

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT- SECOND SESSION

THE PUBLIC INVESTMENTS COMMITTEE

**SPECIAL REPORT ON THE PROCUREMENT AND
FINANCING OF THE CONSTRUCTION OF STANDARD
GAUGE RAILWAY FROM MOMBASA TO NAIROBI
(PHASE I)**

29TH APRIL, 2014

**Clerk's Chambers
Parliament Buildings
Nairobi**

April, 2014

*1 / Special Report of the PIC on the Procurement, Agreements and Financing for the
Construction of the Standard Gauge Railway from Mombasa to Nairobi (Phase I)*

ACRONYMS AND ABBREVIATIONS

AG	Attorney General
CRBC	China Road and Bridge Corporation
DG	Director-General
EAC	East Africa Community
EPC	Engineering, Procurement and Construction
EPZ	Export Processing Zones
EXIM	Export Import
G-to- G	Government to Government
GoK	Government of Kenya
ICD	Inland Container Depot
KEBS	Kenya Bureau of Standards
KPA	Kenya Ports Authority
KRA	Kenya Revenue Authority
KRC	Kenya Railways Corporation
LIBOR	London Interbank Offered Rate
MD	Managing Director
MoT	Ministry of Transport
MOTI	Ministry of Transport and Infrastructure
MOU	Memorandum of Understanding
NEMA	National Environmental Management Authority
PBC	Preferential Buyer Credit
PPOA	Public Procurement Oversight Authority
PPDA	Public Procurement and Disposal Act
PIC	Public Investments Committee
RDF	Railway Development Fund
SGR	Standard Gauge Railway
USD	United States Dollars

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1.0 PREFACE

Mr. Speaker Sir,

The Public Investments Committee is a Select Committee established under Standing Order No. 206 and is responsible for the examination of the working of public investments.

1.1 Establishment and Mandate of the Committee

The Committee is mandated to:-

- (a) Examine the reports and accounts of the public investments;*
- (b) Examine the reports, if any, of the Auditor General on the public investment;*
- (c) Examine, in the context of the autonomy and efficiency of the public investments, whether the affairs of the public investments, are being managed in accordance with sound financial or business principles and prudent commercial practices.*

The Committee shall however not examine:-

- (a) Matters of major Government policy as distinct from business or commercial functions of the public investments;
- (b) Matters of day-to-day administration; and,
- (c) Matters for the consideration of which machinery is established by any special statute under which a particular public investment is established.

The procedure of a Select Committee and other related matters thereto is covered under Standing Order No. 173 – 203. The Committee has power, under the provisions of the Constitution, National Assembly (Powers and Privileges) Act (Cap. 6), the State Corporations Act (Cap. 446) and the Public Audit Act (Cap. 412), to summon witnesses, examine them on oath and receive evidence.

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1.2 Committee Membership

The Committee comprises of the following Members:-

- (1) Hon. Adan Keynan, CBS, MP - Chairperson
- (2) Hon. Kimani Ichung'wah, MP - Vice Chairperson
- (3) Hon. Sammy Mwaita, MP
- (4) Hon. Cornelly Serem, MP
- (5) Hon. Bare Shill, MP
- (6) Hon. Korei Ole Lemein, MP
- (7) Hon. Adan M. Noor, MP
- (8) Hon. Mithika Linturi, MP
- (9) Hon. Beatrice Nyaga, MP
- (10) Hon. John M. Nyaga, MP
- (11) Hon. Njogu Barua, MP
- (12) Hon. Irungu Kang'ata, MP
- (13) Hon. Onesmus Njuki, MP
- (14) Hon. Eng. John Kiragu, M.P
- (15) Hon. Johana Ngeno, MP
- (16) Hon. Mwadeghu Thomas, MP
- (17) Hon. Abdullswamad Sheriff, MP
- (18) Hon. Paul Otuoma, MP
- (19) Hon. John Aluoch Olago, MP
- (20) Hon. Francis Nyenze Mwanzia, MP
- (21) Hon. Dr. Oburu Oginga, MP
- (22) Hon. Major(Rtd) John K. Waluke, MP
- (23) Hon. Ogutu John Omondi, MP
- (24) Hon. Mary Keraa Sally, MP
- (25) Hon. Wafula Wamunyinyi, MP

(26) Hon. Bernard Munyoki Kitungi, MP

(27) Hon. Chrisanthus Wamalwa, MP

1.3 Referral of the matter by the House to the Committee

1.3.1 On 4th December, 2013 the Hon. Korei Ole Lemein, MP rose pursuant to Standing Order 44 (ii) (c) seeking a Ministerial Statement from the Leader of Majority Party regarding the construction of the Mombasa-Kampala-Kigali-Juba Standard Gauge Railway line. The Member requested in his statement that, the Leader of Majority Party should inquire into and report on:-

- (i.) The actual cost of the project and the sources of funds;
- (ii.) Whether the procurement process and the legal requirements were followed in awarding the tender;
- (iii.) The list of all the tenderers and their financial and technical evaluation reports;
- (iv.) The sustainability and cost effectiveness of the project, clearly defining the safeguards put in place to ensure the contract sum is sustained; and
- (v.) Finally, the environmental impact assessment of the project.

1.3.2 The Leader of Majority requested the Speaker to direct the statement to the Public Investments Committee to investigate and report to the House due to the seriousness of the matter and also because it is an issue of investment.

1.3.3 The Speaker directed that the Public Investments Committee examines the matter with regard to the prudence and soundness of the financial decisions revolving around the venture.

1.4 Committee Proceedings

1.4.1 The Committee held nineteen (19) sittings in which it closely examined and heard evidence from witnesses. The Minutes of the Committee are hereto annexed and copies of the Hansard Report may be obtained at the National Assembly Library. In its inquiry into whether or not the affairs of the public investments (Kenya Railways Corporation) were managed in accordance with sound business principles and prudent commercial practices, the Committee heard and received both oral and written evidence from the Hon. Alfred Keter, MP; Cabinet Secretary for Transport and Infrastructure; Cabinet Secretary, the National Treasury; the Public Procurement Oversight Authority; Kenya Railways Corporation; The Attorney General; Kenya Revenue Authority; The Registrar General; the Hon. Chirau Ali Mwakwere, former Minister for Transport; Eng. Abdirizak, former Permanent Secretary, Ministry of Transport; Mr. Nduva Muli, former Managing Director, Kenya Railways Corporation; the Hon. Amos Kimunya, former Minister for Transport; Dr. Cyrus Njiru, former Permanent Secretary, Ministry of Transport; Board of Directors, Kenya Railways Corporation and other relevant witnesses.

1.4.2 The Committee also considered a progress report from the Office of the Auditor-General on the procurement and financing of the Mombasa – Malaba/Kisumu Standard Gauge Railway. The records of evidence adduced, documents and notes received by the Committee form the basis

of the Committee's observations and recommendations as outlined in the Report and can be obtained in the HANSARD reports of the proceedings of the Committee available in the National Assembly Library.

1.4.3 The observations and recommendations, if taken into account and implemented, will enhance accountability, effectiveness, transparency, efficiency, prudent investment and proper financial management and profitability in State Corporations and the public investments sector as a whole and will guide in future procurement and financing of major projects by State Corporations. The observations and recommendations contained herein will help the Kenya Railways Corporation to implement the project in a more efficient transparent and accountable manner.

1.5 Committee's General Observations

Below is a summary of the Committee's observations contained in this Report on the procurement and financing of the Mombasa – Nairobi Standard Gauge Railway.

(a) Memorandum of Understanding

1.5.1 A Memorandum of Understanding (MOU) was signed between the GoK and CRBC in August, 2009 wherein CRBC offered to carry out the feasibility study and preliminary designs of the Mombasa – Nairobi section at no cost to the Government of Kenya, provided that the report could only be used by GoK/KRC and CRBC. The feasibility study was also subject to KRC review and approval. This is a standard requirement for Chinese funded projects, to establish the feasibility themselves before involving their Treasury and Banks.

1.5.2 The National Treasury of Kenya and Exim Bank of China signed an MOU on financing of the Standard Gauge Railway. The MOU is not legally binding to both the Government of Kenya and EXIM Bank of China and only serves as an instrument for further discussions on the terms of the loans and the loan agreements.

(b) Justification for the Project

1.5.3 The Standard Gauge Railway was conceived to make use of standard equipment such as locomotives and rolling stock, ease cargo transport, congestion and relieve the Kenyan roads from damage by heavy axle load vehicles.

1.5.4 In the long run it is cheaper to operate the Standard Gauge Railway as opposed to the one meter gauge railway line, source for equipment and ensure faster movement of freight and passengers.

1.5.5 The railway will open up the East African region and tap into the transport market extending into eastern DRC and South Sudan. The project is economically viable in the long run and Kenya stands to gain economically and socially through the development of the Standard Gauge Railway.

(c) Approval for the project

1.5.6 Kenya, Uganda and Rwanda signed a Tri-partite agreement on August 2012 for the development of a Standard Gauge Railway in the three countries so as to ensure seamless railway operations. Each country will develop the railway network within its borders.

1.5.7 The project was approved by the Cabinet in 2012 and the Government to Government financing arrangement has been endorsed by the Government of Kenya and the Government of the People's Republic of China.

1.5.8 The Attorney General approved the two commercial contracts between CRBC and KRC for civil works and for the supply and installation of facilities, locomotives and rolling stock. The Contract would however not come into force until a financier was identified and funding commitment made.

(d) Tendering

1.5.9 Kenya Railways Corporation had initially used a wrong procurement method, direct procurement, but this was corrected with its termination and substitution with the Government to Government transaction.

(e) Debts Sustainability Analysis

1.5.10 The National Treasury has undertaken a debt sustainability analysis and to ensure that the SGR loan does not compromise the debt policy parameters spelt out in the debt sustainability strategy paper and is sustainable. The results of the debt sustainability analysis are presented below:

Public debt sustainability analysis

Indicator	2014	2015	2016	2017	2018
(Threshold)					
PV of Public Sector debt					
To GDP ratio (56) without SGR	38.7	38.1	38.3	38.7	38.6
PV of Public Sector debt					
To GDP ratio (56) with SGR	39.5	41.1	42.5	43.8	43.8

1.5.11 A safeguard mechanism to assure business for the SGR will also be put in place through execution of “take or pay” agreement between Kenya Railways and the Kenya Ports Authority.

1.5.12 In addition, in the unlikely event that the revenues from railway operations are inadequate for one reason or another, the proceeds from the Railway Development Fund will be used to repay the loan.

(a) Cost and Financing of the Project

1.5.13 The Cabinet Secretary for Transport and Infrastructure gave the total estimated cost of the project to be USD 3.804 billion and external financing for the project identified so far is USD 3.233 billion from the Government of the People's Republic of China covering 85% of the funding while the remaining 15% will be funding from the Government of Kenya.

1.5.14 The Cabinet Secretary, National Treasury provided the Committee with cost estimates of the projects as follows:

- (i) Construction of railways infrastructure (civil works) and procurement of facilities and locomotives on EPC arrangement at cost of US\$ 3.8 billion **(Kshs. 327 billion)**
- (ii) Construction of railways infrastructure (civil works); procurement of facilities and locomotives; compulsory land acquisition; Embakasi ICD expansion; and project supervision a total of **Kshs. 349.4 billion**.
- (iii) Construction of railways infrastructure (civil works); procurement of facilities and locomotives; compulsory land acquisition; Embakasi ICD expansion; and project supervision; cost of insurance premium and interests at a total cost of **Kshs. 447 billion**. This excludes other important costs such as cost of resettlement, demolition cost and relevant expenses; VAT, Duty and relevant tax; and other statutory expenses.

(b) Design, Review, Construction and supervision

1.5.15 The Government has put in place measures to safe guard the project through an independent review and supervision consultant who will oversee the construction and adherence to specification and guarantee quality works.

1.5.16 Commercial viability of the Mombasa-Nairobi Standard Gauge Railway (Phase I) is dependent upon the implementation of Phase II of the project (Nairobi – Malaba/Kisumu) and concurrent development of the Standard Gauge Railway by Partner States (Uganda and Rwanda) who signed the Tri-partite Agreement.

(c) Conduct of witnesses

1.5.17 The conduct particularly of Hon. Amos Kimunya was contemptuous of Parliament and his demeanor and conduct was condescending. He blatantly refused to give information and answer questions raised by Members during the meeting in contravention of Article 35(1)(b) read together with Article 125 of the Constitution, section 23 of the National Assembly (Powers and Privileges) Act, Cap 6, Laws of Kenya and Standing Order 191.

1.5.18 The conduct and demeanor of Mr. Chirau Ali Mwakwere was condescending. He alleged that the information sought was not in his possession.

