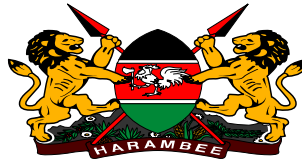


# REPUBLIC OF KENYA



## ELEVENTH PARLIAMENT

### THE NATIONAL ASSEMBLY – (FOURTH SESSION)

#### NO. 019

### COMMUNICATION FROM THE CHAIR:

## ON THE QUESTION OF DISCHARGE OF A MEMBER FROM HOUSE COMMITTEES

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### **Honourable Members,**

You may recall that, on Tuesday, March 22, 2016, the Member for *Lunga Lungu* Constituency the Hon. Khatib Mwashetani, sought guidance of the Speaker on the implication of Article 124 of the Constitution and Standing Orders 19 and 176 in relation to the discharge of a Member of the House from Committees. Specifically, the Member contested his discharge from the House Business Committee and Budget and Appropriations Committee by the Coalition for Reforms and Democracy (CORD). He was concerned that the correspondence for his discharge from the said committees originated from the CORD Coalition Whip and not from his party, the Forum for the Restoration of Democracy, Kenya (Ford-Kenya). The Member therefore sought to know whether the manner in which he was discharged from the Committees was procedural. A number of Members contributed to the ensuing debate including the Leader of the Majority Party, Hon. Aden Duale, the Hon. John Mbadi, the Hon. Johnson Sakaja, the Hon. Peter Kaluma and the Hon. Samuel Chepkong'a amongst others.

### **Honourable Members,**

From the issues canvassed, I deem the following matters as requiring determination -

- (1) Whether the Hon. Khatib Mwashetani was procedurally discharged from the House Committees in accordance with the provisions of Standing Order 176; and
- (2) Whether Standing Orders 19 and 176 are in contravention of Article 124 of the Constitution.

Before proceeding to these matters, it is important to note that the issues raised hereto are not new in parliamentary practice and indeed to this House. In the UK House of Commons, appointment of Members to Committees is the prerogative of parties represented in the House. In that jurisdiction, Members are nominated through a Motion in the House in the name of a Member. Further, it is a general practice in the House of Commons that in proposing nominations for appointment into Committees, parties elect members of those committees in a *secret* ballot by whichever transparent and democratic method they choose. A Member (*other than a Chair elected by the House*) cannot formally resign from a committee unless and until a motion discharging him from membership is agreed to by the House. Notably, appointment to membership of Committee is usually for the remainder of a term of the House. Members with disciplinary matters before the parties ordinarily opt to resign from Standing Committees, but may choose to retain membership in *ad hoc* Committees or Committees established for the sole purpose of discussing a particular Bill.

**Hon. Members**, at this juncture, I am reminded that Speaker Francis Ole Kaparo numerously reminded the House *that 'every rule of the Standing Orders has a reason, rich history and mischief it seeks to prevent'*. Further, lawyers are wont to sayings that whenever you make a law, make one that you will trust anyone with, including your opponent and worst enemy. To this end, attempts to amend the Standing Orders should be well thought out and be considered fully.

**Hon. Members**, our history behind Standing Order 176 on discharge of Members from Committees is quite rich and will interest the House. To begin with, during the appointment of Members to the Select Committee to Review the Constitution of Kenya in the Eighth Parliament, an issue arose as to the nomination process of the proposed Members. Political Parties observed that their Members were included into the membership of the committee without being consulted. Specifically, the Democratic Party, SAFINA party and the Social Democratic Party (SDP) were concerned with the nomination of their members to the Committee. It was then felt that the then ruling party, KANU was usurping the power of the political parties by directly appointing their members to Committees. At that time, the House was not involved in the appointment of Members in Committee, but the decision of the parties to appoint members to respective committees would be communicated to the House by way of statement by the Leader of Government Business on behalf of the House Business Committee.

Similarly, after the coming into power of the NARC government in 2003, several Members of the then opposition parties were appointed to the Executive as Ministers/Assistant Ministers and also to House Committees without consultation with the respective parties contrary to section 17(5) Presidential and National Assembly Elections Act (*now repealed*). KANU, which was then the Official Opposition Party felt that the ruling party sought to weaken the opposition by “buying off” Members of the Opposition. Indeed, during the life of that Parliament, three (3) Members of the PIC, which I chaired, were on diverse dates appointed as Ministers and Assistant Ministers in the Cabinet, against the will of the Party. The general feeling in the Official Opposition, then led by the current President, was that there were attempts to weaken the party. Parties at that time were helpless as they could not withdraw Members appointed to Committees by the ruling party.

