

# NATIONAL ASSEMBLY

## OFFICIAL REPORT

Tuesday, 1<sup>st</sup> February, 2011

The House met at 2.30 p.m.

*[Mr. Speaker in the Chair]*

### PRAYERS

### PAPER

The following Paper was laid on the Table:-  
The Kenya Anti-Corruption Commission (KACC) Fourth Quarterly Report for the year 2010 covering the period 1<sup>st</sup> October, 2010 to 31<sup>st</sup> December, 2010.

*(By the Attorney-General)*

### QUESTIONS BY PRIVATE NOTICE

#### HUMAN-WILDLIFE CONFLICT IN NAIVASHA

**Mr. Mututho:** Mr. Speaker, Sir, I beg to ask the Minister for Forestry and Wildlife the following Question by Private Notice.

(a) Is the Minister aware that in the recent past, five people and hundreds of sheep and goats have been attacked and killed by wildlife in Naivasha?

(b) What immediate measures is the Minister taking to relocate all rogue buffaloes to the park and when will the Minister compensate farmers for destruction of crops by buffaloes and baboons?

(c) Could the Minister state the measures taken by the Ministry over the last five years in Naivasha to solve human-wildlife conflicts?

**Mr. Speaker:** Is the Minister in? He is not in. Maybe we will consider revisiting the Question one more time.

#### DETAILS OF CORRUPTION CASES FORWARDED TO ATTORNEY-GENERAL BY KACC

**Mr. Kombo:** Mr. Speaker, Sir, I beg to ask the Attorney-General the following Question by Private Notice.

(a) Could the Attorney-General provide details of corruption cases that the Kenya Anti-Corruption Commission (KACC) has investigated and forwarded to the Attorney-General for direction since the appointment of the current Director?

(b) How many of these cases has the Attorney-General approved for prosecution, rejected and/ or returned to the Commission and why?

**The Attorney-General (Mr. Wako):** Mr. Speaker, Sir, I beg to reply.

Since the appointment of the current Director of the KACC in July 2010, a total of 53 files were forwarded to the Attorney-General for direction. These include files submitted to my office as recently as the close of business yesterday 31<sup>st</sup> January, 2011.

I lay on the Table the list submitted to me of the files requested for. The files show all the required details. These details are contained in the copy of the KACC Third Quarter Report for the period 1<sup>st</sup> July, 2010 to 31<sup>st</sup> September, 2010 which I already laid on the Table last year. I have today tabled the Report for the quarter covering the period 1<sup>st</sup> October, 2010 to 31<sup>st</sup> December, 2010. It has the recommendations the KACC submitted to me, my actions thereon, and the reasons therefore.

*(Mr. Wako laid the document on the Table)*

**Mr. Kombo:** Mr. Speaker, Sir, obviously, it is a bit of an ambush from the Attorney-General. He has just laid the Report on the Table this afternoon and so I have no copy of it. I have not been able to see it so as to be able to interrogate the reasons why he may or may not have taken some actions. Could I be in order to ask that the Question be deferred so that I can peruse the document that has been laid on the Table?

**Mr. Speaker:** Mr. Wako, will you be available tomorrow afternoon so that we consider this matter?

**Mr. Wako:** Mr. Speaker, Sir, although he says that it is an ambush; it is not because I only received this Quarterly Report from KACC on Friday. It is for the period covering up to 31<sup>st</sup> December, 2010. If he wants to peruse the Report, it is okay. I agree. Tomorrow is Wednesday and I will make myself available in the afternoon to answer the questions that may be raised.

**Mr. Speaker:** Mr. Kombo, are you comfortable with that?

**Mr. Kombo:** Mr. Speaker, Sir, the Departmental Committee on Finance, Planning, and Trade will be sitting in Mombasa tomorrow to discuss the Tourism Bill. So, maybe, Thursday will do.

**Mr. Speaker:** What do you have to say, Mr. Wako? Sorry, hon. Members. We have to do it this way so that it is convenient to all.

**Mr. Wako:** Mr. Speaker, Sir, I am sorry that if it is not tomorrow, then it may have to be done after ten days because I am proceeding on some visit and I will come back after the first week of February.

**Mr. Speaker:** Mr. Kombo, could the Committee do without you tomorrow afternoon?

**Mr. Kombo:** Mr. Speaker, Sir, that is exactly what I was going to say. If that is the case, then I will be available tomorrow afternoon.

**Mr. Speaker:** That, to me, looks reasonable.

Hon. Members, please, note that when you ask a Question by Private Notice, it may entail a very quick answer within 24 hours. So, you should not complain when you want it dealt with urgently that it is now being dealt with urgently. This is because that is what you desire.

So, that Question is deferred until tomorrow at 2.30 p.m.

*(Question deferred)*

**Mr. Ochieng:** On a point of order, Mr. Speaker, Sir!

**Mr. Speaker:** Order, Member for Nyakach! I know that you have Question No.2 by Private Notice. I am not blind to it.

Member for Ikolomani, maybe you will want to ask your Question a little later. The Minister has some information that he wants that has not arrived. We will come to your Question a little later.

## ORAL ANSWERS TO QUESTIONS

### *Question No.405*

#### CHARGES LEVIED ON PATIENTS' VISITORS IN NYANZA HOSPITAL

**Mr. Olago** asked the Minister for Medical Services:-

(a) what informed the decision by the management of Nyanza Provincial General Hospital to charge all relatives and friends who visit patients at the hospital Kshs.200/= per day; and,

(b) if it is now policy of the Ministry to charge the Kshs.200/= in all Government Hospitals or if it only applies to Nyanza Provincial General Hospital.

**The Assistant Minister for Medical Services (Mr. Kambi):** Mr. Speaker, Sir, I beg to reply.

(a) Between 2008 and April, 2010, Nyanza Provincial Hospital used to charge relatives staying with patients in the ward Kshs200 a day. However, at no time has the hospital charged relatives and friends visiting patients during designated visiting times.

The decision to charge relatives staying in the wards back then was taken for two reasons:

(i) To discourage relatives other than designated caretakers crowding the wards outside the designated visiting time as this was affecting the quality of care given to patients.

(ii) To compensate the hospital for the extra expense on utilities, mainly water, occasioned by relatives staying in the ward. The charge was, however, abandoned in April, 2010 in favor of crowd control through the use of guards.

(b) It has never been the policy of the Ministry to charge relatives and friends visiting patients.

**Mr. Olago:** Mr. Speaker, Sir, I am satisfied that the charges have now been withdrawn. However, my only regard was the condition to make these charges applicable to members of the public until this Question was asked in the House. However, under what circumstances has the hospital introduced Kshs10 per bicycle entering the hospital, instead of these charges?

**Mr. Kambi:** Mr. Speaker, Sir, I am not aware that *boda bodas* are being charged Kshs10 to enter the hospital. However, I will investigate the matter and instruct my officers appropriately. If that is found to be true, we will punish them according to the law of this land.

**Mr. Shakeel:** Mr. Speaker, Sir, I have the honor of having been the Chairman of the hospital for the period up to end of December, 2009. I would like the Assistant Minister to clarify why this charge was levied. The Assistant Minister knows that there were not enough members of the nursing staff. In fact, the hospital, at that time, was operating with less than 200 staff out of the designated more than 500 staff. The relatives had to stay behind to help staff look after the patients. We had pleaded with the Ministry to give us more nurses. Could the Assistant Minister confirm whether or not New Nyanza Hospital has sufficient nurses to do the job?

**Mr. Kambi:** Mr. Speaker, Sir, the hon. Member did not ask a question. He says he was the chairman until 2009. So, how comes he was the chairman of the hospital as well as the Member of Parliament in 2009?

**Mr. Olago:** On a point of order, Mr. Speaker, Sir. Is it in order for the Assistant Minister to refuse to answer the question simply because, in his view, Mr. Shakeel was the chairman of the Hospital Board? That is a fact. However, is that good reason for him not to answer the question?

**Mr. Speaker:** Certainly that is valid.

**Mr. Kambi:** Mr. Speaker, Sir---

**Mr. Speaker:** Order, Mr. Assistant Minister! Please, resume your seat and relax. It is not in order for you not to answer a question merely because the Member for Kisumu Town East served in a certain capacity. Secondly, it is not in order for you, instead of answering a question, to ask a question.

Mr. Assistant Minister, respond to the question by the Member for Kisumu Town East.

**Mr. Kambi:** Mr. Speaker, Sir, the Member of Parliament did not ask a question. He was just giving a statement.

**Mr. Speaker:** Order, Mr. Assistant Minister! Please, resume your seat.

Member for Kisumu Town East, could you repeat your question?

**Mr. Shakeel:** Mr. Speaker, Sir, could the Assistant Minister confirm that the New Nyanza General Hospital now has the complete complement of 554 nurses that it is meant to have? We had about 200 nurses. Could he confirm that we now have the full complement of nurses?

**Mr. Speaker:** Mr. Assistant Minister, that is a valid question.

**Mr. Kambi:** Mr. Speaker, Sir, with regard to the nurses, that is a different question. However, I will go and ask my technical people how many nurses are in Nyanza General Hospital.

**Mr. Chanzu:** Mr. Speaker, Sir, in one of his supplementary answers, the Assistant Minister said that they were charging Kshs200 in order to control the many visitors who were visiting the hospital. Does the Ministry or the Government not have a policy of containing this kind of situation rather than putting in place what seems like *ad hoc* measure? What will happen to the other hospitals in case something like that happens? Do you not have a policy in place?

**Mr. Kambi:** Mr. Speaker, Sir, I said clearly that we used to charge Kshs200. However, we no longer charge because it is not a Government policy. There is no hospital in the whole Republic of Kenya which charge patients or relatives who visit them.

**Mr. Shakeel:** Mr. Speaker, Sir, I think the Assistant Minister is not being very clear. The Members of public who have been charged Kshs200 were the ones who were staying there overnight and utilizing the services and the food of the hospital. Could he be very clear that we are talking about those members of the public who stayed overnight with the patients and not those who were visiting the patients? They have never been charged.

**Mr. Kambi:** Mr. Speaker, Sir, as I said, it is only this hospital which used to charge Kshs200. However, we scrapped it immediately and employed guards. So, when it is time for visiting patients, nobody is denied permission to do so.

**Mr. Ochieng:** On a point of order, Mr. Speaker, Sir. Is the Assistant Minister in order to mislead this House that New Nyanza General Hospital does not have guards while the hospital has had guards all along? Is he in order? Could he just give us the proper reason as to why they were charging the Kshs200 to people who go to visit patients?

**Mr. Speaker:** Order, Member for Nyakach. The Assistant Minister has said that that used to happen. They then determined that it was wrong and they gave directions that that charging should cease. So the situation has been remedied. Do not flog it beyond where it is necessary.

Last Question, Member for Kisumu Town West.

**Mr. Olago:** Mr. Speaker, Sir, I have no further question.

**Mr. Speaker:** Next Question.

*Question No.423*

CIRCUMSTANCES SURROUNDING SUSPENSION  
OF COMMISSIONER OF MINES

**Mr. Speaker:** The Member for Wundanyi not here? The Question is dropped.

*(Question dropped)*

*Question No.465*

OUTCOME OF MINERALS SURVEYS UNDERTAKEN IN KENYA

**Dr. Otichilo** asked the Minister for Environment and Mineral Resources:-

(a) what has been the outcome of specific mineral surveys that have been undertaken in the country since 2000,

(b) which minerals have high economic potential for exploitation and where they are found; and,

(c) whether it is true that western Kenya has gold deposits.

Mr. Speaker, Sir, I have not received a written answer.

**Mr. Speaker:** Mr. Michuki, are you the Minister for Environment and Mineral Resources?

**The Minister for Environment and Mineral Resources** (Mr. Michuki): Mr. Speaker, Sir, this is a very strange situation. The Question for which we were prepared to answer has not been asked. I beg the indulgence of the Chair to go and prepare for Question No.465.

**Mr. Speaker:** Very well. How long do you require, Mr. Minister?

**The Minister for Environment and Mineral Resources** (Mr. Michuki): Mr. Speaker, Sir, we can answer this Question on Thursday.

**Mr. Speaker:** Member for Emuhaya, are you comfortable with that?

**Dr. Otichilo:** It is okay, Mr. Speaker, Sir.

**Mr. Speaker:** Very well. It is so ordered! The Question will appear on the Order Paper on Thursday this week, at 2.30 p.m.

*(Question deferred)*

*Question No.563*

REPAIR OF KYOGONG-SIGOR-KABOSON-  
CHEBUNYO-MOGOR ROAD

**Mr. Ruto** asked the Minister for Roads:-

(a) whether he is aware that the Kyogong-Sigor-Kaboson-Chebunyo-Mogor Road (C14) is in a deplorable condition, and if so, what steps he is taking to ensure the road is repaired; and,

(b) how the Kshs25,000,000 set aside for the repair of the road in the 2009/2010 Financial Year was utilized.

**The Assistant Minister for Roads** (Mr. Kinyanjui): Mr. Speaker, Sir, before I reply, I want to confirm to the hon. Member that I am fully aware of the contents of his Question and I will answer to his satisfaction.

The road in question starts from Kilgoris to Junction of D5 with a total of 84 kilometres.

(a) I am aware that the above road is in need of urgent repair and that my Ministry has set aside funds for maintenance of this section of the road during this financial year. The maintenance work is expected to begin within February 2011.

(b) The sum of Kshs25 million which was set aside in the Financial Year 2009/2010 budget was used in procuring a design contract for the said road.

I also wish to add that in the same year, a total of Kshs6,146,300 was allocated for routine maintenance of the said road and a further Kshs7,289,900 for periodic maintenance. However, due the transitional period from the Ministry to the authorities, the amount was not utilized and was, therefore, returned to the Ministry.

**Mr. Ruto:** Mr. Speaker, Sir, it is really shocking to hear that funds were returned to the Treasury and yet the road was in such a bad shape. Could the Assistant Minister explain to us what disciplinary measures he has taken against these officers who returned the funds to the Treasury, leaving the road impassable?

Secondly, could he explain---

**Mr. Speaker:** Order! Ask one question at a time. Mr. Assistant Minister, please, respond. You will have another opportunity.

**Mr. Kinyanjui:** Mr. Speaker, Sir, I would not call it disciplinary measures; probably correctional measures. As I said, we have now started the procurement process. The hon. Member will appreciate that previously the Ministry was actually undertaking all the works in the constituencies. Since, 2009/2010 Financial Year, three authorities were formed. During that year, we had to ensure that we now transfer the procurement of the works to the authorities. During the same period, we were not able to do the procurement for the said works. During the said period, we were not able to do the procurement for the said works. However, during this financial year, we have set aside a total of Kshs15,597,000 and a contract has already been awarded and work will commence next month.

**Mr. Chanzu:** Mr. Speaker, Sir, it is good that the Ministry came up with the three Authorities, but I think it still has the overall responsibility. For example, why has money allocated for a road in last year's Budget not been utilized up to now, yet the financial year is almost ending? The Kshs45 million that was allocated for the Majengo-Luanda Road has not been utilized up to now. What is the Ministry doing about that?

**Mr. Kinyanjui:** Mr. Speaker, Sir, I want to agree with the hon. Member that, indeed, we have had challenges when it comes to ensuring that we are able to utilize the funds that are set aside within the given period. But I also wish to state that we also have serious capacity challenges within certain areas in the country, where we send money but we are not able to absorb as much as the Government has actually set aside. One of the things my Ministry is doing is to try and ensure that we increase the capacity of our contractors to be able to absorb the funds allocated for maintenance of these said roads.

**Ms. Karua:** Mr. Speaker, Sir, now that we are on the subject of repairs of roads, could the Assistant Minister tell us what action they are taking, as they build new roads, to ensure that the old ones are repaired, especially the Kutus-Kerugoya-Kagumo-Karatina Road? What action are you taking among many other roads which are in a terrible state?

**Mr. Kinyanjui:** Mr. Speaker, Sir, I wish to remind the House that, indeed, the budget for the Ministry of Roads is divided into two. We have the development budget and the maintenance budget, where funds are specifically set aside for the maintenance of the roads that have already been constructed. However, as to when that road would be done, I would request the hon. Member to file a Question specific to that road and we would be able to respond to that.

**Mr. Ruto:** Mr. Speaker, Sir, could the Assistant Minister tell this House what designs he has come up with using the Kshs25 million which he said he set aside for design? Who actually authorized the Kshs25 million to be used on design instead of repair of the road? What design is this and could he table a copy of that particular design? Have you budgeted for the implementation of that design?

**Mr. Kinyanjui:** Mr. Speaker, Sir, the Kshs25 million in question was within the Development Budget. Within the year 2009/2010, my Ministry advertised for the design of this road and it was awarded to Crestar and Truder(?) Consulting Engineers at a total cost of Kshs34.4 million. The design is in the final stage and is expected to be completed by March, 2011. Once the budget is complete, then the Ministry will prioritize the road in terms of its upgrading to bitumen standards.

*Question No.588*

MISMANAGEMENT/CORRUPTION AT MOSACCO

**Mr. Speaker:** The Member for Mumias still not here? The Question is dropped.

*(Question dropped)*

*(Dr. Khalwale stood up in his place)*

**Mr. Speaker:** I have dropped the Question already. Member for Ikolomani, you are standing too late!

Next Question by the Member for Juja!

