

Paper laid by the
Chair of the
Special Committee
on the proposed Removal
from Office of Governor
of Embu County.

13/5/14

REPUBLIC OF KENYA



THE SENATE

ELEVENTH PARLIAMENT



Approved
Speaker
~~[Signature]~~
13/5/14

THE REPORT OF THE SPECIAL COMMITTEE ON THE PROPOSED
REMOVAL FROM OFFICE OF MARTIN NYAGA WAMBORA, THE
GOVERNOR OF EMBU COUNTY.

13TH MAY, 2014

PREFACE

Mr. Speaker Sir,

Honourable Senators will recall that at the special sitting of the Senate held on Tuesday 6th May, 2014, the Honourable Speaker of the Senate, by way of a Communication from the Chair, informed the Senate that he had received correspondence from the Speaker of the County Assembly of Embu communicating the approval of a Motion by the County Assembly of Embu to remove, from office, the Governor of Embu County.

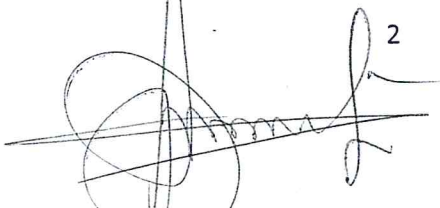
Mr. Speaker Sir,

Thereafter, the Senate Majority Leader gave Notice of and moved the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 29th April, 2014 the County Assembly of Embu approved a Motion "to remove from office, by impeachment," the County Governor of Embu County;

AND FURTHER, WHEREAS by letters dated 29th April, 2014 (Ref: CAE/SCA/1/35 and 36) and received in the Office of the Speaker of the Senate on 30th April, 2014, and 2nd May, 2014, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;

AND WHEREAS, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 68(1)(b) the Senate, by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;



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NOW THEREFORE, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 68(1)(b), the Senate resolves to establish a Special Committee comprising the following Senators –

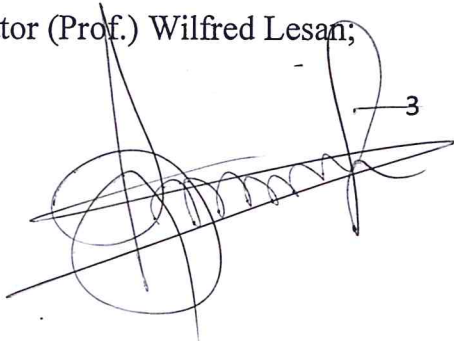
- 1. Senator Kipchumba Murkomen;*
- 2. Senator Kimani Wamatangi;*
- 3. Senator Zipporah Kittony;*
- 4. Senator (Prof.) Wilfred Lesan;*
- 5. Senator Naisula Lesuuda;*
- 6. Senator Peter Mositet;*
- 7. Senator James Orengo;*
- 8. Senator (Dr.) Boni Khalwale;*
- 9. Senator Boy Juma Boy;*
- 10. Senator (Eng.) Hargura Godana; and*
- 11. Senator Judith Sijeny;*

to investigate the proposed removal from office of the Governor of Embu County and to report to the Senate within ten (10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated.

Mr. Speaker Sir,

Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. Senator Kipchumba Murkomen;
2. Senator Kimani Wamatangi;
3. Senator Zipporah Kittony;
4. Senator (Prof.) Wilfred Lesan;



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5. Senator Naisula Lesuuda;
6. Senator Peter Mositet;
7. Senator James Orenge;
8. Senator Boni Khalwale;
9. Senator Boy Juma Boy;
10. Senator (Eng.) Hargura Godana; and
11. Senator Judith Sijeny;

to investigate the proposed removal from office of the Governor of Embu County and to report to the Senate within ten (10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated.

Mr. Speaker Sir,

Section 33(4) of the County Governments Act, 2012 and standing order 68(2) of the Senate Standing Orders mandates the Special Committee to-

(a) investigate the matter; and

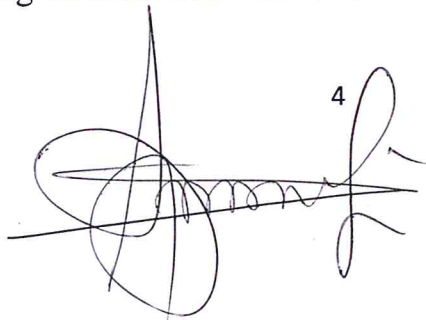
(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the Governor to have been substantiated.

The Committee, in the execution of its mandate, was guided by these provisions of the Act and the Standing Orders.

Mr. Speaker Sir,

The Special Committee held its first meeting on the afternoon of Tuesday, 6th May, 2014, immediately following its establishment. Pursuant to standing order 183, owing to the

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urgency of the matter at hand, at that meeting, the Committee conducted the election of its Chairperson and Vice-Chairperson. Senator Boni Khalwale and Senator Kipchumba Murkomen were elected unopposed to the positions of Chairperson and Vice-Chairperson, respectively.

Mr. Speaker Sir,

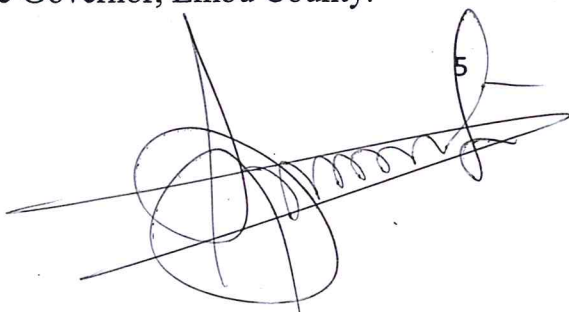
Section 33 and standing order 68(3) of the Senate Standing Orders provide that the Governor shall have the right to appear and be represented before the Special Committee during its investigations. Pursuant to these provisions of the law, the Committee invited both the Governor and the County Assembly to appear and be represented before the Committee. Both parties were represented by Counsel in the proceedings.

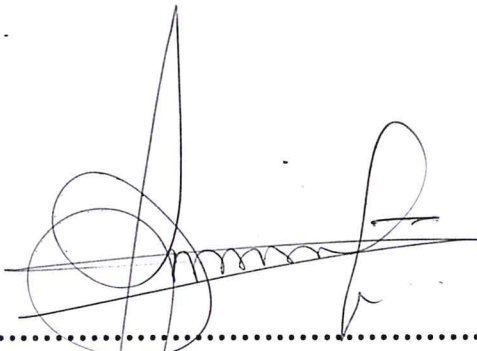
Mr. Speaker Sir,

The Committee wishes to thank the Offices of the Speaker of the Senate and the Clerk of the Senate for the support extended to it in the execution of its mandate. The Committee further extends its appreciation to the parties to the matter; namely, the County Assembly and its Advocates and the Governor and his Advocates for their well-researched and eloquent submissions in this matter. The Committee also appreciates the media for the coverage of its proceedings during the course of the investigations. Further, the Committee acknowledges the members of the public who expressed great interest in the proceedings, sitting in the galleries as they followed the proceedings in the matter.

Mr. Speaker Sir,

It is now my pleasant duty and privilege, on behalf of the Special Committee, to present to the Senate, this Report of the Special Committee on the Proposed Removal from Office of the Governor, Embu County.





SIGNED:

SEN. (DR.) BONI KHALWALE, M.P.
(CHAIRPERSON)

DATE..... 13TH May 2014

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1.0 INTRODUCTION

1.1. Background

1. Pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, No. 17 of 2012, on 29th April, 2014, the County Assembly of Embu approved Motions “to remove from office, by impeachment,” the Governor of Embu County.

2. Article 181 of the Constitution provides as follows-

Removal of a county governor

(1) *A county governor may be removed from office on any of the following grounds—*

- (a) gross violation of this Constitution or any other law;*
- (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;*
- (c) abuse of office or gross misconduct; or*
- (d) physical or mental incapacity to perform the functions of office of county governor.*

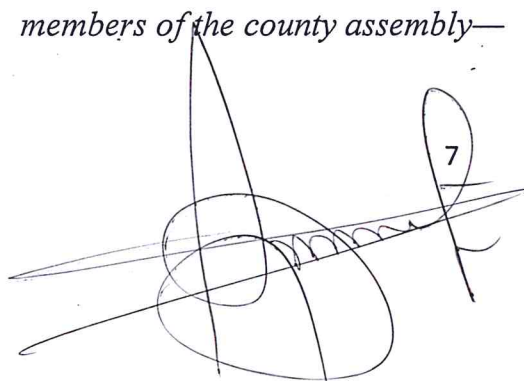
(2) *Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).*

3. Section 33 of the County Governments Act provides as follows-

Removal of a governor

(1) *A member of the county assembly may by notice to the speaker, supported at least a third of all the members, move a motion for the removal of governor under Article 181 of the Constitution.*

(2) *If a motion under subsection (1) is supported by at least two-thirds of all members of the county assembly—*



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- (a) *the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and*
- (b) *the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.*
- (3) *Within seven days after receiving notice of a resolution from the speaker of the county assembly—*
- (a) *the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and*
- (b) *the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.*
- (4) *A special committee appointed under subsection (3)(b) shall—*
- (a) *investigate the matter; and*
- (b) *report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.*
- (5) *The governor shall have the right to appear and be represented before the special committee during its investigations.*
- (6) *If the special committee reports that the particulars of any allegation against the governor—*
- (a) *have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or*
- (b) *have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.*
- (7) *If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*
- (8) *If a vote in the Senate fails to result in the removal of the governor, the*

Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.

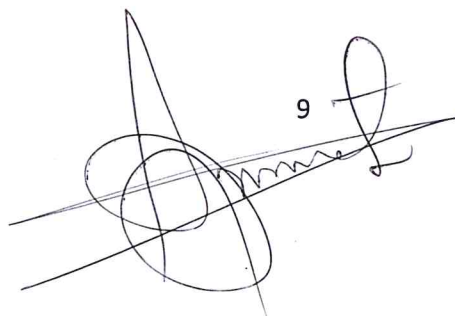
(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.

4. By letters dated 29th April, 2014 (Ref: CAE/SCA/1/35 and 36) which were received in the Office of the Speaker of the Senate on 30th April, 2014, and 2nd May, 2014, respectively, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the Motion for the removal from Office of the Governor by the County Assembly and further forwarded to the Speaker of the Senate the following documents in respect of the Governor-

- (1) A notification to the Governor of the charges leveled against him and an invitation addressed to the Governor inviting him to appear before the County Assembly to defend himself;
- (2) the Particulars of Allegations thereon and related annexures; and
- (3) the Hansard Recording of the proceedings in respect of the Motion for the removal of the Governor from office.

5. The documents submitted by the County Assembly of Embu to the Speaker of the Senate are attached as *Annex I*.

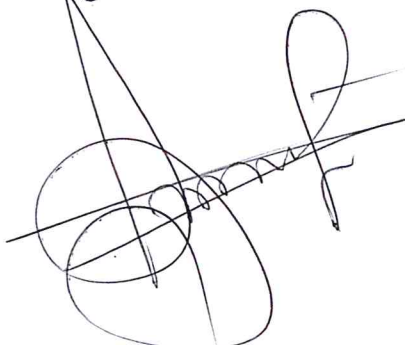
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6. In terms of Article 181 of the Constitution, section 33(3)(a) of the County Governments Act and standing order 68(1)(a) of the Senate Standing Orders, the Speaker of the Senate is required, *within seven days after receiving notice of a resolution from the Speaker of a County Assembly, to convene a meeting of the Senate to hear charges against the Governor.*
7. In this respect, by *Gazette* Notice No. 3020 dated 30th April, 2014, which was published in a Special Issue of the *Kenya Gazette* published on 2nd May, 2014, the Speaker of the Senate convened a special sitting of the Senate for Tuesday, 6th May, 2014 at the Senate Chamber on the First Floor of the County Hall Building in Nairobi, commencing at 2:30 p.m. Pursuant to standing order 29(5) of the Senate Standing Orders, the Speaker specified the business of that sitting to be, among others, the hearing of the charges against Mr. Martin Nyaga Wambora, the Governor, Embu County.
8. The *Gazette* Notice is attached as *Annex 2*.

1.2. **The Special Sitting of the Senate held on 6th May, 2014**

9. The special sitting of the Senate was held on Tuesday 6th May, 2014. The Order Paper of that sitting is attached as *Annex 3*. At that sitting, the Speaker of the Senate, by way of a Communication, informed the Senators that he had received communication from the Speaker of the County Assembly of Embu relating to the approval of the Motion by the County Assembly of Embu County for the removal of the Governor of Embu County. The Communication of the Speaker of the Senate is attached as *Annex 4*.
10. Thereafter, the Senate Majority Leader gave Notice of and thereafter moved the following Motion-



THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 29th April, 2014 the County Assembly of Embu approved a Motion “to remove from office, by impeachment,” the County Governor of Embu County;

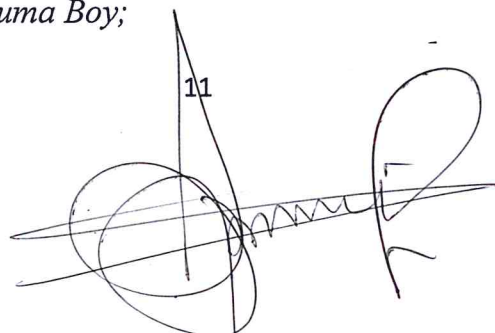
AND FURTHER, WHEREAS by letters dated 29th April, 2014 (Ref: CAE/SCA/1/35 and 36) and received in the Office of the Speaker of the Senate on 30th April, 2014, and 2nd May, 2014 respectively, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;

AND WHEREAS, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 68(1)(b) the Senate, by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

NOW THEREFORE, pursuant to section 33(3)(b) of the County Governments Act, 2012 and standing order 68(1)(b), the Senate resolves to establish a Special Committee comprising the following Senators –

1. Senator Kipchumba Murkomen;
2. Senator Kimani Wamatangi;
3. Senator Zipporah Kittony;
4. Senator (Prof.) Wilfred Lesan;
5. Senator Naisula Lesuuda;
6. Senator Peter Mositet;
7. Senator James Orengo;
8. Senator (Dr.) Boni Khalwale;
9. Senator Boy Juma Boy;

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10. Senator (Eng.) Hargura Godana; and

11. Senator Judith Sijeny;

to investigate the proposed removal from office of the Governor of Embu County and to report to the Senate within ten (10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated.

11. Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. Senator Kipchumba Murkomen;

2. Senator Kimani Wamatangi;

3. Senator Zipporah Kittony;

4. Senator (Prof.) Wilfred Lesan;

5. Senator Naisula Lesuuda;

6. Senator Peter Mositet;

7. Senator James Orengo;

8. Senator Boni Khalwale;

9. Senator Boy Juma Boy;

10. Senator (Eng.) Hargura Godana; and

11. Senator Judith Sijeny;

to investigate the proposed removal from office of the Governor of Embu County and to report to the Senate within ten (10) days of its appointment on whether it finds the particulars of the allegations to have been substantiated.

2.0 METHOD OF WORK

12. In the execution of its mandate, the Committee conducted a number of activities which are set out below.

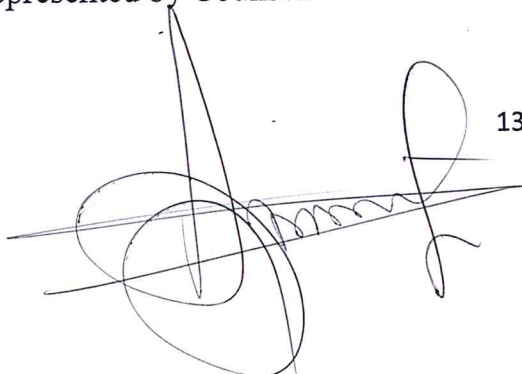
2.1. Meetings of the Special Committee

13. The Special Committee held its first meeting on the afternoon of Tuesday, 6th May, 2014, immediately following its establishment. Pursuant to standing order 183, owing to the strict timelines attached to the execution of the mandate of the Special Committee, at that meeting, the Clerk of the Senate conducted the election of the Chairperson and Vice-Chairperson of the Committee. Senator (Dr.) Boni Khalwale was elected, unopposed, as the Chairperson of the Committee while Senator Kipchumba Murkomen was similarly elected unopposed as the Vice-Chairperson of the Committee.

2.2. Indicative Programme of Events

14. Following the conduct of the election at the first meeting of the Committee, the Committee considered an Indicative Programme of Events which is attached as *Annex 5*. The Committee observed that in terms of section 33(4)(b) of the County Governments Act, 2012 and standing order 68(2)(b) of the Senate Standing Orders, the Committee had only ten days within which to investigate the matter in respect of the Governor and thereafter to report to the Senate on whether it found the Particulars of the Allegations against the Governor to have been substantiated.

15. The Committee observed that from the experience of other jurisdictions, proceedings for the removal of persons from office, commonly referred to as impeachment proceedings, are quasi-judicial in nature. The proceedings therefore bear close resemblance to a court-room trial, complete with examination and cross-examination of witnesses. Parties to the proceedings will usually be represented by Counsel.

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16. It was evident to the Committee, at that early stage that, bearing in mind the nature of the proceedings anticipated in the hearing for the removal from office of the Governor, the Committee had the onerous task of ensuring that the statutory timelines were adhered to.

2.3. Invitations to Appear

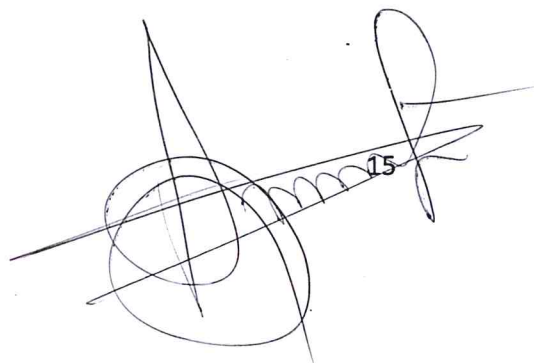
17. The Committee observed that section 33(5) of the County Governments Act, 2012 and standing order 68(3) of the Senate Standing Orders provide that *“the Governor shall have the right to appear and be represented before the special committee during its investigations”*. The Committee noted that the phraseology in these provisions of law required *“an invitation to appear before the Committee”* as opposed to *“Witness Summons”*. Witness summonses, which are the tool used to compel the attendance of witnesses before courts and Parliamentary Committees, require the attendance of the witness summoned.
18. In terms of section 23(a) of the National Assembly (Powers and Privileges) Act (Cap 6), as read together with section 7 of the Sixth Schedule to the Constitution, a witness who is summoned by a Parliamentary Committee must appear before the Court or Committee at the pain of payment of a fine not exceeding two thousand shillings or imprisonment for a term not exceeding twelve months, or both such fine and imprisonment where the witness fails to make an appearance. A right to appear before a Committee, however, is not mandatory. A person who is invited to appear has the discretion to decide whether or not to appear before the Committee. The Committee would however be required to demonstrate that it afforded the person, in this case the Governor, an opportunity to appear and be represented before the Committee. The Governor would then determine whether to appear before the Committee and if so, whether to do so in person or by Advocate, or in person and by Advocate.

19. The Committee further observed that the County Assembly, as the originator of the Resolution for the removal of the Governor had by the letters to the Speaker of the Senate dated 29th April, 2014 filed, together with the Resolution of the County Assembly, a number of documents in respect of the Resolution. The Assembly therefore had the option not to appear before the Committee and to rely entirely on the written documentation filed with the Office of the Speaker. However, the Committee observed that in the interests of justice, it would also be necessary to invite the Assembly to appear before the Committee, if it so desired, and to produce further evidence, if any, be it written evidence or presented by way of witnesses.

20. Having made these observations, and taking into account the limited time available, at its first meeting held on 6th May, 2014, the Committee resolved to invite the Assembly and the Governor to appear before the Committee for the hearing of the evidence. Copies of the Notices to Appear are attached as *Annex 6*. The Invitations to Appear were duly served on the parties and both parties were represented at the hearing as follows-

- (a) Mr. Charles Njenga and Mr. George Nganga Mbugua of the firm of M/s Muchoki Kangata Njenga & Company appeared on behalf of the County Assembly;
- (b) Mr. Wilfred Nyamu of Nyamu and Nyamu Company Advocates appeared on behalf of the Governor.

