



REPUBLIC OF KENYA

TWELFTH PARLIAMENT – THIRD SESSION

THE SENATE

VOTES AND PROCEEDINGS

WEDNESDAY, SEPTEMBER 25, 2019 AT 2.30 P.M.

1. The Senate assembled at thirty minutes past Two O'clock.
2. The Proceedings were opened with Prayer said by the Speaker.
3. **COMMUNICATIONS FROM THE CHAIR**

The Speaker conveyed the following Communications from the Chair: -

(i) Visiting Delegation of the Committee on Humanitarian and Social Issues of the FP-ICGLR

“Honourable Senators,

The Forum of Parliaments of Member States of the International Conference on the Great Lakes Region (FP-ICGLR) is an inter-parliamentary organization composed of 12 Member States including the Republic of Angola, the Republic of Burundi, the Central African Republic, the Republic of Congo, the Democratic Republic of Congo, the Republic of Kenya, the Republic of Rwanda, the Republic of South Sudan, Republic of the Sudan, the United Republic of Tanzania, the Republic of Uganda and the Republic of Zambia.

The mission of the Forum of Parliaments of the ICGLR, in line with the “Pact on Security, Stability and Development in the Great Lakes Region”, is to promote, maintain and strengthen peace and security in the Great Lakes Region.

The FP-ICGLR, in collaboration with the Senate, is holding a three-day meeting of the Committee on Humanitarian and Social Issues of the forum in Nairobi, from 24th to 26th September, 2019. The Committee will be discussing, among other issues, Sustainable Development Goal (SDG) 3 on healthy lives and promotion of wellbeing for all at all ages, undertake a review of public health systems and performance assessment in each Member State, share best practices and lessons learnt in public health management; and the role of Parliaments in improving health systems in Member States of the ICGLR.

Honourable Senators,

This afternoon, we are joined by the Members of the Committee on Humanitarian and Social Issues who are in Nairobi for this important meeting. They are seated in the Speaker's Gallery. I request each member of the Committee to stand when called out so that you are recognized in the Senate tradition. They are –

- 1) Hon. Marguerite Nyagahura , MP – President of the Committee and a Member of Parliament from Rwanda;
- 2) Hon. Ildephonse Bigirindavyi, MP –Vice-President of the Committee and a Member of Parliament from the Republic of Burundi;
- 3) Senator Jacqueline Solange Moundzalo , MP, from the Republic of Congo (Brazzaville);
- 4) Hon. Christine Ishengoma, MP, from the United Republic of Tanzania; and
- 5) Hon. Bondjo Maxime, MP, from the Central African Republic;

The Committee is accompanied by the following officials from the FP-ICGLR Headquarters–

- 1) Hon. (Amb.) Onyango Kakoba – Secretary General of the FP-ICGLR;
- 2) Ms. Winnie Kamau - Program Manager, Economic Development, Regional Integration and Social Issues; and
- 3) Ms. Jeni Botha – Personal Assistant to the Secretary General.

Honourable Senators,

It is my hope that the recommendations arising from this meeting will go a long way in influencing policies that will benefit the people of the Great Lakes Region. On behalf of the Senate and on my own behalf, I welcome the delegation to the Senate and wish you fruitful deliberations.

I thank you.”

(ii) Visiting Delegation from the Migori County Assembly

“Honourable Senators,

I would like to acknowledge the presence, in the Speaker's Gallery this afternoon, of a delegation of Members and officers from the Migori County Assembly.

The delegation is in the Senate to undertake a benchmarking visit on the operations of committees and specifically with the Sessional Committee on Delegated Legislation. I request each Member of the delegation to stand so that you may be acknowledged in the Senate Tradition.

