

COUNTY GOVERNMENT OF KITUI



THE COUNTY ASSEMBLY SECOND ASSEMBLY – (THIRD SESSION)

COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT ON CONSIDERATION OF PUNGUZA MIZIGO
(Constitutional Amendment) Bill 2019

CLERK'S CHAMBERS,
OCTOBER, 2019
COUNTY ASSEMBLY BUILDINGS,
KITUI, KENYA

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1.0 COMMITTEE MANDATE

The Committee on Justice and Legal affairs was established vide a resolution of the County Assembly and it borrows its mandate from the National Assembly's Standing orders which is;

To consider all matters related to Constitutional Affairs, administration of law and justice, including the Judiciary, public prosecutions, elections, ethics, integrity and anti-corruption and human rights.'

The Honourable Speaker of the County Assembly, on the 24th day of September 2019, while exercising his discretion directed that the consideration of the Punguza Mizigo (Constitutional Amendment) Bill 2019 be undertaken by the Committee on Justice and Legal Affairs.

Mr. Speaker Sir,

The draft Bill having been presented to the office of the Speaker on 23rd July 2019, it is expected to be processed by the Assembly and a Speaker's certificate transmitted to the parliament on or before 18th October 2019

Mr. Speaker Sir,

On 24th September 2019 and pursuant to Standing Order No. 119 of the County Assembly of Kitui Standing Orders, The Punguza Mizigo (Constitutional Amendment) Bill 2019 was tabled in the Assembly and consequently committed to the committee on justice and legal affairs for consideration.

Mr. Speaker Sir,

The delay in tabling the Bill was occasioned by a joint petition filed by one David Kariuki Ngari and International Economic law Centre against the IEBC, Third way Alliance Kenya (the sponsor of the Bill) and the 47 county Assemblies. On 30th July 2019, the petitioners obtained Court orders barring all County Assemblies from debating and/or approving the Bill pending hearing and determination of the Application.

The Court orders were vacated on 13th August, 2019 when the Application came up for hearing before the Vacation duty Judge therefore allowing the County Assemblies to proceed on consideration of the Bill

Duly considering the urgency of the matter and the strict deadlines outlined in the draft bill, the Chairperson of the Committee in consultation with the Committee Clerk and the legal officer requested for the facilitation to conduct the public participation of the said Bill to enable the Committee to get the views of the public as regards the Bill.

The office of the Clerk placed an advertisement for the public participation on the Bill in the star newspaper of Saturday 28th September 2019, and in a social platform (Kitui County Assembly Facebook page.)

Mr. Speaker Sir,

The Committee facilitated public participation for the Bill at the Kenya Forestry Research Institute(KEFRI) Kitui regional Centre pursuant to Standing Order, 120(3) of the County Assembly of Kitui Standing Orders, on 8th September 2019, where it collected views of the public.

The public participation exercise was attended by the members of the public across the County this being members from Kitui Central, Kitui West, Kitui Rural, Mwingi Central, Mwingi West, Kitui East, Mwingi North and Kitui South sub counties.

Mr. Speaker Sir,

The Committee finally retreated to Mwingi town at summer springs Hotel where it held three (3) sittings to review and consider the contents of the Bill and views of the public made during the public participation and there after compiled this report.

2.0 COMPOSITION OF THE COMMITTEE

Hon. Speaker Sir,

The County Assembly Committee on Justice and Legal Affairs as currently constituted is composed of the following Honourable Members.

1. Hon. Nelson K. Musyoka	Chairperson
2. Hon. Eliud M. Ndinguri	Vice Chairperson
3. Hon. Geoffrey Mwalimu	Member
4. Hon. Dr. Grace Mutua	Member
5. Hon. Stephen M. Musili	Member
6. Hon. Philip Nguli	Member
7. Hon. Peter M. Kilonzo	Member
8. Hon. Josephine K. Mutie	Member
9. Hon. Charity S. Mwangangi	Member
10. Hon. Deiys M. Mukala	Member

3.0 ACKNOWLEDGEMENT

Mr. Speaker Sir,

I wish to thank the members of the committee for their utmost co-operation which enabled the successive completion of this exercise. The Committee also thanks the secretariat for dedication to duty and service to it.

On behalf of the Committee, I now have the honour and pleasure to submit the Committee's report on PUNGUZA MIZIGO (Constitutional Amendment) Bill 2019.

HON. NELSON K. MUSYOKA (M.C.A)
CHAIRPERSON, COMMITTEE ON JUSTICE AND LEGAL
AFFAIRS.
COUNTY ASSEMBLY OF KITUI

SIGNED.....DATE.....

