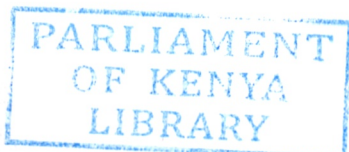


REPUBLIC OF KENYA



PARLIAMENT

THE SENATE



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by: Sen-Bulow
12/06/2016
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ELEVENTH PARLIAMENT – FOURTH SESSION

REPORT OF THE SENATE STANDING COMMITTEE ON FINANCE,
COMMERCE & BUDGET
ON


THE PETITION BY RESIDENTS OF MACHAKOS COUNTY
CONCERNING

BREACH OF THE CONSTITUTION AND OTHER LAWS BY THE COUNTY
EXECUTIVE AND THE COUNTY ASSEMBLY OF MACHAKOS

Approved

Speaker
9/6/16

**PARLIAMENT BUILDINGS
NAIROBI**

Rt. Hon. Speaker
*You may approve for
tabling.*

09/06/16

JUNE 2016

PREFACE

Mr. Speaker Sir, on behalf of the Members of the Finance, Commerce and Budget Committee and as required under the Senate Standing Orders, I hereby present to this House, the Committee's Report on the petition by Citizens of the Republic of Kenya, and residents of Machakos County, that was presented to the Senate by the Sen. Ekwere Ethuro, Speaker of the Senate.

The petition was brought to the attention of the Senate by twenty four (24) residents from Machakos County. The petition was tabled in the Senate on 25th June, 2015, and thereafter, committed to the Standing Committee on Finance, Commerce and Budget for consideration and determination.

Mr. Speaker Sir, it is significant to mention that the purpose of the approval of this report is to protect and enhance the process of law making in the County Governments and set the benchmarks for developing a shared vision in the management of public finance.

Further, the County governments should appreciate the importance of development planning and budgeting in meeting the increasing demands in service delivery versus limited resources. The committee hopes that this report will assist in entrenching the independence of county assemblies in performing their functions of representation, legislation and oversight as espoused in Section 9 of the County Governments Act, 2011.

Mr. Speaker Sir,

The Standing Committee on Finance, Commerce and Budget is established pursuant to Standing Order No. 208 and is mandated, to investigate, inquire into and report on all matters relating to coordination, control and monitoring of the county budgets and to:

- a) *Discuss and review the estimates of County governments and make recommendations to the Senate;*
- b) *Examine the Medium term Budget Policy Statement presented to the Senate;*
- c) *Examine and report on the Budget allocated to constitutional commissions and independent offices;*
- d) *Examine bills related to the Counties;*
- e) *Examine the Budget, including the Division of Revenue Bill; and*
- f) *Examine and consider all matters related to resolutions and Bills for appropriations, share of national revenue amongst the counties and all matters concerning the National Budget, including public finance, monetary policies and public debt, trading activities and commerce, tourism, investment and divestitures policies, planning and development policy.*

Mr. Speaker Sir,

The Committee on Finance, Commerce and Budget was constituted by the House on Thursday 13th March 2014 during the Second Session of the Eleventh (11th) Parliament and as currently constituted, comprises the following members:

1. The Hon. Sen. Billow Kerrow, MBS, MP. -Chairperson
2. The Hon. Sen. Peter Ole Mositet, MP. -Vice-Chairperson
3. The Hon. Sen. G. G. Kariuki, EGH, MP.
4. The Hon. Sen. Moses Wetang'ula, EGH, MP.
5. The Hon. Sen. Beatrice Elachi, CBS, MP.
6. The Hon. Sen. Mutahi Kagwe, EGH, MP.
7. The Hon. Sen. (Dr.) Boni Khalwale, MBS, MP.
8. The Hon. Sen. (Prof.) Peter Anyang' Nyong'o, EGH, MP.
9. The Hon. Sen. (Dr.) Zipporah Kittony, MBS, OGW, MP.
10. The Hon. Sen. Aaron Kipkirui Cheruiyot, MP.
11. The Hon. Sen. Catherine Mukite Nabwala, MP.
12. The Hon. Sen. Mutula Kilonzo Junior, MP.
13. The Hon. Sen. (Prof.) John Lonyangapuo, CBS, MP.
14. The Hon. Sen. Paul Njoroge Ben, MP.
15. The Hon. Sen. (Dr.) Wilfred Machage, MGH, MP.
16. The Hon. Sen. (Dr.) Agnes Zani, MP.

I. PRAYERS OF THE PETITIONERS FROM MACHAKOS COUNTY

Pursuant to provisions Article 119 of the Constitution of Kenya and part XXIV of the Senate Standing Orders, the petitioners sought answers to the following prayers -

- (a) That the Senate urgently investigates the matters raised in this petition and comes up with appropriate recommendations as may be necessary to address the said issues;
- (b) That the Senate takes measures aimed at protecting devolution, and tax payer's monies, including recovery of public funds from those found to have irregularly benefitted from the same;
- (c) That the Senate calls for production of documents to enable inspection by the Auditor General and the appropriate Senate Committee; and
- (d) That the Senate requests the Ethics and Anticorruption Commission to expeditiously complete investigations on each and every allegation and to listed above and to recommend prosecution of all persons found to be culpable.

Committee sittings

In deliberating on issues on by the residents of Machakos County concerning breach of the Constitution and other laws by the County Executive and County Assembly of Machakos, the committee held a total of two (2) sittings and received both oral and written submissions from the petitioners and the Governor of Machakos County Government, Hon. (Dr.) Alfred Mutua.

II. COMMITTEE GENERAL RECOMMENDATIONS

The committee having considered the matters in the petition recommends as follows:

That –

1. The Director of Public Prosecutions (DPP) carry out further investigations, with a view to taking legal action, on the procurement of the Land Cruiser V8 vehicle for the Governor's office.
2. On the basis of the evidence submitted to the Committee, the Committee finds that due process was followed in the construction of the Machakos Peoples' Park.
3. The DPP take legal action on the purchase of the police vehicles as the county was in direct breach of the law and government financial procedures in purchasing second hand vehicles.
4. The Controller of Budget prepares and submits a report to the Senate on the authorization granted by her office to county governments to purchase security vehicles. Schedule four of the Constitution delineates police services as a National Government Function and the continuing purchase of police vehicles by county governments requires explanation on why counties spent public money on National Government functions.
5. With regards to the allegation on single sourcing, the procurement process was not through single sourcing.

