

PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Tuesday, 17th November, 2015

*The Senate met at the Senate Chamber,
Parliament Buildings, at 2.30 p.m.*

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

STATEMENTS

REPORT OF MEDIATION COMMITTEE

Sen. (Dr.)Khalwale: Mr. Speaker, Sir, I regret that the Report of the Mediation Committee that I was chairing between this Senate and the National Assembly has a small technical problem. However, it is ready and we have signed it. It might come towards the end because today is the deadline.

The Speaker (Hon. Ethuro): Order, Senator! We said that you can canvass those quietly. I thought you were going to do your Statement.

Sen. (Dr.)Khalwale: Yes, Mr. Speaker, Sir.

The Speaker(Hon. Ethuro): Proceed.

PRESENCE OF KDF IN SOMALIA SERVING UNDER AMISOM

Sen. (Dr.)Khalwale: Mr. Speaker, Sir, I rise under Standing Order No.45(2)(b) to request for a Statement from the Chairperson of the Standing Committee on National Security and Foreign Relations relating to the presence of Kenya Military Security Forces in Somalia serving under the African Union Mission in Somalia (AMISOM). In the Statement, the Chairperson should clarify the following:

1. Is it true or not that the Kenya Defence Forces are abetting illegal trade in charcoal, sugar and other contraband goods and thereby knowingly oiling the funding of the *Al Shabaab* operations?

2. Could the Chairman confirm whether the Government of Kenya is aware that a few days ago, the National Parliament of Somalia voted with an overwhelming majority in a resolution that the Kenyan forces must be excluded from the AMISON forces and leave Somalia?

3. As a consequence, could the Chairperson tell us whether the Government of Kenya has now developed an exit strategy for our military security forces to leave Somalia?

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

Sen. Hassan: On a point of order, Mr. Speaker, Sir. I can also just add to the same Statement. Sen. (Dr.) Khalwale has asked about the Government's knowledge about trade in charcoal and sugar. In the same report, it is alleged that there has been massive human rights violation by the KDF, including torture and rape of those populations. Could the Government confirm whether they are aware of those transgressions by the KDF?

Sen. Haji: Mr. Speaker, Sir, I would have asked to be given a week. However, in view of the fact that even the Cabinet Secretary (CS) for Defence is currently out of the country, and we do not know when she will be coming back, maybe two weeks will be reasonable because if I say next week and they are not back, it will be a problem.

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

ACTIVITIES OF BRITISH TROOPS TRAINING IN KENYA

Sen. Lesuuda: Mr. Speaker, Sir, I rise under Standing Order No.45(2)(b) to request for a Statement from the Chairperson of the Standing Committee on National Security and Foreign Relations regarding the activities of the British troops who train in the country. The Chairperson should state:-

1. The general terms of agreement between the Kenyan Government and the British Government on offering of training grounds for British soldiers in the country and the benefits that Kenya draws from the agreement.
2. Whether the Government is aware that the said British soldiers leave behind live ammunition that has caused injuries and deaths to residents, including children and herders who reside around the areas where they train.
3. The measures that the Government has put in place to secure the lives of Kenyans who reside in those areas.
4. The measures that the Government will take to compel the British Government to compensate Kenyans who are injured and relatives of Kenyans who die as a result of injuries from the live ammunition that is left on the training grounds.
5. Whether the local communities benefit in any way from the said agreement.

Sen. Haji: Mr. Speaker, Sir, with the consent of the gracious lady, Sen. Lesuuda, I want to answer this in two weeks' time.

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

Hon. Members, now we go to responses.

THE SALE OF FAKE AND COUNTERFEIT PHARMACEUTICAL DRUGS AND PRODUCTS IN THE COUNTRY

Sen. Lesuuda: Mr. Speaker, Sir, pursuant to Standing Order No.45 (2) (b), I rise to seek a Statement from the Chairperson of the Standing Committee on Health regarding the sale of fake and counterfeit pharmaceutical drugs and products in the country. This is based on a recently published report by a special working group of the National Council on Administration of Justice that indicated that approximately 40 percent of *malaria*

drugs sold in Kenya are counterfeit and more than 30 percent of the pharmaceutical drugs stocked in the country are also counterfeit.

In the Statement, the Chairperson should:

- (i) State the factors leading to the proliferation of counterfeit drugs and other pharmaceutical products in the country.
- (ii) Provide the names of the fake and counterfeit drugs currently in circulation in the country.
- (iii) State the number of deaths caused by the use of the counterfeit drugs in Kenya in the last five years.
- (iv) State the amount of financial loss they incurred in the country by the sale of counterfeit drugs in Kenya in the last five years.
- (v) State measures taken if any, by the Ministry of Health, the Pharmacy and Poisons Board, the Kenya Bureau of Standards, the Anti Counterfeit Agency and the Kenya Revenue Authority to eliminate the sale and registration of such counterfeit drugs.

The Speaker (Hon. Ethuro): Yes, Vice Chair, Sen. Kittony.

Sen. Kittony: Thank you Mr. Speaker, Sir. I will give the response on Thursday next week.

The Speaker (Hon. Ethuro): It is so ordered. The response will be on Thursday next week.

Sen. Khaniri: Mr. Speaker, Sir, I am not responding to any Statement, neither am I asking for a new Statement but I just want to make an inquiry of Statements that I had asked earlier. I do not know if this is the right time or after the delivery of Statements that are ready.

The Speaker (Hon. Ethuro): Proceed.

NON-PAYMENT OF SEPTEMBER SALARIES TO TEACHERS

Sen. Khaniri: Thank you, Mr. Speaker, Sir. Four weeks ago, I requested for a Statement from the Chair of Education Committee who I can see is present in the House with regard to the payment of teachers' salary and the court rulings. He promised to issue the Statement two weeks ago and up to now, the Statement has not been delivered to this House.

Sen. Karaba: Thank you Mr. Speaker, Sir. I have not yet received the Statement from the Cabinet Secretary (CS) for Education. I am still pursuing it and hope by the end of the week, I will be able to give an answer to the House.

Sen. (Dr.) Khalwale: Thank you Mr. Speaker, Sir. Whereas the Chairman is justified to communicate, but listening to him, he has not given us any reason to indicate the difficulties he is facing. We run the risk as an institution to be seen not to be different from the Jubilee Government that does not seem to take the issue of teachers seriously. He should tell us the reason.

Sen. Karaba: Mr. Speaker, Sir, I cannot tell you what is happening with the Ministry because mine is not to micro-manage the Ministry of Education. What we

normally do is to wait until the Statements come to our Committee and we have not received them. What do I do with the CS?

Thank you.

The Speaker (Hon. Ethuro): Sen. Karaba, you have not yet responded to Sen. (Dr.) Khalwale's question. Nobody asked you to micro-manage the Ministry.

Sen. Karaba: Mr. Speaker, Sir, we have not as a Committee received the Statement from the Education CS.

The Speaker (Hon. Ethuro): Order, Senator. The issue is: Why?

Sen. Karaba: Mr. Speaker, Sir, we might not tell the reason but by the end of this week, I will be able to give the reason it has not been received.

The Speaker (Hon. Ethuro): I thought that by the end of the week, you were to give a response.

Sen. Karaba: Mr. Speaker, Sir, I will try to give both.

The Speaker (Hon. Ethuro): So, if I understand you, you will give reasons for the delay as you deliver the report.

Sen. Karaba: Exactly, Mr. Speaker, Sir.

The Speaker (Hon. Ethuro): So, we will give you until Tuesday next week. Order, Members. Could we have a response from Statement (a) by the Committee on Legal Affairs and Human Rights as it appears on the Order Paper? Could we go to Statement (b)?

Sen. Obure: On a point of order Mr. Speaker, Sir. I want to draw your attention to the fact that this request for a Statement from the Independent Electoral and Boundaries Commission (IEBC) was made in May, six months ago. It is very disappointing that six months later, IEBC has been unable to give us a Statement. I would like the Chair to explain why he allows this state of affairs to persist.

The Speaker (Hon. Ethuro): Order, Sen. Obure. The Chair is not here.

Sen. Obure: Mr. Speaker, Sir, I meant the Chair of the Committee on Legal Affairs and Human Rights.

The Speaker (Hon. Ethuro): We wanted to move to the next Statement so that by the time we repeat, may be they would have come.

Sen. Haji, proceed to respond to Statement (b).

ARREST OF A JOURNALIST ON THE ORDER OF THE CABINET SECRETARY FOR INTERIOR AND COORDINATION OF NATIONAL GOVERNMENT

Sen. Haji: Thank you, Mr. Speaker, Sir. On Wednesday, 11th November, 2015, Sen. Wetangula rose on the Floor of the House and requested for information regarding the arrest of a journalist, Mr. John Ngirachu. The hon. Senator particularly sought to be informed on the following:

1. Under what law and authority did the Cabinet Secretary for Interior and Coordination of National Government issue the Statement, which is unconstitutional and illegal?
2. Whether Chapter 4 of the Constitution has been suspended.
3. Whether the CS is trying to drive the country into the dark days.

4. Whether journalists are free to pursue their work without interference.

5. Whether it should be prudent for Government officials---

Sen. Wangari: On a point of order Mr. Speaker, Sir. I know the Chair to be a very soft spoken person but for the benefit of the whole House, he is not audible, and I would ask that he properly raises his voice so that we can follow.

Sen. Haji: Mr. Speaker, Sir, I will proceed.

5. Whether it should be prudent for Government officials who are aggrieved by any act of a journalist should take civil remedies instead of criminal remedies.

Mr. Speaker, Sir, the Government has the mandate to ensure that information relating to its security systems is secured and is not released to unintended people. Having this in mind, on 4th November, 2015, I presented information on the procurement of security items before the National Assembly Public Accounts Committee in camera, as provided for by law. The discussion was held in a privileged environment and information provided on a need-to-know basis.

Unfortunately, the following day, 5th November 2015, *The Daily Nation*, *The Standard* and *The Star* dailies printed distorted and misleading information which could create a perception that there are malpractices relating to procuring of security items within the Ministry.

Further, by detailing the various equipment, country of origin and the costs, the dailies not only provided critical information on our culpability to would be enemies of our nation, but further exposed our security services to a significant risk, having in mind that our country is at war against various enemies, including the *Al Shabaab*. This is why the media is expected to act and exercise utmost professional ethics.

In this particular case, the information was issued to the House Committee in confidence. I was, therefore, concerned when the information was released to the public without the knowledge of my office/Ministry, and requested the police to investigate how the classified information was obtained by the media.

Mr. Speaker, Sir, it is not true that I issued orders for the arrest of Mr. John Ngirachu in connection to an article he had published on 5th November, 2015 in *The Daily Nation* newspaper relating to procurement of security items within the Ministry of Interior and Coordination of National Government. However, I complained to the relevant authority about the reporting of privileged information furnished to an organ of State, under confidential status, without first getting the necessary clearance. The power to arrest is vested mainly in the National Police Service, which is an independent organ of Government.

Further, it is not true that police officers arrested and detained the journalist. However, it is true that on 10th November, 2015, at about 3.00 p.m., police officers from the Directorate of Criminal Investigations (DCI) called Mr. Ngirachu through phone and requested for a meeting at a place of his choice.

Subsequently, the officers met him at Professional Centre along Parliament Lane. After explaining the purpose of the meeting, he was requested to accompany them to DCI Headquarters to record a statement. Mr. Ngirachu accompanied police to DCI Headquarters on his own volition and was not under arrest at any given time. Mr.

Ngirachu requested to be allowed time to call his lawyers before recording his statement, which delayed the recording of the statement.

The invitation extended to Mr. Ngirachu to record a statement was informed by the provision of Section 52 of the National Police Service Act, 2011, which gives police officers powers to summon any person while endeavoring to discover the author of a crime and put any question, whether suspected or not. The invitation was for purposes of offering the journalist the opportunity to explain how confidential information was released for publication and to determine whether a criminal offence had been committed and if so, by whom.

Mr. Speaker, Sir, Chapter 4 of the Constitution of Kenya, 2010 relating to the Bill of Rights and in particular, Article 34 (2) (b), providing for the freedom of media has not been amended. The media, however, is expected on its part to disseminate information that is fair, correct and which will not put to risk national security.

In particular, the information published should not infringe on the rights and freedom of any person, of which security of every person is the Ministry's responsibility as provided for by Article 19 (1) (b) and Article 24 (1) (d), which provides for the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others. The enjoyment of rights and fundamental freedom is a mutual situation and must be safeguarded by all, including State organs against abuse.

I wish to categorically state that, as a Cabinet Secretary in charge of security, I have no intention to drive the nation back to yesteryears. I wish to clarify that we are cognizant of the different avenues through which the media dispute may be resolved. However, where a criminal offence has been committed and while pursuing the civil remedy and mediation or arbitration, the same should not deter the State from acting on criminal acts perpetrated by anybody.

Lastly, it is the position of the Government that any allegation made by anybody, including the media as regards to the Government, must be substantiated, while those making the allegation must be held responsible.

The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, does the Chairperson appreciate the provisions of Article 35 of the Constitution which states in part that "every citizen has the right of access to information held by the State without any exception?" What Mr. Ngirachu published was that there was impropriety and possible corruption in some procurement process at the Ministry of Interior and Coordination of National Government.

The Chairperson is trying to paint a very civil picture; that the police called him on phone - they never do that - and invited him to a coffee shop and he voluntarily walked with them to the Directorate of Criminal Investigations Headquarters. Obviously, he was under arrest. There is nothing like "the police magnanimously called Mr. Ngirachu, sat with him, had coffee and walked with him voluntarily."

