter dated 12th July, 2010, from the council, KPMG was informed that the final report they had submitted had been tabled at a meeting of the National Standards Council held on the same day and adopted. The council in the letter asked for the list of all the 115 applicants together with their applications to be sent to the Chairman's office by 14th July, 2010.
- That on 13th July, 2010 KPMG responded stating that that was not within the terms they provided recruitment services sighting confidentiality.
- That the contract between KPMG and the council expired on 22nd of July.
- On 28th July, 2010 KPMG received a letter purporting to terminate the contract on grounds that they had failed to deliver on contractual obligations.
- KPMG responded on 29th July, 2010 pointing out that they had delivered, received confirmation from the NSC that their report had been adopted, and that the contract had since elapsed.

- Contract cost 1.5 million having been paid a down payment of 40% and were still in negotiations for the balance.
- Early in the recruitment process, Mr. Mwaura had been informed by the former Permanent Secretary in the Ministry of Industrialization that there were attempts to interfere with the process and that KPMG should ensure that the highest standards of professionalism and integrity were maintained in the process.
- KPMG assured the PS that the process was secure from any external interference and this had been demonstrated by the other public sector recruitments that they had done sighting KRA and more recently for the Interim Independent Electoral Commission.
- The C.E.O. claimed that emissaries had been sent to some of the KPMG members of staff having been sent by the Minister for Industrialization.

MIN. NO. 138/2010

COMMITTEE'S CONCERNS

- At what point did the issues begin.
- Did KPMG ever inform the council about the interference by the Minister?
- Can Mr. Mwaura substantiate that the Minister was interfering with the process.

MIN. NO. 139/2010

C.E.O.'S RESPONSE

Mr. Mwaura informed the Committee that he never informed the council of the interference. Mr. Mwaura agreed to bring his staff to substantiate his claims of the interference.

MIN. NO. 140/2010

ADJOURNMENT

There being no other business, the meeting was adjourned at 10.30 a.m.

SIGNED.....
(CHAIRMAN)

DATE:.....

MINUTES OF THE THIRTY SECOND SITTING OF THE
COMMITTEE ON EQUAL OPPORTUNITY HELD ON
THURSDAY, 28TH OCTOBER 2010, IN THE SMALL DINING,
MAIN PARLIAMENT BUILDINGS AT 11.00 A.M.

PRESENT

The Hon. Mohamed Abdi Affey, M.P. (Chairman)

The Hon. Luka Kigen, M.P.

The Hon. Francis Chachu Ganya, M.P.

The Hon. Millie Odhiambo, M.P.

ABSENT WITH APOLOGY

The Hon. Joseph Lekuton, M.P. - (Vice Chairman)

The Hon. Ephraim Maina, M.P.

The Hon. Raphael Letimalo, M.P.

The Hon. Fred Chesebe Kapondi, M.P.

The Hon. Maison Leshoomo, M.P.

IN ATTENDANCE - BOARD OF MANAGEMENT, KENYA BUREAU OF
STANDARDS.

Dr. Karanja Thiong'o	-	Chairman
Mr. John Kaurra	-	Member
Mrs. Mary Ng'eny	-	Member
Mr. Adan Mohammed	-	Member
Maj. Rt. Gabriel Wakasyaka	-	Member
Mr. Martin Gumo	-	Treasury Representative
Mr. John Bor	-	Treasury Representative
Mr. Edward Ngige	-	State Corporations Rep
Mr. Francis Odera	-	Member
Mr. Geoffrey Mahinda	-	Member
Mr. Erastus Kimuri	-	PS Industrialization Rep
Mr. Julius Koringura	-	Secretary

Dr. Jacinta Wasike

- Member

KENYA NATIONAL ASSEMBLY

Ms. Rose Mudibo - Secretary

Mr. Abdullahi Aden - Clerk Assistant

MIN NO. 141/2010

PRAYER

The Chairman called the meeting to order at 11.15 a.m. followed by a word of prayer.

MIN NO. 142/2010

INTRODUCTION

The Chairman introduced the Members of the Committee to the delegation and gave the Chairman of the Board a chance to do the same.

MIN NO. 143/2010

BRIEFING BY THE CHAIRMAN

The Chairman welcomed the Members of the Committee and the Board Members. The Chairman also took the delegation through the mandate of the Committee and why the meeting had been called highlighting the issue of the recruitment of the Managing Director, Kenya Bureau of Standards.

MIN NO. 144/2010

BRIEFING BY THE CHAIRMAN OF THE BOARD

The Chairman informed the Committee of the State Co-operations Act, the Standard Act (1987) and the guidelines (2004) given by the Head of the Civil Service sighting the councils powers.

- That KPMG was contracted by the National Standards Council to assist in the recruitment on 18th March, 2010.
- The Contract was later cancelled due to some disagreements between the board and KPMG leading to the Board to re-advertise for the position in the daily newspapers in consultation with the Ministry.
- That instead of giving the board 8 names KPMG gave only 6 names and declined to

give any other information to the board and advised the board that 2 were for comparative purposes leaving the board with only 4.

- The Chairman explained that the council needed the full list to check on matters of gender and regional balancing.
- That the Council decided to terminate the services of KPMG and carry out the process by itself.
- That the Council advertised the position in the daily newspapers and the KEBS website.
- The board received 74 applications and shortlisted 15 while 11 attended the interviews which were carried out in two days in the presence of the Permanent Secretary.
- That all the communication to the Minister was done through the Permanent Secretary.
- Both applicants and the board members were coded during the exercise.
- The Council then agreed that the first five candidates were to move to the next stage.
- The Council decided to do further vetting of the five candidates when later the Chairman decided that they go on merit and forward the first three names.
- That at this point the PS noted the contradicting views of the members of the council.
- That the council never got the opportunity to scrutinize the original certificates of the candidates.
- The Committee was informed that they did not know the origin of the report given to the Minister of the first five candidates containing wrong information with different scores.

MIN NO.145/2010

COMMITTEES CONCERNS

The Committee raised the following concerns to the Board:-

- The Committee needed to know why the council did not go for another firm to help in the process.
- Was the council competent enough to carry out the task?
- Were all Kenyans given an equal opportunity to the job advertised?

MIN NO.146/2010

BOARD'S RESPONSE

The Committee was informed as follows:-

- That the Council in consultation with the Ministry they felt it was fair to carry out the process on its own.
- The Committee learnt that the council members went through training on recruitment which enabled them to carry out the task.
- That the advertisements were put in the daily newspapers and the website to reach all Kenyans at large.

MIN.NO. 147/2010

ADJOURNMENT

There being no other business, the Chairman adjourned the meeting at 1.00 p.m.

SIGNED:.....

Aley
(CHAIRPERSON)

DATE:.....

16/11/2010

MINUTES OF THE THIRTY THIRD SITTING OF THE COMMITTEE ON
EQUAL OPPORTUNITY HELD ON TUESDAY 2ND NOVEMBER 2010 IN
COMMISSION ROOM PARLIAMENT BUILDINGS AT 10:00AM.

PRESENT

Hon: Mohammed Affey, M.P (Chairman)

Hon: Luka kipkorir Kigen, M.P

Hon: Raphael Lakalei Letimalo, M.P

ABSENT WITH APOLOGY

Hon: Chesebe Fred Kapondi, M.P

Hon: Francis Chachu Ganya, M.P

Hon: Millie Odhiambo- Mabona, M.P

Hon: Joseph Lekuton, M.P (Vice-Chairman)

Hon: Maison Leshoomo, M.P

Hon: Ephraim Maina, M.P

KENYA NATIONAL ASSEMBLY

Abdullahi Aden - Third Clerk Assistant

Rose Mudibo - Protocol Officer

National Cohession and Interaration Commission.

Mzalendo Kibunja - (Chairman)

Hassan Noor - Commissioner

Alice Nderiritu. - Commissioner

The Chairman took the Commissioners on the mandate of the Committee on equal opportunities.

MIN NO. 148/2010 Commission Chairman

The Commission Chairman presented its report on the Appointment of the Managing Director Kenya Bureau of Standards to the Committee on equal opportunity and the following were their observations.

- Independent body formed to conduct another interview for the top fifteen names, the interviews to be conducted by the Ministry of Public Service. It is not necessarily discrimination when a Minister appoints a person from his/her ethnic Community to a senior position, however given the past practices in this regard, the process to such an eventuality must be seen transparent and open.
- The process was not procedural and therefore no substantive Managing Director for Kenya Bureau of Standards.
- Discrimination by the state along ethnic lines is outlawed under section 24 (4) of the constitution and section 7 of the national Cohesion and Integration act.
- That the real facts surrounding the issue (KEBS MD) be made public to diffuse the direction or misdirection in public that ethnic concerns continue to guide governance in this Country.

MIN NO. 149/2010 COMMITTEE RESOLUTIONS

- The Committees mandate on equal opportunity to all Kenyans on gender, race, and disabilities in any appointment to any position in the government to be transparent and equally accessible.
- That the report will form part of the Committees recommendation.
- That the Committee wants to know whether tribalism was there in the appointment of KEBS Managing Director.

MIN NO. 150/2010 ADJOURNMENT

There being no other business for discussion, the Chairman adjourned the meeting at 1:15 P.m.

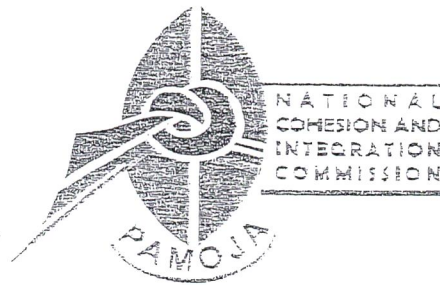
SIGNED: *Aley*

CHAIRPERSON

DATE..... *16/11/2010*



Fact
Finding
Report
on the
KEBS MD
selection



November 2

2010

[The process, issues and recommendations of the Cohesion Commission, following their findings on the MD selection process by the NSC at KEBS.]

Report and
Recommendations

MATTER IN FACT-FINDING

In a Matter of the selection of a new Managing Director for the Kenya Bureau of Standards

Hearings: October 21, 25, 26 and 28, 2010

FACT-FINDING RECOMMENDATION

Appearances By:

Name:	Designation:
Dr. (Eng) Karanja Kibicho	Permanent Secretary, Ministry of Industrialization
Dr. Karanja Thiong'o	Chairman of the NSC Board
Mr. Abdi Duale	Board Member NSC
Mr. Martin Gumo	"
Mr. Francis Odera	"
Mr. Erustus Kimuri	"
Mr. Nderitu Mureithi	Assistant Minister, Ministry of Industrialization
Hon. Henry Kosgei, EGH	Minister for Industrialization
Mr. Julius Koringura	Board Member NSC
Mrs. Mary Ngeny Chepkemboi	"
Mr. John Kaurra	"
Mr. Adan Mohammed	"
Mr. Thomas Bor	"
Mr. Geoffrey Mahinda	"
Mj. Rtd Gabriel Wakasyaka	"
Mr. Josphat Mwaura	CEO, KPMG

1. STATEMENT OF PROCEDURE

- 1.1. This matter arises out of an impasse in the selection process for the Managing Director (MD) of the Kenya Bureau of Standards (KEBS) within the membership of the National Standards Council otherwise also referred to in this report as the Board and the subsequent disagreement between the Minister for Industrialization on the one side, and the Assistant Minister for Industrialization and the Permanent Secretary in the Ministry for Industrialization on the other hand, on the appointment of the new MD. The existing impasse and the public disagreement has led to a public outcry on apparent sustained ethnic overtones in public appointments culminating in receipt of a complaint by the National Cohesion and Integration Commission (NCIC- hereinafter the Cohesion Commission).
- 1.2. Pursuant to the receipt of a complaint the matter was submitted to a Panel of Fact-finders selected by and from among the Cohesion Commission Commissioners to look into the matter. The Panel conducted hearings on October 21, October 25, October 26, and October 28, 2010 in Nairobi, Kenya. During the course of these hearings, the parties had an opportunity to present positions and to tender supportive documentation. At the conclusion of the hearings, the fact-finders deliberated on their individual analysis and opinions of the respective positions presented by the parties who presented at the hearings. The Panel analyzed all the supportive documentation tendered in the course of the fact finding. Having had an opportunity to review the record, the Fact-finders prepared their recommendations which were deliberated at a full Cohesion Commission sitting and final recommendations adopted.
- 1.3. This writing is a reflection of the recommendations adopted by the Cohesion Commission. Either or both divides of the impasse may publicize this report beginning 10 days after it is issued if they wish to do so, and a majority of the Commissioners of the Cohesion Commission agree that this report should be made available to the public.

2. ISSUES

1. Did discrimination along ethnic lines interfere with the MD selection process by the NSC?
2. Was the action by the Minister for Industrialization dictated by ethnic favoritism?
3. Is ethnicity a key issue for consideration in the instance?

3. RELEVANT STATUTORY LANGUAGE

3.1. Fact-finding panel; hearings, investigations and inquiries; powers

The panel shall, within 10 days after its selection, meet with the parties and consider their respective positions. The panel may make additional inquiries and investigations, hold hearings, and take other steps which it may deem appropriate. For the purpose of the hearings, investigations, and inquiries, the panel may issue notices requiring the attendance of witnesses and the production of evidence. The Minister, Assistant Minister, Permanent Secretary, Chairman of the Board and NSC Board members as well as KPMG authorized representatives shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

3.2. Findings of fact and advisory recommended terms of settlement; submission to parties and to public;

The Cohesion Commission shall make findings of fact and make recommendations, which recommendations shall be advisory only. Any findings of fact and recommendations shall be submitted in writing to the parties privately before they are made public. The panel, subject to the direction of the Cohesion Commissioners meeting, may make those findings and recommendations public 10 days thereafter. During this 10-day period, the parties are prohibited from making the panel's findings and recommendations public.

4. BACKGROUND

4.1. Chapter 496 - Standards Act which has 1974-07-12 as its commencement date, is an Act of Parliament to promote the standardization of the specification of commodities, and to provide for the standardization of commodities and codes of practice; to establish a Kenya Bureau of Standards, to define its functions and provide for its management and control; and for matters incidental to, and connected with, the foregoing.....

Section 6 (1) establishes a council of the Bureau by the name of the National Standards Council.

Part (2) of that section states that the Council shall, subject to the provisions of subsection (3), consist of the following members -

- (a) a chairman appointed by the Minister;
- (b) a secretary who shall be the Director of the Bureau;
- (c) not more than seven persons appointed by the Minister who shall be public officers;

(d) not more than eight persons appointed by the Minister who shall possess knowledge of industrial or commercial standards or other matters likely to be of assistance to the Bureau

Section 7 (1) provides that the Council shall have power - (b) to advise and obtain advice from the Minister in regard to any matter within his purview under this Act;
(c) to formulate matters of policy for the purpose of providing general or specific guidance to the Institute for the better performance of its functions under this Act;
(d) to do all things necessary for the better carrying out of the provisions and purposes of this Act except where otherwise provided.

- 4.2. The Kenya Bureau of Standards (KEBS) was established in July 1974. The KEBS Board of Directors is known as the National Standards Council (NSC). It is the policy-making body for supervising and controlling the administration and financial management of the Bureau. The Managing Director is the Chief Executive responsible for the day-to-day administration of the Bureau within the broad guidelines formulated by the NSC. KEBS mission is to provide internationally recognized standards, measurements and conformity assessment solutions that meet customer needs.
- 4.3. On 03 Sep 2009 the then Managing Director KEBS was removed from office in public interest having been accused of inappropriate conduct. Prior to his removal, the NSC/Board had over a long period of time been in the process of negotiating his salary, which was high above the stipulated wage regulations for his position, with the Ministry of State for Public Service (formerly DPM). Upon his removal one..... was appointed acting Managing Director.
- 4.4. On 21st Dec 2009 the Board initiated the process of recruitment of a new MD. The minutes dated 15th March 2010 indicate agreement by the Board to assign the process to an external human resource firm for purposes of transparency and accountability.
- 4.5. KPMG was awarded the contract on the basis of their excellent technical presentation. Their financial bid was rather high as compared to other shortlisted bidders but it was agreed that they depicted the best placed firm to undertake the task.
- 4.6. According to the details contained in the contract dated..... the express conditions were that KPMG shortlist the best 14 candidates and thereafter present 6 names to the NSC Board for interview purposes.

- 4.7. KPMG submitted a list of 14 candidates and as per the terms of the contract the names were coded and only the sex and region of origin were indicated.
- 4.8. In addition, KPMG submitted a list of six candidates and the list was questioned by the NSC Board members. The actual list from KPMG was of four shortlisted names. An additional 2 names were tendered upon the insistence of the Board for comparative purposes. The comparative names were persons who came close to qualifying but for various reasons were deemed unfit for the position, but seeing as the NSC insisted on the contractual obligation that 6 names be submitted, there was need to provide the additional names with the riders.
- 4.9. The Board subsequently was asked by KPMG to accept an amendment to the contractual terms so as to allow KPMG to interview an additional 7 candidates at an extra cost of about half a million Kenya shillings. Internal consultations within KEBS including with the Ministry concluded that no additional candidates be interviewed and that KPMG be asked to submit all the applications they had received to KEBS. A stale-mate arose between KPMG and the Board with the balance of the 60% fee not being offset and the full list of applicants' names never being tendered to the board. The matter remains unresolved to date.
- 4.10. A fresh recruitment process was initiated. This time the Board opted to conduct the interviews themselves. The minutes of the meeting held on 6th August 2010 indicate that a small team in the form of an adhoc committee was tasked with the responsibility of processing the applications, short-listing the best candidates and coding the names of the 15 names short-listed so that full identities of the candidates would remain unknown to the full membership of the Board. A short-listing criterion was also adopted.
- 4.11. Twelve (12) names of candidates applying from outside KEBS were shortlisted. An additional three names of candidates drawn internally (within KEBS) was added to this list so that there was a total of 15 candidates invited for interviews. The Board then developed an interviewing procedure as per minutes dated 7th September 2010. Part of the procedure dictated that the oral interviews conducted by the Board comprise 70% of the marks while written tests to be marked by an external independent marker (selected through consensus at a Board meeting of 15th September 2010) was to form 30 % of the final marks. At this point the adhoc committee that was overseeing the short-listing did note that some of the 3 shortlisted internal candidates had questions around their integrity, but for reasons of staff morale decided to interview them anyway.

- 4.12. Eleven (11) candidates attended the interviews while 4 (four) were unable to turn up on the dates. The interview dates were 14th and 15th September 2010. On the 15th of September at the close of the interviews having tallied all the marks from the oral examiners the candidates were ranked one to eleven according to their scores. At this point only 70% of the agreed total scores had been compiled. The marks from the external examiner were yet to be received.
- 4.13. Until this time, there were no major disagreements within the Board and also with the Ministry which was involved through the at times personal and at times representative representation of the PS at the meetings. At the time when this list of marks as depicting from the oral exams was acceptable to all concerned. The top 5 (five) candidates were identified and all were in agreement that any of the five represented MD material. It is a generally accepted fact by all parties that at this stage the difference in the marks between the top five and the candidate appearing as 6th on the list was wide enough and as such it was not anticipated that once the marks were received from the external examiner there would be a major shift in the lineup as far as the top 5 candidates was concerned.
- 4.14. When the marks from the external examiner arrived later towards the end of the day on the 15th of September, the disagreements among the Board members started. First, some members wanted only the top 5 candidates marks subjected to the external examiners test scores while some felt that all 11 candidates be so subjected. Secondly, the criteria for short-listing the three candidates whose names would then be decoded and submitted to the Minister for him to make the requisite appointment of an MD was not accepted unanimously. Some Board members felt that the top three candidates as per the scores be presented as the list from which the Minister was to make his selection. Other Board members felt that the list of 5 be discussed and all the names be analyzed by the Board before a final list of 3 could be adopted.

5. DISCUSSION

- 5.1. The process of fact-finding in this present matter is a necessary step in the procedure between the parties before either side may endeavor to achieve the ends which they are seeking. One would hope that the parties would view the process of fact-finding as more than simply a step on the road to fostering their stands, even though the results of the fact-finding are merely recommendations. The Fact-finders did make an effort to use the process as a means to offer direction to the parties to reach an agreement during the course of the fact-finding hearings, but it became abundantly clear that the position of either sides were fixed, particularly on the issue of who faulted the agreed/set process. The Fact-finders are preparing this report based on the evidence that was presented and the resolution that the evidence justifies.

- 5.2. Although the first recruitment process through KPMG stalled and did not conclude in presentation of 3 names to the Minister it is relevant in as far as it will either support or disprove allegations that the process has right from the onset been tainted with ethnic overtones aimed at favoring or distancing candidates from a particular community. KPMG was categorical that the NSC members did not make attempts to interfere with the recruitment process. In fact KPMG was impressed at the initial meetings with the members of the Board with whom they interacted and felt that it was a group that they could work with. Two senior officials within KPMG are alleged to have been approached and asked to interfere with the process. These remain allegations as this process could not allow for investigation of the allegation. However, KPMG insist that the candidates' names were never decoded and only the final 6 names submitted to the NSC were revealed. The NSC was categorical that they never did receive the names of the applicants other than the final list of names. It may be difficult to show that the Minister made or did not make any attempts to influence the process. But for the Cohesion Commission what is key is whether there is indication that there was interference to skew the process in favor of or against an ethnic group. Also in issue is whether there was attempt to tilt outcomes in favor of a particular person because of his ethnic group.
- 5.3. It would be safe to infer that the KPMG process had some issues (which could however be explained at a different appropriate forum). The Fact-finders arrive at this guided conclusion based on the fact that there would be need to confirm that the compilation of the lists at any given stage was without interference and was thoroughly completed. The indicator is that the 1st list of 14 names submitted by KPMG had one female candidate from Rift Valley. The second additional list of 7 names had one female candidate from central. The final list of 4 names submitted for interview had one female candidate from Nyanza. This raises the question as to where the final female in the list of four come from as she does not appear to have been in the list of interviewed candidates. As already stated this could probably be explained at another process.
- 5.4. If the Minister had an interest in getting a member of his ethnic community in the final shortlist then it would be safe to assume that he would have been satisfied with the final KPMG list of 4 which had among it a member of the Kalenjin community. However this process was terminated and a fresh process initiated. Thus the question as to whether 'wider' ethnic issues led to the collapse of the first recruitment attempt through KPMG is, on the face of it, an unlikely argument. In deed from the hearings it emerges that the main cause of the breakdown of that contractual relationship was failure by the two parties to conclusively agree on the details around the execution of the process. In relation to the question as to whether there was an attempt to tilt the process in favor of a particular candidate because of his ethnicity, the Fact-finders does not find that this can be substantiated. Although there were allegations of attempts by the Minister to interfere with the process, these attempts were weak at best and were subsequently according to KPMG unsuccessful and did not cause hurdles to the process. KPMG allege that the candidate preferred by the Minister was not shortlisted, neither in the original list of 14 nor in the additional list of 7. The process was generally allowed to proceed smoothly until the final hic cups emerged that led to collapse of that contractual relation.

- 5.5. The issue as to whether ethnicity was in focus at the start of the MD replacement/selection process is not disputed. The existing issues relating to transparency in the governance and management of KEBS was the core reason for the decision to submit the selection process to external expertise. It is also the reason that the names were coded during the 2nd recruitment attempt conducted by the NSC. The NSC did however ask that regions be indicated so that they would be able to ensure that the shortlisted candidates represented the face of the nation.
- 5.6. The point at which the process became flawed is a point in issue particularly so as to determine whether the break in the process was so as to skew the process in favor of a candidate from a particular ethnic community. It is apparent that the Board in its preparation for the interview process during the current recruitment had taken this in account by applying a formula that marks exceedingly above or below the mean mark would be discarded in determining the final score. The Panel determined that this would take care of the any favoritism or attempts to influence the process in any way.
- 5.7. Dissent within the Board started with the selection of the top 5 names to be cut off for subsequent determination of three names for presentation to the Minister. Some members of the Board felt strongly that the marks from the external examiners only be included to the marks of the top 5 candidates of the oral interview. Some Board members were of the opinion that the entire list of 11 candidates be subjected to aggregation after inclusion of the marks from the written test (external) examiner. Although, it is apparent that this in itself was not a major divisive issue of dissent as only candidate number 5 in the list before adding the external examiners marks moved down the list to be replaced by another candidate who was ranked between number 6-11. Majority of the Board members did at that stage agree to retain the list of five from the short-listing of the marks from the oral interviews. Although there are suspicions from both sides of the now split board that there was some interference with the process, the precautionary measures applied were accepted as sufficient to allow continuation.
- 5.8. The major issue of dissent within the Board remains the manner of selecting the top three names for submission to the Minister. Whereas some Board members were of the opinion that the candidates with the top three marks be submitted, others felt that there was need to have the entire five subjected to an agreed upon vetting process to determine the best three names. The proposed criteria for final determination was salary request, integrity report and reference check results. The final selection criterion is not in issue as all parties agreed on this. The issue in contention is whether the entire list of 5 was to be subjected to the scrutiny or only the candidates with the top three marks were to be further scrutinized. It appears to the Panel of Fact-finders that ethnic discrimination was not the main cause of dissent within the NSC at this stage. Was the underlying reason for insistence on applying the final criterion to all five so as to promote the interest of one individual? The answer to this lies in the scrutiny of the character of the individual Board members and their susceptibility to compromise.
- 5.9. On the issue as to whether the Ministers action (in appointing a new MD) was guided by ethnic favoritism either for a particular community or for a particular individual from a

particular ethnic group, the Fact-finders note the Ministers concern (expressed at the hearing) that the position had been unoccupied for almost one year- the period within which it was required that a substantive MD be appointed. The initial process through KPMG scuttled. This process although had been progressing well had hit a deadlock and the board was now split into two opposing sides. Neither side as constituted could procedurally complete the process. The Chairman of the NSC was on the one side with a few members, while the acting Secretary (so selected for purposes of the recruitment process- as the acting MD was a candidate and therefore could not sit through the process) was on the opposing side together with some members. Neither lists; presented by the Chairman and by the dissenting group was a presentation of the NSC as by law and through guidelines should be constituted.

- 5.10. The common factor was that the 5 names were all agreed upon. The proper presentation of the list of 3 names as by law required was in question. Applying the agreed criterion (salary expectation, integrity and reference check), the Minister ticked off names from the list of 5 until he was left with whom he considered the best suited candidate. Did he do so fairly? On the face of it, yes. The issue of the MD's salary had been a major cause of concern during the tenure of the last MD. It would have been irresponsible of the Board to offer a salary that would take them back to that position again. Was his action legally correct? He did not follow the rules to the letter. Should he have tried to reconcile the opposing sides and get them to complete the task at hand rather than hasten to appoint? It is the considered opinion of the Fact- finders that this would have been the best direction to take.

6. EMERGENT DIRECTION

- 6.1. In summary, the Fact-finders conclude that ethnic discrimination either in favor of or against a particular ethnic group or person cannot stand and that the process was largely correct and a very brief portion is left for proper conclusion of the process and that the action of the Minister in appointing a new MD is unlikely to work for the good of this key public institution. Although ethnic concerns subsisted through the process, when agreed upon procedures were adopted and applied, the findings were generally accepted. The Panel recommends procedural conclusion of the process perhaps through the intervention of an independent body (as agreed upon by all parties involved).

7. CONCLUDING REMARKS AND RECOMMENDATIONS

- 7.1. It is no secret that Kenya is a nation largely split along ethnic divisions. Negative ethnic interests led to the almost national breakdown of the governance system in 2008. The need to consciously and actively address negative ethnicity, particularly in access to public resources, was determined through the creation of a permanent commission, the National Cohesion and Integration Commission. The mandate of the Cohesion

Commission comes at an opportune time in the face of the new Constitution which lays emphasis on nation building and good leadership among others so as to promote participation by all. Perception plays a key role in promoting feelings of discrimination along ethnic lines. The hue and cry that the selection of the KEBS MD has created in the recent past indicates the extent to which ethnic consideration to public appointment continues to be an issue of concern and division in Kenya. Other than the complaints submitted to the Cohesion Commission on the issue, the threat it poses in further dividing the nation was reason enough for this fact finding.

7.2. Having considered the facts presented, the following considered recommendations are presented:-

7.2. (i) That the process be allowed to conclude procedurally. The fifteen names shortlisted for interviews be subjected to another interview process by an independent body such as Ministry of State for Public Service (former DPM). It is not necessarily discrimination when a Minister appoints to a senior position a person from his ethnic community. However given the past practices in this regard, the process to such an eventuality must be seen to have been transparent and open. Confidence in the public institutions, particularly one of such importance as the standards body is, must be sustained. Section 73 (1) (a) (iv) of the Constitution provides that the authority assigned to a state officer must promote public confidence in the integrity of the office. Nation building requires that all feel that they can participate in public leadership and that ethnic concerns will not guide their ability or inability to so participate. The NSC process was unanimously accepted and procedurally correct until the point of selection of 15 candidates for interviews. The proposed conclusive process pick up from this point.

7.2.(ii) That rules guide and limit the process of identifying an MD of KEBS and any Chief Executive of a public institution. The availability of avenues to stop and restart the selection process leaves room for manipulation. Discrimination by the state along ethnic lines is outlawed under Section 27 (4) of the Constitution and Section 7 of the National Cohesion and Integration Act. While applying other strategies to cultivate a culture of equality and nationhood, clear procedures must be adopted that will offer a check against the common tendency to discriminate. In addition, the selection process by the Council must be above board so that any of the three names presented to the Minister is generally acceptable as MD.

7.2.(iii) That operative guideline is provided for criteria of person qualified for selection to the boards of public institutions. The boards of public institutions play a key and important in offering direction to the management of these institutions. Persons who hold such positions must be persons of integrity and not susceptible to manipulation. The principles of Section 232 of the Constitution must reflect in such criterion.

7.2. (iv) That the real facts surrounding this issue (KEBS MD selection process) be made public to diffuse the direction or misdirection in public that ethnic concerns continue to guide governance in this country. It is important that public discussions be informed so that the path that the country is adopting of non discrimination along ethnic lines not be skewed by misinformed assumptions.

7.2.(v) That clear guidelines be developed to direct the implementation of action within public institutions to address ethnic representation imbalances in the workforce. Section 7 (2) of the National Cohesion and Integration Act requires than no more than a third of the staff at an institution be from one ethnic group. Kenya must move from having institutions whose workforce appears to represent only one community. However clear mind must be had to the importance that competence plays in ensuring effective execution of the mandate of the institution.

Signatures

Dr. Mzalendo Kibunjia, Chairman

Mary Onyango, Vice Chairperson

Comm. Dr. Ahmed Yassin

Comm. Alice Nderitu

Comm. Fatuma Mohamed

Comm. Halakhe Waqo

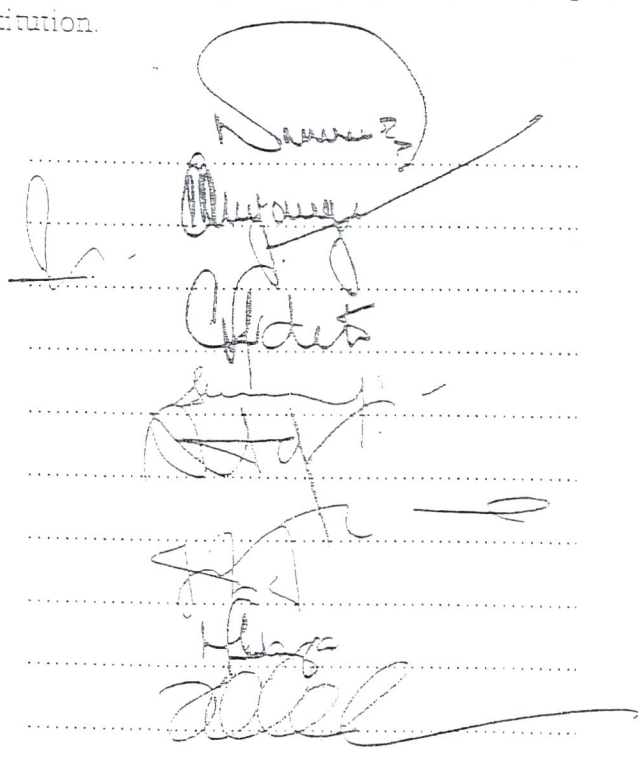
Comm. Jane Kiiano

Comm. Rev. Lawrence Bomet

Comm. Milly Lwanga

Sec. Hassan Mohamed

Date: 2/11/10





KPMG Kenya
Certified Public Accountants
18th Floor, Lonrho House
Standard Street
PO Box 40612 00100 GPO
Nairobi, Kenya

Telephone +254 20 2806000
Fax +254 20 2215695
Email info@kpmg.co.ke
Internet www.kpmg.co.ke

"CONFIDENTIAL & LEGALLY PRIVILEGED"

Hon. Amb. Mohammed Affey
Chairman
Parliamentary Committee on Equal Opportunities
Clerk's Chambers
National Assembly, Parliament Buildings
Nairobi

Our ref: K024/DK95310001/jm/ik

4 November 2010

Dear *Hon. Affey,*

Recruitment of Managing Director of Kenya Bureau of Standards

Further to my appearance before the committee on 28 October 2010, please find the documents requested by the committee confirming:

- 1 The contractual terms under which KPMG was retained by KEBS to provide assistance in the recruitment for the position of Managing Director. Please find attached a copy of the contract and engagement letter, together with the relevant correspondence on contract revision and agreement on report delivery date of 12 July 2010 and contract end date of 22 July 2010.
- 2 That KPMG discharged its responsibilities under the contract and submitted a final report that included four candidates for consideration by the NSC for the position of Managing Director. In addition, we also provided another three candidates and expressly stated that we did not consider these to be qualified for the position. These additional comparison candidates were being provided at the request of the NSC. Attached is a letter from KEBS dated 12 July 2010 which acknowledges receipt of the report, confirms tabling before a meeting of the NSC of 12 July, and adoption of the same. In our view, the recommended candidates represented the diversity of Kenya based on merit.
- 3 That subsequent to the performance and expiry of the contract, KEBS purported to terminate KPMG's contract. Attached are copies of some correspondence between KPMG and KEBS on the purported termination.

In addition the committee also requested evidence of the attempted interference in the recruitment process by the Minister. Attached are two statements signed under oath by our Mrs Josephine Oduor-Mwaniki, the manager responsible for our executive selection services and who was called to a meeting by Mr Isalah Kiplagat. Mr Kiplagat expressly stated that he was representing the Minister in the recruitment of the Managing Director at KEBS. The other statement is from our Mr Richard B Ndung'u, the former CEO and now Tax Partner who was invited to a meeting by the Minister. At that meeting, the Minister stated that he had a candidate interested in the position and proceeded to mention the name of the candidate. This is the name of the individual appointed into the position by the Minister.



I do hope that these will assist the committee in its work. Please do not hesitate to contact me if you require any further clarification.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Josphat Mwaura'.

Josphat Mwaura
Chief Executive Officer and Senior Partner

Enclosures: *As above*



Terms of reference

The terms of reference for this engagement are for KPMG to perform the following:

- Gain a good understanding of KEBS corporate strategy and the strategic initiatives for the Chief Executive Officer role and identify any possible implications for this recruitment;
- Review and update the existing job description for the position;
- Identify the critical job competencies and person specifications for the position as derived from the updated job description;
- Draft an advertisement for consideration and approval by KEBS and advertise in agreed upon media;
- Advertise in the dailies;
- Receive and code all responses to the advertised position;
- Develop an appropriate selection criteria for the position in line with the updated job description;
- Evaluate all applications using the agreed-upon selection criteria;
- Short-list candidates who meet the requirements set out in the selection criteria;
- Send an initial short-list of 8 to 10 candidates to KEBS and agree on the candidates to be interviewed;
- Conduct interviews for the short-listed candidates and identify those that exhibit the requisite knowledge, skills and abilities required for the position;
- Conduct strategy presentations for the candidates further short-listed for the position;
- Administer psychometric testing to the candidates short-listed;
- Prepare and submit to KEBS, a short-list report on the suitability of the recommended candidates for the position;
- Train KEBS Board members for the final interviews and facilitate final interviews by preparing the interview appointments and ensuring that candidates avail themselves for interviews; and
- At the request of KEBS following final selection, conduct reference checks and advise KEBS accordingly on the outcome.

KEBS will be responsible for conducting the final interviews and selection of the final candidate.

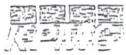
This engagement does not cover any other work relating to other areas other than those expressly covered in our terms of reference above.

Our recommended approach

We set below our approach to assisting KEBS in the recruitment of this position.

Review and update job descriptions

We will conduct a high-level job analysis to confirm the objectives, key responsibilities and person specifications for the position and further update the existing job description received from KEBS.



Competency identification and selection criteria

Competencies are discrete dimensions of behaviour which are relevant for job performance. Thus, competencies deal with behaviours people need to display in order to perform a job effectively. They are a cluster of observable behaviours and actions which can include personality, ability, interest and motivation.

We will:

- Liaise with KEBS to identify the critical job competencies and key skills required to effectively perform in the position;
- Use the Saville & Holdsworth (SHL) competency model to determine the relevant job competencies; and
- Develop an appropriate selection criteria for the position.

The recruitment process

Our recruitment process will involve conducting an assessment centre comprising of the following assessment tools:

- *Competency based interviews* - We shall develop structured competency based interview questionnaires for the initial interviews which will gauge the candidates' technical skills and behavioural competencies with regard to the position. The interviews will be conducted by a panel of KPMG Consultants. This will form the first criteria for further short-listing the candidates who will proceed for further assessments as outlined below.
- *Strategy presentations* - The short-listed candidates will further be required to deliver a presentation to a panel audience on a case study analysis of KEBS to demonstrate their understanding of the challenges currently facing KEBS and their vision and strategy to address these challenges. The structure and content of this assessment will be developed by KPMG based on the strategic objectives of KEBS and will be conducted by KPMG Consultants.
- *Psychometric testing*
 - *Advanced Managerial Ability tests* - these are tests designed to measure current ability and future potential for different types of work skills. The tests we propose to administer will assess verbal and numerical analysis. Verbal and numeric tests measure the ability of the individual to evaluate the logic of various kinds of arguments and the individual's ability to make correct decisions or inferences from numeric data respectively.
 - *The Occupational Personality Questionnaire (OPQ)* - OPQ provides a profile of the candidate's perception of their behaviour at work. By understanding an individual's style, information on how they fit in within certain work environments and teams and how they will cope with different job requirements can be gained. The OPQ will summarise how the candidate's preferred style or typical way of behaving is likely to influence his/her potential on a range of management competencies. These management competencies include Leadership, Planning and organising, Quality orientation and Commercial awareness among others. The competencies provide insight on the candidate's fit to the role with regard to behavioural competencies.



The results of the Occupational Personality Questionnaire and the ability tests will be combined to provide a competency profile for the short-listed candidates. We will match the candidates' results with the competencies identified and this will form the basis of our recommendations.

We shall present to KEBS the results of the assessment and selection sessions in the form of a short-list report on the suitability of the candidates recommended.

Deliverables

The deliverables for this assignment will be as follows:

- A project plan indicating the timeframe within which the recruitment assignment will be conducted;
- An updated job description for the position;
- A draft advertisement for the position to be reviewed and approved by KEBS;
- An initial short-list summary of candidates identified for the position;
- A final short-list report giving a detailed assessment of recommended candidates for consideration by KEBS;
- Final interview timetable; and
- Reference checks for the candidate appointed to the position.

Limitation of scope

For the services described in this engagement, KPMG is unable to proactively source for candidates in a contractual employment relationship with any of our current clients. In addition, KEBS shall be solely responsible for the final selection of the candidate to fill the role.

Timetable

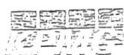
Our project plan will detail the timeframe within which the recruitment process will be conducted. It will take approximately eight weeks from the time we contract until the time you meet the final short-listed candidates. The process shall commence on submission of this signed engagement letter, unless agreed otherwise.

Debriefing

On completion of the engagement, as part of our commitment to the quality of our service, we would welcome the opportunity to receive your views on the work carried out by ourselves and the service delivered. We will contact you in due course in order to make specific arrangements.

Reliance on information provided by Kenya Bureau of Standards

As we have indicated in the terms of reference above, our performance on this engagement shall rely on information provided by KEBS particularly but not limited to an overview of KEBS's operations and strategy and the job profile of the position. You will endeavour to ensure that any information which we may require for the purpose of the engagement is made available to us, as and when we may reasonably require. You agree to keep us regularly informed of any new information or developments of which you are aware which may have a bearing on the provision of this recruitment service by us in connection with our engagement. We shall not be treated as having notice, for the purpose of the engagement, of any information provided by any person to, or known by, any KPMG person other than those individuals directly concerned with



the services to be provided by KPMG Kenya in connection with the engagement. We will not be responsible for loss or damage as a result of information material to our task being withheld or concealed from us or wrongly represented to us.

Fees

Our fee for this recruitment is KShs 1,488,396. This is inclusive of disbursements, psychometric testing and VAT at 16%. In the event that the recruitment is terminated, we would invoice you on the basis of time spent up to that point.

Payment terms

- Mobilisation fee 40%
- Final fee on submission of the final report 60%

The team

Josphat Mwaura	-	Engagement Partner
Josephine Oduor-Mwaniki	-	Lead Consultant
Lydia Gathuge	-	Senior Advisor
Jackline Onchuru	-	Advisor

We shall reasonably endeavour to ensure that individuals identified in this engagement contract as being involved in the services are so involved. However, we may substitute those identified for others of equal or similar skills and experience, should the need arise.

Confidentiality

Our standard internal procedures are designed to ensure that confidential information communicated to us during the course of this assignment will be maintained confidentially. We agree that we will treat as such all confidential information obtained from you and will not disclose such information to others, except to those KPMG Kenya persons engaged in providing services to you, or use such information except in connection with the performance of the services agreed to in this letter.

Deferment condition

Should our recommended candidate be hired by KEBS, (whether it be a firm, company or group), or any of its subsidiaries or associated companies, within 12 months of the original referral date, KPMG Kenya is entitled to the full fee from the client as we are the effective introducing agents and will invoice accordingly.

Use of client name

KEBS authorises KPMG Kenya, or any of the KPMG member firms, to disclose, as evidence of KPMG's client portfolio, the name of KEBS on outgoing KPMG materials.

Restrictive practice

KPMG Kenya will not be restricted or prevented from providing services to other existing or potential clients by virtue of our relationship with KEBS.



Standard terms and conditions

We have included our standard contract terms and conditions in the Appendix of this letter, which form an integral part of this contract.

Conclusion

We thank you for this opportunity to serve KEBS and we look forward to working closely with you and your team to realise the objectives of this assignment.

Please do not hesitate to contact me if you require any additional information or clarification.

Yours sincerely

Joseph Mwaure
Engagement Partner



Appendix: KPMG's standard terms and conditions



These standard terms and conditions apply to services rendered by KPMG to a client pursuant to a letter recording the engagement ("the engagement letter") enclosing these standard terms and conditions or incorporating them by reference.

Definitions

The meanings of the following words and phrases, which are widely used in these standard terms and conditions, shall be as set out below:

Colleagues or a colleague: collectively or individually, KPMG persons and employees who are not members of the engagement team.

Engagement team: collectively or individually, KPMG Persons and employees who are involved in delivering the services.

KPMG or we (or derivatives): The KPMG contracting party as identified by our letterhead.

KPMG persons: The KPMG contracting party, each and all of our partners, directors, employees and agents as the case may be, together with any other body or entity controlled by us or owned by us or associated with us and each and all of its partners, directors, employees and agents and "KPMG person" shall mean any one of them.

Other beneficiaries: Any and each person or organisation whose activities you may control, if any such person or organisation is identified in the engagement letter as a recipient or beneficiary of the services or any product thereof and any and each person or organisation which we and you agree may be so treated.

Services: The services to be delivered by us under the engagement letter.

Services contract: The standard terms and conditions included in this document and any additional terms specified in an engagement letter, together with any documents or other terms applicable to the services to which specific contractual reference is made in the engagement letter.

You (and derivatives): The addressee of the engagement letter.

Service delivery

1. We will seek to ensure that our service is satisfactory at all times and delivered with reasonable skill and care. If at any time you would like to discuss with us how the service can be improved you are invited to telephone the partner or director identified in the engagement letter.
2. The engagement will be governed by (Kenyan) law and jurisdiction.

Our services and responsibilities

3. We may acquire sensitive information concerning your business or affairs in the course of delivering the services ("confidential information"). In relation to confidential information, we shall

comply with the confidentiality standards of our regulatory bodies. We shall also require disclosure to partners/directors and employees who need to know such information to perform KPMG quality performance review process. This clause shall not apply where confidential information enters the public domain or where we may be required to disclose it to our insurers, legal advisers or under legal compulsion.

4. Prior to completion of the services we may supply oral, draft or interim advice or reports or presentations but in such circumstances our written advice or our final written report shall take precedence.
5. We shall not be under any obligation in any circumstances to update any advice, report or any product of the services, oral or written, for events occurring after the advice, report or product concerned has been issued in final form, unless otherwise specifically agreed upon by mutual consent of you and us in the body of the engagement letter.
6. Any product of the services released to you in any form or medium shall be supplied by us on the basis that it is for your benefit and information only or that of the other beneficiaries and that it shall not be copied, referred to or disclosed, in whole (save for your own internal purposes) or in part, without our prior written consent. The services shall be delivered on the basis that you shall not quote our name or reproduce our logo in any form or medium without our prior written consent. You may disclose in whole any product of the services to your legal and other professional advisers for the purposes of your seeking advice in relation to the services, provided that when doing so you inform them that:
 - disclosure by them (save for their own internal purposes) is not permitted without our prior written consent, and
 - we accept no responsibility or liability to them in connection with the services.
7. Any advice, opinion, statement of expectation, forecast or recommendation supplied by us as part of the services shall not amount to any form of guarantee that we have determined or predicted future events or circumstances.

Ownership

8. We shall retain ownership of the copyright and all other intellectual property rights in the product of the services, whether oral or tangible, and ownership of our working papers. For the purposes of delivering services to you or other clients, we shall be entitled to use or develop knowledge, experience and skills of general application gained through performing the services. You agree to keep confidential any methodologies and technology used by us to carry out our services.
9. We have the right to use your name as a reference in proposals or other similar submissions to other prospective clients, unless you specifically forbid such disclosure. If we wish to use details of the work done for you for reference purposes, we will obtain your permission in advance.



Fees

10. We shall render invoices in respect of the services comprising fees, outlays and VAT thereon (where appropriate) ("fees"). Details of our fees and any special payment terms shall be set out in the engagement letter.
11. Our fees are based on the time spent on your affairs by KPMG persons and on the levels of skill and responsibility involved. The fees may differ from estimates that may have been supplied. Stringent reporting requirements or deadlines imposed by you might require work to be carried out at a higher level than usual or outside normal working hours. This may result in increased costs; additional fees may also be as a result of material changes in the services or difficulties in obtaining information which could not reasonably be foreseen.
12. Outlays in respect of travelling expenses, photocopies, stationery, revenue stamps, postage and telephone calls will be recoverable at our predetermined rates.
13. Our fees will be exclusive of VAT, which may qualify for deduction as input tax by registered vendors.
14. In return for the delivery of the services by us, you shall pay our fees (without any right of set-off), on presentation of our invoice. If you are not in agreement with any fee note, please notify us in writing of your objection within 21 working days of our despatch of the fee note. Failure to do so will constitute acceptance of the fee. Approval of financial statements or minutes reflecting our fees will constitute acceptance of the fees, including any over / under provision that does not warrant re-drawing the financial statements.
15. We will be entitled to charge interest (at the maximum rate allowed by law) on all amounts outstanding, for whatsoever reason, for more than 30 days from the date of presentation of our fee note. Such interest will be calculated on a monthly basis. All payments will be allocated first as to interest, then as to outlays then as to the longest outstanding fee.
16. In the event of your appointing another auditor or advisor in our stead, or otherwise terminating our mandate, we will be entitled to raise a fee note upon receipt of such notification for all work done to date and not yet billed, at our standard charge-out rates, including disbursements incurred. In such event, you undertake to settle our account in full prior to our handing over books and records to you or to our successor.

Your responsibilities

17. You shall retain responsibility and accountability for:
 - the management, conduct and operation of your business and affairs
 - any representations made by the company to third parties including published information
 - the maintenance of the accounting records, the preparation of the annual financial statements and the safeguarding of the assets

- the adopted policies and prescribed procedures are adhered to for the prevention of errors and irregularities, including fraud and illegal acts
- the use of, extent of reliance on or implementation of advice or recommendations supplied by us or other product of the services
- making any decision in respect of the services delivered or any use of the product of the services
- the delivery, achievement or realisation of any benefits directly or indirectly related to the services that require implementation by you.

Information

18. To enable us to perform the services, you shall use your best endeavours to procure and supply promptly all information and assistance and all access to documentation in your possession, custody or under your control and to personnel under your control where required by us. You shall inform us of any information or developments which may come to your notice and which might have a bearing on the services.
19. We may rely on any instructions or requests made or notices given or information supplied, whether orally or in writing, by any person whom we know to be or reasonably believe to be authorised by you to communicate with us for such purposes ("an authorised person"). We may communicate with you by electronic mail where an authorised person wishes us to do so, on the basis that in consenting to this method of communication, you accept the inherent risks (including the security risks of interception of or unauthorised access to such communications, the risks of corruption of such communications and the risks of viruses or other harmful devices) and that you shall perform virus checks.
20. We may receive information from you or from other sources in the course of delivering the services and:
 - we shall consider the consistency and quality of information received by us
 - we shall not seek to establish the reliability of information received by us
 - we shall not be liable to you for any loss or damage suffered by you arising from fraud, misrepresentation, withholding of information material to the services or other default relating to such material information, whether on your part or that of the other information sources
21. We will not be responsible for loss or damage arising as a result of information material to the engagement being withheld or concealed from us or wrongly represented to us provided that this clause shall not exclude liability, subject to the maximum limits set out in clause 30, if enquiries which we ought reasonably to have made in the course of our work under this engagement would have made us aware of the deficiencies in such information.



