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KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT

FOURTH SESSION (2011)

**THE CONSTITUTIONAL IMPLEMENTATION OVERSIGHT
COMMITTEE**

REPORT

**ON THE APPROVAL OF DR. WILLY M. MUTUNGA FOR
APPOINTMENT TO THE OFFICE CHIEF JUSTICE, MS. NANCY M.
BARAZA FOR APPOINTMENT AS DEPUTY CHIEF JUSTICE AND
MR. KERIAKO TOBIKO FOR APPOINTMENT AS DIRECTOR OF
PUBLIC PROSECUTIONS**

Clerk's Chambers,
Parliament Buildings,
NAIROBI.

JUNE, 2011

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Mr. Speaker Sir,

The Constitutional Implementation Oversight Committee is a select committee established under Section 4 of the Sixth Schedule of the Constitution with a mandate of overseeing the implementation of the Constitution and which among other things:-

- (a) *Shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning—*
- (i) *the preparation of the legislation required by this Constitution and any challenges in that regard;*
 - (ii) *the process of establishing the new commissions;*
 - (iii) *the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff;*
 - (iv) *the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and*
 - (v) *any impediments to the process of implementing this Constitution;*
- (b) *coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of the legislation required by this Constitution; and*
- (c) *take appropriate action on the reports including addressing any problems in the implementation of this Constitution.*

COMMITTEE MEMBERSHIP

The Committee as constituted by the House on 5th October, 2010 comprise of the following members:-

1. The Hon. Hussein Mohammed Abdikadir, M.P. Chairperson
2. The Hon. Millie Odhiambo-Mabona, M.P. Vice-Chairperson
3. The Hon. Beth Mugo, EGH, M.P.
4. The Hon. Chirau Ali Mwakwere, EGH, M.P.
5. The Hon. Martha Wangari Karua, EGH, M.P.
6. The Hon. (Prof.) Phillip Kaloki, M.P.
7. The Hon. (Dr.) Kilemi Mwiria, M.P.
8. The Hon. Charles Kilonzo, M.P.
9. The Hon. Ekwere Ethuro, EBS, M.P.
10. The Hon. Cecily Mbarire, M.P.
11. The Hon. (Dr.) Eseli Simiyu, M.P.

12. The Hon. Moriasi Ombui, M.P.
13. The Hon. Amina Abdalla, M.P.
14. The Hon. David M. Ngugi, M.P.
15. The Hon. Ababu Namwamba, M.P.
16. The Hon. Danson Mwazo, M.P.
17. The Hon. Sophia Abdi, M.P.
18. The Hon. (Dr.) Joyce Laboso, M.P.
19. The Hon. Joseph Kasaine Nkaiserry, M.P.
20. The Hon. Charles Onyancha, M.P.
21. The Hon. Alfred Khang'ati, M.P.
22. The Hon. John Mbadi, M.P.
23. The Hon. Elizabeth Ongoro, M.P.
24. The Hon. Rev. Julius Murgor, M.P.
25. The Hon. Lucas K. Chepkitony, M.P.
26. The Hon. Benedict Fondo Gunda, M.P.
27. The Hon. Rachel Shebesh, M.P.

Mr. Speaker Sir,

On the 18th May 2011 you informed the House that H.E the President had after consultation with the Right Hon. Prime Minister nominated for approval by the National Assembly the following persons pursuant to the provisions of Article 166(1) (a), 262 and 157(2) read together with Section 24(2) of the Six Schedule of the Constitution.:-

- i). Dr. Willy Munywoki Mutunga as Chief Justice;
- ii). Ms. Nancy Makokha Baraza as Deputy Chief Justice; and
- iii). Mr. Keriako Tobiko as Director of Public Prosecutions.

You then directed that the names and Curriculum Vitae of the nominees be referred to the relevant Departmental Committee.

In view of the operational challenges facing the Departmental Committee on Justice and Legal Affairs on 2nd June, 2011, you directed that the Constitutional Implementation Oversight Committee (CIOC) take up the matter for consideration and report to the House. Further, given the provisions of Standing Order No.180 which allows public access to proceedings of Committees and, in order to comply with the provisions of Article 73(2)(d) of the Constitution which underscores accountability to the public for decisions and actions taken, you urged members of the public who wished to submit memoranda to do so to the Committee in respect of the three nominees.

As directed, the Committee took up the matter and put up paid advertisements in the dailies inviting members of the public to make representations on the three nominees. The Committee held public hearings where 42 persons gave their views on the nominees. The list of persons who appeared and made oral submissions to the Committee is attached to this report (*Appendix 1*). This is in addition to 41 memoranda on the nominees that the Committee received. The list of persons who sent memoranda to the Committee is attached to this report (*Appendix 2*). The Committee also had a meeting with the nominees where they were asked to clarify issues arising from the public hearings. In total the Committee held eight (8) sittings to deliberate on the suitability of the nominees for appointment to the respective offices.

Mr. Speaker Sir,

The Committee deliberated on the issues raised during the public hearings together with the submissions made by the nominees and now recommends that the nominees be appointed to the respective offices to which they have been nominated; with some members expressing reservations on the nomination of the DPP and with Honourable John Mbadi and Honourable Ababu Namwamba registering his specific objection on the nomination of the DPP.

The Committee further recommended that the approval of the Director of Public Prosecutions be subject to further investigations on the outstanding issues with objections by Hon. Mwakwere and Hon. Ombui.

The Committee also recommends that future nominations submitted to Parliament for approval be accompanied by an explanatory report setting out the criteria and methodology used by the interviewing body in settling for such nominees. This information would enrich the deliberations of the relevant vetting committee of Parliament and the House as a whole.

Acknowledgements

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate. The Committee also appreciates the media for live coverage of its proceedings during the vetting process. Further, the Committee thanks members of the public who made submissions, orally and in writing, to the Committee.

Mr. Speaker Sir,

It is my pleasant duty and privilege, on behalf of Constitutional Implementation Oversight Committee, to present and commend this report on the approval to the

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offices of the Chief Justice, Deputy Chief Justice and Director of Public Prosecutions, to the House for adoption pursuant to the Communication from the Chair made on 2nd June, 2011 and in accordance with Section 4 of the Sixth Schedule to the Constitution.

SIGNED.....


HON. ABDIKADIR HUSSEIN MOHAMED, M.P
CHAIRPERSON

DATE:

14th JUNE 2011

BACKGROUND

1. Section 24 (1) of the Sixth Schedule to the Constitution provides that the Chief Justice in office before the effective date shall, within six months after the effective date vacate office. The effective date being 27th August, 2010, the then Chief Justice vacated office on 27th February, 2011.
2. On 28th January, 2011, the office of the President announced names of four nominees for the constitutional offices of Chief Justice (CJ), Attorney General (AG), Director of Public Prosecutions (DPP), and Controller of Budget. Shortly thereafter, the Right Honourable Prime Minister asserted that the said nominations had been done without the requisite consultation with his office, as required by the National Accord and Reconciliation Act, 2008.
3. The matter raised considerable public outcry, with different groups issuing press statements on the same, including the Commission for the implementation of the Constitution (CIC) and the Judicial Service Commission (JSC). The matter also found its way to the House and the High Court (*Nairobi High Court Petition No 16 of 2011*).
4. The Honourable Speaker made a ruling on 17th February, 2011 to the effect that the nominations were unconstitutional.
5. On 22nd February, 2011 H.E the President withdrew the list of nominees to constitutional offices and directed that the appointment of the Chief Justice and the Deputy Chief Justice be done by the Judicial Services Commission (JSC). He also stated that he would hold consultations with the Rt. Honourable Prime Minister on the nomination of the Attorney General and thereafter appoint a panel to advertise and interview candidates for the position of Director of Public Prosecutions.
6. On 4th March, 2011 the Judicial Service Commission through *Gazette Notice No. 2061* advertised the vacancy in the position of Chief Justice and the Deputy Chief Justice and invited the public to make applications. Twenty six persons applied for the position of Chief Justice while fourteen others applied for position of Deputy Chief Justice. Soon thereafter, ten applicants were short-listed and interviewed for the position of Chief Justice while eight applicants were short-listed and interviewed for the position of Deputy Chief Justice.
7. On 13th May, 2011 the Judicial Service Commission nominated Dr Willy Mutunga and Ms. Nancy Baraza as Chief Justice and Deputy Chief Justice respectively. The JSC then forwarded the names to the President for formal nomination and eventual approval by Parliament.

8. On 17th May, 2011 H.E the President and the Right Honourable Prime Minister endorsed the nominees for the posts of Chief Justice, Deputy Chief Justice and Director of Public Prosecution, paving the way for vetting by Parliament.
9. Owing to the challenges facing the Departmental Committee of Justice and Legal Affairs, on 2nd June 2011 the Honourable Speaker in a communication to the House referred the names of the three nominees to the Constitution Implementation Oversight Committee for vetting.
10. The Honourable Speaker directed the Constitution Implementation Oversight Committee to submit its recommendations on the nomination to the House on Wednesday, 8th June 2011. On that date, the Committee reported progress and requested an extension of time to enable the Committee to conclude its work. The Honourable Speaker then directed the Committee to table its report on Tuesday 14th June 2011.
11. In conducting the vetting process, the Committee examined the candidates against the criteria set out in the Second Schedule of the *Commission for the Implementation of Constitution Act, 2010* (Criteria for vetting/approval of nominees for appointment to public office by the National Assembly). That criteria requires the nominees to disclose information on their personal and professional life including their political affiliations, tax compliance and potential conflict of interests. Issues raised by members of the public during public hearings and memoranda presented to the Committee were also put to the nominees.

CONSIDERATION OF THE NOMINEES BY THE COMMITTEE

NOMINATION OF DR. WILLY MUNYWOKI MUTUNGA FOR THE POSITION OF CHIEF JUSTICE

Qualifications

The qualifications for appointment to the office of Chief Justice are set out in several provisions of the Constitution. Article 166(1)(a) provides that the President shall appoint the Chief Justice and Deputy Chief Justice "in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.

Article 166(2) further requires that each judge of a superior court (of whom the Chief Justice is a part) shall be appointed from among persons who-

- (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under sub-Articles (3) to (5) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Article 166(3)(a) provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.

Section 24(2) of the Sixth Schedule to the Constitution provides that "a new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly.

Section 29 also applies to the appointment of the Chief Justice. It provides that-

- (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.
- (2) Unless this Schedule provides otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.

Views Received by the Committee

In supporting Dr. Willy Mutunga's nomination, members of the public made the following submissions:-

- i). He is highly qualified, highly trained with critical and objective judgment, attributes which will enable him to serve in the position.
- ii). He has been a mentor to many.
- iii). He has for a long time been devoted to issues of access to justice for all and has tirelessly fought for a democratic, free, just and transparent Kenya and for a new constitution.
- iv). He has the necessary competence, he is reform minded and is a mentor to many.
- v). He has been involved in a lot of community development issues while at the Ford Foundation such as spear-heading the provision of housing to the less fortunate members of society in slums areas.
- vi). He is recognized nationally and internationally as a person of integrity who is principled.
- vii). He is humble, understanding and patriotic person who interacts with all persons especially the poor and he has fought against human rights violations and oppression.
- viii). He is an intellectual and an institution builder. He was instrumental in the formation of the University of Nairobi Staff Union, the Kenya Human Rights Commission and the Citizens Coalition for Constitutional Change (4Cs).

- ix). He is an individual with a morally upright character whose family life was interfered with during detention while fighting for constitutional change.
- x). His nomination was arrived at following an open and competitive process.
- xi). He would restore institutional confidence in the Judiciary,
- xii). He would dispense justice without fear or favour.
- xiii). He advocates for the marginalized communities, believes in constitutionalism and is not a tribalist.
- xiv). He is an Independent minded person who would be guided by the Constitution and the law.

In opposing Dr. Mutunga's nomination, members of the public made the following submissions-

- i). He did not meet the threshold under Article 166 (2)(c) on high moral standards.
- ii). He champions for the rights of homosexuals and was the advocate on record in the registration of the Kenya Gays and Lesbians Trust (KEGALE).
- iii). He has been unable to manage his family affairs and cannot therefore be entrusted with the management of the judiciary.
- iv). He does not uphold family values.
- v). He would not be a role model to young Kenyans particularly owing to the ear stud that he dons.
- vi). He works for an institution that advocates for aggressive population control.

The Observations of the Committee

The Committee having considered the curriculum vitae of Dr. Mutunga and the representations made by members of the public and having interviewed the nominee made the following observations on the nomination of Dr. Mutunga to the position of Chief Justice-

a. The Process of Nomination

The Committee reflected and deliberated on the process that was followed in the nomination of the Chief Justice in the light of the provisions of Articles 166(1)(a) and 172 of the Constitution and section 24(2) and 29 of Sixth Schedule to the Constitution. Two schools of thought emerged.

On the one hand, some members expressed the view that the Constitution at section 24(2) and 29 of the Sixth Schedule to the Constitution made specific provisions as to how a Chief Justice is to be nominated in the transitional period pending the next General Elections. Consequently, in their view, Articles 166(1)(a) and 172 were, in so far as the appointment of the Chief Justice pending the next General Elections was concerned, suspended. The view was therefore taken that in the transitional period before the next General Elections, the Judicial Service Commission did not have any role to play in the process of nomination of a Chief Justice. It was therefore argued that in these circumstances the process of nomination of the Chief Justice had not strictly complied with the requirements of the Constitution.

Other members expressed the view that the transitional provisions under sections 24(2) and 29 of the Sixth Schedule to the Constitution were not to be read in isolation but as "explanatory notes" or provisions whose objective was to aid the interpretation and application of the substantive provisions of Articles 166(1)(a) and 172 of the Constitution which were not suspended and were therefore applicable. Such members argued that the nomination process was therefore in order and that the involvement of the Judicial Service Commission in the nomination process was in tandem with the requirements of the Constitution.

Members observed that the two different interpretations on the nomination process for the Chief Justice had been debated at several fora and had been raised by members of the public in their representations to the Committee. Notwithstanding the two different interpretations on the process of nomination of the Chief Justice, the Committee resolved to proceed with the consideration of the candidate.

The Committee observed that notwithstanding the different interpretations, the executive had forwarded the names to Parliament. The Committee therefore left the issue of interpretation to the courts of law.

b) The Educational Qualifications of the Nominee

Article 166(2)(a) of the Constitution which sets out the educational qualifications for judges of superior courts requires that they be appointed from amongst members who "hold a law degree from a recognized university or are advocates of the High Court of Kenya or possess an equivalent qualification in a common-law jurisdiction".

It was observed that Dr. Mutunga is the holder of a Bachelor of Laws (LL.B) Degree and a Master of Laws (LL.M) Degree both awarded by the University of Dar es Salaam, Tanzania in 1971 and 1974 respectively and a Doctor of Jurisprudence (JSD)

awarded by Osgoode Hall Law School, Toronto in 1992. The Committee was satisfied that the nominee met the educational requirements stipulated in Article 166(2)(a) of the Constitution.

c) Experience

Article 166(2)(b) and (3) of the Constitution stipulate the experience required of a person seeking to be appointed Chief Justice. Article 166(2)(b) requires that a judge of a superior court be appointed from among persons who “possess the experience required under sub-Articles (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction”.

Article 166(3)(a) of the Constitution provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in aggregate, to fifteen years.

The Committee observed that Dr. Mutunga was the Regional Representative, Ford Foundation a position he had held from April 2009. Prior to that, between 2004 and March 2009, he had held the positions of Acting Regional Representative and Program Officer in the same organization. Dr. Mutunga had also served as the Executive Director of the Kenya Human Rights Commission between 1998 and 2004. He also served as the Acting Executive Director of the Legal Advice Centre between 1992 and 1993 and was a lecturer and a senior lecturer between 1974 and 1982 at the Faculty of Law, University of Nairobi.

The Committee found that Dr. Mutunga had extensive experience in academia and in the field of human rights and social justice. The Committee therefore concluded that Dr. Mutunga satisfied the educational requirements stipulated under Article 166(2)(b) and (3) of the Constitution.

Some concern was raised on the fact that the nominee had not previously served in the judiciary and would be a new-comer to the judiciary. In this regard, the Committee observed that Article 166(3) of the Constitution made provision for the appointment of a Chief Justice who had either served as a superior court judge, or who had served as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal fields. The Committee further observed that

Chief Justices had been appointed from outside of judiciary in Kenya and in countries such as South Africa (Arthur Chaskalson was appointed First President of South Africa's new Constitutional Court in 1994 having left a legal practice to become a human rights lawyer), the United States of America (Earl Warren was appointed the 14th Chief Justice of the United States Supreme Court in 1953. Prior to that he had a highly successful career in politics), Trinidad and Tobago (In 1995 Michael de la Bastide was appointed Chief Justice straight from private practice) and Hong Kong (in 2010, Geoffrey Ma was appointed as Chief Justice. Before that he was a barrister at law in Singapore).

d) Moral character, integrity and impartiality

Article 166(2)(c) of the Constitution requires that each judge of a superior court shall be appointed from among persons who "have a high moral character, integrity and impartiality". The Committee received a number of representations concerning the moral character of the nominee. Questions were raised concerning the sexuality of the nominee and his ear stud. The Committee put each of these issues to the nominee during his interview and the nominee responded to the issues to the satisfaction of the Committee.

