

VERY URGENT

REPUBLIC OF KENYA



THE SENATE

TWELFTH PARLIAMENT

THE REPORT OF THE SPECIAL COMMITTEE ON THE PROPOSED
REMOVAL FROM OFFICE, BY IMPEACHMENT, OF HONOURABLE ANNE
MUMBI WAIGURU, THE GOVERNOR FOR KIRINYAGA COUNTY

26TH JUNE, 2020

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PREFACE

Mr. Speaker Sir,

Honourable Senators will recall that at the sitting of the Senate held on Tuesday, 16th June 2020, 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 Kirinyaga communicating the approval of a Motion by the County Assembly of Kirinyaga to remove from office, by impeachment, the Governor of Kirinyaga County.

Mr. Speaker Sir,

On Tuesday, 16th June, 2020, the Senate Majority Leader gave Notice of the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act, 2012, and Standing Order 58 of the Kirinyaga County Assembly Standing Orders, on 9th June, 2020, the County Assembly of Kirinyaga approved a Motion to remove from office, by impeachment, Hon. Anne Mumbi Waiguru, the Governor of Kirinyaga County;

AND FURTHER, WHEREAS by letter Ref. Ref: CAK/SPK/SEN/1/001 dated 9th June, 2020, and received in the Office of the Speaker of the Senate on Wednesday, 10th June, 2020, the Speaker of the County Assembly of Kirinyaga 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 may, by

resolution, appoint a special committee comprising eleven of its Members to investigate the matter or investigate the matter in Plenary;

***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 establish a special committee comprising -*

- 1. Sen. Abshiro Halake, MP;*
- 2. Sen. (Dr.) Michael Mbito, MP;*
- 3. Sen. Mwangi Paul Githiomi, MP;*
- 4. Sen. Beth Mugo, EGH, MP;*
- 5. Sen. Anuar Loitiptip, MP;*
- 6. Sen. Philip Mpaayei, MP;*
- 7. Sen. Cleophas Malalah, MP;*
- 8. Sen. Beatrice Kwamboka, MP;*
- 9. Sen. Stewart Madzayo, MP;*
- 10. Sen. Judith Pareno, MP; and*
- 11. Sen. Moses Kajwang', MP.*

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

Mr. Speaker Sir,

The Senate Majority Leader moved the Motion on Tuesday, 16th June, 2020. Following debate on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

- 1. Sen. Abshiro Halake, MP;*
- 2. Sen. (Dr.) Michael Mbito, MP;*

3. *Sen. Mwangi Paul Githiomi, MP;*
4. *Sen. Beth Mugo, EGH, MP;*
5. *Sen. Anuar Loitiptip, MP;*
6. *Sen. Philip Mpaayei, MP;*
7. *Sen. Cleophas Malalah, MP;*
8. *Sen. Beatrice Kwamboka, MP;*
9. *Sen. Stewart Madzayo, MP;*
10. *Sen. Judith Pareno, MP; and*
11. *Sen. Moses Kajwang', MP.*

to investigate the proposed removal from office of the Governor of Kirinyaga 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 (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 the provisions of the law and the Standing Orders.

Mr. Speaker Sir,

Following its establishment, the Special Committee held its first meeting on Wednesday, 17th June, 2020. 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 Cleophas Malala, MP and Senator

Abshiro Halake, 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.

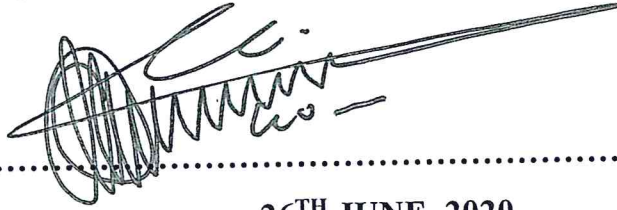
The County Assembly was represented by Mr. Ndegwa Njiru and Mr. Charles Mwangi Ndegwa of M/s Ndegwa & Ndegwa Advocates in the proceedings. In the case of the Governor, by a letter dated 20th June, 2020 (sic) and received in the Office of the Clerk of the Senate on 20th June, 2020, Messr Paul Nyamodi Advocate, Kamotho Waiganjo Advocate and Andrew Muchigi Karani Advocate appeared for the Governor for Kirinyaga County.

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 Kirinyaga County and its Advocates, and the Governor and her advocates 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, by Impeachment, of Hon. Anne Mumbi Waiguru, the Governor for Kirinyaga County.



SIGNED:

26TH JUNE, 2020

SEN. CLEOPHAS MALALAH, MP

CHAIRMAN, SPECIAL COMMITTEE ON THE PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF THE GOVERNOR FOR KIRINYAGA COUNTY.

1. INTRODUCTION

1. Pursuant to Article 181 of the Constitution and section 33 of the County Governments Act, No. 17 of 2012, on 9th June, 2020, the County Assembly of Kirinyaga approved a Motion “to remove from office, by impeachment,” the Governor for Kirinyaga 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) *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.*

4. By a letter dated 9th June, 2020, Ref (CAK/SPK/SEN/1/001) which was received in the Office of the Speaker of the Senate on 10th June, 2020, the Speaker of the County Assembly of Kirinyaga informed the Speaker of the Senate of the approval of the Motion for the removal from office of the Governor of Kirinyaga 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*.
5. 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.*
6. In accordance with these provisions of law, at a sitting of the Senate held on 16th June, 2020, 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 Kirinyaga relating to the approval of the Motion by the County Assembly of Kirinyaga for the removal from office of the Governor of Kirinyaga

County. The Order Paper of that sitting and the Communication made by the Speaker of the Senate on that day are attached as *Annex 2* and *Annex 3*, respectively.

7. Thereafter, the Senate Majority Leader gave Notice of the following Motion-

THAT, WHEREAS, pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act, 2012, and Standing Order 58 of the Kirinyaga County Assembly Standing Orders, on 9th June, 2020, the County Assembly of Kirinyaga approved a Motion to remove from office, by impeachment, Hon. Anne Mumbi Waiguru, the Governor of Kirinyaga County;

AND FURTHER, WHEREAS by letter Ref. CAK/SPK/SEN/1/001 dated 9th June, 2020, and received in the Office of the Speaker of the Senate on Wednesday, 10th June, 2020, the Speaker of the County Assembly of Kirinyaga 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 may, by resolution, appoint a special committee comprising eleven of its Members to investigate the matter or investigate the matter in Plenary;

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 establish a special committee comprising -

- 1. Sen. Abshiro Halake, MP;*
- 2. Sen. (Dr.) Michael Mbito, MP;*

3. *Sen. Mwangi Paul Githiomi, MP;*
4. *Sen. Beth Mugo, EGH, MP;*
5. *Sen. Anuar Loitiptip, MP;*
6. *Sen. Philip Mpaayei, MP;*
7. *Sen. Cleophas Malalah, MP;*
8. *Sen. Beatrice Kwamboka, MP;*
9. *Sen. Stewart Madzayo, MP;*
10. *Sen. Judith Pareno, MP; and*
11. *Sen. Moses Kajwang', MP.*

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

8. The Senate Majority Leader moved the Motion on Tuesday 16th June, 2020. Following deliberations on the Motion, the Senate resolved to establish a Special Committee comprising the following Senators –

1. *Sen. Abshiro Halake, MP;*
2. *Sen. (Dr.) Michael Mbito, MP;*
3. *Sen. Mwangi Paul Githiomi, MP;*
4. *Sen. Beth Mugo, EGH, MP;*
5. *Sen. Anuar Loitiptip, MP;*
6. *Sen. Philip Mpaayei, MP;*
7. *Sen. Cleophas Malalah, MP;*
8. *Sen. Beatrice Kwamboka, MP;*

9. *Sen. Stewart Madzayo, MP;*

10. *Sen. Judith Pareno, MP; and*

11. *Sen. Moses Kajwang', MP.*

to investigate the proposed removal from office of the Governor of Kirinyaga 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.

2. **METHOD OF WORK**

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

2.1. **Meetings of the Special Committee**

10. Following its establishment on Tuesday, 16th June, 2020, the Special Committee held its first meeting on Wednesday, 17th June, 2020. 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 Cleophas Malala, MP was elected, unopposed, as the Chairperson of the Committee while Senator Abshiro Halake, MP was elected 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 Tuesday, 23rd June, 2020 as the date for the commencement of the hearing of evidence for the purposes of the investigations.
11. On Monday, 22nd June, 2020, the Special Committee held a pre-hearing meeting where members considered the documentation received from the parties, 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. The committee also considered a letter from the County Assembly of

Kirinyaga requesting the Committee to issue summons to three witnesses. In the letter Ref: *CAK/SPK/SEN/1/003* dated 20th June, 2020, the Speaker of the County Assembly of Kirinyaga requested the Special Committee to summon Mr. Patrick Mugo Ndathi, the Chief Officer, Finance and Economic Planning; Mr. Kennedy Ngiabi, the Chairperson, County Public Service Board; and Mr. Joseph Otieno Carilus, the Director, Supply Chain Management. The County Assembly stated in its letter that the said officers had refused, neglected or otherwise been unable to give their statements and produce documents requested by the County Assembly.

12. The Special Committee deliberated on the matter and, pursuant to Rule 9 of Part 2 of the Fifth Schedule to the Senate Standing Orders, issued Invitation to Appear as witnesses. The Invitations to Appear were served on the witnesses on the same day i.e. Wednesday 17th June, 2020.
13. The Minutes of the meetings held by the Committee are attached at **Annex 4**.

2.2. Indicative Programme of Events

14. At its first meeting, the Committee adopted an Indicative Programme of Events which is attached as **Annex 5**. 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.
15. 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.

2.3. Invitations to Appear

16. The Committee observed that section 33(5) of the County Governments Act and standing order 75(3) of the Senate Standing Orders provide 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 provide 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”*.
17. The Committee also observed that rule 4(b) of Part 2 of the Fifth Schedule to the Senate Standing Orders provide 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”*.
18. Having made these observations, and taking into account the limited time available, at its first meeting held on Wednesday, 17th June, 2020, 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 6**.
19. The parties were represented at the hearing as follows-
- (a) Mr. Ndegwa Njiru and Mr. Charles Mwangi Ndegwa of M/s Ndegwa & Ndegwa Advocates, appeared on behalf of the County Assembly; and
 - (b) Messrs Paul Nyamodi Advocate, Kamotho Waiganjo Advocate and Andrew Muchigi Karani Advocate appeared on behalf of the Governor.

20. 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 Saturday, 20th June, 2020 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.
21. 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 Saturday, 20th June, 2020 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.
22. Following the service of the Invitations to Appear, the County Assembly filed a Response to the Invitation to Appear on 20th June, 2020 to which was attached various annexures and which is marked as *Annex 7*.

23. The Governor filed a Response to the Invitation to Appear on 20th June, 2020 to which was attached various annexures and which is marked as *Annex 8*.

2.4. Hearing

24. The Committee met on 23rd and 24th June, 2020 to hear evidence for the purposes of the investigations in accordance with its Hearing Programme which is attached at *Annex 9*. The Hansard record of the hearing is also attached as *Annex 10*.

2.5. Working Retreat

25. The Committee held a Working Retreat on 24th and 25th June, 2020 where it considered the charges, the particulars of allegations and documentation received in regard to the matter. The Committee also considered the submissions of the County Assembly and the Governor. The Committee subsequently drafted, considered and approved its Report.

3. THE CONFERENCE OF PARTIES

26. The Committee convened a Conference of the Parties on 23rd June, 2020 at 10.00 a.m. This provided an opportunity for the formal introduction of the members of the Special Committee and the Counsel for the County Assembly and the Counsel for the Governor.

27. During the Conference of Parties, the Chairperson of the Committee made the Opening Remarks where he recited the Mandate of the Special Committee. The Communication by the Chairman is attached as *Annex 11*.

4. READING OF THE CHARGES

28. 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 as *Annex 12*.

