REPUBLIC OF KENYA

TWELFTH PARLIAMENT (FOURTH SESSION)

THE SENATE

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

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REPORT ON CONSIDERATION OF A PETITION BY BERNARD WAHEIRE AND JACQUELINE MUTERE ON IMPLEMENTATION OF THE REPORT OF THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION (TJRC)

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Clerk's Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

JULY, 2020

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PREFACE

Mr. Speaker,

The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to Senate Standing Order 218 and mandated to: -

> *'consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.'*

The Committee is comprised of the following members: -

1) Sen. Erick Okong'o Mogeni, SC, MP - Chairperson
2) Sen. (Canon) Naomi Jilo Waqo, MP - Vice Chairperson
3) Sen. Amos Wako, EGH, SC, FCIArb, MP - Member
4) Sen. James Orengo, EGH, SC, MP - Member
5) Sen. Mohamed Yusuf Haji, EGH, MP - Member
6) Sen. Fatuma Dullo, CBS, MP - Member
7) Sen. Mutula Kilonzo Junior, MP - Member
8) Sen. Irungu Kang'ata, MP - Member
9) Sen. Johnson Sakaja, CBS, MP - Member

Mr. Speaker,

On Thursday, 16th May, 2019, the Hon Speaker reported to the Senate the petition by Bernard Waheire and Jacqueline Mutere on implementation of the Report of the Truth, Justice and Reconciliation Commission. Pursuant to standing order 232(2) of the Senate Standing Orders, the petition was committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

In the petition, the petitioners noted that, following amendment of the Truth Justice and Reconciliation Act in 2013, which rendered implementation of the TJRC Report conditional upon its consideration by the National Assembly, it had not been possible for other state agencies to implement the recommendations of the Commission. This had become a source of great frustration and consequential demoralization for thousands of Kenyans still nursing injuries, as well as physical, emotional, and psychological scars from the dark years of our country's history.

The petitioners therefore prayed that the Senate: -

i) Requests transmission of the Report from the National Assembly to the Senate for consideration and adoption;

ii) Passes all necessary legislation to enable victims of gross human rights violations as identified in the TJRC process, to receive physical and psychological support;

iii) Implements the recommendations of the TJRC Report that concern counties, in particular the establishment and funding of gender-based violence recovery and rehabilitation centres in all the 47 Counties;

iv) Urges the National Assembly to consider the TJRC Report with a view to advising the nation on critical steps towards its implementation, pursuant to section 49 of the Truth Justice and Reconciliation Act, 2008; and

v) Causes the establishment of a Parliamentary Select Committee to oversight the implementation of the TJRC Report recommendations and promote national healing and reconciliation

Mr. Speaker,

The Committee proceeded to consider the Petition and, in this regard, held meetings with the petitioners and with the Solicitor-General, and further received written submissions on the matter from the Attorney General.

The main issue that the Committee had to address, Mr. Speaker, is how to unlock the process of implementing the recommendations contained in the Report of the Truth, Justice and Reconciliation Commission (TJRC).

As Senators may recall, the Truth, Justice and Reconciliation Act, 2008 was amended by the National Assembly in December 2013 by, among others, deleting paragraph 49(3) thereon, which provided that implementation of the TJRC Report would commence within six months upon publication. The provision, as amended, provides that implementation of the TJRC Report shall only commence '*after consideration of the report by the National Assembly*.'

Mr. Speaker,

Although it is now exactly seven (7) years since the TJRC Report was submitted to the National Assembly in July 2013, the Report is yet to be formally scheduled for consideration and debate by the National Assembly, which would unlock implementation of its recommendations by the various agencies and organs of the national and county governments.

The Committee did note that, during the State of the Nation Address delivered at Parliament on Thursday, 26th March, 2015, H. E. the President –

i) urged lawmakers to expedite processing of the Truth Justice and Reconciliation Commission (TJRC) report, seen as critical in the formulation of a reparation framework;

ii) instructed the National Treasury to establish a Fund of Kshs.10 billion over the next three years to be used for restorative justice; and

iii) issued a public apology on behalf of the government for all past human rights violations and other historical injustices.

