



**REPUBLIC OF KENYA
KENYA NATIONAL ASSEMBLY
TENTH PARLIAMENT – FOURTH SESSION**

REPORT

**OF THE
DEPARTMENTAL COMMITTEE ON FINANCE,
PLANNING & TRADE**

**ON THE NOMINATION TO THE OFFICE OF
CONTROLLER OF BUDGET**

FEBRUARY, 2011

1.0 PREFACE

Mr. Speaker Sir,

On behalf of the Members of the Departmental Committee No. F on Finance, Planning & Trade, and pursuant to the provisions of Standing Order No. 181, it is my pleasure and duty to present to the House, the Committee's Report on the nomination to the office of Controller of Budget.

The Committee membership comprise of the following:-

The Hon. Chrysanthus Okemo, EGH, MP **(Chairman)**

The Hon. (Prof.) Philip Kaloki MP **(Vice Chairman)**

The Hon. Jakoyo Midiwo, MGH, MP

The Hon. Musikari Kombo, MP

The Hon. Lucas Chepkitony, MP

The Hon. Nkoidila Ole Lankas, MP

The Hon. Sammy Mwaita, MP

The Hon. Lenny Kivuti, MP

The Hon Nelson Gaichuhie, MP

The Hon. Ntoitha M'Mithiaru, MP

The Hon. Shakeel Ahmed Shabbir, MP

Committee mandate

Finance, Planning & Trade Committee is one of the Departmental Committees established under Standing Order No. 198. In accordance with Second Schedule of the Standing Orders, the Committee is mandated to consider:-

- ◆ Public finance;
- ◆ Banking and insurance;
- ◆ National planning and population development;
- ◆ Trade, commerce and industry;
- ◆ Tourism promotion and management.

Committee meetings

The Committee commenced its deliberation on the nomination matter on Monday 7th February, 2011 and held seven Sittings during which the Committee invited the following persons/institutions to appraise it on the subject matter:-

1. OFFICE OF THE PRESIDENT

Amb. Francis Muthaura, EGH- Permanent Secretary/Secretary
to the Cabinet & Head of Public Service
Prof. Nick Wanjohi, CBS - Private Secretary to the President
Prof. Kivutha Kibwana, EGH - Advisor, Constitutional Review
Mr. Kennedy Kihara, EBS - Secretary/ Liaison, Parliament
and Commissions

2. OFFICE OF THE RT. HON. PRIME MINISTER

Mr. Caroli Omondi - Chief of Staff
Mr. Miguna Miguna - Constitutional Advisor
Mr. Mugambi Imanyara - Legal Advisor

3. MINISTRY OF JUSTICE & CONSTITUTIONAL AFFAIRS

Hon. Mutula Kilonzo, EGH, MP - Minister

4. COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)

Mr. Charles Nyachae - Chairman
Dr. Elizabeth Muli - Vice Chairperson
Prof. Peter Wanyande - Commissioner
Mr. Kamotho Waiganjo - ”
Mr. Kibaya Laibuta - ”
Dr. Florence Omosa - ”
Ms Catherine Muma - ”
Mr. Philemon Mwaisaka - ”

5. INTERNATIONAL COMMISSIONON OF JURISTS (K)- ICJ

Ms Priscilla Nyokabi	-	Council Member
Mr. Chris Gikari	-	Programme Officer
Ms Esly Sainna	-	Programme Officer
Ms Anne Nderi	-	Programme Officer

6. LAW SOCIETY OF KENYA

Ms Marykaren Kigen	-	Deputy Secretary
Mr. Donald Kipkorir	-	Council Member
Mr. Alfred Opiyo Chieng'	-	”

7. FIDA KENYA

Ms Claris Ogangah	-	Deputy Director
Ms Christine Kungu	-	Legal Counsel

8. NATIONAL MUSLIMS FORUM (NAMLEF)

Mr. Abdullahi Abdi	-	Chairman
Mr. Al Hajj Yusuf	-	Vice Chairman
Mr. Abubakar Said	-	Chief Executive
Mr. Salim Vayani	-	Secretary General

Committee's expected output

The Committee is expected to submit a report setting out the consultations/hearings held, the evidence received, and the findings of the Committee on the constitutionality of the nomination process and other propriety of the nominations and its recommendations thereof.

Mr. Speaker Sir,

On behalf of the Departmental Committee on Finance, Planning & Trade, I have the honour and pleasure to present the Committee's Report on the nomination to the office of the Controller of Budget for adoption by the House.

Mr. Speaker Sir,

May I take this opportunity to thank all Members of the Committee for their input and valuable contributions during the deliberations on the matter.

Thank you.

Signed

Hon. Chrysanthus Okemo, EGH, MP

**Chairman,
Departmental Committee on Finance, Planning & Trade**

Date

1.1 BACKGROUND (CHRONOLOGY OF EVENTS)

Nomination of constitutional office holders by H.E. the President

On Friday 28th January 2011, H.E. the President announced the nomination for approval by Kenya national Assembly of persons to the offices of the Chief Justice, Attorney General, Director of Public Prosecutions and Controller of Budget.

Hon. Gitobu Imanyara, MP intervention

On Tuesday 1st February 2011, Hon. Gitobu Imanyara, MP rose on a point of order to seek the direction of Mr. Speaker on the constitutionality of the nomination of the said constitutional office holders by H.E the President and cited Articles 3(1), 166(1), 172 and section 24 of the Sixth Schedule to the Constitution.

Speaker's Ruling

On Thursday 3rd February 2011, Mr. Speaker acknowledged receipt of two letters on the nomination of the said constitutional office holders. One, from the Office of the President on 31st January, 2011 forwarding the nominees to the National Assembly in accordance with the Constitution. Two, from the office of the Rt. Hon. Prime Minister on 1st February, 2011 making representation as to the validity and constitutionality of the letter from the Office of the President.

Consequently, Mr. Speaker ruled that:-

- (i) The House was not yet substantively seized of the matter since there was no motion before the House hence declined to make a determination on the constitutionality of the nominations.
- (ii) The two letters from both the office of the President and the Rt. Hon. Prime Minister be forwarded to the departmental Committees on Justice & Legal Affairs and Finance, Planning & Trade

according to their respective mandates, for disposal as provided for in the Standing Orders and the law.

- (iii) The two Committees to carry out requisite inquiries on the constitutionality of the nomination process and other propriety of the nominations and make recommendations for action by the House and table their reports on or before 10th February, 2011.
- (iv) The role of a Committee in the vetting process is to consider all aspects of the proposed nomination, including compliance with the constitution and all relevant enabling and incidental laws.