5. PRELIMINARY ISSUES

29. Mr. Ndegwa, the Advocate on record for the County Assembly, made preliminary request to be facilitated with clear copies of some documents that the Governor had produced as evidence in her bundles. The County Assembly requested for clear copies of the following documents already filed by the Governor in her response before this Committee the:
- (a) relevant pages of the Governor's ordinary and diplomatic passport; and
 - (b) bank receipt for payment made on 17th April 2020.
30. The Governor's lead Counsel raised three Preliminary issues as follows:
- (a) that the County Assembly filed an unintelligible bundle of documents that were difficult to follow.
 - (b) that Mr. Joseph Carillus Otieno who had been summoned to appear before the Committee by the County Assembly be allowed to appear as a witness on 24th June, 2020 and not 23rd June, 2020 as earlier summoned on grounds that the witness would also be appearing on behalf of the Governor.
 - (c) a Preliminary Objection that the County Assembly had filed several documentations that constituted new evidence and which was not in the evidence that the Governor received from the Speaker of the Senate.
31. On the issues raised by the County Assembly, Counsel for the Governor in response, stated that they had no objection and expressed their willingness to supply clear copies of the requested document but within reasonable time.
32. On the issue of availing clear copies to the County Assembly, the Committee directed that the Governor provides clear copies of the said documents by end of day on Tuesday 23rd June 2020, and serve the County Assembly lawyers via email and copied to the Clerk of the Senate.
33. On the Governor's request that Mr. Joseph Carillus Otieno who had been summoned by the Committee be allowed to appear as a witness and be cross-examined by the Committee on Tuesday 23rd June, 2020, the Committee observed that the request was reasonable and would not prejudice the County Assembly's case. The Committee therefore directed that Mr. Joseph Carillus Otieno appear on Wednesday, 24th June, 2020 and that the County Assembly would be at liberty to cross-examine the witness on the issues raised in the summons.

34. On the Preliminary Objection to the form of the documents filed by the County Assembly, the Committee noted that it would have been desirable for the County Assembly to present well bound documents, properly paginated to assist the Committee and all parties in understanding and deliberating on the matter. The Committee noted with concern the state of the documents lodged by the County Assembly. The documents were not marked, not paginated and were not neatly bound at the time of filing. The Committee stated that in future, parties must file properly paginated, well-marked and neatly bound documents to the Senate. This would assist all parties in following the case.
35. On the Preliminary Objection that the County Assembly had filed several documentations that constituted new evidence which was not in the initial evidence that the Governor received from the Speaker of the Senate, Counsel for the Governor submitted that in the additional evidence filed by the County Assembly on 20th June, 2020 in response to the Invitation to Appear, the County Assembly had included new documents which amounted to new evidence which the Governor had not had an opportunity to look at and respond to appropriately. They submitted that the Governor's response was based on the documents submitted to the Senate on 10th June, 2020. Accordingly, all new evidence must be expunged.
36. In response, Counsel to the County Assembly stated that there was no new evidence filed by the County Assembly. These were additional evidence filed as stated in the Invitation to Appear served on the Speaker of the County Assembly on 17th June, 2020.
37. The Committee observed that it was premature to determine whether there was new evidence before the parties prosecuted their case. Accordingly, the Committee ruled that owing to the limited time available for the Committee to present its findings to the Senate, the Committee noted and encouraged the parties to canvass these issues during the hearing. The committee would thus proceed with the documents as filed and make appropriate determinations on the veracity, admissibility and propriety of the evidence when making its final determination in accordance with Rule 19 of the Fifth schedule of the Senate Standing Orders.
38. The Committee noted that the procedure before the County Assembly was a substantive matter and that it would address the same during its investigation of the allegations before the Committee. The decision of the Committee is attached as **Annex 13**.

6. THE CHARGES AGAINST THE GOVERNOR FOR KIRINYAGA COUNTY, HON. ANNE MUMBI WAIGURU

6.1 CHARGE 1: GROSS VIOLATION OF THE CONSTITUTION AND OTHER LAW

6.1.1 Allegation 1: Failure to deliver the Annual State of the County Address for the Financial Year 2018- 2019 to the County Assembly.

39. The County Assembly in its particulars of allegation stated that the Governor had failed to deliver an annual state of the county address for the financial year 2018 - 2019 as required under section 30 (2) (k) of the County Governments Act. It is alleged that this failure amounts to a gross violation of Articles 1 on sovereignty of the people, 2 on supremacy of the Constitution, 3 on defence of the Constitution, 10 on national values and principles of governance, and 73 on responsibilities of leadership, of the Constitution.
40. Section 30 (2) (k) of the County Governments Act which requires the Governor to deliver an annual state of the county address states that –
- Section 30 (2) (k) of the County Government 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;*
41. The County Assembly further asserted that the Governor’s failure to deliver an annual state of the county address to the County Assembly violates Article 73(1) (a) and (2)(c) of the Constitution as the same is inconsistent with the purpose and object of the Constitution. The County Assembly further stated that by her actions, the Governor failed to demonstrate respect to the people of Kirinyaga County, to bring honour and dignity to the office of the

Governor, to promote public confidence in the integrity of the office of the Governor and a lack of discipline and commitment to the people of Kirinyaga County.

42. Article 73(1) (a) and (2) (c) of the Constitution provides as follows –

73. Responsibilities of leadership

(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.

43. In support of this allegation, the County Assembly called Mr. David Kinyua Wangui, a Member of the County Assembly and the mover of the Motion for removal from office of the Governor, **(statement of Mr. David Kinyua Wangui is marked CAK 1)**. Mr. David Kinyua Wangui stated that the Governor has never delivered a state of the county address to the County Assembly as provided for under section 30 of the County Governments Act and the Standing Orders of the County Assembly of Kirinyaga. The witness testified that an annual state of a county address ought to mirror what happens at the National Government level where a state of the nation address is given in Parliament. The witness further stated that the Governor only addressed the County Assembly during the official opening of the County Assembly. Further, the County Assembly testified that the Governor of Kirinyaga County undermines the authority of the County Assembly of Kirinyaga and has failed to acknowledge the County Assembly as an integral part of the County Government as outlined in the Constitution which provides that a county government is comprised of the County Executive and the County Assembly.

44. In response to this allegation, the Governor filed two bundles of documents **(Constitutional Issues Volume 1 and 2)**. The Governor stated in her response that indeed section 30 (2) (k) of the County Governments Act mandates the Governor to deliver annual state of the county addresses containing such matters as may be specified in county legislation. However, the Governor avers that there is no provision in the Constitution or the County Governments Act that expressly and unequivocally mandates the Governor to deliver the annual state of the County address within a specific venue, and in particular the chambers of the County Assembly of Kirinyaga. Additionally, the Governor submitted to the Committee that she has delivered the annual state of the county addresses directly to the public and has scheduled this year's address for the month of September.

45. In support of the averments by the Governor, two documents which appear as items 1 and 2 in the bundle of documents marked Constitutional Issues Volume 1 were submitted.

These documents are State of the County Address by the Governor for Kirinyaga County, H.E. Anne Waiguru, E.G.H., O.G.W, to the Residents of Kirinyaga County Held on Wednesday, 11th September, 2019, and State of the County Address by the Governor for Kirinyaga County, H.E. Anne Waiguru at the County Assembly of Kirinyaga, Held on Thursday 29th November, 2018.

46. These two documents submitted by the Governor were referred to by Mr. David Kinyua Wangui who categorically stated that no such address was made to the County Assembly.

Observations of the Committee

47. 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, Mr. David Kinyua Wangui, 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. David Kinyua 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 Mr. David Kinyua Wangui was not corroborated, no satisfactory evidence was adduced before the Committee in support of this allegation. However, the Committee observed that since the testimony of Mr. David Kinyua Wangui was not corroborated, no satisfactory evidence was adduced before the Committee in support of this allegation.

48. On the Governor's part, during the opening statement, the Governor submitted that so far two State of the County Address have been delivered and one is scheduled for September, 2020. The Governor produced two speeches dated 29th November, 2018 and 11th September, 2019 ostensibly made at the County Assembly and in Kerugoya County Referral Hospital respectively. However, the contents of the documents submitted by the Governor were never corroborated. The Committee however notes that during the hearing, Mr. David Kinyua Wangui agreed that the Governor delivered a speech in Kerugoya

County Referral Hospital but argued that the speech ought to have been delivered in the County Assembly in accordance with the County Assembly Standing Orders.

Committee's Recommendation

The Committee noted that the County Governments Act 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 Kirinyaga County Assembly are not binding on the Governor when she is outside the business of the County Assembly.

That being said, the Committee recommends that since section 30(2)(k) require the County 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 Kirinyaga 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.

6.1.2 Allegation 2: Undermining the authority of the County Assembly

49. The County Assembly in its particulars of allegation stated that Articles 176 (1) and 185 (3) and (4) of the Constitution, as read together with Section 8 of the County Governments Act, empowers county assemblies to legislate and exercise oversight over respective county executives as well as approve county plans and policies.

50. Article 176(1) of the Constitution establishes '*a county government for each county, consisting of a County Assembly and a county executive.*' On the hand, Article 185(3) and (4) of the Constitution provides as follows –

(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.

51. Section 8 of the County Governments Act which provides for the role of a County Assembly, states as follows –

8. Role of the County Assembly

(1) The County Assembly shall—

(a) vet and approve nominees for appointment to county public offices as may be provided for in this Act or any other law;

(b) perform the roles set out under Article 185 of the Constitution;

(c) approve the budget and expenditure of the county government in accordance with Article 207 of the Constitution, and the legislation contemplated in Article 220(2) of the Constitution, guided by Articles 201 and 203 of the Constitution;

(d) approve the borrowing by the county government in accordance with Article 212 of the Constitution;

(e) approve county development planning; and

(f) perform any other role as may be set out under the Constitution or legislation.

(2) If a County Assembly fails to enact any particular legislation required to give further effect to any provision of this Act, a corresponding national legislation, if

any, shall with necessary modifications apply to the matter in question until the County Assembly enacts the required legislation.

52. Additionally, it was stated in the particulars of allegations that Articles 179 (4) and 185(4) of the Constitution as read together with Section 30 (2) (f) and (j) of the County Governments Act require the Governor to submit county plans and policies to the County Assembly for approval, and an annual report on the implementation status of the county policies and plans. The County Assembly stated that the functions set out under Section 30 (2) (f), (j) and (k) can only be undertaken if the Governor addresses the County Assembly. Section 30(2)(f), (j) and (k) of the County Governments Act provides as follows –

(2) Subject to the Constitution, the Governor shall—

- (a) diligently execute the functions and exercise the authority provided for in the Constitution and legislation;*
- (b) perform such State functions within the county as the President may from time to time assign on the basis of mutual consultations;*
- (c) represent the county in national and international fora and events;*
- (d) appoint, with the approval of the County Assembly, the county executive committee in accordance with Article 179(2)(b) of the Constitution;*
- (e) constitute the county executive committee portfolio structure to respond to the functions and competencies assigned to and transferred to each county;*
- (f) submit the county plans and policies to the County Assembly for approval;*
- (g) consider, approve and assent to bills passed by the County Assembly;*
- (h) chair meetings of the county executive committee;*
- (i) by a decision notified in the county Gazette, assign to every member of the county executive committee, responsibility to ensure the discharge of any function within the county and the provision of related services to the people;*

- (j) submit to the County Assembly an annual report on the implementation status of the county policies and plans;*
- (k) deliver annual state of the county address containing such matters as may be specified in county legislation; and*
- (l) sign and cause to be published in the county Gazette, notice of all-important formal decisions made by the Governor or by the county executive committee.*

53. It was alleged in the particulars of allegation that the Governor's failure to comply with section 30 (2) (f), (j) and (k) of the County Governments Act undermines the power and the authority of the County Assembly to exercise oversight and approve various developmental plans, and also prevents development for the benefit of the citizens of Kirinyaga County.