4.0 INTRODUCTION

Mr. Speaker Sir,

The draft Bill titled PUNGUZA MIZIGO (Constitutional Amendment) Bill 2019 was committed to the Committee on Justice and Legal Affairs on 24th September 2019. The committee was expected to undertake scrutiny of the same and submit its report within fourteen (14) days to the County Assembly for approval.

Mr. Speaker Sir,

Scrutiny of a Bill is the detailed examination of a Bill which has already been introduced to the county Assembly by a sectorial committee to which it is committed to.

Mr. Speaker Sir,

In undertaking the scrutiny, the committee considered the following factors;

- (a) Whether the draft Bill conforms to the letter and spirit of the Constitution since it seeks to amend the Constitution.
- (b) Whether the draft Bill has technical soundness.
- (c) Views and recommendations of the members of public during public participation.

5.0. OVERVIEW OF PUNGUZA MIZIGO (CONSTITUTIONAL AMENDMENT BILL 2019)

Mr Speaker Sir,

The main objective of PUNGUZA MIZIGO (Constitutional Amendment) Bill 2019 is to amend the Constitution of Kenya (CoK 2010) in order to reduce the burden and cost of governance currently being borne by Kenyan taxpayers. Punguza Mizigo call adopts the popular initiative in Article 257 of the Constitution of Kenya 2010 that requires sponsors of a proposal to amend the Constitution of Kenya 2010 must present to the Independent Electoral and Boundaries Commission (IEBC) a million endorsement from registered Kenyan Voters.

This approach also re affirms the sovereign authority of Kenyan people in Article 1 of the Constitution of Kenya 2010.

Mr Speaker Sir,

In achieving its objective, the Punguza Mizigo (Constitutional Amendment) draft Bill 2019 seeks to amend the constitution by amending thirty (32) Articles of the constitution of Kenya (Cok) 2010.

By proposing to amend the said articles of the Constitution, the draft Bill has outlined the rational and justification for amendments.

6.0 CONSIDERATION OF THE PUNGUZA MIZIGO (CONSTITUTIONAL AMENDMENT) BILL, 2019 BY THE COMMITTEE

The committee deliberated on the Bill clauses as below:

Clause 1.

Gives the short title of the Bill as punguza mizigo (constitution of Kenya Amendment) Bill, 2019

The committee did not have any objection on the short title.

Clause 2.

Seeks to amend Article 73 of the constitution of Kenya, 2010 on the responsibilities of leadership by inserting two sub-Articles below:

(3) The recommendations of past and present public inquiry and reports shall automatically be adopted to bar all adversely mentioned individuals from seeking and holding any public or state office

(4) An accounting officer or state officer whose department is cited in the annual Auditor-General report having not accounted public money or fails to prove value for money, shall be required to immediately vacate office.

The committee was of the opinion that this may expose officers to malicious allegations. Further, compelling an officer to immediately vacate an office without according him/her the right to be heard is a direct contradiction with Article 50(2)(C) of the Constitution of Kenya 2010. Auditor General's report is an opinion to help other arms/ organs of the government to undertake investigations.

Clause 3 and 4

Seeks to amend Article 79 of the constitution of Kenya, 2010 on the legislation to establish the Ethics and Anti-Corruption commission by inserting new Article as below:

79A (1) A corruption or theft of public resources case shall be tried within thirty days of arraignment before a court of competent jurisdiction and an appeal be concluded within twenty-one days

(2) A person convicted and found guilty of corruption or theft of public resources or money shall serve a life sentence.

(3) Notwithstanding the provisions of Article 133, no presidential pardon or amnesty shall be applicable for those found guilty of corruption or theft of public resources.

The committee was of the opinion that the timeframe provided may violate the right of the officer to be accorded a fair hearing as provided for in Article 50(2) of the constitution of Kenya, 2010. The short period provided may not allow enough time and facilities to prepare defence in addition to shoddy investigations due to inadequate time. Further there are judicial processes which must be adhered to and interfering with the same may compromise justice.

Clause 5.

Seeks to amend Article 83 of the constitution of Kenya, 2010 on the registration as a voter by deleting sub-article 1 and replacing it with;

“Every person who attains the age of eighteen and who acquires a national identity card shall be deemed to be a fully registered voter for purpose of an elections and referenda”

The committee was of the opinion that the use of *national identity card* may result to lack of transparency and accountability in elections.

Clause 6 and 7.

Seeks to amend Article 88 and 89 of the constitution of Kenya, 2010 on the delimitation of the electoral units;

The amendments seek to do away with the constituencies and use counties as the constituency for the purposes of the election of members of parliament.

