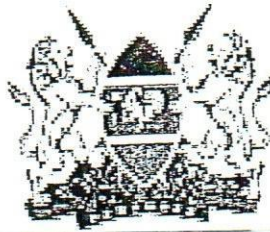


REPUBLIC OF KENYA



THE SENATE

TWELFTH PARLIAMENT

THE REPORT OF THE SPECIAL COMMITTEE ON THE PROPOSED
REMOVAL FROM OFFICE, BY IMPEACHMENT, OF HONOURABLE
MOHAMED ABDI MOHAMUD, THE GOVERNOR OF WAJIR COUNTY

17th MAY, 2021

PAPERS LAID	
DATE	17 MAY 2021
TABLED BY	Chair Spec Comm - Sen Mogere
COMMITTEE	Spec Comm by Impeachment
CLERK AT THE TABLE	Z. Mogere

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PREFACE

Mr. Speaker Sir,

Honourable Senators will recall that at the sitting of the Senate held on Thursday, 6th May, 2021, the Honourable Speaker of the Senate, by way of a Communication from the Chair, informed the Senate that he had received correspondence from the Speaker of the County Assembly of Wajir communicating the approval of a Motion by the County Assembly of Wajir to remove from office, by impeachment, the Governor of Wajir County.

Mr. Speaker Sir,

On Thursday, 6th May, 2021, the Senate Majority Leader gave Notice of the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on Tuesday, 27th April, 2021, the Wajir County Assembly approved a Motion for the removal from office by impeachment, of the Honourable Mohamed Abdi Mohamud, Governor of Wajir County;

AND FURTHER, WHEREAS by letter Ref. No. SPK/WCA/SENATE/4/2021(1), dated Wednesday, 28th April, 2021, and received in the Office of the Speaker of the Senate on Thursday, 29th April, 2021, the Speaker of the County Assembly of Wajir informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate, documents in evidence of the proceedings of the Assembly;

AND WHEREAS, pursuant to Section 33(3)(b) of the County Governments Act, 2012 and Standing Order 75(1)(b) of the Senate, the Senate by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

NOW THEREFORE, pursuant to Section 33(3)(b) of the County Governments Act, 2012 and Standing Order 75(1)(b)(i), the Senate resolves to proceed on this matter by way of establishment of a special committee to investigate the proposed removal from office by impeachment of the Honourable Mohamed Abdi Mohamud, the Governor of Wajir County.

Following deliberations on the Motion, the Senate resolved to establish a Special Committee.

Mr. Speaker Sir,

The Senate Majority Leader subsequently gave notice of the following Motion on the same day, Thursday, 6th May, 2021, –

THAT, WHEREAS, pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012, on Tuesday, 27th April, 2021, the Wajir County Assembly approved a Motion for the removal from office by impeachment, of the Honourable Mohamed Abdi Mohamud, Governor of Wajir County;

AND WHEREAS, pursuant to Section 33(3)(b) of the County Governments Act, 2012 and Standing Order 75(1)(b) of the Senate, the Senate by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

FURTHER whereas, by a Resolution made on Thursday, 6th May, 2021 (Afternoon Sitting), the Senate resolved to proceed on this matter by way of a special committee, pursuant to Section 33(3)(b) of the County Governments Act, 2012 and Standing Order 75(1)(b)(i),

NOW THEREFORE, pursuant to Standing Order 189, the Senate resolves to appoint a special committee comprising the following Senators -

1. Sen. Sakaja Johnson, CBS, MP;

2. Sen. Mwangi Githiomi, MP;
3. Sen. Christine Zawadi Gona, MP;
4. Sen. Susan Kihika, MP;
5. Sen. Mithika Linturi, MP;
6. Sen. (Eng.) Hargura Godana, MP;
7. Sen. Okong'o Mogeni, SC, MP;
8. Sen. Fredrick Outa, MP;
9. Sen. Agnes Muthama, MP,
10. Sen. Petronilla Were, MP; and
11. Sen. Issa Juma Boy, MP,

to investigate the proposed removal from office by impeachment of the Governor of Wajir County and to report to the Senate within ten (10) days of its appointment, pursuant to Standing Order 75(2), on whether it finds the particulars of the allegations to have been substantiated.

Following debate on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. Sen. Sakaja Johnson, CBS, MP;
2. Sen. Mwangi Githiomi, MP;
3. Sen. Christine Zawadi Gona, MP;
4. Sen. Susan Kihika, MP;
5. Sen. Mithika Linturi, MP;
6. Sen. (Eng.) Hargura Godana, MP;
7. Sen. Okong'o Mogeni, SC, MP;
8. Sen. Fredrick Outa, MP;
9. Sen. Agnes Muthama, MP,
10. Sen. Petronilla Were, MP; and
11. Sen. Issa Juma Boy, MP,

to investigate the proposed removal from office of the Governor of Wajir County and to report to the Senate within ten (10) days of its appointment on whether it finds the Particulars of the Allegations to have been substantiated.

Mr. Speaker Sir,

Section 33(4) of the County Governments Act, 2012, standing order 75(2) and rule 2 of Part 2 of the Fifth Schedule to the Senate Standing Orders mandate the Special Committee to –

- a. *investigate the matter; and*
- b. *report to the Senate within ten days on whether it finds the Particulars of the Allegations against the Governor to have been substantiated*

The Committee, in the execution of its mandate, was guided by these provisions of the law and the Senate Standing Orders.

Mr. Speaker Sir,

Following its establishment, the Special Committee held its first meeting on Thursday, 6th May, 2021. Pursuant to standing order 193 and rule 3(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders, the Clerk of the Senate conducted the election for the position of Chairperson and Vice-Chairperson. Senator Okong'o Mogeni, SC, MP and Senator Susan Kihika, MP were elected to the positions of Chairperson and Vice-Chairperson of the Committee, respectively.

Mr. Speaker Sir,

Section 33(5) of the County Governments Act, standing order 75(3) and rule 4(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders provide that the Governor shall have the right to appear and be represented before the Special Committee during its investigations. Rule 4(b) of Part 2 of the Fifth Schedule to the Senate Standing Orders further accords the County Assembly the right to appear and be represented before the Special Committee during its investigations. Pursuant to these provisions of the law, the Special Committee invited both the Governor and the County Assembly to appear and be represented before the Special Committee.

The County Assembly was represented by Ahmednasir Abdullahi Advocates, LLP, in the proceedings. In the case of the Governor, he was represented by V.A. Nyamodi & Company Advocates and Ndegwa and Ndegwa & Associates, Advocates.

Mr. Speaker Sir,

The Special Committee wishes to thank the Offices of the Speaker of the Senate and the Clerk of the Senate for the support extended to the Committee in the execution of its mandate. The Committee further extends its appreciation to the County Assembly of Wajir County and its Advocates, M/s Ahmednasir Abdullahi Advocates, LLP, and M/s. V.A. Nyamodi & Company Advocates and Ndegwa and Ndegwa & Associates, Advocates, the Advocates representing the Governor, for their submissions in this matter. The Special Committee also appreciates the media for the coverage of its proceedings during the course of the investigations.

Mr. Speaker Sir,

It is now my pleasant duty and privilege, on behalf of the Special Committee, to present and commend to the Senate this Report of the Special Committee on the Proposed Removal from Office of Hon. Mohamed Abdi Mohamud, the Governor of Wajir County.

SIGNED:





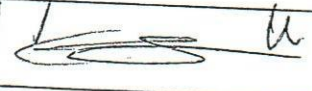


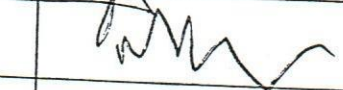
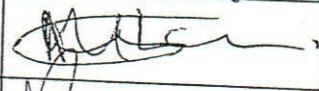
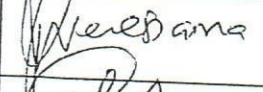

SEN. OKONG'O MOGENI, SC, MP

CHAIRMAN, SPECIAL COMMITTEE ON THE PROPOSED REMOVAL
FROM OFFICE OF THE GOVERNOR OF WAJIR COUNTY.

17TH MAY, 2021

**ADOPTION OF THE REPORT ON THE PROPOSED REMOVAL FROM
OFFICE, BY IMPEACHMENT, OF HONOURABLE MOHAMED ABDI
MOHAMUD, THE GOVERNOR OF WAJIR COUNTY**

We, the undersigned Members of the Special Committee on the proposed removal from office, by impeachment, of Honourable Mohamed Abdi Mohamud, the Governor of Wajir County do hereby append our signatures to adopt the Report on the proposed removal from office, by impeachment, of Honourable Mohamed Abdi Mohamud, the Governor of Wajir County.

No.	Name	Designation	Signature
1.	Sen. Okong'o Mogeni, SC, MP	Chairperson	
2.	Sen. Susan Kihika, MP	Vice Chairperson	
3.	Sen. Sakaja Johnson, CBS, MP	Member	
4.	Sen. Mwangi Githiomi, MP	Member	
5.	Sen. Christine Zawadi Gona, MP	Member	
6.	Sen. Mithika Linturi, MP	Member	
7.	Sen. (Eng.) Hargura Godana, MP	Member	
8.	Sen. Fredrick Outa, MP	Member	
9.	Sen. Agnes Muthama, MP	Member	
10.	Sen. Petronilla Were Lokorio, MP	Member	
11.	Sen. Issa Juma Boy, MP	Member	

1. INTRODUCTION

1.1 Background

1. Pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, No. 17 of 2012, on 27th April, 2021, the County Assembly of Wajir approved a Motion "~~to remove from office, by impeachment,~~" the Governor of Wajir County.

2. Article 181 of the Constitution provides as follows –

Removal of a county governor

- (1) *A county governor may be removed from office on any of the following grounds—*
- a. gross violation of this Constitution or any other law;*
 - b. where there are serious reasons for believing that the county governor has committed a crime under national or international law;*
 - c. abuse of office or gross misconduct; or*
 - d. physical or mental incapacity to perform the functions of office of county governor.*
- (2) *Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).*

3. Section 33 of the County Governments Act provides as follows –

Removal of a governor

- (1) *A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.*
- (2) 4. *If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—*
- (a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and*

- (b) *the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.*
- (3) *Within seven days after receiving notice of a resolution from the speaker of the county assembly—*
 - (a) *the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and*
 - (b) *the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.*
- (4) *A special committee appointed under subsection (3)(b) shall—*
 - (a) *investigate the matter; and*
 - (b) *report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.*
- (5) *The governor shall have the right to appear and be represented before the special committee during its investigations.*
- (6) *If the special committee reports that the particulars of any allegation against the governor —*
 - (a) *have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or*
 - (b) *have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.*
- (7) *If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*
- (8) *If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal*

of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

(9) *The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.*

(10) *A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.*

5. By a letter dated 28th April, 2021 (Ref: SPK/WCA/SENATE/4/2021(1)) which was received in the Office of the Speaker of the Senate on 29th April, 2021, the Speaker of the County Assembly of Wajir informed the Speaker of the Senate of the approval of the Motion for the removal from office of the Governor of Wajir County by the County Assembly and further forwarded to the Speaker of the Senate various supporting documents which are together with the letter attached as *Annex 1*.
6. In terms of section 33(3)(a) of the County Governments Act and standing order 75(1)(a) of the Senate Standing Orders, the Speaker of the Senate is required, *within seven days after receiving notice of a resolution from the Speaker of a County Assembly, to convene a meeting of the Senate to hear charges against the governor.*
7. In this respect, by *Gazette Notice No. 4196* dated 30th April, 2021, which was published in a Special Issue of the *Kenya Gazette* published on 30th April, 2021, the Speaker of the Senate convened a special sitting of the Senate for Tuesday, 4th May, 2021, Wednesday, 5th May, 2021 and Thursday, 6th May, 2021, at the Senate Chamber, Main Parliament Building, Nairobi, with the morning sittings commencing at 10:00 a.m. and the afternoon sittings commencing at 2:30 p.m. Pursuant to standing order 30(1) of the Senate Standing Orders, the Speaker specified the business of that sitting to be, among others, the hearing of the

charges against Hon. Mohamed Abdi Mohamud, the Governor, Wajir County. The *Gazette Notice* is attached as *Annex 2*.

1.2 The Special Sitting of the Senate held on 6th May, 2021

8. In accordance with these provisions of law, at the Special Sitting of the Senate held on Thursday, 6th May, 2021, the Speaker of the Senate, by way of a Communication from the Chair, informed the Senators that he had received communication from the Speaker of the County Assembly of Wajir relating to the approval of the Motion by the County Assembly of Wajir for the removal from office of the Governor of Wajir County. The Order Paper of that sitting and the Communication made by the Speaker of the Senate on that day are attached as *Annex 3* and *Annex 4*, respectively.
9. Thereafter, the Senate Majority Leader gave Notice of the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, 2012, on Tuesday, 27th April, 2021, the Wajir County Assembly approved a Motion for the removal from office by impeachment, of the Honourable Mohamed Abdi Mohamud, Governor of Wajir County;

AND FURTHER, WHEREAS by letter Ref. No. SPK/WCA/SENATE/4/2021(1), dated Wednesday, 28th April, 2021, and received in the Office of the Speaker of the Senate on Thursday, 29th April, 2021, the Speaker of the County Assembly of Wajir informed the Speaker of the Senate of the approval of the Motion by the County Assembly and further forwarded to the Speaker of the Senate, documents in evidence of the proceedings of the Assembly;

AND WHEREAS, pursuant to Section 33(3)(b) of the County Governments Act, 2012 and Standing Order 75(1)(b) of the Senate, the Senate

by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

NOW THEREFORE, pursuant to Section 33(3)(b) of the County Governments Act, 2012 and Standing Order 75(1)(b)(i), the Senate resolves to proceed on this matter by way of establishment of a special committee to investigate the proposed removal from office by impeachment of the Honourable Mohamed Abdi Mohamud, the Governor of Wajir County.

10. Following deliberations on the Motion, the Senate resolved to establish a Special Committee.

11. The Senate Majority Leader subsequently gave notice of the following Motion—

THAT, WHEREAS, pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012, on Tuesday, 27th April, 2021, the Wajir County Assembly approved a Motion for the removal from office by impeachment, of the Honourable Mohamed Abdi Mohamud, Governor of Wajir County;

AND WHEREAS, pursuant to Section 33(3)(b) of the County Governments Act, 2012 and Standing Order 75(1)(b) of the Senate, the Senate by resolution, may appoint a special committee comprising eleven of its Members to investigate the matter;

FURTHER whereas, by a Resolution made on Thursday, 6th May, 2021 (Afternoon Sitting), the Senate resolved to proceed on this matter by way of a special committee, pursuant to Section 33(3)(b) of the County Governments Act, 2012 and Standing Order 75(1)(b)(i),

NOW THEREFORE, pursuant to Standing Order 189, the Senate resolves to appoint a special committee comprising the following Senators -

1. Sen. Sakaja Johnson, CBS,MP;
2. Sen. Mwangi Githiomi, MP;

3. Sen. Christine Zawadi Gona, MP;
4. Sen. Susan Kihika, MP;
5. Sen. Mithika Linturi, MP;
6. Sen. (Eng.) Hargura Godana, MP;
7. Sen. Okong'o Mogeni, SC, MP;
8. Sen. Fredrick Outa, MP;
9. Sen. Agnes Muthama, MP,
10. Sen. Petronilla Were, MP; and
11. Sen. Issa Juma Boy, MP;

to investigate the proposed removal from office by impeachment of the Governor of Wajir County and to report to the Senate within ten (10) days of its appointment, pursuant to Standing Order 75(2), on whether it finds the particulars of the allegations to have been substantiated.

13. Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. Sen. Sakaja Johnson, CBS, MP;
2. Sen. Mwangi Githiomi, MP;
3. Sen. Christine Zawadi Gona, MP;
4. Sen. Susan Kihika, MP;
5. Sen. Mithika Linturi, MP;
6. Sen. (Eng.) Hargura Godana, MP;
7. Sen. Okong'o Mogeni, SC, MP;
8. Sen. Fredrick Outa, MP;
9. Sen. Agnes Muthama, MP,
10. Sen. Petronilla Were, MP; and
11. Sen. Issa Juma Boy, MP.

2. METHOD OF WORK

14. In the execution of its mandate, the Committee conducted a number of activities which are set out below.

1. Meetings of the Special Committee

15. Following its establishment on Thursday, 7th May, 2021, the Special Committee held its first meeting on the same day. Pursuant to standing order 193 and rule 3(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders, at that meeting, the Clerk of the Senate conducted the election of the Chairperson and Vice-Chairperson of the Committee. Senator Okong'o Omogeni, SC, MP was elected, unopposed, as the Chairperson of the Committee while Senator Susan Kihika, MP was similarly elected unopposed as the Vice-Chairperson of the Committee. Further, pursuant to rule 3(b) of Part 2 of the Fifth Schedule to the Senate Standing Orders, the Special Committee appointed Wednesday, 12th May, 2021, as the date for the commencement of the hearing of evidence for the purposes of the investigations.
16. On Monday, 10th May, 2021, the Special Committee held a pre-hearing meeting where members considered the documentation received from the County Assembly, the rules of procedure to be followed by the Committee in discharging its mandate as set out in Part 2 of the Fifth Schedule to the Senate Standing Orders and the hearing programme.
17. The Minutes of the meetings held by the Committee are attached at Annex 5.

2. Indicative Programme of Events

18. At the first meeting of the Committee, the Committee adopted an Indicative Programme of Events which is attached as Annex 6. The Committee observed that in terms of section 33(4)(b) of the County Governments Act and standing order 75(2) of the Senate Standing Orders, the Committee had only ten days within which to investigate the matter in respect of the allegations against the Governor and

thereafter to report to the Senate on whether or not it found the Particulars of the Allegations against the Governor to have been substantiated.

19. It was evident to the Committee that, bearing in mind the nature of the proceedings anticipated in the hearing for the removal from office of the Governor, the Committee had the onerous task of ensuring that the statutory timelines were adhered to.

3. Invitations to Appear

20. The Committee observed that section 33(5) of the County Governments Act and standing order 75(3) of the Senate Standing Orders provided that *"the governor shall have the right to appear and be represented before the special committee during its investigations"*. The Committee further observed that rule 4(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders provided that *"upon the appointment of a date for the commencement of the hearing of the evidence for the purposes of the investigation, the Committee shall invite the Governor to appear and be represented before the special committee during its investigations"*.

21. The Committee also observed that rule 4(b) of Part 2 of the Fifth Schedule to the Senate Standing Orders provided that *"upon the appointment of a date for the commencement of the hearing of the evidence for the purposes of the investigation, the Committee shall notify the County Assembly of the date for the commencement of the investigation and invite the Assembly to designate the members of the Assembly, being not more than three members, if any, who shall appear before the Committee to represent the Assembly during the investigation"*.

22. Having made these observations, and taking into account the limited time available, at its first meeting held on Thursday, 6th May, 2021, the Committee resolved to invite the County Assembly and the Governor to appear before the Committee for the hearing of the evidence. Copies of the Invitations to Appear are attached as Annex 7.

23. The parties were represented at the hearing as follows-

- (a) Ahmednasir Abdullahi of M/s Ahmednasir Abdullahi Advocates, LLP appeared on behalf of the County Assembly; and
- (b) Paul Nyamodi and Njiru Ndegwa of M/s V.A. Nyamodi & Company Advocates and Ndegwa and Ndegwa & Associates, Advocates respectively, Advocates appeared on behalf of the Governor.

24. The Invitation to Appear served on the County Assembly required the Assembly, where it chose to appear before the Committee, to file with the Office of the Clerk of the Senate by 5:00 pm on Tuesday, 11th May, 2021, documentation-

- (a) designating the Members of the County Assembly, being not more than three, if any, who would attend and represent the Assembly in the proceedings before the Special Committee;
- (b) indicating the mode of appearance before the Special Committee; whether in person, by Advocate, or in person and by Advocate;
- (c) indicating the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
- (d) specifying any other evidence to be relied on.

25. The Invitation to Appear served on the Governor required him to indicate whether he would exercise his right to appear before the Committee. If he chose to exercise that right, the Governor was informed that he would be required, to file an answer to the charges with the Office of the Clerk of the Senate by 5:00 pm on Tuesday, 11th May, 2021, in which the Governor would set out-

- (a) the Governor's response to the Particulars of the Allegations;
- (b) how the Governor proposed to appear before the Special Committee; whether in person, by Advocate, or in person and by Advocate;
- (c) the names and addresses of the persons to be called as witnesses, if any, and witness statements containing a summary of the evidence to be presented by such witnesses before the Committee; and
- (d) any other evidence to be relied on.

26. Following the service of the Invitations to Appear, the County Assembly filed a Response to the Invitation to Appear on Tuesday, 11th May, 2021, to which was attached various annexures and which is marked as **Annex 8**.

27. In response to the Invitation to Appear, Counsel for the Governor filed a Notice of Preliminary Issues together with the Governor's Response to the Invitation to Appear, on Tuesday, 11th May, 2021, marked as **Annex 9**.

4. **Hearing**

28. The Committee met on Wednesday, 12th May, 2021, to hear evidence for the purposes of the investigations in accordance with its Hearing Programme which is attached at **Annex 10**. The Hansard record of the hearing is also attached at **Annex 11**.

5. **Working Retreat**

29. The Committee held a Working Retreat on Thursday, 13th May, 2021 to Monday, 17th May, 2021, where the Committee considered the charges, the particulars of allegations and documentation received in the matter. The Committee also considered the submissions of the County Assembly and the Governor, drafted, considered and adopted its Report.

3. **THE CONFERENCE OF PARTIES**

30. The Committee convened a Conference of the Parties on Wednesday, 12th May, 2021 at 10.00 a.m. This provided an opportunity for the formal introduction of the members to the Special Committee and the Counsel for the County Assembly and the Counsel for the Governor.

31. During the Conference of Parties, the Chairperson of the Committee gave Opening Remarks which are attached as **Annex 12** and took the parties to the hearing through the Hearing Programme.

4. **READING OF THE CHARGES**

32. Pursuant to rule 15 of Part 2 of the Fifth Schedule to the Senate Standing Orders, at the commencement of the hearing, the Clerk read out, verbatim, the Particulars of the Allegations against the Governor. The Charges appear at Annex 13.

5. PRELIMINARY ISSUES

33. On 11th May, 2021, at the close of the period for filing of documents in this matter, the Governor of Wajir County, through his Advocates V.A Nyamodi & Company Advocates and Ndegwa & Ndegwa Company Advocates, filed a Notice of Preliminary Issues dated 11th May 2021, giving notice that the Governor would raise the following preliminary issues-

1. *The Resolution passed by the County Assembly of Wajir on 27th April 2021 for the removal of the Governor from office by impeachment was invalid having been passed in violation of the conservatory orders issued on 26th April 2021 by the High Court of Kenya sitting in Meru in Constitutional Petition No E009 of 2021; Aden Ibrahim Mohammed & 6 Others vs County Assembly of Wajir & 3 Others suspending the Notice of Impeachment dated 19th April, 2021, the Notice of Motion for Impeachment dated 19th April, 2021 and the Notification of Notice of Motion for Impeachment dated 20th April, 2021.*
2. *Certain particulars in support of the grounds for removal remain pending before Committees of the County Assembly of Wajir and therefore cannot be grounds for impeachment.*
3. *These proceedings are therefore, to the extent set out hereinbefore, premature and abuse of due process. The same should be struck out forthwith.*

34. On Wednesday, 12th May 2021, when the Special Committee convened for the first day of hearing, the parties raised several preliminary issues for the Committee to consider and render a decision thereon.

