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## PARLIAMENT OF KENYA

THE NATIONAL ASSEMBLY

**ELEVENTH PARLIAMENT** 

FIRST SESSION (2013)

THE DEPARTMENTAL COMMITTEE ON ENERGY, INFORMATION AND COMMUNICATION

REPORT ON THE
KENYA INFORMATION AND COMMUNICATION (AMENDMENT)
BILL, 2013

Clerk's Chambers, Parliament Buildings, NAIROBI. OCTOBER, 2013



#### INTRODUCTION

The Departmental Committee on Energy, information & Communication is one of the twelve Departmental committees of the National Assembly established under SO 216 and mandated to, inter alia; 'to study and review all legislations referred to it:

#### COMMITTEE MEMBERSHIP

The Committee on Energy, Communication and Information was constituted by the House in May, 2013 comprising of the following Members:

The Hon. (Eng) Nicolas Gumbo, MP The Hon. Mithika Linturi, MP

The Hon. Mohammed Elmi, MP The Hon. Aramat Lemanken, MP

The Hon. Athur Papa, MP

The Hon. Banticha Abdullahi, MP

The Hon. Daniel Kazungu, MP

The Hon. Esther Gathogo, MP

The Hon. Fathia Mahbub, MP

The Hon. James Lomenen, MP

The Hon. Aburi Mpuri, MP

The Hon. Joe Mutambu, MP

The Hon. Junet Sheikh, MP The Hon. Kanini Kega, MP

The Hon. Mary N. Mbugua, MP

The Hon. Chris M. Bichage, MP.

The Hon. Mati Munuve, MP

The Hon. Mike Wanjohi, MP

The Hon. Nicholas Ngikor, MP

The Hon. Onesmus Njuki, MP

The Hon. Rachael Amolo, MP

The Hon. Roba Duba, MP

The Hon. Ndungu Githingi, MP

The Hon. Vincent Musau, MP

The Hon. William Kisang, MP

## MANDATE OF THE COMMITTEE

The Departmental Committee on Energy, Communication and Information derives its mandate from provisions of Standing Order 216 (5) which outline functions of the Committee as being:

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all the legislation referred to it;
- d) To study, access and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objective;
- e) To investigate and inquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a Cabinet Secretary;
- f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No.204 (Committee on appointments); and
- g) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In accordance with Second Schedule of the Standing Orders, the Committee is mandated to consider:-

- a) Fossil fuels exploration
- b) Development of energy
- c) Production of energy
- d) Maintenance and regulation of energy
- e) Communication
- f) Information
- g) Broadcasting
- h) Information Communications Technology (ICT) development and management

On Wednesday, 18th September, 2013, the Kenya Information and Communication (Amendment) Bill, 2013 went through the First Reading and referred to the

Departmental Committee on Energy, Communication and Information pursuant to the provisions of the Standing Order No. 127 of the National Assembly.

Pursuant to Article 118 of the Constitution and Standing Order 127, the Departmental Committee on Energy, Information and Communication facilitated Public Participation by engaging the stakeholders on the Bill. The Committee met with the Ministry of Information, Communication and Technology, the Communication Commission of Kenya, the Media Council and Safaricom Limited. Written submissions in form memorandums of were also received from the Media Council of Kenya and the Communication Commission of Kenya, all this in an endeavor to achieve public participation.

#### COMMITTEE'S OBSERVATIONS

The Committee observed that:

- The Sixth schedule of the Kenya Constitution 2010 provides that Bills operationalizing Article 34 be enacted by 27th of August 2013. However the National Assembly Wednesday the 31th of July 2013 extend the period by four (4) months pursuant to the Article 261(2) of the Constitution to allow for further discussions and engagements with stakeholders and players in the Media and Information sector.
- 2. On 17<sup>th</sup> of August 2013 Parliament carried an advertisement in the local dailies calling comments on the *Kenya Information and Communication Amendment Bill 2013* to be submitted to the Clerk of the National Assembly within seven days from then. The advertisement further provided that after the submissions, the Parliamentary Committee on Energy Information and Communication would organize for a public forum in which the public would be invited to submit comments on the Bill.
- 3. The Bill intends to amend the Kenya Information and Communications Act Cap. 411A in order to among other things, align it with the Constitution of Kenya, 2010. In this respect the Bill seeks to provide for a statutory framework governing the communications sector in order to conform and satisfy the

