

THE CLERK OF THE SENATE

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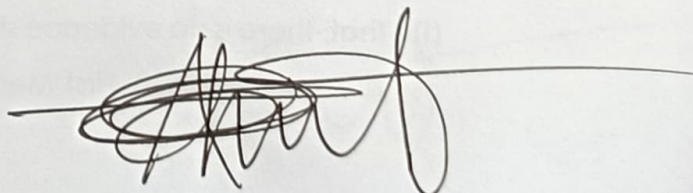
REF: PETITION TO THE SENATE OF THE REPUBLIC OF KENYA CONCERNING
TAXPAYERS MONEY STOLEN THROUGH THE PURPORTED FINANCING BY THE
CHINESE OF STANDARD GAUGE RAILWAY (SGR) PROJECT

I, **THE UNDERSIGNED** citizen of the Republic of Kenya,

CONCERNED that the Standard Gauge Railway (SGR) Project has been used to steal Kenyan taxpayer funds

DRAW the attention of the Honourable Senate of the Republic of Kenya to the following:

1. **That**, I am a Fraud Risk Management Consultant with vast experience in the public sector.
2. **That**, upon undertaking a fraud examination of the Standard Gauge Railway (SGR) project, I established that the project failed to meet the criteria for a public project, likewise, the related contract nor the related debt do not qualify as a public contract or public debt. Further, I established that the purported loan of USD 5,086,329,058.00 from the Exim Bank of China was not paid into the consolidated fund contrary to Article 206(1) of the Constitution 2010, instead, "**Forms of irrevocable notice of drawdowns**" substituted for payment of loan into the consolidated fund. In real terms, SGR was developed using Kenyan taxpayers' money of approximately Ksh.

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644,796,686,819.00 in the form of GOK grants to Kenya Railway Corporation (KRC).

3. **That**, I have based my petition on:

- (i) Articles 214(2), 206, 220(1) of the constitution 2010, Sections 49(1),50(3),51(1),(2)&(4),52,53,58, and 68(2)(g)&(h) of the public finance management Act, 2012.
- (ii) Section 25 of the Kenya Railways Corporation Act, (Cap 387).
- (iii) Article 227 of the Constitution 2010, Sections 46, 51-69 of the Public Procurement and Disposal (PP&D) Act, 2005
- (iv) The published Summary Statement of Public Debt (Debt Register) by the Public Debt Management Office/ National Treasury dated 30th June 2020.
- (v) Preferential buyer credit loan agreement CHINA EXIMBANK PBC NO. (214) 13 TOTAL NO. (307) NO. (142030300520014210788) dated 11th May 2014.
- (vi) The Kenya Railway Corporation audited Financial Statements for financial years 2014/2015, 2015/2016, 2016/2017, 2017/2018, 2018/2019 & 2019/2020.
- (vii) The State Department of Transport's Development Appropriation Acts (Budgets) for the financial years 2015/2016, 2016/2017, 2017/2018, 2018/2019, 2019/2020.and 2020/2021.
- (viii) The National Treasury's Appropriation Acts (Budget) for financial years 2021/2022 and 2022/2023

Conceptualization of Standard Gauge Railway Project

4. **That**, the conceptualization of the SGR project failed to meet the criteria for establishing a Kenyan public project, whereby, among others:

- (i) **That**, there is no evidence showing whether the SGR project was captured in the Vision 2030; First Medium-Term Plan 2008-2012 and Kenya Railway

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Corporation's (**KRC**) strategic plan as required under **section 68(g)** of the Public Finance Management (**PFM**) Act, 2012.

(ii) That, there is no evidence showing whether the SGR project's estimates of expenditure and loans were prepared in conformity with the strategic plan as provided under **section 68(h)** of the PFM Act, 2012.

(iii) That, there is no evidence showing whether the KRC's management conceptualized the SGR project.

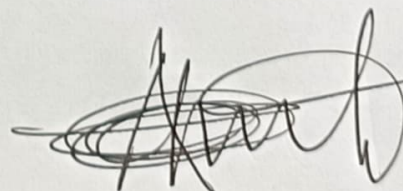
(iv) That, the information available is that China Roads and Bridges Corporation (**CRBC**) initiated the project by offering to undertake feasibility studies free of charge on the condition it is awarded the contract to develop the SGR.

