

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Wednesday, 14th September, 2016

Special Sitting

*(Convened via Kenya Gazette Notice
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*The House met at the Senate Chamber,
Parliament Buildings, at 9.00 a.m.*

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

PRAYERS

COMMUNICATION FROM THE CHAIR

IMPEACHMENT HEARINGS: PROGRAMME FOR THE DAY

The Speaker (Hon. Ethuro): Order, Senators! I wish to welcome you to today's Special Sitting. We shall continue from where we left yesterday, guided by today's Order Paper, the programme for the impeachment proceedings and the rules of procedure, which we circulated yesterday.

In accordance with the program, we shall now proceed with the presentation of the case of the governor, including presentation of his witnesses, if any. As I invite the governor, let me emphasize that we need to adhere to the stipulated timelines and urge all of us to abide by the rule of relevance. I appreciate that we did well yesterday and it is my expectation that, that will continue even today.

Counsel for the governor, I notice that your other learned friends are not in the House; maybe you know where they are.

Mr. Peter Wanyama: Mr. Speaker, Sir, before we begin our presentation, we have an application to make under---

The Speaker (Hon. Ethuro): Order, Counsel! I am yet to formally invite you. That was just on a light touch, for you to welcome your colleagues.

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

PRESENTATION OF THE CASE OF THE GOVERNOR

Sen. Mutula Kilonzo Jnr.: On a point of order, Mr. Speaker, Sir. I am concerned that the primary accused person, the Governor of Nyeri County, is missing from the proceedings. Maybe you should give directions as to whether this matter can proceed in his absence, because I have not heard his lawyer give an excuse or reason the governor is missing from these proceedings. Under the Rules and Act it is the governor who ideally in his name that the defence is proceeding.

The Speaker (Hon. Ethuro): All is true, including the fact that we have not heard Counsel stating whichever way to proceed. Let us hear from Counsel and see whether he qualifies on what you have said.

Proceed, counsel.

Mr. Peter Wanyama: Good morning, Mr. Speaker, Sir. The Governor is on his way here. We apologise on his late coming but in terms of the presentation, we have prepared to take you through the response in not more than 30 minutes. Then, there are witnesses from the county government who will be testifying in our defence. More importantly, we wanted to make an oral application under Standing Order No.1. It is important in helping up our defence.

The Speaker (Hon. Ethuro): You will proceed, counsel. Just to dispose the point of order raised by Sen. Mutula Kilonzo Jnr. One, he is on the way. Two, we have provided that, later the advocate or he can proceed.

You may proceed, counsel.

Mr. Peter Wanyama: Thank you very much, Mr. Speaker, Sir. We are making an oral application for the summoning of the Controller of Budget to testify on some of the issues with respect to the operations of the IFMIS system and the report which the Controller of Budget is alleged to have authored.

Secondly, we will be requesting to play certain video clips as part of our evidence. These video clips are very important, and therefore, we will be asking for those facilities to be provided for and the permission to play those video clips. They are not many.

Thirdly, there is additional evidence. Under the requirements of natural justice, the allegations which were made against the Governor, we have tried as much as possible to provide the information in terms of the responses and we have an additional bundle of documents. We have made enough copies; 40, which we will be requesting because they contain important documentation that the Senate would want to look at before they finally decide this matter.

Lastly, we have a certificate of compliance from the Kenya Revenue Authority (KRA). We have made 80 copies which we will be requesting for it also to be allowed as evidence outside the timelines which were set; and a last witness statement of the person who will be producing the video clips, one Jack Kabiru which again we have submitted late. But again, we have made adequate copies. So, all these documents are important for the Governor to fully explain his defence before this Senate.

That is all, Mr. Speaker, Sir.

(The Speaker consulted Sen. Wetangula)

The Speaker (Hon. Ethuro): Proceed, Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr.: Mr. Speaker, Sir, we were wondering whether we can assist you in making a determination by raising some of the issues before you, if you allow. I thought that in normal practice, the witnesses would lay a basis for playing the video since after the evidence is laid before you, that an application of playing the video can then be made. Similarly, the one of the Controller of Budget would be made once they have established the reasons they should be summoned – so that you are in a position to make that determination. That application made in advance – Mr. Speaker, Sir, you do not know what the video would be. So, I suggest that you direct that the evidence be laid and an application be made at an appropriate time.

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

Sen. (Dr.) Khalwale: On a point of order, Mr. Speaker, Sir. In this House, we have the rule of admissibility of documents. Usually, the Speaker is given an opportunity to make a determination before he allows evidence by way of documents to be tabled. I do not know how you will handle the issue of the video; that, you admit it before you have an idea what the video contains. Given that these proceedings are taking place in public, you might have to be careful in making a decision because once the damage is done – the video is played – even if you say the video is no longer admissible, it obviously affects us negatively. I am not saying it would be a video which will not be admissible but I am raising that concern.

The Speaker (Hon. Ethuro): Sen. (Dr.) Khalwale's intervention is the layman's interpretation of what the two lawyers, Sen. Wetangula and Sen. Mutula Kilonzo Jnr. have stated.

Proceed, Sen. Wangari.

Sen. Wangari: Thank you, Mr. Speaker, Sir. I also note that in our rules of procedure for this hearing; No.9, we have the leeway.

“The Senate may at the request of a county assembly or the governor, invite or summon any person to appear and give evidence before the Senate.”

My thinking from what Sen. Mutula Kilonzo Jnr. has raised is that some of these issues were raised at the opening statement. The basis of inviting, say, the Controller of Budget was raised by the counsel as they made their opening statement. I think this application is quite in order. Of course the issue of video clip, I would also support Sen. Mutula Kilonzo Jnr. that we first know exactly the content of the video clip is before the application is made.

The Speaker (Hon. Ethuro): Let us hear from the counsel of the county assembly.

(Loud consultations)

Order, Members, this is directed to me. I do not know why Members think I am not competent enough.

(Laughter)

Four years down the road, I am sure you have already formed that opinion that I am competent enough.

Proceed, counsel.

Mr. Charles Njenga: Mr. Speaker, Sir, hon. Members, on behalf of the county assembly I respond to the application on the issue of summoning the office of the Controller of Budget. That is a matter that is entirely at your discretion. As Sen. Mutula Kilonzo Jnr. has stated, there has to be a basis laid for that invitation. But that is a matter that is entirely within the Senate's discretion. If it determines that, that witness is necessary to complete its investigations in the matter, then that is a discretion that the House can exercise even without referring to the parties. But on the issue of additional evidence by way of addition of witness statements and additional video clips, we strongly object to their production at this stage mainly because as Mr. Speaker commented as we started that this is *quasi-judicial* process that should avail a fair hearing to both parties.

We prepared our case and presentation yesterday, based on the material that was given to us by the Governor and the documents filed together with the submissions made. If you consider our presentations yesterday, we were making constant reference to their responses so that an additional inclusion of evidence at this stage, would be very prejudicial to the County Assembly having already completed our presentation. We would have wanted our witnesses to look at that evidence before we finalise our presentation.

We are not aware of what is sought to be added into these proceedings and the effect of admitting any further evidence would be to reopen the proceedings. I can remember very clearly yesterday when I wanted to refer to a report that was not in our papers, there was strong objection both from the House and the Governor's side. On that basis, we restrained ourselves and restricted our submissions on the material that was before the House and what we had filed. It cannot, therefore, be fair that today and now, then the other side is given leeway to reconfigure their case based on the submissions made yesterday, so that they can plug in any gaps that arose and, therefore, fashion a response that is an afterthought and is founded on the presentation that we made yesterday. I think fair play will demand that what was submitted as pleadings and evidence guide these proceedings and that each party abides by the rules. I can see the rules were very clear that any witnesses, statements and evidence ought to have been filed with the Clerk of the Senate by 12th September, 2016 at noon.

I beg to oppose that application and pray that the proceedings proceed based on the evidence and material that we have on the Governor's side. That is all.

The Speaker (Hon. Ethuro): Hon. Members, I wish to give the following directions. One, is that already as a House, we had invited the Controller of Budget and the Auditor-General. So, they will be available to the parties.

On the issues of new documents and video clips, we gave tight timelines which were to be observed. For them to introduce new documents after one party has already presented its case will compromise the hearing.

(Applause)

I direct that the application for the new documentation and video clips will not be admitted. Counsel for Governor, maybe if you had made that application yesterday, we

would have reconsidered the sense of giving the other party sufficient time to interrogate the matter. However, if you also just allow new additional information, you know this hearing has tight timelines and might never come to an end. So, we just have to live with what we have.

Mr. Peter Wanyama: Mr. Speaker, Sir, thank you very much. I will proceed with the Governor's defence. The bottom line in these proceedings is that it is important to underline the fact that the burden of proof is on the County Assembly to prove these allegations. It is not the Governor to prove his fault

If you look at the material placed before this Senate, there is no evidence whatsoever. The weight of the evidence submitted is very weak. On the face value of this evidence, it is our presentation that even without looking at any other issues including our defense, this impeachment charges should be found to have been unsubstantiated. Why do I say this? I say so because Standing Order No.1 of the Nyeri County Assembly, which is similar to Standing Order No.1 of this House, provides that whenever an issue is not very clear or expressly provided in the Standing Orders. The Speaker of the County is required to make a ruling. That ruling is supposed to be informed by the traditions of the Constitution and legislation, and in the case of the County Assembly, practice at the National Assembly and the Senate, in this case, Parliament. If it is not very clear, in accordance with traditions in other parliaments in the Commonwealth.

There is an issue which we think is very material to the impeachment proceedings. That is, on the right of the Governor to be represented by counsel. We have raised it as part of our response: The right of the Governor to be represented by the counsel at the County Assembly level. Indeed, I confirm that the Governor was summoned to appear before the County Assembly. I confirm that that letter is the one that was read by the County Assembly yesterday and is in our bundle. However, the issue here is not about the Governor appearing but about the Governor electing to be represented by counsel. So, that is really the issue that we are looking at here. Our position is fortified by a legal framework known as the Fair Administrative Action Act which we cannot really create exception from. We have no option but to comply.

The Fair Administrative Action Act provides the framework for according everyone some semblance of justice. I will quote Section 4 and 5 of the provisions of the Fair Administrative Action Act but first of all, this is a legislation that applies to both judicial and *quasi-judicial* interventions. To the extent of the quasi-judicial, ---

(Technical hitch)

I will proceed. Section 4 and 5 of the provisions of the Fair Administrative Action Act specifically provide that any person on whom an adverse decision is supposed to be made, is supposed to be given documentary evidence which will be used against him in that particular decision.

In these impeachment proceedings, when the County Assembly notified the Governor in accordance with that letter – I am making reference to Volume 4 page 4 of the Governor's bundle where there is a very important letter dated 26th August, 2016 and addressed to the Governor. The third paragraph is where the County Assembly says:-

“In accordance with the principle of natural justice, you shall be called upon to answer to the issues which have been raised in the debate.”

Now, what are these issues which have been raised in the debate? They are about compliance with the Constitution and legislation. The Governor thought it fit that these issues can be addressed by a counsel. Therefore, he sent the counsel to the county assembly to address these issues. Before the impeachment day, we wrote a letter-annexed at page two-to the county assembly.

Mr. Speaker, Sir, if you look at paragraph two, we have reviewed a Notice of Motion forwarded to the Governor and it appears that no supporting documents, list of witnesses and their statements, if any, were supplied thereto. So, we requested for these documents and the letter was received by the county assembly on 1st September, 2016. The impeachment took place on 2nd September, 2016.

On 2nd September, 2016, I went to the county assembly at 9.00 a.m. I was invited to the office of the clerk. Later on, we went to the office of the speaker where we discussed this issue for 30 minutes. They told me that they were consulting and they would refer back to me. So, I waited and later on they said that in accordance to their standing orders, the Governor is not required to be represented by the counsel at the county assembly. At that point, they asked me to leave, which I obliged.

Mr. Speaker, Sir, that act of asking legal counsel to leave the county assembly on important impeachment proceedings where he is appearing to represent the Governor contradicts the provision of Section 4 of the Fair Administrative Act which is express that you shall be entitled to legal representation. There are no exceptions about it. As it is, there are no proper impeachment proceedings before this Senate for you to make a decision because of that faulty procedure. We will be specifically requesting that when you retire to look at the evidence that the county assembly has submitted and the evidence that the Governor has submitted, to look at that issue in detail so that you can make a finding that the proceedings under substantive and procedural level have not been substantiated.

I now go to issues about threshold. What is the legal framework governing impeachment proceedings in Kenya? The legal framework governing impeachment proceedings in Kenya has already been clarified. In the Governor's documents Volume III, may I quickly refer to it? This is important for the Governor's defence. There is a definition of gross violation at page 115 of the Governor's documents Volume III. This is a decision of the Court of Appeal clarifying the law governing impeachment in Kenya. It is an important decision as interprets the provisions of Article 181 of the Constitution as read with Section 33 of the County Governments Act.

Mr. Speaker, Sir, in accordance with this decision, there is the definition of the word "gross." For an allegation to be gross, both the charge and the facts must expressly demonstrate that these allegations are gross. In this decision, the Court of Appeal adopted a Nigeria decision and expressly defined what "gross" means. If you look at paragraph a, b, c, d, e, f and g, they have listed the criteria of what amounts to "gross." Therefore, this is important. The upshot of this submission is that not every violation of the Constitution or law will attract the procedure under Article 181 of the Constitution. That is what this says.

If you find that based on the evidence that the county assembly has submitted are not gross, then the only conclusion you will make is that the provisions of Article 181 are not available.

Secondly, is on the issue of nexus. For a Governor to be impeached, those allegations must be personally attributed to the Governor. The issue is contained in the same decision at page 114. Apart from page 114 paragraph 41 of that document, this is where the county assembly kept on emphasising the issue of personal as opposed to collective responsibility. If you look at paragraph 41 at page 114 of the Governor's documents, Volume III ,it says:-

“We are of the view that collective responsibility is policy governance and accountability concept and not a principle of personal liability or individual culpability. If it were so, in the instant case, collective responsibility will imply that all individual members of the various organs of the county government will be personally responsible for acts or omissions of any person in the employment of the county government. Collective responsibility does not mean that the leader or head is individually responsible and politically liable for acts or omissions of subordinates. If collective responsibility were to be a principle of culpability, it will follow that all the persons who are collectively bound must be individually answerable, blameworthy and accountable. It is not the intendment and the import of the concept of collective responsibility.”

Mr. Speaker, Sir, what this decision is saying is that whereas the Governor is the accountable head of the government, use of the public resources and decisions of the government, for purposes of impeachment, there must be an allegation that the Governor did personally to warrant the provisions of Article 181 taking effect. For instance, if the Governor wrote a letter directing something awful to be done, that is a ground for impeachment. If the Governor directed the expenditure of public resources, contrary to the provisions of public finance, that is a ground for impeachment.

However, you cannot impeach a Governor based on the normal usual operational challenges in the county government, most of which can be addressed through other mechanisms. For instance, if you look at the allegation one, there is a charge that the Governor failed to account or make proper disclosure of Kshs352, 976, 913. What is the import of this allegation? The import is that the Governor is the actual accounting officer for public finance management purposes which is not the case.

Mr. Speaker, Sir, secondly, there are other mechanisms to address this particular issue. If you look at the Public Finance Management Act, there are structures on which county finances are supposed to be managed right from procurement up to payment. At no point in time in that layout structure is the county governor involved in terms of approval or otherwise. At the end of the day, the use of these monies, the Governor is accountable to the Senate and the county assembly.

For purposes of culpability, we want to find out what did the Governor do in terms of not accounting for this money? Is this allegation true in the first place? If they are saying that Kshs352,976,913 has not been accounted for and the allegation is based on the report which has been submitted by the County Executive Committee member for finance to the county assembly, the county assembly has not bothered to enquire and issue summons in accordance with the provisions of Article 125 of the Constitution which gives them power to summon anyone to appear before them. Did the county assembly summon the county executive committee member for finance to address these questions which they allege are grounds for impeachment here?

Mr. Speaker, Sir, our submission is that no summons were issued. Mr. Speaker, Sir, secondly, on the amount they claim was missing, if you go Volume 2 of the Governor's bundle, they have an explanation there which the County Governor has put for purposes of this impeachment. The explanation is that the document which the County Assembly--- page 1 and page 2 of the document there is that extract, Volume 2 of the Governor's bundle. That document contains an extract from the Integrated Finance Management Information System (IFMIS).

Later on, the County Executive Committee Member for Finance and the chief officers who are responsible for managing County finances will explain this in detail when they relay their testimonies. This is an extract from the IFMI system. We extracted this list of Kshs352 million because the County Assembly in its documentation, if you look at Vol. 3 of the County Assembly bundle, they have claimed that this money has not been accounted for. I am looking at page 19 specifically where that money exists. On page 19 at the bottom corner, Members can see the sum of Kshs1.1 billion. That is the total figure. This is a report which was submitted by the Committee Executive Member for Finance to the Assembly for them to look at in accordance with the provisions of the Public Finance Management Act. The County Assembly broke this figure down and said only about Kshs800 million has been stated in the figure.

We are asking them to tell us where they got this Kshs352 million. From the charge, they are saying that the sum of Kshs808,292,895 has been disclosed and the money which has not been disclosed they are saying is Kshs352,976,913. However, if you look at this figure it contains both components of the amount which they claim has not been disclosed and the amount which has actually been disclosed. If you add the Kshs352 million and the Kshs800 million which they say has not been disclosed, Members will see this figure of Kshs1.1 billion. So, on what basis did they say that this money has not been disclosed? This is based on their own analysis of the document which was submitted to the County Assembly and this was submitted yesterday. On page 66, Volume 3 of the County Assembly bundle, this document is the basis of saying that the Governor has not accounted for the money.

This is the County Assembly's own analysis of the document and it is not the Governor on this page. If you look at it, you will see the prepared analysis from the report that we have submitted. First of all there are figures which are missing. For example on the County Assembly on item (1), there is a figure which you have disclosed that it is missing. Why did the County Assembly not add the amount which they spent on projects on that particular page? It shows there is something which the County Assembly is doing which is not right.

Mr. Speaker, Sir, our submission is that this document from the County Assembly is extremely erroneous, no money was lost, all the money has been accounted for and for purposes of impeachment the County Assembly never took any initiative to ask the County Executive where this money is. Instead, when we saw the query we went to the IFMIS and extracted this figure which we have put in our response. Members can see everything which they claim has not been accounted for has been accounted for. Indeed, the Kshs352 million has been accounted for. So, that is absolutely important for us to clarify so that there is no communication at all or inference from the County Assembly that we have not accounted for this money.

Secondly, our submission is that perhaps erroneous calculation of facts is based on misreading of the documents or probably outright ignorance of how the system works.

The next allegation again is based on an erroneous proposition of facts. Usually the County Government is funded from the Exchequer and local revenue. The money which they claim that we have not accounted for is actually money from the local revenue. The difference between the Exchequer release and the money which we collected locally is the money which they say we have not accounted for or not disclosed. In Volume 2 on page 3 of our response in the Governor's bundle, just after the calculation of Kshs352 million, at the bottom there is a charge where they said that according to the budget implementation report of the Financial Year 2015/2016, Kshs4,840,770,216 was reported and then there is the other amount of Kshs846,702,900 which was not reported. Kshs846,702,900 is the local revenue which was generated in the County of Nyeri. The Kshs4.8 billion is the Exchequer release. So, the total amount that ought to have gone past through the County Revenue Fund in the County of Nyeri is Kshs5.6 billion.

Mr. Speaker, Sir, the report which they claim that we have not disclosed Kshs846,702,900 is based only on the Kshs4.8 billion. If Members can look at their report they are saying that we have not disclosed this amount but we are saying the report is exclusively based on the Exchequer releases. The report in question which is the Budget Implementation Report is based on the Exchequer releases. Does this amount disclose the full Exchequer release that the County Government of Nyeri got? Yes, it does. If you look at Volume 3 of the County Assembly bundle – this is absolutely important – on the last page on page 21 where there are all the totals.

First of all, let me bring you back to page 18 before we go to page 21 of Volume 3. This is the Budget Implementation Report. On page 18 that analysis starts with Exchequer releases to the Financial Year 2015/2016. This analysis does not contain the local revenue component. So, they cannot say that based on a report which is based on the Exchequer releases, the Governor has not disclosed money which was collected. These are documents strictly based on the Exchequer releases.

Secondly, the County Government of Nyeri has not been audited. The audit is supposed to be done in accordance with the provisions of Article 229 of the Constitution, six months after the end of the financial year. These are the financial dealings of the county up to 30th June, 2016. On what basis can you say that this money has not been accounted for, yet the County Government of Nyeri has not been audited by the Auditor-General and the issues looked into by the Controller of Budget?

Did the Public Accounts Committee (PAC), under the provisions of the Article 229 of the Constitution, receive the audit report? The Constitution states that the Auditor-General should submit the report to the county assembly and to Parliament. The county assembly should wait for that report to be submitted by the Auditor-General. On what basis will they impeach the governor on issues which no findings have been made by anybody?

The true picture of the status of the financial affairs in Nyeri County as at 30th June, 2016 can only be ascertained if the Auditor General has completed the audit which is ongoing. We cannot impeach the governor three months down the line for not accounting for the money, yet the audit process is ongoing. This impeachment charge does not meet the threshold in the Constitution. More importantly, it is a premature

charge that is based on an imagination that money has not been accounted for, disclosed or lost. This finding can only be made by the relevant agencies which are constitutionally required to audit the county government.

Thirdly, at page 8 of the governor's bundle, Volume II, there is a charge that we are utilizing local revenue at source. The explanation is based on the Controller of Budget's finding. They say that there is a variance of Kshs70 million, which shows that we must have utilized local revenue at source. We had requested the Senate to summon the Controller of Budget on this issue because it is a systems issue that definitely has an explanation. As I submitted yesterday, public finance management system at the county assembly has two components; the Integrated Financial Management Information System (IFMIS) component and the Internet Banking (IB) component. The IFMIS component is the National Treasury software that is interfaced with the internet banking module, connected through a virtual private network which is managed by the Central Bank of Kenya.

If we extract reports from the IFMIS system, based on the budget and the financial management system at any point in time, the IFMIS will contain all the commitments which have been made in that county government for payment. However, have all those commitments been paid? For you to get the answer you need to go to the internet banking platform, which also generates a report. The internet banking platform will show exactly how much money was debited at the account of a county government at the Central Bank of Kenya; that will give you a report.

This issue has been explained by the county treasury to the Controller of Budget. In the course of these proceedings, as has been clarified to us, the Controller of Budget will come to testify on this issue because it is a systems issue. The bottom line is that at any point in time, given those commitments and the actual payments, the county revenue fund does not always have money because of late releases. Sometimes the releases are deducted by the Treasury at source. Therefore, you will find that the obligations of a county government are not met, yet they have been committed in the system. At any point in time there will always be a variance in the system. Do we impeach a governor based on a systems issue? Has the county assembly even summoned the Controller of Budget to ask for an explanation for this variance before undertaking this precipitate action of impeachment? Have they summoned the Director of IFMIS or Governor of the Central Bank of Kenya to explain how it works, so that this charge does not arise?

Our submission is that this impeachment is extremely premature. Until we get the report of the Auditor-General, the Controller of Budget and the full picture in terms of the comments by the Director of IFMIS, the county assembly cannot lie in the mouth of the county assembly to say that this is an allegation that warrants impeachment, because there is no nexus with the governor. The County of Nyeri operates a financial system. It was the first county to integrate its finance management system and it is at a very advanced level. We urge the Senate to look at the issue and dismiss the charges.

Mr. Speaker, Sir, I will proceed on page 10 of the response, on the governor's bundle. There is a charge of 'irregular procurement contrary to Public Procurement and Disposal Act.' It is important to emphasize that they have said 'irregular procurement'. The charge is that the county government awarded tenders orally to people and the county governor formed a task force to regularize these tenders. As the person looking at this charge at the beginning, would you want to know the particulars of these tenders that

were allegedly awarded irregularly? The county assembly has full powers to know about these tenders, but they never bothered to put the specific tender details here. What are the tenders that the county government awarded irregularly? What is the tender number? Where is the contract that was executed illegally out of the faulty tender process? On this charge there is no nexus at all. The charge is bare in terms of facts and evidence.

Nonetheless, we have explained that there were queries that were raised by alleged contractors, which are contained in Volume III of the county assembly bundle, from page 81 to page 124. All these documents are queries. These claims were allegedly submitted by contractors to the county assembly, so that it could look at these issues. For example, at page 81, a contractor says that he did some work and is owed Kshs4.4 million, which he wanted to be paid. He then lodged a claim to the county assembly. Most of these works are awarded by the Members of County Assembly (MCAs) verbally; that is what happens on the ground. This is a statement of fact and part of our evidence. Most of them then use pressure. Yesterday, the governor said that when he was sick they put massive pressure on the county executive officers to allocate specific projects in the wards to the MCAs. Yesterday, it was stated by the governor that in the Financial Year 2015/2016 each MCA had a project.

On Page 67 of the County Assembly Document, Volume III, is a list of projects approved by the County Assembly. The import of that is that there is a huge fight between the MCAs and the County Executive Member who is in charge of projects execution on these projects. The MCAs, in breach of the provisions of Article 185(5) that requires them to do oversight while respecting the separation of powers, wanted to be involved in the developmental activities. They award these tenders orally to people on the ground, and then they force the County Government to pay. The truth is that when the County Assembly was putting much pressure on the County Government to pay, the County Governor formed a task force through his county secretary to look at these claims. Who procured them? Were they legitimate claims? If you look at that charge critically, it says: "The Governor later formed a task force to regularize the illegal procurement of various tenders." Indeed, there was a task force which was formed by the County Secretary. All these letters are addressed to the County Secretary. If you look at the claims, it says:- "The County Secretary you owe us money and you ought to pay us." Therefore, the Governor formed a taskforce to look into these issues. That was in the interest of safeguarding public funds. How can you then say it was a gross violation, yet the Governor wanted to find out that if, indeed, you did work who procured you? Where is the Local Purchase Order (LPO)? Where is the contract that was signed?

When this task force was formed, no contractor appeared before it to lodge a claim. It shows you that there was something fishy going on in these claims because they were not done in accordance with the procedures governing the PFM Act and Public Procurement and Disposal Act. The County Government of Nyeri will never pay. It will only pay if they were done in accordance with the procedures governing PFM Act and Public Procurement and Disposal Act.

Does this allegation meet the threshold? It does not at all.

I will now move on to next allegation with regard to Procurement of Karson's House. This allegation is found on page 11 of Volume II of the Governor's bundle. It is important for our submissions to emphasize that the burden of proof on this issue lies in the County Assembly. This is because they are saying we procured Karson Photo

building while contravening the Public Procurement and Disposal Act. It is true that the County Government of Nyeri leased part of this building. It is true the County Government of Nyeri is presently using the premises. Were procedures for leasing as known in Government followed? That is the issue we need to interrogate here.

One of the issues we wanted to emphasize is that when you lease a building, in accordance with the defunct Public Procurement and Disposal Act that is not procurement. A lease is not procurement. You cannot say that you have contravened the Public Procurement and Disposal Act by leasing a building. Under Section 2, 3 and 4 of the defunct Public Procurement and Disposal Act, a lease is not defined as one of the items governed by that legislation for legal and procurement purposes.

Secondly, this was the only building available in Nyeri at the time. There were too many workers who required to be housed. We have annexed evidence which says the County Government of Nyeri engaged a national Government valuer to value the building. The evidence is contained on page 37-50 of the Governor's Bundle Volume II.

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 did not want to interrupt the Counsel. However, he has made a point that seems to be completely confusing the House. If you want to lease a building and there are four or five people who are ready to offer such a building, with your assertion that a lease is not an item of procurement, how then will you make a determination out of these five without going through the Public Procurement and Disposal Act procedure? Could you clarify?

Mr. Peter Wanyama: Mr. Speaker, Sir, I will clarify that.

Sen. Boy Juma Boy: Hoja ya Nidhamu, Bw. Spika.

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

Sen. Boy Juma Boy: Bw. Spika, ningeomba umwambie mwanasheria huyu kuwa anapoangazia stakabadhi yoyote ile, atueleze ni ipi na ni ukurasa gani kwa sababu tuna stakabadhi nyingi hapa. Asipotuelekeza tutabaki kwa mataa na tunaanza kutapakatapaka hapa na pale kwa sababu hizi stakabadhi ni nyinyi.

The Speaker (Hon. Ethuro): Amekusikia, lakini sijui ni "mataa" gani unazungumzia kwa maana mataa yetu yako hapa mbele.

(Laughter)

What is it, Sen. Murkomen?

Sen. Murkomen: Mr. Speaker, Sir, I have noted questions similar to the ones Sen. (Dr.) Khalwale has raised. However, if we have to go systematically, we have to make clarifications. I have a few clarifications that I have also noted which means that we will not be able to flow as we did yesterday. If we can do the way we did yesterday where we note all the questions, especially those related to the substance of his presentation, then we will have an opportunity to ask for clarification for all of them. However, for procedure, I agree with Sen. Boy Juma Boy that when he changes, he should tell us the volume just as the County Assembly did.

The Speaker (Hon. Ethuro): Sen. Murkomen, the latter had been disposed of and is a small point. Sometimes Counsel seems to forget. We remind him so that the Members can follow. Specify the volume, the number, from which party and the page, paragraph or whatever that can easily identify. More importantly is what Sen. Murkomen

has raised. Our business here is to listen. It is the two parties that are in contestation and not us. Therefore, we should not aid or do otherwise, but it is up to the other party to poke holes into the submissions of the other and then we come at the very end.

Counsel, the Controller of Budget is present and maybe they would want to know the kind of issues you will be interested in even as they prepare. You should be able to tell them early enough because they have other commitments.

Sen. Mutula Kilonzo Jnr.: On a point of order, Mr. Speaker, Sir. I thought the person present is the Auditor-General and not the Controller of Budget.

The Speaker (Hon. Ethuro): I was told. You know my eyes are not necessarily physical.

Sen. Mutula Kilonzo Jnr.: Your other eyes are cheating you.

(Laughter)

The Speaker (Hon. Ethuro): Depending on what my other eyes relate to me. Apparently, there is some shortsightedness. The images are not properly reflecting on the retina.

It is confirmed that the Auditor-General is definitely present.

Mr. Peter Wanyama: Mr. Speaker, Sir, thank you for making that clarification.

Mr. Speaker, Sir, I am making reference to Volume II of the Governor's bundle, from Page 37 to Page 62. Our presentation is that this was the only building available at the time and procedures were followed. The person responsible for procurement in the county is a witness. Some of the evidence which leads to that conclusion is contained in this bundle from Page 37 to Page 62. The provisions are very clear. The upshot of this documentation is that the County Government of Nyeri engaged a national Government valuer in accordance with national Government procedures for leasing of buildings. Everything in terms of prudence, costing, communication and space is contained in this correspondence. At the end of the process, a lease was negotiated and signed. The final document there at Page 54 up to Page 62 is the formal lease which was executed for this particular building.

So, our presentation is that all the procedures for leasing of Government building were followed in accordance with the laid down Government regulations. Therefore, no such allegation can stand and in any event, there is no threshold with the Governor at all. There is nothing which they say the Governor did wrong in this leasing. Did the Governor authorise the lease of his own building? No. Did the Governor direct payment of this money without following the procedures? No. Were any procedures relating to leasing of Government buildings followed? Yes. So, what is it that you are impeaching the Governor for? That is the nexus. We are saying that there is nothing which the Governor did. So, we submit that the County Government of Nyeri did follow procedures as contained in the applicable regulations.

There is a charge at Page 13 Volume II of the bundle. The charge is lack of prudence in refurbishment of buildings. Again, it is important to emphasise that whether it is Public-Private Partnership (PPP) procurement or any other method which is authorised, a county government is authorised to get services. There are structures of accountability at the county level. There is the County Tender Committee and the County PPP Unit. All those structures have been established and at no point is the Governor

involved in the formation of these structures. Indeed, if the Governor interferes with procurement matters, is that a ground for impeachment because then it amounts to gross? There is no evidence which has been annexed that the Governor interfered with any procurement process. They are saying that there was lack of prudence in refurbishing of building amounting to Kshs81 million in contravention of Article 201 of the Constitution. Again, the procurement person will testify that rent for this building costs Kshs172,000 per month. The Kshs10 million which they are saying here is actually rent for five years. So, are they saying that that money has not been used prudently?

Secondly, the Kshs41 million was used to renovate the County Government Headquarters but not the Governor's Office. The County Government Headquarters in Nyeri comprises numerous offices; that is more than 20 offices to be precise. There are boardrooms and offices and furniture was bought and all that. So, can you say that it was not done prudently? Why are they creating the impression as if this money was spent on the renovation of only the office of one person; in this case the Governor? So, there is no nexus with the Governor at all.

More importantly and of great significance is the fact that this money was sent and spent at the county level during the transition period. There was a legal framework known as the County Transition Finance Management Act which lapsed. When governors were sworn into office on 27th March, 2013, there were officers who were sent there by the Transition Authority (TA) to manage affairs in the County Government in that transition phase pending the governors settling and we have evidence to that effect. So, you cannot simply ignore that this money was actually accounted for by the TA but not the Governor. So, on what basis are you going to impeach the Governor concerning money which was spent and utilised. Granted he was the Governor but on what basis are you going to ask him to account for money which was used by lawful agencies that were established by law to help the Governor to settle? There is that evidence. So, we cannot ignore legislation and claim that the Governor spent this money imprudently yet there were structures of accountability at the time on a transition basis.

Mr. Speaker, Sir, I just want to point one page of evidence to demonstrate that point so that we bring it to a close. That is in Volume IV of the Governor's bundle. There is a page there which is absolutely critical. That is Page 150 where you will see a letter from the TA signed by the then Chief Executive Officer, Steven Makori. All county governments were allocated money for renovations at this time. These monies were accounted for and spent by the team that was seconded by the TA to the county governments on interim basis and this was anchored in legislation. So, how can you then say that the Governor illegally spent that money?

Lastly, there is an issue pending in this Senate for audit purposes. So, is it not premature to impeach a governor on an issue which is pending in this Senate for audit purposes? It is our submission that that charge does not meet the threshold. Later, the procurement officer in the county will take you through the details of the procedures which were followed in acquiring this building.

I will then go to Page 14 of Volume II of the Governor's bundle. That is the main document I keep on referring to. There is a charge there of splitting of tenders. Our response is on page 14 of the Governor's documents, Volume II. There is a charge there of splitting of tenders contrary to Section 30 f the Public Procurement and Disposals Act. Here, the procurement officer will testify that there were no tenders which were split.

These were separate tender items. You cannot procure a plumber to do electrical work. It is as simple as it can be. But they will be awarded under separate tender items. There is evidence that indeed, those tenders were 'awarded separately. There was no splitting of tenders.

Secondly, it is an allegation which squarely falls within the procurement unit which the county governor is not fully responsible for. The documentary evidence in support of that allegation is contained in Volume IV in the big bundle. The evidence is in support of our defense that the procurement was done properly. There was no splitting of tenders whatsoever. It is contained in Volume IV from page 288. You can see correspondence on the issue. I will invite this Senate to ask the procurement person if there was serious splitting of tenders as alleged or not? You can see here. Volume IV is the Governor's bundle on page 288. That should bring this matter to rest that there was no splitting of tenders. Any allegation of splitting of tenders is based on a misconception of this particular document. If this document shows splitting of tenders, go ahead and confirm the charge. But it does not. This document does not show the splitting of tenders.

At page 288, Volume IV of the Governor's bundle, it says; the tenders in question were for electrical installation, plumbing and drainage, air conditioning, structured cabling, radio communication, telecommunication, boilers, inflators and vessels. There is no splitting of tenders there. There are separate tender items which had to be procured separately. So, that allegation collapses with this evidence alone.

Mr. Speaker, Sir, I will go back to the Governor's bundle Volume II. With your permission, I will proceed. The lack of prudence in use of public funds contrary to Section 201 (d) of the Kenya Constitution and Section 104 (10 (i) of the Public Finance Management Act, 2012. It is page 15 of our main response. We will keep on referring to that document. We are happy that this House has an engineer who understands how, contracting is done. When you award a tender, you do not award tenders based on the engineer's estimates. The engineer's estimates only provide a guideline. When you pay, you pay for the work actually done. For instance, the allegation here is that the County Government of Nyeri paid Kshs48,744,467.55. That is the allegation.

Unfortunately Mr. Speaker, Sir, we brought the actual payment vouchers which were contained in the other bundle which you have excluded which shows that the actual payment which was made by the County Government of Nyeri is Kshs41 million and is based on work that was done on this road in accordance with the contract which was executed between the parties. We have evidence of the actual payment voucher. So, on what basis are they going to say we paid Kshs48 million yet we paid Kshs41 million based on the work that was done and the payment voucher is here only that I cannot produce it for evidence?

Mr. Speaker, Sir, the Bills of Quantities are here, the excavation work was done and sometimes soil was removed and sometimes deeply. So, what we are saying is that all these details of what work the county government did in relation to this project was done prudently and in accordance with the framework governing contract management. So, any allegation that we did not follow procedures is completely baseless. Any allegation that money was lost is completely baseless; specifically, the allegation that Kshs48 million was paid contrary to the contract is a lost allegation. The actual amount which we paid as I repeat for the record is Kshs41 million. As I said, we have payment vouchers to prove that expenditure which can be submitted to this Senate on request so

that we do not find that a charge is substantiated yet there is evidence which leads to the contrary.

Mr. Speaker, Sir, I will now proceed to the next charge at page 17 of our analysis of the Governor's bundle on Volume II. It says failure to establish the County Budget and Economic Forum. This charge is based on the primaries of Section 137 of the PFM Act. Here, let me begin with the some remarks that it has been very difficult for the County Treasury to set up this Budget and Economic Forum. Most of them who have been identified – if you look at Section 137 of the PFM Act, it says as soon as practicable, a county government shall establish – it does not say a county governor. Yesterday, the county assembly misled this Senate by reading the county governor. It does not say the county governor. I want it to go on record. It says, a county government – not a county governor. The governor is the CEO and there are structures within the county government on how this is done. Later on, I will show you correspondence on attempt to for this initiative. A county government shall establish a forum to be known as the County Budget and Economic Forum. The relevant bit is that the County Budget and Economic Forum shall consist of the governor, other members of the executive committee and a number of representatives. This is where we have been having a problem. A number of representatives not being county public officers equal to the number of the executive committee members appointed by the governor from – underline the word appointed by the governor – persons nominated by organizations representing professionals, businesses, labor issues, women, persons with disabilities, the elderly and faith-based groups at the county level.

So, as I said, it has been very difficult for the county treasury to source for the persons to be in this forum. Some of them are based in Nairobi and they do not want to work in Nyeri. So, it has been very difficult and it creates a challenge which affects most of the county governments. Is there a county government that has fully formed this forum in accordance with the statutory timelines as soon as practicable is the statutory timeline? Most county governments have not formed this economic forum as we speak.

So, are we going to impeach the Governor of Nyeri on something which this Senate will want to look at and see whether this legislation should be amended to provide for a convenient way of forming the County Budget and Economic Forum? Are we going to impeach the Governor of Nyeri County based on these difficulties in the implementation of the transition which most counties have? So, our submission is that this is not a ground for impeachment. As we speak, the process of identifying these members of the County Budget and Economic Forum is still ongoing---

The Speaker (Hon. Ethuro): What is it Sen. Orengo?

Sen. Orengo: On a point of order, Mr. Speaker, Sir. I am just concerned about the utterances by counsel when he makes a blanket accusation that most county governments have not... without any evidence before this Senate. He may have allowance to say a lot of things but he should not cast aspersions on other counties. I just want to stand guided on this particular issue that he is treading on very dangerous waters. Unless he has evidence, he can show us.

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

Sen. Murkomen: Actually Mr. Speaker, Sir, I was following the counsel on that issue. Following your initial ruling on non-admissibility of evidence, is it in order for me to say whereas the ruling was referring to evidence that is given before the presentation,

that if there is any assertion in between the presentation of the counsel, there should be leeway in your ruling to introduce that evidence based on the statements that are made in between if a member requests or if you request it yourself or if at the introduction of a witness and there is a requirement by this House that you substantiate that which you have made. I think the Standing Orders and the rules still apply even if we are using other rules of evidence that we usually use in court, the Standing Orders remain in place like Sen. Orengo has said in terms of substantiating every statement that is made in the House.

The Speaker (Hon. Ethuro): What Sen. Orengo said was different from yours. He said you should not make blanket statements unless you substantiate. We have been discouraging substantiating.

We also made the comment earlier that unless you put a case that will require that kind of substantiation, you should just not go ahead to produce evidence without the need for it. So, when you get challenged as Sen. Orengo has done, or if you are making a point that requires that kind of substantiation, you can adduce evidence to that effect limited to that issue. Sen. Mutula Kilonzo Jnr., this thing seems to elicit a lot of interest.

