

**EVIDENCE TAKEN BEFORE THE SENATE SPECIAL COMMITTEE
INVESTIGATING THE PROPOSED REMOVAL FROM OFFICE BY
IMPEACHMENT OF THE GOVERNOR OF EMBU COUNTY HELD ON
SUNDAY, 11TH MAY, 2014 AT THE AMPITHEATRE, KENYATTA
INTERNATIONAL CONFERENCE CENTRE AT 10.30 A.M.**

[The Chairperson - Sen. (Dr.) Khalwale]

SENATORS PRESENT

Sen. Kipchumba Murkomen	-	Vice Chairperson
Sen. Boy Juma Boy		Sen. (Prof.) Lesan
Sen. Naisula Lesuuda		Sen. James Orenge
Sen. Zipporah Kittony		Sen. Judith Sijeny
Sen. (Eng.) Hargura Godana		Sen. Peter Mositet

SECRETARIAT

Ms. Eunice Gichangi	-	Director, Legal Services, Senate
Mr. Anthony Njoroge	-	Director, Litigation & Compliance

IN ATTENDANCE

GOVERNOR'S TEAM

Mr. Wilfred Nyamu	-	Advocate
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COUNTY ASSEMBLY TEAM

Hon. Kariuki Mate	-	The Speaker, Embu County Assembly
Hon. Swaleh Ibrahim	-	Deputy Speaker, Embu County
Mr. Charles Njenga	-	Advocate
Mr. George Ng'ang'a Mbugua	-	Advocate

(The Special Committee convened at 10.30 a.m.)

Prayers

The Chairperson (Sen. (Dr.) Khalwale): Good morning ladies and gentlemen. I notice that we have quorum and that all parties are here. I, therefore, would like to call the meeting to order.

Members, I would like us to start with a round of introduction, starting on my furthest right.

(The Chairperson (Sen. (Dr.) Khalwale), Members of the Special Committee, the Secretariat, Representatives of the County Assembly and the Governor introduced themselves)

Thank you all for introducing yourselves. I believe the rest are the public and the media. You are all welcome.

We want to start straight away. The first item will be opening statements. First, we would like to hear the County Assembly of Embu. We will spend a total of 30 minutes apiece. County Assembly team, you will have 30 minutes and then we will stop. Representatives of the County Assembly, please get organised. The Governor's team will also have 30 minutes.

Let us proceed. You may take the podium.

Mr. Charles Njenga: Mr. Chairman, Sir, I rise to make the opening statements for the County Assembly of Embu. I wish to begin with a brief comment on Article 174 of the Constitution of Kenya that provides for the principles that obtain with respect to devolution.

Article 174 (a) provides one of the main objects of devolution as:-

“The objects of devolution of government are-

(a) to promote the democratic and accountable exercise of power;”

I also wish to refer briefly to Article 175 that provides for principles of devolved government.

This Article states as follows:-

“County governments established under this Constitution shall reflect the following principles:-

(a) county governments shall be based on democratic principles and the separation of powers.”

I make that point as I start to contextualize the charges that are before this honourable Committee, which are set out in *extensor* in the bundle that has been forwarded by the County Assembly of Embu through the office of the Speaker to the Speaker of the Senate, and now to this Special Committee for its investigation.

The basis of these charges, as we shall seek to demonstrate, is the oversight role bestowed by statute and the Constitution upon the County Assembly. This enjoins the County Assembly in the exercise of its statutory functions to have oversight role over the Executive of the county. The Executive of the County reposes in the office of the governor.

The County Assembly of Embu shall seek to demonstrate in its case that the governor has failed to discharge the duties of his office in accordance with the requirements and anticipation of the Constitution and the specific statutes which we have cited. We shall demonstrate particular and very clear breaches and gross violation of the Public Procurement and Disposal Act, the Constitution and finally the Public Finance Management Act.

We are guided in these charges by clear and concrete evidence that has been availed both to the governor and the Special Committee. It is our submission, as we start, that this is not a process that is actuated, or motivated, by any malice, or ill motive, on the part of the County Assembly. It is simply an Assembly that has sat to do its job. The job of a county assembly is well set out at Section 9 of the County Governments Act, which we shall have occasion to deliberate on and evaluate. The County Assembly and its members hold a special place within the architecture of the Constitution that we have and the statutes made there under; they are the only persons statutorily mandated and enjoined to maintain close contact. The words in the statute are “close contact” with the electorate, so that any issue that arises at that level is first of all picked by the members of the County Assembly. It is for this reason, and for being seized of that particular function, that the members of the County Assembly of Embu raised issue with certain aspects of governance within their county.

We will see, in the course of time, that they took time to investigate these issues. These issues include procurement of maize. We have documents that will show that in deeper particulars. There are also other issues about the Embu Stadium and the procurement of motor vehicles. These are issues raised by members of the public to their representatives in the Assembly as provided for in the law. The Assembly took time, followed processes provided for in the law and their Standing Orders to investigate these charges or claims with clear confirmation; they found that, indeed, there had been irregularities in procurement of goods and management of finances in the county. That now forms the basis for the proposal for the removal of the governor by way of impeachment.

We also wish to make a comment on Article 181 of the Constitution that provides the grounds upon which the removal procedure can be activated. It is our submission at the start that the particulars and requirements of Article 181, as read together with the procedure provided for under Section 33 of the County Governments, Act has been strictly complied with.

Of primary importance to note, hon. Chairperson - is that the governor, and that is contained in the first document in our bundle - was given an opportunity to appear before the Assembly on 29th April, 2014 to address the specific charges that are now before this

Committee. He was given a clear three day notice, provided with these charges and asked to appear before the Assembly to address the issues and concerns raised by the Assembly. You will note that the Governor failed to appear without any reasons. He offered no defence or response; instead he filed the matter in court, which is his right; we do not begrudge him for that. But as we stand before this Committee, it is our submission, a submission made on clear, factual and legal basis, that the County Assembly of Embu has before you clear particulars and charges that are backed with evidence. We shall, in the fullness of time, ask this Committee to find that the charges, as framed on the particulars against the Governor of the County of Embu, have been substantiated.

We do not wish to go into the details, but at the time that the Committee will allocate to us, we shall prosecute the charges. We shall, indeed, take the Committee through these documents to demonstrate beyond any reasonable doubt that this is a process that has a clear basis in facts and the law.

Mr. Chairman, Sir, at this point I wish to invite my fellow counsel to also make brief opening remarks within our time; thereafter we shall sit to await the time that the Committee shall allocate us to prosecute the charges.

Thank you, Mr. Chairman, Sir.

The Chairperson (Sen. (Dr.) Khalwale): You are welcome.

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, by way of a further opening statement on the part of the County Assembly, it is now settled law in the case by the International Legal Consultancy Group against the Senate. A three judges' Bench, in a constitutional matter, in a unanimous decision held that governors must be held to account for revenue allocated to their respective counties in view of the provisions of Section 30(3)(f) of the County Governments Act, as read together with Article 10(2)(c) of the Constitution. That was a unanimous decision in Petition No. 8 of 2014.

Governors are no doubt state officers, and they are bound by national values of transparency, accountability and observance of good governance when performing their duties as CEOs of county governments. It is against this fundamental, statutory and constitutional background that the County Assembly of Embu considered and approved a Motion on the proposed removal of the Governor of Embu County on 29th April, 2014 by way of impeachment of the Governor for, amongst other grounds, gross violation of the Constitution and the Public Finance Management Act.

To put it into perspective, under Article 181 it is contemplated that gross violation of the Constitution, or any other law, indeed, would constitute a ground for removal of a governor.

Before that decision was taken, and as my learned friend has pointed out, we were duly guided by the decision in Petition No.8, where the learned judges of the High Court observed that the County Assembly should, and must, accord the Governor an

opportunity to be heard. We will be demonstrating in our case that the County Assembly duly gave the Governor an opportunity to be heard. The County Assembly complied with the orders of the Constitutional Court in as far as the Governor's right to be heard is concerned. Indeed, that is on record and we shall be demonstrating it as we proceed with our case.

We shall be demonstrating in the fullness of time that there have been very serious violations of the procurement law under the watch of the Governor. This has led to massive loss of finances and resources that were meant to improve the welfare of the people of Embu County. Failing to take action was a grave betrayal of the trust bestowed upon the office of the Governor by the people who voted the Governor into office.

We shall be demonstrating that in as far as the procurement was done, it was not in compliance with the provisions of Article 227 of the Constitution, which clearly provides for the requirements of a valid procurement system and what it should comply with. We shall be demonstrating that there was no valid tender committee. Resources were expended without due compliance with the law. In the refurbishment of the stadium, monies were lost. There was also buying of uncertified maize. The Governor knew, or had reasons to believe, that the law was not complied with. There was serious loss and no action was taken. We shall be going into the details of that.

We shall also demonstrate that there were audit queries that were raised by an officer of the Governor, but no action was taken by the office of the Governor to remedy the defects that were being raised.

The totality of what the Governor did is first to bring the office of a governor to serious disrepute. Secondly, it was an abdication of duty. Thirdly, we shall be showing that there was a nexus between the actions that were taken by individuals and the office of the Governor. We shall be demonstrating that the office of a governor is not a ceremonial office. We shall further demonstrate that he has executive powers, both under the County Governments Act and the Constitution. We shall show that he had the opportunity, chance and the means to take action and he chose not to. Instead, his defence was: "It was not me." We shall be seeking to show in the fullness of time that the decision that came from a constitutional court re-emphasized and underscored the direct obligation that a governor has in matters of accountability. We shall be going into details of all those issues.

We hope to persuade you that on the basis of the materials that we have submitted before you, there was a clear and serious gross violation of the law; that is the Public Finance and Management Act, the Public Procurement and Disposal Act and the Constitution.

Finally, we shall also been seeking to demonstrate to this Committee that there exists no order barring this Committee from proceeding to investigate the matter that is before it. The matter that is before you is validly before you for your determination. Ultimately, it is the County Assembly's case that we hope to persuade you uphold; you ought to make

recommendation to the plenary that, indeed, the Governor of Embu County ought to be removed from office by way impeachment.

Thank you.

The Chairperson (Sen. (Dr.) Khalwale): You are welcome. Let us now hear the office of the Governor.

Mr. Wilfred Nyamu: Hon. Members of the Senate Special Committee appointed by the Senate under Article 181(2) of the Constitution and Section 33 of the County Governments Act, on behalf of the Governor, my names are Wilfred Nyamu. We are here in response to an invitation to appear before this Committee to participate in its proceedings. This was an invitation and not summons. The same provides that one may chose to or not to participate.

In appreciation of the role bestowed upon the Senate by the Constitution in matters of devolution and the operations of county governments within the country, the Governor has decided to respect the Senate and appear before this Committee, but with reservations. This is a Committee constituted of the same membership of another committee constituted during previous impeachment proceedings against hon. Martin Wambora, on 4th February, 2014, which dealt with substantially the same charges, the same particulars, and the same issues presented with the same evidence. The Committee then, comprising of the same Members of the Senate, found the charges against the Governor substantiated. The Members of the same Committee, through the Chairman, proceeded to move a Motion, pursuant to which hon. Martin Wambora was removed from office by the Senate.

Hon. Members, at that particular time, there were pending proceedings before the High Court under Constitutional Petition No.3 of 2014 at Kerugoya – where hon. Wambora was challenging the decision of the County Assembly of Embu and the Senate to remove him from office. These proceedings, subsequent to the decision that was made by the Senate on 14th February, 2014, were prosecuted, and the Speaker and the Clerk of the County Assembly of Embu were found guilty of contempt of court. As it is, they are now awaiting sentence on 15th May, 2014.

Mr. Chairman, why am I bringing out all this? I am trying to demonstrate a possibility of malice on the part of the County Assembly of Embu, owing to the fact that already, at the instance of the Governor Martin Wambora, the Speaker of the County Assembly was found guilty of contempt of court. On 16th April, 2014, the High Court, at Kerugoya, comprising of a Bench of three judges, made a determination on the threshold envisaged by the Constitution of Kenya under Article 181.

Hon. Members, it is very clear in everybody's mind that the High Court, under Articles 159 and 165 of the Constitution, is the only organ that is charged with the responsibility of interpreting all the provisions of the Constitution – including Article 181 of the Constitution, pursuant to which provisions this Committee has been formed and

impeachment proceedings commenced. I would urge that once this Committee retires, hon. Members look at the entire judgement in High Court Petition No.3 of 2014, at Kerugoya. I would like hon. Members to also appreciate the law and the authority of the court under Article 159, and Article 165 in matters of interpretation of the Constitution.

The High Court, sitting in Kerugoya, its findings, under paragraph 253 of that particular judgement, states as follows:-

“To our minds, therefore, whether a conduct is gross or not depends on facts of each case having regard to the Articles of the Constitution and any written law alleged to have been violated. We have found that not every violation amounts to gross violation of the Constitution or written law that can lead to the removal of a governor. It has to be gross violation. We are of the view that the standard to be used does not require a mathematical formula, but must take into account the intent of the Constitution under Article 181 of the Constitution. In our view, therefore, whatever is alleged against a governor must be serious, substantial and weighty. 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, with a degree of precision, describe the Articles of the Constitution, or provisions of any law alleged, that have been grossly violated.”

Hon. Members, as it is, the Counsel for the County Assembly of Embu has, indeed, tried to demonstrate what they perceive to be a nexus, or the act of commission in relation to violation of the procurement law and the Public Finance Management Act. As it is, what they have not told this Committee---

The Chairperson (Sen. (Dr.) Khalwale): Just a minute, Mr. Nyamu. We have to be very careful with words. This is a very serious matter. What this Committee heard the lawyer of the County Assembly say was that they are going to demonstrate the nexus, but you are now telling us that they have attempted to demonstrate the nexus. Please, use the correct words, so that the record can be clear. It is only when they fail to demonstrate that you will arrive where you are.

Mr. Wilfred Nyamu: Mr. Chairman, with due respect, they cited the law under which they seek to persuade this Committee that there is nexus between the acts or omissions under those particular laws. That is what I was trying to say – that they have attempted to demonstrate. They have already cited the law. They are trying to actually convince this particular Committee to appreciate the role of the Governor, under the Constitution. That is where I was getting to.

I hope that I am going to get back my two minutes, Mr. Chairman.

The Chairperson (Sen. (Dr.) Khalwale): Proceed.

Mr. Wilfred Nyamu: Mr. Chairman, although under, Article 179(4) of the Constitution, the Governor is the Chief Executive Officer (CEO) of the County Executive Committee (CEC) and the County Government of Embu, as it is, the Constitution, in Article 226(5),

does not make the governor precariously liable for acts and omissions of county officers and employees. That is why, under Article 226(5), the Constitution provides as follows:-

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

As it is, officers appointed under the Public Finance Management Act as Accounting Officers and heads of county entities, which are departments for purposes of procurement, by virtue of the Constitution, under Article 226(5), are liable by themselves. It has to be demonstrated first whether or not the County Assembly exercised its powers and authority to summon such officers as provided under the County Government Act before they get to the Governor. So, a matter touching on the impeachment of the Governor ought to be of last resort after all the avenues have been exhausted, and it has been impossible for the County Assembly of Embu to arrest a situation.

Mr. Chairman, I wish to submit that the County Governor, being not directly involved in matters of procurement and the application of the Public Finance Management Act, whose Sections 148 and 149 are meant for Accounting Officers, the only way the County Assembly would demonstrate a nexus would be through charging the Governor with either violation of the County Governments Act – which they have not – or abuse of office, which they have not. The Governor can only have connection with the Public Finance Management Act and the Public Procurement and Disposal Act, 2005, if he interferes with procurement.

Such an act would only amount to abuse of office, but there is no such charge. In the absence of a charge of abuse of office on the part of the Governor, it would only be a case against the Accounting Officers and the County Executive Committee members to answer to allegations of violation of these two particular statutes and the Constitution, but not the Governor. Therefore, I wish to submit that there is no nexus, at all, in the absence of a charge of abuse of office, and in the absence of a charge of violation of the County Governments Act. This particular Committee, in its previous findings, exonerated the Governor from this aspect.

Hon. Members, we are alive to the fact that, as it is, this particular Committee is governed by the Standing Orders of the Senate. The Standing Orders of the Senate, as even applicable, in terms of the rules of procedure adopted by this Committee, cannot be applied in isolation. The Standing Orders of the Senate, as they are, have to be applied and looked at as a whole, and not selectively. Standing Order No.92 of the Senate, which appears on page 59, deals with matters that are *sub judice* – matters that are before a court of law. It states as follows:-

“No senator shall refer to any particular matter which is *sub judice* or which, by the operation of any written law, is secret. A matter shall be considered to be *sub judice* when it refers to active criminal or civil proceedings and discussion of such matter is likely to prejudice its fair determination.”

As it is, hon. Martin Wambora, the Governor of Embu County, has already initiated proceedings before the High Court under Constitutional Petition No.7 of 2014 at Embu, wherein the Senate and the Speaker are third and fourth respondents. As it is, among the parties against whom the allegations are being deliberated by this Special Committee of the Senate is actually a party and a petitioner against the Senate in proceedings pending before the High Court. There is also an appeal where the Senate is also a party. The appeal was filed by hon. Martin Wambora. So, the *sub judice* rule should essentially apply to these proceedings. For that matter, it is our submission at this particular juncture that this particular Committee and the Senate are in violation of their own Standing Orders by constituting this Committee and convening this sitting.

The Chairperson (Sen. (Dr.) Khalwale): Mr. Nyamu, having read Standing Order No.92 (1), (2) and to an extent (3), I would like you to comment on paragraph (5) of the same Standing Order. Are you alive to that provision? You should read it out yourself.

Mr. Wilfred Nyamu: Mr. Chairman, I am alive to that provision. I shall actually leave it to the discretion of this Committee to determine whether or not it will be on course to deal with this matter when it is before a court of law.

The Chairperson (Sen. (Dr.) Khalwale): Order! Order, Mr. Nyamu! Since you are the one who was leading us in reading that Standing Order, could you, please, read out its paragraph (5) and then you make your comments?

Mr. Wilfred Nyamu: Mr. Chairman, it reads as follows:-

“92(5) notwithstanding this Standing Order, the Speaker may allow reference to any matter before the Senate or a Committee.”

Mr. Chairman, as it is, my reading of this particular provision would be that a party may raise an issue touching on *sub judice* matter and then the Speaker would make a ruling. So, as it stands, from the point of view of hon. Martin Wambora, these Standing Orders apply to his case.

On the issue as to whether or not hon. Martin Wambora was invited to appear before the County Assembly, he was, indeed, invited but he went to court to challenge the moving of the Motion – which was moved on 29th April, 2014. At the same time, hon. Martin Wambora was actually in court against the County Assembly’s Motion, which was to be debated on the same day. At that particular moment, he was guided by the Standing Orders of the County Assembly of Embu – Standing Order No.86, which is on *sub judice*. While in court on the same day to determine as to whether the Motion would be stopped by the court, the Motion was passed.

The Chairperson (Sen. (Dr.) Khalwale): Proceed. You have ten minutes.

