

REPUBLIC OF KENYA



TWELFTH PARLIAMENT– (THIRD SESSION) THE NATIONAL ASSEMBLY

COMMUNICATION FROM THE CHAIR

_____ (No. 57 of 2019) _____

ON THE ACCOUNTABILITY OF THE EXECUTIVE TO PARLIAMENT AND THE PLACE OF THE CHIEF ADMINISTRATIVE SECRETARIES IN RESPONDING TO QUESTIONS IN THE NATIONAL ASSEMBLY

Honourable Members,

You will recall that, on Tuesday 8th October, 2019, and during the statement hour, the Hon. Didmus Barasa, MP, the Member for Kimilili, rose in his place on a Point of Order, seeking the direction of the Speaker on the admissibility of answers to Parliamentary Questions from the Executive given by the Chief Administrative Secretaries. For clarity the Member for Kimilili stated as follows in part –

"...today morning, I appeared before the Departmental Committee on Health to get a reply to a question I had asked, I refused the reply because it was coming from a Chief Administrative Secretary, a person who is not in the Constitution!"

According to the Member for Kimilili, a Chief Administrative Secretary, popularly known as CAS, is unknown to both the Constitution and the Standing Orders of this House.

By this argument, the Member for Kimilili was advancing the argument that accountability of the Executive to Parliament, particularly with respect to

answering any questions relating to matters under the jurisdiction of any of the line Ministries, could only be enforced if appearances before the Committees of the House is restricted to the responsible Cabinet Secretaries and Principal Secretaries.

Honourable Members, the issue raised by the Member attracted immense interest from other Members who sought to canvass on the matter. As your Speaker, I was inclined to permit few of you to ventilate on the matter. This included the Leader of the Majority Party (Hon. Aden Duale), the Leader of the Minority Party (Hon. John Mbadi), the Minority Party Whip (Hon. Junet Mohammed), the Hon. William Cheptumo, the Hon. David Ochieng, the Hon. Kimani Ichung'wah, the Hon. (Prof.) Jacqueline Oduol, the Hon. Amos Kimunya, the Hon. Katoo Ole Metito, the Hon. David Ole Sankok, the Hon. Martin Owino, and the Hon. David Pkosing.

Having considered the various views of the Members who spoke on the matter, I undertook to give a comprehensive direction on the matter and also guide the House on the way forward. In this regard, I have isolated the following two issues as requiring my determination—

- 1. Whether accountability of the Executive to the National Assembly with regard to responding to any questions before a Committee of the House in terms of Article 153(3) of the Constitution and Part IXA of Standing Orders is an exclusive function of Cabinet Secretaries or may be delegated to Chief Administrative Secretaries or other officials in the line Ministries; and,*
- 2. Whether the establishment of the Offices of Chief Administrative Secretaries and subsequent appointment of holders of those Offices offends the Constitution or in any way affects the transaction of business of the House in our Committees.*

Honourable Members, before I guide the House on those questions, it is important to appreciate that, these questions are arising in a phase of governance different from which preceded the promulgation of the Constitution of Kenya on 27th August 2010. As you may be aware, the Constitutional dispensation birthed in 2010 was a shift in the architecture of governance and the nature of the operations of the Legislature and its relationship with the other two arms of government. This shift especially affected the composition and relationship between the Legislature and the Executive, as for the first time in the country's history, no Member of the Executive partakes in the debates and other affairs of either House of Parliament through membership to Parliament.

Honourable Members, as the "Father of the House", the Hon. Jimmy Ang'wenyi, who was also a Member of the 8th and 9th Parliaments, and other ranking Members of this House who served in the 10th and other preceding Parliaments would attest, the presence of the Executive in the Legislature was a unique hallmark of accountability in Parliaments preceding the promulgation of the new Constitution. Article 95(2) of the Constitution provides that "*the National Assembly deliberates on and resolves issues of concern to the people.*" Under this Article, the House is mandated to hold the Executive to account. Among other avenues, this oversight role ordinarily relies on Questions raised by Members, both in their individual and representative capacities as well on the basis of matters arising from undertakings and assurances made by the Executive to the House.

Across Parliaments, Parliamentary Questions enable Parliament to access relevant, timely and actionable answers or information from the Executive to

enable it effectively discharge its mandate. Question Time under the previous dispensation was an active process on the floor of the House, where both the Questioners and the responsible Ministers were present in the House and Supplementary Questions could be raised and either be answered promptly or appropriate assurances or undertakings be made during that sitting.

