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THE DEPARTMENTAL COMMITTEE

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ON

**ADMINISTRATION OF
JUSTICE AND LEGAL AFFAIRS**

**REPORT ON APPOINTMENTS OF THE
DIRECTOR AND ASSISTANT DIRECTORS
OF THE KENYA ANTI-CORRUPTION
COMMISSION**

Clerk's Chambers
Kenya National Assembly

December 2004

1916-1917

Jan	100	100
Feb	100	100
Mar	100	100
Apr	100	100
May	100	100
Jun	100	100
Jul	100	100
Aug	100	100
Sep	100	100
Oct	100	100
Nov	100	100
Dec	100	100
Total	1200	1200

1.0 PREAMBLE

The Departmental Committee on Administration of Justice and Legal Affairs is constituted pursuant to the provisions of Standing order No 151. Its mandate is namely:

- 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;
- To study the program and policy objectives of the Ministries and Departments and the effectiveness for implementation;
- To study and know all legislation after first reading, subject to exceptions under Standing Order 101A (4);
- To study, assess and analyze the relative success of Ministries and departments as measured by the results obtained as compared with its stated objectives;
- To investigate and inquire into all matters relating to all assigned Ministries and Departments as the may deem necessary, and as may be referred to them by he House or a Minister and;
- To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.

The Committee oversees the operation of following Ministries and Departments:

1. The Ministry of Justice and Constitutional Affairs
2. Bodies concerned with the Administration of Law and Justice.
3. The Police
4. The Judiciary
5. Public Prosecution
6. The Electoral Commission

The Members of the Committee are as follows:¹

Hon. Paul K. Muite, MP – Chairman

Hon. Kenneth Marende, MP

Hon. P.O. Owidi, MP

Hon. E.W. Kibunguchy, MP

Hon. Jim Choge, MP

Hon. Amina Abdallah, MP

Hon. Gideon Ndambuki, MP

Hon. Moses Cheboi, MP

Hon. Cecily Mbarire, MP

Hon. Macharia Mukiri, MP

¹ The Committee is currently irregularly constituted and contrary to Standing order No 151 (3) which provides for a maximum of 11 members.

Hon. James O. Magara, MP

Hon. Bifwoli Wakoli, MP

2.0 BACKGROUND

On 5th August 2004, this House approved the appointment of the Director and Four Assistant Directors to the Kenya-Anti- Corruption Commission (KACC). Despite this; the President did not appoint Dr. Julius Tangu Rotich to the position of Assistant Director, Finance and Administration.

On 7th October 2004, Hon. Franklin Bett brought a Question by Private Notice seeking an explanation from the Minister for Constitutional Affairs as to why Dr. Rotich was not gazetted as an Assistant Director of KACC.

The Speaker then directed that the Committee on the Administration of Justice and Legal Affairs should get to the bottom of the issue.

“It should first of all find out what ways the House will be satisfied that a person is fit for appointments to an office before we give our stamp of approval”.

“Secondly, if we make a mistake as is likely to be made either by the House or by any other person or authority, what is the avenue for redress and how will we go about it? On the basis I will ask the Committee to proceed. Let us have answers to the future avenues”.

From the above it is very clear that Speaker of the House is concerned with two interrelated and important issues:

- a) The first aspect of his directive touches on the power of parliament to appoint persons to certain positions that are provided for in certain statutes. In other words Parliament is concerned with both its statutory powers and how to exercise it to the exclusion of an intruding force that in turns erodes the powers and prestige of the House. It also addresses the constitutional doctrine of separation of powers, so that each arm of government exercises its powers according to the law.
- b) Second, the Speaker is concerned about the enforcement and redress mechanism of Parliament when another arm of government disregards its authority and as to what happens when an authority despite the exercise of certain powers by Parliament negates or ignores or acts contrary to the same and

paints a picture of a toothless and impotent Parliament. The Speaker is rightly concerned with the constitutional role of the House and its watchdog role too.