(v) That, there is no evidence showing whether the Kenyan public approved the SGR project through public participation as provided under **Article 201(a)** of the Constitution of Kenya 2010.

(vi) That, regarding **paragraphs 3(i),(ii),(iii) (iv) & (v)** above (among others) the SGR project cannot qualify as a Kenyan public project. It is a project schemed by China Road and Bridges Corporation which entirely benefitted the Chinese at the expense of Kenyans, and it is a representative of many other projects of similar nature schemed by foreign companies and embraced by gullible Kenyan public trustees.

The Purported EPC Turnkey commercial

5. That, the EPC Turnkey commercial contract purported to have been awarded to China Roads and Bridges Corporation failed to meet the following criteria for a Kenya public contract, among others:

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- (i) **That**, there is no evidence showing KRC as the procuring entity invited SGR tenders as provided under **Section 51** of the Public Procurement and Disposal (**PP&D**) Act, 2005, and among others, the tender/contract number not assigned to the contract.
- (ii) **That**, there is no evidence showing KRC prepared tender documents and carried out the tendering process culminating in a contract agreement as provided under **Sections 52 to 69** of the PP&D Act, 2005.
- (iii) **That**, there is no evidence showing whether the Public Procurement Oversight Authority (**PPOA**) now Public Procurement Regulatory Authority (**PPRA**) published notice of award of the EPC Turnkey Commercial Contract as provided under **Section 46** of the PP&D Act, 2005 read with PPOA Circular No. 4/2009 dated 24th June 2009.
- (iv) **That**, there were no provisions under the PP&D Act, 2005 providing for EPC Turnkey Commercial Contract as a Kenyan public contract.
- (v) **That**, there are no contract documents published that contain the contract sum.
- (vi) **That**, regarding **paragraphs 4(i),(ii),(ii),(iv)&(v)** above (among others), the said EPC Turnkey commercial contract cannot qualify as a Kenyan public contract and should be termed as private arrangements between the Managing Director, Kenya Railway Corporation and China Road and Bridges. Hence, public money should not be spent on privately arranged contracts.

The Preferential Buyer Credit Loan Agreement

6. **That**, the preferential buyer credit Loan agreement entered between the government of the Republic of Kenya (**GOK**) and Exim Bank of China for buyer credit loans aggregating to USD 5,086,329,058.00 failed to comply with the provisions of Article 214(2) read with Article 211, 206, and 220 of the

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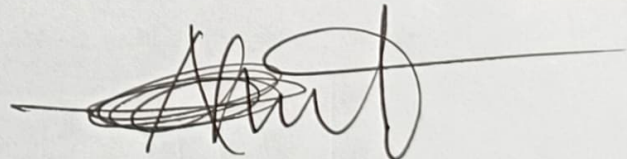
Constitution of Kenya 2010 and Sections 49(1),50(3), and 51(1),(2)&(4) of the public finance management Act, 2012. The following may suffice:

(i) That, the preferential buyer credit loan agreement was entered to finance the purported EPC Turnkey Commercial Contract and the contract for supply and installation of facilities, locomotive, and rolling stock for the Mombasa-Nairobi SGR in July and October 2012 for a total contract sum of USD 3,804,192,784.72 entered between KRC and CRBC (**see Article 1.10 of the preferential buyer credit loan agreement**). Regarding the facts enumerated under paragraph **4(i),(ii),(ii),(iv)&(v)** above EPC Turnkey Commercial Contract do not appear to qualify as a Kenyan public contract, it follows then, the preferential buyer credit loan to finance privately arranged contract cannot be termed as public debt.

(ii) That, the GOK signed up as the borrower for the preferential buyer credit loan agreement contrary to sections 49(1) and 51(1)&(2) of the PFM Act, 2012 which provide that loans may be raised on behalf of the national government and the national government entities which are organs under GOK. There is no single vote for GOK upon which the loans are secured.

