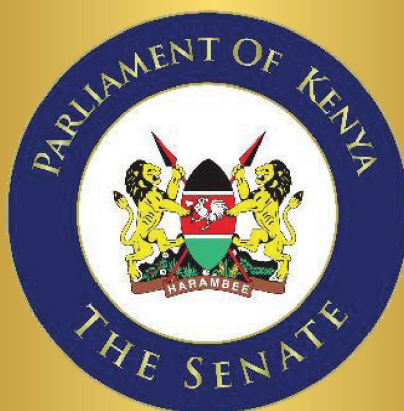


1ST EDITION



REMOVAL FROM OFFICE OF COUNTY GOVERNORS
AND
DEPUTY COUNTY GOVERNORS THROUGH IMPEACHMENT

**AN EASY-TO-USE MANUAL ON
THE PROCEDURES AND RULES**







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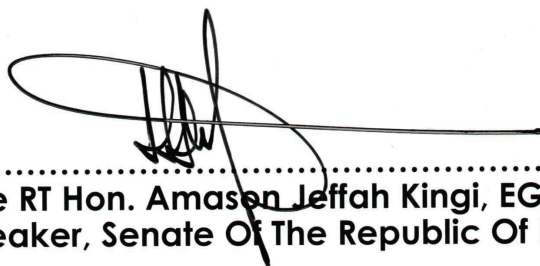
FOREWORD

This Manual seeks to provide a simplified procedure and step-by-step guide to the impeachment process of County Governors and deputy County Governors in Kenya. The Manual breaks down the constitutional and legal processes that are involved in the removal of a Governor or a Deputy Governor from office. The laws and procedures that govern impeachment are continually defined and interpreted by the County Assemblies, the Senate, and the courts of law and can be complex and confusing.

The Manual is a summary of the impeachment process. Accordingly, it only provides a short description of the key concepts and issues at every stage of the impeachment process. Since the Manual is intended as a quick and easy reference, the issues and concepts are provided in a summary or point form.

This Manual is an accessible, easy-to-use, and quick reference for members of County Assemblies or Senators who are involved in the impeachment of a Governor or Deputy Governor. The Manual may also be used by members of the public interested in understanding the impeachment process in Kenya.

For a more detailed discussion of the issues in the entire impeachment process, one can refer to the Digest of the Law and Practice of Impeachments, which was prepared alongside this Manual. It contains a detailed and more comprehensive discussion of the law and practice as it relates to the impeachment of County Governors and deputy County Governors in Kenya. There are ongoing processes that may result in changes to the law and procedures related to impeachment; litigation challenging the current law and process, and a proposed law that may alter the current procedures and practice. This manual describes the current procedures.



.....
The RT Hon. Amason Jeffah Kingi, EGH, MP
(Speaker, Senate Of The Republic Of Kenya)





ACKNOWLEDGMENT

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The development of the Manual was a collaborative effort that brought together the Senate, the county assemblies Forum and the Council of Governors. We thank the different institutions that seconded representatives to the reference committee and provided much-needed input during the preparation of the Manual. Specifically, we thank Dr Johnson Okello, OGW, DR Brighton Buchere, Dr Brenda Ogembo, Mr. Njenga Njuguna, OGW, Ms. Linda Chavera, Mr. Collins Injera, OGW, OLY, Ms. Lucy Akoritsa, Mr. Austin Munene, Ms. Sheila Muriithi and Mr. Tom Kataka, who were part of the Joint Technical Committee that oversaw the development of the Manual. We also thank Ms. Judy Oduma, Ms. Rachel Kidenda, and Mr. Paul Annan for their coordination and facilitation from the side of KDP.

The development of the Manual included interviews and discussions with members and staff of the Senate, County Governments (the assembly and the Executive), NGOs and community organisations involved in governance. We thank all persons who took the time to give their thoughts and views that went into this Manual.

Finally, we thank Dr. Conrad Bosire, the consultant who developed the Manual.


.....
Jeremiah M. Nyegenye, CBS
(Clerk, Senate Of The Republic Of Kenya)





LIST OF ACRONYMS AND ABBREVIATIONS

CEC	County Executive Committee.
CGA	County Governments Act.
CoP	Court of Protection (UK).
COVID-19	Novel Corona Virus.
CPSB	County Public Service Board.
EACC	Ethics and Anti-Corruption Commission.
eKLR	Electronic Kenya Law Reports.
ELC	Environment and Land Court.
KESC	Supreme Court of Kenya.
NWLR	Nigeria Weekly Law Reports.
PFMA	Public Finance Management Act.
ZLR	Zimbabwe Law Reports.





PART 1

INTRODUCTION



PART 1: INTRODUCTION

1.1 Meaning of Impeachment

Impeachment refers to the process through which the legislature can remove an office holder in the Executive branch from office for gross misconduct or violation of the Constitution, the law, or other specified grounds. Accordingly, it is a tool for ensuring political accountability for conduct that is deemed unfit to continue holding office.

Impeachment has its origins in England and was first used in 1376, when Members of Parliament could charge Ministers serving in the King's Government with abuse, remove them from office, and have them imprisoned,¹ thus helping to establish a more accountable government. The practice of impeachment was, over time, borrowed by most democratic governments around the world.

In Kenya, the County Governments Act vests county assemblies with the power to commence removal or impeachment proceedings against the governor. The Senate, on the other hand, is vested with the power to investigate and confirm or dismiss impeachment charges against a county governor or the deputy governor.

1.2 The Ten Steps of Impeachment

The Manual has reduced the detailed processes and steps involved in the impeachment of a governor or a deputy governor. The Manual is structured and arranged along the eight steps of impeachment. The county assembly completes steps 1 to 7, while steps 8 to 10 are accomplished at the Senate. The steps are a collection of the relevant laws, rules, and regulations that apply to the process of impeachment of governors and their deputies.

1 House of Representatives (116th Congress, First Session), 'Constitutional grounds for presidential impeachment' (Report of by the Majority Staff of the House Committee on the Judiciary) December 2019, p. 8.



1.3 Summary of the Impeachment Process

S/No	STEP	CHECK LIST
County Assembly Stage		
1	Preparation of a Proposed Motion of Impeachment.	<ul style="list-style-type: none"> • The specific acts or omissions of the Governor ("the grounds of impeachment"). • The evidence available to support each of the grounds of impeachment. • The evidence that creates a nexus/ links the Governor to the grounds of impeachment.
2	Drafting of the Proposed Motion of Impeachment.	<ul style="list-style-type: none"> • A statement on the specific allegations/grounds and particulars for the intended removal under Article 181 of the Constitution. • Particulars of the offence, clearly stating and explaining specific provisions of the Constitution or the law grossly violated. • Evidence or information of the gross violations annexed to the Impeachment Motion.
3	Submission of the Proposed Motion of Impeachment to the Clerk.	<ul style="list-style-type: none"> • Signature of the Member proposing the Impeachment.