*Question No.626*

DISMISSAL OF THIKA MUNICIPAL COUNCIL EMPLOYEES

**Mr. Kabogo** asked the Deputy Prime Minister and Minister for Local Government:-

a) whether he is aware that Thika Municipal Council unlawfully terminated the services of 250 workers in November 2008, all of whom had worked for over 5 years;

(b) why the several orders from the Thika Labour Office to reinstate the employees have been ignored; and,

(c) whether he could also explain why the council advertised the vacant posts on 11th November 2008 and immediately filled them with persons related to councillors.

**The Assistant Minister, Office of the Deputy Prime Minister and Ministry of Local Government** (Mr. Nguyai): Mr. Speaker, Sir, I beg to reply.

(a) I am aware that the Municipal Council of Thika lawfully terminated the services of 250 casual workers in November, 2008.

(b) Orders from the Thika Labour Office were not ignored but their request for reinstatement of the casuals could not be implemented as the council had no budget for the same at the time.

(c) After getting the necessary approvals from the Office of the Deputy Prime Minister and Ministry of Local Government to employ 52 permanent workers, the council advertized for the recruitment in November, 2008. Applications were received and shortlisted following the official laid down procedures. There is no evidence to show that the successful applicants were relatives to the councillors.

**Mr. Kabogo:** Mr. Speaker, Sir, if you will recall last week or the week before, the Deputy Prime Minister and Minister for Local Government requested for more time to be able to come with a comprehensive answer to this House. If you look at the answer given by the Assistant Minister, is this truly what the Deputy Prime Minister and Minister for Local Government asked time for to come and answer? I have documents here that say the contrary to what the Assistant Minister is saying. He says that these workers were actually casual workers whereas documents that were given to me by the Labour Office say that they were actually not casual workers but permanent workers being paid at the

end of the month. They were 250 employees and the Ministry is saying “reinstate and pay them their dues,” yet the Minister comes here and says casually that they were casual workers. I request that this matter be forwarded to the Departmental Committee on Local Authorities for a thorough investigation, because this is abuse of office. I have a list of employees’ names and their relatives in the council, whereas 250 people are left suffering without salaries and jobs. I seek your indulgence.

**Mr. Speaker:** Order, Member for Juja! This is Question Time. Indeed, the House is now transacting Question No.626. The Assistant Minister has given you an answer. Can you, please, interrogate the parts of the answer which are not satisfactory, so that he can give you an answer as complete as you wish? Please, stick to the rules; avoid making a speech now!

**Mr. Kabogo:** Mr. Speaker, Sir, I have heard you. I am only saying that none of the parts of the Question has been answered. I want to table documents here that will help you understand the frustrations of the people who have been sacked. I have a document here which I want the Assistant Minister to react to. It is a letter written on 24<sup>th</sup> December, 2008 from the Labour Office. In part, it says:-

“They are not casual workers as is meant in the meaning of employment Cap.2007. You have declared them redundant unlawfully.”

Mr. Speaker, Sir, could the Assistant Minister react to that?

*(Mr. Kabogo laid the document on the Table)*

**Mr. Speaker:** Very well! That is a good question. Mr. Assistant Minister, could you respond to that?

**Mr. Nguyai:** Mr. Speaker, Sir, as much as I do sympathize with the issue of having 250 employees declared redundant, I am also in possession of that particular letter and if he was to read through it, there was only one side of the picture as far as this letter is concerned. They say:-

“We wish to inform you that we have thoroughly interviewed the grievance and formed the opinion. They did not wait to get the side of the council and as such”---

Mr. Speaker, Sir, I would want to table this list of 238 of the said employees who were casual labourers and we still consider them as such.

*(Mr. Nguyai laid the document on the Table)*

**Mr. C. Kilonzo:** On a point of order, Mr. Speaker, Sir. The reason why there are different Ministries is because each Ministry is specialized in a particular field. We have a letter here from the Ministry of Labour which classifies the 250 workers as permanent and pensionable and not casuals. Is the Assistant Minister in order to mislead the House that the professionals in the Ministry of Labour do not know what they are doing and that he knows better than them?

**Mr. Nguyai:** Mr. Speaker, Sir, as I stated before, when the opinion issue was addressed, we had formed an opinion without the consent of the employing agency. I think it is necessary for the two parties to sit down and discuss so that they can have a balanced approach.

*(Some hon. Members stood up in their places)*

**Mr. Speaker:** Order! Hon. Members, please, resume your seats! I have a document that has been tabled by the Assistant Minister as authority that the 250 persons named here were casuals. This document, unfortunately, fails the test of the standards we have set in the House. The document has no date or signature. It is not known where it emanated from. In those circumstances, if the Assistant Minister has temerity to table a document that is anonymous, I am afraid that he is not taking the matter seriously. On that basis, I will refer this matter to the relevant Departmental Committee to inquire into it and file a report in the House in the next 31 days. It is so ordered and that is how we will proceed.

**Dr. Khalwale:** On a point of order Mr. Speaker, Sir. So that no other Assistant Minister attempts to mislead this House by bringing documents that do not pass the standards of the House, could the Chair, seriously consider placing sanctions on the Assistant Minister because it is less than three weeks ago when I tabled a document where the same Assistant Minister had directed the Clerk of the Thika Municipal Council to pay councilors to attend a political party arranged by a presidential candidate?

*(Mr. Nguyai stood up in his place)*

**Mr. Speaker:** Order! Please, Mr. Assistant Minister, take your seat. Among other things, the Committee will make its inquiries and capture that in their report. I will then consider whether or not to mete out sanctions against the Assistant Minister. Mr. Assistant Minister, you need not to respond. I am afraid. You do not need to respond at this stage.

Next Question by the Member for Kilgoris!

*Question No.647*

NON-SUPPLY OF WATER TO KILGORIS TOWN

**Mr. Speaker:** The Member for Kilgoris not in? The Question is dropped.

*(Question dropped)*

*Question No.681*

STATISTICS ON POLICE SHOOTINGS SINCE AUGUST 2010

**Ms. Karua** asked the Minister of State for Provincial Administration and Internal Security:-

(a) whether he could state how many people have been shot dead by police in the country since 4<sup>th</sup> August, 2010, giving the names and places they were shot and the circumstances;

(b) whether he could also provide the identities of the officers involved and indicate the disciplinary action taken against them; and,

(c) what measures he is taking to ensure that the trend is curbed.

**The Assistant Minister, Ministry of State for Provincial Administration and Internal Security** (Mr. Ojode): Mr. Speaker, Sir, I beg to reply.

(a) Since 4<sup>th</sup> August, 2010, the following persons have been shot dead under circumstances that pointed to criminal intent on the part of the police officers involved. On 31<sup>st</sup> October, 2010, Joyce Waithera Githu was shot dead by police officers in suspicious circumstances. The deceased was in the company of Anthony Karanja Kibe while riding a motor cycle, registration number KMCC 632 A, along the Nakuru-Nyahururu Road at Ahero Trading Centre where they were stopped but declined to stop. This prompted one of the police officers to shoot at them killing the mentioned person instantly. On 21<sup>st</sup> November, 2010 at about 1.30 am in Njoro area of Ndongyo Loit Sub-location in Laikipia West District, Julius Kiharu Njeru was shot by police officers after being suspected that he was a cattle rustler. He was accompanied by three other people. Again, on the night of 8<sup>th</sup> and 9<sup>th</sup> December, 2010 at Ndongyo Yang area of Turkana North District, one Martin Opiyo was shot dead in suspicious circumstances. While the deceased was sleeping in the company of his two colleagues, he was attacked and shot dead by an unknown person in a robbery incident. Investigations pointed the suspect to be a police officer.

On 6<sup>th</sup> November, 2010, within Siakago Town of Mbeere District, the following persons were shot dead by Mr. Peter Karanja, an Administrative Police Officer. Julianio Muchira, Eliphantus Muthiru Munyi, Rayan Muthoni, Agostino Kinyua Nthumbi, Anthony Mwaniki Nyaga, George Ng'ang'a, Kennedy Namu, Lydia Ng'endo, Wilfred Gitonga, an AP Officer and Fredrick Okwako, an AP Officer.

The circumstances were that at about 11.30 p.m., the officer left his place of duty while armed with a G3 rifle and went into a shooting spree, killing the ten, including two of his colleagues. On 19<sup>th</sup> January, 2011 at about 9.00 a.m., CID Officers from the Special Crime Prevention Unit were pursuing armed suspected robbers who were in a motor vehicle registration No.KBE 637G, Toyota Corolla Station Wagon, along Langata Road following a tip off from members of the public. On reaching the area between the Wilson Airport and the Nairobi West Prison, the suspects who were six in number were challenged to stop and surrender. Three of them namely; Paul Jomo Wanjiku, David Kanini Mwangi and Musee Michuki Mwangi were shot dead. The others escaped on foot towards Kibera Slums while another one drove off with the suspected motor vehicle.

All the three had previous criminal convictions of robbery with violence and police had information that they were headed for a robbery mission. One pistol, American Star Serial No.xx00022 loaded with two rounds of ammunition were recovered. Following the incident, the six officers involved in the incident were interdicted and an inquest file No.3/2011/Langata Police Prison was opened by Nairobi PCIO. The three officers are as follows. No.68684, Sergeant David Chebii; No.56310, Corporal Ben Aboka, No.81496, Corporal Moses Simiyu, No.67162 PC, who was the driver then, Mr. William Tarus, No. 73845, PC. Collins Makhoha, No.67353 PC, Mwangi Murugu. The case file will be forwarded to the Attorney-General in due cause after completion of the investigations for perusing and advice.

Another incident occurred on 29<sup>th</sup> January, 2011 at 2.10 a.m. whereby administrative police officers at Shibundi AP Camp in Kakamega Division of Kakamega

County were called to a scene of robbery by the area councillor Benedict Abundo. Officers, No.220413, APC Evans Cheruiyot and No.220135, APC Charles Sawe, rushed to the scene where it was alleged that the robbers were still inside the compound of Mrs. Agnetta Aburo. Acting on this report, they shot dead the watchman, Mr. Joseph Ewoi, who was guarding the homestead. He died when being rushed to hospital. An Inquest File No.2/2011, Kakamega Police Station, was opened and is pending under investigation.

(b) The following officers have so far been charged and the cases are pending before court:-

(i) Corporal Joseph Mwangi charged with the murder of Joyce Waithera Ngigi vide Murder Case File No. Criminal 769/168/2010.

(ii) Corporal Dishon Musau Kithuka charged with the murder of Julius Kihara Njeru vide Case File No. Criminal 759/15/2010. The case is pending before court.

(iii) APC Ferdinand Mategwa Chivanda charged with the murder of Martin Opiyo vide Criminal Case No.881/32/2010. The case is pending before court.

(iv) APC Peter Karanja charged with killing ten people in Siakago vide Police Criminal Case File No.4B2/379/2010.

(c) The following measures are being put in place to curb the trend:-

(i) Officers with proven history of mental instability are being identified with a view of retiring them on medical grounds.

(ii) Continuous guidance and counseling to all officers to avoid cases of depression and mental stress.

(iii) Close supervision of officers on duty.

(iv) Facilitating officers to take their leaves and off-days.

(v) In the spirit of police reforms, the Kenya Police Service has been training top police managers about human rights issues as enshrined in the new Constitution and how to deal with both internal and external customers.

**Ms. Karua:** On a point of order, Mr. Speaker, Sir. Have you noticed that the Assistant Minister has been answering his own question and not my Question? In part (a) of my Question, I have asked the Assistant Minister to tell us how many people have been shot dead by police officers in the country since 4<sup>th</sup> August, 2010, when we voted in the new Constitution, giving the names and the places they were shot and the circumstances under which they were shot.

He has given me the names of the people who have been shot dead in circumstances that pointed to criminal intent on part of the police. So, he has modified my Question because he knows that police officers have shot dead more than 100 people since then. He has modified the Question, so that there can just be below 20 people. Is it in order for him to answer his own question instead of answering the Question that I asked? Consequently, the answer to part (b) of the Question would not be valid. The only answer which would remotely be as a result of the Question would be part (c), which in the absence of parts (a) and (b), would not make sense. Is he in order? Could you direct him to answer my Question as it appears on the Order Paper and not his own question?

**Mr. Ojode:** Mr. Speaker, Sir, if you look at my answer, you will realize that I have answered the Question. The Member has asked me to state how many people have been shot dead by the police in the country since 4<sup>th</sup> August. In my answer, I have said that: "The following persons have been shot dead---". I have mentioned Joyce Waithera Ngige, who was shot dead by police officers in suspicious circumstances. I have

mentioned even where the incidents occurred, for example, along the Nakuru-Nyahururu Road and Ahero Trading Centre.

**Mr. Imanyara:** On a point of order, Mr. Speaker, Sir. The Assistant Minister is trivializing the answer and is not even commenting on the issue raised by the Questioner. If you look at the answer, you will find that he has only answered the Question in relation to those who have been shot with criminal intent. The Question is: “How many people were killed by the police?” We want to know those who were killed by the police under circumstances that will not amount to criminal intent. We know they are more than what he has given.

**Mr. Ojode:** Mr. Speaker, Sir, when we are dealing with a Question of this nature, it is always good to tell the truth, but I cannot be forced to bring something which is not in existence. The ones which have been captured are the ones I know of. If there are any contradictory names or any other killings, I would prefer that the hon. Member brings the list of those who have been killed and then I can bring mine. I have already tabled my list and so, let us get any contrary view. I have the capacity to check and know those who have been killed by the police and those who have not been killed by the police. If there are any contradictory names, I would like, with the indulgence of the Chair, the Member to bring the names of the people who have been killed by the police that she knows that I do not know. I am the Assistant Minister in charge of that docket.

*(Several Members stood up in their places)*

**Mr. Speaker:** Order, hon. Members! Please, relax! Mr. Assistant Minister, will you, please, indicate to the House if the list that you have furnished the House with this afternoon in answer to the Question by the Member for Gichugu includes all persons who have been shot by the police since 4<sup>th</sup> August, 2010?

**Mr. Ojode:** Mr. Speaker, Sir, if you look at my reply, I have said that: “From 4<sup>th</sup> August, 2010, the following persons have been shot dead---“.

**Mr. Speaker:** Order, Assistant Minister! Of course, I have looked at your answer even as I pose that question. Please, resume your seat!

If you look at part (a) of Question No.681, asks you to state how many people have been shot dead by the police in the country since 4<sup>th</sup> August, 2010. In your answer, you say: “Since 4<sup>th</sup> August, 2010, the following persons have been shot in circumstances that pointed to criminal intent”. You see, you qualify your answer that these persons have been shot in circumstances that pointed to criminal intent. Are there persons who have been shot by the police in circumstances that are different from pointing to criminal intent?

**Mr. Ojode:** Mr. Speaker, Sir, I am not aware of that.

**Mr. C. Kilonzo:** On a point of order, Mr. Speaker, Sir. The Assistant Minister is not taking this Question seriously. The question here is not about the people who were shot by the police because of criminal intent on the part of the police officers. All the people who were shot, intent aside---

**Mr. Speaker:** Order, Member for Yatta! Our Standing Orders tell us that we should refrain from being repetitive. I put exactly what you are asking the Assistant Minister and he has responded and said that as far as he is concerned, these are the only persons who have been shot by the police since 4<sup>th</sup> August, 2010.

**Mr. C. Kilonzo:** Mr. Speaker, Sir, I was building my point.

**Mr. Speaker:** Then come properly and clearly!

**Mr. C. Kilonzo:** Mr. Speaker, Sir, the other day, the police executed some criminals in the streets, who are not on the list. This means that this list is not conclusive. It also does not include people who are shot by police officers on love triangle issues like what happened about a month ago.

**Ms. Karua:** On a point of order, Mr. Speaker, Sir.

**Mr. Speaker:** Order, Member for Gichugu! Let the Assistant Minister respond first!

**Mr. Ojode:** Mr. Speaker, Sir, you will agree with me that even on the incident of Langata Road, I said that we have so far interdicted those officers, and that investigations are going on. If the officers are found to be guilty, they will be charged with murder. I even mentioned the names of the officers who were involved. With your indulgence, if you want me to repeat, I will do so.

**Mr. Speaker:** Order! You do not have to repeat.

*(Ms. Karua stood up in her place)*

What is it, Member for Gichugu?

**Ms. Karua:** On a point of order, Mr. Speaker, Sir. I think we have to stick to the rules of the House. A Minister cannot originate a Question and purport to answer it. I am the Questioner, and the Chair had forwarded my Question to the Ministry. Is it in order that that answer be accepted by the House on the oral amendment by the Assistant Minister? In answer to your Question, the Assistant Minister is purporting to orally amend a written answer, claiming that these are all the people who had been shot by the police. What was so difficult in phrasing the answer in the same terms as the Question?

Mr. Speaker, Sir, I think this House needs your direction, so that the Assistant Minister can answer the Question properly. This is one Assistant Minister who has been very casual in dealing with matters of life and death. He has been so casual, defending his “boys” and has caused the police to kill people with abandon. So, we need your direction.

*(Several hon. Members stood up in their places)*

**Mr. Speaker:** Order! Order, hon. Members!

Assistant Minister, you have used a word there, which is not the language in which you were transacting business before you said it, and you did so without leave of the Chair. So, I want you to apologize to the House before we proceed.