Mr. Wilfred Nyamu: Hon. Members, as it is, and we submit, the charges presented before the Senate constitute the same charges that were before the Senate in the previous proceedings. The evidence was substantially the same and this evidence was actually evaluated by this particular Committee, presided over by the same Chairman and Vice-Chairman. Those deliberations culminated in a report forwarded to the Senate which report was adopted by the Senate following a Motion that was moved by none other than the same Chairman and actually seconded by the same Vice-Chairman and supported by the same Members of this Committee. So that is in terms of principles of natural justice which are actually applicable to these proceedings and it is in no doubt that this particular Committee's proceedings and the proceedings of the Senate under Article 181 are quasi-judicial in nature, where the Committee and the Senate ought to act judicially and the rule against bias is applicable.

The parties before it and the issues before this Committee are substantially the same and to the Governor of Embu as it is and the members of the public, the question will be this: Would this particular Committee faced with the same evidence, facts and allegations come up with a different decision in the circumstances when the membership of the Committee is the same? The Governor's opinion and as advised by counsel would be that it is unlikely that a different decision is going to come from this Committee. For that matter, it is the Governor's submission that the only honourable thing that this Committee would do given that there are 47 Members of the Senate, is to recuse itself and have this matter handled by another committee to be constituted to deal with the same as it is. These are the same matters that were here prior to 14th of February so that now this Committee will actually be like a bench of judges sitting on appeal against its own decision where there is the unlikely event of being fair. I do this because under the law and the principles applicable in the administration of justice, one of them is that justice must not only be done but must also be seen to be done.

Hon. Members, besides, the matters that are in court ought to allow these proceedings to be placed in abeyance to await the outcome of the same and for that matter I would urge this Committee to consider these facts. That would actually be the Governor's position with due respect to the Senate and this Committee to which he elected to appear for that matter. He had actually the right to decide not to appear but if he found it appropriate that he appears and tells the Committee that this is not the right forum for this matter, it ought to be deliberated because this is the same Committee that found him culpable and even the Chairman passionately moved a Motion which culminated in the decision of the Senate.

The last point would be this: I would urge this Committee to consider the fact that under Section 33(8) of the County Governments Act, it is presupposed that where a vote of the Senate does not result in the removal of the Governor and the word is "result", then other resolutions may not be reintroduced before the Senate until after expiry of three months.

As it is, it is in no doubt that a vote before the Senate held on 14th February did not result in the removal of the Governor of Embu, hon. Martin Wambora owing to the judgement of the court that nullified the process so that now it would be unlawful, unconstitutional

and also against Section 33(8) of the County Governments Act for the County Assembly to reintroduce a Motion within a period short of the statutory period of three months. This particular resolution was actually brought before the Senate on 30th April, 2014 when actually such a Motion ought to have been brought at the earliest after the 14th of May 2014 when three months would have lapsed. I know that their argument would have been that as it is, it is like there was no resolution but indeed there was a vote but that vote by the Senate did not result in the removal of the Governor from office because the same was nullified and the Governor is back to office.

So, based on those submissions, I urge this Committee to recuse itself, to dissolve and take back a decision before the Speaker that these proceedings cannot take off. That is all I would like to say, with due respect, and the Governor asked me to impress on to this particular Committee that he has outmost respect for the Senate and he appreciates the role bestowed upon the Senate on matters touching on county governments and devolution and that is why he decided, instead of staying away, he comes before this Committee and states his position. We have filed some response, which on top of what we have said we urge this Committee to consider. That is all.

The Chairperson (Sen. (Dr.) Khalwale): Thank you, Mr. Nyamu. You may resume your seat. You have argued very passionately. On some of the things you have raised, some of them if not all of them, the Senate has already pronounced itself on them but as far as this Committee is concerned, we would like you to uphold total confidence in it for the reason that we have not come here to do finished work. We have come here within ten days to report back to the Senate our findings. When we shall be doing that report, all that you have raised, we shall put those points into consideration. Thank you so much.

Members, I have now concluded that. We now want to move on to hearing of evidence by the County Assembly of Embu. That is evidence of witnesses, cross-examination and re-examination. Members, should I give you a 15 minutes break while the County Assembly organizes itself now for presentation of evidence?

Mr. Wilfred Nyamu: Before we break, I wish to say this, with profound respect to the House; that you shall notice that we have not brought in any abstract of evidence. We believe the same evidence that the Governor had brought before the Senate in the previous proceedings shall guide us so that now we find no reason as to why we should bring any other further evidence. I further want to state that should this Committee decide that it is proceeding with this matter at this juncture and owing to the issues that we have raised, we would humbly request that it be deemed that we have responded to the invitation and owing to the reservations raised, we shall seek leave so that proceedings may be held in our absence.

The Chairperson (Sen. (Dr.) Khalwale): Mr. Nyamu, I think we should not mix issues. The evidence you are referring to, if it is in connection with another matter which is not before this Committee, it cannot form part of the evidence of these proceedings. However, we are in receipt of this document from you and you have attempted to refer to it. We take it as your formal response to the issues that were raised by the County

Assembly of Embu. If you choose to prosecute your matter by being there personally or with other witnesses or by being there with the Governor or by this, that would be perfectly in order for us. We would not coerce you in any way. Thank you so much.

The Vice Chairperson (Sen. Murkomen): Chair, I think for avoidance of doubt, I hope what the counsel was referring to was what we call the evidence here. This is because I think it is important to make it clear to the counsel and to any member of the public that we are not considering any matter except a matter that was brought before us by the County Assembly on the 29th of April. We have no jurisdiction to deal with any other matter which is not before us. We have a very limited jurisdiction and for avoidance of doubt, our responsibility here is not that of a judge at this juncture. We are just an investigating Committee and that is what the law says. The person who makes the decision is on the Floor of the Senate and so ours is to investigate. This is just like in Government where you have a department called the Criminal Investigation Department (CID) and sometimes the courts will order them to go back and investigate. So, ours is investigation and not sitting in judgement as we speak now. So, whatever document you have left with us, whosoever will be able to assist us to investigate because the Senate chose this path, even if it would have chosen just to handle it in plenary, it will assist us in that process. So, we appreciate the counsel for the documents provided to us and if he so wishes that he will confine himself to the same, I mean it will suffice to give us time to look at that.

The Chairperson (Sen. (Dr.) Khalwale): Yes, Orenge.

Sen. Orenge: Thank you, Chairman. If you look at our programme, right now we are dealing with the opening statements, which, really means that we have not gone into the substantive matter before us. I would hope that some of the issues that Mr. Nyamu has raised, when we start the hearing of evidence in the course of these investigations, that he will take it upon himself now to address us fully on the issues that he has raised. This is because I think they are weighty issues but I think they should go on record in the form of proceedings.

Mr. Nyamu, you know we restrained ourselves from asking you some questions because we knew that, normally, when you make an opening statement, we should not interrupt you. Similarly, I think with the County Assembly, we similarly restrained ourselves from asking any questions. So, I would urge you that when the next proceedings commence properly, you address us fully on the issues that you have raised and also we will be able to pose some questions which will be in the nature of seeking clarity on some of the issues that you have raised.

The Chairperson (Sen. (Dr.) Khalwale): Yes, Mr. Nyamu. I think your learned colleagues have persuaded you. It will be very important in the interest of the Governor that you persuade this Committee in accordance with this evidence which you presented yesterday because on 29th the County Assembly brought its bundle of documents. Yesterday you brought yours. They will attempt to persuade us and you have also to persuade us, for us to make a decision one way or the other. No decision has been made

and I can assure you that--- and we have a track record in this country for being people of integrity. Thank you very much.

The Vice Chairperson (Sen. Murkomen): Just on question of procedure and following from the senior counsel; Mr. Nyamu, once the proceedings start properly we will also give time to the County Assembly to respond to what you have raised so that you can help us in the ultimate decision that is going to be made. I mean as a lawyer you know that in the opening remarks, there is no way they would have responded to them.

Mr. Wilfred Nyamu: So, would the Committee then address itself to those issues as a preliminary matter when we resume, if that is the position so that it makes a decision on the way forward? Then it would be treated as a preliminary issue where now we shall abide by the ruling of the Committee because you have raised issues that are actually preliminary and that would warrant direction before commencement of taking of evidence, if the manner in which the Vice-Chairman endeavours to put it is going to apply.

The Vice Chairperson (Sen. Murkomen): Yes, but those were opening remarks. So, how do we address ourselves to opening remarks?

Mr. Wilfred Nyamu: There is no response.

The Vice Chairperson (Sen. Murkomen): Yes, exactly. You will have to wait for the proper proceedings so that then they can respond and then we will tell you whether we will address it immediately or in the final report but we cannot address ourselves to opening remarks yet.

The Chairperson (Sen. (Dr.) Khalwale): Mr. Nyamu, if it may help you probably tonight the same dilemma that you are going through, the whole country is going through the same because this is the first time this kind of thing is happening. Go and read the impeachment proceedings of 1798 against the Senator of Tennessee in the United States of America. The same dilemma was there but it was resolved. So, remove it from your heart. Stick it in your head and let us address issues. Let us adjourn for 15 minutes.

(The Committee adjourned temporarily for 15 minutes)

(The Committee resumed at 11.45 a.m.)

The Chairperson (Sen. (Dr.) Khalwale): Order, ladies and gentlemen! We now want to commence the hearings. I would like to announce that we have two hours for the Country Assembly of Embu and two hours for the Governor.

Hon. Senators, ladies and gentlemen, as we proceed to the substantive hearing of this matter, this Special Committee has noted some issues which have emerged from the opening statements by both parties. We request the parties to note and address them in the course of the hearing of this matter. The issues are as follows:-

- (i) The issue of *sub judice*;
- (ii) The issue of double jeopardy; that the Governor is being tried by the same committee for the same charges;
- (iii) The issue that three months have not lapsed since the last impeachment proceedings;
- (iv) The threshold required for impeachment of a governor;
- (v) The nexus between the Governor and the alleged violations.

Ladies and gentlemen, these important five issues are the ones that will guide this Committee when it retires to consider the evidence and prepare its report to the Senate.

We would want to start with the County Assembly of Embu and I would like a confirmation that you are ready for the next phase. Are you ready?

Mr. Charles Njenga: Yes, we are ready. Just clarifications on the directions you have made; the issues as framed by the Committee, do we address them as preliminary issues or in our closing---

The Chairperson (Sen. (Dr.) Khalwale): It is just in the body of your evidence as you go on.

Mr. Charles Njenga: There are legal issues that we would wish to address in our submission.

The Chairperson (Sen. (Dr.) Khalwale): That would be fine.

Sen. Orenge: Mr. Chairman, like on the issue of nexus, it is a matter which you can address us as a legal issue. But on evidence, you must also point to the evidence. That can arise in the course of the presentation of evidence.

The Chairperson (Sen. (Dr.) Khalwale): The counsel for the Governor, are you ready for the hearing?

Mr. Wilfred Nyamu: Mr. Chairman and Members of the Special Committee, my instructions are that, given the issues that we have raised and which we appreciate have been captured in the minds of the Special Committee; given the kind of guidelines that the Special Committee has given us on how to proceed and the issues that we need to articulate in these proceedings, I am instructed not to proceed beyond where I have reached. I have to leave it to the Committee, upon deliberations to determine whether or not it can proceed to hear this matter as constituted.

The Vice Chairperson (Sen. Murkomen): Thank you, counsel. For purposes of clarity, we take it that your participation in the proceedings is to the extent of opening statements. You are my senior, so my understanding is that when someone does opening statements, he is opening a statement for the substantive issues that he is going to raise. Earlier, I had

put it very clearly to you that for even the issues you have raised, they have not been responded to by the other side. Therefore, are you saying that you open a statement and actually you do not go to the statement itself?

Mr. Wilfred Nyamu: The time that was slotted for opening statement is the only time that we could seize opportunity to raise what we have raised as a preliminary issue before the commencement of these proceedings. That is the point at which we would pronounce ourselves on what we perceive of these proceedings. That ought not to be construed to be participation *per se*. It is registration of the Governor's exception in participation to these proceedings. We have given our memorandum of response which may be construed to mean a preliminary objection to these proceedings or otherwise.

The Vice Chairperson (Sen. Murkomen): Mr. Chairman, Sir, just to conclude what I wanted to find out, my understanding therefore is that your instructions--- As a Committee, we cannot push you beyond what you have been instructed to do. But going back to Friday, when we had the first hearing, you requested for time so that you can prepare. You even told us that there is evidence that you will need, and the witnesses; the time was too short for you to prepare. I am assuming that the instructions changed mid-way.

You are a lawyer and you cannot be forced to act beyond what your client instructs you to do. Forgive me, if I sound a little rude to say that the Governor was taking us for a ride by requesting for two more days to prepare, which we allowed; only to come now and tell us what you are beginning to tell us. You know, there must be also--- The Governor has emphasized respect for the Senate, the Committee and procedures of law and so forth. But two days down the line he says "Oh I am not ready again."

Mr. Wilfred Nyamu: Mr. Chairman, Sir, you will bear me out. In the course of proceedings, even before courts, there comes a time when one raises issues as we have raised, as a preliminary matter to be determined before commencement of any proceedings.

Basically, by asking for time within which to respond, the Governor's response will not be limited to matters of evidence. It can also extend to matters touching on preliminary issues as raised on his behalf, when I stood up.

The Vice Chairperson (Sen. Murkomen): Lastly, Mr. Nyamu, we all practise in the courts, but I have never been in a situation where someone tells the court, "you are not going to determine my issues now, I am out." You know very well on matters of jurisdiction, preliminary objections, the courts can say you address it now or address it as part of the substantive submissions prior to its final ruling.

I will be observing to see how you take it from there, but it will be interesting to know that.

Sen. Orenge: Mr. Nyamu, just briefly; you filed a response on 10th May, 2014 in answer to the invitation to appear before this Committee.

Mr. Wilfred Nyamu: Correct, Senator Orengo.

Sen. Orengo: In that response, I am just looking at it from page 8 to the last page. You have addressed the Committee on specific allegations. You spent five pages in addressing those specific allegations. Is that correct?

Mr. Wilfred Nyamu: Sen. James Orengo, if you look at the wording used in that response, we have indicated that---

Sen. Orengo: No, Mr. Nyamu. Let us not argue. I just want to understand the documents you have on record for the purpose of this Committee. You have addressed the Committee and therefore, the Senate on the issue of specific allegations raised; be it on the issue of Maize or the stadium. You have addressed them in your response.

Mr. Wilfred Nyamu: These are the issues we are going to address ourselves to in the Court of Appeal; as this response would show not before---

Sen. Orengo: No. No! You know, this is the answer. In fact, if I look at this document, it reads:

“In the matter of the Special Committee on the proposed removal of the Governor of Embu County, in the matter of invitation to appear before the Committee---”

That is what your document is talking about. On page six, on the specific allegations and in particular on the allegation of procurement of maize, the hon. Martin Wambora, will seek to persuade the Court of Appeal on the allegation without any foundation for the following reasons---

Mr. Wilfred Nyamu: And this is to the Senate, not to the court. I would urge the Special Committee to read that together with paragraph 5.

Sen. Orengo: Yes. But in a nutshell, what I am saying is that, do you want us to look at this response or not?

Mr. Wilfred Nyamu: As I had stated earlier, the hon. Governor does not expect to get a fair hearing before this Committee. This is the reason why he cannot submit himself any further before this Committee. The matters as responded to were on the basis of what is before the Court of Appeal for consideration.

Sen. Lesuuda: Hon. Chairperson, just to pick on what Sen. James Orengo has said; Mr. Nyamu, do we take it that you want to withdraw what you have filed with us here so that we do not use it when we are looking at this matter?

Mr. Wilfred Nyamu: When you look at that document as tailored, that is the response we have filed and actually you will realize that what we have raised there is what we

shall seek to convince the Court of Appeal, on the issues before this Committee and all that. But it is not *per se* a response to the issues. Therefore, we have also indicated that we are asking this Committee to look at one of the paragraphs here. Those are some of the issues that this committee ought to have deliberated upon. Paragraph 14 asks this Committee to recuse itself. Basically, we have not addressed ourselves to anything that is not in this particular document. The issue of recusal is in this document which we are not withdrawing. Therefore, we are not withdrawing this response. We take it that the Committee has the discretion to determine issues in whichever manner it may, with due respect.

The Chairperson (Sen. (Dr.) Khalwale): Just to make it clear to you, you said that you are under instructions. Therefore, I would like to send you to your client. If you are withdrawing, tell him that these proceedings are so important to the people of Embu and Kenyans. As we proceed, should he change his mind and want to join us later on, we have a lot of time and we want to dispense nothing but justice.

The second announcement I want to make to you and which you should pass over to him is that this Committee, by virtue of a *Kenya Gazette* Notice, is expected to table its report on Tuesday, 13th May, 2014, at 9.00 a.m.

If this Committee finds that the charges have been substantiated, pursuant to Standing Order 68(4)(b), then the Governor shall have the right to be heard, again at that sitting. Please, inform him to be able to make a decision to attend, should that time come. Otherwise, thank you so much.

The issue of our recusal as a Committee should not worry you at all. Maybe, that is what we are going to do. If it is what we are going to do, we will not tell you. We are bound by the Standing Orders to report to plenary. It is within our report that we shall be then reporting to the plenary that, that is the decision we have made. If I were in your shoes, I would dispense and use all my energies to convince us so that we see the need for us to do exactly what you want. But apparently, you have decided not to persuade us, we will then listen to the Embu County Assembly and put our minds to the points that you have raised, in very good faith.

I am glad these things are proceeding live. Therefore, wherever you will be in the office, you will see us go on without any prejudice whatsoever.

Mr. Wilfred Nyamu: Mr. Chairman, we appreciate. But on the same breath, we ask the Committee not to treat this as a withdrawal but response to invitation. We have responded to the invitation as far as we were to go. That is the extent to which we wanted to move in terms of response to the invitation, rather than stay away and not state what we thought as a party to these proceedings.

The Chairperson (Sen. (Dr.) Khalwale): Thank you very much. Let us now hear from the County Assembly of Embu

Counsel, you may proceed.

Mr. Charles Njenga: Thank you, Mr. Chairman. On behalf of the County Assembly of Embu for whom I continue acting, my names are Charles Njenga. It is our submission, hon. Members that the charges as framed by the County Assembly of Embu and as provided and set out in the bundle of documents that are now with the Committee, constitute gross violations of the Constitution and the particular laws that have been cited.

I wish to make a comment first of all on the issue of the nexus of these charges and the particulars, and the Governor of Embu County that is, hon. Martin Nyagah Wambora. I begin with Article 179 of the Constitution which provides for county executive committees and particular reference is made to sub-section 4 that constitutes the county governor and the deputy governor as the chief executive and the deputy chief executive of the county. My reference to the county in this regard is the county as a procuring entity and as an entity of administration within the Republic of Kenya. I also wish to make a comment and a reference to sub-section 6 of Article 179 that provides that members of a county executive committee are accountable to the county governor for the performance of their functions and exercise of the powers so that by dint of Article 179, the county governor is enjoined to be the repository of all executive power within a county and anybody and any officer who exercises certain functions and powers within the structure of a county executive reports directly to the governor.

