

REPUBLIC OF KENYA



Paper laid by the
Chair of the
Special Committee.
GKW
15/8/14



THE SENATE

ELEVENTH PARLIAMENT



Approved
~~[Signature]~~
Speaker
15/8/14

THE REPORT OF THE SPECIAL COMMITTEE ON THE PROPOSED
REMOVAL FROM OFFICE, BY IMPEACHMENT, OF HONOURABLE
BERNARD KIALA, THE DEPUTY GOVERNOR OF MACHAKOS COUNTY

15TH AUGUST, 2014

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PREFACE

Mr. Speaker Sir,

Honourable Senators will recall that at the special sitting of the Senate held on Thursday, 31st July, 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 Machakos communicating the approval of a Motion by the County Assembly of Machakos to remove from office, by impeachment, the Deputy Governor of Machakos County.

Mr. Speaker Sir,

On Thursday 31st July, 2014, the Senate Majority Leader gave Notice of the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 23rd July, 2014 the County Assembly of Machakos approved a Motion "to remove from office, by impeachment," the County Deputy Governor of Machakos County;

AND FURTHER, WHEREAS by a letter dated 24th July, 2014 (Ref: MKSCA/ADM/IMPDG/Vol.1/6 and received in the Office of the Speaker of the Senate on 25th July, 2014, the Speaker of the County Assembly of Machakos 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 Lenny Kivuti;*
- 2. Senator Mutahi Kagwe;*
- 3. Senator Sammy Leshore;*
- 4. Senator Abu Chiaba;*
- 5. Senator Martha Wangari;*
- 6. Senator Njoroge Ben;*
- 7. Senator (Prof.) Peter Anyang' Nyong'o;*
- 8. Senator Kennedy Mong'are Okong'o;*
- 9. Senator (Dr.) Agnes Zani;*
- 10. Senator Daisy Kanainza Nyongesa; and*
- 11. Senator Hassan Omar Hassan.*

to investigate the proposed removal from office of the Deputy Governor of Machakos 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,

The Senate Majority Leader moved the Motion on Tuesday 5th August, 2014. Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. *Senator Lenny Kivuti;*
2. *Senator Mutahi Kagwe;*
3. *Senator Sammy Leshore;*
4. *Senator Abu Chiaba;*
5. *Senator Martha Wangari;*
6. *Senator Njoroge Ben;*
7. *Senator (Prof.) Peter Anyang' Nyong'o;*
8. *Senator Kennedy Mong'are Okong'o;*
9. *Senator (Dr.) Agnes Zani;*
10. *Senator Daisy Kanainza Nyongesa; and*
11. *Senator Hassan Omar Hassan.*

to investigate the proposed removal from office of the Deputy Governor of Machakos 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 mandate 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 Deputy 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,

Following its establishment, the Special Committee held its first meeting on the morning of Wednesday 6th August, 2014. Pursuant to standing order 183 the Committee conducted the election for the position of Chairman and Vice-Chairman. Senator Mutahi Kagwe and Senator (Dr.) Agnes Zani were elected unopposed to the positions of Chairman and Vice-Chairman of the Committee, respectively.

Mr. Speaker Sir,

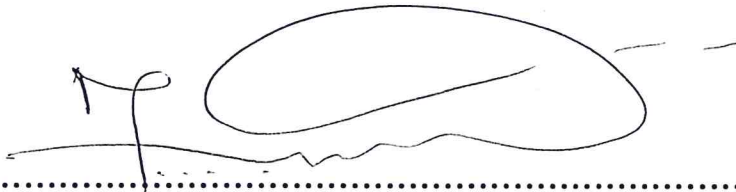
Section 33 and standing order 68(3) of the Senate Standing Orders provide that the Deputy Governor shall have the right to appear and be represented before the Special Committee during its investigations. Pursuant to these provisions of the law, the Committee invited both the Deputy Governor and the 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 the Committee in the execution of its mandate. The Committee further extends its appreciation to the parties to the matter; namely, the County Assembly of Machakos County and its Advocates and the Deputy Governor of Machakos County 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 through the hearings as they keenly followed 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 Bernard Kiala, the Deputy Governor of Machakos County.

A handwritten signature in black ink, consisting of a large, stylized 'M' followed by a series of loops and a horizontal line, all contained within a large, hand-drawn oval.

SIGNED:

SEN. MUTAHI KAGWE, E.G.H. M.P.

(CHAIRMAN)

DATE: 15th AUGUST 2014

1.0 INTRODUCTION

1. Pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, No. 17 of 2012, on 23rd July, 2014, the County Assembly of Machakos approved a Motion “to remove from office, by impeachment,” the Deputy Governor of Machakos 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 by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.*

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

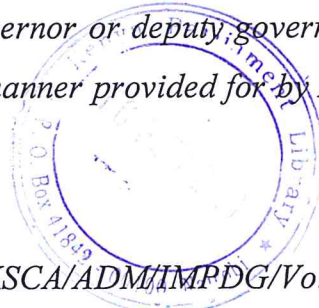
(a) the speaker of the county assembly shall inform the Speaker of the

- 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 letter a dated 24th July, 2014 (Ref: MKSCA/ADM/IMPDG/Vol.1/6) which was received in the Office of the Speaker of the Senate on 25th July, 2014, the Speaker of the County Assembly of Machakos informed the Speaker of the Senate of the approval of the Motion for the removal from office of the Deputy Governor of Machakos County by the County Assembly of Machakos and further forwarded to the Speaker of the Senate the following documents in respect of the Deputy Governor-

- (1) the List of Grounds and Particulars for removal from office of the Deputy Governor;
- (2) the Order Papers of the County Assembly of Machakos for 9:30 a.m. sitting and 2:30 p.m. sittings of 23rd July, 2014;
- (3) Votes and Proceedings of the Plenary Sittings held on 23rd July, 2014 at 9:30 a.m. and 2:30 a.m.;
- (4) Ruling in *Machakos Civil Application No. 113 of 2014: Bernard M. T. Kiala v The Speaker of the County Assembly of Machakos and 4 Others*;
- (5) the Hansard recording of the Sitting held on 23rd July, 2014;
- (6) letter to the Deputy Governor dated 10th July, 2014;

- (7) the Report and Addendum to the Report of the Ad Hoc Committee on the impeachment of the Deputy Governor of Machakos County and Exhibits; and
 - (8) Addendum to the Report of the Ad Hoc Committee on the impeachment of the Deputy Governor of Machakos County.
5. The documents submitted by the County Assembly of Machakos to the Speaker of the Senate are attached as *Annex 1*.
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. At a sitting of the Senate held on 31st July, 2014, the Speaker of the Senate, by way of a Communication from the Chair, informed the Senators that he had received communication from the Speaker of the County Assembly of Machakos relating to the approval of the Motion by the County Assembly of Machakos for the removal from office of the Deputy Governor of Machakos County. The Order Paper of that sitting and the Communication made by the Speaker of the Senate on that day are attached as *Annexes 2 and 3* respectively.
8. Thereafter, the Senate Majority Leader gave Notice of the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on 23rd July, 2014 the County Assembly of Machakos approved a Motion "to remove from office, by impeachment," the Deputy Governor of Machakos County;

AND FURTHER, WHEREAS by a letter dated 24th July, 2014 (Ref: MKSCA/ADM/IMPDG/Vol 1/6) and received in the Office of the Speaker of the Senate on 25th July, 2014, the Speaker of the County Assembly of Machakos 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 Lenny Kivuti;
2. Senator Mutahi Kagwe;
3. Senator Sammy Leshore;
4. Senator Abu Chiaba;
5. Senator Martha Wangari;
6. Senator Njoroge Ben;
7. Senator (Prof.) Peter Anyang' Nyong'o;
8. Senator Kennedy Mong'are Okong'o;
9. Senator (Dr.) Agnes Zani;
10. Senator Daisy Kanainza Nyongesa; and
11. Senator Hassan Omar Hassan.

to investigate the proposed removal from office of the Deputy Governor of Machakos 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.

9. The Senate Majority Leader moved the Motion on Tuesday 5th August, 2014. Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

- 1. Senator Lenny Kivuti;*
- 2. Senator Mutahi Kagwe;*
- 3. Senator Sammy Leshore;*
- 4. Senator Abu Chiaba;*
- 5. Senator Martha Wangari;*
- 6. Senator Njoroge Ben;*
- 7. Senator (Prof.) Peter Anyang' Nyong'o;*
- 8. Senator Kennedy Mong'are Okong'o;*
- 9. Senator (Dr.) Agnes Zani;*
- 10. Senator Daisy Kanainza Nyongesa; and*
- 11. Senator Hassan Omar Hassan.*

to investigate the proposed removal from office of the Deputy Governor of Machakos 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

10. 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

11. Following its establishment on Tuesday, 5th August, 2014, the Special Committee held its first meeting on the morning of Wednesday, 6th August, 2014. Pursuant to standing order 183, at that meeting, the Clerk of the Senate conducted the election of the Chairman and Vice-Chairman of the Committee. Senator Mutahi Kagwe was elected, unopposed, as the Chairman of the Committee while Senator (Dr.) Agnes Zani was similarly elected unopposed as the Vice-Chairman of the Committee.

2.2. Indicative Programme of Events

12. Following the conduct of the election at the first meeting of the Committee, the Committee adopted an Indicative Programme of Events which is attached as *Annex 4*. 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 into the matter in respect of the Deputy Governor and thereafter to report to the Senate on whether or not it found the Particulars of the Allegations against the Deputy Governor to have been substantiated.

13. 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 Deputy Governor, the Committee had the onerous task of ensuring that the statutory timelines were adhered to.

2.3. Invitations to Appear

14. 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*”.
 15. The Committee further observed that the County Assembly, as the originator of the Resolution for the removal of the Deputy Governor, had by the letter to the Speaker of the Senate dated 24th July, 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 oral or written evidence.
 16. Having made these observations, and taking into account the limited time available, at its first meeting held on 6th August, 2014, the Committee resolved to invite the Assembly and the Deputy Governor to appear before the Committee for the hearing of the evidence. Copies of the Invitations to Appear are attached as *Annexes 5*.
-
17. The parties were represented at the hearing as follows-
 - (a) Mr. Kioko Kilukumi of the firm of M/s Kilukumi & Company Advocates, Mr. B.M. Musau of B. Musau & Co. Advocates and Mr. Wilfred Nyamu of Nyamu & Nyamu Co. Advocates appeared on behalf of the County Assembly; and

(b) Harun Ndubi Advocate, Anthony T. Oluoch of M/s A.T. Olouch & Company Advocates and Ms. Celestine Opiyo Advocate, appeared on behalf of the Deputy Governor.

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

- (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.

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

- (a) the Deputy Governor's response to the Particulars of the Allegations;
- (b) how the Deputy 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.

20. In addition to the documents submitted by the Speaker of the County Assembly to the Senate by the letter dated 24th July, 2014, the County Assembly further filed a Response to the Invitation to Appear on Friday 8th August, 2014 to which was attached various annexures and which is marked as *Annex 6*.

21. On Saturday 9th August, 2014, Counsel for the Deputy Governor filed with the Office of the Clerk of the Senate a document the response of the Deputy Governor which is marked as *Annex 7*.

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

22. It was noted 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. It was further noted that previous Special Committees of the Senate that had carried out similar mandates had adopted Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor, which rules apply to the removal of a Deputy Governor.

23. The Committee therefore adopted the Rules of Procedure for the Investigation into the Proposed Removal from Office of a Governor on 6th August, 2014, which are annexed as *Annex 8*.

2.5. Working Retreats

24. The Committee held two Working Retreats: the first between 8th and 10th August, 2014 at which the Committee considered its mandate and the documentation served by both parties.

25. The second Retreat was held between 12th and 14th August, 2014, on the conclusion of the hearing of the matter, and provided the opportunity for the Committee to consider the submissions of the parties and to further draft, consider and approve its Report.

3.0 THE CONFERENCE OF PARTIES

26. The Conference of Parties was held on 11th August, 2014. This provided the opportunity for the formal introduction of the Counsel for both parties to the Special Committee. At that meeting the Programme for the Hearing, which is attached as *Annex 10*, was adopted.

4.0 READING OF THE CHARGES

27. 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 Deputy Governor. The Charges are at pages 161 to 165 of *Annex 1*.

5.0 THE CHARGES AGAINST THE DEPUTY GOVERNOR OF MACHAKOS COUNTY

5.1 CHARGE 1: GROSS VIOLATION OF THE PROVISIONS OF THE CONSTITUTION

28. The Particulars of this Charge are that on various dates between 5th March, 2013 and 7th July, 2014 the Deputy Governor committed the following acts which were in gross violation of the Constitution of Kenya.

29. **Allegation 1: That the Deputy Governor conducted himself in a manner that undermined his position as a Member of the Machakos County Executive by antagonizing the Governor, Members of the Machakos County Executive Committee and other Members of the County Government thereby undermining the collective responsibility of the County Executive as contemplated under Article 179(4), (5) and (6) of the Constitution.**

30. To support this Charge, the County Assembly submitted the following Affidavits sworn by various Members and officials of the County Executive Committee –

- (1) Hon. Hellena Syombua Kiilu, County Executive Committee Member, Department of Decentralization Units, Urban Areas and Municipalities;
- (2) Hon. Joshua Nthenge Musili, County Executive Committee Member, Department of Lands, Energy and Environment and Natural Resources;
- (3) Hon. Lawrence Musyoka Wambua, County Executive Committee Member, Department of Agriculture, Livestock and Cooperative Development;
- (4) Hon. Naomi Mutie, County Executive Committee Member, Department of Health and Emergency Services;
- (5) Hon. Ruth Nduku Mutua, County Executive Committee Member, Department of Education, Youth and Social Welfare;
- (6) Hon. Faith Syokau Wathome, County Executive Committee Member, Tourism and Culture;
- (7) Hon. Elizabeth Mutheu Nzyoka, County Executive Committee Member, Finance and Revenue Collection;
- (8) Hon. George Kioko Luka, County Executive Committee Member, Transport, Roads, Public Works and Housing;

- (9) Hon. Dr. Sunil Kumal Dhall, County Executive Committee Member, Trade, Economic Planning and Industrialization; and
- (10) Mr. Francis Mwaka, County Secretary.

31. The Affidavits are all contained in the Memorandum of Response to the Invitations to Appear which is marked *Annex 6*.

32. The evidence in these Affidavits, which is to a great extent similar, was also presented by way of oral evidence before the Committee by the following witnesses –

- (1) Hon. George Kioko Luka;
- (2) Hon. Naomie Mutie;
- (3) Hon. Hellena Syombua Kiilu; and
- (4) Hon Francis Maliti.