Sen. Mutula Kilonzo Jnr.: Mr. Speaker, Sir, maybe you should direct us. Some of those things that are extraneous to this matters are dangerous because; if somebody else is stealing in Turkana County, does that make stealing legal? You know those statements are extraneous to this proceeding. This is because if it is another county we will ask them why they set up or why they did not set up and why they have not been asked those questions. However, in the case of Nyeri, we want to know why they did not comply with the provision of law.

The Speaker (Hon. Ethuro): That is why we had agreed collectively that we should minimize points of order because those are issues that the other Counsel may wish to challenge after the submission of the Governor's side. So, let us leave it there. I hope you see there is a structural problem.

Proceed Counsel.

Mr. Peter Wanyama: Thank you, Mr. Speaker, Sir. I stand guided. Our submission on that issue is that there is nothing gross there. Indeed, what we are witnessing is a challenge and the CEC Finance will testify on the efforts that he has been making to conceive this Budget and Economic Forum and what are the mechanisms which have existed. The County Assembly says that the reason for not forming this forum has directly contributed to the budget paralysis that we have at the County Government. However, we are saying that the previous two budgets were smoothly passed and there was consultation with members of the public. The platforms for consultation were there. The County Assembly and the County Executive worked very well and passed those budgets harmoniously. So what are these issues that---

The Speaker (Hon. Ethuro): You have one hour or less than an hour to go, Counsel, and do consider the issue of the Auditor-General.

Mr. Peter Wanyama: Thank you, Mr. Speaker, Sir. So, what are these additional issues that have led to suddenly that being an issue that you have not formed an Economic Forum? Therefore, it is the only reason why you have a paralysis? What we are saying is that the assertion was wrong.

That takes me to the next presentation that is on page 19 of our document. The CEC Finance will testify of the difficulties which he has encountered explaining the

reason why we have not formed this Budget Economic Forum. Page 19 of the Governor's bundle Volume II shows you the real reason why we are having a budget paralysis at the Nyeri County and not because we have not formed the Budget and Economic Forum. This is the reason.

There is a stalemate in the budget making process and that stalemate has largely contributed to the Governor being impeached here. The County Assembly in this Charge at page 19 is saying that the Governor has been undermining legislative authority of the County Assembly. The point is that the County Executive Committee Member for Finance has been in constant engagement with the County Assembly on the budget making process. If you look at page 19 of our response and page 20 of Volume II, you will see that all the deadlines which the County Executive Committee Member is required under the PFM to meet were met. All those deadlines were met. But near the end of the process, the County Assembly completely changed the budget. For instance, critical expenditures such as purchase of fuel in the health sector were deleted or reduced. At the end of the day with that massive alteration, it was impossible for the County Executive to prepare an Appropriation Bill. How could you prepare an Appropriation Bill on a budget which you will never implement? That is the reason of the paralysis.

To the extent that the budget was altered by the County Assembly in such a grave manner, it can never be implemented. It is like the alteration was done to sabotage the budget making process. That is the view of the CEC Finance who will come here to testify as contained in his letter dated 11th July, 2016.

That letter appeared in the form of a memorandum. However, there were concerns which were anchored in Section 131 of the PFM Act by the CEC Finance addressed to the Assembly. He asked the Assembly to consider those issues because if they did not do so, then they would never run the finance of the County. The County Assembly has never responded to that issue. That is why we have a paralysis. If this Appropriation Bill was based on a proper budget, passed and then taken to the Governor for assent and the Governor refused to assent or something like that, then there would be a problem. The entry point for the Governor if you look at PFM is at the point of assenting to the Appropriation Bill. So, what is it that the Governor has done yet his County Executive Committee Member for Finance has engaged the County Assembly on an issue which they have completely refused to consider? That is the real reason why you have that paralysis.

We are, therefore saying that the County Governor has not undermined the legislative authority of the County Assembly in any way. If this budget is amended in accordance with the views of the CEC Finance sanctioned under Section 131 of the PFM, then an Appropriation Bill will be prepared by the Executive and taken to the County Assembly. In which case, the Governor will sign it to law after it has been passed. However, that stalemate cannot be unlocked if the County Assembly which has greatly contributed to that issue by altering the budget contrary to the ceilings which have been set by this Senate, then cannot say the Governor has undermined their authority yet they are hugely responsible for the stalemate. They cannot say that. This is an issue which can be resolved just like they have done in the previous financial years. They have discussed this budget and resolved the issues without this acrimony. That is what ought to be done to get out of this stalemate instead of impeaching the Governor.

They need to discuss and see how to prepare a proper budget which is based on the law and which also takes on board the views of the County Assembly and the views of the County Executive Committee Member for Finance, a meeting of minds. That is what is needed. Therefore, this charge of saying the Governor has undermined the authority of the County Assembly is a charge that cannot be supported. It is a precipitate action which is taken against the Governor where really it ought not to have been the case.

Let us look at page 25 of our response in Volume II, I will go very quickly because of time. Evidence was adduced yesterday that, indeed, most of these Bills and nearly all the Bills are now law. The process of a legislation coming into force is contained in Section 24 of the County Governments Act. Therefore, whether the Governor assents to it or not, it will become a law automatically.

Secondly, most of these Bills were generated by the executive. I do not want to go into those issues because we discussed them yesterday and put our position.

What is, again, new is that there are eight other statutes which were assented to by the governor. There is a reason why for instance some of these legislations were not assented to by the governor. These are reasons which, sometimes, the county assembly does not want to consider. For example, there is the issue of the Tea Cess Bill, which is one of the documents here. The President said in the agricultural sector we are abolishing the tea cess because we do not want to burden some farmers. We do not want to create an extra weight in form of taxation. Therefore, the Agriculture and Food Authority was set up and county governments, by virtue of that directive, are not supposed to collect cess. Yet, the County Government of Nyeri then passes the Tea Cess Bill, authorising something that contravenes the national government policy. Then there is a problem. How can one say that the governor failed to assent to legislation, yet there is an underlying reason those legislations ought not to exist in the first place? There is some rationale and reason. However, for purposes of impeachment, there is no gross violation of Section 24 of the County Governments Act, because it is not capable of being violated; there is a mechanism. If the governor does not take action, the next stage accrues.

Mr. Speaker, Sir, at page 27 of our response – Volume II - there is a charge known as ‘failure to comply with the law.’ There are three charges. This is critical because it goes to the root of constitutional compliance. In impeachment proceedings, the Constitution is key. Under Section 181 of the Constitution there is no such charge as ‘failure to comply with the law.’ It is either ‘gross violation of law’, ‘gross violation of the Constitution’, ‘gross misconduct’ or ‘abuse of office.’ How can the county assembly design a charge that does not exist in the Constitution? On that issue alone, the Senate ought to dismiss that charge and make a finding that, first of all, it does not exist. You have jurisdiction, in accordance with Section 2 of the Constitution to make that finding, when you are upholding the Constitution. This is a House of honour; not a House where you bring frivolous charges which are not anchored in law.

On page 28 the allegation is that the governor has not remitted statutory deductions. Who is complaining that the county government has not remitted statutory deductions? Yesterday, the governor said that the Kenya Revenue Authority (KRA) – and we have evidence here which if allowed, I will submit - fettered the County Government of Nyeri for having paid taxes lawfully and in accordance with the timelines set. How can

they say that there is a violation? Is the KRA complaining? Is the NHIF complaining? Is the NSSF complaining?

The evidence that was submitted here is that there are certain deductions to political parties, that is, TNA and GNU. The county assembly produced evidence before this committee to demonstrate that the county governor has not submitted the statutory contributions. This is completely wrong; we cannot do impeachment like this. On page 689; Volume III of the county assembly documents has a letter that was submitted as evidence of the allegation, which we are saying does not exist in the first place. The letter is dated 21st September, 2016 and addressed to the acting chief officer for finance from Josiah Mathenge; it was signed for the clerk of the assembly.

Paragraph 2 says:-

“This office has received complaints for Honorable Members that monthly party deductions to TNA and GNU parties are not being submitted despite being reflected in their pay slips.”

First of all, all statutory deductions, including such deductions have been submitted. There is no evidence that any is owing. Secondly, this letter cannot be evidence of this charge that the governor has contravened the law by not remitting statutory deductions, yet this is the only evidence they submitted. That evidence cannot support that charge at all.

The same applies to the allegation contained in page 28 of Volume II of the governor’s bundle. There is an allegation there that under the stewardship of the governor, the county executive committee has contravened the Public Finance Management (PFM) Act by not releasing salaries for the month of July. It is noteworthy to mention that the month of July comes at the end of the financial year; the financial year ends on 30th June. It is public knowledge and a matter which can be taken judicial notice of, under Section 60 of the Evidence Act, that there were late releases to the county governments for other reasons beyond the control of this House and the National Treasury. That, definitely, affected the salaries of everybody in the county governments and not just the MCAs. Here, it is important to emphasize that this is an operational issue that has been addressed now. Therefore, it cannot be a ground for the impeachment of a governor, because it does not meet the threshold for impeachment.

On page 29 of the governor’s bundle, they say that the governor has failed to define the responsibility of every member of the county executive committee by notice in the Gazette. Again, this allegation has not been particularized. There is nothing gross here. It is also not true that the governor has not gazetted members of the county executive committees and defined their functions. There is evidence here that the governor has done the gazettelement of the county executive committee members and their responsibilities. These county executive committee members were vetted by the county assembly, duly approved and appointed as it were. Therefore, this allegation is completely baseless. We have evidence in this bundle that, that was done.

The other charge is at page 30. Because of time, I will flip over them and then we can get the witnesses to testify. The charge is that the governor has created a sub-county. That is not true. The county public service board, upon the request of the county executive committee member responsible, and on needs-basis, appointed two sub-county administrators, for Kieni East and Kieni West, to be in charge of one sub-county. There are two sub-county administrators who have been appointed to be in charge of a very

large county in terms of population; in accordance to Article 176(2) of the Constitution. We must read the intention of the Constitution, which is to bring services closer to the people.

On what basis can anyone say that the governor has violated the County Governments Act, yet the Constitution requires that services be brought closer to the people? Therefore, this charge is inaccurate. If they had said the Governor had appointed two sub-county administrators, which he did, then we would have responded to it and said it is necessary. To say that the Governor has created an extra sub-county, that is completely wrong. He has not done that. This is because Mathira is heavily populated and Kieni Constituency alone comprises 50 per cent of the population of Nyeri County. So, how can you have one sub-county administrator serving the 50 per cent population of the entire county and yet you are talking about devolution? Devolution is about decentralization of services and it is allowed by the Constitution in Article 174 and 176(2). So, that charge cannot fly at all. It is completely baseless and without any basis in law.

The issue of gender is a serious one for consideration. It is an issue under which Section 60 of the Evidence Act, this House can take judicial notice of what the Supreme Court of Kenya directed; that these issues be done within certain timelines. That is the issue about gender compliance. However, there has been a failure of legislation at the national level on this particular issue. That is an issue that we have to take judicial notice of because the environment in which this impeachment is being crafted is against this policy, challenges and backdrop.

But more importantly, the County Executive Committee (CEC) of Nyeri was dully approved and vetted by the County Assembly. If the County Assembly, indeed, says that the Governor has violated the Constitution, then they would never have approved these CEC members for appointment. Remember they are the ones to approve. The Governor only nominates. So, how can they say that the Governor has violated the Constitution and yet they also have a responsibility to reject those appointments? If they had rejected these appointments, it could have been a different issue. So, it cannot lie on the mouth of the County Assembly to then accuse the Governor of violation of the law, something which they have definitely a part and parcel to play. So, there is no gross violation. The County Assembly here cannot approbate and blow hot and cold on this particular issue.

Down there on the issue of county secretary, page 31 of the same document, Volume 2, says abuse of office. It says that the Governor has appointed a county secretary. It is important to underline the words; “the Governor has appointed the county secretary” because that is what is important in this charge. The truth is that the Governor has appointed an acting county secretary. The Governor cannot appoint a county secretary without following the due process. It is an acting county secretary and not county secretary. The acting county secretary is appointed from amongst officers who are dully qualified. The officer in question is a chief officer in terms of substance. I remember there is a time when the President of the Republic of Kenya appointed Mr. Francis Kimemia who was then Principal Secretary (PS) for the Ministry of Interior and Co-ordination of National Government to be acting head of Public Service. If you want to appoint someone as acting county secretary or acting head of public service, you appoint from the next pool of persons in the public service. In the county government, you do not

appoint a CEC member to be an acting secretary. Instead, you appoint a chief officer who is the next in terms of rank.

Is this Chief Officer, Ms. Alice, qualified? Yes, she is qualified and was dully vetted by the County Assembly and approved. Her qualifications are here. She has a Master's degree. So, on what basis are they saying that she is sitting in that office yet she is not qualified and yet she was approved by the County Assembly? So, that allegation is completely wrong and does not meet the threshold that has been set. In volume 4 of the Governor's bundle, Page 846 is her Bachelor of Arts Degree. There are also all documentations that show many other trainings that she has undergone. So, she was vetted by the County Assembly and dully approved as Chief Officer and is the one who is acting County Secretary.

Public Finance Regulations allow the appointment of an acting person pending the recruitment of a substantive holder. In the same huge bundle on page 1045 to 1053 Volume 4, you will see correspondence between the County Public Service Board and the County Assembly and adverts seeking to recruit chief officers. There is a charge that the County Government has been holding chief officers in acting capacity for too long. There is a process of recruitment but because of the budget stalemate, it cannot be completed. The County Public Service Board (CPSB) cannot complete the recruitment of substantive county secretary and chief officers and the documentation is here. They do not have money to do the recruitment.

Secondly, the County Assembly has been in constant communication. This documentation shows the Chair of the CPSB telling the County Assembly the efforts that they are doing to recruit chief officers and the substantive county secretary. So, on what basis again can the County Assembly, having received these correspondences here, say that this thing has not been done by the Governor and yet they know that there is a process of completing this recruitment? As you can see, that evidence principally collapses all the charges on page 35 of volume 2, where there is a charge that the Chair of the CPSB is conducting in the absence of the chairperson and secretary for a very long time. They do not define what "long time" is. They have evidence here of the substantive chairperson of the CPSB resigning on 8th August. We have an acting chair and we have evidence here that is contained in our bundle. So, how can you say that the Governor has kept these officers for too long and yet there is a process of recruitment and all that?

Secondly the law allows for the appointment of acting officers. That is important to emphasize. The law allows for the appointment of persons in acting capacity. Third, the Governor has the prerogative under the County Governments Act. This is absolutely critical. He need not have 10 CEC members. If he thinks that only six are sufficient, he can appoint the six and give them different portfolios. Once a CEC member has been approved by the County Assembly, there is no legal requirement for that person to act in another position and must be vetted afresh. The allegation here is that the CEC for Finance is an acting person. Yes, indeed, he is the CEC for Health. However, is there a law that before he acts as the CEC for Health, he must be vetted afresh by the County Assembly? Is there such a law? No. the Governor has powers to reassign. Once you have been vetted, you can be given different portfolios by the governor on acting capacity. That is exclusively the prerogative of the Governor.

So, can you impeach the Governor based on the exercise of his constitutional prerogative to reassign a county executive committee member which the law says he can

have a minimum six as opposed to ten which most of them have. So, is that a ground for impeachment? These charges are completely baseless and the county assembly should take this House seriously because these charges do not meet the threshold in the Constitution.

Mr. Speaker, Sir, at this point in time, I would like to invite the county executive committee member for finance to explain some of these issues with respect to public finances. He is a key witness and a first witness in our document. We have a statement which was submitted early enough. With your permission, the Serjeant-At-Arms may be of help to get him from the room to testify.

The Speaker (Hon. Ethuro): It is so ordered.

Mr. Peter Wanyama: Mr. Speaker, Sir, with your permission can we proceed?

The Speaker (Hon. Ethuro): Proceed.

Mr. Peter Wanyama: Mr. Speaker, Sir, for the record, the statement of the witness is contained in the Governor's documents Volume 1.

Mr. Speaker, Sir, with your permission can we swear in the witness?

The Speaker (Hon. Ethuro): Proceed.

*(The Witness for the County Governor, Dr. Charles Githua Githinji,
Introduced himself and took the oath)*

Mr. Peter Wanyama: Thank you Mr. Charles Githua Githinji. Mr. Charles Githua Githinji, what portfolio do you hold in the County Government of Nyeri?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, I am the Acting County Executive Committee (CEC) member for Finance and Economic Planning and substantively in health services.

Mr. Peter Wanyama: How long have you been acting as a CEC for Finance and Economic Planning?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, one year and one month.

Mr. Peter Wanyama: So, can you be in a position where you can say you can authoritatively be aware of all the financial happenings in Nyeri County?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, yes I am.

Mr. Peter Wanyama : Did you write this statement that is before this Senate dated 9th September, 2016?

Dr. Charles Githua Githinji: Mr. Speaker, Sir; yes, I did.

Mr. Peter Wanyama: Do you wish to produce this statement as evidence?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, yes.

Mr. Peter Wanyama: Is there any other thing that you want to tell this Senate by way of clarification?

The Speaker (Hon. Ethuro): Counsel, you only told us about the Governor's Documents Volume 1. Where is the statement within it?

Mr. Peter Wanyama: Mr. Speaker, Sir, unfortunately, it was not paginated by the clerk. However, after a separator, there is a document known as Governor Nderitu Gachagua's witness statement and affidavit which is paginated on top.

The Speaker (Hon. Ethuro): At page one?

Mr. Peter Wanyama: Mr. Speaker, Sir, yes. After the separator there is a document which is paginated.

The Speaker (Hon. Ethuro): Members, it is Governor's documents Volume 1, the last document.

Mr. Peter Wanyama: Mr. Speaker, Sir, after the separator, there is a Governor's Nderitu Gachagua's witness statement and affidavits.

Mr. Speaker, Sir, with your permission, I now wish to proceed.

The Speaker (Hon. Ethuro): Proceed, counsel.

Mr. Peter Wanyama: Dr. Charles Githua Githinji, what are your qualifications?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, I hold a degree in Pharmacy from the University of Nairobi, Master of Science in Medical Physiology from University of Nairobi and Doctor of Philosophy of the University of Nairobi.

Mr. Peter Wanyama: Thank you. Now, there are allegations which we need your comments on.

Mr. Speaker, Sir, there is an allegation in charge no.1 that the County Governor being the Chief Executive of the County has not disclosed the sum of Kshs352,976,913. What is your comment on this issue? Feel free to refer to any document that you want to refer to?

Dr. Charles Githua Githinji: Thank you, Mr. Speaker, Sir. This allegation is not correct in that the said amount in the Annual Implementation Status Report for the Financial Year 2015/2016, totaling to Kshs1,161,269,008 is what we, as a County Treasury, produced in the report that we tabled in the County Assembly.

Mr. Peter Wanyama: Hold on. Is this the report?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, yes this is the report.

Mr. Peter Wanyama: Mr. Speaker, Sir, I am referring to the report in Volume III on page 4 of the County Assembly documents.

Dr. Charles Githua Githinji: Mr. Speaker, Sir, in this report, they indicated that we had spent a total of Kshs1,161,269,008. We did that disclosure and it is in that report. In this big document from the Governor---

Mr. Peter Wanyama: You mean Volume IV of the Governor's bundle?

Dr. Charles Githua Githinji: Yes, on page 12 all the way to page 19.

Mr. Peter Wanyama: Mr. Speaker, Sir, the Governor's bundle Volume IV.

Dr. Charles Githua Githinji: Mr. Speaker, Sir, they have produced Vote Book Status Report for the Financial Year July 2015 to June 2016.

Mr. Peter Wanyama: What is a Vote Book?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, the Vote Book is the record of what we have transacted. It records all the transactions that we have paid from the County Treasury. This Vote Book is produced automatically from the IFMIS system meaning we cannot alter it. On page 19, column four from the end is cumulative expenditure and down there is the total of the same amount.

Mr. Peter Wanyama: Which is it?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, Kshs1,161,269,008.755. This is what we spent on development vote. The amount that is indicated here in this allegation that the total project expenditure is Kshs808,292,095, we did not give this in our report. It is from the difference of the two figures that you get Kshs352,976,913 of which the allegation is that we are unable to account for. If you add up the two figures, you will come up with what we disclosed.

Mr. Peter Wanyama: So you disclosed a global figure?

Dr. Charles Githua Githinji: Yes, we did.

Mr. Peter Wanyama: Then you are saying that the other figure is part of the global figure?

Dr. Charles Githua Githinji: Exactly. This computation of Kshs808 million was done by the County Assembly. The County Assembly summed up the votes in the development budget that went directly to capital projects. I must mention that when doing this reporting, we received a circular from the Controller of Budget with a format which we were supposed to abide by when reporting on capital projects that we are doing in the wards.

Mr. Peter Wanyama: So, you are saying this report on Volume III, page 4 of the County Assembly document is based on the format of the Controller of Budget?

Dr. Charles Githua Githinji: Yes, Mr. Speaker, Sir; it was Kshs808 million. That is the section they summed up and came up with Kshs808 million. In the development budget, what we reported to the Controller of Budget as per the format, we were also required to indicate the amount we spent on specific projects. There is, over and above that, the amount in the development budget that cannot be accounted for as per the projects there is the money that goes to facilitate the implementation of these projects.

Mr. Peter Wanyama: Can you give an example of this money?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, an example is fueling the vehicles. That is in the development budget of which we have given tabulation in each volume.

Mr. Peter Wanyama: Do you mean the County Assembly documents?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, in our response we tabulated those votes that do not go directly to the development projects as per the format of the Controller of Budget, but yet it is still part of the development vote. I have said we had included Kshs100 million as budgetary reserves and it is in the development budget to pay the debts of the previous year. That could not be captured as a project.

Mr. Peter Wanyama: Where is that expenditure of Kshs100 million if I show you the IFMIS extract for the record?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, it is in Volume II from the Governor's bundle, page 3 and 4.

Mr. Peter Wanyama: You can give one example so that we move on.

Dr. Charles Githua Githinji: On page 2, under lands, housing and physical planning, there is the purchase of Information, Communication Technology (ICT) networking and communication equipment; Kshs49,999. That could not be associated directly with the capital project. However, it is part of the development budget. We were able to pick all the votes that are on page 2 and 3. The allegation is that we are not able to account for Kshs352,976,913.

Mr. Peter Wanyama: Have you engaged the county assembly on this issue, to explain this discrepancy? Have they written to you in a correspondence, called you or visited your office?

Dr. Charles Githua Githinji: No. They have not yet called us to explain these figures.

Mr. Peter Wanyama: Thank you very much. There is an additional allegation concerning a huge sum of money of about Kshs800 million.

Dr. Charles Githua Githinji: Again, this allegation is not correct.

Mr. Peter Wanyama: What does the allegation say?

Dr. Charles Githua Githinji: The allegation is that according to the monthly Exchequer release report from the Office of the Controller of Budget, dated 11th July, 2016, the total Exchequer issue as at 30th June, 2016 amounted to Kshs5,687,473,119, against what the county treasury reported in the annual budget implementation status report for the same year totaling Kshs4,840,770,218. Therefore, that is a difference of Kshs846,702,900.

Mr. Peter Wanyama: Explain the Kshs846,702,900.

Dr. Charles Githua Githinji: First and foremost, these two reports should not and cannot be compared because they are totally different.

Mr. Peter Wanyama: Why do you say so?

Dr. Charles Githua Githinji: The monthly Exchequer release report from the Controller of Budget for the whole year totals Kshs5.6 billion. These are the amounts of money that the Controller of Budget has given the county treasury authority to withdraw from CRF account?

Mr. Peter Wanyama: What is CRF account?

Dr. Charles Githua Githinji: This is the County Revenue Fund (CRF) account in the Central Bank of Kenya. This account receives money from the National Treasury; the equitable share, Level 5 conditional grant, Danish International Development Agency (DANIDA) money and other conditional grants, together with local revenue. So, it is always higher than what is raised by the National Treasury. We got the authority to withdraw this amount from the CRF account. That is what the Controller of Budget calls 'the Exchequer release.'

Regarding the budget implementation report from the county treasury, I want to draw your attention to Kshs4,840,770,218. This is the figure that was picked by the assembly, and we have a tabulation in the report that I will refer to shortly. This is the money that is the equitable share, Level 5 grants and DANIDA money, totaling to the exact figure, without including the local revenue and other sources of revenue to the CRF. This was the National Treasury release directly to CRF and so, it cannot be compared. It is part of the information that we are building up into the report that we have given.

Mr. Peter Wanyama: Is the county government undergoing audit now?

Dr. Charles Githua Githinji: The audit is ongoing and will be complete by the end of September.

Mr. Peter Wanyama: Have you engaged the county assembly on this issue?

Dr. Charles Githua Githinji: No. They have not called us to clarify this.

Mr. Peter Wanyama: Let us go to the next issue. The next allegation is that you spent money at source.

Dr. Charles Githua Githinji: That is not true.

Mr. Peter Wanyama: Why do you say it is not true?

Dr. Charles Githua Githinji: This is the first quarter of the Financial Year 2015/2016. The allegation is that the Controller of Budget, during the first quarter of Financial Year 2015/2016, authorized for withdrawal of a sum of Kshs545 million from the CRF to the operations accounts.

Mr. Peter Wanyama: What is the operations account?

Dr. Charles Githua Githinji: According to the Public Finance Management Act, all revenue for the county government is received and channeled through the CRF in the Central Bank of Kenya. For it to be utilised, we get authority of the Controller of budget through requisitions. When authority is granted, our requisition is that we want a certain amount of money to go to the Central Bank of Kenya account that is operational. There is a recurrent expenditure account and the development expenditure account for the executive. There are also both recurrent and development expenditure accounts for the county assembly. We requisition money to get into those accounts, so that we can use it for payment.

The Controller of Budget authorized us to spend Kshs545 million. However, looking at our account, we seem to have spent Kshs615 million. So, there is an excess that we have been able to utilize, but she had not authorized. She can only conclude and suggest that we used money at source. This is not true in that the report that the Controller of Budget is using to conclude that we have spent Kshs615 million, is generated from the Integrated Financial Management Information System (IFMIS). However, in our process of paying we used both IFMIS as the payment processing platform, which is interfaced or hyphenated with internet banking.

Mr. Peter Wanyama: What do you mean by 'interfaced'?

Dr. Charles Githua Githinji: Interface means that the two are connected. The IFMIS is a payment processing module, but the actual movement of money is effected at internet banking. When we use IFMIS information, anytime we process, even though we have not made actual movement of money to pay, it will be seen as if we have paid, yet we have not. Therefore, depending on IFMIS information, we have used more than what has been authorized to be paid. It is only a process waiting for more money to be authorized for us to pay. We have a system problem that needs to be rectified for all the counties, so that there is a cut-off point at the end of a financial year. We should close the system so that we can generate actual amounts spent.

Mr. Peter Wanyama: Have you raised this issue with the Controller of Budget? You must have seen her report.

Dr. Charles Githua Githinji: Yes. We have raised it with her and she confirms to have looked at it. In this year's annual report she will rectify that.

Mr. Peter Wanyama: Have you had a forum to discuss this issue with the assembly to clarify this? The Chair of the Public Accounts Committee (PAC) was here yesterday and said some things that you need to confirm.

Dr. Charles Githua Githinji: This is the end of the Financial Year 2015/2016 – early July - and we have not been called to explain this.

Mr. Peter Wanyama: Has this issue been audited?

Dr. Charles Githua Githinji: It is undergoing auditing as I speak.

Mr. Peter Wanyama: The Hon. Senators want to know why there is a stalemate in the budgetary making process. You appear to have had an issue with the county assembly, and you are the County Executive Committee (CEC) Member for Finance. Why would you have a stalemate with the assembly on the budget making process?

Dr. Charles Githua Githinji: First, it has nothing to do with keeping timelines.

Mr. Peter Wanyama: Why do you say so?

Dr. Charles Githua Githinji: The county treasury by law is required to submit budget estimates to the assembly by 30th April every year. We submitted the budget

estimates on 29th April, one day before the deadline. The assembly has up to 30th June to have discussed the budget, with the view of approving it with or without amendments. The approved budget was brought to my office on 5th July, five days late. When I looked at it, it was not a budget coming from the estimates we had given. It was totally different in terms of amendments. It was way beyond what was authorized in law and it was totally un-implementable.

Mr. Peter Wanyama: What do you mean by “totally un-implementable”?

Dr. Charles Githua Githinji: I could see variations effected in the budget affecting non-discretionary votes were too much that we could not implement the budget, or use it to service the county services.

Mr. Peter Wanyama: Be specific; what is a non-discretionary vote?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, for example, is the lighting system that we have in Nyeri County where we pay a monthly bill of Kshs6 million. We had budgeted Kshs80million towards paying the electricity bill. However, it was slashed by half. We were given Kshs40million.

Mr. Peter Wanyama: It was slashed from Kshs80 million to Kshs40 million?

Dr. Charles Githua Githinji: Yes. This amount is not enough for us to pay the electricity bill for the entire year. Failure to pay which, we may be plunged into total darkness.

Mr. Peter Wanyama: What happened then?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, as the CEC Finance, I saw that the budget was un-implementable and I wrote a memorandum of objection to the County Assembly. This memorandum is on page 64 of Governor’s bundle Volume II.

Mr. Peter Wanyama: What did you write?

Dr. Charles Githua Githinji: Memorandum of objection to the changes effected.

Mr. Peter Wanyama: Since it is a long document, what were you saying in a summary? When is it dated?

Dr. Charles Githua Githinji: It is dated 11th, July, 2016.

Mr. Peter Wanyama: Just to recollect, when did you say the budget was received?

Dr. Charles Githua Githinji: I received the budget on 5th July, 2016. I did the memorandum on 11th July, 2016. I highlighted the fact that in approving the budget the County Assembly had not done it within the law. I pointed out to them that there were votes which were affected, but they should not have been affected to that extent because we could not have implemented them. I indicated those votes. I told them even if they wanted to vary, the PFM Act 2015 is very clear on it. It says you should not vary with more than 1 per cent of the vote.

I indicated why I felt strongly that there was need for the County Assembly to re-look into the budget with a view of approving it within the provisions of the law.

Mr. Peter Wanyama: What powers were you exercising under that memorandum? Did you have any title powers?

Dr. Charles Githua Githinji: I had not been given opportunity to go and discuss this budget with the County Assembly---

Mr. Peter Wanyama: Do you mean they approved the budget without discussing it with you?

Dr. Charles Githua Githinji: Yes, I was only invited on the last day on 30th June, 2016, to go and give the input regarding the budget policy of the County Government. The same day in the afternoon, the report was tabled in the County Assembly and adopted. I felt I did not have time to go and explain the need to abide with our estimates.

Mr. Peter Wanyama: Has the County Assembly ever responded to---

The Speaker (Hon. Ethuro): Order, Counsel! You have five minutes to go and you are not done with this witness. You still have two others; that is the Controller of Budget and the Auditor-General.

Mr. Peter Wanyama: Mr. Speaker, Sir, we are begging that we be given more time because we had more witnesses.

The Speaker (Hon. Ethuro): When did you start begging?

Mr. Peter Wanyama: Mr. Speaker, Sir, we are begging now. If you look at the evidence, it is about the impeachment of the Governor. The evidence, as put, is “gross violation and nexus”. It is important that we get this evidence out so that---

The Speaker (Hon. Ethuro): I agree Counsel, but you must honour your words. You said you were just going to make your submission within 30 minutes. One and half hours would have comfortably gone to witnesses.

Mr. Peter Wanyama: Mr. Speaker, Sir, I apologise. We have done previous impeachments---

The Speaker (Hon. Ethuro): I reminded you after one hour. I will allow you 30 more minutes which will take care of all the witnesses.

Mr. Peter Wanyama: Mr. Speaker, Sir, I appreciate. Have they ever responded to that letter?

Dr. Charles Githua Githinji: They only wrote back to say that the memorandum I wrote had no legal basis.

Mr. Peter Wanyama: You were, therefore, unable to prepare the Appropriation Bill?

Dr. Charles Githua Githinji: No, the Appropriation Bill was based on the Approved Budget. That budget as approved by the County Assembly as I had indicated was not implementable because it was passed without regard to the law. Therefore, we could not progress and have it implemented. .

Mr. Peter Wanyama: In your view, what should be done to unlock this budget stalemate? As the CEC Finance, you have a budget stalemate. The County is operating on Vote on Account and we do not have money for development. What do you think should be done? Should we impeach the Governor?

Dr. Charles Githua Githinji: This should not be the reason to impeach the Governor. There are mechanisms to unlock the stalemate. We copied the same memorandum of objection to the Controller of Budget, the Commission for Revenue Allocation (CRA) and Intergovernmental Budget and Economic Council (IBEC). I visited the Controller of Budget’s office, we discussed and that is how we were allowed by her authority to access Vote on Account.

Mr. Peter Wanyama: Finally, you need to solve the stalemate?

Dr. Charles Githua Githinji: We held discussion with her and she is willing to break the stalemate. In fact, she has called both the County Assembly representative, my two chief officers and I, this Friday to attempt to break the stalemate.

Mr. Peter Wanyama: This Friday?

Dr. Charles Githua Githinji: Yes.

Mr. Peter Wanyama: Thank you very much. Let me go to the last issue, the County Budget and Economic Forum. The issue here is very simple. Have you set up this forum? If not, what are the reasons you have not done so?

Dr. Charles Githua Githinji: I have been acting as the CEC finance from August 1st 2015. I am aware that this is an issue that we discussed at the County Executive Committee level. It had been initiated by the CEC whom I replaced. However, I am informed and it is true that when the letters were sent to various organizations that need to be represented in the forum, there has been an issue getting the persons to represent those bodies. This has delayed the process. However, we are still pursuing it.

Mr. Peter Wanyama: what do you mean by “still pursuing it”? Are you working on it now?

Dr. Charles Githua Githinji: Yes, we have written again to those bodies that have not---

Mr. Peter Wanyama: when do you intend to finish this process since we do not want to run back and forth again?

Dr. Charles Githua Githinji: In the most practicable time, probably I will give it in the next three months or so.

Mr. Peter Wanyama: Okay.

Mr. Speaker, Sir, thank you very much. That is all for this witness. I will take your directions. Will he be available for cross-examination because ideally that is the procedure? Otherwise we have a next witness but ideally, he should be available for cross-examination.

(The Speaker (Hon. Ethuro) consulted with the Clerk-at-the-Table)

The Speaker (Hon. Ethuro): Counsel for County Assembly, you may now cross-examine the witness.

Mr. Charles Njenga: Dr. Charles Githinji, you have said that one of the issues that resulted to a budget stalemate was material deviation from the budget.

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: That could mean that what you---

The Speaker (Hon. Ethuro): Counsel for County Assembly, just trying to manage time, could you do your bit in 10 minutes?

Mr. Charles Njenga: I will try the best I can because he has referred to a lot of material.

Your contention is that the Assembly mutilated the budget and removed some of the non-discretionary items which you said made it impossible to operate. Is it not so?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: In fact, you gave an example of electricity.

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: Go with me to County Assembly Documents Volume III at Page 607. Do you confirm that is your memorandum?

Dr. Charles Githua Githinji: Yes it is.

Mr. Charles Njenga: At Page 609, you also say that there was a reduction in the Department of Health. You have also talked about electricity, is it not so?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: Now go with me to the schedules or summaries. Let me get you the page. Let us start with Page 627 of the same document. You can see No.8 is Health Services and Sanitation.

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: Can you confirm to this Senate very quickly that in your Column for Deviation, right from the start to the end, it is indicated o?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: The indication being that there was no deviation from your submitted budget to the approved budget?

Dr. Charles Githua Githinji: Yes, in health.

Mr. Charles Njenga: So, to that extent, your memorandum is misleading on the factual position at Paragraph 2.3.

Now let us go to electricity on Page 635, where you said that you budgeted to pay electricity but the Assembly is frustrating you. That is at Page 636 No.13 which is Energy. Look at the Column for Deviation and confirm to this Senate that the particular items for electricity, that is payment for those bills, there is no deviation. In fact, what has been deducted was domestic travel which was reduced by Kshs500,000, daily subsistence allowance reduced by Kshs500,000, and your board committees and seminars reduced by Kshs400,000. I am reading from your documents.

Dr. Charles Githinji, I put it to you that your evidence to this Senate was false and misleading on the factual position of the budget stalemate. The record is clear and this is your document. You came to lie to the Senate but it is okay, we shall pick that later.

Now let us go to Ground 1 on the issue of the breakdown. I am reading from your statement. That is Governor's Documents Volume I. these are documents in a folder and there is a separator and then there is a statement of the witness. It is written; Governor Nderitu Gachagua's Witness Statements/Affidavits. At the Page, there is a statement of the CEC for Finance and Economic Planning. You have said that in your Annual Budget Implementation Report, you disclosed the total sum spent for development of Kshs1,161-- You know the number, is that not so?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: You have said that the sum of Kshs808,292,895 was nowhere in your report.

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: Now, can you confirm that that sum is the aggregate total of the actual expenditure under the Projects Report you gave to the Assembly?

Dr. Charles Githua Githinji: What I indicated is that it is the Assembly that computed the Kshs808,292,895. We reported in wholesome an amount of Kshs1.16 billion.

Mr. Charles Njenga: What I am saying is under your report and the schedules that you provided for the projects and the actual expenditures, the total expenditure under the projects not under the entire Development Vote was Kshs808,292,895, which you did not indicate as a total but only indicated the global sum of Kshs1,161,269,008. Is that it?

Dr. Charles Githua Githinji: That is exactly what I mean.

Mr. Charles Njenga: That is exactly what you mean. In your report, you say you had not captured the balance. I am reading your statement which says; while providing the report on the projects implementation status--- That is on Page 3, Paragraph 3. This is the Governor's document, Volume I.

The Speaker (Hon. Ethuro): Order, Members. Volume I on Governor's documents, page three.

Mr. Charles Njenga: The statement of the witness. So Dr. Githinji, you confirm on your statement that it is your admission that the items now disclosed under table one were not captured in your Annual Budget Implementation Status Report as presented now?

Dr. Charles Githua Githinji: I will be referring to that computation. I presented the global budget of Kshs1.161 billion not in parts.

Mr. Charles Njenga: So, this table that you have put here as table one was not in that report? It is a simple yes or no answer.

Dr. Charles Githua Githinji: Yes, it was not part of the report.

Mr. Charles Njenga: The sum of Kshs352,976,000 and as categorized and given particulars, in your statement now, it was not part of the report. Now, is there any reason why as the CEC Finance you did not find it important to disclose the particulars as you have now done of this expenditure of Kshs352 million in your Annual Budget Implementation Status Report?

Dr. Charles Githua Githinji: The format of doing the report does not require going into breakdowns unless the assembly has not understood and you go there to indicate that.

Mr. Charles Njenga: Does that format say that you should not disclose some items?

Dr. Charles Githua Githinji: It is not that we have disclosed but we have disclosed in totality of one billion.

Mr. Charles Njenga: Does that format say that you should not give particulars of certain expenditures?

Dr. Charles Githua Githinji: It does not require giving particulars.

Mr. Charles Njenga: Is there any regulation or any statutory basis for the exclusion of these particulars from your report that you relied on?

Dr. Charles Githua Githinji: None.

Mr. Charles Njenga: None?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: Very well and very good. If you go to the Exchequer releases, can you also confirm – and I am looking at page six of your statement on the same document---

Dr. Charles Githua Githinji: Which page?

Mr. Charles Njenga: Your statement that is signed.

Dr. Charles Githua Githinji: Which page?

Mr. Charles Njenga: Page six.

Dr. Charles Githua Githinji: Yes, I am there.

Mr. Charles Njenga: Can you also confirm that in your Budget Implementation Status Report the information now given as table three was not disclosed in that report?

Dr. Charles Githua Githinji: Table three or table two because I am on table two?

Mr. Charles Njenga: The number given as table two was given as total exchequer releases. I am asking – because you have admitted that these are clarifications that you are now making and in the governor’s response which can be found at Volume II of the Governor’s documents, there is an admission that items two, three and four were not captured in the Annual Budget Implementation Status Report. Is that a confirmation you can make?

Dr. Charles Githua Githinji: Table number three---

Mr. Charles Njenga: Was not in your report.

Dr. Charles Githua Githinji: I said our report is totally different from the Controller of Budget report.

Mr. Charles Njenga: No, I am saying table number three as it is was not in your report.

Dr. Charles Githua Githinji: This is part of our response. It was not supposed to be in the controller of budget report. It was to be Controller of Budget exchequer release but not the County Treasury release. That is the difference.

Mr. Charles Njenga: All I need to confirm – and I think we are together – is that table three was not in your Annual Budget Implementation Status Report.

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: That is the confirmation I wanted.

The Speaker (Hon. Ethuro): Counsel, let me add you another 10 minutes.