- 6.** The procurement of second hand vehicles was in was in direct breach of the law and government financial procedures against purchasing second hand vehicles. The Committee recommends that DPP take legal action on the purchase of the ambulances.
- 7.** The DPP investigate the purchase of the used vehicles as the Governor had failed to submit a pre-purchase evaluation done by the Ministry of public works or a Government registered valuer establishing the length of usage and true worth of the second hand vehicles.
- 8.** The accounting officer of the Assembly be held liable for this contravention of the law as county assemblies cannot purport to give itself themselves power to break national laws.
- 9.** The committee was not satisfied that the appropriate procurement procedures were followed in the purchase of the forty tractors and accordingly recommends that the DPP investigate the procurement process with a view to taking legal action if culpability is found.
- 10.** With respect to the appointment of the chief officers the committee was not satisfied that the recruitment process was done in accordance with the law. The Committee recommends that this matter be investigated by the DPP with a view of taking legal action.
- 11.** With respect to the issues of nepotism, the committee finds that the petitioner's allegations are valid and the DPP should investigate the names outlined by the petitioner with a view of taking legal action.
- 12.** The matters raised by the petitioner on irregular payments and expenditure in breach of the law are serious and the Governor be personally surcharged for the irregular use of Ksh. 7.5 million of public funds expenditure. That further, appropriate legal action is taken by the DPP.

- 13.** The matters raised by the petitioner on irregular payments of confidential expenditure are serious and appropriate legal action be taken by the DPP including instituting recovery of the funds.
- 14.** The allegations concerning irregular payments of allowances to MCAs are confirmed as supported by the Auditor General's report. The Committee further recommends that monies paid be recovered from the members of the county assembly and the DPP take legal action to prosecute anyone found to have committed an offence of bribery.
- 15.** The matters raised by the petitioner on irregular expenditure on foreign travel are serious and should be investigated further by the Ethics and Anti Corruption Commission.
- 16.** If the allegations by the petitioner are found to be true, all delegates who took part in the foreign trip to South Africa should be personally surcharged for irregular expenditure.
- 17.** Members of the County Assembly should undertake their responsibilities in line with Article 226 of the Constitution.
- 18.** The matters raised by the petitioner on the irregular expenditure relating to the investor conference and cocktail part are serious and should be investigated further by the DPP with a view to taking legal action.
- 19.** The intermittent use of manual systems was a problem faced by all county governments during the transition period and has now been effectively addressed by most counties.
- 20.** The county government should expedite the establishment of the audit committee.
- 21.** The matters raised by the petitioner on the irregular procurement of goods and services amounting to Ksh. 14, 062,067.00 are serious and the DPP should take appropriate legal action.

- 22.** The DPP investigate the procurements related to the purchase of security gadgets and apparatus.
- 23.** The procurement process for the Kithimani-Makutano ma Mwala road was above board as the Public Procurement and Disposal Act permits that a road tender can be divided into lots with no limitation on the number of lots. The procurement process for each lot was also done in accordance with the law and accordingly the allegation of the petitioner in this regard be dismissed.
- 24.** The National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) should carry out further investigations to ensure that all statutory payments have been made by the county government.
- 25.** NHIF and NSSF should ensure that every county government makes statutory remittances promptly.
- 26.** The Auditor General carries out a forensic audit of the county revenue account as well as the banking of locally collected revenues.
- 27.** The matters raised by the petitioner on irregular expenditure and procurement of goods and services amounting to Ksh. 288,137,582.00 are serious and should be investigated further by the DPP with a view to taking legal action.

ACKNOWLEDGEMENT

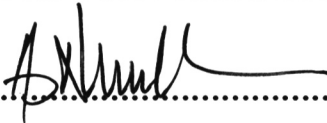
Mr. Speaker Sir,

The Committee is grateful to the Petitioners and the Governor, Machakos County who appeared before the Committee to share on their roles and how their actions may have impacted on the alleged breach of the Constitution and other laws by the County Executive and County Assembly of Machakos.

The Committee is also particularly grateful to the Offices of the Speaker, the Clerk of Senate for the support received as it discharged its mandate. The Committee also wishes to thank the Senators who participated in the process to ensuring that the Committee completes its report.

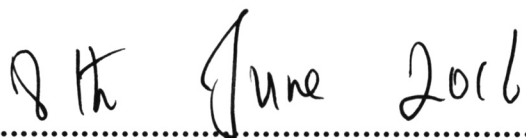
Mr. Speaker Sir,

On behalf of the committee, and pursuant to standing order 227(2), It is therefore my pleasant and honourable duty to present and lay on the table of the house the report of the Finance, Commerce and Budget Committee on the petition by residents of Machakos County concerning breach of the Constitution and other laws by the County Executive and County Assembly of Machakos on the issues raised for consideration and subsequent adoption.

SIGNED: 

SENATOR BILLOW KERROW, MBS, MP.

(Chairperson, Standing Committee on Finance Commerce and Budget)

Date: 

III. INTRODUCTION

REVIEW OF THE PETITION TO THE SENATE OF THE REPUBLIC OF KENYA IN THE MATTER OF THE COUNTY GOVERNMENT OF MACHAKOS

3.1 Brief on the Machakos Petition

1. The Constitution under Articles 37 and 119 grants every Kenyan a right to petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation. The Petition to Parliament (procedure) Act No. 22 of 2012 makes provision for the procedure for the exercise of the right pursuant to those Articles. The Act also defines the format of petitions to be addressed to the Senate or National Assembly.
2. This petition has been presented by residents of Machakos County concerning breach of the Constitution and other laws by the County Executive and County Assembly of Machakos. The petition has been signed by the petitioners.

