



*Paper Laid
and
Chair person of
Legal. AAB
Hon Samuel
on 25/6/2013
Just*



PARLIAMENT OF KENYA

THE NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT

FIRST SESSION (2013)

THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT

ON REQUESTS FOR STATEMENTS BY HON. IBRAHIM ABDI SANEY MP, HON. JOHN WALUKE MP AND HON. JAMES OPIYO WANDAYI MP.

JUNE, 2013

1.0 PREFACE

On behalf of the Departmental Committee on Justice and Legal Affairs and pursuant to the provisions of Standing Order No. 199, it is my pleasure and duty to present to the House, the Committee's Report on Requests for Statements from Hon. Ibrahim Abdi Saney, Hon. John Waluke and Hon. James Opiyo Wandayi

1.1 Committee Membership

The Committee on Justice and Legal Affairs was constituted by the House on Thursday 16th May, 2013 comprising of the following members:

Hon. Samuel Chepkonga, M.P.,.....Chairperson

Hon. Priscilla Nyokabi, M.P.....Vice-Chairperson

Hon. Muriithi Waiganjo, M.P

Hon. Ndirangu Waihenya, M.P

Hon. Florence Kajuju, M.P

Hon. Kang'ata Irungu, M.P

Hon. Benson Mutura, M.P

Hon. Olago Aluoch, M.P

Hon. John Njoroge M.P

Hon. William Cheptumo, M.P

Hon. Njoroge Baiya, M.P

Hon. Mohamed Abdi, M.P

Hon. Kangongo Bowen, M.P

Hon. Sammy Koech, M.P

Hon. Moses Cheboi, M.P

Hon. Paul Bii, M.P

Hon. Charles Gimose, M.P

Hon. Johanna Ngeno, M.P

Hon. Boniface Otsiula, M.P

Hon. David Ouma Ochieng, M.P

Hon. Neto Agostinho, M.P

Hon. Dr. Christine Olumbaka, M.P

Hon. Kaluma Peter, M.P

Hon. Fatuma Ibrahim, M.P

Hon. Ben Momanyi Orori, M.P

Hon. Munuve Mati John, M.P

Hon. Ken Okoth, M.P

Hon. T.J. Kajwang', M.P

Hon. Mutua Mutemi, M.P

1.2 Mandate of the Committee

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of standing order 216 (5) which outline functions of the Committee as being:

- a) a)To investigate, inquire into, and report on all matters relating to the mandate,management,activities,administration,operations and estimates of the assigned ministries and departments;
- b) To study the Programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all the legislation referred to it;
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;
- e) To investigate and inquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a Cabinet Secretary;
- f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments); and
- g) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.
- h) In accordance with Second Schedule of the Standing Orders, the Committee is mandated to consider:-
 - a) Constitutional Affairs
 - b) The administration of Law and Justice
 - c) The Judiciary
 - d) Public prosecutions
 - e) Elections
 - f) Ethics, Integrity and anti-corruption and
 - g) Human rights

1.3 Committee Meetings

The Committee held two sittings during which the Honourable Attorney General attended one of the sittings.

1.4 Acknowledgements

- a. The Committee wishes to sincerely thank the Offices of the Speaker and the Clerk of the National Assembly for the necessary support extended to it in the execution of its mandate.
- b. The Chairperson of the Committee takes this opportunity to thank all Members of the Committee for their patience, sacrifice, endurance and Commitment to Public Service under tight schedules which enabled us to complete the task within the stipulated period.
- c. The Committee wishes to record its appreciation for services rendered by the staff of the National Assembly attached to the Committee. Their efforts and input made the work of the Committee and production of this Report possible.
- d. Finally, it is now my pleasant duty, on behalf of the Departmental Committee on Justice and Legal Affairs, to present and recommend this report on the to the House for adoption pursuant to Standing Orders of the National Assembly and other enabling provisions of the Law.

Thank you.

Signed.....

Hon. Samuel Chepkon'ga, M.P

**(Chairperson
Departmental Committee on Justice and Legal Affairs**

Dated this.....^{24th}.....day of.....^{June}.....2013

2.0 BACKGROUND

2.1 ESTABLISHMENT OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

The Departmental Committee on Justice and Legal Affairs is one of the Departmental Committees established under Standing Order No.216 (1) with the Mandate among others to respond to requests for statements to matters under the mandate of the Committee and as the Honourable Speaker may direct.

Pursuant to the provisions of Standing Order 44 (2) (c), the Speaker directed the Chairperson of the Committee two respond to the requests as sought by respective members of the House.

2.2 Request for Statement By Hon. Ibrahim Abdi Saney MP

The subject matter of the request is regarding the challenges facing membership of Teachers Service Commission (TSC) where it advertised to fill vacancies in its membership in September 2012.

The Commission shortlisted eleven (11) candidates for the position of member of the commission and five (5) for chairperson and thereafter interviews were conducted in October 2012. The selection panel forwarded five (5) candidates for the commissioner' position and three (3) candidates for Chairperson to the Principals for onward submission of one (1) nominee for chairperson and three (3) nominees to parliament for consideration and approval.