Knowledge and conflicts

22. The engagement team shall not be required, expected or deemed to have knowledge of any information known to colleagues which is not known to them personally or be required to obtain such information from colleagues. The engagement team shall not be required to make use of or to disclose to you any information, whether known to them personally or known to colleagues, which is confidential to another client.
23. We or other KPMG persons may be approached to advise another party or parties who are in dispute with you, or to advise or represent the interests of a party or parties whose interests are opposed to yours through their material concern in matters to which the services are specifically and directly related ("adversarial conflicts"). We seek and shall continue to seek to identify adversarial conflicts. If you know or become aware of any which may arise, you shall inform us promptly.
24. We shall not accept an engagement which may give rise to an adversarial conflict for the engagement team. Colleagues may accept such an engagement where appropriate and where effective barriers exist to prevent the flow of confidential information from the engagement team to colleagues and from colleagues to the engagement team. We may accept such an engagement only when the adversarial conflict is disclosed to all the parties involved and their consent is obtained.
25. We or other KPMG persons may be approached to advise another party or parties where there is no adversarial conflict but whose interests compete with yours specifically and directly in relation to the subject-matter of the services ("competing party" or "competing parties"). We seek and shall continue to seek to identify competing parties. If you know or become aware that a KPMG person is advising or proposing to advise a competing party, you shall inform us promptly. In such situations we take appropriate measures to ensure that strict confidentiality is maintained in all respects.
26. Where a party being advised by us, has been identified by us or notified by you as a competing party, we shall activate appropriate barriers and when operating we shall be entitled to advise the competing party concerned at any time and in any capacity (save in relation to an adversarial conflict). We will write to you with the detail of the potential adversarial conflict and how this will be approached either before we commence work in accordance with these standard terms and conditions or during the engagement.
27. Where a party has engaged us to advise it, we may consider that, even with barriers operating, your or the other party's interests are likely to be prejudiced and we may not be satisfied that the situation can be managed. In that event, we may have to terminate the services contract and we shall be entitled to do so on notice, taking effect immediately. We shall consult you before we take that step. We shall not be responsible for any costs that you may incur in securing other professional services.

The services contract

28. The services contract sets out the entire agreement and understanding between us in connection with the services. Any modifications or variations to the services contract must be in writing and signed by an authorised representative of each of us. No variation of the terms and conditions of the engagement will be of any force or effect unless reduced to writing and signed by all of the signatories thereto. In the event of any inconsistency between the engagement letter and any other elements of the services contract, the engagement letter shall prevail. In the event of any inconsistency between these standard terms and conditions and additional terms that may apply, the additional terms shall prevail.

Third party rights

29. The services contract shall not create or give rise to, nor shall it be intended to create or give rise to, any third party rights.

Circumstances beyond your or our control

30. Neither of us shall be in breach of our contractual obligations nor shall either of us incur any liability to the other if we or you are unable to comply with the services contract as a result of any cause beyond our or your reasonable control. In the event of any such occurrence affecting one of us, that one shall be obliged as soon as reasonably practicable to notify the other, who shall have the option of suspending or terminating the operation of the services contract on notice taking effect immediately on delivery.

Waiver, assignment and sub-contractors

31. Failure by any one of us to exercise or enforce any rights available to us shall not amount to a waiver of any rights available to either of us.
32. Neither of us shall have the right to assign the benefit or burden of the services contract without the written consent of the other of us.
33. We shall have the right to appoint sub-contractors to assist us in delivering the services as members of the engagement team, but we shall consult you before doing so.

Exclusions and limitations on our liability

34. The maximum liability of KPMG or any individual partner, director, or employee, as the case may be, of the KPMG contracting party or of any body or entity controlled by us or owned by us or associated with us in respect of direct economic loss or damage suffered by you or by other beneficiaries arising out of or in connection with the services, shall be limited to the fees charged and paid for these services. The maximum liability shall be an aggregate liability for all claims arising, whether by contract, delict, negligence or otherwise.
35. In the particular circumstances of the services set out in the engagement letter, the liability to you and to other beneficiaries of each and all KPMG persons in contract or tort or under statute or otherwise, for any indirect or consequential economic



loss or damage (including loss of profits) suffered by you (or by any such other party) arising from or in connection with the services, however the indirect or consequential economic loss or damage is caused, excluding our willful misconduct, shall be excluded to the extent that such limitation is permitted by law.

36. You and other beneficiaries shall not bring any claim personally against any individual partner, director, employee or agent, as the case may be, of the KPMG contracting party or of any body or entity controlled by us or owned by us or associated with us in respect of loss or damage suffered by you or by other beneficiaries arising out of or in connection with the services. This restriction shall not operate to limit or exclude the liability of the KPMG contracting party as a company for the acts or omissions of its partners, directors, employees and agents. Any claim from you or other beneficiaries must be made within two years of the date on which you or they became aware, or ought reasonably to have become aware, of circumstances giving rise to a claim or potential claim against us.

Third parties

37. You shall indemnify any KPMG persons and hold us harmless against any loss, damage, expense or liability incurred by them or us as result of, arising from or in connection with a combination of the following two circumstances:
- any breach by you of your obligations under the services contract and
 - any claim made or threatened by a third party or any other beneficiaries which results from or arises from or is connected with any such breach.

Termination

38. Each of us may terminate the services contract or suspend its operation by giving due notice in writing to the other at any time. Termination or suspension under this clause shall be without prejudice to any rights that may have accrued for either of us before termination or suspension and all sums due to us shall become payable in full when termination or suspension takes effect. We will be entitled to raise a fee note upon receipt of such notification for an amount adequate to cover all work done to date and not yet billed including disbursements incurred.
39. The following clauses of these standard terms and conditions shall survive expiry or termination of the services contract: clauses 1, 3, 4, 5, 7, 16, 19, 21, 24, 25, 26, 27, 28, 30, 31, 32, 34, 35, 39, 40 and 41.

Severability

40. Each clause or term of the services contract constitutes a separate and independent provision. If any of the provisions of the services contract are held by any court or authority of competent jurisdiction to be void or unenforceable, the remaining provisions shall continue in full force and effect.

Capacity

41. You agree to and accept the provisions of the services contract on your own behalf and as agent for other beneficiaries. You shall procure in such circumstances that any other beneficiaries shall act on the basis that they are a party to the services contract, as if they had each signed a copy of the engagement letter and agreed to be bound by it. However, you alone shall be responsible for payment of our fees.
42. Your signature constitutes agreement to settlement of any dispute, controversy or claim by arbitration. The arbitration shall be held before a single arbitrator who is knowledgeable in legal procedures, the rules of evidence and similar engagements. The arbitrator shall be a person nominated by you and us or failing agreement between you and us within 7 days after the arbitration has been demanded, shall be a person appointed by the Chairman of the Institute of Arbitrators, including any applicable statutes or limitation and rules of evidence. The arbitrator shall deliver a written opinion setting forth findings of fact, conclusions of law and the rationale for the decision. Any opinion entered as a final judgement will be final and binding on both parties.

Staff

43. Our staff undergo periodic training and this, together with the taking of annual leave, may lead to staff turnover and lack of continuity. We will use our best endeavours to avoid any disruption to an engagement's progress.
44. You agree not to make any offer of employment or to employ any member of KPMG staff working on an assignment with yourselves. You also agree not to employ such a person or use such a person's services as a consultant either independently or via a third party for a period of 6 months following the end of any involvement by the individual concerned with any assignment for yourself without our consent.



Kenya Bureau of Standards
Quality products for quality life

KEBS Head Office
P.O. Box 04974, Nairobi 00200
Tel: +254 (0) 20 6068490, 8008500
Mobile: 0722 262 157/8,
0784 800 471/2
Fax: +254 (0) 20 6009 660
Direct Dial: +254 (0) 20 654 8000
E-mail: info@kebs.org
Web: <http://www.kebs.org>

REF: KEBS/CONF./MD/00/2/18

Date: 2010-07-27

Josephat Mwaura
Senior Partner and CEO
KPMG
P.O. Box 40612 - 00100
NAIROBI

Rec'd 23/7

Dear *Josephat,*

RE: TERMINATION OF THE CONTRACT BETWEEN KEBS AND KPMG

KEBS Coast Region
P.O. Box 98371, Mombasa 80100
Tel: +254 (0) 41 2317050, 223093938/40
Fax: +254 (0) 41 229 448
E-mail: kebs-msa@kebs.org

KPMG was engaged by the National Standards Council (NSC) to carry out the recruitment of the Managing Director for Kenya Bureau of Standards (KEBS). A formal contract was executed between KEBS and KPMG dated 16th March, 2010.

KEBS Lake Region
P.O. Box 2648, Kisumu 40100
Tel: +254 (0) 57 202 6396, 202 9549
Fax: +254 (0) 57 202 7814
E-mail: kebs-kisumu@kebs.org

Prior to the signing of the contract, a meeting was held between KPMG and the NSC on 14th March, 2010 whereat clear deliverables and project plan were agreed.

KEBS Rift Valley Region
P.O. Box 2138, Nakuru 20100
Tel: +254 (0) 51 221 0533/6, 221 1208
Fax: +254 (0) 51 221 0078
E-mail: kebs-nakuru@kebs.org

You were to proceed and carry out the recruitment process based on the agreed timelines and deliverables.

The NSC considered your report at its meeting held on 19th July, 2010 and noted that the same was not in accordance with the agreed deliverables in several instances. The instances were communicated to you in our letter dated 19th July, 2010 and you were given a chance to respond.

KEBS N. Kavira Region
P.O. Box 1790, Nyeri 10100
Tel: +254 (0) 51 203 1410/1
Fax: +254 (0) 51 203 2038
E-mail: kebs-nyeri@kebs.org

You responded on 21st July, 2010. The NSC met on 23rd July, 2010 and considered your response.

Having considered your response the NSC concluded that you had failed to deliver on your contractual obligations as agreed and resolved to terminate the contract between KEBS and KPMG.

KEBS North Eastern Region
P.O. Box 976, Garsia 70100
Tel: +254 (0) 46 2515
Fax: +254 (0) 46 3498
E-mail: kebs-garsia@kebs.org

This letter serves to communicate the termination of the contract in accordance with Clause 13.

Without prejudice to our right to claim all material received in regard to the exercise and in view of your claim of ownership of the same, you are advised to keep them in safe custody without any alteration whatsoever pending resolution of the matter and for the future accountability of KEBS to the Government of Kenya, the people of Kenya and for the ends of justice.

You will be informed of further developments in regard to the decision taken.

Yours sincerely,

Dr. Haranja Thiong'o
CHAIRMAN
NATIONAL STANDARDS COUNCIL



Kenya Bureau of
Standards

Quality products for quality life

Date: 2010-07-12

REF: KEBS/CONF./MD/00/2

KEBS Head Office
P. O. Box 54974, Nairobi 00200
Tel: +254 (0) 20 605490, 605506,
Mobile: 0722 202 107/6,
0734 500 471/2
Fax: +254 (0) 20 609 660
Direct Dial: +254 (0) 20 694 8000
E-mail: info@kebs.org
Web: http://www.kebs.org

Josephat Mwaura
Senior Partner and CEO
KPMG
P.O. Box 40612 - 00100
NAIROBI

Dear Josephat

RE: RECRUITMENT AND SELECTION OF MANAGING
DIRECTOR

KEBS Coast Region
P. O. Box 88376, Mombasa 80100
Tel: +254 (0) 41 2217050, 2230939/38/40
Fax: +254 (0) 41 229 448
E-mail: kebs-msa@kebs.org

I refer to your letter Ref. K024.0K95810001/jlm/jo dated 12th
July, 2010 regarding the above subject.

KEBS Lake Region
P. O. Box 2949, Kisumu 40100
Tel: +254 (0) 57 202 839, 202 9549
Fax: +254 (0) 57 202 7814
E-mail: kebs-kisumu@kebs.org

This is to confirm receipt of the final report containing the list of
shortlisted candidates and their profiles.

KEBS Rift Valley Region
P. O. Box 2136, Nakuru 20100
Tel: +254 (0) 51 221 0563/5, 221 1208
Fax: +254 (0) 51 221 0075
E-Mail: kebs-nakuru@kebs.org

The report was tabled at the National Standards Council (NSC)
meeting held on the same day and the same was adopted. The
NSC is planning to carry out the interviews as scheduled. In the
meantime however, the NSC has directed that you submit the
list of all the applicants together with the applications to my
office on or before 14th July, 2010.

Yours sincerely,

KEBS Mt. Kenya Region
P. O. Box 1790, Nyeri 10100
Tel: +254 (0) 51 203 1410/1,
+254 (0) 51 203 2036
E-mail: kebs-nyeri@kebs.org

Dr. Karanja Thiong'o
CHAIRMAN
NATIONAL STANDARDS COUNCIL

KEBS North Eastern Region
P. O. Box 576, Garsisse 70100
Tel: +254 (0) 46 2519
Fax: +254 (0) 46 0453
E-mail: kebs-garsisse@kebs.org



Kenya Bureau of Standards
Quality products for quality life

CONFIDENTIAL

KEBS Head Office
P. O. Box 64974, Nairobi 00200
Tel: +254 (0) 20 6005490, 6005506,
Mobile: 0722 202 137/8,
0704 600 471/2
Fax: +254 (0) 20 6009 660
Direct Dial: +254 (0) 20 694 8000
E-Mail: info@kebs.org
Web: http://www.kebs.org

REF: KEBS/CONF/JMD/00/2

Date: 2010-07-05

Josephat Mwaura
Senior Partner and CEO
KPMG
P.O. Box 40612 - 00100
NAIROBI

Dear *Josephat*

RE: PROVISION OF HUMAN RESOURCE CONSULTANCY SERVICES TO
KENYA BUREAU OF STANDARDS

KEBS Coast Region
P. O. Box 99376, Mombasa 80100
Tel: +254 (0) 41 2217050, 2230339/3340
Fax: +254 (0) 41 229 448
E-mail: kebs-mbs@kebs.org

Further to your letter dated 5th July, 2010 and our subsequent discussions over the invoice and the extension time line, the NSC is obligated to pay the 40% invoice and will do so as early as possible. The NSC members agreed to change the timelines as follows:

KEBS Lake Region
P. O. Box 2949, Kisumu 40100
Tel: +254 (0) 57 202 9396, 202 9549
Fax: +254 (0) 57 202 7814
E-mail: kebs-kisumu@kebs.org

Key Activity	Date	Detailed Activity	Responsibility
Submit report	12 th July 2010 at 2.30 p.m.	Submit report with results and files to the NSC	KPMG
Final Interviews	19 th /20 th July 2010	NSC interview panel training and final interview and selection of candidates	KPMG/NSC
Engagement Closure	22 nd July 2010	Submit engagement closure letter to KEBS	KPMG
		Schedule client satisfaction meeting	KEBS and KPMG

KEBS Rift Valley Region
P. O. Box 2138, Nakuru 20100
Tel: +254 (0) 51 221 0553/5, 221 1206
Fax: +254 (0) 51 221 0078
E-Mail: kebs-nakuru@kebs.org

Kindly note the agreed changes and work towards successful completion of the project.

Yours *sincerely*

Dr. Karanja Thiong'o
CHAIRMAN
NATIONAL STANDARDS COUNCIL

KEBS Mt. Kenya Region
P. O. Box 1790, Nyeri 10100
Tel: +254 (0) 51 200 1410/1
Fax: +254 (0) 51 200 2036
E-Mail: kebs-nyeri@kebs.org

KEBS Horn Eastern Region
P. O. Box 878, Garissa 70100
Tel: +254 (0) 40 2513
Fax: +254 (0) 40 3455
E-Mail: kebs-garissa@kebs.org



Kenya Bureau of Standards
Quality products for quality life

Josephat
No Disturbance

KEBS Head Office
P. O. Box 54574, Nairobi 00200
Tel: +254 (0) 20 6005450, 6005506,
0734 500 471/2
Fax: +254 (0) 20 6005 660
Direct Dial: +254 (0) 20 694 8000
E-Mail: info@kebs.org
Web: http://www.kebs.org

Ref: KEBS/ CONF/NSC/1A/3

Date: 2010-06-29

Mr. Josephat Mwaure
Senior Partner and CEO
KPMG
P.O. Box 40612 - 00100
NAIROBI

KEBS Coast Region
P. O. Box 98375, Mombasa 80100
Tel: +254 (0) 41 2317050, 2290939/38/40
Fax: +254 (0) 41 229 448
E-mail: kebs-mse@kebs.org

Dear *Josephat*

**PROVISION OF HUMAN RESOURCES CONSULTANCY SERVICES
TO KEBS**

Please refer to our telephone conversation on Monday 28th June 2010 based on your letter, dated 22nd June 2010.

As noted, your work plan did not concur with that in the offer letter and therefore was not agreed to by ourselves, as the reply suggests. As explained, the board needs time to audit the process undertaken by you in order to arrive at the six candidates.

Given your sentiments on this issue, let us have your final report and all the application files by 6th July 2010, so that your training program can take place on your suggested date of 13th July 2010.

Please note that this is the last extension of the work plan.

Yours Sincerely,

Dr. Haranja Thiong'o (MENAS)
CHAIRMAN, NSC

KEBS Lake Region
P. O. Box 2945, Kisumu 40100
Tel: +254 (0) 57 222 8395, 222 9549
Fax: +254 (0) 57 222 7814
E-mail: kebs-kisumu@kebs.org

KEBS Rift Valley Region
P. O. Box 2138, Nakuru 20100
Tel: +254 (0) 51 221 0553/5, 221 1208
Fax: +254 (0) 51 221 0076
E-mail: kebs-nakuru@kebs.org

KEBS Mt. Kenya Region
P. O. Box 1790, Nyeri 10100
Tel: +254 (0) 61 200 1410/1
Fax: +254 (0) 61 200 2038
E-mail: kebs-nyeri@kebs.org

KEBS North Eastern Region
P. O. Box 671, Garissa 70100
Tel: +254 (0) 48 2519
Fax: +254 (0) 48 3455
E-mail: kebs-garissa@kebs.org

Dr Karanja Thiong'o
The Chairman
National Standards Council
Kenya Bureau of Standards (KEBS)
KEBS Centre, Poyo Road
Nairobi

Our ref: K024/DK95310001/jim/jc

29 July 2010

Dear

Consultancy services for the recruitment of KEBS Chief Executive

We are in receipt of your letter dated 27 July 2010 which was delivered to our office on 28 July inst. Your letter purports to terminate the contract ostensibly because we "failed to deliver on our contractual obligations" but does not point out the specific clauses of the contract that we are in breach of. We would like to bring to your attention that the contract had already expired at the time of termination and we had already performed our services in accordance with the contractual obligations, and submitted our final fee note. For the avoidance of doubt, we set out below the chronology of events relating to this contract:

- KPMG submitted a proposal for the services in January 2010 and vide your letter dated 22 January 2010, KEBS informed us that our Technical proposal had met the minimum requirements and vide your letter dated 16 February 2010, KEBS invited us to commence negotiations;
- Following the successful conclusion of negotiations, we submitted an engagement letter to KEBS setting out the specific terms of engagement and executed a contract on 16 March 2010;
- Specifically, the engagement letter which formed an integral part of the contract, set out the scope of our work within the terms of reference and the deliverables under this engagement together with the standard terms that govern our work. These were accepted by the NSC as part of the contract under clause 14;
- The assignment commenced on 19 March 2010 with an initial completion date of 21 May 2010. However, due to the delays occasioned by consultations within the NSC, KEBS communicated extension of the delivery dates to 12th July for submission of our report and 22 July 2010 as the closure date (copy letter attached);
- As communicated in various correspondence, the NSC has been involved throughout this engagement, either directly or through its appointed representative, and in particular has:
 - Approved the job description including the qualifications and competencies that were to form the basis of the selection process (copy of approved JD attached)
 - Approved the position specification to be included in the advertisement (copy attached)

Handwritten signature and initials at the bottom of the page. The signature is a stylized, cursive name, and the initials 'KS' are written to the left of it.

- Approved the application review criteria which formed the basis of the review of the applications received (copy attached)
- Approved the short-list report dated 5 May which set out the basis for short-listing. This report included the candidates who had qualified within the limits of the contract, together with additional candidates who had met the minimum criteria and whom we had asked the NSC to consider together with the attendant cost implications.
- The NSC had initially provided verbal approval of the additional candidates but this decision was subsequently reversed at the eleventh hour necessitating a cancellation of the interviews. Vide our letter dated 27 May 2010, we expressed our concern at the delay by the NSC to provide guidance to enable the process to move forward. The final approval of the short-list was only received on 16 June 2010 (copy attached).
- KPMG conducted the interviews, strategy presentations and psychometric testing and submitted the final report to the NSC on 12 July 2010 in accordance with the contract. Vide its letter dated 12 July 2010, the NSC confirmed receipt of the final report and that the report had been tabled before the NSC on the same day and the same adopted (copy letter attached).
- Subsequent to the adoption of the report by the NSC, we agreed with you that the training for the NSC as well as commencement of interviews will be on 19 and 20 July 2010 and we proceeded to arrange interviews with the candidates on this basis. However, on 15 July 2010 (copy of letter attached), you communicated that the training and interviews could not proceed as you needed to make further consultations with the NSC. In our conversation that afternoon, I expressed our disappointment with this last-minute cancellation once again and reiterated that this would have a negative impact on the selection process and the role of the NSC. As this was a matter out of our control, we left the rescheduling of the training to the NSC at their convenience and confirmed that we had discharged our responsibilities under the contract.
- Following the confirmation of receipt, review and adoption of our final report by the NSC, we submitted our final fee note which remains unpaid.


From the foregoing, it is clear that KPMG has discharged its responsibilities under the contract and KEBS cannot purport to terminate a contract that has already been performed and expired on 22 July 2010. We encourage you to seek legal advice from the Government's chief legal advisor to avoid falling foul of the law and causing the Government and the people of Kenya to incur any unnecessary costs. In particular, we would like to draw to your attention to Section 70 of the Public Procurement and Disposal Act as some of the requests made by NSC may be in contravention of this section.

The payments under the contract are now due and payable. The first payment was due at commencement and this was only paid after considerable delay contrary to clause 3(iii) of the contract thereby occasioning KEBS and the Government to incur an unnecessary interest expense as stipulated in clause 3(iii). The interest amounts due under that clause remain unpaid to date. Our final fee should also be paid on or before 20 August 2010 to avoid incurring any unnecessary interest expense under the terms of the contract.

In conclusion, we reiterate that we have fully discharged our responsibilities as previously confirmed by the NSC in writing and intend to vigorously pursue our rights under the contract. We are open to dialogue with the NSC to demonstrate our performance under the contract and look forward to receiving final payment by the due date.

Yours sincerely

Josphat Mwaura
Chief Executive Officer and Senior Partner



3

347

INTERNAL MEMO



MINISTRY OF INDUSTRIALIZATION

From: Hon. Minister
To: PS
Date: 23rd September, 2010

RE: RECRUITMENT OF MANAGING DIRECTOR - KEBS

I am in receipt of the Adhoc Committee report on the recruitment of the Managing Director of Kenya Bureau of Standards (KEBS).

From the report and what I have been able to gather on my own it would appear that there has been no final vetting of the final five (5) candidates.

However, the following is what can be concluded from the results of the five:-

- 1) Abdi Kadir Omar Aden - KEBS 039, Marks 65%. The fact that he wants to take a salary cut is suspicious.
- 2) Eva Adegga Oduor - KEBS 016, Marks 66%. Currently working with KEBS. Associated with the former Managing Director.
- 3) John Mtuta Mruttu - KEBS 019, Marks 64% wants too high a salary of 1.32 m.
- 4) Joseph K. Kosgey - KEBS 011, Marks 62%. Appears to have strong financial management base.
- 5) Eng. Michael Ochieng Owino - KEBS 025, Marks 53%. The score of 53% is too low.

From the foregoing, it would appear by elimination, the most suitable candidate is Joseph K. Kosgey.

I therefore appoint him the Managing Director of Kenya Bureau of Standards (KEBS) with immediate effect.


HON. H.K. KOSGEY
MINISTER

INTERNAL MEMO

**ADHOC -COMMITTEE'S REPORT ON THE RECRUITMENT OF MANAGING
DIRECTOR KENYA BUREAUS OF STANDARDS**

Background

The National Standards Council of Kenya Bureau of Standards advertised for the post in all the daily newspapers. The closing date for the applications was indicated as 2nd September, 2010.

A total of 74 applicants were received. The National Standards Council appointed an Adhoc Committee to shortlist the applicants as per the indent and the agreed criteria. From the applicants, a shortlist of 15 applicants was presented to the National Standards Council by the Adhoc Committee. The 15 shortlisted applicants were invited to the interview. However, 4 of the shortlisted applicants did not present themselves for interviewing.

The Adhoc Committee who did the shortlisting in consultation with the NSC decided to include the three (3) serving KEBS directors who had also applied for the post, purely for purposes of transparency and comparisons of candidates.

The National Standards Council interviewed the 11 candidates over 3 days (13th, 14th and 15th of September, 2010) which resulted in a final list of 5 qualified candidates and they were to be vetted to get the best three (3). However, the Chairman made a ruling that the first three be picked according to marks scored, not according to the vetting criteria as earlier agreed, on the 15th September, 2010.

The list of the 5 candidates is as follows:

1. KEBS 039	-	Marks	<u>70%</u>	- Abdi Kadir Omar Aden	
2. KEBS 016	-	Marks	<u>66%</u>	- Eva Adega Oduor	<u>ADHOC</u>
3. KEBS 019	-	Marks	<u>64%</u>	- John Mtuta Mruttu	
4. KEBS 011	-	Marks	<u>62%</u>	- Joseph K. Kosgey	
5. KEBS 025	-	Marks	<u>55%</u>	- Eng. Michael Ochieng Owino	

On the 15th of September, 2010, the National Standard Council met and picked 3 candidates based on the marks scored as above and listed below:-

1. KEBS 039	-Abdi Kadir Omar Aden	- Salary requested Ksh.900.000
2. KEBS 016	- Eva Adega Oduor	- Salary requested Ksh.700.000
3. KEBS 019	- John Mtuta Mruttu	- Salary requested Ksh.1.32M, a 10% increase.

Copies of their academic, professional and testimonials are hereby attached

From: Adhoc-Committee

AGREEMENT

BETWEEN

KENYA BUREAU OF STANDARDS

AND

KPMG KENYA

This Agreement, (hereinafter called "the Contract") is entered into this 16th March, 2010 by and between Kenya Bureau Of Standards of P.O Box 54794-00200 Nairobi Kenya (hereinafter called "the Client) of the one part and KPMG Kenya of P.O Box 40612-00100 Nairobi Kenya (hereinafter called "the Consultant") of the other part.

WHEREAS the client wishes to engage the Consultant to perform the services set out herein (hereinafter referred to as "the Services"), and

WHEREAS the Consultant is willing to perform the said Services,

NOW THEREFORE THE PARTIES hereby agree as follows:

1. Services
 - (i) The Consultant shall perform the Services specified under Section V: Terms of Reference contained in The Request For Quotation For Consultancy Services For Recruitment Of Chief Executive Officer For Kenya Bureau Of Standards: RFP NO: KEBS/HQS/0132/2009/2010 ("the bid document") which document is made an integral part of this contract.
 - (ii) The Consultant shall provide the personnel listed as the "Consultant's Personnel", to perform the Services.
 - (iii) The Consultant shall submit to Client the reports as specified in the consultant's technical proposal under the title "Activity (work) schedule"
 - (iv) The Contractor shall provide a schedule of activities which is hereby adopted as an annex to this contract and which shall set out the activities to be undertaken and the time lines thereof
2. Term

The Consultant shall perform the Services during the period commencing on 15th March 2010 and continuing through to 21st May 2010 or any other period(s) as may be subsequently agreed by the parties in writing.
3. Payment
 - i) For Services rendered pursuant, the client shall pay the Consultant an amount not to exceeding Kshs.1, 488,396 (Kenya Shillings One Million Four Hundred Eighty Eight Thousand, Three Hundred Ninety six) plus 16% VAT. This amount has been established based on the understanding that it includes all of the Consultant's costs and profits as well as any tax obligation that may be imposed on the Consultant.
 - ii) The schedule of payments is specified below:
 - 40% on signing of the agreement; and
 - 60% upon the client's receipt of the final report, acceptable to the client.
 - iii) Payment shall be made in Kenya Shillings unless otherwise specified not later than thirty (30) days following submission by the Consultant of invoices in duplicate to the client. If KEBS has delayed payments beyond thirty (30) days after the due date hereof, simple interest shall be paid to the Consultant for

each day of delay at a rate three percentage points above the prevailing Central Bank of Kenya's average rate for base lending.

4. Project Administration
- A. Coordinator
- KEBS designates J. B. Kalo as Client's Coordinator. The Coordinator will be responsible for the coordination of activities under this Contract and for receiving and approving invoices for payment.
- For purposes of acceptance and approval of reports under this contract, the client hereby designates Dr. Jacinta Wasike who shall be responsible for the acceptance and approval of the reports and of other deliverables.
- B. Reports
- The reports listed in "Consultant's Reporting Obligations," shall be submitted in the course of the assignment and will constitute the basis for the payments.
5. Performance Standards
- The Consultant undertakes to perform the Services with the highest standard of professional and ethical competence and integrity. The Consultant shall promptly replace any employees assigned under this Contract that the client considers unsatisfactory.
6. Confidentiality
- The Consultant shall not, during the term of this Contract and within two years after its expiration, disclose any proprietary or confidential information relating to the Services, this Contract or the client's business or operations without the prior written consent of the client. Provided that this clause does not include any information which:
- is or hereafter becomes generally known to the public except by reason of breach by the Consultant;
 - was available to the Consultant on a non-confidential basis prior to the time of its disclosure by the Client;
 - is disclosed by an independent third party with a right to make such disclosure;
 - the Consultant is required to disclose it to its insurers, legal advisers or under legal compulsion;
 - The Consultant is required to disclose to its partners/directors and employees who need to know such information to perform its normal review processes.
7. Ownership of
- Material
- Any studies, reports or other material, graphic, software or otherwise prepared by the Consultant for the client under the Contract shall belong to and remain the property of the client. The consultant shall retain ownership of the copyright and all other intellectual property rights in the products of the services, whether oral or tangible. Methodologies and technology used by the consultant to carry out the services shall remain the intellectual property of the consultant.
- prepared by the Consultant for the client under the Contract shall belong to and remain the property of the client. The Consultant may retain a copy of such documents and software.

8. Consultant Not to be engaged in certain activities
- The Consultant agrees that during the term of this Contract and after its termination the Consultant and any entity affiliated with the Consultant shall be disqualified from providing goods, works or services (other than the services and continuation thereof) for any project resulting from or closely related to the services. Provided that the Consultant shall not be prohibited from providing such other services to the Client if procured competitively and in accordance with the applicable law.
9. Insurance
- The Consultant will be responsible for taking out any appropriate insurance coverage.
10. Assignment
- The Consultant shall not assign this Contract or sub-contract any portion of it without the client's prior written consent.
11. Law Governing Contract
Language
- The Contract shall be governed by the laws of Kenya and the language of the Contract shall be the English language.
12. Dispute Resolution
- Any dispute arising out of the Contract which cannot be amicably settled between the parties shall be referred by either party to the arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the chairman of the Chartered Institute of Arbitrators, Kenya branch, on the request of the applying party.
13. Termination:
- Notwithstanding anything to the contrary contained in this contract, this contract shall at the option of the client terminate:
- i) If the Contractor breaches any of the terms, covenants, provisions and conditions contained in this contract or the applicable
 - ii) If the Contractor ceases or threatens to cease to carry out the services or takes or threatens to take any action to liquidate its assets, or stops making payments in the usual course of business;
 - iii) If the Contractor becomes insolvent or bankrupt or makes any arrangements with its creditors for relief of debt or takes advantage of any law for the benefit of debtors or goes into liquidation or receivership whether compulsory or voluntary;
 - iv) If the Contractor fails to comply with any final decision reached as a result of arbitration proceedings pursuant to clause i hereof;
 - v) If the Contractor submits to the client a statement which has a material effect on the rights, obligations or interests of the client and which the contractor knows to be false;
 - vi) If the Contractor, in the judgment of the client, has engaged in corrupt, fraudulent or deceptive practices in executing the contract. For the purpose of this clause "Corrupt Practices" means the offering, giving, receiving or soliciting of any value to influence the action of a public official in the selection process or in contract execution, and "Fraudulent or deceptive Practices" means a misrepresentation of facts in order to influence a selection process or the execution of a contract;

vii) If, as a result of Force Majeure, the Contractor is unable to perform a material portion of the Services for a period of not less than sixty (30) days.

Termination by the Contractor

Notwithstanding anything to the contrary contained in this contract this contract shall at the option of the contractor terminate:

i) If the client is in material breach of its obligations pursuant to this contract and has not remedied the same within sixty (60) days after notice thereof has been given to the client by the contractor,

ii) If the client fails to comply with any final decision reached as a result of arbitration pursuant to clause I hereof.

14. Documents

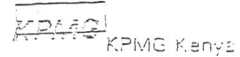
The following documents shall be deemed to form and be read and construed as part of this agreement:

- i) The Bid document
- ii) The Consultant's Technical Proposal
- iii) The Consultant's engagement letter
- iv) The Consultant's standard terms and conditions

IN WITNESS WHEREOF the Parties hereto have caused this Contract to be executed the day and year first before written.

SEALED with the common seal of)
KENYA BUREAU OF STANDARDS)
In the presence of)
Director)
Corporation Secretary)

SEALED with the common seal of)
KPMG KENYA)
In the presence of)
Engagement Partner)
Manager)



J. L. Mwangi

IN THE MATTER OF THE OATHS AND STATUTORY DECLARATION
ACT (CHAPTER 15 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF THE RECRUITMENT OF THE MANAGING
DIRECTOR OF THE KENYA BUREAU OF STANDARDS (KEBS)

AFFIDAVIT

I, Richard Boro Ndung'u, of P.O. Box 45147-00100 Nairobi make oath and state as follows:

1. I am a citizen of Kenya and holder of National Identity Card Number 7868994 and competent to make this affidavit.
2. I am a certified public accountant of Kenya and a Partner in the firm of KPMG of Lonrho House 16th Floor, Nairobi.
3. That sometime between April and June this year I received a telephone call from a Ms Salina Jeptoo, who described herself as a Personal Assistant to the Honourable Henry Kosgey, Minister for Industrialization.
4. She stated that the Minister wanted to meet with someone senior in KPMG Kenya to gain an understanding of how we conduct our executive recruitment process, and she said that I was the only Partner that her contact knew, and therefore gave her my mobile number.
5. I cannot at this time recall who she said her contact was.
6. I agreed to meet with the Minister, which she then arranged.
7. When I met with the Minister at his office at Teleposta Towers, we initially made some small talk, and then the Minister enquired about KPMG's recruitment process.
8. I explained that KPMG Kenya has a very robust process, and depending on the Terms of Reference contracted with the client, the process could include:
 - a. assessment centres
 - b. psychometric testing and
 - c. formal, often Power-point assisted, presentations to the interview panel.

Richard Boro Ndung'u

9. The Minister then mentioned that there was a candidate who was interested in the position of Managing Director at the Kenya Bureau of Standards (KEBS), that KPMG was assisting with, and which is under his Ministry.
10. The Minister indicated that the candidate's name is 'similar' to his and he proceeded to mention the name of the candidate which, to my recollection, is the same as that of the candidate subsequently announced by the Minister as the new appointee to the position of Managing Director at KEBS.
11. By way of reply, I explained that the candidate would be subjected to the same robust process as any of the other candidates, and that the ultimate decision on the appointee rested firstly with the KEBS Board in the three names the KEBS Board would submit to the Minister, and then with the Minister himself, in the one person he would appoint from amongst the three choices.
12. I also explained to the Minister that Josphat Mwaura was not only the Chief Executive Officer (CEO) & Senior Partner of KPMG Kenya & East Africa, but that he was also the Partner in-charge of the People & Change Department of KPMG East Africa, and that this includes the Executive Selection Division, which was handling the recruitment of the Managing Director at KEBS.
13. I then proceeded to give the Minister Mr Mwaura's mobile telephone contacts to enable the Minister to contact Mr Mwaura directly, if he so wished.
14. After a few pleasantries, the meeting then ended, and I considered the matter dealt with.
15. It was critical and a matter of professional integrity that the whole process remain absolutely impartial and unimpeachable, and I therefore did not discuss my meeting with the Minister with anyone involved in the KEBS Managing Director recruitment exercise.
16. When the announcement of the new Managing Director at KEBS was made, my attention was drawn to public controversy surrounding the way the Minister made and announced his appointment, and also to the comments attributed to an anonymous KEBS Board Member, seeking to explain why the KEBS Board had discarded KPMG's report, and why they felt they had to repeat the recruitment exercise themselves.
17. It is then that I mentioned my earlier meeting with the Minister to the CEO and my fellow Partners.

 2

9. The Minister then mentioned that there was a candidate who was interested in the position of Managing Director at the Kenya Bureau of Standards (KEBS) that KPMG was assisting with, and which is under his Ministry.
10. The Minister indicated that the candidate's name is 'similar' to his and he proceeded to mention the name of the candidate which, to my recollection, is the same as that of the candidate subsequently announced by the Minister as the new appointee to the position of Managing Director at KEBS.
11. By way of reply, I explained that the candidate would be subjected to the same robust process as any of the other candidates, and that the ultimate decision on the appointee rested firstly with the KEBS Board in the three names the KEBS Board would submit to the Minister, and then with the Minister himself, in the one person he would appoint from amongst the three choices.
12. I also explained to the Minister that Josphat Mwaura was not only the Chief Executive Officer (CEO) & Senior Partner of KPMG Kenya & East Africa, but that he was also the Partner in-charge of the People & Change Department of KPMG East Africa, and that this includes the Executive Selection Division, which was handling the recruitment of the Managing Director at KEBS.
13. I then proceeded to give the Minister Mr Mwaura's mobile telephone contacts to enable the Minister to contact Mr Mwaura directly, if he so wished.
14. After a few pleasantries, the meeting then ended, and I considered the matter dealt with.
15. It was critical and a matter of professional integrity that the whole process remain absolutely impartial and unimpeachable, and I therefore did not discuss my meeting with the Minister with anyone involved in the KEBS Managing Director recruitment exercise.
16. When the announcement of the new Managing Director at KEBS was made, my attention was drawn to public controversy surrounding the way the Minister made and announced his appointment, and also to the comments attributed to an anonymous KEBS Board Member, seeking to explain why the KEBS Board had discarded KPMG's report, and why they felt they had to repeat the recruitment exercise themselves.
17. It is then that I mentioned my earlier meeting with the Minister to the CEO and my fellow Partners.

 2

IN THE MATTER OF THE OATHS AND STATUTORY DECLARATION ACT
(CHAPTER 15 OF THE LAWS OF KENYA)

AND

IN THE MATTER OF THE RECRUITMENT OF THE MANAGING DIRECTOR OF
THE KENYA BUREAU OF STANDARDS (KEBS)

AFFIDAVIT

I, Josephine Oduor-Mwaniki of P.O. Box 40612-00100 make oath and state as follows:

1. I am a citizen of Kenya and holder of National Identity Card Number 10474847 and competent to make this affidavit.
2. I am employed as the Senior Manager, People & Change (which includes Executive Selection) by KPMG of Lonrho House 16th Floor, Nairobi.
3. Mr. Isaiah Kiplagat the Chairman of *Athletics Kenya* called me on or about 24 February 2010 (week of 22-26 February) on the KPMG office line and requested for a meeting after establishing that I was the manager in charge of Executive Selection. He asked me whether I was a member of the Nairobi Club and when I answered in the affirmative, he requested for a breakfast meeting the next morning.
4. Mr. Kiplagat did not disclose the purpose of the meeting but I went ahead to meet with him as I know of him as the chairman of the *Athletics Kenya* and expected that this may be a business opportunity.
5. I met with Mr. Kiplagat the following morning at 8.30am at Nairobi Club in the main dining room.
6. The initial discussions held were mainly around exploring my family background, social and religious activities, including where I attend church services, and discussion about the club of which we are both members.
7. I was not clear why Mr Kiplagat was making these enquiries but I proceeded to answer the questions in polite conversation. When I explained where I go to church and that my husband was a pastor there, he mentioned that his daughters also go to church there.
8. Eventually Mr Kiplagat mentioned that he was representing the Minister for Industrialization, Mr Henry Kosgey, with regard to the recruitment of the Managing Director, Kenya Bureau of Standards, which KPMG was undertaking.
9. He indicated that there were many parties interested in this position and that the Minister was interested in getting a good candidate through a thorough process. I informed him that KPMG was still in the contracting process with the Council.
10. The meeting ended at about 9.15 am and we exchanged contacts and I never heard from Mr. Kiplagat again.

11. I found it odd to be contacted by a prominent person who, to my knowledge, was not directly involved in the management of the National Standards Council. I provided a briefing of the meeting to the KPMG Chief Executive Officer and engagement partner, Josphat Mwaura, on what had transpired and agreed to continue to safeguard our process from any external interference.
12. I make this affidavit from facts within my own knowledge and it is true.

Sworn by the said Josephine Oduor-Mwariiki)

At Nairobi this 4th day of November, 2010)

Before me)

Peter M. Waiyaki)
Advocate, Commissioner for)
Oaths and Notary Public)
Commissioner for Oaths)
Nairobi, Kenya)

Drawn by:

Mboya & Wangong'u

Advocates

Lonrho House, 7th Floor

Standard Street

P.O. Box 74041-00200

Nairobi

Dr Karanja Thiong'o
The Chairman
National Standards Council
Kenya Bureau of Standards (KEBS)
KEBS Centre, Popo Road
PO Box 54974 00200
Nairobi

Our ref: K024/DK95310001/jim/Jo

5 July 2010

Dear

Provision of human resources consultancy services to the Kenya Bureau of Standards

I refer to your letter dated 16 June 2010, our response dated 22 June 2010, our conversation on Monday 28 June 2010, and your subsequent letter dated 29 June 2010.

As I had indicated in our conversation on Monday 28 June 2010, our proposed delivery date of 12 July 2010 for the final report was based on the availability of the candidates whom we contacted after confirmation by yourselves that you only wanted to proceed with the 14 candidates already interviewed. As I indicated then, based on the availability of the candidates, we will only finish the strategy presentations and psychometric testing on Friday 9 July 2010 and intend to put in extra effort to enable us to deliver the report by Monday 12 July 2010. This was the basis of the revised project plan that we forwarded to you vide our letter dated 22 June 2010.

We have also subsequently sent a letter to the Company Secretary (copy attached) pointing out that KEBS has not honoured the contract with regard to the mobilisation fees payable on signing of the contract. This has remained outstanding for more than three months now and we have continued to provide the services in good faith in the expectation that the payment will be processed expeditiously. However, our follow-up has not yielded any fruits and we have now formally communicated that the project plan will be negatively affected by this delay on KEBS part to honour the contractual obligations.

I would be grateful if you could follow-up the outstanding payment and confirm to us when this is likely to be delivered to enable us to commit to the delivery date of 12 July 2010. We are very keen to complete this process and to safeguard it from the delays that have been experienced thus far. We believe the process has progressed significantly to enable KEBS to identify a candidate for CEO who has been subjected to an independent, credible and merit based selection process led by the NSC.

Please do not hesitate to contact me or Josephine Oduor-Mwaniki if you require any additional information or clarification.

Yours sincerely

Josphat Mwaura
Chief Executive Officer and Senior Partner

- iv) **Misadventure by Your Firm**
- In May 2010, you presented a shortlist of 21 candidates instead of the 14 candidates requested by the NSC. The attendant additional cost would have resulted in the NSC flouting the public procurement procedures.
 - Instead of presenting six (6) candidates for final interview by the NSC, you presented only four (4) credible candidates.
- v) **Transparency Accountability and Good Corporate Governance**
Lack of facts on the candidates has made it impossible for the NSC to be accountable to the process used to arrive at the four candidates presented for final interviews. Interviewing the four candidates will restrict the NSC direct decision into eliminating only one candidate.
- vi) **Presentation of the Final Report**
The NSC expected KPMG to present it with the final report but instead a report addressed to the Chairman was sent by courier.
- vii) **Failure to Provide the Shortlist Details as Required by NSC**
This has put NSC in the dark about the applicants' relevant information for concurrence.

Please respond to the above issues on or before Thursday 22nd July, 2010.

Yours Sincerely,



Dr. Karanja Thiong'o
CHAIRMAN
NATIONAL STANDARDS COUNCIL



Kenya Bureau of Standards
Quality products for quality life

KEBS Head Office
P. O. Box 54974, Nairobi 00200
Tel: +254 (0) 20 605490, 605506,
Mobile: 0722 202 137/8,
0734 600 471/2
Fax: +254 (0) 20 609 860
Direct Dial: +254 (0) 20 694 8000
E-Mail: info@kebs.org
Web: http://www.kebs.org

REF: KEBS/CONF./MD/00/2/68

Date: 2010-11-02

Mr. Patrick G. Gichohi, CBS
Clerk of the National Assembly
National Assembly
Parliament Building
P.O. Box 241842 - 00100
NAIROBI

Attn: Rose Mudibo

KEBS Coast Region
P. O. Box 99376, Mombasa 80100
Tel: +254 (0) 41 2317050, 2330939/38/40
Fax: +254 (0) 41 229 448
E-mail: kebs-msa@kebs.org

Dear Sir,

RE: EXPENDITURE ON MD KEBS RECRUITMENT

KEBS Lake Region
P. O. Box 2949, Kisumu 40100
Tel: +254 (0) 57 202 8396, 202 9549
Fax: +254 (0) 57 202 7814
E-mail: kebs-kisumu@kebs.org

This is in response to the demand by the committee on Equal Opportunity in our meeting of 28th October, 2010. You will note that the expenditure is from December, 2009 up to 26th October, 2010.