33. In their Affidavits, the Members of the County Executive Committee referred a meeting of the Cabinet of the Machakos County Executive Committee held on 7th July, 2014, at the Governor's Office, which they aver that at the preliminary stage of that meeting, the Deputy Governor alleged that his security at his rural residence had been withdrawn and that thereafter somebody had called and issued death threats against him.

34. They averred that the Deputy Governor stated that after his own investigations, he could report that the Chief of Staff wanted to kill him. The Affidavits further stated that the Deputy Governor further indicated that he had reported the matter to the police at Embu where he had also recorded a statement and that the police were investigating the matter.

35. The Members and officers of the County Executive then stated that the Governor in ruling on the matter stated that it was fair that police be given an opportunity to conclude investigations and that thereafter, the Deputy Governor stated that he was feeling uncomfortable sitting in the same meeting with people who wanted to kill him.
36. In the Affidavits and oral evidence presented before the Committee, the County Assembly averred that the conduct of the Deputy Governor was an affront to the principles of collective responsibility expected of each member of the County Executive and that the Deputy Governor had betrayed his obligation to adhere to the principal of collective responsibility.
37. The provisions of the Constitution which are referred to by the County Assembly provide as follows –
- (1) Articles 179(4) *“the county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively”*.
 - (2) Article 179(5) further provides that *“when the county governor is absent, the deputy county governor shall act as the county governor”*.
 - (3) Article 179(6) provides that *“members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers”*.
-
38. In response to this Charge, the Deputy Governor stated in his Response to the Invitation to Appear that the allegation is frivolous. He further noted that while it is good to develop consensus on issues, it is impossible for healthy coherent human beings to always agree on everything. He further stated that this would not be to undermine the Government but to promote cohesiveness and plurality.

39. **Allegation 2: It was further alleged that the Deputy Governor failed to disclose that he had a pending criminal case in a court of law, contrary to Article 10 and Chapter 6 of the Constitution.**

40. Article 10 of the Constitution sets out the national values and principles of governance that bind all State organs, State officers and public officers. Article 10(2)(c) in particular provides that the national values and principles of governance include good governance, integrity, transparency and accountability.

41. Chapter 6 of the Constitution provides for the guiding principles of leadership and integrity that govern the conduct of State Officers. In particular, Article 73 provides as follows-

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.

42. Article 75 of the Constitution further provides as follows-

Conduct of State officers.

75. (1) A State officer shall behave, whether in public and official life, in private life, or in association with other persons, in a manner that avoids—

(a) any conflict between personal interests and public or official duties;

(b) compromising any public or official interest in favour of a personal interest; or

(c) demeaning the office the officer holds.

(2) A person who contravenes clause (1), or Article 76, 77 or 78 (2)—

(a) shall be subject to the applicable disciplinary procedure for the relevant office; and

(b) may, in accordance with the disciplinary procedure referred to in paragraph (a), be dismissed or otherwise removed from office.

(3) A person who has been dismissed or otherwise removed from office for a contravention of the provisions specified in clause (2) is disqualified from holding any other State office.

43. In support of this allegation the County Assembly relied on the Affidavits and oral evidence of the Members of the County Executive Committee relating to the Cabinet Meeting held on 7th July, 2014, at which all Members of the County Executive Committee were asked to confirm whether or not they were facing any criminal charges or whether or not any member had a complaint for investigations pending before the police. It is stated in the Affidavits that all the members replied in the negative save for the Chief of Staff who indicated that he had an ongoing political case filed by Hon. Harun Mwau arising from the Wiper Campaigns in Kibwezi. No further evidence was adduced on this matter.
44. In response to this Charge, the Deputy Governor stated that this allegation was false as the case in question had been dismissed under section 215 of the Criminal Procedure Code. The Deputy Governor produced a copy of the Judgment in *Republic v Edwin Benjamin Waswa, Meshack Omulla, Johannes Okello and Bernard Muia, Criminal Case No. 820 of 2005* in which the Deputy Governor was an accused person which is at page 359 of *Annex 7*. In the Judgement, it is indicated that that the accused persons were indeed acquitted under section 215 of the Criminal Procedure Code.
45. The Deputy Governor further stated that at the time of his nomination, the case had been concluded and that the burden of proof that there was a pending criminal case was on the County Assembly.
46. **Allegation 3: It was also alleged that the Deputy Governor committed acts which exhibited bias in the appointment of officers within his docket and attempted to influence appointments of members of his extended family, contrary to Article 73(2)(b) of the Constitution.**

47. Article 73(2)(b) of the Constitution provides that *“the guiding principles of leadership and integrity include objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices”*.
48. In support of this allegation, the County Assembly relied on the evidence of Jackson Musyoka Kala, the Acting Chief Officer responsible for the Department of Public Service, Labour, and Information Communication Technology. Mr. Kala stated that in the course of his duties, he had undertaken a staff audit of the Machakos County Government and that he had investigated and discovered the following relatives of the Deputy Governor who were in the employ of the County Government-
- (1) Frank Kiala, the Manager of Machakos Kenyatta Stadium, who he stated was a paternal cousin of the Deputy Governor;
 - (2) Purity Nthenya, the Revenue Collecton Officer in Athi-River Sub-County, who he stated to be the Deputy Governor’s niece;
 - (3) Musyoka, the Accountant at the Department of Decentralized Units, Urban Areas and Municipalities, who he stated to be the Deputy Governor’s cousin;
 - (4) Carol Musyoki, a tea girl in the Deputy Governor’s office, who he stated was a former employee of the Deputy Governor at Kiala Foundation, the Deputy Governor’s private organization in Nairobi; and
 - (5) Michael Kiala Muthini, the caretaker of Matuu Call Centre, who he stated to be the Deputy Governor’s cousin.
49. In her evidence, Hon. Naomi Mutie, the Machakos County Executive Committee Member for Health and Emergency Services, stated that sometime in October, 2013 the Deputy Governor had telephoned her and asked her to transfer the

Deputy Governor's sister in-law, Mrs. Mary Kiala a nurse at Matuu Level 4 Hospital, to Machakos Level 5 Hospital. She further stated that the Deputy Governor had asked her to appoint Mrs. Kiala as the Matron-in-Charge of Machakos Level 5 Hospital.

50. Hon. Mutie further stated that upon investigating the matter further, she found that the position of Hospital Matron at the Machakos Level 5 Hospital was soon to fall vacant and she directed that a senior nursing officer be appointed to take over the position. She further stated that an order was issued from Nairobi to the effect that Mrs. Kiala be posted to Machakos Level 5 Hospital but not as the Matron. Further, she stated that Dr. Jacks Nthanga effected an internal posting order indicating that Mrs. Kiala be deployed as the Hospital Matron. Ms. Mutie deponed that she cancelled this internal posting order as it was contrary to the agreement between the National and County Governments Intergovernmental Forum on Health where it had been agreed that the National Government would not interfere with or transfer staff in the Counties without consultation with the respective County Government.
51. In his evidence, Hon. George Kioko Luka, the County Executive Committee Member for Transport, Roads, Public Works and Housing deponed that during the recruitment of grader operators, the Deputy Governor had approached him with the names of eight persons and insisted that the persons be employed as grader operators. He stated that upon being interviewed, only two of the persons whose names had been forwarded by the Deputy Governor qualified for the position and that the Deputy Governor took offence about this.
52. In response to this charge the Deputy Governor denied exercising bias in the appointment of officers and further denied exerting any influence in order to secure the appointment of members of his extended family. Further, in his opening

statement, the Deputy Governor alleged that at a Retreat of the Machakos County Executive Committee, he had pointed out that there was rampant nepotism in the County Government of Machakos and he had given the following examples-

NO	NAME	DESIGNATION	RELATIONSHIP
1	Mbithe KALA	Wiper Nominated MCA	Mother to Musyoka Kala
2	Musyoka KALA	Chief officer, Public service, Labour & ICT	Son to Mbithe Kala and Husband to Salome N. Kioko
3	Salome Ngina Kioko	Procurement officer – Water Irrigation & Sanitation	Wife to Musyoka KALA
4	Ivei KALA	Emergency caller- Matuu Call centre	First cousin to Musyoka KALA
5	Joseph MUSYOKA	Water bowser driver	First Cousin to Musyoka KALA
6	-	Over 20 Drivers	Over 20 drivers and other 10 county Government employees are related directly or indirectly to Musyoka Kala
7	Nimrod Mbai	Chief officer- Decentralized units, urban areas and Municipalities	Former Body guard to the Governor Dr Alfred Mutua when he was serving in the office of the Government spokesman and husband to Grace Mbithuka . It's NOT clear if he has resigned from his former office or seconded to the county government.

NO	NAME	DESIGNATION	RELATIONSHIP
8	Grace Mbithuka	Procurement Officer – Education, Youth & sports	Wife to Nimrod Mbai
9	-	Over 30 Drivers in the inspectorate unit	Over 30 Drivers and over 50 county government employees are either directly or indirectly related to Nimrod Mbai
10	Mwengi Mutuse	Chief of staff/ PA to the Governor	Formerly of the office of the Government spokesman, husband to Esther Mueni MWENGI
11	Esther Mueni MWENGI	Procurement officer, Decentralized Units , Urban areas and Municipalities	Wife to MWENGI Mutuse
12	Stephen Muoka	Procurement officer, Water, Irrigation & Sanitation	Brother to Mwengi MUTUSE
13	Ngeto Mutuse	Revenue Clerk Mavoko Subcounty	Brother to Mwengi Mutuse
15	MOSES MUTHUSI	Subcounty Adiministrator, Mavoko	Cousin to Mwengi Mutuse and the officer who was irregularly appointed
16	Livingstone Mutuse	Technician , County image	Brother to Mwengi Mutuse
17	Mumo Makundi	County officer, decentralised units, Urban &	Cousin to Mwengi MUTUSE

NO	NAME	DESIGNATION	RELATIONSHIP
		Municipalities	
18	Alfred Mutua	Revenue officer, Mavoko Subcounty	Cousin to Mwengi Mutuse
17	-	Over 50, county employees	All directly or in directly related to Mwengi Mutuse who campaigned unsuccessfully for the Kibwezi west parliamentary seat in 2013 hence need to consolidate support from his supporters in preparation for the next general election
18	Peter MUTIE	Chairman, Machakos Entertainment Center, Film, Music and Arts Board (MACHAHOOD)	Husband to Ruth NDUKU Mutua
19	Ruth NDUKU Mutua	County Executive Committee Member, Education, Youth & Sports	Wife to Peter MUTIE
20	Ken WATHOME	Chairman, Machakos Investment Board	Brother to Faith Syokau WATHOME
21	Faith Syokau WATHOME	Couny Executive Member, Culture, sports and Tourism	Sister to Ken WATHOME
22	Robert Maitha	Director, Trade & Economic Planning	Husband to Winfred KITHOME
23	Winfred	Asst Director, Labour	Wife to Robert Maitha

NO	NAME	DESIGNATION	RELATIONSHIP
	Kithome	& ICT	
24	Nicholas KIMANZI	Director, Labour & ICT	Husband to Erica Kasimbi
25	Erica Kasimbi	County officer, Public Service, Mavoko Subcounty	Wife to Nicholas Kimanzi
26	Jacinta MASIKA	Chief Officer, Finance	Sister to Maria MASIKA
27	Rosemary MULEE	Secretary, County Public Service Board	Sister to Francis Mulee
28	Francis MULEE	Driver, Transport Dept.	Brother to Rosemary Mulee
29	Mwikali MUTHOKA	Chief Officer, Dept. of Lands & Energy	Sister to Emmanuel MUTHOKA
30	Emmanuel MUTHOKA	Protocol Officer, Office of the Governor	Brother to Mwikali MUTHOKA

53. The County Assembly however argued that this matter had never been raised in County Executive Committee Meetings.

54. In an Affidavit sworn by Hon. Faith Syokau Wathome the County Executive Committee Member responsible for Tourism and Culture, the Member stated that the Deputy Governor had employed his adopted son to work in her Ministry *'taking advantage of his position as the County Executive Committee Member in charge of public service'*. She further stated that the Deputy Governor had posted the said son to work as the Manager for the Machakos Stadium and that he had approached her to take care of and protect his son.

55. The Deputy Governor denied this allegation and asserted that Mary Kiala, his sister-in-law, was employed by the Ministry of Health from the 1990s, together with his cousin. He further asserted that Frank Martin Kiala, was a casual employee on contract at the Machakos Stadium.
56. The Deputy Governor contended that these were the only people connected to him who were working at the County of Machakos. The rest of the persons named were not related to him.
57. **Allegation 4: It was further alleged that the Deputy Governor solicited for money from members of the public to award contracts for jobs in the County Government contrary to Article 73 of the Constitution.**
58. In response to this allegation, the Deputy Governor stated that the County Assembly had failed to substantiate this claim.
59. **Allegation 5: It was alleged that the Deputy Governor failed to adhere to the values and principles of public service, contrary to Article 232 of the Constitution.**
60. Article 232 of the Constitution provides-
-
- (1) The values and principles of public service include—*
- (a) high standards of professional ethics;*
 - (b) efficient, effective and economic use of resources;*
 - (c) responsive, prompt, effective, impartial and equitable provision of services;*
 - (d) involvement of the people in the process of policy making;*
 - (e) accountability for administrative acts;*

(f) transparency and provision to the public of timely, accurate information;

(g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;

(h) representation of Kenya's diverse communities; and

(i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—

(i) men and women;

(ii) the members of all ethnic groups; and

(iii) persons with disabilities.

(2) The values and principles of public service apply to public service in—

(a) all State organs in both levels of government; and

(b) all State corporations.

(3) Parliament shall enact legislation to give full effect to this Article.

61. On this, the County Assembly again made reference to its evidence in which it alleged bias in the appointments of the offices and influencing of appointments to members of the Deputy Governor's extended family.

62. The Deputy Governor contended that the principles of Article 232 of the Constitution bind the entire County Government and further stated that he was never responsible for recruitment and or deployment of public servants within the County.