21. The Invitation to Appear to the County Assembly required the Assembly, where it chose to appear before the Committee, by Thursday, 8th May, 2014, to file with the Office of the Clerk of the Senate, documentation-



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- (a) designating the Members, if any, who would attend and represent the Assembly in the proceedings before the Special Committee;
- (b) indicating the mode of appearance by the Members before the Special Committee; whether in person, by Advocate, or in person and by Advocate;
- (c) indicating the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
- (d) specifying any other evidence to be relied on.

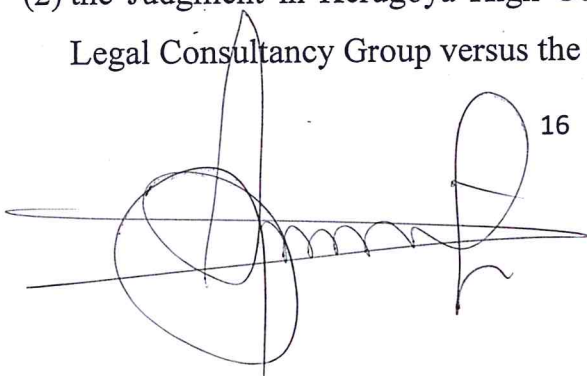
22. In the Invitation to Appear, the Governor was requested to indicate whether he would exercise his right to appear before the Committee. If he chose to exercise that right, the Governor was informed that he would be required, by Thursday, 8th May, 2014, to file an answer to the charges with the Office of the Clerk of the Senate in which the Governor would set out-

- (a) the Governor's response to the particulars of the allegations;
- (b) how the Governor proposed to appear before the Special Committee; whether in person, by Advocate, or in person and by Advocate;
- (c) the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
- (d) any other evidence to be relied on.

23. In addition to the documents submitted by the Speaker of the County Assembly to the Senate by the letter dated 29th April, 2014, the County Assembly further filed the following documents-

- (1) a Response to the Invitation to Appear, filed on 8th May, 2014, *Annex 8*;
- (2) the Judgment in Kerugoya High Court Petition No. 3 of 2014, International Legal Consultancy Group versus the Senate and Another, *Annex 9*; and

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(3) the Judgment in Kerugoya High Court Petition No. 8 of 2014, Hon. Martin Nyagah Wambora and 4 Others versus the Speaker of the Senate and 5 Others, *Annex 10*.

24. In response to the Invitation to Appear, Counsel for the Governor filed “the Governor’s Memorandum of Response on 10th May, 2014.

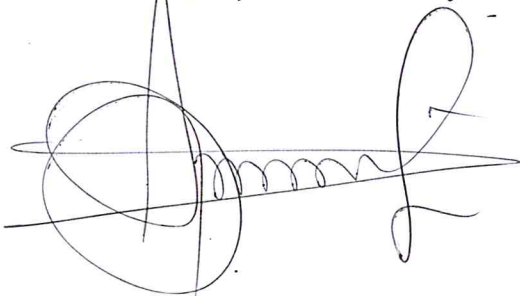
2.4. Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor

25. On the Rules of Procedure, the Committee observed that Article 181 of the Constitution, section 33 of the County Governments Act, 2012 and standing order 68 of the Senate Standing Orders did not provide sufficient detail on the procedure to be followed by the Special Committee in the conduct of its investigation.

26. The Committee therefore observed that there was need to develop Rules of Procedure that would address specific issues of procedure. The Committee observed that, the Senates of the United States of America and the Philippines had developed and adopted Rules of Procedure to govern investigations during impeachment proceedings to supplement the general Rules of Procedure of the respective Senates.

27. The Committee adopted the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor on 9th May, 2014. The Rules of Procedure, which are attached as *Annex 7*, regulate the procedure relating to a number of critical matters in respect of which the County Governments Act and the Standing Orders were silent.

28. It is important to observe that under Rule 33, the Committee proposes that the Rules shall, with necessary modifications, apply to the process for the removal of

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any other State or public officer in respect of whom the Senate has jurisdiction. The Committee further proposes that, at the appropriate time, the Senate considers adopting the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor. The adoption of the Rules by the Senate would provide a common framework for the operation of future Special Committees.

29. The Rules of Procedure were applied to the investigation by the Committee.

3.0 THE CONFERENCE OF PARTIES

30. The Conference of Parties was held on Friday, 9th May, 2014. This provided the opportunity for the formal introduction of the Counsel for both parties to the Special Committee.

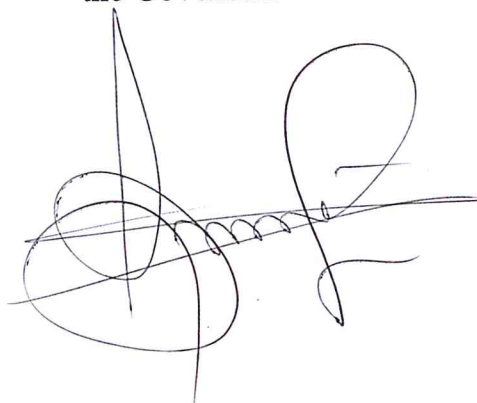
4.0 READING OF THE CHARGES

31. Pursuant to rule 16 of the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor, the hearing before the Committee commenced with the reading out, verbatim, of the Particulars of the Allegations against the Governor. The Charges are at page 3 of *Annex 1*.

32. Thereafter, following an application by Counsel for the Governor, the hearing was adjourned to Sunday, 11th May, 2014 to allow the Governor more time to prepare a Response to the Charges filed by the County Assembly.

5.0 OPENING STATEMENTS

33. Pursuant to rule 17, on Sunday, 11th May, 2014, the Committee allowed an Opening Statement to be made on behalf of the County Assembly and on behalf of the Governor.

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34. A number of issues emerged from the Opening Statements which the Special Committee noted and requested the parties to address in the course of the hearing. The issues are as follows-

- (1) the issue of sub judice;
- (2) the issue of double jeopardy; that the Governor was being tried by the same Committee for the same charges;
- (3) the issue that three months had not lapsed since the last impeachment proceedings;
- (4) the threshold required for impeachment of a Governor; and
- (5) the nexus between the Governor and the alleged violations.

35. It is important to note that after delivering his Opening Remarks and before any further proceedings in the matter, Mr. Wilfred Nyamu Mate, Counsel for the Governor, indicated that his instructions extended only to raising the issues that he had raised in his Opening Statement and that he had instructions not to proceed beyond where he had reached. The Counsel stated as follows *"I further want to state that should this Committee decide that it is proceeding with this matter at this juncture, and owing to the issues that we have raised, we would humbly request that it be deemed that we have responded to the Invitation and owing to the reservations raised, we shall seek leave so that proceedings may be held in our absence"*.

36. On being asked by the Committee whether he was seeking to withdraw from the proceedings or to withdraw the Memorandum of Response filed on behalf of the Governor, the Counsel stated that the Governor was not withdrawing from the proceedings but that he had responded to the Invitation to Appear and had responded as far as he wished to respond to the allegations by the County Assembly.

37. Before addressing itself to the specifics of the Charges, the Committee shall commence by considering each of these emerging issues.

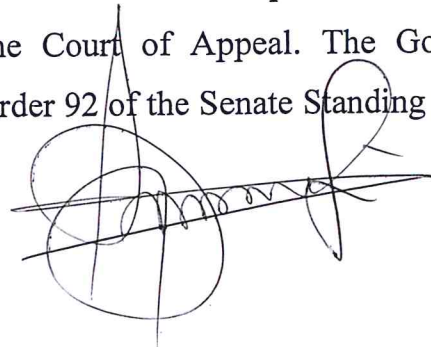
6.0 THE EMERGING ISSUES

6.1 Sub-Judice

38. The Governor of Embu, in his memorandum of response to the charges filed with the Office of the Clerk of the Senate on 10th May 2014 submits that the Senate had, on 4th February, 2014, formed a Special Committee to investigate an earlier proposed removal from office of the Governor of Embu County. That Special Committee found that the allegations had been substantiated in a Report tabled before the Senate on 14th February, 2014. The Governor of Embu had challenged those impeachment proceedings by filing a petition in the High Court. The High Court sitting in Kerugoya in a judgment delivered on 16th April 2014 quashed the proceedings and resolution of the Senate for the removal of Governor Martin Wambora as the Governor of Embu County.

39. The memorandum further states that the Honourable Martin Wambora was dissatisfied with part of the Judgment that failed to determine whether the allegations made against him met the constitutional threshold for the removal of a Governor and he had appealed to the Court of Appeal in Nyeri.

40. Honourable Martin Wambora postulated that the allegations forwarded to the Senate and now before the Special Committee were substantially the same as the charges that were the subject of the then pending appeal proceedings before the Court of Appeal in Nyeri. Honourable Wambora therefore submitted that it would be proper and in accord with the rule of law that the Special Committee proceedings await the determination of the Court of Appeal. The Governor referred the Special Committee to standing order 92 of the Senate Standing Orders

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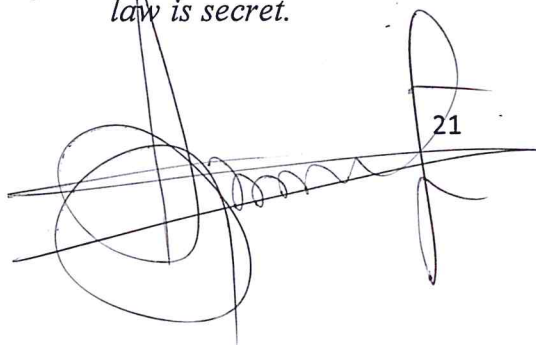
on the *sub judice* rule and asked that the same be invoked and that the current proceedings be held in abeyance.

41. Mr. Wilfred Nyamu Mati, when he appeared before the Special Committee on 11th May 2014 to represent the Governor, repeated this averments. He further informed the Committee that Hon. Wambora had initiated other proceedings before the High Court challenging these impeachment proceedings where the Speaker of the Senate and the Senate were the 3rd and 4th Respondents. He also made reference to the appeal at the Court of Appeal referred to in the memorandum of response in submitting that the Special Committee was in violation of the Senate Standing Orders on *sub-judice*. Mr. Nyamu however conceded that standing order 92(5) provides that notwithstanding the provisions of standing order 92(1) to (4), the Speaker may allow reference to any matter before the Senate or a Committee.

42. The Advocates for the County Assembly, in response to issue of *sub-judice* submitted that the rule applies to a matter that is actively before the court for determination. It is incumbent upon the Governor to supply the Special Committee with the pleadings of the cases referred to. They argued that the matter at the High Court was filed when the Embu County Assembly was already deliberating the proposed removal from office of the Governor of Embu County. They submitted that there was no court order barring the proceedings for the removal of the Governor and nothing in law prevented the Special Committee, and by extension the Senate from proceeding with the impeachment process merely because the Governor had filed proceedings in court.

43. Standing Order 92 of the Senate Standing Orders states as follows-

- (1) *Subject to paragraph (5), no Senator shall refer to any particular matter which is sub judice or which, by the operation of any written law is secret.*

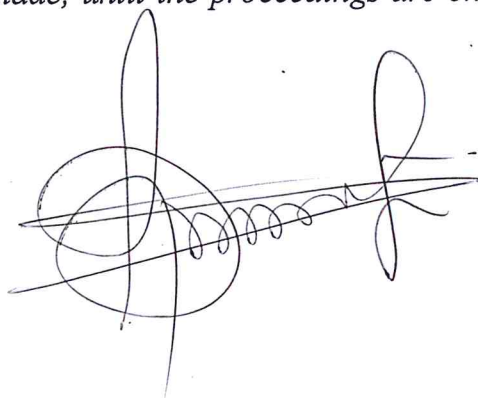


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- (2) *A matter shall be considered to be sub judice when it refers to active criminal or civil proceedings and the discussion of such matter is likely to prejudice its fair determination.*
- (3) *In determining whether a criminal or civil proceeding is active, the following shall apply-*
 - (a) *criminal proceedings shall be deemed to be active when a charge has been made or a summons to appear has been issued;*
 - (b) *criminal proceedings shall be deemed to have ceased to be active when they are concluded by verdict and sentence or discontinuance;*
 - (c) *civil proceedings shall be deemed to be active when arrangements for hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance;*
 - (d) *appellate proceedings whether criminal or civil shall be deemed to be active from the time they are commenced by application for leave to appeal or by notice of appeal until the proceedings are ended by judgment or discontinuance.*
- (4) *A Senator alleging that a matter is sub judice shall provide evidence to show that paragraphs (2) and (3) are applicable.*
- (5) *Notwithstanding this Standing Order, the Speaker may allow reference to any matter before the Senate or a Committee.*

44. The Special Committee noted that the issue of whether a matter was *sub judice* had previously been dealt with by Speakers of Parliament. In the Tenth Parliament, the Speaker of the National Assembly, Honourable Kenneth Marende, made several rulings on whether a matter alleged to be *sub-judice* may be discussed. On 7th March 2012, Hon. Marende made a ruling on whether a question relating to an alleged trespass on private land by Administration Police was *sub judice*. The relevant part of the ruling stated as follows:

“Under Standing Order 80(3)(c) civil proceedings would be considered active when arrangements have been made for hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance.

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Honourable Members, in the present matter, with respect to all the civil matters cited, I do not find that the Member has met all the requirements of Standing Order 80(2),(3)(c) and (4). There is no indication from the documents tabled by the Hon. Member on the present status of the court matters to which the documents refer. The following pertinent questions remain to me unanswered-

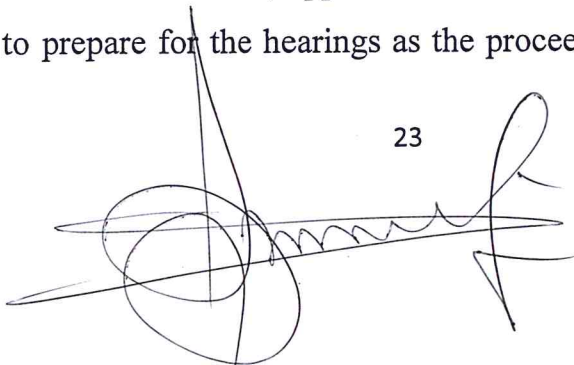
- (i) Did the applications referred to ever proceed to full hearing?*
- (ii) Are the applications presently or at listed for hearing?*
- (iii) Were the interlocutory orders issued by the High Court on 30th August, 2010 extended?*
- (iv) Has judgment been issued in any of the matters? Have the applications been withdrawn?*

On the criminal matter, there is similarly no indication of the present position of the case from the documents on record. Did the case proceed to court? Has the matter been concluded? Were the charges withdrawn? What sentence was meted out, if any? I, therefore, find that with respect to the criminal case the Member has not met the requirements of Standing Order 80(2), (3)(a) and (b), and (4).

Honourable Members, in the circumstances, bearing in mind the considerable length of time that has elapsed without the Speaker being furnished with the requisite evidence in terms of our rules, the claim by Mr. K.Kilonzo that the matters, the subject of Question No. 676, are sub judice does not meet the threshold of the Standing Orders. I, therefore, rule that Question No. 676 be fully answered. To this end, I direct that the Question be listed in the Order Paper for disposal at the earliest opportunity that Order No. 6 permits."

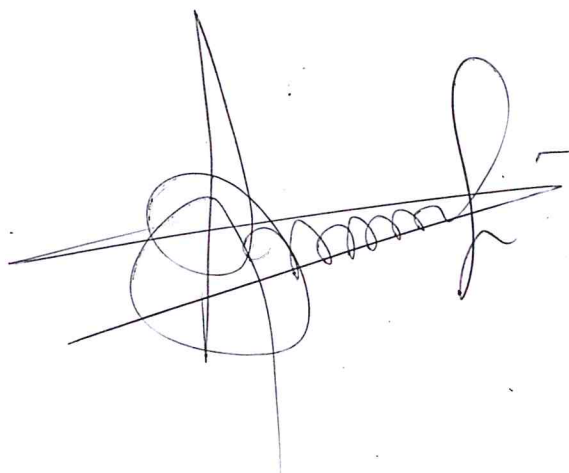
45. It is instructive to note that standing order 80 of the National Assembly Standing Orders referred to in the ruling of the then Speaker of the National Assembly is practically the same, word for word, as standing order 92 of the Senate Standing Orders.

46. The Special Committee noted that its hearings had initially been scheduled to commence on Friday, 9th May, 2014 at 9.00 a.m. On that date, Mr. Nyamu; Advocate for the Governor, appeared before the Special Committee and applied for time to prepare for the hearings as the proceedings had allegedly come to the

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Governor's attention only the day before. The Special Committee granted this request and adjourned its hearings to Sunday, 11th May, 2014, taking into account the fact that the Committee was expected to report to the Senate on Tuesday, 13th May, 2014. When Mr. Nyamu appeared before the Committee on 11th May, 2014 and raised the issue of *sub-judice*, he did not provide the Committee with a single document to support his claim that there was an appeal pending in the Court of Appeal in Nyeri with regard to these proceedings nor that there was a matter at the High Court on the same proceedings.

47. As the person alleging *sub judice*, the Special Committee found that it was incumbent on the Governor of Embu County to provide evidence that there were active civil proceedings and further that the discussion of the matter at hand was likely to prejudice its fair determination. The Governor did not provide any such evidence and the Committee therefore finds that the matter is not *sub-judice*.
48. The Special Committee further noted that the Governor shall have the right to appear before the Senate during the consideration of this report. The Governor may at that time, once again, raise the issue of *sub judice* and produce before the Senate documents in support of that claim.
49. The Committee noted that the Governor of Embu County, through his Advocate, indicated that he would be moving the Court of Appeal to determine whether the allegations made against the Governor met the constitutional threshold for removal of a Governor. The High Court at Kerugoya, in its judgment made on 16th April 2014 in High Court Petition No. 3 of 2014, *Hon. Martin Nyagah Wambora & 4 others -v- The Speaker of the Senate and 5 others*, stated as follows at paragraph 245, page 112-

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“We must to some extent agree with Mr. Nganga that the County Assembly and the Senate are the best judge to determine whether the charges presented against the 1st Petitioner were in accordance with Article 181 of the Constitution. The Constitution has set out that power of judging the merit of the charges to those two houses. It would thus be wrong in our view for this court to question the merits of the decision made by the County Assembly and the Senate. Indeed we wholly agree with the High Court decision in Nancy Baraza –v- Judicial Service Commission & 9 others (2012) e KLR 2013 it was held that;

“It is not for this Court or the Commission to find that the allegations made against the Petitioner did not amount to gross misconduct. In fact according to Pro. Yash Pal Ghai’s ‘Kenya Constitution: An instrument for change’ cited by the Petitioner ‘whether a conduct is gross or not will depend on the matter as exposed by the facts’ which facts it is the duty of the tribunal to establish.”

50. The Special Committee has also noted the ruling of Justice Majanja in High Court Constitutional Petition No. 213 of 2014, *Law Society of Kenya –v- The Cabinet Secretary Treasury and the Attorney General*, in which the Judge stated as follows-

“Article 95(4)(b) and (c) of the Constitution reposes in the National Assembly the mandate to exercise oversight on matters of revenue and expenditure. The petitioner has made grave allegations of fraud, corruption and incompetence which may result in the loss of substantial revenue if the amount is paid out. While the Court takes such allegations seriously, the constitutional mandate of the National Assembly cannot be ignored or wished away.

*While the High Court, under Article 165(3)(d) of the Constitution, has jurisdiction to hear and determine any question respecting the interpretation of the Constitution, the issue whether it should exercise such jurisdiction is a matter to be determined in the circumstances of each case. As the parties concede the matter is before the legislature and one of its core constitutional duties is to exercise oversight. The public interest must be determined on the basis of the Constitution which intends that State Organs exercise their fullest mandate to meet its objects. In light of the principles I have cited in **Gitirau Peter Munya’s case**, it is in such cases that the Court is called upon to exercise deference to the National*

Assembly. ... To issue the conservatory order would necessarily impinge on the ability of the legislature to exercise its constitutional mandate in the circumstances of the case."

51. The Special Committee therefore finds that the proper place for the determination of whether the allegations against Hon. Martin Wambora are substantiated is the Senate, as set out at Article 181 of the Constitution and section 33 of the County Government Act.

