



REPUBLIC OF KENYA

TWELFTH PARLIAMENT – (FOURTH SESSION)

THE SENATE

VOTES AND PROCEEDINGS (MORNING SITTING)

TUESDAY, MAY 19, 2020 AT 10:00 AM

1. The Senate assembled at Ten O'clock.
2. The proceedings were opened with Prayer said by the Speaker.
3. **COMMUNICATION ON GUIDELINES CONCERNING VOTING IN THE SENATE DURING THE COVID-19 SITUATION IN KENYA**

The Speaker conveyed the following Communication concerning voting in the Senate during the COVID – 19 situation in Kenya.

“Hon. Senators,

You will recall that at the sitting held on 5th May, 2019, during the Division on the *Report Regarding the Implementation Status of the Resolution on County Governments’ Infrastructure Projects*, Sen. (Dr.) Isaac Mwaura rose on a Point of Order and sought the guidance of the Speaker on the matter of the voting procedure in the Senate, claiming that he was in receipt of a concern that the Senate Majority Leader and the Senate Minority Leader were voting on behalf of Senators and that if that was the case, then there was the possibility of Bills from the Senate being rejected by the National Assembly.

Sen. (Dr.) Mwaura further asked why Senators who were present in the Chamber could not vote even when the minimum number of delegations required to carry a matter in the Senate had been confirmed to be present. This was in the context of the *Further Guidelines for Senate Plenary and Committee Sitings During the COVID-19 Pandemic Situation* that I issued on 17th April, 2020.

The Guidelines provide as follows-

- (1) *On a day when a Plenary sitting is scheduled to be held, in order to facilitate the smooth processing of legislative business that is before the Senate, in addition to the Senators designated by the Senate Majority Leader and the Senate Minority Leader as attending the Senate sitting in the Senate Plenary*

Chamber, a Senator shall be considered and reckoned to have attended and to be present during the sitting if the Senator-

(a) has come to the precincts of Parliament for purposes of the sitting;

(b) is at the Senator's office within the precincts of Parliament; and

(c) has been recorded and certified by the Clerk to be present in terms of sub-paragraphs (a) and (b).

(2) Whenever a vote is to be taken on a matter concerning counties, the vote shall be by roll-call and in addition to the Senators who are physically present in the Senate Plenary Chamber, a Senator who is present at a sitting in terms of paragraph (1) shall –

(a) for purposes of reckoning the county delegations that are present and voting in terms of Articles 122 and 123 of the Constitution and Part XVI of the Standing Orders, be considered and reckoned to be present and voting; and

(b) communicate his or her vote in writing to the Senate Majority Leader or the Senate Minority Leader or to a Senator designated for that purpose by the respective Leader, as appropriate and may, for the purpose of such communication, use electronic means such as email or text message.

(3) Whenever a question is put on a matter concerning counties, in order to secure the expeditious and efficient disposal of the business of the Senate, the Senate Majority Leader and the Senate Minority Leader, or a Senator designated for that purpose by the respective Leader, shall, when called upon to do so by the Speaker, verbally state the vote of each Senator of their respective side.

I undertook to give a Ruling on the matter at the next Sitting of the Senate Plenary.

Hon. Senators, as you are all aware, the Coronavirus Disease 2019 (COVID-19) is a global pandemic that has disrupted the way business is undertaken in virtually every sector of our society and put the entire world in uncharted territory.

It has resulted in unprecedented preventive measures being undertaken globally. These include quarantines, isolations, lockdowns, social distancing, thorough hygiene protocols, among others.

In Kenya, since the reporting of the first case and the subsequent spread of the disease to many parts of the country, the Government has introduced various containment measures including-

- (i) advising members of the public to maintain basic hygiene;
- (ii) requiring that people maintain social distancing;
- (iii) recommending that employees who are not in essential services be allowed to work from home;
- (iv) imposition of a daily curfew from 7 p.m. to 5 a.m.;
- (v) restriction of travel into and out of the Nairobi Metropolitan area and the counties of Kwale, Mombasa and Kilifi; and
- (vi) restriction of movements in certain parts of Nairobi and Mombasa.

