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KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT

THE DEPARTMENTAL COMMITTEE NO. C ON DEFENCE
AND FOREIGN RELATIONS

REPORT ON THE STATUS AND OWNERSHIP OF THE MILITARY
CARGO ABOARD MV. FAINA

CLERK'S CHAMBERS,
PARLIAMENT BUILDINGS,

NOVEMBER, 2009

PREFACE

Mr. Speaker, Sir,

1. The Departmental Committee on Defence and Foreign Relations was constituted on 17th June, 2009 pursuant to provisions of Standing Order 198 (1) and (2). Under the provisions of Standing Order 198 (3) the Committee is mandated to:-

(i) investigate, inquire into, and report on all matters relating to the mandate, management, activities, administrations, operations and estimates of the assigned Ministries and departments;

(ii) study the Programme and policy objectives of the Ministries and departments and the effectiveness for the implementation;

(iii) study and review all legislation referred to it;

(iv) study, assess and analyse the relative success of the Ministries and departments as measured by the results obtained as compared with its stated objectives;

(v) investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House or a Minister; and

(vi) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

2. The Committee oversees the performance of the following Ministries and Government Department:-

(i) Defence;

(ii) Foreign Affairs;

(iii) East African Community and;

(iv) National Security Intelligence Service.

3. Under the above Ministries, the Committee covers the following subjects;

- (i) Defence matters;
- (ii) Foreign policy;
- (iii) Treaties , Conventions and Agreements;
- (iv) International and Regional Organisations;
- (v) Bilateral and Multilateral Relations;
- (vi) Regional Cooperation policy;
- (vii) East African Community affairs;

MEMBERSHIP

4. The Committee comprise the following Members:-

- (i) The Hon. Adan Keynan Wehliye, MP - **Chairperson**
- (ii) The Hon. Hassan Ali Joho, MP – **Vice Chairperson**
- (iii) The Hon. Julius Kiema Kilonzo, MP
- (iv) The Hon. Eugene Ludovic Wamalwa, MP
- (v) The Hon. Charles M. Kilonzo, MP
- (vi) The Hon. Jeremiah Ngayu Kioni, MP
- (vii) The Hon. George Nyamweya, MP
- (viii) The Hon. Joshua Serem Kutuny, MP
- (ix) The Hon. Peter Edick Omondi Anyanga, MP
- (x) The Hon. Benedict Fondo Gunda, MP
- (xi) The Hon. Wilson Mwotiny Litole, MP

METHODOLOGY OF INQUIRY

5. The Committee carried out its investigations through meetings to cross-examine witnesses in Parliament, fact finding visit to the port of Mombasa and an inspection visit to Kahawa Barracks. The Committee commenced its investigations on Monday October 06, 2008 and has held a total of 15 sittings.

During the investigation witnesses from the following institutions appeared and adduced evidence before the Committee in sittings held in Parliament Buildings, Mombasa and Kahawa Barracks:-

- (i) Ministry of State for Defence;
- (ii) Ministry of Foreign Affairs;
- (iii) Kenya Police;
- (iv) Kenya Revenue Authority;
- (v) Kenya Ports Authority;
- (vi) Kenya Maritime Authority;
- (vii) Government Clearing Agency, and;
- (viii) Rift Valley Railways;

6. The witnesses who appeared before the Committee were cooperative and had a lot of evidence to produce before the Committee but could not do so due to limitations imposed by Section 18 (2) of The National Assembly (Powers and Privileges) Act, Cap 6, Laws of Kenya. After deliberations the Committee was of the view that Section 18 (2) of the National Assembly (Powers and Privileges) Act be reviewed to allow witnesses to adduce evidence before Committees of Parliament on matters that do not jeopardize national security.

7. The Committee after deliberations was of the view that its Members be subjected to vetting to enable them assess security information and to be able to inspect security installations.

The decisions of the Committee on this report were arrived at after extensive deliberations and were unanimous.

Mr. Speaker, Sir,

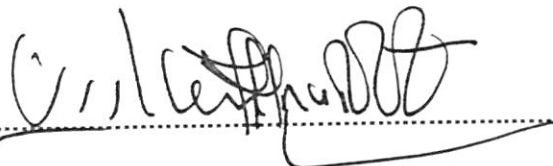
8. I wish to express my appreciation to Members of the Committee who have sacrificed time from their family and constituents during the inquiry. The Committee is grateful to the witnesses who appeared before the Committee to adduce evidence.

The Committee wishes to record its appreciation to you and the Clerk of the National Assembly for the continuous facilitation of our operations.

9. It is now my humble duty, on behalf of the Committee to commend the report to the House for adoption, pursuant to provisions of Standing Order 181. The committee will soon bring amendments to The National Assembly (Powers and Privileges) Act, Cap 6 section 18.

Thank you,

Sign:



THE HON. ADAN W. KEYNAN, MP.

CHAIRPERSON, DEPARTMENTAL COMMITTEE ON DEFENCE AND FOREIGN RELATIONS

Date:

19/11/09

Background

10. The vessel Mv. Faina registered in Belise in Central America was hijacked on 25th September, 2008 in International waters, 307 miles off the coast of Somalia and was carrying military hardware comprising of 33 T72 tanks and other assorted military hardware purchased from Ukraine.