Regarding his marital status and family values, various concerns had been raised before the Committee. The nominee informed the Committee that he was married, separated and that he had filed for divorce a process he described as painful and difficult. The nominee further informed the Committee that he had children. The Committee was satisfied with the responses of the nominee on his marital status and family values.

Representations were also made to the Committee regarding the perceived liberal views of the nominee and the impact that this would have if he were to be appointed Chief Justice. Some described the nominee as an activist and expressed concern that this would impact his performance in the judiciary. Others however expressed the view that the nominee's past involvement in activism would enrich his performance in the judiciary.

Representations were also made to the Committee that the ideals and principles of the nominee's employer would impact negatively on the nominee's execution of his functions as Chief Justice and as a member of the Supreme Court. In response to these concerns, the nominee informed the Committee that despite his personal views and beliefs on various matters, if appointed Chief Justice he would strictly observe and operate within the confines of the Constitution and would be guided by the Constitution in the execution of his functions.

On the whole, the Committee was satisfied with the responses of the nominee on matters of moral character, integrity and impartiality and therefore found that the nominee satisfied the requirements of Article 166(2)(a) of the Constitution.

NOMINATION OF MS. NANCY MAKOKHA BARAZA FOR THE POSITION OF DEPUTY CHIEF JUSTICE

Qualifications

The qualifications for appointment to the office of Deputy Chief Justice are set out in Article 166(1)(a) of the Constitution which provides that the President shall appoint the Chief Justice and the Deputy Chief Justice "in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.

Article 166(2) further requires that each judge of a superior court, of whom the Deputy Chief Justice is a part, shall be appointed from among persons who-

- (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under sub-Articles (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Article 166(3)(a) provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.

Section 29 also applies to the appointment of the Chief Justice. It provides that-

- (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.
- (2) Unless this Schedule provides otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President

shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.

Views Received by the Committee

In supporting Ms. Baraza's nomination, members of the public made the following submissions:-

i). She is eminently qualified and has the requisite academic and professional qualifications and the experience required for the position for which she has been nominated.

ii). She was a member of the CKRC and is currently the Vice Chairperson of the Kenya Law Reform Commission.

iii). She is very articulate on human rights and women's issues.

iv). She is a highly respected member of the LSK.

v). Her nomination is in line with the principle of affirmative action for women.

vi). Her nomination gives a demonstration of the hope given to women and other marginalized groups.

In opposing Ms. Baraza's nomination, members of the public made the following submissions:-

i). Her values and principles are not in tandem with religious and cultural values.

ii). Her past activities, particularly with the Federation of Women Lawyers in Kenya (FIDA), and her values are not in consonance with the constitutional provisions on the right to life and family.

iii). She lacks the necessary moral authority to be Deputy Chief Justice.

iv). She does not respect family values and is divorced.

v). She supports homosexuality.

vi). She cannot be a role model to young Kenyans.

vii). She lacks judicial experience.

The Observations of the Committee

The Committee considered the curriculum vitae of Ms. Baraza and the representations made by members of the public and interviewed the nominee. Having done so, the Committee made the following observations on the nomination of Ms. Baraza to the position of Deputy Chief Justice-

a. The Educational Qualifications of the Nominee

Article 166(2)(a) of the Constitution in setting out the educational qualifications for judges of superior courts requires that they be appointed from amongst members who "hold a law degree from a recognized university or are advocates of the High Court of Kenya or possess an equivalent qualification in a common-law jurisdiction".

The Committee observed that Ms. Baraza is the holder of a Bachelor of Laws (LL.B) Degree and Master of Laws (LL.M) awarded by the Faculty of Law, University of Nairobi in 1980 and 2005, respectively. The nominee also holds a Diploma in Legal Studies from the Kenya School of Law awarded in 1981. Ms. Baraza is a PhD candidate registered at the University of Nairobi. The Committee observed that Ms. Baraza holds Certificates in various disciplines: Alternative Conflict Resolution Mechanisms, Judicial Reform for Improving Governance in Anglophone Africa, Change Management, Changing the Law through Successful Reform and Contract Drafting and Negotiation.

The Committee was satisfied that the nominee met the educational requirements stipulated in Article 166(2)(a) of the Constitution.

b) Experience

Article 166(2)(b) and (3) of the Constitution stipulate the experience required of persons to be appointed Deputy Chief Justice. Article 166(2)(b) requires that a judge of a superior court be appointed from among persons who "possess the experience required under sub-Article (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction".

Article 166(3)(a) of the Constitution provides that the Chief Justice and other judges of the Supreme Court (of whom the Deputy Chief Justice is a part) shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or

- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in aggregate, to fifteen years.

The Committee observed that Ms. Baraza was the Deputy Chairperson of the Kenya Law Reform Commission and chairperson of the Media Council Complaints Commission. Ms. Baraza was also a part-time Lecturer at the Kenya School of Law, a Lecturer at the School of Law, Kenyatta University and a Council Member of Egerton University.

The Committee noted that Ms. Baraza had served as a Commissioner of the Constitution of Kenya Review Commission and was a founder member and past chairperson of the International Federation of Women Lawyers (FIDA). The Committee found that the nominee held extensive experience in the legal profession and therefore satisfied the requirements of Article 166(2)(b) and (3) of the Constitution.

Some concern was raised on the fact that the nominee had not previously served in the judiciary and would be a new-comer to the judiciary. In this regard, the Committee observed that Article 166(3) of the Constitution made provision for the appointment of a Chief Justice who had either served as a superior court judge, or who had served as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal fields. The Committee further observed that Chief Justices had been appointed from outside of judiciary in Kenya and in countries such as South Africa (Arthur Chaskalson was appointed First President of South Africa's new Constitutional Court in 1994 having left a legal practice to become a human rights lawyer), the United States of America (Earl Warren was appointed the 14th Chief Justice of the United States Supreme Court in 1953. Prior to that he had a highly successful career in politics), Trinidad and Tobago (In 1995 Michael de la Bastide was appointed Chief Justice straight from private practice) and Hong Kong (in 2010, Geoffrey Ma was appointed as Chief Justice. Before that he was a barrister at law in Singapore).

c) Moral character, integrity and impartiality

Article 166(2)(c) of the Constitution requires that each judge of a superior court shall be appointed from among persons who "have a high moral character, integrity and impartiality". The Committee received a number of representations concerning the moral character of the nominee. Questions were raised by members of the public on the sexuality of the nominee and on her position on abortion and on

homosexuality particularly in the context of her ongoing PhD studies on the subject of "Equality and Non-Discrimination Principles and the Question of Homosexuality in Kenya". The nominee was also questioned on her marital status and her family values.

Questions were also put to the nominee regarding concerns raised by members of the public to the effect that she was too liberal and was an activist and that this would impact her service as Deputy Chief Justice if appointed. In response to these concerns, the nominee informed the Committee that despite her personal views and beliefs on various matters, if appointed, she would dispense her duties as Deputy Chief Justice by dutifully observing and applying the provisions of the Constitution.

The Committee was satisfied with the responses of the nominee to the concerns raised on moral issues and the Committee therefore found that the nominee met the requirements of Article 166(2)(c) of the Constitution.

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NOMINATION OF MR. KERIAKO TOBIKO FOR THE POSITION OF DIRECTOR OF PUBLIC PROSECUTIONS

Qualifications

Article 157(3) of the Constitution provides that “the qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court”.

The qualifications for appointment as a judge of the High Court are set out in Article 166(2) and (5) of the Constitution. Article 166(2) requires that each judge of a superior court, of whom a High Court judge is a part, shall be appointed from among persons who-

- (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under sub-Articles (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Article 166(5) of the Constitution provides that each judge of the High Court shall be appointed from among persons who have-

- (a) at least ten years experience as a superior court judge or professionally qualified magistrate; or
- (b) at least ten years experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

Section 29 of the Sixth Schedule to the Constitution would also apply in the transitional period. It requires that-

- (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.
- (2) Unless this Schedule provides otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National

Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.

Views Received by the Committee

In supporting the nomination of Mr. Tobiko, the public made the following representations. That:-

- i). He is highly qualified and is an outstanding and brilliant lawyer with an impeccable academic record.
- ii). He has been an active member of various commissions such as the Njonjo Land Commission and the Constitution of Kenya Review Commission (CKRC).
- iii). His nomination was competitive, transparent, above board and took into consideration Article 250(4) of the Constitution on regional and ethnic diversity of the people of Kenya.
- iv). He is competent and would properly discharge his functions as DPP.
- v). He scored 87% in the interview and was ranked the best candidate.
- vi). He has over 21 years experience in the legal profession and 5 years as the Chief Public Prosecutor.
- vii). He is a person of high moral character, integrity and impartiality as envisaged in Article 166 (2)(c).
- viii). He has played a critical role in reforming the office of the Chief Public Prosecutor.
- ix). He represents minorities/ marginalized groups.

In opposing Mr. Tobiko's nomination, members of the public made the following submissions-

- i). This is a new dispensation that required a new DPP.
- ii). That the DPP nominee seems to be riding on the integrity of the nominees to the positions of Chief Justice and Deputy Chief Justice.
- iii). He has previously served in the position of DPP yet no tangible achievements can be attributed to him.
- iv). He made false accusations against the CKRC Chair with a view to having him removed from office.

- v). He breached the CKRC's rules of confidentiality and sought constantly to undermine the independence and integrity of the Commission by reporting to the President and some key politicians on matters that were confidential.
- vi). He engaged in a campaign to disrupt the work of the Commission so as to prevent the drafting and adoption of the new constitution by claiming consultations had not been done even after the Commission had concluded the consultations with the people and analyzed their recommendations.
- vii). As Chief Public Prosecutor, he has acted in contravention of his duties and responsibilities and has failed to pursue allegations of corruption against people in high office.
- viii). Mr. Tobiko cannot be trusted with the heavy responsibility of protecting the innocent or the prosecution of suspects as exemplified in the recent acquittal of Hon. William Ruto and others who charged with illegal acquisition of land.
- ix). Mr. Tobiko was an interested party in some of the cases such as the Anglo-Leasing Case having previously represented some of the suspects as a lawyer in private practice and that this would result in conflict of interest.
- x). He has not delivered as a prosecutor and is not effective.
- xi). He has been partial in the handling of number of cases.
- xii). The process of nominating Mr. Tobiko to the office of Director of Public Prosecution was not open and transparent.
- xiii). Mr. Tobiko had sabotaged the prosecution of his former client, Livingstone ole Ntutu in Criminal Case No. 2157 of 2003 – R vs. Livingstone ole Ntutu and Onyambu.
- xiv). He had, through proxies, solicited for a bribe of Kshs. 5 million in corruption-related charges against Mr. Sammy K. Kirui.
- xv). In High Court Succession Cause No. 1263 of 2000 – in the matter of the estate of Lerionka Ole Ntutu (deceased) he had certified the Consent in which Naiyanoi Ntutu, who was listed as number 42 and to whom ID number 1269818 was ascribed, was, at the time, a minor of six years of age and thus could not have possibly held an identity card.

The Observations of the Committee

The Committee considered the curriculum vitae of Mr. Keriako Tobiko, the representations made by members of the public and interviewed the nominee on two occasions. The Committee made the following observations on the nomination of Mr. Keriako Tobiko to the position of Director of Public Prosecutions-

a. The Process of Nomination

The Committee deliberated on the process that was followed in the nomination of the Director of Public Prosecutions. Article 157(2) of the Constitution provides that “the Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President”.

The Committee observed that His Excellency, the President, had, by Gazette Notice No. 2649 of 16th March 2011, established an Interview Panel which was mandated to “receive and process applications and interview and recommend at least three (3) suitable candidates for consideration for nomination to the Office of the Director of Public Prosecutions”. It is from the three names forwarded to the President by the Interview Panel that the President had nominated Mr. Keriako Tobiko for appointment as Director of Public Prosecutions and subsequently forwarded his name to the National Assembly for approval.

The Committee observed that although not an express requirement of Article 157(2) of the Constitution, the methodology adopted by the Interview Panel was opaque and did not take into account the constitutional values and principles of participation of the people, transparency and accountability.

b) The Educational Qualifications of the Nominee

Article 166(2)(a) of the Constitution requires that a Director of Public Prosecutions be appointed from amongst persons who “hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction”. The Committee observed that Mr. Tobiko holds a Bachelor of Laws (LL.B) Degree (First Class Honours) from the University of Nairobi awarded in 1989, a Post Graduate Diploma in Law awarded in 1990 from the Kenya School of Law and a Master of Laws (LL.M) Degree awarded in 1991 by Cambridge University. In 1991, Mr. Tobiko was admitted for a PhD programme on “the Regulation of Securities Markets in Sub-Saharan Africa”.

The Committee was satisfied that the nominee’s educational qualifications, which were observed to be outstanding, met the requirements stipulated in Article 166(2)(a) of the Constitution.

c) Experience

Article 166(2)(b) and (5) of the Constitution stipulate the experience required of a person to be appointed Director of Public Prosecutions. Article 166(2)(b) requires that the person “possess the experience required under sub-Articles (3) to (5) as

applicable, irrespective of whether that experience was gained in Kenya or another Commonwealth common-law jurisdiction”.

Article 166(5) of the Constitution provides that each judge of the High Court shall be appointed from among persons who have-

- (a) at least ten years experience as a superior court judge or professionally qualified magistrate; or
- (b) at least ten years experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

The Committee observed that Mr. Tobiko had served as the Director of Prosecutions and subsequently as Chief Public Prosecutor from May 2005 a position he continued to hold. Prior to that, Mr. Tobiko was the senior partner in the firm of Tobiko & Associates from 1993 to 2005. Mr. Tobiko had also served as an assistant lecturer in the School of Law, University of Nairobi, a legal officer with the Public Law Institute and a bank clerk with Barclays Bank (Kenya) Limited. Mr. Tobiko had also served as a Commissioner in the Commission of Inquiry into the Land Law Systems in Kenya, and as a Commissioner in the Constitution of Kenya Review Commission.

The Committee observed that Mr. Tobiko's experience met the requirements of Article 166(2)(b) and (5) of the Constitution.

d) Moral character, integrity and impartiality

Article 166(2)(c) of the Constitution requires that each judge of a superior court shall be appointed from among persons who “have a high moral character, integrity and impartiality”. The Committee received a number of representations from members of the public concerning the integrity of the nominee. The concerns raised in the representations were put to the nominee by the Committee. Having considered the issues raised and the responses of the nominee, various views were proffered by members of the Committee on the suitability of the nominee for appointment to the position of Director of Public Prosecutions.

The following issues were deliberated by the Committee-

i). The Handling of Nairobi Chief Magistrate Court Criminal Case No. 2157 of 2003 – Republic vs. Livingstone Kunini Ole Ntutu and Onyambu

In a letter written to the Attorney-General by Justice M. Ole Keiwua dated 12th May 2006, Justice Keiwua alleged that Mr. Tobiko, as Director of Public Prosecutions, had sabotaged the prosecution of his former client Mr. Livingstone Kunini ole Ntutu in Criminal Case No. 2157 of 2003. Justice Keiwua alleged that crucial evidence had been withheld in the prosecution of the matter at the instigation of, amongst others, Mr. Tobiko. Justice Keiwua indicated that he had previously requested that a *nolle prosequi* be entered so as to pave way for the appointment of a neutral prosecutor who would prosecute the case outside of the interference of Mr. Tobiko.

In a letter dated 3rd February 2006 addressed to the Attorney-General, the Directors of Olkiombo Limited also raised similar fears regarding the handling of Criminal Case No. 2157 of 2003 by Mr. Tobiko as the Director of Public Prosecutions stating that “we must complain [that] the office of Director of Public Prosecutions has compromised the prosecution. We refer to an incident recently before the Chief Magistrates Court where a State Counsel stopped the prosecution before seven crucial witnesses had testified”. The letter further states “we see this as a move by Mr. Keriako Tobiko, the Director of Public Prosecutions to bail out his client Ntutu. The DPP acted for Ntutu and his company Iingina Contractors Ltd in a transaction which involved illegal excision and registration of Mau Forest Trust Land”. They further claimed that “DPP while in private practice acted for Ntutu and his company in connection with subdivision No. Narok/CIS/Mara/Ololulunga/9678”.

The Committee was informed that Mr. Livingstone Kunini ole Ntutu the accused in Criminal Case No. 2157 of 2003 was acquitted in a Judgment delivered on 30th May 2006 as the State had failed to prove its case against the accused. No appeal was lodged by the State against the decision of the Court.

