

# NATIONAL ASSEMBLY

## OFFICIAL REPORT

Tuesday, 6<sup>th</sup> October 2015

The House met at 5.00 p.m.

[*The Speaker (Hon. Muturi) in the Chair*]

### PRAYERS

### QUORUM

**Hon. Speaker:** Well, Hon. Members, perhaps, because I spoke in Kiswahili and it might not have been understood when we said “*papa hapa*”, we do not have the necessary quorum. But, let me also remind the House that the earlier session was a Joint Sitting of the two Houses. For today’s purposes, therefore, we are going to have two sittings; one sitting which was joint and now a sitting of the National Assembly. That is the way it is designed when we sit as we are doing. Ring the Bell for 10 minutes just to alert Members. I am sure they may not wish to miss the sitting.

*(The Quorum Bell was rung)*

Hon. Members, we now have a quorum. Serjeant-at-Arms, please, remind Members coming in that this is a second sitting. It is a separate sitting. The earlier one was a Joint Sitting of the two Houses. This is a sitting of the National Assembly. Therefore, the Members coming for this sitting are entitled to log in. The earlier logging in was for a Joint Sitting of the two Houses.

Let us proceed.

### MESSAGES

#### REFERRAL OF THE EXCISE DUTY BILL BY H.E THE PRESIDENT

**Hon. Speaker:** Hon. Members, take your seats. I have two Messages. One Message being Message No.31 of 2015 is referral of the Excise Duty Bill, 2015 by His Excellency the President.

Hon. Members, you may recall that on 27<sup>th</sup> August 2015, the National Assembly passed the Excise Duty Bill, 2015. Thereafter, the Bill was presented for assent to the President in accordance with the provisions of the Constitution and our Standing Orders. However, His Excellency the President, by way of a Memorandum, has since referred the Bill back to the National Assembly for reconsideration pursuant to the provisions of Article 115(1)(b) of the Constitution.

Hon. Members, the President has expressed reservations on Part 1 of Paragraph (i) of the First Schedule of the Bill. Consequently, the President recommends amendments to the various

items in this Schedule relating to fruit juices, cigarettes and motorcycles. Standing Order No.154 requires the National Assembly to consider the President's reservations within 21 days. Therefore, the Memorandum stands committed to the Departmental Committee on Finance, Planning and Trade for consideration. The Committee should table its report by 20<sup>th</sup> October 2015.

In considering the Memorandum, regard will be given to the guidance given by the Speaker in a Communication delivered on 28<sup>th</sup> July 2015 concerning consideration of Presidential Memoranda and amendments thereto, particularly my guidance that amendments by a Committee or an individual Member that have the effect of fully accommodating the Presidential reservations will not attract the two-third requirement for passage.

I wish to remind the House and the Committee that only the clauses of the Bill that have reservations will be considered. I also direct the Clerk to circulate the Memorandum from His Excellency the President to all Members so that they can familiarize themselves with its contents.

I thank you.

#### PASSAGE OF THE FOOD SECURITY BILL (SENATE BILL NO. 23 OF 2014)

This second Message, being Message No.32 of 2015, is from the Senate. This relates to the passage of the Food Security Bill (Senate Bill No.23 of 2014) by the Senate.

Hon. Members, pursuant to the provisions of Standing Order No.41(4) relating to Messages from the Senate, I wish to report that I have received a Message from the Senate regarding the passage by the Senate of the Food Security Bill (Senate Bill No.23 of 2014).

Hon. Members, the Message states as follows:-

“THAT, the Food Security Bill (Senate Bill No.23 of 2014) was published in the *Kenya Gazette Supplement* No.81 of 30<sup>th</sup> May 2014, as a Bill originating in the Senate and was passed by the Senate on Wednesday, 16<sup>th</sup> September 2015 with amendments and in the form attached hereto.”

Consequently, and in accordance with the provisions of Article 110 of the Constitution, the Senate now seeks the concurrence of the National Assembly to the said Bill.

Hon. Members, I am aware that the Clerk has circulated the Bill in accordance with our Standing Orders. The Bill may now be scheduled for First Reading after which it shall stand committed to the Budget and Appropriations Committee for consideration in accordance with the provisions of Article 114 of the Constitution. Thereafter, the Bill will stand referred to the Departmental Committee on Agriculture, Livestock and Co-operatives for consideration, pursuant to the provisions of Standing Order No. 127, taking into account the recommendations of the Budget and Appropriations Committee.

Thank you, hon. Members.

#### PAPERS LAID

**Hon. (Dr.) Shaban:** Hon. Speaker, I beg to lay the following Papers on the Table of the House today, 6<sup>th</sup> October, 2015:-

The Public Finance Management (State Officers and Public Officers Motor Car Loan Scheme Fund) Regulations, 2015.

The Annual Report of the Ministry of Information, Communication and Technology for the 2014/2015 Financial Year (pursuant to Article 153(4)(b) of the Constitution)

The Annual Report and Financial Statements of Kenya Tourism Board for the year ended 30<sup>th</sup> June 2013.

The Annual Report and Financial Statements of Bukura Agricultural College for the year ended 30<sup>th</sup> June 2014.

The Annual Report and Financial Statements of the Sacco Societies Regulatory Authority for the period ended 30<sup>th</sup> June 2014.

The Annual Report and Financial Statements of Kenya Coconut Development Authority for the period ended 31<sup>st</sup> July 2014.

The Annual Report and Financial Statements of Kenya Law Reform Commission for the period ended 30<sup>th</sup> June 2015.

**Hon. Speaker:** Hon. Members, for avoidance of doubt, the Public Finance Management (State Officers and Public Officers Motor Car Loan Scheme Fund) Regulations, 2015 are referred to the Committee on Delegated Legislation. It is fair that the Committee expedites a number of these regulations.

The Report from the Ministry of Information, Communication and Information is referred to the Departmental Committee on Energy, Communication and Information.

Yes, Hon. Chepkong'a.

