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**REPUBLIC OF KENYA**  
**ELEVENTH PARLIAMENT- (FOURTH SESSION)**  
**THE NATIONAL ASSEMBLY**  
**COMMUNICATION FROM THE CHAIR**

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*(No. 66 of 2016)*

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**ON THE APPLICATION OF STANDING ORDER 176 ON  
DISCHARGES OF MEMBERS FROM COMMITTEES**

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**Honourable Members**, on Thursday, October 27, 2016 during the afternoon sitting, the Leader of the Majority Party, the Hon. Aden Duale, MP rose on a Point of Order seeking direction from the Speaker on the de-whipping of Members from Committees by parliamentary parties pursuant to Standing Order 176. Specifically, he sought a determination of the question as to whether political parties can invoke the provisions of Standing Order No. 176 against certain Members despite the provisions of the Constitution; in particular Article 47 on the right to fair administrative action, Article 50 on the right to fair hearing and Article 236(b) on the protection of Public Officers. Additionally, the Leader of the Majority Party sought guidance whether the House has a role in the process of the discharge of a Member from a Committee to which it considered and approved his or her appointment. He also sought guidance on whether our current practice of actualizing the provisions of Standing Order 176 would be unconstitutional to the extent that, in some cases, the discharges are necessitated by matters external to the proceedings or business of the House. He also contended that, even if that particular Standing Order did not exist, political parties would still have the liberty and lawful avenues to punish or instill discipline on their Members within the confines of internal party mechanisms and the Political Parties Act. From the issues canvassed by Leader of the Majority Party, the following issues arouse thoughtful consideration-

- (1) whether and to what extent to Standing Order 176 may be used as a mechanism for enforcing party discipline for breaches outside the proceedings of the House or its committees;
- (2) whether the provisions of Standing Order 176 is to be applied against Members of the House by instigation of or order of persons other than Members of the House;
- (3) whether Standing Order 176 adequately protects the rights of Members in the performance of their functions in the House. Related to this is the question of whether in the practice of Standing Order 176 without instituting a formal fair hearing forum within a political party setting in the confines of the precincts of the Parliament, we have been exposing Members to some form of injustice and unfair prejudice.

**Honourable Members**, you will recall that in reserving the concerns of the Leader of the Majority Party for a considered ruling, I did mention that the Procedure and House Rules Committee has been actively dealing with the issue of the review of Standing Order 176 in light of formal concerns raised by Members and various suggestions for amendment of the Standing Orders. Undeniably, this matter has caused disquiet in the House and specifically the Leadership for a long time. Indeed, the Member for Lunga Lunga (*Hon. Khatib Mwashetani*) had earlier in the Session raised matters along the same line. The concerns raised with regard to the application of Standing Order 176 and the intervention sought have been threefold-

- (i) The need for the affected Member to be notified before discharge;
- (ii) The need to subject the aforementioned notification to a forum of members of the parliamentary party in the House; and
- (iii) The need for the affected Member to be afforded a practical and fair hearing within the **Parliamentary Party set-up** by his or her parliamentary party.

**Honourable Members,** you may also recall that this is not the first time that Parliament is being faced with the issue of discharge from committee membership. Indeed, as I indicated in a Communication on **April 14, 2016**, the Tenth Parliament was severally confronted by a similar issue. Notably, the Departmental Committee on Justice and Legal Affairs, then chaired by the Hon. Ababu Namwamba, MP remained moribund for more than one year as one of the coalition partners attempted to de-whip its Members from the Committee. The then Speaker, Hon. Marende, noted that he could not effect the discharge as the Standing Orders were silent on the matter. The then Standing Order 176 provided that, and I quote, *“A vacant position occasioned by the resignation, removal, or appointment of a Member to the Government shall be filled within seven days after the National Assembly next meets”*

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. I am sure the matter is very fresh to members who served in the House then. To demonstrate the active debate that ensued, the *Hansard* records shows that, on the 27<sup>th</sup> of October, 2011, the then Leader of Government Business who was also the Vice-President and Minister for Home Affairs was taken to task by the then nominated member, the Hon. Shebesh to explain why he had not effected the removal of certain Members from the Departmental Committee on Justice and Legal Affairs following her Party's decision. In the debate, the then member for Chepalungu, the Hon. Isaac Ruto contended that since the Standing Orders did not define what comprised removal process, or who was to commence or effect the removal, the Leader of Government Business had no authority to “remove” any Member from a Committee.