They arrested him on the basis of information contained in a publication, where he was informing the public of a corrupt practice that has become the hallmark and trademark of the Jubilee Government.

Could you assure this House that Articles 34, 48, 49, 152 (4) (a) and 153 (3) of the Constitution shall be adhered to and obeyed by Cabinet Secretaries? Article 152(4) (a), requires every Cabinet Secretary to be obedient to the Constitution that they have sworn to defend, uphold and protect. This includes the fundamental rights of individuals, including journalists who have the right and duty to publish information for Kenyans to know.

Does the Chairperson and the Cabinet Secretary, that he is speaking for, appreciate the positive role that the media plays in busting and publicizing corrupt transactions going on in Government departments? In fact, without the media, we would not have known what Ms. Waiguru is doing with public funds in her Ministry. Could he assure the House and the country that journalists will act freely to inform the public and where any aggrieved party wants to take a remedy, there are civil courts to go to, but not to use the police to terrorize them?

Sen. Hassan: Mr. Speaker, Sir, further to that clarification, I would like to know whether the Cabinet Secretary of the Ministry of Interior and Coordination of National Government is aware of the evolving and changing paradigms of security. We are moving from a world where we lived in a paradigm of scrutiny to the democratization of our security. That means that citizen participation in security is legitimate.

Secondly, is the Cabinet Secretary aware that the rights of Government to withhold information only extends to a point where the information held does not lead to committing a crime and herein possible abuse of resources? Is the Chairperson aware that there are various defence and security journals that elaborate the kinds of strengths different militaries in the world have, for instance, the United States of America (USA), Russia and China? The culture of secrecy has been overtaken by events as countries share information on matters of equipment and security.

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, could the Chairperson clarify to the House whether the Cabinet Secretary is aware of the provisions of Article 245(4) that completely prohibits him or any other person from directing the Inspector-General (IG) to arrest or investigate anybody?

Could the Chairperson tell us what Maj. Nkaissey meant when he pointed a KANU like finger protruding and popping from the television screens of Kenyans warning all of us that we will be held responsible? Could he clarify what “being held responsible” means? Does it mean he will arrest, beat or kill? He was pointing a finger at us, but we will not stop talking about corruption in this country.

Mr. Speaker, Sir, as I said yesterday, Ms. Waiguru is presiding over thieves. She is, therefore, the head of thieves at the National Youth Service (NYS). Is she the reason---

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

What is it, Sen. Murkomen?

Sen. Murkomen: Mr. Speaker, Sir, we have always marketed ourselves and told the nation that we are the House of reason. We obey the law and follow due process. Is it in order for Sen. (Dr.) Khalwale to become the prosecutor, complainant and the judge to give the final verdict on the streets on who a thief is? Is it not against the Constitution that scantily provides that presumption of innocence is a key principle? If we were to go that

direction, there would be so many people on the Opposition side we would be calling thieves.

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, if by using the word “thief” is being taken to mean that I am being unreasonable, with all due respect to Sen. Murkomen, when a biro pen that costs Kshs20 is bought at Kshs8,700, the person pocketing the difference is a thief.

If Ms. Waiguru is not the thief, could the Jubilee Government tell us who the thief is? I speak on behalf of Mr. Mangiti and Mr. Nelson Githinji. They will not be referred to as thieves when the buck stops with their boss who is Ms. Waiguru. She should not be reduced to a State witness.

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

Proceed, Sen. Wangari?

Sen. Wangari: Mr. Speaker, Sir, we saw a public servant lie on record about the information that he was giving to a Committee of Parliament that includes some of the information that Sen. (Dr.) Khalwale is quoting. He lied on oath and the Committee that is led by CORD was silent then. Is it then in order for the Senator to repeat that it was given by the source of the information? Does he have another document that he is looking at?

The Speaker (Hon. Ethuro): Order, Members! You are all dealing with irrelevant issues. Can we focus on the issue of the Cabinet Secretary in charge of the Ministry of Interior and Coordination of National Government?

Sen. (Dr.) Machage: Mr. Speaker, Sir, is the Chairperson aware that according to the rules of this House or Parliament as a whole, all plenary proceedings in the House and the Committee are public hearings? They can only be in-camera with the permission of the Speaker. Did the Cabinet Secretary seek the Speaker’s permission to have the information that he was giving to the Committee privileged and, therefore, in-camera?

Sen. Muthama: Mr. Speaker, Sir, I am one of the people who have been victimized by the orders of Maj. Nkaissery. For the Chairperson to say that Mr. Ngirachu was not arrested is false. The Cabinet Secretary wrote a letter while he was in the USA and ordered the Inspector-General and the Criminal Investigations Department (CID) to arrest me. Is it the work of the Cabinet Secretary to order for people to arrest others yet there are people who have been assigned that work? I would like the Chairperson to clarify that.

(Loud consultations)

The Speaker (Hon. Ethuro): Order, Senators!

Please, Mr. Chairperson, respond.

Sen. Haji: Mr. Speaker, Sir, I read the Statement from the Cabinet Secretary and I will defend it.

With regard to the question by Sen. Wetangula, on the right to information under Article 35 of the Constitution, there was no mention of coffee taking in the statement. Being a lawyer, I am sure that he understands better the right to information.

Any country wishes to keep its secrets and materials confidential so that it does not fall into the wrong hands. The Cabinet Secretary said that they gave this evidence in good faith, in-camera. With the consent of the Speaker, all the Committees work at the pleasure of the Speaker. Therefore, by extension, they had the right to allow him to be heard in-camera.

On the question about Section 34 on the obedience to the Constitution, this is universal. It is not only Cabinet Secretaries and Government officers, we also took the oath in front of the Speaker that we shall protect and defend the Constitution. Therefore, it cannot be said that this only applies to Cabinet Secretaries.

On the issue raised by Sen. Hassan, when I was Minister for Defence, I used to get journals with my pictures talking about the number of forces every country in the world has, and who the Minister for Defence was. That is a fact and nobody can deny it. The journalists do not have information to write about internal secret matters.

Sen. (Dr.) Khalwale talked about the issue of ordering the Inspector-General. Even in his Statement he said: "I did not order but I complained to the Inspector-General".

On the question of pointing fingers, I have not seen it myself. There is nobody inside the screen where he can point the finger. Those who saw it were outside. Therefore, he never meant Sen. (Dr.) Khalwale neither Sen. Haji. We should leave it that way.

On the issue of Sen. (Dr.) Machage, I replied that in-camera, we are all Committee Members working work under the Speaker's mandate and, therefore, on his behalf, we can make certain decisions. My brother, Sen. Muthama, talked of people being ordered to arrest others. I have responded to this. He has replied that he has not ordered the police to arrest the journalist, but he has complained to the police.

The Senate Minority Leader (Sen. Wetangula): On a point of order. Mr. Speaker, Sir. You have seen how my distinguished colleague has been fumbling with papers here and not answering questions. What we want to know as a House of Parliament and as country is: Are journalists going to pursue their career of collecting and disseminating information without State harassment? That is very important.

Secondly, the Constitution under Article 35(1) (a) states that:-

"Every citizen has the right of access to information held by the State."

In the entire Constitution, there is no qualification. Is the Chairman in order to tell us that, that access has qualification when the Constitution is absolute in its terms; "access to information"? More particularly, this is to information that leads to the disclosure of impropriety by Government agencies.

Without disclosure and busting on corrupt cartels, like I said, we probably would never have known what Waiguru is doing or what others are doing. It is the media that has been prying into this. Those who are lawyers like Sen. Murkomen know that illegally obtained evidence, if it leads to a disclosure of criminal offence, is admissible. Can the Chairman respond to these issues?

Sen. (Dr.) Machage: On a point of order Mr. Speaker Sir. I sought to know from the Chairman whether the Cabinet Secretary had permission from your office for in-

camera proceedings so that the information he was giving to the Committee was privileged and confidential. He has not answered that question.

Sen. Wangari: On a point of order Mr. Speaker, Sir. My clarification is on the issue of procedure. I want to pick from where Sen. (Dr.) Machage has stopped. We are a House of Rules and Procedure. In the Senate Standing Order No.202, it very clear states that all Committee proceedings will be in the open unless there is express permission from the Speaker.

We are actually discussing the proceedings of another House. Are we in order to actually presume? This meeting was not taken by a Committee of the Senate, it was a Committee of the National Assembly. We have got all this information from the media. Are we in order to discuss the proceedings of another Committee? I am asking this because we, as the Senate, have amended our Standing Orders.

How do we know that they have not amended theirs? Are we in order to discuss the proceedings?

The Speaker (Hon. Ethuro): Order, Senator

(Loud consultations)

Sen. Wangari: Point taken .Thank you.

The Speaker (Hon. Ethuro): Senators, there is a distinction between a respondent and the one asking for clarification.

Sen. (Dr.) Khalwale: Mr. Speaker, Sir, the things that the Cabinet Secretary Nkaissery said and did and which were reported in the country is a matter of public notoriety. Given that in his answer, the Chairman has returned a no answer to everything, are we satisfied that the Chairman has adequately responded to our concerns? Could the Chairman be directed to come with the correct answer?

Sen. Hasan: Well said.

Sen. Haji: Mr. Speaker, Sir, I stand by what I said that the information is limited. Article 24 of the Constitution states that there is limitation as far as security measures are concerned. Just read it.

(Loud consultations)

The Speaker (Hon. Ethuro): Order, Members, the Chair will be heard.
Proceed, Chair.

Sen. Haji: Mr. Speaker, Sir, we are talking about information and I have referred to the Article of the Constitution which limits information. Whether it is security or what, it limits information. I have answered Sen. (Dr.) Machage, and I am not going to repeat.

Regarding Sen. (Dr.) Khalwale, I have answered every matter that has been raised unless you want me to answer what you want, which I cannot do.

The Speaker (Hon. Ethuro): Hon. Senators, we move to the next Order. These other Statements will be put on the Order Paper tomorrow.

Sen. Haji: Mr. Speaker, Sir, I had a Statement but you said it will be put on the Order Paper tomorrow.

The Speaker (Hon. Ethuro): That is what I said. All the pending Statements will be scheduled on tomorrow's Order Paper.

COMMUNICATIONS FROM THE CHAIR

VISITING DELEGATION FROM BUNGOMA COUNTY ASSEMBLY

Honourable Senators, I would like to acknowledge in the Speaker's Gallery this afternoon, the visiting delegation from Bungoma County Assembly. I request each Member of the delegation to stand when called out so that they may be acknowledged in the normal Senate tradition.

They are:

Procedure and Rules Committee

- | | | |
|------------------------|---|----------------|
| 1. Hon. John Makali | - | Speaker |
| 2. Hon. Jane Chebet | - | Deputy Speaker |
| 3. Hon. Gentry Naliaka | - | Member |
| 4. Hon. Moses Wakala | - | Member |
| 5. Hon. Sammy Chemwei | - | Member |

Powers and Privileges Committee

- | | | |
|-----------------------------------|---|------------------------|
| 1. Hon. James Barasa Mukhongo | - | Vice Chairperson |
| 2. Hon. Henry Majimbo Okumu | - | Member/Minority Leader |
| 3. Hon. John Wanjala Musakali | - | Member |
| 4. Hon. Chrisantus Wechuli Simiyu | - | Member |
| 5. Hon. Elly Tindi Manasseh | - | Member |
| 6. Hon. Joseph Nyongesa Juma | - | Member |
| 7. Hon. Jane Cheperenger | - | Member |
| 8. Hon. Protus Waswa Wafula | - | Member |

They are accompanied by the following staff:-

John Ongwea Mosongo, Tome Francis Simiyu, Dennis Waswa Wanjala, Celestine Mochong, Caroline Wamalwa, Absalom Wendo and Robert Mwambani.

On behalf of the Senate and on my own behalf, I welcome them to the Senate and I wish them fruitful deliberations for the remainder of their stay.

VISITING COUNTY ASSEMBLY STAFF FROM VARIOUS COUNTIES ON ATTACHMENT AT THE SENATE AS PART OF THE COUNTY LEGISLATIVE STAFF ATTACHMENT PROGRAMME

Hon. Senators, the Kwale, Busia, Turkana, Murang'a, Makueni, Homa Bay, Isiolo, Mandera, Elgeyo Marakwet County Assemblies' staff are on an attachment programme organized by my office through the Senate County Liaison Office. I wish them a fruitful programme while they are at the Senate.

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The Senate Minority Leader (Sen. Wetangula): Mr. Speaker, Sir, allow me to welcome the delegation from my county led by the Speaker, his deputy and the two committees including the famous Wendo whom every Member who has been here for more than one term would remember.

I also welcome members of staff from other counties and encourage you, the Speaker and the leadership of the Senate, to continue with positive engagements with county assemblies, members, speakers and their staff so that we can have shared experiences in order to assist the counties in discharging their responsibilities of representation, legislation and oversight. This is to protect the country from the looting spree that is going on in counties.

Thank you.

Sen. Murkomen: Thank you, Mr. Speaker, Sir. In my capacity as the Chair of the Committee on Devolution and whose responsibility is to deal with intergovernmental relations, I thank your office for facilitating capacity building for the county staff. We have reiterated that those men and women in the Speaker's Gallery are our primary clients and partners. It is important that we ensure that the counties are capacitated. I, Sen. Hassan, Sen. Mutula Kilonzo Jnr., among others, led a process of advocating for more resources to counties.

If we do not do that, we will not be able to check corruption that is rampant in the counties. The delegation includes those from my county led by my former student who is a lawyer and is doing a good job. I am proud of the team.

Thank you.