**Hon. Chepkong'a:** Thank you, Hon. Speaker. I beg to table the Report of the Departmental Committee on Justice and Legal Affairs upon its consideration of the following four Bills:-

(i) The Magistrates' Courts Bill, 2015;

(ii) The Small Claims Court Bill, 2015;

(iii) The High Court (Organization and Administration) Bill, 2015; and,

(iv) The Court of Appeal (Organization and Administration) Bill, 2015.

**Hon. Speaker:** There is need for the technical unit to check whether all the machines are working. That is because it shows that Hon. Keynan has placed a request and yet, I do not seem to see him. It also shows that Hon. Tiya Galgalo, Hon. Birdi and Hon. Mbarire have made requests and yet, I do not seem to see them. The technical unit will deal with the matter. Hon. Oburu Odinga is also shown to be making a request. He cannot obviously escape my notice. I know where he normally sits. He is nowhere. There is need for these machines to be checked.

Next Order!

## POINT OF ORDER

### COURT SUMMONS OVER IMPEACHMENT OF CS ANNE WAIGURU

**Hon. Maanzo:** On a point of order, Hon. Speaker.

**Hon. Speaker:** I was trying to put off the request by Hon. Keynan since I do not see him in the House. I am surprised that it came to you. Hon. Maanzo, I can now see you.

**Hon. Maanzo:** Hon. Deputy Speaker, my point of order concerns the earlier pronouncement of this House. Even the House pronounces itself either by passing a law or by a ruling of the Speaker that Members do contribute. Therefore, the issue I am raising is to what extent the rulings are binding to the public generally. That is because once we pass a law, it binds all of us unless a proper procedure is used in court to pinpoint particular issues. We have

delivered a Motion to the Clerk on the impeachment of Cabinet Secretary, Anne Waiguru but, to our surprise, the CIC went to court and purported to sue Parliament and the court summoned the Speaker instead of summoning the Attorney-General, who acts on behalf of the Government of Kenya. Although you have already made a ruling on the matter, I still believe that this is a matter requiring your intervention so that members of public and other interested parties can know the proper method of approaching an issue on which Parliament has pronounced itself, since the matter was already live in Parliament. Already, documents have been presented to the Clerk and are being processed. It is a matter already happening in Parliament and, therefore, the courts cannot interfere with it, especially following the earlier pronouncement by the Speaker.

**Hon. Speaker:** Hon. Members, I am not aware of any Motion since I have not seen such Motion. I am the one who approves Motions. I have not seen any court summons either. However, I have seen Members of Parliament debate on television, purporting to be impeaching people. The way to impeach a person is through a Motion brought to the House through the Clerk, who should then bring it to me for approval. That is the way we have always dealt with such Motions. We can deal with the matter here. So, regarding the issues debated on television shows like *Cheche* and other such programmes that even “cooked up” court orders, I clarify that I have not seen any such court order. I have not even seen any court summons. If people want to excite themselves, it is okay. You know people want to be happy. If people want to excite their supporters, it is okay. I cannot rule on things which have not come to the Floor of this House.

Honestly, it would be unfair on my part to be required to make any ruling about something that I have not seen. Nothing has come to me. Since you said that you have submitted a Motion, please, ask the Clerk why it has not come to me. As usual, these are things which are easy to deal with. The rules are so clear. If it has come to my desk, it would have found its way here very fast. So, I am not sure whether you have filed it because I have not seen it. I cannot, therefore, comment on purported court orders. Those are for those people who just want to talk about things out there in the streets. We cannot bring those kinds of matters in the House. I quite agree with you, Hon. Maanzo. You saw me, but again, I have not seen the court order, the summons or even the Motion. So, if I purport to make a ruling now, I will be making a ruling in futility. I have not seen any of those. If there is a court order, there should have been a proper process. I am not aware. So, the best we can do here is to ignore. Let us wait and deal with the matter when it becomes active and alive here. You are the people who make decisions on matters of Motions.

I also believe that matters legislative must be left to the exclusive domain of the Legislature. At that rate, if it does not happen, we will even put in the *Kenya Gazette* announcements that we are going to be addressed by certain persons and then we will be told that we have been enjoined. You can imagine the kind of embarrassment that would cause. Then it means that Parliament does not have a calendar of its own. The only rule that we know of is one of *sub-judice*. Again, for us to make a decision on that one, we need to see the actual substance of the matter. We cannot just tell Members not to discuss or debate issues merely because somebody is doing some other things out there. We are an independent arm of the Government.

(Applause)

Let us move to the next Order.

## MOTION

ADOPTION OF REPORT ON EAC PEACE AND SECURITY  
PROTOCOL/MUTUAL PEACE AND SECURITY PACT

THAT, this House adopts the Report of the Committee on Regional Integration on East African Community (EAC) Peace and Security Protocol and the Mutual Peace and Security Pact, laid on the Table of the House on Wednesday, 29<sup>th</sup> April 2015 and pursuant to Section 8 of the Treaty Making and Ratification Act, 2012, approves the East African Community (EAC) Peace and Security Protocol and the Mutual Peace and Security Pact.

*(Hon. (Ms.) Kajuju on 27.8.2015)*

*(Resumption of Debate interrupted on 1.10.2015)*

**Hon. Speaker:** Hon. Members, debate on this Motion was concluded. What remained was to put the Question.

*(Question put and agreed to)*

Next Order!

**BILL**

*Second Reading*

THE MAGISTRATES' COURTS BILL

*(Hon. (Dr) Shaban on 1.10.2015)*

*(Resumption of Debate interrupted on 1.10.2015)*

**Hon. Speaker:** Hon. Members, Hon. Nicholas Gumbo was on the Floor when the House adjourned for lack of Quorum as raised by Hon. Lessonet. If Hon. Gumbo is present, he can make use of his balance of five minutes. If he is not present, then I can see the Chairperson of the Departmental Committee on Justice and Legal Affairs, Hon. Chepkong'a.

