REPUBLIC OF KENYA

ELEVENTH PARLIAMENT – (THIRD SESSION)

THE NATIONAL ASSEMBLY

VOTES AND PROCEEDINGS

THURSDAY, NOVEMBER 19, 2015

1. The House assembled at thirty minutes past Two O'clock

2. The Proceedings were opened with Prayer

3. **PRESIDING** – the Speaker

4. **COMMUNICATION FROM THE CHAIR**

The Speaker conveyed the following Communication –

"Honourable Members,

You will recall that on Thursday, November 12th, 2015, at the commencement of consideration of the Motion to adopt the Report of the Public Accounts Committee on the Special Audit Report of the Judicial Service Commission (JSC) and the Judiciary of May, 2014, the Leader of Majority Party rose on a point of Order and drew the attention of the House to contents of a letter from the Chief Justice dated October 27th, 2015. The said letter, which was addressed to the Speaker was copied to the Leader of the Majority Party, the Leader of the Minority Party, the Chairperson of the Public Accounts Committee, the Chairperson of the Justice and Legal Affairs Committee, the Chairperson of the Budget and Appropriations Committee and the Clerk of the National Assembly among other persons. Other Members, including the Chairperson of the Public Accounts Committee the Hon. Nicholas Gumbo, the Hon. John Mbadi, the Hon. Olago Aluoch, the Hon. Priscilla Nyokabi, the Hon. Peter Kaluma, the Hon. Dalmas Otieno and the Hon. David Ochieng', also contributed and offered their views on the matter.

Honourable Members,

From the issues raised by Members and the contents of the Letter, I have deduced the following issues as requiring my determination:-

1. Whether a Committee of this House, or indeed the House, can require the attendance, in person, of the holder of the office of the Chairperson of the Judicial Service Commission , and if so, what capacity does that portend to his other offices that he holds;
2. Whether the Public Accounts Committee can re-open the Report on the Judicial Service Commission and the Judiciary that has already been tabled in the House as

requested by the Chief Justice of the Republic of Kenya in his letter of October 27, 2015, given the additional information now available; and

3. Whether the two arms of Government, that is, the Judiciary and Parliament should develop a more structured way through which to engage in matters of accountability.

Honourable Members,

On the first issue of whether the Chairperson of the Judicial Service Commission is expected to appear before a Select Committee of the House when required to do so, it is imperative to first be conscious of the other Constitutional offices represented by the holder of that office. The Chief Justice of the Republic of Kenya holds three key offices; He is the Head of the Judiciary as provided for in Article 161(2)(a) of the Constitution, the President of the Supreme Court as provided for in Article 163(1)(a), and that he is also Chairperson of the Judicial Service Commission as provided for in Article 171(2)(a).

Indeed, there are various jurisdictions that operate under a similar model to the one we have in our country. For example, in addition to heading both the Judiciary and the highest Courts, the Chief Justice also chairs the equivalent of a Judicial Service Commission in the Philippines, Nigeria, Pakistan, South Africa, Malaysia, Ghana and Sri Lanka. In the United States of America and India, the Chief Justice is also in charge of administration and supervisory responsibilities of the Judiciary.

In jurisdictions such as Australia, Japan, New Zealand, the United Kingdom and Canada, administrative and managerial functions are not within the purview of the Chief Justice. For instance, whereas the Lord Chief Justice of England and Wales is the Head of the Judiciary and President of the Courts of England and Wales, he is not in charge of administrative and supervisory matters, which are undertaken by the Judicial Appointments Commission. On his part, the Chief Justice of Canada chairs the Canadian Judicial Council but has no role in routine administration of the judiciary, as this is a task vested on the Commissioner for Federal Judicial Affairs who reports directly to the Minister of Justice.