1.5.19 The Committee on diverse dates invited the General Manager, China Road and Bridge Corporation, a state owned Corporation of the People's Republic of China to appear before it to adduce evidence on the procurement and financing of the Standard Gauge Railway but the Firm failed to honour the Committee's invitation and summons and instead the Ministry of Foreign Affairs after receiving a note verbale from the

Embassy of the People's Republic of China wrote to the Committee indicating that CRBC is a state owned Corporation and should not therefore be summoned by the Committee. The Ministry of Foreign affairs cautioned the Committee that summoning CRBC would have 'serious and irrevocable negative consequences to Kenya's national interests and relations with China'. This is in contravention of Article 125 of the Constitution, section 14 and 23 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya and Standing Order 191.

1.5.20 The Committee observed that CRBC is a state owned Corporation specially created to undertake commercial activities and therefore can sue and be sued. The Corporation therefore being a commercial entity should not enjoy the same immunity that is accorded to a diplomatic Mission/Embassy.

1.5.21 China Road and Bridge Corporation Kenya Limited, a company registered in Kenya under Registration No. C.166624 with its Directors being Mr. Peter Maingi Gatere and Mr. Leonard Mwangi Ndungu and registered office located at LR No. 209/1184/11, Mpaka Road, Wetlands was also invited by the committee to adduce evidence on the matter but failed to honour the Committee's invitations in contravention of Article 125 of the Constitution, section 14 and 23 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya and Standing Order 191.

1.5.22 There has been a tendency on the part of the government officials to commission projects without budgetary provisions/finances and adherence to Public Procurement laws. The project was commissioned without the procuring entity assuring itself of budget or source of finances thus begging the question what would happen if the financing agreement

is not signed or the expected source of financing fails to materialize? This tendency of commissioning projects without budget or assurance of source of financing has led to failure to adhere to procurement laws, lack of transparency and accountability in the implementation of such projects..

1.6 Committee's Recommendations

Based on the evidence adduced and written submissions, the Committee recommends that:-

1.6.1 The development of the Standard Gauge Railway project from Mombasa to Nairobi should proceed on condition that the Government fulfils the following recommendations:-

- (a) Fastracks the feasibility study, preliminary designs and costing for Phase II covering Nairobi- Malaba with a branch line to Kisumu in line with the tri-partite agreement;
- (b) Fastrack the Procurement of Phase II (Nairobi- Malaba/Kisumu) of the Standard Gauge Railway once the financing agreement for Phase I is concluded, taking into account the provisions of Article 227 of the Constitution and the provisions of part IV of the Public Procurement and Disposal Act, 2005;
- (c) Government initiates sourcing of funding from development partners and put measures in place for prudent management of RDF for the commencement of Phase I covering Mombasa to Nairobi.
- (d) Urgently initiate the procurement of an independent consultant to facilitate design review, oversee construction and ensure specifications and quality is guaranteed through a transparent, fair and competitive tender in line with Article 227 of the Constitution,

the Public Procurement and Disposal Act, 2005 and with the approval of the Attorney General.

- 1.6.2 KRC ensures that all the pertinent issues that were raised in the feasibility and preliminary study report regarding design concept single or dual track; building standards; travelling speed and train operation; motive power; rolling stock specifications; and maintenance of facilities be reviewed by an independent consultant to make sure the main goals of the project are achieved in line with Vision 2030.
- 1.6.3 KRC and Ministry of Transport and Infrastructure ought to ensure that the project addresses the connectivity to Mombasa Island, Kilindini Port, within Nairobi and to other areas of economic interests such as the proposed Konza Techno City. If the connectivity and routing is not fully addressed it will cause major operational problems and litigation challenges particularly at the port of Mombasa and Nairobi where the already existing meter gauge railway line is being operated by Rift Valley Railways (RVR).
- 1.6.4 The Cabinet Secretary National Treasury and the Cabinet Secretary in charge of Transport and Infrastructure should spearhead the formation of an inter-ministerial technical and implementation team to manage the project and to review cost and benefit analysis of expansion of important infrastructure such as bridges, tunnels and via duct to allow for future expansion of a single to double track vis-avis the cost of construction of a double track line in the first phase.
- 1.6.5 The Government adopts Public Private Partnership arrangement in the operation of train services. To this end, the Government should reconsider spending more money on the construction/development of infrastructure

and less on the locomotives and wagons which can be sourced by the private sector.

1.6.6 The Standard Gauge Railway phase I project addresses operational challenges associated with use of single line track for both freight and passenger services which require different speeds and safety standards with emphasis to KRC's initial goals of this project.

1.6.7 The Ministry of Transport and Infrastructure and KRC should put in place measures to ensure capacity development including technology transfers and capacity building of Kenyans in areas such as design, construction, maintenance, operation and management of the Standard Gauge Railway.

1.6.8 The National Treasury should finalize the negotiations on the financing agreement to pave way for the implementation of Phase I of the project covering Mombasa to Nairobi.

1.6.9 The Cabinet Secretary for Transport and Infrastructure and the Cabinet Secretary for the National Treasury should constitute an inter-ministerial technical team to provide an accurate total cost estimate of the whole project from Mombasa to Nairobi and implement the Standard Gauge Railway project. This cost estimate should include critical cost components such as cost of land acquisition; demolition cost and relevant expenses; Value Added Taxes; Duty and relevant tax; financing, loan interest and relevant expense; and other statutory expenses.

1.6.10 Kenya Railways Corporation hastens the commencement of the process of procurement of an independent consultant to facilitate design review, oversee construction and ensure specifications and quality is guaranteed through an open, transparent, fair and competitive tender in line with Article 227 of the Constitution, the Public Procurement and Disposal Act, 2005 and with the approval of the Attorney General.

- 1.6.11 The Government of Kenya should liaise closely with the Government of Uganda in line with the provisions of the tri-partite agreement for the development of Phase II of the Kenya section of the Standard Gauge Railway to ensure a seamless railway network between the two countries.
- 1.6.12 The Registrar General deregisters China Road and Bridge Company Kenya Limited, a Kenyan firm with the same name as the State owned Chinese company that the office of the Registrar had allegedly registered inadvertently.
- 1.6.13 The Criminal Investigation Department investigates the missing file of China Road and Bridge Company Kenya Limited, its activities and operations and the circumstances under which the Registrar of Companies registered two companies with the same name. Appropriate action should be taken on those found culpable.
- 1.6.14 The Government and all procurement entities must at all times ensure that Article 227 of the Constitution and the provisions of Public Procurement and Disposal Act, 2005 are observed to the letter i.e. public agencies should at all time implement procurement methods that are fair, equitable, transparent, competitive and cost-effective.
- 1.6.15 The "Take or Pay" proposal between KRC and KPA should be reviewed by the Government to plan for intermodal transportation that treat road transport as complementary and not a competitor to rail transport.
- 1.6.16 The present governance structure and management of the Railway Development Fund (RDF) does not allow for transparency and accountability. To strengthen the structure and management of the Fund, a proper legal framework should be prepared by the Cabinet Secretary and submitted to Parliament within two months for approval and enactment.

- 1.6.17 The Government should fast track the mobilization of domestic resources for the development of the Standard Gauge Railway projects in the Country through the Railway Development Fund rather than relying on borrowed Funds which puts pressure on the Country's Debt Sustainability.
- 1.6.18 The Government should ensure that all its development programmes are coordinated and budgeted properly by all Government Ministries and agencies to avoid situations under which Government Ministries/agencies give conflicting information on the same subject matter.
- 1.6.19 The financing agreement should explicitly state the financing by the EXIM Bank of China will cover costs for the railway line, civil works construction, acquisition of rolling stock and locomotives. Other peripheral costs such as land acquisition etc will be financed by the Kenya Government in the 15% contribution.
- 1.6.20 The former Minister for Transport, Hon. Amos Kimunya be prosecuted by the Director of Public Prosecution for contravening Article 125 read together with Article 35 (1) (b) of the Constitution, the provisions of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya and the Standing Order No.191 and for contempt of the Committee and failing to answer to issues raised by the Committee.
- 1.6.21 The Public Procurement Oversight Authority should be more pro-active and vigilant in its oversight role over public procurement and advice ministries and Government agencies on the best procurement procedures.
- 1.6.22 Government officials should desist from commissioning projects before financing and or budgetary provision have been secured and proper procurement provisions followed so as to ensure transparency and accountability in projects implementation and adherence to the rule of law.

1.6.23 The Tripartite Agreement should be availed and subjected to scrutiny by the Attorney General to ensure compliance with Kenyan Laws and ratification as required by Article 2(6) read together with the Treaty Making and Ratification Act (*No 45 of 2012*), of the Constitution and the treaties and ratification law.

1.7 Acknowledgement

The Committee wishes to record its appreciation to the office of the Speaker and Clerk of the National Assembly for facilitation. The Committee also appreciates all the witnesses who appeared and adduced evidence before it. Further, the Committee is indebted to the staff of the National Assembly, Kenya National Audit Office, the Inspectorate of State Corporations and the Department of Government Investments and Public Enterprises (The National Treasury) for the services they rendered to the Committee. It is their commitment and dedication to duty that made the work of the Committee and production of this Report possible.

ADOPTION OF THE SPECIAL REPORT OF THE PUBLIC INVESTMENTS COMMITTEE ON THE PROCUREMENT AND FINANCING FOR THE CONSTRUCTION OF THE STANDARD GAUGE RAILWAY FROM MOMBASA TO MALABA/KISUMU

We the Members of the Public Investments Committee have pursuant to Standing Order 199 adopted this report and affix our signatures to affirm our approval and confirm its accuracy, validity and authenticity:-

1. Hon. Adan Keynan, CBS, MP
2. Hon. Kimani Ichung'wah, MP
3. Hon. Sammy Mwaita, MP
4. Hon. Cornelio Sereen, MP
5. Hon. Baré Shill, MP
6. Hon. Korel Ole Lemoin, MP
7. Hon. Adan M. Noor, MP
8. Hon. Muthika Lintori, MP
9. Hon. Beatrice Nyaga, MP
10. Hon. John M. Nyaga, MP
11. Hon. Njogu Barua, MP

Special Report of the PIC on the Procurement and Financing for the Construction of the Standard Gauge Railway from Mombasa to Malaba/Kisumu

12. Hon. Irungu Kang'ata, MP
13. Hon. Oresmus Njuki, MP
14. Hon. Eng. John Kiragu, MP
15. Hon. Johana Ng'eno, MP
16. Hon. Mwaideghu Thomas, MP
17. Hon. Abdullswamad Sheriff, MP
18. Hon. Paul Otuoma, MP
19. Hon. John Aluoch Olago, MP
20. Hon. Francis Nyeze Mwanzia, MP
21. Hon. Dr. Obaru Oginga, MP
22. Hon. Major (Rtd) John K. Waluke, MP
23. Hon. Ogutu John Omondi, MP
24. Hon. Mary Keraa Sally, MP
25. Hon. Wafula Wamunyinyi, MP
26. Hon. Bernard Munyoki Kitungi, MP
27. Hon. Chrisanthus Wamalwa, MP

The Special Report of the Public Investments Committee on the Recapitalization and Restructuring of the Balance Sheet of Telkom Kenya Limited

Mr. Speaker,

On behalf of the Members of the Public Investments Committee, I beg to table the special Report of the Committee on the procurement and financing of the Mombasa - Nairobi Standard Gauge Railway pursuant to Standing Order 199 (6) and commend it to the House for adoption.

Sign:



HON. ADAN. W. KEYNAN, CBS, MP
CHAIRPERSON, PUBLIC INVESTMENTS COMMITTEE

Date:

24/4/2014

Special Report of the PIC on the Procurement, Agreements and Financing for the Construction of the Standard Gauge Railway from Mombasa to Nairobi (Phase I)

2.0 BACKGROUND OF THE STANDARD GAUGE RAILWAY

- 2.1 The Government of Kenya has identified transport as the critical enabler for the delivery of vision 2030, which aims to make Kenya a middle income country by the year 2030. Vision 2030 aspires for a country firmly interconnected through a network of roads, railways, ports, airports, water and sanitation facilities, and telecommunications.
- 2.2 The Government through the Ministry of Transport and Infrastructure is focusing on developing and improving the transport sector as a key driver of economic development. The railway sub-sector, which has been underperforming over the years, is in urgent need of revamping to ensure it plays its rightful role in the economic and social development of the country and the region as a whole.
- 2.3 The current railway system in Kenya linked to Uganda was developed over 100 years ago and now has serious limitations in terms of technology, speed and capacity. Regarding capacity, the current railway handled only 0.9 million tons in 2012/2013 compared to Mombasa port throughput of 22 million tons in 2012 at a growth rate of 8% per annum. The balance of the traffic was therefore handled by road transport resulting to very high cost of road maintenance and carnage.
- 2.4 The existing railway is on concession to the Rift Valley Railway since 1st October, 2006, in spite of this, its performance has continued to decline due to the poor condition of the infrastructure, facilities, locomotives and rolling stock as a result of lack of investment. The purpose for developing the Standard Gauge Railway project is to provide additional transport capacity on the Northern Transport corridor and also open the country to less expensive and readily available locomotive and rolling stock built to SGR specifications.