Concern over the actual ownership of the military cargo aboard Mv. Faina led the Committee on Defence and Foreign Relations to start investigations into the status and ownership of the military cargo aboard the ship.

Evidence, observations and recommendations

11. The Committee heard evidence on various matters pertaining to the status and ownership of the military cargo aboard the Ukrainian ship, MV Faina, hijacked off the coast of Somalia. As part of its investigations the Committee visited Kenya Ports Authority and held briefings with the management of the port of Mombasa as well as other key stakeholders that use the port. The Committee also invited the relevant government Ministries to brief the Committee on matters related to the hijacked ship.

12. Evidence was adduced by officers from various organizations and Government departments as follows:-

12.1 The Kenya Ports Authority (KPA)

The Management of the Kenya Ports Authority informed the Committee that:-

- (i) A report on the hijacked ship, MV. Faina, was received through Baawil agencies, which is a local clearing agent, indicating that the ship was to dock on 27th October, 2008 at around 6.00 pm and was to discharge a total of 2, 320 metric tonnes of cargo that was described as "project cargo".
- (ii) Ordinarily KPA receives notices of vessels expected to offload at the port of Mombasa under the 10 days list through local

agents. The Port is also expected to receive a manifest declaring the contents of the cargo 48 hours prior to docking. In this case, the Port did not receive the manifest of MV. Faina as expected and could, therefore, not know the contents of the cargo. Prior to receiving the notification, the Ministry of State for Defence had alerted the Port that it expected the cargo and would be sending its officers to handle the consignment.

- (iii) Tight security is only accorded to military hardware, ammunition and currency while at the port of Mombasa.

12.2 Government Clearing Agent

The Committee was informed that:-

- (i) The Government Clearing Agent is mandated to clear, forward, provide warehousing, transportation and facilitate government cargo. The government clearing officer is therefore expected to clear imported goods for and on behalf of all government Ministries and Parastatals. This was reiterated vide a circulars ref: conf.1/08A (44) dated April 16, 2008 and conf.1/08A (56) dated July 26, 2008 by the Permanent Secretary, Ministry of Finance.
- (ii) In the past, the agency had cleared military goods but did not have any documentation related to MV. Faina since the vessel had not docked at the port.
- (iii) Contrary to the above circulars directing that all government goods be cleared by the government clearing agent some government agencies use private Clearing and Forwarding Agencies to clear their goods and this leads to loss of revenue for the government, high clearing charges that are reflected in high consumer prices in addition to compromising security of the government cargo.
- (iv) The government clearing agent is expected to clear government goods once information on the cargo is

delivered. In relation to the Department of Defence and particularly military cargo, no information or request to the government clearing agent was given and therefore the cargo was not cleared by the government clearing officer.

12.3. Kilindini Police Division (Port Police)

The Committee was informed that:-

- (i) The work of the port Police is to provide security to the port and ensure that there is proper documentation for goods exiting the port of Mombasa. This is done by examining cargo documents and maintaining the number of trucks that exit the gate. The police offer security on behalf of the shipping line and not the end user of the cargo. In case of doubt then the cargo is recorded, detained and verified before releasing.
- (ii) When military cargo is handled at the port, the police would only be alerted by the Military but no counter-checking would be done. If the cargo is not taken upon clearance the Department of Defence liaises with the port Police to secure the cargo.
- (iii) In the case of Mv. Faina, no notification had been received by the port police since the vessel had not docked.

12.4 Rift Valley Railways (RVR)

The Management of Rift Valley Railways (RVR) appeared before the Committee and informed the Committee that:-

- (i) The Company normally transports cargo for the military and other organizations on payment of the required charges. When transporting cargo the company receives a note indicating the destination of the cargo and the consignee.
- (ii) When transporting Military cargo the Department of Defence normally hires an extra coach to transport soldiers who offer security for the cargo.

- (iii) RVR does not inspect the consignments but only handles the consignment note from where the number of wagons is allocated for transportation. The consignee is only expected to specify the dimension of wagons required. RVR gets its payment based on the number of wagons allocated, tonnage, and the destination (distance).
- (iv) Payments for the transportation of the cargo aboard Mv. Faina had been paid for in advance by the Department of Defence.

12.5 Kenya Maritime Authority (KMA)

The Committee held a meeting with officials of the Kenya Maritime Authority who briefed the Committee that:-

- (i) The Kenya Maritime Authority is the regulator for maritime safety, security, preservation and protection of marine environment. The authority inspects the conditions of ships docking at the port, their crew and cargo to ensure they are in conformity with the acceptable international and domestic standards.
- (ii) Due to high number of ships and lack of capacity, the Authority had entered into a Memorandum of Understanding with 13 Port countries in the Indian Ocean to coordinate inspection of ships. The Memorandum requires that a State inspects at least 25% of ships docking at its port and the same is coordinated through a common website to avoid repetition in inspection.
- (iii) The only notification that the Authority receives is the Expected Time of Arrival (ETA) and manifests are only received from commercial liners.

