PARLIAMENT OF KENYA

THE SENATE

THE HANSARD

Wednesday, 29th January, 2020

Special Sitting

(Convened via Kenya Gazette Notice No. 380 of 22nd January, 2020)

The House met at the Senate Chamber, Parliament Buildings, at 9.00 a.m.

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

PRAYERS

HEARING AND DETERMINATION OF THE PROPOSED REMOVAL FROM OFFICE, BY IMPEACHMENT, OF THE GOVERNOR OF KIAMBU COUNTY

The Speaker (Hon. Lusaka): Hon. Senators, let me welcome you back to this morning session. From our programme, today we will start with receiving of evidence from the Governor.

Gov. Waititu and your team, you are most welcome.

PRESENTATION OF THE CASE OF THE KIAMBU COUNTY GOVERNOR

Mr. Ng'ang'a Mbugua: Thank you, Hon. Speaker and Hon. Senators. Hon. Speaker, before the Governor proceeds to tender his defence in this impeachment, yesterday you pronounced yourself on the request to admit the Governor's documents filed outside the prescribed time. You deferred that application to the hearing of the defence case. Therefore, before the commencement of the Governor's defence, we propose to revisit that application. It is that application that I would wish to urge and invite your determination and ruling on.

Mr. Speaker, Sir, this application relates to a request to admit the Governor's documents outside the prescribed time. The foundation of this application is to be found in the following enabling provisions. We rely on Part 1, Rule 29 of the Rules of

Procedure. We also rely on the Constitution of Kenya, Article 129(2)(d)(?), provisions of the Fair Administrative Actions Act, Section 4(3)(a), and the previous precedent set by this Senate.

Mr. Speaker, Sir, when the Governor was served with the invitation to appear on 22nd January, 2020, he had three days to put together his evidence. In doing so, he needed access to his office, which at the time was a challenge owing to a subsisting injunction barring him from access to the County Government Offices.

Mr. Speaker, Sir, to enable the Governor substantively respond to the issues in the invitation to appear, he needed to consult with technical persons within the County Government, who would then provide him with the material necessary to respond substantively to the issues in the invitation to appear. There was a delay in receiving those documents within those three set days. In the circumstances, it was difficult for the Governor to put in his documents on the 25th, by 5.00 p.m. Failure to comply with that timeline was neither deliberate nor as a result of dilatory conduct on the part of the governor.

Mr. Speaker, Sir, the Governor only managed to present his evidence on the 27th of January, 2020, one day outside the prescribed time. However, when he noticed that he was running late, he endeavoured to put in a preliminary objection by the 25th of January, 2020, which was part of what he would be relying on, and as a demonstration of good faith; and that he had every intention to challenge and defend himself before this Senate.

Mr. Speaker, Sir, when you are invited to make a determination on an application of this nature, Standing Order 1 requires you to bear in mind the following. That the assembly, unlike the Governor, had documents together long before the invitation to appear was served; and hence in furtherance of the principle of equality of arms, the limited extension sought by the Governor is fair and reasonable.

Mr. Speaker, Sir, I wish to point out that when we realised that we were running late, we endeavoured on Monday to drop a copy of those documents with the Assembly offices, so that by the time we were appearing on Tuesday, they had due notice of the documents and the evidence that we sought to rely on. That was on Monday in the evening. That was in good faith, so that by the time we are revisiting this application, the Assembly then had notice that in as much as the documents had not been received by the Senate, there was every intention to urge an application to have the documents lodged.

Mr. Speaker, Sir, I also wish to mention that yesterday, I am informed that the Counsel of the Assembly was also furnished with a copy of those documents in as much as they had not been admitted again, so that they have can have due notice of the content of those documents and they are prejudiced during their case.

Mr. Speaker, Sir, because this is a critical consideration, the nature of the evidence touches on evidence of what transpired on 19th December, 2019.

Attendance logs which speaks to threshold and numbers. This is evidence that this Senate is entitled to, even without the Governor moving the Senate. It is evidence that the Senate, on its own Motion, can call for. It is in the interest of justice that all material that is relevant for the just determination of this impeachment be before this Senate for consideration.

Mr. Speaker, Sir, as you exercise your discretion, Standing Order 1 requires you to bear in mind the provisions of the Constitution, the law and the forms and precedent of this Senate. I wish to remind this Senate that during the proposed impeachment of Governor Wambora and the late Governor Gachagua, there was a request of this same nature, where documents were admitted into evidence on the Floor of the Senate on the date when the impeachment proceedings commenced. Therefore, there is a custom and a precedent. We are not saying that we did that because there is a custom and a precedent, but this is a House of precedent and customs and it, therefore, behoves it to bear in mind that a precedent has been set before where an application of this nature was considered and granted.

We accordingly urge you, very respectfully, to grant this application. We urge you to allow admission into evidence the Governor's response dated 27th January, 2020, and the list of authorities which we have attached thereto and two witness statements of persons that were present on 19th December, 2019, when the impeachment proceedings took place on the Floor of the Assembly.

I wish to mention that we had a chance to pass on to the Office of the Clerk a copy of those documents yesterday. We wanted the Senate to administratively have a chance to look at the nature of the evidence that we seek to adduce through those documents. However, we invite your determination on this question and a ruling on it, and we urge you to find our application merited and that you grant it.

Ancillary to this, as you make a determination on those two applications at this preliminary stage, is an application that arose yesterday during the hearing of the Assembly's case. It relates to objection to documents which were filed by the Assembly in contravention of Rule 19 of the Rules of Procedure of this Senate's Standing Orders. Rule 19 speaks to introduction of new evidence that was not part of the allegation against the Governor at the Assembly.

That Rule correctly understood, presupposes that the allegations and the evidence originally presented before the Assembly prior to the passing of the resolution to impeach, and which the Governor was expected to defend himself against at the Assembly, must be the same evidence that the Assembly should rely on during the impeachment trial at the Senate. Introduction of new evidence at the impeachment trial stage at the Senate essentially means that the Governor has been deprived of a chance to defend himself against that evidence since the first defence stage is at the Assembly level. This is in keeping with Standing Order No. 63 of Kiambu County Assembly Standing Orders. It is on the right to be heard and it says that the person being removed, and in this case the Governor whose impeachment is sought, shall be availed with the report of the select Committee at the Assembly, together with any other evidence adduced and such note or papers presented to the Committee at least three days before the debate on the Motion. That is the Standing Order.

What it presupposes is that the evidence at inception when the Motion was tabled must consistently be the same evidence that the Governor is expected to defend himself against at the Assembly level, and when the matter is escalated to the Senate, it must be the same evidence.

Mr. Mbuthi Gathenji: On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): What is your point of order?

Mr. Mbuthi Gathenji: Mr. Speaker, Sir, can the counsel refer to the correct Standing Order? I think that he is referring to something that is no longer part of the Standing Orders. We want to give him the Standing Orders for him to make reference to the correct Standing Order in order for us to have the correct record.

Mr. Ng'ang'a Mbugua: Mr. Speaker, Sir, allow me to ask my learned colleague to look at it. I got this one from their website. This is a printout of the Standing Order 63 on the right to be heard, but my learned colleague will clarify on the hard copy.

The application that we are making is that the Standing Orders of this Senate, under Rule 19, prohibit the introduction of new evidence and there is already a foundation. There has to be consistency. The case of the Assembly cannot keep mutating. It cannot mutate from evidence that was before the Assembly, then it goes to the Senate and it mutates into another case which the Governor is expected to respond to. That is the rationale. The consistency must be maintained.

Yesterday, there was an admission by their own key witness No. 1, who made reference to documents that he conceded were never served on the Governor at the Assembly stage. Those are the documents that we are objecting to and urging that this Senate, in consideration of this impeachment Motion, does not consider. These documents are pages 1, 2, 3-33, 34, 35, 36, 37-42, 43-49, 64-74, 76-98 and 100-120 of the Assembly bundle of documents.

As I wrap up that submission, I wish to also refer you to the right to fair administrative action---

The Senate Majority Leader (Sen. Murkomen): On a point of order, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): Order, Counsel. What is your point of order Sen. Murkomen?

The Senate Majority Leader (Sen. Murkomen): Mr. Speaker, Sir, we need your guidance. To the best of my understanding, there was one application by the counsel with regard to admission of evidence, but I have heard an argument relating to expunction of evidence of the County Assembly. I have not seen that application. It had not been made before or we were not put on notice in so far as that application is concerned. Is it not tidy for the counsel to first focus on the application to admit evidence, and then you can make your ruling and give directions to this House? When done with that, we can then go to other issues. Otherwise, this House will be lost in making a decision if it is jumbled out like that.

The Speaker (Hon. Lusaka): I think that the Senate Majority Leader is right. Be careful, otherwise you will end up mixing yourself up like yesterday.

Mr. Ng'ang'a Mbugua: Mr. Speaker Sir, I am well guided. We could reserve this second application on expunging documents filed in contravention of Rule 19 after you pronounce yourself on the request. We had thought of just putting them together so that as you make a determination and exercise your discretion – because it is important to be fair to both sides – you will also notice that there is an indiscretion on the part of the

Assembly in as far as compliance with the rules is concerned. Our case is that they have not complied with a certain rule. It is important to point out that their case is also not entirely fool proof when it comes to strict compliance with the rules.

Mr. Speaker, Sir, I am guided. You can make a determination after they have a chance to respond to our first application, and then we can revisit the second application after your determination.

The Speaker (Hon. Lusaka): Counsel for the Assembly, do you have any comments before I make a ruling?

Mr. Mbuthi Gathenji: Thank you, Mr. Speaker, Sir. My name is Mbuthi Gathenji. I am going to respond on behalf of the Assembly.

First and foremost, the application before you is for leave to file documents out of time. The first important thing that this House should do is to define those documents. The presumption from the application that is before you relates to two types of documents; evidence and pleadings.

You will find that the counsel has not given a background of how they accessed this House. The only way they can approach this House is to first comply with Rule No. 6 of this Schedule, that obliged them to file an answer and the answer is mandatory. This answer must be filed within three days of the invitation under Rule No. 4(a) on a date specified in the invitation. Once they file the answer to the charges, they then have audience to go into the realm of documents.