Despite this plea to Parliament and directive to the National Treasury having been made in March 2015, the TJRC Report is yet to be considered, and the Restorative Justice Fund is yet to be established.

Mr. Speaker,

Having extensively deliberated on the matter, the Committee arrived at the following findings. That -

a) While the Truth Justice and Reconciliation Commission carried out its mandate and submitted its final report and recommendations as required, the Truth Justice and Reconciliation Act, as amended, mandates the National Assembly to consider the Report before its implementation thereon can commence.

b) While there have been public pronouncements by H. E. the President and the Attorney General in support of implementation of the Report, the National Assembly is yet to formally schedule the TJRC Report for consideration by the House, as required under section 49 of the Truth Justice and Reconciliation Act.

c) The public apology issued by H.E. the President during the 2015 State of the Nation Address, and his directive to the National Treasury to establish a Restorative Justice Fund, was an important step in acknowledging the historical injustices and human violations that have occurred in Kenya's past, and in laying ground for healing and reconciliation processes to commence among the Kenyan people.

d) The failure to operationalize the reparations framework by the state continues to unduly lengthen the suffering of survivors and the families of the victims of Kenya's historical injustices and human rights violations. Reparation, under such a framework, would be a means of dignifying victims by measures aimed at promoting justice and reconciliation, by addressing historical injustices through rehabilitation, compensation, restitution and/or collective reparations, in a degree that is proportionate to the gravity of the violations and the harm suffered.

Arising from its observations on the matter, the Committee **recommends that a motion be introduced in the Senate to deliberate on this matter**, and to adopt resolutions thereon, among others –

i) Urging the National Assembly to formally consider the Report of the Truth, Justice and Reconciliation Commission, thus paving way for implementation of its recommendations.

ii) Directing the Cabinet Secretary for the National Treasury to submit to Parliament, within thirty (30) days, the regulations under the Public Finance Management Act to anchor the Restorative Justice Fund into a legal framework.

iii) Calling upon county governments to find a way of supporting reparations in their own way, including through budgetary allocations for memorials in the counties where massacres took place, to remember and honour the victims and survivors and to stand as a symbol for non-re-occurrence of violations.

In this regard, the Committee calls upon the House leadership to fast-track consideration and passage of the County Hall of Fame Bill (Senate Bill No. 39 of 2018), which is pending at Committee stage in the Senate.

iv) Urging county governments to establish gender-based violence recovery and rehabilitation centres in all the 47 Counties.

Mr. Speaker,

In arriving at this recommendation, the Committee took note that the Petitions to Parliament (Procedure) Act (No. 22 of 2012) and Part XXV of the Senate Standing Orders do not have provision for the report of a Committee on a petition to be debated by the Senate, which would allow a formal resolution to be adopted thereon.

In this case, the Committee was of the view that this is matter which does require deliberation by the whole house, and the adoption of resolutions thereon that may be followed upon for implementation.

Mr. Speaker,

The Committee wishes to thank the Offices of the Speaker and the Clerk of the Senate for the support extended to it during consideration of this Petition.

Further it wishes to thank the petitioners and the stakeholders who appeared before and sent written submissions to the Committee.

Mr. Speaker,

It is now my pleasant duty, pursuant to Standing Order 232(2), to present the Report of the Standing Committee on Justice, Legal Affairs and Human Rights on its consideration of a petition on implementation of the Report of the Truth, Justice and Reconciliation Commission (TJRC).

I thank you, Mr. Speaker.

16th July, 2020

Signed..... Date.....