54. In support of this allegation, the County Assembly called Mr. David Kinyua Wangui, a Member of the County Assembly and the mover of the Motion for removal from office of the Governor, (the statement of Mr. David Kinyua Wangui is marked CAK 1). Mr. David Kinyua Wangui stated that the County Assembly has not been able to offer effective oversight over the county executive and that the Governor has been undermining the authority of the County Assembly. The efforts by the County Assembly to exercise oversight over the county executive has been undermined by the failure by the county executive to provide information the county executive whenever such information is requested by the County Assembly. In support of his testimony, the witness referred to the following letters, which he alleges that they were never responded to –

- (a) letter dated 25th February, 2020;
- (b) letter dated 19th March, 2020; and

- (c) letter dated 23rd March, 2020, letter from the Clerk of the County Assembly of Kirinyaga to the county executive committee member for Agriculture, Livestock, Fisheries and Veterinary Services.

55. Additionally, the County Assembly submitted several letters contained in the bundle of documents which was submitted in response to the invitation to appear and marked '*undermining the Assembly*'.

56. In response to this allegation, the Governor submitted documents contained in two bundles of documents marked 'Constitutional Issues Volume 1 and 2'. These documents are –

- (a) Annual Development Plan for the FY 2019/20 together with a letter dated 31st August, 2018 forwarding the plan to the Clerk of Kirinyaga County Assembly;
- (b) Annual Development Plan for the FY 2020/21 together with a letter dated 29th August, 2019 forwarding the plan to the Clerk of Kirinyaga County Assembly;
- (c) County Fiscal Strategy Paper 2018;
- (d) County Fiscal Strategy Paper 2019 together with a letter dated 28th February, 2019 forwarding the County Fiscal Strategy Paper to the Clerk of Kirinyaga County Assembly;
- (e) County Fiscal Strategy Paper 2020 together with a letter dated 28th February, 2020 forwarding the County Fiscal Strategy Paper to the Clerk of Kirinyaga County Assembly;
- (f) County Budget Review and Outlook Paper (CBROP), 2017 together with a letter dated 29th October, 2017 forwarding the same to the County Assembly;
- (g) County Budget Review and Outlook Paper (CBROP), 2018 together with a letter dated 15th October, 2018 forwarding the same to the County Assembly;
- (h) County Budget Review and Outlook Paper (CBROP), 2019 together with a letter dated 15th October, 2019 forwarding the same to the County Assembly;

- (i) Letter dated 27th February, 2020 responding to the letter by the County Assembly dated 13th February, 2020 with respect to implementation status of the 2019/2020 county budget;
- (j) Letter dated 25th February, 2020 responding to request for information for 2018/2019 and 2019/2020 Financial Years;
- (k) Letter dated 3rd March, 2020 responding to the letter by the County Assembly dated 25th February, 2020 regarding information on 2018/2019 and 2019/2020 Financial year.

57. Additionally, the Governor, in her Response to Appear at page 17 to 18, states that she has co-operated fully with the County Assembly. The Governor contends that the County Assembly has failed to respect the constitutional principle of separation of powers, by purporting to take over the responsibilities of County employees, and attempts to enforce legal boundaries have resulted in the County Assembly threatening County personnel with impeachment. This, the Governor submits, undermines the efficient operations of the County government and county employee confidence.

Observations of the Committee

58. The Committee observed that the County Assembly had provided various letters addressed to the county executive requesting information from various departments to be given to the County Assembly. The Committee further observed that the county executive has been providing information to the County Assembly. This can be deduced from the evidence submitted by both the County Assembly and the Governor. It is therefore the Committee's view that the County Assembly has been exercising oversight over the county executive.

The Committee notes that the evidence submitted by the Governor supporting the submission of reports and documents to the County Assembly was never challenged by the County Assembly.

Allegation 3: Violations under written law, including violation of the Public Procurement and Asset Disposal Act, 2015 and the Public Finance and Management Act, 2012.

59. The Governor has violated section 46 of the Public Procurement and Asset Disposal Act, 2015 by usurping the powers of the accounting officer in establishing an irregular tender evaluation committee. The Committee comprises of the Governors' partisan staff namely Pauline Kamau and Gichira Wayne. In a bid to act as a conduit to award tenders to the Governor's preferred bidders, the two officers directly take instructions from the Governor and conveniently alternate as chairpersons of all major tender evaluation committees contrary to Article 73(1)(b) of the Constitution.

60. The Governor's actions of interfering with the constitution of the tender evaluation committees is meant to compromise the integrity of the tendering process and the same is driven by corruption, nepotism, favoritism, improper and ulterior motives. The Governor has been in charge of a corrupt County tendering policy contrary the provisions of the Public Procurement and Assets Disposal Act, 2015 thereby violating the provisions of the Articles 201 (a), (d), (e) and 227(1) of the Constitution.

61. The following is a list of tenders in support of the allegation that the Governor has been interfering with the tendering process in the County government of Kirinyaga –

(a) Tender No. CGK/SCM/CTIED/OT/004/2018-2019 of Kshs. 19,145,740/= for proposed upgrading of Kagumo market at Kagumo town, Kirinyaga County;

62. This tender was awarded to Joames Investment Limited without following the due process. Further, the tender was unilaterally undertaken by Master Rock Construction Company whose bid was non-responsive. The County Assembly, in support of their allegations, submitted a tender evaluation form.

63. In her response, the Governor, through witness statement by Mr. Carillus Otieno, stated that the tender was never awarded to Joames Investment and therefore there was

nothing to cancel. The Company was among the unsuccessful bidders who received regret letters and acknowledged the same. (pg. 59 of the Governors response). The Governor, further avers that Master Rock bid was responsive as evidenced in the evaluation report. (Governors documents marked as annexure 4i)

64. The tender evaluation committee and the head of supply chain management made recommendation that Master Rock Construction Company, having submitted proposals with the highest combined technical and financial scores, be considered for the awarded the tender. (Annexure 4i at 7.0).

65. According to the evaluation report supplied by both parties, the bid by Master Rock was responsive. (Governor's documents marked as 4i and County Assembly documents marked as CAK- 1H).

Committee Observation

66. The Committee perused the documents submitted by the both parties. The Committee noted that the County Assembly had submitted a tender evaluation form which was not signed. The Committee further noted that the documents submitted by the Governor confirmed that the tender had only been awarded to Master Rock who scored higher marks than Joames Investments during the technical evaluation.

67. The committee therefore observed that the allegations by the County Assembly was not substantiated.

(b) Tender No. CGK/ MSPH&S/OT/ 023/2018-2019 for proposed indefinite quantity framework agreement for non- pharmaceutical and Tender No. CGK/TR&PW/ OT/ 016/2017-2018 for construction of Kagio Matatu Parking Phase One (1)- Lot 1 in Kiine ward;

68. This tender was reserved for the Access to Government Procurement Opportunities (AGPO) program but the same was awarded to Jipsy Civil and Building Contractors

Limited which company is not listed in the AGPO certified list of 2017-2018. The evaluation committee noted that Jipsy Civil and Building Contractors Limited was not AGPO certified but went ahead to find the bid responsive. This is despite Rowamu Holdings Limited (Bidder No. 7), which was AGPO certified, posting the lowest responsive bid of Kshs. 29, 661, 872.80/=.

69. The Governor in her response avers that she does not take part in procurement processes at any stage and therefore did not usurp powers of the accounting officer under Section 44 and 45 of the Public Procurement and Asset Disposal Act. Further, it was submitted that the tender was awarded to Jipsy Civil and Building Contractors Limited by an evaluation committee which was duly appointed by the accounting officer. The Evaluation report was subsequently submitted stating that the tenders which were responsive and nonresponsive. Rowamu Holding Limited was non responsive.

70. The tender was then awarded to Gipsy civil and building Contractors Limited which was AGPO certified. (annexures marked as 5a and 5p of the response.)

71. According to the tender document, Jipsy Civil and Building Contractors limited was AGPO certified. (Marked by the County Assembly as annexure CAK-1J is unsigned.)

72. The County Assembly of Kirinyaga did not adduce any other evidence to support the allegation.

Observations of the Committee

73. The committee therefore observed that what the allegations by the County Assembly were not substantiated.

(c) Tender No. CGK/TR&PW/OT/013/2017-2018 for construction of Kagio Matatu Parking Phase One (1)- Lot 3 in Mutiithi ward;

74. This tender was reserved for the Access to Government Procurement Opportunities (AGPO) program but the same was awarded to Taphes & Nitram Enterprises Limited which company is not listed in the AGPO certified list of 2017-2018. The evaluation committee noted that Taphes & Nitram Enterprises Limited was not AGPO certified but went ahead to find the bid responsive and awarded the tender for Kshs. 10, 841, 244.00/=. This is despite Joames Investment Limited, which was AGPO certified, posting the lowest responsive bid of Kshs. 10, 908, 361.60.
75. The Governor in her response avers that she does not take part in procurement processes at any stage and therefore did not usurp powers of the accounting officer under Section 44 and 45 of the PAD Act.
76. Further, the tender was awarded to Taphes and Nitram Limited by an evaluation committee which was duly appointed by the accounting officer. The Evaluation report was subsequently submitted stating the tenders which were responsive and nonresponsive.
77. In determining the bidder to be recommended for the award, the committee evaluated bids according to the criteria set out in tender documents and examined the documents based on clause 2.2 'instruction to tenderers' of the Tender stipulating the highest technical scores for responsive bidders. (Annexures marked as 6(a) to 6(p).

Committee Observations

No nexus between the Governor and the appointment of the tender evaluation Committee was not established.

(d) Tender No. CGK/MOW/OT/ 038/ 2017- 2018 for the proposed water works for Mwea Makima water project;

78. This tender was awarded to Eva Trading Agencies Limited, a company associated with the family of Mugo Ndathi, the County Chief Officer, Finance. Mr. Edwin Gicobi

Ndathi, who is a brother to the County Chief Officer, Finance holds 300 shares in the company.

79. The Governors response through a witness Mr. Carilous Otieno, is that the Governor does not take part in procurement processes at any stage and she does not appoint any member to the tender committees action which would amount to patronage and usurpation of powers of accounting officers under Section 44 and 46 of the PAD Act.

80. That the allegation on conflict of interest against Mr. Ndathi, Chief Officer Finance, are unsubstantiated since he did not sit in the evaluation committee which awarded the tender to Eva trading Agencies Limited. That the issuance of the letters is just a formality after critical decision has been made on the qualified tenderer.

81. Further, in making their decision on responsive bids, the tender evaluation Committee was guided by Section 55(2) of the PPAD Act which provides

A person on consortium shall be considered ineligible to bid where in case of a corporation, private company, partnership or other body, the person or consortium, their spouse, child or sub- contractor has substantial or controlling interest and found to be contravention of section (1) (e), (f), (g), and h.

82. The Governor averred that no evidence had been adduced linking Mr. Ndathi in terms of Section 55(2).

Committee Observation

83. The Committee observed that the County Assembly was able to prove impropriety in the award of this tender. There was clear case of conflict of interest but involving the accounting officer and the Company in question. One of the shareholders is the brother to the accounting officer who executed the contract. (See section 56 of the PPAD Act).

(e) Tender No. CGK/ ICT/ OT/ 047/ 2017-2018 for the design, development, Installation and commissioning of integrated hospital management information system;

84. The County Assembly alleges that the tender was awarded to Velocity Partners Limited, a company that did not exist at the time the tender was advertised. The tendering process had been completed by the previous county government but was re- advertised and awarded to the Company at a cost of Kshs. 50,691,565.00/= and the amounts paid despite no work being done. The contract signed between the County and Velocity Partners Limited in May, 2018 was for Kshs. 27,203,450.00/= but the total amount paid out by the County amounts to Kshs. 50,691,565.00/=. The said Velocity Partners Limited was paid by deposit to their Bank Account No. 1036020022262 held at Sidian Bank. The payments were invoiced and settled on the same day of the invoice as follows—

- (i) invoice dated 9th August, 2018 totaling Kshs. 30,643,575.00/=;
- (ii) invoice dated 11th December, 2018 totaling Kshs. 6,000,000.00/=;
- (iii) invoice dated 22nd January, 2019 totaling Kshs. 8,607,300.00/=; and
- (iv) invoice dated 24th January, 2019 totaling Kshs. 5,440, 690

85. The Governor's Response is that velocity partners was in existence at the time the tender was advertised. In the attached incorporation certificate, the company was incorporated 5th May, 2017 (annexures marked as 12q)

86. The tender had two-pronged contract, to wit, contract to develop a Health Management Information System (HMIS) and a contract to develop a payment management system (PMS) which were awarded to velocity limited at a cost of 27,203,450 and 24,345,500 respectively.