Both aspects of the issues as framed by the Speaker have enormous effect on the balance of power between the various arms of government and the effect of a blatant usurpation of parliamentary authority by the executive and the concomitant effect it has on a limited government that adheres to the rule of law. These various interrelated issues are actually well captured by the Speaker when he replies to Dr. Khalwale. He says:

“The committee should look into the whole issue of vetting and approval by the House of persons to whom this House is empowered to approve, and what happens about the question that follows next when the House has approved the appointment and the appointing authority has declined to so appoint.”

The matter was then referred to this Committee on 7th October 2004 for appropriate deliberation and action.

The Committee decided to deliberate on the matters referred to it in two phases: First the issue of Dr. Rotich and secondly the whole issue of Parliamentary vetting/approval of appointments when the law requires Parliament to vet/approve such appointments. This report therefore relates to the issue of Dr. Rotich. A further report on the second phase will be made to the House after the Committee concludes its investigations on the matter.

3.0 DELIBERATIONS OF THE COMMITTEE

On 8th October 2004, the Committee deliberated the matter and resolved to invite the following persons to appear before it in order to chart the way forward:

- The Current Chair of the Anti- Corruption Advisory Board – Mr. Allan Ngugi and members of the Advisory Board;
- The Former Chair of the Kenya Anti- Corruption Advisory Board – Mr. Ahmednasir Abdullahi;
- The Attorney General;
- The Minister for Justice and Constitutional Affairs; and
- The Minister for Lands and Housing.

3.10 Meeting with Members of the Kenya Anti-Corruption

Advisory Board

On 26th October 2004, the committee met the current chair of the Anti-Corruption Advisory Board together with five members of the Board².

They informed the committee that:-

- a. They had abided to the provisions of the Anti- Corruption and Economic Crimes Act, 2003 in recruiting the Director and Deputy Directors..
- b. During the recruitment process, Dr Rotich had a distinct advantage over the other candidates having worked for the previous Anti-Corruption Authority (KACA). He was an outstanding personality
- c. The list of successful candidates was submitted to the House on 23rd December 2003.
- d. The Institute of Certified Public Accountants of Kenya (ICPAK) lodged a complaint after the board had already submitted the list of successful candidates to Parliament.

² Mr. Richard B Ndungu, Ms Anna M Machungu, Ms Mariamu El-Maawy, Mr. Charles K. WAmbugu and Mr. Kipng'etich K Bett.

They stated that Dr. Rotich had failed to pay his membership fee and thus ceased to be a member of the Accountants body

- e. The Board investigated the complaint and concluded that Dr. Rotich was a qualified professional and had already paid the membership fee.
- f. The Board learnt about the allegations of misconduct against Dr. Rotich while he was at the National Cereals and Produce Board from the press and no formal complaint was lodged.
- g. The Permanent Secretary in the Ministry of Justice and Constitutional Affairs had confirmed the President's refusal to appoint Dr. Rotich.
- h. The Board was due to hold an extraordinary meeting to discuss the next steps and recommend the way forward.

3.11 Observations

The Committee reiterated that the Advisory Board was an independent body under the Act and was directly answerable to the National Assembly and should not seek advice from or allow the Ministry of Justice and Constitutional Affairs to interfere in its operations. A proper appreciation of both the law and the

policy behind the Act leads to the inescapable conclusion that Parliament did not confer on the Advisory Board and the Commission got the very wide powers it did by accident. It was by design. Parliament was informed by the fact that considering the history of the Emperor President who appoints all and fires all, the need to have statutory safeguards for institutions that check the power of government was important. So both the spirit and the law and even the policy framework mean that the powers of the president in relation to these two institutions were not only taken away but were statutorily designed to be domesticated. In addition, Parliament was given the central indeed the focal point in relation to these three organs. It was precisely to insulate the Advisory Board and the Commission that the Act took the operations of these institutions outside the axis and orbit of the Presidential fiat. A fundamental inability to appreciate the historic genesis and statutory intent of the Act underlines the government's bunched policies in relation to every step it took in the saga.

It is clear from the views the Committee received from the Advisory Board that all the rules and regulations touching on the recruitment of the Director and his four assistants were clearly

adhered to. We find no fault and are of the view that the law was adhered to.