2.5 On 3rd August, 2012, the Cabinet granted approval for the SGR project and specifically for:-

- (i) The development of a new Standard Gauge Railway linking Mombasa to Malaba with a branch line to Kisumu;
- (ii) The Standard Gauge Railway to be developed through a Government to Government arrangement supported by Government budget and a railway development and maintenance fund; and
- (iii) The Government to sign a bilateral agreement with the Government of the Republic of Uganda for joint development of the railway and subsequent seamless operation.

3.0 REPORT OF THE AUDITOR GENERAL

The Auditor General in his letter dated 28th March, 2014 (***Annex 1***) informed the Committee that the audit of the Standard Gauge Railway is in the planning stage, however from a desk review the following have been observed:-

- 3.1 The need for the Standard Gauge Railway is well entrenched in Kenya's economic blue print of Vision 2030.
- 3.2 Statistics from the Kenya Railways Corporation emphasize the need for the Standard Gauge Railway and indicate that in 2011 only 8% of the cargo from the port of Mombasa was transported by rail and the remaining 92% was transported by road transport.
- 3.3 The feasibility study was conducted as well as Environmental Impact Assessment as required by section 58 of the Environmental Management Conservation Act (*No 8 of 1999*).

3.4 Although a Commercial Contract between Kenya Railways Corporation and China Road and Bridge Corporation has been signed, the loan agreement has not been signed so, no funds have been disbursed. Consequently it would not be prudent at this juncture to make conclusions as regard to the procurement process or the value for money aspect.

Committee's Observations

3.5 The Committee observed that:-

- (i) The need for the Standard Gauge Railway is well entrenched in Kenya's economic blue print of Vision 2030.
- (ii) The feasibility study was conducted as well as environmental impact assessment as in accordance with section 58 of the Environmental Management Conservation Act *(No 8 of 1999)*.
- (iii) Two Commercial Contracts have been signed between Kenya Railways Corporation and China Road and Bridge Corporation but the loan agreement has not been signed and therefore no funds have been disbursed.

4.0 EVIDENCE BY WITNESSES

4.1 EVIDENCE BY HON. ALFRED KETER, MP

The Hon. Alfred Keter, Member of Parliament for Nandi Hills appeared before the Committee on 15th January and 22nd January, 2014 to adduce evidence on the Mombasa – Nairobi Standard Gauge Railway. He informed the Committee that:-

4.1.1 The country needs an efficient railway system to ease transport congestion and reduce the cost of transportation. The procurement, agreement and

financing of the SGR tender from Mombasa to Malaba is fraught with irregularities and is in contravention of Article 227 of the Constitution, the provisions of the Public Procurement and Disposal Act, 2005.

4.1.2 In April 15th and September 9th, 2008 China Road and Bridge Corporation (CRBC) wrote as a private investor to the then Transport Minister Hon. Chirau Ali Makwere and the then Prime Minister Hon. Raila Odinga respectively seeking to invest in the transport sector and more specifically in the construction of an electric railway System in Kenya (***Annex 2***). The China Road and Bridge Corporation (CRBC) engaged the Government as a private entity and entered into a contract with Kenya Railways Corporation in its private capacity and therefore the contract/procurement was never a Government to Government procurement. It was initiated as a private business venture.

4.1.3 On August 12, 2009 the then Ministry of Transport and China Road and Bridge Corporation (CRBC) signed a Memorandum of Understanding (MOU) in which CRBC was to undertake a free feasibility study on the Standard Gauge Railway. The MOU provided that all facets of the Standard Gauge Railway project will be undertaken in accordance with the Laws of Kenya. The MOU also gave financing options for the project under which CRBC was to source for funding of the project.

4.1.4 Kenya Railways had initiated a procurement process of an independent feasibility study by advertising in the media. An independent consulting firm was identified and tender awarded but the Ministry of Transport (MoT) cancelled the procurement process. Ideally a new procurement

process should have been initiated and fair practice applied but instead CRBC was chosen to undertake the feasibility study.

4.1.5 After completion of the feasibility study, CRBC presented its report to the Ministry of Transport in January, 2012 in which it recommended that the SGR be changed from an electric engine to a diesel powered engine. The cost of the SGR is estimated at USD 3.4 – 3.8 billion.

4.1.6 The Ministry of Finance on 4th January, 2010 wrote to the Government of China requesting for a concessional loan for the construction of a new Standard Gauge Railway at a cost of USD 2.5 Billion (***Annex 3***). The funding of the project is not a grant to Kenya but rather a loan that the people of Kenya are going to pay. Already Kenyans are being taxed (Railway Development Levy) to repay the loan even before the project commences.

4.1.7 The Attorney General (AG) had advised Kenya Railways Corporation to ensure that the requirements of the Public Procurement and Disposal Act, 2005 are followed when the former sought the AG's comments and approval on the commercial contracts.

4.1.8 CRBC undertook the feasibility study, design and preparation of bill of quantities for the project and was later awarded the contract based on the feasibility study and costing that it had done. This is clearly a case of conflict of interest. The Government ought to have appointed an independent firm to undertake the feasibility study and costing of the project as part of due diligence and to get value for money in the project.

- 4.1.9 A similar project is being undertaken in Ethiopia but at a lower cost yet the Ethiopian railway is a duo line railway. Open tendering should have been allowed for Kenyans to get value for money and the different components of the system (railway line, locomotives and spares) should have been awarded to different contractors and not to one contractor to mitigate the risk of failure and allow fair competition.
- 4.1.10 In previous engagements between the Government of Kenya and the Government of China tenders for projects were procured competitively. Chinese companies were allowed to compete openly for the tenders for example during the concession loan for the Kenya Rural Telecommunication Development Project (Phase II, 2007) (*Annex 4*).
- 4.1.11 China Road and Bridge Corporation and its mother company China Communications Construction Company Limited were debarred by the World Bank from participating in any of its projects for the period January 2009 to January 2017 due to fraud/corruption and flouting procurement regulations for a road project they undertook in the Philippines (*Annex 5*).
- 4.1.12 The leadership was misled into commissioning a project that is laden with irregularities. Due diligence ought to have been undertaken before commissioning the project. His interest in the matter is transparency and value for money for Kenya and exercise of his Constitutional right under Article 95.

Committee's Observations

4.1.13 The Committee observed that:-

- (i) Article 227 of the Constitution of Kenya provides that public procurement should be fair, equitable, transparent, competitive and cost effective.
- (ii) China Road and Bridge Corporation initiated the project and undertook the feasibility study, design and costing for the project and was awarded the tender. This raises issues of conflict of interest and lack of due diligence as well as questions as to whether Kenyans will get value for money on the project due to lack of competition in the procurement process.
- (iii) China Road and Bridge Corporation and its mother company China Communications Construction Company Limited were debarred by the World Bank from participating in any of its projects for the period January 2009 to January 2017 due to fraud or corruption and flouting procurement regulations for a road project they undertook in the Philippines.
- (iv) No specific costing data was given to assist in cost comparison of proposed SGR in Kenya and others outside the country.
- (v) The project was commissioned before securing financing.

4.2 EVIDENCE BY THE PUBLIC PROCUREMENT OVERSIGHT AUTHORITY

The Director General of the Public Procurement Oversight Authority (PPOA), Mr. Maurice Juma, appeared before the Committee on 20th January, 2014 to adduce evidence on the procurement process for the construction of the Nairobi – Mombasa Standard Gauge Railway. He informed the Committee that:-

4.2.1 Kenya Railways Corporation (KRC) on October 2nd, 2012 reported to the Public Procurement Oversight Authority pursuant to regulation 62 (3) of *29 / Special Report of the PIC on the Procurement, Agreements and Financing for the Construction of the Standard Gauge Railway from Mombasa to Nairobi (Phase I)*

public procurement and disposal regulations, 2006. The Procuring entity reported that it had engaged China Road and Bridge Corporation through a direct procurement at a cost of USD 1,146,791,008.75. According to KRC, the use of direct procurement was premised on section 74 (2) (b) of the procurement law and the fact that there was an MOU between the Ministry of Transport and CRBC for a feasibility study with the option of considering construction of the Standard Gauge Railway.

4.2.2 Upon completion of the feasibility study and review by Kenya Railways Corporation (KRC), CRBC was awarded a tender in July, 2012 and communicated to the company in October, 2012 to construct the Standard Gauge Railway (SGR) at a cost of USD 1,146,791,008.75 exclusive of VAT, Customs Duties, IDF fee, Cess and withholding tax (**Annex 6**). A negotiation committee was appointed in August, 2012.

4.2.3 Kenya Railways Corporation withdrew the award citing that the procurement was Government to Government and was therefore not subject to the provisions of the Public Procurement and Disposal Act, 2005. PPOA advised KRC against the use of direct procurement since the method was not competitive and requested for additional information on the subject project for purposes of review (**Annex 7**). The documents were never availed. KRC wrote citing that the contract with CRBC resulted from a negotiated grant between the Government of Kenya and the Government of China thus G-G funding and therefore section 6 (1) of PPDA, 2005 applied.

4.2.4 According to section 6 (3) of the Public Procurement and Disposal Act, 2005 Government to Government procurement should have a negotiated grant. There was no documentary evidence submitted by KRC to suggest that the contract was Government to Government except their letter indicating a Government to Government arrangement.

4.2.5 The KRC had entered into a commercial agreement with CRBC on the development of a Standard Gauge Railway.

4.2.6 In a letter dated 3rd October, 2012, the Solicitor General indicated that the said procurement shall be subject to the financing agreement and therefore section 6 of the Public Procurement and Disposal Act shall apply (***Annex 8***).

4.2.7 PPOA had not done due diligence on CRBC. It was the procuring entity that was to undertake the due diligence on the contractor.

Committee's Observations

4.1.8 The Committee observed that:-

- (i) The Attorney General had offered general advice to the Public Procurement and Oversight Authority relating to Government to Government transaction or arrangements.
- (ii) The commercial contract between KRC and CRBC resulted from a negotiated grant between the Government of Kenya and the Government of China.

4.3 EVIDENCE BY MANAGEMENT OF KENYA RAILWAYS CORPORATION

The Acting Managing Director, Kenya Railways Corporation, Mr. Alfred Matheka appeared before the Committee on 20th January, 2014 to adduce evidence on the procurement and financing for the construction of the Standard Gauge Railway. He informed the Committee that:-

4.3.1 A Tri-partite agreement was signed by the Governments of Kenya, Uganda and Rwanda for the construction of a Standard Gauge Railway. To action the Communiqué by the Presidents of EAC the Cabinet in August, 2012 approved the development of a Standard Gauge Railway linking Mombasa to Malaba with a branch line to Kisumu.

4.3.2 The then Ministry of Transport on 12th August, 2009 signed an MOU with China Road and Bridge Corporation (CRBC) for a feasibility study and preliminary design of Mombasa-Nairobi section of the railway with the option of considering the construction. Under the Memorandum, CRBC could identify the financiers and mobilize resources at no cost to the Government of Kenya (***Annex 9***).

4.3.3 The Feasibility study report was submitted to Kenya Railways Corporation (KRC) in January, 2012 and KRC approved the feasibility study and preliminary designs report on 26th June, 2012.

4.3.4 The scope of works approved in the feasibility study report included:

- (a) construction of 609 Kilometers of single track railway;
- (b) construction of stations, workshops and freight exchange depots;

- (c) supply and installation of facilities including signaling and communication, electricity and water supply;
- (d) supply and commission of 56 locomotives;
- (e) supply and commissioning of 1,620 freight wagons;
- (f) Supply and commission of 40 passenger coaches; and
- (g) Training and capacity building.

4.3.5 Upon completion of the feasibility study and review by KRC, CRBC was awarded a tender (**Annex 6**) to construct the Standard Gauge Railway (SGR). Kenya Railways Corporation withdrew the award citing that the procurement was Government to Government and was therefore not subject to the provisions of the Public Procurement and Disposal Act, 2005.

4.3.6 The standards of the SGR compared to the currently existing meter gauge Railway is as follows:

Table 1: Comparison Between the Standard Gauge Railway and Existing Meter Gauge Railway		
Item	Standard Gauge Railways	Meter Gauge Railways
Classification	Class I	Class III
Gauge	1,435 mm	1,000mm
Track	Single Track	Single Track
Axle Load	25 tones	16 tones
Speed	120Km/h	40Km/h
Minimum Curve Radius	1,200m, difficult 800m	175 m (10 degrees)
Ruling gradient	1.2%	1.5%

Traction category	Diesel	Diesel
Locomotives power	Passenger: 3,200 HP Freight: 5,000 HP	Passenger and Freight 2,600 HP
Trailing Load	4,000 tones (216 (TEUs))	1,000 tones (34 TEUs)
Effective Length of Crossing	880 meters	450 meters
Type of signaling	Automatic inter-station block (Computer aided)	Manual (Currently there is no signaling)
Construction Clearance	Double-stacked container wagon and future electrification	Single Track Containers
Targeted Traffic	Freight and Long distance passengers	Freight and Passengers
Design hauling capacity	28 million tones	1.5 million tones

4.3.7 The Kenya Railway Corporation had entered into a commercial agreement with CRBC on the construction of a SGR at a total cost of USD 3.804 billion. The contract was to come into force once financiers had been identified. KRC used the provisions of section 6 (1) of the Public Procurement and Disposal Act, 2005 to undertake the procurement of the project under a Government to Government arrangement.