Mr. Charles Njenga: Thank you Mr. Speaker, Sir. That number and the details of the total which comes to about Kshs800 million was not in your report. Can you confirm that the items disclosed or the sources of funds disclosed at table three apart from local revenue, all the others are from the national Government?

Dr. Charles Githua Githinji: Yes, they are.

Mr. Charles Njenga: Thank you so much. Are you also able to confirm to us that the authorized expenditure – and I am now looking at your clarification on the issue of local revenue – that the authorized expenditure by the Controller of Budget for that period under review was only Kshs545 million?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: That is true?

Dr. Charles Githua Githinji: It is correct.

Mr. Charles Njenga: Are you also able to confirm that from their report, the actual expenditure spent by the county government was Kshs615 million?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: You have said that there is a clarification that was made by that office on those two numbers, right?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: Would you be as kind to give us a copy of that clarification?

Dr. Charles Githua Githinji: In writing.

Mr. Charles Njenga: It was a conversation?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: Very well. On the issue of the budget – and I am now coming to a close so that my colleague will ask you two or three questions – I am referring the witness to page 598 of the County Assembly Volume III documents on the blue volume. It is the County Budget’s Committee Report on the budget. Are you able to confirm that one of the recommendations by the county assembly was to reduce the vote-head on domestic travel and other subsistence costs from the Office of the Governor from Kshs13 million to Kshs4.5 million?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: They also reduced on the vote of foreign travel for the governor from Kshs10 million to Kshs4 million in their proposal?

Dr. Charles Githua Githinji: Governor’s office and not the governor.

Mr. Charles Njenga: Governor’s office?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: At (f), there was a reduction of the vote-head to purchase motor vehicles for that office alone from Kshs13 million to nil?

Dr. Charles Githua Githinji: Yes.

Mr. Charles Njenga: Now, I put it to you that these reductions are what have resulted into this stalemate that the governor and the county government felt slighted by these reductions and refused to co-operate any further with the assembly in the budget making process.

Dr. Charles Githua Githinji: In my memorandum, I was not under any directive from the Governor. So, I was the one looking at the budget and I saw there was a problem.

Mr. Charles Njenga: Did you ever attend any of the Committee meetings you were invited to attend by the Assembly?

Dr. Charles Githua Githinji: I was invited to one and I attended it.

Mr. Charles Njenga: You were only invited to one meeting?

Dr. Charles Githua Githinji: There was another one on 26th July, which again was cancelled by a mobile phone text.

Mr. Charles Njenga: Look at page 644 of the same Volume III. It is a letter dated 16th June, 2016.

Dr. Charles Githua Githinji: Which page?

Mr. Charles Njenga: It is on page 644. Can you confirm that that is your letter to the County Assembly?

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

Sen. Mutula Kilonzo Jnr.: Sorry, it is not an intervention, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Counsel, you have five more minutes.

Mr. Charles Njenga: Can you confirm that by that letter you were requesting for a postponement of your meeting with the Budget and Appropriation Committee?

Dr. Charles Githua Githinji: Exactly. This is what I am referring to. I was to go on 21st June. However, on the same day in the morning, I received a text message from the Chairman Budget and Appropriation Committee telling me that the Speaker had postponed it.

Mr. Charles Njenga: Is that text part of your record? Is it anywhere in your record?

Dr. Charles Githua Githinji: It is on my phone.

Mr. Charles Njenga: On your phone? Well you do not have your phone here with you, but we should have interrogated that further. I do not have the time to do so. My colleague will ask you questions for the last five minutes.

Mr. George Ng'ang'a: Dr. Githinji, I have a few questions for you. It was suggested that the reason that the substantive CEC has not been appointed is because of the so called budget stalemate. What we want you to clarify, Dr. Githinji, is for how long have you been serving as the acting CEC for Finance?

Dr. Charles Githua Githinji: I did not get your question clearly.

Mr. George Ng'ang'a: For how long have you acted?

Dr. Charles Githua Githinji: The entire question, please.

Mr. George Ng'ang'a: For how long have you acted as the CEC Finance?

Dr. Charles Githua Githinji: One year, one month.

Mr. George Ng'ang'a: So, that effectively since last year August and that was prior to the so called budget stalemate.

Dr. Charles Githua Githinji: No.

Mr. George Ng'ang'a: When did the budget stalemate commence?

Dr. Charles Githua Githinji: I am talking about 2015.

Mr. George Ng'ang'a: Listen to my question. The appointment to act in that capacity as the CEC Finance acting was prior to this problem that we have been having with the budget?

Dr. Githua Githinji: Yes.

Mr. George Ng'ang'a: Are you aware of any attempt to fill in that position substantively since last year August when you were appointed to act in that position?

Dr. Charles Githua Githinji: There has been no need because the one who was substantive holder of the office---

Mr. George Ng'ang'a: There has been no need---

Dr. Charles Githua Githinji: Was still under investigation---

Mr. George Ng'ang'a: So, there has been no need to fill that position?

Dr. Charles Githua Githinji: Yes

Mr. George Ng'ang'a: Is the Chief Officer in that department of Finance also in an acting capacity?

Dr. Charles Githua Githinji: The Chief is substantive. The Chief Officer Finance and Accounts is substantive.

Mr. George Ng'ang'a: Remember that you are under oath. There is a gentleman called Mr. Richard Kuria Kimani. Is that gentleman serving in the position of Chief Officer Finance in a substantive or acting capacity?

Dr. Charles Githua Githinji: In acting capacity.

Mr. George Ng'ang'a: For how long has he acted?

Dr. Charles Githua Githinji: For the last two years.

Mr. George Ng'ang'a: For the last two years? Has there been a substantive Chief Officer in the department of Finance since the County Government of Nyeri was inaugurated?

Dr. Charles Githua Githinji: Under Finance and Economic Planning, we have two Chief Officers, one is substantive.

Mr. George Ng'ang'a: Dr. Githinji, I have asked you a simple question. Since that inauguration of the County Government of Nyeri, has there been a substantive Chief Officer department of Finance?

Dr. Charles Githua Githinji: Yes, there has been.

Mr. George Ng'ang'a: Who is this?

Dr. Charles Githua Githinji: Mr. Mukira.

Mr. George Ng'ang'a: I am referring to Finance, since inception and remember you are under oath.

Dr. Charles Githua Githinji: Mr. Francis Kirira is the one and he is substantive.

Mr. George Ng'ang'a: I am referring to the department of Finance.

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

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, listening to the responses from the witness, maybe as the Chair of the proceedings, you need to caution him of the consequences of deliberately misleading us.

Mr. George Ng'ang'a: Now my question is and I am not referring to the---

The Speaker (Hon. Ethuro): There is no need because the Counsel had already reminded him that he is under oath and I am sure he knows the implications of that.

Mr. George Ng'ang'a: There are two departments. Mr. Speaker, Sir, I am referring to the department of Finance because we have Finance and Economic Planning. We have Economic Planning where we have a Mr. Kirira. I am referring to Finance Department. Has there been a chief officer before? That is since inception, a substantive chief officer, yes or no?

Dr. Charles Githua Githinji: Not that I am aware of.

Mr. George Ng'ang'a: Not that you are aware of. So since inception, there has been no substantive chief officer and you have been acting as the CEC for a period of one year and one month.

Let us move on. This is in reference to the comment you made that the budget as passed by the Assembly contravened the law. I refer you to your statement.

Hon. Senators I am referring to Governor's bundle, Volume I, the witness statement of Dr. Githinji on page 8. I want to refer to this page together with page 500 of Volume III of the Assembly bundle. So page 8 and page 500. So if Dr. Githinji will be kind enough to turn to page 500. You have stated that the Executive could not have implemented the approved estimates because they were passed by the Assembly in contravention of the law. Was that your evidence?

Dr. Charles Githua Githinji: Yes

Mr. George Ng'ang'a: I want to refer, Hon. Senators, the witness to page 500 of Volume III of the Assembly. If you are there, Dr. Githinji, there is a letter dated the 5th July, 2016, which communicates a resolution that was passed by the Assembly on the 30th June. Are we there? It is page 500. Can you confirm that the Assembly is very clear when the approved estimates were adopted and passed by the Assembly? Does that letter talk of on the 30th June, 2016? Look at the opening paragraph. This letter is addressed to you and the opening paragraph is that on the 30th June, 2016 then it goes on and then it provides that in accordance with Section 131(1) this Assembly do approve together with the amendments and then it goes on to say that it further adopts the report of the Budget and the Appropriation Committee. Confirm from that letter that the decision by the Assembly was taken on the 30th June, 2016. Is that correct?

Dr. Charles Githua Githinji: Yes; 30th June, but the letter is dated 5th July.

Mr. George Ng'ang'a: Therefore, communication of the decision is a separate matter. When was the decision taken by the assembly? Was it on 30th June or 5th July?

Dr. Charles Githua Githinji: 30th June.

Mr. George Ng'ang'a: Thank you. Refer to your witness statement at Page 8 in Volume I of the governor's documents. There is the paragraph that he quotes Section 131 of the Public Finance Management (PFM) Act. We want to see whether your comment that their decision was illegal has any basis. You have cited the provision of Section 131 and stated that:-

“The county assembly shall consider the county government budget estimates with a view to approving them with or without amendments, in time for the relevant appropriation law and any other laws required to implement the budget, to be passed by 30th June in each year.”

Therefore, the decision that we have seen complies with that section, to the extent that it was passed on 30th June. Now, let us go to appropriation. You have said that the appropriation could not be passed by 30th June. I will refer the witness to the provision of Section 129 of the PFM Act, which requires the CEC member to submit to the county assembly the budget estimates and any other bills required to implement the budget, except the Finance Bill, by 30th April in that year.

My question is: When you were forwarding the draft or proposed estimates did you as the acting CEC Member for Finance submit to the assembly the proposed Bills, in particular, the Appropriation Bill proposed to implement the proposed estimates, in line with Section 129? Was that done by you, as the Acting CEC Member for Finance by 30th April?

Dr. Charles Githua Githinji: No.

Mr. George Ng'ang'a: Thank you. Now, after the decision was sent to you by the assembly that the budget estimates, as amended, had been passed by the assembly, was there any attempt by the executive to send the Appropriation Bill for consideration?

Dr. Charles Githua Githinji: No.

Mr. George Ng'ang'a: Also, effectively without an appropriation Bill being sent by the executive, you agree with me that there is no way that the budget, as approved by the assembly, would have been implemented.

Dr. Charles Githua Githinji: Yes.

Mr. George Ng'ang'a: Thank you.

The last question is: Did you send the so called memorandum prior to the Appropriation Bill being sent to the assembly?

Dr. Charles Githua Githinji: Yes.

Mr. George Ng'ang'a: What are these issues that the executive would have been raising before even a Bill has been considered and passed by the assembly?

Dr. Charles Githua Githinji: The Appropriation Bill is based on the approved budget. The memoranda was to---

Mr. George Ng'ang'a: Let me put it differently, *Daktari*. Is it the proposed budget that becomes law or it is the appropriation Bill, once considered and passed by the assembly that would then be assented to by the governor, and in default, would self-assent itself? Is it the approved budget estimates or the Appropriation Bill?

Dr. Charles Githua Githinji: The Appropriation Bill.

Mr. George Ng'ang'a: Effectively, if there would be any memorandum, it would be after a Bill has been passed by the assembly. Is that correct? But if there will be a memorandum detailing the issues that the governor has with the decision of the assembly on the Bill, it would be after the Bill has been forwarded and not before.

Dr. Charles Githua Githinji: Not necessarily.

Mr. George Ng'ang'a: We will take that as your answer.

Last question is: You said that the budget was incapable of being implemented. Now, a reading of Section 131 that gives the county assembly the power to consider and approve the budget with amendment--- Does that Section 131 provide for the limit to which the county assembly can make amendments to the budget estimates?

Dr. Charles Githua Githinji: The limits are in the PFM Regulations, 2015.

Mr. George Ng'ang'a: Are the PFM Regulations subordinate to the Act? Which one would supersede the other in case there would be an inconsistency?

Dr. Charles Githua Githinji: Regulations are meant to operationalize the law?

Mr. George Ng'ang'a: Let me ask you that question again. If there is an inconsistency between Section 131 and the regulation promulgated by the Cabinet Secretary for the National Treasury, which one would override the other?

Dr. Charles Githua Githinji: The law.

Mr. George Ng'ang'a: So that in your evidence Section 131 gives the assembly the mandate to make amendments without any limits.

Dr. Charles Githua Githinji: Yes.

Mr. George Ng'ang'a: Thank you. That is all, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Sen. Mutula Kilonzo Jnr.!

Sen. Mutula Kilonzo Jnr.: I want to refer you to your report, and I asked this question yesterday. It appears that you cite Section 166 of the PFMA. My own reading of Section 166 is that it refers to quarterly reports. The section that refers to annual reports is 164; maybe you should check. However, would that explain the reason why by quoting the wrong section in your report, you then ended up not having the documents that are required under Section 164? Perhaps you can check that.

Secondly, under Section 137 of the PFM Act is it your understanding that the county executive committee member is responsible for setting up a budget and economic forum of the county, where the governor, who is your boss, sits as a chairperson? You should clarify that.

Lastly, by looking at Section 129 and 131 of the PFM Act, under what provisions of law did you send a memorandum? I have looked at 129 and 131 and there is no provision for a memorandum.

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

Mr. Peter Wanyama: Mr. Speaker, Sir, the proper procedure, in accordance to the program, is that when a witness has been cross-examined and issues have arisen, you re-examine the witness. Secondly, looking at the program, I do not see room for Senators to ask the witness questions at this stage. The program is clear that the county government will respond to these issues at a time which has been set in the program. Therefore, it is extremely unprocedural for my witness to be asked questions now on issues, which will appear illegal and we will be responding to at the time when the Senators will be asking questions. We need to make a decision on the issue. He is not a lawyer. We will respond to those issues---

The Speaker (Hon. Ethuro): Order, Counsel! Do not assume that because we are not lawyers, we do not understand English.

(Laughter)

You are very clear on your objection and I agree, particularly since it is a procedure that we adapted yesterday. You are wrong in saying Senators have no time to seek clarifications via questions. That time will come. What we determined yesterday and what we should do today is that the other party cross examines your witnesses and then you do a re-examination. After that, we then come to Senators. I am sure that you are satisfied with that.

Counsel, does that satisfy your fears?

Mr. Peter Wanyama: Mr. Speaker, Sir, I think that is perfect. I can proceed with my re-examination in five minutes.

The Speaker (Hon. Ethuro): Proceed. Members, may I ask you to note whatever issues you have and then you will have an opportunity to interrogate the witnesses and the Governor's side.

What is it, Sen. Mutula Kilonzo Jnr.?

Sen. Mutula Kilonzo Jnr.: On a point of order, Mr. Speaker, Sir. It is a concern. Counsel Wanyama says that this gentleman cannot answer legal questions. At the beginning of this session for the one-and-a-half hours that he began, there are matters that the lawyer raised. In the clarifications that we will seek, will you restrict the witness to the questions of finance and the other issues that were raised by Mr. Wanyama to him? We need some clarity. Or, will we cross-examine the lawyer? We can also do that.

The Speaker (Hon. Ethuro): As far as I am concerned, you will raise any question. It is up to the Governor's party to answer either by counsel or the witness directly. If the submission of the Statement by the witness raises legal issues, he will answer the questions. So, we will deal with that matter once we reach that stage.

Proceed, Counsel.

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

Dr. Githinji, how many chief officers do you have?

Dr. Charles Githua Githinji: Two.

Mr. Peter Wanyama: Do you mean two finance officers in your docket?

Dr. Charles Githua Githinji: It is Finance and Economic Planning dockets.

Mr. Peter Wanyama: So, you have one Chief Officer for Finance and another for Economic Planning. Could you name them? Who is in charge of Finance?

Dr. Charles Githua Githinji: Mr. Kimani is in charge of finance.

Mr. Peter Wanyama: Mr. Kimani who?

Dr. Charles Githua Githinji: Aah ---

Mr. Peter Wanyama: The other docket?

Dr. Charles Githua Githinji: Mr. Francis Kirira.

Mr. Peter Wanyama: Okay. Are they both on acting appointments or one is substantive?

Dr. Charles Githua Githinji: Mr. Kirira Francis is substantive and Mr. Kimani is acting.

Mr. Peter Wanyama: Are you a lawyer?

Dr. Charles Githua Githinji: No.

Mr. Peter Wanyama: Do you understand the difference between principle legislation and a subsidiary legislation?

Dr. Charles Githua Githinji: No.

Mr. Peter Wanyama: Okay. Thank you. On this budget stalemate, I want to be very specific, ---

The Speaker (Hon. Ethuro): Order! I do not know what we heard. What was the response to that question, Counsel?

Mr. Peter Wanyama: Perhaps I can rephrase.

The Speaker (Hon. Ethuro): No. just the response of the last one. I think your question was clear.

Mr. Peter Wanyama: Dr. Githinji, you can respond again loudly.

The Speaker (Hon. Ethuro): Did he say yes or no?

Dr. Charles Githua Githinji: No

Mr. Peter Wanyama: Okay. On this budget stalemate, I want you to look at page 3 of that memorandum in Volume II of the Governor's bundle. Could you read paragraph 2.4 for the honourable House, please?

Dr. Charles Githua Githinji: Mr. Speaker, Sir, it reads as follows:

“The total budget submitted to the County Assembly was Kshs6,464,561,041 but the amount was reduced with Kshs95,438,250. Therefore, the approved budget is Kshs6,369,922,791. No explanation has been provided on the variance.”

Mr. Peter Wanyama: Thank you. Now, is this the alteration which you said was made on the budget to your dissatisfaction?

Dr. Charles Githua Githinji: Part of it, yes.

Mr. Peter Wanyama: Part of it?

Dr. Charles Githua Githinji: Yes.

Mr. Peter Wanyama: Like here, you are talking about how much in terms of variance?

Dr. Charles Githua Githinji: Kshs95.4 million.

Mr. Peter Wanyama: Now, in accordance with the regulations guiding the public finance management, what is the percentage of the budget that the County Assembly is allowed to vary?

Dr. Charles Githua Githinji: 1 per cent per vote head?

Mr. Peter Wanyama: 1 per cent per vote head.

Dr. Charles Githua Githinji: Yes.

Mr. Peter Wanyama: Thank you. Now, let me go back again to this budgetary stalemate. Do you usually speak with the County Assembly Committee on Finance? Do you speak and engage each other?

Dr. Charles Githua Githinji: Yes we do, but not on this one.

Mr. Peter Wanyama: Was there a complete stalemate on this one?

Dr. Charles Githua Githinji: Yes.

Mr. Peter Wanyama: Were you picking phone calls from each other? On this issue had they previously called you and said come to the Assembly, we want to discuss this issue of the budget for the Assembly; you are the CEC member for Finance. Have you had these interactions?

Dr. Charles Githua Githinji: The correspondence that I have had is through an invitation letter.

Mr. Peter Wanyama: Okay. I now want to ask you the final question. Do you believe that this stalemate can be resolved?

Dr. Charles Githua Githinji: Yes it can.

Mr. Peter Wanyama: Do you strongly believe it can be resolved?

Dr. Charles Githua Githinji: Yes, I believe so.

Mr. Peter Wanyama: By whom?

Dr. Charles Githua Githinji: By the Assembly especially the Committee on Budget and Appropriation together with the County Treasury and myself can sit down together and discuss it.

Mr. Peter Wanyama: So, if you sit down together, you can sort this out?

Dr. Charles Githua Githinji: Yes.

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

Mr. Speaker, Sir, I have no further questions for re-examination.

Thank you.

The Speaker (Hon. Ethuro): Very well. Counsel, you have two other witnesses - the Auditor-General and The Controller of Budget. I would propose you get the Auditor-General and the Controller of Budget so that they can attend to other issues later in the afternoon. We will then proceed from there.

The witness may retire.

(Dr. Charles Githua Githinji withdrew from the Witness Stand)

(The Auditor-General (Dr. Edward Ouko) and the Controller of Budget (Dr. Agnes Adhiambo) entered the Chamber)

Hon. Speaker (Hon. Ethuro): Counsel for the Governor, you need to help us; which witness do you wish to start with. I can see both of them are there and that cannot be possible.

Mr. Peter Wanyama: Mr. Speaker, Sir, we can start with the Auditor-General for few minutes because we will not take long.

Hon. Speaker (Hon. Ethuro): Well, start with the Auditor-General. Meanwhile assist the Controller of Budget to get a seat.

Mr. Peter Wanyama: Mr. Speaker, Sir, with your permission we can swear in the witness.

Hon. Speaker (Hon. Ethuro): Proceed.

(The Auditor-General (Dr.) Edward Ouko took the oath)

The Auditor-General (Dr. Edward Ouko): Mr. Speaker, Sir, and Members of the Senate, I am pleased to be here to try and assist in this very difficult matter. I have three issues which I feel I can address.

Hon. Speaker (Hon. Ethuro): Order, Auditor-General! I am sure that is the mode you are familiar with but these are interesting times. You are somebody's witness and therefore, you will wait to be led. Counsel, proceed.

Mr. Peter Wanyama: Thank you, Mr. Speaker, Sir. Mr. Ouko, my name is Peter Wanyama. I am the legal counsel for the Governor facing these impeachment charges. I will ask you a number of questions but before that, I will show you the charges so that you can refresh your memory if you have seen them before or if you are seeing them for the first time. I will generally ask you for a comment.

Mr. Ouko, have you completed the audit of the County Government of Nyeri's finances for the financial year ending 30th June, 2016?

The Auditor-General (Dr.) Edward Ouko: Mr. Speaker, Sir, we have not yet. We are doing the Report of the Financial Year 2014/2015.

Mr. Peter Wanyama: So, for the Financial Year 2014/2015, have you completed the audit?

The Auditor-General (Dr.) Edward Ouko: Mr. Speaker, Sir, we are in the process of finalising the audit.

Mr. Peter Wanyama: Are you still at the county doing the audit?

The Auditor-General (Dr.) Edward Ouko: Mr. Speaker, Sir, we are at the county but now, the reports are coming in to the head office.

Mr. Peter Wanyama: Mr. Speaker, Sir, I am making reference to the Governor's documents Volume II at page one. The Governor is being accused of failure to make proper disclosure of Kshs352,976,913. That is what the county assembly is saying. Can you confirm that this is for the Financial Year that you are auditing? Have you seen these allegations before?

The Auditor-General (Dr. Edward Ouko): Mr. Speaker, Sir, I have not seen this one. I cannot tell off head whether this figure is this year or not. If it is saying Financial Year 2014/2015, then it is Financial Year 2014/2015. I am not in a position to confirm this now.

I have just been given the information that it is related to Financial Year 2015/2016. I am not yet there in audit.

Mr. Peter Wanyama: You are not yet there?

The Auditor-General (Dr. Edward Ouko): Mr. Speaker, Sir, yes.

Mr. Peter Wanyama: Thank you. You audited the finances of county governments in the year Financial Year 2013/2015. Is that right?

The Auditor-General (Dr.) Edward Ouko: Yes.

Mr. Peter Wanyama: Can you briefly explain what you did for that Financial Year when you audited? When you completed the audit, where did you forward the reports to?

The Auditor-General (Dr.) Edward Ouko: Mr. Speaker, Sir, well according to the Constitution, when I have audited the county, there are two reports which we have. We have the county assembly report and the county executive report. The county assembly report went to the county assembly and copied to the Senate. The county executive report went to the county assembly and copied to the Senate.

Mr. Peter Wanyama: A copy is made to the Senate?

The Auditor-General (Dr.) Edward Ouko: Mr. Speaker, Sir, yes.

Mr. Peter Wanyama: Before you prepare the Reports specifically for the Financial Year 2013/2014, do you interact with the county treasury or the client you are auditing?

The Auditor-General (Dr.) Edward Ouko: Mr. Speaker, Sir, we interact with them in inception meetings, fieldwork, exit meetings and in-between, there are exchanges of queries back and forth until we reach the final report.

Mr. Peter Wanyama: Mr. Speaker, Sir, with respect to the Financial Year 2013/2014. I want to show the Members an extract of a report which was submitted before this House. I am making reference to Volume III of County Assembly documents on page 244.

Mr. Ouko, is that an extract of your report?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, yes, it is.

Mr. Peter Wanyama: Can you read the heading of that extract with respect to the charge in question?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, the heading is: "Lack of Prudence of Refurbishment of Buildings Kshs81,384,118.40.

Observations: The County Government entered into a lease agreement with Deborah Wangui/Wambui Mwangi – the lessor, who agreed to lease the commercial building title No. Nyeri Municipal Block 1/74 known as Karson Photo House measuring 4,700 square feet on the first floor (1,700 square feet) and the second floor (3,000 square feet) for a term of 5 years and 3 months (63 months), from the 1st day of May 2013 to 30th September 2017. According to the agreement, the County Government was to pay Kshs156,800 per month which was to be subjected to service charge of 10 per cent, Kshs15,800, making a monthly total rent of Kshs172,480,000. This implies that the County Government would pay a total of Kshs10,866,240 as rent during that lease period.

However, no reason was provided as to why the County Government spent Kshs29,176,932.40----."

The Speaker (Hon. Ethuro): Order! What is the figure, Auditor-General?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, Kshs29,176,932.40 to renovate the rented building and continue to pay rent for the same.

Mr. Peter Wanyama: What was your recommendation there?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, the recommendations were the County Government should exercise prudence in the use of public funds by considering constructing their own office block to make a long-term saving on rent payments.

Mr. Peter Wanyama: Who was your client at that time when you were auditing the County government?

The Auditor General (Dr.) Edward Ouko: A Mr. Speaker, Sir, as you can see this was in a transition. This was the new system that had just come in place. The new county systems that had come in place and we are referring to May. The county was my audit because it was constitutionally there and it was my client, but there were a lot of instructions that were coming from the Transition Authority on how the transition was being done.

Mr. Peter Wanyama: Can you elaborate that issue because it appears to be another issue here?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, in between during this period, we were continuing to get instructions and guidance from the Transition Authority on a number of issues.

Mr. Peter Wanyama: What do you mean guidance? Who in your opinion was actually incurring expenditure?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, in my opinion, the expenditure is incurred by the County Government because the County had come into existence as of March.

Mr. Peter Wanyama: There were transitional officers seconded to the County who you said were working at that time.

The Auditor General (Dr.) Edward Ouko: I think that is a known fact that the Transition Authority actually also seconded staff to the counties.

Mr. Peter Wanyama: Did you audit the Transition Authority?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, yes, we audited the Transition Authority as an institution separately.

Mr. Peter Wanyama: Did you find in the audit any funds which had been allocated to spend at the County level for renovation of buildings, the executive Office of the Governor and the Assembly?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, the institution would have its own accounts and this own accounts would be the budget which is allocated to that institution. However, the monies which are supposed to go to the counties would not be reflected to the institution's accounts.

Mr. Peter Wanyama: I want to ask you an opinion. If an audit query has been raised and it has been responded to, do you still put it in the final audit report?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, the audit query would be raised and if it is satisfactory explained, we might leave it out. However, there are also some issues of audit interest whether they have been resolved or not, that should go into the report depending on their importance.

Mr. Peter Wanyama: In terms of this particular allegation, do you usually come across these allegations many times in your audit and can you relate them as operational issues or issues where an individual can be personally responsible at the level of governor?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, these are normal issues especially during this time when a lot of Counties were setting up. There were a lot of issues about renting, a lot of construction and refurbishment. This was quite a common issue throughout the counties and this is a normal operational audit issues which should be considered.

Mr. Peter Wanyama: Thank you very much. Mr. Speaker, Sir, that is all for the Auditor General.

The Speaker (Hon. Ethuro): Counsel for County Assembly, do you have anything for the Auditor General?

Mr. Charles Njenga: To help us understand the contents of your report, could you advise us or the Senate on the sources of information when you are compiling an audit report?

The Auditor General (Dr.) Edward Ouko: Mr. Speaker, Sir, the sources of information are various; there are people who give information and documents which we look at. There are many other things which we consider; books, the recorded books, the general ledger and invoices, etc. These are the sort of sources of information for audit.

Mr. Charles Njenga: So you consider the primary documents maintained by your clients?

The Auditor General (Dr.) Edward Ouko): Mr. Speaker, Sir, yes, these are the primary documents.

Mr. Charles Njenga: Very well. In your audit report, you said that, for example, in that matter you have been referred to by counsel, that Kshs29,176,932.40 was spent in renovation. This is a number picked from actual documents available.

The Auditor General (Dr.) Edward Ouko): If you said it was spent, it would be spent and recorded in the books as such. .

Mr. Charles Njenga: That would also be true for, at page 245, the amount that is Kshs41,340,946?

The Auditor General (Mr. Edward Ouko): Yes, Mr. Speaker, Sir

Mr. Charles Njenga: I need your comment on one of your constitutional functions under the Constitution and that is Article 229.

Article 229 (6) of the Constitution states that:-

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

Advise us on how you performed this function of confirming lawfulness and efficiency in spending of public money.

The Auditor-General (Dr.) Edward Ouko): That part of the Constitution applies at several levels. There is the first level when you look at these documents and question the basis of the expenditure; how it has been instituted, recorded and spent in the books. ‘Lawfully’ means compliance with various laws, for example, the Public Finance Management (PFM) Act and other laws.

Then there is the effectiveness element that looks at a bigger issue, for example, issues of impact, which are beyond the books. It looks at whether the reported expenditure translates into the impact which was expected, in this case, in the delivery of the services to the people.

Mr. Charles Njenga: Finally, on that issue, is that the basis upon which you gave an opinion at page 14; that the spending of the sum of Kshs81 million to refurbish a building and the governor’s office was not prudent in the circumstances. In fact, you advise that there could have been better value for money if this money was expended to build an office block for the county executive.

The Auditor-General (Dr.) Edward Ouko): That was our humble view. We are looking at this lease for five years. Therefore, when we total whatever will be paid, our humble view is that if that money would have been available and provided upfront, we could have provided the same building, but it depends on how the money was to come.

Mr. Charles Njenga: In your narrative on that observation at page 14 of the report, can you also confirm that this building that was procured for this amount was only for the first and second floors and not the entire building? That is a direct reading from your observations.

The Auditor-General (Dr.) Edward Ouko): That is clear. The total was 4,700 square feet. The first floor was 1,700 square feet and the second floor was 3,000 square feet.

Mr. Charles Njenga: So, it was not the whole building? I have just read your comment on page 5 where the issue of engineer estimates is mentioned.

Hon. Senators, this is found at page 395 of the county assembly documents, Volume III. You have made reference to the issue of engineer's estimates as a guide in procurement for civil works. You have commented that in this particular project there was a variance of about 26 per cent. Make your comment or opinion at clause 3.6 for the record.

The Auditor-General (Dr.) Edward Ouko): My point here was in regard to delays in terms of the expected works. I better read so that it is clear. I will read the whole point, if you allow me.

Mr. Charles Njenga: I will allow you.

The Auditor-General (Dr.) Edward Ouko): The title is "Delay in completion of non-motorized facility of Kshs48,744,467,055."

"During the financial period under review the Nyeri County Government undertook construction of Non-motorized Facility (NMT) in Nyeri Town at a cost of Kshs48,744,467.55. The engineer had estimated the cost of facility to be Kshs38,638,342, therefore, resulting in a variance of Kshs10,106,125.55 or 26 per cent above the estimated cost. The excess variation would have necessitated a review of the tender before awarding was done. The construction work was also behind schedule as it was planned to be completed on 27th June, 2014. At the time of the audit in August 2014, this work was still ongoing at about 50 per cent complete. In the circumstances, it could not, therefore, be confirmed if the public got value for money from the construction of this building by the county government."

Mr. Charles Njenga: You confirm that this was your opinion on the prudence of this spending; you were expressing doubt as to whether the public got value for money in the construction of these facilities?

The Auditor-General (Dr.) Edward Ouko): The context of value for money was the delay. Money spent but no value received is the concept of 'value-for-money' that we are talking about.

Mr. Charles Njenga: That would be good with me. I have no other questions for the Auditor-General, but there is one question by my colleague.

The Speaker (Hon. Ethuro): Proceed.

Mr. George Ng'ang'a: Mr. Speaker, Sir, I only have one question. Is the oversight function by the assembly only limited to reports received or prepared by the Office of Auditor-General?

The Auditor-General (Dr.) Edward Ouko): The oversight responsibility of county assemblies is in the Constitution.

Mr. George Ng'ang'a: At any one time, if an issue arises of how funds and resources are spent by the executive, will it be within the oversight mandate of the assembly, even before the audit report has been finalised by your office? Will it be within their mandate to raise that issue and take appropriate action notwithstanding that the audit report has not been finalised?

The Auditor-General (Dr.) Edward Ouko): I am an auditor. I do not know if you are alluding for me to interpret the Constitution.

Mr. George Ng'ang'a: I seek your comment on that.

The Auditor-General (Dr.) Edward Ouko): That would be my personal feeling. There are two levels of oversighting; oversight of the institution and the managerial accountability during the period.

Mr. George Ng'ang'a: I am referring to the institutional oversight of the assembly with respect to resources that are charged with the county executive. What would be your comment if an issue like that arises?

The Auditor-General (Dr.) Edward Ouko: I would compare it to a company with a board looking on the executive. You would not expect the board to be asking questions on issues which are on-going during the management period.

Mr. George Ng'ang'a: Let, me paraphrase my question: If an issue of how resources are being spent by the County Executive is brought to the attention of the County Assembly which essentially oversees how resources are spent, would it be a justification that because the auditor and controller general has not audited the executive, the Assembly should not take any action with regard to how those resources are being spent by the executive?

The Auditor-General (Dr.) Edward Ouko: I hesitate to answer “yes” or “no” because it depends on whether that oversight is extending towards managerial accountability.

Mr. George Ng'ang'a: We take that period. That is all.

The Speaker (Hon. Ethuro): The witness is now discharged. Let us get the next one.

Hon. Senators: He has not been re-examined.

Mr. Speaker (Hon. Ethuro): Counsel does not wish to re-examine.

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

The Speaker (Hon. Ethuro): I am rescinding your discharge Auditor General because Members are interested. You can trust Sen (Dr.) Khalwale to be asking on some issues.

Proceed Sen (Dr.) Khalwale.

Sen (Dr.) Khalwale: Mr. Speaker, Sir, hearing some of the answers the Auditor-General has given, we might need to probe him a little bit so that he is even more clearer at this stage. Mr. Ouko, you have told us that you do not want to say one way or the other when the lawyer asked you whether there is any reason why the County Assembly would be stopped from looking into the Accounts of the Executive if you have not audited the accounts at the time they are doing so? May I take you down memory lane? In your experience in this Parliament, have you ever come across a situation whereby Parliament looked into an issue before you had concluded your audit?

The Auditor-General (Dr.) Edward Ouko: Yes, Mr. Speaker, Sir.

Sen (Dr.) Khalwale: Would you like to give us such an example?

The Speaker (Hon. Ethuro): Order, Members! Sen (Dr.) Khalwale, I heard the Auditor-General very well when he responded. He started by saying that he is an auditor. Since he is not competent in certain sectors let us deal with him on his core business. There will be other people and witnessed for other things.

Sen (Dr.) Khalwale: Mr. Speaker, Sir, so that I will not be seen to be fishing for something, I put it to the Auditor-General that he has appeared before this Parliament before and helped it on a matter which he had not concluded audit on and he gave us an opinion. That included the issue of the printing of the Kenya Currency by De La Rue. Is it true or not?

The Auditor-General (Dr.) Edward Ouko: Mr. Speaker, Sir, it is true. However, when Parliament called me at that time it did so for me to appear as a friend of Parliament

to help it decide on a matter. When you summon me I come and tell you the information I have and share it with you. It is normal when you summon me.

Sen. Okong'o: Mr. Speaker, Sir, I inquire from the Auditor-General whether it is his constitutional mandate to understand financial management in all sectors of this country. If so, who gave him and at what stage?

The Speaker (Hon. Ethuro): Order, Senator! How relevant is that question? We are doing badly on time today. Let us stick to the relevant critical issues.

Sen. Okong'o: Mr. Speaker, Sir, the constitutional mandate of the Auditor-General is to interrogate financials given to other sectors of this country. I was asking whether it is in his mandate to interrogate the financials of every sector.

The Speaker (Hon. Ethuro): Order! The witness does not need to respond to that. We are dealing with charges and particulars, not general information. I will not allow deep sea fishing on barren land.

Sen. Orengo: Mr. Speaker, Sir, I hope I will not be fishing. I want the Auditor-General to clarify a matter to me. He will agree with me that the head of the county treasury is the CEC Finance. Would he expect the CEC to be familiar with the legal regime surrounding management of financial resources?

The Auditor-General (Dr.) Edward Ouko): Mr. Speaker, Sir, the CEC Finance is a very important post in the county. You would expect such a person to have good understanding of the public finance management aspect of the transactions of the county. There would, therefore, be other legal matters which he or she must seek advice on. However, as far as the PFM Act is concerned, they should be totally familiar with them.

The Speaker (Hon. Ethuro): From now, we will just get all the questions written somewhere so that he can respond at once. I realise there is a bit of interest.

Sen. Mutula Kilonzo Jnr: Out of your statement you have said that you are now working on the 2014/2015 Financial Year account which you expect to report.

From the Constitution, it appears, therefore, that you will actually be late in terms of even 2016/2016 which leaves a legal lacuna because the county government will then shut down before you interrogate their expenses.

Article 226(2) of the Constitution states that:-

“The accounting officer of a national public entity is accountable to the National Assembly for its financial management, and the accounting officer of a county public entity is accountable to the county assembly for its financial management.”

Would it be in order to suggest, therefore, that you will give county assemblies and counties the advice that arising out of the late reports from your Office, county assemblies will proceed under Article 226(2) to question the expenditure of county governments pending your audits?

Secondly, according to this Constitution under which you were appointed, in my reading of Article 226, there is no portion where you have the discretion to give opinions like the one you have said the county government should exercise prudence in the use of public funds. Under Article 226(5), the Constitution states that:-

“If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.”

That is the Constitution. What is your comment?

Sen. Ong'era: Mr. Speaker, Sir, in fact, Junior has asked the very question I wanted to ask. I want to further ride on that question.

The Speaker (Hon. Ethuro): Order! Sen. Ong'era, who is Junior?

(Laughter)

Sen. Ong'era: Mr. Speaker, Sir, I am sorry. I meant the distinguished Senator from Makueni. That is the Duke of Makueni who is Sen. Mutula Kilonzo Jnr.

Dr. Ouko, thank you for appearing here. The question I want to ask you is that there is a report of the Auditor-General that was presented here yesterday on the Financial Operations of Nyeri County. In that report is regard to Karson Photo House. We were given information that stated that Kshs10.8 million was paid for rent for this particular private premise that the County Government had hired and they spent Kshs29.1 million to renovate that premise. We noted that in that report, you only stated that prudence should be exercised in the use of financial resources. My question is; why did you not consider that the Governor should be surcharged for spending Kshs28.1 billion on a private property?

Sen. Murkomen: Mr. Speaker, Sir, I would like to ask the Auditor-General one question. When you complete your audit, like in the situation of 2013/2014 FY, whom do you direct the management letter and audit issues raised? Is it a CEC, Chief Officer (CO), governor---

The Speaker (Hon. Ethuro): Order, Sen. Murkomen. That question is very clear.

Sen. Murkomen: Okay, thank you, Mr. Speaker, Sir.

Sen. Sang: Mr. Speaker, Sir, I have one question to the Auditor-General. Does it worry you if you go to a county government where the CEC for Finance, as indicated by yourself that this is a very important position, is acting for one year and one month and the CO for Finance is acting for two years?

The Speaker (Hon. Ethuro): Auditor-General, proceed.

The Auditor-General (Dr.) Edward Ouko): Hon. Senators, thank you very much for these very insightful questions, some of them trying to turn the Auditor-General to be a legal analyst also.

Regarding the issue of the interpretation of Article 226 and the fact that my reports are still pending, the work and responsibility must continue. My take on that is that the Constitution requires expenditures to go ahead. Expenditures have been approved by Parliament and they are being controlled by the Controller of Budget and it has to continue. That is my comment.

Concerning the use of the word "prudence" we did not use it in more legal terms but we used it in the context of trying to see value for money issues. That is how we analyse prudence in the context of value for money and maybe the context of Article 229(6) which the other counsel referred to about effectiveness. Maybe you will excuse me for use of the word "prudence". We used it to show that had the money been delivered all together, in other words the money which was to be spent five years, they could have actually built a house or whatever. I think it was because of lack of a better word but that is our understanding of the word "prudence" there.