**Mr. Ojode:** Mr. Speaker, Sir, I apologise.

**Mr. Speaker:** Very well. Could you then come forward and respond to the point of order by the Member for Gichugu?

**Mr. Ojode:** Mr. Speaker, Sir, I have given a very good answer to the Question. I cannot give answers on which I cannot make any substantiation. Apparently, from August last year to date, my police officers have not killed as many as 100 suspects as is being alleged by the Questioner. In respect of those who have been killed, I have already indicated who they were, the action that has been taken and where the killings took place. I need not mislead this House. It is not in my nature to say something which I cannot

substantiate. The names I have given and the places where the incidents happened are here. I have given them out and read them out to the Questioner.

*(Several hon. Members stood up in their places)*

**Mr. Speaker:** Order! Order, hon. Members! I have acquainted myself to the Question asked by the Member for Gichugu. I also have with me the answer given by the Assistant Minister. Our Standing Orders are clear on the content of Questions. Questions are intended to seek information which may be in the custody of the Executive. In this particular case, the Question seeks information from the Ministry of State for Provincial Administration and Internal Security. The Question is explicit in terms of what information it is seeking. I am afraid that the answer given by the Assistant Minister is not categorical and unequivocal as expected by the Questioner. The Question clearly seeks certain information. The Assistant Minister then goes on to give information that is qualified and appears to be restricted. So, I will direct that this Question is deferred to Thursday this week, at 2.30 p.m., so that if the Assistant Minister is taking the position that these are the only persons who have been shot by the police since 4<sup>th</sup> August, 2010, then he should categorically and unequivocally state so. If the Member for Gichugu and other hon. Members have information that may be different from what the Assistant Minister will be saying, then they will avail that information and the Assistant Minister will inquire into it further. I so direct, Mr. Assistant Minister.

**Mr. Ojode:** Mr. Speaker, Sir, I concur with your ruling.

**Mr. Speaker:** Very well. So, the Question is deferred to Thursday, this week, at 2.30 p.m.

*(Question deferred)*

## **QUESTIONS BY PRIVATE NOTICE**

### **HUMAN-WILDLIFE CONFLICT IN NAIVASHA**

**Mr. Mututho:** Mr. Speaker, Sir, I beg to ask the Minister for Forestry and Wildlife the following Question by Private Notice.

(a) Is the Minister aware that in the recent past, five people and hundreds of sheep and goats have been attacked and killed by wildlife in Naivasha?

(b) What immediate measures is the Minister taking to relocate all rogue buffaloes to the park, and when will he compensate farmers for destruction of crops by buffaloes and baboons?

(c) Could the Minister state the measures taken by the Ministry over the last five years in Naivasha to solve human-wildlife conflicts?

**The Assistant Minister for Forestry and Wildlife (Mr. Nanok):** Mr. Speaker, Sir, first, I would like to apologise for coming in late to answer this Question. I expected my Minister to have responded to the Question. I have been informed that he is out of the country. So, I stepped in to answer it.

Mr. Speaker, Sir, I beg to reply.

(a) I am aware that over the last two months, livestock have attacked several people, sheep and goats in Naivasha. The attacks on people in the recent past, which unfortunately resulted in deaths, are as follows:-

(1) We had two deaths in Loldia Farm within the month of November, 2010. The two were attacked while tracking a rogue buffalo together with Kenya Wildlife Service (KWS) staff at the victims' farm.

(2) We had one death in Ndabibi area. The victim was attacked while herding livestock in Tanki Tatu area.

(3) We had two deaths in Soysambu Conservancy. Two persons were injured, and were airlifted to Nairobi Hospital, while the tour guide was taken to St. Mary's Hospital in Gilgil. So, the total number of persons who were attacked and killed by wildlife was three and those who were injured were three.

(b) My Ministry, through the KWS, is totally committed to the protection of people and their property throughout the country. However, the buffaloes within Naivasha did not originate from the KWS protected parks per se but rather from the privately owned Soysambu Ranch and Maruela Conservancy and the surrounding area. However, the Ministry will liaise with those private conservancies and demand that they take control of buffaloes under their jurisdiction.

The KWS has an office in Naivasha Town, headed by a warden and assisted by Problem Animal Control Rangers, who are specially trained on wildlife management. As per the current Wildlife Conservation and Management Act, Cap. 376, the Government only compensates for human injuries or deaths caused by wildlife. Section 52 of the Wildlife Act, which was amended vide Bill No.16 of 1989, did away with compensation in respect of any damage to crops, livestock and property by wildlife. So, as the current law stands, the only legally acceptable compensation is for human death and injury.

*(Loud consultations)*

**Mr. Speaker:** Order! Order, hon. Members! Members for Kisumu Town West and Cherengany, we have facilities within these Chambers where you can go and consult, if necessary. It is disorderly conduct to remain standing in the pathways of this Chamber. So, please, note that we will be beginning to take action hereafter.

Proceed, Assistant Minister!

**The Assistant Minister for Forestry and Wildlife** (Mr. Nanok): Thank you, Mr. Speaker, Sir.

(c) The measures that my Ministry has put in place in Naivasha, through the KWS, are as follows:-

(i) We have established adequate capacity with an office manned by staff and rangers on the ground to respond to emergencies.

(ii) In the year 2009, the KWS helped put up a 10 kilometre fence between Mbaruk and Soysambu area to reduce the number of accidents on the Naivasha-Nakuru Road as a result of motorists hitting buffaloes.

(iii) The KWS has, in addition, developed and is maintaining a database on conflicts, which has enabled the KWS to map out areas with high conflict rates, and which allows for strategic decision making on human-wildlife conflict management.

As such, in Naivasha area, the KWS conducts patrols in Kari, Oserian, Duka Moja, Ewaso Kedong, Marula, Kongoni, Ndabibi, Two Crater Lake, Gilgil, Kikopey, Oljijit, Kongoni, Huruma, Loldia and Manda areas.

Lastly, we have established telephone hotlines that are given to the public for swift reporting of conflict cases. In Naivasha, these numbers are 0718983398 and 050-2020510.

**Mr. Mututho:** Mr. Speaker, Sir, you have heard the Assistant Minister admit that all these buffaloes originate from private ranchers, what they call “conservancies”. You have also heard the Assistant Minister state that they have used public funds to fence 10 kilometres of that area. What steps has he taken to compensate those poor farmers who cannot harvest anything because of wildlife from the conservancies?

**Mr. Nanok:** Mr. Speaker, Sir, while I tend to agree with the hon. Member for Naivasha, the current law we are following indicates that any damage to crops is not compensated. However, we had looked at this in the amended Bill which we were meant to have brought to this House. Last year, I tabled a document in this House which we discussed that showed the stage of that Bill. So far, this Bill has not yet been brought to the House and we expect that very soon, it will be finalized and approved by the Cabinet so that we can bring it before the House.

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

**Mr. Speaker:** Order, the Member for Naivasha!

Yes, the Member for Gwassi!

**Mr. Mbadi:** Mr. Speaker, Sir, cases of attacks by wildlife on human beings and domestic animals are very frequent especially in the constituencies which border the parks. The Assistant Minister has indicated to this House severally that the Bill will be presented to this House soon. Could we get a clear date or timeframe today within which this Bill will be brought to this House so that it is adopted and it becomes law?

**Mr. Nanok:** Mr. Speaker, Sir, by the time we presented the Bill to the Cabinet for approval, it happened that we had a new Constitution in place and all Bills that had been presented to the Cabinet were referred back so that they can be in line with it. I hope that in the next few weeks, if not few months, that document will be finalized, approved by the Cabinet and brought to this House for debate and approval.

**Mr. Mbai:** Mr. Speaker, Sir, the destruction caused by wildlife is not only confined to Naivasha. It is also happening in Masinga and Kiathani Village. The damage is caused by elephants which cross over from Mwea Game Reserve. What plans does the Assistant Minister have to put an electric fence along the game reserve so that the elephants can be restricted from crossing over to Masinga where they destroy farmers’ crops?

**Mr. Nanok:** Mr. Speaker, Sir, that is an issue that we can take up. If any Member has problems in areas where we have game parks and game reserves, he is welcome to come and discuss with us so that we can agree on the way forward. You have to realise that during dry conditions, particularly now, wild animals also go out foraging for pasture and water. Most of these incidents happen at this time. I welcome the idea of hon. Members coming so that we can sit down and discuss so that we can find a solution that can satisfy the community.

**Dr. Nuh:** Mr. Speaker, Sir, time and again, it happens that the Kenya Wildlife Service (KWS) usually takes a very long time to compensate people who are injured even

after the District Wildlife Compensation Committee approves and forwards the request. Could the Assistant Minister tell us the maximum time limit within which compensation should be forwarded to the clients after the district committee recommends to the KWS? Could he also tell us what they are doing to shorten this duration of time?

**Mr. Nanok:** Mr. Speaker, Sir, you will realise that after the District Wildlife Compensation Committee approves claims, they are normally forwarded to the Ministry Headquarters where we have the Ministry Wildlife Compensation Committee. The Committee looks at all the claims that have been forwarded by the District Wildlife Compensation Committees every month. Delays normally occur as we await the Treasury to provide us with the funds so that we can channel them to the district treasuries for payment. In the new Bill to be brought before this House, we have looked at the establishment of a trust fund which will make the payments as soon as the approvals are made by the headquarters.

**Mr. Mututho:** Mr. Speaker, Sir, the wildlife still come from private conservancy. Does the law still protect the private conservancy to the extent that their wildlife come out and kill and yet these people cannot claim any form of compensation?

Mr. Speaker, Sir, I seek your indulgence. There are 41 families who have been chased away from their farms by baboons.

**Mr. Speaker:** Order, the Member for Naivasha. You must comply with the rules of the House.

Mr. Assistant Minister, please answer that question!

**Mr. Nanok:** Mr. Speaker, Sir, the KWS is the one charged with the responsibility of protecting our wildlife resources. We have taken the responsibility to discuss with private conservancies to make sure that they put those buffaloes under control.

**Mr. Mututho:** On a point of order, Mr. Speaker, Sir. The question has not been answered. Does the no-compensation policy against destroyed crops and injured animals also cover private conservancies?

**Mr. Nanok:** Mr. Speaker, Sir, as the Act is now, it is only the Government that can compensate.

#### NUMBER OF FORM ONE CHANCES IN NATIONAL SCHOOLS

**Dr. Khalwale:** Mr. Speaker, Sir, I beg to ask the Minister for Education the following Question by Private Notice.

(a) Could the Minister confirm the total number of Form One chances that exist in national secondary schools in Kenya and state the minimum marks/score required for admission into these schools?

(b) How many candidates qualified for admission into those schools in the 2010 KCPE?

(c) What is the Government doing to ensure that all the candidates who qualified join national secondary schools?

**The Minister for Education (Prof. Ongeru):** Mr. Speaker, Sir, I beg to reply.

(a) There are 4,517 form one places in the 18 national secondary schools.

(b) The Ministry does not set the cut-off marks to national schools. This is because the minimum marks score required for admission into a national school varies from one district to another and depends on the district's number of Kenya Certificate of

Primary Education (KCPE) candidates, performance in KCPE examinations and candidates' national school of choice. The formula for computing the district quota is as follows:

“District candidature times the available vacancies in the national school over the national candidature.” It is, therefore, possible for a candidate with high marks from a performing district to miss a slot in a national school while one with a lower marks in a lesser competitive district to secure a place in the national school. However, for Starehe Boys and Girls schools and centres, they have their own criteria and mechanism of selecting their students. The admission of candidates is carried in favour of needy and vulnerable candidates. The national schools established by the members of the Armed Forces also admit 80 per cent of their students from their members of staff while 20 per cent is admitted from the civilians.

(c) All candidates who qualify for admission to national schools will not be absorbed due to the limited spaces available. However, the Ministry has taken the following measures to ensure a majority of the KCPE candidates join national schools.

(i) In the Financial Year 2010/2011 the Treasury allocated Kshs750 million for the expansion of the learning facilities to accommodate an extra class of 45 students in each of the 18 national schools. As a result of this expansion, an additional 810 places were created in the national schools.

(ii) The Ministry is exploring modalities of elevating two top performing provincial secondary schools in each of the 47 counties to national school status. This will reduce pressure on the current 18 national schools, and also guarantee opportunities and quality education in the disadvantaged districts.

(iii) We are engaging the Treasury for additional funding for the expansion and improvement of provincial schools to enable them absorb the majority of candidates.

**Dr. Khalwale:** Mr. Speaker, Sir, may I congratulate the Minister for the urgent measures he is taking to increase the number of places for our children. In respect of the two schools he wants to elevate in each county to national status, could he confirm whether the process of elevating those schools will be done in accordance with the new Constitution? If he is going to respect the new Constitution, it will be wrong for him to give two national schools equally across the board. The Constitution contemplates that the counties with bigger populations should have access to more national schools than smaller counties.

**Prof. Onger:** Mr. Speaker, Sir, what we have is an intention of elevating the county schools to national level. There will be several dynamics that will be looked at in considering the positions. It may well be that some counties will not, in fact, require as many national schools as other counties with big populations. Therefore, we intend to take affirmative action in order to conform to the Constitution.

**Mrs. Odhiambo-Mabona:** Mr. Speaker, Sir, could the Minister clarify his Statement that all the candidates who qualified to join national schools joined? Could the Minister clarify why they have limited the number of students from private schools joining national schools? They have thereby affected students who are orphans from schools that support orphans like Gethsemane School in Mfangano Island and Christ Gift in Mbita Point. These are schools that deal with orphans, yet they are classified as private schools.

I even have the names of girls who qualified to join national schools but have not, as a consequence of the policy, joined them, yet they are from marginalized areas.

**Prof. Ongeri:** Mr. Speaker, Sir, I am aware of the few cases of “private schools” that were public schools. Therefore, we have every intention that during the replacements of 15<sup>th</sup> February, they will have priority to be considered for Form I places in national schools.

**Mr. Bahari:** Mr. Speaker, Sir, in the Minister’s distribution of national schools across the country, can he ensure that they are distributed within the counties? In my county, the schools that have been identified are just next to each other.

**Prof. Ongeri:** Mr. Speaker, Sir, the list the hon. Member is seeing in national newspapers is a creation of the national newspapers. We have only requested for proposals from counties in order to consider them on the basis of merit. The list that was published in one of the dailies is not the official one. We have only requested that proposals be made to the Ministry, so that on the basis of that, and in line with a discussion with the Treasury, we can make an informed decision.

**Mr. Mwiru:** Mr. Speaker, Sir, I commend the Ministry for the good job they are trying to do to create more chances for our children in these schools. I do not know which criteria the Ministry is using to choose the schools that are supposed to be elevated to national school status, and whether they are considering other dynamics within those counties like the sponsors and the areas they are in, including the constituencies.

**Prof. Ongeri:** Mr. Speaker, Sir, I think we are jumping the gun. All that we have done is to express the intent. In view of the congestion at the national level, and in line with the policy of the Ministry, we need to look at schools in counties that can be elevated to national schools, so that they can mitigate against the shortage of places in national schools. Furthermore, I want to inform this hon. House that, indeed, I have appointed and gazetted a task force to look at all these areas, including realigning the Ministry of Education policy with Sessional Paper No.1 2005 in tandem with the new Constitution from the national level to the county level. When that information and policy paper is presented to us, hon. Members will have the opportunity, through a Sessional Paper that I intend to publish, to come to this House for further debate. It is only then that we will make conclusive decisions on which direction we are moving.

**Mr. Speaker:** Last point; Member for Ikolomani!

**Dr. Khalwale:** Mr. Speaker, Sir, the net effect of the affirmative action that the Ministry took is that some of the deserving children from very poor families have found their way into national schools. Thank you very much.

However, given that in those national schools the school fees can range from Kshs60,000 to Kshs100,000, what is the Ministry doing specifically to support the same children from poor backgrounds whom they took to national schools, and now risk missing those positions? The situation is open to corruption, as rich parents will buy the positions.

**Prof. Ongeri:** Mr. Speaker, Sir, that is a very good question. We give bursaries to constituencies. There is Kshs500 million distributed to every constituency for taking care of such poor children, who may have gone to national schools. We have told the principals that they should not expel any of those students. We are requesting that the principals bring the names to us. I have every intention to write to each Member of Parliament, where a case may arise, soliciting for your help along these lines.

Secondly, recently we launched a scholarship programme for Form I students through the Equity Foundation and the Master Card Foundation. These are sponsoring 1,200 students every year and a total of 5,000 students at a cost of Kshs4 billion. This is an additional injection of scholarships available to the poor and needy deserving candidates. Therefore, there is every opportunity for these poor students to access these scholarships.

Mr. Speaker, Sir, if they are not enough, and they are never enough, I will request that, through your CDF kitty, you help them acquire education. All we did was to offer them positions in national schools. I think this has gone down very well nationally; the poor fellows would never have been able to achieve those opportunities without that affirmative action.

**Mr. Speaker:** Next Question!

PREMATURE RETIREMENT OF SENIOR  
MILITARY OFFICERS

**Mr. Ochieng:** Mr. Speaker, Sir, I beg to ask the the Minister of State for Defence the following Question by Private Notice.

(a) What are the reasons for the premature retirement of Major- Gen. Enock Sasia, Brig. Arthur Owour, Col. Joseph Ojwang, Lt. Col. Rono and Lt. Col. Machasiu from the Armed Forces?

(b) Could the Minister provide a list of senior military officers whose services were extended, the respective justifications for the extension of service and explain the apparent skewed application of the decision?

