

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Tuesday, 3rd November, 2020

*The House met at the Senate Chamber,
Parliament Buildings, at 2.30 p.m.*

[The Speaker (Hon. Lusaka) in the Chair]

PRAYER

COMMUNICATIONS FROM THE CHAIR

WELCOME TO HON. SENATORS FROM RECESS

The Speaker (Hon. Lusaka): Hon. Senators, I take this opportunity to welcome you back from the three-week recess period. This last part of our calendar will run for a period of one month from today, Tuesday, 3rd November, 2020 to Thursday, 3rd December, 2020. I hope you had time to reflect with your families and constituents.

Hon. Senators, as we return from recess, let us remember that COVID-19 continues to pose serious health challenges to all of us. As you know, this scourge has affected and made an impact on each and everyone of us in one way or another. During the recess period, it hit close home where we lost one of our Secretariat Officers in the Directorate of Serjeant-at-Arms, the late Philemon Okinda. Our Secretariat has gone above the call of duty to ensure that we are adequately facilitated to execute our constitutional mandate. I take this opportunity to commiserate with the late Okinda's family and the larger Parliament fraternity and appreciate our Secretariat for the efforts and sacrifices they make everyday for us and this nation. I will ask us to rise for one-minute silence in his remembrance.

*(Hon. Senators stood up in their places and
observed a minute of silence)*

Thank you.

Data availed by the relevant Ministry and information in the public domain is that we are now in a second wave of the pandemic which is allegedly more lethal than the first one. I urge each and every one of us to religiously adhere to the parliamentary guidelines on keeping safe and preventing the spread of the pandemic. Be your neighbour's keeper, wear your mask responsibly and at all times.

Hon. Senators, we have resumed sittings for a very short period before the Senate proceeds on the long recess next month. This coupled with the implication of the High Court ruling on Bills pending at various stages in the Senate, Motions, Petitions and Statements that are before Committees, not forgetting the imminent constitutional review processes and a raft of expected legislative proposals as a result of the Building Bridges Initiative (BBI) to a united Kenya, our work is clearly cut out for us. I will say a little more on the High Court judgement shortly.

Hon. Senators, I call upon all of us to dutifully attend and participate in Committee and Plenary meetings. My Office and the Secretariat are at your disposal to facilitate you in your work.

I thank you.

THE IMPLICATION OF THE HIGH COURT JUDGEMENT
ON CONSTITUTIONAL PETITION NO. 284 OF 2019

Hon. Senators, I have another communication to make.

On 20th June 2019, the Senate passed a Motion and resolved, among other things, to institute legal proceedings to –

(a) Challenge the laws that have been enacted unprocedurally in the Twelfth Parliament;

(b) Seek an interpretation of the term “money Bill”; and

(c) Seek a final determination of the procedure to be followed in respect of all the Bills that are pending before Parliament so as to ensure compliance with Article 110(3) of the Constitution and for the future.

In line with the resolution of the House, on 18th July, 2019, the Senate filed a Petition seeking for the following orders:

(a) A declaration be and is hereby issued that pursuant to Article 110(3) of the Constitution, a Speaker of a House of Parliament must first seek the concurrence of the Speaker of the other House of Parliament as to whether a Bill is one that concerns counties. If it is, whether it is a special or an ordinary Bill, before the Bill can be introduced for consideration in the originating House.

(b) A declaration be and is hereby issued that it is mandatory and a condition precedent for any Bill that is published by either House to be subjected to a joint concurrence process to determine in terms of Article 110(3) of the Constitution whether the Bill is a special or an ordinary Bill and that such determination is not dependent on “a question arising” as to whether the Bill is one that concerns counties.

(c) A declaration be and is hereby issued that the provisions of Article 110(3) are couched in mandatory terms and is a condition precedent before any House of Parliament can consider a bill.

(d) A declaration be and is hereby issued that pursuant to Article 110(3) of the Constitution, one Speaker cannot unilaterally make a decision as to whether a Bill does or does not concern counties, or whether a question as to whether the Bill is one that concerns counties does or does not arise;

(e) This Honourable Court orders the immediate cessation of consideration of all Bills that are pending before either House and for which joint concurrence by the Speakers of both Houses as to whether the Bills concern counties has not been

demonstrated to allow for such Bills to be subjected to the mandatory joint concurrence process contemplated under Article 110(3) of the Constitution;

(f) A declaration be and is hereby issued that any Bill or delegated legislation that provides for, or touches on, the mandate or powers of the Parliamentary Service Commission must be considered by the Senate as it directly affects the Senate's ability to undertake its constitutional mandate, including its ability to consider Bills that affect counties;

(g) A declaration be and is hereby issued that the following Acts passed by the National Assembly are unconstitutional, null and void for violation of Articles 96, 109, 110, 111, 112 and 113 of the Constitution-

1. The Public Trustee (Amendment) Act (No. 6 of 2018)
2. The Building Surveyors Act (No. 19 of 2018)
3. Computer Misuse and Cybercrimes Act (No. 5 of 2018)
4. The Statute Law (Miscellaneous Amendments) (No. 4 of 2018)
5. The Kenya Coast Guard Service Act (No. 11 of 2018)
6. The Tax Laws (Amendment) Act (No.9 of 2018)
7. The Statute Law (Miscellaneous Amendments) Act (No. 18 of 2018)
8. The Supplementary Appropriation Act (No. 2 of 2018)
9. The Equalization Fund Appropriation Act (No. 3 of 2018)
10. The Sacco Societies (Amendment) (No. 16 of 2018)
11. The Finance Act (No. 10 of 2018)
12. The Appropriations Act (No. 7 of 2018)
13. The Capital Markets (Amendment) Act (No. 15 of 2018)
14. The National Youth Service Act (No. 17 of 2018)
15. The Supplementary Appropriation Act (No. 13 of 2018)
16. The Health Laws (Amendment) Act (No. 5 of 2019)
17. The Sports (Amendment) Act (No. 7 of 2019)
18. National Government Constituency Development Fund Act (2015)
19. The National Cohesion and Integration (Amendment) Act (2019)
20. The Statute Law (Miscellaneous Amendments) Act (2019)
21. The Supplementary Appropriation Act (No. 9 of 2019)
22. The Appropriation Act (2019)
23. The Insurance (Amendment) Act (2019)
24. The National Government Constituency Development Fund Act (2015)

In the alternative to prayer (g), and without prejudice to prayer (g), that this honourable court suspends the validity of the Statutes below to enable Parliament to comply with the procedures set out under Articles 96 to 113 of the Constitution within a period of six months, and to report back to this honourable court on the action taken to comply with the legislative procedure as set out in the Constitution-

1. The Public Trustee (Amendment) Act (No. 6 of 2018)
2. The Building Surveyors Act (No. 19 of 2018)
3. Computer Misuse and Cybercrimes Act (No. 5 of 2018)
4. The Statute Law (Miscellaneous Amendments) (No. 4 of 2018)
5. The Kenya Coast Guard Service Act (No. 11 of 2018)
6. The Tax Laws (Amendment) Act (No.9 of 2018)
7. The Statute Law (Miscellaneous Amendments) Act (No. 18 of 2018)

8. The Supplementary Appropriation Act (No. 2 of 2018)
9. The Equalization Fund Appropriation Act (No. 3 of 2018)
10. The Sacco Societies (Amendment) (No. 16 of 2018)
11. The Finance Act (No. 10 of 2018)
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14. The National Youth Service Act (No. 17 of 2018)
15. The Supplementary Appropriation Act (No. 13 of 2018)
16. The Health Laws (Amendment) Act (No. 5 of 2019)
17. The Sports (Amendment) Act (No. 7 of 2019)
18. National Government Constituency Development Fund Act (2015)
19. The National Cohesion and Integration (Amendment) Act (2019)
20. The Statute Law (Miscellaneous Amendments) Act (2019)
21. The Supplementary Appropriation Act (No. 9 of 2019)
22. The Appropriation Act (2019)
23. The Insurance (Amendment) Act (2019)
24. The National Government Constituency Development Fund Act (2015)

A declaration be issued that the Appropriation Act, 2019 is unconstitutional, null and void for violation of Articles 110 (3), 218 and 222 of the Constitution.

A declaration be and is hereby issued that the Constitution requires that the Speakers of both Houses of Parliament adhere to the following binding and mandatory legislative path and procedure for every Bill that is published by either House-

- (1) That the business of considering and passing of any Bill is not to be embarked upon and concluded before the two Chambers, acting through their Speakers, address and find an answer for a certain particular question: What is the nature of the Bill in question?
- (2) That the two Speakers, in answering that question, must settle three sub-questions –
 - (a) Is this a Bill concerning county governments, and if it is, is it a Special or an Ordinary Bill?
 - (b) Is this a Bill not concerning county governments?
 - (c) Is this a money Bill?
- (3) That any disagreement as to the nature of a Bill should be harmoniously settled through mediation and an obligation is thus placed on the two Speakers, where they cannot agree between themselves, to engage the mediation mechanism.
- (4) That the two Speakers would each be required to appoint an equal number of Members, who would deliberate upon the question and file their report within a specified period of time, or that the two Chambers may establish a Standing Mediation Committee to deliberate upon and to resolve any disputes regarding the path of legislation to be adopted for different subject-matter.

A declaration be and is hereby issued that Articles 3, 115, 131 (2) and 259 of the Constitution impose a constitutional and legal obligation on both Speakers of Parliament, prior to submitting a Bill for assent to demonstrate compliance with the procedure set out under Articles 109 to 115 of the Constitution has been complied with.

A declaration be and is hereby issued that the provisions of Standing Order No.121 (2) of the National Assembly Standing Orders that provide that:

“Whenever any question arises as to whether a Bill is a Bill concerning county governments, the Speaker shall determine whether the Bill is a Bill concerning county governments and, if it is, whether it is a special or an Ordinary Bill” is inconsistent with Article 110(3) of the Constitution and, therefore, pursuant to Article 2 (4) of the Constitution is null and void.

A declaration be and is hereby issued that Standing Order No.143 (2) to (6) of the National Assembly Standing Orders which is set out below is inconsistent with the legislative process on Bills concerning counties as set out in Articles 109(4), 110 to 113, 122 and 123 of the Constitution and, therefore, pursuant to Article 2 (4) of the Constitution is null and void-

“(2) Following First Reading, the Speaker shall, within reasonable time, pronounce his or her opinion contemplated under Article 114(2) of the Constitution.

(3) Where the opinion of the Speaker under paragraph (2) is to the effect that the Bill is not a money Bill, the Bill shall be proceeded with in the same manner as a Bill originating in the National Assembly after First Reading.

(4) Where the opinion of the Speaker under paragraph (2) is to the effect that the Bill is a money Bill in terms of Article 114 of the Constitution, the Bill shall stand referred to the Budget and Appropriations Committee.

(5) The Budget and Appropriations Committee shall consider the Bill and report its recommendations to the House.

(6) Where the Budget and Appropriations Committee recommends that the House—

(a) Proceeds with the Bill, the Bill shall be proceeded with in the same manner as a Bill originating in the National Assembly after First Reading in the manner recommended by the Budget and Appropriations Committee.

(b) Should not proceed with the Bill, that fact shall be recorded in the journals of the House.

A declaration be and is hereby issued that where the Speakers of both Houses concur that a Bill is one that concerns counties, pursuant to Article 109 (4), the Bill must be passed in accordance with Articles 110 to 113, 122 and 123 of the Constitution and the Standing Orders of both Houses, and is not subject to Article 114 of the Constitution.

A declaration be and is hereby issued that where the contents of a Bill affect the functions and finances of the counties, the Bill is not a money Bill within the meaning of 114 (3) of the Constitution.

A declaration be and is hereby issued that where a Bill deals with financial matters and such matters affect the finances or functions of county governments pursuant to Article 110 (1) (c), the Bill is a Bill concerning county governments and must be considered by the Senate.

A declaration be and is hereby issued that an Act of Parliament constitutes an Act that has complied with the legislative process required of both Houses by participation of both Speakers as required under Article 110 (3) of the Constitution and where the Bill concerns counties by consideration in the Senate as required in the Constitution.

This honourable court be pleased to issue any other appropriate order or relief as it may deem fit and just. Costs of the Petition be awarded to the petitioner in any event.

The Senate's Petition was consolidated with a Petition filed by the Council of Governors (CoG) in High Court Petition No.353 of 2019; Council of Governors *versus* The National Assembly and Others. In that Petition, the CoG was challenging Section 4 of the Kenya Medical Supplies Authority Act as amended by the Health Law Amendment Act, 2019 on the following grounds that the:

- (a) Legislative process of the Health Law Amendment Act, 2019 was tainted with illegality for failing to conduct public participation and making substantive amendments through an Omnibus Bill.
- (b) The Senate was not involved in the enactment of the Health Law Amendment Act, 2019.
- (c) Amendments will adversely interfere with health service delivery in the counties because the Kenya Medical Supplies Agency (KEMSA) is unable to supply adequate drugs and medical supplies.
- (d) Amendments interfere with the principles of distinctiveness under Article 6 of the Constitution.

The Chief Justice appointed a Bench of three judges comprising Justices J. Ngaah, A. Ndung'u and T. Matheka to hear this Petition.

The Senate was represented by Sen. James Aggrey Orenge, SC; Sen. Okong'o Omogeni, SC; Sen. Mutula Kilonzo Jnr.; Ms. Mercy Thanji, Directorate of Litigation and Compliance (Senate Department) and Dr. Johnson Okello, Director Legal Services, Senate.

The Court subsequently on 29th October, 2020 delivered its judgment and ruled as follows-

(a)The concurrence process is mandatory and must be undertaken before a Bill can be introduced in the originating House. The Speakers of both Houses must first comply with the mechanism under Article 110 (3) of the Constitution, to concur on whether or not a Bill concerns counties, and whether it is a special or ordinary Bill. Where the Speakers are unable to agree on this question, the issue shall be referred to a mediation mechanism for resolution.

(b)The two Speakers of the Houses of Parliament should expeditiously implement a mediation mechanism for resolving the issue of concurrence on whether or not a Bill is a Bill concerning counties where the Speakers are unable to concur.

(c)The concurrence process is not dependent on "a question" arising as stated in the National Assembly, Standing Order 121. The High Court declared the procedure in Standing Order 121 of the National Assembly Standing Orders unconstitutional in so far as the same requires that "a question" must arise before concurrence is sought.

(d)On Bills currently under consideration by either House of Parliament, the High Court ordered the immediate cessation of the consideration of such Bills pending before either House, where the joint concurrence by the Speakers of both Houses as to whether or not the Bills concern counties, has not been demonstrated. Both Houses of Parliament are, therefore, immediately required to refer such Bills to the mandatory joint resolution/concurrence process under Article 110 (3) of the Constitution before the Bills can go through the legislative process.

(e)On matters touching on Parliamentary Service, the Court issued an order that any Bill or Delegated Legislation touching on the Parliamentary Service Commission must be referred to the Senate.

(f)The procedure set out under Standing Order 143(2) to (6) of the National Assembly Standing Orders, which the National Assembly applies to refer Bills originating from the Senate to the Budget and Appropriations Committee to determine whether or not the Bill is a Money Bill, was declared unconstitutional.

On this question, the High Court ruled that —

(i)the provisions of standing order 143 (2) to (6) of the National Assembly Standing Orders are unconstitutional; and,

(ii)a Bill concerning counties and a Money Bill are mutually exclusive. Accordingly, where the two Speakers have jointly resolved that a Bill is a Bill that concerns counties, then Article 114 does not apply and the Bill must be considered in line with the procedures set out under Articles 109(4), 110, 111, 112, 113, 122 and 123 of the Constitution.

(g)That 23 of the Acts passed by the National Assembly and enacted into law in contravention of Articles 96, 109, 110, 111, 112 and 113 of the Constitution were declared unconstitutional, thus, null and void.

Hon. Senators, this is a landmark ruling that not only reaffirms constitutionalism and the rule of law in Kenya, but also the role of the Senate in devolution.

(Applause)

The judgment has far-reaching implications on the legislative business of the Senate as an order was also issued for a cessation of consideration of all Bills that are pending before either House for which joint resolution by the Speakers on whether they affected counties was not undertaken in order to allow for such Bills to be subjected to the mandatory process contemplated under Article 110 (3) of the Constitution.

Further, the Court has given the two Houses of Parliament a 9-month window in which the impugned Acts ought to be brought in line to comply with the provisions of Article 110(3) of the Constitution and regularized.

The Senate Business Committee (SBC) has considered this matter and through my office and those of the House leadership, further directions on the next course of action on the Bills will be communicated in due course.

In the meantime, no Bill which does not meet the requirements of Article 110 (3) of the Constitution will be scheduled in the Order Paper at any stage before that exercise is completed and directions given.

Allow me to thank all of you for participating in and supporting this process of seeking court intervention on the role and mandate of the Senate. Special thanks and gratitude go to the Senators who led our legal team, led by Sen. Okong'o Omogeni, Senior Counsel, Sen. James Orengo, Senior Counsel, and Sen. Mutula Kilonzo Jnr. for prosecuting the case *pro bono*, thereby saving us the use of public resources.

We are also aware that the National Assembly is contemplating appealing the High Court decision and have asked our lawyers to be vigilant and deal with the matter, which we are confident that they will.

I thank you.

I will allow a few comments. I give the first opportunity to the Chair of the Justice, Legal Affairs and Human Rights Committee, Sen. Omogeni.

(Loud consultations)

Order! I can see all lawyers are here listed. I will give you an opportunity.

Sen. Omogeni: Thank you, Mr. Speaker, Sir. I think I should have the first go, then, I will leave it to my colleagues. I thank everybody who participated in this process, more so, the strategy that was employed by this House in passing a resolution and taking full ownership of this process.

Any serious case must be argued by serious lawyers. In 2002 when the election of George Bush was being challenged by Al Gore, Al Gore picked Warren Christopher, the former Secretary of State, to lead his team of lawyers, while George Bush picked James Baker. I think it was with wisdom that this House settled on Senior Counsel, Sen. Orenge, Sen. Mutula Kilonzo Jnr. and I, plus other members from our Directorate of Legal Services.

I thank profusely the team from our drafting department led by Dr. Okello and Ms. Mercy Thanji, who did a lot of work in the background. She appeared in court with us and did the preparation of the submission and filing of authorities. I hope the leadership is taking note of that lady who has exhibited a lot of passion in arguing cases that touch on the mandate of the Senate before the Court. I remember appearing with her when we argued Advisory No.3 of 2019 before the Senate.