The National Assembly rejected the names and the President submitted a second list of nominees to Parliament for approval. However the list submitted contained the same names that were rejected by the House except for one, Mr.Cleopus Tirop. The relevant Committee made a second report recommending approval of the list, and the House approved the nominees on 9th January, 2013. This was in contravention of the TSC Act which required a fresh list to be sub-mitted rather than the first list that had been rejected.

A Petition was lodged in court challenging the legality on the approval and subsequent appointment of the nominees to respective positions. On 25th March 2013, the Court ruled that the nomination was improper, null and void in law. The court further directed that the President picks the next set of candidates based on meritocracy, gender and regional balance from the list of shortlisted and interviewed candidates. Among the nominees only Mr. Cleopus Tirop met the requirement of fresh nomination hence was appointed and sworn in as a commissioner.

The honorable member sought an explanation on the following:

- (a) Why the court ruling in **Petition No.8 of 2013 (Abdi Sitar Yusuf versus the AG and the Selection panel of TSC)** was not implemented in light of the remaining 2 vacancies for members of the commission.
- (b) Why the state law office is not fulfilling its constitutional mandate of advising the president to submit the names of the remaining commissioners as ruled by the High Court and as duly guided by the TSC Act; and

Why the Attorney General is allowing the TSC, a constitutional commission, to face a potential crisis as the term of the remaining five (5) commissioners is soon coming to an end on 14th June 2013 leaving only one commissioner in office from 15th June, 2013

2.3. Request for Statement by Hon. John Waluke MP

The subject matter of the request is regarding the failure by officials at the Attorney General's Chambers to release **Ksh.21, 330,557 to Hon. Otieno Mark Onyango** awarded to him on 15th June 2012 by the High Court for wrongful detention.

The honorable member sought a statement on the following:

- (a) The Chairperson to provide reasons as to why the money has not been released to the former Member of Parliament.
- (b) An indication to the House when the money will be paid to the former member of Parliament.

2.4 Request for Statement by Hon. James Opiyo Wandayi

The subject matter of the request is regarding clarification on the following issues regarding the Kenyan case at the ICC:

The honorable member sought a statement on the following:

1. The position of the Government on co-operation with the International Criminal Court (ICC) as obligated by the Rome Statute
2. The position of the Government on statements attributed to Kenya's representative to the United Nations calling for termination of the criminal cases against three Kenyans at the ICC.
3. The position of the Government on the resolution of the 21st Ordinary Session of the African Union in Addis Ababa, on May 26, 2013, calling for the referral of the Kenyan cases at the ICC back to Kenya.
4. The capacity and preparedness of the Government to investigate and prosecute the three ICC cases if referred back to Kenya.

3.0 MEETING WITH THE HONOURABLE ATTORNEY GENERAL

PROF.GITHU MUIGAI

During its sitting held on Monday 17th June, 2013, the Attorney General informed the Committee as follows;

On the Request by Hon. Ibrahim Abdi Saney, he said that;

- In the view of the decision of National Assembly to reject the first list of nominations and the subsequent nullification of the second list by the High Court, the proper course to be adopted is for the President to draw fresh names of nominees from the short list made by the Selection Panel.
- The decision of the Court invalidated only the second list submitted to the National Assembly but did not affect the entire selection process.

- The Attorney General's office issued an advisory opinion to TSC on 30th May, 2013 bearing information conveyed above.

On the request by Hon. John Waluke, he informed members that;

- Judgment of the suit was delivered on 15th June, 2012, in favour of the Plaintiff. The Court stated that the claims for violation of fundamental rights were a claim against the state and awarded the Plaintiff Ksh. 20,000,000/- (Twenty Million Shillings) for violation of his fundamental rights against the office is yet to receive the settlement funds from the Ministry as advised.
- The successor of the Ministry of Provincial Administration and Internal Security that is the Ministry of Interior and Coordination of National Government be tasked with the question as to when the settlement of the claim will occur.

The A.G confirmed that Hon. Mak'Onyango will be paid in full and his office has never frustrated the Judgment creditor

On the Request by James Opiyo Wandayi regarding Kenyan position on the ICC, the AG observed that;

- Kenya remains committed to its obligations under the Rome statute having voluntarily negotiated, signed, ratified and domesticated the Rome Statute. Kenya has been actively engaged in the activities of the Court and promptly paid its assessed contribution to the Court.
- In addition, The Republic has fully cooperated with the ICC in the following manner:
 - a) Fully domesticating the Rome Statute through the International Crimes Act, 2008;
 - b) The Government has also facilitated the work of the ICC investigators in Kenya by facilitating collection of evidence through enactment of the International Crimes Procedures for obtaining Evidence Rules 2010;

- c) Appointment of a judge of the High Court to preside over taking of statements by Government Officials; mechanisms. This was a collective decision of AU member states.
- d) The Government has the capacity and preparedness to investigate and prosecute the three ICC cases if referred back to Kenya.
 - The political, legislative as well as democratic landscape has changed since the promulgation of the constitution.
 - There are plans to have an international crimes division of the High Court.