I hope this satisfies the committee

Yours faithfully,

KEBS Rift Valley Region
P. O. Box 2138, Nakuru 20100
Tel: +254 (0) 51 221 0553/5, 221 1208
Fax: +254 (0) 51 221 0076
E-mail: kebs-nakuru@kebs.org

Dr. Karanja Thiong'o (MKNAS)
CHAIRMAN
NATIONAL STANDARDS COUNCIL

KEBS Mt. Kenya Region
P. O. Box 1790, Nyeri 10100
Tel: +254 (0) 61 203 1410/1
Fax: +254 (0) 61 203 2038
E-Mail: kebs-nyeri@kebs.org

c.c: **Dr. (Eng.) Kibicho Karanja**
Permanent Secretary
Ministry of Industrialization
Teleposta Towers
NAIROBI

KEBS North Eastern Region
P. O. Box 576, Garissa 70100
Tel: +254 (0) 46 2519
Fax: +254 (0) 46 3455
E-Mail: kebs-garissa@kebs.org

BOARD AND OTHER EXPENSES ON RECRUITMENT OF MD FROM 2009-OCT 2010

DATE	MEETING	WARRANT NO.	AMOUNT	REMARKS
15/03/10	COORDINATION	6067	53,118.00	MD Recruitment
22/03/10	"	6067	53,118.00	MD Recruitment
28/03/10	"	6067	28,400.00	MD Recruitment
07/05/10	"	6067	15,400.00	MD Recruitment
13/05/10	"	6067	107,500.00	MD Recruitment
19/03/10	"	6067	15,400.00	MD Recruitment
22/05/10	"	6067	15,400.00	MD Recruitment
25/03/10	"	6067	15,400.00	MD Recruitment
20/04/10	"	6067	15,400.00	MD Recruitment
23/04/10	"	6067	15,400.00	MD Recruitment
06/05/10	"	6067	15,400.00	MD Recruitment
18/05/10	"	6067	15,400.00	MD Recruitment
21/12/09	NSC	4621	546,454.50	MD Recruitment
22/02/10	NSC	4948	430,221.00	MD Recruitment
22/02/10	NSC	4949	104,000.00	MD Recruitment
25/02/10	NSC	5080	388,367.00	MD Recruitment
26/02/10	NSC	5080	211,800.00	MD Recruitment
26/02/10	NEGOTIATION	5119	39,000.00	MD Recruitment
03/03/10	NSC	5149	30,350.00	MD Recruitment
05/03/10	NSC	5149	388,530.75	MD Recruitment
19/03/10	NSC	5266	317,200.00	MD Recruitment
24/03/10	NSC	5307	771,613.75	MD Recruitment
22/04/10	NSC	5340	541,082.75	MD Recruitment
05/05/10	NSC	5668	449,311.75	MD Recruitment
06/05/10	NSC	5668	317,200.00	MD Recruitment
13/05/10	NSC	5746	725,111.75	MD Recruitment
16/06/10	NSC	5968	857,637.50	MD Recruitment
23/07/10	NSC	166	925,917.50	MD Recruitment
06/08/10	NSC	280	636,278.00	MD Recruitment
06/08/10	ADHOC	279	382,039.50	MD Recruitment
03/09/10	NSC	482	183,350.50	MD Recruitment
07/09/10	NSC	548	370,189.50	MD Recruitment
4-6/09/10	ADHOC	559	307,052.00	MD Recruitment
06/09/10	ADHOC	559	180,730.00	MD Recruitment
14/09/10	NSC	593	818,117.50	MD Recruitment
15&16/09/10	NSC	593	737,304.00	MD Recruitment
19/07/10	NSC	134	672,799.50	MD Recruitment
06/09/10	NSC	763	660,030.00	MD Recruitment
07/08/10	ADHOC	781	39,000.00	MD Recruitment
08/09/10	ADHOC	781	69,800.00	MD Recruitment
17/09/10	ADHOC	671	87,600.00	MD Recruitment
20/09/10	ADHOC	671	56,800.00	MD Recruitment
23/09/10	Adhoc	671	615,769.50	MD Recruitment
	KPMG	PV No.4682	538,118.00	MD Recruitment
	COST OF ADVERTISING	PV No. 4850, 5012, 482, 483	1,794,559.20	MD Recruitment
24/10/10	NSC/NATIONAL COHESION & INTEGRATION COMMISSION	854	105,252.00	MD Recruitment
26/10/10	NSC/NATIONAL COHESION & INTEGRATION COMMISSION	895	663,854.10	MD Recruitment
		Total	16,528,519.55	MD Recruitment

Prepared by : J.B KALO

Verified by: J. KAMOCHI

[Signature]
KENYA BUREAU OF STANDARDS
 P. O. BOX 54974-00200
 NAIROBI

PARLIAMENT
OF KENYA
LIBRARY

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT – SECOND SESSION - 2014

SELECT COMMITTEE ON DELEGATED LEGISLATION

REPORT ON THE
NATIONAL TRANSPORT AND SAFETY AUTHORITY
(OPERATION OF PUBLIC SERVICE VEHICLES)
REGULATIONS, 2014

NATIONAL ASSEMBLY,
PARLIAMENT BUILDINGS,
NAIROBI

July, 2014

*Paper laid
By the Hon. W. O. Omburo
Chair on Thursday
24/7/14
[Signature]*

1.0 PREFACE

The Select Committee on Delegated Legislation was constituted on 21st May, 2013 and comprises of the following members:-

- | | | |
|--|---|-------------------------|
| 1. Hon. William Cheptumo, M.P | - | Chairperson |
| 2. Hon. Joseph Gitari, M.P | - | Vice Chairperson |
| 3. Hon. Kabando wa Kabando, M.P | | |
| 4. Hon. Mohamed Aden Huka, M.P | | |
| 5. Hon. Ngikor Nicholas Nixon, M.P | | |
| 6. Hon. Michael Kiso Manthi, M.P | | |
| 7. Hon. Ibrahim Abdi Saney, M.P | | |
| 8. Hon. Zainabu Chidzuga, M.P | | |
| 9. Hon. John Waiganjo, M.P | | |
| 10. Hon. Yussuf Hassan, M.P | | |
| 11. Hon. Paul Koinange, M.P | | |
| 12. Hon. George Theuri, M.P | | |
| 13. Hon. Elisha Busienei, M.P | | |
| 14. Hon. Alfred Keter, M.P | | |
| 15. Hon. Eusilah Jepkosgei, M.P | | |
| 16. Hon. Paul Bii, M.P | | |
| 17. Hon. William Kisang, M.P | | |
| 18. Hon. Bernard Shinali, M.P | | |
| 19. Hon. Eng. Shadrack Manga, M.P | | |
| 20. Hon. Charles Gimose, M.P | | |
| 21. Hon. Vincent Musau, M.P | | |
| 22. Hon. Peter Kaluma, M.P | | |
| 23. Hon. Rachael Ameso, M.P | | |
| 24. Hon. Simba Arati, M.P | | |
| 25. Hon. Neto Agostinho, M.P | | |
| 26. Hon. Wetangula Timothy Wanyonyi, M.P | | |
| 27. Hon. Marcus Mutua Muluvi, M.P | | |
| 28. Hon. Tom J. Kajwang, M.P | | |
| 29. Hon. Hassan Aden, M.P | | |

1.1 Committee's Mandate

The Committee on Delegated Legislation is a Select Committee established pursuant to provisions of the Standing Order No. 210 whose mandate is to consider in respect of any statutory instrument whether it:-

- Is in accordance with the provision of the Constitution, the Act pursuant to which it is made or other relevant written laws;

- b. Infringes on fundamental rights and freedoms of the public;
- c. Contains a matter which in the option of the Committee should more properly be dealt with in an Act of the Parliament;
- d. Contains imposition of taxation;
- e. Directly or indirectly bars the jurisdiction of the court;
- f. Gives retrospective effect to any of the provision in respect to which the Constitution does not expressly give any such power;
- g. Involves expenditure from the consolidated fund or other public revenues;
- h. Is defective in its drafting or for any reason form or part of the statutory instrument calls for any elucidation;
- i. Appears to make some unusual or unexpected use of the power conferred by the Constitution or the Act pursuant to which it is made;
- j. Appears to have had unjustifiable delay in its publication or laying before Parliament;
- k. Makes rights, liberties or obligations unduly dependent upon non-renewable decisions;
- l. Makes rights, liberties or obligations unduly dependent insufficiently defined administrative powers;
- m. Inappropriately delegates legislative powers;
- n. Imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;
- o. Appears for any reason to infringe on the rule of law;
- p. Inadequately subjects the exercise of legislative power to Parliamentary scrutiny; and;
- q. Accords to any other reason that the Committee considers fit to examine.

Standing Order No. 210 (4) provides that if the Committee:-

- a. Resolves that the statutory instrument, be acceded to, the Clerk shall convey that resolution to the relevant state department or the authority that published the statutory instrument;
- b. Does not acceded to the statutory instrument, the Committee may recommend to the House that the Assembly resolves that all or part of the statutory instrument be annulled;
- c. The Clerk shall submit the resolution under paragraph 4(b) above to the relevant state department or the authority that published the statutory instrument.

1.2 The National Transport and Safety Authority Regulations, 2014

The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 (hereinafter "the Regulations") were submitted to the National Assembly on 18th March 2014 by the Cabinet Secretary for Transport and Infrastructure. The overall objective of the Regulations is to regulate the operation of public service vehicles in order to enhance compliance with the law and improve safety on the roads.

1.3 Committee Meetings

The Committee held a number of sittings during which the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 were considered in accordance to the Constitution, the Standing Orders 210(4) of the National Assembly, the provisions of the Statutory Instruments Act (Act No. 23 of 2012) and other relevant written laws.

The Committee finds that the Statutory Instrument (The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014, is not in accord with the mandatory requirements of the provisions of the Constitution, Statutory Instruments Act, 2013, the parent Act to which it is made and other relevant written laws.

Pursuant to Standing Order 210(4) (b) and the provisions of the Statutory Instruments Act, 2013, the Committee recommends to the House that the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 be annulled.

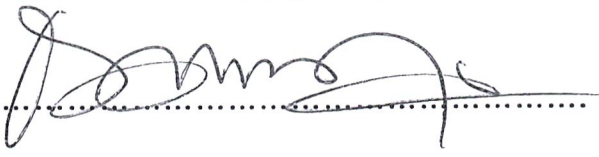
1.4 Acknowledgement

The Committee wishes to sincerely thank the Offices of the Speaker and the Clerk of the national Assembly for the necessary support extended to it in the execution of its mandate.

The Chairperson of the Committee takes this opportunity to thank all the Members of the Committee for their useful and immense contribution in scrutinizing the National Transport

The Committee further wishes to record its appreciation for the services rendered by the staff of the National Assembly that enabled the production of this Report.

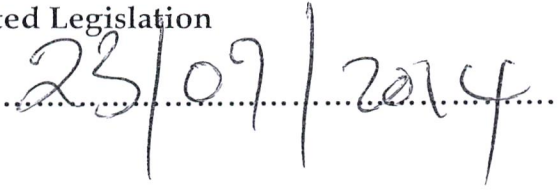
Finally it is my pleasant duty and privilege, on behalf of the Select Committee on Delegated Legislation to introduce this report to the House.

Signed.....

Hon. William Cheptumo, M.P

(Chairperson)

Committee on Delegated Legislation

Date.....

- **Section 19** provides that in cases where Parliament has adopted a report or a resolution that a statutory instrument be revoked, the statutory instrument shall stand revoked and the regulation making authority shall publish the revocation within fourteen days.
- **Section 24(1)** provides that a statutory instrument shall not be inconsistent with the provisions of the enabling legislation or of any Act. Such a statutory instrument shall be void to the extent of the inconsistency.
- **Section 24 (5)** provides that there may be annexed to the breach of a statutory instrument a penalty not exceeding twenty thousand shillings or imprisonment for a term not exceeding six months or both which the regulation-making authority may think fit.
- **Section 25(1)** provides that a statutory instrument may provide for the imposition of fees and charges on any matter for which such provision is made in the enabling legislation.

(ii) *The Interpretation and General Provisions Act*

- **Section 36 (1)** allows the President, by an order to transfer the exercise of a power or performance of a duty to a Cabinet Secretary where the exercise of a power or performance of a duty has been conferred on the President by an Act of Parliament.
- **Section 37** deals with the execution of duties of a Cabinet Secretary or public officer during periods of their temporary absence from office or inability to perform such duties. It provides that such powers and duties shall be performed by a Cabinet Secretary designated by the President, or a person named by, or by the public officer holding an office designated by the Cabinet Secretary. The Cabinet Secretary or the person or public officer so designated shall have and exercise those powers and shall perform those duties subject to such conditions, exceptions and qualifications as the President or Cabinet Secretary may direct.
- **Section 38** deals with delegation of powers. It provides that where an Act of Parliament confers the exercise of a power or the performance of a duty on the President, the Attorney-General or a Cabinet Secretary, the President, the Attorney-General or the Cabinet Secretary, may, unless by law expressly prohibited from doing so, delegate the exercise of the power or the performance of the duty by notice in the Gazette to a person by name or to the person for the time holding an office specified in the notice subject to such conditions,

exceptions or qualifications as the President, the Attorney-General or the Cabinet Secretary may specify on the notice.

(iii) Provisions which empower the Cabinet Secretary to make the Regulations

The Regulations are made pursuant to the powers conferred to the Cabinet Secretary under section 54 of the National Transport and Safety Authority Act, No. 33 of 2012 ("the Act") which allows the Cabinet Secretary to in consultation with the Board, to make regulations for the better carrying into effect of the provisions of this Act.

The functions of the Authority under the Act are:

- (a) advise and make recommendations to the Cabinet Secretary on matters relating to road transport and safety;
- (b) implement policies relating to road transport and safety;
- (c) plan, manage and regulate the road transport system in accordance with the provisions of this Act;
- (d) ensure the provision of safe, reliable and efficient road transport services; and
- (e) administer the Act of Parliament set out in the First Schedule and any other written law.

3.0 COMMITTEE OBSERVATIONS

Upon scrutiny with reference to the considerations set out in the Statutory Instruments Act, the Interpretation and General Provisions Act and the enabling provisions of the National Transport and Safety Authority Act set out above, the Committee noted that:-

- (a) there was no explanatory memorandum attached to the Regulations contrary to section 11 (2) of the Statutory Instruments Act, 2013;
- (b) in light of (a) above, there is no evidence of the preparation of a regulatory impact statement as provided for under section 6 of the Statutory Instruments Act nor of consultation with stakeholders as provided for under section 5 (1) of the Statutory Instruments Act;
- (c) in the absence of an explanatory memorandum, the Committee was unable to decipher whether there was public participation as envisaged by Article 118 (1) (b) of the Constitution;

(d) proposed regulation 5 (1) and 6 which requires a person desirous of operating public service vehicles to be a member of a body corporate contravenes article 36 (2) of the Constitution. Article 36 (2) of the Constitution states that: "A person shall not be compelled to join an association of any kind."

In addition, regulation 5 (2) gives the Authority too wide a discretion to determine who to licence and, therefore, creates an avenue for corruption and abuse by the Authority;

(e) by providing for a penalty exceeding twenty thousand shillings and an imprisonment term exceeding six months, regulation 15 (1) of the Regulations contravenes section 24 (5) of the Statutory Instruments Act and is, therefore *ultra vires*;

(f) regulation 2 of the Regulations dealing with definitions is defective in its drafting contrary to section 13 (h) of the Statutory Instruments Act. There are no margin notes reflecting the Chapter Numbers accompanying the words "city, public service vehicle and urban area;"

(g) regulation 9 of the Regulations extends criminal liability to the operator of a commuter service vehicle for acts committed by a driver, conductor or other member of staff. This is against the rules of natural justice which require for a person to be individually responsible for any criminal acts they commit.

In addition, it contravenes section 2 of the Employment Act (Cap 226) which recognizes an employee as a person employed for wages or a salary and a casual employee as a person whose terms of engagement provide for his payment at the end of each day and who is not engaged for a period longer than twenty four hours yet an operator of a public service vehicle is not allowed to engage staff on commission basis;

(h) regulation 10 of the Regulations does not outline the criteria to be used in granting or refusing to grant a licence in order to operate a long distance night time passenger service and, therefore, contravenes Standing Order 210 (3) (i) in that it appears to make unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made;

(i) regulation 11 (e) and (f) of the Regulations are in contravention of Standing Order 210 (3) (i) in that it appears to make unusual or unexpected use of the powers conferred by the Constitution or the Act pursuant to which it is made. This is because it disallows the use of carriers by public service vehicles and thus

limits and inconveniences passengers who may not be able to afford other means of transporting their goods.

This is also in contravention of article 46 (1) (d) of the Constitution which safeguards the rights of consumers to the protection of their health, safety and economic interests. The economic interests of both the public service vehicles and passengers are limited by these provisions;

- (j) regulation 12 (1) (a) of the Regulation does not spell out the criteria to be used by the Authority to certify drivers to ply a particular route and the Committee may not be able to determine the appropriateness of this provision in the absence of the information;

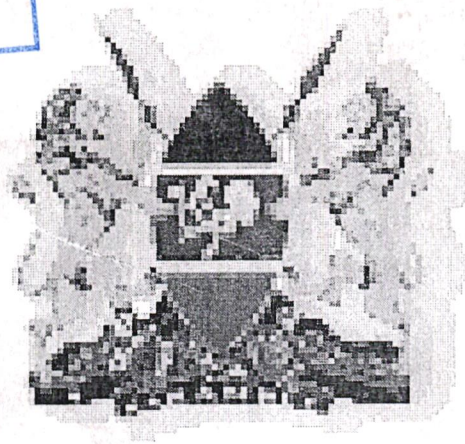
4.0 COMMITTEE RECOMMENDATIONS

In view of the Committee's observations under 3 (a) to (j) above, the Committee finds that the Statutory Instrument (The National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014), is not in accord with the mandatory requirements of the provisions of the Constitution, Statutory Instruments Act, 2013, the parent Act to which it is made and other relevant written laws.

Pursuant to Standing Order 210(4) (b) and the provisions of the Statutory Instruments Act, 2013, the Committee recommends to the House that the National Transport and Safety Authority (Operation of Public Service Vehicles) Regulations, 2014 be annulled.

*****END*****

PARLIAMENT
OF KENYA
LIBRARY



THE HANSARD

Parliamentary Select Committee
on Constitution Review

25th January 2010

RECORD OF PROCEEDINGS TAKEN BEFORE THE PARLIAMENTARY SELECT COMMITTEE ON CONSTITUTION REVIEW HELD ON MONDAY, 25TH JANUARY, 2010, AT THE GREAT RIFT VALLEY LODGE, NAIVASHA

(Prayers)

(The Committee commenced at 9.00 a.m.)

Mr. Chairman: Now if we could look at the programme. I do not know whether every Member has a copy of the revised programme for this next leg of the process. Does everybody have a copy? It might not be in your file but it was circulated. As per the programme, we have five chapters to deal with today. Are we together on the programme? Does everybody have a copy of the programme?

Hon. Members: Yes!

Mr. Chairman: So, as the programme, we have five chapters to deal with today that is the Judiciary and Land before lunch. Then Public Service and National Security and Commissions and Independent Offices. Generally speaking these are not very controversial Chapters. We are hoping to conclude with them before the end of the day. Then the proposal is that on day 2, we now go to the specifics as far as the Executive, Devolved Governments and Representation before lunch and after lunch, we deal with the Legislature, Public Finance and then a number of provisions including amendments to the Constitution, General Provision, Transitional and Consequential Provisions and the Schedules. Those transitional clauses will have quite a bit of controversy.

Then day 3, we look at consideration of pending issues. We confirm the minutes and we hope to depart at lunch time. Then on Thursday, in the afternoon at 4.00 p.m. in Nairobi, God willing we adopt the Report. We are assuming that from Wednesday afternoon and Thursday morning, the Secretariat would have gone through producing a document and then on Thursday afternoon we adopt that as a Report. Then on Friday, at 3.00 p.m. is when we hand it over. Again, giving the Secretariat that morning to put the final touches together because they would have been very busy with us here. On Friday, afternoon is when we hand over the document to the CoE. So, that is the proposal.

So, I am proposing we can go straight to the Judiciary.

Mr. Mungatana: Mr. Chairman, Sir, this Committee has not even gone to Kampala. We have been working through and through. Were you not able to create maybe one week to go somewhere on a fact finding mission? Seriously!

I think when we go for the Liaison Committee meetings, I was very proud to say that we have the largest Committee. We have done the most substantial work and we are the cheapest Committee because we have not used our Budget at all. This is the first time when we are out of Nairobi and we have done like 35 meetings so far. But I hear you, Mheshimiwa Mungatana.

So, now that we have the programme proposed and seconded can we say it is accepted?

Hon. Members: Yes!

Mr. Chairman: Now we have the quorum and we move to the Judiciary. If you look at the Harmonized Revised Draft Chapter 11.

The Minister for Tourism (Mr. Balala): First of all, I want to thank you for drawing up the agenda. Also, let us appreciate the commentaries in the media and the public interest towards the work we have done up to Friday, which is highly applauded. Today, when I read COTU Secretary General, Mr. Atwoli's applaud on this PSC, I was satisfied that we are doing the right thing. So, I want to appreciate that let that spirit remains and the interest of the nation is much more than individual.

Mr. Chairman: Thank you very much Waziri. Those are sentiments I wholly agree with. I think anybody who read yesterday's editorial from *The Daily Nation*, I think it was a wonderful thing to read. Of course, we have had a few detractors here and there. My comment to the Ligale Commission is that we respect their independence. We applaud them for pushing for independence. But it is the role of the Constitution to set the maximum and the minimum in terms of the constituencies and to set the criteria for delimitation. That has always been a Constitutional function. So, we are usurping anybody's role. I was surprised with Mutahi Ngunyi's eating humble pie. I was very annoyed earlier on when he had written a very harsh Article. But I agree with you Mheshimiwa, I think we have had fairly good reception and a lot of goodwill. I think we would benefit from that goodwill, if we can conclude in the next two days.

I am hoping we can be a bit more disciplined in terms of time so that when we slot anything for a certain time, let us conclude it and let us not start on something else. I am hoping in terms of the process, when you make comments, it will be basically to amend and not to basically give a background or a discussion on any of those issues so that we actually deal with the proposals as lay down.

Thank you very much. If we can start with Article 191 on Judicial Authority on Chapter 11. Judiciary, Part, Judicial Authority and Legal Systems.

191. (1) Judicial authority—

(a) is derived from the people;

(b) Vests in the courts and tribunals established in accordance with This Constitution; and

(c) Shall be exercised by the courts and other tribunals-

(i) in the people's name and for their common good; and

(ii) in conformity with this Constitution and the law.

(2) In exercising judicial authority the courts and tribunals shall be guided by the following principles—

(a) Justice shall be done to all irrespective of status;

- (b) Justice shall not be delayed;
- (c) Alternative forms of dispute resolution including reconciliation, Mediation and arbitration and traditional dispute resolution Mechanisms shall be promoted;
- (d) Justice shall be administered without undue regard to technicalities; and
- (e) The purpose and principles of this Constitution shall be protected and promoted.

Let me stop at that so that it gives us a pose.

Mr. Nyegenye: Mr. Chairman, Sir, on this particular Article it has broadly remain the same in all the Drafts with exception of this observation. But the PNC in Article 178(4) and Bomas 183(4), had a clause requiring persons participating in the administration of justice to strive to deliver the highest standards of service to the public, to comply with the principles set out in the Chapter on Leadership and Integrity and to continue to educate themselves in current legal developments. This is a Clause that has been omitted in the Revised Harmonized Draft.

Mr. Chairman: One of the criticisms of the Draft was that it was bulky. It was even requiring continuous legal education which is provided for under the rules of the Law Society Act. So, probably, that is what led to its removal
So, 191(1), does anybody have issues with this Article about Judicial Authority.

Mr. Mungatana: Mr. Chairman, Sir, I do not know, I would be very advised by the Senior Counsel, hon. M. Kilonzo. But I just feel that the whole of this, 191(1), 191(2), 191(3, 4) are just narratives. They are not like, for example, independence of the judiciary. That is a principle that must be in the Constitution. Then to tell us that judicial authority is derived from the people. Already, we have said at the very beginning that the Constitution—the power of the people is to legislate, the power to executive is in this. You know, we have already covered that. So, I feel all this is like sort of repetitive and it is really not constitutional. I do not know how other Members feel but I feel like we should delete 191(1-4) and we retain 192. I propose.

The Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, I want to say that 191 have no constitutional principle at all. It is exaltations that have no meaning. So, but 192 need to be summarized to entrench the independence of the judiciary.

Mr. Chairman: So, you are seconding, hon. Mungatana's proposal?

The Minister for East African Community (Mr. Munya): Yes, I am seconding his proposal. Although, 193, perhaps we need to look at it more to see whether we need to leave anything because of course, the work of the Chief Justice vis-a-vi the Judicial Service Commission needs to be streamlined.

Mr. Chairman: Let me start with Mheshimiwa Wetangula and then the Minister for Higher Education.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, hon. Mungatana has a point. I would just give an example, 191(1) (c), when you say shall be exercised by the courts and other tribunals- (i) in the people's name and for their common good. You are creating a very dangerous provision in the Constitution if a section of Kenyan go to court to enforce something and the court finds it without merit, they will jump up and say it has exercised authority in the name of the people and for the common good of the people, yet it is a very narrow interest. We should not have a Constitution that is open to that kind of manipulation. Statements like judicial authority is derived from the people are meaningless. Judicial authority shall be founded on the Constitution and it is the Constitution that is the basis of the Bill of Rights and all other interests of the people. When you go even to No.2: (d) justice shall be administered without undue regard to technicalities. What does this mean? If the Chief Justice promulgates rules and even says that if you are served within ten days. People will go and challenge that. As both hon. Mungatana and Munya said, these are not Constitutional principles on the issue of administration. I think the most critical issue is for us to espouse the independence of the judiciary and make it responsive to people's interest than put in unworkable clauses in the Constitution.

Mr. Chairman: So, can we then say because there could be some issue on judicial authority even been derived from the Constitution. So, can we say one statement recasting and taking into account whatever is useful out of 191, as opposed to having the whole page including Article 4 on the next page, which I think is---

The Assistant Minister for East African Community (Mr. Munya): The danger is trying to constitutionalise principles like where the authority is derived from. There is a lot of jurisprudence on that. There are people who think that it is derived from the positive word of the law. Others think it derived from the people. So, this is constitutionalising one theory of law that judicial authority is derived from the people. It is not fair really to keep this kind of principles in a Constitution.

Mr. Chairman: Look at, maybe I should skip because now we are dealing with a whole Article look at 4 on the next page-

“The State shall provide the resources and opportunities to members of the Judiciary to enable them to deliver the highest standards of service to the public”

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Chairman, Sir, people who are speaking on this issue is lawyers. So, I hope you will patient with me because I am not a lawyer. However, as a Kenyan living in this country and understanding how our judiciary works, I do not know how to put it. For example, I would not insist on 1919(2a), but if you look at “b” is that also just in the administration of things because sometimes if you feel aggrieved, as I have felt in this country and my lawyer there would know. Every day you go in they say: Next year, next week, next month, six years on, seven years on and there is no where you can go because they keep changing the judges and it goes on and on and you cannot get justice. If you are not protected by the Constitution, then what happens to you. But I said: The lawyers probably know best. I am not opposing what hon. Mungatana said. I am just asking for some clarifications.

Mr. Kioni: Mr. Chairman, Sir, I think would stand to be helped a lot by the senior lawyers. But I want to take the view that we may need to recast this so that we do not lose everything because there is the (d), there which talks about justice shall be administered without undue regard to technicalities. I think it goes together with the (b) that you do not delay justice. So, I want to take the view that we need to recast so that we do not lose everything. But again it has things that are not useful, in fact, things that can be hindrance in the search for justice. I do not know whether we are dealing with 191 only—

Mr. Chairman: I wanted us to finish with 191 so that we can move forward. In terms of the 4, my view is that---

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Again, like hon. Dr. Kosgei, I am a layman. I have been able to compare the old Constitution and the Draft and the style is completely different. So, I wanted our good friends, the lawyers to tell us why it is so much different. It is a whole world of difference between Chapter 4 of the current Constitution and this one. The style is different. There is so much narrative on the Draft. Is it because a lot was lacking so that we know how to improve?

Mr. Mungatana: Mr. Chairman, Sir, we need to also agree that judiciary itself is a source of law through precedence and whatever. In fact, the biggest complaint that we should be fixing with the judiciary is the question of the principle of independence and this basically was going to resources. I think that we try to put a Clause that allows them to draw from the Consolidated Fund. If we can give that we have dealt with a big issue. The other issue was how the judges were being appointed. All these things to me are just stories. We need to look at the Judicial Service Commission and we needed to give the judges financial independence. The rest of the other things like hon. Musila said are narratives. They should not really be in the Constitution.

Mr. Chairman: I get you. I want us to go Clause by Clause. But just to respond to Mheshimiwa Musila. Mheshimiwa Wetangula, Article 206 deals with the judicial funds so probably we would handle it at that point.

Mheshimiwa Musila in attempting to answer your question, this originated from Bomas. Before Bomas this old Constitution we have was there and stated most of those rights. But judiciary had interpreted each of those so strictly that everybody was denied those rights. If you remember, the Mwakenya trials, when the lawyers sought to have those bill of rights enforced, what the court said was that the law required the Chief Justice to do rules and the Chief Justice had not done those rules. So, because those rules were not done, you are not able to enjoy this bill of rights. Because of that history, everybody wanted to be so specific and clear that there is no interpretation that will be very restricting. This is where the problem is coming from. But I agree with you that I do not know that will be the best way to address that problem. We might have to be a bit more conservative in our drafting. But our court should be a little bit more open in terms of interpretation.

Mr. Chairman: So, Clause 191(1). The other alternative is that we let the whole of Clause 191 be recast so that we do not lose some of the good things and we do not go too much in the negative. Is that agreed?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, the whole of Clause 191(1) does not need recasting; it needs deletion. It states as follows:

191. (1) Judicial authority—
- (a) is derived from the people;
 - (b) vests in the courts and tribunals established in accordance with this Constitution; and
 - (c) shall be exercised by the courts and other tribunals—
 - (i) in the people's name and for their common good; and
 - (ii) in conformity with this Constitution and the law.

It is leaving out, in fact, the fundamentals of judicial authority, that is, common law that is part of our legal establishment. I am talking about judicial precedence. Even statutes passed by Parliament are all left out. I think the whole of Clause 191 should be deleted. If you look at the formulation in our current Constitution, it is very clear. I do not know why we are bringing this confusion.

(Microphone hitch)

Mr. Chairman: When we deal with the Executive, it says that the Executive authority vests in either the President, the Cabinet or whatever. I would add "the Constitution" in Clause 191(1)(a) so that it reads: "It is derived from the people and based on the Constitution". Even if sub-clauses (a) and (b) are a bit of fluff, we could live with them and leave the rest of the sub-clauses as they are.

The Minister for Justice, National Cohesion, and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, the main function of a Chapter like this in a Constitution is merely to say where the authority is vested. Let me read you what the Americans say in theirs and that is why I agree with recasting because we can do this in a few sentences. It says:

"The Judicial power of the USA shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme Court and inferior courts shall hold their offices during good behaviour and shall at stated times receive for their services a compensation which shall not be diminished during their continuance in office."

The South African one has used the same approach and I do not need to read it to you. So long as we clearly say that judicial authority is vested in the courts and derived from the Constitution and law, we will be home and dry.

Mr. Chairman: So, can we agree that that is recast?

Hon. Members: Yes.

Mr. Chairman: Let us have a proposer and seconder.

Mr. M. Kilonzo proposed.

Maj-Gen. Nkaissery seconded.

Mr. Chairman: We now move to Clause 192. It is about independence of the Judiciary and it states thus:

- “**192.** (1) In the exercise of judicial authority, the Judiciary shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority.
- (2) The office of a judge of a superior court shall not be abolished while there is a substantive holder of the office.
- (3) The remuneration and benefits payable to, or in respect of, members of the Judiciary, shall be a charge on the Consolidated Fund.
- (4) The remuneration and benefits payable to, or in respect of judges shall not be varied to their disadvantage.
- (5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.”

This Article has broadly remained the same in all the drafts. Does anybody have an issue on the independence of the Judiciary?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, I caught something said by Mr. M. Kilonzo in relation to the American Constitution. It was about the judge remaining in office during good behaviour. I think we must fit something like that somewhere as we proceed. This is because they should not be given power and think it will be there forever even when they misbehave.

Mr. Chairman: I have noted that, but there is Article 201 that deals with removal.

The Minister for Justice, National Cohesion, and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I think Mr. Musila is making an exceedingly good point. This is nothing to do with removal because the Americans also have clauses dealing with removal. Once you put it down there that they shall hold their offices during good behaviour, you are expressing a positive position that they know that is what the Constitution requires. It adds value, yes and we should find a way of inserting it there.

Mr. Chairman: Is it not in Article 201? I am, however, getting Mr. M. Kilonzo's view that we should have a positive requirement as part of the earlier bits not just as a condition for requirement. I also agree with Mr. Munya that when you say that this is a condition for requirement, the opposite, therefore, is that---

So, can we say that we broadly agree with Clause 192?

Hon. Members: Yes.

Mr. M. Kilonzo proposed.

Mr. Kioni seconded.

Mr. Chairman: Now we go to Clause 193: Judicial Offices and Officers.

Mr. Mungatana: Mr. Chairman, Sir, I was just wondering. Here it is being said that their remuneration and benefits shall be charged to the Consolidated Fund. What about the whole court administration and stuff like that? Where do we secure that independence?

Mr. Chairman: Your view is that we have complete financial independence something akin to the Parliamentary Service Commission.

Mr. Mungatana: Yes.

Mr. Chairman: When we deal with the Judicial Fund, let us handle it at that point. I, however, agree with you that it is a critical function.

Hon. Members, so that we do not have to go back, please, if you have any issues before we pass anything, bring it up.

Clause 193 states thus:

“**193.** (1) The Judiciary consists of the judges of the superior courts, the judicial officers and other staff.

(2) There are established the offices of Chief Justice who shall be the Head of the Judiciary.

(3) There is established the office of Deputy Chief Justice who shall be the Deputy Head of the Judiciary.

(4) The Chief Justice shall in consultation with the Judicial Service Commission-

(a) prepare and implement programmes for the continuing education and training of judges, magistrates, other judicial officers and other staff of the judiciary;

(b) advise the national government on improving the efficiency of the administration of justice.

(5) There is established the office of the Chief Registrar of the Judiciary

who is the chief administrator and accounting officer of the Judiciary.
(6) The Judicial Service Commission may establish such other offices of registrar as may be necessary.”

Any proposals?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I would propose that we carry Clauses 193(1)(2)(5) and (6). I also propose that we delete 191(3) and (4).

Mr. Chairman: Why not (3)?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I do not believe that we need a constitutional office of Deputy Chief Justice.

Mr. Chairman: We have a constitutional office of a Deputy Speaker and Deputy President. This is the third arm of Government. It ought to be equal.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, if you look at comparable jurisdictions, including the UK where we draw our legal principles, and even the USA, they do not have a Deputy Chief Justice. All they have is a Chief Justice.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, all Judges as they sit while exercising the functions of the Office of the Judge, they have equal jurisdiction. Even the Chief Justice does not have jurisdiction which is different from the other judges. Now, if you introduce the Office of the Deputy Chief Justice, you are trying to create a very militaristic line of command in the courts. I do not think that should be the position. However, their seniority is normally acknowledged and not necessarily expressed.

Mr. Chairman: Okay. I stand corrected, Mr. Wetangula. Could we then have your proposal? I totally agree as far as 193(4) is concerned.

Mr. Kioni: Mr. Chairman, Sir, I was looking at the definition which states that the Judiciary consists of judges of the superior court, the judicial officers and other staff. What is the meaning of judicial officers?

Mr. Chairman: Magistrates, tribunals--- We had defined earlier that the Judiciary includes magistrates, tribunals and whatever.

Mr. Kioni: We need to pay attention to that definition as we go along. I think it is being used like the judicial officers include the support staff and such.

Mr. Chairman: I think they have differentiated the Judiciary as opposed to the judicial officers. So, the Judiciary consists of judges of the superior court, judicial officers and other staff. So that

even if you are clerk, you are still part of the Judiciary, but you have a different role from that of a judge.

Mr. Wetangula proposed.

Mr. Mungatana seconded.

Mr. Chairman: Is that carried? Before we carry it, let us hear Mr. Orengo.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, in Clause 193(1) where it says that the Judiciary consists of judges of the superior courts, the judicial officers--- Just on that bit of judicial officers, I think there is some difficulty in mentioning magistrates and probably leave out presiding officers or members of a tribunal. However, with regard to magistracy, if you look at a lot of cases and access to justice, a lot of things are done at the magistrate's level as opposed to the High Court. So, I would suggest that we mention Judges of the Superior Court, magistrates, judicial officers and other staff.

Mr. Chairman: So, can we get that amendment to--- Then we have to redo your proposal Mr. Wetangula and deal with Mr. Orengo's amendments. Thereafter we will delete the ones you wanted deleted.

So, could we get your proposal formally Mr. Orengo?

The Minister for Foreign Affairs (Mr. Wetangula): That we add the word "magistrates" after the words superior court.

Mr. Orengo proposed.

Mr. Wetangula seconded.

Mr. Chairman: So, it is carried that the word "magistrates" is specified before the words, "the judicial officers".

Let us have your proposal, Mr. Wetangula.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I propose that Clause 193 be reformulated to include sub-clauses 193(1) as amended, 193(2), 193(5) and 193(6) with 193(3) and 193(4) deleted.

Mr. Chairman: Yes. You propose for the deletion of 193(3) and 193 (4).

Mr. Kioni seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: Systems of Court, Clause 194. It states as follows:

“194. (1) The superior courts are the Supreme Court, the Court of Appeal, the constitutional Court and the High Court.”

That Constitutional Court, I have not seen anybody in love with it. Again, it is the same route. Mr. Orengo and Mr. Wetangula!

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, once we have a supreme court, I really do not think we need a Constitutional Court. The Judiciary will be really top-heavy having a whole panel of Court of Appeal and the Constitutional Court. In any case, there is a problem we had dealt with earlier which is that constitutional issues---

Mr. Chairman: They are dealt in the High Court.

The Minister for Lands (Mr. Orengo): And there is a possibility of that jurisdiction being given to lower courts. So, if that is the arrangement you may have a lot of confusion.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I fully support what “Lord Jim” has said and also add that in many jurisdictions, constitutional courts are *ad hoc*. They constituted to deal with specific constitutional issues. You do not have constitutional issues on a daily basis and, therefore, you cannot have a fully established court. I suggest that we delete any reference to a constitutional court because that jurisdiction is actually vested in the High Court.

Mr. Chairman: Is that carried?

Mr. Kioni: What would it be if you were to say, “the hierarchy of courts”?

Mr. Chairman: It comes in the next Article, but I want us to clear with the deletion of the words “Constitutional Court” appearing in Clause 194(1). Is that carried?

Hon. Members: Yes.

Mr. Chairman: In view of that, do we then say that the entire Clause 197 goes? Can I get a proposer and a seconder?

Mr. Kioni: I propose the deletion of Clause 197.

Mr. Mungatana seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: Now, let us to Clause 194(2). It states as follows:-

“(2) In the hierarchy of courts the Court of Appeal and the Constitutional Court shall be of equal rank.”

The Minister for Foreign Affairs (Mr. Wetangula): Mr Chairman, Sir, we have just deleted that.

Mr. Chairman: So, Clause 194(2) is irrelevant. The idea was basically to place the Constitutional Court somewhere. Is there someone to propose the deletion?

Mr. Wetangula proposed.

Mr. Munya seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: We now move to Clause 194(3). It states thus:

“(3) Parliament shall establish by legislation courts with the status of the High Court to hear and determine disputes relating to—

(a) employment; and

(b) the environment and the use and occupation of, and the title to, land.

(4) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

(5) The subordinate courts are the courts established under Article 202 or by Parliament in terms of that Article.”

Mr. Chairman: No.3 essentially provides for the Industrial Court and other Tribunals.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, even though I agree with you, I do not know why we are attempting to put them at the same level with the High Court. These are ordinary issues that can be dealt with on a daily basis. Why do we establish them and create them at the same level as the high court.

Mr. Chairman: I would imagine that we want them at sufficient level so that---

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, just to add on to that, in fact, if you look at the current legislation, appeals from the courts contemplated here go to the high court like from the industrial courts, the NEMA tribunals or any other tribunals in procurement, the courts marshals they all end up in the appellate process to the high court. I do not know if we desire to change that.

Mr. Chairman: I need intervention from senior *wakilis* on this.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, if you have fairly senior court like the industrial court, normally you have members or somebody there who qualifies to be a judge so that if you have a supreme court and the court of appeal then you are likely in the determination of any dispute, to go through a very lengthy process. Coming from the Ministry of Lands, there has been a suggestion that we should have a special court to deal with land issues because at the moment from our records there are about 5,000 land cases involving disputes over Government land leave alone the other disputes which relate to land. But if we did not have these two superior courts; the Supreme Court and Court of Appeal, I would really not have a problem.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, I appreciate what Mr. Orengo is saying but it would make things more difficult for citizens if you were to elevate courts dealing with land and employment to the status of the High Court because you will have fewer judges then the reach by the citizens would again diminish. So, it would not likely to reduce the backlog. Even though we still have the Supreme Court, I do not think everybody would be going all the way to it.

Mr. Chairman: The suggestion I was getting was that the appeal process will be so long because you will have to appeal to the High Court first then to the Court of Appeal then to the Supreme Court. That chain would be so long and expensive.

The Assistant Minister for East African Community (Mr. Munya): I started by appreciating that but I said that perhaps then we need to rethink of it because if you elevate it to the High Court still there is a big problem because most land cases are down there on the ground with ordinary citizens.

Mr. Chairman: Can we then leave this to legislation, for Parliament to decide the status?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, as we do that, let me just point out something. In fact, I thought that Mr. Orengo would have thought in the opposite direction. When we are thinking of land cases, most of them are in the villages and I do not think this country can afford to have judicial officers of the status of high court judges at every village level. What we are trying to do, I believe, is to have judicial establishments dealing with land as low as it is practically possible so that they can be able to adjudicate on land issues and land disputes involving citizens and the state or citizens and citizens. Then the law can provide that if the process of appeal is the law and put a cap on it.

Mr. Chairman: Can we say that Parliament shall establish by legislation courts with such status as Parliament may determine to hear and determine disputes relating to employment and so on.

Mr. Kioni: Mr. Chairman, Sir, before it is proposal the other important tribunals that should not be left out is the business premise and rent tribunal which is a very important tribunal. In fact, it is more active than these other tribunals. If we have to elevate the two we should also be careful

not to leave other important tribunals. Whichever way we decide to treat the two, we should also extend it to other tribunals. I would suggest leaving it to Parliament to do that.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, now that we are talking about other courts, I do not wish to jump the gun but if you look at page 202 of the draft which refer to court marshal as a subordinate court. This is a matter that would be against the practice now because court marshal cannot be a subordinate court because of the nature of crimes that it deals with and the special circumstances. Therefore, I am sure my colleague knows more about it but we would like to continue having the same jurisdiction as it has now as opposed to here where it is being made a subordinate court.

Mr. Chairman: I think it is a subordinate court. I think the problem is the term “subordinate”. This is just to differentiate it from the high court because the High Court was referred to as the superior court. This was just a differentiation from the High Court and not in any way to reduce its status or power. Even the chief magistrate in Nairobi is in a subordinate court but they handle capital offences. The problem was in the differentiation of the superior court. Now are going to have the superior court as the High Court, the Court of Appeal and the Supreme Court. So, Mr. Musila, I think it is just a terminology.

(Off record)

I think I will have that deleted from the record. They are not Kangaroo courts. They are absolutely courts established by law and I think you should appreciate it.

Can we move forward? Let us leave three for recasting. Do we conclude on three or do we leave it for recasting? I wanted it to be left to Parliament but Mr. Kioni brought in the issue of the business premise and rent tribunal and we do not have the whole that list.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, either you mention all of them here or mention none. So, the best is to leave it to Parliament.

Mr. Chairman: Do we agree to that? That it will be recast so that Parliament will not only give the status but also where they will and what they will deal with?

Anything else on that Article?

Can I get a proposal for recasting? Mr. Ruto, are you proposing that we recast?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I propose that this be recast.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): I second.

Mr. Chairman: That is carried.

Let us move to 194(4); it states:-

“Parliament shall determine the jurisdiction and functions of the courts contemplated in clause 2”.

Is clause four deleted?

Can I get a proposer and seconder?

(Mr. Wetangula proposed)

(Mr. Balala seconded)

Clause 5 states:-

“The Subordinate courts are the courts established under Article 202 or by Parliament in terms of that Article”.

Any problem with that? Can we get that carried, proposed again by those two gentlemen? So, it is proposed by Mr. Wetangula and seconded by Balala. Can we then carry the whole of that Article 194 as amended?

It is again proposed by Mr. Wetangula and seconded by Mr. Balala.

Part 2- Supreme Court. May I alert you that this is a court that has never existed before and it will be at the top of the hierarchy so let us give it a little bit more care? Article 195(1) states:-

“There is establish the Supreme Court which consists of-

- (a) the chief justice who shall be the president of the court;
- (b) it was deleted.

Can we then hold on (b) as (c) which says: No fewer than five and not more than seven other judges. Why can you not just fix the number? Then we will have to amend part (c) also. I have just been alerted to one fact.

Part (b) deals with two things: There is the deputy chief justice which we said that we do not want to deal with but there is also a vice president of the court. The structure of this is that every court; the Court of Appeal, the High Court and the Supreme Court, each has a president and the vice president to lead that court.

The Minister for Foreign Affairs (Mr. Wetangula): Naturally the most senior judge will be the vice president of this court after the chief justice. You do not even define it.

Mr. Chairman: So, how do you provide for that because we said we do not want to provide for a deputy chief justice? One of the problems with our current judiciary is that the Chief Justice does not have a lot leeway but he is also a power unto himself. The other judges have no role in terms of the running of the judiciary. One of the things that we need to fix is that.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, have we not seen complaints that the order of seniority has been skipped. There are so many cases that keep coming up and down. I think a definition would be good. We know that there are people who have been on the registry they sit there and you find that in your own profession people who have been way behind have been catapulted and these things keep on coming up.

Mr. Mungatana: Mr. Chairman, Sir, I was proposing that we capture that idea of the senior most being the vice president of the court by recasting Article 195(a) and say:-

- “There shall be established a Supreme Court which consists of-
- (a) the chief justice who shall be the president of the court and then
 - (b) the vice president of the court who shall be the senior most ranking judge
 - (c) five other judges”

Mr. Chairman: Can we get that proposed and seconded.

Mr. Mungatana: I propose.

Mr. Chairman: You are proposing the amendment of (b) and (c). Can it be seconded?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): I second.

That is carried. Number 2, the Supreme Court shall be properly constituted for the purpose of its proceedings---

The Minister for Foreign Affairs (Mr. Wetangula): I propose that we delete that.

Mr. Chairman: Why do you want to delete that?

The Minister for Foreign Affairs (Mr. Wetangula): We have said that it will consist of the chief justice, the most senior judge who will be the vice president and five others. There is no quorum unless they are seven and we leave it there.

Mr. Chairman: Will that be very restrictive? If one of them was sick would you not tie the court not to sit that day? Can we reduce it to a bit fewer than the total? My question is; must they all be present?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, from what I have noticed and the experience, all supreme courts sit in full. You cannot fish for judges for form the Supreme Court. They all sit in full always.

Mr. Chairman: Okay.

PART—SUPERIOR COURTS

SUPREME COURT

195. (1) There is established the Supreme Court which consists of—

(a) the Chief Justice, who shall be the president of the court;

(b) the Deputy Chief Justice, who shall—

(i) deputise for the Chief Justice; and

(ii) be the vice-president of the court; and

(c) not fewer than five and not more than seven other judges.

(2) The Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges.

(3) The Supreme Court shall sit in Nairobi.

(4) The Supreme Court shall have—

(a) exclusive original jurisdiction to hear and determine disputes arising from the process of the impeachment of the State President;

(b) a presidential election petition; and

(c) subject to clause (5) and (6), appellate jurisdiction to hear and determine appeals from—

(i) the Court of Appeal and the Constitutional Court; and

(ii) any other court or tribunal as prescribed by an Act of Parliament.

(5) Appeals shall lie from the Court of Appeal to the Supreme Court—

(a) as of right in any case involving the interpretation or application of this Constitution; and

(b) in any other case in which the Court of Appeal or the Supreme Court certifies that a matter of general public importance is involved.

(6) The Supreme Court shall not be bound by its previous decisions if it considers it is in the interests of justice and the development of the law for it not to be so bound.

(7) All other courts shall be bound by the decisions of the Supreme Court.

(8) An Act of Parliament may make further provision for the operation of the Supreme Court.

Mr. Mungatana: Mr. Chairman, Sir, I was saying that all the seven should be seated, but in the event that during the proceedings one of them has walked out to help himself or something, it means that the proceedings cannot continue. On a practical level, it means that the court cannot proceed if one of them is away even for a few minutes. I do not think that is correct.

Mr. Chairman: While we consult on other jurisdictions, let us bracket it.

Mr. Mungatana: Mr. Chairman, Sir, technically, even in Parliament, if the quorum is 30 and one Member of Parliament walks out, and somebody raises the issue of quorum, Parliament cannot proceed with business. So, I think it is a bit too restrictive.

Mr. Chairman: You have a point. So, let us bracket it while we look at what other jurisdictions have.

(Article 195 (1)(c) bracketed)

Article 195(3)

Mr. Chairman: Hon. Members, is it necessary to say in the Constitution that the Supreme Court shall sit in Nairobi?

An hon. Member: No!

Mr. Chairman: So, can I have proposal for its deletion?

The Minister for Tourism (Mr. Balala): Mr. Chairman, Sir, I propose that Article 195(3) be deleted.

The Minister for Foreign Affairs (Mr. Wetangula) seconded.

Mr. Chairman: That is carried!

(Article 195(3) deleted)

Article 195(4)

The Minister for Foreign Affairs (Mr. Wetangula) :---*(Inaudible)*

Mr. Chairman: Hon. Members, can we agree to the proposal for deletion of the “Constitutional Court” since we have already agreed to that one? Is that one proposed for carrying?

Hon. Members: Yes!

(Article 195(4) amended appropriately)

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, Article 195(4)(c) provides that the Supreme Court, subject to clause (5) and (6), shall have appellate jurisdiction to hear any other court or tribunal as prescribed by an Act of Parliament. Are we contemplating a situation where, from example, an appeal from a NEMA tribunal can go straight to the Supreme Court, when there is the High Court in the middle?

Mr. Chairman: Yes, but we are also not restricting, so that we do not close that window. Sometimes the Supreme Court might want to deal with things straight, like the American one. It does not just sit on appeal. It also has original jurisdiction of things that it thinks are very important to the public. It could pick up something just to pronounce itself on that issue. So, we do not close it off.

The Minister for Agriculture :---*(Inaudible)*

Mr. Chairman: They are the ones who decide. They know how their time is. You do not go straight as of right. They are the ones who decide. So, let us leave it in the current formulation.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, Article 195(6) says that the Supreme Court shall not be bound by its previous decisions if it considers it is in the interest of justice and the development of the law for it not to be so bound.

In a case involving the Narok County Council, it looked like the courts had no other way but to depart from their previous decisions.

Mr. Chairman: Do you remember the Moi ruling on service? If the court was not allowed to reverse its judgement, we would have had that as our law---

(Article 195 (5), (6), (7) and (8) agreed to)

Mr. Chairman: Hon. Members, can I have a proposer and seconder for adoption of Article (195) as amended?

Mr. Mungatana proposed.

Mr. Kazungu seconded.

(Article 195 as amended agreed to)

Article 196

196. (1) There is established a Court of Appeal, which—

(a) shall consist of such number of judges, not being fewer than twelve, as may be prescribed by an Act of Parliament; and

(b) shall be organized and administered as may be prescribed by an Act of Parliament.

(2) There shall be a president of the Court of Appeal who shall be elected by the judges of the Court of Appeal from among themselves.

(3) The Court of Appeal has jurisdiction to hear appeals from—

(a) the High Court; and

(b) such other court or tribunal as may be prescribed by an Act of Parliament.

Mr. Chairman: Hon. Members, are there any issues with Article 196?

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, with regard to the provisions made under 196(2), the practice in India and Pakistan is that judges have got a level seniority. So, instead of an election, the most senior judge becomes the President of the Court of Appeal. We can provide for a specific tenure of, say, six years. An election can turn into a political process.

Mr. Chairman: I get your point, but how does that compare to a judge who is obviously senior but everybody knows that he is the worst manager?

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, a Chief Justice or President of the Court of Appeal is not necessarily a manager.

Mr. Chairman: I think that is what they are thinking of; that, that person becomes the top officer in that court.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, you manage the cases, but not the administration. In the process of appointing the judges, surely, if somebody is incompetent and he manages to be appointed judge, then the system would be wrong.

Mr. Chairman: Not necessarily incompetent. One could obviously be a good judge, but who---

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, there is a judge I know, whose name I will not disclose. He is one of the brightest judges in the Judiciary at the moment. He is very humble but when it comes to promotion, he will not get anywhere. When it comes to things like elections, he will never get anywhere because that is not his predisposition. He should have been a Judge of the Court of Appeal a long time ago.

Mr. Chairman: I suspect that I know who you are talking about. So, could we say we head that way?

Mr. Mungatana: Mr. Chairman, Sir, we should agree that, here, we are dealing with a single profession. We already know how lawyers are sworn in. We already know the ranking of our judges. It is even demoralizing for a senior judge to lose an election. It looks a bit mucky. So, I support.

Mr. Chairman: Can we say we recast it, so that we bring in the issue of ranking?

Hon. Members: Yes!

Mr. Chairman: So, we recast Article 196(2), so that instead of providing for election, there will be seniority.

(Article 196(2) to be re-casted)

(Article 196 as amended agreed to)

(Article 197 skipped)

Mr. Chairman: Hon. Members, let us go to Article 198, the High Court.