1.2. ESTABLISHMENT OF THE OFFICE OF CONTROLLER OF BUDGET

Article 228 of the constitution provides that:-

- (1) There shall be Controller of Budget who shall be nominated by the President and with the approval of the National Assembly, appointed by the President.
- (2) To be qualified to be the Controller, a person shall have extensive knowledge of public finance or at least ten years experience in auditing public finance management.
- (3) The Controller shall, subject to Article 251, hold office for a term of eight years and shall not be eligible for re-appointment.
- (4) The Controller of Budget shall oversee the implementation of budgets of the national and county governments by authorizing withdrawals from public funds under Articles 204, 206, and 207.
- (5) The Controller shall not approve any withdrawal from public funds unless satisfied that the withdrawal is authorized by law.
- (6) Every four months, the Controller shall submit to each House of Parliament a report on the implementation of the budgets of the national and county governments.

2.0 SUBMISSIONS ON THE NOMINATION PROCESS

2.1 OFFICE OF THE PRESIDENT

2.1.1 Amb. Francis Muthaura, Permanent Secretary/Secretary to the Cabinet & Head of Public Service

He informed the Committee that the consultative meetings between H.E. the President and the Rt. Hon. Prime Minister on the nomination process took place as follows:-

6th January, 2011 - (Annex 1)

The agenda on consultations between H.E the President and the Rt. Hon. Prime Minister had the following items:-

1. Fast tracking of appointments necessary for the establishment of a local mechanism for the trial of post-election violence suspects.
 - Gazette Notice advertising the post of Director of Public Prosecutions.
 - Identification of a nomination for the post of Chief Justice.
 - Deputy Chief Justice to be recommended by the Judicial Service Commission which is already in place.
2. Advertisement for the post of Controller of Budget.
 - Gazette Notice
3. Renewal of contract for the Director General, NSIS
 - Being recommended for renewal to ensure continuity.
4. To attend to urgent legislation, vet and approve nominations of persons to fill state offices.
 - (i) The Minutes on Agenda items 1 and 2 of the Meeting of 6th January, 2011 state that:-
 - (a) The two Principals considered fast tracking of appointments necessary for the establishment a local mechanism for the

trial of post-election violence suspects and the nominations were:-

- Chief Justice
- Director of Public Prosecutions
- Controller of Budget
- Deputy Chief Justice

(b) The two principals agreed that the nomination of the Deputy Chief Justice be done through the Judicial Service Commission while the others were to be done directly by the Principals through consultations as provided for in the Constitution.

(c) The Technical Team was authorised to facilitate identification of the persons through consultations.

(ii) The Committee was further informed that:-

(a) The two Principals disagreed with the proposal by the Technical Team to advertise for the positions and on the basis of legal advice received from Prof. Kivutha Kibwana, agreed not to advertise for the positions but to consult in accordance with the Constitution and agree on the names.

(b) The Ministry of Finance was requested but did not submit nominees for the position of Controller of Budget and Mr. William Kirwa was settled on from the list of applicants for the position of Chairperson of the Commission on Revenue Allocation. The National Security Intelligence Service also gave a clean report on Mr. Kirwa to the Head of Public Service verbally.

27th January, 2011 - (Annex 2)

1. Item 5 on the proposed agenda was constitutional appointments of:- Chief Justice, Deputy Chief Justice, Director of Prosecutions, Attorney General, and Controller of Budget.
2. The Minutes on Agenda item 5 on consultations between the Office of the President and the Rt. Hon. Prime Minister state that:-
 - (a) H.E. the President presented a list of the following persons which had been compiled out of consultations between the two Principals for appointments to various positions.

POSITION	PROPOSED PERSON FOR NOMINATION	CURRENT POSITION	COUNTY
Chief Justice	Justice Paul Kihara Kariuki	High Court Judge	Kiambu
Deputy Chief Justice	Justice Hannah Okwengu	High Court Judge	Homa Bay
Attorney General	Mr. Fred Ojiambo	Private practice	
Director of Public Prosecutions	Mr. Kioko Kirukumi	Private Practice	
Controller of Budget	Mr. William Kirwa	MD, Agricultural Dev. Corporation	
Kenya Anti-corruption Commission	Prof. PLO Lumumba	Director, KACC	

- (b) The Principals referred the list after consultations to the Technical Team comprising:- Amb. Francis Mathuara, Dr. Mohammed Isahakhia, Prof. Nick Wanjohi, and Mr. Caroli Omondi to scrutinize and prepare a harmonized position.
- (c) H.E. the President indicated that he needed to make the nominations by the following day before his departure for the AU meeting in Addis Ababa and therefore the Technical Team was

directed by the Principals to present a harmonized list later in the afternoon.

- (b) The Technical Team met to harmonize the list and agreed on all the names except for the proposals for Chief Justice. The Technical Team agreed to forward separately to the Principals the following three names for the position of Chief Justice with request that the Principals assist in selecting one name for nomination.
- Justice Paul Kihara
 - Justice Riaga Omolo
 - Justice Magan Visram

(iii) 7th February, 2011- (**Annex 3**)

The proposed Agenda included the following items:-

- Review of the nomination to fill constitutional offices.
- Review of government approach in localizing the ICC.

The press statement issued by the Presidential Press Unit after the meeting stated that, the two Principals agreed to respect the on-going parliamentary process and its outcome on the issue of the nominations currently under consideration by Parliament.

2.1.2 Prof. Kivutha Kibwana - Advisor, Constitutional Review

He presented a written submission (**Annex 4**) and informed the Committee that:-

- (i) The nomination of the Controller of Budget is provided for under Article 228(1) of the Constitution which states that, there shall be a Controller of Budget who shall be nominated by the President and with the approval of the National Assembly, appointed by the President.

- (ii) It is the President's constitutional duty to nominate the person qualified to be eventually appointed to be Controller of Budget.
- (iii) Under Section 29(2) of the Sixth Schedule, the President is required, subject to the National Accord and Reconciliation Act, to consult the Rt. Hon. Prime Minister on the name that the President proposes as Controller of Budget.
- (iv) Article 259(11) describes, *inter alia*, the meaning of consultation but it should be noted that consultation does not mean concurrence as the value of consultations is to help the President access any vital information regarding any nominee before his ultimate decision on the suitability.
- (v) Kenya's unique position in which the Rt. Hon. Prime Minister will be in existence until the next General Election requires that, H.E. the President must consult with the Prime Minister before he makes any nomination to an office requiring National Assembly approval.
- (vi) If the H.E. the President refused to consult the Rt. Hon. Prime Minister where consultation is required, then the purported nomination by H.E. the President is null and void.
- (vii) When the President presents names to the Speaker of National Assembly under his hand in which the President confirms that consultations have taken place, it is not the duty of the Speaker to question the President's action. Any dissatisfied party can challenge the matter in any appropriate legal fora.