Under Rule No. 6(a), the response itself must be a response to the particulars of the allegation. So, that is the first document, and that is what places them here. Before they talk about evidence to support that answer, they must first satisfy you that they have a base. In our case, they have not. There are no pleadings contrary to the rules of procedure in the Fifth Schedule. Before Governor Waititu asks for any additional indulgence from this House, what he should do is to satisfy you that that he has filed an answer, as required by Rule No.6.

Moving on, the rules are very clear on who should receive this document. It is the Office of the Registry. Besides providing for the content of the answer, there is a requirement that in Rule No. 6 of your Registry that the Office of the Clerk of the Senate should receive those documents. It is our case that our case has already been heard. In substance, we have brought witnesses and closed.

It is our case that any admission of the answer to start with will require this House to start afresh, if it is going to comply with the equality of arms principle. The equality of arms principle, in brief, provides that you file your allegation against me, and I will file my answer in response to your allegations. Evidence is based on the allegation and the particulars. Therefore, it is our case that they must be precise in what they are looking for, otherwise you cannot exercise a discretion when there is a breach of a very fundamental document, which is the answer.

Oral evidence, cross-examinations and re-examinations have been given, and they are all based on the answer. The equivalent in our civil proceeding is a plaint and a defense. We cannot have evidence brought into the darkness. As I said, the rules and timelines are mandatory.

Before I go to the next point that I was going to raise, I do feel that you are being asked to exercise a discretion. A discretion is where somebody has already confirmed that he has transgressed the rules. First and foremost, you must consider that factors for denial of Senate on the exercise of discretion.

The Governor is a well-informed person in terms of parliamentary procedures, the deadlines, the consequences and the limits of the Speaker's discretion. Governor Waititu and his legal advisors had the relevant information contained in the allegation as early as that December through to the date of receiving the invitation. They never tried to file even a skeleton answer or even a shred of defense saying what they had for the time being, this is what we have and when we go before the Senate, we will make an application for substantive documents. They have shown laxity, arrogance and, in actual fact, lack of good faith.

As of the 28th of January, they had not even served an advance copy and a draft answer to the counsels or to the House giving an indication as to what they expect to use in this Chamber, and upon which they were asked for leave for any further discretion of this court.

It is apparent that the counsels never intended to argue any other matter except preliminary objections. It is very good to be forthright and candid to this House. That is the style they wanted, until the witness testified. The preliminary objection can only be based on information upon which they would have come to controvert the allegation. They cannot come before you and say that they did into have anything.

Another important observation is that Governor Waititu had counsels in Kiambu during the Motion consideration. Therefore, they had materials upon which they could have filed a skeleton answer.

Mr. Speaker Sir, your discretion should not be trivialized. Somebody should not sit on his rights and come at the last moment. There is nothing--- You have finished! As I said, there must also be equality of arms. We exposed our case. If they come and file documents for an answer, what are they going to say and what are we going to say?

Therefore, the dilemma you have now is the reopening of the proceedings from the beginning. You have told us several times and I have seen that you are time bound; you have deadlines.

We may also ask for leave to file counter documents and to file fresh statements. How long is this proceeding going to go? Therefore, in my view, the way forward is that this House should invite the counsel for the Assembly to summarise his case through his submission and satisfy you that from the evidence adduced on the allegation has reached a threshold for removal of the Governor in the absence of an answer.

Mr. Speaker, Sir, the position of the County Assembly is that the time for evidence is over. In your own discretion, you had given us time to consider this application. I also feel that it is out of your magnanimity that we are arguing this application. You could have determined that in the absence of an answer, no more evidence and cross-examination should be carried out by the counsel for the Governor.

I would like my learned friend to proceed further and just wind up the other areas.

Mr. Njoroge Nani Mbugua: Mr. Speaker, Sir, just a few additions to what my learned senior has argued on. First, the request for additional evidence. It is very clear from the submissions that you have heard that the Governor is not asking to produce evidence about the allegations on his conduct. You have been told that the evidence is with regard to the logs and attendance at the County Assembly.

It is, therefore, clear that the Governor has no intention of tabling any evidence with regards to the allegations. However, what is curious is that the preliminary objection that was filed before you states that it is self-evident on the available facts. So, at the point that they filed a preliminary objection, they were satisfied that there were available facts that were already filed.

Coming to the Standing Orders; we are told that the evidence that is supposed to come is evidence to help you determine whether there was quorum in the County Assembly. It is my humble submission that the Senate has no business interrogating that question in light of its mandate and its rules.

The rules circumscribe what you are required to do. Rule No. 2 provides that the Senate shall, in Plenary, investigate the matter and determine whether the particulars of the allegations against the Governor have been substantiated. So, the only thing you are supposed to be looking at is whether the allegations against the Governor have been substantiated.

Rule No. 19 which has been cited to you, in fact, precludes the County Assembly from bringing evidence about the process in terms who attended and who did not attend. It says in presenting its evidence, the Assembly shall not introduce any new evidence that was not part of the allegations against the Governor. The question of quorum was not an issue at the County Assembly and there was no evidence about that. Therefore, the County Assembly is precluded from bringing that evidence.

This House is being asked to interrogate the resolution of the Speaker. In fact, the Notice of Motion expressly states that the Speaker of the County Assembly is misrepresenting to the Senate. I submit that when the Speaker received the notice from the County Assembly of Kiambu, the presumption is that there was a quorum in that particular House. Therefore, it is not for this House to interrogate that question.

I pointed out yesterday that the Standing Orders of Kiambu County has clear provisions for bringing out that question. Standing Order No. 98 provides in case of confusion or error in counting occurring in the course of the rollcall concerning the numbers or names recorded which cannot otherwise be corrected, the Speaker shall direct the Assembly to proceed to another rollcall. That is during the hearing.

Second, if after a rollcall has been made and it is discovered that a member had been inaccurately reported or an error had occurred in the names of the Division, the facts shall be reported to the Assembly and the Speaker shall determine that the necessary corrections be made.

Mr. Speaker, Sir, the place where the Governor ought to have raised the question of numbers is the County Assembly. The only way that the Governor can now ask you to revisit that question is if he had applied in the County Assembly and been denied. Then he would be coming here to tell you that we made that application there. We were denied

and we think that you need to revisit. Therefore, it is my humble submission that no grounds have been submitted to warrant the request.

The proceedings in question were on the 19th of December, 2019. Therefore, it is not that the Governor only learnt about what he is required to respond to three days from the time he received the invitation letter. He received it and he was fully aware of what transpired in the County Assembly from 19th of December. He had adequate time to prepare and put in those--- It is our humble submission that you should not allow the introduction of evidence. What we have here is an attempt to ambush the County Assembly by bringing in evidence that we have no opportunity of interrogation.

Mr. Speaker, Sir, lastly, counsel has submitted from the podium that the County Assembly was given these documents. We have not received those documents. We have not received any documentation from the Governor on the evidence that he is proposing to submit. Since we came yesterday, counsel has not had the courtesy to give us copies of those documents as well. For those reasons, we would ask that you dismiss that application.

The Speaker (Hon. Lusaka): Thank you very much.

Yes counsel.

Mr. Ng'ang'a Mbugua: Mr. Speaker, Sir, a rejoinder on Senior Counsel Gathenji's submission that we did not file any answer or any pleading. I wish to point out that we filed a notice of preliminary objection to the process; that is a pleading. That is a document contesting the Assembly's case.

Mr. Speaker, Sir, you have been told that the nature of the evidence that we seek to introduce is just on logs; far from it! My learned friend has not looked at the entirety of the evidence. There are materials that speak to the allegations; on failure to, for instance, disburse funds to the County Assembly, hence undermining their legislative authority. There are documents showing a schedule of Members of the County Economic Budget Forum. All these are documents that are part of the documents we proposed to adduce.

Therefore, that it is not entirely correct that our case is just on procedure; we are also attacking the merit.

Yesterday, Mr. Speaker, Sir – and this in response to the allegation that we are ambushing the county assembly – we raised this issue at the earliest opportunity before they conducted their case. In your wisdom, you reserved your determination of that question before or during the hearing of the defence case. Therefore, the County Assembly had notice that we would be revisiting that question; so, the contention that they did not know what our case was is not entirely correct.

Mr. Speaker, Sir, I have stated – and I am stating this as an officer of the court – that on Monday evening, when we were unable to get the documents received by the Clerk of the Senate, I dispatched my clerk to drop three sets of documents to the County Assembly of Kiambu. That was courtesy and good faith. Therefore, the allegation that we are ambushing them or that this is a sharp practice conduct is not entirely correct.

Mr. Speaker, Sir, you have a discretion. We have laid a basis and we have demonstrated to you that the evidence we have attached was not forthcoming to the Governor within the three days. What we did is that we made sure that within those three

days, we raised a very critical objection on the issue of process; because that is the only issue we would have been able to respond to at that point in time. But as to the answer relating to the substance, it flows from evidence. Therefore, how would the governor been able to respond substantively to the merits of the allegation without the evidence? That is the question, and that is why were are saying that given the basis that we had laid earlier, we have demonstrated that the failure was not out of dilatory conduct on the part of the Governor; and neither was it deliberate. There was every intention to contest these allegations.

Mr. Speaker, Sir, I will give Mr. Njenga just one minute to address the issue of the mandate of the Senate in this investigation that learned senior Mr. Nani Mungai has addressed you on.

Thank you, Mr. Speaker, Sir.

Mr. Charles Njenga: Mr. Speaker, Sir, and honourable Members, I wish to address only two issues of the submission made by counsel. First, his submission was that the mandate and the power of the Senate is limited only to the investigation on the question of substantiation of the charges; far from it! This Senate has had occasion to sit on over eight impeachment proceedings. In two of them, which I participated in and some of the Members are still here, the Senate said clearly that part of its mandate is to investigate whether the process at the County Assembly was correctly carried out. At paragraph 75 of the report of the Gov. Mwangi wa Iria Special Committee, which is within the records of the Senate, the Senate settled this point. It said:-

> "It is incumbent upon the Senate to determine if there was any violation at the county assembly"

That was reiterated at the Report of Gov. (Prof.) Chepkwony, the Governor of Kericho County, at paragraph 234:-

> "The Special Committee has a duty to defend the Constitution in line with Article 31 and 94(4), by confirming the propriety of the proceedings before it that preceded the proceedings before the Senate.