35. Mr. Ahmednasir Abdullahi, S.C. of M/s Ahmednasir Abdullahi Advocates, LLP, Counsel for the County Assembly of Wajir informed the Committee that a request, vide a letter Ref. AAC/6144/2021 dated Tuesday, 11th May, 2021 and addressed to

the Clerk of the Senate (**Annex 14**) was made to the Special Committee to summon the following persons to appear and give evidence before the Committee pursuant to Rule 9 of the Fifth Schedule to the Senate Standing Orders –

- (a) Mrs. Khare Omar Maalim;
- (b) Yussuf Mohamed Abdi;
- (c) Farhiya Mohamed Abdi; and
- (d) Osman Abdi Jimale.

36. Mr. Abdullahi, S.C. further submitted that the case revolved around the role played by the said witnesses in the management of the affairs of the County of Wajir and had been awarded numerous tenders for the supply of goods and services in Wajir County as set out in the Affidavit by Hon. Shueb Bare Ahmed, Member of Wajir County Assembly and marked as CA-7. Mr. Abdullahi, S.C. averred that the witnesses were crucial to the case in support of the removal from Office by impeachment of Hon. Mohamed Abdi Mohamud, Governor of Wajir County.
37. Mr. Abdullahi, SC further sought clarification on the role of Hon. Mohamud Abdi Mohamed, the Governor of Wajir in the proceedings as the Governor was not one of the persons to be called as a witness in the impeachment proceedings. Counsel therefore sought that the Governor be barred from addressing the Committee in any capacity having elected not to be a witness and having elected to appear through counsel.
38. The second request from Mr. Abdullahi, S.C. was for the inclusion of the Affidavit sworn by Hon. Shueb Bare Ahmed, Member of the Wajir County Assembly marked CA-7 and containing bank statements as well as CR12s of the companies associated with Mr. Osman Abdi Jimale, one of the persons sought to be summoned, which had been inadvertently omitted. Mr. Abdullahi, SC stated that the documents were crucial in linking the various companies to the witnesses for whom summons had been sought and further, that the Governor would not be prejudiced given that the Governor's defence would be the next day.

39. In response to the preliminary issues raised by Counsel representing the County Assembly, Mr. Paul Nyamodi of M/s V.A. Nyamodi and Co. Advocates, Counsel for the Governor objected to the request on the following grounds –

- (a) Rule 9 of the Fifth Schedule to the Senate Standing Orders confers a discretion by using the word “may” and not an obligation on the Special Committee to summon witnesses at the request of the parties to the impeachment proceedings;
- (b) as a matter of law, whereas the witnesses proposed to be summoned were competent to testify against the Governor of Wajir, the witnesses were not compellable as they were related to the Governor by virtue of being husband and father respectively;
- (c) the Constitution of Kenya, provides for the family as the foundation of the society and further, the future of the cohesiveness of the society would be compromised if such applications were allowed;
- (d) the applicant had not demonstrated that they had attempted to summon the said witnesses and had been unable to;
- (e) Governor of Wajir had not had an opportunity to interrogate the Affidavit by Mr. Shueb Bare Ahmed and the bank statement, CR12s and documents proposed to be included in evidence by the Counsel for the County Assembly of Wajir and further, the inclusion of the documents would be an ambush and prejudicial to the Governor of Wajir;
- (f) evidence ought not to be produced during a hearing as the Governor would not have time to consider and respond to the same;
- (g) the evidence proposed to be introduced was not before the County Assembly; in particular, the CR12s proposed to be introduced in evidence were dated between 9th and 10th May, 2021 and hence obtained after the impeachment proceedings had been concluded in the County Assembly of Wajir and could not have been considered during the consideration of the Motion for Impeachment by the County Assembly;
- (h) the evidence contained in the Affidavit by Hon. Shueb Bare Ahmed contained information which was not considered by the Wajir County

Assembly; the evidence considered by Wajir County Assembly was supplied to the Governor by the Senate and the Governor has responded to the allegations exhaustively;

- (i) the introduction of the said documents and information would be an expansion of the scope of the Motion for impeachment and would be prejudicial to the Governor who was expected to respond to it on the same day of the hearing;
- (j) Rule 19 of Part 2 of the Fifth Schedule to the Senate Standing Orders prevented the introduction of evidence not considered by the County Assembly as follows –

19. In presenting its evidence, the Assembly shall not introduce any new evidence that was not a part of the allegations against the Governor by the County Assembly as forwarded by the Speaker of the County Assembly to the Speaker of the Senate.

- (k) the County Assembly was under an obligation to ensure that all documents and information required to be used in evidence was submitted within the stipulated timelines in order for the Governor to exercise all rights conferred on him under Article 50 of the Constitution and further, evidence or information which was not considered in the County Assembly should not be introduced; and

- (l) the Affidavit of Shueb Bare Ahmed be expunged from the record.

40. On his part, Mr. Paul Nyamodi of M/s V.A. Nyamodi and Co. Advocates, the Counsel for the Governor, submitted on the Notice of Preliminary Issues dated 11th May, 2021 as follows –

- (a) the resolution passed by the County Assembly of Wajir on 27th April, 2021 for the removal of the Governor from Office by Impeachment was invalid, having been passed in violation of the conservatory orders issued on 26th April, 2020 by the High Court of Kenya in *Constitutional Petition No.*

E009 of 2021, Aden Ibrahim Mohammed & 6 Others versus County Assembly of Wajir & 3 Others. The Court issued an order suspending the Notice of Impeachment dated 19th April, 2021, and the Notification of the Notice of Motion for Impeachment dated 20th April, 2021;

- (b) Standing order 89 of the Wajir County Assembly Standing Orders as read with section 14 of the County Governments Act bar the Assembly from debating any matter under consideration before a Committee of the Assembly. Hence, particulars in support of the grounds for removal remain pending before a Committee of the County Assembly of Wajir could not form a ground for impeachment; and
- (c) the impeachment proceedings would therefore, to the extent set out hereinbefore, be premature and an abuse of due process and should be struck out forthwith.

41. Mr. Abdullahi, S.C. responded to the Preliminary Objection as follows –

- (a) public interest overrides the requirement that one cannot summon or call as a witness, a family member of a person alleged to have committed an offence;
- (b) the evidence proposed to be introduced formed part of the allegations that were before the County Assembly and did not constitute new allegations and hence, could be introduced in evidence;
- (c) the information proposed to be introduced relating to the CR12s was not new evidence but just a confirmation of the information contained therein; and
- (d) the impeachment process is not a criminal trial but a constitutional inquiry.

42. The Committee, having listened to the parties, distilled the following Preliminary Issues from the Submissions by the parties –

- (i) Whether the Committee should exercise its powers under Rule 9 of the Fifth Schedule to the Senate Standing Orders and summon the witnesses requested by the County Assembly;
- (ii) Whether the Affidavit sworn by Hon. Shueb Bare Ahmed, Member of the Wajir County Assembly and marked CA-7 should be admitted into evidence;
- (iii) Whether the bundle of documents marked CA 4 and CA 8 should be expunged from the record as it contains issues that were not canvassed before the County Assembly of Wajir;
- (iv) Whether the Committee is barred from proceeding with the hearing of this matter owing to conservatory orders issued by the High Court sitting in Meru; and
- (v) Whether the proceedings herein are premature and abuse of process.

Resolutions of the Committee

43. The Committee analyzed the evidence and submissions on the Preliminary Issues and delivered its ruling on the matters raised.
44. Regarding the role of the Governor in the proceedings, the Committee observed that Rule 4(a) of Part 2 of the Fifth Schedule to the Senate Standing Orders provides that the Senate shall invite the Governor to appear and be represented before the Senate during its investigations. The Committee further observed that Rule 6(b) provides that *"where the Governor chooses to appear before the Committee, the Governor shall be required, within three days of the invitation under rule 4, on a date specified by the Committee, to file an answer to the charges with the Office of the Clerk of the Senate in which the Governor shall set out how the Governor proposes to appear before the Special Committee; whether in person, by advocate, or in person and by advocate"*. Hence, the role of the Governor in the proceedings was clear as he could either appear in person or be represented by an Advocate.

45. In considering the request to summon witnesses, the Committee took cognisance of Rule 9, Part 2 of the Fifth Schedule to the Senate Standing Orders, which provides that *“The Committee may, at the request of the County Assembly or the Governor, invite or summon any person to appear and give evidence before the Committee.”*
46. However, the Committee was not persuaded that sufficient evidence had been adduced to warrant the Committee to issue the summons sought with respect to Mrs. Khaire Omar Maalim, Yussuf Mohamed Abdi and Farhiya Mohamed Abdi. In any event, the Committee noted that the County Assembly could still adduce evidence during the hearing to show a nexus between abuse of office and the Governor’s family without the testimony from the witnesses sought. However, the Committee exercised its discretion under rule 9 of Part 2 of the Fifth Schedule to the Senate Standing Orders to allow the request for summons to be issued to Mr. Osman Abdi Jimale to appear before the Committee on Thursday, 13th May, 2021.
47. Regarding the request for the inclusion of the annexures to the Affidavit sworn by Mr. Shueb Bare Ahmed, the Committee allowed the request on the basis that the wider mandate of the Committee is to exercise its oversight function and flows from the powers in Article 125 of the Constitution. The Committee however did not allow Mr. Ndegwa Njiru’s application to expunge the affidavit sworn by Mr. Hussein Abdirahman Dahir on behalf of the County Assembly and which is marked CA1 as the information contained therein would be crucial to conduct the investigation and to establishing whether the allegations against the Governor had been substantiated or not.
48. On the question of whether the matters canvassed in the documents annexed CA4 and CA8 amount to introduction of evidence that was not adduced before the County Assembly, it was the Committee’s finding that this matter could only be determined after the substantive hearing of both parties. In this regard therefore, the Committee held that the matter was premature and would be determined after the hearing of all the evidence. The Committee therefore declined the request to expunge the documents.

49. Regarding the issue of the injunction issued by the High Court in **Meru High Court Petition No. E009 of 2021, Aden Ibrahim Mohamed & Others Vs County Assembly of Wajir & Others**, the Committee observed that the Senate had previously been faced with similar proceedings in the past where it had been called upon to hear, investigate and vote on charges against a sitting governor. In addition, the Committee noted that any person aggrieved by the removal proceedings in a County Assembly had the opportunity to appear before the Senate raise all issues affecting the process and further, the County Assembly and the Senate had a constitutional mandate to discharge with respect to the impeachment process. Given the outcome of the said proceedings, the Committee observed that the Senate ought not to involve itself on the validity of the proceedings before another legislative body and would only limit itself to the question of whether the allegations forming the basis of the Motion for removal by impeachment of the Governor have been substantiated.
50. The decision of the Committee, delivered by the Chairperson of the Committee, Sen. Okong'o Omogeni, SC, MP on 12th May, 2021, is attached as **Annex 15**.
51. The Committee subsequently issued Summons (**Annex 16**) for the attendance of Mr. Osman Abdi Jimale before the Committee on 13th May, 2021 in line with the Committee's ruling. The Summons were served on Mr. Jimale electronic via WhatsApp as his whereabouts could not be established.

6. THE CHARGES AGAINST THE GOVERNOR OF WAJIR COUNTY,
HON. MOHAMED ABDI MOHAMUD

52. Mr. Ahmednasir Abdullahi, Counsel representing the County Assembly, in presenting the County Assembly's case, stated that it was going to call three witnesses to adduce evidence to substantiate the charges against the Governor of Wajir County. The first witness for the County Assembly was Hon. Abdullahi Issack, Member of the Wajir County Assembly representing Elnur/Tulatula Ward.
53. Hon. Issack, started by stating that he had drafted the motion to impeach the governor of Wajir County and collected signatures from thirty-two members of the Wajir County Assembly (Notice of Motion annexed as CA 3).
54. The witness further stated that after giving the notice of motion, the Speaker adjourned the Assembly's sitting, notified the Governor of the Notice of Motion and gave the governor seven days to respond to the issues raised in the Notice of Motion. Hon. Issack referred the Committee to the letter from the Speaker of the County Assembly to the Governor, dated 20th April, 2021, (page 19 in annexure CA 3). He further referred the Committee to page 20 of the same bundle of documents, which is a call of submission of memoranda to members of the public, requesting them to submit to the clerk of Wajir county, any representation that they may have on the issues raised in the notice of motion.
55. Hon. Issack briefly explained that the grounds of impeachment in his motion included gross violation of the Constitution, County Governments Act, 2012, Public Procurement and Asset Disposal Act, 2015, and the Public Finance Management Act, 2012.

CHARGE 1: GROSS VIOLATION OF THE CONSTITUTION OF KENYA, 2010; THE COUNTY GOVERNMENTS ACT, 2012; THE PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT, 2015 AND THE PUBLIC FINANCE MANAGEMENT ACT, 2012

56. The Particulars of this Charge are as follows –

(a) Allegation 1: Failure to account for the financial resources allocated to the County

57. The County Assembly, in the Particulars of Allegations submitted to the Senate on 29th April, 2021, stated that the Governor had failed to account for the financial resources allocated to the County and appropriated by the County Assembly by failing to provide quarterly expenditure reports to the County Assembly in blatant disregard of Articles 201(a) and 183(3) of the Constitution and sections 149 and 166 of the Public Finance Management Act, 2012.

58. This was in violation of Articles 201 (a) and 183(3) of the Constitution and sections 149 and 166 of the Public Finance Management Act, 2012. These provisions provide as follows-

Article 201(a) of the Constitution provides that *“the following principles shall guide all aspects of public finance in the Republic-*

(a) there shall be openness and accountability, including public participation in financial matters;

....

Article 183(3) of the Constitution further provides that –

(3) The county executive committee shall provide the county assembly with full and regular reports on matters relating to the county.

59. Section 149(1) and 149(2) of the Public Finance Management Act, 2012, set out the responsibilities of an Accounting Officer in the accounting of financial resources as follows –

(1) An accounting officer is accountable to the county assembly for ensuring that the resources of the entity for which the officer is designated are used in a way that is-

- (a) lawful and authorised; and*
- (b) effective, efficient, economical and transparent.*

(2) In carrying out a responsibility imposed by subsection (1), an accounting officer shall, in respect of the entity concerned-

- (a) ensure that all expenditure made by the entity complies with subsection (1);*
- (b) ensure that the entity keeps financial and accounting records that comply with this Act;*
- (c) ensure that all financial and accounting records that the entity keeps in any form including in electronic form are adequately protected and backed up;*
- (d) ensure that all contracts entered into by the entity are lawful and are complied with;*
- (e) ensure that all applicable accounting procedures are followed when acquiring or disposing of goods and services and that, in the case of goods, adequate arrangements are made for their custody, safe guarding and maintenance;*
- (f) bring a matter to the attention of the County Executive Committee member responsible for the entity if, in the accounting officer's opinion a decision or policy or proposed decision or policy of the entity may result in resources being used in a way that is contrary to subsection (1);*

- (g) prepare a strategic plan for the entity in conformity with the medium term fiscal framework and financial objectives of the county government;*
- (h) prepare estimates of expenditure of the entity in conformity with the strategic plan referred to in paragraph (g);*
- (i) submit the estimates of an entity, which is not a county corporation, to the County Executive Committee member for finance;*
- (j) submit the estimates of an entity, which is a county corporation, to the executive committee member responsible for the entity who, after approving it, shall forward it to the County Executive Committee member for finance;*
- (k) not later than three months after the end of each financial year, prepare annual financial statements for that financial year and submit them to the Auditor-General for audit, with a copy to the County Treasury;*
- (l) try to resolve any issues resulting from an audit that remain outstanding;*
- (m) manage the assets of the entity to ensure that it receives value for money when acquiring, using or disposing of its assets;*
- (n) dispose of assets at the most competitive price and at the lowest possible cost ensuring that the proceeds from all asset disposals are deposited in a bank account of the entity;*
- (o) ensure that the respective county government entity has adequate systems and processes in place to plan for, procure, account for, maintain, store and dispose of assets, including an asset register that is current, accurate and available to the relevant County Treasury or the Auditor-General;*
- (p) provide the County Treasury with any information it requires to fulfil its functions under this Act;*

- (q) provide information on any frauds, losses, or any violations of subsection (1) and provide explanations for the actions taken to prevent similar conduct in future; and*
- (r) carry out such other responsibilities as may be specified in regulations by the County Executive Committee member for finance.*

60. Section 166 of the Public Finance Management Act, 2012 further provides as follows –

(1) An accounting officer for a county government entity shall prepare a report for each quarter of the financial year in respect of the entity.

(2) In preparing a quarterly report for a county government entity, the accounting officer shall ensure that the report-

(a) contains information on the financial and non-financial performance of the entity; and

(b) is in a form determined by the Accounting Standards Board.

(3) Not later than fifteen days after the end of each quarter, the accounting officer shall submit the quarterly report to the County Treasury.

(4) Not later than one month after the end of each quarter, the County Treasury shall-

(a) consolidate the quarterly reports and submit them to the county assembly;

(b) deliver copies to the Controller of Budget, National Treasury and the Commission on Revenue Allocation; and

(c) publish and publicise them.

(5) In the case of an entity that is a county corporation, the accounting officer for the corporation shall also submit a copy of the quarterly report to the County

Executive Committee member responsible for the corporation, who, upon approving it, shall submit a copy to the County Treasury.

61. In the written Response to the Invitation to Appear, and which was filed with the Senate on Tuesday 11th May, 2021, the Governor in response to this allegation submitted as follows –
- (a) that section 166 of Public Finance Management Act mandates an accounting officer to prepare reports for each quarter of the financial year in respect of each entity for submission to the County Treasury who in turn submits the same within one month after the end of each quarter to the County Assembly;
 - (b) that the County Executive had complied with the provisions of the law with regard to the preparation and submission of the quarterly financial reports to the National Treasury, Controller Budget, Auditor General and County Assembly; and
 - (c) that the reports were the basis by which the Controller of Budget prepares quarterly Budget Implementation Review Reports, in line with Section 228(6) of the Constitution. The reports are then shared with the National Assembly as well as the County Assembly of Wajir.
62. During the hearing, the witness for the Governor, Mr. Adan Kalmoy, the Acting Director, Accounting Services of Wajir County adduced documents (marked as annex A) in support of the allegation that the Governor had failed to account for the financial resources allocated to the County. He also relied on his Witness Statement dated 11th May, 2021. The documents relied on in support of the allegation and contained in annex A are as follows -
- (a) a letter dated 5th April, 2021 addressed to the Director-General, Accounting and Quality Assurance, National Treasury, submitting Wajir County's quarterly report for the period ending 31st March, 2021 (Annex 1(a));

- (b) Wajir County Executive Reports and Financial Statements for the Quarter ending March 31st, 2021 (the report is marked 1(b));
 - (c) letter dated 12th January, 2021, addressed to the Director-General, Accounting and Quality Assurance, National Treasury, submitting Wajir County's quarterly report for the period ending 30th December, 2021, (Annex 1(a)); and
 - (d) Wajir County Executive Reports and Financial Statements for the Quarter ending 31st March, 2021 (Annex 1(b)).
63. During cross-examination by Mr. Ahmednassir SC, Counsel representing the County Assembly, Mr. Kalmoy was put to task to state why the County of Wajir was utilizing the National Government logo in its official communication. Mr. Kalmoy confirmed that indeed the county executive used the National government logo as this was a template that the county had received from the National Treasury.
64. On further cross examination by Senior Counsel Ahmednasir in relation to the list of chief officers holding various portfolios in the Wajir County Government, Mr. Kalmoy confirmed that Mr. Adow Osman Ahmed, Mr. Yussuf Dayib Abdi and Mr. Ahmed Guhad Omar did not hold the positions of CCO Decentralization, Water and Medical Services respectively, as indicated in the County Executive's quarterly report for the quarter ending 31st March, 2021. It was the Senior Counsel's view during cross-examination that the documentation presented was fake and was only prepared after the Governor had been impeached.

Observations of the Committee

65. Having considered the evidence submitted by the parties, the Committee found that the allegation has not been substantiated.

(b) Allegation 2: Lack of accountability in the management of county resources

66. The County Assembly in the Particulars of Allegations submitted to the Senate on 29th April, 2021 stated that the Governor failed to account for the management of County resources by incurring unsustainable debts and other pending obligations amounting to 2 Billion Kenya Shillings. These pending obligations were never disclosed both in the County Fiscal Strategy Paper, 2019 and 2020, thus violating Article 201(e) of the Constitution which provides that *financial management shall be responsible, and fiscal reporting shall be clear* and section 107(2) of the Public Finance Management Act, 2012. Section 107(2) of the Public Finance Management Act, 2012 which provides-

(2) In managing the county government's public finances, the County Treasury shall enforce the following fiscal responsibility principles-

- (a) the county government's recurrent expenditure shall not exceed the county government's total revenue;*
- (b) over the medium term a minimum of thirty per cent of the county government's budget shall be allocated to the development expenditure;*
- (c) the county government's expenditure on wages and benefits for its public officers shall not exceed a percentage of the county government's total revenue as prescribed by the County Executive member for finance in regulations and approved by the County Assembly;*
- (d) over the medium term, the government's borrowings shall be used only for the purpose of financing development expenditure and not for recurrent expenditure;*
- (e) the county debt shall be maintained at a sustainable level as approved by county assembly;*

- (d) over the medium term, the government's borrowings shall be used only for the purpose of financing development expenditure and not for recurrent expenditure;*
- (e) the county debt shall be maintained at a sustainable level as approved by county assembly;*
- (f) the fiscal risks shall be managed prudently; and*
- (g) a reasonable degree of predictability with respect to the level of tax rates and tax bases shall be maintained, taking into account any tax reforms that may be made in the future.*

67. At the hearing, Hon. Abdullahi Hassan Issack, in his evidence in support of this allegation, averred that the County Government of Wajir had pending bills amounting to Kshs. 2.064 Billion, having failed to pay persons contracted by the County to undertake various works. This was despite the fact that the monies had been budgeted for in the FY 2018/2019 and monies allocated for payment of the said works. The money was however diverted to other payments.
68. Hon. Issack further stated that the information presented to the Wajir County Assembly by the County Executive Committee Member for finance was only a portion of the pending bills and was not a full account of the monies owed by Wajir County. This, he stated was noted, when the Ad-hoc Committee on Pending Bills of the County Government of Wajir was constituted by the Wajir County Assembly, following a public outcry; carried out a verification process on the issue and found that the amount by the County Executive Committee Member for finance had understated the amount and that a further amount totaling Kshs. 1.6 billion was still pending.
69. During cross-examination by Mr. V. Nyamodi, Counsel for the Governor, the witness stated that it was the Governor's responsibility, as the chief executive officer of the county to pay the pending bills. He however noted that the issue of pending bills was not unique to Wajir County Government and it was an issue that cut across all forty-seven County Governments. (The *Ad hoc* Committee's Report is annexed as CA 3). Mr Issack further submitted that this was acknowledged by

the ad-hoc committee established by the County Assembly to interrogate the pending bills. It was further noted that the recommendations made by the ad-hoc committee were not addressed to the Governor but to various accounting officers including the county executive committee member for finance and chief officers in the Departments dealing with water resource development, health and roads.

70. While being cross-examined by the Counsel representing the Governor, Mr. Issack indicated that the Governor performed his role through the County Executive Committee Members and further, that the County Assembly had the power to summon the accounting officers to appear before the Assembly. However, no information was tendered by the County Assembly evidencing the issuance of summons to the County Executive Committee Member of finance or any other County Executive Member.
71. When put to task regarding responsibility for pending bills, Mr. Issack acknowledged that the President had issued a directive that all accounting officers pay all pending bills and stated that while the Governor was not an accounting officer, he had appointed accounting officers including the accounting officer in the Department of Finance and that the Governor was solely responsible for the matters relating to pending bills as the officers worked under him.
72. In the Governor's written response submitted to the Senate on 11th May, 2021, the Governor through his Advocates on record, responded to this allegation as follows-
 - (a) Although the County Government of Wajir had pending bills of Ksh. 2 billion in the financial year 2018/2019, the County had an unspent balance of Ksh. 2.6 billion, in terms of revenue, brought forward from the financial year 2017/2018, which could clear the said pending bills. The said unspent balance was factored in the Wajir County Appropriation Act. The Committee was referred to annexure 2 (a)- Wajir County Appropriation Act, 2018.