3.20 Meeting with the Former Chairman of the Kenya Anti-Corruption Commission

On 12th November 2004, the Committee met with Mr. Ahmednasir Abdullahi, former Chairman of the Kenya Anti-Corruption Commission who is also the current Chairman of the Law Society of Kenya. The Committee wanted to find out facts about the recruitment process, the legal position and constitutionality of the President's refusal to appoint Dr. Rotich and what precipitated Mr. Abdullahi's resignation. Mr. Abdullahi stated as follows:-

- a. After the Board advertised for the five positions, about 380 candidates applied for the various positions.
- b. The Board interviewed those whom it considered qualified for the position of Director.
- c. Dr. Rotich had applied for two posts: Assistant Director Research, policy and preventive Services and Finance and Administration. He was short listed and interviewed for one post.

- d. During the recruitment process there were no complaints received from either the Institute of Certified Public Accountants of Kenya (ICPAK) or the National Cereals and Produce Board, or the Government.
- e. Information about the candidates was sought from the Director of Intelligence.
- f. After completing the process, the Board received a complaint from ICPAK stating that Dr. Rotich was unsuitable for the post. There was no substance in the complaint.
- g. The Board investigated the matter and concluded that it was not so weighty as to render Dr. Rotich unsuitable for the post. There was no substance in the complaint.
- h. Other candidates for the posts did not also hold practicing certificates from the relevant professional bodies and this was not held against them.
- i. After Dr. Rotich was not appointed, numerous meetings on diverse dates were held with the Minister for Justice and Constitutional Affairs and the Permanent Secretaries to Justice and Constitutional Affairs and Governance and Ethics in order to address the concerns of the Government that Dr. Rotich was not qualified and the need to resolve the issue before the names were forwarded to the President.

- j. From the meetings, it appeared that Hon. Amos Kimunya was the dark force behind the process to thwart the appointment of Dr. Rotich.
- k. The Government through the Permanent Secretary in the Ministry of Justice and Constitutional Affairs tried to exert pressure on the Board to remove Dr. Rotich's name as the "President had a problem with Dr. Rotich".
- l. The Board remained firm and prior to the gazettelement of the appointments the Board prepared and signed contracts with the five candidates that were conditional to appointment by the President.
- m. During the debate in Parliament, Dr. Rotich's appointment was approved by the Government together with that of the other four candidates.

3.21 The Legal Position

Mr. Abdullahi made the following observations concerning the Boards legislative powers:

- a. The Kenya Anti-Corruption and Economic Crimes Act, 2003 is a revolutionary piece of law that creates two independent bodies; the Advisory Board and the Commission. Both organs

are answerable only to parliament and the President has no executive role over the said organs.

- b. Members of the Board are not Government appointees and are nominated by various professional bodies set out in the Act. The government has no role at all, and this seems not to be appreciated by the Authorities.
- c. The Act gives the Advisory Board powers to appoint the Director and the Assistant Directors and then makes its recommendations to the National Assembly in accordance with the provisions of the Act.
- d. Once the National Assembly ratifies the appointments, the President's role is ceremonial and formal, namely to appoint. The Act provides that the President "**SHALL**" appoint.
- e. There is no provision allowing the President not to appoint the recommended candidates.
- f. The appointment ought to have been made and then a tribunal established to look into the substance of the allegations raised against Dr. Rotich.
- g. Parliament conferred Executive powers on the Board as it is mandated to do under section 23 (2) of the Constitution.
- h. Section 25 of the Constitution does not apply to the present scenario at all as it allows tenure of office to be held under "any

other law". Sub-section 2 refers to offices in the public service, armed forces, National Youth Service or any other for or service.

- i. KACC Directors are not members of the Public Service.
- j. Section 11 of KACC Act specifically provides that the State Corporations Act shall not apply to the KACC.
- k. In the premises the President clearly acted contrary to the law and his actions/omissions are unjustified.

