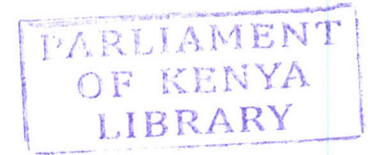


REPUBLIC OF KENYA



TWELFTH PARLIAMENT
THE NATIONAL ASSEMBLY – (SECOND SESSION)

COMMUNICATION FROM THE CHAIR
(NO. 35 of 2018)
ON INVESTIGATORY MANDATE OF HOUSE COMMITTEES AND THE
CONDUCT OF MEMBERS IN COMMITTEES

Honourable Members,

You will recall that on Tuesday, 12th June 2018 the Member for Igembe North Constituency, the Hon. Maoka Maore stood on a point of order, pursuant to Standing Order No. 83 and sought the guidance of the Speaker on the scope of investigatory functions of the committees of the House. In particular, the Hon. Member invited the Speaker to pronounce himself on whether the ‘*power to investigate*’ as enshrined in our Standing Orders contemplates the Committees of the House undertaking a parallel investigation of matters under investigation by investigative agencies of the State such as the Directorate of Criminal Investigations (DCI), the Ethics and Anti-Corruption Commission (EACC) and the Directorate of Public Prosecutions (DPP).

Honourable Members, in his submission, the Member for Igembe North was concerned that Committees of this August House are, in his words “*of late seemingly engaged in chasing newspaper headlines*”.

This means that the Committees may be reactively basing the subject of their inquiries on media reports rather than proactive work plans or reports of specialized offices such as that of Auditor-General, the Controller of Budget and other offices established by law and which submit statutory reports to the National Assembly, especially with regard to cases of alleged misuse of public funds. Further, the Hon. Maoka Maore was concerned that audit committees were seemingly deviating from their mandate of considering reports by the Auditor General and instead undertaking preliminary inquiries which fall within the purview of the Auditor-General's Office. He sought direction from the Speaker on whether the undertaking of parallel investigations by House Committees amounts to duplication, noting that the end result of investigations by the Committee would be recommendations that the relevant investigatory agencies proceed to investigate the same matters.

Honourable Members, as you may recall, the Leader of the Majority Party, the Hon. Aden Duale, the Hon. Olago Aluoch, the Hon. (Dr.) Eseli Simiyu, the Hon. Kimani Ichungwah and the Hon. Opiyo Wandayi ventilated at length in reaction to the matter upon which I undertook to issue a considered ruling.

Honourable Members, you will also recall that on Wednesday July 4, 2018 during the afternoon session, the Leader of Majority Party similarly rose on a Point of Order and sought the Speaker's guidance on the conduct of Members in Committees. In his submission, the Leader of the Majority Party highlighted various instances where, in his opinion, the conduct of Members with regard to commenting on matters active before the Courts, attendance and usurpation of meetings as

“friends of Committees” and cosyng with witnesses portrayed the House in bad light. He concluded by seeking that the Speaker guide the House on how Members and Committees should conduct themselves while participating in the activities of the House in accordance with the Constitution and the Standing Orders.

Honourable Members, from the ensuing debate, Members, including the Leader of the Minority Party, the Hon. John Mbadi, the Hon. OlagoAluoch, the Hon. Mark Nyamita and the Hon. Charles Kilonzo contributed in support of the point raised by the Leader of the Majority Party, raising further issues for the guidance of the Speaker which I summarise as follows–

- (i) the issue raised by the Hon. Maore over the apparent reactive nature of House Committees in basing their work on media reports instead of generating their own business;
- (ii) the manner of interrogating and questioning witnesses appearing before Committees;
- (iii) the repeated failure by Members to declare their interest in matters under consideration by Committees as required under the Parliamentary Powers and Privileges Act and the Standing Orders;
- (iv) the apparent failure by Members to relate at ‘arms-length’ with witnesses appearing before Committees before they enter meetings, during interrogation and in the course of their exit from meetings;

- (v) the repeated and unreported failure by Members to attend Committee meetings;
- (vi) the apparent conflict of interest and alleged compromise of Committees where Committee activities are partly or wholly funded by State or private entities; and
- (vii) the attendance and indecorous participation by non-Committee Members in Committee meetings.

Honourable Members, at the close of debate on the point raised the Leader of the Majority Party, I undertook to give a comprehensive Communication to guide the House on the conduct of Members in Committees. I shall proceed to dispose of the points raised by the Leader of the Majority Party and the Hon. Maore in this Communication.