Sen. Hassan: Mr. Speaker, Sir, after consulting with the Chair of the County Public Accounts Committee and the Vice Chair, we should encourage public accounts committees to come to the Senate County Public Accounts Committee for training so that they can develop the grid to interrogate wheelbarrows and other kinds of expenditures that do not make common sense.

Sen. Khaniri: Mr. Speaker, Sir, allow me to join you in welcoming the various delegations and particularly the delegation from Bungoma County. I also thank you profusely for the programme that you put in place to build capacity of our county assemblies. I remind them that they have an important role to play in ensuring that devolution works and benefits the people of Kenya. The role of oversight is important besides representation and legislation. I put emphasis on oversight.

The reports that are getting to us in the County Public Accounts and Investments Committee from the counties are disheartening. The reports we read in the Press about wheelbarrows costing millions of shillings, building of gates costing millions of shillings and buying of curtains are disheartening. This is not what devolution was meant for. It is the responsibility of our county assemblies to ensure that these malpractices do not continue.

We thank you and welcome you to the Senate.

(The monitors in the Chamber went off)

Sen. Hassan: On a point of order Mr. Speaker, Sir. So that our counterparts from the county assemblies monitor what is going on in the Senate, I request your office to inform the Clerk's office that we have been having this problem for the last two to three weeks. They either repair them or put them off completely.

Sen. Kittony: Thank you, Mr. Speaker, Sir. I join you in welcoming the delegation in the Chamber today. I thank the officers who have come to learn. Your office is doing the right thing. I also thank the delegation from Bungoma County for giving the President an arousing welcome when he visited their county and even made some Members to run away.

Sen. Abdirahman: Thank you, Mr. Speaker, Sir. I join my colleagues in welcoming Members of the County Assembly of Bungoma and at the same time welcome staff from the various county assemblies. It has been a big challenge for many county assemblies to do good legislation. Training staff is an essential component that will boost capacity in our counties. I encourage more counties to send their staff for training or capacity building. I welcome the Mandera County delegation and the other delegations from various counties.

Sen. Boy Juma Boy: Asante Bw. Spika. Ninaungana na Waheshimiwa wenzangu kuwakaribisha wageni kutoka Bunge la Kaunti ya Bungoma. Waswahili husema kwamba mgeni hupokelewa mzigo lakini macho huachiwa mwenyewe. Wageni wetu kutoka Bunge la Kaunti ya Bungoma wana macho na kwa hivyo, waone vile tunavyofanya katika Seneti. Pia waone zile *wheelbarrow* za laki moja ama Ksh40,000.

Nawakaribisha wafanyikazi wote kutoka Kwale eneo ambalo ninawakilisha na zile kaunti zingine ambazo wamefika hapa. Hii ndio Seneti na Bunge ambalo linaonyesha kwa hali, mali na vitendo.

Asante.

Sen. Hargura: Mr. Speaker, Sir, I would like to join you and other colleagues in welcoming the delegations from the counties. It has always been the concern of this House that whatever is going on in the counties is as a result of lack of capacity by the county assemblies to provide the necessary oversight. This is a good programme which ensures that both the staff and Members of the County Assemblies (MCAs) come to learn, so that they can provide effective oversight in the running of the county governments.

Thank you.

Sen. Adan: Mr. Speaker, Sir, I wish to join my colleagues in welcoming the counties that are visiting us, especially the staff from Isiolo County. I wish to encourage them to start working on what we have lost. We had a lot of issues as a county for quite some time. It is, therefore, encouraging that they have put themselves together to work on their capacity building, so that they can go back and deliver on their mandate. I wish them good well during their attachment. Isiolo County should move forward and execute its mandate.

Thank you.

Sen. Haji: Mr. Speaker, Sir, I want to join you and other colleagues in welcoming all the delegations. In particular, I would like to welcome the staff from Mandera and Isiolo counties which are in northern Kenya. This is the first time that staff or delegations

have come from that part of the country. When they go back, they should encourage others to also come.

Thank you.

The Speaker (Hon. Ethuro): Next Order!

COMMITTEE OF THE WHOLE

(Order for Committee read)

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

IN THE COMMITTEE

*[The Temporary Chairperson
(Sen. (Dr.) Machage) took the Chair]*

CONSIDERATION OF THE PRESIDENTIAL MEMORANDUM ON THE PUBLIC PROCUREMENT AND ASSET DISPOSAL BILL (NATIONAL ASSEMBLY BILL NO.40 OF 2014)

The Temporary Chairperson (Sen. (Dr.) Machage): Order, Senators! We are in the Committee of the Whole for the consideration of the Presidential Memorandum on the Public Procurement and Asset Disposal Bill (National Assembly Bill No.40 of 2014). We had gone through the recommendations and all that was left was for two questions to be put. They are: Questions on amendments to Clause 51 (3) and Clause 124.

An hon. Senator: We did everything!

The Temporary Chairperson (Sen. (Dr.) Machage): Order! You can rise on a point of order.

Sen. Keter: On a point of order, Mr. Temporary Chairperson, Sir. I remember very well the last time we considered this Presidential Memorandum. The only thing that was remaining was the putting of the question on whether or not to approve it. We went through all the amendments.

The Temporary Chairperson (Sen. (Dr.) Machage): Order, Senator! Did you listen carefully to what I said? I said exactly that.

*(The Temporary Chairperson (Sen. (Dr.) Machage)
consulted with the Clerk-at-the-Table)*

I will combine the two clauses; Clause 51 (3) and Clause 124. I, therefore, put the Question, that the President's recommendations on Clause 51 (3) and Clause 124 of the Public Procurement and Asset Disposal Bill (National Assembly Bill No.40 of 2014) be approved.

Can you draw the Bar?

(Loud consultations)

The question was not put because of the numbers in the Chamber. Now you have your voting powers. If you think what I have done is wrong, you can abstain from voting.

(Sen. Murkomen spoke off record)

Sen. Murkomen, you are out of order.

Sen. (Dr.) Khalwale: On a point of order, Mr. Temporary Chairperson, Sir. My understanding is that before drawing the Bar, you should have asked for the Division Bell to be rung for whatever period of time – hopefully for one minute or less – and then the Bar is drawn.

The Temporary Chairperson (Sen. (Dr.) Machage): That is quite in order. Ring the Division Bell for one minute.

(The Division Bell was rung)

DIVISION

ELECTRONIC VOTING

(Question, that the President's recommendations on clauses 51(3) and 124 of the Public Procurement and Asset Disposal Bill be approved, proposed and Senate proceeded to vote by County Delegations)

The Temporary Chairperson (Sen. (Dr.) Machage): Could you log in? You have 60 seconds to vote.

(Voting in progress)

Certainly, secretariat, there is a problem because Members are unable to vote.

Hon. Senators: We have voted.

The Temporary Chairperson (Sen. (Dr.) Machage): Are you okay? Assisted voters can come forward to the Clerk's Desk.

(Some Hon. Senators moved to the Clerk's Table)

AYES: Sen. Adan, Isiolo County; Sen. Chelule, Nakuru County; Sen. Haji, Garissa County; Sen. Karaba, Kirinyaga County; Sen. Kembi-Gitura, Murang'a County; Sen. Keter, Kericho County; Sen. (Prof.) Kindiki, Tharaka-Nithi County; Sen. Lesuuda, Samburu County; Sen. Melly, Uasin Gishu County; Sen. (Eng.) Muriuki, Nyandarua County; Sen. Murkomen, Elgeyo-Marakwet County; Sen. Sang, Nandi County; and, Sen. Wangari, Nairobi County.

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NOES: Sen. (Prof.) Anyang'-Nyong'o', Kisumu County; Sen. Boy Juma Boy, Kwale County; Sen. Hargura, Marsabit County; Sen. Hassan, Mombasa County; Sen. (Dr.) Khalwale, Kakamega County; Sen. (Prof.) Lonyangapuo, West Pokot County; Sen. (Dr.) Machage, Migori County; Sen. Madzayo, Kilifi County; Sen. Mohamud, Wajir County; Sen. Mositet, Kajiado County; Sen. Musila, Kitui County; Sen. Muthama, Machakos County; Sen. Ntutu, Narok County; Sen. Obure, Kisii County; Sen. Okong'o, Nyamira County; Sen. Orengo, Siaya County and Sen. Wetangula, Bungoma County.

The Temporary Chairperson (Sen. (Dr.) Machage): Order, Senators. The results of the Division are as follows:

AYES: 17

NOES: 13

ABSTENTIONS: Nil

Hon. Members, as per the Communication by the Speaker in the previous sitting, these results do not show an outright acceptance or rejection of the President's reservations. Therefore, this is a constitutional purgatory.

Sen. Hassan: On a point of order, Mr. Temporary Chairman, Sir. First and foremost---

(Loud consultations)

The Temporary Chairperson (Sen. (Dr.) Machage): Order, Members! Let us listen.

Sen. Hassan: Mr. Temporary Chairman, Sir, we made it very clear in this House that votes by any delegation must be through a written letter by the leader of that delegation. I find it very unfortunate that one delegation can vote twice.

The Temporary Chairperson (Sen. (Dr.) Machage): How did you know that?

Sen. Hassan: Sen. Chelule and Sen. Wangari voted and they are from the same delegation.

(Loud consultations)

The Temporary Chairperson (Sen. (Dr.) Machage): Order! Order! To my knowledge, Sen. Wangari is not part of the Nakuru Delegation, but Sen. Chelule is.

Sen. (Dr.) Khalwale: On a point of order, Mr. Temporary Chairman, Sir. I thank you for the results that you have just returned. However, I would like you to clarify the meaning of your declaration. This is because the outcome of a vote in a division results in only two ways; either, the "Ayes" or the "Noes" have it. As of now, you have not pronounced yourself whether it is the "Ayes" or the "Noes" who have it. Kenyans want to know---

(An. hon. Senator spoke off record)

How can a professor heckle? How I wish you were a professor of Medicine.

Mr. Temporary Chairman, Sir, I invite you to make it abundantly clear, because the Jubilee is a Government of tricksters. If your pronouncement is not clear, they will change this into “Ayes.”

(Loud consultations)

The Temporary Chairperson (Sen. (Dr.) Machage): Order! Order! What is it, Sen. Murkomen, and please, be careful with your language?

Sen. Murkomen: On a point of order, Mr. Temporary Speaker, Sir. I keep on saying that considering the stature of this House, the language we use here must be one that befits us, as Senators. Is it in order for any Senator, let alone a Senator who is involved in bullfighting, to call his colleagues tricksters and fixers?

(Several Senators stood in their places)

The Temporary Chairperson (Sen. (Dr.) Machage): Order! Order! The Chair is on his feet.

What is it, Sen. Orengo?

Sen. Orengo: On a point of order, Mr. Temporary Chairman, Sir. This is a matter that we cannot leave unresolved, because the Constitution is very clear. When we handle a vote which is basically a memorandum and a reservation from the President, the Constitution gives Parliament certain powers. Those powers are in Article 115(2). We should ask ourselves what to do with the Presidential Memorandum. That is what we are trying to do in these proceedings. If I may read in *extenso*, the entire Article 115(2) states that:-

“If the President refers a Bill back for reconsideration, Parliament may, following the appropriate procedures under this Part—

- (a) amend the Bill in light of the President’s reservations; or
- (b) pass the Bill a second time without amendment.”

At the end of the Third Reading, which is important, you must report to the Senate. You must give a report on what we have done with the President’s Memorandum. For that reason, we have taken a vote. This is the first time---

I do not know whether they do it in Elgeyo-Marakwet County, but I thought there is a senior Member from Elgeyo-Marakwet County, since there are many athletes who come from there, that after a race, there is always a result. The result of these proceedings must be clear whether we have approved the reservations or not or passed the Bill with or without amendments. That is why we were asked to vote.

The Temporary Chairperson (Sen. (Dr.) Machage): I have heard.

Sen. Orengo: Mr. Temporary Chairperson, Sir, I am very happy that when I am addressing you on this point, even the leadership on the opposite side is listening very carefully. I am speaking for the purpose of the record. Could you tell us what we have done?

Sen. Muthama: Mr. Temporary Chairperson, Sir, let us try and help this House with the system of voting where Sen. Wangari and Sen. Chelule are said to have voted for the same county. We want a clarification because every delegate is registered from the county he or she comes from. We want to know where Sen. Wangari is registered because from the information that I have as a Whip, she votes for the delegation from Nairobi County. Is that the position Chair? That is what we want clarified because we do not want rigging and stealing of the votes here like the money which is being stolen in the Ministry.

The Temporary Chairperson (Sen. (Dr.) Machage): Sen. Wetangula, make your comments very brief.

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Temporary Chairperson, Sir. I will make it very short. This is on the point raised by the distinguished Senator for Siaya County. The ruling by the Chairperson is very clear and you have made reference to it. My understanding and expectation from the Chairperson of the Committee is that after the vote, there must be a result announced.

In this case, the Chairperson declared the result as 17 “Ayes” and 13 “Noes”. We would expect the record to reflect as follows:-

AYES: 17

NOES: 13

Therefore, the Memorandum of the President is lost. That is it and nothing else. Even if the “Ayes” were 23, the Memorandum is still lost because of the threshold of 24. So, the Chairperson saying that it moves to purgatory does not amount to an announcement of a result of a vote in the Chamber.

The Temporary Chairperson (Sen. (Dr.) Machage): Very well. I have heard you.

Sen. Hassan: On a point of order, Mr. Temporary Chairperson, Sir. Let me also scrutinize those results a bit. I am being very sincere. On the monitor, we had 11 votes saying “No”. A dash means “No”. In addition to those 11 votes which said “No”, Sen. Madzayo voted “No”, making it 12. Sen. Orenge voted “No”, that is 13. Sen. Halima voted “No”, making it 14. Sen. (Prof.) Anyang'-Nyong'o voted “No”, making it 15 and I know a Senator from Jubilee who voted “No”, making it 16.