Therefore, it behooves the question. Do I go there and say because there was no value for money, somebody else must refund it? It depends on the circumstances because

there are some cases a person takes a particular decision which we can single out and tell them that they caused the county to lose so much. In that case, we will be very clear and say; Mr. X, you take the responsibility. When it is institutional where you have various ministries, CECs and all that taking decision jointly, you cannot put that responsibility of say Kshs48 million on one person but on the institution. That is why we go asking about the effectiveness and value for money issues.

In a way, that also responds to the Karson Photo House issue. When we raise the issues, first of all, we determine the most directly responsible person at a particular level. On the overall, management letters are directed to the people who could be called accounting officers because they are the management overseers in terms of the execution or expenditure of funds. We have the CEC for Finance but there are also other CECs who may be involved and we direct those issues directly to them. However, when we look at the final management or compendium of all issues, the primary address goes to the CEC.

The Speaker (Hon. Ethuro): Auditor-General, which CEC?

The Auditor-General (Dr.) Edward Ouko): The CEC Finance.

Regarding whether it is proper that we should have CEC Finance acting over a long period of time, of course it will be my concern that the person is substantive but then as an Auditor, it is not my decision to make--- So long as the work is being done and the laws are being complied with it does not mean that the person acting is competent. From the auditing point of view, if we see the acting as a serious point of weakness which casts doubt on the issues of the accounts, then we will be concerned.

The Speaker (Hon. Ethuro): Finally, Sen. Okong'o.

Sen. Okong'o: Mr. Speaker, Sir, I have heard the Auditor-General mention about institutions. In institutional hierarchy, you do not blame institutions. For instance, in the Republic of Kenya, the buck stops with the President on national matters if issues go wrong. On county matters, the buck stops with the governor. I do not understand why the Auditor-General cannot be very clear to say that counties are managed by CEOs called governors. You cannot randomly talk about institutions. Article 179 is very clear.

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

Sen. (Dr.) Khalwale: On a point of order, Mr. Speaker, Sir. Sen. Mong'are has raised a very pertinent issue. He has asked the Auditor to explain to Kenyans why he chose not to recommend that the Kshs29 million that the Governor allowed from public funds to renovate a private building should not be recovered from him.

Mr. Speaker, Sir, this is going to be a turning point if the country is going to believe that public funds can be used to improve a private building and public funds continue paying rent for that improved building and that the Auditor-General finds nothing wrong with it.

Mr. Speaker, Sir, I want to remind the Auditor-General that in this Parliament, there are many times auditors have made these kinds of reports and when the auditees appear before the Public Accounts Committee (PAC), they then vary that recommendation to include actual surcharge and therefore, recovery of the money. Auditor, because we are in public, I want to remind you that you also have an office to protect.

The Speaker (Hon. Ethuro): Order, Auditor-General. You can respond to those two but let me also assure the House that the reports of the Auditor-General come to you.

So, you still have a good opportunity to deal with the issues you have now raised. Proceed, Auditor.

Auditor-General (Dr.) Edward Ouko): Thank you, Mr. Speaker, Sir. Let me say about the governor; I am not the people who made the Constitution and set up the position of governor. It is very clear and it is in the Constitution. It is not me to make that decision. On that, you should not be asking me whether he is the CEO or not. I think that is being unfair to me. I did not make the Constitution. The Constitution on the responsibility of the governor is there and we have to accept that.

Secondly, when I am doing my audit, the Auditor is not doing the audit to come and hang the people. Therefore, you should not be expecting my report to say hang so and so. As you had put it, that job is left to you here. I am not a hangman but what I can do is to give you enough information in my reports for you to reach that adequate decision.

(Laughter)

The Speaker (Hon. Ethuro): Well done Auditor-General. You may now retreat. Let us give this opportunity to the Controller of Budget. You have now confirmed who the hangmen are.

(Laughter)

Counsel and the witness, let us proceed. Let us hope this one will be brief.

Mr. Peter Wanyama (Advocate): Thank you very much Mr. Speaker, Sir. With your permission, we can swear the witness.

The Speaker (Hon. Ethuro): Proceed.

(The Controller of Budget (Ms. Agnes Odhiambo) took the oath)

Mr. Peter Wanyama (Advocate): Madam Agnes Odhiambo, my name is Mr. Wanyama the legal counsel for the governor defending him in these impeachment proceedings. There are two issues that I am going to get your comments on. If I may, I will show you a document where that issue is coming from.

There is a charge on page eight of the Governor's bundle, Volume II. You can read the particulars for the Senate. Charge number two on page eight of that Volume II of the Governor's bundle. You can just read it quickly.

The Speaker (Hon. Ethuro): Which Volume?

Mr. Peter Wanyama (Advocate): Volume II of the Governor's bundle, page eight.

The Controller of Budget (Ms. Agnes Odhiambo): It reads; 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. Can I continue?

Mr. Peter Wanyama (Advocate): Yes, please continue.

The Controller of Budget (Ms. Agnes Odhiambo): In the County Government Budget Implementation Review Report, first quarter financial year 2015/2016 from the Controller of Budget, it is reported that Nyeri County Government utilized the locally collected revenue at source in contravention of the law. The Controller of Budget during

the first quarter of financial year 2015/2016 authorized for withdrawal of a sum of Kshs545 million into the operations account.

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

Mr. Peter Wanyama (Advocate): Thank you very much. Do you confirm for this Senate that this is an extract from your report?

The Controller of Budget (Ms. Agnes Odhiambo): Yes, Mr. Speaker, Sir.

Mr. Peter Wanyama (Advocate): Thank you. You confirm that this content is as contained in your report?

The Controller of Budget (Ms. Agnes Odhiambo): Yes, Mr. Speaker, Sir.

Mr. Peter Wanyama (Advocate): Thank you. Now, this issue, because it appears to be a violation of Section 109 of the Public Finance Management Act, 2012, had you discussed this issue with the County Treasury because your report is principally based on the review of the finance in the county. Have you discussed the issues with the County Treasury?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, yes, and, may be, I can give the context to this matter. The office of the Controller of Budget authorized Kshs545 million to the Nyeri County for utilization. One of the mandates of the office is to prepare quarterly reports. In preparation of these reports, we rely on the financial reports that we get from the counties. So, when we received the expenditure report from the county for the first quarter of 2015/2016 financial year, the total expenditure was kshs615 million therefore giving a difference of Kshs70 million which in our first quarter report, we attributed that excess to use of local revenue at source because at that stage, we did not have any information to the contrary.

Mr. Speaker, Sir, we wrote to the head of the county treasury on the same and what we did is in the subsequent reports; the second quarter and third quarter reports, we analyzed to see whether that situation was still obtaining.

Mr. Speaker, Sir, there were no discrepancies. Neither did we observe any in the third quarter report. We are now compiling the fourth quarter report. We are also checking to find out whether that discrepancy still exists. In fact, the discrepancy occurred in the first quarter of the financial year.

Mr. Peter Wanyama: Thank you very much. Looking at that discrepancy, you say that you had discussions with the county treasury on this issue. Can you remember the context of those discussions for the benefit of this Senate?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, we had a meeting with the representatives of the county treasury on 8th September and the CEC in-charge of Finance did explain that the variance arose because of the way the IFMIS and the Internet Banking (IB) systems were reporting on the expenditure.

Mr. Speaker, Sir, with your permission, I can explain. The payments for county government entities and also the National Government entities are processed through IFMIS. The payments are processed in the IFMIS system, but the transmission of the payment is done in the IB system. This is a Central Bank system.

Immediately the payments are processed in IFMIS, if there were any commitments in the commitment column, they are automatically moved to the payments column. So, in the event that you do not click the approved button to transmit the payments, you will have this scenario. You will have excess expenditure although you

have not paid because the commitments are sitting under the payments column. I hope I have made myself clear.

So, the CEC in-charge of Finance explained that in the first quarter, that is what happened. They processed payments to the tune of Kshs70million, but they did not transmit. They processed the payments in the IFMIS system. So, ideally, all amounts that were in the commitments column moved to the payments column. However, they did not transmit those payments through the IB system. They ended up with expenditure being exaggerated in a way.

When we received their return of Kshs616 million, ideally that expenditure should have been less the amount that was not transmitted through the IB system. So we had that discussion and what we informed the county is that we need to engage because this could be happening to other Government entities. We need to engage with the IFMIS directorate, the Central Bank team then ourselves and the county treasury. We discussed this and somehow reached a way forward because this will be able to assist other Government entities as well. One of the solutions that we looked at, as the office of the Controller of Budget, is if we could come up with maybe cut-off points that might help so that we do not end up with this kind of situation.

Mr. Peter Wanyama: What is “a cut-off point”?

The Controller of Budget (Ms. Agnes Odhiambo): A cut-off point in accounting terminology is the point where you inform the entities that we will process our transactions for say the previous quarter by this date. Which means if you have processed payments in IFMIS, you ensure that all those payments are transmitted through the IB system then you will not end up with reconciliations between what is in IFMIS, what is in IB and what is in your ledger; you will avoid all these reconciliation problems. Therefore, that difference, in my view, as the Controller of Budget is a system issue. It is a matter that was sorted out in our view because we did not experience any discrepancies in the second quarter and third quarter. As I said, fourth quarter figures are not yet out.

Mr. Peter Wanyama: Thank you very much. So you confirm that this discrepancy was fully explained.

The Controller of Budget (Ms. Agnes Odhiambo): Yes because we did not experience that difference in the subsequent quarters.

Mr. Peter Wanyama: Thank you very much. My last question is; you are aware that there is a budget stalemate at Nyeri County.

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, I am aware.

Mr. Peter Wanyama: Have you had any communication with the Assembly or the CEC Finance with respect to that budget stalemate?

The Controller of Budget (Ms. Agnes Odhiambo): I have, Mr. Speaker, Sir.

Mr. Peter Wanyama: Briefly explain for this Senate.

The Controller of Budget (Ms. Agnes Odhiambo): I have had a meeting with the County Assembly representatives and they did explain what transpired. I have also had a meeting with the County Executive representatives and they also explained their side of the story. Basing on Article 252(1) as the Controller of Budget, I have powers to mediate where there is a stalemate on matters that touch on budget implementation. I have agreed with the County Assembly representatives and the County Executive representatives that we have a meeting on Friday 3.00 p.m. so that I can try and bring these two teams together.

Mr. Peter Wanyama: Friday which date?

The Controller of Budget (Ms. Agnes Odhiambo): Friday, 16th September, 2016. We are meeting on 16th September, 2016 to try and resolve this stalemate. I am doing this because the Constitution gives me such powers.

Mr. Peter Wanyama: In your opinion, can this stalemate be resolved based on your experience in this office having seen similar disputes?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, this can be resolved. I have looked at the variances between the budget that was submitted by the County Executive to the County Assembly *vis-a-vis* the County Fiscal Strategy Paper because that was one issue that was raised by the County Assembly.

I have also looked at the differences between the budget submitted by the Executive to the County Assembly and the budget approved by the County Assembly and the variances are not big. You are aware I have handled more serious cases like Makueni and I was able to bring the two parties together. So looking at the Nyeri matter, I am very confident that we shall agree. I must say both parties are willing to negotiate. So, I am confident we will be able to sort them out because the variances are not many.

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

The Speaker (Hon. Ethuro): Counsel for the County Assembly.

Mr. Charles Njenga: Mr. Speaker, Sir, I have very few questions. Are you able to confirm on the issue of this discrepancy between the authorized amount that is Kshs545 million and the amount reported as actual expenditure in the first quarter of Kshs615 million that this number of Kshs615 million was given to your office by the county treasury. That is the information you received from the county treasury.

The Controller of Budget (Ms. Agnes Odhiambo): Yes, Mr. Speaker, Sir. We received Kshs615 million.

Mr. Charles Njenga: As a record from the county treasury of the actual expenditure for the first quarter.

The Controller of Budget (Ms. Agnes Odhiambo): Yes, Mr. Speaker, Sir.

Mr. Charles Njenga: Are you also able to confirm that this meeting that now came about to try and explain or resolve the difference was held on the 8th September, 2016?

The Controller of Budget (Ms. Agnes Odhiambo): Yes, Mr. Speaker, Sir.

Mr. Charles Njenga: For your information that was last week after the Motion.

The Controller of Budget (Ms. Agnes Odhiambo): Yes, Mr. Speaker, Sir.

Mr. Charles Njenga: For your information, that was last week after the Motion that has now precipitated these proceedings was approved. You say that the explanation that was given, after these charges were filed and a meeting was held, is that there were some items that had been committed, but not actually expended. Is it not?

The Controller of Budget (Ms. Agnes Odhiambo): There were items which were committed in the system, but payment for the same was processed in the Integrated Financial Management Information System (IFMIS). However, the transmission of the payment was not made in Internet Banking (IB) system. The IFMIS system is the prescribed system by the National Treasury for all Government entities. The IB is the Central Bank of Kenya payment system.

Mr. Charles Njenga: In your explanation, which was very clear, somebody had not clicked the approval module, so that those amounts may move to the proper section.

The Controller of Budget (Ms. Agnes Odhiambo): I did explain that for the payment to be transmitted, one has to approve. The explanation that was given to us by the county executive is that they did not have sufficient funds in the system. Therefore, the payment was suspended in IB. It was a question of not being able to complete the transaction because they did not have sufficient funds.

Mr. Charles Njenga: Now, in this discussion, the explanations that you are giving and the difference of Kshs70 million that is there between the two numbers, were you given any particulars or narrative as to what it constituted in terms of payment? What was it paying for? Was it for particular a service or good? Is that information you were given?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, as an office, we restrict ourselves to our mandate. We do not check on what was being paid; we look at expenditure. That is the responsibility of the Auditor-General who will then interrogate and check who is being paid and what the payments are for. As an office, we look at the broad categories of expenditure. We look at salaries, hospitality, domestic travel, and the rest.

I just want to clarify that we did check the second quarter and third quarter returns and they did not have any differences. Therefore, that is what we used to check whether the issue we had raised in our first report had been dealt with. If our second quarter and third quarter reports could be checked, that issue has not been raised. That is how we check whether the issues we raised in the previous report have actually been addressed.

Mr. Charles Njenga: That is okay. The charges before the Senate relate specifically to the first quarter. If I heard you right, the information on the particulars is really not within your domain. Therefore, that is not information you can have.

You have made an observation on page 280 of the same report; the Controller of Budget Report, First Quarter, 2015/2016. You can just read the second paragraph and I will rest at that point.

The Controller of Budget (Ms. Agnes Odhiambo): During the reporting, that is under ---

Mr. Charles Njenga: This relates to use of locally generated revenue at source.

The Controller of Budget (Ms. Agnes Odhiambo): During the reporting period, the office noted that a number of county governments had continued to violate the requirement to deposit all locally generated revenue into the County Revenue Fund. Instead, they have been spending the revenue at source. These counties include; Homa Bay, Nairobi City, Nyeri, Taita Taveta, Tharaka Nithi and West Pokot counties.

Mr. Charles Njenga: Just complete because that is also important.

The Controller of Budget (Ms. Agnes Odhiambo): Failure to deposit all locally generated revenue into the County Revenue Fund constitutes a breach ---

(Loud consultations)

Mr. Speaker, Sir, it is our first quarter report ---

The Speaker (Hon. Ethuro): Proceed, Controller of Budget. Unless I make the intervention, ignore the rest.

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, failure to deposit all locally generated revenue into the County Revenue Fund constitutes a breach of the law. Accordingly, we recommend all counties should deposit all locally generated revenue into the County Revenue Fund.

Mr. Charles Njenga: Now, from where you sit as the Controller of Budget, why is it important as a check and control procedure that all the revenue should be deposited into the County Revenue Fund by counties? Is it just an academic provision? Just comment.

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, it is not an academic requirement. It is actually provided for in the Constitution. That just goes to explain and provide for proper accountability of the funds that are being collected by the counties. This is because if counties collect revenue and use at source, then we lose the control function. The Controller of Budget is supposed to approve all withdrawals from public funds. That way, we have accountability and the Controller of Budget will be able to indicate how much has been released and how much has been spent. So, it goes to really provide for proper use of Government resources.

Mr. Charles Njenga: That is all. Thank you very much.

Mr. Speaker, Sir, my colleague has just one question for the Controller of Budget.

The Speaker (Hon. Ethuro): Proceed.

Mr. George Ng'ang'a: Madam Controller of Budget, are you aware of any complaints before, reaching your office where the Nyeri County Assembly has protested that the requisition that has been forwarded to you by the CEC Member for Finance with regard to funds that should be released for payment of salaries to the Assembly, have been altered by the executive?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, I am aware of that matter. It is a recent one because of the stalemate that is obtaining at the moment.

Mr. Charles Njenga: Now, give us your comment. When such an action is taken by the CEC Member for Finance effectively affecting the operations of the assembly, is that lawfully?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, as you are aware, there is a budget stalemate in Nyeri County. Nyeri County does not have an Appropriation Bill as has been explained to the distinguished House. Now, because of that, the Public Finance Management Regulations, County Governments 2015 at section 38.1, the Controller of Budget may approve withdrawal of funds but based on the last budget that was approved by the County Assembly. So, Nyeri County and one or two others are receiving money based on Section 38 of the PFM Regulations. These regulations have used the word "may", which means that the Controller of Budget must exercise a lot of care and diligence in approving withdrawals under this section. Why do I say that? The Controller of Budget is supposed to only look at essential services. So, the Controller of Budget looks at salaries, water, teas, *et cetera*. The Controller of Budget is not obligated to approve funds, say, for foreign travel. Domestic travel is understood because the county assembly and the county executive must travel for one reason or another.

Mr. Speaker, Sir, there are two requisitions that have been made. The Controller of Budget has only released money based on the first requisition that was received. In the

first requisition, I do recall that the county executive and the county assembly had included certain expenses that in my view were not necessary.

Therefore, I personally, instructed the county treasury to remove two items that in my view were not necessary. Those were the two items that were removed. That is one on travel and another on training. In my view, those are the expenses that should await finalisation and approval of the budget and the relevant laws. I am not aware of any amount that may have been adjusted by the executive. The reason why I communicated - I did not adjust it because the law does not allow me to adjust - is because the law allows me to refer back to the county treasury because it is the county treasury that must consolidate all the requests and provide one request to the office of the Controller of Budget for approval.

The matter was also brought out when I had a meeting with the county assembly which I did explain to the county executive. It is one of the issues that we shall be looking at when we meet on Friday.

Mr. Speaker, Sir, if there is an adjustment by the county executive, communication has to be made to the county assembly and more specifically to the accounting officer, who in this case is the clerk.

I hope I have answered along the way.

Mr. George Ng'ang'a: Mr. Speaker, Sir, yes. Let me probe you further. So, you confirm that you have received a complaint by the assembly that their requisition has been affected with respect to the salaries. Did you receive a complaint to the effect that the monies that were requisitioned by the County Executive Committee (CEC) member ostensibly on behalf of the assembly with respect to payment of salaries were insufficient? Did you receive such a complaint from the assembly?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, I received a verbal complaint which was made when we had a meeting with the county assembly. I requested them that going forward, they should submit those complaints in writing.

Mr. George Ng'ang'a: When it comes to the Appropriation Bill for this year which you said has not been passed, has any reason been given to your office by the county executive why that Appropriation Bill was not presented to the assembly even after the budget estimates were adopted and passed by the assembly?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, yes. The reason given by the county executive was the alterations or amendments to the various votes that exceeded one per cent. This is because the regulations provide for changes to the budget only up to one per cent. Those are the issues we were discussing on Friday.

Mr. George Ng'ang'a: So, the reason given was on alteration not that the budget estimates were passed after the statutory deadline of 30th June? Is that correct?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, the explanation given was on the changes.

Mr. George Ng'ang'a: But the changes according to them exceeded the set out regulations?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, yes.

Mr. George Ng'ang'a: I am sure your office has had a chance to consider those regulations as against the provisions of Section 131 of the Public Finance and Management Act (PFMA) which provides that the estimates or the proposed estimates will be considered and approved with or without amendments by the assembly. Your

office has had an opportunity to consider the subsequent regulation that seems to cap the extent to which the Assembly can amend. Do you see an inconsistency between the two? If you do, which ones should prevail, is it the substantive Section 131 or the regulations you have referred to?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, I am not in a position to give any comment on that. Interpretation of the law, I think is the preserve of the Auditor General.

Mr. George Ng'ang'a: Lastly, on the County Budget and Economic Forum. In your report that you have prepared with respect to Nyeri County, have you made a comment to the effect that it is one of the very few counties that have not put in place that very important forum? Were any reasons given to your office why that forum – County Budget and Economic Forum – has not been put into place by the County government of Nyeri?

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, we have not been given any explanation for that.

Mr. George Ng'ang'a: Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Counsel for Governor? Yes, Sen. Okon'go.

Sen. Okon'go: Mr. Speaker, Sir, my question to the Controller of Budget is, does the correction of subsequent use of funds – especially I am talking about the issues of revenue spent at source – but the subsequent collection of the funds regularise or cure that bridge?

Sen. Orengo: Mr. Speaker, Sir, I am worried about the interventions which have been made by the Controller of Budget because the County Assembly of Nyeri as it should be relying on the power donated to the Controller of Budget under Article 228 (6) of the Constitution which states that every four months the Controller of Budget shall submit to each House of Parliament a report on the implementation of budgets of the National and County budgets and therefore the quarterly budget. The County Assembly has relied on a report by the Controller of Budget. She cannot have it both ways. Either her report then from what I am hearing is inaccurate, and to that extent, she should admit that it is inaccurate and therefore she should not be relied upon, and mark you once you said one part is inaccurate, then the entire report is also in jeopardy.

Secondly, I am also worried it is just last week that they met to resolve this problem which arose in the first quarter and she is saying that on Friday we are going to discuss. So, can she be clear whether this question has been resolved or we are waiting to resolve on Friday this important question that is now live before the Senate?

Mr. Speaker, Sir, finally, I am also taken aback by the Controller of Budget to the extent that she is trying to explain what may have gone wrong. There is something wrong with the two systems – the IFMIS and the IB system. This is not rising out of a factual finding. It is something that has been explained by the County Government. Are you now saying that you have already taken lock, stock and barrel the explanation by the County Government without yourself having this very important constitutional duty and yourself having not settled this matter for purposes of this Parliament? This Parliament is also as a Senate very much concerned about what you tell us in your reports and that is why I am worried. Could you respond to those?

The Controller of Budget (Ms. Agnes Odhiambo): Thank you, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): Order! The Controller of Budget, put what Sen. Orengo has said in another perspective. When people refer to the first quarter, you need to put it in a context, for example, 2015/2016. Now we are in 2016/2017; we are talking about one year ago. The second important issue was that once you made the report and there was the difference that you noticed, on your own motion, what did you do? Is your job just to report and leave it that way or you have a constitutional duty to go beyond just reporting figures?

You can handle those two.

Sen. (Prof.) Lesan: Mr. Speaker, Sir, I want to ride on Sen. Orengo's question about the Integrated Financial Management Information System (IFMIS) and the Internet Banking (IB) System. This problem has arisen in many counties, including Nyeri County. These are information systems that can be synchronized. Is it possible for the Office of the Controller of Budget to work on synchronizing these systems, so that this problem does not continuously arise? This is a figures management issue.

The Controller of Budget (Ms. Agnes Adhiambo): Mr. Speaker, Sir, with regard to the first question on whether correction is sufficient or a harsher decision should be taken, I want to refer the distinguished House to Article 225 of the Constitution. It provides for stoppage of funds where there is persistent--- In this case it is persistence in the use of local revenue. That mandate is bestowed upon the Cabinet Secretary for the National Treasury. The key word is 'persistent use'. Therefore, if we had observed that in the second quarter of the 2015/2016 the county is using local revenue at source, we would have raised it. If they continued to use the same revenue in the third quarter, we would have raised it in that report, as we do with the other counties. The issue here is "persistence". That is why I explained that when we raised the issue, we actually wrote to the County Executive Committee (CEC) Member for Finance in a letter dated 26th February, 2016. Therefore, we did not just sit; we took action. We were proactive and wrote to the county treasury on the same. Our report was produced in January 2016 and we immediately wrote to the CEC in charge of Finance.

The second question that was raised by Sen. Orengo is whether our report is correct. It is correct because the figures were based on the returns that we received from the county treasury. I explained that we received financial returns showing that the County had spent Kshs615million. On the other hand, the Controller of Budget had released Kshs545million. Those figures are correct because Kshs615million is derived from the financial returns produced by the county treasury. The releases are from our own records. Therefore, I want to re-emphasize that our report is 100 per cent correct.

In terms of what is now obtaining, since from the explanation provided by the county treasury we have taken action which is that we want to engage with the IFMIS Directorate and Central Bank because this is not affecting Nyeri alone. It could be affecting ministries and other counties.

I liked the proposal by the Senator on synchronization where the two systems should talk to each other. We are already championing that. We want to meet with the technical teams in these two institutions and find a way forward that will help all the other entities.

Mr. Speaker, Sir, I want to emphasize that our office takes action immediately. We are a very small, but very dedicated and hardworking team. I think it is the same issue that I have explained.

The Speaker (Hon. Ethuro): You have already explained that. Proceed to the legal matter.

The Controller of Budget (Ms. Agnes Adhiambo): Mr. Speaker, Sir, those were the issues.

The Speaker (Hon. Ethuro): Proceed, Sen. Dr. Khalwale.

Sen. Dr.) Khalwale: Mr. Speaker, Sir, I thank the Controller of Budget for taking so long to confirm that the County Assembly of Nyeri was right in finding that Kshs70 million had been spent without the authorization of the Controller of Budget. This is because where I come from, a sum of Kshs70million is a lot of money and the members of the public are watching. It is as simple as this: You have left money in the house for the servant to spend Kshs545 for lunch, since there was other money in the safe in this house, the servant spends Kshs615 and your class eight child who is very clever says there is a deficit of Kshs70.

I am glad that you have confirmed that in Nyeri, the County Assembly was right that Kshs70 million was spent without authorization. My question is: I have looked at Article 228 of the Constitution that captures your responsibility and nowhere do I see it giving you the power to arbitrate on disputes.

You are now telling this Sitting that you want this matter to rest because on Friday you are going to arbitrate over it. Can you help me so that you clear my fears that this is a consideration that you are being driven into doing by the County Government of Nyeri, so as to sanitize them having been found to have committed an error?

Finally, if the County Government of Nyeri had the bad manners of spending money before they banked in the first quarter and you discovered, when you found that the bad manners had not been repeated in the second and subsequent quarters, could you confirm that that does not free them from the mistake that they did in the initial incidence?

The Speaker (Hon. Ethuro): Just take all of the questions. Sen. Boy Juma Boy.

Sen. Boy Juma Boy: Bw. Spika, ningependa Msimamizi wa Bajeti anifafanulie--

(Sen. (Dr.) Khalwale consulted with Sen. Orengo)

Bw. Spika, niokoe kutokana na maneno ya Sen. (Dr.) Khalwale na Sen. Orengo.

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

Sen. Boy Juma Boy: Bw. Spika, swali langu ni kwamba shitaka la pili limetegemea ripoti iliyotoka kwa Msimamizi wa Bajeti. Shitaka hili la pili linahusu matumizi ya Kshs70 million kinyume na vile ilivyokusudiwa. Katika ripoti hiyo, Msimamizi wa Bajeti amesema kwamba Kshs70 million, kwa mujibu wa jinsi nilivyomwelewa, hazikutumika bali ilikuwa ni *kuclick* hapa na pale kutokana na International Monetary Fund (IMF).

(Laughter)

Swali langu kwa Msimamizi wa Bajeti ni je, anaridhika kwamba Kshs70 million hazikutumika kinyume na fikra ambayo mimi na wengine tunayo?

The Speaker (Hon. Ethuro): Ni nini kilitendeka *wakaclick* vizuri sana?

(Laughter)

Sen. Hargura: Mr. Speaker, Sir, on the same issue, if somebody was given Kshs545 and he spends Kshs615, it is very clear that there was some other source. That is coming out clearly. People are blaming the IFMIS and Internet Banking (IB) system. Why are we not seeing the printers from the IFMIS and IB showing that discrepancy as evidence to that?

Sen. Mutula Kilonzo Jnr.: I do not know whether you have been shown the report that has led primarily to the impeachment of the Governor on misreporting of Kshs352 million. In that report, the executive quotes Section 166 of the PFM Act which is in reference to quarterly reports. The report we have here is a yearly report. So, I believe he quoted the wrong Section because that should be 164. That brings me to the question. He has cited in the forwarding note that he has forwarded this document to your Office. Maybe we would have saved Nyeri County a lot of problems if these reports had arrived at a desk. A comment would have then been issued saying that the Acting CEC omitted the documents and details in support.

For avoidance of doubt, I will read Section 164(2) which states that:-

“The accounting officer shall include in the financial statements—

(a) appropriation accounts, showing—

(i) the services for which the appropriated money was spent;

(ii) the amounts actually spent on each service; and

(iii) the status of each Vote compared with the appropriation for the Vote; and

(iv) a statement explaining any variations between the actual expenditure and the sums Voted; and

(v) any other information specified by the County Treasury;”

Could you please tell the Senate whether your Office got into details of this report? From the admission of the Acting County Executive, a lot of information that is supposed to be in the law is missing.

Secondly is on the budgets. There are people who are proposing – maybe you are aware and the CEC Finance mentioned this – that the only variation that can be done is up to 1 per cent. Are you aware of the findings of this Senate on variations with regard to regulations? Secondly on the same, there are people who are proposing – maybe your Office is aware – that there are amendments that we suggested on ceilings on budgets on recurrent expenses under Section 107. Somebody is proposing that amendment was subdued by the County Revenue Allocation and, therefore, disappeared. Are you aware of the sentiments as you attempt to resolve the dispute in Nyeri County?

The Speaker (Hon. Ethuro): Sen. Sijeny!

Sen. Sijeny: Mr. Speaker, Sir, I think my colleagues have answered a few of the things I wanted to ask.

The Speaker (Hon. Ethuro): Members, remember it is getting to almost 2.15 p.m.

Sen. Sijeny: Yes, but just a quick clarification. You said you are aware there is some stalemate. When did you come to discover this? How many meetings have you had or is this going to be the first reconciliation meeting?

The Speaker (Hon. Ethuro): Sen. Gwendo!

Sen. Gwendo: Thank you Mr. Speaker, Sir. My question is in regard to the Kshs70 million. The Controller of Budget said on the Kshs70 million, she had already talked to the CEC and it was in regard to the Integrated Financial Management Information System (IFMIS). Are you trying to insinuate that IFMIS is not a safe system for the counties because you blamed IFMIS for the discrepancy in the Kshs70 million?

Sen. Sang: Mr. Speaker, Sir, I have one question to the Controller of Budget. That is with regard to apparent conflict between the PFM Act and the regulations with regard to what extent the county assembly can change the budget. Now that you are going to mediate to this process, what is your position? Is it that the law supersedes the regulations or the regulations supersede the law?

The Controller of Budget (Ms. Agnes Adhiambo): Thank you very much, Mr. Speaker, Sir. I will try to answer the questions. On the issue of spending of the Kshs70 million, the county assembly was right in pointing out that matter because the county assembly relies on our figures. In my personal view, what should have happened as is normally the case when we appear before the National Assembly, the county assembly should have summoned the county executive in charge of finance to shed light on the issues raised in our report. If that had been done in February because the first quarter reports were released in January---

The Speaker (Hon. Ethuro): What is Sen. Wako?

Sen. Wako: It is not me Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is Sen. (Dr.) Machage?

Sen. (Dr.) Machage: On a point of order Mr. Speaker, Sir. We need your guidance on this. We are listening to the gracious lady in her capacity as the Controller of Budget. Now, she is giving her personal views. Is she in order?

The Speaker (Hon. Ethuro): She is perfectly in order. She has to know what happens to her reports. It will be irresponsible not to know. She is not just churning them for the sake of it.

The Controller of Budget (Ms. Agnes Adhiambo): Mr. Speaker, Sir, as I was explaining, we urge the county assemblies to take action on our reports. Those reports should be used by the assemblies. The county executive must be summoned – and I used the word summoned - to appear before the county assemblies to answer. If this had happened, it would not be an issue because the explanation, information and details would have been provided to support that.

So, I would then take the issue on the printouts of IFMIS and internet banking system. These documents should be provided and these figures should be looked at. As I explained, I did say that this is the explanation that was given by the county executive. We will not look at all documents because of time. This happened last week. We are going to look at the returns from IFMIS and the IB information as well. So we are going to do quite a bit of work to authenticate the explanation that the County Executive is giving.

I also use IFMIS and maybe at this stage I should answer the question on IFMIS. As I explained, the payment system for the Government is IFMIS, but when it comes to transmitting that payment, you use the IB. Therefore, as far as the payments are concerned, I am happy that the system is actually processing the transactions correctly. What happened in this case and it is happening because as I am trying to explain, I took my own expenditure report today morning when I was informed that I am appearing

before the Senate. I checked with my accountant to know what happens to commitments that are processed for payment in IFMIS. She explained to me that immediately you process the payment in IFMIS, those commitments move from the commitments column to cumulative expenditure. However, if you do not complete the transaction by approving in IB, then those amounts remain as if you have paid. I hope I have tried to explain.

When you then print your expenditure report, what was in commitment that you had already processed will appear as if you have paid, but you may not have paid for one reason or another. The explanation we were given by Nyeri County is that they did not have sufficient funds. Therefore, they could not complete the transaction. I hope I have explained on the issue of Kshs70 million.

I hope Sen. (Dr.) Khalwale and Sen. Orenge are now satisfied that it is a question of how those two systems “talk” to each other. But it is good that we involve the technical teams before we can conclude whether we require synchronization or whether we require another interface.

In terms of where we draw our mandate from to conciliate, Sen. (Dr.) Khalwale, with the permission of Mr. Speaker, Sir, is Article 252(1) (b).

With your permission, Mr. Speaker, Sir, I will read ---

The Speaker (Hon. Ethuro): Order! There is a small point according to use of wording.

Sen. Murkomen: Mr. Speaker, Sir, there is a very slight point of order. On the question of Kshs70 million in the manner in which Sen. Orenge and Sen. (Dr.) Khalwale had put it. It would appear that there was a missing Kshs70 million which was actually spent, but in her explanation, she is trying to say that there was no existence of a Kshs70 million anywhere. She says there is a column here that seems to increase the money if it not dealt with properly. I want her to come out so clearly on whether there was Kshs70 million that was not declared by County Government and spent or there was Kshs70 million represented on paper but there was no actual expenditure. We, as Senate, want to be sure. Was there Kshs70 million raised from the County and spent by the County Government without going through the procedure of the Central Bank? Is it that there is actually no expenditure relating to Kshs70 million? Just explain in simple and plain language so that we can make a determination because it is critical.

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, to answer that question accurately, one is that I would have to call for all the documents or request the Auditor General. As I said, there is a distinction between the mandate of the Controller of Budget and that of the Auditor-General. It is the Auditor-General who interrogates the financial records to determine who has been paid what and whether there was proper procurement. If it is revenue, the Auditor-General will delve deeper into the details and tell us so much was collected by Nyeri County. It is very important that we truly distinguish the mandate of the Controller of Budget and that of the Auditor-General.

The Speaker (Hon. Ethuro): Proceed, The Controller of Budget. We are dealing with the Controller of Budget and we have the distinction.

The Controller of Budget (Ms. Agnes Adhiambo): Thank you very much, Mr. Speaker Sir.

I was on where we draw our mandate from. As the Office of the Controller of Budget we draw our mediation powers from Article 252(1) (b) of the Constitution. With your permission, could I read?

The Speaker (Hon. Ethuro): Proceed, and Sen. Murkomen is directed to listen as you read.

The Controller of Budget (Ms. Agnes Adhiambo): Article 252 (1) (b) reads:-
“Each Commission and each holder of an independent office has the powers necessary of conciliation, mediation and negotiation.”

That is where we draw the powers of conciliation from.

On the issue of whether I am aware of the stalemate, yes I am aware. This only came to light about two weeks ago. First, I read it in the newspapers and then met with the county assembly and the county executive. Therefore, it is a very recent matter. Under Article 252, I am attempting to try and bring the two parties together, because the people of Nyeri are suffering. They are not getting services. I am within my mandate to try and bring the two parties together, but if I am unable to, I will then refer them to the Senate and other agencies as well.

I have covered issues on the Kshs70 million exhaustively. I will now move on to whether, as an office, we analysed the report that was delivered to us. We have not done so in a lot of detail, because we concentrated on the issues that affected the mandate of the office, which are basically two and I have dealt with them. Therefore, we have not analysed the report in a lot of details.

In terms of whether we are aware of the variations in the budget, we are aware as I explained. There were variations between the budget submitted to the county assembly by the county executive and also the County Fiscal Strategy Paper. The variances are not many; they can be resolved. There was also variance between the approved budget by the county assembly and the budget submitted by the county executive.

I am also aware that the 1 per cent variation is a matter under consideration by the Senate. Therefore, when I try to bring the two parties together, I will be alive to the position of the Senate and advise accordingly.

In terms of what takes precedence if a regulation is inconsistent with the law, I will not pronounce myself on this, because this is the sole mandate of the Attorney General. He is the person mandated to interpret the law. With your permission, I will skip that one.

From my record I have addressed all the questions from the distinguished Senators.

The Speaker (Hon. Ethuro): No more points of order. It is very clear, particularly yours. In fact, of all of them, yours is clearer than the rest.

Conclude, The Controller of Budget.

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, to conclude, I would want to just repeat for record purposes, one, that when we discovered that there is a difference between the expenditure as provided by the county treasury and the releases, we raised it in our report. Our report, as I have explained, is a budget control and not an audit report. Therefore, we followed that up with a letter to the Head of Treasury to point out this matter. In subsequent reports---

(Sen. Kittony approached and consulted the Speaker)

Is the Speaker really listening?

The Speaker (Hon. Ethuro): Order, Controller of Budget!

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, I was wondering if you were listening.

(Laughter)

The Speaker (Hon. Ethuro): I am blessed with many capacities.

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, thank you very much.

We raised this matter and took it upon ourselves as is within our mandate to check if this matter was persisting or it has now been addressed. That is why we did not raise it in our second and third quarter reports. Now, with the new information that has been given to us by the County Executive and this only came to light last week, we have gone a step further. We want to engage with the technical team and just check how the IFMIS and internet banking communicate with each other. However, my office also uses IFMIS and the internet banking system and the two systems are quite efficient, in my view. One handles payments from procurement right through to payment. The internet banking system by Central Bank is a secure payment system. So, we are now comfortable that the payments are secure. You are performing the ---

The Speaker (Hon. Ethuro): Order, Controller of Budget! Do not belabour that point. In any case, you have told us that you will look at the technical details.

The Controller of Budget (Ms. Agnes Odhiambo): Mr. Speaker, Sir, basically, that was the main issue that I really wanted to bring across and to say that the office has acted within its mandate. The office has not slept on the job with regard to that aspect. I hope I have explained myself and that the distinguished Senators are satisfied with my explanation.

(Loud consultations)

The Speaker (Hon. Ethuro): Order, Senators! She is referring to the Office of the Controller of Budget, for avoidance of doubt. As to the determination of the finality on your performance, we will give it to you another day. For now, you are discharged, honourably.

Hon. Members, that should bring us to the end of the morning session, which ends in the afternoon. So, we will proceed with the remainder of business.

The House is adjourned until 3.30 p.m. today.

(The Senate adjourned temporarily at 2.35 p.m.)

[The House resumed at 3.30p.m.]

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

The Speaker (Hon. Ethuro): Order Members. Welcome back to the afternoon session of the Special Sitting. You have an Order Paper with you. We will proceed from where we left. The counsel for the Governor will be calling other two witnesses.

Counsel, proceed.

Mr. Peter Wanyama: Thank you, Mr. Speaker, Sir for the opportunity to further present the Governor's case.

With your permission may I call Mr. Eliud Muchoki Mureithi who is the Vice Chair of the Nyeri County Public Service Board.

(Sen. Mutula Kilonzo Jnr. stood in his place)

Sen. Mutula Kilonzo Jnr.: Mr. Speaker, Sir, I am wondering whether you gave directions that our queries or clarifications on the acting county executive member of finance will come at the end after they complete this because that was not done.

The Speaker (Hon. Ethuro): That is correct. Let us proceed with the swearing.

(Mr. Eliud Muchoki Mureithi took the oath)

Mr. Peter Wanyama: Thank you. Can you again, for the record, inform this honourable Senate your full names.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, my name is Eliud Muchoki Mureithi.

Mr. Peter Wanyama: Who are you?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I am the Vice Chairperson of the Nyeri County Public Service Board.

Mr. Peter Wanyama: When were you appointed as the Vice Chair of the Nyeri County Public Service Board?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I was elected by the Board Members to be the Vice Chair of the Board when the Board was sworn into office in 2013.

Mr. Peter Wanyama: Now, I am sure---

The Speaker (Hon. Ethuro): Speak through the microphone.

The Speaker (Hon. Ethuro): Proceed, Counsel.