4.0 COMMITTEE'S OBSERVATIONS

The Committee having met the Attorney General observed the following;

- 4.1 In view of the National Assembly to reject the first list of nominations and the subsequent nullification of the second list by the High Court, the proper course to be adopted is for the President to draw a fresh names of nominees from the short list made by Selection Panel under section 8(6) of the **Teachers Service Commission Act No. 20 of 2012** ("the Act") which states as follows;

"Where the National Assembly rejects any nominee, the Speaker shall within five days communicate its decision to the President and request the President to submit fresh nominations from amongst the persons shortlisted and forwarded by the selection panel under subsection (6)."

- 4.2 The Republic has fully cooperated with the ICC in the following manner;
- Fully domesticating the Rome Statute through the International Crimes Act, 2008.

- The Government has also facilitated the work of the ICC investigators in Kenya by facilitating collection of evidence through enactment of the International Crimes Procedures for obtaining Evidence Rules 2010
- Appointment of a judge of the High Court to preside over taking of statements by Government Officials; mechanisms. This was a collective decision of AU member states.
- The Government has the capacity and preparedness to investigate and prosecute the three ICC cases if referred back to Kenya.

5.0 RECOMMENDATIONS OF THE COMMITTEE

On the Teachers Service Commission;

- The President should draw two names of nominees from the list that was prepared by the selection panel and submit to the National Assembly for Consideration.

On the Otieno Mak'Onyango case;

- The Cabinet Secretary for Interior and Coordination of National Government will soon be invited to appear before the Committee to explain how they will make good the Judgment creditor's Payments.

On the Kenyan Case at the ICC;

- Kenya should remain committed to its obligations under the Rome statute having voluntarily negotiated, signed, ratified and domesticated the Rome Statute. Kenya has been actively engaged in the activities of the Court and promptly paid its assessed contribution to the Court.

ANNEXTURES

MINUTES OF THE 17TH SITTING OF THE DEPARTMENTAL COMMITTEE
ON JUSTICE AND LEGAL AFFAIRS MEETING HELD ON MONDAY 24TH
JUNE, 2013 AT THE MEDIA CENTRE, PARLIAMENT BUILDINGS AT 10.00

A.M

PRESENT

Hon. Samuel Chepkong'a, MP – **Chairperson**
Hon. Ndirangu Waihenya, MP
Hon. Moses Cheboi, MP
Hon. Paul Bii, MP
Hon. Kaluma Peter, MP
Hon. Mutua Mutemi (Bishop) , MP
Hon. John Njoroge Chege, MP
Hon. T.J. Kajwang', MP
Hon. William Cheptumo, MP
Hon. Munuve Mati John, MP
Hon. Benson Mutura, MP
Hon. Florence Kajuju, MP
Hon. Muriithi Waiganjo, MP
Hon. Ken Okoth, MP

ABSENT WITH APLOGY

Hon. Olago Aluoch, MP
Hon. Neto Agostinho, MP
Hon. Priscilla Nyokabi, MP
Hon. Kangongo Bowen, MP
Hon. Kang'ata Irungu, MP
Hon. Sammy Koech, MP
Hon. David Ouma Ochieng, MP
Hon. Boniface Otsiula, MP
Hon. Mohamed Abdi Haji, MP
Hon. Johana Ngeno, MP
Hon. Ben Momanyi Orori, MP
Hon. Njoroge Baiya, MP
Hon. Fatuma Ibrahim Ali, MP
Hon. Charles Gimose, MP
Hon. Dr. Christine Ombaka, MP

NATIONAL ASSEMBLY

1. Abenayo Wasike.....Committee Clerk
2. Felista Karanja.....Parliamentary Intern

MIN.NO. 82/2013

OPENING PRAYER

The meeting started with a word of prayer.

MIN. NO. 83/2013

REMARKS BY THE CHAIRMAN

The Chairman invited members and informed them that the main agenda of the meeting is to prepare for the vetting of the Solicitor General nominee.

MIN.NO.84/2013

REPORT BY THE SECRETARIAT

The Chairman invited the Secretariat to brief members on progress made towards approval hearings of the Solicitor General nominee.

- The Secretariat informed members that the notification on the approval process had already been sent and published in the print media as required in law.
- Members were also informed that the approval hearing will be conducted on Thursday 27th June, 2013 at 10.00 a.m.
- The Report on the approval of the SG nominee should be tabled on or before Tuesday 2nd July, 2013 for consideration by the House.
- Members were given the Curriculum Vitae of the nominee for perusal.

Members were satisfied with the progress made in preparation for approval hearing and asked the secretariat to avail information on the job description of the Solicitor General.

MIN.NO.85/2013

ANY OTHER BUSINESS

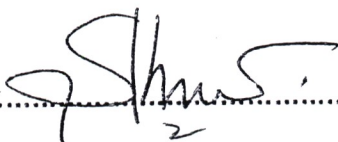
Members considered progress on requests for statements on the Hon.Otieno Mak'Onyango case, the TSC question and the ICC factor, and an invitation for a retreat with members of the Judges and Magistrates vetting Board to be held in Mombasa on 4th -7th July, 2013.

Having perused the Curriculum vitae of the nominee, the committee resolved that the Secretariat should obtain a report from the Public Service Commission on the recruitment process that was followed.

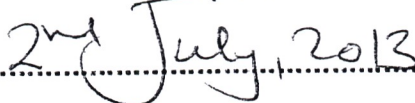
The Committee also resolved that information from KRA, EACC, CID, HELB and the LSK should be availed for the process.