SEN. ERICK OKONG'O MOGENI, SC, MP

CHAIRPERSON

STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS

ADOPTION OF THE REPORT OF THE STANDING COMMITTEE ON JUSTICE, LEGAL AFFAIRS AND HUMAN RIGHTS ON ITS CONSIDERATION OF A PETITION BY BERNARD WAHEIRE AND JACQUELINE MUTERE ON IMPLEMENTATION OF THE TRUTH, JUSTICE AND RECONCILIATION COMMITTEE REPORT

We, the undersigned Members of the Standing Committee on Justice, Legal Affairs and Human Rights, do hereby append our signatures to adopt this Report-

Sen. Erick Okong'o Mogeni, SC, MP	-Chairperson	
Sen. (Canon) Naomi Jilo Waqo, MP	-Vice-Chairperson	
Sen. Amos Wako, EGH, SC, FCIArb, MP	-Member	
Sen. James Orengo, EGH, SC, MP	-Member	
Sen. Mohamed Yusuf Haji, EGH, MP	-Member	
Sen. Fatuma Dullo, CBS, MP	-Member	
Sen. Mutula Kilonzo Junior, MP	-Member	
Sen. Irungu Kang'ata, MP	-Member	
Sen. Johnson Sakaja, CBS, MP	-Member	

CHAPTER ONE

ESTABLISHMENT, MANDATE AND MEMBERSHIP OF THE COMMITTEE

The Standing Committee on Justice, Legal Affairs and Human Rights is established pursuant to Senate Standing Order 218 and mandated to: -

> *'consider all matters relating to constitutional affairs, the organization and administration of law and justice, elections, promotion of principles of leadership, ethics, and integrity; agreements, treaties and conventions; and implementation of the provisions of the Constitution on human rights.'*

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6) Sen. Fatuma Dullo, CBS, MP - Member
7) Sen. Mutula Kilonzo Junior, MP - Member
8) Sen. Irungu Kang'ata, MP - Member
9) Sen. Johnson Sakaja, CBS, MP - Member

The Committee secretariat comprises: -

a) Mr. Charles Munyua - First Clerk Assistant
b) Ms. Sylvia Adera - Second Clerk Assistant
c) Mr. Mitchell Otoro - Legal Counsel
d) Ms. Lucianne Limo - Media Relations Officer
e) Ms. Lucy Mwaniki - Serjeant-at-Arms

CHAPTER TWO

SUMMARY AND ANALYSIS OF THE PETITION

2.1 Establishment and mandate of the Truth, Justice and Reconciliation Commission

The Truth, Justice and Reconciliation Commission (TJRC) was created, as a transitional justice mechanism, through the enactment of the Truth Justice and Reconciliation Act, 2008 which came into effect on 17th March, 2009. The broad mandate of the TJRC was to investigate gross violations of human rights and historical injustices that occurred in Kenya from 12th December, 1963 to 28th February, 2008.

The TJRC was mandated to:

i) Establish an accurate and complete record of human rights violations perpetrated by the State since Kenya's independence on 12th December, 1963 up to 28th February, 2008, as well as the possible causes, nature, and extent thereof;
ii) Investigate gross human rights violations and violations of international human rights law;
iii) Determine means of redress for victims; and
iv) Recommend the prosecution of perpetrators of such violations, as well as reparations for victims.

The Act establishing the TJRC also provided that its findings would be made public through the resultant report of the Commission.

2.2 The Truth, Justice and Reconciliation Commission Report

The process of compiling the report was extensive. This involved the collection of 42,465 statements and 1,828 memoranda from Kenyans and conducting of public hearings that provided a forum for victims, witnesses, and alleged perpetrators to present their submissions. In addition, the TJRC conducted research and investigations, following which the information and data was collated, analyzed, and used to compile the final report.

The Report of the Commission was structured into four volumes.

Volume I provided an account of how the Commission was formed, how it interpreted its mandate and conducted its work, and the challenges it faced in carrying out its mandate.

Volume II was further divided into three sub-volumes.

Volume IIA focused on the major violations of bodily integrity rights that were committed during the Commission's mandate period. These were unlawful killings and enforced disappearances (massacres, extra-judicial killings, and political assassinations); unlawful detentions, torture, and ill-treatment; and sexual violence. While much of this volume focused on violations directly committed by the state, it also included descriptions of killings, severe injury and violence, sexual violence, detention, and other similar violations committed by non-state actors.

