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27th November, 2013

Hon. Justin Muturi
Speaker of the National Assembly,
P.O. Box 41842 -00100
NAIROBI

Dear *Hon Muturi;*

RE: MEMORANDUM OF REFUSAL ON THE KENYA INFORMATION AND
COMMUNICATION (AMENDMENT) BILL, 2013

The above matter refers.

His Excellency the President has scrutinized the above-mentioned Bill as passed and has noted that there are outstanding issues pertaining to the Bill passed by the National Assembly.

In view of the above and pursuant to Article 115(1) (b) of the Constitution, His Excellency the President has refused to assent to the above-mentioned Bill. Accordingly, we have annexed herewith a duly signed memorandum, which sets out in detail the issues for reconsideration and resolution by the National Assembly.

Sincerely,

Joseph K. Kinyua
Chief Of Staff and Head of Public Service

cc: **Hon. Prof. Githu Muigai**
State Law Office
P.O. Box 40112-00100
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Abdikadir H. Mohamed
Senior Advisor,
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Mr. Justin Bundi
Clerk of the National Assembly
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THE CONSTITUTION OF KENYA

REFUSAL TO ASSENT TO THE KENYA INFORMATION AND COMMUNICATIONS (AMENDMENT) BILL, 2013

MEMORANDUM

By His Excellency the Honourable
Uhuru Kenyatta, President and
Commander-in-Chief of the Kenya Defence
Forces.

Submitted to the Honourable Speaker of the
National Assembly.

WHEREAS a Bill entitled “A Bill for An Act of Parliament to amend the Kenya Information and Communications Act, 1998 and for connected purposes,” the short title of which is “The Kenya Information and Communications (Amendment) Act, 2013”, was passed by the National Assembly on the 31st October, 2013;

AND WHEREAS the Kenya Information and Communications (Amendment) Bill, 2013, was presented to

me for assent, in accordance with the provisions of the Constitution, on the 26th November 2013;

NOW THEREFORE, in exercise of the powers conferred on me by Article 115 (1) (b) of the Constitution, I refuse to assent to the Kenya Information and Communications (Amendment) Bill, 2013, for the reasons set out hereunder:

1. CLAUSE 5:

Clause 5 of the Bill published on the 22nd July, 2013 proposed to insert a new section 5C. The proposal which was not agreed to by the National Assembly read as follows:

Policy
Guidelines
by the
Cabinet
Secretary.

5C. (1) The Cabinet Secretary may issue to the Authority, policy guidelines of a general nature relating to the provisions of this Act.

(2)The guidelines referred to under subsection (1) shall be in writing and shall be published in the Kenya Gazette.

The provision aimed to clarify the role of the Cabinet Secretary in issuing policy guidelines of a general nature relating to the provisions of the Act in accordance with the

provision of paragraph 18 of the Fourth Schedule of the Constitution.

RECOMMENDATION:

In view of the foregoing, I recommend that clause 5 be amended by inserting the following new section:

Policy
Guidelines by
the Cabinet
Secretary.

5C. (1) The Cabinet Secretary may issue to the Authority, policy guidelines of a general nature relating to the provisions of this Act.

(2) The guidelines referred to under subsection (1) shall be in writing and shall be published in the Kenya Gazette.

2. CLAUSE 7:

(A) PROPOSED SECTION 6B

Clause 7 of the Bill proposes the insertion of a new section 6B into the Act, which sets out the procedure for the appointment of the members of the Board of the Communications Authority of Kenya. The section provides for the shortlisting of applicants by the Cabinet

Secretary, the vetting of the shortlisted applicants by the National Assembly and the subsequent appointment of the chairperson and members of the Board by the President and the Cabinet Secretary respectively.

The proposed section 6B, as currently worded, maybe construed to be contrary to Article 34 (3) (b) of the Constitution, which provides for a media that is independent of control by government, political and commercial interests. The appointment of the members of the Board by the Executive and the National Assembly exclusively may be seen to erode the independence of the media as envisaged under Article 34 of the Constitution.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed section 6B be deleted and replaced with the following new section:

Appointment
procedures.

6B.(1) Within fourteen days of the occurrence of a vacancy in the office of chairperson or member, the President or the Cabinet Secretary, as the case may be, shall -

(a) by notice in the Gazette and on the official website of the Ministry, declare a vacancy in the Board, and invite applications from qualified persons; and

(b) convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Board.