2.2 OFFICE OF THE PRIME MINISTER

2.2.1 Mr. Caroli Omondi, Chief of Staff

Mr. Caroli Omondi presented a written submission (***Annex 5***) informed the Committee that:-

A. Technical Team/Panel

- (i) There were no minutes of the Meeting of 27th January, 2011 between H.E the President and the Rt. Hon. Prime Minister and no Minutes of the meetings between the two Principals have been kept to the best of his knowledge. This is confirmed by the two draft agenda from both the two offices which do not contain the items, “Adoption of Agenda” or “Confirmation of the Minutes”.
- (ii) The Principals had agreed that a Panel be established comprising representatives of the Office of the President, Office of the Prime Minister, Law Reform Commission, Law Society of Kenya, Judicial Service Commission and the Public Service Commission, to identify and recommend three (3) candidates for each position to the Principals.
- (iii) The Panel was to be constituted and chaired by the Head of Public Service/Secretary to the Cabinet. The Panel met for the first and only time during which the Head of Public Service excused himself and invited the President’s Private Secretary to chair the meeting on his behalf.
- (iv) The Panel comprising the President’s Private Secretary; Permanent Secretary, Ministry of Justice & Constitutional Affairs; Permanent Secretary, Provincial Administration and Internal Security; Solicitor General; and the Chief of Staff in the Office of the Prime Minister, met only once to deal with the preliminary aspect of the nomination matter. The Panel discussed the criteria and options for appointing a Chief Justice and agreed that the key factors on criteria be seniority, competence, integrity and reform-mindedness.
- (v) The Panel agreed that:-
 - (a) The new Chief Justice could be appointed from the Commonwealth, the Judiciary or from the private practice in

Kenya but the Panel did not discuss any nominee to the position of the Chief Justice.

- (b) The Judiciary would be invited to provide a list of the serving Judges so as to establish their seniority (**Annex 6**).
- (c) Candidates for the position of the Director of Prosecutions would be identified from private practice, prosecution service and the Judiciary. While various members mentioned various names of prominent criminal law practitioners, there was no discussion on the suitability of any nominee.
- (vi) The Panel did not discuss the position of the Attorney General. The Panel did not also discuss the position of Controller of Budget as there was no representative from the Treasury present at the meeting.
- (vii) There were no minutes of the meeting of the Panel and the Panel has not met again after its first and only meeting. The Panel did not produce any joint report and never reported back to the two Principals.

B. The National Accord & Reconciliation Act

Mr. Caroli Omondi presented a written submission (**Annex 7**) and further informed the Committee that:-

1. Consultations (Item No. 5)

- (i) Appointments under the Constitution are subject to the National Accord & Reconciliation Act, which is premised on “**real power-sharing**”, “**consultations**” and “**willingness to compromise**”. Real power-sharing connotes equality and parity in making the appointments.
- (ii) Appointments are subject to the provisions of the National Accord which established the Grand Coalition Government

based on shared power. Consequently, any nomination must be made jointly by both coalition partners.

- (iii) Consultations within the framework of the National Accord therefore mean “**compromise**” between the two Principals as the basis of any decisions on a matter under consideration.
- (iv) Consultations require that the parties consulting offer each other sufficient opportunity to exchange views; share sufficient information available on each nominee on the basis of full disclosure of accurate information; act reasonably and must be free and frank in exchanging views.
- (v) Consultation must be undertaken when the proposals are still in their formative stages without any fixed views all through to the end and consultation must not be treated “**perfunctorily**” or as a mere formality.
- (vi) Consultation must be practical and conducted within a time period sufficient for views to be exchanged fully and matters thoroughly interrogated. The timeframe depends on the seriousness of the matter and urgency is no substitute to sufficient time for practical consultations.

2. National Values and Principle (Item No. 7)

- (i) The nominations breached the constitutional requirements of regional balance and gender parity as no woman was nominated.
- (ii) The nominee of the office of the Attorney General, if accepted, will put majority of all the senior positions within State Law Office under one ethnic group

- (iii) The nominee for the position of Director of Public Prosecutions, if accepted, will undermine the independence of the Prosecution Service in prosecuting pending cases of grand corruption in which the nominee has been defence counsel.

C. Reactions on the Statement made by the Vice President in Parliament on Tuesday 1st February, 2011

Mr. Omondi Caroli presented a written submission (**Annex 8**) and made the following reactions to the Statement by the Vice President in Parliament on the consultative process between H.E. the President and the Rt. Hon. Prime Minister regarding the nomination matter:-

1. Technical Team

There was only one Technical Team which held only one meeting and therefore, there were no “*Technical meetings*” or “*Technical Teams*” as stated by the Vice President.

2. Foreign Chief Justice

The Rt. Hon. Prime Minister did not express the view that we should have a foreign Chief Justice as stated by the Vice President, but only suggested that a transitional Chief Justice be appointed from the Commonwealth for a fixed non-renewable term of three (3) years for the reasons that:-

- (i) It was important to get a new Chief Justice from a functioning Judiciary as such Chief Justice would be able to identify the shortcomings of our Judiciary and offer best international practices in reforming our Judiciary.
- (ii) A Commonwealth Chief Justice would bring the credibility needed in establishing a local mechanism to deal with post-election violence matters and to negotiate with ICC, a referral of the pending cases.

- (iii) Such Chief Justice would not be seen as bias or partisan or beholden to any interest in the country.
- (iv) The transition period would allow the country to assess newly appointed or promoted Judges and identify a suitable successor.
- (v) A local candidate appointed from outside the Judiciary was likely to experience resistance within the Judiciary and thus undermine the reform process.
- (vi) That the current serving Judges had not been vetted as required by the new Constitution and were therefore ineligible for appointment.

3. Justice Riaga Omolo as the Prime Minister's preference

The Prime Minister did not at anytime propose or insist on the choice of Justice Omolo as stated by the Vice President. The Hon. Judge is ranked as the senior most Judge after the Chief Justice and it is in this respect that his name came under consideration in addition to having been vetted by the National Assembly as a Member of the Judicial Service Commission.

4. Mr. Fred Ojiambo

That Mr. Fred Ojiambo was replaced by Prof. Githu Muigai because the former did not have higher post-graduate qualification is incorrect because this was not a consideration before the Technical Team.

5. Prime Minister's trip to Addis Ababa

The Rt. Hon. Prime Minister left for Addis Ababa on 28th January 2011, and the trip was known to both Amb. Francis Muthaura and Prof. Nick Wanjohi well in advance as it was discussed in the meeting of 27th January, 2011 under the agenda on the AU's Peace

and Security Council. The clearance of the plane that would transport the Rt. Hon. Prime Minister to Addis Ababa was also discussed during the said meeting.

6. Finalization of the consultations on nomination

(i) The matter had not been finalized as at 27th January, 2011 as stated by the Vice President and further consultations were planned by the parties but the parties did not agree that Friday 28th January, 2011 would be the final date for the consultations.

(ii) There was no agreement that the Prime Minister would be consulted on phone while in Addis Ababa and indeed the Prime Minister had proposed in writing that the consultations would be held the following week vide the letter dated 27th January, 2011 to Amb. Francis Muthaura (**Annex 9**).

(7) Proposal to nominate Justice Alnashir Visram

The proposal to nominate Justice Visram to the position of Chief Justice was never communicated to the Prime Minister as stated by the Vice President and the proposal was not discussed by the Technical Team.