The Committee was concerned that despite the complaints of conflict of interest made to the Attorney-General on this matter, the request for the appointment of a neutral prosecutor was not acceded to and there was no evidence of any action taken on the part of Mr. Tobiko to address the claims of conflict of interest.

Related to this, an issue was raised concerning High Court Succession Cause No. 1263 of 2000 – in the matter of the estate of Lerionka Ole Ntutu (deceased). A Consent to the Making of Grant of Administration dated 20th June 2000 was produced before the Committee. The Consent indicated that Mr. Tobiko, the advocate on record, had certified that the persons whose names and signatures

were indicated on the Consent had appeared before him and that having understood the document, they had freely and voluntarily executed it. Representations were made that Naiyanoi Ntutu, who was listed as number 42 and to whom an ID (Number 1269818) was ascribed, was, at the time she allegedly appeared before Mr. Tobiko, a minor of six years of age and thus could not have possibly held an identity card.

On this, Mr. Tobiko explained that the succession cause involved numerous dependants and that he had given the dependants the Consent and asked them to arrange for signatures and subsequently return the document to his office. He then proceeded to certify the documents on 20th June 2000. Some members expressed concern about the casual and reckless manner in which the matter had been handled, more so by a person seeking appointment to the office of Director of Public Prosecutions.

ii). The Prosecution of the Anglo-Leasing Cases

Members were satisfied with the manner in which the apparent conflict of interest in Criminal Case No. 8 of 2005 – Republic vs. Sylvester Mwandime Mwaliko & 3 Others and Criminal Case No. 338 of 2005 – Republic vs. Zakayo arap Cheruiyot & John Agili Alao had been handled. In a letter dated 23rd June 2005, the Attorney-General appointed Mr. Joe W. Okwach, Senior Counsel, as the special advocate to prosecute the matters on behalf of the Republic on the ground that Mr. Tobiko had acted for one of the accused persons in one of the cases.

That notwithstanding, some members expressed concern over the pace at which the prosecution of the Anglo-Leasing matters was proceeding arguing that during Mr. Tobiko's tenure as Director of Public Prosecutions, there had been no significant progress in the prosecution of those cases. Other members also expressed the view that if the nominee were to be confirmed for appointment, the future of the Anglo-Leasing Cases would be uncertain.

iii). The Prosecution of Nairobi CMCR No. 973 of 2004 – Republic vs. William Samoei Ruto and 7 Others

Some members expressed concern at the manner in which CMCR No. 973 had been handled by the office of the Chief Public Prosecutor resulting in the acquittal of the accused persons for failure by the prosecution to prove its case. Such members were concerned that crucial witnesses, who they argued were available and accessible, were not produced to give evidence thus resulting in the acquittal for failure by the prosecution to prove the case. They therefore took the view that the prosecution had deliberately withheld evidence.

It was however argued, by some members, that the Chief Public Prosecutor could not be accused of failing to produce witnesses as the investigatory organ was the police force and not the office of the Chief Public Prosecutor. It was further argued that the matter had taken a considerable period of time and that in the intervening period a number of witnesses had died while others could not be traced by the investigating officers.

iv). Past Record and Performance

Regarding his performance since appointment as Director of Public Prosecutions and subsequently as Chief Public Prosecutor, Mr. Tobiko submitted to the Committee a bundle of documents on the reforms that had been successfully implemented in the office of the Chief Public Prosecutor. These included: A Service Charter for the Directorate of Public Prosecutions, a Code of Conduct and Ethics for Public Prosecutors, a Reference Manual on the Sexual Offences Act, 2006 for Prosecutors, a Training Needs Assessment, Curriculum and Training Manual for Public Prosecutors, and the establishment of an Anti-Piracy Unit. There were however, representations made to the Committee to the effect that some of the achievements that Mr. Tobiko had highlighted were attributable to his predecessor.

Members observed that as Chief Public Prosecutor, Mr. Tobiko had worked under the direction and supervision of the Attorney-General and that his office had not therefore enjoyed the financial and operational independence necessary for the optimal performance of the Chief Public Prosecutor. This, some members argued, had to be taken into consideration in judging the past performance of the nominee.

Some members, however, argued that despite the functional challenges of the office of the Chief Public Prosecutor, the nominee could have achieved more in reforms and particularly in the prosecution of critical corruption-related cases. Such members argued that there had been no tangible reforms in the office of the Chief Public Prosecutor and expressed fears as to whether the nominee would be the reform and change agent anticipated by the new constitutional dispensation. Some members expressed hope that if appointed, the nominee, now working as an independent Director of Public Prosecutions with full mandate, would deliver on the much needed reform in the prosecution office.

v). Responses to Other Queries and Issues

The Committee received representations to the effect that the nominee, while a Commissioner of the Constitution of Kenya Review Commission, had claimed and received allowances to which he was not entitled. The then Secretary to the Commission, Dr. P.L.O. Lumumba informed the Committee that the payments had been erroneously paid to all but two Commissioners and that when it had been

established that the payments were irregular, these had been recovered from Commissioners, including Mr. Tobiko. Members observed that from the evidence of Dr. Lumumba, Mr. Tobiko had no outstanding financial matters with the Commission.

That notwithstanding, the Committee observed that when the question of the irregular payments had been put to Mr. Tobiko by the Committee, Mr. Tobiko had responded in an evasive manner and had not been forthright on the matter.

Concerning Mr. Tobiko's performance as a Commissioner with the Constitution of Kenya Review Commission, the Committee received divergent views on the matter.

vi). Corruption-Related Charges Against Sammy K. Kirui

Representations were made to the Committee by Mr. Sammy K. Kirui, both in writing and orally, alleging that Mr. Tobiko had, through proxies solicited for a bribe of Kshs. 5 million from Mr. Kirui. Mr. Kirui claimed that he had received messages on his phone to this effect which he had submitted to the NSIS.

Mr. Kirui stated that the Kenya Anti-Corruption Commission had initially recommended that he be charged with abuse of office. Mr. Kirui further stated that Mr. Tobiko had, through intermediaries, indicated that if the monies were not forthcoming, he would add more charges – failure to perform a statutory duty and conspiracy to defraud. Mr. Kirui stated that when he had declined to make the payments, he was shocked to find that the charges were indeed added. Mr. Kirui goes on to state "I want to point out that I am not alone in this, I speak on behalf of the so-called prominent personalities who are facing corruption related charges but they are not willing to speak out".

Mr. Kirui also claimed that Mr. Tobiko "has been and continues to be the gatekeeper of the corrupt in high places".

These matters were put to Mr. Tobiko when he appeared before the Committee. Mr. Tobiko stated that he did not know and had not met Mr. Kirui. Some members were of the view that Mr. Tobiko was not forthright on the issue as to whether he had met Mr. Kirui while some felt that the allegations were spurious and were not directly linked to Mr.

Tobiko. Some members were also of the view that he was not forthright on the issue as to whether he knew a "Ms. Chepkorir" who Mr. Kirui stated was one of the intermediaries. Other members were of the view that he had sufficiently explained these issues.

vii). Allegations Relating to Integrity

Allegations regarding bribery, conflict of interest and lack of reform attributes were made against the nominee. The Committee considered these allegations and the responses of the nominee to the allegations.

Some members were also of the view that the allegations were largely attributable to professional rivalry, vendetta from suspects facing criminal charges and political and community disputes. Other members took the view that despite the responses by the nominee to the allegations made, many questions remained unanswered and many issues remained outstanding.

Some members therefore recommended that the approval of the Director of Public Prosecutions be subject to further investigations on the outstanding issues. However, Hon. Mwakwere and Hon. Ombui registered their objections, taking the view that the recommendation for further investigations was vague and inconclusive both technically and legally.

RECOMMENDATIONS OF THE COMMITTEE

Following deliberations, the Committee resolved to take a vote through secret ballot in order to identify areas of consensus and to determine the opinion of Members on the suitability of the nominees for appointment to the respective offices. The results were as follows:-

	Name of nominee	For	Against	Abstain	Total
1.	Dr. Willy M. Mutunga as CJ	21	2	0	23
2.	Ms. Nancy M. Baraza as Deputy CJ	23	0	0	23
3.	Mr. Keriako Tobiko as DPP	11	11	1	23

Following the above results the Committee held further deliberations on the nominees and resolved to move the process forward and therefore makes the following recommendations to the House:-

- i). THAT, pursuant to Article 166 (1)(a) of the Constitution and Sections 24 (2) and 29 of the Sixth Schedule to the Constitution, this House approves Dr. Willy Muniyoki Mutunga for appointment to the position of Chief Justice.
- ii). THAT, pursuant to Article 166 (1)(a) of the Constitution and Section 29 of the Sixth Schedule to the Constitution, this House approves Ms. Nancy Makokha Baraza for appointment to the position of Deputy Chief Justice.
- iii). THAT, pursuant to Article 157 (2) and Section 29 of the Sixth Schedule to the Constitution, this House approves Mr. Keriako Tobiko for appointment to the position of Director of Public Prosecutions; with some members expressing reservations on the approval of the DPP and with Hon. Mbadi and Hon. Namwamba registering their specific objections.
- iv). THAT the approval of the Director of Public Prosecutions is subject to further investigations on the outstanding issues; subject to objections by Hon. Mwakwere and Hon. Ombui.
- v). THAT, future nominations submitted to Parliament for approval be accompanied by an explanatory report setting out the criteria and methodology used by the nominating body in settling on such nominees.

XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX

Appendix 1

ORAL SUBMISSIONS

NO.	NAME	ORGANIZATION
1.	Prof.Yash Pal Ghai	
2.	Prof.Chispino.C. Ochieng	
3.	Hamillton.L. Parseina	Marginalised Groups
4.	Ken Wafula	
5.	Charles.M.Ayieni	
6.	Patrick .O.Onyango(PADDY)	
7.	Njoroge Waweru	
8.	Peter .T. Wambua	
9.	Joseph Towett	
10.	Paul Chepsoi	
11.	Okotch Mondo	
12.	Mzee Gitu Wakahendi	
13.	Lawrence Mbelati	Manyuto Pastoralists
14.	Joseph Osokoni Ole-Kishau	
15.	Leah Naikanae	
16.	Hassan Shano	
17.	Mathew Okwanda	
18.	Peter Waiyaki	
19.	Clement Lenachuru	
20.	Dickson Kipkemoi Rotich	
21.	Gladwell Otieno	K. P. T. J.
22.	George Kegoro	K. P. T. J.
23.	Dinah Agai Simbiri	
24.	Julliet Makhoha	
25.	Fatuma Anyanzwa	
26.	Hon.Otieno K'opiyo	
27.	Beatrice Kamau	
28.	Ogla Karani	
29.	Bishop Oginde	
30.	Father Fredinard Lugonzo	
31.	Betty Murungi	
32.	Mr. William Ombese	
33.	Mr. Harrison Kinyanjui	
34.	Michael Mungai	
35.	Prof.Ngato Kariuki	
36.	Kavetsa Adagala	
37.	Prof. P. L. O. Lumumba	
38.	Mr. Sammy Kirui	
39.	Hon. Justice Moijo Ole Keiwua (Mr. Stephen Mwenesi)	
40.	Mr. Joe W. Okwach, SC	
41.	S. Amos Wako (AG)	
42.	Mr. Phillip Murgor	

WRITTEN SUBMISSIONS

NO.	NAME	ORGANIZATION
1.	Joshua Munungi Musee	
2.	Charles Ndambuki	
3.	Antipers Orukoh	
4.	Marystella Njeri	
5.	Anthony Gitau	
6.	Peter Muriithi	
7.	Elizaa Mwanjala	Kenya Christian Church Leaders
8.	Ruth Khalahi	
9.	Johnson Wachira	
10.	James Mbinji	
11.	Dr. Stephen K. Karanja	St. Michael's Medical Care
12.	Rene Kiamba	International Christian Chamber of Commerce
13.	Kevin Osido	The Youth Agenda
14.	Robert Wachira Gichohi	
15.	David K. Kobaa	
16.	Mr. Geoffrey Maina and Gideon Solonka	Advocate
17.	Dr. Andrew K. Ndonga	Kenya Catholic Doctors Association
18.	David Kuria Mbote	
19.	Lantano Nabaala	Kenya Pastoralists Network
20.	Ascar Kwamboka	Maendeleo ya Wanawake Nyamira Branch
21.	Maj. Stanley Muigai Kiama	Kenya Veterans Association
22.	Sammy K. Mutiso	
23.	Dennis Kagithe Itui	
24.	Very Rev. Fr. Vincent Wambugu John P. Nyakundi	Kenya Episcopal Conference
25.	Andrew O. O. Okoiti	
26.	Jean Njeri Kamau	
27.	Mr. Raphael Obonyo	The Youth Congress
28.	John P. Nyakundi	
29.	Prof. Yash Pal Ghai	
30.	Kenneth Gituma Mwirichia	
31.	Josephat Mwaura	
32.	Rev. Canon Peter Karanja	Kenya Christian Church Leaders
33.	Hon. Kiema Kilonzo,	Member of Parliament for Mutito Constituency
34.	Mr. Kenneth Akide	Law Society of Kenya
35.	Boniface Wambua	
36.	Dr. Regina G. Mwatha, MBS	Kenya National Human Rights and Equality Commission (National Commission on Gender and Development)
37.	Mrs. Jacinta W. Kigo	
38.	Mr. Sammy Kirui	
39.	Brenda Akinyi	
40.	Christine Akinyi	
41.	William Nyariki Nyamongo	

MINUTES OF THE TWENTY SEVENTH SITTING OF THE
CONSTITUTIONAL IMPLEMENTATION OVERSIGHT COMMITTEE HELD
IN THE MAIN COMMITTEE ROOM, COUNTY HALL, PARLIAMENT
BUILDINGS ON TUESDAY 14TH JUNE, 2011 AT 9.25 AM.

PRESENT:

- | | |
|--|------------------|
| 1. The Hon. Hussein Mohammed Abdikadir, M.P. | Chairperson |
| 2. The Hon. Millie Odhiambo, M.P. | Vice-Chairperson |
| 3. The Hon. Chirau Ali Mwakwere, EGH, M.P. | |
| 4. The Hon. Beth Mugo, EGH, M.P. | |
| 5. The Hon. Martha Wangari Karua, EGH, M.P. | |
| 6. The Hon. Ababu Namwamba, M.P. | |
| 7. The Hon. Lucas K. Chepkitony, M.P. | |
| 8. The Hon. Amina Abdalla, M.P. | |
| 9. The Hon. Rachel Shebesh, M. P. | |
| 10. The Hon. Danson Mwazo, M.P. | |
| 11. The Hon. Cecily Mbarire, M.P. | |
| 12. The Hon. David M. Ngugi, M.P. | |
| 13. The Hon. Ekwere Ethuro, EBS, .M.P. | |
| 14. The Hon. Moriasi Ombui, M.P. | |
| 15. The Hon. (Dr.) Joyce Laboso, M.P. | |
| 16. The Hon. Elizabeth Ongoro, M.P. | |
| 17. The Hon. John Mbadi, M.P. | |
| 18. The Hon. (Prof.) Phillip Kaloki, M.P. | |
| 19. The Hon. Charles Kilonzo, M.P. | |
| 20. The Hon. Charles Onyancha, M.P. | |
| 21. The Hon. Benedict Fondo Gunda, M.P. | |
| 22. The Hon. (Dr.) Kilemi Mwiria, M.P. | |
| 23. The Hon. Alfred Khang'ati, M.P. | |

ABSENT WITH APOLOGY

The Hon. Joseph Kasaine Nkaiserry, M.P.

ABSENT

1. The Hon. Sophia Abdi, M.P.
2. The Hon. (Dr.) Eseli Simiyu, M.P.
3. The Hon. Rev. Julius Murgor, M.P.

IN ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|------------------------|---|-------------------------------------|
| 1. Mrs. C.W. Munga | - | Deputy Director, Committee Services |
| 2. Ms. Eunice Gichangi | - | Senior Legal Counsel |
| 3. Mr. Zakayo Mogere | - | Second Clerk Assistant |
| 4. Mrs. Rebecca Tonkei | - | Research Officer I |
| 5. Mr. Oscar Namulanda | - | Third Clerk Assistant |

MIN. NO. 067/2011: PRELIMINARIES

The meeting was opened with a word of prayer.