I also thank Members for their vigilance. If you recall there was a time when a rumour went around that we were about to compromise this matter. It took the intervention of Sen. Murkomen and Sen. Cheruiyot to insist that the matter must be heard and a decision be rendered on merit.

Mr. Speaker, Sir, there is no doubt that as you have rightly put it, this is a landmark decision. I think the window of opportunity that we have to reassert the legislative mandate of the Senate cannot be gainsaid.

When we started this suit there was a lot of ridicule from our colleagues from the National Assembly. Others kept on reminding us that they are the one who disburse money and participate in budget making process and, therefore, the Judiciary would be cowed and may not give orders that are favourable to the Senate, but here we are. Having kept faith in our Judiciary, we have gotten a judgement that has for once restated the role that your office, as the Speaker, should play in making determination on Bills that affect counties.

This is a landmark decision because it is not every day that courts can nullify a total of 24 Acts of Parliament. In addition, two Standing Orders of the National Assembly have been declared unconstitutional. It is a big win for the Constitution that we enacted in 2010, and for the courts.

Mr. Speaker, Sir, the second point I want to make is that I want to thank our courts that have come out and exhibited courage in making a pronouncement of this nature. If there is a time that we, as Senators, should fight for the independence of the Judiciary, this is the time. Without the Judiciary, I dare say without the many decisions that we have gotten that have been favourable to the Senate right from the Supreme Court or through to the High Court, this Senate would have really been weakened. However, with this decision, the authority of this House in participating in the legislative process has been affirmed by the courts.

Mr. Speaker, Sir, I have heard fears being expressed that the Members of National Assembly may intend to appeal to the Court of Appeal. First, I want to request our colleagues in the National Assembly to go back and reflect on the number of decisions that have come both from the Supreme Court - two of them - and one from the High Court and then make a very pragmatic decision on whether it is worthwhile proceeding to appeal on this matter.

Mr. Speaker, Sir, if you read this judgment in detail, it is merely restating and reaffirming the findings of the Supreme Court on these matters. Lawyers in this House will tell you that decisions from the Supreme Court are binding on the Court of Appeal and the High Court.

If wisdom was prevailing, Members of the National Assembly should accept that we have a Bicameral Parliament, which constitutes of the National Assembly and the Senate. They should come to the realization that the Senate is here to stay and that we must play our role as outlined under Articles 93 and 94 of the Constitution in the legislative process. However, should they insist and proceed to the Court of Appeal, we assure them that we will still be here. We will appear for this House *pro bono* and we will be there to defend this decision to finality.

Finally, Mr. Speaker, Sir, the ball now shifts to you. This judgment places your office on the driver's seat. It is you who will be making a determination on whether a Bill concerns counties, or it does not concern counties.

I want to make reference to the findings of the Supreme Court in Reference No.2 of 2013, where the Supreme Court made a finding to the effect that almost all legislations in one way or another, affect counties. If you want to pass a law that touches on security, that is a Bill that affects counties. If you want to talk about National Government - Constituencies Development Fund (NG-CDF) which will involve undertaking of certain development activities at the county level, that is a Bill that affect counties.

We look upon your office working with us to ensure that this decision is used to the benefit of this House and that going forward, all these 24 Bills that were declared unconstitutional will get input from this House in the legislative process.

I thank you.

The Speaker (Hon. Lusaka): Petitioner number three, Sen. Murkomen, kindly, proceed.

Sen. Murkomen: Thank you very much, Mr. Speaker, Sir. This is a very great day. Actually, it was not today. The day this judgment was delivered was a great day for the Senate, devolution and for this country.

Mr. Speaker, Sir, first, I want to thank you, petitioner number two, for accepting to be a petitioner in this case and for providing leadership. It was not easy. The day you signed these documents, a day before and the very day that we went to file these documents, we walked together from here to the High Court in Milimani.

Mr. Speaker, Sir, that show of solidarity, you became the second Speaker who led this House to get the right decision from the courts. The first Speaker, Hon. Ethuro, led us to the Supreme Court. You led us to the High Court for proper implementation of that decision that we had received from the Supreme Court.

Mr. Speaker, Sir, I am happy to have been part of the petitioners as a petitioner number three. I want to confess to Senators in this House that it was not an easy decision.

Being the Senate Majority Leader then, it was putting me in direct collision path with the President and the Party Leader of Jubilee.

Mr. Speaker, Sir, you remember an incident that occurred in State House before we filed this case having written a letter to the President that he needed to intervene before we go to court, but it was not very friendly. I knew for sure that it will only take leadership for people to stand firm for us to maintain and protect this House.

That is why I want to congratulate the Senate Minority Leader who also became our counsel in this case, Senior Counsel, Sen. Omogeni and my brother, Sen. Mutula Kilonzo Jnr. for taking up the responsibility to represent the Senate for free.

I also want to thank the Secretariat led by the Clerk, the Director of the Directorate of Legal Services and Ms. Mercy Thanji who did a fantastic job and a number of us who are lawyers. I know the Senator for Migori County, Sen. (Dr.) Ochilo-Ayacko, Sen. (Prof.) Kindiki, Sen. Pareno, myself and others gave our comments, including the soon to be admitted Sen. Cherargei, who was the Chairperson of the Committee on Justice, Legal Affairs and Human Rights then. He was part and parcel of those who contributed to this process; the Senator for Mombasa, Sen. Faki, and all the lawyers in this House.

Mr. Speaker, Sir, I want to also remind my colleagues that Parliament is now going to be called Parliament. If you follow the procedure that the courts have highlighted, laws of Kenya will be laws made by the Parliament of Kenya, not one House. This is the point we have reiterated over and over again that you cannot have one House taking over the responsibility of making laws on behalf of the rest of the Parliament.

Mr. Speaker, Sir, imagine, even a law that governs the administration of this House like the Parliamentary Service Commission was hurriedly passed in the National Assembly, with a lot of mutilation of responsibilities of the Clerk of this House and the Secretary of the Parliamentary Service Commission, among other responsibilities. This is because people feared that if they brought it to this House, this House will scrutinize it and it will never pass the test. Now, we have the opportunity to scrutinize all those laws within the nine months that have been given by the courts, and failure to do so, all those laws will fall by their side.

Mr. Speaker, Sir, I also want to emphasize here that this is not the last case. One, I fear for you because the powers that have been recognized of the Speaker and the responsibility you have with your brother in the National Assembly in determining whether a Bill concerns county, puts a lot of spotlight on you.

Mr. Speaker, Sir, you have to stand firm because history will judge you, whether you will stand firm or you will waver. Some people will quietly come to you at night and tell you; can you accede to the following laws that they do not concern counties? We will be left with a fantastic judgment without a defender of that very judgment. That judgment is a sword by itself. It cuts both ways. It gives powers to this House, but gives you the responsibility to become vigilant because many people will come before you to arm-twist you to make decisions that are not going to be favourable to this House.

Mr. Speaker, Sir, I need to suggest something that the Committee on Justice, Legal Affairs and Human Rights, Sen. Omogeni and the team will have to look at. We need to amend our Standing Orders to state in details the procedure of the operationalization of Article 110. This can include a communication from the Speaker on

what decision he will have taken on Article 110, so that it is not just going to be the Speaker making the decision on Bills, but also the same decision be communicated to the House.

Mr. Speaker, Sir, in a situation where there is need for mediation as to whether the law concerns the counties and should have been allowed to come to this House or not, then we should also put in our Standing Orders the procedure, including formation of a mediation team prior to the operationalization of that law.

Lastly, we have achieved a lot, but there is a threat that is going to affect this House. The BBI will take away the gains we have achieved in that judgement, particularly when it comes to Article 123 in terms of decision of this House where the people of Kenya already desired that decisions of this House must be passed by at least a half of the counties, not just the individuals sitting in this House of the Counties. We must be vigilant.

I saw in the media, Sen. Orengo and Members of the 'lower' House saying, "this document cannot be opened and it must go as it is." I hope that was a misrepresentation of facts. It must be opened up to discussion because there are some gaps.

Mr. Speaker, Sir, how can you tell me that Article 218 that talks about division of revenue shall be vetoed by the National Assembly and, at the same time, tell us that 35 per cent of the money will go to counties? If you get a President who is a *mjeuri*, that President will say, I cannot be able to allocate 35 per cent; and there is nothing we can do because he will collude with the National Assembly and they pass 15, 20 or 18 per cent. There is nothing we can do.

The courts have already recognised that appropriation will not take place at the national Government level until we agree on Division of Revenue. That is why those people have run to the BBI Report to remove our responsibility on it.

I want to challenge this House and say without fear of contradiction that it is a pity that BBI was led by a Chairperson who is the Chairman of the Committee on National Security, Defence and Foreign Relations in this House. The Former Attorney General, Sen. Wako, who is a very respectable person, was sitting in the committee. However, the institution that has been assaulted most in this document is the Senate.

Mr. Speaker, Sir, you must lead the House to a proper retreat. I want to thank Sen. Omogeni because I have information that he stood firm with some Senators who were in a forum in Naivasha and said that things must change in the BBI Report concerning the Senate. It will take the courage of Senators in this House to stand firm and say we want a Senate that stands for the interest of the people of Kenya.

I will hate the day I will come back to this House to be called the "male Senator of Elgeyo Marakwet." I will hate the day I will come to this House and call Sen. Orengo, "the male Senator of Siaya", or call Sen. Wako "the male Senator of Busia." What kind of a thing is that?

If we are tired of making the Senate a proper Senate with proper representation and one vote for every county and want to donate this House for purposes of gender parity, it is better to change that section and say that the Senate shall be composed of women only so that every county can elect one Senator who is a lady. However, to come here and address Sen. Dullo the "female Senator of Isiolo", I think we have a problem.

We need to ensure that the institution of the Senate is protected. We must achieve the gender rule, but not by losing the gains that we have achieved in the last seven or eight years while protecting the interests of the counties and the county governments.

Mr. Speaker, Sir, I thank you very much. Please stand firm like that. Even the way you were reading the Communication today, that kind of confidence is what we want. Since for the remaining one and half years, these decisions will be on your shoulders, we will stand before you. We will support you like we did in this case. I pray that you will stand firm.

I beg to support.

Sen. Khaniri: Mr. Speaker, Sir, I thank you for giving me the opportunity. I will be very brief because I know there is a lot of interest on this matter.

At the very outset, allow me to thank the very able legal team, that represented us in this suit led by Sen. Omogeni. Allow me to hail the High Court for the landmark ruling that they made on this matter.

The Senate Minority Leader (Sen. Orengo): On a point of order, Mr. Speaker.

The Speaker (Hon. Lusaka): What is your point of order, Sen. Orengo?

The Senate Minority Leader (Sen. Orengo): Mr. Speaker, Sir, I normally do not like blowing my trumpet, but on this one, Sen. Khaniri is very wrong. If you read that judgement, you will find that I was the lead counsel and the judgement bears that out.

He cannot say that within my hearing shot and I let it go. It is the only little bit of glory that I got because I did not get any payment for this. I must point out if I am being overlooked.

The Speaker (Hon. Lusaka): Sen. Mutula Kilonzo Jnr., what is your point of intervention?

Sen. Mutula Kilonzo Jnr.: Mine is just additional information. To a large extent, the lawyer of the National Assembly applied for Sen. Orengo to be disqualified. In fact, Sen. Orengo's name has gone down on record in terms of what representation in a constitutional petition means.

Sen. Khaniri: Sen. Mutula Kilonzo Jnr., thank you for that information.

My sincere apologies to the Senate Majority Leader and my friend, Sen. Orengo, because I did not have the facts right. I want to thank the entire team. I now know that it was led by Senior Counsel, Sen. James Orengo.

We also want to hail the High Court for that landmark ruling which goes a very long way to restore constitutionalism and the rule of law in this Republic. It goes a long way to demonstrate that we are making good strides in achieving the independence of our Judiciary.

This ruling has placed the Senate exactly where it belongs. It has placed the Senate exactly where the drafters of the Constitution want the Senate to be.

For the longest time, Article 110 (3) of the Constitution has been flouted. You have read this Article and it is very clear in the sense that it says that regarding any Bill, there must be concurrence of the two Speakers in both Houses. Our "sister House" or the 'Lower' House around the corner has always acted with impunity when it comes to the provision of Article 110 of the Constitution.

We want to thank the courts for restating the importance of this and the importance of a bicameral Parliament in the Republic of Kenya. The drafters of the Constitution had a reason why we had to have the National Assembly and the Senate. In

my honest opinion, Article 110 says, “If the Bill concerns counties”, I cannot imagine any legislation that does not concern counties. I cannot imagine of any.

This is one of the things that we should rectify in the BBI such that all Bills should come through the Senate because everything concerns counties. Any amendment to the Constitution 2010, or any process or endeavour to amend the Constitution 2010 must always endeavour to strengthen the Senate. The biggest gain we got in the 2010 Constitution is devolution and the Senate is the anchor of devolution.

If you kill or weaken the Senate, it means that you are killing devolution; you have no interest in devolution. Whatever endeavor we have in changing the 2010 Constitution, we must ensure that the Senate is strengthened. That is my biggest contention with BBI, which I fully support except for that factor.

It is not that I want to come back to the Senate. I have made it very clear that this is my last term in the Senate. However, I want see a working Senate. I want to see a Senate that will ensure that monies that we have increased to go the counties benefit people at the grassroots level. We cannot achieve that if we have a weak Senate the way it is being proposed in this document.

Mr. Speaker, Sir, I expected as Senators in this one to speak with one voice because we are the ones who wear this shoe and know where it pinches. Even if we disagree on anything else, on this particular one, gentlemen and ladies, as Senators we must agree. Therefore, I want to encourage you, like the speakers who have spoken before me have done as the Senior Counsel and Sen. Murkomen. Now the onus is on you; you must put your foot down and insist. We have told you that in our judgement, all Bills concern counties.

This ruling has caused His Excellency the President a lot of embarrassment because he assented to laws which have been nullified. I urge him to be vigilant next time, work with you to ensure that you are in concurrence on all the Bills that will go to him for assent.

Mr. Speaker, Sir, you have hinted to us that the National Assembly is planning to appeal. We are telling them to bring it on. Sen. Orenge, Sen. Omogeni and Sen. Mutula Kilonzo Jnr. are still here; *hawajaenda mahali*. We will deal with it perpendicularly. I am sure of victory because the ruling that we got is a true one and based on constitutionalism.

I support.

The Speaker (Hon. Lusaka): Sen. Wetangula, proceed.

Sen. Wetangula: Thank you, Mr. Speaker, Sir. Right from the first Senate, this House and particularly the Senators who are in this House in the last Senate persistently and consistently reminded the National Assembly that Article 110(3) was not an option to observe. I salute my distinguished learned colleagues who spared their time to go to court and fight *pro bono*. I want to assure the House that should there be an appeal preferred by the National Assembly, yours truly here will join the team equally *pro bono*.

This ruling tells Kenyans that the Constitution is a living document. That the Constitution is the last line of defense for weak individuals and perceived weak institutions. It always restores their position, hope and trust.

Mr. Speaker, Sir, we had reached a level where this House was being treated like a subordinate to the National Assembly. Many times, Bills were passed without the Senate’s concurrence. I remember this House adjourning to discuss those issues,

particularly Miscellaneous Amendment Bills and the Omnibus Bills. This is where they would lump in issues on agriculture, health, water and everything concerning counties and pass the Bills and take them to the President for assent.

We did say here many times and I want to urge that going forward we must develop a template that whenever a Bill is taken to the President for assent, he must see a concurrence certificate from both Speakers of both Houses. There must be a concurrence certificate signed by the Speaker of the Senate and the Speaker of the National Assembly.

Mr. Speaker, Sir, the President acting in good faith has now got a rotten egg on his face. He has been put in a very embarrassing situation because of people failing to advise him. We did tell the Attorney General. We called him to several meetings and told him whenever a Bill is taken to the President for assent, remind the state that this Bill had a concurrence and observance of Article 110(3). It never happened.

Now that we are where we are, I want to urge caution. That the way forward should never be, for you as our Speaker, to be called to sign a retrospective concurrence to Bills that have been declared a nullity. You know impunity in this country, Sen. Orenko, sometimes takes very dangerous routes.

Mr. Speaker, Sir, we must caution ourselves constantly that anybody who will say let us have a retrospective concurrence will never go that route. Those Bills, however well meaning, must go through the mill again. That is publication, First Reading, Second Reading and Third Reading with a prerequisite concurrence from both Speakers.

Mr. Speaker, Sir, so that I leave time for other Members to speak, this House is still under threat. It is still in a cage. The best thing that we can talk about BBI on the Senate is that nobody has attempted to interfere with Article 110(3) in the BBI. That remains our shield and defender; that we will always have Article 110(3) and this judgement to our defense.

Sen. Farhiya thinks that I am alerting them. Even if they go the wrong way, we will go to court again. The courts are there and they have made a landmark ruling. I urge that going forward even with BBI process, we must defend this House. We cannot be harmonizing and strengthening a bicameral structure that does not respect bicameralism. That is including, but not limited to the power being given to the National Assembly to veto the Division of Revenue. That is almost the most important legislation that comes to this House.

Mr. Speaker, Sir, today as I speak on this judgement, I salute the three judges of the High Court, Senator Senior Counsel and my distinguished learned Senior Sen. Orenko for leading the team, and everybody else who participated in one way or another, including those who gave the moral support, by walking all the way from here to the High Court at Milimani to witness us filing the case.

Mr. Speaker, Sir, intimidations may come, but stand firm because history is never written by cowards. History is written by strong and firm people. As one great writer said 'history is written by the winners.' We have won and we are writing history. Those who will follow will remember that there was a second Senate in the second Constitution of Kenya that stood to be counted.

Mr. Speaker, Sir, this House will have no other defender, but itself. I have heard my colleagues like my distinguished nephew Sen. Sakaja who used to throw stones at this House in the last Parliament now come and say we now realize how important this House is and how it must be defended at all costs. We are ready to stand firm and defend it.

The Speaker (Hon. Lusaka): Sen. (Dr.) Lang'at, proceed.

Sen. (Dr.) Langat: Mr. Speaker, Sir, thank you for also giving me this opportunity. First, I would like us to thank ourselves in this particular House. I remember the day when you led all of us marching to the Milimani Law Courts in unison. It was a great day. Our unity was noticed by even the governors who had gone to bed with the Executive to water down our demands. Today we are so happy that our unity has earned this country and this particular House respect. It is said united we stand, but divided we fall. Our unity is our strength in this House.