Having said that, as a background to the charges, I also wish to make reference to Article 227 of the Constitution, sub-section 1 and this is in specific reference to procurement of public goods and services. The Constitution provides that 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. I am inviting the consideration of this Committee in its evaluation of this particular provision to consider that a county is a public entity within the contemplation of Article 227(1), so that when a county is procuring for goods or services, it is expected by the law and the Constitution to do so in accordance with the system that is fair, equitable, transparent, competitive and cost effective. The obligation to ensure compliance with Section 227(1) of the Constitution, in our submission and it is our case that, that lies with the county governor of any county. I will urge that you read Articles 227 and 179 (4) and (6) and I will also refer to Article 73 of the Constitution. Article 73, on Chapter Six of the Constitution provides at sub Article 1(a) as follows:-

“Authority assigned to a State officer-

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

(i) is consistent with the purposes and objects to this constitution;

(iv) promotes public confidence in the integrity of the office.”

The context in which I refer and rely on Article 73 is in reference to the position of a county governor within a county set up. The county governor is the leader of a county,

the chief executive of a county and at that position he is bestowed by the Constitution a public trust. A public trust in the context of this Constitution becomes a constitutional imperative that is enforceable as against any State officer who is seized of it.

Having evaluated those three provisions, I wish now to refer to the Public Procurement and Disposal Act of 2005 and that forms the basis of the first charge; that is gross violation of the Public Procurement and Disposal Act, 2005. My first reference to this particular statute is to Section 27 of that Act which provides for the responsibility for complying with the Act. Who is responsible within the anticipation of this Act for compliance with procurement regulations and rules? To whom can liability accrue when this Act is not complied with strictly? Who can be questioned; to whom can we direct questions when we have reason to believe that there has not been compliance with Public Procurement and Disposal Act? It provides for responsibility at various levels.

The Act provides that each employee of a public entity, each member of a board or a committee of the public entity shall ensure within the areas of responsibility of the employee or member that this Act together with the regulations and any directions of the Authority, are complied with. I emphasize this particular provision because it removes the excuse from a particular member that it was not him. This provision enjoins everybody who participates in the matters of governance, assignment of resources, in the matter of application of resources within a public entity to ensure that within their areas of responsibility; within their sphere of influence; within the radius of their power that strict compliance is made with the Public Procurement and Disposal Act, the regulations and any directions of the Authority created under this Act.

I pose that question with regard to Section 30(3)(f) of the County Governments Act. Briefly, this entire section provides for the functions and responsibility of a county governor. I am sure the Committee will have occasion to go through it. Sub-section 3(f) provides that in performing the functions under Sub-section 2, the Governor shall - and I emphasize "shall" - be accountable for the management and use of the county resources so that it becomes a statutory responsibility bestowed upon him or her to be accountable for all the resources within a county. The Governor ought to be accountable for the way and the manner in which every single shilling available to a county is applied. The Governor cannot divorce himself from the responsibility of accounting for all the resources available to a county. This includes the devolved funds that are made available to the county from the Central Government together with all such other resources that may accrue to a county from other sources. There is no distinction.

A Governor who is the Chief Executive or the overall head, statutorily has a duty to account. It is not a favour or good will. The moment a person submits himself to an election process and is determined to become a governor of any county, then he has to be ready to account to the Senate through its various Committees, instruments and to the entire Republic over the management. "Management" is a very functional word. It basically means controls applied to the use of resources; reporting mechanisms; priority; prudence and all those functions that apply to good governance within the context of application of county resources.

I contextualize Section 27(3) of the Public Procurement and Disposal Act with that accountability function that, as I have stated, never leaves the Office of the Governor. A proper and true construction of Section 27(3) of this Act that enjoins every employee, each member of a board or a committee, and “committee” here includes the Executive Committee within the county as provided for under Article 179 which a Governor by law chairs, within the area of responsibility of that particular employee or member to ensure that the Public Procurement and Disposal Act is complied with. On behalf of the County Assembly of Embu, we submit that by a true import of this particular provision, enjoins the Governor at his area of responsibility.

What is his area of responsibility? The area of responsibility of a Governor is overall co-ordination, oversight, direction and overall confirmation of compliance and above all, a keen role to ensure that the County Executives, Chief Officers, all persons who exercise executive power and who interact with the resources of a county should comply with this Act. The Governor has, at that level or area of responsibility, a statutory duty to ensure that the Public Procurement and Disposal Act is strictly applied within the county.

The case of the County Assembly of Embu is that in failing to ensure compliance; in failing to strictly enforce, demand and supervise compliance with the Public Procurement and Disposal Act and the regulations made there under, the Governor was in express breach of the Public Procurement and Disposal Act. What does this Act generally provide for?

The Act provides for the manner in which procurement within a county should be made. Procurement should be viewed not just as an academic function, but as an important area within the consideration of the discourse of how resources within a county are applied. If a county determines to invest, purchase or buy, it is using funds that are available to that county. Those are funds that should help improve the lot and the welfare of everybody within the county. That is why the Constitution and statute have extensively and deliberately provided for strict procedures within the department or the discipline of procurement to ensure that procurement is not used by State officers or persons exercising executive power to disenfranchise an entire county.

When the Committee evaluates the documents available to it and founding basis of the charge against the Governor in respect to gross violation of the Public Procurement and Disposal Act, it will find that there has been no compliance at all within the County of Embu with these provisions of the Act. One of the provisions that have manifestly been breached is the requirement within the county structure to have tender committees. Tender committees are provided for under the Public Procurement and Disposal Act as particular entities through which procurement should be done so that there is strict compliance with the provisions of this Act. The Statute provides at length as to the mode of constitution of these tender committees and the rules that guide them in their functions of procurement.

Now I am making reference to the Public Procurement and Disposal Act and the County Government Regulations of 2013. These are regulations that are made under the Public Procurement and Disposal Act. Sub-section 3 which should be Rule No.3 state that there shall be applicable procurement and asset disposal by public entities within a county.

If you look at the schedule provided under those regulations, you will find that it provides for, first of all, the types of committees that should exist within a county and the manner in which members of those committees should be appointed. Material to note with reference to the charges before this Committee is that all members of a tender committee should be appointed in writing. That is a statutory obligation. The regulations and the schedule state in respect to the county government tender committee that the chairperson should be an officer appointed in writing by the Secretary of the county. For the Deputy, the appointment should be done in writing by the Chief Secretary.

The emphasis is that the evidence and the proof of appointment of members to any tender committee would be appointment letters. If I wanted to find out whether within any public entity, not restricting myself to Embu County, there are tender committees. The documents I would require from the county or from that entity would be appointment letters of the members of that committee. Without that or in the absence of such letters, then I am allowed in law to conclude and safely so that there does not exist a tender committee in such a public entity.

We submit that with respect to the County of Embu, and after issues were raised with regard to procurement, the county government and the county executive were asked to avail the names and the letters to demonstrate that, indeed, there were tender committees. Those were inquiries that were made to the Governor and to the officers under the Governor. To the present day or to this date as we stand, none have ever been provided. I refer---

The Chairperson (Sen. (Dr.) Khalwale): Order, counsel! If after failing to give you copies of those appointment letters, they had copies of minutes indicating the membership, would that constitute evidence of the existence of such a committee?

Mr. Charles Njenga: Mr. Chairman, Sir, it would not in law. This is because in law, we have to show. I am looking at the Act. We have to show that a member was appointed in writing by the appointing authority. In the absence of that, there will be on the face of it irregularity. That is the law as it is.

The Chairperson (Sen. (Dr.) Khalwale): I wanted that record cleared.

Mr. Charles Njenga: Hon. Members, you will see a report of the Embu County Public Service Board which is marked CAENo.6 from the bundle of documents that form---

The Chairperson (Sen. (Dr.) Khalwale): Just hold on, we go there.

Mr. Charles Njenga: Mr. Chairman, Sir, at the bottom of the page, it is No.178. It is marked in bold.

The Chairperson (Sen. (Dr.) Khalwale): We are there. You may proceed.

Mr. Charles Njenga: Very well, Mr. Chairman, Sir! To contextualize this particular report, you will have to go through the reports of two committees of the Assembly which I will refer to shortly. They are marked CAE1 and CAE2. They were recommendations by the County Assembly Committees investigating the two matters of the maize and the Embu Stadium that Members of the Tender Committee that participated in those two matters; action be taken against them through the County Public Service Board. So, the Secretary was writing this particular report to the Clerk for the attention of the County Assembly with regard to demonstrating whether the Board had, indeed, taken action against the members of the tender committee or the persons who had participated in the two questioned tenders. In the next page, there is a minute dated 14th January, 2014.

Mr. Chairman, Sir, when the board met, it made its request to the county secretary to provide the names of the persons who constitute the tender committees. The findings of the board and which have not been disputed in any document availed by the Governor or any other person, was that (A): It was not possible to take any action on any person without ascertaining the availability of any evidence of appointment of the officers in line with the Public Procurement and Disposal Act and the regulations of 2013 or any other procurement law and the category in which each of the affected staff is since the disciplinary measures will differ. The availability of evidence of appointments of the officers would be in the files of the particular persons where there would be a letter saying that: This person has been appointed to this tender committee.

As you read that particular report, I would also like to look at the document on page 198; bottom page numbers. It is one of the last documents and minute No.6 which is on page 200, where the county secretary or the board was appearing before the County Assembly Implementation Committee to present the report. You will see the particular questions framed by the Members which include: Was there a tender committee and who are the members? Are they the ones who attended the procurement procedures on the maize and the face lifting of the Embu Stadium? Again, and this is material, the response that he gave was that he was given four personal files for staff who were supposed to have formed the tender committed.

I am looking at the last paragraph of page 200, bottom numbers. It starts with: "In response---"; and it goes on to the next page. He says that he also had four personal files for staff who were supposed to have formed the tender committed. He had four names of staff who were supposed to have formed the tender committee that participated in the matter of the procurement with regard to the maize and the face lifting of the Embu Stadium. But these four personal files, in the findings of the County Public Service, he said that yet, they did not have appointment letters. This is the evidence he was looking for. These are the people that you have told us that are the members of these tender committees. He took their files. The files were availed to them and looked at them.

However, there was no evidence in those files that those persons had ever been appointed to any tender committee.

It proceeds to 2B and this is a reply by the Secretary of the County Public Service Board. The four files of members of staff which were forwarded to his office as tender committee members did not have appointment letters. These finding of facts by this committee in these minutes have been made available to the Governor, the county secretary and everyone. However, to this present date, no one has ever availed letters of appointment of any person to attend a committee of Embu County. It is our submissions that in the absence of those letters, the Embu County Assembly, guided by the law, evaluating the strict provisions of these regulations and the Act, had a clear basis, as you will see in the findings of the special committee that was investigation the two matters - that the county assembly had clear basis in law of concluding that, indeed, with respect to the County Executive of Embu, there were no tender committees.

Sen. Orengo: Mr. Chairman, Sir, in 2A, on that page that you are reading, on 202, in the response he says that there was a tender committee appointed by the county secretary and its membership did include the chief officers which was procedural. He seems to be saying two things at the same time that they were appointed, the appointment was procedural, but it is only the letters which not have been found in the files.

Mr. Charles Njenga: Mr. Chairman, Sir, it has always been their position, the county secretary and the governor, that there were tender committees. They have maintained that position from the time this matter was being investigated by the county assembly and by the committees of the county assembly. That is why the initial report was that, indeed, there are tender committees. But that report is empty without evidence as anticipated by the law, of the members of these tender committees. The Public Service Board, so as to report to the county assembly, required specifically---

Sen. Orengo: Mr. Chairman, Sir, I just want this to be clear. What do you say to that particular report? We are just looking at these documents and there is no additional evidence. What he is saying in this letter or in these proceedings, is that there was actually a tender committee appointed by the county secretary and its membership did include the chief officers, which was procedural. What we are quibbling about is whether or not the letters of appointment were in existence. If they were, you are saying that they should have been in the personal files. I am saying this because these are very serious charges. When we have evidence which is exculpatory against the governor, it should be taken in his favour that a Committee of the county assembly, when examining this matter was faced with this report that there was actually a tender committee and appointed by the county secretary. You are trying to tell us that just because there were no letters of appointment in the files, there was breach of the requirements of the law. You are not even saying that there was no appointment. You are just saying there were no letters in the files.

The Vice Chairperson (Sen. Murkomen): Just for clarity, this report is looking at what period or at what point in time? Was it 2013 up to which month? These violations that

have been committed or alleged to have been committed by the county government and the governor were at what time?

Mr. Charles Njenga: Mr. Chairman, Sir, this was at the time when these issues arose. Before I lose the first question, the county assembly is not saying that there was a tender committee, but there were no appointment letters. We are saying that there were no tender committees. The evidence of appointment of any person into such a committee is non-existent, so that there will be no basis apart from a mere declaration or response of saying, yes, there is a tender committee. A committee is a constitutive body which has several persons. The law provides the persons who should be in that particular committee.

The Chairperson (Sen. (Dr.) Khalwale): Before you move on, confirm if what I understand you to mean it the truth? When asked whether there was a tender committee, he said there was a tender committee?

Mr. Charles Njenga: Yes, Mr. Chairman, Sir.

The Chairperson (Sen. (Dr.) Khalwale): But when challenged to prove the existence of the tender committee by way of appointment letters, he failed to do so?

Mr. Charles Njenga: Perfect, Mr. Chairman, Sir.

The Chairperson (Sen. (Dr.) Khalwale): Is that what you mean?

Mr. Charles Njenga: That is the position.

The Chairperson (Sen. (Dr.) Khalwale): Thank you.

Mr. Charles Njenga: With respect to the time when these inquiries were being made, I refer the Committee to CAE1. This is a report of the Joint Committee of Agriculture, Livestock, Fisheries and Co-operatives and the Committee on Public Accounts and Investments on maize seeds procurement by the county.

Sen. Orenge: Mr. Chairman, Sir, before you leave this matter, the assembly had this person by the name of secretary to the Public Service Board. I am sure he was summoned because he was providing useful information. Did this matter go any further other than establishing from the secretary to the Public Service Board as to the existence or non-existence? Did it stop there? I am raising this because you have also supplied to us the judgement in the case. There are certain things that have been said in that judgement which I have in my mind that things of this nature, you needed to go further than what you are putting before us that simply because an Executive Board member appeared before the assembly and you draw the conclusion that there is no such appointment letters. Was this matter taken any further or was the governor confronted by a letter or otherwise or the county secretary, was it drawn to his attention? You may have a situation where somebody is trying to pass the buck and he says: "Yes, they were appointed." You

know, a secretary to the County Public Service Board is not a functionally of any lower substance. This is somebody who should know better and when he says, when confronted, that there was a tender committee appointed by the county secretary, he is not talking about the governor. He is talking about the county secretary. You know, the governor is the one who is in trial. So, what we have before us does not point to the governor at all. What do you have to say to these two things? One, he says that there was a county committee appointed by the county secretary. Was the county secretary confronted to determine whether or not that was true; if at all, there were letters to that effect?

Mr. Charles Njenga: Mr. Chairman, Sir, that is why I started by setting out the role of the governor with respect to the law that applies to procurement in the county. You will see that from these primary documents, recommendations were made. They are in the report of the Joint Committee of the County Assembly of Embu. Those recommendations were then forwarded for action to the governor and to the Ethics and Anti-Corruption Commission (EACC) for investigation. There was a requirement made by way of the resolution of the county assembly of Embu, based on these reports, that investigation to be carried out properly into those matters, including how procurement could be done without a properly constituted tender committee; that the county secretary steps aside to allow and facilitate these particular issues. It is the action or inaction of the governor that precipitated the very resolution that is before this Committee.

In the anticipation of the county assembly of Embu, faced with these particular documents, findings and recommendations, there should have been, at the very least, an action taken by the governor to, first of all, confirm the factual position and take action. You will see from the same bundle that the action that the governor took was filing a pleading in court to support the county secretary's case which demanded and sought to bar and prevent the EACC from investigating the matter and also to seek to stay the resolutions of the county assembly of Embu. He never took out one single action to confirm to the county assembly where he has audience, even under the Standing Orders that, in the matter of tender committees, I have investigated the reports that you have made and I have found out that these are the members. We challenged him and even in the judgement that the Senator is referring to, in the fullness of time, when you have occasion to go through it, on the question of the conduct of the county secretary and the recommendations made by the county assembly of Embu, the court found that the county secretary's actions and her application in court for judicial review had no merit. The court found that the county assembly had taken out the matter in the procedure and in the manner anticipated in its very procedures.

In making that finding, so that all these matters can be properly contextualized, you have to evaluate the two reports in their fullness; that is, the persons invited to appear before these committees, evidence given before these committees and then the recommendations. If I may refer first of all to CAE1, and this is the Committee on Agriculture, Livestock, Fisheries, on page 8---

Sen. (Prof.) Lesan: Mr. Chairman, Sir, just before he moves ahead, let me raise a small matter with the dates. This issue is being canvassed as matters arising in the meeting held on 16th January. This is matters arising in a meeting which was held on 13th January, 2013. The meeting is being held in 2014. However, the matters being discussed were raised in 2013. I find this a whole year earlier. I do not know whether this is as mistake or it is the order of the things that happened.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, what do you have to say about that?

Sen. (Prof.) Lesan: Mr. Chairman, Sir, this page 199 of the same document that we are discussing on matters arising. The meeting was held in 2014. However, the issues being discussed were raised in 2013; a whole year after. It could just be a mistake in dates. If it is, then a lot of time has passed in between and it looks like it is an old issue being discussed.

Mr. Charles Njenga: Mr. Chairman, Sir, I can confirm that this is a typo on the year. It is actually January, 2014.

Sen. Orengo: But surely, this is your document and when you present it to us in the form it is, you cannot be giving evidence on this.

Mr. Charles Njenga: That is a typo, Mr. Chairman, Sir.

Sen. Orengo: That will be very prejudicial for you when my brother is confronting you with this, then he will say that it is meant to be 2014. Then those minutes are not here.

The Chairperson (Sen. (Dr.) Khalwale): Hon. Members, let us listen to him. What is your response to that question?

Mr. Charles Njenga: On the question of the date?

The Chairperson (Sen. (Dr.) Khalwale): Yes.

Mr. Charles Njenga: Mr. Chairman, Sir, I have stated and reiterated that the reference to 2013 is a typo. It is purely a typographical mistake that can appear in any document. It is supposed to be 13th January, 2014.

The Vice Chairperson (Sen. Murkomen): Mr. Chairman, Sir, it will help if we have the previous minutes. It may not be now, but at least, you should be able to give a commitment as to which minutes were being confirmed.

Mr. Charles Njenga: Mr. Chairman, Sir, that is okay.

Sen. Orengo: Mr. Chairman, Sir, look at the minutes. They are signed by Alice Mwita. I thought normally they should have been signed by the Chairman. What is being

confirmed here is just the preparation. But as far as I am concerned, they should have been signed by the Chairman of the committee.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, the document we have is a report of the Committee of the House. So, if you can ask for time so that you get the actual minutes about what was taking place within the Committee then that will concur with what you are saying. We want documentary evidence. This is a report. You know a report might have been written several months later, but the minutes will indicate the actual time when this took place.

Mr. Charles Njenga: Mr. Chairman, Sir, the minutes of the previous meeting---

The Vice Chairperson (Sen. Murkomen): Is it in your practice that the Clerk signs the minutes? I can see here First Clerk Assistant, Alice Mwita. She is the one who signed the minutes.

Sen. Orengo: Mr. Chairman, Sir, at least, you can also tell us whether or not, generally, in the County Assembly of Embu, it is the Chairman of Committees who sign minutes, or the Clerks are allowed to sign them. If that is not the case then even these minutes are not properly before us.

