

Approved
8/2/24 12/03/2024




REPUBLIC OF KENYA
THE NATIONAL ASSEMBLY

THIRTEENTH PARLIAMENT - THIRD SESSION - 2024
PUBLIC PETITIONS COMMITTEE

REPORT ON-

PETITION NO. 4 OF 2022 REGARDING FUNDS SPENT BY THE NATIONAL
GOVERNMENT CONTRARY TO THE PROVISIONS OF ARTICLE 223 OF THE
CONSTITUTION BY MR. STEPHEN MUTORO

MARCH, 2024

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 12 MAR 2024	DAY: TUESDAY
TABLED BY:	VICE-CHAIRPERSON PUBLIC PETITIONS & COMMITTEE HON. JAMES SITIENI
CLERK-AT-THE-TABLE:	B. INTOFU

DIRECTORATE OF LEGISLATIVE AND PROCEDURAL SERVICES
CLERK'S CHAMBERS
PARLIAMENT BUILDINGS
NAIROBI

TABLE OF CONTENTS

CHAIRPERSON'S FOREWORD	3
PART ONE	4
1. PREFACE	4
1.1. ESTABLISHMENT AND MANDATE OF THE COMMITTEE.....	4
1.2. COMMITTEE MEMBERSHIP.....	5
1.3. COMMITTEE SECRETARIAT	6
PART TWO.....	7
2. PETITION NO. 4 OF 2022 REGARDING FUNDS SPENT BY THE NATIONAL GOVERNMENT CONTRARY TO PROVISIONS OF ARTICLE 223 OF THE CONSTITUTION	7
2.1. INTRODUCTION.....	7
2.2. PETITIONER'S PRAYERS	7
PART THREE	8
3. STAKEHOLDERS SUBMISSIONS ON THE PETITION	8
3.1. SUBMISSIONS BY THE PETITIONER.....	8
3.2. CONTROLLER OF BUDGET (COB)	9
3.3. SUBMISSIONS BY THE CABINET SECRETARY, MINISTRY OF ROADS AND TRANSPOR.....	11
3.4. SUBMISSIONS BY THE CABINET SECRETARY, MINISTRY OF AGRICULTURE AND LIVESTOCK DEVELOPMENT.....	13
3.5. SUBMISSIONS BY THE CABINET SECRETARY, MINISTRY OF DEFENCE	15
3.6. SUBMISSIONS BY THE CABINET SECRETARY, ENERGY AND PETROLEUM.....	15
3.7. SUBMISSIONS BY THE FORMER CABINET SECRETARY AND PRINCIPAL SECRETARY, NATIONAL TREASURY AND ECONOMIC PLANNING.....	16
3.8. SUBMISSION BY THE CABINET SECRETARY, INTERIOR AND NATIONAL ADMINISTRATION 18	
3.9. SUBMISSIONS BY THE FORMER CABINET SECRETARY, MINISTRY OF AGRICULTURE, FISHERIES AND LIVESTOCK DEVELOPMENT	19
3.10. SUBMISSIONS BY THE IMMEDIATE FORMER PRINCIPAL SECRETARY, STATE DEPARTMENT OF AGRICULTURE	19
3.11. SUBMISSIONS BY THE IMMEDIATE FORMER PRINCIPAL SECRETARY, STATE DEPARTMENT OF BROADCASTING AND TELECOMMUNICATION.....	20
3.12. SUBMISSIONS BY THE CABINET SECRETARY, NATIONAL TREASURY & PLANNING	20
3.13. SUBMISSIONS BY THE CHIEF EXECUTIVE OFFICER, TELKOM KENYA LIMITED	21
3.14. SUBMISSIONS BY THE IMMEDIATE FORMER CABINET SECRETARY, MINISTRY OF ICT	22
3.15. SITE VISIT	23
PART FOUR	25
4. COMMITTEE OBSERVATIONS.....	25
PART FIVE.....	27
5. COMMITTEE RECOMMENDATIONS.....	27
ANNEXURES.....	30

LIST OF ABBREVIATIONS AND ACRONYMS

CS	-	Cabinet Secretary
GOK	-	Government of Kenya
JHL	-	Jamhuri Holdings Limited
KRA	-	Kenya Revenue Authority
MDAs	-	Ministries, Departments & Agencies
NMS	-	The Nairobi Metropolitan Services
NSC	-	National Security Council
NSTS	-	National Security Telecommunication Service
TKL	-	Telkom Kenya Limited

CHAIRPERSON'S FOREWORD

On behalf of the Public Petitions Committee and in accordance with the provisions of Standing Order 227, it is my distinct privilege to present to this House the Committee's Report on its consideration of Public Petition regarding Contrary to the Provisions of Article 223 of the Constitution by Mr. Stephen Mutoro. The petition, conveyed to the House in accordance with Standing Order 225(2)(b) by the Speaker of the National Assembly on 15th September 2022.

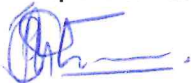
The Petitioner prayed that the National Assembly, through the Public Petitions Committee, orders the Auditor-General to conduct a special forensic audit on all public expenditures during the transition period from July to September 2022. Specifically, the Petitioner sought an examination of expenditures that were not approved by the National Assembly. The Petitioner further called for the formation of a Commission of Inquiry to investigate government officials responsible for the contested expenditures. Additionally, the petitioner urged the consideration of amendments to the Finance Act of 2022 and other relevant laws, with a focus on recalling delegated legislative power on taxation granted to the Kenya Revenue Authority among other prayers.

Upon considering the petition, the Committee observed that withdrawals were made by the MDAs between July and September 2022, coinciding with the conclusion of the Jubilee Administration's term. The Committee noted a lack of safeguards preventing the outgoing administration from incurring expenditures in case of an emergency. The House subsequently approved all expenditures, except for Kshs. 4.5 million allocated to the maize flour subsidy program and Kshs. 6,091,140,702 earmarked for the acquisition of Telkom Kenya through the Supplementary Appropriation Act of 2023. Lastly, the Committee highlighted that, despite the availability of the Contingency Fund to address emergencies, none of the MDAs sought funds from it due to the stringent conditions outlined in Section 21 of the Public Finance Management Act of 2012. Instead, they opted to request funding under Article 223 (1) (a) of the Constitution, bypassing Article 223 (1) (b).

In response to the petitioner's prayers, the Committee recommends that the Auditor-General conduct a forensic audit on all public expenditures by the National Government between July and September 2022 to ascertain any alleged misappropriation. Further, the Committee recommends amendment to Section 62 and any other consequential provisions of the Public Finance Management Act (2012) to establish an independent Public Debt Management Office outside the National Treasury among other recommendations.

The Committee expresses appreciation to the Offices of the Speaker and Clerk of the National Assembly for providing guidance and necessary technical support during the discharge of its duties. The Chairperson extends gratitude to the Committee Members for their devotion and commitment to duty throughout the consideration of the petition.

On behalf of the Committee and pursuant to the provisions of Standing Order 199, I now wish to lay the Report on the Table of the House.



HON. NIMROD MBITHUKA MBAI, M.P.
CHAIRPERSON, PUBLIC PETITIONS COMMITTEE

DATE.....*12th March 2024.*.....