(8) State House Comptroller phone call to Mr. Omondi

(i) The Comptroller called his phone at around 6.30 p.m. and informed him that H.E the President had wished to talk to the Rt. Hon. Prime Minister but did not divulge the subject matter.

(ii) The Rt. Hon. Prime Minister was at the time attending the AU's Peace and Security Council Meeting with the other

Heads of States and Governments that started at 4.00 p.m. and ended at around 11.00 p.m. in the night.

- (iii) No aide was allowed into the meeting and he only had the opportunity to inform the Rt. Hon. Prime Minister at 11.30 p.m. while back at the Hotel that the Comptroller had called and informed him that H.E. the President had wished to talk to the Rt. Hon. Prime Minister but he was not aware of the subject matter.
- (iv) The Prime Minister only learned from the media during refreshment break that the nominations had been made for these positions.

2.2.2 Mr. Miguna Miguna, Constitutional Advisor

Mr. Miguna informed the Committee that:-

- (i) It is not true that it is the President's constitutional duty to nominate the person qualified to be eventually appointed to be the Controller of Budget as stated by Prof. Kivutha Kibwana under item No. 3 of his submission, without taking cognizance of the National Accord & Reconciliation Act.
- (ii) The instructions from the two Principals to the Technical Committee to submit three (3) names for each position was not complied with.
- (iii) The legal opinion for the government on the nomination process of the Controller of Budget should have only been sought from the Attorney General as principal legal advisor to the government and not Prof. Kivutha Kibwana.
- (iv) If the President refused to consult the Prime Minister where consultation is required then the nomination process was

unconstitutional and therefore null and void as confirmed by Prof. Kivutha Kibwana in his submission under item No. 14.

2.2.3 Mr. Mugambi Imanyara, Legal Advisor

Mr. Mugambi informed the Committee that:-

- (i) The nomination process was unconstitutional and the letter and the spirit of the Constitution should be respected in the nomination process. Both Article 27(3) on equality for men and women, and Article 27(8) on gender balance should be respected.
- (ii) The subject letter forwarding the nominees to the National Assembly from the Office of the President was not under the hand of H.E. the President as provided for in the Constitution but was signed by Amb. Francis Muthaura not for or on behalf of H.E. the President.

2.3 COMMISSION FOR THE IMPLEMENTATION OF THE CONSTITUTION (CIC)

The CIC presented a written submission (**Annex 10**) and informed the Committee that:-

1. The mandate of CIC as contained in Article 249 (1) of the Constitution is to:-
 - (i) Protect the sovereignty of the people;
 - (ii) Secure the observance by all state organs of democratic values and principles including those articulated in Article 10 and Chapter 6 of the Constitution particularly with respect for the rule of law, participation of the people, integrity, good governance, transparency and accountability; and
 - (iii) Promote constitutionalism.

2. CIC is mandated to work with each constitutional commission (of which the Judicial Service of Commission is one) to ensure that the letter and spirit of the constitution is respected in the appointment.

2.3.1 Appointment of the Chief Justice

The CIC informed the Committee that:-

- (i) Article 166(1) (a) provides for the appointment of the Chief Justice while Sections 24(2) and 29(2) of the Sixth Schedule reinforces this provision that the appointment will be subject to the National Accord and Reconciliation Act, and after consultation with Rt. Hon. Prime Minister and with the approval of the National Assembly.
- (ii) The three provisions should be read together in dealing with the appointment of the Chief justice based on the following:-
 - (a) Article 166 is not suspended under Section 2 of the Sixth Schedule.
 - (b) Article 24(2) which deals with the appointment of the first Chief Justice under the Constitution does not expressly excluded the Application of Article 166.
 - (c) The Judicial Service Commission is already established and is operational and one of its primary roles is to recommend persons to be appointed as Chief Justice.
- (iii) Article 166(1) contemplates that the appointment of the Chief Justice shall be a shared responsibility among the three arms of the government and in carrying out the mandate of appointment prior to the first elections, the President shall consult the Rt. Hon. Prime Minister.
- (iv) The letter and the spirit of the Constitution should be followed in the implementation of the Constitution and with regard to the appointment of the Chief Justice, the provision in Article 166 and

read together with Sections 24 and 29 of the Sixth Schedule require that:-

- (a) The process should commence with recommendations by the Judicial Service Commission to H.E. the President who in turn should consult the Rt. Hon. Prime Minister, after which the President forwards the name of the nominee to National Assembly for approval.
- (b) The role of the Judicial Service Commission in the appointment of the Chief Justice should be respected and the Commission allowed to undertake the function reserved to it by the Constitution.

2.3.2 Appointment of Attorney General, Director of Public Prosecutions and Controller of Budget

The CIC informed the Committee that:-

- (i) The provisions relating to the appointment of the three constitutional offices are set out in Articles 156, 157 and 228 of the Constitution respectively.
- (ii) In the period before the first elections, these Articles must be read together with the provisions of Section 29 of the Sixth Schedule which require H.E. the President to consult the Rt. Hon. Prime Minister prior to appointment, subject to the National Accord and Reconciliation Act. Therefore, the process of appointment should reflect both the letter and the spirit of the Constitution.

2.4 THE MINISTER FOR JUSTICE AND CONSTITUTIONAL AFFAIRS

Minister informed the Committee that:-

- (i) The Ministry of Justice and Constitutional Affairs is not a player in the current nomination process for the constitutional offices.

- (ii) Article 10, 73(2) and Chapter 6 of the Constitutions demands that the process of sourcing for constitutional offices be transparent, inclusive, non-discriminatory and allow for public participation. Article 10 on principle of governance is not negotiable and is a mandatory requirement as regards public participation.
- (iii) Gazettement of the advertisement for the position of Chief Justice could not have been done before setting up the Judicial Service Commission, because it is the Commission that is supposed to recommend nominees as per Article 166(2).
- (iv) The Court Ruling of 3rd February, 2011 on the nomination process is interim as the case is on-going but the judicial decisions should be respected.
- (v) The Constitution provides for the current Chief Justice to vacate the office by 27th February, 2011 but there is no provision for the effective date for the in-coming Chief Justice. However, there cannot be a constitutional crisis because a precedent has been set before by having the senior most Judge as acting Chief Justice. The benefit of having a new Chief Justice by the said date is to assist in the vetting of Judges and setting up of the Supreme Court.
- (vi) He welcomed the nominations as it allowed for public participation and for the reform process to move forward.

2.5 INTERNATIONAL COMMISSION OF JURISTS (K) – ICJ

The ICJ presented a written submission (***Annex 11***) and informed the Committee that:-

- (i) Article 165(3)(d)(i) gives the High Court exclusive jurisdiction to hear any question regarding the interpretation of the Constitution. The Article further specifies that such interpretation includes the

determination of whether anything said to be done under the authority of the constitution is constitutional or not.

