



KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT

FOURTH SESSION (2011)

**THE CONSTITUTIONAL IMPLEMENTATION OVERSIGHT
COMMITTEE**

REPORT

**ON THE APPROVAL OF DR. WILLY M. MUTUNGA FOR
APPOINTMENT TO THE OFFICE CHIEF JUSTICE, MS. NANCY M.
BARAZA FOR APPOINTMENT AS DEPUTY CHIEF JUSTICE AND
MR. KERIAKO TOBIKO FOR APPOINTMENT AS DIRECTOR OF
PUBLIC PROSECUTIONS**

Mr. Speaker Sir,

The Constitutional Implementation Oversight Committee is a select committee established under Section 4 of the Sixth Schedule of the Constitution with a mandate of overseeing the implementation of the Constitution and which among other things:-

- (a) *Shall receive regular reports from the Commission on the Implementation of the Constitution on the implementation of this Constitution including reports concerning—*
 - (i) *the preparation of the legislation required by this Constitution and any challenges in that regard;*
 - (ii) *the process of establishing the new commissions;*
 - (iii) *the process of establishing the infrastructure necessary for the proper operation of each county including progress on locating offices and assemblies and establishment and transfers of staff;*
 - (iv) *the devolution of powers and functions to the counties under the legislation contemplated in section 15 of this Schedule; and*
 - (v) *any impediments to the process of implementing this Constitution;*

- (b) *coordinate with the Attorney-General, the Commission on the Implementation of the Constitution and relevant parliamentary committees to ensure the timely introduction and passage of the legislation required by this Constitution; and*

- (c) *take appropriate action on the reports including addressing any problems in the implementation of this Constitution.*

COMMITTEE MEMBERSHIP

The Committee as constituted by the House on 5th October, 2010 comprise of the following members:-

- 1. The Hon. Hussein Mohammed Abdikadir, M.P. **Chairperson**
- 2. The Hon. Millie Odhiambo-Mabona, M.P. **Vice-Chairperson**
- 3. The Hon. Beth Mugo, EGH, M.P.
- 4. The Hon. Chirau Ali Mwakwere, EGH, M.P.
- 5. The Hon. Martha Wangari Karua, EGH, M.P.
- 6. The Hon. (Prof.) Phillip Kaloki, M.P.
- 7. The Hon. (Dr.) Kilemi Mwiria, M.P.
- 8. The Hon. Charles Kilonzo, M.P.
- 9. The Hon. Ekwere Ethuro, EBS, M.P.
- 10. The Hon. Cecily Mbarire, M.P.
- 11. The Hon. (Dr.) Eseli Simiyu, M.P.

12. The Hon. Moriasi Ombui, M.P.
13. The Hon. Amina Abdalla, M.P.
14. The Hon. David M. Ngugi, M.P.
15. The Hon. Ababu Namwamba, M.P.
16. The Hon. Danson Mwazo, M.P.
17. The Hon. Sophia Abdi, M.P.
18. The Hon. (Dr.) Joyce Laboso, M.P.
19. The Hon. Joseph Kasaine Nkaiserry, M.P.
20. The Hon. Charles Onyancha, M.P.
21. The Hon. Alfred Khang'ati, M.P.
22. The Hon. John Mbadi, M.P.
23. The Hon. Elizabeth Ongoro, M.P.
24. The Hon. Rev. Julius Murgor, M.P.
25. The Hon. Lucas K. Chepkitony, M.P.
26. The Hon. Benedict Fondo Gunda, M.P.
27. The Hon. Rachel Shebesh, M.P.

Mr. Speaker Sir,

On the 18th May 2011 you informed the House that H.E the President had after consultation with the Right Hon. Prime Minister nominated for approval by the National Assembly the following persons pursuant to the provisions of Article 166(1) (a), 262 and 157(2) read together with Section 24(2) of the Six Schedule of the Constitution.:-

- i). Dr. Willy Munywoki Mutunga as Chief Justice;
- ii). Ms. Nancy Makokha Baraza as Deputy Chief Justice; and
- iii). Mr. Keriako Tobiko as Director of Public Prosecutions.

You then directed that the names and Curriculum Vitae of the nominees be referred to the relevant Departmental Committee.

In view of the operational challenges facing the Departmental Committee on Justice and Legal Affairs on 2nd June, 2011, you directed that the Constitutional Implementation Oversight Committee (CIOC) take up the matter for consideration and report to the House. Further, given the provisions of Standing Order No.180 which allows public access to proceedings of Committees and, in order to comply with the provisions of Article 73(2)(d) of the Constitution which underscores accountability to the public for decisions and actions taken, you urged members of the public who wished to submit memoranda to do so to the Committee in respect of the three nominees.

As directed, the Committee took up the matter and put up paid advertisements in the dailies inviting members of the public to make representations on the three nominees. The Committee held public hearings where 42 persons gave their views on the nominees. The list of persons who appeared and made oral submissions to the Committee is attached to this report (*Appendix 1*). This is in addition to 41 memoranda on the nominees that the Committee received. The list of persons who sent memoranda to the Committee is attached to this report (*Appendix 2*). The Committee also had a meeting with the nominees where they were asked to clarify issues arising from the public hearings. In total the Committee held eight (8) sittings to deliberate on the suitability of the nominees for appointment to the respective offices.

Mr. Speaker Sir,

The Committee deliberated on the issues raised during the public hearings together with the submissions made by the nominees and now recommends that the nominees be appointed to the respective offices to which they have been nominated; with some members expressing reservations on the nomination of the DPP and with Honourable John Mbadi and Honourable Ababu Namwamba registering his specific objection on the nomination of the DPP.

