## THE CONSTITUTION OF KENYA (AMENDMENT) (No. 2) ACT 1968

## No. 45 of 1968

Date of Assent: 10th July 1968

Date of Commencement: 12th July 1968

## An Act of Parliament to amend the Constitution, and for matters incidental thereto or connected therewith

ENACTED by the Parliament of Kenya, as follows:-

Short title and construction.

- 1. (1) This Act may be cited as the Constitution of Kenya (Amendment) (No. 2) Act 1968.
- (2) This Act shall be construed as one with the Constitution, in so far as it makes amendments to the Constitution.

Interpretation

L.N. 718/1963. 28 of 1964. 38 of 1964. 14 of 1965. 16 of 1966. 17 of 1966. 40 of 1966. 4 of 1967. 2. In this Act, "the Constitution" means the Constitution of the Republic of Kenya contained in Schedule 2 of the Kenya Independence Order in Council 1963, as amended by the Constitution of Kenya (Amendment) Act 1964, the Constitution of Kenya (Amendment) (No. 2) Act 1964, the Constitution of Kenya (Amendment) Act 1965, the Constitution of Kenya (Amendment) Act 1966, the Constitution of Kenya (Amendment) (No. 2) Act 1966, the Constitution of Kenya (Amendment) (No. 3) Act 1966, the Constitution of Kenya (Amendment) (No. 4) Act 1966, the Constitution of Kenya (Amendment) Act 1967 and the Constitution of Kenya (Amendment) Act 1968.

Amendment of Constitution.

16 of 1968.

3. The provisions of the Constitution specified in the first column of the Schedule to this Act are amended in the manner specified in relation thereto in the second column of that Schedule.

Transitional provisions.

4. (1) Upon the commencement of this Act, the persons who immediately before the commencement of this Act were specially elected members of the National Assembly shall be nominated members of the Assembly, and they shall be deemed to have been appointed as such in accordance with the Constitution as amended by this Act and they shall hold their seats in the Assembly accordingly.

(2) Any order made under section 29 of the Constitution and in force immediately before the commencement of this Act shall be deemed to have been made under and in accordance with the Constitution as amended by this Act and shall have effect and continue in force accordingly.

## **SCHEDULE**

(s. 3)

Provision Chapter II Amendment

Section 29.

- (a) In subsection (4), delete all the words following the words "majority of all the members of the Assembly".
- (b) Delete subsections (5) and (7).

Chapter III Section 33A.

Delete whole section and substitute five new sections as follows—

Election of President.

- 33A. (1) The President shall be elected in accordance with this Chapter and, subject thereto, with any Act of Parliament regulating the election of a President.
- (2) A person shall be qualified to be nominated for election as President if, and shall not be so qualified unless, he—
  - (a) is a citizen of Kenya; and
  - (b) has attained the age of thirty-five years; and
  - (c) is registered in some constituency as a voter in elections to the National Assembly.
- (3) Whenever Parliament is dissolved, an election of a President shall be held at the ensuing general election, and at that election—
  - (a) one candidate for President shall be nominated, in such manner as may be prescribed by or under an Act of Parliament, by each political party taking part in the general election;
  - (b) the nomination of a candidate for President shall not be valid unless it is supported, in such manner as may be prescribed by or under an Act of Parliament, by not less than one thousand persons registered as voters in elections to the National Assembly;

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- (c) where only one candidate for President is validly nominated, and that candidate is elected as a member of the National Assembly, he shall be declared to be elected as President;
- (d) where more than one candidate for President is validly nominated, a poll shall be taken in each constituency for the election of a President (whether or not a poll is required to be taken for an election to the National Assembly in that constituency);
- (e) in every constituency in which a poll is required to be taken, whether for the election of a President or for the election of a member of the National Assembly or for both, only one poll shall be taken, and the ballot paper shall be in such form as to pair each candidate for President who is nominated by a particular political party with the candidate (if any) for the National Assembly who is nominated by that political party, and so as to permit the voter to cast one vote for one of the pairs (which shall be taken to be a vote for each member of the pair who is a candidate in a contested election);
- (f) the candidate for President who is elected as a member of the National Assembly and who receives a greater number of valid votes cast in the Presidential election than any other candidate for President who is elected as a member of the National Assembly shall be declared to be elected as President.
- (4) A fresh election of a President shall be commenced and held in the manner prescribed by subsection (5) of this section where—
  - (a) no candidate for President has been validly nominated before the expiration of the time for the delivery of nominations in a Presidential election;