(iii) That KRC is a national government entity that under section 51(1) of the PFM Act, 2012 read with Section 25 of the Kenya Railways Corporation Act, (Cap 387) is empowered to borrow independently. However, KRC's statement of financial position as of 30th June 2015 (2014/2015 financial statement) recorded accumulated losses of Ksh. 18,514,313,370.00, therefore, in such a financial position KRC was not credit worthy to have been granted any loan.

(iv) That GOK as provided under Article 260 is a collectivity of offices which include, Ministries, Departments, State Corporations, and county

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governments. Therefore, by GOK signing up as the borrower it means all assets under GOK organs are encumbered.

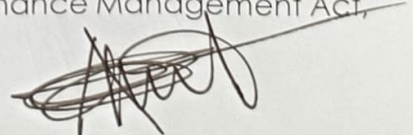
(v) That, regarding **paragraph 5(ii)&(iii)** above, the issues raised therein being within the knowledge of the Cabinet Secretary/National Treasury and Exim Bank of China that KRC was insolvent, therefore, it had no financial capacity to shoulder USD 5,086,329,058.00 credit facility, they connived to substitute GOK as borrower rather than KRC to enable encumber all assets under GOK organs.

(vi) That, the only written preferential buyer credit loan agreement published (availed) was Loan no. 2014006 of USD 1,600,000,000 dated 11th May 2014. The loan agreements for the other two loans, No. 2014008 and 2015023 of USD 2,003,584,028.87 and 1,482,745,029.43 dated 11th May 2014 and 3rd December 2015 respectively, appear not to have been published (availed). This raises a red flag as to their existence.

(vii) That, regarding **paragraphs 5(i)&(vi)** it appears the credit facility of USD 5,086,329,058.00 extended by Exim Bank of China is USD 1,282,136,273.00 above the contract sum of USD 3,804,192,785.00. According to Articles 2.4, and 2.5 of the preferential buyer credit Loan Agreement, all proceeds from the credit facility will be paid to the contractor and suppliers of the SGR project in China, and goods, technologies, and services shall be purchased from China using the credit facility proceeds. This means the excessive loan will not be injected into the Kenya economy, it will be retained and help the Chinese economic growth. This appears to be the incentive for granting excessive loans.

Conditions and Terms set in the Preferential Buyer Credit Loan Agreement

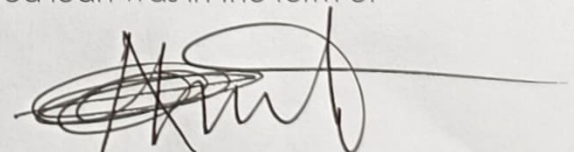
7. **That,** the conditions, and terms set in the preferential buyer credit loan agreement changed the governance and diluted safeguards for public money set in the Constitution 2010 and the Public Finance Management Act,



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20012 which ensures transparency and accountability, consequently, opening floodgates to siphoning Kenyan public money. The following sampled conditions and terms may suffice:

- (i) **That, End-user** refers to Kenya Railway Corporation as the ultimate utilizer of the credit facility disregarding that KRC is an independent entity established under the Kenya Railways Corporation Act, (Cap 387). The term end-user downgraded KRC to an institution under the direction of the Exim Bank of China, not the KRC Act.
- (ii) **That, Escrow Account** is an account established and opened by the End-user (**KRC**) in a bank appointed by the Exim Bank of China. The opening and transactions involving this account were contrary to Article 206(1) of the Constitution 2010 read with section 28(1) of the PFM Act, 2012 and Regulation 82 of PFM Regulations 2015. Approximately Ksh. 50,838,624,096.00 was transferred from the secure consolidated fund to the escrow account exposing public money to the risk of misappropriation.
- (iii) **That, the Irrevocable Notice of Drawdown** is an authority contained in the "Form of Irrevocable Notice of Drawdown" authorizing debiting an account titled "**The Government of the Republic of Kenya**". The account was opened and operated contrary to the provisions of Article 206(1) read with Section 17 of the PFM Act, 2012. Essentially irrevocable notice of drawdown was a substitute for payment of the loan money to the consolidated fund as required under Article 206(1) of the Constitution 2010 read with section 50(7) of the PFM Act, 2012.
- (iv) **That, On-Lending Agreement** means the GOK entered a loan agreement with KRC whereby GOK on-lent KRC the credit facility to implement SGR. It appears ironic that no loan money was received by GOK from the Exim Bank of China, the purported loan was in the form of



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an Irrevocable Notice of Drawdown, therefore, GOK had no loan money for on-lending to KRC. In my opinion, the over Ksh 539 billion Exim Bank of China loan recorded in the KRC's financial statement for 2014/2015 to 2019/2020 financial years were fictitious entries.

