

# PARLIAMENT OF KENYA

## THE SENATE

## THE HANSARD

Tuesday, 13<sup>th</sup> September, 2016

### Special Sitting

*(Convened via Kenya Gazette Notice  
No. 7316 of 9<sup>th</sup> September, 2016)*

*The House met at the Senate Chamber,  
Parliament Buildings, at 11.05 a.m.*

*[The Speaker (Hon. Ethuro) in the Chair]*

### PRAYERS

### COMMUNICATION FROM THE CHAIR

#### IMPEACHMENT HEARING: MANDATE OF THE SENATE, RULES OF PROCEDURE, PROGRAMME AND ALLOCATION OF TIME

**The Speaker** (Hon. Ethuro): Hon. Senators, let me take this opportunity to welcome you back for this Special Sitting of the Senate which is the sixth during the current recess. In addition, we shall, tomorrow, Wednesday, 14<sup>th</sup> September, 2016, and maybe Thursday, 15<sup>th</sup> September, 2016, hold the seventh and eighth Special Sittings respectively during this recess. Your finding time to come each time you are required to do so during this recess is clear demonstration of your dedication to the service of the people of Kenya and readiness to execute your constitutional mandate.

Hon. Senators, pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012, on 2<sup>nd</sup> September, 2016, the County Assembly of Nyeri approved a Motion for the Removal from Office of the Governor of Nyeri County. By letter dated 2<sup>nd</sup> September, 2016, and received in my Office on 5<sup>th</sup> September, 2016, the Speaker of the County Assembly of Nyeri informed the Speaker of the Senate of the approval of the Motion by the County Assembly of Nyeri and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly.

Pursuant to Section 33(3)(a) of the County Governments Act, 2012, and Standing Order No.68(1)(a) of the Senate Standing Orders, on Wednesday, 7<sup>th</sup> September, 2016, the Speaker of the Senate convened a meeting of the Senate to hear charges against the Governor of Nyeri County. Further, on the same date, the Senate resolved to investigate the matter of the proposed removal from office, by impeachment, of the Governor of Nyeri County by the Senate in plenary.

Hon. Senators, the mandate of the Senate in so far as it relates to the removal of a governor from office is provided for under Article 181 of the Constitution as read together with Section 33 of the County Governments Act, 2012, and Standing Order No.68 of the Senate Standing Orders. In particular, Article 181 of the Constitution provides as follows:-

“(1) A county governor may be removed from office on any of the following grounds—

- (a) gross violation of this Constitution or any other law;
- (b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;
- (c) abuse of office or gross misconduct; or
- (d) physical or mental incapacity to perform the functions of office of county governor.

(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds mentioned in clause (1).”

Hon. Senators, as you may recall, in a ruling that I made on Thursday, 8<sup>th</sup> September, 2016, I stated that neither Article 181 of the Constitution nor Section 33 of the County Governments Act nor, indeed, our own Standing Orders shed any light on the procedure to be followed where the hearing and determination of the proposed removal from office of a governor by impeachment is to be undertaken by the Senate in plenary.

Accordingly, pursuant to Standing Order No.1 of the Senate Standing Orders, I directed that the procedure which the Senate has previously utilized in forming special committees established pursuant to Section 33(3) of the County Governments Act, 2012, and Standing Order No.61(1) of the Senate Standing Orders, would apply with the necessary modifications to the hearing by the Senate in plenary.

Hon. Senators, in this regard, the rules of procedure for the hearing and determination of the proposed removal from office, by impeachment, of a governor, has been circulated to all Senators, and to both the County Assembly and the Governor. The rules of procedure shall apply to these proceedings.

Hon. Senators will further note that the hearing programme has been circulated, which details the various activities in the hearing and determination of the matter, and the time allocated to each activity. It will be crucial that all the parties comply with the time allocated.

In summary, the programme is as follows:-

Today, Tuesday 13<sup>th</sup> September, 2016, after we have dispensed with preliminary matters, the charges against the Governor as submitted by the County Assembly shall be read to the Governor. This will be followed by the opening statements to be made on behalf of both parties and thereafter the presentation of the case of the County Assembly.

On Wednesday 14<sup>th</sup> September, 2016, the Governor will have an opportunity to present his case before the Senate. This will be followed by the closing statements by both parties. The Senate, therefore, urges all parties to observe the time allocated to them in the hearing programme so as to ensure that the matter is disposed of expeditiously.

The Senate shall then proceed to a closed session for deliberations prior to voting on each of the charges. In accordance with Section 33(7) of the County Governments Act, 2012 and Standing Order No.68(5) of the Senate Standing Orders, the voting shall be by county delegations and the voting shall be in the open. The Governor shall cease to

hold office if a majority of all county delegations of the Senate vote to uphold any impeachment charge. If the charges are not substantiated, the Governor shall remain in office.

Hon. Senators, it is important to observe that pursuant to Rule 11 of the Rules of Procedure, the hearing of evidence once it commences shall proceed and continue on until the Senate concludes the hearing of the matter. As the Senate embarks on the hearing and determination of the matter, the Senate must, therefore, undertake this task in the most expeditious manner, and in addition, observe procedural propriety. The Senate, acting as a *quasi-judicial* organ, must also observe the principles of natural justice.

I wish to emphasize as I conclude that the Senate is cognizant of the gravity of this matter with which it is seized and that it shall accord all the parties to the proceedings a fair hearing.

I thank you.

**HEARING AND DETERMINATION OF THE PROPOSED  
REMOVAL FROM OFFICE, BY IMPEACHMENT, OF  
HON. JAMES NDERITU GACHAGUA,  
THE GOVERNOR OF NYERI COUNTY**

**The Speaker** (Hon. Ethuro): Hon. Members, before the Clerk reads the details of the charges, let us dispose of the preliminaries. That is by way of introduction. I invite the members representing the County Assembly and their counsel if any, to introduce the team.

INTRODUCTION BY THE NYERI COUNTY ASSEMBLY TEAM

**Mr. Charles Njenga:** Good morning hon. Members. For the County Assembly of Nyeri, my name is Charles Njenga, Counsel acting for the County Assembly of Nyeri. I will be assisted in my task by Mr. George Ng'ang'a, Counsel. Then we have hon. Baragu, Member of the County Assembly of Nyeri, then we have Wambui, Legal Counsel, County Assembly of Nyeri and finally we have Mathew who will also be with us from the County Assembly of Nyeri.

Mr. Speaker, Sir, those are the persons representing the County Assembly of Nyeri. Thank you.

**The Speaker** (Hon. Ethuro): Can we get the introductions from---

*(Loud consultations)*

Order, hon. Members! Your interventions are also not proper.

Sen. Orengo, can you do it properly by submitting a request and then you wait for the recognition.

I wish to recognise Sen. Orengo.

**Sen. Orengo:** Mr. Speaker, Sir, I thank you. As I was listening to the introductions, they were not proper because they were names in regard to particular persons or individuals, it was one name and there was no prefix; Mr., Mrs., Hon. --- We

did not get all that proper introduction for purpose of record – and also designation - I am being reminded by my colleague, the Senator for Kakamega County.

Could we, therefore, for purposes of record and since we are sitting for the first time, in a full hearing in plenary, have proper introductions?

**The Speaker** (Hon. Ethuro): I could not agree more. You are appearing before the Senators. It is important that we get to know the name and designation. The name must be in full.

So, you may wish to proceed along those lines.

**Mr. Charles Njenga:** Thank you for that guidance. The team from the Nyeri County Assembly is as follows:-

#### NYERI COUNTY ASSEMBLY

|                     |   |   |
|---------------------|---|---|
| Mr. Charles Njenga  | - | Advocate                                |
| Mr. George Ng'ang'a | - | Advocate                                |
| Hon. Baragu Mutah   | - | Member of County Assembly, Kiganjo Ward |
| Ms. Wamboi Ngunjiri | - | Principal Legal Counsel                 |
| Mr. Mathew Kibui    | - | Clerk, Budget Committee                 |

#### INTRODUCTION BY THE NYERI COUNTY EXECUTIVE TEAM

**Gov. James Nderitu Gachagua:** Mr. Speaker, Sir, the Team from the Nyeri County Executive is as follows:-

#### NYERI COUNTY EXECUTIVE

|                       |   |                 |
|-----------------------|---|-----------------|
| Gov. Nderitu Gachagua | - | Governor        |
| Mr. Peter Wanyama     | - | Advocate        |
| Ms. Eunice Mwanza     | - | Legal Assistant |

**The Speaker** (Hon. Ethuro): Order Governor. You need to repeat the introductions and be a bit louder. Those introductions are not complete. There is a missing one.

*(The Governor repeated the introductions)*

**Gov. James Nderitu Gachagua:** Mr. Speaker, Sir, my advocate had advised me so because she is not part of the legal team. It may not be necessary but I would like to introduce her. She is:-

Ms. Alice Wachira – Ag. County Secretary

**The Speaker** (Hon. Ethuro): What is it Sen. (Dr.) Khalwale?

**Sen. (Dr.) Khalwale:** On a point of order, Mr. Speaker, Sir. Just for the record and clarification, could the governor confirm whether he is appearing and leading his team in person or he is going to be led in the presentation by his counsel?

**The Speaker** (Hon. Ethuro): Order Governor! I have not invited you. You can dispose that issue at the time you are making your opening statements. Clerk, can you read the charges.

READING OF THE CHARGES

**The Clerk of the Senate** (Mr. Nyegenye): Hon. Nderitu Gachagua, please take the stand for the reading of the charges.

*(Gov. Nderitu Gachagua took the stand)*

The following are the three charges brought against you by the County Assembly of Nyeri in respect of which the County Assembly proposes that you be removed from office by impeachment pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012.

**A. GROSS VIOLATION OF THE CONSTITUTION OF KENYA, 2010, THE COUNTY GOVERNMENTS ACT, 2012, THE PUBLIC FINANCE MANAGEMENT ACT, 2012 AND THE PUBLIC PROCUREMENT AND DISPOSAL ACT, 2005.**

**1. That you, being the Chief Executive of the County, failed to account or make proper disclosure of Kshs352,976,913, contrary to Article 201(A) of the Constitution of Kenya 2010 and Section 104(1)(i) of The Public Finance Management Act, 2012.**

According to the Annual Budget Implementation Status Report for the financial year 2015/2016, a sum of Kshs1,161,269,008 was utilized under the development expenditure. However, the projects of expenditure in the same report amount to Kshs808,292,895 leaving a sum of Kshs352,976,913 unaccounted for.

Secondly, according to the monthly Exchequer release reports from the office of the controller of budget dated 11<sup>th</sup> July, 2016, the total Exchequer issues as at 30<sup>th</sup> June, 2016 amounted to Kshs5,687,473,118 against what the County Treasury reported in the Annual Budget Implementation Status Report for the financial year 2015/2016, that is, Kshs4,840,770,218 resulting to the undisclosed amount of Kshs846,702,900.

**2. Utilizing local revenue at source contrary to Article 207 of the Constitution of Kenya, 2010 and Section 109 of the Public Finance Management Act, 2012.**

In the County Governments Budget Implementation Review Report for the first quarter of the financial year 2015/2016 from the Office of the Controller of Budget, it is reported that Nyeri County utilized the locally collected revenue at source in contravention of the law. The Controller of Budget during the first quarter of the financial year 2015/2016, authorized for withdrawal of a sum of Kshs545 million in to the operations account.

However, the county spent Kshs615,143,048 which is Kshs70 million in excess of what the Controller of Budget had authorized.

**3. Irregular procurement contrary to the Public Procurement and Disposal Act, 2005**

- i) Under your stewardship, the County Executive in violation of the Public Procurement and Disposal Act, 2005, issued county government tenders without due regard to the procurement process and therefore the tender award was not fair, equitable, transparent, competitive and cost effective contrary to Article 227 of the Constitution of Kenya, 2010. You later formed a taskforce to regularize the irregular procurement of various tenders in regard to the construction of roads within the county.
- ii) The process of procuring Karson House Building contravenes the Public Procurement and Disposal Act, 2005 in that a taskforce was formed which identified the building without using the recommended procurement procedure.

**4. Lack of prudence in refurbishment of buildings amounting to Kshs81,384,118.40 in contravention of Article 201 (d) of the Constitution of Kenya, 2010 and Section 104 (1) (i) of the Public Finance Management Act, 2012.**

Contrary to Article 201 (d) of the Constitution of Kenya, 2010 that requires public money to be used in a prudent and responsible way, the county executive, under your watch spent a sum of Kshs29,173,582.40 renovating Karson's house, a building partly rented by the county government and a sum of Kshs41,340,946 to renovate the governor's office. The total amount spent on renovation and the rent for Karson's House of Kshs10,866,240 would have been sufficient to construct a modern office block for the county government.

**5. Splitting of Tenders, Contrary to Section 30 of the Public Procurement and Disposal Act, 2005.**

Contrary to Section 30 of the Act which states that no procuring entity may structure procurement as two or more procurements for the purpose of avoiding the use of procurement procedure, the County Executive, under your stewardship, split the tender for the refurbishment of Karson's Photo House into four:-

- i. Proposed refurbishment of 1<sup>st</sup> and 2<sup>nd</sup> floors of Karson Photo House contract of Kshs14,098,860.40
- ii. Electrical installation works contract of Kshs6,583,552.
- iii. Plumbing, drainage and fire protection services contract of Kshs2,333,800.
- iv. Telecommunications installation works contract of Kshs6,157,370.

The tender for refurbishment of the Governor's office was split into five:-

- i. Refurbishment and alterations contract of Kshs19,993,220.
- ii. Supply, installation, testing and commissioning of electrical installation works contract of Kshs8,123,880.
- iii. Plumbing, drainage and fire protection services contract of Kshs4,514,837.
- iv. Air conditioning installation Kshs2,143,466.
- v. Telecommunication installation works contract of Kshs 6,496,530.

**6. Lack of prudence in use of public funds, contrary to Section 201(d) of the Constitution of Kenya and Section 104(1)(i) of the Public Finance Management Act, 2012.**

Under your stewardship, a construction of a non-motorised facility, Kamakwa to Nyeri Town along Baden Powell Road, Nyeri Town to Meeting Point Section along Kenyatta Road was undertaken.

The County Government awarded the contract at a cost of Kshs48,744,467.55 against the engineer's estimate of Kshs38,638,342 resulting to a variance of Kshs10,106,125,55. The cost was grossly exaggerated.

**Sen. (Dr.) Kwalwale:** On a point of order, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): What is it, Sen. (Dr.) Khalwale?

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, I rise under Standing Order No.1 to invite you, without advancing the reasons, to ask whether the Governor of Nyeri would like to hear the reading of the charges against him while he is seated.

**The Speaker** (Hon. Ethuro): Order! Sen. (Dr.) Khalwale, let me inquire from the Governor. Are you comfortable in that position or you wish we proceed along the lines suggested by Sen. (Dr.) Khalwale?

**Gov. James Nderitu Gachagua:** Mr. Speaker, Sir, I am very comfortable. Thank you, Sen. (Dr.) Khalwale. I am okay and I see no reason to sit down.

**The Speaker** (Hon. Ethuro): Let us proceed. Sen. (Dr.) Khalwale, you are overruled.

Proceed, Mr. Clerk.

**The Clerk of the Senate** (Mr. Nyegenye): Thank you, Mr. Speaker, Sir.

**7. Failure to establish the County Budget and Economic Forum as stipulated under Section 137 of the Public Finance Management Act, 2012.**

The Governor has failed to establish the County Budget and Economic Forum. As a result, there has been poor consultation with the public on matters related to county plans, county fiscal strategy paper, budget review and outlook paper, matters relating to budgeting, the economic and financial management at financial management at financial level.

**8. Undermining the legislative authority of the County Assembly, contrary to Article 185 of the Constitution of Kenya 2010 and delaying the budget making process.**

The stalemate in regard to the Nyeri County Budget for the Financial Year 2016/2017 is as a result of the County Executive failing to carry out the Budget process in a timely manner and in accordance with the law as provided for under Section 129(5) of the PFM Act. The Assembly having passed the Budget Estimates for the Financial Year 2016-2017, the County Executive Committee Member for Finance was to forward an Appropriation Bill to the Assembly as soon as the budget estimates were approved in accordance with Section 129(7) of the PFM Act.

That you have completely disregarded the Assembly in the Budget Making Process hence the delay in the passing of the Appropriation Bill.

**9. Failure to consider and/or assent to County Bills passed by the County Assembly, contrary to Section 30(2)(g) of the County Governments Act 2012.**

That you have completely failed, neglected and/or ignored your mandate of considering and/or assenting to Bills passed by the County Assembly.

A total of seven Bills, were neither considered nor assented to by you despite having been passed and forwarded to you in accordance to Section 24 of the County Governments Act. The Bills are as follows:-

- i. The Nyeri County Co-operative Societies Bill, 2015
- ii. The Nyeri County Tea Cess Bill, 2016
- iii. The Nyeri County Agricultural Development Fund Bill, 2016
- iv. The Nyeri County Elimu Fund Bill, 2015
- v. The Nyeri County Ward Development Fund Bill, 2015
- vi. The Nyeri County Water and Sewerage Services Bill, 2015
- vii. The Nyeri County Enterprise Development Fund Bill, 2015

**B. FAILURE TO COMPLY WITH THE LAW**

That you have violated Article 41(1) of the Constitution of Kenya 2010 that ensures every person the right to fair labour practices and Section 19 of the Employment Act by failing to remit and/or delaying the remittance of statutory deductions of County Officers, for example, NHIF, NSSF, voluntary pension contributions and political parties remittances.

Further, that under your stewardship, the County Executive contravened Section 109(4)(b) of the PFM Act by deliberately delaying the release of salaries for the month of July, 2016 for the Members of the County Assembly and staff of the County Assembly.

That you have failed to define the responsibilities of every member of the County Executive Committee by notice in the gazette, contrary to Section 30(2)(i) of the County Governments Act.

That you have established extra sub-counties in Nyeri County in contravention of Section 48(1) (b) of the County Governments Act and without the approval of the Assembly.

That you, in the composition of the County Executive Committee, violated the Constitution and the law by failing to consider the gender parity representation of minorities, the marginalised and the community and cultural diversity.

**C. ABUSE OF OFFICE/GROSS MISCONDUCT**

That you have you have made several irregular appointments in the county as follows:-

- (1) That you have appointed a county secretary in acting position for an indefinite period of time, contrary to Section 44 and 64 of the County Governments Act. The County assembly, through a motion, resolved that having found the Acting County Secretary,



Alice Njamiu Wachira, unqualified and unsuitable to hold the said position, that she vacates the office forthwith and competitive sourcing be commenced by the lawful appointing authority immediately. Further, that pending competitive sourcing of the County Executive Secretary, a qualified and competent person be appointed to act in the Office of County Secretary for a period not exceeding three months.

That you blatantly ignored the assembly's resolution and hence, the Acting County Secretary is still in office despite the fact that she has not been vetted and approved by the county assembly.

- (2) Further, the County Public Service Board has been conducting its functions in the absence of a chairperson and secretary for a very long period of time. That you, in violation of Section 58 of the County Governments Act, have purportedly and unlawfully appointed an acting secretary from among the officers of the county government, who has not been vetted and approved by the county assembly.
- (3) That in addition, you have for a long duration of time, operated with perennial acting county executive committee members and acting chief officers, who have not been vetted by then county assembly, thereby jeopardizing service delivery and accountability in the County.

Hon. Governor, how do you plead; guilty or not guilty?

**The Speaker** (Hon. Ethuro): Order! Let us hear the Governor!

**Gov. James Nderitu Gachagua:** I plead, not guilty.

**The Speaker** (Hon. Ethuro): Governor, to all the charges or specific ones?

Procedurally, we will take one by one;

Charge No.1?

**Gov. James Nderitu Gachagua:** Not guilty.

**The Speaker** (Hon. Ethuro): Charge No. 2?

**Gov. James Nderitu Gachagua:** Not guilty.

**The Speaker** (Hon. Ethuro): Charge No. 3?

**Gov. James Nderitu Gachagua:** Not guilty.

**The Speaker** (Hon. Ethuro): We are done with you, Hon. Governor. You may assume your seat.

What is it, Sen. Wamatangi?

**Sen. Wamatangi:** On a point of order, Mr. Speaker, Sir. I rise to draw your attention to Charge No.2, before the Governor takes his plea of guilty or not guilty. I would like to enquire whether the county assembly would want to consider amending or correcting that charge.

*(Loud consultations)*

**The Speaker** (Hon. Ethuro): Order, Senators! Sen. Wamatangi must be heard.

**Sen. Wamatangi:** Mr. Speaker, Sir, the figures are wrong. The amount declared there, Kshs615,143---

**The Speaker** (Hon. Ethuro): Oder, Sen. Wamatangi! You may resume your seat. There is an opportunity for that; not now.

**Sen. Wamatangi:** Mr. Speaker, Sir, I wanted to draw the attention of the House that the amount pleaded as lost is wrong.

**The Speaker** (Hon. Ethuro): Oder, Senator! Hon. Senators, we have gone an extra length to provide documents to you and in particular, the Rules of Procedure and the programme for the hearing. I can tell you for free that a defective charge is a defence. Therefore, wait for them to do so.

Hon. Senators, the next bit is the opening Statements. I would like to invite the County Assembly of Nyeri to proceed with the opening statements. You have not more than 30 minutes.

**Sen. Muthama:** On a point of order, Mr. Speaker, Sir. You led the Plenary up to Charge No.6 and then there was an intervention by Sen. Wamatangi. You did not continue from Charge No.7 to No.10.

**The Speaker** (Hon. Ethuro): Order, Senators. I appreciate that this is the first time we are doing this and it could be a bit tricky. It means that we should do quite a bit of listening. There are three charges and not 10. Those other 10 just support the charges; they are the particulars of the charges. For avoidance of doubt, even before the intervention by Sen. Wamatangi, the governor had already pleaded not guilty to all the three charges. That is why the point of order by Sen. Wamatangi was premature. There will be an opportunity not only for that point of order to be made use of, but depending on what the governor himself in his defence will submit.

We are now on the opening statements and will start with the County Assembly of Nyeri.

OPENING STATEMENTS ON BEHALF OF THE  
NYERI COUNTY ASSEMBLY

**Mr. Charles Njenga:** Thank you, Mr. Speaker, Sir and hon. Members. On behalf of the County Assembly of Nyeri, I am Counsel Charles Njenga. I will make the opening statements.

Hon. Members, the question must be why we are here today. We have heard the charges that have been read out against the governor. What are we supposed to do with these charges? Article 181 is an interesting Article within the architecture of the Constitution in that it allows---

**The Speaker** (Hon. Ethuro): Order, Counsel. Just an in-house thing; make sure that somebody or yourself is watching some lights at the Table. When it is yellow, it means that you have five minutes to go. When it is red, you must stop.

**Mr. Charles Njenga:** Thank you, Mr. Speaker, Sir. I note that they are more like the traffic lights. I am very well guided.

*(Laughter)*

Back to my point, Article 181 provides an opportunity for intervention within the term of a governor for reasons stated and for evidence and grounds that could be demonstrated. It is often argued that, yes, Article 38 of the Constitution provides political rights; that a person who is elected must hold office for the term. However, it is the same Constitution that anticipates that there can be situations where the governorship of an individual over a county is no longer tenable. We are here today because the governorship of Hon. Nderitu Gachagua in the County of Nyeri is no longer tenable for the grounds stated and the evidence that is now before the Senate.

Article 181 has been interpreted by the Court of Appeal. I am referring to the response to the invitation to appear by the County Assembly, where I have set out an extract from the judgement of the Court of Appeal No.21 of 2014, that defines the nature and character of impeachment proceedings. The material part says:-

“The impeachment architecture in Article 181 of the Constitution reveals that the removal of a governor is not about criminality or culpability but about accountability, political governance, as well as policy and political responsibility.”