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- (b) a candidate for President who is validly nominated dies on or before any of the days on which the poll is taken in a Presidential election;
- (c) a candidate for President, who would but for his death have been entitled to be declared elected as President under this section, dies after the taking of the poll has begun in the Presidential election and before he has been declared elected as President.
- (5) In the election of a President otherwise than at a general election—
  - (a) every candidate for President shall be nominated by a political party, in the manner prescribed by or under an Act of Parliament, from amongst the elected members of the National Assembly;
  - (b) the nomination of a candidate for President shall not be valid unless it is supported, in such manner as may be prescribed by or under an Act of Parliament, by not less than one thousand persons registered as voters in elections to the National Assembly;
  - (c) where only one candidate for President is validly nominated he shall be declared to be elected as President;
  - (d) where more than one candidate for President is validly nominated, a poll shall be taken in each constituency for the election of a President;
  - (e) the candidate for President who receives a greater number of valid votes cast in the Presidential election than any other candidate shall be declared to be elected as President.

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Vacancy in office of President.

- 33AB. (1) If the office of President becomes vacant by reason of the death or resignation of the President, or by reason of his ceasing to hold office by virtue of section 33B or section 33E of this Constitution, an election of a President shall be held within the period of ninety days immediately following the occurrence of that vacancy, and shall be held in the manner prescribed by section 33A (5) of this Constitution.
- (2) While the office of President is vacant as aforesaid, the functions of that office shall be exercised-
  - (a) by the Vice-President; or
  - (b) if there is no Vice-President, or if the Vice-President considers that he is for any reason unable to discharge the functions of the office of President, by such Minister as may be appointed by the Cabinet.
- (3) Where the Vice-President or any other Minister is exercising the functions of the office of President by virtue of this section or of section 33D of this Constitution, he shall not act, except in accordance with a resolution of the Cabinet, in the exercise of the powers relating to-

(a) the preservation of public security, under section 29 of this Constitution or under Part III of the Preservation of Public Security Act;

- (b) the prorogation and dissolution of Parliament, under subsections (1) and (3) of section 65 of this Constitution;
- (c) the appointment and removal of Ministers and Assistant Ministers under sections 75 and 81 of this Constitution;
- (d) the assignment of responsibility to a Minister, under section 77 of this Constitution; or

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(e) the giving of consent to a Minister or Assistant Minister absenting himself from Kenya, under section 82 of this Constitution.

Assumption of office of President.

33AC. A person elected as President in accordance with this Constitution shall assume office as President as soon as he is declared to be elected.

Oath of President.

33AD. A person assuming the office of President shall, before entering upon the office, take and subscribe the oath of allegiance and such oath for the due execution of his office as may be prescribed by or under an Act of Parliament.

Tenure of office of President.

- 33AE. (1) The President shall, unless his office becomes vacant by reason of his death, his resignation or his ceasing to hold office by virtue of section 33B or section 33E of this Constitution, continue in office until the person elected as President at a Presidential election held following a dissolution of Parliament assumes office.
- (2) During his tenure of office, the President shall not hold any office of profit other than that of President and that of member of the National Assembly.

Section 33B.

Delete whole section and substitute a new section as follows-

Determina-

- 33B. (1) Subject to this section, section 50 of questions as this Constitution shall apply to the hearing and to validity of determination of a question whether a person has elections, etc. been validly elected as President, as it applies to the hearing and determination of a question whether a person has been validly elected as a member of the National Assembly.
  - (2) Where a person applies to the High Court for the determination of more than one of the following questions, namely, whether a person was qualified to be nominated for election as President, or was validly elected as President, or being President was validly elected as a member of the National

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Assembly, he shall make one application only to the High Court.