THE HIGH COURT

198. (1) There is established the High Court which—

(a) consists of such number of judges as may be prescribed by an Act of Parliament; and

(b) shall be organized and administered as may be prescribed by an Act of Parliament.

(2) There shall be the Principal Judge of the High Court who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (4), the High Court has—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office; and

(d) any other jurisdiction, original or appellate, conferred on it by or under an Act of Parliament.

(4) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court or the Constitutional Court under this Constitution;

(b) over which the Constitutional Court has assumed jurisdiction in terms of its rules; or

(c) falling within the jurisdiction of the courts contemplated in Article 194(2).

(5) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority, exercising a judicial or *quasi*-judicial function, but not over a superior court.

(6) For the purposes of clause (5), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority as is mentioned in clause (5) and may make any orders and give any directions it considers appropriate to ensure the fair administration of justice.

Mr. Chairman: Hon. Members, Article 198(1) provides that there is established the High Court which consists of such number of judges as may be prescribed by an Act of Parliament. Do we

need to put a minimum of the number of judges here? We had put a minimum number in the earlier one. Think about a minimum.

The reason as to why I am talking of a minimum number is because we already know we should at least have an establishment of 120 or so judges. There are only 54 judges.

The Minister for Foreign Affairs (Mr. Wetangula) :---(*Inaudible*)

Mr. Chairman: Okay. In respect of 198(2), which provides that there shall be the Principal Judge of the High Court who shall be elected, do we use the same formulation as in the previous Article?

Hon. Members: Yes!

(Article 198(2) to be re-casted accordingly)

Mr. Chairman: Hon. Members, Article 198 refers to Article 194(2). What does Article 194(2) provide for?

An hon. Member: We deleted that one.

Mr. Chairman: If we deleted that one, Article 198(4) is just (a) and the first part of (a). Is that agreed?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, am I misreading? Article 198(1)(c) says "an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office", but the High Court will also handle appeals from lower courts. Are we excluding that provision? It has unlimited original jurisdiction in criminal and civil matters. It is also an appellate court for subordinate courts, which should be mentioned. I would want to be amended to read as follows:-

"an appeal from a decision of a subordinate court or tribunal appointed under this Constitution"

Mr. Chairman: So, let us re-cast 198(1)(c), so that it talks about appeals from the subordinate courts referred to in 202.

(Article 198(1)(c) to be re-casted accordingly)

Mr. Chairman: Hon. Members, Article (5) provides that the High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority, exercising a judicial or *quasi* judicial function, but not over a superior court.

Article (6) provides that for the purposes of clause (5), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority as is mentioned in

clause (5) and may make any orders and give any directions it considers appropriate to ensure the fair administration of justice.

Hon. Members, I think we should re-cast 198(2) and 198(4) and carry the rest of the clauses.

An hon. Member: And Article 198(3)(c), Mr. Chairman, Sir.

Mr. Chairman: So, we are re-casting Articles 198(2), 198(3)(c) and 198(4), in terms of deleting (b) and (c) and part of (a)?

Hon. Members: Yes!

(Amendments agreed to)

Mr. Chairman: Can I have a proposer and seconder for adoption of Article 198 as amended?

Mr. Ruto proposed.

The Minister for Foreign Affairs (Mr. Wetangula) seconded.

(Article 198 as amended agreed to)

APPOINTMENT OF CHIEF JUSTICE, DEPUTY
CHIEF JUSTICE AND OTHER JUDGES

199. (1) The State President, acting on the recommendation of the Judicial Service Commission shall appoint judges.

(2) The State President shall appoint the Chief Justice and the Deputy Chief Justice on the approval of the National Assembly.

(3) The judges of the superior courts shall be appointed from among persons who—

(a) hold a law degree from a recognized university or are advocates of the High Court of Kenya or possess equivalent qualification in a common law jurisdiction;

(b) possess the required experience gained in Kenya or in another Commonwealth common law jurisdiction and referred to in clauses (3),(4), (5) and (6); and

(c) have a high moral character, integrity and impartiality.

(4) The Chief Justice and judges of the Supreme Court shall be appointed from among persons who have—

(a) at least fifteen years experience as judge of the Court of Appeal, the Constitutional Court or the High Court; or

(b) at least fifteen years experience as distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal fields; or

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years;

(5) The judges of the Court of Appeal shall be appointed from among persons who have—

(a) ten years experience as judge of the High Court; or

(b) ten years experience as distinguished academic or legal practitioner or such experience in other relevant legal fields; or

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

(6) The judges of the Constitutional Court shall be appointed from persons who have—

(a) at least ten years experience as judge of the Court of Appeal or a judge of the High Court; or

(b) at least ten years experience as distinguished academic or legal practitioner or such experience in other relevant legal fields; or

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

(7) The judges of the High Court shall be appointed from persons who have—

(a) at least ten years experience as professionally qualified magistrate;

(b) at least ten years experience as distinguished academic or legal practitioner or such experience in other relevant legal field; or

(c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

(8) A judge of the Constitutional Court shall, in addition, be a person—

(a) versed in constitutional law and constitutionalism; and

(b) with proven commitment to human rights values and practices.

Mr. Chairman: Hon. Members, I do not like the term “State President” as referred to under Article 199, but let us go on. We will deal with when we deal with the Executive.

Article 199(2) says that the State President shall appoint the Chief Justice and the Deputy Chief Justice on the approval of the National Assembly. We had already deleted “Deputy Chief Justice”.

Article 199(3) says that the judges of the superior courts shall be appointed from among persons who—

(a) hold a law degree from a recognized university or are advocates of the High Court of Kenya or possess equivalent qualification in a common law jurisdiction;

(b) possess the required experience gained in Kenya or in another Commonwealth common law jurisdiction and referred to in clauses (3), (4), (5) and (6); and,

(c) have a high moral character, integrity and impartiality.

Hon. Members, why do we not deal with this Article up to this point, first?

An hon. Member: Mr. Chairman, Sir, the parts of this Article are connected to these other parts.

Mr. Chairman: Hon. Members, Article 199(4) is providing for the other courts. All the superior courts are there.

Mr. Kioni: Mr. Chairman, Sir, we have the lower courts and the superior courts.

Mr. Chairman: The superior courts are all there.

Mr. Kioni: Yes, and that needs to be carried through and through. There seems to be some places where---

Mr. Chairman: The superior courts are anything that is not the subordinate courts. Hon. Members, do you have any problem with Article 191(1), (2) and (3)?

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Chairman, Sir, I just want to ask, for purposes of understanding something. I am talking of the selection process. Is there any vetting process, especially when you bring the provision made under part (c) of sub-Article 199(3) (c)? I am thinking of the Claris/Thomas' saga?

Mr. Chairman: This is actually one of the issues. The proposal that the draft had was that we have an Independent Judicial Service Commission (IJSC), and that the IJSC advertises for those posts and recruits. Once it has done that, the IJSC sends those proposals to the President for appointment. Now that we have proposed an executive President that might be different from the one we have, typically, in the Claris/Thomas process, what would happen is that the President alone would appoint the judge and take that proposal to Parliament. Parliament, first, at the Committee stage, and later the full House, where you would have that position filled. So, in the US, they would not be advertising for the jobs. What they do the President will say: "I think the Minister for Justice will make a very good judge and say: I am proposing the Minister for Justice to be a judge." That comes to the Parliamentary Committee, and they have hearings. It is an open process. They say: "Anybody who has any issues with this gentleman or this lady, let us hear it." They will then vote on it. It is then taken to main House. They vote on it and it is confirmed.

So, may be, we will follow the process in the UK, which has just set up a new Judicial Service Commission, which does not include Parliament in that process. It is just between the judicial process and the Prime Minister. Whichever we use, in any event, this will still hold.

So, other than the reference to the Deputy Chief Justice in 199(2), can we carry Article 199(1), (2) and (3)? Can I have a proposer and seconder?

Ms. Odhiambo: Mr. Chairman, Sir, based on what you have just said, why are we carrying Article 199(1), (2) and (3) without making a provision for that vetting? I can see that there is only vetting for the Chief Justice, and not for the other judges.

Mr. Chairman: What are you suggesting?

Ms. Odhiambo: Mr. Chairman, Sir, I would suggest that we adopt the USA system, so that the appointments go through Parliament.

Mr. Chairman: Are you suggesting that the President appoints without having to go through advertisement, and then the appointments go through Parliament for confirmation?

Ms. Odhiambo: Yes, Mr. Chairman, Sir.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, I am a layman as regards to law, but I want, for the sake of clarity, I would like to seek clarification. We are having a Supreme Court, the Court of Appeal and the High Court. What are the roles of all those courts? I think we are setting up too many courts. Can you tell me why we should have three tiers of Judiciary?

Mr. Chairman: Hon. Members, is there anybody who would want to try to explain that to hon. Nkaisserry?

Mr. Chachu: Mr. Chairman, Sir, if Parliament is going to vet the appointment of the Judges---

Mr. Chairman: Can we try and answer hon. Nkaisserry? Let us deal with this one first, before we hear Mr. Chachu.

Let me try and answer that one. You know, we have an appeal process, because judges are human beings. They could actually get wrong. We want to be able to have a second level, if you are not happy with a judgement that the first court has given you; to be able to go to a higher court for review of your case. If you are not happy, we want you to be able to go to even a further higher court.

When it comes to my understanding of the American system, the Supreme Court deals with very critical constitutional issues. It is very limited in terms of numbers, but very powerful in terms of the sound they set. The others are supposed to give you an appellate opportunity.

Secondly, the High Courts are going to be quite a number. Courts of Appeal will be very many, just like the High Court, but you would want to be able to go to a further court for those very key decisions, where you can have a decision made for everybody. Ultimately, the philosophical basis for that provision is that courts are human beings, and they could get it wrong. You may want to have a second level to which, if you aggrieved, your decision is not closed. If we had left it to just one court, even if they were wrong, you would have nowhere else to go. It is said that in God's case, there is no appeal. In human being's case, there is always appeal. You can appeal to the next and next levels. Of course, I agree with you that the chain should not be so high. That is why we agreed to kick out the Constitutional Court.

Mr. Chairman: We also have the economy to think of. Ideally, having two levels of appeal after the High Court is not a bad thing because there are a number of cases that come straight to the High Court and then you want to appeal to two levels. If it comes to the Magistrate Courts, two levels. So, this is the philosophical reason behind. Then let us go to Maj-Gen. Nkaisserry. You are not convinced, I can see from your eyes.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): You have not convinced me because I think you are trying to just give good names for the sake of making this constitution look like we have done a good job. If you are aggrieved and you go to the lower court, for example, the Magistrate Court and you bring your problem to the High Court and then you go to the Court of Appeal, I think you just need to give a name, if it is the Supreme Court and then remove the court of appeal. Otherwise, I think you can create a specific court, for instance if my case has not been properly addressed then the Chief Justice can constitute another panel of judges to hear it but you do not have to have a court or another level for the sake of appeal.

Mr. Chairman: Two things happen hon. Maj-Gen. Nkaisserry. First of all, there are people who will start with the High Court and not the Magistrate court. So, their first point of appeal is the Court of Appeal. Then the Court of Appeal has many courts. In other words, it is a court that has many branches. The Supreme Court has only one branch. It is only one court of a set number. So, even those courts of appeal, several of them might give different interpretations and they have the right to do that because they are courts as equal to the other court. You want to come to a certain point at the apex where everybody else follows *amri*. Like you are the General, you might have several arms. Is there anybody else who has any other issue with the High Court? Other than the reference to deputy, this whole debate, I think what Ms. Odhiambo pointed out is very critical. In view of the nature of the Executive we are likely to take, does that impact on the form of appointment discipline of the judges? This is because we could have the Judicial Service Commission as proposed in the current draft which has no role for Parliament except in terms of removing the Judges or do we have the American system where it is the president and Parliament's decision that do the appointments. The President appoints and Parliament vets. There are two different philosophies.

Mr. Chachu: Mr. Chairman, Sir, that is the question I was trying to pose and basically, in terms of the appointment of judges. If we use the American model where Parliament will have to vet those appointments, what will be the role of the new Judicial Service Commission? I thought that that was one of its key functions as established here.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, I am a lay man also here, but when we say that they should be vetted by Parliament, are we talking about the High Court judges plus the court of appeal?

Mr. Chairman: All the superior courts.

The Minister for Agriculture (Mr. Samoei): I think it is important for the people through their representatives to have a say on some of these people. It provides the connection between the supremacy of the people and all these institutions.

Mr. Chairman: And checks that institution.

The Minister for Agriculture (Mr. Samoei): Because if we let the Judicial system run away from the people and just to be between the President and the Judicial Service Commission, I think there is an issue there, but if we are persuaded that there is a way that can be done, then we can go that direction. But it will greatly depend on the Judicial Service Commission, the composition and how it operates. If you have a Judicial Service Commission and the nature of its appointment in such that it is not firm---

Mr. Chairman: The alternative is that all members of the Judicial Service Commission are vetted by Parliament and they now do the vetting for the Judges.

The Minister for Agriculture (Mr. Samoei): There is weak link somewhere there. I think we should rethink the formula and maybe go the other way.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I am afraid, we must provide for vetting judges. The experience has been very bad and when we reach even the Judicial Service Commission, I am going to request that we insert a provision for them to recruit these judges before recommending them to the President transparently.

Mr. Chairman: I think we have to go with one general system as opposed to the other. Either we go the Judicial Service Commission way which is what Britain is now trying to do or we go with the American system which is that the President appoints but it is vetted by Parliament and he can only then confirm once the vetting has gone through.

The Minister for Higher Education (Dr. Kosgei): Mr. Chairman, Sir, let me try to persuade you because I am the one who raised this issue and I gave the example of Thomas because if you remember the debate that went on before he was vetted, when he was eventually selected despite the debate, it then became easier to trust him. Had he gone in through a standing thing like the Judicial Commission which will end up being a club of people who know each other and then those issues had come earlier, he would never have been able to perform his job. Given the way we work and the way the whole world works, if I were the person selected, I would prefer to be vetted and thrown out or accepted because once I am accepted, then I feel I have the moral authority to do my job.

Mr. Chairman: In any event, we have reduced Parliament's work so that confirmation of senior appointments really is one of the key functions.

Ms. Odhiambo: Mr. Chairman, Sir, if you see the trend that Kenya is taking, even if you look at the other pieces of legislation that is coming up, we are actually vetting people that are at less superior levels to judges. For me, it is actually very important that the vetting goes through Parliament.

The Minister for Lands (Mr. Orengo): There is a point that Dr. Sally mentioned that is critical to me. Once we have this requirement of high moral character, integrity and impartiality, it comes wily nilly mandatory to have a confirmation process. If you remember the Clarence Thomas' case, if the appointment was confined to some small point, for instance, the Judicial Service Commission, the issue that came out in public would not have been easy. But if it goes through Parliament, then you got the public out there who through their elected representatives may have issues which then gets to Parliament. So, I think a vetting process is necessary.

Mr. Chairman: Does anybody have a contrary view? It looks like we are heading that way, and so, if we are generally agreed, we can proceed.

The Minister for Tourism (Mr. Balala): Mr. Chairman, Sir, I just want to refer what Ms. Odhiambo has said that the trend is that we are going towards vetting by Parliament. But if we are going to the Presidential system, which is the American style, then the President should appoint and then Parliament vets or the Parliament Select Committee.

Mr. Chairman: Agreed.

Mr. Ethuro: Mr. Chairman, Sir, I know opposites, but not on this one. I would imagine the President is not going to appoint people because he knows them or he plays golf with them. The President would be guided by the Judicial Service Commission in terms of these people, particularly consistent with the high moral character, integrity and impartiality. The role of Parliament is just to affirm and confirm. Parliament would be expected really not to go into the details unless there are serious lapses. So, I find that there is no contradiction in having both.

Mr. Chairman: Will it not be too elaborate?

Mr. Ethuro: It could be too elaborate but I think it is necessary for purposes of integrity. Now you can determine whether it is opposite or not.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, I am really not deviating from hon. Ethuro has said. In fact, I am perpetuating it. Let the Judicial Service Commission through its processes originate the names from where the President can then make an appointment and Parliament eventually either ratifies or rejects.

Mr. Chairman: Is that what we have generally agreed on?

Hon. Members: Yes.

The Minister for Tourism (Mr. Balala): Here we are talking about a system and here we have the Presidential system. When the President nominates anyone, he should have a process where he also does intelligence on these individuals. That is the process where he can give the names to the Parliament Select Committee just to verify further rather than the PSC originating the list.

Mr. Chairman: We have agreed on that. The Judicial Service Commission should originate the list.

The Minister for Tourism (Mr. Balala): Then what leeway are you giving the President to appoint? He is just basically receiving the list from the Judicial Service Commission. The President has no power any more.

Mr. Chairman: The Minister for Tourism has a point. If it is the Judicial Service Commission originating the list, then the President essentially cannot bring anybody outside that list. So, what will be the role of the President?

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, if there was a Magistrate reappointed as a judge, the Judicial Service Commission will interrogate the performance of this Magistrate. The judgements whenever they got an appeal, were they allowed? There are quite a number of technical issues that the President will not be able to deal with. If you allow the President to originate the list from anywhere, looking generally at the qualifications that we have placed as requirements, you will have all sorts of odd people who may qualify on paper but who many not really perform the functions properly. So, we should make sure that probably the Judicial Service Commission should not have a limited number of persons. Let us say, for example, the President wants to appoint ten people, they should have a list of about 30 or 40 people, so there is some discretion.

Mr. Chairman: Okay.

The Minister for Lands (Mr. Orengo): So, we can say that the President shall appoint from a list.

Mr. Chairman: Essentially, one of the key roles of the Executive is to make these senior appointments and as our check also on the Judiciary, the Executive should be the one proposing. All these institutions have to be interconnected. So, while I agree with you that we should check the President in terms of his not picking from anybody, the President ought to have the ability to decide between some individuals. Probably that latter bit that hon. Orengo has said that we should give a list might square that.

Mr. Mungatana: Mr. Chairman, Sir, I want to agree with hon. Balala here and I wanted us to go back to the Cabinet. If we are not setting a list from which the President appoints, we might as well create a Cabinet or a Judicial Service Commission. So we create a list and when the President is elected, he should go to that list and then bring that list to Parliament for it to be approved. If we say that we want a pure President system, let us leave with that system. Let us leave with it wholly because there is no justification whatsoever to restrict that. If Parliament is not clever enough to pick out those judges and say that there is something wrong with some of them, then they have to leave with it. My proposal is very simply: Let the President bring whoever he thinks qualifies. Because obviously he has State agents with him and he can consult with the Judicial Service Commission, the Law Society of Kenya and then they bring the same list to Parliament and it will be vetted if he will come to Parliament because he has to defend that list. You cannot give him a list or the Judicial Service Commission cannot give him a list for him to come and defend through himself or his party. Let him just look at the people that he thinks should come and then let his party defend that list in Parliament.

The Minister for Higher Education (Dr. Kosgei): Mr. Chairman, Sir, I am not a lawyer and I feel bad that I have to speak about this again. But I thought we were running away from the situation where the Presidency controls the appointment of the judges. I thought the idea was that we want to set up an independent judiciary. How are we setting up an independent judiciary if we then allow the President to pick the judges? I want the lawyers to tell me how to do that? That is really mixing up again the Executive and the Judiciary.

Mr. Chairman: Let me respond to that. The court has the right to declare the President's election null. In other words, they have that power over the Executive and over Parliament. The Executive and Parliament should have some power over the courts, lawful power and not the independence. So, the only way they do is to have an input in the process that appoints them to this House. The President will not have the powers he has now, which is basically he has that Dr. Kosgei is the judge and the Judicial Service Commission is a rubber stamp and the President appoints you. But now we will have the President saying that I am proposing Dr. Kosgei to be a judge, and then Parliament will vet. So, if the President and Parliament agree, then you really ought to serve as a judge.

Ms. Odhiambo: Mr. Chairman, Sir, I do not think that that means that we do not want a Presidential system. Even if you look at the American system, it is presidential. As much as we want a presidential system, we need to put higher standards even higher than in the American system for purposes of accountability. When we say that we let the President appoint, for example, our first President was Jomo Kenyatta who was a non-lawyer. The second one was Moi, a non-lawyer and the third one is President Kibaki, a non-lawyer, the fourth one, I will be a lawyer, but that is the only exclusion. Whenever they made appointments or whenever they have to make appointments, they do not sit somewhere and say pinky ponky, they actually consult. So, in this situation, you have the Judicial Service Commission to recommend. If you do not have the

Judicial Service Commission, they will be actually consulting someone, meaning that we will be having a kitchen Judicial Service Commission. So, why can we not just do it properly instead of letting the President choose from among his friends to recommend for him the people they like?

Mr. Chairman: I was persuaded by the list being larger than the actual number.

Ms. Odhiambo: I am persuaded by that too.

Mr. Vice-Chairman: I just want to draw comparison between the Judiciary and the Cabinet, with due respect this is really a little problematic. The Cabinet is an institution implementing political decisions. We are trying to move from a certain scenario to develop a judiciary that can enjoy the confidence of everybody and can have capacity to execute its work without looking over the shoulder.

Mr. Orengo gave us a very good proposal that will guarantee to an acceptable degree, independence of the Judiciary while also granting the President sufficiency in terms of making choice. The idea of having a list generated by the Judicial Service Commission that should be wide enough to allow the President some latitude should be acceptable.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Article 205 makes provision for that at page 116. One of the very top functions of the Judicial Service Commission is to recommend to the State President, persons for appointment as judges. I believe this is the correct way to go because at this point should the Judicial Service Commission act on its own, the President can say: "No, I will not recommend this person to Parliament" or send its friends to apply.

We are not reducing the Presidency by requiring that they at least be recommended by the Judicial Service Commission. They will be able to source the character that Mr. Orengo was talking about. The ability to perform functions whether the person is bankrupt, it will be for them to vet. If you look at the American system, the reason for this fiasco of this judge who was appointed is that whichever President comes into office he starts using his cronies to start looking for their philosophical minded friends in the Judiciary, which is ridiculous.

Ms. Karua: It happens everywhere even in America. The President looks for people who think like him or those he can use. That is how come the court declared President Bush President. Al Gore lost courtesy of the court. So, rigging even inside a court room happens in every system. So, how can we improve on the American and British systems? Even in the British system the administration hand picks. That is why in Kenya, a judge under investigation is picked and sworn in so that somebody else can appoint an ageing Chief Executive in a certain parastatal. This is a trade-off which later embarrasses everyone. The same Executive does not stop the prosecution of the judge under question. That is why they promote magistrates famous for fixing drug cases. They are taken to the High Court or the Court of Appeal a man whose sole

qualification is having fixed a petition for someone. You avoid it by running away a little from the American and also the British and mixing a little bit of the Italian system. Italy may not be famous for many things but there is one thing they do which many people do not, except for Canadians. This is to hire judges competitively. We should include the word "Competitive". I saw in the Constitution that judges will be hired competitively. The details will be for the Judicial Service Commission Act. When we hired the judges who were dealing with constitutional disputes, apart from an oral interview, those people will also do a written interview. That is how the suggestion came in. The interviews should be done by different departments.

We should also work on the Judicial Service Commission so that it is not just a judge of the High Court. I am not for excluding the Chief Justice. If you are hiring for breweries and you exclude its Chief Executive or the Kenya Airways, you will be so wrong. You cannot get the Speaker out of the Parliamentary Service Commission because someone has to take responsibility somewhere. I would still have the Chief Justice. I would even have him chair it but I would bring in the private sector the professional societies of East Africa as one of the stakeholders. I would bring one person from the university. I would bring in the Law Society of Kenya. After the Chief Justice you can have a couple of other judges but you make sure that they are like four or three. When you bring strong independent personalities who are not handpicked, there is competitiveness you can be sure the system will run itself. It is a model I will also try to propose for Parliamentary Service Commission that unless you have half-half from the private sector and insiders we will not get the accountability we desire.

I would also let the President pick the Chief Justice but from among the judges of the Supreme Court. Remember they have been hired competitively. They are already there. So, let him have his choice among those the system has already cleared so that we run away from the American system where one system can favour retrogressive polices at the behest of those in authority.

Mr. Chairman: I want to give you more time so that we can go through. The first issue was how you appoint the judges. There were two proposals from the floor. One was that we use the Judicial Service Commission and the other was to let the President pick directly vetted by Parliament.

Ms. Karua: Sometimes a President can pick a very good person but it is by sheer fluke not by effort. When they use effort they pick very bad ones and we do not have to go into details or give names. Let us bring in the word "competitive". I want you to know that even the Americans were trying to improve on the British. So Kenya can try to improve on those two models.

The Minister for Tourism (Mr. Balala): I think we should not disregard the role of our President. Do not render him a clown. It is important that the President appoints people who think like him and they may be cronies there is nothing wrong with that. This happens all over

the world. I feel the generation of the list should come from the President who will give it to the Judicial Service Commission and then together, they present it to Parliament. That will be the right way. You cannot allow the Judicial Service Commission to generate the list. If the President has any names he cannot put them in the list.

The Minister for Foreign Affairs (Mr. Wetangula): Even in the current system from Kenyatta, Moi to Kibaki even as good and bad people have been appointed those names normally come through the Judicial Service Commission. Whether they are stage-managed or not, is another matter. They normally ostensibly come through the Judicial Service Commission. The better system is what Mr. Orengo proposed that the Judicial Service Commission proposes a list to give the President some latitude. From that list he appoints.

Mr. Chairman: Could you propose that and we get it seconded. Let us give Mr. Mungatana a chance so that we can conclude.

Mr. Mungatana: We need to agree that in the running of the presidency there will be certain issues that will be important. They might determine who becomes what or how people vote. For example, we have not made a decision on the issue of pro-choice and pro-life. If there is a President who is pro-choice and he comes to make a Government, and he says when we get in this is how we will run the Government.

---(*Inaudible*)--- it to have created a premeditated list through a Judicial Service Commission that he never appointed and has no influence on; you just restrict him to a list of 30 people. Let us agree that there are certain things that that President will have to use the Judiciary where necessary to make sure that the policies that he promised people are made a reality. For example, someone talked about the Supreme Court here being the place where those decisions of pro-life and pro-choice will be made. If you have a judge or bench that is already pre-determined probably by the judicial service Commission, people who are all pro-choice and they have a list of people who are all pro-choice, how will these things happen? This is my argument: I like that Article that Mr. M. Kilonzo talked about on the functions of the Judicial Service Commission. It reads as follows:

“And shall recommend to the State President persons for appointment as judges but the President is not restricted.”

He can choose to pick whatever list we have created. He can also choose to go outside so that we nominate---

Mr. Chairman: The list will be larger than the number he has to pick. For every post he will be given two names and he picks one.

Mr. Mungatana: This is what I am trying to amend. This list that is proposed by Mr. Orengo should not be restricted so that the President---

Mr. Chairman: In other words, he can pick from the list or from elsewhere.

Mr. Mungatana: He can pick from elsewhere and then he clears with the Judicial Service Commission. If you are a clever President---

Mr. Chairman: No. You are saying he clears with the Judicial Service Commission. How does he clear with the Judicial Service Commission?

Mr. Mungatana: If I want to appoint someone, even without this recommendation, you have heard submissions on the floor here. Without even this thing being in the Constitution, the President will quietly consult. Does this man or woman fit the bill? He can pick from that list or go outside that list and pick people that he thinks can serve then he brings to Parliament because the check is Parliament.

Mr. Chairman: I have heard you.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): One of the things we want to achieve in writing this Constitution is to run away from the past. Past experience has shown us that the Executive has interfered with the Judiciary. Mr. Mungatana has talked about the President putting his policies in the Judiciary. That will be close interference of the Judiciary. I am surprised because you remember the triangle he gave us there said that we lift up from 100 metres to 50 metres and that is not the best way to live. That cannot be 50 metres. I want to very strongly recommend Mr. Orengo's proposal that the President will pick from among the list of names provided by the Judicial Service Commission. After the President appoints, they will be subjected to the parliamentary vetting. If we do that I am sure we will get people on who the President will not have direct influence.

Ms. Karua: The appointment by the President should be the very last thing so that the Judicial Service Commission ought to propose and that is a revised Judicial Service Commission and then parliament vets. That is what we do for other seats. The President will then pick. If you start---

Mr. Chairman: The President will do formal appointment at the end, but we want the Judicial Service Commission to initiate.

Ms. Karua: So, you want to mix it with the one for USA where the President picks first and then they go?

Mr. Chairman: Yes.

Ms. Karua: I have no problem with that.

Mr. Chairman: Could we propose and second?

The Minister for Agriculture (Mr. Samoei): Surely, I have no quarrel with the Judicial Service Commission proposing. I think they should propose a list. There is also no harm in us saying the President may not be limited. If the President has somebody he feels very passionate about let him include that person in the list that will go to Parliament. It will be known in Parliament that this name did not originate from the Judicial Service Commission. Therefore Parliament will take an extra oversight and look at it. Sometimes the President can have a legitimate reason---

Mr. Chairman: I have heard you. If you realise my original view was that the Judicial Service Commission should not even have any role. My view earlier on was that this should be left to the President and he sends the names. I have since been convinced that there is a necessity for having a reformed Judicial Service Commission.

The Minister for East African Community (Mr. Munya): Where there is vetting by Parliament there is really no need for a Judicial Service Commission. There is absolutely no need where there is vetting for Parliament even there are no Judicial Service Commission proposals because it does not matter where the names come from as long as there is that parliamentary vetting. To close the gap for our President to be able pick other competent people who may have been left out by the Judicial Service Commission is not right because it is already checked by the appointment by Parliament.

Mr. Chairman: If we are going to have a list from the JSC I think it will be very untidy to open it up again.

The Minister for East African Community (Mr. Munya): We had better not have any list from them. We would rather limit the JSC to the management of the Judiciary and let the appointments be done by the President and then vetting by Parliament.

The Minister for Lands (Mr. Orengo): Mr. Chairman, I just want to strengthen the idea that hon. Wetangula was making. In fact, there was a proposal on the Floor but I want to buttress it with what hon. Martha Karua was saying that in order to get the list, how does the Judicial Service Commission (JSC) generate the least? What probably would do by way of legislation is that at the level of the JSC, there should be a competitive process so that the least that comes from the JSC will be through a competitive process.

Mr. Chairman: I am personally convinced that is a superior system than just allowing the President. However, I think we must give the chief executive the leeway out of say 20 names to be able to pick five so that the president actually decides.

The Minister for Lands (Mr. Orenge): Mr. Chairman, you remember even from the Truth, Justice and Reconciliation Commission (TJRC), Parliament was dealing with a list of 15 and picked nine.

Mr. Chairman: Then the president still picked six out of the nine we sent.

Ms. Karua: Now, the amendment that I am proposing is already there that the JSC generates a list competitively. Why do we do this? So that those who feel they are competent and are not affiliated to politicians, they are never considered, they will have a chance and when the process is elaborate as the one we are proposing, competitively picked, appointed by the President, vetting by Parliament, those who know they cannot measure up will not even dare. So, we get the best. I propose that the list generated by the JSC be done so competitively and then be appointed by the President. The President appoints from that list and then Parliament approves.

Mr. Chairman: No! The President should have a larger list than the actual number he is sending.

Ms. Karua: That is okay. The list generated by the JSC amounts to something like a short listing of qualified candidates from among. The JSC generates a list. The President appoints from among. When you use the word “among”, it means he does not have to pick the whole. He nominates and Parliament approves.

Mr. Vice-Chairman: I second.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, before secondment, my only departure is that the competitive sourcing of this list is a process. I think it should go into the JSC Act that will tabulate how they will arrive at the list to take it to the President.

Mr. Chairman: Because they might say this is not a requirement in the constitution. Put in just one word. So, hon. Wetangula, please second it.

Mr. Vice-Chairman: I have seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: Now, let us go back to the Article.

The Minister for Foreign Affairs (Mr. Wetangula): We will take an hour on the Article.

Mr. Chairman: Yes, but it was a critical and important thing. We are now at 199(4). It states:-

“The Chief Justice and Judges of the Supreme Court shall be appointed from among persons who have at least 15 years experience as a Judge of the Court of Appeal,

constitutional court removed.” Anywhere where you see “constitutional court”, disregard it because we have removed it. It further states: “or the High Court (b) at least with 15 years experience as a distinguished academic judicial officer, legal practitioner or such experience in other relevant legal fields or (c) held the qualifications specified in Paragraph A and D for a period amounting to in aggregate to 15 years.” (5) The Judges of the Court of Appeal shall be appointed from among persons who have (a) ten years experience as a Judge of the High Court or (b) ten years experience as distinguished academic or legal practitioner or such other experience in the other relevant legal fields or (c) held the qualification specified in paragraphs (a) and (b) amounting in aggregate to ten years. (6) The judges of the constitutional court”.

Delete the entire No.6. No.7. The judges of the High Court shall be appointed from persons who have (a) at least ten years experience as professionally qualified magistrate (b) at least ten years experience as distinguished academic or legal practitioner or such experience in other relevant legal field or (c) held the qualifications specified in Paragraphs A and B for a period amounting in aggregate to ten years. (8) A Judge of the constitutional court.

Delete No.8. Now, does anybody have any issues to fit it with the decision we have made as far the JSC is concerned? Can I get a proposer and seconder? Hon. Kioni, are you proposing for 199 as amended?

Mr. Kioni: Mr. Chairman, Sir, as I propose, we have talked of a list. Is it possible to clarify if the President needs five names if there is a list?

Mr. Chairman: My view would be he will double the number.

Hon. Kioni: I think if we capture that that is okay. With that, I propose that Article 99 as amended be carried.

Mr. Kazungu seconded.

Mr. Chairman: Okay. Tenure of office of the Chief Justice and other judges, Article 200 (i). It states:-

“A judge shall retire from office on attaining the age of 70 years but may opt to retire at the age of 65 years. (2) The Chief Justice shall hold office for a maximum of ten years or until attaining the age of 70 years whichever comes first. (3) Despite Article 195 (i)(c) where the Chief Justice’s term of office expires before he attains the age of 75, the Chief Justice may continue in office as a Judge of the Supreme Court even though there may already been the maximum permitted number of supreme court judges holding office.” (4) The Chief Justice and any other judge may resign from office by giving notice to the state president, (5) If there are proceedings that were commenced before a judge of a

superior court prior to attaining the age of retirement, the judge continues in office for a period of up to six months not only for purposes of delivering a judgement or performing any other function in relation to those proceedings”.

Does anybody have an issue with Article 200?

Ms. Karua: Mr. Chairman that is one of----.

Mr. Chairman: What about the others?

Ms. Karua: No! The others I do not.

Mr. Chairman: Can we get proposals and secondments for the others? Proposed by the Minister for Justice, National Cohesion and Constitutional Affairs and seconded by hon. Chachu. Is that carried?

Hon. Members: Yes.

Mr. Chairman: No. 5 then.

Ms. Karua: The problem I have with No.5 is that when you say someone may remain for six months, they will forever always remain for the maximum period. Now, if I am about to become 70, I am aware. So, the whole year I should be preparing my exit but because majority people cling and never want to leave, they will be waiting to get the six. Actually, two judges came to me when I was at the justice office all wanting me to lobby for them to be hired on contract to finish judgement but I had no powers to do so. It is as though retirement has happened on you suddenly. So, I am proposing that we delete 5 na *wajipange!*

Mr. Ethuro: seconded.

Mr. Chairman: Is that carried?

Hon. Members: Yes.

Mr. Chairman: The judges should plan for their retirement early.

Mr. Kioni: That is okay for 5 but what becomes of the judges who may already be over 70?

Mr. Chairman: There is a very important point raised by hon. Kioni. There are currently judges who are 70 and the current retirement age is 74. So, we will handle it on transition. 201 Removal from Office. It states:-

“A judge of a superior court may be removed from office only on the grounds of (a) inability to perform the functions of office arising from mental or physical incapacity (b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of

Parliament (c) bankruptcy; (d) incompetence or (e) misconduct or misbehaviour whether in performance of judge's duties or otherwise.

2. The removal of a judge may not be initiated by the JSC acting on its own motion or in the petition of any person.

3. Despite Article 295 (2) (b), the petition by a person under Clause 2 shall be in writing setting out the alleged facts constituting the grounds for the judge's removal.

4. The JSC shall consider the petition and if it is satisfied on the grounds under (1), send the petition to the president.

5. Within 14 days after receiving the petition, the President shall suspend the judge from office and acting on the recommendations of the JSC (a) in the case of the Chief Justice, appoint a tribunal consisting of (a) (i) Speaker of the senate or chairperson. That, I think will definitely go. (ii) superior court judges from common law jurisdiction (iii) One advocate of 15 years standing and (iv) two other persons who have experience in public affairs and (b) in the case of a judge other than the Chief Justice, appoint a tribunal consisting of four members from among persons who hold or have held offices as a judge of a superior court or a qualified to be appointed as such but in either case, have not been within the proceeding three years as members of the JSC. (2) One advocate of 15 years standing and (3) two other persons with experience in public affairs.

6. The Tribunal shall inquire into the matter and report on the facts and make recommendations to the President who shall act in accordance with the recommendations of the tribunal.

7. The remunerations and benefits payable to a judge who is suspended from office under Clause 5 shall be adjusted to one half such time as the judge is removed or restated in office.

8. A tribunal appointed under Clause 5 (b) shall elect a chairperson from among its members and

9. A tribunal appointed at Clause 5 shall be responsible for regulation of its proceedings.

10. A judge who is aggrieved by a decision of the tribunal and its Article, may appeal against the decision to the High Court or in the case of the High Court to a Court of Appeal.

Does anybody have issues with that Article?

Ms. Karua: Yes. No.2. Now, when you say that the removal of a judge maybe initiated by the JSC or on the petition of a person, judges make decisions that affect all of us. An aggrieved

person can decide to be a nuisance and judges will be destabilized. Now, if we want to open up that it is beyond the JSC, either we delete “the person” or put an institution and I want to say in my experience the institution is also not full proof. During my tenure at the Ministry of Justice, National Cohesion and Constitutional Affairs, the petition that the Law Society of Kenya (LSK) brought was actually a petition was ought not to have been brought by a professional body if you saw the allegations. So, I am thinking we leave it at the JSC because if it refuses to work, a person can take out a *mandamus*. Otherwise, you will completely take away the independence of the judges by having litigants, petitions and their removal on a daily basis.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I fully support what hon. Martha has said because in my many years of practice, I have even seen many cases where when an incompetent lawyer goes to court and loses a case, he blames it on the judge by lying to their clients that the judge did this even when there was no such thing and they will instigate even their clients to petition for the removal of a judge for losing a case. I think let us leave it to the JSC so that it can be defined in a statute.

Mr. Chairman: So, proposer so that we get a seconder and move? Can we deal with that so that that is agreed?

The Minister for Foreign Affairs (Mr. Wetangula): But then you will allow me to raise the issue with 1(E)?

Mr. Chairman: Yes, I will but can we agree on that? Do you have a contrary view?

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, even though I get the sense on what they are saying, if we lock out other people petitioning the commission and there is no requirement that the petition must be carried by the commission, perhaps we need to improve on it by saying that individuals can petition but that petition does not have to go anywhere because if you do not let individuals think that the commission has no access to, then nobody will ever have his day in the tribunal.

Mr. Chairman: But it says that also in (3). It states:-

“The JSC which shall consider the petition and if it satisfied, then it will send the petition to the state president”.

The Assistant Minister for East African Community (Mr. Munya): Absolutely. So, what is the reason of trying to lock out individuals or institutions?

Mr. Chairman: In other words, both the petition of the individual and that of the JSC on its own motion will be considered and they send to---

Ms. Karua: Mr. Chairman Sir, it is only the JSC that can petition the president but individuals can petition the JSC. Thank you hon. Munya for pointing that out. Then it will be okay. So, the further amendment by hon. Munya is welcome.

Mr. Chairman: So, can we take them together?

Ms. Karua: Yes.

Mr. Chairman: There are two petitions we are talking about. There is a petition by the individual to the JSC and from the JSC whether from an individual or directly on their motion, to the president. We need to redraft. Anything extra?

Mr. Kioni: Mr. Chairman, through this I see the JSC receiving the petition either from itself or from another person but is there a place where you are saying that a judge also needs to be given a fair hearing? Where is it implied? I think it is important that it comes out here also.

Mr. Chairman: No, but you are forgetting this is not the tribunal. This is just to set up the tribunal. The petition is just to set up the tribunal. That this is the precedent; just to suspend this person so that the tribunal can be set.

Ms. Karua: Rules to regulate the tribunal. Why? The tribunals set up in 2003 are still running. We have got to limit them in time lest they become a cash cow for people sitting in them. So, what hon. Kioni is saying can be provided for within. That is what I was actually going to propose in 10 when you allow me.

The Minister for Agriculture (Mr. Samoei): They are cured by No 4 which clearly says: "The JSC shall consider the petition and if it is satisfied that it discloses a ground under Clause 1, send the petition to the President". If it says they will consider, it means there will be an assessment of merit.

Mr. Chairman: And they make their own rules.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, you know how Mr. Ringera destroyed judicial officers by receiving a letter from a litigant, not even giving the person complained against an opportunity to even give an explanation. This was like in the Aganyanya case. He reached far reaching decisions and destroyed careers. I think we must be explicit that they must be given a hearing because if we just say consider.

Mr. Chairman: So, let us now go sequentially.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, I want to delete "otherwise" in No.1 (e) so that the misbehaviour and misconduct should be in relation to the performance of the judge.

Mr. Chairman: Why not misconduct elsewhere that touches on the office but might not be---?

The Minister for Foreign Affairs (Mr. Wetangula): But it left to a lot of---

Mr. Chairman: Let us leave the “otherwise” because it will be determined by the Judicial Service Commission (JSC). There has to be a proposal to the JSC and then it will go to a Tribunal. So, can we propose and carry this one? I think it is reasonable. Can we get it proposed that judges ought to be of the highest levels of integrity whether they are doing judicial duties? So, can I get a proposer and a seconder for 201(1)? Hon. Wetangula, the other proposal is “misconduct or misbehaviour”, we remove these other “whether performance or”.

The Minister for Foreign Affairs (Mr. Wetangula): I propose the amendment.

Mr. Chairman: Plus adopting 201 (1) with amendment to include gross and to delete all the words appearing after misbehaviour. That is seconded. Is that carried? (2), the removal of a judge may be initiated by--- Again, there was an amendment by hon. Munya. So, (2), (3) and (4) to be recast, so that the petition by the individual is to the Judicial Service Commission. That needs to be clarified and secondly, that the judge has to be given an opportunity. When you say petitions, you are not sure whether it is individual petitions to the JSC, but let us just recast it to be very clear. Can I get a proposer for recasting and a seconder? Hon. Samoei and hon. Karua.

(5), within 14 days after receiving the petition, the President shall suspend the judge from office and acting on the recommendations of the JSC-

(a) the Speaker of the National Assembly---

Ms. Karua: Why can we not leave it locally because you do not want to legislate in your constitution about foreigners?

Mr. Chairman: Let us go first of all with (i), the Speaker of the National Assembly. Right?

Ms. Karua: That is right. I think this is borrowed from other jurisdictions. When it is the Chief Justice, that you get the chair of another independent institution to chair it because the Chief Justice will not have a pair in the Judiciary. He is the apex. So, he needs somebody else. I would like to convince my colleagues that it should be the Speaker, but shall we remove the word “senate”?

Mr. Chairman: So, that we say the Speaker of the National Assembly.

Mr. Karua: Yes.

Mr. Chairman: (ii) “Three superior court judges”. So, I will ask for a proposal for that.

(iii) “One advocate of fifteen years standing”. Does anybody have a problem with that?

Hon. Karua: No.

Mr. Chairman: (iv) Two other persons with experience in public affairs”. So, in (i)(a), with amendments as far as the common wealth jurisdiction and Senate is concerned, can I get a proposer and a seconder? Proposed by Ms. Odhiambo and seconded by hon. Mungatana. The record will show that we have removed Senate to indicate the Kenya National Assembly and we have stopped at judges as far as (ii) is concerned and deleted the words following thereafter.

(b) in the case of a judge other than the Chief Justice, appoint a tribunal consisting of—

(i) four members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such, but in either case have not been, within the preceding three years, members of the Judicial Service Commission”. Does anybody have a problem with that?

Hon. Members: No.

Mr. Chairman: (i) One advocate of 15 years standing”. No issues.

(ii) Two other persons with experience in public affairs”. Can we get a proposer and a seconder for (v)(b)?

(Hon. Chachu proposed and hon. Noor seconded)

That is carried. Let us go to (6):-

“The tribunal shall inquire into the matter and report on the facts and make recommendations to the State President, who shall act in accordance with the recommendations of the tribunal”.

Here, I think we should put a time limit. There is one tribunal that has been going on for eight years. Hon. Karua, we need a time limit for tribunals.

Ms. Karua: Yes, we need a time limit, but the Constitution cannot include all details. So, that if we said that Parliament shall make laws regulating the proceedings of such a tribunal, but we can put a hint and say that expeditiously or speedily. We must put a hint of the expeditious disposal within the constitution.

Mr. Chairman: So that the Tribunal shall inquire into the matter and report on the facts and make expeditious recommendations.

Ms. Karua: Will inquire into the matter expeditiously.

Mr. Chairman: So, propose that amendment, hon. Karua?

Ms. Karua: I propose that on (6), we add the word “expeditious between the word “matter” and “report”, so that it will read that the Tribunal shall inquire into the matter expeditiously and report.

Mr. Chairman: Is that carried?

(Seconded by hon. M. Kilonzo)

With regard to (7), it reads:-

“The remuneration and benefits payable to a judge who is suspended from office under clause (5) shall be adjusted to one half until such time as the judge is removed from, or reinstated in, office”.

Mr. Chachu: Mr. Chairman, Sir, before you give them a due hearing, why should you suspend their salaries?

Ms. Karua: For a judge to be suspended, it means that the Judicial Service Commission, who is his employer, has already formed an opinion that there is a weighty matter. If you were to leave it for the judge to be on full salary, you see, it is not right. It runs all through employment. To be on half pay, it means that they are not doing their work. If we put expeditious and we may limit it to only six months within which they must finalize, it means that they will either resume to salary or proceed home. It is the normal way. We agreed, just like we are saying that everybody should pay tax, let there be no people who have special privileges once suspended from work.

Mr. Chairman: I think it makes sense. Let us go to (8).

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Should we write that this is going to happen and he is going to be paid Ksh2 and all that?

Mr. Chairman: Let us carry it. Hon. Wetangula could you propose the amendment?

The Minister for Foreign Affairs (Mr. Wetangula): I propose.

The Minister for Agriculture (Mr. Samoei) seconded.

Mr. Chairman: No (9):-

“A tribunal appointed under clause (5) shall be responsible for the regulation of its proceedings”.

Ms. Karua: I wanted us to regulate the tribunal. If we go through the experience of 2003, the tribunals appointed were supposed to be ad hoc. They have become permanent and pensionable without telling us. They have refused to finish, they are on a riot. Let us delete that clause.

Mr. Chairman: So, propose for deletion.

Ms. Karua: I propose that we delete clause (9) and in its place, we say:-
“Parliament will legislate to regulate the proceedings of the tribunal”.

Mr. Chairman: Now that the request has come and been accepted, let us go forward. That is carried. No. (10), a judge who is aggrieved by a decision of the tribunal under this Article may appeal against the decision to the High Court and in the case of a high court to the court of appeal”. Actually why not all of them to the High Court?

The Minister for Lands (Mr. Orengo): It is the tribunal.

Mr. Chairman: That is recast. Then (10) becomes (9). So, can we get a proposal for the whole Article now with amendments?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): I propose.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): If the Chief Justice is the President of the Supreme Court and he is the one who is the subject of these proceedings, and he is suspended and aggrieved, then who shall preside over his appeal? We removed the deputy.

Mr. Chairman: But we said there could be the Vice-President of the court. We removed the deputy but we said that there is a vice-President. So, are you asking which court he will appeal to or who will be presiding over that court?

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): In any case, once the Chief Justice ceases to be part of the Supreme Court, then it is not fully constituted.

Mr. Chairman: In terms of the numbers!

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Yes, because we had limited the number to seven. So, there is an issue there.

Ms. Karua: If the number is seven, then we need nine judges. Even sickness can make somebody absent.

Mr. Chairman: So, we revisit that point.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): The DPM has got a very valid point.

Mr. Chairman: So, the quorum should be five. Thank you, hon. Mudavadi. The maximum is seven and we have said five out of seven.

Ms. Karua: The Court of Appeal and the Supreme Court.

Mr. Chairman; Can we get a proposer for the Article now?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): I propose that Article 201 be approved as amended.

Mr. Ruto seconded.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): But before we leave that, we forgot to provide that the Supreme Court will make its rules of procedure. The Court of Appeal has got that power but not the Supreme Court. We forgot to provide that the Supreme Court will make its own rules of procedure. The Court of Appeal has the power to do so.

Mr. Chairman: I will hand over for the remaining time to hon. Namwamba.

The Vice-Chairman: Can we get a proposal for the adoption of the whole of 201 with the noted amendments? Sorry, that has been adopted. *Waziri* made a proposal and hon. Wetangula seconded and so that was adopted. So, we move to 202 – Sub-ordinate courts.

202. (1) The subordinate courts are—

- (a) the Magistrates courts;
- (b) the Kadhis' courts;
- (c) the Courts Martial; and
- (d) any other court or local tribunal as may be established by an Act of Parliament.

(2) Parliament shall by legislation confer jurisdiction, powers and functions on the courts established under clause (1).

Can we hear from Mr. Nyegenye how this compares to the previous drafts, quickly.

Mr. Nyegenye: The main departure here is what was in the innovation in PNC of Christian courts, Hindu courts and other religious and traditional courts. These are omitted in this draft.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, I want to revisit the question I asked. After going through this Constitution, I do not find Court Martial being described as a sub-ordinate court. So, why is it necessary now to put court martial in this court? Therefore, I propose that they be deleted.