5.2 CHARGE 2: GROSS VIOLATION OF THE PROVISIONS OF VARIOUS ACTS OF PARLIAMENT.

The County Governments Act, No. 17 of 2012

63. The Particulars are that on various dates the Deputy Governor committed acts which were in gross violation of the County Governments Act. In particular, that the Deputy Governor failed to supervise the progress of County projects contrary to sections 30 and 32 of the County Governments Act.
64. Section 30 of the County Governments Act provides for the functions and responsibilities of a County Governor. These include section 30(2)(e) which states that the Governor shall “*constitute the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county*”.
65. Section 30(3) requires the Governor, “*In performing the functions under subsection (2)*”, to “*provide leadership in the county’s governance and development*” and to “*provide leadership to the county executive committee and administration based on the county policies and plans;*”.
-
66. Section 32 of the County Governments Act provides for the function of a Deputy Governor as follows-
- Functions of the deputy governor***
- (1) *The deputy governor shall take and subscribe to the oath or affirmation as set out in the Schedule to this Act before assuming office.*
- (2) *The deputy governor shall deputize for the governor in the execution of the governor’s functions.*

(3) *The governor may assign the deputy governor any other responsibility or portfolio as a member of the county executive committee.*

(4) *When acting in office as contemplated in Article 179(5) of the Constitution, the deputy governor shall not exercise any powers of the governor, to nominate, appoint or dismiss, that are assigned to the governor under the Constitution or other written law.*

(5) *The governor shall not delegate to the deputy governor any of the functions referred to in subsection (4).*

67. In support of this Charge, the County Assembly referred to the evidence of Jackson Musyoka Kala, the Chief Officer in the Department of Public Service, Labour and Information Communications Technology. In the Affidavit, Mr. Musyoka stated that the Deputy Governor, who was in charge of the said Department, had *“not been available for the performance of the functions, duties and responsibilities of his portfolio in the Department”*. Mr. Kala further stated that as a result, he had *“experienced untold hardship in lacking policy formulation, oversight and direction.”* He further stated that he had been *“forced to perform some of the roles, with reluctance, of policy formulation, oversight and direction in the Department”* which he said were duties of the Deputy Governor.

58. It was the case of the County Assembly that there was continued absenteeism from office and cabinet meetings by the Deputy Governor.

69. The Deputy Governor contended that this complaint was frivolous and could only be made by the Governor and that the Governor had not raised such complaints in person.

70. He further stated that there was no evidence of deteriorated work due to lack of supervision. He also alleged that the County Executive Committee Members in

complaining of lack of supervision were conversely admitting to laxity and ought to have resigned.

The Public Officer Ethics Act, Cap 183

71. The Particulars were that on various dates the Deputy Governor committed the following acts which were in gross violation of the Public Officer Ethics Act-
72. **Allegation 1:** That the Deputy Governor influenced or attempted to influence the employment of his relatives in dockets under him or in other County institutions contrary to section 17 of the Public Officer Ethics Act. Section 17 of the Public Officer Ethics Act provides that *“a public officer shall not practice nepotism or favouritism”*.
73. In support of this charge, the County Assembly relied on the evidence of the following persons-
- (1) Jackson Musyoka Kala;
 - (2) Hon. Namoi Mutie;
 - (3) Hon. George Kioko Luka; and
 - (4) Hon. Faith Syokau Wathome.
-
74. **Allegation 2:** That on 7th July, 2014 the Deputy Governor intentionally and wilfully misled members of the public that his official car had been withdrawn, information which the Deputy Governor knew was not true contrary to section 19 of the Public Officer Ethics Act.
75. Section 19 of the Public Officer Ethics Act provides as follows that *“a public officer shall not knowingly give false or misleading information to members of the public or to any other public officer”*.

76. In support of this allegation, the County Assembly relied on the evidence of John Mutinda Pascal and that of Joseph Kasio Musembi, who stated that they were the driver and conductor, respectively, of *matatu* registration No. KBE 716Y plying the Machakos-Mlolongo route. In his evidence, Mr. Mutinda stated that on 7th July, 2014, while on his normal duties, he left the Machakos bus terminus with fare paying passengers *en route* to Mlolongo. He states that at the Machakos County Headquarters a number of vehicles blocked the road and stopped his *matatu* and that a gang of ten people opened the front seat for a man he later came to learn was the Deputy Governor.
77. Mr. Mutinda further stated that the whole exercise took about ten minutes and that after the ten minutes of what amounted to 'forcible detention and restraint' the Deputy Governor and the gang left him alone. Mr. Mutinda stated that the vehicle did not move during this time.
78. Mr. Kasio, the conductor of the *matatu*, gave the same evidence.
79. The County Assembly further produced CCTV images which they alleged showed the movement of the Deputy Governor on 7th July, 2014 –
- (1) from the Deputy Governor's office while in an official vehicle to his office at the County Headquarters;
 - (2) from the County Headquarters to the road where he allegedly boarded the *matatu*;
 - (3) on the road while he allegedly awaited his official vehicle; and
 - (4) on the road where he was allegedly picked by the vehicle which drove out of town.

80. Copies of these images are at pages 224 to 229 of *Annex 1*.
81. In response to this allegation, the Deputy Governor stated that his personal security and motor vehicle were indeed withdrawn and that the County Government had tried to justify the withdrawal of the vehicle as being necessary to change number plates. The Deputy Governor further alleged that he was not informed of the withdrawal of his vehicle and this demonstrated the vendetta and insubordination that he was subjected to.
82. On the CCTV images produced by the County Assembly, the Advocates for the Deputy Governor argued that the footage could not be relied on as the footage had been edited and thus could not be confirmed to be authentic.
83. The County Assembly further relied on a clip of the press statement which they stated was issued by the Deputy Governor. The statement was in kikamba and a translation was produced by the County Assembly at page 230 of *Annex 1* and a newspaper extract attached at page 222 of *Annex 1*.
84. The County Assembly alleged that from this evidence, it was clear that the Deputy Governor had acted in violation of the Public Officer Ethics Act by giving false and misleading information to the public. The County Assembly argued that as had been demonstrated in the case of Nancy Baraza, this ground was, in itself, sufficient to remove the Deputy Governor from office.
85. **Allegation 3: That on various instances, the Deputy Governor conducted himself in a manner that did not maintain public confidence in the integrity of the Office of the Deputy Governor, contrary to section 9 of the Public Officer Ethics Act. Section 9 of the Public Officer Ethics Act provides as follows-**

9. (1) *A public officer shall-*

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

(b) treat the public and his fellow public officers with courtesy and respect;

(c) to the extent appropriate to his office, seek to improve the standards of performance and level of professionalism in his organisation;

(d) if a member of a professional body, observe the ethical and professional requirements of that body;

(e) observe official working hours and not be absent without proper authorization or reasonable cause;

(f) maintain an appropriate standard of dress and personal hygiene; and

(g) discharge any professional responsibilities in a professional manner.

86. The County Assembly's case as presented in the oral evidence and in the Affidavits was that the Deputy Governor had acted contrary to section 9 of the Public Officer Ethics Act and that he had failed to carry out his duties as the Deputy Governor of Machakos County as demonstrated by the Affidavit of Jackson Musyoka Kala.

The National Cohesion and Integration Act, No.12 of 2008

87. The Particulars were that on various dates the Deputy Governor committed the following acts which were in gross violation of the National Cohesion and Integration Act.

88. **Allegation 1: That the Deputy Governor called Dr. Sunir Kumal Dhall, the County Executive Committee Member for Trade, Economic Planning and Industrialization, a “mhindi”.**

89. No oral or written evidence was presented with respect to this allegation.

90. **Allegation 2: That the Deputy Governor had used derogatory language against people from outside Machakos County.**

91. In this regard, the County Assembly relied on an Affidavit sworn by a Dr. Eric Omondi Abande, the Chairman of the Kenya Medical Practitioners, Pharmacists and Dentist Union, Lower Eastern Branch.

92. In his Affidavit, Dr. Abande stated that in May 2014, the Union had received complaints from medical practitioners serving in Machakos County to the effect that they had been intimidated, discriminated and harassed on the basis of their ethnic backgrounds. As a result of the complaints, Dr. Abande stated that he convened a meeting of medical practitioners within Machakos County at Machakos Level 5 Hospital on 23rd May, 2014. Dr. Abande stated that at that meeting, one Richard Ogecha complained of intimidation and harassment and stated that the intimidation and harassment had caused him to transfer from Machakos Level 5 Hospital to Kenya Medical Training College.

93. Dr. Abande further stated that “*during that time and through the months of June and early July 2014*”, the Deputy Governor was reported “*in the print, electronic and social media to have asked “nguus” to leave Machakos County to work in their homes of origin and that non-Kambas and non-Machakos Kambas should not be employed to work within the Machakos County*”. The County Assembly

stated that the Kikamba word “*Nguu*” means tortoise and is a derogatory term used to refer to non-Kambas and non-residents of Machakos County.

94. Dr. Abande further stated that the Deputy Governor was reported to have said that “*such nguus should not supply commodities to the Hospital or engage in construction work within the county*”. Dr. Abande went ahead to stated that most medical practitioners had verbally complained to him that, “*they felt threatened and intimidated by the comments and public policy views expressed by the Deputy Governor.*”

95. In support of the above statements, Dr. Abande annexed to his Affidavit a copy of his letter dated 25th May, 2014, addressed to the Governor of Machakos County in which he had raised concerns over the aforesaid issues and requested for assurance from the office of the Governor that the concerned employees would deliver their services in the County without interference from any quarters.

96. On this allegation, the County Assembly also relied on Affidavits sworn by:

- (1) Benedict Mutuku;
- (2) Patrick Kilonzo Ngala;
- (3) Penninah Mbithe Wanyoro; and
- (4) Joshua Nzuki Muli.

97. The Affidavits are annexed at pages 16 to 19 of *Annex 6*.

98. In these Affidavits, the deponents referred to an after-church service meeting held on 5th June, 2014 at St. Peters Cleavers Catholic Church at Ndalani at which the Deputy Governor had allegedly said-

- (1) that nothing good was happening at the County Government of Machakos and he knew well because he was a part of it;
- (2) that this was attributable to the “nguus” (tortoises) in the county;
- (3) that he further said that there were too many non-Kamba and non-Machakos Kambas serving in the County yet these were positions for residents of Machakos; and
- (4) that the Government would continue to be poorly run unless the “nguus” were removed;

99. At a burial of the same day, they stated that the Deputy Governor further stated-

- (1) that Machakos residents and especially the youth should not expect to get jobs as positions of employment had been given to “nguus”;
- (2) that if the Government continued in that manner, nothing was going to happen in the County; and
- (3) that he would not remain quiet until the “nguus” were removed from the County so that his people got the employment positions.

100. The County Assembly further relied on the Affidavits of Dominic Muendo Mutua, a *boda boda* operator and Hannah Wambui Waweru a dealer in vegetables both residents of Masinga sub-County in Machakos County, which are attached at pages 21 and 22 of *Annex 6*. In the Affidavits, the Deponents state that since the beginning of June 2014, to the date of swearing the Affidavit that there had been tension between the Kikuyu and Kamba communities in the area although the communities had previously lived harmoniously.

101. They both stated that they had heard radio broadcasts on Musyi FM, Mbaitu FM and Athiani FM where the Deputy Governor asked “nguus” to go back to their homes of origin and suggestions that people who were not Machakos Kambas should not be employed by the County within Machakos County.

102. Mr. Mutua stated that the tension was so serious that police officers at Kakuku Police had advised *boda boda* operators to stop operations before 7:00 p.m. He stated that he got so intimidated by the tension that he started closing operations by 5:00 p.m. every day.
103. In the case of Ms. Waweru, she stated that as a result of the tension, as a non-Kamba resident within Machakos County, she had been sleeping with a lot of fear of possible attack, forcible removal or eviction.
104. Mr. Mutua stated that since the tension as a member of the Kamba community, he had been living in fear of possible attack or retaliation from the Kikuyu community and that since then, men had been sleeping outside keeping vigil until the time when there would be announcements that Bernard Kiala had been impeached.
105. In response to this charge, the Deputy Governor in his written Submissions, stated that he had not caused to be printed any inflammatory leaflets. He further stated that no member of the public had complained of it and further, that no evidence had been produced to link him to any leaflets.
106. **Allegation 3: That the Deputy Governor caused inflammatory leaflets to be printed.**
-
107. Mr. Dominic Muendo Mutua stated that he had heard from fellow *boda boda* operators and customers that leaflets had been distributed by unknown persons within Kakuku Market.

108. Hon. George Kioko Luka further produced what he stated to be a leaflet that was circulated in the County titled “*nguu-toka*” stating that “*Machakos County is under siege from tortoise*” and that “*Machakos ni ya watu wa Machakos*”.
109. The Deputy Governor, in response to the allegation, re-stated that he had not caused any inflammatory leaflets to be printed and that no member of the public had made such a complaint or produced evidence to link him to any leaflets.
110. **Allegation 4: It was alleged that the Deputy Governor had made inflammatory remarks on social media.**
111. In support of this allegation the County Assembly relied on the various Affidavits sworn by the County Executive Committee Members who, in their respective Affidavits, stated that in the meeting held on 7th July, 2014, the Cabinet received a media update that the Deputy Governor had updated his Facebook page with a false account stating that he had been ejected from the Cabinet meeting for raising issues about corruption and nepotism and that the information had subsequently appeared in the print media.
112. In response to this allegation, the Deputy Governor stated that the allegation was frivolous and vexatious and asserted that there was no evidence that the words used were inflammatory or criminal.
113. **Allegation 5: That the Deputy Governor uttered ethnically and regionally divisive and defamatory words during public rallies.**
114. With respect to this allegation, the County Assembly relied on the above-cited Affidavits of-

- (a) Dr. Eric Omondi Abande;
- (b) Benedict Mutuku;
- (c) Joshua Nzuki Muli;
- (d) Penninah Mbithe Wanyoro;
- (e) Patrick Kilonzo Ngala;
- (f) Patrick Njuguna Mbugua;
- (g) Dominic Muendo Mutua; and
- (h) Hannah Wambui Waweru.

115. In response to this allegation, the Deputy Governor reiterated that word “nguu” is a metaphor in Kamba language which is used “*to encourage peace and observance of the need not to spoil for war*”. He further stated that his “*utterance at the public rallies were for encouraging peace among members of the County*”.

The Leadership and Integrity Act, No. 19 of 2012

116. The Particulars are that on various dates the Deputy Governor committed the following acts which were in gross violation of the Leadership and Integrity Act.

117. **Allegation 1: That the Deputy Governor used his office to push for Government contracts in various County Departments including those of Trade, Health and Agriculture to relatives and friends contrary to section 10 of the Leadership and Integrity Act.**

118. Section 10 of the Act provides as follows-

Performance of duties

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

- (a) *carry out the duties of the office efficiently and honestly;*
- (b) *carry out the duties in a transparent and accountable manner;*
- (c) *keep accurate records and documents relating to the functions of the*

office; and

(e) report truthfully on all matters of the organization which they represent.