- (ii) A petition filed in the High Court to determine the constitutionality of the nomination process by the H.E. the President for the constitutional offices of the Chief Justice, the Attorney General, the Director of Public Prosecutions and the Controller of Budget was heard and determined on 3rd February 2011, that the nominations were unconstitutional and that the nominees should therefore not be processed for their proposed offices.
- (iii) In the light of its assurance to the International Community of its intent to prosecute perpetrators of post-election violence, the government is revamping the Judiciary. Therefore, it would be important to respect the decisions of the Judiciary, otherwise such revamping would be superficial and it cannot be ruled out if post election violence perpetrators would also not respect the court decisions as aggrieved parties.

2.5.1 UNCONSTITUTIONALITY OF THE NOMINATION PROCESS

The ICJ informed the Committee that:-

- (i) Clause 29 of the Sixth Schedule requires H.E. the President to consult with the Rt. Hon. Prime Minister in making any appointment to new constitutional offices or those that fall vacant. Therefore, the nomination of the Attorney General, the Director of Public Prosecutions and the Controller of Budget legally require a consultative process between the two Principals.
- (ii) Consultation in various case laws and jurisdiction has been accepted as, **“such decisions shall require the concurrence of such other functionary; provided that if such functionary is a body of persons, it shall express its concurrence in accordance with its own decision making process”**.

- (iii) Under the National Accord and Reconciliation Act, the two Principals are equal partners in the governance of the country and the new constitution also takes cognizance of this. Therefore, the assertions by the Rt. Hon. Prime Minister that he was not consulted are grave and should be ventilated prior to nominees for such positions being accepted.
- (iv) Articles 69, 118, 196, and 201 of the Constitution provide for public participation in governance. Therefore, H.E. the President violated the Constitution by excluding public participation. The public ought to have been informed of every step of the nomination process as constitutional offices cannot be legally filled behind closed doors and still be in compliance with these provisions.

2.5.2 ICJ RECOMMENDATION ON THE NOMINATION PROCESS

In view of the foregoing, the ICJ recommended to the Committee the following:-

- (i) To declare the nomination process unconstitutional in solidarity with the High Court and render the process back to H.E. the President and the Rt. Hon. Prime Minister for proper nomination in accordance with the Constitution.
- (ii) That the nomination process of the Chief Justice, Attorney General, Director of Public Prosecution and Controller of Budget should be competitive, transparent and accountable. Therefore, these constitutional offices should be advertised, shortlisted and nominated publicly.

2.6 LAW SOCIETY OF KENYA AND FIDA-KENYA

2.6.1 FIDA Kenya

FIDA Kenya Presented a written submission (***Annex 12***) and informed the Committee that it considered the following issues with regard to the nomination process:-

- (i) Whether the letter and the spirit of the Constitution was adhered to in the nomination process.
- (ii) Whether the nomination process accorded both men and women equal treatment which includes right to equal opportunities in political, economic, cultural and social spheres as envisaged under Article 27 of the Constitution.
- (iii) The implicatiation of not having a transparent, participatory, competitive process for constitutional office bearers and more specifically the current nominations.
- (iv) The historical background in respect to equality and discrimination.
- (v) The bearing of political impasse in regard to the implementation of the Constitution.

CONSTITUTIONALITY OF THE NOMINATION TO THE OFFICE
OF THE CONTROLLER OF BUDGET

FIDA Kenya informed the Committee that:-

- (i) The process of appointment is set out in Article 228 of the Constitution but the Article must be read together with the provisions of Section 29 of the Sixth Schedule of the Constitution which provides that, the appointment be made by H.E. the President subject to the National Accord & Reconciliation Act, and after consultation with the R. Hon. Prime Minister, and with approval of the National Assembly.
- (ii) The process of nomination was not inclusive and therefore Articles 129 and 131(2) of the Constitution were not upheld, and favoured only men while discriminated against women. Therefore, approving the nominations will not be in the spirit of the Constitution.

- (iii) Article 10 of the Constitution which sets out the national values and principles were disregarded while undertaking the nomination.
- (iv) Article 27 of the Constitution provides for equality and freedom from discrimination but the nomination process did not afford equal opportunity to both men and women.
- (v) The nomination process was flawed even if a woman was among those four nominees because the process was not competitive, transparent and participatory.
- (vi) Any violation of the Constitution by any arm of the Government will undermine the fundamentals of constitutionalism in the country and continue to destroy public confidence in the Executive, Judiciary and the Legislature's ability to implement of the new Constitution.

2.6.2 LAW SOCIETY OF KENYA (LSK)

LSK presented a written submission (**Annex 13**) and informed the Committee that:-

- (i) The Constitution does not define the expression "***in consultation***" but the term "***after consultation***" which is used in Section 24(2) of the Sixth Schedule of the Constitution of Kenya is also used in the interim constitution as well as the present Constitution of South Africa and it is defined as "***such decision shall be taken in good faith after consulting and giving serious consideration to the views of such functionary***".
- (ii) The actual degree of consultation will depend on the prevailing political circumstance and the political style of the President but it should be noted that consultation does not mean concurrence.

- (iii) The recent nominations for constitutional offices were done without public participation as required by Article 10(2) (a) of the Constitution.

2.7 SUBMISSION BY NATIONAL MUSLIMS FORUM (NAMLEF)

NAMLEF presented a written memorandum (**Annex 14**) and submitted its position on the nomination to the office of the Controller of Budget that:-

- (i) H.E the President did not follow the constitutional process in the appointment and that Article 228 should be read in the spirit of the National Accord & Reconciliation Act, which is an integral part of the Constitution and which requires consultation between the two Principals in order to ensure harmony.
- (ii) The appointments are in contravention of Article 250(4) which provides that the appointments to commissions and independent offices shall take into account the national values contained in Article 10 and the principle that the composition of the commissions and offices taken as a whole, shall reflect the regional and ethnic diversity of the people of Kenya. This will be violated as the Chairperson of Revenue Allocation Commission is from the same region and same ethnic community as that of the proposed Controller of Budget.
- (iii) The appointments to public offices must adhere to the requirements of Article 232(h) which demands representation of Kenya's diverse communities, regional, ethnic and religious balance.
- (iv) The appointments must conform also to other critical constitutional requirements relating to transparency, citizen participation and gender balance.