- On the Otieno Mak'Onyango case, the committee resolved to invite the Cabinet Secretary in charge of Interior and National Co-ordination for deliberation on delayed payment. The Committee will set a date later.
- The Committee resolved that the Mwandawiro issue should also be brought to the attention of the Cabinet secretary.
- The secretariat to prepare a report on request for statements.
- On the ICC the Committee adopted the explanation given by the Attorney General.
- On the TSC it was resolved that the remaining two members on shortlisted candidates should be submitted by the nominating authority to Parliament for consideration.

The meeting adjourned at 12.30 pm for the next sitting on Thursday 27th June, 2013 at 10.00 a.m

Signed.....

Chairperson

Date.....

MINUTES OF THE 16TH SITTING OF THE DEPARTMENTAL COMMITTEE
ON JUSTICE AND LEGAL AFFAIRS HELD ON 17TH JUNE, 2013 IN
COMMITTEE ROOM 4TH FLOOR, CONTINENTAL HOUSE AT 2.30 P.M

PRESENT

Hon. Samuel Chepkong'a, MP – Chairperson
Hon. Ndirangu Waihenya, MP
Hon. Moses Cheboi, MP
Hon. Paul Bii, MP
Hon. Kaluma Peter, MP
Hon. Ben Momanyi Orori, MP
Hon. Mutua Mutemi (Bishop) , MP
Hon. John Njoroge Chege, MP
Hon. Njoroge Baiya, MP
Hon. Johana Ngeno, MP
Hon. T.J. Kajwang', MP
Hon. Ken Okoth, MP
Hon. William Cheptumo, MP
Hon. Munuve Mati John, MP
Hon. Benson Mutura, MP
Hon. Mohamed Abdi Haji, MP
Hon. Muriithi Waiganjo, MP
Hon. Olago Aluoch, MP
Hon. Neto Agostinho, MP
Hon. Fatuma Ibrahim Ali, MP

ABSENT WITH APOLOGY

Hon. Sammy Koech, MP
Hon. Dr. Christine Ombaka, MP
Hon. Kang'ata Irungu, MP
Hon. Boniface Otsiula, MP
Hon. Kangongo Bowen, MP
Hon. Charles Gimose, MP
Hon. Florence Kajuju, MP
Hon. David Ouma Ochieng, MP
Hon. Priscilla Nyokabi, MP

NATIONAL ASSEMBLY

Abenayo Wasike.....Committee Clerk
Felista Karanja.....Parliamentary Intern

IN ATTENDANCE

Hon. Githu Muigai.....Attorney General
Mr. Tom Odede.....State Counsel
Ms Joan M. Chesoni.....State Counsel

MIN.NO.77/2013

OPENING PRAYER

The meeting started with a word of prayer

MIN.NO.78/2013.....MEETING WITH THE ATTORNEY GENERAL

The Attorney General met the Committee and responded to requests for statements sought by members of Parliament through the Chairman of the Legal Affairs Committee.

The Attorney General submitted the attached brief containing responses for:

- Statement on the Otieno Mak'Onyango Case-Request by Hon. John Waluke
- Statement on Appointment of the Chairperson and the Members of the Teachers Service Commission-Request for statement by Hon. Ibrahim Abdi Saney.
- Statement on Kenyan case at the ICC-Request for Statement by Hon. James Opiyo Wandayi.

On the appointment of the Chairperson and the Members of Teachers service Commission; the A.G stated that:

- In the view of the decision of National Assembly to reject the first list of nominations and the subsequent nullification of the second list by the High Court, the proper course to be adopted is for the President to draw a fresh names of nominees from the short list made by the Selection Panel under notice in the

gazette and proceed to constitute a new selection panel to consider the application

On the Otieno Mak'Onyango case; the A.G stated that:

- Judgment of the suit was delivered on 15th June, 2012, in favour of the Plaintiff. The Court stated that the claims for violation of fundamental rights were a claim against the state and awarded the Plaintiff Kshs. 20,000,000/- (Kshs. Twenty Million) for violation of his fundamental rights against the office is yet to receive the settlement funds from the Ministry as advised.
- The successor of the Ministry of Provincial Administration and Internal Security that is the Ministry of Interior and Coordination of National Government be tasked with the question as to when the settlement of the claim will occur.
- The A.G confirmed that Hon. Mak'Onyango will be paid in full and his office has never frustrated the Judgment creditor.

On the Kenyan Case at the ICC; the A.G stated that:

- Kenya remains committed to its obligations under the Rome statute having voluntarily negotiated, signed, ratified and domesticated the Rome Statute. Kenya has been actively engaged in the activities of the Court and promptly paid its assessed contribution to the Court.
- In addition, The Republic has fully cooperated with the ICC in the following manner:
 - a) Fully domesticating the Rome Statute through the International Crimes Act, 2008;
 - b) The Government has also facilitated the work of the ICC investigators in Kenya by facilitating collection of evidence through enactment of the International Crimes Procedures for obtaining Evidence Rules 2010;
 - c) Appointment of a judge of the High Court to preside over taking of statements by Government Officials; mechanisms. This was a collective decision of AU member states.

d) The Government has the capacity and preparedness to investigate and prosecute the three ICC cases if referred back to Kenya.