- (v) **That, Self-Raised Fund** is an amount of not less than ten percent (10%) of the commercial Contract amount payable by KRC to the CRBC as counterpart funding and another fifteen percent (15%) of the contract for facilities and Rolling Stocks to be applied exclusively for the commercial contract for facilities and Rolling Stocks. This fund was established contrary to Article 206(1) of the constitution. The self-Raised fund is Kenyan taxpayers' money. Upon undertaking a fraud examination, I established that SGR was constructed, and the facilities and Rolling stock were purchased using this fund. This is evidenced by the GOK SGR grants of approximately Ksh. 645 billion recorded in the KRC's financial statements for 2014/2015 to 2019/2020 financial years.

Kenya Railway Corporation, State Department of Transport, and The National Treasury Expenditure Books on SGR

Kenya Railway Corporation

8. **That**, upon undertaking a fraud examination of the KRC's audited financial statements for the 2014/2015 to 2019/2020 financial years relating to SGR, I established the following:

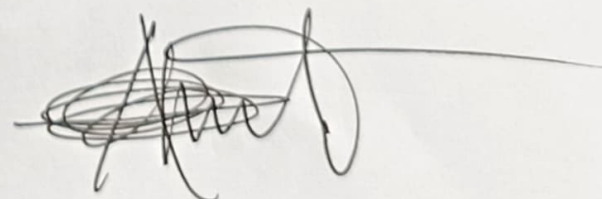
- (i) **That**, KRC made the first cash payment of Ksh. 6,627,645,067.00 directly to China Road and Bridges Corporation in the financial year ending 30th June 2014 notwithstanding work on the SGR project commenced in December 2014. Since the payments were made from GOK grants (Exchequer issues), it raises a red flag as to whether this was a scheme to siphon out public money from the consolidated fund.

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- (ii) **That**, SGR Grants from GOK aggregated to Ksh. 644,796,686,819.00 for the 2014/2015 to 2019/2020 financial years. If the grants were utilized for purposes of the SGR project, it means KRC spent Ksh. 237,748,058,854.00 above the contract sum of Ksh. 407,048,627,965.00 (USD3,804,192,784.72 @ 107). This provides evidence that the SGR was developed using Kenyan taxpayers' money not a credit facility from the Exim Bank of China.
- (iii) **That**, SGR Escrow grants aggregated to 50,838,624,096.00 for the 2014/2015 to 2019/2020 financial years. The Escrow grants are an addition to Ksh. 644,796,686,819.00 SGR GOK Grants which makes the total Kenyan taxpayers' money spent on the SGR project approximately Ksh. 695,635,310,915.00.
- (iv) **That**, KRC purports to have received Exim Bank Loan aggregating to approximately Ksh. 539,270,066,338.00 which was recorded in their financial statements for the 2014/2015 to 2019/2020 financial years. The said loans can be termed as fictitious book entries as there were no loans in real terms received from the Exim Bank of China.
- (v) **That**, regarding **paragraphs 7(i),(ii)&(iv)** above it appears that the amount spent to develop SGR aggregated to Ksh. 1,184,066,753,157.00 notwithstanding the contract sum was approximately Ksh. 407,048,627,965.00. Therefore, I can conclusively state that China Roads and Bridges and the suppliers of facilities and Rolling Stocks were overpaid by Ksh. 777,018,125,192.00.