This reminds me that a majority of us were part of 'Team Kenya' and as result, the President promised to increase allocations to the counties. The unity of 'Team Kenya' touched the President to the point that he promised an additional Kshs53 billion to the counties.

I thank the legal team that represented us in court. I congratulate Sen. Orenge, Sen. Mutula Kilonzo Jnr. and Sen. Omogeni who has proven that he comes from a clan of courageous people.

We must continue fighting for the Senate, which is the anchor of the counties. I would like to remind fellow Senators that the strength of the counties is not in the amount of money that is apportioned to them; counties can be given more money but without strengthening the oversight role of the Senate, the money will be misused or and will go to enrich the governors. I would like to encourage every one of us that on matters touching the Senate, we must continue standing together to protect devolution in our country.

We must stand as a Senate on pertinent issues such as the BBI Report. We need to have our own *Kamukunji* to dissect the BBI Report and analyze the benefits of the Senate in the Report. We should not betray ourselves. Let us continue to stand together on matters touching this particular House.

I would not like to end my speech without thanking the Judiciary. I thank the Judiciary for standing firm and being independent. They could have been influenced to delay their ruling but they stood firm and respected their independence. I urge us to continue being united.

I thank you.

The Speaker (Hon. Lusaka): Sen. Wako, proceed.

Sen. Wako: Mr. Speaker, Sir, I thank you for giving me this opportunity. I would like to begin by congratulating my colleagues; the Senate Minority Leader, Sen. James Aggrey Orenge, my fellow Senior Counsel, Sen. Omogeni, son of his father and my junior, Sen. Mutula Kilonzo Jnr., for successfully pursuing this case before the court.

I am quite sure that it is the formidable arguments from them and the submissions that were made that compelled the court to make this sterling judgement. I would also like to congratulate the petitioners, including you, Mr. Speaker, for the courage you had in taking this matter to court.

In the last Parliament, the Senate took a similar Petition to the court. We presented our argument in court and got a very good judgement. It was the first judgement, advisory opinion, that emanated from the Supreme Court, which had been set up and constituted under the new Constitution. If the ruling that was made in the last Parliament had been followed, it would have been unnecessary for us to pursue this case in court again.

Sadly, the letter and spirit of that ruling was never followed, in spite the good faith of the Senate who assumed that the Speaker of the National Assembly would automatically do what he must do. The Speaker of the National Assembly did not do what he was supposed to do and instead continued with impunity.

We have to take that matter into account when we consider the way forward. If the letter and spirit of the ruling of the last Parliament was not followed up to now and if the good faith on the part of the Senate was not honoured at all, the way forward must, therefore, include changes in our laws and Standing Orders. That is why I am in complete agreement with what Sen. Wetangula has stated.

We must insist on having two certificates as stipulated in Article 110 (3) of the Constitution which states that:

‘Before either House considers a Bill, the Speakers of the National Assembly and Senate shall jointly resolve any question as to whether it is a Bill concerning counties and, if it is, whether it is a special or an ordinary Bill.’

We would like to have certificates on all Bills stating that the two Speakers have met and considered the Bill in question and jointly agreed on whether a Bill concerns counties or not. That consensus should be reached by the two Speakers before any Bill is tabled before the National Assembly or the Senate. If we do that, I believe that we would have achieved our purpose in ensuring that the Senate is part of the bicameral legislature under our Constitution.

At the conclusion of the whole procedure and before the matter goes to the President, there should be another concurrence certificate as Sen. Wetangula mentioned earlier. We must explore ways to make sure that it is part of our Standing Orders. If we do that, the President would be firmly protected from anything.

The Judiciary has ruled that the President assented to Bills that were not Bills at all. This is very embarrassing to him. The President normally assents to Bills that are passed in Parliament in the presence of either the Speaker of the Senate or Speaker of the National Assembly, the Attorney-General, the Solicitor-General and many other people.

I do not know whether things have changed but when I was the Attorney-General, the President would never assent to any Bill before I gave a certification that the Bill is properly before him and that it had gone through all the procedures in Parliament. We should have amended the Constitution to ensure that the Attorney-General examines whether a Bill has consensus of both Houses of Parliament before being presented to the President for assent.

The Attorney-General has a very important role to play in giving certification that a Bill has properly passed through Parliament. The Attorney-General cannot establish consensus on a Bill if the Speakers of both Houses have not signed it. If the law remains as it is, and it is properly implemented, we would have solved our problems. All in all, it would have been better if it was expressly stated in the Constitution that the Senate has a role to play in all the Bills before Parliament.

It was clearly stated in the Constitution that the Senate has a role to play in all the Bills. I can tell you that my opinion was, and it remains my opinion that the Senate should consider all the Bills and that Bills that touch on counties should originate in the Senate while all other Bills should originate from the National Assembly. That is my position, it has been my position, it was my position and it remains my position up to this time that I am speaking. I hope that you get the message.

Mr. Speaker, Sir, on the Building Bridges Initiative (BBI) process, all that I would say is that, I thank Sen. Okong'o Omogeni Omogusi, for representing us very well yesterday in Naivasha. Various caucuses were asked to give their opinions on a matter before the plenary and I believe that I heard him say that after consultations, although the Bill says; "harmonize the processes in the Bicameral Parliament", the Bill does not have that. Therefore, it is necessary that that aspect of the matter be gone into. I hope that going forward, the Chairperson of the Committee on Justice, Legal Affairs and Human Rights will prevail.

Another point, which I had forgotten is that, before the Speaker meets the Speaker of the other House to find out whether this Bill touches on the counties, the Committee on Justice, Legal Affairs and Human Rights should have gone through it and advised the Speaker on the matter. Again, I think that our procedures will be able to take that into account. I congratulate you all.

The Speaker has told us that it may go to the High Court and the team can handle that. However, if it goes to the Supreme Court, you can be rest assured that the Attorney-General *Emeritus* will be part of that team, so that it is known, that this matter is now serious to attract the attention of the Attorney-General *Emeritus* to appear before the court.

I thank you.

(Applause)

Sen. (Arch.) Kasanga: Thank you, Mr. Speaker, Sir, for giving me the opportunity to add my voice to this debate. I want to congratulate you and thank you for having led us through this process and for demonstrating the leadership that was required at that point in time.

I also want to thank my colleagues led by our Senate Minority Leader, Senior Counsel, Sen. James Orengo, Sen. Omogeni and all the others who participated. We want to thank you very much. We thank you for this momentous judgment that you fought for and, indeed, fighting for Senate. You are our heroes and you will never be forgotten for the milestone that you have achieved for this House.

In my experience of legislating, I have seen how it is very emotive; it requires a lot of lobbying and balancing emotions of various stakeholders as well as Kenyans at large. By the time you introduce a Bill to a House, the amount of work and time that has been put in, is so significant such that when these Bills are declared Money Bills and are not able to proceed in the next House, even after having been declared by yourself, it not only robs us of the time and money that we have spent, but also the hopes of Kenyans who participated in that legislative process.

Mr. Speaker, Sir, I have to thank the Judiciary for this ruling and I must say that the hopes of Kenyans will be restored by it because all the Bills are pending and waiting for this clearance to go through. I personally look forward to your next Communication on the way forward. I can tell you that from where I sit, many Kenyans are waiting to hear and see what will happen to these Bills. Therefore, we look forward to that and thank you so much for that Communication.

Just to speak a little on the BBI process and also touch on something that the former Senate Majority Leader has mentioned - I can see that he is not around - personally, I look forward to having women in this House. I look forward to a time in

future when women will come here and vote equally as the males who will be coming to this House in the next Parliament.

My good friend, Sen. Murkomen should not worry if he is called the male Senator of Elgeyo-Marakwet because there will be a female Senator of Elgeyo-Marakwet and they will both be Senators in the same breath. I really look forward to that. As much as I agree with my fellow colleagues; yes, let us be vigilant, let us not lose sight of the gains of this House in the 2010 Constitution, but let us celebrate the steps that we are taking ahead. It is for posterity for this country and we will be dealing with the two-thirds gender principle in this case.

Lastly, before I sit, your earlier Communication on COVID-19 should not go unnoticed by this House. You have told this House that we should be vigilant; let us be careful and follow protocols. As you are aware, it is a majority of us that are causing Kenyans to be affected so much, because we are going out there and addressing them in crowds and we are not demanding that they focus and adhere to the protocols that have been put in place.

Thank you for that Communication and to the hon. Members, please, COVID-19 is on the rise and many Kenyans are going to be affected. Our counties are not yet ready. Most of them do not even have the prerequisite protocols that are needed to save Kenyans. Let us play our part and lead from the front.

Thank you.

The Speaker (Hon. Lusaka): I can see that there is still a lot of interest and so I will limit it to three minutes. It is going to 4.00 p.m.

(A Member spoke off record)

The Speaker (Hon. Lusaka): Okay, five minutes. Sen. Cherargei, it will be good if you can wind up in less than five minutes.

Sen. Cherargei: Thank you, Mr. Speaker, Sir, for this opportunity. From the onset, I want to congratulate the team led by Senior Counsel, Sen. James Orenge, Sen. Okong'o Omogeni and Sen. Mutula Kilonzo, Jnr., for the job well done. I also want to congratulate your office for facilitating Dr. Okello, Ms. Mercy Thanji and other officials who assisted us in ensuring that the process was smooth.

In two or three occasions, when I was the Chairperson of the Committee on Legal Affairs, I had the opportunity to accompany Sen. Orenge and Sen. Mutula Kilonzo Jnr., to Milimani Law Courts and I can attest that they worked hard and were really committed to this.

I want to say that this is embarrassing to the President and just as my colleagues have said, I hope that in future, we need to have a concurrence certificate. In some jurisdictions, a situation where 24 legislations are nullified by the High Court as a result of non-concurrence, is an impeachable ground. It is so disappointing.

As we go to consider the BBI Report among other issues on the role of the Senate, we have to stand and walk together to ensure that the Senate is placed in its rightful position. I hope that our colleagues will stand with this Report so that we can achieve a lot as we work together.

I also want to thank the Committee on Justice, Legal Affairs and Human Rights. The legal team that was there worked very hard to ensure that the pleadings were there.

We provided the necessary leadership. Sen. Faki, Sen. Mutula Kilonzo, Jnr., Senior Counsel, Sen. James Orenge, Sen. Fatuma Dullo, Sen. Susan Kihika and myself.

I remember that at some point when you were not available, we were a bit worried but because of your guidance and leadership, we took a walk of justice towards Milimani Law Courts and Sen. (Dr.) Musuruve also really tried. There are many people who do not ordinarily walk but that day they participated in the walk of justice.

Finally, I want to urge our colleagues at the National Assembly, that this matter has been settled and they should now use Alternative Dispute Resolution (ADR). They should also use this opportunity, including many other stakeholders in engaging, so that as Senate, we are able to move forward.

When the leadership team is called, we will need to make serious noise, so that the Senate can be recognized. We do not have a problem with two Senators being elected from one county to achieve gender balance. However, we should not use the Senate as a dumping ground for gender parity issues. We want a strong Senate. My advice to women is that they should push that the Senate gets more power, so that they will have more say on issues that are crosscutting and affecting ordinary *wananchi*.

The Speaker (Hon. Lusaka): What is your point of intervention, Sen. Nyamunga?

Sen. Nyamunga: On a point of order, Mr. Speaker, Sir. I am very disappointed by the statement by the Senator for Nandi. He has said that if we are looking for gender parity, we should not look at the Senate as a place where we want to dump our women. By listing women to be part and parcel of this House, according to him, that makes the Senate a dumping ground. Can he come clear on that?

The Speaker (Hon. Lusaka): Sen. Cherargei, be careful. You are beginning to tread on very dangerous ground.

Sen. Cherargei: Mr. Speaker, Sir, let me paraphrase. I advise the women of this country, inside here and outside, that they should make sure that where they are being taken, they have a direct say on the lives of women, people with disability and all Kenyans.

(Loud consultations)

Mr. Speaker, Sir, can I finish? I need to be protected.

The Speaker (Hon. Lusaka): What is your point of order, Sen. Dullo?

Sen. Dullo: Mr. Speaker, Sir, Sen. Cherargei is treading on a wrong footing. If he is advising women of this country where he cannot do so, he will put himself in trouble.

Is he in order to tell women of this country that they are the ones to choose whether or not to come to the Senate? Whether we have a strong Senate or not is the work of the Senators in this House. We are the ones in the office. It is not the role of women in this House and outside there. Is he in order to put that responsibility on women of this country?

The Speaker (Hon. Lusaka): Sen. Cherargei, I cautioned you that you are wading into dangerous areas and it will derail what you want to say and your time. Be careful.

Sen. Cherargei: Thank you, Mr. Speaker, Sir. It is within my right to give an opinion. However, I have noted the concern of women Senators in this House and we will try in future to factor their sentiments in. Let us work to make the Senate stronger for the benefit of all Kenyans and guard devolution in this Republic.

I congratulate the High Court. We can underscore the importance of having an independent Judiciary in this country.

I thank you.

The Speaker (Hon. Lusaka): Sen. Mutula Kilonzo Jnr., you have the Floor.

Sen. Mutula Kilonzo Jnr.: Thank you, Mr. Speaker, Sir. I will be brief. If you had headed out at the time we wanted you to walk with us, this was precedent setting. I hope your fears have now been allayed.

For the future of this country, your name will forever be in a precedent called ‘the Speaker of the Senate *versus* the National Assembly and others.’ They will read your name. We have had a rough time with you. However, one legacy is this and we thank you for leading the team.

Secondly, Sen. Orengo is rarely appreciated and Senior Counsel, Omogeni. We should tell him when he is listening right here, that his forthrightness and the work he has done, in terms of not only this Petition but Constitution making generally---

This is the reason I am sitting comfortably here, because I know that even in the current discussion, when Sen. Orengo is there, I am sure---

From the discussions we even had yesterday, all of us should not worry about what will happen in future because I believe that we will have a foothold even in the document being prepared.

Thirdly, Sen. Omogeni mentioned the words in the advisory opinion of a good Speaker, and Sen. Wetangula has attributed this to you. A good Speaker will find something about public finance and security that concerns counties. I am proposing - I mentioned this at the Senate Business Committee (SBC) - that you send a message to the National Assembly by appointing a mediation committee of strong Senators, so that they know that we are serious about this. This is so that when you sit in a meeting, they do not bulldoze you. If they do, they will not bulldoze the rest of the Senators. I agree with the Sentiments that when you concur, find a way where we can get that information.

Although we are concerned about our jurisdiction and in Standing Order No.1 about precedent and judicial *stare decisis*. When you write your book, which I encourage you to do, the High Court has said that an advisory opinion is not advice but legally binding on all courts.

We are encouraging the National Assembly to try their luck, but once this ruling is enforced in that manner, we have received declarations we should rest assured. However, we welcome the offer by Sen. Wetangula and Sen. Wako to rob and go and deal with anybody who wants to challenge that ruling.

Lastly, you have encouraged that the decree is issued; we serve the Speaker. This is important but the Members have been frustrated about the Bills that have come here. I have resisted the temptation. Some of the Senators here have gone to lobby with the Budget Office. I am aware because one member of the budget officers told me, ‘you did not come to us.’ I am glad that nobody in this House will go and sit in the Budget Office about their Bills being considered in the National Assembly. This is because that was a violation of this Constitution and befouling our role on legislation in the Constitution.

I thank you and the offer you made at the SBC, we will hold you to it.

The Speaker (Hon. Lusaka): Sen. Wambua, proceed.

Sen. Wambua: Thank you, Mr. Speaker, Sir, for this opportunity to add my voice to your Communication. As the other Senators before me have said, I want to take this

opportunity to thank you and the leadership of the Senate, both the minority and majority party, and all the Senators for moving to court when they did, to get a determination on these Bills that were assented to without the input of the Senate.

I also want to thank the lawyers led by the Senate Minority Leader, Sen. Orengo, Senior Counsel Sen. Omogeni and my good friend and neighbour, Sen. Mutula Kilonzo Jnr., not forgetting the secretariat led by our Clerk through the legal office for a job well done.

Mr. Speaker, Sir, the same spirit applied in fighting for the real role of the Senate in legislation should be applied in ensuring that we defend the institution of the Senate of the Republic of Kenya against all manner of assault.

In your Communication, you mentioned that we will have an important role to play in the Building Bridges Initiative (BBI) process. It must go on record that the Senate of the Republic of Kenya, in this national process, must be seen to be playing its rightful role.

It shall be remembered and has been said here that the decision of the Court in as far as the 24 bills are concerned has placed the Senate of the Republic of Kenya where it rightfully belongs.

Mr. Speaker, Sir, as Senators, we should not allow any other process to take us off that mark. We must fight as leaders, as representatives of our counties, and as defenders and champions of devolution to ensure that when it comes to the vetting of public and state officers, we should play our role.

Article 110 (3) of the Constitution is not a decoration of constitutional provisions. The requirement for concurrence between the two Speakers of the two Houses in determining whether a Bill concerns counties or not must be followed to the letter.

Mr. Speaker, Sir, I want to touch on a matter that my colleagues have not touched on. Is it fair game that somebody can mislead the President 24 times to assent to Bills that are unconstitutional, we just sit back, and that is okay? Consequences must ensue. It cannot be business as usual that the President of the Republic of Kenya has been misled 24 times on unconstitutional Bills, and the people who did that just walk scot free.

Lastly, on the matter of the Coronavirus Disease (COVID-19), you have told us to be more vigilant. This afternoon, I have just seen that 52 students and six teachers in a school in Teso have tested positive. Something needs to be done. We have relaxed and are behaving as though we are living in normal times. I do not know what we need to do, whether this is the time to reconstitute the *ad hoc* Committee on the COVID-19 situation in Kenya, but some action needs to be taken.

I thank you.

The Speaker (Hon. Lusaka): Sen. (Prof.) Kamar.

Sen. (Prof.) Kamar: Thank you, Mr. Speaker, Sir, for giving me the opportunity to join my colleagues, first of all, in congratulating ourselves for taking the walk to the High Court. Some of us had never walked across Uhuru Highway, but we did because of your leadership.

I also congratulate the team that led to this very successful judgement. I thank Sen. Orengo, who was the leader of the team, Sen. Omogeni, Sen. Mutula Kilonzo Jnr., and all those who contributed in one way or the other, because this is a landmark ruling. This is not just for the Senate; it is for the country. It is putting things right so that there is order in the nation.

When Article 110 (3) was articulated, it was not meant to undermine anybody, or to create competition between one Speaker and the other. It was supposed to put order in the way we do things. We should not have had any negative competition between the two Houses because both Houses are literally working for the same people. It was wrong for the other House to imagine that they can seek signatures, approvals and endorsements from the President when they have not articulated.