They are:-

- 1) Hon. David Chacha Mathews - Chairman
- 2) Hon. Samwel Orima - Vice chairman
- 3) Hon. Kevince Keke - Chief whip
- 4) Hon. Edward Ouma - Member
- 5) Hon. Monica Otieno - ”

6) Hon. Elizabeth Tala	-	Member
7) Hon. Ruth Atieno	-	”
8) Hon. Doreen Dande	-	”
9) Hon. Clarice Oyoo	-	”
10) Hon. Leonard Lot	-	”
11) Hon. George Owiti	-	”
12) Hon. Graham Kagali	-	”
13) Hon. Samwel Rioba	-	”
14) Hon. Francis Migori	-	”
15) Hon. Christine Bihita	-	”
16) Hon. Patrick Aran Aran	-	”
17) Hon. Judith Gad	-	”
18) Hon. Grace Odhiambo	-	”
19) Hon. Peter Mijungu	-	”
20) Ms. Lydia Oruko	-	Clerk delegated
21) Ms. Vincencia Awino	-	Snr. Clerk
22) Mr. Alcent Matiku	-	Clerk asst.
23) Mr. Edward Odera	-	Sergeant
24) Ms. Angela Nsato	-	Hansard

On behalf of the Senate and on my own behalf, I welcome you to the Senate and I wish you well for the remainder of the visit.

I thank you”.

(iii) Processing and Passage of the Division of Revenue Bill and the County Allocation of Revenue Bills.

“Honourable Senators,

As you may recall, at a sitting of the Senate held on 17th September, 2019, I reported to the Senate a Message from the National Assembly on the decision of the National Assembly on the Mediated Version of the Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019.

After reading the Message, a number of Senators rose on points of order seeking clarification on the process leading to the assent of the said Bill. The Senators included Sen. James Orengo, Sen. (Eng.) Mohamed Mahamud, Sen. Moses Kajwang’, Sen. Moses Wetang’ula, Sen.(Eng.) Hargura Godana, Sen. Cleophas Malalah, Sen. Farhiya Haji, Sen. Mutula Kilonzo Jnr., Sen. Ledama Olekina, Sen. Reubenson Kibiru, Sen. Aaron Cheruiyot, Sen. (Prof.) Samson Ongeri, Sen. George Khaniri, Sen. (Dr.) Abdullahi Ali, Sen. Naomi Shiyonga, Sen. Isaac Mwaura, Sen. Abshiro Halake and Sen. Ochillo Ayacko.

I, thereafter, gave an undertaking that I would give a comprehensive report on the activities that took place prior to the Assent of the Bill. From the points of order raised, the following issues arose-

- (i) Was there a report of the Mediation Committee on the Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019?

- (ii) If there was a report of the Mediation Committee, which one was it? The one tabled in the National Assembly or in the Senate?
- (iii) Was the Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019 validly assented to?
- (iv) What is the procedure for transmission of Bills passed by both Houses for assent?

Honourable Senators,

Before I address these issues, I shall give a brief background of the process leading to the assent of the Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019. This process commenced with the publication, by the National Assembly, of the Division of Revenue Bill, National Assembly Bills, No. 11 of 2019. The Bill set the equitable share of revenue for the County Governments at Kshs. 310 Billion, a drop by Kshs. 4 Billion from the allocation of Kshs. 314 Billion for the Financial Year 2018/2019. This Bill was passed, without amendments, by the National Assembly and referred to the Senate for concurrence. The Senate passed the Bill, with amendments, to provide for an allocation of Kshs. 335.7 Billion to the County Governments.

The National Assembly rejected the amendments of the Senate and the Bill proceeded to mediation pursuant to Article 113 of the Constitution. The mediation process collapsed. This led the Senate to publish a fresh Bill, the Division of Revenue Bill, Senate Bills No. 13 of 2019, providing for an amount of Kshs. 335.67 Billion as the equitable share for the County Governments. The Senate passed the Bill and referred it to the National Assembly for concurrence. The National Assembly withdrew the Bill and did not consider it further.