MIN. NO. 068/2011: CONFIRMATION OF MINUTES OF THE PREVIOUS MEETINGS

1. Minutes of the Twenty First Sitting of the Committee held on 25th May, 2011 were confirmed as a true record of the deliberations after being proposed by Hon. Cecily Mbarire, MP and seconded by Hon. Ekwere Ethuro, MP.
2. Minutes of the Twenty Second Sitting of the Committee held on 2nd June, 2011 were confirmed as a true record of the deliberations after being proposed by Hon. (Pro.) Phillip Kaloki, MP and seconded by Hon. Martha Karua, MP.
3. Minutes of the Twenty Third Sitting of the Committee held on 6th June, 2011 were confirmed as a true record of the deliberations after being proposed by Hon. Danson Mwazo, MP and seconded by Hon. David Ngugi, MP.
4. Minutes of the Twenty Fourth Sitting of the Committee held on 7th June, 2011 were confirmed as a true record of the deliberations after being proposed by Hon. Cecily Mbarire, MP and seconded by Hon. Moriasi Ombui, MP, subject to the following amendments:-
 - i). Under Min. 048/2011, (b) (ii) (pg.3)

That Dr. Mutunga took responsibility of the registration of the Kenya Gay and Lesbian (KEGALE) Trust.
 - ii). Under Min. 050/2011 (pg.8) include a new paragraph-

(g) His affidavit in the case of land succession involving the Ole Ntutus where a six year old girl was indicated as having an Identification Card No. 1269818.
5. Minutes of the Twenty Fifth Sitting of the Committee held on 8th June, 2011 were confirmed as a true record of the deliberations after being proposed by Hon. Beth Mugo, MP and seconded by Hon. Moriasi Ombui, MP, subject to the following amendments:-
 - i). Under Min. 054/2011 (pg.2) include a new paragraph-

vi). Although Mr. Tobiko is bright, he did not exercise the right work ethics while in CKRC.
 - ii). Under Min. 057/2011 (pg.3)

To reflect that the evidence received was by Mr. Stephen Mwenesi (Advocate) on behalf of Justice Moiwo Ole Keiwua.
6. Minutes of the Twenty Sixth Sitting of the Committee held on 9th June, 2011 were confirmed as a true record of the deliberations after being proposed by Hon. Martha Karua, MP and seconded by Hon. Lucas Chepkitony, MP, subject to the following amendments:-
 - i). Under Min. 064/2011 (pg.3)

iv). Delete the words 'Liberalist lifestyle' and replace therefore with 'Liberal views'.

ii). Under Min. 064/2011 (pg.4)

Delete paragraph 2 (ii) (a) and substitute therefore a new paragraph-

2 (ii) (a) Questions were raised on the lack of transparency in the nomination process.

iii). Under Min. 064/2011 (pg.4) 2 (iii) (f)

Insert the word 'either' before the word 'perpetuated'.

iv). Under Min. 064/2011 (pg.5)

That the rejection of Hon. John Mbadi on the Committee recommendation on the nomination of Mr. Keriako Tobiko as DPP be recorded.

MIN. NO. 070/2011: ADOPTION OF THE COMMITTEE REPORT ON THE NOMINATIONS TO THE OFFICES OF CHIEF JUSTICE, DEPUTY CHIEF JUSTICE AND DIRECTOR OF PUBLIC PROSECUTIONS

Members went through the draft report and adopted it for tabling in the House subject to the following key amendments:-

1. Deleting paragraph (7) in page 6 of the draft report.
2. On the views received by the Committee (pg 19), all submissions opposing the nomination of Mr. Tobiko be recorded.
3. On the Committee's observations on the nomination of Mr. Kerako Tobiko as DPP (pg 26), the issue of the bribery allegations by Mr. Sammy Kirui be clearly highlighted.
4. That the reservations of some members and the objection of Hon. J. Mbadi and Hon. Ababu Namwamba on the approval of Mr. Keriako Tobiko as DPP be recorded.
5. That a further recommendation be added as follows-
(v) THAT, the approval of Mr. Keriako Tobiko as DPP is subject to investigations on the outstanding issues.
6. That the objections of Hon. C. Mwakwere and Hon. M. Ombui on the new recommendation (v) above be recorded.

MIN. NO. 071/2011: ADJOURNMENT

There being no Any Other Business, the Chairperson adjourned the meeting at Two O'clock.

SIGN:.....

(CHAIRPERSON)

DATE:..... 14/06/2011

MINUTES OF THE TWENTY SIXTH SITTING OF THE CONSTITUTIONAL IMPLEMENTATION OVERSIGHT COMMITTEE HELD IN THE MAIN COMMITTEE ROOM, COUNTY HALL, PARLIAMENT BUILDINGS ON THURSDAY 9TH JUNE, 2011 AT 10.30 AM.

PRESENT:

- | | |
|--|------------------|
| 1. The Hon. Hussein Mohammed Abdikadir, M.P. | Chairperson |
| 2. The Hon. Millie Odhiambo, M.P. | Vice-Chairperson |
| 3. The Hon. Chirau Ali Mwakwere, EGH, M.P. | |
| 4. The Hon. Beth Mugo, EGH, M.P. | |
| 5. The Hon. Martha Wangari Karua, EGH, M.P. | |
| 6. The Hon. (Dr.) Kilemi Mwiria, M.P. | |
| 7. The Hon. Ababu Namwamba, M.P. | |
| 8. The Hon. Lucas K. Chepkitony, M.P. | |
| 9. The Hon. Amina Abdalla, M.P. | |
| 10. The Hon. Rachel Shebesh, M. P. | |
| 11. The Hon. Danson Mwazo, M.P. | |
| 12. The Hon. Cecily Mbarire, M.P. | |
| 13. The Hon. David M. Ngugi, M.P. | |
| 14. The Hon. Ekwere Ethuro, M.P. | |
| 15. The Hon. Sophia Abdi, M.P. | |
| 16. The Hon. Moriasi Ombui, M.P. | |
| 17. The Hon. (Dr.) Eseli Simiyu, M.P. | |
| 18. The Hon. (Dr.) Joyce Laboso, M.P. | |
| 19. The Hon. Elizabeth Ongoro, M.P. | |
| 20. The Hon. John Mbadi, M.P. | |
| 21. The Hon. (Prof.) Phillip Kaloki, M.P. | |
| 22. The Hon. Charles Kilonzo, M.P. | |
| 23. The Hon. Alfred Khang'ati, M.P. | |

ABSENT WITH APOLOGY

1. The Hon. Benedict Fondo Gunda, M.P.
2. The Hon. Rev. Julius Murgor, M.P.
3. The Hon. Charles Onyancha, M.P.
4. The Hon. Joseph Kasaine Nkaiserry, M.P.

IN ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|---------------------------------|---|------------------------|
| 1. Hon. Nkoidila Ole Lankas, MP | - | Member of Parliament |
| 2. Hon. Mohammed H. Gabbow, MP | - | Member of Parliament |
| 3. Ms. Eunice Gichangi | - | Senior Legal Counsel |
| 4. Mr. Zakayo Mogere | - | Second Clerk Assistant |
| 5. Mrs. Rebecca Tonkei | - | Research Officer I |
| 6. Mr. Oscar Namulanda | - | Third Clerk Assistant |
| 7. Ms. Annette Bosibori | - | Parliamentary Intern |

MIN. NO. 062/2011: PRELIMINARIES

The meeting was opened with a word of prayer.

MIN. NO. 063/2011: DELIBERATIONS OF VIEWS FROM THE PUBLIC ON THE NOMINEES

The Committee deliberated on the views before it (oral representation and written memoranda) on all the three nominees and noted key recurring issues on the nominees as follows:-

1. Nomination of Dr. Willy Mutunga and Ms. Nancy Baraza

The Committee noted that issues raised on the two nominees were almost similar and they are broadly on:-

- i). Academic and Professional qualifications
- ii). The nomination process
- iii). Integrity
- iv). Liberalist lifestyle (morality, sexuality, religion & family values)
- v). Judicial experience

2. Nomination of Mr. Keriako Tobiko

The Committee noted that issues raised on Mr. Keriako Tobiko are broadly on:-

- i). Academic and Professional qualifications
- ii). The nomination process
- iii). Integrity
- iv). Performance in his current position

MIN. NO. 064/2011: DELIBERATIONS ON THE SUITABILITY OF DR. WILLY MUNYOKI MUTUNGA TO SERVE AS CHIEF JUSTICE, MS. NANCY MAKOKHA BARAZA TO SERVE AS DEPUTY CHIEF JUSTICE AND MR. KERIAKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

The Committee deliberated on the views presented before it and the responses of the nominees and made the following observations:-

1. Nomination of Dr. Willy Mutunga and Ms. Nancy Baraza as Chief Justice and Deputy Chief Justice respectively

On the nominations of Dr. Willy Mutunga and Ms. Nancy Baraza to serve as Chief Justice and Deputy Chief Justice respectively, the Committee noted that:-

i). Academic and Professional qualifications

Article 166 of the Constitution sets out the requirements for the positions of Chief Justice and Deputy Chief Justice and the nominees has met the academic and professional requirements.

ii). Nomination process

- a) There has been many interpretations of the Constitution as to whether the Judicial Service Commission (JSC) was to be involved in the recruitment process of the Chief Justice and the Deputy Chief Justice and as to whether the JSC is to submit more than one nominee for the position for the president to consider.
- b) The Constitution does not dictate to the President on the process to follow and he chose to involve the JSC and that the matter has been overtaken by events now that the names of the nominees are before the Committee and further that the process should await the interpretation by the Supreme Court.
- c) The Committee recommends that in future appointments, the appointing authority shall forward the names of the nominees to Parliament with an explanatory report setting out the criteria and methodology used in settling for such nominees. The openness and transparency is a requirement of Article 172 (2) of the Constitution.

iii). Integrity

The Committee noted that the two nominees are persons of high integrity as no one raised any issue touching on their integrity during the public hearings.

iv). Liberalist lifestyle (morality, sexuality, religion & family values)

- a) The Committee noted that most persons who made representations against the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza based their position on the perceived liberal lifestyle of the nominees.
- b) On morality issues, the Committee was satisfied with the explanation of the nominees and noted that one is not rendered dysfunctional because of being a divorcee and the assurance that the nominees will be guided by the Constitution in the discharge of their duties.
- c) On sexuality issues, it was noted that the nominees had stated that they are not in a same sex relationship and the academic research being undertaken by Ms. Baraza is meant to inform the society and Government policy.
- d) On religion, it was noted that the nominees are religious with Dr. Mutunga being a Muslim while Ms. Baraza is a Christian and an elder in her church (Quakers).
- e) On family values, it was noted that Kenya is tolerant to issues of divorce as it is provided for in the law and various traditions and further that the two nominees have children.

v). Judicial experience

- a) The Committee noted that Article 166 (2) and (3) of the Constitution sets out the academic and professional requirements for the respective positions and that the nominees have met the set requirements.
- b) There is no requirement that a Chief Justice and Deputy Chief Justice have to be appointed from persons already serving in the judiciary. References were made to South Africa, USA, Hong Kong, Trinidad & Tobago and Nova Scotia (Canada) where Chief Justices have been appointed from persons in private legal practice. In Kenya examples in the appointments of Justice Kitili Mwendwa, Justice Zaccheus Chesoni and Justice Benard Chunga as Chief Justice from outside the judiciary were given.

2. Nomination of Mr. Keriako Tobiko as Director of Public Prosecutions

The Committee deliberated on the views presented before it and the response from the nominee and made the following observations:-

i). Academic and Professional qualifications

Article 157 read together with Article 166 (5) of the Constitution sets out the requirements for the position of Director of Public Prosecutions and the nominee has met the academic and professional requirements.

ii). Nomination process

- a) The nomination process for Mr. Tobiko was not transparent as the interviews were not done in public like those by the Judicial Service Commission (JSC). However, the mistake is not attributable to Mr. Tobiko but to the interviewing panel.
- b) The Committee recommends that in future appointments, the appointing authority shall forward the name of the nominee to Parliament with an explanatory report setting out the criteria and methodology used in settling for such nominee. Openness and transparency is a Constitutional requirement.

iii). Integrity

- a) The Committee noted that most persons who made representations against the nomination of Mr. Keriako Tobiko based their position on the integrity issues of the nominees.
- b) It was noted that the nominee refunded allowances that were wrongly paid to him while he was at CKRC and that the transport allowance was paid to all commissioners due to an erroneous interpretation of the law by the then Commission Secretary.
- c) Allegations by Prof. Ghai that the nominee tried sabotaging the work of CKRC were not substantiated and could be as a result of personal differences.
- d) The bribery allegations by Mr. Sammy Kirui against the nominee could not be substantiated by the claimant and further that Mr. Alfred Getonga who had been mentioned by the claimant wrote to the Committee denying the allegations.
- e) The nominee proved that he was wrongly included in the list of those persons who had irregularly acquired land in the Mau forest.
- f) As an advocate he perpetuated fraud or did not exercise due diligence when he swore an affidavit indicating that a six year old girl (in the Ole Ntutu succession case) had an Identification Card.

iv). Performance in his current position and possible conflict of interest

- a) The Committee noted that most persons who made representations against the nomination of Mr. Keriako Tobiko based their position on the nominee's performance in his current position and possible conflict of interest in some cases before court.

- b) It was noted that the nominee has not interfered with the Anglo leasing cases particularly Criminal case No. 338 of 2005 (*Republic Vs Zakayo Arap Cheruiyot & another*) as the Attorney General had appointed a special prosecutor from private practice to handle the case. The special prosecutor (Mr. Joe Okwach) confirmed to the Committee that he reports to the Attorney General on the case.
- c) The nominee did not handle nor interfere with the land case pity Livingstone Ole Ntutu and Justice Moiwo Ole Keiwua - Nairobi Chief Magistrate Court Criminal Case no. 2157 of 2003 (*Republic versus Livingstone Kunini Ole Ntutu and Onyambu*). This was confirmed by the Attorney General. However, he ought to have declared his perceived interest and ~~seek~~ ^{submit} the appointment of a special prosecutor from private practice. D
- d) The nominee did not interfere nor neglect his duties in the fraud case involving Hon. William Ruto as it was the police who were to get witnesses to court.
- e) The nominee has put in place some reforms in the Directorate of Public Prosecutions and that his shortfall in performance should not be solely blamed on him as he works under directions from the Attorney General. He should be given a chance as DPP under the Constitution and if he fails there are elaborate mechanisms for removal.

Following deliberations, the Committee resolved to take a vote through secret ballot in order to identify areas of consensus and to determine the opinion of Members on the suitability of the nominees for appointment to the respective offices. The results were as follows:-


	Name of nominee	For	Against	Abstain	Total
1.	Dr. Willy M. Mutunga as CJ	21	2	0	23
2.	Ms. Nancy M. Baraza as Deputy CJ	23	0	0	23
3.	Mr. Keriako Tobiko as DPP	11	11	1	23

Following the above results the Committee held further deliberations on the nominees and resolved to move the process forward and therefore made the following recommendations to the House:-

- i). **THAT**, pursuant to Article 166 (1)(a) of the Constitution and Sections 24 (2) and 29 of the Sixth Schedule to the Constitution, this House approves Dr. Willy Muniywoiki Mutunga for appointment to the position of Chief Justice.
- ii). **THAT**, pursuant to Article 166 (1)(a) of the Constitution and Section 29 of the Sixth Schedule to the Constitution, this House approves Ms. Nancy Makokha Baraza for appointment to the position of Deputy Chief Justice.
- iii). **THAT**, pursuant to Article 157 (2) and Section 29 of the Sixth Schedule to the Constitution, this House approves Mr. Keriako Tobiko for appointment to the position of Director of Public Prosecutions.

MIN. NO. 066/2011: ADJOURNMENT

There being no Any Other Business, the Chairperson adjourned the meeting at Twenty Minutes past Two O'clock until Tuesday 13th June, 2011 at 9.00 a.m.

SIGN:.....

(CHAIRPERSON)

DATE:..... 14TH / 06 / 2011

PRESENT:

1. The Hon. Hussein Mohammed Abdikadir, M.P.
2. The Hon. Millie Odhiambo, M.P.
3. The Hon. Chirau Ali Mwakwere, EGH, M.P.
4. The Hon. Beth Mugo, EGH, M.P.
5. The Hon. Martha Wangari Karua, EGH, M.P.
6. The Hon. (Dr.) Kilemi Mwiria, M.P.
7. The Hon. Ababu Namwamba, M.P.
8. The Hon. Lucas K. Chepkitony, M.P.
9. The Hon. Amina Abdalla, M.P.
10. The Hon. Rachel Shebesh, M. P.
11. The Hon. Danson Mwazo, M.P.
12. The Hon. Cecily Mbarire, M.P.
13. The Hon. David M. Ngugi, M.P.
14. The Hon. Ekwere Ethuro, M.P.
15. The Hon. Sophia Abdi, M.P.
16. The Hon. Moriasi Ombui, M.P.
17. The Hon. (Dr.) Eseli Simiyu, M.P.
18. The Hon. (Dr.) Joyce Laboso, M.P.
19. The Hon. Elizabeth Ongoro, M.P.
20. The Hon. John Mbadi, M.P.
21. The Hon. Rev. Julius Murgor, M.P.
22. The Hon. (Prof.) Phillip Kaloki, M.P.
23. The Hon. Charles Kilonzo, M.P.
24. The Hon. Benedict Fondo Gunda, M.P.
25. The Hon. Alfred Khang'ati, M.P.