IV. HIGHLIGHTS ON THE ISSUES PETITIONED

The Petitioners allege that-

a) That the Machakos County Executive irregularly incurred expenditure by making purchases and carrying out projects through single sourcing, without following the laid down procurement laws, in the-

(i) purchase of 1 Toyota Land cruiser VX motor vehicle;

(ii) construction of Machakos Stadium;

(iii) construction of Machakos People's Park;

(iv) purchase of 120 Police vehicles;

(v) purchase of 70 ambulances; and

(vi) purchase of 40 tractors;

b) That the Machakos County Assembly irregularly incurred expenditure in the purchase of a vehicle for the Speaker through single sourcing and without following the laid down procurement laws and procedures;

c) That the County Executive has carried out several appointments in breach of the law as to vetting. The appointments have also been characterized by nepotism;

d) That the County Executive has made several irregular payments from public funds without following the applicable provisions of the law. This includes-

(i) irregular payments of allowances by the County Executive to Members of the County Assembly (MCAs);

(ii) irregular expenditure on foreign travel;

(iii)irregular expenditure on an investor conference; and

(iv)other expenditures simply marked as ‘confidential’;

- e) That there has been improper interaction between the County Executive and the County Assembly including in the making of payments by the County Executive to MCAs to advance objectives of the Executive. This has led to watering down of the principle of separation of powers at the County and effectively rendered the County Assembly ineffectual in exercising its oversight role over the County Executive.

Other grievances raised by the petitioners relate to-

- a) failure to implement the IFMIS system by the County Executive;
- b) failure to constitute an Internal Audit Committee as required by the Public Finance Management Act (No. 18 of 2012);
- c) irregular procurement of goods and services for sums exceeding Kshs.300 million;
- d) purchase of fictitious and unjustified security gadgets and apparatus;
- e) construction of the 33 kilometer Kithimani-Makutano road without following public procurement laws;
- f) non-remittance of statutory deductions despite the same having been deducted from employees’ salaries;
- g) failure to deposit revenue in the County Revenue Fund; and
- h) irregular and unexplained income and expenditures by the County Executive of Machakos.

V. PRAYERS OF THE PETITIONERS

The petitioners' prayer was that the Senate of the Republic of Kenya intervenes and: -

- (a) That the Senate urgently investigates the matters raised in this petition and comes up with appropriate recommendations as may be necessary to address the said issues;
- (b) That the Senate takes measures aimed at protecting devolution, and tax payer's monies, including recovery of public funds from those found to have irregularly befitted from the same;
- (c) That the Senate calls for production of the following documents to enable inspection by the Auditor General and the appropriate Senate Committee:

In respect of the purchase of the Toyota Land cruiser motor vehicle, ambulances and Police vehicles:

- i. The advertisements and invitation for bids.
- ii. The applications and submission by various bidders in respect of the tender.
- iii. The minutes of the tender/quotation opening.
- iv. The evaluation reports.
- v. Tender Committee minutes and decision.
- vi. The award.
- vii. The acceptance documents.
- viii. Contracts drawn.
- ix. Delivery documents
- x. Payment documents. xi. Log books.

In respect of the purchase of 40 tractors:

- i. The advertisements and invitation for bids.
- ii. The applications and submission by various bidders in respect of the tender.
- iii. The minutes of the tender/quotation opening.

- iv. The evaluation reports.
- v. Tender Committee minutes and decision.
- vi. The award.
- vii. The acceptance documents.
- viii. Contracts drawn.
- ix. Delivery documents
- x. Payment documents.
- xi. Log books.

In respect of the construction of Machakos People's Park:

- i. The advertisements and invitation for bids.
- ii. The applications and submission by various bidders in respect of the tender.
- iii. The minutes of the tender/quotation opening.
- iv. The evaluation reports.
- v. Tender Committee minutes and decision.
- vi. The award.
- vii. The acceptance documents.
- viii. Contracts drawn.
- ix. Delivery documents
- x. Certificate of completion.
- xi. Payment documents.

In respect of irregular appointments:

- i. The documents supporting all appointments made by the County Government from 2013 to date.
- ii. The notices issued advertising all jobs and positions in the County Government.
- iii. In relation to each appointment minutes confirming the approval of the County Public Service Board including evidence that the Board had been in existence prior to any such appointment.
- iv. Evidence of public participation in respect of the appointments.

- v. Records kept of the applications for each of the positions. The records or minutes of the interviews and the scores thereof of each candidate in respect of all the positions; and
- (d) That the Senate requests the Ethics and Anticorruption Commission to expeditiously complete investigations on each and every allegation and to listed above and to recommend prosecution of all persons found to be culpable.

VI. SUBMISSION FROM PARTIES

In establishing facts, the committee invited and met with the Petitioner and the Governor, Machakos County.

Submission by the Petitioners

The petitioners appeared before the committee on 22nd July, 2015, to make their presentation with regard to the contents of the petition before the committee.

The petitioners requested the Finance committee of the Senate to look into the prayers of the petition and informed the Committee that all their pleas' were attached in the submissions as provided to the Committee with all the corresponding evidence;

Submission by Hon. (Dr.) Alfred Mutua - Governor Machakos County

The Governor appeared before the committee on 12th November, 2015, to make his presentation on behalf of the County Government of Machakos with regard to the contents of both petitions before the committee.

He informed the Committee that on the petition relating to breach of the constitution and other laws by the county executive and the county assembly of Machakos, he would send submissions. He however later wrote a letter to the Committee to be excused from appearing again, but clarified that if there was any clarification required he would commit himself to appearing in person. **(Annexe II).**

VII. KEY ISSUES TO BE ADDRESSED IN THE PETITION

The Petitioners allege that-

1. Irregular purchase of a motor vehicle in breach of the Constitution and Procurement Laws:

- 1.1. **THAT** the County Executive has irregularly purchased one (1) Toyota Land cruiser VX motor vehicle at the cost of Kshs 6.5 million without following procurement procedures set out under Article 227 of the Constitution and the Public Procurement and Disposal Act 2005.
- 1.2. **THAT** the same breached the Government policy on purchase of second hand motor vehicles.
- 1.3. **THAT** the special Report of the County Assembly Public Accounts and Investments committee dated March, 2015, confirms that there was no proper explanation for breach of the Public Procurement and Disposal Act, and, instead of taking action, the County Assembly appears to have brushed over and excused the non-compliance with and admission of breach of the Law.

Committee Observation

The Committee observed that the submissions from the county government did not respond to the matter of irregular purchase of one (1) Toyota Land cruiser VX motor vehicle at the cost of Kshs 6.5 million. The submissions had instead made reference to the Toyota Land Cruiser and Toyota Harrier Station Wagon motor vehicles purchased by the County Assembly.

The Committee noted that the petitioner had submitted evidence of a delivery note to Machakos County from Extreme Autos Ltd. for one Land Cruiser V8, KBU 900L.