6.2 Double Jeopardy, Biais and Recussal

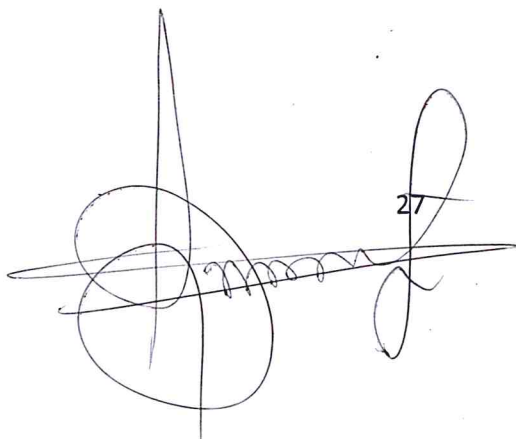
52. In his memorandum of response Hon. Martin Wambora raised the issue of double jeopardy stating that the proceedings before the Special Committee were based on substantially the same charges, particulars and grounds on which a Special Committee comprising of the same Senators as were in the present Special Committee found to have been substantiated in the Report tabled before the Senate on 14th February, 2014. Mr. Nyamu pointed out that even the Chairperson and Vice-Chairperson of the Special Committee were the same persons as the Chairperson and Vice Chairperson of the Special Committee that investigated the earlier charges against Governor Wambora.
53. The Governor, through his Advocate, submitted that the proceedings were quasi-judicial in nature. That the present Special Committee was faced with the same charges, based on the same facts as it had considered earlier and on which it had found the Governor guilty of the charges. Mr. Nyamu argued that the Committee could not arrive at a different decision from the one it had earlier reached. In the circumstances, he submitted that the Committee was biased and unable to arrive at a different decision from the one arrived at earlier. He submitted that the Chairperson of the Committee had passionately moved the earlier motion to impeach the Governor. Further, that the Committee was being asked to sit on appeal of on its own decision. He asked the Special Committee to recuse itself and

seek to have this matter handled by a Special Committee formed by other Members of the Senate. This, he argued, was the only way, that justice would be seen to have been done.

54. Mr. Nyamu then submitted that at the time the earlier impeachment proceedings were continuing there was a court order preventing the removal of the Governor from office. The High Court in Kerugoya thereafter found the Speaker and Clerk of the County Assembly of Embu guilty of contempt of court and they were awaiting sentencing on 15th May, 2014. He therefore argued that the County Assembly was actuated by malice in bringing these impeachment proceedings against the Governor.

55. In response, the Advocates for the County Assembly of Embu submitted that double jeopardy applied when a person is vexed twice, that is, the person is tried and acquitted of charges and then charged again with the same offence based on the same facts. This was not the case here as Governor Wambora's earlier impeachment was voided by the High Court. The Special Committee was referred to paragraph 317 at page 148 of the judgment in High Court Petition No. 3 of 2014 *Hon. Martin Nyagah Wambora & 4 others -v- The Speaker of the Senate and 5 others* which states as follows-

“For the avoidance of doubt, we are aware that some of the reliefs we have granted in this Petition, have the effect of reinstating the 1st Petitioner to the office of Governor of Embu County. However, this should not be construed as a bar to any future removal from office should the need arise as long as the same is conducted in accordance with the law.”

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56. The Special Committee was further referred to paragraph 316, page 147 of the same judgment that declared null and void all previous proceedings concerning the removal of Governor Wambora as follows-

We declare that the proceedings, resolutions, consequential gazette notices, actions and any communications with regard to the removal of the 1st Petitioner before the Embu County Assembly and the Senate were held in violation and in disregard of court orders and were therefore null and void.

57. The Advocates then pointed out that the procedure at the Senate had not been faulted and referred the Special Committee to paragraph 238 of the judgment which stated as follows-

We find that in the present case, the procedure followed at the Senate was not faulted. However, the 1st Petitioner claimed that the procedure used in the County Assembly denied him his rights to a hearing therefore violated his right to fair administrative action.

58. On the issue of recusal the Advocates for Embu County Assembly submitted that the setting up of the Special Committee was provided for under section 33(3)(b) of the County Governments Act. It is only the Senate that could set up the Special Committee. The Constitution of Kenya had provided for only one Senate and there could not be different Members of the Senate prior to the next General Elections.

59. The Advocates for the Assembly further pointed out that the Special Committee had warned itself of the need for impartiality and objective findings. These, they submitted, were fresh proceedings. The findings of the Special Committee were not binding on the Senate at Plenary. It was therefore, ultimately, for the Senate to determine the matter.

60. On the issue of bad faith, Counsel for the Assembly submitted that it is for the Governor of Embu to prove bad faith or malice and in this case the Governor had not proved the bad faith alleged.

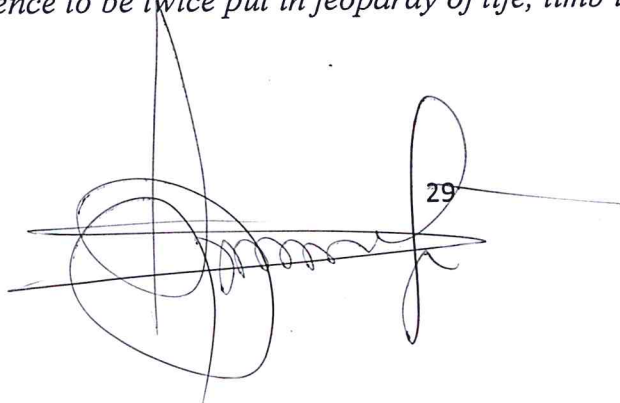
61. The Special Committee noted that the issue of the composition of the Committee was a matter that was discussed by the Senate at the time the Committee was being formed. Senator (Dr.) Machage in his contribution to the debate postulated that having the same Committee members as those in the previous impeachment proceedings was not fair and was prejudicial to the Governor. He argued that the Special Committee was unlikely to arrive at a different finding as it had arrived at earlier. However, the majority of Senators were of the view that these are fresh impeachment proceedings and that there was nothing prejudicial in the composition of the Special Committee. The Senate thereafter voted in favour of establishing the Special Committee with its current composition.

62. The Special Committee has carefully considered the issues raised of double jeopardy, bias and recusal. The Committee has arrived at the following conclusions-

(1) The concept of double jeopardy is found in our Constitution at Article 50(2)(o) which states as follows-

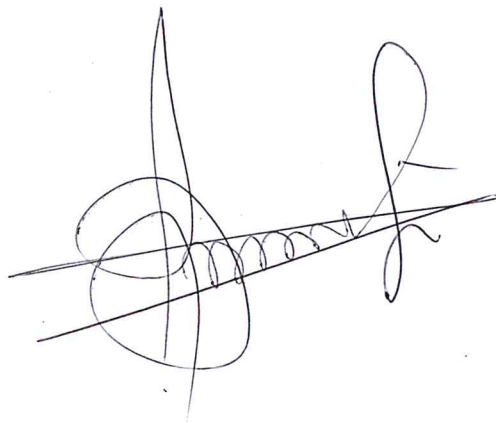
“(o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;”

(2) In the United States of America the fifth amendment to the United States Constitution provides that *“Nor shall any person be subject for the same offence to be twice put in jeopardy of life, limb in civil or criminal cases.”*

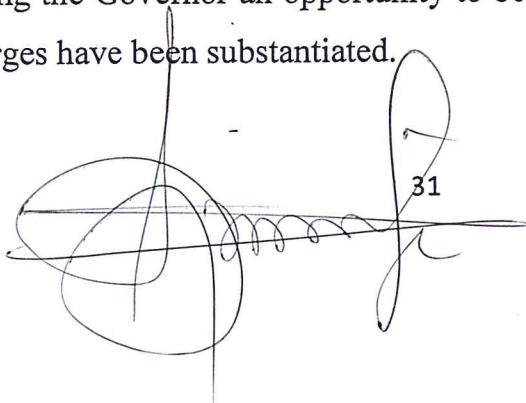


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- (3) The two essential protections provided by the rule against double jeopardy are prohibitions against-
- (a) retrial after an acquittal; or
 - (b) retrial after a conviction.
- (4) In the present case the Governor was “*convicted*” by the Senate during the impeachment proceedings of 14th February, 2014. The High Court thereafter declared those proceedings null and void. Thus the previous proceedings and “*convictions*” before the County Assembly of Embu and before the Senate were nullified and, in law, never took place. The Governor of Embu County was therefore put back in the same position as he was before the earlier impeachment proceedings had commenced at the Embu County Assembly.
- (5) There having been no previous impeachment proceedings in law, it could not be said that the Governor Wambora was being tried again for an offence for which he had already been convicted.
- (6) The Special Committee noted that with every rule there was usually an exception. The Supreme Court of the United States of America in the case of **Oregon –v- Kennedy**, 456 U.S. 667 (1982), found that the common rule was that a mistrial was not covered by the double jeopardy clause and a defendant may therefore be tried again after a mistrial. However the Supreme Court held that “*only where the governmental conduct in question is intended to “goad” the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.*”

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- (7) The above exception does not apply in the present case as the High Court voided all previous proceedings. There is therefore no bar to the current impeachment proceedings on grounds of double jeopardy.
- (8) The Governor of Embu had alleged bias on the basis that the membership of this Special Committee was the same as the as membership of the previous Special Committee that investigated the allegations against Governor Wambora. The Constitution and the County Governments Act had designated the Senate as the State Organ to investigate the proposed removal of Governors in Kenya. The composition of the Senate was fixed by the Constitution and would not change before the next General Elections. The Senate addressed the issue of possible bias when considering the composition of this Committee and satisfied itself that the Committee would not be biased. The Committee cannot now find contrary to the findings of the Senate on the issue of bias.
- (9) The Senate, in appointing the Special Committee, directed that the Special Committee treats the investigation as a fresh matter and not a re-opening of the previous investigation. The Special Committee warned itself that this was an entirely new investigation and that it must be guided solely by the facts presented in this investigation. The Committee was minded to be free, fair, objective and impartial during the investigations. If the charges were substantiated, it was also important to note that the Senate would have the final say on the proposed removal of Governor Wambora as Governor of Embu County. The report of the Special Committee would merely assist the Senate in arriving at a resolution. The Senate was not even under an obligation to form the Special Committee and may have gone ahead to hear the matter and, after giving the Governor an opportunity to be heard, resolve on whether or not the charges have been substantiated.



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(10) It therefore follows that the Special Committee rejects the invitation by the Governor of Embu County to recuse itself.

6.3 The Lapse of Three Months

63. The Governor of Embu County argued that under section 33(8) of the County Governments Act, a motion to remove a Governor should not be made within three months of another such motion. The earlier motion to remove the Governor was passed on 14th February, 2014. There should therefore be no new motion to remove the Governor until after 14th May, 2014.
64. In response to these submissions, the Advocates for the County Assembly of Embu argued that section 33(8) of the County Governments Act barred the bringing of a motion to remove a Governor within three months of the failure of a motion to remove a Governor. In the present case there has not been a failure of a motion to remove the Governor of Embu County. The previous motion was successful but later declared null and void by the High Court.
65. The Special Committee was persuaded by the arguments of the Advocates of Embu County Assembly. Section 33(8) of the County Government Act states as follows-

If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

66. There has been no failure of a motion to remove the Governor and subsequent notification of the failure to the Speaker of Embu County Assembly. Further to this, the High Court quashed all previous impeachment proceedings with regard to

Governor Wambora and, in law, this was therefore an entire new motion to remove the Governor from office.

6.4 Threshold Required for the Impeachment of a Governor

67. The Governor of Embu County has in his memorandum of response stated that he had moved to the Court of Appeal to seek a determination of whether the allegations made against him met the constitutional threshold for removal of a Governor. His Advocate referred the Special Committee to paragraphs 252 and 253 at page 116 of the judgment in High Court Petition No. 3 of 2014 **Hon. Martin Nyagah Wambora & 4 others –v- The Speaker of the Senate and 5 others** in which the High Court held as follows-

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

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

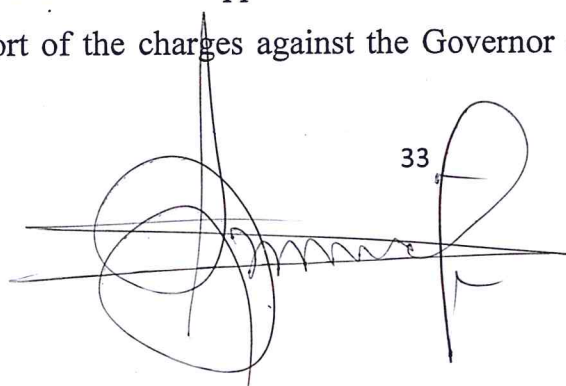
(a) Be serious, substantial and weighty.

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

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

68. The Special Committee agreed with the above exposition by the High Court on the threshold of evidentiary burden in proving charges of gross violation of the Constitution and shall applied the same when considering the evidence presented in support of the charges against the Governor of Embu. The Committee further

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deliberated on the related issue of the standard of proof required for a governor to be removed from office? The Committee considered whether it was-

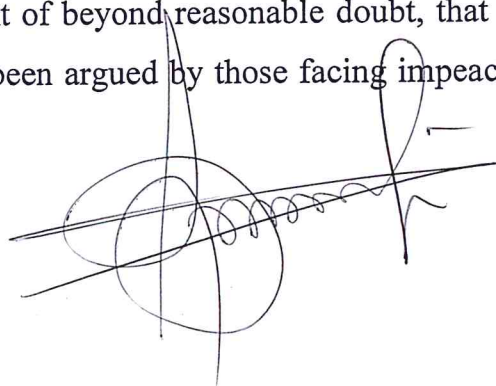
- (a) On a balance of probabilities as is the case in civil trials;
- (b) Beyond reasonable doubt as is the case in criminal trials; or
- (c) Somewhere in between, that is, the standard of proof should be higher than on a balance of probabilities but lower than beyond reasonable doubt.

69. Determining the standard of proof in impeachment proceedings has been the subject of debate across the world. While contributing to the debate Senator Miriam Defensor Santiago of the Senate of the Philippines in a keynote address delivered at a convention held on 8th February 2012 said that, *“an impeachment trial is a unique process, because it is a hybrid. Impeachment is both quasi-judicial and quasi-political. It is neither a civil case nor a criminal case. A criminal case is designed to punish an offender and to seek retribution. In contrast, impeachment is the first step in a process that tries to remedy a wrong in governance. It has been said that the purpose of impeachment is not personal punishment, but rather to maintain constitutional government, through the removal of an unfit official from a position of public trust.”*

70. Yale Law professor Charles Black Jr. in “Impeachment: A Handbook” states as follows:

“Weighing the factors, I would be sure that one ought not to be satisfied, or anything near satisfied, with the mere ‘preponderance’ of an ordinary civil trial, but perhaps must be satisfied with something less than the ‘beyond a reasonable doubt’ standard of the ordinary criminal trial, in the full literal meaning of that standard. ‘Overwhelming preponderance of the evidence’ comes perhaps as close as can to denoting the desired standard.”

71. In the United States there has been debate on the standard of proof required in impeachment proceedings. The argument of beyond reasonable doubt, that is, the highest threshold in proving a case has been argued by those facing impeachment

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proceedings. On the other hand the members of the Houses of Senate and Congress have argued for a lower standard of proof. The argument on the appropriate standard of proof in impeachment proceedings was played out in the 1986 Senate impeachment trial of Judge Harry Claiborne (Gray & Reams, *The Congressional Impeachment Process and the Judiciary: Documents and Materials on the Removal of Federal District Judge Harry E. Claiborne*, Volume 5), where the Attorney's of the judge filed a motion to designate beyond a reasonable doubt as the applicable standard for the Senate in reaching its determination. In support of the motion they argued that the constitutional language made it clear that an impeachment trial was in the nature of a criminal proceeding; the standard of proof in all criminal trials is beyond a reasonable doubt; historically impeachments have been conducted in the nature of a criminal proceeding; and the consequences for the defendant were grave, requiring the prosecutors to be held to the highest standard of proof, beyond a reasonable doubt.

72. The response of the House Managers in opposition to the Claiborne motion noted that the reasonable doubt standard was designed to protect criminal defendants who risked forfeitures of life, liberty and property. Such a standard was inappropriate, they maintained, because the Constitution limits the consequences of a Senate impeachment trial to removal from office and disqualification from holding office in the future, explicitly preserving the option for a subsequent criminal trial in the courts. The end result was that the Senate refused to impose the beyond reasonable doubt rule as the Senate standard.

73. In summary the United States Senate has traditionally left the choice of the applicable standard of proof to each individual Senator. While rejecting a motion to make the criminal standard the standard in the Claiborne impeachment, the discussion made clear that it was simply a decision to allow each member to make that choice and not a repudiation of the standard itself. Individuals might apply

that or any other standard of their choice. A walk through history and an examination of the discussions of legal commentators may aid individuals in weighing their choices, but provides no definitive answers. Indeed, such an exercise is perhaps most useful in highlighting basic questions that members will want to ask themselves when searching for the appropriate standard.

74. In Kenya it is useful to note the provision of Article 73 of the Constitution which deals with the responsibilities of leadership:

Responsibilities of leadership

73. (1) *Authority assigned to a State officer—*

(a) *is a public trust to be exercised in a manner that—*
(i) *is consistent with the purposes and objects of this Constitution;*

(ii) *demonstrates respect for the people;*

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

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

and

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

(2) *The guiding principles of leadership and integrity include—*

(a) *selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;*

(b) *objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;*

(c) *selfless service based solely on the public interest, demonstrated by—*

(i) *honesty in the execution of public duties; and*

(ii) *the declaration of any personal interest that may conflict with public duties;*

(d) *accountability to the public for decisions and actions; and*

(e) *discipline and commitment in service to the people.*

75. These are therefore the standards by which the Governor should be judged when considering the allegations against him and the evidence produced in support of the allegations. The violations must be gross, that is, a glaring error, flagrant and extreme. The violation must be such that it brings dishonor and lowers the dignity of the office of governor. A minor infraction of the law cannot attract the sanction of impeachment. The Supreme Court of Nigeria in the case of **Hon. Muiwa Inakoju & others –v- Hon. Abraham Adeolu Adeleke** stated as follows-

Section 188 is not a weapon available to the legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as a human being, cannot always be right and he cannot claim to be always right. That explains why section 188 talks of gross violations. Accordingly, where a misconduct is not gross, then section 188, weapon of removal is not available to the House of Assembly.

7.0 THE CHARGES AGAINST THE GOVERNOR OF EMBU COUNTY

7.1 GROSS VIOLATION OF THE PUBLIC PROCUREMENT AND DISPOSAL ACT

76. The following were the specific matters canvassed under this Charge-

(a) Procurement of Maize Seeds for Distribution to Farmers

77. The County Assembly in the Particulars of Allegations stated that on the 25th October, 2013, the Office of the Governor had authorized the procurement of maize of a variety and quantity other than that requisitioned by the Office of the Director of Agriculture, that being the office in which the expertise on the matter resided. The County Assembly stated that whereas the Director of Agriculture had requisitioned for two varieties of maize; namely KDV-1 and KDV-6, the maize variety that was procured by the Office of the Governor was DK 8031. In this

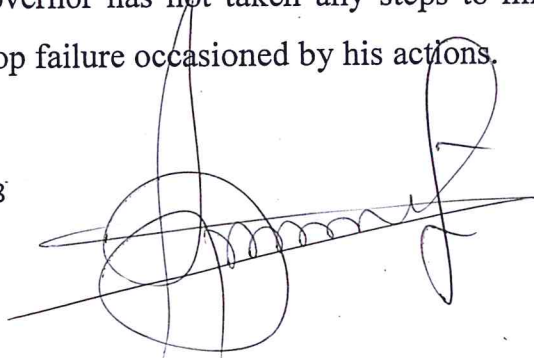
respect the County Assembly made reference to the following documents all part of the bundle at *Annex 1*-

- (a) a letter dated 25th October, 2013 from the Office of the Governor signed by the County Secretary which authorized and directed that sixteen tonnes of DK 8031 maize be purchased as a matter of urgency (*page 28 of Annex 1*); and
- (b) a report of the County Executive Committee Member to the County Assembly of Embu, forwarded by a letter dated 14th November, 2014 in which the Member attached, as Appendix 1, the "*Seed Procurement Plan/Request for the Short Rains 2013*" which indicated that for both Mbeere North and Mbeere South, in respect of maize seed, the variety in the plan was KDV-1 or KDV-6 (*page 41 of Annex 1*).

78. The County Assembly stated that the Seed Procurement Plan did not make reference to the DK 8031 variety of maize seed that was eventually purchased by the Office of the Governor. The Special Committee was referred to the Report of the County Executive Committee Member for Agriculture in which the Member had stated in respect of the DK 8031 maize that-

"the CEC Member for Agriculture and the County Director of Agriculture were not involved, neither was it communicated to them about the distribution plan... We cannot ascertain how the seeds were procured, neither who inspected the seeds upon the delivery".