The unprecedented times in which we find ourselves pose unique challenges for legislatures around the world. Legislatures, by their nature are, or at any rate, should be, open spaces for public involvement, interaction and participation. The primary questions which legislatures have had to grapple with in the face of a deadly and highly contagious disease have included-

- (a) whether to continue holding sittings;
- (b) if to continue holding sittings, whether these are to be held physically or virtually;
- (c) if to meet physically, how to ensure that the appropriate protocols relating to personal protective equipment, hygiene and social distancing are observed;
- (d) if to meet virtually, how to utilize appropriate technology to ensure safe and seamless transaction of business.
- (e) the frequency of meetings and the nature of business is to be transacted.
- (f) how to protect the sanctity of each legislator's vote.

In our Parliament, to allow for the continuation of parliamentary business within the Kenya's COVID-19 containment guidelines, on 13th March, 2020, at the onset of the pandemic, jointly with my brother; the Speaker of the National Assembly, we issued a set of Guidelines to all Members of Parliament and staff of Parliament. As no two legislatures or even two chambers of the same legislature are exactly the same in their circumstances, thereafter, on 2nd April, 2020, the Speaker of the National Assembly issued further guidelines for the conduct of business in the National Assembly; and on 17th April, 2020, I issued further guidelines to all Senators and staff of the Senate, which contain the voting guidelines that are the subject matter of this Ruling.

How each Parliament or House of Parliament responds to the Covid 19 situation has depended on a multiplicity of factors including the Constitution and the laws of the country, the mandate of the different Houses, the prevailing public health situation in the country, containment measures imposed by the executive arm, the number of legislators and the available infrastructure. Speakers or presiding officers of legislatures have had to, in the first instance, take leadership acting as agents of necessity to offer practical and pragmatic interim solutions to enable the continuity of business until the full legislative body through its appropriate organs can define the way forward.

For jurisdictions such as ours, the versatility of standing order number 1 or its equivalent, has been powerfully manifested. Standing order number 1 was clearly designed to ensure that no situation arises where the business of Parliament stalls or its conduct is rendered impractical for the reason only that a situation was never envisaged or contemplated and accordingly no express provision was made in the Standing Orders on how Parliament would proceed in such event. It empowers the Speaker to step into such a breach and determine a procedure based on the Constitution, statute law and the usages, forms, precedents, customs, procedures and traditions of the Parliament of Kenya and other jurisdictions to the extent that these are applicable to Kenya.

A sampling of action taken by Legislatures around the world reveals a mixture of interventions unique to the circumstances of those jurisdictions. Jurisdictions such as Spain, Brazil, Norway and Finland have all allowed for remote sittings. Others such as Poland, Mongolia, Belgium, Greece, Romania, Portugal and the European Union Parliament have a hybrid of both virtual and physical sittings where only a small percentage of Members attend chamber so as to ensure appropriate social distancing. Yet others such as Croatia, Luxembourg and France have limited the number of meetings and the kind of business to be transacted.

Of paramount importance in a parliamentary context is voting. The Belgian House of Representatives amended its Rules of Procedure to allow Members, under certain conditions, to be considered as “present” at selected committee and plenary meetings even when they are not physically in the chamber, and to vote electronically or by email. In Ireland, voting is currently by either ‘voice vote’ or ‘roll call vote’ with Members remaining in their seats. In Greece, postal votes are being accepted. Only last week, the House of Representatives of the United States of America, with a Constitution that does not expressly provide for proxy voting, has voted to construe the Constitution as not prohibiting proxy voting and has amended its rules of procedure to allow proxy voting during this period of the corona virus pandemic for Congressmen who are unable to attend the Plenary sittings in person.