The Minister for Foreign Affairs (Mr. Wetangula): If you went to Cap.99 of the Armed Forces Act, under which the court martial are established, they are clearly defined there. They are clearly established as sub-ordinate courts and indeed, they are subordinate courts. I want to ask hon. Musila to appreciate that this is just a constitutional recognition of the establishment existence and validity of courts martial. So, it is actually positive. Nobody is bringing them under the realm of civil authority. They are getting constitutional recognition.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): I am not insisting but someone may wonder why I am asking that. It is because of the nature of the court. For example, a court martial here can determine cases outside this country. For example, wherever our military personnel are located, they can hear and determine cases there. So long as it is understood that that still continues as it has been going on, fine. Because if it were a sub-ordinate court, the fear was that probably, then it will not be having jurisdiction outside where, for example, forces are stationed and conducts hearing there. So long as it is understood that, that is fine.

The Minister for Foreign Affairs (Mr. Wetangula): It is very clear, if you send troops to Sierra Leone, with all intents and purposes, they remain Kenyan troops with all the establishments, the privileges and the limitations. If they make any mistakes there or commit offences, you consider court martial there and try them and it will be viewed as if it was within jurisdiction.

The Assistant Minister for Defence (Mr. Musila): I appreciate that advice. Thank you.

Mr. Vice-Chairman: What is contemplated in Article 2 for the courts martial has already catered for that by Cap.99.

Okay. Is there any other issue on Article 202(1) and (2)?

Mr. Kioni: Mr. Vice-Chairman, Sir, can we be informed by - I do not know who - We see that we had more courts; we have the Hindus, the Christians and all the others. Why is it that we did away with them and left one?

The Minister for Foreign Affairs (Mr. Wetangula): (Off record) ---by Wako to justify the existing framework of having the Kadhi's Courts---

Ms. Karua: Nobody had asked for them!

The Minister for Foreign Affairs (Mr. Wetangula): Nobody even asked for them! Our entire legislative structure is Christianity---

Ms. Karua: The Christian Courts are the ones we have.

Mr. Vice-Chairman: I think it was an attempt to assuage concerns and settle---

The Minister for Foreign Affairs (Mr. Wetangula): (Off record) ---they wanted to confuse Christians because we were making noise against Kadhi's Courts--- (Off record) it has no foundation---

Mr. Vice-Chairman: Thank you. Do we, then - for reasons of moving forward - adopt one and two?

Hon. Members: Yes.

Mr. Vice-Chairman: Can I get a proposer for 202?

(Ms. Karua proposed and Maj-Gen. Nkaisserry seconded)

Mr. Chachu: Thank you, Mr. Vice-Chairman, Sir. All I wanted to say has already been said by hon. Wetangula; I support the Article as formulated, because it has just been lifted from the current Constitution as it is.

Mr. Vice-Chairman: hon. Mungatana!

Mr. Mungatana: Mr. Vice-Chairman, Sir, there is no problem the way it is formulated, but the issue I want to discuss here was brought to me and I did not have an answer for it. Now that we are doing clear recognition and whatever to one system of law that is for Muslims, even when we provide for it and I support the way it is, is it justifiable for the State to foot the Bill as far as supporting the Kadhi's Court is concerned? I wanted to hear what the views are because I thought if we are dealing with a religion that is, let us say, if it is a Christian or a Hindu Court or whatever, we all agree let all those courts exist; even the village courts that hon. Ruto is talking about – the customary law courts. Let us agree we put all of them there. But is there justification for the State to actually pick the tab? That is the question I have, because if that justification is not there, then let us provide for all these, but let the people who practice that, like the way if I want to marry under customary law, I will have to pay for it – keep the elders there and do everything there – let us think again. Let us put it there but let me, who wants to practice there, support that system.

Mr. Vice-Chairman: hon. Orenge has the Floor, but it has already been noted that---

The Minister for Lands (Mr. Orenge): I think, Mr. Vice-Chairman, Sir, probably what I want to say may be overtaken by events because I did not hear hon. Wetangula pursue it. But Article 202 deals with the courts. But if you want to know the applicable law or the source of law in so far as the courts are concerned generally, that is contained in the Judicature Act and it spells out in the administration of justice what would be the source of law for the Magistrates Court and the High Court---

Ms. Karua: ---(*Off record*) ---Not the Kadhi's Courts!

The Minister for Lands (Mr. Orenge): No, I am saying in the Judicature Act. That is where you find it.

Mr. Vice-Chairman: Thank you.

Hon. Munya, you wanted to have a bite on that?

The Assistant Minister for East African Community (Mr. Munya): Mr. Vice-Chairman, Sir, I really find it--- Because the Kadhi's Courts are administering law on a specific section of our society restricted to personal status, marriage, divorce or inheritance. The Christians and other groups, when it comes to those particular issues, the State pays for them! When you want to divorce your wife, the State pays for you – the Judge sitting there in the High Court or in whatever Court is paid by the State! When you want to marry, the Registrar of Marriages is paid by the State! When you have a dispute over children, including custody and all that, it is still the State that is paying! So, really, this idea that for the Kadhi's Courts, the State is bearing a burden which it is not bearing for other people is not founded on any facts or law.

Mr. Vice-Chairman: Thank you.

Can we have a proposer for the adoption?

Mr. Kioni: Mr. Vice-Chairman, Sir---

Mr. Vice-Chairman: Do you have an objection?

Ms. Karua: It has been proposed and I was to second.

Mr. Kioni: Mr. Vice-Chairman, Sir, one of the things I want to--- I also want to get the benefit of some clarifications from amongst us. The difference between Muslim Law and *Sharia* Law as it is contained in number 6. And as he has also said, the way it was provided for or the way it is provided for in the current Constitution is the way it appears in the draft. I think there is some little bit of difference on Sub-Article 4. I think we need to see that either we have--- I think we have just collapsed the last two sentences or we have improved on what was there. I think we need to look at it because of the debate that is out there. But that issue on Muslim Law and *Sharia* Law and then why is it that we are collapsing the last two or three sentences of Sub-Article 4, as contained in the current Constitution?

Mr. Vice-Chairman: Ms. Karua?

Ms. Karua: You see, Mr. Vice-Chairman, Sir, when the current Constitution was written, it is the time we were getting Independence. That is why the reference to the protectorate is there. Now, what was the protectorate is what is Kenya. So, it is no longer necessary, in my view, to recite the word “protectorate” in a Constitution made in 2010. So, that is the only difference.

Mr. Vice-Chairman, Sir, the other very slight difference is on number 5, where they have added: “submit to the jurisdiction of the Kadhi’s courts” because it ends with “profess the Muslim religion”, which is also totally harmless in the sense that it says where the parties are willing to go to the Courts; which is the position today.

Mr. Vice-Chairman, Sir, I also wanted to support what hon. Munya said. There are a lot of cases within our own respective customary law – pregnancy compensation – if you remember those cases, it is not the *wazee* who pay! Even land cases based on tradition; that your first brother was registered, it is clan land. So, we are at par, actually.

Mr. Vice-Chairman: Okay, thank you!

So, this distinction between *Sharia* Law and Muslim Law, quickly, *Waziri? Wewe ndio Waziri mhusika!*

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Thank you, Mr. Vice-Chairman, Sir. The concepts of law we are putting in this clause have nothing to do with *Sharia* Law, because *Sharia* Law is basically where, in a lot of Republics, you would find that the State is clearly declared to be a Muslim State. Therefore, both criminal and civil law applies. The concept we are putting here, and I think we have explained it sufficiently

to the Christians, is limited to personal law, marriage, divorce or inheritance and only those who submit.

In my experience, Mr. Vice-Chairman, Sir, if you allow me, I have had thousands of Muslim clients who never went to a Kadhi's Court, although they could have. So, it is a matter of personal choice. A lot of them prefer to the High Court.

Mr. Vice-Chairman: Okay, thank you!

Hon. Balala, would you like to have a word on this as the last word really? And then we need to move forward, unless there is something fundamentally---

The Minister for Tourism (Mr. Balala): I agree with my colleagues, Mr. Vice-Chairman, Sir, on most of the things. I just have one little error, which is really not a big deal, but the line: "submit to the jurisdiction of the Kadhi's courts". Because here we are talking about the parties professing the Muslim Faith. When you profess the Muslim Faith, you cannot go out of the Islamic Faith. So, again to say "(off record) ---to submit"; no! according to the religion, you cannot have a choice to submit because you have to submit.

Again, because this is a subordinate court, if you cannot adhere to the decision of the Kadhi, then you go to the High Court, which is allowed. So, you have like an appeal to the High Court. So, the word "submit" is unnecessary! So, I want a full stop placed after the word "religion" and delete the rest.

Mr. Vice-Chairman: Are you moving that as a Motion?

The Minister for Tourism (Mr. Balala): Yes, please!

Mr. Vice-Chairman: Let me get a seconder for that.

Mrs. Noor: I second.

Mr. Vice-Chairman: Then you can debate it now.

Proceed, hon. Wetangula!

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, we have to acknowledge the ingenuity of those who drafted this clause to limit this, because there are even certain situations where people take sanctuary in religion for convenience, and this is very common in this country! We cannot drive people towards a certain religious concept if they feel uncomfortable. That is why we have the State above everything else! But if you are not comfortable and do not want to submit yourself to this, you can go to secular courts and have your issues adjudicated. Because all these jurisdictions we are giving to the Kadhi's Courts, the reliefs are also available in the secular courts!

Mr. Vice-Chairman: Okay, thank you!

(Loud consultations)

hostage. In circumstances where I feel I should have a relationship with another Muslim and then it comes to personal law, really, it is personal law and then I am held hostage, that will put those who profess the Islamic Faith as a distinct entity and we want cohesion of some sort. I think to open up debate on this can be dangerous.

Mr. Vice-Chairman: Thank you!

(Mr. Balala proposed and Mr. M. Kilonzo seconded)

Mr. Vice-Chairman: That is adopted! Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: Before we move on, Mr. Wetangula, perhaps you want to return us to customary law.

The Minister for Foreign Affairs (Mr. Wetangula): In 202(d), I think we need recognition; Mr. Nyegenye can give us a formulation of the application and administration of customary law outfits.

Mr. Vice-Chairman: Is that a motion?

The Minister for Foreign Affairs (Mr. Wetangula): Yes!

An hon. Member: There is nothing like that!

Mr. Vice-Chairman: That is a Motion and we will debate it.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, let me explain. If you go back to Article 2, there was reference in Article 2(3), I think, where we deleted mention of customary law and we just said "any law" that is in consistence with the Constitution shall be void to that extent. We deleted "including customary law". Here we are being very specific; subordinate courts will be magistrate's courts, Kadhi's courts, courts martial, any other court or local tribunal as may be established by an Act of Parliament. There are several customary law administering courts, informal as they may be, that are not established by any Act of Parliament but they keep our society in good order. Where do we recognize them? I am not talking of sources of law! I am talking of administration of law.

Mr. Vice-Chairman: is that Motion seconded?

Mr. Mungatana: Mr. Vice-Chairman, Sir, *nili kuwa nasema ya kwamba* it is important for us to leave a window open for the future development and even legislation in future of a whole system of customary law courts which will be dealing with issues that are going to be those issues that deal with *mambo ya huko* village. So, if we have, like now, the magistrate's courts are mentioned and the administration is clear, the Kadhi's courts is mentioned and the administration is clear; the court martial also we know the administration is clear. If we mention the customary law

courts, the traditional courts, whichever way we put it, what we will be doing is that for purposes of future development, maybe they will be law that will go specifically to deal with those matters so that we do not leave our African traditions to just disappear. So, I second the motion of Mr. Wetangula.

The Assistant Minister for East African Community (Mr. Munya): Mr. Vice-Chairman, Sir, we have spent many years since 1963, even earlier, trying to modernize our Judicial system and we have been insisting that we need trained officers to preside over courts. So if we recognize those traditional courts, it will be several steps backwards. In any case, there is no bar to the application of customary law. That is why Lord Jim said that the judicature Act already recognizes application of customary law but we want that application to be done by courts that are manned by trained officers not just elders there who get bribes who have become thoroughly corrupt. It will be terrible if we went ahead to recognize traditional forms of courts in our national Constitution.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, I do not support and the reason is that even right now, our courts still deal with customary law. I have personally litigated a lot of cases based on customary law. I am sure most of the lawyers have done that whether it is personal law or others, so there is really no need. Other than that, if you actually at a lot of these informal customary system, they are very insensitive to marginalized and vulnerable groups. For example, *Njuri Ncheke*. I went to meet them a year before Aurelia Brazil tried to meet them and they refused to meet us because we were women. So if you set up those courts you are saying that women will not be able to appear before some of those courts. So, for me what we need to do is have more courts and more trained personnel. We are moving towards – I want to agree with Mr. Munya – modernization so let us not go back.

The Minister for Lands (Mr. Orengo): Remember the S.M. Otieno case!

An hon. Member: That is horrible!

The Minister for Lands (Mr. Orengo): It is horrible but it went to the High Court and the Court of Appeal and basically what was there for discussion was Luo customary law as opposed to Judeo-Christian law. But if I can give you a practical example of what Moi tried to do, as his sense of personal mission on issues of land, he said instead of these cases going to the magistrates' courts or the High Court, for that matter, they should go to a panel of elders. In fact, the law was amended so that you had to go to the elders and then go to the magistrates' court to confirm or register the award. It led to a lot of problems because, first of all, maintenance of records by these elders' courts was so difficult because you need to have a right of appeal and a right of appeal without proper court records cannot be executed under that kind of system. But you had instances where elders made a certain decision but when they come to the court for purposes of registration the award, and I had an example of this in Kakamega, even an elder who was in that court swore an affidavit to say that he was not part of that decision and that he did not--- I am saying that we may be dishonest but unless you have a fully well trained court, specifically to administer customary law, it will be very difficult. It is extremely difficult!

Mr. Mungatana: I think it is for the exact reason that Mr. Orengo is talking about that we need to provide for these courts. What those elders experienced showed us that these things can be improved. It is for that reason that we need to make a provision for the establishment of these traditional courts and then Parliament will, therefore, in due course legislate appropriately so that we have proper records. Let us have this kind of level of training for those who will be manning those courts.

Mr. Vice-Chairman: Do we just add there “traditional courts”?

Mr. Mungatana: I think we should add “traditional courts” and then leave it there. If the future people feel like Mr. Orengo feels, they will never legislate. But I really think we should not leave it out and I strongly support.

Mr. Vice-Chairman: What would be the definition of traditional courts?

Mr. Mungatana: Traditional courts will be the courts that will be operating under customary law. I wanted to make it even further clear that let us say that Parliament decides to legislate on that, they will now set up the entire system of jurisdiction, the way we have all these others like magistrates’ here and the others; they will set it up but we do not lose it. I urge that we keep it there. Customary law should stay there!

Mr. Vice-Chairman: We need to bring this to a close!

Ms. Karua: Mr. Vice-Chairman, Sir, I just want to draw our attention to this: That our children know nothing of those customs you now want, that you, yourself, this generation, none of us here is competent to be an elder in those courts. This is a dying tradition and the good values that we can recall from there, we now can codify them into our laws. It will be retrogressive to add the word “traditional”. Even today in our Constitution, it is not there yet we apply customary law. Let us not go a step backwards. Let us move forward and those very good things you think bring them we legislate.

Mr. Vice-Chairman: We could also leave it to be determined by Parliament under 1(d).

The Minister for Agriculture (Mr. Samoei): Mr. Vice-Chairman, Sir, precisely, that is what I was going to say that we can have a middle ground because already there is a provision in the Constitution for other courts. If they will become that important, under 1(d), they will be set up by an Act of Parliament.

Mr. Vice-Chairman: Any other is included in 1! Can we move on? Motion dropped! We move Article 204(1); there is established the Judicial Service Commission consisting one Supreme Court judge elected by the judges of the Supreme Court who shall be the chairperson of the commission; one Court of Appeal judge elected by the judges of the Court of Appeal, one High Court judge elected by the judges of the High Court; the Attorney-General, two advocates, one a woman and one a man, each of whom has, at least, 15 years experience dominated by the statutory board responsible for the professional regulation of advocates; one person nominated

by the Public Service Commission, a magistrate nominated by the Judiciary and one person, not being a lawyer, appointed by the President to represent the public. The Chief Registrar of the Judiciary shall be the secretary to the Commission. Members of the Commission apart from the Attorney-General shall hold office provided that they remain qualified for a term of five years and shall be eligible to be nominated for a further and final term of five years.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, I have no problem with the Article as formulated. What I fail to understand is the exclusion of the Chief Justice who is the head of the Judiciary. I think the Chief Justice should not be a member but should also be the chair of the JSC for the simple reason that as the head of the Judiciary, he has the greatest responsibility to ensure that things work well, correct people are recommended for appointment and so on and so forth, and also has the insight of what goes on in the Judiciary. I do not quite understand why we should exclude the Chief Justice but put on other judicial officers on this Commission.

Mr. Vice-Chairman: What do you propose?

The Minister for Foreign Affairs (Mr. Wetangula): I propose that the Chief Justice be a member and the chair of the JSC.

(Mr. Kioni seconded)

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: That is carried! Any other?

Ms. Karua: Mr. Vice-Chairman, Sir, I am of the view that we should not make the JSC too large. It is too large, for me, and I would propose that it should have three members from the Judiciary, one of whom should be the Chief Justice. It is not necessary that we have a magistrate, a judge of the High Court and a judge of the Court of Appeal. Let us have the Chief Justice and two others and then let us have two people from the private sector which would be the Law Society of Kenya (LSK) and I thought that we could bring the professional society because we are the consumers of justice. It is okay to retain the Public Service Commission and the Chief Justice as the parts coming from the Government side. Let us then have the Chief Justice, one judge, either from the High Court or Court of Appeal, then one magistrate which makes three people, then we have the Public Service Commission, two advocates from either gender, nominated by the LSK, it is better language than "one man, one woman". I do not know where we can fix it. I also wanted one person representing the academia, the various law schools in the country because you are looking for real competent people and we talked of competitiveness when they are coming for interview.

Mr. Vice-Chairman: Let me get this right! --- *(Off record)*

Ms. Karua: Thank you so much, you are doing better than me.

Mr. Vice-Chairman: Let me get this right, Ms. Karua, whether I am with you. The Chief Justice who is also the chair, one judge, one magistrate, one nominee of the PSC, two legal persons, one practitioner the other from academia, nominated by the professional body representing either gender. That is what I have. What we do not have is someone from---

Ms. Karua: Instead of the Attorney-General I want to propose that it be indicated the Minister for the time being responsible for matters relating to justice. If the Government decides it is the Attorney-General, then it will be. If there is a Minister then it will be a Minister or a PS or something; the link between the Government. If we are going presidential it would be that Minister because it is like a PS. What happens is that there must be a link.

Mr. Vice-Chairman: Why not the Attorney-General?

Ms. Karua: Because whoever will be responsible for matters relating to justice. When you structure governments like in some countries, the Attorney-General is below a person who--- When you put specifically a person, then it is not possible to re-direct if the Government orders its Ministries differently.

Mr. Vice-Chairman: So let us look at this again. We have that proposal to replace the Attorney-General with the Minister for the time being responsible for matters of justice and then the person listed in 1(h); one person not being a lawyer appointed by the President to represent the public. Is that agreed?

Mr. Vice-Chairman: Thank you, Mr. Chairman, Sir.

Mr. Chairman: The problem with the Judiciary is that--- We have all lambasted the Judiciary. Absolutely, that lambasting was rightfully called for. However, their biggest problem has been funding. Unfortunately, because of the nature of the Judiciary, usually, they would not be able to harass the Minister for Finance, like everybody else does, for those resources. So, unless we address the issue of starving of funds to the Judiciary, we cannot on one hand say that they must be able to operate at this level of efficiency and on the other hand not give them funding.

Secondly, Parliament is also an independent arm of the Government and it has secured for itself financial independence. So, without locking the percentage--- Legally speaking, the Minister for Finance cannot touch the budget of Parliament. Parliament just allows the Minister for Finance to touch its budget, but legally, the way it has been done in the Constitution, Parliament's budget is independent of the Treasury. What the Judiciary is looking for is some form of financial independence and proper resourcing.

Mr. Vice-Chairman: Then this should be recast if that is the aim.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, Sir, if the issue is that Parliament should have a clear role, then we can actually adjust sub-clause (3): "Legislation shall provide for the establishment and regulation of the Fund."

Mr. Vice-Chairman: It is already established here in Clause 206(1).

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): You could recast it so that you capture both.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Vice-Chairman, Mr. Mudavadi has said what I wanted to say. The fact of the matter is that the eight months that I have worked with these people, they are miserable. There mechanisms for sourcing funds either from Parliament or otherwise are non-existent. So, a fund be established and then Parliament can enact along. Without this fund, you will never change the perception of the Judiciary.

Mr. Vice-Chairman: Ms. Karua, while at it, perhaps, you will help us move the amendment.

Ms. Karua: I just wanted to state as a matter of fact that the Judiciary has been returning funds. They were given funds to renovate the Old Customs Building, but for almost ten years they have been playing poker with the funds until they have finally refurbished it excessively. It is just like Parliament intends to renovate the House excessively.

When a country is budgeting, it does so just like a person does in his home. It has to be within ones means. If you keep on giving each arm of Government the right to do its own budget, there is going to be a very impractical and impossible situation. I am of the view that the money for both Parliament and Judicial Service Commission be discussed. I am saying even that of Parliament. We cannot be telling people on a day that there is disaster or famine that there is no money and yet we have such a huge travel budget. I want to confess that I love travelling, but we need to discuss this in the open so that the public either comes along or shouts at us. Therefore, I am throwing caution that while we say they must be enabled---

I want this Committee to know that World Bank has been holding money for the computerization. However, because of rent-seeking opportunities and when there is money which must be spend in a certain way--- Government bodies, including the Judiciary, take too long to effect because they are looking for opportunities. So, I want to make it known that it is not that the Judiciary has lacked money, rather it is that they have dragged over even the little money that they get. Let us find a cure. We found it in the Judicial Service Commission and I want us to look at Constitutions of other places to see how judicial funds are dealt with so that we do not put a permanent feature here which is uninformed.

The Minister for Lands (Mr. Orenge): What about if you use the formulation that exists in terms of the Parliamentary Service Commission. If I may read it from the current Constitution, Section 45b(5)(e) states:

“The Parliamentary Service Commission shall have power---”

It then continues in (e) to state:-

“In such manner as may be prescribed by or under an Act of Parliament (i) to cause to be prepared and led before the National Assembly in each financial year estimates of expenditure which shall be charged on the Consolidated Fund of the Parliamentary Service for the next financial year and (ii) to cause to be audited.”

You know if you leave it the way it is, even the question of audit may be challenged that we do not have the powers to audit.

Mr. Vice-Chairman: Could you, please, then, move the Motion?

The Minister for Lands (Mr. Orenge): Mr. Vice-Chairman, Sir, I move that the words used in the current Constitution with regard to the Parliamentary Service Commission replace Clause 206.

Ms. Karua seconded.

Mr. Vice-Chairman: That is carried. Could someone then move for the adoption of Chapter 11 on the Judiciary as amended?

Ms. Karua: Mr. Vice-Chairman, Sir, I now move that Chapter 11 on the Judiciary as amended be adopted.

Mr. Samoei seconded.

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: And now I move that we break for early lunch and reconvene after one hour, that is, 2.00 p.m.

(The Committee adjourned at 12.50 p.m.)

(The Committee resumed at 2.15 p.m.)

Mr. Chairman: I think we can presume a continuation of the earlier session. Let us continue with the next agenda of the programme – LAND. It starts on Article 73

I will read Article 73:-

“1.Land in Kenya shall be held, used, managed in a manner which is equitable, efficient, productive and sustainable in accordance with the following principles;

(a)equitable access to land;

(b)security of land rights for all land holders, user and occupiers in good faith;

(c)sustainable and productive management of land resources;

(d)transparent and cost-effective administration of land;

(e)sound conservation and protection of ecological sensitive areas.

(f)elimination of gender discrimination in laws, regulations, customs and practices related to land and property.

(g)encouragement of communities to settle land disputes through recognized local community initiatives consistent with this Constitution.

2.These principles shall be implemented through a national land policy developed and reviewed regulated by the national government through legislation”.

Mr. Mungatana: Mr. Chairman, Sir, my proposal is that we delete Article 73(1) and (2). These principles and values as a general principle we have been removing them and for consistency, these should go. If it is rights in land should be stated in accordance with the Constitution but stating aspirations within the Constitution and then going on to say that they will be implemented in a national and policy to be developed by the national government. I think we are taking this thing a bit too far. The second reason why I am proposing to delete this section is that again, we are exposing a whole administration or government to the possibility of several law suits just because in the opinion of somebody the national policy that has been promulgated by the government in power is not giving equitable access to land, then a person is taken to court.

Mr. Chairman, Sir, I am of the opinion that if we are vesting rights, they should be real rights in the Constitution but not inspirational issues. So, for those two reasons, I propose that we should delete Article 73(1) and (2).

Mr. Chairman: Anybody seconding that proposal?

Minister for Lands, would you want to have a say on this matter?

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, I have no problem with especially the issue of land policy. I do not think that is a matter that should be in the Constitution. Policies may be desirable whether to have them or not but I do not think that they should be a directive in the Constitution to that effect. The only problem that I have which gives us a lot of problems in the management of public land comes into play while you may find that a particular group of people have more access to public land, some of which is not being put to productive use. To some extent in the country there are certain areas in the Republic where foreigners are acquiring land and holding them not for any useful purpose rather than leisure and entertainment. Some of the lawyers here would give advice on how we can create the principle eminent domain so that where public land is concerned applications of these principles are set out in Article 73 may help. Like now, one of the biggest land owners is Kenya Railways Corporation (KRC) but if you see what has happened to that is that it has just been shared amongst individuals and there is no basis

for intervention whatsoever. If it can be reformulated so that some of those principles can help in the management of public land.

Mr. Chairman: Mr. Mungatana, could you propose that instead of the deletion we recast in one broad statement of policy.

Mr. Mungatana: Mr. Chairman, Sir, I will stand advised by the Minister for Lands because he is the one who is engaged directly but I thought that the principle of eminent domain could be captured very well under Article 75 where we are dealing with public land itself. I am still not very persuaded that we need to bring in principles and stuff like that. We could reformulate and add it there under Article 75 to capture that issue, the eminent domain, clearly as a principle.

Mr. Chairman: Since Article 75 starts with public land issue, let us have a short statement.

Mr. Mungatana: Mr. Chairman, Sir, I propose that we recast Article---

Ms. Karua: Mr. Chairman, Sir, I am following the thinking of the Minister, when you look at the whole paragraph, it may be a good one because we have a lot of unsettled issues. Right now there is the issue of Mau and there are other public utility areas that will need to be back in public hands for use by the public. These principles would serve as a guide to any court handling and interpreting.

Mr. Chairman: So, are you withdrawing your seconding of the Motion.

Ms. Karua: I am just contributing to the broadened debate trying to persuade that perhaps we might want, even in the recasting, and that is I am arguing against recasting, we might want the broad principles as they are. Remember that at the beginning we had broad principles which would then help the interpretation of the Constitution. You can compress them but it would be better to have all those ideas.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, I fully appreciate what Mr. Mungatana and Mr. Orenge are saying but I would propose that we edit this Article by deletion of (a), (b), (f) and (g) so that if we are setting out the broad principles then we could say that land in Kenya shall be held, used and managed in a manner which is efficient, productive and sustainable in accordance with the principles of sustainable and productive management of land resources, transparent and cost effective administration of land and sound conservation and protection of ecological sensitive areas. In my view, those are the only broad principles that belong here. The rest belong elsewhere. We are trying, as we develop, to reduce the expectations of people that to be a Kenyan you must own land. If we engage in industrial growth more and more Kenyans will find the need to own land totally unnecessary. When you have in the Constitution something like "equitable access to land"; what does it mean? Does it mean that anybody who does not even have use for land must have equitable access to land? When you talk about "rights occupiers in good faith" I do not even understand what this means. May be Mr. Orenge can enlighten me. We should not start giving rights to even occupiers in good faith and yet we are trying to limit expectations of land ownership so that people can move to other

different levels of production and growth. A country with a vast economy like the USA, production from land to their GDP is less than 3 per cent. Here we are still talking of over 50 per cent. So, we must move progressively towards that. So, let us talk about sustainable and productive management, transparent and cost-effective administration and sound conservation and protection of ecologically sensitive areas as the broad principles on land.

Mr. Chairman: Is that agreed?

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, my view is that we could edit it but by basically removing (2) which deals with the element of land policy. That is Article 73(2). I think it is important, because land is very emotive and the moment we start sending a signal--- This is already in the public domain, there is the issue of security of land rights and so forth, if you start sending signals to the financial system that somewhere along the line, the whole issue of collateral is now being tampered with. I would want to say that we can deal with part 2 but some of these core principles are so important. Even the issue of gender discrimination should be retained. This is a very emotive area. My understanding of this is that we are setting a situation in this Constitution where you are also sending a message that you are not just going to tamper with people's rights on land. Judging from the debate that we have been going through, whether we are conserving Mau or not, sending the message that you are likely to start stumbling on people's rights by eliminating this principle would be very dangerous. So, I strongly advocate for the retention of these principles because land is unique and has been the basis of even our struggle for Independence as a country. We must look at it slightly different from just the routine process that we may have handled in the other paragraphs.

Mr. Chairman: I am hoping that we can conclude on this.

Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, Sir, I have no problem with these broad principles and I understand what the DPM is saying. I do not have a problem with equitable access because it does not mean taking away anybody's right but part (b) is quite dangerous; security of land rights for all land use, land holders, users and occupiers in good faith." Even though there is a rider "good faith" it can give an excuse for many violations of people's rights. It can even lead to occupation, where people jump into other people's farms and say that the Constitution is giving them the right. It would be reckless to put that kind of principle. But the others are okay. Security of land rights is enough.

Mr. Chairman: We need to move forward.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, allow me to say something. If you recall the referendum of 2005, the principle pillars that drove the anti-draft agitators is exactly what (f) is providing for. I would rather we recognize the principle, and I do believe that my daughters have every right to inherit my land, but we can put it elsewhere in the Constitution within the Bill of Rights and Non-discrimination clauses so that those negative elements who will drum up tribal sympathies all over do not use this as an excuse to campaign against the draft Constitution. I am sure they will do exactly that.

Mr. Chairman: I know Ms. Karua will say that she does not agree but let me hear from the Minister of Lands.

The Minister for Lands (Mr. Orengo): I want to deal with (f) and give some perspective, although the DPM has already addressed it. You remember that under the Registered Lands Act, the first process after adjudication process is that the person who is registered as the land holder, that title that he holds cannot be challenged even in the court. That has caused a lot of problems. The way people live in the village, they live as families and communities. You will find that a family decides to register their title deed under a son as the owner. To deal with that problem has been extremely difficult. Sometimes when you are talking about historical injustices, you are not just talking about Maasailand but you will find that there are women or families dispossessed because of that particular provision under the Registered Land Act. Therefore, if we can find some formulation in the Constitution, it can help us deal with those historical injustices, where there are families who had a right to land but because one of them was registered you find that in a family of 100 about 70 are disinherited. Most of the time it is the women members of the family who suffer.

Regarding part (b) I agree with Mr. Munya that security of land rights would do. I just wanted to point on one or two things in regard to the last forward occupiers in good faith. In the Coast Province, there are a lot of people who are living on land which belong to somebody else or absentee landlords. In a place like Lamu the entire district belongs to the government. If you just using right land based on land rights can be reflected in a title deed then one can use a provision like this to interfere with the rights of others. I think this issue of “---occupiers in good faith” may help but it might be too wide. I would wish to have a formulation because in the Coast Province, there is a big problem.

Ms. Karua: Mr. Chairman, Sir, I just want to draw your attention to the Constitution. I was looking at how land was dealt with. It is placed together with other properties but only trust land had a specific chapter. I am not saying that we should not have a chapter on land but how to secure property rights which are the same as land, it would be good to look at the entire section 75 of the current constitution which is very explicit. It is about the rights to property. Then we can have a provision that has the best of this so that we can secure those rights. It talks about the instances where the state can compulsorily acquire and the issue of compensation. It is very elaborate. It is about three pages. It goes from pages 51 to 54. That is informative. We should not live things that are ordinarily provided for out.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, I had not finished. What Ms. Karua is saying is right but if we were to return to the Constitution as it exists today, it is a mixture of what we have here and what is in the current Constitution which is good. “Equitable access” to land is trying to run away from the “right to land” which some people were advocating that the right to land, just like education, should become one of the basic rights. But equitable access to land does not mean ownership of land. It means that in your day to day activities, you have some right to access like you are moving from Naivasha to Nairobi. We must put some formulation

which will allow us to beaches and all that. It is about access. I think this formulation is good enough to cater for that.

Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, this is a very dangerous thing. To me, you cannot put a land policy in the Constitution. When you look at those principles, it seems we are giving weight to principles and yet we are making a Constitution. If you look at part (a) "equitable access to land". If you do not have land and I am speaking like a land owner and among people who have been marginalized and whose land has been taken away like where we are sitting here.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, if we are going to say "equitable access", a clever lawyer like Jim will come along and say: "According to the Constitution of the Republic of Kenya, we must all have equal access to land." So, this principle is very dangerous. In fact, we must not say "Principle of Land Policy". We should say "Principle of Land Tenure". We should not bring a policy into the Constitution.

So, I support hon. Mungatana. We should get rid of this provision, because it is going to bring a lot of unnecessary debate.

Mr. Chairman: Hon. Members, so that we can move forward, could we have this re-cast, so that we have the general issues that the Minister for Lands, and hon. Karua, have talked about, without going into the pitfalls that hon. Mungatana has warned about?

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I was going to suggest, with respect, that on Article 73, we merely give Parliament the power to make laws on land policy partly because we have had very bad experiences, particularly with (a). If you remember a former Minister, who will remain nameless, going somewhere and leading his constituents to clear a road through the land of another constituent. It became a very serious matter. We have had similar instances. So, if we are neighbours and you find the route out of your land is too long, you can come and say that you want equitable access through my land.

This is a delicate issue. I would rather we leave it to legislation. Hon. Mungatana is right. Then you can manage. I am very happy myself, although somebody is going to accuse me of being a land owner. The existing Section 75 of the current Constitution, as hon. Karua has said, requires careful consideration, subject to qualification to bring it up to date with the people's aspirations. It has all sorts of regulations and provisions, which are the only reason, as far as I am concerned, that we are ahead of all other countries in East and Central Africa, other than South Africa; because we recognized and protected land rights at the very earlier stages. Tanzania, Uganda and Zambia have not yet caught up with us.

So, I do not want us to go that way. Even for civil process and tax. Therefore, much as Sections 74 and 75 may have been abused in some instances through land grabbing, let us not throw the baby out with the bath water. It is a very viable Section.

Mr. Chairman: Hon. Members, let me get some clarification. Hon. Karua, when you said that the current Constitution's provisions, were you talking of only Article 73 or were you talking about the entire Chapter?

Ms. Karua: Mr. Chairman, Sir, I thinking of Section 75. If you look at it, you will see that even to attach somebody's land for a civil debt is anticipated in by this Section. Once you protect rights in the Constitution, if no derogation is provided for, it will become unconstitutional to a mortgagee to sell a defaulter's land, or for the Minister of Lands to remove people out of the Mau Forest. Even if you need the land for purposes of defence, if it is not elaborately provided for in the way Section 75 is, it will not be possible.

Mr. Chairman: When you deal with Section 75, in the current set up, are you saying Section 75 instead of the current chapter or Section 75---

Ms. Karua: Mr. Chairman, Sir, I want it imported so far as it is necessary. I am not saying that we just sit where Section 75 is. There are other openings that have been brought into modern thinking. So, we only pick from Section 75 the minimum that is necessary for other processes like compulsory acquisition, court process and all the things that are absolutely necessary in a democratic society.

Mr. Chairman: So, if I have gotten you right, you are saying: "Let us import Section 75."

An hon. Member: She has no land!

Ms. Karua: Except where I live, and I am proud of not having any land.

Mr. Chairman: Ms. Karua, are we to use Section 75 as a replacement for Article 73 or as a replacement for the entire Chapter?

Ms. Karua: Mr. Chairman, Sir, we are to use it as an enhancement.

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, there is no sufficient protection of land rights. All that it talks about is protection from deprivation, but there is no sufficient protection on land rights.

Mr. Chairman: And you would understand the historical context!

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, the historical context is very important. The formulation that hon. Karua is talking about is the formulation that exists in the current Constitution; that, you give a right and proceed to take it away. I am not averse to the derogations as contained in the current Constitution. I am against it, but I think it would be wrong to make the derogations – the principal objective of the constitutional provisions. So, you can enhance---

What I am saying is that it is important to affirm the security of land rights, which is what hon. Munya was saying about (p). You need a general statement there, securing land rights as a whole, not just on account of declaration.

Mr. Chairman: How do we proceed forward then?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, (g) should be deleted and then we make progress. If we want to have it there, then it will have formulated broad principles, first, by ensuring the security of land rights, howsoever described; sustainable and productive management, transparent and cost-effective administration, sound conservation and protection and elimination of discrimination, but I can assure you that you will have problems with the last one at the referendum.

The Minister for Agriculture (Mr. Samoei): Mr. Speaker, Sir, speaking from the position of the Ministry of Lands, "equitable access" has the connotation of land subdivision, which is becoming a very big threat to land use, and especially agricultural productivity. I would really want to persuade us that unless there is another meaning to "equitable access to land", it can be interpreted all the way to justify land subdivision in order for everybody to have a piece. For purposes of land use, we are actually talking the opposite. We are talking of land consolidation as a means of agricultural productivity. For that reason, unless I am persuaded otherwise, I would say that maybe we should delete (a).

However, I agree with Mr. Orenge that before we talk of derogation, we should take (b), as hon. Wetangula has put it. We can take all the others up to (f), but (g) has no meaning. It says "encouragement of communities---" "This is an administrative issue that I think they can live without. That should be able to solidify the principles.

Mr. Chairman: Hon. we really need to agree to a way forward.

Mr. Ruto: Mr. Chairman, Sir, I still wish to retain (g). There are certain very complex situations in the very rural areas, especially in the areas where adjudication is now beginning to feature, or in areas where land was communally owned. It is very difficult to us modern techniques to determine whose land it is. Communities are best placed to settle such disputes. A very crafty fellow will simply decide to go all the way to the High Court to declare an entire chunk of location his, simply because he was able to go and collude with the Land Registry and get a title deed. So, I think this one protects---

Mr. Chairman: That is what hon. Orenge was talking about?

Mr. Ruto: Yes, Mr. Chairman, Sir.

Mr. Chairman: Can we agree then that we go ahead with 73(a)?

Hon. Members: No, let us delete it!

Mr. Chairman: Do you want to delete 73(a)? Let us hold (a). We agreed with (b) so long as there is a full stop after "land rights"?

Hon. Members: Yes!

Mr. Chairman: Nobody has a problem with (c)?

Hon. Members: No!

Mr. Chairman: Nobody has a problem with (d)?

Hon. Members: No!

Mr. Chairman: No one has a problem with (e)?

Hon. Members: No!

Mr. Chairman: For (f), except the issues talking about the referendum, nobody has a problem with it?

Hon. Members: No!

Mr. Chairman: Regarding (g), now that Mr. Ruto has spoken, we have no big issues with it?

Hon. Members: No!

Mr. Chairman: So, the only problem we have is that to (a), and if I was to say, it really does not break any bones to hold us from continuing. Otherwise, let agree to delete it and move forward.

Hon. Members: Delete it!

Mr. Chairman: So, can I get a proposer and a seconder?

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, it is quite to the contrary. The way that we want to plan our land use, for example, in many parts of the Republic, land is becoming scarce and populations are growing. Probably, instead of somebody taking to his little piece of land, there are areas where you would want to re-plan the way people live; because if everybody has to use the land as it is, for example in Kisii, and even in some places in Nyakach, if they have to live in the way they occupy the land and the titles, then you cannot put that land to proper use. So, equitable access tries to demonstrate that although you may be moved from the land you occupy, if re-planning is done, you will still have the same type of interest on your land without necessarily sticking to the land that you have. We are using that model in a lot of settlement schemes now. Instead of giving people pieces of land, they are settling in something that looks like a little town, where you can plan the roads, the schools and everything else; then somewhere about a mile away or 100 yards away, they can have the land for cultivation.

Mr. Chairman: Hon. Members, we have been on this Article for close to an hour. We need to move. We either agree to delete or retain. So, can I get a proposer and seconder?

The Minister for Foreign Affairs (Mr. Wetangula): proposed.

An hon. Member :---*(Inaudible)*

Mr. Chairman: We have been arguing about the mischief and the non-mischief of---

Ms. Karua :---*(Inaudible)*

Mr. Chairman: There is also a court that will interpret. Sub-Article (b) talks about security of land rights. If you are worried about people invading land---

I think we are all agreed that 73(2) goes. Can I get a proposer for deletion of 73(2)?

The Deputy Prime Minister and Minister for Finance (Mr. Kenya) proposed.

The Assistant Minister for East African Co-operation (Mr. Munya) seconded.

(Article 73(2) deleted)

Mr. Chairman: Can I have a proposer for adoption of Article 73 as amended?

Ms. Karua proposed.

Ms. Odhiambo seconded.

Mr. Chairman: That is carried!

(Article 73 as amended agreed to)

Mr. Chairman: Hon. Members, Article 74 has similar issues.

VESTING AND CLASSIFICATION OF LAND

74. (1) All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.

(2) All land in Kenya is designated as public, community or private.

Mr. Chairman: Hon. Members, is there anybody with a problem with this Article? It has broadly remained the same in all the drafts.

The Minister for Foreign Affairs (Mr. Wetangula):---

Mr. Chairman: Propose that then. We delete 74(1) and (2) and replace with what you have just said?

The Minister for Foreign Affairs (Mr. Wetangula): Yes, Mr. Chairman, Sir. I propose that we re-cast Article 74 by deleting sub-Articles (1) and (2) and simply saying "Land in Kenya is classified as public, community or private."

Mr. Chairman: We also need to amend the title to remove "vesting". Can I have a seconder?

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, the principle of eminent domain has been a big problem to us. Subject to the derogation that I was talking about compensation and so on, in a modern economy, it is important to give some residual powers to the state on determining to the land, although it may be private and communally owned. Without that principle, you would find it very difficult. In a place like Singapore, if they want to build an estate, it is so easy because the rights of the state and the people collectively to undertake projects that are for the benefit of the nation becomes a lot easier. Even the most capitalist countries, including the USA, apply the doctrine of eminent domain. In Kenya, the Government may want to build a road in Nairobi, or we may want to build a police station. First, you cannot find the land. The most interesting thing is that you find the State buying the same land it gave away. It may be difficult without those kinds of provisions.

Mr. Chairman: I agree with you in terms of land for public use – the public interest tramping the private interest. I absolutely agree with you, but why do we not do it when we do the taking part later on to say that "Government can take private land for public use, so long as the Government pays compensation for the same."

The Minister for Land (Mr. Orengo): Yes, but you need to justify it because, the doctrine of eminent domain is well recognized in the world.

Ms. Karua: Mr. Chairman, Sir, even in the current Constitution, what justifies compulsory acquisition is the public interest, where public good overrides private interest. So, it is a doctrine that is applicable here, but how to cast it, if it has been cast elsewhere, why are we not shown two instances, so that people can quickly gravitate towards it?

Ms. Karua: Like it is in the Section 75.

The Minister for Lands (Mr. Orengo): If you can just look at it, I can bring examples because it is something which was solely debated.

Mr. Chairman: Okay, we bracket it essentially because we all agree to the principle.

Mr. Ruto: Mr. Chairman, Sir, you will recall that I had indicated to you that some of these rights on land appear to have been washed out in Section 47(3) and I had asked you whether I can raise this issue when we are discussing the Article on land. Section 47(3)(a) on the Bill of Rights reads that:-

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless that deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Six; or—“

I would like to know whether (b) (1) and (2) applicable? Again, at the end there, 3(6) says:-

“The right recognized and protected under this Article does not cover any property that has been unlawfully acquired”.

We are not being told clearly who determines what is unlawful.

Mr. Chairman: My view is that the State can deprive you of your land rights as we have just heard now, if it is for the public good, but you will be compensated.

Mr. Ruto: But (a) does not explicitly say that unless we say that b (1) and (2) is applicable to (a).

Mr. Chairman: But you see, we are talking about Bill of Rights and the State does not have the right to deprive you of those rights, generally speaking, except for things like land where you are being told that we can deprive you based on the procedures in the Land Chapter. On the last bit, I agree with you. Probably we should tighten it to say that the determination is by a court of law. You could read that again.

Mr. Ruto: It says: “The right recognized and protected under this Article does not cover any property that has been unlawfully acquired”. I think there should be a clear description.

Mr. Chairman: That the determination of which must be by a court of law.

Mr. Ruto: That would really cover it. So, if six can do that, then it is okay. When I was reading (a) I was unable to determine whether 3(a) enjoys the provisions of b(1) and (2).

Mr. Chairman: Which one?

Mr. Ruto: In the same 47. Can I read?

Mr. Chairman: Go ahead.

Mr. Ruto: I have read (a) and (b). It says:-

“(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution or an Act of Parliament that—

(i) requires prompt payment in full, of a just compensation to

the person, before the property is taken;

(ii) allows any person who has an interest in, or right over, that property, a right of access to a court of law”.

(3) in totality reads that:- “The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless that deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Six; or---“

I would expect that even acquisition of land is subjected to (i) and (ii) 2) – Bill of Rights. I would expect (a) to have the same protection as (b)(i) and (ii) have, so that it does not give a blanket excuse to the Government to just take away your right over land and not to compensate.

Mr. Chairman: I get your point and probably it is a drafting issue, but since it refers to another part of Chapter 6 and we are dealing with Chapter 6, let us see whether there is any unfairness in Chapter 6 and handle it here.

Mr. Ruto: That is why I decided that since it is referring to Chapter 6, I will only raise it when we are dealing with Chapter 6.

Mr. Chairman: As we go through Chapter 6, we will see whether there is anybody who is being deprived.

The Minister for Lands (Mr. Orengo): What about if we had a formulation in 3(a) that subject to Chapter 6 of this Constitution, the State shall not deprive a person of property of any description and then you go to the word “description” and put a full stop. Then all these provisions that you find there, you lift them and take them to Chapter 6. Because then what Ms. Karua was saying, all those qualifications can be put together and make a lot more sense.

Mr. Chairman: I absolutely agree. Hon. Ruto, are you set?

Mr. Ruto: It should be restored elsewhere. Supposing we are unable to trace where that is restored. I would like that to be stored here. I do not want you to take it away unless you are giving protection instantly. We want instant protection so that we are able to read it concurrently. Not all of us have that capacity to read all these chapters at the same time.

Mr. Chairman: Can we do this way: Flag that, let us attach it to this and then ask the drafters to recast and bring it up. You should also keep it in mind so that when we are doing the final day on Wednesday, it comes out.

Mr. Ruto: I hope they have captured Ms. Karua’s suggestion on 3(6).

Mr. Chairman: I think we can agree on that now. Propose and second for that.

Mr. Ruto: Ms. Karua proposed and I seconded.

Mr. Chairman: Thank you. We have bracketed 74 to get the formulation from our drafters brining in the section in vesting or eminent domain. Let us go to 75 then. Are we agreed? Public Land! But that does not interrupt hon. Wetangula from continuing with the classification bit so that (2) essentially is jus to classify land into public, community or private. So, we pass (2) as it is and we clear (1) just to deal with vesting.

75. (1) Public land is—

- (a) land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;
- (b) land lawfully held, used or occupied by any State organ, except where such land is occupied under a private lease;
- (c) land transferred to the State by way of reversion or surrender”.

This means that if you have a 99 lease, after the end of the 99 year lease, the land is supposed to go back to the Government or if you had a lease and you do not want to keep that lease anymore, you surrender it back to the State.

“(d) land in respect of which no individual or community ownership can by any legal process be established;

- (e) land in respect of which no heir can by ordinary legal process be identified;
- (f) all minerals and mineral oils as defined by law;
- (g) government forests other than forests to which Article 76(2) (e) applies, game reserves, water catchments areas, national parks, animal sanctuaries, and specially protected areas;
- (h) all roads and thoroughfares specified by an Act of Parliament;
- (i) all rivers, lakes and other areas of water as defined by an Act of Parliament;
- (j) the territorial sea and its sea bed;
- (k) all land between the high and low water mark;
- (l) any land not classified as private or community land under this Constitution; and
- (m) any other land declared to be public land by an Act of Parliament”.

Does anybody have any issues with any of those?

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, I think public land should be put under the control and the management of the devolved governments because this is public land. We are talking about public land. Apart from (j) (f) and (l), the rest should go to the devolved governments.

Mr. Chairman: That is why I am saying that once we go to (2) public land, classified and clauses (a) to (e) shall vest and be held by the county governments. They should be held in trust for the people resident in the council and shall be administered on---

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): No, no. You see, even (g) will not sell. Apart from (f), (j) and (l), that probably will go to devolved governments.

Mr. Chairman: First of all, (a) to (e) is sort out for you and then other than the ones that you have marked, the rest are (g), (h), (i) and (k). So, let us see. (h), for example, "all roads and thoroughfares specified by an Act of Parliament", why should that be with the country governments?

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): not county, I mean devolved governments. Why should the National Government be bothered be asked for something like a road passing through Kajiado and we have a devolved government?

Mr. Chairman: Okay. Let us go to the next one. What about: "All land between higher and low water marks?"

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): I have no problem with that. You see, (f) is talking about minerals, whether they are subterranean. When you come to (j), you are talking of territorial source. You could bring even the lakes to part of this. When you come to (l), it is very explicit, but the rest should be under the devolved governments.

Mr. Chairman: Maybe (g) in terms of game reserves. We can stretch it.

The Minister for Tourism (Mr. Balala): With regard to (g), it talks about reserved national parks for the people of Kenya, but also there is a notion that if the central government wants land it should go and request the devolved government for land instead of the devolved government land being taken away by the centre while they are not even aware that it has been taken away.

