

CONSTITUTION OF KENYA REVIEW COMMISSION

(CKRC)

NATIONAL CONSTITUTIONAL CONFERENCE

(NCC)

Verbatim Report of

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**MEETING BETWEEN CKRC COMMISSIONERS AND MEMBERS OF THE
PARLIAMENTARY SELECT COMMITTEE (PSC) HELD AT COUNTY
HALL, NAIROBI**

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19.02.04

CONSTITUTION OF KENYA REVIEW COMMISSION

VERBATIM REPORT OF PROCEEDINGS OF A MEETING WITH PSC HELD AT COUNTY HALL,
NAIROBI ON 19TH FEBRUARY, 2004.

Commissioners Present:

1. Prof. Ahmed I. Salim	-	First Vice-Chairperson
2. Mrs. Abida Ali Aroni	-	Vice Chairperson
3. John Mutakha Kangu	-	Commissioner
4. Ms. Nancy Baraza	-	“
5. Dr. Charles Maranga	-	“
6. Ms. Salome Wairimu Muigai	-	“
7. Mr. Domiziano Ratanya	-	“
8. Bishop Bernard Kariuki Njoroge	-	“
9. Mr. Riunga Rajji	-	“
10. Pastor Zablon Ayonga	-	“
11. Mr. Githu Muigai	-	“
12. Mr. Ibrahim Lethome Asman	-	“
13. Dr. Abdirizak Arale Nunow	-	“
14. Ms. Kavetsa Adagala	-	“
15. Mr. Ahmed I. Hassan	-	“
16. Prof. Wanjiku Kabira	-	“
17. Hon. Mrs. Phoebe Asiyo	-	“
18. Dr. M.A. Swazuri	-	”
19. Mrs. Alice Yano	-	“
20. Mosonik arap Korir	-	“
21. Dr. Andronico Adede	-	“
22. Mr. Keriako Tobiko	-	“
23. Hon. Amos Wako	-	Ex-Officio

Members of Parliament:

Parliamentary Select Committee Members

1. Hon. Paul Muite	-	Chairman
2. Hon. Moody Awori		
3. Hon. Kiraitu Murugi		
4. Hon. G. G. Kariuki		
5. Hon. Norman Nyagah		
6. Hon. James Kamotho		
7. Hon. Bonaya Godana		
8. Hon. Yusuf Haji		
9. Hon. Kipruto arap Kirwa		
10. Hon. Kipkalya Kones		
11. Hon. Kivutha Kibwana		
12. Hon. Justin Muturi		
13. Hon. Njoki Ndung'u		
14. Hon. Uhuru Kenyatta		
15. Hon. Andrew Ligale		
16. Hon. Joe Khamisi		
17. Hon. Moses wetangula		

CKRC Staff in Attendance:

Irene Masit - Deputy Secretary, taking minutes
Patricia Mwangi - Verbatim recording
Irungu Ndirangu - Press

Meeting was called to order at 3.30 p.m. with Hon. Paul Muite in the Chair.

Hon. Paul Muite: I want to call the meeting to order, we were supposed to start the meeting at 3.00 p.m., I see now it is coming to 3.30 p.m. I think it is fair that we start and those who may not be with us can join us when they come.

Let me start by welcoming those who are not normally Members of the Parliamentary Select Committee (PSC) and in particular the Commissioners of CKRC for being able to come at short notice.

To the Members of the Parliamentary Select Committee, I would suggest that although the Agenda has item No. 1 – Confirmation of the Minutes of the Previous meeting and Matters Arising, with your consent, we skip these two items and we go to the Item No. 3 which is The Constitution of Kenya Review Commission and the way forward for the review process.

As a way of very brief remarks to explain the process of the present meeting, PSC has--

(Inaudible), the rules of the Hon. Michuki do not apply here! *(Laughter)*. The Select Committee held a couple of meetings on concerns regarding certain sections of the CKRC Act, Section 27 and Section 28 and also Section 47 of the Constitution.

I would like to very briefly say that the concerns of the PSC – Parliamentary Select Committee - strictly stem from a desire to ensure that the country gets a new Constitution enjoying the widest possible support of the Kenyan people. In other words, there is absolutely no attempt nor desire or design on the part of MPs to scuttle the process of giving this country a new Constitution. Further, the PSC would like to remove any obstacles towards the emergence of a new Constitution and the concerns in order to remove those obstacles. As a result of deliberations the PSC appointed a sub-committee of 10 of its Members who are all lawyers to go and identify what requires to be amended in respect of Section 27/28 and also Section 47.

At a consequent meeting with the PSC, those suggested amendments were debated at length by the PSC and at the end of the deliberations the PSC adopted the report of the sub-committee of 10 which it had appointed, recommending amendments to Section 47 in the Constitutions, Section 27 and Section 28 of the CKRC Act. We then made that report before an informal meeting with Members of Parliament at *Kamukunji* and after deliberations it was felt that the matter, in terms of building

consensus, should be handed over to an expanded committee where the Speaker of the National Assembly and also Honourable the Attorney General of the Republic of Kenya were members.