The Committee further recommended that the approval of the Director of Public Prosecutions be subject to further investigations on the outstanding issues with objections by Hon. Mwakwere and Hon. Ombui.

The Committee also recommends that future nominations submitted to Parliament for approval be accompanied by an explanatory report setting out the criteria and methodology used by the interviewing body in settling for such nominees. This information would enrich the deliberations of the relevant vetting committee of Parliament and the House as a whole.

Acknowledgements

The Committee wishes to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate. The Committee also appreciates the media for live coverage of its proceedings during the vetting process. Further, the Committee thanks members of the public who made submissions, orally and in writing, to the Committee.

Mr. Speaker Sir,

It is my pleasant duty and privilege, on behalf of Constitutional Implementation Oversight Committee, to present and commend this report on the approval to the

offices of the Chief Justice, Deputy Chief Justice and Director of Public Prosecutions, to the House for adoption pursuant to the Communication from the Chair made on 2nd June, 2011 and in accordance with Section 4 of the Sixth Schedule to the Constitution.

SIGNED.....

**HON. ABDIKADIR HUSSEIN MOHAMED, M.P
CHAIRPERSON**

DATE:

BACKGROUND

1. Section 24 (1) of the Sixth Schedule to the Constitution provides that the Chief Justice in office before the effective date shall, within six months after the effective date vacate office. The effective date being 27th August, 2010, the then Chief Justice vacated office on 27th February, 2011.
2. On 28th January, 2011, the office of the President announced names of four nominees for the constitutional offices of Chief Justice (CJ), Attorney General (AG), Director of Public Prosecutions (DPP), and Controller of Budget. Shortly thereafter, the Right Honourable Prime Minister asserted that the said nominations had been done without the requisite consultation with his office, as required by the National Accord and Reconciliation Act, 2008.
3. The matter raised considerable public outcry, with different groups issuing press statements on the same, including the Commission for the implementation of the Constitution (CIC) and the Judicial Service Commission (JSC). The matter also found its way to the House and the High Court (*Nairobi High Court Petition No 16 of 2011*).
4. The Honourable Speaker made a ruling on 17th February, 2011 to the effect that the nominations were unconstitutional.
5. On 22nd February, 2011 H.E the President withdrew the list of nominees to constitutional offices and directed that the appointment of the Chief Justice and the Deputy Chief Justice be done by the Judicial Services Commission (JSC). He also stated that he would hold consultations with the Rt. Honourable Prime Minister on the nomination of the Attorney General and thereafter appoint a panel to advertise and interview candidates for the position of Director of Public Prosecutions.
6. On 4th March, 2011 the Judicial Service Commission through *Gazette Notice No. 2061* advertised the vacancy in the position of Chief Justice and the Deputy Chief Justice and invited the public to make applications. Twenty six persons applied for the position of Chief Justice while fourteen others applied for position of Deputy Chief Justice. Soon thereafter, ten applicants were short-listed and interviewed for the position of Chief Justice while eight applicants were short-listed and interviewed for the position of Deputy Chief Justice.
7. On 13th May, 2011 the Judicial Service Commission nominated Dr Willy Muniyoki Mutunga and Ms. Nancy Baraza as Chief Justice and Deputy Chief Justice respectively. The JSC then forwarded the names to the President for formal nomination and eventual approval by Parliament.

8. On 17th May, 2011 H.E the President and the Right Honourable Prime Minister endorsed the nominees for the posts of Chief Justice, Deputy Chief Justice and Director of Public Prosecution, paving the way for vetting by Parliament.
9. Owing to the challenges facing the Departmental Committee of Justice and Legal Affairs, on 2nd June 2011 the Honourable Speaker in a communication to the House referred the names of the three nominees to the Constitution Implementation Oversight Committee for vetting.
10. The Honourable Speaker directed the Constitution Implementation Oversight Committee to submit its recommendations on the nomination to the House on Wednesday, 8th June 2011. On that date, the Committee reported progress and requested an extension of time to enable the Committee to conclude its work. The Honourable Speaker then directed the Committee to table its report on Tuesday 14th June 2011.
11. In conducting the vetting process, the Committee examined the candidates against the criteria set out in the Second Schedule of the *Commission for the Implementation of Constitution Act, 2010* (Criteria for vetting/approval of nominees for appointment to public office by the National Assembly). That criteria requires the nominees to disclose information on their personal and professional life including their political affiliations, tax compliance and potential conflict of interests. Issues raised by members of the public during public hearings and memoranda presented to the Committee were also put to the nominees.

CONSIDERATION OF THE NOMINEES BY THE COMMITTEE

NOMINATION OF DR. WILLY MUNYWOKI MUTUNGA FOR THE POSITION OF CHIEF JUSTICE

Qualifications

The qualifications for appointment to the office of Chief Justice are set out in several provisions of the Constitution. Article 166(1)(a) provides that the President shall appoint the Chief Justice and Deputy Chief Justice “in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.

Article 166(2) further requires that each judge of a superior court (of whom the Chief Justice is a part) shall be appointed from among persons who-

- (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under sub-Articles (3) to (5) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Article 166(3(a) provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.

Section 24(2) of the Sixth Schedule to the Constitution provides that “a new Chief Justice shall be appointed by the President, subject to the National Accord and Reconciliation Act and after consultation with the Prime Minister and with the approval of the National Assembly.

Section 29 also applies to the appointment of the Chief Justice. It provides that-

- (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.
- (2) Unless this Schedule provides otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.