S/NO	STEP	CHECK LIST
		<ul style="list-style-type: none"> • Affirmation that the particulars of allegations contained in the Proposed Motion are true to their knowledge. • Verification by at least a third of all the Members that the allegations in the Proposed Motion are true of their knowledge and belief on the basis of their reading and appreciation of information pertinent to it. • A verification form provided by the Clerk for the Members verifying to affix their signatures.
4	Approval of the Proposed Motion by Speaker.	<ul style="list-style-type: none"> • Compliance of the Proposed Motion of Impeachment with the County Assembly's Standing Orders. • Precision and clarity of Motion. • Maintainability of the Proposed Motion under the Constitution and applicable laws. • Justiciability (nexus and substantiation) of the



S/No	STEP	CHECK LIST
		proposed Motion of Impeachment.
5	Notice calling for Impeachment of the Governor.	<ul style="list-style-type: none"> • Seven (7) days' Notice. • Submission to the Clerk of the County Assembly of a list of signatures of all Members in support of the Impeachment Motion for the removal of the Governor within seven days.
6	Consideration of the Impeachment Motion.	<ul style="list-style-type: none"> • Placement of the Impeachment Motion of Impeachment on the Order Paper. • Compliance with the timelines for disposing of the Impeachment Motion of Impeachment in the County Assembly Standing Orders. • The Speaker shall only allow a member to move the Impeachment Motion if he/she is supported by at least a third of all Members. • Adequate Notice to the Governor of the charges of impeachment. • Appointment of place, date and time for the Governor to respond to the allegations.



S/No	STEP	CHECK LIST
		<ul style="list-style-type: none"> Public participation and consultation on the Impeachment charges. County Assembly deliberations and vote.
7	Transmission of the Decision to the Speaker of the Senate.	<ul style="list-style-type: none"> Motion must have been passed by at least two-thirds of all Members of the Assembly. Communication of the decision to the Senate Speaker within two days of the vote. Documents to accompany communication include the Impeachment Motion, County Assembly Hansard, the division of votes list, an advertisement for a summons to the Governor, advocates, a list of witnesses, records, videos, and other evidence.
Senate Stage		
8	Preparation for the Senate Hearing.	<ul style="list-style-type: none"> The bundle received by the Senate Speaker. Speaker of the Senate convenes a meeting of the Senate to hear the charges against the Governor. Within



S/No	STEP	CHECK LIST
		<p>seven days of receipt of the documents from the county assembly</p> <ul style="list-style-type: none">• The Senate, may carry out the implementation in plenary of resolution, appoint a special committee comprising eleven of its members to investigate the matter.• Speaker appoints a date for the commencement of the Hearing of the evidence.• The Clerk of the Senate invites the Governor and the County Assembly to appear and be represented and notifies them of the date for the commencement of the investigations.• Filings of documentation by the Governor and the County Assembly on a date specified in the Invitation in accordance with the Senate Rules.• Clerk furnishes each party with the documentation filed by the other.



S/No	STEP	CHECK LIST
9	Impeachment Hearing by Plenary/Special Committee	<ul style="list-style-type: none">• In Plenary, except as otherwise provided in the Rules under Standing Order 80(8), or exceptional circumstances, the proceedings shall be held in public, the Speaker presides, the Clerk reads out the Particulars of Allegations, the Speaker allows opening statements, County Assembly presents its case and calls witnesses Governor similarly presents evidence, Speaker allows closing statements.• A Special Committee shall investigate the matter and report to the Senate within ten (10) days on whether it finds the particulars of the allegations against the governor to have been substantiated.• The Same Hearing procedure applies to an impeachment hearing conducted in plenary.



S/No	STEP	CHECK LIST
10	Conclusion and Communication of Senate Decision.	<ul style="list-style-type: none">• Deliberations of both the plenary and special committees are in camera.• After deliberations, in the Plenary, the Speaker calls on the House to vote on each Charge. A simple majority of county delegations in favour of any charge means the Governor ceases to hold office. A vote that none of the charges are substantiated means the Governor stays in office.• If the Special Committee finds any ground substantiated, the Report is subjected to a plenary vote after listening to the Governor.• The Senate Speaker communicates the decision to the County Assembly Speaker and gazettes the decision when the Governor ceases to hold office.



What happens if the impeachment process becomes subject to court proceedings?

- Courts rarely halt impeachment proceedings and only do so in exceptional cases.
- Where court orders are issued, the county assembly and the Senate should comply with the court orders.
- If dissatisfied with court orders, the county assembly or Senate should challenge the orders through review or appeal against the orders
- A county assembly or the Senate should actively participate in court proceedings as opposed to ignoring the court process altogether.



PART 2

PROCEDURES AT THE COUNTY ASSEMBLY



PART 2. PROCEDURES AT THE COUNTY ASSEMBLY

2.1 Introduction

Preparation of the Impeachment Motion and activities that take place before the actual tabling of the Impeachment Motion of removal from office in the County Assembly is a critical step in the impeachment process. A number of the Impeachment Motions that have been submitted to the Senate have been dismissed on the grounds that the allegations were not substantiated; out of the 15 impeachments carried out between 2013 and 2024, only four received a nod from the Senate.

The above situation points to either the lack of evidence to support the allegations of impeachable offences committed by the governor or deputy that is the subject of the impeachment process, or poor preparation, including the gathering and collation of evidence to support the impeachment charges.

Secondly, after the submission of the draft motion of impeachment and its subsequent tabling in the county assembly, the clock starts running. If there was no proper work done in the preparatory phases, the process might be doomed due to the pressure of time arising from the tight statutory timelines that start running upon the tabling of the Impeachment Motion of removal in the county assembly.

2.2 Step 1: Collating the Grounds of Impeachment

Any Member of the County Assembly (MCA) may commence or start an Impeachment Motion against the governor or deputy governor.

The MCA intending to commence impeachment proceedings must first gather preliminary evidence and information to support the allegations of the commission of impeachable offences by the governor or the deputy governor. Impeachable offences are those that fall within the following grounds that are provided for under Article 181 of the Constitution:

- Gross violation of the Constitution or any other law;
- Where there are serious reasons for believing that the county governor has committed a crime under national or international law
- Abuse of office or gross misconduct; or
- Physical or mental incapacity to perform the functions of the office of county governor.