2. 8 SUBMISSION BY INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS OF KENYA (ICPAK) – (Annex 15)

The Committee received a written submission from ICPAK which stated its position on the nomination to the office of the Controller of Budget that:-

- (i) The appointment to the Constitutional Offices should be undertaken in accordance with the spirit and the letter of the Constitution. The process of appointment of all holders of public offices must be in a transparent and accountable manner, providing equal opportunities to all Kenyans with the requisite competence to occupy these positions.
- (ii) One of the values espoused in the Constitution is transparency and this must be respected. Therefore, the Institute is proposing that such positions should be advertised so as to allow Kenyans to express their interest and provide a wider pool of professionals to select from.
- (iii) The criteria set out in section 228(2) prescribe that to qualify to be nominated as Controller of Budget, one needed to have accumulated ten (10) years experience in auditing public finance management. Therefore, by extension this section alludes to the fact that the Controller of Budget should ideally be a professional accountant who has undertaken extensive auditing work and has knowledge of public finance management.
- (iv) The Constitution further envisaged the Office of Controller of Budget as being a key office in fighting corruption and ensuring greater transparency and accountability in Government spending. Therefore, it is fitting that the Controller of Budget should be a member of a professional body that has a Code of Ethics for its members and has a robust disciplinary process to enforce adherences to its critical values.

- (v) It is for this reason that the Institute proposes that the Controller of Budget and indeed all offices that deal with accounting and auditing matters such as the Auditor General, be held by professional accountants who are members of ICPAK.

3.0 COMMITTEE'S OBSERVATIONS

Mr. Speaker did in his ruling of 3rd February 2011 filter certain issues for the Committees to make recommendations on. This Committee has extracted the following issues from the ruling that are relevant to its mandate. These are:

1. What is the status, import and weight to be attached to the opinion of the Commission on the Implementation of the Constitution on a matter such as this;
2. Were there consultations between the President and the Prime Minister as contemplated by section 29(2) of the Sixth Schedule to the Constitution; tied to this point, are a number of other questions including what the minimum threshold of consultation should be and if consultation denotes concurrence, consensus or other measure of agreement. Additionally there is the further point of what was intended by the drafters of the Constitution in providing for consultation as they did;
3. What is the import of making the consultations subject to the National Accord and Reconciliation Act;
4. Do the nominations meet the constitutional requirements of regional balance and gender parity;
5. Do the questions raised on the nomination of office-holders amount to a dispute within the meaning of the Political Parties Act;

6. And finally, whether or not the correct approach to the questions raised on the propriety of the nominations can be resolved by a vote in this House to approve or disapprove the nominees?

In addition to the above issues, and from the evidence adduced before it, the Committee has distilled the following legal issues requiring recommendation to the House:-

1. What are the Constitutional requirements for the process of nomination of a person to the office of Controller of Budget? This question has several parts:
 - (a) Does the President require to consult with the Prime Minister in the process of nomination of a person to the office of Controller of Budget?
 - (b) Does the Constitution place any prerequisites on the President and the Prime Minister in the nomination process?
 - (c) If a competitive nomination process is required, was the competitive process adopted in this case sufficient?
 - (d) If consultation is required, what is the level of consultation required of the President and the Prime Minister and in the circumstances presented to the Committee was the Constitutional requirement of consultation attained?
 - (e) Did the communication on the nominations to the National Assembly meet Constitutional requirements?
2. Were the legal requirements for the process of nomination for appointment of a person to the office of Controller of Budget met?
3. If the legal requirements for the process of nomination have been complied with, is Mr. William Kipkemboi Kirwa a suitable person for appointment as Controller of Budget?

1. WHAT ARE THE LEGAL REQUIREMENTS FOR THE PROCESS OF NOMINATION OF A PERSON TO OFFICE OF CONTROLLER OF BUDGET?

(a) Does the President require to consult with the Prime Minister in the process of nomination of a person to the office of Controller of Budget?

There appeared to the Committee unanimity from all persons concerned that Article 228(1) is, in the transition stage, tempered by Section 29 of Schedule 6 of the Constitution of Kenya. Section 29 of the Sixth Schedule states as follows:

“New appointments

29 (1) The process of appointment of persons to fill vacancies arising in

consequence of the coming into force of this Constitution shall begin on the effective date and be finalised within one year.

(2) Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.”

It was therefore clear that the President requires to consult the Prime Minister in nominating a person to the office of Controller of Budget.

(b) Does the Constitution place any prerequisites on the President and the Prime Minister in the nomination process?

Article 228(1) of the Constitution merely provides that there shall be a Controller of Budget who shall be nominated by the President, and with the approval of the National Assembly, appointed by the President. The Committee, from the representations made before it, established that there are two schools

of thought on the matter, one based on executive power and the other based on a competitive process. They can be summarized as follows:

(i) Executive Power

One school of thought put forward to the Committee is that the President and Prime Minister are not restricted in making a choice of a person to nominate to the position of Controller of Budget. They are free to headhunt and after consultation nominate the person. This is part of Executive power, derived by the President (and Prime Minister) from the people, upon election. This Executive power is founded upon Article 1(3)(b) that states as follows:

“1(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

- (a) Parliament and the legislative assemblies in the county governments;
- (b) the national executive and the executive structures in the county governments; and
- (c) the judiciary and independent tribunals.”

Article 228(1) does not place any prerequisites on the nomination process and the exercise of Executive authority should not be unnecessarily fettered. This is common in other countries with a Presidential system such as the United States of America where the President is free to headhunt for Presidential appointees such as Judges of the Supreme Court, the Attorney General, the Secretary of State and other similar positions then forward the names to Congress for approval. This is the same Executive power granted to a President to appoint members of his/her Cabinet. In no country in the world does a President advertise for applications from persons interested in becoming members of his/her Cabinet. The same principle therefore applies to the nomination of a person to the office of Controller of Budget.

(ii) Competitive Process

The other school of thought put forward to the Committee is that the President and Prime Minister should use a competitive process in selecting the person to be nominated. This school of thought relies on the following provisions of the Constitution to support this position:

Article 10 of the Constitution provides as follows:

“National values and principles of governance

2. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—
 - (a) applies or interprets this Constitution;
 - (b) enacts, applies or interprets any law; or
 - (c) makes, or implements public policy decisions.
- (2) The national values and principles of governance include—
 - (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
 - (c) good governance, integrity, transparency and accountability; and
 - (d) sustainable development.”

The portion of this Constitutional Article to emphasize is that relating to the participation of the people, equity, social justice, inclusiveness, equality, non-discrimination, protection of the marginalized, good governance, integrity, transparency and accountability. These national values and principles must be reflected in the nomination process. A competitive process shall therefore afford

all qualified Kenyans an opportunity to apply for nomination for the position of Controller of Budget and ensure the national values and principles of governance are respected.

Article 27(3) of the Constitution which provides as follows:

“27(3) Women and men have the right to equal treatment including the right to equal opportunities in political, economic, cultural and social spheres.”

Chapter Six of the Constitution and in particular Article 73(2)(a) which states as follows:

“73(2) The guiding principles of leadership and integrity include-

(a) selection on the basis of personal integrity, competence and suitability, or election in free and fair elections;”

Chapter Thirteen of the Constitution and in particular Part 1 which deals with the values and principles of public service. The relevant portions are:

“Values and principles of public service

232. (1) The values and principles of public service include—
- (a)
 - (b)
 - (c)
 - (d)
 - (e) accountability for administrative acts;
 - (f) transparency and provision to the public of timely, accurate information;
 - (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions;
 - (h) representation of Kenya’s diverse communities; and

- (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of—
 - (i) men and women;
 - (ii) the members of all ethnic groups; and
 - (iii) persons with disabilities.”