Honourable Members,

This particular issue would have been a lot easier to address if we were operating in a system similar to the United Kingdom or Canada where the Chief Justice does not also oversee administration of the Judiciary. However, that is not the case. Different jurisdictions have diverse ways of engaging the Chief Justice, particularly in cases where he or she heads the body responsible for recommending persons for appointment as judges, reviewing conditions of service for judges and judicial officers, among other administrative functions. For example, Section 5 of the United Kingdom's Constitutional Reform Act of 2005 provides that, and I quote:

> *"The chief justice of any part of the United Kingdom may lay before Parliament written representations on matters that appear to him to be matters of importance relating to the judiciary, or otherwise to the administration of justice, in that part of the United Kingdom."*

Arising from this, the Lord President of the Court of Session, who is the equivalent of the Chief Justice in Scotland, laid before the United Kingdom Parliament in January 2012 written representations regarding the Scotland Bill 2012. Likewise, the Lord Chief Justice of England and Wales appears annually before the Committee of the House of Commons to

give evidence on issues of constitutional importance and on a regular basis before the Justice Committee of the House of Commons. As a matter of fact, on Tuesday 26th October, 2010, the Rt. Hon. Lord Judge, Chief Justice of England and Wales and Rt. Hon. Lord Justice Goldring, Senior Presiding Judge of England and Wales appeared as witnesses before the British House of Commons Justice Committee on their administrative, disciplinary and budgeting responsibilities in the Judiciary.

Honourable Members,

In determining whether or not the Chief Justice should appear before a Select Committee of the National Assembly when required to do so, I wish to refer the House to Article 125 of the Constitution on **Power to Call for Witness**, which states, and I quote:

> *125. (1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.*
>
> *(2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court—*
>
> *(a) to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;*
>
> *(b) to compel the production of documents; and*
>
> *(c) to issue a commission or request to examine witnesses abroad.*

In addition, Section 14 of the National Assembly (Powers and Privileges) Act, Cap. 6, on power to order attendance of witnesses provides, and I quote:

> *14. (1) The Assembly or any standing committee thereof may, subject to the provisions of sections 18 and 20, order any person to attend before it and to give evidence or to produce any paper, book, record or document in the possession or under the control of that person.*

Honourable Members,

From the foregoing, it is clear that any witness invited by or summoned to the National Assembly or its Committees is obliged and expected to attend and appear before the Assembly or its Committees without fail. The Constitution is explicit on this.

The Judicial Service Commission, just like any other Commission as specified in Article 248(2) of the Constitution of Kenya remains accountable to the accountability institutions set out in the Constitution and other legislation, including the National Assembly.

One of the key roles of the National Assembly as stated in Article 95, Sub-article, 4(c) and 5(b) of the Constitution is to exercise oversight over national revenue and its expenditure and oversight of State organs. According to **Mason's Manual of Legislative Procedure, 2010 Edition**, under the Chapter on Investigations by Legislative bodies, subsection 6, the Legislature has power to investigate any subject where there is a legitimate use that the legislature can make of the information sought, and an ulterior purpose in the investigation or an improper use of the information cannot be imputed. The Manual further states in subsection 10, that an investigation into the management of the various institutions of the State and the departments of the State government is at all times a legitimate function of the legislature.

In our case, expenditure is reviewed through the Public Accounts Committee and Public Investments Committee and operational matters through Departmental Committees.
While it is important to recognize the position of the Chief Justice as the Head of Judiciary, it is imperative too to note that the bearer of the office of Chairperson of the Judicial Service Commission is expected to appear before this House or its Committees when invited to do so.

Pursuant to Article 226(3) of the Constitution, the accounts of all governments and State organs are audited by the Auditor General and once laid in the House, the Public Accounts Committee calls accounting officers to respond to audit queries contained therein. The law has clearly prescribed who the accounting officers are for the State organs. If , however, in the course of investigation, evidence is adduced to the fact that certain holders of public offices have either directed, approved or acted in a manner contrary to law or lawful instructions, then such public officers shall be personally liable for such actions and investigative Committees will have power to summon and examine such persons without let. This is a power that is inherent and reposed in the Legislature and does exist as an indispensable incident as stipulated in Article 125 of the Constitution.