I like the way the judgement was made at the point of noting how costly this is going to be. The judges said that they should have thought about the costs before they offended the law. I, therefore, think that this will bring us back to an orderly way of doing things between the two Houses, and I think that we should take it from here.

It is very clear that we have heard statements that do not really befit negative competition, including saying that even the Senate was supposed to be closed. How do you close the Senate when you want devolution? We know very well that the role of the Senate is basically to look after the interests of the counties and the county governments. If the Senate is not there, there is no way that we can deal with the interests of our counties.

Mr. Speaker, Sir, the Building Bridges Initiative (BBI) is here, and 35 per cent is going to be given to the counties. If that money is going to be put in, it is more important now more than ever that the Senate is strengthened, so that it can do its representative and oversight role, particularly the role of oversight.

We have been talking for funding for oversight that has never really come through. There is no way that 35 per cent of the resources of this country can go into hands that cannot be scrutinized. We must see transparency and accountability in expenditure, and must be able to make everyone accountable, so that we are not just coming here to read the reports of the Auditor-General and looking at postmortem reports five years after the governor has retired. We really need to be up to date.

It is very important that the Senate is not put in its own position. I think that this is one thing that we must deal with when we are dealing with BBI, to make sure that the Senate is in the rightful position to do the oversight of the funding, which is going to be quite substantive.

With that, I support that communication that you have given this afternoon.

The Speaker (Hon. Lusaka): Sen. Cheruiyot.

Sen. Cheruiyot: Thank you, Mr. Speaker, Sir. This is for the history books. This has made me proud to be a Senator. I am so happy for the decision that we took as a House on that day, to first of all, reaffirm our commitment to Article 3 of our Constitution, that we shall defend our Constitution at every instance. This is one such instance where as a House, we resolved that it is more important to be united as the House of the Senate than to be divided along the usual parochial party lines that we are so used, yet on most occasions end up being to the detriment of this House.

On this particular issue, we spoke with one voice, and as a House, we can learn that there are so many things that are good for Kenya, for devolution, and for the Senate, but cannot be achieved until we have the kind of resoluteness that we had on this matter, and the unity that we show-cased to the country.

Mr. Speaker, Sir, I want to celebrate and join the rest of my colleagues in appreciating the work that was done by our colleague Senators, the senior counsel that have been mentioned, the members of staff who serve in our litigation and compliance

director, who worked hard to ensure that the Senate and the Constitution of Kenya is defended.

[The Speaker (Hon. Lusaka) left the Chair]

[The Deputy Speaker (Sen. (Prof.) Kamar) in the Chair]

Madam Deputy Speaker, I am really proud of our colleagues, and I appreciate the work that they did in ensuring that these 24 laws that are not in compliance with the demands of our Constitution as per the dictates of Article 110 (3) are nullified, until the National Assembly comes back to its senses.

If this is not an indictment of a full House, if this is not an indictment of the leadership of a country that signed these laws---

I do not buy the political narrative that I see being peddled here this afternoon that the President was not properly briefed and did not know that these laws did not meet the demands of our Constitution.

I am sure that they knew, but because we have to come to a place where we believe that the culture of this country is such that anything that the Senate says can be ignored, they chose to ignore. Long live our Judiciary. Long live the judges that made this very wise decision and ensured that from now going forward, if you read this ruling, it puts notice on even legislation that is active before both Houses that have not met the demands of Article 110 (3) of our Constitution.

Madam Deputy Speaker, if that is not great for this House, I do not know what else is. This is perhaps one of the most important rulings that devolution has secured in the last ten years of its existence since this current Constitution was promulgated.

Madam Deputy Speaker, I join my colleagues in congratulating the team and reminding them that we remain vigilant and watchful.

Let us not forget that two days before this matter was argued before the High Court a decision had already been made to withdraw. In fact, I can now confidently report to this House that I was made aware by people within the precincts of parliament - I will not say if it was staff or Members who love devolution - they spoke to me in confidence and told me, "Senator, if you guys do not stand up and agree that this case be withdrawn, then you will curse the day that you served in this House because it shall no longer be business as usual." We stood firm as a House and that is why we are here to celebrate.

Finally, there is an issue I heard my colleague Sen. Kasanga mention and I feel we need to canvass it properly. I feel that our women colleague Senators sometimes miss the gist of the debate. It is not that we are opposed to have a male or female Senator elected in a county. Our argument is against the watering down of the position of a Senator.

You can be a man or a woman but that position must be respected. If you are not saying that we can have a male and a female Member of County Assembly (MCA); a male and a female Member of the National Assembly, Governor or the President, why the Senate? You are weakening the institution and the stature of the Senate. That is what we are opposed to.

Sen. (Dr.) Ochillo-Ayacko: Thank you, Madam Deputy Speaker. My neighbor Sen. Kasanga is trying to incite me to respond to my very good friend, Aaron "the brother

of Moses". Since I have limited time, the ladies can defend themselves. I will not defend them on this one. I will just talk about what is before us.

(Laughter)

I want to congratulate all of us. All of us stood firm, all of us were focused. Without standing firm and staying focused, we would not have instructed the Speaker to go to court. It was every Member of this House, the focus and commitment, that instructed the Speaker and moved him to lodge this matter in court. It was the commitment and the determination of each and every one of us that instructed Senior Counsel, Sen. Orenge together with the able team of lawyers to go to court.

It is with our firm instructions as Members of the Senate that we did not buckle and agree to a settlement that would have been lopsided. We all deserve accolades and congratulations for the firm and consistent position we took on this matter.

I will congratulate the Office of the Speaker for taking the instruction seriously and marching with us to court. You deserve a pat on the back and accolade.

I will also thank Sen. Orenge and all the lawyers including myself for acting on the instructions without demanding payment; being selfless. We all, as lawyers of this House went to court deserve a pat on the back for the stand we took. I also commend and praise the court for not cowering or bulging to any threat including the threat of not being funded because this is a very important matter.

There is a misconception that the Senate represents counties or that the purpose of the Senate is about devolution. The Senate represents the people of Kenya in the context of their devolved activities. Just like the National Assembly, the Senate has concurrent jurisdiction in representing the people of Kenya. We as Senators represent Kenyans and every Kenyan lives or has an interest in one county or the other.

When we speak for counties, we do not speak in abstraction. We speak as representatives and defenders of the Kenyans in their county or devolved interest. Therefore, any person who would like to minimize the role of the Senate by saying that the Senate's business is county business gets it all wrong.

It is important as I conclude that now that the courts have set the record straight, we are beginning to get to a chapter that is found in the book written by Samuel Huntington about the third wave of democracy. Each time there is a wave of democracy there will always be attempts at clawing back, pushing back and taking away the---

(Loud consultations)

Sen. Wetangula: Madam Deputy Speaker can you disband this *Kamukunji* so that we can listen?

Sen. (Dr.) Ochillo- Ayacko: Madam Deputy Speaker, they are eating into my time.

The Deputy Speaker (Sen. (Prof.) Kamar): Hon. Members, please consult in low tones.

Sen. (Dr.) Ochillo-Ayacko: Thank you for defending me. Let us prepare to defend the gains we have had. Let us defend it here, in court, in BBI, on earth, in heaven with all our knowledge, experience and strength.

Thank you very much and congratulations to all of us.

Sen. Faki: Asante Bi. Naibu Spika kwa kunipa fursa hii kuchangia Taarifa iliyosomwa na Mhe. Spika.

Kwanza niruhusu niwape kongole Spika pamoja na Seneti nzima kwa uamuzi wao wa kwenda mahakamani kutetea haki ya kikatiba ya Seneti. Vilevile nawapa kongole mawakili wote ambao walihusika katika kesi hii tukiongozwa na Mhe. Orengo, Mhe. Omogeni, Mhe. Sen. Mutula Kilonzo Jnr. na wale wengine wote ambao tulikuwa nyuma tukitoa mawazo na usaidizi wa aina nyingine.

Nilikuwa na Sen. Omogeni wakati kesi ilipokuwa inazungumzwa. Kwa hakika alizungumza kwa ujasiri mkubwa akisaidiana na wakili Bi. Mercy Thanji ambaye yuko katika Idara ya Sheria katika Bunge letu la Seneti.

Vilevile ningependa kuipongeza Mahakama kwa kutoa uamuzi ule kwasababu imetoa uamuzi kwa ujasiri ili kuhakikisha kwamba imetangaza kuwa sheria 29 zimepitishwa kinyume cha sheria.

Wakati huu ambapo tunapongeza Mahakama kuna Majaji 40 ambao wamechaguliwa na Tume ya Kuajiri Mahakimu ambao Mhe. Rais amekataa kuwatangaza rasmi na kuwaapisha kama Majaji. Kitendo hicho kinahujumu Katiba kwasababu *Judicial Service Commission (JSC)* ikipendekeza Majaji waajiriwe, inapendekeza kwasababu imewafanyia ukaguzi na kila kinachotakiwa kufanywa kuhakikisha kwamba wale Majaji wameweza kuchaguliwa. Hatuwezi kupigania uhuru wa Seneti au Seneti iweze kupata nguvu zaidi wakati mahakama inaendelea kuhujumiwa na Rais.

Kamati ya Haki, Maswala ya Sheria na Haki za Kibinadamu ya Seneti iliweza kumuita nafikiri Mwanasheria Mkuu kuja kuzungumzia swala hilo, na mpaka sasa hatujaweza kupata utatuzi kuhusiana na suala la kuajiriwa kwa Majaji 41.

Majuzi tu mmoja wa Majaji ambao walikuwa wamependekezwa alifariki dunia, na hivyo ndivyo ndoto yake ya kuwa Jaji katika Mahakama Kuu ya Kenya ilididimia. Tunapozungumzia taasisi za kikatiba ni lazima tuhakikishe kwamba taasisi hizo zinafanya kazi kulingana na sheria. Hatuwezi kuwa na taasisi ambazo hazina mamlaka kikatiba na vilevile tunategemea kwamba zinaweza kufanya kazi vile wananchi wanavyotaka.

Tunapozungumzia BBI, lazima uwezo wa Seneti kujadili maswala ya ugavi wa rasilimali uendelee kuwepo. Vilevile, Seneti ipewe nafasi ya kukagua nafasi zote za ajira katika Serikali ili kuhakikisha kuna usawa na *Checks and balances* katika Katiba yetu ambayo tumeitumia kutoka mwaka 2010.

Mwisho, sisi kama Seneti lazima tuwe macho wakati huu wa BBI ili kuhakikisha yote ambayo tumeweza kuyapata yanaendelea kuimarika na kuimarisha Seneti kwa maana ni taasisi pekee ambayo inaweza kulinda ugatuzi katika nchi yetu.

Asante.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you. Sen. James Orengo, kindly, proceed.

The Senate Minority Leader (Sen. Orengo): Thank you, Madam Deputy Speaker, for giving me this chance to contribute in regard to this historical moment; the decision made by the High Court in regard to the many Bills which were passed unconstitutionally.

Madam Deputy Speaker, the only thing I would add in congratulation to the Speaker is that I wish that instead of just naming the party as the Speaker of the Senate,

we should have had the name of Hon. Kenneth Lusaka, Speaker of the Senate, so that in reference to this case, his name would be cited now and again.

I want to assure the House about this particular case. In doing so, I want to first begin by congratulating Sen. Okongo Omogeni, Sen. Mutula Kilonzo Jnr. and the other counsels who are from the legal Secretariat, including Dr. Okello, Ms. Mercy Thanji and the Office of the Clerk in enabling us do this work.

I also must thank the former Chairperson of the Committee on Justice, Legal Affairs and Human Rights, Sen. Cherargei. Many people would forget that the basis for this case was established during his chairmanship. All through, he stood firm. The first appearance in court and subsequent appearances, the Chairman was there. Sen. Okongo Omogeni continued to do the same work as Chairperson of the Committee on Justice, Legal Affairs and Human Rights as part of the legal team in the case.

One must remember that the law in regard to the power of the Senate had long been declared during the Justice Mutunga's leadership in the Supreme Court. This is not the first time that the powers of the Senate are being spelt out by the Judiciary. Indeed, in the case that we went to the Supreme Court when we took the National Assembly to the Supreme Court, we had asked for various legislations to be declared unconstitutional, but it declined to do so. However, they warned the National Assembly that if they did not follow the procedure set out in the Constitution, the courts would not hesitate to declare them as being unconstitutional.

The Justice Maraga's leadership has also made pronouncements on the basis of the law as stated by this particular bench in regard to Article 110(3) of the Constitution. I am going by the doctrine of precedent and *stare decisis*. This is now the law of the land. I know that there may be plans to appeal against this ruling, but that will not go anywhere until they reach the Supreme Court. This is because the basis of this decision is the Advisory Opinion No.2 of the year 2014, if not 2013.

I think we are in good territory. This case is precedent setting. In future, we cannot hesitate to go to the courts again - as we have demonstrated - whenever there is such injustice.

Madam Deputy Speaker, in the year 1942, Winston Churchill made a speech in the House of Commons and said:

“I have not become the king's first Minister in order to preside over the liquidation of the British Empire”.

At that time, he believed the British Empire where the sun never set will never be liquidated, but subsequently, it was liquidated. Happily, for him, the jewel on the crown which was India became independent after he had ceased to be Prime Minister. Later on, in the 1950s, again, he became the Prime Minister.

Madam Deputy Speaker, as a Senator and the reason I offered my services in this case is that I believe that the Senate must continue to play its constitutional role. That role must not be emasculated and that without the Senate, Parliamentary systems as designed by the Constitution will come to naught. Any attempt to dissolve this Senate or to emasculate its authority is undermining the authority of the Constitution of Kenya as by law established.

I truly believe that so long as we continue to have Speakers who are determined as Hon. Lusaka demonstrated and Article 110(3) is part of the Constitution, the role of this Senate will continue to be the same. This is because the power and the authority to

determine whether the Bills can come to this Senate has not been taken away and is not likely to be taken away.

The only thing that I want to say in conclusion and I am glad Sen. Wako is here, sometimes in historical moments until we watch out very well, we can enter - as I have said before this House - in lamentations. There was time when we were trying to create a new constitutional order or how to create the position of Prime Minister, so that we could have the Grand Coalition.

There was a lot of chest-stamping, but I am glad that when the two principals asked Sen. Wako and I to work on a draft of the new constitutional Bill that was going to make it possible to have a Grand Coalition Government, we did it knowing that the country was in a position where the country did not want any less.

Mr. Speaker, Sir, I want to promise this Senate that I have actually itemized three issues in this draft Bill that we must look at very carefully. I think women have been very strategic. On everything to do with women in meeting the gender balance, they have played their role so well that nobody wants to touch that anymore. I am sure that it will continue to be so because they have been very strategic.

Sen. (Dr.) Mwaura, I want to congratulate you because you have done some strategic thinking. You laid out a strategy on the question of those living with disability. That is another question which has been resolved and nothing will change it.

(Applause)

I want to encourage Senators that the last word has not been written. Articles 217 and 218 of the Constitution is something that we need to look at. The authority of the Senate may be taken away if you do not look out properly on these two Articles.

There is an additional Article which has been giving the Cabinet Secretary of the Ministry of National Treasury powers to suspend funding going to counties. If you do not watch out that very well, the powers of the Senate would have been taken away very drastically.

I want to say that so long as we continue to work together---

Sen. (Dr.) Musuruve: On a point of order, Madam Deputy Speaker.

The Deputy Speaker (Sen. (Prof.) Kamar): Sorry. There is a point of order from Sen. (Dr.) Musuruve.

Sen. (Dr.) Musuruve: Thank you, Madam Deputy Speaker, for giving me this opportunity.

Is it in order for the Senate Minority Leader to fail to acknowledge my role in Naivasha when we presented the issue with Sen. (Dr.) Mwaura before the party leaders with regard to issues of PWD?

The Senate Minority Leader (Sen. Orengo): Madam Deputy Speaker, unfortunately, my eyes were tilted towards Sen. (Dr.) Mwaura. That is the only reason. However, Sen (Dr.) Musuruve, I cannot forget to thank you because you spoke about it forcefully.

Madam Deputy Speaker, I think we need to organize a quiet *Kamukunji* because we do not have a referendum---

Madam Deputy Speaker, can you give me one minute?

The Deputy Speaker (Sen. (Prof.) Kamar): I will give you one minute because you are the leader of the team.

The Senate Minority Leader (Sen. Orengo): I still think that we have a report that has been made to the President and Hon. Raila Amollo Odinga, but we do not have a Referendum Bill because that happens when you have the final Bill with a million signatures being taken to the Independent Electoral and Boundaries Commission (IEBC).

We should quietly retire into a *Kamukunji* like we do many times and talk about this issue in a more strategic manner, to ensure that not all is lost in as far as the powers and authority of the Senate is concerned.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Sen. Orengo.

Sen. Madzayo.

Sen. Madzayo: Shukran Bi. Naibu Spika. Nataka kuchangia Taarifa iliyosomwa na Spika wetu kuhusiana na kesi iliyokua kortini.

Jambo la kwanza ni kuwashukuru Maseneta ambao ni mawakili ambao waliweza kutuwakilisha katika kesi hii, hususan Sen. Orengo, Sen. Omogeni, Sen. Mutula Kilonzo Jnr., na mawakili wengine walioweza kuchangia.

La muhimu katika hii ni kwamba tulipokuwa tukipeleka kesi hii Kortini, sote tulikua tumekubaliana kwamba kulikua na dhulma ambayo ilikua imefanywa na hatukupendelea katika zile sheria 24 ambazo zilipitishwa bila kuhusisha Seneti wala Spika wetu kuwa katika mahojiano kama hayo.

Kipengele cha 110(3) katika Katiba yetu kiko wazi na kinasema kuwa kabla Bunge letu kukubaliana na Mswada, ni lazima Spika wa Seneti na Spika wa Bunge la Taifa waweze kukaa na kujadiliana kuhusiana na ule Mswada. Wakiona kuwa ni maalum ama ni wa kawaida, wanaweza kuona jinsi ule Mswada utanza.

Jambo la kusikitisha ni kwamba Bunge la Kitaifa limekua likipuuza na hivi sasa imebainika wazi kuwa Seneti ina uwezo katika ile sheria inayosema kuwa hakuna Mswada ambao unaweza kupitishwa bila Seneti kuhusishwa. Ule uerevu waliokua wakifanya, Waswahili husema, “mwerevu hajinyoi.” Hata uwe mwerevu namna gani, huwezi kuchukua makasi ukajinyoa.