Views Received by the Committee

In supporting Dr. Willy Mutunga's nomination, members of the public made the following submissions:-

- i). He is highly qualified, highly trained with critical and objective judgment, attributes which will enable him to serve in the position.
- ii). He has been a mentor to many.
- iii). He has for a long time been devoted to issues of access to justice for all and has tirelessly fought for a democratic, free, just and transparent Kenya and for a new constitution.
- iv). He has the necessary competence, he is reform minded and is a mentor to many.
- v). He has been involved in a lot of community development issues while at the Ford Foundation such as spear-heading the provision of housing to the less fortunate members of society in slums areas.
- vi). He is recognized nationally and internationally as a person of integrity who is principled.
- vii). He is humble, understanding and patriotic person who interacts with all persons especially the poor and he has fought against human rights violations and oppression.
- viii). He is an intellectual and an institution builder. He was instrumental in the formation of the University of Nairobi Staff Union, the Kenya Human Rights Commission and the Citizens Coalition for Constitutional Change (4Cs).

- ix). He is an individual with a morally upright character whose family life was interfered with during detention while fighting for constitutional change.
- x). His nomination was arrived at following an open and competitive process.
- xi). He would restore institutional confidence in the Judiciary,
- xii). He would dispense justice without fear or favour.
- xiii). He advocates for the marginalized communities, believes in constitutionalism and is not a tribalist.
- xiv). He is an Independent minded person who would be guided by the Constitution and the law.

In opposing Dr. Mutunga's nomination, members of the public made the following submissions-

- i). He did not meet the threshold under Article 166 (2)(c) on high moral standards.
- ii). He champions for the rights of homosexuals and was the advocate on record in the registration of the Kenya Gays and Lesbians Trust (KEGALE).
- iii). He has been unable to manage his family affairs and cannot therefore be entrusted with the management of the judiciary.
- iv). He does not uphold family values.
- v). He would not be a role model to young Kenyans particularly owing to the ear stud that he dons.
- vi). He works for an institution that advocates for aggressive population control.

The Observations of the Committee

The Committee having considered the curriculum vitae of Dr. Mutunga and the representations made by members of the public and having interviewed the nominee made the following observations on the nomination of Dr. Mutunga to the position of Chief Justice-

a. The Process of Nomination

The Committee reflected and deliberated on the process that was followed in the nomination of the Chief Justice in the light of the provisions of Articles 166(1)(a) and 172 of the Constitution and section 24(2) and 29 of Sixth Schedule to the Constitution. Two schools of thought emerged.

On the one hand, some members expressed the view that the Constitution at section 24(2) and 29 of the Sixth Schedule to the Constitution made specific provisions as to how a Chief Justice is to be nominated in the transitional period pending the next General Elections. Consequently, in their view, Articles 166(1)(a) and 172 were, in so far as the appointment of the Chief Justice pending the next General Elections was concerned, suspended. The view was therefore taken that in the transitional period before the next General Elections, the Judicial Service Commission did not have any role to play in the process of nomination of a Chief Justice. It was therefore argued that in these circumstances the process of nomination of the Chief Justice had not strictly complied with the requirements of the Constitution.

Other members expressed the view that the transitional provisions under sections 24(2) and 29 of the Sixth Schedule to the Constitution were not to be read in isolation but as “explanatory notes” or provisions whose objective was to aid the interpretation and application of the substantive provisions of Articles 166(1)(a) and 172 of the Constitution which were not suspended and were therefore applicable. Such members argued that the nomination process was therefore in order and that the involvement of the Judicial Service Commission in the nomination process was in tandem with the requirements of the Constitution.

Members observed that the two different interpretations on the nomination process for the Chief Justice had been debated at several fora and had been raised by members of the public in their representations to the Committee. Notwithstanding the two different interpretations on the process of nomination of the Chief Justice, the Committee resolved to proceed with the consideration of the candidate.

The Committee observed that notwithstanding the different interpretations, the executive had forwarded the names to Parliament. The Committee therefore left the issue of interpretation to the courts of law.

b) The Educational Qualifications of the Nominee

Article 166(2)(a) of the Constitution which sets out the educational qualifications for judges of superior courts requires that they be appointed from amongst members who “hold a law degree from a recognized university or are advocates of the High Court of Kenya or possess an equivalent qualification in a common-law jurisdiction”.

It was observed that Dr. Mutunga is the holder of a Bachelor of Laws (LL.B) Degree and a Master of Laws (LL.M) Degree both awarded by the University of Dar es Salaam, Tanzania in 1971 and 1974 respectively and a Doctor of Jurisprudence (JSD)

awarded by Osgoode Hall Law School, Toronto in 1992. The Committee was satisfied that the nominee met the educational requirements stipulated in Article 166(2)(a) of the Constitution.

c) Experience

Article 166(2)(b) and (3) of the Constitution stipulate the experience required of a person seeking to be appointed Chief Justice. Article 166(2)(b) requires that a judge of a superior court be appointed from among persons who “possess the experience required under sub-Articles (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction”.

Article 166(3)(a) of the Constitution provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in aggregate, to fifteen years.

The Committee observed that Dr. Mutunga was the Regional Representative, Ford Foundation a position he had held from April 2009. Prior to that, between 2004 and March 2009, he had held the positions of Acting Regional Representative and Program Officer in the same organization. Dr. Mutunga had also served as the Executive Director of the Kenya Human Rights Commission between 1998 and 2004. He also served as the Acting Executive Director of the Legal Advice Centre between 1992 and 1993 and was a lecturer and a senior lecturer between 1974 and 1982 at the Faculty of Law, University of Nairobi.

The Committee found that Dr. Mutunga had extensive experience in academia and in the field of human rights and social justice. The Committee therefore concluded that Dr. Mutunga satisfied the educational requirements stipulated under Article 166(2)(b) and (3) of the Constitution.