Honourable Members, on the question as to whether the investigatory work of the Committees of the House may lead to unnecessary duplication and result in futile recommendations, I wish to note that the House has an inherent investigatory mandate. This mandate is discharged through Committees, which, as Hon. Maore did rightly contend, 'are the turbines, which move the House.' The manner in which the House and its Committees carry out investigations is fundamentally different from the manner in which an agency such as the Directorate of Criminal Investigations (DCI), the Ethics and Anti-Corruption Commission (EACC) conducts investigations. Indeed, a probe by the House in the public interest may unearth more information than an investigation by either of the two agencies in which a witness may be wary of self-incrimination.

The House can investigate on its own motion by seeking primary evidence, or rely on secondary evidence as do the Special Funds Accounts Committee, Public Investments Committee and the Public Accounts Committee with regard to audited reports submitted by the Office of the Auditor General.

Honourable Members, the investigatory power of the House is drawn directly from the authority granted by the people, who have unequivocally entrusted it with the role of appropriating public revenue, approving revenue-raising measures and exercising oversight over public expenditure. As a guardian of the public purse, it would be inimical of Parliament to turn a blind eye to the manner in which public monies that it voted are utilized by constitutional commissions and independent offices, and the Executive and its agencies. Indeed, a Legislature which assumes the role of a bystander waiting to consume reports from other quarters before taking action, will, to say the least, be dancing on quick sand.

Honourable Members, the Standing Orders are clear on the investigatory mandate of the House and its Committees. With respect to the Public Accounts Committee, Standing Order 205(1)(2) provides that, and I quote,—

*(2) The Public Accounts Committee shall be responsible for the examination of the accounts showing the appropriation of sum voted by the House to meet the public expenditure and such other accounts laid before the House as the Committee may think fit. **I put emphasis on the words “accounts” and “laid before the House”***

For the newly created Special Funds Accounts Committee, Standing Order 205A(2) states that, and I quote–

*(2) The Committee shall be responsible for the examination of the **accounts** of –*

(a) The equalization Fund;

(b) The political parties fund;

(c) The judiciary fund;

(d) The National Government Constituencies Development fund; and

(e) Any other Fund established by law as the Speaker may direct.

Finally, Standing Order 206(2) relating to the Public Investments Committee provides that, and I quote–

*(2) The Public Investments Committee shall be responsible for the examination of the working of public investments on the basis of audited reports and accounts. I put emphasis on the expression **“on the basis of audited reports and accounts”**.*

Honourable Members, a close reading of the said Standing Orders suggest that the primary source of information for the work of audit is the Office of the Auditor-General. Hence, the three audit-related Committees may only commence an inquiry into alleged misuse of public revenue upon receipt of an audit report on the accounts from the Auditor-General, or other specially appointed auditors, on the accounts from which funds are alleged to have been misused.

Honourable Members, as you are aware, the Auditor General submits reports to the House on an annual basis. Nevertheless, audit committees, to wit, the Special Funds Accounts Committee, the Public Accounts Committee and the Public Investments Committee are not precluded from requesting the Auditor-General to undertake a **special**

audit as and when the need arises to examine accounts of a public entity to ascertain whether or not monies are being managed according to sound financial principles. Indeed, the Public Accounts Committees of the previous Parliaments effectively investigated allegations of misuse of public funds that came to light in course of their work or examination of issues and upon guided preliminary inquiries, asked the Auditor-General to undertake special audits. However, it is the special audit that ultimately became the basis of subsequent in-depth investigations. In my considered opinion, there exists no justification for deviating from this established practice.

Honourable Members, under the Standing Orders, Departmental Committees have been granted latitude to investigate specified matters under state departments agencies falling within their mandate at any time. Standing Order 216(5) provides that, and I quote—

(5) The functions of a Departmental Committees shall be to –

(a) investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and Departments;

Honourable Members, this House has therefore charged Departmental Committees with the duty to conscientiously inquire into and report on the administration, operations, management, activities and indeed the estimates of the assigned line ministries, departments and agencies. Accordingly, Standing Order 216(5) **does not** contemplate Departmental Committees inquiring into **accounts** of line ministries, departments and agencies, but the programmes and policy objectives of the line ministries, departments and agencies and the effectiveness of the

implementation, as part of their routine oversight function on behalf of Parliament.