(c) Could the Minister also explain the correlation between the premature retirements and the procurement of the 42 AMR Parhard Light Armored Cars from M/s Sayamar (an Israeli company), APC from a single-sourced South African Company, *KN Nyayo* and *KN Umoja* war ships from Financantieri of La Special based in Italy and F5 Aircraft from the Government of Jordan, and clarify whether the Government got value for money in the deals?

**Mr. Speaker:** Hon. Members, with respect to Question No.2 by Private Notice, you will all recall that this Question appeared on the Order Paper on 18<sup>th</sup> January this year, and on that occasion, hon. Members raised certain concerns with respect to the Question among which were the following:-

(a) This matter is already referred or being dealt with by the Committee on Defence and Foreign Relations.

(b) There was a bid by the Member for Ikolomani which was supported by a few other Members that strangers be excluded from the House so that this matter is heard to the exclusion of other Members of the public.

(c) The matter related to aspects that are by operation of law secret.

So, hon. Members, I have weighed all those concerns and doing all I can; balancing one thing against the other, I have arrived at the view that this Question raises matters that go to the core of the defence and security of this country and that, therefore, it would be advisable and expedient for it to be referred to the relevant Parliamentary Committee, which is the Committee on Defence and Foreign Relations so that, that

Committee prepares a report which it will then table in the House for our consideration, if necessary, to the exclusion of strangers. That is how we will proceed.

The Committee will be expected to prepare and table its report within the next 14 days from today. Member for Nyakach, it is so directed!

That then brings us to the end of Question Time and we will take the next order.

Hon. Members, we will proceed this way: I am aware that issues have been raised in relation to the appointments which were made recently by the Executive, led by His Excellency the President of the Republic of Kenya, and we will hear Members who have issues with respect to that matter, but first we will take other Statements or requests for Statements away from that matter.

Member for Juja!

## **PERSONAL STATEMENT**

### **MEMBERS ADVERSELY MENTIONED IN THE HOUSE**

**Mr. Kabogo:** Mr. Speaker, I rise under Standing Order No.76 to make a Personal Statement arising from the communication from the Chair on documents I laid before the Table of the House on 22<sup>nd</sup> December, 2010.

It is my understanding that a matter concerning the conduct of a Member can only be discussed in the House in accordance with Standing Order No. 79. It is unfortunate that this was disregarded and names of hon. Members were adversely mentioned in the House unprocedurally, in clear disregard of the House Standing Orders.

Mr. Speaker, Sir, on 23<sup>rd</sup> December 2010, I wrote letters to the Director of the Kenya Anti-Corruption Commission, Prof. Lumumba, the Minister of State, Office of the President and the Police Commissioner; letters that I wish to table.

Despite having demanded to be provided with a copy of the allegations against me, neither the Minister nor the Commissioner of Police has responded nor acknowledged my request. However, I did receive a copy of a US dossier marked "Secret Real Kenya" from the Director of the Kenya Anti-Corruption Commission who in his reply dated 29<sup>th</sup> December, 2010 wrote, saying:-

"We refer to your letter dated 23<sup>rd</sup> December 2010 and pursuant to your request and in accordance with section 35 1(a) and (b), of the Constitution, we enclose a copy of the information in our custody and germane to your case.

Mr. Speaker, Sir, I wish to table that letter from the Kenya Anti-Corruption Commission and attached to it is a document that was handed over to me. Equally, I have the document also forwarded by the Kenya Anti-Corruption Commission which I wish to table.

I wish to bring to your attention that the information I have just tabled is a replica of the information I had tabled earlier on 22<sup>nd</sup> December 2010, germane to my case. I would wish to remind you that the Rt. Hon. Prime Minister did confirm to the House having received the same report from the American Ambassador. It is not in dispute and it is on record that the American Ambassador Michael Ranneberger filed alleged criminal complaint with the Kenya Anti-Corruption Commission and distributed copies to various Government departments as confirmed by the Rt. Hon. Prime Minister. I therefore urge

that the Prime Minister do table the document that he was given by the Ambassador. On 22<sup>nd</sup> December, Prof. George Saitoti did promise to do a comparative analysis of the report that I tabled and the one that was in his possession. He indicated that he would come back to the House and to date he has not brought it to the House.

Mr. Speaker, Sir, drug trafficking is a concern the world over and Mr. Michael Ranneberger hailing from the United States of America, a country where drug trafficking is rife and whose efforts in the war against such trafficking has been nothing short of futile and plagued with corruption, should be in a position to grasp the importance of fighting this war with information whose veracity would be beyond reasonable doubt.

Mr. Speaker, Sir, I invite you to look at the document titled “Sham and Corrupt War on Drugs and the Crimes against America” which I beg to table.

*(Mr. Kabogo laid the document on the Table)*

Mr. Speaker, Sir, this report or dossier is nothing else but falsehoods, innuendos and malicious statements made with the sole purpose of maligning the names of hon. Members of Parliament. It is very unfortunate that the US Ambassador can alter or cause to be authored such a criminal document whose contents, falsehoods and inaccurate information has no supporting evidence.

Section 28 of our Constitution States:-

“Every person has inherent dignity and the right to have that dignity respected and protected”

It is in the face of these unsubstantiated allegations that I am of the view that my right to that inherent dignity has been infringed.

Section 35(2) of our Constitution states:-

“Every person has a right to the correction or deletion of untrue or misleading information that affects the person”

So, in general, I am saying that the information tabled in this House by the Minister of State for Provincial Administration and Internal Security, having seen the information that came from the KACC, it is clear, putting the two documents together; the one by hon. Hassan Ali Joho and the one by myself, it has eight hon. Members of Parliament named negatively as drug traffickers or suspects and yet that information is not the information that the Minister did table.

Mr. Speaker, Sir, I urge that the Minister tables the information that he holds. In addition, since you did not give me a lot of time, I would like to table the Personal Statement.

**Mr. Speaker:** Very well! You may do so. Hon. Members, note that, that is a Statement issued pursuant to the provisions of Standing Order No.76. So, there shall be no debate; no *sub poena*, but it would go on record.

*(Mrs. Shebesh stood up in her place)*

**Mr. Speaker:** What is it, Mrs. Shebesh? I am not on notice that you will issue any Statement or make any request.

**Mrs. Shebesh:** Mr. Speaker, Sir, I did issue a notice, but if it has not got to you, then I will issue it again. However, I did issue the notice in the morning.

**Mr. Speaker:** You issued the notice to whom and through which means?

**Mrs. Shebesh:** Mr. Speaker, Sir, I issued the notice through the Office of the Clerk and the Speaker, but I will confirm that that happened.

**Mr. Speaker:** Order! Please, resume your seat! I will have to verify that before I allow you.

*(The Clerk-at-the-Table consulted with the Speaker)*

The Clerk declines that you gave any such notice to him and I know that you did not bring it to me.

**Mrs. Shebesh:** Mr. Speaker, Sir, I will clarify that and request for the Statement tomorrow.

**Mr. Speaker:** Please, ensure that you comply with the Standing Orders all the time!

What is it, the Member for Central Imeni?

## **POINT OF ORDER**

### CONSTITUTIONALITY OF NOMINATION OF JUDICIAL OFFICERS BY THE PRESIDENT

**Mr. Imanyara:** Mr. Speaker, Sir. I rise on a point of order to seek your assurance, guidance and direction on what we, hon. Members of this National Assembly should do where incidents of gross violation of the Constitution occur, instigated by either the Members of this House, the Executive or the Judiciary.

In rising on a point of order, Mr. Speaker, Sir, I am aware of Article 3 (1) of the Constitution that we recently promulgated which says: "Every person has an obligation to respect, uphold and defend this Constitution."

Yesterday, Kenyans were treated to a spectacle that we have not seen in the history of this country where the country's Chief Justice and the Country's Chief Legal Advisor held a press conference and signed a statement which accused the Head of State of breach of the Constitution in the manner in which he has submitted to you the nominees for positions under the new Constitution.

Mr. Speaker, Sir, in the Statement by the Judicial Service Commission at which the hon. Chief Justice was present and signed this Statement; and at which the hon. Attorney-General, a constitutional office holder who is the Chief Legal Advisor to the Government and whom we depend upon to let us know whether the Government is acting in accordance with the Constitution, stated as follows, and I have a copy of the statement that was signed by all of them:-

"We, the members of the Judicial Service Commission express our grave concern and misgivings about the nomination for the Chief Justice that was made by the President last week. We note that the President states that he consulted the Prime Minister prior to the nomination. We have also noted the views expressed by the Prime Minister that he was not consulted prior to the nomination. As we implement and internalize the new Constitution, we, the Judicial Service Commission, are of the view that both the Judiciary and the Kenyan people must start the new era heralded by the new Constitution on the

right footing; both the letter and the spirit of the new Constitution must be adhered to in our view. In light of the divergent views coming from the principals, we are of the view that the principals need to reconsider their respective positions. There is an urgent need for a rethink of the matter and to put the country first that entails a withdrawal of the nominations and a fresh start. On our part, it is our view that in order to give the process of appointing judicial officers' legitimacy, public confidence, ownership and acceptance by the people of Kenya, the Judicial Service Commission must play an integral role in the process. It is our view that Articles 171 (e) and (2) read together with Article 166 (1) and Schedule 6, Section 24, gives the Judicial Service Commission powers to play that important role. Such a process, in our view, would de-politicize and provide the much needed legitimacy and acceptance of the nominees."

Mr. Speaker, Sir, that is a very important Statement issued by an arm of the Government - the Judiciary - which is headed by the Chief Justice. I have just said that the Chief Justice sat at a press conference and signed this Statement, a copy of which I table before the House.

*(Mr. Imanyara laid the document on the Table)*

Shortly thereafter, another Commission formed under the laws passed in this House and appointed only the other week upon our return also issued a Statement signed by the Chairman of that Commission, namely the Commission for the Implementation of the Constitution (CIC) expressing similar views and ending – because it is a lengthy Statement – as follows:-

"In view of the above, it is the position of the CIC that the letter of the Constitution as provided for in Article 66, together with Sections 24 and 29 of the Sixth Schedule require that the appointment of the Chief Justice by the appointing authorities should be as follows.

(i) The process of appointment should commence with recommendations by the Judicial Service Commission to the President, who in turn should consult the Prime Minister after which the President forwards the name of the nominee to the National Assembly for approval before final appointment by the President.

(ii) The role of the Judicial Service Commission in the appointment of the Chief Justice should be respected and the Commission allowed to undertake the function reserved to it by the Constitution."

Mr. Speaker, Sir, that is a lengthy statement. It is signed and I table before this House a copy of the statement.

*(Mr. Imanyara laid the document on the Table)*

Mr. Speaker, Sir, you would have noticed that the Judicial Service Commission did point out that the Prime Minister did dissociate himself from that nomination process, which would point to a breach of the provisions of the Constitution that incorporate the National Accord that requires consultations between the Principals before appointments are made.

Indeed, I am aware that the Rt. Hon. Prime Minister has written to you at length on this issue and you have a copy of that letter, which I have tabled before the House.

What bothers me and hon. Members of this House who I have spoken to is that, contrary to the oath that all of us took, each of us, as a Member of Parliament and each of the heads of the various arms of the Government, there is a clear attempt to undermine the Constitution under the circumstances that will point to a very dangerous trend.

Mr. Speaker, Sir, should we get this wrong and go back to the old days, then there would have been no need for the long crusade for a new Constitution in this Republic. This is if the implementation process is carried out in a way that undermines that process.

Mr. Speaker, Sir, because you have made Communications from the Chair on the need for the implementation of the Constitution in a manner provided for in the Constitution, I rise to seek your directions on how we should proceed in this regard, bearing in mind the provisions of Standing Order No. 47 (b) which forbid the bringing into this House of any Motions, laws or any Bills that are contrary to the Constitution.

**Hon. Members:** Yes!

**Mr. Imanyara:** Mr. Speaker, Sir, I do seek your direction and guidance.

*(Applause)*

**Mr. Mungatana:** On a point of order, Mr. Speaker, Sir. I thank you for giving me the opportunity to also put my thoughts in this matter.

Mr. Speaker, Sir, I want to state that irrespective of whatever has happened, there are two schools of thought here; one that believes these nominations were within the Constitution. The other school of thought believes that these nominations were not within the Constitution. I want to plead with you that whatever directions you will give concerning this matter, at the end of it all, we must all be winners.

Mr. Speaker, Sir, I do not wish to repeat the arguments which were very well put by the hon. Gitobu Imanyara. I believe that the process may not have been followed. I also hold the opinion that it was not done constitutionally. However, my opinion and opinions of all us cannot outweigh the opinion of the Committee on the Implementation of the Constitution (CIC). Why I say so is that the CIC is mandated expressly by the Constitution under the Transitional and Consequential provisions, Section 5, to monitor, facilitate and oversee the implementation of this Constitution and also make a report on any impediments on the implementation of the Constitution, amongst other things.

Mr. Speaker, Sir, we have been told how this CIC has already pronounced itself. There is need for you to give direction so that the temperatures in the country can come down and the politics around this thing can come down and we move forward. At the end of it, we must have a Chief Justice, an Attorney-General, a Director of Public Prosecutions and a Budget Controller.

Mr. Speaker, Sir, I seek your direction that you find the following. As of this date, Parliament is now seized of this matter officially. Therefore, there should be no outside discussions that may prejudice or harden positions, with a view to finding a solution.

Secondly, I wish that you would direct that the Parliamentary Select Committee that we elected here, known as the Constitutional Implementation Oversight Committee (CIOOC) under the chairmanship of hon. Abdikadir be convened within 24 hours with a view to receiving formally a report from the CIC. As they bring that report, they bear in mind the provisions regarding the appointment of the Chief Justice, Article 166 of the Constitution, regarding the appointment of the Attorney-General, Article 156 of the

Constitution, regarding the appointment of the Director of Public Prosecution, Article 157 of the Constitution and, finally, regarding the appointment of the Controller of Budget, Article 228 of the Constitution, which will be read together with the Sixth Schedule, Sections 24 and 29.

Mr. Speaker, Sir, thirdly, I would request that you find and direct that the Office of the President and the Office of the Prime Minister be present in these meetings, so that whatever direction that is agreed upon in that meeting of the Parliamentary Committee on the Constitutional Implementation and Oversight Committee and the CIC, it may be implemented so that this country is saved the problems of press wars.

Mr. Speaker, Sir, you should also direct that the names of these distinguished members, who have been nominated, as we stand now, should not be prejudiced only by reason that they were nominated in an unconstitutional manner. So, when the representatives of the two big offices and the Parliamentary Committee on the Constitutional Implementation and Oversight Committee are sitting, they look at all these things together. At the end of it, I request that you direct that that report be brought to this House at least by next week so that the country can move forward, so at the end of it all, we are all winners. At the end of it all, we must have a Chief Justice, a Director of Public Prosecutions, an Attorney-General and a Controller of Budget.

With those few remarks, I beg to support.

**The Minister for Energy** (Mr. Murungi): On a point of order, Mr. Speaker, Sir.

Mr. Speaker, Sir, I would like to comment on the statement laid on the table from the Commission on the Implementation of the Constitution (CIC) and the Judicial Service Commission (JSC).

Mr. Speaker, Sir, both statements indicate the process used by the Executive in nomination of the names that are now before the House was unconstitutional and did not follow the procedures laid in our current Constitution. The main complaint is that the procedure was flawed because the JSC was not involved in the sourcing of those names.

Mr. Speaker, Sir, I have very great respect for the hon. Attorney-General, the hon. Chief Justice and the Chairman and other members of the CIC. However, on this particular case, they are all wrong in the interpretation of the Constitution.

Mr. Speaker, Sir, we are Members of Parliament. We passed this Constitution and we can read the provisions of the Constitution ourselves. The key Articles of the Constitution on which these arguments hang is Section 24(2) of the Sixth Schedule of the Constitution and Section 166. I would plead with the hon. Members to read these two Sections themselves and make their own interpretations.

Mr. Speaker, Sir, regarding Section 24(2) of the Sixth Schedule, which is part of the transitional provisions, it says that:-

“ A new Chief of 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.”

Where is the JSC referred to? It is quite clear from plain reading of this section that the JSC has absolutely no role to play in the appointment of the Chief Justice during this transition period. Those Members who were in the discussion that led to the preparation of this new Constitution at Naivasha know the reason why this provision reads the way it does, and I would like them to speak.

Mr. Speaker, Sir, Section 166 relates to the appointment of the Chief Justice after the transition period and it reads as follows:- “The President shall appoint the Chief Justice and the Deputy Chief Justice in accordance with the recommendation of the Judicial Service Commission (JSC) and subject to the approval of the National Assembly.” So, after the transition period, that is when the JSC comes in and that time, as you know, there will be no Prime Minister who will be consulted.

*(Applause)*

I think it is worth of note and we need to speak plainly about this. The Chief Justice is the outgoing CJ; he is the one being replaced. The Attorney-General is also outgoing; he is also being replaced and so, they have an interest.

**An hon. Member:** So does the President!

**The Minister for Energy** (Mr. Murungi): Mr. Speaker, Sir, we should read these statements because every person has an interest. The only factual issue that this House should consider---

**An hon. Member:** On a point of information!

**The Minister for Energy** (Mr. Murungi): Mr. Speaker, Sir, I do not need any information! I am very educated as far as law is concerned. The issue for this House to consider is whether there was any consultation between the President and the Prime Minister. That is the only issue! That is because the President says there were consultations while the Prime Minister says there were no consultations. Let those who also participated in the consultations come here and tell us how the consultations took place and then it will be for hon. Members to decide whether there were any consultations or not.