Some concern was raised on the fact that the nominee had not previously served in the judiciary and would be a new-comer to the judiciary. In this regard, the Committee observed that Article 166(3) of the Constitution made provision for the appointment of a Chief Justice who had either served as a superior court judge, or who had served as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal fields. The Committee further observed that

Chief Justices had been appointed from outside of judiciary in Kenya and in countries such as South Africa (Arthur Chaskalson was appointed First President of South Africa's new Constitutional Court in 1994 having left a legal practice to become a human rights lawyer), the United States of America (Earl Warren was appointed the 14th Chief Justice of the United States Supreme Court in 1953. Prior to that he had a highly successful career in politics), Trinidad and Tobago (In 1995 Michael de la Bastide was appointed Chief Justice straight from private practice) and Hong Kong (in 2010, Geoffrey Ma was appointed as Chief Justice. Before that he was a barrister at law in Singapore).

d) Moral character, integrity and impartiality

Article 166(2)(c) of the Constitution requires that each judge of a superior court shall be appointed from among persons who "have a high moral character, integrity and impartiality". The Committee received a number of representations concerning the moral character of the nominee. Questions were raised concerning the sexuality of the nominee and his ear stud. The Committee put each of these issues to the nominee during his interview and the nominee responded to the issues to the satisfaction of the Committee.

Regarding his marital status and family values, various concerns had been raised before the Committee. The nominee informed the Committee that he was married, separated and that he had filed for divorce a process he described as painful and difficult. The nominee further informed the Committee that he had children. The Committee was satisfied with the responses of the nominee on his marital status and family values.

Representations were also made to the Committee regarding the perceived liberal views of the nominee and the impact that this would have if he were to be appointed Chief Justice. Some described the nominee as an activist and expressed concern that this would impact his performance in the judiciary. Others however expressed the view that the nominee's past involvement in activism would enrich his performance in the judiciary.

Representations were also made to the Committee that the ideals and principles of the nominee's employer would impact negatively on the nominee's execution of his functions as Chief Justice and as a member of the Supreme Court. In response to these concerns, the nominee informed the Committee that despite his personal views and beliefs on various matters, if appointed Chief Justice he would strictly observe and operate within the confines of the Constitution and would be guided by the Constitution in the execution of his functions.

On the whole, the Committee was satisfied with the responses of the nominee on matters of moral character, integrity and impartiality and therefore found that the nominee satisfied the requirements of Article 166(2)(a) of the Constitution.

NOMINATION OF MS. NANCY MAKOKHA BARAZA FOR THE POSITION OF DEPUTY CHIEF JUSTICE

Qualifications

The qualifications for appointment to the office of Deputy Chief Justice are set out in Article 166(1)(a) of the Constitution which provides that the President shall appoint the Chief Justice and the Deputy Chief Justice "in accordance with the recommendation of the Judicial Service Commission and subject to the approval of the National Assembly.

Article 166(2) further requires that each judge of a superior court, of whom the Deputy Chief Justice is a part, shall be appointed from among persons who-

- (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under sub-Articles (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Article 166(3)(a) provides that the Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or
- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years.

Section 29 also applies to the appointment of the Chief Justice. It provides that-

- (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.
- (2) Unless this Schedule provides otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, until after the first elections under this Constitution, the President

shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.

Views Received by the Committee

In supporting Ms. Baraza's nomination, members of the public made the following submissions:-

- i). She is eminently qualified and has the requisite academic and professional qualifications and the experience required for the position for which she has been nominated.
- ii). She was a member of the CKRC and is currently the Vice Chairperson of the Kenya Law Reform Commission.
- iii). She is very articulate on human rights and women's issues.
- iv). She is a highly respected member of the LSK.
- v). Her nomination is in line with the principle of affirmative action for women.
- vi). Her nomination gives is a demonstration of the hope given to women and other marginalized groups.

In opposing Ms. Baraza's nomination, members of the public made the following submissions-

- i). Her values and principles are not in tandem with religious and cultural values.
- ii). Her past activities, particularly with the Federation of Women Lawyers in Kenya (FIDA), and her values are not in consonance with the constitutional provisions on the right to life and family.
- iii). She lacks the necessary moral authority to be Deputy Chief Justice.
- iv). She does not respect family values and is divorced.
- v). She supports homosexuality.
- vi). She cannot be a role model to young Kenyans.
- vii). She lacks judicial experience.

The Observations of the Committee

The Committee considered the curriculum vitae of Ms. Baraza and the representations made by members of the public and interviewed the nominee. Having done so, the Committee made the following observations on the nomination of Ms. Baraza to the position of Deputy Chief Justice-

a. The Educational Qualifications of the Nominee

Article 166(2)(a) of the Constitution in setting out the educational qualifications for judges of superior courts requires that they be appointed from amongst members who “hold a law degree from a recognized university or are advocates of the High Court of Kenya or possess an equivalent qualification in a common-law jurisdiction”.

The Committee observed that Ms. Baraza is the holder of a Bachelor of Laws (LL.B) Degree and Master of Laws (LL.M) awarded by the Faculty of Law, University of Nairobi in 1980 and 2005, respectively. The nominee also holds a Diploma in Legal Studies from the Kenya School of Law awarded in 1981. Ms. Baraza is a PhD candidate registered at the University of Nairobi. The Committee observed that Ms. Baraza holds Certificates in various disciplines: Alternative Conflict Resolution Mechanisms, Judicial Reform for Improving Governance in Anglophone Africa, Change Management, Changing the Law through Successful Reform and Contract Drafting and Negotiation.

The Committee was satisfied that the nominee met the educational requirements stipulated in Article 166(2)(a) of the Constitution.

b) Experience

Article 166(2)(b) and (3) of the Constitution stipulate the experience required of persons to be appointed Deputy Chief Justice. Article 166(2)(b) requires that a judge of a superior court be appointed from among persons who “possess the experience required under sub-Article (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction”.