12.6 Ministry of State for Defence

The Committee held a meeting with the Ministry of State for Defence and was informed that: -

- (i) MV. Faina was hijacked by pirates off the coast of Somalia and that since then the ship has been blocked from docking at any Somalia port and is being surrounded by international naval ships from US, NATO, Russia and other countries. Security has since been beefed up along the coast.
- (ii) The military hardware aboard Mv. Faina belonged to the Government of Kenya and that the government was not in contact with the pirates and would not pay ransom demanded by the pirates. The cargo aboard Mv. Faina was the responsibility of the supplier, shipping agent and the insurer until the goods are offloaded and handed over to the Department of Defence.
- (iii) The Government of Kenya had entered into bilateral and multilateral agreements with various governments including the government of South Sudan.
- (iv) The Department of Defence occasionally, when requested, facilitates clearance of military goods for neighbouring armies through bilateral arrangements.

12.7 Ministry of Foreign Affairs

The Minister for Foreign Affairs, Hon. Moses Wetangula, appeared before the Committee and adduced the following evidence, that:-

- (i) The military consignment aboard the hijacked ship belongs to the Kenyan Military and was being transported on CIF basis as per international commercial practice. This puts obligation of safe delivery on the insurer and ship owner. Kenya will only take full responsibility of the cargo once it is offloaded at the port of Mombasa.

- (ii) That the Kenyan Government was not in anyway involved in ransom negotiations with the hijackers and would not pay any form of ransom.
- (iii) The Kenya-Sudan relations were cordial contrary to reports. However, the Kenyan Ambassador to Sudan had been summoned by some intelligence officers attached to the Sudanese Ministry of Foreign Affairs and questioned with regard to the cargo aboard Mv. Faina. The Sudanese Minister for Foreign Affairs had sent an apology to Kenya over the incident.
- (iv) Kenya, as a leading player in the Comprehensive Peace Agreement, fully supported the existing United Nations Arms embargo against Sudan and could not in any way participate in arming any of the parties in Sudan.

12.8 Kenya Revenue Authority (KRA)

The Kenya Revenue Authority Commissioners informed the Committee that:-

- (i) The procedure of customs clearance is effected through the *Simba process*. The process requires supply of mandatory details into the KRA database including the name of the importer, origin of the goods, destination, entry point, taxes and duty paid.
- (ii) KRA effects clearance through a password regime, which does not allow any form of manipulation. In case of urgent or sensitive cargo then KRA may apply prior release process, which has been done to Military consignments in the past.
- (iii) No clearance can be done without clear documentation since the same is used to determine taxes and duties to be paid. All the clearance for government cargo is ordinarily meant to be done by the Government Clearing Agent.

(iv) All military cargo for the Kenyan Government is tax exempt but in case of cargo on transit, then a special transit bond is executed. The goods are expected to leave Kenya within 30 days for them to qualify as transit cargo and a tax will be levied accordingly in case of delay.

(v) There were cases in the past whereby unscrupulous people imported goods purporting to be for the Kenyan military so as to be exempted and KRA officials had discovered that the goods were not meant for the military and action was taken against the traders and due taxes were paid.

(vi) Military goods do not require declaration and are exempted from taxation as provided for under the 5th schedule of the Customs Act.

13. Visit to Kahawa Barracks

The Committee visited Kahawa Barracks to view the military arsenal that was offloaded from MV. Faina. The Committee held a meeting with the Minister and Department of Defence officials who briefed the Committee on the status of the military arsenal. The Committee viewed twenty six T72 tanks imported from Ukraine.

Conclusion and Recommendations

14. From the evidence adduced before the Committee the confusion over the ownership of the military cargo aboard MV. Faina, first raised by United States Navy in Bahrain, had the potential of severing relations between the Government of Kenya and Sudan. This is evident by the questioning of Kenya's Ambassador in Sudan by Sudanese intelligence officers. Kenya has been a key player in the peace process in Sudan that saw the signing of the Comprehensive Peace Agreement (CPA) between the Khartoum government and the SPLA and should not be seen in any way to be stock piling for or arming any of the parties to the CPA. Kenya respects the UN arms embargo imposed upon Sudan

and therefore cannot be seen to be purchasing arms for South Sudan.

15. In spite receiving evidence that the cargo belonged to Kenya, the Committee could not get documentary details on the status and ownership of the cargo due to limitations of Cap 6 section 18 (2).

16. Section 18 (2) of the National Assembly (Powers and Privileges) Act, Cap 6, Laws of Kenya, provides that no public officer shall produce documents or give evidence on matters relating to the navy, military or air force without the president's consent. Witnesses invoked the above law when requested for information by the Committee. The Committee while acknowledging the security concerns of our nation recommends a review of the National Assembly (Powers and Privileges) Act to allow public officers to disclose information to Committees of Parliament particularly on matters that do not jeopardise the country's security and sovereignty so as to bring about accountability and checks and balances in the armed forces.

17. The above notwithstanding the continuing acts of piracy along the Somalia coast in the Indian Ocean are a threat to Kenya's security, commerce and tourism. The Government should work closely with the international community in combating piracy as a short term solution while working towards a politically and economically stable Somalia.