119. Mr. Collins Sila Kaia, the acting Chief Officer responsible for the Department of Education, Youth and Social Welfare, swore an Affidavit in support of this allegation. He stated that the Department in which he was based was planning to extend its Headquarters by building extra structures for members of staff. He further stated that sometime between September and October, 2013, the Deputy Governor had demanded that Mr. Kaia offers a construction contract for the extension and development of the new office structures to a lady called Rose who was the Deputy Governor's personal friend. Mr. Kaia further stated that the Deputy Governor had directed Mr. Kaia to secure, on behalf of the said lady, the necessary documentation to enable her to commence the construction. Mr. Kaia however did not comply with the said directions by the Deputy Governor.
120. Mr. Kaia further alleged that sometime between January and May, 2014, the Deputy Governor had directed Mr. Kaia's department to facilitate the activities of an organization known as MACUSA (the Machakos County University Students Association), outside of the allocated budget for the Department. He further alleged that the Deputy Governor had interfered with the operations of the Social Welfare Board which was responsible for the administration of the social welfare fund to women, youth and the physically challenged. This interference, he stated, had resulted in the cancellation of the entire process by the Members of the County Assembly and thus delay in the implementation of the social welfare programme since 7th December, 2013 to the date of his Affidavit.
121. In her Affidavit, the Hon. Ruth Nduku Mutua, the County Executive Committee Member for Education, Youth and Social Welfare, gave evidence that was similar to that of Mr. Kaia, her Chief Officer, on the matters.

122. In her Affidavit Hon. Naomi Mutie, the County Executive Committee Member in charge of Health and Emergency Services, also stated that sometime in January, 2014 the Deputy Governor had persistently asked her to award a tender for supply of drugs to a Mr. Boniface Kiala, the Deputy Governor's brother, as the said Mr. Kiala had funded the election campaigns of the Machakos Government. She further alleged that sometime in June 2014, the Deputy Governor took advantage of his position by demanding that she gives space for a restaurant at the Park to a friend of the Deputy Governor.

23. In his Affidavit, Hon. Dr. Sunil Kumal Dhall the County Executive Committee Member responsible for Trade, Economic Planning and Industrialization alleged that the Deputy Governor had asked him to award tenders in favour of companies that the Deputy Governor had an interest in and to his friends. He further alleged that when his Department had advertised for market tenders in March, 2014 the Deputy Governor had asked Dr. Sunil to award tenders in favour of the companies that the Deputy Governor was interested in. Dr. Sunil further alleged that the Deputy Governor had prevailed upon the Chief Officer in Dr. Sunil's Department, Ms. Shiela Mueni Mukunya, to award tenders to two of his preferred bidders.

24. Ms. Mukunya stated as such in her Affidavit. She indicated that she had received two text messages from the Deputy Governor describing the names of two companies that he wished to be awarded tenders. She stated further that she had also received a phone call from the Deputy Governor demanding and insisting that the two companies be awarded the tender. The text messages are annexed at pages 247 of *Annex 1*.

125. Further, Hon. George Kioko Luka the County Executive Committee Member responsible for Transport, Roads, Public Works and Housing stated in his evidence that the Deputy Governor had "always mounted pressure on Cabinet colleagues

...seeking to have his people...given tenders while reminding them that [was] the Deputy Governor”.

126. The Deputy Governor denied these allegations and reiterated that he neither influenced nor employed bias in the appointment of officers.

127. **Allegation 2: That the Deputy Governor intimidated his colleagues through sms and telephone calls seeking various favours contrary to section 34 of the Leadership and Integrity Act.**

128. Section 34 provides as follows-

34. Bullying

(1) A State officer shall not bully any person.

(2) For purposes of subsection (1), “bullying” includes repeated offensive behaviour which is vindictive, cruel, malicious or humiliating and is intended to undermine a person.

129. On this allegation , the County Assembly relied on the sms print-outs of Hon. George Kioko Luka, which are attached as *Annex 10*. The Assembly also relied on the sms evidence by Ms. Mukunya which is at page 247 of *Annex 1*.

130. During the hearing, Hon. Dr. Sunil Kumal Dhall County Executive Committee Member responsible for Trade, Economic Planning and Industrialization, stated in his evidence that Ms. Mukunya had forwarded the said sms messages to him, as her supervisor.

131. During the oral hear, Ms. Mukunya reiterated the above information and also read out certain text messages that she had received from the Deputy Governor.

132. The Deputy Governor asserts that this allegation is baseless and states that a casual glance at the exhibited texts shows that they come from the accuser.

133. He further states that the Ad- Hoc Committee should have obtained court orders to get the mobile provider to produce the sms messages to the Committee to prove they come from the Deputy Governor. The sms, he stated, seemed to have been edited and doctored. He also stated that it was within the text of the sms that they had attempted to implicate the source of the sms as being the Deputy Governor's mobile number.

134. **Allegation 3: That the Deputy Governor solicited for Ksh.500,000 from Dr. Sunil Kumar Dhall, the County Executive Committee Member for Trade, Economic Planning and Industrialization contrary to section 12 of the Leadership and Integrity Act.**

135. Section 12 of the Act provides as follows-

12. Financial integrity

(1) A State officer shall not use the office to unlawfully or wrongfully enrich himself or herself or any other person.

(2) Subject to Article 76(2)(b) of the Constitution, a State officer shall not accept a personal loan or benefit which may compromise the State officer in carrying out the duties.

136. In his evidence before the Committee, Hon. Dr. Sunil Kumal Dhall stated that the Governor had approached him for a personal loan of Kshs. 500,000/-. Dr. Dhall stated that the Deputy Governor "pushed him against the wall" to the extent that he relented and gave Kshs. 200,000/-, which was later repaid.

5.3 CHARGE 3: GROSS MISCONDUCT

137. The Particulars are as follows.

138. **Allegation 1: That on various dates the Deputy Governor failed to attend County Executive Committee Meetings without good cause.**
139. In response to this charge, the Deputy Governor stated that this allegation was false as the minutes of the County Executive Committees Meetings show that the Deputy Governor was “*Absent with Apology.*”
140. **Allegation 2: That on 7th July, 2014 the Deputy Governor conducted himself in a manner unbecoming of a public officer by misleading the public that he had been ordered out of a County Executive Committee meeting, information that the Deputy Governor knew to be false.**
141. In support of this allegation, the County Assembly relied on the various Affidavits and oral evidence of the County Executive Committee Members in which they stated that at the Cabinet Meeting held on 7th July, 2014, the agenda was amended in order to insert an agenda item described as “Discussion of the Deputy Governor’s Conduct”. The Deputy Governor, they stated, was asked to step outside so that his conduct could be discussed, allegations drawn up and thereafter that he would be called back to respond on the allegations of misconduct.
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142. The County Assembly also produced a clip of footage which they alleged was that of the Deputy Governor addressing the media after the alleged ejection from the Cabinet Meeting. Hon. Hellena Syombua, in examination-in-chief, identified the image and voice on the footage as being that of the Deputy Governor.
143. In further support of this allegation, Francis Wambua Maliti in his affidavit further stated that he was informed that after the meeting, the Deputy Governor had rushed

to town and organized a demonstration against the County Executive Committee to protest against the purported ejection from the County Executive Committee meeting.

144. In response to this allegation, the Deputy Governor stated that he was ordered out of the meeting of the County Executive Committee on the 7th July, 2014 but denied that he had addressed the public on 7th July, 2014 as regards being ordered out of the County Executive Meeting.

145. He further stated that as an elected leader, he had a right and a duty to address the public. He stated that it would appear from the general tenor of all accusations that the County Executive would prefer a silent and gagged Deputy Governor.

146. **Allegation 3: That on various dates the Deputy Governor misled members of the public that his security had been withdrawn, information which the Deputy Governor knew to be false.**

147. In response to this allegation, the Deputy Governor stated that his official security detail at his residential home was withdrawn without notice of the withdrawal being given to him.

148. The Deputy Governor further stated that upon the Machakos County Assembly resolving to impeach the Deputy Governor, the Governor or his agents changed the locks to the Deputy Governor's office making it impossible for him to continue discharging his duties as contemplated under section 33(2) (b) of the County Governments Act. He also stated that his personal assistant and office staff had either been suspended or transferred.

149. **Allegation 4: That on various dates the Deputy Governor neglected duties delegated to him by the Governor.**

150. In support of this allegation the County Assembly relied on the evidence of Jackson Musyoka Kala the acting Chief Officer responsible for the Department of Public Service, Labour, and Information Communication Technology, in which he stated that he worked under the direct supervision of the Deputy Governor who had not been *“available for the performance of the functions, duties and responsibilities of his portfolio”*. Mr. Kala further stated that he had *“experienced untold hardships in lacking policy formulation, oversight and direction”*. He further stated that he had been forced to perform, with reluctance, some of the roles, of policy formulation, oversight and direction in the Department.
151. In response to this allegation, the Deputy Governor stated that the County Executive Committee Members could not purport to supervise him as he was their senior. He went on to state that the Ad Hoc Committee of the County Assembly failed to question the Governor to confirm or deny this allegation as the Governor would be the only person entitled to raise this question.
152. He further stated that the complaint coming from the County Executive Committee Members, the Deputy Governor’s subordinates, it was evidence of the contempt they hold him with.
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153. **Allegation 5: That the Deputy Governor made utterances in public which disclosed information that was confidential to the County Executive Committee.**
154. In support of this charge, the County Assembly relied on the Affidavit of Hon. Elizabeth Mutheu Nzyoka, the County Executive Committee Member for Finance and Revenue Collection. In her Affidavit, she stated that she was uncomfortable serving in the same committee with the Deputy Governor as there was evidence that the Deputy Governor was sharing top secrets with persons who had sworn to bring the County

Government down and who had filed or caused to be filed suits against the County Government and the Governor.

155. Hon. Nzyoka further stated that the Deputy Governor had conspired with Members of the County Assembly of Machakos who were opposed to programmes presented to the Assembly by the County Executive. She further stated that the Deputy Governor had betrayed the oath of secrecy and was therefore unfit to sit in the County Executive Committee which was privy to confidential information, including security.
 156. Hon Nzyoka also stated that the approvals of certain confidential expenditure relating to security called for secrecy which could not be guaranteed owing to the conduct of the Deputy Governor. For instance, Ms. Nzyoka further deponed, sometime in June, 2014 she presented a status report on the financial position of the County to the Cabinet at a meeting where the Deputy Governor was present. She was later informed by Hon. George Kioko Luka that Hon. Johnson Muthama, the Senator of Machakos County, had stated the actual figures as she had presented them in the Cabinet meeting. She therefore suggested that the Deputy Governor may have divulged this confidential information.
 157. In response to this allegation, the Deputy Governor stated that the County Assembly had not been not disclosed which confidential or secret information was published and to whom, at what time and where? He therefore described this claim as frivolous and vexatious.
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158. The Deputy Governor further stated that this allegation was general and failed to take into account Article 35 and section 7 of the Sixth Schedule to the Constitution in contextualising the Official Secrets Act.

159. **Allegation 6: That the Deputy Governor criticized Government decisions which he was a party to.**
160. In support of this allegation the County Assembly relied on Affidavits of the following persons which are attached at pages 15 to 22 of *Annex 6*, and which relate to statements allegedly made by the Deputy Governor at an after-service meeting at Ndalani Catholic Church on 15th June, 2014 and at a burial of the same day-
- (1) Dr. Eric Omondi Abande;
 - (2) Benedict Mutuku;
 - (3) Joshua Nzuki Muli;
 - (4) Penninah Mbithe Wanyoro;
 - (5) Patrick Kilonzo Ngala;
 - (6) Patrick Njuguna Mbugua;
 - (7) Dominic Muendo Mutua; and
 - (8) Hannah Wambui Waweru.
161. Hon. George Kioko Luka, in his evidence, further stated that the Deputy Governor should have addressed any complaints to the Cabinet as opposed to inciting the public against the Government that he served. Hon. Luka further deponed that the Deputy Governor's conduct was an upfront to the principles of collective responsibility which was expected of all County Executive Committee Members.
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162. In further support of this allegation, the County Assembly submitted an Affidavit sworn by Faith Syokau Wathome, the County Executive Committee Member for Tourism and Culture, in which she stated that owing to adverse public statements that the Deputy Governor had made against the Governor and the County Government in the presence of the media and a protest that the Deputy Governor had led against the County Government on 7th July, 2014 the Deputy Governor ought to have ceased to

hold office. Hon. Wathome further stated that she had reservations about sharing Cabinet secrets in any Cabinet meeting with the Deputy Governor.

163. In response to this allegation, the Deputy Governor stated that this complaint was frivolous and vexatious. He further stated that it did not disclose the nature of the decisions criticized and that it offended the Bill of Rights and Article 10 of the Constitution of Kenya.

5.4 GROUND 4: ABUSE OF OFFICE

164. The Particulars are as follows.

165. **Allegation 1: That on various dates, the Deputy Governor attempted to use his office as the Deputy Governor of Machakos to influence the award of a tender to supply drugs by incessantly making telephone calls to the County Executive Committee Member in charge of Health and Emergency Services.**

166. In this regard, the County Assembly relied on the evidence by Hon. Naomi Mutie County Executive Committee Member in charge of the Department of Health and Emergency Services. She alleged that sometime in January 2014, the Deputy Governor had called her and told her that his brother, Mr. Boniface Kiala, funded the election campaigns that led to the Government's victory and therefore that he should have been awarded a tender to supply drugs.

167. In response to this allegation, the Deputy Governor stated that there was no evidence to support the allegation other than the sole accusation of Hon. Naomi Mutie. He further stated that the Ad Hoc Committee of the County Assembly had failed and or neglected to call evidence from other independent witnesses, especially those connected with procurement, to examine the veracity of this spurious claim.