Sheria kama hii ya kuzembea ama kutotii amri katika Katiba ndio sisi tunasema kwamba Mahakama imefanya jambo la muhimu kuweza kuurekebisha na kuweka sawa.

Vile vile, nataka kuwapea kongole Majaji walioketi kusikiza kesi hii. Majaji hao wamefafanua kabisa na kueleza kila kitu kinaga ubaga kwamba, hamtachukua sheria kwenye mikono yenu na kufanya vile mnavyotaka.

La mwisho ni kwamba, sisi tukiwa hapa Seneti, tunahitaji Wabunge wa Bunge la Kitaifa waweze kuelewa kwamba Seneti linahitaji kupewa heshima yake. Sheria kama hii ambayo imewekwa hivi sasa, tunatarajia kuwa Spika wetu anajukumika kusimama kidete na hutatingisika. Hata iwe mchana au usiku, utaangalia kwamba haki ya Seneti haikuweza kuzimika.

The Deputy Speaker (Sen. (Prof.) Kamar): Asante. Sen. Farhiya.

Sen. Farhiya: Thank you, Madam Deputy Speaker, for giving me this opportunity to contribute to this matter.

I wish to thank the two Senior Counsels and Sen. Mutula Kilonzo Jnr., for making us proud and representing us very well. I will not forget Dr. Okello and his team who are always diligent, professional and knowledgeable, and it always contributes to the success of this Senate. Let us not forget them as we praise each other.

It is not a mistake that this Senate has three Senior Counsels and not any other House in this country. We are very proud of the Senators who represented us well.

We all walked from here, whether in Jubilee or the National Super Alliance (NASA); as a team of Senate, all the way to Milimani Court and I am happy that it was not in vain. When people are united, they can achieve anything.

When the Senate generates Bills, it is so unfair that we use Government resources to ask for stakeholders' contribution and people come to offer their feedback, only for Bills to be referred to as money Bills by the National Assembly. In this negotiation process, we should have money Bills as only funds from the Consolidated Fund.

Once money has been transferred to counties, and since this House is the one tasked to legislate for county governments, if the matter is affecting money that is already appropriated to counties, it should be the mandate of this House and should not be called a money Bill because that money has already been appropriated.

Right now, there are people who could not talk initially because they thought that they are the "super House" and the Senate has no say on anything. Now that they know we have a say on issues, we should come to the table, so that some of these issues come clear and we can give our views and legislate.

For instance, Sen. Kang'ata sponsored the Ward Fund Bill and the Standing Committee of Finance and Budget changed it to become a Finance Bill. The proposals in the Ward Fund Bill would have made sharing of resources at the county level much easier. You do not need to have elected the governor for you to have a share from the county government.

Madam Deputy Speaker, I also want to join Sen. Nyamunga and Sen. Dullo in canvassing that if Sen. Cherargei had moved the Gender Bill forward when he was the Chairperson of the Standing Committee on Justice, Legal Affairs and Human Rights, then we would not have been in the list of people whose House is almost being dissolved. We are surviving right now because President Uhuru Muigai Kenyatta decided to take his time on that. Otherwise, we would have been dissolved.

Let us have people who are friendly to the other gender. As I said before in this House, I came from an organization where the senior management had only one man. The tables can turn. Let us not look at gender issues as women issues. Anybody who has minority is seen as such.

Madam Deputy Speaker, in terms of the Senate being weakened, I believe that as long as Sen. Orengo is on the table, we will survive on that one as a House. Let us trust the process and I am sure things will be right.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you. Sen. (Prof.) Onger, proceed.

Sen. (Prof.) Onger: Thank you, Madam Deputy Speaker. Let me also add my voice to this very important historic and landmark ruling. I thank the team that represented us in the High Court. Let me also register that I was a Member of that group that energetically walked from this Chamber to Milimani High Court.

One of the things that have come out pleasantly is reaffirmation and restatement of Article 110 of the Constitution as regard to Bills that may be generated by this House and the National Assembly. There has been a very clear definition on how the Fourth Schedule functions of the county governments that may have implication or reference to money Bills can be treated in the advisory that has been given by the Court.

Madam Deputy Speaker, that clarity has come out quite well because hitherto there has been one monopolistic tendency by the “Lower House”, the National Assembly, in trying to adjudicate on matters on finance at the total exclusion of the Senate. The High Court, in the special bench, has redefined how this is going to be treated *vis-à-vis* Articles 218, 205, 110 of the Constitution, both of them taken together in subsection 1, 2, 3, 4, and 5. That process has been defined.

Like my colleagues have also alluded to earlier on, we now need to define the process in our Standing Orders, so that at no time will somebody short-circuit this process. This is because it will be clearly known. The Speaker has been given some teeth to bite. Our Speaker of the Senate can put his foot down, in concurrence with Article 110 (3) of the Constitution; that before either House considers a Bill, the Speakers of the National Assembly and the Senate shall jointly resolve any question as to whether it is a Bill concerning counties. If it is, they will resolve whether it is a special or ordinary Bill. Now we have *locus standi* where we can put our foot on.

There are many other proposals in the Building Bridges Initiative (BBI) that would be coming before this. I do not want to anticipate debate. However, there is one thing I just want to put forward; that let us take it in good spirit. There is no law which is punitive. The law is being made to improve whatever is to come in the future. It is the way we look at it that defines how we want to define that Bill.

Therefore, let us not prejudge any Bill which may be coming before this House. My only advice at this stage would be that let us take it in its own stand. It must have emanated from the existing laws that we found ourselves in a very difficult position to implement.

Madam Deputy Speaker, therefore, there is an innovation that has been made or a certain amendment, adjustment or realignment of the laws, in order to accomplish particularly the two thirds gender rule. It has been a headache to an extent that some way has got to be found out on how to resolve this matter.

With those few remarks, I thank you, Madam Deputy Speaker for giving me this opportunity.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Senator. Sen. Shiyonga, proceed.

Sen. Shiyonga: Madam Deputy Speaker, thank you. Thank you for those who are already wishing me to be the Kakamega County Woman Senator. I will be and may the words come true. I thank you for this opportunity to contribute to the Communication.

I take this opportunity to thank our Speaker, Hon. Kenneth Lusaka, for the walk they did led by the legal team and other Members that day. History has been written.

Madam Deputy Speaker, this House has been humiliated by the “Lower House”. I always call it the “Lower House” because even in the construction itself, it is lower. It is on the lower part of this compound.

Where people think that justice cannot be given, that day they were proved wrong. Let us not engage in sibling rivalry when it comes to constitutional matters. You might not be a pastor; it is not a must that you should be a reverend; you might not be even a Member of Parliament. However, when God is on your side, you can make the rightful judgment. That day, the Senate was proved right. The National Assembly with the sibling rivalry they can think about was proved wrong.

Madam Deputy Speaker, I want to state that there was nothing that we had been doing wrong. We had been putting our Bills right. We had been debating in this House. We had been sitting in this House. We are paid because we are here to make laws, only to find that our brothers and sisters down there looking at us like we are doing nothing. One day when they sit where we are, they will know very well that the shoe wearer knows where it pinches most.

The continuous violation of the constitutional rulings that are done by our “Lower House” and the confusion they cause our President, to assent on laws that have not been agreed as Parliament, is very humiliating and wrong. They forget to know that justice that is done through a rightful process is justice that is delivered to somebody who is yearning to get the rightful answer.

Madam Deputy Speaker, there is nothing that can make you happier than a judgement that has been ruled in favour of somebody who has been humiliated the way we have been humiliated. One day the Members who are sitting there, if they will come to this House, let them know that this House started by being the “Upper House”.

Other countries respect the Senate, but our brothers and sisters down there think they are the people to speak for us. We are not here to be spoken for. We are here to make constitutional laws. We are here to talk for ourselves, represent and protect our counties. That is exactly what we did. However, they think we came here to do sibling rivalry. We are beyond that.

Madam Deputy Speaker, for the Senators who are here, let us unite when it comes to these matters. Even if any other matter comes, let us unite so that we can show Kenyans that this House is there to be recognized and it is written in unity. This House is there and up to the task.

Thank you and I support the Communication.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you. Sen. (Dr.) Ali, proceed.

Sen. (Dr.) Ali: Madam Deputy Speaker, I wish to thank our lawyers led by Sen. Orengo. The National Assembly behaves in the manner that younger siblings do by making unnecessary noise and talking ill of the Senate. It is about time that the Senate stood up and told them off. Now that the Judiciary has supported the stand of the Senate, we should not allow any other entity from whichever angle to try and dilute the work of the Senate. The Senate has been empowered and with that, we should fight to ensure that we remain that way, if not enhance it.

The BBI Report should strengthen the Senate. We should not go back on this decision by the Judiciary. The position of the Senate should be to go forward and not backwards. I sometimes get surprised to hear people say that certain Bills affected the national Government and not the counties. The national Government is made of the counties. The national Government cannot stand alone without the counties. Everything that happens in this country must start in the counties. The Senate has been too lenient on certain issues. We should stand firm when dealing with the National Assembly and deal with issues from there with all the force that we have and all the other forces that we can bring to our side.

Sen. Shiyonga talked of the ‘lower House’ and I agree with her. The Senate Chamber was the first that we had after Independence. The National Assembly used to hold its sittings in this Chamber before the other House was built. This Chamber is the pioneer of everything. As pioneers, we should continue with our stand to make sure that

things work out well. Some of us that were in Naivasha are aware that some of the clauses in the BBI Report are not very good. I hope that things will work out for the betterment of this country. We will support any issue that has to do with enhancing the Senate. We will not support anything that will downgrade the Senate.

Madam Deputy Speaker, with those few remarks, I beg to support.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Sen. (Dr.) Ali.

Kindly proceed, Sen. (Rev.) Waqo.

Sen. (Rev.) Waqo: Madam Deputy Speaker, I would like to add my voice to this Communication from the Chair. I must state that I am very happy with the ruling. I would like to thank the Committee on Justice, Legal Affairs and Human Rights, in which I sit, for the work we have done together with our Senior Counsels and the legal team.

This is a historic moment in our lives and in the history of our nation because no one expected such an outcome. When the Senate walked to Milimani Court to file the petition, it was a new experience for some of us because I had personally never participated in any demonstration. The walk from the precincts of Parliament to the Milimani Court to demand for something was a new experience for me. It was also the first time to me to get into a court. I thank God for the experience that I got.

The court nullified the 23 Bills that were passed by the National Assembly without the input of the Senate. There is a kind of competition between the National Assembly and the Senate. Many of the Bills from the Senate have died in the National Assembly. There is need for the leadership to sit and reason together, so that we can work together to grow our nation and not to finish each other. We should not do anything that will harm or reduce our responsibilities. By doing what we did, we have supported our Constitution which is under threat. The Constitution of Kenya 2010 has given many of us the opportunity to be here and helped Kenyans to see that we are making progress. Our move has protected our Constitution so we should continue doing that.

I have gone through the ruling and picked three important things. First, that the 23 Bills were nullified, the second one is that the petition was dismissed without conditions, third, the National Assembly has been given nine months to regularize the laws that have been passed. I am encouraged to hear that all these things should be regularized in nine months. I congratulate all the Senators who walked all the way from the precincts of Parliament to Milimani Court. Some of us really struggled to walk all the way to Milimani, but we made history. I am proud of the outcome of our efforts. We should thank all the people who participated in the cause and represented us in court.

I thank you, Madam Deputy Speaker.

The Deputy Speaker (Sen. (Prof.) Kamar): Thank you, Sen. (Rev.) Waqo.

Kindly proceed, Sen. (Eng.) Hargura.

Sen. (Eng.) Hargura: Madam Deputy Speaker, I thank you for giving me the opportunity to support the Speaker's Communication regarding the recent court case. I thank all the Senators because it was a joint decision of the Senate to go to court on this issue.

I thank our able Senior Counsels, Sen. Orengo and Sen. Omogeni, as well as Sen. Mutula Kilonzo Jnr. for representing the Senate *pro bono* and making sure that the position of the Senate is not eroded through the back door by the National Assembly, which is trying to do away with our legislation making mandate by introducing their own interpretation of how to determine whether or not a Bill concerns counties. I thank the

judges for making it very clear that the National Assembly cannot use their Standing Orders to circumvent a provision in the Constitution.

In the last Senate, we had a similar problem when the Division of Revenue Bill became an issue. We went to the Supreme Court to seek an advisory opinion on that matter, which clearly stated that almost all matters concern counties.

Unfortunately, the National Assembly has been using the same interpretation of the law to make sure that some Bills do not come to this House. Initially, it was matters not concerning counties when it was advised that all matters concerning counties now became money Bills to the extent that the last time I heard that there was a mediation between the two Houses in determining what are these money Bills, the National Assembly went as far as saying that any legislation that creates a position that attracts remuneration is a money Bill.

Basically, you cannot improve on legislation because when you have to improve on service delivery, sometimes it requires creating an office. We have even created the Office of the County Attorney. Maybe, that in the interpretation of the National Assembly will mean a money Bill because that is already a position that requires to be filled and remuneration.

Now we have to make use of this ruling and ensure that all those legislations, over 20 of them, which by-passed this House, have to come back and go through the legislative process right from publication all through. If it will require mediation, so be it, so that we can now sit down and come up with a legislation, which is in the interest of the citizens of this country but not legislation that is passed mysteriously because somebody is trying to create some mischief somewhere.

Madam Deputy Speaker, thank you for giving me this opportunity. I will urge that we keep on making sure that we are vigilant, especially in this time of Building Bridges Initiative (BBI). We should make use of this because my understanding is that whenever there is a review of a constitution or any law, it is to improve the existing institutions to strengthen them and not to weaken them as we are seeing now.

Many issues have been raised, and I thank my colleagues in the Pastoralists Parliamentary Group. The points that they came up with are the minimum that have to be addressed for us to get that improvement and enhancement of our rights in this country, so that issues which we have been considering as marginalization all this time are sorted out and not aggravated further. Things like the Equalization Fund, a fund which has a sunset close of 20 years already, ten years into its period, its life has not been implemented. We need to make sure that those constitutional provisions actually attain the impact that Kenyans had in mind.

Thank you, Madam Deputy Speaker.

Sen. (Dr.) Mwaura: Naibu Spika, ningependa kuchangia Kauli hii na kusema kwamba ni jambo ambalo linapigia upato swala zima la nguvu ya Bunge la Seneti, hususan, uamuzi huu ambao umeweza kutupilia mbali ama kuweka shaka ama dosari Sheria 23 ambazo zimeweza kupitishwa pasipo kuhusisha Seneti.

Mwanzo, ninashabikia uamuzi huu kwa sababu tunafaa kukumbuka kwamba hatuna Mabunge mawili. Tuna Bunge moja la Kitaifa ambalo lina nyumba mbili. Nyumba hii ya Bunge la Seneti sio tu Nyumba ya kushughulikia maswala ya ugatuzi, ni kuhakikisha kwamba maswala ya ugatuzi yanawiana na sera ya kitaifa. Mara nyingi,

tunaona kwamba kuna kule kutokuelewa kwa nia ya Bunge hili, hususan mkono wa Serikali wa utekelezaji.

Watu wengi hawajaweza kutathmini maudhui ya uamuzi huu. Ni kumaanisha kwamba, jukumu la kuonyesha kwamba sheria ama Mswada wowote hauhusiani na maswala ya serikali gatuji ama kaunti. Jukumu hilo sasa sio la Bunge la Seneti, lipo katika Bunge la Kitaifa. Kwa sababu, kama vile ambavyo korti iliamua, utawezaje kusema kwamba kuna sheria ambazo zinatekelezwa katika Serikali ya Kitaifa pasipo na maeneo ya kaunti? Haiwezekani kwa sababu ukiangalia nchi hii, hata Jiji la Nairobi ni kaunti.

Kwa hivyo Bi. Naibu Spika, ningependa kusema kongole na hongera kwa sababu hatukuweza kushtushwa. Hata ilikuwa wakati juzi tu, unaona kama kuna midahalo kwamba tutupilie kesi mbali kwa sababu tunaweza kuwa na udhamini wa miswada kati ya maseneta na wabunge wa Bunge la Kitaifa. Lakini, hiyo sio suluhu. Mimi mwenyewe nimeweza kudhamini zaidi ya miswada mitano katika Bunge hili. Tunafanya kazi nyingi kama Maseneta lakini, miswada hii hata iwe inaweza kuwasaidia Wakenya, inaweza kufungua masoko yetu yawe huru. Mara nyingi miswada hii haiwezi kupitishwa katika Bunge la Kitaifa ilmradi kwamba inhusisha mambo ya kifedha.

Mhe. Naibu Spika, ninafikiri ni jambo ambalo tunafaa kuliangalia kwa undani, tuweze kuona sisi ambao tuko hapa, swala hili zima lisiweze kutumiwa kuweza kudhoofisha nguvu za Seneti katika mchakato wa *Building Bridges Initiative (BBI)*. Tuchukue hii nafasi tuseme kwamba tufuatilie na huu uamuzi, kwa sababu, nimeona katika vyombo vya habari kwamba Bunge la Kitaifa limeweza kusema kwamba litakata rufaa uamuzi huu.

Tuhakikishe kwamba, kama vile tumetoka kule Naivasha kwamba vipengele hususan ambavyo vinahusikana na ugavi wa fedha kati ya Serikali ya kitaifa na serikali gatuji zozote, isiwe kwamba sasa hivi hatuna ushawishi. Kwa nini nasema hivyo? Ukiangalia vile ambavyo dhana zipo katika sheria zilizopendekezwa ama mswada ama rasimu iliyopendekezwa ya kubadilisha Katiba, ni kwamba sasa hatutangojea Mhasibu Mkuu wa Serikali aweze kufanya yale mahesabu na Bunge la Kitaifa kupitisha. Hapo kutakuwa na kasheshe ni pesa zipi ambazo zitakuwa asilimia 35.

Kwa sababu naona muda umeyoyoma, naunga mkono. Hongera na kongole kwa wale ambao walikuwa wametusimamia, hususan viongozi wa Bunge la Seneti. Vile ambavyo tuliandamana tukaenda kule Milimani, hatukuchoka. Kuna wazee kama Mzee Ongeru ambao nilikuwa naona kwa picha nimemshika mkono. Tulikuwa pia na Mzee Amos Wako. Tukiona kama tutadhalilishwa, lakini tukasimimama na Kenya, na ninafikiri, Bunge la Seneti ni Bunge la kuwaleta Wakenya kwa pamoja. Tuwe na malumbano na sintofahamu, lakini mwishowe tutakuwa na uwiano.