That is the proceedings before the county assembly. Therefore, part of your constitutional and statutory mandate is to confirm that the Motion that was brought by the County Assembly before you was properly passed. That is a settled question by precedent of this honourable House.

Mr. Speaker, Sir, on the question of what the remit of the Senate is with regard to this nature of proceedings, Section 33 of the County Governments Act provides a very special jurisdiction to the Senate when hearing impeachment proceedings. It is not a judicial function; it is a *quasi-judicial* function that is described by statutes as investigative. You are here to investigate; that is the word used four times at Section 33. In an investigation, it is neither an adversarial nor a court-centred process. The Senate has power to inquire as to the proceedings that preceded the matter coming to the Senate.

You have been told that some of these questions were not raised at the County Assembly. Witness No.1 confirmed that the Governor had sent two lawyers. He has also confirmed that those two lawyers were denied audience. They could not access the logs or any documents. They were told, "Go like the ordinary *mwananchi*, sit at the gallery

and watch in peace. It is the same argument that is now being made that they should have intervened at the Floor and confirmed about the numbers and the evidence. It is a zero sum argument that the Governor had no opportunity to address the County Assembly through his advocates, yet he is being told today that, that was the forum; and that, "If you did not address the County Assembly, forever shut up!"

Mr. Speaker, Sir, that is not the mandate of the Senate under Section 33. You are being asked to be very unfair to the Governor by locking out any possible response. If you look at the documents which were submitted to this House on Monday – but, of course, they could not be filed – they contain a response or what counsel is calling an answer to the charges. They contain particular documents, arguments and our list of authorities. If those are admitted, you will see beyond peradventure that what we have before you – and that is why there is a strenuous fight to lock these documents out – the Senate should not see them because if they do so, they will realise that what you have before you are mere allegations.

Mr. Speaker, Sir, as I sit, I wish to reiterate precedents set by this House. I participated in the matter of the proposed removal of the late Governor Gachagua. I was representing the County Assembly, as my seniors are. On the date we were before this House, standing at this very place, we were served with documents by the Governor. We conceded without even objecting. The Speaker then directed that those documents be admitted. He gave us 10 minutes to look at them, and proceeded with the motion.

Mr. Speaker, Sir, I suggest, propose and request in all fairness, that we made this notice of documents yesterday before the case started. It is not an overnight reflection or afterthought. We were clear in our minds, but we were directed by the Speaker and we obliged that, "Hold your peace. Make your application when your occasion comes." Today we are here, and we are being told, "No, you should have done that yesterday." Let us be fair to the Governor. It is all I ask.

The Speaker (Hon. Lusaka): Hon. Senators, before I use my discretion, I will allow maybe two comments, if there are any.

(Silence)

Okay, I think given the weighty matters that have been raised, I am going to suspend the session for 30 minutes. The Senate will remain in camera, off the televisions and media, so that they consult. The counsel and the parties will be called after 30 minutes.

It is so ordered.

(All members of the public and the media withdrew from the galleries)

(The House went into camera)

(End of in-camera session)

(The House was suspended for ten minutes)

(The House resumed at 11.00 a.m.)

The Speaker (Hon. Lusaka): Hon. Senators, the parties, ladies and gentlemen, welcome back to the open Session.

When we adjourned to go into the in-camera session, the Senate retreated to make a determination on the application by the Governor of Kiambu County to be allowed to file evidence out of time and for such evidence to be admitted by the Senate.

The ruling on this matter is as follows:-

The application has not been allowed and is hereby denied. The effect of this is as follows:-

(1) That the Governor shall now proceed to put forth and urge his defence.
(2) That the Governor's defence shall be limited to the case filed by the county assembly and evidence put forward by the assembly, including any matters which arose in examination and cross-examination of the witnesses.
(3) The Governor is also at liberty to canvass all the matters raised in his preliminary objection as it was filed.
(4) At the conclusion of the case for the defence, the parties shall each make their closing statements as appears on the hearing programme, and the Senate shall retire to a Closed Session and afterwards to make a decision.
(5) The programme is adjusted accordingly. The Governor is invited to commence his defence and will have the original time of not more than four hours that was allocated.

We will have a break at 1.00 p.m. for lunch. Hon. Senators, parties, ladies and gentlemen, please note that, in accordance with Rule 29 of the Impeachment Rules, this ruling is final.

Counsel for the Governor may now proceed.

Mr. Charles Njenga: Mr. Speaker, Sir, Members of the Senate---

(Loud consultations)

The Speaker (Hon. Lusaka): Order, Members!

Mr. Charles Njenga: Mr. Speaker, Sir, as directed, we will now proceed to respond to the charges brought against the Governor of Kiambu County. On the record of the Senate, the Governor had filed a notice of preliminary objection that raised four points of law. As part of the Governor's response, we shall proceed to urge the said preliminary objection. I shall start and then my colleagues will argue the second ground.

Let me begin by stating that the Governor pleaded not guilty to the charges. What is the effect of a plea of not guilty in this kind of proceedings? The effect of a plea of not guilty in this kind of proceedings, which are quasi-judicial, is that the burden immediately shifts to the county assembly to prove all the material particulars of the

charges. We say that in particular respect because one of the material particulars they are supposed to demonstrate is that there is a valid Motion before the Senate, resolution or process that properly, and in a manner provided for by law, activated the jurisdiction of the Senate.

The county assembly must demonstrate that the process that the Senate is called upon to interrogate, to hear and determine charges, was proper from the time of its inception. Without that lack of demonstration, then there is the risk and possibility that the Senate is sitting on an unconstitutional Motion.

Allow me to make reference to the determination; a decision of the court made by the late Justice Onguto in the case of Mwangi wa Iria vs Murang'a County Assembly. It is a reported case. In paragraph 92 of that decision, the court said that:

> "The Senate must also interrogate the entire process as it scurried through the county assembly. I have seen no law that restrains the Senate from returning a verdict that the process was not conducted as detailed under the Constitution or any law for that matter."

The Senate must consider the process as it went through the motions in the County Assembly.

I say that because in the recitals read by the Speaker of this House on the material that was presented by the county assembly to the Senate, you will notice at the outset that one of the documents was not provided. You were given a notice of Motion and an order paper, but you were not given a list of the members who voted in support of the resolution. That is a document that admittedly and even by reference to the record, is absent.

The second important fact that I want to refer to is that there was an admission by the witness of the county assembly that it is information that was not brought to the Senate. That is material to us because we have determined as the people of Kenya and our Constitution that we are a democratic nation that observes the principles of democratic governance.

What is democratic governance? Democratic governance relates to validation of any act, appointment or resolution by a number threshold. Hon. Senators, you are Senators because of numbers; you won an election. The President of the Republic is the President because of numbers. In the Constitution, there is a litany of many enactments that are validated by certain number thresholds even in this Senate.

As a way of illustration, I will look at Article 115. On the question of budget and the veto of the President, there is clear prescription of a two-thirds majority for the Senate or Parliament to veto such a recommendation.

If we go back to our case, then what are the numbers required to pass a resolution impeaching the Governor at the county assembly? Section 33(2) of the County Government's Act provides that:-

> "If a Motion under subsection (1) is supported by at least two-thirds
> of all the Members in the County Assembly---'

The Motion will become a resolution in the context of Section 33(2) when it is supported by at least two-thirds, and that is when it will be capable of activating the jurisdiction of this Senate.

If such a Motion, however well prosecuted, argued or well meritorious an assembly may think it is, but short of the two-thirds majority, it does not result to a motion that is tenable and sustainable, and in the context of Section 33 can be capable of activating the process of removing a governor.

What are the facts in this matter? I speak to these facts referring to the investigative mandate of the Senate. The Senate, as earlier illustrated, has an investigative mandate. What is to investigate? It is to interrogate, call, look for and to search for the truth independently. The Senate has power to summon under the rules, and the power to summon extends to the investigative mandate of the Senate. Part of the information that is available to the Senate to look at is the question of how many members participated in the passing of this resolution.

It is our submission that this is a burden that is supposed to be demonstrated by the county assembly. Once you put in a preliminary objection impugning the validity of the resolution, then the burden shifts to the county assembly, to demonstrate that indeed the number threshold was achieved.

In making this submission, the following facts are relevant. Thirty five members of the county assembly were not in the county assembly on 19th December, 2019.

This is a fact that can be independently verified by the Senate. This is a fact that the Senate can call the county assembly into account because attendance of an august House of any Parliament is a documented fact. It cannot be left to conjecture, speculation and equivocation. It is a fact that is put on record by way of a HANSARD, a biometric log or a register. This is public information that the Senate has capacity to take judicial notice of under the Evidence Act.

Mr. Speaker, Sir, it will be a sad day for the Senate and the country if the Senate says that they cannot inquire into the proceedings of the county assembly as they hear an impeachment Motion. What that means is that three members of the county assembly can wake up one day and bring a resolution to the Senate and say: 'quickly convene and hear these charges.'

Far from it, the duty of the Senate under Article 96 of the Constitution is to protect counties, their institutions and their people. Part of this protection is interrogating what goes on in the county assembly, and all the organs set out in the Constitution.

You will see that the report of the Speaker says that there were 64 members. It is very easy – and nothing could have been easier – to provide a list of these 64 members who were present in the House on that day. That was not given. There is nothing easier than providing a list of the 63 members who purportedly voted in support of the resolution, and saying that under Section 33 (2) of the County Governments Act, these are the members who supported the Motion.

We have at our disposal on the evidence--- The directions were that it should not be admitted, but it is within the Governor's knowledge that 35 MCAs were not present. Of the 35 members, 33 of them have sworn affidavits which they can be cross-examined

on in any forum, not just the Senate; even in court and they have said that they were not in the county assembly. That is a material fact. It cannot be ignored, avoided or glossed over. This Senate has a responsibility to the people of Kiambu and the nation; to confirm what happened. Was there a fraud of the assembly upon the Senate?