Honourable Members, allow me to share with the House the conclusions of a study carried out by two parliamentary scholars, *Brazier & Ram*, in 2006 which are instructive in this matter. The two observed that the government is accountable to the people through parliament for raising and using public funds. They also noted that the concept of financial accountability is as old as parliament and that, since the thirteenth century, the raising and use of public funds has been subject to parliament. Finally, Brazier and Ram emphasized that in modern times, one of the important functions of parliament is to hold the government accountable for its spending of public money.

Indeed, it is a general public expectation that Parliament should keep an eye on the government expenditure. Consequently, parliament, through its committees, is obligated to look for instances of misuse of public money and prescribe the necessary remedies. But that responsibility must be dispensed with in accordance with the rules set out in our Standing Orders, which assign **different responsibilities** to the various committees of the House.

Honourable Members, the Parliamentary Service Commission has assigned qualified and competent staff to support Committees for the effective and efficient running of committee affairs in line with their oversight mandate. This is more so with regard to the conduct of inquiries. In addition, some Committees consume the services of other agencies that are attached to Parliament including from the Office of the Auditor-General, the Controller of Budget and the Inspectorate of State

Corporations. For the effective conduct of inquiries, Chairpersons and Members are expected to accord these officers the opportunity to render their advice before the commencement and during hearings. Committees may hold preparatory meetings in this regard in order to structure their engagement with witnesses and efficiently utilize their time. This is crucial to effective interrogation and questioning of witnesses.

Honourable Members, the existence of parallel investigations does not preclude the Committees of the House from discharging their constitutional mandate. Further, Committees have no way of dictating the timelines applicable to investigations outside Parliament. This House has had occasion to conduct various inquiries in the public interest which culminated in evidence-based recommendations and formed the basis for prosecution of cited perpetrators. It rests upon each Committee to decide and resolve on the urgency of the inquiry they propose to undertake, but, where persons who are being investigated are charged in court and prosecution commences on the same matters that are before a committee, I see no use in the particular committee proceeding with the matter, unless there is new information different from those being prosecuted in court.

Honourable Members, with regard to the “chasing of headlines”, I note that the mandate of debating and resolving issues of concern to the people ultimately calls upon the House to be both proactive and reactive. As highlighted to Members during the comprehensive induction programme at both House and individual Committee level, the major issues of the business of the House are transacted through

Committees. The Standing Orders clearly outline the mandate of each Committee. Members have been sensitized on the need to formulate Committee work-plans covering their mandate for the optimal use of the time afforded by the calendar of the House. Nevertheless, a work-plan cannot predict when an accident, tragedy or emergency will occur or when a whistleblower decides to come forward. Formulation of a proper work-plan assists a Committee to discharge its mandate effectively in ordinary times. Since a Committee is also be expected to discharge its mandate in extraordinary times, the true test of the discharge of its mandate is how well it adjusts its existing work-plan to effectively navigate any matters arising. The administrative mechanisms that the House has put in place have rationalized Committee operations. Any inquiry that a Committee undertakes is structured with defined reporting timelines, including requirements for submission of progress reports.

Honourable Members, in his contribution on the point raised by the Leader of the Majority Party, the Hon. Olago Aluoch touched on the apparent lack of interrogation skills by some Members during Committee meetings. While I may not entirely agree with the Honourable Member, I do note that the art of effective interrogation is a skill acquired over time. There is no harm in Members studying how ranking members of the House, senior legal practitioners, judges of superior Courts and indeed their colleagues in other Parliaments effectively interrogate witnesses. Members have to remember at all times that the aim of an interrogation is to bring out or reveal information

relevant to the matter under consideration by the Committee. Coercion, intimidation and embracing of witnesses rarely aids this objective.

Honourable Members, I need not reiterate the rules relating to the declaration of interests. As you will recall, upon assuming office, by dint of paragraph 10 of the Fourth Schedule to the Parliamentary Powers and Privileges Act, 2017, each one of you was deemed to have signed the Code of Conduct for Members contained in the that Fourth Schedule to the said Act, 2017 upon taking oath of office. Indeed, paragraph 6 of the Code provides, and I quote,—

(1) Members of the House shall—

(a) register with the relevant Speaker all financial and non-financial interests that may reasonably influence their parliamentary actions;

(b) before contributing to debate in the House or its Committees, or communicating with State Officers or other public servants, declare any relevant interest in the context of parliamentary debate or the matter under discussion; and

(c) observe any rules agreed of the House in respect of financial support for Members or the facilities of the House.

Further, Standing Order 90 states, and I quote,

(1) A Member who wishes to speak on any matter in which the Member has a personal interest shall first declare that interest.

