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## Time for Harvest

Mukabi Kabira

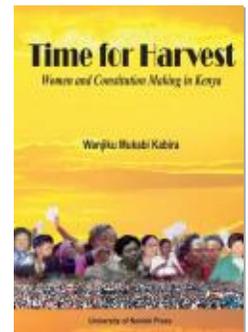
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## *Appendix VII: Petition*

### **National Women's Conference on the first anniversary of the promulgation of the constitution meeting at Ufungamano House**

*Urgent petition to the tenth National Assembly of Kenya August 26<sup>th</sup> 2011*

The women of Kenya have today met at Ufungamano House at the National Women's Conference to celebrate the Women's Movements and their gains a year after the promulgation of the Constitution of Kenya, 2010. Among the participants are women representatives from the various Counties of Kenya including the doyens of the women's struggle in Kenya.

We are dismayed and outraged to learn that the National Assembly this afternoon refused the proposed amendment to the Elections Bill 2011, those amendment intended to provide a method of ensuring that the Constitutional requirement stating that not more than two-thirds of either sex shall comprise elective bodies is adhered to.

#### *Brief statement of the problem*

The two-thirds Constitutional threshold arises from a close analysis of the relevant Articles in the Constitution. The relevant provisions include:

- a. Quite significantly, Article 27 (6) and (8) of the Bill of Rights which indicates that ... (6) To give full effect to the realisation of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination... (8) In addition to the measures contemplated in clause (6) the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.
- b. Article 97(1) (a) of the Constitution sets out the number of elected legislators to Parliament at two hundred and ninety, each elected from single member constituencies. This already sets the electoral method to a first-past-the post system. Sub-article 1 (b) provides for forty-seven women to be elected based on the forty-seven counties while sub-article 1 (c) provides for twelve members to be nominated by parliamentary political parties in proportion to their parliamentary strength and to represent special interests including youth, persons with disabilities, and workers.
- c. Article 97(2) reiterates that no one can be excluded from contesting in the election under sub-article 1(a) which essentially means that despite

forty-seven seats being reserved for women, they are still free to vie for elective posts too.

- d. In addition, Article 81 of the Constitution prescribes general principles for the electoral system. Sub-article (b) states that, “*not more than two-thirds of the members of elective public bodies shall be of the same gender.*”
- e. Article 100 of the Constitution reiterates the essence of Article 27(8).

When closely examined and read altogether, these Articles definitely provide for Affirmative Action to be implemented immediately with regards to women’s representation. Consider the following:

- a. Article 21(2) states: “The State shall take legislative, policy and other measures, including the setting of standards, to achieve the progressive realisation of the rights guaranteed under Article 43 [Relates to Economic and Social Rights].”
- b. Article 54(2): “The State shall ensure the progressive implementation of the principle that at least five percent of the members of the public in elective and appointive bodies are persons with disabilities.
- c. Article 82(1): Parliament shall enact legislation to provide for—(e) the progressive registration of citizens residing outside Kenya, and the progressive realisation of their right to vote.
- d. Article 89(7)(b): In reviewing constituency and ward boundaries, the Commission shall progressively work towards ensuring that the number of inhabitants in each constituency and ward is, as nearly as possible, equal to the population quota.

It is difficult to sell the argument that when it came to defining the two-thirds criteria, somehow the makers of the Constitution were careless and forgot to delineate that the threshold was to be achieved progressively. For this reason, the reading of the two-thirds criteria must be construed as having been intended for immediate application.

As to whether Article 81 ought to be construed as Constitutional principles that are desirable but not mandatory in the strict sense and hence to be achieved progressively, it is instructive to note that the other ‘*principles*’ in the same Article that refer to freedom of citizens to exercise their political rights, universal suffrage and free and fair elections are not being read in the same spirit. In other words, a deliberate choice is being made as to when a principle in the same Article ought to be construed loosely as a desirable thing or strictly as a mandatory requirement.

*The basis of women's demands*

Based on the arguments and counter arguments that have been levied in recent weeks on the subject matter, the clear lack of political will to implement these Constitutional provisions has been evident. At the core of this refusal by yourselves Honourable Members of Parliament, to understand the meaning of why Affirmative Action has been provided for in the Constitution, is the sheer lack of shame as to how we have left women behind in the walk towards justice, equality and development.

It is imperative that the Constitutional threshold of not more than two-thirds is understood not as a women's issue but a Constitutional requirement that both men and women must ensure compliance thereof to avert a national Constitutional crisis.

The National Women's Conference, therefore, demands that the National Assembly, guided by the Speaker, immediately provides in no uncertain terms a way forward with regard to the implementation of the Constitutional two-thirds threshold that is anchored in the Bill of Rights and, therefore, not negotiable. The Bill of Rights enjoins all three organs of the State to take legislative and other measures to ensure the realisation of this Constitutional threshold. Parliament is one such arm of the State not to mention the Executive that is headed by President and supervised by the Prime Minister and the Judiciary, that is, superintended by the Chief Justice.

The women of Kenya are not asking for favours from Parliament but are demanding that you comply with the provisions of the Constitution.