4.3.8 Due diligence was undertaken on CRBC by KRC through an inter-ministerial delegation that undertook a visit. The Chinese Embassy, Nairobi wrote on 8th June, 2012 expressing support and confirming the capacity of CRBC to undertake the project (**Annex 10**).

- 4.3.9 A delegation from Kenya also visited the company and some of the projects undertaken by CRBC in China (***Annex 11***). The company had undertaken mega projects in Kenya such as birth 19 at the Kenya Ports Authority, Thika Super Highway, Mama Lucy Hospital among others.
- 4.3.10 The Government is seeking a loan of USD 3.233 billion part of which is concessional loan of USD 1.6 billion and USD 1.633 billion commercial loans. 85% of the project is to be financed by the loan while 15% equivalent to USD 571 Million (Kshs. 50 billion) is to be financed by the Government of Kenya using the Railway Development Levy. The Interests on the loan is 2% per annum and the insurance on the commercial loan is 6.93% of the loan to be paid in three premium installments. The loan is insured by a Chinese firm China Export and Credit Insurance Corporation (SinoSure) with no local broker.
- 4.3.11 An independent consultant will be hired to supervise the construction, supply and installation of facilities and commissioning of all locomotives and rolling stock in addition to undertaking design review of all the designs. Cash flow analysis was done to determine that the project will have sufficient cash flow and that the debt limit will be sustainable. An Environmental Impact Assessment of the project was also undertaken with NEMA certificate obtained with mitigation measures being factored in the project.

Committee's Observations

4.3.12 The Committee observed that:-

- (i) The Cabinet in August, 2012 approved the development of a Standard Gauge Railway linking Mombasa to Malaba with a branch line to Kisumu.
- (ii) Kenya Railways Corporation awarded CRBC a tender to construct the Standard Gauge Railway (SGR) using direct procurement but this was withdrawn by the procuring entity citing that the procurement was Government to Government.
- (iii) KRC used the provisions of section 6 (1) of the Public Procurement and Disposal Act, 2005 to undertake the procurement of the project under a Government to Government arrangement.
- (iv) An independent consultant will be hired to review designs and supervise the track construction, supply and installation of facilities and commissioning of all locomotives and rolling stock in addition to undertaking design review of all the designs.
- (v) A Cash flow analysis had been done by the National Treasury to determine that the project will have sufficient cash flow and that the debt limit will be sustainable.
- (vi) An Environmental Impact Assessment of the project was also undertaken with NEMA certificate obtained with mitigation measures being factored in the project.

4.4 EVIDENCE BY THE NEGOTIATION COMMITTEE OF KENYA RAILWAYS CORPORATION

Eng. S. Ouna, Chairman of the Contract Negotiation Team, appeared before the Committee to adduce evidence. He informed the Committee, that:-

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4.4.1 CRBC and KRC appointed negotiation teams to negotiate commercial turnkey contracts for civil works and for the supply and installation of facilities, locomotives and rolling stock.

4.4.2 The purpose of the negotiation was to prepare a draft commercial contract that was to be signed between KRC and CRBC for the civil works of the proposed Mombasa to Nairobi SGR Project. The negotiation was to focus on the following areas:

- (a) Particular conditions of the projects,
- (b) Schedule of Payment,
- (c) Bills of Quantities,
- (d) KRC requirements and specifications and,
- (e) Contract price.

4.4.3 The contract is aligned to FIDIC 1999 conditions of Contract for EPC/Turnkey Projects (Part II) and the Bills of quantities were based on preliminary design of the railway as well as agreed specifications.

4.4.4 The standards that will determine the performance of the railway include: Design speed, class of the railway, maximum gradient, minimum curvature, axle load, and the length of the crossing loop. The agreed parameter will enable the railway to have a maximum capacity of 22 million tons per annum, which would enable it to be lifting at least 40 % of freight delivered at Mombasa by 2035.

4.4.5 The parties considered certain unit costs and made appropriate adjustments which reduced the original estimate by Kshs. 2,641,283,124.69 bringing the contract price for civil works to Kshs. 220, 921,502,221.08.

Committee's Observations

4.4.6 The Committee observed that:-

- (i) CRBC and KRC appointed negotiation teams to negotiate commercial turnkey contracts for civil works and for the supply and installation of facilities, locomotives and rolling stock with the purpose of preparing a draft commercial contract.
- (ii) The parties considered certain unit costs and made appropriate adjustments which reduced the original estimate by Kshs. 2,641,283,124.69 thus bringing the contract price for civil works to Kshs. 220, 921,502,221.08.

4.5 EVIDENCE BY THE DUE DILIGENCE TEAM OF KENYA RAILWAYS CORPORATION

The due diligence team informed the Committee that:-

4.5.1 The GoK undertook due diligence on CRBC to confirm its suitability to undertake the implementation of the project by sending a delegation to China from 27th October to 5th November 2012. The objective of the due diligence included:-

- (i) Confirming that CRBC technical, financial and managerial/human resource capacity to deliver the railway project;

- (ii) Visiting CRBC nominated partners for the Railway project development and confirming their capacity to deliver supporting facilities for the project; and
- (iii) Experiencing Chinese technology in design and functionality of the railway infrastructure and support facilities to be applied to Mombasa-Malaba/Kisumu Railway.

4.5.2 The CRBC due diligence report confirmed the following:-

- (i) CRBC is a registered corporation by the State Administration for Industry and Commerce since 8th December, 2005, registration No. 1000001003996;
- (ii) The registered address is C 88 Andingmenwai Road Dongcheng District Dajie Zhounle Plaza Beijing;
- (iii) CRBC is a large scale state-owned foreign trade and economic corporation enterprises that focuses on construction of roads, railways, airports and other transport infrastructure;
- (iv) The Corporation serves as a window and plat form for the overseas operations of China Communications Constructions Company Limited;
- (v) CRBC has established relevant branches in 40 countries globally including Kenya;
- (vi) CRBC is a reputable company with national and international recognition for the delivery of infrastructure projects;
- (vii) The Corporation has undertaken several large railways development projects in China including Beijing- Shanghai High Speed Railway, Hrabn-Dalian passenger dedicated line, Guangkun mixed traffic among others; and
- (viii) CRBC has the technical, financial and managerial/ human resource capacity to deliver the proposed Mombasa- Nairobi SGR.

- (ix) **CSR Ziyang Locomotives Manufacturing Company** based in Chengdu in China has been identified by CRBC to partner with it to deliver locomotives for the project as per the equipments suppliers submitted to KRC by CRBC. The facility has a production capacity of 500 diesel and electric locomotive per year.
- (x) Locomotive range from meter gauge to broad gauge and from heavy haul passenger and shunting locomotives.
- (xi) One of the standard locomotives manufactured by the company is type DF8B-a3680KW locomotive similar to the one specified for the Mombasa- Nairobi SGE freight haulage. The locomotive has been developed in China along with engine and electrical transmission and has a proven technology dating back to 1998. The locomotives is currently operating in Turkmenistan and Kazakhstan
- (xii) The facility also manufactures and exports locomotives parts such as crank-shaft, wheels, and braking gear to the US, EU and India.

Committee's Observations

4.5.3 The Committee observed that:-

- (i) The GoK undertook due diligence on CRBC to confirm its suitability to undertake the implementation of the project by sending a delegation to China between the 27th of October, 2012 and the 5th of November, 2012. The due diligence confirmed that CRBC and its appointed sub contractors have the technical, financial and managerial or human resource capacity to deliver the proposed Mombasa- Nairobi SGR.

4.6 EVIDENCE BY THE CHAIRMAN OF THE BOARD OF KENYA RAILWAYS CORPORATION

General (Rtd) J. M. Kianga, Chairman of the Board of Kenya Railway Corporation, appeared before the Committee to adduce evidence on the procurement and financing of the construction of the Standard Gauge Railway. He informed the Committee that:-

4.6.1 Following the entering into the concession agreement with Rift Valley Railway in October 2006, the mandate of KRC was redefined in line with Vision 2030 through a five year strategic plan, 2007-2012. One of the key strategic objectives of the plan was to develop a national railway network. This led to the development of the Kenya National Railway master plan which was adopted at the EAC to become part of the East African Community. The Mombasa-Malaba/Kisumu SGR is a key component of this plan. This informed the tender for the Feasibility Study and Preliminary Design of the Mombasa-Malaba/Kisumu SGR

4.6.2 The feasibility study report by CRBC was submitted to KRC by the Permanent Secretary, MoT in February 2011 for review. The study covered items such as: traffic forecast; project necessity; route selection and terminals; technical standards; operation planning; technical description; environmental assessment; construction period assessment; economic valuation; and conclusion and recommendations.

4.6.3 The procurement of CRBC was through an MOU between the Ministry of Transport and CRBC and signed by then Minister for Transport, Hon. Chirau Ali Mwakwere on behalf of the Ministry of Transport.

4.6.4 KRC was involved in the process of vetting and reviewing the Feasibility Study and Preliminary Design. Prior to the approval of the Feasibility Study and Preliminary Design, the Committee was informed by the Permanent Secretary, MoT that the Feasibility Study and Preliminary Design were approved by the Board of Directors of KRC. The Committee is of the view that the Feasibility Study and Preliminary Design should have been approved by the Committee before being approved by the Board of Directors of KRC.

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Study and Preliminary Design, KRC received affirmation vide letter dated 8th June 2012 from the Embassy of the Government of the People's Republic of China in Kenya expressing their support to CRBC in their involvement in the project.

4.6.5 The need to include the supply and installation of the facilities and equipment in a turnkey project is to ensure seamless development of the railway and for the railway to commence revenue generation immediately the infrastructure is ready.

Committee's Observations

4.6.6 The Committee observed that:-

- (i) The procurement of feasibility study was through an MOU between CRBC and the Ministry of Transport, signed by the then Minister for Transport, Hon Chirau Ali Mwakwere.
- (ii) The tender for the Feasibility Study and Preliminary Design of the Mombasa-Malaba/Kisumu SGR, was informed by the Kenya National Railways Master Plan that was adopted by the East African Community.
- (iii) KRC was involved in the process of vetting and reviewing the Feasibility Study and Preliminary Design done by CRBC.

4.7 EVIDENCE BY CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE

Mr. Michael Kamau, the Cabinet Secretary for Transport and Infrastructure, appeared before the Committee on 20th January, 2014 to adduce evidence on the

procurement and financing of the construction of the Standard Gauge Railway. He informed the Committee that:-

4.7.1 A Tri-partite agreement was signed by the Governments of Kenya, Uganda and Rwanda for the construction of a Standard Gauge Railway. The objective of the project is to ensure seamless and efficient railway that will result in lower cost, quality of services and high level of safety. The salient features of the agreement were that:-

- (a) The three countries were to use unified standards for the construction of the SGR;
- (b) The construction and completion is to be undertaken within set timelines; and
- (c) There should be seamless operation of the Railway line.

4.7.2 The Ministry of Transport signed an MOU with China Road and Bridge Corporation (CRBC) for a feasibility study with the option of considering the construction (**Annex 9**). Under the MOU, CRBC could identify the financiers and mobilize resources at no cost to the Government of Kenya.

4.7.3 Upon completion of the feasibility study and review by Kenya Railways Corporation (KRC), CRBC was awarded a tender to construct the Standard Gauge Railway (SGR) (**Annex 6**). Kenya Railways Corporation later withdrew the award citing that the procurement was Government to Government and therefore applied the provisions of section 6 (1) of the Public Procurement and Disposal Act, 2005 to undertake the procurement of the project under a Government to Government arrangement.

4.7.4 The Attorney General authorized the signing of the commercial contract and subsequent action by the Attorney General indicated approval for the project (***Annex 12***). The contracts would not come to force until a financier was identified and funding commitment made.

4.7.5 The project was procured through a Government to Government arrangement. This is normally the case where the Government uses development partner funds. Under such circumstances the rules of the funding partner are used. The Chinese procedure requires that a feasibility study is done by the same company that will undertake the development of the project. KRC had entered into a commercial agreement with CRBC on the construction of a SGR. The total cost of the project was USD 3.804 billion. The contract was to come into force once financiers had been identified.

4.7.6 Kenya Railways Corporation undertook due diligence on CRBC through inquiries from the Chinese Embassy, Nairobi which wrote confirming the capacity of CRBC to undertake the project. KRC also sent a due diligence technical team/delegation to visit the company and some of the projects it had undertaken in China. Further the company had undertaken mega projects in Kenya such as birth 19 at the Kenya Ports Authority, Thika Super Highway, Mama Lucy Hospital etc.