Honourable Members, Question Time was not only popular to Members but also the general citizenry, who could watch and hear as their representatives put their government to task over issues of concern to them and receive prompt pertinent responses and undertakings on record. This changed at commencement of the Eleventh Parliament, the first under the new Constitutional dispensation.

Honourable Members, the introduction of a presidential system of governance in which members of the Cabinet are no longer Members of Parliament resulted into the absence of representatives of the Executive in the Houses of Parliament, and therefore effectively crippling the idea behind Question Time. As a result, various attempts to revitalize Question Time under the new constitutional dispensation were made by the 11th and this 12th Parliament, culminating in the insertion of **Part IX in the National Assembly Standing Orders** relating to Questions. Those of you who served in the 11th Parliament would recall that the first attempt was a temporary substitution of Question Time with "**Statements**" directed to Chairpersons of relevant Committees for a response, as a way of attempting to align the new constitutional dispensation with the processes of Parliament.

In this new arrangement, Questions asked by Members were responded to in writing by the relevant Cabinet Secretary and the responses would be read out

on the floor of the House by the Chairperson of the relevant Departmental Committee.

Honourable Members, whereas this arrangement worked with difficulties in the interim, it will be recalled that Chairpersons of Committees faced challenges as they could not comprehensively speak or make any undertakings on behalf of the Executive, which they are constitutionally expected to oversight. In 2014, upon recommendations of the Procedure and House Rules Committee, the House considered provisions of Article 153 of the Constitution which provides for the ***Decisions, responsibility and accountability of the Cabinet*** with a view to engendering proper accountability by the Executive to Parliament. Article 153(3) and (4) of the Constitution provides that—

(3) A Cabinet Secretary shall attend before a committee of the National Assembly, or the Senate, when required by the committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible.

(4) Cabinet Secretaries shall—

(a) act in accordance with this Constitution; and,

(b) provide Parliament with full and regular reports concerning matters under their control.

Honourable Members, in another attempt to actualize the requirements of Article 153 of the Constitution and address the challenges faced by the temporary “Statements” procedure, the House yet again amended its Standing Orders to establish a **Committee on General Oversight** and introduce **Cabinet Secretaries Reporting Time.**

Cabinet Secretaries Reporting Time was intended to allow a Cabinet Secretary to make a report to the House on any matter under his or her charge. On the other hand, the Committee on General Oversight was intended to enable the attendance of Cabinet Secretaries before a Committee of the Whole House

chaired by the Speaker or the Deputy Speaker, to respond to questions raised by Members and whose notice had been given.

Honourable Members, As you may recall, on the basis of the doctrine of separation of powers and functions among the arms of Government, the arrangement for Cabinet Secretaries to be accountable to Parliament through the Committee on General Oversight was argued to be untenable by a section of the society who perceived the Committee on General Oversight as another sitting of a full House of Parliament. In view of the foregoing, I issued a ruling on 21st October 2014, **staying the Provisions of the Standing Orders relating to the Committee on General Oversight and its operations.** In that Communication, I also directed the Procedure and House Rules Committee to spearhead consultations with a view to creating a mechanism providing for the accountability of the Executive to the House while upholding the doctrine of Separation of Powers. This ruling however, did not preclude Cabinet Secretaries from the obligation to appear before Committees of this House and respond to Questions by Members every Tuesday Morning.

Honourable Members, consequently, in the 12th Parliament, the Procedure and House Rules Committee recommended amendment of the Standing Orders to reintroduce Questions in a manner that is not only consistent with the Constitution but also able to link the process to the public affected by issues raised in those Questions.

The proposals culminated in the introduction of **Part IXA (Questions)** in the 4th Edition of the National Assembly Standing Orders. Under this Part, a Member now reads his or her Question on the floor of the House for the Question to be recorded in the *Hansard* and the responsible Cabinet Secretary is required to appear and respond to the Question before the relevant Departmental

Committee. It is worth noting that under Standing Order 42A(5), the appointment of the date when the Cabinet Secretary responsible for a Question to be responded to will appear before the relevant Committee to answer the Question is done and communicated to the House by the Leader of the Majority Party. I do hope that this background suffices to explain the milestones leading to the subsisting procedure on handling Parliamentary Questions before this House.