Hon. Senators: Yes!

(Applause)

The Temporary Chairperson (Sen. (Dr.) Machage): Order! Sen. Hassan is completely right. He is correct on his complaint because this is the secretariat---

(Loud consultations)

Order. I have been re-looking at these figures and the secretariat ---

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Chairperson, Sir, before you make a ruling ---

The Temporary Chairperson (Sen. (Dr.) Machage): No, I will give you time but let me speak first. I have been re-looking at these figures after making my own count on the Floor. So, I asked the secretariat to re-check and, indeed, the report I get is that they confused the figures.

An hon. Senator: Give us the right figure.

The Temporary Chairperson (Sen. (Dr.) Machage): Now, let me give you the right figures.

Sen. (Dr.) Khalwale: Yes! *Hapo!*

The Temporary Chairperson (Sen. (Dr.) Machage): The results are as follows:-

AYES: 17

NOES: 13

ABSTENTIONS: Nil

(Applause)

Before I make the pronouncement of the ruling on the vote, I also have to answer the question about Sen. Wangari. To my knowledge, she represents Nairobi County, and Sen. Chelule represents Nakuru County. If there is a position otherwise, I am not aware of that.

(Loud consultations)

An. Hon. Member: What about Sen. Sijeny?

The Temporary Chairperson (Sen. (Dr.) Machage): Order! I may not go to that nitty-gritty now.

The Senate Minority Leader (Sen. Wetangula): We are satisfied.

Sen. (Dr.) Khalwale: We are satisfied.

The Temporary Chairperson (Sen. (Dr.) Machage): After having given you the results, I told you the “Noes” had it but none of the “Ayes” or the “Noes” reached the threshold of 24. Therefore, the President’s recommendation is defeated.

Sen. (Dr.) Khalwale: Yeaaaah!

(Applause)

An. hon. Member: Tuendelee.

(Sen. Murkomen stood up in his place)

Sen. (Dr.) Khalwale: Sen. Murkomen, what do you want?

(Loud consultations)

The Temporary Chairperson (Sen. (Dr.) Machage): Let us have some order.

Sen. (Dr.) Khalwale: That is how you are going to lose in 2017! The Noes have refused.

(Several Members stood in their places)

The Temporary Chairperson (Sen. (Dr.) Machage): Order, hon. Members! I will choose one of you. Sen. Murkomen, please, respect me and sit down. Let us start with the Senate Majority Leader.

Please, open the Bar.

(The Bar was opened)

Before we proceed, what I have reported is on the findings of the voting as per the Committee of the Whole. That is exactly what I have communicated on and it is lost at that stage.

The Senate Majority Leader (Sen. (Prof.) Kindiki): On a point of order, Mr. Temporary Chairperson, Sir. Mine is based on the direction that you have just given *vis-à-vis* the very detailed ruling that the Speaker of this House made on this matter.

If I recall, the ruling of the Speaker was as follows:-

(1) For the recommendations of the President to be defeated, you need 32 votes rejecting.

(2) For the recommendations of the President to pass, you need 24 votes affirming.

(3) In the absence of (1) and (2) above, the recommendations are neither lost nor passed.

Mr. Temporary Chairperson, Sir, you started very well by talking about purgatory, which I do not understand very well. However, those who are Catholics tell me it is a situation which is neither good nor bad. Therefore, could you clarify? If the argument is that the recommendations are lost, then we need to be told that 32 votes have said so, which I am not aware of.

(Several Senators stood up in their places)

The Temporary Chairperson (Sen. (Dr.) Machage): Order! Indeed, the Senate Majority Leader has expressed the tool used and I am sure other points of order are aligned to that. May I quote what the Speaker said last Wednesday. To avoid many points of order, I want to quote. Listen very carefully. I now quote the Speaker:-

“As I explained, this means that any other action that does not result in an outright acceptance or rejection of the President’s Reservations put the Bill in a constitutional purgatory.”

I do not know how you pronounce that. Wherever, you went to school – I continue:-

“A constitutional purgatory requiring some new actions that will reignite and bring the legislative process to a close”.

In this regard, the following could occur:-

First, since it is evident from the rendition of Article 115 of the Constitution that the legislative process on any Bill only comes to an end when there is agreement between the Legislature and the Executive, and having found none, this may provide the occasion for further consultations between the Legislature---

(Loud consultations)

The Temporary Chairperson (Sen. (Dr.) Machage): Order! Order, please!

An hon Senator: He even walked in when the Speaker was on his feet.

The Temporary Chairperson (Sen. (Dr.) Machage): Order! I will throw somebody out. Now, I do not even know where I was.

(Laughter)

An hon. Senator: Purgatory!

(Laughter)

The Temporary Chairperson (Sen. (Dr.) Machage): I will repeat from where I said: “The following could occur,” so that we are together.

Firstly, since it is evident from the rendition of Article 115 of the Constitution that the legislative process on any Bill only comes to an end when there is agreement between the Legislature and the Executive, and having found none, this may provide the occasion for further consultations between the Legislature and the Executive on the President’s Reservations. Such consultations may result in a re-submission of the Motion, at an appropriate time, in accordance with the Standing Orders.

Secondly, it is also possible that the situation could mark the end of the life of the Bill as published and instead result in the introduction of a new Bill which could either exclude the contested provisions or include the provisions in a negotiated format.

The third possibility is that the failure to accept or reject the President’s Reservations may be an indicator that Parliament does not intend to enact new legislations on the matters covered in the Bill and that it would rather retain the existing legislative framework. The legislative process would, therefore, come to an end. This option must be read in light of the fact that the two Bills are Bills that are subject to the constitutional timelines stipulated in Article 261 of the Constitution as read together with the Fifth Schedule to the Constitution.

Hon. Members, what we have just concluded is a vote. That is what I reported; where the “Ayes” had 13 and the “Noes” 17. Then, I told you that this is constitutional purgatory. That is where we are.

(Several Senators stood up in their places)

Order! I will give you an opportunity. Are you okay with that?

Hon. Senators: Yes!

The Temporary Chairperson (Sen. (Dr.) Machage): What is it, Sen. Orengo?

Sen. Orengo: On a point of order, Mr. Temporary Chairperson, Sir. I have decided to make this point because we are all in a learning process. I plead with the Senate Majority Leader that this constitutional question must be resolved in the manner in which the Presidential Memorandum comes to Parliament. We are using the language of the old Constitution, introducing and casting it into the new Constitution. That is where the problem is.

Mr. Temporary Chairperson, Sir, if you look at Article 115---

*(The Temporary Chairperson (Sen. (Dr.) Machage)
Consulted the Clerks-at-the-Table)*

I wish the Clerks-at-the-Table could allow you to listen to me.

Article 115 talks about the President making reservations. What we should be dealing with in the Senate are the reservations by the President and not his recommendations. In fact, the word recommendation is found in the old Constitution. If you read the old Constitution, it is quite clear what Parliament was required to do. However, this current Constitution talks only about reservation.

The problem that we have is that, if you look at the order that we have been dealing with which is Order No.8; its substance is found on the appendix, which is the notices of amendments. That is what is before the House. It has been brought by the Senate Majority Leader. It is a simple question. There is no question about reservation; it is just talking about recommendation, which states:-

“PRESIDENT’S RECOMMENDATIONS:

Amendments recommended by H.E. the President to the Public Procurement and Asset Disposal Bill.

Clause 51 (3):

THAT the Bill be amended by inserting the words “and licensed” immediately after the word “registered”

So, that question was before the House, that we should “amend.” It was not whether we agree with his reservations. This confusion is constant. We are trying to engage you positively so that this constitutional question is resolved. What is before this House is that the President is proposing an amendment, which he is not allowed to do under the Constitution. What he can bring is only reservations.

So long as this confusion continues, then we are beginning to think that the calls for amendment of the Constitution are very important because sometimes when there is no clarity--- Even in France now they are talking about amendment of the Constitution where there is no clarity.

However, it is not good to just push because you are in power or because you have the tyranny of numbers. There are certain constitutional values that once the Constitution tells you to do things in a certain way, then we will just sit here and we are told we are dealing with reservations when there are no reservations we are dealing with. We are dealing with amendments proposed by the President which he has no powers to do under the Constitution. Full stop!

(Loud consultations)

The Temporary Chairperson (Sen. (Dr.) Machage): Order, hon. Members!

There will be many constitutional issues and points of order. I beg that you allow me to report progress, and then, we can continue thereafter so that we conclude this.

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Temporary Chairperson, Sir.

The Temporary Chairperson (Sen. (Dr.) Machage): Is the point of order along what I have ruled on?

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Chairperson, Sir, it has nothing do with what you have said, except one little point. When we withdrew into the Committee of the Whole, we were told that we will deal with Order Nos.8 and 9. Or is it Order Nos.9 and 10?

An hon. Senator: Order Nos.8 and 9.

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Chairman, Sir, I do not understand when the Chairperson wants to report progress. We have to deal with both orders, finish and then you will report to the Speaker. I have seen Sen. Mositet around. Sen. Murkomen is here who shares the responsibility of the Temporary Speaker.

The Temporary Chairperson (Sen. (Dr.) Machage): Order! To my knowledge, it does not matter. Let us deal with Order No.9.

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Chairman, Sir, are we done with the item listed as Order No.8 on the Order Paper?

The Temporary Chairperson (Sen. (Dr.) Machage): I want to report progress and then we go to Order No.9.

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Chairman, Sir, do you report progress or outcome? There is no progress.

The Temporary Chairperson (Sen. (Dr.) Machage): Since it is in abeyance, if you listened to what I read, it means the three options could occur. So, this is not a concluded issue.

Sen. (Prof.) Anyang'- Nyong'o: Mr. Temporary Chairman, Sir, it is good to be clear on what we are doing. The point that Sen. Orengo has made needs a statement from you so that we know where we are going. As far as I know, what we have done was just to consider the recommendation of the President on a particular clause. Article 115(4) of the Constitution on the Presidential Assent and Referral says:-

“Parliament, after considering the President’s reservations, may pass the Bill a second time, without amendment, or with amendments that do not fully accommodate the President’s reservations, by a vote supported—

- (a) by two thirds of members of the National Assembly; and
- (b) two thirds of the delegations in the Senate, if it is a Bill that requires the approval of the Senate.”

We have not yet put the Bill before us. We have been considering the reservations of the President in a particular Article in the Bill. In fact, a new proposed reservation. We need to dispose of that reservation before we come to vote on the Bill. We are jumping

the gun. You should make a clarification that the majority sitting here, have disapproved of that particular recommendation. So, it does not stand. We have not yet disposed of the Bill itself. Just make that clear so that we know what we are doing.

Sen. (Dr.) Khalwale: Mr. Temporary Chairman, Sir, look at the memorandum from the President on page 879 of the Order Paper, for example, on Clause 40(a), the President says “a new clause be inserted.” A new clause cannot amount to a reservation.

The Temporary Chairperson (Sen. (Dr.) Machage): Order! You are already on Order No.9.

Sen. (Dr.) Khalwale: Mr. Temporary Chairman, Sir, I was just clarifying.

The Temporary Chairperson (Sen. (Dr.) Machage): That clarification is not accepted. Just wait. You have a point, but you are doing it at the wrong time. Unless you have something else, hold your horses. Do you have something else other than what you are talking about?

Sen. (Dr.) Khalwale: Yes, Mr. Temporary Chairman, Sir.

The Temporary Chairperson (Sen. (Dr.) Machage): Okay. Proceed.

Sen. (Dr.) Khalwale: Mr. Temporary Chairman, Sir, the contention at this stage is as raised by Sen. Orengo between a recommendation and a reservation. If the Chair is satisfied that there is material difference between recommendation and reservation, then the Chair should guide this House. The President has acted contrary to the Constitution, which in Article 115(4) gives him the right only to make a reservation and not a recommendation.

It is, therefore, unconstitutional if you leave it hanging saying that there are three other possible outcomes. We have said “no”, but they have said “yes”. The ‘Ayes’ have been unable to defeat us. When you are unable to defeat your opponent, it means your opponent has defeated you. So, it is done, lost and negated.

(Laughter)

The Temporary Chairperson (Sen. (Dr.) Machage): Order! I never studied English Language, but I did Medicine. However, these are just language semantics. What we have been voting on was either to accept or reject the Presidential Memorandum on the Public Procurement and Asset Disposal Bill (National Assembly Bill No.40 of 2014).

As the Chair of the session, that is where my mandate stops. I gave you the opportunity to vote and I announced the results. I want to report back to the House. Let us raise those points of order to the Speaker when he comes.

Sen. Orengo: On a point of order, Mr. Temporary Chairman, Sir. A word contained in the Constitution of Kenya cannot be semantics. It cannot. The moment we begin to think of this document in terms of semantics---

The Temporary Chairperson (Sen. (Dr.) Machage): Order! You are reading me wrongly, Sen. Orengo.

Sen. Orengo: No, Mr. Temporary Chairman, Sir. What you have said has gone on record. You said the difference between reservation and recommendation is semantics. That is a grave travesty coming from the Senate. I hope you will clarify that point for the sake of future generations looking at the proceedings.

Sen. Wamatangi: On a point of order, Mr. Temporary Chairman, Sir. Arising from the point of order raised by Sen. Orengo in the entire Article 115(3) and (4) of the Constitution, there is no doubt about what he is talking about. That is the language of expressing the reservation or recommendation. The point is that the Constitution envisages and allows the President to express his reservations. Therefore, the question that Sen. Orengo would need to clarify to the House is, in his thinking, how is the President supposed to express his reservations to this House?