requirements of the Constitution of Kenya, 2010. It has also proposed to make a raft of amendments to enable better regulation of the sector by providing for the handling of new regulatory challenges in the communications sector due to rapid technological changes. It is proposed to rename the Communications Commission of Kenya to Communications Authority of Kenya so as to better reflect the regulatory function of the current Commission. The Bill seeks to provide a framework for dealing with issues relating to competition and consumer protection in the sector . The enactment of this Bill shall not occasion additional expenditure of public fund.

- 4. Pursuant to provisions of Article 34(5) of the Constitution "Parliament shall enact legislation that provides for the establishment of a body which is will be independent of control by Government, political or commercial interest." It was therefore in the opinion of the Committee that since Clause 5 of the Bill had provided that the Cabinet Secretary may "issues policy guidelines to the Authority" that would amount to a compromise to the Independence of the Authority if indeed the spirit of Article 34(5) of the constitutions is to apply, however the Government remains at the center to check the activities of the Media to protect the integrity of the Country and basic human rights.
- 5. The Committee would also wish to point out that they have agreed to recommend the National Assembly undertake the vetting exercise and seek to amend clause 7 of the Bill on Appointments of nominees to the Authority, to propose that the appointment of Chairperson and Board members of the Authority be subjected to vetting by National Assembly pursuant to the Public Appointments (Parliamentary approval) Act 2012, this is in a bid to ensure that the National Assembly is in light of those mandated to protect the integrity and ensure smooth flow of Information and Communication in Kenya.
- **6.** All proposed amendments to the Bill Committee will come to the House in due cause for consideration. The spirit and the principal behind the amendment will concern the Independence of the Authority and the management of the Universal Service Fund, since the committee did not

approve the involvement of the Cabinet Secretary in the management of the fund in *clause 35* of the *Bill* and will accordingly seek the consent of the House to amend that particular clause.

to amend that particular clause.

**ACKNOWLEDGEMENTS** 

The Committee wishes to thank the good Offices of the Speaker and the Clerk of the National Assembly for the support to the Committee extended to facilitate smooth execution of its mandate. The Committee also appreciates the Secretariat for their

promptness in the preparation of this report.

I also wish to express my sincere appreciation to the Honourable Members of the Committee who sacrificed their time to participate in the activities of the Committee and especially preparation of this report. I wish to report to the House that we

achieved and maintained our quorum at the beginning and end of all meeting.

It is therefore my pleasant duty and privilege, on behalf of the Departmental Committee on Energy, Information and Communication to table this report on the Kenya Communication (Amendment) Bill, 2013 and commend it to the House for information pursuant to the provisions of Standing Order 127 of the National

Assembly.

Signed Signed

CHAIRPERSON

HON. JAMLECK KAMAU. MP

Date: 8 (0 /2013

MINUTES OF THE 33RD SITTING OF THE DEPARTMENTAL COMMITTEE ON ENERGY, INFORMATION & COMMUNICATION HELD ON MONDAY, 30<sup>TH</sup> SEPTEMBER, 2013, IN THE COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDINGS AT 2.30PM.

#### PRESENT

- Hon. Jamleck Kamau, MP. (Chairperson)
- Hon. Jackson Kiptanui, MP (Vice Chair)
- Hon. Mike Wanjohi, MP.
- Hon. Aramat Lemanken, MP
- Hon. Fathia Mahbub, MP.
- Hon. Joe Mutambu, MP.
- Hon. Esther Gathogo M.P
- Hon. Racheal Ameso Amolo, MP.
- Hon. Eng James Rege, MP
- Hon. Vincent Musau, MP
- Hon. Onesmus Njuki, MP.
- Hon. William Kisang, MP.
- Hon. Mohamed Elmi
- Hon. Artur Papa Odera M.P
- Hon. Dan Kazungu, MP
- Hon. Roba Duba, MP
- Hon. Kanini Kega, MP
- Hon. Nicholas Gumbo MP
- Hon. Mati Munuve, MP
- Hon. James Lomenen, MP
- Hon. Nicholas Ngikor, MP
- Hon. James Lomenen, MP
- Hon. Nicholas Ngikor, MP

#### **ABSENT**

- Hon. Junet Sheikh Nuh, MP.
- Hon. Banticha Abdullahi, MP
- Hon. Mary Njoki Mbugua, MP
- Hon. Ndungu Gethenji, MP.
- Hon. Aburi Mpuri, MP.