Article 166(3)(a) of the Constitution provides that the Chief Justice and other judges of the Supreme Court (of whom the Deputy Chief Justice is a part) shall be appointed from among persons who have-

- (a) at least fifteen years experience as a superior court judge; or

- (b) at least fifteen years experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in aggregate, to fifteen years.

The Committee observed that Ms. Baraza was the Deputy Chairperson of the Kenya Law Reform Commission and chairperson of the Media Council Complaints Commission. Ms. Baraza was also a part-time Lecturer at the Kenya School of Law, a Lecturer at the School of Law, Kenyatta University and a Council Member of Egerton University.

The Committee noted that Ms. Baraza had served as a Commissioner of the Constitution of Kenya Review Commission and was a founder member and past chairperson of the International Federation of Women Lawyers (FIDA). The Committee found that the nominee held extensive experience in the legal profession and therefore satisfied the requirements of Article 166(2)(b) and (3) of the Constitution.

Some concern was raised on the fact that the nominee had not previously served in the judiciary and would be a new-comer to the judiciary. In this regard, the Committee observed that Article 166(3) of the Constitution made provision for the appointment of a Chief Justice who had either served as a superior court judge, or who had served as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal fields. The Committee further observed that Chief Justices had been appointed from outside of judiciary in Kenya and in countries such as South Africa (Arthur Chaskalson was appointed First President of South Africa's new Constitutional Court in 1994 having left a legal practice to become a human rights lawyer), the United States of America (Earl Warren was appointed the 14th Chief Justice of the United States Supreme Court in 1953. Prior to that he had a highly successful career in politics), Trinidad and Tobago (In 1995 Michael de la Bastide was appointed Chief Justice straight from private practice) and Hong Kong (in 2010, Geoffrey Ma was appointed as Chief Justice. Before that he was a barrister at law in Singapore).

c) Moral character, integrity and impartiality

Article 166(2)(c) of the Constitution requires that each judge of a superior court shall be appointed from among persons who "have a high moral character, integrity and impartiality". The Committee received a number of representations concerning the moral character of the nominee. Questions were raised by members of the public on the sexuality of the nominee and on her position on abortion and on

homosexuality particularly in the context of her ongoing PhD studies on the subject of *“Equality and Non-Discrimination Principles and the Question of Homosexuality in Kenya”*. The nominee was also questioned on her marital status and her family values.

Questions were also put to the nominee regarding concerns raised by members of the public to the effect that she was too liberal and was an activist and that this would impact her service as Deputy Chief Justice if appointed. In response to these concerns, the nominee informed the Committee that despite her personal views and beliefs on various matters, if appointed, she would dispense her duties as Deputy Chief Justice by dutifully observing and applying the provisions of the Constitution.

The Committee was satisfied with the responses of the nominee to the concerns raised on moral issues and the Committee therefore found that the nominee met the requirements of Article 166(2)(c) of the Constitution.

NOMINATION OF MR. KERIAKO TOBIKO FOR THE POSITION OF DIRECTOR OF PUBLIC PROSECUTIONS

Qualifications

Article 157(3) of the Constitution provides that “the qualifications for appointment as Director of Public Prosecutions are the same as for the appointment as a judge of the High Court”.

The qualifications for appointment as a judge of the High Court are set out in Article 166(2) and (5) of the Constitution. Article 166(2) requires that each judge of a superior court, of whom a High Court judge is a part, shall be appointed from among persons who-

- (a) hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;
- (b) possess the experience required under sub-Articles (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and
- (c) have a high moral character, integrity and impartiality.

Article 166(5) of the Constitution provides that each judge of the High Court shall be appointed from among persons who have-

- (a) at least ten years experience as a superior court judge or professionally qualified magistrate; or
- (b) at least ten years experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

Section 29 of the Sixth Schedule to the Constitution would also apply in the transitional period. It requires that-

- (1) The process of appointment of persons to fill vacancies arising in consequence of the coming into force of this Constitution shall begin on the effective date and be finalized within one year.
- (2) Unless this Schedule provides otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National

Assembly, until after the first elections under this Constitution, the President shall, subject to the National Accord and Reconciliation Act, appoint a person after consultation with the Prime Minister and with the approval of the National Assembly.

Views Received by the Committee

In supporting the nomination of Mr. Tobiko, the public made the following representations. That:-

- i). He is highly qualified and is an outstanding and brilliant lawyer with an impeccable academic record.
- ii). He has been an active member of various commissions such as the Njonjo Land Commission and the Constitution of Kenya Review Commission (CKRC).
- iii). His nomination was competitive, transparent, above board and took into consideration Article 250(4) of the Constitution on regional and ethnic diversity of the people of Kenya.
- iv). He is competent and would properly discharge his functions as DPP.
- v). He scored 87% in the interview and was ranked the best candidate.
- vi). He has over 21 years experience in the legal profession and 5 years as the Chief Public Prosecutor.
- vii). He is a person of high moral character, integrity and impartiality as envisaged in Article 166 (2)(c).
- viii). He has played a critical role in reforming the office of the Chief Public Prosecutor.
- ix). He represents minorities/ marginalized groups.

In opposing Mr. Tobiko's nomination, members of the public made the following submissions-

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- i). This is a new dispensation that required a new DPP.
- ii). That the DPP nominee seems to be riding on the integrity of the nominees to the positions of Chief Justice and Deputy Chief Justice.
- iii). He has previously served in the position of DPP yet no tangible achievements can be attributed to him.
- iv). He made false accusations against the CKRC Chair with a view to having him removed from office.