- (b) The Ksh. 2 billion pending bills had been audited by a Consultant contracted by the Office of the Auditor General known as "Mchunguzi" in June 2018. (Annexure 2 (b)- Special Audit Wajir County Government Pending Bills (the Mchunguzi Report).
- (c) The audit of the Pending Bills revealed that the County Government of Wajir had pending bills of Kshs. 2,357,171,365. Out of this amount, Ksh. 2,013,079,825 was paid by the County Government of Wajir in the Financial Year 2018/2019.
- (d) Further, pursuant to the directive of National Treasury that counties must clear audited pending bills as a condition for them to access their respective exchequer releases, the County Government of Wajir prepared a payment plan and communicated the same to the Cabinet Secretary National Treasury and Planning. As at 13th December, 2019, the County Government of Wajir had outstanding pending bills of Ksh. 344, 091,540 as per the letter dated 13thDecember, 2019 from the County Government of Wajir to The Cabinet Secretary National Treasury (Annexure 2 (c)).
- (e) The County Government Wajir, therefore, had paid 85% of the audited pending bills even before the directive by the National Treasury to the Counties to clear their pending bills. This clearly manifests the willingness of the County Executive to pay its pending bills.
- (f) County Government of Wajir pending liabilities were disclosed in both the County Fiscal Strategy Paper 2019 and 2020 under the Fiscal Responsibilities as required by Section 107 of the Public Finance Management Act, 2012 contrary to the allegation that same was never disclosed. These are captured in the County Fiscal Strategy Paper 2020 on Page 28 second to last paragraph and County Fiscal Strategy Paper 2019 on Page 14 last paragraph (Annexure 2(d) and (e)).

73. During the hearing, Mr. Mohamed Yunis Sheikh, the Deputy Director, Budget, Wajir County stated that the allegation that there was lack of accountability in the management of county resources by incurring unsustainable debts and other

obligations to the tune of Kshs. 2 billion was untrue as the alleged Kshs. 2 billion existed from the financial year 2017/18, the County Government had an unspent balance of Kshs. 2.6 billion from that financial year as seen as can be seen from the last page of the Wajir County Appropriation Act, 2018, which is annexed in the bundle of documents submitted in support of the Governor's case, (Annex B, page marked 2(a)). He further stated that the pending bill arose from the fact that the County did not receive an approval for the withdrawal of funds to spend the Kshs. 2.6 billion and hence, the debt could not be classified as unsustainable as the monies existed.

74. With regard to the letter relied on by the County Assembly written by the county executive committee member for finance as evidence that there was a pending bill of Kshs. 2.3 billion (Annex 2b), Mr. Sheikh stated that by the time the letter was written on 13th December, 2019, the County Government had paid Kshs. 2 billion. He further stated that the letter was also written before the directive by the National Treasury for counties to clear pending bills before the release of the exchequer. he stated that the County Government had paid 85% of the audited pending bills prior to the directive by the National Treasury that all counties pay their pending bills in order to receive their exchequer release. Mr. Sheikh also averred that all pending bills for the County Government had been disclosed in the County Fiscal Strategy paper for the year 2019 and 2020 and confirmed that this disclosure was contained in page 28 of the Strategy Paper for the year 2020 (Annex 2D).

Observations of the Committee

75. The Committee considered the information submitted and the evidence adduced by the parties and noted the County Assembly did not adduce any evidence to substantiate the allegation that there was lack of accountability of county resources on the part of the Governor. Hence, the Committee found that allegation 2 was not substantiated.

(c) Allegation 3: Failure to draft the medium-term strategy for the financial year 2020/2021

76. The county assembly in the Particulars of allegations submitted to the Senate on 29th April, 2021 alleged that the failure to draft the Medium-Term Strategy for the Financial Year 2020/2021 was in contravention of section 123 of the Public Finance Management Act. The County Assembly avers that the lack of strategy placed Wajir County in a highly precarious position as it may lead to protracted and costly court battles with creditors and eventual auctioning of the County Assets. Section 123 of the Public Finance Management Act, 2012 provides that-

County Treasury to submit county government debt management strategy to county assembly

(1) On or before the 28th February in each year, the County Treasury shall submit to the county assembly a statement setting out the debt management strategy of the county government over the medium term with regard to its actual liability and potential liability in respect of loans and its plans for dealing with those liabilities.

(2) The County Treasury shall include the following information in the statement—

(a) the total stock of debt as at the date of the statement;

(b) the sources of loans made to the county government;

(c) the principal risks associated with those loans;

(d) the assumptions underlying the debt management strategy; and

(e) an analysis of the sustainability of the amount of debt, both actual and potential.

(3) As soon as practicable after the statement has been submitted to the county assembly under this section, the County Executive

Committee member for finance shall publish and publicise the statement and submit a copy to the Commission on Revenue Allocation and the Intergovernmental Budget and Economic Council.

77. During cross-examination by Senior Counsel Ahmednassir for the Governor, Hon. Abdullahi Issack confirmed that the county executive committee member for finance was the person responsible for preparing the medium-term strategy for FY 2020/2021 and further, the County Government had incurred liabilities in the form of pending bills owing to the lack of the medium term strategy.
78. In the Governor's written response submitted to the Senate on 11th May, 2021, the Governor, responded to this allegation as follows-
- (a) the Debt Management Statement can only be prepared when the County Government has borrowed or is expected to borrow loans in the medium term, which in this case, the County Government is yet to borrow any loans and it is not anticipating borrowing any loan in the medium term;
 - (b) the County Government of Wajir however, usually prepares the County Fiscal Strategy Paper, which incorporates county pending bills and other liabilities such as its debts and provides for the debt financing policy. The County Fiscal Strategy Paper is usually submitted to the County Assembly for approval by 28th February of every year. The Committee was referred to the annexure 3(a) and 3 (b) of Bundle C, D, E- County Fiscal Strategy Papers (CFSP) for 2020 and 2019; and
 - (c) the County Government of Wajir already had the Budget for the financial year 2020/2021 and the County Fiscal Strategy Paper had already been approved by the County Assembly. Therefore, the allegation that the County risks being in a precarious financial position as it will have no budget to run its affairs was baseless.
79. During interventions made by Committee members on this matter, the Members sought a clarification from Mr. Mohamed Yunis Sheikh, on whether the County

Government failed to prepare a medium-term strategy because the county did not have loans. In response, Mr. Sheikh stated that the county had a County Fiscal Strategy and a Debt Management Strategy which were both medium term strategies and further that section 123 of the Public Finance Management Act, 2012, was not applicable to the County as it did not have any pending liabilities which would require it to prepare a County Fiscal Strategy Paper nor did the County anticipate to borrow. (Annex 3A, 3B and 3C contained in File C, D and E).

Observations of the Committee

80. The Committee considered the evidence submitted by the parties and found that allegation 3 on failure by the Governor to draft the medium-term strategy for the financial year 2020/2021 was not substantiated.

(d) Allegation 4: Violation of articles 176(1) and 185 of the Constitution by disregarding the County Assembly as an arm of the County Government

81. The County Assembly, in the Particulars of Allegations submitted to the Senate on 29th April, 2021, the County Assembly stated that the Governor violated Articles 176(1) and 185 of the Constitution of Kenya, 2010 by disregarding the County Assembly as an arm of the County Government and further undermining its three cardinal roles of legislation, oversight and representation through systematic non-remittance of the requisitioned funds for the County assembly operations amounting to Kshs. 70,216,902. The County Assembly averred that this is an affront to the separation of powers understanding that the County Assembly is an independent entity. This systematic crippling of the Assembly operations compromises the independence of the County Assembly.

82. Article 176(1) of the Constitution provides that-

(1) There shall be a county government for each county, consisting of a county assembly and a county executive.

83. Article 185 of the Constitution of Kenya provides that-
- (1) The legislative authority of a county is vested in, and exercised by, its county assembly.*
 - (2) A county assembly may make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.*
 - (3) A county assembly, while respecting the principle of the separation of powers, may exercise oversight over the county executive committee and any other county executive organs.*
 - (4) A county assembly may receive and approve plans and policies for—*
 - (a) the management and exploitation of the county's resources; and*
 - (b) the development and management of its infrastructure and institutions.*
84. During the hearing while being examined by Counsel representing the Assembly, Hon. Abdullahi Issack averred that the money accruing to Wajir County Assembly and which ought to have been remitted in June, 2020, was Kshs. 70,216,902, which was for the payment of salaries, mileage and medical cover for Members of Wajir County Assembly. He stated that the monies were not remitted to the County Assembly and had been withheld by the county treasury with the aim of frustrating the Members of the County Assembly in carrying out their roles. This according to Hon. Issack was a violation of the principle of separation of powers. The witness stated that as at the time of the hearing, the money was yet to be released to the County Assembly.
85. Hon. Issack submitted a bank statement from the Central Bank of Kenya indicating that the money was paid to the County Assembly. Hon. Issack further stated that he had received the statement by the Central Bank of Kenya from an individual and not the Bank and that he was not willing to disclose his source.
86. In the Governor's written response submitted to the Senate on 11th May, 2021, at page 28, the Governor responded to this allegation as follows-

- (a) the County Assembly has over the years been allocated funds in the budget within the ceiling prescribed by the Commission for Revenue Allocation in the County Allocation of Revenue Act and approved by the Senate;
- (b) the Ksh.70,216,902/= claimed by the County Assembly as unremitted was in respect of the balance due to them for the Month of June, 2020;
- (c) this amount was part of the Exchequer Release received by the County Government of Wajir in the month of August 2020, after the closure of the Financial Year. The Committee was referred to the annexure 4(a)- the County Revenue Fund Account Statement and Annexure 4(b) - a Letter dated 20th July 2020 from the Council of Governors to the Cabinet Secretary National Treasury (Annex C, D, E);
- (d) the County Executive appropriated the same amount for the County Assembly and factored in the budget of the Financial Year 2020/2021 Budget. The Committee was referred to the annexure 4 (c) in the bundle C.D.E - Wajir County Appropriation Act, 2020;
- (e) in the said budget, it is apparent that the County Assembly of Wajir was allocated Ksh. 830,194,403/=-, which comprised of the pending liability for the Month of June 2020 amounting to Kshs. 70,216,902/= and the Financial Year 2020/2021 allocation of Kshs. 759,977,501/=-;
- (f) the County Executive had so far received and spent exchequer release up to Month of January, 2021 but the County Assembly has been paid its allocation up to the Month of March, 2021 manifesting the willingness of the County Executive to honour timely funds transfer to the County Assembly as and when funds are released by the National Treasury. The Committee was referred to the annex 4 (a)-, bundle C,D,ECounty Revenue Fund Account Statement; and
- (g) the County Government of Wajir had received 61% of the equitable share and the balance from June 2020. The County Executive had transferred 75% of the Financial Year 2020/2021 County Assembly budgetary allocation. The Committee was referred to annexure (4e), bundle C, D, E - Wajir County

Treasury Tabulation of release to County Assembly and Annexure 4(f)-
Wajir County Treasury Tabulation of Equitable Share Receipt.

87. During the hearing, Mr. Mohamed Yunis Sheikh, the Deputy Director, Finance, Wajir County, while being examined by Counsel representing the Governor, stated that the allegation was misleading as the non-remittance of the 70 Million was as a result of late exchequer release. Mr. Sheikh stated that to remedy the issue, the county executive re-appropriated the money in the current financial year 2020/2021. Annex 4A, in the bundle C, D, E shows that the money was transmitted to the county revenue fund for wajir county. He further stated that late remittance was an issue that affected all counties. He made reference to annex 4B, in the bundle C.D.E, stating that the Council of Governors had on 20th June, 2020 alerted the National Treasury that county governments were yet to receive the June disbursements.
88. In his evidence, Mr. Sheikh further stated that the County Allocation of Revenue Act had given Wajir County Assembly a ceiling of Ksh. 760 Million but in the current financial year, the county assembly was allocated 830 million, including the unspent Ksh. 70,216,902. The County Allocation of Revenue Act is annexed as 4(d) in the bundle C, D, E. He stated that Kshs 626 million had been released by 30th April, 2020 and Kshs 203 Million is yet to be released by the National Treasury.

Observations of the Committee

89. The Committee considered the information submitted by the County Assembly and noted that this was an issue that affected all the forty-seven County Governments owing to a gap in the existing legislation. The Committee found that the County Assembly did not demonstrate that the Governor had violated any law.
90. However, the Committee observed that there was need to amend the law to require that acquisitions be independent of each other on the part of the County Assembly and the County Executive.

91. The County Government was able to demonstrate that the funds were eventually remitted to the County Assembly as per the requisition and hence, the issue was rectified.

92. The Committee therefore found that with the current provisions of the law, allegation 4 on violation of articles 176(1) and 185 of the Constitution by disregarding the County Assembly as an arm of the County Government was not substantiated.

(e) Allegation 5: Failure to establish the County Budget and Economic Forum

93. The County Assembly in the Particulars of Allegations submitted to the Senate on 29th April, 2021, stated that the Governor had failed to establish the County Budget and Economic Forum for the County Budget consultation process as stipulated in Section 137 of the Public Finance Management Act, 2012 and as a result the County Governor had violated sections 87, 91 and 115 of the County Governments Act, 2012 as well as Article 10 and 201(a) of the Constitution and deliberately created an atmosphere to facilitate plunder and loss of public resources.

94. Section 137 of the Public Finance Management Act provides that-

(1) As soon as practicable after the commencement of this Act, a county government shall establish a forum to be known as the (Name of the County) County Budget and Economic Forum.

(2) The County Budget and Economic Forum shall consist of-

(a) the Governor of the county who shall be the chairperson;

(b) other members of the county executive committee;

(c) a number of representatives, not being county public officers, equal to the number of executive committee members appointed by the Governor from persons nominated by organisations representing professionals, business, labour issues, women, persons with disabilities, the elderly and faith based groups at the county level.

(3) The purpose of the Forum is to provide a means for consultation by the county government on-

(a) preparation of county plans, the County Fiscal Strategy Paper and the Budget Review and Outlook Paper for the county; and

(b) matters relating to budgeting, the economy and financial management at the county level.

(4) In addition to the above, consultations shall be in accordance with the consultation process provided in the law relating to county governments.

95. Section 87 of the County Governments Act, 2012 provides that-

Citizen participation in county governments shall be based upon the following principles-

(a) timely access to information, data, documents, and other information relevant or related to policy formulation and implementation;

(b) reasonable access to the process of formulating and implementing policies, laws, and regulations, including the approval of development proposals, projects and budgets, the granting of permits and the establishment of specific performance standards;

(c) protection and promotion of the interest and rights of minorities, marginalized groups and communities and their access to relevant information;

(d) legal standing to interested or affected persons, organizations, and where pertinent, communities, to appeal from or, review decisions, or redress grievances, with particular emphasis on persons and traditionally marginalized communities, including women, the youth, and disadvantaged communities;

(e) reasonable balance in the roles and obligations of county governments and non-state actors in decision-making processes to promote shared responsibility and partnership, and to provide complementary authority and oversight;

- (f) promotion of public-private partnerships, such as joint committees, technical teams, and citizen commissions, to encourage direct dialogue and concerted action on sustainable development; and*
- (g) recognition and promotion of the reciprocal roles of non-state actors' participation and governmental facilitation and oversight.*

96. Section 91 of the County Governments Act, 2012 provides that-

Establishment of modalities and platforms for citizen participation

The county government shall facilitate the establishment of structures for citizen participation including—

- (a) information communication technology based platforms;*
- (b) town hall meetings;*
- (c) budget preparation and validation fora;*
- (d) notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;*
- (e) development project sites;*
- (f) deleted by Act No. 13 of 2014, s. 3;*
- (g) establishment of citizen fora at county and decentralized units.*

96. Section 115 of the County Governments Act, 2012 provides that-

(1) Public participation in the county planning processes shall be mandatory and be facilitated through-

- (a) mechanisms provided for in Part VIII of this Act; and*
- (b) provision to the public of clear and unambiguous information on any matter under consideration in the planning process, including-*
 - (i) clear strategic environmental assessments;*
 - (ii) clear environmental impact assessment reports;*
 - (iii) expected development outcomes; and*
 - (iv) development options and their cost implications.*

(2) Each county assembly shall develop laws and regulations giving effect to the requirement for effective citizen participation in development planning and performance management within the county and such laws and guidelines shall adhere to minimum national requirements.

97. Article 201(a) of the Constitution provides that-

201. The following principles shall guide all aspects of public finance in the Republic-

(a) there shall be openness and accountability, including public participation in financial matters;...

98. In rebuttal to this allegation, Mr. Abdullahi Maalim, the acting County Secretary, while giving his evidence, stated that the County Budget Economic Forum was not yet in place as section 137 of the Public Finance Management Act, 2012, required this forum to be established as soon as practicable after the commencement of the Act. He further stated that at the time, it was not practically possible.

99. The Governor responded *vide* the written Response dated 11th May 2021 by submitting that the County Government is in the process of establishing the Wajir County Budget and Economic Forum and that the County Government had issued terms of reference in April, 2021. Further, the County Government sent out calls for nomination from ten non-state actors, which nomination is expected to close in May, 2021. Once the nomination process is completed the County Budget & Economic Forum will be in place.

Observations of the Committee

100. The Committee considered the information submitted by the parties and noted that there was a lacuna in the existing legislation. In particular, the Committee found that the law did not impose a specific time line within which a County Government is required to establish a County Budget and Economic Forum. In particular, the Committee noted that section 137 of the Public Finance Management Act, 2012,

imposed an obligation on a County Government to establish the forum as soon as practicable after the commencement of the Public Finance Management Act, 2012.

101. The Committee further observed that as long as it could be established that a County Government had taken steps towards establishing a County Budget and Economic Forum, the Governor could not then be found to be in breach of section 137 of the Public Finance Management Act, 2012.
102. The Committee noted that this issue had arisen in the previous impeachment processes relating to Hon. Chepkwony, Governor of Kericho County, Hon. Samboja, Governor of Taita Taveta and Hon. Ann Waiguru, Governor of Kirinyaga County Government. The Committee therefore observed that it was necessary to amend section 137 of the Public Finance Management Act, 2012, to impose a specific timeline within which the Forum should be established and hence, recommended that the Act be amended to provide a timeline of eight months.
103. The Committee therefore found that in so far as the existing legislation does not provide for a timeline within which to establish a County Budget and Economic Forum, allegation 5 on the failure on the part of the Governor to establish the County Budget and Economic Forum was not substantiated.

(f) Allegation 6: Failure to deliver the annual state of the county address

104. The County Assembly in the Particulars of Allegations submitted to the Senate on 29th April, 2021 stated that the Governor had violated section 30(2)(k) of the County Government Act, 2012 by failing to deliver the Annual State of the County Address through which the policy direction of the County Government is enumerated. This was despite the several requests made by the Assembly. The County Assembly submitted a letter reference *WCA/SPK/GOV/01/2020* dated 24th June, 2020 addressed to the Governor, urging him to give the address.

105. Section 30(2)(k) of the County Governments Act provides as follows-

(2) Subject to the Constitution, the governor shall-

(k) deliver annual state of the county address containing such matters as may be specified in county legislation;

106. During the hearing, Hon. Abdullahi Issack during examination in chief by senior Counsel Ahmed Nassir averred that the Governor had never issued an address to the County Assembly save for the first address made during the opening of the County Assembly and swearing-in of the Speaker, contrary to section 30(2)(k) of the County Governments Act, 2012. He stated that the Speaker of Wajir County Assembly wrote, on 24th June, 2020, to the Governor of Wajir County Assembly requesting that he attends the County Assembly for the purposes of addressing the Assembly and that he enumerates, in the address, policies and the direction that the County Government was taking. This, according to the County Assembly, would enable the County Assembly know the policies that were under implementation or direction that the County Government was taking.

107. In response to the County Assembly's allegation, Mr. Abdullahi Hassan Maalim, Ag. County Secretary, while adducing evidence on behalf of the Governor, stated that there was no county legislation in place to give clear guidelines on the address by the Governor. He stated that pursuant to section 30(2)(k) of the County Governments Act, the address was to contain matters specified in a county legislation. He further stated that the Governor had addressed the Members of the County Assembly in various locations and not necessarily in the County Assembly but had not given what they referred to as the Annual State of the County Address.

108. In seeking clarification, the Special Committee sought clarification from the county secretary, whose responsibility it was to generate county legislation. In response the county secretary stated that it was both the county executive and county assembly's duty to generate legislation.

109. In the Governor's written response submitted to the Senate on 11th May, 2021, the Governor responded to this allegation as follows —

- (a) that the Governor had on various occasions addressed members of the County Assembly but not necessarily in the County Assembly;
- (b) the duty to make an annual state of the county address was not a constitutional obligation but a statutory duty stipulated under section 30(2)(k) of the County Government Act, 2012. It does not obligate the Governor to make an annual address to members of the County Assembly;
- (c) there is no statutory defined venue where an annual state of the County Address should be made; and there is no statutory stipulated format in which the Annual State of the County Addresses should be prepared;
- (d) the said annual addresses have therefore been made in compliance with section 30(2) (k) of the County Governments Act No. 17 of 2012, and Articles 1,2,3, 10, 73, and 179(4) of the Constitution allegedly violated; and
- (e) the Speaker of the County Assembly also had an obligation of inviting the Governor to the Assembly.

110. The Committee observed that indeed section 30(2)(k) of the County Governments Act, 2012 requires the Governor to deliver an Annual State of the County Address. However, this section does not specify the place such an Address should be delivered. The Committee noted that the County Assembly through its first witness, Hon. Abdullahi Issack who is a member of the County Assembly, testified that no Annual State of the County Address had ever been delivered in the County Assembly during the term of the Governor. Hon. Abdullahi testified before the Committee that the Governor ought to deliver the State of the County Address in the County Assembly as happens in the case of the President and Parliament at the national level. However, the Committee observed that since the testimony of Hon. Issack was not corroborated, no satisfactory evidence was adduced before the Committee in support of this allegation.

111. On the Governor's part, during examination in chief, the County Secretary, Mr. Abdullahi Hassan submitted that so far two State of the County Address have been delivered but not in the county assembly. He further stated that whereas the County Government Act require a legislation to be enacted to govern the content of the annual state of the County Address, there was no such legislation enacted in Wajir County and therefore, in his opinion, the Address can be made anywhere within the county.

Committee observations

112. The Committee noted that the County Governments Act, 2012, does not specify where a State of the County Address ought to be delivered. This means that the same could be delivered in a place other than the County Assembly. The Committee also noted that the standing orders of any legislature directs the conduct of business in the respective legislature but does not bind people outside the business of the legislature. Therefore, the standing orders of the County Assembly of Wajir are not binding on the Governor as he is not a member of the County Assembly.
113. However, it was noted by some members that it was apparent that the Governor did not address the County Assembly and further, that even if the law was not clear regarding the obligation imposed on the Governor to issue an annual address to the County Assembly, it was only prudent for a Governor to issue the annual address in order to keep the County Assembly updated on the affairs of the County Government.
114. That being said, the Committee recommends that since section 30(2)(k) of the County Governments Act, 2012, requires the County Government to enact a county legislation providing for the contents of the Annual State of the County Address, the County Assembly being the legislative arm of the Wajir County Government, should enact a county legislation to provide for matters relating to the Annual State of the County Address. Such legislation would be binding on the Governor.
115. The Committee therefore found that allegation 6 was not substantiated.