We are not here to try the criminal or civil liability of the Governor; far from it. What Hon. Senators must evaluate as you go through the documents is whether in the instances isolated and put forth as grounds, the Governor was accountable. “Accountable” is a principle well captured within our constitutional design. You must also be looking for political governance – the reading of Article 174 that provides for democratic rule even within the counties. You must be looking for policy and political responsibility.

Hon. Senators, these are the standards that are relevant to an impeachment trial. I deliberately set out that particular provision because in the face of these proceedings and as we continue, you have to evaluate the context of a governor within the county set up. Who is a governor, what does he do and why is he in that position? The relevance of that consideration is that it puts in context the various grounds, documents and decisions that are now subject of these grounds and proceedings. Without that contextual evaluation, most of these charges will be lost and will not find any understanding in the minds of this House.

In Article 179 of the Constitution, there is a deliberate resignation of the governor as the Chief Executive Officer (CEO) of a county. That is deliberate and intentional to ensure that the ultimate executive authority within the county vests in the governor. Within my reading of Section 30 of the County Governments Act – I do not need to read verbatim the very detailed provisions of that particular provision of statute – the governor is, in all ways, in charge of the executive functions within the county.

Hon. Senators, the charges that are before you are grave, gross and weighty. Why do I say that? Consider the first charge and complaint. This shall be demonstrated in the evidence that shall be laid before this honourable House. That, there was non-disclosure of funds expended by the County Executive but not disclosed. Expended, yes. However, when the County Executive sat to write a report which does not come to the County Assembly by an act or grace or favour on the part of the Governor and the County Executive, it is a legal obligation. The legal obligation enjoins the County Executive to make a full and frank disclosure of all expenditures in the period under review. So, in this period under review, there is failure to disclose an expenditure in the sum of Kshs352,976,000. The question is, why not disclose? A simple act of disclosure. Accountability is not really a term of art. It is simple English. What you have been given, render an account of how you spent it. In that account, you must disclose to the last cent.

You will see in the documents that are before this House, that there was an intentional non-disclosure of this very substantial amount. The reasons given – you will see in the response made by the Governor – are simply that; “I did not consider them to be capital expenditures or items.” So, whatever the nature and designation of an expense, the duty to disclose is inescapable in your accounting when you present a report to the assembly and to the public and say that this is the annual budget implementation status

report. The expectation of your office and the public is that that account should be true in all material respects.

That is not the only non-disclosure that you shall see. Exchequer releases – money from the National Treasury – are funds contributed by all of us within the country and apply to the various counties according to the formula that is given. In their implementation status report, they disclosed an amount almost Kshs1 billion less. It is about Kshs800,000,000 odd and we shall get the numbers as we prosecute the charges. The question is: Why is this insistence on hiding some numbers? What is the mischief? What is the justification? Why can you not put it all there in the report so that the County Assembly and the public decide and determine what to do with it? You cannot determine within yourself that this does not merit disclosure. There is no provision in law known to us that excludes any item from being disclosed.

I am not prosecuting these charges but I wish to consider a report of this House that was made and adopted on 13<sup>th</sup> May, 2014 in the matter of the proposed removal from Office of Martin Nyaga Wambora, the Governor of Embu County. The Senate considered certain matters and made certain decisions. I am reminded that this is a House of order, precedence and follows its own regulation and rules. Therefore, the standards set out in this report will also be of relevance to the present proceedings. This is what the Senate said in that matter with regard to accountability:-

“When persons in charge of managing county finances are not held to account, the objectives of devolution as set out under Article 174, which includes promoting democratic and accountable exercise of power and to enhance checks and balances, will be defeated.”

Mr. Speaker, Sir, when persons managing county finances are not held to account, the question is, who will hold them to account? Who is mandated to hold them to account? My suggestion is that it is the call of the honourable Senators. The duty to hold governors to account is constitutionally vested in this House. If you fail in that duty, devolution will fail on your account.

The standard must be at all times, that even wastage or pilferage of even Kshs10 or a shilling must invite a sanction. We must resist the temptation as we shall be urged to do to set a high standard so unachievable that an executive or a governor has to waste Kshs1 billion, Kshs10 billion or Kshs50 billion for him to be accountable to this House under Article 181.

Mr. Speaker, Sir, the standard must be so strict and the message must be strong that nobody will venture to try to interfere with the budget and the finances in the counties. I recall the recent happenings in the Senate of Brazil. The President was impeached. If you consider the reasons, they were - not word for word - in all material respects, similar to the reasons that are before you. The President of Brazil was impeached because of flouting budgetary law as provided under Article 85 of the Constitution of Brazil. That was the only charge under the Fiscal Responsibility law. That could be in our context the Public Finance Management Act.

In my submission, in the opening statement, I urge you Senators not to give any leeway, latitude or opening where persons with ill intent within the counties can use to pilfer public funds or to refuse to adhere to the law set out. There is a popular defence that shall be promoted and urged before this House. That is the defence of “it was not my act.” Or “it was not me” or “it is not my personal responsibility.” we shall hear that a lot

in the course of these proceedings. However, honourable Senators, consider this determination by this House in the matter that I set out where you rejected that defence in that Senate Report at Paragraph 150. I am sure that is a Report that is within your record because it is a document from the Senate. The Committee said:-

“The Special Committee further observed that the standard response from the Governor to all the allegations set out by the county assembly has been “it was not me.” this response by the Governor does little to promote public confidence in the Office of the Governor as required under Article 73 of the Constitution. The Governor seems to have abdicated from taking any responsibility from the goings on in his office and in his county despite being elected the Chief Executive Officer of the county. This is in violation of Section 73 (2) (d) of the Constitution that requires state officers to be guided by the principle of accountability to the public for their decisions and actions.”

Mr. Speaker, Sir, this is the standard that I commend to this House to apply in this matter. That, it shall never be a defence in the mouth of a Governor that “that was not my act.” If you allow and admit that defence, the risk that you run this country to is that the ingenious machinations shall be put in place where a governor will not have to sign anything or make any decision personally but can procure persons to disobey the law on his behalf. He can procure persons to perpetrate corruption on his behalf. He can also procure persons to commit all manner of illegalities and yet escape free from any interrogation; from any scrutiny by this House.

In the standard of accountability that has been set by the Court of Appeal, this honourable House has to evaluate deep within these grounds the place of the governor in that set up. When you do that, you will find that all these grounds have been overwhelmingly established by the county assembly and have their documents that are relevant to those charges. The state of affairs in Nyeri County calls for the intervention of this House. The people of Nyeri County are looking upon this House to avail justice in the form of political governance which has failed and irretrievably broken down. The only result that can remedy that situation is this House endorsing the removal of Governor Nderitu Gachagua as the Governor of Nyeri County.

Mr. Speaker, Sir, I invite my co-counsel to use the balance of my minutes in our opening statement.

Thank you Mr. Speaker, Sir and the Hon. Members.

**Mr. George Ng'ang'a:** Mr. Speaker, Sir and the Hon. Members, my learned friend has set out succinctly the case for the County Assembly of Nyeri in the matter of the proposed removal by impeachment of the Governor of Nyeri County. By way of further introduction, we endeavour to demonstrate that the requirement of political accountability is critical in our devolution design.

We shall endeavour to demonstrate that it has come to a time when the Chief Executive Officer of the county must take a personal responsibility of the decisions that are taken by the county government. What you will notice as we proceed to set out our case is that there has been a clear abdication of the responsibility. There has been a clear dereliction of duty where the Governor of Nyeri County has deliberately flouted the Constitution and all known laws regarding accountability and the manner in which the county government structures are supposed to be run.

Mr. Speaker, Sir, we shall for instance, demonstrate in the fullness of time that we have a county executive where an individual is serving in an acting capacity in three

ministries for over a period of one year. You will find a county government where all chief officers are in an acting capacity. You will find a county government where resolutions are made by the county assembly in furtherance of their oversight duty and there is absolutely no regard to those resolutions. The recommendations are made and the governor does not see to it that those recommendations are implemented.

Mr. Speaker Sir, you will find that Bills have been passed. The Governor does not even acknowledge receipt of those Bills, leave alone assenting to them. He does not send memoranda so that at the end of the day; the Bills just proceed. We know those Bills will eventually become law by themselves because, at the end of the day, there is a provision in law. The question this Honourable Senate must ask itself is, why was there a requirement that the County Governor must participate in that process of assenting to Bills? It is because as a CEO, as the head of the County Executive, he is reposed of the knowledge and skills. First is to input his views or the views of the County Executive in the county statute making process so that self-assenting as a provision in the Act does not remedy that mischief. Why is it that you have someone who said “elect me as Governor”; functions and duties are bestowed upon that person but then he deliberately flouts those provisions?

Mr. Speaker Sir, and Honourable Members of the Senate, I know there are people who out there are saying, hang on, the people to renew the mandate of the Governor are the masses and we have only got barely one year to go to the elections. However, the provision for removal of a sitting governor is not dependent on the time that is remaining to be served by that Chief Executive of the County. It is for the Senate, in furtherance of its solemn mandate under Article 96 of the Constitution to remind all serving governors that whereas you are the ones to implement what he we have entrusted you with, we shall not hesitate to crack the whip, not because we dislike you but it is because you asked to be bestowed with that duty or with that mandate and you have failed to deliver on that mandate. You will then act on behalf of the people who gave us that mandate under Article 96 by reminding you that we do not have to await the next elections for us to tell you; “time is up”. So, in the fullness of time, we shall be inviting this Honourable Senate to consider the totality of the material that is before it and find there is more than sufficient evidence, first to demonstrate that the Honourable Governor is directly culpable for all the charges that are set out in the articles for removal presented before this Senate.

Secondly, under Section 33 of the County Government Act, he is partially accountable for those actions and that the nexus exists and that the threshold which has already been set before this Senate and extrapolated further by courts of law will be more than satisfied so that a very clear message is sent out there; that devolution was not set out in our constitutional architecture for jest or for the sake of it. It was meant deliberately to ensure that better services are rendered to the people of Kenya. If governors are allowed to be a threat to the delivery of those services or to the achievement of the objective set out under the Constitution, then this Senate is the one that must tell those governors that “you have to go home so that we can get people in charge who can deliver on that mandate”.

Mr. Speaker Sir, that will be it for our opening statement. Thank you very much. God bless.

OPENING STATEMENTS ON BEHALF OF THE GOVERNOR  
OF NYERI COUNTY

**The Speaker** (Hon. Ethuro): Next opening statement from the Governor of Nyeri County.

**Mr. Peter Wanyama:** Thank you, Mr. Speaker, Sir. As part of our Opening Statement, I will invite Gov. Nderitu Gachagua to lay the basis of his impeachment and then I will also take time in ten minutes to---

**The Speaker** (Hon. Ethuro): You are reminded about the point of order by Sen. (Dr.) Khalwale. Proceed, Gov. Nderitu Gachagua.

**Gov. James Nderitu Gachagua:** Mr. Speaker Sir, and Honourable Members, in order to get the genesis and the proper perspective of this impeachment, it is in order that I lay a few facts before the House so that we can be able to look at these charges in that perspective and in context. I have been in my career, a Member of Parliament for Mathira Constituency in the Ninth Parliament. I have been a professional---

**The Speaker** (Hon. Ethuro): Order! Order Governor! Let them change that microphone. The other one was clearer. Of course, we are holding his time.

**Gov. James Nderitu Gachagua:** Mr. Speaker Sir, I was elected under Section 180 of the Kenya Constitution by the people of Nyeri, indeed on a minority party because I convinced the people of Nyeri that I was up to the task of being the Governor of Nyeri. In the last three years, Nyeri County has won the following national recognitions. In the Financial Year 2014/2015, the Nyeri County was voted the best County by the Office of the Controller of Budgets in the absorption of the overall budget. In the Financial Year 2014/2015, we received recognition as the best County in terms of remittance of taxes to the Kenya Revenue Authority. In 2015, we were rated by the World Bank as the level county case study in the adoption of the Integrated Financial Management Information Systems (IFMIS).

Nyeri County was voted the best county in sanitation development by the World Bank in the Financial Year 2014/2015. Indeed, the County was also recognized by the Commission of the Implementation of the Constitution (CIC) as the best county in the 2015/2016 report in terms of provisions of medical services in our dispensaries and in our health centres and in our Level Four hospitals. Indeed, in that general context, I am happy to say that we have been able to do that kind of work in Nyeri.

Mr. Speaker Sir, in early 2015, I had serious challenges with my health but I was “rest assured” that the systems of the County Government were working perfectly well. This is why in 2014/2015, as I have said earlier, we were rated the best performance in the absorption of funds in the stated areas.

**The Senate Minority Leader** (Sen. Wetangula): Mr. Speaker, Sir, on a point of order. Thank you for giving me an opportunity. I am not assisting the Governor, but being a lay person, it is important to inform him that we are not here to mitigate or for him to give us a record of what he has done but to answer to the charges that are placed before the House. That is very important in case you lose your time in the process.

*(Loud consultations)*

**The Speaker** (Hon. Ethuro): Order! Order Members! Order, Sen. Wetangula! An opening statement is a statement. The party concerned is at liberty to choose what he thinks would be good for him. When it comes to the charges themselves, then that is the issue of relevance.

Proceed, governor.

**Gov. James Nderitu Gachagua:** Thank you, Mr. Speaker, Sir. As my health condition fluctuated from time to time, there was a long debate in Nyeri County as to whether or not I would survive. By the grace of God and prayers from family, relatives and the people of Nyeri County, my health continued to improve considerably. However, by January 2016 my health deteriorated and I was admitted in hospital until April, 2016.

When I came back to the county in April I was in a much better condition and ready to carry out my day to day duties as the Governor of Nyeri. When I came back I found the following disturbing scenario in the County of Nyeri. The Members of County Assembly---

**The Speaker** (Hon. Ethuro): Order, Governor. Let us change the microphone. Let it be adjusted to close proximity to the governor. Governor, maintain the proximity once you get the right fix.

**Gov. James Nderitu Gachagua:** The Members of the County Assembly of Nyeri County had, through intimidation of my officers with the threat of impeaching them, managed to allocate for themselves contracts worth Kshs6 million each in every ward, contrary to Article 174 of the Constitution, Section 87 of the County Governments Act and particularly, Section 9 of The Nyeri County Public Participation Act of 2015.

I stopped the implementation of these projects because they were contrary to the law. A Public participation forum to comply with Section 9 of the Act was organized on 23<sup>rd</sup> April, 2016. Five thousand leaders were invited to the forum to approve the projects generated from the community. We have attached the letter of invitation. The contracts for the projects that were confirmed by the forum have since been awarded and work is in progress on the ground towards their implementation. Thereafter, agitation started at the assembly that the governor had come back to impede their plans for the campaigns for 2017.

The second area of difference was the sauna and wellness centre, which the assembly intended to construct. This item had been sneaked into the budget under the item on construction of buildings. It was only when the assembly advertised for the construction of the wellness centre that we realized what nature of the building it was. I then instructed the physical planning department to look into that project. It is then that we established that the drawings had not been submitted for approval, ostensibly to keep the project secret for as long as possible. We instructed the department to stop the project and the assembly consequently cancelled the advertisement. The assembly never forgave me for this.

The third area of difference was the *Elimu* Fund with a total of Kshs90 million. By the time I came back from hospital, I found that the Members of the County Assembly had allocated themselves each Kshs3 million and submitted the list of beneficiaries to my staff, the majority of whom were their friends and relatives. I had the list cancelled and the beneficiaries spread out at the sub-location level in all the 251 sub-locations. I directed that the bursaries were to be awarded to the strictly needy children as vetted by the members of the community at the sub-location level. The Members of the



County Assembly were clearly unhappy about it. When I later went to the ceremony to give out the bursary cheques to the successful students, about 35 Member of the County Assembly boycotted the function.

It is after all the above incidents that a plot was hatched that I must be removed from office by all means possible. The meetings to plot for my removal were held at the home and under the chairmanship of Eng. Ephraim Mwangi Maina a senatorial candidate who lost in the last general elections. The meetings were held as follows:-

The first meeting was held on 22<sup>nd</sup> April, 2016 at Green Hills Hotel with a specific agenda to plan on how Gov. Nderitu Gachagua will be left out in the leadership of the proposed Jubilee merger and to discredit his performance by any means possible.

The second meeting was held on 28<sup>th</sup> April, 2016 at Eng. Maina's rural home to review the agenda of the first meeting and plan to boycott and disrupt the governor's state-of-the-county address.

The third meeting was held on 14<sup>th</sup> May, 2016 at Eng. Maina's rural home, with the same agenda as the first two meetings and also to plan on how to paralyze the operations of the county government by rejecting the proposed 2016/2017 budget estimates.

The fourth meeting was held on 9<sup>th</sup> July, 2016 at Eng. Maina's rural home to plan on how to impeach hon. Nderitu Gachagua and paint him as unsuitable to hold the office of Governor.

We have the sworn affidavit of hon. John Njuguna Wambugu, the MCA for Mugunda Ward on the above stated meetings,;he was personally present in all of them.

Mr. Speaker, Sir, no particulars of evidence has been given to me so that I can prepare a defence before the Nyeri County Assembly. When my lawyers went to the assembly in readiness to offer a defence, despite lack of evidence and particulars, they were chased away by the speaker and were told that I had to personally defend myself despite the very grave charges leveled against me. Since the charges were of gross violation of the Constitution, I thought it was only fair that I be represented by a constitutional lawyer. As the lawyers were chased away, the assembly went ahead to vote - 32 to 0 - on the Motion without the benefit of our defence, contrary to Section 4 as read with Section 5 of The Fair Administration of Justice Act, 2015, under which any person charged with any offence in judicial or a *quasi-judicial* proceedings is entitled to legal representation. My constitutional rights were denied and I seek justice from this august House.

Mr. Speaker, Sir, further developments after the impeachment reveal how this plot was hatched and progressed. On Monday, 5<sup>th</sup> September, 2016, hon. Kabando Wa Kabando, the Member for Mukurweini, with four other Members of Parliament, namely hon. Kanini Kega from Kieni, hon. Peter Weru, hon. Mary Wambui from Othaya, the 32 MCAs who had voted for the impeachment, plus all the gubernatorial candidates for the 2017 elections broke into my office ostensibly to inform my staff that they were safe despite my having been removed as Governor of Nyeri.

They then went to celebrate. In a press conference held thereafter - of which we have the footage - they asked the Senate not to interfere with the work of MCAs and ensure that they confirm the impeachment. They further warned the Senator of Nyeri County, Sen. Kagwe, not to interfere and to respect "the wishes of the Nyeri people".

In conclusion, I would like to inform the Members that on the night in question, when the 32 MCAs spent the night in the precincts of the County Assembly of Nyeri, they were frantically calling and telling me that I was letting matters get out of hand and risked harassment and possible impeachment by the Senate, while they could easily organize for me to pay only two of them a sum of Kshs200,000 to get myself out of the hook. I told them that I was not interested.

Mr. Speaker, Sir, I have a career spanning a period of 40 years both in the Government service and public life. I have a reputation to protect regarding my personal integrity. That is why I have decided to come to this House for my case to be heard by a respectable body within the Constitution; a body that respects the laws and the principles of fair administration of justice. I have been before this House on two occasions; first, on my own volition, when I appeared before the Committee of Finance chaired by the Sen. Billow Kerrow seeking assistance from this House on financial issues in Nyeri County.

Secondly, I have been before the County Public Accounts and Investments Committee (CPAIC) of this House without any coercion. I am here by choice and confident that I will get justice. As you look through these charges, you will find that they are issues of operational nature. Indeed, allow me to quote one of the charges where I am accused of not paying Members of the County Assembly (MCAs) and their staff on time. Money paid to MCAs and the staff is based on a ceiling set by this House. This is money remitted to the county treasury through a requisition by the county treasurer. This money is only available when you get a disbursement from the National Treasury. As I speak, we have not had such a disbursement and the salaries are still unpaid. Therefore, to now ask the Governor of Nyeri County to step aside as Governor because the National Treasury has not released Exchequer to the entire country, it is not only unfair, but totally unjustifiable. You will see that kind of trend running across these charges.

Mr. Speaker, Sir, I stop there to my give legal counsel a chance to go through the issues. As I said, I am here by choice and I know I will get justice. We shall demonstrate in each of these charges that there is no basis or merit for my removal from office because the threshold in terms of the Constitution requirement has not been achieved. There has been no public participation in this matter. I would generally say that I think the charges as framed are really---, I do not want to say it is joke. However, once we go into them, we will be able to see whether they are worthy or not.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, for the record, my name is Peter Wanyama, the Legal Counsel for the Governor.

It is important that we lay this basis because if you look at these charges, you will get the feeling that the County Assembly has not done what is expected of it. This is because impeachment is a political process that must meet the legal and constitutional threshold.

The process of removal of a Governor is a process that is laid in Article 181 of the Constitution. If you read the provisions of Article 181 of the Constitution, you will see that there are certain fundamental criteria, safeguards and guidelines which the Constitution requires must be met before any impeachment is accepted.

One of the most important safeguards which is constitutionally provided is gross violation. The law on impeachment has now been settled. We are not grappling in the dark. We have a definition of the words “gross violation”, “gross misconduct,” and “abuse of office.” The law, as it is, is that whenever a charge is indicated that it is

“gross”, first of all, it must specifically state the word “gross.” Secondly, the charge in question must specify the section of the Constitution that has been violated. For example, if you look at charge No.1, you will see it has a major and incurable defect. First, there is no provision of law which has been cited as having been violated. Secondly, there is no provision of the Constitution which has been cited as having been violated.

If you look at charge No. 2, they have charged the Governor with a charge known as “failure to comply with the law”. Is that a charge which is available under the provisions of Article 181 of the Constitution? Is there an express charge under Article 181 of the Constitution, known as “failure to comply with the law?” yet, it exists in the charge instrument.

It is our submission by way of introduction that the charges as drafted, have not at all met the threshold laid down by reading of Article 181 of the Constitution. Secondly, the evidence which has been submitted by the County Assembly, there is no evidence at all which links the Governor to these allegations. Yes, it can be said that the Governor is the Chief Executive Officer of the county. However, in terms of accountability, the Governor is accountable at a policy decision level; for everything at the county level.

But what is the law governing impeachment? The law governing impeachment as laid down by my colleague from the County Assembly has been settled. This is the law. There must be nexus between the Governor and those allegations. For instance, if the Governor wrote a letter or directed either verbally or by way of any other direction for something illegal to be done, then that is a test which will meet the threshold. If you look at the charges as drafted, it says that as Chief Executive Officer of the County, you are responsible or accountable for this. In accordance with this documentation and the evidence admitted, we are saying that there must be nexus. What it is the Governor did, in terms of wrong doing, to warrant culpability?

Mr. Speaker, Sir, let me give you one of the charges as we lay down that introduction. Every county government operates financial management software which has two components: the Integrated Financial Management System (IFMIS) and the Internet Banking (IB) component. Whenever there are commitments which the county government is supposed to pay, for instance, non-discretionally commitments such as salaries, they are always in the financial part of the IFMIS system where those commitments are made. However, if there is no money in the accounts of that county government at Central Bank, those commitments will exist in the system. However, if you want to know whether those payments have been made or not, you will go to a different platform known as the IB platform. This is the platform which shows the actual payment figures. At any point in time, if you print the IB platform which shows the various debits to the accounts of the county government at the Central Bank and if you print the extract of the IFMIS, you will see that there will always be variance. There must be a variance given the way the county public finance management system works.

For us, we are saying there is a variance while they are saying Kshs70billion has not been accounted for. They are saying there is a variance in the system. The report which was used by the Controller of Budget to prepare this explanation is based on the IFMIS component and not the IB component which shows the actual component which has been made from the system.

We will be asking later on, in terms of evidence, that this House summons the Controller of Budget because we want to see the truth. Is there some money which the

County Government of Nyeri has not accounted for? They talked about Kshs352million. If you look at Kshs352million from the documents which were submitted by the county treasury, that figure is not there. We will demonstrate that in the evidence. The county treasury submits a report to the county assembly, which picks it, does its own analysis and prepares a completely different figure. Based on their own figure, they say that the Governor has contravened the law.