Sen. Kang'ata: Let me take this opportunity to congratulate each and every Senator and also our colleagues who led us in this matter by offering their legal services to champion this matter in court on *pro bono* basis.

Let me also take this opportunity to congratulate the Court for properly looking at the law and ensuring that they are guided by the fidelity to the law as it is, and not as it ought to be.

In jurisprudence, that is the philosophy of law. We have several approaches to law. There are those who look at the law as it is; the so called positivist. Then, there are those who look at law as it ought to be; the so called natural lawyers.

We look at the philosophy underpinning this good decision. You see that jurisprudence of positivism being inbuilt in this finding. For me, I think it is positive. It expands our jurisprudence and knowledge of law. It ensures that the Senate occupies the rightful place in the entire constitutional architecture of this Republic of Kenya.

Madam Deputy Speaker, without straining your mind, when you look at an Act of Parliament, it is called an Act of Parliament, and Parliament comprises of both the Senate and the National Assembly. Therefore, it goes without saying that ideally almost all forms of statutes should be subjected to concurrence both by the National Assembly and the Senate.

I am aware that our colleagues will be filing an appeal at the Court of Appeal.

I urge this House to be vigilant. We should go to fight it out in the Court of Appeal, so that we maintain this major piece of decision that has been rendered by the High Court.

Madam Deputy Speaker, let me now dwell on the issue concerning BBI and how it is going to remedy some of the lacunas that exist currently in our Constitution. There are some Senators and other members of the public who have been saying that the BBI is proposing to whittle down the powers of the Senate; to make the Senate an inferior House *vis-a-vis* the National Assembly. We would have wanted more, but strictly speaking, BBI did not really touch on Article 96 of the Constitution, which is the one that establishes the jurisdiction of the Senate. Therefore, the power of the Senate to legislate, oversight and make laws concerning counties and represent counties, which is provided for under Article 96 has not been touched.

Be that as it may, what we should be fighting for and I belong to that school of thought, is to seek an enhanced role of the Senate going forward. Those of us who support BBI, we may need to re-tweak two things. One, we should consider granting the Senate the power to vet various officials in the Executive for the simple reason that under the BBI, we are proposing to domicile the Executive in the National Assembly. Therefore, you cannot have Cabinet Secretaries sitting in the National Assembly and they are going to be vetted by their colleague Members in the National Assembly. Therefore, if you want fairness and objective vetting, allow the Executive to sit in the National Assembly, but the vetting be done by the Senate because no Senator will be sitting in the Executive.

Madam Deputy Speaker, the other thing we may need to consider granting the Senate is the power to initiate any form of Bill. Currently, the so called Money Bills cannot be initiated at the Senate level. As a result, several Bills have gone to the National Assembly and have been torpedoed. They have been deemed to be Money Bills and, therefore, we are unable to proceed with them. To address that lacuna, we need to grant the Senate the power to initiate any form of Bill; whether Money Bill or otherwise. However, on the larger scheme of things, when you look at the BBI, let me tell the nation that the BBI has very positive provisions.

[The Deputy Speaker (Sen. (Prof.) Kamar) left the chair]

[The Temporary Speaker (Sen. (Dr.) Mwaura) in the chair]

I want to bring to the attention of Kenyans why we proposed the so called expanded Executive in the BBI. We did this for several reasons. Kenya is an ethnically-divided society. A Constitution designed for ethnically-divided societies differs with societies that are not ethnically-divided.

Mr. Temporary Speaker, Sir, I seek your leave that you add me five minutes to finish this point.

The Temporary Speaker (Sen. (Dr.) Mwaura): Nafikiri kwa sababu unawakilisha Kiranja ya Walio Wengi, nakupa dakika tatu.

Sen. Kang'ata: Mr. Temporary Speaker, Sir, ethnically-divided societies' constitutional design tends to differ with societies that are not ethnically-divided. I will give an example of Belgium, Switzerland and Northern Ireland where you have a major division between the Protestants and the Catholics. They have a democracy called Consociational democracy. It has been explained very well by a writer called Arend Lijphart in his Article called '*Constitutional Design for Divided Societies*' that was published way back in 1994 by the Journal of Democracy. He has also written another book called Patterns of Democracy.

When you read his ideas, he argues that in an ethnically-divided society, you need to promote consensus democracy. It has certain characteristics. Number one, it has an expanded executive or a grand coalition. Number two, it has a mutual veto. Number three, it has a proportional representation electoral system. When you look at Switzerland, Belgium, Northern Ireland and other countries in Asia like Lebanon, where you have a division of the Shiite Muslim and Sunni Muslim and the Christians, you will see that democracy works well by ensuring representation of each and every segmented group in that society in the executive.

Therefore, BBI is proposing to establish that democracy in Kenya. This form of democracy is not new in Kenya at all. Between the year 2008 and 2007 Kenya was a Consociational democracy. We inserted Section 15 (a) in the 1969 Constitution to establish the position of a Prime Minister. That Government has been evaluated as one of the most inclusive governments that Kenya has had since Independence.

Mr. Temporary Speaker, Sir, the drafters of the Constitution 2010 thought they can remedy that problem of ethnic divisions in two ways. Number one, they came up with devolution. Number two, they established centripetalism, that is, electoral rules that are geared to give incentives to politicians to come up with coalitions that are quite large that they can accommodate everyone. Therefore, we provided for Article---

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana Kiranja wa Walio Wengi. Umezungumza vizuri sana na kwa ufasaha kama mhadhiri wa Chuo Kikuu. Maswala ya sheria na serikali ni jambo nzuri zaidi.

Fursa hii nampa Sen. (Dr.) Musuruve ambaye tumeshirikiana sana kuhakikisha kwamba haki za watu wenye ulemavu zimeweza kurudishwa katika ripoti ya BBI.

Sen. (Dr.) Musuruve: Thank you, Mr. Temporary Speaker, Sir, for giving me this opportunity to give a comment on the Statement made by the Speaker of the Senate. It was encouraging and a win-win situation to see that all Senators were standing in solidarity and walking to Milimani Law Courts. I remember that time I was wondering in my mind how I was going to walk to Milimani Law Courts because of my disability. However, somehow, I found myself there. It was very good that my fellow Senators were patient with me as I went up the rooftop of the vehicle. This demonstrated that if we work

together as the Senate, we can achieve whatever we want, and that unity of purpose is good.

Even though I am talking about unity of purpose, it should not be misconstrued that when we stand in solidarity against something that is noble then it is a good cause. No. The Senate is the upper House and Article 109 states clearly on what should be done constitutionally when it comes to how to exercise legislative powers. I was really excited when we went to Naivasha. It was a good moment and even the party leaders were there. We saw Hon. Raila Odinga there. He demonstrated that he is a leader who listens. I want to thank him for giving us attention as leaders with disabilities. The Chair can remember very well that he gave us his time and we articulated very well the concerns of persons with disability in the BBI. It was echoed very many times when the President was addressing us regarding the gap they are seeing and what they intend to do. They did say that something will be done concerning persons with disability. The President, the Rt. Hon. Raila Odinga and Sen. Orengo all said that clearly.

I want to tell Kenyans not to listen to rumourmongers, but listen to our leaders because there is a way in which God works through them. They clearly stated that no one will be left behind in the BBI. Sen. Orengo has also assured us that all our concerns will be taken on board.

Mr. Temporary Speaker, Sir, without blinking an eye, I want to tell Kenyans that BBI is the way to go. We all remember vividly what happened in 2008. Every election year, we experience violence in various parts of this country. The violence is not as a result of two-third gender rules, but because of lack of representation at the top. Therefore, we need to expand the Executive through BBI, so that we solve this problem once and for all.

Let us embrace this noble idea of BBI because we are one people living in one beautiful country. We must support hon. Raila Odinga and His Excellency the President in this initiative because they put the interest of this country first. If they decided to put their political ambitions at bay, why can we, as Kenyans, not support them?

Mr. Temporary Speaker, Sir, I know that you are a Christian and we have prayed many times for peace to prevail in the country. God has answered our prayers through these two leaders who came together for the purpose of uniting Kenya. If there are gaps identified in the BBI document, they can be addressed without us raising political temperature in the country.

I congratulate hon. Raila Odinga and the President. I can see that they have put us before---

(Sen. (Dr.) Musuruve's microphone went off)

The Temporary Speaker (Sen. (Dr.) Mwaura): Nafikiri kuwa Sen. (Dr.) Musuruve ametangaza msimamo wake kuhusu BBI. Yeye ni mcha Mungu kama mimi na sisi hushiriki maombi pamoja. Viti ambavyo mimi na yeye hukalia vimetupiliwa mbali katika BBI lakini viti hivyo vitarejeshwa ndio hata wengine wapate nafasi kama sisi. Walemavu wana haki zao kikatiba. Kama si hivyo, Seneti haitakuwa na mlemavu yeyote kwa sababu ni vigumu sana kwa watu walio na ulemavu kuchaguliwa, kwa sababu ya kunyanyapaliwa na kutengwa na jamii.

Sasa nampa fursa Seneta mwakilishi wa vijana hapa Bungeni, Sen. Chebeni, ili pia yeye atoe maoni yake.

Sen. Chebeni: Thank you, Mr. Temporary Speaker, Sir. I also want to join my colleagues in adding my voice to this Statement. I begin by thanking the leadership of this House because they have walked us through this journey, and we are finally here. I thank all of us for having participated in the walk to the High Court. I remember I saw Sen. (Dr.) Musuruve in her vehicle that day. It really demonstrated that we can all participate in this process of ensuring that the Senate is respected.

I also thank the High Court for this great ruling. It is a landmark ruling and it has placed the Senate in its rightful place as the 'upper' House. It has brought respect to this House and order to Parliament with regard to how Bills are processed.

Mr. Temporary Speaker, Sir, I will be very brief. My comment will be on only one thing. I think we need to have a way of ensuring that a certificate is presented to the President before he assents to any Bill.

(Applause)

In this regard, we will ensure that we do not come to such eventualities. This is very embarrassing to the President. I do not know how 24 Bills could be signed by him into law without them passing through this House. I, therefore, congratulate the leadership of this House and everybody who took part in ensuring that this House and the Constitution is respected.

I support.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana, Sen. Chebeni, mwakilishi wa vijana. Umetupatia wazo zuri sana, kuwa lazima kuwe na cheti cha kuhakikisha Miswada yote imepitishwa katika Mabunge yote mawili.

Saa hizi nitampa nafasi Sen. M. Kajwang'. Simuoni. Je, yupo?

Sen. M. Kajwang': Mr. Temporary Speaker, Sir, I am present.

The Temporary Speaker (Sen. (Dr.) Mwaura): Pole. Nafikiri niliangalia mahali ambapo wewe hukaa kila wakati.

Sen. M. Kajwang': *Asante, Bw. Spika wa Muda.* I know that I have already breached the Standing Orders because I intend to proceed in English. First of all, I congratulate every member of this Senate. We are great when we work together.

When we first walked to the Supreme Court to seek an advisory on the role of the Senate in the division of revenue and legislation affecting counties, we came out victorious and stronger. When we walked to the High Court in Milimani to seek the opinion of the court on legislation that has been passed without the consent of the Senate, we emerged victorious, and we are stronger today.

Mr. Temporary Speaker, Sir, I know that the other House has a right to appeal, but these are some of the sapient issues that we must try to avoid. One House of Parliament suing another is the equivalent of a husband and wife engaged in endless litigation. The nation looks at Parliament as one entity. Many members of the public do not give a damn that one is the Senate and the other is the National Assembly. All that is required is for Parliament to work in harmony, in a yin-yang kind of situation, so that it can deliver on the aspirations of the people of Kenya.

I urge that instead of pursuing endless litigation in the courts of law, we must find a formula for Parliament to sit down and give effect to Article 110 (3) of the Constitution, which is coached in mandatory terms. The problem in this country is not the absence of laws; the problem is the spirit and behaviour of persons who are in positions of authority.

We lack the spirit of constitutionalism and that has been further shown in this particular matter.

Mr. Temporary Speaker, Sir, there are those who think that the Senate is being weakened. My view is different. In the proposals in BBI, 35 per cent of resources will be allocated to county governments. That means the scope of Senate supervision and oversight over public finances has shifted from 15 to 35 per cent. With 35 per cent of the national revenue, the Supreme Court advisory, and the High Court ruling, this House is going to be the 'upper' House.

You do not have to write it in the Constitution that the Senate is the upper House. Look at two examples. In Australia, the Senate is designated as an Upper House. It represents the State and is a House of review, but the government sits in the other Chamber, yet the Australian Senate has been able to assert itself.

Look at our neighbours down south in South Africa. They have the equivalent of a Senate called the Council of Provinces. Even though it is defined as an Upper House, it does not behave as such because the Council of Provinces in South Africa has people who are elected from regional assemblies to sit in it.

You do not need that explicit description in the Constitution. That should not be a deal breaker or a showstopper. As the Senate, we cannot say that we are not going to support BBI because the Senate is not designated as an Upper House. I know many men in this Chamber who are designated as husbands at home, but they are not any better than the wives in their homes. Power does not have to be written on your forehead.

Mr. Temporary Speaker, Sir, let us seize the moment. If the Government is going to sit in that other House, this is the House that will put a break on all the unconstitutional and illegal legislative affairs that will come from that other House. You can imagine if security laws were to come to the Senate after having been processed in the National Assembly.

Let us be courageous. I am so happy that in this fourth revolution, the focus is now on economic prosperity. I am excited that in BBI, we have put issues like a digital infrastructure, sustainable agriculture and economic development as economic principles. Whoever is going to run this country with the new or the amended Constitution must ensure that the conversation moves from regions, hustlers and others. The conversation is about prosperity because it is only in prosperous society that our young people, women, and all segments of society will have an opportunity and feel proud to be part of a nation called Kenya.

Finally, Mr. Temporary Speaker, Sir, we must also review our Parliamentary Budget Office (PBO) that renders contradictory opinions on money Bills in this Parliament. That needs to be fixed because it is part of the problem.

I support and I congratulate the legal team and the entire House for this wonderful development.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana. Umejieleza kwa ufasaha mwingi zaidi. Kama tungelikuwa na Mawaziri hapa, nafikiri ungekuwa Waziri wetu wa Fedha.

Sen. (Dr.) Milgo: Thank you, Mr. Temporary Speaker, Sir, for this chance to also speak to this very important issue. First of all, I take this opportunity to congratulate our Speaker together with all the Senators for leading us in our work, which I now call signature work that has enabled us to stamp the authority of the House of the Senate.

Secondly, I thank our Senior Counsel, Sen. Orengo, Sen. Omogeni and Sen. Mutula Kilonzo Jnr., and the Senate Committee on Justice, Legal Affairs and Human Rights for work well done. This is historic, particularly bearing in mind that up to 24 Bills have been set aside. This is not lost. I think we are ready to reprocess some of the Bills.

I was able to look at some of the Bills and as the Chair of the Committee on Education, I have identified one that we can still reprocess. I have read through it and seen some amendments that could be added. We can take up those Bills and pass them as soon as possible. Those 24 Bills were very important and speaking to very many issues, including *Huduma Namba* and other important issues touching the people of this country.

I think the ruling has restated to all and sundry that Kenya has a bicameral Parliament despite the fact that the National Assembly has been trying to look down upon the Senate. This is high time that they should be able to note that the National Assembly as well as the Senate are people's representatives. All of us carry a complimentary role and each House should be given the recognition it deserves.

Unfortunately, in most cases, we go ahead and fight each other in wars that are not necessary. It is unfortunate that as we speak, the President assented to the 24 Bills, which puts him in a very awkward position. I support my colleagues on proposing that in future, before any Bill is assented to, there should be a certificate to show the Bills have been properly processed and passed through the two Houses so that the Head of State is not embarrassed as it is now. This is so that we have what we are calling "smart approach" to issues in future.

Mr. Temporary Speaker, Sir, out of this, we have wasted a lot of time. I even remember there are Bills that normally go for mediation. If they have originated from the Senate, it takes an abnormally long time. In some of our committees, we have a number of Bills that are waiting formation of a mediation Committee and because the Bill has originated from the Senate, it takes a long time even for the National Assembly to send their membership. When their Members come, they all want to be Chairpersons to ensure they stamp their authority and to reject many of our Bills even by way of calling them Money Bills all the time.

Right now, we are in the mood of BBI. If the BBI proposals are passed, it is going to send a lot of money to the counties; 35 per cent and even 5 per cent to the wards. This is high time the Senate oversight authority and legislation should be strengthened as the 'Upper House'.

The Constitution of Kenya 2010 is termed as the most progressive, world over. Let this BBI - if it shall be passed - make it not only a Constitution that brought on board issues of inclusivity, but one that ensures that there is restoration of institutions such as the Senate so that all institutions can now work to ensure that there is no conflict of interest. It should also ensure that there is value for money when it comes to issues of oversight. That way, the Senate will be recognized.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana.

Sen. Nyamunga: Thank you, Mr. Temporary Speaker, Sir, for giving me this opportunity just to add my voice to the same statement that was made by the Speaker on the ruling of the High Court of Kenya concerning the issues we had presented there.

It has taken a long time but by the end, we can see that the ruling has given life to this House. I thank all the Senior Counsels and all the Senators who participated in that

case. It was a joint effort and we should thank all of us. It is a win for the Senate and our Speaker. I know it was very difficult for him to lead that walk to the High Court in Milimani. He did it and we have now seen the results of that sacrifice that the Senators made.

I have been disturbed in a very big way by the behavior of Members of the National Assembly. I think as Members in both Houses and more so, the National Assembly, we suffer from a very big complex. I do not know whether it is inferiority or superiority complex. It is a big problem to the extent that we divide ourselves. Some people think they are more Kenyan than others or one House is superior to the other.

We are here to give service to our people, make laws for them, represent them and make sure we give them the best, from the opportunity they have given us to serve in the two Houses. It should not be a contest of who is more superior, bigger or smaller.

Although we are making any laws, we do not make them for ourselves or as individuals. We should make them for posterity and the future of this nation. Right now, we, as the Senate, are going through struggles. As we serve in this House, we should make sure we iron out most of the problems that the Senators who will come to this House after us will find it a little bit better and easier. We should bring this superiority complex to an end and know that the cardinal responsibility that we have is the people of Kenya.

I support the BBI not for any reason but for the fact that when we were doing the Constitution in 2010, it was very clear that there was a percentage that was not right. Time has come and ten years is not a short time. If you look at the mature democracies such as USA, I think they have amended their Constitution almost 27 times. Ten years is long enough for us to know where we have weaknesses and where we can strengthen our Constitution.