168. **Allegation 2: That the Deputy Governor threatened County Executive Committee Members to be loyal to him purporting that he would protect them once the Governor was impeached.**
169. In response to this Charge, the Deputy Governor stated that the allegation was false and the same had not been substantiated. He further stated that there was no evidence of threats against any member of the Executive. He further stated that “*while it is a laughable claim, it could at best be a promise rather than a threat*”. In his view, “*this too, is evidence of the Executive Members intermeddling in the politics of the County rather than serving the public impartially*”.
170. **Allegation 3: That the Deputy Governor used his office to cause anxiety and tension to investors, private sector professionals and members of the public who were non-Kambas and non-Machakos Kambas.**
171. With respect to this Charge, the County Governor relied on the earlier mentioned Affidavits of-
- (1) Dr. Eric Omondi Abande;
 - (2) Benedict Mutuku;
 - (3) Joshua Nzuki Muli;
 - (4) Penninah Mbithe Wanyoro;
 - (5) Patrick Kilonzo Ngala;
 - (6) Patrick Njuguna Mbugua;
 - (7) Dominic Muendo Mutua; and
 - (8) Hannah Wambui Waweru.

172. In response to this allegation, the Deputy Governor stated that there was no evidence on this allegation. He further stated that this allegation was based only on an opinion of the already poisoned members of the County Executive Committee and the Ad Hoc Committee of the County Assembly who were ‘looking for every possible excuse, howsoever unreasonable’ to seek the removal of the Deputy Governor.
173. The Deputy Governor further argued that in any event, this opinion ought to have been the outcome of an in-depth focussed economic and security study. He stated that it was in public knowledge that the Governor had made public statements purporting that the Machakos’ economy was on an upward trend. It would be inimical, the Deputy Governor stated, to make this sort of claim against the reports of growth in the economy.

6.0 IMPEACHMENT GENERALLY

174. The Special Committee is cognizant of the role of the Senate as set out in Article 96(1) of the Constitution which provides that the “*the Senate represents the counties and serves to protect the interests of the counties and their governments*” Impeachment is one of the mechanisms by which the Senate exercises its role of protection of the Counties and their Governments.
175. In order to assist the Special Committee make an informed decision on the proposed impeachment, it is important that the Committee look at the origin and history of impeachment of public officials.
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176. In England impeachment originated in the 14th century, when it became a means of initiating criminal proceedings based on clamour, or outcry. Among the first recognized cases of impeachment was that of William, 4th Baron Latimer, who had been closely associated with the government of King Edward III. The charges against

Latimer were oppression in Brittany; that he had sold the castle of Saint-Sauveur to the enemy, and impeded the relief of Béchere], a British garrison under siege, in 1375; that he had taken bribes for the release of captured ships, and retained fines paid to the king, and the city of Bristol; and finally, that in association with Robert Lyons, he had obtained money from the crown by the repayment of fictitious loans. Baron Latimer was subsequently impeached by Parliament.

177. Subsequent subjects of impeachment were often political figures, usually royal ministers. Latimer's case also marks the point at which impeachment became not merely a means of initiating criminal proceedings but also a method of trial.
 178. After the mid-15th century, impeachment fell out of use until the 17th century, when it was revived as a means by which Parliament could get rid of unpopular ministers. The use of impeachment gradually waned as the 18th century progressed, mainly because it proved to be a political instrument by which to attack the king's ministers.
 179. In the early 19th century the acceptance of the principle that cabinet ministers are responsible to Parliament, rather than to the sovereign, made impeachment unnecessary, and the procedure fell into disuse after the unsuccessful trial of Lord Melville in 1806.
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180. In the United States, Alexander Hamilton, the Chief of Staff for George Washington and one of the interpreters and promoters of the US Constitution, wrote that impeachment is "*a method of national inquest into the conduct of public men.*"
 181. Senator William Blount of the United States was in 1797-1799 impeached by the House of Representatives for the alleged incitement of two Indian tribes to mount a military expedition against neighboring Spanish territories for purposes of capturing

the same for Great Britain. The Senator was however removed by the Senate using its own internal procedures before he could be tried in the Senate.

182. Sometimes impeachment is not based on criminal activity but rather morality and professional conduct. Most recently (in July 2014), a member of the Missouri House of Representatives filed articles of impeachment against Governor Jay Nixon (D) for ordering Missouri's Department of Revenue to accept joint tax returns filed by same-sex couples who have been legally married in other states. The Missouri Constitution prohibits the state from recognizing same-sex marriages.

183. In 1929, the Oklahoma legislature impeached Henry Johnston, seventh governor of Oklahoma, after convicting him of general incompetency.

184. In Nigeria, several Governors have been impeached on the basis of corrupt practices. After setting up the anti-graft agency, the Economic and Financial Crimes Commission (EFCC), the Nigerian Government started targeting corrupt officials such as Governor Ayodele Fayose and his deputy from Ekiti State who were both impeached for corruption. The Governor of Bayelsa State, Diepreye Alamieyeseigha was also impeached for corruption and money laundering.

185. Abdulkadir Musa, the first Nigerian State Governor to ever be impeached met his fate because he was unable to form a cabinet. He had been elected on a platform of the People's Redemption Party (PRP) when the dominant party in the House was the National Party of Nigeria, whose members he refused to nominate.

186. In Nigeria, incompetence is not a crime yet, for non-delivery and as a betrayal of public trust, it is an impeachable offense. Inability to govern is also not a crime yet it is grounds for impeachment.

187. The Senate therefore has the responsibility to set a standard for impeachment that bears the proper hallmarks of impeachment: due process, fairness and justice.

7.0 JURISDICTION OVER THE DEPUTY GOVERNOR

188. The Deputy Governor through his lawyer, submitted that the Deputy Governor ought not to be removed from office because there is no provision in the Constitution for removal of a Deputy Governor. Counsel further submitted that if a Governor and a Deputy Governor are removed from office, the national Government will take over the operations of the County which is contrary to the spirit of devolution.

189. The Special Committee however disagrees. Under Article 182 (4) of the Constitution, the Speaker of the County Assembly shall act as county governor where a vacancy occurs in the office of the county governor and that of the deputy governor.

190. Subsequently, under Article 182 (5) of the Constitution, where such a vacancy occurs in the offices of the governor and the deputy governor, elections shall be held within 60 days after the Speaker assumes office as county governor. The submission that the national government will take over the county government therefore lacks basis in the Constitution.

191. It also worthwhile to note that the same procedure applies for the national government. Under Article 146 (2) (b) of the Constitution, where there is a vacancy in the office of the President and that of the Deputy President, the Speaker of the National Assembly shall act as President and an election to the office of the President shall be held within sixty days after the vacancy arose in the office of the President.

192. The High Court of Kenya has in two cases held that a Deputy Governor is impeachable using the same procedure as that provided for a Governor. These are:

- i. High Court in Kerugoya Constitutional Petition No. 5 of 2014 Hon. Dorothy N, Muchungu –v- Speaker County Assembly of Embu & others.
- ii. High Court in Machakos Misc. Application No. 113 of 2014 Hon. Bernard Muia Tom Kiala –v- the Speaker of the County Assembly of Machakos & 4 others.

193. In *High Court Kerugoya Constitutional Petition No. 5 of 2014; Hon. Dorothy N, Muchungu –v- Speaker County Assembly of Embu & Others*, the High Court held as follows with regard to the removal of a Deputy Governor:

“73. Being a state officer if a Deputy Governor contravenes Articles 76, which deals with financial probity of state officers, Article 77 by participating in any other gainful employment or & 78 (1) by holding dual citizenship, he/she is subject to the provisions of Article 75 (2) and (3) as well as the Leadership and Integrity Act, No. 19 of 2012, enacted pursuant to the provisions of Article 79 of the Constitution.

74. We are therefore in agreement that the Deputy Governor as a state officer is subject to the provisions of Chapter Six or any other law which deals with the conduct of state officers for example the Leadership and Integrity Act, Public Officers Ethics Act or any other written law. But where is the procedure for the removal of the Deputy Governor in the event he/she contravenes Chapter Six?

75. We have agonized deeply over this issue. It is clear to us that it could not have been the intention of the people of Kenya in enacting the Constitution of Kenya 2010, that they would have a Deputy Governor in office without a mechanism for his/her removal in the event that he/she breached the principles and values the people of Kenya hold dear. These values as stipulated under Article 10 and 174 of the Constitution can be recognized as the aspirations of the people of Kenya and are a reflection of the democratic space the people of Kenya aspired for, prior to the promulgation of the Constitution of Kenya, 2010.”

194. The Committee also notes that after a motion for the removal of Hon. Bernard Kiala was received by the Speaker of the County Assembly of Machakos, the Deputy Governor filed *High Court Machakos Miscellaneous Application No. 113 of 2014; Hon. Bernard Muia Tom Kiala –v- the Speaker of the County Assembly of Machakos & 4 Others* alleging that the Constitution does not provide for the removal of a Deputy Governor. However, in its Ruling, the High Court in that matter held:

“I am therefore in agreement with the holding by the judges in the case of Hon. Dorothy N. Muchungu case (supra), that the procedure for removal of the Governor is the same one that applies with the necessary modifications to the Deputy Governor.”

8.0 THE THRESHOLD FOR IMPEACHMENT

195. The Special Committee needs to decide, after taking all matters into consideration, whether it is pragmatic and in the interests of the County of Machakos for the Deputy Governor to be removed from office.

196. There has been considerable debate in the United States over the definition of impeachable crimes. In the early proposals, the president and other officials could be removed on impeachment and conviction for "corrupt conduct," or for "malpractice or neglect of duty." Later, the wording was changed to "treason, bribery, or corruption," and then to "treason or bribery" alone. However, later it was felt that "treason or bribery" was too narrow a definition. It was thereafter proposed to include "mal-administration," which was later changed to "other high crimes and misdemeanors. A final revision defined impeachable crimes as "treason, bribery or other high crimes and misdemeanors."

197. On the threshold or standard of proof for impeachment, 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.”

198. In the United States there has been debate on the burden 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 proceedings. On the other hand the members of the Houses of Senate and Congress have argued for a lower standard of proof.
199. 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.

200. 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.
201. 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.
202. Jennifer L. Blum, writing in the Catholic University Law Review, Vol. 44, Issue 1, Fall 1994, in an article entitled *How Much Process Is Due: The Senate Impeachment Trial Process After Nixon vs United States* stated:

“The Committee’s role is not to make a recommendation to acquit or convict, but rather to serve as a fact finding body that provides each senator with

sufficient information to make an individual determination regarding an official's guilt or innocence."

203. Congressman Gerald Ford, [116 Cong. Rec. H.3113-3114 (April 15, 1970)] stated as follows with regard to the issue of an offence that would warrant impeachment:

"What, then, is an impeachable offense? The only honest answer is that an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the other body considers to be sufficiently serious to require removal of the accused from office..."

204. However this view has been rejected by most legal scholars because it would have the effect of having the President serve at the pleasure of Congress. Nevertheless there are some, particularly in Congress, who hold this opinion.

205. Although what constitutes an impeachable offense is to be determined by the political representatives, it is imperative that the person sought to be removed is accorded a fair hearing, due process and justice.

206. In a recent case in the High Court being Petition No. 3 of 2014 Hon. Martin Nyagah Wambora & 4 others –v- The Speaker of the Senate and 5 others the High Court held as follows:

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

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

a) be serious, substantial and weighty.

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

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.”

207. The issue of the threshold for impeachment is complex and does not contain a simple mathematical formula. During the Senate’s consideration of the report of the Special Committee investigating the removal of the Governor of Kericho on 3rd June 2014 the Senate adopted the Committee’s recommendation that the threshold for impeachment should take into account the following considerations-

(i) The allegations must be serious, substantial and weighty;

(ii) The violation must be a flagrant and glaring violation;

(iii) There must be a nexus between the violation and the Governor;

(iv) The violation must have led to harm, loss or damage to society;

(v) The violation must have led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to carry out the functions of that office with integrity and accountability.

9.0 PROCEEDINGS BEFORE THE COUNTY ASSEMBLY OF MACHAKOS

208. The Deputy Governor in his response to the invitation to appear filed on his behalf by A. T. Oluoch & Co. Advocates submits that the impeachment process before the County Assembly of Machakos were so systematically rushed and stage managed that the same did not amount to a fair hearing. He further submitted that the constitutional principles of rule of law, participation of the people and respect for human rights and dignity were breached during the impeachment hearing.
9. The Deputy Governor of Machakos County in his oral submissions, through his lawyer Mr. Harun Ndubi, complained that the County Assembly of Machakos did not follow its own Standing Orders while impeaching him. Mr. Ndubi noted that the Senate has previously held that a County Assembly is an independent legislature albeit at a devolved level and therefore it is the sole judge of the propriety its own proceedings. He however submitted that it may be time that the Senate reconsiders this position and enquires into the propriety of the proceedings before the County Assembly. Mr. Ndubi went on to submit that there was no evidence produced before the Committee that there was a motion to impeach the Deputy Governor, that the Clerk of the County Assembly of Machakos submitted the motion to the Speaker of the County Assembly for approval and that the Speaker of the County Assembly approved the motion. He questioned what happened between the 7th July 2014 when members of the County Executive Committee swore affidavits making various allegations against the Deputy Governor and 10th July 2014 when the County Assembly appointed an Ad Hoc Committee to investigate the matter. In effect, Mr. Ndubi submitted that there was no motion before the County Assembly for the impeachment of the Deputy Governor and therefore the Special Committee should find that the entire impeachment proceedings are irregular.

210. It would appear that Mr. Ndubi's submissions are predicated on the provisions of Standing Orders 60 and 61 of the County Assembly of Machakos Standing Orders:

Procedure for removal of Governor by impeachment

60. (1) *Before giving notice of Motion under, section 33 of the County Governments Act, 2012 the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of a gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office.*

(2) *The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.*

(3) *The Clerk shall submit the proposed Motion to the Speaker for approval.*

(4) *A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days" notice calling for impeachment of the Governor.*

(5) *Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days: Provided that if the Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.*

(6) *When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is*

supported by at least a third of all Members of the Assembly to move the motion: Provided that within the seven days" notice, the Clerk shall cause to be prepared and deposited in the Clerk"s office a list of all Members of the Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled " SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF MACHAKOS COUNTY GOVERNOR BY IMPEACHMENT".

(7) Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.

(8) When the Motion has been passed by two-thirds of all members of the Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days.

Procedure for removal of Deputy Governor

61. The Standing Orders relating to removal of Governor shall apply, with the necessary modifications, to the removal of the Deputy Governor.

211. The role of the Special Committee Senate as set out at section 33(4)(b) of the County Governments Act is to ***"report to the Senate within ten days on whether if finds the particulars of the allegations against the governor to have been substantiated."*** Similarly the Senate is then under a duty to either uphold the impeachment charge or vote against the impeachment. It is therefore not desirable to delve into the propriety or otherwise of the proceedings before the County Assembly of Machakos even though the Deputy Governor may raise issue with the same.