*(Applause)*

*(Several hon. Members stood up in their places)*

**Mr. Speaker:** Order!

**Mr. Farah:** Mr. Speaker, Sir, I do not wish to take a lot of time. I think we are trying to usher in a new era in this country in which--- A person said this is going to be a nation of flaws. It is not a nation of men and men; not a nation in which the position and status of a person overrides every other consideration.

*(Mr. Munya stood up in his place)*

**Mr. Farah:** Mr. Speaker, Sir, I am on a point of order. Whereas I want to---

*(Mr. Munya consulted loudly)*

**Mr. Speaker:** Order, Mr. Munya! Allow Mr. Farah, at least, to open his contribution.

**Mr. Munya:** *(Inaudible)*

**Mr. Farah:** Mr. Speaker, Sir, that is a matter for the conscience of the Deputy Speaker because he is---

**Hon. Members:** No!

**Mr. Speaker:** Order! Mr. Farah, you cannot respond to a point of order which has not been raised.

**Mr. Farah:** Fair enough, Mr. Speaker, Sir! I have illustrated it with what it deserves. The point I am trying to get across is: This is a nation of flaws because of the Constitution that we promulgated. I want to agree with what Mr. Imanyara and partly what Mr. Mungatana have said. It says that unless Schedule Six, Part IV(29)(2) prescribes otherwise, when this Constitution requires an appointment to be made by the President with the approval of the National Assembly, up and until after the first election 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.

*(Loud consultations)*

Consultation is not information! Consultation is concurrence!

*(Loud consultations)*

Mr. Speaker, Sir, can you protect me from---

*(Loud consultations)*

Having said, I do not know if a matter---

*(Loud consultations)*

Can I have your protection?

**Mr. Speaker:** Order, hon. Members! Please, let us be tolerant and hear Mr. Farah!

**Mr. Farah:** Mr. Speaker, Sir, it sickens me to see a whole House delude itself – or a substantial part of the House – that the so called National Accord need not take into consideration the aspect of power sharing. It is in that spirit that the President is not exercising executive power under this Constitution and through the transition individually. He is exercising powers with the Prime Minister.

*(Applause)*

Power is shared under this Constitution! It is under these circumstances that none of them; neither the Prime Minister on his own nor the President on his own can take an executive decision of this magnitude without the concurrence of the two of them.

Having said that, I am seeking your direction on how validly is this matter being now discussed before this House in the sense that--- My presumption would be if the President had given his own appointments, however unconstitutional – and it is for the

House itself to determine, would it be moved as a Motion by a Minister? We have not had this thing moved as a Motion here on the Floor of the House. I am seeking your direction on that!

**The Minister for Lands** (Mr. Orengo): Mr. Speaker, Sir, I thank you for giving me an opportunity to add my voice to this very important issue. I would like to plead with hon. Members that the matters that we are discussing are very weighty constitutional issues and it is important that we consider them soberly. I am saying soberly because if you look at the Constitution, Parliament is given the important role of ensuring that this Constitution is implemented through Bills and other decisions that are required in the transitional and consequential provisions.

With the greatest respect, I would want to disagree with my learned friend, Mr. Murungi. In this Constitution, where any provisions are suspended, it makes it clear which section is suspended and does not apply.

*(Applause)*

If you look at the Sixth Schedule on Transitional and Consequential Provisions, Section 2, the provisions of the Constitution that are suspended are clearly set out. That is found on page 192. The sections and the provisions related to the Judiciary are not included. Chapter 7 is excluded. It deals with the Executive. Chapter 8 is excluded. Articles 129 to 155 are suspended and the provisions of the Constitution relating to devolved funds are suspended. The other articles that are suspended are those dealing with elections for county assemblies and governance. Then the laws relating to devolved governments are set out and they are suspended. Article 62 and 63 in relation to the National Land Commission are also suspended. So, when I listen to my dear brother who is a senior counsel saying that one part of the Constitution is suspended - when the Constitution itself is not saying so - that is the greatest breach of the Constitution that one can perform before an august Assembly like this.

Mr. Speaker, Sir, if, indeed, it is true that the provisions of the Constitution which my learned friend referred to are suspended, then when the President is appointing the Chief Justice on the issue of qualification, where does he look? They are found in the body of the Constitution! He does not have to look at 24 because if he looks there, then he can appoint Dr. Khalwale to be the Chief Justice and, obviously, that cannot be true. He has to go into the main provisions of the Constitution to find out who is qualified to be the Chief Justice!

Mr. Speaker, Sir, this is a weighty constitutional issue. I plead with you because in this issue there will not be any winners. There is no PNU or ODM about this.

This Constitution bars the current Chief Justice from becoming a Chief Justice. It also does not allow him even to become a member of the Supreme Court. It says that the only position he can hold in the Judiciary is in the Court of Appeal after he has been vetted. How then can a junior member in the Judiciary be able to occupy the seat of the Chief Justice without being vetted? It does not make any sense. I do not know where my learned friend learned his law because this is a simple matter of interpretation.

We cannot take one section and then say that these are the provisions of the Constitution. Section 24 must be read together with other provisions of the Constitution. The article dealing with national values and principles of governance is very critical. It

says there must be the rule of law, participation of the people, transparency and accountability.

Finally, on the provisions dealing with the public service, the Constitution requires that the process of recruiting officers be competitive. It says there must be competitiveness, gender equality and regional balance. These are public offices. All those principles are in the Constitution.

Mr. Speaker, Sir, when we are looking at regional balance we are not just looking at those four positions. For example, if we look at the office of the Attorney-General as presently constituted by the nomination by the President, the Attorney-General will be somebody from Central Province. The Solicitor-General will be somebody from Central Province. The Deputy Solicitor-General will be somebody from Central Province. The Registrar-General will be somebody from Central Province.

**Hon. Members:** No! No!

**The Minister for Lands** (Mr. Orengo): Yes. These are facts!

*(Loud consultations)*

**Mr. Speaker:** Order, hon. Members. Let us hear the Member for Ugenya. You will also have an opportunity to be heard as I am sure you will want to be heard.

**The Minister for Lands** (Mr. Orengo): These are facts which I am stating.

Finally, this provision has been quoted by my learned friend, Mr. Imanyara and others. This is Section 24(2) of the Sixth Schedule. Everybody is talking about the consultation. It is the hierarchy of what the President is required to do. Consultation is number three. It states as follows:

“A new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act---“. Before we even come to consultation, it must be in accordance with the National Accord and Reconciliation Act. If you look at the Accord, the title reads as follows:

“An Act of Parliament to give effect to agreement on principles of partnership of coalition.”

If you look at the principles of partnership and coalition, because it is part of the law, and by our own Act through a constitutional amendment we enthroned the schedule into a constitutional status.

It states as follows:- “There must be real power sharing in the partnership.”

So, before you begin to talk about consultation you must determine whether in making that appointment, it was done on the basis of the National Accord.

*(Loud consultations)*

Mr. Speaker, Sir, this is a new Kenya. There is nobody who will make decisions in political backrooms and get away with it. You are required to be accountable to the people of Kenya and their sovereignty. So, whatever you do, at the end of the day, you must pass the test of accountability.

Thank you, Mr. Speaker, Sir.

**Mr. Speaker:** The Minister for Justice, National Cohesion and Constitutional Affairs.

*(Ms. Karua stood up in her place)*

*(Laughter)*

Order, hon. Members! Let us hear the Minister for Justice, National Cohesion and Constitutional Affairs, Mr. M. Kilonzo. We will, at a suitable time, hear the former Minister for Justice, National Cohesion and Constitutional Affairs.

**The Minister for Justice, National Cohesion and Constitutional Affairs** (Mr. M. Kilonzo): Mr. Speaker, Sir, forgive me for starting in a slightly different way and say that we, as a Parliament, have an obligation not to confuse the public. I think the requirement to respect the Constitution is fundamental.

Therefore, I will start with Article 10 which talks about National Values and Principles of Governance. They are so clear and it is possible that some of us who were so vehement in “Yes” never internalized these values. When I say so, I am speaking to both my bosses, His Excellency the President and the Right hon. Prime Minister. The first value is patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people.

I cannot see how you can dismiss that clause. Secondly, part “b” talks of human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and so on. I am surprised at my friends who have spoken before me. They have not noticed that in this list, even if there were consultations, there is no single woman. I cannot understand that at all. On that basis alone, I would urge serious understanding and fore bearing in what I am about to say.

Look at the issues of consultation. Article 259(11) on page 169 of the Constitution says: -

“If a function of power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation with the approval or consent of, or on consultation with another person, the function may be performed or the power exercised only on that advice, recommendation with that approval or with that consent or after the consultation, except where to the extent that this Constitution provides otherwise.”

The question that I think the country must come to terms with is that if you look at Article 259(11), it has the words “approval” and “consent”. Therefore, the obvious conclusion that I make is for you to decide on this although we are treating you as a judge and you are qualified. We are treating you like a Chief Justice and you are qualified. However, you will have to consider this. Does the word “consultation” in Section 24 that has been cited after consultation mean consent? Does it mean with the approval of the Prime Minister? Does it mean with the consent of the Prime Minister? Does it mean with the concurrence of the Prime Minister?

**An hon. Member:** Yes!

**The Minister for Justice, National Cohesion and Constitutional Affairs** (Mr. M. Kilonzo): Fortunately, it is not the honourable Speaker making those remarks that I hear on the Floor.

Mr. Speaker, Sir, therefore, I will defer to you in making this decision to bear in mind that in my firm view, the consultation provided for in Section 24---

**Mr. Speaker:** Order! Minister for Justice, National Cohesion and Constitutional Affairs, I am allowing this point of order because I have the discretion to do so.

What is it Mr. Nyamweya?

**Mr. G. Nyamweya:** On a point of order, Mr. Speaker, Sir. Is it really in order for the Minister for Justice, National Cohesion and Constitutional Affairs to urge you as the Speaker to take the functions of the Judiciary? The Constitution can only be interpreted by the Judiciary; the Supreme Court. In the absence of the Supreme Court, it says very clearly that the Court of Appeal will do so. It is quite disturbing for the Minister to be urging you to take the place of the Chief Justice. It is true that it is a weighty matter, but let the Minister also give us factual and wise counsel and not mislead the House.

**Mr. Speaker:** Order! Indeed, the Minister was conscious of that concern. He did urge me reservedly, knowing that I am not the Chief Justice or Judge, but saying that even as Speaker I have qualifications to be, but that I should not exercise that power from this Chair. So, I have heard him.

**The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo):** Mr. Speaker, Sir, I thank you for that because it is correct.

Mr. Speaker, Sir, I was simply saying that I hope that – because you are the one who has allowed these contributions through points of order – you will bear in mind that reading of Article 259(11) that distinguishes consent from approval, recommendation from approval and also uses the word “consultation” knowing very well that it also contains the words “approval”, “consent” as well as “recommendation.” My observation, politely and with utmost respect – and I say so for the benefit of the country – is that the word “concurrence” does not appear in Section 24 at page 201.

Mr. Speaker, Sir, having said that, I want to also invite those who are saying that this is constitutional to go to Articles 172 of the Constitution. You will begin to see the theme of the appointment of Judges as well as the Chief Justice. If you look at Article 172(2) it says:

“In the performance of its functions the Judicial Service Commission shall be guided by the following-

- (a) Competitiveness and transparent processes of appointment of judicial officers and other staff of the Judiciary; and,
- (b) promotion of gender equality.

Mr. Speaker, Sir, I have already spoken to the fact that the list, even if there were consultations that the Rt. Hon. Prime Minister is asking for--- I believe there were consultations, because I happen to be in the Office of the President several times last week and I saw these wonderful and very important gentlemen meet. I cannot say with certainty what they discussed but I know that they spoke. They spent four hours when I was waiting for the approval to present the two Bills on the Judicial Service. I have an obligation for full disclosure. As far as I am concerned, I cannot say for sure whether they discussed these appointments, but I would expect them to have been aware if the notice has come out in the course of the week.

Mr. Speaker, Sir, my argument is: What is consultation? To what extent do you consult? If two gentlemen sit in a room, did this Constitution envisage that they come out and shake hands and then say “we have agreed?” It is my argument that we request the two Principals to apply Chapter Six of the Constitution. Let me read it because this is my

final recommendation this afternoon. If you look at a Chapter Six, on Leadership and Integrity, what does it tell all of us? Article 73 says:

“Responsibilities of leadership

Authority assigned to a State officer-

(a) is a public trust to be exercised in a manner that-

(ii) demonstrates respect for the people;

(iv) promotes public confidence in the integrity of the office.”

Mr. Speaker, Sir, it is in my view – and I say this very firmly – unfair that the two Principals having met, as I have said I saw them meet and consulted as I saw them consult, that they expose the public to this debate. I would like to plead with the Rt. hon. Prime Minister and His Excellency the President to offer leadership to this country, so that as we start judicial reforms, the country understands that there is dignity in their offices and the offices we are trying to create.

Mr. Speaker, Sir, I beg your ruling.

**The Vice-President and Minister for Home Affairs** (Mr. Musyoka): Thank you, Mr. Speaker, Sir. As you will have noticed, I have just returned from claiming our country back.

Mr. Speaker, Sir, I want to issue this clarification. I will have occasion to make a full Statement on what the media has called “shuttle diplomacy” because I think this House is entitled, if for no other reason than that, the leader actually had to go on this mission.

Mr. Speaker, Sir, today, I want to issue a clarification with regard only to the matter of consultation. This is because what we are faced with – and I am happy that my brother, the Prime Minister is here – is a matter of credibility. Who between the President and the Prime Minister is telling the country the truth? That is actually the truth. The subject of judicial appointments was first discussed at a meeting between the President and the Prime Minister held before Christmas on 16<sup>th</sup> December, 2010. During the meeting, the President felt that it would be better if the issue was revisited after the New Year.

Mr. Speaker, Sir, the item of the appointments was subsequently placed in the agenda and discussed on 6<sup>th</sup> January, 2011 at Harambee House between His Excellency the President and the Rt. hon. Prime Minister. The meeting agreed on the procedure to be followed in the appointments.

(a) The identification and consultations on the nominations by the two Principals and submission to Parliament by His Excellency the President for approval.

(b) It was agreed that the law did not require the selection of candidates by either the Judicial Service Commission or the Public Service Commission.

(c) The technical team was instructed to identify suitable candidates to facilitate further consultations. In the technical meetings it was reported that the Prime Minister expressed the view that we should have a foreign Chief Justice. However, the President insisted that at close to 50 years of Independence, we have very qualified Kenyans and to search for a Chief Justice outside of Kenya would be improper and that it would send the wrong message to the law society, the legal fraternity and, indeed, the whole country.

Mr. Speaker, Sir, on Thursday, 27<sup>th</sup> January, 2011, the item was on the agenda in a consultative meeting held from 12.00 p.m. between again, His Excellency the President and the Rt. hon. Prime Minister. It must have been about the same time the Minister for

Justice, National Cohesion and Constitutional Affairs was at Harambee House but, clearly, he was not able to get into the consultations. During the meeting, President Kibaki presented his proposal, borrowing on the consultations which had taken place between the technical teams representing him and those representing the Prime Minister.

The proposal, therefore, presented by His Excellency the President was as follows:

- (a) Justice Kihara for Chief Justice.
- (b) Fred Ojiambo for Attorney-General.
- (c) The post of Deputy Chief Justice to be filled by a woman through the Judicial Service Commission.
- (d) Kioko Kilukumi for Director of Public Prosecutions; and,
- (e) William Kirwa for Director of Budget.

In response, the Prime Minister said that if the President could not agree to a judge from the Commonwealth to be nominated as the Chief Justice, then he would insist on Justice Omolo to be nominated in the position.

Number five, the President - it is ecstatic to see that His Lordship, Justice Omolo was present at the Press Conference - the President pointed out that he needed to make appointments before he left for Addis Ababa, Ethiopia for the African Union Meeting. It was, therefore, decided that the technical team would discuss and report back on the same day in the afternoon. The team comprised of Ambassador Muthaura, Mr. Mohamed Isakhakia, Prof. Nick Wanjohi and Mr. Caroli Omondi.

Six, the technical teams reported separately that they had agreed on three of the positions, but were unable to agree on the position of the Chief Justice. The team presented three options for Chief Justice; Justice Omolo, Justice Kihara or Justice Visram for consideration by the Principals.

Seven, at the same time, the President asked the Prime Minister to propose an Attorney-General to replace Mr. Ojiambo as the job of the Attorney-General, being the Chief Legal Advisor of the Government, required higher post graduate qualifications. I have no difficulty with my learned brother, Mr. Fred Ojiambo. He is a senior partner at Kaplan and Stratton where I did my pupillage. However, I think it was felt that higher post graduate qualifications would be proper. So, Prof. Githu Muigai was proposed and agreed upon by both technical sides.