Honourable Members, let me now address the first issue for determination, which is **“Whether accountability of the Executive to the National Assembly with regard to responding to any questions before a Committee of the House in terms of Article 153(3) of the Constitution is an exclusive function of Cabinet Secretaries or may be donated to Chief Administrative Secretaries.** The central issue of concern to the Hon. Didmus Barasa and, indeed the House, is the question of accountability of the Executive to the House and the person through which such accountability is to be projected. In addressing this issue, I will re-state provisions of Article 153(3) of the Constitution as read together with Standing Order 42A(5) which domesticated the Article 153(3) in the National Assembly Standing Orders.

Article 153(3) and (4) of the Constitution provides that—

(3) A Cabinet Secretary shall attend before a committee of the National Assembly, or the Senate, when required by the committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible.

Standing Order 42A(5), which gives effect to this provisions provides as follows

42A(5) A member shall ask his or her question on the day it is scheduled in the order paper and the leader of the majority party, at an appointed date, inform the house of the date and time when a

cabinet secretary shall be required to appear before a Committee to reply to a question, subject to paragraph (6).

Honourable Members, the wording of the stated provisions of the Constitution and Standing Orders leaves no doubt as to the expectations of the House in terms of who is accountable to the House. In substance, Article 153(3) of the Constitution is couched in mandatory terms that vests direct constitutional obligation on a Cabinet Secretary with little or no latitude to a Cabinet Secretary delegating that authority, with regard to appearing and answering questions relating to their duties when required to do so by the House. A Cabinet Secretary is therefore under an obligation to appear before a Committee of Parliament and to answer any question concerning a matter for which he or she is responsible. Additionally, as provided for in Article 153(4) of the Constitution, a Cabinet Secretary must provide Parliament with full and regular reports concerning matters under his or her control.

Submission of Reports

Honourable Members, I therefore do agree with the position held by the Hon. Member for Kimilili that the Constitution envisages Cabinet Secretaries as the principal link between the Executive and the legislature. This is borne out of their responsibility to attend Committees of Parliament and regularly report to Parliament on matters that they are responsible for as well as the fact that this House approves their appointment to various dockets and initiates the process of their removal from office under Article 152 of the Constitution.

Honourable Members, over and above construing the provisions of Article 153(3) and (4) of the Constitution in the context of their substance, there is the second limb to it – that of **the process** of achieving the intended goals, which process is determined by the House pursuant to the provisions of Article 124 of

the Constitution. This now begs a another question for me, which is: **Does Article 153(3) and (4) also imply that the obligation by a Cabinet Secretary to provide full and regular reports to Parliament or respond to questions, cannot be achieved unless the Cabinet Secretary appears in person before Parliament or its Committees?**

Honourable Members, in attempting to answer this question for purposes of the business of the House, it is worth noting that, other than Cabinet Secretaries, Article 155 of the Constitution establishes the position of Principal Secretaries tasked with administering state departments under their docket. Principal Secretaries are essentially the accounting officers of the Ministries. They offer primary responses to any audit queries under consideration by the Public Accounts Committee in the scrutiny of national expenditure by Parliament. Invariably, responses provided by Cabinet Secretary on a matter raised by the House rely on information collated by the Principal Secretary from either their departments or the various agencies falling under such a department. Indeed, and as Members will recollect, a Cabinet Secretary is often accompanied to Committee meetings by the relevant Principal Secretary and technical officers drawn from the Ministry and state agencies who assist the Cabinet Secretary to provide relevant and actionable information to the Committee.

Honourable Members, The practice in other commonwealth parliamentary jurisdictions supports the link between membership of the Cabinet and accountability to Parliament. In the House of Commons of the United Kingdom, only Ministers are allowed to answer questions on the floor of the House despite there being Parliamentary Secretaries who are effectively Assistant Ministers and Parliamentary Under-Secretaries who assist them in the discharge of their duties. In the Parliament of New Zealand, in addition to addressing questions

to a Minister, a Member may address a question to an Associate Minister within the limits of any responsibilities formally delegated by a Minister. Additionally, Members of Parliament designated as Parliamentary Under-Secretaries are mandated to respond to a question on behalf of an absent Minister. However, a question cannot be addressed to a Parliamentary Under-Secretary. The fundamental difference between our Legislature and these two Westminster-style legislatures is that, in our case, the Cabinet comprises of persons who are not Members of Parliament.