**Hon. Chepkong'a:** Hon. Speaker, this is a very important Bill. It is one of the Bills that seek to give effect to the new Constitution. The main objective of this Bill, as may have been stated since I was not here when the debate began, is to give effect to Article 23(2) and Article 169(1)(a) of the Constitution. In particular, Article 23(2) seeks to give original jurisdiction to hear and determine matters for either redress, of denial, a violation, infringement or a threat to a right of a Kenyan. This seeks to give that power or jurisdiction to the Magistrates' Courts that was not conferred upon them before. Article 169 of the Constitution seeks to confer jurisdiction and gives functions and powers to the Magistrates' Courts.

As you may be aware, the Magistrates' Courts have been operating in a very limited manner particularly with regard to succession issues. The pecuniary limits or jurisdiction of most

of the magistrates have been pegged at Kshs100,000, while we know that the interest of succession matters could be as much as Kshs20 million. That necessitates the parties to travel to the headquarters of the various counties seeking to enforce their rights, particularly on small matters like confirmation of administration.

So, this Bill seeks to increase the jurisdiction of the Magistrates' Courts with particular regard to the pecuniary limits that a Magistrate Court can entertain. We seek to increase in particular the pecuniary limit with regard to succession to a maximum of Kshs20 million. The proposal that is contained in Clause 7 states that the Magistrates' Courts can exercise jurisdictional powers in proceedings of civil nature in which a value of the subject matter does not exceed Kshs7 million. The Committee discussed that and found that it is too low. We are, therefore, proposing to increase that limit to Kshs20 million.

We are also proposing to increase the limit, to be presided by Senior Principal Magistrate, from Kshs5million to Kshs10million and, likewise, going down to Resident Magistrates from Kshs2 million to Kshs4 million. This will save in terms of cost and travel for those who are seeking to obtain letters of administration and confirmation of the same from the Magistrates' Courts. At the moment, the maximum limit for a Chief Magistrate is about Kshs1 million with regard to succession and it is Kshs500,000 with regard to Senior Principal Magistrate. This is forcing many litigants to travel as far as 150 kilometres to obtain such services. So, we are seeking to help Kenyans to access judicial services at a very close range as opposed to travelling long distances and spending millions of shillings.

The Judiciary, through the Judicial Service Commission (JSC), is seeking to establish courts all over the country, particularly at the headquarters of the counties. A High Court shall be established in every county headquarters. They are also seeking to ensure that Magistrates' Courts are established in every division to minimise the time of travel for those who are seeking judicial services. So, this is a very important Bill as it seeks to ensure that Kenyans who have been suffering are assisted.

Hon. Speaker, I am also a victim of these services. We have been seeking to confirm some letters of administration of my late father. The magistrates have not been given the capacity and so, it has forced us to go all the way to Eldoret where it is packed. When we go there, the court list is filled with other very urgent matters like the ones of the Kenya Union of Post-Primary Education Teachers (KUPPET) and Kenya National Union of Teachers (KNUT). So, they never get to our matters and yet, they are very important issues which we need to resolve to minimise wrangles. At times, you see families killing each another because they have not been given the powers to ensure that properties of the deceased are sub-divided to entitled beneficiaries.

I remember one Member of Parliament who told me that we need to increase the jurisdiction of the Magistrates' Courts because his constituents are travelling from Nkubu to Meru to seek services to ensure that their letters of administration are confirmed. So, they have been bothering him asking him for money and transport to ensure that they get as far as 70 or 80 kilometres. With the passage of this Bill, those matters that have maximum value of Kshs20million can now be confirmed at Nkubu Principal Magistrate's Court or the Chief Magistrate's Court. One does not need to go to the High Court in Meru.

*[The Speaker (Hon. Muturi) left the Chair]*

*[The Temporary Deputy Speaker]*

*(Hon. Kajwang') took the Chair]*

So, it is a very important Bill, Hon. Temporary Deputy Speaker, which we should pass as quickly as possible to ensure that those services are accessible to Kenyans. I thank you.

**The Temporary Deputy Speaker** (Hon.Kajwang'): Thank you very much. Member for Ol Jorok.

**Hon. Waiganjo:** Thank you, Hon. Temporary Deputy Speaker, for giving me this opportunity to debate the Magistrates' Courts Bill. This is a piece of legislation that Parliament has been given express mandate by the Constitution to enact to give original jurisdiction to subordinate courts to determine applications of various issues within the Constitution, particularly those under Article 23(2) of Chapter 4 of the Constitution, which primarily deals with the Bill of Rights.

Article 169(1)(a) of the Constitution defines subordinate courts as Magistrates' Courts - which is the subject matter of this legislation. It also defines subordinate courts as Kadhis' Courts, Court Martials and other tribunals. Therefore, this is one of the Bills that the Constitution has clearly indicated that Parliament has to pass. The most important thing is that Parliament is conferring jurisdiction to those subordinate courts. This Bill repeals Chapter 10 of the Magistrates' Courts Act, Section 20 because it did not have sufficient jurisdiction for our magistrates. Therefore, this Bill is the one that is coming to confer jurisdiction, functions and powers to those courts.

If you look at the objects of this piece of legislation, it clearly says that the main objective is to facilitate judicial service. It does not say only to facilitate judicial services but that, such service has to be just, expeditious, proportionate and accessible. Therefore, this Bill is in line with Article 232 of the Constitution which refers to values and principles of public service. It clearly states that the jurisdiction that is given to those courts must conform and comply with Article 232 of the Constitution. Those values include standards because our courts have to have the highest standards. It also refers to the efficiency of our Magistrates' Courts. To make them efficient, we have to pass this piece of legislation. It also talks about accountability, transparency and people-driven issues. That is to say that it has to involve people.