4.7.7 The total cost of the project is USD 3.2 billion part of which is a concessional loan of USD 1.6 billion and a commercial loan of USD 1.63 billion. 85% of the project cost is to be financed by the loan while 15% is to be financed by the Government of Kenya using the Railway Development

Levy. The Interests on the loan is 2% per annum and the insured by a Chinese firm, SinoSure, at the rate of 6.9% of the loan to be paid in installments.

4.7.8 An independent consultant will be hired to review designs and supervise the project before it starts and during construction phase. A cash flow analysis was done to determine that the project will have sufficient cash flow and that the debt limit will be sustainable. An Environmental Impact Assessment of the project was also undertaken, with NEMA certificate obtained, with mitigation measures being factored in the project.

4.7.9 American standards were used in the project. The implementation of the project will ensure that there is capacity building where skills and knowledge will be transferred. The project seeks to implement a monolithic railway but structures such as bridges, tunnels will be built to accommodate an additional line in future. Brand new workshops will also be built in Embakasi to cater for maintenance facilities.

Committee's Observations

4.7.10 The Committee observed that:-

- (i) There was no competitive bidding on the project since it is only one firm (China Road and Bridge Corporation) that initiated the project and undertook the feasibility study, design and costing and was subsequently awarded the tender (CRBC).
- (iii) The MOU on the feasibility study provided that CRBC undertook the feasibility study, design and costing of the project at no cost to the Government.

- (iv) Kenya Railways Corporation invoked section 6(1) of the Public Procurement and Disposal Act, 2005 in exclusion of section 6 (3) of the same Act citing that the financing of the project was by a negotiated grant.
- (v) The Attorney General authorized the signing of the commercial contract and subsequent action by the Attorney General indicated an approval for the project.
- (vi) Kenya Railways Corporation undertook due diligence on CRBC through inquiries from the Chinese Embassy, Nairobi which confirmed the capacity of CRBC to undertake the project and a due diligence technical team/delegation that visited the company and some of the projects it had undertaken in China.
- (vii) An independent consultant would be hired to review the design and supervise the construction to ensure that the public gets value for money.
- (viii) American standard and not Chinese standards are the choice of the project.

4.8 EVIDENCE BY THE CABINET SECRETARY FOR NATIONAL TREASURY

Mr. Henry Rotich, the Cabinet Secretary for Treasury, appeared before the Committee on 21st January, 2014 to adduce evidence on the procurement and financing for the construction of the Standard Gauge Railway. He informed the Committee that:-

4.8.1 Treasury is not directly involved in the implementation of projects. The responsibility of the procurement and implementation of capital projects including monitoring and evaluation lies with the line Ministries/State agencies while Kenya National Audit Office provides independent audits as required by law. The role of National Treasury in respect of such

projects is to secure the required financial resources to undertake the projects as long as they are in line with the National Development Plans.

4.8.2 The Cabinet approved the development of the Standard Gauge Railway in August, 2012 followed by the signing of a bi-lateral agreement by the Governments of Kenya and Uganda for the construction of a Standard Gauge Railway and later converted to a Tri-partite agreement after Rwanda joined the project.

4.8.3 The Standard Gauge Railway project involves construction of a railway infrastructure (civil works) and procurement of facilities and locomotives on an Engineering, Procurement and Construction (EPC) arrangement at a cost of USD 3.8 billion.

4.8.4 The project will be financed through a loan that will cover 85% of the project and Government of Kenya contributing 15% of the cost of the project. The National Treasury submitted a formal request to the Government of China for financial assistance towards implementation of the project in October, 2012 (***Annex 13***) The Kenyan component will be financed through the Railway Development Levy. The Treasury has already issued regulations on the Railway Development Levy.

4.8.5 The loan will cost USD 3.23 Billion from EXIM Bank of China comprised of a concessional loan of USD 1.6 billion and a commercial loan of USD 1.63 billion. The concessional loan is for 20 years and has a grace period of 7 years and an interest rate of 2% per annum while the commercial loan is for 10 years and grace period of 5 years and insurance cover of 6.93% of

the commercial loan and interest of six months LIBOR + 360 basis point. The loan has a grant element of 35%. The insurance component is always available for any commercial loan. For China, the insurance cover has to be done by a Chinese firm, SinoSure. The insurance cover is to take care of nonpayment.

4.8.6 The major financial implications of the project will be Kshs. 349.44 billion relating to:-

- (d) EPC contract for USD 3.8 billion covering USD 2.657 billion for civil works, and USD 1.146 billion for facilities, locomotives and rolling stock;
- (e) Kshs. 8.04 billion for compulsory acquisition of 2,253 hectares of land for the railway corridor;
- (f) Kshs. 10.6 billion for Embakasi Inland Container Depot (ICD) expansion programme, facility development and container handling equipment;
- (g) Kshs. 1 billion for land acquisition for the Embakasi inland depot; and
- (h) Kshs. 3 billion for project supervision.

4.8.7 Treasury signed an MOU in July, 2012 with EXIM Bank in China that was witnessed by the President of the Republic of Kenya (***Annex 14***). The MOU was based on the commercial agreement between Kenya Railways Corporation and China Road and Bridge Corporation (CRBC). There is no sovereign guarantee by the Government of Kenya on the loan. There was direct borrowing from Exim Bank of China. The loan is to the Government of Kenya and is on lent to Kenya Railways Corporation. GoK and EXIM

Bank of China signed an MOU because EXIM Bank provided the funds and represented the People's Republic of China.

4.8.8 The Government of Kenya has met all the requirements of the EXIM Bank of China which include; an Assurance that the Government will guarantee minimum freight demand for the SGR through execution of take or pay agreement between KRC and the Kenya Ports Authority and confirmation that Railway Development Fund will be used to repay the loan. EXIM Bank of China is currently going through its internal credit approval process following which it will submit to GoK, through the National Treasury the Financing Agreements. The financing agreement has not yet been signed.

4.8.9 Kenya Railways Corporation had awarded CRBC a tender under direct procurement which it later cancelled. The cancellation of the award under direct procurement did not negate the commercial contract signed in July, 2012. The cancellation was only meant to correct the procurement process from direct procurement to Government to Government arrangement.

4.8.10 An arrangement will be struck with Kenya Ports Authority to ensure that sufficient volumes of freight go through the Standard Gauge Railway. No guarantee has, however, been given on the volumes for the railway cargo.

4.8.11 The current GoK debt limit is Kshs. 889 billion against a ceiling of Kshs. 1.3 trillion approved by Parliament. The debt ratio is therefore 38.7%.

4.8.12 The Attorney General provided guidance on the procurement process and cleared the commercial contract.

4.8.13 An independent consultant will be hired to supervise the project once it starts to ensure that the project is completed.

Committee's Observations

4.8.14 The Committee observed that:-

- (i) The Cabinet approved the development of the Standard Gauge Railway in August, 2012 followed by the signing of a bi-lateral agreement by the Governments of Kenya and Uganda for the construction of a Standard Gauge Railway that was later upgraded to a tri-partite agreement when Rwanda joined.
- (ii) Treasury signed an MOU in July, 2013 with EXIM Bank in China that was witnessed by the President of the Republic of Kenya, based on the commercial agreement between Kenya Railways Corporation and China Road and Bridge Corporation (CRBC).
- (iii) There is no guarantee to ensure that sufficient volumes of freight go through the Standard Gauge Railway since no agreement has been signed between Kenya Ports Authority and Kenya Railways Corporation.
- (iv) There is no financing agreement yet signed between the Government of Kenya and EXIM Bank in China.
- (v) There is no sovereign guarantee by the Government of Kenya on the commercial and concessional loan from the Government of China.
- (vi) An independent consultant would be hired to ensure the project is completed timely.

4.9 EVIDENCE BY THE ATTORNEY GENERAL

Prof. Githu Muigai, the Attorney General, appeared before the Committee on 21st January, 2014 to give evidence on the procurement and financing for the construction of the Standard Gauge Railway. He informed the Committee that:-

4.9.1 The office of the Attorney General is an advisory office that offers legal advice to the Government of Kenya, promotes rule of law and good governance.

4.9.2 Kenya Railways Corporation has executed two commercial contracts; one for the development of the Mombasa - Nairobi SGR and the other for the supply of facilities, locomotives and rolling stock for the Mombasa - Nairobi section of the Standard Gauge Railway. The Attorney General advised that, amendments be made on the contract and that there must be compliance with the Public Procurement and Disposal Act, 2005. The signing of the commercial agreements is a condition precedent to the financing agreement. The financing agreement has not yet been signed and it must be certified by the State Law office.

4.9.3 A Government to Government (G-G) arrangement is not a procurement method but an arrangement between sovereign nations that could support procurement activities. A G-G agreement is not a method for selecting suppliers so as to support the award of a contract. The purchase of BVR kits brought to the fore challenges in this kind of arrangement and this experience informed the advice given to Public Procurement Oversight Authority (PPOA) by the office of the Attorney General (***Annex 15***).

4.9.4 The Attorney General's office did not validate the procurement process but approved the commercial agreements conditional to the Ministry Department and Agency (MDA's) fulfilling the conditions and amendments proposed by the Attorney General. The office advised that Article 227 of the Constitution of Kenya should be observed to the utmost. Public agencies are expected to implement procurement methods that are fair, equitable, transparent, competitive and cost effective and with full application of the Public Procurement and Disposal Act No. 3 of 2005, Laws of Kenya.

4.9.5 The Attorney General advised PPOA against allowing certain kinds of contracts and advised KRC and the Ministry to put in place certain amendments before signing the commercial contracts

4.9.6 There will be no liability on the part of the Government of Kenya if the contract fails since the financing agreement has not been effected.

Committee's Observations

4.9.7 The Committee observed that:

- (i) Article 227 of the Constitution of Kenya provides that public procurement should be fair, equitable, transparent, competitive and cost effective.
- (ii) A Government to Government (G-G) arrangement is not a procurement method but an arrangement between sovereign nations that could support procurement activities.
- (iii) The Office of the Attorney General approved the commercial agreements conditional to the Ministry of Transport and Kenya Railways Corporation fulfilling the conditions and amendments proposed by the Attorney General.

- (iv) There are no contractual liabilities on the part of the Government of Kenya since the financing agreement has not been effected and it is the financing agreement that is bound to create such contractual obligations.

4.10 EVIDENCE BY THE COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY

The Commissioner General, Kenya Revenue Authority, Mr. Njiraini appeared before the Committee on 22nd January, 2014 to give evidence on the status of the revenue collected under the Railway Development Levy. He informed the Committee that:-

- 4.10.1 In the Budget Statement for Fiscal Year 2013/14 delivered on 13th June, 2013 the Cabinet Secretary for the National Treasury proposed an amendment to the Customs and Excise Act, Cap 472, Laws of Kenya, so as to introduce a Railway Development Levy of 1.5 % of the customs value of all imported goods (***Annex 16***).
- 4.10.2 The objective was to mobilize funds for the construction of a Standard Gauge Railway network in order to facilitate the transportation of goods. Therefore the Railway Development Levy collection was introduced with effect from 1st July 2013, payable by all importers at a rate of 1.5% of the customs value of the imports.
- 4.10.3 The Finance Bill, 2013 indicates that all imports of domestic use are subject to the 1.5 % Railway Development Levy to be paid by the importer at the entry point. It further indicates that the Cabinet Secretary shall establish a Railway Development Levy Fund where all the proceeds are to be paid and is to be managed, administered or wound up in accordance with the Public Financial Management Act, 2012 and its regulations.

4.10.4 The total collection of Railway Development Levy for the period 1st July, 2013 to 31st December, 2013 was Kshs. 10,052,287,901 against a target of Kshs. 6,780,260,980.11. The full year Treasury target for the Financial Year 2013/14 is Kshs. 13,500,000,000 hence the remaining balance to meet the target is Kshs. 3,447,712,099.

4.10.5 The Railway Development Levy is facing challenges in its application to diplomats, goods destined for EAC Member States and bonded goods destined for EPZ areas. The Authority is consulting with the National Treasury on ways of addressing the challenges.

Committee's Observations

4.10.6 The Committee observed that:-

- (i) The Railway Development Levy was established to mobilize funds for the development of a Standard Gauge Railway network in order to facilitate the transportation of goods and is paid by the importer at the entry point.
- (ii) Kenya Revenue Authority had surpassed its target in collection of the Railway Development Levy.
- (iii) All proceeds of the Railway Development Levy are channeled to the Railway Development Levy Fund which is to be managed, administered or wound up in accordance with the Public Financial Management Act, 2012 and the regulations thereunder.
- (iv) The Railway Development Levy is facing challenges in its application to diplomats; goods destined for EAC Member States and bonded goods destined for EPZ areas.