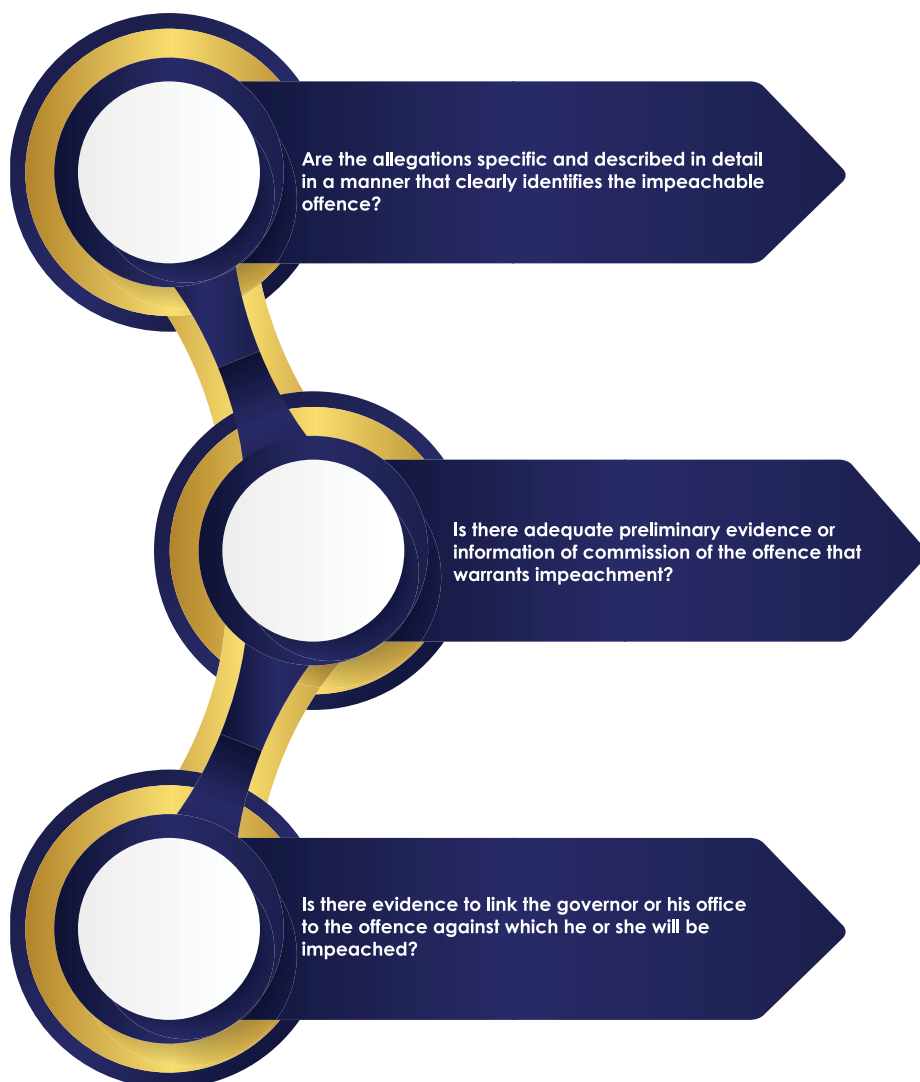


The MCA or MCAs that intend to introduce a motion must carefully evaluate the alleged wrongs or misdeeds of the Governor or Deputy Governor to be impeached as they put down the accusations in the draft motion to be handed over to the Clerk of the County Assembly.

First, the allegations must meet the threshold that the Senate and courts of law have set. Not every infraction of the law or improper conduct falls within the category of an impeachable offence.

Preparation of the Impeachment Motion

Questions to Ask





Things to Do

- Collect information and evidence that you seek to rely on in the Impeachment Motion for intended removal.
 - Examples: County Assembly reports, Committee reports, Auditor General's reports, Controller of Budget Reports, county internal audit reports, and reports or information within the departments or agencies of the county government
- Carry out a preliminary assessment of the relevance of the information collected to the allegations and the value of the evidence gathered.
- Seek technical assistance from the Office of the Clerk to access and analyse information of a technical nature, and facilitation to access information from national agencies.

Ground One: Gross Violation of the Constitution or Any Other Law

The term “gross” targets a particular category of violations other than ordinary or straightforward violations. The courts have mentioned that not every violation or breach of the Constitution can lead to the removal of a Governor or Deputy Governor. The courts have added that “it must be serious, substantial, and weighty²

In addition to the grounds identified under article 181 of the constitution of Kenya 2010, the Supreme Court has noted that a violation has to be an intentional and persistent violation of any provision of the Constitution or law, and the facts must prove the alleged violation.³

² Muiwa Inakoju and Others v Abraham Adaolu Adeleke

³ As above.



Examples of the constitutional and legal provisions whose violation may amount to an impeachable offence, (according to the courts):

- Chapter 1 on the Sovereignty of the People and Supremacy of the Constitution more specifically Articles 1, 2, and 3 (2) of the Constitution.
- Chapter 2- Article 4 that establishes Kenya as a sovereign multi-party Republic & Article 6 that establishes devolution and access to services.
- Article 10 on national values and principles of good governance.
- Chapter 4 on the Bill of Rights.
- Chapter 6- Articles 73 to 78 on Leadership and Integrity.
- Chapter 12 - Article 201 on principles of public finance.
- Chapter 13- Article 232 on values and principles of public service.
- Chapter 14 - Article 238 on principles of national security.
- Article 259 (11) on advice and recommendation.
- Any conduct that comes within the definition of the offence of treason in the Penal Code (Cap 63 of the Laws of Kenya).



Further examples (from the Nigeria Federal Court) of possible impeachable offences

- a. interference with the constitutional functions of the legislature and the judiciary by an exhibition of over constitutional Executive power;
- b. abuse of the fiscal provisions of the Constitution;
- c. abuse of the Code of Conduct for public officers;
- d. disregard and breach of the provisions on fundamental rights;
- e. interference with local government funds and stealing from the funds, pilfering of the funds...for personal gains...;
- f. instigation of military rule and military government; and
- g. any other subversive conduct which is directly inimical to the implementation of some other major sectors of the Constitution.

Additionally, the Senate has stated that “there must be a nexus between the violation and the Governor” and “the violation must have led to harm, loss or damage to society.”⁴ Finally, the Senate also stated that “the violation must have led to a loss of dignity in the office held and loss of confidence or trust in the person holding office to carry out the functions of that office with integrity and accountability.”⁵

4 The Senate (11th Parliament), ‘Report of the Special Committee on the Proposed Removal from Office of Prof. Paul Kiprono Chepkwony, the Governor of Kericho County’ (3 June 2014) 99, para. 260.

5 The Senate (11th Parliament), ‘Report of the Special Committee on the proposed removal from office of Prof. Paul Kiprono Chepkwony, the Governor of Kericho County’ (3 June 2014).