Chairperson
Vice-Chairperson

ABSENT WITH APOLOGY

1. The Hon. Charles Onyancha, M.P.
2. The Hon. Joseph Kasaine Nkaiserry, M.P.

IN ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|----------------------------------|---|------------------------|
| 1. Hon. John Pesa, MP | - | Member of Parliament |
| 2. Hon. Nkoidila Ole Lankas, MP | - | Member of Parliament |
| 3. Hon. Moses Lessonet, MP | - | Member of Parliament |
| 4. Hon. Shakeel Shabir, MP | - | Member of Parliament |
| 5. Hon. Mohammed Affey, MP | - | Member of Parliament |
| 6. Hon. David Koech, MP | - | Member of Parliament |
| 7. Hon. Mohammed Hussein Ali, MP | - | Member of Parliament |
| 8. Hon. Thomas Mwadeghu, MP | - | Member of Parliament |
| 9. Hon. Jeremiah Kioni, MP | - | Member of Parliament |
| 10. Ms. Eunice Gichangi | - | Senior Legal Counsel |
| 11. Mr. Zakayo Mogere | - | Second Clerk Assistant |
| 12. Mrs. Rebecca Tonkei | - | Research Officer I |
| 13. Mr. Oscar Namulanda | - | Third Clerk Assistant |
| 14. Ms. Annette Bosibori | - | Parliamentary Intern |

15. Ms. Judy Thogori - Parliamentary Intern
16. Ms. Mercy Wangeci - Parliamentary Intern

MIN. NO. 053/2011: PRELIMINARIES

The meeting was opened with a word of prayer.

MIN. NO. 054/2011: EVIDENCE BY THE DIRECTOR OF KENYA ANTI-CORRUPTION COMMISSION ON THE SUITABILITY OF MR. KERAIKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

Prof. P.L.O Lumumba, the Director of Kenya Anti-Corruption Commission appeared before the Committee and testified in his capacity as the former Secretary to the Constitution of Kenya Review Commission (CKRC) on the conduct of Mr. Keriako Tobiko when he served as a Commissioner in CKRC.

Prof. Lumumba informed the Committee that Mr. Tobiko served as a commissioner for the period 2000 – 2005 and that:-

- i). At appointment, Mr. Tobiko was winding up as a commissioner in the Njonjo Commission on land laws. This commission was wound up in 2002.
- ii). Mr. Tobiko did not receive money for work he did not do and was the first one to return allowances in case he was paid by mistake.
- iii). Upon proper interpretation of the law, Mr. Tobiko and other Commissioners refunded money they had been paid as transport allowances while they had commission vehicles. This was as a result of an erroneous interpretation of the law by the then Commission Secretary (the late Prof. Okoth Owiro).
- iv). Mr. Tobiko had a strong character in the Commission (CKRC) and was highly connected to the political class.
- v). Mr. Tobiko disliked Prof. Ghai with a passion.

MIN. NO. 055/2011: EVIDENCE BY MR. SAMMY KIRUI ON THE SUITABILITY OF MR. KERAIKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

Mr. Sammy Kirui, the former Permanent Secretary in the Ministry of Local Government appeared before the Committee to clarify issues arising out of his memorandum raising objections on the nomination of Mr. Keriako Tobiko to serve as Director of Public Prosecutions (DPP)

Mr. Kirui informed the Committee that he is currently facing corruption cases (No.19 and 20 of 2010) involving abuse of office and failure to perform public duty in relation to the Cemetery land purchased by the City Council of Nairobi for Kshs. 283 million. He also informed the Committee that:-

- i). He was approached by one of his friends, a Mr. Alfred Getonga, and informed that Mr. Tobiko is will to assist him in the case but he will need Kshs. 5 million.
- ii). In April, 2010 he was approached by a Mr. Livingstone Ole Ntutu (cell phone no. 0717550643), a Ms. Chepkorir Kelion (Cell phone no. 0721972007), and a

0722100077) who asked for the money on behalf of Mr. Tobiko.

- iii). He never reported the matter to the police nor KACC as he did not have faith in them. He however forwarded the SMS details to an officer of NSIS, a Mr. Songok.
- iv). He never gave out the bribe asked for and as a result, he was charged with more offences.
- v). The only time he had met with Mr. Tobiko was when he was serving as the Director General of the Communications Commission of Kenya (CCK) and Mr. Tobiko was a lawyer in private practice when Mr. Tobiko requested him to list his firm in a panel for legal services in CCK.

MIN. NO. 056/2011: EVIDENCE BY MR. JOE OKWATCH ON THE SUITABILITY OF MR. KERAIKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

Mr. Joe Kwach, a Senior Counsel appeared before the Committee to clarify on issues arising out of prosecution of Criminal case No. 338 of 2005 (*Republic Vs Zakayo Arap Cheruiyot & another*).

Mr. Kwach informed the Committee that on 23rd June, 2005 he was appointed by the Attorney General as a special prosecutor in the mentioned case when Mr. Tobiko was appointed a DPP. This arose out of a potential conflict of interest as Mr. Tobiko was the defense counsel in the case prior to his appointment.

He also informed the Committee that:-

1. He has practiced law for the last 35 years
2. As a lead counsel for the above case he has carried his work professionally without interference from anybody and that he reports to the Attorney General and not Mr. Tobiko.
3. Frequent transfer of magistrates and lack of co-operation from the Court Registrar has frustrated the determination of the case.

MIN. NO. 057/2011: EVIDENCE BY MR. JUSTICE MOIJO OLE KEIWUA ON THE SUITABILITY OF MR. KERAIKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

Mr. Stephen Mwenesi, an advocate acting for Mr. Justice Moiyo Ole Keiwa, appeared before the Committee to clarify on issues of Nairobi Chief Magistrate Court Criminal Case no. 2157 of 2003 (*Republic versus Livingstone Kunini Ole Ntutu and Onyambu*).

Mr. Mwenesi tabled a signed copy of a letter dated 12th May, 2006 by Justice Ole Keiwua to the Attorney General complaining that Mr. Tobiko was sabotaging the prosecution of the case. He informed the Committee that Justice Moiyo Ole Keiwua stands by the contents of a letter.

He also informed the Committee that Mr. Tobiko instigated the suspension of Justice Ole Keiwua from the Bench on allegations of corruption and forgery of documents.

Papers Laid

Mr. Mwenesi tabled the following papers in the course of his submissions

- (i) Lease dated 8th August 2008 – Ol Kiombo Limited to Talek Limited
- (ii) Title Land Reference Number 13325
- (iii) Charge Sheet
- (iv) Correspondence between S. Musalia Mwenesi Advocates and the Honourable Attorney General
- (v) Judgement in Criminal Case Number 2175 of 2003 dated 30/8/06
- (vi) Letter dated 3rd February 2006 – 2 copies
- (vii) Letter dated 23rd April 2003 Ref. Ref. AG/CR/2053/607
- (viii) Consent to the making of Grant of Administration in the matter of the Estate of Lerioka Ole Ntutu (Deceased) dated 20th June 2000 – 2 copies
- (ix) List of Allegations in Tribunal Matter Number 2 of 2004
- (x) Judgement dated, signed and delivered at Nairobi on 20th April 2010 in Judicial Review Miscellaneous Civil Application No. 1298 of 2004 – 2 copies

MIN. NO. 058/2011: EVIDENCE BY THE ATTORNEY GENERAL ON THE SUITABILITY OF MR. KERAIKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

Hon. Amos Wako, the Attorney General, appeared before the Committee to clarify on some issues raised on the performance of Mr. Tobiko in his current duties as the Chief Public Prosecutor.

The Attorney General informed the Committee that Mr. Tobiko was appointed Director of Public Prosecutions on 25th May, 2005 and that:-

- i). During the first formal meeting between him and the DPP on 22nd June, 2005 he informed Mr. Tobiko that he will appoint a private counsel to handle cases that might bring conflict of interest.
- ii). He appointed Mr. Joe Okwach on 23rd June, 2005 to handle the prosecution of Criminal case No. 338 of 2005 (*Republic Vs Zakayo Arap Cheruiyot & another*) and directed that all files be handed over to Mr. Okwach to avoid the DPP handling them.
- iii). The issues in the Nairobi Chief Magistrate Court Criminal Case no. 2157 of 2003 (*Republic versus Livingstone Kunini Ole Ntutu and Onyambu*) brought a lot of acrimony among the prominent families in the Maasai community.
- iv). Mr. Tobiko did not handle nor interfere with the Ole Ntutu case.
- v). It is the duty of the police to summon and ensure attendance of witnesses.
- vi). Changes in leadership at the Narok Council have often affected the case both for and against.
- vii). He is disappointed with the outcome of the Ruto case and has applied for certified copies of proceedings with the intention of appealing.
- viii). Mr. Tobiko is not only brilliant but he is competent and has brought a lot of reforms in the office of the Public Prosecutor.
- ix). Mr. Tobiko is fit to be appointed as Director of Public Prosecutions.

The attorney General tabled the following papers in the course of his submissions:

- i). *Letter from the then Minister for Local Government Hon. Musikari Kombo to the Attorney General requesting him to investigate and verify the authenticity of the discontinuos of defence or any manipulation of the Ol Kiombo case.*
- ii). *Letter from the Attorney General to the then Minister for Local Government Hon. Musikari Kombo informing of the request for comprehensive brief and record of the court proceedings and judgement of the case involving the Ol kiombo ltd.*
- iii). *Brief of the proceedings of the Ol Kiombo case*
- iv). *Report of the Attorney General on the allegations of irregular purchase of the Cemetery land in Machakos by the City Council of Nairobi*

(Lunch Break at 1.35 p.m)

AFTERNOON SESSION – (At 2.25 P.M)

PRESENT:

- | | |
|--|------------------|
| 1. The Hon. Hussein Mohammed Abdikadir, M.P. | Chairperson |
| 2. The Hon. Millie Odhiambo, M.P. | Vice-Chairperson |
| 3. The Hon. Chirau Ali Mwakwere, EGH, M.P. | |
| 4. The Hon. Beth Mugo, EGH, M.P. | |
| 5. The Hon. Martha Wangari Karua, EGH, M.P. | |
| 6. The Hon. (Dr.) Kilemi Mwiria, M.P. | |
| 7. The Hon. Ababu Namwamba, M.P. | |
| 8. The Hon. Lucas K. Chepkitony, M.P. | |
| 9. The Hon. Amina Abdalla, M.P. | |
| 10. The Hon. Rachel Shebesh, M. P. | |
| 11. The Hon. Danson Mwazo, M.P. | |
| 12. The Hon. Cecily Mbarire, M.P. | |
| 13. The Hon. David M. Ngugi, M.P. | |
| 14. The Hon. Ekwee Ethuro, M.P. | |
| 15. The Hon. Sophia Abdi, M.P. | |
| 16. The Hon. Moriasi Ombui, M.P. | |
| 17. The Hon. (Dr.) Eseli Simiyu, M.P. | |
| 18. The Hon. (Dr.) Joyce Laboso, M.P. | |
| 19. The Hon. Elizabeth Ongoro, M.P. | |
| 20. The Hon. John Mbadi, M.P. | |
| 21. The Hon. Rev. Julius Murgor, M.P. | |
| 22. The Hon. (Prof.) Phillip Kaloki, M.P. | |
| 23. The Hon. Charles Kilonzo, M.P. | |
| 24. The Hon. Benedict Fondo Gunda, M.P. | |
| 25. The Hon. Alfred Khang'ati, M.P. | |

ABSENT WITH APOLOGY

1. The Hon. Charles Onyancha, M.P.
2. The Hon. Joseph Kasaine Nkaiserry, M.P.

Papers Laid

NATIONAL ASSEMBLY

Mr. Mwenesi tabled

- (i) Lease of
- (ii) Title
- (iii) Cheque
- (iv) Copy of the OI
- (v)
- (vi)
- (vii)
- (viii)

- 16. Mr. Joseph Mwangi
- 17. Ms. Mercy Wangeci

of his submissions:
to verify the
Government
brief and
the OI

- Member of Parliament
- Member of Parliament
- Member of Parliament
- Member of Parliament
- Member of Parliament
- Member of Parliament
- Member of Parliament
- Member of Parliament
- Senior Legal Counsel
- Second Clerk Assistant
- Research Officer I
- Third Clerk Assistant
- Parliamentary Intern
- Parliamentary Intern
- Parliamentary Intern

MIN. NO. 059/2011: EVIDENCE BY MR. PHILLIP MURGOR ON THE SUITABILITY OF MR. KERAIKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

Mr. Phillip Murgor, the former DPP, appeared before the Committee and gave views on the office of the DPP and the suitability of Mr. Tobiko to assume such office.

Mr. Murgor informed the Committee that when he was appointed as DPP on 19th May 2003, he had not applied for the position and that:-

- i). He has no interest in the position of DPP as he did not apply.
- ii). His removal from office in May 2005 was meant to stall the prosecution of Anglo leasing cases as can be attested by the Special Audit Report of the Public Accounts Committee in 2006 (page 42).
- iii). The DPP under the old Constitution works under the directions of the Attorney General and in the case involving a Naivasha rancher, Mr. Tom Cholmondeley, it is the Attorney General instructed him to enter a *nolle prosequi*.
- iv). Mr. Tobiko has not initiated any meaningful reforms in the office despite his being there for over 6 years and that all the reforms that Mr. Tobiko is referring to were commenced and concluded during his (Murgor) tenure. Mr. Tobiko came in to launch them.
- v). Mr. Tobiko is not fit for appointment as DPP under the Constitution as such appointment will bring a lot of conflict of interest in many corruption cases.

Paper Laid

Mr. Murgor tabled the following papers in the course of his submissions:-

- i). Letter of termination of appointment as DPP dated 26th September 2005 from the PS/ Secretary to the Cabinet Amb. Francis K. Muthaura, EGH to Mr. Murgor.
- ii). An undated press release from State House indicating all the appointments made by the President where Mr. Keriako Tobiko was replacing Mr. Murgor

MIN. NO. 060/2011: VETTING OF MR. KERIAKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

Mr. Keriako Tobiko, the nominee for Director of Public Prosecutions (DPP) appeared before the Committee to respond to allegations leveled against him in the course of the vetting process.

He informed the Committee that despite the intense public scrutiny and many allegations against him, he is still interested in the job and that:-

- i). He does not recollect ever meeting Mr. Sammy Kirui.
- ii). He knows Mr. Livingstone Ole Ntutu and Mr. Muntet but he does not know a Ms. Chepkorir Kelion.
- iii). He did not solicit a bribe nor sent anyone to solicit a bribe on his behalf and that people who are using his name are commen.
- iv). His differences with Justice Ole Keiwua arose because Justice Ole Keiwua believed that he (Tobiko) used his office to instigate the removal of the Judge from office.
- v). He undertook all the reforms in the DPP office contrary to what Mr. P. Murgor said.
- vi). He did not instigate the removal of Mr. Murgor from office.
- vii). If there is a conflict of interest arising, he will appoint another prosecutor to deal with the matter.
- viii). He is fit and qualified to hold the office of DPP under the Constitution.

MIN. NO. 061/2011: ADJOURNMENT

There being no Any Other Business, the Chairperson adjourned the meeting at Thirty Five Minutes past Four O'clock until Thursday 9th June, 2011 at 10.00 a.m.

SIGN:.....

(CHAIRPERSON)

DATE:..... 17/06/2011.....

PRESENT:

- | | |
|--|------------------|
| 1. The Hon. Hussein Mohammed Abdikadir, M.P. | Chairperson |
| 2. The Hon. Millie Odhiambo, M.P. | Vice-Chairperson |
| 3. The Hon. Chirau Ali Mwakwere, EGH, M.P. | |
| 4. The Hon. Beth Mugo, EGH, M.P. | |
| 5. The Hon. Martha Wangari Karua, EGH, M.P. | |
| 6. The Hon. (Dr.) Kilemi Mwiria, M.P. | |
| 7. The Hon. Ababu Namwamba, M.P. | |
| 8. The Hon. Lucas K. Chepkitony, M.P. | |
| 9. The Hon. Amina Abdalla, M.P. | |
| 10. The Hon. Rachel Shebesh, M.P. | |
| 11. The Hon. Danson Mwazo, M.P. | |
| 12. The Hon. Cecily Mbarire, M.P. | |
| 13. The Hon. David M. Ngugi, M.P. | |
| 14. The Hon. Ekwee Ethuro, M.P. | |
| 15. The Hon. Sophia Abdi, M.P. | |
| 16. The Hon. Moriasi Ombui, M.P. | |
| 17. The Hon. (Dr.) Eseli Simiyu, M.P. | |
| 18. The Hon. (Dr.) Joyce Laboso, M.P. | |
| 19. The Hon. Elizabeth Ongoro, M.P. | |
| 20. The Hon. John Mbadi, M.P. | |
| 21. The Hon. Rev. Julius Murgor, M.P. | |
| 22. The Hon. (Prof.) Phillip Kaloki, M.P. | |
| 23. The Hon. Charles Kilonzo, M.P. | |

ABSENT WITH APOLOGY

1. The Hon. Benedict Fondo Gunda, M.P.
2. The Hon. Charles Onyancha, M.P.
3. The Hon. Joseph Kasaine Nkaiserry, M.P.

ABSENT

The Hon. Alfred Khang'ati, M.P.