PART ONE

1. PREFACE

1.1. ESTABLISHMENT AND MANDATE OF THE COMMITTEE

The Public Petitions Committee is established pursuant to the provisions of Standing Order 208A and is mandated to -

- a) consider all public petitions tabled in the House;
- b) make such recommendations as may be appropriate with respect to the prayers sought in the petitions;
- c) recommend whether the findings arising from consideration of a petition should be debated by the House; and
- d) advise the House and reporting on all public petitions committed to it.

1.2. COMMITTEE MEMBERSHIP

The Public Petitions Committee was constituted in October 2022 and comprises of the following Members:

Chairperson

Hon. Nimrod Mbithuka Mbai, M.P.
Kitui East Constituency
United Democratic Alliance (UDA)

Vice Chairperson

Hon. Janet Jepkemboi Sitienei, M.P.
Turbo Constituency
United Democratic Party

Hon. Patrick Makau King'ola, M.P.
Mavoko Constituency
Wiper Democratic Movement-Kenya
(WDM-K)

Hon. Edith Vethi Nyenze, M.P.
Kitui West Constituency
Wiper Democratic Movement-Kenya
(WDM-K)

Hon. Ernest Kivai Ogesi Kagesi, M.P.
Vihiga Constituency
Amani National Congress (ANC)

Hon. Maisori Marwa Kitayama, M.P.
Kuria East Constituency
United Democratic Alliance (UDA)

Hon. Joshua Chepyegon Kandie, M.P.
Baringo Central Constituency
Maendeleo Chap Chap Party (MCCP)

Hon. John Walter Owino, M.P.
Awendo Constituency
Orange Democratic Movement (ODM)

Hon. Bernard Muriuki Nebart, M.P.
Mbeere North Constituency
Independent

Hon. Bidu Mohamed Tubi, M.P.
Isiolo South
Jubilee Party (JP)

Hon. Caleb Mutiso Mule, M.P.
Machakos Town Constituency
Maendeleo Chap Party (MCCP)

Hon. John Bwire Okano, M.P.
Taveta Constituency
Wiper Democratic Movement-Kenya
(WDM-K)

Hon. Peter Mbogho Shake, M.P.
Mwatate Constituency
Jubilee Party (JP)

Hon. Sloya Clement Logova, M.P.
Sabatia Constituency
United Democratic Alliance (UDA)

Hon. Suzanne Ndunge Kiamba, M.P.
Makueni Constituency
Wiper Democratic Movement-Kenya
(WDM-K)

1.3. COMMITTEE SECRETARIAT

The Public Petitions Committee is facilitated by the following secretariat:

**Head of Secretariat
Mr. Ahmed Kadhi
Senior Clerk Assistant**

**Ms. Anne Shibuko
First Clerk Assistant**

**Ms. Miriam Modo
First Clerk Assistant**

**Mr. Willis Obiero
Clerk Assistant III**

**Mr. Shadrach Omondi
Legal Counsel II**

**Mr. Edison Odhiambo
Fiscal Analyst**

**Ms. Patricia Gichane
Legal Counsel II**

**Mr. Martin Sigei
Research Officer III**

**Mr. Andrew Shangirai
Principal Sergeant at Arms**

**Mr. Yezel Jillo
Sergeant at Arms**

**Ms. Lilian Mburugu
Media Relations Officer**

**Ms. Rahab Chepkilim
Audio Officer**

PART TWO

2. PETITION NO. 4 OF 2022 REGARDING FUNDS SPENT BY THE NATIONAL GOVERNMENT CONTRARY TO PROVISIONS OF ARTICLE 223 OF THE CONSTITUTION

2.1. INTRODUCTION

1. Public Petition No. 4 of 2022 by Mr. Stephen Mutoro, Secretary General of the Consumer Federation of Kenya (COFEK) was conveyed to the House by the Speaker on 15th November, 2022.
2. The Petitioner stated that, towards the end of the term of the Jubilee Administration, Kshs. 55 billion was spent without the approval of the National Assembly, contrary to the provisions of Article 223 of the Constitution.
3. The Petitioner further averred that the said expenditure was incurred by the Government at a time when the country was grappling with huge debt, high inflation, and high cost of living.
4. The Petitioner further stated that there was lack of transparency and accountability in the run-up to the transition from one administration to another which to him was a matter of great concern that if it goes unchecked, similar incidences would recur in future.
5. To the best of the Petitioners' knowledge, the matter in respect of which the Petition is made is not pending before any Court of Law or Constitutional body.

2.2. PETITIONER'S PRAYERS

6. The Petitioner prayed that the National Assembly through the Public Petitions Committee-
 - (a) orders the Auditor-General to conduct a special forensic audit within two weeks on all public expenditures from July to September 2022 specifically expenditures that were never voted for by Parliament.
 - (b) A Commission of Inquiry be formed to enable the public know how Kshs. 55 billion was irregularly allocated and spent. The Commission of Inquiry to put the following officers to their strict proof -
 - i.) Outgoing/Former Cabinet Secretary;
 - ii.) Controller of Budget;
 - iii.) Accounting Officers of all beneficiary allottees; and
 - iv.) Any other relevant officer and interested members of the public.
 - (c) amends the relevant laws to bar outgoing administrations from spending any such public funds not voted for by the National Assembly and introduce heavy penalties including life imprisonment for those found culpable.
 - (d) amends the Finance Act, 2022 and other relevant laws with focus on recalling on delegated legislative power on taxation granted to the Kenya Revenue Authority or any other agency.
 - (e) establishes an Independent Public Debt Management Authority soonest possible so that the said agency tracks and monitors any new debt and repayment to fully comply with the applicable laws.
 - (f) Tables the Report on the said inquiry before the House for debate and scrutiny.

PART THREE

3. STAKEHOLDERS SUBMISSIONS ON THE PETITION

3.1. SUBMISSIONS BY THE PETITIONER

On Thursday, 9th March, 2023, the Secretary General of the Consumer Federation of Kenya (COFEK), Mr. Stephen Mutoro, appeared before the Committee and submitted as follows, that: -

7. During the transition period of the previous government to the new government, funds were lost and credible information within the public domain indicated that the Jubilee administration in its last days spent a sum of Kshs. 55 billion without the approval of the National Assembly and the period under question was between July-September 2022.
8. Funds lost could be much more than those lost during Goldenberg, Anglo leasing and chicken gate scandals that ever happened in the history of the country and points to weak mechanisms of transparency and accountability especially during the transition periods by Governments.
9. Funds were spent by various Ministries, Departments and Agencies amidst the elevated debt vulnerability by the country's economic challenges and the high cost of living among other prevalent problems.
10. "Transition periods" have continued to be avenues for looting government resources by exiting Governments and constitute to blatant corruption.
11. Independent Commissions are not autonomous with specific reference to the Office of the Controller of Budget whose mandate as outlined in Article 228(5) of the Constitution, is among others, "to approve or not approve any withdrawal from public funds unless satisfied that the withdrawal is authorized by law".
12. Funds would not have been lost if the Controller of Budget complied with the provisions of Article 228(5) of the Constitution.
13. Submissions by the Controller of Budget regarding approval of colossal sums of money to various Ministries, in what she attested to as "arm-twisting", by the Executive, was a clear indication of lack of autonomy.
14. Independent Institutions have continued to suffer from political interference and are neither independent nor autonomous in some situations where fiscal decisions have to be made.
15. The Attorney General failed to intervene in addressing the problem as required by the law in line with Article 156(1) of the Constitution which requires him/her to promote, protect, uphold the rule of law and defend the public interest.
16. The existence of Independent/Constitutional Commissions is a waste of public funds as they are majorly ceremonial and do not live up to their mandates as envisaged by the Constitution.
17. There is need to establish a Commission of Inquiry to undertake investigations due to the complexity of the matter and the many Government Ministries, Agencies and Departments that are involved.