The Temporary Chairperson (Sen. (Dr.) Machage): Order! That is not what Sen. Orengo was talking about. What is before us is a Presidential Reservation that was brought to us through a Memorandum, the Memorandum that we have looked at here. That is where the point of contention is. In the voting, the Committee of the Whole has said ‘no’ to the Memorandum. Therefore, the question that is being raised is: By saying “no” to the memorandum, have we said “no” to the Reservation? That is the point you have to look at.

(Loud consultations)

Order! I’m trying to guide you. When you come to that, you then go to the Constitution. Both sides of the House, the “Ayes” and the “Nays”, did not meet the threshold. That is what I am trying to tell you. It means it can take any of the three modalities that I read to you. It, therefore, means that I report progress and we continue.

Sen. Keter: Mr. Temporary Chairman, Sir, the point which Sen. Orengo argued about was reservation *vis-à-vis* recommendation. Overall, it is to consider the Memorandum of the President the way you have put it. Whichever it is, the issue is if you want to disagree with the Memorandum, you have to have 32 votes. If you want to agree with the same, you have to have a minimum of 24 votes. Therefore, if you have 23 votes, you have not been able to acquire the minimum requirement. Therefore, it is a loss. We should proceed from that point.

The Chairperson (Sen. (Dr.) Machage): That is exactly what I have been telling you.

(Loud consultations)

Order!

PROGRESS REPORTED

CONSIDERATION OF THE PRESIDENTIAL MEMORANDUM ON THE PUBLIC PROCUREMENT AND ASSET DISPOSAL BILL (NATIONAL ASSEMBLY BILL No.40 OF 2014)

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Temporary Chairperson, Sir, pursuant to Standing Order No.139, I beg to move that the Committee of the Whole reports progress on its consideration of the Presidential Memorandum on

the Public Procurement and Asset Disposal Bill (National Assembly Bill No.40 of 2014) and seek leave to sit again.

Sen. Wamatangi seconded.

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Temporary Chairperson, Sir.

The Temporary Chairperson (Sen. (Dr.) Machage): The Standing Orders explicitly tell you that you cannot rise on a point of order when the Question is being put. I will now put the Question. Now that is what goes into record. The “Ayes” have it.

(Question put and agreed to)

(The House resumed)

[The Temporary Speaker (Sen. Mositet) in the Chair]

(Loud consultations)

Hon. Senators: Simameni! Simameni!

An hon. Senator: We are not joking!

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

The Temporary Speaker (Sen. Mositet): Sen. (Dr.) Khalwale, please, use the right language.

Sen. (Dr.) Khalwale: Mr. Temporary Speaker, Sir, I have said nothing so far. I was waiting for you to---

The Temporary Speaker (Sen. Mositet): Okay, proceed.

Sen. (Dr.) Khalwale: Mr. Temporary Speaker, Sir, the proceeding of this vote is being covered live. Both the visual result and the audio result are on record. The audio result has been that the “Noes” have carried the day. I would like you to prick your conscience that the Chair of the Session, the distinguished Senator for Migori has chosen to create drama out of a very serious exercise called “voting” in Senate.

(Several Hon. Senators stood up in their places)

I have not finished, you will have your bite. I know you are cleverer than me.

Mr. Temporary Speaker, Sir, it is important that before we proceed, you find that what has taken place is fraudulent. With tremendous respect, if you allow this to proceed, then you will have reduced Senate to something which has no description in the English dictionary.

The Senate Majority Leader (Sen. (Prof.) Kindiki): On a point of order, Mr. Temporary Speaker, Sir. I rise on the Standing Order No.90. In particular, I would like to find out whether it is in order for the Senator for Kakamega County to impute improper motive on the Chair of a Committee of this House; and to discuss the conduct of the Chairperson of the Committee of the Whole of this House without a substantive Motion.

Mr. Temporary Speaker, Sir, I say so, because the Senator for Kakamega County has used two terms. First, he said the Chairperson of the Committee of the Whole of the Senate, the distinguished Senator for Migori County has acted fraudulently. Those are very strong words. As much as the Senator for Kakamega is entitled to his opinion, our Standing Orders refuse us to use such language against colleagues and also against the colleagues who preside over the proceedings of this House.

Is he in order to say that there has been fraud in this House and there have been tricks which have been performed by the Chair of the Committee of the Whole?

Sen. Orendo: On a point of order, Mr. Temporary Speaker, Sir. If what we have just witnessed happened in isolation, I would understand, but a pattern has emerged. In the first vote, which was more or less a scientific vote, there was no voice vote because votes were being recorded electronically. However, when the result of manual voting was first announced, they were opposite of what the actual results were. At that moment, we took it as a mistake.

I would like to remind the Senate Minority Leader that what Sen. (Dr.) Khalwale was saying was not that the Chair was fraudulent. What he was saying was that the outcome was fraudulent.

It was fraudulent because even the Chair, when we had voted, he looked this side, and despite the points of order that we had been raising, when we expressed a voice vote; the “Nays”, and he said - I think that is in the HANSARD – that: “That is what I was waiting for”, showing clearly that the “Nays” had it.

Mr. Temporary Speaker, Sir, I want to believe in the constitutional arrangement of this Republic the person who sits in that Chair as the head of a State organ and a branch of Government, if in broad daylight we can see something which is happening and even people in the Gallery are going back to say that even in Parliament, a vote can be rigged, then they should not have come here, in the first place, to learn from the Senate.

This is a matter which we must bring a substantial Motion, if need be. That substantial Motion is to make sure that the record of this House is---

Sen. Wamatangi: On a point of order, Mr. Temporary Speaker, Sir. Is the Senator for Siaya in order to mislead this House? While he in broad daylight, having seen what transpired immediately when the vote was taken and the Bars were opened, more than six Members of this side came in. This automatically means that in case of any subsequent vote, even if we do a physical count of the Members sitting in the House, you will see there are more Members on this side.

(Several hon. Members stood up in their places)

Mr. Speaker, Sir, I am on a point of order. If the distinguished Senator for Siaya is in doubt, we can do a head count and see how many Members are more in this House.

Mr. Speaker, Sir, I rise under Standing Order 90(4). Is the distinguished Senator for Siaya in order to use the word ‘rigging’ in this House? He had risen earlier and pretended to speak with extreme decorum, only to go behind there and use offensive language. Is he in order?

(Sen. Orengo stood up in his place)

The Temporary Speaker (Sen. Mositet): Order, Senator! Please, sit down. This matter is very clear because the Chair had ruled on it. It is just the report of the Committee of the Whole. We should give the Temporary Chairperson a chance to report. That is my ruling.

Temporary Chairperson of the Committee of the Whole, could you report?

(Loud consultations)

Order, Sen. Hassan.

(Sen. (Dr.) Khalwale spoke off record)

Order! Sen. (Dr.) Khalwale, you have used some words which are unparliamentary. Could you, please, withdraw and apologize? You said that they are stupid; I heard it. I will give you two minutes to do so.

Sen. (Dr.) Khalwale: Mr. Temporary Speaker, Sir, with utmost respect, whoever has drawn your attention to the fact that I have uttered those words will live with his conscience. I am a modest man and I would never call any of these colleagues “stupid.” Therefore, you are asking me in the full glare of camera to own something that I did not say. Take time and scientifically assign that statement to me. What I said, and for which if I am asked to apologize I will make a decision, is that some people have stolen our land and now they want to steal the Constitution. That is the only thing I said. How do you make me apologize for something which I did not say?

*(The Temporary Speaker (Sen. Mositet)
consulted with the Clerk-at-the-Table)*

The Temporary Speaker (Sen. Mositet): Sen. (Dr.) Khalwale, the issue has been clarified to me. There is a Senator who uttered the word “stupid,” but it is not Sen. (Dr.) Khalwale. You are let loose.

Hon. Senators, I ask the Temporary Chairperson of the Committee of the Whole to report progress to the House.

(Loud consultations)

Sen. (Dr.) Machage: Mr. Temporary Speaker, Sir, could you hear me out? My chairing of the Committee of the Whole was not intended to raise any controversy. If Members of this House are not happy and have raised points of order to that effect; that the vote be repeated, I will not give the report to the House. As the Temporary Chairperson of the session, I agree with them and withdraw.

(Loud Consultations)

The Temporary Speaker (Sen. Mositet): Order, Senators! Sen. (Dr.) Khalwale has the Floor.

Sen. (Dr.) Khalwale: On a point of order, Mr. Temporary Speaker, Sir. The distinguished Senator for Migori has honourably and gracefully disowned the vote which he pronounced. In English—

*(The Temporary Speaker (Sen. Mositet)
consulted with the Clerk-at-the-Table)*

Sen. Orengo: Clerk, let the Temporary Speaker listen.

Sen. (Dr.) Khalwale: Clerk, you are the one who is messing up this House! What is he doing? This is serious.

(Loud Consultations)

The Temporary Speaker (Sen. Mositet): Continue, Sen. (Dr.) Khalwale.

Sen. (Dr.) Khalwale: Mr. Temporary Speaker, Sir, this House is guided by 251 Standing Orders. If you go through them, from No.1 up to No.251, there is no provision whatsoever that the Chairperson shall leave the Chair report to the House and things that were not agreed upon in the Committee of the Whole. From the beginning – and we want Kenyans to know - that there has been an attempt to squeeze through the so-called Presidential recommendations in spite of the clear rejection by this House or clear failure to get a win in this House.

We know you are “big” and control everything, but just as you beat us in the National Assembly, the High Court, Court of Appeal and the Supreme Court will find that what you have done here is null and void.

The Temporary Speaker (Sen. Mositet): Please, stick to point of order.

Sen. (Prof.) Anyang'-Nyong'o: Mr. Temporary Speaker, Sir, if you had given me the chance to speak earlier, this problem would have been solved. To err is human. When the Chair was speaking, having noted that the amendments or reservations that the President had proposed had been rejected in this House by a vote of 17 to 13, it is a fact that any vote taken while those same Members were in this House could not be negated. It was not possible to negate it.

When the Chair heard the “Nays” in a voice vote higher than the “Ayes”, he assumed that the “Nays” were confirming what had been there and mistakenly said that the “Ayes” have it. If you ask the Chair why he stood up and made a statement that is not accommodated in the Standing Orders is precisely because what he did when he was chairing was also not accommodated in the Standing Orders. The “Nays” had a bigger voice vote than the “Ayes” yet he said something contrary to that. To err is human.

The Senate Majority Leader (Sen. (Prof.) Kindiki): On a point of order, Mr. Temporary Speaker, Sir. I understand the desperation of the Opposition to try and defeat this memorandum. Unfortunately, the Opposition does not have the numbers to do what

they want. They require 32 votes to reject this memorandum. They will not get that number.

Secondly, the Jubilee Coalition, which supports this memorandum, has no apologies to make neither does the Opposition. We require 24 votes to approve this Bill. We have that number. We may not have that number right now in this sitting, but we can raise it to approve this memorandum. My point of order is in connection with what we have just witnessed from the Chair of the Committee of the Whole, the Senator for Migori County, who had a good job, but appears to have been intimidated by two Senators whose names I do not want to mention, who have been yelling and making all kinds of demands.

Mr. Temporary Speaker, Sir, Standing Order No.172 states what a Chairperson of the Committee of the Whole who has just finished chairing a committee of the Whole needs to do. It does not anticipate of what the Senator for Migori County has just done. He is trying to disown a decision he has made. Standing Orders No.172 says:-

“A Committee of the Whole may not adjourn its own sitting or the consideration of any matter to a future sitting, but the Chairperson may, by Motion, be directed notwithstanding that all matters referred to the Committee have not yet been considered, to report progress to the Senate and ask leave to sit again.”

In a nutshell, the obligation placed by the Standing Orders on Sen. (Dr.) Machage is the obligation to report progress. He is not supposed to tell us that he is withdrawing. I do not even understand what he is withdrawing in the first place. He cannot withdraw anything; he has to report progress. Could he do so?

Sen. Hassan: Mr. Temporary Speaker, Sir, as Sen. Orengo has said, this House must hold itself to the highest standards of decorum. We accept votes when we lose in this House. We, as the Opposition, take it in decorum. However, where votes are manifestly reported in a manner that is different, we do not accept. If Sen. (Dr.) Machage was the Chairperson at that point, decides that the vote he took is false and does not want to report, he has disowned it. Even though the Standing Orders do not anticipate so, there are ways in which the Speaker must interrogate the rules progressively. That is why the Chairperson has broad powers under the Standing Order No.1.

The Senate Majority Leader and the Senate Deputy Majority Leader, in their conscience know that the “Nays” vote was louder. We are not here as a joke; we are here as products of 50 years of humiliation. We are here in the Senate to make things right for our counties. That is why we have equal votes for all the counties. Therefore, when my vote that represents the popular voice of the people of Mombasa County that comprises of 1.3 million people can be abrogated by a simple discretion, then we have a problem in this House. I beg you to rule that if Sen. (Dr.) Machage cannot report what he chaired in the Committee of the Whole, then that vote is null and void.

Sen. Omondi: Mr. Temporary Speaker, Sir, I would like to register our disappointment as the Delegation of Kakamega County. A Member who misdirected you that Sen. (Dr.) Khalwale used unparliamentary words owes him an apology.

Sen. Keter: Mr. Temporary Speaker, Sir, we are challenging what the Chair did. However, there is a provision in the Standing Orders that if you disagree with what the

Chair has ruled, there is a requirement for 15 Senators to stand. However, I only saw three Senators. Therefore, bringing up these issues now is irrelevant. Let us go by the rules of the House. We go by the provisions of Standing Orders No.76. Let us proceed.