Again, they went through the deliberations and once again brought a report to the Parliamentary Select Committee which proceeded to table that report before the informal meeting of Members of Parliament which, as you may have gathered from the media, is called the Speaker's *Kamukunji*. There was no voting at the second *Kamukunji* or even the first *Kamukunji* and what came out was that, yes, there is a need to amend Section 47 and also Sections 27 and 28, by a majority.

However, it was felt that there is need to build as one consensus as possible for these amendments and it was in that context that that *Kamukunji* said that a further meeting should be held between the PSC, the CKRC and also individual Honourable Members of Parliament appointed by the various Political Parties in Parliament from the Government side and from the Opposition.

So the meeting today is between the PSC, CKRC and 9 additional Members who were appointed, I believe 5 from the Government side and 4 from the Opposition – is that correct? I believe the Clerk's office sent out invitations to the Whips. Whips are those Members of Parliament who are supposed to finalise logistics while giving the names.

The purpose of the meeting therefore is first of all to brief the CKRC on the deliberations and the decisions that have been taken and to try and build consensus and above all also have your views because we have always worked – at least Parliament through the PSC and the CKRC – jointly. If you remember we sat in this very room when we fixed the very first *Kamukunji* and even when we were adjourning, we also sat in this room. So even as we move now towards this issue of amending Sections 27 and 28, we want very much to develop that partnership between PSC and of course the CKRC.

Very briefly on Section 47 of the Constitution, what informed the decision by the PSC and to some extent by the informal meeting of Members of Parliament, first and foremost is to remove doubt because those of you who have the Rules, Section 47, you will see very briefly that Section 47 vests in Parliament and Parliament alone, the power to alter, to amend the Constitution

(?) what meaning one is to give to the term “alter” or “amend”. Leaving that aside, clearly the powers are vested with Parliament alone.

Thereafter, the Parliament is to permit or mandate a body other than itself to do the alterations or the amendments and it is here there is a need to amend Section 47 so as to constitutionally, legally authorize the donation of that power to a body other than Parliament because in the absence of that one is running the danger of any Kenyan out of the 30 million Kenyans going to court and saying the CKRC Act to the extent that it seeks to confer powers on a body other than Parliament, for example, Bomas, to alter the Constitution then it is in conflict with Section 47 of the Constitution and that therefore in terms of Section 3 of the Constitution, the Act is unconstitutional. This is one of the areas we want to remove so that that possibility is preempted and

removed

The second one is that instead of asking me about the extent of meaning of the word “alter” and again here as lawyers one would agree that the approach which a court adopts in the interpretation of a section of a statute is to pose the question, what was the intention of the framers of the Constitution when they used this particular language. So what was the intention of the framers of the Constitution, in other words what were the alterations of the Constitution? The argument was that when you look at the entire Section 47, in fact the framers of the Constitution did not leave us to go trying to ascertain what they meant by the word “alteration”, they went further and define what is meant by “alteration” in sub-section 6 of Section 47. The argument here is that it is to alter the particular provision or section, to repeal that section or reenact it and so on and so forth.

But even where one may take a sort of legal view that “alter” can also mean replacement of the entire Constitution, I think we all agree, we are re-writing the Constitution, we are not intending to make alterations to favour the NARC force, then why do you want to run the risk of any court saying that replacement of one Constitution with another one is not an alteration within the conceptualization of Section 6 in the light of the definition of alteration under Section 47? So we thought that those doubts should be removed so that again we can have the Constitution in time, in fact we are racing to have one on 30th of June.

When it comes to Sections 27 and 28 of the CKRC Act, you will remember that in fact the latest amendments were effected I think in August/September, 2002 just before we went to elections in December. There was at that time a rush to have a new Constitution in time to enable the last elections to be held on the basis of a new Constitution. So there were amendments that were effected as we are targeting shortening of the period.

Now I am sure you are perhaps more conversant than ourselves with the provisions of Section 27 regarding the manner of voting but if a particular clause is to become part of the new Constitution it must enjoy the support of two thirds of the members voting. But equally, for any clause to go to a referendum it must also have the support of two thirds of Members voting because what happens if a particular clause does not have the support of two thirds in order to become part of the new Constitution, then you have people who are also voting against it so that again that clause does not get the support of more than two thirds in order to go into referendum. Suppose we were to come into that lacuna then you would have a Constitution which is incomplete because a Constitution, for example, that cannot settle the issue of the Executive – I am just using that by way of example – then it will call the other provisions becoming part of the new Constitution, would be an incomplete Constitution and we felt that these are obstacles that should be removed through appropriate amendments.