79. The Assembly further stated that the procured maize seeds of the variety of DK 8031 either did not germinate or where they did, they recorded a germination rate of below twenty per cent. This, they stated, resulted in untold losses to maize farmers of Embu County, and the Governor has not taken any steps to mitigate losses to farmers for the total maize crop failure occasioned by his actions.

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80. In support this claim, the County Assembly annexed the report of the Joint Committee of the County Assembly of Embu comprising the Committee of Agriculture, Livestock, Fisheries and Co-operatives and the Committee on Public Accounts and Investment dated 7th January, 2014 on “maize seeds procurement by the County Executive”. The Report is at page 10 of *Annex 1*.
81. The County Assembly further referred to a letter by the County Executive Committee Member for Finance and Planning dated 2nd January, 2014, attached at page 50 of *Annex 1*, addressed to the County Assembly in which it was evident that the non-germination of the maize seeds was a matter in the public domain. It was further clear from that letter that although the County Executive was considering the matter of compensation to the farmers for the losses resulting from the failed seed, no action had been taken in this respect at that time.
82. These actions, the County Assembly stated, were in violation of the provisions of section 26 and 34 of the Public Procurement and Disposal Act, 2005. Section 26 of the Act provides as follows-
- (1) For the purpose of ensuring that its decisions are made in a systematic and structured way, a public entity shall establish procedures to provide for the making of decisions, on behalf of the public entity, relating to procurement.*
- (2) The procedures required under subsection (1) shall be consistent with this Act and the regulations.*
- (3) All procurement shall be—*
- (a) within the approved budget of the procuring entity and shall be planned by the procuring entity concerned through an annual procurement plan;*
- (b) undertaken by a procuring entity as per the threshold matrix as set out in the regulations;*
- (c) handled by different offices in respect of procurement initiation, processing and receipt of goods, works and services.*
- (4) A public entity shall establish a tender committee, procurement unit and such other bodies as are required under the regulations for the purpose of making such decisions on behalf of the public entity as are specified in this Act and the regulations.*

(5) A tender committee or body established under subsection (4) shall be established in accordance with the regulations and shall—

(a) consist of not less than five members;

(b) have as its secretary, the procurement professional in charge of the procurement unit.

(6) A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget to meet the obligations of the resulting contract.

(7) A procurement unit established under subsection (4) shall be staffed with procurement professionals whose qualifications have been recognised by the Authority.

(8) For the purpose of this section, a “procurement professional” means a person who—

(a) has professional qualifications in procurement and supply management from a recognised institution;

(b) is engaged in a calling or occupation in which recourse to procurement is directly or indirectly involved and has experience in the practise of procurement; and

(c) is a member of a recognised institute of purchasing and supply.

(9) The level of qualification and experience required of procurement professionals under subsection (8) shall be as prescribed.

(10) The Authority shall facilitate the establishment of an examination body for procurement professionals and shall ensure support for their professional association.

83. Section 34 provides as follows-

(1) The procuring entity shall prepare specific requirements relating to the goods, works or services being procured that are clear, that give a correct and complete description of what is to be procured and that allow for fair and open competition among those who may wish to participate in the procurement proceedings.

(2) The specific requirements shall include all the procuring entity's technical requirements with respect to the goods, works or services being procured.

(3) The technical requirements shall, where appropriate—

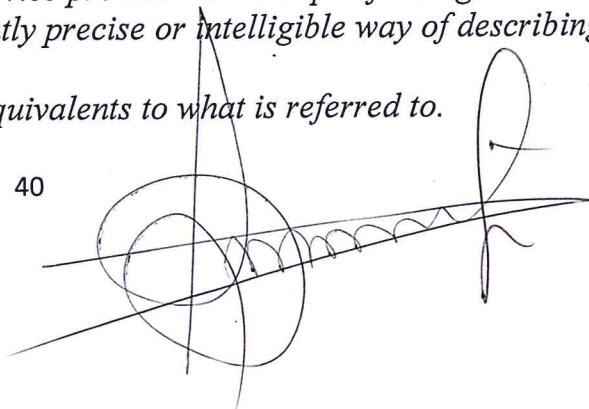
(a) relate to performance rather than to design or descriptive characteristics; and

(b) be based on national or international standards.

(4) The technical requirements shall not refer to a particular trademark, name, patent, design, type, producer or service provider or to a specific origin unless—

(a) there is no other sufficiently precise or intelligible way of describing the requirements; and

(b) the requirements allow equivalents to what is referred to.



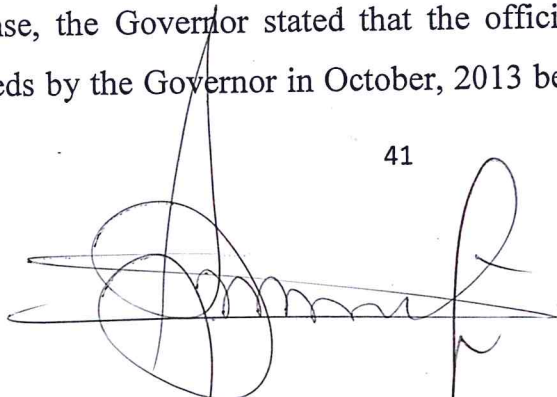
84. The Governor, in response, argued that the allegation was without foundation as-

- (a) procurement of maize seeds was not done by the Governor but by the County Procurement officials following requisition by the then County Accounting Officer in line with the existing procurement law; and
- (b) the failure in germination of some of the seeds could not be blamed on the Governor or on the procurement officials as such failure may have been as a result of lack of adequate rainfall or other non-procurement related factors.

85. The County Assembly further argued that although the authority by the purported Tender Committee to procure maize seeds was granted on 27th November 2013, the distribution exercise carried out by the Governor of Embu County in person, commenced on 1st October, 2013, nearly two months before the alleged procurement was carried out. The County Assembly took the view that this action by the Governor blatantly violated the procurement procedures laid down under section 26 of the Public Procurement and Disposal Act, 2005. It was the County Assembly's position that *"the form and nature of the purported minutes of the purported Tender Committee point to an attempt to regularize an otherwise irregular process"*.

86. Further, the County Assembly stated that the procured maize was delivered by the supplier directly to farmers and that it was not entered into any store records to ascertain its quality and quantity through inspection. This, they argued, was in blatant violation of section 26 of the Public Procurement and Disposal Act, 2005.

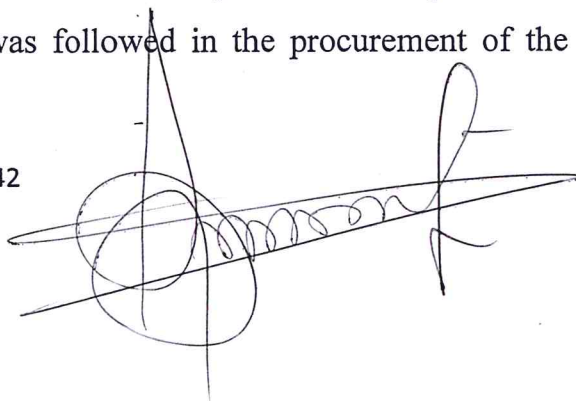
87. In response, the Governor stated that the official launching and distribution of maize seeds by the Governor in October, 2013 before the confirmation of minutes



of the Tender Committee that had earlier approved the quotation for procurement of maize seeds had nothing to do with the procurement process. The Governor further stated that records availed by the County Procurement Department confirmed that the procurement of maize seed was very competitive, that there were four bidders who responded and that subsequently, the lowest bidder was awarded.

Observations of the Special Committee

88. It was clear to the Committee that the matter of the DK 8031 maize seeds was a matter of great public concern within Embu County. Embu is a County that relies heavily on agriculture and that is known for its productivity. Thus, where maize seeds are distributed extensively within the County by and with the authority of the Governor, planted by the farmers in good faith and those seeds either totally fail to germinate, or where they did, the germination rate was less than twenty per cent, this is a matter that would be of utmost and grave concern to the residents of the County.
89. The Committee was informed that it is these concerns that led to the establishment by the County Assembly of a Joint Committee on Agriculture, Livestock, Fisheries and Cooperatives and the Committee on Public Accounts and Investment to investigate the matter of the procurement of the maize seeds by the County Executive. The Report of the Committee is at *page 10 of Annex 1*.
90. In its Report dated 7th January, 2014, the Joint Committee reported a number of findings including that-
- (a) the Chief Officer had not provided documentary evidence to prove that the necessary procurement method was followed in the procurement of the DK 8031 maize seeds;

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- (b) the entire procurement process for the maize seeds was concluded in one meeting and was therefore unprocedural and questionable;
- (c) the firm that was awarded the tender was not the lowest bidder and no information was provided as to why that firm was awarded the tender;
- (d) the procurement process used in the procurement of the maize seeds pointed to *“complacency, incompetence and manipulation of the procurement system to aid fraud”*; and
- (e) technical advice from the relevant Department was ignored throughout the procurement process.

91. The Joint Committee recommended that the Ethics and Anti-Corruption Commission undertakes investigations into the matter. The Joint Committee further recommended that until cleared by the Ethics and Anti-Corruption Commission, the County Secretary steps aside.

92. The County Assembly brought to the attention of the Special Committee the Report of the County Executive Committee Member for Agriculture, Livestock, Fisheries and Cooperative Development forwarded to the County Assembly by a letter dated 14th November, 2013. In that report, the County Executive Committee Member states that-

(1) Embu County had received sixteen tonnes of DK 8031 maize seed variety which had been delivered directly to the main distribution centres in the County on 31st October, 2013.

(2) *“The CEC Member for Agriculture and the County Director of Agriculture were not involved, neither was it communicated to them about the distribution plan. Sub-county agriculture officers were dealing directly with the County Secretary’s office on the issue. We cannot ascertain how*

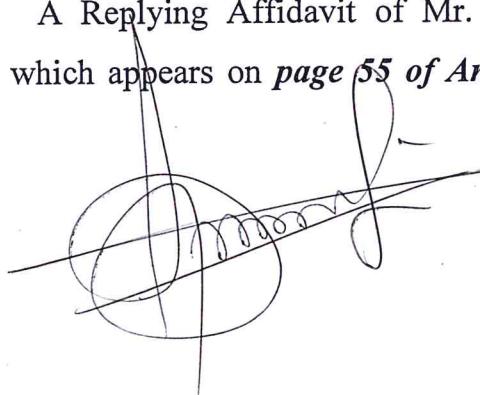
the seeds were procured, neither who inspected the seeds upon the delivery”.

- (3) the official launch of the seed distribution was presided over by the Governor of Embu County on 1st November, 2013 at Ugweri Chief’s Camp, Karurumo Polytechnic, Kathanjuri Baraza Grounds and Kithimu Chief’s Camp;
- (4) on the germination of the DK 8031, the seed had either not germinated or was germinating very poorly (less than twenty per cent of what was planted);
- (5) the DK 8031 which had already germinated had very weak shoots;
- (6) some farmers, who reported relatively high germination rates, had mixed the DK 8031 with other seed varieties.

93. The County Executive Committee Member for Agriculture recommended that-

- (1) The Kenya Plant Health Inspectorate Service (KEPHIS) visits some of the sampled farms and collects samples of available remaining seeds for testing so as to establish the cause of poor germination;
- (2) the County Government purchases *the right variety* of maize seeds and re-issues these to the farmers “*to avert more public outcry and shame to the County*”;
- (3) the procurement department be investigated to ascertain why DK 8031 maize seed was purchased despite technical advice by the County Executive Committee Member for Agriculture on requisition of KDV 1 or KDV 6 maize seeds, as set out in the procurement plan (*page 41 of Annex 1*).

94. This matter was brought to the attention of the Ethics and Anti-Corruption Commission by the County Assembly. A Replying Affidavit of Mr. Japhet Baithalu, an officer of the Commission, which appears on *page 55 of Annex 8*,



indicates that the Ethics and Anti-Corruption Commission received a letter from the Clerk of the County Assembly on 8th January, 2014 requesting the Commission to undertake investigations into the allegations of irregularities in the purchase of maize seeds by the Embu County Government. The investigations were also to extend to the allegations of irregularities in respect of the works for the face-lifting of Embu County Stadium.

95. As is evident from paragraphs 8, 9 and 10 of the Replying Affidavit, the Commission took immediate steps to commence investigations into the matter, commencing with a letter of 9th January, 2014 to the County Secretary seeking further information on the matter.
96. The Kenya Plant Health Inspectorate Service (KEPHIS) was also seized of the matter through a complaint made by the Director of Agriculture. In a letter dated 10th January, 2014 to the Chief Executive of Mosantos, the company that had sold the maize seeds to the County Government, KEPHIS demanded that the company takes full responsibility for the non-germinating maize seed.
97. It was evident to the Committee that the matter of the DK 8031 maize seeds was of great concern to the County and was accorded urgent and serious attention by the County Assembly, the County Executive Committee Member for Agriculture, the Ethics and Anti-Corruption Commission and KEPHIS. All these offices and agencies employed all means possible to establish to interrogate the matter of the DK 8031 maize seeds.
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98. It is noteworthy, however, that while it would be expected that the Governor would be at the centre of the efforts to unravel the matter of the DK 8031 maize seeds, the records submitted to the Special Committee, including the response of the Governor, do not demonstrate any action on the part of the Governor.

99. The Governor, in his response, seems to have taken the approach of denying liability and assigning blame to other officials within the County, specifically the procurement officials, arguing that procurement was not undertaken by the Governor but by these officials. On the lack of germination of the seeds, the Governor, in his response, blamed "*lack of adequate rainfall or other non-procurement reasons*". This, however, is not corroborated by the documentation from the experts - KEPHIS and the County Executive Committee Member for Agriculture - which make no mention of lack of adequate rainfall as a factor that may have contributed to the non-germination or poor germination of the DK 8031 maize seeds.
100. Article 179(4) of the Constitution provides that the Governor is the "*chief executive*" of the County. Where the entire County is virtually at a stand-still due to a failed crop, and the County Executive is virtually on trial by the residents of Embu County, it is unthinkable that the chief executive of the County would do nothing except to shift blame to junior officers in the County and to blame, without any proof, lack of adequate rainfall as the cause of the failed crop. As chief executive, the Governor retains an overall oversight responsibility over the affairs of his County, including matters of procurement, and he cannot therefore be heard to say, on a matter so important to the County as the distribution of failed maize seeds that "*it was not me*".
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101. Article 227 of the Constitution provides for "*procurement of good and services*" and requires, at sub-article (1) that "*when a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective*". In this matter, the Special Committee observes that there is no evidence that the procurement of the maize seeds was conducted in a *fair, equitable, transparent, competitive and cost-*

effective manner. The evidence of the County Assembly and that of the County Executive Committee for Agriculture points to procurement of the DK 8031 maize seeds which was authorized by the Office of the Governor but that fell below the threshold under Article 227 of the Constitution. The County Assembly in making its case stated that the entire procurement of the maize seeds demonstrated “*complacency, incompetence and manipulation of the procurement system to aid fraud*”. This position was not rebutted by the response of the Governor which merely sought to place blame on the procurement officials.

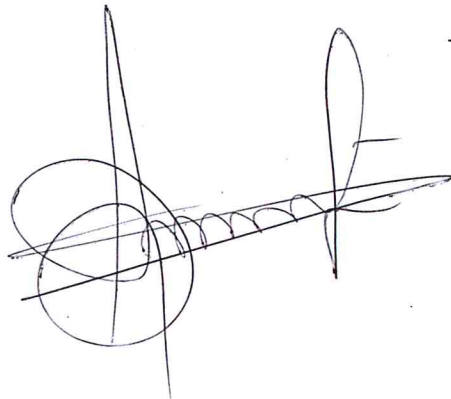
102. Section 27 of the Public Procurement and Disposal Act, 2005, further requires at sub-section (3) that “*each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member that this Act, the regulations and the directions of the Authority are complied with*”. No evidence was presented by the Governor to demonstrate that, as the chief executive of the County Executive, he had ensured compliance with the Public Procurement and Disposal Act, 2005 before taking the steps of launching the DK 8031 maize seeds and extensively distributing the maize seeds within the County. There was also no evidence that the Governor had directed the County Secretary or the officials serving in his office to adhere to the procurement laws. Had the Governor done so, he would probably have forestalled the massive losses occasioned to the farmers.

103. The Committee further observed, as had been submitted by the County Assembly, that the annual procurement plan of the Director of Agriculture prepared in accordance with section 26(3) of the Public Procurement and Disposal Act, provided for the purchase of two varieties of maize: KDV 1 and KDV 6. The County Executive, with the authorization and full knowledge of the Office of the Governor, proceeded to instead purchase maize of variety DK 8031 without the authority of the Tender Committee as required under section 26(4) of the Public

Procurement and Disposal Act and in accordance with the procurement procedure detailed under section 34 of the Act.

(b) Procurement of Works for the Face Lifting of Embu Stadium

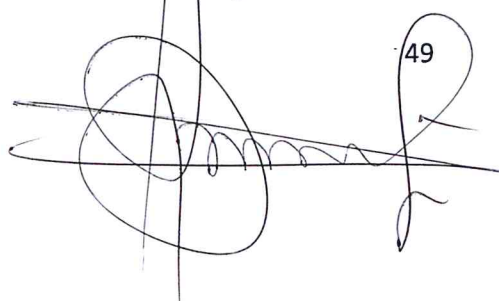
104. It was the County Assembly's case that the Governor, through his office, initiated the works for the face-lifting of the stadium without involving the user department and other technical departments, in total violation of sections 26(1) and 26(3)(c) of the Public Procurement and Disposal Act, 2005. The County Assembly stated in the Particulars of Allegations that the head of the user department was on record stating that she had not been involved at any point in the procurement process. In support of this, the County Assembly made reference to the Report of the Joint Committees of Infrastructure, Youth and Sports on Face-lifting of the Embu Stadium which is attached at page 53 of *Annex 1*.
105. The County Assembly further stated that, the Governor, through his office, had received Bills of Quantities for the face-lifting of the stadium on 30th December 2013, while the tender for the works was floated on 22nd October 2013, a clear violation of section 26 of the Public Procurement and Disposal Act, 2005. This, the County Assembly stated, was a clear indication that the Bills of Quantities appeared to be an effort to regularize an otherwise irregular procurement process. The County Assembly stated that the Governor had a "vested personal interest" in the matter stating that the Bills of Quantities from the County Works Office had been prepared in November, 2013 and were forwarded to the Office of the Governor on 30th December, 2013. Thereafter, the Governor had personally forwarded the Bills of Quantities to the County Assembly on 31st December, 2013 in answer to queries raised by the Assembly. The Bills of Quantities are attached page 120 of *Annex 1*.

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106. In addition, the County Assembly stated that the Governor, through his office, had initiated the procurement of the works before ascertaining the availability of sufficient funds in violation of sections 26(3)(a) and 26(6) of the Public Procurement and Disposal Act, 2005. And further that an attempt to regularize this violation through a supplementary budget was defeated by the absence of a justification of the circumstances under which a project whose approved budget was Ksh. 8 million increased to Ksh. 50 million. The County Assembly argued that the Bills of Quantities that were forwarded to the County Assembly on the 31st December, 2013 were an attempt at that justification.
107. The Governor, in response, stated that the Governor was not personally involved in the award of the tender and that it was the accounting officer and the procurement officials who were in charge of the tendering process as required under section 27(2) of the Public Procurement and Disposal Act, 2005. The Governor further stated that the award of the tender was the subject of investigations by the Ethics and Anti-Corruption Commission and that it would therefore be prudent to await the outcome of the investigations so as to verify whether the procurement process was contrary to the law.
108. On the allegations of insufficient funds, the Governor stated in his response that Kshs. 8 million was the amount provided for in the budget but that the Embu County Executive Committee had decided to allocate additional funds required in the 2013/14 Supplementary Budget. The Governor further stated that the Kshs. 8 million budgeted for upgrading of the stadium "*is yet to be spent to date*".