(g) Allegation 7: Failure to submit the annual report of the implementation status of county policies and plans

116. The County Assembly in the Particulars of Allegations submitted to the Senate on 29th April, 2021 stated that the Governor had violated section 30(2)(j) of the County Governments Act, 2012, by failing to submit to the County Assembly an annual report of the implementation status on the County policies and plans. Section 30(2)(j) of the Act provides that subject to the Constitution, the governor shall submit to the county assembly an annual report on the implementation status of county policies and plans as follows -

Functions and responsibilities of a county governor

1. ...

2. *Subject to the Constitution, the governor shall -*

(j) submit to the county assembly an annual report on the implementation status of the county policies and plans;...

117. The Governor's response to this allegation is contained at page 34 of the Response to the Invitation to Appear where the Governor submitted that—

(a) The allegation was misleading because annual reports on implementation of county policies and plans have always been availed to the County Assembly in compliance with section 162 of the Public Finance Management Act, 2012, which mandated public officers to ensure resources are used in a manner that is effective, efficient, economical and transparent, as demonstrated through submission of statutory documents required under the Public Finance Management Act, 2012, County Governments Act, 2012, and other laws. Section 162 of the Public Finance Management Act, 2012, provides as follows -

162. Obligations of public officers with respect to county government resources

(1) Every public officer employed in or by the county government shall comply with the Constitution and all laws relating to conduct of public officers when carrying out a responsibility imposed, or exercising a power conferred, by this Act.

(2) Every public officer shall also—

(a) comply with the provisions of this Act so far as they are applicable to the officer;

(b) ensure that the resources within the officer's area of responsibility are used in a way that—

(i) is lawful and authorised; and

(ii) effective, efficient, economical and transparent; and

(c) within the officer's area of responsibility—

(i) ensure that adequate arrangements are made for the proper use, custody, safeguarding and maintenance of public property; and

(ii) use the officer's best efforts to prevent any damage from being done to the financial interests of the county government.

(b) The five-year period County Integrated Development Plan as required under section 108 of the County Governments Act 2012 which clearly stipulates the County's goals and objectives; an implementation plan with clear outcomes; provisions for monitoring and evaluation; and reporting mechanisms of the status of the set goals and objectives. The Committee was referred to annexure 6(a), bundle G - The five-year period County Integrated Development Plan (CIDP) 2018-2022.

(c) The Governor submits Annual Development plans to the County Assembly for Financial Years 2020/2021 prepared in accordance with Article 220(2) of the Constitution and section 126 of the Public Finance Management Act, 2012. The Committee was referred to annexure 6(b), bundle G - Annual

Development Plans submitted to the County Assembly for the Financial Years 2021/21.

- (d) Annual financial statements are submitted by the Governor at the end of each financial year by the County in formats prescribed by the Accounting Standards Board as required under section 163 of the Public Finance Management Act, 2012. The Committee was referred to annexure 2 (c), bundle G - Annual Financial statements for the Financial Years 2021/21.
- (e) Quarterly financial reports are prepared in compliance with section 166 of the Public Finance Management Act 2012 in every financial year in respect of the entity. The Committee was referred to annexure 2(d) - Quarterly financial reports for financial year 2019, 2020 and 2021.
- (f) County Fiscal Strategy Paper as required under section 117 of the Public Finance Management Act, 2012, whose contents broadly specify the strategic priorities and policy goals that guide the county government in preparing its budget in every financial year are prepared and submitted to the County Assembly. The Committee was referred to annexure 3(a) and 3(b), bundle C, D, E - County Fiscal Strategy Paper for years 2020 and 2019.

Observations of the Committee

- 118. The Committee noted that the information contemplated under section 30(2)(j) of the County Governments Act for submission by the Governor was not the same information that was required to be submitted under section 162 of the Public Finance Management Act, 2012.
- 119. The Governor did not comply with the requirement under section 30(2)(j) of the County Governments Act to submit the annual report on the implementation status of the county policies and plans and hence, the Committee found that this allegation was substantiated.

120. However, the Committee observed that this violation is not a gross violation of the Constitution or any other law as it is not a serious, substantial and weighty as to warrant the Governor's removal from office under Article 181 of the Constitution and section 33 of the County Governments Act.

(h) Allegation 8: Failure to establish an audit committee

121. The County Assembly in the Particulars of Allegations submitted to the Senate on 29th April, 2021 stated that the Governor had violated regulation 167(1) of the Public Finance Management (County Governments) Regulations, 2015, by failing to establish an audit committee for the County that will adhere to the forms prescribed by the Accounting Standards Board and that would further encapsulate the governance process, accountability process, control systems and offer objective advice on issues concerning risk, control, regulatory requirements and governance for the County.

122. Regulation 167(1) of the Public Finance Management (County Governments) Regulations provides that—

Audit Committees

167. (1) Subject to paragraph (2) of this regulation, each county government entity shall establish an audit committee.

(2) The County Treasury, where deemed necessary, may approve the sharing of one audit committee by two or more county government entities.

123. During cross-examination, the County Assembly stated that the county executive committee member for finance was responsible for the establishment of the audit committees.

124. In the written Response dated 11th May 2021, the responded to this allegation at page 35 and submitted that –

- (a) the County Government of Wajir through the County Public Service Board advertised for the vacant positions of the Audit Committee on 19th June 2020 in the Standard Newspaper and all County Notice Boards and the deadline for applications was 3rd July 2020.
- (b) The County Public Service Board received 10 applications and after review, two applications met the preliminary requirements for shortlisting and the advertisement was therefore non-responsive.
- (c) The County Public Service Board resolved to re-advertise the positions in the next recruitment period.
- (d) Before the said positions were re-advertised, county programmes and plans by the covid-19 pandemic as the County Public Service Board prioritized employing Universal Health Coverage staff under the prevailing covid-19 environment thereby delaying the re-advertisement for the Audit Committee as earlier planned.
- (e) The Committee was referred to annexure 8(a) - Advertisement in the Standards Newspaper of 19th June 2020; annexure 8(b) - Application Register dated 8th July 2020; annexure 8(c) - Report on shortlisting of candidate for the position of Members of Audit Committee dated 17th July 2020; annexure 8(d) - Extract of minutes of the County Public Service Board meeting held on 23rd September 2020.

125. In response to this allegation, the acting county secretary Mr. Hassan testified that the County Public Service Board was in charge of establishing the audit committee. The Board had made an attempt to establish the committee through a competitive process but the advertisement was non-responsive. The advertisement was carried in the Standard Newspaper of 23rd September, 2020, contained in annex 8, Bundle H. The Board intended to re-advertise but soon thereafter with the outbreak of the COVID-19 pandemic and the roll-out of the UHC, the Board was yet to revisit this issue.

Observations of the Committee

126. The Committee considered the evidence submitted by the parties and noted that there were attempts by the Governor to establish the Audit Committees and further, that the advertisements by the County Public Service Board were non-responsive. The Committee also found that the responsibility in law fell on the County Public Service Board to re-advertise.
127. The Committee therefore found that allegation 8 on the failure by the Governor to establish an audit committee was not substantiated.

i. Allegation 9: Failure to seek approval of payments out of emergency fund

128. The County Assembly in the Particulars of Allegations submitted to the Senate on 29th April, 2021 stated that the Governor had never sought the approval of payments out of the emergency fund for the last three consecutive financial years and instead frustrated the Assembly's effort to enforce compliance.
129. The County Assembly stated that section 19 of the Wajir County Disaster Management Act allows the Governor through the County Executive Committee Member for Finance to establish a County Emergency Fund, make payments out of the fund where necessary and seek approval of the County Assembly within two months of making such payments. Section 19 of the Wajir County Disaster Management Act provides that-

19.(1) The county government shall establish the County Disaster Management Fund, which shall be administered on behalf of the Directorate, by the chief executive officer.

(2) The County Disaster Management Fund shall be financed from the following sources, namely —

- (a) such monies or assets as may accrue to the Directorate in the course of the exercise of its powers or the performance of its functions under this Act;*
- (b) grants made by the national government or other county governments;*
- (c) loans, aid or donations from national or international agencies; and*
- (d) all monies from any other source provided or donated to the Directorate.*

(3) The County Disaster Management Fund shall be used to meet the expenses for emergency preparedness, response, mitigation, relief and reconstruction in the county after a disaster.

(4) The chief executive officer shall administer the County Disaster Management Fund subject to the provisions of all laws and regulations relating to public financial management.

130. During the hearing, Hon. Abdullahi Isaack averred that the Governor of Wajir County had, despite withdrawing money from the emergency fund, failed to provide the County Assembly with the statements and seek the approval of the Assembly, contrary to section 167 of the Public Finance Management Act. The Assembly had appropriated Kshs. 150 million in FY 2017/2018 for purposes of the first emergency with the fund being 2% of the total revenue. It was the County Assembly's testimony that the Governor had not sought the approval of the County Assembly for the payments out of the Emergency Fund established under the Wajir County Disaster Management Act with respect to FY 2018/2019 and 2019/2020 nor had he accounted for the use of the said monies to the Assembly. This was also noted by the Auditor-General in the report for the year 2018/19 with respect to the County Government. However, during cross-examination, Hon. Isaack stated that the Governor was not the accounting officer with respect to the County Emergency Fund.

131. The failure to seek the approval of Wajir County Assembly to withdraw funds from the County Emergency Fund was also raised by Hon. Hussein Abdirahman Dahir who appeared on behalf of the County Assembly. In particular, he raised concerns, during cross-examination, regarding the withdrawal, by the Governor, of emergency funds to deal with COVID-19 without the approval of the County Assembly. Whereas he confirmed that the Governor was not the signatory to the fund and that the county executive committee member for finance was responsible for the withdrawal, banking and other related matters, Hon. Abdirahman stated that the Governor took leadership of all officers and was hence, ultimately responsible for the withdrawal and use of the funds.

132. At pages 36-38 of the Governor's Response to the Invitation to Appear dated 11th May 2021, the Governor submitted that –

- (a) Section 110 of the Public Finance Management Act states that a County Executive Committee may establish an emergency fund for the county government with the approval of the county assembly.
- (b) There was no Wajir County Emergency Fund and therefore there can be no charge for a violation that does not exist.
- (c) The county government of Wajir legislated an Act known as the Wajir County Disaster Management 2014 under which a fund known as Wajir County Disaster Management Fund exists independent of the provisions of the Public Finance Management Act.
- (d) Section 19 of the Wajir County Disaster Management 2014 establishes the County disaster management fund administered by the county executive committee member in charge of finance and that prior to 14th May 2020, the Act did not require the administrator to seek the approval of the county assembly upon payments made from the county disaster management fund.
- (e) Following the amendment of the Wajir County Disaster Management Act, 2014 by the Wajir County Disaster Management (Amendment), 2020 which

commenced on 14th May 2020 and prior to the commencement date, did not require approval.

- (f) Any expenditure by the County Government of Wajir from the Emergency Funds after the amendment is within the provisions of the Wajir County Disaster Management (Amendment), 2020 as the two-month period within which approval should be sought has not lapsed and the Executive is in the process of seeking the approval as required under the Act.
- (g) The Committee was referred to annexure 9(a)- Letter dated 10th January 2020 from the Controller of Budget to CEC Finance and Economic Planning requesting for release of emergency funds, annexure 9(b) - Copy of the Management Wajir County Disaster Management 2014, annexure 9(c) - Copy of the Wajir County Disaster Management (Amendment) Act 2020. This annexures are in bundle J and K.

133. Mr. Adan Kalmoy, acting Director, Accounting Services, testified on behalf of the Governor and in his filed witness statement, stated that whereas section 110(1) of the Public Finance Management Act, 2012, conferred a discretion on the county executive committee to establish an emergency fund as follows -

- (a) The County Executive Committee member for finance shall administer the county government Emergency Fund for the county government in accordance with a framework and criteria approved by the county assembly.*
- (b) The County Executive Committee member for finance shall establish and maintain a separate account into which all money appropriated to the Emergency Fund shall be paid.*

134. Mr. Kalmoy stated that the Wajir County Emergency Fund did not exist within the meaning of section 110(1) and (2) of the Public Finance Management Act, 2012 and hence, there could not have been a charge of violating something that did not exist. For this reason, Mr. Kalmoy further stated as follows -

- (a) the allegation that the Governor violated section 19 of the Public Finance Management Act was baseless;
- (b) the Wajir County Disaster Management Fund established under the Wajir County Disaster Management Act, 2014, existed independent of the provisions of the Public Finance Management Act, 2012;
- (c) any expenditure incurred after the amendment was within the County Disaster Management Act; and
- (d) the Wajir County Disaster Management Act, 2014, did not, prior to the amendments effected on 14th May, 2020, require the administrator of the fund to seek the approval of the county assembly upon payments made from the county disaster management fund and further, that the amendments were made at the instigation of the Controller of Budget vide a letter dated 10th January, 2020 (Annex 9(a)(file J&K)) requiring the amendment in order to align the Act with the provisions of section 111, 113 and 114 of the Public Finance Management Act, 2012 which provide as follows -

111. County Executive Committee member for finance to administer the Emergency Fund

- 1. The County Executive Committee member for finance shall administer the county government Emergency Fund for the county government in accordance with a framework and criteria approved by the county assembly.*
- 2. The County Executive Committee member for finance shall establish and maintain a separate account into which all money appropriated to the Emergency Fund shall be paid.*

113. Limitation on power of County Executive Committee member for finance to make payments from Emergency Fund

The County Executive Committee member for finance may not, during a financial year, make a payment from the Emergency Fund under section 112 exceeding two per cent of the total county government revenue as shown in that county government's audited financial statements for the previous financial year, except for the first year.

114. County Executive Committee member for finance to seek approval for payments from Emergency Fund

- (1) The County Executive Committee member for finance shall seek approval of the county assembly within two months after payment is made from the Emergency Fund.*
- (2) If the county assembly is not sitting during the period referred to in subsection (1), or soon thereafter, the County Executive Committee member for finance shall seek the approval for the payment within fourteen days after the County Assembly next sits.*
- (3) As soon as practicable after the county assembly has approved the payment, the County Executive Committee member for finance shall cause a draft of the appropriation Bill to be introduced in the county assembly for the appropriation of the money paid and for the replenishment of the county government's Emergency Fund to the extent of the amount of the payment.*

Observations of the Committee

135. The Committee considered the evidence submitted by the parties and found that at the time of the alleged offence, the Wajir County Disaster Management Act had not been amended to require approval by the County Assembly for the withdrawal monies from the Emergency Fund and therefore the Governor could not be held liable. However, the Committee observed that the Public Finance Management Act, 2012, does make provision requiring approval for the withdrawal of funds from the County Assembly, it was necessary to review the existing legislation to give more clarity to the process.

136. It is therefore the Committee's finding that allegation 9 on failure by the Governor to seek approval of payments out of emergency fund was not substantiated.

j. **Allegation 10: Operation of various bank accounts at local commercial banks**

137. The County Assembly in the Particulars of Allegations submitted to the Senate on 29th April, 2021, stated that the Governor had violated regulation 82(1)(b) of Public Finance Management (County Governments) Regulations, 2015, by operating nineteen (19) bank accounts in local commercial banks.
138. The County Assembly, in this respect, attached the Auditor-General's report for the financial year ending 30th June, 2018 on pg.183 of bundle CA3. The Report indicates that on the question of lawfulness and effectiveness in use of public funds during the year under review, the County Executive of Wajir operated twenty-three (23) bank accounts. Four (4) of the accounts were operated at the Central Bank of Kenya while the other nineteen were held at local commercial banks. The Auditor-General observes that the operation of the nineteen bank accounts with commercial banks is contrary to regulation 82(1)(b) of the Public Finance Management (County Governments) Regulations, 2015.

Regulation 82(1)(b) of the Public Finance (County Governments) Regulations, Provides-

82. Criteria for approval of opening and operating county government entities bank accounts

(1) Subject to the provisions of section 119 of the Act, the following criteria shall be considered by the County Treasury before granting approval to a county government entity to open and operate a county government bank account—

- (a) all county exchequer accounts shall be opened at the Central Bank of Kenya;*
- (b) for avoidance of doubt, all county government bank accounts shall be opened at the Central Bank of Kenya except for imprest bank accounts for petty cash.*

Section 119 of the PFM Act provides-

119. Banking arrangements for county government and its entities

- (1) The County Treasury is responsible for authorising the opening, operating and closing of bank accounts for the county government and its entities, except as otherwise provided by other legislation and in accordance with regulations made under this Act.*
- (2) As soon as practicable, each County Treasury shall establish a Treasury Single Account at the Central Bank of Kenya or a bank approved by the County Treasury through which payments of money to and by the various county government entities are to be made.*
- (3) The Treasury Single Account shall not be operated in a manner that prejudices any entity to which funds have been disbursed.*
- (4) An accounting officer for a county government entity shall not cause a bank account of the entity to be overdrawn beyond the limit authorised by the County Treasury or a Board of a county government entity, if any.*
- (5) A County Treasury shall keep complete and current records of all bank accounts for which it is responsible under the Constitution, this Act or any other legislation.*
- (6) Subject to subsection (3), an accounting officer who authorises the bank account of a county government entity to be overdrawn is liable for the full cost of the overdrawn amount, in addition to any other disciplinary measures that—*

(a) the County Executive Committee member for finance may impose under section 156; or

(b) any other relevant authority may impose under the provisions of any other legislation.

139. In the Governor's response to the invitation to appear dated 11th May, 2021, the Governor, at paragraph 39 confirmed that the County Executive had accounts with the commercial banks in accordance with section 119(1) of the Public Finance Management Act and section 82(4) PFM regulation 2015. The Governor further stated that all operating accounts are opened with local banks with the approval of the County Treasury and further that most of the accounts were health facility accounts supported by donors and thus a requirement that the facility accounts be opened with local banks for operations and maintenance. The Committee was referred to annexure 10(a) - Copy of the letter by the county executive committee member for finance and economic planning dated 11th June 2018 authorising the opening and operation of the Wajir County Kenya Climate Change Smart Agriculture Project Account with Commercial Bank of Kenya annexure 10(b) - Copy of a letter dated 29th December, 2020 by the National Treasury addressed to the Royal Danish Embassy and copied to the Council of Governors forwarding a copy of the Development Engagement Document and Bilateral Agreement on Primary Health Care 2021-25 (primary health care support program: Improved primary health care with focus on reproductive, maternal, new-born, child and adolescent health); annexure 10(c) - Kenya Climate Smart Agriculture Program (KCSAP-Donor) giving the condition for the provision of funds; annexure 10(d) - Copy of list of bank accounts held by the County Government as at 30th December, 2020; annexure 10(e) - Copy of Youth Polytechnic (Grants) giving the conditions for providing funds. These annexes are to be found in bundle J and K.

Observations of the Committee

140. The Committee considered the evidence submitted and found that some of the accounts were opened for donor funded projects as per the requirements by the donors and evidence was submitted by the Governor in this regard.

141. The Committee therefore found that allegation 10 on the operation, by the Governor, of various bank accounts at local commercial banks was not substantiated.

k. Allegation 11: Violation of regulation 25(1)(b) of the Public Finance Management (County Government) Regulations, 2015

142. The County Assembly in its Particulars of allegations alleges that the Governor violated Regulation 25(1)(b) of the Public Finance Management (County Governments) Regulations, 2015, by exceeding the expenditure limit of 35% County Government's total revenue. For instance, as at 30th June 2019, the County Government of Wajir's wage bill was equivalent to 39.6% of the aggregate operational revenue. Regulation 25(1)(b) of the Public Finance Management (County Governments) Regulations, 2015 provides as follows-

25. (1) In addition to the fiscal responsibility principles set out in section 107 of the Act, the following fiscal responsibility principles shall apply in the management of public finances-

(a) the County Executive Committee Member with the approval of the County Assembly shall set a limit on the county government's expenditure on wages and benefits for its public officers pursuant to section 107(2) of the Act;

(b) the limit set under paragraph (a) above, shall not exceed thirty five (35) percent of the county government's total revenue.

143. The Governor has submitted at pages 40-41 of the Response dated 11th May 2021 that these allegations were unfounded because as at 30th June, 2019, the

expenditure on wages and benefits for County Government of Wajir public offices, both County Executive and Assembly, stood at 32%. For the County Executive only, the expenditure on wages and benefits was at 30% while the County Assembly was at 52%. The Committee was referred to annexure 11(a) - The Financial Statement for the financial year 2018/2019 ((Annexed as L).

144. Mr. Mohamed Yunis Sheikh, Deputy Director of Budget, appeared on behalf of the Governor and confirmed that the wage bill with respect to Wajir County stood at 32% as at 30th June, 2019 with respect to the County Assembly and the Executive. He stated that the approved budget for that year was Kshs. 13 billion and that there was an actual delay of Kshs. 11.9 billion. He further stated the actual total expenditure of the County Assembly and the Executive was Kshs. 53.7 billion, representing 9% of the total budget and 32% of the actual revenue received. Mr. Sheik noted that the County Executive had a budget of kshs. 12.4 billion while the actual revenue was Kshs. 11.2 billion and that whereas the expenditure was set at Kshs. 9.4 billion, the actual expenditure was Kshs. 3.4 billion, representing 30% of the total revenue.

Observations of the Committee

145. The Committee considered the evidence submitted by the parties and noted that the issue of pending bills is a problem bedeviling all the forty seven counties and that measures must be taken to address this issue once and for all. The committee therefore found that allegation 11 on the violation of regulation 25(1)(b) of the Public Finance Management (County Government) Regulations, 2015, by the Governor was not substantiated.

1. Allegation 12: Violation of section 119(5) of the Public Finance Management Act, 2012

146. The County Assembly in the particulars of allegations stated that the Governor failed to keep complete current records of all bank accounts required under the

Constitution or other legislation and in particular FY 2017/2018 thus causing the misuse of Kshs. 409,175,031.81 as this money was withdrawn between 06/10/2017 and 29/06/2018 and its use could not be ascertained. The County Assembly provided the Report of the Auditor-General for FY 2017/2018 as evidence in support of this allegation, at page 183, bundle CA 3.

147. According to the County Assembly, the failure to keep cashbooks is a violation of section 119(5) of Public Finance Management Act, 2012, which provides as follows—

119. Banking arrangements for county government and its entities

(5) A County Treasury shall keep complete and current records of all bank accounts for which it is responsible under the Constitution, this Act or any other legislation.

148. Hon. Abdullahi Isaack while giving evidence on behalf of the County Assembly averred that the Auditor-General, in the report to the county with respect to FY 2018/2019, indicated that Wajir County Government had failed to maintain cashbooks thereby leading to cash misuse of Kshs. 409 million and Kshs. 440 million respectively. According to the Auditor-General, the monies had been withdrawn with no cashbook by the County Treasury contrary to section 119(5) of the Public Finance Management Act and led to the misuse of the said monies.
149. The Governor responded to this allegation at page 42-43 in the Response to the Invitation to appear dated 11th May, 2021, as follows –

(a) Keeping current records of all bank accounts is the statutory responsibility of the county treasury headed by the CEC- Finance and not a duty and responsibility of the Governor. In this regard therefore there is no fault or violation by the governor.

(b) That there are complete records of all bank accounts operated by the County Government of Wajir as required under Section 119(5) of the PFM Act, as well as cash books for the FY 2017/2018. The Committee was referred to annexure 12(a) - Copy of Bank Reconciliation and Cash Books for the Years 2017/2018/2019/2020).