In our own case, we started with general guidelines for both Houses but the peculiarities of each House have since demanded that each House addresses its unique challenges. Senator Mwaura's concern has taken on a greater importance because, while standing order 96(5) of the Senate Standing Orders provides that it is out of order for a Senator to criticize or call to question, the proceedings in the National Assembly and while there is a corresponding provision in standing order 87 of the National Assembly Standing Orders regarding the proceedings of the Senate, it is in the public domain that a Member of the National Assembly, on the floor of the National Assembly, sensationally called to question the proceedings in the Senate and went so far as to seek the ruling of the Speaker of the National Assembly on the constitutionality of our proceedings.

Briefly stated, the crux of the allegation made on the floor of the National Assembly was that the voting procedure employed by the Senate during these extraordinary circumstances pursuant to the aforementioned Guidelines violates Articles 122 and 123 of the Constitution by empowering or allowing the Senate Majority Leader and the Senate Minority Leader to vote on behalf of other Senators.

Hon Senators, fidelity to the Constitution is at the core of the business of the Legislature and members of the public would be alarmed, as indeed they must have been, to hear that this august House has been conducting its business in a manner that violates the Constitution. An allegation of unconstitutionality levelled against a House of Parliament is so grave that it merits an urgent and appropriate clarification.

In making this clarification, it is important to recite the following key differences between the Senate and the National Assembly both under the current Covid 19 situation, but also generally under the Constitution and the laws-

- (a) under the current situation, the Senate Chamber has been cleared by the health authorities to only accommodate twenty-eight Senators while the National Assembly Chamber is allowed to accommodate fifty-three Members;
- (b) with fifty-three Members in the Chamber, the National Assembly can transact virtually any business save for amending the Constitution or other business requiring a fixed majority;
- (c) the Senate on the other hand requires at least twenty-four county delegations in the Chamber to vote on matters that concern counties and cannot vote on any contested matter with only the twenty-eight senators;
- (d) even if the twenty-eight available slots in the Senate are allocated only to heads of delegations, it would mean that all of nineteen county delegations and the specially elected Senators who represent persons with disabilities, women and the youth would be left out of the proceedings. This is further complicated by the need to maintain party proportions in the Chamber;
- (e) ordinarily, voting in the Senate is electronic while voting in the National Assembly is by acclamation. With the COVID-19 situation, while the voice vote is unaffected, electronic voting in our chamber has not been recommended because of a number of factors including the so called "assisted voters" who have to come to the Clerks' Table to vote and the paperwork entailed in the print-outs of the results. In any case, the electronic voting provided for in the Senate Standing Orders is predicated on physical presence in the Chamber and would not therefore solve the problem of the limitation of the numbers permitted in the Chamber. Thus, while the National Assembly did not have to change its method of voting, the Senate had to resort to the roll-call method of voting; and
- (f) at the time of issuance of the Guidelines, the Senate had resolved to hold only one sitting in a week between the hours of 2:30p.m. and

4:30p.m and therefore it was important to transact business in the most efficient manner in the two hours available.

All the foregoing notwithstanding, did the Senate therefore resort to allowing or empowering the Senate Majority Leader and the Senate Minority Leader to vote on behalf of other Senators? The answer is an emphatic and resounding No!

Honourable Senators, Article 122(1) of the Constitution provides that *except as otherwise provided in the Constitution, any question proposed for decision in either House of Parliament shall be determined by a majority of the members in that House, present and voting.*

Article 123(4) provides that *except as provided otherwise in the Constitution, in any matter in the Senate affecting counties each county delegation shall have one vote to be cast on behalf of the county by the head of the county delegation or, in the absence of the head of the delegation, by another member of the delegation designated by the head of the delegation.*

Article 259 (1) of the Constitution requires that the Constitution be interpreted in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance.

In addition, Article 259(3) of the Constitution provides that every provision of the Constitution shall be construed according to the doctrine of interpretation that the law is always speaking.