The Committee noted that the county government had failed to submit a pre-purchase evaluation done by the Ministry of public works or a Government registered valuer establishing the length of usage and true worth of the second

hand vehicles. The Committee further noted that the auditor general had raised queries on the procurement procedure applied in the purchase of the vehicles.

Committee Recommendation

The Committee recommends that the Director of Public Prosecutions (DPP) carry out further investigations on the procurement of this vehicle with a view to taking appropriate legal action.

2. Irregular construction of Machakos Peoples Park

- 2.1 **THAT** the County Executive single sourced the construction the Machakos Peoples' Park without following procurement procedures set out under Article 227 of the Constitution and the Public Procurement and Disposal Act 2005.
- 2.2 **THAT** the Procurement of a contractor was done without following the procedure set out under the Public procurement and disposal Act and in breach of the Constitution.

Committees Observation

The Committee on reviewing the procurement documents for the construction of the Machakos Peoples' Park observed that, the County Government had assigned procurement of various works for the park to the different departments of the Machakos County Government.

The Committee further observed that each department undertook procurement for the various works required under it. The submissions showed evidence of competitive procurement among various pre-qualified suppliers for the different goods and services required for construction of the park.

The petitioners did not submit any evidence to support their allegations on the irregular construction of Machakos Peoples Park.

Committees Recommendation

On the basis of the evidence submitted to the Committee, the Committee finds that due process was followed in the construction of the Machakos Peoples' Park.

3. Irregular purchase of 120 Police vehicles.

- 3.1 **THAT** without legal justification the County Executive procured and carried out purchase of 120 police vehicles, by way of single sourcing, without following procurement procedures set out under Article 227 of the Constitution and the Public Procurement and Disposal Act 2005.
- 3.2 **THAT** the same also breached Government policy on purchase of second hand motor vehicles.

Committees Observation

The Committee observed that the County Government had purchased 120 police vehicles through competitive tendering as indicated by submissions. The Committee further observed that six companies had bid for the tender to supply the security vehicles and Extreme Auto Ltd. had been awarded the tender amounting to Ksh. 137,200,000 after meeting all the tender requirements **(See Annex IV)**.

The Committee further observed that the vehicles purchased were second hand vehicles and that no pre-purchase evaluation had been done by the Ministry of Public Works or a Government registered valuer establishing the length of usage and true worth of the second hand police vehicles

Committee Recommendations

The Committee recommends that DPP take legal action on the purchase of the police vehicles as the county was in direct breach of the law and government financial procedures in purchasing second hand vehicles.

The Committee further recommends that the Controller of Budget prepare and submit a report to the Senate on the authorisation granted by her

office to county governments to purchase security vehicles. Schedule four of the Constitution delineates police services as a National Government Function and the continuing purchase of police vehicles by county governments requires explanation on why counties spent public money on National Government functions.

4. Irregular purchase of Ambulances:

- 4.1 **THAT**, the County Executive carried out purchase of 70 ambulances and 10 motor cycle ambulances, by way of single sourcing, without following procurement procedures set out under Article 227 of the Constitution and the Public Procurement and Disposal Act.
- 4.2 **THAT** the same also breached the Government policy on purchase of second hand motor vehicles.

Committees Observation

The Committee observed that the County Government had purchased 70 ambulances through competitive tendering. The Committee further observed that eight companies had bid for the tender to supply the ambulances and M/s Pharmaken Ltd. had been awarded the tender amounting to Ksh. 125,300,000 after meeting all the tender requirements **(See Annex V).**

Committee Recommendations

With regards to allegation number one, the Committee notes that procurement process was not through single sourcing.

On the second allegation, the Committee notes that the procurement of second hand vehicles was in was in direct breach of the law and government financial procedures against purchasing second hand vehicles. The Committee recommends that DPP take legal action on the purchase of the ambulances.

5. Irregular purchase of Speakers' vehicle by the County Assembly:

- 5.1 **THAT**, the County Assembly purchased two vehicles, as below, for use by the Speaker without following the applicable procurement laws and procedures-
- a) a pre-used or second hand Toyota Harrier Station Wagon 2360 CC at Kshs 2,600,000.00; and
 - b) a pre-used or second hand Toyota Prado 2690 Cc at Kshs 7,000,000.00.
- 5.2 **THAT** purchase of the two motor vehicles was by way of single sourcing, without following procurement procedures set out under Article 227 of the Constitution and the Public Procurement and Disposal Act 2005.
- 5.3 **THAT** instead of having the payment in respect of the Toyota Prado at Kshs 7, 000,000.00 made in the name of the supplier it was made to a 3rd party at the request of the County Speaker.
- 5.4 **THAT** the request and action of the County Speaker was in breach of the law and especially that the payment was made by the Speaker rather than the Clerk of the County Assembly who is the Chief Executive of the County Assembly and the accounting officer.
- 5.5 **THAT**, the Speaker breached the Government policy on purchase of second hand motor vehicles in the purchase of vehicles referred to above.
- 5.6 **THAT** the County Assembly Public Accounts and Investment Committee which is the watchdog committee that assists the County Assembly in its oversight role over the County Executive, rubber stamped the issues raised in the Kenya Audit report and made no punitive recommendation for the flagrant breach of procurement laws and the Constitution.

- 5.7 **THAT** the County Assembly of Machakos failed to table the Auditor General's report as required by law and thereby failed to hold the Speaker of the County Assembly and the Executive accountable.

Committee Observation

The Committee observed that the County Assembly had purchased one second-hand Toyota Harrier Station Wagon and one second-hand Toyota Prado (**See Annex I**) motor vehicles at a total cost of Kshs. 9.6 million. The Committee further observed that the purchase of second-hand vehicles had been authorised by the County Assembly through a motion passed in the Assembly on the premise of an existing county policy to purchase pre-used motor vehicles to save on costs.

The Committee further noted that this matter had been raised by the Auditor General in his FY 2013/14 audit report.

Committee Recommendation

The Committee recommends that the DPP takes legal action against the county government as no submissions had been made of a pre-purchase evaluation done by the Ministry of public works, or a government registered valuer establishing the length of usage and true worth of the second hand vehicles.

The Committee recommends that the Accounting Officer of the Assembly be held liable for this contravention of the law as county assemblies could not purport to give themselves powers to break national laws.