The National Assembly proceeded to publish and pass a new Division of Revenue Bill, the Division of Revenue (No. 2) Bill, 2019 that set the equitable share of revenue for the County Governments at Kshs. 316.5 Billion. This Bill was referred to the Senate which proceeded to amend the Bill by-

- (i) increasing the equitable share to county governments from Kshs 316.5 billion to Kshs 335.67 billion;
- (ii) withdrawal of financing for the leasing of medical equipment; and
- (iii) the inclusion of an additional conditional allocation from development partners at the request of National Treasury.

Honourable Senators will recall that the National Assembly rejected the amendments of the Senate and the Bill was referred to a Mediation Committee.

The Mediation Committee concluded its sittings on 11th September, 2019. On the same day, Sen. (Eng.) Mohamed Mahamud, Vice-Chairperson of the Mediation Committee, tabled the Report of the Mediation Committee on the Division of Revenue Bill in the Senate while Hon. Kimani Ichung'wah, Chairperson of the Mediation Committee, tabled the same report in the National Assembly.

Honourable Senators,

Going back to the first issue that arose from the points of order which is whether there was a Report of the Mediation Committee on the Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019, the record is clear that there was indeed a report of the Mediation Committee that was signed by both the Chairperson and the Vice-Chairperson of the Mediation Committee and that was tabled in both Houses on the same day, 11th September, 2019. The Report as tabled in both Houses included a version of the Bill as agreed on by the Mediation Committee.

Honourable Senators,

The second issue that arose from the points of order is: which is the Report of the Mediation Committee? The one tabled in the National Assembly or that tabled in the Senate? The Hansard Record of the Senate indicates that on 11th September, 2019, while moving the Motion on the Adoption of the Report of the Mediation Committee on the Bill, the Chairperson of the Senate Standing Committee on Budget and Finance stated that the Bill, as adopted by the Mediation Committee, would come into force upon publication in the Gazette. The Chairperson however alluded to the fact there had been an attempt that morning, from some quarters, to provide for a retrospective commencement date in the Bill, so that the Bill would commence on 1st July, 2019. On account of the urgency in the division of revenue process, the Senate proceeded to debate and adopt the Motion on the Report of the Mediation Committee on the same day.

In the case of the National Assembly, the proceedings of the National Assembly of 12th September, 2019, which were later transmitted to the Senate, indicate that before adoption of the Mediation Committee Report, a Communication from the Chair was issued on the commencement date of the Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019 as adopted by the Mediation Committee. The Communication indicated that the Bill as contained in the Report of the Mediation Committee tabled in both Houses had a “slight variance” concerning clause 1 of the Bill as agreed upon by the Mediation Committee. The Communication stated that while clause 1 of the Bill as tabled in both Houses provided that the Bill would “come into force upon publication in the Gazette”, the report had been altered and that the Chairperson of the Mediation Committee had therefore “quashed the alteration” in the Report tabled in the National Assembly by way of a handwritten text authenticated by his signature. The text of the Bill as adopted by the National Assembly therefore provided for a commencement date of 1st July, 2019.

Honourable Senators,

Having heard the presentation by Sen. Mahamud and further having read the proceedings of the Report of the Mediation Committee, I found myself in an unprecedented situation where a Mediation Report is said to have been adopted by a Committee, signed by the Chairperson and the Vice-Chairperson of the Committee, tabled in both Houses on the same day and in the same form but eventually adopted in a different form in each House.

I therefore took the extra-ordinary step of calling for the audio recording and transcription of the proceedings of the meeting of the Mediation Committee together with the extracts of the relevant minutes. Having listened carefully to the audio recording and read the transcription and minutes thereof, I found that the proceedings of the Committee are, on the matter of the commencement date, inconclusive on the decision reached by the Committee and the intention of the Committee thereon.

We therefore find ourselves in a situation where the Report of the Mediation Committee as adopted by the Mediation Committee was considered and adopted by the National Assembly in a form otherwise than that which was adopted by the Committee and by the Senate in the form in which it was adopted by the Mediation Committee. Procedurally, should an issue arise on a report of a Mediation Committee or a Joint Committee during consideration in either of the Houses, the House in which the matter arises should remand the matter back to the Mediation Committee or Joint Committee for re-consideration. The rationale being that the report for consideration and adoption by the Houses must be tabled, considered and adopted in the same form. There is no opportunity for amendment or any form of correction of a report of a Mediation Committee or a Joint Committee once tabled in a House.