Observations of the Special Committee

109. The Committee observed that the County Assembly had established a Joint Committee of the Committees of Infrastructure and Youth and Sports on the matter of the face-lifting of Embu Stadium. In its Report, which is attached at

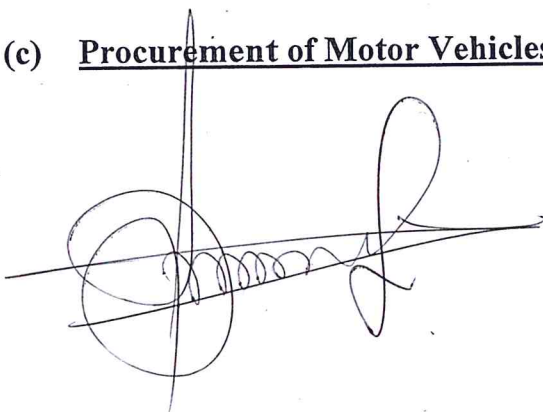


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page 53 of Annex I, the Committee found that there were “apparent signs of fraud and theft of public funds that required urgent investigation by the Ethics and Anti-Corruption Commission”. The Committee therefore recommended that “until cleared by the Ethics and Anti-Corruption Commission, the County Secretary and the Tender Committee members who were involved in the unprocedural procurement acts should step aside and be discharged of their duties immediately to allow for investigations”.

110. The County Executive Committee Member for Youth, Empowerment and Sports in a report submitted to the County Assembly by a letter dated 3rd January, 2014, stated that procurement in the County was centralized and resided in the office of the County Secretary and that no Department in the County could undertake its own procurement.
111. The Committee further observed that as in the case of the maize seeds, County Assembly and the Ethics and Anti-Corruption Commission had taken action on the matter of the face-lifting of the Embu Stadium. However, no tangible action was taken by the Governor. Again, the Governor, in his response, chose to assign blame to the procurement officials in the County. Although the procurement officials have various responsibilities under the Public Procurement and Disposal Act, their roles and obligations do not override those of the Governor as the chief executive of the County who in terms of section 27(3) of the Public Procurement and Disposal Act, 2005 must demonstrate that he has taken all necessary steps to ensure that the procurement laws and regulations have been complied with in the County. No such evidence was adduced in the matter of the procurement relating to the face-lifting of Embu County Stadium.

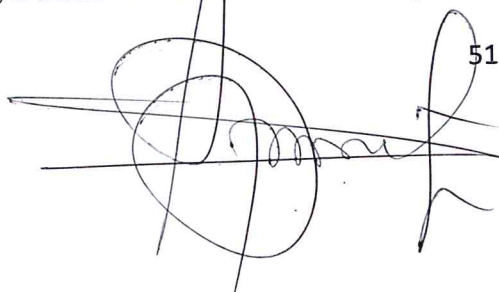
(c) **Procurement of Motor Vehicles**

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112. It was the County Assembly's case that the Governor of Embu County "*directly procured various motor vehicles from specific dealers for specified amounts of money without any reference to the county Tender Committee in blatant violation of sections 26 (1)(2)(3) and (4) of the Public Procurement and Disposal Act, 2005*". To support this claim, the County Assembly made reference to a letter of authority authored by the Governor, whose subject is "Procurement of Embu County Vehicles", which is at page 134 of *Annex 1*".
113. On this, it was argued for the Governor that the Governor did not have personal responsibility because in purchasing motor vehicles, the County Procurement Department had not violated procurement procedures as it had used existing and valid Government Supply Branch Contracts in respect of the motor vehicles purchased from CMC Motor Group Ltd. and Toyota Kenya Ltd. Further that where Government Supply Branch Contracts exist, the ministries of the national Government and the County Supply Departments do not float their own tenders but use the shortlisted firms. Purchase of the vehicles then proceeds in accordance with the vehicle engine capacities approved by the Salaries and Remuneration Commission.
114. The Governor therefore argued that where the County Government procures vehicles from approved firms, there can be no violation on the part of the Governor.

Observations of the Committee

115. The Committee took note of the response of the Governor which is to the effect that the County Procurement Department had not violated procurement procedures as it had used existing and valid Government Supply Branch Contracts in respect of the motor vehicles purchased from CMC Motor Group Ltd. and Toyota Kenya Ltd, a form of restricted tendering that is allowed under the procurement laws.



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116. The Committee observed that even where such a procurement method is selected, the Public Procurement and Disposal Act, 2005 provides for the process that leads to the award of a tender under such method. In particular, section 29(3) of the Public Procurement and Disposal Act, 2005 provides that *“a procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity-*

(a) obtains the written approval of its tender committee;

(b) records in writing the reasons for using the alternative procurement method”.

117. Although in his response the Governor indicated that restricted tendering was used as the procurement method, there was no evidence to demonstrate to the Committee that section 29(3) of the Public Procurement and Disposal Act had been complied with in the purchase of the motor vehicles and in particular that the approval of the Tender Committee was sought and obtained. From the evidence on record, the Governor and the County Secretary procured the vehicles without the approval of the Tender Committee as required under section 29(3) of the Public Procurement and Disposal Act which states as follows-

A procuring entity may use restricted tendering or direct procurement as an alternative procurement procedure only if, before using that procedure, the procuring entity—

(a) obtains the written approval of its tender committee; and

(b) records in writing the reasons for using the alternative procurement procedure.

(d) Violations of the Public Procurement and Disposal Act, 2005, Set out in the Report of the Auditor-General for the Period 3rd March 2013 –30th June, 2013.

118. The County Assembly made reference to the following irregularities cited in the

Report of the Auditor-General-

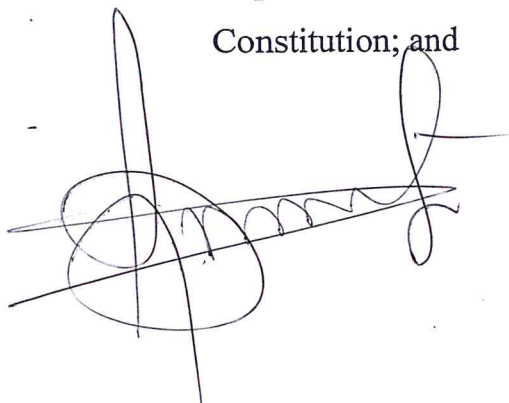
- (a) irregular award of contracts for repair works at the Town Hall and Probation Offices in violation of section 27 of the Public Procurement and Disposal Act, 2005;
- (b) unwarranted disqualification of interested bidders in violation of section 66(3)(b) of the Public Procurement and Disposal Act, 2005;
- (c) favoritism in consideration of responsiveness of tenders during evaluation which is against the objectives enshrined under section 2 of the Public Procurement and Disposal Act, 2005. This is also contrary to section 34 of the same Act;
- (d) failure to conduct financial and technical evaluation of contracts in violation of Regulation 16 of the Public Procurement and Disposal Regulations 2006;
- (e) irregular re-allocation of funds for works not included in the Bills of Quantities contrary to section 26 (1), (2) and (3) of the Public Procurement and Disposal Act, 2005;
- (f) lack of formal contracts for works such as in contracts- EBU/COUNT/07/2013, EBU/COUNT/09/2012-13, and EBU/COUNT/08/2012-13 in violation of section 68 of the Public Procurement and Disposal Act, 2005;
- (g) use of unregistered sub-contractors such as during undertaking of works related to electrical installation, CCTV and plumbing works all valued at Ksh.2,402,500, in violation of section 31 of the Public Procurement and Disposal Act, 2005;

- (h) irregular procurement method in the contract for the refurbishment of Embu County Council Hall to house the County Assembly, contract EBU/COUNT/06/2012-13 valued at Ksh. 33,315,836 in violation of section 29 of the Public Procurement and Disposal Act, 2005;
- (i) irregular purchase and registration of a motor-vehicle registration number KBU 683T in that the purchase price exceeded the budgeted amount in clear violation of section 26(2)(a) of the Public Procurement and Disposal Act, 2005; and further, that there was no record to show that the same was registered from the time of its purchase in the name of the County Government of Embu, an action that violates section 45 of the Public Procurement and Disposal Act, 2005; and
- (j) procurement of fuel was found to be irregular with no store records maintained to show receipt and usage of fuel in violation of Regulation 17 of the Public Procurement and Disposal Regulations 2006 (revised 2013).

119. The report of the Auditor-General on the financial operations of Embu County from 3rd March, 2013 to 30th June, 2013 is at page 139 of *Annex 1*.

120. On these matters, the Governor in his response stated that he was not personally responsible for any omissions or acts of violations as-

- (a) the Transitional Authority, through its appointed officials, was in charge for the period March to June, 2013 and that officers should be held personally responsible for the violations in accordance with Article 226(5) of the Constitution; and

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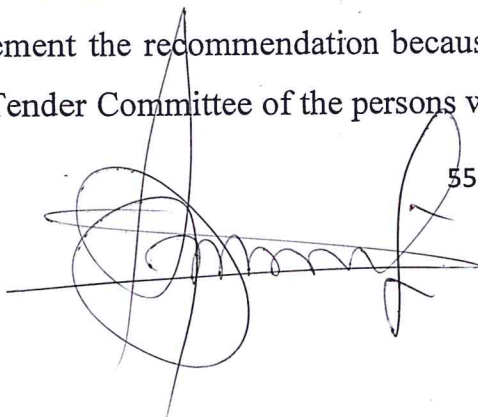
(b) the Governor could not be held responsible for store clerks who had not kept proper store records.

Observations of the Committee

121. The Committee observed that the Auditor-General in his report had cited serious matters relating to the state of financial management in the County of Embu.
122. While the Committee would have benefitted from a clear response by the Governor to each of the issues raised by the Auditor-General, the Governor opted to provide a generalized and rather casual response to the issues in which he cited the Transitional Authority, through its appointed officials, as being responsible for the violations. No supporting documentation or further evidence was adduced to shed further light on this statement by the Governor.
123. As a result, the serious matters cited by the Auditor-General all pointing to massive irregularities in the procurement processes and the award of contracts in the County, remain unchallenged and unexplained.

(e) Non-existence of a Tender Committee for the County Executive

124. The County Assembly alleged that at the time of procuring works for the face-lifting of the Embu Stadium, the Office of the Governor was not able to demonstrate that there existed a Tender Committee that had been appointed pursuant to the provisions of section 26(4) of the Public Procurement and Disposal Act, 2005 and regulation 7 of the Public Procurement and Disposal (County Governments) Regulations, 2013. The County Assembly stated that when it recommended by Resolution of the Assembly, the interdiction of those responsible for procurement of the works, the County Public Service Board had been unable to implement the recommendation because there was no record of any appointment to a Tender Committee of the persons who were purported to be such members.



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125. Additionally, the County Assembly submitted that a recommendation by the County Assembly that Members of the Tender Committee that procured maize seeds for distribution to farmers be interdicted could not be implemented because the implementing body could not find any record of the appointment of the persons purported to be members of the Tender Committee, a clear and blatant violation and disregard of section 26(4) of the Public Procurement and Disposal Act, 2005 and regulation 7 of the Public Procurement and Disposal (County Governments) Regulations, 2013.
126. It was the County Assembly's case that the Governor continuously applied public funds to works and services without an appointed Tender Committee in violation of the Public Procurement and Disposal Act, 2005 and in a clear bid to circumvent prudence and accountability in management of public resources that were the principle basis for the enactment of the Public Procurement and Disposal Act, 2005. In support of this allegation, the County Assembly made reference to the Report of the Embu County Public Service Board titled "Status Report to the Implementation Committee of Embu County Assembly" which is marked "CAE 6" and is attached as part of the bundle of documents under *Annex 1*.
127. In response to this matter, the Governor stated that "*the Embu County Executive had had four procurement committees between March 2013 to date*". These he stated to be-

- (a) Transitional Authority appointed Procurement Committee 1;
- (b) Transitional Authority appointed Procurement Committee 2;
- (c) Principal Officers Procurement Committee; and
- (d) Chief Officers Procurement Committee.

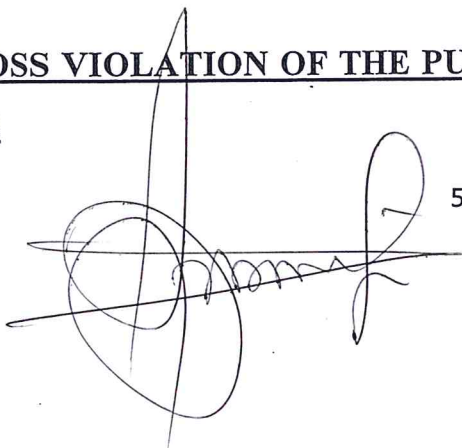
Observations of the Committee

128. The establishment of a Tender Committee is provided for under section 26(4) of the Public Procurement and Disposal Act which requires a public entity to establish a Tender Committee.
129. The County Assembly's case in so far as the existence of a Tender Committee is concerned relates to the period of the procurement relating to the face-lifting of Embu County Stadium and the purchase of the maize seeds. The County Assembly alleges that there was no Tender Committee in place at that time and that the recommendations of the Joint Committees that investigated the matter of the stadium and the matter of the maize seeds to the effect that the members of the Tender Committee be interdicted could not be implemented.
130. The Governor's response does not specifically address this matter but instead lists four Tender Committees that are said to have existed in the County. No evidence of the membership to those Committees and their respective appointment dates is provided. Further, the Governor does not indicate which of the four Committees was responsible for the award of the tenders relating to the face-lifting of Embu County Stadium and the maize seeds, yet these are the two matters specifically cited by the County Assembly in the Particulars of Allegations.

Finding of the Committee on the Charge of Gross Violation of the Public Procurement and Disposal Act, Chapter 412A of the Laws of the Kenya

131. Pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated.

6.2 GROSS VIOLATION OF THE PUBLIC FINANCE MANAGEMENT ACT, 2012

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132. In support of this charge, the County Assembly cited the irregular procurement of maize seeds for distribution to farmers, in which maize seeds other than those requisitioned for by technical officers were procured by the Office of the Governor. The Assembly further stated that the procurement was not authorized by a Tender Committee and that store records were not maintained, all demonstrating a serious violation of Section 121 of the Public Finance Management Act, 2012 whose object is to ensure prudent application of public funds, taking into account the principal of value for money.

133. The County Assembly further argued that the irregular procurement of works for the face-lifting of Embu Stadium in which the tendering was done without the input of the technical Departments, without Bills of Quantities, without an appointed Tender Committee and without ascertaining the availability of funds all demonstrated a serious violation of section 121 of the Public Finance Management Act, 2012. Section 121 provides as follows-

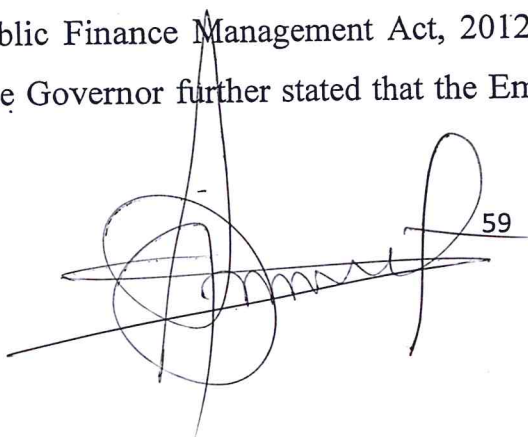
For the purposes of this Act, all procurement of goods and services and disposal of assets, required for the purposes of the county government or a county government entity are to be carried out in accordance with Article 227 of the Constitution and the Public Procurement and Disposal Act (Cap. 412C).

134. Further that the action of the Governor to direct the purchase of motor vehicles in complete disregard of the procurement laws and the applicable Regulations was a blatant violation of section 121 of the Public Finance Management Act, 2012.

135. The Assembly argued that the Governor had “*willfully and calculatedly presided over a County Government that lacked Tender Committees in an effort to defeat*

accountability and prudence in application of public funds as evidenced in the report of the County Public Service Board, which indicated that there was no officer appointed to any Tender Committee during the procurement of maize seeds, procurement of works for the rehabilitation of the Embu Stadium". This, the Assembly argued, was a violation of section 121 of the Public Finance Management Act, 2012.

136. It was also the County Assembly's position that the report of the Auditor-General on the accounts of the County Government for the period March to June 2013 unearthed gross violations of laws regulating prudent management of funds. The County Assembly cited pages 27-63 of the Report as demonstrating gross violation of, among others, section 121 of the Public Finance Management Act, 2012. The report is at page 139 of *Annex 1*.
137. It was further argued on the part of the County Assembly that section 162 of the Public Finance Management Act, 2012 placed an obligation on any County public officer to ensure prudent management of County resources, and further that where the County Assembly demonstrated a breach of this obligation and made certain remedial recommendations, including the interdiction of County officers to facilitate investigations, no action had been taken by the Governor. The County Assembly stated that instead, the Governor, in blatant disregard of that law, proceeded to swear affidavits in defense of one of the officers, namely Ms. Margaret Lorna Kariuki, the County Secretary.
138. The Governor stated that these allegations were without substance as the Governor is not the Accounting Officer of Embu. The Governor cited section 149(1) of the Public Finance Management Act, 2012 on the roles of the Accounting Officer. The Governor further stated that the Embu County Government was awaiting the



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report of the Ethics and Anti-Corruption Commission upon the request of the County Assembly of Embu.

Observations of the Committee

139. The Committee observed that a number of the issues raised under this Charge were substantially the same as those raised in the first charge of Gross Violation of the Public Procurement and Disposal Act, which is has been dealt with earlier in this Report. The Committee therefore reiterates its observations under the previous charge on the breach of the procurement laws and regulations.
140. In addition, the Committee observes that in addition to the Governor's role as the chief executive of the County as set out under Article 179(4) of the Constitution, under section 30(3)(f) of the County Governments Act, the Governor in performing the functions of his office, is "*accountable for the management and use of the county resources*". Thus, although the Governor is not an accounting officer in the County, the Governor's role extends to overall oversight and accountability for the management and use of resources allocated to the County. This is a critically important role as the success of devolution within each County and in the country as a whole rests on proper and efficient use of the resources allocated by Parliament to the counties. And for this role, the Governor is accountable to the Senate as the Senate discharges its mandate under Article 96(1) of the Constitution of protecting the interests of the counties and of their governments. On this, the High Court in *Constitutional Petition No. 8 of 2014, International Legal Consultancy Group versus the Senate and the Clerk of the Senate*, stated as follows on accountability of Governors for financial management-

"In our considered view, since the County Governors are not answerable to the County Assembly in terms of fiscal management of the County resources under section 149 of the Public Finance Management Act, 2012,

they must be held to account by the Senate for the national revenue allocated to their respective Counties in view of the provisions of section 30(3)(f) of the County Governments Act, 2012 as read together with Article 10(2)(c) on the national values and principles of governance. The Governors, being State officers are bound by the national values of transparency, accountability and observance of good governance when performing their duties as the Chief Executive Officers of the County Governments”.

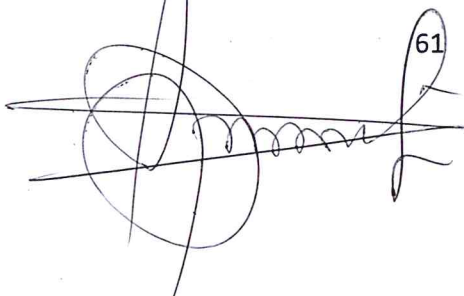
141. The High Court further stated that *“when persons in charge of managing county finances are not held to account, the objectives of devolution set out under Article 174, which includes promoting democratic and accountable exercise of power, and to enhance checks and balances of powers, will be defeated”.*
142. It is evident from the pronouncements of the High Court that Governors have a responsibility of ensuring financial probity within their respective Counties. Further, section 162 of the Public Finance Management Act, 2012 places obligation on public officers with respect to County Government resources, which obligations would bind a Governor. Section 162 of the Act is as follows-

Obligations of public officers with respect to county government resources

(1) Every public officer employed in or by the county government shall comply with the Constitution and all laws relating to conduct of public officers when carrying out a responsibility imposed, or exercising a power conferred, by this Act.

(2) Every public officer shall also—

(a) comply with the provisions of this Act so far as they are applicable to the officer;



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(b) ensure that the resources within the officer's area of responsibility are used in a way that-

(i) is lawful and authorised; and

(ii) effective, efficient, economical and transparent; and

(c) within the officer's area of responsibility-

(i) ensure that adequate arrangements are made for the proper use, custody, safeguarding and maintenance of public property; and

(ii) use the officer's best efforts to prevent any damage from being done to the financial interests of the county government.