3.22 Observations

Following this meeting the Committee was of the view that the Anti Corruption and Economic Crimes Act, 2003 did not fall under the purview of sections 23 and 25 of the Constitution. The Act gave the Advisory Board enormous powers. The Advisory Board has the sole and exclusive power to hire and fire all the chief officers of the Commission. This in turn entails the obvious namely that no other entity including the President has powers on issues that are exclusive within the domain of the Advisory Board. This is well captured in the First Schedule of the Act which is promulgated pursuant to Section 8 of the Act. It sets out the qualifications that should guide the Advisory Board. Implicit in this requirement are two derivative issues; One, that the Board must strictly adhere to the statutory qualification of the candidates as setout. Second, once it does so, then other organs

that have complimentary roles should not deviate from the recommendations of the Board in such a manner as to suggest that they can override the Board on its statutory functions. Further, on the firing aspect, Section 5 of the Schedule sets out in elaborate detail the procedure for removal. Again this monopolistic aspect clearly means that the Advisory Board has the sole Powers on this aspect of its mandate. No where does the Act give the President a substantive right that allows him to shape the composition of the commission in the manner he did by refusing to appoint Dr. Rotich. The sad and inescapable inference is that the President sent a poignant signal that no one whom, he is uncomfortable with will assume a senior position in the Commission, and no matter what the law is, he must have the final say.

Further the Committee observed that:

- i. The Anti-Corruption and Economic Crimes Act, 2003 gives independent and executive powers to the Anti- Corruption Advisory Board to recruit and recommend appointees to the Anti-Corruption Commission. In doing this, the Board acts independently and in fulfillment of its statutory duty. This independence was deliberate. Parliament wanted to create institutions that fight corruption without any regard to the comfort or discomfort of the executive arm of the Government.

Institutions that are so independent that they only report to Parliament. The Act is one of new statutes designed specifically to take powers from the President and share it between Parliament and the new institutions Parliament creates. It was part of the democratization ideals which informed the second liberation of this country.

- ii. The Act does not give the President any powers to refuse to make appointments that have been approved by the National Assembly. Such refusal is not even remotely contemplated. The President's role is ceremonial in that once the candidates pass through the envisaged stages, the President simply provides the *coup de grace* and appoints them religiously as he is mandated.

- iii. By refusing to appoint Dr. Rotich, the President has acted in violation of the Constitution and the Law. The Rule of Law is in danger. Dictatorship begins when the Rule of Law is replaced with personal rule.

3.30 Meeting with the Minister for Justice and Constitutional Affairs

The Minister was summoned to appear before the Board on 26th October 2004. He did not attend nor did he send an apology. Another meeting was scheduled for Friday 19th November 2004; which also the Minister failed to attend but sent apologies.

3.40 Meeting with the Attorney General

The Attorney General sent apologies and was said to have been out of the country on the relevant dates.

3.50 Meeting with the Minister for Lands and Housing

The Hon. Amos Kimunya whom the Committee wished to interview on his public pronouncements on the issue and also having been the dark force against Dr. Rotich as stated by former Chairman of KACC, failed to attend or send apologies despite requests for him to appear before the Committee.

3.60 The Way Forward:

Four important and interrelated issues that have enormous importance to this country and the attempt to create a just society governed by the rule of law arise from this saga.

First, the statutory framework and the institutional building capacity which Parliament has made in relation to the Advisory Board and the Anti Corruption Commission are undermined by the President's refusal to appoint Dr. Rotich. A literal reading of the statute makes its meaning very clear. There is no room for ambiguity. The President simply doesn't have the statutory powers to refuse or scuttle the process once the nomination of the candidates is recommended by the Advisory Board and approved by Parliament. The Act creates three interrelated steps that address how the requirement of the Director and Assistant Directors should be conducted. The foundational base is provided by the role played by the Board. The Board is given statutory guidelines on how to conduct this process. The candidates to be appointed as director and assistant directors must be qualified in law, public administration, and finance and fraud investigation. These are the basic minimums the candidates must satisfy. Once the Advisory Board recommends, Parliament takes over the process to see whether the candidates

recommended are qualified under the Act. If so, they approve. If not it returns the candidates back to the Board. The third step is that once Parliament has approved, it forwards the candidates to the President for appointment. The operative word is that the President **“SHALL”** appoint. The word “shall” is a mandatory order and leaves no discretionary on the person so ordered, by a statute enacted by Parliament.