150. Mr. Adan Kalmoy, acting Director, Accounting Services, testified on behalf of the Governor and in his response to the allegations against the Governor stated as per his statement to the Committee stated that -

- (a) section 119(5) of the Public Finance Management Act, 2012, imposed the obligation to keep current records of all bank accounts on the county executive committee member for finance and not the Governor;
- (b) the allegation was misplaced as there were in place complete records of all bank accounts operate by Wajir County Government (Annex 12(a)-Bank reconciliation and cash books for FY 2017/2018 to 2019/2021); and
- (c) the issue regarding the operation of nineteen banks contrary to section 82(1)(b) of the Public Finance Management (County Governments) Regulations, 2015 which requires County Governments which open banks accounts to open these at the Central Bank of Kenya, save for imprest bank accounts for petty cash had been identified by the Auditor-General and considered by the Senate Sessional Committee on the County Public Accounts and Investments in February, 2021, and the Senate, in its report (Annex 12(b)) stated that the matter had been successfully mitigated and resolved.

Observations of the Committee

151. The Committee considered the information and evidence submitted by the parties and observed that it was not the Governor's responsibility to keep a record of the financial documents. The Committee also noted that the County Assembly, being the oversight body, should have raised this with the Governor and addressed the said issue.

152. The Committee therefore found that allegation 12 on the violation of section 119(5) of the Public Finance Management Act, 2012 by the Governor was not substantiated.

m. Allegation 13: Violation of Articles 201(a)(d) and (e), 226(5) and 227(1) of the Constitution of Kenya on procurement of goods and services

153. The County Assembly, in the Particulars of Allegations, alleged that the Governor violated the principles of public finance and procurement of public goods and services as envisaged under Articles 201(a), (d), (e), 226(5) and 227(1) of the Constitution which provide as follows-

201. Principles of public finance

The following principles shall guide all aspects of public finance in the Republic—

(a) there shall be openness and accountability, including public participation in financial matters;...

*(d) public money shall be used in a prudent and responsible way;
and*

(e) financial management shall be responsible, and fiscal reporting shall be clear.

226. Accounts and audit of public entities

(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.

227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

154. The County Assembly, in the Particulars of Allegations, further stated that the Governor contravened the provisions of the Presidential directive No. 2 of 2018 (Executive Order No. 2 of 2018 on Procurement of Public Goods, Works and Services by Public Entities). The Assembly further stated that the Auditor-General in his report on financial statements of Wajir County Executive for the year ended 30th June, 2018 observed the following glaring irregularities committed under the watch of the Governor-

- (a) Irregular procuring of goods and services amounting to Kshs. 172,751,776 without raising quotations as required by section 105 and 106 of the Public Procurement and Disposal Act, 2015. Instead of raising quotations, the county executive used standard forms to procure goods, works and services that did not give guidance on specific requirements of the tender, where to place them and the deadline for submission of the tender.

Sections 105 and 106 of the Public Procurement and Asset Disposal Act, 2015 state as follows—

105. When request for quotations may be used

A procuring entity may use a request for quotations from the register of suppliers for a procurement if—

- (a) the estimated value of the goods, works or non-consultancy services being procured is less than or equal to the prescribed maximum value for using requests for quotations as prescribed in Regulations;*
- (b) the procurement is for goods, works or non-consultancy services that are readily available in the market; and*

- (c) *the procurement is for goods, works or services for which there is an established market.*

106. Procedure for request for quotations

(1) A procuring entity shall prepare a request for quotations that sets out the following—

- (a) the name and address of the procuring entity;*
- (b) the specific requirements prepared under section 67 relating to the goods, works or services being procured;*
- (c) an explanation of where and when quotations shall be submitted; and*
- (d) anything else required under this Act or the Regulations to be set out in the request for quotations.*

(2) An accounting officer of a procuring entity shall deal with the request for quotations in accordance with the following—

- (a) the accounting officer of a procuring entity shall give the request to such persons as are registered by the procuring entity;*
- (b) the request shall be given to as many persons as necessary to ensure effective competition and shall be given to at least three persons, unless that is not possible;*
- (c) the accounting officer of a procuring entity shall give the request to each person early enough so that the person has adequate time to prepare a quotation;*
- (d) at least three persons shall submit their quotations prior to evaluation.*

(3) The successful quotation shall be the quotation with the lowest price that meets the requirements set out in the request for quotations.

(4) Where the lowest price is above the prevailing market rates, the request for quotations shall be cancelled or terminated in accordance with the cancellation and termination procedures set out in this Act.

(5) The following shall apply with respect to the contract resulting from a procurement by a request for quotations—

- (a) the procuring entity shall place a purchase order with the person submitting the successful quotation;*
- (b) the person submitting the successful quotation shall confirm the purchase order in writing; and*
- (c) an accounting officer shall consider recommendations for award arising from a contract under procurement by a request for quotations for approval or rejection.*

(b) Irregular award of contract for construction of 60,000 M3 mega pan at Shimbirey to Ms. FATCO Construction and Transporters Ltd at a contract sum of Kshs. 34,747,105.27 while the company had less experience in water construction than the other bidders in the tender.

(c) The misappropriation of Kshs. 199,237,448. The Controller of Budget authorized a request for credit from the County Government of Wajir vide letter dated 5th December 2019 and a sum of Kshs. 199,237,448 was credited to the Wajir County Development Operation Account, Kshs. 104,046,400 for 24 companies for Water resources department and Kshs. 95,241,305 for 15 companies for roads, transport and public works department. However, the money was diverted for different use contrary to the purpose of which the money was requested for. The Assembly further alleged that out of the 24 companies that were listed as beneficiaries of the sum of Kshs. 104,046,400 meant for water resources, none of the companies were paid except Dulla Limited which was paid Ksh. 26,672,608. The rest of the 23

companies did not receive any payments and the money was diverted and paid to other companies that were not included in the list attached to the request for funds. This as stated by the Assembly was a clear case of misappropriation and outright theft of public funds. The County Assembly also submitted a list of companies that were used for request of funds.

- (d) Out of the sum of Kshs. 95,241,305.78 for roads, transport and public works which was meant to pay 15 companies, none of the 15 listed companies were paid except Halane Construction Limited which was paid Ksh 43,805,207.50 but the money was paid on 20th November 2019, 6 days before the County had even made the request for the funds, thus making the payment suspect and fraudulent. The other 14 companies listed alongside Halane Construction Company in the letter requesting for funds were not paid, but instead the sum of Kshs. 51,436,101.28 was diverted to other companies other than the intended payees. As evidence, the County Assembly submitted a copy of payment registers, marked as Annex C(i).
- (e) Award of Tender No WCG/OT/SP/02/2019-2020 for supply of relief food and assorted items for humanitarian needs. The tender was awarded to Leyli General Contractors Co. Limited which is associated with the Governor and his family. Contrary to the law, the company was allowed to supply items at an inflated rate. For instance, the company supplied 42,857 bales of maize meal (ugali) flour at a cost of 3,500 per bale totaling to Ksh 149,999,500 contrary to the local market price of Kshs. 1,600 per bale. Further, some items were not 100% delivered, for instance sleeping mat and Tarpaulin. The County Assembly submitted a letter of notification of award to the supplier and response to request for statement on County food and non-food items.
- (f) Contrary to the provisions of the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012, the County Executive of Wajir under the leadership of the Governor, awarded contracts

to various companies to undertake construction of mega water pan that have not been factored in the approved budget of FY 2020/2021. The documents submitted by the County Assembly are marked as Annex E. The tenders were marked as follows –

- 4. WGC/OT/WTR/01/2020-2021
- 4. WGC/OT/WTR/02/2020-2021
- 4. WGC/OT/WTR/03/2020-2021
- 4. WGC/OT/WTR/04/2020-2021

The tenders were awarded to the following companies:

- Tender no. 1: Leyli General Constructors Ltd
- Tender no. 2: Warbow Building Construction ltd
- Tender no. 3: Kamorow Construction ltd
- Tender no. 4: Bloomergic Construction ltd

155. During the hearing, Hon. Abdullahi Isaack in support of the allegation stated that with respect to M/s FATCO Construction and Transporters Limited, the Auditor-General raised a query regarding the fact that the company had been awarded a tender worth Kshs. 34,747,105 yet the three bidders who were eliminated had better experience than FATCO Construction and Transporters Limited. He further stated that the said company was paid a bribe amounting to Kshs. 9 million by Omar Abdullahi. In supporting the allegation, the Assembly pointed to the date the contract was advertised and the date the deposit was made into the account of the company. The Assembly further stated that the company was not the lowest bidder and hence, had to give a kickback in order to obtain the tender. The Assembly further stated that there were ongoing investigations by EACC into the company.

156. Hon. Isaack further stated that Kshs. 119 million was misappropriated with the monies being paid to companies that were not meant to be paid and could not be accounted for. He stated that the monies were paid to companies that were associated with the Governor.
157. With regard to Leyli General Constructors Limited, Hon. Isaack adduced evidence to show that the company was contracted to supply 42,857 bales of maize meal (ugali) flour at Kshs. 3,500 while the cost was retailing locally at Kshs. 1,600. (Annex CA 3) This was almost 200% of the local price and further, the delivery was not complete. However, the Assembly was not aware if payment had been made. He further noted that Leyli General Constructors Limited was owned by Mr. Osman Jimale who had been summoned to appear before the Committee. Other items identified as not being fully delivered include sleeping mats and trampoline which were delivered at 93% and 80% respectively.
158. Hon. Isaack stated that despite lack of a budget during FY 2020/2021 for the construction of mega dams in Wajir County, the County Government still went ahead to advertise the construction of four mega water pans which were proposed to be constructed in four sub-counties. There was no approval for the amendment of the budget by the County Assembly. In addition, the County Government contracted a company to carry out the works at a cost of Kshs. 18 million, with the works being completed and a letter of completion being issued to the company. The company was yet to be paid.
159. Hon. Isaack further stated in his examination-in-chief, that there was favouritism in the payment of suppliers. One supplier completed works and was not paid for close to four years as a result of which he sought redress from the Courts. The Assembly however noted that Fartun Enterprises and Leyli General Contractors limited, which companies had been awarded tenders in December, 2020 were paid their monies on 1st February, 2021 and 21st April, 2021.

160. It was Hon. Isaack's evidence that the normal tendering process was not followed. In particular, that four or five companies owned by the same person would apply for the same tender, with one company being known and which would submit the lowest bid. Hence, there was no competition. In addition, most projects were undertaken as split projects, leaving them prone to manipulation e.g. by splitting them to avoid subjecting it to the tender process and exempting them from advertisement.
161. With regard to procurements done through single sourcing, during cross-examination, Hon. Dahir stated that this issue was noted by the ad-hoc committee established by the County Assembly to interrogate pending bills and a recommendation was made, in its report, that a complaint be lodged with the Review Board established under the Public Procurement and Asset Disposal Act. The Assembly however only made this recommendation but did not lodge any complaint with respect to the procurement procedures adopted by the County Government.
162. The Governor's response to this allegation is contained at pages 44-49 of the Response to the Invitation to Appear dated 11th May 2021 as follows -
- (a) the Governor had no role in public procurement at any level in the procurement cycle and has not in any way violated the provisions of Article 201, 226(5) and 227(1) of the Constitution of Kenya, 2010. Under Sections 44, and 71 of the Public Procurement and Disposal Act, 2015, and section 148 of the Public Finance Management Act, 2012;
 - (b) the County Government used standard tender documents for the procurement of works on only what was within the quotation threshold as per Section 105 and 106 of PPDA 2015 since Quotation forms do not have sufficient information hence, the use of customized standard tender document with detailed description of where to place them. The tender date, specification and evaluation criteria were set out in the tender document in

- line with section 58(1) of the PPAD which states an accounting officer of procuring entity shall use standard procurement and asset disposal documents issued by the authority in all procurement and disposal proceedings and further section 70(2)(3) of Public Procurement and Disposal Act, 2015, which states that the tender documents used by the procuring entity pursuant to subsection 2 shall contain sufficient information to allow fair competition among those who may wish to apply;
- (c) the accounting officer in charge of finance was the personnel in charge of all payments made for and on behalf of the county government as a statutory duty and the governor does not interact with payment and/or request to make payment as alleged;
 - (d) section 109(7) of the Public Finance Management Act, provides that the approval of the Controller of Budget to withdraw money from the County Revenue Fund, together with written instructions from the County Treasury requesting for the withdrawal, is sufficient authority for the approved bank where the County Exchequer Account is held to pay amounts from this account in accordance with the approval and the instructions and therefore the request made to the controller of budget on the 5th December 2019 was not statutorily required to be backed up by a list of companies to be paid;
 - (e) that section 45(3) of the Public Finance Management (County Governments) Regulations 2015, the requirement is that the release of funds from the County Revenue Fund to County government entities shall be in accordance with the authority granted by the controller of budget together with the written instructions of the county treasury;
 - (f) the request to pay the 24 companies was made to the controller of budget and the same was authorized and credited to the Wajir County Development Operation account on the 10th December 2019;
 - (g) on the 9th December 2019, the chief executive officer, council of governors received a letter dated 5th December 2019 from the National treasury and planning addressed to Wajir County: where the County Government was required to provide the national treasury with a repayment plan, clearly

- specifying how the County intends to clear all the eligible pending bills and owing to the said communication from the national treasury, the accounting officer finance had to prioritize the payment of pending bills to avoid the county grinding to a halt in a situation where the national treasury invoked the provisions of Article 225 and stopped the transfer of funds to the County;
- (h) however despite the justified diversion on the basis of the directive from the National Treasury, the companies that were not paid as per the monies received on the 10th December 2019 were still paid in the subsequent requisitions;
 - (i) the Committee was referred to annexure 15(a) - Copy of Request Letter for the Grant of Credit on the Exchequer Account dated 26th November, 2019, annexure 15(b) - Copy of the Advisory from National Treasury dated 5th December, 2019, annexure 15(c) - Copy of the Payment Plan for Pending Bills, annexure 15(d) - Copy of List of Companies Paid in Subsequent Leases and annexure 15(e) - Copy of Development Bank Statement;
 - (j) supply of relief food and assorted items for humanitarian needs. The tender was awarded to Leyli General Contractors Co. Limited which is associated with the Governor and his family;
 - (k) the allegation is not true, misleading and intended to malign and embarrass the Governor;
 - (l) the Governor does not take part in any decision making relating to the procurement processes envisaged under Section 44, 45, 46, 47 and 48 of the PPAD Act, at any stage and therefore did not violate the provisions of the PPAD;
 - (m) the tender for the above project were procured using open tender as per annexure 16 (a) - Tender advert leading to two years' framework contract pursuant section 141 of PPDA 2015. Hence the tender was above board since it was advertised in line with section 96(1) in one of the local dailies (Standard Newspaper) on 10th September, 2019, and further uploaded in the county website as per section 98(1) the tender document provided sufficient information to allow fair competition among those who may wish to submit

the tender document hence Leyli General Contractors was the lowest Evaluated Bidder out of the 12 bidders who applied for the project as per annexure 16 (i)- evaluation report;

- (n) regarding the allegation that all items have not been delivered, the Governor averred that all non-food items i.e. sleeping mat and tarpaulin were delivered 100%. Attached is the Delivery notes signed by the Inspection and acceptance Committee, S13 (Goods Received Note) to prove the delivery of the items and referred to Annexure 16 (O). Inspection and acceptance certificate, delivery notes, S13, Stores ledger and Response by the accounting officer to the assembly;
- (o) further that the matter is still at the assembly committee of labour and decentralized unit stage and therefore cannot be the ground of impeaching the governor since its still under the departmental committee's deliberation;
- (p) the tender evaluation Committee duly appointed by the accounting officer was guided by section 55(2) of the PPAD Act which provision only ousts a spouse, child or sub-contractor who has a substantial or controlling interest in a bidding entity. No evidence has been tendered to show that the directors of the company in question have any relation with the Governor;
- (q) the Committee was referred to Annexure 16(a) - Copy of tender advert, Annexure 16(b) – Copy of Tender Document, Annexure 16(c) – Copy of tender returns register (Annexure 16(d) – Copy of tender opening register, Annexure 16(e) -. Copy of tender attendance register, Annexure 16(f) Copy of tender opening committees, Annexure 16 (g) Copy of tender opening report for Tender No. WCG/OT/SP/02/2019-2020, Annexure 16(h) Copy of tender Evaluation Appointment Committees, Annexure 16(i) Copy of Tender Evaluation report for Tender No. WCG/OT/SP/02/2019-2020, Annexure 16(j) Copy of tender Professional Opinion, Annexure 16(k) Copy of tender award notification, Annexure 16(l) Copy of contract agreement, Annexure 16(M) Copy of inspection and acceptance committees, Annexure 16(N) Copy of delivery Note, Annexure 16(O) Copy of certificate inspection and acceptance committee certificate, Annexure 16(P) S13 (Counter receipt

Voucher) No 87900565/8790566, Annexure 16(Q) copy of store ledger for folio number 40,41,42,43and 45. Annexure 16(R) Response by the department to the assembly departmental committee on labour and decentralized (Annexure 16(S) and Annexure 16(T) copy of Standing Order No. 89);

- (r) section 126(1)(a) of the PFM Act, mandates the County Government to prepare a development plan in accordance with Article 220(2) of the Constitution of Kenya, that includes inter alia strategic priorities for the medium term that reflect the county government's priorities and plans;
- (s) section 126(1)(c) of the PFM Act, requires the county government to prepare a development plan in accordance with Article 220(2) of the Constitution of Kenya with programmes to be delivered with details for each program of the strategic priorities to which the program will contribute and the Wajir County Integrated Development Plan (CIDP) which is a five (5) year development plan as provided for under Section 107(1)(a) of the County Government Act 2012, is a long-term planning and it guides the annual term planning in terms of the annual development plans both of which have been approved by the county assembly as per Annexure 6(a)- The five-year period County Integrated Development Plan (CIDP) 2018-2022);
- (t) the annual development plan was approved by the county assembly with the terms of construction of mega pans from which the county departments draws the plans and programmes for implementation in accordance with section 126 of the PFM Act. This can be seen as per Annexure 6(b) - Annual Development Plans submitted to the County Assembly for Financial Years 2020/2021);
- (u) the Financial Year 2020/2021 water resource development department had in the Annual Development Plan, Four mega pans that were strategic priorities in 3 sub Counties of Wajir South (Alio Ismail and Handaki South), Wajir North (Kuraw) and Alenley of Tarbaj Sub County. The above areas are dependent on water trucking;

- (v) after the budget was submitted to the County Assembly members reviewed the Mega pan and replaced it with desilting of pans and other water works;
 - (w) the existing water pans in the 3 sub Counties of Wajir South (Alio Ismail and Handaki South), Wajir North (Kuraw) and Alenley of Tarbaj Sub County, had completely silted and were not holding water, broken water retention walls to the extent that the community were fully dependent on water from trucks.
 - (x) when the department initiated the implementation of the desilting of the pans the assessment carried out by the technical officers established that most of the water pans had water from October/December rains. The department of water notified the County Treasury on the matter and implemented the construction of mega pans since their objectives were to enhance water harvesting. (Annexure 17 (b) letter dated 2nd November 2020).
 - (y) with the advice from the technical team of 2nd November 2020, and noting that the department has an approved annual development plan (2020/2021) which provided for the construction of Four (4) mega water pans, and an approved budget on desilting of water pans, the department prepared a procurement plan to desilt and expand the water holding capacity of the old existing 3 sub Counties of Wajir South (Alio Ismail and Handaki South), Wajir North (Kuraw) and Alenley of Tarbaj Sub County as per the PPDA 2015 and issued a contract for their construction and excavation works;
 - (z) the objective as per the annual development plan was achieved and there was therefore prudent use of public resources; and
 - (aa) the Committee was referred to annexure 17(a) – Extract of the approved annual development plan, FY 2020/2021, annexure 17(b) – Copy of the Technical advice communication dated 2nd November 2020, annexure 17(c) – Copy of the approved procurement plan FY 2020/2021, annexure 1(d) – Extracts of Section 126 & 125 of the Public Finance Management Act.
163. During the hearing, Mr. Mohamed Yunis Sheikh, Deputy Director of Budget, stated with respect to the implementation of projects (construction of four water

pans) worth about Kshs. 130 million without a budget, that a Department could not spend money if such money was not available to it and further, each accounting officer was responsible for ensuring that any expenditure proposed to be undertaken was budgeted for. He further stated that he was not aware of the tenders, awards and subsequent payments made for the construction of the water pans by the Department of Water without a budget and was hearing this for the first time. Mr. Sheikh also stated that section 135(1) of the Public Finance Management Act, 2012, authorised the county executive to submit to the Assembly a supplementary budget and thus spend monies that had not been appropriated as follows –

(1) A county government may spend money that has not been appropriated if the amount appropriated for any purpose under the County Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by this Act or no money has been withdrawn from the county government emergency fund.

164. Mr. Sheikh further stated that it was the responsibility of the Department to undertake an assessment to determine if a need had arisen and further, that there was an assessment that had been carried out by the Water Department. He further stated that the expenditure for the water pans by the Water Department were of the nature contemplated under section 135 of the Public Finance Management Act, 2012 and further, no evidence had been tabled to show that the Water Department had not sought the approval of the County Assembly to incur the expenditure. Mr. Sheikh further clarified that once an expenditure of this nature had been incurred, an accounting officer was required to seek a supplementary budget from the County Treasury and seek the approval of the County Assembly. He stated that there was no supplementary budget that had been done to regularise the expenditure.

165. Further to this, Mr. Ahmed Guhad Omar, County Chief Officer, also testified on behalf of the Governor and stated that the County Government had prepared a County Integrated Development Plan and its Annual Development Plan which had been approved by the County Assembly. He further stated that the Water Resources Development Department had, in its Annual Development Plan for FY 2020/2021 (Annex 17C) set out four mega plans that were of strategic priority in three sub-counties. He stated that the Department initiated the implementation of the work plan but an assessment carried out by the Department established that most water pans had water from the October to December rains as per the letter of the technical team dated 2nd November, 2020 (Annex 17(b)). He further stated that the Department prepared a procurement plan to capture the four mega pans and subsequently awarded a contract for the excavation, construction, fencing and other works.
166. With regard to the award of tender to FATCO Construction and Transporters Limited, Mr. Abdi Abdullahi Hassan stated that it was the responsibility of the Evaluation Committee to confirm the experience of the company. He referred to the tender evaluation report (Annex 14(e)) and stated that experience was one of the items in a technical evaluation criteria and further, that the company, and another, Yellow Construction Company Limited, met the mandatory and technical criteria and proceeded to the financial stage where they both tied. He stated that the tender was awarded to FATCO Construction and Transporters Limited as it was the lowest substantive evaluated bidder in line with section 86(1) of the Public Procurement and Asset Disposal Act, 2015, which provides as follows-

Successful tender

The successful tender shall be the one who meets any one of the following as specified in the tender document—

- (a) *The successful tender shall be the one who meets any one of the following as specified in the tender document;*

- (b) the responsive proposal with the highest score determined by the procuring entity by combining, for each proposal, in accordance with the procedures and criteria set out in the request for proposals, the scores assigned to the technical and financial proposals where Request for Proposals method is used;*
- (c) the tender with the lowest evaluated total cost of ownership; or*
- (d) the tender with the highest technical score, where a tender is to be evaluated based on procedures regulated by an Act of Parliament which provides guidelines for arriving at applicable professional charges.*

167. With regard to tender WCGOTSP02/2019/2020 for the supply and delivery of relief food and assorted items for humanitarian needs, Mr. Hassan stated that the tender was carried out through a competitive bidding process and was advertised in accordance with section 91 of the Public Procurement and Asset Disposal Act, 2015. He further stated the process culminated in the award of the tender to Leyli General Contractors who were found to be the most responsive evaluated bidder and referred the Committee to Annex 16(i) (File N(iv)). He further stated that out of the twelve bidders, six were non-responsive and that further, while there were some goods that were not delivered 100%, the sleeping mats and tarpaulins had been delivered at 100% and certified by the Inspection and Acceptance Committee who issued a certificate to that effect once received by the store manager (Annex 16N and 16Q).