- v). He breached the CKRC's rules of confidentiality and sought constantly to undermine the independence and integrity of the Commission by reporting to the President and some key politicians on matters that were confidential.
- vi). He engaged in a campaign to disrupt the work of the Commission so as to prevent the drafting and adoption of the new constitution by claiming consultations had not been done even after the Commission had concluded the consultations with the people and analyzed their recommendations.
- vii). As Chief Public Prosecutor, he has acted in contravention of his duties and responsibilities and has failed to pursue allegations of corruption against people in high office.
- viii). Mr. Tobiko cannot be trusted with the heavy responsibility of protecting the innocent or the prosecution of suspects as exemplified in the recent acquittal of Hon. William Ruto and others who charged with illegal acquisition of land.
- ix). Mr. Tobiko was an interested party in some of the cases such as the Anglo-Leasing Case having previously represented some of the suspects as a lawyer in private practice and that this would result in conflict of interest.
- x). He has not delivered as a prosecutor and is not effective.
- xi). He has been partial in the handling of number of cases.
- xii). The process of nominating Mr. Tobiko to the office of Director of Public Prosecution was not open and transparent.
- xiii). Mr. Tobiko had sabotaged the prosecution of his former client, Livingstone ole Ntutu in Criminal Case No. 2157 of 2003 – R vs. Livingstone ole Ntutu and Onyambu.
- xiv). He had, through proxies, solicited for a bribe of Kshs. 5 million in corruption-related charges against Mr. Sammy K. Kirui.
- xv). In High Court Succession Cause No. 1263 of 2000 – in the matter of the estate of Lerionka Ole Ntutu (deceased) he had certified the Consent in which Naiyanoi Ntutu, who was listed as number 42 and to whom ID number 1269818 was ascribed, was, at the time, a minor of six years of age and thus could not have possibly held an identity card.

The Observations of the Committee

The Committee considered the curriculum vitae of Mr. Keriako Tobiko, the representations made by members of the public and interviewed the nominee on two occasions. The Committee made the following observations on the nomination of Mr. Keriako Tobiko to the position of Director of Public Prosecutions-

a. The Process of Nomination

The Committee deliberated on the process that was followed in the nomination of the Director of Public Prosecutions. Article 157(2) of the Constitution provides that “the Director of Public Prosecutions shall be nominated and, with the approval of the National Assembly, appointed by the President”.

The Committee observed that His Excellency, the President, had, by Gazette Notice No. 2649 of 16th March 2011, established an Interview Panel which was mandated to “receive and process applications and interview and recommend at least three (3) suitable candidates for consideration for nomination to the Office of the Director of Public Prosecutions”. It is from the three names forwarded to the President by the Interview Panel that the President had nominated Mr. Keriako Tobiko for appointment as Director of Public Prosecutions and subsequently forwarded his name to the National Assembly for approval.

The Committee observed that although not an express requirement of Article 157(2) of the Constitution, the methodology adopted by the Interview Panel was opaque and did not take into account the constitutional values and principles of participation of the people, transparency and accountability.

b) The Educational Qualifications of the Nominee

Article 166(2)(a) of the Constitution requires that a Director of Public Prosecutions be appointed from amongst persons who “hold a law degree from a recognized university or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction”. The Committee observed that Mr. Tobiko holds a Bachelor of Laws (LL.B) Degree (First Class Honours) from the University of Nairobi awarded in 1989, a Post Graduate Diploma in Law awarded in 1990 from the Kenya School of Law and a Master of Laws (LL.M) Degree awarded in 1991 by Cambridge University. In 1991, Mr. Tobiko was admitted for a PhD programme on “the Regulation of Securities Markets in Sub-Saharan Africa”.

The Committee was satisfied that the nominee’s educational qualifications, which were observed to be outstanding, met the requirements stipulated in Article 166(2)(a) of the Constitution.

c) Experience

Article 166(2)(b) and (5) of the Constitution stipulate the experience required of a person to be appointed Director of Public Prosecutions. Article 166(2)(b) requires that the person “possess the experience required under sub-Articles (3) to (5) as

applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction”.

Article 166(5) of the Constitution provides that each judge of the High Court shall be appointed from among persons who have-

- (a) at least ten years experience as a superior court judge or professionally qualified magistrate; or
- (b) at least ten years experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or
- (c) held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.

The Committee observed that Mr. Tobiko had served as the Director of Prosecutions and subsequently as Chief Public Prosecutor from May 2005 a position he continued to hold. Prior to that, Mr. Tobiko was the senior partner in the firm of Tobiko & Associates from 1993 to 2005. Mr. Tobiko had also served as an assistant lecturer in the School of Law, University of Nairobi, a legal officer with the Public Law Institute and a bank clerk with Barclays Bank (Kenya) Limited. Mr. Tobiko had also served as a Commissioner in the Commission of Inquiry into the Land Law Systems in Kenya, and as a Commissioner in the Constitution of Kenya Review Commission.

The Committee observed that Mr. Tobiko’s experience met the requirements of Article 166(2)(b) and (5) of the Constitution.

d) Moral character, integrity and impartiality

Article 166(2)(c) of the Constitution requires that each judge of a superior court shall be appointed from among persons who “have a high moral character, integrity and impartiality”. The Committee received a number of representations from members of the public concerning the integrity of the nominee. The concerns raised in the representations were put to the nominee by the Committee. Having considered the issues raised and the responses of the nominee, various views were proffered by members of the Committee on the suitability of the nominee for appointment to the position of Director of Public Prosecutions.