(2) Personal interests include pecuniary interest, proprietary interest, personal relationships and business relationships.

Honourable Members, these rules are self-explanatory. It is therefore incumbent upon every Chairperson to ensure that, prior to the commencement of every meeting, that Members declare their interest in any matter falling with the agenda items of that particular sitting. At no time may you be seen as advancing a personal interest. Failure to

disclose an interest creates a presumption that any contribution made to a matter under consideration by the House or a Committee, however relevant, advances your personal interest as a Member.

Honourable Members, Article 73 of the Constitution outlines the nature and responsibilities of leadership. It states, and I quote,—

(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;

Honourable Members, the authority granted to you by the people of Kenya is a public trust. The manner in which you exercise this authority must reflect the dignity of the office the people have called upon you to perform. Consequently, Members must relate with persons appearing as witnesses before the Committees at “arms-length”. The advent of participation of the public in the processes of the House pursuant to Article 118 of the Constitution has thrust the conduct of Members in the full glare of the public like never before, more so when proceedings are streamed live online, or broadcast live by the various TV stations. Members must conduct themselves with utmost respect while interacting with witnesses. In this regard, while appearing before Committees, witnesses should be ushered in and escorted out by the secretariat or the Serjeant-at-Arms. Chairpersons are reminded of their responsibilities in this regard.

Honourable Members, as you are aware, Committees are an extension of the House whose creation is mandated by Article 124 of the Constitution. Just as failure to attend eight sittings of the House may lead to the vacation of a Members’ seat, the House thought it fit to sanction the discharge of a Member who fails to attend four consecutive sittings of a Committee without permission or sufficient reason. The Clerk of the National Assembly has put in place mechanisms for the recording and reporting of the attendance of Committee Meetings. In this regard, I am in receipt of a current report and shall request the Liaison Committee and the House leadership to review it and take action on any errant Members as appropriate. Cases abound of

members barely sitting through a public hearing. It is time we confronted this reality and choose to enforce order and decorum.

Honourable Members, during the ensuing debate on the point raised by the Leader of the Majority Party, the Hon. Mark Nyamita and the Hon. Charles Kilonzo queried the propriety of State or private entities funding Committee activities and whether such funding may conflict or compromise the inquiry process.

Honourable Members, as you are aware, the Parliamentary Service Commission is allocated adequate funds to facilitate the two Houses and their organs to discharge their respective mandates as provided for under the Constitution. Each Committee of the House is allocated adequate funds to enable it carry out its programmes. This is meant to insulate Parliament from external direction or control. The office of the Clerk receives and processes requests for facilitation of Committee activities in line with the adopted workplans and budgets. Any engagement with Committees outside their planned activities should be channeled through the office of the Clerk who will review the nature of the engagement and any details related to the welfare of Members. As a rule, the House caters for all expenses relating to a matter under inquiry by a Committee to dispel any perception of undue influence, conflict of interest or bias.

Honourable Members, nevertheless, you will recall that the work of the House and its Committees is not limited to inquiry. The Executive may, on its own motion, wish to engage the House and its Committees in consultation on matters of policy or review ongoing programmes and activities. In this regard, co-funding such an engagement is permissible

as long as the relationship is maintained at “arms length”. My office and that of the Clerk shall consider any such requests from the Executive and private entities and use our discretion, on a case-by-case basis.

Honourable Members, of late some Committees seem to have many non-committee Members, commonly referred to as ‘friends of committee’. Indeed, in some instances as alluded to by the Leader of the Majority Party and other Members, these ‘friends’ have adopted the behavior of the proverbial camel. The camel begged and received permission to insert only its nose into a traveler’s tent, but proceeded to insert its entire body and subsequently evict the traveler from his lodging. There is no bar to non-Committee Members attending the proceedings of a Committee. Indeed Standing Order 195 allows this, only barring non-Committee Members from voting. Members would refrain from attending the meetings of other Committees in previous Parliaments despite this permission. The scenes recently witnessed where Committee Members are outnumbered by their ‘friends’ to the extent that they lack sitting space and adequate time allocation to prosecute their mandate are unfortunate and unacceptable. This is an abuse of the spirit of Standing Order 195 and has cast the House in very negative light with regard to the seriousness and decorum of Committee proceedings. Consequently, to remedy this I therefore direct that the Clerk of the National Assembly immediately put in place administrative measures to reserve marked sitting places for each Committee Member at any meeting properly convened. It shall be upon each Chairperson to determine the number of non-committee Members

to allow to participate in a Committee sitting at any given time, taking into account the available sitting space. In light of the fact that all Members have the opportunity to discuss any matter reported to the House by a Committee, Chairpersons of Committees shall give priority to Committee Members in examination of matters before the Committee, including asking questions and a non-Committee **Member may only speak with the permission of the Chairperson and may be ordered to withdraw from the committee sitting for disorderly conduct.** Further, a non-Committee Member is not permitted to sit in the Committee during the internal sittings of the Committee, including the pre-inquiry sittings, confirmation of minutes or report writing meetings.