The evidence which has been submitted shows that every expenditure can be accounted for because Nyeri County Government is advanced in terms of implementing the Integrated Financial Management Information System (IFMIS). So, there is no possibility at all that such huge sums of money cannot be accounted for. These are explanations because the other reason we are saying that this impeachment is baseless. This is because the County Assembly could have exercised other alternative measures. For instance, did they summon the County Executive Committee (CEC) member for Finance to explain these issues? Did they summon the Governor to appear before the Assembly to explain these issues? Was such a letter received from the Assembly to the Executive? Why do you rush by going through an impeachment yet you have not exhausted the available mechanisms which are provided for in law?

Secondly, most of these issues are issues contained in the Controller of Budget Report which are pending before this House. There are audit queries which have been raised and they are pending before this House. So, in the absence of an explanation in terms of answering these queries, can an impeachment process ensue at this point in time? The Senate has not looked at these issues in terms of addressing the audit queries yet Members of the County Assembly (MCAs) are saying that they want to impeach the Governor because there is a wrongdoing.

It is our submission that these impeachment proceedings are extremely premature and have no basis in law. We will be demonstrating, through evidence, that if you examine the evidence from the County Assembly, there is no evidence which they have submitted whatsoever that supports any of those charges. The reports which they have ostensibly submitted are reports of the Controller of Budget, reports of the Auditor-General and their own internal reports. So, if you look at it from that fulsome perspective, you get the impression that something is seriously wrong with these charges.

Despite these problems in terms of the way the charges have been drafted, we have a credible defence on each and every allegation. Throughout this hearing, we will be demonstrating that no such violation exists. If, indeed, there is a violation, then that is a violation which is not gross and linked to the Governor but a violation which cannot attract the provisions of Article 181 of Constitution because Article 181 of the Constitution, as we will submit, has been interpreted. It provides the basis upon which impeachment charges are conceptualized and drafted. If there is a violation of Article 181 of the Constitution, then no such impeachment proceedings can be accepted by this Senate.

Mr. Speaker, Sir, this Senate is exercising a *quasi-judicial* function. The implication of that is that we will be asking the Senate to look at the issues in broad totality. For instance, there is a fundamental issue which we think is legitimate and genuine which if examined critically can lead to the finding that all these charges are not substantiated. This is it. At the county assembly level, the Governor was not given an

opportunity to defend these allegations through legal counsel, contrary to the provisions of the Fair Administrative Action Act, 2015.

In our view, under Standing Order No.1 of the County Assembly of Nyeri, the Speaker is required to make a ruling. While making that ruling, he is guided by the Constitution because there are certain principles in law which can never be deviated. One of the principles is the requirement to be heard. Even the devil himself must be heard. So, it is absolutely critical that this Senate makes a finding on that particular issue because it is part of our submission that you cannot impeach a governor at the county assembly level without giving that governor opportunity to be heard, either in person or through legal counsel. If you do that, then you have violated all manner of principles known in law. That is an issue which we will be asking this Senate to look at, so that we lay proper basis for the implementation of devolution in this country.

Mr. Speaker, Sir, lastly, there are certain challenges to the implementation of devolution. A county government is not the governor. There are numerous structures in the county government for service delivery. In these structures, you will not find perfection. So, where there are issues in terms of problems which the Governor called "operational in nature", do you impeach the Governor because of these operational challenges? Definitely, not! The law governing impeachment is not based on the principle. Unfortunately, this House found that impeachment is based on collective responsibility but the Court of Appeal has interpreted that and said impeachment is based on personal culpability.

There is a paragraph which we will be reading throughout these impeachment proceedings to the extent that whereas political responsibility and collective accountability are issues which are the bedrock of governance in this country, for purposes of impeachment, there must be an aspect of personal culpability. There must be something which the Governor did wrong in person. Throughout these proceedings, we will be inviting you to look at that issue. Is there anything which the Governor did wrong at a personal level? If you find any, vote to impeach. Our submission is that if you look at the way the charges have been drafted, you will not see the aspect of the Governor's personal culpability.

Throughout this trial, we will be demonstrating what amounts to personal culpability. For instance, if the CEC for Finance has been in constant communication with the County Assembly on the budget-making process and there is a stalemate, what is the role of the Governor in that regard? Did the Governor instruct the CEC for Finance not to work with the County Assembly in the budget-making process? One of the issues which have precipitated this impeachment is principally the failure of that budget-making process and the need by the MCAs to go beyond what they have been given in terms of law and exercise some executive function. At what point is the Governor involved in the budget-making process?

Is there any wrongdoing on the evidence submitted? It is being alleged that the Governor has failed to assent to law yet we have evidence demonstrating that all the laws which the County Assembly says the Governor has not assented to have actually been assented to. On the contrary, even if a governor has not assented to a legislation, there is a statutory mechanism for that legislation coming to force automatically. Do we impeach a governor yet there is a mechanism for a legal framework to come into force automatically without assent? Is that a ground which is capable of impeachment?

Mr. Speaker, Sir, I know that my time has lapsed. Thank you very much for listening to me.

**The Speaker** (Hon. Ethuro): Hon. Members, that brings us to end of this particular session. So, the House will adjourn until 2.00 p.m. this afternoon.

*(The Senate temporarily adjourned at 12.55 p.m.)*

*[The House resumed at 2.00 p.m.]*

*[The Speaker (Hon. Ethuro) in the Chair]*

**The Speaker** (Hon. Ethuro): Hon. Senators, welcome back to the afternoon session. We will now proceed with the presentation of the case. We will start with the presentation of the county assembly including presentation of witnesses. We expect this session not to take more than two hours. We expect the cross-examination of witnesses, if any, to take another 30 minutes and clarification and questions by Senators to take one hour. Nyeri County Assembly, please proceed.

PRESENTATION OF THE CASE OF THE NYERI  
COUNTY ASSEMBLY

**Mr. Charles Njenga:** Mr. Speaker, Sir, we shall proceed with the case of the county assembly. I shall take the Senate through the first seven charges and as from No. 7, my colleague will take over. We have one witness who shall only adopt his witness statement and he shall be available for cross-examination by the governor's counsel.

**The Governor being the Chief Executive of the County, failed to make an account and proper disclosure of Kshs352,976,913 contrary to Article 201 (a) of the Constitution of Kenya and Section 104 (1) (i) of the Public Finance and Management Act, 2012.**

I wish to start by reading Article 201---

**The Speaker** (Hon. Ethuro): Counsel, it will be helpful when you clarify the charge and you use the particulars to prosecute your case. If you are referring to documents – because all of us have the documents available – you can specify which document and on which page.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I have just read charge No.1. I will be referring to the County Assembly documents, volume III and it is marked in blue.

**The Speaker** (Hon. Ethuro): Order counsel! The charge, if I could be of help for our purposes, we have three charges. The rest are the particulars for the charge. So, for charge number one; gross violation of the Constitution of Kenya, 2010, the County Governments Act, 2012, the Public Finance Management Act, 2012, the Public Finance and Management Act, 2012 and the Public Procurement and Disposal Act, 2005. That is the charge.

**Mr. Charles Njenga:** Thank you Mr. Speaker, Sir, for that clarification and assistance. Article 201 of the Constitution which sets the background to this charge and

the particulars, principles of Public Finance and Management Act, 2012; I will only read 201 (a), it says:-

“There shall be openness and accountability including public participation in financial matters”

There is a constitutional imperative for openness and accountability. There is a requirement by the law and by the Constitution. This is not discretion. It is not an elective duty. It is not a matter where a public officer can decide to do or not to do. It is a constitutional provision that requires observance to the strict letter of the law in all matters of public finance. There is a deliberate distinction on the two facets of Article 201 (a):- Openness: The requirement is; be open to the public, county assembly, Office of the Controller of Budget, Auditor-General and to the Senate on all aspects of expenditure and funds that come to your disposal by virtue of your position. That is the Constitution.

I will quickly refer the Senate to page four of the County Assembly document volume III, you will see the Budget Implementation Status Report Financial year 2015-2016. This is a document that is issued from the county treasury. It is issued from the Governor’s Government. It is a blue document. I think four is on the flipside, look at page five. I referred to the title for identification of the document we are considering. That document is made pursuant to our legal obligation on the part of the Governor to report on all matters of public finance and in particular budget implementation to the county assembly. That obligation for good order can be found in Section 30(2) of the County Governments Act. Let me read it for your information because it refers directly to the Governor. It says: “the Governor shall”, when you go to Section 30(2)(j), it states:-

“Submit to the County Assembly an annual report on the implementation status of the county policies and plans”.

This includes the budget. This is a specific statutory duty given to the Governor. The Governor shall.

In this report that we have, if you go with me to page eight, where the heading or the subtitling is “Overall Budget Outlook and Implementation Report, at No.12, there is a report on the total expenditure on development for the year which was Kshs1,161,269,008 as total expenditure on development. That is the number they have given as money expended for development in the year under review. You would expect that the development expenditure in the year would be the amount spent in totality of the projects undertaken within that particular period. The amount expended to implement certain projects, for example, a road, a market or there could be something like construction of a youth polytechnic, ECD and learning materials. The expenditure given is Kshs1,161,269,008 for all the projects undertaken under project within the year.

There is on page 25 a document titled “Projects/Programmes Implementation Status Financial Year 2015/2016. It is a long list that runs all the way from page 25-61. These are the projects undertaken within the year in the County of Nyeri. In that list, there is a column headlined: - “Actual Expenditure” which is on top of all the pages. There is project titled, “Expected Duration, Sources, Estimated Value, Total Disbursement and so on. There is actual expenditure. This is a report on what was actually expended on a particular project within the year. If you tally the amount reported as having been expended for actual expenditure, in an ideal situation where there is an accountable report, then that number should be as the number reported as total expended

for development. But in this case, in fact, I think deliberately, this status report did not have a total.

This is a document given to us, the County Assembly, by the Executive. It had no total at all; they took time to calculate it. This is just an arithmetic intervention and you will see if you tally that amount, it comes to a total of Kshs808,292,896. There is a summary we have set out on page 66 that may simplify your analysis where we have tallied the actual expenditure. This is development expenditure. The actual expenditure is Kshs1,161,269,008. We have also tallied that project expenditure. It comes to Kshs808,292,896.

The question that immediately poses is this difference of Kshs352,976,112 that the Executive admits in their own report was expended for development; in which project did it fall? At which particular programme was it directed? That is the gap. That is what we are calling a material non-disclosure in a report. The County Executive and the Governor deliberately chose not to disclose a difference of Kshs352,972,112 in their own annual implementation status report given to the County Assembly and I believe given to the office of the Controller of Budget and to all the other offices, including the Commission on Revenue Allocation (CRA).

First of all, there are no expenditure items excluded from reporting. At the outset, an implementation status report must include all expenditure items regardless of their character, designation and priority. The duty to disclose does not discriminate against any item. However, let us consider their response as to why the Executive and the Governor refused deliberately to disclose the sum of Kshs352,976,112. In fact, as counsel for the Governor was opening, he said that he does not know where we got this number. Of course, he does not know because in their own report they did not put it. Only a keen eye would have noticed that there is a shortfall or a difference. The response they have now made was only prompted by these proceedings. If the governor was not under charge, we would not have received this response. Is that the way that we want to run our counties? Is that the standard that this Senate wants to uphold as a manner of application and management of public finances? That is a question for the Senate to answer.

However, let us consider the response. I am referring to "Governor's Documents, Volume II," which is bound in red. Page 1 is their responses to the charges. They explain why Kshs352, 976,913 did not find any favour or merit in their report. They say:

"While providing the status report the county government did not capture the items listed below, as they are not considered capital projects, but budgeted under development as they support delivery of services."

First is an admission that they did not capture that number. That is a direct admission by the governor and the executive that there was failure to disclose a number as significant and material as Kshs352, 976,913. Even without further interrogation, there is a violation right there. That violation is admitted; that they did not capture that number, but let us also consider the reason. They say that these are capital projects, but budgeted under development. Is there any justification to exclude any projects from reporting? Yes, they were budgeted under development, but in the development status report, they failed to report them. What are capital projects? In my understanding, capital projects are in the nature of assets and value addition. If you look at the classifications given there by department, all the way up to page 5, you will see that some of these items include construction of buildings and purchase of medical and dental equipment. These are



capital projects. There is no reason they should not have been reported in an annual budget implementation status report, if the governor and the executive were acting in good faith and under the duty to be accountable and open, as demanded by the Constitution.

They then say that although they were budgeted under development, in their own personal opinion they were not considered. It is a personal consideration they developed or conceived and used it to justify failure to disclose and hide expenditure. We would not have known about this had these charges not been brought before the county assembly and this House. This is clear violation.

I was keenly listening to the awards given to Nyeri County. I wish that one of these awards was an award for accountability. Obviously, they would not have merited that. When in your own documents you fail to report to the very people who have entrusted public trust upon you by electing you, then your governorship and leadership is no longer tenable.

In that particular charge No.1 there was also failure to disclose Kshs846,702,900 in the Exchequer releases. This is a county that has some consistent hesitancy in making disclosure of the monies that come to them and how they were expended. On page 18 of the County Assembly Documents, Volume III; the Annual Budget Implementation Status Report, there is a heading 'Financial Performance of the County During the Financial Year 2015/2016.' Then there is a sub-heading; 'Exchequer Releases for the Financial Year 2015/2016.' That table runs through to page 19, where the total is. There is a number given of Kshs4,840,770,000. It is written right on top. That is the amount they disclose in their report as total Exchequer releases for that financial year. They say that that is the money they have been given by the National Treasury; these are the funds that they have received for the Consolidated Fund.

Contrast that with the report given by the Office of the Controller of Budget (CoB). That report is found on page 62 of the same document. That is the letter forwarding the Exchequer release report. On page 63 we have 'Financial Year 2015/2016: Summary of the Exchequer issues for the recurrent budget. There is a column written 'Total Exchequer issues as of 30<sup>th</sup> June 2016,' amounting to Kshs4,366,543,000. That is the number at the bottom.

When you flip over to page 64 there is the total Exchequer issues summary as at 30<sup>th</sup> June for the development budget. The first one was for the recurrent budget and at page 64 we now find the development budget. The total is Kshs1,320,929,979; that is the number given by the Office of the Controller of Budget as the total that was issued to Nyeri County. If we add the two numbers - recurrent and development budgets - the total Exchequer issues as at 30<sup>th</sup> June will be Kshs5,687,473,118. There is a summary that captures that summation at the bottom of page 66; 'the Office of the CoB Report, Kshs5,687,473,118.' What is reported by the county executive in their report is Kshs4,840,770,218. There is a difference of Kshs846,702,900. If you round this off, it will be Kshs1 billion. There is a difference of Kshs1 billion not disclosed; monies released by the National Treasury to the County but it is misreported in the final report given by the executive to the County Assembly.

Hon. Senators, the duty to account also relates to the integrity of the persons to him that duty vests. Failure to account relates directly to the honesty, integrity and dignity of the person to whom that duty is given. Under the governorship of Gov. Nderitu

Gachagua, we have a report issuing and there is a non-disclosure of over Kshs1 billion. When this matter is brought up to be interrogated further by the County Assembly and the Senate, we are told: "No. This is a witch-hunt. The County Assembly only wanted a sauna," and many other kinds of distractions. The point is; why did you not report? Why are your reports not faithful in all material respects? This is a clear violation which invites the intervention of this Senate.

To be fair, let us consider the response. On page 4, Volume II of the Governor's response, the material part is the third paragraph. First of all, the numbers are admitted and it is admitted that their implementation status report did not have the Kshs846,702,900. That, on a factual level, is admitted. Now, the explanation is that this is local revenue collection account, slotted into the county revenue fund and account balances as at 30<sup>th</sup> June, 2015. This is our own local revenue as opposed to the Exchequer releases from the national sources, namely; the equitable share and the other grants that are listed.

Let us interrogate that response from their report. Go back to the County Assembly documents Volume III on page 8 which is still part of their report. At paragraph 11, they say:-

"The County Assembly of Nyeri raised local revenue of Kshs709,554,435."

That is the number you are looking at for local revenue. From the Office of the Controller of Budget report---

*(Mr. Charles Njenga flipped through the document)*

I have the original. Let me just confirm what page it is. It is from the Office of the Controller of Budget, County Government's Budget Implementation Review Report for the First Quarter, 2015/2016. I am not sure that you have the document or if the particular page is in the volume that you have but that is a public document that we can get. On page 216 with regard to Nyeri County, the Controller of Budget says:-

"Nyeri County had a balance of Kshs5.66 million as cash balances from Financial Year 2014/2015."

So, we have the local revenue of Kshs709 554,435---

**Mr. Peter Wanyama:** Mr. Speaker, Sir, objection.

**The Speaker** (Hon. Ethuro): What is it, counsel?

**Mr. Peter Wanyama:** Mr. Speaker, Sir, *(inaudible)* where evidence is required to be fully and frankly disclosed to us. What we are witnessing is a deliberate manipulation and misreading of figures. It is important that he discloses that to us. We want to specifically see what he is reading so that we can contextualise. We do not want to be taken round in circles that this and that document, some of which have not been disclosed to us, contrary to the rules of this Senate.

Thank you.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I have the original document with me. I can give it to the counsel. I think the particular page in the photocopy was not annexed to the volume. However, the report has been ---

**The Speaker** (Hon. Ethuro): Order, counsel! It does not work that way. You should have submitted it with the rest of your documentation.

**Mr. Charles Njenga:** Mr. Speaker, Sir, in fact, if you look at the volume, there are many extracts from this particular document. It is only this page. I will just refer to the page without referring to the document. The Senate has power to call this document which is public. You can walk right to the Office of the Controller of Budget and get a copy.

On page 216, you will see that number. I will not refer to the document again. This Senate is investigating this matter. It has the right to look for whatever information that can facilitate its investigation. This is not an Assembly document. We are just saying the balance, as disclosed by the Controller of Budget, is Kshs5,600,000. The local revenue reported in their own account is Kshs709 million. So, in simple arithmetic, the total should be about Kshs715 million. So, their explanation is not valid. If it were valid, then the two numbers should add up to Kshs846,706,900. If you go by their response that this number that was not disclosed is local revenue plus cash balances, it does not add up. No amount of argument or explanation, however ingenious it is, can add 709 and five to make 846.

Mr. Speaker, Sir, this is the mischief we are saying has been persistent in the reporting by the County Treasury under the Governor in the same report. We urge that the Senate does find that in the making of this report, there was material non-disclosure which is not justifiable in the circumstances.

I do not wish to dwell on that anymore because of time. Let us consider the issue of utilising. I am now looking at the particulars No. 2 of ground (a): Utilizing local revenue at source contrary to Article 207.

Mr. Speaker, Sir, for good measure, let me read Article 207 to contextualise my submission. Article 207(1) of the Constitution reads:-

“There shall be established a Revenue Fund for each county government, into which shall be paid all money raised or received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament”

Mr. Speaker, Sir, that is the material provision relevant to this ground. All funds shall be deposited in the Revenue Fund received by or on behalf of the county government, except money reasonably excluded by an Act of Parliament. This Article goes on to say:-

(3) “Money shall not be withdrawn from a Revenue Fund unless the Controller of Budget has approved the withdrawal.”

This is a check mechanism. It is a system infused into the Constitution deliberately. It is the Constitution that took time to provide sufficient detail as to how revenue should be treated at the county level. The first provision is that any money whether rates, licenses or whatever it is, should be deposited in the Revenue Fund. This is for good reason. It is from the Revenue Fund that there are mechanisms and systems of expending those funds. If they are not deposited into these accounts, then they are vulnerable funds. They can be misused and swindled away and they cannot be accounted for. That is the danger that we get when a county decides to collect money and use it off the pocket without depositing it into the Revenue Fund.

Mr. Speaker, Sir, this is a Report by the Office of the Controller of Budget. If you look at page 74 of County Assembly Documents, Volume III, there is an excerpt from the Report. At the last paragraph it says:-

“An analysis of the total expenditure and total funds authorised to be withdrawn by the Controller of Budget indicates that the expenditure by some counties exceeded the total funds released.”

The Controller of Budget is noting that some counties are spending more than what the office has authorised. Already, that is a violation of the Constitution because Article 207 shows that money cannot be expended without the authority of the Office of the Controller of Budget.

*(The Senate Minority Leader (Sen. Wetangula) spoke off the microphone)*

**Mr. Charles Njenga:** Mr. Speaker, Sir, I am reading page 74 the last paragraph that says “An analysis of total expenditure.” This suggests that some counties were utilising locally collected revenue at source in contravention of Article 207 and Section 109.

**The Speaker** (Hon. Ethuro): Order, Counsel. Which document and which volume are you referring to?

**Charles Njenga:** Mr. Speaker, Sir, I am referring to County Assembly Documents Vol. 3, page 74.

**The Speaker** (Hon. Ethuro): Proceed.

**Mr. Charles Njenga:** Mr. Speaker, Sir, those are the examples of the counties which have run afoul of this stringent and particular requirement of the Constitution and not even the statute. They are Nairobi, Taita Taveta, and West Pokot among others. We see Nyeri County at 112.9 per cent. We are spending money without depositing it in the Revenue Fund. This is a direct contravention of Article 207.

*(Loud consultations)*

**The Speaker** (Hon. Ethuro): What is it, Sen. Murkomen?

**Sen. Murkomen:** On a point of order, Mr. Speaker, Sir. The Counsel should take us to the specific lines and pages so that we can move faster. This is in terms of referencing so that it does not eat into his time.

**The Speaker** (Hon. Ethuro): Order Counsel. I think I had already made that kind of directive. For Members, on such small matters that you find necessary, approach the Chair so that we give them all at once.

**Mr. Charles Njenga:** Mr. Speaker, Sir, the document is paginated. I can only direct to the paragraph because the lines are not numbered. I believe that you can follow.

**The Speaker** (Hon. Ethuro): The direction is the Volume. Counsel, sometimes you state volume of whether it is the County Assembly's or the Governor's, the page and the paragraph, if it is there.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I am referring to the County Assembly documents Vol. 3 at page 74 where I read the narrative by the Controller of Budget.

**The Speaker** (Hon. Ethuro): That is on the analysis on the last paragraph. Did you move to page 75?

**Mr. Charles Njenga:** Mr. Speaker, Sir, before I move to page 75, there is table at page 74 on top which is important to note that the source of this information is the Office of the Controller of Budget and the County Treasury. Therefore, the source of this information is not from the assembly but the County Treasury itself.

At page 75 of the same County Assembly Documents Volume 3, there is the actual number that is Kshs615, 143, 048. That is what was expended.

Mr. Speaker Sir, it is at the last column on total expenditure. If you go down---

**The Speaker** (Hon. Ethuro): It is at row six from the bottom and then the last column.

**Mr. Charles Njenga:** Mr. Speaker Sir, yes Kshs615 million. The actual authorised amount was Kshs535 million. So, there is an excess of Kshs70 million. The violation is spending money at the source without depositing the same as designated and as provided by law into the revenue fund.

Let us consider the response made by the Gov. Nderitu Gachagua. This is on page 8 going through to 9 of the documents by the Governor Volume 2. Therefore, we would say implicitly from the response, there is an admission of a difference but now the Governor explains the difference. He says that the difference of Kshs70 million is a variance between commitments in the system already deducted by the system *versus* the actual release of funds.

**The Speaker** (Hon. Ethuro): That is page 9, second paragraph.

**Mr. Charles Njenga:** Thank you, Mr. Speaker, Sir, for your guidance. This explanation cannot be true. This is for the reason that the figures and the numbers reported by the Controller of Budget is actual expenditure. That is a number supported by invoices and payment vouchers. It is not a commitment, it is an actual expenditure amount disclosed of Kshs615,143,048. A commitment which is defined under the PFM Act as a contract or an intention to spend cannot be accounted for as an actual expenditure. A commitment would be, for example, issuing an LPO or an LSO. The effect of a commitment is that it reduces the balance available per vote so that if we had a roads budget of Kshs100 million and then you commit Kshs20 million, the balance available under that road from the budgetary allocation would be reduced by the commitment amount. However, it does not reduce or does not impact at all on a number that is directly provided as actual expenditure.