87. According to a letter dated 16th April, 2018, this was an open tender advertisement in daily newspapers on 9th February, 2018 and tender opening committee was appointed by the accounting officer, finance.

88. The Governor further states that two contracts were awarded as follows:

- (i) Tender No. *CGK/ICT/OT/047/2017-2018*; provision of consultancy services for design, development, supply, installation & commissioning of an integrated hospital Management information system for 27,203,450.00; and
- (ii) Tender no: *CGK/ICT/OT/O46/2017-2018*; provision of consultancy services for design, development, supply, installation & commissioning of performance management, project management, monitoring and evaluation systems (with Executive Dashboard) for Ksh. 24,345,500.00/-.

Provisions of the Law

85. Section 46 of the Public Procurement and Asset Disposal Act, 2015 provides as follows

46. Evaluation Committee

(1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise.

(2) In establishing the ad hoc evaluation committee referred to in subsection (1) above, the procuring entity that is a State Department or a County Department, shall do so in consultation with the Cabinet Secretary or the County Executive Committee member responsible for that entity, as the case may be.

(3) Despite subsection (1), where technical expertise is required from outside the organisation, such expertise may be obtained from other procuring entities or procured to join the committee, on recommendation, in writing, by the head of the procurement function, and the committee shall be appointed by the accounting officer, in writing.

(4) An evaluation committee established under subsection (1), shall—

(a) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for

prequalification, registration lists, Expression of Interest and any other roles assigned to it;

(b) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;

(c) have as its secretary, the person in charge of the procurement function;

(d) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;

(e) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227 (1) of the Constitution.

(5) For greater certainty a procuring entity shall where a member of the ad hoc evaluation committee contravenes any provisions of this Act, institute disciplinary measures in accordance with the procuring entity's disciplinary measures and the provisions of this Act.

(6) Where a public entity lacks capacity to comply with this Act an accounting officer shall seek assistance from the National Treasury.

(7) Subject to this Act, the evaluation committee may invite external technical experts who are not employees of the organisation to assist in matters that need specific technical expertise.

(8) Notwithstanding the provisions in this section, the Cabinet Secretary may prescribe other procedures for evaluating low value procurements below specified thresholds.

86. Article 201 (a), (d) and (e) of the Constitution provides 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;

(b) the public finance system shall promote an equitable society, and in particular—

(i) the burden of taxation shall be shared fairly;

- (ii) *revenue raised nationally shall be shared equitably among national and county governments; and*
- (iii) *expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;*
- (c) *the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;*
- (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.*

87. Article 227(1) of the Constitution provides 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.

Observations of the Committee

88. The Committee observed that the tender was clearly mismanaged. The tender requirements were not adhered to. The committee further noted that the company awarded the tender i.e. Velocity Partners Ltd was registered in May, 2017 and was awarded the tender No. *CGK/ICT/OT/047/2017-2018*; Tender for the Design, Development, Installation and Commissioning of Integrated Hospital Management Information System despite not meeting the five (5) years requirement stipulated in the Tender documents

89. The Committee noted that whereas the County Executive alleged that this was a joint venture, there was evidence adduced to prove that this was a joint venture. The company in question Velocity Ltd was not qualified for the award of this tender yet the Company was awarded the tender. This according to the Committee amounted to a fraudulent award to the tender.

90. The Committee recalled that the County Assembly had alleged that the Governor had presided over a corrupt and joint criminal enterprise by ensuring that persons who had close association to her presided over the evaluation and award of tenders. In particular, the Committee noted with concern that one Wayne Gichira, the ICT Advisor to the Governor

conceptualized the project, chaired the evaluation committee, co-signed the contract with the Chief Officer, Finance and were responsible for the testing of the system.

91. The Committee further observed that while payment was made in full, the Integrated Hospital Management Information System is not operational and therefore the County Assembly is right in alleging that there is no such a system. It is important to note making payment prior to the User Acceptance Testing is an offence under the law.

92. The Committee notes that it is apparent that there exists a well-orchestrated and complex web of corruption in the tendering process at the County Government of Kirinyaga. To this end, officers who are found culpable must take personal responsibility for their acts of omission or commission. The Director, Supply Chain Management, one Mr. Joseph Carrillas Otieno stated before the Committee that he appointed Mr. Wayne Gichira as a member of this Committee.

93. The Committee recommends that the Ethics and Anti-corruption Commission and the Directorate of Criminal Investigation to pursue this matter with a view to bringing the culprits to book.

(f) Tender No. CGK/ MOW/ OT/ 039/ 2017-2018 for the proposed water works for Riagicheru Irrigation Water Project;

94. This tender was awarded to Eva Trading Agencies Limited, a company associated with the family of Mugo Ndathi, the County Chief Officer, Finance. Mr. Edwin Gicobi Ndathi, who is a brother to the County Chief Officer, Finance holds 300 shares in the company. The tender committee recommended the award of tender to be given to the Company at Kshs. 9, 942, 022.00/= whereas Value House Limited posted the lowest responsive bid of Kshs. 9, 633, 550.00/=

Response to Allegation

95. The Governor does not take part in procurement processes at any tendering stage, and neither does she appoint any member to tender committees, actions which would otherwise amount to patronage and usurpation of powers of the Accounting Officer under sections 44 and 46 of the Public Procurement and Asset Disposal Act, (PPAD), 2015.

96. The Governor further stated that allegation of conflicts of interest is unsubstantiated and misleading because the Accounting Officer, i.e. the Chief Officer Finance did not sit in the *ad hoc* tender evaluation committee which determined the award to Eva Trading Agencies Limited. The issue of issuance of award letters are just a formality process, after critical decision making has been made on the qualified tenderer.

97. In any event, whereas section 66(5) of the PPAD Act, 2015 requires a declaration of interest by “An employee or agent of the procuring entity or a member of the Board or committee of the procuring entity who has a conflict of interest” it is noted as follows:

(i) the Officer did not take part in the procurement proceedings; and

(ii) the officer did not take part in any decision relating to the procurement or contract after the procurement contract was entered into, as prescribed under section 66(5) of the PPAD Act, 2015.

98. Further in making their decision on responsive bids, the duly appointed tender evaluation committee herein, was guided by section 55(2) of the PPAD Act, 2015, which provides that “*A person or consortium shall be considered ineligible to bid, where in case of a corporation, private company, partnership or other body, the person or consortium, their spouse, child or sub-contractor has substantial or controlling interest and is found to be in contravention of the provisions of subsection (1) (e), (f), (g) and (h).*”

99. The above provision only excludes 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 Chief Officer in question had:

(a) any spouse, child, or sub-contractor in Eva Trading Agencies Limited; or

(b) any spouse, child, or sub-contractor in Eva Trading Agencies Limited with substantial or controlling interest in the said company. In conclusion, Eva Trading Agencies Limited Company was eligible to bid.

100. Finally as set out in the evaluation report, Value House Limited was technically non responsive and hence could not be evaluated on the financials.

(g) Tender No. CGK/MOE/OT/036/2017-2018 for the proposed water works for South Ngariama water project;

101. This tender was awarded to Eva Trading Agencies Limited, a company associated with the family of Mugo Ndathi, the County Chief Officer, Finance. Mr. Edwin Gicobi Ndathi, who is a brother to the County Chief Officer, Finance holds 300 shares in the company. The tender committee recommended the award of tender to be given to the Company at Kshs. 11, 943, 820.00/= whereas Tornjim Investment Limited posted the lowest responsive bid of Kshs. 11, 655, 880.00/=

Response to Allegation

102. The Governor does not take part in procurement processes at any tendering stage, and neither does she appoint any member to tender committees, actions which would otherwise amount to patronage and usurpation of powers of the Accounting Officer under sections 44 and 46 of the PPAD Act, 2015.

103. The allegation of conflicts of interest is unsubstantiated and misleading because the Accounting Officer, i.e. the Chief Officer Finance did not sit in the *ad hoc* tender evaluation committee which determined the award to Eva Trading Agencies Limited. The issue of issuance of award letters are just a formality process, after critical decision making has been made on the qualified tenderer. In any event, whereas section 66(5) of the PPAD Act 2015 requires a declaration of interest by “An employee or agent of the procuring entity or a member of the Board or committee of the procuring entity who has a conflict of interest” it is noted as follows:

- (i) the Officer did not take part in the procurement proceedings; and
- (ii) the officer did not take part in any decision relating to the procurement or contract after the procurement contract was entered into, as prescribed under section 66(5) of the PPAD Act, 2015.

104. Further in making their decision on responsive bids, the duly appointed tender evaluation committee herein, was guided section 55(2) of the PPAD Act 2015, which provides that “*A person or consortium shall be considered ineligible to bid, where in case of a corporation, private company, partnership or other body, the person or consortium, their spouse, child or sub-contractor has substantial or controlling interest and is found to be in contravention of the provisions of subsection (1) (e), (f), (g) and (h).*”

105. The above 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 Chief Officer in question had:

- (a) any spouse, child, or sub-contractor in Eva Trading Agencies Limited; or
- (b) any spouse, child, or sub-contractor in Eva Trading Agencies Limited with substantial or controlling interest in the said company.

106. In conclusion, Eva Trading Agencies Limited Company was eligible to bid. Finally, as set out in the evaluation report, Tornjim Investment Limited was technically non responsive and hence could not be evaluated on the financials.

(H) Tender No. CGK/ MOW/ OT/ 037/ 2017-2018 for the supply and delivery of assorted UPVC pipes for Kenera Water project in Murinduko ward;

107. The tender was not reserved for AGPO, therefore companies ought to have been in business for at least 3 years before qualifying to tender for services under the tender category. Humfel Limited was incorporated on the 28th December, 2017 and was awarded the tender on 26th March, 2018. The company did not possess the National Construction Authority certification for waterworks category, did not provide a performance bond and further did not produce the financial audited accounts for the previous three years.

Response to Allegation

108. The Governor does not take part in procurement processes at any tendering stage, and did not usurp powers of the Accounting Officer under sections 44 and 46 of the PAD Act 2015. While the advertisement for this Tender was open to all parties, certified AGPO entities could also apply. Humfel Limited was AGPO certified and was entitled to the benefits of AGPO certified companies. In determining the bidder to be recommended for award the committee considered section 55 of the PPAD Act 2015 which stipulates the criteria for eligibility participate in tender processes. In the view of the said section, the evaluation committee had no grounds to disqualify or discredit eligibility of Humfel Limited which was legally and legitimately awarded the tender.

- (I) Tender No. CGK/ MSPH&S/OT/ 023/2018-2019 for proposed indefinite quantity framework agreement for non- pharmaceutical; Two Rays General Supplies Limited was paid Ksh 8,000,000/= without any supply being made.**

Response to Allegation

109. The allegation that M/s Two Rays General Suppliers was paid Kshs. 8 Million for supplies not delivered is blatantly **FALSE**, misleading and malicious because from the County records there is no such payment to M/s Two Rays General Supplies Limited for the amount of Kshs. 8 million. Consequently, the alleged non-supply by Two Rays General Supplies Limited despite alleged payment of Kshs. 8 million is **UNTRUE**.

- (J) The tender to procure the governor's vehicle at a cost of KSH 15, 000, 000/= was irregularly awarded despite the same having been procured during the previous County Government regime. Further, the purchase was made using funds meant for Contractors Retention Account. The Assembly's attempt to oversight this matter through inquiry has yielded no results as letters to the County Executive have gone unanswered.**

Response to allegation

110. Contrary to the allegation, the Governor's vehicle was not irregularly procured for the following reasons:

- (a) It was purchased pursuant to National Government's (State Department of Public Works Procurement Framework) Provisional Circular No. SB/MV/1/2019-2021 for supply of Motor Vehicles, a procurement framework envisaged under sections 56 of the PPAD Act 2015.
- (b) It is noted that section 56 of the PPAD Act 2015 allows for the use of another State organ's, public entity's or regulated professional body's registration list of all registered persons, provided that the list is valid and developed through a competitive process.