Honourable Members, it has come to my attention that some Committees are insistent on Cabinet Secretaries appearing before them in person to answer queries directed to the Ministry. I am fully cognizant of the provisions of Article 153(3) and (4)(b) of the Constitution which oblige a Cabinet Secretary to attend before a committee of the National Assembly when required by the committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible and provide Parliament with full and regular reports concerning matters under their control, respectively. Nevertheless, Hon. Members, Committees ought to be alive to the possibility that awaiting the eventual appearance of a Cabinet Secretary to answer all queries in person may prejudice the effective discharge of their mandate. In this regard, I urge Committees, on a case-by-case basis, to consider allowing either the Principal Secretary or a Senior Officer of the Ministry, to attend and answer queries where the personal

attendance of the Cabinet Secretary can be excused. **Indeed, technical officers are the best placed to respond to issues of technical nature.**

Honourable Members, as I conclude, the House is reminded that the Constitution places strict obligations on the conduct of Members in the discharge of their role as leaders. Parliament is under constant scrutiny. Committee meetings are open to the public and proceedings are now streamed live online and in televisions. The actions, comments, body language, gestures and even grooming of Members is under constant evaluation by the people. The partial or indecorous conduct of an individual Member or a Committee of the House is deemed, by extension, as the conduct of the House. Let us strive to do better and uphold the dignity of the House.

In summary, I therefore direct the following—

- 1. THAT** it rests upon each Committee to decide and resolve on the urgency of the inquiry they propose to undertake if an investigative agency is conducting a parallel investigation, and where prosecution has preferred charges on individuals of interest to the Committee on matters similar to those before it, the inquiry before the Committee should be suspended. Any further inquiry may only be proceeded with the leave of the Speaker;
- 2. THAT,** prior to the commencement of every meeting, every Chairperson must require that Members declare their interest in any matter under consideration;

- 3. THAT,** Members should relate with persons appearing as witnesses before Committees at “arms-length”. In this regard, while appearing before Committee witnesses should be ushered in and escorted out by the secretariat or the Serjeant-at-Arms. Members should also endeavor to avoid making any contacts with witnesses prior or during hearings;
- 4. THAT,** as a rule, the House shall cater for all expenses relating to a matter under inquiry by a Committee. Any proposal by any organisation to co-fund a Committee activity should be treated with caution and if such co-funding or funding shall be considered necessary, requests should be directed to the Office of the Clerk for review and approval on a case-by-case basis;
- 5. THAT,** the Clerk of the National Assembly immediately put in place administrative measures to **reserve** marked sitting places for each Committee Member at any meeting of a Committee;
- 6. THAT,** it shall be upon the Chairperson of a Committee to determine the number of non-Committee Members to allow to participate in a Committee sitting at any given time, taking into account the available sitting space and convenience of the committee;
- 7. THAT,** a Chairperson of a Committee shall give priority to Committee Members in the asking of questions in a Committee sitting. In this regard, a non-Committee Member may only speak with the permission of the Chairperson;

- 8. THAT,** a Chairperson shall report to the Speaker any incident where a non-Committee Member grossly misconducts him or herself during a Committee sitting for disciplinary action in the House;
- 9. THAT,** forthwith, contravention of Standing Order 86 that prohibits premature reference to proceedings before committees constitutes an act of gross disorderly conduct pursuant to Standing Order 107A(1)(i) attracting suspension or discharge from a Committee;
- 10. THAT,** Committees consider allowing either the Principal Secretary or a Senior Officer of the Ministry, to attend and respond to queries where the personal attendance of the Cabinet Secretary can be excused, save for examination of matters before the audit committees, that is the Public Accounts committee, the Public Investments committee and the Special Funds Accounts Committee where accounting officers must appear to respond to audit queries as required by law.

The House is so guided.

THE HON. JUSTIN B. MUTURI, E.G.H., MP
SPEAKER OF THE NATIONAL ASSEMBLY

Thursday, 26th July, 2018