6. Irregular purchase of Tractors:

- 6.1 **THAT** the County Executive purchased 40 tractors, by way of single sourcing, without following procurement procedures set out under Article 227 of the Constitution and the Public Procurement and Disposal Act 2005.

6.2 **THAT** actions of the County Executive amounted to breach of Government policy on purchase of second hand motor vehicles in purchase of the tractors referred to above.

Committee Observation

The Committee observed that the County Government had undertaken single sourcing in the purchase of the 40 tractors as all bidders had quoted above the reserve price during the open tender. The County Government had opted for direct procurement due to the onset of the rainy season. The committee noted that the direct procurement, done within the reserve price and set specifications, had been granted by the Tender Committee and the approval tabled before the Committee.

The Committee observed that no evidence was provided of the failed procurement process, i.e. that the bids were not responsive. Consequently the Committee is of the opinion that there was no competitive bidding.

Committee Recommendation

The Committee is aware that section 74 (2)& (3) of the Public Procurement and Disposal Act provides that direct procurement can be used when there is an urgent needs for the goods, works or services being procured and which due to urgency would render the other available methods of procurement impractical. The same section further provides that direct procurement can be used if the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

The Committee notes that on the basis of the section referred above there may be a valid justification. However the committee was not satisfied that the appropriate procurement procedures were followed and accordingly recommends that the DPP investigate the procurement process with a view to taking legal action if culpability is found.

7. Irregular appointments in breach of the Law:

- 7.1 **THAT** the County Government engaged in irregular appointments in breach of the law.
- 7.2 **THAT** with the sole purpose or aim of evading vetting and scrutiny the Governor made appointments, in particular, appointments of Chief Officers prior to the establishment of the County Public Service Board, solely in order to avoid being accountable.
- 7.3 **THAT** the Board in numerous correspondences complained of appointments which were done irregularly and without approval or consultation with the Board.
- 7.4 **THAT** the County Executive is also guilty of breach of the County Government Act by failing to keep requisite records of persons employed, the process and procedure for appointments, the records of applications and interviews if any, in relation to the above mentioned irregular appointments.
- 7.5 **THAT** the County Executive in its appointments is also guilty of nepotism. The Public Service Board and Members of the County Assembly in numerous correspondences have flagged out names of persons said to have been employed and closely related to the Governor or from the same families.

Committee Observation

The Committee observed that no evidence was provided of the published advertisement for recruitment of chief officers and thus it was impossible to tell if the advertisements had been done prior to the establishment of the County Public Service Board. The Governor in his submissions alleged that the County Public Service Board advertised for positions of Chief Officers in the Local Dailies on **10th October, 2013**, after which applicants were interviewed by the County Public Service Board and shortlisted.

The Committee observed that pursuant to County Government Section 8(1) (a), the nominees were tabled on the floor of the house on **8th July, 2014** after being vetted in various sectoral and select committees according to the Standing Orders and were subsequently approved. The Clerk to the County Assembly vide a letter **Reference. MKSCA/ADM/VETN/VOL.1/12** dated **8th July, 2015** forwarded the list of nominees to the County Secretary for appointment.

The Committee further observed that there was no response to the allegations relating to appointments that were done irregularly and without approval or consultation with the Board; failure by the county executive to keep requisite records of persons employed; the process and procedure for appointments and accusations of nepotism.

The petitioners provided evidence of a dossier prepared by the Deputy Governor indicating cases of rampant nepotism and further examples of cases of nepotism in the county public service. Thirty (30) names were given and therefore further investigations should be done to ascertain the allegations of the petitioner.

Committee Recommendation

The Committee was not satisfied with the explanations provided by the county government and consequently finds as follows:

With respect to the appointment of the chief officers the committee was not satisfied that the recruitment process was done in accordance with the law.

With respect to the issues of nepotism, the committee finds that the petitioner's allegations are valid and that further scrutiny should be done to ascertain the identity of the employees mentioned. The Committee recommends that this matter be investigated by the DPP with a view of taking legal action.

8. Irregular payments and expenditure in breach of the Law:

- 8.1 **THAT** the County Executive made irregular payments of kshs 2.8 million without following provisions of the law.
- 8.2 **THAT** the payments relate to expenditures for the late Senator of Makueni County Senator Mutula Kilonzo Senior, where irregular payments were drawn of Kshs 2.8 million ostensibly as funeral expenses.
- 8.3 **THAT** the Machakos County Public Accounts and Investment Committee (MPAIC) Special report, attempted to exonerate the Governor from this expenditure by stating that the expenditure was approved by the Transitional Authority and that the expenditure was “honourable” given the stature of the late Senator Mutula Kilonzo. In spite of the expenditure being irregular the County Assembly has attempted to justify it in its report.
- 8.4 **THAT** the issue is not whether the expenditure was honourable or not but whether it complied with the Public Finance management Act and provisions of Article 201 of the Constitution on prudent use of public finance.
- 8.5 **THAT** the expenditure was not provided for in the budget for the Transitional Period of January, 2013 to 30th June 2013.

Committee Observation

The Committee observed that no supporting documentation was submitted to support the payments or refute the allegations made by the petitioners.

Committee Recommendation

The Committee notes that the matters raised by the petitioner are serious and accordingly recommends:

That the Governor be personally surcharged for the irregular use of Ksh. 7.5 million of public funds expenditure

That appropriate legal action is taken by the DPP.

9. Irregular payments of confidential expenditure:

- 9.1 **THAT** the Governor of Machakos made irregular confidential payments without following provisions of the law.
- 9.2 **THAT** the payment amounted to Kshs 7,500,000.00 in form of expenditure by the Governor termed “confidential expenditures”.
- 9.3 **THAT** the 2013 audit report states that the so called confidential expenditure was not provided for in the Transitional Budget of the County Government for January, 2013.

Committee Observation

The Committee observed that no evidence was submitted to refute the allegations made by the petitioner. The Committee also notes that maintaining a confidential expenditure account using public funds is in contravention of the law.

Committee Recommendation

The Committee notes that the matters raised by the petitioner are serious and recommends that appropriate legal action be taken by the DPP including instituting recovery of the funds.

10. Irregular payments of allowances to Members of the County Assembly:

- 10.1 **THAT** the County Executive further made irregular payments or incurred expenditure without following provisions of the law by making a payment of Kshs 4,000,000.00.