111. It was on this basis that Toyota Kenya Limited was identified as the dealer to supply the vehicle at the cost of Kshs. 14,500,000.00/= and not the alleged Kshs. 15,000,000.00/= as indicated in the executed sale agreement.

112. The vehicle is cited as having been purchased during the previous county government regime, but it was not appropriate for use by the Governor due to the demanding nature of her duties. A new vehicle had been budgeted for and approved by the County Assembly (Budget for FY 2019/2020). The expense was captured as a development expenditure within the meaning of section 2 of the PFM Act 2012 and was approved by the County Assembly as such.

113. Pursuant to the approval of the Budget estimates for FY 2019/20, the County commenced the procurement process in accordance with the law. When the County Treasury submitted the payment requests to the Controller of Budget for approval, the latter declined on the argument that the expense was captured as a development expenditure as opposed to a recurrent vote.

114. Owing to the urgency of the matter, and the pending preparation and approval of the supplementary budget FY 2019/2020 to effect the change of the estimate from development to recurrent budget, the County explored the alternative method of using the

County's **General Deposit Account as a security through a Bank Guarantee**, and not the Contractors Retention Account as alleged.

115. The initial Guarantee was for a period of ninety (90) days and further extended twice, and the dealer refused further extension of the facility. Owing to these extraneous circumstances, the dealer redeemed the security. It is noted that the County submitted the supplementary budget FY 2019/2020 on 12th February 2020 but there was inordinate delay in approval by the County Assembly as it approved of the same on 18th March 2020. Upon approval, the funds were duly and timely refunded on 25th March 2020.

116. The county endeavoured to ensure that the purchase was done through the legally stipulated procedure, by ensuring as demonstrated above that the Governor's vehicle estimate was budgeted for both in Budget estimate FY 2019/2020 and the supplementary budget FY 2019/2020.

117. Further, the implied allegation that the County Assembly's attempt to oversight this matter through enquiry has yielded no results is NOT correct as it is the same body which approved the procurement of the vehicle and provided funds both in the Budget estimates FY 2019/20 and the subsequent supplementary budget for FY 2019/20.

Committee's Observation

118. The committee observed that this was allegation was not substantiated because the County Assembly approved the purchase of motor vehicle twice. The County Assembly passed the expenditure as a development expenditure. It was settled by passing of the Supplementary budget.

119. Any lending by county Governments must be approved by the County Assembly and guaranteed by the National Treasury.

6.2 CHARGE 2: ABUSE OF OFFICE AND GROSS MISCONDUCT

The Particulars of this Charge are as follows—

(1) Allegation 1: Violation of section 46 of the Public Procurement and Asset Disposal Act, 2015;

119. The Governor has violated section 46 of the Public Procurement and Asset Disposal Act, 2015 by usurping the powers of the accounting officer in establishing an irregular tender evaluation committee. The Committee comprises of the Governors' partisan staff namely Pauline Kamau and Gichira Wayne. In a bid to act as a conduit to award tenders to the Governor's preferred bidders, the two officers directly take instructions from the Governor and conveniently alternate as chairpersons of all major tender evaluation committees contrary to Article 73(1)(b) of the Constitution. The Governor's actions, which are driven by corruption, nepotism, favoritism, improper and ulterior motives. By usurpation of the power of the accounting officer under section 46 of the Public Procurement and Asset Disposal Act, 2015, the Governor has violated Article 201 (a), (d), (e) and 227(1) of the Constitution.

Provisions of the Law

120. Section 46 of the Public Procurement and Asset Disposal Act, 2015 provides as follows –

46. Evaluation Committee

(1) An Accounting officer shall ensure that an ad hoc evaluation committee is established in accordance with this Act and Regulations made thereunder and from within the members of staff, with the relevant expertise.

(2) In establishing the ad hoc evaluation committee referred to in subsection (1) above, the procuring entity that is a State Department or a County Department, shall do so in consultation with the Cabinet Secretary or the County Executive Committee member responsible for that entity, as the case may be.

(3) Despite subsection (1), where technical expertise is required from outside the organisation, such expertise may be obtained from other procuring entities or procured to join the committee, on recommendation, in writing, by the head of the procurement function, and the committee shall be appointed by the accounting officer, in writing.

(4) An evaluation committee established under subsection (1), shall—

- (f) deal with the technical and financial aspects of a procurement as well as the negotiation of the process including evaluation of bids, proposals for prequalification, registration lists, Expression of Interest and any other roles assigned to it;
 - (g) consist of between three and five members appointed on a rotational basis comprising heads of user department and two other departments or their representatives and where necessary, procured consultants or professionals, who shall advise on the evaluation of the tender documents and give a recommendation on the same to the committee within a reasonable time;
 - (h) have as its secretary, the person in charge of the procurement function;
 - (i) complete the procurement process for which it was appointed and no new committee shall be appointed on the same issue unless the one handling the issue has been procedurally disbanded;
 - (j) adopt a process that shall ensure the evaluation process utilized adheres to Articles 201(d) and 227 (1) of the Constitution.
- (5) For greater certainty a procuring entity shall where a member of the ad hoc evaluation committee contravenes any provisions of this Act, institute disciplinary measures in accordance with the procuring entity's disciplinary measures and the provisions of this Act.
- (6) Where a public entity lacks capacity to comply with this Act an accounting officer shall seek assistance from the National Treasury.
- (7) Subject to this Act, the evaluation committee may invite external technical experts who are not employees of the organisation to assist in matters that need specific technical expertise.
- (8) Notwithstanding the provisions in this section, the Cabinet Secretary may prescribe other procedures for evaluating low value procurements below specified thresholds.

121. Article 201 (a), (d) and (e) of the Constitution provides 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;
- (f) the public finance system shall promote an equitable society, and in particular—

- (iv) *the burden of taxation shall be shared fairly;*
- (v) *revenue raised nationally shall be shared equitably among national and county governments; and*
- (vi) *expenditure shall promote the equitable development of the country, including by making special provision for marginalized groups and areas;*
- (g) *the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;*
- (h) *public money shall be used in a prudent and responsible way; and*
- (i) *financial management shall be responsible, and fiscal reporting shall be clear.*

122. Article 227(1) of the Constitution provides 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.

123. In his witness statement, the first witness for the County Assembly, Hon. David Kinyua Wangui, who also happens to be the mover of the impeachment motion in the County Assembly, reiterated the particulars provided in the motion for impeachment. He buttressed the same during the hearing, stating that Ms. Pauline Kamau was recruited by the County Public Service Board at the insistence and coercion by the Governor. According to Hon. David Kinyua Wangui, this forceful recruitment was to ensure that Ms. Pauline Kamau sits in various tender committees and influences the award of tenders to the Governor's preferred bidders. He further stated that one of the tenders awarded to Velocity Partners Limited, **marked 46 and 47**, had been so awarded by a tender committee chaired by Mr. Gichira Wayne. He contended that this award was suspect as two companies kept appearing interchangeably, Velocity Partners Limited and Velocity Partners Limited.

124. In his witness statement, the first witness for the Governor, Mr. Joseph Carilus Otieno, stated that the allegation regarding interference with the composition of the tender

evaluation committees is false and malicious as the county procurement processes are compliant with the provisions of the Constitution, the Public Procurement and Asset Disposal Act and the Public Finance Management Act. He went on to state that the Governor respects the Offices established in the County and officers duly mandated to discharge duties in the said Offices and that she has no role in public procurement at any level in the procurement cycle and has not in any way usurped the powers of the Accounting Officer. He referred the Committee to sections 44 and 46 of the Public Procurement and Asset Disposal Act and section 148 of the Public Finance Management Act, stating that the provisions provide that an accounting officer is the public officer authorized to constitute ad hoc tender evaluations committees in public procurement entities.

Committee Observations

125. The Committee notes that in the documents filed and during the hearing, the County Assembly did not draw a nexus between the Governor and the appointment of either Ms. Pauline Kamau or Mr. Gichira Wayne to a tender committee. Indeed, Mr. Carilus Otieno, as the head of the county procurement unit, confirmed that the Governor had not taken part in the formulation of any tender committee.

126. However, the Committee noted that the circumstances under which Pauline Kamau was recruited raised a lot of questions. The said officer was not qualified to hold the office of Director of Administration and further that her recruitment was pushed through by the Governor. The County Assembly stated that the County Public Service Board was coerced to issue recruitment letter. This however does not bar her from being appointed to serve in a tender committee. (*See Article 232 of the Constitution*)

127. For Gichira Wayne, he was the Governor's staff appointed by the County Public Service Board for the term of the Governor. According to the principles of public service, there could be a breach.

(2) Allegation 2: Improper conferment of a benefit on a public officer.

128. The County Assembly alleges that Governor used her office to improperly confer a benefit to herself when she was irregularly paid travel allowances by way of imprest amounting to Kshs. 10,634, 614/= without travelling. The County Assembly submits that payments were made to the Governors personal account No. 180290174860 at Equity Bank in the name of Anne Mumbi Waiguru.
129. Before the hearing, the County Assembly raised a preliminary request that they needed the original passports of the Governor to enable them prosecute their case and the Committee in its ruling dated 23rd June, 2020 directed that the Governor do provide clear copies of the passports and the same be copied to the Clerk of the Senate by end of the day.
130. However, when the copies were provided by the counsel for the Governor, the Counsel for the Assembly maintained that the copies of the documents provided were not clear and further requested that he be allowed to take the Governor to the stand over the same. The Committee in its ruling dated 24th June, 2020 directed that the Governor to provide clear copies of the passports to the Counsel for the Assembly and if the copies provided were not clear, the Governor was directed to provide clear copies of the documents to the satisfaction of the Committee.
131. On the issue of whether the Governor should be taken to the stand over the copies of the passport, the Committee noted that the County Assembly never requested for the Governor to be summoned to give evidence. It is also instructive to note that rules of fair hearing do not allow accused persons to be compelled to give evidence against themselves. This is also provided for under the Constitution which, under Article 50 (2)(i) provides that every accused person has the right to a fair trial, which includes the right to remain silent and not to testify during the proceedings. The Committee therefore dismissed the request by the counsel for the County Assembly.
132. The County Assembly submitted that the Governor used her office to improperly confer a benefit to herself when she was irregularly paid travel allowances by way of imprest amounting to Kshs. 10,634, 614/= without travelling. They stated that the

payments were made to the Governors personal account No. 180290174860 at Equity Bank in the name of Anne Mumbi Waiguru.

133. The County Assembly relied on paragraph 93 of the Public Finance Management (County Governments) Regulations, 2015 which provides as follows—

“93. Classes of Imprests

- i. An imprest shall be issued for a specific purpose, and any payments made from it, shall be only for the purposes specified in the imprest warrant.*
- ii. There are two types of imprests namely—*
 - a) Temporary or Safari imprest; and*
 - b) Standing Imprest.*

(3) Temporary imprests shall be issued mainly in respect of official journeys and are intended to provide officers with funds with which they can meet travelling, accommodation and incidental expenses.

(4) Before issuing temporary imprests under paragraph (2), the Accounting Officer shall ensure that—

- (a) the main objective of the journey cannot be achieved by other cheaper means;*
- (b) the applicant has no outstanding imprests;*
- (c) the applicant imprest has been recorded in the imprest register including the amount applied for; and*
- (d) that adequate funds are available against the relevant items of expenditure to meet the proposed expenditure.*

(5) A holder of a temporary imprest shall account or surrender the imprest within seven (7) working days after returning to duty station.

(6) In the event of the imprest holder failing to account for or surrender the imprest on the due date, the Accounting Officer shall take immediate action to recover the full amount from the salary of the defaulting officer with an interest at the prevailing Central Bank Rate.