You may also remember that Section 28, (9) says that the Draft that will come from Bomas goes to the Attorney General, comes to the Parliament, Parliament will either enact it as it is or reject it as it is. Now, when we analysed and noted that position we came to the conclusion there is a very grave danger of the country being denied a new Constitution through a Member or Members of Parliament simply voting to shoot down the document because there is one clause or other that they do

not want. We were feeling there is need to amend Section 28 in order to provide some mechanism for the best possible consensus building in order to ensure the final document when we come to sign it will indeed pass through the consensus that will have been built up through a debate. The document that will come from Bomas must come in the form of an annex to a report and for that report to be debated by Parliament before being sent to the Attorney General. We thought that that would provide the mechanism for consensus building that may not have been brought on board through the Bomas process.

For example, we have a Committee, the Consensus Building Committee, that is now going on at the KCB Training School. When you look at the Act, there is no provision for institutionalising any consensus which may be reached at the KCB Training School because any consensus that may be reached there, as we understand it, is still subject to approval by the Delegates who are perfectly at liberty to shoot down that consensus. I am not suggesting that they will, I am just saying if they did, us as the major stakeholders become accountable to that consensus. Does it not make a lot more sense perhaps to have a provision that will add weight to that sort of consensus and have a legal framework of institutionalizing any consensus. These are the sort of amendments that are demanded.

The other one which is quite fundamental is, you will remember at the time when the Commission as currently constituted was being formed, that is the Commissioners who were appointed by PSC and Commissioners who were appointed by Ufungamano, negotiations took place which preceded that and the Ufungamano Initiative, one of the conditions of the merger was actually a referendum. They were arguing the document, the final Constitution, must be ratified by a memorandum of the entire Kenyan people voting “yes” or “no” on the entire document not just issues. This was actually a condition to the merger. Somewhere along the way that condition appears to have been abandoned and when they came recently to have a meeting with the PSC they brought this out and they said they still feel that that particular term should have been honoured.

There also real issues here which the Parliamentary Select Committee were influenced by, namely, since we are re-writing the Constitution or coming up with a new Constitution how constitutionally, legally do you ratify a new Constitution given that Parliament itself is a creature of the Constitution, therefore subordinate to the Constitution? Because the minute you stand up in Parliament to do the ratification then you are accepting the menace that tomorrow Parliament can throw away that Constitution because it is like you are conceding that Parliament is above the Constitution when we know it is the other way round. The sovereignty of the supremacy in constitution making is in the people. What we are doing is combining the constitutional and legal framework.

So the question remains, how do you ratify that new Constitution and the two routes available are either through a constituency assembly, that is to say people who are elected to an assembly to go and debate the Constitution and ratify it before elections through universal suffrage or through a referendum; the Kenyan people will be the ones to ratify the Constitution. So it was the view of the PSC that one or the other demands or imperatives in the amendment of Section 47 of the Act is to provide for a referendum by the Kenyan people to ratify the new Constitution.

So I would like to leave it there and probably ask whether there is any other view from the PSC side or Parliament. Yes, Honourable Godana.

Hon Bonaya Godana: Thank you very much, Mr. Chairman. I do not know whether I want to start with Transition as it is probably my problem, although it is a very long lecture (?) to a very long lecture. You should have warned us that you were calling us to receive a lecture.

I really wonder what we are doing. I think we are engaging in much ado about nothing. The Commission was given a task and has yet to accomplish that task. Parliament's concerns and problems about whether this is legal or not will be concerns or problems to be handled when we come to that bridge. This is not an issue in my view. We are trying to create issues where there are none. Obviously we know, and you know as a lawyer, that there is no such a thing as (?) , that even law is defective if the statute is defective. Let us get through with Bomas, when we are through with Bomas let the Delegates go home, we tell them, "thank you, now is for Parliament to take over" then we can deal with some of these issues that the Chair is telling us about.

I wonder why you are interested in designing the whole path where we are heading. I think the pathway is very clear, for the Commission it is to conclude the Conference in accordance with the statute. Once that is done their job will have been done, the rest is for us, Parliament. If it is legal we pass it, if it is unacceptable or illegal we do not pass it. Thank you, Mr. Chairman.

Hon. Paul Muite: Are there any other views that are not necessarily personal. I have not been a lecturer, I was probably (inaudible) of my ability to inform our colleagues who are not members of the PSC about how we came to call them. I would invite any other view.

Hon. James Kamotho: Mr. Chairman, I think I am equally as confused as many of those who are seated here because after the *Kamukunji* I would have thought that the 9 party representatives should have met with PSC before inviting the Commission to come because all the Members representing parties are completely lost. They do not know what all this is about.

Secondly, your conclusion that in *Kamukunji* the majority supported the views you expressed, I do not think there was any barometer or any way of measuring who was supporting what. I think that *Kamukunji* was just *Kamukunji*, because we did not vote, there was a lot of noise and therefore what we should be doing is us ourselves to sort out our own internal problems out before we involve other people.