Mr. Peter Wanyama: When were you elected?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I was elected by the Board Members to be the Vice Chair of the Board when the Board was sworn into office in 2013.

Mr. Peter Wanyama: Thank you. I am sure you have seen the allegations before this Senate.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, yes; I have.

Mr. Peter Wanyama: Did you write a statement in response to some of these allegations?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, yes.

Mr. Peter Wanyama: When did you write that statement?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I wrote the statement this week 8th September, 2016.

Mr. Peter Wanyama: Do you have a copy of that statement?

Mr. Speaker, Sir, I am referring to the Governor's documents, Volume 1 at page 13.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I have my statement.

Mr. Peter Wanyama: There are human resource issues which have arisen in these impeachment proceedings which the Senate would like you to clarify. For instance, there is this issue of the acting county secretary. What is your comment on the appointment of county secretary in Nyeri County?

Mr. Eliud Muchoki Mureithi: Thank you Mr. Speaker, Sir. The issue of the acting county secretary of the Nyeri County Government is in accordance with the human resource best practice.

Mr. Peter Wanyama: First of all, who is this acting county secretary before we go to the practices?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the acting county secretary is Madam Alice Wachira.

Mr. Peter Wanyama: Who is she?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, she is the substantive chief office for public administration, information and communication. She is now also acting as the county secretary.

Mr. Peter Wanyama: Are you in a position to tell who appointed her to the position of the acting county secretary?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, she was appointed by the appointing authority who is the Governor.

Mr. Peter Wanyama: In relation to her recruitment as the chief officer, was she subjected to due process in terms of the recruitment through advertisement among others?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the appointment of Madam Alice N. Wachira - when she came into the Nyeri County Government, she was recruited and selected following the due process that is in place in terms of when officers are being recruited in the County Government. It was competitive, it was advertised and she went through a thorough interview process and was finally recommended to the appointing authority. Subsequently, her name was forwarded to the County Assembly who vetted and approved her for appointment.

Mr. Peter Wanyama: Thank you. In terms of the qualifications of a chief officer, we do not want to spend a lot of time on this because it is in the afternoon, but just briefly state this; are you in a position to know the qualifications of a chief officer in terms of length of service? Is it similar to the one of the County Secretary at a substantive level as provided in the statute?

Mr. Eliud Muchoki Mureithi: Thank you, Mr. Speaker Sir, and Honourable Senators. The chief officer is a job group below the County Secretary and the Board sets the recruitment criteria and the qualifications required for a person to be recruited to that office. Madam Alice Wachira met all the required qualifications that the County Public Service Board in exercise of its mandate---

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

Sen. Wako: Mr. Speaker, Sir, I rise on a point of order because we do not want to waste time necessarily in asking questions which I think are irrelevant. As far as I know on the issue of chief and the Acting Chief Secretary, the issue is not Madam Alice--
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The Speaker (Hon. Ethuro): Order! There is no position of Chief Secretary.

Sen. Wako: Mr. Speaker, Sir, I stand corrected. As usual, you correct me, I know. As far as this position is concerned, the issue is not the questions that are being

asked. It has been shown and demonstrated that she applied for the post of chief officer, that she was interviewed and she was appointed chief officer. So that issue is really irrelevant, we do not want to waste time on asking irrelevant questions. The issue as far as I know is that she then was appointed by the Governor as Acting Secretary. She was appointed in an acting position for three months and that up now the substantive post of County Secretary has not been filled. It is not in dispute as far as I know that the Governor can appoint the Chief Officer in an acting capacity as County Secretary. However, what is in dispute is why she should continue to be County Secretary after the three months period is over and why the substantive post of County Secretary has not been advertised and appointed. That is the issue.

The Speaker (Hon. Ethuro): We have heard you, Sen. Wako.

Sen. Wako: Mr. Speaker, Sir, thank you.

Sen. Haji: Mr. Speaker, Sir, I do not know whether it is me who does not understand the question or it is Sen. Wako. In the accusation, the Governor is being accused of employing this lady who is not qualified. She is not competent and she is not qualified. Therefore, to give evidence that she is qualified, it is quite in order.

The Speaker (Hon. Ethuro): I understand both of you, Senators. It is just that there is something between you that you are missing and I will not try to explain that. However, I hear Sen. Wako loud and clear; that, in the interest of time, there are some issues that have already been dispensed with. You may just go straight to the particular issues.

Mr. Peter Wanyama: Thank you, Mr. Speaker, Sir. Indeed Sen. Wako became an advocate the year that I was born and therefore I stand guided appropriately.

(Laughter)

I was wrong in pursuing that approach. Thank you very much. Mr. Eliud Muchoki, the Governor is being accused of appointing an Acting Secretary. Can you read the charge itself for the record so that we dispense off that issue very quickly?

The Speaker (Hon. Ethuro): Which document, counsel?

Mr. Peter Wanyama: Volume II of the Governor's bundle on page 31. Can you read the first sentence of the charge so that we finish the issue quickly?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the charge is that the Governor has made several irregular appointments in the county as follows:

The first one, the Governor has appointed the County Secretary in an acting position.

Mr. Peter Wanyama: Hold on. The statement says the Governor has appointed a County Secretary in?

Mr. Eliud Muchoki Mureithi: In an acting position.

Mr. Peter Wanyama: Is that statement correct?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, it is not correct because Madam Alice Wachira---

The Speaker (Hon. Ethuro): Counsel, let me follow you. Page 31?

Mr. Peter Wanyama: Mr. Speaker, Sir, page 31 of the Governor's bundle, Volume II.

The Speaker (Hon. Ethuro): Which bit?

Mr. Peter Wanyama: Mr. Speaker, Sir, charge (c).

The Speaker (Hon. Ethuro): I have seen it.

Mr. Eliud Muchoki Mureithi: The Governor has made several irregular appointments in the County as follows: The first one, the Governor has appointed a County Secretary in acting position.

Mr. Peter Wanyama: Thank you. Hold on there, we do not want to go to the details. Is that statement factually correct?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, and Honourable Senators, this is not correct.

Mr. Peter Wanyama: Why do you say so?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, it is not correct because Madam Alice Wachira is substantially the Chief Officer, Public Administration, but has been appointed to act as County Secretary.

Mr. Peter Wanyama: Thank you very much. Have you received the request from the Executive to recruit a substantive County Secretary?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, yes, I can confirm that the Board has received a written request to recruit a substantive County Secretary, among other senior officers like County Attorney and many others. This is included in our recruitment plan.

Mr. Peter Wanyama: How many other officers have you advertised for recruitment?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, we have advertised for a range of positions that are vacant in the county. We have over 150 positions in health, including various cadres.

Mr. Peter Wanyama: Can you be specific here? Have you advertised for the recruitment of chief officers?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, we have also received a request to advertise for three chief officers for Infrastructure, Housing, Culture and Tourism and we have done that. We have received applications, we have verified them and we have also given a feedback to the Executive.

Mr. Peter Wanyama: Have you been in communication with the County Assembly to update them on this progress?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, and Honourable Senators, I can confirm that on 23rd of August, I did appear before the Committee of Public Administration and Communication of the County Assembly of Nyeri. I did go through with my entire Board the whole process of all the acting appointments in the county and any other requirements that they wanted to hear from the Board. We clarified and gave a thorough analysis and a detailed response to the issues that they required.

Mr. Peter Wanyama: How many chief officers, to your knowledge, are on acting capacity as we speak?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, and Honourable Senators, there are three. There are three chief officers who are in acting positions. We have an acting chief officer for culture and tourism, Madam Mary Kimani, chief officer for infrastructure and roads, Mr. Julius Ringera

Mr. Peter Wanyama: Mr. Ringera is for which docket?

Mr. Eliud Muchoki Mureithi: Infrastructure and Roads. We have an acting chief officer for lands, housing and physical planning, Ms. Beatrice Koech.

Mr. Peter Wanyama: Why have you not recruited these chief officers?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, we advertised for the positions of these three chief officers in August. To be specific, I can give the dates when we advertised for those positions. It was on 17th June, 2016 in *The Daily Nation*. The adverts for the various positions were closing on 8th July, 2016.

Mr. Peter Wanyama: Just hold on. I am making reference to Volume IV, page 1059 of the governor's bundle. The advert appears twice in the document. Is this the advert in question for the recruitment of chief officers?

Mr. Eliud Muchoki Mureithi: Yes. This is the advert that the board put in the newspaper.

Mr. Peter Wanyama: Why have you not recruited? We need to finish this issue, so that we can retire you.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, when we put this advert we got various responses after the closure of the advert. The board then put the various responses through the verifying process. We found that a number of them had different observations. But, overall, we found the applicants nonresponsive. We wrote and gave our input on our findings as a board back to the executive on 1st August, 2016. We enumerated what our observations were.

Mr. Peter Wanyama: As we speak, what is stopping you from recruiting these chief officers?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, as I had mentioned earlier, as a board, we have a recruitment plan. Currently, we are engaged in identifying suitable candidates who have applied for the positions in various cadres in the department of health. They include nurses, physiotherapists, medical laboratory technicians, dental technicians; a whole range of them---

Mr. Peter Wanyama: Go straight to the point why you cannot recruit, so that we save on time.

The Speaker (Hon. Ethuro): Counsel, in the morning session, we did not manage time properly. We need to finish with him.

Mr. Peter Wanyama: I am finishing, Mr. Speaker, Sir.

Why is it that you cannot recruit?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, we have range of other positions that we have also advertised in infrastructure; drivers, plant operators, technicians, mechanics---

Mr. Peter Wanyama: Go to the reason.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, we are giving priority to these particular positions because they are in the frontline in terms of the service delivery to the people. Therefore, we are focusing on getting those particular positions filled, because they will be posted to the outlying areas in the various sub-counties, where they will assist the government in delivery of service to the people. That is why, as a board, we are giving priority to the recruitment of these particular essential services. Thereafter, we will re-advertise the positions that will not have been filled.

Mr. Peter Wanyama: Mr. Speaker, Sir, that is all for examination-in-chief.

The Speaker (Hon. Ethuro): Counsel for the county assembly.

Mr. George Ng'ang'a: Thank you, Mr. Speaker, Sir. Mr. Mureithi, I have a few questions for you. You have stated that you are currently the vice chair of the county public service board.

Sen. Okong'o: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): What is it, Sen. Okong'o?

Sen. Okong'o: Mr. Speaker, Sir, since I do not see the accused governor in the Chamber, will it be procedural and legally in order to proceed without him?

The Speaker (Hon. Ethuro): He is represented.

Proceed.

Mr. George Ng'ang'a: Thank you, Mr. Speaker, Sir. In your testimony, Mr. Mureithi, you stated that you are the vice chair of the Nyeri county public service board. Is that correct?

Mr. Eliud Muchoki Mureithi: That is correct.

Mr. George Ng'ang'a: Currently, does the board have a chair and a secretary appointed under Section 58 of the County Governments Act?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, it is true that I am the vice chair of the board. At the same time, I am acting as the chairperson of the board, because the chairperson resigned with effect from 8th September.

Mr. George Ng'ang'a: What about the secretary?

Mr. Eliud Muchoki Mureithi: The secretary is on leave until mid-October.

Mr. George Ng'ang'a: Are you aware since when the Secretary has been on leave?

Mr. Eliud Muchoki Mureithi: He has been on leave since early June.

Mr. George Ng'ang'a: Was it voluntary or she was requested by the governor to proceed on leave?

Mr. Eliud Muchoki Mureithi: The secretary informed the board members that he was proceeding on leave.

Mr. George Ng'ang'a: Did she proceed on leave voluntarily or she was asked by the governor to proceed on leave?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I want to clarify that the secretary is a 'he' and not a 'she.'

Mr. George Ng'ang'a: Are you aware under what circumstances he proceeded on leave? Was it voluntary or he was instructed by the hon. Governor to proceed on leave?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I can only report what the secretary informed the board and the letter that he showed us, as the board.

Mr. George Ng'ang'a: Are you aware of a letter that was written on behalf of the governor, directing the secretary to proceed on leave for a period of 90 days.

Mr. Eliud Muchoki Mureithi: Yes, I am aware. I forwarded the letter to the secretary when it was brought to my attention.

Mr. George Ng'ang'a: Her proceeding on leave was by virtue of that letter that was written and received by the Office of the Governor, is that correct?

Mr. Eliud Muchoki Mureithi: After receiving that letter saying that she was proceeding on leave, I did not go into details of why she was doing so at the time.

Mr. George Ng'ang'a: Are you aware of the circumstances under which she resigned?

Mr. Eliud Muchoki Mureithi: No, I am not aware.

Mr. George Ng'ang'a: When do you say he resigned?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the Chairperson of the County Public Service Board (CPSB) proceeded on her annual according to what she told the Board. During her leave, she sent a letter to the Secretary of the CPSB informing them that she had resigned. She was instructing the CPSB to communicate with the Department of Human Resource to process her dues.

Mr. George Ng'ang'a: When did it happen? We are interested in the date.

Mr. Eliud Muchoki Mureithi: We received the letter in August 2016.

Mr. George Ng'ang'a: Before you received the letter, how long was she away?

Mr. Eliud Muchoki Mureithi: She was away from May this year.

Mr. George Ng'ang'a: To your knowledge, has there been any attempt to recruit a substantive chairperson?

Mr. Eliud Muchoki Mureithi: Not to my knowledge.

Mr. George Ng'ang'a: Not to your knowledge. The CPSB as presently constituted under the provisions of Section 58 is supposed to have a chairperson nominated and appointed by the County Governor with the approval of the County Assembly. This is a very important CPSB. According to that Section 58, would you consider the current CPSB as duly constituted in the absence of a substantive chairperson?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, this matter has also been brought to the attention of the CPSB and the Committee of Public Administration of the County Assembly. We appeared before the Committee and also put it in writing explaining to them that the CSPB as currently constituted is lawfully and fully compliant with respective statutes of Section 58.

Mr. George Ng'ang'a: Notwithstanding the fact that you do not have a substantive chairperson who has been appointed and approved by the County Assembly?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the law envisages that the chairperson may be away for one reason or another. That is why it allows the CPSB members to elect among themselves a Vice-Chairperson who would then step in, in the absence of the chairperson. This is common practice---

Mr. George Ng'ang'a: Let me ask you then: If you are saying that a Vice-Chairperson would be appointed to step in; do you have a letter from the Governor appointing the Vice-Chairperson under Section 64 of the Act, directing the Vice-Chairperson to act as the chairperson of the CSPB, if your statement is anything to go by? Is acting on behalf or rather a chairperson automatic by virtue of you being the Vice-Chairperson?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, it is not the first time that the chairperson has been away from the CSPB. She has been away for---

Mr. George Ng'ang'a: Would you kindly answer the question? Do you require a formal letter from the appointing authority to act as the chairperson of the CPSB or automatically you become eligible to act by virtue of you being the Vice-chairperson of CSPB?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I have acted before as the acting chairperson of that CSPB when the chairperson has been away for one reason or another. I am also acting as the chairperson when the chairperson was on leave. Even now that she has resigned, I am acting as the chairperson.

Mr. George Ng'ang'a: Let me read Section 64(1) for you. It says:-

“A person shall not be appointed to hold a public office in an acting capacity unless the person satisfies the prescribed qualifications for holding that public office.

(2) Acting appointment shall be made only by the lawful appointing authority and for a specified period.”

Mr. Speaker, Sir, my question is: Seeing that the lawful appointing authority is the Governor, have you been given any appointment in writing to act as the acting chairperson of the CSPB?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, yes, I do have the letter.

Mr. George Ng'ang'a: Do you have it with you or in the documents before this Senate?

Mr. Eliud Muchoki Mureithi: No, I do not have it.

Mr. George Ng'ang'a: Thank you. Let us move on. You have been asked a question regarding the qualifications of the acting county secretary because that is the crux of these impeachment proceedings. Are you aware that the qualifications of a chief officer under Section 45 of the County Governments Act and that of the county secretary under Section 44 are different?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, it is expressly---

Mr. George Ng'ang'a: Could you, first of all, answer my question? Are you aware that the qualifications of a chief officer under Section 45 of the County Governments Act and that of the county secretary under Section 44 are different?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the qualifications of a chief officer and those of a county secretary are, if anything the same. These are the reasons---

Mr. George Ng'ang'a: Let us not generalize. I want to refer you to the section that deals with the appointment to those two offices. We are dealing with the county secretary for the purposes of this proceeding, which is governed by Section 54 of the County Governments Act. It says:-

“The county secretary shall be competitively sourced from amongst persons who are university graduates with at least ten years' experience in administration and management.”

So, there is a requirement for ten years' experience in management and administration with respect to county secretary. Is that correct?

Mr. Eliud Muchoki Mureithi: Yes, it is.

Mr. George Ng'ang'a: Let us go to the segment that deals with the chief officer under Section 45(1). It says:-

“The governor shall nominate qualified and experienced county chief officers from amongst persons competitively sourced and recommended by the CPSB.

(2) With the approval of the county assembly appoint county chief officers.”

Have you seen a requirement under Section 45 for ten years' experience in management and administration with respect to chief officers?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, there is what we call the---

Mr. George Ng'ang'a: Could you, first, answer my question, Mr. Mureithi before you can explain?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the chief officer being an office in public service is guided by the scheme of service that guides the appointment of senior officers into public service. The CSPB has the mandate to set the minimum

qualifications of any officer who applies to be a chief officer. The CSPB of Nyeri did set the minimum requirements and qualifications which I have said that they are, if not the same, similar.

I am also aware of the ten years' experience in administration and management for the appointment of a county secretary.

Mr. George Ng'ang'a: You are taking us through a lot of explanation even when you are asked a direct question. The explanation you gave is that Madam County Secretary is qualified because she had been recruited as a Chief Officer. Are you aware that when this matter became the subject of investigation by the County Assembly, the issue of her qualification with respect to the ten years' experience became an issue? Are you aware of that?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I have appeared before the Public Administration Committee of the County Assembly of Nyeri and explained in details that the county secretary's qualifications are set in the section that the lawyer has read to us. When the chief officer, Madam Alice Wachira joined the county to be the chief officer, she had met all the requirements. By the time she was appointed to act as the county secretary, she had met all the requirements under that section.

Mr. George Ng'ang'a: Let me refer you to page 708 Volume II of the County Assembly Documents.

Hon. Senators, I am referring the witness to Page 708 of the County Assembly Documents, Volume III. This is the Report of the County Assembly Legal Affairs Committee.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I do have that document.

Mr. George Ng'ang'a: You can be assisted by your team.

Mr. Eliud Muchoki Mureithi: Which page?

Mr. George Ng'ang'a: Page 708

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I have the document.

Mr. George Ng'ang'a: Could you kindly turn to Page 708?

Mr. Eliud Muchoki Mureithi: Yes I am there.

Mr. George Ng'ang'a: On Page 708, there is a paragraph where reference is made to the Chairperson of the board. It starts by the Chairperson introducing the members of the committee and welcoming the representatives of the CPSB to introduce themselves. The Chairperson referred to the letter of 11th May, where they cited that the issue under deliberation was not within their jurisdiction under Section 59. Are you aware of that invitation where the Chairperson---

Mr. Eliud Muchoki Mureithi: Yes I am aware.

Mr. George Ng'ang'a: And are you aware that there was a response that was given when that question was asked, that the issue of qualification of a county secretary is not within the mandate of the CPSB?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, it is the first time I am seeing the document before me from the Legal Affairs Committee of the County Assembly. I do recall very clearly that the issue that was raised before the board was whether the board was in a position to confirm whether or not the appointment of the Acting County Secretary falls within their mandate. We categorically said that the appointment of the County Secretary is outside the purview of the board.

Mr. George Ng'ang'a: Just turn to Page 712. There is Paragraph 6 that makes reference that there were no copies of testimonials which were provided to the committee to ascertain her academic qualifications and experience in administration and management. You notice that there was a specific finding regarding the non-qualification of the Acting County Secretary as far as this Report of the Assembly is concerned.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I am not aware because I have not read this Report. It has just been brought in front of me. Therefore, I am unable to comment unless I am given time to peruse and see what they said. It is until then that I will be able to answer counsel effectively.

Mr. George Ng'ang'a: Let us then go to the recommendation on Page 714. Following that investigation, Vice Chair, you seem very ignorant about matters touching the CPSB. Look at paragraph 6 where it is stated that the CPSB should apprise itself with law and embrace the advisory role provided under Section 59 of the County Governments Act, 2012, in the discharge of their mandate. Are you aware that a recommendation was in fact made directly concerning the CPSB to respect their mandate under Section 59 concerning the matter of the County Secretary and the role they had played?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, it is normal procedure that if a committee of the county assembly wants to communicate any matter to the board when it appears before it, it is only reasonable that they communicate in writing to the institution because when they summoned us to appear before them, they wrote to us. Therefore, the findings of their deliberations ought to have been shared with the board in writing.

Mr. George Ng'ang'a: So, you are saying that the board, despite appearing, was actually not even aware or did not come to know about the recommendations that were made with respect to the suitability of the County Secretary to hold office? Let me paraphrase it differently. Are you aware of a resolution that was subsequently made by the Assembly and addressed to the Governor making the recommendation that, in fact, the County Secretary is not qualified and should be relieved of her acting position as a County Secretary?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, if the Committee of the County Assembly had required us to know what its findings were, they would have addressed the board. As I stand here, I am seeing the recommendations for the first time.

Mr. George Ng'ang'a: Okay, let us turn to Page 721 of that document and this is my last question. You have told us that only three Chief Officers (COs) are acting. Do you have a Mr. Richard Kuria Kimani acting in the Department of Finance?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, Mr. Richard Kuria Kimani appeared before the board.

Mr. George Ng'ang'a: Could you answer my question? I am not asking you where he appeared. I am asking you if you are aware, as the Acting Chair of the CPSB, that there is a CO by the name Richard Kuria serving in an acting capacity.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I am confirming that Mr. Richard Kuria Kimani is the Head of Finance. He has appeared before the board and interviewed to be appointed as the Director. The board did find him suitable to be appointed to the role of Director of Finance.

Mr. George Ng'ang'a: Mr. Speaker, Sir, I will take that to be the answer of this witness. I am asking a very direct question but the witness is deciding to prevaricate. He took an oath to tell this Senate the truth and nothing but the truth. It will be upon this

Senate to make its judgment on these answers. I am asking very direct questions but all we are being treated to is some general comment about---

The Speaker (Hon. Ethuro): Repeat your question then he will answer it.

Mr. George Ng'ang'a: Look at Page 721.

The Speaker (Hon. Ethuro): Counsel, that is a different matter.

Mr. George Ng'ang'a: Mr. Speaker, Sir, thank you.

Mr. Mureithi, I have asked you whether Richard Kuria Kimani is an officer serving as an acting CO in the Department of Finance within the Nyeri County Government.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir---

Mr. George Ng'ang'a: Yes or no.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the board---

Hon. Senators: Point of order!

The Speaker (Hon. Ethuro): Order! Members, this is a straightforward question.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the document before me is a new document and I would like to confirm who the various COs of the County Government are. With your permission, I can confirm the names and also those who are acting.

The Speaker (Hon. Ethuro): Then what is difficult for you to say you do not know?

Mr. Eliud Muchoki Mureithi: He is not in my list of the acting officers.

The Speaker (Hon. Ethuro): And you are the Acting Vice Chair of the board. Proceed.

Mr. George Ng'ang'a: So, Mr. Mureithi, you cannot tell whether the persons listed at Page 721 are officers within the County Government serving in whatever capacity? Can you not confirm that?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, I can tell names of Mr. Kimani, Mr. Karuhe, Mr. Materi, Mr. Matheri, Mr. Rigera and Mr. Macharia because I know them and I can confirm in what positions they actually serve in the County Government of Nyeri.

Mr. George Ng'ang'a: Serving in acting capacity as COs.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, up to the end of last month, Mr. Walter Macharia was the CO in the docket of Culture and Tourism. He has since returned back to the national Government after his secondment period ended. Therefore, he is not an acting CO. He was a substantive chief officer. Mr. Julius Ringera, I confirmed that he is acting in the Department of Roads and Infrastructure. Mr. Vincent Matheri is not acting in the Department of Lands Housing and Physical Planning. It is Beatrice Koech who is acting as the Chief Officer. Robert Kang'ethe is acting in the docket of Public Administration in view of the fact that the substantive Chief Officer is the Acting County Secretary. Mr. Richard Kuria Kimani is the Director of Finance within the Department of Economic Planning and Finance.

Mr. George Ng'ang'a: In your evidence, you had already given us only three persons who are acting and from this list, you are confirming that they are much more than those three that you took us through who are acting.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, without contradiction, I confirm that there are three acting chief officers and I also confirm the others who with your permission I can read their names. Those who were in their substantive positions---

The Speaker (Hon. Ethuro): Order! The question is acting.

Mr. George Ng'ang'a: The last question, are you aware---

The Speaker (Hon. Ethuro): Order counsel! Let him confirm the three acting ones.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, the three acting chief officers include in Culture and Tourism. There, we have Ms. Mary Kimamo. In Infrastructure and Roads, we have Mr. Julius Ringera. In Lands, Housing and Physical Planning, we have Ms. Beatrice Koech.

Mr. George Ng'ang'a: Who is the acting in Finance?

Mr. Eliud Muchoki Mureithi: In Finance, we have a Mr. Kimani as the Director.

Mr. George Ng'ang'a (Advocate): So, we do not have an Acting Chief Officer in Finance?

Mr. Eliud Muchoki Mureithi: Not to my knowledge.

Mr. George Ng'ang'a: Thank you. Not to your Knowledge. Do we have an Acting Chief Officer in Energy?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, in Energy, Mr. Zachary Munga was the Chief Officer---

Mr. George Ng'ang'a: Who is the current Acting Chief Officer in Energy? Do you have a Mr. Robert Thuo in that capacity?

Mr. Eliud Muchoki Mureithi: Mr. Zachary Munga is the Chief Officer in Energy until when he resigned to pursue other careers this month.

Mr. George Ng'ang'a: So, we do not have a Chief Officer in that Ministry?

Mr. Eliud Muchoki Mureithi: In Energy?

Mr. George Ng'ang'a: Yes, in Energy.

Mr. Eliud Muchoki Mureithi: I am not aware as yet.

Mr. George Ng'ang'a: Do we have a Chief Officer by the name Mr. John Matiri acting in the Department of Trade, Culture, Industrialization and Cooperative Development?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir...

Mr. George Ng'ang'a: Reply with a yes or no.

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, what he has read is not consistent with the structure of the departments as they are. If you allow me, I can answer this question by giving the departments as they are structured as I am here before this honourable House.

Mr. George Ng'ang'a: Let me ask you here, Mr. Mureithi; within the County Government of Nyeri, do we have a formal structure of how departments have been set up and the officers serving, whether substantively or acting? As the Chairperson of the County Public Service Board, can you say whether that structure exists so that this Senate can be able to get that information?

Mr. Eliud Muchoki Mureithi: Mr. Speaker, Sir, during the CAPS programme that was launched last year, we went through a very thorough exercise of coming up with the official establishment on the---

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

Sen. (Dr.) Machage: On a point of order, Mr. Speaker, Sir. The witness has repeatedly refused, intentionally, not to answer questions directed to him. Would I, therefore, be in order to request that you declare him a hostile witness?

The Speaker (Hon. Ethuro): Proceed, counsel! To the witness, you do not have the luxury of answering the questions you like. You have to answer the questions put to you. To the counsel; there is an easier way of disposing it. You just put it to him then we will know your position and his.

Mr. George Ng'ang'a (Advocate): I will just leave it to the Senate to make its own determination and judgement with respect to this particular witness but I will ask my colleague to ask one or two questions. Thank you.

Sen. Orengo: On a point of order, Mr. Speaker, Sir. Due to time, could we get some direction from you that the parties as they answer questions particularly the witness that they should answer questions directly so that they cannot consume our energy too much? When they are asked a direct question whether this is a church or a mosque and he says when I was in Dar-es-salaam – naturally, you just get worn out. You better answer the question.

The Speaker (Hon. Ethuro): So directed.

Mr. George Ng'ang'a: I just have two questions to the witness. Very quickly I am summarizing. This County Public Service Board which you serve as the Vice Chairperson, you have confirmed that the substantive secretary is on leave. Is that right?

Mr. Eliud Muchoki: That is correct.

Mr. George Ng'ang'a: Who is now performing in that position?

Mr. Eliud Muchoki: Mr. Edward Irungu.

Mr. George Ng'ang'a: So, you confirm that within the Public Service Board, there is also an Acting Secretary?

Mr. Eliud Muchoki: Yes, that is correct.

Mr. George Ng'ang'a: Who appointed him?

Mr. Eliud Muchoki: He was appointed by the appointing authority.

Mr. George Ng'ang'a: Do you have any documentation in that regard?

Mr. Eliud Muchoki: Not with me here.

Mr. George Ng'ang'a: It is not part of your record. Are you aware whether this person you are calling Mr. Edward Irungu Mwangi is a certified Public Secretary?

Mr. Eliud Muchoki: He is acting on special duty assignment.

Mr. George Ng'ang'a: The question is very direct; are you aware whether he is or not a certified public secretary?

Mr. Eliud Muchoki: He is not a certified public secretary that is why he is on special duty assignment which is allowed within the human resource practice.

Mr. George Ng'ang'a: Are you aware of the provisions of Section 58 (1) (c) that require a person serving in that capacity as a mandatory procedure to be a certified public secretary of good professional standing, nominated and appointed by the governor?

Mr. Eliud Muchoki: Yes. If he is serving on substantive appointment, he has to comply with all the requirements under that section.

Mr. George Ng'ang'a: So, you are confirming to the Senate that the person acting as secretary is not qualified in terms of Section 58 (1) (c) to be a substantive secretary of that board?

Mr. Eliud Muchoki: That is substantive but in terms of special assignments, he does.

Mr. George Ng'ang'a: Whatever special assignment means, I will take that as a no. Thank you.

The Speaker (Hon. Ethuro): re-examination!

Mr. Peter Wanyama: Mr. Speaker, Sir, I had agreed with my colleague outside that it is important to minimize time on witnesses because sometimes we are in court and we can see the mood of the judge is not good. We do not go so long that is why I do not want to waste a lot of time asking questions as directed by Sen. Wako.

So, I am not doing any re-examinations. The issues are clear and even for the next witness, I will be much shorter. Thank you.

The Speaker (Hon. Ethuro): Next witness!

(The witness entered the Chamber)

Proceed, Counsel.

Mr. Peter Wanyama: Mr. Speaker, Sir, with your permission, I will request the witness to be sworn in.

(Mr. Patrick Muiti Gitobu took the Oath)

Thank you very much. Would you be kind enough to tell this Senate your full name, please?

Mr. Patrick Muiti Gitobu: My name is Patrick Muiti Gitobu. I am the Director of Procurement in the Nyeri County Government.

Mr. Peter Wanyama: Speak next to the microphone and be a bit louder, please.

Mr. Patrick Muiti Gitobu: My name is Patrick Muiti Gitobu. I am the Director of Procurement in the Nyeri County Government.

Mr. Peter Wanyama: How long have you worked in that position of Director of Procurement?

Mr. Patrick Muiti Gitobu: Mr. Speaker, Sir, I have worked for one year, three months in Nyeri County as the Director of Procurement.

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

[The Deputy Speaker (Sen. Kembi-Gitura) took the Chair]

Mr. Peter Wanyama: You remember submitting a statement before this Committee. Can you remember the date that you signed it?

Mr. Patrick Muiti Gitobu: I signed it on 11th September, 2016.

Mr. Peter Wanyama: Mr. Deputy Speaker, Sir, the statement of Patrick Muiti Gitobu is on page 10 of Governors bundle Volume I. You wish to adopt the contents of this statement before this Senate?

Mr. Patrick Muiti Gitobu: Yes, Mr. Speaker, Sir.

Mr. Peter Wanyama: Please, speak louder next to the microphone.

Mr. Patrick Muiti Gitobu: Yes, I do.

Mr. Peter Wanyama: Anything that you want to add apart from what you have stated in this statement? Is there anything that you want to clarify specifically on the charges in question? Is there anything that you would want to clarify?

Mr. Patrick Muiti Gitobu: No, Mr. Speaker, Sir.

Mr. Peter Wanyama: Just one issue, Mr. Patrick Muiti, for the record. Throughout these proceedings, there were these issues of pending bills. The allegations are that they arrive out of irregular procurement. That most of these procurements were done verbally and, therefore, there are numerous pending bills which have not been paid. What is your reaction on that issue?

Mr. Patrick Muiti Gitobu: What is on record is that we do not have pending bills. What we have are claims which are not substantiated according to procurement law.

Mr. Peter Wanyama: What do you mean not “substantiated according to procurement law”?

Mr. Patrick Muiti Gitobu: The process of procurement is very elaborate. You start from the item being in the budget and then we have a procurement plan. After that, we have a requisition from the user department requiring the service of goods then we will determine the procurement method depending on the series. After that, we may advertise or float quotations. They are opened in public, they are evaluated and then they are taken to the tender committee for award. That is following the old procurement law. They are awarded and then the contracts are signed.

Mr. Peter Wanyama: I am sure you have seen these pending bills. In relation to this procurement, do you confirm whether any of these documents have ever been brought to your attention? Are these pending letters from the contractors to the County Assembly?

Mr. Patrick Muiti Gitobu: No. None at all.

Mr. Peter Wanyama: Has the County Government ever made any payment with respect to this documentation?

Mr. Patrick Muiti Gitobu: Not to my knowledge.

Mr. Peter Wanyama: Coming to the task force which was formed by the Governor, the charge is that those tenders were irregular. They were awarded verbally and the Governor formed a task force to regularize them. Let me ask you a question. You, as the person of procurement, to your knowledge, did any contractor ever come before this task force which was formed by the Governor to lodge a claim?

Mr. Patrick Muiti Gitobu: Mr. Speaker, Sir, I was not a member of the task force.

Mr. Peter Wanyama: But to your knowledge?

Mr. Patrick Muiti Gitobu: I know that there was a task force which was formed, but I have never seen the results of the task force.

Mr. Peter Wanyama: You have never seen---

Mr. Patrick Muiti Gitobu: The report.

Mr. Peter Wanyama: So, you are not aware?

Mr. Patrick Muiti Gitobu: I am not aware.

Mr. Peter Wanyama: Lastly, in terms of the procurement practices at the County Government of Nyeri, where are we in terms of compliance? Have we fully complied with the law? Are there any queries which have been raised by the Auditor-General with

respect to procurement practices? Are you fully compliant with the legislation in terms of how to procure?

Mr. Patrick Muiti Gitobu: Yes, we follow the procurement law.

Mr. Peter Wanyama: Do you interact with the authority at Nairobi; the Public Procurement Oversight Authority (PPOA)?

Mr. Patrick Muiti Gitobu: Yes, I talk to them.

Mr. Peter Wanyama: Any capacity building that you do?

Mr. Patrick Muiti Gitobu: Yes, we did our capacity building by PPOA. They trained our staff for one week. We have had about five trainings by the Kenya Institute of Supplies Management (KISM). Our staff have had various training sessions with KISM.

Mr. Peter Wanyama: Okay. Mr. Deputy Speaker, Sir, most of the other issues can come in during cross examination. I rest my case.

The Deputy Speaker (Sen. Kembi-Gitura): Thank you. Cross examination.

Mr. Charles Njenga: Mr. Muiti.

Mr. Patrick Muiti Gitobu: Yes, your honour.

Mr. Charles Njenga: I will be very brief in my questions. I have very few questions. In the morning, we were told in the presentation that has been made on behalf of the Governor, that it is the MCAs who gave out contracts within the County. My question to you is, do you have with you a list of contracts or tenders awarded by the MCAs? Do you have such a record or such a list? Have you ever seen it?

Mr. Patrick Muiti Gitobu: By the MCAs.

Mr. Charles Njenga: By the MCAs.

Mr. Patrick Muiti Gitobu: Yes.

Mr. Charles Njenga: We were also told in the opening statement by the Governor that when he came back he found that MCAs had given themselves certain contracts and tenders. As the Procurement Officer or the Director of Supply Chain Management, Nyeri County, do you have a list of contracts or tenders given to MCAs by the County Government? Do you have such a list?

Mr. Patrick Muiti Gitobu: No. We do not give contracts to the MCAs.

Mr. Charles Njenga: You do not give contract to the MCAs?

Mr. Patrick Muiti Gitobu: Yes

Mr. Charles Njenga: We cannot hear you.

Mr. Patrick Muiti Gitobu: We do not give contract to the MCA or any Public Officer.

Mr. Charles Njenga: So, you are stating for a fact in your position as the Director that there are no contracts or tenders given to MCAs by the County Government?

Mr. Patrick Muiti Gitobu: That is true, your honour.

Mr. Charles Njenga: Thank you very much. We are happy with your clarification for that very important matter. Confirm to us when you were appointed to your position?

Mr. Patrick Muiti Gitobu: It was 1st June 2015.

Mr. Charles Njenga: 1st June 2015? So, that is way after the procurement of the Karson House building and the renovation.

Mr. Patrick Muiti Gitobu: Yes.

Mr. Charles Njenga: When all that was happening, you were not an employee of the County Executive?

Mr. Patrick Muiti Gitobu: I was not.

Mr. Charles Njenga: You were not? Now from your position as an expert or as a professional in procurement, is leasing of buildings part of procurement as a matter of law?

Mr. Patrick Muiti Gitobu: Leasing of building is done by professionals from Ministry of Housing. I repeat Housing---

Mr. Charles Ng'ang'a: What is the legal basis of your assertion? Can you cite any legal provision to that effect?

Mr. Patrick Muiti Gitobu: I have worked in the national Government for many years. We have leased buildings---

Mr. Charles Ng'ang'a: I am asking you for legal basis and not experience. Let me help you my friend. Section 2 of the old law which, for the record, has also been reproduced in the definitions in the new law has the definition of procurement. I can give you to read, just for the record. Just read it out for the Senate's benefit.

Mr. Patrick Muiti Gitobu: It reads:-

“Procurement means the acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise or by any other contractual means of any type of works, assets, services or goods, including the livestock or any combination.”

Mr. Charles Ng'ang'a: Therefore, by law under that definition, leasing of buildings is part of procurement.

Mr. Patrick Muiti Gitobu: Yes, Mr. Deputy Speaker, Sir.

Mr. Charles Ng'ang'a: Although you were not there when Karson House was procured, we were told in the morning that the procurement was through evaluation by the Ministry and then subsequently, a lease was executed.

Hon. Senators, I wish to refer you to governor's documents, Volume IV, at page 130. We can start with 142, which is the lease. Kindly confirm the date of that lease. “This lease is made on”---

Mr. Patrick Muiti Gitobu: 20th May, 2013.

Mr. Charles Ng'ang'a: The lease was signed by the parties in 2013. One of the parties was the Nyeri County Government.

Now let us go to the letter forwarding the valuation, at page 130. It is a very short letter. Probably, you could read for us the second paragraph; “After inspection”---

Mr. Patrick Muiti Gitobu: It reads:-

“After inspection of the subject office space, we recommend a reasonable rent of Kshs172,480,000, inclusive of the service charge per month.”

Mr. Charles Ng'ang'a: Very well. This is from the Ministry of Land, Housing and Urban Development. Can you confirm the date of that letter?

Mr. Patrick Muiti Gitobu: It is written “17th March, 2014.”

Mr. Charles Ng'ang'a: From those two documents are you able to confirm to the Senate that the letter forwarding the valuation on rent was made almost one year after the lease was signed?

Mr. Patrick Muiti Gitobu: That is true.

Mr. Charles Ng'ang'a: So, it cannot have been the basis upon which this particular lease was procured, negotiated and consummated. Is that right?

Mr. Patrick Muiti Gitobu: Yes, Mr. Deputy Speaker, Sir.

Mr. Charles Ng'ang'a: The last question is on the taskforce, which you say you were not part of and you never sat on it. Are you aware whether this taskforce ever sent out public notices inviting persons with any claims to bring them to it?

Mr. Patrick Muiti Gitobu: There was an advert in the press.

Mr. Charles Ng'ang'a: Do you have the advert?

Mr. Patrick Muiti Gitobu: No.

Mr. Charles Ng'ang'a: Do you know whether the advert, which you do not have, also included the place, time and dates when that taskforce was supposed to sit? Is it something within your recollection?

Mr. Patrick Muiti Gitobu: No.

Mr. Charles Ng'ang'a: You cannot remember.

Mr. Deputy Speaker, Sir, Hon. Senators, that will be all for this witness.

The Deputy Speaker (Sen. Kembi-Gitura): Thank you. Any re-examination?

Next witness!

Mr. Peter Wanyama: Mr. Deputy Speaker, Sir, we do not have any additional witnesses. Regarding the additional witness that we wanted to introduce earlier on, the Speaker issued a ruling that we cannot introduce his statement-in-evidence. Therefore, we will be resting our case now.