Honourable Members, in the case of our legislative setup, the eventual aim of the House is to have responses to Questions made by competent, legitimate and authorised persons in an accurate, timely and authoritative manners so as to assist the House to attempt to *resolve issues of concern to the people and discharge its oversight role over the Executive*, pursuant to the provisions of Articles 95 and 153(3) of the Constitution. In this regard, it ought not to be lost that the 'Cabinet Secretary' is an office rather than a person. Hence, it is arguable that an authorized representative of the Cabinet Secretary may, acting on delegated or donated powers, respond to a matter before a Committee, as long as he or she takes **full responsibility** for the answers and undertakings given by the Executive to the Committee of the House.

This is in tandem with the established practice whereby some Questions are responded to through oral replies by the responsible Cabinet Secretary appearing in person, some through a written reply signed by the responsible Cabinet Secretary and submitted to the Committee. Other questions are responded to through oral submissions made by representatives of Cabinet Secretaries, who presents the responses **signed** by the responsible Cabinet Secretary.

Honourable Members, the practice I have just mentioned is a product of this House. Members will note that, even though the current text of Standing Orders 42A to 42F envisages a Cabinet Secretary as the person to whom all Questions are addressed and from whom all responses are expected, a review of the Hansard Report during consideration of the amendments to the Standing Orders to re-introduce Questions suggests that Members contended with the fact that, on some occasions, Responses to Questions may be made by persons other than Cabinet Secretaries.

While moving the Second Report of the Procedure and House rules Committee on the said amendments, the Deputy Speaker, the Hon. Moses Cheboi, said and I quote-

*"I urge the House to adopt these amendments as contained in the Second Report of the Procedure and House Rules Committee. It is my considered opinion that in operationalising these amendments, the House and its committees will need to strike a fair balance with regard to appearance in person of CSs to answer questions in committees. I understand that CSs and Principal Secretaries (PSs) can be very busy. Between PS and CS, the CS can respond to questions. **Anybody who is above the rank of PS can appear to answer questions. For example, if the Chief Administrative Secretaries (CAS's) are above the rank of PS, they can respond to questions.**"*

The Deputy Speaker's position was supported by the Majority Party Whip, the Hon. Benjamin Washiali who, while contributing to the debate stated the following-

"To me, the question of CSs being too busy to attend to questions is neither here nor there because with the introduction of the Chief Administrative Secretaries, when CSs are busy dealing with other issues of development, the CASs can stand in for them so that the aspect of answering questions is not deferred."

Honourable Members, despite this particular observation not being included in the text of the Standing Orders, it currently guides the procedure of Committees with regard to the consideration of Questions. Further, from the report of the Committee and the debate that ensued in the House during the adoption of Standing Orders **42A to 42F**, there is no doubt that the House intended to permit Chief Administrative Secretaries to also appear before Committees to respond to questions on behalf of the Cabinet Secretaries.

Honourable Members, Having said that, you may agree that to hold Cabinet Secretaries as the only persons who may engage with or appear before Parliament or its Committees will create an unnecessary impediment to the conduct of the business of the House. The House has established Committees in which majority of its work is now conducted. The fact that an increasing amount of work is committed to Committees whose operations run concurrently has created a need for constant interaction with the Executive. The duty to attend and answer questions before Committees and to regularly report to Parliament if enforced in the strictest sense of the substance of Article 153 will therefore mean that some Committees will have to await the availability of Cabinet Secretaries before considering relevant matters.

The wait could not only be indefinite if one were to take into account the official duties of the affected Cabinet Secretaries but also imply that a lot of business would lapse without the requisite reply being provided by the substantive Cabinet Secretaries.

Honourable Members, the prerogative of Parliament to hold the Executive to account ought to be exercised in a manner that enables it to effectively discharge its mandate as given by the people. I am cognizant that vide **Executive Order No. 1 of 2018 on the Organization of Government,** the President communicated to Parliament the manner in which he had decided to re-organize his government. The Executive Order additionally identified the principal persons charged with the overall direction of the various ministries. Apart from the Cabinet Secretaries charged with overseeing the various ministries, a key feature was the inclusion of Principal Secretaries and the Chief Administrative Secretaries. As it is now, an Executive Order under the hand and seal of the President has communicated to the House that a Chief Administrative Secretary is one of three ranking officials in the Executive.