The sum of Kshs615,143,048 was actually expended without authority of the Controller of Budget and directly from the revenue fund. This, in the anticipation and the contemplation of the applicable law, is a direct violation. I wish to have Honourable Senators note the provisions of the Public Finance Act, they are reproduced for your convenience and record at page 76 of County Assembly documents Vol. 3, Section 109. This is deliberate. On page 76, County Assembly Vol. 3, there is a reproduction of Sections 109 of the Public Finance Management Act as read together with Article 207 which is at page 77 of the same bundle.

Mr. Speaker Sir, at this juncture, allow me to read Section 102 of the Public Finance Management Act because it would advise us on the role of the Governor. As you can see from Section 109, these are responsibilities falling directly under the purview and the management of the County Treasury, which is under the CEC Finance and who is a member of the County Executive Committee. However, the law deliberately provides – this is very profound because it avoids the defects of “it is not me, it is the other person, it is the County Treasurer, it is the Chief Officer.” The law anticipated such explanations. On matters of public finance, the law was deliberate and I am reading Section 102(2). The law provides:

“The County Executive Committee shall observe principles of collective responsibility in exercising their functions under this Act.”

So, the law was being deliberately clear that in matters of money, in matters of public finance, the CEC shall be collectively responsible. This is a County Executive Committee that is by law under Section 30 of the County Government Act, chaired by the Governor. This is the same committee that under Article 179 of the Constitution is vested with all executive authority within the county. This is that Committee that with regard to money – money is very sensitive to Kenyans, to everyone, including to the residents and citizens of Nyeri County – in matters of money, there was a deliberate provision of liability at a collective level by the CEC Committee. This is not found in the other statutes. It is not found in many of the other statutes. It is deliberate so that on issues of money, a governor will not be heard to say that compliance was not done by an officer, compliance was not done by this other person. The law provides that he is liable collectively.

Mr. Speaker Sir, where the law expressly provides for liability and responsibility, even the courts cannot divest a person from such responsibility. The law is supreme and the law that does not invite any ambiguity at all cannot be argued out by any stretch of legal arguments or judicial ingenuity. We have been told that “yes, there are offences but there are not mine.” The law with respect to public finance is clear; that you are all collectively responsible and that is a violation that falls squarely on the Governor’s doorstep or footstep. Because of time, I will jump to the issue of procurement before I hand over to my colleague.

**Sen. Wamatangi:** Mr. Speaker Sir, I seek your indulgence at this point. Before the counsel, can one seek clarification on an issue before he moves away from it?

**The Speaker** (Hon. Ethuro): Not now.

**Sen. Wamatangi:** Mr. Speaker Sir, it is okay. My concern was that the point may get lost.

*(Loud consultations)*

**The Speaker** (Hon. Ethuro): Order, Senators! Sen. Wamatangi has the right to seek clarifications and the Chair will assist him. The best way not to lose the point is to put it down in writing.

*(Laughter)*

**Sen. Wamatangi:** Mr. Speaker, Sir, I am actually armed with a pen and several papers. I thought that the point I was raising is critical that even Counsel could lose trail to come back to it. With your indulgence---

**The Speaker** (Hon. Ethuro): Order, Senator. The procedures are very clear; we will hear submissions from the county assembly and they have a maximum of two hours. The governor will then have an opportunity to respond. Your point might be disposed by the governor. That limits Senators to those few remaining points. Just put it down, now that you have confirmed that you are fully equipped with a pen and paper. There will be a one-hour session for the Senators to make those interventions. If anybody else forgets, the Chair never forgets; I will remember you.

Proceed, Counsel.

**Mr. Charles Njenga:** Thank you, Mr. Speaker, Sir and hon. Members. At No.3 of the charges, we have a charge of irregular procurement, contrary to the Public Procurement and Disposal Act 2005. We are aware that this Act has been repealed, but this was the applicable law at the time. The basis of this ground is that there were complaints made to the county assembly by contractors within the county. The nature of their allegations was that they were instructed to do certain works by the county executive without any procurement procedures being applied. Some of these contractors stated that they were instructed verbally.

I want to refer the Senate to the County Assembly's Documents Volume III, page 86. The background of this is that these are persons who were given works to do within the county without any regard to procurement procedures. Some were instructed verbally and others by text. There could be some who were instructed even over the social media. I am not sure, but the letters are clear. For example, on page 86, a letter from DFAFF Construction Limited states:-

“We delivered murram to the above destination as per the attached quotation. We are yet to get an LSO. This was done verbally and the works was inspected by your staff.”

At page 88, there is another letter where another person was told to deliver murram to Mukurweini. At page 92, there is another demand letter. Generally, all the way from page 82 running through to page 96 are demand letters that were sent by contractors to the county executive, but because they could not get paid, the complaint was made to the county assembly. I am reminded by the county assembly to submit that one of its primary roles is to be a representative body of the members of a particular county. This matter fell squarely under its consideration.

At page 181 of the same volume, the county assembly established an *ad hoc* committee to investigate these projects and the matter of the pending bills. I will not go through the HANSARD, but the matter that was before the House is captured more succinctly at page 225, which captures the concerns of the county assembly at the time.

The first concern is in the second paragraph; ‘to establish an *ad hoc* select committee with the following terms of reference’--- This is a county assembly determining to establish an *ad hoc* committee because of the number and volume of complaints from citizens and contractors, to investigate, inquire into and examine the current pending bills totaling Kshs632, 517,962 that had been disclosed in a revised annual development plan that had been issued by the county executive.

They wanted to know the number that constituted the pending bills and who the people were. For the record, the date of this consideration is found at page 226; 21<sup>st</sup> October, 2015. The date is important to the evaluation of the governor's conduct in this matter, because immediately after this committee was formed, the county executive, through the governor, quickly formed a task force and gazzeted it, as indicated on page 79. This is an extract of the *Kenya Gazette* signed by the Acting County Executive Committee (CEC) Member for Lands, Infrastructure and Housing. This was done two weeks after the county assembly was seized of the matter and started effectively investigating. This is a knee-jerk reaction. It is a pre-emptive strike; let us run faster than the county assembly, so that they do not uncover what we have not disclosed or come to the full terms of the extent of these malpractices.

The terms of reference of this task force are very telling in the matter of irregular procurement. This is a county executive constituting a task force to investigate pending claims. At page 79 (b) the term of the task force is a period of 30 days. The terms of reference of the task force, at (b), were to review the procedures used in awarding and/or engagement of such contractors and suppliers. There are suppliers out there who we do not know how they were engaged. We do not know how they were awarded contracts. So, you set up a taskforce to go and review the procedure. It is an admission that at the point of giving out these contracts and awards, no procurement procedure known in law was applied.

The second paragraph says:-

“In the performance of its tasks under paragraph 3(a), the said task force shall put an advertisement in the print media requesting all contractors and suppliers with pending claims and contractual works on county roads to forward their claims to the task force.”

The County Government is not aware, first, who our contractors are? There is no list of prequalified contractors. Who are our suppliers and how much is the extent of our liability? We do not know how much we owe. We have to put an advert in the newspaper and ask anyone and everyone to come and see the task force if they have done work for the County Government of Nyeri. That even opens the possibility of fraud. I could have shown up and said that I tarmacked a certain road. There was no means to verify and no way that a county government can operate without knowing who the contractors are. What jobs and contracts have they been given? What is the extent of our liability?

The sum total by deduction is that no procurement procedures were applied at all.

You may be wondering what the role of the Governor is in procurement. Allow me to read Section 27(3) of the Public Procurement and Disposal Act, 2005. It says:-  
“Each employee of a public entity and each member of a board or committee of the public entity shall ensure within the areas of responsibility of the employee or member that this Act the regulations and any directions of the authority are complied with.”

Each employee of a public entity and each member of a board or committee of the public entity is given a statutory obligation within the area of his or her responsibility to ensure compliance with this Act.

In fact, in this Senate report---

**The Speaker** (Hon. Ethuro): Order, counsel! Just to help you. You have one hour to go.

**Mr. Charles Njenga:** Mr. Speaker, Sir, thank you. I read this provision to avoid the very tempting argument that is likely to be made that: “Yes, there could have been malpractices in procurement, but it was not me, it was not my act, I did not participate, I did not sign anything, I did not call anyone, I did not procure anyone to do any job. This is the mischief that is sought to be cured by section 27(3). It obligates the Governor at his area of responsibility which is that he is the chief executive, the chairperson of the County Executive Committee (CEC).

The question must be: What did he do in the face of these malpractices? If you evaluate and consider the Senate report which is in the record: In the matter of the Proposal to Remove Governor Wambora from Office, the report adopted on the 13<sup>th</sup> May, 2014, the Senate applied this particular standard. The Senate quoted and cited this legal provision in finding that in matters procurement, a governor has a direct role to ensure



that there is compliance with the procurement procedures and regulations within his county.

I urge and seek that you may be persuaded by your own finding in that select committee report which is as a matter of record the standard that obtains here in the Senate. The select Committee was set up, but it never even returned a report. We are not sure what happened to it. That is a matter that we shall, probably, find in the response.

In the response made by the Governor at Governor's Documents, Volume 2, page 12--- There is a problem with the pagination. They are cutoff. It is on page 11. It is a very evasive and escapist response. The response is that the allegation is too general. He is asking for the tender notice number and specific roads. He is the one who is supposed to be providing to the assembly and to us these details.

It is clear from the material that is before this Senate that works were done, tendered out without adherence to procurement procedures. He cannot then turn around, in the face of an allegation, to ask us: What was the tender number? What is the tender notice number? When was it advertised? Who was awarded? That is information that we would have expected to form part of the response if the hon. Governor was being truthful in this matter. The nexus of my submission is that it is a clear violation that invites the sanction of the Senate under Article 181 and that is the sanction of removal from office of the Governor.

Finally, before I sit down and allow my colleague to prosecute the other grounds, allow me to refer you to page 244 of the County Assembly Documents, Volume 3. We are now looking at the Lack of Prudence in Refurbishment of Buildings. These buildings are the County Governor's offices. This is an extract from the report of the Auditor General. Before I read the provision, let me contextualize the role of the Auditor-General in public spending. Article 229 of the Constitution provides a very important role to the Auditor-General. Article 229(6), it is rarely cited anywhere, but it is good for the Senate's consideration. It says:-

“An audit report shall confirm whether or not public money has been applied lawfully and in an effective way.”

The Auditor-General has a constitutional mandate to determine by his own opinion as an expert, whether public funds have been expended in a legal and effective way. Effective or efficiency is standard of prudence. Effectiveness is a matter within the jurisdiction of the Auditor-General to consider and give his opinion on. In this matter, he has given a very clear opinion with regard to the spending by the Governor and the County Executive. He says that the county government first of all paid Kshs10,866,000 as rent for the building called Karsons House which is a private building. Now, he says; no reasons were provided as to why the county government then spent Kshs29,176,932 to renovate this rented building. So, you are paying rent but over and above that, we are renovating for the landlord the building up to the sum of Kshs29 million. That is on Page 244 of the County Assembly Documents Volume III.

**Sen. Orengo:** On a point of order, Mr. Speaker, Sir. With due respect, I request that where counsel is referring to---

**The Speaker** (Hon. Ethuro): Order Sen. Orengo, our procedures have not been suspended on this one. I noticed that actually two Members got away with it. That is why I am alive to it now.

**Sen. Orengo:** I thought that rules changed in my absence.

Mr. Speaker, Sir, with great respect, I request, through you, that where the counsel is referring to a document which is not authored by the County Assembly but it is a public document, he should give particulars of that document. Right now, we are being referred to part of a report by the Auditor-General but we do not know which year precisely and whether they have been seized of that report. Otherwise, as it stands, it is a photocopy and all that. So, in order for it to be authenticated, he should tell us which report this is. He should particularize.

**The Speaker** (Hon. Ethuro): Counsel, you have heard the Member.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I am guided and I do not wish to mislead the Senate.

**The Speaker** (Hon. Ethuro): I know you may find it a bit difficult repeating yourself in terms of the volume you are referring to. There is no harm because Members will be consulting documents at different stages. So, just state whether it is Governor's or County Assembly documents, the volume and the page.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I am so guided. The document I am referring to is in the County Assembly Documents, Volume III. The heading or identity of the document can be seen at Page 386 of the same volume. What I was reading at Page 244 is an extract from this Document. It is the Kenya National Audit Office Report of the Auditor-General on Financial Operations of Nyeri County Executive for the Period; 1<sup>st</sup> July, 2013, to 30<sup>th</sup> June, 2014. Page 244 is an extract from that particular Report. In fact, it is at Page 14 of the entire Report and I was reading the last paragraph.

If you flip over to the next page which is Page 245, there is a very elaborate narration given by the Auditor-General that another expenditure of Kshs41,340,946 was incurred on renovation of the Governor's Office. It was not explained why the county government was spending a total of Kshs81,384,118, being Kshs41,340,946 for renovating the Governor's Office and Kshs29,176,000 for Karsons House. Together and above that, we were also paying Kshs10,866,240 for rent. This amount prudently applied would have been sufficient to construct a modern office block for the county government. There is a recommendation there; to apply prudence.

Mr. Speaker, Sir, allow me to refer to Page 253 to further fortify that point that in this matter of Karsons House, there was what I can only call "impunity". This is because regarding the initial award of tender for the renovations at Page 253 of Volume III of the County Assembly Documents, we have a letter there from the Office of the Governor awarding the tender to refurbish Karsons Photo House to Petlico Agencies for the sum of Kshs14,098,860.40. That is the award sum for that project but from the Auditor-General Report, the county executive, for the same job, used Kshs29 million. This is more than double. How did it jump to this particular number? How did you expand the scope of works or what really happened? These are questions that must be answered. The Senate must ask very hard questions because the probity for use of public funds depends on the determination that we shall make in regard to this matter.

On Page 433 in the same volume, there is a table showing how the tenders for this particular works were split into five. That is why we have a specific complaint and ground that there was a violation of the procurement law that prohibits expressly splitting of tenders contrary to Section 30 of the Public Procurement and Disposal Act.

Mr. Speaker, Sir, because of time, I will allow my colleague to highlight on the other few grounds. Thereafter, we shall call our witness just to respond to questions that

will arise concerning this document from the Governor's advocates and also from the Senate. I thank you.

**Mr. George Ng'ang'a:** Mr. Speaker, Sir, I will proceed with the further prosecution of the Assembly's case by dealing with Charge A which is on the gross violation of the Constitution, the County Governments Act---

**The Speaker** (Hon. Ethuro): Order, counsel; I wish to bring to your attention that you have only dealt with one charge and there are two others. Given the time remaining, you may wish to---

**Mr. George Ng'ang'a:** Yes, I will deal with them collectively.

I am referring you to volume No. 1 and 2 of the County Assembly document with respect to Charge A, particularly No. 7. It is on the gross violation of the Constitution that the governor has deliberately and grossly violated Section 137 of the Public Finance Management Act, 2012. I do not know whether we are there.

**The Speaker** (Hon. Ethuro): Order, counsel; you proceed until you are interrupted.

**Mr. George Ng'ang'a:** Very well. The Governor has failed to establish the county budget and economic forum. This is in contravention of Section 137 of the Public Finance Management Act, 2012. You will find that the requirement obligates the governor to constitute that forum. So, the obligation is on the Governor personally.

What has the governor in this case sought to do? When this issue was raised, you will find in Volume No.3 at page 485 of the assembly document, there are guidelines which were communicated to all governors in a circular dated 3<sup>rd</sup> Mach, 2015 and you will notice it is from the Commission of Revenue Allocation and it sets out that CRA in its mandates under Article 216 on matters concerning financial management by county government is bringing the attention of governors to the requirement of Section 137 of the Public Finance Management Act, 2012 on the constitution of the County Budget Economic Forum.

Honourable Senators, you will notice that the County Government of Nyeri is one of the very few counties that have not constituted this important forum. You will notice that this forum plays a very important role in matters of budget formulation and management of funds. In fact, under Section 137 of the Public Finance Management Act, 2012, you will notice that it is mandated with matters of budgeting, the economy and financial management at the county level. Perhaps part of the reason why there is an impasse in the budget process in Nyeri County is because we do not have this forum in place. You will notice that since the governor came into office, there has been no attempt to constitute this forum.

Mr. Speaker, Sir, that obligation is on him personally. What you will notice is a letter at page 496 of Vol. No. 3 of the assembly documents which is a letter dated 10<sup>th</sup> March, 2015 signed by the Chief Officer for Economic Planning. He is acknowledging that there was a complaint by the assembly with respect to failure to constitute this forum. This is what the Chief Officer is telling the assembly; that within a period of 30 days, the County Budget and Economic Forum will be appointed to perform their responsibilities as envisaged under the above section. That remains a statement of intent. So, since 2015, 30 days have lapsed, no forum, no obligation, a direct obligation on the office of the governor's personal responsibility. There is a direct nexus. Someone has violated the law and has not tendered any explanation for not doing that.

Mr. Speaker, Sir, on charge A; particular No. 8 on Volume Nos. 1 and 2 on undermining the legislative authority of the county assembly which is a contravention of Article 185 of the Constitution. The documents in support of the particulars of that charge will be found at page 500-680 of Vol. No. 3 of the Assembly documents. The county assembly approves budget estimates in line with the Constitution. There has been this thinking that it is the executive that should approve what they have proposed. The only rider when it comes to the budget making process and the power conferred on the assembly by the Constitution is to ensure that the approval is done in line with Article 201 of the Constitution.

Recently, I know there were guidelines that were set out that you can only adjust to the extent of one per cent. That is back door way of taking away the legislative authority and independence of the assembly. The assembly approved the estimates, forwarded them to the executive with amendments. What was done, instead of forwarding the Appropriation Bill, a purported memorandum was sent detailing protest and things that the office of the governor felt they were unhappy about. Nothing was done. The Bill was not initiated. Now, there is a stalemate engineered by the executive and blamed on the assembly. The assembly cannot be blamed for discharging their mandate under the Constitution and under the County Governments Act in as far as the budget making process is concerned. The executive failed to initiate the Appropriation Bill and say we have a stalemate; we do not have resources to implement. Then who has caused that state of affairs? It is the executive headed by the county governor.

Mr. Speaker, Sir, the frustration that we are talking about in as far as the legislative function of the assembly is concerned, is because until today, we do not have the Appropriation Bill sent by the executive to the assembly for consideration. Without that, there cannot be any appropriation. That is a gross dereliction of duty. What should have happened is for that Bill to be initiated. If the governor is unhappy with the recommendation of the assembly after the Appropriation Bill has been sent, then he would send a memorandum. Now, we have a memorandum that has been sent even before the Appropriation Bill has been sent.

Mr. Speaker, Sir, that is a frustration of the legislative function of the assembly. There has also been failure to assent to Bills; again, a gross violation of Section 30 (2) (g) of the County Governments Act, 2012. I want to bring this into perspective. When I heard the opening statement, there was this submission that a Bill can self-assent itself. But it is important for us to appreciate this very sacrosanct obligation on the part of the Governor to assent. If it was the intention of Parliament when it was passing that Act, to have a Bill self-assent itself, then it would have done away with the obligation of the President or the Governor, in this case, to assent to a Bill. We have more or less seven Bills: The Nyeri County Co-operative Societies Bill, the County Tea Cess Bill and many more.

They have been forwarded to the Governor and they have not been assented to. The Governor is not even concerned that there is a requirement under Section 24 of the County Governments Act to at least send memorandum detailing that, probably, I have concerns with section one, two, and three or with the entirety of this Bill. Nothing is done. You will notice that the requirement to assent is mandatory. So, he does not assent; neither does he register his protest with that Bill by sending a memorandum. That frustrates the legislative agenda because it shows you the attitude of the Governor

towards that legislative function of the Assembly. It really does not matter, because, at the end of the day, it will self-assent itself.

You will realize the implementation of this Bill is vested on the Executive so the moment the Governor does not assent or return a memorandum, it means that the implementation of that Bill is almost zero because he is not happy with it. However, he is not even polite enough to address an institution like the County Assembly and tell them this is why I have this problem. You will notice that the obligation is mandatory. Therefore, failure to assent to these Bills without any good reason at all, is a gross violation of the law under Section 24 and Section 30(2)(g) of the County Governments Act.

Under (B) which is violation of the Law, of the charges, we have set out various Articles of the Constitution. That is (B)(i) on Vol.1 and Vol.2. I just want to flip through a bit quickly because of time. We have (B)(i)-(v) in Vol.1 and Vol.2 of the County Assembly document where we have, for instance, contravention of Section 19 of the Employment Act. This is where you have the County Executive headed by the County Governor failing to make remittances to statutory bodies such as NHIF and NSSF. This is a very basic administrative obligation of the County Executive.

Under Section 109(4)(b) which we are saying there has been a gross violation, when there has been delay in remittances of salaries to members of the County Assembly for no good reason. It cannot be that the County Executive can bring about a stalemate situation and say that funds have not been made available and that is why we have to delay your salaries. That would be blackmail because the moment independent organs are now held at the mercy or are made to operate at the mercy of the County Executive; it means you will be told that unless you approve this, you will go without salaries. If that is to be allowed to happen, then the legislative mandate and the independence of the County Assembly to oversight the County Executive in management of County resources will be watered down. That is a gross violation of Section 109(4)(b) of the PFM Act.

There has also been a gross violation of Section 30(2)(i) of County Governments Act that requires that the County Governor shall set out all the responsibilities, the duties and the functions of the various holders of the County Executive Committee offices. That is very important. We need to know who is in charge of what function and there is a direct obligation on the office of the Governor to do that under Section 30(2)(i) of the County Governments Act. That has never been done to date.

There has also been a gross violation of Section 48(1)(b) of the County Governments Act where you have creation of additional sub-counties within Nyeri without the approval of the County Assembly. Section 48 is very clear that when it comes to sub-counties, they will be in terms of constituencies within that county. That is the first guideline. We have six constituencies within Nyeri County, but eight sub-counties. These two additional sub-counties have no approval whatsoever sought from the County Assembly. These sub-counties are themselves in contravention of the County Governments Act. We have to also put this into perspective because the running of these extra sub-counties requires resources. These resources come from the allocation from the taxpayers' money. Therefore, the moment that you now violate and create a sub-county, probably, because of some political consideration, then that cannot be allowed to happen. This is because it violates the law and it is an imprudent use of resources that are charged to the County Executive by law.

Mr. Speaker, Sir, another violation is with respect to the composition of the County Executive Committee (CEC). I just want to invite you, Mr. Speaker, Sir, and the Hon. Senators to Vol. III of the Assembly document where we have the composition of the CEC. This is found on page 720 of the big document. If you look at page 720, you will find the composition of the CEC. One of the things that will strike you is that we have an acting Executive Member for Finance and Economic Planning, a Dr. Charles G. Githinji who is also the substantive CEC of Health Services. One of the interesting things is that Dr. Charles G. Githinji has been acting in the portfolio of Finance and Economic Planning for a year and four months. So he is the substantive in Health Services and he is also acting in Finance. Then we have a Robert Thuo Mwangi who is the substantive of Agriculture and Livestock and acting in Energy. You will also find that there is another acting Member of CEC for Roads. Out of ten portfolios, there are three who are acting and they are also holding substantive positions.

The requirement of the law when it comes to appointment is that the Governor will nominate the CEC members and seek the approval of the Assembly. The moment you have acting appointments, two things will happen. One, you circumvent the requirement of the County Assembly to approve. Secondly, you will get persons who will be acting in those positions, who will not be independent. This is because they know that at the end of the day, if they do not do things that go down well with the appointing authority, they will not be confirmed in those positions.