The Vice Chairperson (Sen. Murkomen): And also, at what instance are minutes signed? I thought minutes are signed when they are confirmed.

Mr. Charles Njenga: Mr. Chairman, Sir, that is a response we shall give. My clients are here and so we shall address those specific concerns on who signs minutes within the county assembly. We will also address the issues raised on the minutes of the previous meeting that now led to these particular minutes that have been annexed to the bundle.

Sen. Orengo: Mr. Chairman, Sir, we can look at this document, but its evidential value, I think, is almost zero.

Mr. Charles Njenga: Mr. Chairman, Sir, our submission is that the minutes are properly before this Committee. They have been signed. We can provide the original if the question of authenticity arises.

Sen. Orengo: Mr. Chairman, Sir, are you saying seriously, on behalf of your clients, that minutes of a committee of a county assembly can be signed by a Clerk Assistant? Do you want to take instructions from your clients so that we have an answer to this? This is an important point because you are relying on it.

The Vice Chairperson (Sen. Murkomen): You can consult.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, you can go where your client is and consult.

Mr. Charles Njenga: Very well, Mr. Chairman, Sir. Give me five minutes.

The Chairperson (Sen. (Dr.) Khalwale): Do you need more time to consult so that we make a small break?

Mr. Charles Njenga: Sorry, Mr. Chairman, Sir. It will not take more than two minutes.

(Consultations)

The Chairperson (Sen. (Dr.) Khalwale): Hon. Members, it looks like Counsel needs more time to consult. This is a very serious matter and we cannot rush over it. We will adjourn for the next one hour during which time you will consult and Members can have lunch. We will then come back.

It is 1.00 p.m. now. We reconvene at 2.00 p.m.

(The Special Committee adjourned temporarily at 1.02 p.m.)

(The Special Committee resumed at 2.15 p.m.)

The Chairperson (Sen. (Dr.) Khalwale): Order, Members. I would like to call this meeting to order. We stopped at a point where the counsel for the County Assembly of Embu was leading us in his evidence. Could you, please, resume from where you left?

Mr. Charles Njenga: Mr. Chairman, we do confirm that the minutes of 16th January, 2014, which have been annexed to the bundle on page 198 going through to 201 as signed by the First Clerk Assistant who prepared them, constitute the last record of the meeting of that particular committee, that is, the County Assembly of Embu Implementation Committee. They were prepared by Alice Mwita who has signed them.

I do confirm that this is a true record of those minutes. With reference to who signed them, I have confirmed that it is the person who prepared the minutes who has signed them. That is what the County Assembly of Embu committees, in their preparation of records, do. These minutes, upon confirmation are then in the next meeting signed by the Chairman and the Secretary. With regard to the record of this County Assembly of Embu Implementation Committee that is the last meeting. Those are the official records in that file.

Sen. Orengo: So, these are unconfirmed minutes.

Mr. Charles Njenga: After 16th there has not been any---

Sen. Orengo: No, but they are unconfirmed minutes.

Mr. Charles Njenga: Yes, precisely. After 16th January, 2014, there has not been any subsequent meeting of this Implementation Committee in view of the many other things that---

Sen. Orengo: But would it not be good on a matter of this weight which is now being presented as evidence before us that this same matter or materials were put before the County Assembly following confirmation? I am not saying that this is fatal, but there is something about the law of meetings. For instance, how you keep minutes, how they should be confirmed and who does it.

Mr. Charles Njenga: Mr. Chairman, Sir, I stand guided, However, as I was saying, most of these committees, for many other reasons, after 16th January, 2014, have not been able to meet. That is why there has not been a meeting to confirm these particular minutes. In the same breath, I would like to say this as a matter of record.

The entire bundle was forwarded to the Governor as it is with a letter. That is not disputed. In fact, he has made a comment on all these documents in his response and confirmed that he has received them. He has not taken issue with regard to authenticity of these documents.

Sen. Orengo: Mr. Chairman, Sir, what about the previous minutes for 13th January, 2013? You know there was a meeting on 13th January if we assume that meeting was in 2014. There was a meeting on 13th January and within three days you had another meeting where there was confirmation of minutes of 13th January, 2013 and then matters arising were discussed. This matter came up under Matters Arising. So, the substance of this matter was in the previous minutes. On this occasion it was just coming as a matter arising. So, it would give me the impression that the substantive meeting over this issue was on 13th January, 2013. It would appear that this meeting was just called to confirm the minutes, consider the matters arising and then forward it to us. If you look at the chain of events it looks like all these things were being done with an objective in mind. Since the objective had been achieved, this Committee has not met, as you said, up to now. That is three months down the line, there has not been any other meeting.

Mr. Charles Njenga: As a matter of record, we can supply and we undertake to supply the minutes of the previous meeting. That is an official record. I will liaise with my clients and then avail it to the Committee so that when making deliberations and evaluations of the content and the import of all these documents, we can make reference to the documents before the Committee.

Sen. (Prof.) Lesan: Mr. Chairman, Sir, my colleague Senator has raised the issue of the minutes of 13th January, 2013. This is significant because it can actually sort out what we seek to understand about matters arising. To assist him, though, we want to agree that this date of 2013 is wrong because this date falls on a Sunday. So, I am sure they will recognize that if they look at their records.

(Laughter)

Ours is a special meeting; I would not expect them to meet on Sunday in Embu. If we can actually have the minutes which, probably, would read 13th January, 2014 which is a Monday, then I am likely to accept that, but not as it is now.

Mr. Charles Njenga: Very well. That is something that we owe to this Committee. We shall supply a copy of these minutes. We shall send somebody to get the record and we shall avail it to the Committee.

The Chairperson (Sen. (Dr.) Khalwale): You may now proceed.

Mr. Charles Njenga: Mr. Chairman, Sir, in reference to that particular proposition that we have referred to, that is, the absence of tender committees, the bearing on the factual issues that were raised by the County Assembly of Embu bears out at the report of the Joint Committee on Agriculture, Livestock, Fisheries, and Co-operatives. This report is designated as CAE1 on Page 8 and it goes up to page 38. The basis of this particular investigation, as you can see, from the introduction thereof is immediately after the summary of the charges as we start out on the document. I am speaking to this document with regard to the charges of gross violation of the Public Procurement and Disposal Act, with regard to procurement of maize seeds.

This is on page 8, at the beginning of the document, immediately after the summary of the charges. I invite you to evaluate this Report and the issues in here with regard to maize seeds that were procured by the Office of the Governor of the County of Embu, which were subsequently supplied to farmers within the county, but which failed to germinate to the required standards or threshold. This, therefore, occasioned massive losses to the persons who planted them, who are basically subsistence farmers within the County of Embu.

That issue was raised by the members of the public through their representatives in the Assembly, and a report of investigations was demanded. Of importance to note on page 12 of that Report on the investigations is that there were summons to the concerned Executives, the CEC member in charge of Agriculture, the CEC member in charge of Finance, the County Secretary and various documents were evaluated. The material document which I wish to refer the Committee to and which was availed to the Committee investigating the matter is on page 26 of the Report and this is the document that procured those particular seeds.

It is a letter dated 25th October, 2013, issued from the Office of the Governor, Embu County Government and signed by the County Secretary and it authorizes the purchase of particular seeds such as green grams and cow peas, together with maize. With regard to maize, the Committee will also want to look at the Report that was provided by the CEC, Agriculture; that report features from page 30 all the way to page 38. It is a Report of the Executive in charge of Agriculture and it has a very comprehensive introduction. A point to note on the introduction - that is on page 31, the second paragraph - is that it confirms that the official launch of the seed distribution was actually presided over by the Governor of Embu County on Friday, 1st November, 2013 at Ogweris Chief's Camp. It

also confirms that the maize was distributed to other centers in all the wards in each sub-county.

Material to my submission is Appendix I on page 37 of that Report and these are technical observations by the CEC member from a research conducted pursuant to the complaints that those particular species of maize, referred in that observation as DK 8031 has either not germinated or is germinating very poorly - that is at less than 20 per cent of the total seed that was planted. The CEC member also confirms on the second paragraph that where it has germinated, it has very weak shoots. That, by implication, would mean that there will be an unlikelihood of harvest from such seeds.

The question that poses for this Committee to consider is the basis and what informed the procurement of that particular seed variety? From the Report of the CEC member in charge of Agriculture, I will just wish to refer the Committee to the procurement plan that has been annexed on page 38, where it states seed requisition by variety. The CEC member for Agriculture confirms that having considered other factors including the weather forecast, which had predicated late onset and short rainy period, he had presented a procurement plan and it had varieties of seeds. You will see that for maize, the requirement is for a variety stated there as KDV1 or KDV6, for Mbeere South. What you will note from the entire procurement plan was that there was never reference or requisition whatsoever for the variety that was later on procured, which is now DK8031, and which was procured as demonstrated by way of this letter dated 25th October, 2013 from the Office of the Governor and by the County Secretary.

The Chairperson (Sen. (Dr.) Khalwale): Order Counsel! Yes Senator Kittony.

Sen. Kittony: Mr. Chairman, Sir, I think we are really deliberating on this issue of maize, which is very clear that there were some faults. I would like us to really find out if there were any complaints from the mentioned farmers. Is there anything that they wrote to show us there was that problem, or it is just notes that we are receiving? That is because if there were, then, as a farmer on the ground, there should be a complaint. So, how will we know that there was this problem?

The Chairperson (Sen. (Dr.) Khalwale): Yes, Counsel, go ahead. You heard the question.

Mr. Charles Njenga: I understand the question to be whether there was a complaint.

The Chairperson (Sen. (Dr.) Khalwale): Yes.

Mr. Charles Njenga: Yes, there were, indeed, complaints and that is why I started by setting out the basis of this investigation by the Committee. This matter was raised in the House on 31st December, 2013 by a Member, having received complaints from his constituents and raised it on the floor of the House for deliberation. The House subsequently constituted that particular Committee to investigate the matter.

There is also a letter on paged 47 of the Report. That is a letter by the Chairperson of the Committee of Finance and Economic Planning, and two things are in that letter by reference. It is not paragraphed but there is a sentence that starts from: "When the office learnt that the maize failed to germinate, through the media and public places---"That shows that there was discussion in public places by the farmers or by the public and even in the media. Those were issues that within the context of Embu, were in the public domain and the conversation was such that it raised concerns even to the Chairperson of the Committee on Finance and Economic Planning. There is even the issue raised in this letter. I think it is the fourth line from the bottom. There was consideration of compensation to the farmers of their losses. But in the writing of this particular Executive, the office found it prudent to await the Kenya Plant Health Inspectorate Services (KEPHIS) Report because of the issue of compensation. So, there was admission by the Executive that there was a loss to the public and to the farmers. But the manner in which that was to be dealt with had not been conclusively addressed or agreed. But there was clear acceptance that, indeed, there was a loss to the public. I also want to refer the Committee - and I will not refer to it here - to the Governor's response on this particular issue. He admits that, yes, there was an irregularity. There was a loss. But his response is that, that should not be visited upon the Office of the Governor. It should only be considered---

The Vice Chairperson (Sen. Murkomen): Sorry, Chair! You said where is the Governor responding to that? Is it in the bundle?

Mr. Charles Njenga: There is a response by the Governor on record and No.6 addresses itself to that issue. It says that failure of the seeds to germinate cannot be blamed on the Governor. That is his first line of response. I will do no more Chairman and Members than to ask the Committee to consider the totality of this Report and the response by the Governor; and find that there is no more than a mere denial of liability on his part, but an acknowledgement that, indeed, there was malfeasance in the procurement of those seeds.

Sen. Orengo: We have this question of seeds and, of course, we have not had an answer on the question of appointment or lack of appointment or when the tender was presented before the relevant Committee. But when this matter was before the Committee that you have just referred to - the Committee on Agriculture - it came up with the long Report here. It is the one beginning from page eight. The County Assembly of Embu Report of Joint Committee on Agriculture Livestock, Fisheries and Co-operatives and Committee on Public Accounts and Investments on Maize seeds procurement by the County Executive. I just want you to put in focus what this document tells us and what it is about. It is all about procurement of maize seeds.

Now, this is a Committee of Embu County Assembly that considered this matter in extension. Finally, they make their findings and observations on page 23 at the bottom and 25 at the top. On No.8, the Committee found out that the Public Procurement and Disposal Act guidelines and proceedings on procedures and procurement processes for any public entity were not followed to the letter. No. 9, it was established by the Committee that before the appointment of chief officers, the county secretary was the

accounting officer for all the departments. No.10, it was also established that procurement is a shared service and, therefore, the county secretary is directly answerable to any act of omission. So, the Committee prepared this document on 7th March right during the heat of this matter that has brought us here. Then you make recommendations on page 26 and I dare say even with the subsequent documents that we have looked at, there is no indication at all that your eyes are looking at the Governor. In fact, the focus of the county assembly was on the secretary. They do not talk about the Governor until we have this Motion of the county assembly. What do you say to that? Is there anything, other than the debate in the County Assembly why you say---?

The Chairperson (Sen. (Dr.) Khalwale): Order Member! Let Sen. James Orengo conclude then I will give you a chance to speak. Sen. James Orengo, can you conclude?

Sen. Orengo: Yeah. I am saying that your documents do not bear out the case you are making other than the proceedings before the resolution. The documentation that we have here shows that at no one point did the Assembly, before that debate or during its deliberations in Committee, the Governor was being held culpable. If the Governor was being held culpable, where does it come out in the document, other than by inference?

Mr. Charles Njenga: As I said and I will repeat that, this was the primary documentation. The County Assembly of Embu has undertaken investigations through its Committees. The reports have been adopted by the Assembly and the recommendations. One of the recommendations was that the county secretary, who is an appointee of the Governor and who reports directly to the Governor, should be interdicted to allow for investigations by the Ethics and Anti-Corruption Commission and until cleared, together with the Members of those Tender Committees that participated - which we are contending were not even in existence. That is the letter dated 7th of January 2014. It is to the Secretary, Ethics and Anti-Corruption Commission and to the Governor. It is at page17---

Sen. Orengo: I just want you to look at the charges. You know this is a very technical matter; the offences for which the Governor is being accused or charged: Violation of specific provisions in the law. I do not think this is a matter which we can make conclusions merely by inference. Therefore, I want you to persuade me that when you are talking about violation of the Public Procurement and Disposal Act and on account of the fact that you have shown me the judgment of the Court in Kerugoya as part of your material, how are you going to persuade me and the Committee that the Governor was, indeed, culpable; not holding him responsible on account of being the employer. That is because in my view, we must have specific violations of the Public Procurement and Disposal Act and regulations which you can point to me that these are specific charges we are making against the Governor and this is how he committed the offense.

Mr. Charles Njenga: We have set out Section 26(3)(c) of the Public Procurement and Disposal Act. The finding of the Court in Kerugoya was not that there has to be personal interaction with the matter on the person of the Governor for there to be a gross violation of any statute. That was not the finding of the Court. The Court simply enumerated what

in its definition or interpretation of Article 181 would constitute gross violation. We have brought the case that within the area of the responsibility of the Governor under the Public Procurement and Disposal Act, Section 26 - and we have shown that all those matters were brought to his notice - he failed to take action that would have ensured compliance with this particular statute. That is the nexus that the law requires for us to establish. At our closing submissions, we shall be extensive on what is the position of a Governor in matters accounting within a county set up. It shall be our case, as it is now, that to the extent that the Governor, having clear notice of these matters brought to him by way of recommendations, reports and documents, and having failed to show a single action on the face of clear irregularity, he cannot escape merely because he did not pen down his signature to a document; merely because he acted through executives. That shall be a case which we shall submit extensively. It is our submission that the documents with the Committee support that position.

Sen. Kittony: My concern is that if you look at the observations and compare the two, unless there was something I did not see even after the samples being there, it is still going there. When KEPHIS came in, it is the right person who should have assisted us on this issue because they are the people who sampled the maize seeds. The KEPHIS Report is not conclusive. It would have helped us if we got that Report from KEPHIS.

Sen. Wamatangi: I wanted to help out on the last point that was raised by Sen. Orenge on the involvement of the Governor other than by insinuation. I was looking at the Governor's own documents that he filed with us today on page 3, No.6, clause 3, where in his own admission, he says that as for the official launching and distribution of the maize by the Governor, before the confirmation of the minutes of the tender that had earlier approved the quotation, the launch had nothing to do with procurement. He is confirming that he launched the maize seeds himself. Is that not provable direct involvement?

Mr. Charles Njenga: On the issue of the KEPHIS Report, there is a letter by KEPHIS at page 190 addressed to the supplier of that maize referring to a complaint by the Embu Office, Director of Agriculture.

The Chairperson (Sen. (Dr.) Khalwale): We have seen it!

Mr. Charles Njenga: At paragraph 2 he makes that comment that the lots were sold to farmers by a company with full knowledge that the germination capacity was far below the national standard of 90 per cent and had been stamped "not for sale" as required by law. In fact, KEPHIS was asking the supplier to take full responsibility for their actions. We shall refer to that letter in our closing submissions.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, while you are still on maize, the KEPHIS letter is quite straightforward but there is something in his response where the Governor is saying in the documents he filed yesterday that there was inadequacy of rainfall. Was this something that was investigated during the inquiries?

Mr. Charles Njenga: If you look at the Report by CAC - and I recommend to this Committee to carefully go through the Report because all these things were raised. On the said requisition of the seed variety, the technical report was that it was in consideration of a weather forecast which predicted late onset and a short rainy period. All those factors had technically been appropriated in requesting the said specific seed variety. So, it was not an impromptu or off the cuff requisition. It was a clear thought out technical recommendation.

The Chairperson (Sen. (Dr.) Khalwale: Are you done with the rain?

Mr. Charles Njenga: Yes, I want to go to the letter that was done to the Governor to apply the recommendations because that is where---

The Vice Chairperson (Sen. Murkomen): As he goes to that letter, what Sen. Orengo was asking him and which I totally agree and even in relation to when he referred to the court case which he has put in the file, it was the question of the nexus? Yes, you can succeed in demonstrating that there was flouting of procurement rules and violation of all the legislation regulations and so forth. But what this Committee wants is to understand the proper link between that and the action or inaction of the Governor. That is because it can be proved that the CEC and everybody else were involved. But how did it end up being a Governor's responsibility or how did the buck stop with him? What was the link? That will help us. We have appreciated all these linkages you have given us but that is what we are asking. How does the Governor come in?

Mr. Charles Njenga: The County Assembly of Embu--- in this case with regard to nexus is that when a public officer is mandated and obligated in law to act in a certain way in the face of a situation, if he fails to so act, then that is complicity in the eyes of the law and it establishes a clear nexus between his inaction or action and the result. The result is the loss that was visited on the citizens. That is what I wish to show that whatever was discussed; whatever was resolved by the County Assembly was brought to the Governor for action. Here is a report that procurement was done wrongly. Here is evidence that the wrong maize was procured. Here is evidence that people are complaining. The question now should be: What did you do? There is no more nexus that can be established. If that can be the standard that we want to establish as a measure of governance in Kenya, that unless a Governor signs a document or signs an invoice or requisition saying "bring me maize", then he should never at all be questioned on that matter. We are saying that, as long as he has a statutory obligation to account for money; money used to buy that maize was money to the County. It was not the Governor's personal funds. To the extent that---

Sen. Orengo: Then what do you say to this? I have a letter here which they wrote to the Ethics and Anti-Corruption Commission (EACC) on 7th January, 2014 on page 179. It is referred to in the submissions and all that. At the bottom, you recount the problem and request implementation and then on page 180, you talk about procurement. This--- I am sorry, some of it is in relation with the stadium and at the end of it, you are saying by a copy of this letter, the Governor of Embu County and the Secretary of County Public Service Board are requested and required to facilitate the vacation of office in terms of

the resolutions of the County Assembly and Tender Committee. Again, there is some kind of admission that there was a Tender Committee because you are requiring vacation of office by the county secretary and the members of the tender committee. So, my question keeps on coming back. Where does the Governor come in?