(7) *If the Accounting Officer does not recover the temporary imprest from the defaulting officer as provided for in this regulation he or she commits an offence as provided under the Act.*

(8) *In order to effectively and efficiently manage and control the issue of temporary imprests, an accounting officer or AIE Holder shall ensure that no second imprest is issued to any officer before the first imprest is surrendered or recovered in full from his or her salary.*

(9) *If the accounting officer or AIE Holder under paragraph (8) does not comply with the provisions of this paragraph, he or she commits an offence as provided under the Act.*

(10) *If an imprest is to be recovered from any public officer by instalments, the Accounting Officer shall personally authorize such recovery and such moneys shall no longer be an imprest but an unauthorized advance from county government funds, and in addition to the interest charged under paragraph (6), the Accounting Officer shall take appropriate disciplinary action against the officer concerned for the abuse of the imprest.*

(11) *Standing imprest shall be intended to be in operation for a time and requires bringing the cash level of the advance continuously up to the agreed fixed level by systematic reimbursement of expenses*

(12) *Standing imprest shall involve personal responsibility as it shall be issued to an officer in his or her own name, and not to the holder of an office.*

(13) *When an imprest holder leaves the service, or is transferred, he or she shall surrender the total standing imprest which includes cash plus payment vouchers which together amount to the fixed level of the imprest, and a new imprest issued to his successor.*

(14) *The holder of a standing imprest shall keep a memorandum cash book to record all receipts and payments and the balance on hand shall agree with the cash balance recorded in the memorandum cash book, and in the absence of any receipts, the*

actual cash balances plus the expenses paid shall equal at all times the fixed level of the imprest for which the imprest holder is personally responsible.

(15) When the imprest holder needs to have his or her funds replenished, he or she shall send an abstract and analysis of his or her memorandum cash book, plus originals of the supporting payment vouchers to accounts division.

(16) If the accounts division in paragraph (15) is satisfied that the expenditure has actually been incurred, and that it has been incurred for the intended purposes, and there is no irregularity in the payment vouchers, it shall arrange for the analysed expenditure to be posted to the various heads and items, and arrange for the cash to be transferred to the imprest holder so as to "top-up" his or her fund.

(17) In addition to paragraph (15) the head of accounts division shall also ensure that frequent spot checks are made of the standing imprest itself by a responsible officer as follows—

(a) count the cash on hand;

(b) Confirm that the actual cash on hand corresponds with the balance on hand as recorded in the memorandum cash book;

(c) ensure that the documents justify the difference between the fixed imprest level and the actual cash balance; and

(d) report on any anomalies found to the head of the accounts section.”

134. The County Assembly further relied on Paragraph 94 of the Public Finance Management (County Governments) Regulations, 2015 which provides as follows—

“94. Duties of Imprest Holders

An officer holding an imprest shall ensure that—

a. the imprest issued to him or her shall be used for the intended purpose only;

b. the imprest moneys and any payment vouchers awaiting replenishment are adequately safeguarded at all times;

- c. proper cash sale receipts are received for all payments out of the imprest;*
- d. the full amount of the imprest can be accounted for at all times in cash, stamps, money at bank and completed payment vouchers; and*
- e. goods purchased through imprest are taken on charge and certificate issued”.*

135. The County Assembly submitted that the Governor was paid imprest but did not travel and as a case in point they cited the Governor's trip to the United States that she did not travel yet she was paid imprest.

136. The County Assembly further submitted that the Governor only surrendered the imprest for the trips that were cancelled on 17th April, 2020 after the motion for impeaching her had already been filed at the Assembly.

137. One of the witnesses Mr. Mugo Ndathi, County Executive Committee member in charge of finance while being cross-examined by the Counsel for the County Assembly confirmed that the Governor refunded the money to the County Treasury in April for the trip she did not go to in January, 2020.

138. He further confirmed to the Committee that while the law requires that the imprest be surrendered within seven days from the date of return and failure to which the officer be surcharged, it is common practice that the refund/surrender are to be done before the end of the financial year.

139. He further noted that he was the one who reminded the Governor through her personal assistant that she had pending imprest that needed to be cleared.

140. In response, the Governor agreed that she received travel allowances and imprests from the County government to discharge her official functions. She further contends that the said payments are granted in compliance with the relevant National and County policies and regulations for public officers.

141. The Governor also stated that it was normal for the official trips to be cancelled and/or postponed at the last minute due to the inevitable circumstances, and that in the event of such cancellations she always refunds to the County government the funds allocated as allowances and imprests for the relevant cancelled official function. She indicated in her response to the allegations that allowances and imprests for cancelled official functions and trips were duly refunded to the County government in compliance with the relevant policies and regulations.

142. She further contends that she is aware that where a public officer does not fully account for the allowances and imprests given to them or delaying to refund a given amount, then the public officer is surcharged for the unaccounted funds.

143. Further in response to the allegations, the Governor provided as part of her evidence copies of her passport indicating the dates of her travel for the dates in contention to prove that she travelled for the said dates and a bank slip dated 17th April, 2020 surrendering the imprest for the cancelled trips. As per the Committee directions, the Committee verified and was satisfied that the copies of the passports true copies of the original passports provided by the Governor.

Observations of the Committee

144. Having established that a Governor just like any other public or state officer is entitled to travel allowances or imprests while discharging official duties, paragraph 93 of the Public Finance Management (County Governments) Regulations, 2015 imposes a duty on the officer receiving the imprest to surrender the same within seven (7) days from the date of the official trip or function failure to which the accounting officer shall the Accounting take immediate action to recover the full amount from the salary of the defaulting officer with an interest at the prevailing Central Bank Rate.

145. The Committee further notes that paragraph 93 (7, 8 and 9) makes it an offence for the accounting officer who fails to recover the full amount of imprest from the salary of

the defaulting officer or to continue issue the defaulting officer with the further imprests.

146. The County Executive Committee member in charge of finance who is also the accounting officer confirmed to the Committee that while surrender of imprest is supposed to be done within seven days from the date of return but in practice same is supposed to be done before close of financial year.

147. The Committee notes that the Governor indeed surrendered the imprest for the trips she had received imprest but did not travel as evidenced by the receipt of payment dated 17th April, 2020 and copies of the passports for the trips she went which was outside the period provided in law. The Committee also noted that the County Executive Committee member who is the accounting officer even after noticing that the Governor had not surrendered the imprest within the stipulated time, did not invoke the provisions of the Public Finance Management (County Government) Regulations to surcharge the Governor. On this basis, the Committee notes that the Governor having refunded the imprest for the trips she did not go, there was no evidence adduced to show that there was improper benefit accruing to the Governor.

148. On this basis the Committee finds that paragraph 93 of the Public Finance Management (County Governments) Regulations, 2015 was breached by the County Executive Committee member in charge of finance, who is also the accounting officer for failing to recover the imprest from the Governor or to surcharge her for delay in accounting for the imprest. Paragraph 93 (5, 6 and 7) provide as follows:

“(5) A holder of a temporary imprest shall account or surrender the imprest within seven (7) working days after returning to duty station.

(6) In the event of the imprest holder failing to account for or surrender the imprest on the due date, the Accounting Officer shall take immediate action to recover the full amount from the salary of the defaulting officer with an interest at the prevailing Central Bank Rate.

(7) If the Accounting Officer does not recover the temporary imprest from the defaulting officer as provided for in this regulation he or she commits an offence as provided under the Act.”

Committee recommendations

The Chief Officer/Accounting officer must comply with the requirements as to the surrender of imprests. Parties should avoid stating allegations without prosecuting their case.

Allegation 3: Disregard of the recommendation of the County Public Service Board regarding remuneration of members of the Board of Kirinyaga Investment Development Authority (KIDA), payment of KIDA Board members outside the IFMIS and County Government Payroll, and payment of imprest amounting to more than fourteen Million paid to Mr. Francis Muriithi Kariuki.

149. The Kirinyaga Investment Development Authority Act established the Kirinyaga Investment Development Authority (KIDA). The County Public Service Board directed that members of the board of KIDA not be paid until their salaries had been approved by the Salaries and Remuneration Commission via a circular. The Governor disregarded the recommendation of the County Public Service Board and has continued to have the Board of KIDA paid outside IFMIS and County Government Payroll. This amounts to abuse of office and contravention of the provisions of the Public Finance Management Act and the Salaries and Remuneration Commission Act.

150. Further, Imprest amounting to more than fourteen million shillings was paid out to a Mr. Francis Muriithi Kariuki on instruction of the Governor. This imprest is yet to be accounted for.

151. Article 230 of the Constitution provides establishes the Salaries and Remuneration Commission and Sub-Article 4 provides for its functions. Article 230 (4) provides as follows—

“230. Salaries and Remuneration Commission

(4) The powers and functions of the Salaries and Remuneration Commission shall be to—

(a) set and regularly review the remuneration and benefits of all State officers; and

(b) advise the national and county governments on the remuneration and benefits of all other public officers.”

152. Further, the provisions of the law on imprests (Public Finance Management (County Governments) Regulations, 2015) are similar to those under Allegation 2 of the Second Charge.

153. It is instructive to note that during hearing, the Assembly did not adduce any evidence in support of this allegation and none of the witnesses called by either the County Assembly or the Governor of Kirinyaga County testified on this issue.

154. However, the Governor in her written response to this allegation stated that the Kirinyaga Investment Development Authority was passed by the County Assembly and it expressly and unequivocally imposes a duty on the County government to pay the sitting allowances of the Board members.

155. She further stated that the allowances paid to the said Board members were based on the guidelines issued by the Salaries and Remuneration Commission. She relies on circular from the Salaries and Remuneration Commission ref No: SRC/ADM/CTR/1/13 (122) and dated 16th April, 2014 providing guidance on payment of taskforce allowance and remuneration of Commissions of Inquiry, Tribunals, and Committees appointed by the government.

156. Thus, she holds that the allegation by the County Assembly against her with respect to the Kirinyaga Investment Development Authority lacks juridical cogency for want of substantiation. She further submitted that an allegation is not established and proven with specific and credible evidence cannot form the basis for culpability. She relies on the Supreme Court of Kenya decision in the case of **Evans Odhiambo Kidero & 4**

others vs. Ferdinand Ndungu Waititu & 4 others (2014) eKLR (SC Pet. 18 & 20 of 2014) where it held as follows:

a. “.....(56).....mere allegation does not shift the burden of proof.....”

Observations of the Committee

157. This Committee notes the provisions of Article 50 of the Constitution provides that every accused person has the right to a fair hearing, which includes the right to be presumed innocent until the contrary is proved.

158. The Committee is also guided by the rule of evidence that “*he who alleges must prove*” as supported by the provisions of sections 107 and 109 of the Law of Evidence Act.

159. Section 107 provides that;

“(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

160. While section 109 provides:

“109. The burden of proof as to any particular fact lies in the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of fact shall lie on any particular person.”

161. The Committee notes that no evidence was adduced before the Committee by the County Assembly to support the allegation that the Governor disregarded the recommendation of the County Public Service Board regarding remuneration of members of the Board of Kirinyaga Investment Development Authority, payment of Board members outside the IFMIS and County Government Payroll and payment of imprest amounting to more than fourteen million paid to Mr. Francis Muriithi Kairuki.

162. The Committee further observed that the Governor had provided a circular from the Salaries and Remuneration Commission providing guidance on payment of taskforce allowance and remuneration of Commissions of Inquiry, Tribunals, and Committees appointed by the government.

Committee's Observation

163. The allegation was not canvassed by the County Assembly and therefore not substantiated. Parties must not handle the motions of this nature and character in a casual manner.

Allegation 4: Violation of the right to health of the people of Kirinyaga County.

164. The County Assembly alleged that the Governor has, through omission or commission, caused the health sector in Kirinyaga County to run into disarray. The deplorable state of the health sector has compromised and undermined the realization of the right to the highest attainable health standard of the people of Kirinyaga as enshrined under Article 43 (1) of the Constitution.