When we now complain about the mismanagement of resources, as has been set out by my learned friend, it is because we have persons in those positions who are acting. They have been acting for the last one year and a few months. It is not that they have a temporary acting position of three months or less, and for good reasons. No attempt whatsoever has been made by the governor to fill those positions substantively. That is a clear violation of the law, when it comes to appointment of county executive committee members.

Hon. Senators, when it comes to gender, out of those ten, 90 per cent are of the same gender. There is only one female in charge of special programmes, youth and sports. Again, it does not comply with the gender parity requirements of the Constitution; a gross violation. It cannot be that this is an oversight when we have 90 per cent of the same gender and only 10 per cent of the other gender.

When you turn over to page 721, you will actually find that all chief officers within the Nyeri County Government are in an acting capacity. According to the Governor the requirement to get the approval of the assembly to appoint was just for jest; it was just to find its place in our laws. According to him it does not make sense. Therefore, we have these acting appointments and no reason has been given. When we have these acting persons then no wonder we have the litany of transgressions and violation of the law. Since we have persons who are not in those positions substantively, they are, therefore, only answerable to one person. I am told that when some of these people are summoned by the assembly, it only requires a phone call for them to leave a meeting.

When you are not in office substantively, it means that you will even be removed without any due process. How can an acting appointment go on for a year, plus? Surely, whichever way we look at it, it is an extremely gross violation of the law. What is even worse is that the obligation to fill these positions substantively is on the governor. We

have not been told that the governor has in the past initiated the process of nominating and his nominees have been rejected by the assembly. They can be, but we have not even seen attempts to fill these positions substantively.

Mr. Speaker, Sir, Violation 'C' is on abuse of office. The governor has made several irregular appointments in the county as follows: The current acting secretary has been appointed in contravention of Section 44 and 64 of the County Governments Act. What is even worse is that besides this person being in an acting capacity, she also does not meet the academic qualifications of a substantive holder. Whereas our laws, under Section 64 of the County Governments Act, contemplate that you can have an appointment in an acting capacity, that person, first, must have the academic qualifications of a substantive holder. Secondly, the acting appointment must be for a limited period of time. What we have in the case of the County Government of Nyeri is that the current acting county secretary is unqualified because she does not meet the ten years' experience in matters of management or administration.

Secondly, she has not been appointed to act in that position for a defined period of time. Therefore, we have a very important officer who heads the county public service and is acting. Since she has not been told until when she will act, she can act until the next elections. What that does is again to deny the assembly its legislative function when it comes to vetting and confirmation of those persons in office. That is deliberate and designed to deny the county assembly its functions, and it is a gross violation of the law.

I will invite you, Hon. Senators, when you retire to consider this matter, to look at all the documents we have attached from page 695 to 714 of the assembly's document Vol. III. Page 712 constitutes a report of the assembly on the matter of the county secretary. This matter became the subject of consideration by the legal affairs committee of the assembly through a report that you will find from page 696 all the way to page 714. I will just scheme through the recommendation at page 712, paragraph 4.0.

"From the foregoing the committee made the following recommendations:-

(1) That the acting county secretary is unsuitable to hold the said position. Alice Njamiu Wachira should vacate the office forthwith and competitive sourcing be commenced by the lawful appointing authority immediately."

This is a report for June 2016.

(2) "That pending the competitive sourcing of a qualified county secretary, a qualified and competent person be appointed to act in the office of county secretary for a period not exceeding three months."

Therefore, the county assembly appreciates that there might be situations where an acting appointment is feasible, but it must be limited to a certain period.

(3) "That a qualified person be lawfully and urgently appointed by the lawful authority to the position of county secretary within three months."

Until today, the recommendation to have the acting county secretary leave office has not been implemented. The only person in law who has the power to implement that is the county governor, because he is the appointing authority when it comes to the holder of the office of county secretary. Nothing has been done. Therefore, we have a governor who has no regard to institutions. He has no regard to recommendations made by lawful organs. He can do whatever he can; *mta-do?*

*(Laughter)*

I beg your pardon. In the fullness of time, when you interact with the attitude of such an officer, then you begin to understand why Nyeri County is facing the sort of problems that have brought us before this honourable Senate this afternoon. That clearly is a gross violation.

Again on abuse of office and gross misconduct, at the moment we have a county public service board with an acting chairperson and secretary. There have been complaints about unfairness when it comes to appointments to public service offices. When you have an acting chairperson and acting secretary of a board, one, it contravenes Section 58 of the County Governments Act. This is because the obligation to make sure that we have a substantive chairperson and secretary is on the appointing authority, who shall nominate and forward these names to the Assembly. The Assembly cannot initiate the process of appointment.

The moment the Governor deliberately fails to initiate this process, two things are bound to happen. One, you will have persons who will be recruited, who more often than not, will not even be suitable to serve in those offices. This is because you have the members of the board acting on behalf of the Governor to fill in those positions on behalf of the Governor. If you do not do that – remember you are acting – I can always decide that it is the end of the road for you and I can get someone else to replace you. When that happens, you have person who are not qualified to serve and who will continue drawing salaries from public coffers when they do not merit. Now, that is a gross violation.

As I wind up probably in the next five minutes, you have ---

**The Speaker** (Hon. Ethuro): Order, counsel! You may wish to remember that you have a witness. Unless you have dispensed with him, all that has to be within your time. I think you have about two minutes.

**Mr. George Ng'ang'a:** Mr. Speaker, Sir, thank you for your guidance. From the programme, there is the presentation of the case for two hours and then cross-examination of the witness. The witness will simply just adopt and we will hand him over for cross-examination. So, I thought we are still within.

**The Speaker** (Hon. Ethuro): That adoption has to be done within the two hours. So, you may wish to just do it towards the very end. Cross examination is from the Floor and the counsel.

**Mr. George Ng'ang'a:** Mr. Speaker, Sir, this is the last point that I am making on the gross violation of Section 35(1)(2) of the County Governments Act. This is on the appointment of the chief officers. Hon. Senators, as you have noticed, all the chief officers are in an acting capacity. I have made reference to page 721 of Volume III; Acting CEC Finance, Acting CEC Public Administration, Acting CEC trade, land and roads officers and Acting county secretary. Our submission is that when you create that state of affairs, which has been created by none other than the Governor, then you grossly violate section 35(1)(2). By doing so, you deprive the County Assembly.

**The Speaker** (Hon. Ethuro): What is it, Sen. (Dr.) Khalwale?

**Sen. (Dr.) Khalwale:** On a point of order, Mr. Speaker, Sir. To my mind, this eloquent prosecution of the case is going a long way in making it easy for many of us to be seized of the mater. Could I request that under Standing Order No.1, you allow the prosecution an extra five minutes?



**The Speaker** (Hon. Ethuro): Order, Members! We are not going to converse. We had the opportunity to agree on these timelines. In fact, when you are more eloquent, the easier for the understanding of the Members. Just deal with the matter within two hours. My job here is to enforce the time limit.

**Mr. George Ng'ang'a:** Mr. Speaker, Sir, this state of affairs of creating acting appointments contravenes very grossly, Section 35(1)(2) of the County Governments Act on the procedure for appointment of chief officers. These chief officers are the accounting officers and Principal Secretaries (PSs) within the county. So, when you have accounting officers who are acting, then quite substantially, their independence is eroded and they will always pander to the whims of the appointing authority. That undermines devolution in a very big way because then, you will not have prudent management of resources. The totality of that evidence is that we have shown that the obligation lies squarely on the Governor and there is a nexus. Who else nominates and fills this position? A nexus, direct! The threshold is there. What justification can there be that there cannot be anyone within Nyeri County who would merit a substantive appointment? That is an insult. It cannot be, with tremendous respect.

At this point, I request that we have the one and only witness whose work will only be limited to adopting what we have presented. We will then hand him over to cross-examination to the counsel of the Governor.

Thank you.

**The Speaker** (Hon. Ethuro): Well! Your learned friend had indicated that he can recognise the traffic lights before him. If it is just a matter of presentation, you can do it within the yellow lights.

**Mr. George Ng'ang'a:** Mr. Speaker, Sir. I am well guided.

*(The Speaker consulted with Sen. (Prof.) Kindiki and Sen. Wetangula)*

**The Speaker** (Hon. Ethuro): Proceed.

**Mr. Charles Njenga:** Mr. Speaker, Sir, and Hon. Members, the witness statement of our witness is found in the County Assembly documents, volumes I and II, the ones in blue. It is not paginated. It is a two page folder that is not paginated but it is the last document. That is the witness statement of Hon. Baragu Mutahi.

**The Speaker** (Hon. Ethuro): Hon. Members, he is referring to volumes I and II of the very last document. That should be easy to find on the County Assembly documents.

Proceed, Counsel.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I wish that the witness be given a copy so that he can adopt it for the record.

The witness can introduce himself before this honourable House and take the oath.

*(The Witness for the County Assembly, Hon. Baragu Mutahi,  
introduced himself and took the oath)*

**Mr. George Baragu Mutahi:** Mr. Speaker, Sir, my name is George Baragu Mutahi.

**Mr. Charles Njenga:** Mr. Mutahi, what do you do for a living?

**Mr. George Baragu Mutahi:** Mr. Speaker, Sir, I am a Member of the County Assembly of Nyeri County representing Kiganjo/Matare Ward. I am also the chairperson of the Public Accounts Committee.

**Mr. Charles Njenga:** With regard to this matter, do you have the document written "Witness statement of Hon. Baragu Mutahi?"

**Mr. George Baragu Mutahi:** Mr. Speaker, Sir, yes, I have.

**Mr. Charles Njenga:** I want you to confirm that, it is your witness statement and that you signed it.

**Mr. George Baragu Mutahi:** Mr. Speaker, Sir, yes, it is.

**Mr. Charles Njenga:** Do you wish to adopt that particular statement for its use as your evidence before the Senate?

**Mr. George Baragu Mutahi:** Mr. Speaker, Sir, I do.

**Mr. Charles Njenga:** Mr. Speaker, Sir, we wish to avail the witness for any cross-examination based on the statement and our documents that may be directed to the witness. He was the Mover of the Motion at the County Assembly. His position with regard to this matter is that, he is the one who initiated the Motion and prosecuted it at the County Assembly.

**The Speaker** (Hon. Ethuro): Order, Members. The next bit is cross-examination of the witness. Kindly make use of the equipment before you to make your request to cross-examine the witness.

**Mr. Peter Wanyama:** My name is Peter Wanyama and I am the counsel for the Governor. Mr. George Baragu, what qualification do you have? Do you have a degree or a diploma?

**Mr. George Baragu Mutahi:** Mr. Speaker, Sir, I have a Diploma and I am pursuing a Bachelor of Arts Degree.

**Mr. Peter Wanyama:** Any specific qualifications in public finance?

**Mr. George Baragu Mutahi** (Witness): Mr. Speaker, Sir, no qualifications but I have been doing---

**Mr. Peter Wanyama:** Do you have any qualification in public finance?

**Mr. George Baragu Mutahi :** Mr. Speaker, Sir, I do not have but I have been doing---

**The Speaker** (Hon. Ethuro): Members, in order to help the Chair to allocate the time, kindly put your requests if you intend to cross-examine the witness. I will balance the time between the counsel and the Members.

**Sen. Orengo:** On a point of order, Mr. Speaker, Sir. In regard to what you have just said, the witness statement the way it appears is just a broad statement. It is not even evidence the way I look at it. The problem is that you will have to tell us whether we are free to ask the witness the questions on behalf of the county assembly. I doubt whether they should be in a position to answer questions on behalf of the county assembly. Are the counsels who appeared for the assembly the ones to answer questions on behalf of the county assembly? If they answer, will that be evidence or commentary? It is important that it is put on record.

**Sen. Murkomen:** On a point of order, Mr. Speaker, Sir. I second the position raised by Sen. Orengo. The statement sworn by the Member of the County Assembly who is now a witness, is so broad that we have to make a determination whether he is the

person to answer questions on and on behalf of all the county assembly in term of the documents that are before us before one can determine how many questions we will ask.

Having been in this process in the past with Sen. (Dr.) Khalwale who was my chair then, it was the witness statements that we received that were concise. We could identify that a particular witness was supporting particular evidence. On this one, we have been told that the witness is a County Assembly Member and was the Mover of the Motion. The door has been opened for us to ask anything and everything.

Mr. Speaker, Sir, you have to guide us if we have to cross-examine. I do not know what the counsel will do about him because we need to know exactly what the property value of the document that he has sworn.

**Sen. Sang:** Mr. Speaker, Sir, while the same concerns raised by Sen. Murkomen and Sen. Orendo are valid, if you look at the sworn statement by the Honourable Member under paragraph six it reads:-

“I hereby adopt the evidence before the Senate, the contents of the Notice of Motion and Motion that was adopted by the county assembly.”

Mr. Speaker, Sir, this suggests that the witness seems to own the entire proceedings of the Senate. Therefore, we will cross-examine him on the basis of the entirety of the contents of the allegations. We need that confirmation from the counsels so that we deal with it at that level.

**The Speaker** (Hon. Ethuro): Order, Sen. Sang. That is the more reason that you have that opportunity to cross-examine. So, that is not a point of order.

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, Mr. John Baragu Mutahi, is leading us through the charges. So, we should not be seen to put pressure on him on any specific charge beyond the mere fact that he should clarify areas that might be unclear to us in a specific charge. To me, the person to be put to task will be the Governor and the witnesses he will bring when he will be responding to charges.

**The Speaker** (Hon. Ethuro): There are points of orders from Sen. Wamatangi and Sen. (Dr.) Machage.

**Sen. Wamatangi:** On a point of order, Mr. Speaker, Sir. To be certain whether the questions we will pose to the witness are restricted to only what we see as the broader view of the matter at hand or are we going to ask questions specific to what the counsel has said?

As you have noticed, there were many times when I wanted to seek clarifications on various issues. I think it is important that it comes out that on matters which have already been prosecuted by the counsel and requires clarifications, should we pose them at this time to this witness? How will they be dealt with by the counsels?

**The Speaker** (Hon. Ethuro): Sen. Machage.

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, my name is Sen. (Dr.) Machage.

*(Laughter)*

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, I am worried of the comment made by Sen. (Dr.) Khalwale that the onus to prove he accusations should be shifted to the accused. In the justice system of this country, the accused does not hold that responsibility. It is always the accuser who has that onus.

**The Speaker** (Hon. Ethuro): My apologies Sen. (Dr.) Machage, what was your issue?

**Sen. (Dr.) Machage:** Mr. Speaker Sir, whereas it is difficult to rewind what you said like a tape recorder, but I will attempt. I was worried about the comment by Sen. (Dr.) Khalwale that the onus of proof of accusation should be shifted to the accused.

**Sen. (Dr.) Khalwale:** Those are his own words. I never used those words.

**The Speaker** (Hon. Ethuro): Order, Sen. (Dr.) Khalwale!

**Sen. (Dr.) Machage:** Mr. Speaker, Sir, thank you for the protection. That responsibility lies on the accuser and not the accused.

**The Speaker** (Hon. Ethuro): Order! By the way, Sen. (Dr.) Machage, when Members make points of order, it is their views and opinions, it is not a determination. A Member should not feel under compulsion to respond to them, but you can always make your intervention in order to make the Chair dispose the various points of order. So, do not blame another Member, you just put another perspective. On that basis before I dispose this matter I am wondering whether the counsel to the County Assembly has something to say after hearing all those interventions by the Members.

**Mr. Charles Njenga:** Thank you, Mr. Speaker, Sir, together with Honourable Members of the Senate. Sen. Sang's point of order or clarification captures our thinking and our position that we needed not reiterate word for word the entire contents of the Motion again together with the arguments. The witness has adopted all these documents in the Motion as his evidence---

*(Loud consultations)*

**The Speaker** (Hon. Ethuro): Order, Senators! When you feel so aggrieved, I can always ask him to repeat. We do not have to be so aggrieved to the extent we are breaching our own Standing Orders.

**Mr. Charles Njenga:** Mr. Speaker Sir, I was saying that the contribution by Sen. Sang captures our position in the matter that we did not need to reiterate word for word the contents of the notice of Motion and the reference to the documentation in support of the Motion. However, the witness has adopted or accepted or owned the entirety of the Motion and the documents and any questions on the factual position espoused in these documents can be posed to him. We shall make, as counsel, commentaries on the legal position that may require some clarification or that may require further submission from our end.

**The Speaker** (Hon. Ethuro): What is it, Sen. Murkomen? I thought we should just dispose the matter?

**Sen. Murkomen:** Mr. Speaker Sir, the senior counsel, Sen. Orengo and Sen. Wako, will help me here. If that is the case that this witness is going to be there to answer all questions related to the case that have been put forward by the lawyers, how then should we proceed? If we cross-examine him at the moment, we are going to do partly work, maybe do the case of the Governor first at the moment. If we were going to deal with it later after the Governor has done his case, it becomes now easy for us to seek the clarification. If we do it before hand, before the Governor does his case, to the best of my knowledge, at the moment, considering that the lawyer is saying he is answering everything related to what was presented, means that we will preempt at some instance

the case of the Governor which may appear to be that in some instance, we are assisting the Governor. Would it then be better for us if we are going to ask clarifications as Senators to postpone that after the Governor has done his case because that witness will still be around to deal with that matter? That is just out of an observation. Thank you.

**The Speaker** (Hon. Ethuro): Order! Order, Members! I wish you were patient enough to hear how I will dispose the matter then you can react because my ruling could have satisfied you.

I therefore rule on the following basis: For better clarity, the cross-examination of the witness will be done at this stage by the Counsel for Gov. Nderitu Gachagua. First, this is an affidavit by the witness, so we were opening this session of the affidavit for the defense and the rest of you including what Sen. Sang has captured for those kinds of clarifications. To avoid any doubts, let us stick to the cross-examination by the defense side. Then after that you have re-examination, if you look at the programme. That will be done by the Counsel for the County Assembly. Then (d) which is clarification and questions by Senators, then we will restrict both. Actually the issues are there because the witness is for the County Assembly, so whatever issues we will be directing to the County Assembly. It is up to the County Assembly to decide who will answer them.”

So, that is the way we should proceed. Sen. (Dr.) Machage.

**Sen. (Dr. Machage):** Mr. Speaker Sir, will I be order to seek your guidance on clarification on the status of this document because you have just alluded to it being an affidavit? Is an affidavit similar to a statement? If that is so, please, tell us.

**The Speaker** (Hon. Ethuro): Let us say it is a statement which is signed and the owner is here. The author is physically present.

**Sen. Orengo:** Mr. Speaker Sir, since this is a *quasi-judicial* body, I would urge you that the witness do not just adopt the statement. This is because we are taking a very serious action on the power that we have been supplied with documents and some of them are not authored by the County Assembly. They are relying on, for example, documents which have been written by contractors. We do not know whether those contractors could admit that indeed those are their letters. There are a lot of documents which are not primary documents in this bundle. Therefore, the only alternative for the witness to take is if he is going to help us in this process; he is not just to say that he adopts the evidence, he has to declare that he adopts the Witness Statements as the truth having been sworn, not just to adopt the witness in general terms but adopt---

**The Speaker** (Hon. Ethuro): Order! Order, Sen. Orengo! If you read paragraph 6 which Sen. Sang cited, “I hereby adopt in my evidence before the Senate.”

**Sen. Orengo:** Mr. Speaker Sir, That is not good enough.

**The Speaker** (Hon. Ethuro): (7): “I make this Statement in support of the said resolution of the County Assembly.”

**Sen. Orengo:** Mr. Speaker Sir, That is not even good enough because it should have been a declaration under the Oaths and Statutes Declaration Act; something which he can be pinned down on because we do not want a situation where evidence which is being given before the Senate can be recanted. He should recant it knowing that there would be consequences. Unfortunately, I would have taken a very different position as Sen. Murkomen did indicate. We have been used to calling witnesses. For example, in this Volume we would have said okay you have given us your evidence but we are going

to call these individual witnesses including the Auditor General so that the statements then would be collaborated.

As it stands now, it will be very difficult for me as long as this is a *quasi-judicial* body to take a bundle of documents which are not authenticated, they are just photocopies. We have presented photocopies before you here and you have told us that you need to look at them before you can allow us to produce them. Today we have here and in the morning even before we could read it, they were allowed to go through it without authentication. So, all I am asking is that you should not just adopt the statement but he should declare that what is contained in that statement is the truth, the whole truth and nothing but the truth, so that we can hold him to account.

**Sen. Mutula Kilonzo Jnr.:** On a point of order, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): What is it Sen. Mutula Kilonzo Jnr.?

**Sen. Mutula Kilonzo Jnr.:** Mr. Speaker, Sir, I would like you to clarify one little thing. I have been watching Senators scribbling a lot of questions. Although our order suggests that we will be seeking clarifications, in actual sense, the Senators will cross-examine the witness. Ideally, in Law, the re-examination should come after the cross-examination. Where it reads 're-examination and then clarifications,' you ought to change it, so that the re-examination can come after the questions have been asked. The questions here are actually cross-examination.

**The Speaker** (Hon. Ethuro): Finally, Sen. Wetangula.

**The Senate Minority Leader** (Sen. Wetangula): Mr. Speaker, Sir, we find ourselves in this little mix because we put a little pressure on the lawyers for the assembly to move faster than they intended. We did not give them an opportunity to lead the witness in the normal manner and place evidence on record. They could have even shown the witness these volumes and asked him whether they are the documents they collected and placed before the assembly, and whether they are the documents they want the Senate to rely on, so that they are properly introduced as evidence before we come in.

Secondly, the right procedure is that, although we are both investigators and jurors in these proceedings, the primary responsibility lies with the two parties. Evidence is led from the witness in a manner that the counsel wishes to. Then, it is up to the ability of the lawyer for the governor to exhaustively cross-examine the witness on any material particulars that have been placed on record. Then we, as the jurors, can come in to seek clarification and ask questions where necessary, but not to appear to be the ones prosecuting or defending the case. If we did that it would be good. Therefore, I want to implore you to ask the lawyers whether they need time to lead the witness properly, so that we can have things properly on record, for us to proceed thereafter.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, as the governor's side, I think we have a right to be heard and express ourselves on these issues. With your permission, I will proceed to express ourselves on these issues.

*(Sen. Wamatangi consulted loudly)*

**The Speaker** (Hon. Ethuro): Sen. Wamatangi, let me hear you.

**Sen. Wamatangi:** Mr. Speaker, Sir, although we already have our procedure documented, in light of these developments and for the sake of ensuring that we go through a process that will live up to the intended integrity, would I be in order to suggest that where it becomes necessary we extend or expand the programme to accommodate

the required procedures? I entirely agree with what Sen. Wetangula has said; that we should follow a procedure that will be exhaustive, but also lead, as they say in Law, to justice being seen to have been done.

**The Speaker** (Hon. Ethuro): The more we make interventions the more they come.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, with your permission, we have a right---

**The Speaker** (Hon. Ethuro): Order, Counsel. I have not disposed of your matter; it is still being canvassed. Just relax. You may even wish to assume your seat and listen to the Members.

*(Laughter)*

Sen. Bule.

**Sen. Bule:** Mr. Speaker, Sir, the issue we are dealing with today is weighty. It is of public interest that we have to give time. We need to hear each and every person who is in this Senate. We need to extend the time allocated so that everybody can be heard. We could take two or three days, but we want Kenyans to know that the Senate is a serious House that wants them to get their rights.

Thank you, Mr. Speaker, Sir.

**Sen. Wangari:** Mr. Speaker, Sir, I want to add my voice on these issues. First of all, we are a House of records and precedent. Having sat in one of such Committees, I would take a different view in terms of Sen. Wetangula's presentations. In the programme; the presentation of the case of the county assembly, (a) sets out clearly that it is the presentation of the case of the county assembly including presentation of witnesses, if any.