18. Parliament recalls certain delegated legislative powers to certain government agencies citing abuse for instance KRA imposing additional levies on citizens to shield citizens from abuse by state agencies

19. The Petitioners prayed that the National Assembly: -

- a) prioritizes tracking and recovery of the said funds and those found culpable be brought to book;
- b) establishes a Commission of Inquiry to investigate and make public, the findings on how the Kshs. 55 billion was irregularly allocated and spent;
- c) orders the Auditor-General to conduct a Special Forensic Audit for the period in question specifically the period between July to September, 2022 to establish fraud, corruption and other financial improprieties as provided for by Section 37 of the Public Audit, 2015;
- d) Amends relevant laws specifically Article 223 of the Constitution to bar outgoing administrations from spending public funds;
- e) Amends the Finance Act, 2022 and other relevant laws with focus on recalling on delegated legislative powers granted to various agencies e.g., KRA;
- f) Summons all those implicated persons including the Former Cabinet Secretary of the National Treasury and the former NMS Director, General Mbadi among others for interrogation; and
- g) Recommends removal from Office of the current Controller of Budget.

3.2. SUBMISSIONS BY THE CONTROLLER OF BUDGET (COB)

On Tuesday, 7th March, 2023, the Controller of Budget, CPA Dr. Margaret Nyakang'o, appeared before the Committee and submitted as follows: -

20. The requisition process under Article 223 of the Constitution had the following five stages-

- (a) The spending MDAs initiate the requisition process by writing to the Cabinet Secretary (CS), Ministry of National Treasury and Economic Planning to request supplementary budget;
- (b) The Cabinet Secretary of the National Treasury then approves and sends a response letter to the MDA with a copy to the COB and the Auditor General for information, but without the original request from the MDA;
- (c) The Director General (DG) of Accounting Services at the National Treasury sends a requisition to the COB;
- (d) The Controller of Budget acknowledges the requisition and replies outlining to the Principal Secretary the requirements to adhere to the provisions of Article 223, specifically for parliamentary approval and regularisation;
- (e) The National Treasury raises a request to COB for withdrawal/funding using the approval in note (a) and note (c); and

- (f) Finally, the COB considers the requisition in line with the law and, if it complies with the law and regulations, approves the withdrawal of funds to the National Treasury on behalf of the requesting MDA.

21. With regard to funding under Article 223 of the Constitution between July-September 2022 related to the Petition -

- (a) The COB approved State Department for Infrastructure's requisition of: -
 - (i) Kshs.2.8 billion to cater for additional budget for select flagship projects-Improvement of Lamu-Ijara-Garissa Road and funding done on 5th August, 2022;
 - (ii) Kshs. 4.8 billion to cater for additional budget for select flagship projects-dualling of Nairobi Eastern Bypass and funding done on 5th August, 2022; and
 - (iii)Kshs.1,850,000,000 to cater for additional budget for select flagship projects-Construction of Makupa Causeway and funding made on 5th August, 2022.
- (b) The Ministry of Defence's requisition of Kshs. 2.2 billion to cater for the GOK funding component of Level 4 Forces Research and Referral Hospital and funding done on 04-Aug-2022;
- (c) The National Treasury's requisition of Kshs. 6,091,140,702 to cater for the Exit of Helios Investment in Telkom Kenya LTD and funding done on 5th August, 2022;
- (d) The State Department for Crop Development and Agricultural Research's requisition of Kshs.4 billion to cater for the implementation of the maize subsidy programme and funding done on 4th August, 2022;
- (e) The Ministry of Petroleum and Mining's requisition of Kshs. 16,597,436,070.98 to cater for compensation of oil importers under Petroleum pump price stabilization and funding done on 16th September, 2022;
- (f) The State Department Early Learning and Basic Education's Kshs. 4,121,665,433.00 to cater for Secondary Education quality and improvement Projects under IDA and funding done on 14th September, 2022; and
- (g) Presidency's requisition of Kshs.411,909,902.70 out of Kshs.2,961,436,261.85 and the outstanding balance of Kshs.2,549,526,359.15 which had not yet been approved due to the non-provision of documents.
- (h) The Controller of Budget however, raised the following concerns that -
 - (i) The feedback on the progress on approval of the National Assembly on Article 223 supplementary funding had not been shared with the COB for tracking and eventual reporting by the National Treasury;
 - (ii) The ten per cent (10%) ceiling should be by corresponding vote rather than the entire approved budget;
 - (iii)The National Assembly considers reviewing the law to protect Article 223 from abuse; and
 - (iv)The mandate of the Office of the Controller of Budget of overseeing and implementing the budget be done independently by the Controller of Budget.

3.3. SUBMISSIONS BY THE CABINET SECRETARY, MINISTRY OF ROADS AND TRANSPORT

On Thursday, 20th April, 2023, the Principal Secretary for the Ministry of Roads and Transport, Eng. Joseph Mbugua, appeared before the Committee on behalf of the Cabinet Secretary for Roads and Transport and submitted as follows: -

22. Approval of the Additional Budget under Article 223 of the Constitution provides that the National Government may spend money that has not been appropriated by Parliament if *inter-alia*,

(i) *The amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by that Act; and*

(ii) *When the National Assembly has approved spending which had been granted under Article 223 of the Constitution, an appropriation bill shall be introduced for the appropriation of the money spent.*

23. The State Department of Roads made a request for additional funding to the National Treasury and received approvals to spend in advance of Appropriation under Article 223 of the Constitution amounting to Kshs. 9.45 billion within the financial year 2022/2023 for ongoing road projects as tabulated below: -

No	Vote	Budget Code	Project Name	Implementing Agency	Amount (Kshs.)
1	1091	159101	Upgrading of Lamu-Ijara-Garissa Road (A10) to All Weather Standard	KeNHA	2,800,000,000
2		124801	Dualling of Nairobi Eastern Bypass	KURA	4,800,000,000
3		154601	Construction of Makupa Causeway	KeNHA	1,850,000,000
		TOTAL			9,450,000,000

Table 1: Approved funding for three (3) ongoing road projects

24. The said request for additional funding was made to the Cabinet Secretary for the National Treasury and Planning in respect of three roads highlighted in Table (1) above and it was based on the following grounds: -

- (a) The Projects had been recommended by the National Security Council for implementation and therefore required optimum funding; and
- (b) The projects had material pending bills which were hindering prompt implementation.