So, what we are saying is that by passing this piece of legislation, we are trying to decongest the High Court by giving more jurisdictions to our subordinate courts. For instance, if you look at Section 7 of this Bill, you will realise that most of the matters that were moving to the High Court will now be ventilated and filed in the subordinate courts because, previously, the Chief Magistrates' Court would only handle matters of pecuniary jurisdiction of only Kshs7 million. This means that if you had a claim of over Kshs7million, then you had to go to the High Court. You can imagine how many claims are of over Ksh7 million. Therefore, this Bill now states that a Chief Magistrate's pecuniary jurisdiction has now been enhanced from Kshs7 million to Ksh20 million. It means that even a person in the village does not need to come to the High Court to file a succession case where the estate of the deceased is Kshs20 million and below. That means a huge chunk of litigation that revolves around our High Courts relating to matters of pecuniary jurisdiction of Kshs20 million and below will now not go to the High Court. Equally, a Senior Principal Magistrate's Court was handling pecuniary jurisdiction of only Kshs5million. This Bill has enhanced that jurisdiction to Kshs15million. The Principal Magistrate's Court was handling matters of Kshs4 million and now it is Kshs10 million. If you look at the Senior---

*(Microphone went off)*

**The Temporary Deputy Speaker** (Hon. Kajwang'): Well, I can assure you that, that was not me. It was not my doing. It must have been an act of God or some other forces which are not attributable to the Chair. You have about five minutes running.

**Hon. Waiganjo:** Thank you, Hon. Temporary Deputy Speaker. I was saying that the jurisdiction of the subordinate courts has been enhanced by this piece of legislation. Therefore, it is a good thing.

The other thing that this legislation has done is to look at Chapter Four of the Constitution which is on the Bill of Rights. Previously, any matter which was related to the Bill of Rights would automatically go to the High Court. What does this Bill do? It is entertaining matters of Chapter Four of the Constitution which is the Bill of Rights but, specifically, those under Article 25(a) and (b). That is because the High Court still has residue or jurisdiction on matters of Chapter Four particularly on Articles 47, 48, 49, 50 and 51 but, those under Article 25(a) and (b) can now be ventilated before the subordinate courts. They are important matters because we are talking about freedom from torture, slavery, fair trial and *habeas corpus*. Previously, you would only get *habeas corpus* in the High Court but now you can appear before a subordinate court, apply for it and get it. Therefore, this Bill is taking care of many matters that would go to the High court and bringing them down to the level of subordinate courts.

If you look at the other gist of this Bill, it wants to allow magistrates to determine labour, environment and land matters. Previously, this was the purview of the High Court. On matters of labour, environment and land, we used to have many litigants unable to come to the High Court because the High Courts were too congested. But now, litigants will be able to ventilate their matters in the subordinate courts now.

Hon. Temporary Deputy Speaker, this Bill also clearly lays out the administration of those courts. The courts have an administrator who is in charge of the registry and keeping of records and, therefore, it is an efficient court. The killer point of this Bill is on matters of succession because one does not need to go to the High Court. They can ventilate their issues in subordinate courts but, I am a bit worried about Section 3(c) of this Bill. It appears to talk about seduction or pregnancy of unmarried woman or girl.

Clause 7(3)(d) talks about enticement of, or adultery with, a married person. In my school of thought, in fact in law, I do not think our Penal Code has any offence known as "adultery".

**The Temporary Deputy Speaker** (Hon. Kajwang'): Are you talking about Clause 7?

**Hon. Waiganjo:** I am talking about Clause 7(3)(d). It talks about enticement of, or adultery with, a married person. It appears to me that it purports to create a criminal offence in the name of adultery. There is no such offence in the Penal Code. I do not think this kind of legislation should come up with criminal offences. This is a matter that needs amendment. I want to submit that I will be moving an amendment to delete this provision.

The other issue that I would want to point out in this piece of legislation---

**The Temporary Deputy Speaker** (Hon. Kajwang'): Member for Ol Jorok, this refers to proceedings of a civil nature.

**Hon. Waiganjo:** It refers to proceedings of both civil and criminal nature.

**The Temporary Deputy Speaker** (Hon. Kajwang'): Could it be referring to what was in the former African Courts Act, or something like that?

**Hon. Waiganjo:** Hon. Temporary Deputy Speaker, in law currently, the Penal Code is the one that defines crimes and penalties. Our Penal Code does not talk about any crime called "adultery".



**The Temporary Deputy Speaker** (Hon. Kajwang'): Does this talk about the penal law or does it talk about civil jurisdiction? Could it be talking about damages, for example, or some other sanctions under African customary law?

**Hon. Waiganjo:** Probably, Hon. Temporary Deputy Speaker. I would really have loved to see that. If it talks about compensation, what would be the compensation by an adulterous man or woman? Indeed, it would help to avoid situations where people take the law into their own hands when a situation of adultery arises. It would help if a man, whose wife has indulged in adultery, could be given several goats so that he can forgive the adulterer and the co-adulterer. Probably, that way, we would reduce the number of crimes of passion. However, that is not expressly stated in this piece of legislation.

**The Temporary Deputy Speaker** (Hon. Kajwang'): Is it your position, therefore, that the Bill, to the extent that it proposes some civil jurisdiction on enticement of, or adultery with, a married person is in error?

**Hon. Waiganjo:** It, indeed, is. In fact---

**The Temporary Deputy Speaker** (Hon. Kajwang'): Hon. Waiganjo. Because I have engaged you, I will give you a few more minutes. Put your card in the intervention slot.

**Hon. Waiganjo:** Thank you, Hon. Temporary Deputy Speaker. Clause 7(3)(c), (d) and (e) are matters that we need to have a closer look at. In paragraph (c), we are talking about seduction or pregnancy of an unmarried woman or girl, but we are not talking about the age; we are not talking about defilement. We are saying that if somebody seduces and impregnates a woman, then situationally, it is an offence. In my thinking, that is wrong. I would want to bring an amendment to delete paragraph (c), because it is anybody's right to seduce a woman. Even women seduce men.

With regard to paragraph (d), on the issue of enticement of, or engaging in adultery with, a married person, these are matters of right. Anybody claiming adultery under the African customary law would be out of their mind because there is no such thing as adultery under the African customary law, as we know it. This is a section that requires an amendment, which I will bring to the House at the appropriate time.

**The Temporary Deputy Speaker** (Hon. Kajwang'): Thank you very much. Did I see the Member for Kandara on my intervention list? Did you choose to withdraw your intervention?