Sen. Mutula Kilonzo Jnr.: Mr. Temporary Speaker, Sir, the Standing Orders are not cast on stone. Unfortunately, for us, there is something called precedence which is where you disagree or form a new precedence on a matter that has never been decided before. The Chairperson of the Committee of the Whole made a mistake. In fact, I would like the Kenya Broadcasting Corporation (KBC) to give us a video clip for us to demonstrate that the Chair made a mistake. In a case where you do not have a provision, the Chair can withdraw the vote. I urge you to look at the Standing Order No1.(2). It says:-

“The decisions made in paragraph (1) shall be based on the Constitution of Kenya, statute law and the usages, forms, precedents, customs, procedures and traditions of the Parliament of Kenya and other jurisdictions to the extent that these are applicable to Kenya.”

Mr. Temporary Speaker, Sir, where the noisy vote by this side was more than that side, we do not need to look for any other provision. Sen. (Dr.) Machage, the Chair of the Committee of the Whole must stand by his withdrawal of the vote because it was fraudulent in any respect.

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Speaker, Sir, the House finds itself in a very difficult situation. As you sit in the Chair, you did not walk in after the events that happened. You were sitting in the House; you saw and heard. The distinguished Senator for Migori, after putting the matter to vote either made an honest mistake or a fraudulent one.

(Applause)

If he made an honest mistake, I will refer you to a book written by the former Clerk of Parliament, Mr. Patrick Gichohi. I sat on the Speakers Panel in the Seventh Parliament. In a vote such as this one, I misunderstood the volumes and made a decision that I later reflected on to have been incorrect. None other than the distinguished Senator from Kisumu and Sen. Orengo, who were then in that House, argued their case. As the Temporary Speaker then, I rescinded the decision and we went on with the matter as if there was no decision.

We salute the Senator for Migori after condemning him for giving an evidently fraudulent result. He has owned up to the mistake.

(Applause)

Mr. Temporary Speaker, Sir, this is something very honourable. He has said that he made a mistake. He has raised a controversy for which he is sorry. Therefore, the decision he made is no decision. It is bizarre to hear the distinguished Senator for Kiambu County, who just walked in and did not know what was happening, standing up to argue that because the voice vote was lost, we start counting how many people were there. If he

wants to learn some lesson from those who have been here longer, the voice vote is not dependent on numbers, it is dependent on volume. That is why it is called a voice vote. When I saw the voice put, the distinguished Senator for Kericho and Tharaka-Nithi counties respectively, looked like they have just emerged from a hospital ward.

(Laughter)

They feebly, said “Ayes.” That cannot be a vote to carry the day. A voice vote must be cast by those who are ready to voice “yes” or “no.”

More importantly, for us to make progress, I asked the Chair and I want to ask again, Order Nos.8 and 9, when the Speaker left the Chair, and previously been proceeding that way - I asked the Chair, what is the rationale or efficacy of adjourning to report progress and progress on what because we are done with Order No.8? The President Memorandum has not been approved and is confined to where it should be.

Again, we were to move on in the Committee as we have been doing to deal with Order No.9 and when we finish, you come to the Chair for a report. We are being treated to a use of the phraseology, “report progress”. At the very most, if there is any report is to report the outcome of the Committee proceedings. Not to report any progress because there is no progress to report. We are done with the matter.

Mr. Temporary Speaker, Sir, there are so many anomalies coming up that are convoluting the process of procedure in this House. We want the Chair to be strong and firm. The moment we see and hear first the Clerks-at-the-Table confusing the figures, we do not know whether it was fraudulent or an honest mistake. The winning vote was declared as the losing vote and the losing vote as the winning vote, as you did in the 2013 elections.

(Laughter)

Then eventually---

The Senate Majority Leader (Sen. Kindiki): On a point of order, Mr. Temporary Speaker, Sir. We are here this afternoon on a very important matter. I have said I fully understand what the opposition is trying to do and it is within their right. I wish them luck. I have also expressed myself that they will not succeed.

Having said that, is it in order for the Senate Minority Leader to impute improper motive on the Chair of the Committee of the Whole of the Republic of Kenya, by saying blatantly and openly that the Chair has rigged the outcome of the vote? If that is the assertion, he should bring a substantive Motion to discuss the conduct of Sen. (Dr.) Machage for which notice will be given so that we prepare and defend the Chair - those of us who think that the Chair has been fair.

The Senate Minority Leader has consistently got away with snide remarks against colleagues. Time has come for us to tell him off.

(Loud consultations)

You have heard him here just now trying to say how the Senate Majority Leader was voting as if he has come from a hospital bed. That is not dignified language. I want to tell the Senator from Bungoma, I want to tell you my friend: “You do not have the exclusive copyrights of insults! Stop undermining, demeaning and indignifying your colleagues. That is how you will be respected.”

Mr. Temporary Speaker, Sir, is he in order?

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Speaker, Sir, I was on the Floor, let me finish. The loss of temper by the Senate Majority Leader and the use of excessive and extravagant language that I did not use, is not keeping and inconsistent with his character. He did not listen to me. When I made my submission, he was busy talking to Sen. Orengo. I heard him say: “What did he say?” He was not even listening to me.

(Laughter)

When we wake up from lack of proper attention, we are bound to act in an erratic manner, like my distinguished colleague has done. I said and I want to say it again, that what has happened here is not right. I did not cast any aspirations nor did I assault the character of the distinguished Senator for Migori. In fact, Sen. (Prof.) Kindiki is not the spokesman for Sen. (Dr.) Machage. Sen. (Dr.) Machage is here and he is listening to me. If I said anything offensive to him, he would have risen to protest.

Even you, Mr. Temporary Speaker, Sir as the Chair, if I said anything that offends the Standing Orders, the first roadblock is the Speaker himself. What I said was this, that the Senator who was in the Chair, the distinguished Senator for Migori, said the Clerks-at-the-Table mixed up the figures. I said, and I repeat, in the mix up, whether it was an honest mistake or otherwise, it ended up, in the first instance, the winners being announced as the losers and the losers as the winners, the same way it was done in March 2013.

(Applause)

That is what I said, and I say it again.

(Loud consultations)

The Temporary Speaker (Sen. Mositet): The Senate Minority Leader, I am giving you one minute after which, I will make a ruling.

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Speaker, Sir, I urge you to bring back the proceedings to the rails and let us go to the business of the House as it ought to be. Standing Order No.8 is done with. What is left is whether the Chair was right in purporting to report progress when there was no progress to report the outcome. That is what you should direct.

Secondly, having rescinded his decision, you should find a way of allowing under Standing Order No.1 a vote to be taken again. We can then go to Order No.9 and deal with the blow we have dealt with in Order No.8.

Sen. (Eng.) Kariuki: Thank you, Mr. Temporary Speaker, Sir. Today, it may turn out to be an important day because a number of fundamental issues have been raised. Sen. Orendo started by questioning whether the President should bring an amendment instead of a reservation. That is already a fundamental issue. I and other Members were of the view that the President's reservations could be in the form of suggestions or in the form of an amendment.

That being the case, in order for Parliament to reject the President's suggestions or amendments or whatever it is, we need two-thirds, which we did not raise. The fact that there may have been an argument whether the vote was taken, a decision should be made to make us move forward.

If I recall correctly, the Chair who was presiding over the Committee has not officially told you that he has withdrawn. He just stopped there. In my view, we should give a chance to the Chair so that we can know which way to go. Since we have legal minds in the House, we can find a way of continuing with Standing Order No.9 and proceed. In the meantime, the Chair can give the report.

Sen. Orendo: Mr. Temporary Speaker, Sir, the reason I am saying this is because I have been having a discussion with the Senate Majority Leader, one point that I emphasise is that the authority of the President to give presidential assent or deny, otherwise a veto, is an important constitutional contravention which we cannot do away with in our modern Constitution.

I emphasise that this is an authority that the President has in every democracy. That is why partly we are a Republic. If you want to know what a republic is, go back to the days of Julius Caesar.

Mr. Temporary Speaker, Sir, looking at the powers and the functions of Parliament, it requires the Members of Parliament to protect the Constitution. However, among the powers of the President, there are two important things that we must think about. The President is not only the head of Government, but also the Head of State. When we are dealing with a Presidential veto in the House, let us have decorum. When there is Presidential reservation or recommendation on the Floor, we are dealing with the President as the Head of State and not Head of Government.

I want to hear the Senate Majority Leader when we are considering this matter to give the President that important constitutional function as Head of State and not Head of Government. That is why when these reservations are before the Senate, we must have a bipartisan way of approach.

Mr. Temporary Speaker, Sir, we are required to protect the Constitution. Equally, the President is expected to respect, uphold and safeguard the Constitution. They are three important words. In our functioning, if the President finds that Parliament erred through the exercise of Presidential Assent, he can express those reservations. I heard the Senator for Kiambu County trying to make issue with what I had said before. Just as much as the Constitution is important, Sen. (Dr.) Machage must abide by the Standing

Orders when he sits as the Chairperson of a Committee of the Whole. In any case, that Motion was not moved by him, but by the Senate Majority Leader.

The Standing Orders can never be above the Constitution because the freedom of conscience requires that if Sen. (Dr.) Machage has something, which in his conscience is right, he cannot be compelled to take action on a certain version. He cannot use the Standing Orders to do so, because the Constitution is above the Standing Orders.

Sen. (Dr.) Machage said that having listened to what Members have said since the vote was taken out of my conscience, I cannot be ready to report. Therefore, if the President brought this assent as the Head of State who must protect, uphold and safeguard the Constitution, he will be the first person to protect and safeguard Sen. (Dr.) Machage for exercising his constitutional right for being not compelled like the Senate Majority Leader which is normally in the business of Jubilee Government to force people to do things.

Sen. (Dr.) Machage: Mr. Temporary Speaker, Sir, I did not raise what would appear to be a controversy because I knew there was no provision within the Standing Orders. The Standing Orders have a provision under Standing Order No.1 for a Speaker to decide an issue that has no written regulations, recommendations or advice by our own Standing Orders. That is why I did what I did. The HANSARD records clearly what went on in the House. As a Chair of the Committee, you are also guided by the Clerks-at-the-Table. I have for many days tried and obtained guidance from the Clerks-at-the-Table and also followed the law.

Mr. Temporary Speaker, Sir, at first, the Senate Minority Leader is right. When we made the first vote, which was by electronic system, which for once did not work well - a matter that was raised by Sen. Keter - the votes were read out and the "Noes" were given 13 and the "Ayes" 17. When I looked at the numbers from both sides, I doubted the result. A point of order was raised by Sen. Hassan and that vote was relooked at electronically. Thereafter, it was reversed. That is the controversy number one.

Mr. Temporary Speaker, Sir, in my view, I was awarding the people who had a louder voice on this side. That is where my conscience lies. However, in the advent of the announcing, it was taken differently, maybe because I used the wrong "No" or "Yes." On a matter of reporting, the normal procedure would be that I report "that the House has considered the matters before the House and approved, rejected or no progress." In any case, those are prototype reports that have been developed by the House. The Standing Orders do not provide a modality on how to report. Therefore, I was very much within my own right to give a report of progress the way I saw it. I am within the Standing Orders because the Standing Orders do not tell me how to report, because what we are using is a practice.

Mr. Temporary Speaker, Sir, in my own judgment, the "Nays" had it, and I have been very open and candid. Since I am forced to report otherwise, my conscience cannot allow that and, therefore, I decline. I have left the honours of deciding on what to do to you.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Temporary Speaker, Sir, for the record, Sen. (Dr.) Machage has made the situation clearer. Based on the explanation he has given, I agree with the position he has taken. However, having said so,

the debate we have had here is healthy, except a few instances where an excited Senator or two went beyond the usual decorum and tranquility of this House to insult or impute ill motives on other Senators.

Mr. Temporary Speaker, Sir, before you make your ruling, I believe that Standing Order No.1, which has been alluded to by several colleagues, is not applicable in this matter. I say so because Standing Order No.1 applies in matters not provided for; where there are gaps. In my view, there are no gaps in this matter because Standing Order No.172 is very clear on what happens immediately after the Committee of the Whole has sat.

Secondly, the role of the President in making reservations is provided for in the Constitution of the Republic of Kenya, but not in the Jubilee Manifesto. To some extent, I agree with my learned senior, Sen. Orengo, that this power by the Executive, as Head of State, must be exercised cautiously, judiciously and in the best interest of the country. It should not be misused or applied to try and overthrow the supreme authority of Parliament to make law. Having said so, I want to emphasise that we, from the Jubilee side, believe that the President in this present case, has exercised that power constitutionally and we have expressed ourselves.

(Sen. (Dr.) Khalwale spoke off record)

Mr. Temporary Speaker, Sir, now that I am guided by Sen. (Dr.) Khalwale to move to the next point, those of us who support the President's Memorandum have not lost. Whether the decision is to follow the pattern which Sen. (Dr.) Machage said - that the "Noes" or the "Ayes" have it - the consequence is the same; that the matter is neither won nor lost. The matter is in abeyance and, therefore, the consequence is the same. Whether the "Noes" or the "Ayes" have it, the effect is that the President's Memorandum has not been rejected, because you require 32 delegations to reject it. On the other hand, it has not been approved because we require 24 votes to approve it. Therefore, we will get 24 votes from this side and approve it when it will be brought some other time.

Mr. Temporary Speaker, Sir, finally, in the context of Sen. (Dr.) Machage's very clear position. I disagree with my senior, Sen. Orengo, about the freedom of conscience. Freedom of conscience is a right and not an obligation. When you have a right, you can exercise it or refuse to exercise it. However, he is coaching it to appear as if it is an obligation yet it is not.