Hon. Esther Gathogo M.P

Hon. Chris Bichage, MP.

Hon. Mithika Linturi M.P

#### IN ATTENDANCE

Mr. Stephen Chege- Head of Regulatory & Public Policy Mrs. Karimi Ruria- Senior Manager, Public Policy

## NATIONAL ASSEMBLY SECRETARIAT

Mr. Amos Kiangwe- Clerk Assistant III

Ms. Cammelyne Anguche - Junior Legislative Fellow

Mrs. Maureen Atamba - Secretary

#### MIN. NO. 1/2013 PRELIMINARY

The meeting was called to order at 2.30 PM. Thereupon the meeting commenced with a word of prayer.

## MIN. NO. 2/2013 MEMORANDUM OF SUGGESTED AMENDMENTS TO THE ICT BILL

Safaricom Limited presented their memorandum on the Kenya Information and Communication Bill as follows:

#### That;

## Clause 1. S. 7 (S. 6B, Principal Act) - Appointment Procedure

#### Proposed Amendment

THAT, Section 6 of the Bill be deleting paragraph (3) and replacing it with the following paragraphs:

- (3) The Cabinet Secretary shall concurrently submit the names of the shortlisted applicants to the Ethics and Anti-Corruption Commission for vetting in accordance with the requirements of Chapter Six of the Constitution and the Ethics and Anti-Corruption Commission shall vetting the shortlisted Candidates submit its report and recommendations to the Cabinet Secretary.
- (3A) The Cabinet Secretary shall within seven days of expiry of the public notice under subsection (1)

Consider the public comments received under subsection (2) and report by the Ethics and Anti-Corruption Commission received under subsection (3) and—

In the case of the chairperson forward three names to the President for appointment;

In the case of any other members, make the appointment.

#### Rationale

Although the Board members and chairperson are required to meet the qualifications set out under Chapter Six of the Constitution, this appointment procedure does not expressly require vetting under Chapter Six of the Constitution. The suggested amendment includes a mandatory vetting to be Conducted by the Ethics and Anti-Corruption Commission.

## Clause 2. S. 19 (S. 83A, Principal Act) - Penalties

#### Proposed Amendment

That, Section 19 of the Bill be deleted and replaced with the following paragraph:

Section 83A of the principal Act is amended in subsection (1) by deleting the words "five hundred Thousand" and replacing them with the words "three million".

#### Rationale

П	Proposed	fine i	s excessive	and not	proportional	to t	he offence.
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□ such fines deny offender resources to correct anomaly

## Clause 3. S. 29 (S. 84T, Principal Act) - Competition Management

#### Proposed Amendment

That, Section 29 of the Bill be amended as follows:

Sub-paragraph (b) be amended by inserting the words "up to a maximum of three years" immediately after the Word "persists" to read as follows:

Section 84T (6) of the principal Act is amended—

(b) By deleting paragraph (b) and substituting therefore the following new paragraph—

(b) Require the licensee to pay a fine not exceeding the equivalent of ten percent of the Annual gross turnover of the preceding year, for each financial year that the breach persists up to a maximum of three years.

Sub-paragraphs (c) and (d) be deleted.

#### Rationale

☐ the suggested amendment ensures that the penalty for anti-competitive conduct is capped at three years and not open-ended.

☐ This ensures that the stiff penalty is maintained while ensuring predictability in determining the amount.

## Clause 4. S. 30 (b) (S. 84W, Principal Act) - Competition Management

#### Proposed Amendment

That, Section 30 (b) (ii) of the Bill be amended as follows:

By deleting the word "and" at the end of sub-paragraph (b).

By deleting sub-paragraph (c).

#### Rationale

 $\Box$  The initial proposal introduces discretion no clear criteria which the Authority can apply.