- The political, legislative as well as democratic landscape has changed since the promulgation of the constitution.
- There are plans to have an international crimes division of the High Court.

The A.G undertook to provide clarifications to the Committee by close of business on Tuesday 18th June, 2013.

The A.G also promised to involve the Committee in international engagements concerning his office.

MIN.NO.79/2013

CONFIRMATION OF THE MINUTES

Minutes of previous meetings were confirmed as follows;

- Fourteenth sitting held on Tuesday 11th June, 2013 were proposed by Hon.Mutua Mutemi and seconded by Hon. Peter Kaluma
- Fifteenth sitting held on Wednesday 13th June, 2013 were proposed by Hon. Ken Okoth and seconded by Hon. Moses Cheboi.

MIN.NO.80/2013

ADOPTION OF THE COMMITTEE REPORT

The Hon. T.J. Kajwang' proposed adoption of the Report and was seconded by Hon. Moses Cheboi.

Members of the Committee by Majority adopted the Report on the Nomination of the three Foreign Judges as Members of the Judges and Magistrates Vetting Board as follows;

THAT Pursuant to section 9 (13) of the Vetting of Judges and Magistrates (Amendment) Act, 2011 and Standing Order 199; and in order to enable the vetting process to proceed to conclusion, the Committee recommends that:-

This House approves the Hon. Justice (Rtd) Barnabas Albert Samatta of Tanzania, Hon. Lady Justice A.E.N.Mpagi-Bahigeine of Uganda and Hon. Justice Joseph Asoka Nihal De Silva of Sri Lanka for appointment by H.E the President as Members of the Judges and Magistrates Vetting Board.

MIN.NO.81/2013

ADJOURNMENT

The meeting was adjourned 5.20 pm.

Signed..........

Chairperson

Date...18th June 2013.....

298
NATIONAL ASSEMBLY
19 JUN 2013
P.O. BOX 41112 NAIROBI



RECEIVED
19 JUN 2013
CLERK'S OFFICE

THE STATE LAW OFFICE
OFFICE OF THE ATTORNEY-GENERAL

Your Ref: KNA/DC-I/CORR/2013/12

Date: 18th June, 2013

Our Ref: AG/CONF/6/B/72 (54)

Clerk of the National Assembly
Parliament Buildings
NAIROBI



RE: REQUEST FOR STATEMENTS FROM THE CHAIRPERSON OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

The above matter refers and previous correspondence on the same resting with our letter REF: AG/CONF/6/B/72 (54) dated 14th June, 2013.

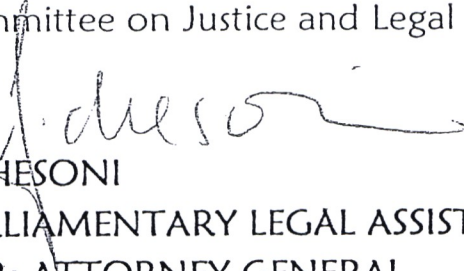
As undertaken during by the Attorney General during the sitting of the Departmental Committee on Justice and Legal Affairs on 17th June, 2013, please find below supplementary information on the issues raised.

1. Statement on Appointment of the Chairperson and the Members of The Teachers Service Commission - Request For Statement By Hon. Ibrahim Abdi Saney MP;
 - a) A copy of the Advisory issued to the Teachers Service Commission is enclosed;
 - b) The number of eligible candidates for a fresh list for the position of Commissioner is two (2).

2. Statement on NAIROBI HCCC NO 845 OF 2003 OTIENO
MAK'ONYANGO VS ATTORNEY GENERAL & DANIEL
TOROITICH ARAP MOI – Request For Statement By Hon.
John Waluke MP;

The Office of the Attorney General is awaiting a response from
the Ministry as to when payment will be made.

Please convey the information to the Chairman of the Departmental
Committee on Justice and Legal Affairs


J. CHESONI
PARLIAMENTARY LEGAL ASSISTANT
FOR: ATTORNEY GENERAL



THE STATE LAW OFFICE
OFFICE OF THE ATTORNEY-GENERAL

Your Ref: TSC/LS/250/2012/13

30th May 2013

Your Ref:

Date:

Our Ref:

AG/CONF/9/29/3 VOL. 1

Mr. Gabriel K. Lengoiboni, EBS, CBS
Secretary/Chief Executive
Teachers Service Commission
TSC House, Upper Hill
NAIROBI



Dear

Mr. Secretary,

RE: APPOINTMENT OF THE CHAIRPERSON AND MEMBERS OF THE
TEACHERS SERVICE COMMISSION

I am in receipt of your letter dated 24th May, 2013 in which you have sought my opinion on the issue of appointment of members of the Teachers Service Commission and particularly your recommendation that a fresh selection panel be constituted by the President to interview and select nominees to fill the existing vacancies in the Commission.

I have carefully reviewed the matter in light of the applicable provisions of the relevant legislation and seek to render my advice as follows:

1. The operative section of the Teachers Service Commission Act No. 20 of 2012 ("the Act") with regard to the appointment of the commissioners is section 10 (3) and (4) which provides that;

(3) Where a vacancy occurs in the membership of the Commission under subsection (1), the

appointment procedure provided for in section 8 shall with necessary modifications, apply.