Mr. Chairman: I agree with you, but the only one that is outside that bracket now is (g). The rest, namely, (a), (b), (c), (d) and (e), we have already said will be held by the devolved government in trust for the people. The only one that we need to add is (g).

The Minister for Lands (Mr. Orengo): The Maj-Gen. Nkaisserry fears. I know that in his area, there are these game reserves and they are captured by 76. If you read 76(2)(e), it reads:-
"for the purposes of clause (1) community land includes—
(e) ancestral lands and lands traditionally occupied by hunter and gatherer communities". I thought that this should include (c) which reads: "land lawful held, managed or used by specific community as forest, grazing areas or shrines".

The Minister for Tourism (Mr. Balala): I have a problem on these national reserves and parks. I will give an example of the Mara, which is held by the Narok County Council and Trans Mara County Council. The national park in Tsavo, it is owned by the national government. The community has no role whatsoever while the community should have the ownership, the management can be organized through a central system that the security aspect of the national park and reserves are taken care of. That is one, I am very concerned. Secondly, including minerals, for example, in Isiolo, we are digging oil. When we get that oil, it is all our national interest. What is Isiolo benefiting from that oil or how much is it benefiting for it to develop itself even further? That is part of my concern.

Mr. Chairman: Since Maj-Gen. Nkaisserry raised it, let us hear from him and then hon. Kioni.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, Sir, the way this thing was drafted is really very foggy. When you look at the area which hon. Orenge has talked about which is 76(2), it says that it will be administered on their behalf by the National Land Commission. If we have a devolved system already, why would the National Land Commission be administering this on our behalf? This should be re-drafted or you shift what I am saying down to 76 and it can now be specific.

Mr. Kioni: I think this is getting very murky. If we do not give full attention to it, it will be a mess eventually. Going through what hon. Balala has just said, we are not stretching it to the level that we should. What about if Ndakaini today wake up and say: "all this belongs to us"? That is water. We have the hydro electric dams. What if the people in those regions will wake up tomorrow and say, enough. What will we do with the forests? We have not put in some thoughts here. If we do not allow ourselves to get deep into this, this is going to get us into trouble. Looking at it from a national point of view---

Mr. Chairman: I think we can discuss it without the dangers being mentioned. Let us just say that there are issues.

Mr. Kioni: But it is impossible to talk about it without the dangers because if we do that---

Mr. Chairman: That is very critical. Let us be positive.

Mr. Kioni: I am just saying that we need to be real with these things. We should look at it from a national angle. When you devolve all these things and take them to the Jimbos, if there is anything like that, that you are thinking about, then we would rather come clear and say what we are addressing here.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, I just wanted to react to hon. Balala's point where he refers Tsavo, for example. In every country, there are national parks and other parks. What is envisaged in 75 are national assets. For example, Tsavo will be a national park and the Mara will be under 76. I do not want us to say that wherever there are parks, they all belong to the local authorities because there would be of necessity national parks and parks which are administered by the local authorities.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, this issue of the counties versus the Land Commission, we should not forget where we are coming from that the greatest mess in this country is because the councillors that we have today, they way they have demarcating and alienating land, I believe that we want this National Land Commission because we are informed of the past, so that there is more accountability. Today, even if you look at the Maasai land, which is supposed to be communal, some of that land has already been alienated and people have title deeds. That is the truth. So, to tame the appetite of this kind of leaders, it is important that we have a central body to deal with them. Lastly, we should also understand the extent. When we talk about community land, we should know what we are talking about and be informed. When we talk of that community land, it does not mean what is put under there. If there are minerals, that becomes public and not communal. With that in mind, it is important that we agree the importance of this Article.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I think we need to be very careful about what we are doing. We need to be able to identify where the problem has existed and what we are trying to correct. I thought quite clearly that the issue of land being not available to local communities and being administered or dished out in the wrong manner by the national government is being addressed by 75(1)(a) all the way through to (e). All the other issues do not relate to any specific community but rather relate to the area that we call Kenya.

If we say now that all water resources that belong in a particular forest belong to that community and yet there are other areas that benefit from that water, what are we saying? If we say that resources that come from one area belong to that area and do not belong to the nation, are we then not talking about balkanisation? Kenyans are very worried and concerned about this issue. If we do not handle this thing by stepping back and addressing ourselves as Kenyans and not as communities, we will end up in big problems. This is something that can be very emotive and explosive. Issues that relate to community land have been addressed quite adequately in (a) all the way through to (e). If we are still talking about the Kenyan nation and we are not talking about moving towards a federal system, I would plead with Maj.-Gen. Nkaiserry to withdraw the issues that he put to the table. I would really appeal to him to do that.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): I think we should retain the National Land Commission. This is in the national interest. There would be what might be community interest. Essentially, the mischief that Maj.-Gen. Nkaiserry is trying to---

Mr. Chairman: And the two should not even be divergent.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): In fact, they should be complementing each other. If you look at community land and go further up to 36(4) it talks of disposal with legislation specifying the nature, extent of the rights of the members in each community individually and collectively. So, somewhere along the line the

National Land Commission is important. We should retain the draft as it is. If there are any concerns about whether there will be consultation or not, let us find a way of dealing with that. But I think we should retain the National Land Commission.

The Minister for East African Community (Mr. Munya): I agree with what Mr. Mudavadi and Mr. Kenyatta are saying that there is something very strange about the formulation. I agree with that principle that these are national assets in land that must be treated as such otherwise we will bring chaos in the country when we start vesting national assets that have been used as national for over the years. When we start vesting their interests in the county government, we are inviting a lot of trouble. County governments do not seem to take care of community land any way. That is why we have problems of Mau where Narok County Council land forest was taken by individuals. That is why we are having that problem. It is not good historically to say that.

If you look at the land where Parliament has been built, according to 75(1) (b) it means that that would be county land held by the National Land Commission in trust. Where Parliament is build and where Ministries are all that becomes county land. This formulation is quite ridiculous. We really need to reformulate this whole thing.

Mr. Chairman: Just a clarification; the land where Parliament has been built comes under Nairobi City Council.

The Minister for Agriculture (Mr. Samoei): I agree that we need to be much more clear so that we avoid any confusion that may arise especially on what belongs to the State or public *vis-a-viz* what belongs to the community or county land. This was trying to address itself to a centralised system that dishes land out there without regard to the people who live there. While we treat that we should not muscle the whole thing and make National Assets disappear. There is that legitimate concern which has been taken care of by 75(2) which clearly states that the appropriate land at the local level should be in the hands of the county or the regional Government.

To say that water catchment areas like the Mau or national parks should be in the hands of the local government would be wrong because these are national assets. There is a big argument about how the Mau water catchment area has been abused. This is what is going on in our national parks as well. There are so many establishments coming up and watering down the national park set up. I think we should be careful when we are referring to such. Therefore, I am saying that we should retain the formulation the way it is except looking at what Mr. Munya was raising on 1(e) so that that we are careful on what we are trying to do.

Ms. Karua: I just want to raise a red flag and say that we are getting into this because we have not quite finished with devolution. You remember I asked for definitions. When I looked on the web I found that federal is where rights of the counties, states or region are enshrined in the constitution and devolution is where you devolve by an Act of Parliament. We have already

devolved through the constitution. It need not be the actual *Majimbo*. We can tamper it to be what we want.

Mr. Chairman: But I think we agreed that we are not talking about *Majimbo*. We said that very clearly.

Ms. Karua: That is why I am saying we can tamper it the way we want because we are adjusting to known notions. We need to be very clear of those issues so that we are able not to move too far from where we were. It has already been said by Mr. Mudavadi. We must have this concept that the national government is the overall custodian of public good. The devolved government manages some of the things but subject to the overall whip.

I agree with Mr. Munya when he said that even when resources have been managed locally, individuals have tended to use them for their use and therefore, mismanaged them. So, mismanagement is not only at the national level it is also found among individuals.

Mr. Chairman: Typically, it is worse at the local level.

Ms. Karua: So, we have put safeguards that the national custodian is the Government and the management is in the hands of the devolved government. We must look for safeguards that ensure. As Mr. Balala said about oil in Isiolo, that one may have oil the other one gold and the other nothing else but the water source which is gold itself. We are nation because it is a support system. If we see it as that we will not worry who has what so long as we have enough safeguards.

Mr. Chairman: In any event those will be catered for by specific Acts. For example, right now the extraction of natural resources is very modernised right now. There is a lot of local population involvement including talking to them and getting them on board.

Ms. Karua: I was just going to appeal that we do mind that because we chose unitary let us not go further than we ought to go every time we are coming to this.

Mr. Chairman: Agreed. So, could I get a proposer and a seconder for 71(1)?

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaiserry): To retain it the way it is or with proposed amendments?

Mr. Chairman: The way it is. I want to convince you that (a) to (e) properly caters for the issues that are dear to you. In fact, Mr. Samoei captured it very well that is why I was asking Mr. Kioni to pay attention. The mischief you are fearing was that there would be somebody in Nairobi dishing out land very far without any recourse to you. That is catered for. 75(4) says:-

“Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use.”

The Assistant Minister, Ministry of State for Defence (Maj.-Gen. Nkaisserry): I am not against this totally but I think you got me wrong. I said that we have a devolved system. So, part of what is in 75 is exactly what I said from the very beginning. This is a very important debate and people have gone round in circles even using threatening language. We do not have to go that way. When you talk about your water, we are paying for it. Everybody is paying for water. If you talk about your power, we are paying for your power. If you get oil in our land we will buy it from you. You will not be keeping it. A natural resource which was put there by God like animals---

Mr. Chairman: I think let us leave it the way it is doctored, hon. Munya. I think generally it is--

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, if it is talking about land occupied by a state organ like Parliament.

Mr. Chairman: In other words, that is public land.

The Assistant Minister for East African Community (Mr. Munya): But the way it is defined, it is county council land.

Mr. Chairman: No! What we are defining is public land.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, if you look at (2) which says: "Public land classified under Clause 1 (8)(e) shall vest in and detailed by the county Government in trust land and resident in the county. In Part (b), you can never transfer the land that is occupied by state organs to the county council.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, if you look at 75(i) (a) to (m) is acceptable and we have approved as they stand. We have to find a way of either exiting (2) or recasting it. Could you give us some reformulation?

Mr. Chairman: Just remove (b) out of the (a) to (e). I actually did not see any problem with it because if the county council of Nairobi hold the land of Nairobi in trust and manages in terms of rates and---

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Precisely. The moment you remove this, then the factor where local authorities are able to get what you call contribution in lieu of rates - where the Government is entitled to pay rates to that particular local authority - the Central Government is not obligated to pay any rates. So, it does not mean that by it being crafted this way, it means that the land--- This is because even private land in Nairobi is still part of the county and you pay rates.

Mr. Chairman: Thank you very much. Community Land 76(1). It states:-

“Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or community of interest. (ii) For the purpose of Clause 1, community land includes (a) all land lawfully held as trust land by the county Governments”.

Sorry, we were off-record when we were discussing. So, if we could get the proposer and seconder for 75. Mr. Balala, could you formally propose adoption of 75?

The Minister for Tourism (Mr. Balala): Mr. Chairman, my senior DPM can do that.

The Minister for Local Government (Mr. Mudavadi): I propose.

Mr. Chachu seconded.

Mr. Chairman: Okay. Let us go to 76. 75 is carried. 76 (2) states:-

“For the purpose of Clause 1, community land includes (a) all land lawfully held as trust land by the county Governments (b) land lawfully registered in the name of group representatives under the provisions of any law for the time being in force (c) land lawfully held, managed or used by specific communities as community forests, grazing areas and shrines. (d) land lawfully transferred to a specific community by any process of law (e) ancestral lands and lands traditionally occupied by hunter/gatherer communities (f) any other land declared to be community land by an Act of Parliament but shall not include public land as defined in Article 75

(3) Any unregistered community land shall be held in trust by county Governments on behalf of the communities.

(4) Community land shall not be disposed off or otherwise used except in terms of legislation specifying the nature and extent of the rights of the members of each community individually and collectively.

(5) Parliament shall elect legislation to give effect to this Article.

Anybody who has a problem with that?

Hon. Members: No!

Mr. Chairman: Proposer and seconder? The Minister for Lands and then Maj-Gen. Nkaisserry.

The Minister for Lands (Mr. Orengo): Mr. Chairman, I was saying that if you go by the definition or classification of public, community or private and then under that particular Article it says: “All land lawfully held as trust land”. I think that classification has to change. It maybe there by dent of the current law or Constitution, but once this Constitution comes in place, the concept of trust land---

Mr. Chairman: Unless you define it somewhere?

The Minister for Lands (Mr. Orengo): Yes, Mr. Chairman.

Mr. Chairman: Actually. In fact, there are very many things like the National Accord so defined. So, that is really poor drafting. Let us flag it. In other words, no classification called trust land exists in the Constitution we are making but we need to define.

The Minister for Lands (Mr. Orengo): No. You know under the current Constitution, there is a category of land known as trust land. When we pass this Constitution, there will be no category of land as community.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, I was saying if you remove (a) for example and in the classification of community land you only leave (b) (c) (d) (e) and (f), there is a certain category of land that will be left that will not fall under any of these classifications.

Mr. Chairman: Like which one?

The Assistant Minister for East African Community (Mr. Munya): For example land in my constituency that is in the north which we call northern grazing zone which is actually county council land which is held in trust for the Tigania community and which is not yet registered.

Mr. Chairman: That will be under (e) Ancestral lands and lands already occupied by communities.

The Assistant Minister for East African Community (Mr. Munya): We are not hunters and gatherers!

Mr. Chairman: No! What about land lawfully held and managed used by special communities that is (c)? Grazing areas or shrines?

Hon. Members: Shrines!

Mr. Chairman: I think the point you raised is critical. First of all, (a) should be trust land. I think it should be land held in trust. If they wanted to talk about the issues we have raised earlier but anything that remains of the trust land is carried--- We need to define it so that whatever land is left, then it should be addressed by---

The Minister for Foreign Affairs (Mr. Wetangula): I think this is a definition of what community land is, according to this Constitution and I am saying all land currently held as trust land by county Governments will now be community land.

Mr. Chairman: Thank you. Now at that point, the current Constitution we are drafting now talks only of three classifications. There is no fourth classification called trust land.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, it is not creating a fourth classification. It is transferring the classification from trust land to community land.

Mr. Chairman: Now, therefore, you have a classification that you are moving from. That is the fourth classification.

Hon. Members: No, it is not, Mr. Chairman!

Mr. Chairman: Okay. What is trust land according to this draft?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, currently trust land under the Constitution---

Mr. Chairman: Not under the Constitution but under this draft because you will not be carrying that---

The Minister for Foreign Affairs (Mr. Wetangula): Under this draft, there is no trust land and what this section is saying is what is trust land today will be community land.

Mr. Chairman: That will require a definition of trust land. It is so that specific.

Ms. Karua: Mr. Chairman, I am proposing that we stop using the terminology "trust land" in this Constitution and the transfer of trust land to become community land be done by the transitional clause.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, I think (c) takes care of Munya through the 76 (2) (c) "Land lawfully held, managed and used by specific communities as community forests, grazing areas or shrines".

Mr. Chairman: That is agreed but to get hon. Munya and hon. Wetangula to go with us, the Constitution will benefit from clarity. That might be left out.

The Assistant Minister for East African Community (Mr. Munya): Mr. Chairman, it is generally a grazing zone or area but there is also category of land that under the current law is lawfully held as trust land so that you have to have all these categories to transfer to community land. If you remove (a) ---

Mr. Chairman: No, I am not removing. I am saying it should be redrafted so that it is more specific like you have just said now because in this draft we will not have the word or term called "trust land" defined separately as a different classification.

The Minister for Lands (Mr. Orengo): Mr. Chairman, the current Constitution talks about what is trust land and the more you look at it, the more the reason why you need some clarity in this and I am reading Chapter 9 of the current Constitution. It states-

“Subject to this chapter, the description of land as trust land (a) land in the special areas meaning the areas of land in the boundaries of which were specified---“

If you look at it, really you would not help anybody by having those words in the draft.

The Assistant Minister of State for Defence (Maj-Gen. Nkaisserry): Mr. Chairman, for the sake of the Constitution to be clear, when you look at 2 (c) and this is where we have been before, land lawfully held and managed and used by specific communities as community forest”. Now, if we were talking of forests in 1975 that they are going to the national level. Take an example of the Maasai Mau site. So, either we have specific issues in the specific clause and seal them there instead of spreading. So, I would rather have land lawfully held and then we remove the word “forest”.

Mr. Chairman: Maj-Gen., there is no contradiction because there are certain communities which use forests like the *Ogiek*. So, this is not a contradiction.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, I want to convince Lord Jim (Mr. Orengo) that Article 76 2(a) and all those that flow are just categories of land that are going to be then collectively called community. 76(5) says: “Parliament shall then enact legislation to give effect to this Article”, and that legislation can describe the transition from trust land to community land.

Mr. Chairman: You are with us here and you are telling us that. 50 years from now, a lawyer will be telling somebody there are only three categories of land in this country. Community, public and private. There is nothing called trust land. We do not want that fight at that time. Let us just have in the transitional mechanisms that clarified. Let us go on. Are you defining what trust land is as part of the definition? Which law defines it? The only law that defines it is the Constitution and we are moving away from the Constitution. Let us go on. We are not moving it. We are just getting that clarified.

Mr. Ruto: Mr. Chairman, I think this chapter is chaotic because first of all, it even goes ahead to talk about communities being defined in terms of ethnicity, culture or community interests. How do you actually go ahead and actually quickly classify this? What is a community now? What does this mean? Secondly, I was looking at (e) Ancestral land and lands traditionally occupied by hunter and gatherer communities. Now, what do you mean by ancestral lands? All land in Kenya is ancestral. So, at what stage do you say this belongs to my ancestors? Unless you want to invite me, then we have got quite a bit to do with hon. Kiunjuri. We shall start tangling with hon. Kiunjuri right away.

Mr. Chairman: Hon. Ruto, Parliament shall elect legislation to give impetus to this proposal. It will be up to Parliament to define those things. Can I get a proposer and seconder?

Ms. Odhiambo: I propose.

The Minister for Tourism (Mr. Balala) seconded.

Mr. Chairman: It will be what Parliament says. It will give a law which will give definitions. It is up to Parliament to say then. So, you will debate in Parliament. Private Land Chapter 77 states:-

“Private land includes (a) registered land held by any person under freehold tenure, (b) land held by any person under leasehold tenure and (c) any other land declared private land or under by or under an Act of Parliament”

Anybody who has a problem with private land?

*(Proposed by Maj-Gen. Nkaisserry
and seconded by Mr. Mungatana)*

Mr. Chairman: Land Holding by non citizens- this Article has remained broadly the same.

78 (1) A person who is not a citizen may hold land on the basis of leasehold tenure only and such a lease however granted shall not exceed 99 years.

78 (2) An agreement deed or conveyance of whatever nature which converse on a person who is not a citizen and interest in land greater than 99 years lease is void. And we have just already said (a)

78 (3) for purpose of this Article a company or body corporate is a citizen only if it is fully owned by citizens. Not even 51 percent? I thought 51 percent. Parliament may enact legislation to make further provisions for the operation of this provision. Now let us go with one. Does anybody have a problem with it?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): In quite a number of countries, non citizens do not own property and I have always wondered why in this country it is such an open policy, 99 years is just like giving away land. Is there no way that we can restrict ownership of land so that we do not get foreigners buying more land in this country?

Mr. Chairman: If I was to try and hazard a philosophical basis, in Britain, in old England, land belonged to feudal Lords, the nobility, which is why we have the term landlord. All the land used to belong to a small group of families and everybody used to be a tenant on that land. That was one of the biggest points of discrimination and when those who were there moved away and went to the US, one of the first things they did away with was feudal ownership of land where land belonged to just a small group of people and everybody else was a tenant. So the first thing they said when they went to America is that even if you were a foreigner you can come and buy

the whole of New York so long as you have the money and you follow the rules of the state. This is one of the key factors in economic progress. On the other hand the Arabs are completely different, they have a major attachment to land and as far as they are concerned land is everything. They do not allow any foreigner to own any land. Actually Dubai has changed now in the sense that they have allowed leaseholds now. So I think it is good to be somewhere between where you have controlled ownership of land. Yes Minister for Education!

The Minister for Higher Education (Mrs. Kosgei): It is a small question. Do the foreigners then have exactly the same land rights as the citizens?

Mr. Chairman: I think if it is a leasehold, it is a leasehold it. Now there is a proposal to have only leasehold. 78(1) is proposing only leaseholds for foreigners. Our current constitution allows even for freehold.

The Minister for Higher Education (Mrs. Kosgei): I do not like it!

The Minister for Tourism (Mr. Balala): You are entitled to residency and also you are entitled to open a company in that country. But opening a company, then you have to have a local as a sleeping shareholder.

Mr. Kioni: I was wondering whether we should not reduce the years from 99 to not exceeding 50 years.

Mr. Chairman: Minister for Lands, what is your view?

The Minister for Lands (Mr. Orengo): In fact most of the leases that are being given to anybody leave alone foreigners, is 50 years or less. But where there is justification for example if they are carrying out a project of some significance, and would want longer leasehold in terms of tenure, probably the banks are insisting on that, normally we would want evidence of that. Every case is not dealt on the basis of what exists in the policy and therefore you give the maximum. You look at what person wants to do with the land but I can tell to know the extent to which foreigners own land in this country, this is one of the areas when we were trying to prosecute the land policy in terms of it, there was a large body of foreign land owners. In fact they had convinced some of our partners not to support the process because of this policy which is being introduced of not having more than A99-year tenure. There are foreigners who have freehold even for 10,000 years.

Mr. Chairman: Then there is a clarification I have just been alerted to, in (3). You remember we said ownership 51 percent. What I have just been informed is that when it comes to land the idea was to specifically keep companies at 100 percent Kenyan to be considered a citizen. So this is a movement from the general which I think is a reasonable thing to point out. Now that you are giving foreigners leasehold, for you to qualify for freehold if you are a company then you must be a 100 percent shareholding. So I think that is where 3 is coming from.

Mr. Mungatana: I wanted us to leave 78 (1) the way it is because we should not be closing up at this time when people are moving towards the global village. In fact as we are talking now I was even thinking that it would be very nice if we can be informed of what the position is with

the other East African Community member countries. And I can hazard a guess on this issue. That Uganda, Tanzania and all those which were initially in the British Protectorate kept the 99 year position. So I am thinking that in order for us to create some form of uniformity we should not be closure phobic. There is nothing to fear because like the minister has told us, in the issuance of the lease itself they can make it 50 years so that, that 99 is just an upper limit.

Mr. Chairman: Can I get a proposer and a seconder for Article 78!

Mr. Mungatana: Mr. Chairman I propose.

Mr. Chairman: Secunder! All of it as it is. The three we clarified the company. We stated that this is for purposes of, if a company wants freehold as opposed to leasehold, because they are entitled to a leasehold if they are foreign company. For the ownership of that company to be considered Kenyan, you need 100 percent, which is reasonable. Just like for purposes of the Insurance Act, you need at least 30 percent Kenyan holding to be given a licence.

Okay seconded by who? Mr. Kiunjuri!

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, just for clarity, because we are talking of leasehold land here. This Article is talking of leaseholders.

Mr. Chairman: Land holding by non citizens.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): A person who is not a citizen may hold land on the basis of leasehold only.

Mr. Chairman: Only, therefore he might not hold freehold. So if a company that is owned 51 percent by a Kenyan asks for freehold land and says they are a Kenyan company, this Article outlaws that.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Then why do we not be very specific and---

Mr. Chairman: This is better placed! So proposed by Mr. Mungatana, seconded by Mr. Kiunjuri, is that carried?

Regulation of Land use and Property, 79 (1)- the state has the power to regulate the use any land interests or rights in land in the interest of defence, public safety, public order, public morality, public health---

The Minister for Agriculture (Mr. Samoei): On a point of order! I think what Mr. Mudavadi is trying to say is this; if a citizen, own 51 percent of a company, the majority shareholder, and yet he has some foreign partners, are you telling us you us that you are going to deny him the right for his company to own land on leasehold.

Mr. Chairman: Leasehold is okay!

The Minister for Agriculture (Mr. Samoei): It is not on leasehold. If you read (3) it says:-

“For the purpose of this Article a company or body corporate is a citizen only if it fully owned by citizens”.

This means, if I have none citizens who own 40 per cent, then that company will be considered non citizen and therefore cannot qualify to own land.

Mr. Chairman: Non citizens are entitled to leaseholds of 99 years.

An hon. Member: Then what is the purpose of this Article? It means nothing!

Mr. Chairman: It means---

The Minister for Agriculture (Mr. Samoei): But you know we are not discussing theory here. Why do you want to put this (3) here on land holding by non citizens?

Mr. Chairman: This is the reason Mr. Samoei: Assuming that same company went to the Minister for lands and said we want a freehold piece of land and the issue came, are you a Kenyan citizen as a company or not because only citizens are entitled to freehold.

Regulation of Land Use and Property, 79 (1)- the state has the power to regulate the use of any land interest or rights in land in the interest of defence, public safety, public order, public morality, public health, land use planning or the development of the utilization of property.

Two, the state shall encourage and provide a conducive social, economic and political environment and legal framework for the creation, development and management of property.

Three, parliament shall enact legislation ensuring that investment in property benefited from the local communities and their economies.

(Proposed Maj-Gen. Nkaiserry)

Unless there is anything, second it first of all so that we can discuss that.

The Minister for Foreign Affairs (Mr. Wetangula): 79 (1) says:-

“The State has power to regulate the use of any land, interest or rights of land in the interest of defence, public safety, public order, public morality, public health, land use, planning---“.

That is fine but it must come at some benefit to the owner of the land. Where do we provide that?

Mr. Chairman: No! That will be handled in legislation. Even now it is being handled by legislation.

Mr. Wetangula: But the current constitution provides for adequate compensation where your land rights are interfered with! We cannot just leave it to legislation.

Mr. Chairman: Let us move on Mr. Wetangula. Seconded by who?

The Assistant Minister for East African Community (Mr. Munya): Once you put 79 (1), (2) is more of a summary of policy of land than anything else. It has no basis in a constitution.

Mr. Chairman: I have no problem with that one, deleting it off. So can you then Mr. Munya propose and we get the delineation corner to do the same?

The Minister for East African Community (Mr. Munya): I propose the deletion of 79 (2).

(Mr. Samoei seconded)

Mr. Chairman: Can we then carry 79 with amendments? Proposed by who and seconded by who?

(Mr. Balala proposed)

(Mr. Kioni seconded)

Mr. Kioni, confirm that you have seconded?

Mr. Kioni: Mr. Chairman I have seconded.

Mr. Chairman: 80 (1) states:-

“There is established the National Land Commission, (2) the functions of the National Land Commission are (a) to manage public land on behalf of the National and county government. We will handle county government issues with devolution, (b) recommend to the national government a national land policy, (C) advice the national and county government on policy framework for the development of selected areas of Kenya to ensure the development of community and private land in accordance with the development plans for those areas, (d) investigate disputes about land ownership, occupation and access to public land in areas as provided for by legislation, (e) advice the national government on and assist in the execution of a comprehensive programme for the registration of title deeds throughout Kenya, (f) conduct research, initiate investigations once we have done the establishment”.

The Minister for Foreign Affairs (Mr. Wetangula): To reformulate it just to read:-

“There shall be a National Land Commission whose functions shall be defined in an Act of Parliament”.

Mr. Chairman: Thank you. So can you propose and somebody to second?

(Seconded by Mr. Samoei)

Is it carried?

Let us go to 81- Legislation on Land- parliament shall enact legislation to revise, consolidate, rationalize existing land laws. What parliament should be doing is really up to--- the Minister for Lands is this helpful to you?

The Minister for Lands (Mr. Orengo): There is work in progress and when it is complete we will need to amend it like revising consolidation. This is part of work in progress. Actually, I do not find it---

Mr. Chairman: So can we propose deletion of 81? Then I am being advised that the better format might be just to say; parliament will do legislation to give effect to the chapter on land. Is that agreed? We go to part two on environment.

We have said that we delete it but replace it with 19 which will be done by redrafting. Can I get a proposer and a seconder for that? Proposed by Mr. Kenyatta and seconded by Mr. M. Kilonzo.

Part 2, Environment and Natural resources--- Yes sir!

The Minister for Agriculture (Mr. Samoei): Hon. Kenyatta should not propose this. Let somebody else do that. In view of this let Mr. Munya propose, it can be used against him. This particular one is talking about squatters and landless and all these people.

Mr. Chairman: Mr. Kenyatta is as much part of this committee and has all the rights but let us hear from Mr. Munya. Go ahead!

The Assistant Minister for East African Community (Mr. Munya): I propose the deletion of 81 and reformulation of it accordingly.

Mr. Chairman: Seconded by Maj-Gen. Nkaisserry. Okay, let us go to part two of the environment. The state shall respect the integrity of natural processes and ecological communities and promote the conservation of habitats and species, (b) ensure sustainable exploitation, utilization, management, conservation of the environment and natural resources and the equitable sharing, (c) ensure that social and cultural values traditionally applied by communities of Kenya, for the sustainable management of the environment and natural resources are observed.

“83- Every person has a duty to co-operate with the state organs and other persons”.

But a general broad statement really will help. So can we recap 82 so that there is a broad statement that captures the spirit of that? Is that agreed? Can I get a proposer and a seconder?

Mr. Chairman: 83 says everybody has a duty; we are talking about the general---

Ms. Karua: (Off record) ---the duty so that it can be taken to---

Mr. Chairman: It has been proposed by hon. Balala and seconded by Ms. Karua.

(Proposed by Mr. Balala)

(Seconded by Ms. Karua)

Let us go to Article 83---

An hon. Member: The casting.

Mr. Chairman: The casting, yes. Protection of the Environment.

Protection of the environment

“83. Every person has a duty to cooperate with State organs and other persons to—

- (a) ensure ecologically sustainable development and use of natural resources;
- (b) respect, protect and safeguard the environment;
- (c) take measures to prevent or discontinue any act or omission which is harmful to the environment; and
- (d) maintain a clean and healthy environment.

This Article has broadly remained the same. Can I get a proposer and a seconder?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): I propose.

The Minister for Higher Education (Dr. Kosgei): I second.

(Proposed by Mr. Kiunjuri)

(Secinded by Ms. Karua)

Mr. Chairman: Is it carried?

The Minister for Foreign Affairs (Mr. Wetangula): No, Mr. Chairman, Sir. In Article 83 (c), you know when you put out a clause like this, it must also have an attendant penal clause. Because when you say:

“(c) take measures to prevent or discontinue any act or omission which is harmful to the environment”

What happens when you do not? This is not a statement of constitutional policy; this looks like it is an obligation being placed on citizens. It must have penal sanctions!

Mr. Chairman: You have a point.

Ms. Karua: *(Off record)*---

The Minister for Foreign Affairs (Mr. Wetangula): But if it is in the environmental law, we do not need it here!

Ms. Karua: *(Off record)* ---

Mr. Chairman: What about Article 85 - about enforcement of environmental rights - as hon. Munya pointed out?

“85. (1) If a person alleges that a right to a clean and healthy environment recognized and protected under this Constitution has been, is being or is likely to be, contravened, in addition to any other legal remedies which are available in respect to the same matter, that person may apply to a court for redress.”

The Minister for Foreign Affairs (Mr. Wetangula): That is still different from Article 83 (c).

Ms. Karua: Even this is too elaborate; Article 85. They should just say justifiable--- (Off record)

The Minister for Foreign Affairs (Mr. Wetangula): So, I want to delete (c) or Mr. Nyegenye can advise us on how it can be reformulated. Because when you say:

“(c) take measures to prevent or discontinue any act or omission which is harmful to the environment”---

Mr. Chairman: Can we say reformulate?

The Minister for Foreign Affairs (Mr. Wetangula): What happens when you do not? Because there must be some penal element to it.

Mr. Chairman: You have a point. So, can we say we reformulate?

Okay, can you propose a recasting of part “c”?

The Minister for Foreign Affairs (Mr. Wetangula): In fact, Mr. Chairman, Sir, Article 83 should end at part “b” and delete parts “c” and “d”

Mr. Chairman: Okay. So, propose for the deletion.

The Minister for Foreign Affairs (Mr. Wetangula): I propose we delete parts “c” and “d”.

Mr. Chairman: Any seconder?

Mr. Namwamba: Mr. Chairman, Sir, I just wanted to note that as Mr. Nyegenye still recasts Article 82, that Article 82(2) is exactly the same thing as Article 83(b).

Mr. Chairman: Okay. So, let us recast Article 83 also.

Mr. Namwamba: So, the whole of Article 83 really needs to be reworked.

Mr. Chairman: Okay. Let us get a proposer and a seconder!

Mr. Namwamba: I second *Waziri's*---

Mr. Chairman: Proposer now for recasting the entire Article?

Yes, *Mheshimiwa*?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): It is a very, very fundamental issue, and when we talk of part "c", that you take measures to prevent or discontinue any act or omission which is harmful to the environment, I think this is the one can give me rights, as a citizen to prosecute. So that if I believe it is causing harm to us or to the community, I can take legal action. So, I believe we should keep part "c"; it should be there.

Mr. Chairman: You are very right; so that instead of deleting, let us reformulate it so that it is cleaner than what it is right now.

Mheshimiwa, re-cast Article 83. So, can you propose for re-casting?

The Minister for Foreign Affairs (Mr. Wetangula): I propose that Article 83 be re-cast.

(Proposed by Hon. Wetangula)

(Secoded by Hon. Ruto)

Mr. Chairman: Okay, we are on Article 84.

CONSERVATION OF THE ENVIRONMENT

"84. In the utilization and management of the environment the State shall—

- (a) protect genetic resources and biological diversity;
- (b) establish systems of environmental impact assessment, environmental audit and monitoring of the environment;
- (c) encourage public participation;
- (d) protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and genetic resources of communities; and
- (e) ensure that the environmental standards enforced in the Republic are the accepted international standards.

(Loud consultations)

So, can somebody propose there?

Mr. Chachu: I propose, Mr. Chairman, Sir.

An. Hon. Member: Delete it!

Ms. Karua: Mr. Chairman, Sir, before deleting it, can we now link it and say: Parliament may make legislation to provide for the enforcement, conservation and--- We link up with the other clauses so that we are leaving it to Parliament and, sort of, acknowledging the legislation that is already there---

Mr. Chairman: Acknowledging the need for conservation of the environment, protection of the environment---

Ms. Karua: Enforcement, utilization---

Mr. Chairman: And obligations in relation to the environment.

So, can I get a proposer for deletion from hon. Chachu, and then secondment; then we can get the proposal from Ms. Karua.

Anybody to second hon. Chachu in terms of deletion of Article 84?

(Seconded by hon. Kioni)

Ms. Karua, you can now propose recasting!

Ms. Karua: I propose.

(Proposed by Ms. Karua)

The Minister for Tourism (Mr. Balala): (Off record) Mr. Chairman, Sir, I believe that from 82 through to 88, all of them can be consolidated and be re-casted thoroughly and make one simple statement as a constitutional statement.

Mr. Chairman: So, then, you have to mention each of those and say "We recast."

Ms. Karua: We are saying, that I propose that we have a clause that will obligate Parliament to make legislation on issues of conservation, enforcement, protection, utilization and development of natural resources relating to agreements---

Mr. Chairman: No, no! Leave agreements because there are some critical issues---

Ms. Karua: Okay. Generally, the matters covered by Articles we have already deleted, which are Articles 84 to 88.

Mr. Chairman: So, seconded by hon. Balala. if you could second on record, please! Let us get it seconded and then we can debate it. Second it formally because there are many Articles that we are dealing with. You could give him the---

The Minister for Tourism (Mr. Balala): I second, Mr. Chairman, Sir.

Mr. Chairman: Thank you very much.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, we have deleted enough, and I believe that this chapter is a very, very chapter. When you talk of environmental issues - and that is what is affecting us today - those of us who have been affected and who have been fighting seriously for the environmental issues, we need some of these things articulated clearly in the Constitution. For example, if you look at Article 85 - Enforcement of environmental rights and protection of environment, I do not think you should just recast it to be two paragraphs or two lines.

Mr. Chairman, Sir, if you look at (off record) this basis, whereby constitutionally, you can be able now to challenge any other laws. I believe the other Acts cannot take precedence over this Constitution. So, you should give Kenyans their rights that cannot be challenged in any way. This should be in the constitution and not in the Acts of Parliament or in any other laws.

Mr. Chairman: So, can we agree that in recasting---

(Loud consultations)

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): It is a really fundamental issue, Mr. Chairman, Sir.

Mr. Chairman: I agree with him. So, probably, we can retain Article 85 and even when we are doing the recasting, it should not just be bare bones; we should have some substance in doing the recasting.

Ms. Karua: *(off record)*

Mr. Chairman: I get it, hon. Kiunjuri.

Let us proceed to Article 87 - Agreements relating to natural resources

“87. (1) A transaction involving the grant of a right or concession by or on behalf of any person, including the national government, to another person, for the exploitation of any natural resource of Kenya, entered into after the effective date, is subject to ratification by Parliament.

I think is better to say “A certain class of transactions” because if every transaction has to be ratified by Parliament, there are hundreds of thousands of transactions that take place in the country dealing with natural resources.

Ms. Karua: *(Off record)* --- Committee of Parliament because normally it is the Committee. And, because previously we have made very careless agreements, I am of the view this clause should stay because Parliament works through Committees. There is---

Mr. Chairman: Yes, yes, yes. That cures it. Thank you! Then we agree.

Ms. Karua: And I wanted to say that the difference between us and those in the Gulf – the Arabs – is the way we have each dealt with our natural resources. So, this is very fundamental.

Mr. Chairman: True! Actually, my problem is catered for by (2) Parliament shall by legislation provide for the classes of transactions subject to ratification under clause (1). Because I did not want somebody who wanted one truck of *kokoto* to be told: “You have to get Parliament to approve it”

(3) Parliament may, by legislation supported in each House---

No, no, no! We have already done that in the legislature.

Yes, Minister for Higher Education?

The Minister for Higher Education (Dr. Kosgei): Mr. Chairman, Sir, my exemption ----

Mr. Chairman: Thank you very much, *Waziri!*

Can I get a proposal for the deletion of sub-Article 3?

The Minister for Foreign Affairs (Mr. Wetangula): I propose.

Mr. Chairman: Proposed by hon. Wetangula and seconded by Ms. Karua. Is that carried?

An hon. Member: Yes.

Ms. Karua: Is it deleted?

Mr. Chairman: We have said recast.

Legislation regarding the environment

“88. Parliament shall enact legislation to—

(a) establish a national environment commission and set out its functions; and

(b) give full effect to the provisions of this Chapter.

Why should have another commission?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): These issues of commissions---

Ms. Karua: The word “commission” should be---

Mr. Chairman: Actually the whole of Article 88, because we have talked about Parliament, in the earlier proposal we had. So, could we get a proposal for deletion for this one? Do we have a proposer?

Mheshimiwa Wetangula and then *Mheshimiwa* William Ruto; so that we keep the deletion corner active.

Is that carried?

An hon. Member: It is carried!

Mr. Chairman: Now, can I get a proposer for the entire chapter?

Ms. Karua: I propose, Mr. Chairman, Sir.

Mr. Chairman: That is a proposal for adoption of the entire chapter from *Mheshimiwa* and Martha Karua; seconded by Maj-Gen. Nkaisserry. Is that carried?

An hon. Member: Yes.

Mr. Chairman: We have a 15-minute break and then we come back.

Ms. Karua: Mr. Chairman, Sir, before we go for the break, may I take you back to the lands case? I still want to go back to Section 81, page 51. I want to suggest that the issue:

“(i) provide for the settlement of the landless and squatters including the rehabilitation of spontaneous settlements in urban and rural areas;

Even if not cast in this very way, I am seeing the way we have been dealing with the landless; in the morning, harassing people in the settlements in town to make way for whatever. And even the way we have evicted people generally, this has a bearing. How and where can we place is so that things are done in a human manner? It may not belong to here, but we have to have somewhere that, tomorrow, if the Government is building a highway through Kibera, it does not wake people up early in the morning and scoop them out. There has to be some safeguard of these social rights. I feel uncomfortable leaving it just like that. Or the way we beat up Internally Displaced Persons (IDPs) even before giving them where to resettle.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, in a country where 21 per cent of our land is classified as arable and fit for food production – high potential – as they call it, I think it would be a wrong direction for us to create an impression that it is the duty of the State to settle everybody on land. What government's do all over the world is to provide facilities; decent housing, sanitation, educational facilities, health facilities and so on. So that the Government is obligated to have policies that keep people in a habitable condition. But if you

make it your duty as a Government to settle people on land when you do not have it, I think you are putting yourself in a very difficult constitutional condition!

Mr. Chairman: But I think the point---

Yes, *Mheshimiwa!*

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Thank you, Mr. Chairman, Sir. I think the point Ms. Karua is making is very valid. However, in this country, people have a habit of settling in land that does not belong to them! so, if you say you will protect those people or say that "they must be removed in this manner," I think on the other side, you should also have laws which prevent people from going into land for a purpose that is not planned for. So, I think it is two way. It is not just protecting illegal settlers; you must also protect the land, whether it is for the City Council, whether it is private or public. We are going into a very dangerous ground, because if we are going to protect those people who occupy land illegally, then they must also be punished by occupying land illegally.

Mr. Chairman: I got you. But you could do the same thing humanely. That is what the *Mheshimiwa* is saying.

Ms. Karua: Yes, it may have been illegal when Kibera started and when all the *Laini Saba's* came. It may have been illegal when Mathare, Mukuru kwa Njenga, name them, but the Government was not asleep, they acquiesced! Because when you stop developing estates and when also the inequalities increase, that is the situation.

So, Mr. Chairman, Sir, what we are trying to balance here is that, because the Government must develop, like now it is developing Kibera, it has the duty to relocate in order to do that. I am not suggesting that we say everybody gets a *shamba* for cultivation, but whether we go back to the chapter on social rights or where, I think it will be somewhat immoral to let this go away without a safeguard for the people. We have seen how all three Governments have been so cruel; unbelievably so!

Mr. Chairman: Okay, because I want us to agree on the process, we have three chapters which were listed for our action this afternoon and which we still want to conclude on; public service, national security and commissions. We will do them quickly. So that we conclude on the chapter on land, what Ms. Karua is saying is really not something that is out of--- We will see how we will handle it between the drafters and if *Mheshimiwa*, if you could keep it in your mind---

The Assistant Minister, Ministry of State for Defence (Mr. Musila): There are people who own land and the land is occupied by squatters; they cannot access it.

Ms. Karua: Depending on how you got it!

Mr. Chairman: Okay. Can we meet at 5.00 p.m.?

(Loud consultations)

Yes, Mr. Minister for Lands!

An hon. Member: You need to be very careful!

The Minister for Lands (Mr. Orengo): Mr. Chairman, Sir, on this question of settling squatters, there is nothing that causes me pain every day in as far as squatters are concerned. It is something that we need a very well articulated legislation, not necessarily constitutional. Because I can tell you that there are a lot of places, and I can give very many examples, where a lot of people, particularly in the Coast and some areas in the Rift Valley, they have learned that the best way to occupy land and get it in the end is to invade somebody's land and you stay there and you are faced with a *fait accompli*. You have to treat them humanely because you cannot remove them. So, in the end, it is the Government which pays for it.

Mr. Chairman: Okay. So, legislation then.

The Minister for Lands (Mr. Orengo): Yes. Legislation.

Ms. Karua: (off record) I am not done with it. I am going to look for a place in the Bill of Rights somewhere and I am going to come with it.

An hon. Member: *Sawa.*

Mr. Chairman: Okay.

So, we are starting on public service when we come back

(The Committee adjourned temporarily at 4.35 p.m.)

(The Committee resumed at 5.00p.m.)

Mr. Chairman: Okay! I think we can get back to the session. There was a request in the petitions that we received on Friday; one from the Civil Society group thanking us for meeting them. Was it circulated? It was saying that they were happy with the progress and that they wish us well. The second is a petition from the religious sector on Friday. I think both should be circulated. There was a request, I am told, from them seeking to have a meeting with us. We will retain the same decision we have made with the Civil Society because our time is so short and once we open up to meet one group, it will be difficult to stop other groups from coming. We better conclude our work and if there are any written proposals, we receive them. Is that agreed?

Hon. Members: Yes!

(Off record)

Mr. Chairman: In fact, that is why I am saying that. I am told certain people are---

The Minister for Agriculture (Mr. Samoei): But they seem to have information which I thought would be wrong that we have asked them to come here. The religious sector and---

Mr. Chairman: I am told that they are saying that the media has reported that we have said that, yet we have not said it at any time. So, for purposes of clarity, at no time have we confirmed any meeting with the Civil Society or with the religious sector and I do not think it will be appropriate to meet with any particular team. For purposes of clarity, note that those SMS are not from any member of this Committee; not from myself or the Vice-Chairman and I do not think any other hon. Member has agreed to meet with the religious sector for purposes of confirmation.

I will now hand over the session to the Vice-Chairman. Public Service is the next chapter.

[Mr. Chairman left the Chair]

[Mr. Vice-Chairman took the Chair]

Mr. Vice-Chairman: Let us proceed! Let us move to Chapter 14; Public Service.

(Off record)

Mr. Chairman: It is leadership and secretaries; it is a very small chapter and we will get back to it. It is just a few pages but we will get back to it.

Mr. Vice-Chairman: The world of Mr. Ruto is bliss! There is no complication, if it is delete, you delete! We will get back to it as soon as we compete this. Values and principles of public service, 267(1):

“The values and principles of service include:-

- (a) 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 people in the process of policy making;
- (e) accountability for administrative acts;
- (f) transparency and provision to the public of timely, accurate information
- (g) subject to paragraph (j) merit as the basis as appointments and promotions
- (h) representation of Kenya’s diverse communities representation of Kenya’s diverse communities and affording them adequate and equal opportunities for appointments, training and advancement of men and women, the members of all ethnic groups, persons with disabilities in the public service at all levels.

(2) The values and principles of public service apply to public service in:-

- (a) every level of government;
- (b) all State organs; and
- (c) state corporations.

(3) Parliament shall by legislation provide for a code of conduct for public officers.

Our legal experts tell us that this provision has remained broadly the same in the Harmonized Draft, the Bomas Draft as well as the Wako Draft with the exception of Clause 3. What do you think of Article 267; values and principles of public service?

Mr. Ombui: Mr. Vice-Chairman, Sir, I think what we have been given here as values and principles should be found in the Code of Conduct under which it has been catered for in Clause 3. Once we have the code of conduct then it can have all these principles and values.

Mr. Vice-Chairman: Are you then moving a motion.

Mr. Ombui: I am just proposing we delete No.267 (1) and (2) and we remain with No.3

Mr. Vice-Chairman: Who seconds that?

Ms. Karua: Mr. Vice-Chairman, Sir, I think that although this is essentially what the Public Officers Ethics Act and other laws say, because governance is a big issue in Kenya and for any society, we should leave this as enshrined in the Constitution and there will be the standard of measurement as to which direction the Public Service is going. I would even strengthen (j) which talks of merits as the basis of appointment to be competitiveness and merit so that we outlaw single-sourcing completely in appointment where you just wake up and pick a person. (*Off record*) It is 1(g).

Mr. Vice-Chairman: I am informed that that reference should be to paragraph (h). That is why we are debating them. Are they constitutional issues?

The Assistant Minister for East African Community (Mr. Munya): Mr. Vice-Chairman, Sir, we are making the issues that are supposed to be provided for in the Constitution extremely elastic if we are going to provide codes of conduct in the Constitution because they are guidelines on how to behave. They are more of moral exhortations than strict rules. Sometimes they do not even fit in the proper legislation itself so when we elevate them to constitutional principles, I am completely dumbfounded.

Mr. Vice-Chairman: Mr. Munya is dumbfounded!

The Minister for Foreign Affairs (Mr. Wetangula): It reminds me of colonial days where instead of saying a rat catcher they said a rodent officer. He is dumbfounded!

The Minister for Higher Education, Science and Technology (Dr. Kosgei): I want to support Mr. Munya's position in that what I see here is what should be in the Public Service Commission rather in a Constitution because when a civil servant or a public officer is hired, there are many levels of training even on public finance and the ethics of how to handle the governance issues should fall there. Perhaps, if we really want to retain it, we just want to talk about ethics but that seems too weak to be contained in this area.

Mr. Vice-Chairman: So, are we reducing that to a single provision referring the whole code of conduct to legislation? Can we get a very specific proposal in that respect? Mr. Ombui if you could craft for us a provision---

The Minister for Agriculture (Mr. Samoei): I think the best way to go is to say this section be recast so that we just have a single paragraph which will have an ending referring it to legislation in the effect of what will be in that paragraph.

Mr. Vice-Chairman: Along the lines of Clause 3? But we leave those details to Parliament.

The Minister for Agriculture (Mr. Samoei): We can provide broad guidelines!

Mr. Vice-Chairman: Mr. Ruto, do you wish to put your sentiments on record?

Mr. Ruto: Mr. Vice-Chairman, Sir, I think what we should be saying is that we first establish the PSC and then they shall set standards for conduct. These things belong, first of all, even to the mission of that particular PSC.

Mr. Vice-Chairman: Do you then move for the whole of 267 to be deleted?

Mr. Ruto: Yes but we first say that we shall establish the PSC! Forget about that because that is part (2) so 267 is irrelevant.

Mr. Vice-Chairman: 268(1) already establishes the PSC.

Mr. Ruto: Then they will do this as a matter of course.

Mr. Vice-Chairman: Before you move that, let us hear Mr. Kiunjuri!

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Vice-Chairman, Sir, you have given the information I wanted to give him that if we delete 267 then we start that Chapter at 268.

Mr. Vice-Chairman: So, Mr. Ruto, please go ahead and propose.

Mr. Ruto: Mr. Vice-Chairman, Sir, I propose the deletion of 267 in its entirety! We only add a rider as an advice that the first head of commission should read what we deleted at a later stage.