**Hon. Members**, though not prevalent during the 10<sup>th</sup> Parliament, there were instances where the same issues arose. A case in point was that of the Departmental Committee on Justice and Legal Affairs, the Chaired by the Hon. Ababu Namwamba, MP. The Committee was in limbo for more than one year as one of the coalition partners attempted to de-whip its Members from the Committee. I am sure the matter is very fresh to members who served in the House, including the Hon. Njoroge Baiya. The then Speaker, Kenneth Marende then noted that he could not effect the discharge as the Standing Orders were silent on the matter. The ensuing disagreements saw the mandate of the committee being taken over by the Constitutional Implementation Oversight Committee, then chaired by the Hon. Abdikadir Mohamed. In the subsequent review of the Standing Orders, records indicate that the House was unanimous in passing the new provision giving parties powers to de-whip their Members as in other multi-party jurisdictions. I want to jog the memory of the Deputy Leader of the Minority Party, Hon. Midiwo who, together with the then Member for Gichugu were very vocal in the push for change of the rules to empower parties to discharge their Members from Committees.

**Hon. Members**, away from the brief history and before determining the matters at hand, it would be key to understand the appointment process to Committees in our current case. Standing Order 174(1) on the Criteria for nomination states and I quote,

***“In nominating Members to serve on a select committee, the Selection Committee shall ensure that the membership of each committee reflects***

***the relative majorities of the seats held by each of the parliamentary parties in the National Assembly.”***

From the above, it is observed that nomination to Committees is the preserve of ‘Parliamentary Parties in the National Assembly’ except for certain instances for example where a Member is an independent Member. A question then arises as to what really constitutes a ‘Parliamentary Party’?

**Hon. Members,** Standing Order 2 defines “a Parliamentary Party” *as a party or coalition of parties consisting of not less than five per cent of the membership of the National Assembly.* Consequently, a Parliamentary Party is that party or coalition of parties with not less than five percent of the membership of this House, that is, eighteen (18) Members. Members are therefore nominated to serve in Committees of this House by the Parliamentary Parties in the National Assembly. Subsequent to this, Standing Order 176(1) provides that the *“a Parliamentary Party that nominated a Member to a Select Committee, may give notice, in writing, to the Speaker that the Member is to be discharged from a select Committee”.*

**Hon. Members,** as you are all aware, FORD-Kenya as a political party has less than eighteen Members in the House and on its own, is not a Parliamentary Party in as far as our rules apply. It therefore follows that FORD-Kenya as a political party has no capacity to either nominate or discharge a Member to or from a Select Committee of this House. Indeed, it is true that the Hon. Khatib Mwashetani was nominated to the House Committees by the Cord Coalition and not FORD-Kenya. Sequentially therefore, any attempt to de-whip the Member can only be initiated by the CORD Coalition which in this case is the Parliamentary Party to which he belongs. Indeed, I am aware that FORD-Kenya, vide a letter dated February 08, 2016 and signed by the Secretary-General had directed the Minority Chief Whip *“to immediately de-whip Hon. Khatib Mwashetani from all parliamentary committees”.* I am satisfied that the discharge of Hon. Khatib Mwashetani from House Committees was procedurally done in as far as our rules apply.

**Honourable Members,**

On the constitutionality or otherwise of Standing Orders 19 and 176 in as far as they relate to Article 124 of the Constitution, it is noted that firstly, Standing Order 19(3) deals with the manner in which the Leader and the Deputy Leader of Majority Party may be removed from office which is by way of a majority of votes of all members of the largest party or coalition of parties in the National Assembly. Standing Order 176 as has been seen earlier deals with the discharge of Members from House

Committees. Article 124(1) of the Constitution provides that *'each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.'* Mechanisms such as the committee system and the offices of the Leader of the Majority and Minority Parties are intended for orderly operations of Parliament as an institution. In this regard therefore, as far as I am concerned, Standing Orders 19 and 176 cannot be termed as unconstitutional as they provide a mechanism for internal conduct and organization of the House and appointment and discharge of Members into Committees is a matter affecting conduct of business of Committees.

**Honourable Members**, the above matters are weighty even with deep consideration. Indeed, it is important to note that some of the issues raised and specifically on Standing Order 176 are already before the Procedure and House Rules Committee having been raised by Hon. Samuel Chepkong'a by way of proposed amendments to the Standing Orders. I know the Committee will be making a progress report which may indicate the direction that the matters will be taking. I have requested the Committee, in its report to the House, to incorporate the aspects of fair hearing and due process in the discharge mechanism without taking away the powers of parties to de-whip their Members. Accordingly, I call upon Hon. Mwashetani, and indeed all of us, to await the conclusion of this matter by the Committee. In the interim, and in the absence of any amendments Standing Orders 19 and 176 still apply on all matters relating to the discharge of Members.

**I Thank you!**

**THE HON. JUSTIN B.N. MUTURI, E.G.H, MP**  
**SPEAKER OF THE NATIONAL ASSEMBLY**

**April 14, 2016**