(4) A member appointed under subsection (3) shall serve for a non-renewable term of six years.”

Section 8 of the Act accordingly provides that;

“8. (1) Within fourteen days of the commencement of this Act, or whenever a vacancy arises in the Commission, the President in consultation with the Prime Minister shall by notice in the Gazette declare a vacancy and constitute a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel constituted under subsection (1) shall consist of—

- (a) a chairperson not being a public officer appointed by the President;
 - (b) the Cabinet Secretary in the Ministry responsible for matters relating to education or his representative;
 - (c) the Attorney General or his representative;
 - (d) the Cabinet Secretary in the Ministry responsible for public service or his representative;
 - (e) one person nominated by the Federation of Kenya Employers;
 - (f) two persons, one man and one woman, nominated by the registered trade unions representing the interests of registered teachers;
 - (g) one person nominated by a recognised association of private schools;
- and

(h) a prominent educationist not serving in Government appointment by the Cabinet Secretary.”

2. The legal import of the above is that whenever a vacancy arises, the same should be declared by the President in a Gazette and a selection panel comprising representatives of the above enumerated bodies constituted by the President.
3. Any reference to the office of the Prime Minister should accordingly be ignored as the office has lapsed following the first elections held on 4th March 2013 under the Constitution.
4. In view of the decision of National Assembly to reject the first list of nominations and the subsequent nullification of the second list by the High Court, the proper course to be adopted is for the President to draw a fresh names of nominees from the short list made by selection Panel under section 8(6) of the Act to fill the present vacancies as provided by section 8(11) which states as follows;

“ Where the National Assembly rejects any nominee, the Speaker shall within five days communicate its decision to the President and request the President to submit fresh nominations from amongst the persons shortlisted and forwarded by the selection panel under subsection (6).”
5. As regards the envisaged vacancies likely to arise upon the expiry of the current Commissioners by the 14th day of June, 2013, the section 8 of the Act provides that the President shall by a notice in the Gazette declare the vacancies as and when they arise and thereafter proceed to constitute a new selection panel to select new candidates to fill the vacancies.
6. The issue of constituting a new selection panel to select candidates for the existing vacancies does not arise at all. A selection panel has already been constituted by the President as provided by law.

Thereafter, the first list of nominees was presented to the National Assembly but was rejected. A second list was submitted to National Assembly but the same was subsequently nullified by the High Court.

7. The decision of the court invalidated only the second list submitted to the National Assembly but did not affect the entire selection process including the constitution of the selection panel so as to require setting up of a new selection panel for the already existing vacancies.
8. In view of the above, I am of the considered opinion that as regards the existing vacancies and for which a selection process has already been initiated, it behoves the President to draw fresh names of nominees from the list that has been prepared by the selection panel.

As regards future vacancies, the President is enjoined by law to declare such vacancies as and when they arise by notice in the gazette and proceed to constitute a new selection panel to consider the applications.

Please be advised accordingly.

Yours


~~GITHU MUIGAI, EGH, SC
ATTORNEY GENERAL~~

Copy to:

Mr. Francis Kimemia, EGH
Secretary to the Cabinet
Office of the President
Harambee House
NAIROBI

Prof. George Godia, CBS
Permanent Secretary
Ministry of Education
Jogoo House
NAIROBI

252 (1)
VERY URGENT

of Committees
The Committee to
discuss & prepare
a report for the
HSE



1304
WASIK
pls TNA
PA
17/6

THE STATE LAW OFFICE

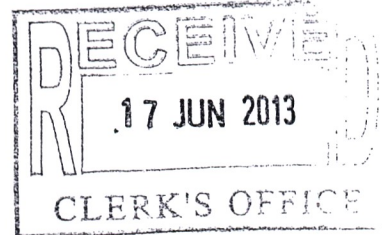
Justin
OFFICE OF THE ATTORNEY-GENERAL
17/6

Your Ref: KNA/DC-I/CORR/2013/12

Date: 14th June, 2013

Our Ref: AG/CONF/6/B/72 (53)

Mr. Justin Bundi
Clerk of the National Assembly
Parliament Buildings
NAIROBI



Dear *Mr. Bundi*

RE: REQUEST FOR STATEMENTS FROM THE CHAIRPERSON OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

The above matter refers and previous correspondence on the same resting with your letter REF: KNA/DC-I/CORR/2013/12 dated 12th June, 2013.

Below, please find the content of my responses.

1. Statement on Appointment of the Chairperson and the Members of The Teachers Service Commission - Request For Statement By Hon. Ibrahim Abdi Saney MP;
 - a) In view of the decision of National Assembly to reject the first list of nominations and the subsequent nullification of the second list by the High Court, the proper course to be adopted is for the President to draw a fresh names of nominees from the short list made by selection Panel under

section 8(6) of the Teachers Service Commission Act No. 20 of 2012 ("the Act") to fill the present vacancies as provided by section 8(11) which states as follows:

" Where the National Assembly rejects any nominee, the Speaker shall within five days communicate its decision to the President and request the President to submit fresh nominations from amongst the persons shortlisted and forwarded by the selection panel under subsection (6)."