Our submission is in the full evaluation of facts. You will find that the Governor of Kiambu County was not impeached at the county assembly. The Motion and the resolution that found its way to the Senate is unattainable and unsustainable to the effect that it should be dismissed at the threshold. It is very easy for this Senate, in its investigative mandate, to call for even the Closed Circuit Television (CCTV) records of the county assembly. It is our submission that this is a duty that the Senate has dutifully and willingly carried out in the past.

In the Special Committee of this Senate convened to investigate the matter of Hon. Mwangi wa Iria, there arose the question of whether the Governor was heard at the county assembly. The plea by the county assembly was that, that is not a matter that the Senate should investigate. The Senate should just look at the Motion and resolution, and proceed. However, this House said that they want to see the HANSARD, look at the invitation to the Governor and the process in the county assembly. This report is within your records.

In the fullness of that evaluation, unfortunately in that case, the Senate found that the Governor had been properly notified. The point that I am making is that the Senate took time to call for facts and investigate the matter that was raised in the course of the proceedings. It is on page 75 of the report. In fact, Senate said: "We, as a Special Committee, have a duty and it is incumbent upon us to determine if there was any violation of the Constitution at the county assembly level."

Today, we are being told that we should ignore the county assembly process and deal with what we have. That is not what the Constitution and the law provides. I urge the hon. Senators to interrogate these material facts in their fairness to the Governor. You must make a decision as to whether you were properly activated and seized of this matter. This is because if you find that the number threshold was not attained, the matter rests there. You have to down your tools. This is because you are improperly moved by the county assembly to a process that has certain minimum statutory and constitutional prescriptions.

Similarly, in the matter of Prof. Paul Kiprono Chekwony - which I also had the occasion to appear for the county assembly – an issue was raised by the Governor on the question of whether or not there was public participation at the county assembly. The Senate Committee said that they could not ignore that fact. It is an issue that affects the constitutionality of the resolution that has been brought to us. We must investigate it.

If you look at that report – I think it is 115 pages – the Senate went into material detailing; calling evidence and summoning persons to confirm whether or not there was public participation at the county assembly level. The effect, therefore, directly impugns the validity of the resolution, to the effect that the Governor was not properly impeached at the county assembly level.

Therefore, in this matter of Gov. Waititu, there may be many arguments, allegations and issues raised by the county assembly. Fair enough. It is their right to want to remove the governor. It is the right of this Senate to hear and determine those charges. However, it is also the right of Gov. Waititu to receive the benefit of the law and due process. If you do not owe him anything else, you owe him that. The standard of the law and due process has to be applied not for the benefit of the governor or the Senate, but for the institution of the rule of law that we have prescribed as a national value under Article 10 of the Constitution.

Yes, we may remove him, but let us remove him as the law prescribes. If the law says two-thirds, we have to confirm that the two-thirds majority was attained. Numbers are democracy. If those numbers were not attained at the county assembly level, then the resolution must fail. At the very least, we have to adhere to our constitutional principles, our constitutional standards and our precedent as the Senate. I must say that I have been impressed by the Senate's insistence in all these reports on the adherence of the county assemblies on due process, threshold nexus and the standards that are now settled.

In this matter, Gov. Waititu, as a governor under Article 27 of the Constitution, deserves equal protection of the law. That is a right that is available to him. You cannot be told that lack of numbers is a technicality; it is not. That question was settled by the Supreme Court in Raila Odinga's Petition of 2013. Where the Constitution prescribes a number threshold, that number threshold is not a technicality. It is a substantive issue that must be demonstrated by evidence.

Therefore, arguments will be raised that we have not presented evidence with regards to this issue. There was an admission before this House that it cannot be verified independently even by a Member of the County Assembly who moved the Motion that the numbers required to be realised were realised. Where there is such doubt, can you then move to remove the governor on the basis of that resolution? When there is that ambiguity, then the benefit of doubt must be given to the governor.

My colleague will take up the other preliminary issue. However, on this question, I rest by saying that in as much as this matter relates to Kiambu County, it will settle the law on this unique issue. This is because that issue has never arisen in any of the impeachment questions that have come before this assembly; the question of numbers has never arisen. It is unique to these proceedings. This is the opportunity for the Senate to insist on the county assembly that the requirements of removal under Section 33 – the one-third approval and the two-thirds support – must strictly be demonstrated before such a resolution is admitted for hearing.

This is because it will be a sad day if we all gathered for two or three days to deliberate, discuss, argue and determine a motion that is improperly before the House. That is why we raised this as a preliminary issue. It will be a manifest, unfair and a wasteful exercise if, at the totality of the facts and the evidence, it demonstrated that, indeed, the Senate was improperly moved.

Therefore, hon. Senators, it behooves this House, and it is a responsibility that is given to you by the Constitution, to investigate – to investigate. I repeat "investigation" for emphasis. This is not a contestation between two parties alone; this is a contestation

between two parties and an investigative organ properly constituted and the law. The Senate has the capacity to even summon the Clerk and the Speaker; call for those logs and demonstrate independently, even without our input; the integrity of the vote.

The issue of electoral and voter fraud is a live issue in this country. When it is raised, the Senate cannot prevaricate on it; it has to look at it and call for evidence. What we have before you is an admission on two things. First, those details were not given to the House, and secondly, the mover of the motion and the witnesses of the county assembly – even in the face of the preliminary objection, which they admit they were served with and they knew that the issue of numbers was an issue in these proceedings – they did not lead any evidence. The burden is theirs. Once a governor pleads not guilty, the burden is theirs to prove that the number threshold was realised. It cannot be a presumption. It cannot be assumed, as it has to be demonstrated by evidence, empirical admissible evidence to a threshold as required by law. That demonstration and evidence are absent. In its absence, then the unavoidable conclusion – and this is my plea to the Senate – it must find that without that evidence, then there is no proper resolution upon which the Senate can move to determine whether or not the charges are substantiated.

I rest on that point and wish to invite my colleague, Mr. Wanyama, to add the second point of our appeal.

Thank you so much.

Mr. Peter Wanyama: Good morning, Senators.

Mr. Speaker, Sir, my name is Peter Wanyama. I will be making submissions regarding a very fundamental point, which touches on these proceedings; the constitutionality and legality of these proceedings.

Mr. Speaker, Sir, we have a problem. These proceedings, we submit, in terms of compliance with the Constitution, the provisions of the County Governments Act and your own Standing Orders, are a nullity in law. Nullity in the sense that there are certain legal questions, which then lead to the conclusion that if those legal questions are considered, then in your decision when you are retiring to make the final vote on the charges facing the governor, you must address that question first.

The question is on timelines. It is difficult for yourselves to make this decision because the illegality in question arises from a decision of the Senate itself in these impeachment proceedings, and not an illegality that arises from the county assembly proceedings. So, as I said, it is a very difficult decision to make. In court, it is very easy for us to make submissions for judges to recuse themselves when they do not have jurisdiction. So, we are only repeating it here, but only that the forum is different.

Article 181 of the Constitution is express, clear and unequivocal on the process of impeachment of a governor. In accordance with the grounds laid in Article 181 of the Constitution, the process shall be in accordance with legislation enacted by Parliament. The legislation in question is the County Governments Act. The import of that is that the timelines which have been set in the County Governments Act derive validity from the Constitution itself. A response can be made that these timelines can be cured by the provisions of Article 159 of the Constitution, which provide that procedural technicalities are not supposed to impede access to justice. However, our submission is that compliance

with the provisions of the County Governments Act is a constitutional imperative and a constitutional command. The authority derives strictly from the Constitution and, therefore, it cannot be cured in any interpretation whatsoever.

Therefore, in terms of that issue, it is important to emphasise that the Senate has no powers whatsoever to change provisions which have been put in statutes. The only power that you have is to introduce an amendment to that section, which shall then go through the normal legislative process, then the timelines will definitely change. Therefore, as it is, I am going to make submissions that compliance with these timelines is strictly a fundamental legal question. If you look at the provisions of Section 33 of the County Government Act regarding the timelines, in summary, the Senate has breached these timelines by 28 days.

Mr. Speaker, Sir, the Senate has convened a Session to hear and discuss the charges against the Governor outside the statutory timelines which have been provided for in Section 33 of the County Government Act, and that is very critical. You are late by 28 days. The import of that is that you have no jurisdiction whatsoever then, to consider the allegations which were levelled by the County Assembly against the Governor.

As an additional question: Does the Senate have powers to extend these timelines? Do you have statutory discretion? Normally, if timelines have been cast in Statute and you read the Statute in terms of interpretation, you will, definitely, find that some Statutes can confer you with discretion to extend these timelines.

The logical question there is: Do you have a statutory discretion to extend timelines by interpretation of the Standing Orders or by a ruling of the Speaker?

My submission is that Section 33 of the County Government Act has been cast in stone and it does not give the Senate discretion whatsoever. I submit that discretion in this case has been taken away. In law, we, usually say that desecration is like the hole in the doughnut. It must be exercised within the confines of the parameters of law. If the law has given you discretion, then just like the doughnut, you must exercise it within those confines. Otherwise, any decision we make which is outside that hole in the doughnut is a decision which we submit is *ex-facie* illegal. It is unconstitutional and cannot be sustained at all.

Mr. Speaker, Sir, I also emphasize in terms of decisions that have been made by this House. Remember this is a House of precedent. There has been more than seven impeachment proceedings which have been conducted in this House. At no point in time during the impeachment of Governor Wambora did the Senate extend its timelines beyond the provisions of Section 33 of the County Government Act.

In fact, during the impeachment of Governor Wambora, the Senate had to sit up to 4.00 a.m. in the morning to comply with the strict timelines in the Statute. That is very significant.

During the impeachment of Gov. (Prof.) Chepkwony, this House had to be recalled from recess to hear an important matter concerning the removal of Gov. (Prof.) Chepkwony. During the impeachment of Governor Mwangi Wa Iria, timelines were strictly complied with. Section 33 of the County Government Act was strictly compiled with. There was no deviation whatsoever even by a minute.

During the impeachment of the late Governor Gachagua, again, timelines were complied with. During the impeachment of Governor Samboja, again, timelines were compiled with. During the impeachment of the Deputy Governor of Machakos, timelines were complied with.