(2) The selection panel referred to under subsection (1), shall comprise of persons drawn from the following organizations –

- (a) Media Council of Kenya;
- (b) Kenya Private Sector Alliance;
- (c) Law Society of Kenya;
- (d) Institute of Engineers of Kenya;

- (e) **Public Relations Society of Kenya;**
- (f) **Kenya National Union of Teachers;**
- (g) **Consumers Federation of Kenya; and**
- (h) **the Ministry responsible for matters relating to media.**

(3) **At their first meeting the panel shall appoint a Chairperson and a Vice-Chairperson who shall be of opposite gender.**

(4) **An application in respect of a vacancy declared under subsection (1), shall be forwarded to the selection panel within seven days of the publication of the notice and may be made by -**

- (a) **any qualified person; or**
- (b) **any, person, organization or group of persons proposing the nomination of any qualified person.**

(5) The selection panel shall, subject to this section, determine its own procedure and the Cabinet Secretary shall provide it with such facilities and other support as it may require for the discharge of its functions under this section.

(6) The selection panel shall consider the applications, shortlist and publish the names and qualifications of all the applicants and those shortlisted by the panel in the Gazette and on the official website of the Ministry, within seven days from the expiry of the deadline of receipt of applications under subsection (4).

(7) The selection panel shall interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants under subsection (6).

(8) Upon carrying out the interviews, the selection panel shall select—

(a) three persons qualified to be appointed as chairperson; and

(b) two persons, in relation to each vacancy, qualified to be appointed as members of the Board,

and shall forward the names to the President or the Cabinet Secretary, as the case may be.

(9) The President or the Cabinet Secretary, shall within fourteen days of receipt of the names under subsection (8) appoint the chairperson and the members, respectively.

(10) In selecting, shortlisting and appointing the chairperson and members of the Board, the President and the Cabinet Secretary shall -

(a) ensure that the appointees to the Board, reflect the interests of all sections of society;

(b) ensure equal opportunities for persons with disabilities and other marginalised groups; and

(c) ensure that not more than two thirds of the members are of the same gender.

(11) Every appointment made under this section shall be published in the Kenya Gazette.

(B) PROPOSED SECTION 6C (2)

Clause 7 also introduces a new section 6C into the Act which provides for the appointment of the members of the Board of the Communications Authority of Kenya for a term of three years with the approval of the National Assembly, which may be renewed for one further term. Subsection (2) thereof provides as follows:

(2) The renewal of the term of office of the chairperson or member of the Board under subsection (1) shall not take effect unless that

chairperson or member has been vetted and approved by the National Assembly prior to taking office for another term.

This requirement of vetting by the National Assembly interferes with the discretionary powers of the appointing authority in renewing the term of appointment of the chairperson or members of the Board of the Authority. In view of the fact that the National Assembly is no longer involved in the appointment process proposed herein, this section is therefore superfluous. The process of subjecting the renewal of the appointment of the members of the Board to Parliamentary approval would also fetter the independence of the Authority in the performance of its functions under the Act.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed section 6C (2) be **deleted**.

(C) PROPOSED SECTION 6D (2) AND (3)

Clause 7 further proposes the introduction of a new section 6D into the Act which provides for the grounds on which the office of the chairperson or member may become vacant and the procedure for removal of the chairperson or member by the National Assembly. Subsections (2) and (3) of that section provide as follows:

(2) A person desiring the removal of the chairperson or a member of the Board on any ground specified in subsection (1)(c) may present a complaint under oath to the National Assembly setting out the alleged facts constituting that ground.

(3) The National Assembly shall, within seven days, consider the complaint and if satisfied that it discloses a ground under subsection (1)(c) —

(a) submit the complaint together with its recommendations to the President in the case of a chairperson; and

- (b) submit the resolution of the National Assembly to the Cabinet Secretary in the case of a member of the Board.**

These subsections may be viewed as impeding the independence conferred by Article 34 of the Constitution on the Authority by vesting the removal of the board members on the National Assembly. Further, the proposed appointment procedure in provided under section 6B hereinabove no longer includes the National Assembly.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed section 6D (2) and (3) be deleted and replaced with the following new provisions:

- (2) A person desiring the removal of a member of the Board of the Authority on the ground specified in subsection 1 (c) may present a complaint under oath to the Cabinet Secretary, setting out the alleged facts constituting that ground.**

(3) The Cabinet Secretary shall consider the complaint and, if satisfied that it discloses a ground under subsection (1) (c), shall send the complaint to the President.