Volume IIB focused on some of the unique parts of the Commission's mandate concerning historical injustices in Kenya. The volume had three chapters: land and conflict; economic marginalization and violation of socio-economic rights; and economic crimes and grand corruption.

Volume IIC focused on the stories and narratives of groups of people that are provided special protection under domestic and international law because of a history of discrimination and oppression. These are women, children, and minority and indigenous people.

Volume III focused on issues relating to national unity and reconciliation in Kenya. This included the causes of ethnic tension and recommendations to promote healing, reconciliation, and coexistence among ethnic communities.

The final volume of the Report – ***Volume IV*** – provided a catalogue of the findings and recommendations of the Commission, including on the Report's implementation mechanism and reparation framework.

The report therefore provided an important foundation for examining Kenya's past and made recommendations that could help to create a stronger republic that adheres to the rule of law and respects human rights.

The report was presented to H. E. the President Uhuru Kenyatta in May 2013 and subsequently laid on the Table of the National Assembly on Wednesday, 24th July, 2013.

2.3 The 2013 amendments to the Truth Justice and Reconciliation Act

Prior to the year 2013, the Truth Justice and Reconciliation Act provided that, upon the publication of the report of the Commission, the Minister responsible for matters relating to justice and constitutional affairs would operationalize the implementation mechanism or arrangement, to monitor the implementation of the recommendations of the Commission and to facilitate their implementation. Section 49(3) thereof provided that implementation of the report of the Commission would commence *within six months upon publication.*

In December 2013, the Truth Justice and Reconciliation Act, 2008 was amended by the National Assembly to subject the report of the Commission to consideration by the National Assembly prior to its implementation.

The Act was further amended at section 49(3) to provide that implementation of the TJRC Report shall only commence '*after consideration of the report by the National Assembly.*' This amendment clipped the powers of all the agencies who the Commission had tasked with overseeing the implementation of the recommendations, including the Attorney General and the Director of Public Prosecutions.

Additionally, while section 48(4) of the Act previously provided for the Minister to table the report of the Commission in Parliament, this section was amended to delete 'Parliament' and insert in place thereof 'National Assembly'. The effect of this was to remove the Senate from the process of consideration of the TJRC report.

To date, the National Assembly is yet to consider the TJRC Report.

2.4 Summary of the Petition

On Thursday, 16th May, 2019, the Hon Speaker reported to the Senate the petition by Bernard Waheire and Jacqueline Mutere on implementation of the TJRC Report. Pursuant to standing order 232(2) of the Senate Standing Orders, the petition was committed to the Standing Committee on Justice, Legal Affairs and Human Rights for consideration.

In the petition, the petitioners noted that, following amendment of the Truth Justice and Reconciliation Act in 2013, and the non-consideration of the TJRC report by the National Assembly, implementation of the TJRC report had not been possible.

They noted that victims and survivors of gross human rights violations which were investigated by the TJRC continued to suffer from their violations. Further, that the National Assembly's refusal to prioritize debate and act on the TJRC Report was a source of great frustration and consequential demoralization for thousands of Kenyans still nursing injuries, as well as physical, emotional and psychological scars from the dark years of our country's history.

The petitioners regretted that the lack of action on the TJRC Report had resulted in the lack of a policy framework for the implementation of the recommendations of the TJRC and undermined efforts of the victims to bring closure to their suffering and restart their lives. It had also undermined the search for healing and reconciliation of our nation, and its transition to prosperous, peaceful, stable, and inclusive democracy.

Lastly, the petitioners stated that they had on various occasions tried to engage the National Assembly to act on the TJRC Report, without success.

The petitioners therefore prayed that the Senate: -

i) Requests transmission of the Report from the National Assembly to the Senate for consideration and adoption;

ii) Passes all necessary legislation to enable victims of gross human rights violations as identified in the TJRC process, to receive physical and psychological support;

iii) Implements the recommendations of the TJRC Report that concern counties, in particular the establishment and funding of gender-based violence recovery and rehabilitation centres in all the 47 Counties;

iv) Urges the National Assembly to consider the TJRC Report with a view to advising the nation on critical steps towards its implementation, pursuant to section 49 of the Truth Justice and Reconciliation Act, 2008; and

v) Causes the establishment of a Parliamentary Select Committee to oversight the implementation of the TJRC Report recommendations and promote national healing and reconciliation.