The President in refusing/declining to appoint Dr. Rotich was thus in clear violation of the law. He must have been advised that he had such powers. The Attorney General has gone public and hinged the Presidents action on executive powers. But does the president have executive powers to override the executive powers of parliament when its acts pursuant to a statute it promulgated. A careful analysis of Sections 23 to 26 puts to rest the fallacy that he can do so.

In order to disabuse the Government of the fallacious contentions it has been peddling that the President has powers to refuse appointing any person to the public service and that everyone in the public service holds office at the pleasure of the

President, the Committee went into a detailed analysis of sections 23-25 of the constitution.

Section 23(1) states and we quote:

“the executive authority of the Government of Kenya shall vest in the President and, subject to this constitution, may be exercised by him either directly or through officers subordinate to him.

(2) Nothing in this section shall prevent Parliament from conferring functions on persons or authorities other than the President”.

(Emphasis added)

It is quite obvious from the above quoted section that persons other than the President can exercise executive powers under the constitution. But more important subsection 2 is clear and emphatic. It gives unlimited statutory powers to Parliament to create offices and institutions that can exercise executive powers whether in competition or independent of the President. If we correlate this subsection with the issue at hand, it validates and empowers Parliament as it did in creating the offices of the Director and Assistant Directors that exercise executive powers. In enacting the

KACC Act, Parliament exercised the Constitutional power and authority pursuant to sub-section (2) of section 23 of the Constitution of Kenya. It is thus quite obvious that the Anti Corruption and Economic Crimes Act, 2003 passes the test of constitutional validity and is well grounded.

Section 24 states and we quote:

“Subject to this constitution and *any other written law*, the powers of constituting and abolishing offices for the Republic of Kenya, of making appointments to such offices and terminating any such appointment, shall vest in the President.”(Emphasis added).

The KACC Act falls within “other written Laws” within the ambit of section 24 of the Constitution of the Republic of Kenya.

Again it is very clear that the Act was constitutionally legitimate in empowering Parliament to make appointments in departure from the monopoly the President has historically enjoyed. In fact, the constitution adopts a liberal and progressive posture and creates an

equal space for Parliament to make appointments but always pursuant to an Act of Parliament.

Section 25 states and we quote:-

(1) “Save in so far as may be otherwise provided by this constitution or any other law, every person who holds office in the service of the republic of Kenya shall hold that office during the pleasure of the president:...

(2) In this section “office in the service of the republic of Kenya” means office in or membership of the public service, the armed forces of the republic, the national youth service or any other forces or services established for the republic of Kenya”.

In enacting the KACC Act, Parliament provided “otherwise” regarding the KACC Director and Assistant Directors within the ambit of section 25 of the Constitution of the Republic of Kenya.

FINDINGS

From section 25, it is very clear again what an office in the public service is, and it does not include any of the offices created under the Anti Corruption Act.

From sections 23 to 25 we can synthesis the following constitutional principles which demystify the notion that the President can exercise executive powers where Parliament exercised such powers pursuant to an Act of Parliament; lawfully enacted by Parliament itself in accordance with the Constitution.

- a) The President does not enjoy an absolute monopoly in relation to the exercise of executive powers under the Constitution. Indeed Parliament can appoint individuals to executive positions through enabling statutes. This is thus an area of constitutional sharing of executive powers. Parliament was thus entirely within the constitution when it enacted the Anti Corruption Act and arrogated to itself powers to approve the persons recommended by the Advisory Board and making the President's role in the matter purely ceremonial.

- b) The President can create and abolish offices, but he has to give way where there is a statute that addresses the creation and

abolishment of offices. His power in this regard relates only to the instances where the same is not addressed by a written law.

c) The offices that are subject to Presidential appointment and abolishment are mainly those in the armed and disciplined forces. Offices created by the Anti Corruption Act are outside the contours drawn by the constitution.

d) Remarkably the above constitutional provisions create a liberal and progressive mechanism where Presidential powers are held in check contrary to the suggestions by apologists of the imperial President have historically pontificated that the President is above the Law. The President is not above the Law. The President is subject to the Law. It is the Law which provides that there shall be a President of the Republic of Kenya. It is the Law which provides how that President shall be elected and it is the Law which provides what powers that President shall have and how that President shall exercise those powers. Section 14 of the Constitution simply exempts the President from legal proceedings “while in office.”