The Vice Chairperson (Sen. Murkomen): Counsel, I understand the letter to say that the Governor should assist in ensuring that the County Secretary and the Tender Committee vacates office. Is that what the letter is all about?

Mr. Charles Njenga: This is a letter copied to the Governor and he has acknowledged that he received it even in his affidavit. What is not disputed and is common ground is that in the face of this letter and the recommendations, he did nothing. That is what we have a problem with. That, in itself, is evidence of complicity. The requirement and the mandate of a County Assembly to recommend the stepping aside of the Executive is well within the County Assembly's powers. When this recommendation - and we shall submit on that - was placed before the Governor, first of all, it was simultaneously made to the EACC. There is an affidavit in these documents sworn by the EACC showing the action they immediately took. In fact, they wrote to the County Secretary and demanded to see the procurement documents. There is a Report by the County Assembly, a constitutional commission well aware of its statutory duties and obligations. We have this complaint. We are not saying you are guilty but show us. That is the affidavit annexed at---

There is a response to the invitation filed by the County Assembly of Embu on 8th May and we have annexed that affidavit at page 55. It is an affidavit by an officer of the EACC called Japheth Mbaitandu filed in court where he explains that immediately he got that complaint--- It is an affidavit filed in the High Court, dubbed Miscellaneous Application No.17 of 2014. I refer to paragraph 89 of the dispositions of that investigator where first he confirms as a matter of fact that he received from the County Assembly of Embu the letter dated 7th which was requiring for investigations on the issue of the maize and the stadium. Particular material to note is on paragraph 9, which is an action. The following day, this officer is writing to the County Secretary. "I have received a complaint; give me more information and documents in relation to the transaction." This was on the 9th and he even sets out - there is an annexure at page 66 of the letter asking for the particular documents.

The question that we ask is: If this officer could act thus immediately, promptly and dutifully, what is the action taken by the Governor who was copied by way of the letter? The only action in this documents presented by the Governor is an affidavit filed in the same case which we have annexed. It is on record at page 185. This is where the Governor now files this affidavit in court and you will appreciate that even in the reading of the judgment in the petition--- This was an affidavit filed in support of the application by the County Secretary seeking to stop the investigations that EACC had initiated by way of that letter.

The affidavit is on page 185 of the main bundle. On paragraph 12 of that affidavit, the Governor accepts and concedes that he was served with this letter on 7th January. He had it and he cannot complain that he did not know that there were specific complaints raised.

His case, as you will see from that affidavit, is that the Ethics and Anti-Corruption Commission (EACC) should not investigate this matter. At paragraph 25, in fact, he desponds that the County Secretary will suffer harm if the orders against her - to stop an investigation - are not granted.

The Governor says that if we investigate the County Secretary, she will suffer irreparable harm – in an affidavit. That is why we are saying that the matter of nexus should be viewed in a very wide context and with a clear understanding of the placing and the position of the Office of the Governor in matters of accountability within the county.

It is our submission that the generality of these documents and the clear facts which are undisputed, the charge against the Governor in the matter of breach, gross violation of the Public Procurement and Disposal Act is established.

I reiterate Section 27(3) which has specifically been cited of the Public Procurement and Disposal Act that says: “Every state officer has an obligation to confirm and enforce compliance with this Act within the area of his responsibility.”

So, it is incumbent upon the Governor to show in the area of his responsibility and in the face of clear breaches what he did. Inaction of statutory obligation constitutes a violation of that statute.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, you are left with 15 minutes. However, because you had interruptions, I will listen to you if you request for slightly more time.

Mr. Charles Njenga: Mr. Chairman, we also invite the evaluation of this Committee on the County Assembly Report of the Joint Committees on Infrastructure, Youth and Sports at page 51 and where procurement matters were raised with regard to the works of uplifting of the Embu Stadium.

At page 56, you will see that the Executive in charge of Sports was invited and he filed a Report with the Committee. That Report features at page 64. It is attached to the letter on page 64 dated 3rd January, 2014 and the Report is annexed from page 66 going through to 68.

At page 67 on the budget assigned, you will see that this is the Executive in charge of Sports who sits in the Executive Committee that is chaired by the Governor. He acknowledges the approved budget was Kshs8 million. He further confirms that they had requested for a supplementary budget of Kshs30 million for additional works that were now supposed to be done in the stadium, but which had not been initially budgeted for. He acknowledges, in this letter, that they commenced the face-lifting of the stadium

without a sufficient budgetary allocation. That is in the reading of Section 26 of the Public Procurement and Disposal Act. It is a clear breach.

The statute says that all procurement should be within the approved budget of the procuring entity. Sub-section 6 says; “A procuring entity shall not commence any procurement procedure until it is satisfied that sufficient funds have been set aside in its budget.”

Before you start face-lifting a stadium, first, you have to confirm that there is a clear budget for all the works that you want to do. We submit, as you will see from the recommendations of the Committee – which have not been disputed – that procurement procedures were not applied in the works that were procured and that there were recommendations made for an investigation by the Ethics and Anti-Corruption Commission (EACC). The Report was communicated to the Governor by way of letters dated 7th January.

As a matter of fact, on page 75 of the bundle, you will see the letter that was requesting for additional funds was done under the hand of the Governor himself. It is a letter dated 31st January, 2013. This is on page 75.

I also wish to refer to page 134 which is about direct procurement of motor vehicles from the office and authorized by the hand of the Governor. There is a document written as “Internal Memo” authored by the Governor which is on procuring Embu County Government Vehicles.

You will note that there is no reference to a tender committee, procedure, competitive bidding, prequalification and all the other aspects of open tendering that are statutory and are set out in the Public Procurement and Disposal Act. Where an entity chooses not to apply that mode of procurement, then the law is clear on the justification that has to be shown as to why there is an election not to apply the Act. That, in our submission, has not been made.

As I close, noting the time that you have given me – my colleague will prosecute one of the other aspects of the charges – I wish to make a brief reference, for the record, to the Report of the Auditor-General which appears on page 139 going all the way to page 177. The period in issue in this Report is clear from the heading and it is from 3rd March, 2013 to 30th June, 2013 but as we will see from the text, it covers periods leading to 10th September, 2013.

I will refer the Committee to page 153 in the text of the audit Report where it refers to a physical verification of a generator that was carried out on 10th September, 2013 at paragraph b. This is on page 39 of the Report but 153 of the entire bundle. At paragraph “d” which is under the heading *Lack of Certificate of Testing* under the main heading of *Irregular Procurement Procedures*, there is reference to testing of a generator that was taken out on 10th September, 2013. The finding there was that there was no evidence that the generator had been tested and found in good working condition before installation.

The point I am making is that in this Report, the audit considered matters even for periods leading to 10th September, 2013.

For the record, I will refer the Committee to the findings of the Auditor-General which is a constitutional office with regard to - page 33 of the Report and page 167 of the main bundle – *Poor Maintenance of Revenue Collection and Control Sheet*. You will note that the recommendation for action is to the county governments.

The County Governments Act establishes county executives which are chaired by the Governors under his constitutionally obligation under Article 179(4). So, this is an action directly targeted to the Governor as the one in charge of the county government.

The Auditor-General proceeds to enumerate under paragraph 3.5, particulars of Irregular Award of Contracts for repair works at the town house and probation officers and sets out the particulars. There was unwarranted disqualification of interested bidders and favouritism in consideration for responsiveness. The one I wish to emphasise is lack of formal contracts which is at page 35 where the Auditor-General finds that there were no formal contracts executed between contractors and cites particular numbers for the construction of the conference room in partitioning. He says that this is contrary to Section 68 of the Public Procurement and Disposal Act. He cites a particular reference to the Act and cites a clear targeted contravention, singled out and particularised on the part of the county government and sets out, at page 38 of the Report, that procurement laws should be applied in all procurement processes.

The county governments – this is at page 38 of the Report - should ensure that the contractor completes all the works without further delays. The point I am making is that even the Auditor-General, in his constitutional mandate to audit national and county governments and all other institutions of a public character, singled out clear violations of the Public Procurement and Disposal Act on the part of the county government and it is our respectful submission that we urge this Committee to adopt that, to the extent that despite all these recommendations, findings and clear guidelines having been given and recommended to the county government by the Auditor-General, no single action has been demonstrated; either by way of a response from the Governor to the charges before the County Assembly or before this Committee that, indeed, he acted to ensure compliance to the Public Procurement and Disposal Act within that context.

We urge the Committee to evaluate the totality of that. It is a very bulky Report which has many findings. We recommend that the Committee evaluates the entirety of this Report and find that to the extent that the charge of a gross violation of the Public Procurement and Disposal Act is also based on this Report which was received by the County assembly, has been substantiated. That charge and the particulars are set out at the violation particular “d” which is at page 3 of the charge where we have set out, with clear particulars, the issues picked out from the Auditor-General’s Report.

Sen. Orenge: I have two questions before you retire. The Auditor-General’s Report is still work in progress and subject to deliberations by the Assembly and by Parliament.

Many times, during that process, Parliament may disagree with the Auditor-General's Report. So, would you agree with me that this is work in progress and it is not conclusive evidence of what you are talking about?

My final question is something which has been out there in the air, that there is an element of malice in these proceedings. I was looking at some of the minutes of meetings you have held. A meeting is held the same day – look at page 43. The Embu County Assembly Committee on Agriculture had a meeting on 3rd of January. If you look at those minutes, you will see that there is no reference to any previous meetings. This is a meeting held on that day and the minutes are signed on the same day by the Acting Chairman.

Subsequently, there is another meeting held on 6th January, on page 43. A meeting was held on 6th January and the minutes were signed on the same day. Prof. Lesan is the one who came up with this point.

On page 46 again there is another meeting. There is no consideration of previous minutes or confirmation and then the next day it is signed. Whether it is signed after the consideration of minutes or not, it would appear the Acting Chairman just called for the minutes and signed. In regard to the law of meetings, it is highly irregular and would seem to point out that there was something moving these committees in respect to this matter to do with the Governor, to press on with it; to disregard the normal rules about the law of meetings. I would want you to address us a little bit on this so that these allegations of malice do not go unchallenged.

Mr. Charles Njenga: Kindly, if I may just take some brief from my client here---

The Chairperson (Sen. (Dr.) Khalwale): Do you want to consult? You are perfectly in order.

Mr. Charles Njenga: There is something he wants to inform me. There is no malice in the actions taken by the County Assembly. The minutes of the meeting that features at Page 43, I am advised that this was a joint meeting of the two committees and there was no previous meeting of the two committees as would have invited the consideration of the previous minutes.

With regard to the process of investigations and the summons to the County Secretary and the other officials of the County Executive with regard to these very matters, I would urge the Committee to refer to the findings of the court in Petition No.3 where they dismissed the application by the County Secretary seeking to quash the recommendations of the County Assembly on the basis – I would recommend that reasoning to the Committee – that she was in the context of where she was and the documents she was ordinarily expected to maintain, she acted in clear contravention and contempt of the summons of the County Assembly. In fact, the court went out to find out that the County Assembly in regard to the process of investigations and the recommendations was perfectly in order. Those were the same allegations that have been raised, but you will see

that the content of the findings of the County Assembly are in the reports of the committees and these committees invited executives from the body of the reports, admitted documents and considered evidence given by the Executive. They did not just make recommendations out of malicious intent.

Whenever a party claims malice, then it has to demonstrate that there is absolutely no justification for the action. But malice cannot be used as a shield against inquiries that are properly founded on documents and on a procedure and a power available to the County Assembly in law. It cannot be malicious to execute a statutory function. That is my submission in that regard.

The Chairperson (Sen. (Dr.) Khalwale): Before you sit down, there are two small things which I would like you to address us on; one is related to what Sen. Orengo has told you. But let me start with the substantive one. If you go to the response by Mr. Nyamu on bullet 8, Page 4, he is responding to the issue of procurement of the motor vehicle. You will see in 8 (i) he says:-

“In purchasing of motor vehicles, the County Procurement Department did not violate procurement procedures as it used existing and valid Government supply branch contracts in respect of motor vehicles purchased from CMC Motor Groups Limited and Toyota Kenya. Where Government supply branch contracts exist, the Ministries of national Government or County Supply Department do not have to float their own tenders. They just order from the shortlisted firms which are then awarded the tenders by the relevant national Government departments”.

I would like you to comment on this. What is your response to this?

The second issue relates to the alleged buyers. Can you confirm that in the County Assembly of Embu, each ward is represented and that all the communities of Embu have, at least, one or more wards that they belong to?

Mr. Charles Njenga: Mr. Chairman, Sir, I will quickly respond to the first one. But you will allow me five minutes to respond to the second one on the constitution of the County Assembly of Embu and on the matters of representation of the various committees. On the issue of Paragraph 8 (i) of the response, a plain reading of Section 29 of the Public Procurement and Disposal Act will show that the Act anticipates instances where a procuring entity can use alternative procuring procedures. That is allowed. But that recommendation has to be made by the tender committee itself so that if you want to procure directly through the procuring procedures applied by other government departments, then the tender committee has to minute that; that we have considered this particular procurement, and we recommend, for purposes of that procurement, an alternative. That is by way of a reference to another shortlisted firm by another Government department.

But you cannot, by yourself, without reference to the tender committee, go directly to the supplier and procure on the basis that you are aware of this particular supply agreement between that entity and another Government department. In fact, our position is that if that agreement existed, nothing would have been easier than for the Governor to annex it to this response so that we have it in evidence, but merely stating that without particulars and without reference to the clear requirement of the law under Section 29 (3) of the Public Procurement and Disposal Act, cannot be a defence to the charge of flouting the Act. That is because the Act is very clear on when we can apply alternative means. When we want to depart from open tendering, there has to be a minute by the tender committee offering justification as to why that has been used at that particular instance. That would be the minute that would then be here to show that, that was considered and it was accepted and agreed and the Governor was allowed to proceed as such.

Mr. Chairman, Sir, maybe, if I could take instructions on the second matter.

The Chairperson (Sen. (Dr.) Khalwale): By all means.

Sen. Orenge: Mr. Chairman, Sir, while he takes instructions, I was not quite done with you with the joint committee because I do not think you gave me an answer that was satisfactory. If you look at the attendances, there is a substantive Chair and Co-chair in respect to both meetings and then the minutes are signed by an Acting Chair and the meeting on the 3rd and 6th is a meeting of the same committees. So, it is not like it was one meeting held for these joint committees. So, there should have been some record of it looking at its previous minutes and then confirming the same. So, while all these things were being considered, there is a story these minutes are telling us which unless you explain, I have my reservations about whether there was complete *bona fide* on these two meetings.

Mr. Charles Njenga: Mr. Chairman, Sir, I will take instructions and answer.

The Chairperson (Sen. (Dr.) Khalwale): In other words, your time is over but you may consult and then come and report to us.

Mr. Charles Njenga: Maybe as I respond, my colleague can be addressing the question of the Public Finance Management Act and the Constitution and then I will just answer those two responses.

The Chairperson ((Sen. (Dr.) Khalwale): How much time do you need for your colleague? It is not a crime to consult. Feel free! You seem to be under a lot of tension.

The Vice-Chairperson (Sen. Murkomen): Mr. Chairman, Sir, I think for the record we are generally not satisfied with the manner in which - in the corporate governance requirements - the manner in which the County Assembly are keeping their records; basically, who signs the confirmation of minutes and so on. It may not have a bearing or it may - you never know - in the final decision we are going to make. I think it is an area

that should be noted that we call in law *orbiter dictum*. That they have to pull up their socks in the way they keep their records.

The Chairperson (Sen. (Dr.) Khalwale): That is very clear Members. But I also want to urge you that there are issues that we shall have to argue during the time of deliberation like the one you have referred to as *orbiter dictum*. That sounds like Kalenjini.

(Laughter)

If there are issues which you think we can discuss when we are in our consideration, we reserve it for the same time.

So, Sir, how much time will you require?

Mr. George Nganga Mbugua: Mr. Chairman, Sir, there are certain legal issues that were framed by the Committee that I would wish to respond to as I prosecute grounds Nos. 2 and 3. I will try and do it within 40 minutes.

The Chairperson (Sen. (Dr.) Khalwale): That is really long. We will give you 30 minutes and out of your 30 minutes; you will have to donate some time to your colleague to respond to those two questions. So, it will be 30 minutes for both of you. Since you are asking for that much time, the levels of glucose in our blood have gone down, and I think we better stretch a bit and then come back and take your presentations.

Lead Counsel, once you conclude, will you request that you are given time for submissions?

Mr. Charles Njenga: Definitely! That is because of the five issues that you have asked us to respond to in terms of matters of law that were raised by the Governor's advocate.

The Chairperson (Sen. (Dr.) Khalwale): You will be doing oral or written submissions?

Mr. Charles Njenga: I think we can do oral submissions just to wrap it up so that we do not have to--- But if the Committee so directs that we file a written one and deposit it with the Senate, we can.

The Chairperson (Sen. (Dr.) Khalwale): How much time will you need for submissions?

Mr. Charles Njenga: For oral submissions, I think between us if I gave every issue as you framed 10 minutes, and there are five issues, we will need 50 minutes.

The Chairperson (Sen. (Dr.) Khalwale): Are you comfortable going the oral route or you think you will be losing out something?

Mr. Charles Njenga: On the issue of especially the threshold, we will be referring to some authorities because that is really a standard. I am seeking to apply what has been

applied in other jurisdictions. We can supply those authorities later, but we can still make oral submissions.

The Chairperson (Sen. (Dr.) Khalwale): So, you are not asking for anything more than the 50 minutes. So, hon. Senators, maybe, we go for a cup of tea, come back and sit in, do the 30 minutes plus 50 minutes and then we shall have concluded the case of the County Assembly of Embu and hopefully thereafter, the Governor might come in. He might be hiding in the wings because lawyers have many tactics. If doctors were like that, many people would be dead in the world.

(The Special Committee adjourned temporarily)

(The Special Committee resumed at 4.15 p.m.)

The Chairperson (Sen. (Dr.) Khalwale): Okay, ladies and gentlemen. We would like us to resume. Counsel for the County Assembly of Embu, you may address us now.

Mr. George Ng'ang'a Mbugua: Thank you, Mr. Chairman, Sir. I will begin my prosecution with just a brief highlight on some of the issues that were framed by the Committee before this Session began. Number one, the Committee asked us to respond to, or address it on, the issue of *sub judice*, given the submissions that were made by the counsel for the Governor.

Mr. Chairman, Sir, it was submitted that because this matter is pending in a court of law, then it is not properly before this Committee, or this Committee is not properly seized of it and cannot, therefore, deliberate on it. My understanding of the *sub judice* rule is that, first of all it must relate to discussions on merits of a matter that is actively before court for determination. For the Committee to answer that question, it was incumbent upon the Governor to submit to this Committee the pleadings, or the documents, he has filed in court in respect of the matter in the High Court, so that this Committee can appreciate what the grievances of the Governor before the High Court are.