CHAPTER THREE

CONSIDERATION OF THE PETITION

In considering the petition, the Committee held a meeting with the petitioners and the Solicitor-General. The Committee further received and considered a written advisory on the matter from the Attorney General, as well as reports by key stakeholders tracking implementation of the TJRC Report.

3.1 Meeting with the Petitioners

At the meeting with the petitioners, the Committee was informed of the suffering that the victims of various historical injustices and human rights violations, since independence, continue to go through, as they await implementation of the recommendations of the TJRC Report. Most of the victims saw the establishment of the TJRC as a beacon of hope that would finally lead to healing of the physical, emotional, and psychological scars from the dark years of our country's history.

This hope had however been dashed by the amendments effected to the Truth, Justice and Reconciliation Act, which subjected implementation of the TJRC Report to political processes.

A flicker of hope had been fanned again in the year 2015, when H.E. the President, during the State of the Nation Address in 2015, issued a public apology for all historical injustices and human rights violations perpetrated by the state and other actors during the previous years. The President further pledged the establishment of a Restorative Justice Fund, with an initial allocation of Kshs.10 billion, towards redressing historical injustices and enabling the settlement of reparation claims.

While the Fund was to have been operationalized within three years, this was yet to be done, leading to even greater frustration among the communities and people who had suffered.

The petitioners noted that a number of the citizens who would have been eligible for compensation and settlement of reparation claims, including court awards in some cases, had grown old and died, or died from complications arising from the torture they underwent during Kenya's dark history. They therefore urged the Senate to urgently intervene and help bring closure on the matter.

3.2 Oral and written submissions by the Attorney General

The Committee held a meeting with the Solicitor-General, who represented the Attorney General, and received written submissions on the matter. The salient points of the Attorney General's submission to the Committee were as follows: -

i) On the request by the petitioners for the Senate to call for transmission of the TJRC Report from the National Assembly to the Senate for consideration and adoption, the Attorney General noted that even if the Senate received and considered the TJRC Report, this would still not meet the requirement of section 49 of the TJR Act, which requires that the Report be considered by the National Assembly.

ii) On passage of necessary legislation to enable victims of gross human rights violations as identified in the TJRC process, to receive physical and psychological support, the Attorney General noted that several statutes enacted since promulgation of the new Constitution in 2010 bear on the implementation of the TJRC Report. Among these are the Prevention of Torture Act, the Media Council Act, the Victim Protection Act, the Marriage Act, the Matrimonial Property Act, the Community Land Act, the National Land Commission Act, and the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act.

iii) On the proposal to establish a Parliamentary Select Committee to oversight the implementation of the TJRC Report recommendations and promote national healing and reconciliation, the Attorney General noted that, while Parliament enjoys the general power to establish such a Committee, in the present case, the Committee may not serve any useful purpose until such time as the National Assembly has duly considered the Report and made recommendations thereon.

Additionally, the Solicitor-General noted that legislation was yet to be enacted to operationalize the Restorative Justice Fund, which would facilitate compensation to victims of historical injustices and post-election violence.

3.3 Consideration of the Petition by the Committee

The Committee considered the petition as submitted, and the submissions made by the petitioners and the Attorney General, and noted as follows: -

a) While the Truth Justice and Reconciliation Commission had carried out its mandate and submitted its final report and recommendations as required under the Truth Justice and Reconciliation Act, implementation of the Commission's recommendations had been hampered by the action to amend the Act and subject its implementation thereon to approval by the National Assembly, which had not been forthcoming, seven (7) years since the Report was tabled in the National Assembly in July, 2013.