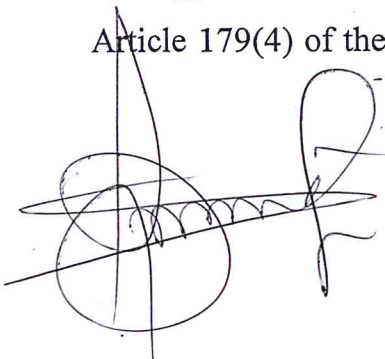
143. As the chief executive of the County, the Governor had a responsibility to ensure that he discharged the obligations under section 162 of the Public Finance Management Act, 2012 with respect to the management and utilization of County resources. The response of the Governor to the allegations set out by the County Assembly does not demonstrate to the Committee that the Governor has indeed discharged his mandate under section 162 of the Public Finance Management Act, 2012.

Finding of the Committee on the Charge of Gross Violation of the Public Finance Management Act, Chapter 412C of the Laws of Kenya

144. Pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated.

6.3 GROSS VIOLATION OF THE CONSTITUTION OF KENYA, 2010

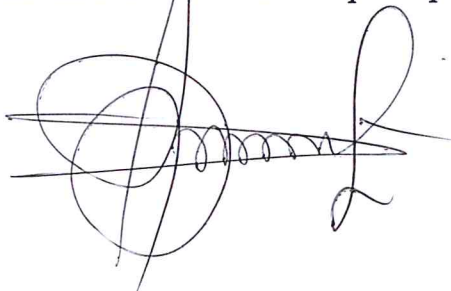
145. To support this charge against the Governor, the County Assembly argued that Article 179(4) of the Constitution provided that the County Governor is the Chief

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Executive Officer of the County while Article 179(6) provides that members of the County Executive Committee are accountable to the Governor for the performance on their functions and the exercise of their powers. The County Assembly therefore argued that in light of this, the Governor was culpable for the gross violation of Article 227 of the Constitution of Kenya, 2010 by-

- (a) failing and/or neglecting to ensure that contracts for procuring maize seeds were done in accordance with a system that was fair, equitable, transparent, competitive and cost effective;
 - (b) neglecting to follow the statutory procedures in procuring services for the face-lifting of Embu Stadium in a bid to defeat fairness, transparency, competitiveness and cost-effectiveness in the application of public funds;
 - (c) blatantly violating statutory procedures by personally ordering for the purchase of motor vehicles in order to defeat transparency and accountability;
 - (d) deliberately operating a County Government that applied public funds to goods, services and works without an appointed County Tender Committee in order to benefit a corruption cartel that in all indications operated from his Office; and
-
- (e) failing to provide information and to act on recommendations made by the Auditor-General when requested to do so for accountability purposes.

146. The County Assembly further averred that Article 10(2)(c) of the Constitution provides for good governance, integrity, transparency and accountability as a part of the national values and principles of governance to which every State organ,



State Officer or public officer is bound. The County Assembly argued that the Governor had violated this Article by-

- (a) failing to ensure adherence to the laws and Regulations that aid transparent and accountable use of County resources, among them, the Public Procurement and Disposal Act, 2005 and the Regulations made thereunder and the Public Finance Management Act, 2012; and
- (b) defending, without any justifiable basis, officers who had been found to have violated the principles of good governance, integrity, transparency and accountability, notably one Margaret Lorna Kariuki, the County Secretary of Embu County. To support this claim, the County Assembly annexed the A Replying Affidavit sworn by the Governor, at *page 197 of Annex 1* and a Press Statement by the Governor which is at page 183 of *Annex 1*.

147. The County Assembly further stated that the Governor had blatantly disregarded the express provisions of Article 232 of the Constitution on the values and principles of public service, which, Article 232(1)(e), includes accountability for administrative acts. The County Assembly submitted that notwithstanding its resolutions on numerous occasions that specific disciplinary action be taken against Ms. Margaret Lorna Kariuki, the Embu County Secretary, for incompetence and corruption, the Governor of Embu County had failed to take any of the actions, and instead, had proceeded to defend her in public and in Court. The Governor had misled the County Assembly through a letter from the Governor to the County Speaker (*at page 197 of Annex 1*) that the County Secretary had stepped aside while in reality, she had continued to be in office. There had been no evidence presented to the Assembly that the County Secretary had ever stepped aside or had been interdicted. In this regard, a copy of the Minutes of the County Assembly's Implementation Committee Meeting held on

16th January, 2014 where the County Executive Member for Finance stated on oath that the County Secretary was still in office is attached *at page 199 of Annex I.*

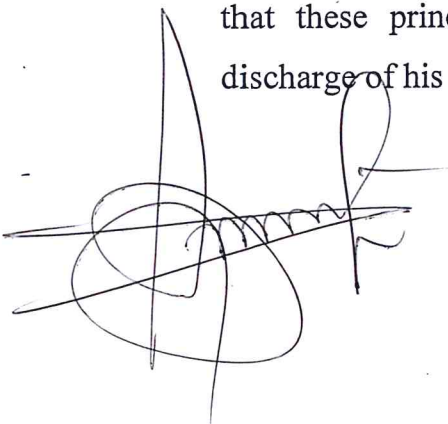
148. On this allegation of violation of the Constitution, it was argued for the Governor that while it was true that the Governor was the Chief Executive of the County under Article 179(4) of the Constitution and that members of the County Executive Committee Members are accountable to the County Governor for the performance of their functions and the exercise of their powers, *“the Constitution does not make a Governor vicariously liable for the acts and omissions of other County officers and employees”*. In support of this, Article 226(5) of the Constitution was cited.

Observations of the Committee

149. The Committee, in addition to the provisions cited by the County Assembly, observed and noted the following provisions of the Constitution that have a bearing on this matter-

(a) Article 260 of the Constitution – this Article includes, in the definition of “State office” the office of a Governor;

(b) Article 10 of the Constitution provides for the national values and principles of governance which, in terms of Article 10(1), bind all State organs, State officers, and public officers. These values and principles were variously cited by the County Assembly in their case as against the Governor, including the principles of good governance, integrity, transparency and accountability. It was the case of the County Assembly that these principles had not been observed by the Governor in the discharge of his functions;

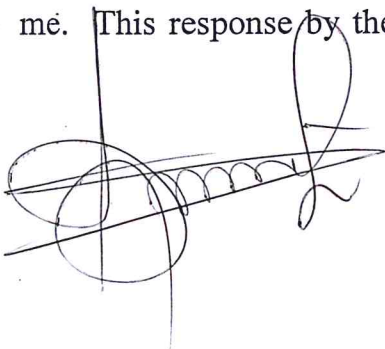
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(c) Article 179(4) of the Constitution which provides that the Governor is the chief executive of the County and therefore has overall responsibility and oversight over the management of public resources in the County;

(d) Article 227(1) of the Constitution which requires that *“when a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective”*. The County Assembly’s is to the effect that the procurement processes in the County have not complied with Article 227(1) of the Constitution. The Auditor-General’s Report also displayed various transactions that appeared to be have been conducted otherwise than in accordance with Article 227(1) of the Constitution. The response of the Governor did not exonerate the Governor from liability for the matter raised by the County Assembly and by the Auditor-General;

(e) Article 73 of the Constitution which sets out the responsibilities of leadership provides at Article 73(1) that the authority that is assigned to a State officer is to be exercised in a manner that, among other things, is *consistent with the purposes and objects of this Constitution, brings dignity to the office and promotes public confidence in the integrity of the office*. Article 73(2)(b) further sets out as a guiding principle of leadership and integrity *“objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices”*.

150. The Special Committee further observed that the standard response by the Governor to all the allegations set out by the County Assembly has been “it was not me. This response by the Governor does little to *“promote public confidence”* in

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the office of the Governor as required under Article 73(1)(a)(iv) of the Constitution. The Governor seems to have abdicated from taking any responsibility for the goings on in his office and in his County, despite being the elected chief executive of the County. This is in violation of section 73(2)(d) of the Constitution which requires that State officers be guided by the principle of “*accountability to the public for decisions and actions*”.

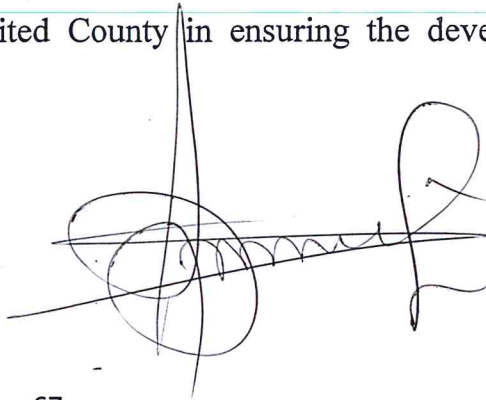
Finding of the Committee on the Charge of Gross Violation of the Constitution of Kenya, 2010

151. Pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated.

8.0 OTHER OBSERVATIONS

The General State of Affairs in Embu County

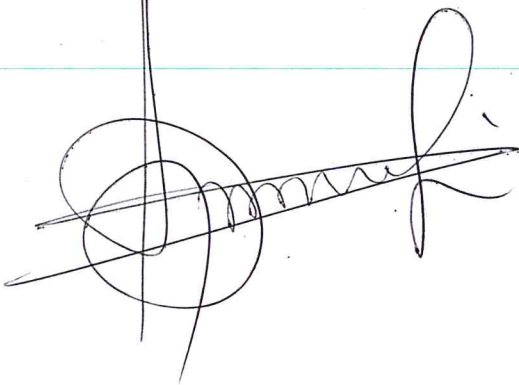
152. Although a comprehensive analysis of the state of affairs in Embu County was not part of the mandate of the Special Committee, it would be an omission on the part of the Special Committee not to mention that in the course of the investigation and particularly the public hearings, it became apparent that matters in that County were in a far less than satisfactory state. In the interests of the people of Embu, there is urgent need, whichever way the present matter concludes, for a concerted effort at seeking reconciliation and cohesion in the County. There is need for the County to now proceed as a united County in ensuring the development and success of the County.

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9.0 CONCLUSION

153. **The Special Committee, having executed its mandate under section 33 of the County Governments Act and standing order 68 of the Senate Standing Orders has found as follows-**

- (1) On the Charge of Gross Violation of the Public Procurement and Disposal Act, Chapter 412A of the Laws of the Kenya, pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated;**
- (2) On the Charge of Gross Violation of the Public Finance Management Act, Chapter 412C of the Laws of Kenya, pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated; and**
- (3) On the Charge of Gross Violation of the Constitution of Kenya, 2010 pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated.**

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MINUTES

MINUTES OF THE OF THE FIFTH SITTING OF THE SENATE SPECIAL COMMITTEE TO INVESTIGATE THE PROPOSED REMOVAL FROM OFFICE OF THE GOVERNOR OF EMBU COUNTY HELD ON TUESDAY, 13TH MAY, 2014 AT THE BOMA HOTEL, SOUTH-C, NAIROBI AT 7.15AM

PRESENT

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

IN ATTENDANCE

i) Ms. Eunice Gichangi	-	Director, Legal Services
ii) Mr. Anthony Njoroge	-	Director, Litigation and Compliance
iii) Mr. Njenga Ruge	-	Deputy Director, Legislative and Procedural Services
iv) Ms. Mary Chesire	-	Deputy Director, Committee services
v) Maj. (Rtd) Samson Sorobit	-	Chief Sergeant-at-Arms

MIN. NO.024/2014 - **PRELIMINARIES**

The Chairperson called the meeting to order at 7.15pm.

MIN. NO.025/2014 - **CONFIRMATION OF PREVIOUS MINUTES**

Minutes of the first, second, third, fourth and fifth sittings were confirmed by Members present and signed by the Chair after proposed and seconded by Sen. Sijeny and seconded by Sen. Prof. Lesan, respectively.

MIN. NO.026/2014 - **ADOPTION OF THE REPORT**

The Committee adopted the report and agreed that the Chair tables will Special Sitting of the Senate, today, **Tuesday, 13th May 2014** at 9.00am.

The meeting adjourned *sine die* at 7.50am.

Signed:
(Chairperson)

Date:
13/04/14



**MINUTES OF THE OF THE FOURTH SITTING OF THE SENATE
SPECIAL COMMITTEE TO INVESTIGATE THE PROPOSED REMOVAL
FROM OFFICE OF THE GOVERNOR OF EMBU COUNTY HELD ON
MONDAY, 12TH MAY, 2014 AT THE BOMA HOTEL, SOUTH-C, NAIROBI
AT 5.15PM**

PRESENT

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

IN ATTENDANCE

i) Ms. Eunice Gichangi	-	Director, Legal Services
ii) Mr. Anthony Njoroge	-	Director, Litigation and Compliance
iii) Mr. Njenga Ruge	-	Deputy Director, Legislative and Procedural Services
iv) Ms. Mary Chesire	-	Deputy Director, Committee services
v) Maj.(Rtd) Samson Sorobit	-	Chief Sergeant-at-Arms

MIN. NO.021/2014 - **PRELIMINARIES**

The Chairperson called the meeting to order at 5.15pm

MIN. NO.022/2014 - **CONSIDERATION OF THE DRAFT
REPORT**

The Committee considered the draft report and proposed amendments and agreed to adopt them at the next sitting on 13th May 2014 at 7.30am at the Boma Inn Hotel.

MIN.NO. 23/2014

ADJOURNMENT AND DATE OF
NEXT MEETING

The meeting adjourned at 8.30pm. The date of the next sittings was set for
Tuesday, 13th May, 2014.

Signed:
(Chairperson)

Date: 13 / 05 / 14

MINUTES OF THE CONTINUATION OF THE THIRD SITTING OF THE SENATE SPECIAL COMMITTEE TO INVESTIGATE THE PROPOSED REMOVAL FROM OFFICE OF THE GOVERNOR OF EMBU COUNTY HELD ON SUNDAY, 11TH MAY, 2014 AT THE KICC AMPHITHEATRE, NAIROBI AT 4.15PM

PRESENT

Sen. Boni Khalwale	-	Chairperson
Sen. Kipchumba Murkomen	-	Vice-Chairperson
Sen. James Orengo	-	Member
Sen. Peter Mositet	-	Member
Sen. Boy Juma Boy	-	Member
Sen. (Eng.) Hargura Godana	-	Member
Sen. (Prof.) Wilfred Lesan	-	Member
Sen. Judith Sijeny	-	Member
Sen. Naisula Lesuuda	-	Member

IN ATTENDANCE

1. COUNTY ASSEMBLY TEAM

i)	Mr. Kariuki Mate	-	Speaker, County Assembly of Embu
ii)	Mr. Ibrahim Swaleh	-	Member, County Assembly of Embu
iii)	Mr. Charles Njenga	-	Advocate for the County Assembly
iv)	Mr. George Ng'ang'a	-	Advocate for the County Assembly

3. SENATE STAFF

i)	Ms. Eunice Gichangi	-	Director, Legal Services
ii)	Mr. Anthony Njoroge	-	Director, Litigation and Compliance
iii)	Mr. Njenga Ruge	-	Deputy Director, Legislative and Procedural Services
iv)	Ms. Mary Chesire	-	Deputy Director, Committee services
v)	Maj. (Rtd) Samson Sorobit	-	Chief Sergeant-at-Arms

MIN. NO.017/2014

PRELIMINARIES

The Chairperson called the meeting to order at 4.15pm

The counsel for the County Assembly made the following submissions;-

- a. With regard to the first and second charge, it is the case of the County Assembly that the Governor is the Chief Executive Officer of the county and has the primary accounting responsibility in respect to matters of procurement in the county;
- b. Pursuant to section 30 (3) (f) of the County Government Act, 2012 the Governor is responsible for the management and prudent use of resources in the county since procurement of goods, services and works is about the use of public funds allocated to the county;
- c. When a public entity contracts, it shall do so in a fair and transparent manner and when a restrictive tendering is used, it has to be justified since restrictive tendering has the effect of removing the competitive nature of the tender process;
- d. To the extent that the Governor deliberated on the restrictive tendering, then he was accountable and responsible under section 30 (3) (f) which assigns that the office of the Governor shall ensure prudence and accountability in the manner in which procurement is done,
- e. The Governor is a Chief Executive with enormous executive powers and hence he is responsible for all matters that take place under his jurisdiction and hence the Governor cannot abdicate his responsibilities;
- f. By failing to take action, he abdicated his executive responsibility thereby contravening the law and betraying the trust of the people who entrusted him to ensure that funds are accountable for;
- g. Indeed, prudence and accountability in how funds are used is the core objective and responsibility of the Governor;
- h. The constitution provides for impeachment if there is a violation of the constitution or any other law. Section 73 of the Public Procurement and Disposal Act was grossly violated;
- i. It is gross violation for his inaction to take corrective measures as he did not sanction the concerned department but on the contrary swore an affidavit concluding that the investigation facing the County Secretary was without basis and premature yet the Ethics and Anti-corruption Commission was undertaking investigations against her;
- j. The Governor stated that he wrote a letter and asked the county secretary to step aside yet she insisted that she proceeded on leave. This means that he

- misled the committee when he alleged that he complied with the resolution of the county assembly;
- k. The fact that procurements are considered by an independent tender committee does not take away the responsibility of the Governor to make sure compliance with procurement laws and regulations;
 - l. Swearing the affidavit was an act of complicity and he should not be allowed to pass off as if he is beyond reproach. This was an attempt to obstruct justice;
 - m. That the committee finds that the allegation in charge 1 and 2 have been substantiated;
 - n. The lack of an accounting officer who was to be designated by a county executive committee member brought about challenges. The Governor ought to have intervened. He violated that law by his inaction;
 - o. The Governor deliberately sought to shift the blame to the chief officers when the ultimate responsibility belonged to him and if the Governor is exonerated, then a wrong signal will be sent;
 - p. That they did not deliberately cross examine some witness because the process of impeachment has not been impugned by the Governor;
 - q. The essence of impeachment is to ensure that holders of state offices execute their mandate in compliance with the law and the constitution;
 - r. The Senate is undertaking the inquiry to establish whether the Governor has discharged his mandate in line with the constitution and the County Governments Act, 2012;
 - s. He noted that the impeachment process is based on violations. In our case, the abuse of office is based on acts, omission and commissions;
 - t. Urged the committee to recommend that the buck must stop with the highest office holder and that is the Governor;
 - u. The role of the Senate in Article 96 of the constitution is to protect counties and their Governments, the word "protect" capture the relationship between the Senate, counties and their governance;
 - v. The Senate must protect the people by setting the standards that will not applied across all the counties and by every executive working in the counties,
 - w. The Senate must asserted itself and set clear standards that they it not be tolerating and condoning excuses at the level of accountability in the management of public funds;
 - x. The county Executive Committee of Embu irregularly awarded contracts and favoured some parties. The Senate must prescribe a higher standard not just for Embu but for all the 47 counties and
 - y. Asserted that this is not a civil or criminal trial; it's a test on governance.

There was no representation for the Governor to make his final submissions.

MIN. NO. 019/2014

ANY OTHER BUSINESS

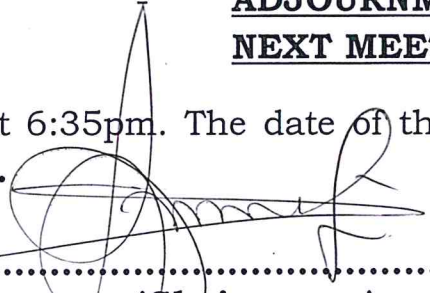
The Committee resolved to undertake a report writing retreat on Monday, 12th May, 2014 which will be tabled in the Senate on **Tuesday, 13th May, 2014.**

MIN.NO. 020/2014

**ADJOURNMENT AND DATE OF
NEXT MEETING**

The meeting adjourned at 6:35pm. The date of the next sittings was set for **Monday, 12th May, 2014.**

Signed:

.....


(Chairperson)

Date:

.....
13/05/14

MINUTES OF THE CONTINUATION OF THE THIRD SITTING OF THE SENATE SPECIAL COMMITTEE TO INVESTIGATE THE PROPOSED REMOVAL FROM OFFICE OF THE GOVERNOR OF EMBU COUNTY HELD ON SUNDAY, 11TH MAY, 2014 AT THE KICC AMPHITHEATRE, NAIROBI AT 2.00PM

PRESENT

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

IN ATTENDANCE

1. COUNTY ASSEMBLY TEAM

- i. Mr. Kariuki Mate - Speaker, County Assembly of Embu
- ii. Mr. Ibrahim Swaleh - Member, County Assembly of Embu
- iii. Mr. Charles Njenga - Advocate for the County Assembly
- iv. Mr. George Ng'ang'a - Advocate for the County Assembly

2. GOVERNOR'S TEAM

Mr. Wilfred Nyamu - Advocate for the Governor

3. SENATE STAFF

- i) Ms. Eunice Gichangi - Director, Legal Services
- ii) Mr. Anthony Njoroge - Director, Litigation and Compliance
- iii) Mr. Njenga Ruge - Deputy Director, Legislative and Procedural Services
- iv) Ms. Mary Chesire - Deputy Director, Committee services
- v) Maj. (Rtd) Samson Sorobit - Chief Sergeant-at-Arms

The Chairperson called the meeting to order at 2.15pm.