- 10.2 **THAT** the expenditure was ostensibly made as a token of appreciation to members of the Machakos County Assembly for voting in the current Speaker of the assembly.
- 10.3 **THAT** each County Assembly member got Kshs 100,000.00.
- 10.4 **THAT** the Assembly Members signed for the money as an advance salary, yet the documents given to the Auditor General to explain the same purported it to be allowances for an induction course at the rate of Kshs 10,000.00 per day for 10 days. This is irregular and fraudulent.
- 10.5 **THAT** the payment was irregular both at payment point and at the point of accounting and threatens the principle of separation of powers, which is provided for under the principles of devolved or County Government.
- 10.6 **THAT** the expenditure is also in breach of the principles of public finance captured under Articles 201 of the Constitution.
- 10.7 **THAT** the Auditor General Report covering the period between January 2013 and June 2013 and the County Assembly in their special audit report dated March, 2015 made a finding that the expenditure was irregular and must be refunded.
- 10.8 **THAT** the principles of devolved government are based among other things the separation of powers between the County Executive and the County Assembly.
- 10.9 **THAT** at the National level the National Assembly oversees the National Executive in terms of its actions and expenditures while at the County Government, the architecture of the Constitution contemplates a complete separation of powers where the County Assembly oversees and checks the excesses of the County Executive. See Article 175 (a) of the Constitution.
- 10.10 **THAT** the Impeachment proceedings against the Machakos County Deputy governor were done at the behest and bidding of the County

Executive, and majority of the witnesses' presented were members of the County Executive government.

- 10.11 **THAT** though the Motion or petition to the Senate for removal or impeachment of the Deputy Governor was by the County Assembly as presented by the Speaker of the Assembly, the payment of legal fees to the Advocates representing the County Assembly was done by the County Executive.
- 10.12 **THAT** the Governor was not only setting in place a chain of events that would render the Assembly ineffective but also a co-perpetrator in the acts and omissions relating to misuse of public finances and abuse of office.
- 10.13 **THAT** the Petitioners advance as a case in point, the audit report namely "Special Audit Report on the County Government of Machakos and the five local authorities during the transition period" dated 12th February, 2014.
- 10.14 **THAT** this report as per the Constitution, once presented to the Assembly, ought to have been discussed within three months of its presentation.
- 10.15 **THAT** the Kenya Audit Report was ready on the 12th of February, 2014 but according to the report of the Public Accounts and Investments Committee dated March, 2015 it was not until September, 2014 that the Assembly began consideration of the report.
- 10.16 **THAT** it took the Assembly seven months to begin discussion on the report and another seven to conclude discussion on the Kenya Audit Report.

Committee Observation

The Committee observed that the Governor in his submissions had denied making payments to the members of the county assembly to influence their decision-making. The Governor also denied any improper

interaction with the assembly that had influenced the scheduling of business in the assembly.

The Committee observed that the evidence submitted by the petitioner had made reference to a report of the auditor general questioning irregular payments made by the county executive to the county assembly. The Auditor General had recommended that the money paid to the members of the assembly be refunded.

Committee Recommendation

The Committee finds that the allegations by the petitioner are confirmed as supported by the Auditor General's report and recommends that the monies paid be recovered from the members of the county assembly.

The Committee further recommends that the DPP take legal action against anyone found to have committed an offence of bribery.

11. Irregular expenditure on foreign travel:

- 11.1 **THAT** the County Executive authorized and incurred expenditure for an alleged foreign trip amounting to Kshs 4,555,104.00.
- 11.2 **THAT** the trip to South Africa was for the 40 elected Members of the County Assembly and the County executive team but was never budgeted for nor authorized.
- 11.3 **THAT** the auditor general noted in its report that there were no invitation letters attached, no invitations to bid, no quotations and no visas to support the fact that the trip actually took place or how the service was procured.
- 11.4 **THAT** the expenditure is in breach of the Public Procurement and Disposal Act and the provisions of Article 227 of the Constitution and other laws.

- 11.5 **THAT** the alleged trip, if it took place also suggests that executive and the assembly joint trips are part of the systemic erosion of the principle of separation of powers.
- 11.6 **THAT** the County Assembly in its Special Report of March, 2015 by the Public Accounts and Investments Committee seems to be a response on a trip to Dubai whereas the Kenya Audit report of 12th February, 2014 was a query on a trip to South Africa, which still remains unexplained.
- 11.7 **THAT** the Public Accounts and Investments Committee also avoids in its recommendations and observations to take a position on the breach of the Public Procurement and Disposal Act and other laws.
- 11.8 **THAT** furthers the Clerk of the County Assembly who was by then under interdiction was part of the delegation and trip that went for the alleged trip to South Africa on taxpayers' money.

Committee Observation

The Committee observed that no evidence was submitted to rebut the allegations made by the petitioners.

Committee Recommendation

The Committee notes that the matters raised by the petitioner are serious and should be investigated further by the Ethics and Anti Corruption Commission.

The Committee further recommends that if the allegations by the petitioner are found to be true, all delegates who took part in the trip should be personally surcharged for irregular expenditure.

The Committee further recommends that the Members of the County Assembly should undertake their responsibilities in line with Article 226 of the Constitution.

12. Irregular expenditure on Investor Conference and Cocktail Party:

- 12.1 **THAT** the County Executive authorized and incurred expenditure for an alleged Investors Conference amounting to Kshs 10,537,935.00
- 12.2 **THAT**, the said conference was not budgeted for.
- 12.3 **THAT** the expenditure kept escalating first by an additional 2,638,336.00 and then an additional Kshs 765,000.00.
- 12.4 **THAT** the Auditor General noted in his Report that no list of participants was annexed to the vouchers and no tenders for the services were availed to confirm whether the services sought were competitively sourced.
- 12.5 **THAT** in addition there was a cocktail party following the conference where the Audit Report also notes that there were no list of participants nor how the sourcing of the services were obtained.
- 12.6 **THAT** the expenditure is in breach of the Public Procurement and Disposal Act and the provisions of Article 227 of the Constitution and other laws.
- 12.7 **THAT** the report of the Public Accounts and Investments Committee of the Machakos County Assembly confirmed that there was single sourcing but curiously excuses the anomaly by stating that the provider was the only one who could provide the service on a short notice.