Hon. Paul Muite: Are there any other views? You know, this was not a decision by Mr. Muite, this was a decision by the *Kamukunji* that 9 people plus CKRC should-- Yes, Honourable Nyagah then Honourable Kones.

Hon. Norman Nyagah: Chairman, I want to be as brief as possible. We as PSC should not run away from our obligation, we have a mandate which we should follow and it is very clearly stipulated and that is why we are all seated here. We have had several meetings and this group on my left is as important as this other group that came and sat where I was from the *Ufungamano*. I still do believe that before Tuesday, the sub-committee that was nominated by the PSC can still meet with the 9 that were approved by *Kamukunji*.

I would also want to say the following because everyone of us has his role and I do meet with a lot of people and when we are calling people in *Kamukunji* and so on, I know they talk to me. I think the feeling as expressed by the speaker of that day of the feeling of that *Kamukunji*, was very clearly represented in the right direction. I am not going to talk about barometers and so on. Maybe in the next *Kamukunji* on Tuesday, we should go through voting and see that barometer, is it high or low, but as has been our common practice, I do not think we have gone into measures of finding out what barometers there are.

I think the general consensus of Parliament has been, there is great concern. I do not think we should allow a situation where once people have sat in Bomas, they allow themselves to then go through a crisis. I think we see a bumpy road at the end, that was going to happen. Really there should be a way of seeing how that can be arrested so that we can give a Constitution. I have said it here before and I want to repeat the same again, Mr. Chairman. It is not a myth that if we continue in the manner in which we have continued without a clear-cut consensus, this document will be rejected by Parliament. Yet what we are saying, we want a situation where there will be consensus, there will be a clear direction so that this document is not rejected. I feel that is the direction which we should take. I have sometimes gotten into a situation where I feel that not all of us are interested in a new Constitution. That is just my own view.

Hon. Paul Muite: Honourable Kones.

Hon. Kipkalya Kones: Mr. Chairman, thank you. I think, Mr. Chairman, we are trying to be a bit dishonest to ourselves. The issue that we are trying to discuss in here is an issue that we are not going to avoid, however we look at it. Mr. Chairman, to point out areas which we feel are likely to put us into some problems in the smooth delivery of this Constitution, I think if we sorted them out ahead of time, it is better for all of us. To say that we better let the Commissioners finish their work and let the Delegates in Bomas finish their work and go home, and then we come into Parliament and get into a deadlock, we will be cheating and we will be lying to this country. I think, Mr. Chairman, what we feel is likely to put us into trouble we sort it out here. There is no sin we are committing by inviting our Commissioners who have deliberated on this issue for more than two years. I think they will also feel included if we discuss together sections that we feel are likely to give us problems.

Mr. Chairman, it is also not true that the members who were selected to join the PSC, the 9 members, are lost. I think they are not lost whatsoever because we have been together, we have been discussing these issues together in *Kamukunji*, we have brought these issues open to all the members and they have been discussing them critically and exhaustively in *Kamukunji* and nobody is lost whatsoever. So I think, Mr. Chairman, all we are saying is we either decide to be honest to ourselves and

honest to this country or we decide to start denying the country the truth that is within us. So, Mr. Chairman, I feel this is the right forum, let us discuss these problems, let us face them squarely, let us not stick our heads in the sand and imagine we have somebody else who is going to help us. Mr. Chairman, I think we are on the right path.

Hon. Paul Muite: Honourable Kariuki.

Hon. G.G. Kariuki: Mr. Chairman, first of all I have to say I have not refused to be in this meeting. I know why I am here and I know the problem that is facing all of us as Kenyans when we are dealing with this matter of the Constitution. Mr. Chairman, let us not be misled by the history of suspicion which started at the time we started the Constitution making, because it is said some of the members either of Parliament or the Commission would want to have this process scuttled. There was something like that but let us forget that history. Let us now be realistic as men and women and ask ourselves whether we are in the right path, and if we are in the right path, are we going get where we are intending to go? If we suspect there could be a problem, you could call it hypothetical, but you are free to suspect that something may happen which might stop whatever you want to achieve. I think time has come, if we cannot, as a Committee, agree on the interpretation of Section 47, that is a matter for the other people to interpret but let us say here we all know that Parliament is the supreme authority and will be the only organ that will be expected to ratify whatever Delegates will have passed.

Now, during that time before ratification and when the document is prepared by the Delegates, do we have any other venue where we can say, if we pass this document as it is, we may be inviting a national crisis. Are we going just to fold our hands and say, "let the national crisis come" because when Parliament says no to a document, there is definitely going to be a crisis and will that crisis be of any help to any one of us?

Why can't we be honest to ourselves and say, let us try all the possibilities that will make whatever we are doing successful and we come out with a document that will be acceptable. Let us not shy out of our responsibility. The Commissioners have got their responsibility; the Delegates have got their responsibility; Members of Parliament sitting as Members of Parliament have a responsibility, they are answerable to this nation on what may happen. But when we are at the Conference, we are there as Delegates but a time has come when we have to wear our hat. Whether it is painful or not, we have to get somewhere and to take a decision. So, let it not appear as if Honourable Muite is lecturing to us. Personally, I would like to hear as a student, I would like to hear a lecture from any person who is more informed than myself. That is the benefit of being in a meeting like this one.