Article 258 of the Constitution provides that in construing the Constitution it should be interpreted in such a manner that promotes its purposes, values and principles. It should also be interpreted in a manner that promotes good governance and the rule of law.

To enable there to be fair competition, participation of the people and to enable there to be a pool of applicants to enable equal opportunity for appointment of men and women, members of all ethnic groups and persons with disabilities the process of nomination of a person to the office of Controller of Budget should be done by advertisement or other competitive method(s).

There is need to distinguish nominations that are the unrestricted prerogative of the President under our Constitution and those that require advertisement. Under Article 152 (though suspended until after the next General Elections) the President shall nominate and with the approval of the National Assembly appoint Cabinet Secretaries. The President is free, under Article 152(5), to re-assign or dismiss a Cabinet Secretary. A Cabinet Secretary therefore largely serves at the pleasure of the President. If a person serves at the pleasure of the President it is only logical that the President is given a free hand to select the person to nominate to the position of Cabinet Secretary. The President is however still under an obligation to observe the national values of principles of governance as he head hunts the persons for nomination as Cabinet Secretaries. On the other hand, under Article 228(2) the Controller of Budget holds office for a period of eight years and is not eligible for re-appointment. The Controller of Budget is an independent office as set out under Article

248(3) of the Constitution. The Controller of Budget, under Article 251, may only be removed from office upon the recommendation of a Tribunal appointed to investigate his/her conduct. The nomination of a person to such an independent office with security of tenure should be done with public participation and through a competitive process. This is particularly in light of the fact that the duties of the Controller of Budget require the holder to work independently and not under the direction of any person or authority. This is set out at Article 249(2)(b) which provides that the holder of an independent office shall not be subject to direction or control by any person or authority.

The Committee considered the above two schools of thought and came to the conclusion that for purposes of good governance the nomination of a person to office of Controller of Budget should be done through a competitive process.

(c) If a competitive nomination process is required, was the competitive process adopted in this case constitutionally sufficient?

The Committee was informed that the name of the nominee to the position of Controller of Budget was selected from persons who had previously applied for the position of Commissioner in the Commission on Revenue Allocation as established under Article 215. Article 215 provides as follows:

“215 (1) There is established the Commission on Revenue Allocation.

(2) The Commission shall consist of the following persons appointed by the President—

(a) a chairperson, who shall be nominated by the President and approved by the National Assembly;

(b) two persons nominated by the political parties represented in the National Assembly according to their proportion of members in the Assembly;

- (c) five persons nominated by the political parties represented in the Senate according to their proportion of members in the Senate; and
 - (d) the Principal Secretary in the Ministry responsible for finance.
- (3) The persons nominated under clause (2) shall not be members of Parliament.
- (4) **To be qualified to be a member of the Commission under clause (2) (a), (b) or (c), a person shall have extensive professional experience in financial and economic matters.”**

The Committee found that the name of Mr. William K. Kirwa appears in Kenya gazette number 14183 dated 19th November 2010 in which Amb. Francis K. Muthaura Permanent Secretary, Secretary to the Cabinet and Head of Public Service published the names of applicants to the then declared vacancy of Chairperson of the Revenue Allocation Commission. The Committee noted that the qualifications for a person to be appointed a Commissioner for Revenue Allocation are extensive professional experience in financial and economic matters. However the qualifications for a person to be appointed Controller of Budget are extensive knowledge of public finance or at least ten years experience in auditing public finance management. The Controller of Budget must have extensive knowledge of public finance and not simply financial matters generally. The qualifications for Commissioner of Revenue Allocation are therefore different from those for Controller of Budget.

The Committee further found that it is not right to use the qualifications for Commissioner of Review Allocation to shortlist candidates for the position of Controller of Budget as the two positions are distinct and the work to be performed in the two offices different in nature and scope. It is noteworthy that even the tenure of the two offices is different as the Controller of Budget is in

office for a term of eight years while a Commissioner is in office for a term of six years as set under Article 250(6)(a).

The Committee also found that this nomination procedure is not fair as there could be qualified persons interested in the position of Controller of Budget who were not interested in the position of Commissioner of Revenue Allocation and therefore did not apply. The nomination procedure used would therefore have knocked out such interested qualified persons.

The Committee therefore came to the conclusion that the competitive process adopted in this case did not meet the legal requirements.

(d) If consultation is required, what is the level of consultation required of the President and the Prime Minister and in the circumstances presented to the Committee was the Constitutional requirement of consultation attained?

Again the Committee received two different interpretations of the Constitutional threshold for consultation. It is important to note that the Constitution does not expressly define the word “consultation”. The first interpretation established a low threshold based on the ordinary dictionary meaning of the word “consultation”. The Committee was referred to the Shorter Oxford English Dictionary which defines “consult” as *inter alia*, to take counsel together, deliberate, confer while “consultation” is said to mean, *inter alia*, “the action of consulting or taking counsel together, deliberation, conference. In Webster’s New Universal Unabridged Dictionary “consultation” is defined as a meeting of persons to discuss, decide or plan something. Readers Digest Universal Dictionary defines consultation as a conference at which advice is given or views are exchanged.

This interpretation of consultation connotes that consultation does not necessarily lead to concurrence and indeed consultation is not concurrence.

Once there is engagement, exchange of views and deliberation, then consultation has taken place. Concurrence may or may not take place.

The other interpretation relies on the provision of section 29(2) of the Sixth Schedule of the Constitution which states as follows:

“29(2) Unless this Schedule prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.”

It is therefore argued that the definition of the word “consultation” must be read in the context of and subject to the National Accord and Reconciliation Act.

The preamble to the National Accord and Reconciliation Act states as follows:

“AN ACT of Parliament to give effect to the Agreement on the Principles of Partnership of the Coalition Government, to foster national accord and reconciliation, to provide for the formation of a coalition Government and the establishment of the offices of Prime Minister, Deputy Prime Ministers and Ministers of the Government of Kenya, their functions and various matters connected with and incidental to the foregoing.”

Section 9 of the National Accord and Reconciliation Act states as follows:

“9. In this Act, the Agreement on the Principles of Partnership of the Coalition Government means the Agreement set out in the Schedule.”

The 1st Schedule to the National Accord and Reconciliation Act sets out the agreement on the principles of partnership of the coalition Government (**Annex 16**)

“Consultation” within the meaning of our laws has therefore taken on a special meaning. The Committee understands section 29(2) of the Sixth Schedule as putting forward the following sequence of events:

- 1) The President shall first take cognizance of the National Accord and Reconciliation Act.
- 2) Consult with the Prime Minister in accordance with the National Accord and Reconciliation Act.
- 3) Nominate the person.
- 4) Seek approval of the National Assembly.
- 5) Appoint the person.