Mr. Speaker, Sir, it begs a fundamental and very serious question which we cannot run away from: should Governor Waititu be subjected to a different impeachment threshold? What does it say about proceedings which are then conducted in this House? What does it say about precedent, the rules regarding precedent which are binding to this House? What does it say about compliance with the Constitution on one fundamental question which is the principle of equality before the law, that is a constitutional imperative and command?

Let me just read for the record and for the HANSARD. Article 26 of the Constitution says-

> "Every person is equal before the law and has the right to equal protection and equal benefit of the law."

Mr. Speaker, Sir, an impeachment proceeding which is being conducted in accordance with the provisions of Section 33 of the County Government Act pursuant to the provisions of Article 181 of the Constitution must be uniform. Every governor or deputy governor who comes before this House in an impeachment proceeding must be subjected to a similar standard of impeachment. Any deviation from that, then calls into question the legality of the process.

You can see that it is clear beyond peradventure that Governor Waititu cannot be subjected to an impeachment proceeding which is done at the discretion of the Senate and outside the provisions of the County Government Act.

We can run away from that issue but it is a live legal question. The courts have ruled on the question regarding equality before the law. Every person must be subjected to a similar treatment and must derive benefit from the law. Why should Governor Waititu be subjected to a process of impeachment which is done 28 days after the statutory timelines? Is that not a problem?

Mr. Speaker, Sir, I submit that we have a heavy and fundamental legal problem which cannot be cured by the provisions of Article 159 of the Constitution.

Another comparison is very important. There are strict timelines in Article 144 of the Constitution regarding the impeachment of the President and the Deputy President. Those timelines must be followed. There is no way during the impeachment of a President or Deputy President, you can go ahead and change those timelines because they are cast in law. They are cast in stone and cannot be deviated from. Changing those timelines then becomes a problem.

In terms of the interpretation of the law, we must interpret the law in a manner that we create a multiple basis for consistency in parliamentary decision-making. So in this case, all we are asking for is consistency in parliamentary decision-making. There must be a multiple basis through which we exercise that power to interpret the law.

When you retire, that should be the first issue for this House to consider. It should rank first in time. The moment you discover that Mr. Speaker made a mistake by

convening this House 28 days after the statutory timelines, that is the moment that then you vote and say: "We cannot allow an illegality." This is because the moment you allow that illegality, you are setting a dangerous precedent in the application of that particular section in this country's legal history.

The other comparison is that election petitions in law are strictly conducted within the timelines which have been set. It is just a comparison. There is no way you can extend the timelines which have been put by Statute in terms of election petitions determination. Those timelines have been set pursuant to a constitutional process and implemented by Statute. There are policy reasons that those timelines have been cast in that manner. Why? It is important and critical that impeachment proceedings against a governor be determined within the statutory timelines provided for in Section 33 of the County Government Act.

Remember that a governor is elected by the people and, therefore, Article 38(3) of the Constitution, the governor has a right to hold that office once elected. It is a right in the Bill of Rights. There can be no substantive impropriety in the process of taking away the governor's right to hold office through impeachment proceedings.

This technicality, we submit, is substantive. It is not merely a procedural question which, as I submitted earlier can be cured by the provisions of Article 159 of the Constitution or a ruling of the Speaker varying the Standing Order. We submit that hon. Speaker made a substantive, fundamental and serious mistake which casts doubt to the legality of these proceedings and it can only be cured by a rejection of these proceedings.

Mr. Speaker, Sir, let me just highlight what the courts have said regarding timelines. I know our documentations were rejected, so I will just read into the HANSARD on what the Supreme Court of Kenya said concerning timelines in the Raila Odinga Case under Section 60 of the Evidence Act. Courts of law are usually required to take judicial notice of the existence of decisions, judgements and all that.

We submit that a similar comparison can be taken in this House because it is a *quasi-judicial* process. The House can take judicial notice – sorry - parliamentary notice of the existence of Raila Odinga versus Independent Electoral and Boundaries Commission and others [2013] eKLR where the Supreme Court, the highest court in this country in terms of the doctrine of judicial precedent and, therefore, its decisions are binding, in respect to compliance with timelines. At Paragraph 29 it says-

> "As a matter of fact, if the timelines amount to a procedural technicality then it is a constitutionally mandated technicality."

So, we can borrow the same submissions here. If compliance with Section 33 which derives its authority from Article 181(2) of the Constitution creates a technicality in terms of procedure, then you are bound by it. You cannot change it. As I said, there is only one way in which you can change it when you are sitting as Parliament - through an amendment of legislation to provide for other timelines. We are really emphasizing that issue because it is at the core of these impeachment proceedings.

Mr. Speaker, Sir, we are submitting in summary that the serious and egregious breach of Section 33 of the County Governments Act occasioned by an unofficial act of the Speaker in convening the House 28 days after the statutory timelines which have been

set, just like a court of law, you then have powers to correct that mistake by ruling that, indeed, you have no jurisdiction to look at this issue, to look at the impeachment allegations against the governor and proceed to make a decision accordingly. The decision we are seeking is to reject the impeachment against the governor and determine that the charges have not been substantiated.

There is an additional issue there which we can emphasize now in terms of summary. The impeachment is a *quasi-judicial* process. In view of that, there is a legal question which arises again in these proceedings. The legal question is: Can the governor be subjected to impeachment proceedings based on matters which are *sub judice*? From the proceedings of the county assembly, a legal question has now arisen. If you listen carefully to the submissions which were made by the county assembly, it is clear that there are certain matters which are being canvassed in a court of law.

Mr. Speaker, Sir, Standing Order No.98, your own rules of this House prohibit discussion on matters which are *sub judice*. The legal implication is that if you proceed to make a determination on that matter, you will be breaching that principle of *sub judice* which is covered in your own Standing Orders. We submit that you need to show some deference. Any matter which you are being called upon to make a decision on, if you find that they are in the proceedings which are in a court of law, we submit that you need to apply your rational mind. Apply that rational basis test when you are deciding not to look at that matter because it will be opening up a pandora's box of saying that you have breached the Standing Orders.

Courts are prohibited also from looking at matters which are pending in Parliament. In a similar vein, even Parliament is prohibited from looking at matters which are pending in court.

On the political question doctrine, any matter which covers the ambit of a political process, the so-called political questions, are matters which this House can conveniently handle.

Mr. Speaker, Sir, impeachment proceedings, being *quasi-judicial* proceedings, then proceed on the basis that those questions can then be addressed so long as they are not pending in court. If they are pending in court, it will heavily prejudice. It is like subjecting the governor to two processes. First is an impeachment proceeding which is really a *quasi-judicial* and the other one is a court process which then undermines the rule of law.

As I submit, there are also policy reasons why Rule No. 98 exists in the Standing Orders. Rule No. 98 is meant to lay basis for consistency in decision making so that there is harmonious working of different arms of Government. Therefore, the governor has a legitimate expectation that those matters which are in court should not be considered here because they will heavily prejudice him. When you are examining this question, I invite the House to look at the evidence which has been tendered by the county assembly and the charge which the governor faces. That then will clear the issue in that perspective for a determination by this court so that we do not expose the governor to what is called double jeopardy; subjecting him to two processes. This, therefore, becomes extremely and highly prejudicial to the governor.

Thank you very much, Mr. Speaker, Sir. I will be coming back thereon to make submissions on the threshold on the county assembly's case. That is all for the preliminary objection.

Mr. Charles Njenga: Mr. Speaker, Sir, we are still arguing our preliminary objection. There were four points on the preliminary objection. I will be very brief on the two that are remaining. I do not want to tire the Hon. Senators with legal arguments, but they are important. We are defending a man whose job is on the line. Kindly allow us to quickly go through the motions of our two other remaining arguments.

First, in our preliminary objection, we have isolated the issue of compliance with the Standing Orders of the Kiambu County Assembly. I will do no more in that regard than refer Hon. Senators to Standing Order No. 82 of the County Assembly of Kiambu that provides at Part 2 (b) that-

"A Special Motion in the nature of a removal of governor by way of impeachment should be disposed of within 14 days."

That is the prescription of the Standing Orders. What is the factual reality of these proceedings? It is conceded by the Mover, that the Motion was introduced on the 3rd December, 2019. It is also conceded and the Communication is clear from the Speaker that that Motion was argued and disposed of on the 19th of December, 2019. That was well outside the Standing Orders of the Kiambu County Assembly which provides for a 14 days period limitation. If it is not disposed of within 14 days, then that Motion is no longer tenable, sustainable or arguable as a Motion under Standing Order No.82 and capable of activating the proceedings for the removal of the governor.

Having said that, allow me to retract a bit on the issue of timelines and say that in evaluating how time is calculated for purposes of statutory interpretation, there are two ways. First, there are Statutes which provide within themselves on how time should be interpreted. In default of such provision, the Senate or any other judicial, *quasi judicial* or any other arbitral organ seized of a matter regarding time has to look at Chapter 2 of our laws which provides for interpretation and general provisions.

Section 57 clearly provides that:

> "Where a thing is to be done within a specific number of days those days are exclusive from the day in which the event runs to the day to which that event should have been done within the time given.

This means that when the Senate was served and seized of this resolution on 23rd of December, 2019, the law says, seven days, which should have expired on 31stDecember, 2019 unless that Statute provides jurisdiction to extend that time, then it cannot be extended.

The analogy I gave is on electoral petitions where some of you participated and instructed some of us to act for you. The law is clear. In fact, the Supreme Court said in the case of Hon. Lemanken Aramat that the jurisdiction of the court to hear is inherently tied to the issue of time. Once a breach of this strict scheme of timelines is done, it removes the entire dispute from the jurisdiction of the court.

In closing on that issue, our submission is that the lapse of the statutory timeline is granted by the County Government Act which is the law that grants this Senate jurisdiction to hear an impeachment Motion. It is not in the Constitution.

If you look at Article 96 and 181, it does not mention the Senate; it is mentioned under Section 33 with the limited function within the prescribed time. It is difficult to make a decision that appears to undermine your jurisdiction. That we concede. However, this is an institution established and governed by the law. So, your first allegiance should be to the law. That is our simple request, prayer and submission.