Observations of the Committee

168. The Committee, having reviewed the evidence submitted by the parties in relation to the allegation on the irregular procuring of goods and services amounting to Kshs. 172,751,776 without raising quotations as required by section 105 and 106 of the Public Procurement and Disposal Act, 2015, found that –

(a) whereas the Governor stated that the forms and standard documents used for purposes of carrying out procurements were inadequate and did not contain all the information necessary for them to carry out their procurements efficiently and further, that they had developed their own forms to carry out the procurements, no information or documents were submitted by the County Assembly or the Governor evidencing the new or varied forms used by the Executive for purposes of procurement; and

(b) the Committee therefore observed that the allegation had not been substantiated.

169. The Committee, having reviewed the evidence submitted by the parties in relation to the allegation on the irregular award of contract for construction of 60,000 M3 mega pan at Shimbirey to Ms FATCO Construction and Transporters Ltd at a contract sum of Kshs. 34,747,105.27 while the company had less experience in water construction than the other bidders in the tender observed that –

(a) Governor had submitted all the required documents (to the Committee) and noted that experience was not a requirement for the purpose of award; and

(b) the tender evaluation process had been carried out in accordance with the Public Procurement and Asset Disposal Act, 2015 and hence, the allegation as not substantiated.

170: The Committee, having reviewed the evidence submitted by the parties in relation to the allegation on the misappropriation of Kshs 199,237,448 by the Department for roads, transport and public works, non payment of companies that had carried out works in Wajir County and diversion of money to pay companies not included in the list for payment, observed that –

- (a) since there is no legislation in place requiring accounting officers to make payments based on the requisition of funds from the County Treasury, the Prompt Payment Bill, 2021, should be fast-tracked as part of streamlining the issue of payment to contractors;
- (b) the relevant Committee in Wajir County Assembly and the Senate Standing Committee on Finance and Budget interrogate the issue of pending Bills matter to curb the issue of pending bills at the County Government level; and
- (c) having considered and analysed the evidence submitted by the parties, the allegation not to be substantiated.

171. Regarding the allegation of the irregular award of Tender No WCG/OT/SP/02/2019-2020 for supply of relief food and assorted items for humanitarian needs, the Committee observed that –

- (a) the price at which the bales of *unga* (maize meal flour) were procured was almost 200% of the market value of the said bales. The accounting officer had the discretion to apply the law and terminate that particular tender;
- (b) the accounting officer did not adhere to section 106(4) of the Public Procurement and Asset Disposal Act, 2015; and
- (c) accordingly, the accounting officer who was involved in the procurement process with respect to the tender should be held accountable.

172. Regarding the allegation of the construction of four water pans without an approved budget, the Committee considered the evidence adduced and observed that –

- (a) the construction of the four mega water pans had not been initially provided for in the budget and further, that despite undertaking these works, the Department of Water which was the parent Department, did not seek the

approval of the County Treasury nor did they include it in the supplementary budget. The Committee further observed the responsible accounting officer in the Department for water was responsible for seeking the necessary approvals and re-allocation of budget and ensuring that there were adequate monies in place prior to commencing any projects.

173. The Committee therefore recommends that the responsible accounting office be held responsible.

174. The Committee therefore found that allegation 13 on the violation of Articles 201(a)(d) and (e), 226(5) and 227(1) of the Constitution of Kenya on procurement of goods and services was not substantiated.

n. Allegation 14: Violation of Article 227 of the Constitution of Kenya and the Public Procurement and Asset Disposal Act, 2015

175. The County Assembly in the Particulars of allegations alleges that the Governor failed to prudently manage the County resources by engaging in procurement of goods and services without a system that is fair, equitable, transparent, competitive and cost-effective as required by Article 227(1) of the constitution which states as follows-

227. Procurement of public goods and services

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

176. Further, the Assembly stated that whereas the Public Procurement and Asset Disposal Act, 2015, clearly stipulates the procedure to procure goods and services by any public entity, the Governor violated the Act on the following grounds-

- (a) Allowing unqualified professionals to handle the function of procurement in the department of Roads and Public Transport contrary to section 47 of the Public Procurement and Asset Disposal Act, 2015, which has led to the mismanagement of resources allocated to the department. Section 47 of the PPAD Act, 2015, provides as follows-

47. Procurement function

- (1) A procurement function shall be handled by procurement professionals whose qualifications are recognized in Kenya.*
- (2) The head of the procurement function shall among other functions under this Act, be responsible for rendering procurement professional advice to the accounting officer.*
- (3) The Cabinet Secretary shall make regulations for the better carrying out of this section in respect to low value procurement.*
- (b) Allowing the accounting officers of the key sectoral departments to procure goods and services without any annual procurement plan approved by the relevant county executive committee member that is based on an indicative or approved budget. As a result, the accounting officers have engaged in fraudulent procurement activities and overspending sprees leaving the unsuspecting members of the public worse. The Departments of Roads and Public Transport, Water and Health are the biggest casualties and remain a threat to the County economy and service delivery.
- (c) The Governor had routinely, since assuming office, facilitated and condoned corruption by allowing the accounting officers of various departments, while procuring goods and services, to split and structure the entire development budget of the County into numerous quotations of below four (4) million Kenya Shillings to avoid and circumvent the procurement procedures contrary to section 54 of the Act. In some cases,

the tender documents such as the quotations, LSOs and minutes were all raised in the same day. Section 54 of the PPAD Act provides as follows-

54. Procurement pricing and requirement not to split of contracts

(1) No procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of a procurement procedure except where prescribed.

(2) Standard goods, services and works with known market prices shall be procured at the prevailing market price.

(3) The Authority shall issue a quarterly market price index as reference guide to assist accounting officers make informed price decisions.

(4) Public officers involved in transactions in which standard goods, services and works are procured at unreasonably inflated prices shall, in addition to any other sanctions prescribed in this Act or the Regulations made thereunder, be required to pay the procuring entity for the loss resulting from their actions.

177. In the Governor's written Response dated 11th May 2021, the Governor responded to this ground as follows –

- (a) The County Government had complied with the legal provisions in sections 44, 45, 46, 47, 48, 53, 54, 57, and 71 of the Public Procurement and Asset Disposal Act, 2015.
- (b) The allegation of allowing unqualified professionals to handle the function of procurement in the department of Roads and Public Transport contrary to section 47 of the Public Procurement and Asset Disposal Act 2015 is not true.

- (c) The department of Roads and Public Transport has qualified procurement personnel employed by the County Public Service Board, having gone through vetting for employment as an employee for the County before acceding to be procurement personnel appointed by the accounting officer of the various departments.
- (d) The allegation on allowing the accounting officers of the key sectoral departments to procure goods and services without any annual procurement plan approved by the relevant county executive committee member that is based on indicative or approved budget is not true and is a malicious act to implicate the Governor.
- (e) The departments of Roads and Public Transport, water and Health have all acted within the requirements of the procurement laws by preparing annual procurement plans which are realistic and within the approved budget as required of them by Section 53(2) of the Public Procurement and Asset Disposal Act, 2015.
- (f) The Committee was referred to annexure 18(a)-g to the Governor's response-, academic qualification.
- (g) The allegation that the Governor has routinely since assuming office, facilitated and condoned corruption by allowing the accounting officers of various department in procuring goods and services to split and structure the entire development budget of the County is not true.
- (h) Section 54 of the Public Procurement and Asset Disposal Act has an exemption under regulation 154(1) of the Public Procurement and Asset Disposal Regulations 2020 that provides that despite the provisions of Section 54(1) of the Act, a procuring entity may for the purpose of ensuring maximum participation of citizen contractors, disadvantaged groups, small, micro and medium enterprises in public procurement, unbundle a category of goods, works and services in practicable quantities.
- (i) Wajir County is a vast county with an unusually long distance linking several towns and communities with different dynamic, topography and

community interest and, in order to enhance equity and fair distribution of resources among the six sub- counties and 30 wards in the county in line with Article 175(b) of the Constitution of Kenya, 2010, the County Government spread their priorities and captured the same in the County Integrated Development Plan and Annual Development Plan approved budget from the assembly hence issued Quotation to our various pre-qualified contractors in line with regulation 154(1) of the Public Procurement and Asset Disposal Regulations, 2020.

- (j) The Committee was referred to annexure 19 (a) Copy of procurement plan FY 2020/2021 for the department water, annexure 19 (b) copy of procurement plan for the department of health FY 2019-2020 and FY 2020-2021.

- 178. During the hearing, Mr. Abdi Abdullahi Hassan, the Deputy Director of Supply Chain Management, on behalf of the Governor, adduced evidence attached as Annex O 18(a) attaching various certificates to indicate that staff working in the procurement department were qualified and registered with the Kenya Institute of Supplies Management. Further to this, he indicated that it was not possible to have unqualified staff working in the department as the Public Procurement Regulatory Authority carries out an annual check to ascertain qualifications of staff.
- 179. On the issue of procurement of goods without annual procurement plans, Mr. Abdi submitted the water department procurement plan for the financial year 2020/2021 and the Department of Public Health, Medical Services and Sanitation Procurement plan for the financial year 2019/2020 to support the fact that the county executive complied with the requirement of having annual procurement plans in place (Annex 19(a) and 19(b) O (i) and (ii)).
- 180. On the allegation that the Governor condoned corruption by allowing accounting officers to split tenders, the witness stated that this was not possible as

the budget of wajir county was an itemized budget which required that expenditure is done on particular items. He further stated that the County Government served a vast area and required to be in tandem with section 54 of the Public Procurement and Asset Disposal Act, 2015 and regulation 154(1) of the Public Procurement and Asset Disposal Regulations, 2020, which allowed for the unbundling so as to enable the County Government serve every ward.

Observations of the Committee

181. The Committee observed, from the evidence provided by the parties, that the Governor was able to establish that all officers working in the Procurement Unit were qualified as evidenced by the certificates provided by the Governor. The Committee therefore found that the allegation was not substantiated.
182. The Committee further established, from the evidence adduced by the parties, that there were procurement plans in place and that the procurement processes were carried out in accordance with the Public Procurement and Asset Disposal Act, 2015. The Committee therefore found that the allegation was not substantiated.

o. Allegation 15: Violation of the right to health of the people of Wajir County

183. The County Assembly alleged, in the Particulars of Allegation, that the County Executive under the leadership of the Governor had caused the health sector of the County to run into disarray and into a deplorable state that had comprised and undermined the realization of the right to the highest attainable health standard of the people of Wajir as enshrined in Article 43(1) of the Constitution of Kenya, 2010.
184. The Assembly further alleged that whereas it had allocated over Kshs. 2.4 Billion to the department of medical services, public health and sanitation in the financial years 2018/2019, 2019/2020 and 2020/2021 which is equivalent to 22%

way above the national health policy requirement of 20% under the Universal Health Coverage, the only County referral hospital laboratory which also serves the region conduct a test on the corona virus pandemic due to faulty test kits and lack of reagents despite an additional allocation of Kshs. 194,000,000 in the 3rd Wajir County Supplementary budget for FY 2019/2020 in a bid to contain the spread of the disease.

185. Further, the Assembly stated that mismanagement of the budget appropriated for basic health services such as ambulances, fuel and maintenance as evidenced by the public outcry after the widely circulated incident in Eldas Constituency where a desperate caller who wanted to save a life in rural Eldas was tasked to buy tyres and fuel for the county ambulance. The Department admitted to this allegation in response to a statement by the MCA for Eldas Ward tabled on the floor of the County Assembly through the sectoral committee for Public Health and Medical Services. This notwithstanding the death of the Senior County Public Health Officer for lack of oxygen in the main County Referral Hospital (Annex D, page 72).
186. During the hearing, Hon. Dahir stated that despite the appropriation of Kshs. 2.4 billion to the Department of Medical Services and Public Health, the renal unit in Wajir Referral Hospital was shut down due to a strike by employees working in the Health Department. This, according to the County Assembly, was a clear misuse of public funds.
187. During cross-examination, the Assembly, through its witness Hon. Hussein Abdirahman Dahir noted that Kshs. 2.4 billion allocated with respect to the Health Department and the Universal Health Coverage was 22% of the county budget and hence, exceeded the 20% requirement under the said Universal Health Coverage. Hon. Abdirahman confirmed that the County Assembly was involved in the approval of the budget allocation of the said monies. In addition, Hon. Abdirahman stated that the Wajir County Health System has been at its

worst since independence and used the public outcry as the parameter to gauge the poor state of the health system in the County. However, Hon. Abdirahman had no information regarding the state of the health system during independence against which an assessment could be made.

188. Hon. Dahir further stated that complaints and petitions had been received by the County Assembly from the residents of Habaswein regarding the state of Habaswein Sub-County Referral Hospital and made reference to a petition dated 8th April, 2021, which was received by Wajir County Assembly. He stated that whereas the hospital was under the leadership of the county executive committee member when it fell into a crisis, the committee member worked under the leadership of the Governor. He further stated that the workers remained unpaid and had downed their tools. He stated that the workers decried the poor working conditions in the hospital and failure of payment of their dues and staffing levels and further, that he had established the existence of the poor working conditions from his visit to the hospital. Hon. Dahir stated that the petition was pending before the County Assembly for consideration.
189. In adducing his evidence in support of the Governor, Dr. Dahir Somow, the County Director of Health stated that Wajir County had one hundred and twenty two health facilities that were operational. Forty two other facilities were in the process of being operationalized. In his view, with a population of 769,000 this was relatively good but noted that this did not meet the World Health Organisation ratio. He further stated that the health facilities were in working conditions and further, that there were one thousand and ten technical and non-technical staff serving these facilities. Dr. Somow however stated that the health sector in the County faced a major challenge of high staff turnover owing to the resignation and desertion by employees due to insecurity, particularly with respect to the facilities in Wajir South and Wajir East. Dr. Somow however stated that this could not be attributed to the Governor.

190. To support the fact that the health sector in Wajir County was functional and not in disarray, Dr. Somow made reference to statistics from the Kenya Health Information system, which was an online platform hosted by the Ministry of Health, where the forty seven counties submit monthly reports on various aspects of the health sector. From the information submitted, Wajir County had improved in various areas, such as the proportion of pregnant women who attended ante- natal clinics had improved from 49.2% in 2017 to 86.1% in 2021. He further stated that there had been an increase in the number of children who were immunized with the DPT vaccine from 62.7% to 75.3%. He further noted that the County Government had also invested in equipment including good quality fridges that had been approved by the Ministry of Health and the World Health Organisation and also carried out an integrated outreach in order to provide health services to the settlements through community health volunteers and assistants. He also noted that the number of skilled birth attendants had increased from 19% to 49.1% and this had an impact in lowering the rate of maternal mortality in Wajir County (Annexed as P(21e)).
191. With regard to the current state of the health sector in comparison to the period at independence, Dr. Somow stated that whereas there had only been one operational theater then, the County now had in place a comprehensive obstetric antenatal care facilities that could carry out cesarean sections. He further stated that ambulance services were free. He stated that the County Government had in place, eleven ambulances with eight ambulances having been procured by the previous Government while the current regime had procured three ambulances. He further stated that the poor road network and vastness of the county led to frequent breakdown of their ambulances. He further stated that there was in place, a sufficient budget of about Kshs. 25 million for purposes of the referral system.
192. With regard to the renal unit at the main hospital in Wajir, Dr. Somow stated, during cross-examination, that the unit was fully functional and that all the six

machines in the unit were working. He however noted that the challenge faced was due to the fact that the machines were under the Managed Equipment Services (MES) programme and were leased. He further stated that water in Wajir County was salty and that this normally destroys the membranes. Whereas Angelica, the company that supplies the membrane previously undertook the replacement at a cost of Kshs. 150,000, the company indicated that it could not pay for the replacement any more and that the County Government had to incur this cost. He further stated that the County had put in place a desalination machine so as to help with saline water. In addition, he stated that the hospital had a transformer of 250kva while power consumption was 600kva and that the county had purchased a larger capacity transformer of 1000kva and have placed for the construction of a transformer house for it.

193. Regarding the workforce in the health sector, Dr. Somow stated that the County had in place fifty doctors out of whom, twenty two were on study leave. He noted that the aim of training the doctors was to ensure that they had in place consultants in each specialty and across the sub-counties, given that they had no consultant in place as the County Government could not attract any specialists despite publishing advertisements for consultants. He stated that because of this, the County Government had to hire a doctor from Ethiopia on a contract basis. He further stated that prior to releasing doctors for training, a training needs assessment was carried out and that the doctors were bonded to ensure they remained in the service of the County Government upon return from their studies.

Observations of the Committee

The Committee, having considered the evidence submitted by the parties, found that allegation 15 on the violation of the right to health of the people of Wajir County to have been substantiated and further, that the violation meets the threshold for an impeachable office.

CHARGE 2: ABUSE OF OFFICE/GROSS MISCONDUCT

1. Allegation 1: Abuse of power and authority

194. The County Assembly alleged, in the Particulars of Allegation, that the Governor abused his power and authority contrary to Article 236 as read together with Article 235 of the constitution of Kenya, 2010, the County Governments Act, 2012 and the Public Service Act by reshuffling the Chief Officers in the finance department six times within two years despite being a critical docket within the County Government of Wajir, with the intent of distorting institutional memory and facilitate corruption and plunder of public resources. The County Assembly further alleged that the unpredictability of the tenure of the office which was now largely dependent on the constantly changing mood and liking of the Governor's wife, had eroded public confidence in the critical department of the County treasury.

Articles 235 and 236 of the Constitution state as follows-

235. Staffing of county governments

(1) A county government is responsible, within a framework of uniform norms and standards prescribed by an Act of Parliament, for—

- (a) establishing and abolishing offices in its public service;*
- (b) appointing persons to hold or act in those offices, and confirming appointments; and*
- (c) exercising disciplinary control over and removing persons holding or acting in those offices.*

(2) Clause (1) shall not apply to any office or position subject to the Teachers Service Commission.

236. Protection of public officers

A public officer shall not be—

(a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

195. In the Governor's Response dated 11th May 2021, the Governor stated that –

- (a) The allegation regarding reshuffling of the Chief Officers in the Finance department six (6) times is false and designed to mislead the Special Committee.
- (b) Since, the Governor assumed office, he has re-assigned the Chief Officers in the Department of Finance only four (4) times and not six (6) times as alleged. As per Annexure – 22 (a)- letters reassigning the Chief Officers in the Department of Finance
- (c) The Governor reassigned the said Chief Officers while exercising his powers under Section 45 (5) of the County Government Act
- (d) The number of reshuffles of Chief Officers that the Governor can make during his term in the office is not limited by any law and the Governor can make as many reshuffles as he deems fit.
- (e) The reshuffles were made in good faith with a sole view of enhancing service delivery to the residents of Wajir as envisaged by Article 175 (b) of the Constitution.
- (f) None of the reshuffled Chief Officers in the Department of Finance has ever lodged any complaint of victimization or discrimination in the course of their reshuffles. Further, there is no Court case that has ever been instituted by the reshuffled officers to complain that due process of law was not followed.

- (g) The Governor respects the Offices established in the County and officers duly mandated to discharge duties in the said Offices.
 - (h) The Committee was referred to Annexure 22 (a)- Letters and press release reassigning the Chief Officers in the Department of Finance.
196. During the hearing, Hon. Abdullahi Isaack on behalf of the County Assembly averred that there was no accountability in the re-shuffling process of the chief officers in the Department of Finance and further, that the reshuffling was meant to conceal important information in the docket of finance. However, during cross examination he admitted that the Governor had the power to reshuffle chief officers in the County Government and did not have to consult the County Assembly in doing so.
197. In rebutting this allegation, Mr. Abdullahi Hassan, the acting County Secretary appearing on behalf of the Governor testified and stated that reshuffling of officers was a normal process and when this happens, there is a clear hand over mechanism. Mr. Hassan confirmed that the various appointments and deployments made to the office of chief officer of finance were as follows -
- (a) Mr. Bare Idriss was the first appointee in the office of chief officer during the tenure of the Governor of Wajir and was removed from office on 30th July, 2018;
 - (b) Mr. Ahmed Gerat was appointed to office on 1st July, 2018, and was re-assigned in October, 2018;
 - (c) Mr. Mohamed Sela took over from Mr. Gerat in October, 2018.
198. Hence, Mr. Maalim confirmed that there had been a high turnover with respect to the office of the Chief Officer of finance.

Observations of the Committee

199. The Committee therefore found allegation 1 abuse of power and authority was not substantiated.

2. Allegation 2: Violation of Article 73(2)(B) of the Constitution

200. The County Assembly in the Particulars of Allegations stated that the Governor had violated Article 73(2)(b) of the Constitution on objectivity and impartiality in decision making and in ensuring his decisions were not influenced by nepotism, favoritism and other improper activities or corruption practices.

73. Responsibilities of leadership

(2) The guiding principles of leadership and integrity include—

(b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;

201. During the hearing, Hon. Shueb Bare Ahmed, on behalf of the Assembly further alleged that the Governor had allowed his wife to literally run the affairs of the county as the de facto authority by officiating and signing off where necessary for decisions his wife unilaterally makes based on her own wishes and judgment without due regard to any law. It was an open secret in Wajir County and far beyond its borders that Mrs. Kheira Omar is the 'supreme' leader of the County and it is always her way or the highway. This had caused ridicule and disrepute to the high office of the County Governor. Therefore, it was the view of the County Assembly that the decision by the Governor to relinquish the executive powers vested on him constitutionally and derived from the people, amounted to abuse of office and relegation of duties.

202. Hon. Ahmed further stated that the First Lady managed the affairs of Wajir County and this was evidenced by her participation in meetings between the Governor and the County Assembly which she would sometimes chair and make

decisions on behalf of the Governor. The first lady issued orders to employees of the county though this was not done formally.

203. The Governor's Response to this allegation is as follows –

- (a) The allegations of the Governor allowing his wife to literally run the County affairs as the *de facto* authority are baseless, false and malicious.
- (b) The County Government of Wajir has established a fully functional County Executive Committee which is constituted of the Governor, the Deputy Governor and other members appointed by the Governor with the approval of the County Assembly of Wajir.
- (c) All the County executive authority is vested in and exercised by the Wajir County Executive Committee, which is charged with the mandate of *inter-alia*; implementing county and national legislation; managing and coordinating the functions of the County administration and its department.
- (d) The Wajir County Executive Committee hold meetings regularly and the deliberations of all its meetings are recorded in writing by the County Secretary. The resolutions of the Committee are made by a majority of the members present and voting. These resolutions are accessible to the public.
- (e) All the County Executive Committee minutes and/or resolutions are ratified by the Governor and the County Secretary.
- (f) The Governor's wife is not a member of the County Executive Committee of the Wajir County Government and as such, she does not participate in the meetings and decision making by the County Executive Committee. As such, it is utterly false to allege that she runs the County Government of Wajir.