4.11 EVIDENCE BY HON. CHIRAU ALI MAKWERE, FORMER MINISTER FOR TRANSPORT

Hon. Chirau Ali Makwere, former Minister for Transport appeared before the Committee on 3rd February, 2014 to give evidence on the procurement and financing of the Mombasa - Nairobi Standard Gauge Railway. He informed the Committee that:-

4.11.1 He served as the Minister for Transport from 2005 to 2010 and was succeeded thereafter by Hon. Amos Kimunya. During his tenure as Minister for Transport, he prioritized infrastructure development. He identified CRBC with his own initiative through the internet and initiated contact with CRBC based on their capability to undertake the project taking into account the nature of work that the company had done in China such as the development of the Beijing - Shanghai Railway Line. The company was later awarded the tender for the construction of the Mombasa - Nairobi Standard Gauge Railway.

4.11.2 There was a Cabinet approval for the development of the Standard Gauge Railway. The specifications for the railway were made by the Ministry of Transport.

4.11.3 He signed the MOU as the Minister for Transport but never awarded the contract. At that point he would not confirm that this was going to be a Government to Government arrangement since it was subject to review by other Government Ministries and agencies.

4.11.4 The CRBC wrote to Hon. Mwakwere congratulating him for being appointed a Minister and presented a draft MOU.

4.11.5 The cost of the railway varies in different sections of the Mombasa – Nairobi railway depending on the terrain, weather patterns, Wildlife migratory routes among other factors.

4.11.6 He was aware that China Road and Bridge Corporation was blacklisted by the World Bank in the Philippines. The Philippines issue was an isolated case since the company has been in business in Kenya for many years without any issue of integrity being raised against it.

4.11.7 He does not know the Board of Directors of CRBC or when they were registered in Kenya.

Committee's Observations

4.11.8 The Committee observed that:-

- (i) The CRBC wrote to Hon. Mwakwere congratulating him for being appointed a Minister and presented a draft MOU for the feasibility study. This implies that the SGR was initiated by CRBC and not the Ministry of Transport.
- (ii) The MOU between the Ministry of Transport and CRBC was the genesis and the basis on which the project was premised and executed. The MOU provided the grounds for the feasibility study upon which the implementation of the Standard Gauge Railway is based.
- (iii) The Hon. Chirau Ali Mwakwere was non-committal to any of the issues raised by the Committee. The Committee noted that through his demeanor

Hon. Mwakwere had demonstrated arrogance and a condescending attitude.

4.12 EVIDENCE BY MR. NDUVA MULI, PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT AND INFRASTRUCTURE

Mr. Nduva Muli appeared before the Committee on 5th February, 2014 to adduce evidence as a former Managing Director of Kenya Railways Corporation, on the procurement and financing of the Mombasa - Nairobi Standard Gauge Railway. He informed the Committee that:-

4.12.1 The railway system linking Kenya and Uganda was developed over 100 years ago and now has serious limitations in terms of technology and capacity. The railway sub-sector, which has been underperforming over the years, is in urgent need for revamping to ensure it plays its rightful role in the economic and social development of the Country and the region.

4.12.2 The current railway capacity handled only 0.9 million tons in 2012/13 compared to Mombasa Port throughput of 22 million tons in the same period at a growth rate of 8 % per annum. This means that 96 % of the goods from Mombasa Port are presently handled by the more expensive road transport. The performance of the existing railway line which is on concession to Rift Valley Railway since 1st October 2006 has continued to decline due to poor condition of the infrastructure, facilities, locomotives and rolling stock. This is as a result of lack of investment.

4.12.3 The current railway capacity cannot be increased beyond five million tons per annum due to the following limitations:-

- (i) Steep gradient of 2.5 % and tight curvature of 175 meters radius limiting delivery speed to less than 20 Km/h.
- (ii) Weak structure limiting axle load to 16 tones, which in turn limits the hauling capacity.

4.12.4 On 3rd August, 2012 the Cabinet granted approval for the project as follows:-

- (i) The development of a new Standard Gauge Railway linking Mombasa to Malaba with a branch line to Kisumu;
- (ii) The Standard Gauge Railway to be developed through a Government to Government arrangement supported by Government Budget and a Railway Development and Maintenance Fund; and
- (iii) The Government to sign a bilateral Agreement with the Government of the Republic of Uganda for joint development of the railway and subsequent seamless operation.

4.12.5 KRC initiated procurement of feasibility study but was overtaken by events when CRBC offered to carry out the study at its own cost as agreed with the Ministry of Transport

4.12.6 KRC project specifications and concern for SGR study were drawn to provide parameters of study and were finally discussed and agreed to prior to completion of the study.

4.12.7 The development of the Mombasa to Malaba/Kisumu Standard Gauge Railway will involve the construction and subsequent operation of

approximately 1,250 kilometers and will be split up in two phases (Phase 1- Mombasa to Nairobi; Phase 2 - Nairobi to Malaba and Kisumu).

4.12.8 The Government recognized the need to commence with the development of Phase I (Mombasa- Nairobi) since 70% of freight handled at the port of Mombasa originates from or is destined to Nairobi. Phase I would therefore resolve the perennial freight congestion problem at the port and secure the position of Mombasa as the port of choice for the region and Kenya as a transport hub. Phase I is expected to be completed by December, 2016.

4.12.9 On 1st October, 2009 the technical officers from both Kenya and Uganda finalized the Bilateral Agreement and the Minister for Transport (Kenya) signed and dispatched it to Uganda for signature. The Agreement has since been scaled up to a Tripartite Agreement after the Republic of Rwanda ratified the agreement on 28th October, 2013 in order to extend the line to Kigali. Each country would however develop the railway network within its borders to avoid procurement challenges. The Mombasa to Kigali Railway is expected to be in operation by December, 2018.

4.12.10 The tender for the construction of the Standard Gauge Railway from Mombasa to Malaba was viable and the Mombasa – Nairobi section was awarded within the law.

4.12.11 Kenya Railways Corporation was involved in the vetting and review of the feasibility study as well as the preliminary design done by China Road and Bridge Corporation for the project. Following the approval of the

feasibility study and preliminary designs presented by CRBC, on 26th June 2012, KRC and CRBC entered into two commercial agreements. One commercial contract was for civil works worth USD 2.658 billion (Kshs. 220.9 billion) and the other commercial contract was for the supply and installation of facilities, locomotives and rolling stock worth USD 1.146 billion (Kshs. 106.1 billion). Therefore the total cost of the project is USD 3.804 billion (Kshs. 327 billion) at the exchange rate of Kshs. 86 per USD). The contracts would not come to force until a financier was identified and funding commitment made.

4.12.12 The due diligence conducted by Kenya Railways Corporation confirmed that China Road and Bridge Corporation is a Government institution of the People's Republic of China. It was formally established as a state-owned enterprise in 1979 with the name of China Road and Bridge Engineering Company. (CRBEC). CRBC was registered by the State Administration for Industry and Commerce on 8th December, 2005 and in 2006 it became a fully owned subsidiary company of China Communication Construction Company (CCCC).

Committee's Observations

4.12.13 The Committee observed that:-

- (i) Kenya, Uganda and Rwanda signed a tri-partite agreement for the development of a Standard Gauge Railway network in the three countries.
- (ii) There was a Cabinet approval for the development of a Standard Gauge Railway.

- (iii) KRC had initiated the procurement of a feasibility study for SGR but terminated it as directed by the then Minister for Transport.
- (iv) China Road and Bridge Corporation did the feasibility studies, design, costing and finally was awarded the tender for the construction of Standard Gauge Railway from Mombasa to Nairobi.
- (v) KRC had proposed fundamental issues to be addressed by the feasibility study and implementation of the SGR project.
- (vi) Kenya Railways Corporation was involved in the vetting and review of the feasibility study as well as the preliminary design done by China Road and Bridge Corporation for the project.
- (vii) The development of the Standard Gauge Railway will involve the construction and subsequent operation of approximately 1,250 kilometers and will be split up into two phases (Phase 1- Mombasa to Nairobi; Phase 2 - Nairobi to Malaba and Kisumu).

4.13 EVIDENCE BY ENG. ABDIRIZAK ALI, FORMER PERMANENT SECRETARY, MINISTRY OF TRANSPORT

Eng. Abdirizak Ali, the former Permanent Secretary (PS), Ministry of Transport (MoT) appeared before the Committee on 12th February, 2014 to adduce evidence on the Mombasa – Nairobi Standard Gauge Railway. He informed the Committee that:-

4.13.1 There was no Cabinet approval for the project during his tenure as a Permanent Secretary. This might have been done after he had left the Ministry.

4.13.2 The Memorandum of Understanding on the feasibility study was presented to his office for consideration and endorsement. On review of the MOU they observed that the MOU should remain as a gentleman's

agreement between the two parties with no contractual obligations to the Government and that the study must be bankable and the Government must draw the terms of reference for the study and be able to supervise and approve it.

4.13.3 There were no discussions on the design and construction of SGR since the consultations only focused on the terms of reference, content and quality of the study, bankability of the study and that there was no obligation arising on the part of the Government due to the MOU.

4.13.4 He is not aware that CRBC did the feasibility study, preliminary design, costing and sourcing for funds and later awarded contract to construct the railway.

Committee's Observations

4.13.5 The Committee observed that:-

- (i) The MOU signed between MoT and CRBC was an understanding between the two parties with no contractual obligations to the Government.
- (ii) Consultations between MoT and CRBC on the feasibility study focused on the terms of reference, content, quality and bankability of the study and not the design or construction of the Standard Gauge Railway.

4.14 EVIDENCE BY REGISTRAR GENERAL

Mrs. Bernice Gachehu, the Registrar General appeared before the Committee on 13th February and 12th March, 2014 to give evidence on the legal status and registration of China Road and Bridge Corporation. She informed the Committee that:-

4.14.1 China Road and Bridge Corporation was initially registered as China Road and Bridge Engineering Company under part 10 of the Companies Act (Cap 486) on 28th December, 1984 under registration number F66/84. Part 10 of the Companies Act, provides for registration of Companies incorporated outside Kenya. Section 633 (1) states that *"once a foreign company establishes a place of business within Kenya, it should within 30 days of their establishment deliver to the Registrar of Companies, a certified copy of its charter and or memorandum and Articles, a list of its Directors and Secretaries, the names and postal address of persons authorized to accept service of process on behalf of the company and the full address of the registered or principal office of the company."*

4.14.2 On 24th December, 1984 the following documents were supplied to the Registrar of Companies in compliance with section 366 of the Companies Act.

- a) Form 236, dated 20th December 1984, which shows the list of documents that were delivered to the Registrar for registration of the Company.
- b) Form 237 dated 20th December 1984 which shows the list and particulars of the Directors and Secretary of the Company.
- c) Form 238 dated 20th December 1984, which shows names and address of persons resident in Kenya authorized to accept service on behalf of the Company.
- d) Form 250 dated 20th December 1984, which shows the situation of the registered or principal office of the Company in China.

e) A notarized Business Certification and Statute of the Company and their translation in English.

4.14.3 Having satisfied the requirements of section 366, the Company was issued with a Certificate of Compliance dated 28th December, 1984 as per section 367 of the Companies Act (***Annex17***).

4.14.4 There is a local registered Company under the Name China Road and Bridge Corporation Kenya Limited which was registered on 23rd December, 2008 under Registration No. C.166624 with its Directors being Mr. Peter Maingi Gatere and Mr. Leonard Mwangi Ndungu. The registered office is LR NO.209/1184/11, Mpaka Road, Westlands (***Annex 18***).

4.14.5 This name was inadvertently issued to this Company because when they sought registration on 23rd December, 2008 there was in existence another Company under the name China Road and Bridge Corporation F66/84 on 9th September, 1996 through a change of name from China Roads and Bridges Engineering Company. China Road and Bridge Corporation Kenya Limited has since been directed to change its name in accordance with section 20 (2) (a) of the Companies Act.

Committee's Observations

4.14.6 The Committee observed that:-

(i) The nature of work and the undertaking by China Road & Bridge Corporation Kenya Limited is not known. Its Memorandum and Articles of Association are missing in the registry at the Registrar of Companies.

- (ii) For the last 30 years that CRBC (K) ,which is a Chinese firm, has been in Kenya, it has never filed its audited accounts with the Registrar as required in the Companies Act.
- (iii) The CRBC Kenya Limited has also never filed its returns with the Registrar's office, in contravention of the Companies' Act, Cap 486, Laws of Kenya.
- (iv) The Kenyan company, CRBC Kenya Limited, issued with a certificate on December 23, 2008 was registered inadvertently since CRBC China was already in existence at the time.