The following issues were deliberated by the Committee-

i). The Handling of Nairobi Chief Magistrate Court Criminal Case No. 2157 of 2003 – Republic vs. Livingstone Kunini Ole Ntutu and Onyambu

In a letter written to the Attorney-General by Justice M. Ole Keiwua dated 12th May 2006, Justice Keiwua alleged that Mr. Tobiko, as Director of Public Prosecutions, had sabotaged the prosecution of his former client Mr. Livingstone Kunini ole Ntutu in Criminal Case No. 2157 of 2003. Justice Keiwua alleged that crucial evidence had been withheld in the prosecution of the matter at the instigation of, amongst others, Mr. Tobiko. Justice Keiwua indicated that he had previously requested that a *nolle prosequi* be entered so as to pave way for the appointment of a neutral prosecutor who would prosecute the case outside of the interference of Mr. Tobiko.

In a letter dated 3rd February 2006 addressed to the Attorney-General, the Directors of Olkiombo Limited also raised similar fears regarding the handling of Criminal Case No. 2157 of 2003 by Mr. Tobiko as the Director of Public Prosecutions stating that “we must complain [that] the office of Director of Public Prosecutions has compromised the prosecution. We refer to an incident recently before the Chief Magistrates Court where a State Counsel stopped the prosecution before seven crucial witnesses had testified”. The letter further states “we see this as a move by Mr. Keriako Tobiko, the Director of Public Prosecutions to bail out his client Ntutu. The DPP acted for Ntutu and his company Ilingina Contractors Ltd in a transaction which involved illegal excision and registration of Mau Forest Trust Land”. They further claimed that “DPP while in private practice acted for Ntutu and his company in connection with subdivision No. Narok/CIS/Mara/Ololulunga/9678”.

The Committee was informed that Mr. Livingstone Kunini ole Ntutu the accused in Criminal Case No. 2157 of 2003 was acquitted in a Judgment delivered on 30th May 2006 as the State had failed to prove its case against the accused. No appeal was lodged by the State against the decision of the Court.

The Committee was concerned that despite the complaints of conflict of interest made to the Attorney-General on this matter, the request for the appointment of a neutral prosecutor was not acceded to and there was no evidence of any action taken on the part of Mr. Tobiko to address the claims of conflict of interest.

Related to this, an issue was raised concerning High Court Succession Cause No. 1263 of 2000 – in the matter of the estate of Lerionka Ole Ntutu (deceased). A Consent to the Making of Grant of Administration dated 20th June 2000 was produced before the Committee. The Consent indicated that Mr. Tobiko, the advocate on record, had certified that the persons whose names and signatures

were indicated on the Consent had appeared before him and that having understood the document, they had freely and voluntarily executed it. Representations were made that Naiyanoi Ntutu, who was listed as number 42 and to whom an ID (Number 1269818) was ascribed, was, at the time she allegedly appeared before Mr. Tobiko, a minor of six years of age and thus could not have possibly held an identity card.

On this, Mr. Tobiko explained that the succession cause involved numerous dependants and that he had given the dependants the Consent and asked them to arrange for signatures and subsequently return the document to his office. He then proceeded to certify the documents on 20th June 2000. Some members expressed concern about the casual and reckless manner in which the matter had been handled, more so by a person seeking appointment to the office of Director of Public Prosecutions.

ii). The Prosecution of the Anglo-Leasing Cases

Members were satisfied with the manner in which the apparent conflict of interest in Criminal Case No. 8 of 2005 – Republic vs. Sylvester Mwandime Mwaliko & 3 Others and Criminal Case No. 338 of 2005 – Republic vs. Zakayo arap Cheruiyot & John Agili Alao had been handled. In a letter dated 23rd June 2005, the Attorney-General appointed Mr. Joe W. Okwach, Senior Counsel, as the special advocate to prosecute the matters on behalf of the Republic on the ground that Mr. Tobiko had acted for one of the accused persons in one of the cases.

That notwithstanding, some members expressed concern over the pace at which the prosecution of the Anglo-Leasing matters was proceeding arguing that during Mr. Tobiko's tenure as Director of Public Prosecutions, there had been no significant progress in the prosecution of those cases. Other members also expressed the view that if the nominee were to be confirmed for appointment, the future of the Anglo-Leasing Cases would be uncertain.

iii). The Prosecution of Nairobi CMCR No. 973 of 2004 – Republic vs. William Samoei Ruto and 7 Others

Some members expressed concern at the manner in which CMCR No. 973 had been handled by the office of the Chief Public Prosecutor resulting in the acquittal of the accused persons for failure by the prosecution to prove its case. Such members were concerned that crucial witnesses, who they argued were available and accessible, were not produced to give evidence thus resulting in the acquittal for failure by the prosecution to prove the case. They therefore took the view that the prosecution had deliberately withheld evidence.

It was however argued, by some members, that the Chief Public Prosecutor could not be accused of failing to produce witnesses as the investigatory organ was the police force and not the office of the Chief Public Prosecutor. It was further argued that the matter had taken a considerable period of time and that in the intervening period a number of witnesses had died while others could not be traced by the investigating officers.

iv). Past Record and Performance

Regarding his performance since appointment as Director of Public Prosecutions and subsequently as Chief Public Prosecutor, Mr. Tobiko submitted to the Committee a bundle of documents on the reforms that had been successfully implemented in the office of the Chief Public Prosecutor. These included: A Service Charter for the Directorate of Public Prosecutions, a Code of Conduct and Ethics for Public Prosecutors, a Reference Manual on the Sexual Offences Act, 2006 for Prosecutors, a Training Needs Assessment, Curriculum and Training Manual for Public Prosecutors, and the establishment of an Anti-Piracy Unit. There were however, representations made to the Committee to the effect that some of the achievements that Mr. Tobiko had highlighted were attributable to his predecessor.