☐ All criteria should be known to all parties.

## <u>Clause 5. S. 33 (S. 93, Principal Act) - Customer Information</u> Confidentiality

Page 3 of 5

#### Proposed Amendment

That, Section 33 of the Bill be deleted and replaced with the following paragraph:

The principal Act is amended by adding following subsection immediately after subsection (3) - (4) Provided that access to information and restrictions on disclosure of information held by the Authority shall be implemented pursuant to Article 35 of the Constitution

#### Rationale

	Section	on	93	18	fundamental	ly	important	to	confid	ent	iality	of	cu	sto	mer
ini	format	ion													
	The	sug	gest	ed	amendment	in	corporates	refe	erence	to	Article	9	3	of	the
Сс	nstitu	itioi	n												

## Clause 6. S. 34 (S. 102, Principal Act) - Appeals Tribunal

## Proposed Amendment

That, Section 34 of the Bill be amended by deleting sub-paragraph (5) and replacing it with the suggested sub- paragraphs (5) & (6) below:

Section 102 of the principal Act is amended-

- (c) Inserting the following new subsection immediately after subsection (4)-
- (5) There shall be paid to the Chairman and members of the Tribunal such remuneration and allowances as the Cabinet Secretary shall, from time to time determine.
- (6) The Cabinet Secretary shall be responsible for the remuneration and other operational expenses of the Tribunal.

#### Rationale

	The	suggested	amendment	ensures	that	the	Tribunal	be	fully	constituted	in
or	der t	o decide m	atters.								

 $\Box$  The suggested amendment ensures that the funding of the Tribunal is independent of industry players to ensure that its decisions are fair and impartial

## Clause 7. S. 35 (S. 102A, Principal Act) - USF Advisory Council

#### Proposed Amendment

That, a new provision (bb) be inserted in subparagraph 2 that reads as follows:

- 35. Section 102A of the Principal Act is amended in- Page 4 of 5 (bb) in subsection (2) (b), by inserting the following subsection (c) immediately it:
- (c) There shall be three slots in the Council for representatives from the broadcasting, Telecommunications and postal sectors to be appointed by the Cabinet Secretary in accordance with this section.

Rationale
$\hfill \square$ It was understood that the purposed of increasing the Council members was to allow representation in the industry.
$\hfill\Box$ The suggested amendment allows nominations from the industry in order to ensure that the most robust management of the USF.
Clause 8. S. 36 (proposed new provision) - CCK Prosecutorial Powers
Proposed Amendment
That, Section 36 be deleted.
Rationale
□ CCK should not have prosecution powers that are not defined.
☐ Article 157 (12) requires the National Assembly to pass an Act that will guide all parastatals on prosecution powers, not piecemeal amendments.
☐ Provisions with respect to transition are provided in Section 37 of the Bill.
Clause 9. S. 39 (Sec 2, Principal Act) - Appeals Tribunal
Proposed Amendment
THAT, Section 39 of the Bill be deleted and replaced with the paragraph below:
39. The Second Schedule to the Principal Act is amended by deleting paragraph I and replacing it with the following paragraph—
1. The members of the Tribunal shall satisfy the requirements of Chapter Six of

## Rationale

Page 5 of 5

 $\hfill\Box$  The suggested amendment provides for vetting of Tribunal members in line with Chapter 6 of the Constitution.

1A. The members of the Tribunal shall hold office for a period not exceeding three years, and shall be eligible for reappointment for one more term of a

the Constitution and shall be vetted accordingly

period not exceeding three years.

☐ The suggested amendment also provides for a fixed term of office for members of the Tribunal, similar to those of the Energy Tribunal, Industry Property Tribunal as well as the Water Tribunal.

# Clause 10. New Provision S. 24A (S. 84D, Principal Act) -Liability for Transmitting Information under Section 84D of the Principal Act.