Sen. (Prof.) Anyang'-Nyong'o: On a point of information, Mr. Temporary Speaker, Sir.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Temporary Speaker, Sir, I would like to be informed by Sen. (Prof.) Anyang'-Nyong'o, because he is a very good friend of mine.

Sen. (Prof.) Anyang'-Nyong'o: Mr. Temporary Speaker, Sir, could I inform my dear in the legal profession that in the old days, Theology and Law were fused together? One of the most leading theologians, who is also a lawyer, Bishop Augustine of Hippo, said that in the court of conscience, there is no obligation to obey an unjust law. It is not just a right, but an obligation as well.

Sen. Orengo: On a point of information, Mr. Temporary Speaker, Sir.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Temporary Speaker, Sir, I accept to be informed by Sen. Orengo.

Sen. Orengo: That is very gracious.

Mr. Temporary Speaker, Sir, I just want to give the distinguished Senate Majority Leader an example of men without conscience. Those who killed people in Paris were human beings without a conscience; without sense of right or wrong. The people who massacred six million Jews were people without a conscience. The other example is that of the Garissa University attack. The people who steal elections are also people without a conscience.

The Senate Majority Leader (Sen. (Prof.) Kindiki): Mr. Temporary Speaker, Sir, I thank them for the information. I will contend with the last part in another forum.

Mr. Temporary Speaker, Sir, allow me to end my point of order. In terms of reporting, in my view, no progress has been made on this matter and, therefore, the three options that were provided by the ruling of the Speaker should ensue.

Thank you, Mr. Temporary Speaker, Sir.

The Temporary Speaker (Sen. Mositet): Hon. Senators, a lot of weighty issues have been raised. Sen. (Dr.) Machage has come out clearly on what he heard and the issue of reporting. I will defer the ruling on the reporting to allow us to go through the HANSARD and part of the recording, so that we can make a proper ruling on that. Consequently, I defer Order Nos.8 and 9 since we have to go to the Committee of the Whole.

DEFERMENT OF THE COMMITTEE OF THE WHOLE

CONSIDERATION OF THE PRESIDENTIAL MEMORANDUM ON THE PUBLIC
PROCUREMENT AND ASSET DISPOSAL BILL (NATIONAL ASSEMBLY BILL NO.40 OF 2014)

(Sen. Keter on 29.10.2015)

(Resumption of Debate interrupted on Thursday, 29.10.2015)

CONSIDERATION OF THE PRESIDENTIAL MEMORANDUM ON THE PUBLIC
AUDIT BILL (NATIONAL ASSEMBLY BILL NO.38 OF 2014)

(Resumption of Debate interrupted on 29.10.2015)

(Committee of the Whole deferred)

*(The Temporary Speaker (Sen. Mositet)
consulted with the Clerk-at-the-Table)*

Hon. Senators, because of the numbers, and we were still to be in the Committee of the Whole in all the other Orders, let us move on to Order No.15.

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Sen. (Prof.) Anyang'-Nyong'o: On a point of order, Mr. Temporary Speaker, Sir. Am I be in order to ask the Clerk and your legal team to consider making a clarification to the Senate regarding Article 115 of the Constitution which speaks on the reservations of the President whereas what has been put before us has been recommendations from the President; two terms which have caused a problem in the Senate today?

Secondly, while looking at the practice in Parliament, I would recommend that you compare the Presidential Memoranda that were submitted to Parliament by President Kibaki in terms of reservations as compared to what is emerging as a legislative role in the presidency and not just expressing reservation on the legislative role of Parliament?

The Temporary Speaker (Sen. Mositet): Sen. Wetangula, be brief.

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Temporary Speaker, Sir. In that consideration, I also urge the Chair, after looking at the words “reservations” and the term being used “recommendations”, we also want the Chair to guide the House as to whether the President has the liberty under the Constitution to send new clauses when he is only entitled to exercise his right of veto by sending his reservation to Parliament about what is on the Bill. When the President goes beyond reservations, recommends and then drafts new clauses, that is not envisaged under any Article of the Constitution, more particularly Article 151.

Lastly, we are done with Order No.8. There is no legitimate reason for us to step down Order No.9. Order No.8 was on its own. In fact, I painstakingly argued that we needed to remain in the Committee of the Whole to deal with Orders No.8 and 9 so that we finish and have a singular report back to the House. Those arguments were not upheld. I respect the ruling of the Chair even when I do not agree with it. We need to go to Order No.9. As long as we have quorum, deal with it and vote on it. If it gets 32 votes, it is rejected. If it gets less than 24, it is not passed and then we get a report.

Sen. Orenge: On a point of order, Mr. Temporary Speaker, Sir. As said by the Senate Minority Leader, I urge the Chair to look at the old Constitution where the issue of Presidential Assent and the exercise of veto power were done under very different circumstances. This is because then the President was part of Parliament. The Parliament of Kenya consisted of the President and the National Assembly. The current Parliament does not have the President as a component of Parliament.

The second more important issue particularly on this issue of coming up with new clauses under the new Constitution is that there is the element of public participation. That, a Bill that has been published, during the period that it is published and in between the First and Second Readings, there is an engagement by the public and other stakeholders. Bills commence by publication.

It would undermine the architecture of this Constitution if an amendment brought by the President, which introduces new clauses, it has not been published, tabled, read the First Time, has not been subjected to public participation, has not gone through the Second Reading and those new clauses appear suddenly or abruptly during the Committee Stage. That would undermine the procedure under which the Constitution requires that we enact legislation.

Therefore, we should be true to the promises and requirements of this Constitution that all these requirements must be met. In fact, if the President had any

problem with the Bill, he can introduce those clauses during the Committee Stage or the main stages that a Bill goes through. So, if the President is asleep and waits for a Bill to arrive in State House to introduce new clauses, that would undermine the authority of the Constitution. What we are talking about is not an idle point. Let me tell this House that the First Parliament lost its powers gradually by little things like this. It was nibbled off.

Mr. Temporary Speaker, Sir, in fact, I am so happy that the Senate Deputy Majority Leader is here because I think at one time there was a “Keter Bill”, which was supposed to empower Parliament. From his utterances, he is now involved in a process of emasculating Parliament. I do not know whether that old adage about power and absolute power corrupting absolutely--- So, I think all those matters should be put to your ruling and consideration so that we abide by the Constitution.

Sen. Mugo: On a point of order, Mr. Temporary Speaker, Sir. Thank you for finally recognizing me. I have been trying to speak the whole afternoon and so allow me to also say what I wanted to say earlier.

First, the issues being brought back had been aired and discussed fully before and then the Speaker made a ruling. Now, the Senate Minority Leader and hon. Senators are trying to go behind the Speaker’s ruling. I believe that they are all very experienced Members of Parliament. Most of them have been here for a long time. The Speaker’s ruling is normally not challenged with. If you want to challenge the Speaker’s ruling, at least, have enough decorum to wait and do it with the substantive Speaker who made the ruling.

(Sen. Wetangula consulted loudly)

It is true it was dealt with. The Speaker made a ruling and he allowed the President’s observations to come to this stage and be discussed. This Stage was only to vote and report ---

The Senate Minority Leader (Sen. Wetangula): On a point of order, Mr. Temporary Speaker, Sir.

Sen. Mugo: I am on a point of order. You have been speaking the whole afternoon---

The Senate Minority Leader (Sen. Wetangula): Point of information.

Sen. Mugo: I do not need your information.

(Loud consultations)

I believe even the Senator for Migori was just confused by his colleagues because they kept twisting him round and round, even when he tried to say that his was for us to vote and him to make the report. You have just made a decision and communicated it. I hope it will not now be watered down to change your decision like they want you to change the Speaker’s decision which had been made.

Secondly, the Opposition believes if you tell a lie many times, it becomes the truth. You lost the elections, you did not win. Kenyans know this. A few might not know. Please, do not live in that lie. Work hard and see if you can win the next elections.

(Loud consultations)

So, stop lying all the time that you won the elections. Which figures did you use? Where did you count the figures? You lost at the counting stage. You lost in the High Court and the Supreme Court. Which counting did you use? Could you, please, table your figures?

The Temporary Speaker (Sen. Mositot): Order, Senator! Let us have Sen. Mutula and then we continue.

Sen. Mutula Kilonzo Jnr.: Mr. Temporary Speaker, Sir, we want to help the Chair---

(Sen. Orengo spoke off record)

The Temporary Speaker (Sen. Mositot): Order, Sen. Orengo!

Sen. Orengo: Mr. Temporary Speaker, Sir, I was just going to----

(Loud consultations)

The Temporary Speaker (Sen. Mositot): Order!

Proceed, Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr.: Mr. Temporary Speaker, Sir, we must remember our mandate under Article 96 of the Constitution; it is not to defend the President. We have to uphold the law. My concern, which I must mention on record, is that the precedent we are setting here will be reflected in your county of Kajiado or my county of Makueni and many other counties. So, while there is celebration from the majority side, that they think they can defend the Office of the President in violating the law and the Constitution, this idea of passing laws through memoranda will be repeated in our counties.

Mr. Temporary Speaker, Sir, Kiambu County, for example, through Sen. Wamatangi has a Petition in this Senate where the County of Kiambu, through the Governor, passed a memorandum. Now, we are violating the same things that we are doing. We will set a dangerous precedent. Seated where you are, you will be seen not to complain when your governor passes a law through a memorandum where the assembly has rejected a law which they do not agree with.

Therefore, in terms of our mandate under Article 96, I just want to correct Sen. Mugo, that, our mandate is not to defend the President because President Kenyatta is an individual while the Presidency is an institution. That is why we need to repeat on record what Sen. Orengo said; "Head of State and not Head of Government."

The Temporary Speaker (Sen. Mositot): I will allow Sen. Keter to speak then after that we---

Sen. Keter: Mr. Temporary Speaker, Sir, you had made a ruling that you deferred Orders Nos.8 and 9 until the Speaker makes a ruling.

However, if I am not wrong, I remember the issues being raised now were raised before. When this memorandum was tabled, the Speaker deferred it in a ruling in which he said that whether the President was within the law in terms of admissibility or

legislative process, he said, yes, indeed. We are going back to that ruling. It is good to be on record. There is a ruling which Speaker Ethuro made here, and which you are being invited to be included in the ruling. The issues which are being canvassed now were there before. For us to make headway, why do we not wait for the ruling on the issues which had been raised and touch on this? Otherwise, we will revisit other issues. Is there a timeline? Do we keep deferring this? For how long? It is good for the House to be alive to it; whether we will keep deferring the Memorandum or not. The National Assembly has already approved this, for how long shall we defer for a ruling from the Chair? Will we not be overtaken by events? For the record of this House, these issues cut across – whether one is in Jubilee or not. Do we keep on deferring? There must be a limit to that effect.

Sen. (Prof.) Anyang'-Nyong'o: Mr. Temporary Speaker, Sir, I appreciate the points raised by the Senate Deputy Majority Leader. Being conscious of time is good, but this is a very weighty issue which involves a very important aspect of the Constitution as captured in Article 115. If we got that article correct, even in the order of the day, we would put the wording correctly by saying “President’s Recommendation” is constitutionally wrong. We should say “Presidential Reservations.” That is what should be there to be in line with the present Constitution.

That is one of the reasons we should look at what we are doing now in context of the previous Parliament which was under an old Constitution. I am glad Sen. Orendo made that clear; that comparison should take into account that we are operating under a different constitutional order that we seem to have carried on the practices of it into the present dispensation, which is wrong.

Secondly, even if these were to be recommendations, they should have been handled by the majority leaders in the National Assembly and the Senate. They are the legislative arm of the current Government in Parliament. The President, as Sen. Orendo said, is not here and the only people who can speak for him, for legislative purposes, are the Majority Leader here and in the National Assembly.

Therefore, if you really read strictly constitutionally, what the President is now trying to do is usurp the role of his majority leaders in both Houses who should be making these amendments to the Bill. Then, if he has reservations, they should not come in terms of framing the law, but in terms of why do I have reservations about this particular clause. He gives a reason. It is the reasons that the President gives that will then persuade either the National Assembly or the Senate to amend the Bill. However, the President cannot sit and frame the Bill which should have been done by his majority leaders in either House.

Mr. Temporary Speaker, Sir, we are making these points not because we are going back to amend the ruling by the Speaker, but to make sure that when you look at what has gone on today, we will have a better procedure in this House and the President or the Majority Leader will understand what the role of the Legislature and the Executive is. They are quite distinct in the present Constitution.

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Speaker, the reason this matter keeps popping up on the Floor is not because there was no ruling, but because it is so weighty and important to the country. In our considered opinion, we

believe that the Speaker's ruling that we said we respect and did not agree with, can actually be qualified by the Speaker.

I would like to advise my good friend, Sen. Mugo, that the Speaker is not a person, it is an office. So, when you are seated there, we do not address you as Temporary Speaker; you are Mr. Speaker and we are addressing you as such.

Sen. Orengo: On a point of information, Mr. Temporary Speaker, Sir.

The Senate Minority Leader (Sen. Wetangula): Please, inform me.

Sen. Orengo: Mr. Temporary Speaker, Sir, I would like to inform my senior and Senate Minority Leader that there is a number of Senators here who served in the Kibaki Government, including my sister, Beth Mugo.

An hon. Senator: It is Sen. Mugo.

Sen. Orengo: I am sorry, Sen. Beth Mugo. I said my leader, Sen. Wetangula, Sen. Obure and quite a number of others served in Kibaki Government. He was the first President to deal with Presidential veto under the new Constitution. He dealt with a Speaker who was very particular about any reservations that would be made. As President Kibaki sat in State House, he was confronted by the Speaker who would look at everything that came from the President to make a determination whether he had a point or not.