Provisions of the Law

131. Article 43 (1) of the Constitution provides as follows—

43. Economic and social rights

(1) Every person has the right—

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

165. In her witness statement and evidence in chief, the second witness for the County Assembly, Dr. Gor Goody Kirit Kumar, stated that the state of healthcare in Kirinyaga County was extremely poor and had been run down by the Governor and her administration. She stated that issues started in 2017 where the incinerator and the autoclave that is used to sanitise and sterilize surgical equipment and linen broke down. She further stated that several letters were written to the Kirinyaga County

Executive alerting them of the importance of the machines and that failure to repair them would lead to the spread of infections but the letters were ignored.

166. Dr. Gor Goody Kirit Kumar further stated that there is severe shortage of linen in the hospitals in Kirinyaga County forcing doctors to reuse linen on patients which has led to the spread of infections. To make do with the small linen resources available, Dr. Gor testified that the hospital in Kirinyaga are forced to send their linen to Karatina Hospital but Karatina Hospital is only able to assist with a small load as they have their own load of linen to clean. She submits that this led to many infections in the newborn unit. The witness further testified that dispensaries in the County were shut down. She also stated that casual labourers that were trained and specialized in managing hospital waste and handling of patients were fired and untrained casuals hired. She submitted that this worsened the condition of hospitals with patients sleeping on bare mackintoshes with wards so dirty that three health workers contracted hepatitis B and C.

167. Dr. Gor Goody Kirit Kumar testified that living facilities given to health workers in hospitals are unsafe with most facilities riddled with asbestos and not in compliance with the Occupational, Safety and Health Act. She also stated that all difficulties health workers experienced necessitated their going to strike and most have not been in gainful employment for over one year after being dismissed by the County Assembly. She insisted that the sorry state of health was unique to Kirinyaga County.

168. In her witness statement and evidence in chief, the third witness for the County Assembly, Dr. Agnes Gachoki, corroborated the evidence by Dr. Gor Goody Kirit Kumar, confirming that healthcare in Kirinyaga County was extremely poor and had been run down by the Governor and her administration. She provided that she facilitated the opening of a dialysis unit which served the people of Kirinyaga well but unfortunately the project failed because the county executive was unable to procure consumables for the unit ostensibly because there was no budget for it. She further stated that she was instrumental in the renovation of four of the County outpatient

hospitals as they were dilapidated. She also stated that she managed to get donors to construct an eye unit in the hospital with no cooperation from the Governor.

169. In her witness statement and evidence in chief, the second witness for the County Assembly, Ms. Wanjiru Njeru, stated that the state of healthcare in Kirinyaga County was extremely poor and had been run down by the Governor and her administration. She stated that there had been an expose that exposed the deplorable state of Kerugoya County Referral Hospital which necessitated the Kenya Medical Practitioners and Dentists Board to visit the facility and issue recommendations that threatened the closure of the hospital.

170. Ms. Wanjiru Njeru further stated that the recommendations of the Kenya Medical Practitioners and Dentists Board necessitated the Governor to appoint a taskforce to look into the matter and Ms. Wanjiru Njeru was appointed to chair the same. She however states that after the taskforce made its report and handed it to the Governor, the Governor dismissed it and refused to read it stating that it was too long and that the Governor wanted it reduced to issues: staff to be fired and things needed to be procured. This, according to Ms. Wanjiru Njeru, contributed to the continued deterioration of the health sector in the county.

171. Counsel for the Governor, in response to the Committee's Invitation to Appear, stated that medical workers employed by the Kirinyaga County Executive went on an illegal strike that unfortunately led to their dismissal. They stated that the actions of the County Executive were informed by the public interest of the people of Kirinyaga County for a functional health service and were in line with constitutional principles and in compliance with court orders issued. They further stated that the medical workers whose services were terminated disobeyed express court orders and placed the health of Kirinyaga County constituents at risk.

172. Counsel for the Governor added that the County Government of Kirinyaga has undertaken the following progressive measures in implementation of Article 43 of the Constitution—

- (a) competitive recruitment of hospital managers to manage county health facilities;
- (b) renovation of the out-patient section of Kerugoya County Referral Hospital. This has resulted in a more spacious and therefore better environment for both the staff and patients;
- (c) construction of a Computed Tomography (CT) Scan Center at Kerugoya County Referral Hospital in collaboration with the national government, and installation of the necessary machines and/or equipment awaiting commissioning;
- (d) procurement of some modern equipment for the hospital including incinerator with a capacity to handle all hospitals' waste;
- (e) construction of new and spacious laundry facilities and installation of a new modern washing machine and repaired drier and iron at Kerugoya Hospital and at Kimbimbi, Kianyaga and Sagana Hospital and repairing of washing machines;
- (f) construction of a new kitchen facility at Kerugoya Hospital which is expected to be completed before the end of the month;
- (g) construction of an isolation ward which is expected to be completed in the next two weeks;
- (h) construction of a well-equipped eye care unit at Kerugoya County Referral Hospital which is run and administered by qualified personnel;
- (i) maintenance of significantly high level of cleanliness in health facilities with hospital management monitoring the situation very closely;
- (j) courtesy of the National Government, procuring medical interns who will complement the existing human resource;

(k) construction of a new modern hospital complex which, upon its completion, will result in the elevation of Kerugoya County Referral Hospital from Level to 4 to Level 5, thus enabling residents to access highly specialized services like Intensive Care Unit (ICU), Highly Dependency Unit (HDU), Magnetic Resonance Imaging (MRI) Scans, Computed Tomography (CT) Scans and Oncological treatments. The complex will enable centralization and segregation of hospital waste collection and disposal for eventual incineration and will be equipped with modern equipment and theatres and will also offer more modern services.

173. In his witness statement and evidence in chief, the third witness for the Governor, Mr. Joe Muriuki, corroborated the submission filed by the Counsel for the Governor. He stated that he has lived in Kirinyaga County for long and health services in Kirinyaga County were not deplorable as painted by the witnesses for the County Assembly.

Committee Observations

174. The Committee notes that the allegation against the Governor is violation of the right to health of the people of Kirinyaga County and has been alleged to support the charge of abuse of office or gross misconduct.

175. The Constitution does not define what amounts to abuse of office. Section 101 of the Penal Code states that “any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another is guilty of a felony”. This statutory provision criminalises abuse of office.

176. The *repealed* Anti-Corruption and Economic Crimes Act, No. 3 of 2003, provides that a person who uses his office to improperly confer a benefit on himself or anyone else is guilty of an offence. This repealed provision anticipates abuse of office only occurring where impropriety leads to the conferment of a benefit to a person.

177. The Committee notes that the Constitution does not define the term abuse of office. The Committee further notes that the threshold for impeachment does not reach the threshold of an overwhelming preponderance of the evidence which is higher than a balance of probabilities but lower than beyond reasonable doubt.
178. The Committee notes that nothing was substantiated by either party as to the state of health in Kirinyaga county. The Committee takes cognisance of the committee's work.

7. FAIR TRIAL BEFORE THE COUNTY ASSEMBLY OF KIRINYAGA

179. During the opening statement, the Governor raised a preliminary issue pursuant to Rule 13 of Part 2 of the Fifth Schedule to the Senate Standing Orders. She submitted that the County Assembly of Kirinyaga purported to pass a resolution to approve a motion seeking impeachment of the Governor without according her the right to be heard. The Governor argued that the County Assembly had acted unconstitutionally and urged the Special Committee to first establish, at the outset, whether the action of the Assembly adhered to the requirements of due process and fair hearing set out under the Constitution.
180. The Committee notes that generally the Senate has traditionally avoided going behind the veil of a resolution of a County Assembly to interrogate if a County Assembly followed its own rules of procedure and therefore determine if the resolution was arrived at in a proper manner. In so doing the Senate has followed the prerogative of every Legislature as stated by Seerval, H. M. in his treatise where he observes that the declaration in Article 9 of the Bill of Rights (1688) involved the right of each House to be the **sole judge of the lawfulness of its own proceedings even where the procedure of a House, or the right of its members to take part in its proceedings was dependent on statute.** For such purposes, the House can as stated by May in his treatise, 'practically change or practically supersede the law'. It is important to note that this refers to instances where a House

of Parliament resolves to follow a procedure notwithstanding the provisions of its own Standing Orders.

181. The Special Committee is however conscious of the provisions of Article 3(1) of the Constitution which states that “Every person has an obligation to respect, uphold and defend this Constitution.” Neither the national Legislature nor a County Assembly can by resolution override the express provisions of the Constitution. Thus, so long as there is no clear violation of the Constitution by the County Assembly of Kirinyaga, the Special Committee cannot question the lawfulness of the proceedings before the County Assembly vis-à-vis its Standing Orders and rules of procedure. However, it is incumbent upon the Special Committee to determine if there was any violation of the Constitution once such an allegation is brought before it.
182. The Special Committee notes that in High Court Constitutional Petition no. 458 of 2015 **Mwangi wa Iria & others –v- Speaker of Muranga County Assembly & others**, in his ruling on the Governor’s application for conservatory orders to restrain the Senate from proceedings with the impeachment of the Governor, Justice J. L. Onguto ruled as follows:

“I take cognizance of the fact that the Senate is truly, what I may call, the Impeachment Court. The Senate is expected to not only investigate the nexus of the allegations to the 1st Petitioner (the Governor). The Senate must also interrogate the entire process as it scurried through the County Assembly. I have seen no law that restrains the Senate from returning a verdict that the process was not conducted as detailed under the Constitution or any law for that matter. Pray, the Senate rises to the occasion and is practical and realistic in its investigations.”

183. The special committee further noted that Article 25(c) of the Constitution guarantees the right to a fair trial to all persons. Article 47 of the Constitution further guarantees

persons the right to administrative action that is lawful, reasonable and procedurally fair. In Petition No. 3 of 2014, Hon Martin Nyagah Wambora & County Assembly of Embu & Another, the High Court of Kenya held as follows—

“ ... the right to a hearing must be accorded to a Governor at any time that the motion proposing removal from office is being debated before it is approved and rejected.”

184. The Court of Appeal in Onyango Oloo –v- Attorney General (1986-1989) EA 456 stated as follows with regard to the principle of natural justice:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard ... There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To “consider” is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard, to think, hold the opinion... “Consider” implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide the manner he decided.”

185. In its determining whether the Governor was granted a fair hearing at the County Assembly, the special committee notes the findings of the High Court in Constitutional Petition no. 458 of 2015 **Mwangi wa Iria & others –v- Speaker of Muranga County Assembly & others** where the court held as follows:

“84. With regard to the right to be heard, my judgment does not favour the Petitioners’ (Governor) approach.

85. The 1st Petitioner, at one remove states and raises the fact that there was no fairing; and at another remove engages and admits that the 1st Petitioner was invited to state his case but opted to give a written response. Again, at one remove the 1st Petitioner complains and states that he was unable to attend as he was not afforded the opportunity; and at another remove the 1st Petitioner states that he asked for more time and to supplied with documents to help prepare his defence which time was allegedly declined.

86. In my judgment and without making a final finding, it is apparent that there was an invite to the 1st Petitioner to state his side of the story. It was for the 1st Petitioner to attend. It was his call. He opted not to attend. The 1st and 2nd Respondents appeared to be very cautious and even informed the 1st Petitioner that he was entitled to a fair hearing. He was also assure of fair administrative action. Whether this happened cannot be ascertained with finality at this stage.

87. It may be necessary to interrogate further whether the time afforded to the 1st Petitioner would adequately satisfy the requirement that opportunity be afforded to an accused person to prepare his defence. It may also be necessary to interrogate whether the time was generally adequate. I however take cognizance of the fact that the time set for the process, even at the Senate level, appears to heap pressure on the parties. For the 2nd Respondent to have given the Petitioner seven days to prepare

his defence, would in the circumstances of the case and in view of the statutory provisions not be too enormous or unconstitutional.”