Thank you very much.

Sen. Sang: On a point of order, Mr. Deputy Speaker, Sir. I see the witness standing at the door with a very huge file. Could you give directions to dismiss him or something of the sort?

The Deputy Speaker (Sen. Kembi-Gitura): What directions do you expect me to give? He has finished his evidence and is free to retreat.

Witness, you are free. Thank you for the evidence.

CLARIFICATIONS AND QUESTIONS FROM SENATORS

We are not doing badly. We are now at clarifications. We have one hour for clarifications from Senators. Like we have been doing in the past, all you need to do is state the clarification you are seeking, either from the governor's or the county assembly side. As to who will answer the question, will be at the discretion of Counsel. We can proceed from there.

Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr.: Mr. Deputy Speaker, Sir, I have about four questions. The first question will be directed to the governor or his lawyer. From the letter dated 25th August inviting the governor to appear before the county assembly, the governor did not respond. The letter by the advocates to the county assembly does not refer to the notice by the governor and neither does the governor inform the county assembly that he has appointed advocates to act on his behalf. Was this an omission or was it deliberate?

The second question is on the lease for this building; Karson House. The lease document states clearly that any renovations will be done with the consent of the landlord. Two, the valuer, before the Nyeri County Government entered into that lease, confirmed that, in fact, there had been recent renovations. Three, when the County Government entered into this lease, it is not specified that there was any renovations that

were required. Is this an omission or it was deliberate? Four, what is the understanding of the County Assembly in terms of Article 226(2) in terms of the report by the County Executive?

Lastly, you pointed that to the Court of Appeal ruling. I noticed that the Court of Appeal did not quote Section 102 of the PFM Act which talks about collective responsibility in terms of procurement. We also know of the principle of *per in curiam*, where a ruling does not comply with a law. Could you make a comment on that?

Sen. (Prof.) Lesan: Mr. Deputy Speaker, Sir, mine are two little ---

(Sen. Murkomen consulted loudly)

The Deputy Speaker (Sen. Kembi-Gitura): Order, Sen. Murkomen! You are in the direct line between Sen.(Prof.) Lesan and me.

Sen. (Prof.) Lesan: Mr. Deputy Speaker, Sir, thank you. Now you can see me. Let me seek two clarifications. It is about the renovations that were done. I would like to know from the Counsel for the Governor, whether these renovations that were done in this building; were they the type of renovations that were going to be removed at the end of the lease or they were permanent modifications of the building?

Two, I would like to have a simple explanation of this variation in the dates of valuation and lease. Looking at it as it is now, it can only mean that there was a mistake or there is a case of deception in the dates of the lease and the dates that the valuer moved into the building. I would like to have a clarification.

The Deputy Speaker (Sen. Kembi-Gitura): I believe the procedure that we are following is that we shall take all the clarifications at the same time. So, we take all of them and they will be given at the same time.

Sen. Ong'era: Mr. Deputy Speaker, Sir, thank you for giving me this opportunity so that I may also ask my questions. The first one is to the Governor and his lawyer. Why, of all the CEC members that you have, out of the 10 members, I can see nine men and one woman. This is in clear contravention of Article 29(8) of the Constitution.

Second is on the rent. I had asked this question earlier in the morning but I will repeat. Why did the County Government do renovations on a private property amounting to Kshs29.1 million and go ahead and pay rent of Kshs10 million and why the County Government did not see it necessary to recoup the rent from what it had already expended on?

Finally, just like Sen. (Prof.) Lesan asked, could you make clarifications? Why was valuation done one year after the lease had already been issued? The last question is in regard to a clarification on the actual amount paid to Karson Photo House. Was it Kshs14 million and some cents or Kshs29 million for the renovations?

Sen Gwendo: Mr. Deputy Speaker, Sir, my question is with regard to gender compliance, just as Sen. Ong'era has spoken to. Earlier on, the Counsel to the Governor said that the Governor did not comply with the gender due to the failure on the same at the national level. Due to the fact that the gender balance had not been done, does that warrant the kind of imbalance that they have in the executive? Is it that they did not have any competent persons from the said gender that is not represented?

Sen. (Dr.) Khalwale: Mr. Deputy Speaker, Sir, thank you. To the Governor, there is evidence that indeed, you were invited to attend the proceedings but could not. Could

you clarify; did you present yourself accompanied by your lawyer and you were turned away? Two, you have asserted that the accounting officer was responsible for the mistake of non-disclosure of the amount of around Kshs352 million. Are you aware that had you honoured the invitation, you were free to be accompanied by that officer and that all you needed to do was to introduce the officer and he would have discharged on your behalf during the hearing in the County Assembly?

Mr. Governor, you have said that the Public Accounts Committee (PAC) in Nyeri County Assembly must sit pretty and wait for the Auditor-General to complete the audit of the entire financial year. In view of your background as a former Member of Parliament (MP) in this Parliament and in fact, you were my colleague, are you not aware that PAC is free to be seized of any matter and in fact, has the discretion of ordering for a special audit?

Governors are expected to hold and indeed they do hold regular CEC meetings on decisions made by accounting officers. In fact, further to that, Article 226(5) of the Constitution ---

(The red light went on)

Sorry! My time is up. Could I?

The Deputy Speaker (Sen. Kembi-Gitura): Just finish.

Sen. (Dr.) Khalwale: In fact, Article 226(5) of the Constitution – I will not read – provides even more emphasis for the same. Governor, in view of this, do you still hold that you are not responsible for the transgressions that the Nyeri County Assembly found upon you?

Sen. Sang: Mr. Deputy Speaker, Sir, I have a few questions to the Governor. One, a lot of senior staff of the CEC are working on acting capacity. The chief officers and the County Secretary and, in fact, even the CEC for Finance whom all of you have agreed even in your own presentation, that he is on acting capacity but when he made his statement, he purported to call himself the substantive CEC in charge of Finance. Mr. Governor, do you not find it important to have these staff confirmed and give the responsibility to the County Assembly to carry out its responsibility of approving.

The second is with regard to the county secretary. What is this obsession with this county secretary to the extent that when the county assembly has made a recommendation, you have stuck with her? What is this particular qualification that this county secretary holds that no other person in your county or in this country would hold?

For your information Mr. Governor, the last Governor that we sorted out through an impeachment, had the same obsession with his county secretary. So, can you tell us what specific qualification your county secretary holds?

Mr. Deputy Speaker, Sir, on this final matter on the issue of whether the violations were gross or not, if indeed it is your opinion that they were not gross violations, what action have you taken against any of the staff who may have committed violations, that in your opinion were not gross? What administrative action have you taken against any of them whether it is the county executive member for finance, chief officers, among others?

Sen. Obure: Thank you Mr. Deputy Speaker, Sir. Mine is in the form of an observation addressed to both parties. In all these proceedings, I get the impression that the working environment between the executive arm and the county assembly is severely

strained. There is bad blood between the members of the assembly and the executive. This has obviously led to a lot of misunderstanding and conflict between the two arms of government in the County Government of Nyeri.

Therefore, I want pose a question or two to both parties: Do both parties acknowledge the existence of this poor working relationship? Do they both accept having contributed towards this situation? As a way forward, does each party feel that the differences can be resolved and that the relationship will grow in the interest of the citizens of Nyeri County?

Thank you.

Sen. Cheruiyot: Thank you, Mr. Deputy Speaker, Sir. I have a number of questions. I will be precise. One of the things that are not clear in my mind as we head towards making a decision is the leasing of Karson House. During your presentation, one of the information was that when you invited bids for property to lease, there was no response and that Karson House was the only facility that was ready.

The accusation that the assembly is making against you is that prudence. Prudence is not a definite thing. I thought in your further clarification to us, you may want to show us advertisements that went out and minutes of the tender opening or things like that which may justify your allegation that there was no other bid received from other entities.

Mr. Deputy Speaker, Sir, secondly, in your presentation about the county secretary, you alluded to the county secretary being there to perform, sometimes, special duties. What are these special duties that you alluded to?

Finally, to the assembly, you said that in your charge item six that the road was built at a cost of Kshs10 Million higher than the engineer's estimates. Could you please-perhaps it can be here but I have not seen it-point us to the specific document. It can be a letter from the engineer showing that for sure, the road was built at a higher cost.

Thank you.

Sen. Muthama: Mr. Deputy Speaker, Sir, I want to pose a question based on the signed lease. I base this on my experience as a serious landlord. When you sign a lease to rent a property you take it the way it is. The value is based on the cracks appearing and the leakages on the roof. That is where you signed the contract. The assessment must be done after the renovations to look at the cost. I want the counsel to consult the Governor and come out with some clear answers on why the valuation was done after the lease was signed?

The property is leased for Kshs10 Million for example but the renovation is taking Kshs29 Million. A property that will cost rent of Kshs10 Million in 10 years, normally with simple calculations, it will cost you to buy a plot on that land with Kshs5 Million and construct it with Kshs7 Million and that totals to Kshs12 Million and you own the building. Why did you cost the county that money?

Mr. Deputy Speaker, Sir, secondly, is the statement that was given by the vice chair of the board. I wish to know when the vice chair was appointed and whether he sits in that office because some of the documents which are minutes of the board he seems to be a stranger to them. He says he has never seen them yet he is the vice chair of the board. May I know where he has been operating from? Does he sit in the verandah when the board is discussing issues or he is the vice chair who chairs the meeting. Those are my two serious questions.

Sen. Murkomen: Mr. Deputy Speaker, Sir, the Senate in a couple of hours or minutes will make a decision on the impeachment of the Nyeri County Governor. The decision will go either way. There is a question I wish to know from the Governor. For how long will the situation be and the relationship between the county assembly and the executive be? For how long do you intend for people to act in office? For how long will the county public service board have officers acting? For how long will this state of limbo be in Nyeri County?

Even the questions that are beyond the impeachment of the governor, the Senate is interested in knowing, for lack of a better word, that the county has been disabled. It is not functioning. I will also be happy to hear from the county on how long this impasse will continue.

Mr. Deputy Speaker, Sir, I am not clear on the question of Kshs352 Million and the one for Kshs70 Million, both from the county assembly perspective and from the Governor. From the county assembly perspective, whether the county assembly is saying that the documents are not available or they are saying that Kshs 350 Million plus Kshs70 Million is misappropriated; this needs to be clear from the county assembly but also to the county executive. The information you are giving us must be clear whether it is answering the question of documentation or accountability on the misappropriation of that money. If there is something that is playing around my mind that looks closer to being weighty, is the amount of money we are talking about.

Sen. Orendo: Mr. Deputy Speaker, Sir, I would want to say this with a very heavy heart. A lot of times when people want authority and power, there is an element of excitement, but when it comes to accountability, then people try to run away. In accordance with the Constitution, in fact, the Constitution of Kenya borrowed words which are more relevant in the corporate world than in the public affairs. It says that the County---

The Deputy Speaker (Sen. Kembi-Gitura): Where are you reading?

Sen. Orendo: Mr. Deputy Speaker, Sir, I am reading Article 179 of the Constitution. First of all it says:

“A County Executive Committee consists of the County Governor and the Deputy Governor and the members of the County Executive.”

Sub-Article (4) says:

“The County Governor and the Deputy Governor are the Chief Executive.”

This is a language from the corporate world. Then it says again at Sub-Article (6):

“The members of the County Executive are accountable to the County Governor.”

Mr. Deputy Speaker, Sir, if you read the Constitution and the County Governments Act, things begin and end with the Governor. That is why I am saying it is very important when you take these positions to be prepared to take these responsibilities. I am worried by the fact that at the end of the day despite these constitutional provisions, there is a tendency to argue that this is not the responsibility of the Governor. There is the Chief Executive or there is the Board. So is the Governor conscious of this role that has been given under the Constitution; that he is the Chief Executive?

Sen. Elachi: Mr. Deputy Speaker, Sir, I would want both the Governor’s side and the County Assembly to clearly give clarity to the people to tell them because four

months down the line you have not done your budget, you have not done your appropriation and we are now in September. When will this county start its work? How will you ensure all your workers, especially your health workers are not going to go on strike?

Secondly, the Governor to explain to us what happened to the CEC of Finance who was from the Treasury and therefore definitely he was a competent person at that time. Was it issues of mismanagement? Can he explain to us and also to the Nyeri people to understand and indeed to look at the Public Service Act and realise that you are not supposed to be acting more than three months? So, what are you going to do with all your officers who are acting? If they go to court definitely, they will be heard and you will have to explain.

Lastly, is on the issue of utilising your local revenue at source. I know the Controller of Budget talked about this but it is something that we need clarity so that no one will blame the institution of Senate that indeed Kshs70 million was either in the budget of 2014/2015 and you had appropriated it to do something. That is why it was carried forward to come and deal with issues of 2015/2016 or indeed the money was used at source. You must help this Senate to clarify that or else Kenyans will believe indeed Kshs70 million was misappropriated.

Thank you.

Sen. Wako: Mr. Deputy Speaker, Sir, most of the issues have been raised by other Members but I will raise about three or four. First, I heard somebody say that Section 24 of the County Governments Act is not capable of being violated and this is in reference to the giving of consent to the Bills. Section 24 of the County Government Act is similar almost word for word to Article 115 of the Constitution which I had the pleasure of participating in the drafting. The mischief was; how do you deal with the President and in this case with the Governor who refuses to give assent or refer the matter to the County Assembly with the reasons of refusal. A Governor who does not exercise his discretion because that had been the mischief under the previous regimes, they were sitting on the Bills. We came up with a solution that in that case the country should not suffer because the Bill can become effective after 14 days of publication. However, the mischief of the Governor or the President is there and can be punished in whatever way possible.

The third one is the issue of the County Secretary. All the documents we have been given are documents of an attempt to feel the positions of acting chief officers. We have had no document whatsoever to fill the post of the County Secretary. Although, the County Assembly did point out that the post must be filled and that he was not capable of doing the work of the County Secretary; that is in spite of the fact that the period which is allowed in any acting position could be three months, but at most six months according to the Public Service Regulations and those are long gone. So, why is it that that post has not been advertised and they are only advertising posts of chief officers and the two positions are separate?

The Deputy Speaker (Sen. Kembi-Gitura): Sen. Wako your time is up. It has been up for a very long time.

Sen. Karue: Thank you, Mr. Deputy Speaker, Sir. There are three clarifications I am seeking and I hope they will be quick. First, this Karson Photo House which was rented, it was not clear from both the Assembly and the Governor's side. They were not

clear when this was done. There was intimation as though it was part of the process when the Transition Authority (TA) was still there. Also, what kind of work was being done? Most of the buildings we know, for example, in Nairobi, you rent a building which is open plan and so you need to customize. Is it the kind of work they were doing or is it carpeting? What is it they were doing so that as we make our decision, we have a frame of mind as to what kind of expense this was?

The other one is the issue of County Secretary. Again, by way of clarification, what I got was like this particular lady, notwithstanding Sen. Sang's comment, had been interviewed and vetted for the position of chief officer and what we are being told is that the qualifications are similar. So, if you are in one and you have been vetted, therefore, the Assembly cannot say one has not been vetted. We need to know what these qualifications are so that we know if there is a difference, if any.

Mr. Deputy Speaker, Sir, last but not least. There was also the issue of the Governor being denied the opportunity for representation. It is good for us to know how this was refused. Was it that the Governor went with the advocate and then they were told they cannot go in or were they informed not to go when they were going to appear before the County Assembly? We need to know if the Governor was denied that opportunity so that we can get the gravity of the situation.

Thank you.

(Sen. Madzayo consulted loudly)

The Deputy Speaker (Sen. Kembi-Gitura): Sen. Madzayo, are you on a point of order?

Sen. Madzayo: No, Mr. Deputy Speaker, Sir.

Sen. (Dr.) Machage: Mr. Governor, in your introductory remarks to this House, you told us that for some time you were ill or had poor health. In your own opinion, do you think that is the reason you have very many acting secretaries in your cabinet? Two, did you appoint them into that capacity or another person does the appointment and waits for your ratification? Thirdly, under Article 181 (d) of our Constitution, the county assembly could have as well have taken that opportunity to remove you from---

The Deputy Speaker (Sen. Kembi-Gitura): Order, Sen. (Dr.) Machage. Are we pursuing the right line?

Sen. (Dr.) Machage: Yes, Mr. Deputy Speaker, Sir. I am asking a question. I am just quoting what I want to base my question on. In your view and opinion, do you not think that the county assembly has been fair to you?

The Deputy Speaker (Sen. Kembi-Gitura): Finally, Sen. Hargura.

Sen. Hargura: Mr. Deputy Speaker, Sir, I would like to get a clarification from the county assembly on the issue of splitting of tenders, contrary to Section 30 of the Public Procurement and Disposal Act. Normally, when this kind of splitting is done, somebody is trying to avoid a particular procurement process like direct tendering. They split so that they can do quotation. Is there any achievement on the part of the executive in being able to avoid a particular procurement system because of splitting these tenders?

Sen. Madzayo: Mr. Deputy Speaker, Sir, in accordance with our observations, there are quite a number of senior people who work with the governor and are in acting capacity. They have been acting for the last one year. How much time does the governor need to confirm these people in their positions?

Secondly, the county secretary is a very important person in his government. If the county secretary will be on an acting capacity, how much more time does he need to have him confirmed?

The Deputy Speaker (Sen. Kembi-Gitura): Thank you, Senators. There are no more requests for the Floor. The direction is as per our programme. We will now proceed to the responses after which we will go to closing remarks. This will take just about one hour, together with the time that we have already taken.

(Sen. Wetangula consulted loudly)

The Deputy Speaker (Sen. Kembi-Gitura): Sen. Wetangula, what is your request? I had essentially closed, but you have two minutes to raise an issue.

The Senate Minority Leader (Sen. Wetangula): Mr. Deputy Speaker, Sir, I am sorry I was away for part of the morning. I had gone to represent all of you at the burial of *Mzee ole Ntimama*, and it went well.

The Deputy Speaker (Sen. Kembi-Gitura): Your time is running.

The Senate Minority Leader (Sen. Wetangula): Your Excellency Governor and your Counsel, in all these proceedings, every governor goes to office with a running mate called the deputy governor. When the governor is away, the deputy governor should be there to do some of the things that you are being asked. Where is he, and what has been the role of your deputy governor in this entire process?

The Deputy Speaker (Sen. Kembi-Gitura): We shall now have the responses starting with the governor's side.

Gov. Nderitu Gachagua: Thank you, Mr. Deputy Speaker, Sir, for giving me an opportunity to respond to some of the issues. From the outset, as I said a little earlier in my opening remarks, and given that this is the first *quasi-judicial* hearing being conducted at the Senate by the Plenary, and being the accused person, by and large I am fairly happy with the way the proceedings have gone. In the closing remarks, we will put our case. So far, as the Governor of Nyeri, I am happy with the way proceedings have gone.

Mr. Deputy Speaker, Sir, I want to explain a little about the county secretary who seems to have generated so much heat. Indeed, this is a very crucial position in any government. Were it not that we are the ones in the dock today, you would be surprised at how many governments have county secretaries. This is the heart of the county government. It is an office where a lot of day to day decisions that affect so many are made. Therefore, that the office generates heat.

The last substantive county secretary that we had in Nyeri resigned. As the appointing authority she confided in me that she could not take the pressure of the office of the county secretary. She was a very competent, hardworking and 'soft' young lady. It is that 'soft' bit of it that could not make her conduct this job. On a number of times she was admitted to hospital for high blood pressure due to the pressure that she was getting at the county assembly; the summons, unnecessary demands, timelines within which she had to do things and sometimes even the use of unsavory language. She was always summoned and there was little she could do. At some point she just said: "Governor,, let me go away." I told her: "Thank you very much, you have done a fairly good job. We will see how to manage."

Mr. Deputy Speaker, Sir, when that situation happened, my options were that the most senior position in government is that of a county secretary and the next one is that of a chief officer. Therefore, I did not have much choice in choosing the county secretary; it had to be more or less among the chief officers currently working in the county. To ensure that work and service delivery continued in the county, I had to consult the County Public Service Board for assistance in getting a person who would coordinate the services of the county. The name of a lady, Alice Wachira, came up and I was told confidentially why she was being suggested. It was because prior to her appointment as acting county secretary, she was the chief officer for administration. In that particular docket, she was doing a lot of coordination work among the other dockets. Therefore, assuming that all of them were equal, because of the aspect of coordination, I thought that she would be good in terms of coordinating work within the county, as we seek for a substantive appointment to that position.

Immediately she came into office the heat started. It is not about the person, but the office of the county secretary. In my view, this particular lady is made of a different mettle from the one who left. She took her work very seriously and stood up to some of these Members of County Assembly (MCAs). It is in that standing up, taking positions and being uncompromising that a lot of bad blood developed between her and the MCAs.

Obviously, as the Governor of Nyeri, it is in my interest and that of the people of Nyeri that we render services in an atmosphere that is conducive, good and peaceful. Therefore, it is imperative that this position be taken up because if there is too much heat in that office, it will not be good for rendering of services.

We are in the process of filling that position substantively. One of the Members asked how long I will take to do so. I will take as short a time as possible. However, let us take notice that because of all this heat generated in Nyeri for the last couple of months, we may run into challenges. We will try our best. As of now, in terms of performance, coordinating activities of the County Government of Nyeri, I am satisfied that she is doing a good job. She is not confirmed, because obviously for now with that blood she is unlikely to be confirmed in that County Assembly, she is doing a fairly good job until we fill that position.

Mr. Deputy Speaker, Sir, I want to admit that, that is the job I sought. The Governor's job as we are learning, is not easy. It is a job that requires decisions to be made on a day to day basis however unpopular they might be. In the course of doing that job, there is friction in Nyeri because I drive a tight ship. That is how I can explain what is happening with the County Executive Committee (CEC) members.

I started with ten CECs in ten dockets. As we moved on, at my level of chairing the Executive Committee, I realized that two or three of those CECs were baggage to the County Government. Indeed, I had to offload them. I would rather work with six hardworking and efficient officers than have ten just to be keep a cabinet of ten members. However, they went to court when they were removed from the Cabinet. They were in court for a long time arguing that their jobs were protected and so on, irrespective of whether they were working or not. As we were arguing in court, we had been injuncted by the High Court in Nyeri, not to fill those positions until the matter was heard and determined. That took a bit of time.

Mr. Deputy Speaker, Sir, the CECs who are acting in the dockets that are not filled, have been approved by the County Assembly, They appear there routinely to

answer issues related to their dockets. Therefore, the idea that the work in terms of accountability by the County Assembly of Nyeri is not accountable to the County Assembly because of that appointment of CECs is not correct. As far acting CECs are concerned, there is no issue of the County Government of Nyeri being accused of being inefficient and not doing its work because of the acting appointments does not arise.

With regard to chief officers, there is a big difference on how they are appointed with the appointment of the CECs. For the CECS, I have a choice as Governor to headhunt and bring somebody for approval in County Assembly. However, I cannot headhunt for the Chief Officer (CO). That is a process that has to be undertaken by the CPSB of Nyeri. Because of that delay in terms of processing chief officers and so on, it was my concern. That is what finally led to the previous chairman having to leave office. This is because you cannot keep giving excuses. "Oh, we shall advertise and so on." This could not be allowed to go on forever because time was running out. We have a five year timeline to deliver on our mandate. I confirm that this is a process that has been going on to with a view to getting substantive officers.

However, as that process was continuing, we had to have chief officers who were substantive to act in these positions.

Mr. Deputy Speaker, Sir, as you quote the law and lay a lot of blame game, there is the practical nature of this. If you advertise sometimes, you do not get enough applications. The CPSB says they did not get any suitable applicant. You only have to re-advertise and restart the process all over again. We have had these challenges. Again, as a Governor of Nyeri and even as I blow my own trumpet, is that when I look at various benchmarks in terms of performance and things generally happening in Nyeri, even with that team of acting officers and acting CECs, I think by and large, I am satisfied that we are delivering the mandate to the people in a fair and efficient manner.

Mr. Deputy Speaker, Sir, with regard with Karson House, I want to say a few things about it. First, this was a building procured by the Department of Works for the Nyeri County Government officers. Unlike Nairobi where you have a choice of ten to fifteen buildings in Upper hill, the choice in Nyeri Town, where we are headquartered, is very narrow. You will be surprised as we are talking that we do not have a building with a lift. We are that kind of a county.

The Deputy Speaker (Sen.) Kembu-Gitura: You have ten minutes.

Gov. James Nderitu Gachagua: Mr. Speaker, Sir, the Department of Works was going to look for these offices. I can only give such a direction at the Executive Committee. I cannot divulge this to the Cabinet.

The Deputy Speaker (Sen.) Kembu-Gitura: Order, Governor! For the sake of good order and timing, you have ten minutes between you and the Counsel. After which I shall give 20 minutes to the County Assembly to deal with their issues.

Gov. James Nderitu Gachagua: Mr. Deputy Speaker, Sir, as Governor, it a longstanding instruction within Cabinet in which all chief officers and CECs are intended to follow that in carrying out our function as a County Government, everything must be done in accordance with the law, be it procurement, looking for houses, quotations or whatever it is. I ultimately take responsibility.

When things are not done, what is available to me is to take disciplinary action which, at times, may include dismissal. At that level, I can say I accept responsibility. I do not accept responsibility for the County Executive alone. To show how we consult,

one year ago, when the mortgages and car loans became available to the MCAs and chief officers in the County Government, we did not have enough votes. The Speaker, the Clerk, the Majority and the Minority leaders came to my office where we sat for two hours looking for a solution. The County Assembly provided Kshs100 million guarantee at the Family Bank to enable the MCAs to enjoy the facility.

Mr. Deputy Speaker, Sir, we are not fighting every day. It is just that for me to get involved,, things must be brought to my attention at that level. I have not heard a single incident in all these proceedings where I have been accused of something that was brought to my attention and I did not act. I have acted on all issues that require my attention as Governor in running the County Government of Nyeri. I take responsibility and I am able to answer any matter that has been brought to my attention by either the assembly or even the executive where I have never run away from taking responsibility for any action or work.

Mr. Deputy Speaker, Sir, as I wind up, I would like to talk about Karson House. At that time, offices were being sought for us by the TA. Regarding the tenders and everything that was going on, it is the long-standing instruction that these things must be done in accordance with the law. If it is true, everybody must carry his cross. If the cross is laid at the Governor's door, I am prepared, as the Governor of Nyeri, to carry the cross. But so far, regarding all these proceedings and allegations, I have not had a single incident where I have been accused of not taking responsibility. I will be ready to take my cross.

Mr. Deputy Speaker, Sir, I also want to say that the issue of my health is not something that I would want to discuss here. As I said earlier, I am really grateful to God for keeping me alive and making me better. At no time has the issue of my performance and my health ever been threatened. I am healthy and strong to carry this mandate. That is all I would like to say about that.

Finally, because I know I may not have an opportunity again to come here and talk to this House, looking at all those issues that have been raised and the interactions between Members of the Senate, fortunately for me, it contains many lawyers who are very senior in this country. That is why I said earlier that I am confident that at the end of the day, it will be clear on what these issues are and whether they have been addressed and whether, in deed, the Governor can be asked to carry the cross. Talking as a leader and the Governor of Nyeri, this is what I want to say. When the dust has settled, it is important for us in Nyeri to sit down –if possible with these MCAs – and get back on track of service delivery. This is because even as we fight, quarrel and shift the blame, the real people getting hurt are the people of Nyeri. At some point, these MCAs and I should actually apologise to the people of Nyeri and get on and do the job.

Mr. Deputy Speaker, Sir, I thank you.

The Deputy Speaker (Sen. Kembi-Gitura): Thank you.

Counsel, do you have anything to say in a very short time?

Mr. Peter Wanyama: Mr. Deputy Speaker, Sir, I will address the issue of representation at the Assembly. I request for strictly 10 minutes.

The Deputy Speaker (Sen. Kembi-Gitura): I gave you the timelines, did I not? Just take your five minutes so that we see how far you will go.

Mr. Peter Wanyama: Thank you, Mr. Deputy Speaker, Sir. What happened at the County Assembly is that the Governor, in accordance with the provisions of Section 5

of the Fair Administrative Action Act was to be represented by counsel in the *quasi-judicial* process which was happening at the County Assembly. He did not come to the County Assembly in person but he sent legal counsel. We communicated the fact of us acting for Governor to the County Assembly a day before they impeachment because everything was being done very quickly. A day before the impeachment, we communicated through a letter which they acknowledged. Indeed, when I went there, there was massive security at the entrance of the building. Because I had communicated that I was coming, the Speaker had made arrangement for me to go straight to the Clerk's Office and later to his Office. When I went to his Office, the issue was read out. We discussed and then the Speaker said that; unfortunately, we cannot allow you to represent the Governor before the County Assembly. I had gone there with documentary evidence which had been given to me by County Executive Committee and the Governor too addressed those issues. That is what happened at the County Assembly. I was asked to leave and then the impeachment proceedings continued.

Secondly, regarding the issue about non-disclosure of the Kshs70 million, first of all, I appreciate that--- There are more senior lawyers here. Yesterday they raised the issues and based on the experience of doing impeachment before, I thought that there is more than we need to do in terms of bringing documentation. Remember that it was very late. For the first time, we received the County Assembly's evidence from the Clerk's Office. That was a day before yesterday. So, we did not have time to look at these issues. Nonetheless, we prepared a huge bundle of documents which contain most of the issues. We worked overnight.

Yesterday when these issues arose, even if the burden lies on the Assembly, for purposes of making sure that Senators do not think that we are hiding anything, I requested for a printout of the IFMIS payment and the IB payment from the County Executive which I requested to be availed before this Senate. I also requested for many other documents including the complete tender documents for the Karson's Building. The documents I have before me are those documents which contain the extract of the IFMIS payment and the extracts of the IB Module to clear the issue that the Kshs70 million has been accounted for and it is consistent with what the Controller of Budget submitted today.

Again, I requested for the file on the Karson's Building. From the evidence that is in this file, it is very clear that in terms of the procedures, for instance, the renovations which are said to have been done on this Building are actual partitions to make the Building fit within the needs of the County Executive. They are not renovations and I have documentary evidence for that. Unfortunately and this is our own mistake, we prepared this bundle yester night up to 2.00 a.m. but unfortunately, we requested for this. It is really our mistake and we cannot blame the Speaker for having ruled against us because the rules were very clear. At the end of the day, we are saying that we have documentary evidence in proof of most of these allegations in a complete manner. If we had been given time and opportunity, we would definitely have brought this to the attention of the Senate. I made 40 copies of this yester night. It is not that we are hiding anything.

From where we stand as the position of County Governor, we have documented evidence. So the issue of Kshs70 million and any other issue which requires documentary evidence is indeed there. For instance, with respect to the non-motorized facility, I

requested the specific payment vouchers which we now have which shows that contrary to the County Assembly's assertion that Kshs48 million was paid, the actual amount which was paid was Kshs41 million. I have two payment vouchers which we intended to introduce as evidence.

Mr. Deputy Speaker, Sir, I know that my time has lapsed.

The Deputy Speaker (Sen. Kembi-Gitura): Is that all? Do you require more time? How much more time do you require?

Mr. Peter Wanyama: Perhaps 10 minutes.

The Deputy Speaker (Sen. Kembi-Gitura): No, I will give you five minutes, in which case the other side will also have 25 minutes if they need it.

Mr. Peter Wanyama: Mr. Deputy Speaker, Sir, I appreciate.

On the issue about whether these allegations are gross or not, I wanted to simply explain that – I appreciate my senior colleague, Sen. Mutula Kilonzo Jnr. – we may have a difference of opinion on the issue. Perhaps, your opinion is much weighty in terms of experience and all that but in my humble opinion in terms of whether these allegations are gross or not, we thought that the Court of Appeal has interpreted the decision fully regarding the provisions of Article 181. The Court of Appeal said that impeachment is a serious matter and it ought to meet the threshold in the Constitution. Therefore, there must be nexus between the Governor and those allegations and that those allegations are supposed to be specifically detailed and gross. So, that was my opinion. I may be wrong and all that but I respect the comments.

Secondly, in relation to the provisions of Section 166 and the reports which are required under 167, I went to check the issue. I went to check and if you look at the provisions of Section 164 of the PFM Act, it talks about financial statements. I may be wrong on this but the financial statements are the balance sheet, the income expenditure of the county government and the cash flow. So, these are the financial statements which are required by the PFM Act for the county treasury to submit to the county assembly on 30th September every year.

However, if you look at the provisions of Section 166, this talks about quarterly reports. So, I agree with you that there may have been some mistake which was made in that documentation resulting to this impeachment. I perfectly agree. I do not need to belabour that point further.

On the issue of gender compliance, I need to point out that indeed, there is no gender equity in the County Executive of Nyeri. That is very clear. However, in terms of the evidence which has been represented by the governor, it is something that the governor needs to look at for purposes of remedying but at least a third of the County Executive Committee Members are not supposed to be from the same gender to meet that law. So, it is not an excuse that they are saying all these paralysis at the national level will affect issues at the county level. Something ought to be done at the county level. It is a challenge but it must be done. Steps should be taken to ensure that we do not have that problem at the county executive level in terms of composition.

I know my time is up. I will retire because my five minutes are up.

The Deputy Speaker (Sen. Kembi-Gitura): Thank you very much counsel. Counsel for the county assembly, you have 25 minutes if you need them. Just to remind you that you will be dealing with only the issues directed to you.

Mr. Charles Njenga: Thank you Mr. Deputy Speaker, Sir. I will want to directly respond to the issues raised knowing that we responded to most of the issues from our presentation yesterday. On the issues of Court of Appeal decision alluded to it by my learned senior Sen. Mutula Kilonzo Jnr. Yes, a full evaluation of that judgment by the court, it revealed that the Court of Appeal considered the issue of collective responsibility as a matter of practice but what the Court of Appeal did not consider is the import of collective responsibility as a legal obligation imposed by statute. That can be found at Section 102 of the PFM Act. That is a responsibility that enjoins even the governor as the chairman of the CEC committee. That legal distinction is very important in evaluating the net effect, net import and tenure of that court of appeal judgment in these proceedings.

The issue of Kshs352 million and Kshs70 million as asked by Sen. Murkomen, it is simple. The Kshs352 million is in the Annual Budget Implementation Report. This is the county executive saying we have spent Kshs1.61 billion on developments. So, the assembly asks, where are the projects because development can only be programmes and projects? They are given a list but the list of the projects, the total is less. It is Kshs800 million. So, there is a difference. The question that poses is that why are you not being truthful and honest in reporting what you spent this balance on. It is like I give Kshs100 and you tell me I will spend the entire Kshs100 but I will only tell you how I spent kshs70. For Kshs30, do not mind. Just know that I spent it but how I spent it is my own business, I will not tell you.

The only reason we got this response and details is because these charges were filed. This response was only received in their response to the charges before this House. But for these proceedings, we would never have known how this Kshs352 is alleged to have been spent. That is why we are saying, it is a constitutional imperative you be open and transparent. That is a constitutional duty that you have no discretion whatsoever on and that is where that issue of a direct violation of the Constitution arose from. I hope I am clear on that Sen. Murkomen.

On the issue of the Kshs70 million, the Controller of Budget was here and she said her report is truthful. In fact, she said her reports can be relied upon by this House and by any other institution. In that report, she says – and this is not disputed – that to the Nyeri County Operational Account, I only authorized Kshs545 million to be spent. I am still answering the question by Sen. Murkomen on the Kshs70 million. I only authorized Kshs545 to be spent but the total expenditure admittedly spent by the County Executive is Kshs615 million. So, they spent more, by their own admission, than that which was authorized by the office of the Controller of Budget.

So, the question that immediately poses is; where did you get the additional money that was not authorized by the Controller of Budget. The only explanation is that the Kshs70 million was local revenue that was collected but not deposited in the county revenue fund and spent because Kshs615 million is not a commitment. It is an actual expenditure as explained by the Controller of Budget. In that regard, we were told because of these charges, last week, the county executive rushed to our office to try and explain things up. We heard the explanations and she was very unequivocal that she cannot explain for a fact that this money was not spent unless she views the primary documents. From her record, the figures are clear. Over Kshs70 million was spent from local revenue from the source.

Regarding the budget impasse, I think it is easy. It does not need a lot of interrogation. All the executive needs to do is to bring the Appropriations law for consideration by the assembly. The assembly will consider and pass it and forward it to the governor for assent. If there is any issue arising from it, then a memorandum can be issued for consideration.

On the issue of engineer's estimates, the Senator who asked specifically on the reference to that can be found on ---

The Deputy Speaker (Sen. Kembi-Gitura): What is your point of order Sen. Murkomen? Just a minute counsel!

Sen. Murkomen: Mr. Deputy Speaker, Sir, will I be in order to make an application according to the relevant Standing Order that the House extends its sitting until we complete these proceedings?

The Deputy Speaker (Sen. Kembi-Gitura): What Standing Order is that? You said relevant. I do not understand what you mean by "relevant."

Sen. Murkomen: Mr. Deputy Speaker, Sir, it is already 6.00 p.m. I have made the application on time. I notice it is 6.00 p.m. I just want to put you on notice.

The Deputy Speaker (Sen. Kembi-Gitura): I do not believe we need to extend time.

Sen. Murkomen: Mr. Deputy Speaker, Sir, it is Standing Order No.30.

The Deputy Speaker (Sen. Kembi-Gitura): Yes, but what does the gazette notice say?

Sen. Murkomen: Mr. Deputy Speaker, Sir, I was just acting out of caution because---

The Deputy Speaker (Sen. Kembi-Gitura): I appreciate that very much, but even yesterday we finished past 6.30 p.m. I am perusing the gazette notice to see what it says.

Sen. Murkomen: Mr. Deputy Speaker, Sir, we rose at 6.30 p.m. We only extended by two minutes or so.

The Deputy Speaker (Sen. Kembi-Gitura): Hon. Senators, if you follow keenly the programme we have been using, including the one we used today, you saw that we rose long after 12.30 p.m. The normal rising for the House in the morning is 12.30 p.m. The reason for that is the gazette notice that was issued by the Speaker on 9th September, 2016 talks about the sitting days. For today's Wednesday, 14th September, 2016 commencing at 9.00 a.m. Those are the riding words, "commencing at 9.00 a.m." So we do not have to extend time, but we can sit until midnight. We may want to extend time at midnight, but I do not think it will be possible because then you need another gazette notice.

Thank you very much Sen. Murkomen for raising the issue. That is the legal position.

You may proceed, Counsel.

Mr. Charles Njenga: Thank you, Mr. Deputy Speaker, Sir. There is a Senator, forgive me for not recollecting who it was, specifically. The Senator asked specifically where within our documents one can get the issue of the Engineer's estimates. That should be in County Assembly documents, Volume III on page 411. It is an extract from the audit report of the Auditor-General and the categorization and the breakdown is clear from that 4.5, contract sum Kshs48,744,467, Engineer estimate Kshs38,638,342, the

variance Kshs10,106,125. On page 276, a few pages before of the same document, you will see the agreement made between the County Government and the contractor. The contract sum is indicated as Kshs48,744,467. Those are two reference documents that you will be looking at in considering that particular ground.

I take that question also with regard to the issue of the splitting of tenders. On page 433 of the same document, you will see in the matter of this Karson House. This Karson House needs to be understood properly in context. It is not really the entire building. The County Government is only acquiring about 11 offices, one and a half floors to house some of their officers. So it is not really the whole building that they were partitioning or renovating. The total tenders in our estimation the contract ought to have been awarded to one contractor who could then have subcontracted the works, but the split tenders are as highlighted to make a total expenditure for those works of Kshs29,173,582. You can see the appendix listing the various aspects of the frameworks that were done within that partitioning has now been explained.

The narrative to the Auditor-General report was very clear. There were renovations that were done on a private building together now with the partitioning. However, the important factor to consider is that even from the lease documents you can calculate the square feet that were acquired by way of lease. You will see that the sum of Kshs29 million could not really have been value for money, in that instance.

Mr. Deputy Speaker, Sir, the only other thing that I want to highlight--- I will just mention briefly before I give my colleague my remaining few minutes. On the matter of the appearance before the County Assembly, it is admitted the County Governor did not appear. On record, we did not have any letter from the County Governor saying that I have received your summons or your invitation, but for purposes of my attendance, I will be represented by this particular Counsel. That is not a record that we have in any of the documentation that is before this House. Therefore, a direct response to that question is that the Governor did not appear or respond to that invitation.

I will invite my colleague to use the other minutes to make the clarification sought from the House.

Mr. George Ng'ang'a: Thank you, Mr. Deputy Speaker, Sir. There is a question that was asked on how one unlocks this impasse. First, we do not ourselves see any impasse. What we have is a problem that has been created solely by the Executive. We say this because, first of all, when the Assembly discharged its mandate and approved the budget in line with the law, it is the Executive that intentionally sabotaged that process. What you heard is that they did not forward the Appropriation Bill to the Assembly. Therefore, without that Appropriation Bill then there was absolutely no way that the budget would have been implemented.