Committee Observation

The Committee observed that no evidence was submitted to rebut the allegations made by the petitioners.

Committee Recommendation

The Committee recommends that the matters raised by the petitioner are serious and should be investigated further by DPP with a view to taking legal action.

13. Failure to implement the Integrated Financial Management Information System (IFMIS):

- 13.1 **THAT** the County Executive has deliberately failed to fully implement the IFMIS system and the intermittent use of manual systems has exposed the County to accounting errors.
- 13.2 **THAT** this has been captured in the Kenya Audit Report dated 12th February, 2014 at page 49 clause 10.5 by the Auditor General, and in the Report of the Controller of Budget at page 104 to 107 report of 2013 – 2014 financial year.

Committee Observation

The Committee observed that the Governor in his response had informed the Committee that the County Government of Machakos had fully implemented the IFMIS from October, 2013 and all payments since were made through IFMIS and G-PAY.

Committee Recommendation

The Committee recommends that the intermittent use of manual systems was a problem faced by all county governments during the transition period and has now been effectively addressed by most counties.

14. Failure to constitute an Internal Audit Committee:

- 14.1 **THAT** the County Executive has deliberately failed to constitute an Internal Audit Committee as required by the Public Finance Management Act, 2012.
- 14.2 **THAT** the Report of the Controller of Budget on Machakos County at page 104 to 107 report of 2013 – 2014 financial year has captured this failure.

Committee Observation

The Committee observed that the Governor in his response had informed the Committee that the County Government was in the process of advertising for the positions of the audit committee members and once the process was completed, the committee would be constituted.

Committee Recommendation

The Committee recommends that the county government should expedite the establishment of the audit committee.

15 Irregular procurement of goods and services:

- 15.1 **THAT**, the County Executive has engaged in irregular procurement of goods and services amounting to Kshs 14,062,067.00.
- 15.2 **THAT** this has been captured in the Audit Generals Report dated 12th of February, 2014 at page 15 to 16 clause 4.11, and in the Special Report of the Machakos County Assembly PAIC at page 16 to 18.

Committee Observation

The Committee observed that no evidence was submitted to rebut the allegations made by the petitioners.

Committee Recommendation

The Committee recommends that the matters raised by the petitioners are serious and should be investigated further by the DPP with a view to taking legal action.

16 Unjustified purchase of security gadgets and apparatus:

- 16.1 **THAT** the County Government of Machakos engaged in unjustified purchase of security gadgets and apparatus.
- 16.2 **THAT** this has been revealed in the Unit Budget Implementation Report for 2013/2014.

16.3 **THAT** these items include:

- i. Computer and IT equipment @ Kshs 6,867,100.00.
- ii. Frequency radio Communication system @ Kshs 9,440,000.00.
- iii. Security service at the Stadium @ 1,116,000.00.
- iv. Mobile phones for officers @ 480,300.00.
- v. Handheld communication equipment @ 18,975,000.00.
- vi. Radio mobile communication @ 10,548,000.00.

Committee Observation

The Committee observed that evidence submitted claimed that at the onset of the County Government, the Inspectorate and Emergency response Department were ill equipped and were using archaic communication equipment in the execution of their work. The equipment purchase was targeted at modernizing the two departments to enhance security, improve on the enforcement of the county bylaws, and improve on the response time for emergency services.

The Committee further observed that no procurement documents had been submitted to support this claim and justify the procurement.

Committee Recommendation

The Committee recommends that DPP investigate the procurements mentioned with a view to taking legal action.

17 Construction of 33 kilometer road between Kithimani and Makutano:

17.1 **THAT** the County Government of Machakos engaged in irregular construction of a 33-kilometer road, which was awarded to eleven (11) contractors.

17.2 **THAT** the tendering was in breach of the Public Procurement and Disposal Act by breaking the tender into more segments than is allowed

in law and thus engaged in award of tenders that did not give the people of Machakos value for their money.

Committee Observation

The Committee observed that the Governor in his response had informed the Committee that the construction of the 33 Kilometer Kithimani-Makutano ma Mwala Road had taken place in 3 months. The quick completion of the road was attributed to the various contractors who undertook the work simultaneously. The Committee noted that the evidence submitted for the procurement of the road construction was above board. **(See Annex VIII).**

Committee Recommendation

The Committee notes that the procurement process for the Kithimani-Makutano ma Mwala road was above board as the Public Procurement and Disposal Act permits that a road tender can be divided into lots with no limitation on the number of lots. The procurement process for each lot was also done in accordance with the law and accordingly the allegation of the petitioner in this regard be dismissed.

18 Non remittance of statutory deductions:

- 18.1 **THAT** the National Social Security Fund Act requires all employers to remit monies deducted from their employees to the NSSF for purposes of staff retirement benefits.
- 18.2 **THAT** the County Government has consistently made deductions on staff salaries for purposes of staff retirement benefits but failed to remit the same to the NSSF in breach of the law.
- 18.3 **THAT** the National Hospital Insurance Fund Act imposes an obligation to every employer to deduct and remit monies from employees' salaries for purposes of the Hospital insurance fund.

- 18.4 **THAT** the County Government, and in particular the Executive has been carrying out deductions without making corresponding remittance to the NHIF as required by law.
- 18.5 **THAT** the county government has been making deductions for LAP Fund and HELB without making corresponding remittances to the relevant authorities.

Committee Observation

The Committee observed from the evidence that at the closure of the financial year June 2014, there were statutory deductions that had not been remitted to various institutions. However, all pending deductions had now been remitted and were being remitted on time. The committee also noted claims that the County had written to the relevant authorities to seek waivers on the penalties for the outstanding amounts and to date no penalty has been levied.

Committee Recommendation

The Committee recommends that the National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) should carry out further investigations to ensure that all payments have been made. The Committee further recommends that these two agencies should ensure that every county government makes statutory remittances promptly.

19 Failure to deposit revenue in the County Revenue Fund:

- 19.1 **THAT** Article 207 of the Constitution requires every County Government to establish a Revenue Fund into which shall be paid all money raised or received on behalf of the County Government.
- 19.2 **THAT** the County Government has consistently received revenue or collected revenue but failed to deposit the same in the Revenue account.
- 19.3 **THAT** the report of the Controller of Budgets for the previous financial years shows a decline of the revenue collection for Machakos County.