212. The Special Committee agrees with the exposition by Seerval, H. M. in his treatise where he observes that the declaration in Article 9 of the Bill of Rights (1688) involved the right of each House to be the **sole judge of the lawfulness of its own proceedings even where the procedure of a House, or the right of its members to take part in its proceedings was dependent on statute.** For such purposes, the House can as stated by May in his treatise, 'practically change or practically

supersede the law'. It is important to note that this refers to instances where a House of Parliament resolves to follow a procedure notwithstanding the provisions of its own Standing Orders.

213. On the same subject, section 15 of the Mason's Legislative Manual provides that-

“A Legislative body having the right to do an act in law must be allowed to select the means of accomplishing such act within reasonable bounds. Under a constitutional provision declaring that each House shall determine the rules of its proceedings, the fact that a House acted in violation of its own rules, or violation of parliamentary law in a matter clearly within its power does not make its action subject to review by the courts”

214. And with respect to the relationship of *lex Parliamenti* to the common law Seerval in paragraph 20.31 quotes *Sir Ivor Jennings (Law and the Constitution, 5th ed)* as follows:

“Thus the law and custom of Parliament is a different branch of the law, administered in different courts, the High Court of Parliament, from the common law, which is administered by the Supreme Court of Judicature, whether it is called part of the laws of England is a matter of definition. It is, then the laws of England deal with three kinds of rules, legislation, the case law of the courts, and the law and custom of Parliament; though the last is composed partly of legislation and conflicts with the second only in exceptional cases. As is implied in the name, there is a ‘custom’ as well as a ‘law’ of Parliament’.

215. In the British case of **British Railways Board and another v Pickin [1974] 1 All E R 609** Lord Morris of the House of Lords ruled as follows, (on page 620):

'It must surely be for Parliament to lay down the procedures which are to be followed before a bill can become an Act. It must be for Parliament to decide whether its decreed procedures have in fact been followed. It must be for Parliament to lay down and to construe its standing orders and further to decide whether they have been obeyed; it must be for Parliament to decide whether in any particular case to dispense with compliance with such orders. It must be for Parliament to decide whether it is satisfied that an Act should be passed in the form and with the wording set out in the Act. It must be for Parliament to decide what documentary material or testimony it requires and the extent to which Parliamentary privilege should attach. It would be impracticable and undesirable for the High Court of justice to embark on an inquiry concerning the effect or the effectiveness or the internal procedures in the High Court of Parliament or an inquiry whether in any particular case those procedures were effectively followed...'

216. Lord Morris cited Lord Campbell in the case of *Edinburgh & Dalkeith Railway Co. v Wauchove* with approval thus:

"All that a Court of Justice can do is to look to the Parliamentary roll: If from that it should appear that a bill has passed both Houses and received the Royal Assent, no court of justice can inquire into the mode in which it was introduced into Parliament, nor what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses. I trust, therefore, that no such inquiry will again be entered upon in any Court in Scotland, but that due effect will be given in every Act of Parliament, private as well as public, upon what appears to be the proper construction of its existing provisions".

217. In the Kenyan case of **Okiya Omtatah Okoiti –v- the Attorney General & others** High Court Case No. 227 of 2013, a three judge bench of the High Court stated as follows with regard to parliamentary privilege:

‘Our view is that Members of Parliament can debate anything under the sun. The freedom of speech in this respect is unlimited except by the Standing Orders which are made by Parliament. We are therefore persuaded by the decision in the Canadian case of Canada (House of Commons) v. Vaid [2005] 1S.C.R. where at paragraph 42 the importance of parliamentary privilege as stated in the British Joint Commission Report is captured in the following words:-

“Parliamentary privilege consists of the rights and immunities which the two Houses of Parliament and their members and officers possess to enable them to carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.”

In our view, Members of Parliament should not look over their shoulders when conducting debates in Parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two Houses of Parliament and even those before the county assemblies.’

218. The matters raised by Mr. Ndubi are administrative matters dealt with by the Speaker of the County Assembly and his Clerk. As the Senate has previously held, so long as there is no clear violation of the Constitution by the County Assembly of Machakos, the Special Committee cannot question the lawfulness of the proceedings before the County Assembly vis-à-vis its Standing Orders and rules of procedure.

219. The Speaker of the Senate did on 25th July 2014 receive a letter from the Speaker of the Machakos County Assembly notifying the Senate of a resolution of the County Assembly of Machakos to impeach the Machakos Deputy Governor Mr. Bernard Kiala. The Senate cannot now go behind that resolution and investigate whether the County Assembly properly arrived at the resolution.
220. The Special Committee finds it necessary to investigate if there was a clear violation of the Constitution as alleged by the Deputy Governor. In this regard the Deputy Governor alleged that his right to a fair hearing under Article 50 of the Constitution had been breached. Article 50 of the Constitution provides that every person has the right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court, or if appropriate, another independent and impartial tribunal or body.
221. The Deputy Governor did not however adduce any evidence of breach of his constitutional rights. The County Assembly on the other hand produced the report of the Ad Hoc committee on the impeachment of the Deputy Governor of Machakos County. Paragraphs 9 and 10 of the report at page 8 state that members of the public were also allowed to present their memorandum pertaining to the case and the Deputy Governor's Attorney was represented in the hearing by Ms. Celestine Opiyo of Orengo & Co. Advocates pursuant to Standing Order 63. However it is said that Ms. Opiyo left shortly after the exercise had begun. Paragraph 13 at page 21 of the report states that the Committee invited the Deputy Governor or his legal team to respond to the charges leveled against him. However his advocate left the meeting prematurely thereby failing to respond to the charges.
222. The Deputy Governor has also complained in his written submissions that members of the public were never informed or invited to tender evidence in favour or against the

Deputy Governor. Though this issue was not urged during the oral submissions, the Special Committee notes that Article 196(1) of the Constitution provides that County Assemblies shall facilitate public participation in their legislative and other business.

223. The process leading to the removal of a Governor is a special process that is quasi-judicial, deliberately assigned by the Constitution and statutes to special State organs.

224. Impeachment proceedings are quasi-judicial in nature and the procedure is similar to the procedure in criminal trials as the following elements are present:

- i.) charges are framed and put to the Governor;
- ii.) the Governor pleads to the charges;
- iii.) evidence is adduced against the Governor;
- iv.) the Governor defends himself against the charges; and
- v.) the Senate decides whether to pass a resolution to remove the Governor or not.

225. Public participation in the removal of a Governor should be guided by the following principles:

- (i) Article 259 of the Constitution requires that the Constitution be interpreted in a manner that promotes good governance.
- (ii) Proceedings for the removal of a Governor are different from recall proceedings as set out under Article 104 of the Constitution where the electorate has a right to recall a Member of Parliament before the end of their term of Parliament.
- (iii) The proceedings for the removal of a Governor are concerned with the gross violation of the Constitution and other laws which is a matter of law and fact.
- (iv) In determining whether there has been a gross violation of the Constitution, a quasi-judicial body need not take views from the

public on whether or not there has been a gross violation of the Constitution as the same is a matter of fact and law.

- (v) The interpretation of Article 196 that promotes the purpose of the Constitution and contributes to good governance is that public participation envisaged in proceedings for the removal of a Governor, is having the proceedings open to the public so that they are aware of the charges against the Governor and the Governor's response to such charges.
- (vi) The County Assembly of Machakos published the motion seeking the removal of the Governor which information could have been accessed by any member of the public who may have been interested in the proceedings.

10.0 FINDINGS OF THE SPECIAL COMMITTEE

226. Having considered all these matters, it then fell to the Special Committee to discharge its mandate under section 33 of the County Governments Act and standing order 68 of the Senate Standing Orders. Section 33(4) of the County Governments Act 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.

227. The Committee found as follows on each of the Charges.

9.1 CHARGE 1: GROSS VIOLATION OF THE PROVISIONS OF THE CONSTITUTION

228. **Allegation 1: That the Deputy Governor conducted himself in a manner that undermined his position as a Member of the Machakos County Executive by antagonizing the Governor, Members of the Machakos County Executive Committee and other Members of the County Government thereby undermining the collective responsibility of the County Executive as contemplated under Article 179(4), (5) and (6) of the Constitution.**

229. This allegation was founded on Article 179(4), (5) and (6) of the Constitution which provide as follows-

- Articles 179(4) *“the county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively”*.
- Article 179(5) further provides that *“when the county governor is absent, the deputy county governor shall act as the county governor”*.
- Article 179(6) provides that *“members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of their powers”*.

230. The Committee observed that the evidence adduced by the County Assembly did not clearly indicate the manner in which these provisions of Article 179 of the Constitution had been breached.

231. That aside, the Committee further received representations from the Advocates for the Deputy Governor concerning the issue of separation of powers as between the County Executive and the County Assembly. The Deputy Governor complained that he was subjected to a dual and simultaneous *“trial”* at the County Executive and in the

County Assembly. He submitted that this was evidence of the determination of the County Executive to remove him from office at any cost.

232. The Committee observed that Article 185(3) of the Constitution provides that “a county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.” Thus, in light of the general principle of separation of powers, it is therefore the County Assembly that should exercise oversight over the County Executive Committee Members rather than County Executive Committee Members conducting mini-trials over the fellow Executive Committee Members.

233. **The Committee therefore unanimously found that the allegation of violation of Article 179(4), (5) and (6) of the Constitution was not proved and was therefore not substantiated.**

234. **Allegation 2: It was further alleged that the Deputy Governor failed to disclose that he had a pending criminal case in a court of law, contrary to Article 10 and Chapter 6 of the Constitution.**

235. It is noteworthy that in the course of the hearings, the County Assembly did not produce any evidence in support of this allegation. However, the Deputy Governor, in his response, supplied with the Committee with the Judgment in *Republic versus Edwin Benjamin Waswa, Meshack Omulla, Johannes Okello and Bernard Muia, Criminal Case No. 820 of 2005* in which it was indicated that that the accused persons, the Deputy Governor included, had been acquitted under section 215 of the Criminal Procedure Code.

236. The Deputy Governor further stated that at the time of his nomination, the case had been concluded and that the burden of proof that there existed a pending criminal case was on the County Assembly. In any event, the Committee observed that it was not clear under what legal provisions and for what purposes the County Executive Committee had asked for this disclosure during the Cabinet meeting of 7th July, 2014. The Committee therefore agreed with the Deputy Governor. The burden lay on the County Assembly to produce evidence of the alleged pending criminal case, which the Assembly failed to do.
237. **Consequently, the Committee unanimously found that the allegation of failure by the Deputy Governor to disclose that he had a pending criminal case in a court of law, contrary to Article 10 and Chapter 6 of the Constitution, was not proved and was therefore not substantiated.**
238. **Allegation 3: It was also alleged that the Deputy Governor committed acts which exhibited bias in the appointment of officers within his docket and attempted to influence appointments of members of his extended family, contrary to Article 73(2)(b) of the Constitution.**
239. On this allegation, the County Assembly alleged that the Deputy Governor had influenced the employment of his relatives in the County Government. The County Assembly failed to provide any evidence that would have supported this allegation. As such, the allegation remained a mere allegation.
240. **The Committee therefore unanimously found that the allegation that the Deputy Governor had violated Article 73(2)(b) of the Constitution was not proved and was therefore not substantiated.**

241. **Allegation 4: It was further alleged that the Deputy Governor solicited for money from members of the public to award contracts for jobs in the County Government contrary to Article 73 of the Constitution.**
242. On this allegation, the County Assembly did not adduce any evidence, written or oral, before the Committee. There was in fact no mention during the hearings of this allegation. The allegation therefore remained a mere allegation.
243. **The Committee therefore unanimously found that the allegation that the Deputy Governor had violated Article 73 of the Constitution was not proved and was therefore not substantiated.**
244. **Allegation 5: It was alleged that the Deputy Governor failed to adhere to the values and principles of public service, contrary to Article 232 of the Constitution.**
245. This allegation was centred on the alleged bias on the part of the Deputy Governor in the appointment of public officers in the County Government of Machakos. The evidence adduced by the County Assembly in support of this allegation was largely similar to the evidence relating to the allegation of bias in the appointment of officers within the Deputy Governor's docket and the attempted influence of appointments of members of his extended family, contrary to Article 73(2)(b) of the Constitution.
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246. Again, the Committee observed that aside from the allegations made, the County did not provide any evidence in support of the allegation.
247. **The Committee therefore unanimously found that the allegation that the Deputy Governor had violated Article 232 of the Constitution was not substantiated.**

9.2 CHARGE 2: GROSS VIOLATION OF THE PROVISIONS OF VARIOUS ACTS OF PARLIAMENT.

The County Governments Act, No. 17 of 2012

248. **The Particulars are that on various dates the Deputy Governor committed acts which were in gross violation of the County Governments Act. In particular, that the Deputy Governor failed to supervise the progress of County projects contrary to sections 30 and 32 of the County Governments Act.**
249. On this allegation, the County Government did not provide any clear evidence of the County projects that the Deputy Governor had failed to supervise contrary to sections 30 and 32 of the County Governments Act. The Committee would, at the bare minimum, have expected evidence to be produced indicating the County projects assigned to the Deputy Governor, the dates of such assignment, the actions expected of the Deputy Governor and details regarding the alleged inaction. This was not forthcoming.
250. **The Committee therefore found that the allegation that the Deputy Governor had violated sections 30 and 32 of the County Governments Act was not proved and was therefore not substantiated.**

The Public Officer Ethics Act, Cap 183

251. **Allegation 1: That the Deputy Governor influenced or attempted to influence the employment of his relatives in dockets under him or in other County institutions contrary to section 17 of the Public Officer Ethics Act.**
252. The Committee again observed that although a number of allegations were made by County Assembly to the effect that the Deputy Governor had influenced or attempted

to influence the employment of relatives in dockets under him, the County Assembly had not provided any evidence in support of the allegation.

253. **The Committee therefore unanimously found that the allegation that the Deputy Governor had violated section 17 of the Public Officer Ethics Act was not proved and was therefore not substantiated.**

254. **Allegation 2: That on 7th July, 2014 the Deputy Governor intentionally and willfully misled members of the public that his official car had been withdrawn, information which the Deputy Governor knew was not true contrary to section 19 of the Public Officer Ethics Act.**

255. The Committee observed that there was no contention as between the parties that the Deputy Governor's official car had been withdrawn. The difference lay in the reasons cited for the withdrawal of the vehicle. While the County Assembly stated that the vehicle had been withdrawn to facilitate the installation of County number-plates, the Deputy Governor stated that the vehicle had been withdrawn abruptly and without any notification to him and further that he had been informed that the Governor had given express orders that he should not use any Government vehicle.