Mr. Deputy Speaker, Sir, you heard the Controller of Budget in the morning saying that the opportunity that she has had to listen to the parties, the variation was not big. However, we were then told by the CEC Finance, that this budget could not be implemented. I think the Hon. Senators were quick to see where the problem lies. If the problem was that variation, what then would have been so difficult in having the Bill forwarded to the Assembly, passed by the Assembly then you initiate the process of implementation of the budget? Then along the way, you can either come up with a supplementary budget or just resolve whatever issues there might be in the process of implementation.

The problem that we have, where the residents of Nyeri County cannot access services, has not been occasioned by the assembly. The assembly is now being blamed for discharging its mandate. But just because that document that was approved by the assembly is not what the executive considers palatable, the executive now decides that they will not have this budget implemented. That would be wrong because it is blackmail. Probably, they want to push this institution to a point where salaries are delayed, operations cannot go on and then, you will be told that it is you who caused this. That unless you rethink your position and forward to them a budget that they can work with, this problem will continue indefinitely. That is not how devolution was fashioned to work. If the independence of this very important organ called the assembly is not protected from this sort of machination, then the dream that was envisioned by the framers of the Constitution will be lost.

Mr. Speaker, Sir, there was an issue that was raised by the governor; that these matters were not brought to his attention. I do not wish to take the Senate through the entire documents that we have submitted, but you will notice that one of the documents, at page 695 of Volume III, of the documents submitted by the assembly, is in fact a resolution that was forwarded to the governor way back in June this year, recommending that the county secretary be relieved of her duties. That resolution was made under Section 40 of the County Governments Act, but it was ignored. We have not heard any comment regarding the Bills that were forwarded to the governor. I heard him say: "If these matters were brought to his attention."

You will see from our documents that these documents were sent. Sen. Wako said that the fact that those Bills can operationalize themselves, does not take away the mischief. It does not cure the illegality of a governor who intentionally refuses to assent to them, under Section 24 and 30 of the County Governments Act. There must be a reason these sections are there. One of the grounds upon which a governor can be impeached from office, is intentional violation of the law. So that, when there is no explanation why these Bills were not rejected or a memoranda sent, then one can only conclude that the action of this person was actually deliberate and intentional and, therefore, a contravention of the law.

There is the issue of the court cases that the governor alluded to; that the reason these positions have not been filled substantively is because there are court cases pending. First of all, we have not been told which court cases these are. One of the things that we heard in the morning from one of the witnesses is that in the department of finance, since the inauguration of the county government, there has not been a chief officer. The reason, therefore, could not have been that someone went to court, because there has never been a substantive chief officer.

There is a pending court case, and I will give the particulars because it is a public document. There is a Petition No.9 of 2016 filed in the High Court, Nyeri, which is a culmination of summons that were issued to CECs who declined to honour invitations to appear. Because under the Privileges Act it is an offence, when the assembly sought assistance from the Director of Public Prosecutions to charge these CECs, they filed a constitutional reference. The governor is the Chief Executive Officer of the County and heads the county executive. Under his watch, he sees county executive officers going to court to be shielded from accountability and honouring summons to go and explain.

Today, we are being told that he did not know about this. That cannot be a serious submission.

The other point is on the right to be heard. I like the passion and the fervency with which the governor has appeared before the Senate. I wish this was the same passion he demonstrated before the assembly. What we have is a notice that was served on him personally, but because he has absolutely no regard for the assembly, he perhaps thought that he is, with due respect, so important a person that he should not appear to be presenting himself in person before the assembly. Now, he wants this Senate to believe that he was deprived of a chance to be heard. That cannot be a serious submission.

Lastly, there has been an admission that we have a county executive that, in fact, has not met the gender parity requirements under the Constitution. Article 175 is so express; that the county executive shall not consist of more than two-thirds of the same gender. These acting appointments were made personally by the governor. Therefore, he knew the gender of these persons. The governor knows very clearly that the Constitution says that this body must, as a matter of law, be compliant in terms of gender. Now, we are being told to excuse the governor for these indiscretions. That is a constitutional violation that he knows.

In fact, as a practicing lawyer, today, if I were to go to court and challenge all the decisions and resolutions passed by that CEC, as currently constituted, it will be nullified, yet these are resolutions that have subjected the county government to expenses. This cannot be allowed to happen; where officers who are aware of the law and what they are supposed to do, come before the Senate and make admission that, yes, they have violated this, but seek for mercy. Laws were made to be obeyed. The law is the law. If there has been a violation, there is a sanction.

Thank you, Mr. Speaker, Sir.

The Deputy Speaker (Sen. Kembi-Gitura): Very well. Thank you very much. We will proceed to the closing remarks. Let me kindly have an indication from Counsel about roughly how long each of you will require for the closing remarks.

Sen. Murkomen.

Sen. Murkomen: From the body language of both counsels and both sides, it appears to me as though the clarifications they were making were their closing remarks.

The Deputy Speaker (Sen. Kembi-Gitura): Order, Sen. Murkomen! I cannot see their bodies from here.

Sen. Murkomen: Mr. Deputy Speaker, Sir, the mood of the House.

The Deputy Speaker (Sen. Kembi-Gitura): Order, Sen. Murkomen! No, there is no mood of the House. I need an indication so that I know how much time to give you. I will give you the time that you require. I will not curtail your time but I would just like to have an indication so that I have the timelines.

Counsel for the County Assembly?

Sen. Mutula Kilonzo Jnr., what is your point of order?

Sen. Mutula Kilonzo Jnr.: On a point of order, Mr. Deputy Speaker, Sir. We were thinking that most of the issues have been raised. However, the conclusion of the processes after the submissions--- I thought it would have been much better the submissions and our deliberations are done simultaneously, if we think that we can do that today.

The Deputy Speaker (Sen. Kembi-Gitura): We agreed on our timetable, if you recall. I have a working sheet. I am not just getting this from my own mind. I have a programme that I want to follow. All I know is that we have until midnight if we wish to go on until then, but that is the programme we have and I think it has been shared with the counsel. So, even as I am asking them, I think they know that now it is time for them to make closing remarks. For their convenience and that of the House, I am just seeking an indication. If you have no indication, then I will give you timelines within which you must make the submissions.

Sen. (Dr.) Machage: On a point of order, Mr. Deputy Speaker, Sir. I would like to bring your attention to Standing Order no.109 and request that you adjust that Standing Order to today's sitting and read it to the ---

The Deputy Speaker (Sen. Kembi-Gitura): Standing Orders No?

Sen. (Dr.) Machage: Mr. Deputy Speaker, Sir, Standing Order No.109. It deals with matters of irrelevance and repetitions. I request that that Standing Order will also be respected by the lawyers.

The Deputy Speaker (Sen. Kembi-Gitura): Sen. (Dr.) Machage, with respect, I am not going to preempt the situation. I do not know what they will say. They are doing an extremely important function of representing their respective clients. I do not want to be pre-emptive.

Now, Counsel, if you do not have any indication of the time, then I will give you time within which to do your submissions.

Sen. Orengo, are you on a point of order?

Sen. Orengo: On a point of order, Mr. Deputy Speaker, Sir. I thought that you would be useful in terms of pointing out to the counsel what we would like to hear at this stage because it is not really a general address.

The Deputy Speaker (Sen. Kembi-Gitura): I am asking them, in the first instance, to let me know how long they will require. If they do not do that, then I will give directions.

Counsel for the County Assembly.

Mr. Charles Njenga: Mr. Deputy Speaker, Sir, between ourselves, we will take a maximum of 15 minutes.

The Deputy Speaker (Sen. Kembi-Gitura): What of Counsel for the Governor?

Mr. Peter Wanyama: Mr. Deputy Speaker, Sir, I will take similar time. Strictly 15 minutes.

The Deputy Speaker (Sen. Kembi-Gitura): That is good. Okay. Now, I am not going to ---

(Sen. Murkomen consulted loudly)

Order, Sen. Murkomen!

Unlike what Sen. Orengo has said, I will not restrict you. It is up to you to say what you want to say in your closing remarks because it will help us as a Senate to recap everything that we have heard since yesterday and today. So, it is up to you. Use the time. You have asked for 15 minutes, I will give you 20 minutes each.

So, Counsel for the County Assembly, you begin.

CLOSING STATEMENTS ON BEHALF OF THE
COUNTY ASSEMBLY

Mr. Charles Njenga: Mr. Deputy Speaker, Sir, it is good you have good intentions of me. One day, I will be a Senator but for now, I am just counsel for the County Assembly.

I proceed to make our closing remarks. I will not go back to the grounds because in our closing submissions, we submit that all the grounds that are set out in the Motion and the charges before you have been well established. A factual basis has been laid. Evidence has been read and a legal foundation of each charge both in statute and in the Constitution has been established. We have done more than that in our documents. We have reproduced copies of the extracts of the material statutes just for your evaluation and convenience.

However, I want us to evaluate this ruling by the Court of Appeal that has been alluded to one time too many. It is found in the documents of the Governor Volume III. There is a very important finding that I wish the Senate considers in exercising your mandate in this matter. That is on page 111. Governor's documents, Volume III on page 9 of the judgment of the Court Appeal in Civil Appeal No.21 of 2014.

This is to clear your mind as to your role in the matter and the role of the courts because it is an issue that has been alive before in our submissions. The Court of Appeal had the extract at page 112, paragraph 32. It was following in just trying to define what is the respective roles of each of the institutions set out in our Constitutional design that have a role in this matter. I will only read the last four lines that say:-

“Article 181 of the Constitution does not vest the courts with the jurisdictions to hear charges relating to the removal of a Governor from office. From the dicta in *Mulberry versus Madison*, it is our considered view in so far as the process of the removal of a Governor from office is concerned, the province of the court is solely to decide on the rights of individuals and not to enquire on how the County Assembly and the senate perform duties in which they have discretion.”

Let me turn to duties in which this House has discretion. So, in the matter of consideration of these charges, the Court of Appeal has found that this House has discretion. The judgment of this House is what is applicable in the matter and in regard to the question relating to the removal of a Governor from office under Article 181. Therefore, it is for this House to consider the charges that have been brought before you. It is for you, first of all, to decide whether those offences, in the scheme of things within counties are gross and whether there is responsibility personally on the part of the Governor and whether the threshold has been realised. You can find that discretion nowhere else. It is resident in this House. We urge that the Senate does rise to the occasion and interrogate the charges and when you do, it will be clear beyond peradventure that the charges have been established beyond doubt.

In following to that to further give you confidence in the exercise of this very important discretion, on page 118 of the same judgment of the Court of Appeal, the Court cited the decision in *Nancy Barasa versus Judicial Service Commission (JSC)*.

Mr. Deputy Speaker, Sir, let me start from paragraph 49. This was the finding of the court that:

“It is not for this court or the commissions to find the allegations made against the petitioner do not amount to gross misconduct”

In fact, according to Prof. Yash Pal Ghai, “Kenyan Constitution, An Instrument for Change” cited by the petitioner:-

“Whether a conduct is gross or not, will depend on the matter as exposed by the facts available in the matter that is before you which is the duty of the tribunal to establish. It is not the duty of the courts. It is the duty of the tribunal seized of the matter to establish.”

Mr. Deputy Speaker, Sir, so in all the constitutional, legal and the factual issues raised, this House has absolute discretion within the constitutional parameters that guide all of us to make a determination and when we do, we will uphold and confirm the charges.

Article 181 is provided deliberately within the Constitution to provide for instances which, in the estimation of a county assembly and the Senate, cannot be resolved in any other way apart from the removal of a county governor. The facts as presented - and in fact it is clear from the House that there is a crisis of unprecedented proportions in that county because it has become impossible to operate and receive proper reports. There is expenditure being expended without disclosure. We have to file charges so that we can get a complete report of how money has been spent. That is happening and it is clear to the Senate.

Mr. Deputy Speaker, Sir, there is expenditure without authorisation which is a basic minimum irreducible legal obligation. There is expenditure without authorisation. There is lack of prudence and that is an indicator of lack of leadership. There is total breakdown of governance. There are no institutional frameworks that can support governance even when the chief executive is not around. In fact, you heard in his testimony that when he is not around - and he was not around - when he came back things were haywire.

The only conclusion one can make is that, the system is deliberately so centered on that one person. It is so weak on its own self that it cannot survive without that central operative. That is not how we want to run our counties. That is not the job we gave governors. We gave them the power to execute executive authority in the counties but in accordance with the law. The standard is the law and not your judgment, feelings or discretion, but the law.

In this present instance, we have seen so many violations and the explanation being given as we have seen from the responses are admissions. We admit this, but we the records and we have given them to you. We admit this happened but we did not correct it on time. When these charges are filed, people rush to have meetings to sanitise records. Is that the way that this Senate wants us to run our counties?

Mr. Deputy Speaker, Sir, I say this deliberately because the message you will send to all the 47 counties is that if you can do and fashion your activities in this manner, you can escape liability and accountability. However, if you raise the baseline to a standard that has to be complied with, then there shall be order in the counties. This is similar to the jurisdiction provided in the Employment Act of summary dismissal because there comes a time when the employment of an employee is untenable.

We urge the Senate to consider the people of Nyeri County. We have been told that, this can be resolved by discussions and going to commissions. Why has it never been done? It is only being proposed now to escape the sanction of removal. Secondly,

Article 181 is not profiled in a manner that it arises from a graduated process that first, you have to demonstrate that you talked, went to an independent commission and then you went to the Senator's office. It is not graduated in that respect by law because it is acknowledged that from the facts as they are, a situation can be discerned that requires immediate action by the Senate and that is the action of removal of the governor.

Mr. Deputy Speaker, Sir, we urge that you uphold the charges. The governorship of Governor Nderitu Gachagua the Nyeri County is no longer tenable and that on the material that is before you, you have more than enough and sufficient reason to do so.

On behalf of the County Assembly of Nyeri, we have the confidence and we are inspired by your sense of duty under Article 96. That is to protect the counties and their governments. That is the role of the Senate but from whom are you protecting the counties and the governance? It is from persons within the system like the governor who are hell-bent and have intentionally set out to ensure that, that system does not realise the functions of and objectives of devolution.

Mr. Deputy Speaker, Sir, with that, I will invite my colleague to close for the few minutes remaining. However, I am confident and happy to know that you have been keen to look at the documents, evidence and hear the testimonies. We were even deceived from this podium that the county assembly frustrated the payment of bills of electricity, that we moved budgets from the health sector. The records are with you. There was zero deviation. This is an indicator of the extent to which an executive can go just to malign the assembly and to make the point that we are the boss in this town. We urge that the Senate find that the charges have been established.

Mr. George Ng'ang'a: Thank you, Mr. Deputy Speaker, Sir and the Hon. Senators. This Senate is being called upon to discharge a solemn mandate. It is a mandate that is enshrined in our Constitution that is only reposit on this Senate.

Before this matter was escalated to where we are today, the assembly has really suffered. It has been frustrated. The people of Nyeri County have suffered. They are looking upon the assembly to alleviate that suffering.

Mr. Deputy Speaker, Sir, this Senate has been seized of a matter of this nature before. This Senate does not just rubberstamp the decision or the resolution of the assembly. It considers very critically what is before it. That is why it has agreed with the decision of the Assembly, and in other instances, it has disagreed. There is no better way to demonstrate the independence and the ability and the capacity of the Senate to interrogate the matter before it.

Mr. Deputy Speaker, Sir, with the respect to the matter that is for consideration this evening, we have been able to demonstrate that the charges facing the Governor are largely not by omission but intentional acts of gross violation of the law. The law is clear, as has been said before, and I do not intend to take this Senate back on the issue of threshold, but suffice it to state that there is no mathematical formula that you will find under Article 181 that you are to employ in determining what is gross and what is not gross. Our courts have in the past attempted to set out some regulations or a sort of some loose formula for guidance purposes.

Allow me to just refer the Senate to the Governor's documents Volume III, a decision you will find at page 116. I refer to this decision because, first, it is a decision from the Court of Appeal. In fact, it is a decision that we have from the highest court in

Kenya on the matter of threshold and, therefore, it would be a useful tool in guiding the deliberations of this Senate.

Mr. Deputy Speaker, Sir, and Honourable Senators, if you could refer to paragraph 46 of that decision - I know it starts from paragraph 45 - This is what the Judges of the Court of Appeal sitting in Nyeri had to say about what constitutes gross violation.

“We reiterate that what constitutes gross violation of the Constitution is to be determined on a case by case basis. Gross violation of the Constitution includes violation of the values and principles enshrined under Article 10.”

So, if Article 10 prescribes gender parity in appointments and you have a violation of that article, within the interpretation of the Court of Appeal, it is a gross violation.

Mr. Deputy Speaker, Sir, then much more importantly is what follows thereafter. “That Article 10 of the Constitution and violation of Chapter 6 of the Constitution – I want to pause here to emphasise, Honourable Senators – or intentional and/or persistent violation of any article of the Constitution or intentional and blatant or persistent violation of the provisions of any other law.”

So, if this Senate is satisfied that there is a violation of one section of any other law, a section of the statute, an article of the Constitution, if you are satisfied that the Assembly has been able to demonstrate, one, violation attributable to the Governor, then there would be a basis to return a verdict that the charge has been substantiated. That is the Court of Appeal speaking.

Mr. Deputy Speaker, Sir, just a brief highlight.

The Deputy Speaker (Sen. Kembi-Gitura): Your time is up. How much more time do you need?

Mr. George Ng’ang’a: Mr. Deputy Speaker, Sir, five minutes so that I can wrap it up.

The Deputy Speaker (Sen. Kembi-Gitura): You have five minutes.

Mr. George Ng’ang’a: Thank you, Mr. Deputy Speaker, Sir. To demonstrate this intentional violation is, for instance, when it comes to the appointment of the County Executive Committee (CEC) members as provided under Section 35, the appointments have not been subjected to the approval of the Assembly, yet that is a mandatory requirement of Section 35 and this has been going on for the longest time. That situation is designed to circumvent the requirement for approval so that we can continually have persons serving who did not necessarily have to be approved by the Assembly, yet Section 35 of the County Governments Act is critical.

When you fail to appoint chief officers in line with Section 45 of the County Government Act yet you know as the Governor that you are supposed to appoint and subject those appointees to the ratification and approval of the Assembly, then by design and intentionally, you circumvent the requirement of Section 44. When Section 30 Sub-section (2)(g) of the County Governments Act says one of the functions of the County Governor is to assent to Bills, and we have attached bills being forwarded to the Governor and the Governor does not assent to those Bills, neither does he return a memorandum to set out why he cannot assent to those bills, then it is a clear demonstration of an intentional violation of Section 30 of the County Governments Act.

Mr. Deputy Speaker, Sir, when the Assembly passes a resolution that a member of the County Executive, the County Secretary does, not meet the academic qualifications to serve as a County Secretary, and as we have shown in our documents the resolution is passed on to the Governor, under Section 40 the Governor has no discretion. In fact the word is:

“Upon receipt of a resolution by the Assembly recommending that that person be dismissed, the Governor shall---.”

That recommendation was sent this year in June to the Governor and, until today, three months down the line, nothing is done. That is a clear intentional violation of a section of the Constitution.

Mr. Deputy Speaker, Sir, when the County, Budget and Economic Forum, a very important body that facilitates public participation in budget making process, the Governor does not initiate the process of constitution of this body since that government came into place and we are now just a few months to the next election. It is him who initiates this process. Then failure to do that can only be a violation of Section 137 of the Public Finance Management Act. There has been an admission and I say this because one of the violations in respect of the composition of the County Executive is on gender. Article 175 of the Constitution makes it mandatory and what you heard is that we are aware but just pardon us because we did not quite have a big pool of people from whom to select. I am not aware of any provision in the County Governments Act that says that if you are to make appointment on an acting capacity, you are only limited to the pool of the chief officers that you already have in office. So, that is a deliberate violation of that section of the Constitution.

Mr. Deputy Speaker, Sir, Section 48 (1)(b) of the County Government Act sets out the sub-counties which are supposed to be as per the constituencies you have within the County. We saw eight sub-county administrators appointed and you have additional two sub-counties created outside the provision of Section 48. Fine, the reason could be noble. However, it must be that the Act of Parliament, that is the County Governments Act, ought to be amended first to give the County Governor then that power to create additional sub-counties but not to rationalise why you had to do that. Yes, we appreciate it is important to bring services closer to the people, but it is much more important to do that within the law. So, when he does that outside the law it is a deliberate and intentional violation of the law.

I could go on and on, but the point we are making is this---

The Deputy Speaker (Sen. Kembi-Gitura): You could extend, but your time is up.

Mr. George Ng'ang'a: Mr. Deputy Speaker, Sir, under Section 33, if you find only one out of the various grounds substantiated, then there would be a basis for you to confirm the removal of the governor from office.

We urge the hon. Senators to find that the assembly has, indeed, substantiated its charges and under Section 33 and Article 181 of the Constitution, we should proceed to pass a resolution that the governor cease from holding office.

The Deputy Speaker (Sen. Kembi-Gitura): Thank you very much. Counsel for the governor, you have 20 minutes.

CLOSING STATEMENTS ON BEHALF OF THE GOVERNOR

Mr. Peter Wanyama: Thank you, Mr. Deputy Speaker, Sir, for giving me this opportunity to make our final closing remarks. I notice that Sen. Wako is not here. I want to apologize for the earlier statement that he was admitted to the Bar the same year that I was born. Indeed, that is not true. He was admitted to the Bar in 1970 and I was born in 1981.

The Deputy Speaker (Sen. Kembi-Gitura): I accept the apology on his behalf and it will go on the HANSARD anyway.

Mr. Peter Wanyama: This is a good forum. An opportunity has been given to us to give our side of the story. The Senators have interacted with us more than we expected. They have put us to task to explain some of the issues and we appreciate that.

The county assembly brought charges before the Senate for impeachment, but at the end of the day, it is important to emphasize that the burden of proof entirely falls squarely and resolutely on the county assembly. From the evidence adduced before the Senate, it is clear that there is something wrong on the charges that have been brought by the county assembly.

First of all, in terms of procedural fairness, we have demonstrated that the governor was not given an opportunity to be represented by Counsel at the county assembly, the impeachment proceedings were done in a hurry and the documents were not prepared properly. In terms of the issues that the governor ought to have raised, you get the impression that even in terms of the institutions at the county assembly, those mechanisms to exhaust these problems that the county assembly has drafted for impeachment, were not utilized. The county assembly did not bother to find out the truth of what transpired on some of the issues they have adduced as grounds for impeachment.

For instance, it is now clear from the evidence of the Controller of Budget and the evidence of the County Executive Committee (CEC) Member for Finance that the issue about spending money at source is something which has credible explanation that makes practical and legal sense. Instead of seeking this explanation by way of the powers that the county assembly has been given under the Constitution, the county assembly chose to impeach the governor. This is an issue that runs throughout all the impeachment charges. Most of the issues are as a result of knee-jerk reaction by the county assembly.

In our submissions, these impeachment proceedings ought not to have been here in the first place. If you look at the question of threshold, only one witness, who did not want to testify before this House, was produced to support more than 10 charges which are before the Senate.

It is clear that the county assembly was not serious in terms of presenting its case before the Senate. If it was serious about presenting its case well in the Senate, it could have brought some documented evidence, which they can easily get from the county executive; documents which we have endeavored to produce before this Senate, so that we can discharge the burden which ideally the county assembly ought to have discharged. Therefore, on the question of burden of proof, it is our submission that the county assembly has not discharged that burden well to meet the threshold which has been laid down by the Senate in a decision which we have annexed. This House is not a rubberstamp of faulty decisions; it is guided by rules of evidence, precedent and the most important document; the Constitution.

Indeed, in our documentation, which we have annexed in the governor's bundle Volume III, there is a decision of this House, in the matter concerning the impeachment of the Governor for Kericho County, Gov. Paul Chepkwony, where the Senate looked at these issues and in its wisdom, having found that the impeachment proceedings---

The Deputy Speaker (Sen. Kembi-Gitura): Use the microphone for the sake of the HANSARD.

Mr. Peter Wanyama: My apology, Mr. Deputy Speaker, Sir. Having found that the impeachment charges did not meet threshold, the Senate proceeded to dismiss and find those charges unsubstantiated.

We urge that on the question of burden of proof alone and the issue of procedural fairness, you make a similar finding that these charges are not substantiated. The threshold which has been laid down in Article 181 of the Constitution is a high a threshold, which the Senate in its decision concerning the impeachment of Governor of Kericho confirmed.

For a governor to be removed from office, the allegations must be extremely serious. That is why the Constitution expressly uses the words 'gross violation of the Constitution'. There must be evidence brought before this House to demonstrate the act of 'gross violation,' which has been directly attributed to the governor. There must be gross violation of the law. After the county assembly has uttered the word 'gross' they will ultimately confine themselves 'a violation.'

It is our submission that if you find that there is a violation of any legislation or a section of the Constitution, then from the evidence adduced that violation is not gross at all. 'Gross' has been defined as something serious. If the governor had directed the expenditure of public resources, contrary to the provisions of public finance, then that would amount to be gross; your face-type of allegations that are extremely overt and done in unashamed manner.

Our submission is that if you examine the allegations based on the issue of threshold, the only conclusion you can get is that these are usual and normal operational challenges in the County Government of Nyeri, which the Auditor-General confirmed today in his submissions. It is normal to find some of these operational challenges whenever you go to a county government. There are mechanisms in legislation to provide for how to deal with these operational challenges. These operational challenges principally arise because even though the governor is the chief executive officer and accountable for the county resources at that level, there are structures of how these resources are supposed to be managed.

There are structures, for instance, on how procurement is supposed to be done. The governor is not supposed to interfere in the procurement process. The governor is not supposed to interfere on how accounting officers, designated as such, make their financial management decisions, in accordance with the framework which has been laid in the Public Finance Management Act and the regulations.

As to whether the Governor can be impeached from office on that issue, we urge this Senate to consider the evidence which was submitted by the County Assembly and our response; you find that the challenges are operational in nature.

Impeachment of the Governor is a knee-jerk reaction to these operational challenges. At the end of the day, the impeachment will not resolve the underlying problems which inform these operational challenges. Instead, we call upon and request

this Senate to make appropriate recommendations geared towards remedying these operational challenges.

Under Article 96 of the Constitution, it is within the mandate of this Senate to make these recommendations. The Senate is supposed to protect counties, but not to see them go down on issues which can clearly be addressed. For instance, is mediation something which can be pursued to remedy this budget stalemate? The Controller of Budget has said: "Yes, give me a chance; these are issues which I can mediate because I have mediated difficult issues before." Are we going to impeach the Governor and yet there are mechanisms established in law to deal with that?

In the impeachment of the Kericho County Governor, these similar issues were there between the County Assembly and the County Executive. The Senate in its recommendations, which we have annexed in the Governor's Bundle Volume III, was express, that there was need for urgent reconciliation to ensure the problem does not persist. We are urging this Senate to make that recommendation. The Governor has indicated so. It is only the County Assembly which seems to be saying that it is the Governor who is responsible for this mess.

For the County Assembly to recognise that there is a dispute, they must accept their part of blame. It is the County Assembly which approved the nine CECs who they say, do not meet the gender balance rule. How can they later on say that the Governor should be impeached on something which they approved? They should have as well not approved the nine CEC members and asked the Governor to submit a fresh list that complies with the Constitution.

We can clearly see that it cannot lie on the mouth of the County Assembly to then accuse the Governor, that he has grossly violated the Constitution, because that appears to be the only issue in terms of violation which we have said exists. However, for purposes of impeachment, it does not exist because it is not a gross violation to be coming from the County Assembly for purposes of impeachment. The flip side is that if it the County Assembly has rejected these names and the Governor had gone ahead to appoint without considering the recommendations of the County Assembly, then in my opinion, it would have been a gross violation.

Most of these issues which the Count Assembly is alleging are grounds for impeachment are issues which have been there in terms of time. For instance, the issue of Karson House arose at that stage when governors were being sworn into offices. There was an interim team which was appointed courtesy of a legal framework which ceased to exist.

The county interim financial management Act which created an elaborate regime for transitional mechanisms of Public Finance Management, was supposed to ensure that when governors come into office, assets would be safe. A lot of assets could not be accounted for. The then county interim financial management Act created framework whereby the money which was supposed to ensure that governors come into the office was utilized in a proper and structured manner.

It is this money which eventually went to the renovation of the Governor's office and other critical expenditures at that time. It is important to emphasize that at this time we were at the initial stages of the implementation of devolution and there were challenges. Devolution cannot succeed if not properly implemented. The solution is not to impeach the Governor but creating systems and structures that must work. For

instance, if we impeach the Governor on the ground that he has undermined the authority of the County Assembly, and then the issues that resulted in the budget stalemate are not addressed, it will lead to more and more paralysis in the County Government of Nyeri. It is not a solution at all.

The better solution is for the two parties to sit down, because we are at a critical stage of the implementation of devolution where these issues must be addressed through mechanisms which have been laid down in law and the Constitution.

On the question of whether the last allegation which is failure to comply with the law, I have been consistent in our submissions that there are three charges which the Governor is facing before this Senate. Two charges are founded in Article 181; the one on gross violation, misconduct and abuse of office. If you read Article 181 they are clearly mentioned.

The other allegation is on gross violation of the Constitution and law. Again, if you look at the provision of Article 181, that allegation is unavailable. Does this charge known as failure to comply with the law exist in Article 181? It is not there. There is no charge known as failure to comply with the law for which the Governor is being called to defend himself.

If it was failure to comply with the law, you could have said, gross violation of the law. Why do you say it is failure to comply with the law yet, that charge is unavailable under Article 181 of the Constitution. I am happy that a former Judge that has appeared before this Senate and I really hold him in high esteem in terms of understanding the legal framework governing these issues. In this case, he would ask: Whether we could come up with an impeachment charge where it is not founded in the Constitution?

Finally, I state that devolution cannot succeed without six fundamental factors. It is now emerging that six fundamental factors are not even enough. They are:

- (1) Adequate resources;
- (2) Public participation;
- (3) Ethics and governance in the management of public resources;
- (4) Adequate human resource such as skilled personnel to ensure that the structures and devolution works at the county level.

It is now emerging that the other issues we need for devolution to succeed and specifically for the County of Nyeri, in terms of interpersonal relationship, is to ensure that there is close working relationship between the county executive and the county government. There are certain weaknesses that may precipitate some of these stalemates. For instance, in the budget making process there is a provision in the Public Finance Management Regulations which seems to give the CEC Finance certain powers contrary to the provisions in the PFM Act which appear to confer similar powers to the County Assembly.

If you look at issues in this critical perspective, perhaps, there is time to relook at the legal framework that supports devolution, public finance management, public procurement at the county level with a view to improve and enhance the working relationship between the county executive and the county assembly. Otherwise, if these issues are there in law and we are not coming out to clarify whose position is actually true, most of these misunderstandings will definitely arise.

Otherwise, the County Governor of Nyeri respects the mandate and powers which have been given to the County Assembly of Nyeri. At the same time, we expect that the

County Assembly of Nyeri respects the constitutional mandate which has been given by the Executive Office of the County Government of Nyeri. So, in terms of our final prayers, we pray that you find within the provisions of Article 181 and intendment of Section 33 of the County Governments Act that there is no charge of gross violation of the Constitution which has been substantiated.

Secondly, within the intendment of Article 181 of the Constitution as read with provisions of Section 33 of the County Governments Act, we again pray with humility that you find there is no such charge of failure to comply with law.

Lastly, within the intendment of Article 181 of the Constitution as read with Section 33 of the County Governments Act, we again pray that you find the charge with respect to abuse of office or gross misconduct has not been substantiated.

Mr. Deputy Speaker, Sir, thank you very much. I really appreciate the opportunity to address this House.

The Deputy Speaker (Sen. Kembi-Gitura): Thank you very much counsel, you may resume your seat.

(Mr. Peter Wanyama resumed his seat)

Hon. Senators, we have come to the end of the active proceedings. As the Programme shows, we will go into a closed session for a period not exceeding one hour. The closed session means that everybody who is not a Senator or an officer of the Senate will withdraw from the Chamber and the Gallery so that we can have our own deliberations on the issues that you have raised. I want to thank you very much for all the issues that both the parties have raised to us. Therefore, we will make a decision. So, please withdraw from the Chamber. I request you to come back at exactly 8.15 p.m. The Serjeant-at-Arms and orderlies will show you back to where you will sit. At that time, we shall then proceed in open House and, hopefully, complete the proceedings this evening. So ordered.

(All Members of the public and media personnel withdrew from the Chamber and the Gallery)

(The Senate went into camera)

(The House resumed at 8.15 p.m.)

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

(Loud consultation)

The Speaker (Hon. Ethuro): Order, Members! We have resumed.
Next Order!

(Loud consultations)

Order, Members! Just for guidance; as we proceed, all of you must be having a Supplementary Order Paper. As we agreed in the closed session, this particular session will take a maximum of one hour. A Motion will be moved and apart from the Mover

and the Seconder, the rest of the contributors will have a maximum of five minutes and that will be reduced as we go towards the end of the limit, depending on the interest. So we will proceed along those lines.

NOTICE OF MOTION

RESOLUTION TO REMOVE FROM OFFICE, BY IMPEACHMENT, THE GOVERNOR OF NYERI COUNTY

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, I beg to give notice of the following Motion:

THAT, WHEREAS, pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012, on 2nd September 2016, the County Assembly of Nyeri approved a Motion to remove from office by impeachment the Hon. James Nderitu Gachagua, the Governor of Nyeri County;

AND FURTHER, WHEREAS by letter dated 2nd September 2016, Ref. No.CAN/CEN/PMNT/COR/2/(3) received in the Office of the Speaker of the Senate on 5th 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 and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;

AND WHEREAS pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012 and Standing Order No.68, the Senate also heard the County Assembly on the grounds of removal from office by impeachment of the Governor;

AND FURTHER, WHEREAS pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act, 2012 and Standing Order No.68, the Senate also heard the Governor of Nyeri County on the grounds of removal from office by impeachment of the Governor;

NOW THEREFORE, pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act, 2012 and Standing Order No.68, the Senate resolves to remove from office by impeachment the Hon. James Nderitu Gachagua, the Governor of Nyeri County on the following charges; namely:-

- (1) 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.
- (2) Failure to comply with the law; and
- (3) Abuse of office/Gross misconduct.

Thank you.

The Speaker (Hon. Ethuro): Next Order!

MOTION**RESOLUTION TO REMOVE FROM OFFICE, BY IMPEACHMENT,
THE GOVERNOR OF NYERI COUNTY**

The Senate Majority Leader (Sen. (Prof) Kindiki): Mr. Speaker, Sir, I beg to move the following Motion:-

THAT, WHEREAS, pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012, on 2nd September 2016, the County Assembly of Nyeri approved a Motion to remove from office by impeachment the Hon. James Nderitu Gachagua, the Governor of Nyeri County;

AND FURTHER, WHEREAS by letter dated 2nd September 2016, Ref. No.CAN/CEN/PMNT/COR/2/(3) received in the Office of the Speaker of the Senate on 5th 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 and further forwarded to the Speaker of the Senate documents in evidence of the proceedings of the Assembly;

AND WHEREAS pursuant to Article 181 of the Constitution and Section 33 of the County Governments Act, 2012 and Standing Order No.68, the Senate also heard the County Assembly on the grounds of removal from office by impeachment of the Governor;

AND FURTHER, WHEREAS pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act, 2012 and Standing Order No.68, the Senate also heard the Governor of Nyeri County on the grounds of removal from office by impeachment of the Governor;

NOW THEREFORE, pursuant to Article 181 of the Constitution, Section 33 of the County Governments Act, 2012 and Standing Order No.68, the Senate resolves to remove from office by impeachment the Hon. James Nderitu Gachagua, the Governor of Nyeri County on the following charges; namely:-

- (4) 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.
- (5) Failure to comply with the law; and
- (6) Abuse of office/Gross misconduct.

Mr. Speaker, Sir, I will be very brief. In moving this Motion, I would like to thank the County Assembly of Nyeri because the Motion before us today is as a result of the County Assembly of Nyeri exercising their constitutional and statutory mandate, as they should, to oversight the executive. Therefore, I want to applaud the assembly for taking their responsibility seriously and thank them for providing the Senate with an opportunity to hear the matters they have brought before us.

Secondly, this is the fifth impeachment incident that has been brought to this Senate. In the first matter involving the Governor of Embu County, this Senate decided to

vote for the impeachment of the Governor of Embu County. That governor is still in office, courtesy of the Judiciary. The matter is pending before the Supreme Court. But as far as this Senate is concerned, the decision we made is final and is as it is.

The second impeachment process involved Kericho County, which the Senate in its wisdom, evaluated the evidence and found that none of grounds upon which the governor had been accused of had been substantiated. The third one involved the deputy governor of Machakos County and similarly, the Senate found so.

The fourth case involved the Governor of Murang'a. Again, the Senate found that there were no sufficient grounds to impeach the Governor of Murang'a County.

The time has come for county governments and especially those in the executive, to know that when the assembly and the Senate are exercising this mandate, they are doing so because the law provides so. This is a *quasi-judicial* process and so, the rules of fairness must apply. I am sure that this evening those rules will apply.

The Governor of Nyeri County has made a spirited defence by himself and through Counsel and explained to this House the reasons he believes the charges that have been brought against him do not suffice to impeach him. This House has a very important duty tonight. We must decide tonight, in a final way, in accordance with the law and the statutes, whether or not Hon. Gachagua continues to hold office as governor, based on the analysis of the evidence that has been adduced by both sides. This is a duty we must discharge.

Fifthly, I thank the Senators for sitting continuously yesterday and today, especially, considering that this is the first time that this House is conducting an impeachment hearing in Plenary. This is a precedent setting procedure and I am sure that in many years to come, scholars and students of parliamentary processes and procedure will learn great lessons from what has happened in the last two days in this House.

Mr. Speaker, Sir, I will not say more than that. I urge the hon. Senators to discharge their responsibilities tonight with sobriety, judicious keenness and in the best interests that delivers justice to both parties, in this case, the assembly and the governor and more importantly, the residents and people of Nyeri County, and by extension, the people of the Republic of Kenya.

With those few remarks, I beg to move and request my brother and counterpart, the Senate Minority Leader, to second this Motion.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, I beg to second. I hope I am entitled to my usual one hour.

(Laughter)

The Speaker (Hon. Ethuro): Of course, not.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, this is precedent setting. This is the first time this House sits as a Committee of the Whole to listen to an impeachment case.

We have listened to a case presented by the County Assembly of Nyeri, to the defense mounted by His Excellency the Governor of the County of Nyeri. The House has listened to the witnesses. I salute the lawyers appearing on both sides for their tremendous industry in presenting and defending the case for their clients, respectively.

In this process, just as we said, at the opening session, the cardinal rule is fairness, fair play, the right to be heard which we have accorded the Governor, and the duty by this Senate to make a finding without fear, favour or prejudice.

Mr. Speaker, Sir, at the end of this session, each of the 47 Delegations are obligated in law to cast a vote either to send that gentleman home or to keep him in office; to make him an ordinary citizen or retain him as the Governor of the County of Nyeri.

Allegations have been placed before us, running from impropriety in management of finances to non-observance of the law, including the supreme law of the land, the Constitution. My colleagues and I, and, indeed, you, Mr. Speaker, Sir, have listened very carefully with our support staff guiding us from the background. At the end of the day, we must also bear into account that the public out there, particularly the distinguished people of Nyeri, who elected their Governor and who have either received adequate services, or the opposite, have been watching and have an interest in this process.

Consequently, like my distinguished colleague has said, this Senate is now faced with a very simple, but daunting task of making a decision that will go down in the annals of history as being the first ever impeachment proceedings that are heard publicly, and viewed by every Kenyan because it was live broadcast and, above all, this House is able to uphold and or disagree with the findings of the County Assembly.

Mr. Speaker, Sir, we are not sitting on appeal; we cast an original vote as a House of Parliament. In doing so, I encourage my colleagues to remember the words of the great mercurial lawyer: Johnnie Cochran in the case of O.J. Simpson versus the People of America. In his submission, he told the jurors that: "If the glove fits, convict, if the glove does not fit, you must acquit." That is a case that set the entire American nation spellbound to the extent that President Bill Clinton had to address the nation an hour before the verdict.

My dear colleagues, "if the glove fits, convict, if the glove does not fit, you must acquit." Here in this Chamber, you are holding in your hands and in your brains the future of the County of Nyeri. Whether it has to start afresh or continue in the manner it has been run. Since the vote is personal, my colleague and I do not want to tell you to convict or acquit, because you cast a vote on behalf of your county that brought you here. You also know that you also carry a national responsibility under Article 96 of the Constitution of the Republic of Kenya, that this House is the protector and defender of counties and their governments. Counties and their governments mean, and includes the people of those counties.