The last issue that we raised as a preliminary objection is the question of public participation. I will not add any facts in support of that preliminary objection other than the deficiency or the complete lack of evidence by the county assembly showing that there was any public participation.

I remind the House that this is a settled issue by this House. The Senate said in the Special Committee considering the issue of Gov. (Prof.) Chepkwony, the Governor of Kericho County that public participation is a necessary constitutional pre-requisite and that has to be demonstrated by the county assembly. That is a finding of the Senate and it is bound by its own finding.

On the material that was presented before this House by the county assembly, there was no evidence whatsoever of public participation.

The Court of Appeal in Civil Appeal No. 192 of 2015 in the case of Gov. Martin Nyaga Wambora also spoke to that issue. The court said, but I do not wish to read the entire judgment, that-

> "Impeachment of a governor is such an important issue of a constitutional moment that the public ought to be facilitated by the county assembly to participate in."

On that ground, the decision of the Senate and the County Assembly of Embu, in that instance, was set aside by the Court of Appeal. So, it is an issue that this House is enjoined to consider.

Our submission is that in absence of any demonstration of public participation, the resolution before the House is constitutionally deficient and incapable of supporting the removal of the Governor of Kiambu County has proposed and, therefore, must fail.

We, therefore, pray and ask hon. Senators to consider our interventions on point of laws by way of this notice of preliminary objection. In full evaluation thereof, you will find that they all have merit based on the evidence that is already on record, of a public character and for which the Senate has powers to take judicial notice thereof under the Evidence Act.

I shall now call my colleague to respond to the substantive issues raised in the charges.

Mr. Ng'ang'a Mbugua: Mr. Speaker, Sir, and hon. Senators, you have been taken through the legal deficiencies of the Motion that was presented to this House by the assembly.

Mr. Speaker, Sir, following the direction and the ruling you gave, I will now speak to the factual and evidentiary deficiency of this impeachment as presented by the assembly.

I will start my discussion on a rendition on what the standard that should be met by the assembly is. An oft-cited decision which I am happy that the assembly in their opening remarks cited is that of Gov. Martin Nyaga Wambora and others versus the Speaker of the Senate which is reported 2014 EKLR.

Mr. Speaker, Sir, I start my discussion by quoting a finding of the Court of Appeal on what constitutes impeachable conduct. The Court of Appeal had occasioned to consider that matter and in its wisdom gave the following rendition of the law.

> "That to our minds, therefore, whether a conduct is gross or not, would depend on the facts of each case having regard to the Article of the Constitution or the law alleged to have been violated. We find, however, that it is not every violation of the Constitution or written law can lead to the removal of a governor. It has to be gross violation".

This Senate may find certain violations. However, not every violation of the law constitutes an impeachable offence.

In the same decision, the Court of Appeal went on to say that the violation must be serious, substantial and weighty. So, this Senate, in its consideration of this impeachment Motion, will need to ask itself whether that standard of being serious, substantial and weighty been discharged by the assembly. It should not just point out that there was a legal infraction. What is the nature of that infraction?

Mr. Speaker, Sir, in a case from the Supreme Court of Nigeria which we had occasion to cite in a previous impeachment hearing, Hon. Muyiwa Inakoju and Hon Abraham Adeolu Adeleke, the Supreme Court of Nigeria had occasion to consider the issue of what an impeachable offence is and had occasion to say as follows:

> "That a Governor as a human being cannot always be right just like no human being can always be right".

That explains why Section 188 of that decision talks about gross violations. The decision by the Supreme Court of Nigeria is that where misconduct is not gross, then the weapon of removal from office is not available to the House of Assembly.

The question that we need to continually grapple with after having listened to the evidence that was tabled yesterday is whether those infractions were proved. If you are to find that the infractions were proved, do they rise to the required standard? I will revisit that in a short while.

Mr. Speaker, Sir, there are various other decisions that I do not intend to take you through, such as the Gov. Mwangi wa Iria decision which I had opportunity to participate in where violations were found, some of which mirrors what is before the Senate today including allegations touching on pending bills. However, they were all rejected not because they were not proved, but because in the wisdom of the Senate, they did not rise to the required standards that would constitute the grounds for invoking removal from office. The Court of Appeal set the same standard in the case of Gov. Wambora.

Given that this is a *Sui generis, quasi-judicial* investigative process, the standard is certainly beyond a balance of probabilities but slightly below a reasonable doubt.

The Speaker (Hon. Lusaka): What is your point of order, Sen. Omogeni?

Sen. Omogeni: On a point of order, Mr. Speaker, Sir. I would like to seek the guidance of the Chair. According to the programme, we should be receiving evidence by the Governor; either evidence of witnesses if any or cross examination or re-examination-in-chief. Thereafter, we are supposed to receive closing statements and there is a sequence of events where we are supposed to listen to the county assembly before we get closing statements on behalf of the Governor.

However, having listened to counsel for the Governor, I am getting impression that we have mixed up the programme. It is like we are getting closing statements from the Governor where counsel is summing up the legal issues and making an address to the Senate.

Can I get guidance from the Chair as to whether we have altered the programme? Are we at the stage of getting closing statements or are we supposed to be receiving the evidence of the Governor?

The Speaker (Hon. Lusaka): Kindly proceed, Sen. (Dr.) Kabaka.

Sen. (Dr.) Kabaka: On a point of order, Mr. Speaker, Sir. I disagree with Senior Counsel Omogeni with regard to what he is trying to tell this Senate. You have ruled that there is no extension of time to submit their evidence. What other evidence does he require the counsels representing the Governor of Kiambu County to present other than arguing the four critical points on the appeal?

The Speaker (Hon. Lusaka): What is your point of order, Sen. Murkomen?

The Senate Majority Leader (Sen. Murkomen): On a point of order, Mr. Speaker, Sir. You ruled yesterday that the lawyers of the Governor will make their application for preliminary objection together with their substantive response to the charges which denied them the opportunity to make the preliminary objection before the county assembly makes its case. That prejudiced the Governor from succeeding in this House later to bring evidence because this House says that as a result of the ruling yesterday, there cannot be other evidence because the County Assembly of Kiambu has closed its case.

There is no evidence that is admitted as per your ruling. That means that the only thing that the Governor's advocates can do, is to haze around responses to the charges using points of law and facts that are available to us without going to any evidence because there is no evidence as ruled by this House. Being a person who supported the admission of this evidence, you can see where we are going.

The Speaker (Hon. Lusaka): Kindly proceed, Sen. Orengo.

The Senate Minority Leader (Sen. Orengo): On a point of order, Mr. Speaker, Sir. Looking at the rules, there is some justification from what has been said by Senior Counsel, Sen. Omogeni as well as what the Senate Majority Leader has said. The only confusion that is arising is that the counsels for the Governor have termed what they are doing now as a preliminary objection. However, what I understood them to be doing is making a response to the case that has been laid out by the County Assembly.

If they are presenting or reacting to the case that has been presented by the County Assembly, then the Governor should not be shut out. There is going to be another opportunity when the closing statements are going to be made. Each party will only have 60 minutes each to close which is a very short time.

The advocates for the Governor are doing the right thing but calling it the wrong name. For example, in the preliminary objection, the advocates say that we have no jurisdiction; they should not be heard saying anything else other than talk of the question of jurisdiction. Why would they want us to consider the evidence when we do not have jurisdiction. It is a misnomer for them to call this a preliminary objection. They should say that they are making statements including the statements that they are making about jurisdiction in answer to the case that has been made out by the County Assembly.

The Speaker (Hon. Lusaka): Kindly proceed, Sen. Mutula Kilonzo Jnr.

Sen. Mutula Kilonzo Jnr.: Mr. Speaker, Sir, I am of a different view. My learned friend, Mr. Peter Wanyama, has argued forcefully that we should down our tools and go home. The other Counsels for the Governor have also argued many things.

Since they have chosen the mambo-jambo and the recipe of what they want to do, we should give them their time to argue as they please, present what they want and then close because they have chosen the *modus operandi* of their case. They have chosen what to do. If we intervene, we will look like we want to advise them, yet the Governor has paid his legal counsel fees to advise him.

We are not supposed to advise the legal team of the Governor. We should let them to conduct their case. These are very senior lawyers of the profession who carry a lot of respect from some of us. We should tell them how much time they have and continue. We are going to sit here patiently but I would like to correct Mr. Wanyama that we never sat here until 4.00 am. We will not sit until 4.00 a.m.

I thank you, Mr. Speaker, Sir.

The Speaker (Hon. Lusaka): Kindly proceed, Sen. Wetangula.

Sen. Wetangula: Mr. Speaker, Sir, the Governor and his lawyers find themselves in a difficult situation because ordinarily, for those of us who go to court, the sequencing of cases is not what they find themselves in. We have put them in a box where they are now supposed to navigate between a preliminary objection post-hearing and the hearing itself as per your own ruling. Whatever the jumbled situation we may find ourselves in, I think this House has the capacity to sift the wheat from the chaff at the end of the day and determine fairly what should be done.

So, let them argue their case in the manner they best know; within the circumstances they find themselves in. At some point, I believe they will call their client to testify depending on what they want to do. I am sure this House and these distinguished Senators know how to skin the cat; whether to start with the tail, ears, the head, the back or whichever part.

I thank you.

The Speaker (Hon. Lusaka): Thank you for your input.

I direct that Mr. Ng'ang'a proceeds in the manner he was doing. By the end of it, if the statement says the same thing, so be it.

Sen. Sakaja: On a point of order, Mr. Speaker, Sir. On behalf of "unlearned friends" but highly educated, the direction sought by Sen. Omogeni is key. As Sen. Orengo has said, it is a misnomer and not a preliminary objection. Secondly, we are already in the meat of the substance of these charges.

Mr. Speaker, Sir, the direction that we need is for you to tell us how much more time they have left because we cannot just go on in perpetuity. Please direct as such.

The Speaker (Hon. Lusaka): Before I do that, let me hear what Sen. (Prof.) Ongeri has to say.