Observations of the Committee

186. The Committee observes that the Senate has traditionally been hesitant to make a thorough inquiry into the impeachment process at the County level. This has been so because the Senate is reluctant to make itself a court of first instance in the matter of the impeachment of a Governor and to substitute its own findings of fact for those of the concerned County Assembly.
187. The Committee is however keen to observe that a delicate balance needs to be struck between the need for the Senate to avoid a miniscule interrogation of County Assembly processes and the Senate’s constitutional obligation together with all other persons to respect and uphold the Constitution.
188. The Committee is of the position that the right to be heard is a right that is mandatory and must be availed to a person at every forum before which a decision is to be made that affects their rights. In analogous terms, it is not open to a Magistrate’s Court or the High Court to say to a party to a matter before it that he or she will not be heard at that court because a right exists to be heard later at the High Court, the Court of Appeal or the Supreme Court, as the case may be.
189. The Committee observes that an impeachment process in which the person sought to be impeached is denied an opportunity to be heard at the County Assembly is so gravely and fatally flawed that the Senate cannot lend its stamp of approval on it.
190. The Committee is therefore of the view that the Senate’s mandate in the impeachment process of the Governor will always extend to consideration of the process undertaken at the County Assembly if the fundamental provisions of the Constitution or the law are alleged to have been violated or contravened and it is

therefore open to either party to canvass this point before the Special Committee of the Senate or the Senate in Plenary.

8. IMPEACHMENT GENERALLY

191. Article 96(1) of the Constitution 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.
192. To assist the Committee, make an informed decision on the proposed impeachment, it looked at the origin and history of impeachment of public officials.
193. 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.
194. 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.
195. 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.

196. 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.
197. 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*".
198. 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.
199. Sometimes impeachment is not based on criminal activity but rather morality and professional conduct. For instance, 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.
200. In 1929, the Oklahoma legislature impeached Henry Johnston, seventh Governor of Oklahoma, after convicting him of general incompetency.
201. 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.

202. 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.
203. 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.
204. 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."**
205. 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 initiation of a motion to remove the Governor by 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.”

206. 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.

207. 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 Taita Taveta County – the report dated 24th October, 2019; and

208. The 8th and 9th impeachment were those of the Governor of Nyeri County and the Governor of Kiambu which were conducted in plenary.

209. 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 two cases, namely that of the Governor of Embu County and the Governor of Kiambu County. The Senate found the charges unsubstantiated in the case of the Governor of Kericho County, the case of the Deputy Governor of Machakos County, the case against the

Governor of Murang'a County, the Governor of Nyeri County and the Governor of Taita Taveta County.

210. The Governor of Embu County was 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. The Governor of Kiambu County was impeached for grossly violating the Constitution and the for Gross misconduct.

9. THRESHOLD FOR IMPEACHMENT

211. The Special Committee must, after hearing all the evidence tendered before it and taking all matters into consideration, decide whether it is Constitutional, lawful, pragmatic and in the interests of the County of Kirinyaga for the Governor to be removed from office.
212. 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."

213. 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.

214. In the Supreme Court of Nigeria case of Hon. Muyiwa Inakoju & others –v- Hon. Abraham Adeolu Adedeke S.C. 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.”

215. 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.

216. 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.

217. In 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.

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.”

218. 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-

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

(ii) The violation must be a flagrant and glaring violation;

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

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

(v) 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.

219. 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.

220. This Special Committee adopts the above threshold for removal of a Governor as adopted by the Senate on 3rd June, 2014.

10. OTHER OBSERVATIONS AND RECOMMENDATIONS OF THE SPECIAL COMMITTEE

221. 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 Kirinyaga County, are germane to the totality of the situation of the Kirinyaga County and merit the attention of the Senate.

(1) Toxic relationship between the County Executive and the County Assembly

222. The Committee observes that the proceedings before it has exposed acrimonious, contemptuous and cold relationship between the County Assembly on the one hand and the County Governor on the other that threatens to grind the County to a halt. It is inconceivable that in these circumstances the people of Kirinyaga County can be enjoying the benefits of devolved government that the Constitution of Kenya avails. Urgent measures require to be taken to bring the two protagonists to the table to find an amicable solution.

223. In this respect, cognizant of the Senate's role as the custodian of the interests of the counties and their governments, the Committee recommends that the Senate, through its relevant organs, immediately assumes jurisdiction and invites the County Assembly and the County Governor to a consultative process that will restore a functioning government to the people of Kirinyaga County.

224. The area Senator should lead the various reconciliatory measures to bring together the County executive and County Assembly and all other institutions in order to restore harmonious working relations in Kirinyaga County.

(2) Conduct of the Governor

225. The Committee is unimpressed and must express its reservations on the pattern of conduct of the Governor that it has perceived on the basis of the evidence adduced before it. For example, while it is open to the Governor to indulge in less important activities, it is an uninspiring and disturbing picture when the Governor cannot similarly find time to appear before the County Assembly to present the annual State of the County address. The condescending attitude of the Governor towards the County Assembly is uncalled for and does not inspire confidence and trust in the County Executive leadership.

226. The Governor appears to require to be reminded of the high calling of her office and the responsibilities of leadership as set out under Article 73 in the Leadership and Integrity Chapter of the Constitution.

(3) The investigation by the Special Committee

227. The Committee observes that whenever there is an impeachment process before the Senate, it amounts to a solemn quasi-judicial exercise. The Committee is cognizant of the rights of parties to determine the manner in which they shall appear before the Committee or indeed if they shall appear at all.

228. If the parties choose to appear, it will assist the Committee if they are prepared for such appearance and they avail to the Committee such material as will enable the Committee to reach a fair determination on the matter. The Committee's operational context is adversarial rather than inquisitorial in its orientation and can only rely on such evidence, including witnesses, as is presented or as appear before it. Where documents are referred to but not produced or promised but not availed, the Committee has no recourse other than to rely on only what is availed.

(4) Further investigations by relevant investigatory agencies

229. The Committee observes that the impeachment process is not a panacea for all incidents of maladministration or criminal conduct. Where allegations are made of

a criminal nature, it may be the case that while the Committee has neither the time nor the resources to make a conclusive finding, the matter is nevertheless serious in nature and may require the relevant organs of Government to pursue. The Committee's view is that some of the allegations made in the present impeachment process merit such consideration. These include the allegations relating to-

- (a) award of tender to companies that do not meet the qualifications provided in the tender documents as was the case in Tender No. *CGK/ICT/OT/047/2017-2018*; Tender for the design, development, installation and commissioning of integrated hospital management information system;
- (b) awarding tenders to companies that have affiliations or relations with the persons working and holding positions of responsibility in the County Executive as was the case in *Tender No. CGK/MOW/OT/038/2017-2018; Tender for the proposed waterworks for Mwea-Makima water project, March 2018*; and
- (c) reinstating staff and keeping the staffers inordinately long without their due pay as it has been with the 77 health workers who were reinstated in Kirinyaga County on the moratorium issued by the County Governor.

230. The Committee recommends that the Ethics and Anti-Corruption Commission investigates these matters and takes appropriate action within sixty (60) days and report to the Senate on action taken.

(5) Statutory timelines for conclusion of the impeachment process

231. The Committee observes that the impeachment process provided for in Article 181(2) of the Constitution is one requiring utmost judiciousness and circumspection. A ten-day period from the reporting of charges for the investigation or hearing, the analysis of evidence, decision and report-writing and presentation to the Senate and its deliberations is inadequate. The Committee notes that there is the Impeachment Procedure Bill, Senate Bills No. 15 of 2018 which is currently before

the National Assembly. This Bill should be fast tracked as it addresses some of the concerns.

11. FINDINGS OF THE SPECIAL COMMITTEE

232. 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-

- (1) investigate the matter; and
- (2) report to the Senate within ten days on whether it finds the Particulars of the Allegations against the Governor to have been substantiated.

233. The Committee takes the position that, in line with the precedents of the Senate in impeachment proceedings, in order to find that any particular of an allegation of the charges is substantiated, a determination must be made both that evidence has been adduced pointing to wrongdoing in the manner alleged in the Charge and that the threshold for an impeachable offence has been attained.

234. 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.

235. The Committee's findings on each of the Particulars of the Allegations are therefore as follows -

236. **Charge 1: Gross violation of the Constitution and any other law;**

(1) Allegation 1: Failure to deliver the annual state of the county address for the Financial year 2018/2019 to the County Assembly

237. From the evidence adduced before the Committee, the Governor demonstrated that two Annual State of the County Address was made. One albeit was not delivered in the County Assembly. The Committee further noted that there is no county legislation to provide for the content of the Annual State of the County Address as required by section 30(2)(k) of the County Government Act.

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

(2) Allegation 2: Undermining the authority of the County Assembly

239. Evidence adduced before the Committee showed that the county executive has always submitted county policy papers and plans including the County Strategy papers before the County Assembly. Further the County Assembly has always approved the annual budget.

240. There is evidence of Plans and Policy documents have been presented to the County Assembly for approval.

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

(3) Allegation 3: Violation of the Public Procurement and Asset Disposal Act, 2015 and the Public Finance Management Act, 2012

242. From the evidence adduced, the Committee noted a clear mismanagement of some tenders. Of the 12 tenders listed in the Motion, the County Assembly only prosecuted four of them. Of the four tenders prosecuted, the Committee notes that there was clear mismanagement of the tender process where tenders were awarded to Companies whose bids were not responsive or where there were clear cases of conflict of interest. The specific tenders in question includes—

- (a) Tender No. CGK/ICT/OT/047/2017-2018; Tender for the design, development, installation and commissioning of integrated hospital

management information system; in this tender, full payment was made long before the User testing was done and further, the company awarded did not meet the qualifications prescribed in the tender documents;

- (b) *Tender No. CGK/MOW/OT/038/2017-2018; Tender for the proposed waterworks for Mwea-Makima water project, March 2018;* This tender was awarded to Eva Trading Agencies Limited which was clearly owned by a member of the family, specifically the brother to the Accounting Officer who awarded the tender with no declaration of interest.

243. In the circumstances, the Committee recommends that investigatory authorities undertake investigations on the same and the culpable officers including the respective Tender Evaluation Committee members be called to account.

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

245. **Charge 2: Abuse of Office and Gross Misconduct**

i. *Allegation 1: Violation of section 46 of the Public Procurement and Asset Disposal Act, 2015*

246. Evidence adduced before the Committee showed that the respective tender committees were by law established by the respective accounting officers. There was no evidence linking the Governor with the establishment of tender evaluation committees.

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

(2) Allegation 2: Conferring a benefit to a public officer

From the evidence adduced, the Committee established administrative malaise in the management of imprests in Kirinyaga County. The Committee first took great exception to the County Assembly for listing twelve imprests paid to the Governor and alleging that the Governor was issued with imprest but never travelled or surrendered. The County Assembly on prosecuted two of the alleged travels. The Governor adduced evidence of the travel and where travel was not undertaken, the imprest was surrendered though out of

time. The Committee observes that accounting officers must adhere to the Public Finance Management Act, 2012 which require imprests to be surrendered with seven days and in the event of delay, the refund should be made with interest.

248. The Committee finds that this allegation was proved but does not amount to an impeachable offence.

(3) Allegation 3: Disregard of the recommendation of the County Public Service Board regarding remuneration of members of the Board of Kirinyaga Investment Development Authority (KIDA), payment of KIDA Board members outside the IFMIS and County Government Payroll, and payment of imprest amounting to more than fourteen Million paid to Mr. Francis Muriithi Kariuki.

249. Evidence adduced before the Committee demonstrates that payment was made in accordance with Salaries and Remuneration Commission circular on Payment of allowances to Boards and Commissions.

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

(4) Allegation 4: Violation of the Right to Health of the people of Kirinyaga county.

250. From the evidence adduced before the Committee, it was established that there were significant systemic problems in the health sector in Kirinyaga that can be addressed by various organs including the County Assembly and National Government institutions.

251. The Committee further notes the high turn-over of health workers in Kirinyaga County and the inordinate delay in the payment of health workers who pursuant to the Governor's moratorium, resumed work. This issue should be addressed forthwith.

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

12. CONCLUSION

253. 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 two Charges against the Governor have not been substantiated.