(Sen. Bule Spoke off record)

Mr. Speaker, Sir, restrain the distinguished Senator for Tana River. I choose my words carefully and I need no assistance to do so.

With those few remarks I beg to second.

The Speaker (Hon. Ethuro): Order, Members.

(Question proposed)

Sen. Murkomen: Mr. Speaker, Sir, from the outset, I would like to congratulate the County Assembly of Nyeri for carrying out their oversight responsibility with diligence and commitment. Apart from my own county, this is the first county assembly that I addressed with your permission outside my county. Of course I have addressed almost 10 counties.

Mr. Speaker, Sir, I just want to say straightforward that first of all I have some lamentation to make. Because of constraints of time, we are unable to delve into issues before us. Be it as it may, out of the rush, I will just go straight to the point so that I do not waste a lot of time.

Mr. Speaker, Sir, I had the privilege of being the Vice Chair in the First Impeachment of a governor in this House. The impeachment of a governor is provided for in Article 181 of the Constitution. There are grounds of gross violation of the Constitution and the law where there is a serious reason believed that the county governor has committed a crime under national or international law and abuse of office and so on and so forth. The reason I am reading this is because I would like to go straight to the point.

This Governor was brought to this House to be impeached on three grounds. Of the three, I would like to say without any fear of contradiction that failure to comply with the law is not a ground for impeaching a governor. Therefore, that gives me opportunity first of all to strike out the thought and reasoning that the Second Ground that was brought before this House is not a ground for removal of a governor, even though the grounds provided there could have been argued under gross violation of the law. That leaves me with two grounds to look at. The First Ground is gross violation of the Constitution. The grounds laid down here in support of this impeachment are matters related to finance. I have heard the County Assembly, the Governor and the witnesses brought before this House.

Mr. Speaker, Sir, the summary of my thoughts is as follows. There are questionable issues regarding accountability on information related to finances in Nyeri County. These issues relate to explanation as to variance of Kshs70 million provided herein and again another amount of Kshs352 million in terms of explanation. However, my argument is that impeachment is a very serious issue which should be the last resort because the consequences are grave. It is varying a right of voters to have a governor in office.

Mr. Speaker, Sir, having listened to the Auditor-General and the Controller of Budget, this is my decision this evening. I am not like the Senate Majority and Minority Leaders who have not made their position public but I know they will make it later in the voting. However, I am confident to face this straight head-on. In my opinion, these issues should have first been handled at the level of the Auditor-General and Controller of Budget before a grave position of impeachment was taken to be brought to this House.

Mr. Speaker, Sir, I have also seen the provision related to failure to comply with the law and failure to assent to legislation. As I said earlier, the consequence of failure to assent to law is provided for in the Constitution and the Act that the law will take effect. Therefore, it is not really a situation where you can say it cannot be remedied.

Looking at the last charge which is abuse of office, I agree with the County Assembly that there are many issues in Nyeri County Government related to persons in offices in acting capacity and their terms of service. That is a violation of Section 58 of

the County Governments Act. However, I resist to believe that those violations, considering the political and governance structure which is happening in Nyeri, will be a basis for one to automatically say an impeachment should ensue.

Mr. Speaker, Sir, looking at the three grounds, my take is that there are violations that must be looked at. There are institutions that should look at these violations including the Auditor-General and the Controller of Budget. There are issues that would require mediation processes. There are also issues that would require leaders to take up the higher road of leadership and address issues as a county.

In my conclusion---

(Sen. Murkomen's microphone went off)

The Speaker (Hon. Ethuro): As the Deputy Senate Majority Leader, I will add you one more minute.

Sen. Murkomen: Mr. Speaker, Sir, thank you. It is not easy to be a deputy and watch your boss having 10 minutes and you have none.

Mr. Speaker, Sir, in conclusion, I would like to say that the issues raised therein can be addressed in a different forum but not in the most extreme decision of impeaching a governor. My decision is that the Governor must be set free.

Thank you.

Sen. Orenge: Mr. Speaker, Sir, first of all, let me thank the County Assembly for coming up with this matter and particularly the lawyers who made a very strong case. Their performance before us was really commendable. However, we need to ask ourselves; what is the evidence which has been presented before us by the County Assembly? What is the evidence that has been presented before us by the County Assembly in pursuit of this impeachment? From their own bundle, the three most important documentation that they have brought here are; a report of the Controller of Budget, that of the Auditor-General and their own report of the committee. I asked the Controller of Budget this question; do you accept the accuracy of the report in relation to counts 1, 2 and 3? The answer was that she was not correct and on Friday, they will resolve this matter. That is the evidence which the County Assembly is relying on. The author, maker and provider of that evidence has already said that that evidence is neither here nor there. Can you crucify a governor on the basis of evidence whose maker says it is wrong?

Secondly, a lot of issues that I have listened to here are from the Auditor-General. I heard one of us asking a very pointed question. He said that the question of hanging is upon us and he will not hang anybody. When he came to provide that evidence to make us hang the Governor, he was very reluctant and the lawyers for the County Assembly never prodded him. I thought they would try to prod the Auditor-General to accept what he had written as being the truth and nothing but the truth. So, again on that account, can we rely on that evidence because the provider of that evidence said he is still in the process of carrying out that audit?

In relation to the other evidence that is here about the irregular procurement contrary to the Public Procurement and Disposal Act, there is a proper legal mechanism for challenging procurement questions. There was no evidence provided that, that mechanism had been pursued nor was there a report made that an offence had been

committed because under that Act, there are offences provided for. Overall, if you look at the charges as laid out up to Count 6, they are matters to do with the Auditor-General.

I have looked at the other charges and Sen. Murkomen has commented on them. There are serious things happening in Nyeri which are not right. In fact, nobody should give the impression here that issues of governance are being conducted by the governor in the manner that is stipulated by the law. That cannot be correct. Our question is; for purposes of impeachment, do they have sufficient evidence to crucify somebody who carries the votes of nearly 500,000 people in Nyeri County on account of evidence of this nature? It is a big volume but if you look at it, the volume does not help us a lot in the sense that it is not authenticated. Just imagine, one of these fine days, you will be taken to court just because of this volume and you are taken to jail for 10 months because it looks very impressive but in it, there is nothing. Like somebody said “*bure kabisa*” but anyway, that is not my---

(Laughter)

The Speaker (Hon. Ethuro): Order, Sen. Orengo!

Sen. Orengo: I withdraw those sentiments.

The Speaker (Hon. Ethuro): You better, because you also know Volume IV is even bigger.

(Laughter)

Sen. Orengo: That is why I am saying things are even wrong with the governor’s office. I think when accusations against the governor are being made like for example, you are putting somebody in acting position for two years, there is something you are trying to tell us; that you are putting somebody there on notice that he can go anytime. Those are not good management practices. You are the one who is the overall in charge of affairs in Nyeri. If anything goes wrong, you are the person to be taken to account.

I thank you and I oppose.

The Speaker (Hon. Ethuro): Sen. Sang!

Sen. Sang: Thank you Mr. Speaker, Sir. I rise to oppose this Motion. I wish to associate myself with the sentiments of Sen. Murkomen and Sen. Orengo. With regard to impeachment, you are talking about “gross”. I think this House has addressed itself on several occasions in each of the various impeachment motions to that particular threshold of “gross”.

Mr. Speaker, Sir, if you look at it from the evidence presented before us, from the counter by the governor, there is no gross violation of the Constitution. However, I want to state clearly that what exists in Nyeri County is a management crisis. Even as we proceed to vote on this matter, it should be clear that to the Governor of Nyeri, there is a management crisis. Sen. Wetangula asked one question; within this management crisis that we are witnessing within Nyeri County, where is the position of the Deputy Governor?

Mr. Speaker, Sir, the governor himself indicated that for quite some time, he has not been around the county because of the reasons that are best known to us, but the Deputy Governor is completely missing in the equation. This means there is a problem within the management and governance structure in the county. For you to keep six

County Officers (COs) on acting capacity, that is a crisis in itself. These are the accounting officers. So, I want to ask the governor that for me, I will be expressing my vote on this particular one. I think the issues are not as gross as required by the Constitution but the governor must sit down with his executive and his county assembly together with the Senator and address the serious management crisis within Nyeri County.

Mr. Speaker, Sir, I also want to address myself to one particular fact. This is the fifth impeachment motion that we are handling as a Senate. However, the enthusiasm with which the National Assembly Members coming from this particular County have shown interest in this matter leaves a lot to be desired. Members of this House have been receiving messages, we saw people demonstrating and we saw people making certain positions known. We want to tell the National Assembly Members from Nyeri that this House will not be directed on how it is going to discharge its mandate. The best we need from them is that when a matter goes to the National Assembly to support this Senate in terms of oversight, giving us the resources to do oversight, they should be at the forefront supporting the Senate and the county assembly so that these institutions mandated by the Constitution can carry out their responsibility, but not to transfer their bitterness which we do not understand for what reason. As a Senate, we will not be directed. We are going to discharge our mandate on the basis of the Constitution.

With those few remarks, I do oppose.

Sen. Haji: Thank you Mr. Speaker, Sir. Under normal circumstances, I would have just said I support all that has been said by the previous speakers. As I said earlier, in all the other four impeachments, I never commented and I never voted. The reason was, instead of me relying on evidence given to other people which came to me as hearsay, I have been in the Chamber today and yesterday to hear both the accused and the accusers giving their evidence and they are cross-examined.

From the onset, I do not find that there is enough evidence in all the three charges to impeach the governor. What we should ask ourselves is; what drove the assembly to impeach the governor at this time, four years down the road? Where were they all this other time?

The other thing that we need to ask ourselves is; is this impeachment something that has resulted from the fact that the governor stopped Members of the County Assembly from getting Kshs6 million for the projects that they wanted to initiate?

Thirdly, we should ask ourselves; is there outside political manipulation to impeach the governor? From all the evidence and everything that we have read and seen, there is an outside influence which this House should not accept. We should deal with the matter based on what we have heard and what we have read here.

Mr. Speaker, Sir, I, therefore, oppose the Motion to impeach the governor.

Sen. Wako: Thank you for giving me this opportunity, Mr. Speaker, Sir. Five minutes is too short so I will be brief.

Of course, there is a ground for gross violation of this Constitution or any other law. The underlining word is “gross”. So, two or three acts may not suffice. It must amount to “gross”. Do we have enough evidence here to show gross violation of human rights?

(Laughter)

Gross violation of law, sorry. Mr. Speaker, Sir, I used to be a special rapporteur on human rights of the United Nations so human rights come easier.

Let me go on. On count seven of the first Charge, I think there has been a violation of law in that although Section 137 of the PFM Act says a forum be set up as soon as practically possible---. I can agree that from 2013 up to now, it has not been set up. Even then, the assurance of the CEC Finance that it will be set within 30 days from 30th March, 2015 has not been done. That is a gross violation. On failure to assent, that is a violation of the Constitution because the grounds are set out in the Constitution for reasons that the governor must either assent or return the Bill back with reasons. He never did that and he cannot rely on the fallback position of 14 days from publication for the Bill to come into force.

On the issue of the appointment of the County Secretary, there has been a violation of the law in that he has been acting for more than six months according to the guidelines given by the Public Service Commission Regulations. They have not taken any steps up to today to amend that situation. They have advertised all posts of all other acting county officers, but not this one. There has been a violation of law on that regard.

On the acting County Executive for Finance, again, there has been a violation of the law on acting. It says you cannot act for more than six months. Here it is even worse because we are told that he does not have a chief officer. That key position of Finance without a chief officer and acting CEC, maybe has led to some of these violations and infringements on the issues of budgeting process and other things. To me, there has been a violation of the law. However, in my mind, the violations of this law do not amount to gross violations of the law on that regard.

I would speak on the other issues, but my colleagues have spoken very ably on the other issues of procurement and budgeting process. I almost agree that the Governor can be found guilty on this enough to send him home. However, the evidence of the Auditor-General and the Controller of Budget made me start doubting and the fact of the matter is that I also sit on the County Public Accounts and Investment Committee, and I know that the audit report, which forms the basis of this allegation, is yet to be completed. It is now before us and in due course it will be examined by that Committee. Therefore on all these issues, they may have come to us just a little bit prematurely. They should have come a little bit later.

Mr. Speaker, Sir, I would agree that although there has been violation of law and although they have relied on the Auditor-General's report and so on, in support of their allegation and so on, those allegations are premature. Therefore, in totality, the grounds are not sufficient enough for me to be able to say, "Mr. Governor go home." Stay on, but please, ensure that you act in accordance to the law within 30 days and fill all the---

The Speaker (Hon. Ethuro): Order, Sen. Wako! You time is up!

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, I rise at this very solemn moment to comment on all the accusations. Accusation number one has got item one concerning the question of expenditure of Kshs352 million plus. The question was not about accounting for that money, it was about non-disclosure. The evidence before this Senate is that the disclosure was not made. The Governor should have convinced this House that he made that disclosure. He did not.

In the same charge, there was the issue of utilization of revenue at source and that is Kshs70 million. The Governor should have taken this opportunity to show this House that the variance of Kshs70 million whereas it was not captured, but then he should have used this opportunity to show us on what he spent the Kshs70 million. He did not.

There was the issue of procurement contrary to public procurement law. Listening to the Governor and his Counsel, they have adequately discharged themselves of that allegation.

In the same charge, there was the issue of lack of prudence in refurbishment of the building amounting to Kshs81.3 million. Neither the Governor nor the Auditor-General has convinced this House that there was prudence in refusal to put up a new building instead of renting or renovating.

The issue of splitting tenders; the Governor has convinced this House. It is a non-issue.

There was in the first charge lack of prudence in use of public funds contrary to Section 201(b) of the Kenya Constitution. The Governor through his lawyers has convinced this House that this allegation is actually wild.

There was the issue of failure to establish Economic Forum and the Governor has discharged himself and so has he on the issue of undermining legislative agenda.

However, on the issue of the Bills that were originated by the County Assembly, we cannot encourage Governors in this country and not even the President of Kenya that he can just be sitting in the office when legislative agenda is brought before him, he does nothing, does not consider and expects people to believe that he has not abdicated his duties. The Governor failed to convince this House.

On charge B on the failure to comply with the law, the Governor has discharged himself.

Charge C on the issue of abuse of office and gross misconduct, the Governor has discharged himself.

I now face this House that since the Governor had discharged himself from C and B, but because there are serious glaring issues in the first charge, this House must tonight rise and send a clear statement that the Senate of the Republic of Kenya practices zero tolerance to corruption.

I, therefore, want to support the Motion that the Governor of Nyeri should go home to send a clear message that Kshs70 million would have changed many lives in Nyeri County. To send a clear message that Kshs352 million---

The Speaker (Hon. Ethuro): Order!

Sen. Wangari: Thank you, Mr. Speaker, Sir. I want to, first of all, congratulate the House for sitting through these proceedings. This is one in history. It is one that we are setting precedence and the first case that we have had in plenary.

When we speak of devolution and audit devolution we expect that it should be able to transform lives. We have said this even in the previous impeachment Motions for other counties that this must be seen to be done. Are there issues in Nyeri? Definitely there are there. Is Nyeri County running smoothly the way it should be? Of course, not! These issues have been demonstrated not just here, they are even in the public domain, not just with this Motion, but even before. We have seen the issues in running of the County Assembly and the County Executive. These issues have actually been a contributor to where we are today.

When the High court pronounced itself on the issue of Governor Wambora on the threshold of impeachment, one thing I read from that ruling was that the “gross” must actually vary from each case to case. It is not a universal measure in every county. When I look at these three charges, one I agree with the Counsel for the Governor. However, in their defense, they do not see Article 181 of the Constitution talk about failure to comply with the law. Personally, I feel Charge B does not even need to move beyond that point.

Secondly, on the issue of natural justice and the rules of natural justice, I am not convinced why the county assembly did not admit the Counsel for the governor to be heard. The defence and reaction we got from the county assembly lawyers was that they did not get a written response from the governor. Since the governor had been accused, it was not really for him to write a letter. It was for him to either be present in person or represented by his Counsel.

The same case should have happened here. Had the governor chosen not to come and sent his lawyers, we would still have listened. That said and done, this impeachment was void *ab initio*. It was faulty from the beginning. I am not convinced that it should warrant impeachment; the threshold has not been met.

However, allow me to talk about a few issues. One that is very close to my heart is the issue of gender balance. Although the governor talked about having one lady who was very ‘soft’, I want to confirm that Nyeri women have been known in the public domain to be very tough.

(Laughter)

We must see more women in the County Government of Nyeri. That is not a favour, but a requirement in the Constitution. It must be done and seen to be done.

Having said that, I want to also comment on the premature bringing of this issue here. Some of these issues are actually being dealt with in the County Public Accounts and Investments Committee. I hope that when the Committee resumes its sittings, we can use the report of this impeachment to deal with some of the issues because they are actually listed and the case is still ongoing.

With those remarks, I oppose the Motion.

The Speaker (Hon. Ethuro): Order, Members! It is about the end of time and we have 16 requests. I will, therefore, reduce the time to a maximum of two minutes.

(Loud consultations)

We will do three minutes each and conclude by 9.30p.m., regardless.

Sen. Gwendu.

Sen. Gwendu: Mr. Speaker, Sir, I wish to congratulate the Members of County Assembly of Nyeri for taking keen interest in changing the lives of the people of Nyeri. They brought this matter here to try and make things better in Nyeri. I also congratulate the Senators for the patience and having the psyche to try and solve the problem in Nyeri.

Having said that, I would like to delve into the roles of the governor. He is given authority over the county government, as provided for in the Constitution. After looking at the bundles of information that were provided in front of us, it clearly proves that there is a problem in Nyeri that needs to be solved by the person given the authority to take care of Nyeri. The governor should play a key role in changing the lives of people in

Nyeri. When devolution was introduced in Kenya, it was supposed change the life of women back in the villages in Nyeri.

Yes, there is a problem, but the other problem is the governor's attitude towards the problem. Is the governor bent on getting the solution? I heard the Counsel talk about finding a solution to the one thing I had a problem with; the gender issue in the county executive. Considering that the Counsel agreed that there is a problem in that sector, to me it is not gross violation. Yes, we need the other gender that is not represented to be in that executive. However, the kinds of issues that have been presented here do not go down as issues that should let the governor to be impeached.

The governor needs to have the attitude of sorting out the problem in Nyeri, since the county government is there to change the lives of people in Nyeri. If at all he will be saved by this Senate, let him first of all make peace with the Members of the County Assembly (MCAs). Truth be told, the bad blood will be there because they brought him here with a view that there is a problem in Nyeri. Since the governor has the authority to take care of the county, he needs to go down and sort out the problem in Nyeri.

I beg to oppose the Motion.

Sen. Hassan: Mr. Speaker, Sir, governors countrywide have made their counties enclaves of despair. They have literally monopolized power unabated. They have created so much frustration that the whole promise of devolution has almost been squandered. That is the frustration that the county assembly is trying to speak to. We have had five impeachments here and this cannot be taken lightly. There is something structurally wrong with county governments.

We call our governors to account and we are not malicious. We call them to account because there is a law and promise of devolution. These are not enclaves of unabated and unqualified power; 47 little regimes almost replica to the Moi regime that we have read about. That is why there is frustration in counties; there is frustration with Members of the National Assembly and this Senate. However, even as we bring the impeachments, this Senate must exercise the high standards, because we are people who are not malicious. We are calling our governors to account because we realize that there is a promise and responsibility that we all have.

Therefore, some of these areas that are alluded to are matters that I wish the county assembly will pursue to the very end. There are institutions like the Ethics and Anti-Corruption Commission and the Directorate of Criminal Investigation; this is not the end of it. Unfortunately, I join my colleagues to agree that the threshold might not have been met in this particular impeachment. However, I feel the frustration of the people of Nyeri and everybody who is talking about devolution and had enormous hope of devolution in this country, but has been squandered by 47 marauding people who use sirens as a symbol of power and prestige rather than deliver to the people in the actual terms.

(Applause)

They engage themselves in wastage; they have cronies and marauding advisers all over them. These people want to impeach you because they want humility in government; an ear and participation of the people. That is the fundamental objective of Article 174; bringing government closer to the people and ensuring participation of the people. What I

heard shows that the Governor of Nyeri fails miserably, under Article 174, in terms of bringing government closer to the people and ensuring democracy. The institution of democracy is the county assembly.

However, again, we are not malicious. We know the mistakes that the governors are making. I hope that Kenyans will correct those mistakes politically. The MCAs should go and correct these mistakes politically and not escalate them to a point where they put this Senate in a corner. We are a House of record and without proper evidence, we cannot convict.

I oppose.

Sen. Mutula Kilonzo Jnr: Mr. Speaker, Sir, corruption and impunity is county No.48 of this country. In this bundle there is corruption and impunity. The governor then uses the mantra, like all of them do, “it was not me; it was somebody else.”

If there was a charge of gross incompetence, Nyeri County counts for it. I am satisfied that the governor was served and he ignored the assembly. I see a systematic contempt of the County Assembly of Nyeri. He ignored them for seven days, because there is a default clause. That is impunity. If he cannot follow the law, dictate the law and show the people of Nyeri what to do, that is impunity.

A county government spends Kshs48 million; Kshs29 million for renovation and the rest to pay rent for one year, and the Auditor-General thinks he can give them a slap on wrist to go home and think why they should pay rent for 10 years. How can the County Government of Nyeri perpetuate itself by imaging that they will be there for another term before the election? This is impunity. The people who were supposed to surcharge these people have given them a slap on the wrist. We are, therefore, left with an unenviable position of saying that we have no evidence and yet we can look at it.

In the Committee of Chepkwony where I sat – this Report is one of the best that we have done – there were various contraventions but it was not gross violation because everybody thinks that you can give governors a slap on the wrist and go home; “It was not you, after all. Somebody else will do it.” The CEC member, produces a report, quotes the wrong section and does not see the problem with it. In fact, I am told that he is a doctor and he is doing finance. Gross negligence! You then wonder why we have a country that is so poor yet, we, leaders, are wining and dining in the best hotels.

The Governor has violated so many laws, as Sen. Wako says. He has operated on the default Clause under 24 and the CEC, 137, yet he is supposed to be the Governor and set up that forum. However, we have a report of the Senate. If we are going to follow precedence, it says there must be gross violation. It shows what is supposed to be done. Nyeri County is---

(The microphone went off)

Sen Cheruiyot: Mr. Speaker, Sir, thank you for giving me this chance. First of all, I wish to congratulate Nyeri County Assembly for work well done. I consider them and rank them along other county assemblies and some of the things that we see are brought to us for those of us who sit in the Committee on Finance, Commerce and Budget. We get to read some of the petitions and you get the sense that this is a county assembly that is serious with the work that it does.

However, the matters that are before us are grave and serious. I have had an opportunity to read through each of the three charges that have been brought before us. I take keen interest in charge “a” where the Governor is accused that as the Chief Executive Officer (CEO), he failed on account of gross violation of the Constitution of Kenya, the County Governments Act, the PFM Act of 2012 and the Public Procurement and Disposals Act. The charge is about prudence and whether the Nyeri County Governor made good decisions. It is not about whether there was theft of money but whether he made the right decisions.

I liken them to two boys who were sent with Kshs100 each to go and buy packets of milk. One chooses to buy two packets in a supermarket and the other buys one in a shop. If you run the test of theft on these boys, none of them will be found to have stolen. If you run the test of prudence, one of them fails. If you run the test of prudence on Nyeri County Government, they will not pass. Something is wrong on the account of the lease of this Karson Photo House. The County Assembly may not have demonstrated to us properly and the people that were supposed to have done the job of studying this document with more prudence have equally failed us. They have come here and contradicted us and we find ourselves in a difficult situation. We make decisions based on the evidence that has been adduced before us.

It is so unfortunate that when we eventually gather here today, we will make a decision that perhaps later or in retrospect, we will look back and question why we let this happen. I hope governors watching us tonight including those of us in this House who aspire to be governors, will not take this as an excuse and know that they can play with public resources and get away with it. Let it be known, and I think this is a yellow card that we will give to the Governor of Nyeri County. If you do not change, a red card awaits you. We will let you ---

(The microphone went off)

Sen. Ong’era: Mr. Speaker, Sir, let me also make my contribution. Clearly, there have been violations that have been committed by Nyeri County Government. The first point that I consider a violation under the Constitution is Article 27(8) of the Constitution that is very clear. There was no promotion of gender equity. Indeed, from the evidence adduced, we saw that there is only one woman CEC member out of 10.

Second is the issue of *ad hoc* sourcing of contracts without clear tendering procedures. This is a violation under Section 34 and 35 of the Public Procurement and Disposals Act.

I come to the abuse of office and this is in the leasing of Karsons Photo House. We were told that renovations amounting to Kshs29 million were done and yet another Kshs10 million was paid as rent. We were further informed that Kshs41 million was spent on renovating the Governor’s offices. These three figures amount to about Kshs80 million which if there was real prudence, it would have constructed a new county office. It grieves me to see that the County Government spent Kshs29 million in renovating a house that did not belong to the County Government. It was private property.

However, looking at all these violations under the Constitution, it takes us to the case of Chepkwony that this Senate eloquently looked at. Does this amount to gross violation as stipulated under the Constitution, Article 181? I think these are violations

that can be dealt with clearly by our Committee on County Public Accounts and Investments (CPAIC). I hope that they will make a finding and surcharge the Governor the Kshs29 million spent on a property that does not belong to the County Government. Under the Chepkwony case, it was clearly stated that the violation must have led to harm, loss or damage to the society and it must show a nexus between the violation and the Governor. Third, the violation must have led to a loss of dignity in the ---

(The microphone went off)

Sen. (Eng.) Muriuki: Mr. Speaker, Sir, I wish to address two issues only. The first one is, this whole process has been going on for close to 10 days now up to when the media started reporting that the Assembly will vote and so on. In my observation, the social media has been awash with all manner of comments and views. However, you will find roughly eight or nine out of 10 of the issues which are being commented on are not on the charge sheet.

This House has even gone ahead and conducted impeachment of a governor. Sometimes when the House finds that there is no reason enough to impeach the governor, again, you find the social media and sometimes personalities and so on with all manner of comments that this person has done this and that. However, the point is, the actual charge does not include those issues. My suggestion is, when impeachment proceedings reach the House, I think the Senate should take enough opportunity to publish and publicise what the issues are so that everybody is aware of what is being looked into.

The other issue is, this time we have done it as the whole House. When we are doing it through a committee, the governor is normally given the last chance to address the House before the voting. Now that we have gone the Plenary way, that seems to have not been included. It would have been okay if this session of debate did not appear. Now that we have commenced again, I suggest that it would be at the discretion of the Speaker that the Governor if he so wishes-just like we have done with others before because we may raise issues which he may wish to clarify or comment upon-may be given a chance if he so wishes to reply.

The Speaker (Hon. Ethuro): Order Senator. Hon. Members, our time is up but I will give the Member for Nyeri County the last opportunity.

(Loud consultations)

Proceed Sen. Kagwe.

Sen. Kagwe: Thank you Mr. Speaker, Sir. May I say from the onset that I am proud of being a Senator and I could not have been prouder than today to see the expression of Members and the honesty with which it is expressed. I feel that it is a historic occasion.

Having said that, whatever the outcome of the vote that is about to take place, it will neither be the victory nor the loss of any party. By the end of the day, Nyeri County's image today is in pain. The image of our county is not good. Whatever the outcome, the members of the county assembly of Nyeri County have raised the bar as far as behaviour and the management of resources is concerned. I think that there is merit in the issues that have been said here regarding the management.

Mr. Speaker, Sir, whenever a county is doing well, the credit for the wellness of that county goes to the governor of the county. It appears to me logically that whenever a county is not doing well, then the responsibility for not doing so well must also be borne by the governor of the county. Therefore, going forward, what we will need in Nyeri County is politics of humility. It is the realisation that in order for us to realise our greatness we must first realise our smallness. We must appreciate that the bigger version in this picture is the people of Nyeri County.

Therefore, I urge that whatever happens in the next few minutes, let the governor and the members of the county assembly and in the chaotic situation where the Members of the National Assembly were involved, let us all realize - including myself - that humility is the way forward. We must bow our heads to God and the people of Nyeri appreciating that those are our employers. We must come down to them and get together and unite so that our people can do well, now and in the future.

Mr. Speaker, Sir, on my part, I vow that I will work with all those parties that are willing. Syria is at war but it is not at war because people are not trying to make them come together. Libya is also at war but she is not at war because nobody is trying to get them together. They are at war because the willingness to humble themselves in front of their people is not there.

Therefore, I am calling for the political willingness and might for us to work together as the people and leadership so that we prosper as a nation.

Finally, even though I have no authority because the Sang Bill which should have brought us together in this kind of circumstance, is pending in court---. The role of the Senator would have been properly defined in order for us to bring people together. I vow that nonetheless, I will work with all willing parties and I will do my best to try and bring our people together in Nyeri County because by the end of the day, it is those people that matter. I pray that may God be on our side. May God help this Senate make a proper decision. We will respect the decision as the people of Nyeri County. May God be with the members of our county assembly and may He help the Governor and indeed, yours truly, the Senator of Nyeri County.

(Applause)

The Speaker (Hon. Ethuro): Order, Members. That brings us to the end of our contributions. The Mover may now reply.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Speaker, Sir, may I say three things in reply to this Motion. First, I am concerned with matters corruption in this country. In the three and a half years I have sat in this Senate, I continue to be tormented with stories of carcinogenic wheelbarrows that cost Kshs100, 000 apiece, money being ferried in vehicles and there was one case where a governor spent public money to buy fish fingerlings to pour into moving waters.

The sword of impeachment and the sword of serving jail term are hanging on the heads of all the corrupt people in the counties like the sword of Damocles. Secondly, I thank the assembly for bringing this case. I do not think the assembly should be trivialised or vilified because they are doing their job. I only hope that next time we have this process, they will give us a good case.

Mr. Speaker, Sir, this House is not a *Kangaroo* court. We do not mob-lynch people. Where there is no evidence, we acquit. Therefore, I decry all the sideshows that we have seen and heard including street parties to celebrate the process of impeachment. That is out of order. May I tell all those who are involved that threats and messages being sent to the Senators trying to intimidate Senators with Short Message Services (SMSs) to decide one way or the other; that they have dialed the wrong number.

May I tell the assembly - this is my personal view that I am entitled to - that this case is a major flop for lack of evidence. However, to the Governor of Nyeri County, the MCAs have a right, if these violations persist - three months from now - to repeat this process over and over again.

Mr. Speaker, Sir, the third and last point, is to explain my role as the Mover of this Motion and my role as---

(Sen. (Dr.) Khalwale stood up in his place)

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

Sen. (Dr.) Khalwale: On a point of order, Mr. Speaker, Sir. Sen. (Prof.) Kindiki is our Senate Majority Leader. How can he assume that this case is going to be lost and say that it is a major flop? Could he speak for himself and if he does not want to speak for himself, could he speak for corruption because it is corruption that is the reason that the children in Tharaka Nithi County have no chance of becoming a professor the way he is. Could he speak for himself?

The Speaker (Hon. Ethuro): Order, Sen. (Dr.) Khalwale! The Senate Majority Leader represents Tharaka Nithi County and is a child of Tharaka Nithi County. So, every child of Tharaka Nithi County has an equal chance to become a professor.

Sen. Murkomen: On a point of order, Mr. Speaker, Sir. Is it in order for the Senator for Kakamega County – and the Chair needs to rule on this - to impute improper motive on all the Senators including Sen. Hassan, Sen. Orengo, Sen. Wako, Sen. Mutula Kilonzo Jnr., Sen. Sang, Sen. Cheruiyot and Sen. Haji who have spoken publicly that they are not satisfied with the evidence and all the other issues and impute improper motive that the reason for that lack of satisfaction is corruption? This should not go unchallenged.

The Speaker (Hon. Ethuro): Order! Order! This will go unchallenged because your challenge is not helpful at all, for the simple reason your contributions have nothing to do with your voting until the vote is taken. That is the only determination, Sen. Murkomen. You can still change your mind.

(Laughter)

The Senate Majority Leader (Sen. (Prof.) Kindiki): Thank you, Mr. Speaker, Sir. That is why you got a First Class in the university. For the avoidance of doubt and for the information of Sen. (Dr.) Khalwale, the fingerlings that were bought corruptly and poured into moving eleven rivers - this was done in Tharaka- Nithi. So, I speak against corruption with the greatest amount of pain and grimace that is possible.

Allow me to say – and this is even important that Sen. (Dr.) Khalwale has raised this issue as I conclude – myself and my brother the Leader of Minority are the movers and seconders of this Motion. The Motion is crafted in a positive language. So, my

moving this Motion has no bearing whatsoever in my role as the Senator for Tharaka-Nithi, having listened to the proceedings that took place for the last two days. For avoidance of doubt, I want to end by quoting Charles Ralph who said:

“Impeachment is a method of removing people whose continued presence in office could cause grave harm to the nation; in this case to the County.”

Mr. Speaker Sir, I do not think in the present case where a shallow case has been presented, where we have seen sideshows, bordering on malicious, capricious and malevolent, political gimmicks---. We cannot allow such an impeachment to proceed before this Senate. Having said that, I nevertheless--- I beg to move this Motion.

The Speaker (Hon. Ethuro): Order, Majority Leader! You have to be careful. Restrict yourself to what you heard in the last two days.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Thank you, Mr. Speaker, Sir. Somebody sent me a not so pleasant SMS as a Senator and I felt offended because you cannot direct me how I will vote. I have shared with few other Senators who received such offensive messages. Having said that, I do not support this impeachment but I beg to move the Motion.

Thank you.

The Speaker (Hon. Ethuro): Order Senators! Therefore we wish to put the question. This is a vote affecting Counties. There may be no greater vote that would affect a County than this one. So, voting will be by delegations. The voting will be electronic.

I am therefore directing that the Division bell be rung for one minute.

(Division bell was rung)

Order, Senators. Close the doors and draw the Bar.

I want to guide you on the voting. We will vote on each of the three grounds. Therefore, we will take three votes. I will announce the results at the end of the voting for the three grounds.

The Senate Majority Leader has asked me to remind you that, for avoidance of doubt, if you vote ‘Yes’ you are voting for the impeachment and if you vote ‘No’, the Motion is negated and so, there will be no impeachment. This is in consideration of the tendency to vote ‘Yes’ always.

Make sure that your cards are working now. You may now commence to vote on the charges, starting with the first charge.

(The Senators proceeded to vote)

DIVISION

ELECTRONIC VOTING

(Question, that the Senate resolves to remove from office, by impeachment, the Hon. James Nderitu Gachagua, the Governor of Nyeri County for 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, put and the Senate proceeded to vote by County Delegations)

AYES: Sen. (Dr.) Khalwale.

NOES: Sen. Adan, Isiolo County; Sen. Boy Juma Boy, Kwale County; Sen. Bule, Tana River County; Sen. Chelule, Nakuru County; Sen. Cheruiyot, Kericho County; Sen. Elachi, Nairobi County; Sen. Haji, Garissa County; Sen. Hargura, Marsabit County; Sen. Hassan, Mombasa County; Sen. Kajwang' M., Homa Bay County; Sen. Karaba, Kirinyaga County; Sen. Kembi-Gitura, Murang'a County; Sen. (Prof.) Kindiki, Tharaka-Nithi County; Sen. (Prof.) Lesan, Bomet County; Sen. (Prof.) Lonyangapuo, West Pokot County; Sen. (Dr.) Machage, Migori County; Sen. Madzayo, Kilifi County; Sen. Melly, Uasin Gishu County; Sen. Mohamud, Wajir County; Sen. Mositet, Kajiado County; Sen. (Eng.) Muriuki, Nyandarua County; Sen. Murkomen, Elgeyo-Marakwet County; Sen. Mutula Kilonzo Jnr., Makueni County; Sen. Mwakulegwa, Taita-Taveta County; Sen. Obure, Kisii County; Sen. Okong'o, Nyamira County; Sen. Orengo, Siaya County; Sen. Sang, Nandi County; Sen. Wako, Busia County; Sen. Wamatangi, Kiambu County; and, Sen. Wetangula, Bungoma County.

ABSTENTION: Sen. Kagwe, Nyeri County.

The Speaker (Hon. Ethuro): Hon. Senators, the results of the Division are as follows:-

AYES: 1

NOES: 31

ABSTENTIONS: 1

The "Noes" have it.

(Question negated by 31 votes to 1)

DIVISION

ELECTRONIC VOTING

(Question, that the Senate resolves to remove from office, by impeachment, the Hon. James Nderitu Gachagua, the Governor of Nyeri County for failure to comply with the law, put and the Senate proceeded to vote by County Delegations)

AYES: Nil

NOES: Sen. Adan, Isiolo County; Sen. Boy Juma Boy, Kwale County; Sen. Bule, Tana River County; Sen. Chelule, Nakuru County; Sen. Cheruiyot, Kericho County; Sen. Elachi, Nairobi County; Sen. Haji, Garissa County; Sen. Hargura, Marsabit County; Sen. Hassan, Mombasa County; Sen. Kajwang' M., Homa Bay County; Sen. Karaba, Kirinyaga County; Sen. Kembi-Gitura, Murang'a County; Sen. (Dr.) Khalwale, Kakamega County; Sen. (Prof.) Kindiki, Tharaka-Nithi County; Sen. (Prof.) Lesan, Bomet County; Sen. (Prof.) Lonyangapuo, West Pokot County; Sen. (Dr.) Machage, Migori County; Sen. Madzayo, Kilifi County; Sen. Melly, Uasin Gishu County; Sen. Mohamud, Wajir County; Sen. Mositet, Kajiado County; Sen. (Eng.) Muriuki, Nyandarua County; Sen. Murkomen, Elgeyo-Marakwet County; Sen. Mutula Kilonzo Jnr., Makueni County; Sen. Mwakulegwa, Taita-Taveta County; Sen. Obure, Kisii County; Sen.

Okong'o, Nyamira County; Sen. Orengo, Siaya County; Sen. Sang, Nandi County; Sen. Wako, Busia County; Sen. Wamatangi, Kiambu County; and, Sen. Wetangula, Bungoma County.

ABSTENTIONS: Sen. Kagwe, Nyeri County.

The Speaker (Hon. Ethuro): Hon. Senators, the results of the Division are as follows:-

AYES: Nil

NOES: 32

ABSTENTIONS: 1

The "Noes" have it.

(Question negated by 32 votes to 0)

DIVISION

ELECTRONIC VOTING

(Question, that the Senate resolves to remove from office, by impeachment, the Hon. James Nderitu Gachagua, the Governor of Nyeri County for Abuse of Office/Gross Misconduct, put and the Senate proceeded to vote by County Delegations)

AYES: Nil

NOES: Sen. Adan, Isiolo County; Sen. Boy Juma Boy, Kwale County; Sen. Bule, Tana River County; Sen. Chelule, Nakuru County; Sen. Cheruiyot, Kericho County; Sen. Elachi, Nairobi County; Sen. Haji, Garissa County; Sen. Hargura, Marsabit County; Sen. Hassan, Mombasa County; Sen. Kajwang' M., Homa Bay County; Sen. Karaba, Kirinyaga County; Sen. Kembi-Gitura, Murang'a County; Sen. (Dr.) Khalwale, Kakamega County; Sen. (Prof.) Kindiki, Tharaka-Nithi County; Sen. (Prof.) Lesan, Bomet County; Sen. (Prof.) Lonyangapuo, West Pokot County; Sen. (Dr.) Machage, Migori County; Sen. Madzayo, Kilifi County; Sen. Melly, Uasin Gishu County; Sen. Mohamud, Wajir County; Sen. Mositet, Kajiado County; Sen. (Eng.) Muriuki, Nyandarua County; Sen. Murkomen, Elgeyo-Marakwet County; Sen. Mutula Kilonzo Jnr., Makeni County; Sen. Mwakulegwa, Taita-Taveta County; Sen. Obure, Kisii County; Sen. Okong'o, Nyamira County; Sen. Orengo, Siaya County; Sen. Sang, Nandi County; Sen. Wako, Busia County; Sen. Wamatangi, Kiambu County; and, Sen. Wetangula, Bungoma County.

ABSTENTIONS: Sen. Kagwe, Nyeri County.

The Speaker (Hon. Ethuro): Hon. Senators, the results of the Division are as follows:-

AYES: Nil

NOES: 32

ABSTENTIONS: 1

The "Noes" have it.

(Question negated by 32 votes to 0)

Hon. Senators, the effect of this is that all the allegations have not been substantiated. So, the Governor remains in office.

ADJOURNMENT

The Speaker (Hon. Ethuro): Order, Members. Now we have come to the end of the business of the Special Sitting. Therefore, the House stands adjourned until Tuesday, 4th October, 2016, at 2.30 p.m., of course unless another petition comes from the Senate Majority Leader or the Senate Minority Leader.

The Senate rose at 10.05 p.m.