**Honourable Members,** In the subsequent review of the Standing Orders, records indicate that the House was unanimous in passing the new provision giving parties powers to remove individual Members in Committees and replace them as in other multi-party jurisdictions. The Deputy Leader of the Minority Party, Hon. Midiwo, may recall the push for change of the rules to empower parties to discharge their Members from Committees

which he fervently spearheaded together with the then Member for Gichugu, Hon. Martha Karua.

**Honourable Members,** in parliamentary practice, party discipline is integral in the management of parliamentary party affairs and Whips play an important role. For votes on key issues, it is imperative for the Majority Party and the Minority Party to maximize the turnout of their Members. As such, the Whips try to ensure that every member from their party turns out to vote. The duties of Whips include keeping members and peers informed of forthcoming parliamentary business, maintaining the party's voting strength by ensuring members attend important debates and support their party in parliamentary divisions, passing on to the party leadership the opinions of members and ensuring party discipline. Party discipline is a mechanism political parties use to keep their members functioning as a cohesive group rather than as an informal collection of individuals. It encourages party loyalty among members who may be tempted to act individually. The question that arises with regard to the current concerns raised by the House is to what extent and in what manner can a parliamentary party enforce party discipline by de-whipping Members from committees of the House?

**Honourable Members,** In the Third Edition of *Parliamentary Practice in New Zealand*, David McGee writes that permanent changes in replacing members on select Committees may be made by the House itself but, more commonly, they are made by the Business Committee. However, while the Business Committee formally appoints members to committees, it is normally concerned with the party proportions rather than the individual members proposed to serve on each committee which is regarded as a matter for each party to determine according to its internal arrangements. Until 1972, replacing members on select committees could only be effected by the House on a motion with notice. The practice in New Zealand has since changed and making changes to committees is a largely administrative matter dealt with off the floor of the House and formally effected by the Business Committee without question. The only instance where the Business Committee

exercises its own judgment on a proposal is where a party proposes to vary its proportions to a committee by replacing its Member with a Member of another party. In our context, the mandate of considering these proportions and proposing appointments is vested in the Committee on Selection.

**Honourable Members,** In the House of Commons of the UK, the general rule is that a Member has to be notified before appointment to or discharge from a committee. Indeed, Standing Order 121 states:-

*"121. (1) Any Member intending to propose that certain Members be members of a select committee, or be discharged from a select committee, shall give notice of the names of the Members whom he intends so to propose, shall endeavour to ascertain previously whether each such Member will give his attendance on the committee, and shall endeavour to give notice to any Member whom he proposes to be discharged from the committee."*

The key words to be emphasized here are ***"shall endeavour to give notice to any Member whom he proposes to be discharged from the committee"***. Obviously, this implies that for discharges, the rule of natural justice and fair hearing need to apply in the discharge process.

**Honourable Members,** That now brings us to the next question, which is- **what then is a Notice ?** In a Ruling made in the USA Supreme Court on 24<sup>th</sup> April, 1950, in a Case between **Mullane Vs Central Hanover Bank & Trust Co.** ( Ref. 339 US 306, 1950), the Court held that notice must be ***"reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"***.

**Honourable Members,** It will be also noted that in the United Kingdom, both the Labour and Conservative Parties have a code of conduct that requires Members to behave in a way that is consistent with the policies of their party, to have a good voting record and not to bring the party into disrepute. Indeed, in the Sixth Edition of *How Parliament Works*, City of

*Westminster*, Robert Rogers and Rhodri Walters write that a back-bencher's cardinal sin is to abstain, or worse vote against his or her party without giving any warning. Notwithstanding the fact that the Code for both the Labour and Conservative Party contains a "conscience clause" which recognizes a right of dissent on matters of deeply held personal conviction, Members who vote against their party position are usually perceived as having committed a serious breach of party discipline. In a study of the House of Commons, when asked to rank "acts of disloyalty" in order of seriousness, Party leaders and backbenchers both rated cross-voting as the most serious violation of party discipline. In addition to being either excluded by party associates or refused party funds and organizational support in election campaigns, Parties have other mechanisms to punish Members that they deem to be errant. These include, refusal for promotion to cabinet; denial of decent office accommodation and adequate staff; being overlooked as members of certain prestigious parliamentary committees; denial of opportunities to be part of travelling parliamentary delegations; denial of opportunity to ask a question during prime time such as Question Period; or refusal of party assistance in performing services for constituents and discharge from party caucuses.