Members observed that as Chief Public Prosecutor, Mr. Tobiko had worked under the direction and supervision of the Attorney-General and that his office had not therefore enjoyed the financial and operational independence necessary for the optimal performance of the Chief Public Prosecutor. This, some members argued, had to be taken into consideration in judging the past performance of the nominee.

Some members, however, argued that despite the functional challenges of the office of the Chief Public Prosecutor, the nominee could have achieved more in reforms and particularly in the prosecution of critical corruption-related cases. Such members argued that there had been no tangible reforms in the office of the Chief Public Prosecutor and expressed fears as to whether the nominee would be the reform and change agent anticipated by the new constitutional dispensation. Some members expressed hope that if appointed, the nominee, now working as an independent Director of Public Prosecutions with full mandate, would deliver on the much needed reform in the prosecution office.

v). Responses to Other Queries and Issues

The Committee received representations to the effect that the nominee, while a Commissioner of the Constitution of Kenya Review Commission, had claimed and received allowances to which he was not entitled. The then Secretary to the Commission, Dr. P.L.O. Lumumba informed the Committee that the payments had been erroneously paid to all but two Commissioners and that when it had been

established that the payments were irregular, these had been recovered from all Commissioners, including Mr. Tobiko. Members observed that from the evidence of Dr. Lumumba, Mr. Tobiko had no outstanding financial matters with the Commission.

That notwithstanding, the Committee observed that when the question of the irregular payments had been put to Mr. Tobiko by the Committee, Mr. Tobiko had responded in an evasive manner and had not been forthright on the matter.

Concerning Mr. Tobiko's performance as a Commissioner with the Constitution of Kenya Review Commission, the Committee received divergent views on the matter.

vi). Corruption-Related Charges Against Sammy K. Kirui

Representations were made to the Committee by Mr. Sammy K. Kirui, both in writing and orally, alleging that Mr. Tobiko had, through proxies solicited for a bribe of Kshs. 5 million from Mr. Kirui. Mr. Kirui claimed that he had received messages on his phone to this effect which he had submitted to the NSIS.

Mr. Kirui stated that the Kenya Anti-Corruption Commission had initially recommended that he be charged with abuse of office. Mr. Kirui further stated that Mr. Tobiko had through intermediaries, indicated that if the monies were not forthcoming, he would add more charges – failure to perform a statutory duty and conspiracy to defraud. Mr. Kirui stated that when he had declined to make the payments, he was shocked to find that the charges were indeed added. Mr. Kirui goes on to state “I want to point out that I am not alone in this, I speak on behalf of the so-called prominent personalities who are facing corruption related charges but they are not willing to speak out”.

Mr. Kirui also claimed that Mr. Tobiko “has been and continues to be the gatekeeper of the corrupt in high places”.

These matters were put to Mr. Tobiko when he appeared before the Committee. Mr. Tobiko stated that he did not know and had not met Mr. Kirui. Some members were of the view that Mr. Tobiko was not forthright on the issue as to whether he had met Mr. Kirui while some felt that the allegations were spurious and were not directly linked to Mr.

Tobiko. Some members were also of the view that he was not forthright on the issue as to whether he knew a “Ms. Chepkorir” who Mr. Kirui stated was one of the intermediaries. Other members were of the view that he had sufficiently explained these issues.

vii). Allegations Relating to Integrity

Allegations regarding bribery, conflict of interest and lack of reform attributes were made against the nominee. The Committee considered these allegations and the responses of the nominee to the allegations.

Some members were also of the view that the allegations were largely attributable to professional rivalry, vendetta from suspects facing criminal charges and political and community disputes. Other members took the view that despite the responses by the nominee to the allegations made, many questions remained unanswered and many issues remained outstanding.

Some members therefore recommended that the approval of the Director of Public Prosecutions be subject to further investigations on the outstanding issues. However, Hon. Mwakwere and Hon. Ombui registered their objections, taking the view that the recommendation for further investigations was vague and inconclusive both technically and legally.

RECOMMENDATIONS OF THE COMMITTEE

Following deliberations, the Committee resolved to take a vote through secret ballot in order to identify areas of consensus and to determine the opinion of Members on the suitability of the nominees for appointment to the respective offices. The results were as follows:-

	Name of nominee	For	Against	Abstain	Total
1.	Dr. Willy M. Mutunga as CJ	21	2	0	23
2.	Ms. Nancy M. Baraza as Deputy CJ	23	0	0	23
3.	Mr. Keriako Tobiko as DPP	11	11	1	23

Following the above results the Committee held further deliberations on the nominees and resolved to move the process forward and therefore makes the following recommendations to the House:-

- i). **THAT**, pursuant to Article 166 (1)(a) of the Constitution and Sections 24 (2) and 29 of the Sixth Schedule to the Constitution, this House approves Dr. Willy Muniwoki Mutunga for appointment to the position of Chief Justice.
- ii). **THAT**, pursuant to Article 166 (1)(a) of the Constitution and Section 29 of the Sixth Schedule to the Constitution, this House approves Ms. Nancy Makokha Baraza for appointment to the position of Deputy Chief Justice.
- iii). **THAT**, pursuant to Article 157 (2) and Section 29 of the Sixth Schedule to the Constitution, this House approves Mr. Keriako Tobiko for appointment to the position of Director of Public Prosecutions; with some members expressing reservations on the approval of the DPP and with Hon. Mbadi and Hon. Namwamba registering their specific objections.
- iv). **THAT** the approval of the Director of Public Prosecutions is subject to further investigations on the outstanding issues; subject to objections by Hon. Mwakwere and Hon. Ombui.
- v). **THAT**, future nominations submitted to Parliament for approval be accompanied by an explanatory report setting out the criteria and methodology used by the nominating body in settling on such nominees.

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