256. There was no tangible evidence produced by the County Assembly to support the Assembly's justification for withdrawal of the vehicle.

257. **The Committee therefore unanimously found that the allegation that the Deputy Governor had violated section 19 of the Public Officer Ethics Act was not proved and was therefore not substantiated.**

258. **Allegation 3: That on various instances, the Deputy Governor conducted himself in a manner that did not maintain public confidence in the integrity of the Office of the Deputy Governor, contrary to section 9 of the Public Officer Ethics Act.**

259. From the totality of the evidence presented by the County Assembly, there are various instances in which the Deputy Governor did not conduct himself in a manner that maintained public confidence in the integrity of the Office of the Deputy Governor, contrary to section 9 of the Public Officer Ethics Act. This included the incident relating to the *matatu* registration number KBE 716Y on 7th July, 2014. However, the Committee found that these acts did not amount to gross violation of the Public Officer Ethics Act.
260. **The Committee therefore unanimously found that although the evidence pointed to the fact that the Deputy Governor had not conducted himself in a manner that did not maintain public confidence in the integrity of the office of Deputy Governor, the Deputy Governor’s misconduct did not meet the threshold of gross violation envisioned in section 9 of the Public Officer Ethics Act the Committee therefore found that the allegation was not substantiated.**

The National Cohesion and Integration Act, No.12 of 2008

261. **Allegation 1: That the Deputy Governor called Dr. Sunir Kumal Dhall, the County Executive Committee Member for Trade, Economic Planning and Industrialization, a “*mhindi*”.**
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262. Although this matter was raised in the Grounds and Particulars of Allegations as forwarded by the County Assembly of Machakos, no evidence whatsoever was adduced by the County Assembly in support of this allegation.
263. **The Committee therefore unanimously found the allegation was not proved and was therefore not substantiated.**
264. **Allegation 2: That the Deputy Governor had used derogatory language against people from outside Machakos County.**

265. The Committee took note of the Affidavit of Dr. Eric Omondi Abande, the Chairman of the Kenya Medical Practitioners, Pharmacists and Dentists Union, Lower Eastern Branch, and the Affidavits of Benedict Mutuku, Patrick Kilonzo Ngala, Penninah Mbithe Wanyoro, Patrick Njuguna Mbugua, Dominic Muendo Mutua, Hannah Wambui Waweru, Nathan Ng'atua Mutui and Joshua Nzuki Muli.
266. The Committee observed that the Affidavits raised serious, substantial and weighty allegations against the Deputy Governor. The evidence centred on the use, by the Deputy Governor, of the word "*nguu*" which, in the County Assembly's evidence, was stated to be a derogatory term referring to non-Kambas and non-Machakos Kambas. The Deputy Governor in his submissions stated that the term "*nguu*" was a metaphor in the Kamba language which was used to encourage peace and the need not to spoil for war. He further stated that his utterances at the public rallies were for encouraging peace among residents of the County.
267. The preponderance of evidence tendered before the Committee on this matter clearly indicated that the word "*nguu*" was a derogatory term used by the Deputy Governor to refer to non-Kambas and non-Machakos Kambas.
268. The Committee observed that by so doing, the Deputy Governor had blatantly violated the National Cohesion and Integration Act, in particular, section 3 on ethnic discrimination, section 6 on harassment on the basis of ethnicity and section 13 on hate speech. The Committee found that there was a direct link between the Deputy Governor and the utterances complained of. Further, the Committee found that violations by the Deputy Governor had led to the following consequences-
- (1) intimidation, harassment and loss of medical personnel at Machakos Level 5 Hospital; and

- (2) a general state of anxiety and fear of possible attacks, evictions or reprisals all resulting from the ethnic-based tensions.

269. All these violations, the Committee observed, were harmful to the interests of Machakos County. The Committee found that the derogatory utterances by Hon. Bernard Kiala led to loss of confidence and trust in his holding of the office of Deputy Governor and further in his ability to carry out the functions of that office with integrity and accountability. The conduct of the Deputy Governor demeaned the office of Deputy Governor and was a betrayal of the public trust to serve and protect all residents of Machakos County without discrimination on the basis of ethnicity or regional origin.

270. **The majority of the Members of the Committee found that Deputy Governor had used derogatory language against people from outside Machakos County and had therefore violated the National Cohesion and Integration Act, in particular, section 3 on ethnic discrimination, section 6 on harassment on the basis of ethnicity and section 13 on hate speech.**

271. **Allegation 3: That the Deputy Governor caused inflammatory leaflets to be printed.**

272. The County Assembly produced leaflets containing inflammatory statements before the Committee. However, no nexus was established between the Deputy Governor and these leaflets. There was no evidence adduced to indicate that the Deputy Governor had either authored or authorized or facilitated the authoring and distribution of the leaflets.

273. **The Committee therefore unanimously found that this allegation was not proved and was therefore not substantiated.**

274. **Allegation 4: It was alleged that the Deputy Governor had made inflammatory remarks on social media.**

275. The County Assembly produced a document which they stated to be a print-out of the Deputy Governor's Facebook page with an update stating that he had been ejected from a Cabinet meeting for raising issues of corruption and nepotism, which the County Assembly stated to be false. There was no evidence provided to the Committee to prove that the print-out was that of the Deputy Governor's Facebook account, if he had such an account, and that the alleged update was made by the Deputy Governor.

276. **The Committee therefore unanimously found that the allegation was not proved and was therefore not substantiated.**

277. **Allegation 5: That the Deputy Governor uttered ethnically and regionally divisive and defamatory words during public rallies.**

278. The Committee, once again, relied on the Affidavits of-

- (1) Dr. Eric Omondi Abande;
- (2) Benedict Mutuku;
- (3) Joshua Nzuki Muli;
- (4) Penninah Mbithe Wanyoro;
- (5) Patrick Kilonzo Ngala;
- (6) Patrick Njuguna Mbugua;
- (7) Dominic Muendo Mutua; and
- (8) Hannah Wambui Waweru.

279. The evidence left no doubt that the Deputy Governor had indeed uttered ethnically and regionally divisive and defamatory words during public rallies.

280. The Committee noted, in particular, the evidence relating to an after-church service meeting held on 5th June, 2014 at St. Peters Cleavers Catholic Church at Ndalani at which the Deputy Governor had allegedly said-

- (1) that nothing good was happening at the County Government of Machakos and he knew that well because he was a part of the Government;
- (2) that this was attributable to the “*nguus*” (tortoises) in the County;
- (3) that there were too many non-Kambas and non-Machakos Kambas serving in the County Government yet these were positions for residents of Machakos; and
- (4) that the Government would continue to be poorly run unless the “*nguus*” were removed.

281. At a burial of the same day, the County Assembly stated that the Deputy Governor had further stated-

- (1) that Machakos residents and especially the youth should not expect to get jobs as positions of employment had been given to “*nguus*”;
- (2) that if the County Government continued in that manner, nothing was going to happen in the County; and
- (3) that he would not remain quiet until the “*nguus*” were removed from the County so that his people took up the employment positions.

282. These statements, the Committee found, were inflammatory and defamatory and were intended to cause ethnic division in the County. The utterances had begun to stir up ethnic hatred and tensions in the County. The Committee therefore found that the statements were in gross violation of the National Cohesion and Integration Act, in

particular section 3 on ethnic discrimination, section 6 on harassment on the basis of ethnicity and section 13 on hate speech.

283. **The majority of the Members of the Committee found that the Deputy Governor had uttered ethnically and regionally divisive and defamatory words during public rallies and had therefore violated the National Cohesion and Integration Act, in particular, section 3 on ethnic discrimination, section 6 on harassment on the basis of ethnicity and section 13 on hate speech.**

The Leadership and Integrity Act, No. 19 of 2012

1. **Allegation 1: That the Deputy Governor used his office to push for Government contracts in various County Departments including those of Trade, Health and Agriculture to relatives and friends contrary to section 10 of the Leadership and Integrity Act.**

285. Although various allegations were made regarding the alleged influence in the award of contracts within the County, the Committee found that the evidence adduced by the County Assembly in support of this allegation did not meet the evidentiary threshold to enable the Committee find in favour of the County Assembly.

5. **The Committee therefore unanimously found that the allegation that the Deputy Governor had violated section 10 of the Leadership and Integrity Act was not proved and therefore not substantiated.**

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287. **Allegation 2: That the Deputy Governor intimidated his colleagues through sms and telephone calls seeking various favours contrary to section 34 of the Leadership and Integrity Act.**

288. The allegations that the Deputy Governor sent intimidating sms messages and made intimidating telephone calls was not supported by the requisite evidence to link the Deputy Governor to the sms messages allegedly emanating from him. There was no evidence from the relevant telephone service providers to verify the authenticity of the telephone calls and sms messages complained of.
289. **The Committee therefore unanimously found that the allegation that the Deputy Governor had violated section 34 of the Leadership and Integrity Act was not proved and was therefore not substantiated.**
290. **Allegation 3: That the Deputy Governor solicited for Ksh. 500,000/- from Dr. Sunil Kumar Dhall, the County Executive Committee Member for Trade, Economic Planning and Industrialization contrary to section 12 of the Leadership and Integrity Act.**
291. The Committee did not find, from the evidence presented, any violation of section 12 of the Leadership and Integrity Act.
292. **The Committee therefore unanimously found that the Deputy Governor had violated section 12 of the Leadership and Integrity Act was not proved and was therefore not substantiated.**
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9.3 CHARGE 3: GROSS MISCONDUCT

293. **Allegation 1: That on various dates the Deputy Governor failed to attend County Executive Committee Meetings without good cause.**
294. The Committee noted that the Minutes of the County Executive Committee Meetings produced in support of this allegation indicated that the Deputy Governor was “Absent with Apology”. In the absence of any further evidence, the Committee could

not find that the Deputy Governor was in dereliction of duty for failing to attend County Executive Committee Meetings.

295. **The Committee therefore unanimously found that the allegation was not proved and was not substantiated.**

296. **Allegation 2: That on 7th July, 2014 the Deputy Governor conducted himself in a manner unbecoming of a public officer by misleading the public that he had been ordered out of a County Executive Committee meeting, information that the Deputy Governor knew to be false.**

297. From the evidence of the County Assembly, it was clear that the Deputy Governor had indeed been asked to leave the meeting of 7th July, 2014 to enable County Executive Committee to discuss his conduct. It is a matter of semantics as to whether he was asked to leave, ordered out or ejected.

298. **In the circumstances the Committee unanimously found that the allegation was not proved and was not substantiated.**

299. **Allegation 3: That on various dates the Deputy Governor misled members of the public that his security had been withdrawn, information which the Deputy Governor knew to be false.**

300. In response to this allegation, the Deputy Governor stated that his official security detail at his official residence had been withdrawn. The County Assembly did not provide any evidence that the Deputy Governor's official security was still in place.

301. **The Committee therefore unanimously found that the allegation was not proved and was not substantiated.**

302. **Allegation 4: That on various dates the Deputy Governor neglected duties delegated to him by the Governor.**

303. Section 32(2) and (3) of the County Governments provide that the Deputy Governor shall deputize the Governor in the execution of the Governor's functions and that the Governor may assign the Deputy Governor any other responsibility.

304. The Committee found that while allegations were made to the effect that the Deputy Governor had neglected his duties, there was no evidence adduced as to what duties had been assigned to him by the Governor and the manner in which he had failed to perform the duties.

305. **The Committee therefore unanimously found that the allegation was not proved and was not substantiated.**

306. **Allegation 5: That the Deputy Governor made utterances in public which disclosed information that was confidential to the County Executive Committee.**

307. The evidence produced on this allegation was largely hearsay evidence. There was no direct link between the alleged leakage and the Deputy Governor.

308. **The Committee therefore unanimously found that the allegation was not proved and was not substantiated.**

309. **Allegation 6: That the Deputy Governor criticized Government decisions which he was a party to.**

310. The Committee observed that the evidence presented by the County Assembly related to alleged public utterances by the Deputy Governor relating to matters of employment and corruption. There was no evidence of specific County Executive Committee decisions that the Deputy Governor had criticized.

311. **The Committee therefore unanimously found that the allegation was not proved and was not substantiated.**

9.4 GROUND 4: ABUSE OF OFFICE

312. **Allegation 1: That on various dates, the Deputy Governor attempted to use his office as the Deputy Governor of Machakos to influence the award of a tender to supply drugs by incessantly making telephone calls to the County Executive Committee Member in charge of Health and Emergency Services.**

313. The Committee again found that although various allegations were made regarding the award of tenders within the County, the evidence adduced by the County Assembly in support of this allegation did not meet the evidentiary threshold to enable the Committee find in favour of the County Assembly.

314. **The Committee therefore unanimously found that the allegation was not proved and was not substantiated.**

315. **Allegation 2: That the Deputy Governor threatened County Executive Committee Members to be loyal to him purporting that he would protect them once the Governor was impeached.**

316. The Committee found that no evidence was produced to support this allegation.

317. **The Committee therefore unanimously found that the allegation was not proved and was not substantiated.**

318. **Allegation 3: That the Deputy Governor used his office to cause anxiety and tension to investors, private sector professionals and members of the public who were non-Kambas and non-Machakos Kambas.**

319. On this allegation, the County Assembly relied on the earlier mentioned Affidavits of-

- (1) Dr. Eric Omondi Abande;
- (2) Benedict Mutuku;
- (3) Joshua Nzuki Muli;
- (4) Penninah Mbithe Wanyoro;
- (5) Patrick Kilonzo Ngala;
- (6) Patrick Njuguna Mbugua;
- (7) Dominic Muendo Mutua; and
- (8) Hannah Wambui Waweru.

320. Article 181(1)(c) of the Constitution provides that a County Governor [*and in this case a County Deputy Governor*] may be removed from office on the ground of abuse of office or gross misconduct. The evidence adduced before the Committee was to the effect that the Deputy Governor had abused his office by causing anxiety and

tension in the County through his inflammatory utterances and ethnically divisive statements.

321. The Committee observed that in this respect, the conduct of the Deputy Governor had met the threshold for the removal from office for abuse of office pursuant to Article 181(1)(c) of the Constitution.

322. **The majority of the Members of the Committee therefore found that the allegation that the Deputy Governor had used his office to cause anxiety and tension to investors, private sector professionals and members of the public who were non-Kambas and non-Machakos Kambas had proved.**

11.0 OTHER RECOMMENDATIONS OF THE COMMITTEE

323. In the course of the hearing of the matter, the Special Committee observed a number of issues which are outside of the specific charges against the Deputy Governor of Machakos County on which the Committee made recommendations.