**Hon. (Ms.) Wahome:** Hon. Temporary Deputy Speaker, I thought that you had seen the intervention.

**The Temporary Deputy Speaker** (Hon. Kajwang'): I was waiting for you to speak to the subject of seduction or pregnancy of an unmarried woman, particularly on enticement of, or adultery with, a married person.

**Hon. (Ms.) Wahome:** Hon. Temporary Deputy Speaker, I actually wanted to raise an intervention and inform the House on what the Member for Ol Jorok said, that it has not been a known crime under any other law. The Subordinate Courts Act and the Matrimonial Causes Act recognise adultery. The adulterer, who is the man, is given a penalty.

**The Temporary Deputy Speaker** (Hon. Kajwang'): Did you say that there is some compensation of a donkey or something?

**Hon. (Ms.) Wahome:** Once you join a man as a respondent in a divorce petition, the statute law---

**The Temporary Deputy Speaker** (Hon. Kajwang'): You are referring to African divorce law. What is your citation?

**Hon. (Ms.) Wahome:** It is the African Christian Marriage and Divorce Act. It provides for a penalty against a man who sleeps with somebody's wife.

**The Temporary Deputy Speaker (Hon. Kajwang')**: Hon. Members, I will allow the Member for Kandara to finish speaking, because the matter that she is raising is very important.

**Hon. (Ms.) Wahome:** Hon. Temporary Deputy Speaker, it is, indeed, a very important issue. My only concern is that if I were to improve that particular provision then it would be that a woman who is found to be in the same situation is penalised. It is the husband who benefits from adultery committed by the wife with another man but the wife does not benefit from that offence. The man who sleeps with---

**The Temporary Deputy Speaker (Hon. Kajwang')**: Do you call that a benefit? Is that a benefit, Member for Kandara?

**Hon. (Ms.) Wahome:** He benefits because there is compensation given to the man whose wife is found to have slept with another man. The man is the one who gets the penalty, especially when he is a respondent in a suit.

**The Temporary Deputy Speaker (Hon. Kajwang')**: I hear you.

**Hon. (Ms.) Wahome:** That is what I wanted to speak to. Maybe I will have the opportunity to speak to the Bill.

**The Temporary Deputy Speaker (Hon. Kajwang')**: Member for Ainabkoi, what is your point of order?

**Hon. Chepkong'a:** On a point order, Hon. Temporary Deputy Speaker. Very serious things are out of order. One is reference to a law that has been repealed. As you know, we passed the Marriage Act last year. One of the legislations that were repealed is what Hon. Wahome was making reference to. It is inappropriate to make reference to a law that does not exist. Neither does it create any crime anymore because it has ceased to exist.

The new Marriage Act recognises five types of marriage. One of them is customary marriage, on which it is clear. Of course, I have been quoted out of context – that I have said that any woman you walk around with is your wife. I have been talking to Hon. Wahome but she does not look like she can be my wife. Neither does she have the capacity. I am talking about the references that were made by the women's movement. That thinking itself is very archaic. It does not exist in law.

**The Temporary Deputy Speaker (Hon. Kajwang')**: I hear you although I heard the Member for Kandara state that it has been repealed. In any case, Chair, before you walked into the Chamber, the Member for Kandara was supplying information. It arose from the Member for Ol Jorok, who said that this legislation seems to create jurisdiction of a civil nature for, amongst other things, seduction or pregnancy of an unmarried woman or, girl and enticement of, or adultery with, a married person, when, in fact, you say that, that jurisdiction, under African customary law, was vanquished by virtue of the fact that, that law was repealed. In the context of the Marriage Act, which is now the law, how then is this jurisdiction supposed to be supplied? I think that was the point of discussion. Member for Kandara have you not said enough on this one?

**Hon. (Ms.) Wahome:** I am still on a point of information.

**The Temporary Deputy Speaker (Hon. Kajwang')**: Can I give you one minute and not more than one?

**Hon. (Ms.) Wahome:** Yes. I want to inform the Chairman that first of all, I am aware there was a repeal but under the Kikuyu Customary Law - the customary law has been codified under the new Marriage Act - a father was entitled to compensation for his daughter who was

made pregnant by a man who was not marrying her. Therefore, that compensation may not be for a criminal offence, but a man was actually penalised and was to compensate a father for impregnating his daughter, whom he was not marrying. That compensation was expected to, possibly, deal with maintenance. I am aware that now we have new maintenance provisions under the Children Act. So, I think my learned friend, hon. Chairman, will stand informed.

Hon. Temporary Deputy Speaker, I will rise again to contribute.

**The Temporary Deputy Speaker** (Hon. Kajwang’): Okay. That is well received. Member for Vihiga, are you in the Chamber?

**Hon. Chanzu:** Yes.

**The Temporary Deputy Speaker** (Hon. Kajwang’): Where art thou?

**Hon. Chanzu:** I am here, Hon. Temporary Deputy Speaker.

**The Temporary Deputy Speaker** (Hon. Kajwang’): All right. Proceed.

**Hon. Chanzu:** Hon. Temporary Deputy Speaker, would you mind if I move to another seat? This thing is too short.

**The Temporary Deputy Speaker** (Hon. Kajwang’): Well, it is your choice where you sit in the Chamber.

**Hon. Chanzu:** I did not realize it. I had not put in the card and I pressed. So, I could not move the card. Can I move to---

**The Temporary Deputy Speaker** (Hon. Kajwang’): You can see that I can hear you. So, wherever you are, I will be perfectly able to hear you.

**Hon. Chanzu:** I am having some discomfort. I just wanted to move to the next seat.

**The Temporary Deputy Speaker** (Hon. Kajwang’): It is your choice. You know you are now going under the pillar; Maybe, you do not want your face to be seen.

**Hon. Chanzu:** Sorry, Hon. Temporary Deputy Speaker.

**The Temporary Deputy Speaker** (Hon. Kajwang’): Do you want me to call the next speaker as you organize yourself?

**Hon. Chanzu:** Please.

**The Temporary Deputy Speaker** (Hon. Kajwang’): Member for Kaloleni

**Hon. Chea:** Thank you, Hon. Temporary Deputy Speaker for this opportunity. I wish to support this Bill. I also wish to point out from the outset that for the objectives of this Bill to be achieved, there will be need for serious co-operation right from the members of the Judiciary, the advocates practising in courts and, of course, litigants.