Two – and I think this is much more important – is that with respect to the matter that reference was made to, it is very critical that this Committee investigates at what point that matter was filed. To the understanding of the County Assembly, that matter was filed when the Motion was being deliberated upon by the County Assembly, specifically with a view to stopping that process. We are aware that the High Court, in its wisdom, has not given any order to stop the process that was proceeding before the County Assembly; neither has it given any order to bar this Committee from investigating the matter that is before this Committee.

Mr. Chairman, Sir, I would also just wish to develop the argument on *sub judice* by referring to the decision in Mumo Matemu, which we have supplied to the Secretariat. I am sure the hard copy will be made available. But just for reference purposes, the decision in Mumo Matemu and the Trusted Society of Human Rights Alliance, is a Court of Appeal decision in Civil Appeal No.290 of 2012. I am specifically referring to the

holding of the Court of Appeal at Page 15, where it very briefly held that – this was with respect to separation of powers – the Court of Appeal were agreeing with the finding of the High Court which had observed that separation of powers must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude it requires to implement its legislative intent.

So, we must view the actions of the Governor in as far as the proceedings that were referred to in the High Court, first within the perspective of what the role of this Committee is, and the role of the Senate is within the law under Section 33 of the County Government Act and the Constitution. It is a common ground that the jurisdiction that has been invoked by the County Assembly in bringing the matter that is before you is duly provided for by law, and there is no ouster provision either under the County Governments Act, Section 33, or the Constitution, that when a party, which is the subject of removal proceedings, has filed a matter in the High Court or in any other court of law, then this Committee, or the Senate, should defer its investigations until the determination of the matter.

Whereas we do not begrudge the Governor for the steps he has taken – and we submit it was well within his rights – the mere fact that he intends to appeal against the decision that was delivered in Kerugoya; and the mere fact that he has filed fresh proceedings, while in itself is a right that he is entitled to pursue, does not in law take away your jurisdiction to interact with this question of the proposed removal and make your own findings based on the law. That is as far as the issue of *sub judice* is concerned.

Now on the question of double jeopardy, in my understanding as counsel, is where a party complains that he is being vexed twice. A matter has gone to court, you have been convicted or discharged, then fresh charges based on the same matter are brought against you or before the same competent court that tried you; you then say “Hey, I was acquitted in the earlier court; so I cannot be tried again.”

Mr. Chairman, Sir, with regard to the decision which we have submitted to you in Petition No.3, I will make a specific reference to the finding of the Constitutional Court to answer the question of whether there is double jeopardy. This is to be found at page 148 of that Petition, the matter of the hon. Martin Nyaga Wambora and four others versus the Speaker of the Senate, the Clerk of the Senate, the Attorney-General, the Deputy Governor of Embu and the County Assembly of Embu. That decision at holding No.317 is where the Constitutional Court held:-

“For avoidance of doubt, we are aware that some of the reliefs we have granted in this petition have the effect of reinstating the Governor; however, this should not be construed as a bar to any future removal from office, should the need arise as long as the same is conducted in accordance with the law.”

The proceedings that culminated in the proposal to remove the Governor were undertaken within the law. In the petition, the County Assembly was faulted for not giving the Governor an opportunity to be heard. It is on record in this matter, which is a fresh matter, that he was given an opportunity to be heard. Did the decision of the County Assembly to that extent comply with this decision? Yes, it did.

Number, two, Mr. Chairman, Sir, the High Court faulted the County Assembly for proceeding with the matter when there was a pending court order against the matter going on before the County Assembly. In the instance of the proposed removal of the hon. Governor that is before this Committee for determination, there is no court order. The success of the Governor in that petition was limited to upholding of his complaint with respect to two grounds in that specific holding by the High Court, while saying that it was not a bar; it was, therefore, within the contemplation of the High Court that as far as the process leading to the removal of the Governor is within the law, then, with tremendous respect, it cannot be said that there is double jeopardy.

Sen. Orengo: You have been influenced by the Chairman!

(Laughter)

The Chairperson (Sen. (Dr.) Khalwale): Order! You did not hear him! Proceed!

Mr. George Ng'ang'a Mbugua: Thank you, Mr. Chairman, Sir.

Submission was made that any proceedings that would have been brought afresh should have been done after the expiry of three months. It seems that the counsel for the Governor, with due respect, did not read, or did not appreciate sufficiently, the provisions of Section 33 of the Act. Just very briefly, I am referring to the County Governments Act; this is Section 33(8) in response to the complaint that the matter is not properly before you because three months have not lapsed since the previous impeachment proceedings:-

“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.”

Mr. Chairman, Sir, the bringing of these proceedings before the County Assembly and its approval of the Motion was not as a result of failure of a vote, so that, really, the complaint that we should not have come to court at the time, or that we should have observed a three-month rule, really does not arise. That answers the complaint regarding the three months.

Mr. Chairman, Sir, there was the issue of the recusal. That would be answered by the provisions of Section 33(3)(d) of the County Governments Act:-

“Within seven days after receiving notice of a resolution from the Speaker of the county assembly—

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.”

The Vice Chairperson (Sen. Murkomen): Before you go to the next point, what you have just said is very important. You are referring to Section 33(8); is that right?

Mr. George Ng’ang’a Mbugua: Yes.

The Vice Chairperson (Sen. Murkomen): Has it occurred to you also that had there been a failure by the Senate, there would have been specific action by the Speaker?

Mr. George Ng’ang’a Mbugua: Yes, there would have been.

The Vice Chairperson (Sen. Murkomen): There would have been specific action by the Speaker about that failure.

Mr. George Ng’ang’a Mbugua: Yes, indeed; and it is common ground that there was never a failure; neither was there that specific action so as to then bring into operation the time bar of three months.

On the question of recusal, if I understood the Governor’s complaint, it is that because the entire plenary interacted with the matter and voted for his removal, then there should be another special Senate somewhere that should try him; that is the way I understand it, if I take his argument to its logical conclusion. The decision of this Committee will not be binding on the plenary, yet it is still the same plenary that voted in the initial impeachment that will vote. Is he, then, suggesting that in the event that you have been tried by the same Senate and the matter comes back before the same Senate, then another special Senate should be constituted somewhere?

With due respect, that is not right. This Committee has warned itself, and I appreciate the comments that are coming from the hon. Members; you are interacting with this matter as if you have never seen these complaints before. That is why these questions are coming from the Committee speaking to the documents, putting us to task to prove specifically each and every one of these charges; that in as far as the County Assembly is concerned, we have no doubt about the impartiality of this Committee to interrogate these documents and make an objective finding and recommendation to the Senate. So, the issue of recusal does not arise at all.

I have heard counsel for the Governor referring to evidence previously adduced, and I was very pleased to hear that the first thing the Committee said was that, “Hey, these are fresh proceedings!” First; the Committee appreciates that the initial proceedings were

quashed and the outcome of those proceedings was equally quashed. But the High Court proceeded and said that this should not be construed to mean that it was a bar to future impeachment proceedings, as long as they are conducted within the law. That was the only caution. The submission of the County Assembly is that we have dutifully observed that caution, and we have complied with the law. Therefore, the issue of recusal, in my view--- It may probably have had some merit if the decision of this Committee was binding on the plenary; probably, that may have had some merit. But the decision, or the recommendations, will not be binding on the plenary; ultimately, the decision will have to be taken by the entire Senate as to whether the Governor should be removed from Office.

The Chairperson (Sen. (Dr.) Khalwale): Order! Order, counsel!

Yes. Sen. Orengo?

Sen. Orengo: I just wanted you to try that point for our benefit. I am looking at the orders and the decision that was quashed, which is that of the County Assembly. The resolution and decision that is found in paragraph (c) on page 147, and then on paragraph (d); the Gazette Notice was also quashed by way of an order of *certiorari*. But with regard to the proceedings before the Senate, the relevant order is (b): “We declare that the proceedings and resolution were in violation and, therefore, were null and void.”

Mr. George Ng’ang’a Mbugua: Yes.

Sen. Orengo: Can you probably address, or speak to the issue of what is meant by the statement that the proceedings “were null and void”? Where do the previous proceedings stand legally?

Mr. George Ng’ang’a Mbugua: My comment to that is that the High Court pronounced itself and declared the proceedings, resolution, consequential Gazette Notices, actions and any other communication with regard to the removal of the first Petitioner by the Embu County Assembly and the Senate a violation and disregard of the Court orders and were, therefore, null and void. My view is that, it was not because of the merit, or lack of it, that led to the quashing, but---

I will also speak to some specific findings in the same judgement; in fact the High Court, and this is to answer the question raised by the hon. Member--- When the High Court was making its decision in this matter--- I am referring to a specific finding that the process before the Senate was not faulted; this is holding No.238; it is a very specific exonerating statement of the High Court. It says:-

“That we find in the present case the procedure followed at the Senate was not faulted.”

This holding is No.238 at page 109 of the judgement. We were making our submissions before that quotation. The submission was that the disobedience of the court order was

not even before the Senate. They were even able to draw a distinction in the order as had been obtained in that matter. It was actually not barring the Senate, because at the time the Speaker convened the House and a committee was constituted, there was no order barring the entire Senate from sitting. That is why you find specifically the court is even finding that there was no order barring the Senate but only to the extent that it admitted a matter that proceeded in disobedience of a court. That is the only extent to which the High Court proceeded to quash the proceedings.

Mr. Chairman, Sir, just to take this argument a little bit further---

The Chairperson (Sen. (Dr.) Khalwale): Order! You are moving away from the contest that has arisen; that this is the same Committee that was seized of this matter. I am listening to the clarity you have used to comment on the Senate, I would also like you, on record, to comment to the same extent in so far as the membership of the County Assembly of Embu itself is concerned. If it is contesting the membership of this Committee, are you alive to whether he contested the membership of the County Assembly, or whether he should have or he should not have contested the same?

Mr. George Ng'ang'a Mbugua: Thank you very much for that. With due respect, this is just to show the absurdity of the argument that has been adopted by the Governor. When the Motion was re-introduced, you realize that it was even approved by a bigger number than the previous number that had approved it and it is on record. Secondly, there was a specific invitation; in fact, you will find in the HANSARD that the Serjeant-at-Arms had to go and look for him before the actual vote, just in case he was around, or was within the precincts of the County Assembly. The point is that if he is to complain that he is being tried by the same Committee, is he again saying that at the County Assembly level, he would only have been subjected to a Motion for his proposed removal if it had been tabled before a different county assembly and not the County Assembly of Embu?

The upshot of my submission is that the argument that he is being tried before the same Committee, and, therefore, has no chance of getting any justice whatsoever or a fair trial, has no merit. It behooves him to come here with an open mind as we did, prepared to be asked questions and to present evidence in support--- Let him present his evidence to exonerate himself; then this Committee will make its own independent and objective findings.

Mr. Chairman, Sir, in the same judgement of the High Court, you realize that paragraph 207 says that in Kenya the constitutional power to impeach a governor has been donated to the county assembly and the Senate. If you go on the same decision, you will find that the holding at paragraph 233, looking at the provisions of Article 181(1), is clear that it contains the constitutional basis for the removal of a governor, hence it is the substantive law on the subject. On the other hand Section 33 of the Act provides for the procedural law in the removal of a governor and operationalises Article 181. The judgement says:

“It is therefore, our finding that for the removal of a governor to be valid, the process used must strictly adhere to the substantive and procedural law contained in both Article 181 and Section 33.”

The High Court said “We do not bar subsequent impeachment proceedings as long as they comply with Article 181 and Section 33.”

The constitution of this Committee by the plenary was in compliance with Section 33. There is no proviso that says that in the event the same Committee had tried the Governor before, it should not be constituted, or it cannot sit again, to investigate the matter. There is no bar and we cannot read a bar where none exists. Furthermore, we have said that this Committee will only make a recommendation, but not a binding decision, to the plenary.

Mr. Chairman, Sir, I have referred to paragraph 238 where the High Court did not fault the procedure before the Senate. I am referring to paragraph 241. The High Court said and this was a reproduction of the submissions; it said:-

“In rebuttal Mr. Ng’ang’a submitted that by being asked to interrogate the threshold for the removal of a governor the same is tantamount to sitting on appeal against the Senate’s decision and this court did not have such jurisdiction, including the power to interrogate the merits of a decision made by the Senate. He thus contented that the threshold applicable in the removal of the Governor is set out under Article 181 of the Constitution and the court cannot set its own threshold’.

The court agreed with my submissions and I am referring you to paragraph 245 on the issue of threshold. This is where I will bring in the nexus issue and the threshold. There was a specific complaint which was like an appeal of the decision of the Senate that the threshold was not reached. This is what the court said in paragraph 245:

“We must to some extent agree with Mr. Ng’ang’a that the county assembly and the Senate are the best judges to determine whether the charges presented against the first Petitioner are in accordance with Article 181 of the Constitution. The Constitution has granted the power of judging the merit of the charges to the two Houses. As to whether the charges have been substantiated or not, the merits or otherwise, are not for determination by the High Court or any other court. Therefore, determination is by the county assembly and the Senate.

This is what the Constitutional Court is specifically saying here. It further says:-

“It would thus be wrong, in our view, for this court to question the merits of the decision made by the county assembly and the Senate. Indeed, we wholly agree with the High Court decision in *Nancy Baraza Vs. the Judicial Service Commission* and this is their finding: “That it is not for this court or the commission to find, that the allegations made against the petitioner did not amount to gross misconduct.”

In fact, according to Prof. Yash Pal Ghai, *Kenya Constitution, An Instrument for Change*, cited by the petitioner, whether a conduct is gross or not, will depend on the matter as exposed by the facts, which facts it is the duty of the tribunal to establish. It has been

contended that because the word “gross” was missing in our initial charges the High Court should proceed and quash the decision. The Constitutional Court said that the grossness of a matter is not in the word; it is in the material presented before the tribunal. In this case, as to whether gross violation standard has been met, is for the Senate to determine and not any other body.

Mr. Chairman, Sir, you notice that at paragraph 246, the High Court proceeded to say that they were aware that the Senior counsel, Mr. Muite, did not move this court to make a determination on the merit or otherwise of the charges framed against the petitioner. So, there was no merit question. Paragraph 246 refers to the submission that had been made by the counsel leading the Governor’s case. He actually agreed that it was not a merit question, because the manner in which the petition had been framed was like it was an appeal against the decision.

Mr. Chairman, Sir, this is where the rubber meets the road. In his response, the Governor said we have a matter pending in the Court of Appeal regarding the question of threshold which they are begrudging the High Court of not finding, that the threshold was not met. If you look at the memorandum of response, they are saying that the appeal they are pursuing in Nyeri is to the extent that according to them the threshold as to whether there was a gross violation was not met before the Senate. This is what the court said. First of all, we have seen that merit, or otherwise, is for the Senate to determine. We have again seen as to whether the threshold has been met is for you to determine. So, to the extent that there might be a pending appeal, it still cannot stop you from proceeding to determine the merits of the proposed removal because no other court has been given that power to interrogate the merits other than yourselves. When the court proceeded to define gross, it was by way of an *orbiter dictum*. In fact, this was a caution it threw. If you look at paragraph 249, page 114, it says:-

“We are, therefore, satisfied that we have the jurisdiction to interpret at this stage the meaning of the word “gross” as used in Article 181 of the Constitution.”

So, they interpreted that word but proceeded to say that in the interpretation, they would not be questioning the merit of the decision of the Senate; they would be formulating a guideline on what constitutes gross violation in the Constitution and the law. On one hand the Senate was not faulted on the evidence as tabled before you, that those charges were not substantiated. That was not a finding. They only said that in their jurisdiction to interpret the Constitution, they would give their guideline.

Mr. Chairman, Sir, that guideline is the one that you will find at paragraph 251, where they were agreeing with the decision in the Nigerian case of hon. Muiwa Inagochu. As to what constitutes gross violation, the Supreme Court stated as follows:-

“The following, in my view, constitute gross violation or breach of the Constitution,

- (i) interference with the constitutional functions of the legislature and the judiciary except exhibition of overt and constitutional executive power;
- (ii) abuse of fiscal provisions of the Constitution.

These are provisions regarding how resources are used or managed. These resources have an underpinning in the Constitution; it is how revenue is generated and how it is allocated to counties. That is a fiscal provision under the Constitution. Where there is an abuse, for instance, we have demonstrated and I will do that when I am referring to the specific violations.

For instance on the issue of direct procurement of the vehicles, you have a letter from the Governor in his own handwriting and a proforma invoice to him as a Governor from CMC; I will show you the page. If you look at where we begrudge the Governor of direct procurement on page 136 of our bundle, a proforma invoice for a vehicle is addressed to the Governor and not to a committee. So, specific inquiries must have been made by the person to whom the proforma invoice was sent. This is at page 136. At page 134, he did an internal memo to the County Secretary. You notice that the internal memo is dated 25th September, 2013. The proforma invoice from CMC is dated 20th September, 2013 which was three days after. There is no reference to attend a committee.

This was a direct procurement and we have seen that under Section 27 of the Public Procurement and Disposal Act, there has to be approval of the tender committee. The requirements under Section 73 of the Public Procurement and Disposal Act, as to the prerequisite that must be observed before there is a direct procurement, was never satisfied. If you now tie that to the decision of the Supreme Court, and to what the High Court is agreeing with, that abuse of fiscal provisions of the Constitution--- Article 227 provides that where a procuring entity intends to procure goods and services, it must do so in accordance with a system that is fair and transparent. Is that direct procurement under the hand of the Governor in line with that provision, that is Article 227 of the Constitution, or the provisions of Public Procurement and Disposal Act? No. Now that definition of gross meets the threshold.

The other issue is interference with local government funds. This is holding No.251. Again this is the High Court talking. You have a situation where a resolution has been passed by the County Assembly that we are recommending that the County Secretary be investigated and as that is being done, she should step aside. But as the Chief Executive Officer (CEO), he authored a letter on 16th January, 2014, and misled the County Assembly that she had stepped aside; then on the same day he signed an affidavit to support a case by his County Secretary to stop investigations against her because of alleged fiscal mismanagement. If that is not abuse or interference with how funds at the county level are utilized, what is?

Our submission is this, that was not just by implication - to make a solemn disposition in a court of law. At this point, I want to say that that document is a matter that is already concluded. For the record, the judicial review application by the County Secretary was

dismissed by the High Court. In fact, the High Court proceeded to agree with the submissions by the County Assembly, that the process leading to the recommendation to have that lady step aside was within the law. The point is, you have the High Court vindicating the position of the County Assembly and then you have the CEO explicitly, in no uncertain terms, supporting a case to bar investigations.

In my humble submission, that constitutes a gross violation. This is because what it seeks to do is to assist that particular officer to be insulated from being investigated for alleged misuse of public finances, directly by the office of the governor.

The Chairperson (Sen. (Dr.) Khalwale): Order, counsel! The point you have brought is of such significant importance to us that we will not leave it just as a matter of record. We would like to annex that particular judgment that you are referring to. Give us a copy.

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, we have actually submitted a copy to the Secretariat. The Secretariat can confirm if they have a copy of the entire decision. You will find that the decision constitutes the findings of the Judicial review case by the County Secretary.