Sen. (Prof.) Ongeri: Mr. Speaker, Sir, yesterday you made a ruling and gave us a litany of rules of procedure that we were supposed to consider. Senior Counsel Okong'o Omogeni has sought preliminary guidance from the Chair regarding the manner in which we should proceed and whether it is right or wrong.

I will refer you to Part 1 of the Fifth Schedule of the Standing Orders. Paragraph 2(b) provides that the Senate shall, in Plenary, determine whether the particulars of the allegations against the Governor have been substantiated. I expect the counsel for the Governor to strictly give us evidence because that is what we are looking for. At the end of it, we will decide which way the evidence weighs.

Mr. Speaker, Sir, in order for us to order our thinking chronologically, we should go according to the programme which has been laid out.

The Speaker (Hon. Lusaka): Hon. Senators, I have made a ruling on this matter. Let the Counsel proceed.

Mr. Ng'ang'a Mbugua: Thank you, Mr. Speaker, Sir, for that guidance. Before I delve into the deficiencies of the Assembly's case, I was just setting out the standards. It was just a background because from the guidance that we received from the Speaker, it is that even in the absence of our evidence, it is open to us during our defence to comment on the evidence and the case as presented by the Assembly. So, I started with the standard and the threshold and then I will delve into the actual charges and the alleged violations.

Mr. Speaker, Sir, I was on the standard that was set by the Court of Appeal in the famous case of Gov. Wambora. Again, the standard is slightly below--- Actually it is between a balance of probability and beyond reasonable doubt. The appreciation of the Court of Appeal is that the allegations and the charges which are premised under Article 181 must rise to that very high standard. The burden to discharge that proof never shifts. It is always the Assembly's burden to discharge so that even in the absence of evidence by the Governor, if the evidence of the Assembly does not meet that standard, then their Motion must be rejected.

Allow me to point out again, just for the comfort of hon. Senators, that in as much as we argued the preliminary points of law and now we are delving into the merits or otherwise of the Assembly's case, it is following your guidance that when you retired to consider the matter in plenary, if you find you have no jurisdiction, then as Sen. Mutula Kilonzo Jnr., has pointed out, you will down your tools.

There are many times courts guide us to argue the preliminary objections and the merits of an application together. So, it will still be open to the Senate to down its tools.

However, should it still find that it has the tools to intervene, that is why we are now considering the merits.

Mr. Speaker, Sir, allow me now to go straight to the evidence that was presented before this Senate by the Assembly. This Senate was told that there have been violations of the Public Procurement and Disposal Act and the Constitution which were said to be gross.

The particulars were that there were pending and unsustainable bills within Kiambu County. I wish to pose this question to hon. Senators. How can pending bills, some of which have been inherited from previous regimes, constitute gross violation of the law as to become an impeachable ground? In a humble submission, it is not.

If we were to sustain the fact that there have been pending bills in Kiambu County, then perhaps, this Senate would be required any time a Motion is presented from any of the 47 counties - because all of them have pending bills and this is a matter of public notoriety - to uphold such a Motion.

The other question that perhaps this Senate needs to consider the allegation is the direct role of the Governor as far as incurring the so-called unsustainable debts. Was there any evidence that was tabled linking the Governor directly in terms of the nexus that was set out in Gov. Wambora's case? None at all! In our very humble submission, that allegation has not been proved.

Mr. Speaker, Sir, some of the reasons that constitute pending bills--- This is a matter that the Senate has had to grapple with. For instance, in their oversight capacity, Senators have summoned governors and CECs of various counties and is what may have caused this.

One of the things this Senate may have noticed is that there have been cases of delayed Exchequer releases, delayed completion of projects that extend across financial years, emerging issues that arise from budgets, fluctuating local revenue sources and pressure from projects *et cetera*. So, there are a host of external factors that bring about a situation of pending bills, which have nothing to do with the culpability of a governor.

Mr. Speaker, Sir, you were told by Witness No. 1 that there is a gross violation in relation to tendering and contracts. The evidence that was adduced was that there is a schedule of the so-called contracts amounting to over Kshs3 billion. What you noticed during cross-examination is that not a single contract or award of tender was produced in the hand of the Governor. Now you are being told that because there is a list showing contracts of Kshs3.3 billion, you should find the Governor to have violated the Procurement Law and, therefore, amenable to impeachment. With all due respect, that cannot be a serious basis. You were not told the role that the Governor directly played in issuance of those alleged tenders.

First, we never saw them, but much more significant, what role did he play? Was that evidence-led? None at all. There is a dearth of evidence in as far as that question is concerned, but now you are being told that merely because a sensationalized figure of Kshs3 billion has been mooted, you need to impeach the Governor. That cannot be a serious ground. You need to be told, in the entire procurement process, where does the Governor come in? Does he evaluate tenders? In this case, did the governor come under

trial or on trial, evaluate any tender? Did he award any tender? In what manner did he directly contravene the procurement law? That we are not told, but then you are being told to impeach him on that ground.

You were told that tenders were granted for roads because he was to receive a tithe; 10 per cent. Of course, it is very flowery to say 10 per cent, like we pay tithe in churches. But were you shown evidence of any money that came from any contractor, so that the Governor can be said to have derived a personal benefit from these so-called tenders to sustain that ground? None at all. Whose burden is it to discharge that? It is the Assembly; the burden never shifts. It is not for the Governor to bring evidence and say: "I did not issue tenders or did not receive kick-backs." They are saying that he received. Where is the evidence? None at all.

Mr. Speaker, Sir, how can infractions of failure to disclose pending bills in the Fiscal Strategy Paper amount to an impeachable offence? How? Yes, it may be an infraction. Are there other oversight mechanisms that the Assembly may have deployed to redress that? Certainly, yes. Were they deployed? None.

Failure to set up County Budget Economic Forum: first, it was not shown. Part of the evidence that we received late was a schedule showing Members of the County Budget Economic Forum, but again, which, and we respect the decision of this Senate, we were not able to tender because the Senate was of the view that we--- However, there is a budget forum.

Our submission is that they needed to show. It is not just allege and push the burden to us; show that it does not exist. Even if it does not exist, I am aware that during the consideration of the impeachment of Gov. Mwangi *wa* Iria, the Governor of Murang'a, that issue came up and was cited as an infraction. Did it amount to an impeachable ground? Certainly not. In the wisdom of this Senate, they went ahead to say: "Yes, there may have been violations and infractions, but we believe that other oversight mechanisms and methods would have been deployed to redress that."

Mr. Speaker, Sir, it was alleged that the Governor has committed a crime against national law because a report from the Ombudsman implicates the Governor. It is like taking a newspaper report that alleges that somebody committed a crime, and now presenting it before this Senate and saying that a crime has been committed. What I am happy about is that this Senate is comprised of noble men and women, who are intelligent enough to appreciate that a report cannot constitute a crime.

The lady who is said to have been defrauded of the land, would have come and taken oath before this Senate saying: "I dealt with Gov. Waititu, he did A, B, C, and D, and I lost my property." That was not done. You were not even told that the Director of Criminal Investigations (DCI) has commenced any investigations. What you saw was an affidavit. Why would Cecilia be happy to sign an affidavit and not present herself for cross-examination before this Senate, so that this Senate can be satisfied that Gov. Waititu was a beneficiary of a fraud committed against her? What was being hidden? That is a question I would urge this Senate to bear in mind in consideration of this matter.

There is the question of conflict of interest. Conflict of interest has to do with what benefits accrued to the Governor personally? This is because, that is the key

element of that crime. What you were told is that there are CR12s of person who could not be demonstrated to be the Governor's kin, merely because Cecilia somebody Ndung'u bears the name Ndung'u. I am sure that there are so many Kenyans in this country, if you go to the Registry of Persons, who bear the name Cecilia Muthoni Ndung'u.

I am sure George Ng'ang'a Mbugua, a CR12 that shows I am a Director and shareholder does not necessarily mean that I am that George Ng'ang'a Mbugua. A higher standard is required, so that it behooves the Assembly to go ahead and say: "Why we are saying this person is this and related in this manner is because of one, two and three." Even then, that is not where the Senate stops. Was there personal benefit that accrued? That you were not told, so that it is very easy to sensationalize and say: "We have a CR12." That is not enough to constitute an impeachable ground under conflict of interest.

It is also worth noting, and this is again a matter that this Senate can take judicial notice of, that we have charges which are pending in anti-corruption courts. The governor has presumption of innocence under Article 50 of the Constitution. He pleaded not guilty to allegations of conflict of interest. The matter has not even commenced. Not a single witness has even testified, but now you are being told to pronounce yourself on this question involving alleged conflict of interest, based on the material that has been provided to you. The Standing Orders of this Senate gives deference to a court of law that is seized of a matter such as the one that is presented before you.

Mr. Speaker, Sir, how can alleged failure to release funds to the Assembly--- First, did the Assembly produce a statement of accounts saying that for this financial year, we were entitled to release this amount of money, and that the amount of money that was actually sent to us from the Executive is this much; this was not sent? Now we are told that you need to disprove that.

First of all, the Governor has no authority to incur expenditure. The head of the County Treasury should be perhaps the one on trial. Who is the accounting officer? Has the Governor been shown to be the accounting officer? He does not incur expenditure or authorize any payment. But even then, has the County Assembly said: "this is what they were entitled under the budget, this is what was authorized by the Controller of Budget (COB), this is what actually came into the County Treasury and this is what you released to us? This you did not release; what reasons do you have?" Has that been placed before this Senate? That was not done.

Yesterday, you heard from Witness No.2, who is a legal advisor of the Deputy Governor, Nyoro and was employed by the Deputy Governor himself. He took the initiative allegedly as a public-spirited citizen of Kiambu, wrote to the Ombudsman, not on any other question, but the question of alleged fraud touching on the Governor. If he was that public-spirited, how come he never wrote to the Ombudsman asking about any other investigation? Why him as the legal advisor to the Deputy Governor? What was the motive, because the bona fides must also be investigated? This is so that we do not allow, as Senators, turf wars or issues which are parochial in nature to cloud the thinking of this Senate. It is a respectable august House. This gentleman came and said: "This

was my role." So, you can tell who is wagging the tail, but that is the evidence that now this Senate is being called upon to uphold and impeach the Governor.