25. The Cabinet Secretary for National Treasury approved additional budget provisions amounting to Kshs.9,450,000,000 under Article 223 of the Constitution with financing on 3rd August, 2023 as detailed below: -

39. The available maize stock as at May, 2022 was about 5.3 million (90 kgs) based on Maize Balance Sheet projected to July 2022, implying that the country would have a 2-months deficit of maize equivalent to about 6 million until the next harvest in July - August, 2022.
40. Maize imports decreased to 217,676 bags in April compared to 343,203 bags (90kgs) in March due to constrained regional supply.
41. Consequently, maize prices were escalating ranging between Kshs.4600-5000 in May, 2022 compared to Kshs.3000-3500 between January - April, 2022. The Government therefore intervened by waiving duty for 6 million bags of white non-GMO maize to be imported from outside the East African and COMESA regions through Gazette Notice dated 9th May 2022 to bridge the gap.
42. Maize process however continued to rise due to disruptions in the global supply chain, and high fuel prices with attendant logistical costs. The imported maize landing price was Kshs. 5,700 to Kshs. 6,500 per 90 kg bag. The price of the sifted maize flour (normal maize brands) remained high retailing at an average of Kshs. 190-215 per 2kg packet.
43. The Government decided to further cushion consumers through the allocation of resources to finance a maize-flour subsidy program to address the high consumer maize flour prices across the country.
44. The Cabinet Secretary for the National Treasury and Planning held meetings with millers on the 15th and 20th of July 2022 to discuss the financing to subsidize white maize flour occasioning the announcement of the Fifth Stimulus Programme covering the supply and distribution of maize meal across the entire country by the Retired President on the same day that sifted maize flour would retail across the entire territory of the Republic of Kenya at a price of Kshs. 100, down from Kshs. 205 for a 2 kg packet.
45. The Ministry of Agriculture then requested for Funds for the maize flour subsidy programme vide letter Ref. MOA/LCD/9/12/1 dated 18th July 2022 amounting to Kshs. 9.12 billion and the National Treasury granted approval to the state Department to spend additional Kshs. 4 billion vide Letter Ref.: RES1169/22/01 A (7) dated 21st July 2022 under Article 223 of the Constitution in implementation of the Maize Flour Subsidy Programme pending regularisation in the FY 2022/2023 Supplementary Estimates.
46. The Head of Public Service vide a Letter Ref. CAB/NSC/14/2. VOL.1/(24), dated 25th July 2022, communicated to the National Security Council on the approval of the following—
 - (i) Noted the contents of the Memorandum;
 - (ii) Sifted maize Flour Subsidy Programme for immediate implementation; and
 - (iii) Directed that the Cabinet Secretary for National Treasury and Planning to provides Kshs.2 billion per week and Kshs. 532 million to clear the outstanding bills pending to Millers for the Financial Year 2017/2018.
47. The National Treasury approved the State Department to spend additional Kshs. 4 billion under Article 223 of the Constitution in implementation of the Maize Flour subsidy programme was not regularised in the FY2022/2023 Supplementary Estimates No. I.

3.5. SUBMISSIONS BY THE CABINET SECRETARY, MINISTRY OF DEFENCE

On Tuesday, 14th March, 2023, the Principal Secretary for the Ministry of Defence appeared before the Committee and submitted as follows: -

48. With regards the source of the Kshs.2.2 billion, the Executive Order No. 4 of 2020 dated July, 06, 2020 established the National Security Telecommunication Service (NSTS) to develop, operate and maintain multi-agency network for the security agencies to address the gap of lack of a pure network.
49. The Communication Authority of Kenya (CAK) was directed to assign and lease the frequencies which previously belonged the national security agencies to commercial operators. The proceeds towards the lease were to be used to establish and operate the 'new' NSTS.
50. The National Treasury granted approval for the NSTS to receive the payments for the frequency spectrum and retain the funds in NSTS accounts.
51. The NSTS realized Kshs.3.1 billion from the commercialization for Financial Year 2021/2022, but after due consideration, only part of the amount was required for the project. Therefore, Kshs.2.2 billion was surrendered to the National Treasury.
52. Pursuant to Article 223(1), the Ministry requisitioned for additional funds necessitated by the need to fund ongoing construction of Forces Research and Referral Hospital in Kabete.
53. Initially, the project was to be funded by an Export Credit Arrangement (ECA) through an agreement between the Chinese Government and the Kenyan Government on a 85% and 15% contribution respectively. However, due to policy shift, the Chinese Government withdrew from funding the project occasioning stalling of the same as they were the biggest funders.
54. The withdrawal of the Chinese Government funding occasioned the Ministry to source alternative funding to settle payment for the certificates that had been raised by the contractor for the works done. The request for additional funding under Article 223 was approved and subsequently ratified by Supplementary Estimates I for Financial Year 2022/2023.
55. The said funds were used for the settlement of certificates for works done at the Forces Research and Referral Hospital amounting to the Ministry's 15 percent contractual obligation.

3.6. SUBMISSIONS BY THE CABINET SECRETARY, ENERGY AND PETROLEUM

On Wednesday, 15th March, 2023, the Cabinet Secretary, Ministry of Energy and Petroleum appeared before the Committee and submitted as follows -

56. The Government was importing petroleum through 85 licensed Oil Marketing Companies (OMCs) through an open tender system captured in the petroleum regulations and Public Procurement and Disposal Act, 2015.
57. The recovery during post-COVID, Ukraine-Russian War and tightening of monetary policy in the US increased competition for petroleum and subsequently leading to higher prices. Therefore, to sustain the small economies like Kenya, the Government made an intervention to subsidize petroleum to manage inflation through a Gazette Notice.
58. The Ministry made a request to the National Treasury and Economic Planning through a letter Ref: MOPM/P/CONF/3/34 VOL.IV(62) dated 2nd August, 2022 for the allocation of an

additional Kshs.16,597,436,070.98 to cover a deficit required to settle outstanding compensation to importers of refined petroleum products which was critical in order to avoid disruption in supply of petroleum products.

59. The Ministry of National Treasury and Economic Planning through a letter dated Ref. 1194/22/02/A (10) dated 25th August, 2022, communicated its consideration and approval of additional funding of Kshs.16,597,436,070.98 to the Ministry of Energy and Petroleum under Article 223 (Supplementary Appropriation) of the Constitution.
60. The payments were in respect to the petroleum pump price stabilization programme introduced as an intervention vide Legal Notice No. 124 of 10th July, 2020, Petroleum Development Levy Order, 2020.
61. The funds were used to pay eleven (11) Oil Marketing Companies (OMCs) in September and October 2022.