Eight, the President said that because he was travelling to Addis Ababa on Saturday, the matter needed to be finalized by 12.00 noon, Friday, 28<sup>th</sup> January, 2011. It was imperative that the proposals were made before the African Union Heads of States Meeting in Addis Ababa. You can understand the reason for this. The President has been saying that he would want to have a local mechanism and he wanted to demonstrate before his colleagues that he was serious on this matter of appointments of the new Judiciary officers. This was made clear to the Right Hon. Prime Minister. On Friday morning, 28<sup>th</sup> January, 2011, the Prime Minister sent a letter signed by Mr. Caroli Omondi, addressed to Ambassador Muthaura saying that he had left for Addis Ababa and that the consultations should be held the following week. Obviously, the Prime Minister did a very good job because he tried to represent all of us with regard to the Cote d'Ivoire crisis and that he was required to make a report. That is contained in the letter signed by Mr. Caroli Omondi.

Number ten, the Prime Minister was informed that because the matter needed to be concluded before the President left for Addis Ababa, consultations could be facilitated through the phone. The President then made a proposal that Justice Alnashir Visram be nominated as the Chief Justice, who hails from a minority community, so as to accommodate the Prime Minister's concerns of neutrality. The proposal was communicated to the Prime Minister. In response, the Prime Minister said that he had no problem with Prof. Githu Muigai being the Attorney-General, but insisted on Justice Omolo being nominated as the Chief Justice. The Prime Minister was asked to call the President from Addis Ababa so that they could finalize. The Prime Minister said that he would call the President. The President waited at the Harambee House between 12.30 pm and 3.00 pm, but the Prime Minister did not make that call. At 3.00 p.m., the President left for State House to have lunch. This was at 3.00 p.m. What a late time to have lunch! A telephone number to reach the President at State House was communicated to the Right Hon. Prime Minister so that he could call the President. The Prime Minister did not make that call. At 6.00 p.m., the State House Comptroller called the Prime Minister so that the President could speak to him in Addis Ababa. Mr. Caroli Omondi answered the Prime Minister's phone. After consulting, Mr. Caroli Omondi said that the Prime Minister was busy and he would call back after one and half hours. This is the time that he was reporting, hopefully.

Number 14 and finally, at this point, the President felt that he had consulted extensively, had accommodated the Prime Minister and had fulfilled the constitutional requirement with regard to consultation and, therefore, made the announcement on Friday, 28<sup>th</sup> January at 8.30 a.m.

I think it is up to the country to decide whether there were consultations or not.

**Mr. Speaker:** Order! Leader of Government Business, you have done your part. You have said your piece in the language that you had. However, there is one area in which, perhaps you have strayed, in my opinion. It is not right to say that the House will decide on who between the President and the Prime Minister is saying the truth. It is not the conduct of the two that is in question here. That position will have to be expunged from the records.

**Ms. Karua:** Mr. Speaker, Sir, we have heard from the Leader of Government Business. My conclusion is that there was no agreement between the President and the Prime Minister. That has been made very clear. However, the President got tired of the consultations. The President must not tire of consultations. Sometimes, consultations go wrong and can take a long time. However, on important matters, it is my plea that we should not tire; whether it is the Assembly or the two Principals. I want to say that this is not about the two Principals. This is not a power game between them. This is about our country. This is about reforms. Courts of law are everything to our country. It is failure to believe the courts that was used as an excuse to do what we did to each other. It is important that as we set out to get a Chief Justice to steer off the judicial reforms, we must burn our midnight oil, even if it means going round and round until we come to the answer. I am urging that soberly, this matter is referred back to consultations.

Number two, even if the consultation was right, the process was wrong. I said that this is not about the two individuals. Before I go back to the sections my colleagues read, what did we want to achieve as Kenyans when we passed the new Constitution on 4<sup>th</sup> August? We wanted a complete break from the past. We wanted a new method of filling

the top offices. That is why Section 166, unlike the previous Constitution where the President could appoint any judicial officer, this time it is the Judicial Service Commission (JSC) made not only of lawyers, but of others within the society. It is an expanded JSC which this House, for the first time in the history of this country, has vetted. All the other JSCs have been an in-house thing. So, for the first time, we have vetted the JSC which will give us a head of the Judiciary who then must be approved by Parliament. It is not right that we should use our knowledge of the law to mislead. The Schedule cannot take over the substantive sections of the Constitution. When it comes to appointments, Section 166 overrides anything the Schedule says. Again, does the Schedule conflict? It does not. The Schedule talks about consultations. The Schedule is helping us. After 2012, we will not have two Principals. We will have one Principal, the President.

Mr. Speaker, Sir, after 2012, we shall not have two Principals. We shall have one Principal, namely, the President. This is an accident in history that we have two Principals. So, the Schedule is helping us to know how to behave during this period where we have two Principals. So, every reference to the President appointing in this Constitution, during the transition and before the 2012 Elections, will mean in consultation with the Prime Minister as per the National Accord. That is all that the Schedule is directing. It is not seeking to take over the provisions of Section 166. Therefore, the Judicial Service Commission (JSC), in my view, is totally right when it asserts its right to originate the names. This takes it away from being a power game between two individuals. You have seen the reaction of the House. People are reacting emotionally depending on which Principal you support. I support neither. I want to go with the law. I want to support Kenya and go with the law.

Therefore, let us sober up and remember that beyond Parliament, we are Kenyans. We are going to quarrel with each other and we will need an independent court to arbitrate over our quarrels. We will go through elections and any disputes that we will have, we will go the court.

*(Loud consultations)*

Mr. Speaker, Sir, will you protect me from across the aisle consultation that is taking place?

**Mr. Speaker:** Order, hon. Members! Order Member for Westlands, Member for Lugari and Member for Kisumu West! Let us hear the Member for Gichugu!

**Ms. Karua:** Mr. Speaker, Sir, I was saying that we all need the courts to solve our disputes with each other and to even handle this sort of situation where we are arguing about the interpretation of the Constitution. If we do not have a court that we can all believe in, where are we going to go? I want to urge the President and the Prime Minister not to tire in their consultations and that the JSC is the one that must give them the names. These two gentlemen must not have the liberty to bring their cronies to us. The JSC must give us the names and then all they do is to pick from a pre-determined bucket.

I want to agree with those who have said that because the Chief Justice is outgoing, he ought not to sit in the JSC, but that is not my reason. Let us look at Schedule 6, Chapter 24. His time has expired by sheer effluxion of time. His tenure ended on Friday. The Schedule reads that:-

“The Chief Justice in office immediately before the effective date shall within six months after the effective date vacate office and may choose...” So, he vacated office by sheer passage of time; effluxion of time on Friday. Therefore, in yesterday’s Press conference, he was accompanying--- We can say sorry that he was in attendance. So, the Committee must choose one among them to chair temporarily. We must, therefore, be conscious, as a House and the leadership of this country, that we do not have a Chief Justice in Kenya at the moment. We, therefore, must move with speed. Let the Judicial Service Commission very quickly come up with the names. Let the House do its work.

**Mr. Jamleck Irungu Kamau:** On a point of order, Mr. Speaker, Sir. Is it in order for hon. Karua to mislead this House that the tenure of the Chief Justice expired on Friday while we know very well it has not expired until 27<sup>th</sup> February? This will be six months after the promulgation of the new Constitution.

**Ms. Karua:** Mr. Speaker, Sir, if he has counted accurately and it will be on 27<sup>th</sup> February, then it will expire on that date and we still have time, but I need not apologize on that. His tenure is fixed and will expire by sheer effluxion of time.

**The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo):** On a point of order, Mr. Speaker, Sir.

**Mr. Speaker:** Order, Member for Gichugu!

**Ms. Karua:** Mr. Speaker, Sir, but I sat in silence listening to him.

**Mr. Speaker:** Order, Member for Gichugu! The Minister for Justice, National Cohesion and Constitutional Affairs has caught my eye and I have the discretion to allow a point of order notwithstanding that you are on a point of order!

**Ms. Karua:** And that I sat in silence when he contributed.

**Mr. Speaker:** Well, he may not have the same manners that you do.

**The Minister for Justice, National Cohesion and Constitutional Affairs (Mr. M. Kilonzo):** Mr. Speaker, Sir, I have a lot of respect for my learned friend, hon. Karua, but a simple calculation from 27<sup>th</sup> August, 2010, is that the first month ended on 27<sup>th</sup> September, the second month on 27<sup>th</sup> October, the third month on 27<sup>th</sup> November, the fourth month on 27<sup>th</sup> December, the fifth month on 27<sup>th</sup> January and the sixth month will end on 27<sup>th</sup> February, 2011. Therefore, we have an obligation to advise the country correctly.

**Ms. Karua:** Mr. Speaker, Sir, that is nothing new. He has merely repeated what hon. Jamleck Kamau had ably and with brevity convinced me. Even though the Chief Justice’s tenure is unexpired, to sit to determine who his successor is going to be, is morally wrong. He should exclude himself. I talked of a new break and even the Attorney-General, although he is not barred, both of them are being retired by this document. They may wish to let a new team help us, otherwise, we will not have a complete break with the past. It is their choices in the past that have got us to where we are, namely, to need a new beginning. That is the point I was trying to make.

To wind up, we will still need to vet whoever is nominated by the Judicial Service Commission and appointed by the two Principals. They will still need to undergo vetting. You cannot sit as Chief Justice who have not been vetted and preside over the vetting of judges. I want to agree with the principle of gender inclusivity and also looking at Kenya as a whole. If it is the Finance Chapter, it has the Commission on Revenue Allocation, Director of Budget and other officers. When appointments are being made, the two Principals must look at Kenya, so that you do not take a cluster and cluster it with

individuals without looking at the larger country and the gender composition. I heard my learned colleague, the Minister for Lands, complaining about certain structures. Yes, you will go to Ministries and find that there is no geographical distribution, but it is not only the office he was citing. You will go to the Prime Minister's or the President's office and the story is the same. This is an opportunity for us to break with the past and we better do it right.

Mr. Speaker, Sir, you have been asked not to interpret the law as the court. For purposes of House proceedings, the Speaker is the final arbiter. A court of law may later, on a Motion, interpret differently, but for purposes of our proceedings, it is to the Speaker we turn for directions. Do not shy away from your responsibility of giving directions to the House. You will only be exercising your function as the head of this arm of the Government called the Legislature. You will not have overstepped your mandate and the writing is clear. Once again, the Principals should consult and give us a name that will have originated from the Judicial Service Commission.

**The Prime Minister** (Mr. Raila): Thank you, Mr. Speaker, Sir. I did not anticipate that I will be required to make this Statement, but I am compelled to do so having listened very carefully to what the Leader of Government Business has said here. Probably, it may not have been fair for me to make this Statement without the President being present here, but the circumstances as I have said, are the ones that compel me to do so.

Mr. Speaker, Sir, I want us to understand that over the period, we have perfected the method of consultation with His Excellency the President. Indeed, we have been guided by the National Accord, which we jointly signed, and in which we say as follows in the preamble:-

“Given the current situation, neither side can realistically govern the country without the other. There must be real power-sharing to move the country forward and begin the healing and reconciliation process.

With this agreement, we are stepping forward together as political leaders to overcome the current crisis and to set the country on a new path. As partners in a coalition government, we commit ourselves to work together in good faith as two partners through constant consultation and willingness to compromise.

This agreement is designed to create an environment conducive to such a partnership and to build mutual trust and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda to address the fundamental root causes of recurrent conflict, and to create a better, more secure and more prosperous Kenya for all.”

Mr. Speaker, Sir, guided by the National Accord, we have perfected the art of consultation with the President. We meet regularly. Usually, we agree on the agenda we are going to discuss before we meet. That means we do not have to spend a lot of time.

I want to say that I wish the Vice-President and Minister for Home Affairs had shared with me the Statement that he had been given to read here. He would probably have thought twice before he read that Statement. There are certain aspects of that Statement which are correct. I want to inform the House in advance that I am going to be very candid and very factual. I think it is important to do so.

*(Applause)*

Mr. Speaker, Sir, the dates that the Vice-President and Minister for Home Affairs has mentioned, that is 6<sup>th</sup> December and 16<sup>th</sup> December, 2010 are correct. Indeed, we met on 6<sup>th</sup> December, 2010 and said that we would meet again. We met on 16<sup>th</sup> December, 2010. When we met on 16<sup>th</sup> December, our experts drew our attention to Transitional Clause 24, on the appointment of the Chief Justice, which says:-

“24(2) The 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.”

Advised that way, we decided that there must be some kind of procedure we were going to follow to be able to identify the Chief Justice, the Attorney-General, the Director of Public Prosecutions and the Controller of Budget. We agreed that a panel be set up to handle this matter and come up with recommendations of three names for each of those positions.

We suggested that the panel should consist of one officer from the Office of the President, one officer from the Office of the Prime Minister, one officer from the Law Reform Commission, one officer from the Law Society of Kenya, one officer from the Judicial Service Commission, and one officer from the Public Service Commission. We agreed that that panel should find a way of interviewing Kenyans and then making recommendations of three names from which we would be able to pick individuals.

Mr. Speaker, Sir, that was on 16<sup>th</sup> December, 2010. We did not meet again until 27<sup>th</sup> January, 2011, which was Thursday, last week. Before our meeting of Thursday, our aids had agreed on the agenda we were going to discuss. The Minister for Justice, National Cohesion and Constitutional Affairs has said that we met for a long time. On that day, we were not talking about these positions. The agenda from my office was:-

First, I was going to brief the President on the drought situation in the country and the measures we were taking as Government to deal with that situation. When I was in North Eastern Kenya, parents petitioned that during this period of serious drought, as Government, we needed to find a way of waiving school fees for them. This is a decision which has financial implications, and which is to be taken to him.

Secondly, I was going to brief the President on my mediation role in Ivory Coast.

Mr. Speaker, Sir, on the other side, the President's agenda was:-

First, he was to brief me on the issue of the African Union and the “shuttle diplomacy”, which the Vice-President and Minister for Home Affairs talked about.

Secondly, he was to brief me on the issue of the International Criminal Court (ICC).

Thirdly, he was to brief me on the issue of these appointments.

Having dealt with the three other items, we came to this other one, and I said that we had appointed a panel to give us advice but that panel had not come up with any names. Over the issue of the Chief Justice, I told the President that because we were setting up a process of vetting all the judges and the process had not started, we appoint a new person before 27<sup>th</sup> February, 2011, when the term of the current Chief Justice would expire. I suggested that we get a judge from the Commonwealth for a fixed term of three years, non-renewable, as we go through the process of vetting the current judges and looking at them before we do the appointment.

Mr. Speaker, Sir, His Excellency the President said: “Yes, that is also a good idea. However, we can also look at the people we have locally and maybe, we can have somebody who has got near it. That way, we will be seen to have rewarded merit locally.” I told him: “Mr. President, I have no serious objection about that if we can get somebody who is acceptable.”

At that time, no name had been mentioned. I asked him: “Do you have any suggestions?” He told me: “Yes, I have made some consultations and I have the names.” I said: “Then let us look at those names.” He then produced a list of names, which I have here, and which are as follows:-

(i) The Chief Justice is Justice Paul Kihara Kariuki, High Court Judge, Kiambu County.

(ii) The Deputy Chief Justice is Justice Hannah Okwengu, High Court Judge, Homa Bay County. The Attorney-General is Mr. Fred Ojiambo, private practice; Director of Public Prosecutions is Mr. Kioko Kilukumi, private practice. The Controller of Budget is Mr. William Kirwa who is the Managing Director, Agricultural Development Corporation (ADC). The Director of the Kenya Anti-Corruption Commission (KACC) is Dr. PLO Lumumba. That is the list that I was given by His Excellency, the President. I informed him that because I was seeing the list for the first time, I needed time to consult. He then told me that he wanted us to agree so that those names could be announced the same day.

Mr. Speaker, Sir, you understand that this is a weighty issue because I said that we had already appointed a panel. I was told that one of the two gentlemen who were with us in the room were members of the panel. They told us that they only met once and they interviewed persons for the position of the Director of Public Prosecution and had come up with two names. One was Mr. Kioko Kilukumi and the other was Mr. Kiage. They adjourned to meet again to deal with the issues of the Attorney-General, the Chief Justice and the Controller of Budget but they had not yet met. We agreed with the President that I should go, make some consultations and send my Permanent Secretary and Chief of Staff to meet with his Permanent Secretary and Personal Secretary or advisor that afternoon.

When I made some consultations, our view was that to pick from the current Judiciary people who have not been vetted will not be right. Through those consultations, we came up with the name of Mr. Pheroze Nowrojee as the Chief Justice. We said that, that was the name we had from the private sector, otherwise we would get somebody from outside and if not he would come up with another name. We have nothing against Justice Paul Kihara Kariuki except that he is a member of the current bench and has not been vetted. When this team went back to consult, they did not agree. First, they said that Mr. Pheroze Nowrojee is an activist and, therefore, is not acceptable. I said that I will be very candid. Mr. Pheroze Nowrojee’s name, having been dropped, they came up with a list of judges in the Judiciary. That is something that I was amazed with.

During the first consultation with the President, I asked what the background of Mr. Kariuki was and I was told that he is a reformer. That is the reputation that he has. So, the list of pecking order was provided from the Office of the President and not from me. So, when they were discussing at that time, they came up with a pecking order of the Judiciary which they got from the Judiciary. It is in that list that the names of Justice Ringa Riaga and Justice C.S. Omolo appear. I had never talked about Justice Omolo. This

was never my idea. I did not talk about Justice Omolo being the Chief Justice. This list was provided when the experts were discussing at the Office of the President. It was provided from the Office of the President.

*(Loud consultations)*

**Mr. Speaker:** Order, hon. Members!

Please let us hear the Prime Minister.