The committee was of the opinion that this will occasion a direct contradiction with Article 1 and 174 of the constitution of Kenya, 2010, where the people may exercise their sovereign power either directly or through their democratically elected representatives.

The Bill therefore does not give a framework on how the citizen will exercise their powers through adequate representations. Further, the promotion of representation of marginalised groups may not be achieved.

Clause 8.

Seeks to delete Article 90 of the constitution of Kenya 2010 on the allocation of party list seats;

The amendment seeks to do away with nomination of members to parliament and the senate.

The committee was of the opinion that this occasions direct contradiction with Article 27 (6) of the constitution of Kenya, 2010 on the third gender rule. The same may not be attained. Further, the promotion representation of marginalised groups may not be achieved.

Clause 9 and 10.

Seeks to amend Article 93 and 96 of the constitution of Kenya 2010 by giving the senate veto power as below:

93(5) on its own motion or upon receiving a petition from any person, the senate shall within twenty-one days consider and review decisions of the National Assembly and upon establishing that search decisions contravene this Constitution or goes against public interest, the senate shall veto search decisions pursuant to Article 93(3).

96(6) the senate may amend or veto a special Bill that has been passed by the National Assembly, to the president for assent.

Veto power in most democratic countries is bestowed to the houses with smallest representatives. The committee was in agreement of the amendment to have Senate as the Upper House.

Clause 11.

Seeks to amend Article 97 of the constitution of Kenya, 2010 on the Membership of National Assembly by;

- I. Reducing the constituencies from 290 to 47 and Parliament having 94 members, a male and a female from each constituency.
- II. Having six members nominated from special interest groups taking into account the gender balance of one man and one woman for the person with disabilities, youth and ethnic and other minorities.

The committee noted that this amendment occasions direct contradiction with Article 1 and 174 of the Constitution of Kenya, 2010 on the representation. The marginalised groups may never be adequately represented. Further, the third gender rule may not be attained as contemplated under Article 27(6) of the Constitution of Kenya, 2010.

Clause 12.

Seeks to amend Article 98 of the constitution of Kenya 2010 on the membership to the senate *by doing away with all nominations to the senate.*

The committee noted that this amendment occasions direct contradiction with Article 1, 100 and 174 of the constitution on the representation. The marginalised group and the third gender rule may not be attained as contemplated under Article 27(6) of the constitution of Kenya, 2010.

Clause 13.

Seeks to amend Article 100 of the constitution of Kenya, 2010 on the promotion of the representation of the marginalised groups.

This contradicts Article 1, 27(6) and 174 of the constitution on representation.

The marginalised /special interest groups and the third gender rule may not be attained.

Clauses 14,15,16,17 and 18.

Seeks to amend Articles 101,111,121 and 123 constitution of Kenya, 2010 respectively.

Articles 101 refers to the election of members of parliament. The Bill seeks to do away with notification of a party whenever a vacancy occurs in the office of its member in the National Assembly.

Articles 111 gives the senate executive powers to solely legislate on Special Bills concerning county governments.

Articles 121 on Quorum of the senate is increased from 15 to 24 senators.

Articles 123 on the decisions of the senate be deleted.

The committee was in support of the proposals since they are meant to strengthen the powers accorded to the senate as the upper house.

Clauses 19 and 20.

Seeks to amend Article 136 and 142 of the constitution of Kenya, 2010 *by capping the presidential term to one and running for a period of seven years. The election date for the presidency has also been stated.*

The committee noted that since elections in Kenya are very costly. The date and the term for election for members of parliament set out under Article 101(1) should be also be harmonised. Democracy may not be achieved. The president may not be accountable/responsible for his/her term since no motivation of being re-elected. Further having an election in the 5th year and another one on the 7th year will adversely affect the economy of the country.

It was also not highlighted on when the amendment would take effect.

Clause 21.

Seeks to amend Article 146 of the constitution on the vacancy in the office of president. The amendment seeks to have the speaker of the senate as president in case of vacancy in the both office of the president and the deputy president.

The committee was in support of the proposal since the senate becomes the upper house.

Clause 22.

Seeks to amend Article 157 of the constitution by giving more roles to the director of the public prosecutions.

The committee was the opinion that this contradicts the right to be heard as stated in Article 50(2) (C) of the constitution of Kenya, 2010. Further The Committee was of the opinion that the audit reports may be compromised.

Clause 23.

Seeks to amend Article 177 of the constitution on the membership of the county assembly.

The committee noted that the amendment contradicts Article 1, 27 (6), 174 and 197 of constitution on the representation. The marginalised groups and the third gender rule may never be attained.