The Committee observed that there were consultations between the principals on 6th and 27th January 2011. However, taking the evidence from both the principal’s technical staff, it appears that the level of consultation was inconclusive. The threshold for consultation is high. The two Principals must commit themselves to work together in good faith as true partners, through constant consultation and willingness to compromise.

(e) Did the communication on the nominations to the National Assembly meet Constitutional requirements?

An issue arose as to whether the process of communicating the nomination of Mr. William K. Kirwa to the National Assembly met legal requirements. The letter communicating the nomination, along with those for the position of Chief Justice, Attorney General and Director of Public Prosecutions, is dated 31st January 2011 and written by Amb. Francis K. Muthaura Permanent Secretary, Secretary to the Cabinet and Head of Public Service. It is addressed to Mr. Patrick G. Gichohi, Clerk of the National Assembly. The body of the letter read as follows:

“RE: PARLIAMENTARY APPROVAL FOR NOMINATIONS FOR STATE OFFICERS BY HIS EXCELLENCY THE PRESIDENT”

Following consultations with the Rt. Hon. Amolo Raila Odinga, EGH, MP, the Prime Minister of the Republic of Kenya and in accordance with the Constitution, His Excellency President Mwai Kibaki has made the following nominations of person to fill the respective state offices for approval by the National Assembly.

1. Chief Justice: The Hon. Justice Alnashir Ramazanali Magan Visram
2. Attorney General: Professor Githu Muigai
3. Director of Public Prosecutions: Mr. Kioko Kilukumi, and
4. Controller of Budget: Mr. William Kipkemboi Kirwa

Accordingly, I have been directed by His Excellency the President to forward these nominations to the National Assembly. I am therefore requesting you to facilitate the consideration of the nominations by the National Assembly.

C.V.s of the nominees are attached herewith.”

The Committee noted that Article 135 of the Constitution of Kenya provides as follows:

“A decision of the President in the performance of any function of the President under this Constitution shall be in writing and shall bear the seal and signature of the President”

The Committee further noted that the above Article 135 of the Constitution of Kenya is one of the provisions of the Constitution that is suspended under section 2(c) of the Sixth Schedule of the Constitution and shall only come into effect upon the final announcement of all the results of the first elections for Parliament under the new Constitution. Amb. Francis K. Muthaura, in his letter dated 31st January 2011 states that he has been directed by the

President to forward the nominations to the National Assembly. The Committee therefore came to the conclusion that, Article 135 having been suspended and given Amb. Muthaura's position in Government, the communication on the nominations to the National Assembly was lawful and proper.

2. Were the legal requirements for the process of nomination of a person to the office of Controller of Budget complied with?

The unanimous view of the Committee is that there were actions by both His Excellency the President and the Right Honourable the Prime Minister to comply with the Constitution of Kenya in the process of nomination of a person for the position of Controller of Budget. The Committee has however come to the conclusion that the Constitution, adopted by Kenyans on 4th August 2010 and promulgated on 27th August 2010 sets a higher threshold than the actions of His Excellency the President and the Right Honourable the Prime Minister.

All Kenyans, particularly those in leadership positions, are grappling to come to terms with the very high standards set by the Constitution. Similarly, we are all struggling to come to a common understanding of the principles set out in our Constitution. This was particularly evident from the divergent interpretations of the Constitutional provisions that the Committee received from both lawyers and non-lawyers. The people of Kenya are now beginning to enjoy the provisions of Article 1(1) of the Constitution that provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution.

It is an important learning step that shall set a good precedent for high Constitutional standards for future nominations by the Executive. It is not a moment for apportioning blame but for learning and finding an appropriate framework for future Constitutional appointments.

3. If the legal requirements for the process of nomination have been complied with, is Mr. William Kipkemboi Kirwa a suitable person for appointment as Controller of Budget?

The Committee did not address itself to the question of Mr. William Kipkemboi Kirwa's suitability as it found that the stringent legal requirements for his nomination under Articles 10, 27, 73 and 232 had not been addressed. If the National Assembly finds, contrary to the opinion of the Committee, that the nomination of Mr. William Kipkemboi Kirwa met the stringent legal requirements the Committee shall proceed to vet the nominee and recommend to the House accordingly.

3.1 OTHER OBSERVATIONS

1. It is important to note that this nomination related to one post only and a mechanism needs to be put in place for ensuring that there is a fair representation of Kenya's diverse communities when all public sector appointments are taken as a totality. This mechanism must deal with the questions of how to take into account participation of the people, equity, gender balance, fair representation of Kenya's diverse communities, non-discrimination, good governance, equality, integrity, transparency, accountability and protection of the marginalized. It is an onerous task but the people of Kenya demand it and must receive it.
2. The Committee did not find the issues herein as amounting to a dispute between political parties within the meaning of the Political Parties Act. The issues raised were simply an interpretation of the Constitution.
3. The Committee received representations from the Commission for the Implementation of the Constitution as established under section 5 of the Sixth Schedule of the Constitution. This is the Constitutional organ established to monitor, facilitate and oversee the development of legislation and administrative procedures required to implement the

Constitution. It is required to work with each constitutional commission to ensure to ensure that the letter and spirit of the Constitution is respected. The Commission informed the Committee that, with regard to the issues raised over nomination of the Controller of Budget, its role is mainly advisory. The Committee concluded that the Commission for the Implementation of the Constitution is required to give its opinion on this matter and that its opinion must be given due and weighty consideration.

4. The High Court delivered a ruling on this matter. The Judiciary and Legislature have separate and distinct roles to play in the Constitution. The Judiciary cannot injunct Parliament from performing its Constitutional role. The Judiciary can however declare action taken by Parliament to be unconstitutional. It would therefore be advisable for parties interested in matters that Parliament is seized of to take advantage of the various fora for public participation available in Parliament before moving to Court. If after Parliament has pronounced itself on a matter any person is still aggrieved, he/she can then proceed to Court to seek an interpretation of the Constitution. In other words, let the Judiciary check Parliament after Parliament has acted and not attempt to supervise Parliament as Parliament acts.
5. The Departmental Committees of Parliament are the proper place to test the propriety and legality of nominations but the final determinant of Constitutionality in the House vests in the Speaker of the National Assembly as provided for under Standing Orders 47(3) and 104.
6. The Committee recommends that in all formal meetings of public officers, comprehensive minutes should be taken for purposes of ensuring good governance. The Committee was concerned that only draft minutes as opposed to confirmed minutes were available of some meeting involving very high ranking public officers.

4.0 COMMITTEE'S RECOMMENDATION

Subsequent to the foregoing, the Committee recommends that pursuant to Article 228(1) of the Constitution of Kenya the nomination of Mr. William Kipkemboi Kirwa for the position of Controller of Budget be returned to the two Principals for nomination in a manner that meets the stringent legal requirements and in particular those set out under Articles 10, 27, 73 and 232 of the Constitution.

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