**The Prime Minister** (Mr. Raila): Mr. Speaker, Sir, I said that if they insist then I would say that Justice Omolo is a serving judge and, therefore, he does not qualify because he has not been vetted. I said that if they insist that they must have people from the bench then let them go by the seniority. I said that in that pecking order there is, first, Justice Omolo, Justice Phillip Tanui, Justice Samuel Bosire, Justice Emmanuel Okubasu, Justice Bowjio ole Keiwua, Justice Erastus Githinji, Justice Phillip Nyamu Waki, Justice Onyango Otieno, Justice Aganyanya, Justice Magan Visram and Justice Gregory Nyamu.

Mr. Speaker, Sir, on the list of High Court judges which they had, we found the first one was Justice Mbogholi Musagha. We also found that Justice Kariuki who had been projected was number 21 on the list of High Court judges. Our view was that this matter needed more time for consideration. The gentlemen from the Office of the President left my people and said that they were going to consult with the President. After they came back I was called later and told that they were saying that I should pick the Attorney-General of my choice and they would pick the Chief Justice. I said that it is not a question of me or the President's preference in picking people to fill very important offices in the country. It was not an ODM's Attorney-General or PNU's Chief Justice but we were picking a Chief Justice for the Republic of Kenya. That is why I said that this matter needed further consultations. Since I was travelling to Addis Ababa the following morning, I suggested that this matter be deferred until we come back because the President was also leaving for Addis Ababa the day after my departure. I instructed my secretary to write a letter to the Permanent Secretary, Office of the President. The letter says:-

“I have been instructed to advise you that the Rt. Hon. Raila Odinga, the Prime Minister of the Republic of Kenya will be travelling to Addis Ababa, Ethiopia tomorrow on 28<sup>th</sup> January, 2011 to present his report on the Cote d’Ivoire to the Africa Union Peace and Security Council. Consequently, the consultations between His Excellency, Mwai Kibaki, the President and Commander-in-Chief of the Armed Forces of the Republic of Kenya and the Prime Minister on the appointments of the Chief Justice, the Attorney-General, the Director of Public Prosecutions and the Controller of Budget should be held sometime next week on a date convenient to both Principals.”

Mr. Speaker, Sir, that is how I left the country and travelled the following day. The meeting that I was attending in Addis Ababa started late in the afternoon at 4.00 p.m. We were in a closed door meeting and I was not informed that anybody wanted to talk to me. When I went out of the room to go and have some refreshments, I was confronted by a battery of journalists asking me if I was consulted about the appointments. I was not aware and I did not make any comment at that time. Later on, I was told that the President, in consultation with the Prime Minister, had appointed not Justice Paul Kihara Kariuki but Justice Visram and not Mr. Ojiambo but Prof. Githu Muigai as the Attorney-

General. At that point I said that when we discussed with His Excellency the President, those two names never appeared in the list. When I discussed with His Excellency the President, those two names never appeared anywhere. I am prepared to swear to this. Therefore, I was never consulted.

I want to say that we are dealing with very weighty issues of State and, therefore, we need to be very transparent in our dealings with these matters. I would say that I have nothing against the appointment of Justice Visram as the Chief Justice of the Republic Kenya and Prof. Githu Muigai as the Attorney-General. He is a good friend of mine. In fact, he is also my neighbour. His fence touches mine, and he is someone I have known for a long time. I would have no objection at all to these being appointed, but we must create proper criteria for appointing these people.

Mr. Speaker, I feel very strongly that there must be some kind of transparency and competitiveness in these appointments, because we are not appointing them for this Government. We are going for elections and there will be another Government, but these positions will be there for another number of years. That is why it is important that we have a neutral, transparent and credible process of choosing these people. That is all that I have been asking for. I do believe strongly that this has not been done. This was done in a hurry because we were going to Addis Ababa to meet heads of State to try and convince them that we have begun the process of judicial reforms.

Mr. Speaker, my hon. friend, the former Minister for Justice and Constitutional Affairs, the Member for Imenti South started what he called “radical surgery” of the Judiciary in 2003. At that time, we had Mr. Chunga as the Chief Justice. Mr. Chunga was my prosecutor in those dark days. So, I really had no time for him; he also comes from my constituency. Mr. Chunga was hounded out of office. Once out office, we then appointed Justice Gicheru, who then appointed Justice Ringera to carry out investigations in the Judiciary and carry out reforms. So, the question was: Who vetted Justice Gicheru? Who vetted Justice Ringera, so that he could pass judgment over his other colleagues?

**The Minister for Energy** (Mr. Murungi): On a point of information, Mr. Speaker, Sir.

**Mr. Speaker:** Order! The Right Honourable Prime Minister, do you wish to be informed?

**The Prime Minister** (Mr. Raila): No! I do not need any information, Mr. Speaker, Sir.

*(Laughter)*

So, that is where the rain began to beat us, because we did not start on a clean slate or platform. That was why the so-called “radical surgery” ended up without any serious reforms in the Judiciary. That is why we still have a situation where we have some judgments which are negotiated in advance. That is why every hon. Member in this House will agree with me that the Judiciary is as corrupt today as it was under Chief Justice Chunga.

Mr. Speaker, Sir, it is important that this time round we get it right. Let us get it right from the very beginning. Let us not just try to sinecure. Let us not appoint people because so and so comes from this corner. No!

Mr. Speaker, Sir, the other issue that I have, and I have said it, is that our Constitution talks about gender. I would like to see this reflected properly in

appointments which are being made now henceforth. Therefore, I found it extremely objectionable that we can appoint people to four very important positions and there is not a single woman. We have a situation where the Chief Justice is--- If we did not have them, then we would have an excuse. We have a situation where in Ghana, the Chief Justice is a woman. The Chair of the Electoral Commission of South Africa is a woman. Therefore, I insist that this process was done unconstitutionally. It needs to be nullified and then we start afresh.

**Mr. Kioni:** Thank you, Mr. Speaker. One of the things that needed clarification was whether there was consultation. Listening to the Leader of Government Business and the Prime Minister, both of them confirmed that there was consultation.

**Mrs. Odhiambo-Mabona:** On a point of order, Mr. Speaker, Sir. Is the hon. Member in order to misinform the House? We have all been here. We have listened to the Vice-President and Minister for Home Affairs and to the Prime Minister. The Prime Minister has been very categorical that for two of those positions, there was no consultation. I shall not be intimidated. There was no consultation.

**Mr. Kioni:** Mr. Speaker, Sir, I said that listening to the Prime Minister and the Vice-President and Minister for Home Affairs it is now clear to us, and the public at large that there was consultation, and the utterances that one maybe mad and not the other one, really has no place in our politics now.

Mr. Speaker, Sir, I was one of the 27 people who were in Naivasha.

**Mr. Speaker:** Order, hon. Member for Ndaragwa! You have used language that appears very offensive. You are referring to His Excellency the President and the Right Hon. Prime Minister and saying that one of them may have been mad.

**Mr. Kioni:** No! Mr. Speaker, Sir, I said that utterances to that effect have no room. I did not say that any of them is mad. I have no doubt.

**Mr. Speaker:** Fair enough. I will give you the benefit of the doubt. If the word “mad” appears in what you say, it is ordered to be expunged.

**Mr. Kioni:** Mr. Speaker, Sir, I will go with that ruling.

I was saying that I was one of those people who went to Naivasha as the Parliamentary Select Committee (PSC) on constitutional review. When we received the draft from the Committee of Experts (CoE), within it there was the provision that in any consultation between the Prime Minister and the President there would be need for concurrence. We sat as members of the PSC and agreed that if we allow the word “concurrence” into the Constitution, then we would allow ourselves to get into a stalemate in this country. We were unanimous in saying that what we needed was consultation, so that the country never came to a standstill. That is one of the things.

Mr. Speaker, Sir, in that meeting my good friend, the Minister for Lands amongst others, were present.

**The Minister for Lands (Mr. Orengo):** On a point of order, Mr. Speaker, Sir. It may go on record that what Mr. Kioni is saying is accurate when it is not accurate. There were arguments about what is in the National Accord, and that is why we said that because it is clear on the issue of power sharing--- It went beyond consultations. In law, the inclusion of the word, “concurrence” would have been completely superfluous.

**Mr. Kioni:** Mr. Speaker, Sir, again he has confirmed that we agreed not to have the word “concurrence” in the Constitution. That is why it is not there.

The other thing was---

**Mr. Speaker:** Order! That will need interpretation, because each of you has a different position from the other.

**Mr. Kioni:** Mine is that it is not in the Constitution; so interpretation would be easy.

Mr. Speaker, Sir, the other thing was the issue of the appointment of the Chief Justice. In the Sixth Schedule if you read 29(2) it says:-

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

Mr. Speaker, Sir, again, it is “unless this Schedule prescribes otherwise”. It prescribes that a new Chief Justice shall be appointed by the President subject to the National Accord and Reconciliation Act, after consultation with the Prime Minister and with the approval of the National Assembly. Nowhere does the Judicial Service Commission (JSC) come in. In the event that there is a vacancy, Section 3 provides how that vacancy will be filled.

Mr. Speaker, Sir, you have been invited to make a ruling and give an interpretation of all this. As you do so, I want to draw your attention to Article 165(3) (d). It says:-

“Subject to Clause (5) the High Court shall have jurisdiction to hear any question respecting the interpretation of this Constitution, including the determination of the question whether any law is inconsistent with, or in contravention of this Constitution”

You can read the whole of it. In other words, matters of the interpretation of this Constitution lie with the High Court.

Mr. Speaker, Sir, I am happy to recall that you have on a number of occasions in previous sittings said that it is not your work to interpret the Constitution. So as we do this, it is important that you remain clear as to what you have told us in the past.

Mr. Speaker, Sir, there is the Political Parties Act which was passed by this same House. Under Section 5, there is an establishment of a tribunal called “the Political Parties Disputes Tribunal”. Section 6 provides for the purpose of that Tribunal. The purpose of that Tribunal is to determine disputes between members of a political party, disputes between political parties forming a coalition, or appeals from decisions of the Registrar under this Act.

If the dispute that is before us has anything to do with the political parties in the name of ODM and PNU, then the place to take that dispute is to the Political Parties Dispute Tribunal, and not to the Speaker of this House.

**Mr. Mbadi:** On a point of order, Mr. Speaker, Sir. The hon. Member for Ndaragwa has made a very serious assertion and allegation, which I feel is out of order by saying that the appointment of the Chief Justice and three other officers, which are Constitutional provisions, can be taken to a tribunal that handles matters of political parties. Is it in order for the hon. Member to reduce a constitutional matter to a matter of differences between political parties?

**Mr. Speaker:** Member for Gwassi, you have raised that matter, but I am afraid it does not amount to a valid point of order. You must follow the proceedings in this House to be able to raise a point of order that will pass the test. The Member for Ndaragwa put a

situation which is figurative. He is not categorical. He says, “If it is a problem of political parties---“. Obviously, he is not asserting that, that is so. I know you are a good scholar.

Proceed, Mr. Kioni!

**Mr. Kioni:** Thank you Mr. Speaker, Sir, for that clarification.

It is also important for us to take note of the fact that the power sharing, as contained in the National Accord, is between parties. Any dispute coming out of power sharing then has a bearing on the political parties.

Finally, listening to the Prime Minister I did not hear him make any proposal for giving a woman one of the four positions. There was no initiative from that side. I was keenly listening to hear that the aspect of gender had consideration by both sides.

**The Prime Minister** (Mr. Raila): On a point of order, Mr. Speaker, Sir. As I have mentioned, we had not agreed on the other positions at all. We were talking about the Chief Justice only. We had names which we were not able to submit because of lack of consultations.

Mr. Speaker, Sir, if you allow me, we always agree. We have sent names here for members of other Commissions, for example the Commission on the Implementation of the Constitution (CIC) and the Revenue Allocation Commission (RAC). We always agree if there is proper consultation, but in this case there was no consultation.

**The Minister of State for Immigration and Registration of Persons** (Mr. Kajwang’): Mr. Speaker, Sir, I will be very brief. I just want to address one issue. That is the issue of the jurisdiction of the Speaker in determining whether this House can discuss the names that have been brought forward to his office for discussion either in this House or in a Committee of this House. The law is that this House cannot discuss anything that is unconstitutional. It is up to the Speaker to determine whether the Motion to come before the House meets the test of constitutionality. It is not for a court to determine for this House whether a matter is constitutional or not. In fact, it is the duty of the Speaker to, either in his own Chambers or on the Floor of the House, to make a ruling as to whether a matter---

**Mr. G. Nyamweya:** On a point of order, Mr. Speaker, Sir, this is really of grave concern. There is really no Motion before the House in the first place. So, there is nothing that we can ask you to go and rule on. In fact---

**Mr. Speaker:** Order, Mr. Nyamweya! Why do you want to pre-empt any possible decision by the Speaker. Leave that to me!

**The Minister for Lands** (Mr. Orengo): On a point of information, Mr. Speaker, Sir.

**The Minister for of State for Immigration and Registration of Persons** (Mr. Kajwang): I will allow!

*(Laughter)*

**The Minister for Lands** (Mr. Orengo): Mr. Speaker, Sir, I just want to inform the Member for Mbita that indeed, the Constitution contemplates that every person in Kenya including State organ and State officers; in the national values and principles of governance, must apply or interpret this Constitution. For example, when the President is making a decision, he has to satisfy himself that the decision he is making is Constitutional. So, this Constitution is wise to advise every State organ, every State

officer, every public officer and all persons, whenever any of them applies or interprets this Constitution - this is on page 15 – enacts, applies or interprets any law or makes or implements public policy decisions.

Mr. Speaker, Sir, the simple answer is, if what Mr. Nyamweya is saying is true, then the oath of allegiance and/or affirmation is completely useless because it says: “I shall obey, protect, preserve and defend the Constitution” If you cannot interpret it, then how do you defend it? So, with respect, I think you need to go back to Law School.

**Mr. Speaker:** Order, Order hon. Orenge! Some of what you have said is completely unnecessary because I had ruled hon. Nyamweya actually, as not raising a valid point of order because he was seeking to usurp my role. So, you did not have to speak to that and in the process perhaps, insult hon. Nyamweya. But because you asked him to go back to school, I will allow hon. Nyamweya to say his piece.

**Mr. G. Nyamweya:** Thank you Mr. Speaker, Sir. Ordinarily, I would not be bothered really to engage myself in matters that have no concern to ourselves. Truly we are dealing with very heavy and weighty matters, and this is something we must be able to get out of. We must navigate the country of this quagmire. For that, we must be truthful and factual to the Constitution which we have passed. We must also be truthful to our own procedures. Our own procedures, truly, was a point of order raised and we have dealt at great length with all these matters without enabling the House to eventually come to any conclusion. I think that is common sense. It is not a question of my loyalty or patriotism to the Constitution. I think my learned friend should have the courtesy of honouring me the way I honour him.

**The Minister of State for Immigration and Registration of Persons (Mr. Kajwang):** Mr. Speaker, Sir, I was just about to conclude. As much as we emphasise the consultation which ought to be there and which must be there because it is in the Constitution, we must also understand that we did not even start with the word “consultation”. We started with “National Accord” and due weight must be given to the spirit and the letter of the National Accord before you suggest whether the consultation has actually happened or not.

Mr. Speaker, Sir, the only little thing I wanted to add is that, I can hear a lot of Members suggesting that you have no jurisdiction to determine whether this matter can be ruled on; whether we should discuss it or not. But I want to urge that it can be ruled on. In fact, that is why you have allowed us to speak on it. That you can rule on it with or without a Motion because you have the jurisdiction to do so and if time comes for a Motion, we can debate that Motion. I think you can save this country a lot of time and a lot of agony by ruling on this matter; that there was no consultation and that the appointments were unconstitutional.

**Mr. Abdikadir:** Mr. Speaker, Sir, after the passing of the Constitution, probably the most seminal decision this House will make involves the appointment of the new Chief Justice. There is one major decision we have to take very seriously; that is the decision. Other than the House and the Executive, the most critical institution for us at this time in the history of this country is the Judiciary. Having the right Chief Justice with the right support from the country behind him or her is really the best gift this Parliament can give to the country at this point in time.

Mr. Speaker, Sir, this is really about the law, but it is more than the law. It is about a culture. It is about constitutional culture and developing the right conventions as

we move forward in the implementation of the Constitution. The way we do these things is very important. It is not just the things that are done, but really the way we do these things is very important. Somehow, it looks like we always look for the most difficulty way of doing things. I do not know why we torture ourselves as a country and always look for the most difficult routes. Surely, there are simpler ways of handling these things.

Last week, a number of us travelled as Justice Committee and we met a lot of Kenyans. The hope in their eyes and the aspirations they have for this country and the frustration that is out there; that we as a country have everything as an ingredient to move us forward but we just refuse to make these decisions and move forward. Surely as a people and a leadership, we do not have to do this every time based on politics. Really, let us get to the bottom of this. This is the game of politics being played as a zero sum game. Not only that you must win, but the other party must lose. It does not have to be that way. The law is very simple; in my opinion, the Judicial Service Commission is not necessary in this first appointment and the law is very clear. But the consultation of the Prime Minister is compulsory. That is the law! The first appointment is made under Article 24.