On the question of appointment letters, a witness chickened out. Apparently, the witness who you were told could not testify because Witness No.1 touched on the issue of appointment, is a member of the Public Service Board.

Ask yourself a question; how come a member of the County Public Service Board (CPSB) that does recruitment and shortlisting could not come and say; "Senators, on these questions of these casuals, we did not recruit". The Governor may have issued letters, there is nothing barring him as the Chief Executive to issue a letter of appointment subsequent to a recruitment process. You are told that the letter must refer to the minutes of the board. Were you shown a proviso within the law that says that a letter of appointment must state when you were shortlisted and when the board sat?

Mr. Speaker, Sir, now, you are being told there were 600 casuals, The Ethics and Anti-Corruption Commission (EACC) intervened, did we get a letter from the EACC challenging the recruitment? It was said on oath, so it was very easy for that witness whom you all had a chance to listen to, who prevaricated all through and was very evasive; that was their star witness, whose objective was to come and nail the Governor, he was the Mover of the Motion and had all these material, but that is the evidence that you are being told that has risen to the threshold set out in Wambora's decision, slightly below the standard that is required. That is the evidence, it is beyond reasonable doubt but the standard is just slightly below. That is the standard you are being told to uphold.

Mr. Speaker, Sir, it is not only about the Governor, Hon. Ferdinand Waititu, because we all aspire to hold these offices. What I am happy about is that this Senate is not there to validate. In fact, by you clearing the Governor, it is not that you are saying that there has not been infractions, there may be just like other counties, but all we are saying is that - that is why we set out all these issues about due process and threshold - let us be consistent, just like this Senate has consistently been consistent about the standards, so that we do not make it very easy for Assemblies to simply just converge, craft a Motion, pass it through a very opaque manner without even disclosing the numbers and bang! Senate, we invoke your process.

That is trivializing a very nobble House. It is trivializing the impeachment role of this Senate. You will be sending a message, not that this Senate was favorable to Hon. Waititu today, no. It is that before we are seized of this matter, these guarantees are bare minimum and they must be met. What we are saying is that the threshold has not been met.

Let this Senate in its report and that is what we shall be urging that even where it finds that there have been omissions, say that these are oversight mechanisms that can be deployed within Kiambu and that can redress these issues that have been raised by the Assembly and be very hesitant to invoke the weapon of impeachment and remove the honorable Governor. That is as far as the threshold and the merits of their case is concerned.

Mr. Speaker, Sir, I want to yield – I do not know how much time we have, but perhaps for the comfort of the Senators, when we are making our closing arguments, we

will be extremely brief because part of what we have covered in our defense was very substantial and it touched on our closing arguments. We will not wear the Senators down with a rehash of the same argument.

Thank you very much for your time, we really appreciate.

The Speaker (Hon. Lusaka): You have two- and-a-half hours to go.

Mr. Charles Njenga: Mr. Speaker, Sir, I can assure the honorable House, Hon. Senators, we do not intend to be here for another two-and-a-half hours. We shall endeavor to finalize and as soon as we have nothing useful to add, we shall rest. However, it is our duty to insist on one thing; that the standard applied repeatedly in such proceedings be adopted and used in the present proceedings and we will not tire to repeat that because Gov. Waititu is entitled to equal protection, treatment before this honorable House.

Standing Order No.2 of this House enjoins the Speaker and the House to adopt precedence of the House. That is a positive provision within the Senate on Standing Orders. I say that to lay basis of a comparison of how this honorable House has processed previous similar charges. These charges are not unique to this House. They have been heard, of course, with slight modification, slight variation of facts, slight variation of numbers but they have been heard by this House.

The first issue and the first ground without reading relates generally to pending bills and debts within the county. The question is, how has the Senate treated that matter before? In the Special Committee that was investigating the proposed removal of Gov. Mwangi wa Iria, and I have a copy, it is available from the Clerk's records. The allegation against him was that the County Executive has contributed debts to the tune of Kshs2.8 billion in the county.

In Kiambu County, we are being told Kshs4 billion**.** What did the Senate say? The Senate said that it is not possible to ascribe liability to the Governor of the issue of debt without interrogating the position of the Controller of Budget on whether those funds were available. The position of the Auditor General with regard to the question of whether this debt constitute Local Purchase Orders (LPOs) or invoices and such other material considerations. The Senate said that although there appears to have been certain things that were not done, this is not an impeachment question. If it was not an impeachment question for the Governor of Murang'a, it cannot be - in the proper reading of the Standing Orders of this House and the precedent set - an impeachment question for Governor Waititu; that is fairness and justice.

There was the same issue of failure to establish a County Budget Forum to publish a County Fiscal Strategy Paper (CFSP), which was also a ground in the same Special Committee and the allegations before the Senate. In fact, that was ground allegation number five in the record on the allegations against the Governor of Murang'a at that point. The Senate said - I am reading the ruling of the Senate in that matter - that although there appears to be a violation of the County Government Act, the violation did not rise to the level of gross violation and was, therefore, not substantiated. The Committee and the Senate recommends that the Governor sets up the County Budget and

Economic Forum as required under Section 137 of the Public Finance Management Act within 90 days.

The resolution of the Senate was a recommendation to follow the law in that regard. It was not to remove the Governor. So, we ask, in the face of the same allegation, of course, with slight variation, in fact, I think they used the same template, can it then become, mutate, and be treated differently as an impeachment question for Gov. Waititu?

That will be manifestly unfair. It will be treating two governors, facing the same charge, unequally and differently.

The issue of national law has also come to this House as a ground, a charge. It was a charge against Gov. Wambora and Gov. Mwangi wa Iria. It was ground charge number two in the charge sheet against Gov. Mwangi wa Iria. In this report, which I have, the Senate said that in the matter of alleging commission of a crime, then the evidence that should be brought to the House as evidence supporting such a ground, is a conviction; because an allegation can be made on any set of facts. On that ground, the Committee and the Senate found that that was not an impeachment ground.

I submit and commend the reading of this report by the Hon. Senators; because it was prepared by this House, the House cannot run away from it, that you follow the same reasoning, the same analysis of facts and the same analysis of the law. When you do that, you will arrive at the same conclusion that the ground of commission of crime, unless backed by a conviction, is not a sustainable impeachment ground. That is the standard of the Senate. It is documented in the report.

On the allegation on abuse of office, charge number three, against Gov. Mwangi wa Iria; the Senate said, and I read verbatim;-

"The Committee unanimously found that there were violations of the law. The violation did not rise to the level of gross misconduct and was therefore, not substantiated."

This was a matter of expenditure by the Governor on county billboards, county advertisements and all that. The Senate found that that was not an impeachment question. On that ground, in fact, the Committee said, in future, any governor who contravenes these provisions of the law should be surcharged for the cost of advertisement.

The reasoning of the Senate was where there is available alternative remedy, then the tool of impeachment should not be deployed as a matter of cause because then it demonstrates that it is not being used in good faith.

The last illustration before I sit is in the issue of employment matters. They have also come as an issue of impeachment as grounds against governors and the Senate has had occasion to interrogate the same charges. In this case, the allegation was failure to appoint a chairperson of the Board and interfering with the processes of the Board, that is the County Public Service Board (CPSB).

The Senate said that on employment matters, the County Governments Act provides sufficient remedies and unless the County Public Service Board complains that there is personal interference by the Governor, then it is not an impeachment issue.

In this case, the complaint is not by the County Public Service Board. In fact, the witness who had filed a witness statement said, to his mind, there is no wrong doing on

the part of employment of those persons. He says, "I became aware during the impeachments that there were allegations of certain persons who were hired allegedly by the Governor".

In the report of the Committee of Senate on the matter of the proposed removal of Prof. Chepkwony, an interesting finding and conclusion was made by the Senate at paragraph 243. The comment was that the Committee finds the Governor has not abdicated his role as Governor. He has, however, breached the law in some instances as a result of combination of certain factors. These challenges, if recognised and acknowledged, can be remedied. That was the Senate speaking.

The Committee did not find that in the Kericho Governor, an individual was hell-bent in violating the law or abdicating responsibility. Therefore, the totality of the decision was that, it is not appropriate in these circumstances to remove the Governor. This is a standard set by the Senate.

Has Gov. Waititu on the evidence available abdicated his role as Governor? Has he been shown as a person hell-bent on violating the law intentionally? Has he been shown to consistently defy or disregard recommendations? I submit that none of those factors have been demonstrated. If not, then the appropriate recommendation is that he should not be removed, but those matters can be resolved by utilization of certain institutions, laws, an enforcement thereof in a strict manner.

We, therefore, commend and urge that the same stick; Senate holds a big stick against governors under Article 181, but the same measure, and the same stick used against the other governors should be applied against Governor Waititu. You cannot change the stick, the intensity, and the measure thereof, or the number of canes because now we have Gov. Waititu.

Fairness demands that equal wrong be treated equally in terms of remedy. We made no admission on wrong, but should peradventure such be found, then the resolution thereof has already been prescribed, detailed, given with material and very lucid reasoning by the Senate Committee and the Senate. That is our plea and that is our application that on the evidence available, the only allegations that do not rise to the level of gross violation necessitating the deployment of impeachment and removal of the Governor from the office of the County Government of Kiambu.

Clear *mala fides*, of course, have been demonstrated. The impeachment was not brought in good faith. There has been violation of standing orders, failure to comply with Constitution and statutory timelines and thresholds. There has been admission that part of the evidence has been procured by direct beneficiaries of the impeachment. Is that a matter which this Senate wants to rubberstamp and put a serial of approval as to how matters should then proceed in our 47 counties? What shall flow from these proceedings, that is the template that shall be applied in all our counties. Is should not be.

The Senate's role is noble and clear, and if properly applied to the set of facts that are available in this matter, then there are no grounds for removal of Governor Waititu from office as the Governor of Kiambu County.

I will invite Mr. Wanyama then from there---

ADJOURNMENT

The Speaker (Hon. Lusaka): Order, Counsel. It is now 1.00 p.m. We have to adjourn. You will have a balance of two hours and ten minutes when we come back from lunch.

I want adjourn the sitting. We will break for lunch and resume at 2.00 p.m.

The Senate rose at 1.00 p.m.