I am not a lawyer but the way someone presents their witnesses is a personal issue. The Counsels for the county assembly have said clearly that they do not intend---

**The Speaker** (Hon. Ethuro): Sen. Wangari, I am sure you mean something else.

**Sen. Wangari:** Mr. Speaker, Sir, it is a methodology that can be adopted at a personal level by the prosecution. The Counsels for the county assembly have said clearly that they do not intend to actually lead the witness. In fact, they offered and volunteered that they would just want them to adopt. Personally, I think it is a methodology that anyone can adopt.

If we tell them to lead the witness, then, we will be doing the prosecution for them. Let us go your way; we should not tell them to lead the witness. Let us go with what they have presented, but do the clarifications after we hear the side of the governor.

**The Speaker** (Hon. Ethuro): Finally, Sen. (Prof.) Kindiki.

**The Senate Majority Leader** (Sen. (Prof) Kindiki): Mr. Speaker, Sir, one of the cardinal principles of natural justice is the rule against bias and the right to be heard. For that reason and given the extraordinary role that this House is playing this afternoon, I support the view of more flexibility and more time, so that the assembly can properly lay their case and prosecute it, considering that they only have one witness. That is the silver bullet that they have. The Senate should not entertain a situation where we look like we must help them make the case or we are in a hurry.

In particular, I am afraid that the statement that has been presented here is not even adequate. I hope they can be given as much time as possible to make the best out of

their witness. This should be the case when the time comes for the governor. Otherwise, as we say in natural justice, justice must not only be done, but must be seen to be done. The people of Kenya want to see how this Senate is handling both parties. We should not make a quick decision that can be contemptuously ridiculed by those who will come after us and people who are strangers to this House.

**The Speaker** (Hon. Ethuro): Order, Members. I am afraid that the Senate Majority Leader is trying to do an overkill. The matters before us are very simple. The county assembly has not asked for more time. They have all operated under the time given. In fact, they did not even conclude that time. They have only one witness whom they have presented. They do not even want that witness to do much, except for the statement the witness has made.

To agree, to some extent, with the Senate Majority Leader in terms of fairness, and to agree with Sen. Wangari, it is not our business to aid them. It is up to them to do the business the way they wish to. That leaves an opportunity for the other side to poke holes into that manner. It is not our business.

My direction will remain the same for the sake of clarity. While we had anticipated that the Senators might also wish to cross-examine the witness because this was the only opportunity for the witness to make the intervention and be dispensed with. In order to avoid the evident confusion, therefore, I direct that the witness of the County Assembly will be cross-examined by the Governor's side and then the County Assembly will examine its own witness so that we dispense with that side of things first.

Secondly, we have the final opportunity as the Senators to dispose of the matter. We, as Senators, cannot cross-examine the witnesses. Today was the day for the County Assembly. Hon. Senators, your input will be to deal with all those issues that the County Assembly has given us, including what the witness may have decided or will decide on how best to respond on them.

Finally, on the issue of admissibility of the documents and the rest, my understanding is that, one, we are at the appellate stage in this process. Basically, there is an act of faith in terms of what the County Assembly is bringing to us. They could as well have brought nothing. It is for us to say these allegations are not substantiated and that is why we have the issue of substantiation of allegations. The moment in which they bring the stuff is what forms the basis of your decision and your interrogation of the matter. It is not up to us to try to help them. I think that clarifies the issues that were brought.

In terms of time, I repeat that it is we who are looking for time that is not there. I have already gazetted Thursday, just in case we ran out of time for the two days we have proposed. There is plenty of time and so far we are operating within the suggested timeframe. Whenever you make interventions and points of order, which we are not encouraging, we do not count that time in terms of the proceedings. So, that already takes into account the time allocated for this business.

That is clear enough. Definitely in my Communication, I appreciated the rules of natural justice and that everybody will have a fair hearing. That is on record.

**Sen. Wako:** On a point of order, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): Order, Sen. Wako! You run the risk of abusing privilege knowing that with your reputation we cannot deny you. Proceed.



**Sen. Wako:** Mr. Speaker, Sir, I support your ruling. However, in furtherance of that ruling, I would request that if the witness is going to be examined, he has to be examined on evidence because we only examine on evidence which is before us. So far, we have only heard submissions by the counsel which may not, in themselves be evidence. Therefore, in this affidavit, some of the first questions that must be asked is that the witness should, not only just adopt what is before us, but he should state that he is aware of the contents, has personal knowledge of the contents. Where he does not have personal knowledge of the contents, he has to state that he is aware to the best of the knowledge that he has, and he truly believes that it is true. In other words, it should go beyond adoption and say, "that is my evidence, and I truly believe in it." This is so that it can now be the basis for cross-examination.

**Sen. Boi Juma Boi:** Hoja ya nidhamu, Bw. Spika.

**The Speaker** (Hon. Ethuro: What is it, Sen. Boy?

**Sen. Boy Juma Boy:** Bw. Spika, ulikuwa umeshatoa uamuzi ya kwamba haitakuwa kazi yetu kuwasaidia washtaki. Nidhamu anayorejelea tena Sen. Wako anapinga amri ile ile uliyokwishatoa ya kwamba mshtaki aachwe aendelee na kesi yake na sisi kazi yetu ni kusikia. Baada ya kumpa mwanya sen.wako anarejelea kulekule ambako wewe tayari umeshatoa uamuzi. Je, hii ni sawa?

*(Loud consultations)*

**The Speaker** (Hon. Ethuro): Nakubaliana nawe Sen.Boy Juma Boy. Uamuzi ni uleule nilliouoa. Sen.wako mwenyewe alikubaliana nao lakini anajaribu kupitia kwa njia ya kando. Njia ya mkato, kutumia mwanya kama ulivyosema.

Proceed, counsel.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, I will proceed with my cross-examination. Mr. George Baragu, in charge No.1, you said that the Governor cannot account for the sum of Kshs352,796,913 million. Are you aware how the IFMIS works?

**Hon. Baragu Mutahi.** Mr. Speaker, Sir, I am only aware of what was given as expenditure and what was accounted by the Executive.

**Mr. Peter Wanyama:** Do you know of IFMIS?

**Hon. Baragu Mutahi:** I know of that system, but I was not using it to get my judgment on this.

**Mr. Peter Wanyama:** Are you the Chairperson of the Public Account Committee (PAC)?

**Hon. Baragu Mutahi:** Yes, I am.

**Mr. Peter Wanyama:** How often do you engage with the County Executive Committee Member for Finance (CEC)? Do you write letters to him? Do you meet in his office to understand how financial operations are done at the county level?

**Hon. Baragu Mutahi:** Normally when there are queries, and they must be from the Auditor-General, we invite them for meetings.

**Mr. Peter Wanyama:** You invite them for meetings?

**Hon. Baragu Mutahi:** Yes, But I---

**Mr. Peter Wanyama:** Have you gotten to learn how they make payments within the county executive? Through that computer, have you gotten to learn?

**Hon. Baragu Mutahi:** I think the issue here is not the IFMIS---

**Mr. Peter Wanyama:** I am asking you a very simple question. Just answer it. If no, you say "no."

**Hon. Baragu Mutahi:** No!

**Mr. Peter Wanyama:** You have not gotten to learn how they run the system. On what basis do you say that this Kshs352,796,913million cannot be accounted for?

**Hon. Baragu Mutahi:** No! I have evidence to show that.

**Mr. Peter Wanyama:** Where is the evidence? Please, show me the evidence that this money cannot be accounted for.

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, if you allow me.

**The Speaker** (Hon. Ethuro): Proceed.

**Mr. Peter Wanyama:** Are you referring to the page 4 of Volume III of the County Assembly Document?

**Hon. Baragu Mutahi:** Wait, Mr. Counsel.

**Mr. Peter Wanyama:** I am assisting you. Is it Volume 3 of the County Assembly Document?

**Hon. Baragu Mutahi:** You know that when you assist me, you might take---

**The Speaker** (Hon. Ethuro): Order! Both of you! Counsel, be a bit patient.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, I am assisting the Senators also so that we are on the same page. We are making reference to Volume III of the County Assembly Document.

**The Speaker** (Hon. Ethuro): Order! When the Senators need your assistance, they will ask for it through me.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, thank you very much

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, I have a report here from the Executive that is on page 19.

**Mr. Peter Wanyama:** Page 19 of which document?

**Hon. Baragu Mutahi:** The Budget Implementation Status Report.

**Mr. Peter Wanyama:** You mean Page 4 of the County Assembly---

**Hon. Baragu Mutahi:** I am talking about Page19. That is where I am.

**The Speaker** (Hon. Ethuro): Of which volume, honourable?

**Hon. Baragu Mutahi:** The County Assembly Documents Volume III, Page 19

**The Speaker** (Hon. Ethuro): Proceed.

**Hon. Baragu Mutahi:** Annex 3 at the bottom of the page is about development expenditure by 30<sup>th</sup> June, 2016. The second last column is about the actual expenditure. Thereunder, we have the totals of Kshs1,161,269---

**The Speaker** (Hon. Ethuro): Just read the entire figures. You know these are figures.

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, we have the total amount of actual expenditure on projects on Page 25 of this document. When you add all the totals of the expenditure on projects, you get Kshs846,702,900. So, if you get the difference from the actual expenditure, you will get the Kshs352,976,913. That is simple and that is how we have done it and it is what we have from the executive.

**Mr. Peter Wanyama:** Let me ask you a simple question. The charge here is that this money was not disclosed or rather not accounted for. If you add this figure of Kshs846 million, Kshs702,000 and Kshs900,000 plus this amount which you claim has

not been disclosed of Kshs352,976,913, how much does it come to? If you add these two figures, how much does it come to?

**Hon. Baragu Mutahi:** You are talking of---

**Mr. Peter Wanyama:** There are two figures. The accusation is that the amount has not been disclosed and you are saying that Kshs352,976,913 is the amount specifically which has not been disclosed. You are saying that the only amount which was disclosed was Kshs846,702,900. Is that right?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** If you add these two figures, the amount you claim has not been disclosed and this amount which has actually been disclosed, how much does it come to? It comes to Kshs1,161,269,008. Right?

**Hon. Baragu Mutahi:** That is Kshs846,702,900 plus Kshs352,976,913

**Mr. Peter Wanyama:** Go to Page 19 of that document at the bottom corner. Do you see a figure there of Kshs1,161,269,008?

**Hon. Baragu Mutahi:** I can see it.

**Mr. Peter Wanyama:** Thank you very much.

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, the issue is not the addition of figures. It is about nondisclosure of monies approved by County Assembly. That is what we are arguing. They did not disclose Kshs352 million.

**Mr. Peter Wanyama:** Let me be specific. You are saying that Kshs352,976,913 has not been disclosed, right?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** You are saying that that amount has not been disclosed and the implication is that probably that money has gotten lost. Here I am reading to you a Budget Implementation Report, the same document where there is a figure of Kshs1,161,269,008 which you have admitted includes Kshs352 million. So, where is that aspect of nondisclosure?

**Sen. (Dr.) Khalwale:** On a point of order, Mr. Speaker, Sir. I would like Advocate Wanyama to help me. The charge here is that the amount of Kshs352 million was not disclosed and that it only happened after these proceedings were preferred against his client. So, why is he now shifting the responsibility of the witness to account for the Kshs352 million instead of just accepting that the disclosure was made or it was not made? The disclosure they made at the end ended up being done but it did not account for all the money. Could he help us on that?

**Mr. Peter Wanyama:** Mr. Speaker, Sir, I appreciate that comment. The basis of this cross-examination is that the County Assembly claims that Kshs352 million has not been disclosed. How they came to Kshs352 million is their own calculation. My basis is that this Kshs352 million is part of global figure which has been disclosed on Page 19 of that document. If you look at the end of the document on Page 19, you will see that there is Kshs1.1 billion which contains that amount which they say has been disclosed and the amount which has not been disclosed. So, that is the basis of that cross-examination.

Mr. Speaker, Sir, allow me to proceed because later, the CEC for Finance will explain this issue to the benefit of everybody here.

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, what I am saying regarding the issue of nondisclosure is that what has been disclosed by the county executive is only the

Kshs846,702,900 which went to the implementation of projects but Kshs352 million has not been disclosed and that is the question we are raising to the Governor.

**Mr. Peter Wanyama:** So, what are the components of Kshs1.1 billion?

**Hon. Baragu Mutahi:** It should contain the Kshs352 million but it is not there.

**Mr. Peter Wanyama:** Exactly, thank you very much.

**Hon. Baragu Mutahi:** The money is not there and it has not been disclosed. We have Kshs846,702,900 which was used for projects but what projects was Kshs352 million used for? That is the question. You did not disclose that and the Governor violated the law in this case.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, I will proceed.

**The Speaker** (Hon. Ethuro): Proceed.

**Mr. Peter Wanyama:** Now go to Page 63 of the same document if you may, please. That is the County Assembly Documents Volume III. It is the document containing the Controller of Budget's Report of 13<sup>th</sup> June, 2016.

**Hon. Baragu Mutahi:** Correct.

**Mr. Peter Wanyama:** My question here is very simple. Have you, as the County Assembly of Nyeri, asked the CEC for Finance or the Governor to explain this issue before? Have you done it before? This is a report dated 13<sup>th</sup> June, 2016 and those are three months ago.

**Hon. Baragu Mutahi:** This is a report from the Executive.

**Mr. Peter Wanyama:** I am asking this, before you drafted this Motion to do the impeachment, did you seek any comments from the CEC for Finance or the Governor on this issue to explain this thing you call discrepancies?

**Hon. Baragu Mutahi:** This is a report from the Executive. It is their report.

**Mr. Peter Wanyama:** It is the Controller of Budget's Report. From the heading, it is from the Office of the Controller of Budget then it came to your possession as the county assembly doing oversight. Did you summon the county executive to explain these discrepancies before bringing this impeachment Motion?

**Hon. Baragu Mutahi:** But how can you give a status report to me and then ask me to explain to me again?

**The Speaker** (Hon. Ethuro): Order, Honorable! That is a straight forward question. You either answer or you are declining to answer rather than saying the source of the report. The issue is not the source. Just repeat your question counsel.

**Mr. Peter Wanyama:** Thank you Mr. Speaker, Sir. The report from the controller of budget came to your possession and is dated 30<sup>th</sup> June, 2016. Before debating this impeachment motion on these particular issues, did you seek the comment of the governor or the CEC for Finance?

**Hon. Baragu Mutahi:** No, I did not.

**Mr. Peter Wanyama:** Thank you. On page 66 on the same bundle on Vol. No. 3 on the county assembly document, can you confirm who did this calculation for the record? Is it the County Executive?

**Hon. Baragu Mutahi:** This was our summary.

**Mr. Peter Wanyama:** The County Assembly summary?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** Thank you very much. Coming to page 74, we have the Controller of Budget report. As the chairperson of this important committee, do you

usually experience these challenges? Are these issues you are raising as impeachment issues, are they issues you interact with on a day to day basis as the chair of the committee?

**Hon. Baragu Mutahi:** No, these are gross matters, this time round.

**Mr. Peter Wanyama:** I am saying for instance, if the county executive has spend money at source, is it an issue that you would ordinarily write to the executive asking questions as the Chairperson of the Committee or summoning them before the committee?

**Hon. Baragu Mutahi:** It is not easy for the executive to reveal if they spend money from the source. So, it is not something that we have experienced.

**Mr. Peter Wanyama:** Again, have you summoned the CEC for Finance or the governor to explain these issues before the assembly?

**Hon. Baragu Mutahi:** You know, we have had history with the executive.

**Mr. Peter Wanyama:** You have powers under Section 145. Have you summoned?

**Hon. Baragu Mutahi:** Yes, we had summoned the executive sometimes back but he did not come.

**Mr. Peter Wanyama:** Do you remember when it was?

**Hon. Baragu Mutahi:** I do not have the dates but it should be last week but one. He did not turn up but he said he was busy going to the controller of budget office.

**Mr. Peter Wanyama:** After you have brought this Motion?

**Hon. Baragu Mutahi:** What I mean is that there was an invitation but we did not hold that meeting.

**Mr. Peter Wanyama:** But you summoned the CEC for Finance after you have brought his motion?

**Hon. Baragu Mutahi:** Not after the Motion. At that time, you could not have summoned the CEC after the motion.

**Mr. Peter Wanyama:** No, you said last week.

**Hon. Baragu Mutahi:** Before 2<sup>nd</sup> September, 2016.

**Mr. Peter Wanyama:** Not last week?

**Hon. Baragu Mutahi:** The important thing is that we had an invitation because there are letters.

**Mr. Peter Wanyama:** Do you have those letters before this Senate for records?

**Hon. Baragu Mutahi:** The letters are with the clerk.

**Mr. Peter Wanyama:** Thank you very much. Let us proceed on the issue of procurement.

**Hon. Baragu Mutahi:** That is on which page?

**Mr. Peter Wanyama:** The same bundle on page 79. Let me summarize the issue here; from the testimony, the county assembly received queries from contractors most of which you have annexed here from page 89-180. Right?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** What was the gist by these contractors? What were they saying, for the record?

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, this case arose when contractors were given tenders through word of mouth on roads. So, the county assembly came to know about the issue because it was raised by many contractors because they were not getting

their payments. So, the county assembly, after going through those issues decided to form an ad hoc Committee through a motion to investigate those cases of irregular procurement.

**Mr. Peter Wanyama:** Hold on there. I am just following that train. You said the county assembly committee investigated?

**Hon. Baragu Mutahi:** I did not say it investigated. I said an ad hoc committee was formed.

**Mr. Peter Wanyama:** To do what?

**Hon. Baragu Mutahi:** To investigate.

**Mr. Peter Wanyama:** Thank you very much. During the course of your investigations, did you summon the CEC responsible or the governor to explain these pending bills?

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, we summoned many of them and there are so many letters here.

**Mr. Peter Wanyama:** No, from the executives not from the---

**Hon. Baragu Mutahi:** We wrote asking the documents from the executive if the counsel can allow me and the efforts were completely frustrated. In the same week, the governor went ahead and formed a taskforce---

**Mr. Peter Wanyama:** We will come to that. I want us to go systematically so that we understand the efforts that you did. You said that the committee investigated these pending bills. What I am asking is; did you summon the County Executive?

**Hon. Baragu Mutahi:** We did not investigate. I said we formed the, committee but it was frustrated by the executive and we did not do our work because we were not given documents that we asked for from the executive and no executive could come and sit with us.

**Mr. Peter Wanyama:** So, you never investigated these allegations?

**Hon. Baragu Mutahi:** We did not investigate. During the course of that problem, the governor went ahead and formed a taskforce to regularize irregular procurement.

**Mr. Peter Wanyama:** Thank you. That statement brings us to page 79 where that taskforce is. Are you there?

**Hon. Baragu Mutahi:** Yes, I am there.

**Mr. Peter Wanyama:** Who formed this taskforce? On page 80, there is a name there. You can read it for the record.

**Hon. Baragu Mutahi:** You are saying on which page?

**Mr. Peter Wanyama:** Page 80. There is the name of the person who gazetted this taskforce.

**Hon. Baragu Mutahi:** Mr. Joseph Kiragu, CEC member. But I would want say that---

**Mr. Peter Wanyama:** Let me ask you a question; is it within the mandate of the executive to form a taskforce to look at the issue of pending bills or is it a mandate of the county assembly?

**Hon. Baragu Mutahi:** Both of them have a mandate to form committees.

**Mr. Peter Wanyama:** Okay. So, looking at the executive, one, on this particular issue, was it wrong for the county executive to form a committee to look at this issue of pending bills?

**Hon. Baragu Mutahi:** Very wrong because it was frustrating the ad hoc committee of the county assembly. It was regularizing something which was irregular.

**Mr. Peter Wanyama:** Let me ask you another question; are you aware as to whether any of these contractors came to the committee to present their issue?

**Hon. Baragu Mutahi:** Which committee?

**Mr. Peter Wanyama:** The committee which was formed by the governor.

**Hon. Baragu Mutahi:** I am not aware because the committee never tabled any report in the county assembly.

**Mr. Peter Wanyama:** Thank you. Go to page 92; one example then we move to the next issue because I do not want us to dwell on this issue too much. There is a document there from First World Solutions Limited on the same bundle. I am just picking one document.

**Hon. Baragu Mutahi:** I have it.

**Mr. Peter Wanyama:** This one is addressed to the County Secretary. Are you there?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** Thank you. It is addressed to the County Secretary. What is the date on the letter? There is a date up there. It is dated 13<sup>th</sup> ---

**Hon. Baragu Mutahi:** I cannot see the date.

**Mr. Peter Wanyama:** There is a date on top of the document.

**Hon. Baragu Mutahi:** It is dated 13<sup>th</sup> October?

**Mr. Peter Wanyama:** Page 92 of the bundle of the County Assembly Vol. III. Are you aware of the legal framework governing procurement? Just say if you are not aware.

**Hon. Baragu Mutahi:** There is the law. The Procurement and Disposal Act.

**Mr. Peter Wanyama:** Under the legal framework, you cannot make any payment to anybody until a contract has been signed. Is that right?

**Hon. Baragu Mutahi:** That is right.

**Mr. Peter Wanyama:** Until a contract has been signed.

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** So, if someone came with such a letter to the Governor saying I want to be paid, what would have happened if the Governor paid? He has come to the Assembly and the Assembly has said these are pending Bills and then they ask the Governor to pay. Will it be okay for the Governor to pay a pending Bill using this document that you have annexed here as evidence?

**Hon. Baragu Mutahi:** It will be wrong and illegal.

**Mr. Peter Wanyama:** It will be wrong. Thank you very much.

Let us go to the next issue. The next issue is on page 244 of the County Assembly bundle. It is the same document. There is a charge there on lack of prudence in refurbishing Karsons Building.

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** Page 244 is an extract from the report of the Auditor-General. Is that correct?

**Hon. Baragu Mutahi:** Correct.

**Mr. Peter Wanyama:** From this extract, particularly the observations at paragraph one, can you tell from this extract when the refurbishment was done? Was it 2014, 2013 or 2016?

**Hon. Baragu Mutahi:** This report of the Auditor-General is---

**Mr. Peter Wanyama:** I am just saying in terms of the date, when was this refurbishment done from this report?

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, if you can protect me. I may not remember the date of the refurbishment of the building, but this report is from the Auditor-General. We went through it as PAC. What is sure is that there was no value for money in this. Putting money in a private house, that is Kshs29million and paying rent of Kshs10 million. I do not think there is any logic in that. What we are saying---

**Mr. Peter Wanyama:** This is what I am asking so that you do not go around. The issue is very simple. When was this alleged refurbishment done? Was it done in 2013?

**Hon. Baragu Mutahi:** Yes, it was done during 2013/2014 Financial Year.

**Mr. Peter Wanyama:** 2013/2014 Financial Year

**Hon. Baragu Mutahi:** Exactly.

**Mr. Peter Wanyama:** Are you aware that at that time the team managing these resources was the Transition Authority (TA)? Are you aware that it is the TA which spent this money?

**Hon. Baragu Mutahi:** The TA never spent the money. We called the TA team in our meeting and they had letters to show that they did not. There is also a task force that was appointed by the Governor to oversee refurbishment of that house.

**Mr. Peter Wanyama:** Where is that letter?

**Hon. Baragu Mutahi:** I have it here. I will produce it in due time.

**Mr. Peter Wanyama:** Perhaps, to help you, go to page 253. Can you remember when governors were sworn in to office?

**Hon. Baragu Mutahi:** I cannot remember the date, but the letter I am talking about is on page 251. That is the letter showing that the Governor appointed a task force to oversee procurement of that building.

**Mr. Peter Wanyama:** Look at 253, just two pages after that then we move on.

**The Speaker (Hon. Ethuro):** Order, Counsel! I initially thought I am unable to protect the Hon. Member, but I think there is a case for doing so. You had requested for a letter and he said he was going to produce. It is only fair that you must appreciate it when he has now found it and then you can move to page 253.