Likewise, **Honourable Members**, in the German Bundestag, Parliamentary groups play a key role in placing Members to serve in Committees as they appoint Committee Members, and may also remove individual Members and replace them at will with another of its Members.

In the United States Congress, the Senate by a resolution appoints Chairs and Members to serve in Standing Committees and to fill vacancies thereon. However, while Senate Rules are fairly clear regarding how nominations are to be approved as stated above, they do not address how nomination of Senators to Committees by Parties is to be made. In practice, each Party vests this authority to their Parliamentary Group meeting, popularly referred to as "Conference". The Republican Party has a Committee on Committees comprising of Party Leader and Senators that nominates Members to Committees which is then approved by the Republican Conference. The Democratic Party on the other hand, has Democratic

Steering and Outreach Committee comprising the Democratic Leader in the House, the Democratic Whips and most Senior Democrats which makes nominations to Committees before it is approved by the Democratic Conference which comprises all Democrats in the Senate. Nominations and replacements made by these Panels are rarely challenged on the floor because it is in the Parties' forum where decisions are made.

**Honourable Members,**

In our case, the law relating to internal party disciplinary measures has since been radically changed by the Constitution and the enactment and amendment of our electoral laws. Article 47 of the Constitution, Sub- Article 1, provides that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In addition, Committees are established pursuant to Article 124 for the orderly conduct of the proceedings of the House. Consequently, membership to a committee forms part of the endeavour to ensure the orderly conduct of the proceedings of the House. In my opinion and as is the practice in comparative jurisdictions, for a parliamentary party to de-whip its Members, the reason for the action must necessarily relate to an act or omission by the Member that relates to the business of the House. This is particularly as espoused in my proceeding examples of the United Kingdom Labour and Conservative Parties' codes of conduct that require Members to behave in a way that is consistent with the policies of their party, to have a good voting record and not to bring the party into disrepute in the House. The decision to deny a Member the right to actively participate in committees without a right to fair administrative action and for reasons unrelated to the business of the House would, in my mind, offend the letter and spirit of Articles 74 and 124 of the Constitution.

**Honourable Members,** though the decision to de-whip a Member from a Committee is one to be made internally by a parliamentary party, the current Standing Order 176 neither incorporates the need for the decision of the party to be based on any grounds nor does it provide for a procedure affording the affected Member a right to be heard. When

compared against the extensive provisions under the *Political Parties Act* with regard to the discipline of Members by parties that sponsored them to the House, the inadequacy of the Standing Order, which parliamentary parties would use to discipline their Members *within the House*, becomes apparent. You will agree that this clear disparity calls for an urgent review of the text of that Standing Order.

**Honorable Members**, the issue of enforcing party discipline within the House through discharge of Members from Committees is indeed a serious issue that requires conscious consideration by all. I am aware that the Procedure and House Rules Committee, which I chair, is considering the matter at length. Since I will be expected to preside in the House during the debate on the matter at hand, I request to recuse myself from committee until the end of that process. In the meantime, I request the members of the committee to ensure that the report on the consideration of these concerns is tabled **soonest** to allow the House to substantively consider the recommendations arrived at and deal with this recurring concern.

In the meantime, **Honorable Members**, until this House addresses the question of the appropriate process for the discharge of members from Committees including putting in place formal mechanisms for **notification** and eventual removal of Members from Committees, I will not admit any further requests for the discharge of any Member from a Committee unless the Whip of the party proposing the action demonstrates the following-

- (i) That, the parliamentary party has given the affected Member notice of his or her intended discharge. Notice referred here has a meaning ascribed to it by the US Supreme Court Ruling quoted in this Communication, and;
- (ii) That, the parliamentary party has afforded the affected Member a prior right to be heard on the issue. In this regard, it is not for the Speaker to dictate who



will neither constitute the Panel nor its procedure, but suffice to say that some form of a hearing must have taken place.

For avoidance of doubt, **Hon. Members**, my communication is not intended to amend the current Standing Order 176, but to supplement the matters not provided for which is requiring parties to comply with the Constitutional standards of notification and fair hearing. In this regard, the decision of a Party to discharge a Member from a Committee, having accorded him or her a formal hearing is final and ought not be challenged or subjected to a vote in the House.

**I Thank you!**

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

**November 30, 2016**