The Chair directed the advocates for both the County Assembly of Embu and the Governor of Embu in submitting their evidence and final submissions to address the following matters:

- 1) The issue of *sub judice*;
- 2) the issue of double jeopardy; that the Governor is being tried by the same committee for subsequently the same charges;
- 3) The issue that the statutory three months period before reintroduction of a motion to impeach the Governor has not lapsed;
- 4) The threshold required for impeachment of Governor;
- 5) The nexus between the Governor and the alleged charges;

These are some of the issues that will guide the committee when considering the evidence and preparing its report to be tabled before the Senate.

Upon reading the directive, the counsel for the Governor informed the committee that his client, the Governor of Embu county, has taken exception not to take part in the hearing and thus, he had no further instructions to proceed.

After consultation with the committee, the Chair noted that the committee cannot compel the counsel for the Governor to submit evidence and therefore, free to do as he chose.

Upon invitation by the chair, the counsel representing the County Assembly of Embu presented the following evidence before the committee;-

1. Gross Violation of the Public Procurement and Disposal Act, 2005.

a) Procurement of maize seeds for distribution to farmers:

- i) On the 25th October 2013, the office of Governor authorized the procurement of maize of different variety and quantity other than those requisitioned by the Director of Agriculture, the expert of the concerned department. Whereas the expert requisitioned for two varieties, namely KDV-1 and KDV-6, the maize variety procured by the Office of the Governor was DK 8031, in violation of the provisions of sections 26 and 34 of the Public Procurement and Disposal Act, 2005.

The procured maize seeds of variety DK 8031 either did not germinate or recorded a germination rate of below 20%, resulting in untold losses to maize farmers of Embu County, and to date, the Governor has not taken any steps to mitigate losses to farmers for the total maize crop failure occasioned by his actions.

The counsel referred the committee to the Annexure marked "CAE 1" at Pages 8-50 of the County Assembly bundle which is a report of joint committees of Agriculture, Livestock, Fisheries and Co-operatives and Public Accounts and Investments on maize seeds procurement.

- ii) Whereas authority of the purported tender committee to procure maize seeds was granted on 27th November 2013, the distribution exercise carried out by the Governor personally, commenced on 1st October 2013, nearly two months before the alleged procurement was done, in blatant violation of the procurement procedures laid down under section 26 of the Public Procurement and Disposal Act, 2005.

Indeed, the form and nature of the purported minutes of the purported tender committee point to an attempt to regularize an otherwise irregular process.

- iii) The procured maize was delivered by the supplier, directly to farmers and was not entered into any store records to ascertain its quality and quantity through inspection, in blatant violation of section 26 of the Public Procurement and Disposal Act, 2005.

b) Procurement of works for the face lifting of Embu stadium.

- i) The Governor through his office initiated the works to face-lift the stadium without involving the user department and other technical departments, in total violation of section 26(1) and 26 (3) (c) of the Public Procurement and Disposal Act, 2005. The head of the user department is on record stating that she was not involved at any part in the procurement process.

The counsel referred the committee to the Annexure marked "CAE 2" at pages 51-74 of the County Assembly bundle of documents which is a report of joint committees of Infrastructure, Youth and Sports on face-lifting of the Embu stadium

- ii) The Governor through his office received Bills of Quantities for the face-lifting of the stadium on 30th December 2013, while the tender for the works was floated in 22nd October 2013, a clear violation of section 26 of the Public Procurement and Disposal Act, 2005. Indeed the Bills of Quantities appeared to be an effort to regularize an otherwise irregular procurement process.

The counsel referred the committee to the Annexure Marked "CAE 3" at pages 75-133 of the County Assembly bundle; which is the Bills of Quantities from the County Works office prepared in November 2013 and forwarded to the office of the Governor on 30th December 2013, who personally forwarded them to the County Assembly in answer to oversight queries on 31st December, 2013. The Governor's personal involvement is evidence of a vested personal interest in the matter.

- iii) The Governor through his office, initiated the procurement of works before ascertaining availability of sufficient funds in violation of sections 26(3) (a) and 26(6) of the Public Procurement and Disposal Act, 2005. An attempt to regularize this violation through a supplementary budget was defeated by the absence of a justification of circumstances under which a project whose approved budget was Ksh.8 million increased to Ksh.50 million. The Bills of Quantities forwarded them to the County Assembly on the 31st December, 2013 was an effort at that justification.

c) Procurement of motor vehicles.

The Governor directly procured the purchase of various motor vehicles from specific dealers for specified amounts of money without any reference to county tender committee in blatant violation of sections 26 (1)(2)(3) and (4) of the Public Procurement and Disposal Act, 2005.

The counsel referred the committee to the Annexure marked "CAE 4" at pages 134-138 of the County Assembly bundle of documents which has the letter of authority from the Governor written 3 days after the receipt of pro-forma invoice from CMC Motors Group Limited.

d) Violations of the Public Procurement and Disposal Act, 2005, by the County Executive of Embu under the Governor through his office, set out in the report of the Auditor General for the period 3rd March 2013 -30th June, 2013

- i) Irregular award of contracts for repair works at the town hall and probation offices in violation of section 27 of the Public Procurement and Disposal Act, 2005.
- ii) Unwarranted disqualification of interested bidders in violation of section 66(3)(b) of the Public Procurement and Disposal Act, 2005;
- iii) Favoritism in consideration for responsiveness of tenders during evaluation which is against the objectives enshrined under section 2 of the Public Procurement and Disposal Act, 2005. This is also contrary to section 34 of the same Act.
- iv) Failure to conduct financial and technical evaluation of contracts in violation of Regulation 16 of the Public Procurement and Disposal regulations 2006 (revised 2013);
- v) Irregular reallocation of funds for works not included in Bills of Quantities contrary to section 26 (1), (2) and (3) of the Public Procurement and Disposal Act, 2005;
- vi) Lack of formal contracts for works such as in contracts- EBU/COUNT/07/2013, EBU/COUNT/09/2012-13 and EBU/COUNT/08/2012-13 in violation of section 68 of the Public Procurement and Disposal Act, 2005;
- vii) Use of unregistered sub-contractors such as during undertaking of works related to electrical installation, CCTV and plumbing works

- all valued at Ksh.2,402,500, in violation of section 31 of the Public Procurement and Disposal Act, 2005;
- viii) Irregular procurement method in the contract for the refurbishment of Embu County Council Hall to house the County Assembly, contract EBU/COUNT/06/2012-13 valued at Ksh.33,315,836 in violation of section 29 of the Public Procurement and Disposal Act, 2005;
 - ix) Irregular purchase and registration of a motor-vehicle registration number KBU 683T in that the purchase price exceeded budgeted amount in clear violation of section 26(2)(a) of the Public Procurement and Disposal Act, 2005; and further, that there was no record to show that the same was registered from the time of its purchase in the name of the County Government of Embu, an action that violates section 45 of the Public Procurement and Disposal Act, 2005;
 - x) Procurement of fuel was found to be irregular with no store records maintained to show receipt and usage of fuel in violation of Regulation 17 of the Public Procurement and Disposal Regulations 2006 (revised 2013);

The counsel referred the committee to the Annexure marked "CAE 5" at pages 139-177 of the County Assembly bundle of documents which is part of the report of the Auditor General on financial operations of Embu County from 3rd March 2013 to 30th June 2013.

e) Non existence of a Tender Committee for the County Executive

- i) At the time of procuring works for the face-lifting of the Embu Stadium, the office of the Governor was not able to demonstrate that there existed a tender committee appointed pursuant to the provisions of section 26(4) of the Public Procurement and Disposal Act, 2005 and regulation 7 of the Public Procurement and Disposal (county governments) Regulations, 2013, and when the County Assembly by resolution recommended the interdiction of those responsible for procurement of the works, the County

Public Service Board was unable to implement the recommendation because there was no record of any appointment to a tender committee of the persons purported to be such members.

- ii) - A recommendation by the County Assembly that Members of the Tender Committee that procured maize seeds for distribution to farmers be interdicted could not be implemented because the implementing body could not find record of any appointment of the persons purported to be members of the Tender Committee, a clear and blatant violation and/or disregard of section 26(4) of the Public Procurement and Disposal Act, 2005 and regulation 7 of the Public Procurement and Disposal (county governments) Regulations, 2013.

The counsel referred the committee to the Annexure marked "CAE 6" at pages 178-181 of the County Assembly bundle which is the report of the County Public Service Board on the implementation of the resolution of the County Assembly to interdict the purported members of the tender committee.

The Governor continuously applied public funds to works and services without an appointed Tender Committee in violation of the Public Procurement and Disposal Act, 2005 and in a clear bid to circumvent prudence and accountability in management of public resources that were the principle basis for enactment of the Public Procurement and Disposal Act, 2005.

2. Gross Violation of the Public Finance Management Act, 2012.

- a) The irregular procurement of maize seeds for distribution to farmers in which maize seeds other than those requisitioned for by technical officers were procured by the office of the Governor, the procurement was not authorized by a tender committee and stores records were not maintained, all demonstrated a serious violation of Section 121 of the Public Finance Management Act, 2012 whose object is to ensure

prudent application of public funds, taking into account the principle of value for money;

- b) The irregular procurement of works for the face lift of Embu stadium in which tendering was done without the input of technical departments (more specifically, bills of quantities), without an appointed tender committee, and without ascertaining availability of funds all demonstrated a serious violation of section 121 of the Public Finance Management Act, 2012;
- c) The action of the Governor to direct the purchase of motor vehicles in complete disregard of the procurement law and the applicable regulations was a blatant violation of section 121 of the Public Finance Management Act, 2012;
- d) The Governor has willfully, calculatedly presided over a County Government that lacked tender committees in an effort to defeat accountability and prudence in application of public funds as evidenced in the report of the County Public Service Board, which indicated that there were no officers appointed to any tender committee during the procurement of maize seeds, procurement of works for the rehabilitation of the stadium. This is a violation of section 121 of the Public Finance Management Act, 2012;
- e) The report of the Auditor General on the accounts of the County Government for the period March to June 2013 unearthed gross violations of laws regulating prudent management of funds. Pages 27-63 of the report demonstrates a gross violation of, among others, section 121 of the Public Finance Management Act, 2012;
- f) Section 162 of the Public Finance Management Act, 2012 has placed an obligation on any County public Officer to ensure prudent management of County resources, and where the County Assembly demonstrated a breach of this obligation and made certain remedial recommendations including the interdiction of County Officers to facilitate investigations, no action was taken. Indeed, the Governor, in blatant disregard of this law, proceeded to swear affidavits in defense of one of the officers, namely Ms. Margaret Lorna Kariuki, the County Secretary;

3. Gross Violation of the Constitution of Kenya.

a) Article 179(4) of the Constitution provides that the County Governor is the Chief Executive officer of the County while Article 179(6) provides that members of the County Executive Committee are accountable to the Governor for the performance on their functions and exercise of their powers. In consequence thereof, the Governor is culpable for the gross violation of Article 227 of the Constitution of Kenya, 2010 by:

- i) Failing and/or neglecting to ensure that contracts for procuring maize seeds were done in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
- ii) Neglecting to follow the statutory procedures in procuring services for face lifting of Embu stadium in a bid to defeat fairness, transparency, competitiveness and cost effectiveness in application of public funds.
- iii) Blatantly violating statutory procedures by personally ordering for the purchase of motor vehicles in order to defeat transparency and accountability.
- iv) Deliberately operating a County Government that applied public funds to goods, services and works without an appointed county tender committee in order to benefit a corruption cartel that in all indications operated from his office.
- v) By failing to provide information and act on recommendations made by the auditor general when requested to do so for accountability purposes.

b) Article 10(2)(c) of the Constitution of Kenya, 2010 pronounces good governance, integrity, transparency and accountability as among the national values and principles of governance to which every State organ, State Officer or any public officer is bound. The Governor of Embu County has violated this Article by:

- i) Failing to ensure adherence to laws and regulations that aid transparent and accountable use of county resources; among them the Public Procurement and Disposal Act, 2005 and Regulations thereunder, and the Public Finance Management Act, 2012.
- ii) Defending without any justifiable basis, officers who have been found to be in violation of the principles of good governance, integrity, transparency and accountability, notably one Margaret Lorna Kariuki, the County Secretary of Embu County.

The counsel referred the committee to the Annexure marked "CAE 7" on pages 182-195 of the County Assembly bundle which is the Governor's Affidavit and press statement in support of the county secretary.

c) Disregard for the express provisions of Article 232 of the Constitution on the values and principles of public service.

- i) Notwithstanding that the County Assembly has resolved on numerous occasions that specific disciplinary actions be taken against Ms. Margaret Lorna Kariuki, the Embu County Secretary for incompetence and corruption, the Governor of Embu County has failed to take any of the actions, and instead, has gone on to defend her publicly and in court, even misleading the County Assembly through a letter to the County Speaker that the County Secretary had stepped aside while in reality, she continued to be in office. There is no evidence to date that the County Secretary ever stepped aside or was interdicted.

The counsel referred the committee to the Annexure marked "CAE8" on pages 196-201 of the County Assembly bundle is the Governor's letter to the Hon. Speaker alleging that the county secretary had stepped aside and a copy of minutes of the County Assembly Implementation Committee meeting where the County Executive Member for Finance stated on oath that the County Secretary was still in office.

Upon conclusion of evidence by the County Assembly, and being no representation from the Governor, hearing of evidence was closed.

MIN. NO.016/2014

**ADJOURNMENT AND DATE OF
NEXT MEETING**

The sitting adjourned at 3.45pm. The date for the next meeting was set at 4.00p.m.at the KICC Amphitheatre.

Signed:
(Chairperson)

Date: 13 / Oct / 14

MINUTES OF THE THIRD SITTING OF THE SENATE SPECIAL COMMITTEE TO INVESTIGATE THE PROPOSED REMOVAL FROM OFFICE OF THE GOVERNOR OF EMBU COUNTY HELD ON SUNDAY, 11TH MAY, 2014 AT THE KICC AMPHITHEATRE, NAIROBI AT 10.00 A.M.

PRESENT

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

IN ATTENDANCE

1. COUNTY ASSEMBLY TEAM

- i) Mr. Kariuki Mate
- ii) Mr. Ibrahim Swaleh
- iii) Mr. Charles Njenga
- iv) Mr. George Ng'ang'a

- Speaker, County Assembly of Embu
- Member, County Assembly of Embu
- Advocate for the County Assembly
- Advocate for the County Assembly

2. GOVERNOR'S TEAM

Mr. Wilfred Nyamu

- Advocate for the Governor

3. SENATE STAFF

- i) Ms. Eunice Gichangi
- ii) Mr. Anthony Njoroge
- iii) Mr. Njenga Ruge

- iv) Ms. Mary Chesire
- v) Maj. (Rtd) Samson Sorobit

- Director, Legal Services
- Director, Litigation and Compliance
- Deputy Director, Legislative and Procedural Services
- Deputy Director, Committee services
- Chief Sergeant-at-Arms

The Chairperson called the meeting to order at 10.00 am and commenced with the reading of the Prayer. After a brief introduction of the Committee and others in attendance, the chairperson, invited the advocates for the County Assembly of Embu and advocate of the Governor to make their opening remarks/statements in that order.

Upon invitation by the chair, the counsel representing the Governor of Embu County made the following opening remarks before the committee and stated as follows:-

- a) That the Governor acknowledges and respects the important constitutional duty and role of the Senate and the special Committee in ensuring probity and accountability at the county level.
- b) That the special Committee and by extension the Senate had violated its own Standing Order 92 (1), (2) and (3) which prevents the Senate from referring to any particular issue which is *sub judice*.
- c) That the Committee comprises the same membership who presided over the previous hearing hence his client would suffer double jeopardy. While the Governor has no doubt about the integrity of the honourable members, the likelihood of biased decision is real and indeed the prospect of an impartial hearing nil. He appealed to the committee recuse itself and refer the matter to the Speaker of the Senate to reconstitute the membership.
- d) That the allegations and subsequent charges raised against the Governor by the Embu County Assembly did not meet the constitutional threshold for impeachment or removal from office of the Governor as outlined in Article 181 of the Constitution.
- e) That there were public officers in the county executive who were responsible for procurement and the Governor had no direct control over the procurement process and therefore, there was no nexus between the Governor and the alleged violation of Public Procurement and Disposal Act, 2005, the Constitution of Kenya 2010, and the Public Finance Management Act. The County Assembly should have charged the Governor for abuse of office under the County Governments Act, 2012.

- f) That the County Assembly in introducing a motion of removal from office of Governor for the second time without due regard to statutory period is in contravention to the provisions of the County Governments Act, 2012. Section 35(8) stipulates that if a vote in the Senate fails to result in the removal from office, a motion of removal cannot be re-introduced in the Senate before the expiry of three months lapses from the date of such vote, and consequently the special committee should terminate its proceedings, as those months have not lapsed.

MIN. NO.012/2014

**OPENING STATEMENTS BY THE
COUNTY ASSEMBLY**

Upon invitation by the chairperson, the counsel representing the County Assembly of Embu made the following opening remarks:-

The Counsel;-

- a) Urged the committee to carefully analyze and consider all the documents filed by the County Assembly of Embu;
- b) Stated that the procurement of works for the rehabilitation of Embu stadium and procurement of defective maize seed caused an outcry and raised many questions. The defective seeds procured by the Embu county executive did not germinate and were not fit for the purpose, and as a result, Embu farmers suffered massive losses;
- c) Informed the committee that the Governor could not account for the utilization of public funds;
- d) Stated that the non-existence of a Tender Committee was an outright gross violation of the Public Procurement and Disposal Act, 2005 and Procurement Regulations. The procurement process lacked proper documentation such as advertising the tender, tender committee report, minutes, and letters of award;
- e) Stated that the Embu County Assembly acted in good faith and within the law in bringing the motion of impeachment and had no malice whatsoever;
- f) Stated that the function of the Governor is to provide leadership and guidance as he is at the helm of the county government and therefore, the chief executive officer of the county government;
- g) Informed the committee that by virtue of section 30 of the County Governments Act, 2012; the Governor is responsible for all the affairs of

the county in general and prudent management and use of county resources in particular;

- h) Stated that the Auditor-General's report indicated mismanagement of public funds by the County executive and lack of accountability;
- i) Informed the committee that the Governor failed to hold to account the public officers for their misconduct as recommended by the County Assembly. The Public Procurement and Disposal Act, 2005 emphasized the importance and requirement of transparency, fairness and competitiveness in any public tendering;
- j) Informed the committee that the Governor swore an affidavit, in a bid to protect the county secretary from investigation and possible prosecution;
- k) Stated that the vote on the motion for the impeachment and the charges against the Governor received the support of two thirds majority of the members of the county assembly;
- l) Stated that they will proof the existence of a nexus between the charges and conduct of the Governor.

MIN. NO.013/2014

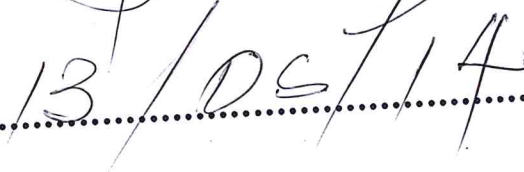
**ADJOURNMENT AND DATE OF
NEXT MEETING.**

The sitting adjourned at 1.00pm. The date for the next meeting was set to 2.00p.m.at the KICC, Amphitheatre, this afternoon.

Signed:


(Chairperson)

Date:



MINUTES OF THE SECOND SITTING OF THE SENATE SPECIAL COMMITTEE TO INVESTIGATE THE PROPOSED REMOVAL FROM OFFICE OF THE GOVERNOR OF EMBU COUNTY HELD ON FRIDAY, 9TH MAY, 2014 AT THE KICC AMPHITHEATRE, NAIROBI AT 9.30A.M.