11.1 Intra-County Dispute Resolution Mechanisms

324. The Special Committee observed that since the constitution of the forty-seven County Governments, in the short span of just about one and a half years, the Senate had so far, including the present matter, considered three proposals for the removal of a Governor and two proposals for the removal of a Deputy Governor.

325. This, the Special Committee observed, was a considerably high number of impeachment matters compared with the experiences of other jurisdictions, particularly the United States and the Philippines.

326. The Special Committee therefore observed that there was need for intra-County dispute resolution mechanisms that would assist in the resolution of disputes within the Counties at the early stages. In this regard, the Special Committee noted that while Article 189(3) and (4) of the Constitution provides for resolution of disputes between Governments, there is no similar provision in the Constitution of resolution of disputes within the Counties. Article 189 (3) and (4) of the Constitution provides as follows-

(3) In any dispute between governments, the governments shall make every reasonable effort to settle the dispute, including by means of procedures provided under national legislation.

(4) National legislation shall provide procedures for settling inter-governmental disputes by alternative dispute resolution mechanisms, including negotiation, mediation and arbitration.

327. Further, the Intergovernmental Relations Act, which was enacted pursuant to Article 189 of the Constitution provides, particularly at Part 4 of the Act, for dispute resolution mechanisms for disputes arising between, rather than within, the County Governments. Section 30 restricts the application of the Part to disputes arising-

(a) between the national Government and a County Government; or

(b) amongst County Governments.

328. There is no mention of the resolution of disputes within County Governments. The Special Committee therefore recommends that legislation be developed and enacted to provide for and guide dispute resolution processes within the Counties.

11.2 Uniform Law on Impeachment Proceedings in County Assemblies

329. The Special Committee observed that in virtually all impeachment proceedings before the Senate, including the present matter of the Deputy Governor of Machakos County,

preliminary questions had been raised on the procedures that were followed by the respective County Assemblies in handling impeachment at the County level.

330. The Special Committee observed that section 33(1) and (2) of the County Governments Act provide for the procedure at the county level as follows-

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

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

(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.

331. The Special Committee further observed that each county had adopted its own standing orders which, in addition to the provisions of section 33(1) and (2) of the County Governments Act, made provisions on the procedure to be followed in the Assemblies. The Special Committee further observed that each Assembly, as a Legislature, was free to adopt such procedures as it considered appropriate for the consideration of Motions for impeachment.

332. That notwithstanding, this being a crucial matter which has continued to raise questions both in the Senate and in the Courts, the Special Committee proposes, for greater certainty in the processes of impeachment, the development of a uniform legislation that would guide all counties on the processes for the consideration and disposal of a Motion for Impeachment of a Governor or Deputy Governor. The legislation would address critical questions that have often been raised such as-

- (1) in what manner should the Governor and Deputy Governor be accorded a hearing;
- (2) should the County Assembly establish a Special Committee to consider the matter or consider it in Plenary?;
- (3) timelines for invitation of a Governor or Deputy Governor before the County Assembly; and
- (4) what constitutes a “fair hearing” in terms of Article 50 of the Constitution the County Assembly.

11.3 Composition of Special Committees

333. The Special Committee has further noted that this is the fifth Special Committee appointed for the investigation into the proposed removal of a Governor or Deputy Governor. The Committee observes that there appears to have been a deliberate intention by the Senate to exclude from the composition of each of the Special Committees members who had served on earlier Special Committees. While this may have been intended at ensuring impartiality the Special Committee observes that Special Committees would greatly benefit from the experience and exposure of the Special Committees that served in the past. The Special Committee therefore recommends that, for the future, the Senate considers a blend of Senators who have not served in previous Special Committees with Senators who have served in previous Special Committee.

11.4 Governance Issues at the County Government of Machakos

334. In the course of the hearings various matters were raised by the parties relating to governance at the County Government of Machakos. Allegations relating to irregularities in the procurement processes, nepotism, tribalism, hate speech, corruption and processes in the appointment of various officials were raised. These

are issues that the relevant committees of the Senate and other relevant institutions and agencies of Government can deal with.

11.5 National Cohesion Matters

335. The Committee observed, with great concern, the issues raised at the hearings in the written evidence availed to the Committee touching on matters of national cohesion.
336. In particular, the Committee observed that section 7(2) of the National Cohesion and Integration Act provides that no public establishment shall have more than one-third of its staff from the same ethnic community.
337. The Committee therefore recommends that even as the County Governments seek to ensure observance of the not more than one-third rule under section 7(2) of the National Cohesion and Integration Act, the County Governments ensure observance of the principles of equity and inclusivity.

12.0 CONCLUSION

338. We now come to the core of the matter, where the Committee must state whether it finds the Particulars of the Allegations against the Deputy Governor to have been substantiated.
339. From the evidence received by the Committee, of all the Particulars of the Allegations detailed under the four Charges, the following Particulars were found to have been proved-
- (1) That the Deputy Governor had used derogatory language against people from outside Machakos County;

- (2) That the Deputy Governor uttered ethnically and regionally divisive and defamatory words during public rallies;
- (3) That the Deputy Governor used his office to cause anxiety and tension to investors, private sector professionals and members of the public who were non-Kambas and non-Machakos Kambas.

340. The question before the Committee was whether the threshold for impeachment had been met.

341. The Committee observed that the Senate had previously pronounced itself on the threshold for impeachment. The Senate had adopted the following as the considerations to be taken into account in determining the matter of threshold-

- (i) *The allegations must be serious, substantial and weighty;*
 - (ii) *The violation must be a flagrant and glaring violation;*
 - (iii) *There must be a nexus between the violation and the Governor;*
 - (iv) *The violation must have led to harm, loss or damage to society;*
 - (v) *The violation must have led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to carry out the functions of that office with integrity and accountability.*
-

342. The Committee further took note of the experiences of other jurisdictions on the matter of threshold, including the following examples-

- (a) Senator William Blount of the United States was in 1797-1799 impeached by the House of Representatives for the alleged incitement of two Indian

tribes to mount a military expedition against neighboring Spanish territories for purposes of capturing the same for Great Britain. The Senator was however removed by the Senate using its own internal procedures before he could be tried in the Senate;

- (b) Recently (in July 2014), a member of the Missouri House of Representatives filed articles of impeachment against Governor Jay Nixon for ordering Missouri's Department of Revenue to accept joint tax returns filed by same-sex couples who have been legally married in other states. The Missouri Constitution prohibits the state from recognizing same-sex marriages;
- (c) In 1929, the Oklahoma legislature impeached Henry Johnston, the seventh Governor of Oklahoma, after convicting him of general incompetency; and
- (d) Abdulkadir Musa, the first Nigerian State Governor to ever be impeached met his fate because he was unable to form a Cabinet. He had been elected on a platform of the People's Redemption Party (PRP) when the dominant party in the House was the National Party of Nigeria, whose members he refused to nominate.

13. The majority of the Members of the Committee were of the view that the evidence adduced by the County Assembly on these matters was serious, substantial and weighty. The evidence centred on the use, by the Deputy Governor, of the word "*nguu*" which, in the County Assembly's evidence, was stated to be a derogatory term referring to non-Kambas and non-Machakos Kambas. The Deputy Governor in his submissions stated that the term "*nguu*" was a metaphor in the Kamba language which was used to encourage peace and the need not to spoil for war. He further stated that his utterances at the public rallies were for encouraging peace among residents of the County.

344. The majority of the Members of the Committee took the view that the preponderance of evidence tendered before the Committee on this matter clearly indicated that the word “*nguu*” was a derogatory term used by the Deputy Governor to refer to non-Kambas and non-Machakos Kambas. The majority were of the view that this word, especially when uttered by the Deputy Governor, in public, was derogatory and divisive. They therefore found that the Deputy Governor had blatantly violated the National Cohesion and Integration Act, in particular, section 3 on ethnic discrimination, section 6 on harassment on the basis of ethnicity and section 13 on hate speech. The Committee found that there was a direct link between the Deputy Governor and the utterances complained of.

345. Further, majority of the Members found that the violations by the Deputy Governor had led to the following consequences-

- (1) intimidation, harassment and loss of medical personnel at Machakos Level 5 Hospital; and
- (2) a general state of anxiety and fear of possible attacks, evictions or reprisals all resulting from the ethnic-based tensions.

346. All these violations, the majority of the Members of the Committee observed, were harmful to the interests of Machakos County. The majority were of the view that the derogatory utterances by Hon. Bernard Kiala were dangerous and divisive and it was not in the interests of Machakos County that the Deputy Governor continue to hold office. Further that the conduct of the Deputy Governor demeaned and abused the office of Deputy Governor and was a betrayal of the public trust to serve and protect all residents of Machakos County without discrimination on the basis of ethnicity or regional origin. The majority of the Members of the Committee were of the view that the derogatory utterances by the Deputy Governor, even when spoken by an ordinary person, were dangerous and divisive; when spoken by a Deputy Governor, who

deputizes for the County Governor, the words had the potential of being regarded as the official County policy.

347. Taking these factors into account the majority of the Members of the Committee held the view that the threshold required for impeachment had been attained.
348. The minority of the Members of the Committee took the view that although the statements attributed to the Deputy Governor were offensive, the statements did not meet the requisite threshold for impeachment. Further that the statements were not so grave as to call for the impeachment of the Deputy Governor. Other mechanisms could be employed by the relevant Government institutions and agencies to inquire into and address the matters complained of. The minority of the Members of the Committee further took the view that the impeachment proceedings were prematurely initiated as other avenues for resolution of the matters complained of were available and ought to have been used.
349. **Pursuant to standing order 203(5) of the Senate Standing Orders, a Minority Report by Sen. Hassan Omar Hassan is appended as *Annex 11*.**
350. **The final finding of the majority of the Members of the Special Committee is that the Hon. Bernard Kiala, the Deputy Governor of Machakos County be impeached on account of-**
- (1) **Gross Violation of the National Cohesion and Integration Act; and**
 - (2) **Abuse of Office.**
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13.0 ANNEXURES

OBJECTION TO THE IMPEACHMENT OF DEPUTY GOVERNOR OF MACHAKOS HON. BERNARD KIALA

Mr. Speaker, My perusal and first reading of the impeachment proceedings and documentation provided to me upon taking up my mandate as a member of the Special Committee pointed to a coordinated and premeditated scheme by the County Government and County Assembly of Machakos County to witch-hunt and punish through impeachment the Deputy Governor. In this very analysis **Mr. Speaker,** I find myself incapable either in conscience or political pragmatism to validate such a scheme.

Mr. Speaker, In my perusal, it was evident that most of the affidavits from the County Executive Members were sworn on 9th July, 2014, on the same day the County cabinet had purported to fix as the date to discuss allegations of Misconduct against the Deputy Governor. Interestingly **Mr. Speaker,** the initial Agenda to discuss the Misconduct of the Deputy Governor was catalysed by the Deputy Governor's concerns on his safety and security raised in the County cabinet meeting of 7th July, 2014.

Ironically **Mr. Speaker,** the issues of the safety and security of the Deputy Governor which constitutes a paramount responsibility of any collegiate were not discussed evidenced by the minutes of this meeting. An agenda towards his misconduct substituted his security concerns. **Mr. Speaker,** these actions point towards malice. I also reasonably believe that it was following this meeting that the scheme to impeach the Deputy Governor was either hatched or put into high gear. This in my view explains why affidavits of Members of the County Executive were sworn on 9th July, 2014 - and by the admission of one of the Executive Member on cross-examination - in the Governor's office. **Mr. Speaker,** the contents of the affidavits were similar and in my considered view were rehearsed statements intended to actualise the intention to impeach. This in my view validates my assertions towards the scheme and further points to an element of coaching of would be witnesses to the impeachment proceedings.

Mr. Speaker, this action is evidence that the said agenda to discuss the Misconduct of the Deputy Governor was a mere formality and the County cabinet did not imbue patience to see through its 'proceedings' on the Misconduct of the Deputy Governor. There was haste by both the County Government and the County Assembly to

impeach the Deputy Governor – a scheme in which I cannot be party to and neither can I recommend to the Senate to approve.

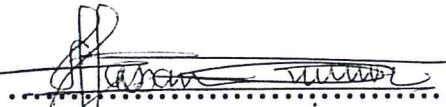
Mr. Speaker, the scheme to impeach seemed to have sent the accusers into a ‘fishing expedition’. Everything and anything would therefore do. This was evidenced by the myriad charges presented before the Machakos County Assembly and eventually to the Senate. The Senate framed twenty four (24) charges in which by consensus the Senate Special Committee found twenty one (21) of the said charges unsubstantiated.

Mr. Speaker, my view is that the three (3) charges which the Special Committee feels substantiated remain unsubstantiated for the reasons stated hereinunder;

1. That the charges so substantiated do not meet the threshold necessary to warrant the impeachment of the Deputy Governor.
2. That the matter of hate speech are matters of strict proof that require not only substantiation but the threshold of beyond reasonable doubt that are a consequence of criminal proceedings.
3. That just a mere correlation is in my view an insufficient basis to pass a guilty verdict on account of a criminal allegation which onus of proof is beyond reasonable doubt.
4. That the constitution places a threshold of what bars public officers to hold public office on account of criminal allegation and/or conviction pursuant to Articles 193(2)(f) and 193(3) of the Constitution.
5. That it is my considered opinion that not having tried these particular allegations conclusively, I find it premature to validate the allegations of hate speech.
6. That in my view, it would be my recommendation that such allegations must be dealt with by the necessary agencies and institutions that have the mandate and capacity to conclusively investigate and try these allegations herein the National Cohesion and Integration Commission and the Office of Director of Public Prosecutions, a recommendation captured in the recommendation of the Special Committee.

Mr. Speaker, let me caution the Senate that the very charge of hate speech is often perpetuated by the villain as a ‘weapon’ against the victim. It bears the very tendency to substitute the villain for victim and the victim for villain. Unfortunately, this is the situation in Kenya within the realm of the hate speech regime. Often it has targeted the weak, the victim(s) and has been riddled by politicization.

Mr. Speaker, I find the position to impeach the Deputy Governor untenable and therefore differ with the majority vote for reasons aforementioned to impeach the Deputy Governor of Machakos County, Hon. Bernard Kiala.

SIGNED: .....

SEN HASSAN OMAR HASSAN,
SENATOR – MOMBASA COUNTY.

DATE: 15th August, 2014.....