The State Department for Transport

9. **That**, upon undertaking a fraud examination of the State Department for Transport's development expenditure estimates for the 2015/2016 to 2020/2021 financial years relating to SGR, I established the following:

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- (i) In the development appropriation Acts (Budgets) for the 2015/2016 to 2020/2021 financial years, allocations of Appropriation-in-Aid (**AIA**) loans from the government of China (CHINA) relating to SGR were approved by Parliament following section 50(3) of PFM Act, 2012 aggregated to Ksh. 387,972,000,000.00. There is no evidence of a written loan agreement with the government of China.
- (ii) **That**, regarding **paragraphs 5** and **8(i)** above, there appear to be two types of loans, one from Exim Bank of China aggregating to USD 5,086,329,058.00 (Ksh. 544,237,209,206.00 @ Ksh. 107), the other Ksh. 387,972,000,000.00 from the government of China (CHINA). This raises a red flag as to which loan and which lender between the Exim Bank of China and the Government of China extended SGR credit facilities.
- (iii) **That**, in the development appropriation Acts (Budgets) for 2015/2016 to 2020/2021, the aggregate expenditure estimates relating to SGR from Mombasa to Naivasha were Ksh. 604,359,120,492.00 comprising direct payments (AIA loans) of Ksh. 436,903,133,106.00 and Ksh. 159,940,987,386.00 receipts not classified and 7,515,000,000.00 exchequer issues (tax revenue).

The National Treasury

10. That, upon undertaking a fraud examination of the National Treasury development expenditure estimates for 2021/2022 to 2022/2023 financial years relating to SGR, I established the following:

- (i) **That**, notwithstanding that the development of Nairobi to Naivasha SGR was completed and commissioned in December 2019, Ksh. 27,158,000,000.00 and Ksh. 36,830,000,000.00 aggregating to Ksh. 63,988,000,000.00 was captured in 2021/2022 and 2022/2023 financial years respectively, for the development of Nairobi to Naivasha SGR.

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(ii) Administrative budgetary categorization for the development of Mombasa-Nairobi-Naivasha SGR was state Department of Transport whereby the last budgetary allocation was in 2019/2020, however, the development of Nairobi-Naivasha SGR remerged under National Treasury in 2021/2022 and 2022/2023 financial years. It has disappeared in the 2023/2024 development budget estimates.

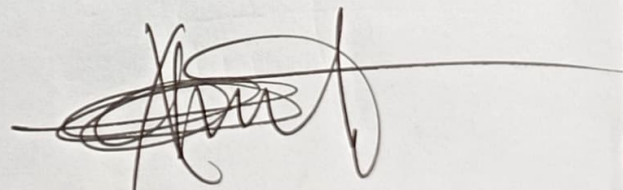
(iii) Based on **paragraph 9(i)&(ii)** above, it raises a red flag as to whether the expenditure of Ksh. 63,988,000,000.00 for the development of Nairobi to Naivasha SGR was authentic.

Inconsistency in SGR credit facilities recorded in the National Treasury, State Department of Transport, and Kenya Railway Corporation

11. That, there is inconsistency in loans relating to the SGR as reflected in the books of the National Treasury, State Department of Transport, and Kenya Railway Corporation in terms of the lender and the amount. The National Treasury debt register shows three loans, 2014006, 2014008, and 2015023 aggregating to USD 5,086,329,058.00 (Approx. Ksh. 466,419,291,422.00) from Exim Bank of China. The KRC in its financial statements shows aggregate receipt of Ksh. 539,270,066,338.00 loans as of 30th June 2020 from the Exim Bank of China and the State Department for Transport in its Appropriation Acts (Budgets) up to the financial year ending 30th June 2021 shows AIA loans aggregating to Ksh. 387,972,000,000.00 from the government of China.

Sharing the fraud examination reports with public/state officers responsible for managing, oversight, and safeguarding public funds.

12. That, I shared the fraud examination reports with the relevant Public/State officers responsible for managing, oversight and safeguarding public funds including the Principal Secretary/National Treasury, the Managing Director/Kenya Railway Corporation, the Principal Secretary/State



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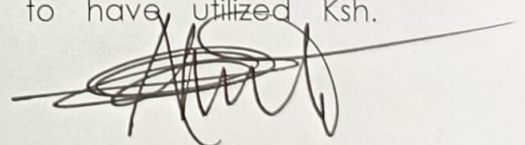
Department of Transport, the Attorney General, the Controller of Budget and the Auditor General. Apart from the Controller of Budget who acknowledged receipt of the report, the rest of the Public/State offices were condescendingly mute, which I construed to mean that, they concurred with my findings.