So, Mr. Chairman, I think we better avoid being suspicious of one another and let us ask ourselves, if we are the people expected by the entire nation to give them a document, are we in the right path? If there is any problem, let us sort it out now. Let us not be shy to tell the Delegates that up to this point-- I know people are worried about the kind of hypothesis that we are in because we are discussing hypothetical things because we do not know what the Delegates will come up with. You are

only given seven days to have this document in Parliament; shall we have any other time to hold these meetings and decide what direction we are going to go? I think we need to have cool minds when we are dealing with a matter of this nature because personally, I think it is a very serious matter. Thank you.

Hon. Paul Muite: Honourable Kaindi.

Hon. Peter Kaindi: Mr. Chairman, let me start by saying very clearly that I am actually not confused. I am not confused because I was in the last Parliament and although I am not a lawyer, neither is Parliament composed of lawyers only, but many of us who are not lawyers do participate in making of the legislation and statutes that govern this country. I however do recall from experience that, particularly in the eighth Parliament, voting on certain issues was extremely political, was dramatic and I fear that you can see a replay of the things that I used to see during the voting for such a crucial document as the Constitution. When we were requested last week to join this group, it was an effort to try and build consensus at the wider forum, to try and ask ourselves, if this document goes and comes the way our friend Godana has said that, let it come to Parliament and then we can deal with it from Parliament-- When I look at the avenue that is provided for in Parliament, it is either you vote for it or you do not vote for it. Unless I am misreading that interpretation - and I stand to be guided - the voting that I do know in Parliament, that voting, it may not be possible to convince everybody to vote for it and we are skeptical that if that stage is reached, we might find ourselves not able to deliver a Constitution to the people of Kenya. Any effort in my view that can be made at whatever level to ensure that by the time the document comes to Parliament we are speaking the same language, I think that is welcome and I think that is why we are here.

(Consultations on the floor).

Hon. Yusuf Haji: Somebody was putting--

Hon. Paul Muite: No, it is working now.

Hon. Yusuf Haji: Mr. Chairman, I said that I was not in the last *Kamukunji* meeting but unfortunately I must say that what is happening here is what we have all read immediately after the *Kamukunji* meeting. It is very sad that we, as a Select Committee, have invited some people to come here and yet we are not on the same wavelength. I said in the second *Kamukunji* meeting that unless the Select Committee puts its act together, there is no way we will come out of this confusion and I am seeing the same thing happening here today. Instead of us dialoging with our people, our friends that we have invited, it is now becoming debate among the Select Committee, yet if we would have met as a Select Committee and discuss these issues, we would not be in the shame that we find ourselves in. So I object very vehemently that we are not putting our act together. If we want to move ahead, I think before we invite other people to come and listen to all the rubbish that we talk here, we should first of all meet and agree and after agreeing we invite people from outside when we are on the same wavelength so

that we do not shame ourselves and we do not shame this country. So, with those few remarks I say, call off this meeting, let us go back to the drawing board, discuss, agree and come back and speak to our people who are here with us.

Hon. Kipkalya Kones: Point of Order, Mr. Chair.

Hon. Paul Muite: Yes, Honourable Kones.

Hon. Kipkalya Kones: Mr. Chairman, I think it will be fair if you inform the Honourable member that at the last Select Committee meeting we had here, we were all agreed that we were going to present to *Kamukunji* recommendations of the 10-member sub-committee of the Select Committee and it was unanimous. However, when we went to the floor of the House of the *Kamukunji*, people who were in this Committee turned around and opposed what was discussed and agreed in this Committee. So, for how long, Mr. Chairman, are we going to sit as members of the Select Committee agreeing here and disagreeing outside?

Hon. Paul Muite: Honourable Muturi, Honourable Kiraitu and then Honourable Ligale.

Hon. Justin Muturi: Thank you, Mr. Chairman. I think it is important for us to also, as people who make laws, follow those which we have made.

(Inaudible discussions on the floor).

(His Excellency the Vice President, Hon. Moody Awori, joins the meeting).

Hon. Justin Muturi: Let me continue, Mr. Chairman. as you welcome His Excellency Vice President. Mr. Chairman, as a Committee we have had reports from the Sub-Committee, which reports has been adopted by the main Committee. I think it is only fair that those who may wish to express different views from those contained in the report do so at appropriate times but not on occasions like this when we are presenting a report that has been adopted. Even in Parliament really, there is always somebody who will oppose but the majority view is what is presented. Having said that, Mr. Chairman, I find it surprising that we are coming here to argue about things which we have already agreed on. If indeed it was a law it would be operational.