## Proposed Amendment

THAT, a new Section 24A be inserted as follows:

Section 84D of the principal Act is amended by repealing the section and replacing it with the following section:

- 22. (1) A licensee shall not be subject to any civil or criminal liability in respect of third party material in the form of electronic versions to which it merely provides access to or for operating facilities for information systems or transmitting, routing or storage of electronic versions via an information system under its control, as long as the licensee:
- (a) Does not initiate the transmission;
- (b) Does not select the addressee;
- (c) Performs the functions in an automatic, technical manner without selection of the data; and
- (d) Does not modify the data contained in the transmission.
- (e) Has not performed actions (a)-(d) or any other illegal actions knowingly or intentionally
- (f) Conforms with the rules and regulations
- (2) The acts of transmission, routing and of provision of access referred to in subsection (1) include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place:
- (a) For the sole purpose of carrying out the transmission in the information system;
- (b) In a manner that makes it ordinarily inaccessible to anyone other than anticipated recipients; and (c) for a period no longer than is reasonably necessary for the transmission.

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 $\square$  S. 84 of the Principal Act should be amended due to the following:

O ISPs/data companies should not be held liable for information transmitted on their systems because this information is not generated by them.

## MIN. NO. 3/2013

## DATE FOR THE NEXT MEETING

The next meeting will be held on notice.

## MIN. NO. 4/2013

## **ADJOURNMENT**

The Chairperson adjourned the meeting at 4.20PM.

Signed	
(CHAIRPERSON)	
HON. JAMLECK KAMAU, MP	
Date. 8 18 2073	

MINUTES OF THE 35TH SITTING OF THE DEPARTMENTAL COMMITTEE ON ENERGY, INFORMATION & COMMUNICATION HELD ON MONDAY, 30<sup>TH</sup> SEPTEMBER, 2013, IN THE COMMITTEE ROOM 9, MAIN PARLIAMENT BUILDINGS AT 4.30PM.

#### PRESENT

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- Hon. Jackson Kiptanui, MP (Vice Chair)
- Hon. Mike Wanjohi, MP.
- Hon. Aramat Lemanken, MP
- Hon. Fathia Mahbub, MP.
- Hon. Joe Mutambu, MP.
- Hon. Racheal Ameso Amolo, MP.
- Hon. Vincent Musau, MP
- Hon. Onesmus Njuki, MP.
- Hon. William Kisang, MP.
- Hon, Mohamed Elmi
- Hon. Artur Papa Odera M.P.
- Hon. Eng. James Rege, MP
- Hon. Chris Bichage
- Hon. Dan Kazungu, MP
- Hon. Roba Duba, MP
- Hon. Kanini Kega, MP
- Hon. Nicholas Gumbo MP
- Hon. Mati Munuve, MP
- Hon. James Lomenen, MP
- Hon. Nicholas Ngikor, MP
- Hon. James Lomenen, MP
- Hon. Nicholas Ngikor, MP
- Hon. Esther Gathogo M.P.

## **ABSENT**

- Hon. Junet Sheikh Nuh, MP.
- Hon. Banticha Abdullahi, MP
- Hon. Mary Njoki Mbugua, MP
- Hon. Ndungu Gethenji
- Hon. Aburi Mpuri, MP.

Hon. Mithika Linturi M.P Hon. Esther Gathogo M.P

#### IN ATTENDANCE

#### MINISTRY OF INFORMATION, COMMUNICATION & TECHNOLOGY

Dr. Fred Matiang'i - Cabinet Secretary

Mr. Joseph Tiampaty- Principal Secretary

Ms. Lilian Moraa- Legal Officer

Mr. Joseph Kihanya- Committee Legal Expert

Mr. Paul Mugambi- Office of the Cabinet Secretary

#### NATIONAL ASSEMBLY SECRETARIAT

Mr. Amos Kiangwe- Clerk Assistant 111 Ms. Cammelyne Anguche – Junior Legislative Fellow Mrs. Maureen Atamba – Secretary

## MIN. NO. 1/2013 PRELIMINARY

The meeting was called to order at 4.30 PM. Thereupon the meeting commenced with a word of prayer.

#### MIN. NO. 2/2013 COMMITTEE MEMBERS

The Committee members wanted clarification on the following:

- Why the Ministry had failed to invite the Committee on any workshops and conferences in and out of the country regarding matters to do with Energy in the Country.
- Why the Ministry had written to Communication Commissions of Kenya(CCK) demanding an explanation of why CCK had hosted the Committee for a workshop in Mombasa without seeking permission from the Ministry.
- Why there are no consultations between the Ministry and the Committee regarding issues concerning Energy in the country.
- The letter that the Ministry wrote to Communication Commissions of Kenya (CCK) should be forwarded to the Committee as soon as possible.