A purposive interpretation of Article 259 of the Constitution therefore means that Articles 122 and 123 of the Constitution must be construed in a manner that enables the Senate to continue to operate even at a time when it faces the challenges presented by the COVID-19 health crisis.

As such, a voting procedure that provides an opportunity to ALL the county delegations to participate in any vote on a matter concerning counties is not merely desirable, it is mandatory. To do otherwise is to violate the Constitution.

The Guidelines that were issued on 17th April, 2020 were introduced to ensure efficiency in the roll call method and for better time management in the Chamber as well as to ensure that all county delegations have an equal opportunity of voting on matters concerning counties whether they made it in the list of the twenty-eight senators designated to sit in the Chamber or not. This was achieved firstly by construing the term “present and voting” as used in the Constitution to mean not just the Senators sitting in the Chamber but also those others within the designated places in the precincts of Parliament that were deemed to be part of the extended Senate Chamber and secondly by allowing all the votes (once cast by the Senators themselves) to be communicated at once by the respective leaders during the roll call instead of each senator in

the Chamber standing to answer the roll call and the votes of those outside the chamber being communicated by a different medium.

Those who have alleged that some Senators are voting on behalf of others have misconstrued how voting on matters affecting counties has been taking place. The Guidelines make it clear that the vote is cast by each Senator but communicated to the Senate by the leaders. No Senator's right to vote as they choose is taken away. It cannot be taken away. No Senator has delegated their right to vote as they choose to the Majority or Minority Leader to exercise that right on their behalf. Our Constitution does not permit this.

The Guidelines do not provide for proxy voting as was erroneously alleged. Proxy voting is a form of voting whereby a member of a decision-making body may delegate his or her voting power to a representative, to enable a vote in absence. It clearly cannot be a proxy vote where the voters are present and where they furthermore cast the votes themselves. The correct analogy is really that the Majority Leader and the Minority Leader are "tellers" to present the tally of the votes cast by the Senators on their respective sides.

As pointed out earlier in this Ruling, all jurisdictions are having to adapt and innovate. In jurisdictions where virtual sittings have been adopted, for instance, new meaning has been given to the term "present". For instance, for the first time in the EU Parliament's sixty-two year history, in the month of March, Members who usually vote by raising their hands in plenary or by pushing a button on their desks, voted by email from their home countries. We are no exception.

Nevertheless, Honourable Senators, the COVID situation is constantly evolving and appropriate decisions must be constantly made. In our case, we have now not only extended the sitting hours by reverting to the usual adjournment at 6:30 pm on Tuesdays, but we have resolved to be sitting on Tuesday mornings. This has injected a further four and a half hours sitting time in each week and eased the pressure on our procedures. It will therefore be possible to conduct the full roll call in the Chamber for the Senators present in the Chamber, while we must continue to accommodate Senators who attend the sitting but cannot be present inside the Chamber.

In addition, Honourable Senators, the option of finding a larger venue that can accommodate all Senators without the need for designation of only some Senators to attend the Plenary continues to be pursued and, if adopted, the need for these innovations and adjustments may cease. Indeed, the Senate Business Committee has requested the Procedure and Rules Committee to consider the various dynamics that have been brought forth by the Covid-19 situation and to make proposals for possible amendments of the Senate Standing Orders, including provision for virtual sittings of the Plenary.

Honourable Senators, in conclusion, I wish to reiterate that the Senate will always be bound by and act in accordance with the Constitution and

the laws of this country. This is the oath that all of us in this House have taken.

I thank you.”