b) The TJRC report recommended the setting up of a reparations mechanism for which the state would be responsible. Further, it recommended the following forms of reparations to be provided to victims of historical injustices:

   i) Restitution: restoration to original position before the violation occurred.
   ii) Compensation: money for damage suffered.
   iii) Rehabilitation: medical care and psychosocial support.
   iv) Satisfaction, which includes official declarations restoring dignity and reputation, public apology, commemoration, and tributes.
   v) Guarantees of non-repetition: prevention of re-occurrence of violations including structural measures that will prevent re-occurrence of the violations.

c) The TJRC Report also recommended the establishment of a reparation fund to achieve the following aims:

   i) Compensating victims, both individually and communally.
   ii) Rehabilitation.
   iii) Building memorial monuments.

d) During the 2015 State of the Nation Address, delivered at Parliament on Thursday, 26th March, 2015, H. E. the President –

   i) urged lawmakers to expedite processing of the Truth Justice and Reconciliation Commission (TJRC) report, seen as critical in the formulation of a reparation framework;

   ii) instructed the National Treasury to establish a Fund of Kshs.10 billion over the next three years to be used for restorative justice. This would provide a measure of relief and underscore the government's goodwill; and

iii) issued a public apology on behalf of the government for all past human rights violations and other historical injustices.

e) Following the President's directive, the Attorney General, and the Kenya National Commission on Human Rights (KNCHR) led efforts to come up with regulations under the Public Finance Management Act to anchor the Restorative Justice Fund into a legal framework. This culminated in the draft Public Finance Management (Reparations for Historical Injustices Fund) Regulations, 2017.

f) The purpose of the Regulations was to provide a framework for the establishment and operationalization of a reparations program which would include:

i) administration of the Reparation Fund;
ii) registration and verification of claims; and
iii) Any other matter necessary to give effect to the Regulations.

g) Reparation under those regulations would be a means of dignifying victims by measures that are aimed at promoting justice and reconciliation, by addressing historical injustices through rehabilitation, compensation, restitution and/or collective reparations, in a degree that is proportionate to the gravity of the violations and the harm suffered.

CHAPTER FOUR

COMMITTEE FINDINGS AND RECOMMENDATIONS

4.1 Committee Findings

Having considered the Petition and engaged with stakeholders on the matter, the Committee makes the following findings: -

a) While the Truth Justice and Reconciliation Commission carried out its mandate and submitted its final report and recommendations as required, the Truth Justice and Reconciliation Act, as amended, mandates the National Assembly to consider the Report before its implementation thereon can commence.

b) While there have been public pronouncements by H. E. the President and the Attorney General in support of implementation of the Report, the National Assembly is yet to formally schedule the TJRC Report for consideration by the House, as required under section 49 of the Truth Justice and Reconciliation Act.

c) The public apology issued by H.E. the President during the 2015 State of the Nation Address, and his directive to the National Treasury to establish a Restorative Justice Fund, was an important step in acknowledging the historical injustices and human violations that have occurred in Kenya's past, and in laying ground for healing and reconciliation processes to commence among the Kenyan people.

d) The failure to operationalize the reparations framework by the state continues to unduly lengthen the suffering of survivors and the families of the victims of Kenya's historical injustices and human rights violations.

4.2 Committee Recommendations

Arising from its observations on the matter, the Committee recommends that a motion be introduced in the Senate to deliberate on this matter, and to adopt resolutions thereon, among others –

i) Urging the National Assembly to formally consider the Report of the Truth, Justice and Reconciliation Commission, thus paving way for implementation of its recommendations.

ii) Directing the Cabinet Secretary for the National Treasury to submit to Parliament, within thirty (30) days, the regulations under the Public Finance Management Act to anchor the Restorative Justice Fund into a legal framework.

iii) Calling upon county governments to find a way of supporting reparations in their own way, including through budgetary allocations for memorials in the counties where massacres took place, to remember and honour the victims and survivors and to stand as a symbol for non-re-occurrence of violations.

iv) Urging county governments to establish gender-based violence recovery and rehabilitation centres in all the 47 Counties.

LIST OF ANNEXES

Annex 1: Copy of the Petition by Bernard Waheire and Jacqueline Mutere on implementation of the Report of the Truth, Justice and Reconciliation Commission (TJRC)