Honourable Senators,

As to the procedure for transmission of Bills, as I have indicated earlier, having passed their version of the Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019, the National Assembly proceeded to send the Senate a message, which I subsequently reported to the Senate on 17th September, 2019. On the same day, 17th September, 2019, the Bill as passed by the National Assembly was presented for assent and was duly assented to.

Honourable Senators,

The procedure for referring Bills for Presidential Assent is clearly set out under Articles 110(5) and 113(3) of the Constitution. Article 110(5) of the Constitution deals with the procedure when both Houses pass the Bill in the same form and provides that "If both Houses pass the Bill in the same form, the Speaker of the House in which the Bill originated shall, within seven days, refer the Bill to the President for assent."

Article 113(3) of the Constitution provides for the procedure for referring a version of the Bill proposed by a mediation committee for Presidential Assent and states that "If both Houses approve the version of the Bill proposed by the mediation committee, the Speaker of the National Assembly shall refer the Bill to the President within seven days for assent."

The Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019, being a version of a Bill proposed by a mediation committee, would fall within the procedure envisaged under Article 113(3) of the Constitution and would therefore be a Bill to be presented for assent by the Speaker of the National Assembly.

As a matter of practice, both Speakers and Clerks have usually certified a Bill which has been considered by both Houses. This however is not an obligation under any law but is good practice that has developed.

Honourable Senators,

So as to cure this procedural and legal lacuna, the Senate passed the Determination of the Nature of Bills (Procedure) Bill, Senate Bills No. 30 of 2018, which provides for a certificate of concurrence, where the Speakers and Clerks of both Houses certify that the Bill is a true copy of the version passed by either House or that the Speakers concurred where it is a Bill that does not concern county governments. The Bill is now pending in the National Assembly. When passed, this Bill will provide clarity and address this matter.

In relation to the issue arising from the point of order as to whether the Division of Revenue (No. 2) Bill, National Assembly Bills No. 59 of 2019 was validly assented to, in my view this cannot be answered conclusively at this point. A determination of validity of any law passed by Parliament cannot fall on one House or the Speaker of one House. It is for this reason that the Senate is in Court in High Court Petition No. 284 of 2019 seeking the Court's determination on the constitutionality of a number of Acts that in the opinion of the Senate were passed unconstitutionally. Pronouncing myself on this matter may therefore prejudice the fair determination of the court matter.

“Honourable Senators,

In conclusion, it is important to note that the protracted process of the enactment of the Division of Revenue Act, 2019 that the country has witnessed has come at a time when the country is engaging in a robust discourse on constitutional reform. It is my view that this reform should include a review of the Constitution to address the challenges relating to the legislative mandate and processes of both Houses so far identified in the process of implementing the Constitution.

I thank you”

(iv) Visiting students and teachers from St. Theresa Ithanga Secondary School, Murang'a County

“Honourable Senators,

I would like to acknowledge the presence, in the Public Gallery this afternoon, of visiting students and teachers from St. Theresa Ithanga Secondary School, Murang'a County.

On behalf of the Senate, and on my own behalf, I welcome them to the Senate and wish them well for the remainder of their stay.

I thank you.”

4. PAPERS LAID

The following Paper was laid on the Table of the Senate-

Report of the Standing Committee on Finance and Budget on the County Government's Cash Disbursement Schedules for Financial Year 2019/2020.

(Sen. Mutula Kilonzo Junior, MP, on behalf of the Chairperson, Standing Committee on Finance and Budget)

5. NOTICE OF MOTION - (Chairperson, Standing Committee on Finance and Budget)

THAT, pursuant to Section 17 of the Public Finance Management Act and Standing Order 183 of the Senate, this House approves the Report of the Standing Committee on Finance and Budget on the County Governments Cash Disbursement Schedule for Financial Year 2019/2020, laid on the Table of the House on Wednesday, 25th September, 2019.