Hon. Temporary Deputy Speaker, the most important thing I wanted to mention in this is the question of jurisdiction. If you look at Clause Six of this particular Bill--- Of course, as it has been the case, magistrates are conferred with criminal jurisdiction. I am looking at a situation where probably we will have a good number of magistrates in this country, and we have a situation where we will have magistrates specializing in particular areas. What we can see happening in this country now is that, probably, in one station there is one magistrate and he will preside over both civil and criminal cases. If we reach a situation where I believe the Judicial Service Commission (JSC) will have many magistrates in this country, we will have a situation where we will have magistrates specialising in particular areas like the criminal field.

I say this because you realise that technology is catching up with us. There are so many crimes that are being committed today that require a certain level of expertise. So, if we proceed in the traditional way of handling these matters, I do not think we will be going far in terms of handling criminal issues in this country.

The success story in this Bill, as has been alluded to by my fellow Members, is the question of succession. We have had a serious problem when it comes to succession. For instance, I used to have one court in my constituency of Kaloleni. This court ordinarily used to be manned by a Resident Magistrate, whose jurisdiction was too low. People had to travel about 65 to 70 kilometers to the High Court in Mombasa to file their petitions for letters of administration. With the jurisdiction of the magistrates serving in their areas, it will be quite easy for parties to file their succession matters in these courts and, of course, have land ownership changed. What is happening today is that there are so many titles that are lying at the registries. Land transactions cannot be done because you realise titles have not been changed and it is a big problem.

The other thing that I want to mention here is the question of court administrators. We have been used to a situation where registries are manned from all over. We have also had cases of consumers of justice, litigants for that matter and advocates, complaining about disappearance of proceedings and court files. When proceedings disappear or when court files disappear, this is the time when you realize justice is delayed. Most of the time you have to go back to court, so that you can reconstruct files. Too much time is spent on the reconstruction of files; at the end of the day, the justice people seek is not obtained. That is why I mentioned from the beginning that there must be some level of co-operation.

You realise that at times magistrates are transferred suddenly. We really have to see the JSC taking care of these issues. If a magistrate is transferred, and leaves a matter unresolved, then it becomes difficult to handle it. I want to emphasize that for the objectives of this particular Bill to be achieved, then all stakeholders must participate.

I support this Bill and thank you, Hon. Temporary Deputy Speaker, for the opportunity.

**The Temporary Deputy Speaker** (Hon. Kajwang’): Thank you. Member for Vihiga.

**Hon. Chanzu:** Thank you, Hon. Temporary Deputy Speaker for giving me the opportunity to support this Bill. This Bill is timely, considering that with the new Constitution the structure and size of the Government is now different. There is a lot involved here. Apart from the content here, which is commendable--- The structure of Government we had then involved eight provinces but now we have 47 counties. From the outset, there is a lot of involvement that needs to be managed. There is clarification in the Memorandum of Objects and Reasons. It is said that the Bill does not limit fundamental rights and freedoms, and does not concern county governments. Of course, this is because the roles to be played here belong to the national Government. But whatever you do, as a result of the changes that have taken place, as we implement this, the enactment of this Bill shall not occasion additional expenditure.

I do not know what that means but I believe it will--- When responsibilities and roles increase, you need more people at the end of the day. I am looking at what happened before and what is expected to happen thereafter. I am also looking at how magistrates operate and the kind of growth that we are undergoing in the country, the sophistication level and growth of the economy and so on--- Everything goes up because with passage of time, even the crime that we are dealing with today is not crime that was dealt with five years ago.

There is also the element of advancement. Criminals also get advanced every now and then. The other day I read in the newspapers an incident where in Equity Bank, robbers alerted the bank that they were going to carry out an inspection the following day. They said that they were coming from the head office. Since these guys are used to some kind of routine checks they did not question. Even Members here are used to auditors going to their offices; so, they do not

question anything. I know even the Speaker goes through the same when your Constituencies Development Fund (CDF) officers tell you inspectors are coming this week.

These guys called and said they would be there in the morning. These fellows were waiting and they came in the morning and met the cleaners. They introduced themselves and told the cleaners to open. They got in, looked around waiting for the senior officers to come. After they realized everything was settled, they took a pen-knife – I do not know whether you know a pen-knife, hon Temporary Deputy Speaker - and pinned somebody on the wall and took Kshs30 million. You can imagine the kind of sophistication we are dealing with. Nobody can say this Bill is not going to bring more quality. That is not my business because Kenyans are still paying taxes and they want services. It is a very good idea that this should happen.

The Chairman of the Committee on Justice and Legal Affairs and my colleagues should bear in mind that the level of the courts we have, apart from saying they are Magistrates' Courts, which used to be low level courts--- The counties are now governments on their own and require higher calibre personnel to deliver the same kind of service.

Money will continue to trickle from here to the Constituencies. We said that 15 per cent and more should go to the county and that will continue happening. It will come a time when Nairobi is going to become a shell. In fact, those agitating to become the President of Kenya in the coming years will find themselves dealing with only three functions, among them national co-ordination, which will be unnecessary because the counties will be functioning. The counties will be dealing with security, which means when I become the Governor in 2017, I will deal with my security in a different situation. I am not going to rely on here, crying of insecurity yet I am facilitated. I will have my own security. I will have in place a structure that will not only give security an opportunity to relate with the head office and also serve me. With regard to the issue of the court, this should be the start of what should be done. We should think further, so that as we deal with the Magistrates' Courts we ensure that they are answerable to some structure, which should exist. If that structure is not there they will be answering in a vacuum, which will be useless.

With those few remarks, I support.

**The Temporary Deputy Speaker** (Hon. Kajwang'): Member for Nyaribari Chache.

**Hon. Tong'i:** Thank you, Hon. Temporary Deputy Speaker, for the opportunity to speak on this Bill, which has good intentions of making Kenya a better place to live in. We all know that in the absence of law confusion sets in. This Bill is trying to address that concern. We do not want to live in a vacuum where confusion is the order of the day, and where everybody's business becomes nobody's business. This Bill will address many of those concerns.