3.7. SUBMISSIONS BY THE FORMER CABINET SECRETARY AND PRINCIPAL SECRETARY, NATIONAL TREASURY AND ECONOMIC PLANNING

The former Cabinet Secretary for the National Treasury and Economic Planning, Hon. (Amb.) Ukur Yatani, EGH and the Former Principal Secretary for the National Treasury and Economic Planning, Mr. Julius Muia, PhD, FCPA, vide letters dated 14th July, 2023 and 7th July, 2023 respectively, sent written submissions and stated as follows: -

62. *On the meaning of the phrase “a need has arisen” as used in Article 223 of the Constitution and how is this need applied in connection to Section 40(3) (a) of the PFM (National Government) Regulations, 2015 the former CS and PS responded as follows -*

Article 223 -

- (1) *subject to clauses (2) to (4), the National Government may spend money that has not been appropriated if -*
 - (a) *The amount appropriated for any purpose under the Appropriations Act is insufficient or a need has arisen for expenditure for a purpose for which no amount has been appropriated by the Act; or*
 - (b) *The money has been withdrawn from the Contingencies Fund.*
- (2) *The approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of the money, subject to clause (3).*
- (3) *If Parliament is not sitting during the time contemplated in clause (2), or is sitting but adjourns before the approval has been sought, the approval shall be sought within two weeks after it next sits.*
- (4) *When the National Assembly has approved spending under clause (2), an appropriation Bill shall be introduced for the appropriation of the money spent.*
- (5) *In any particular financial year, the national government may not spend under this Article more than ten per cent of the sum appropriated by Parliament for that financial year unless, in special circumstances, Parliament has approved a higher percentage.*

The PFM Regulation 40(3) further provides that -

The purpose for which approval is sought for a supplementary budget shall be: -

- (a) Unforeseen and circumstances where no budget provision was made; or*
- (b) Unavoidable, in circumstances where there is an existing budgetary provision which however is inadequate.*

In light of the above, the Constitution envisages a situation where a need is unforeseen and unavoidable, particularly where Parliament has not appropriated any funds or the need is unavoidable where Parliament has appropriated insufficient funds. For instance, if budgetary provisions are estimates and the outcome of public procurement is unavoidable, then Article 223 of the Constitution can be applied given a need has arisen. Also, “a need may arise” in this circumstance was unforeseen and unavoidable during the financial year thus necessitating expenditure of the Government. For instance, when the COVID-19 pandemic struck in 2020, “a need arose” where no budgetary provision had been made and the Government had to intervene under Article 223 of the Constitution. Under either of the two circumstances described above, Parliamentary approval must be sought within two months after the expenditure has been incurred or where approval is not granted within the two months and Parliament adjourns, seek approval within 14 days when it next sits or where it was on recess, within 14 days after it next sits.

In conclusion, it is clear the two relevant laws are linked and the Constitution supersedes the Regulation.

- 63. *On the need to clarify whether expenditures which were already known at the time of finalizing the estimates but could not be accommodated can be brought back during budget implementation through a supplementary, the former CS and PS responded as follows -***

The National Treasury was guided by the Laws governing Public Finance specifically the Constitution, Public Finance Management Act, 2012 and attendant Regulations. His opinion was that if a need arises, expenditures which were already known at the time of finalizing the estimates but could not be accommodated can be brought back during budget implementation through a Supplementary Budget particularly if there was fiscal space or if the fiscal space allowed. This was expressly permitted by Article 223 of the Constitution which deals with Supplementary Appropriation.

- 64. *On the reasons why the expenditures in question could not wait for the Annual Appropriation and why the National Treasury administratively approved but the disbursement and subsequent payment took two months, the former CS and PS submitted as follows -***

- (i)** Some of the expenditures which were granted were unforeseen and unavoidable such as drought-related interventions. In such circumstances, it was not possible to delay such expenditure to the next financial year for it to be appropriated;
- (ii)** In dealing with expenditure requests, that were originated by Ministries to be allowed under Article 223, the National Treasury was guided by the provisions of Article 223(1), (2) and (3) of the Constitution. The subsequent payment of the expenditure granted under Article 223 was managed by the requesting Ministries subject to the availability of exchequer; finally,

- (iii) All the spending by the National Government between July 2022 and September 2022 was submitted to the National Assembly for approval vide a letter Ref: ES 1/02 'H' (7) dated 12th September 2022 and acknowledged by a Letter Ref: NA/DLP/TBO/CORRES/2022 dated 28th September 2022.

65. *On the circumstances under which the National Treasury authorized the Ministry of Defence to spend KSh.900 million which accrued from frequencies given by the Communication Authority of Kenya, the former CS and PS responded as follows—*

That, he had informed the current Cabinet Secretary to provide the above information/documentation to the Committee because he left Office in October, 2022 and may not be in a position to provide the same.

3.8. SUBMISSION BY THE CABINET SECRETARY, INTERIOR AND NATIONAL ADMINISTRATION

The Cabinet Secretary for Interior and National Administration, the Hon. Kithure Kindiki. EGH, vide a letter dated 25th June, 2023, forwarded written submissions and stated as follows, that—

66. The mandate of the Ministry of Interior and National Administration entailed the creation of an enabling environment by ensuring peace and security to the people and property, maintaining a credible national integrated information management system, promoting national cohesion, facilitation of administration of justice and provision of correctional services for Kenya's economic development.
67. Article 223 of the Constitution stipulates that the National Government may spend money that has not been appropriated if; the amount appropriated for any purpose under the 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 the approval of Parliament for any spending under this Article shall be sought within two (2) months after the first withdrawal of the money.
68. Arising from the above and in appreciation of the escalated activities towards the August 2022 General Election, the State Department for Interior and Citizen Services sought an additional budget provision of Kshs.300 million under Article 223 of the Constitution to strengthen the security operations of multi-agency security teams to address the then-prevailing security issues across the country and the upcoming General Elections.
69. Subsequently, the National Treasury, approved additional funding of Kshs.125 million vide a Letter Ref: TNT/CONF/118/18/01/N (123) dated 3rd August, 2022, to implement the planned security-related activities in respect to the August General Elections.
70. The said funds were utilized for the intended purposes and the same was regularized under Supplementary Estimates No. 1 for the financial year 2022/2023 that was approved by the National Assembly in February, 2023.

3.9. SUBMISSIONS BY THE FORMER CABINET SECRETARY, MINISTRY OF AGRICULTURE, FISHERIES AND LIVESTOCK DEVELOPMENT

The Former Cabinet Secretary in charge of Agriculture, the Hon. Peter Munya, EGH, vide a letter dated 30th August, 2023, forwarded written submissions and stated as follows, that;

71. At a meeting held on 25th July, 2022, the National Security Council (NSC) considered the Memorandum NSC (22)30 and approved the Sifted Maize Flour Subsidy Program and the NSC further directed the Cabinet Secretary to the National Treasury and Economic Planning to provide Kshs.2 million per week for its implementation.
72. Regarding funds for implementation of the Maize Flour Subsidy program, approval was granted by the Cabinet Secretary to the National Treasury under Article 223 of the Constitution and Section 21(2), (3) and (4) of the Public Finance Management Act, 2012.
73. Regarding the execution of the Maize Flour Subsidy Program, the Principal Secretary, of the State Department for Crop Development and Agricultural Research was the team leader of the Inter-Ministerial Taskforce that implemented the entire Sifted Maize Flour Subsidy Program.