- (3) Where at any time the High Court determines under section 50 of this Constitution that the President has not been validly elected as a member of the National Assembly, or that the seat in the Assembly of the President has become vacant, the High Court shall declare the seat in the Assembly of the President to be vacant, and—
  - (a) an election shall be commenced forthwith and shall be held in the constituency for which the President stood for election as a member of the Assembly; and
  - (b) if the President is not elected as a member of the Assembly at that election, he shall cease to hold office as President upon the expiration of the time allowed by law for the making of an application to the High Court under section 50 of this Constitution in respect of that election, or, where such an application is made by him or by the Attorney-General, upon the High Court determining that the person declared to be elected at that election has been validly elected:

## Provided that—

(i) if the High Court determines, in relation to an election held pursuant to paragraph (a) of this subsection at which a person other than the President has been declared to be elected, that that person has not been validly elected, the High Court shall declare the seat to be vacant and a further election shall be held pursuant to paragraph (a) of this subsection, and paragraph (b) of this subsection and this proviso shall apply accordingly;

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- (ii) notwithstanding that his seat in the Assembly has been declared to be vacant, the President shall be entitled to sit as a member of the Assembly and to exercise all the powers and privileges of an elected member of the Assembly until he ceases to hold office as President.
- (4) Where the High Court determines under section 50 of this Constitution that the President has not been validly elected as President for any reason other than that he has not been validly elected as a member of the National Assembly or that the seat in the Assembly of the President has become vacant, he shall cease to hold office as President.

Section 33D.

Delete whole section and substitute a new section as follows—

Exercise of President's functions during absence, illness, etc. 33D. Where the President intends to be absent from Kenya, or where he considers it desirable by reason of illness or any other cause to do so, he may in writing appoint the Vice-President to exercise, subject to section 33AB (3) of this Constitution and subject to such restrictions or exceptions as he may specify, the functions of his office.

Section 33E.

Delete whole section and substitute a new section as follows—

Removal of President on grounds of incapacity.

- 33E. (1) Any question whether the President, or any other person exercising or about to exercise the functions of the office of President, is unable by reason of physical or mental infirmity to exercise the functions of that office, shall be determined in accordance with this section.
- (2) Where the question is whether a person has become unable by reason of physical or mental infirmity to exercise the functions of the office of

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President, and the Chief Justice is requested by resolution of the Cabinet conveyed to him by the Speaker of the National Assembly to cause that question to be determined, then—

- (a) the Chief Justice shall appoint a tribunal, which shall consist of not less than five persons appointed by him from among persons who are qualified as medical practitioners under the law of Kenya, and who shall include any person nominated for appointment in accordance with subsection (5) of this section; and
- (b) the tribunal shall inquire into the matter and make a report to the Chief Justice, stating the opinion of the tribunal whether or not the person in respect of whom the question arises is, by reason of physical or mental infirmity, unable to discharge the functions of the office of President; and
- (c) the Chief Justice shall certify accordingly under his hand and cause the certificate to be conveyed to the Speaker of the National Assembly:

Provided that the Chief Justice shall cause the question to be determined without a resolution of the Cabinet if he receives a certificate under the hand of the Speaker of the National Assembly to the effect that there are no Ministers present in Kenya, other than a person with respect to whom the question arises, and that the Speaker considers that it is in the interests of Kenya that the question should be determined without delay.

(3) Where the question is whether any person in respect of whom the Chief Justice has given a certificate in accordance with subsection (2) of this section that he is unable to exercise the functions of the office of President has ceased to be unable by reason of physical or mental infirmity to exercise

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those functions, and the Chief Justice is requested, by resolution of the Cabinet conveyed to him by the Speaker of the National Assembly, or by request under the hand of the person in respect of whom such certificate was given conveyed to him by the Speaker of the Assembly, to cause that question to be determined, then the Chief Justice shall appoint a tribunal in accordance with paragraph (a) of subsection (2) of this section, and that tribunal shall inquire into the matter and report in accordance with paragraph (b) of that subsection, and the Chief Justice shall certify accordingly under his hand and cause the certificate to be conveyed to the Speaker of the Assembly.