4.15 EVIDENCE BY HON. AMOS KIMUNYA, FORMER MINISTER FOR TRANSPORT

Hon. Amos Kimunya, former Minister for Transport, appeared before the Committee on 17th February, 2014 to adduce evidence on the procurement and financing of the Mombasa - Nairobi Standard Gauge Railway (SGR). He informed the Committee that:-

4.15.1 The SGR project had been discussed severally since 2003. It is an integral part of Vision 2030 as an enabler of trade and movement. Regionally it is a core component of the modernization of the Northern Corridor (Mombasa to Democratic Republic of Congo). Officially, it was launched in State House, Nairobi in October 2008, in a joint communiqué by President Mwai Kibaki and President Yoweri Museveni of Uganda. This was followed by bilateral discussions between Kenya and Uganda which culminated in a bilateral agreement documenting the necessary frameworks. In Kenya, this was approved by Cabinet in August 2012, and

signed. Rwanda has since joined this agreement thus converting it into a Tri-partite agreement.

4.15.2 Kenya Railways Corporation (KRC) is a State Corporation set up under an Act of Parliament, and is a designated procurement entity as per the Public Procurement and Disposal Act, 2005. In the past, Ministries have been restrained from, and even reprimanded by Parliament and the Public Procurement Oversight Authority (PPOA) on involvement in procurement matters of State Corporations. The Government of Kenya (GoK) was represented in the KRC Board by the PS-Treasury, PS-Transport and the Attorney General.

4.15.3 Negotiations on the financing of Government projects are the mandate of the National Treasury. Due diligence review was conducted in October/November, 2012 by a high level GoK/KRC team. The Embassy of China in Kenya also expressed its support for China Road and Bridge Corporation (CRBC).

4.15.4 A Memorandum of Understanding (MOU) was signed between the GoK and CRBC in August, 2009 wherein the CRBC offered to carry out the feasibility study and preliminary designs of the Mombasa – Nairobi section at no cost to the Government of Kenya, provided that the report could only be used by GoK/KRC and CRBC. The feasibility study was also subject to KRC review and approval. This is a standard requirement for Chinese funded projects, to establish the feasibility themselves before involving their Treasury and Banks.

- 4.15.5 The first Draft report of the feasibility study was forwarded to his office as the then Minister for Transport in 2011 by CRBC when they visited the Ministry as part of an official delegation accompanying the Chinese Vice Minister of Transport.
- 4.15.6 The cost of the railway is high due to the gradient considering that the terrain from Mombasa is varied rising from sea level to flat terrain and high altitude. The railway was changed to diesel driven due to challenges of power but in future the trains could be converted to be electric driven.
- 4.15.7 The Standard Gauge Railway was conceived to ease cargo transport congestion. The railway will open up the East African region and tap into the transport market extending into eastern DRC and South Sudan. In the meantime the cost is high but in the long run the project will be worthwhile.
- 4.15.8 He stopped tendering for a feasibility study by KRC because there was already a feasibility study underway by CRBC at no cost to the Government. He stopped the parallel study to save money that was to be used in procuring the feasibility study by KRC.

Committee's Observations

- 4.15.9 The Committee observed that:-
- (i) The Hon. Amos Kimunya issued a directive through the Permanent Secretary for the cancellation of an independent feasibility study that was to be commissioned by Kenya Railways Corporation.

- (ii) There was interference by the Ministry of Transport on the procurement process of the Standard Gauge Railway. The procuring entity was sidelined to the periphery during the procurement of CRBC to undertake the feasibility study and preliminary designs.
- (iii) The conduct of Hon. Amos Kimunya was contemptuous of Parliament and his demeanor and conduct was condescending. He blatantly refused to give information and answer questions raised by Members during the meeting in contravention of Article 35(1) (b) read together with Article 125 of the Constitution, section 23 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya and Standing Order 191.

4.16 EVIDENCE BY DR. CYRUS NJIRU, FORMER PERMANENT SECRETARY MINISTRY OF TRANSPORT

Dr. Cyrus Njiru, former Permanent Secretary, Ministry of Transport appeared before the Committee on 27th February, 2014 to give evidence on the procurement and financing of the Mombasa – Nairobi Standard Gauge Railway. He informed the Committee that:-

4.16.1 The Ministry of Transport had signed an MOU with CRBC for a feasibility study and preliminary design of the Standard Gauge Railway. CRBC was to undertake the feasibility study at no cost to the Government. The MOU ought to have been interrogated further.

4.16.2 There are certain projects that can be undertaken by the contractor who did the feasibility study, design and costing. This is, however, an unconventional method of infrastructure development and is normally

done for huge projects where funding is a challenge and where the contractor can source for funding. Many countries were approached by the Government to fund the project but declined except China.

4.16.3 The prompt implementation of the project will be beneficial to Kenya and the region. There should however be professional supervision of the implementation of the project.

4.16.4 Kenya Railways Corporation had initiated a process for procuring an independent feasibility study. During this period there was a discussion within Government that a parallel study should not be commissioned. As a result he was directed by the Minister, Hon. Kimunya, to terminate the procurement process of a parallel feasibility study.

4.16.5 Kenya Railways raised issues on the feasibility study and a simulation and sensitivity analysis was done.

4.16.6 Kenya Railways Corporation was involved in the vetting and review of the feasibility study as well as the preliminary design done by China Road and Bridge Corporation for the project.

Committee's Observations

4.16.7 The Committee observed that:-

- (i) The MOU signed by the Ministry of Transport implied that CRBC was to execute the project through a clause that provided that the feasibility study was only to be used by MoT, KRC and CRBC.
- (ii) The Ministry of Transport terminated the procurement of an independent consultant by Kenya Railways who was to undertake a feasibility study. An independent feasibility study could have produced independent costing of the project and therefore value for money.

- (iii) There is need to separate the cost of the railway line from the locomotives and other services.

4.17 EVIDENCE BY THE NATIONAL LAND COMMISSION

Mr. Muhammad Swazuri, Chairman, National Land Commission appeared before the Committee on 13th March, 2014 to adduce evidence on the land acquisition for the Standard Gauge Railway. He informed the Committee that:-

4.17.1 The Commission received a request from Kenya Railways Corporation to acquire land for the Standard Gauge Railway on 19th August, 2013.

4.17.2 The land acquisition and compensation sub-committee of the National Land Commission held meetings with Kenya Railways to explain preliminary details since there were no details to allow the Commission undertakes the acquisition.

4.17.3 Kenya Railways Corporation has so far submitted information for the first 56 km that extends from part of Mavumbo and South Samburu Group Ranches in Taita Taveta County, the Kenya Wildlife Tsavo East and Tsavo West Parks in Taita Taveta County to Kathekani in Makueni County. The Corporation is yet to avail information for the next 220 km stretch for verification and validation.

4.17.4 The National Land Commission subsequently gazetted the notice of intention to acquire on 7th February, 2014 (***Annex 19***). The Commission is awaiting Kenya Railways to facilitate it to issue gazette notices, of intention to acquire land, to respective land owners as legally provided for.

4.17.5 The Commission is already receiving inquiries from the public about the corridor of the Standard Gauge Railway. Details are yet to be submitted by Kenya Railways Corporation.

4.17.6 The National Land Commission will undertake due process as legally provided by law on compulsory acquisition.

Committee's Observations

4.17.7 The Committee observed that:-

- (i) The National Land Commission, following consultations with Kenya Railways Corporation gazetted the notice of intention to compulsorily acquire land for the Standard Gauge Railway.
- (ii) The National Land Commission will undertake due process as legally provided by law on compulsory acquisition and compensate affected land owners in line with Article 40 (3) of the Constitution.

4.18 OTHER WITNESSES

(a) China Road and Bridge Corporation Limited

4.18.1 The Committee on diverse dates invited the General Manager, China Road and Bridge Corporation to appear before it to adduce evidence on the procurement and financing of the Standard Gauge Railway (***Annex 20***).

4.18.2 The firm did not honour the Committee's invitation and summons issued in contravention of Article 125 of the Constitution, section 14 and 23 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya and Standing Order 191.

4.18.3 The Ministry of Foreign Affairs after receiving a note verbale from the Embassy of the People's Republic of China (Annex 20) wrote to the Committee indicating that CRBC is a state owned Corporation and should not therefore be summoned by the Committee. The Ministry of Foreign affairs cautioned the Committee that summoning CRBC would have 'serious and irrevocable negative consequences to Kenya's national interests and relations with china' (***Annex 21***).

4.18.4 The Committee observed that CRBC is a state owned Corporation specially created to undertake commercial activities and therefore can sue and be sued. The Corporation therefore being a commercial entity should not enjoy the same immunity that is accorded to a diplomatic Mission/Embassy.

2.5.1 China Road and Bridge Corporation International was formally established in China and entered the international project contracting market in the year 1979.

2.5.2 CRBC International became a wholly-owned subsidiary of China Communications Construction Company Limited (CCCC) after a major corporate restructuring in 2005.

2.5.3 On December 18th, 2005, China Harbour Engineering (Group) Company and China Road & Bridge Corporation (CRBC) were merged by consolidation to form a new company, China Communications Construction Group (CCCCG) a central enterprise supervised by State-owned Assets Supervision and Administration Commission of the State Council of China.

4.18.5 On October 8th, 2006, with the approval from the State Council, CCCC was reorganized and reformed and it initiated and founded China Communications Construction Company Limited

4.18.6 The World Bank Group on July 29th, 2011 announced the debarment of China Communications Construction Company (CCCC) Limited, and all its subsidiaries, for fraudulent practices under Phase 1 of the Philippines National Roads Improvement and Management Project. Under the sanction, CCCC is ineligible to engage in any road and bridge projects financed by the World Bank Group until January 12, 2017.

4.18.7 China Road and Bridge Corporation (CRBC) was, along with six other firms and one individual, debarred by the World Bank for eight years, beginning January 12, 2009, following an investigation of the National Roads Improvement and Management Project in Philippines by the World Bank Group.

(b) China Road and Bridge Corporation Kenya Limited

4.18.8 China Road and Bridge Company Kenya Limited which was registered locally in Kenya on 23rd December, 2008 under Registration No. C.166624 with its Directors being Mr. Peter Maingi Gatere and Mr. Leonard Mwangi Ndungu. The registered office is LR NO.209/1184/11, Mpaka Road, Westlands

4.18.9 The Committee invited the Company through their Directors on record to appear before the Committee to adduce evidence before it (**Annex 22**). The said directors failed to appear before the Committee as invited in contravention of section 14 and 21 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya.

4.18.10 The registered Directors of the Company a Mr. Peter Maingi Gatere and Mr. Leonard Mwangi Ndungu did not respond to the invitations of the Committee.

5.0 COMMITTEE'S GENERAL OBSERVATIONS

(d) Memorandum of Understanding

- 5.1 A Memorandum of Understanding (MOU) was signed between the GoK and CRBC in August, 2009 wherein CRBC offered to carry out the feasibility study and preliminary designs of the Mombasa – Nairobi section at no cost to the Government of Kenya, provided that the report could only be used by GoK/KRC and CRBC. The feasibility study was also subject to KRC review and approval. This is a standard requirement for Chinese funded projects, to establish the feasibility themselves before involving their Treasury and Banks.
- 5.2 The National Treasury of Kenya and Exim Bank of China signed an MOU on financing of the Standard Gauge Railway. The MOU is not legally binding to both the Government of Kenya and EXIM Bank of China and only serves as an instrument for further discussions on the terms of the loans and the loan agreements.

(e) Justification for the Project

- 5.3 The Standard Gauge Railway was conceived to make use of standard equipment such as locomotives and rolling stock, ease cargo transport, congestion and relieve the Kenyan roads from damage by heavy axle load vehicles.
- 5.4 In the long run it is cheaper to operate the Standard Gauge Railway as opposed to the one meter gauge railway line, source for equipment and ensure faster movement of freight and passengers.
- 5.5 The railway will open up the East African region and tap into the transport market extending into eastern DRC and South Sudan. The project is

economically viable in the long run and Kenya stands to gain economically and socially through the development of the Standard Gauge Railway.

(f) Approval for the project

5.6 Kenya, Uganda and Rwanda signed a Tri-partite agreement on August 2012 for the development of a Standard Gauge Railway in the three countries so as to ensure seamless railway operations. Each country will develop the railway network within its borders.

5.7 The project was approved by the Cabinet in 2012 and the Government to Government financing arrangement has been endorsed by the Government of Kenya and the Government of the People’s Republic of China.

5.8 The Attorney General approved the two commercial contracts between CRBC and KRC for civil works and for the supply and installation of facilities, locomotives and rolling stock. The Contract would however not come into force until a financier was identified and funding commitment made.

(d) Tendering

5.9 Kenya Railways Corporation had initially used a wrong procurement method, direct procurement, but this was corrected with its termination and substitution with the Government to Government transaction.