(4) On considering a complaint under subsection (1) or on receiving a complaint under subsection (3), the President —

(a) may suspend the chairperson or member pending the outcome of the complaint; and

(b) shall appoint a tribunal in accordance with subsection (5).

(5) The tribunal appointed under subsection (4)(b) shall consist of—

(a) a person who holds or has held office as a Judge of a superior court, who shall be the chairperson;

(b) at least two persons who are qualified to be appointed as Judges of the High Court; and

(c) one other member who is qualified to assess the facts in respect of the particular ground for removal.

(6) The tribunal shall investigate the matter expeditiously, report on the facts and make a recommendation to the President, who shall act in accordance with the recommendation within thirty days.

2. CLAUSE 17:

Clause 17 of the Bill proposes to amend section 46I of the Act which sets out the minimum local content of programmes which a broadcaster should broadcast on radio or television. The proposed subsections (3), (4) and (5) of that section provide as follows:

(3) A broadcaster licensed to distribute radio or television programme services shall ensure that at least forty-five percent of the programmes broadcast on radio or television on any given day comprise local content.

(4) The programmes containing local content referred to in subsection (3) shall be broadcast between 6 a.m. and 10 p.m. on any given day.

(5) The provisions of subsections (3) and (4) shall take effect not later than eighteen months from the date of coming into effect of this Act.

As the entity envisaged under Article 34 the Authority is the institution best placed to regulate content as opposed to statutory prescription by the National Assembly.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed section 46I be amended by deleting subsections (3), (4) and (5) and replacing them with the following new provision:

(3) A broadcaster licensed to distribute radio or television programme shall broadcast on radio or television such percentage of Kenyan programme as shall be prescribed by the Authority.

3. CLAUSE 37:

(A) PROPOSED SECTION 102 (3)

Clause 37 of the Bill further introduces a new section 102 which provides for the establishment of the ~~Communications and Multimedia Appeals Tribunal~~. Subsection (3) of that section, which sets out the membership of the selection panel responsible for appointing the members of the Tribunal, provides as follows:

(3) The selection panel referred to in subsection (2) shall consist of five members drawn from the following organisations—

- (a) the Ministry for the time being responsible for information, communication and technology;**
- (b) the Media Council;**
- (c) the Telecommunications Service Providers Organisation of Kenya;**

(d) the Courier Industry Association of Kenya; and

(e) the Authority.

The membership of the selection panel as set out under the proposed provision is drawn from the media players and the government exclusively. This provision maybe seen as fettering the objective shortlisting and recruitment of members of the Tribunal as it may subject the process to interference by interested stakeholders in the government and media.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed section 102 (3) of the Bill be deleted and replaced with the following:

(2) The selection panel referred to under subsection (2), shall comprise of persons drawn from the following organizations—

(a) Media Council of Kenya;

(b) Kenya Private Sector Alliance;

- (c) Law Society of Kenya;
- (d) Institute of Engineers of Kenya;
- (e) Public Relations Society of Kenya;
- (f) Kenya National Union of Teachers;
- (g) Consumers Federation of Kenya;
and
- (h) the Ministry responsible for
matters relating to media.

(B) PROPOSED SECTION 102 (16) (c)

Clause 37 of the Bill further introduces a new section 102 (16) which provides for the vacation of the office of a member of the Communications and Multimedia Appeals Tribunal. Paragraph (c) of that subsection provides for the removal of a member of the Tribunal by the Cabinet Secretary on the recommendation of a selection panel, where such member fails to discharge his functions whether arising from infirmity of body or mind or from any other cause or for misbehaviour. The selection panel is comprised of representatives of the media and government institutions.

Subjecting the removal of the members of the Tribunal to a process that is steered by a panel that is comprised of members of the media and government institutions and who would therefore have an interest in the matter may render the process partial or be viewed as lacking in independence.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed section 102 be further amended:

(i) in subsection (16), by deleting and replacing paragraph (c) with the following new provision:

(c) if he or she is removed from the membership of the Tribunal by the Cabinet Secretary on the recommendation of a Tribunal set up for that purpose under subsection (17); and

(ii) by inserting the following new subsections immediately after subsection (16):

(17) A person desiring the removal of a member of the tribunal on the ground specified in subsection 16 (c) may present a complaint under oath to the Cabinet Secretary, setting out the alleged facts constituting that ground.

(18) The Cabinet Secretary shall consider the complaint and, if satisfied that it discloses a ground under subsection (16) (c)—

(a) may suspend the member pending the outcome of the complaint; and

(b) shall appoint a tribunal in accordance with subsection (20).