**Mr. Peter Wanyama:** Okay. Thank you Mr. Speaker, Sir.

**Hon. Baragu Mutahi:** Yes it is fair that he accepts that---

**The Speaker (Hon. Ethuro):** Order! I have already aided you.

**Hon. Baragu Mutahi:** Thank you, Mr. Speaker, Sir.

**Mr. Peter Wanyama:** Where is that letter that you said so that we dispose of that matter? It is on which page?

**Hon. Baragu Mutahi:** It is on page 251.

**Mr. Peter Wanyama:** Page 251? I will go there. Could you, please, read that letter?

**Hon. Baragu Mutahi:** Mr. Speaker, it says: "Office of the Governor. Task force on offices, renovation works."



The above matter refers. The office of the Governor is in the process of acquiring offices to accommodate some of the staff. The offices need to be partitioned and renovated. I nominate you as member of the above task force with the following duties. Prepare renovation work drawings, bills of quantities for works and any other duty.

**Mr. Peter Wanyama:** Thank you. Tell us when the letter is dated then we can move on.

**Hon. Baragu Mutahi:** It is dated 10<sup>th</sup> May, 2013, signed by Hon. Nderitu Gachagua.

**Mr. Peter Wanyama:** You are not aware that there was a team by TA to manage funds at the counties?

**Hon. Baragu Mutahi:** This letter is from the Governor. This is not a TA---

**Mr. Peter Wanyama:** I am asking you a simple question.

**Hon. Baragu Mutahi:** There was the TA, but they were not in-charge of this.

**Mr. Peter Wanyama:** Thank you very much. Go to page 254 so that we bring that issue, once and for all, then we move on to the next issue for us to save on time. Can you go to page 254.

**Hon. Baragu Mutahi:** I am here.

**Mr. Peter Wanyama:** That letter is from---

**The Speaker (Hon. Ethuro):** The yellow light is on.

**Mr. Peter Wanyama:** Thank you, I will finish in a short while. Can you read it. That letter is from who? TA, right? When is it dated?

**Hon. Baragu Mutahi:** It is dated 23<sup>rd</sup> April, 2013.

**Mr. Peter Wanyama:** It is addressed to who?

**Hon. Baragu Mutahi:** Chief Finance Officer.

**Mr. Peter Wanyama:** By who?

**Hon. Baragu Mutahi:** By the TA.

**Mr. Peter Wanyama:** Yes. It is about that money. Right? The money for refurbishment.

**Hon. Baragu Mutahi:** Yes. They were actually guiding the Executive to use the money prudently.

**Mr. Peter Wanyama:** Thank you very much. Go to page 266 very quickly as we wind up.

Do you have any evidence that you brought before this Committee to support this allegation that there was splitting of tenders? Any evidence from your bundle here apart from this extract of law? Is there any evidence that you have brought? Just here from your bundle, if you do not have it just say that you do not have and that you will avail it later. From your bundle as contained in page 266. Do you have any evidence?

**Hon. Baragu Mutahi:** I am checking, please.

**Mr. Peter Wanyama:** We can move on if you do not have. Can you now go to page 267. If you do not have, you simply say so, so that we move on to save on time.

**Hon. Baragu Mutahi:** Yes, I have the bundles.

**Mr. Peter Wanyama:** From your evidence

**Hon. Baragu Mutahi:** Yes. 433 is where the bundles are.

**Mr. Peter Wanyama:** Can you go to page 267. We are now at 267.

**Hon. Baragu Mutahi:** Did you get the bundles first?

**Mr. Peter Wanyama:** Which page?

**Hon. Baragu Mutahi:** Page 433. Did you see the tenders?

**Mr. Peter Wanyama:** Page 433. These procurement items which you say--- Does it amount to splitting of tenders or they were separate tender items? Just from the document itself.

**The Speaker** (Hon. Ethuro): What is it, Sen. Muthama?

**Sen. Muthama:** On a point of order, Mr. Speaker, Sir. The document that the witness is being referred to by the Counsel has page 266 (a) and 266(b). Could he clarify which one he is referring him to so that we can read from the same page?

**The Speaker** (Hon. Ethuro): Counsel.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, initially I was at page 267.

**The Speaker** (Hon. Ethuro): Before you moved to page 267 you had made reference to page 266. The Members is asking which one; (a) or (b)?

**Mr. Peter Wanyama:** Mr. Speaker, Sir, for the record I did not make reference to page 266. Instead, I made reference to page 267 and we are done with it.

**The Speaker** (Hon. Ethuro): Which page were you on before you moved to page 267?

**Mr. Peter Wanyama:** Mr. Speaker, Sir, from my document page 266 is an extract from the Public Procurement and Disposal Act.

**The Speaker** (Hon. Ethuro): That is not the issue, Counsel. The issue is whether page 266 has (a) and (b).

**Mr. Peter Wanyama:** Mr. Speaker, Sir, I do not see any (b) from my bundle.

**The Speaker** (Hon. Ethuro): Proceed!

**Mr. Peter Wanyama:** Kindly, let us move to page 433.

**Hon. Baragu Mutahi:** That is where I am.

**Mr. Peter Wanyama:** Do these procurement items have different tender numbers?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** Thank you very much.

Kindly go to page 500 of the bundle.

**The Speaker** (Hon. Ethuro): I will allow another five minutes.

**Mr. Peter Wanyama:** Thank you very much, Mr. Speaker, Sir. Are you on page 500 of the bundle?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** Are you aware that there are ceilings which have been set by this House on recurrent expenditure at the county level? Are you aware whether there are any ceilings set, such that you cannot do a budget that overshoots those ceilings, because we do not have money as a country?

**Hon. Baragu Mutahi:** There are ceilings.

**Mr. Peter Wanyama:** In this budget making process, did you overshoot those ceilings by any amount?

**Hon. Baragu Mutahi:** No, we did not. According to my knowledge we did not. That is not the cause of the problem in budgeting here.

**Mr. Peter Wanyama:** I am just asking you a simple question. Did you overshoot the ceilings or not. If not, then say: "We did not".  
Did you overshoot the ceilings?

**Hon. Baragu Mutahi:** We did not.

**Mr. Peter Wanyama:** Let me ask you about your relationship with the County Executive Committee (CEC) Member for Finance. If you look at the Act, the budget making process is an intense process with timelines.

Let us look at page 20 of Volume II of the Governor's bundle. In terms of the budget preparation process, did the county executive miss any deadline?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** Which deadline?

**Hon. Baragu Mutahi:** The county executive never sat with any sectoral committee.

**Mr. Peter Wanyama:** Which deadline did they miss?

**Hon. Baragu Mutahi:** Meeting the sectoral committees to decide on the budget. The time they brought their estimates was the last day before the budget.

**Mr. Peter Wanyama:** Therefore, you are saying that the county assembly never delayed in the budget making process?

**Hon. Baragu Mutahi:** It never delayed, but the executive refused completely to sit with the assembly to discuss the budget.

**Mr. Peter Wanyama:** Who were you dealing with on this issue?

**Hon. Baragu Mutahi:** Obviously it is the CEC Member for Finance and the other CECs in the departments.

**Mr. Peter Wanyama:** Okay. He will be here tomorrow to testify.

Finally on the issue of appointments, you say from your charge that the county governor has illegally appointed an acting county secretary. Can you, for the record, name this acting county secretary? Do you know her name?

**Hon. Baragu Mutahi:** Yes. She is Alice Njamiu.

**Mr. Peter Wanyama:** Alice?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** What other portfolio does she hold in the county government?

**Hon. Baragu Mutahi:** She has been acting.

**Mr. Peter Wanyama:** What other portfolio?

**Hon. Baragu Mutahi:** I do not think there is any other. What I know is that the Assembly---

**Mr. Peter Wanyama:** Do you not know that she is a chief officer?

**Hon. Baragu Mutahi:** I do not think so; she is not. She is the acting secretary of the county. I do not know if she is a chief officer. I know that the assembly, through the committee on legal affairs tabled a report which was very clear that the secretary is not qualified to hold that position. There is a report to that effect.

**Mr. Peter Wanyama:** Mr. Speaker, Sir, I am winding up. Are you aware of the names of the chief officers that the county assembly approved? You say that Alice is not a chief officer. Are you aware that the county assembly approved chief officers, and that Alice is one of them?

**Hon. Baragu Mutahi:** Alice is not a chief officer; she is an acting secretary.

**Mr. Peter Wanyama:** I am talking about the substantive portfolio. The governor cannot appoint someone from outside, who has not been vetted by the assembly, to be an acting officer.

I am asking you a simple question: Did you approve the appointment of Alice as a chief officer or not? If not, we will end the matter there.

**Hon. Baragu Mutahi:** Earlier on she was approved as a chief officer, but she is not qualified to hold the position of county secretary.

**Mr. Peter Wanyama:** Was she approved as chief officer?

**Hon. Baragu Mutahi:** Yes.

**Mr. Peter Wanyama:** Thank you, very much. Are you aware of the efforts that have been made by the executive to recruit---

**The Speaker** (Hon. Ethuro): Counsel, your time is up. Maybe just one last burning one.

**Mr. Peter Wanyama:** Thank you, Mr. Speaker, Sir. Just one last burning one.

Are you aware of the efforts made by the county public service board to recruit chief officers? Are you aware of any advertisements? The board chairperson will be here tomorrow.

**Hon. Baragu Mutahi:** I am not aware. But the procedure that has been---

**Mr. Peter Wanyama:** Thank you very much. That is all, Mr. Speaker, Sir.

**Hon. Baragu Mutahi:** The procedure that has been followed by Gov. Gachagua's administration is to put people in acting positions.

**Mr. Peter Wanyama:** That is all, Mr. Speaker, Sir.

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, kindly allow me to add something, because I have been taken through a speed that I am not used by a lawyer. I am not a lawyer.

*(Laughter)*

Matters that are in this report and the grounds that we have raised are of gross, and I have tried to make my case. The governor is the chief executive of the county, through Article 179 of the Constitution. He cannot run away from these issues.

**The Speaker** (Hon. Ethuro): Order, witness. You had that opportunity, which you declined. We went to the next stage of cross-examination, which we have concluded. Therefore, you may assume your seat.

**Hon. Baragu Mutahi:** Thank you, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): Order, Members. You need to stop reading my lips and start listening to my words. I talked about cross-examination. I am yet to talk about re-examination; it is a whole world of difference.

*(Sen. Wetangula spoke off record)*

Order, Sen. Wetangula! I cannot be wiser. I have been repeating the procedure from morning and particularly to your good self. Let us now move to the re-examination stage. I repeated a few minutes ago when the clarifications were being sought on how we will proceed.

**Mr. Charles Njenga:** Mr. Speaker, Sir, and Hon. Members, we shall have very few questions in re-examination.

Hon. Baragu, could you advise the Senate – arising from the questions that you are led – why you as the Mover of the Motion that precipitated these proceedings,

thought that the violations exposed in this Motion are gross and sufficient for purposes of Article 181? Just be brief and to the point.

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, the reasons that I took were informed by the violations of the Constitution and the law on matters pertaining to County funds and governance. Clearly, they are gross. In this report, for example, the amount of money that we are talking about here is close to Kshs1.4 billion that has not been disclosed. The issue of procurement and the law has been breached especially in that part of the Karsons building and a footpath that cost the county Kshs48 million. The footpath is just four kilometers and the width is one metre and some inches. It was murramed, compacted and bitumen poured on top. That matter is grave. You can see a kilometre of that road, just a stretch, cost Kshs12 million. If you break down further, you will see that 100 metres of that road cost the taxpayer Kshs1.2 million. So, those issues made me get to the decision that we have to move this way. This is because we have issues, if I may finish, that pertain to the Auditor-General's report of 2013/2014. The Committee on County Public Accounts and Investments (CPAIC) went through it, the report was brought to this Senate and the Governor is yet to account for those issues in the Senate.

**Mr. Charles Njenga:** Let us move to the details now. You have been asked about the figure of Ksh352 million that you allege or have stated that was not disclosed. Quickly, from the report that you received from the executive, was that figure disclosed? That is a direct question.

**Hon. Baragu Mutahi:** The Kshs352 million was not disclosed.

**Mr. Charles Njenga:** Was it nowhere?

**Hon. Baragu Mutahi:** It was nowhere.

**Mr. Charles Njenga:** In that report, was it explained to which particular expenditure of how it was expensed, the sum of Kshs352 million that was in the approved development expenditure that the executive admits to have spent?

**Hon. Baragu Mutahi:** There was no project relating to the Kshs352 million.

**Mr. Charles Njenga:** So, how did you arrive at that number, just for clarity?

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, I took the actual expenditure Kshs1,161,169; that is on page 19 and subtracted the total amount that went to projects in page 25 of this document. It was Kshs800 million – I cannot get the figure – and I got the Kshs352 million which was not disclosed and remains so.

**Mr. Charles Njenga:** So, had you not done that arithmetic, you would not have discovered that there is no report or account for that amount?

**Hon. Baragu Mutahi:** We went through the whole status report and we could not discover or see where the Kshs352 million is.

**Mr. Charles Njenga:** Okay, very well. To the question that you did not consult the County Executive Committee (CEC) Member; just a confirmation; where did you get this annual budget implementation status report? Where did it come from? What is the source of that document?

**Hon. Baragu Mutahi:** It is from the CEC, Finance.

**Mr. Charles Njenga:** It is from the CEC, Finance?

**Hon. Baragu Mutahi:** Yes

**Mr. Charles Njenga:** Was it forwarded to the County Assembly?

**Hon. Baragu Mutahi:** Exactly.

**Mr. Charles Njenga:** Now, on the issue that you raised about the procurement for these contractors and the works thereof, just for clarity and in consideration of the charges that you have forwarded, is the issue of payment based on those documents or procurement of those contractors without any procedure?

**Hon. Baragu Mutahi:** It was unprocedural in the way tenders were given.

**Mr. Charles Njenga:** So, your issue in bringing these charges was that those contractors had been procured without due process?

**Hon. Baragu Mutahi:** Exactly

**Mr. Charles Njenga:** Is that what you have put in your charges?

**Hon. Baragu Mutahi:** That is true.

**Mr. Charles Njenga:** Did you ever receive any report from the taskforce appointed by the Governor?

**Hon. Baragu Mutahi:** The taskforce appointed by the Governor never tabled a report in the County Assembly.

**Mr. Charles Njenga:** Do you know whether it tabled any report anywhere?

**Hon. Baragu Mutahi:** It did not table any report.

**Mr. Charles Njenga:** Can you state that as a fact from your own knowledge?

**Hon. Baragu Mutahi:** From where I sit, there was no report to do with the taskforce in the Assembly.

**Mr. Charles Njenga:** From where you stand. Not sit.

**Hon. Baragu Mutahi:** Yes, where I stand.

**Mr. Charles Njenga:** Now, on page 251, there is a letter where you were referring the Senate to. It is the one on the taskforce on offices renovation works. Hon. Senators, I am referring to County Assembly documents, volume 3. Hon. Baragu, do you have the letter?

**Hon. Baragu Mutahi:** The letter is there. It is on page 251; task force on offices renovation works.

**Mr. Charles Njenga:** So, by way of this letter, who is the Governor appointing or nominating?

**Hon. Baragu Mutahi:** The Governor is appointing county works engineer, the town engineer, county architect and the county quantity surveyor to oversee those works.

**Mr. Charles Njenga:** Now, is there any reference, whatsoever, to that letter to the tender committee?

**Hon. Baragu Mutahi:** There is no reference.

**Mr. Charles Njenga:** There is no reference at all to a tender committee.

**Hon. Baragu Mutahi:** Not at all.

**Mr. Charles Njenga:** Mr. Speaker, Sir, that is all from me. However, hold on for a question from my co-counsel.

**Mr. George Ng'ang'a:** Thank you, Mr. Speaker, Sir. I wish to seek one clarification from the witness.

Mr. Baragu, you have been asked a question with respect to the acting county secretary. You have been asked whether she has the qualifications to serve as the chief officer. The clarification I want to seek from you is whether the academic qualifications for appointment to the position of county secretary are the same as those for appointment to the position of the chief officer.

**Hon. Baragu Mutahi:** Mr. Speaker, Sir, they are not the same.

**Mr. George Ng'ang'a** (Advocate): Thank you. Mr. Speaker, Sir, that is all.

**The Speaker** (Hon. Ethuro): The witness may assume his sit. We now move to the next bit of clarifications and questions by Senators to the County Assembly of Nyeri.

**Sen. Mutula Kilonzo Jnr.:** Mr. Speaker, Sir, I have three questions. First, please clarify to us on the charge 9 (a) that is on Bills. According to the County Governments Act, the governor has 14 days to assent to the law failure to which the law is deemed to have been assented to. Under Section 25, the law is supposed to be gazetted upon assentment. Please clarify under charge nine on the Bills that you have specified here so that we understand where the default is. What is the date that the assembly passed each Bill? On what date did it lapse? On what date was it gazetted?

Secondly, is on Section 137 of the Public Finance Management Act (PFMA) which is on Economic and Budget Council; on the three budgets that Nyeri County Government and assembly has passed, what procedure has been adopted to agree on the budget now that it appears that there is a disagreement yet this law has been in place since 2013.

Mr. Speaker, Sir, lastly, from this report which you have cited as the basis of the discrepancy of Kshs352 Million, from the section quoted by Francis Kirira, it seems to have quoted Section 166 of the PFMA. My own reading of that section is that, that is the quarterly report. The correct Section would be 164. However, that is not the question. The Section requires that this report is forwarded to the Controller of Budget and the Commission on Revenue Allocation. Did the county assembly adopt this report? If not, why? Did you check with the county Controller of Budget and the Commission on Revenue Allocation for comments on what you have alleged?

**The Speaker** (Hon. Ethuro): The county assembly team, you will take all the questions as they are asked by the Senators.

Sen. Mutula Kilonzo Jnr. has already provided leadership in terms of operating within the two minutes we had suggested.

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, I will use one-and-half minutes. My first question is to the county assembly. There is this officer-I believe is the chief officer who is currently acting-whom you have referred to as lacking the prerequisite qualifications. Can you confirm her curriculum vitae?

Secondly, in your opening remarks, counsel for the Governor, you had asserted that there was no indication from the side of the county assembly on the specific areas of the Constitution that were grossly violated. In the evidence that that has come before us, the county assembly has clearly referred to the violation of Article 201(a), 207 and 201(d) of the Constitution. So, is it still the county assembly's position that you did not specify the Articles of the Constitution under which you claim that the Governor had violated the Constitution?

**The Speaker** (Hon. Ethuro): You have taken two minutes as opposed to the one-and-half minutes.

**Sen. Ong'era:** Mr. Speaker, Sir, I have two questions. First, why was the Governor not given a right to be heard by the county assembly? Can you state whether this is a requirement in the county assembly's standing orders.

The question on qualifications of the county secretary has already been asked. Lastly, why have you not stated to us the actual procedure of how you went about in impeaching the Governor? If I heard right, there was a question of the right to be heard.

**Sen. Orengo:** Mr. Speaker, Sir, mine is partly what Sen. Ong'era has asked. I was looking through the material that we have been given from the county assembly. I was hoping to find some evidence of a notice to appear before the county assembly served on the Governor like we have done in these proceedings and being given an opportunity to be heard. Unfortunately, we do not have the HANSARD. Is it possible that you point to us in the proceedings where that right was given to the Governor?

Undoubtedly, the charges that you have presented against the Governor are serious. I have two issues to be clarified. The Auditor-General's Report for the period 1<sup>st</sup> July, 2013/2014 was tabled in the assembly on 21<sup>st</sup> July, 2015 and the County Public Accounts Committee dealt with it. A Report was given by that Committee. It appears that the Committee was dealing with the report of the Auditor-General.

In the Committee itself, I do not see any accusations against the Governor but against accounting officers. This is in relation with the question of refurbishment of the Governor's office and so on. You seem to be putting blame on the accounting officers. Is there any moment when you have discussed the Auditor-General's report and Report of your County Public Accounts Committee and reached a resolution?

Finally, there was something that came up in the Governor's speech. So I will leave it to those two.

**The Speaker** (Hon. Ethuro): Members, do not say mine is like the other one. Do not even mention it at all because it is on record. Sen. Obure.

**Sen. Obure:** Thank you, Mr. Speaker. Sir. Mine is in relation to the procurement process relating to the refurbishment to the Karson Photo House offices. I want to make reference to page 51 Vol. 3 of the Assembly document where a Taskforce was being formed to carry out these works. I heard the lead counsel raise the question of whether the matter had been referred to the Tender Committee. However, I see that on the following page which is page 252, estimates were indeed carried out by the County Works Officer. On page 53 I see that there was an award of tender to some company called Betilico Agencies Limited. I wanted to confirm whether these works went through the tendering process as required.

**Sen. Murkomen:** Thank you, Mr. Speaker Sir. I have three questions. First, one of the critical issues in impeachment is the nexus between the officer being impeached and the action. In the case of Embu, it was clear that the County Assembly wrote numerous letters and attempted resolutions that were sent straight to the Governor and brought to his attention and then they brought a case of inaction. Did the County Assembly attempt to bring directly to the attention of the Governor any of these acts of maladministration, whether it is the tendering, whether it is the action of a chief officer or the actions of a County Executive Officer (CEC) so that then we can establish nexus?

Secondly, most of the tender issues were about whether the tender process was followed. Was there any attempt at any stage in this process in your investigations where Public Procurement Oversight Authority (PPOA) was involved in the matter of tenders?

Finally, on the question of assenting to Bills, I did not hear very well what Sen. Mutala Junior said. You are saying that there is a gross violation of the law, but the law itself says in 14 days if there is inaction on the part of the Governor, it automatically becomes law. So, which law has been violated there and how is it grossly violated?



**Sen. Karaba:** Thank you, Mr. Speaker, Sir. I would like to ask two questions. The first one is whether the Senatorial office in Nyeri County had anything to do with the reconciliatory process in the county.

Secondly, I wanted to know whether the list of the officers that is given in this volume is the same names that were there originally after elections? Were there some who were either sacked before business was made or this is the actual names or list of the people who were initially employed after 2013?

Mr. Speaker Sir, since I still have time, I would like to know whether the process of impeachment was properly conducted given that we were reading that some of the ladies were in the hall the whole night with children.

**Sen. Wetangula:** Thank you, Mr. Speaker Sir. Can you allow me to speak seated? I cannot stand. I have to push my books off.

**The Speaker** (Hon. Ethuro): You can move to your preferred position of the dispatch box.

**Sen. Wetangula:** The problem was not speaking from here but the books were all over.

This is to the Assembly and their counsel. On the question of refurbishment of the House where the officers are, I know that the Auditor General raised an audit query. Was the expenditure beyond the rent to refurbish the building recoverable from the rent or it was just an expenditure from the County Government on a property that is not theirs? If it was recoverable as rent, it becomes another issue.

Secondly, just for absolute clarity because this has been asked by two other colleagues. Is it the case that you invited the Governor to come to the Assembly to defend himself and he declined to come or you did not invite him at all?

**The Speaker** (Hon. Ethuro): I am wondering about this concept of absolute clarity.

**Sen. Muthama:** Mr. Speaker Sir, I want to raise one issue. It involves the squandering of Kshs352,976,913 and another Kshs70 million. This brings a total of Kshs422,976,913 million. There is a ruling that was given by a Judge recently where he said a person cannot pluck an amount of money there without evidence and ask someone to pay. For this amount to be written here, a forensic audit probably could have been done and establish who exactly received this money. For money to be withdrawn from the account it is either through a cheque that has been paid to someone or the money is drawn in cash and then distributed. Can you tell us how this money actually left the bank account and to whom it went? How the money was received, how it was distributed and the third party who received the money if it was in form of cash or RTGS?

Thank you.