Mr. Chairman, I want to go to a small area that you touched on. I want to proceed with what we should be discussing. Mr. Chairman, when the *Ufungamano* team visited us here, they revisited the issue of a referendum and indeed the issue of a referendum is contained in Section 27 of the CKRC Act, as you rightly pointed out. But due to the amendment that was effected in August 2002, where we said that for an issue to be included in the Draft, it has to get the support of two thirds majority of Members present and voting and again if it is defeated, for it to go to a referendum it has again to get the support of

the same number, two thirds of the majority of Members present and voting-- Mr. Chairman, as you can see that creates quite some difficult situations. Be that as it may, we included in the Act that, as what was raised during the negotiations, as the avenue through which a referendum would be conducted. But, Mr. Chairman, that referendum as contained in Section 27 Sub-Section (6), is now played well in Sub-Section (7) where it says, "a national referendum under Sub-Section (6) shall be held within two months of the National Constitutional Conference". We are in the National Constitutional Conference, so if anything has to go to a referendum, it will go within two months of the Conference.

However, Mr. Chairman, in Section 28 Sub-Section (1), we get a total contradiction because we say that, "the Commission shall on the basis of the decision of the people at the referendum and the Draft Bill as adopted by the National Constitutional Conference, prepare the Final Report and Draft Bill.". The referendum will take place two months after the Conference. When will it be that the Conference will adopt results of a referendum? Mr. Chairman, I am just posing this to show that we created a problem in the Act and I am of the very, very firm view that even as much as we say that Parliament should come and adopt the Final Draft, Parliament being a creature of the Constitution, and indeed even in the Draft Bill-- In the Preamble we say, "We, the people of Kenya give unto ourselves this Constitution". Mr. Chairman, I feel we shall be abusing what is in the Preamble if Parliament is the one that is coming at the tail end to adopt the Constitution.

I think these are issues that we need to think about seriously and if we are to wait, Mr. Chairman, to cross the bridge when we get to it, then I have no illusions in my mind that we are planning to fail because we are failing to plan ahead. We obviously must be planning to fail irrespective of political persuasions and interests. I am interested in seeing a new Constitution for this country and if we want to see that, Mr. Chairman, we must plan ahead and we must not plan to fail. Thank you, Mr. Chairman.

Hon. Paul Muite: Before Honourable Kiraitu takes the floor, I would plea with Honourable colleagues here that we do not re-open debate on this matter really truly because we appointed a Sub-Committee, the Sub-Committee made a report to the full Committee and much of what we are hearing now in terms of differences of opinion, we went through all that; we expressed our views and at the end of it, Honourable Haji - you were actually not able to come to that particular meeting but I think we received your apologies - we adopted this report. So, in fact, what was taken to the *Kamukunji* was a position by the PSC. We had heard the dissenting views but the fact of the matter is that a majority of the members voted to adopt the report. We even asked those who had dissenting views and felt sufficiently strongly to want their dissenting views recorded, to ask for that to happen and it happened.

So I think it is not embarrassing or humiliating. I think it is a good idea in the interests of transparency for the Commissioners to see some of the debates that go on amongst us. But you are quite right that even if we had had another meeting, it would not have really changed anything because we adopted the report and it is that report that I was advising the Commissioners the contents of, really. Honourable Kiraitu.

Hon. Kiraitu Murungi: Thank you, Chair. First I would like to very briefly say where we have come from. I think the reason why we are here is because we made a public commitment that the Constitution that is being drafted is going to be ready and it is going to be presented to Kenyans in the month of June this year and we are barely about one hundred days away and one would understand the question why it is becoming urgent, why there is a kind of rush and panic. I think the whole idea is, in the course of looking at the Act and the Constitution, the PSC discovered that there could be certain ambiguities and roadblocks in our law, which would make it impossible for us to have a new Constitution by June this year. Therefore, we decided to see what amendments we could make into the Acts and what amendments could be made to the Constitution to clear the road for the new Constitution. So, I think that is why we are here.

We have discussed the matter in great detail before the Committee of lawyers which met and we made very specific proposals for the amendment of Section 27, Section 28 of the Act and Section 47 of the Constitution. We presented the report as a Committee, to the Select Committee which was adopted. Of course there was a minority view which was recorded and after that, we presented the report to the *Kamukunji* of 140 Members of Parliament. Again, the report was accepted, the necessity for amending both the Law, the Act and the Constitution was accepted both by the Committee and the *Kamukunji* and what the *Kamukunji* did in our last meeting was to say, “let the PSC meet”. They also arranged for another group of nine wise men and women to join the Committee and then they said, “you go and meet with the CKRC, consider with them those amendments that you have proposed and then you report back to the *Kamukunji* on those very specific amendments.”. So, I think today’s meeting is really not to talk about generalities, it is to discuss with CKRC the possible amendments to Section 27, Section 28 and Section 47 of the Constitution. I think we should not digress from the principle task which brought us here today. After this we are going to prepare very specific proposals which we will take back to the *Kamukunji* on Tuesday next week.