(Mr. Kiunjuri seconded)

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: Okay, let us go to 268! We are advised that provision 268 has remained the same, both in the Harmonized Draft, the Bomas Draft and the Wako Draft:-

“268(1) There is established the Public Service Commission.

(2) There shall be a secretary to the Commission who shall be the Chief Executive of the Commission.

(3) The Secretary to the Commission shall:-

(a) be appointed by the State President on the recommendation of the Public Service Commission and with the approval of the National Assembly; and

(b) hold office for a term of five years and be eligible for reappointment for one further and final term of five years”.

The Minister for Agriculture (Mr. Samoei): Mr. Vice-Chairman, Sir, the impression created here is that the PSC is just about the Commission Secretary. It does not say how many commissioners, how they will be appointed, who is going to chair. It just about the chief executive! Where is the Commission? So the Commission has not been established!

Mr. Vice-Chairman: I am informed that if you look at the general provisions on commissions, you will find some further details but we may also want to look Chapter 8 of the current Constitution to see how the PSC is dealt with there. So can we have a very specific proposal on that? Meanwhile we can also look at the general provisions on commissions, Article 293 specifically; composition, appointment and terms of office. I was making reference to that chapter for purposes of us picking anything that we might use to enrich the chapter we are on now knowing that we are likely to knock out a lot of these general provisions with regard to commissions. What I am asking is whether there is anything we can borrow from those general provisions. If there is anything we can borrow from there and from Chapter 8 of the current Constitution--- Do you want me to quickly run you through that? Chapter 8 of the current Constitution, Section 106(1): There shall be a public service commission which shall consist of a chairman, a deputy chairman and 15 other members. The members of the commission shall be appointed by the President subject to sub-section 4, a person shall not be qualified to be appointed as a member of the commission – and they have those qualifications (a), (b) and (c) and (4) the disqualifications referred to in sub-section 3 shall cease to be disqualifications in respect of a person when Parliament has been dissolved on two occasions after the person ceases to be such a member, candidate or holder of office.

I do not know whether we want to look at those provisions and see whether there is anything to borrow alongside provisions from Chapter of the Revised Harmonized Draft.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, I suggest that we largely adopt the wordings of the current Constitution with a rider that they shall be vetted by Parliament. We can reduce the membership to nine.

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Vice-Chairman, Sir, before we decide on the number, especially to reduce it, could we look at slightly at what their work is supposed to be? Because if they are to interview all the people who enter the public sector and then they also interview everybody for any promotion and they have to hold disciplinary meetings and so on, nine are not enough. As a matter of fact, one of the reasons that PSC has not really worked well and allowed other people to promote people without going through the process is that they never had enough time because they were too few, too old or too tired but definitely nine may not be the right number.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, I will come back to my earlier suggestion which is basically to have them vetted by Parliament; as to the numbers I would be ok with 15.

Mr. Vice-Chairman: Something else I want us to note is that the drafters seem to have adopted a design that would avoid repetition because they had so many commissions to deal with but we are not going to do away with all of them. We are going to keep a number of them and so we may want again to return to the design of the drafters to have all these together. But let us just make a conclusion on this one then we can re-visit that when we get to that Chapter.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Vice-Chairman, Sir, I think we have to take a decision here. Already we have Chapter 16 dealing with commissions and independent offices. I am yet to be convinced on what is the meaning of commissions. In Chapter 14, what will isolate the issue of public service if you have deleted section 267, then you have gone straightaway to commissions. You have gone to the establishment of the PSC which is just a commission. If you look at it, it does not provide even for removal from office.

Mr. Vice-Chairman: So, the proposal we have here is to have the compact we are naming "Public Service Commission" complete. We want it to be a complete package.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): But it does not even include removal of office!

Mr. Vice-Chairman: That is what we are saying and that is why Ms. Odhiambo has a motion on the floor that we borrow from Chapter 8 of the current Constitution which has now has all those details; the concerns you are mentioning and then enrich it further with the general provisions from Chapter 16 of the Revised Harmonized Draft.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, I think there is wisdom in trying to provide a uniform criteria for recruitment, dismissal, appointment of a tribunal for all

the Commissions and to try and standardize and to try and make it neat so that we do not have to repeat for every Commission, how they will appointed, the numbers, how they will be dismissed and all that. I think really, there was some wisdom in this. I would want to persuade us--- I think the provisions of Chapter 16 on page 158, we can actually look at them later and remove what we think is wilding and even cut down on the number of Commissions without necessarily having to create every Commission in every place and provide for numbers, nature of appointments, nature of dismissal and that kind of thing. I think really it would be a lot better.

Mr. Vice-Chairman: You are right and that was why I was making reference to some drafting design. All those questions you are raising like the manner of appointing them, you will find that in Article 293. The removal from office, you will find that in Article 294 which sets it out. But with reference to all Commissions, what I am hearing from some of you is that we want treat the Public Service Commission separately and have all provisions related to that Commission in one place.

Ms. Karua: Why we must treat each Commission separately, once you elevate it to the Constitutional level, we need to set the criteria of appointment. What qualification do we need for each Commission? If it is the Public Service Commission, I know as a matter of fact that since the old Constitution does not provide for any, it has not necessarily been people who have human resource management. We also now can decide whether we want as Dr. Kosgei said, many Commissioners because they are dealing with the country. It is impractical to expect even 20 Commissioners to employ all the people in the country. They have to delegate and delegation is built in. So, we can actually down size even the Public Service Commission because they power to delegate. We give them the qualifications. They set the standards. They supervise but they cannot purport that they would do each matter directly themselves. We can have the design and all those things in mind.

Mr. Vice-Chairman: Then the proposal to borrow from Chapter Eight of the current Constitution and Chapter 16 of the Revised Harmonized Draft, which makes those general provisions. But I want us, first of all to adopt that. Ms. Odhiambo, could you place that proposal again to borrow from Chapter Eight of the current Constitution and Chapter 16 of the revised Harmonized Draft. Then, we would take those qualifications and guidelines including a cap on the number of the Commissions.

Ms. Odhiambo: Mr. Chairman, Sir, I wish to propose that we import the provisions of Chapter Eight of the current Constitution on the composition of the Public Service Commission and Chapter 16 of the Revised Harmonized Draft.

Mr. Deputy Chairman: Mheshimiwa Kiunjuri are you still in a seconding mood for that one?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, Sir, I wish to second the proposal.

Mr. Vice-Chairman: Now, Mheshimiwa Karua, perhaps you want to lead us in making the qualifications that can guide our drafting team.

Ms. Karua: I have only one and we have to help each other because, I would imagine someone well versed in human resource management.

Mr. Vice-Chairman: First of all, why do we not determine the figure? We have the figure nine and we have the figure 15, could we make a decision on those nine Commissioners.

Ms. Karua: I would go for five. A lean mean Commission.

Mr. Vice-Chairman: So, we have five, nine, 15.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Chairman, Sir, Dr. Kosgei made a point about the size and of course we said they have the powers of delegation. But we have to look at the context in which we are dealing with this Public Service Commission. Five is too lean and they would have a lot of difficulties.

Mr. Vice-Chairman: So, you support 15.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): I would support 15.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Chairman, Sir, for the reasons that Dr. Kosgei gave and in addition, the Public Service Commission is not like any other ordinary Commission, of course as currently they have not been as good as they should be because for some strange reasons the Public Service Commission and the Teachers Service Commission are only staffed with retirees. They do not hire any young people. Everybody retires to go there. But properly constituted, the Public Service Commission is supposed to ensure that the Public Service reflects Kenya's diversity. To do that I think we need to equip them both in terms of numbers and capacity and skills. In fact, I would not support delegation. This is something that they must do themselves. So, I support the number 15 so that at any one time they can have capacity to handle various issues that come before them.

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Chairman, Sir, let me say this again for the numbers. Delegation sounds okay, but if you look at the history of things, because the Public Service Commission was ignored for some time, that delegation led to a position where people get appointed from the Office of the President or from other places. If the Public Service Commission is properly constituted, they should have several of them sitting even in the appointments, promotions and discipline. As it is now, you can be dismissed by a Permanent Secretary or somebody and the Public Service Commission does not have capacity to listen to that case.

When I was hired by the Government, I went through the Public Service Commission and I was given an interview of two hours by people who were competent. If you go there now, you can actually bully them because basically once it became matter for retirees or they have too many things to do, people got promoted by default. So, I would still insist that 15 would be a minimal number and they have to be properly qualified for that institution to bring merit back into the system.

Mr. Vice-Chairman: So, do we adopt 15.

The Minister for Agriculture (Mr. Samoei): Mr. Chairman, Sir, I agree with Minister, Dr. Kosgei that we should find the criteria of bringing back professionalism. But surely, a Commission of 15, to me looks really funny. I think any Commission beyond nine members, whatever they are doing, there should be a way of doing it differently so that we can actually let the Commission do what it is supposed to do best. Surely, the Commission must find a way of doing all these things including promotion in a professional manner. I do not think, it matters how much the number would be, if they do not design a way of doing this thing professionally, they would not be able to promote everybody everywhere in the whole country.

Mr. Vice-Chairman: Give us a number.

The Minister for Agriculture (Mr. Samoei): Anything beyond nine surely looks to me funny.

Mr. Vice-Chairman: I want a seconder for nine.

The Assistant Minister for East African Community (Mr. Munya): I second nine because if you were to say that the Public Service Commission would interview and promote everybody even 15 would not be enough. So, we should have a Commission that will set standards and supervise departments to do the work that the Commission that is supposed to do. Physically every Commissioner to be able to sit down and interview and promote every employee of the Public Service Commission is next to impossible. Let them regulate, set standards and supervise departments.

The Minister for Tourism (Mr. Balala): I just want to know; do the Commissioners also be mandated for executive authority in terms of executive function of the Commission.

Mr. Vice-Chairman: That is why they hire and fire.

The Minister for Tourism (Mr. Balala): So, why do you have retirees and people who are too old?

Mr. Vice-Chairman: That is why are creating the nation.

The Minister for Tourism (Mr. Balala): Then we should have qualifications for those Commissioners if we are going to give them executive powers.

Mr. Vice-Chairman: We are just setting the beacons.

The Minister for Tourism (Mr. Balala): So, I support nine.

Mr. Vice-Chairman: Is nine carried?

Hon. Members: Yes!

Mr. Vice-Chairman: I want your guidance here. Now we are importing provisions of Chapter Eight of the current Constitution and Sections of Chapter 16 of the Revised Harmonized Draft and recasting that whole Section on the Public Service, do we need to go through the provisions we have here like Article 269? Should we still go through Article 269? I guess those qualifications are also set out in--- Are they anywhere in Chapter 16. It is very broad; we do not have anything specific. That is a lacuna we want to attend to.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Chairman, Sir, I am not sure we do. I just wanted to raise the point that on the last line except where there is a contrary provision in this Constitution or any other law to constitute and abolish offices in the public service; we actually assigned this function to the President. Then (b) except where there is a contrary provision in this Constitution or any other law to appoint person who hold or act in offices in the public service to appoint persons to hold or act in offices in the public service, to confirm appointments and to exercise disciplinary control over and remove persons holding or acting in those offices”.

I would like to say that I have even discussed this with the Minister now in charge of Public Service, hon. Otieno and he says, if we are creating the Executive the way we have, then these two functions should revert back to the Presidency.

Mr. Vice-Chairman: What you are saying is that we should actually run through Article 269, besides the direction we have given to our drafting team to import, let us just run through Article 269:-

Powers and Functions of the Public Service Commission

269. (1) The powers and functions of the Commission are—
- (a) except where there is a contrary provision in this Constitution or any other law, to constitute and abolish offices in the Public Service; - which is actually a Presidential prerogative
 - (b) except where there is a contrary provision in this Constitution or any other law, to appoint persons to hold or act in offices in the public service, to confirm appointments and to exercise disciplinary control over and remove persons holding or acting in those offices;
 - (c) to promote the values and principles set out in Article 13 and

267 throughout the public service; We have knocked our Article 267 so that is it. Let us just check what is in Article 13.

The Minister for Agriculture (Mr. Samoei): We want to know how it has been recast. Now, bits and pieces here--- What will happen with what we saying should be lifted from wherever.

Mr. Vice-Chairman: Please, move for the recasting of the whole of Part 2, along the lines we have we have guided.

The Minister for Agriculture (Mr. Samoei): Yes, I think so, so that we discuss the final document.

Mr. Vice-Chairman: So move it.

The Minister for Agriculture (Mr. Samoei):Mr. Chairman, Sir, I move that we recast this whole Section Part 2 in the line that we have recommended that we import the necessary from Chapter Eight of the current Constitution and Chapter 16 of the Revised Harmonized Draft so that we can have a clear Commission.

Mr. Vice-Chairman: A new Part --- of Chapter 14. Just the reference to the Public Service Commission, 268, 269,270. Let us look at Article 270 together just before we clump it there.

Staffing of county governments

“270. A county government is responsible for the recruitment, appointment, promotion, transfer and dismissal of members of its public services within a framework of uniform norms and standards prescribed by an Act of Parliament”.

So, we are including that in that recast format of the Public Service Commission. Then let us look at Article 271 together.

Protection of public officers

“271. A public officer shall not be—

- (a) Victimized or discriminated against for having performed the Functions of office in accordance with this Constitution or any other law; or
- (b) dismissed or removed from office or demoted in rank or otherwise Punished without due process of the law”.

They should be part of the whole. I want a Seconder for that. That is part hon. Samoei’s Motion. Who seconds that?

(Mr. Orengo seconded)

Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: That is carried. We have given some guidance like on the number. We have adopted the number nine. We have also said that we need very clear qualifications. There is whole framework of disqualifications in Section 106(3) of Chapter Eight of the current Constitution. The drafting team can be guided by that together with others we can suggest now.

Yes, Mheshimiwa, Dr. Kosgei.

Mr. Vice-Chairman: Any additions for qualifications?

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Before we talk about the qualifications, Clause 269(a) - I know you have finished the debate there - talks about the abolition of a public office. I do not know if you are aware that this is what is usually used when you want to get rid of somebody from the service. You write to them telling them about the abolition of the office they hold. Perhaps, the last part of Clause 271(b) will take care of that. I just wanted us to be aware. By the way, I still hold a letter that abolished the office I once held. It is abused. I got a letter telling me that I have been retired because the office I was holding had been abolished.

Mr. Vice-Chairman: Let us get some guidelines for the drafting team on qualifications. They will also need to be guided on Clause 269 in terms of the specific functions. Look at Clause 269 and see whether there are some functions there which we need to remove. Like Mr. M. Kilonzo has mentioned Clause 269(1)(a) and 269(1)(b) as functions that do not belong to the Public Service Commission. If there is any other function that we need to knock out for the guidance of the drafting team, let us have it now.

Ms. Karua: Do we require them to competitively appoint persons? Let us use the word "competitively" in Clause 269(1)(b). So, once we say, "Competitively appoint" or "competitively confirm" it will have to be competitive, including the promotions. I have an experience that they sometimes promote without any regard to the records.

Mr. Vice-Chairman: Any seconder for that? Mr. DPM, you could go ahead and second.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Fine. I just want us to revisit something, but it can be recast. You know we actually deleted Clause 267. However, I would like to say something for the purpose of record and because it is something we are washing under the carpet.

You will remember that one of the biggest issues in the campaign was always the issue of the Public Service appointments being one sided. That can be very emotive. I believe that background must have informed the drafters of this document. Here we are, all of a sudden,

pushing it aside as if it does not exist or as if that tension does not exist. If you say that you are going to write that in the Code of Conduct, I can tell you it is already there. We know that individuals, just left with the Code of Conduct do not necessarily adopt or stick to it. So, I would like us to revisit that.

Indeed, when we were drafting the provisions of how the President shall identify his Cabinet, we still had that specific provision that the face of Kenya shall be reflected. There was something like that one.

Mr. Vice-Chairman: Mr. Mudavadi, help us move ahead by making a proposal to reintroduce Clause 267 in those specific terms.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, Sir, I propose that we revisit Clause 267 in that context so that it becomes a core criterion that will be used. That way, this issue of ethnicity and what have you, in the negative sense, can then be completely dealt with, or, at least, flagged.

Mr. Vice-Chairman: Will we be incorporating that in Clause 269 or do we introduce it as a principle?

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): It could be as a principle because we are recasting--- From what we are doing now, we will have a reformatted version.

Mr. Vice-Chairman: So, Clause 267 makes a comeback as a principle. Could I get a seconder?

Ms. Odhiambo seconded.

Mr. Vice-Chairman: We have just adopted two Motions. We have adopted the Motion to reintroduce Clause 267 and recast it in the terms Mr. Mudavadi has explained so that the Public Service Commission is guided by certain principles that will reflect the face of the country.

We have also adopted the Motion that introduces the word, "competitively" in the relevant sections of Clause 269 especially 1(b) and where else, Ms. Karua?

Ms. Karua: If it is introduced in Clause 269(1)(b) it is sufficient because then it is directional.

Mr. Vice-Chairman: So, those two have been adopted. Are they carried?

The Minister for Lands (Mr. Orengo): Well, with a small rider, with regard to Clause 267(3), I would suggest that instead of restricting legislation to the Code of Conduct, we may have a general provision that Parliament shall enact legislation to give effect to this Article.

So, I propose that Parliament shall enact legislation to give effect to this Article.

Mr. Vice-Chairman: That is further development of the new Clause 267.

Ms. Odhiambo seconded.

Mr. Vice-Chairman: So, that is carried.

We wanted some guidelines on qualifications to guide the drafting team.

Ms. Karua: This is just to get debate from the others. I basically have one. They should be graduates with a Masters degree or equivalent in Human Resource Management, relevant social sciences--- I was going to say Human Resource Management, Psychology and all other relevant social sciences.

Mr. Vice-Chairman: Could our screen team just list those qualifications on the screen so that we run through them together?

Ms. Karua: We said a Masters degree or its equivalent in Public Administration, Human Resource Management--- Do we need to go on with Human Resource Management?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Vice-Chairman, Sir, whereas I have no problem with the basis of trying to set minimum qualifications, when you lock something like this in a Constitution and yet we have no idea what the requirements, say, 50 years from now will be, then there could be a problem. Why can we not just say that there will be legislation on the minimum qualifications required instead of locking it in the Constitution? It is actually dangerous! We are presuming that we know what the situation will be a long time from now.

Mr. Vice-Chairman: You may also want to consider the style adopted by the current Constitution which treats it in the negative sense by giving us disqualifications instead.

Ms. Karua: Let us hope then that because Parliament is vetting, some direction will come out of the process.

Mr. Vice-Chairman: Do we then agree that we shall be guided by Section 106(3) of the current Constitution that sets out disqualifications? We may also check elsewhere.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, personally, I will be more persuaded if we put the qualifications constitutionally. I, however, stand guided by practice in other jurisdictions. This is because this is a very critical function of the Government and we cannot allow any Tom, Dick and Harry to---

Mr. Vice-Chairman: So, we guide the drafting team to look at both Section 106(3) of the current Constitution and also check what obtains in other jurisdictions. We will then look at what they would have recast. Is that acceptable?

Hon. Members: Yes.

Mr. Vice-Chairman: Let us move on. We are now looking at Part 3, the Teachers Service Commission.

Mr. Chairman: Mr. Vice-Chairman, I propose the deletion of Part 3, Part 4 and Part 5.

Mr. Vice-Chairman: We are on Part 3 of the same Chapter on Teachers Service Commission. Part 4 is on the Health Services Commission and Part 5 is the Kenya Correctional Services. The Motion by Mr. Chairman is to delete all those three in their entirety.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, I second the proposal on the understanding that---

Mr. Vice-Chairman: Mr. Chairman, you are stopped from proposing. But you have vacated the Chair. I think we can take it.

The Minister for Foreign Affairs (Mr. Wetangula): He has vacated the Chair. Mr. Namwamba, you are chairing and he is participating. He is first a Member before he is the Chairman.

I second and add that these commissions they are setting up, the Teachers Service Commission is already set up elaborately in the Teachers Service Commission Act. The Health Services Commission could be traced in several other legislations and I do not know why we are putting it in the Constitution. The Kenya Correctional Service Commission is actually set up out in the Prisons Act.

I second the proposal, by Mr. Abdikadir. Let us not import too many things in the Constitution. We should be flexible because these are dynamic processes. Tomorrow we may need to change and we do not have to change the Constitution.

The Minister for Lands (Mr. Orenge): Mr. Vice-Chairman, Sir, I want to talk on the correctional services. In many countries, Governments are handing over prisoners to institutions that are running prisons. So, people are building prisons, because the Government sometimes cannot maintain them. So, with an eye to the future, you cannot have every part of Government governed by the Commission. Already you have a commission for the Ministry of Lands. I am waiting for one for the Ministry for Foreign Affairs and another one for the Ministry of Finance.

(Laughter)

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): An objection, Mr. Vice-Chairman, Sir. The Teachers Service Commission, even though there is an Act, is, of course, by delegated authority from the Public Service Commission. One of the things that the teachers have been agitating for is to have a Commission recognized directly within the Constitution. Now, this is a very powerful constituency in the context of what we want to

achieve. We want to have a new Constitution go through. So, whether it is blackmail or not, it is a reality now. They are there.

We need to be very careful on this clause because the progress we have been making by having the teachers and the entire machinery supporting us is going to be more productive in ensuring that we get a new Constitution. So, I would like to plead with this Committee to reconsider its position. Even if we may be talking of three of them, let us not make the mistake of knocking away the Teachers Service Commission.

Ms. Odhiambo: On a point of order, Mr. Vice-Chairman, Sir. I want to know whether we are departing from our previous procedure of going through each clause and then confirming. This is because when we reached this Part earlier on, that is the Kenya National Commission on Human Rights and the Gender Commission we used a similar guillotine approach. I was of the view that it stays as a constitutional body. There are some, of course, that I think should be out. When we move in a block manner, we do not have a chance. We are forced to throw things off.

Mr. Vice-Chairman: But we also adopted a principle that certain organs that we believe do not deserve to be clothed in the Constitution can be knocked out guillotine. We had agreed on that.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Vice-Chairman, Sir, I want to support Mr. Mudavadi. Already we have a few organizations petitioning us. So, we cannot ignore this constituency. The teachers are a very consistent group. This constituency is so large and solid. It is organized and, in fact, it is a movement. So, for political purposes---

Mr. Vice-Chairman: I hear you, but for purposes of Constitution-making let us find a better reason than that we are dealing with a constituency. This is because, honestly, we are not going to retain provisions here on account of a constituency that will intimidate us.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Vice-Chairman, Sir, let me finish. Lastly, even if you talk of the Public Service Commission, this is equally a strong Commission. You are talking of over 300,000 teachers. I have no objection if you want to remove it, but I only wanted to---

Mr. Vice-Chairman: Mr. Kiunjuri, I have no problem with what you are saying. All I am saying is that potential intimidation cannot be good rationale to retain a provision in the Constitution.

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Vice-Chairman, Sir, I happen to work in the Ministry of Education. The Teachers Service Commission is not well served by the Public Service Commission. There has been a long standing problem. They are left to be run by the Ministry of Education which is unwieldy.

If we set a Commission for them, it would control the ups and downs that we have for them. This is very different from COTU which operates as a union outside. The teachers have their own

trade union and that is not what we are talking about. As Government, it is better to have a Commission that can run their affairs rather than leave them in the Ministry of Education which does not handle them properly.

Mr. Vice-Chairman: I think we can now resume.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, I would beg to differ on the basis that nothing prevents us from creating a Teachers Service Commission (TSC) that is independent of the Public Service Commission (PSC). The issue here is whether it deserves to be placed in the Constitution. The second point that I have is that the functions of the commission shall be---

Again this is the same problem that I had previously when I talked about qualification. To register, train, recruit and register and yet we are also talking about devolvement and giving devolved governments additional duties which shall include teachers and primary education and so on. Here we are locking ourselves here with a national body. I really think that this is something that can be dealt in legislation, create a commission that is independent of Public Service Commission but it does not have to be the Constitution. If we were to go that route, as Ms. Odhiambo said, there is a myriad of other commissions that also have one reason or another to justify their own inclusion in the commission. So, if we are going to take the principle like we did with the Human Rights Commission, it should apply across. We cannot say that it is because that this is a major lobby group, we cannot have the same rights like the Human Rights Commission. It is either we retain them all or move them all out and retain one commission for each arm of Government. We have a commission for the Judicial Service Commission, Parliamentary Service Commission and the Public Service Commission. Those are the only three commissions that we recognize in the Constitution.

Mr. Kioni: Mr. Vice-Chairman, Sir, I have nothing to add.

Mr. Chachu: Mr. Vice-Chairman, Sir, I concur with Mr. Kenyatta. Earlier on, we did away with one commission that had been proposed in this draft constitution, that is, the Kenya National Human Rights Commission (KNHRC). There are many commissions in this country and all are serving Kenyans and have a mandate. If we have to be consistent, and consistent is important when dealing with such a major national exercise. We should treat all of them equally. I do not think we should give certain privileges and leave others out. If we are going to entertain them then let us do it to all of them if not let us have a general provision for them but not necessarily entrench all of them in the Constitution. They can be dealt with through legislation.

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, I am sorry to differ with the Deputy Prime Minister. If you look at Section 272, what is there that would enthrone this Commission to a Constitutional pedestal. You put it there because there are some functions which if not there it will be challenged or undermined by other existing laws. Indeed, my reading of this provisions is that the Commission will have so much powers--- For example, if you 270(2)(v) – terminate the employment of teachers. There is no rider to that in these provisions. Although there are general provisions that follow in other provisions within the chapter, but I am

trying to ask myself a genuine question. If you look at the functions of this Commission what gives them a Constitutional pedestal. I am looking at it but I do not see anything.

Mr. Vice-Chairman, let us not make a mistake. We have had a very strong paper here by the Catholics, "though shall not kill". If you think teachers are important then we should talk about the Catholics because they are very important. Even on the issue of Kadhi's Courts there is a constituency out there that is opposed to it but as a matter of principle and thinking about Kenya we have insisted that they must stay. So, I want to be advised on what is in those provisions that rises to a Constitutional level then it will be justified.

(Mr. Chairman's contribution off-record)

Mr. Vice-Chairman: Dr. Kosgei is convinced but not the Deputy Prime Minister and Minister for Local Government.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, Sir, if you look further in these provisions that we are looking at you come to page 155, you are establishing a Police Service Commission, and so the same argument can go. The issue that comes out and these are issues that we must recollect, the issue of police reforms as an example and the recommendations that have been made by the people who have been advocating for police reforms and the trend that they are proposing--- Surely just because the Teachers Service Commission (TSC) did not exist in the Constitution before we should use it as a basis to say that it cannot come in. That would be the wrong way to go.

My view is this: If it is not a technical argument then let us look at the political argument. My view is that we want this Constitution to be carried. I am not acting in fear but I am being pragmatic. I think we want to carry critical constituencies with us. What is the purpose of having a nuisance value and yet we want to carry this thing through. So, I want to persuade the Committee to reconsider this. This was not even a contentious paragraph in this draft and the areas that had been broadly agreed upon by the Committee of Experts consulting with those various constituencies. So, we are going to an area where we want to bring in a very critical area that was not contentious then put huddles in our way. So, ladies and gentlemen rethink this thing.

Mr. Vice-Chairman: Bwana DPM, there are two critical issues here; the guidance from Mr. Orengo that when you look at that Article 292, there is no anything there which warrants to be elevated and which cannot be vested in the TSC in any other way. If we are going to allow ourselves to act in fear, I think one of the responsibilities that we have here is to distill this draft, which we have been doing very well and to harmonize it alongside certain principles. So, is this proportion to delete the three Commissions carried?

Hon. Members: Yes!

Mr. Vice-Chairman: The proposal is carried.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): Mr. Vice-Chairman, Sir, I would like to register my objection.

Mrs. Noor: I am objecting to the issue of deleting TSC and other commissions.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): I also register my objection.

Mr. Vice-Chairman: Proposal carried with three objections.

Could I have a proposal to adopt Chapter 14 as amended?

The Minister for Higher Education, Science and Technology (Dr. Kosgei): Mr. Vice-Chairman, Sir, on that chapter, I do not think that we looked at clause 256.

Mr. Vice-Chairman: Clause 256 is not part of chapter 14. I just want a proposal chapter 14 on Public Service.

The Minister for Higher Education, Science and Technology (Dr. Kosgei): I propose.

Mr. Kazungu: Seconded.

Mr. Vice-Chairman: Dr. Kosgei proposes and Mr. Kazungu seconds. Is that carried?

Hon. Members: Yes.

Mr. Vice-Chairman: It is carried with amendment. You notice that we have not gone to Article 275 – Director General because it is inconsequential to Part 5 on the correctional services. So, that dies with that part for the record. We are moving to the next chapter on National Security.

CHAPTER 15 – NATIONAL SECURITY

Chapter 15, Article 276.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Chairman, Sir, I just wanted to make some amendment to that definition.

Mr. Vice-Chairman: We are just about to go through it. We will follow our procedure and run through it.

The information that we have from our legal experts is that this chapter does not contain provision on Administration Police Service which had been included in both Bomas Draft and the Wako Draft.

National Security Organs

Part 1 – Principles and Objects

Article 276

“1. National security is the protection of the territory of Kenya, its people, their property, rights and freedoms and other national interest against internal and external threats.

2. The national security of Kenya shall be promoted and guaranteed in accordance with the following principles-

- (a) national security subject to the authority of this Constitution and Parliament
- (b) national security shall be pursued in compliance with the law including international law and with the utmost respect to the rule of law, democracy, human rights and fundamental freedoms
- (c) national security organs shall respect the diverse culture of the communities within Kenya in discharging their duties
- (d) recruitment by the national security organ shall reflect the diversity of the Kenyan people in equitable proportions”.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, I tried to give definition of national security as it is in other jurisdictions notably, Canada, United States of America (USA) and so on. This is the definition and I would request my colleagues to consider. So, I am proposing a definition on 1. It reads:-

“National security is the protection of Kenya’s territorial integrity and sovereignty, its people, their property, peace, stability, prosperity and other national interests from internal and external threats.”

Mr. Vice-Chairman: That is a proposal to recast Article 276(1).

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Actually it is more elaborated. I will read it slowly.

“National security is the protection of Kenya’s territorial integrity and sovereignty, its people, their property, peace, stability, prosperity and other national interests from internal and external threats.”

Mr. Vice-Chairman: Formally, place it as a Motion.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, I propose that 276(1) be amended. I want to restrict myself to part 1. The definition be replaced by the following:-

“1. National security is the protection of Kenya’s territorial integrity and sovereignty, its people, their property, peace, stability, prosperity and other national interests from internal and external threats.”

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Seconded.

Mr. Vice-Chairman: Is that carried with the rider that rights and freedoms are included?

Hon. Members: Yes.

Mr. Vice-Chairman: That is carried. Let us now look at Article 276(2).

Minister for foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, if what Mr. Musila proposed and what Ms. Karua and Mr. Ruto added has been carried then the bulk of Article 276(2) is a repetition.

Mr. Vice-Chairman: Look at Article 276(2) d.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, if you look at the first part, it address an external aggression but the second part talks about how we deal with each other internally and it has very core issue that we should not lose. Therefore, I propose that we retain part 2 as it is.

Mr. Vice-Chairman: Secunder for that?

Ms. Odhiambo: Mr. Ruto wants to second.

Mr. Vice-Chairman: Before we get a seconder, let us listen to Mr. Wetangula.

Minister for foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, look at part 2(b), you cannot subject your “interest of national security” and have limited by international law. There are certain interests of national security that go way beyond that. I think we need to relook at that. Let me give you an example.

Mr. Vice-Chairman: I will have hon. Odhiambo and then hon. James Orengo.

Ms. Odhiambo: Thank you, Mr. Vice-Chairman, Sir. I still stand by my proposal. It is in human rights relating to security that countries are subject to international law much more than any other. In international law, the way the law is developing is such that you cannot derogate issues of security. Countries are not allowed. Therefore, I am still comfortable with (b). I am still comfortable with all the other provisions. I would urge that we retain it as it is.

Mr. Orengo: Mr. Chairman, Sir, Messrs. Musila and Wetangula are forgetting a fact. The Ministry of Defence has actually done a Paper, which goes beyond the responsibility of security forces in carrying out their functions. It belongs to me to mention it here, but they are quite aware that there was a Paper that was discussed and referred to International Human Rights Commission, Humanitarian Law, War Crimes and all that. So, if you commit yourself to a policy and then in the Constitution you look like you want to operate like you are in banana republic, I do not understand.

The Minister for East African Community (Mr. Munya): Mr. Vice-Chairman, Sir, a country states in its laws, especially when it is referring to its national security, that it is going to respect

international law. Then we put “general international law” because there are provisions in international law that even developing countries question. So, when you put a general position that you respect international law, you are tying yourself to things you actually do not know. If there was a settlement, for example, outside that part of Kenya should be hived off and given to another state, would you respect that? That would be an international law on settlement. So, let us not put “international law” there.

Mr. Vice-Chairman: In any case, we have already mentioned “respect for the rule of law.” Is that not sufficient?

Mr. Chairman: Hon. Members, on some of these things, we are bound by international law, whether we write it in our law or not. We are bound to respect international humanitarian law, whether hon. Munya wants it or not. Whether we state in the Constitution or in an Act of Parliament, torture is illegal. Whether we like it or not, it is still illegal.

Mr. Vice-Chairman: Mr. Chairman, Sir, in my opinion, without being verbose, the moment you make reference to the rule of law, the rule of law is a collective concept.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, I think what we need to do in (b) is just to add “international humanitarian law” for two reasons: Kenyan Defence Forces participate in peacekeeping missions. They get involved in some of these issues. So, if we could put “international humanitarian law”, it will capture that spirit. So, I think it very is important to declare our commitment to respect international humanitarian law, because we participate in peacekeeping operations.

Mr. Vice-Chairman: Hon. Members, let us be systematic. Let us look at these Articles one by one. We have adopted Article 276(2), which provides the following:-

276. (2) The national security of Kenya shall be promoted and guaranteed in accordance with the following principles—

(a) national security is subject to the authority of this Constitution and Parliament.

Mr. Vice-Chairman: Is that one passed?

Hon. Members: Yes!

(Article 276(2)(a) agreed to)

(b) national security shall be pursued in compliance with the law, including international law, and with the utmost respect for the rule of law, democracy, human rights and fundamental freedoms.

An hon. Member :---*(Inaudible)*

Mr. Vice-Chairman: Do you want to re-cast this one?

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, given the use of the words “respect for the rule of law”, but knowing the special circumstances in which Kenya has been dealing with external conflicts, this is a plus for this country. The addition by hon. Nkaisserry “including international humanitarian law”--- International humanitarian law is the law of wars. It is very well defined.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Vice-Chairman, Sir, I just wanted to say very quickly and very humbly that this preoccupation with fear of international war is misplaced. Many countries continue expressly providing for international law. The German Constitution recognizes the European Union and all the requirements, *et cetera*. So long as you are specific, like the general is saying, if you are specifying a particular law, and not generally, it is no big deal, if it does not hurt you.

Mr. Vice-Chairman: *Waziri*, could you, please, move to re-cast for us 2(b)?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Chairman, Sir, on principles and objectives, what we have just agreed to, we define national security as follows:-

“National security is the protection of Kenya’s territorial integrity and sovereignty, its people, their property, peace, stability, prosperity and other national interests, from internal and external threats.”

So, why are we dealing with issues of international law when that is not the mandate of your national security? I do not see the Americans writing this in their law.

Mr. Vice-Chairman: It is a principle.

Ms. Karua: Under international humanitarian law, the Jamaican we deported the other day would still be here, and the circus would still be here, and you would be citing your Constitution. Human rights law and humanitarian law are twin issues. The moment you put that jargon in a constitution, and it has no demarcation, look at the circus. Even the Artur Brothers would still be here.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, we need to be very clear here. If you look at this Article, you will see that it says “---and other national interest from internal and external threats.” We will be involved with external threats. Therefore, we should base our action on the international humanitarian law. For instance, we have troops in the DRC Congo, and some of our soldiers are involved in an activity that pertains to international humanitarian law. So, we have to respect that law. It is really not a major problem.

Mr. Vice-Chairman: But do we need to be explicit for us to achieve that?

Mr. Chachu: Mr. Vice-Chairman, Sir, I do not see the need to include this in our Constitution. For all these years, we have been without all the things that hon. Nkaisserry has mentioned. I do not think it is necessary for us. We are a sovereign state, with our own national laws. Let us stick to that position.

Mr. Kioni: Mr. Vice-Chairman, Sir, we have been told by those who have spoken that it does not matter whether we state it or not. We will still be bound by it. So, I do not understand why we are so passionate in trying to include it in our own Constitution.

Mr. Vice-Chairman: If it does not matter then, a principle that has been guiding our drafting.

Mr. Kioni: Mr. Vice-Chairman, Sir, I was going to propose, for those reasons, that we delete it.

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, whatever we do, we cannot run away from international responsibilities, and that we have ratified most of these statutes. In fact, we may have made a mistake of ratifying the wrong statutes when America stayed out of it. What I want to emphasize is that we just draw the distinction. There is a distinction between human rights and international human rights law. There is the one dealing with human rights as we understand it. International humanitarian law deals with war crimes. The law of war is very specific. On the basis that whether we have it in the Constitution or not, we shall still be bound, I will go by what you say.

Mr. Vice-Chairman: Hon. Munya, have the last word on this, so that we can move forward.

The Assistant Minister for East African Co-operation (Mr. Munya): Mr. Chairman, Sir, international humanitarian law deals with war crimes. It includes even treatment of prisoners of war. It includes exchange of prisoners and all those things that are complicated, which a country would not want to be bound by it because most of them involve negotiations between a country that is fighting with another country. You would not want to have that kind of provision in your constitution.

Mr. Vice-Chairman: Hon. Munya, move for the re-casting of Article 256(2)

The Assistant Minister for East African Co-operation (Mr. Munya): Mr. Vice-Chairman, Sir, I move for the deletion of the words "including international law".

Mr. Vice-Chairman: Hon. Members, is that seconded?

Mr. Chachu seconded.

Mr. Vice-Chairman: Is it carried?

Hon. Members: Yes!

Mr. Vice-Chairman: That is carried!

(Article 256(2) deleted)

The Minister for Lands (Mr. Orengo): Mr. Vice-Chairman, Sir, I want to record my objection.

Mr. Vice-Chairman: Objection recorded!

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, I also want to record my objection.

Mr. Vice-Chairman: That is a rare one, but it is welcome!

Hon. Members, we are now moving on to Article 276(2)(c) says that national security organs shall respect the diverse culture of the communities within Kenya in discharging their duties.

The Minister for Agriculture (Mr. Samoei): Mr. Vice-Chairman, Sir, unless it is clearly what it is supposed to mean, reading it in mind, this paragraph does not have any meaning. Paragraph (d) has more meaning.

The Vice-Chairman: So, do you propose deletion of Article 276(2) (c)?

Deletion of Article 276(2) (c)

The Minister for Agriculture (Mr. Samoei): Mr. Vice-Chairman, Sir, I propose that Article 276(2)(c) be deleted.

The Assistant Minister for East African Co-operation (Mr. Munya) seconded.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Vice-Chairman, Sir, this paragraph means that the police are suppose to allow a Maasai man to carry his *rungu* in town, but if I carry my *rungu* in town I can be arrested. That is my limited interpretation of this paragraph.

Mr. Vice-Chairman: Hon. Kiunjuri, if you look at Article 276(1), there is reference to rights and freedoms, which should be able to cover such concerns.

Mr. Ruto: Mr. Vice-Chairman, Sir, some of the rights we have included in here excludes some aspects of culture. When security personnel are, for example, are handling my sister here, they should not even touch the *buibui* on her head. Those are cultures unique to those areas. In some areas, security officers are not even---

So, I should say that they have to be respectful. They should not even invade mosques or churches.

Mr. Vice-Chairman: So, do we retain it?

Hon. Members: Yes!

Mr. Vice-Chairman: Is it retained?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, when you are dealing with national security and operations on security, some things are better left unmentioned. I will give you an example. Suppose the man who bombed the American Embassy did not die. He survived, ran and hid himself in the Holy Family Basilica, and we have provisions like this one, and you have to get him to know who his accomplices are, who planned the bombing, and the church is not releasing him. Some of these things are better left unmentioned, so that we leave them to the day today dynamics of life in the country. Otherwise, when you lock yourself away, you actually endanger your own state and security of your people.

Mr. Vice-Chairman: Article 276(1) has already cast in the constitution, the rights and freedoms. Is the Motion to delete carried?

Hon. Members: Yes!

Mr. Vice-Chairman: It is carried!

(Article 276(2) (c) deleted)

Amendment of Article 276(2)(d)

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, I would propose that we amend Article 276(2) (d) to stop at “Kenyan people”.

Mr. Vice-Chairman: Can I have a seconder for that amendment?

The Assistant Minister, Ministry of State for Defence (Mr. Musila) seconded.

Mr. Vice-Chairman: Hon. Members, is that carried?

Hon. Members: Yes!

(Article 276(2) (d) amended)

The Vice-Chairman: Hon. Members, let us proceed to Article 277.

Ms. Karua: Mr. Vice-Chairman, Sir, hon. Wetangula did not even explain why he wanted this paragraph amended in the manner he suggested. Could he explain?

The Vice-Chairman: We have already disposed of that Question and moved to the next item.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, there is need for him to explain.

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, I can explain. For example, if you are talking of diversity of Kenyan people and equitable proportions, in this country, we have about three or four communities that constitute over 70 per cent of the population. They can actually marginalize the smaller communities in the name of equity. If we want to leave the recruitment into the Armed Forces open to all, then using words like equitable proportions is to legitimize marginalization of smaller communities.

Ms. Odhiambo: Mr. Vic-Chairman, Sir, I would actually support the Motion for re-opening this debate and leaving it as it is. Equity is not equality. When you talk of equality, you are talking about 50:50. When you talk of equity, you are talking about marginalization. Every time there is the word “equity” it talks to marginalization. For me, this means that whenever we are recruiting national security organs in this country, we will be saying it is not one or two tribes. It shall reflect the entire country. When you put “equitable proportions” it even makes it healthier, fatter and plumper. So, I support that.

Ms. Karua: Mr. Vice-Chairman, Sir, I do not have to say anything else because Millie has described it. Let it stay as it is, so that those who do it, when asked, they can always say: “This is what we have done.”

Retention of Article 276(2) (d)

Mr. Vice-Chairman: Mr. William Ruto, can you move for retention?

Ms. Karua: Mr. Vice-Chairman, Sir, I beg to move that Article 276(2)(d) be retained as it is.

The Minister for Tourism (Mr. Balala) seconded.

Mr. Vice-Chairman: Hon. Members, is that carried?

Hon. Members: Yes!

(Amendment to Article 276(2)(d) revoked)

Mr. Vice-Chairman: I want somebody to propose the adoption of Article 276 as amended.

Ms. Odhiambo proposed.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, I want to re-open debate on Article 276.

Mr. Vice-Chairman: Hon. Nkaisserry, we really need to move forward.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, what I have to say is very important. Let us look into this issue of “equitable proportion”. This is an issue of marginalization. I support hon. Wetangula’s position to delete the words “equitable proportion”. If we are going to recruit, say, 3,000 persons, and we apply the equitable proportion principle, somebody somewhere is going to be marginalized.

Mr. Vice-Chairman: Hon. Nkaisserry, “equitable” by its very nature cannot marginalize.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, allow me to explain my point. I want to bring an issue here. No wonder our security organs do not reflect the proportions of ethnic groups.

The Vice-Chairman: Hon. Nkaisserry, this is not about proportionality.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): We are putting a proportion here. If you remove the equitable proportion, that is a big issue.

The Vice-Chairman: It is to correct marginalization. But that motion is carried. Can we keep it carried? The Motion is kept carried. We move on to 277-

(1) The national security organs are—

(a) the Kenya Defence Forces;

(b) the National Intelligence Service; and

(c) the Kenya Police Service.

(2) The primary object of the national security organs and security system is to Safe-guard the well-being of the people of Kenya and their property and rights and freedoms, and the sovereignty, peace, national unity and territorial integrity of Kenya”.

This is really a repetition of 276(1). I will just run through all of them and then we can look at them as holistically.

“(3) In the performance of their functions, the national security organs and every member of the national security organs shall not—

(a) act in a partisan manner;

(b) further any interest of a political party or cause;

(c) prejudice a political interest or political cause that is legitimate under this Constitution; or

(d) obey a manifestly illegal order.

(4) A person shall not establish an organization concerned with national security or a military or paramilitary organization except as provided for by this Constitution or by an Act of Parliament.

(5) The national security organs shall be subordinate to civilian authority.

(6) Parliament shall enact legislation to provide for the functions, organization and administration of the national security organs”.

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): Mr. Vice-Chairman, Sir, I would like to make a proposal to delete 277(1) and (2) because as you have correctly stated that is a repeat. The issues referred to in 277(3), (4) be moved to 276. The reason I am proposing this is to lock our security organs in the constitution. In most countries, they are actually created by statute because it allows for flexibility in the organization of the Defence Forces. Here we are actually locking the organs and their operations into the constitution. Canada, South Africa, the United Kingdom and the United States, all these countries have the Armed Forces catered for in a statute. There are a number of issues which may be of concern like I am saying (3) and (4), that can actually go in the principles and objects. My argument is that the organs should be catered for in legislation as opposed to be catered of in the constitution. You can add to 276(3), (4) and (5) because they are part of the principles and then you delete the whole 277(1) and (2) and then this can be contained in 276.

The Vice-Chairman: Can I get a seconder for that?

Mr. Kazungu seconded.

The Minister for Agriculture (Mr. Samoei): While I agree with the proposal by hon. Kenyatta, I do not find it enough reason to take this very important component to the statute only on account that it does not exist anywhere else. Part of what we are doing now is to correct what the old constitution did not do. I think specifically, the Defence Forces and the Police are very critical to our national security especially the provisions on the police in terms of the police service. Are they critical that we should have a Police Service Commission that is irresponsive to the populace, so that we eliminate some of the brutality that we have seen dispensed by the police by making sure that there is real oversight in what the police do in their responsibility. Unless I am really persuaded, further on, there is the Kenya Police Service Commission which is provided for here. I think we need the Police Service Commission right here.

Mr. Kioni: Mr. Vice-Chairman, Sir, perhaps for reason that have been advanced before that when we say that our national security organs are (1), (2) and (3), and this is not a constitution that we are going to deal in another 15, 20 30 years, what are we saying to the generations that will come way after us? That we consign them to this arrangement that we feel comfortable with now without really giving them room in future for them to have other organs that they will think will fit then? I concur that it will be wrong for us to lock this in the constitution.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, Sir, we are talking about national security. Who is going to deal with this national security? We have to mention the national security organs even if we are going to give their specific duties in the statutes, but we have to indicate who is responsible for the national security and leave it there. It is very important. Then, why are we talking about national security if you are not talking about who is going to be responsible for that national security?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, the point I want to emphasize is what hon. Kenyatta has said. One of the main reasons why up to now our forces have existed under the Armed Forces Act is the evolving nature of the Forces. Is it not going to be very difficult to change the constitution whenever there is going to be changes? I would rather we retain the details of the Armed Forces Act. Secondly, on page 151, I am advised that when you limit to those three, the Kenyan Defence Forces, the National Intelligence Service and the Kenya Police Force and you leave another lot called the Auxiliary Forces, the Kenya Wildlife Service, the Administration Police and the Police who would be called in as reserves in the event of war. So, if we were to limit these three, then there is a break out of war and say for instance, the Commander in Chief calls the forces for reinforcement, then organs like the National Youth Service should be included in here because they form part of the reserve forces which if we are to insist on this being here, we should also include the others so that the Commander in Chief can also command all those, for instance, the National Youth Service, the Kenya Wildlife Service and the Forestry Service, so that they are part of the security organs.

The Minister for Tourism (Mr. Balala): I am very concerned if we are going to delete these three organs. We are working on the principle of security and intelligence here and if there is any latitude that we need to give for any other, I think (d) can be appropriate for any policing services. That can be appropriate where Mr. Musila is talking about the KWS, the Forestry Service and the Tourist Police Service. But to delete it is dangerous. It is important to have it there as a matter of principle in the constitution so that we can address the issue of security for our country. The Commander in Chief is definitely going to be commanding all those police services under him wherever there is war, they will be at standby.

Ms. Karua: I would want us to go back to the current constitution where other than the appointment of the Police Commissioner which is referred to, the Police Force is not itself mentioned. I want to say that once you mention something, anything else is excluded and if tomorrow we want to re-organize our forces so that if it is the police and all those others, we want to configure them differently, then you have tied your hands. We can have, like we have in this chapter, issues about national security and their objects, and the rest we leave to legislation once we open an opportunity, so that we can have Acts of Parliament and tomorrow when things change, then we can change. As it is now, the APs are already lobbying because they are excluded, so they take it as abolition and the moment we put them, just like we talked of the Commissions, the KWS, should not be very far from the door, because they too ought to be mentioned. We ought to leave it wide enough for us to be able to do practical things, but to have the general principles of how to handle our national security in the Constitution.

The Assistant Minister for East African Community (Mr. Munya): I cannot agree with hon. Karua more because threats to national security change with time and we need the flexibility that is required to deal with whatever threats we may face at a particular time. In fact, parts of our problem has been the over centralization of our police forces. That is why we have not been able

to handle our national security properly. So, when we carry that centralization, we bring serious problems. We may arrive at one time and decided that we need even the regions and the cities to have their own commands. For example, in the United Kingdom, they have the Metropolitan Police, which runs the security of the City. In the United States, they have many independent organs that deal with security like the FBI, CIA and other security guards. Here we are missing the problem. We have a problem in the centralization of the forces.