IN ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|----------------------------|---|------------------------|
| 1. Hon. John Pesa, MP | - | Member of Parliament |
| 2. Hon. Asman Kamama, MP | - | Member of Parliament |
| 3. Hon. Shakeel Shabir, MP | - | Member of Parliament |
| 4. Ms. Eunice Gichangi | - | Senior Legal Counsel |
| 5. Mr. Zakayo Mogere | - | Second Clerk Assistant |
| 6. Mrs. Rebecca Tonkei | - | Research Officer I |
| 7. Mr. Oscar Namulanda | - | Third Clerk Assistant |
| 8. Ms. Annette Bosibori | - | Parliamentary Intern |
| 9. Ms. Judy Thogori | - | Parliamentary Intern |
| 10. Ms. Mercy Wangeci | - | Parliamentary Intern |

The meeting was opened with a word of prayer.

MIN. NO. 048/2011: VETTING OF DR. WILLY MUNYOKI MUTUNGA TO SERVE AS CHIEF JUSTICE

The Chairperson welcomed the nominee to the meeting and instructed the administration of Oath to the nominee. Thereafter the Chairperson asked the nominee to take the Committee through the information requested in the Second Schedule of the Commission for the Implementation of the Constitution Act, 2010.

Dr. Willy Mutunga informed the Committee that he is a Kenyan citizen born on 16th June, 1946 and that:-

i). He holds a Doctor of Jurisprudence from the Osgoode Hall Law School, Toronto where he graduated in 1992. He also holds a Master of Laws degree and a Bachelor of Laws from the University of Dar-es-salam Tanzania where he graduated in 1994 and 1971 respectively.

ii). He has worked at Ford Foundation Eastern Africa since 2004 to date and has served as a regional Representative since 2009. He also worked with Kenya Human Rights Commission from 1998-2004. He was an acting Lecturer from 1974-1982 at the Legal Advice Centre.

iii). He has won various awards among them Senior Counsel, Government of Kenya, Lifetime Award for protection and promotion of human rights, Kenya National Commission on Human Rights 2003, Jurist of the Year Award by the International Commission of Jurists Kenya Section 2003.

iv). He has also attained various academic distinctions and is a member of Law Society of Kenya and International Bar Association.

v). He has fully complied with his tax obligations to the State up to date and has never been adversely mentioned in any investigatory report of Parliament or any Commission of Inquiry.

vi). He has a divorce case (No. 179 of 2009) pending in court which might be construed to be a conflict of interest if he is appointed. However, he will not interfere with the determination of the case.

vii). He was judged on 10th June 1982 with a criminal charge of possession of seditious publication but the case was withdrawn after he was detained without trial on 29th July 1982.

Arising from the public hearings and memoranda on the suitability of the nominee, Members raised questions to Dr. Willy Mutunga on the following broad areas:-

a) The significance of the stud adorned in his left ear.

b) The nominee's views on Sexuality.

c) The nominee's views on Family values.

d) The nominee's views on Abortion.

e) The nominee's views on Religion.

The nominee gave the following response to the questions posed as above:-

a) Adornment of the ear stud

The nominee informed the Committee that the ear stud is significant to him as it represents his religious beliefs.

b) Sexuality

The nominee informed the Committee that:-

- i). He is not Gay and does not support gay activities.
- ii). The registration of the Kenya Gay and Lesbian (KEGALE) Trust was done by one of the advocates in his firm and that he has not sat in the firm since 1989 when he decided to do human activism.
- iii). He does not discriminate against gays. He respects the rights of gays, lesbians and everyone.

c) Family Values

The nominee informed the Committee that:-

- i). He is a firm believer of family values and treasures the family as the smallest unit of society.
- ii). He has been married twice and has children from his previous marriages which he is seeking to end through a divorce case No. 179 of 2009.
- iii). Separation and divorce is painful process.
- iv). The law is very clear on same sex relations.
- v). The Ford Foundation believes in inherent dignity of all people and has supported organizations that give voice to the vulnerable and children.

d) Abortion

The nominee informed the Committee that the law is clear on abortion and his views are similar to those expressed in the Constitution.

e) Religion

The nominee informed the Committee that:-

- i). He is a man of faith and believes in a supreme being.
- ii). He is a notoriously religious man having spent the better part of his childhood practicing the Akamba Religion but was later baptized into protestant where he got the name Willy. Later on he was baptized as a catholic and got the name Willy Jacob. However, later on he converted to Islam where he got the name Wali Mohammed.
- iii). He acknowledges that religion has been a great source of divide in Kenya but his views on religion will not guide him but the Constitution will remain his conscious.

f) Judicial Experience

The nominee informed the Committee that:-

- i). Although he has never worked in the judicial service, he has done a lot of work having established a Law firm in 1974 and continued going to court in 1998.

- ii). He believes that the Judiciary requires negotiation, cohesion where people work together for the good of the country
- iii). He hopes to tap on long experience of Judges of integrity and the reforms proposed by the Justice Ouko Committee to get a reformed Judiciary
- iv). He hopes to put a Judiciary for all Kenyans and not just for the rich as is currently perceived. He hopes to change that perception so that the rich and the poor are convinced that they will get Justice.
- v). He believes that all Kenyans must work together and breathe life to the Constitution.
- vi). He would be a servant of the Constitution and Law and his personal views would not matter.
- vii). Although the remuneration of a Chief Justice was not commensurate with what he gets at the Ford Foundation, he wanted to render national service.

MIN. NO. 049/2011: VETTING OF MS. NANCY MAKOKHA BARAZA TO SERVE AS DEPUTY CHIEF JUSTICE

The Chairperson welcomed the nominee to the meeting and instructed the administration of Oath to the nominee. Thereafter the Chairperson asked the nominee to take the Committee through the information requested in the Second Schedule of the Commission for the Implementation of the Constitution Act, 2010.

Ms. Nancy Baraza informed the Committee that she is a Kenya citizen born on 10th September, 1957 and that:-

- i). She is currently pursuing a PhD degree from the University of Nairobi (Topic: Equality and non-discrimination principles and the question of homosexuality in Kenya). She is a holder of a Master of Laws and Bachelor of Laws from the University of Nairobi in 2005 and 1980 respectively. She is also a holder of a Post Graduate Diploma in legal Studies from the Kenya School of Law which she attained in 1981.
- ii). She has attained various certificates among them Alternative Conflict Resolution Mechanisms at the University of Iowa, U.S.A in 1996 and a Certificate in Judicial Reforms for improving Governance in Anglophone Africa, 2003.
- iii). She is an Advocate of the High Court of Kenya, Commissioner of Oaths, Member of the Law Society of Kenya, Member of the East African Law Society, Member of the Common Wealth Association of Lawyers and a Member of FIDA-KENYA.
- iv). She has worked as a Legal Counsel in 1982-1984 in the Ministry of Cooperative Development. She was also a Litigation Assistant in the firm of Kilonzo and Company, Advocates in 1983-1987. She was a Partner in Kioni, Baraza & Company, Advocates in 1987-1989 and a Senior Partner in Nancy Baraza & Company, Advocates in 1990-2005. She also worked as a Commissioner in the Constitution of Kenya Review Commission (CKRC).
- v). She is currently the Deputy Chairperson, Kenya Law Reform Commission, Chairperson Media Council Complaints Commission, a Part-time Lecturer at the Kenya School of Law, Kenyatta University and also a Council Member of Egerton University.

vi). Among her Awards is Order of Grand waite (OGW) awarded in 2000.

vii). She has never been charged in a court of law and has fully complied with her tax obligations to the State up to date and has never been adversely mentioned in any investigatory report of Parliament or any Commission of Inquiry.

Arising from the public hearings and memoranda on the suitability of the nominee, Members raised questions to Ms. Nancy Baraza on the following broad areas:-

- a) The nominee's views on Sexuality.
- b) The nominee's views on Family values.
- c) The nominee's views on abortion.
- d) The nominee's views on Religion.
- e) Her lack of Judicial experience

The nominee gave the following response to the questions posed as above:-

a) Sexuality

The nominee informed the Committee that:-

- i). She is not a lesbian.
- ii). She is currently undertaking a PhD research titled 'Equality and non-discrimination principles and the question of homosexuality in Kenya' and that her inspiration to undertake the study came during her tenure at CKRC where gays and lesbians submitted their memoranda. She took up the research out of curiosity and believes that it will go a long way in helping the country learn about gays and lesbians. Her study is not illegal.

b) Family Values

The nominee informed the Committee that:-

- i). She is a divorcee and a mother of two children and a firm believer in family values.
- ii). She chaired the Committee on Bill of Rights at the Bomas of Kenya Constitutional Conference which championed for the right to life.
- iii). Her PhD thesis is considered ground-breaking since very little information was available on homosexuality yet gayest is a reality in the society with 15% of Kenyans being gay.
- iv). The findings of the research will help the entire country especially the health sector.

c) Abortion

The nominee informed the Committee that she has no views on abortion outside the Constitution and the Penal code and she would obey the Constitution in interpreting the Law and that her previous work in FIDA did not advocate for abortion but rights of women including access to reproductive health services.

d) Religion

The nominee informed the Committee that she is a Quaker by faith and a strong member of her church.

e) Judicial Experience

The nominee informed the Committee that she has wide experience law having practiced law since 1982 and believes that what the judiciary needs is a dose of activism.

(Lunch Break at 1.15 p.m)

AFTERNOON SESSION – (At 2.25 P.M)

PRESENT:

- | | |
|--|------------------|
| 1. The Hon. Hussein Mohammed Abdikadir, M.P. | Chairperson |
| 2. The Hon. Millie Odhiambo, M.P. | Vice-Chairperson |
| 3. The Hon. Chirau Ali Mwakwere, EGH, M.P. | |
| 4. The Hon. Beth Mugo, EGH, M.P. | |
| 5. The Hon. Martha Wangari Karua, EGH, M.P. | |
| 6. The Hon. (Dr.) Kilemi Mwiria, M.P. | |
| 7. The Hon. Ababu Namwamba, M.P. | |
| 8. The Hon. Lucas K. Chepkitony, M.P. | |
| 9. The Hon. Amina Abdalla, M.P. | |
| 10. The Hon. Rachel Shebesh, M. P. | |
| 11. The Hon. Danson Mwazo, M.P. | |
| 12. The Hon. Cecily Mbarire, M.P. | |
| 13. The Hon. David M. Ngugi, M.P. | |
| 14. The Hon. Ekwee Ethuro, M.P. | |
| 15. The Hon. Sophia Abdi, M.P. | |
| 16. The Hon. Moriasi Ombui, M.P. | |
| 17. The Hon. (Dr.) Eseli Simiyu, M.P. | |
| 18. The Hon. (Dr.) Joyce Laboso, M.P. | |
| 19. The Hon. Elizabeth Ongoro, M.P. | |
| 20. The Hon. John Mbadi, M.P. | |
| 21. The Hon. Rev. Julius Murgor, M.P. | |
| 22. The Hon. (Prof.) Phillip Kaloki, M.P. | |
| 23. The Hon. Charles Kilonzo, M.P. | |

ABSENT WITH APOLOGY

1. The Hon. Benedict Fondo Gunda, M.P.
2. The Hon. Charles Onyancha, M.P.
3. The Hon. Joseph Kasaine Nkaiserry, M.P.

ABSENT

The Hon. Alfred Khang'ati, M.P.

IN ATTENDANCE

1. Hon. John Pesa, MP
2. Hon. Shakeel Shabir, MP
3. Hon. Nkoidila Ole Lankas
4. Ms. Eunice Gichangi
5. Mr. Zakayo Mogere
6. Mrs. Rebecca Tonkei
7. Mr. Oscar Namulanda
8. Ms. Annette Bosibori
9. Ms. Judy Thogori
10. Ms. Mercy Wangeci

NATIONAL ASSEMBLY

- Member of Parliament
- Member of Parliament
- Member of Parliament
- Senior Legal Counsel
- Second Clerk Assistant
- Research Officer I
- Third Clerk Assistant
- Parliamentary Intern
- Parliamentary Intern
- Parliamentary Intern

MIN. NO. 050/2011: VETTING OF MR. KERIAKO TOBIKO TO SERVE AS DIRECTOR OF PUBLIC PROSECUTIONS

The Chairperson welcomed the nominee to the meeting and instructed the administration of Oath to the nominee. Thereafter the Chairperson asked the nominee to take the Committee through the information requested in the Second Schedule of the Commission for the Implementation of the Constitution Act, 2010.

Mr. Keriako Tobiko informed the Committee that he is a Kenya citizen born on 12th December, 1964 and that:-

- i). He is currently pursuing a PhD on Regulation of Security Markets in sub-Saharan Africa, at Cambridge University, England. He holds a Masters of Laws from Cambridge University, England, a Post Graduate Diploma in Law from the Kenya School of Law and a Bachelor of Laws from the University of Nairobi.
- ii). He was awarded a Ghahi Smarak Award best "A" level student 1984.
- iii). He is currently the Chief Public Prosecutor. He has been an Advocate of the High Court of Kenya since 1992. He has also been the Director of Public Prosecutions since May 2005; He is also a Senior Partner of Tobiko & Associates, Advocates. He was an Assistant Lecturer at the University of Nairobi 1992-1993, Legal Officer Public Law Institute, and Barclays Bank as a Bank Clerk 1985-1986.
- iv). Among his National appointments is Commissioner in the Constitution of Kenya Review Commission 2000-2005. Commissioner in the Commission of inquiry into the land law systems in Kenya (1999-2002). Member of the Advisory Board of the Witness Protection Agency 2008 to-date and appointed by the Hon. Attorney-General as the National contact person in relation to the International Criminal Court of Justice. In March, 2011, he was appointed to team up with the Attorney General and Solicitor-General to represent the government in the proceedings before the ICC in relation to the 2007/08 Post Election Violence in Kenya.
- v). He has never been charged in a court of law and has fully complied with his tax obligations to the State up to date.
- vi). He was mentioned adversely in the Special Audit Report by the Public Accounts Report of 2006 (pg 42) when he was appointed DPP while he was acting as a defence counsel in some of the criminal cases involving the Anglo leasing scandal.

vii). He declared a potential conflict of interest involving Criminal Case no.338 of 2005 (*Republic Vs Zakayo Arap Cheruiyot & another*). He stated that while in private practice, he acted for Mr. Zakayo Cheruiyot in this case and that on appointment as DPP, the Attorney General appointed Mr. Joe Okwach SC, to prosecute the proceedings on behalf of the republic to avoid any issues being raised on possible conflict of interest. Mr. Okwach is being assisted by two senior and experienced prosecutors, Mrs. Dorcas Oduor and Ms. Emily Kamau.

Arising from the public hearings and memoranda on the suitability of the nominee, Members raised questions to Mr. Keriako Tobiko on the following broad areas:-

- a. His role in the constitutional reform process while he served as commissioner of the Constitution of Kenya Review Commission (CKRC).
- b. His role in the matter of Nairobi Chief Magistrate Court Criminal Case no. 2157 of 2003 (*Republic versus Livingstone Kunini Ole Ntutu and Onyambu*).
- c. His conflicting interest in the Criminal Case no.338 of 2005 (*Republic Vs Zakayo Arap Cheruiyot & another*).
- d. The delays and 'casual' prosecution of cases by his office particularly those involving corruption matters.
- e. Allegations of bribery by Mr. Sammy Kirui (former Permanent Secretary, Ministry of Local Government).
- f. His reform strategy in the Department.

The nominee gave the following response to the questions posed as above:-

- a. **His tenure at the Constitution of Kenya Review Commission.**

The nominee informed the Committee that:-

- i). At the time he was appointed to the CKRC in 2000, he was winding up as a commissioner in the Commission of inquiry into the land law systems in Kenya (1999-2002) (Njonjo Commission).
- ii). He contributed substantially to the CKRC as a member of the Research and Drafting team under the leadership of the late Prof. Okoth Ogendo. He was also a member of the thematic team on land matters in the Commission.
- iii). That on several occasions he took up the role of a rapporteur, collected views from members of the public and carried out civic education in his capacity as commissioner.
- iv). He did not take any money/allowances that he did not deserve.
- v). He did not sabotage the Commission and he was never a gate-keeper of those in power.
- vi). The allegations by Prof. Ghai were personal vendetta against him.