## MIN. NO. 3/2013 MINISTRY OF INFRORMATION, COMMUNICATION & TECHNOLOGY

The Cabinet Secretary noted that:

- There was no letter that the Ministry had written to the Communication Commissions of Kenya (CCK) regarding the workshop that they had had with the Committee on Energy in Mombasa.
- That he had not ignored the Committee but assumed that the two day conference the ministry attended in Uganda was for a short period hence did not see the need for the committee members to attend.
- The Conference he had attended In Mombasa was for a short time hence he did not see the need for the Committee members to attend.
- That the reason why the Government put USF is to address the question of marginalization of development of development especially infrastructure in the country.

#### RECOMMENDATION

1. The Ministry has the responsibility to work with the Parliamentary Committees on issues related to Energy.

The Principal Secretary noted that:

- He was the one who had written the letter to the Communication Commissions of Kenya (CCK) though he wrote it in good faith.
- He will forward the letter to the Committee the following day.
- The Ministry is interested in strengthening of institutions that they have within their docket.

# MIN. NO. 4/2013 MINISTRY OF INFRORMATION, COMMUNICATION & TECHNOLOGY

The Cabinet Secretary discussed their proposed amendments as follows:

- The Communications Authority of Kenya to replace the Communications Commission of Kenya and be the converged regulator for the ICT Sector with Constitutional Underpinning and Compliance in its membership, appointments functions and discharge of its mandate.
- The Broadcasting Content Committee has oversight over broadcasting content as envisaged under the bill as this is not only best practice

internationally, but also because content regulation is a license condition in the regulation of airwaves as anticipated under the Constitution of Kenya, 2010.

- The Universal Advisory Council Manages that fund as provided under the bill as this is not only the best practice under our environment from the international practices with input on Public Policy Intervention from the Government.
- That the Board of the Authority be constituted as proposed, as this is the only way the Communications Authority will fulfill the requirements of Article 34 of the Constitution as observed by the High Court Judgment in Petition Number 346 of 2012.

#### MIN. NO. 5/2013 WAY FORWARD

That the Ministry remains ready to engage in further discussions on these proposed legislations to achieve a robust framework to implement the constitution and meet the requirements of the ICT Sector, an identified key driver of Vision 2013.

## MIN. NO. 5/2013 ANY OTHER BUSINESS

1. The Ministry to forward other responses for statements of Hon. Abdullahi Diriye, member for Wajir South Constituency, Hon. Janet Nangabo, Member for Trans Nzoia County, Hon. Abdi Dukicha, Member for Galole Constituency. Each of the statements should have its own letterhead.

## MIN. NO. 6/2013 DATE FOR THE NEXT MEETING

The next meeting will be held on Wednesday, 2<sup>nd</sup> October 2013 in 4<sup>th</sup> Floor Continental House, parliament Building at 11am with ESSAR Energy and Overseas Limited.

## MIN. NO. 7/2013 ADJOURNMENT

The Chairperson adjourned the meeting at 6.30pm.

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Signed	Lan	way	
(CHAIRPERSON	)		
HON. JAMLECK	KAMAU, M	P	
Date	810	2013	•••••

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	HON.JAMLECK KAMAU, MP(CHAIRPERSON	dini so
	2. HON JACKSON KIPTANUI, MP(VICE CHAIR)	
	3. HON.BANTICHA ABDULLAHI, MP	Thirt
	4. HON. DAN KAZUNGU, MP	
	5. HON.ESTHER GATHOGO, MP	
	6. HON. FATHIA MABBUB, MP	Scorne
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	13. HON. KANINI KEGA, MP	
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19. HON. NICHOLAS NGIKOR, MP	
20. HON. ONESMUS NJUKI, MP	
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26. HON.CHRIS M. BICHAGE	
27. HON.ABURI MPURI	
28. HON. NDUNGU GETHENJI, MP	

## ABDULLAHI ADEN

For: CLERK OF THE NATIONAL ASSEMBLY