The Chairperson (Sen. (Dr.) Khalwale): Where?

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, it is consolidated. I will give you the specific pages. The dismissal of the judicial review application starts from page 79. The specific findings with respect to the judicial review by the county secretary to stop the investigations and the findings dismissing that judicial review application are on pages 79 and 80, starting from paragraph 186 going to paragraph 187. Paragraph 186 it says:-

“In this case, the effect of granting the order of *certiorari* as sought in paragraph 3 would be to quash the decision which is requiring the applicant to step aside from her office pending investigations which action the applicant had already taken on her own volition. In the circumstance, granting such an order would not serve any useful purposes. It would be tantamount to this court granting orders in vain which is not permissible in law.”

You will also find that in the preceding paragraphs is where the decision is. But turning to prohibition, again, that was denied.

If you move on to page 80, still at paragraph 187, one of the pertinent findings is that at the top of page 80 it says:-

“This court cannot issue an order of prohibition whose effect would be to shield the applicant or any other member or official of the County Executive Board from investigations by the Ethics and Anti-Corruption Commission, an independent commission created under the

Ethics and Anti-Corruption Act No.22 of 2011 with the sole mandate of investigating allegations of corruption and matters related to economic crimes.”

Mr. Chairman, Sir, if the High Court could not make an order to shield---

Sen. Orengo: Mr. Ng’ang’a, at paragraph 187, you have read up to the citation of the statute, the Ethics and Anti Corruption Commission Act. Continue to the next sentence.

Mr. George Ng’ang’a Mbugua: Mr. Chairman, Sir, it further states:-

“We have no hesitation in finding that a court of law cannot prohibit a statutory body from executing its lawful mandate. In the circumstances, we have to decline the applicant’s invitation to issue an order of prohibition in terms of prayer four. For all the foregoing reasons, we are satisfied that the application lacks merit and it is hereby dismissed with no orders as to costs.”

Sen. Orengo: Mr. Chairman, Sir, in proceeding with this matter, is the Senate actually exercising a mandate granted by the Constitution and by statute?

Mr. George Ng’ang’a Mbugua: Indeed, Mr. Chairman, Sir---

Sen. Orengo: Is there that provision?

Mr. George Ng’ang’a Mbugua: Indeed, Mr. Chairman, Sir. In fact, quite recently just to show you the shift that we are having in the Judiciary, in the latest decision by the Law Society of Kenya (LSK) against the Attorney-General and the Cabinet Secretary for the National Treasury, there was a specific order that in as far as that particular matter was concerned where they were seeking to bar the Treasury from paying certain monies to some Anglo Leasing related companies, the High Court referred the matter to the National Assembly. This matter is pending and it exercised restraint. So, I cannot agree more with the observation by senior counsel that the court is reemphasising the importance of respecting other statutory bodies in carrying out its mandate. In this particular decision which is before the court---

Sen. Orengo: We would like you to provide that particular judgment for us to consider. This is on the issue of jurisdiction.

Mr. George Ng’ang’a Mbugua: Mr. Chairman, Sir, I undertake to forward that to the Secretariat on soft copy.

The Chairperson (Sen. (Dr.) Khalwale): Mr. Njoroge had informed me yesterday that he has it. I had asked him about it. Proceed.

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, with due respect, there is a rethinking of what the Constitution has done when it donates certain powers to certain other organs and the importance of the Judiciary to allow those organs to carry out their constitutional mandate. The matter before you is clearly one of those matters where the framers of the Constitution and Kenyans when they voted in the referendum said that the question for the proposed removal is really a question to be determined by the Senate and no other body. That is exactly why we are before you.

On the question of “gross”, as I leave that point, it is really---

The Chairperson (Sen. (Dr.) Khalwale): Order! You have exhausted your time. But I will allow you another ten minutes.

Mr. George Ng'ang'a Mbugua: Very well, Mr. Chairman, Sir.

Paragraph 307 on page 144, says:-

“The resolution that led to the removal proceedings at the Senate whose outcome may affect his political right to hold an elective office, we are persuaded to find, which we hereby do, that even at the County Assembly 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 or rejected.”

First of all, there was a specific observation by the Committee in the previous hearing that some hearing should be there. The court agreed as a matter of fact that, that should have been done. In the matter that is before you, it is not in doubt that the governor was given that opportunity to be heard. So, we really complied with these orders before the matter came before the Senate.

If you turn to the conclusion, because this is very important when the Committee is answering the specific complaints by the governor, on page 146, it says:-

“We have found that the 1st, 2nd, 5th and 6th respondents acted in violation of the court orders of 3rd February, 2014 and 23rd January, 2014, respectively. In the circumstances, the removal of the 1st petitioner as the Governor of Embu County by the Senate was null and void *ab initio* and, therefore, amounted to a nullity in law.”

The decision really to annul had nothing to do with whether we had been able to persuade the Committee and the Senate as to whether the threshold had been met. So, we must read or speak to that finding when the Committee is making its own determination as to the implication of this decision and the allegation that there is a matter that is now pending in the Court of Appeal. If the High Court is saying we are refraining from interrogating the merits then one would ask: What is being pursued in the Court of Appeal? The High Court is specifically saying: “This is a matter for the Senate to determine.”

In fact, I submitted that the Senate is entitled to be either right or wrong in its decision. The question as to whether the decision is right or wrong must remain with the Senate and no other body. That is as far as reference to this decision is concerned.

Mr. Chairman, Sir, let me now refer to another very important decision, which, again, we will find very useful to this matter and make this Committee very comfortable that whatever it is doing is within the law. While this matter was---

The Vice Chairperson (Sen. Murkomen): Mr. Chairman, Sir, let me say something before the counsel moves from that point. Mr. Ng'ang'a, forgive us for interrupting; we might add you another two minutes.

What does it mean to say something has been brought to the court, it has been quashed, nullified and it is null and void? In the eyes of the law, what does that mean?

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, it ceases to exist. The decision cannot be implemented. It is as if there was never a decision. That would be the simplest way I can put it. When it has been quashed and nullified, that decision is not capable of taking effect. For instance, if the decision was to have the governor removed from office, my own reading would be that when it is nullified, it is that the position obtaining before the decision was made reverts. It is like there was never a decision in the first place.

The point I want to make is that the reasons leading to that nullification are critical when it comes to any subsequent proceedings. This is because if the subsequent proceedings are brought with due compliance to the reasons that the High Court gave in nullifying the earlier decision, then a party cannot be heard to say: "I should be in the High Court." As a matter of fact, this is now where we are as the County Assembly. It is not upon the governor to determine the forum where he should be tried. When Kenyans voted and passed this Constitution they said that the question for the proposed removal is to be determined by a specific body. My reading of Section 33 and Article 181 does not anywhere, even by implication, suggest that a party dissatisfied can go to another tribunal.

For me, it shows bad faith that before you know the ultimate decision – when this committee is interacting with this matter it is saying: "We are not bound by any previous findings or whatever we may have found before." For us, the proceedings were quashed. We are not referring to any evidence that was adduced before. This is a fresh matter that must be entertained and interrogated on its own merits. If it does not satisfy the requirements in law, we will propose to the Senate as much and a decision will be made.

So, there is absolutely no reference made. In fact, our reference to these decisions is because they are guiding us to get it right. We are saying that we cannot afford to get it wrong a second time. That is the case by the County Assembly. That is why we are referring to these decisions by the High Court.

While that decision was being made, there was this petition by the International Legal Consultancy Group against the Senate and the Clerk of the Senate which made some pertinent findings that will be critical when this Committee is interacting with this matter. This is to be found at paragraph 59. This is Petition No.8 of 2014. It was canvassed the same time we were canvassing the matter of the hon---

The Chairperson (Sen. (Dr.) Khalwale): Order, counsel! Is that part of the documents that you filed?

Mr. George Ng'ang'a Mbugua: Yes, Mr. Chairman, Sir.

The Chairperson (Sen. (Dr.) Khalwale): Very well.

Mr. George Ng'ang'a Mbugua: On paragraph 59, this is what the High Court said.

“In our considered view, since county governors are not answerable to the county assembly in terms of the fiscal management of county resources under Section 149 of the Public Finance Management Act, they must be held to account by the Senate for the national revenue allocated to their respective counties in view of the provisions of Section 30(3)(f) of the County Governments Act as read together with---

Hon Senators: Which page?

Mr. George Ng'ang'a Mbugua: Mr. Chairman, Sir, I am reading page 38.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, please, if you may just repeat, so that Members are able to follow you.

Mr. George Ng'ang'a Mbugua: Thank you, Mr. Chairman, Sir. I am well guided.

For the record, this is on page 38. The judgment is paginated.

It states:

“We have also examined Section 30(3)(f). The same states that the county governor shall be accountable for the management and use of county resources. By implication this provision that the county governor as the overall head of the county is accountable for the utilization of county resources, including the national revenue allocated to his or her respective county.”

The main defence by the hon. Governor is that: “I am not accountable; I have some chief officers somewhere. Senators, you should pursue some other persons, not me.”

Now, this is a constitutional court speaking. So, as you apply that section, it is not a leap into the unknown. The law is stated.

As you read that you notice that it also says:-

“Since the accounting officers at the county are directly accountable to the county assembly for the management of financial resources under the Public Finance Management Act who then is the governor accountable to under Section 30(3)(f)?”

Who is the Governor accountable to? The answer is given. It says:-

“In our considered view, since the county governors are not answerable to the county assembly in terms of the fiscal management of the county resources under Section 149 of the Public Finance Management Act, they must be held to account by the Senate for the national revenue allocated to their respective counties in view of the provision of Section 30(3)(f) of the County Governments Act, 2012 as read together with Article 10(2)(c) on National Values and Principles of Governance. The governors being state officers are bound by national values of transparency, accountability and observance of good governance when performing their duties as the chief executive officers of the county governments.”

So, a CEO who superintends an enterprise that has no regard to the provisions of the Public Procurement and Disposal Act or the Public Finance Management Act really has violated Article 10(2)(c). The High Court has said as much, that you are accountable and you cannot tell us: “Some other person is accountable.”

If you move on to paragraph 60, there is a part that says:-

“Every officer in every State organ at both levels of government must respect and comply with any mechanism of accountability established by the Constitution and the law to the fullest extent possible.”

I am referring to paragraph 60, on page 39, somewhere in the middle, where it starts “every officer in every State organ at both levels of government must respect and comply with any mechanisms of accountability established by the Constitution and the law to the fullest extent possible.” The court, under Article 259, must, therefore, interpret the Constitution in a manner that promotes good governance through transparency and accountability. Put in another way, when persons in charge of managing county finances are not held to account, the objectives of devolution set out under Article 174, which includes promoting democratic and accountable exercise of power and enhanced checks and balances of power will be defeated.

The position advanced by the petitioner – that the county governors cannot be summoned – is not relevant. The point is that there cannot be any doubt that a governor is accountable. He is accountable, Mr. Chairman. We are saying that the totality of the material before you demonstrates very clearly that he superintended over an enterprise that deliberately flouted the Public Procurement and Disposal Act, the Public Finance and Management Act, and the Constitution.

So, as I wind up, I would like to very briefly comment on one of the grounds I was to comment on. I have basically prosecuted ground 2, violation of the Public Finance and Management Act, with specific reference to the procurements. For instance, the one we have shown that contravenes Section 73. The direct procurement did not comply with the law. In that case, we saw the hand of the governor. We have also seen the queries on the question of the audit report. I agree that it is a matter that is in progress, but for an accountable governor who appreciates his obligation as a State officer under Article 10 of the Constitution, the requirements to properly manage resources that have been bestowed upon him, even as the matter is in progress, it behoves him to show us: “With respect to these audit queries, I have taken the following action---” None has been demonstrated. Instead, the defence is: “I have a matter pending in the Court of Appeal. Please, excuse me. Carry on with the matter.” That is the defence, Mr. Chairman, Sir.

The issue of gross violation ties to what my learned friend did when he tied up Article 179(4), where the governor is provided for as the Chief Executive Officer. We have seen even in the High Court, in the International Legal Consultancy Group case; that, the High Court is actually saying: “Yes, you are the CEO, and you must be accountable”. Telling us that we should insulate you from accountability by telling us that you should not be summoned by the Senate to account for your actions, really--- So, you are all too happy to be told that you have Kshs20 billion that is under your watch to manage, and when queries are raised as to how you have managed it, you tell us that we should insulate you. We cannot do so, because it is a blatant violation of the Constitution.

Mr. Chairman, Sir, the totality of our submission, as I now sit, is that the law is well settled. You will not be reinventing the wheel. The wheel has been invented. Your brief is well cut out. Regarding the matters that we have brought before you, the documents show the nexus. The nexus, on which maybe, with your permission, I should take one minute to comment, is that the point of the nexus, which is to be found in the determination in Petition No.3, first, it was an *obita dictum*. It was not the matter that the High Court was being called upon to determine. It was not the binding part of the decision. It was not that the matter before it did not meet the threshold.

The High Court, in its interpretative capacity, is saying: “If you ask us, this is the guide”, and the guide says, under item (b), on the issue of nexus: “There must be a nexus between the Governor and the alleged violations of the Constitution or any other written law.” In my own understanding, “nexus” is a link. I would not buy the argument that I must show that I directly, for instance, took a pen and signed something, in as much as there is already evidence to the effect that he procured those vehicles himself. There is an affidavit he swore to defend his own officer from investigation. So, even if we were to

raise that bar and say that there must be a personal link, we have surpassed that threshold. Whereas the High Court did not require us to show a personal link, we have demonstrated a personal link, but the point I am making is that the nexus is for you to determine by interrogating the documents we have brought before you, and not for another court to determine.

So, suffice it to state, with due respect and tremendous humility, Mr. Chairman, Sir, that the County Assembly passed that Motion, first, without any malice. No malice at all. That fact cannot be demonstrated more in a way other than looking at the numbers that voted. If there was rethinking on the part of the County Assembly, why would that Motion even meet a higher number approving the question of the proposed removal of the governor? Why was there no a rethinking by some Members of the County Assembly that, perhaps, they were not right? You have the Motion properly moved in accordance with the Standing Orders. A right to be heard was given to the governor, but he snubbed that opportunity. The HANSARD will bear me witness. You will notice that he was not only notified to appear and defend himself, but he was also before the board. He was looked for around the precincts of the County Assembly. He was nowhere to be seen. Instead, he chooses to go to the High Court and say: "Double jeopardy. Insulate me from this process."

Mr. Chairman, Sir, we are saying that we are not driven by any malice. We are here on behalf of the voters of Embu County. Those who suffered by tilling their fields and being given maize seed that did not germinate yet they expended tremendous resources to prepare those lands, so that they can get maize. We are here on behalf of the County Assembly---

Sen. Orenge'o: Mr. Ng'ang'a, why are you limiting yourself to voters?

Mr. George Ng'ang'a Mbugua: Not voters, I am sorry. I am referring to the residents of Embu County.

So, really, what prompted the County Assembly to act had nothing to do with malice. The suggestion that is being created out there, in the media or elsewhere, that there was malice is not correct. There was no malice and there will never be any malice. What the County Assembly cannot sit down and see is where complaints are being made, but no action is being taken. Then, they will be going against the oath that they took when they were sworn-in to serve as Members of the County Assembly of Embu.

Mr. Chairman, Sir, with those very many remarks, unless there is any question from the hon. Members, I would want to rest my prosecution.

Thank you very much.

The Chairperson (Sen. (Dr.) Khalwale): Thank you very much. You may resume your seat.

Counsel, you had some little work to do for us. We are very concerned that we also respond to the impression that has been created about your county assembly and, to a small extent, the Senate – that we are driven by bias and malice. You will remember Sen. Orengo's question and my question. Sen. Orengo, would you like to repeat it?

Mr. Orengo: No! No! It was already addressed. Was there something else?

The Chairperson (Sen. (Dr.) Khalwale): No! He had not addressed mine. You may address it now. It was about the composition of the Assembly. We want to know if all the communities are represented in that County Assembly. We are privileged to have a Senior Counsel in our midst. He proposes that if you have somebody with you – the Speaker, for example – whom you can call and lead him for him to introduce the evidence of the composition of the Assembly of Embu, it will help. Do you have a way of going about it?

Mr. Charles Njenga: Mr. Chairman, Sir, our formal response as a reply to the invitation indicated clearly that the County Assembly shall appear by way of its advocates and that shall not call any witnesses. From where I stand, I can confirm, as per instructions, on the particular questions of facts.

Sen. Orengo: Mr. Njenga, I was just looking at one of the authorities that you have cited here. You have cited Article 165 with regard to the supervisory jurisdiction of the High Court. The High Court can call, for the record of this Committee, to determine whether certain fundamental principles were complied with. So, my fear is that if you speak to a matter of evidence that is not on record, it may be used against us that we did allow such evidence. So, if you do not want to call a witness, then I do not think you should address that question.

Mr. Charles Njenga: Mr. Chairman, Sir, on the technicality of calling a witness, the rules that the Vice Chairperson lead us through while we were convening this particular sitting stated that the Committee can by itself summon any witness. That would create a window through which, legally, you can ask any person, by summons and record, to address a particular question of fact. I do not think such summons has to be written summonses.

The Chairperson (Sen. (Dr.) Khalwale): Maybe, I should put it this way; there is nothing wrong in us discussing this matter in the full view of the public, but I would guide you in view of us maintaining our integrity. Do you think you would want to invite a particular witness who will establish that all the communities, or almost all the communities of Embu, are represented in the County Assembly? I now want to start by giving everybody a chance to ventilate on the matter, so that we can take a decision. It is better that way. I will start with Judy. I heard you talking.

Sen. Sijeny: Mr. Chairman, Sir, I was just saying that the counsel for the County Assembly has demonstrated to us the nature of his instructions. They have opted to proceed by way of advocate. On the issue of time, my opinion is that we can skip that bit.

The Chairperson (Sen. (Dr) Khalwale): Yes, Vice-Chairperson.

The Vice Chairperson (Sen. Murkomen): Mr. Chairman, Sir, I think the issue here is materiality. What is the material benefit? The law provides for two-thirds of the County Assembly, and that is it. Even if today we were find out that there are some Kalenjins who live in Embu and they are not represented, how would that help us? If we establish that there are some Luos who live in one centre in Embu, who are not represented, how will that help us? So, materiality here is the fact that we need to establish; that the Motion got the support of two-thirds majority. The Speaker of the Senate was satisfied that the matter was worth coming to the Senate and it came here. The other issues out there, are political in nature. We can take judicial notice.

The Chairperson (Sen. (Dr.) Khalwale): We have heard two senators. Are there more contributions?

Sen. Wamatangi: Mr. Chairman, Sir, I was pondering on the matter from a larger perspective. I could see what you wanted to satisfy. This is a matter that also carries a lot of public interest, but given the fact that those answers can only be found or gotten through the counsel, who seems reluctant to go that direction, or probably, he does not have the relevant source to give him that information correctly--- Maybe, it suffices to say, just like the Vice-Chairperson has said, that the constitutional threshold is two-thirds. It is satisfied.

The Chairperson (Sen. (Dr.) Khalwale): That is very true. My Vice Chairperson is asking whether there are any Luhyas in Embu. I want to confirm that there are very many Luhyas there.

(Laughter)

Yes, Sen. Juma Boy!