Examples of violation of the Constitution or law that the Senate has previously found not to amount to an impeachable offence

- A public declaration that purported to appoint county staff without authority of the County Public Service Board, but appointment was not actualised through letters of appointment. The Senate found that the violation did not rise to the level of an impeachable offence (First impeachment case of Meru Governor).
- Failure to submit annual reports to the County Assembly on the status of implementation of policies and plans, as required by law is not serious, substantial and weighty (Impeachment case of Murang'a Governor).
- Approval by the county Executive to fund a private entity to the tune of KES 27 Million using county government funds is a violation of the law but does not warrant removal. Senate recommended recovery of the funds from the entity (Impeachment case of Murang'a Governor).
- Failure to nominate the chair of the County Public Service Board for over a year is a violation, but which never rose to the level of gross violation (Impeachment case of Murang'a Governor).
- Failure to gazette members of the county Executive committee is a violation but did not rise to the level of an impeachable offence (Impeachment case of Murang'a Governor).
- Failure to surrender imprest within seven days, as prescribed by the law and regulations, does not amount to an impeachable offence (Impeachment of Kirinyaga Governor)
- Failure to develop a policy framework or plan to support the performance of a county function is a violation but does not rise to the level of an impeachable offence (Impeachment case of Murang'a Governor).
- Delay in the setting up of the County Budget and Economic Forum (CBEF) is a violation of the law, but not a grave one. (Impeachment case of Murang'a Governor).

NOTE: While the Senate has previously found these acts non-impeachable, each case will be determined on the basis of its own facts and merits.



Questions to Ask:

1. Do the alleged violations of the Constitution or other law amount to a “gross” violation, in other words, is it a flagrant and glaring violation?
2. Have the alleged violations been clearly identified and explained in sufficient detail?
3. Is there preliminary evidence or information that can support the commission of the identified violation?
4. Are the violations intentional and persistent? For example, is there recorded evidence of unsuccessful efforts from the County Assembly to stop the violation?
5. Is there demonstrable personal knowledge of the governor or deputy governor other connection between the person of the governor and the alleged violation(s)?

Ground Two: Abuse of Office or Gross Misconduct

The courts have held that the word “gross”, as used in the first ground as regards violation of the Constitution or law, or as used in other contexts in the Constitution, essentially means the same thing. This means that the word “gross”, as used to describe the misconduct or other offence under this ground, refers to a different category from ordinary misconduct. The courts have held that the word “gross” can only mean any of the following: atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, evil, and shocking.⁶

The Supreme Court has added that: “all the words used to describe “gross” express some extreme negative conduct; a degree of misconduct of such a serious, outrageous and flagrant nature⁷ The Senate in noting this observed that “the various meanings of the word “gross” in relation to violation. Gross violation is a flagrant violation, a glaring error, nasty, crass. It must be a severe transgression of the constitution or law.”⁸

6 Muya v Tribunal Appointed to Investigate the Conduct of Justice Martin Mati Muya, Judge of the High Court of Kenya [2022] KESC 16 (KLR), para 180.

7 *ibid* para 183.

8 Senate, ‘Report of the Special Committee on the Proposed Removal from Office, by Impeachment, of Honourable Mohamed Abdi Mohamud, the Governor of Wajir County’ (17 May 2021) p. 129, para 266.



This means that an MCA who seeks to commence an impeachment under this ground must describe not just ordinary misconduct but that which is of “an aggravated” nature on the part of the governor or deputy so as to fit in the second ground.

Furthermore, the evidence or information available must support the level of description of the misconduct so as to support the grounds.

Example 1: Gross misconduct of Governor of Nairobi

In the impeachment matter of the Governor of Nairobi, Mike Mbuvi Sonko, the Governor was accused of gross misconduct and behaving in manner that placed the office of governor in serious disrepute. The specific charge was that the Governor admitted, in public, of signing the transfer documents while he was intoxicated. The Senate found that this amounted to a serious dereliction of duty that was sufficient to remove the governor from office.

Example 2: Allegation of misconduct on Governor of Murang'a County

One of the charges against the governor of Murang'a County was abuse of office and gross misconduct, by branding county projects with his name. The special committee noted that the governor is under an obligation to build the brand of Murang'a County without making it synonymous with his image. The Governor's use of his personal name and image on bill boards and other advertisements as well as the mock examination papers smirks of personal branding and political aggrandizement. This is the use of public resources to advance personal and political goals. This is contrary to Articles 73 and 75 of the Constitution. However, the special committee did not find this gross misconduct and was, thus, not of the threshold of an impeachable offence.



Examples (by the Supreme Court of Nigeria) of gross or grave misconduct

- a. Refusal to perform constitutional functions,
- b. Corruption.
- c. Abuse of office or power,
- d. Sexual harassment.
- e. A drunkard whose drinking conduct is exposed to the glare and consumption of the public and to public opprobrium and disgrace unbecoming of the holder of the office of Governor or Deputy Governor,
- f. Using, diverting, converting or siphoning State and Local Government funds for electioneering campaigns of the Governor, Deputy Governor or any other parson,
- g. Certificate forgery and racketeering, where this is directly connected, related or traceable to the procurement of the office of the Governor or Deputy Governor.

Questions to Ask:

6. Has the alleged misconduct/ abuse of office on the part of the governor been described in sufficient detail?
7. Was the misconduct of an aggravated nature or severe enough as to fall within the scale and scope define by the Senate or the courts?
8. Is there evidence or information that supports the allegation to the level expected in (1) and (2) above?
9. Does the evidence link the person of the governor or their involvement in the alleged misconduct or abuse of office?



Ground Three: Crime under National or International Law

When a governor is accused of committing a crime, it is only necessary that evidence of such crime by the governor is availed to justify this ground. Where a governor or deputy has been convicted of an offence and is sentenced to more than six months in prison, it is an automatic ground for loss of office in the law.⁹ However, evidence of such conviction needs to be tendered in support of this ground.

It is not a requirement that a governor must have been convicted of an offence or is facing criminal charges for the County Assembly to move under this ground. What is important is the existence of evidence and information that implicates the governor or deputy in the crime.

Accordingly, the MCA must:

- Identify with specific detail the kind of crime or offence committed by the governor and describe the governor/ deputy governor's involvement in sufficient detail
- Provide evidence and information linking the commission of the crime above to the person of the governor or the deputy governor that is subject to the impeachment proceedings on this ground.

Questions to Ask:

1. Can the crime or offence be identified and described in sufficient detail?
2. Is there a personal involvement of the governor in the crime?
3. What evidence exists of the commission of the crime and the link to the person of the governor?

Ground Four: Physical or Mental Incapacity

A member of a county assembly intending to commence the removal process on the basis of physical or mental incapacity has to fulfil a number of conditions that have been put in place by courts of law. These conditions were developed from other cases that have come before the court relating to the dismissal of employees on medical grounds or removal of office holders and are actually applicable to the removal of governors on similar grounds (mental or physical incapacity).

⁹ The County Governments Act, s 32C (e).