- b. **Nairobi Chief Magistrate Court Criminal Case no. 2157 of 2003**
(*Republic versus Livingstone Kunini Ole Ntutu and Onyambu*)

The nominee informed the Committee that:-

- i). He did not play any role and did not in any way interfere with the case.

- iii). Both Mr. Justice Ole Keiwua and Ole Ntutu were his friends
 - iv). He did not play any role in the suspension of Mr. Justice Ole Keiwua as a Judge and that all allegations on the Judge were thrown out and he resumed his duties as a Judge.
- c. **Conflict of interest in the Criminal Case no.338 of 2005 (*Republic Vs Zakayo Arap Cheruiyot & another*).**

The nominee informed the Committee that:-

- i). He was the Chief Defense Counsel in the case prior to his appointment as Director of Public Prosecution.
- ii). The Attorney General appointed a special independent prosecutor, Mr. Joe Okwach, SC to prosecute the case and that the case is on going with the special prosecutor reporting to the Attorney General on the progress.

d. Delays and 'casual' prosecution of corruption cases

The nominee informed the Committee that:-

- i). His office has never failed to prosecute cases.
- ii). The blame squarely lies with the Police who are mandated to ensure court attendance by witnesses.
- iii). He is not related to Hon. William Ruto and he did not interfere in the fraud case against him.

e. Allegations of bribery by Mr. Sammy Kirui

The nominee informed the Committee that he has never met Mr. Sammy Kirui, the former Permanent Secretary, Ministry of Local Government and that he never sent any one to solicit a bribe from Mr. Kirui.

f. His strategy on reforms

The nominee informed the Committee that:-

- i). Change cannot be brought by only 'new faces' as he has undertaken several reforms in the judiciary.
- ii). He will reform the office of the Public Prosecutor by establishing an organized structure, improving the staff welfare and the mode of public communication with the office.

The nominee also informed the Committee that:-

- i). There was no intention of fraud in his affidavit in the case of land succession involving the Ole Ntututs as all persons in the affidavit did not appear in his office personally but one relative took the form to them for signing. This led to a mistake where it was indicated that a young girl of six years then had an Identification Card.
- ii). Until the DPP is appointed, the Attorney General is the Public Prosecutor.

- iii). He is not serving any political interest in his duties.
- iv). He was condemned without being heard by the Public Accounts Committee in their report of 2006.
- v). He will not use provisions of Article 157 (9) of the Constitution to delegate the powers of the DPP to the Kenya Anti-corruption Commission.
- vi). The alleged Cases involving pyramid schemes have not been brought to his attention.

Papers Laid

The nominee tabled the following papers during his presentation:-

- i). *Clearance certificate from CKRC*
- ii). *Report of the CKRC Commission's Legal Task Force which he chaired.*
- iii). *Letter dated August 16, 2010 from the Chief Co-ordinator Mau Task Force excluding Mr. Tobiko's name from the list of beneficiaries of the Mau Complex Forests Land*
- iv). *A brief for the removal of Prof. Yash Pal Ghai as Chairperson of the CKRC Commission*
- v). *Correspondences between Prosecutor (Mr. Joe W. Okwach SC) and the Deputy Registrar of the High Court of Kenya on the case between Zakayo Arap Cheruiyot and another*

(Committee deliberations in Camera)

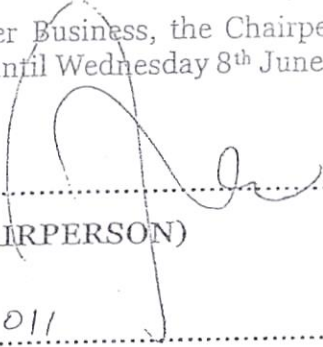
MIN. NO. 051/2011: COMMITTEE DELIBERATIONS ON THE SUBMISSIONS FROM THE NOMINEES

The Committee deliberated on the submissions by the three nominees and resolved that there are some issues on Mr. Keriako Tobiko, the nominee for Director of Public Prosecutions that requires further clarifications. It was further resolved that the following persons be invited to appear before the Committee, on Wednesday 8th June, 2011 at 9.00 a.m, to clarify the issues raised:-

- i). Mr. Sammy Kirui on the issues of bribery allegations including the identity of the persons who solicited a bribe allegedly on behalf of Mr. Tobiko.
- ii). Mr. Joe Okwach on the issues of prosecution of Criminal case No. 338 of 2005 (*Republic Vs Zakayo Arap Cheruiyot & another*).
- iii). Mr. Justice Mojiro Ole Keiwua on the issues of Nairobi Chief Magistrate Court Criminal Case no. 2157 of 2003 (*Republic versus Livingstone Kunini Ole Ntutu and Onyambu*).
- iv). Prof. P.L.O Lumumba, the Director of Kenya Anti-Corruption Commission on the issues of Mr. Tobiko's tenure at CKRC.
- v). Mr. Amos Wako, the Attorney General on issues relating to the suitability of the nominee to serve as DPP.
- vi). Mr. Keriako Tobiko to respond to any emerging issue from the above persons.

MIN. NO. 052/2011: ADJOURNMENT

There being no Any Other Business, the Chairperson adjourned the meeting at Ten Minutes past Six O'clock until Wednesday 8th June, 2011 at 8.30 a.m.

SIGN:.....

(CHAIRPERSON)

DATE:.....14/06/2011.....

PRESENT:

1. The Hon. Hussein Mohammed Abdikadir, M.P.
2. The Hon. Millie Odhiambo, M.P.
3. The Hon. Chirau Ali Mwakwere, EGH, M.P.
4. The Hon. Beth Mugo, EGH, M.P.
5. The Hon. Martha Wangari Karua, EGH, M.P.
6. The Hon. (Dr.) Kilemi Mwiria, M.P.
7. The Hon. Ababu Namwamba, M.P.
8. The Hon. Lucas K. Chepkitony, M.P.
9. The Hon. Amina Abdalla, M.P.
10. The Hon. Rachel Shebesh, M. P.
11. The Hon. Danson Mwazo, M.P.
12. The Hon. Cecily Mbarire, M.P.
13. The Hon. David M. Ngugi, M.P.
14. The Hon. Ekwee-Ethuro, M.P.
15. The Hon. Sophia Abdi, M.P.
16. The Hon. Moriasi Ombui, M.P.
17. The Hon. (Dr.) Eseli Simiyu, M.P.
18. The Hon. (Dr.) Joyce Laboso, M.P.

Chairperson
Vice-Chairperson

ABSENT WITH APOLOGY

1. The Hon. Benedict Fondo Gunda, M.P.
2. The Hon. Charles Onyancha, M.P.
3. The Hon. Joseph Kasaine Nkaiserry, M.P.

ABSENT

1. The Hon. (Prof.) Phillip Kaloki, M.P.
2. The Hon. Charles Kilonzo, M.P. →
3. The Hon. Alfred Khang'ati, M.P.
4. The Hon. Elizabeth Ongoro, M.P.
5. The Hon. John Mbadi, M.P.
6. The Hon. Rev. Julius Murgor, M.P.

IN ATTENDANCE

1. Hon. (Amb) Mohammed Affey, MP-
2. Hon. Peter Mwathi, MP
3. Hon. John Pesa, MP
4. Hon. Nicholas Gumbo, MP-
5. Ms. Eunice Gichangi
6. Mr. Zakayo Mogere
7. Mrs. Rebecca Tonkei

NATIONAL ASSEMBLY

- Member of Parliament
Member of Parliament
Member of Parliament
Member of Parliament
Senior Legal Counsel
Second Clerk Assistant
Research Officer I

acted as counsel to some criminal cases that are in courts of law;

- e) Mr. Tobiko's prior appointment was controversial and was discussed in a Public Accounts Report of March 2006; and
- f) Mr. Tobiko sabotaged the constitution review process while serving as a commissioner in the CKRC.

2. Prof. Chrispino Ochieng

Professor Chrispino Ochieng, a lecturer and architect, presented his views and informed the Committee that he supports the nomination of Dr. Willy Mutunga as the Chief Justice as he is a person of integrity, focused, principled and a mentor to many. Further, he informed the Committee that Dr. Mutunga has been involved in community development while working for the Ford Foundation.

3. Hamilton Passeina

Mr. Hamilton Passeina, the Chief Executive Officer, FONACON, presented a memorandum on behalf of various civil society organizations and professional groups representing the marginalized and minority communities and stated that they support the nomination of Mr. Keriako Tobiko for Director of Public Prosecutions as he scored the highest marks during the interview and that his appointment reflects the face of Kenya and shows adherence to the spirit of the constitution which recognizes minority communities who have been neglected in the past.

He also stated that they support the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza for Chief Justice and Deputy Chief Justice respectively.

4. Ken Wafula

Mr. Ken Wafula, the Chairman of the National Council of NGOs, presented a memorandum on the suitability of the three nominees and stated that:-

- i). He supports the nomination of Dr. Willy Mutunga for Chief Justice as he is credible and reform minded and further that there is no scandalous issue (including an ear stud) that can prevent him from being appointed to office.
- ii). He supports the nomination of Ms. Nancy Baraza for Deputy Chief Justice as she has an impeccable track record in reforms and further that concerns over her family life and academic thesis cannot be reason enough to bar her from assuming office.
- iii). He supports the nomination of Mr. Keriako Tobiko as Director of Public Prosecutions as he is a person of high moral integrity and the views raised by Prof. Ghai on the nominee smacks of vendetta war emanating from their personal and mode of operations differences at the CKRC.

5. Charles M. Ayieni

Mr. Charles Ayieni, a sociologist presented his views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that:

- i). He supports the nomination of Mr. Keriako Tobiko for DPP as the allegations leveled against the nominee by Prof. Ghai were of a personal nature and could not be substantiated.

- ii). He is opposed to the nomination of Dr. Willy Mutunga for CJ as he does not satisfy provision of Article 166 (2) (c) and thus cannot represent a society he does not adhere to its morals.

6. Patrick Onyango (Paddy)

Mr. Patrick O. Onyango, the Executive Director, Citizens Coalition for Constitutional Change presented a memorandum on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that:

- i). He supports the nomination of Dr. Willy Mutunga for CJ as he has known the nominee for a long time having served a detention sentence together and that the nominee meets the threshold of Chapter Six of the Constitution and further that the nominee is an organized institutional builder and a mediator whose ear stud and family problems has its origins in detention.
- ii). He supports the nomination of Ms. Nancy Baraza for Deputy Chief Justice as she is qualified, a reformer, meets the threshold of Chapter Six of the Constitution and has contributed a lot to women and gender issues.

7. Njoroge Waweru

Mr. Njoroge Waweru, an economist presented his views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that:

- i). He supports the nomination of Dr. Willy Mutunga for CJ because of his competence in jurisprudence and he is a reform minded person with a capacity of being independent.
- ii). He supports the nomination of Ms. Nancy Baraza for Deputy Chief Justice as she is independent and reform minded and has competence in jurisprudence.

8. Peter Antony Wambua

Mr. Peter Wambua, the National Chairman of Political Detainees, presented his views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that:-

- i). He supports the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza as they are simple, understanding and assist in human rights issues, and that the ear stud by Dr. Mutunga had nothing to do with his sexuality. *(He tabled a photograph of his grandfather adorning an ear stud).*
- ii). He does not support the nomination of Mr. Keriako Tobiko as the process of nomination was not transparent.

9. Joseph Towett

Mr. Joseph Towett representing the Ogiek Council of Elders presented his views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he supports all the nominees as they are highly qualified and underwent through a competitive process and they will restore institutional confidence.

Mr. Paul Chepsoi presented his views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he had confidence in Dr. Willy Mutunga as he did not have historical ties and would dispense justice without fear or favour.

11. Okoch Mondoh

Mr. Okoch Mondoh, Chairperson Kenya Leadership Trust, presented his views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that:-

- i). He opposes the nomination of Dr. Willy Mutunga and Nancy Baraza as it violates Article 166 of the Constitution and Part V of the Judicial Service Act and that further they have funded and supported homosexual activities (*He tabled a book titled 'Sex Matters' containing a report of the Naivasha meeting that was attended among others Dr. Willy Mutunga*).
- ii). There will be danger if Dr. Willy Mutunga and Ms. Nancy Baraza are appointed to office as they are likely to advance liberal agenda against the conservative majority.
- iii). Ms. Nancy Baraza has been openly intolerant to conservative views on family and during her tenure as a member of CKRC she threw him out of a public session in Kakamega Golf Hotel in 2005.

12. Hon. Gitu wa Kahengeri, OGW

Hon. Gitu wa Kahengeri, presented his views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he supports the three nominees and that:-

- i). He had known Dr. Willy Mutunga for a long time as a staunch freedom fighter who has fought with blood to liberate Kenya.
- ii). Dr. Mutunga is not a tribalist and believes in constitutionality and will ensure that justice is done or seen to be done.
- iii). Ms. Nancy Baraza is one of the persons who spoke against dictatorship and for a long time defended and advanced the rights of women.

13. Laurence Mbelati (MPIDO)

Mr. Laurence Mbelati representing the Manyoto Pastoralist Integrated Development Organization (MPIDO) presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he supports the nomination of Mr. Keriako Tobiko as it followed the due process, represents the marginalized community and that allegations leveled against him by Prof. Ghai were of personal nature.

14. Joseph Osokoni Ole-Kishau

Mr. Joseph Osokoni Ole-Kishau representing the Maasai Community of Naivasha, presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he supports the nomination of Mr. Keriako Tobiko as it reflects

the face of Kenya by including minorities and that allegations leveled against him by Prof. Ghai were of personal nature.

15. Leah Naikanae

Ms. Leah Naikane of League of Women Pastoralists, presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that she supports the nomination of Mr. Keriako Tobiko as he scored the highest marks during the interviews and his appointment reflects the face of Kenya and that allegations leveled against him by Prof. Ghai were of personal nature.

16. Hassan Shano

Mr. Hassan Shano of the Waso Trust land Isiolo, presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he supports the nomination of Mr. Keriako Tobiko as it reflected the face of Kenya by including minorities and that allegations leveled against him by Prof. Ghai were of personal nature.

17. Mathew Okwanda

Mr. Mathew Okwanda of the National Elders Council presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he supports the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza as they are highly qualified, will clear the mess in the judiciary and restore institutional confidence.

18. Peter Waiyaki

Mr. Peter Waiyaki, an advocate, presented a memorandum and views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that:-

- i). He supports the nomination of Mr. Keriako Tobiko as the position of DPP is a new position thus Mr. Tobiko should not be judged on the basis of saying that he has held the office before. However, the process of his nomination was not transparent.
- ii). He does not support the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza as the entire process of appointment of the nominees to the was flawed and unconstitutional and argued that Article 166 of the Constitution demanded that the president was to receive a list from which he was to choose a suitable candidate to the position. He further argued that the nominees did not meet the requisite criteria of high moral character despite their high academic qualifications. He stressed that public morality extends to how we conduct ourselves in our private life.
- iii). In not supporting the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza, Mr. Waiyaki stated that the nominees have associated themselves with and supported persons and groups associated with homosexuality and abortion.

(Lunch break at 1.30 p.m)

PRESENT:

1. The Hon. Hussein Mohammed Abdikadir, M.P.
2. The Hon. Millie Odhiambo, M.P.
3. The Hon. Beth Mugo, EGH, M.P.
4. The Hon. Martha Wangari Karua, EGH, M.P.
5. The Hon. (Dr.) Kilemi Mwiria, M.P.
6. The Hon. Ababu Namwamba, M.P.
7. The Hon. Lucas K. Chepkitony, M.P.
8. The Hon. Amina Abdalla, M.P.
9. The Hon. Rachel Shebesh, M. P.
10. The Hon. Cecily Mbarire, M.P.
11. The Hon. David M. Ngugi, M.P.
12. The Hon. Ekwee Ethuro, M.P.
13. The Hon. Sophia Abdi, M.P.
14. The Hon. Moriasi Ombui, M.P.
15. The Hon. (Dr.) Eseli Simiyu, M.P.
16. The Hon. (Dr.) Joyce Laboso, M.P.
17. The Hon. John Mbadi, M.P.
18. The Hon. Charles Kilonzo, M.P.

Chairperson
Vice-Chairperson

ABSENT WITH APOLOGY

1. The Hon. Benedict Fondo Gunda, M.P.
2. The Hon. Charles Onyancha, M.P.
3. The Hon. Joseph Kasaine Nkaiserry, M.P.

ABSENT

1. The Hon. Chirau Ali Mwakwere, EGH, M.P.
2. The Hon. (Prof.) Phillip Kaloki, M.P.
3. The Hon. Danson Mwazo, M.P.
4. The Hon. Alfred Khang'ati, M.P.
5. The Hon. Elizabeth Ongoro, M.P.
6. The Hon. Rev. Julius Murgor, M.P.