13. That, none of these issues raised in this Petition is pending in any court of Law, Constitutional, or any other legal body I know of.

WHEREFORE, your humble petitioners pray that the Senate –

In execution of its constitutional mandate to represent the will of the people, and to exercise their sovereignty under Articles 94(2), 96 and 211 of the Constitution of Kenya 2010, urgently inquires the matter and demands full disclosure as it addresses the following:

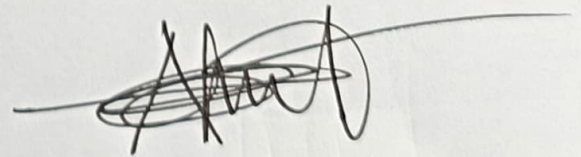
- 1) The issues raised under **paragraph 3** above, to determine whether the Standard gauge railway project qualified as a public project.
- 2) The issues raised under **paragraph 4** above, to determine whether the said EPC Turnkey Commercial contract qualified as a public contract.
- 3) The issues raised under **paragraph 5** above, to determine whether the preferential buyer credit loan qualified as a public debt.
- 4) Under **paragraph 5** above, Exim Bank of China extended credit facilities of USD 5,086,329,058.00 (Approx. Ksh. 544,236,888,206.00 @107) and purported to have utilized it all to pay the contractor and suppliers of SGR whose contract sum was USD3,804,192,784.72 (Ksh. 407,048,627,965.00 @107) overpaying by USD 1,282,136,272 (Ksh. 137,188,581,211.00). On the other hand, under **paragraph 7** GOK purported to have utilized Ksh.



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644,796,686,819.00 to pay the contractor and suppliers of SGR thus overpaying by 237,748,058,854.00 over the contract sum of Ksh. 407,048,627,965.00. The Senate should establish who financed the project, is it GOK? or is Exim Bank of China? and take the necessary action.

- 5) Further, to **paragraph 4)** above, and regarding **paragraph 7(v)** above, both GOK and Exim Bank purport to have paid a total of Ksh. 1,184,066,753,157.00 to the contractor and suppliers of SGR against a contract sum of Ksh. 407,048,627,965.00 thus, overpaying by Ksh. 777,018,125,192.00. If the Senate concurs with my findings it should exercise its authority to demand the overpayment from the contractor and suppliers of SGR.
- 6) If the Senate concurs with my findings under **paragraph 7(i)** above, it should exercise its authority to demand the ineligible payment of Ksh. 6,627,645,067.00 from China Roads and Bridges Corporation.
- 7) The Senate should undertake an inquiry into the inconsistency in financing the SGR project between the National Treasury, State Department of Transport, and Kenya Railway Corporation as per, my findings under **paragraph 10.**
- 8) The Senate should undertake an inquiry to establish the authenticity of Ksh. 63,988,000,000.00 expenditure by the National treasury for the purported development of Nairobi to Naivasha SGR, whereas work on that part of SGR was completed and operations commissioned in December 2019 as per my findings under **paragraph 9.**
- 9) In addition to **paragraph 8)** above, I feel that it is in the interest of the Senate and to a larger extent, the Kenyan taxpayers to interrogate and establish the authenticity of the state department for transport's re-emergent of budgetary allocation of Ksh. 37,396,000,000.00 captured in 2023/2024 budget estimates for the development of Mombasa-Nairobi SGR and the projected estimates of Ksh. 30,082,000,000 and Ksh. 30,324,000,000.00 for


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2024/2025 and 2025/2026 respectively, whereas the development of Mombasa-Nairobi SGR was completed and commissioned in May 2017.

Signed:

NAME: Bernard Muchere, CFE
Fraud Risk Management Consultant
Contact: Phone: 0722880577
Email: muchereb@gmail.com
ID 0810570

SIGNATURE -----

PETITION PRESENTED TO THE SENATE BY:

HON. ANDREW OMTATAH OKOITI, MP
(Senator, Busia County)

On this 22nd Day of June, 2023

Signature: 