Honourable Members, any person to whom the power to govern is entrusted is subject to constant oversight by this House. As your Speaker, I am obligated to ensure that this House stretches its oversight capabilities to such persons to whom the Constitution, statute or lawfully issued Order, such as Executive Order No. 1 of 2018 is assigned authority to govern. My opinion is in harmony with that of my predecessor at the early years of our independence, Speaker Humphrey Slade, who on 3rd July 1963 observed that, and I quote –

“The Chair remains in a unique position to safeguard, in a singular form, the right of Members to bring the Ministers to account and the Executive in general for their actions. Parliamentary Questions, therefore serve as a true parliamentary mechanism to bring the Executive and, indeed, those who govern to be accountable to those being governed.”

Honourable Members, I am therefore of the considered opinion that in holding the Executive to account, the House must take into account its prevailing structure as communicated to it by the President. In this regard, I am persuaded that, for purposes of facilitating the conduct of business of the House, apart from treating the Cabinet Secretary as the officer primarily accountable to Parliament, a room does exist for our Committees to permit the conveyance of **timely and actionable responses to Questions before Committees** through the Principal Secretary and/or the Chief Administrative Secretary.

Honourable Members, in summary, without excusing Cabinet Secretaries from their constitutional responsibility, the House must therefore consider a workable alternative that allows it to obtain relevant, timely and actionable information from Ministries to enable it discharge its mandate. Such information may be presented either by the Cabinet Secretary, in person, OR **in exceptional circumstances and for good reason,** presented on his or her behalf by a person of suitable rank expressly mandated to do so in writing. This in my opinion should then settle the first issue for determination.

Responsibility to Committees

Honourable Members, the second issue that the Member for Kimilili invited the Speaker to guide on is *“whether the establishment of the Offices of Chief Administrative Secretaries and subsequent appointment of holder of those Offices offends the Constitution or in any way affects the transaction of business of the House in our Committees.”* On this matter, I hasten to draw to the attention of the House that, following the creation of the position of Chief

Administrative Secretaries, two petitions were filed with the High Court challenging the creation of those positions on constitutional grounds. These are the Nairobi High Court Constitutional Petition No. 33 of 2018 as consolidated with Petition No. 42 of 2018, namely, *Okiya Omtatah Okoiti & Kenya Human Rights Commission v Speaker of the National Assembly and 74 Others*.

The petitions are pending full hearing and determination. There is also another related matter filed at the Nairobi High Court as Constitutional Petition No. 67 of 2018, Marilyn Muthoni Kamuru & 2 Others v Speaker of the National Assembly and Others, which is also yet to be determined.

I therefore find the question of constitutionality or otherwise of the position of Chief Administrative Secretaries to be a matter that is *sub-judice* in terms of Standing Order 89. In this regard, I decline to render any guidance on that matter, except to observe that, as your Speaker, I have duty to ensure that the transaction of the business of the House is facilitated as necessary to proceed.

Honourable Members, in summary, I wish to guide the House as follows –

- 1. THAT**, as a first and cardinal responsibility, pursuant to the provisions of Article 153(3) and (4) of the Constitution, Cabinet Secretaries are expected to and **MUST** appear before Committees of the House as and when required to do so to answer questions and to examine other matters before Committees;
- 2. THAT**, at the same time, Chief Administrative Secretaries remain admitted to Committees of this House for purposes of transacting the business contemplated under Part IXA of the Standing Orders, which is Questions, as long as they are able to commit their respective state departments to the

undertakings, commitments and assurances they may have to make in the course of responding to Questions before Committees;

3. **THAT**, Committees remain at liberty to determine, on case by case basis, whether it is the Cabinet Secretary, or the Chief Administrative Secretary, or indeed the Principal Secretary is to appear before the Committee to answer Questions and how often they may do so. This is should take into account the weight of the matters contained in the Questions before the Committee; and,
4. **THAT**, whenever a Cabinet Secretary authorizes a Chief Administrative Secretary to respond to Questions before Committees, the Cabinet Secretary shall take full responsibility of responses transmitted to the National Assembly. In this regard, the written responses ought to be signed by the particular Cabinet Secretary to denote the authorization and taking of responsibility.

Honourable Members, This guidance serves as an avenue for allowing the conveyance of a written and signed response to a matter raised by this House or a Question by a person authorized by a particular Cabinet Secretary. The guidance is not a *carte blanche* for a Cabinet Secretaries to disregard their constitutional responsibility of accounting to the people's representatives for their actions in the performance of their constitutional duties.

The House is accordingly guided.

I thank you!


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

Thursday, 17th October 2019