PRESENT

Sen. Boni Khalwale	-	Chairperson
Sen. Kipchumba Murkomen	-	Vice-Chairperson
Sen. James Orengo	-	Member
Sen. Zipporah Kittony	-	Member
Sen. (Eng.) Hargura Godana	-	Member
Sen. (Prof.) Wilfred Lesan	-	Member
Sen. Kimani Wamatangi	-	Member
Sen. Judith Sijeny	-	Member
Sen. Naisula Lesuuda	-	Member

APOLOGY

Sen. Peter Mositet	-	Member
Sen. Boy Juma Boy	-	Member

IN ATTENDANCE

1. COUNTY ASSEMBLY TEAM

i) Mr. Kariuki Mate	-	Speaker, County Assembly of Embu
ii) Mr. Charles Njenga	-	Advocate for the County Assembly
iii) Mr. George Ng'ang'a	-	Advocate for the County Assembly

2. GOVERNOR'S TEAM

Mr. Wilfred Nyamu	-	Advocate for the Governor
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3. SENATE STAFF

i) Ms. Eunice Gichangi	-	Director, Legal Services
ii) Mr. Anthony Njoroge	-	Director, Litigation and Compliance
iii) Mr. Njenga Ruge	-	Deputy Director, Legislative and Procedural Services
iv) Ms. Mary Chesire	-	Deputy Director, Committee services
v) Maj. (Rtd) Sorobit	-	Chief Sergeant-at-Arms

MIN. NO.06/2014

PRELIMINARIES

The Chairperson called the meeting to order at 9.30 am and commenced with the reading of the Prayer. The Committee considered and adopted the Draft Rules of Procedure.

MIN. NO.07/2014

CONFERENCE OF PARTIES

The Conference of Parties commenced with the introduction of the Members of the Committee followed by the introduction of members of the County Assembly present and their advocates and the Governors Advocates.

The Chairperson gave a brief of the mandate of the Special Committee and thereafter, invited the Vice-Chairperson to take the Committee through the Rules of Procedure of the Special Committee investigating into the Proposed Removal from office of a Governor.

MIN. NO.08/2014

GOVERNOR'S MATTER: READING OF THE CHARGES

Upon invitation by the Chairperson, the Director, Legal Services on behalf of the Clerk of the Senate, read the Charges by the County Assembly of Embu against the Governor as set out in the letter dated 29th April, 2014 by the Speaker of the County Assembly which was forwarded to the Speaker of the Senate. The Charges as read are as follows:-

1. Gross Violation of the Public Procurement and Disposal Act, 2005.

a) Procurement of maize seeds for distribution to farmers:

- i) On the 25th October 2013, the office of Governor authorized the procurement of maize of variety and quantity other than those requisitioned by the Director of Agriculture, the expert of the concerned department. Whereas the expert requisitioned for two varieties, namely KDV-1 and KDV-6, the maize variety procured by the Office of the Governor was DK 8031, in violation of the provisions of sections 26 of the Public Procurement and Disposal Act, 2005.

(The procured maize seeds of variety DK 8031 either did not germinate or recorded a germination rate of below 20%, resulting in untold losses to maize farmers of Embu County, and to date, the Governor has not taken

any steps to mitigate losses to farmers for the total maize crop failure occasioned by his actions).

(Annexed and marked "CAE 1" at Pages 8-50 of the County Assembly bundle is a report of joint committee of Agriculture, livestock, fisheries and co-operatives and the committee on public accounts and investment on maize seeds procurement).

- ii) Whereas authority of the purported tender committee to procure maize seeds was granted on 27th November 2013, the distribution exercise carried out by the Governor of Embu County personally, commenced on 1st October 2013, nearly two months before the alleged procurement was done, in blatant violation of the procurement procedures laid down under section 26 of the Public Procurement and Disposal Act, 2005.

Indeed, the form and nature of the purported minutes of the purported tender committee point to an attempt to regularize an otherwise irregular process.

- iii) The procured maize was delivered by the supplier, directly to farmers and was not entered into any store records to ascertain its quality and quantity through inspection, in blatant violation of section 26 of the Public Procurement and Disposal Act, 2005.

b) Procurement of works for the face lifting of Embu stadium.

- i) The Governor through his office initiated the works to face-lift the stadium without involving the user department and other technical departments, in total violation of section 26(1) and 26 (3) (c) of the Public Procurement and Disposal Act, 2005. The head of the user department is on record stating that she was not involved at any part in the procurement process.

- ii) The Governor through his office received Bills of Quantities for the face-lifting of the stadium on 30th December 2013, while the tender for the works was floated on 22nd October 2013, a clear violation of section 26 of the Public Procurement and Disposal Act, 2005. Indeed the Bills of Quantities appeared to be an effort to regularize an otherwise irregular procurement process.

iii) The Governor through his office, initiated the procurement of works before ascertaining availability of sufficient funds in violation of sections 26(3)(a) and 26(6) of the Public Procurement and Disposal Act, 2005. An attempt to regularize this violation through a supplementary budget was defeated by the absence of a justification of circumstances under which a project whose approved budget was Ksh.8 million increased to Ksh.50 million. The Bills of Quantities forwarded to the County Assembly on the 31st December 2013, was an effort at that justification.

c) Procurement of motor vehicles.

The Governor of Embu County directly procured the purchase of various motor vehicles from specific dealers for specified amounts of money without any reference to county tender committee in blatant violation of sections 26 (1)(2)(3) and (4) of the Public Procurement and Disposal Act, 2005.

d) Violations of the Public Procurement and Disposal Act,2005,by the County Executive of Embu under the Governor through his office, set out in the report of the Auditor General for the period 3rd March 2013 -30th June, 2013

- i) Irregular award of contracts for repair works at the town hall and probation offices in violation of section 27 of the Public Procurement and Disposal Act, 2005.
- ii) Unwarranted disqualification of interested bidders in violation of section 66(3)(b) of the Public Procurement and Disposal Act, 2005;
- iii) Favoritism in consideration for responsiveness of tenders during evaluation which is against the objectives enshrined under section 2 of the Public Procurement and Disposal Act, 2005. This is also contrary to section 34 of the same Act.
- iv) Failure to conduct financial and technical evaluation of contracts in violation of Regulation 16 of the Public Procurement and Disposal regulations 2006 (revised 2013);
- v) Irregular reallocation of funds for works not included in Bills of Quantities contrary to section 26 (1), (2) and (3) of the Public Procurement and Disposal Act, 2005;
- vi) Lack of formal contracts for works such as in contracts- EBU/COUNT/07/2013, EBU/COUNT/09/2012-13 and EBU/COUNT/08/2012-13 in violation of section 68 of the Public Procurement and Disposal Act, 2005;

- vii) Use of unregistered sub-contractors such as during undertaking of works related to electrical installation, CCTV and plumbing works all valued at Ksh.2,402,500, in violation of section 31 of the Public Procurement and Disposal Act, 2005;
- viii) Irregular procurement method in the contract for the refurbishment of Embu County Council Hall to house the County Assembly, contract EBU/COUNT/06/2012-13 valued at Ksh.33,315,836 in violation of section 29 of the Public Procurement and Disposal Act, 2005;
- ix) Irregular purchase and registration of a motor-vehicle registration number KBU 683T in that the purchase price exceeded budgeted amount in clear violation of section 26(2)(a) of the Public Procurement and Disposal Act, 2005; and further, that there was no record to show that the same was registered from the time of its purchase in the name of the County Government of Embu, an action that violates section 45 of the Public Procurement and Disposal Act, 2005;
- x) Procurement of fuel was found to be irregular with no store records maintained to show receipt and usage of fuel in violation of Regulation 17 of the Public Procurement and Disposal Regulations 2006 (revised 2013);

e) Non existence of a tender committee for the County Executive

- i) At the time of procuring works for the face-lifting of the Embu Stadium, the office of the Governor was not able to demonstrate that there existed a tender committee appointed pursuant to the provisions of section 26(4) of the Public Procurement and Disposal Act, 2005 and regulation 7 of the Public Procurement and Disposal (county governments) Regulations, 2013, and when the County Assembly by resolution recommended the interdiction of those responsible for procurement of the works, the Public Service Board was unable to implement the recommendation because there was no record of any appointment to a tender committee of the persons purported to be such members.
- ii) A recommendation by the County Assembly that Members of the Tender Committee that procured maize seeds for distribution to farmers be interdicted could not be implemented because the implementing body could not find record of any appointment of the

persons purported to be members of the Tender Committee, a clear and blatant violation and/or disregard of section 26(4) of the Public Procurement and Disposal Act, 2005 and regulation 7 of the Public Procurement and Disposal (county governments) Regulations, 2013.

The Governor continuously applied public funds to works and services without an appointed Tender committee in violation of the Public Procurement and Disposal Act, 2005 and in a clear bid to circumvent prudence and accountability in management of public resources that were the principle basis for enactment of the Public Procurement and Disposal Act, 2005.

2. Gross Violation of the Public Finance Management Act, 2012.

- a) The irregular procurement of maize seeds for distribution to farmers in which maize seeds other than those requisitioned for by technical officers were procured by the office of the Governor, the procurement was not authorized by a tender committee and stores records were not maintained, all demonstrated a serious violation of Section 121 of the Public Finance Management Act, 2012 whose object is to ensure prudent application of public funds, taking into account the principal of value for money.
- b) The irregular procurement of works for the face lift of Embu stadium in which tendering was done without the input of technical departments (more specifically, bills of quantities), without an appointed tender committee, without ascertaining availability of funds, all demonstrated a serious violation of section 121 of the Public Finance Management Act, 2012.
- c) The action of the Governor to direct the purchase of motor vehicles in complete disregard of the procurement law and the applicable regulations was a blatant violation of section 121 of the Public Finance Management Act, 2012.
- d) The Governor has willfully, calculatedly presided over a County Government that lacked tender committees in an effort to defeat accountability and prudence in application of public funds as evidenced in the report of the County Public Service Board, which indicated that

there was no officer appointed to any tender committee during the procurement of maize seeds, procurement of works for the rehabilitation of the stadium. This is a violation of section 121 of the Public Finance Management Act, 2012

- e) The report of the Auditor General on the accounts of the County Government for the period March to June 2013 unearthed gross violations of laws regulating prudent management of funds. Pages 27-63 of the report demonstrates a gross violation of, among others, section 121 of the Public Finance Management Act, 2012
- f) Section 162 of the Public Finance Management Act, 2012 has placed an obligation on any County public Officer to ensure prudent management of County resources, and where the County Assembly demonstrated a breach of this obligation and made certain remedial recommendations including the interdiction of County Officers to facilitate investigations, no action was taken. Indeed, the Governor, in blatant disregard of this law, proceeded to swear affidavits in defense of one of the officers, namely, Ms. Margaret Lorna Kariuki, the County Secretary.

3. Gross Violation of the Constitution of Kenya.

- a) **Article 179(4) of the Constitution provides that the County Governor is the Chief Executive officer of the County while Article 179(6) provides that members of the County Executive Committee are accountable to the Governor for the performance of their functions and exercise of their powers. In consequence thereof, the Governor is culpable for the gross violation of Article 227 of the Constitution of Kenya, 2010 by:**
 - i) Failing and/or neglecting to ensure that contracts for procuring maize seeds were done in accordance with a system that is fair, equitable, transparent, competitive and cost effective.
 - ii) Neglecting to follow the statutory procedures in procuring services for face lifting of Embu stadium in a bid to defeat fairness, transparency, competitiveness and cost effectiveness in application of public funds.

- iii) Blatantly violating statutory procedures by personally ordering for the purchase of motor vehicles in order to defeat transparency and accountability.
- iv) Deliberately operating a County Government that applied public funds to goods, services and works without an appointed county tender committee in order to benefit a corruption cartel that in all indications operated from his office.
- v) By failing to provide information and act on recommendations made by the Auditor-General when requested to do so for accountability purposes.

b) Article 10(2)(c) of the Constitution of Kenya, 2010 pronounces good governance, integrity, transparency and accountability as among the national values and principles of governance to which every State organ, State Officer or any public officer is bound. The Governor of Embu County has violated this Article by:

- i) Failing to ensure adherence to laws and regulations that aid transparent and accountable use of county resources; among them the Public Procurement and Disposal Act, 2005 and Regulations thereunder, and the Public Finance Management Act, 2012.
- ii) Defending without any justifiable basis, officers who have been found to be in violation of the principles of good governance, integrity, transparency and accountability, notably one, Margaret Lorna Kariuki, the County Secretary of Embu County.

c) Disregard for the express provisions of Article 232 of the Constitution on the values and principles of public service.

- i) Notwithstanding that the County Assembly has resolved on numerous occasions that specific disciplinary actions be taken against Ms. Margaret Lorna Kariuki, the Embu County Secretary for incompetence and corruption, the Governor of Embu County has failed to take any of the actions, and instead, has gone on to defend her publicly and in court, even misleading the County Assembly through a letter to the County Speaker that the County Secretary had stepped aside while in reality, she continued to be in

office. There is no evidence to date that the County Secretary ever stepped aside or was interdicted.

MIN. NO.08/2014

**APPLICATION BY THE
GOVERNOR'S COUNSEL FOR
FILING OF DOCUMENTS**

Upon reading of the Charges, the Governor's advocate made a preliminary application to be granted time to file documents in response to the Charges against the Governor. He raised issues as to the mode of service and since service was not made to the Governor in person as per the Rules and Procedure of the Committee but by service in the daily newspapers on Thursday, 8th May, 2014. The Advocate requested to be allowed up to Monday, 12th May 2014 to file their documents. He assured the Committee that it would not occasion any prejudice if it grants them more time to file the documents.

Following the request by the Governor's Advocate and after consultations with the Members, the Chairperson adjourned the proceedings for fifteen minutes to allow the Committee deliberate on the application by the Governor's Advocate and advise on the way forward.

Upon resumption of the proceedings, the Chairperson delivered the following Communication:-

- i) The Special Committee found that the Governor was properly served with the Invitation to appear before the Committee on 9th May, 2014.
- ii) The rules of procedure for investigation into the proposed removal from office of the Governor provide that the Governor may appear before the Special Committee in person, by Advocate, or in person together with his Advocate. It was evident by the presence of the Counsel for the Governor that Governor Wambora had chosen to appear by Advocate.
- iii) The Special Committee had taken into account the provisions of Article 50 of the Constitution of Kenya, 2010, on the right to a fair hearing

which includes the right to have adequate time and facilities to prepare a defence. The Special Committee had also noted the strict timelines stipulated under section 33 of the County Governments Act and Standing Order 68 of the Senate Standing Orders.

iv) In light of that, and in order to allow the Governor adequate time to prepare his defence, the Special Committee adjourned the hearing on the matter to Sunday, 11th May, 2014 at 9.00am in the same venue.

The Governor's Counsel was advised to submit their documents to the office of the Clerk of the Senate by Saturday, 10th May, 2014 by 5.00pm. The County Assembly was also advised to pick copies of the said documents from the office of the Clerk to enable them prepare for the Committee proceedings as scheduled.

MIN.NO. 09/2014

ADJOURNMENT AND DATE OF
NEXT MEETING

The meeting adjourned at 12:30pm. The date of the next sittings was set for **Sunday, 11th May, 2014** at the **Kenyatta International Convention Centre (KICC) Amphitheatre at 9:00am.**

Signed:
(Chairperson)

Date: 12 / 05 / 14
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MINUTES OF THE FIRST SITTING OF THE SPECIAL COMMITTEE OF THE SENATE INVESTIGATING THE PROPOSED REMOVAL FROM OFFICE OF THE GOVERNOR OF EMBU COUNTY HELD IN THE COMMITTEE ROOM ON GROUND FLOOR, COUNTY HALL, ON TUESDAY, 6TH MAY, 2014 AT 5.50 P.M

PRESENT

1. Sen. Kipchumba Murkomen
2. Sen. Kimani Wamatangi
3. Sen. Zipporah Kittony
4. Sen. (Prof.) Wilfred Lesan
5. Sen. Naisula Lesuuda
6. Sen. James Orengo
7. Sen. (Dr.) Boni Khalwale
8. Sen. (Eng.) Hargura Godana; and
9. Sen. Judith Sijeny

ABSENT WITH APOLOGY

1. Sen. Peter Mositet
2. Sen. Boy Juma Boy

IN ATTENDANCE

- | | | |
|------------------------------|---|--|
| 1. Mr. Jeremiah Nyegenye | - | Clerk of the Senate |
| 2. Ms. Eunice Gichangi | - | Director, Legal Services |
| 3. Mr. Njenga Njuguna | - | Director, Committee Services |
| 4. Mr. Anthony Njoroge | - | Director, Litigation and Compliance |
| 5. Mr. Njenga Ruge | - | Deputy Director, Legislative and Procedural Services |
| 6. Ms. Mary Chesire | - | Deputy Director, Committee Services |
| 7. Mr. Mohammed H. Abdullahi | - | Second Clerk Assistant |
| 8. Ms. Judy Ndegwa | - | Legal Counsel II |
| 9. Ms. Caroline Cheruiyot | - | Legal Counsel II |
| 10. Ms. Lucy Radolli | - | Legal Clerk |

MIN. NO. 01/ 2014

PRELIMINARIES

The Clerk welcomed members to the sitting and congratulated them for being appointed to the Committee.

He informed the Committee that the first agenda of the sitting was to elect the Chairperson and Vice-Chairperson and consequently invited nominations for the positions.

Thereupon, Sen. (Dr.) Boni Khalwale was proposed for the position of Chairperson by Sen. Zipporah Kittony and seconded by Sen. Naisula Lesuuda.

There being no other nomination, the Clerk declared Sen. (Dr.) Khalwale duly elected chairperson, unopposed.

Sen. Kipchumba Murkomen was proposed for the position of Vice-Chairperson, by Sen. James Orengo and seconded by Sen. Judith Sijjeny.

There being no other nomination, the Clerk declared Sen. Murkomen duly elected Vice-Chairperson unopposed.

MIN. No. 02 / 2014 **REMARKS BY THE CHAIR AND VICE-CHAIR**

The Chair and Vice-Chair thanked the members for the honor conferred upon them and undertook to ensure that the Committee discharges its mandate within the stipulated timelines.

MIN. NO. 03 / 2014 **CONSIDERATION OF ACTIVITIES AND THE ACTION MATRIX**

The Committee was informed of the activities and the proposed action matrix surrounding the matter of the resolution from the County Assembly of Embu, as follows:-

- i) The Speaker of the Senate to convene a sitting of the Senate within 7 days after receiving the notice of the Resolution from the Speaker of the County Assembly of Embu-This was done by the Speaker through *Gazette* Notice;
- ii) The Senate to appoint a special Committee to investigate the matter-This was done through a resolution by the Senate adopted on Tuesday, 6th May, 2014;
- iii) The Committee to appoint a date to commence its investigations;
- iv) The Committee to prepare its report on Sunday, 11th May and Monday, 12th May;
- v) The Committee has 10 days to report to the Senate i.e on or before Friday, 16th May 2014;
- vi) Upon the Committee finding that the particulars of any allegation against the Governor have been substantiated, the Senate shall, upon according the Governor an opportunity to be heard, vote on the charges;
- vii) The report to be tabled on Tuesday, 13th May 2014 and voting by the Senate to be held on the same day;

The Committee adopted the proposed action matrix and agreed as follows:-

- ~~i) The hearings to commence on Friday, 9th May 2014 at 10a.m with the same administrative arrangements at the KICC; and~~
- ii) The reporting date of Tuesday, 13th May 2014 will be reviewed on Friday, 9th May 2014.

MIN. NO. 04 / 2014 **ANY OTHER BUSINESS**

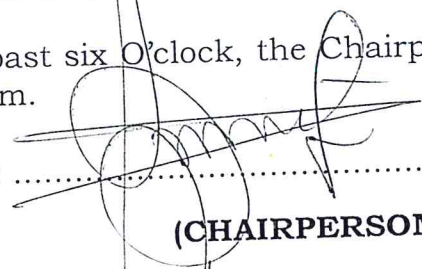
The Committee was informed that the Parliamentary Service Commission had resolved to enter appearance before courts on matters touching on the Senate as an interested party.

MIN. NO. 05 / 2014

ADJOURNMENT

And the time being five minutes past six O'clock, the Chairperson adjourned the sitting until Friday, 9th May, 2014 at 9 a.m.

SIGNED:



(CHAIRPERSON)

DATE:

13 / 05 / 14

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