4. **PAPERS**

The following Papers were laid on the Table of the Senate-

- (i) The Sacco Societies (Specified Non-Deposit Taking Business) Regulations, 2020.
- (ii) The Traffic (Driving Schools, Driving Instructors and Driving Licenses) Rules 2020.
- (iii) The Public Health (COVID – 19 Restriction of Movement of Persons and Related Measures) (Daadab Refugee Complex and Kakuma Refugee Camp) Order, 2020.
- (iv) The Public Health (COVID – 19 Restriction of Movement of Persons and Related Measures) (Mandera County) Order, 2020.
- (v) The Public Health (COVID – 19 Restriction of Movement of Persons and Related Measures) (Mombasa County) (Extension) Order, 2020.
- (vi) The Public Health (COVID – 19 Restriction of Movement of Persons and Related Measures) (Kilifi County) (Extension) Order, 2020.
- (vii) The Public Health (COVID – 19 Restriction of Movement of Persons and Related Measures) (Kwale County) (Extension) Order, 2020.
- (viii) The Public Health (COVID – 19 Restriction of Movement of Persons and Related Measures) (Nairobi Metropolitan Area) (Extension) Order, 2020.
- (ix) The Commission on Administrative Justice “Office of the Ombudsman” Bi-annual Report for the period January to June, 2019.
- (x) The Commission on Administrative Justice “Office of the Ombudsman” Bi-annual Report for the period July to December, 2019.

(The Senate Majority Leader)

5. **STATEMENTS**

a) Pursuant to Standing Order 47(1)

- i. Nominated Senator (Sen. Abshiro Halake, MP) made a statement on the marginalization of the Muslim population with regards to access to finances given to Micro, Small and Medium Enterprises (MSMEs), Women, Youth and Persons with disability by government institutions.

The Senator drew the attention of the Senate to the fact that the loans issued by the Uwezo Fund, Women Enterprise Fund (WEF), Youth Enterprise Fund (YEF), Kenya Industrial Estates (KIE), Industrial Development Bank (IDB) Capital and Industrial and Commercial Development Corporation (ICDC) were aimed at enabling women, youth and persons with disability to access finances and affordable credit with a view to promoting or supporting them to start businesses for wealth and employment creation.

The Senator further stated that the interest payable on these loans by financial institutions upon lending to women, youth, persons with disability and MSMEs locked out the Muslim community from benefiting from such opportunities since, according to Islamic law, loans that attract interest are not permissible.

The Senator highlighted Article 27 of the Constitution which imposes an obligation on every state organ not to discriminate against any person on any grounds, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.

In conclusion, Sen. Abshiro urged taxpayer-funded financial institutions to emulate commercial banks by designing favorable terms that would extend similar courtesies to the Muslim community for this category of loans, given that they were also significant contributors to these taxpayers' funds.

- ii. The Senator for Trans Nzoia County (Sen. (Dr.) Michael Mbiti, MP) made a statement concerning misleading information in the media concerning Coronavirus (COVID-19).

The Senator decried how purveyors of lies had found it convenient to disseminate data that they knew was inadequately verified, exaggerated and ardently written, stating that this was dangerous and could lead to unnecessary panic and anxiety. He stated that as the virus spreads, misleading information had continued to be propagated throughout social media, forcing technology platforms to grapple with what the World Health Organization (WHO) had referred to as "*Infodemic*".

The Senator further stated that the more people continued searching online for information about the Coronavirus pandemic, the more they were easily encountering a barrage of misleading and potentially dangerous, harmful information, with the WHO having warned that misinformation about coronavirus has caused unnecessary stigmatization and discrimination across the world. He cited cases of posts that provide a series of supposed tips about the virus, such as wrongly instructing people to hold their breath to gauge whether they have been infected and falsely suggesting that water, lemon and even alcohol consumption could kill the virus.

The Senator highlighted the provisions of the Computer Misuse and Cybercrimes Act (2018) with regards to imprisonment and/or fines to which persons publishing false and misleading information are liable, upon conviction. He then proceeded to implore the government to remind the

general public of the existence of this law and to employ its law enforcement agencies whenever there is a breach.

b) Pursuant to Standing Order 48(1)

- i. Nominated Senator (Sen. Beatrice Kwamboka, MP) sought a Statement from the Standing Committee on Education regarding the status of education in Kenya following the outbreak of the COVID – 19 pandemic.
- ii. Nominated Senator (Sen. (Dr.) Alice Milgo, MP) sought a Statement from the Standing Committee on Land, Environment and Natural Resources regarding waste management in Bomet County.
- iii. The Senator for Wajir County (Sen. (Dr.) Abdullahi Ali, MP) sought a statement from the Standing Committee on Energy regarding frequent electricity power outages in Wajir County.

c) Pursuant to Standing Order 51(1)(a)

The Chairperson, Standing Committee on Agriculture, Livestock and Fisheries issued a Statement regarding the maize situation in the country and on the implementation status of the recommendations adopted by the Senate from the report of the Ad-hoc Committee on Maize Situation in the Country.