- 19.4 **THAT** the County Executive has employed and continues to maintain members of staff, employed as Town Administrators and who are alleged to have been collecting funds but not remitting to the Revenue Fund.

Committee Observation

The Committee observed that despite assertions that county revenue was collected and banked as required by law, the county government had not submitted evidence of bank statements showing account details and transfer of funds to the County Revenue Account.

Committee Recommendation

The Committee recommends that the Auditor General carry out a forensic audit of the county revenue account as well as the banking of locally collected revenues.

20. Irregular expenditure and procurement of goods and services:

- 20.1 **THAT** the County Executive has sanctioned irregular expenditure and procurement of goods and services amounting to Kshs 288,137,582.00.
- 20.2 **THAT** the County Executive incurred unjustified and over inflated expenditure most of which were in breach of rules on procurement and budgeting.
- 20.3 **THAT** the questionable expenditures include:
- i. Expenditure under County Executive for purchase of vehicles for County Executives costing Kshs 28,920,000.00 which is questionable as there is already a purchase of 14 Subaru vehicles costing Kshs 24 million. (See page 46 of the Income and Expenditure Report 2013/2014.
 - ii. Expenditure under Ministry of Transport for an unexplained Kshs 27,445,436.00 for residential buildings and hostels, but it is not

clear whether this expenditure is for construction or repair of houses, building or hostel.

- iii. Expenditure under Ministry of Transport for an unexplained Kshs 101,711,433.00 for non-residential buildings (offices etc) but it is not clear whether this expenditure is for construction or repair of houses, building or hostel.
- iv. Expenditure under Ministry of Transport for an unexplained Kshs 130,060,713.00 for purchase of trucks and trailers. The number is not disclosed.
- v. There are numerous other Expenditure items in this expenditure report that the Petitioners shall seek to ask the Senate to enquire into and demand tender and other procurement and delivery document.

Committee Observation

The Committee finds that the Governor failed to submit supporting documentation and evidence to rebut the allegations made by the petitioners.

Committee Recommendation

The Committee recommends that the DPP investigate the allegations with a view to taking legal action.

COMMITTEE RECOMMENDATIONS

The committee having considered the matters in the petition recommends as follows:

That –

1. The Director of Public Prosecutions (DPP) carry out further investigations, with a view to taking legal action, on the procurement of the Land Cruiser V8 vehicle for the Governor's office.
2. On the basis of the evidence submitted to the Committee, the Committee finds that due process was followed in the construction of the Machakos Peoples' Park.
3. The DPP take legal action on the purchase of the police vehicles as the county was in direct breach of the law and government financial procedures in purchasing second hand vehicles.
4. The Controller of Budget prepare and submit a report to the Senate on the authorisation granted by her office to county governments to purchase security vehicles. Schedule four of the Constitution delineates police services as a National Government Function and the continuing purchase of police vehicles by county governments requires explanation on why counties spent public money on National Government functions.
5. With regards to the allegation on single sourcing, the procurement process was not through single sourcing.
6. The procurement of second hand vehicles was in was in direct breach of the law and government financial procedures against purchasing second hand vehicles. The Committee recommends that DPP take legal action on the purchase of the ambulances.
7. The DPP investigate the purchase of the used vehicles as the Governor had failed to submit a pre-purchase evaluation done by the Ministry of public works or a Government registered valuer establishing the length of usage and true worth of the second hand vehicles.

8. The accounting officer of the Assembly be held liable for this contravention of the law as county assemblies cannot purport to give itself themselves power to break national laws.
9. The committee was not satisfied that the appropriate procurement procedures were followed in the purchase of the forty tractors and accordingly recommends that the DPP investigate the procurement process with a view to taking legal action if culpability is found.
10. With respect to the appointment of the chief officers the committee was not satisfied that the recruitment process was done in accordance with the law. The Committee recommends that this matter be investigated by the DPP with a view to taking legal action.
11. With respect to the issues of nepotism, the committee finds that the petitioner's allegations are valid and the DPP should investigate the names outlined by the petitioner with a view of taking legal action.
12. The matters raised by the petitioner on irregular payments and expenditure in breach of the law are serious and the Governor be personally surcharged for the irregular use of Ksh. 7.5 million of public funds expenditure. That further, appropriate legal action is taken by the DPP.
13. The matters raised by the petitioner on irregular payments of confidential expenditure are serious and appropriate legal action be taken by the DPP including instituting recovery of the funds.
14. The allegations concerning irregular payments of allowances to MCAs are confirmed as supported by the Auditor General's report. The Committee further recommends that monies paid be recovered from the members of the county assembly and the DPP take legal action to prosecute anyone found to have committed an offence of bribery.
15. The matters raised by the petitioner on irregular expenditure on foreign travel are serious and should be investigated further by the Ethics and Anti Corruption Commission.

25. NHIF and NSSF should ensure that every county government makes statutory remittances promptly.
26. The Auditor General carry out a forensic audit of the county revenue account as well as the banking of locally collected revenues.
27. The matters raised by the petitioner on irregular expenditure and procurement of goods and services amounting to Ksh. 288,137,582.00 are serious and should be investigated further by the DPP with a view to taking legal action.

16. If the allegations by the petitioner are found to be true, all delegates who took part in the foreign trip to South Africa should be personally surcharged for irregular expenditure.
17. Members of the County Assembly should undertake their responsibilities in line with Article 226 of the Constitution.
18. The matters raised by the petitioner on the irregular expenditure relating to the investor conference and cocktail part are serious and should be investigated further by the DPP with a view to taking legal action.
19. The intermittent use of manual systems was a problem faced by all county governments during the transition period and has now been effectively addressed by most counties.
20. The county government should expedite the establishment of the audit committee.
21. The matters raised by the petitioner on the irregular procurement of goods and services amounting to Ksh. 14, 062,067.00 are serious and the DPP should take appropriate legal action.
22. The DPP investigate the procurements related to the purchase of security gadgets and apparatus.
23. The procurement process for the Kithimani-Makutano ma Mwala road was above board as the Public Procurement and Disposal Act permits that a road tender can be divided into lots with no limitation on the number of lots. The procurement process for each lot was also done in accordance with the law and accordingly the allegation of the petitioner in this regard be dismissed.
24. The National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) should carry out further investigations to ensure that all statutory payments have been made by the county government.