3.10. SUBMISSIONS BY THE IMMEDIATE FORMER PRINCIPAL SECRETARY, STATE DEPARTMENT OF AGRICULTURE

On Tuesday, 26th September, 2023, the Immediate Former Principal Secretary Secretary for Agriculture, Mr. Francis Owino, appeared before the Committee and submitted as follows, that;

74. He was appointed as the Principal Secretary in 2018 and served as a Principal Secretary in the State Departments for Public Service and Youth, Industrialization and Fisheries and the Blue Economy.
75. While serving as the Principal Secretary in the State Departments for Public Service and Youth, Industrialization and Fisheries and the Blue Economy, he was further appointed as Acting Principal Secretary of the State Department for Crop Development and Agricultural Research in the Ministry of Agriculture, Fisheries and Livestock Development.
76. In the course of discharging his duties, he received a letter dated 25th July, 2022 from the Head of Public Service addressed to him, his other colleague, the Principal Secretary for Livestock, Cooperatives, the National Treasury and Planning and copied to the Cabinet Secretaries for National Treasury, Agriculture, Fisheries and Cooperatives and the Attorney General.
77. The letter communicated a meeting held on 25th July, 2022, where the Cabinet Secretaries of Agriculture, Livestock and Fisheries and Cooperatives, the National Treasury and Planning and the Attorney General presented a Joint Cabinet Memorandum apprising the Government on the food and nutrition security situation of the country and the need for a maize flour subsidy.
78. The Government consequently approved the Sifted Maize Flour Subsidy for immediate implementation.
79. The then Cabinet Secretary, the National Treasury, was directed to provide Kshs.2 billion per week for four (4) weeks, Kshs. 257 million for monitoring and overseeing the programme at all levels and a further Kshs. 532 million to clear outstanding bills pending for millers for the FY 2017/2018.

80. Upon receipt, he signed contracts with 129 millers who had the requirements including certificate of incorporation, pin certificate, tax compliance certificate, AFA certificate, VAT certificate, valid trade license, bank details, KEBS certificate, millers contact person and physical location of the millers.
81. A command center for receiving and processing payments was set. The Departmental Committee on Agriculture and Livestock conducted an inquiry on the same and tabled a report on 7th July, 2023 and one of the recommendations was that funds that were spent under Article 223 of the Constitution, be regularized.
82. The Ministry of Agriculture should come up with a policy on how to engage in future subsidy programs.

3.11. SUBMISSIONS BY THE IMMEDIATE FORMER PRINCIPAL SECRETARY, STATE DEPARTMENT OF BROADCASTING AND TELECOMMUNICATION

On Thursday, 10th August, 2023, the Immediate Former Principal Secretary for the State Department of Broadcasting and Telecommunication in the Ministry of ICT, Innovation and Youth Affairs, Ms. Esther Koimett, appeared before the Committee and submitted as follows, that;

83. Under the Executive Order on the Organisation of Government in operation at the time of the transaction, Telkom Kenya Ltd. (TKL) was placed under the State Department for Broadcasting and Telecommunication as the State Department in charge of telecommunications policy under the Ministry of ICT.
84. She did not deal with the transaction which is the subject of the inquiry and was not aware of it until it came to the public domain through media reports.
85. She did not have information on the matter even if she was the Principal Secretary then citing that the Government holds 40 percent shareholding in Telkom. The transaction was a shareholder transaction, meaning that the funds for transaction of this nature were provided directly by the National Treasury.
86. To the best of her knowledge, the State Department was not involved in the transaction related to the purchase of shares of a co-investor in TKL. That was a shareholder matter that fell under the purview of the National Treasury as the Ministry with the legal powers for such a transaction, under the Cabinet Secretary to the National Treasury Incorporation Act (Cap 101) of the Laws of Kenya.

3.12. SUBMISSIONS BY THE CABINET SECRETARY, NATIONAL TREASURY & PLANNING

The Cabinet Secretary for National Treasury and Planning, Mr. Njuguna Ndung'u, vide a letter Ref: TNT/CONF 51/07 'E' (70) dated 26th April, 2023, forwarded written submissions and stated as follows -

87. Article 223 (1) of the Constitution provides that the National Government may spend money that has not been appropriated if;
 - (a) *That amount appropriated for any purpose under the 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*
 - (b) *Money has been withdrawn from the Contingencies Fund.*

88. Further, Article 223(2) and (3) of the Constitution provides that the approval of Parliament for any spending under this Article shall be sought within two months after the first withdrawal of money and if Parliament is not sitting during the time contemplated in Clause (2) or sitting but adjourns before the approval has been sought, the approval shall be within two weeks after it next sits.
89. All spending by the National Government between July to September, 2022 was submitted to the National Assembly for approval vide letter Ref: ES 1/02 'H' (7) dated 12th September, 2023. Further, the National Treasury, acknowledged receipt of the National Approvals vide letter Ref: NA/DLP/TBO/CORRES/2022 dated 28th September, 2023.

3.13. SUBMISSIONS BY THE CHIEF EXECUTIVE OFFICER, TELKOM KENYA LIMITED

On Monday, 30th October, 2023, the Chief Executive Officer of Telkom Kenya Limited, Mr. Mugo Kibati, appeared before the Committee and submitted as follows: -

90. The Board of TKL never received an express intention from JHL to exit TKL however, the Board became aware of the intention through: -
- (a) A request by JHL in August, 2021 for the management of TKL to support a due diligence exercise that would be conducted by potential investors which culminated in a presentation by the management on 29th November 2021 to one of the potential investors; and
 - (b) In a letter dated 24th January, 2022, JHL wrote to Telkom Kenya indicating their intention to terminate the Management Services Agreement.
91. JHL informed GOK of its decision to exit Telkom Kenya Limited in July 2021 by exercising its put option. The exit was prompted by the failure to attain shareholder alignment on the company's strategic direction, GOK's disapproval (as a shareholder) of a merger transaction with Airtel Kenya occasioning material loss of value to Telkom Kenya Limited and its shareholders and arbitrary expropriation of the company's prime assets.
92. There was no legal requirement for JHL to inform the Board of TKL on JHL's intention to exit from TKL before communicating the same to the National Treasury.
93. That, the National Treasury, vide a letter dated 19th August, 2022, informed the Chairman of the Board of Telkom Kenya Limited that Jamhuri Holdings Limited (JHL)/Helios had informed the Government of Kenya (GoK) of their decision to exit Telkom by exercising their put option as provided for in the shareholder agreements.
94. The National Treasury requested the Chairman to convene a Board meeting to pass the necessary resolutions to facilitate completion of the transaction.
95. On Tuesday, 29th August, the Chairperson of the Board (Telkom) wrote back to the National Treasury informing him that: -
- (i) the Board as it was constituted at the time, lacked a quorum and therefore could not meet to deliberate on the matter;
 - (ii) The agreed form of the Attorney General's legal opinion had not been submitted for the Board's consideration yet it was a fundamental condition to process the request;
 - (iii) the Directors required all the necessary information to process the request;
 - (iv) if completed, the proposition would introduce significant immediate challenges to the parastatal under the various laws, statutes and guidelines;
 - (v) the company had an obligation to notify its employees, customers and other stakeholders of the transaction; and

- (vi) the Board Members required guidance on how to officially communicate the transaction, particularly about the employment contracts of employees as well as other ongoing operational contracts with critical stakeholders and partners given that the directors were not involved in the transaction.
96. As the CEO of Telkom Kenya Limited and to the best of his knowledge, he was not privy to the meetings of the Board about the said transaction, and the transfer of shares was equally undertaken by the Board and not the CEO. It is the discretion of the shareholders to involve/not involve the Board in such meetings but ordinarily, they are shareholder to shareholder meetings.
97. The Board and Management of TKL were not privy to the discussions between shareholders of the company regarding the value of the shares. However, vide a letter dated 19th August 2022, the following was noted—
- (i) GOK agreed to purchase 60 per cent of the ordinary issued share capital from JHL at a nominal amount of USD 1.;
 - (ii) JHL agreed to transfer by Deed of Novation all rights and obligations relating to all outstanding loans advanced by JHL to TKL amounting to USD.51,186,057;
 - (iii) JHL agreed to transfer by deed of novation all rights and obligations relating to shareholding loans that JHL took over from OrEA amounting to USD.239,938,692; and
 - (iv) GOK made payments for considerations of the purchase of shares and outstanding loans and accrued interest for loans advanced to TKL by JHL.
98. The transaction between JHL and GOK was completed on 12th August, 2022 following receipt of USD 51,186,057 by JHL from GOK and delivery of the fully signed transfer documents including fully signed share transfers from JHL to GOK.
99. TKL neither received nor disbursed any funds relating to the exit of JHL and therefore, the Board was not aware of any detail of payments, accounts particulars and amounts paid.
100. After the new administration came into place, Telkom, engaged the new CS Treasury who inferred that they wanted to secure a new investor to replace Jamhuri and needed Telkom's support. So, it was the National Treasury that had been driving the process of acquiring a new investor to take Jamhuri shares.