- (g) The Wajir County Executive Committee is an independent organ of the Wajir County Government and it is not controlled and/or influenced by any person including the Governor's wife. No iota of evidence has been adduced to demonstrate that the Governor's wife runs the affair of the County Government of Wajir.
 - (h) These allegations are frivolous, scandalous and vexatious, and are intended to cause annoyance and bring disrepute to the governor and the office he holds.
 - (i) The Committee was referred to Annexure 23 (a)- Minutes of the meetings of the Wajir County Executive Committee.
204. During cross-examination by counsel for the Governor, Hon. Ahmed confirmed that the meetings in which the Governor's wife attended were in the nature of *Kamkunji* meetings for which minutes were not prepared. This was one of the ways in which the Assembly conducted its meetings. The meetings were held in the Governor's residence and in various hotels. However, the First Lady did not run the affairs of the Departments directly but rather, that the decisions that were made were influenced by her.
205. The County Assembly further averred that the First Lady was involved in a number of sectors of the county and further, the companies which undertook business with the County Government were related to the First Lady.
206. Hon. Ahmed stated that for one to secure a contract with the County Government of Wajir, one had to part with money and after carrying out the work, one had to part with 10% in order to receive payment for the said works. To support this contention, the witness referred to the statements of the first lady's account in which Kshs. 6 million, a second sum of Kshs. 6 million, Kshs. 2.6 million, and Kshs. 4.6 million were deposited in her account on 9th October, 2017, 9th October, 2017, 11th October, 2017 and 27th October, 2017. These deposits, according to the him, were kickbacks.

207. Hon. Ahmed in his evidence stated that further deposits made into the First Lady account were as follows –
- (a) Kshs. 1 million by Osman Abdi Jimale on 11th November, 2017;
 - (b) Kshs. 9 million by Omar Abdullahi, director FATCO on 18th December, 2017, for him to obtain attender for the construction of a 60 cubic meter water pan at Subidir;
 - (c) Kshs. 625,000 on 1st March, 2019, Kshs. 800,000 on 16th April, 2019, and Kshs. 900,000 on 16th April, 2019 by Isak Abdirizak Issa; and
 - (d) Kshs. 800,000 on 25th May, 2019, Kshs. 900,000 on 7th November, 2019 and Kshs. 900,000 on 28th November, 2019, by abdirizak Issa.
208. Hon. Ahmed in trying to make a nexus between the companies awarded various tenders and the first lady indicated that after money is received at the County Treasury in Wajir, suppliers and contractors who have been awarded tenders are paid. Mr. Osman Abdi Jimal who had seven companies and ran proxy companies for the First Lady was paid Kshs. 305,447,589. A single release from the County Treasury could be paid to five or six companies while suppliers who were owed Kshs. 1 million for works or supplies made in 2016 or 2015 had not been paid.
209. During cross-examination, Hon. Ahmed confirmed that in order for one to be paid as a contractor or service person, one had to pay the First Lady or seek her blessings or go-ahead for one to be paid for delivery of the works or services. This meant that the First Lady had to instruct the Chief Officers within the County Executive to pay the suppliers or contractors.
210. During cross-examination by counsel for the Governor, Hon. Ahmed stated that the statements pointing to the deposits made into the First Lady's accounts were from the Kenya Commercial Bank given to the Assembly by a person whom he refused to disclose during the hearing. He was not aware if the Kenya Commercial Bank was party to the procurement of the bank statement or knew

of the use to which the statement was put to. It was noted that the statement bore the stamp of the Ethics and Anti-Corruption Commission which was currently investigating the matter.

211. With respect to the ownership of the various companies by the Governor's family members or proxies of the Governor's family, the County Assembly, during cross-examination, noted that it did not have any proxy documents or statutory forms to support the allegation but rather, that the Assembly had outlined the manner in which the companies were working for the Governor and the First Family in the Affidavit
212. During cross-examination, Hon. Ahmed stated that Mr. Osman Abdi Jamale owned a number of companies (Annexed as CA 7) and further, that in addition to being a director of the companies he also acted as a proxy for the Governor and his family. The Assembly further stated that the CR12s adduced did not indicate the First Lady and son and daughter as being directors to the said companies.
213. During the hearing, Mr. Abdullahi Hassan, the County Secretary stated that the allegation that the governor's wife was running the county government affairs was far-fetched and there was no lacuna in the leadership of the county government.

Observations of the Committee

214. The Committee, having considered the information and documents submitted by the parties found that there was no evidence linking the First Lady to the activities relating to the running of the affairs of Wajir County Government. In addition, the Committee observed that the County Secretary, during the cross examination, admitted that the County Assembly did not have information or documents evidencing the running of the affairs of Wajir County Government by the First Lady.

215. The Committee observed that section 67 of the Evidence Act provides as follows

Documents must be proved by primary evidence except in the cases hereinafter mentioned.

216. The Committee is guided by the decision of the High Court in **Kenneth Nyaga Mwine vs. Austin Kiguta & 2 Others (2015) eKLR** where the court held as follows –

18. Third, the document becomes proved, not or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents- this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the court would look not at the document alone but it would take into consideration all facts and evidence on record.

217. The Committee observed that Mr. Shueb Bare Ahmed produced bank statements from the Kenya Commercial Bank which are alleged to belong to the Governor's wife but failed to disclose the source of the document, only stating that the statements had been received from somebody in an envelope.

218. The Committee noted that Mr. Shueb Bare Ahmed did not explain the source of the bank statements or apply for this Committee to confirm the authenticity of the bank statements from the Kenya Commercial Bank. The Committee, having perused the statements, was not persuaded that the statements demonstrate illicit cash flows as alleged by the County Assembly.

219. The Committee also noted that there was no nexus between the monies deposited into the First Lady's account by her as there was no evidence submitted to show that the said monies were kickbacks. The Committee further observed, with the regard to the alleged deposits by Mr. Jimale, Mr. Abdullahi and Mr. Abdirizak, that whereas the statements of account did indicate that the said persons did make the deposits, the statements could not be relied upon a being authentic.
220. The Committee therefore found allegation 2 on violation of Article 73(2)(b) of the Constitution was not substantiated.

3. **Allegation 3: Violation of section 59(1)(b) of the County Governments Act, 2012**

221. The County Assembly alleged that the Governor violated section 59(1)(b) of the County Governments Act, 2012 by usurping the powers of the County Public Service Board to appoint persons to hold or act in offices of the county public service. Section 59(1)(b) of the County Governments Act, 2012, states as follows-

59. Functions and powers of a County Public Service Board

(1) The functions of the County Public Service Board shall be, on behalf of the county government, to—

a. ...

(b) appoint persons to hold or act in offices of the county public service including in the Boards of cities and urban areas within the county and to confirm appointments;

222. The County Assembly stated that the Governor had allowed Mr. Jeff Mworio, his Economic Advisor who was employed on contract basis to act as the Head of the County Treasury from March, 2018, to December, 2018. Mr Jeff Mworio

with the help of others irregularly withdrew Ksh 26.1 Million from Wajir County Imprest account held at KCB, Wajir branch. Mr. Mworio was later arrested by Ethics and Anti-Corruption Commission and was charged with abuse of office contrary to section 46 as read with section 48 of the Anti-Corruption and Economic Crimes Act, 2003 which provide as follows -

46. Abuse of office

A person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence.

48. Penalty for offence under this Part

(1) A person convicted of an offence under this Part shall be liable to—

(a) a fine not exceeding one million shillings, or to imprisonment for a term not exceeding ten years, or to both; and

(b) an additional mandatory fine if, as a result of the conduct that constituted the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss.

(2) The mandatory fine referred to in subsection (1)(b) shall be determined as follows—

(a) the mandatory fine shall be equal to two times the amount of the benefit or loss described in subsection (1)(b);

(b) if the conduct that constituted the offence resulted in both a benefit and loss described in subsection (1)(b), the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

223. In the Response dated 11th May 2021, the Governor responded to this ground as follows:

- (a) Mr. Jeff Mworio Kithinji was appointed as Economic Advisor on 1st November 2017 to advise the Governor and the County Government on economic policy direction, assist in the preparation of County Integrated

Development Plan, Annual County Budget and its implementation, drive the agenda of inter-departmental integrated development planning to enhance synergy in the Action Plans, assist the departments in drawing coherent Flagship Projects and funding consistency in those undertakings, preparation of Project Proposals for external funding, preparation of Sessional Papers as necessary to be shared among all interested stakeholders, Preparation of comparative statistical data about the county against other counties, national government and global standards on key development indicators for information and benchmarking.

- (b) He was later deployed as the acting Head of Treasury by the County Secretary on 7th March 2018 through Letter Ref No OCS/ADM/VOL. 10(9). The deployment was made by the former County Secretary who was in charge of the County Public Service and not the Governor as implied.
- (c) The decision to appoint Mr. Jeff Mworira Kithinji as the Acting Head of Treasury was made by the Department of Finance and Audit so that vacancy does not arise in critical docket of Treasury prior to substantive recruitment by the County Public Service.
- (d) That Mr. Jeff Mworira Kithinji appointment was merely in an acting capacity as the Department of Finance and Audit awaiting the recruitment of the substantive Head of Treasury by the County Public Service Board and being in an acting capacity therefore did not usurp the powers of the County Public Service Board as alleged because the said appointment was not substantive and the Board could make a substantive appointment.
- (e) Mr. Jeff Mworira Kithinji was charged on 26th November 2018 along with two other officers on abuse of office contrary to section 46 as read with section 48 of the Anti-corruption and Economic Crimes Act No 2 of 2003 and he was convicted on 15th March 2021 and sentenced to pay Ksh 800,000 or in default to serve four (4) years in prison.

- (f) The County government suspended Mr. Jeff Mworja Kithinji on half pay pending the determination of his case and he has since been removed from the payroll.
- (g) The allegation that the Court ruled that Wajir County governor, H.E Amb. Mohamed Abdi Mohamud is investigated for abuse of office in relation to the above case is false as that recommendation was never made on the Governor as he was not on trial.
- (h) The Committee was referred to Annexure 24 (a)- Appointment letter of Jeff Mworja as Economic Advisor by H.E the Governor, Annexure 24 (b) - Acceptance letter by Mr. James Mworja, Annexure 24 (c) - County Secretary's deployment letter as Head of Accounting Services, Annexure 24 (d)- Letter from EACC communicating the charging of Jeff Mworja along with two others, Annexure 24 (e)- Suspension letter with Half pay, Annexure 24 (f) - Bachelor degree of commerce and Business Administration for Jeff Mworja., Annexure 24 (g)- Extension of Contract for Mr. Jeff Mworja as Economic Advisor, Annexure 24 (h) - EACC letter communicating his conviction along with others and Annexure 24 (i) - Suspension letter without pay pending any appeals.

224. Mr. Abdullahi Hassan Maalim, the acting County Secretary appeared on behalf of the Governor and stated that Jeff Mworja was employed by the Governor on 1st November, 2017 as an economic advisor (contained in the Response to the Senate on the Impeachment of the Wajir County Governor as Annex 24C), and had been advising on economic matters. He further stated that Mr. Mworja was substantively appointed and competitively sourced through the County Assembly and further, that his work was stated in his appointment letter . Mr. Maalim further stated the County Secretary then deployed Mr. Mworja vide a letter dated 28th June, 2018, pursuant to section 72 of the County Government Act which provides as follows -

Power to deploy public officers

1. *The power to deploy a county public officer within a department shall vest in the relevant county chief officer.*
 2. *The power to deploy a county public officer from one department to another shall vest in the head of the county public service.*
225. Mr. Maalim stated that the Governor was not involved in the deployment. He further stated that Mr. Mworio and the County Secretary (who had deployed him) were later charged in the Chief Magistrate's Case No. 47 of 2018 with the offence of abuse of office and the misappropriation of Kshs. 26.1 million and further, that the charges were brought about by the Ethics and Anti-Corruption Commission. He confirmed that they were convicted on 15th March, 2021, and sentenced to a fine of Kshs. 800,000 or a term of four years imprisonment.
226. During cross-examination, Mr. Maalim stated that the appointment was carried out by the Governor pursuant to Article 235 of the Constitution with no reference made to any other statute. It was noted that Article 235 of the Constitution conferred on the County Government powers to establish and abolish offices in its public office and appoint persons to hold or act in those offices and confirm appointments.

Observations of the Committee

The Committee therefore found allegation 3 on violation of section 59(1)(b) of the County Governments Act, 2012, was not substantiated.

OTHER ISSUES

1. Public participation

227. The County Assembly stated that it conducted public participation by publishing a notice in the local dailies calling for memoranda with respect to the proposed

impeachment process in the County Assembly and confirmed that the publication was carried in the Standard Newspaper. The Assembly noted that the uptake of newspapers in Wajir is big. The Assembly however noted that Assembly also. Adopted other modes of public participation including publicization through radio.

2. Irregular purchase of motor vehicle (pg. 84 hans. 12/5/21)

228. The County Assembly averred that the Governor exhausted his budget and instructed the former chief finance officer to use the Department's budget for the purchase of a motor vehicle for the Governor. The Assembly averred that the Governor and the First Lady issued orders that they needed a vehicle but they did not have the budget to undertake the purchase. The county executive committee member of finance indicated that there was no money and protested when the Governor instructed the procurement department to publish an advertisement for the vehicle. Motor vehicle KCQ 004 U, Toyota Land Cruiser was subsequently purchased, irregularly, according to the County Assembly at a sum Kshs. 26 million. Further, the County Assembly averred that Dayoo Construction Company Limited was awarded the tender on 2nd July. After payment of money to that company, the company transferred a sum of Kshs. 2,220,000 to Mr. Yusuf Mohamed Abdi's account and on the same day, Cosmos Cars Limited was paid a sum of Kshs. 14 million by Dayoo Construction Company Limited. In addition, a sum of Kshs. 4 million was paid to Townsville Holding Limited which then sent back the money to Ms. Farhiya Mohamed's account, daughter of the Governor, on 10th September, 2018 as a cut. The Assembly further averred that this matter was under investigation by EACC but on cross-examination, stated that the vehicle, which had been confiscated by the EACC had now been returned to the County Government upon the conclusion of the investigations.

3. Ghost projects and kickbacks for tenders awarded

229. The Hon. Shueb Bare Ahmed, Member of Wajir County Assembly stated, on behalf of the County Assembly that Arag Construction Limited, a company associated with the Governor had been awarded a ghost project for the renovation of water works at Habaswein. The Assembly further averred that the project was yet to be undertaken and despite this, the company had been paid a sum of Kshs. 3,376,684.
230. The Hon. Ahmed further averred that Haska Company Limited was awarded a tender for the supply of food to the County Government. The company was paid a sum of Kshs. 23,530,517 on 27th June 2019. On 29th June, 2019, Kshs. 4,500,000 was paid to Ms. Farhiya Mohamed, a daughter of the Governor.
231. During cross-examination, the Hon. Ahmed averred that the statement indicated that the company was paid for the project and further, that the structure that was to be constructed did not exist at the location in which the works were to be carried out.

4. Capacity of county executive committee members, chief officers and procurement officers

232. The Hon. Dahir, County Assembly averred (Dahir Affidavit, pg. 37 hans. 13/5/21 pg. 48) that the officers employed in the county lacked capacity and did not understand their roles and hence, there was a capacity gap in the County Government. During cross-examination, the Hon. Dahir, who appeared on behalf of the County Assembly, stated that the officers are employed by the County Public Service Board and further the county executive committee members and the chief officers were political appointees, despite being appointed by the Board. Hon. Dahir further stated that they were appointed by the Governor with the approval of the Assembly.

233. It was noted, during further cross examination, that given that the Members of the County Assembly had participated in the approval of the county executive committee members, they ought to have understood the responsibilities of the county executive committee member and in particular, section 35 of the County Governments Act which provides as follows -

Appointment of county executive members

35. The governor shall, when nominating members of the executive committee—

(a) ensure that to the fullest extent possible, the composition of the executive committee reflects the community and cultural diversity of the county; and

(b) take into account the principles of affirmative action as provided for in the Constitution.

(2) The county assembly shall not approve nominations for appointment to the executive committee that do not take into account—

(a) not more than two thirds of either gender;

(b) representation of the minorities, marginalized groups and communities; and

(c) community and cultural diversity within the county

(3) A person may be appointed as a member of the county executive committee if that person—

(a) is a Kenyan citizen;

(b) is a holder of at least a first degree from a university recognised in Kenya;

(c) satisfies the requirements of Chapter Six of the Constitution; and

(d) has knowledge, experience and a distinguished career of not less than five years in the field relevant to the portfolio of the department to which the person is being appointed.

234. While he voted against the approval of the county executive committee members, Hon. Dahir stated that the majority of the Members of the County Assembly voted for the approval of the county executive committee members and hence carried the day. He further confirmed that he swore his affidavit before a Mr. Danson Omari, Commissioner of Oaths, in his offices situated along Lenana Road.

5. Misuse of monies meant for COVID-19

235. The County Assembly, through its witness, Hon. Hussein Dahir Abdirahman stated that the Governor squandered Kshs. 167 million and as a result there was no money to deal with COVID-19. Mr. Abdirahman further stated, during cross-examination, that this was evidenced by the deplorable state of the health facilities in Wajir County. He however could not confirm the amount alleged to have been squandered with respect to the monies allocated for health. He refused to name the persons involved in the squander but stated that they acted under the leadership of the Governor of Wajir County. He also stated that he did not record a statement with any investigative agencies regarding the said misuse of funds.
236. Hon. Dahir, on behalf of the County Assembly, stated during cross-examination, that the County Assembly had approved Kshs. 194 million to combat the COVID-19 menace. He stated that the County Assembly had received a special audit report on the manner in which the monies had been used from the Auditor General which, though not presented, was available to the public. He also stated that he was aware that the Senate was dealing with the matter and further, that a meeting had been held on 10th May, 2021 on the matter. He however stated that he was not invited to attend the meeting (paragraph 24 of his affidavit).
237. Hon. Dahir also stated that the County Government ought to have in place, an approved work plan, budget and procurement plan that indicates the manner in which each of the funds would be used for the prevention and mitigation of

COVID-19. While noting that this was the responsibility of the respective county executive committee members, he further stated that this responsibility was the Governor's as he supervised the committee members.

238. Hon. Dahir also stated that the county executive committee member failed to invoke the provisions of section 135 of the Public Finance Management Act, 2012, to utilise the funds that had been disbursed by the National Government to County Governments to deal with the COVID-19 pandemic.

239. Section 135 of the Public Finance Management Act, 2012, provides as follows

County government to submit to county assembly supplementary budget in certain circumstances

- (1) A county government may spend money that has not been appropriated if the amount appropriated for any purpose under the County Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act, or money has been withdrawn from the county government Emergency Fund.*
- (2) A county government shall submit a supplementary budget in support of the additional expenditure for authority for spending under subsection (1).*
- (3) In complying with subsection (2), a county government shall describe how the additional expenditure relates to the fiscal responsibility principles and financial objectives.*
- (4) Except as provided by subsection (5), the approval of the county assembly for any spending under this section shall be sought within two months after the first withdrawal of the money.*

- (5) If the county assembly is not sitting during the time contemplated in subsection (4), or is sitting but adjourns before approval has been sought, approval shall be sought within fourteen days after it next sits.*
- (6) When the county assembly has approved spending under subsection (2), a supplementary Appropriation Bill shall be introduced for the appropriation of the money spent.*
- (7) In any financial year, the county government may not spend under this section more than ten percent of the amount appropriated by the county assembly for that year unless that county assembly has, in special circumstances, approved a higher percentage.*

6. Inability by the County Government to carry out COVID-19 tests

240. With regard to the inability of the County Government of Wajir to carry out COVID-19 tests as was set out in the Notice of Motion for impeachment, Dr. Somow stated that the Wajir regional referral laboratory was among the trailblazers with regard to the testing of COVID-19 having commenced this on 23rd April, 2020. He however noted that the machine broke down on 28th June, 2020, in the middle of the pandemic and that the County Government made efforts to procure the services of a sciencescope to have the machine fixed as was evidenced by the Local Supply Order No. 001566 and dated 30th June, 2020. (Annexed as 21G) He however noted that the South African supplier was not able to deliver within the agreed timeframe of four to six weeks and hence, the Department was forced to seek another alternative source. With regards to the replacement of the polymerase chain reaction (PCR) machine which had broken down, Dr. Somow stated that samples were being referred to the National Public Health Laboratory using the daily flights and further, that the County received a new machine with the support of the World Bank COVID-19 Health Emergency Response Project on 1st May, as evidenced by the delivery notes (Annex 21I) and is currently awaiting installation, training of staff and commissioning before it becomes operational on 2nd June, 2021.

7. Nepotism/Corruption

241. During cross-examination, it was noted that Mr. Ahmed Guhad Omar, County Chief Officer, Water Resource Development, had written a letter dated 19th December, 2017 addressed to Fartun Enterprises Limited for awarding a tender for the construction of a 30,000 cubic metre water harvesting dam at Alio Ismail location in Wajir South Sub County (Annex 319A). From the CR12, it was noted that Fartun, was Mr. Omar's sister who had been a director of the company in the past but resigned. He further stated that he was not aware if payment had been made but confirmed that the work had been done. He further stated that he did not receive anything out of this.

Observations of the Committee

The Committee observed that given the timelines for investigating this matter, the Committee was unable to comprehensively interrogate the other issues that rose during the hearing and further, that the parties did not canvas these issues adequately. The Committee therefore recommends that the matters be considered by the relevant Committees of the Senate in order to interrogate the issues and recommend the appropriate interventions.

7. IMPEACHMENT GENERALLY

242. The Special Committee is cognizant of the role of the Senate as set out in Article 96(1) of the Constitution which provides that the "*the Senate represents the counties and serves to protect the interests of the counties and their governments*" Impeachment is one of the mechanisms by which the Senate exercises its role of protection of the Counties and their Governments.
243. Removal of a governor is provided for under Article 181 of the Constitution and section 33 of the County Governments Act which provide as follows –

Article 181 of the Constitution

181. (1) *A county governor may be removed from office on any of the following grounds—*

- (a) gross violation of this Constitution or any other law;*
- (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;*
- (c) abuse of office or gross misconduct; or*
- (d) physical or mental incapacity to perform the functions of office of county governor.*

(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).

Section 33 of the County Governments Act:

(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.

(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—

(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and

(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.

(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

- (b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.*
- (4) A special committee appointed under subsection (3)(b) shall—*
 - (a) investigate the matter; and*
 - (b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.*
- (5) The governor shall have the right to appear and be represented before the special committee during its investigations.*
- (6) If the special committee reports that the particulars of any allegation against the governor—*
 - (a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or*
 - (b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.*
- (7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.*
- (8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the Speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.*
- (9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.*
- (10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution.*

244. In order to assist the Special Committee make an informed decision on the proposed impeachment, it is important that the Committee look at the origin and history of impeachment of public officials.