So, we are not talking about some new animal coming from mars. We are talking about a Constitution which came into force in the year 2010 when Kibaki was the President of the Republic of Kenya. There is sufficient precedent before the National Assembly to show us how Kibaki was dealing with similar issues so that the leadership of the House – particularly on the Government side – should go to the archives in order to deal with this point, which will keep on recurring. The problem with it is that this issue is now in the courts in several petitions which have been filed. We may find that we will go on and on and, finally, a judgment comes that all we have done is not in accordance with the Constitution.

Mr. Temporary Speaker, Sir, the Senate Minority Leader can have a session with the leadership on the other side, including Sen. Keter, whom I really respected because him and I were trying to build the independence and autonomy of the Constitution. However, these days when I see him, I see him as an agent of the Executive. So, I do not know whether he speaks for Parliament or he speaks for the Executive.

Thank you.

The Senate Minority Leader (Sen. Wetangula): Mr. Temporary Speaker, Sir, I was on a point of order which I had not finished. I only stepped down to seek information.

I also want to say this to the distinguished Senator for Kericho, who is my good friend; that what we are seeing unfold here today is not the mistake of the President, it is the advisors who are leading the President down the garden path to nowhere. Even those who are ready to jump at every twist and turn to defend the President at all costs and at any rate, like the distinguished Sen. Mugo, will do much better for the President by giving him better advice than standing to defend him where it is not defensible. This is because if the arrays of legal advisors that we know are available to the President were to read the Constitution first, because the President is not expected to spend all his time

reading about Bills, because he has the whole country with him. He has security here, Waiguru there and everything in his hands. We expect those who advise the President to go to him and read every clause of the Constitution and tell him when he makes a decision, it is a proper decision.

Mr. Temporary Speaker, Sir, I want to urge Sen. Keter – I know he is on the outer ring of leadership – that he holds the office he holds and we know the fault lines between United Republican Party (URP) and The National Alliance (TNA), and we fully understand, but try and throw in a few words. Vladimir Ilich Lenin said that even when a mad man speaks, listen to him; it may be his loose moment and you might pick something.

I want to urge you that we are trying to make you look good because you are looking very bad. We want to make you look good by offering honest advice to the President not to jump here as if you are being electrocuted to defend nothing.

Sen. Mugo: On a point of order, Mr. Temporary Speaker, Sir. If at least the Opposition are less abusive and more gentlemen and ladies, I do not think anyone would need to defend the President because he is also very capable than most of you and he has proven it. So, have some respect.

I do now want to answer Sen. Wetangula because what he has said is not worth answering. What I wanted to say is that, I have all the respect for the Speaker and he is very capable. However, we all know that there are Temporary Speakers and there is a substantive Speaker. Whereas we respect the ruling, the substantive Speaker, the Deputy Speaker or a Temporary Speaker cannot change a ruling of another Chair. Should we be pushing the Temporary Speaker to change a ruling that was made, to try to prove that this Bill is wrongly in the House?

The Speaker ruled that it is rightfully in the House and if you did not accept, you should have argued at that time. We should not go round and round. President Uhuru has many good advisors. Please, stop being abusive.

Sen. G.G. Kariuki: Mr. Temporary Speaker, Sir, thank you for allowing me to say something. I came here late, but I was listening to this debate. While I was sitting here, I confirmed that you made a ruling. Immediately after that, it was followed by debate in the name of Standing Orders. We have been here long enough. There is no amount of persuasion that we will expect from the Opposition side. They can speak any language, but we have decided to support this amendment as the Government. Everybody wants to talk about things in the past or their knowledge about many things, but we are not in kindergarten. We are all here because we were elected by the people and nobody---

(Loud consultations)

Mr. Temporary Speaker, Sir, my colleagues, especially the Senate Minority Leader, had all the time to speak and we listened. He knew who he was talking to the gallery and not to us. We are politicians and nobody will change this situation, except if we are defeated by a majority vote. We better believe in that.

Mr. Temporary Speaker, Sir, please, do not allow debate after making a decision, because we are creating a monster for nothing. There is no business.

The Temporary Speaker (Sen. Mositot): Hon. Senators, I had already ruled that the issue of the reporting from the Committee of the Whole will be deferred, so that we can have time to go through the HANSARD and the voice recording. Sen. (Prof.) Anyang'-Nyong'o then intervened first and said that the legal team could assist in determining whether or not the memorandum came to the Senate properly, but the Speaker had already ruled on that. What we are deferring is the reporting.

(Reporting progress deferred)

Let us dispose of Order No.18, because Sen. Hassan said that he is not ready to prosecute his Bill.

Hon. Senators, you can now contribute to the Motion by Sen. Ongoro.

MOTION

REPORT OF THE INTER-PARLIAMENTARY UNION EXPERT MISSION TO KENYA
ON THE FRAMEWORK TO IMPLEMENT THE CONSTITUTIONAL
PROVISION OF THE TWO-THIRDS GENDER RULE

(Sen. Ongoro on 12.11.2015)

(Resumption of Debate interrupted on 12.11.2015)

Sen. (Prof.) Anyang'-Nyong'o: Mr. Temporary Speaker, Sir, this Motion that was moved by Sen. Ongoro is extremely important. I would like to draw the attention of the House to the Motion because few have been debating on many things and I am sure that by now, the House must have lost the substance of the Motion. Let me just read it for the sake of refreshing our memory.

THAT, AWARE that the Parliament of Kenya is an active member of the Inter-Parliamentary Union (IPU) which is the international organisation of national Parliaments;

FURTHER AWARE that the IPU provides support to Parliaments in areas such as law and policy-making, as well as representation;

NOTING WITH APPRECIATION that, upon a request by the Speaker of the Senate, the IPU sent an expert delegation to Kenya from 12th to 16th July, 2015 to offer advice on the way forward in implementing the constitutional requirement on the two thirds gender rule;

NOW THEREFORE, the Senate notes the Report of the Inter-Parliamentary Union Expert Mission to Kenya on the framework to implement the constitutional provision of the two-thirds gender rule laid on the Table of the Senate on Thursday, 8th October, 2015 and extends its appreciation to the IPU for support on the matter.

Mr. Temporary Speaker, Sir, I would like to draw the attention of the House to this report so that we may discuss its substance. The issue of the two-thirds gender rule

has been taken as a matter that only affects women. However, the law is very clear that it is two-thirds gender rule of either gender. The law is very clear; it means either gender.

Secondly, in the context of the new Constitution, coming from a Parliament where women were very inadequately represented, given the demographic figures in this nation, given the role of women in the politics of this nation, particularly in the liberation struggle and the second liberation and given their role in social movements in our country, the framers of the previous Constitution realized that if women were to be only provided with openly in our competitive politics that elects persons to representative institutions. Previous practices, the structure of politics and experiences may still reproduce Parliaments as County Assemblies where the representation of women was not in consonant with their demographic numbers and their role in the economy and the political processes in this country. That is why under the present Constitution, there are affirmative action provisions that ensures women representations will be felt in representative institutions, the Senate, National Assembly and the County Assemblies.

The spirit of our discussion in the IPU, expert team was to go beyond mere formative action provisions in the present Constitution and progressively make it possible for women to compete in openly in our politics within a framework that ensures that representation of women meets two criteria; one, the demographic trends in our nation. Secondly, the participatory and the actual activities and role of women in politics.

In many jurisdictions, there are two ways of making sure that demographic trends are respected in terms of gender representation. The most appropriate jurisdiction or practices that would most approximate the solution we are looking for in Kenya is through proportional representation and party list. When we go to elections, we either adopt a proportion representation principle on its own, so that what people vote for in election are not individuals, but people vote for political parties. In which case if political party “a” gets 70 per cent of the vote and political party “b” gets 30 per cent of the vote, respectively; political party (a) will get 70 per cent seats in a representative institution be it the National Assembly, the Senate and County Assemblies and the other will get *mutatis mutandi* 30 per cent of the seats. Then the political parties are required to submit party lists which will obey the following rule:

The party lists will be submitted so that if the first person on the list is a man, the second person is a woman. They will alternate like that until the party list is exhausted. If a party gets 70 per cent of the vote, that party will take 70 per cent from its party list and send them to that representative institution. That 70 per cent will represent 50-50 men and women; that is 50 per cent men and 50 per cent women.

In the event that the demographic trends show that one gender is much higher than the other in terms of demography, for example, if women are 70 per cent and men are 30 per cent, the way I see demographic trends the world over, especially the developing countries, that could easily be the case. It could be. We must factor that in making the party list.

Mr. Temporary Speaker, Sir, these are debates that we had with the Committee of Experts from the IPU which are germane to the discussions that we will have to have because the present Constitution is a transition Constitution. If I remember well, the Constitution expects the current dispensation to be done away with and a long lasting

dispensation to be written in the Constitution so that we do not have to be revisiting the criteria of gender representation in the future.

In terms of competitive politics, at the moment, the law is weak in punishing gender discrimination in competitive politics. Sen. Ong'era is here and we belong to the same political party and coalition. We have had the onerous task of being very key officials in the biggest political parties in this country. I was a Secretary-General for close to 10 years and so was she the Executive Director for equally the same time. Our experience was that when you go to platforms for public rallies, women are thought of more or less as a group of people to be accommodated in terms of participation, but not a group of people who have a right to participate, especially given their demographic figures in both politics and society in general.

Mr. Temporary Speaker, Sir, when we go towards this new dispensation, the law should be improved to ensure that political parties when they are campaigning or holding rallies or discussions, gender representation is observed. It is only in political rallies, seminars, among others that the leadership qualities of individuals emerge.

The young man called Isaac Mwaura who is now a Member of Parliament in the National Assembly was my mentee. From the beginning, he expressed his interest in politics. I told him that the only way to emerge in the political arena is not to belong to a party, but to participate and make oneself visible and to let the talent of leadership recognised. He consciously cultivated to an extent that when it came to nominating people to the National Assembly, representing minorities, it was obvious in the Orange Democratic Movement (ODM) who was to represent minorities. Nobody had ever thought before that people with albinism are part of the minorities in this country. He made the issue of albinism visible and, therefore, something to be thought about when minorities are being looked into.

Mr. Temporary Speaker, Sir, this has had a lot of impact in Tanzania which has a high population of people with albinism, but where people with albinism have not been as visible in politics as before. The visibility in the participatory process is important in making sure that what we put in the Constitution in the new dispensation and representation of either gender, particularly the women who are coming from a position of discrimination. I have always said that women are a majority minoritised. It is just like people in the third world. Colonialism made us a majority minoritised.

Imagine that little England set in a silver sea - as Shakespeare used to say - of not more than 10 million people conquered many territories and turned majorities into minorities. Here in Kenya, a few settlers came with a few Government officers. They ruled and terrorized this country for more than 50 years. They were the minority, but given the ideology of colonialism and the power of the gun, they minoritised us.

We really had to fight with them and plead with the world, the United Nations (UN) and so on, that we needed a majority rule. Just imagine the experience we went through. Do we want our women to also go through the same experience of liberating themselves from a majority minoritised rather than we - by pure constitutional rationality and the logic of democracy - making sure that we write rules of the game that will make sure that women and other minorities are properly represented in representative institutions?

Mr. Temporary Speaker, Sir, Sen. Ongoro has got it right not to let the Report sit in the archives of the Senate without being debated by this House. That Report should be debated by this House and its importance emphasised, its context explained and its content laid bare. It should become an important document in the new dispensation that we will make in the representation of either gender, when the time that the present Constitution has put into law expires.

Our membership of the IPU as well as the CPU is very important. I had the opportunity of representing this Senate in a CPU in the House of Commons in London not too long ago. The discussion was on economic policy and the fight against corruption carried out by our Senate and the kind of laws that we had passed.

The Temporary Speaker (Sen. Mositet): Your time is up!

Sen. (Prof.) Anyang'-Nyong'o: Mr. Temporary Speaker, Sir, I beg to support.

The Temporary Speaker (Sen. Mositet): I now call upon the Mover or any Senator who can reply on her behalf to do so.

Sen. Ong'era: Mr. Temporary Speaker, Sir, on behalf of Sen. Ongoro, I beg to reply. I thank all the Senators who contributed to this Motion. They made very useful contributions which we have noted. The ideas that have been spoken about should be put into the Bill that is being worked on in the National Assembly.

Mr. Temporary Speaker, Sir, the one-third gender principle is an issue that is enshrined in the Kenyan Constitution. It is an issue we cannot wish away and leave it hanging. We have no choice, but must put it into practice. It is the only way that we can bring equality among the minority in our society, particularly women who have been neglected for a very long time. Therefore, this is very important particularly at this time when we need to enshrine a law that will protect the gains that we have made in the Constitution of Kenya, 2010.

Mr. Temporary Speaker, Sir, I also want to note that many Senators spoke about the constitutional gains that we have made and this should not be wished away. The issues raised in this Motion should be addressed and implemented in a legislative manner, as I have already highlighted.

As you are aware, the IPU is a very strong union which ensures that women rights are enshrined in many national parliaments. Therefore, we continually support the IPU and its programmes to ensure that women are well represented in all national parliaments.

With these few remarks, I beg to reply.

The Temporary Speaker (Sen. Mositet): Hon. Senators, this Motion does not affect counties.

(Question put and agreed to)

ADJOURNMENT

Hon. Senators, there being no other business in the Order Paper, the Senate, therefore, stands adjourned until tomorrow, Wednesday, 18th November, 2015, at 2.30 p.m.

The Senate rose at 6.25 p.m.