Sen. Boy Juma Boy: Mr. Chairman, Sir, I would like to concur with Sen. Judith and Sen. Wamatangi that we should take all that has been presented as evidence.

The Chairperson (Sen. (Dr.) Khalwale): Sen. James Orenge, even if there are no Luos, I want you to speak.

Sen. Orenge: Mr. Chairman, Sir, my problem is with the use of the word “community” both in the law and the Constitution. If we use the word “community” then the Assembly or even our Committee cannot give an effective answer to that question. This is because the word “community” is in respect of every community living in any given area. It could be a community of ten people or 20 people or 30 people. I remember a case that comes up from Baringo all the time. It has gone up to the High Court and the Court of Appeal. They are claiming that over the years, they have never been represented in the National

Assembly. Going by the category of the numbers in that constituency, it is very difficult for them to produce parliamentary representation from that community.

You remember that Parliament was grappling with the question of addressing the requirements of Article 100 of the Constitution. I think that decision was postponed. It was agreed that the rights of communities, including marginalised communities, ethnic and other minorities, can only be addressed progressively. So, in any given area, including my area, there are many categories of communities who are not represented. So, if Embu has achieved it, it would be a very special case.

The Chairperson (Sen. (Dr.) Khalwale): Very well! I am so advised. Counsel, we will not be asking you to call any witness. We will allow you to make your concluding remarks. We will then create time for you to make submissions.

Mr. Charles Njenga: Mr. Chairman, Sir, if you followed the---

The Vice Chairperson (Sen. Murkomen): Mr. Chairman, Sir, just for avoidance of doubt, we were just saying that all these cases and the whole of this bundle; the blue one, forms part of documentation that should go on record.

Mr. Charles Njenga: Mr. Chairman, Sir, there is a response. The original copy is bound in blue. Probably, in the running of the copies, you may not have the bound copy, but it is headlined "County Assembly of Embu's Reply to the Invitation to Appear". Then there are the two authorities that we have submitted for the benefit of the Committee.

Sen. Orengo: Mr. Chairman, Sir, it is very important for us to be told formally which is the answer they have placed before us, and which are the documents, just for purposes of the record. For instance, this blue document that we have contains some of our documents, including the programme and all that. So that there will be no doubts of what the cases are, in terms of documents given to us, could you tell us when the response is dated?

Mr. Charles Njenga: Mr. Chairman, Sir, it is dated 8th of May. It is the same date with the document from the Senate.

The Chairperson (Sen. (Dr.) Khalwale): Let me say that we are happy for you. We want to give you a breather to organize your final submissions. Therefore, before you start we will have a break. You will then tell us the list of the documents you want to form part of the record for reference. I am hoping that you have moved away from 50 minutes because what Mr. Ng'ang'a has done is more or less final submissions.

Mr. George Ng'ang'a Mbugua: In fact, on my part I will not be making any submissions. My learned friend may probably have a simpler task; he might actually not even take the 50 minutes because I have made my submissions and closing remarks.

The Chairperson (Sen. (Dr.) Khalwale): Therefore, two questions then come on, counsel.

Mr. George Ng'ang'a Mbugua: Yes.

The Chairperson (Sen. (Dr.) Khalwale): How long would you need to prepare the official list of your documents for reference? How long would you take to make your final submissions?

Mr. Charles Njenga: I think all that I can do within a maximum of 25 minutes. For the documents on record, I just need to refer to the dates when they were signed and filed. They are with you as they are filed with the secretariat; just two documents. Then my submissions and my closing remarks shall only refer to some of the issues you had framed for our attention. Any other material by way of authorities can be submitted to the secretariat.

The Chairperson (Sen. (Dr.) Khalwale): Therefore, ladies and gentlemen, I will give you a health break of ten minutes. When we come back, he will do the final submissions and then we discharge them and do our way forward.
Let us take ten minutes' health break.

Mr. Charles Njenga: Very well. That is okay.

(The Special Committee adjourned temporarily at 6.00 p.m.)

(The Special Committee resumed at 6.05 p.m.)

The Chairperson (Sen. (Dr.) Khalwale): May I call this meeting to order once again. Is the secretariat ready to proceed?

Hon. Senators: Mr. Chairman, we do not have quorum.

The Chairperson (Sen. (Dr.) Khalwale): There is one more person remaining so that we can start. Counsel, one more minute please.

Order hon. Members, we now have a quorum. We want to resume from where we left. Counsel for the County Assembly of Embu, you may proceed.

Mr. Charles Njenga: Very quickly, Mr. Chairman. As we close, I go directly to, first of all, my comment on the issue of *sub judice*. All that I wish to add from what my colleague submitted is that, the consideration of whether or not a matter is *sub judice* should be looked at from the point at which the other matter is instituted. When a party says that the present proceedings are *sub judice*, it is incumbent upon such a party to show that even before these proceedings were constituted, before the Senate was seized of this matter, there was, indeed, active litigation. No such evidence has been brought.

Speaking as an advocate acting on these matters that have been referred to by the counsel of the Governor; I can confirm and I can go on record as stating that as at 30th April, 2014, when the County Assembly of Embu forwarded the resolution to the Speaker of the Senate, Petition No.7 which has been cited as pending, had not been filed. That is a matter of record and I can confirm that as an advocate appearing in that matter for the county assembly. So, it cannot be that a matter filed subsequent to an event can now render a previous event *sub judice*.

The Chairperson (Sen. (Dr.) Khalwale): Order! Can you confirm the date when Petition No.7 was filed?

Mr. Charles Njenga: It was filed on 2nd May, 2014. In fact, we appeared in court and we are waiting for a ruling that will be issued tomorrow for an interim application. That is my submission. Therefore, this court matter filed subsequent to the Senate having been seized of this matter cannot render the proceeding *sub judice*. Senate became seized of this matter---

The Chairperson (Sen. (Dr.) Khalwale): Order! There is a matter here. Yes, Eng. Godana.

Sen. Hargura: Thank you, Mr. Chairman. I am seeking clarification. When the Governor's lawyer was here he talked about something against the Speaker and the Clerk of the County Assembly which will be ruled on 15th May, 2014. What was that?

Mr. Charles Njenga: Mr. Chairman, to answer the Senator, also appearing in Petition No.3 is the lengthy ruling or judgment. I also appeared in that one for the county assembly. The matter coming up on 15th May, 2014, is simply a consideration of whether or not a sanction or a sentence should be meted out to the Speaker and the Clerk of the County Assembly of Embu, in view of the findings of that court that there was disobedience of a court order. That is the matter that will come up on 15th May, 2014. It has nothing to do with the proceeding before Senate.

Secondly, on the issue of double jeopardy, my submission is simply that, in the consideration of whether a party is being vexed twice on the same issue, there has to be a valid decision. That juxtaposed with a subsequent decision can lead and can form the basis for submission that, "Look here, I am being charged twice." The Constitutional Court sitting in Petition No.3 of 2014 found that, as a matter of fact, the previous proceedings were null and void; *ab initio*. The wordings used by the court, and you will have occasion to go through paragraph 282 of that judgment at page 131--- In fact, the court says that it is like the resolution was never there in the first place. So, a zero resolution, as stated and declared by the court cannot now give basis to one party to say that, when you look at that decision and the previous proceedings, I am now being subjected to the same process on the same defence.

The Chairperson (Sen. (Dr.) Khalwale): Order! Senators, you will speak through the microphone. Senator Orenge, do you have something to add?

Sen. Orengo: I am just asking, what was found null and void? Is it the resolution or even the proceedings of both the County Assembly and the Senate?

Mr. Charles Njenga: Mr. Chairman, if I may read, it is the proceedings and the resolutions of the County Assembly of Embu; which is the sixth respondent. At paragraph 282, the judgment states thus: “In agreement with the above authorities to the effect that anything done in disobedience of court orders is null and void; *ab initio* and it is a nullity in law. Therefore, the sixth respondent having proceeded to pass a resolution for the removal of the first petitioner from office in defiance of a court order; means that the resolution was a nullity. It is like the resolution was never passed in the first place. In the circumstances, there was no valid resolution which could have been forwarded to the Speaker of the Senate for action under Section 33 (2) of the County Government Act. The subsequent actions of the Senate are a nullity.” “Action” here encompasses even proceedings and a nullity including the decision to remove the first petitioner from office so that the Governor cannot say that I am being prosecuted for the same charges again. It cannot be “again” because the first one was nullified in law. That argument or defence is not available to the Governor.

On the issue of the three months period set out under Section 33(8) of the County Government Act, I reiterate the same argument that, an invalid decision or resolution cannot activate the provisions of Section 33(8) of the County Government Act. This section is only alive---

Sen. Orengo: Mr. Chairman, we have a rule against repetition. I do not know whether it relates to parties addressing us also. But I think the counsel should not repeat.

Mr. George Ng’ang’a Mbugua: But he is summarizing.

Sen. Orengo: No! Even if it is summary, time is of the essence.

Mr. Charles Njenga: I will keep within the time.

Sen. Orengo: Unless it is absolutely necessary.

The Vice Chairperson (Sen. Murkomen): Just give the new things.

Sen. Orengo: Yes, bring new things because we are also pressed for time.

Mr. Charles Njenga: All that I am saying had not been said by anyone else.

The Chairperson (Sen. (Dr.) Khalwale): Order counsel! We are not trying to cut you short. All that we are saying is that, where you can avoid; once an issue has properly been dealt with by your colleague, you can steer clear and deal with new things to save time.

Mr. Charles Njenga: I am not repeating Chairman, I am just emphasizing that in view of what I have cited; my only comment and I will say no more is that an invalid resolution as found by the court cannot activate the operation of Section 33(8) of the County Government Act. Therefore, the time period available to a governor under that provision was never activated in the first place, as pleaded by the Governor. It is not operative.

As to the likelihood of bias, I will only say that under Section 33(7) of the County Governments Act, this Committee is appointed by a resolution of the entire Senate made by a vote. That being the mode of appointment, it cannot be said that the exercise of the Senate's democratic right to elect members to their committees construes to be bias on the party of the Governor. You did not appoint yourselves. There was a procedure which was done in public and that is how you came to be.

Finally, a comment on the threshold, all that we shall say in closing is that, as has been shown, threshold is a question of fact. When you are looking at what is gross in a county, you have to look at the context of that county. All we are saying in support of the violations that have been set out in these charges is that, in the context of Embu County, loss of maize worth Kshs3.5 million is gross. We refuse a lower standard and we urge this standard to be applied to all counties.

We are saying that the moment we begin to grant latitude in terms of compliance, that you can violate but not to this extent; you can waste but do not waste Kshs10 million but Kshs1 million, the moment we start setting the standard of gross violations as low as that, then we shall lose the entire script and discourse of devolution.

This Committee of the Senate is enjoined under Article 96 to protect counties and their governments. We are urging that for the safety, maintenance and integrity of counties that you find, as indeed you have the power to, that gross in this context and in the context of administration of affairs of this nature has been established. The violations that we speak about are matters of grave concern. They are on issues that relate to day to day welfare of the people and the resources available to the people of Embu. We cannot countenance a lower standard than a standard that requires every public officer, including the Governor of the County of Embu, to be accountable for every single shilling that comes and accrues in favour of the County of Embu.

If you are comfortable with the Governor who is not accountable to the last penny; the County Assembly of Embu on behalf of the people of Embu has said: "For us, we demand the highest standard applicable. One of the authorities that we shall supply later is the advisory opinion of the Supreme Court. We shall refer to the comments by the Chief Justice about the new constitutional dispensation and its impact on devolution where he says: "The more the checks, the higher the standards that we should insist on." All that I will ask this Committee to find is that, the charges as brought against the governor have been established. The County Assembly of Embu acted swiftly and dutifully.

As I close, the minutes that disclosed the various meetings held by the joint committee members--- Yes, indeed, they were many and frequent and that is why we believe that when an issue arises, it should be investigated as fast as possible. We should not be faulted for speed. If we acted immediately the issue arose, we summoned people, there were meetings, two committees sat and decided on acting chairman, then the County Assembly should, in fact, be commended for taking up the matter within the shortest time possible. The court has found that it acted properly in summoning all these officials, including the County Secretary.

We urge that, in the totality of events, the Governor having not demonstrated even any single suggestion or action in the face of these clear issues, then there cannot be any doubts in our minds that indeed he is in gross violation of the Public Procurement and Disposal Act, the Public Finance Management Act together with the Constitution. We urge this Committee, when it retires to look at the evidence to find that the case against the Governor has been established.

Thank you for your time. We are grateful. I close.

The Chairperson (Sen. (Dr.) Khalwale): Thank you very much. You may resume your seats. Order, hon. Members! Order, Murkomen!

(Loud consultations)

Yes, you will consult in low tones if you do not mind. So, Members, that is the end of the submissions from the County Assembly of Embu. Are there any submissions from the office of the Governor for the second, third and last time? Now, Members, I want to allow each one of you to raise what you think is pertinent at this stage before I release the Members of the County Assembly of Embu and the advocates. I will start with Engineer Hargura. Thank you. Senator Judith Sijeny, thank you. Senator Boy Juma Boy, thank you. Senator (Eng.) Mositet, thank you. Senator (Prof) Lesan.

Sen. (Prof.) Lesan: Thank you, Mr. Chairman. This has truly worked as an investigative hearing and I want to say that despite the short time we had, I think we have exemplified what investigation is. We were giving each side an opportunity to be heard. I think this Committee here has exactly done that. The manner in which we have taken the evidence is exemplary. Thank you.

The Chairperson (Sen. (Dr.) Khalwale): Thank you. Senator Naisula, thank you. Senior counsel Orengo, the Senator for Siaya.

Sen. Orengo: The issue I want to raise is with you. You had already given direction that when counsel comes back he should release the documents that we have been relying on, so that we are sure about what they have put before us, so that we do not just assume that it is this and that.

The Chairperson (Sen. (Dr.) Khalwale): Counsel, for purposes of the HANSARD put it on record concerning the documents which are your official documents for reference. We know you have filed them with our secretariat but Orengo, being a stickler for the law, I am sure there is something he is chasing. So, let us have them.

Mr. Charles Njenga: Mr. Chairman, we are also sticklers of the law. On record, let it be and let the record show that the County Assembly of Embu relies on the reply to the invitation to appear. It was filed on 8th May with the Senate and we also rely on the supplementary list that contains the two decisions of the constitutional court sitting in Kerugoya. We shall supply to the Committee a copy of the advisory opinion of the Supreme Court that we have also mentioned in our submissions.

The Chairperson (Sen. (Dr.) Khalwale): Orengo, any comments?

Sen. Orengo: There is a letter here from the Speaker which talks about notification of the charges, particular allegations thereon and related annexures and then there is the HANSARD recording. I just wanted it to be very clear on your part that we do not want to take these annexures for granted because they have not been introduced before us sequentially. This is so that when we address the matter we know which are, really, the documents that you have presented before us. I see them here but in the manner in which they have been presented, there could be confusion somewhere towards the time when we go for deliberations. The letter is dated 29th April, 2014 and it is by the Speaker and he refers to what he has relayed to the Senate.

Number two are particulars to the allegations thereon and related annexures. I know he referred to some and others he did not refer to. So, I think it is for his own benefit that we know what is in the annexures rather than taking it for granted.

Mr. Charles Njenga: I get it that the Senator is referring to the bundle of documents that were forwarded with the resolutions to the Speaker of the Senate, by the Speaker of the County Assembly of Embu and that was submitted as a bundle. Maybe in the running of the copies we have been disorganized but they have been numbered from page one.

The Chairperson (Sen. (Dr.) Khalwale): Okay, counsel. Because we are having real pressure of time, I direct you to sort it out administratively with the secretariat, just the same way you filed documents so that whatever the secretariat will then bring, even if you did not directly mention or refer to them, they will form part of your reference documents. Is that easier?

Mr. Charles Njenga: Definitely, Chairman. We will do that.

The Chairperson (Sen. (Dr.) Khalwale): Thank you.

The Vice Chairperson (Sen. Murkomen): Chair, first of all, I would like to thank you for leading us very well and conducting the proceedings in a very professional manner. We will be discussing, perhaps, to award you honorary diploma in law for your good job

apart from your medical profession. I would also like to thank the County Assembly of Embu and the counsel of the Governor for appearing before us and making their presentations. I am satisfied that we have accorded both parties reasonable time and indeed enough time to be able to exhaust their case as they chose to present and within our rules.

I would like to tell the County Assembly, the Governor and the members of the public that as a Committee of the Senate we have received a reasonable amount of information that is necessary for us to retreat and write a report to be presented to the House. We will stick to the law and evidence and the issues that were provided before us.

Above all, I think it is important to remind the public that as a House our interest for Embu is the success of devolution and our desire to ensure that whatever decision that is going to be made will assist further the cause of devolution. That is why we are here. It is our primary duty as the Senate and indeed the primary duty of the County Assembly and County Executive. We will continue working with every leader and entity to ensure that devolution succeeds and that we will keep true to the terms of reference that were accorded to this Committee even as we present our report to the House.

I really want to appreciate the media for being here but remind them that as a country we still have a long way to go in terms of highlighting the real issues. Having heard the counsel of the County Assembly here I think it is important to request our brothers and sisters in the media fraternity to deepen their reporting and editing so that they can always give the public the deeper flesh.

I know that this is a new era of devolution. All of us need to build capacity whether it is Parliament, the media or the public so that our people can follow the real issues and not just the sensational ones; deep real legal issues that we are grappling with all the time.

Thank you Chairman. I thank all the members and appreciate everybody. God bless you and God bless Kenya.

The Chairperson (Sen. (Dr.) Khalwale): On behalf of the secretariat, Ms. Gichangi, do you have anything?

Ms. Eunice Gichangi: No, Mr. Chairman.

The Chairperson (Sen. (Dr.) Khalwale): I also would like to thank members of the public. Today being a holiday and seeing that the gallery is full, shows the seriousness with which you are taking this very important matter.

I also want to thank the media because they have covered us the whole day. We are grateful for the same. I know that we have a few Members of the County Assembly (MCAs) of Embu here. However, we know that the balance is back at home. We want to thank you and your advocates. So far, you have remained very professional. I also want to thank the Governor. He was very clear by indicating what he wanted.

At the beginning, he wanted time and we gave him that time. He has now come back represented by the counsel. Again, just like all of you, he has been very professional making it easy for us to be where we have reached.

I also want to thank the secretariat. Continue doing a good job. However, the tougher part is the one that we are getting into now. This is the one of analyzing the evidence so that we do not make a decision outside the evidence that has been adduced today.

Colleagues, Members of the Senate, you can see we are all full house save for my age mate who took leave to go to Kabarak to attend to some issues at home. Otherwise, we are full house. I am so proud of you.

People of Embu, wherever you are, I ask you to maintain your confidence in this Committee, especially the Senate of the Republic of Kenya. You have nowhere else to go. You can only go to the Senate. We are for you. I want to confirm to you that you can look forward to a very considered decision by this Committee. We will not be biased in any way.

Finally, because of what has been transpiring in the grapevine, I want to ask you, people of Embu, to keep peace. The future for devolution is beautiful. Embu will be a great county once we are done with this particular process.

You are now free to go home or to proceed to your hotels if you are staying at the hotels.

I request Members of the Committee to remain behind because the Session is not over. We will proceed to go and meet in our other room, ladies and gentlemen, for our housekeeping.

The Special Committee Adjourned at 6.30 p.m.