- b) As regards the vacancies that arose upon the expiry of the terms of the current Commissioners by the 14th day of June, 2013, the section 8 of the Act provides that the President shall by a notice in the Gazette declare the vacancies as and when they arise and thereafter proceed to constitute a new selection panel to select new candidates to fill the vacancies.
- c) The decision of the court invalidated only the second list submitted to the National Assembly but did not affect the entire selection process including the constitution of the selection panel so as to require setting up of a new selection panel for the already existing vacancies.
- d) An advisory on this matter was issued by my Office to the Teachers Service Commission on 30th May, 2013, bearing the same information conveyed above. Additionally, I also advised the Commission that, I am of the considered opinion that as regards the existing vacancies and for which a selection process has already been initiated, it behoves the President to draw fresh names of nominees from the list that has been prepared by the selection panel.
- e) Further, as regards future vacancies, the President is enjoined by law to declare such vacancies as and when they arise by

notice in the gazette and proceed to constitute a new selection panel to consider the applications.

2. Statement on NAIROBI HCCC NO 845 OF 2003 OTIENO MAK'ONYANGO VS ATTORNEY GENERAL & DANIEL TOROITICH ARAP MOI – Request For Statement By Hon. John Waluke MP;

a) The Plaintiff filed **NAIROBI HCCC NO 845 OF 2003 OTIENO MAK'ONYANGO VS ATTORNEY GENERAL & DANIEL TOROITICH ARAP MOI** seeking to recover general as well as punitive and exemplary damages against the two defendants jointly and severally for unlawful and malicious arrest, prosecution, search and detention during the aftermath of the attempted coup d'état on 1st August, 1982. The Plaintiff also alleged that his fundamental rights and freedoms guaranteed under sections 72(1), 72(3), 74 and 77 of the Constitution of Kenya (repealed) were violated.

The Plaintiff sought the following prayers:-

- i) General damages
 - ii) Punitive and exemplary damages
 - iii) Costs of the suit
 - iv) Interest on (a), (b) and (c)
 - v) Any other or further relief the Honourable Court deemed fit and just to grant
- b) Judgement on the suit was delivered on 15th June, 2012, in favour of the Plaintiff. The Court stated that the claims for violation of fundamental rights were a claim against the state and awarded the Plaintiff Kshs. 20,000,000/- (Kshs. Twenty Million) for violation of his fundamental rights against the

Attorney General. The Plaintiff was also awarded interest at court rates and costs only in respect of disbursements to be paid by the Attorney General.

- c) After the Judgement, the Plaintiff appointed Counsel to undertake the execution process for him. However, during the process, the Plaintiff decided to act in person. The process occurred on various dates from June 2012, through to December 2012.

- d) By a letter dated 16th January 2012, the Attorney General acknowledged receipt of the Plaintiff's letter dated 21st December, 2012 and *noting that the Plaintiff had filed an appeal which was pending before the Court of Appeal*, advised that Plaintiff awaits the outcome of the appeal.

- e) The foregoing notwithstanding and owing to the adverse publicity generated by the Plaintiff in both electronic and print media, the Attorney General on the **19th March, 2013** *advised the Permanent Secretary, Provincial Administration & Internal Security to settle the claim.*

- f) Mr. Chairman, let the Committee take cognizance of the fact that the Attorney General was appearing on behalf of the then Ministry of Provincial Administration & Internal Security, which was the state organ involved in this matter. The Ministry was duly advised to settle the claim but my

Office is yet to receive the settlement funds from the Ministry as advised.

g) I wish to conclude by stating that the successor of the Ministry of Provincial Administration & Internal Security, that is the Ministry of Interior and Coordination of National Government be tasked with the question as to when the settlement of the claim will occur.

3. Statement on The Kenyan Case at the ICC – Request For Statement By Hon. James Opiyo Wandayi MP.

A. On the co-operation with the International Criminal Court (ICC);

Kenya remains committed to its obligations under the Rome Statute having voluntarily negotiated, signed, ratified and domesticated the Rome Statute. Kenya has been actively engaged in the activities of the Court and promptly paid its assessed contributions to the Court.

The Republic has fully cooperated with the ICC in the following manner:

- a) Fully domesticating the Rome Statute through the International Crimes Act, 2008;
- b) The Government has also facilitated the work of the ICC investigators in Kenya by facilitating collection of evidence through enactment of the International Crimes Procedures for obtaining Evidence Rules 2010;
- c) Appointment of a judge of the High Court to preside over taking of statements by Government officials;

- d) Unfettered access into Kenya and within Kenya for the former Prosecutor of the ICC, the current Prosecutor of the ICC, staff members of their Office, Registry Officials of the ICC, Defence Counsel, Victims' Counsel and their respective investigators;
- e) Signing of a host country agreement with the Court;
- f) The formation of a Multi-Agency Task Force on Post-Election Violence;
- g) Establishment of Kenyan Witness Protection Agency;
- h) Provision of confidential documents and information to the ICC including the report of the Commission of Inquiry Into Post-Election Violence ("CIPEV") (also known as the Waki Commission), provision of NSAC minutes;
- i) Formation of a Cabinet Committee to coordinate ICC matters.