It is upon State organs, particularly the Commissions to clearly draw a line between what is policy and day-to-day administrative matters. It would help, if they largely restrain themselves to policy direction and leave execution of policies to the relevant bodies and/or officers.

Honourable Members,

On the second issue of determination on whether the Public Accounts Committee can re-open the Report on the Judicial Service Commission and the Judiciary as requested by the Chief Justice, it is prudent to consider the submissions by the Chairperson and Members of the said Committee that they indeed tried in vain to have the Chairperson of the Judicial Service Commission meet the Committee. In addition, the Committee has submitted that the Chairperson of JSC was given ample time within which to present additional supporting documents on the matters that were under inquiry. Moreover, the additional information by the Chairperson of the Judicial Service Commission was submitted on October 27, 2015, sixteen weeks after the Report was laid in the House by the Committee. You all know too well that the laying of a Committee Report in the House signifies the conclusion of the work of the Committee in the particular task. What now remains is for the House to debate the Report.

Honourable Members,

On the notion that contents of the said Report have been overtaken by events, it is critical to note that in the typical production of Reports of audit nature, there is always the possibility that the situation would have changed by the time the Report is concluded. You know too well that this happens severally in Reports of the Public Investments Committee and the Public Accounts Committee, and less frequently in case of inquires carried out by Departmental Committees. Changes in circumstances or situations do not necessarily invalidate the findings of a Committee. Indeed, it is also possible that such changes may have been attributed to the commencement of the Parliamentary investigations themselves. How many times have persons been asked to temporarily vacate offices, dismissed from office, or even arraigned in court in the middle of Parliamentary investigations or after the Report is laid in the House? As a matter of fact, new information coming after the Report has been laid is useful in two ways:- One, it may present an opportunity to the Committee, or indeed any Member in possession of the

information to move the House to amend the Report to reflect the new or additional information. Secondly, such additional information may assist the particular Committee and the Committee on Implementation to report the present position of the matter in question at a later time. Coincidentally, the Public Accounts Committee and the Public Investments Committee are also expected to follow-up on the implementation progress of their Reports by way of the annual Treasury Memorandum on the Implementation Status. This ensures that the Audit reservations do not keep recurring. Should the matters recur in the subsequent audit Report of the Auditor General, this also presents another opportunity for the Committee to address the matter in its current status, including any additional information that may have been submitted after the initial Report was *tabled*.

Honourable Members,

This leads me to the third and final issue of determination concerning modalities of engaging the Chief Justice in his various capacities. Members who have served in this August House for at least two terms may recall an arrangement utilized by the two watchdogs committees, namely PAC and PIC, in resolving various audit issues a few years ago. At the end of every year, the two Committees would, after taking evidence, but before compilation of reports, pick out the salient policy issues that were recurring in audit reports and separately discuss them with key State and public officers in a sitting referred to as the "Meeting of the Big Five". The "Big Five" in this case included the Controller and Auditor General, the Attorney General, the Head of Public Service, the Permanent Secretary in charge of the Treasury, and the Directorate of Personnel Management. The Meeting would avail opportunity for discussion, at policy level, of recurring audit concerns, with the objective of ensuring that such matters were comprehensively addressed and policy framework for mitigation and deterrent measures would also be explored.

Honourable Members,

In light of Standing Order 1(2) which provided that, in matters not provided for, the Speaker shall largely rely on forms, precedents, customs, Procedures and traditions of this House, I wish to borrow a leaf from this old Parliamentary practice and from the wise counsel proffered by the Member for Rongo Constituency, the Hon. Dalmas Otieno. In this regard, the two watchdog Committees, namely PAC and PIC, should consider setting up Meetings of what I would now refer to as the "Big Six" to handle matters of **policy nature** at the end of their annual Audit Inquiries. The Membership of the "Big Six" should ideally be composed of the Chief Justice in his capacity as the Chief Justice and head of the Judiciary, Auditor General, the Attorney General, The Cabinet Secretary responsible for Finance, the Controller of Budget and the Chairperson of the Budget and Appropriations Committee. The Speaker of the National Assembly as the Chairperson of the Parliamentary Service Commission may be in attendance.