Mr. Ruto: I am persuaded to exclude the mention of the formations in the constitution. The way it has been done it does not look very innovative. It does not look like we are doing a wonderful job. The message we are sending to the other formation is that they are inferior and therefore, they are less important than these others. This has always led to the belief out there that when they go out some are superior. At time, they were almost shooting one another I think in Eldoret or Mombasa because one formation thinks it is superior to the other one and both have guns. Therefore, it creates a quagmire out there in the field. What ought to come out is a proper legislation that defines the role and responsibilities of each formation so that there is no overlap. We need something that can go into the detail, but for us to put it here just like that, then I would insist that we add more so that they are all here. We are now going into the constitutional review and we may even have other formations in the counties. We may decide that there are certain specific units to guard highways. I think this is not very innovative. Even if somebody was trying to settle something that did not look neat at some stage, I still do not think that this is where to do it. It can be done elsewhere.

Mr. Chachu: I am also persuaded by the argument that we should not entrench this into our constitution. The current constitution is a very inadequate document and that is why for the last five years, we have been trying to change it. Still even the boundary of this nation, we did not see the need to entrench it in the constitution at that time and I am sure there is a reason for that. Our forces should be flexible because we live in a world with a lot of extremisms, security issues that might need very urgent flexibility especially by the Executive and because of that, I think we should not lock it in the constitution.

The Vice-Chairman: But it is into the inadequacy of the current constitution that we are engaged in this exercise.

The Minister for Agriculture (Mr. Samoei): Mr. Vice-Chairman, Sir, let me again try to persuade my colleagues that we are talking about the security of our country. It is a very serious issue and I do not think we want to leave the security of our country to the whims of games in Parliament. We are saying that the command of our security forces must be clear. When we talk about security of our country, all of us are equal. When we talk about the Kenya Defence Forces, we know clearly that they are so many other formations in there. There will be the Navy and the others. Those are formations, which we can, if we want, then say that through Acts of Parliament, we can provide for as many formations as it is practicable for purposes of carrying

out security. When we talk about the Kenya Police, precisely for the reasons that were given here, the APs and the Regular Police were actually shooting each other, because there is no clear structure. If we are going to let all manner of forces carry guns and there is no coordination or chain of command, we will end up with a free for all and this will be blaming the other. We should be careful here. All these other polices, whatever it is, whether it is the Forest Police, the Tourist Police or the APs, all of them should become subsets of the Kenya Police Service and they should clearly derive their mandate from the Kenya Police Service, so that we have order. Even those other ones of counties, we should have a uniform way of dealing with the police. Otherwise, people armed with guns can become very dangerous if they have different commands and they can create a mess.

Mr. Vice-Chairman: Before Mr. M. Kilonzo speaks, may I just invite us to look at Article 290 that provides for other police services. Let us also look at Article 280 that outlines the formations within the defence forces. Let us also be guided by what is provided for in other constitutions. There was reference here to the South African constitution. I believe we have a copy. We could look at it and see what is said there. We can also look at any other constitution. Let us be guided as we continue this debate. Meanwhile Mr. M. Kilonzo you have the floor.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): I will be very brief. I will start by giving an example. It is being suggested that you can set up the judiciary. I just want to give you an example so that you can see whether you can compare. It is like setting up the judiciary, spelling out the principles and objects and then you do not provide for the hiring and swearing in of judges. The institution of national security is such a very important one that you have two choices only. If you decide that you are spelling out national security principles and objects and you do not want to expressly provide who will be implementing those principles then it is far better in setting it up you say that Parliament shall establish such other--- If you mention one you must mention all as far as I am concerned.

Alternatively, you could simply say Parliament will do so. The question is that in making a new constitution you do not really take away rights that already exist. The independence constitution expressly provided for the police. It was abolished in dubious circumstances.

I do not agree with Mr. Samoei that other agencies can only be sub-sectors of the Kenya Police. Countries sometimes have even five, six, seven, eight methods of securing national security. The USA has got the marines, the National Guard and all of them are independent. They carry arms and perform specific functions for that country. I do not think you should feel shy in acknowledging what exists and then give Parliament power to create more as you may deem fit.

Mr. Vice-Chairman: May I also inform you that the moment you delete 277(1) you will have to get rid of that whole chapter because the rest of that chapter rides on the formation and functions of the various formations.

The Minister for Foreign Affairs (Mr. Wetangula): If you have an opinion that we do not have to delete then I would propose that we be informed by the recent task force on police reforms that was set up by the President and the Prime Minister and whose report is out.

Mr. Vice-Chairman: Do we have a copy of that report here?

The Minister for Foreign Affairs (Mr. Wetangula): It has been delivered to the Cabinet Security Committee and it is in the process of implementation. It is on the basis of that that we have a new Police Commissioner and now Titus Naikuni chairs the Implementation Committee. That task force did recommend that over the years Kenyans have had to live with and appreciate the presence of the regular police and administration police force which has been the backbone of provincial administration. If we are going to have provincial administration in whatever description or formation, then it is important that we also acknowledge the administration police force as a force in existence. We cannot just wish away this force because of a new constitution. It is a force that Kenyans have developed more confidence in than even the regular police.

If you go to the rural areas my constituents are more comfortable with administration police than the regular police. On the basis of that I would suggest that if we leave 277(1) as we suggested then we add (d) ---

Mr. Vice-Chairman: I did not suggest that. I was calling your attention to the fact that all the other sections are largely connected to that one.

The Minister for Foreign Affairs (Mr. Wetangula): Otherwise, I had previously supported the deletion of 1 and 2 and then move to 3, 4, 5 and 6 to merge with 276 because those are the principles and objects of the force. Further down you will see that we have specific provisions for the Kenya Armed forces in 280 for the National Intelligence Service in 282.

Ms. Odhiambo: I support that we leave it as it is. The reason for this is that we need to know--- That is why I would want us to retain it as (a) (b) (c). When you have different units with different commands then you have anarchy. If you have a situation like the one we have seen in this country before we know what it resulted to. There are many areas in this country including where I come from where people have absolutely no confidence in the administration police. They merely terrorise citizens.

The Minister for Lands (Mr. Orengo): I think there is definite mischief that these provisions are supposed to deal with. In the situation of Iraq and Iran which is replicated in many other countries, not by a constitutional dint but by an executive fiat, you had people like Saddam creating a Presidential Guard which was more powerful than the military formation which is contained in the law as they exist both in Iraq and Iran. One can give many examples of this.

In Italy, there is some confusion there because they are both intelligence and police. Sometimes one unit of the disciplined forces takes a position which is in direct contradiction with the other formation. In the USA they had to appoint an officer to co-ordinate the activities of the intelligence services because everybody was doing things their own way. They said there is no law that is forcing them to give that information to other forces or even to the president.

In 1982 because of the nature of the ordinary statute that we had in terms of the Armed Forces Act Moi by an Executive fiat abolished the Kenya Air force and established the 82 Air Force. This matter was taken to court. I think Mr. Kiraitu Murungi is the one who took the matter to court because the Armed Forces Act was quite clear on this. I think the judge was liberal rather than conservative.

If you leave without making these provisions specific and putting it in there that the National Security Organs shall be subordinate to civilian authority, I think we are creating a lot of anarchy. Even the creation of this intelligence services, the factor that really led to the establishment of security intelligence different from the last special branch because it has no accountability. They could go to the army. Many army officers were arrested.

I have represented a lot of army generals who were arrested, taken to a court martial. They evidence had been collected by the National Security Intelligence. I think Boinet did a very good job in trying to bring the National Security Intelligence under civilian authority with specific mandate.

We have already said that the President can establish offices and so on. That argument can be made in court quite successfully. With the Kenya Armed Forces there, he can establish a different formation; give it more weapons and everything. That is what is happening in Venezuela, Argentina and Haiti. They were not really a military formation but they were created by a presidential bid.

We need to protect the major forces that can be accountable to the country in matters relating to internal and external security. That is not to say that under the constitutional or any other law you cannot legislate and allow the formation of other bodies which can provide police services. I would be very worried if today we said that the Kenya Wildlife Service can be taken to combat situation because they are not trained to do that. They are trained in the sense that I was also trained by the National Youth Service to use weapons and how to attack. It is not a military formation.

England conquered many countries in the world despite its small population. A lot of it was done through mercenaries but there was enabling legislation to allow for mercenary formations. Even in France, many of Napoleon's battles were fought with mercenaries but there was enabling provisions in the law. I am quite passionate about this because of what happened in the past. If

we did not have a national defence force and a national intelligence service that falls outside the system, we will build a banana republic in the end.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): I think Mr. Orengo has made some very fundamental points. I want to ask one thing because we want to be very candid here. Which security force raided the *Standard Newspapers* and *KTN*? Let us be very clear here that what we are trying to protect in this constitution is for posterity. We want to be clear that nobody can move in or get power and then at his own whim create a security force that is personalised to him or her. Secondly, who is really the commandant in the Administration Act?

Mr. Vice-Chairman: The Minister for Internal Security.

The Deputy Prime Minister and Minister for Local Government (Mr. Mudavadi): If it is a security arm of this nature, if it is a police force, who should be the commandant? These are the fundamental questions that we are beginning to ask. Apart from where the constitution puts it in the hands of the President and Commander-in-Chief will we create a situation where the security forces can be such that there is that kind of mischief in the Act where a politician can decide how to deploy them? Let us be clear because we are talking about the future. These are things we must correct. This will cure because it will recognize these institutions in the Constitution and there can be a parliamentary Act that can deal with the other details. Let us recognize our institutions in the Constitution.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): I think it is good that we walk down memory lane. We should not just look at issues that will favour us in one way or the other. We have had two situations in this country. In 1982 there was an attempted *coup*. It is the Air Force then that led the *coup*. We still had the Kenya Army, the Kenya Navy and the Kenya Air Force and they were still under the command of the Chief of General Staff. Even afterwards when Moi renamed the force as "82 Air Force", it still remained the same structures. Its command remained the same. Up to now they have not been a national threat. Nothing has changed. They are still there. Today the Kenya Army, the Navy and the Army are under the command of the Chief of General Staff who can be picked from any of the three.

That is the most delicate one. It is more important for the Chief of General Staff who can be picked from any of the three.

That is the most delicate one. It is more important than the police, administration police, the KWS and the rest. They have been able to co-exist all this time. In 2007 after the general election there was conflict between the Administration Police and Regular Police. We assume there was some conflict because nobody has come out clearly to say there was conflict. Therefore, today we would like to isolate the administration and the regular police. If we are able to fuse the army, navy and the air force, what would be so difficult in us having the regular police, the

administration police and the KWS fused together and they have this Inspector-General under one command whereby no force is treated as superior to the other. We should still remain with the Administration Police with their Commandant, the Police Commissioner and then you give them an Inspector-General who will be in charge of the two forces and he can come from either. He can be appointed from the Administration Police or the Regular Police Force. We do not want to take any as superior. The head of the administration police is the Minister. The head of the police is the Commissioner of Police. Who is senior than the other? If we want to abolish one, then we should abolish the one led by the Commissioner of Police who is under the Minister. That is the junior partner. Then if you are looking at seniority, the Minister is in charge of the Provincial Administration and Internal Security.

The Bomas Draft is here with us. It recognized both of them. We were all seated there and we argued about it. In fact at that time some of us were arguing about scrapping of the administration police force while some of us said that they should remain and the Bomas team was informed of this. It let the two organs to continue.

The task force recommended that the two remain.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Chairman, this issue must be looked at collectively by the end of the day if you come to the training of the two. Administration Policemen are trained in a compact manner. They are more aggressive. If it comes to war and Maj-Gen. Nkaisserry wants to call for another armed force for assistance, they will first of all pick the APs before they go to the regular police. In short, what I am trying to say is that these two forces are trained and disciplined. If you come to my village in Laikipia, I am always calling on the DC for the intelligence committee to remove regular police officers and replace them with AP officers because they are more disciplined than the regular police. So, for me, I support the deletion of the Kenya police service and replacing it with Administration Police who my people trust more than the regular police.

Mr. Vice-Chairman: You are moving us towards some compromise.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Yes, Mr. Vice-Chairman. This is because by the end of the day, this is a subject that will divide us even more. If we are retaining the armed forces here, then we remove the Kenya Police Services, get another name of calling the commander like inspector-general or whoever who will be in charge of those other armed forces and classify who they are without ranking.

Mr. Kioni: Mr. Vice-Chairman, I want to say this but I have not got answers why we are moving the APs out of this lot. The arguments that there was a shooting that happened in Mombasa and the other place actually happened recently. It is a fairly recent thing. It is not something that happened when we were drafting this thing. The number of AP officers who are out there and who are also informed now about the debate that we have because certainly they

have knowledge that there is a section that would want to do away with them, we would need to handle this issue very carefully. Looking at one group with a discriminative eye will give us problems in this country. We had that task force and there was really some huge campaign that was meant to ask Kenyans to say that they need the two of them merged but it did not come out that way. They said no. If we now come through the backdoor because this to me is like the backdoor, I will still achieve what Kenyans said that you do not do. Whatever it is that you have done nicely in this hall will actually go down the drain. I come from an area that has a lot of respect for these people and I can tell you that these are the people we call upon when there is a problem. The regular police forces have their problems and it is not for that reason that I will come to say that we remove them from here. No! I think the fact that we have the units that are not functioning well, what we should be doing to enhance them not for purposes of deleting words because we want to retain the other. That argument will give us problems in this country and I think I want to concur with hon. Kiunjuri that these two forces need to be handled at per. We may need to recommend an overall person who handles them at the same level but without none of them being frightened.

The Deputy Prime Minister and Minister for Local Government (Mr. Kenyatta): Mr. Chairman, if I may, I am not even quite clear what this debate here is all about because it looks like we are talking at cross-purposes when actually we are not. This is because everything that has been stated here for the retention of this particular clause that we need to name them is everything that we agreed when we were saying let us retain number three which reads:-

“In the performance of their functions, the national security organs and every member of the national security organ shall not act in a partisan manner, further any interest or political party or cause, prejudice a political interest or political cause that is legitimate under this Constitution, obey a manifestly illegal order.”

4. A person shall not establish an organisation concerned with national security or a military or a paramilitary organisation except as provided for by this Constitution or by an Act of Parliament.

It is already taken care off. The national security organ and we shall be subordinate to civilian authority and Parliament shall enact legislation to provide for the functions, organisation and administration of the national security organ. Nobody has a problem with any of the issues that have been raised here. All we are saying is that national security is also not static and if you lock yourself today without the recognition of what happens tomorrow. Threats change from time to time. Today, even if we look at the US, their biggest security organ is homeland security. If they had locked themselves into a Constitution by saying we can only establish “x” number of units, where would that entity would have come from because those are the only units that are available? So, consequently, all I am saying is that in this Constitution, we should not constitutionalise operations and structures. We should actually leave that to statutes that can

change from time to time. What we need to Constitutionalise are the fears that an individual can go and create a force outside this Constitution. We have taken care of that. What we are interested in is that our security forces will not be partisan politically or otherwise. That is taken care of. Why then do we want to go into the details of structuring our security apparatus in a constitution. I am not just looking at this clause in isolation. I want us to continue because basically we have gone through even stating what the command will look like. Look at all the clauses that flow from these and really ask yourself: Is this what we want to do to lock our security structure in the Constitution? Is that what we really are saying we want to do?

Mr. Vice-Chairman: What I am asking as we continue this debate because we really must get to a point where we can make a decision: Is someone looking at other jurisdictions? We would want to be informed.

Mr. Kioni: Mr. Chairman, the information that we have is India, Canada, the United Kingdom and the US have not locked their formations.

The Minister for Tourism (Mr. Balala): Mr. Chairman, there has been a confusion and cross-purposes where we are discussing on naming the three critical security organs and also about the AP. I do not know where it came from.

Mr. Vice-Chairman: For your guidance, we are debating a motion to delete Article 2 (77) (1) and (2) and the Administration Police is being used as an example of one of those forces that has not been mentioned here.

The Minister for Tourism (Mr. Balala): Mr. Vice-Chairman, but here we said very clearly that the Kenya Police and any other policing services where if we have to establish any service including the tourist police, we can do that but the key security organs need to be clearly defined. All the mess of insecurity and corruption within the security organs in this country has been caused because of the structure of the police. That is unaccountability and its weaknesses. That is why we have all this mess.

Mr. Ombui: Mr. Chairman, from the proceedings, it is not very clear why we need to mention these names here. If we are trying to revamp the previous indisciplined cases with the force, this one cannot tell anything at all. The problems which have been in the force are serious and naturally caused by different issues which may not be assisted or solved like trying to name these armed forces in the Constitution. I think it is very important for us to leave room for flexibility because it is clearly indicated here that at any given time when need arises that we can just try to get any force through Parliament. We cannot put everything in the Constitution. A few minutes ago we have indicated very clearly that we are not including the Teachers Service Commission (TSC) because of several reasons which were given. So, I feel it is prudent to have very brief information as has been given in the Constitution without naming all these forces.

Mr. Chachu: To begin with, I want to change my earlier position. I have heard about this from earlier speakers and I think it is very important. I think as a nation we are better off if we anchor it in the Constitution than leaving it to the whims of politicians. They could really have their own centre of interests at times. Because of that reason, I have changed my position. I think we should anchor it in the Constitution.

Mr. Ruto: Mr. Vice-Chairman, to me, it appears as if the element of the AP seems to be the main issue of concern there. I want to point out that maybe there may have been some perceptions or actual commission of excesses by that particular formation at some point. However, that in my view does not negate its necessity. In the place where I come from, it is prone to conflicts, fights and inter-tribal warfare and the only force that is proactive is the AP. The force that will quickly stop fighting is that one. These are the people who will walk on foot for eight to 12 kilometres to stop a conflict running together with the assistant chief. I call the police until I am fed up. They do not have a vehicle and they only come to collect the bodies and do post-mortems. The police are unwilling if you are talking about national security especially in trouble prone areas. I propose that if we have to include that, then you will have to add (d) with the AP because--- I was part of that argument even at Bomas because of the experience I have. Even this week, there are problems in Trans Mara and it is the APs that are standing in between these two groups. The regular police do not even want to take phone calls. What are we going to do with the far flung areas? Maybe those urban base people are comfortable with the police because they will only come because of accidents and a few other things and they will put tapes all over the place but they are very difficult. They will only respond when it is a riot situation and they want to be given three days notice that there will be riot so that they can put on the helmets. I am saying that if we are to retain those ones, then let us add (d) the AP Police Service otherwise let us not create a ranking in terms of these services. If there is a problem in the command, I think that is a question for Parliament to deal with. *Ikiwa Bunge inashindwa na hiyo, basi haina kazi!*

Ms. Karua: Mr. Chairman, I want to second hon. Isaac Ruto's motion and he has actually taken words out of my mouth but with joining it with what hon. Kiunjuri had said earlier. I am suggesting that instead of having (c) and (d), we put it together the Kenya Police and the Administration Police Service. The reason for doing that is the way hon. Kiunjuri had argued that they can be two at per but with an Inspector-General. Can they bring harmony?

Mr. Vice-Chairman: In the same manner that the Kenya Defence forces are organized?

Ms. Karua: I want to say one more thing to add onto what hon. Ruto said. All over the country, the nearest person to you is your chief. Who backs your chief and assistant chief? It is the AP. If we are retaining the chiefs, then we cannot be serious that the chiefs be minus the AP. If it is about co-ordination of the law, you cannot throw out the baby with the bath water. Let us tighten where we think we have a lacuna. I beg to second.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Mr. Vice-Chairman, I have just been examining two Constitutions. The South African one actually contains it in Chapter 11. There is the security services the same way we have done and then it is followed by defence, the police and intelligence. In the German one, it is in Chapter XA provision is also made for and it includes even attacks on the German state or one of the individual states. I think that personally and I want to declare my interests, my escort is a AP given to me by Parliament. I am very happy. I was even offered the General Service Unit (GSU) personnel but I refused. Even if you offered me military police, I would refuse. I support hon. Isaac Ruto's motion. We speed it up so long as you do not categorise them and each one as its own system.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): Mr. Vice-Chairman, the Minister for Justice has just said something very interesting and important that in the jurisdiction of Germany, they just talk about defence, intelligence and police. I want to be understood and follow what hon. Kenyatta was saying in Clause 3 that who are these security organs. That is why we must mention the defence, national intelligence services and the police. As it stands now, we should not approach it with emotions because this is an institution we can strengthen via statutes to govern them. As it stands now, what is the mandate of APs? There is no mandate because they were a creation of *Askari Kanga*.

As it stands now, you cannot have an AP station anywhere in the country because really they have no mandate. They can only arrest if the chief tells them to do this and progressively the monster called imperial presidency continues to create an army of its own without really any mandate. As we speak today, there is no mandate in our laws except there is an Act. But what is their law?

What I want to propose is that we have to have these organs as per 277. I will even go further and propose if we want to help, because I have nothing against APs, it is only that I do not know their role. To uplift part 5 bring to (d) and make it other policing services where you can group all these; KWS, Forest Service guards, and if you want to put APs there I have no problem. The alternative is we can have a police service with the regular police, with the CID, the GSU, the APs and the ASTU. This is now if you want to put them like the Armed Forces because I think that is an area you people want to go. But we cannot have two police services in this country because this is going to bring conflict.

Mr. Vice-Chairman: Dr. Kosgei! The motion as placed by Mr. Ruto is exactly in the terms of what you have touched on last.

The Minister for Higher education (Dr. Kosgei): I think Maj-General Nkaisserry has actually said what I wanted to say. There is a bit of suspicion on the APs because of the antecedent. There was no recognition for them and I feel that if we let them remain hanging without adding them on the list, the suspicion will remain. That is not to say that I have the experiences that Mr. M. Kilonzo has with APs. I have exactly the opposite as a matter of fact. I do not know where we

place the GSU because I have found them more useful than the APs. So, that is my experience. The APs are all over the country, they are doing a fine job, there is conflict as we keep saying because there has been no way in which they have been recognized as being legitimate in the system. Therefore, we should add them on that list if under one command with the police or whatever but they have to be there so that the suspicion is removed.

Mr. Vice-Chairman: Okay Mr. Ruto! Point of order first!

The Minister for Lands (Mr. Orengo): I thought Mr. M. Kilonzo read to us the structures in South Africa and Germany. What he denied us are the specific provisions in Germany. Does it give a blanket provision for the creation of defence forces and the police and other services or it is limited? I am just talking about the two examples he gave.

The Minister for Agriculture (Mr. Samoei): I think we need to move forward. I do not think anybody here is denying the existence of the AP. I do not think anybody here is saying the AP should be deleted or anything untoward done to them. I think what we are trying to do here is, we need to recognize this process. We have said here clearly that they need to submit to civilian authority. I think for the defence forces, their chain of command is clear and their mandate is clear; to defend our territorial boundaries. For all forms of police, because they are forces that deal with security within the country, and we have had issues with the police, that is why we are talking of reforming the police. We must agree on at least the basics. That one, there must be a Police Service Commission with civilians in there to provide for how they will operate and to provide an interface between the populace and the force. These people can hire the Inspector-General of the police. I do not mind if we are going to say let the AP exist, let the other police formations exist, but let all of them be under one Inspector-General of police. That will be fine so that in legislation, we can then provide, if need be, for the individual formations including the police, the traffic police, including all the other formations.

The Minister for Tourism (Mr. Balala): Moving forward, I want to second the motion which was provided by Mr. Ruto.

Mr. Vice-Chairman: It has been seconded!

The Minister for Tourism (Mr. Balala): But with the same structure of the Inspector-General with the formations of other policing.

Mr. Vice-Chairman: Mr. Orengo did you have further information or you requested for further information? As we wait for this information, I just want remind us that we have three two motions. We have one by Mr. Kenyatta which was to delete the Article 277 (1) and (2) and merge the rest of that Article with 276. That motion is properly on the floor it was moved, it was seconded, we have debated it.

Then there is the counter motion by Mr. Ruto, which is to retain that structure as proposed with amendments that the Kenya Police Service be structured in the same manner as the Kenya

Defence Forces where various formations of the police force are placed under a single command, which has also been properly recorded. We need to make a choice between those two motions.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): First of all Ms Karua amended (c) where it reads now "Kenya Police and Administration---"

Mr. Vice-Chairman: Her proposal is merged in the---

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): But what I want to say, the way you have placed it is that, it is the Kenya Police Service when it should be Kenya Police and Administration Police.

Mr. Vice-Chairman: But the principle is essentially the motion by Mr. Ruto.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): That is the area of conflict, Chair. Not the details. We will get into those details Mr. Kiunjuri. Mr. Orengo has the floor.

The Minister for Lands (Mr. Orengo): I am proposing, if you are to put the APs in Article 277, then let us look at the formulation of the constitution as it is, the design, because you can see into 277 (1) (a) (b) and (c). Then if it is not mentioned, there are---

Mr. Vice-Chairman: Mr. Orengo for your information they are mentioned in 288.

The Minister for Lands (Mr. Orengo): That is what I am saying. You can look for a generic name, and use that name under the Kenya Police Service. Then part 2, you can create 280 Sub-Article 5 or a substantive Article saying the Kenya Police Service, whatever generic name you use shall consist of the traffic police, the CID---

(Loud consultations)

Mr. Vice-Chairman: Order! Let us listen to this.

The Minister for Lands (Mr. Orengo): That is one of the complaints. Mr. Mudavadi cited a case here.

Mr. Vice-Chairman: Mr. Ruto let us listen to this. We need to make a decision here.

The Minister for Lands (Mr. Orengo): The CID with some people in Government raided KTN and the Police Commissioner said he had nothing to do with it because there was no unified command. So I am saying when it comes to issues of policing, let us have a generic name and mention them because when we go to court, a lot of the CID are not doing their work because they were completely emasculated particularly under the previous Police Commissioner. The Police Commissioner decided what that formation has to do. So we want to create some synergies between all these forces and then they can become even the Kenya Internal Security

Forces or the Public Safety Police. I think that is borrowed from South Africa. They use the title "public safety" and then they have those names.

Finally, I want to say that the formation of the AP, the motivating factor was that the chief had executive authority. You know actually there was forced labour and for this they needed a force. In fact there was a time when this was being debated when we were trying to amend the Chief's Authority Act. Even the PCs were saying in order to enforce their lawful orders; it has to come out as an order from a chief. That is the history and finally, under the police structure if they arrest you for anything, there must be an entry in the Occurrence Book. Evidence must be reported in a certain way. I want to say in a petition I was doing in Western Province, it was to succeed if the police had been in command, but the APs, everything that is recorded did not fall under the auspices of the APs and if you look at the APs Act even now it does not explain in length as opposed to the Kenya Police what are their core duties, their relation to the general police.

Something else that Mr. Kenyatta said and indeed I support him, there is this thing called national interest. Like the Americans will tell you, they went to Afghanistan to secure American national interests. I think you need some broad objective saying that one of the objects of the security organs is to secure the national interests and this is a theory in governance, a political theory, and it exists in many countries, which the duty of the security forces is to secure national interest. Under (c), I am sure we can have a generic name, either the Kenya Internal Security Services or the Kenya Public Safety Services and then under (2) you dig in the question of protecting national interests and then when you go beyond, you define which ones those are.

Mr. Vice-Chairman: Like it has been done for the National Defence Forces in Article 280. Mr. Kenyatta for purposes of compromise, for purposes of moving to the middle, would you withdraw your motion so that we focus on Mr. Ruto's motion?

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I have no problem. But I want this put on record.

Mr. Vice-Chairman: Put that on record!

The Deputy Prime Minister and Minister for Finance (Mr. Kenyatta): I honestly believe that we are not doing the right thing and I just want to say that in the interest of compromise, yes, I will withdraw but I want to object. I do not believe that in this Constitution we should be dealing with structures. We should leave that to statutes and I want to maintain that position.

Mr. Vice-Chairman: Thank you, you can object after the mongrel is born, it is not born yet. Now please give us the information and then we need to make a decision on this.

The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo): Let me start with South Africa, title (2) Police Section 205, 206 refer to 7, refer to even municipal police services, their establishment leave alone the national police. The German one, Article 87 (a) starts with Armed Forces, their establishment, then the administration of the armed

forces, it goes on to refer to the police forces themselves and also federal border guards and then further on Article 115 (a) it makes specific references to the state defence also using the police. So what Mr. Orengo is saying is right.

The German one is very elaborate on this. The South African one is; title one chapter 7 says the defence force must be structured and managed as a disciplined military force.

Mr. Vice-Chairman: But it does not break it down? Can you pass this paper to Mr. Kenyatta please just for his information. Now for purposes of moving forward I want to request a motion, your motion has been varied severally especially with further amendments by Mr. Orengo. Mr. Orengo would you offer to move that motion attracting all the composites. Mr. Orengo please! We are crafting something uniquely Kenyan. The German that is more explicit that is what he said. Let us move forward. Order! We are making progress, one motion has pulled off the floor, we have one motion by Mr. Ruto. It has been modified by Mr. Orengo. Can we have some order please! We are building a compromise and a compromise will include modifications. I want a motion that can bring us together.

Yes Please Mr. Ruto!

Mr. Ruto: I want that to propose that (C) be reversed to read the Kenya Administration and Police Services or alternatively the Kenya Internal Security Services.

Mr. Vice-Chairman: Then complete that motion. Order please! Let us make a decision here. Mr. Ruto please make that motion in its entirety.

Mr. Ruto: That we add to 277 1 (c) that we re-word it as the Kenya Internal Security Services---

Mr. Vice-Chairman: To be structured in like manner as the National Defence Forces.

Mr. Ruto: Those are details now. Those will be details.

Mr. Vice-Chairman: But is that principle. That is the principle I want us to adopt. I want it seconded. Ms Karua seconds.

Ms. Karua: I second and then we specify the two below that.

Mr. Vice-Chairman: Is that motion carried? That motion is carried. Let us move forward then. Then that means that when we come to Article 285 sub Article 2--- you had something on sub Article 2. Please pass the microphone to Mr. Orengo. You had something on national interests?

The Minister for Lands (Mr. Orengo): I wanted a phrase there, it can come in the beginning, in the middle or the end but one of the objects should be to secure national interests. That gives the government some leeway if there is a conflict that is not purely military or civilian, that it can use all the military and police formations for purposes of securing national interests.

Mr. Vice-Chairman: Just look at Article 276 (1). Would that take care of that?

The Minister for Lands (Mr. Orengo): Then, I would suggest that, probably, we go back to Article 276 and be definitive and say: "and national interest."

Mr. Vice-Chairman: Article 276 was recast as amended by hon. Musila's Motion. But because of national interest, it was still carried.

The Minister for Lands (Mr. Orengo): I just want a reformulation.

Mr. Vice-Chairman: Can we look at it as it is now?

"276. (1) National security is the protection of the territory of Kenya, its people, their property, rights and freedoms, and other national interests against internal and external threats."

I am asking whether it can be covered there.

The Minister for Lands (Mr. Orengo): It is covered partly by the use of the word "other." So, it is a bit restrictive and if you are specific, anything defined as national interest.

Mr. Vice-Chairman: So, we remove the word "other" and "national interest." Would that, then, take care of your concern?

The Minister for Lands (Mr. Orengo): Okay.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): You know, Mr. Vice-Chairman, Sir, territorial integrity is a primary interest; sovereignty is an interest, security of our people and their property is an interest. So, other interests will fall in very nicely if you leave that because in all those, we are securing our interests; territorial integrity, sovereignty, security of our people and their property is an interest and other interests which may--- Human rights or all these other things. So, to me, if we left other national interests, it will really feel nice.

Mr. Vice-Chairman: It is acceptable. Let me come back to Article 277 (1). Can I have someone to propose the adoption of this Article as amended?

Ms. Odhiambo: I propose the adoption of Article 277 (1) as amended.

Mr. Vice-Chairman: I want a seconder for that.

Ms. Noor: I second.

Mr. Vice-Chairman: Ms. Noor has seconded. Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: Article 277 (1) is carried.

Article 277 (2) states: -

“(2) The primary object of the national security organs and security system is to safeguard the well-being of the people of Kenya and their property and rights and freedoms, and the sovereignty, peace, national unity and territorial integrity of Kenya.”

Which I had indicated is very similar to Article 276 (1).

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): *(Off record)*
Article 276 (1) is---

Mr. Vice-Chairman: Motion to adopt Article 277 (1). Maj-Gen. Nkaisserry who seconds that.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): *(Off record)*

(Loud consultations)

Mr. Vice-Chairman: We adopt Article 277 (1). It is Article 277 (2). I am sorry. Who will propose the adoption of Article 277 (2)? William, do you second?

The Minister for Agriculture (Mr. Samoei): I second, Mr. Vice-Chairman, Sir.

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes!

Mr. Vice-Chairman: That is carried.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, I would like to request that we go a little bit behind because I did not get that we changed “c”---

Mr. Vice-Chairman: 277 (1)(c)?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Yes.

Mr. Vice-Chairman: Let us see the whole of 277 (1).

The Assistant Minister, Ministry of State for Defence (Mr. Musila): I am talking about that “c”.

Mr. Vice-Chairman: The Kenya Internal Security Services.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): What is the basis on which we agreed on that? Because I do not want to join that---

Mr. Vice-Chairman: Let us ask the question, please?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): We want now to join the Kenya Police and Administration Police as one?

Hon. Members: No!

Mr. Vice-Chairman: No.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): What do we want to do?

Mr. Vice-Chairman: Can I--

The Assistant Minister, Ministry of State for Defence (Mr. Musila): I need to be clear, Mr. Vice-Chairman, Sir.

Mr. Vice-Chairman: Ms. Karua, please, just explain this?

Mr. Kioni: Mr. Vice-Chairman, Sir, before *Mheshimiwa* says, that, to me, is actually a merger.

Mr. Vice-Chairman: It will be explained.

Ms. Karua: It is the "Kiunjuri" style; it is not a merger.

Mr. Kioni: It is!

Ms. Karua: Just the way we have the army; under the Kenya Defence Force, we have the army, the navy and the air force. Now under the Kenya Internal Security Services, we will have two sub-heads: The Police Service and the Administration Police Service, each with a separate commander but with an Inspector-General overall for both of them.

Mr. Vice-Chairman: *Mheshimiwa* Musila, look at Article 277(1) (a) and then jump to 280, which then amplifies Article 277(1)(a) by providing you the three different formations under separate commands but directed by the Chief of General Staff. That is the kind of arrangement we have adopted. We will have the Kenya Internal Security Services where the regular Police and the Administration Police Service will be separate.

Ms. Karua: But under one Inspector-General.

Mr. Vice-Chairman: But under one Inspector-General as the commandant. Is that okay, hon. Musila?

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaisserry): But, Mr. Vice-Chairman, Sir, just a little bit. Then, it should not be Kenya Internal Security Services; it should be Kenya Internal Security Service. Then you put the police and the AP down.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): I can see a problem!

Mr. Vice-Chairman: Kenya Defence Forces

The Assistant Minister, Ministry of State for Defence (Mr. Musila): I can see a problem!

Mr. Vice-Chairman: But you will have one police service. This is fine.

The Assistant Minister, Ministry of State for Defence (Mr. Musila): But there is a problem. There is a problem I want to point out.

Mr. Vice-Chairman: Can we move forward, please?

Mr. Ruto: On a point of order, Mr. Vice-Chairman, Sir.

Mr. Vice-Chairman: Which point of order, Isaac? We have moved forward! We have adopted Article 277(1) and Article 277(2). Can we move forward to Article 277(3)?

“(3) In the performance of their functions, the national security organs and every member of the national security organs shall not—

(a) act in a partisan manner;

(b) further any interest of a political party or cause;

(c) prejudice a political interest or political cause that is legitimate under this Constitution; or

(d) obey a manifestly illegal order.”

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, part “c”, in my estimation, has no meaning. And “d”, an illegal order is an illegal order. It does not have to be manifestly

Ms. Karua: Neither does it have to be in the Constitution.

The Minister for Foreign Affairs (Mr. Wetangula): Yes, neither does it have to be in the Constitution. So, we delete “c” and “d”.

Mr. Vice-Chairman: You move for the deletion of “c” and “d” and the retention of Article 277(3)(a) and (b)?

The Minister for Foreign Affairs (Mr. Wetangula): Yes.

The Minister for Tourism (Mr. Balala): I second.

Mr. Vice-Chairman: *Mheshimiwa* Balala seconds!

The Minister for Lands (Mr. Orenge): Mr. Vice-Chairman, Sir, this is for the protection of the armed forces themselves; it is not for the purposes of the public. So that if he disobeys an order which is illegal, it has a constitutional foundation. I think part of the problem that we have had in Kenya over the years is, again, going back to the KTN raid, it was police officers obeying illegal orders. But the consequence of disobeying that order or if you fall, you fall out of favour - like Kamau did - the State now resorted to punishing him instead of the political class. So, this is really for the protection of the armed forces. And you know there are rules of engagement and all that, and that will flow from this general provision for the protection of the armed forces.

Mr. Vice-Chairman: So, can we then carry 3 with the amendment of “d”, removing “manifestly”?

Ms. Karua: Mr. Vice-Chairman, Sir, you see we have said they will submit to civilian authority. So, we are actually telling them to obey because civilian authority is represented by the political

class. The moment you say that, then you bring in the illegal orders and you are leaving the armed forces at the mercy of people who may interpret for them differently. Let us remove debate; debate belongs to the court where one will be saying "The order I disobeyed was illegal." You see? If you bring debate into the Constitution---

(Loud consultations)

Which constitution has this clause?

The Minister for Lands (Mr. Orenge): Now, look at it; the Rome Statute is part of Municipal law in Kenya, whether you like it or not. The Rome Statute makes the International Criminal Court, a local entity, to the extent that the Statute provide. And there, clearly, there are provisions of this nature which it does not harm for the protection of those in junior positions who get into situations like the KTN raid and you are told that you must obey first and then---

Ms. Karua: But since---

Mr. Vice-Chairman: Order!

Ms. Karua: Mr. Vice-Chairman, Sir, he interrupted me!

Mr. Vice-Chairman: Ms. Karua, you still have the Floor.

Ms. Karua: Because what hon. Orenge is saying may be so, but the moment you bring in the debate of what is an illegal order, the Force Standing Orders tell the police exactly what to do in different situations. So, let us not introduce anything else to them; the Force Standing Orders is enough for them and let us leave the rest for debate in a court of law. Otherwise, it will no longer be a disciplined force; it will be the argument force.

Mr. Vice-Chairman: I want a very definite proposal on how to deal with part 3.

The Minister for Foreign Affairs (Mr. Wetangula): I propose the deletion of "c" and "d"

Mr. Vice-Chairman: You propose the deletion of "c" and "d"

The Minister for Foreign Affairs (Mr. Wetangula): Yes.

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Vice-Chairman, Sir, I want to support because of only one reason---

Mr. Vice-Chairman: Order, please! You are supporting what?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Deletion. We already have the Bill on Human Rights. I am looking at a situation whereby there is an Al-Qaeda member who has the right to life, as enshrined in the Constitution. Therefore, if I command you today that "This is an Al-Qaeda guy, I want you to shoot him down," you can argue the same basis in court; that, that is the reason why you disobeyed – because that gentleman had the right to live – and then you let him go. I agree with Ms. Karua that it will no longer be a disciplined force. The authority in the armed forces will be questionable.

And these days, Mr. Vice-Chairman, Sir, Kenyans are very fond of litigation. People will decide to disobey orders and there will no longer be discipline in the forces.

(Loud consultations)

Mr. Vice-Chairman: Order! What is the problem with “c”?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): Mr. Vice-Chairman, Sir, it reads clearly. For me, I do not have a problem with part “c”; I have a problem with part “d” – “To obey a manifestly illegal order.”

Mr. Vice-Chairman: Part “c” is okay?

The Assistant Minister for Water and Irrigation (Mr. Kiunjuri): For me part “c” is okay. I have a problem with part “d”.

Ms. Odhiambo: Mr. Vice-Chairman, Sir, I have no problem part “c” and “d”. I would want to focus especially on part “d”. very recently, I think most of us saw a situation where when there were riots over this Jamaican guy, then one of the police, who is a Muslim, was being forced to attack, together with the public, fellow Muslims. He refused and he has been fired. So, how do you protect

An hon. Member: *(Off record)*

Ms. Odhiambo: He was being forced to do--- That is an illegal order! How do you ask---

An hon. Member: *(Off record)*

Ms. Odhiambo: No, no, no, no! Let me just explain!

Mr. Vice-Chairman: Order! Let her have her say!

Ms. Odhiambo: Let me explain how it is illegal. If you, as a police follow order to quell a riot as the police alone, that is okay. But when you, as a police, get civilians to go and attack other civilians, that is manifestly illegal! Why are you following such orders? So, I do not support the deletion.

Mr. Kioni: Mr. Vice-Chairman, Sir, I want to record my objection to all this. One, is that when we went to Article 277 (c), that is a merger. Something that has been objected to by Kenyans out there. Two, when we get that example; we have heard a lot of examples that he is giving us the examples as to why this section is crafted this way. The issue of the KTN raid has been mentioned repeatedly. Now, we have the issue of the *Jamia* Mosque with somebody being told by Kenyans “Go and attack” and we want to put it in the Constitution so that when he is next told by Kenyans to “Go and attack” other Kenyans, he does not go. If that is what has informed the crafting of this Section, then we have it all wrong!

Mr. Vice-Chairman: *Mheshimiwa* Kioni, with all due respect---

Mr. Kioni: Part "c", to me, does not seem to make any meaning. And I hold that, one, my objection be registered on what we did – merging the Kenya Police and the Administration Police. That is against the will of Kenyans. Two---

Mr. Vice-Chairman: But we have really not merged---

Mr. Kioni: I take it as a merger and, for that reason, I want my objection registered.

Mr. Vice-Chairman: Okay.

Mr. Kioni: Then, three, if we are not deleting parts "c" and "d", I want my objection registered also.

The Minister for Agriculture (Mr. Samoei): Mr. Vice-Chairman, Sir, for us to make progress, I think part "c" looks funny. If you talk about a political interest, that is very subjective. You know, you do not know what that is. I would propose that we accept that we delete both parts "c" and "d." Let us remove those two.

Mr. Vice-Chairman: Do we, in the interests of moving forward delete both parts "c" and "d"?

An hon. Member: Yes.

Ms. Karua: (Off record)

(Loud consultations)

Mr. Vice-Chairman: Order!

The Minister for Lands (Mr. Orenge): Mr. Vice-Chairman, Sir, what is happening may not be taken seriously because, probably, the way it falls in place may not be very clear. But I have gone to court in many cases affecting police officers who have been dismissed. If you look at the formulation of the Police Standing Orders, you know the ordinary police officers really do not have a say; and some are for very innocent positions! I will inform you that nearly all the cases I have done against the actions taken by either the Police Commissioner or the Police Service Commission have been nullified by the courts. Because if you look at the situation in which these standing orders were made, they were made for a colonial police where the police officers were expected to obey orders coming from superiors, whatever the consequences of those orders. And I think since we are talking about reform of the police force, we must have something in the Constitution because I was asked the question: "Okay, you are talking about the Police Standing Orders, but where does it flow from?" even if you look at Section 86 which talks about the disciplined forces, which secures some of their rights, like disciplined forces have still got protection against torture and life. Why is it that even the secure protection of the law is not definitely mentioned in a formulation that can give an ordinary *askaris* who may be sacked for reasons which are not appropriate? I will plead with you that this stays.

Mr. Vice-Chairman: Okay. I want us to bring this to a close.

Mheshimiwa Wetangula, please, help us bring this to a close. What is the problem with stopping these fellows from obeying illegal orders?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, you know very well, as a lawyer, that we interpret--- In fact, what amounts to an illegal order is a long debate; long, long debate! These are matters that should go to legislation and to Police Force Standing Orders that will define what illegal orders are. But these are not things for the Constitution!

Mr. Vice-Chairman: So, then, can we make a decision?

The Minister for Foreign Affairs (Mr. Wetangula): Mr. Vice-Chairman, Sir, part "c"---

Mr. Vice-Chairman: Do we delete parts "c" and "d"?

Hon. Members: Yes.

Mr. Vice-Chairman: Is that carried?

Hon. Members: Yes.

Ms. Karua: *Wachana na "d"!*

Mr. Vice-Chairman: Just hold on! Let u get some direction from the Chair.

Mr. Chairman: I needed some input on something a bit different so I could have your two minutes. There is some story developing that we have completely collided on the Kadhi's courts and we could not agree. There is a story in the media going on - I was just called by Ms. A. Abdalla who is in Nairobi - and that we had have a major disagreement on the Kadhi's courts that we have called two experts; one Muslim and one Christian. So, I wanted some decision on this.

We have agreed but as usual we did not want to give them details when we went to talk to them with Mr. Namwamba. We just told them that we have dealt with these chapters and most of the issues are agreed and we are moving forward. It is a rumour! I think it is the same one that came with the SMS but now it has gone further and the media seems to say that somebody in the meeting has told them that there was a disagreement and we have called experts tomorrow.

Mr. Vice-Chairman: That is exactly what we told them: Those are the words we used.

Mr. Chairman: I think the one that went live with it was Citizen so I have asked the Citizen to come. I needed to talk to you before--- (*Off record*)

I do not think it is the Committee!

Mr. Vice-Chairman: We need to conclude and go for dinner, can we then allow the Chair to address the---

Mr. Chairman: I would like Mr. Namwamba with me when I am doing that.

Mr. Vice-Chairman: Please let us make a decision on this. Lead us to a decision Maj-Gen. Nkaisserry.

The Assistant Minister, Ministry of State for Defence (Maj-Gen. Nkaiserry): When you look at 3, in the performance of their functions, the national security organs and every member of the national security organs shall not--- We should not read this thing in isolation. We should read that in the main statement; shall not obey a manifestly illegal order, meaning we are not only talking about the police here. We are talking of defence. I can wake up tomorrow and say: "Attack so and so!" and there is no proper order; it is an illegal order. So, you can delete (c), I do not care but (d) is very dangerous.

Mr. Vice-Chairman: Mr. Wetangula, please lead us to a compromise!

The Minister for Foreign Affairs (Mr. Wetangula): Although I do not know what he means, I can let it pass but (d) is open to all manner of interpretations. Let us leave it out so that it is found; if it is the Army, it will be in the Armed Forces Act, Cap.99, if it is the police it will be in the Police Act and the---

Mr. Vice-Chairman: Can we live without (d)? Can we carry Article 3 as amended by deleting (d)?

Hon. Members: Yes!

Mr. Vice-Chairman: Is that carried?

The Assistant Minister for East African Community (Mr. Munya): I want my objection to be recorded for including (c) because it does not mean anything to me and I also object to the merging of the police forces.

Mr. Vice-Chairman: That is noted!

The Assistant Minister for East African Community (Mr. Munya): I am recording my objection to both of them.

Mr. Vice-Chairman: That is recorded! Can we move forward?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): Mr. Vice-Chairman, Sir, I regret that I have to record my objection on 277(1) (c). That to me would be dangerous because I do not think we are doing the right thing.

Mr. Vice-Chairman: But really we have not merged the two forces.

Mr. Kioni: It amounts to that!

The Assistant Minister, Ministry of State for Defence (Mr. Musila): When you talked about one command of Director-General---

Mr. Vice-Chairman: Is the Army and the Navy one thing?

The Assistant Minister, Ministry of State for Defence (Mr. Musila): This is different because if it is the Administration Police (AP), someone said you need the PC and DC to have command over those people. If we are having---

Mr. Vice-Chairman: The objection is taken!

Mr. Kioni: Mr. Vice-Chairman, Sir, my objection!

Mr. Vice-Chairman: Your objection was taken!

Mr. Kioni: Mr. Vice-Chairman, Sir, I want it officially recorded that I have also objected to that merger of (c); I think we should not hoodwink each other here. That is a merger! I have objected to (c) ---

Mr. Vice-Chairman: That objection is already on record! Mr. Kioni, you are being repetitive!

Mr. Kioni: I also object to the lack of deletion of (c) and (d). There is mischief in what we have done!

Mr. Vice-Chairman: Okay! Just record your objection! Your objection is taken! So, do you want us to re-open 277(c)? We do not have to threaten each other with the Press! The Press is already running amok without your incitement! We do not have to----

(Loud consultations)

Order! We have been working in a very good atmosphere and I do not think there is need for any threats about the Press. The Press has already decided to play games. We have recorded objections. We have had a tradition that any proposal adopted can attract an objection and the objections are on record. We have recorded three objections to 277(1) (c). Those objections are on record. Tomorrow when we get into the details of discussing how that Internal Security Services is supposed to be amplified, we will revisit those issues. But I want us to move forward; 277(4):-

“A person shall not establish an organization---

Hon. Members: No!

Mr. Vice-Chairman: Deletion of (d)? Can you put that on record?

The Minister for Lands (Mr. Orengo): I am objection to the deletion of 277(3)(d)!

Mr. Vice-Chairman: Maj-Gen. Nkaisserry also objected to that!

Ms. Odhiambo: I am also objecting to the deletion of 277(3) (d)!

Mr. Vice-Chairman: Okay! So, let us move forward! So 277(3) (d) has attracted five objections but the Motion is carried.

Mr. Ombui: Mr. Vice-Chairman, Sir, I think it is my right to record my objection as regards 277(1) (c), the merging of the two police forces. I do not know the process of doing it so I also object to the same.

Mr. Vice-Chairman: Okay! Let us move on: (4) A person shall not establish an organization concerned with national security or a military or paramilitary organization except as provided for by this Constitution or by an Act of Parliament. Is that okay? Who proposes?

(Ms. Odhiambo proposed and Mr. Chachu seconded)

That is carried!

(5) The national security organs shall be subordinate to civilian authority. Who proposes?

(Mr. Samoei proposed and Mr. Wetangula seconded)

That is carried!

(6) Parliament shall enact legislation to provide for the functions, organization and administration of the national security organs.

(Mr. Kazungu proposes and Ms. Karua seconds)

I want a proposer for adoption of 277 as amended.

(Ms. Karua proposed and Mr. Kazungu seconded)

That is adopted! Is 277 carried as amended?

Hon. Members: No! Subject to the objections recorded!

Mr. Vice-Chairman: Okay! I now move that we take a break, have dinner and complete this Chapter 15 on National Security tomorrow. That will be our first order of business tomorrow morning or do you want us to come back and finish or do you want us to finish and go for dinner?

Could we start tomorrow at 8.30 a.m. instead of 9.00 a.m.? We are adjourned!

(The Committee adjourned at 8.35 p.m.)