Clause 24, 25 and 26.

Seeks to amend Articles 179 ,180 and 182 by doing away with the position of deputy county governor on the election of governor and county governor, the Bill seeks to abolish the position of the deputy county governor and replace it with the principal assistant appointed by the governor from among the CECMs.

The resolved that just as the case is for the president and the deputy president, the same should apply for the county governments the structure in the National Government should also be reflected in the county government. The Committee also

resolved that this situation means that the County shall not have a deputy Chief executive officer hence there is likely to be a power vacuum in the office of the Governor.

Clause 27.

Seeks to amend Article 188 of the constitution on the boundaries of counties.

The committee was in support of the proposal since it strengthens the powers accorded to the senate as the upper house.

Clause 28.

Seeks to amend Article 201 of the constitution on the principles of public finance. The committee was of the opinion that this amendment contradicts Article 230(4) of the constitution on the role of the salaries and Remuneration commission

Clauses 29 and 30.

Seeks to amend Articles 203 and 204 of the constitution by the wards as the basis for development and allocating more resources to the county the committee was in agreement with the proposals, since services to be funded from the equalization fund are from ward level

Clause 31.

Seeks to amends Article 229 of the constitution by giving more roles to the Auditor General.

The committee was of the opinion that this may hasten the action by the investigating bodies to ensure expedient investigation and prosecution of the issues

The judiciary is the only body which can convict an individual after prosecution.

Clause 32.

Seeks to amend Article 250 on the composition, appointment and terms of the office of the independent commissions.

The committee noted that several factors are considered in coming up with the composition of the independent commissions such as expertise, regional balance and representation of the various bodies affected.

By having commissioners not paid a consolidated fund may compromise the independence of the said commission. Reducing the number of commissioners may compromise its decisions since a few members would constitute quorum. The draft Bill did not take into considerations Article 230(2) on the composition of the SRC. Again, this constitutional amendment direct contradiction would cause constitutional implementation crises.

The committee was of the opinion that instead of interfering with the independent commission, the draft bill would have sought to abolish the various parastatals running under the various government ministries which seem to duplicate roles assigned to other bodies.

7.0 SUBMISSIONS BY MEMBERS OF THE PUBLIC

Pursuant to the provisions of article 196(1) (b) of the constitution of the Kenya, 2010, read together with the section 115 of the County Governments Act, 2012, the committee while considering the Punguza Mizigo (constitution of Kenya Amendment) draft Bill, 2019 engaged the members of public by inviting them to submit their views by way of a written memoranda to the office of the clerk

This was done through an advert put in star newspaper of 28th newspaper on Saturday, September 2019, as well as other social media platforms. The members of the public were to submit their views by Monday 7th October, 2019. The committee did not receive any submissions from the members of the public

8.0. COMMITTEE OBSERVATIONS

Mr. Speaker Sir,

During the consideration of the draft Bill, the Committee made the following observations.

The proposed constitutional amendment Bill 2019;

1. Seeks to take Kenya back to the pre-2010 constitution era, a time which did not recognise citizenry participation in running affairs of the country or consider their welfare in exercise of their sovereign power
2. Can only be structured to avoid a direct contradiction with other constitutional provisions.
3. Is in contravention of the object and spirit of devolution.
4. Its provision in its endeavour to curb corruption and protect public resources undermines the right to fair hearing.

9.0. RECOMMENDATIONS

From the observations made above and considering the views of the public, the Committee recommends that the Punguza Mizigo(Constitutional Amendment) draft Bill 2019 be rejected.

That this County Assembly adopts the Committees report rejecting Punguza Mizigo(Constitutional Amendment)draft Bill 2019

Signed: Date.....:Date.....

HON. NELSON K. MUSYOKA
(CHAIRPERSON JUSTICE AND LEGAL AFFAIRS COMMITTEE)

We Hon. Members of the Justice and Legal Affairs Committee do hereby append our Signatures to adopt the report on Punguza Mizigo (Constitutional Amendment) Bill 2019.

NAME:		SIGNATURE
1. Hon.Nelson Musyoka-	Chairperson	.....
2. Hon.EliudNdinguri-	Vice Chairperson	.....
3. Hon. Philip Nguli-	Member	.....
4. Hon.Charity Mwangangi-	Member	.....
5. Hon.Geoffrey Mwalimu-	Member	.....
6. Hon.Stephen Musili-	Member	.....
7. Hon.Deiys Mukala-	Member	.....
8. Hon.Peter Kilonzo-	Member	.....
9. Hon.Josephine Kavivi-	Member	.....
10. Hon.Grace Mutua-	Member	.....