Such meeting will be chaired by the Chair, Public Accounts Committee or Chair, Public Investments Committee as the case may be **and should address, at policy level, ways of dealing with recurring audit queries and cross cutting issues in the three arms of the Government.**

Further, in the event that the Chief Justice appears before a Committee of this House **in his capacity as the Chief Justice,** the respective Chairperson will chair such meeting as is the practice in the House of Commons. Only in very exceptional circumstances would the Speaker, who is also the Chair of all Committees of the House, chair such a meeting.

Honourable Members,

In conclusion, I wish to state as follows-

1. **THAT,** any witness invited by or summoned to the National Assembly or its Committees is obliged to appear before the Assembly or its Committees without fail. This includes the Chairperson of the Judicial Service Commission or the holder of that office in that capacity or personal capacity. Should the Chief Justice be required to appear before a Committee of this House **in his capacity as the Chief Justice,** the respective Chairperson will chair such a meeting.

2. **THAT,** the Report of the *Public Accounts Committee on the Special Audit Report of the Judicial Service Commission (JSC) and the Judiciary of May, 2014*, slated for debate in the House, will not be re-opened for re-consideration by the Committee. However, in light of any additional information, the Committee, or indeed any Member is at liberty to propose any amendment in accordance with Standing Order 54 after the question of the Motion is proposed;

3. **THAT**, in keeping with our Parliamentary practice, should the particular audit reservations or queries recur in subsequent audit reports of the Auditor General on the Judicial Service Commission, the Public Accounts Committee is obliged to take into account any new information, when making its subsequent Report to the House; and,

4. **THAT** PAC and PIC should consider setting up Meetings of the "Big Six" to handle matters of a policy nature at the end of their annual audit inquiries, with a view to considering policy measures aimed at addressing the salient cross cutting audit reservations and matters that require policy direction in the three arms of Government.
   The House is guided accordingly.

   I thank you!"

5. **PAPERS LAID**

The following Papers were laid on the Table –

(i) The World Trade Organization Agreement on Trade Facilitation and the Explanatory Memorandum;
(ii) The National Treasury Quarterly Economic and Budgetary Review (QEBR) for the First Quarter, Financial Year 2015/2016, period ending 30th September, 2015;
(iii) The Annual Reports and Financial Statements of Moi University for the year ended 30th June, 2011, 30th June, 2012 and 30th June, 2013;
(iv) The Report of the Auditor-General on the Financial Statements of Constituencies Development Fund for Emurua Dikirr Constituency for the year ended 30th June, 2014 and the certificate therein;
(v) The Report of the Auditor-General on the Financial Statements of Kenya Seed Company Limited and its subsidiaries for the year ended 30th June, 2014 and the certificate therein;
(vi) The Report of the Auditor-General on the Financial Statements of Masinde Muliro University of Science and Technology for the year ended 30th June, 2014 and the certificate therein;

(vii) The Report of the Auditor-General on the Financial Statements of Maasai Mara University for the year ended 30th June, 2014 and the certificate therein;

(viii) The Report of the Auditor-General on the Financial Statements of Moi University for the year ended 30th June, 2014 and the certificate therein;

(ix) Report of the Auditor-General on the Financial Statements of Laikipia University for the year ended 30th June, 2014 and the certificate therein;

(x) The Report of the Auditor-General on the Financial Statements of Pwani University for the year ended 30th June, 2014 and the certificate therein;

(xi) The Report of the Auditor-General on the Financial Statements of Dedan Kimathi University of Technology for the year ended 30th June, 2014 and the certificate therein;