IN ATTENDANCE

1. Hon. John Pesa, MP
2. Ms. Eunice Gichangi
3. Mr. Zakayo Mogere
4. Mrs. Rebecca Tonkei
5. Mr. Oscar Namulanda
6. Ms. Annette Bosibori
7. Ms. Judy Thogori
8. Ms. Mercy Wangeci

NATIONAL ASSEMBLY

- Member of Parliament
- Senior Legal Counsel
- Second Clerk Assistant
- Research Officer I
- Third Clerk Assistant
- Parliamentary Intern
- Parliamentary Intern
- Parliamentary Intern

MIN. NO. 045/2011: PUBLIC HEARINGS ON THE SUITABILITY OF NOMINEES TO THE OFFICES OF CHIEF JUSTICE, DEPUTY CHIEF JUSTICE AND DIRECTOR OF PUBLIC PROSECUTIONS

The public hearings resumed with the following persons making representations:-

19. Clement Isaiah Lenachuru

Mr. Clement Lenachuru of Liachames Development & Human Rights Organization, presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he supports the appointment of all the nominees as they were duly nominated and are qualified and particularly Mr. Tobiko who represents the marginalized community.

20. Dickson Kipkemoi Rotich

Mr. Dickson Rotich of Sengwer, presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that he supports the appointment of all the nominees as they were duly nominated and are qualified.

21. Gladwel Otieno

Ms. Gladwel Otieno of Kenyans for Peace with Truth and Justice (KPTJ), presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that her opposition to Mr. Tobiko's appointment on the following grounds:-

- i). That the process of nomination was unconstitutional and not transparent as the interview panel failed to include public participation.
- ii). That as a Deputy Public Prosecutor in the Attorney General's office, Mr. Tobiko performed his role incompetently or in a manner that did not protect public interest. She gave examples of the Goldenberg case involving Prof. George Saitoti and the fraud case against Hon. W. Ruto.
- iii). That the nominee does not meet constitutional standards of high moral character, integrity and impartiality. She gave examples to the effect that:-
 - a) The nominee was named in the Ndung'u report as having illegally acquired land in Mau forest.
 - b) The nominee interfered with the prosecution of Criminal Case No. 2157 of 2003 (Republic Vs Livingstone Ole Ntutu)
 - c) There is bound to be conflict of interest if the nominee is appointed as he has acted as counsel in some cases which are not yet determined.

22. George Kegoro

Mr. George Kegoro of Kenyans for Peace with Truth and Justice (KPTJ), presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated his support for the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza as they were qualified and reform minded and that:-

- i). There was no problem in the JSC nominating one person for the position as the law did not specify the number and the President did not complain about the number of nominees.

that the nominees are of high moral standings and should not be judged by the offence of the clients, organizations they have worked for or research they are doing.

- iii). One does not need to have previous judicial experience to be appointed into office. He gave examples of Justice Maluki Kitili Mwendwa in 1968, Justice Zaccheus Chesoni in 1997, Justice Bernard Chunga in 1999, Justice Arthur Chaskalson of South Africa in 1994, Justice Earl Warren of the USA in 1953, Justice Michael de la Bastide of Trinidad and Tobago in 1995, Justice Geoffrey Ma of Hong Kong in 2010, and Justice Ian Malcom MacKeigan of Nova Scotia in Canada in 1973.

23. Dina Agai Simbiri

Ms. Dina Agai Simbiri, President of Bunge la Wananchi, presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated her support for the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza as they are qualified and reform minded and would turn the judiciary around.

24. Juliet Makokha

Ms. Juliet Makokha of Women Political Alliance (Kakamega) presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated her support for all the nominees as persons who would introduce radical reforms in the judiciary and redeem its image as they are all persons of high integrity, qualifications and reform minded.

25. Hajja Fatma Abeyd Anyanzwa

Ms. Fatma Abeyd presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated her support for all the nominees as persons who have brought reforms and fought for the rights of the poor and marginalized and that issues of sexuality should not be used to bar one from holding office.

26. Hon. Otieno K'opiyo

Hon. Otieno K'opiyo presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated that:-

- i). He supports the nomination of Dr. Willy Mutunga as he has known him for a long time as reform minded and of high moral integrity and fits well into the position that he has been nominated to.
- ii). He does not support the nomination of Mr. Keriako Tobiko as the process of nominating him was not transparent and the fact that he has been in office without any significant reforms attributed to him.

27. Beatrice Kamau

Ms. Beatrice Kamau of SOREC presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated her support for all the nominees as persons who are fit to hold the respective offices. She also stated that there is no dress code in Kenya and as such Dr. Mutunga should not be victimized and that Mr. Tobiko should not be blamed for the opaque nomination process as he was not in charge of the process.

28. Olga Karani

Ms. Olga Karani of the Christian Women of Kenya presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated her opposition to the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza questioning their views and beliefs on moral, religious and family values. She claimed that the nomination of the two contravened Article 166 of the Constitution as the nominees are divorced and support homosexuality and abortion.

29. Bishop David Oginde

Bishop Oginde of the Christ is the Answer Ministries presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated his reservations on the nomination of Dr. Willy Mutunga questioning his views and beliefs on moral, religious and family values. He expressed fears that the nominee's beliefs could guide the judiciary into eventually legalizing homosexual marriages as was the case in South Africa. Further, he claimed that the nomination process by the JSC was stage managed to pick predetermined candidates and this led to the harassment of sitting judges.

30. Fr. Ferdinand Lugonzo

Fr. Lugonzo of the Catholic Church presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated his opposition to the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza questioning their views and beliefs on moral, religious and family values. He claimed that the nomination of the two contravened Articles 166 and 167 of the Constitution as the nominees are divorced and support homosexuality and abortion. Further, it was claimed that from their value systems they will be impediments in giving direction to the young people of Kenya.

31. Betty Murungi

Ms. Betty Murungi, a lawyer and former Executive Director of Urgent Action Fund presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated her support to the nomination of Dr. Willy Mutunga and Ms. Nancy Baraza and absolved them from the organization of the Naivasha meeting of 4th – 5th June, 2007. She confirmed to the Committee that she (Urgent Action Fund) was the organizer of the Naivasha workshop that discussed a broad range of sexual reproductive health and rights issues that impact on the management of HIV/Aids in East Africa. Issues discussed include unsafe abortion, sexual violence, Human Rights and the place of sexual minorities, youth sexuality, sex workers, place of culture in the sexuality discourse and HIV/AIDS Programming.

She also confirmed that Dr. Willy Mutunga and Ms. Nancy Baraza did not make presentations at the meeting.

32. William Ombese

Mr. William Ombese of the Federation of Primary/Secondary Schools Parents Association presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated his support to the nomination of Dr. Willy Mutunga because of his views on sexuality and pleaded with him to remove the ear stud before assuming office.

33. Harrison Kinyanjui

of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated his opposition to the nomination of Dr. Willy Mutunga and Ms. Nancy-Baraza claiming that the nomination process was unconstitutional as the JSC only nominated one person for the position yet they (JSC) did not have a role to play in the process.

He also informed the Committee that he has filed a case in court to challenge the process.

34. Michael Mungai

Mr. Michael Mungai, a FORD-K official from Embakasi, presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated his opposition to all the three nominees stating that:-

- i). Dr. Willy Mutunga and Ms. Nancy Baraza did not have the requisite experience to head the judiciary
- ii). Mr. Keriako Tobiko is ineffective and negligent in his current assignment and has abetted corruption in prosecuting of cases.

35. Prof. Ngotho Kariuki

Prof. Ngotho Kariuki presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated his support to all the three nominees stating that he had been detained together with Dr. Mutunga and this interfered with his family. On the nomination process for the DPP, he stated that it was not Mr. Tobiko's mistake.

36. Kavetsa Adagala

Ms. Kavetsa Adagala of SAYARI presented views on the suitability of the nominees to the offices of Chief Justice, Deputy Chief Justice and Director of Public Prosecutions and stated her support to all the three nominees who are known to her personally having worked together in different assignments. She described all the three nominees as hardworking persons who have contributed enormously to the wellbeing of the nation including sacrificing their families.

MIN. NO. 046/2011: ADJOURNMENT

There being no Any Other Business, the Chairperson adjourned the meeting at Fifteen Minutes past Seven O'clock until Tuesday 7th June, 2011 at 9.00 a.m.

SIGN:.....

(CHAIRPERSON)

DATE: 14/06/2011.....

PRESENT:

1. The Hon. Hussein Mohammed Abdikadir, M.P. Chairperson
2. The Hon. (Prof.) Phillip Kaloki, M.P.
3. The Hon. Martha Wangari Karua, EGH, M.P.
4. The Hon. Ababu Namwamba, M.P.
5. The Hon. Joseph Kasaine Nkaiserry, M.P.
6. The Hon. Lucas K. Chepkitony, M.P.
7. The Hon. Charles Kilonzo, M.P.
8. The Hon. Amina Abdalla, M.P.
9. The Hon. Rachel Shebesh, M. P.
10. The Hon. Benedict Fondo Gunda, M.P.
11. The Hon. Moriasi Ombui, M.P.
12. The Hon. (Dr.) Eseli Simiyu, M.P.
13. The Hon. John Mbadi, M.P.
14. The Hon. (Dr.) Joyce Laboso, M.P.

ABSENT WITH APOLOGY

The Hon. Millie Odhiambo, M.P. Vice-Chairperson

ABSENT

1. The Hon. Chirau Ali Mwakwere, EGH, M.P.
2. The Hon. Beth Mugo, EGH, M.P.
3. The Hon. Charles Onyancha, M.P.
4. The Hon. Sophia Abdi, M.P.
5. The Hon. (Dr.) Kilemi Mwiria, M.P.
6. The Hon. Alfred Khang'ati, M.P.
7. The Hon. Cecily Mbarire, M.P.
8. The Hon. Ekwee Ethuro, M.P.
9. The Hon. David M. Ngugi, M.P.
10. The Hon. Elizabeth Ongoro, M.P.
11. The Hon. Rev. Julius Murgor, M.P.
12. The Hon. Danson Mwazo, M.P.

IN ATTENDANCE

NATIONAL ASSEMBLY

- | | | |
|------------------------|---|------------------------|
| 1. Ms. Eunice Gichangi | - | Senior Legal Counsel |
| 2. Mr. Zakayo Mogere | - | Second Clerk Assistant |
| 3. Mrs. Rebecca Tonkei | - | Research Officer I |
| 4. Mr. Oscar Namulanda | - | Third Clerk Assistant |

MIN. NO. 040/2011: PRELIMINARIES

The meeting was opened with a word of prayer.

MIN. NO. 041/2011: DELIBERATIONS ON THE STATUS OF THE CONSTITUTION IMPLEMENTATION PROCESS

The Chairman informed the Committee that the stalemate in the process of vetting nominees to the offices of Chief Justice, Deputy Chief Justice and the Director of Public Prosecutions had been discussed in the House Business Committee and resolved that the Speaker issue Communication committing the nominees to the Constitutional Implementation Oversight Committee for vetting.

Members welcomed the resolution on the matter and resolved that after the Speaker Communication, letters be sent to the nominees, namely, Dr. Willy Munywoki Mutunga for the position of Chief Justice, Ms. Nancy Makokha Baraza, for the position of Deputy Chief Justice and Mr. Keriako Tobiko for the position of Director of Public Prosecutions asking them to appear before the Committee for interview on Monday 6th June, 2011 at 2.00 pm. Further, it was resolved that Section 30 (1) and the Second Schedule to the *Commission for the Implementation of the Constitution Act, 2010* be attached to the letters for action by the nominees.


It was also resolved that the Committee will hold a press conference and appeal to members of the public who may have representations on the nominees to make them to the Committee on Monday 6th June, 2011 starting 8.30 am.

The Committee noted that with the passage of the Independent Electoral and Boundaries Commission Bill, 2011 and the Salaries and Remuneration Commission Bill, 2011, the only bill relating to the implementation of the Constitution, before the House was the Supreme Court Bill, 2011. Consequently, Members took issue with the *Madaraka* Day speeches by H.E. the President and the Rt. Hon. Prime Minister on the need for Parliament to hasten the process of implementing the Constitution.

Members noted that the blame for the slow rate of implementation of the Constitution lay elsewhere as bills have not been published as agreed during the meeting with Commission for the Implementation of the Constitution, the Attorney General and line ministries. The Committee resolved to state its mandate to the public for information.

MIN. NO. 042/2011: ADJOURNMENT

There being no Any Other Business, the Chairperson adjourned the meeting at Ten Minutes past Ten O'clock.

SIGN:.....


(CHAIRPERSON)

DATE: 14/06/2011.....

PRESENT:

1. The Hon. Hussein Mohammed Abdikadir, M.P. Chairperson
2. The Hon. Joseph Kasaine Nkaiserry, M.P.
3. The Hon. Lucas K. Chepkitony, M.P.
4. The Hon. Charles Kilonzo, M.P.
5. The Hon. Ekwere Ethuro, M.P.
6. The Hon. Amina Abdalla, M.P.
7. The Hon. Rachel Shebesh, M. P.
8. The Hon. Benedict Fondo Gunda, M.P.
9. The Hon. Cecily Mbarire, M.P.
10. The Hon. Moriasi Ombui, M.P.
11. The Hon. Alfred Khang'ati, M.P.
12. The Hon. (Dr.) Kilemi Mwiria, M.P.
13. The Hon. (Dr.) Eseli Simiyu, M.P.
14. The Hon. John Mbadi, M.P.

ABSENT WITH APOLOGY

1. The Hon. Millie Odhiambo, M.P. Vice-Chairperson
2. The Hon. Chirau Ali Mwakwere, EGH, M.P.
3. The Hon. (Dr.) Joyce Laboso, M.P.
4. The Hon. Charles Onyancha, M.P.
5. The Hon. Sophia Abdi, M.P.

ABSENT

1. The Hon. David M. Ngugi, M.P.
2. The Hon. Beth Mugo, EGH, M.P.
3. The Hon. Martha Wangari Karua, EGH, M.P.
4. The Hon. Elizabeth Ongoro, M.P.
5. The Hon. Ababu Namwamba, M.P.
6. The Hon. Rev. Julius Murgor, M.P.
7. The Hon. (Prof.) Phillip Kaloki, M.P.
8. The Hon. Danson Mwazo, M.P.

IN ATTENDANCE

1. Ms. Eunice Gichangi
2. Mr. Zakayo Mogere
3. Mr. Oscar Namulanda

NATIONAL ASSEMBLY

- Senior Legal Counsel
- Second Clerk Assistant
- Third Clerk Assistant

MIN. NO. 037/2011: PRELIMINARIES

The meeting was opened with a word of prayer.

MIN. NO. 038/2011: DELIBERATIONS ON THE STATUS OF THE CONSTITUTION IMPLEMENTATION PROCESS

The Chairman informed the Committee that the process of implementing the Constitution is under threat following the stalemate in the operations of the Departmental Committee on Justice and Legal Affairs. He sought views from the Members on the way forward in ending the stalemate.

Members noted that the problems facing the Justice and Legal Affairs Committee are political and thus need a political settlement. It was also noted that Parliament had not started vetting nominees to the office of Chief Justice, Deputy Chief Justice and the Director of Public Prosecutions. The Committee resolved to deliberate and have one position that will be presented to the Members' *Kamukunji* on Thursday 26th May, 2011 at 11.30 am.

At 12.10 pm, the Committee also resolved to continue with the meeting in camera.

(Meeting resumed at 12.45 pm)

The meeting was informed that the Committee had resolved to form a sub-committee to look into the issues causing a stalemate in the operations of the Departmental Committee on Justice and Legal Affairs with a view to finding a solution. The Members of the sub-committee are:-

- i) Hon. Rachel Shebesh, MP
- ii) Hon. (Dr.) Kilemi Mwiria, MP
- iii) Hon. Joseph Nkaissery, MP
- iv) Hon. Cecil Mbarire, MP
- v) Hon. John Mbadi, MP
- vi) Hon. Moriasi Ombui, MP
- vii) Hon. Fondo Gunda, MP
- viii) Hon. Ekwee Ethuro, MP

The Committee noted that the stalemate needed a political settlement and that in the spirit of negotiations that led to the election of Hon. Ababu Namwamba and Hon. Abdikadir Mohamed as Chairperson of Justice and Legal Affairs Committee and the Constitutional Implementation Oversight Committee respectively, the new chairperson of the Justice and Legal Affairs should be a member from the ODM party who is acceptable to the party leadership.

It was stated that members are opposed to the formation of an *Ad-hoc committee* to vet the three (3) nominees to the judicial offices. Instead, it was resolved that members will attend the members' *Kamukunji* and propose that a joint sitting of the CIOC and Justice and Legal Affairs Committees be tasked with the vetting of the nominees to the judicial offices.

MIN. NO. 039/2011: ADJOURNMENT

There being no Any Other Business, the Chairperson adjourned the meeting at Fifty Five Minutes past Twelve O'clock.

SIGN:.....

(CHAIRPERSON)

DATE:.....14/06/2011.....