According to the Supreme Court of Kenya, for a governor to be removed from office on grounds of mental or physical incapacity:

- The existence of a mental or physical illness must be diagnosed by a qualified medical professional
- A decision that the mental illness affects the capacity of the office holder to discharge functions must be made by a board of members from a qualified body to make such an assessment
- The process of such an assessment or determination must safeguard the rights of the governor or the deputy governor

Accordingly, removal from office on grounds of physical or mental incapacity to perform functions upon the satisfaction of a two-stage process:

First, it must be established that the governor suffers from a mental or physical illness. This has to be established by a medical professional certified to test the existence of such physical or mental illness.¹⁰

Secondly, it must be established that the identified mental or physical illness from the first stage has led to the inability of the holder of the office to perform the prescribed functions of that office.¹¹

10 Report of the Tribunal appointed to investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Land Court of Kenya, pp. 87, para 554, quoted in Hon. Lady Justice Mary Muthoni Gitumbi v The Tribunal appointed to Investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Lands Court of Kenya (S.C. Petition No 10 (E013) Of 2022), para 41.

11 Report of the Tribunal appointed to investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Land Court of Kenya, pp. 87, para 554, quoted in Hon. Lady Justice Mary Muthoni Gitumbi v The Tribunal appointed to Investigate the conduct of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Lands Court of Kenya (S.C. Petition No 10 (E013) Of 2022), para 41.



Based on the above, the MCA seeking removal based on this ground should:

1. Provide preliminary evidence or information that is sufficient to demonstrate the necessity of the following steps as described above.
2. Provide evidence of confirmation (by a medical professional) of the existence of a physical or mental incapacity
3. Provide a mechanism for assessment of the link between mental or physical illness and incapacity to perform the duties of governor or deputy governor
4. Provide for a fair process, which includes the right of the governor to challenge and defend any findings regarding their mental health and its impact on the ability to discharge the functions of the office.

In order to set off the process above, the MCA must demonstrate that:

1. The ground is clearly articulated and in detail. Specifically, whether it is physical or mental illness, and that the condition affects the performance of official duties and responsibilities of the governor or deputy governor
2. Clear evidence or information exists that is indicative of the existence of a mental or physical illness on the part of a governor, and details of the same have been described or explained in sufficient detail.
3. Evidence or information exists to support the allegation that the governor or deputy governor is unable to undertake their duties as a result of the mental condition.

Questions to Ask:

1. Is the allegation described comprehensively and in specific terms?
2. Is there enough evidence or information to support a reasonable conclusion that a governor needs to be investigated on grounds of mental or physical incapacity to perform the functions of office governor or deputy?
3. Is there preliminary evidence of a link between the alleged mental or physical incapacity and the governor or deputy's inability to perform functions of office of governor or deputy that can support a removal process?



2.3 Step 2: Drafting of the Impeachment Motion

After collecting the information in the preparatory phase of the Impeachment Motion, equally important is the drafting of the Impeachment Motion and arranging of the accompanying information and evidence to support the draft motion.

In most cases, the county assembly has technical teams to assist the MCA in the drafting of the Impeachment Motion. Some county assemblies have templates or formats, prescribed in their standing orders or rules, to be followed in the drafting of the Impeachment Motion.

In summary, the format or the structure chosen must have the following essential elements:

- A statement on the specific grounds or grounds of impeachment that form the basis of the intended removal under Article 181 of the Constitution
- Particulars of the offence/ grounds, clearly stating the specific provisions of the Constitution or the law that have been violated or which the governor or deputy has fallen short of, and the nature of that violation
- Evidence or information of the violations/ grounds annexed to the Impeachment Motion. This can be in the form of documents, sworn statements, or other evidence with respect to each identified violation collected and assessed in the preliminary phase.
- The draft motion must be supported by at least one-third of the members of the county assembly.
- Evidence of support by other members must be in the form of signatures of those in support of the draft motion.
- The mover of the Impeachment Motion must also sign the draft motion.



2.4 Step 3: Submission of the Proposed Motion of Impeachment

Before submission of the proposed motion to the Clerk to the Assembly, the draft motion must:

- Be signed by the Member proposing the Impeachment.
- Contain an affirmation that the particulars of allegations contained in the Proposed Motion are true to their knowledge and be verified in the form prescribed and provided by the clerk of the county assembly, by at least a third of all the Members that the allegations in the Proposed Motion are true of their knowledge and belief on the basis of their reading and appreciation of information pertinent to it.

2.5 Step 4: Approval of the Motion of Impeachment by Speaker

The speaker of the County Assembly is required to be impartial when deciding to approve the Impeachment Motion for impeachment. The general rules of the county assembly provide objective criteria for deciding whether to approve or reject a draft Impeachment Motion.

There is no need for MCAs to swear affidavits in support of Impeachment Motion

The Supreme Court dismissed this proposition, noting: "The source of the "verification forms", according to the Standing Order is the Clerk of the Assembly. The Assembly itself confirmed having supplied the document in question to MCAs. The Supreme Court held that the Court of Appeal correctly construed the meaning of "verification" in the context of the above Standing Order. The use of the above document has not been shown to have occasioned a miscarriage of justice or caused any prejudice to the appellant. If the intention was to have members who were in support of the Impeachment Motion swear affidavits or make other statements on oath to authenticate the Impeachment Motion, the County Assembly would have, in promulgating the Standing Order, expressly made that provision."



In rejecting or approving the draft Impeachment Motion, the speaker is expected to consider the following factors:

- The impeachment Motion should be drafted in accordance with the applicable rules of the assembly (if any)
- The Impeachment Motion should be precise and clear
- Justifiable and make a rational case as per the constitutional provisions and applicable laws
- The allegations and other content should be capable of reasonable substantiation by the mover of the Impeachment Motion
- The speaker may approve the Impeachment Motion or advise such alteration as may be necessary for purposes of compliance with the general criteria above.

In most counties, the Impeachment Motion is treated as a special motion, which means that it has special and fixed timelines within which it must be processed from the time of submission to the Clerk of the County Assembly.

2.6 Step 5: Notice of the Impeachment Motion

In most counties, the procedure that follows the submission of the Clerk is as follows:

- The Speaker must dispose of the Impeachment Motion within the first three days of receiving the draft motion
- After approval of the Impeachment Motion, the mover of the Impeachment Motion must give notice of the Impeachment Motion to the House within three days of approval of the Impeachment Motion by the Speaker.

Failure to observe timelines

If the Impeachment Motion mover fails to observe the timelines, the Impeachment Motion will be considered withdrawn and may not be re-introduced during the same session of the County Assembly, except with the consent of the speaker of the assembly.



Placement of the Impeachment Motion in the Order Paper

After approval, the Impeachment Motion must be placed in the Order Paper of the County Assembly.

The Order Paper containing the Impeachment Motion for removal must contain the following:

- The allegations and particulars that form the basis of the grounds of impeachment
- The name and signature of the sponsor of the Impeachment Motion
- Names of members and accompanying signatures of those who support the Impeachment Motion
- Upon receipt of notice of the Impeachment Motion, no names shall be withdrawn from the list at this point.

2.7 Step 6: Consideration of the Impeachment Motion

Once the order paper has been prepared and the Motion of impeachment is tabled and moved in the county assembly, a number of fundamental processes must happen, and in close succession due to the tight statutory timelines.