(19) The tribunal appointed under subsection (18) shall consist of —

(a) a person who holds or has held office as a Judge of a superior court, who shall be the chairperson;

(b) at least two persons who are qualified to be appointed as Judge of the High Court; and

(c) one other member who is qualified to assess the facts in respect of the particular ground for removal.

(20) The tribunal shall investigate the matter expeditiously, report on the facts and make a recommendation to the Cabinet Secretary, who shall act in accordance with the recommendation within thirty days.

(C) PROPOSED SECTION 102A

Clause 37 of the Bill also proposes the introduction of a new section 102A into the Act which provides for the complaints which the Tribunal may receive. Subsection (1) of that section provides as follows:

Complaints. 102A. (1) A person aggrieved by —

- (a) any publication by or conduct of a journalist or media enterprise;
or
- (b) anything done against a journalist or media enterprise that limits or interferes with the constitutional freedom of expression of such journalist or media enterprise,

may make a written complaint to the Tribunal setting out the grounds for the complaint, nature of the injury or damage suffered and the remedy sought.

The jurisdiction of the Tribunal is confined to complaints relating to the media enterprises and journalists. It does not deal with any matters relating to telecommunications, courier or postal services, information, communication and technology and other matters which fall within the ambit of the Act.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed section 102A (1) be amended by inserting the following new paragraph immediately after paragraph (b):

(c) any action taken, any omission made or any decision made by any person under this Act,

(D) PROPOSED SECTION 102E

Clause 37 of the Bill further introduces a new section 102E which provides for the decisions that the tribunal

may make. Subsection (1) (f) thereof contains penal consequences, including a fine of not more than twenty million shillings, that can be meted by the Tribunal including those relating to breach of code of conduct.

The code of conduct deals with ethical issues and matters relating to misconduct in relation to media practitioners and may not, therefore, require penal consequences. Such matters are best dealt with in a disciplinary or other similar processes. A cardinal principle of justice in criminal law is that a person should be penalised for offences whose particulars can be established with specificity and clarity. The code of conduct may not meet this threshold so as to attract penal consequences. Further the ceiling of one million shillings for individual journalist may be onerous.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed subsection (1) (f) of section 102E in be amended to read as follows:

- (f) impose a fine of not more than twenty million shillings on any respondent media enterprise and a

fine of not more than five hundred thousand shillings on any journalist adjudged to have violated this Act.

4. CLAUSE 39

Clause 39 of the Bill proposes to amend section 102A of the Act (now renumbered as 102K) which provides for the establishment of the Universal Service Advisory Council. The clause introduces subsections (6) to (15) which set out the procedure for the appointment of the members of the Universal Service Advisory Council. They provide for the shortlisting of the applicants by the Cabinet Secretary and the vetting of the shortlisted applicants by the National Assembly and the subsequent appointment of the chairperson and members of the Council by the Cabinet Secretary.

The appointment of members of the Universal Service Advisory Council ought not require the involvement of the National Assembly.

RECOMMENDATION:

In view of the foregoing, I recommend that the proposed subsections (6) to (15) be deleted and replaced with the following new subsections:

(6) The Council shall consist of a chairperson and eight other members appointed by the Cabinet Secretary in accordance with this section.

(7) Within fourteen days of the occurrence of a vacancy in the office of chairperson or member, the Public Service Commission, shall by notice in the Gazette and on the official website of the Public Service Commission, declare vacancies in the Council, and invite applications from qualified persons.

(8) An application in respect of a vacancy declared under subsection (7), shall be forwarded to the Public Service Commission within seven days of the publication of the notice and may be made by -

(a) any qualified person; or

(b) any, person, organization or group of persons proposing the nomination of any qualified person.

(9) The Public Service Commission shall consider the applications, shortlist and publish the names and qualifications of all the applicants and shortlisted applicants in the Gazette and on the official website of the Commission, within seven days from the expiry of the deadline of receipt of applications under subsection (8).

(10) The Public Service Commission shall interview the shortlisted applicants within fourteen days from the date of publication of the list of shortlisted applicants under subsection (9).

(11) Upon carrying out the interviews, the Public Service Commission shall select three persons qualified to be appointed as chairperson and sixteen persons qualified to be appointed as members of the Council, and shall forward the names to the Cabinet Secretary.

(12) The Cabinet Secretary, shall within fourteen days of receipt of the names under

subsection (11) appoint the chairperson and the members of the Council, respectively.