3.14. SUBMISSIONS BY THE IMMEDIATE FORMER CABINET SECRETARY, MINISTRY OF ICT

The immediate Former Cabinet Secretary, Ministry of ICT, Mr. Joe Mucheru, EGH, vide a Letter dated 31st August, 2023, submitted as follows, that: -

101. The Government of Kenya through the National Treasury was a shareholder at Telkom Limited and the issue of funds spent towards Telkom Kenya Limited or why the said expenditure could not await the annual appropriation process would be adequately addressed by the Cabinet Secretary of the then National Treasury.
102. To the best of his knowledge, he did not deal with the transaction which is the subject of the inquiry and was not aware of it until it came to the public domain through media reports.
103. He did not have information on the matter even if he was the Cabinet Secretary then citing that the said transaction was purely a shareholder-to-shareholder engagement i.e. Telkom and the National Treasury.

3.15. SITE VISIT

104. The Committee undertook an inspection visit to the Forces Memorial and Research Hospital in Kabete on Friday, 24th March, 2023 as earlier proposed by the Principal Secretary, Ministry of Defence, when he appeared before the Committee. During the visit, the Committee was briefed as follows, that—

- (i) The Hospital located at the Kenya Defence Forces Army Barracks in Kabete, a Level Six referral hospital, would have a bed capacity of 700 and would offer specialized health services to the military, security personnel and the general public.
- (ii) With regard to the funds in question, the Ministry requested for additional funding to aid in the completion of the said hospital for the FY 2023/2024.

105. After the visit to the said facility, the Committee noted that -

- (i) The project was a noble idea and upon completion the facility which had a 700-bed capacity would provide premium healthcare and serve all security sectors among them the Kenya Defence Force (KDF), National Police Service (NPS), Kenya Wildlife Service (KWS), National Intelligence Service (NIS), Kenya Coast Guard Service (KCGS), the National Youth Service (NYS) and their families in line with the Big Four National Agenda of enhancing Universal Healthcare.
- (ii) The hospital was still at 25 per cent completion and required more funds to enable its completion though the National Treasury had allocated Kshs.900 Million to the NSTS project and an additional Kshs. 2.2 Billion for the period under review.



Figure 1. *Members of the Public Petitions Committee being taken through a Presentation on the proposed architectural design of the Kenya Defence Forces Army Barracks, Kabete.*



Figure 2. *Members of the Public Petitions Committee being taken through the proposed architectural design of the Kenya Defence Forces Army Barracks, Kabete*

PART FOUR

4. COMMITTEE OBSERVATIONS

Upon hearing from the petitioner and other witnesses, the Committee observed that: -

106. Withdrawals were made by the MDAs mainly between July-September, 2022 towards the end of the term of the Jubilee Administration as claimed by the Petitioner as follows—

- (a) The State Department for Infrastructure's requisition of -
 - i.) Kshs.2.8 billion to cater for additional budget for select flagship projects-Improvement of Lamu-Ijara-Garissa Road vide a letter Ref: Article 223: FY2022-2023/06 dated 4th August, 2022 and funding was done on 5th August 2022;
 - ii.) Kshs.4.8 billion to cater for additional budget for select flagship projects-dualling of Nairobi Eastern Bypass vide a letter Ref: Article 223: FY2022-2023/06 dated 4th August, 2022 and funding was done on 5th August 2022; and
 - iii.) Kshs.1,850,000,000 to cater for additional budget for select flagship projects-Construction of Makupa Causeway vide a letter Ref: Article 223: FY2022-2023/06 dated 4th August, 2022 and funding was made on 5th August 2022.
- (b) The Ministry of Defence's requisition of Kshs. 2.2 billion to cater for the GOK funding component of Level 4 Forces Research and Referral Hospital and funding was done on 4th August 2022;
- (c) The COB approved National Treasury's requisition of Kshs.6,091,140,702 to cater for the Exit of Helios Investment in Telkom Kenya LTD vide a letter Ref: Article 223: FY2022-2023/03 dated 28th July, 2022 and funding was done on 5th August 2022;
- (d) The State Department for Crop Development and Agricultural Research's requisition of Kshs. 4 billion to cater for the implementation of the maize subsidy programme vide a letter Ref: Article 223: FY2022-2023/01 dated 25th July, 2022 and funding was done on 4th August 2022;
- (e) The requisition by the Ministry of Petroleum and Mining of Kshs.16,597,436,070.98 to cater for compensation of oil importers under Petroleum pump price stabilization and funding was done on 16th September 2022;
- (f) The requisition by the Ministry of Interior and Citizen Services of Kshs.125,000,000 to cater for the Multi-Agency Security Teams for the 2022 General Elections vide a letter Ref: Article 223: FY2022-2023/05 dated 3rd August, 2022 and funding was done on 5th August, 2022;
- (g) The requisition by the State Department for Early Learning and Basic Education of Kshs.4,121,665,433.00 to cater for Secondary Education quality and improvement Projects under IDA vide a letter Ref: Article 223: FY2022-2023/24 dated 12th September, 2022 and funding was done on 14-Sep-2022; and;
- (h) The requisition by the Presidency of Kshs.411,909,902.70 out of Kshs.2,961,436,261.85 and the outstanding balance of Kshs.2,549,526,359.15 had not been approved due to non-provision of the relevant documents.

107. The House subsequently approved all the expenditures with the exception of Kshs.4.5 million towards the maize flour subsidy programme and Kshs.6,091,140,702 towards the acquisition of Telkom Kenya through Supplementary Appropriation Act, 2023.
108. Notwithstanding the availability of Contingency Fund to respond to emergencies, none of the MDAs made request from the Fund due to the stringent conditions under Section 21 of the Public Finance Management Act, 2012. They therefore preferred to make funding requests under Article 223(1)(a) of the Constitution and not Article 223(1)(b) of the Constitution.
109. There were no safeguards to bar an outgoing administration from incurring expenditure in case of an emergency. The Constitution gives the National Treasury leeway to spend as long as the amount spent is in line with the provisions of Article 223. Notwithstanding this provision, the Public Finance Management Act, 2012 and its attendant Regulations needed further amendment to bar misuse of Article 223 spending.
110. The Public Debt Management Office is currently domiciled in the National Treasury. This arrangement compromises the independence of the Office since the Head of the Office reports to the Cabinet Secretary. Therefore, the office lacks financial autonomy to discharge its mandates.
111. The Cabinet Secretary for the National Treasury and Planning did not provide the Controller of Budget with the minutes ratifying the prioritization of the three roads by the Ministry of Transport that occasioned approval and disbursement of Kshs.9,450,000,000.