e) The checks and balances between the Presidency and Parliament is a fundamental issue. In any democratic dispensation an orderly interface between these important institutions and a delicate check and balance between the two is very important and indeed is the hallmark of a stable, democratic and functional Government. Any transgression on the respective arena of operation can have a profound negative impact on the rule of law and stability of a country. At times, these two arms of government may clash or come into conflict when they operate in a competing terrain and the law is not clear on their respective roles. This at times creates paralysis of the government and at times can lead to absolute chaos and a constitutional meltdown. This scenario happens when both arms are assertive and independent of one another's control. In the instance at hand the situation is very different, and the law is very clear. It is Parliament that exercised a power pursuant to a statute and the President due to incompetent legal advice simply disregarded the law at the alter of some expediency. The issue is very simple; it is one that cannot cloud the minds of thoughtful men with a firm mastery knowledge of the law. To appreciate the legal issues herein, we must employ a sharp awareness of the provisions of the statute to sharpen our

perception of the scenario created by the refusal of the President to appoint Dr. Rotich. On the one hand, Parliament's action is backed by the Constitution and the law, on the other hand. The omission by the President is marked by an absence of convincing arguments leave alone the law however remotely disfigured. The refusal by the President to appoint Dr. Rotich is an affront to the dignity and the constitutional role of Parliament. It poses a great danger that has been overlooked by the myopic opinion given to the President to take the politically expedient action he took. The President's omission is a direct threat to the rule of law and a government limited in its actions and omission by its adherence to the law. It allows personal rule and the imperial Presidency to rear its ugly head again. It takes the country back to the dark era of the "big man" when the President no matter the law was above the law. It

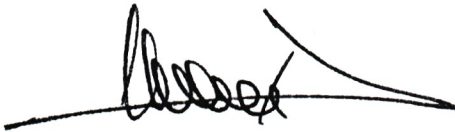
- f) The negative impact of the President's act will have on the independence of the commission is important. In creating an independent commission and the Advisory Board, Parliament was alive to the historic transgression of the executive in all other spheres of state operations. The President could hire and fire anyone. It was a realization of that unsatisfactory state of

affairs that Parliament through the Anti Corruption Act insulated these institutions against state interference. It gives the Advisory Board the exclusive powers to hire and fire the officials of the Commission. More important the composition of the members of the Advisory Board was taken outside the armpit of executive control. Professional bodies have the exclusive mandate to nominate members and Parliament appoints the Board. In disregarding the wishes of both the Advisory Board and Parliament, the President has truly undermined the effectiveness of the Advisory Board and has greatly damaged its future stature and standing. It will now look that it will play a second fiddle to the wishes of the executive and in its recruitment policies, it will be well aware of the fact that the President will always object and veto any candidate he is uncomfortable with. This creates a reverse of roles and relegates the Advisory Board as the executive rubber stamp. In the process this is a great disservice to Parliament's intention to create institutions that are independent of state control and that can fight corruption without any regard to the wishes of the executive arm of government.

g) The quality of legal advice the President was given in light of the mistake he made in not appointing Dr Rotich juxtaposed with the simplicity of the legal issues in contest raise an issue of profound concern to this country. It is widely believed in this country that the Attorney General of Kenya does not give the government the true legal position, but advises on what it wants to hear. Despite the simplicity of the legal issues in contention it was sad to see and hear the AG justify the President's omission on fuzzy legal views that are a relic of the dark ages of the one party state and a President who in the words of the AG "is above the law".

RECOMMENDATIONS

1. The Committee recommends that the House do consider and adopt this report.
2. The Committee recommends that the President appoint Dr. Julius Rotich as required by the KACC Act.
3. The Committee recommends that once appointed, a Tribunal be set up to investigate the allegations made against Dr. Rotich subsequent to his recruitment by the Advisory Board and approval by Parliament.
4. The Committee further recommends that the Report of the Tribunal be implemented.



P.K. Muite

**Chairman - Departmental Committee on the
Administration of Justice and Legal Affairs.**