B. On statements attributed to Kenya's representative to the United Nations;

Mr. Chairperson, I request that this issue be addressed by the Ministry of Foreign Affairs as they are the parent Ministry responsible for Kenya's representative to the United Nations and would therefore be able to clarify any direction given to him.

C. On the Resolution of the 21st Ordinary Session of the African Union in Addis Ababa on May 26th May 2013;

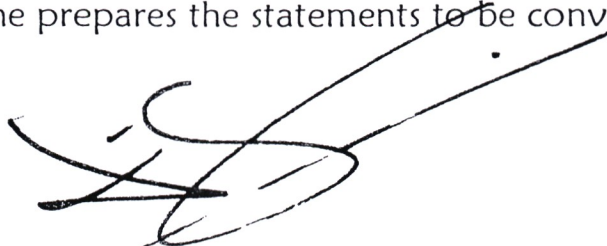
The AU during its 21st Summit passed a resolution for the Kenyan ICC cases to be referred back to the national judicial

mechanisms. This was a collective decision of AU Member States.

D. Capacity and preparedness of the Government to investigate and prosecute the three ICC cases if referred back to Kenya;

- a) The political, legislative as well democratic landscape has changed since the promulgation of the constitution and it is the government's belief that the Kenyan courts can handle the cases;
- b) There are plans underway to have an international crimes division of the High court, it is intended to give effect to Section 8 (2) of the International Crimes Act, No. 16 of 2008, for purposes of both dealing with the pending 2007/2008 PEV cases that are being pursued by the Director of Public Prosecutions (DPP) and in order to prepare in the unlikely event that there are similar cases in the future. The division is also aimed to deal with crimes of an international nature for example piracy, trafficking in persons et cetera;
- c) I wish to conclude by stating that ICC as envisaged by the Rome Statute is a court of last resort.

I trust that the responses above will be adequate to the Chairman as he prepares the statements to be conveyed to the House.



GITHU MUIGAI, EGH, SC
ATTORNEY GENERAL

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THE STATE LAW OFFICE
OFFICE OF THE ATTORNEY-GENERAL

Your Ref: TSC/LS/250/2012/13

Date: 30th May 2013

Our Ref: AG/CONF/9/29/3 VOL/1

Mr. Gabriel K. Jengoiboni, EBS, CBS
Secretary/Chief Executive
Teachers Service Commission
TSC House, Upper Hill
NAIROBI



Dear

RE: APPOINTMENT OF THE CHAIRPERSON AND MEMBERS OF THE
TEACHERS SERVICE COMMISSION

I am in receipt of your letter dated 24th May, 2013 in which you have sought my opinion on the issue of appointment of members of the Teachers Service Commission and particularly your recommendation that a fresh selection panel be constituted by the President to interview and select nominees to fill the existing vacancies in the Commission.

I have carefully reviewed the matter in light of the applicable provisions of the relevant legislation and seek to render my advice as follows:

- I. The operative section of the Teachers Service Commission Act No. 20 of 2012 ("the Act") with regard to the appointment of the commissioners is section 10 (3) and (4) which provides that:

(3) Where a vacancy occurs in the membership of the Commission under subsection (1), the

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appointment procedure provided for in section 8 shall with necessary modifications, apply.

(4) A member appointed under subsection (3) shall serve for a non-renewable term of six years.”

Section 8 of the Act accordingly provides that;

“8. (1) Within fourteen days of the commencement of this Act, or whenever a vacancy arises in the Commission, the President in consultation with the Prime Minister shall by notice in the Gazette declare a vacancy and constitute a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel constituted under subsection (1) shall consist of—

- (a) a chairperson not being a public officer appointed by the President;
 - (b) the Cabinet Secretary in the Ministry responsible for matters relating to education or his representative;
 - (c) the Attorney General or his representative;
 - (d) the Cabinet Secretary in the Ministry responsible for public service or his representative;
 - (e) one person nominated by the Federation of Kenya Employers;
 - (f) two persons, one man and one woman, nominated by the registered trade unions representing the interests of registered teachers;
 - (g) one person nominated by a recognised association of private schools;
-) and

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Thereafter, the first list of nominees was presented to the National Assembly but was rejected. A second list was submitted to National Assembly but the same was subsequently nullified by the High Court.

7. The decision of the court invalidated only the second list submitted to the National Assembly but did not affect the entire selection process including the constitution of the selection panel so as to require setting up of a new selection panel for the already existing vacancies.

8. In view of the above, I am of the considered opinion that as regards the existing vacancies and for which a selection process has already been initiated, it behoves the President to draw fresh names of nominees from the list that has been prepared by the selection panel.

As regards future vacancies, the President is enjoined by law to declare such vacancies as and when they arise by notice in the gazette and proceed to constitute a new selection panel to consider the applications.

Please be advised accordingly.

Yours

Githu Muigai
**GITHU MUIGAI, EGH, SC
ATTORNEY GENERAL**

Copy to:

Mr. Francis Kimemia, EGH
Secretary to the Cabinet
Office of the President
Harambee House
NAIROBI

Prof. George Godia, CBS
Permanent Secretary
Ministry of Education
Jogoo House
NAIROBI

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