The County Assembly usually has seven days from the day the mover of the Impeachment Motion issues a notice of the Impeachment Motion after approval by the speaker to dispose the Impeachment Motion. Within this time, the county assembly is expected to send adequate notice to the governor or deputy governor, hear the governor, debate the Impeachment Motion, and take a vote. The county assembly is also expected to facilitate public consultation and participation during the same period.

The above steps, which follow immediately after the tabling of the Impeachment Motion, mean that the House Business Committee of the County Assembly must plan and schedule the mandatory steps in the proceedings at the time the Impeachment Motion is being placed in the order paper.



Tabling the Impeachment Motion

The mover of the Impeachment Motion is then expected to introduce the Impeachment Motion on the floor. The charges and the allegations and particulars of those charges will be read in the county assembly. Following the reading of the charges, the county assembly speaker is expected to give a number of directions after the tabling of the Impeachment Motion:

First, the County Assembly, through the office of the Clerk, must give notice to the governor or deputy governor of the intended removal, the grounds, particulars of allegations that form the basis of the grounds, and the evidence that the assembly relies on.

Secondly, the county assembly clerk must inform the governor of the venue, day, and time that the governor or deputy will attend to answer the allegations.

Thirdly, the county assembly must inform the governor or deputy of the manner of participation in the county assembly, including the right to appear personally or with an advocate, the time it will take, and the opportunity to ask and respond to questions based on the particulars of allegations adduced.

Fourthly, the county assembly is required, by the Constitution and national law, to facilitate public participation and consultation in the impeachment process. The speaker will give directions on the manner of the public participation process, bearing in mind the strictures of time.

Public Participation

There is relative flexibility in the manner in which the public participation process may be carried out. At the minimum, the following should be planned and implemented:

- The impeachment hearing at the county assembly should be open to members of the public
- The clerk to the county assembly should issue a public notice and place adverts in the media calling for the submission of views on the intended removal of the governor or the deputy governor and the grounds for the intended removal
- The county assembly may organise public forums to collect and record views regarding the impeachment of the governor or the deputy governor.



Notice to Governor or Deputy Governor

Immediately after the tabling of the Impeachment Motion, the county assembly, through the clerk's office, must:

- Issue notice to the governor or deputy governor of the allegations against them in the Impeachment Motion
- Appoint a place, date, and time for the governor to defend themselves from the allegation
- Specify the mode of participation in the county assembly proceedings (whether by lawyer, by person, or both)

Hearing the Governor

The county assembly is required to arrange for the governor to appear before the county assembly and to respond to the allegations.

A county assembly has flexibility in the manner in which it facilitates such a hearing.

The county assembly need not form a select committee to hear the governor and present findings to the assembly. Indeed, the tight timelines do not allow for a two-stage process of a committee and then the plenary. It is thus advisable that the governor appears before the entire county assembly to answer the allegations.

While the county assembly has latitude to plan its internal processes, the arrangements made for the governor must provide a fair process. Specifically:

- The governor has a right to appear before the house personally or through their lawyer and respond to the particulars of allegations.
- The governor has a right and reasonable opportunity to challenge the veracity of the accusations and evidence before the county assembly
- The governor has a further opportunity to respond to questions from members of the county assembly.



Debate

After hearing the governor and their representative, the county assembly is expected to debate the Impeachment Motion and take a vote. The county assembly can deliberate on camera or in public.

Voting

The county assembly should then take a vote on the charges against the governor, and each vote of a member of the county assembly should be recorded.

Two-thirds of the votes of members of the assembly are adequate to declare the Impeachment Motion passed.

The county assembly may have electronic systems of voting, and members may participate remotely in accordance with the rules of procedure in place to guide the county assembly on virtual or remote participation.

2.8 Step 7: Transmission of Decision to Impeach to the Senate

Where the county assembly votes to have the governor impeached, the speaker of the county is required by law to communicate the result of the vote to the Speaker of the Senate within two days of the decision.

The bundle to be submitted to the Senate include:

- a. The Impeachment Motions;
- b. The County assembly Hansard relevant to the impeachment proceedings;
- c. The division of votes list, showing the number of members that were present and voting and the vote of each member on the charge;
- d. Advert summons;
- e. Advocates;
- f. Number of witnesses and witness summons; and
- g. Records videos and other evidence.



PROCEEDINGS AT THE SENATE

The Senate plays the role of a quasi-judicial body in the impeachment of the governor or deputy governor. In other terms, the Senate plays a special role that is almost similar to a court or impartial tribunal when hearing the county assembly and the governor and deciding whether the charges or allegations, as voted by the county assembly, have been substantiated.

The Senators, either in plenary or through a special committee, play a neutral role and are required to listen to the parties and may ask questions for clarification or follow-up on issues. The process of hearing impeachments in the Senate is provided for in the County Governments Act and the Standing Orders of the Senate. These laws cover both the processes where the Senate elects to process an impeachment through a special committee and where the Senate decides to carry out the impeachment through the Committee of the Whole House.

When the committee finds the charges not substantiated, the matter ends. However, where a special committee finds any of the grounds substantiated, the plenary will have a chance to hear the governor and the assembly and have a chance to vote as to whether any of the charges are substantiated. A vote by a simple majority of the senate delegations that any charge is substantiated will mean that a governor ceases to hold office.

2.9 Step 8: Preparation for Senate Hearing

The County Assembly is required to submit to the Speaker of the Senate, within two days of the decision of the county assembly, the decision to impeach the governor or deputy governor.

Once the Speaker of the Senate receives the documents from the speaker of the county assembly, they are immediately sent to the Clerk of the Senate for processing.¹²

The speaker is required to convene a sitting of the senate to hear the charges within seven days of the receipt of the communication

12. Interview with Senate Staff.



If the house is on recess the speaker will consult on the day to recall and convene and gazzate notice calling for a speacial sitting of the senate is prepared for publication for this purpose.

Reading of Impeachment Charges in the Senate

The speaker shall, on the first convening to hear the charges, read out the charges to the Senate. The majority leader is then invited to move the Impeachment Motion before the Senate.

The establishment of a special committee is not automatic but through a motion by the Senate Majority Leader. Prior to the convening, the Senate the Senate Business Committee prepares a proposal and a motion to establish a special committee, complete with a list of 11 members proposed to sit in the special committee. The motion is tabled after the reading of the charges against the governor.

The Senate is then required to debate and vote on whether to proceed with a special committee or plenary and whether to accept the names proposed by the House. According to the rules of the Senate,¹³ the plenary can only reject the entire team selected by the Business Committee. The Senate Business Committee is composed of both the majority and minority leaders.

Senators may vote to defeat or approve the Impeachment Motion to establish a special committee. Before voting, the speaker gives direction on the manner of voting on the question of establishment of a special committee.