Hon. Temporary Deputy Speaker, I want to take this opportunity to thank your office for giving me the opportunity to speak to the President of Tanzania concerning an issue relating to what we are dealing with today, the Magistrates' Courts and their jurisdiction. One Don Bosco has been in the police custody in Tanzania for three years and whenever he is taken to court the court says it has no jurisdiction to handle his case. That has been going on for the last three years. We all hope that this Bill will come into effect, so that it serves Kenyans. I am sure our neighbouring countries, in the spirit of sharing, will copy paste and use this to address concerns like the one my friend Don Bosco is going through in Tanzania. This guy has been in police custody for the last three years without any big action being taken. He needs to be transferred to Kenya to go through the same process in Kenya. We are not saying he is innocent, but he deserves to be treated with fairness. Therefore, this Bill helps in many ways to address concerns such as those cases which might come in future.

Hon. Temporary Deputy Speaker, this Bill will also address the dissemination of services to the farthest parts of Kenya. There are many parts of Kenya where courts and court services are not accessible. I think having this Bill in place will help people access courts where their concerns and issues of law will be handled in a more civilized way. The other day, I saw a video clip where a magistrate was conducting a court session under a tree. For once, I thought about the safety of that magistrate. What would happen if the family members of the aggrieved party came and started “working” on the magistrate and his team? What proper plan, or security measures, is there to protect the magistrate and the people concerned? This Bill comes in handy to address these concerns.

We all agree it is time that Kenya matched the international standards by modernizing our courts. The courts in Kenya that were constructed by the colonial masters have not been improved, and there is need to improve and make them more techno-savvy and usable, so that people in any part of the country can retrieve information without having to be told that files are lost. This Bill will go a long way in addressing that concern.

There is huge congestion in courts. Not long ago Kenyans witnessed one of the most interesting cases that started when I was barely six years, the Koinange’s case. Now 35 years later when I am turning 41 years is when courts are concluding it. I would want to imagine of a case where there is somebody who was to benefit from those resources, that is the over Kshs17 million. You will agree with me that family members have gone through pain. Major beneficiaries of that process have been the lawyers. We are not saying they should not, but there should be a humane way of doing it. Part of the reason why that case has taken 35 years to be concluded is because we did not have the capacity and enough infrastructure to address many cases, hence the delay.

This Bill is going to help Kenyans address their concerns and grievances in a more civilized way, and will not experience what we experienced in the year 2007/2008, when Kenyans took it upon themselves to address their grievances by killing each other. We know this Bill will give us a chance to do things in a more modern way through the court system. At some point, we have to get a way of encouraging our neighbours, more so Tanzanians, to use these kinds of laws.

As a human being and a law maker, I find it so difficult to understand how one can be in police custody for a period of three years without trial. If Don Bosco is a criminal---

**The Temporary Deputy Speaker** (Hon. Kajwang’): Member for Nyaribari Chache, I understand your concern. You must be talking on behalf of your constituent, but this is not a Bill in Tanzania but in Kenya. Will you, please, concern yourself with how it will be applicable in Kenya rather than Tanzania?

**Hon. Tong’i:** Thank you, Hon. Temporary Deputy Speaker. I am properly guided. I am only trying to draw parallels with the best practices we can learn from our neighbours, and I am sure this will be one. It is something that our neighbours and, of course, us as a country, will learn from as we export the knowledge to our neighbours for the goodness of the society; the world has become a global village. What happens in America and other parts of the world directly affects all of us; therefore, we should be aware of what is happening in our neighbourhood, so that we prepare ourselves for challenges.

Hon. Temporary Deputy Speaker, having said that I support this Bill. It is a Bill which is going to help Kenyans address their concerns in a more civilised way for the good of this country and the world. Even foreign investors who want to invest in Kenya are not afraid of putting their resources here because they understand our legal system. When we have a legal system which

works and we know the timeframe it is going to take any investor, I will tell you, as a banker and a former investment manager that, that in itself will be a major attraction to foreign investment that all of us are looking for to address the unemployment issues among the youth. This cannot be done by the Government alone; we need the private sector to participate. For the private sector to do that, they really need a conducive environment.

A conducive environment for the private sector is how the judicial system in a country like Kenya works. If it works well, then they are willing to put in their money, knowing that in the event of a challenge they have a fall back plan, which is the law. That is the only way to address the concerns about commercial and social conflicts, or whichever nature of conflicts that there will be. This Bill will address them. This Bill will empower Magistrates' Courts to expand their jurisdiction, so that they can handle more sophisticated cases, and we will not end up taking everything to the Supreme Court and the Court of Appeal. Some things can be addressed in lower courts to decongest senior courts in the country.

With those many words, Hon. Temporary Deputy Speaker, once again thanks for the support your office gave me to address the concerns of a friend, Bosco, who has been in Tanzanian jails for a long time without a fair trial. Thank you.

**The Temporary Deputy Speaker** (Hon. Kajwang'): All right. Member for Mbita.

**Hon. (Ms.) Odhiambo-Mabona:** Thank you, Hon. Temporary Deputy Speaker for this opportunity to support this Bill. In supporting the Bill, I am very glad for I have seen on the Order Paper that a couple of Bills that are similar, or related, are coming at the same time. I am glad we are bringing this at the same time that we are also bringing the Small Claims Court Bill. The reason I am particularly happy is because I have worked on issues of access to justice for very many years. Actually, in the last Parliament we brought, through the late Hon. Mutula Kilonzo, amendments that provided for the establishment of High Courts in every county. I know that this Bill will enhance access to justice. Some of us come from places that, even though this Bill will be applicable, we are still at very different levels from the rest of the country.

In Mbita, it is only recently that a mobile court was established. We are looking forward to a more permanent court. For a long time the people of Mbita had to travel all the way to Homa Bay to access a court. I know before I came to Parliament, I did a lot of lobbying to ensure we had a court closer.