6. STATEMENTS**(i) Pursuant to Standing Order 47(1)**

The Senator for Vihiga County (Sen. George Khaniri, MP) issued a Statement relating to the death of Ms. Annette Kabarika at the Vihiga County Referral Hospital on Monday, 16th September, 2019.

Thereupon, the Senator informed the Senate that Ms. Kabarika succumbed to injuries on Monday, 16th September, 2019 following admission at the Vihiga County Referral Hospital on 14th September, 2019. Following concerns over her demise, it was alleged that the hospital had demanded 4,500 shillings before performing a CT scan on the patient to ascertain the root of her ailment.

The Senator also noted that there were numerous cases of patients being required to pay certain amounts before being attended to in medical facilities in Vihiga County and around the country. He argued that such practices distort the intention of devolution, following the high level of investment in medical facilities around the country.

The Senator averred that Ms. Annette's case amounted to medical negligence and urged the Vihiga County Government to institute disciplinary action on the concerned staff at the hospital.

Following concerns raised by Senators on the Statement, the Deputy Speaker referred the matter to the Standing Committee on Health, pursuant to Standing Order 47 (3), and directed that the Committee reports to the House within two weeks.

(ii) Pursuant to Standing Order 48(1)

- a) Nominated Senator (Sen. Millicent Omanga, MP) sought a statement from the Standing Committee on Education regarding the fatalities caused by the collapse of a classroom at Precious Talent School in Dagoretti South, Nairobi City County.
- b) The Senator for Taita Taveta County (Sen. Johnes Mwaruma, MP) sought a Statement from the Standing Committee on Land, Environment and Natural Resources regarding land adjudication and allocation in Mabomani area and upper Sofia in Voi Sub-county in Taita Taveta County.

7. THE PUBLIC FINANCE MANAGEMENT (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 63 OF 2019)

Order for First Reading read;

Bill read a First Time and Committed to the Standing Committee on Finance and Budget.

8. MOTION – APPROVAL OF THE COUNTY GOVERNMENTS CASH DISBURSEMENT SCHEDULE FOR FINANCIAL YEAR 2019/20

Order read;

Motion made and Question proposed;

THAT, pursuant to Section 17 of the Public Finance Management Act and Standing Order 183 of the Senate, this House approves the Report of the Standing Committee on Finance and Budget on the County Governments Cash Disbursement Schedule for Financial Year 2019/2020, laid on the Table of the House on Wednesday, 25th September, 2019.

(Sen. Mutula Kilonzo Jnr, MP, on behalf of the Chairperson, Standing Committee on Finance and Budget)

Debate arising;

There being no other Senator wishing to contribute;

Mover replied;

Rising on a Point of Order, pursuant to Standing Order 61(3), the Senator for Makueni County (Sen. Mutula Kilonzo Jnr, MP) requested for the deferment of the putting of the Question to a later date.

And the Deputy Speaker, acceding to the request, nominated Thursday, 26th September, 2019 as the date when the Question shall be put.

9. THE ESTABLISHMENT OF CHILDREN'S HOMES BILL (SENATE BILLS NO. 12 OF 2019)

Order for Second Reading read;

Motion made and Question proposed;

THAT, the Establishment of Children's Homes Bill (Senate Bills No. 12 of 2019) be now read a Second Time.

(Sen. (Dr.) Agnes Zani, MP)

Debate arising;

And the time being thirty minutes past Six O'clock, the Deputy Speaker interrupted the proceedings and adjourned the Senate without Question put, pursuant to the Standing Orders.

10. SENATE ROSE - at thirty minutes past six O'clock.

M E M O R A N D U M

*The Speaker will take the Chair on
Thursday, September 26, 2019 at 2.30 p.m.*

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