Communication to Parties

Whichever way the Senate votes from the day of the first convening, the county assembly and the governor or deputy governor are usually served with an invitation to appaer before the Senate detailing the processes that will follow. The invitation to appear usually served on the county assembly and the governor, the following day after the first convening, provides the following details to the parties:

13. Order 199 (2) Senate Standing Orders.



- a. Details of response to be filed and the time and place to file soft and hard copies
- b. Instructions on how to arrange, bind, and number or paginate documents
- c. Number of copies to be printed and served
- d. Request to indicate mode of participation (whether individually or by the lawyer or both)

The invitation to appear from the Senate is usually signed by the Clerk to the Senate and is addressed to the speaker of the assembly and the governor. The Senate may either deliver the letter physically to the respective offices in the county government or do a service by advertisement in a newspaper of national circulation.

The instructions given to the parties invitation to appear usually depend on the decision made, whether to carry out the hearing via a special committee or a special committee.

2.10 Step 9: Impeachment Hearing at the Senate

Impeachment Hearing via Plenary

Where the Senate votes to proceed with the impeachment through plenary, the speaker shall proceed to set the date and time for the commencement of the hearing of the evidence for purposes of investigation.

Immediately after that, the Senate (through the clerk's office) invites the governor and the county assembly to appear and be represented before the Senate during its investigations. In its communication to the county assembly, the Clerk will ask the assembly to designate not more than three MCAs (if any) to appear before the senate to represent the assembly during the investigation.

The Governor shall be informed to file (within three days) and on a specified date to file an answer to the charges with the office of the clerk of the Senate. The governor shall set out his/ her response to the particulars of the allegations and mode of participation (personal or by lawyer, or both). List of witnesses (if any) and their statements (affidavits) and any other evidence to be relied on. Similarly, the assembly will be invited (within three days of service) on a date/ time specified to provide the three MCAs who shall attend and participate,



the mode of appearance in the Senate, a list of witnesses and affirmed statements by each witness, and any other evidence to be relied on.

Usually, on the date of filing of the documents, the Senate team will oversee the exchange of documents filed by the county assembly and the governor's teams.

The Senate officials will ensure that the documents filed by the parties are numbered consecutively and are bound in book form, in volumes with proper titles appearing on the covers, as per the instructions in the letter of service.

The senate may, at the request of the county assembly or governor, cause summons to be issued or invite any person to testify or give evidence. the Senate also considers other preliminary matters/applications by parties that need to be determined prior to the start of the hearing, such as, validity of documents submitted, timelines.

Where a party chooses not to appear, the Senate shall record this and proceed but may, "for exceptional purposes", permit a later appearance upon a request by the governor to appear.

Once the plenary hearing commences, it shall proceed continuously without interruption by any other business until the hearing of evidence is completed. At the beginning, the Senate Speaker is required to allocate time between the assembly team and the governor that is spread over the following main stages of the hearing:

- a. Opening statement (for both the County Assembly and the Governor);
- b. Hearing of the case of the county assembly;
- c. Response of the Governor; and
- d. Questions by senators and responses from the teams.

The parties may raise preliminary issues or questions. Such matters have usually been considered for at least 30 minutes before the hearing, in accordance with the hearing programme.



Senate can interrogate the County assembly's compliance with constitutional provisions

"[t]he Senate's mandate in the impeachment process of the Governor will extend to consideration of the process undertaken at the county assembly, if the fundamental provisions of the Constitution or the law are alleged to have been violated or contravened and it is therefore open to either party to canvass this point before the Special Committee of the Senate or the Senate in plenary."

Nature of evidence in response to allegations

During the Senate plenary proceedings against Governor Mike Sonko of Nairobi County, the County Assembly tendered evidence of facilitation of his family members to attend official functions abroad. The Senate observed that the Governor merely denied the said allegations without offering the Senate any evidence to the contrary. The Plenary found the ground to have been substantiated.



Order of Plenary Proceedings

- The Clerk to the Senate will read out the allegations against the governor, followed by an opening statement by each party, starting with the county assembly and then the governor. Each party will not take more than 30 minutes.
- The county assembly is then called to make its case, within the time allocated, and may call witnesses, as specified in its file documents and statements. Every witness shall take the prescribed oath before giving evidence to the Senate
- This is followed by the Governor's team, who shall also conduct their case within the allocated time and may call witnesses as per the filed documents and statements. The only persons who may give evidence before the senate: governor, witness, person summoned
- However, no team may introduce new evidence on allegations against the governor, other than what was filed by the parties.
- The mode of presentation of the case in the plenary shall be by examination in-chief, cross-examination, re-examination (re-examination is limited to clarification of issues that may have arisen during the cross examination)
- A senator may put a question (in not more than two minutes) or such further time as the speaker may determine during the presentation of the case by either party.
- The trial process and presentation of evidence shall be open to the public unless there are special reasons for carrying the session in camera
- The Speaker may rule on questions of procedure and substance related to the trial on any issue not covered by the Standing Orders and the Speaker's ruling shall be final
- At the end of the presentation of the evidence, each party will give a closing statement, starting with the county assembly and then the governor. Each party will not take more than one hour.
- Thereafter, the Senate will resume an "in camera" to deliberate on the proceedings
- This will be followed by a voting on each of the charges against the governor



Impeachment Hearing via Special Committee

The Senate may, at the first convening and reading of charges, vote in favour of the Impeachment Motion to establish a special committee to investigate the allegations of the governor or deputy governor. In such a case, the 11-member special committee nominated in the Impeachment Motion will investigate the allegations and table a report in the plenary.

After approval of the Impeachment Motion to establish the special committee, the committee shall :

- a. elect a chairperson and a vice-chair from among its members;
- b. appoint a date for the commencement of the hearing of evidence for purposes of investigation;
- c. the committee shall invite the governor to appear and shall inform the governor that he or they may be represented;
- d. notify the assembly of the date for commencement and, get their team (not more than three); and
- e. the service shall either be physical or through advertisement in a newspaper of national circulation.

In the letter of service from the committee, the committee shall inform the governor on the day (within three days) for submission of evidence, mode of participation, list and details of witnesses, and any other evidence to be relied on. The letter to the county assembly shall inform them of the same. The letter will also indicate the format and manner in which the documents will be paginated and arranged and the number of copies to be filed (usually 80 copies for supply to all senators).

After that, on the same day of filing, the Senate team will oversee the exchange of documents between the county assembly and the governor's teams.

The Committee may, at the request of either party, summon a person to give evidence.

Where a party opts not to appear, this shall be recorded, and proceedings commenced, but later appearance by a party may, for exceptional reasons, be allowed.



The Committee has three days to conduct its business. The first day is dedicated to the county assembly, the second day is for the governor, the third day is for preparing the report, and the fourth day is for tabling the committee report in the plenary.

The report of the special committee is usually required to be tabled in the plenary within ten days of the committee's setting up, as per the provisions of the County Governments Act.