245. In England impeachment originated in the 14th century, when it became a means of initiating criminal proceedings based on clamour or outcry. Among the first recognized cases of impeachment was that of William, 4th Baron Latimer, who had been closely associated with the government of King Edward III. The charges against Latimer were oppression in Brittany; that he had sold the castle of Saint-Sauveur to the enemy, and impeded the relief of Bécherel, a British garrison under siege, in 1375; that he had taken bribes for the release of captured ships, and retained fines paid to the king, and the city of Bristol; and finally, that in association with Robert Lyons, he had obtained money from the crown by the repayment of fictitious loans. Baron Latimer was subsequently impeached by Parliament.
246. Subsequent subjects of impeachment were often political figures, usually royal ministers. Latimer's case also marks the point at which impeachment became not merely a means of initiating criminal proceedings but also a method of trial.
247. After the mid-15th century, impeachment fell out of use until the 17th century, when it was revived as a means by which Parliament could get rid of unpopular ministers. The use of impeachment gradually waned as the 18th century progressed, mainly because it proved to be a political instrument by which to attack the king's ministers.
248. In the early 19th century the acceptance of the principle that cabinet ministers are responsible to Parliament, rather than to the sovereign, made impeachment unnecessary, and the procedure fell into disuse after the unsuccessful trial of Lord Melville in 1806.
249. In the United States, Alexander Hamilton, the Chief of Staff for George Washington and one of the interpreters and promoters of the US Constitution,

wrote that impeachment is "*a method of national inquest into the conduct of public men.*"

250. Senator William Blount of the United States was in 1797-1799 impeached by the House of Representatives for the alleged incitement of two Indian tribes to mount a military expedition against neighboring Spanish territories for purposes of capturing the same for Great Britain. The Senator was however removed by the Senate using its own internal procedures before he could be tried in the Senate.
251. Sometimes impeachment is not based on criminal activity but rather morality and professional conduct. Most recently (in July 2014), a member of the Missouri House of Representatives filed articles of impeachment against Governor Jay Nixon (D) for ordering Missouri's Department of Revenue to accept joint tax returns filed by same-sex couples who have been legally married in other States. The Missouri Constitution prohibits the State from recognizing same-sex marriages.
252. In 1929, the Oklahoma legislature impeached Henry Johnston, seventh governor of Oklahoma, after convicting him of general incompetency.
253. In Nigeria, several Governors have been impeached based on corrupt practices. After setting up the anti-graft agency, the Economic and Financial Crimes Commission (EFCC), the Nigerian Government started targeting corrupt officials such as Governor Ayodele Fayose and his deputy from Ekiti State who were both impeached for corruption. The Governor of Bayelsa State, Diepreye Alamieyeseigha was also impeached for corruption and money laundering.
254. Abdulkadir Musa, the first Nigerian State Governor to ever be impeached met his fate because he was unable to form a cabinet. He had been elected on a platform of the People's Redemption Party (PRP) when the dominant party in

the House was the National Party of Nigeria, whose members he refused to nominate.

255. In Nigeria, incompetence is not a crime yet, for non-delivery and as a betrayal of public trust, it is an impeachable offense. Inability to govern is also not a crime yet it is grounds for impeachment.
256. During the Senate's consideration of the report of the special committee investigating the proposed removal from office of the Governor of Kericho County, the Senate adopted with approval the exposition of Senator Miriam Defensor Santiago of the Senate of the Philippines who in a keynote address at a workshop said that, "an impeachment trial is a unique process, because it is a hybrid. Impeachment is both quasi-judicial and quasi-political. It is neither a civil case nor a criminal case. A criminal case is designed to punish an offender and to seek retribution. In contrast, impeachment is the first step in a process that tries to remedy a wrong in governance. It has been said that the purpose of impeachment is not personal punishment, but rather to maintain Constitutional government, through the removal of an unfit official from a position of public trust."
257. The Court of Appeal of Kenya in Civil Appeal No. 21 of 2014 Hon. Martin Nyaga Wambora & others -v- The Speaker of the Senate & others stated as follows concerning impeachment of Governors in Kenya:
- "Our reading and interpretation of Article 181 of the Constitution as read with section 33 of the County Governments Act shows that removal of a Governor is a Constitutional and political process; it is a sui generis process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility. Section 33 of the*

County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the Constitutional mandate to move a motion for the removal of a County Governor. The Senate's Constitutional mandate to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed; first is intuition of a motion to remove the Governor be a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly's resolution to the Senate for hearing of the charges against the Governor... The Constitutional and statutory mandate to initiate and consider a motion to remove a County Governor is vested in the County Assembly and the Senate."

258. It is therefore clear that the purpose of impeachment is not to apportion culpability, criminal or otherwise as that is for the courts. The purpose of impeachment is to ensure that the people of a county are governed in a manner consistent with the Constitution and laws of Kenya. Impeachment is all about accountability, political governance as well as policy and political responsibility.
259. The Senate therefore has the responsibility to set and maintain the standard for impeachment that bears the proper hallmarks of impeachment: due process, fairness and justice. This the Senate has endeavored to do in the previous impeachments that that it has undertaken as evidenced by the reports of its special committees in-

- (a) The 1st impeachment of the Governor of Embu County - the Report is dated 14th February 2014;
- (b) The 2nd impeachment of the Governor of Embu County - the Report is dated 13th May 2014;
- (c) The impeachment of the Governor of Kericho County - the Report is dated 3rd June 2014;
- (d) The impeachment of the Deputy Governor of Machakos County - the Report is dated 15th August 2014;
- (e) The impeachment of the Governor of Murang'a County - the Report is dated 6th November, 2015.
- (f) The impeachment of the Governor of Nyeri County which was conducted in plenary;
- (g) The impeachment of the Governor of Taita Taveta County- the Report is dated 24th October, 2019;
- (h) The impeachment of the Governor of Kiambu County which was conducted in plenary.
- (i) The impeachment of the Governor of Kirinyaga County - the Report is dated 22nd June 2020.
- (j) The impeachment of the Governor of Nairobi County which was conducted in plenary.

260. It is noteworthy, for record purposes, that so far the Senate has found the charges in support of removal from office of a Governor substantiated in only three cases, namely that of the Governor of Embu County, the Governor of Kiambu County and the Governor of Nairobi County. The Senate found the charges unsubstantiated in the case of the Governor of Kericho County as well as the case of the Deputy Governor of Machakos County, the case against the Governor of Murang'a County, the case against the Governor of Nyeri County, the case against the Governor of Taita Taveta County and the case against the Governor of Kirinyaga County.

261. The impeached Governors were impeached for grossly violating the provisions of the Public Procurement and Disposal Act, the Public Finance and Management Act as well as the Constitution of Kenya as well as gross misconduct/abuse of office.

8. THRESHOLD FOR IMPEACHMENT – BURDEN AND STANDARD OF PROOF FOR IMPEACHMENT

262. The Special Committee shall, after hearing all the evidence tendered before it and taking all matters into consideration, need to decide whether it is Constitutional, lawful, pragmatic and in the interests of the County of Kirinyaga for the Governor to be removed from office.

263. On the threshold or standard of proof for impeachment, Yale Law professor Charles Black Jr. in “Impeachment: A Handbook” states as follows –

“Weighing the factors, I would be sure that one ought not to be satisfied, or anything near satisfied, with the mere ‘preponderance’ of an ordinary civil trial, but perhaps must be satisfied with something less than the ‘beyond a reasonable doubt’ standard of the ordinary criminal trial, in the full literal meaning of that standard. ‘Overwhelming preponderance of the evidence’ comes perhaps as close as can to denoting the desired standard.”

264. Micheal J. Gerhardt, visiting Professor of Law, Duke University, in “The Special Constitutional Structure of the Federal Impeachment Process”, while reviewing the impeachment trial of then US President Bill Clinton states as follows on the issue of threshold-

"The first such feature of the Constitutional allocation of power for impeachment and removal is that it facilitates and rewards a pragmatic or flexible analysis and impedes a formalistic analysis of the fundamental questions at the core of President Clinton's impeachment proceedings-whether his misconduct constituted a "high crime or misdemeanor". A pragmatic analysis of this issue entails balancing various practical considerations or factors, including the magnitude of harm that an impeachable official's misconduct has caused society or the Constitutional order, the nexus between the official's duties and his misconduct, public opinion, and other possible avenues of redress, such as electoral process or legal proceedings. In contrast, a formalist analysis employs rigid criteria for, or extremely well-defined elements of impeachable offences, such as treating every violation of the federal criminal law or every breach of the public trust as justifying removal.

By vesting the impeachable authority in the politically accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of officials well versed in pragmatic decision making. Members of Congress are pragmatists who can be expected to decide or resolve issues, including the appropriate tests, by recourse to practical rather than formalist, calculations. In fact, members of Congress decide almost everything pragmatically, and decisions about impeachment and removal are not exception. The vesting of impeachment authority in political branches necessarily implies the discretion to take various factors, including possible consequences, into consideration in the course of exercising such authority....

Moreover, if formalist reasoning were the norm in impeachment proceedings, many questions posed by the President's misconduct would not have been nearly as heart-wrenching or politically divisive as they

were. Removal would have been extremely easy and straightforward. In addition, the American people flatly rejected the strict liability notion of impeachment; most Americans acknowledged that the President had broken the law, but still did not regard his misconduct as constituting an impeachable offence or as justifying his removal. Most Americans favoured a less rigid approach that balanced the harm and wrongfulness of the President's misconduct against the public interest or welfare.

265. In the Supreme Court of Nigeria case of Hon. Muyiwa Inakoju & others –v– Hon. Abraham Adeolu Addeke SC 272 of 2006 it was held as follows –

“A Governor as a human being cannot always be right and he cannot claim to be always right. That explains why section 188 talks about gross violations. Accordingly, where a misconduct is not gross, then section 188 weapon of removal is not available to the House of Assembly.”

266. It is useful to note the various meanings of the word “gross” in relation to violation. Gross violation is a flagrant violation, a glaring error, nasty, unpleasant, vulgar or crass. It must be a severe transgression of the Constitution or a law.
267. In Kenya it is useful to note the provision of Article 73 of the Constitution which deals with the responsibilities of leadership-

Responsibilities of leadership

73. (1) Authority assigned to a State officer—

(a) is a public trust to be exercised in a manner that—

(i) is consistent with the purposes and objects of this Constitution;

(ii) demonstrates respect for the people;

(iii) brings honour to the nation and dignity to the office; and

(iv) promotes public confidence in the integrity of the office; and

(b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

(2) The guiding principles of leadership and integrity include—

- (a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;
- (b) objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices;
- (c) selfless service based solely on the public interest, demonstrated by—
 - (i) honesty in the execution of public duties; and
 - (ii) the declaration of any personal interest that may conflict with public duties;
- (d) accountability to the public for decisions and actions; and
- (e) discipline and commitment in service to the people.

268. In High Court being Petition No. 3 of 2014 Hon. Martin Nyagah Wambora & 4 others –v- The Speaker of the Senate and 5 others, the High Court held as follows:

“To our minds therefore, whether a conduct is gross or not will depend on the facts of each case having regard to the Article of the Constitution or any written law alleged to have been violated. We find that it is not every violation of the Constitution or written law that can lead to the removal of Governor, it has to be a gross violation.

The question therefore is how to measure what constitutes gross violation. We are of the view that the standard to be used does not require a mathematical formula, but it must take into account the intendment of Article 181(1) of the Constitution. In our view therefore whatever is alleged against a Governor must;

- a. *be serious, substantial and weighty.*

b. *there must be a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.*

(c) The charges as framed must state with a degree of precision the Article(s) or even Sub-Articles(s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated.”

269. The issue of the threshold for impeachment is complex and does not contain a simple mathematical formula. During the Senate’s consideration of the report of the Special Committee investigating the removal of the Governor of Kericho on 3rd June 2014 the Senate adopted the Committee’s recommendation that the threshold for impeachment should take into account the following considerations-

(a) The allegations must be serious, substantial and weighty;

(b) The violation must be a flagrant and-glaring violation;

(c) There must be a nexus between the violation and the Governor;

(d) The violation must have led to harm, loss or damage to society;

(e) The violation must have led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to carry out the functions of that office with integrity and accountability.

270. This Special Committee adopts the above threshold for removal of a Governor as adopted by the Senate on 3rd June 2014. The threshold was also used by the Senate in the subsequent consideration of the proposed removal from office, by impeachment, of Honourable Mwangi wa Iria, the Governor of Murang’a County in November, 2015 and Honourable Granton Samboja, the Governor of Taita Taveta County.

271. Burden of proof is the duty of a party to present evidence on the facts in issue necessary to establish his claim or defence by the amount of evidence required by law.
272. In determining the burden of proof in impeachment proceedings has been debatable across the world, while contributing to the never-ending debate Senator Miriam Defensor Santiago of the Senate of the Philippines held that, "an impeachment trial is a unique process, because it is a hybrid. Impeachment is both quasi-judicial and quasi-political. It is neither a civil case nor a criminal case. A criminal case is designed to punish an offender and to seek retribution. In contrast, impeachment is the first step in a process that tries to remedy a wrong in governance. It has been said that the purpose of impeachment is not personal punishment, but rather to maintain Constitutional government, through the removal of an unfit official from a position of public trust."
273. Therefore, in determining the standard of proof, the question that comes to mind is the nature of impeachment proceedings i.e. are they civil, criminal or administrative proceedings? The standard of proof in civil cases in Kenya is on a balance of probabilities, while that of criminal cases is beyond reasonable doubt.
274. Proof beyond reasonable doubt is that degree of proof which produces a conviction in an unprejudiced mind which arises from moral certainty and not absolute certainty that the person to be convicted is guilty of a crime. One is therefore right to conclude that the result of proving a case beyond reasonable doubt as is in criminal proceedings is a conviction. Bearing in mind the above it is therefore necessary to analyze the nature of each type of proceedings i.e. civil, criminal and administrative to determine the required standard of proof.
275. It is in order to conclude that impeachment proceedings are neither civil in nature nor criminal in nature. Impeachment proceedings are administrative in nature.

Justice Joseph Story of the United States Supreme Court held that, "The design of impeachment is to remove the impeachable officer from office, not to punish. An impeachable act need not be criminal. That explains why the Constitution states that the officer removed shall be subject to prosecution in an ordinary criminal case" From the above quote it is clear that impeachment proceedings are not criminal in nature but administrative due to the simple fact that the end result is purely the removal of an officer from office.

276. Having determined that impeachment proceedings are neither civil nor criminal but indeed administrative in nature, the next question that arises is, what is the standard of proof in administrative proceedings?
277. Yale Law professor Charles Black Jr. who had published "Impeachment: A Handbook" in 1974. Prof. Black had written about "overwhelming preponderance of the evidence" as a suggested mid-level standard for impeachment cases.
278. Black wrote: *"Weighing the factors, I would be sure that one ought not to be satisfied, or anything near satisfied, with the mere 'preponderance' of an ordinary civil trial, but perhaps must be satisfied with something less than the 'beyond a reasonable doubt' standard of the ordinary criminal trial, in the full literal meaning of that standard. 'Overwhelming preponderance of the evidence' comes perhaps as close as can to denoting the desired standard."*
279. The word of Charles Black which we are swayed by, suggest that the standard of proof in administration cases should be high above a balance of probabilities as required in civil cases but should not go beyond reasonable doubt as required in criminal cases. This assertion by Charles Black would be the most appropriate as it would guarantee the integrity of the impeachment proceedings.

280. In the United States there has been debate on the burden of proof required in impeachment proceedings. The argument of beyond reasonable doubt i.e. the highest threshold in proving a case has been argued by those facing impeachment proceedings, on the other hand the members of the Houses of Senate and Congress have argued for a lower standard of proof. The argument on the appropriate standard of proof in impeachment proceedings was played out in the 1986 Senate impeachment trial of Judge Harry Claiborne, where the attorneys of the judge filed a motion to designate beyond a reasonable doubt as the applicable standard for the Senate in reaching its determination in support of the motion they argued that the Constitutional language made it clear that an impeachment trial was in the nature of a criminal proceeding; the standard of proof in all criminal trials is beyond a reasonable doubt; historically impeachments have been conducted in the nature of a criminal proceeding; and the consequences for the defendant were grave, requiring the prosecutors to be held to the highest standard of proof, beyond a reasonable doubt.
281. The response of the House Managers in opposition to the Claiborne motion noted that the reasonable doubt standard was designed to protect criminal defendants who risked forfeitures of life, liberty and property. Such a standard was inappropriate, they maintained, because the Constitution limits the consequences of a Senate impeachment trial to removal from office and disqualification from holding office in the future, explicitly preserving the option for a subsequent criminal trial in the courts. The result was that the Senate refused to impose the reasonable doubt rule as the Senate standard, individual members undoubtedly applied that standard in their own minds when weighing the sufficiency of the evidence in the Claiborne case.
282. In summary the United States Senate has traditionally left the choice of the applicable standard of proof to each individual Senator. While rejecting a motion to make the criminal standard the standard in the Claiborne impeachment, the discussion made clear that it was simply a decision to allow each member to

make that choice and not a repudiation of the standard itself. Individuals might apply that or any other standard of their choice. A walk through history and an examination of the discussions of legal commentators may aid individuals in weighing their choices, but provides no definitive answers. Indeed, such an exercise is perhaps most useful in highlighting basic questions that members will want to ask themselves when searching for the appropriate standard.

283. It is important to note that in determining the charges against the Governor, the threshold set in the Constitution under article 181(1) must be met. The Constitution sets the following as the grounds for impeachment:
- (a) gross violation of this Constitution or any other law;
 - (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;
 - (c) abuse of office or gross misconduct; or
 - (d) physical or mental incapacity to perform the functions of office of county governor.
284. Thus the Senate is obligated to determine whether the various charges brought forth against the Governor are indeed offences that can form the basis for impeachment and are those which meet the threshold set by article 181(1) of the Constitution.
285. We are of the opinion that the Senate of the Republic of Kenya should adopt the position of the United States and more particularly the position of Charles Black i.e. the standard of proof should be higher than on a balance of probabilities and lower than beyond reasonable doubt due to the simple fact that impeachment is an administrative function of the Senate and though quasi-judicial, it is neither civil nor criminal in nature.

9. OTHER OBSERVATIONS AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE

286. In the course of its investigation of this matter, the Special Committee has observed a number of issues which though outside the specific charges made against the Governor of Wajir Taveta County, are germane to the totality of the situation of the Wajir Taveta County and merit the attention of the Senate.
287. The Committee observes that the ten day timeline for the conduct of the investigation, hearing, analysis of evidence and preparation of the report for consideration by the Senate was not adequate. The Committee found that there was need to expand the timelines if the Senate given the nature of an impeachment process. There is need to expand the timelines set out under section 33 of the County Governments Act and standing order 75 of the Senate Standing Orders.
288. The Committee observes that there is need to have in place a framework to guide the impeachment process at the County Assembly level in order to ensure that the process at the Assembly is carried out in a manner that adheres to the Constitution and existing legislation in ensuring that that the Governor has a fair hearing and further, that the interrogation of evidence is effective and further, that threshold for impeachment is met prior to approving a motion for impeachment and submitting the same to the Senate for consideration.
289. The Committee further observes that there was need for capacity building for County Assemblies in order to ensure that they were able to conduct the impeachment process at the County Assembly level effectively. In addition, the Committee observes the need to have in place a template in place to guide county assemblies in the conduct of impeachment processes.
290. The Committee observes that it would be important for the Senate to consider the report of the Special Committee whether or not it finds any of the charges to be

substantiated. The Committee therefore recommends that section 33 of the County Governments Act to ensure that the Committee report is considered by the House whether or not the Committee finds any charge to have been substantiated.

FINDINGS OF THE SPECIAL COMMITTEE

291. Having considered all these matters, it then fell to the Special Committee to discharge its mandate under section 33 of the County Governments Act, standing order 75 and Part 2 of the Fifth Schedule to the Senate Standing Orders. Section 33(4) of the County Governments Act, standing order 75(2) and rule 2 of Part 2 of the Fifth Schedule to the Senate Standing Orders mandates the Special Committee to-
- (a) investigate the matter; and
 - (b) report to the Senate within ten days on whether it finds the Particulars of the Allegations against the Governor to have been substantiated.
292. The Committee takes the position, in line with the precedents of the Senate in impeachment proceedings, that in order to find that any charge is substantiated, a determination needs to be made both that evidence has been adduced pointing to wrong-doing in the manner alleged in the Charge but also that the threshold for an in impeachable offence has been attained.
293. The thrust of the jurisprudence in successive impeachment proceedings before the Senate, which the Committee upholds, has been that it is not every aberration, even if established, that will lead to the impeachment of a Governor.

294. The Committee finds as follows on each of the Charges-

CHARGE 1: GROSS VIOLATION OF THE CONSTITUTION OF KENYA, 2010; THE COUNTY GOVERNMENTS ACT, 2012; THE PUBLIC

PROCUREMENT AND ASSET DISPOSAL ACT, 2015 AND THE PUBLIC
FINANCE MANAGEMENT ACT, 2012

1. Allegation 1: Failure to account for the financial resources allocated to the County

The Committee finds that the allegation was not proved and was therefore not substantiated.

2. Allegation 2: Lack of accountability in the management of county resources

The Committee finds that the allegation was not proved and was therefore not substantiated.

3. Allegation 3: Failure to draft the medium-term strategy for the financial year 2020/2021

The Committee finds that the allegation was not proved and was therefore not substantiated.

4. Allegation 4: violation of articles 176(1) and 185 of the Constitution

The Committee finds that the allegation was not proved and was therefore not substantiated.

5. Allegation 5: Failure to establish the County Budget And Economic Forum

The Committee finds that the Governor had taken steps towards establishing a County Budget and Economic Forum. the allegation was not substantiated. The Committee therefore finds that the allegation was not proved and is therefore not substantiated,

6. Allegation 6: Failure to deliver the annual state of the county address

The Committee finds that from the evidence adduced before the Committee, the County Governments Act does not specify where a State of the County Address ought to be delivered. A State of the County Address can be delivered in a place other than the County Assembly.

The Committee therefore finds that the allegation was not proved and is therefore not substantiated.

7. Allegation 7: Failure to submit the annual report of the implementation status of county policies and plans

The Committee found that Governor did not comply with the requirement under section 30(2)(j) of the County Governments Act to submit the annual report on the implementation status of the county policies and plans. The Committee however also determines that this violation does not rise to the threshold for impeachment of the Governor.

8. Allegation 8: Failure to establish an audit committee

The Committee finds that the allegation was not proved and was therefore not substantiated.

9. Allegation 9: Failure to seek approval of payments out of emergency fund

The Committee finds that the allegation was not proved and was therefore not substantiated.

10. Allegation 10: Operation of various bank accounts at local commercial banks

The Committee finds that the allegation was not proved and was therefore not substantiated.

11. Allegation 11: Violation of regulation 25(1)(b) of the Public Finance Management (County Government) Regulations, 2015

The Committee finds that the allegation was not proved and was therefore not substantiated.

12. Allegation 12: Violation of section 119(5) of the Public Finance Management Act, 2012

The Committee finds that the allegation was not proved and was therefore not substantiated.

13. Allegation 13: Violation of articles 201(a)(d) and (e), 226(5) and 227(1) of the Constitution of Kenya

The Committee finds that the allegation was not proved and was therefore not substantiated.

14. Allegation 14: Violation of Article 227 of the Constitution of Kenya and the Public Procurement and Asset Disposal Act, 2015

The Committee finds that the allegation was not proved and was therefore not substantiated.

15. Allegation 15: Violation of the right to health of the people of Wajir County

The Committee finds that the allegation was proved and was therefore substantiated.

The Committee further found that the allegation meets the threshold for impeachment of the Governor under Article 181 of the Constitution.

The Committee therefore finds that Charge 1 on gross violation of the Constitution of Kenya, 2010; the County Governments Act, 2012; the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012 been substantiated.

CHARGE 2: ABUSE OF OFFICE/GROSS MISCONDUCT

16. Allegation 1: Abuse of power and authority

The Committee finds that the allegation was not proved and was therefore not substantiated.

2. Allegation 2: Violation of Article 73(2)(B) of the Constitution

The Committee finds that the allegation was not proved and was therefore not substantiated.

3. Allegation 3: Violation of section 59(1)(b) of the County Governments Act, 2012

The Committee finds that the allegation was not proved and was therefore not substantiated.

The Committee therefore finds that Charge 2 on abuse of office/gross misconduct has not been substantiated.

CONCLUSION

295. The Committee having investigated the matter in accordance with its mandate under section 33(4) of the County Governments Act and standing order 75(2) of the Senate Standing Orders reports to the Senate that it finds that the as follows –

(a) Charge 1 on gross violation of the Constitution of Kenya, 2010; the County Governments Act, 2012; the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012 has been substantiated; and

(b) Charge 2 on abuse of office/gross misconduct has not been substantiated.