PART FIVE

5. COMMITTEE RECOMMENDATIONS

Pursuant to the provisions of Standing Order 227 and in response to the prayer sought, the Committee recommends that -

1. Prayer 1: *Orders the Auditor General to conduct a special forensic audit within two weeks on all public expenditures from July to September, 2022 and specifically the expenditures that were never voted for by Parliament but were still allocated and spent by Ministries and other Government Agencies;*

The Committee notes that Article 223(1) of the Constitution provides for certain parameters upon which the National Government may spend money that has not been appropriated. The parameters are as follows -

- (a) *The amount appropriated for any purpose under the Appropriation Act is insufficient or a need has arisen for expenditure for a purpose for which no amount had been appropriated by that Act; or*
- (b) *Money has been withdrawn from the Contingencies Fund.*

The Committee further notes that certain expenditures did not find favour within the provisions of Article 223 of the Constitution.

Therefore, the Committee recommends that the Auditor-General conducts a forensic audit with a view to establishing the alleged fraud, corruption and other financial improprieties in compliance with Section 37 of the Public Audit Act, 2015 in respect of-

- i.) the approval by the COB of the National Treasury's requisition of Kshs. 6,091,140,702 to cater for the Exit of Helios Investment in Telkom Kenya LTD and funding done on 5th August 2022; and
 - ii.) the State Department for Crop Development and Agricultural Research's requisition of Kshs.4 billion to cater for the implementation of the Maize Subsidy Programme and funding done on 4th August 2022.
2. Prayer 2: *Establishes a Commission of Inquiry, with public hearings, to have the public know why and further appreciate how the said 55 billion was irregularly allocated and spent;*

- (a) The Committee conducted hearings on this Petition in an open and transparent manner.
- (b) This suffices as a proper inquiry into the matter by the Committee.

Therefore, the Committee rejects this prayer.

3. Prayer 3: *That the said Commission of Inquiry put the following officers to their strict proof;*
- i.) Outgoing National Treasury Cabinet Secretary, Amb. Ukur Yattani;*
 - ii.) Controller of Budget;*
 - iii.) Accounting officers of all beneficiary allottees; and*
 - iv.) Any other relevant officers as well as interested members of the public and professional organizations to give their input.*

The Committee notes that—

- i.) Article 226(5) of the Constitution provides that the holder of a public office, including a political office who directs or approves the use of public funds contrary to law or instructions, is liable for any loss, whether the person remains the holder of the office or not;

Therefore, the Committee recommends that the Auditor-General audits the expenditures and the roles of the officers involved in the execution of their duties in relation to the appropriation of the funds and if found culpable, the appropriate action be taken against them.

4. Prayer 4: *Amends the relevant laws to bar outgoing administrations from spending any such public funds not voted by the National Assembly and by dint of the same, introduce heavy penalties including life imprisonment for those found culpable on such economic crimes that amount to treason and economic terrorism;*

The Committee notes that -

- i.) The current framework is already sufficient. The PFM had anticipated fiscal indiscipline during the electioneering period and provided for pre and post-election economic and fiscal report; and
- ii.) The Petitioner did not provide sufficient reasons for a shift warranting the amendments neither did the Petitioner nor the stakeholders provide with specificity and exactitude the gaps in the law to warrant any amendments.

Therefore, the Committee rejects this prayer and recommends that the provisions of the PFM are sufficient and should be complied with strictly according to the law.

5. Prayer 5: *Moves to amend the Finance Act, 2022 and other relevant laws with focus on recalling on delegated legislative power on taxation granted to the Kenya Revenue Authority and or and any other agency.*

The Committee notes that -

- i.) The Petitioner did not justify any problem with the Finance Act, 2022.
- ii.) The Constitution and the Statutory Instruments Act, 2013 allows Parliament to delegate the making of regulations and other instruments but requires their tabling and consideration by Parliament through the Committee on Delegated Legislation.
- iii.) The Petition did not provide cogent reason to warrant the recalling of the delegated power.

Therefore, the Committee rejects this prayer.

6. Prayer 6: *Makes any other recommendations that it deems fit.*

The Committee recommends that the National Assembly considers the following -

- i.) Appropriating funds in the Financial Year 2024/2025 to allow for completion of stalled projects under the Ministry of Defence (The Forces Referral and Research Hospital in Kabete) and the Ministry of Roads and Transport (the three roads) identified to have high impact in implementation as they touch on security, enhance mobility, accessibility and are key in spurring economic development;
- ii.) Amending Section 62 and any other consequential provisions of the Public Finance Management Act (2012) to create an independent Public Debt Management Office outside the National Treasury; and
- iii.) The Report be considered for debate in the House.

ANNEXURES

- Annex 1:** The Adoption List
- Annex 2:** Public Petition No. 04 of 2022 regarding funds spent by the National Government contrary to the provisions of the Constitution.
- Annex 3:** Minutes of the 6th Sitting held on Tuesday, 13th December, 2022
- Annex 4:** Minutes of the 4th Sitting held on Tuesday, 7th March, 2023
- Annex 5:** Minutes of the 5th Sitting held on Thursday, 9th March, 2023
- Annex 6:** Minutes of the 6th Sitting held on Tuesday, 14th March, 2023
- Annex 7:** Minutes of the 7th Sitting held on Wednesday, 15th March, 2023
- Annex 8:** Minutes of the 8th Sitting held on Wednesday, 15th March, 2023
- Annex 9:** Minutes of the 14th Sitting held on Thursday, 20th April, 2023
- Annex 10:** Minutes of the 24th Sitting held on Friday, 24th April, 2023
- Annex 11:** Minutes of the 62nd Sitting held on Thursday, 26th September, 2023
- Annex 12:** Minutes of the 72nd Sitting held on Monday, 30th October, 2023
- Annex 13:** Minutes of the 7th Sitting held on Thursday, 7th March, 2024
- Annex 14:** Letter dated 30th August, 2023 forwarding Written Submissions from the Former Cabinet Secretary, Agriculture, Hon. Peter Munya, EGH
- Annex 15:** Letter dated 14th July, 2023 forwarding Written Submissions from the Former Cabinet Secretary, National Treasury and Economic Planning, Hon. Ukur Yattani, EGH
- Annex 16:** Letter dated 7th July, 2023 forwarding Written Submissions from the Former Principal Secretary, National Treasury and Economic Planning, Mr. Julius Muia, PhD
- Annex 17:** Letter dated 25th June, 2023 forwarding Written Submissions from the Cabinet Secretary, Interior and National Administration, Hon. Kithure Kindiki EGH
- Annex 18:** Letter Ref: TMT/CONF 51/07 'E' (70) dated 26th April, 2023 forwarding Written Submissions from the Cabinet Secretary, National Treasury, Mr. Njuguna Ndung'u.
- Annex 19:** Letter dated 30th August, 2023 forwarding Written Submissions from the Former Cabinet Secretary, ICT, Mr. Joe Mucheru, EGH.