(e) Debts Sustainability Analysis

5.10 The National Treasury has undertaken a debt sustainability analysis and to ensure that the SGR loan does not compromise the debt policy parameters spelt out in the debt sustainability strategy paper and is sustainable. The results of the debt sustainability analysis are presented below:

Public debt sustainability analysis

Indicator	2014	2015	2016	2017	2018
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(Threshold)

PV of Public Sector debt

To GDP ratio (56) without 38.7 38.1 38.3 38.7 38.6

SGR

PV of Public Sector debt

To GDP ratio (56) with 39.5 41.1 42.5 43.8 43.8

SGR

5.11 A safeguard mechanism to assure business for the SGR will also be put in place through execution of “take or pay” agreement between Kenya Railways and the Kenya Ports Authority.

5.12 In addition, in the unlikely event that the revenues from railway operations are inadequate for one reason or another, the proceeds from the Railway Development Fund will be used to repay the loan.

(i) Cost and Financing of the Project

5.13 The Cabinet Secretary for Transport and Infrastructure gave the total estimated cost of the project to be USD 3.804 billion and external financing for the project identified so far is USD 3.233 billion from the Government of the People’s Republic of China covering 85% of the funding while the remaining 15% will be funding from the Government of Kenya.

5.14 The Cabinet Secretary, National Treasury provided the Committee with cost estimates of the projects as follows:

- (iv) Construction of railways infrastructure (civil works) and procurement of facilities and locomotives on EPC arrangement at cost of US\$ 3.8 billion **(Kshs. 327 billion)**

- (v) Construction of railways infrastructure (civil works); procurement of facilities and locomotives; compulsory land acquisition; Embakasi ICD expansion; and project supervision a total of **Kshs. 349.4 billion**.
- (vi) Construction of railways infrastructure (civil works); procurement of facilities and locomotives; compulsory land acquisition; Embakasi ICD expansion; and project supervision; cost of insurance premium and interests at a total cost of **Kshs. 447 billion**. This excludes other important costs such as cost of resettlement, demolition cost and relevant expenses; VAT, Duty and relevant tax; and other statutory expenses.

(j) Design, Review, Construction and supervision

- 5.15 The Government has put in place measures to safe guard the project through an independent review and supervision consultant who will oversee the construction and adherence to specification and guarantee quality works.
- 5.16 Commercial viability of the Mombasa-Nairobi Standard Gauge Railway (Phase I) is dependent upon the implementation of Phase II of the project (Nairobi – Malaba/Kisumu) and concurrent development of the Standard Gauge Railway by Partner States (Uganda and Rwanda) who signed the Tri-partite Agreement.

(k) Conduct of witnesses

- 5.17 The conduct particularly of Hon. Amos Kimunya was contemptuous of Parliament and his demeanor and conduct was condescending. He blatantly refused to give information and answer questions raised by Members during the meeting in contravention of Article 35(1)(b) read together with Article 125 of the Constitution, section 23 of the National

Assembly (Powers and Privileges) Act, Cap 6, Laws of Kenya and Standing Order 191.

5.18 The conduct and demeanor of Mr. Chirau Ali Mwakwere was condescending. He alleged that the information sought was not in his possession.

5.19 The Committee on diverse dates invited the General Manager, China Road and Bridge Corporation, a state owned Corporation of the People's Republic of China to appear before it to adduce evidence on the procurement and financing of the Standard Gauge Railway but the Firm failed to honour the Committee's invitation and summons and instead the Ministry of Foreign Affairs after receiving a note verbale from the Embassy of the People's Republic of China wrote to the Committee indicating that CRBC is a state owned Corporation and should not therefore be summoned by the Committee. The Ministry of Foreign affairs cautioned the Committee that summoning CRBC would have 'serious and irrevocable negative consequences to Kenya's national interests and relations with China'. (**Annex 20**) This is in contravention of Article 125 of the Constitution, section 14 and 23 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya and Standing Order 191.

5.20 The Committee observed that CRBC is a state owned Corporation specially created to undertake commercial activities and therefore can sue and be sued. The Corporation therefore being a commercial entity should not enjoy the same immunity that is accorded to a diplomatic Mission/Embassy.

5.21 China Road and Bridge Corporation Kenya Limited, a company registered in Kenya under Registration No. C.166624 with its Directors being Mr. Peter Maingi Gatere and Mr. Leonard Mwangi Ndungu and registered

office located at LR NO.209/1184/11, Mpaka Road, Westlands was also invited by the committee to adduce evidence on the matter but failed to honour the Committee's invitations in contravention of Article 125 of the Constitution, section 14 and 23 of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya and Standing Order 191.

5.22 There has been a tendency on the part of the government officials to commission projects without budgetary provisions/finances and adherence to Public Procurement laws. The project was commissioned without the procuring entity assuring itself of budget or source of finances thus begging the question what would happen if the financing agreement is not signed or the expected source of financing fails to materialize? This tendency of commissioning projects without budget or assurance of source of financing has led to failure to adhere to procurement laws, lack of transparency and accountability in the implementation of such projects..

6 RECOMMENDATIONS OF THE COMMITTEE

Based on the evidence adduced and written submissions, the Committee recommends that:-

6.1 The development of the Standard Gauge Railway project from Mombasa to Nairobi should proceed on condition that the Government fulfils the following recommendations:-

- (a) Fastracks the feasibility study, preliminary designs and costing for Phase II covering Nairobi- Malaba with a branch line to Kisumu in line with the tri-partite agreement;
- (b) Fastrack the Procurement of Phase II (Nairobi- Malaba/Kisumu) of the Standard Gauge Railway once the financing agreement for Phase

It is concluded, taking into account the provisions of Article 227 of the Constitution and the provisions of part IV of the Public Procurement and Disposal Act, 2005;

(c) Government initiates sourcing of funding from development partners and put measures in place for prudent management of RDF for the commencement of Phase I covering Mombasa to Nairobi.

(d) Urgently initiate the procurement of an independent consultant to facilitate design review, oversee construction and ensure specifications and quality is guaranteed through a transparent, fair and competitive tender in line with Article 227 of the Constitution, the Public Procurement and Disposal Act, 2005 and with the approval of the Attorney General.

6.2 KRC ensures that all the pertinent issues that were raised in the feasibility and preliminary study report regarding design concept single or dual track; building standards; travelling speed and train operation; motive power; rolling stock specifications; and maintenance of facilities be reviewed by an independent consultant to make sure the main goals of the project are achieved in line with Vision 2030.

6.3 KRC and Ministry of Transport and Infrastructure ought to ensure that the project addresses the connectivity to Mombasa Island, Kilindini Port, within Nairobi and to other areas of economic interests such as the proposed Konza Techno City. If the connectivity and routing is not fully addressed it will cause major operational problems and litigation challenges particularly at the port of Mombasa and Nairobi where the already existing meter gauge railway line is being operated by Rift Valley Railways (RVR).

- 6.4 The Cabinet Secretary National Treasury and the Cabinet Secretary in charge of Transport and Infrastructure should spearhead the formation of an inter-ministerial technical and implementation team to manage the project and to review cost and benefit analysis of expansion of important infrastructure such as bridges, tunnels and via duct to allow for future expansion of a single to double track vis-avis the cost of construction of a double track line in the first phase.
- 6.5 The Government adopts Public Private Partnership arrangement in the operation of train services. To this end, the Government should reconsider spending more money on the construction/development of infrastructure and less on the locomotives and wagons which can be sourced by the private sector.
- 6.6 The Standard Gauge Railway phase I project addresses operational challenges associated with use of single line track for both freight and passenger services which require different speeds and safety standards with emphasis to KRC's initial goals of this project.
- 6.7 The Ministry of Transport and Infrastructure and KRC should put in place measures to ensure capacity development including technology transfers and capacity building of Kenyans in areas such as design, construction, maintenance, operation and management of the Standard Gauge Railway.
- 6.8 The National Treasury should finalize the negotiations on the financing agreement to pave way for the implementation of Phase I of the project covering Mombasa to Nairobi.
- 6.9 The Cabinet Secretary for Transport and Infrastructure and the Cabinet Secretary for the National Treasury should constitute an inter-ministerial technical team to provide an accurate total cost estimate of the whole project from Mombasa to Nairobi and implement the Standard Gauge

Railway project. This cost estimate should include critical cost components such as cost of land acquisition; demolition cost and relevant expenses; Value Added Taxes; Duty and relevant tax; financing, loan interest and relevant expense; and other statutory expenses.

- 6.10 Kenya Railways Corporation hastens the commencement of the process of procurement of an independent consultant to facilitate design review, oversee construction and ensure specifications and quality is guaranteed through an open, transparent, fair and competitive tender in line with Article 227 of the Constitution, the Public Procurement and Disposal Act, 2005 and with the approval of the Attorney General.
- 6.11 The Government of Kenya should liaise closely with the Government of Uganda in line with the provisions of the tri-partite agreement for the development of Phase II of the Kenya section of the Standard Gauge Railway to ensure a seamless railway network between the two countries.
- 6.12 The Registrar General deregisters China Road and Bridge Company Kenya Limited, a Kenyan firm with the same name as the State owned Chinese company that the office of the Registrar had allegedly registered inadvertently.
- 6.13 The Criminal Investigation Department investigates the missing file of China Road and Bridge Company Kenya Limited, its activities and operations and the circumstances under which the Registrar of Companies registered two companies with the same name. Appropriate action should be taken on those found culpable.
- 6.14 The Government and all procurement entities must at all times ensure that Article 227 of the Constitution and the provisions of Public Procurement and Disposal Act, 2005 are observed to the letter i.e. public agencies

should at all time implement procurement methods that are fair, equitable, transparent, competitive and cost-effective.

6.15 The “Take or Pay” proposal between KRC and KPA should be reviewed by the Government to plan for intermodal transportation that treat road transport as complementary and not a competitor to rail transport.

6.16 The present governance structure and management of the Railway Development Fund (RDF) does not allow for transparency and accountability. To strengthen the structure and management of the Fund, a proper legal framework should be prepared by the Cabinet Secretary and submitted to Parliament within two months for approval and enactment.

6.17 The Government should fast track the mobilization of domestic resources for the development of the Standard Gauge Railway projects in the Country through the Railway Development Fund rather than relying on borrowed Funds which puts pressure on the Country’s Debt Sustainability.

6.18 The Government should ensure that all its development programmes are coordinated and budgeted properly by all Government Ministries and agencies to avoid situations under which Government Ministries/agencies give conflicting information on the same subject matter.

6.19 The financing agreement should explicitly state the financing by the EXIM Bank of China will cover costs for the railway line, civil works construction, acquisition of rolling stock and locomotives. Other peripheral costs such as land acquisition etc will be financed by the Kenya Government in the 15% contribution.

6.20 The former Minister for Transport, Hon. Amos Kimunya be prosecuted by the Director of Public Prosecution for contravening Article 125 read together with Article 35 (1) (b) of the Constitution, the provisions of the National Assembly (Powers and Privileges) Act, Cap 6 Laws of Kenya

and the Standing Order No.191 and for contempt of the Committee and failing to answer to issues raised by the Committee.

- 6.21 The Public Procurement Oversight Authority should be more pro-active and vigilant in its oversight role over public procurement and advice ministries and Government agencies on the best procurement procedures.
- 6.22 Government officials should desist from commissioning projects before financing and or budgetary provision have been secured and proper procurement provisions followed so as to ensure transparency and accountability in projects implementation and adherence to the rule of law.
- 6.23 The Tripartite Agreement should be availed and subjected to scrutiny by the Attorney General to ensure compliance with Kenyan Laws and ratification as required by Article 2(6) read together with the Treaty Making and Ratification Act (*No 45 of 2012*), of the Constitution and the treaties and ratification law.

7.0 CONCLUSION AND WAY FORWARD

7.1 The Standard Gauge Railway is a key flagship project under Vision 2030 and is critical for the economic development of Kenya and the wider East Africa region. The project should therefore proceed taking into consideration the observations and recommendations by the Committee and review of the project to ensure value for money since as of now there are no contractual/financing obligations on the part of the Government until a financing agreement is signed

7.2 From the evidence adduced by the Auditor General, Attorney General, Cabinet Secretary to the National Treasury and the Cabinet Secretary for

Transport and Infrastructure, the project has so far been procured within the law and that the Government would not incur any losses since the financing agreement has not been signed.

- 7.3** The Government should competitively procure an independent supervision consultant so as to assure cost effectiveness, adherence to specification, quality guarantee and value for moneys.
- 7.4** The Government should fastrack Phase II of the project to achieve the maximum viable economic potential in the region.
- 7.5** The Public Procurement and Oversight Authority reviews the Public Procurement and Disposal Act, 2005 to align it with the Constitution and the evolving procurement processes more particularly sections 3,9,23 and 137 of the Public Procurement and Disposal Act, 2005.
- 7.6** A proper legal framework should be prepared by the Cabinet Secretary and submitted to Parliament within two months for approval and enactment so as to strengthen the structure and management of the RDF and ensure transparency.
- 7.7** There has been a tendency on the part of the government officials to commission projects without budgetary provisions/finances and adherence to Public Procurement laws. This should cease with immediate effect so as to assure transparency, accountability and adherence to the rule of law.