By BBI being made available for us, it is time for us to correct where we can and make Kenya better. We should make gains and not losses through the BBI. It should correct where there are weaknesses and strengthen the Constitution of this country.

This idea of Money Bill does not augur well for Members of the National Assembly. For example, I have a very good Bill on the County Resource Development. It is a very important Bill that would help most governors to get more resources by developing the resources they have within their localities. When I was about to present it, the issue of Money Bill came in and I had to donate it to the National Assembly.

They may not execute it the way I would have wanted to execute it. They may not have achieved what I would have wanted to achieve because it is purely for the county government. The fact that that is a Money Bill, takes it away from the Senate to the National Assembly.

Mr. Temporary Speaker, Sir, I want to thank the Members and all of us for the win that we had. Even as we go to the Court of Appeal, we believe that justice will be upheld and we will still get what is rightfully for the Senate.

I thank you.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana, kwa sababu ya vile ambavyo umechangia maswala kuhusu miswada ya fedha. Sasa hivi tuende kwa hoja ifuatayo.

PAPERS LAID

Sen. (Dr.) Milgo: Thank you, Mr. Temporary Speaker, Sir, I beg to lay the following Papers on the Table of Senate, today, Tuesday, 3rd November, 2020-

THE ANNUAL COUNTY GOVERNMENTS BUDGET
IMPLEMENTATION REVIEW REPORT FOR FY 2019/20

THE 2020 BUDGET REVIEW AND OUTLOOK PAPER FOR
FY 2021/2022 AND MEDIUM TERM BUDGET

SESSIONAL PAPER NO. 2 OF 2020 ON THE
PROPOSED VETERINARY POLICY

SESSIONAL PAPER NO. 3 OF 2020 ON THE
PROPOSED LIVESTOCK POLICY

(Sen. (Dr.) Milgo laid the documents on the Table)

The Temporary Speaker (Sen. (Dr.) Mwaura): Hoja ifuatayo.

NOTICE OF MOTION

PARKING CHARGES IN PUBLIC INSTITUTIONS
OFFERING ESSENTIAL SERVICES

Sen. (Dr.) Ali: Thank you, Mr. Temporary Speaker, Sir, I rise to give Notice of the following Motion-

AWARE THAT, many urban areas and towns in Kenya lack designated car parking areas as a result of imbalance between parking supply and demand mainly due to ineffective land use planning and miscalculations of space requirements, thereby leading to exorbitant parking fees;

NOTING that most essential services offered in hospitals, educational institutions and other public utilities are offered in urban centers, shopping malls and other designated areas that charge parking fees to access;

ACKNOWLEDGING that whether they are delivered by public or private providers, essential services such as health, banking, education and other utilities are considered to be public services because they are public goods that sustain the well-being of every citizen and help in the development of the society as a whole;

CONCERNED that access to hospitals, educational institutions and other places offering essential services might be hindered due to exorbitant parking fees levied on motorists accessing these services;

FURTHER CONCERNED that charging entry fees amount to double taxation as the motorists who would have paid the parking fees will still pay for the services they seek;

NOW THEREFORE, the Senate urges the Cabinet Secretary for Lands, Housing and Physical Planning together with the Council of Governors to come up with a policy framework to create an enabling environment for protection of motorists accessing essential services from paying exorbitant fees for parking.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana. Hoja ifuatayo.

STATEMENTS

The Temporary Speaker (Sen. (Dr.) Mwaura): Maseneta, ukiangali Ratiba ya leo, Taarifa ambazo zingefaa kutolewa na Sen. Were and Sen. (Dr.) Musuruve zimeweza kuahirishwa. Kwa hivyo, tunaenda kwa arifa ambazo zitatolewa kutokana na Kanuni ya 51.

PROCUREMENT IRREGULARITIES AND GOVERNANCE MALPRACTICES AT KENHA

STATE OF AFFAIRS IN SCHOOLS IN LUGARI CONSTITUENCY

(Statements deferred)

Sen. (Dr.) Milgo, yupo tayari kuwakilisha Kamati. Nakupa fursa ya kuendelea.

ACTIVITIES OF THE COMMITTEE ON LABOUR AND SOCIAL WELFARE

Sen. (Dr.) Milgo: Thank you, Mr. Temporary Speaker, Sir.

I rise pursuant to Standing Order 51(1) (b) to make a Statement on the activities of the Standing Committee on Labour and Social Welfare for the period commencing 13th February to 31st October, 2020.

Mr. Temporary Speaker, Sir, during the period under review, the Committee held a total 55 sittings, considered two Bills, six Petitions and 11 Statements. The Committee also considered two legislative proposals and two policy documents.

In respect of Bills, the following were considered-

(1) The National Museums and Heritage (Amendment) Bill, 2019 (Senate Bills No.7 of 2019).

(2) The Persons with Disabilities (Amendment) Bill, 2020 (Senate Bills No. 15 of 2020).

(3) A legislative proposal: The Sign Language Trainers and Interpreters for the Deaf Bill, 2020.

(4) The Draft County Public Service Boards Bill.

On The National Museums and Heritage (Amendment) Bill, 2019 (Senate Bills No.7 of 2019), the Committee resolved that the Sponsor should take up the new Bill

submitted by the Ministry of Sports, Culture and Heritage. The Committee will table its report on the Bill soon.

Mr. Temporary Speaker, Sir, with regard to The Persons with Disabilities (Amendment) Bill, 2020 (Senate Bills No.15 of 2020), the Committee has called for written submissions from the public and met the Stakeholders today, Tuesday, 3rd November, 2020. The Committee will table its report after considering views from the public.

Mr. Temporary Speaker, Sir, the Committee also considered a legislative proposal for The Sign Language Trainers and Interpreters for the Deaf Bill, 2020, 2020, proposed by Sen. (Dr.) Alice Milgo and Sen. (Dr.) Gertrude Musuruve, and recommended that the Bill be directed to the Standing Committee on Education after publication and First Reading.

The draft County Public Service Boards Bill was also considered during the period under review. The Bill is sponsored by the Committee and seeks to provide for a framework within which the County Public Service Boards would operate. The Committee is still in the process of considering the Bill.

Mr. Temporary Speaker, Sir, regarding Statements, pursuant to Standing Order No. 48(1), 11 Statements were referred to the Committee. Responses to some of these Statements have been received and the matters concluded, but some are still under consideration due to supplementary questions asked by the Senators on the Statements.

The Committee will be meeting the Wajir County Government on the Statement by Sen. Farhiya Ali Haji, concerning alleged stalled payment of sitting allowances to Members of the Wajir Land Tribunal Board on Thursday, 5th November, 2020.

On the Statement by Sen. (Dr.) Ali Abdullahi on non-remittance of employee statutory deductions, non-payment of work injury benefits and other labour related violations by county governments, the Committee received responses from the Ministry of Labour and Social Protection, the Council of Governors (CoG) and the Wajir County Government and shared with the Senator. The Committee is also awaiting response from the National Treasury and will be writing to LAPTRUST and LAPFUND and some SACCOs to get the actual picture.

Mr. Temporary Speaker, Sir, the Committee has noted that non-remittance of statutory deductions, including pension and SACCO funds, are challenges that afflict all counties and will, therefore, be engaging the county governments, including the county assemblies and the National Treasury on the matter.

The Committee is awaiting responses from the National Treasury on the Statement sought by Sen. Petronila Were Lokorio, MP, on alleged frustrations faced by retired public servants or their beneficiaries in claiming benefits at the Pensions Department.

Mr. Temporary Speaker, Sir, the Committee is also awaiting responses for the following statements-

- (i) Statement sought by Sen. Cheruiyot, MP, on the operations of the Anti-Doping Agency of Kenya (ADAK) and the alleged rampant doping test failure by Kenyan athletes;
- (ii) Statement sought by Sen. (Dr.) Musuruve, MP, regarding compensation of Mr. Peter Otieno by Sarova Hotels Ltd; and

- (iii) Statement sought by Sen. Dullo, MP, regarding dismissal of staff by Ewaso Ng'iro North Development Authority.

With regard to Petitions, the Committee considered six petitions during the period under review. As I have stated before, Labour and Social Welfare issues are continuous in nature and even when the report is tabled in the House, the Committee still follows up on the matter to monitor progress on the matters.

For example, the Committee tabled the report on the Petition by Kenya Union of Clinical Officers (KUCO) concerning refusal by both levels of Government to conclude on the Collective Bargaining Agreement (CBA) negotiations on 11th August 2020, but is still following up with the Public Service Commission (PSC) and the Ministry of Health to ensure that the clinical officers have a schemes of service.

The Committee also tabled a report on the Petition by Mr. Peter Wambua Mwangangi on the plight of former Machakos County Ward Representative Staff on the same date.

Mr. Temporary Speaker, Sir, the Committee has concluded the following petitions and will be tabling the reports on them-

- (i) Petition by Sen. Kihika, MP on behalf of Nakuru residents on the unlawful rounding up, detention, transfer and dumping of street children by the County Government of Nakuru;
- (ii) Petition by Sen. (Dr.) Mbito, MP on behalf of the Kenya Railways Staff Retirement Benefits Scheme (KRSRBS) Pensioners on the looming collapse of the Kenya Railways Staff Retirement Benefits Scheme;

The Committee has engaged the sponsors and the Government institutions on the Petition to ensure that the Pensioners are their due. The Committee can confidently report that so far, the pensioners have been paid five (5) out of twelve (12) months arrears.

Even after tabling the report, the Committee will still be engaging the stakeholders to ensure that the arrears are paid in full and the pensioners start receiving timely payments of their pension.

The Committee will be meeting stakeholders on Monday, 9th November, 2020, for a follow-up meeting.

The Committee also will be tabling interim reports on the following petitions

- (i) Petition by Sen. Cherargei, MP, on alleged non-payment of salaries by the Nandi County Government; and
- (ii) Petition by Mr. Lawrence Mutembei on irregular re-deployment by the County Government of Tharaka Nithi.

Mr. Temporary Speaker, Sir, going forward, the Committee intends to carry out the following key activities this quarter:

- (a) Publication of the County Public Service Bill;
- (b) Consideration and tabling of the Report on the Persons with Disabilities (Amendment) Bill, 2020 (Senate Bills No. 15 of 2020);
- (c) Engage the National Treasury and County Governments including the county Assemblies on the issue of statutory deductions, pension and Sacco payments;

- (d) Engage the Ministry of Sports, Culture and Heritage on the Sports, Arts and Social Development Fund and monitor the progress of implementation of activities funded; and
- (e) Deliberations with stakeholders on social safety nets for employees during this pandemic period.

Thank you.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana, Sen. (Dr.) Milgo kwa kutupatia ratiba ya Kamati husika ambayo umekuwa Naibu Mwenyekiti. Naambiwa kuwa mara nyingi wewe huwa kama Mwenyekiti.

Hujawasilisha hiyo Taarifa rasmi kwenye meza. Njoo utaelekezwa hapa.

Sen. (Dr.) Milgo: Mr. Temporary Speaker, Sir, having read the progress of the Standing Committee on Labour and Social Welfare, I now table the Report.

(Sen. (Dr.) Milgo laid the document on the Table)

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana, Sen. (Dr.) Milgo. Najua kuwa wewe ni mama na ukishaandaa chakula lazima ukiweke mezani. Kwa hivyo, lazima uweke hiyo Ripoti kwa meza rasmi.

Ningependa kuchangia kuwa Kamati hiyo iweze kuharakisha Mswada wa watu wenye ulemavu ambao tumedhamini na Sen. Cheruiyot kwa sababu Wizara imeniambia mara mbili na hata leo ulisikia wakisema tuondoe huu Mswada na kama hilo halitafanyika kabla Bunge hii kumaliza muhula wake, itakuwa miaka kumi na tulianza huu mchakato mwaka wa 2007. Kwa hivyo, sio haki kwa watu wenye ulemavu.

Sen. (Dr.) Musuruve, nafikiri kuwa tuliahirisha taarifa yako. Sijui tutafanyaje kwa sababu nilikuwa nimeshapita. Unataka kuiwakilisha rasmi?

Sen. (Dr.) Musuruve: Mr. Temporary Speaker, Sir, thank you for giving me the opportunity.

I just wanted to comment on what the Standing Committee on Labour and Social Welfare has done; the report concerning the pending bills and all that.

I want to thank the Standing Committee on Labour and Social Welfare on coming in on issues of disabilities.

The Temporary Speaker (Sen. (Dr.) Mwaura): Samahani, unataka kuchangia?

Sijui kama kunafaa kuwa na kuchangia hapo?

Nimeelekezwa kuwa inafaa kuwa dakika moja.

Sen. (Dr.) Musuruve: Thank you, Mr. Temporary Speaker, Sir.

I just want to comment that I truly appreciate, on behalf of persons with disabilities what the Standing Committee on Labour and Social Welfare is doing.

I remember when the sign language bill came up; it started in Standing Committee on Labour and Social Welfare and Sen. Sakaja gave it strong support until it was published and it is where it is. I am happy that the Standing Committee on Labour and Social Welfare has taken up the sign language interpretation Bill that is before them. After publication, it will be there for public hearing. I want to call up persons with disabilities from all over to come and enrich the Bill so that it becomes a law.

Mr. Temporary Speaker, Sir, you are a person with a disability and when it comes to persons with disabilities, ones who go through academia, the most disadvantaged are the deaf because of the language barrier. This will be a good bill that will help solve the language problem of the deaf.

I want to thank my fellow Senators for supporting persons with disabilities when they come up with bills in the Senate. Thank you fellow Senator for supporting us always. Thank you for inclusivity in the Senate.

I support.

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana ndio sababu kuwa ni lazima kuwe na Wabunge Maseneta ambao wanawakilisha watu wenye ulemavu.

Nampa Mwenyekiti wa Kamati ya Afya, Sen. (Dr.) Mbiti.

Sen. (Dr.) Mbiti: Mr. Temporary Speaker, Sir, I rise pursuant to Standing Order 51(1)(b) of the Senate Standing Orders to make a Statement relating to the activities of the Standing Committee on Health for the period 1st April 2020 to 6th October 2020.

ACTIVITIES OF THE COMMITTEE ON HEALTH

During the period under review, the Committee held 59 sittings and considered various legislative proposals, Bills, Statements and Petitions as set out below -

(a) Legislative proposals. The Committee undertook prepublication scrutiny of two legislative proposals which were referred to the Committee and they were the County e-Health Bill 2020 sponsored by Sen. Pareno and secondly, the Health (Amendment) Bill 2020 sponsored by Sen. (Dr.) Ali.

Pursuant to Standing Order 126(1), the Committee examined legislative proposals and invited respective sponsors during the reconsiderations. Further, pursuant to Standing Order 125(3) of the Senate Standing Orders, the Committee transmitted its comments to the Hon. Speaker of the Senate on 17th July 2020 and 6th August 2020 respectively.

(b) The Committee considered two Bills during the period under review. The first one is the Reproductive Healthcare Bill (Senate Bill no.23 of 2019). The Reproductive Healthcare Bill was sponsored by Sen. Kihika and was published on 20th November 2019 and read for the First Time on 18th February 2020. Following this, it was committed to the Standing Committee on Health for consideration and facilitation for public participation in accordance with Standing Order No. 141.

Mr. Temporary Speaker, Sir, the Bill passed the Second Reading on 9th June, 2020 and was subsequently deferred to allow for stakeholder engagement and consultation. The Committee successfully concluded the second round of public participation on Monday, 21st September, 2020 having received 213 written submissions from various stakeholders and held a series of stakeholder meetings with more than 45 relevant stakeholder groups.

The sponsor of the Bill was duly invited to all the stakeholder meetings. The Committee has concluded its considerations of the Reproductive Health Bill and has adopted its report thereon for tabling.

Mr. Temporary Speaker, Sir, the second one was the Community Health Services Bill (Senate Bills No. 5 of 2020). The Bill was sponsored by Sen. (Dr.) Zani. It was read for a first time in the Senate on 21st April, 2020. Following this, it was committed to the Standing Committee on Health for consideration and facilitation of public participation in accordance with the Standing Orders.

The Committee has concluded its consideration of the Community Health Services Bill and it is due to adopt its report and the Committee stage amendments thereon for tabling.

Mr. Temporary Speaker, Sir, with regard to Statements, the Committee has considered five Senators' requests for Statements during the period under review as follows. The first was a Statement by Sen. Mutula Kilonzo Jnr. on the scaling up of the Universal Health Care (UHC) program to the 47 county governments.

The Committee held meetings with stakeholders in relation to the Statement including the Ministry of Health, Council of Governors (CoG), Kenya Medical Supplies Authority (KEMSA) and National Hospital Insurance Fund (NHIF). It has further received and analyzed 46 intergovernmental participation agreements that were executed between the national and county governments for the scaling up of the UHC program.

Mr. Temporary Speaker, Sir, the second Statement was by Sen. Sylvia Kasanga on the operations of NHIF. The Committee held meetings with the Chief Executive Officer (CEO) of NHIF on 19th May, 2020 in which Sen. Kasanga was present. Further, in relation to the Statement and other discussions that have risen on the Floor of the House, the Committee is due to convene the stakeholders' forum on the operations and status of reforms at the NHIF.

The third Statement was by Sen. Mugo regarding the death of a patient at M.P. Shah Hospital allegedly due to negligence. The Committee has concluded its considerations of the Statement and has tabled a report thereon for consideration and adoption by the House.

Mr. Temporary Speaker, Sir, the fourth one was a Statement by Sen. M. Kajwang' on the strike by health workers in Homa Bay County in the midst of the COVID-19 pandemic.

The Committee has partially considered the Statement having held an online meeting with the Governor of Homa Bay County, the relevant members of the county executive, the Health Committee of the County Assembly of Homa Bay and health workers' representatives. The Committee has further scheduled a visit to Homa Bay County in due course.

Mr. Temporary Speaker, Sir, the fifth Statement was by Sen. Millicent Omanga on the state of the Pumwani Maternity Hospital. This Committee partially considered this Statement having visited Pumwani Maternity Hospital on 21st September, 2020, held meetings with Nairobi Metropolitan Services (NMS) on Monday, 28th September, 2020. The Committee is further due to hold a meeting with Nairobi City County in relation to the Statement.

Further to the above, the Committee has sought a Statement from the Ministry of Health on the role of non-state actors in the delivery of community health services. In addition, the Committee is due to commence its consideration on pending requests of Statements from Senators as follows.