- (4) Where the Speaker of the National Assembly has received a certificate of the Chief Justice, pursuant to this section, that the President is unable to discharge the functions of his office, and within the succeeding period of three months the Speaker has not received any certificate of the Chief Justice, pursuant to this section, that the President has ceased to be unable to discharge the functions of his office, the President shall cease to hold office upon the expiration of the said period.
- (5) Where the Speaker conveys a resolution of the Cabinet to the Chief Justice under subsection (2) or subsection (3) of this section, he shall forthwith notify the person in respect of whom the question arises, and that person may, by writing delivered to the Speaker within two days of his being so notified, nominate for appointment as members of the tribunal to be appointed by the Chief Justice under this section not more than two persons qualified to be so appointed.
- (6) A certificate of the Chief Justice under this section shall be conclusive for the purposes of this Constitution, and shall not be questioned in any court.

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(7) At any time when the office of Speaker of the National Assembly is vacant or the holder of that office is unable for any reason to exercise the functions vested in him by this section, those functions may be exercised by the Deputy Speaker of the Assembly.

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Chapter IV

Section 37.

Substitute for the words "specially Elected Members elected" the words "Nominated Members appointed".

Section 38 (3).

Insert immediately after the words "National Assembly shall, unless he is" the words "detained in lawful custody, or is".

Section 39.

Delete whole section and substitute a new section as follows—

Nominated Members.

39. There shall be twelve Nominated Members of the National Assembly who shall be appointed by the President from amongst persons who, if duly nominated, would be qualified to be elected as members of the Assembly.

Section 40.

Delete whole section and substitute a new section as follows—

Qualifications for election.

- 40. Subject to section 41 of this Constitution, a person shall be qualified to be elected as a member of the National Assembly if, and shall not be qualified unless, at the date of his nomination for election—
  - (a) he is a citizen of Kenya who has attained the age of twenty-one years;
  - (b) he is registered in some constituency as a voter in elections to the National Assembly;
  - (c) he is able to speak and, unless incapacitated by blindness or other physical cause, to read the English language well enough to take an active part in the proceedings of the National Assembly; and

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(d) he is nominated, in the manner prescribed by or under an Act of Parliament, by a political party.

Section 41 (6).

Delete whole subsection.

Section 42A.

- (a) In subsection (1) substitute for the words "having at his election stood with the support of or as a supporter of a political party" the words "stood at his election as an elected member with the support of or as a supporter of a political party, or accepted appointment as a nominated member as a supporter of a political party".
- (b) In subsection (2) substitute for the words "a specially elected member of the National Assembly stood at his election with the support" the words "a nominated member of the Assembly accepted appointment as a supporter".

Section 45 (5).

Delete the words "or the holding of a general election of the Specially Elected Members".

Chapter V Section 74.

- (a) In subsection (2) delete the words "when Parliament stands dissolved, or".
- (b) Delete subsection (5) and substitute a new subsection as follows—
  - (5) During his tenure of office, the Vice-President shall not hold any office of profit other than those of Vice-President, Minister and member of the National Assembly.
- (c) In subsection (6) (a) delete the words "(being the elected holder of that office)".
- (d) Delete subsection (6) (c) and substitute a new paragraph as follows—
  - (c) upon a person assuming the office of President.

Chapter X Section 184 (1) (c).

Delete the words "acting in accordance with the advice of the Chief Justice".

Chapter XI

Section 186.

- (a) In subsection (3) delete paragraph (d).
- (b) Delete subsection (4).

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Chapter XV

Section 247 (1).

Insert, in the correct alphabetical sequence, the following definition—

"political party" means a political party which is duly registered under any law which requires political parties to be registered, and which has complied with the requirements of any law as to the constitution or rules of political parties nominating candidates for the National Assembly;

Schedule 5. Part II.

Paragraph 2.

Delete subparagraph (c) and substitute a new subparagraph as follows—

(c) if he is detained in lawful custody.

Schedule 6.

Delete whole Schedule.