Special Committee report on the impeachment of the Governor of Murang'a County, p.79

"The Special Committee is cognizant that its mandate is limited only to interrogating the constitutionality of the Assembly's actions and does not extend to interrogating the debates of the Assembly and other inner workings of that devolved legislature."



Order of Special Committee Proceedings

- The special committee shall hold continuous hearing, uninterrupted by any other business, until completion of hearing. At the beginning the Clerk shall read out the charges.
- Preliminary issues or questions shall be dealt with and disposed in not more than 30 minutes unless otherwise directed by the committee.
- This shall be followed by the opening statements of both parties, starting with the county assembly, and followed by the governor. Each party shall take no more than 45 minutes.
- The Senate will use the first day of the committee sitting to set out the case of the assembly. The mode of presentation will take the form of: examination-in-chief, cross-examination by the governor's team, and re-examination of the witness in order in order to clarify issues that came up during the cross-examination. Each witness will swear a prescribed oath before giving evidence to the Senate.
- The second day will follow the same general format with the governor or deputy governor laying out their defence. No party shall provide new evidence other than what was filed. Only governor, CA, and their witnesses, or person summoned by committee, may give evidence before the committee.
- Members of committee may put questions to the witnesses and there is no express time limitation as is the case in trial within the plenary.
- At the close of the governor's case on the second day, both parties will be invited to give their closing statements after trial, first by the county assembly and then followed by the governor. Each party will take no more than 30 minutes.
- On the third day, after conclusion of hearing, committee retreats to deliberate and to prepare the report for presentation to the assembly. The Chairperson will rule on any matter of substance and procedure that is not provided for in the rules and the chairperson's ruling shall be final.
- Committee deliberations are open to the public but the committee may direct that the special committee holds deliberations in camera on matter.



2.11 Step 10: Conclusion of Senate Impeachment Hearing

After the conclusion of the hearing of all parties, the Senate is required to take a vote. However, the final decision of the Senate is dependent on whether the hearing was through a special committee or plenary and on the outcome of the committee hearing.

The law provides that where the special committee finds that none of the charges against the governor were substantiated, the matter terminates there. However, where the committee finds any of the allegations to have been substantiated, there will be a further process after the tabling of the report.

Conclusion of Hearing by Plenary

After the closing of the case by parties in the plenary, the speaker may direct that the plenary goes in camera to deliberate on the merits of the allegations. After that, the speaker will call on the senators to vote on each of the allegations against the governor.

The voting process is held in public and is by delegation. A vote by a majority of the delegations to confirm the charges will result in the removal of the governor and deputy governor from office. A rejection of all the charges by a simple majority of the delegations will mean that the governor or deputy governor continues to hold office.

Where the Senate votes to impeach the governor, the Speaker of the Senate is required to communicate the decision immediately to the speaker of the county assembly. The Speaker also publishes, by a notice in the gazette, the removal from office of the governor through impeachment.

The resolution of the Senate to remove the governor or deputy governor will pave way for the next steps, which may include paving the way for the assumption of office of the deputy governor or the nomination and confirmation of a new deputy governor, as the case may be.



Conclusion of Hearing by a Special Committee

Where the Committee finds that any of the grounds have been substantiated, the Committee's report shall be tabled before the plenary.

The speaker will afford the governor an opportunity to be heard on the allegations that were found to be substantiated.

The governor will be asked questions by senators and give responses.

This will be followed by deliberations of the plenary on the specific allegations that the special committee found to have been substantiated.

The speaker will then put to the vote whether the plenary agrees that the charges were substantiated. A simple majority vote of county delegations to confirm the findings of the committee will result in the removal from the office of the governor or deputy governor. A rejection of the committee's findings will mean that the governor continues to hold office.

Where the Senate votes to impeach the governor, the Speaker of the Senate is required to communicate the decision immediately to the speaker of the county assembly. The speaker is also required to publish, through a notice in the gazette, the removal from office of the governor through impeachment.

This communication will pave the way for the next steps, which may include paving the way for the assumption of office of the deputy governor or the nomination and confirmation of a new deputy governor, as the case may be.





PART 3

JUDICIAL PROCEEDINGS AGAINST IMPEACHMENT



PART 3. JUDICIAL PROCEEDINGS AGAINST IMPEACHMENT

Governors or deputy governors facing impeachment often approach courts for various reliefs or orders. In many cases, governors or deputy governors seek to stop impeachment proceedings on the grounds that their rights are being interfered with or are threatened to be interfered with by the impeachment proceedings.

In some cases, court orders are issued in the midst of the impeachment process, which is characterised by strict timelines that run until the conclusion of the process at the Senate. Whenever such court orders are issued, they have the potential to disrupt the impeachment process. Many questions arise in such situations:

1. Is the county assembly or the Senate (as a legislative organ) bound by orders of a court?
2. Should a county assembly or the senate halt proceedings of impeachments, where such an action will significantly disrupt the strictly time-bound process?
3. How should the county assembly or the Senate engage with court proceedings?

Courts Rarely Halt Impeachment Proceedings

The courts have, over time, developed rules that assist the county assemblies and the Senate in carrying out their role of impeachment, even with the existence of court proceedings:

- a. Courts have now recognised that the duty to impeach is vested by law in the county assembly and the Senate and not in the courts;
- b. Accordingly, the Supreme Court has ruled that courts have no power to interrupt the impeachment process, unless in extreme situations warranting intervention; and
- c. While courts have the power to supervise the impeachment process, they will only intervene after the conclusion of the impeachment process.



Comply with Court Orders

Parliamentary privilege and immunity and the principle of separation of powers do not shield the county assemblies and the Senate from court orders. When court orders are issued, they are binding on the county assembly and the Senate and must be complied with.

Failure to comply with court orders may result in the invalidation of the entire process of impeachment by the courts.

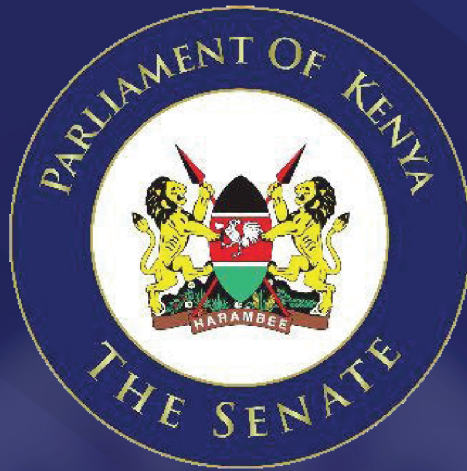
Participate Actively in Court Proceedings

Ignoring court orders against the county assembly or the Senate is not the solution.

If court orders are issued against a county assembly or the Senate, the most preferable option is to participate actively in the court proceedings.

The county assembly or Senate may apply for review of the court orders or appeal to the next court for variation or the setting aside of the court orders.





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