Mr. Speaker, Sir, two weeks ago, I heard that the Executive was setting up a committee to interview these appointments, and I was shocked that we would have a committee of the Executive interview a future Chief Justice. It does not go well that the future Chief Justice of the country can be interviewed by junior civil servants. So, I called both offices of the Executive and asked if that was the case and whether it would be better if they could go the way of advertising. I asked them whether it would be better to use the Judicial Service Commission now that it was there. The view from both sides of the Executive was that this is the Executive's mandate at this point in time. I agreed because that is what the law says. Article 24 talks about the first appointment of the Chief Justice and while it is better to have the Judicial Service Commission, it is not constitutionally necessary to have the Judicial Service Commission in that first appointment. It says:-

“The Chief Justice in office immediately before the effective date shall within six months after the effective date vacate office and may choose to vacate office”.

The normal way for a Chief Justice to vacate office under this Constitution is under Article 168. So, if we were to follow the argument that because Article 166 deals with the appointment of a Chief Justice normally and is operative, we should also use the same interpretation to say the normal exit process for a Chief Justice is under Article 168 and, therefore, that ought to apply irrespective of the Schedule. That is not the case. The first appointment of the Chief Justice was special because we were not sure we would have a Judicial Service Commission in place, in time for the six months when we intended the Chief Justice to exit. We did not want to have a vacuum. That is the reason we put that. This was agreed to three weeks ago by both sides of the Executive. They were very clear in their mind that this was a decision for the Executive to make. That is the first point.

The second point on whether the judges are vetted or not, any appointment, including the ones we made to the Judicial Service Commission (JSC), in the event of a sitting judge is subject to vetting. That is also clear. The critical point before the House now is the issue of consultation. This is about culture. The Office of the Prime Minister and the Office of the President are the two most senior offices other than that of the Speaker and the Chief Justice that we have in this country. Those offices have decorum.

They have to be led with decency, a lot of weight and circumspection. For a normal country, the Prime Minister saying “I was not consulted” or the President saying “I consulted” should be enough. Sometime back, the American President realized that he had to talk to his French counterpart because he thought there were Soviet missiles in Cuba. He sent the photos to show his colleague that this was the case. The French Prime Minister told him: “Look, your word is good enough for me. If you say they are there, I take it.” That is the way it is supposed to be. The way the country is run ought to be on that basis. Surely, this is a decision our two senior most leaders can take.

Mr. Speaker, Sir, I leave it to you and to the two Principals.

*(Applause)*

**Mr. Speaker:** Order, hon. Members! You will note that we just have another 20 minutes to go.

Proceed, Dr. Machage!

**Dr. Machage:** Mr. Speaker, Sir, again an opportunity arises for the leadership of this country to show their strength or weaknesses. I am very happy to note the Statement by the Prime Minister that they have designed a way of talking and solving issues as Principals. He confirms that they have always consulted and agreed on everything. That is noble and that is statesmanship. If I quote him on the speech he gave after he landed, he said: “I have no problem with his Excellency the President. I have only a problem with people surrounding him.” I wish he could also say that he has a problem with people surrounding him, because I think that is the problem.

*(Laughter)*

Mr. Speaker, Sir, the Prime Minister was told and interviewed while in Addis Ababa, and he held his peace not to comment. Why? Because age and wisdom dictated that he does that. However, what happened here at home? An hon. Member of this House rushed and pre-empted what he thought the Prime Minister should say. He fixed the Prime Minister on what to say when he arrived.

**An hon. Member:** Can you tell us who that was?

**An hon. Member:** Toboa!

**Dr. Machage:** I do not have to expound on that because it is public knowledge.

**An hon. Member:** Toboa!

**Dr. Machage:** Mr. Speaker, Sir, this is the issue. Section 24(2) and Section 29(2) are very clear. There are two schools of thought on the appointment of the Chief Justice. However, the two Principles had picked on one school of thought. They all agreed that there was no need for the involvement of the Judicial Service Commission. They consulted and agreed with their teams. The Prime Minister has said in this House that he wishes His Excellency the President was seated as he made his Statement. I find it noble. However, let me say this: The Leader of Government Business, who is the Principal Assistant to the President issued a Statement that I believe is a true summary of what might have transpired in those noble houses.

**Hon. Members:** Why do you believe that?

**Dr. Machage:** Because that is the only information we have here.

(Applause)

Mr. Speaker, Sir, if it is so, I find very little diversion between the statement of the Leader of Government Business and the speech, as put to this House by the Prime Minister. The problem is; how much is enough consultation? How long can a consultation be accepted to take place? This is a subjective issue. Everybody is born with his own personality and different background of upbringing and culture. Some people are impatient and some people are over-patient. That is the truth about humanity. Mr. Abdikadir has made a very moving speech here. You are now called upon as the Principals of this country to give that leadership that has been bestowed upon you by the people of this country. What is my advice? Since---

**Mr. Ogindo:** On a point of order, Mr. Speaker, Sir. Given the interest that is there on this matter and given the amount of time remaining, would I be in order to request that hon. Members take a maximum of three minutes?

**Mr. Speaker:** You will be in order, but even then, only five of you will speak.

**Dr. Machage:** Mr. Speaker, Sir, I am nearly concluding. I will not take much time. Mr. Speaker, Sir, on the way forward, since for some reason a cat has been let out of the bag and already His Excellency the President did what he thought in his wisdom, is more than enough consultation--- We do not know what he would have talked with the Prime Minister over the telephone – the telephone call that the Prime Minister said he was never informed was from the Head of State--- Since he already announced a list of names that are public knowledge, it would be erroneous and not wise - and I seek the Prime Minister to listen to this – not to accept and let this list of names be brought to this House and let us discuss it. That is the only way forward.

Thank you very much.

(Applause)

**An hon. Member:** Those are rejected!

**Mr. Speaker:** Order, hon. Members!

Proceed, Mr. Joho!

**Mr. Joho:** Asante Bwana Spika. Kenya ni nchi ambayo inadai kuwa na uongozi. Sababu ya uongozi, haitoshi kuwa unaweza kuwa na nafasi ya kufanya uteuzi ama uchaguzi. Biblia na hata Qur'ani zimekubali na zimesisitiza umuhimu wa ushauri. Ushauri haumaanishi kuelezana. Kenya ama Wakenya wamejichagulia na kujitengezea Katiba ambayo inafaa kuendesha na kulinda maisha yao.

Bw. Spika, tuko katika mwanzo wa kuanzisha utendaji kazi wa Katiba ambayo imetengezwa na Mkenya kwa niaba ya kuendesha maisha yake. Hatari iko wakati tunaanza safari muhimu na kupiga siasa za kibinafsi wakati Wakenya wanatokwa na machozi wanapoangalia ni uongozi gani Bunge la Kumi na hawa *Principals* wawili wataonyesha katika kuikomboa Kenya.

Hatuchagui majaji wala Jaji Mkuu kwa sababu tumeamka leo na tukasema tunataka kuwachagua majaji. Tunafanya hivyo kwa sababu ya yale yaliyotendeka. Mwaka wa 2008 ni juzi. Hatari ni kwamba sisi viongozi tumesahau.

Bw. Spika, ni maombi ya Wakenya kuwe na amani nchini. Ikiwa kuna mwanasiasa ambaye hashughuliki na matakwa na maono ya Wakenya, basi hafai yeye

kuwa mwanasiasa. Wanasiasa huwakilisha matakwa na maono ya Wakenya. Wakenya wamechoshwa na siasa duni.

Mhe. Waziri Mkuu amesimama hapa na kusema mashauriano kati yake na mhe. Rais yalikuwa yakiendelea kabla ya uteuzi huu kufanywa. Nimemnukuu akisema kwamba majina mawili ya watu walioteuliwa hayakutajwa katika mashauriano yao. Hata hivyo, ni majina hayo tunayoyajadili hapa leo. Je, mazungumzo yetu hapa yanaelekea wapi? Ni wazi kwamba hakuna mashauriano kamili yanayoendelea.

Bw. Spika, sisi kama waheshimiwa Wabunge wa Bunge la Kumi ni lazima tufaulu mtihani wetu leo. Si lazima kwangu au mhe. Mbunge yeyote hapa kumuunga mkono mhe. Rais au Mhe. Waziri Mkuu bila sababu madhubuti. Ni muhimu kwa sisi Wabunge kusema haki kila mara. Sisi viongozi chipukizi hupigwa na butwaa kwa sababu ya mwelekeo wa kisiasa katika nchi hii.

Ni muhimu kwetu mambo haya yaangaliwe upya. Kuwe na mashauriano mapya ili msimamo wa mhe. Rais na Mhe. Waziri Mkuu uoane vilivyo ikiwa tutakuwa na uamuzi mwafaka juu ya matakwa ya wananchi wetu.

Asante sana, Bw. Spika.

**Mr. Wamalwa:** Mr. Speaker, Sir, it is a sad day for this country. I do recall in February, 2008, when we came to this Parliament, when the country was burning. We saw our two Principals rise to the occasion and demonstrate statesmanship and leadership to a new level. Once Napoleon said that from the sublime height to the ridiculous, there is but a thin line. We have seen the leaders; the two Principals, descend from the sublime height of statesmanship into politics. What is before this House could have been afforded.

It is sad that we have had today to see the Prime Minister stand before the House and the President through his very able deputy stand before this House, to defend themselves on this issue. They are doing so before the national television, where the whole nation is watching. It is a sad day. However, I do believe that what hon. Imanyara has read before the House are really two issues. One, whether it is unconstitutional to proceed to discuss the names that have been sent to this House on the basis that there were no consultations, and on the basis that they did not follow the procedure by including the Judicial Service Commission (JSC).

Mr. Speaker, Sir, from the debate this afternoon it is clear that there are two scenarios anticipated by the Constitution, one before the next election, where we would still have this grand Coalition Government with two Principals and that is covered under Article 24 under Sixth Schedule and one after the elections, which, we will only have one President, who will actually act on the advisor of the JSC. That is very clear. As to whether the JSC was to be involved or not, it is very clear that, that should be after the General Election.

The second one is the issue of consultation. Looking at the meaning of “consultation” under the Black’s Law dictionary, it is very clear that consultation means the act of asking the advice or opinion of someone, a meeting in which parties consult or confer each other. So, it is possible that, as we have seen this afternoon, there were consultations between the two Principals. Indeed, there were extensive consultations between the two Principals. As to whether “consultation” and “concurrence” mean the same thing, it is not correct---

**Mr. Olago:** On a point of order, Mr. Speaker, Sir. Is it in order for hon. Wamalwa to mislead the House about the meaning of the word “consult,” when the Concise Oxford

Dictionary, which we all respect, defines the word “consult” as follows amongst others, “to seek permission or approval from a person for a proposed action”.

**Mr. Wamalwa:** Mr. Speaker, Sir, I was quoting the Black’s Law Dictionary. Hon. Olago is my senior, he knows very well, as a lawyer, when you are talking about legal issues, there is the general English Dictionary and the legal dictionary that every lawyer in this House respects. It is the Black’s Laws Dictionary, where the meaning is very clear. I can see my learned friend laughing.

*(Several hon. Members stood up in their places)*

**Mr. Speaker:** Order, hon. Members! We must all relax so that we can come to conclusion of this matter.

Member for Saboti, I think that kind of argument will sell in a trial of a case in the High Court or the Magistrates Court, or the Supreme Court as and when we establish it. But here, this is Parliament, a political institution, so we will take the ordinary meaning of the word “consult”.

**Mrs. Odhiambo- Mabona:** On a point of order, Mr. Speaker, Sir.

**Mr. Speaker:** Order, hon. Odhiambo-Mabona!

**Mr. Wamalwa:** That was the definition of the Black’s Laws Dictionary. Mr. Speaker, Sir, the second definition in the Collins English Dictionary is even clearer. “To consult”, and probably, my learned friend would listen to this very carefully, “is to go to somebody for information or advice”. This is the meaning of “consult” under the Collins Dictionary.

Mr. Speaker, Sir, what we are saying is that, indeed, there were consultations. The appointing authority is the President, but he consults with the Prime Minister to get the advice of the Prime Minister. They can agree, after consultations, or they can disagree or they can even agree to disagree.

*(Several hon. Members stood up in their places)*

**Mr. Speaker:** Order, hon. Memebers! Please relax. Allow the Member for Saboti to finish.

**Mr. Wamalwa:** Mr. Speaker, Sir, what I am saying is that where we stand as a House today, we must not forget the doctrine of separation of powers. The province of interpretation is squarely the province of the High Court. As to whether there were consultations or not, is a matter of fact. We have had both sides. As to whether we have followed the Constitution or not are a matter of the interpretation of the Constitution, which can be done by the High Court. But we are urging that we must find a way out of this situation. There is still room for consultation, but that cannot stop the process before the House. The names should go to the Departmental Committee on Justice and Legal Affairs.

Thank you.

**Mr. K. Kilonzo:** Mr. Speaker, Sir, it is quite unfortunate that the National Assembly has spent almost two hours deliberating on issues of the Executive, which ordinarily, they should have agreed before they got here.

Mr. Speaker, Sir, the Executive, and more so the two Principals, must realize that any time they read from different scripts, the economy of this country is affected. It is serious. So, it is imperative that when you come to this House, being the vanguard of business in this country, they should be reading from the same script.

Mr. Speaker, Sir, I have very ably listened to the Leader of Government Business. I have equally listened very ably to the Prime Minister. I am convinced from the two statements that, indeed, there was consultation. However, if there was consensus or not, it is a different matter altogether. But since the Constitution is very clear under Section 24(2), I think it is the wisdom of the drafters of the Constitution that they envisaged a disagreement when it comes to consultations at times. Therefore, they brought in the issue of Parliament. This Parliament represents the face of Kenya. The whole country is here and so, I urge you to rule that those names are forwarded to the Committee of this Parliament so that we can approve or disapprove them.

**The Minister for Nairobi Metropolitan Development** (Mr. Githae): Mr. Speaker, Sir, I will not go into the legal arguments that I have heard here because you have given me two minutes. I want to suggest a way forward. Not a single hon. colleague has said that the people nominated by the President are not credible, professional---

*(Loud consultations)*

Not a single person has cast any aspersions on the four gentlemen. Therefore, the way forward - and I think this is what the drafters of the Constitution had in mind - is where consultations between the President and the Prime Minister do not lead to a consensus, the matter is brought to this House so that it can vote on the issue. I am saying that the way forward is for the matter to come before this House and we vote on it and we move forward.

**The Minister of State for Public Service** (Mr. Otieno): Mr. Speaker, Sir, we can now understand the environment under which these decisions were made. There was pressure to communicate some appointments in the judicial system to help the case that was going on in Addis Ababa. I was in Addis Ababa myself and by the time these announcements were being made, we had already secured the Kenyan position at Ministerial level and it never changed.

*(Applause)*

So, there was no urgency after the Ministerial level had already supported the Kenya case in Addis Ababa. There was, therefore, no reason to continue the pressure on the President to name the Chief Justice and the Attorney-General and then propose names that had not been discussed with the Prime Minister because they are totally new names.

I would invite that as a House, we look for what will be good for Kenya because we are in a phase where we are creating precedents. We took several weeks to constitute this Coalition Government. We had a crisis here before concerning the Leader of Government Business. We took time until the matter resolved itself amicably. Now we have a serious case of a Chief Justice that would preside over our judicial system for ten years; a Controller of Budget and a Director of Public Prosecutions who would run our

system for eight years. We cannot make those decisions in a hurry and I plead with hon. Members.

Mr. Speaker, Sir, we are placing before you a decision whether this business is properly before us for the House to resolve it by voting. The hon. Member said that we have numbers. I plead with hon. Members that, please, do not reduce us to voting machines; we are handling serious issues that we should have---

**Mr. Speaker:** Order, Mr. Otieno! Your two minutes are over! I am afraid that we must now come to the end of the arguments and points of order as have been raised.

*(The Serjeant-at-Arms entered the Chamber at 6.30 p.m.)*

Order, Sergeant-at-Arms! Hon. Members, I will say this: That the matter which has been canvassed before the House this afternoon is, obviously, a matter of great national importance. The issues raised are critical to the governance of this nation and I am satisfied that I have jurisdiction to determine this matter. Indeed, I have the *locus standi* to intervene in the matter as requested by Mr. Imanyara and ably supported by the arguments and points of order by 17 other hon. Members, making a total of 18. I will give directions one way or the other on Thursday afternoon at 2.30 p.m.

In the meantime, I wish to bring it to the attention of hon. Members that, indeed, we received communication from the Office of the Head of the Civil Service and Secretary to the Cabinet vide a letter dated 31<sup>st</sup> January, 2011, advising that His Excellency the President had nominated certain persons to occupy the offices of Chief Justice, Attorney-General, Director of Public Prosecutions and Controller of Budget. We, from the Speaker's Office, direct the Clerk of the National Assembly to refer the matter to the relevant Departmental Committees. In this case there will be two relevant Departmental Committees, namely, the Departmental Committee on Justice and Legal Affairs and the Departmental Committee on Finance, Planning and Trade. That is what had transpired up to yesterday evening. But, subsequently, I also received a letter from the Office of the Right Honourable Prime Minister which arrived on my desk this morning, also stating a certain position. With what has transpired in the House this afternoon, I undertake to give directions in some form or other on Thursday at 2.30 p.m. So, that will be the position and it brings us to the end of business for today.

## ADJOURNMENT

**Mr. Speaker:** Hon. Members, that brings us to the end of business today. The House is, therefore, adjourned until tomorrow morning, Wednesday, 2<sup>nd</sup> February, 2011 at 9.00 a.m.

The House rose at 6.33 p.m.