Chair, with regard to Section 27, I think the problem is what has been highlighted by my friend, Mr. Muturi. There is provision for Referendum and it says that at the Bomas you need two-thirds majority of the Delegates for any issue to be accepted into the final document. So, whether we are talking about Devolution for instance, you need to command two-thirds of the Delegates who are present and voting for that to be written into the new Constitution. So, if there is a one-third plus one minority which rejects Devolution, then there will be nothing like Devolution in the new Constitution. The other alternative then, would be to send the matter for Referendum, but again you need two thirds to sent the matter for Referendum.

So if there is a one-third which says no to Referendum, then you cannot send that issue of Devolution to Referendum. So, you have a Constitution which does not have that whole Section on Devolution and this could happen to other Sections of the Constitution. So, without this there is definitely a possibility for a stalemate which could arise if Section 27 remains the way it is. Therefore, it might need to be amended to smoothen the path for the provisions we need for the Constitution to go through.

Then, with regards to Section 28, Section 28 reads that, “it is the Conference” - in fact I can read it-- Section 28 reads that “the Commission shall on the basis of the decision of the people at the Referendum and the Draft Bill as adopted by the

National Constitutional Conference, prepare the final report and the Draft Bill”.

So for us, the Conference is going to prepare a Draft Bill, which, if there is any Referendum, should also incorporate those views and they say the Commission is the one to prepare the Final Report and the Final Bill. So, the Conference will leave all the materials they are preparing to the Commission, so the Bill which finally is brought to the Attorney General will be a Bill prepared by the Commission and not by the Conference, because under Section 4, these are two different Constitution making organs. Now, how does this play out and given the timeframes, are you going to give us the same Draft which has been prepared by the Conference, or what is really going to happen? What are the powers of the CKRC as far as preparing this Final Draft and the final Bill is concerned?

Secondly, there is a very real possibility that whatever document is prepared by the Commission is going to be rejected by Parliament because under Section 47 of the Constitution and the Standing Orders of Parliament, if Parliament cannot even change a comma or a full stop in a Constitutional amendment Bill, if there is one sentence that is out of place, if there is a Clause which the Parliamentarians feel strongly about, there is every possibility that the entire Constitution could be rejected if there is no two thirds majority in Parliament regarding that Clause. So, we thought it was important for Parliament to have a look at this Draft to avoid the risk of the entire document being thrown out of Parliament. So, it is good for the document after it is prepared by the Commission, for the Parliament to have a look at it first before the Attorney General prepares the Bill, because once he has prepared the Bill then the Parliament becomes just a rubber stamp and it can either take it as a whole or reject it as a whole. So, we thought there is possibility of another stalemate there after Parliament rejects it. We thought Section 28 could also be amended to provide for that.

Then the question of Referendum. The *Ufungamano* group has been here, they were very angry because they say the agreement entered between our Committee, the PSC and *Ufungamano*, contained a provision for mandatory Referendum at the end of the process and they say this was lost out in the drafting etc, etc. They say for this Constitution now to be accepted by the people of Kenya, for *Wanjiku* to be satisfied that what she sent you to do is what you have done, it has to go for mandatory Referendum at the end.

We do know that the Commission held a Workshop in Mombasa between the 7th and the 10th of December last year, specifically to discuss the issue of Referendum, and I think it would be very good for this forum to hear from the Commission what conclusions you arrived at after that lengthy Workshop. From the information we have it was suggested that Section 47 of the Constitution needs to be amended to create possibility for Referendum and also Section 27 was thoroughly discussed at the Workshop and it was found to be inconsistent and contradictory and there was need for it to be amended for provision for Referendum to be implemented. So again, we would like to hear from you the discussion on Section 47 and 27 as far as the Referendum is concerned.

With regards to Section 47, there is doubt because the words used in the Section are “Parliament has power to alter a Constitution” and the example which we have been giving is that somebody has grown big, the trouser can no longer fit him, so you send it to the tailor for alteration, which means you only add an inch to the waist, you reduce if you have become thinner. But if you go and bring a new trouser of a different color then surely, there is no alteration you have been making. So, they say that Section 47 of the Constitution has to be amended for you to bring a new trouser. As it is now, somebody can stand in Parliament and challenge the authority of Parliament to receive a new Constitution, because Parliament has only powers to receive alterations to the Constitution.

So, these are the legal issues we are grappling with, we would be very happy if instead of wasting time on our usual side shows, we could listen to the Commission and discuss a way forward on how we remove these obstacles because we really need a new Constitution by the middle of this year. Thank you, Chairman.

Hon. Paul Muite: Yes, I think we do need to move forward but I had recognized *Mheshimiwa* Andrew Ligale. Before I give you the floor, let me just recognize on our behalf, the presence of His Excellency the Vice President of the Republic of Kenya and to welcome him. We had received the message that he would be coming a little late. Honourable Ligale.