(xii) The Report of the Auditor-General on the Financial Statements of Murang'a University for the year ended 30th June, 2014 and the certificate therein;

(xiii) The Report of the Auditor-General on the Financial Statements of Pharmacy and Poisons Board for the year ended 30th June, 2014 and the certificate therein;

(xiv) The Report of the Auditor-General on the Financial Statements of Chemelil Sugar Company Limited for the year ended 30th June, 2014 and the certificate therein; and,

(xv) The Report of the Auditor-General on the Financial Statements of Kenya Marine and Fisheries Research Institute for the year ended 30th June, 2014 and the certificate therein.

(Majority Party Whip)

(xvi) The Reports of the Departmental Committee on Transport, Public Works and Housing on:-

(a) the inquiry into the procurement of the Apron Buses by the Kenya Airports Authority;
and

(b) the consideration of the Public Petition by Parents and Stakeholders of Matangini Primary School on the impending relocation of the school to sub-standard temporary structures.

(Hon. Chachu Ganya, Member, Departmental Committee on Transport, Public Works and Housing)

6. **NOTICE OF MOTION** - **ADOPTION OF REPORT ON INQUIRY INTO PROCUREMENT OF APRON BUSES BY KAA**
(*Hon. Chachu Ganya,* Member, Departmental Committee on *Transport, Public Works and Housing*

THAT, this House adopts the Report of the Departmental Committee on Transport, Public Works and Housing on the Inquiry into the Procurement of the Apron Buses by the Kenya Airports Authority (KAA), laid on the Table of the House on Thursday, 19th November 2015.

7. **STATEMENT PURSUANT TO STANDING ORDER 44(2)(a)**

Pursuant to the provision of Standing Order 44(2)(a), the Majority Party Whip issued a Statement regarding the Business of the House for the week commencing Tuesday, November 24, 2015.

8. **THE TAX PROCEDURES BILL (NATIONAL ASSEMBLY BILL NO. 29 OF 2015)**

Order for Second Reading read;

Motion made and Question proposed –

THAT, the Tax Procedures Bill (National Assembly Bill No.29 of 2015) be now read a Second Time

(Leader of the Majority Party – 17.11.2015)

Debate on the Second Reading having been concluded on Wednesday, November 18, 2015 (Afternoon Sitting);

Question put and agreed to.

Bill read a Second Time and referred to the Committee of the whole House tomorrow.

9. **THE GOVERNMENT PROCEEDINGS (AMENDMENT) BILL (SENATE BILL NO.10 OF 2014)**

Order for Second Reading read;

Motion made and Question proposed –

THAT, the Government Proceedings (Amendment) Bill (Senate Bill No.10 of 2015) be now read a Second Time

(Vice-Chairperson, Departmental Committee on Justice & Legal Affairs)

Debate arising;

Mover replied;

Question of Second Reading deferred.

10. **THE NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND BILL (NATIONAL ASSEMBLY BILL NO. 59 OF 2015)**

Order for Second Reading deferred to Tuesday, 24th November, 2015.

11. **THE NATURAL RESOURCES (CLASSES OF TRANSACTIONS SUBJECT TO RATIFICATION) BILL (NATIONAL ASSEMBLY BILL NO. 54 OF 2015)**

Order for Second Reading deferred to another date.

12. **THE PHYSICAL PLANNING BILL (NATIONAL ASSEMBLY BILL NO.46 OF 2015)**

Order for Second Reading read;

Motion made and Question proposed –

THAT, the Physical Planning Bill (National Assembly Bill No.46 of 2015) be now read a Second Time

(Majority Party Whip)

(Change of Chair from Speaker to Deputy Speaker)

Debate arising;

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

13. **HOUSE ROSE** - at thirty minutes past Six O'clock

M E M O R A N D U M

The Speaker will take the Chair on
Tuesday, November 24, 2015 at 2.30 p.m.

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