In the Statement, the Chairperson informed the Senate that Committee had held an online meeting with the Cabinet Secretary (CS) for Agriculture, Livestock, Fisheries and Cooperatives on Monday, 4th May, 2020, where he briefed Senators on food security in the country and maize importation. The Chairperson stated that the CS had confirmed that the national food and nutrition security was stable owing to the fact that the performance of the 2019 long rains season had been near normal and the short rains season had also been good. The CS had further confirmed that the maize Balance Sheet forecast up to June 2020 indicated that there would be a net surplus of about 2,444,800 bags of maize. The Chairperson stated that the CS had further informed the Committee that, given the consumption rate of maize in the country, this surplus would not be enough to cover the one month of July 2020 during which early harvesting was expected to commence. The CS stated that it was due to this expected shortage that the government had gazetted the importation of two million bags of white maize and two million bags of yellow maize by private millers to supplement local supplies and to ensure food prices remained stable.

With regards to the status of implementation of the recommendations of the Report of the Senate Ad-hoc Committee on Maize, the Chairperson informed the Senate that the CS had Ministry had, through the Agriculture and Food Authority (AFA) developed the Crops (Food Crops) Regulations, 2019, that would apply to all food crops produced, processed and marketed in Kenya or imported into or exported out of Kenya. He further stated that these regulations would guide counties in legislating and protecting farmers in the whole grain value chain as had been recommended by the Senate.

6. **THE PANDEMIC RESPONSE AND MANAGEMENT BILL (SENATE BILLS NO. 6 OF 2020)**

(Chairperson, Ad-hoc Committee on COVID-19 Situation in Kenya)

(Second Reading)

(Resumption of debate interrupted on Tuesday, 12th May, 2020)

(Division)

Order deferred.

7. **THE SACCO SOCIETIES (AMENDMENT) BILL (NATIONAL ASSEMBLY BILLS NO. 1 OF 2018)**

(The Senate Majority Leader)

(Second Reading)

(Resumption of debate interrupted on Tuesday, 18th February, 2020)

(Division)

Order deferred.

8. **THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL (NATIONAL ASSEMBLY BILLS NO. 13 OF 2018)**

(The Senate Majority Leader)

(Second Reading)

(Resumption of debate interrupted on Wednesday, 4th December, 2019)

(Division)

Order deferred.

9. **MOTION – FOURTH AND FIFTH PROGRESS REPORTS OF THE AD-HOC COMMITTEE ON COVID – 19 SITUATION IN KENYA**

Order read;

Motion made;

THAT, the Senate **adopts** the Fourth and Fifth Progress Reports of the Ad-hoc Committee on COVID –19 Situation in Kenya, laid on the Table of the Senate on Tuesday, 5th May, 2020 and on Tuesday 12th May, 2020 respectively.

(Chairperson, Ad-hoc Committee on COVID-19 Situation in Kenya – 12.05.2020)

Debate interrupted on Tuesday, 12th May, 2020 (afternoon Sitting) resumed;

And the time being thirty Minutes past twelve O'clock, the Speaker interrupted the proceedings and adjourned the Senate without Question put, pursuant to the Standing Orders.

10. **SENATE ROSE** – at thirty Minutes past Twelve O'clock.

M E M O R A N D U M

*The Speaker will take the Chair on
Tuesday, May 19, 2020 at 2:30 p.m.*