**Sen. M. Kajwang:** Thank you, Mr. Speaker, Sir. One of the charges is failure to comply with the law and I need a clarification. First, the Governor is accused of not remitting statutory dues. When the Governor made his opening remarks he cited that the county had been recognised for tax compliance, that it was the best in tax compliance. The charges by the County Assembly do not indicate the period within which these dues were not remitted. Could you clarify on that?

Secondly, the County Assembly talked of illegal establishment of sub-counties. A sub-county is a national government administration structure. Did the Governor establish a sub-county or he appointed sub-county administrators that were more?

Finally, under the charge on gross violation of the Constitution, the County Assembly has talked of lack of prudence in the use of public funds. As given as evidence by the report of the Auditor General, what is the status of this report? Has it been adopted by this Senate?

Thank you.

**Sen. Nabwala:** Thank you, Mr. Speaker, Sir. I have only one question on the procurement process. There has been some requests or demands made by contractors on work done on the roads and the amounts are huge. The first one is Kshs1,372,800 and there are other two roads also. Were these development projects factored in the budget which was either approved or not approved by the County Assembly?

Thank you.

**The Speaker** (Hon. Ethuro): Sen. Gwendo.

**Sen. Gwendo:** Mr. Speaker, Sir, I have one question in regards to the employment done by the governor without observing the gender rule. Considering that the County Executive Committee (CEC) Members have served for a long time, what did you do when you realised that the governor did not observe the gender rule? Did you wait for this impeachment to come for you to bring the matter here?

**The Speaker** (Hon. Ethuro): Finally, Sen. Sang.

**Sen. Sang:** Mr. Speaker, Sir, I want to seek three clarifications. The first one is with regard to the Auditor-General's report that you have extensively quoted in your case. Did the Public Accounts Committee (PAC) in the county assembly address itself to the Auditor-General's report and was the committee's report tabled, discussed and approved by the county assembly?

The second one is with regard to the acting chief officers, which are important positions in the county because they are accounting officers. If you have six chief officers in acting capacities, what did the county assembly do to try and address this? Is there any procedure, for example, summoning the governor to specifically address himself to this particular aspect of the acting chief officers?

Finally, I want you to confirm whether there were external forces that were working with the county assembly in bringing up this impeachment Motion. Already, a former aspirant for the Senator's position who now intends to run for governor has been mentioned. Could you confirm that this was a process by the county assembly alone or there were external forces that worked with you in framing up these charges?

**The Speaker** (Hon. Ethuro): There are two new entrants and they shall be the last ones.

Sen. Sijeny.

**Sen. Sijeny:** Thank you, Mr. Speaker, Sir. I only have one question to the county assembly. Were the people of Nyeri County given an opportunity to participate before this impeachment was done against their governor?

**The Speaker** (Hon. Ethuro): Order, Sen. Sijeny. What do you mean when you ask whether they were given an opportunity to participate?

**Sen. Sijeny:** Mr. Speaker, Sir, to participate in the decision to impeach the governor; whether they were given the chance to comment or participate.

**Sen. Kisasa:** Bw. Spika, hakuna afaye akakosa mzishi. Naomba kuwauliza swali watu wa Kaunti ya Nyeri. Adhabu ya kaburi aijuaye ni maiti. Gavana alisema kuwa amekuwa mgonjwa na mara kwa mara hali yake ya kiafya haijakuwa ya kupendeza. Mara

nyingi amekuwa nje ya kazi. Wakati alipokuwa hospitalini, nani alikuwa anamshikilia gavana wadhifa wake? Ni kama Bw. Gavana amebwaga zani. Ukibwaga zani, hubwaga zani kwake.

Asante, Bw. Spika.

*(Laughter)*

**The Speaker** (Hon. Ethuro): Methali na maswali ndio hayo.

County assembly, you may wish to respond now. Counsel, you have 30 minutes to respond.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I will make my responses. On the questions that I will not respond to, my colleagues will help me.

We are confirming the dates regarding the question of Bills that was asked by Sen. Mutula Kilonzo Jnr. You shall be given immediately after this.

Regarding the question of how budgets were passed before in the other years and the resolution of any disputes, the issue is that at that time, and in the other instances, we did not see a refusal to forward an Appropriations Bill after passing of the estimates by the assembly. For some reason, this time round, the governor has determined that even after the assembly has passed the estimates, no Appropriations Bill has been forwarded for consideration by the assembly, so as to activate or implement the budget. Instead of an Appropriations Bill, what has come to the assembly is a memorandum. The legal standing of that memorandum, the issues raised and the timing of that memorandum have now resulted to a stalemate. Upon its passing by the assembly any memorandum thereon would have been considered by the assembly before his assent.

On the issue of whether the annual budget implementation report was tabled before the assembly, yes, it was tabled, but we are not aware as to whether that report was presented to the Controller of Budget and the Commission on Revenue Allocation (CRA). That information was not availed to us. As indicated in the forwarding letter by the person who signed, it was for the assembly's information, as required under the Public Finance Management (PFM) Act, 2012. We shall make that confirmation. We shall also seek that information from the acting CEC Finance, whom I am advised will be here tomorrow. We will put that question to him.

Regarding the question on the mode and procedure applied by the assembly in processing this notice of Motion, it is true that there was an invitation sent to the governor to appear under Standing Order No.60 of the County Assembly of Nyeri Standing Orders. In fact, that is not disputed. In the responses made by the governor, he does not dispute that there was an invitation. He raises the issue that he did not appear, which is also not disputed. He raises the issue as to whether, instead, Counsel ought to have been heard. This is a matter that is alive before the court in a petition filed by the governor. We have responded to that application and denied denying him the right to be heard.

There was a notice issued to the governor for his appearance under Standing Order No. 60 of the Standing Orders of the County Assembly of Nyeri.

**The Speaker** (Hon. Ethuro): In what form was the invitation?

**Mr. Charles Njenga:** Mr. Speaker, Sir, it was by letter, which I can make available to the Clerk of the Senate as we continue.

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

**The Speaker** (Hon. Ethuro): What is it, Sen. Wetangula?

**The Senate Minority Leader** (Sen. Wetangula): I hope that my distinguished learned friend knows that the way of invitation to proceedings of this nature is to send a letter to the Governor and have a counter letter signed or an acknowledgement of delivery, so that you prove your case. Just bringing a letter here may not be helpful.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I can confirm that we have that letter. I have a copy and I have information of its delivery to the office of the Governor. That is in the original form, documents that can be availed immediately to the office of the Clerk for the benefit of the entire Senate.

The Clerk has that information. The only reason that we did not put it in this bundle is that it is not disputed. It is an admitted fact and there was not controversy around that issue, especially after evaluation of the documents raised by the Governor.

Concerning whether the Auditor General's report was tabled before the County Assembly, there is on page 293 of the County Assembly documents Volume III a committee report of the Public Accounts Committee of the County Assembly of Nyeri on that report. That report was considered. A report made and tabled at the County Assembly of Nyeri on the 8<sup>th</sup> of October, 2015. That report is available. It is on page 293 to page 384 of the County Assembly Document Volume III.

On the question of refurbishment of Karson House and the letter on page 251 and the subsequent letters, we can confirm that there was some form of tendering done for those works. However, the issue as raised by the Auditor-General was the prudence, the value for money factor. First of all, the award letter on page 253 is for Kshs14 million, but the total expenditure applied was Kshs29 million plus. Therefore there is a doubling of the expense initially awarded.

Secondly, in response to the question of whether these funds included the rent, there is annexed to our documents a copy of the lease. It is found on page 255 of the County Assembly Document Volume III. You will see that in the terms and conditions, the mutual covenant to the parties to that lease it is not provided that the sum of monies expended for renovation would then be credited to be applied to pay rent. There is no provision saying that the amount of Kshs29 million that we have expended to renovate this private building can now be credited to reduce or to obviate the obligation to pay rent. In simple speak, we were renovating and also paying rent for the same building. That is why there is an Auditor-General Prudence inquiry that has also been picked by the County Assembly of Nyeri as an issue which we consider gross and an impeachment matter.

On the issue of the dates of non-remittance of statutory deductions, Counsel will confirm the particular period, but we are also not sure who awarded this award that was alleged to have been given. We were not told, but that is a matter we shall also seek to confirm and clarify from the witnesses.

Let me turn to the issue raised by Senator Sijeny on public participation. We can confirm that there was public notification by way of media notices. We announced through local radio that there was a Motion before the Assembly.

If you look at the County Assembly Document Volume III, page 725-739, we announced through the local radio called *Rware FM* that broadcasts in the Kikuyu

language for better and greater reach. There was also an announcement on *Kameme FM*. In fact, subsequent to those announcements, some forms of responses were made by certain citizens which you will find on page 727-739. There was, therefore, public participation and those who heard those announcements and were concerned about the matter made a response and to make their opinion heard in that regard.

On the issue of the Governors health, we are not able to comment on that since it is a very personal issue. However, statutorily and constitutionally, the Governor---

**Sen. (Dr.) Khalwale:** On a point of order, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): What is it, Sen. (Dr.) Khalwale?

**Sen. (Dr.) Khalwale:** Mr. Speaker, Sir, I want the Counsel for the County Assembly to help us. When you go to page 725 and 726 as he mentioned, this is only a receipt indicating that some money was paid to that media house. Could you show us a copy of the notice, because you might have been paying for a funeral announcement or whatever it is? Can you convince us that you actually invited the people for public participation? Do you have such a document?

**Mr. Charles Njenga:** Mr. Speaker, Sir, it is not a funeral announcement by all means. We do not announce such in the County Assembly. However on page 722, you will see the content of the announcement. The typed part is written in the Kikuyu language. I do not know whether Sen. (Dr.) Khalwale will be able to read that. However, for your benefit and that of the entire Senate, we have translated it into English language. This is what---

**The Speaker** (Hon. Ethuro): Counsel, you may not wish to underestimate the capacities of Sen. (Dr.) Khalwale.

**Mr. Charles Njenga:** Mr. Speaker, Sir, I did not want to venture to underestimate him. I know he is a man of many capabilities which are in the public domain.

On page 726 also, there is the description of the payment. On *Kameme Fm* you will see that the presenters mentioned: Public Notice of Impeachment of Governor. Therefore, there is no equivocation around it. It was a clear notice to the public on that matter.

On the issue of who was in charge if I got the question that was put in fluent Kiswahili, I will hazard a response. Constitutionally, the deputy governor should at all times be in charge when the governor is not available for any reason. The expectation of the County Assembly was that all functions, duties, structures within the County Government would continue running uninterrupted because this is not a personal enterprise of the Governor, but a county with structures that should survive at any time when somebody is indisposed and is unavailable for one reason or another, to administer and discharge that office. To that response, I can only answer on the provision of the law and the constitution that clearly says the deputy should be in charge.

I will invite my colleague to make any other responses. Before he comes, there was an issue about whether there was external influence that we had first from the Governor. We wish this Senate will invite the persons he so adversely mentioned in their absence like Eng. Ephraim Maina. What I can say and I have instructions to state is that there were no such meetings, there was no such connivance or facilitation and the entire Motion and the proceedings before the County Assembly and before this honourable House were in the free will and in the statutory and constitutional duty of the MCAs and we should not underestimate their capacity. We should not be heard to say that our MCAs

cannot conceive, analyse and develop such grounds based on circumstances and facts. We should give them the respect and regard that is due to them, that this is their Motion and it is not facilitated by third party operatives.

**Mr. George Ng'ang'a:** Mr. Speaker, Sir, I will proceed to react to some of the questions that have been asked but not dealt with by my friend. Regarding the question that has been asked by Sen. Mutula Kilonzo Jnr. on the status of the various Bills, this is the status. This is at Page 680 of Volume III. We have the first Bill which is Nyeri County Cooperative Societies Bill, 2015. The Bill was passed by the Assembly on 9<sup>th</sup> March and it was forwarded to the Governor on 22<sup>nd</sup> March, 2016. In default of assent, it was forwarded to the Government Printer for publication, so that effectively it can be operationalised. It is still at the Government Printer awaiting publication.

The second Bill is the Nyeri County Tea Cess Bill, 2016. It was passed on 4<sup>th</sup> May, 2016, and forwarded to the Governor on 16<sup>th</sup> May, 2016. The date due for assent was on 30<sup>th</sup> May. The status is that it is at the Government Printer and it is pending publication. The third Bill is the Nyeri County Agricultural Development Fund Bill which was passed on 4<sup>th</sup> May, and forwarded to the Governor on 16<sup>th</sup> May. The date due for assent was 30<sup>th</sup> May. It was forwarded for assent to the Office of the Governor. It has not been assented until to date. The Nyeri County Enterprise Development Fund Bill was passed on 2<sup>nd</sup> December, 2015. It was forwarded to the Governor on 9<sup>th</sup> December, 2015. The status of that Bill is that it has been gazetted and, therefore, it is now law.

There is the Nyeri County Water Sewerage Services Bill. The status of that Bill is that it has never been assented despite having been forwarded to the Governor on 6<sup>th</sup> July, 2016.

**The Speaker** (Hon. Ethuro): Counsel, I thought that the dates were critical for that particular matter.

**Mr. George Ng'ang'a:** Yes, there are dates set out at Page 680. What is not there is information like it is pending gazette at the Government Printer but effectively it has been forwarded. You will notice that Section 25(2) of the County Governments Act states that:-

“Subject to subsection (3), the county assembly legislation shall come into force on the fourteenth day after its publication in the county Gazette and Kenya Gazette, whichever comes earlier, unless the legislation stipulates a different date on or time at which it shall come into force.”

So, there is a publication requirement that has made it impossible for it to become law.

To answer Sen. Mutula Kilonzo Jnr.'s question, what is critical is that Section 30(2)(g) confers an obligation on the governor. In fact, I want to read it verbatim because it is very critical. It states that:-

“Subject to the Constitution, the governor shall consider, approve and assent to Bills passed by the county assembly.”

Whereas there might be a mechanism through which that Bill can become law without the assent, what justification is there for the Governor not to assent yet there is a direct obligation imposed on him by that Section to approve and assent? Whereas he does not necessarily have to assent, you will notice that even in situation where he is unhappy and chooses not to assent, he is supposed, under Section 24(2)--- This is what Section 24(2) states:-

“The governor shall within fourteen days after receipt of a Bill—

(a) assent to the Bill; or  
(b) refer the Bill back to the county assembly with a memorandum outlining reasons for the referral.”

So, in situations where he does not do either, is that a violation of the law? My basic interpretation of that Section is where a function has been imposed and it does not give you the discretion and you decline to comply, there is a violation. As far as the County Assembly is concerned, they are saying it is a gross violation because you were given the mandate by the people when they elected you. The law confers you with a function that before a Bill becomes law, you give your input but you abdicated that by doing nothing. That undermines the legislative authority because then it means that this Bill just becomes law without you doing anything and that is a gross violation.

Let me go to the other question. This is the question that Sen. Mutula Kilonzo Jr. asked on whether the previous budgets have been passed without the input of economic fora. It is very important to appreciate that under Section 137 of the County Governments Act, the requirement of that public forum is to help or avail the public with an opportunity for public participation. This is because the composition of that forum is a broad spectrum sort of forum which is comprised of professionals from different fields who have been given that function under that Section to participate in the budget-making process. Certainly, there must have been some value addition that this forum was to bring on board. In the past, these budgets have been passed without the contribution of that forum, not because that forum cannot be put in place but because the person conferred with the function and obligation to initiate the process of constituting that forum has failed to act.

In our bundle, we saw a letter from one of the Chief Officers where he promised the Assembly that that would be done within 30 days and this was in March, 2015. The Senator from Elgeyo-Marakwet asked on the link. The Governor is already aware that that forum is not in place. In fact, he had the audacity to tell the Assembly that we will put in place this forum within 30 days. That was in March, 2015, but until today, the 30 days have not lapsed and there is no explanation whatsoever. That is a gross violation because it then denies a very important organ an opportunity to participate in the budget-making process.

On the Curriculum Vitae (CV) of the Acting Secretary; at page 704 of the big bundle of Vol. No. 3, an issue has been raised on the qualifications of an Acting County Secretary. This is to be found at page 704 where the committee of the assembly that was looking into this matter invited the Acting County Secretary to provide qualifications. This was very important. Whereas the governor can appoint a person in an acting capacity, that person must meet the requirement of a substantive holder of that position.

Mr. Speaker, Sir, the case of the assembly is this; that you have an Acting County Secretary who does not meet the qualifications set out under Section 44 of the County Governments Act, 2012. If you look at page 704 on the document paginated at the bottom page 10, this is what the Legal Committee is saying in its report. The committee did not obtain any copies of the testimonials so as to ascertain her academic qualifications. If you turn to page 706, annexure 2.2.1 on the meeting held at 10.00 a.m. the Acting County Secretary is being invited and a letter of invitation citing that she would not be available to attend the meeting due to prior commitments. She is being told to avail the documents. It is not witch-hunt. We want to satisfy ourselves. That opportunity is snubbed.

That led to the recommendations at page 712. These recommendations were brought to the attention of the governor where he was told as the person appointing, we have made our recommendation that she should forthwith cease holding office as the Acting County Secretary and another person be competitively sourced and appoint a person in an acting capacity for not more than three months.

So, the assembly appreciates that you cannot appoint a substantive person immediately. But if you are to do that, we are minded that the law requires you to make sure that acting appointment meets the qualifications of a substantive holder. The governor did nothing.

On the accusations as per the questions by Sen. Orengo, they are on the Accounting Officer and not the governor. We have raised serious gross violations of the Public Procurement and Disposal Act. On the issues of disclosure, you will notice that this was the subject of correspondence including the budget making process where even a memorandum was sent. The executive headed by the governor was aware of this consent. There is another obligation under Section 30 (3) (f) which imposes an obligation on the governor to account. I know this is a Section that this Senate has had an opportunity to consider before. It says; in performing the functions under Section 30 (2), the governor shall be accountable for the management and use of the county resources.

So, this Act does not say it is the Chief Officer for Finance. Whereas we know that that is the person within your establishment to assist you in matters finance, it cannot be that his actions are not your actions. A defense cannot avail to you that it was not me. So, the transgressions enumerated which the governor is not even saying he was not aware – I say this deliberately that whereas a question was put as to what effort was made to draw the attention of the governor to these matters, when you interact with his response and the documents he has attached – of these matters. He was aware of these matters but what action was taken? You will notice that whereas this forum has not been in place for the last two financial years, the county assembly could not have been motivated to witch-hunt because if they had, they would have then decided to impeach him on that ground on the first or second financial year.

I am sure an opportunity must have been availed to the governor to take corrective action, and this was not done.

**The Speaker** (Hon. Ethuro): Counsel, your time is up.

**Mr. George Ng'ang'a**: Mr. Speaker, Sir, add me two more minutes so that I finish.

**The Speaker** (Hon. Ethuro): I will grant you the two minutes.

**Mr. George Ng'ang'a**: Thank you Mr. Speaker, Sir. On the establishment of the sub-county as asked by Sen. M. Kajwang, Section 48 (1) (b) of the County Governments Act, 2012 sets out how you establish a sub-county. They have been established by law. Now, you have eight sub-county administrators who are supposed to be serving in six sub-counties. We have six constituencies within Nyeri County. We have two constituencies that have been split into two in contravention of this Section 48 (1) (b) so that there can be a sub-county administrator; Kieni East and West and Mathira East and West. Those are now four sub-county units but from two constituencies and Section 48 (1) (b) of the County Governments Act, 2012 is very clear.

When you do that, there would be resources to fund so that the agenda might be noble that you want to bring services closer to the people. If the law tells you that you can



only do six, let that law first be amended before you go ahead to appoint two additional sub-county administrators at public expense.

On the gender rule; invitations were issued by the respective committees to the CECs. In fact, there is a pending court case where when adverse action was supposed to be taken on some CECs who declined to honor the invitations and the assembly sought assistance from the Office of the Director of Public Prosecution (DPP) to charge them, they have filed a constitutional petition in Nyeri challenging the invitations to appear and say it contravenes the doctrine of separation of powers. This shows you the attitude of the county executives that we have headed by the county governor yet no action is taken.

On the governor's invitation so that I sit, I have noticed that at page four of Vol. No. 4 of the governor's bundle, he has attached the letter dated 26<sup>th</sup> August – the pagination is at the top. This document is with regard to the right to be heard. The county assembly takes that right seriously. You will notice that this document appears from the governor's own document. So, he must have received it to attach it to the response. One of the things you will notice, there is no ambiguity in paragraph three. The motion is scheduled to be debated on Friday, 2<sup>nd</sup> September, 2016 at 9.30 a.m. and in accordance with Standing Order No. 64 (3) of the County Assembly of Nyeri Standing Orders and the Principles of Natural Justice, you are invited to the said sitting where you shall be called upon to answer issues raised in the debate.

Now, this is from the governor himself and so an opportunity was given and it was up to him to decide whether to take up that opportunity or not. Suffice it to state that due consideration was given to the due process and the requirements of the right to be heard.

**The Speaker** (Hon. Ethuro): What is it Sen. Murkomen? It must remain small.

**Sen. Murkomen:** On a point of order Mr. Speaker, Sir. It is very small. If I can ask my learned friend and the counsel Mr. George who was incidentally a class ahead of me, if I heard the governor well, it was not that he was not invited. It is that his counsel was denied to address the county assembly. Is there anything you can say about that?

**Sen. (Dr.) Khalwale:** Thank you, Mr. Speaker, Sir. Apparently Sen. Murkomen and I, heard different things at the same time from the same person. In view of the assertion by the Counsel for the Governor that they were never given an opportunity to be heard, I would like to invite the Chair to make a determination on the matter of deliberate attempt by the Counsel for the Governor to mislead this particular Senate sitting.

**Sen. Karaba:** Mr. Speaker, Sir, I am surprised that out of the three questions that I asked, none was answered. One is about the role of the Senator of Nyeri as a mediator. Second question was about the final list of the CECs. Is that a final list or there was another one which was there earlier which is not provided here because I am aware of a situation. Third, the last time that you were trying to impeach the Governor, did you have a regular meeting because we are told there was a lady who had a child according to the newspapers who sat there to vote?

**Sen. Bule:** Thank you, Mr. Speaker, Sir.

**The Speaker** (Hon. Ethuro): It must be a point of order.

**Sen. Bule:** Mr. Speaker, Sir, I am not rising on a point of order, but I have a very important question that I want to ask the County Assembly of Nyeri. This is the fourth year of devolution. The County Assembly of Nyeri has not been born today. It has been there and this is the fourth year---

**The Speaker** (Hon. Ethuro): What is the question? We have been around for the same duration. We will appreciate the dimensions.

**Sen. Bule:** Mr. Speaker, Sir, how comes the County Assembly of Nyeri has not approved the appointment of the Executive that has been made and they have not raised alarm for the last three years?

**The Speaker** (Hon. Ethuro): Order, Senator! First and foremost, the time for asking questions is and was over so we are not going to entertain that question. We are finally going to have Sen. Mutula Kilonzo Jnr.

**Sen. Mutula Kilonzo Jnr.:** Mr. Speaker, Sir, I am still on the question of Bills. For us to make a proper determination and confirm that, in fact, the Bill was forwarded, the schedule is not enough. There should be a letter of forwarding to the Governor and there should be another letter forwarding the Bill which has not been assented to, to the Government Printer. The statement made by my learned friend cannot be supported by evidence. I would like to accept it, but it cannot be accepted as evidence.

**The Speaker** (Hon. Ethuro): Order, Members! This is not the end of it. Some of the issues that Members have raised in terms of points of order can still be dealt with after the submissions by the Governor's side. We are not going to support a cause for either party. If the County Assembly does not respond to questions, they know that would be against them and so we should not be overzealous to get responses. They should know what it means not to respond. If they choose not to respond, I am not going to entertain further responses. So Counsel, I have not invited you to respond.

#### ADJOURNMENT

**The Speaker** (Hon. Ethuro): Hon. Members, on that basis, the House stands adjourned until tomorrow, Wednesday, 14<sup>th</sup> September, 2016 at 9.00 a.m.

The Senate rose at 6.45 p.m.