One of the things that I want to speak to is that this Bill is very positive, especially on the issue of enhancing the pecuniary jurisdiction of magistrates. I have indicated that for many people it is going to mean shortening of distances.

The other issue that I am very happy about is that it has addressed the issue of custody and a lot of family law related issues. As a person who has worked in this sector for very long, I know that access to justice, especially for women has been a challenge. Many times women who are ordinarily because of the nurturing and caring roles, charged with care of children by society, are the ones who tend to seek maintenance for children in case of separation. When they have to do that most of them give up when they look at the distances to the courts. For some of them it is not the distances because the courts are near, but because the courts close to them do not have that level of jurisdiction. So, relating to women, I am very happy.

Hon. Temporary Deputy Speaker, I just want to speak a little to what my learned colleague, Hon. Alice spoke to, which is in Clause 7. I want to say that the challenge that this Bill is facing is tension that has been apparent even when we were coming up with the new Constitution; this is tension relating to protecting rights while at the same time recognising customary rights. I know that some of the provisions that Hon. Alice referred to were in the

repealed African Christian and Marriage Divorce Act. However, as the Chairman of the Departmental Committee on Justice and Legal Affairs has said, customary laws have still been imported to the Marriage Act. Part of the imported customary laws actually provide for discriminatory practices against women. This is unconstitutional yet it is the same constitution that also recognises those customary rights.

**The Temporary Deputy Speaker** (Hon. Kajwang’): Even when those customary practices are repugnant to the Constitution?

**Hon. (Ms.) Odhiambo-Mabona:** Hon. Temporary Deputy Speaker, to the extent that they are repugnant to constitutional standards, then they are not applicable.

I would like to say that sometimes---

**The Temporary Deputy Speaker** (Hon. Kajwang’): You are continuing to speak but what, therefore, becomes of this Clause 7(3)? This is to the extent that some of the things that you are talking about could be repugnant to morality or the Constitution itself.

**Hon. (Ms.) Odhiambo-Mabona:** Hon. Temporary Deputy Speaker, they would be unconstitutional because they do not conform to the Bill of Rights. Even though you would cite the case that Hon. Alice mentioned, I know she and I have litigated a lot under Family Law. She actually picked words from my mouth that under Kikuyu Customary Law, a family has a right to get compensated where an unmarried girl gets pregnant. If I were to speak in terms of rights, the person who benefits normally is the father. It is not the father who gets pregnant; it is the girl, and so it is already discriminatory. If I am the one who has been made pregnant, I am the one who should be compensated and not my father. I would not understand why. It is one thing that we really used to argue about even in courts then. At that time we did not have provisions for especially maintenance of children born out of wedlock---

**The Temporary Deputy Speaker** (Hon. Kajwang’): Remember this is an unmarried woman. It is not necessarily an underage girl, and so there could be an issue of consensus also.

**Hon. (Ms.) Odhiambo-Mabona:** Hon. Temporary Deputy Speaker, yes, even when there is consensus, under the customary law, it is not the woman who is compensated. It is the father. So even when I have consented and I am pregnant, I should be compensated and not my father, under customary law. I think when magistrates are dealing with matters like these, they must be alive to issues of human rights.

Another issue that I am very concerned about is the reference to sub-clause (3)(e)(ii) that talks about adoption and legitimacy. Unless I am corrected, legitimacy probably has reference to wedlock, because it is a status issue. Under the Constitution, being born within or without wedlock is no longer applicable. So, even making reference to legitimacy is really irrelevant for purposes of the current Constitution. I would like to ask the Departmental Committee on Justice and Legal Affairs to look at that. I can see that my time is up.

**The Temporary Deputy Speaker** (Hon. Kajwang’): We will look at it. It is your responsibility to prefer amendments because the Committee has already given you a report in which they have concurred in many of these things. So, it is most unlikely that they will want to depart from it.

Proceed.

**Hon. (Ms.) Odhiambo-Mabona:** Hon. Temporary Deputy Speaker, with you indulgence, because I can see that my time is up, I will take a little time to respond to the issue you have raised.

**The Temporary Deputy Speaker** (Hon. Kajwang’): No, I will be very reluctant to extend the sitting of the House. According to the clock, you still have two minutes.



**Hon. (Ms.) Odhiambo-Mabona:** Okay, Hon. Temporary Deputy Speaker. Within those two minutes, which is the time I needed---

**The Temporary Deputy Speaker** (Hon. Kajwang'): Of which I can only give you one minute because I want to address something in the other minute. So, you have only one minute.

**Hon. (Ms.) Odhiambo-Mabona:** Okay, I will summarise in that one minute. Perhaps, when the House leadership sits, it is one issue that I have raised--- In terms of parliamentary practice, what has always obtained is that Members raise issues at Second Reading and the Committee adopts them, so that we do not have every Member bringing amendments. Now we have so many amendments by individual Members because the Committee Report has gone ahead of us. Maybe, that is something you need to look at.

Finally, if this Bill had come earlier, perhaps Hon. Moses Kuria would have been arrested under Clause 9(h). Unfortunately, it is coming a little late in the day. He may have been arrested and charged in his local court for coaching witnesses and such like activities.

I support the Bill and I will be moving amendments that will conform to constitutional standards.

**The Temporary Deputy Speaker** (Hon. Kajwang'): I like the note on which you have wound up your submissions.

The Members for Nakuru Town East, Kandara and Nambale, I recognise that you have been waiting for quite some time to contribute, but time is up and I am very hesitant to extend the sitting even for a minute because I do not have any extraneous thing or evidence that would make me handle it as though something is out of the ordinary.

Although I understand your position, Member for Kibra, I think you just want me to know that you are in the Chamber. This matter will still come up tomorrow afternoon, I suppose. So, come on time and get the first opportunity to debate it.

I thank you so much.

### ADJOURNMENT

**The Temporary Deputy Speaker** (Hon. Kajwang'): Order Members! Hon. Members, the time being 6.30 p.m., this House stands adjourned until Wednesday, 7th October 2015 at 9.30 a.m. It is so ordered.

The House rose at 6.30 p.m.