(13) In selecting, short listing and appointing the chairperson and members of the Council, the Cabinet Secretary shall-

(a) ensure that the appointees to the Council, reflect the interests of all sections of the society;

(b) ensure equal opportunities for persons with disabilities and other marginalised groups; and

(c) ensure that not more than two thirds of the members are of the same gender.

(14) Every appointment made under this section shall be published in the Kenya Gazette.

5. CLAUSE 41

Clause 41 of the Bill provides for transitional provisions. Paragraph (b) and (c) of that clause saves the unexpired

term of the members of the former commission and council Clause 41 provides as follows—

41.(1) On the commencement of this Act-

- (a) any person who was an employee of the former Commission immediately before the commencement of this Act shall be deemed to be an employee of the Authority on the same terms and conditions of service;
- (b) a person who was a member of the Board of Directors of the former Commission shall be deemed to be a member of the Board of the Authority for the unexpired term of that person;
- (c) a person who was a member of the Universal Service Advisory Council shall remain a member of the Council for the unexpired term of that person.
- (d) all property, assets, rights, liabilities, obligations, agreements licences and other arrangements existing at the commencement of this Act and vested in, acquired, incurred or

entered into by or on behalf of the former Commission, shall, be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf of the Authority to the same extent as they were enforceable by or against the former Commission before the commencement of the Act;

(e) where the transfer of any property transferred to or vested in the Authority under subsection (1) is required by any written law to be registered, the Authority shall, within six months from the date of commencement of this Act and amendments thereto or within such other period as any relevant law may prescribe, apply to the appropriate registering authority for the registration of the transfer and thereupon the registering authority shall, at no cost to the Authority or any person by way of registration fees, stamp or other duties—

(i) make such entries in the appropriate register as shall give effect to the transfer;

(ii) where appropriate, issue to the Authority a certificate of title or other statutory evidence of ownership of the property or make such amendments on such certificates or in the appropriate register as may be necessary; and

(iii) make any necessary endorsements on such deeds or other documents as may be presented to such registering authority relating to the title, right or obligation concerned.

The body envisaged under Article 34(5) of the Constitution is required to be in place within three years after the effective date. The Former Commission has been restructured and its membership reconstituted in order to comply with the provisions of Article 34(5) of the Constitution which requires the body to be independent of control by government, political or commercial interests and to reflect the interests of all sections of the society. Therefore saving the unexpired term of the members of the former Commission and the members of the former Council will fetter the implementation of Article 34(5) of

the Constitution. The proposed amendment also does not provide for the transitional provisions for the Appeals Tribunal which has been repealed and replaced with the Communications and Multimedia Appeals Tribunal.

RECOMMENDATION:

In view of the foregoing, I recommend that the clause 41 be amended as follows—

41. (1) A person who was a member of the board of the former body shall continue to hold office for a period not exceeding ninety days or until the appointment of the members of the Authority or Tribunal, whichever comes first.

(2) On the commencement of this Act-

(a) any person who was an employee of the former body immediately before the commencement of this Act shall be deemed to be an employee of the Authority or Tribunal on the same terms and conditions of service;

(b) all property, assets, rights, liabilities, obligations, agreements licences and

other arrangements existing at the commencement of this Act and vested in, acquired, incurred or entered into by or on behalf of the former body, shall, be deemed to have vested in or to have been acquired, incurred or entered into by or on behalf of the Authority or Tribunal to the same extent as they were enforceable by or against the former body before the commencement of the Act;

- (c) where the transfer of any property transferred to or vested in the Authority or the Tribunal under subsection (1) is required by any written law to be registered, the Authority or the Tribunal shall, within six months from the date of commencement of this Act and amendments thereto or within such other period as any relevant law may prescribe, apply to the appropriate registering authority for the registration of the transfer and thereupon the registering authority shall, at no cost to the Authority or the Tribunal or any person by way of registration fees, stamp or other duties—

- (i) make such entries in the appropriate register as shall give effect to the transfer;
- (ii) where appropriate, issue to the Authority or the Tribunal a certificate of title or other statutory evidence of ownership of the property or make such amendments on such certificates or in the appropriate register as may be necessary; and
- (iii) make any necessary endorsements on such deeds or other documents as may be presented to such registering authority relating to the title, right or obligation concerned.

(3) In this section —

“former body” means the Commission and the Appeals Tribunal.

Dated the 27th November....., 2013.



UHURU KENYATTA,
President.