- (1) Statement by Sen. Petronila Were regarding the State of Affairs at Busia County Referral Hospital.
- (2) Statement by Sen. (Dr.) Michael Mbiti on the payment of allowances of office Administrative personnel working in the health sector in county governments.

Mr. Temporary Speaker, Sir, on Petitions, the Committee has prioritized the following Petitions for consideration during the Fourth Session.

- (1) A Petition on the alleged double taxation of pharmacies in Kenya by Mr. Collins Omollo.

(2) A Petition by Sen. (Dr.) Isaac Mwaura on the plight of patients with end stage kidney failure.

On inquiries, the Committee has commenced three inquiries during the period under review. The first one was an inquiry on the alleged negligence in the handling of the late Prof. Ken Walibora prior to his death at the Kenyatta National Hospital. The Committee has concluded this inquiry into the negligence and handling of the late Prof. Ken Walibora and forwarded the report for tabling thereon.

Mr. Temporary Speaker, Sir, the second one is committee inquiry on the allegations of procurement irregularities in KEMSA. The Committee has held hearings with various witnesses and stakeholders in relation to the alleged irregularities in KEMSA. Investigations on the matter are going on.

The Committee inquiry on the performance of counties in health functions, with regard to the performance of counties in the health function, the Committee has held consultative meetings with key stakeholders including the Office of the Auditor General and the civil society groups led by the international budget partnerships.

Mr. Temporary Speaker, Sir, in relation to the same, vide letter dated 5th June, 2020, a request was sent to the Auditor General for a performance audit on the health functions in 10 specified counties within three months as follows: -

Trans Nzoia, Wajir, Nyamira, Narok, Baringo, Busia, Kisumu, Taita Taveta, Makueni and Murang'a Counties.

The key areas of interest to the Committee with this regard to the performance of audit included-

- (a) Procurement of health products and technologies;
- (b) Development projects in the health sector in the selected counties; and
- (c) Utilization of conditional grants from the national Government particularly conditional grants for Level Five hospitals, Health Sector Service Fund (HSSF), user fees foregone and the inquiry is ongoing.

Mr. Temporary Speaker, Sir, on county visits, the Committee has not undertaken any county visit during the period of review. During the upcoming recess, however, the Committee plans to undertake visits to Narok, Kisii, Homa Bay, Kisumu and Busia Counties. Once the dates of the visits have been found out, the Senators for the respective counties will be duly notified and invited to join the Committee on the visits.

To conclude, I wish to thank the Office of the Speaker and that of the Clerk of the Senate for the support accorded to the Committee in undertaking its work. I also wish to thank Members of the Committee both past and present for the commitment and diligence in executing the mandate of the Committee. I thank you.

Mr. Temporary Speaker, Sir, with those remarks, I wish to table the report.

(Sen. (Dr.) Mbitio laid the document on the Table)

The Temporary Speaker (Sen. (Dr.) Mwaura): Asante sana. Nafikiri unaweza kuweka waraka rasmi. Sasa hivi tutaenda kwenye hoja ifuatayo. Nafikiri tuna Mswada. Ukiangalia ratiba ya shughuli, tuna Hoja ya Nane.

MOTION**ADOPTION OF THE NINTH PROGRESS REPORT OF THE AD-HOC
COMMITTEE ON THE COVID-19 SITUATION IN KENYA**

Sen. (Arch.) Kasanga: Thank you, Mr. Temporary Speaker, Sir. I beg to move the Motion -

THAT, the Senate adopts the Ninth Progress Report of the Ad-hoc Committee on the COVID-19 Situation in Kenya laid on the Table of the Senate on Tuesday, 29th September, 2020.

Mr. Temporary Speaker, Sir, 29th September, 2020 is a long time ago. Time has passed. I will try and summarize as much as possible because a lot of these issues have been overtaken. As you know, the mandate of the Committee is coming to an end and we are actually now working on our final report. This is for good order that at least we get it in the Hansard Report, that at least we have done up to this part.

The Ninth Progress Report came about the sixth month point since when the Committee was set up back on 31st March, 2020. The Ninth Progress Report of the Ad-Hoc Committee on the COVID-19 Situation in Kenya details the engagements that the Committee undertook just after tabling the Eighth Progress Report.

Mr. Temporary Speaker, Sir, the first states that it continued to hold engagements with national and county governments on the COVID-19 response and mitigation measures that had been put in place by the two levels of government.

Mr. Temporary Speaker, Sir, we had a meeting with the CAS in the Ministry of Health, Dr. Mercy Mwangangi, on Wednesday, 9th September 2020, during which we received detailed reports on the status of the COVID-19 response at the national level and how funds allocated by the National Government towards the COVID-19 response and mitigation had been utilized and the status of implementation of the Senate's resolutions of the Third Progress Report. We were doing our second round of engagement and so we were receiving the progress report from the CAS.

The Ministry of Health also tabled before the committee documents on the funds that had been committed by the National Government and received from the development partners in support of the fight against the COVID-19. A detailed breakdown of those funds was tabled and the Ministry reported that by 9th September 2020, it had received a total of Kshs23.4 billion comprising Kshs17.7 billion from Government revenue and Kshs6.7 billion from external funding. The report further indicated that a total of Kshs9.2 billion had been disbursed to the counties in this manner; Kshs5 billion as conditional grant for the COVID-19 emergency response, Kshs2.36 billion as emergency allowances for frontline workers for three months, Kshs350 million from DANIDA was given as grants to Level 2 and Level 3 public hospitals and Kshs1.5 billion was given as emergency response support for the Level 4 hospitals. The report from the Ministry of Health also detailed in chapter two of this report and all the annexures are there for Senators to peruse and see.

The Ministry of Health having engaged with the county governments and other stake holders on health related aspects of the pandemic fell under thematic area one of how we had organized ourselves as a Committee. It is my duty to inform the House that the mandate has been officially handed back to the Standing Committee on Health. We

shall formally transmit all the documents and reports in the areas that are outstanding for the Committee on Health to follow up in our final exit report. We shall look forward to getting reports from the Committee on Health on matters to do with COVID-19.

In July 2020, the Committee directed the Controller of Budget to submit to the Committee a Special Budget Review Implementation Report on utilization of funds by County Governments towards COVID-19 interventions, covering the period from 13th March, 2020, when the first COVID-19 case in Kenya was recorded, to 31st July, 2020. The Controller of Budget undertook the review and submitted the Report to the Committee on 21st August, 2020. The Report provides an analysis of the counties' cumulative funds and expenditure on COVID-19, clustered as funding from the National Government, Grants from Development Partners and County own contributions.

The total funds that were available from 13th March to 31st July 2020 to the County Governments for COVID-19 interventions amounted to Kshs13.1 billion. This amount consisted of Kshs.5 billion from the National Government through the Ministry of Health (MOH) for COVID-19 towards quarantine and isolation expenditure; Kshs2.36 billion from the National Government through (MOH) for allowances for Front Line Health Care Workers; Kshs350 million from DANIDA as a grant support Level 2 and Level 3 Health Facilities to fight the pandemic; and Kshs5.39 billion from county own funds. The report did not include the funds received directly by County Governments as donations.

The total expenditure by County Governments during the period was Kshs.3.43 billion and translated to an absorption rate of 33.2 per cent. The absorption rate is calculated as a percentage of actual expenditure to budgeted amount for COVID-19 during the period.

Counties which reported the highest expenditure were Nakuru at Kshs311.97 million, Wajir at Kshs255.33 million and Kiambu at Kshs245.94 million. Seven Counties, namely, Bomet, Embu Kirinyaga, Lamu, Mandera, Marsabit and Nairobi City, did not report any expenditure towards COVID-19 interventions.

The National Government grants of Kshs5 billion for COVID-19 responses was transferred to the various County Revenue Fund Accounts on 4th June 2020 through the Ministry of Health. Counties further received Kshs.2.36 billion on 6th July 2020 from the National Government (Ministry of Health) being allowances for Frontline Health Care Workers dealing with COVID-19 pandemic and Kshs350 million from DANIDA on 30th June 2020 for COVID-19 interventions. The timing of the funds release was too close to the end of the Financial Year 2019/20 and some County Governments did not prepare budgets for the utilization of the COVID-19 Grant from the National Government. Consequently, several County Governments could not withdraw these funds which had remained unutilized as of 31st July 2020.

When the first COVID-19 case in Kenya was reported, there were no clear guidelines from the National Government on the role of Counties in the management and response to COVID-19 cases. Although several County Governments allocated funds within their budgets to fight the Pandemic, they were unable to utilize the funds due to lack of support and guidelines from the Ministry of Health (MoH). The guidelines and expectations from the County Governments were only issued towards the end of May 2020.

County Governments have put in place arrangements for conducting internal audits in line with Section 155 of the Public Finance Management Act, 2012. As of 31st July 2020, County Governments reported actual expenditures of Kshs3.43 billion towards COVID-19 intervention programmes compared the available resource basket of Kshs.13.1 billion.

The Special Budget Review Implementation Report further contains detailed reports on utilization of funds by each County Government towards COVID-19 interventions. A summary of the Controller of Budget Report is found at Chapter 3 of this Report with the Controller of Budget Report itself attached to this Report as Annex 4. I urge all Senators to go through the Report, particularly the sections relating to their respective Counties, and share with the Committee any issues that they would like us to follow up on as a Committee.

The Committee had further directed the Auditor-General to undertake a special audit on the utilization of funds allocated to and appropriated 47 county governments in responding to the COVID-19 pandemic, covering the period from 13th March, 2020 to 31st July, 2020. While the Committee had asked the Auditor General to submit the special audit report by 4th September, 2020, the Auditor General requested for more time to complete the exercise, and we expect to receive the report in the coming weeks. Unfortunately, we have come to the end of our mandate without having received the report of the Auditor-General on the counties. In this case, we shall specify the Committee that will receive analyze and advise on the way forward.

The Ad Hoc Committee on the COVID-19 Situation also undertook site visits to Isiolo and Meru Counties, in the month of June, and to Mombasa, Kilifi and Kwale Counties, in the month of September. During these visits, the Committee met with the respective County COVID-19 Emergency Response Committees, co-Chaired by the County Governors and County Commissioners; Members of the Health Services Committees of the respective County Assemblies; front-line healthcare workers; civil society organizations, the private sector, and other partners who have joined together with the respective county governments in responding to the pandemic.

Through these engagements, the Committee was able to identify key successes that counties have recorded in responding to the pandemic, as well as challenges that have hampered the effective containment of and response to the pandemic. The Committee further observed and received firsthand accounts of the impact of the pandemic on citizens, on healthcare workers, and on county governments; and to gain insights which the Committee would not have been able to do had it not undertaken the visits.

Some of the key observations the Committee made from the visits were on the need to support local innovations in the response to the pandemic; the importance of telemedicine in minimizing contact between healthcare workers and COVID-19 patients, while ensuring they are monitored and attended to; the impact of the change in Ministry of Health guidelines regarding home based care, which has greatly freed up space and facilities in hospitals; and the significant role that the private sector has played in partnering with county governments to respond to the pandemic.

More significantly, the Committee noted that labour-related issues in various counties have greatly hampered the effective response to the pandemic. This has been a cross-cutting theme in all the counties that the Committee visited. The Committee heard

that, in addition to the challenges of access to quality personal protective equipment (PPEs), our frontline healthcare workers have had to contend with delayed payment of salaries, in some cases spanning several months; non-remittance of statutory deductions and other financial obligations; lack of medical insurance either from NHIF or private providers, which has meant that when doctors fall ill they cannot access the same services that they are providing to others; as well as issues relating to training, deployment, and promotions. We shall forward the issues highlighted to the Committee on Labour and Social Welfare to follow up.

We were not happy to learn that many county governments are not giving other incentives other than what had been sent by the National Government. Very few counties have put in place mechanisms to help the frontline workers and motivate them. A lot of support is still needed from the National Government to the county governments when it comes to qualified health care workers for ICU and other related trades that are more specified. All these things are in the report for Senators to see and a few more will come in the next report.

The Committee further continued to engage with the Council of Governors, and received detailed reports from the county governments on the status of COVID-19 interventions at the county level, including reports on how funds which have been allocated at the county level or received from the national government and development partners have been utilized.

We engaged with the CoG. We have received detailed reports from county governments on the status of COVID-19 in the counties, including reports on how funds have been allocated---

The Temporary Speaker (Sen. Mwaura): Samahani Bi. Mwenyekiti, unafikiri utachukua muda upi kumalizia?

Sen. Kasanga: I will finish in next two minutes. It is difficult to change from Kiswahili to English. The brain takes a bit of time. However, in the next two minutes, I will have finished.

We have these reports from the county governments. We will hand them over to the relevant Standing Committee to analyze them and also report to this House accordingly.

The lack of public participation is a key issue that we have come across as we have been doing our work. Again, this is something that we will have to forward to the relevant Standing Committee because we have seen a lot of intervention measures done with the national Government without involving Parliament; starting from regulations and certain kind of intervention measures that have happened throughout this period of COVID-19.

We shall be asking the Committee on Justice, Legal Affairs and Human Rights as well as the Standing Committee on Delegated Legislation to pick up on some of these issues that are really glaring and outstanding for lack of public participation and stakeholder engagement, especially with Parliament. Parliament was left out in the entire National Response Team. We have had to keep chasing after the response team just to get answers and to coordinate with what people are talking and feeling on the ground.

Mr. Temporary Speaker, Sir, as I conclude, we are happy that today's Communication from the Speaker talks about at least a way forward. The Pandemic Response and Management Bill will hopefully see the light of day once the Speaker gives

us further communication after today. We are really looking forward to that because a lot of work had gone into it.

Without forgetting, we want to thank the Office of the Speaker and the Clerk for all the support we have received. All other issues that we have, we shall put them in our exit report, especially our challenges as an *ad hoc* Committee. We had a lot of challenges. To just encourage the Speaker and Members, the COVID-19 pandemic is still on the rise and that we need to be even more vigilant now more than before.

Mr. Temporary Speaker, Sir, I beg to move and I call Sen. (Dr.) Mbito to second.

Sen. (Dr.) Mbito: Thank you, Mr. Temporary Speaker, Sir. I want to thank my Chairperson for that thorough Report. Due to constraint of time, I will just want to speak on two issues.

First, in our inquiry as a Committee, it was very unfortunate that we found very different type of preparedness by counties. We found some counties had good preparedness while some counties were below par. This was a very serious which has actually contributed to all these issues we are seeing of the second surge.

The second very urgent matter that needs to be addressed is the issue of COVID-19 regulations by the Ministry of Health (MOH). We have really ignored the regulations given to us by MOH. As leaders, we should ensure that some of these things are enforced, especially to do with social distancing and wearing of masks. Those are mandatory. With this second surge, we might end up losing many people if we do not take this matter seriously. I call upon leaders to be on the forefront to ensure that we follow the regulations that are in place.

With those few remarks, I beg to second the Motion.

(Question proposed)

The Temporary Speaker (Sen. (Dr.) Mwaura) Sijui kama kuna yeyote ambaye angependa kuchangia? Rafiki yangu Sen. (Dr.) Gertrude Musuruve, una dakika mbili au tatu.

Sen. (Dr.) Musuruve: Thank you, Mr. Temporary Speaker, Sir, for giving me this opportunity to comment on the Report from the *ad hoc* Committee on COVID-19 Situation in Kenya. COVID-19 pandemic is real. We must ensure---

The Temporary Speaker (Sen. (Dr.) Mwaura): Samahani. Sen. (Dr.) Milgo, tafadhali usiondoke. Unaona vile ambavyo Chumba kipo. Ngonja kidogo tunamalizia.

Sen. (Dr.) Musuruve: Thank you, Mr. Temporary Speaker, Sir, some of the minutes have been taken. COVID-19 pandemic is real. We must know the reality on the ground. Very few learners who are going back to school have masks. I visited some schools in my county. I realized that there are some students who do not have masks. They are using handkerchiefs. There is need for both national Government and county governments to protect our children in schools.

A lot of money is going to counties, but governors are not prioritizing COVID-19 issues. For instance, Kakamega County Government is mourning one of its senior officer, the late Mr. Sumba who died from COVID-19 pandemic. He was the County Executive Committee (CEC). I condole with his family and may his soul rest in peace. Apart from Mr. Sumba, we also have a woman who was vying for the governor's position and a doctor who have succumbed to this scourge.

I keep on asking myself why county governments cannot afford masks to our children in schools? Nowadays masks are very cheap. Many schools cannot afford these masks. We are staring at danger of exposing our children and teachers to COVID-19 pandemic. We must walk our talk as far as protecting children in schools is concerned because the situation is dire.

I do not agree the *ad hoc* Committee on COVID-19 status has done its job. There is a lot to be done to mitigate on the rising cases of COVID-19 in this country. The Ministry of Education says it is ready to reopen schools for other learners. I urge them to be cautious because COVID-19 cases are on the rise, especially in the rural areas. There is need to protect our children because they are the future leaders of this country. It will be very unfortunate if we will not pass the button of leadership to them because they would have succumbed to COVID-19 pandemic.

My plea to all leaders and county governments is to provide masks, sanitizers and water to our children in schools. These are essentials that are lacking in our schools and colleges.

Mr. Temporary Speaker, Sir, in the five schools that I visited in Kakamega County, there is no water. Water is a devolved function. Therefore, it is the responsibility of the county governments to provide water to our people. I am calling upon all governments to ensure that there is water in schools. That is how we can walk the COVID-19 talk. Ensure that in the county budgets, there is an emergency fund to provide masks to learners, especially in *mashinani*. Parents in *mashinani* are working hard to put food on the table. Therefore, when you ask them to buy masks, sanitizers, soaps *et cetera*, it is not possible for them to do so.

Mr. Temporary Speaker, Sir, we must bring governors to account to ensure that they are doing what is required of them. Water is a devolved function. I appeal to the concerned Committee of this House to ensure governors provide water in their counties. We also need to have a database on schools that do not have water. We have a duty as a Senate. County governments are under our docket. We have to ensure that we are doing something as a Senate.

The Temporary Speaker (Sen. Mwaura): Asante sana, Sen. Dr. Musuruve. Una dakika kumi na tano wakati tutakapo rejelea kikao hiki kujadili Ripoti hii.

ADJOURNMENT

The Temporary Speaker (Sen. Mwaura): Waheshimiwa Masenata, sasa hivi in saa kumi na mbili unusu, wakati wa kusitisha shughuli za Bunge hili la Seneti. Kikao hiki sasa hivi kimeahiriswa mpaka kesho, Jumatano, tarehe nne Novemba, 2020, saa nane unusu.

The Senate rose at 6:30 p.m.