Hon. Andrew Ligale: Thank you, Chair. I have to start by saying that I am not a member of the Select Committee, but I did receive a letter from the Clerk of the National Assembly inviting me to this meeting. I believe I am one of the nine who may have been selected after the last *Kamukunji*, to try and assist the Select Committee presumably in reaching some consensus. I believe, Chair, that at the last *Kamukunji* meeting, the intention of broadening the mandate of the Select Committee was to try and build consensus amongst ourselves as Parliamentarians, amongst the party leadership so that when we report back to the *Kamukunji* next time, we have a reasonable chance of our views being accepted by a consensus although, as you say, at the last meeting there seemed to be a general agreement that we have a problem on Section 47 of the Constitution and Sections 27 and 28 of the CKRC Act. Yes, but we have to agree that there may well still have been a strong opinion of doubting Thomases who wondered whether our intentions were honourable or whether indeed Parliament was not wanting to take over the job from Bomas as it were.

I would have thought myself, Chair, that it would have been in order before we call in our friends from the Commission, for that team of nine to meet with you at the Select Committee. I do not remember myself, our being requested to come in to a Select Committee meeting and where the Commission was invited specifically so that we can discuss together. Obviously, that would come eventually, but I thought initially it was important that you met the nine of us so that we understood each other and we had two weeks, we were actually given two weeks within which to sit and to agree on a common position to report to *Kamukunji*.

Now, you called us on the Thursday of the second week and we are supposed to report on the Tuesday of the coming week

and as far as I can see, we are not likely to reach a common position today to be able to report to the *Kamukunji* on Tuesday.

I am pleading, Chair, that as a matter of procedure-- In fact I do not know how many of us nine were selected, G.G. I think may have been one of them, I am one of them, I do not know where the others are, whether indeed they are all here, because if they are not, you go to report in the *Kamukunji* and they turn around and say, sorry, we were not part of the discussions so we are not bound by any decisions that may have been taken, so we have nothing to report back to our own parties to say that, yes we have reached a consensus. I am anxious to assist, I can see there is a problem and I would like to be able to say, yes we have reached an agreement as the Select Committee as expanded and having reached a consensus we have then invited CKRC and we have discussed with them and we have also reached a consensus. Then we can be in a position to go and report back to *Kamukunji* and hopefully, at that stage, the *Kamukunji* can endorse our recommendations and we go ahead and proceed to carry out the amendments that are required.

So, all I am really raising, Chair, is that maybe in terms of the procedure, I think we jumped the gun slightly. We should really have met initially on our own first to be briefed and to debate amongst ourselves. Let us raise temperatures, whatever it is, if we have to, but once we have agreed we can then call our friends from the other side. Up to now they are quiet because they are just wondering what is happening between us, mesmerized. (*Laughter*). Yes, and I have to say so, but if you reckon that they are in a position to make a contribution and that they can assist us and we can agree with their views as enunciated in the first-- Njoki, can I finish? You may not agree with me but give me time to finish. So, I am suggesting, as a matter of procedure, we needed to have sorted out ourselves here first before we called in our friends from the other side. I am anxious to contribute and I want to see if I can contribute positively towards resolving the problem. Let us follow the correct procedure. Thank you.

Hon. Paul Muite: Yes, *Mheshimiwa* Njoki Ndungu.

Hon. Njoki Ndungu: With due respect to Honourable Ligale, I think the decision that was reached at the *Kamukunji* was very clear, which was for the PSC to meet with the CKRC and to that meeting an additional nine Members of Parliament were to be added by the parties. It is clear and I think it must be Minuted somewhere, so I think, Sir, on a point of information, the purpose of this meeting is to consult with the CKRC on the report of the PSC and to find if we have a coming together on the way forward for the Constitutional Review. Thank you.

Hon. Paul Muite: I think we need to move forward and I did not get the impression that the Honourable Commissioners there are sort of mesmerized or lost, it is just that we have not given them the opportunity. I think we have had many meetings with them before and even where they feel they are not able to respond conclusively, they always tell us “we have heard you, we need to go and consult and come back to you.”. So, I was giving an opportunity to my Honourable colleagues on this side before giving them an opportunity to the CKRC to respond. When doing so, let me just emphasise a point that Honourable Njoki Ndungu has just alluded to, or stated, namely that the purpose was to see whether we have got common ground regarding the fairly specific recommendations of the Sub-Committee of the PSC, which was adopted by the full Committee, that

Section 47 be amended and Sections 27 and 28 be amended and that there will be a Referendum of the entire Kenyan people to the whole document as one of the amendments to be introduced, and I think that is also the point that the Honourable Kiraitu Murungi was making. I see the Vice Chair of the CKRC and I would hand the floor to you, we would very much wish to hear your comments or your views on what we have said. Thank you.

Com. Idha Salim: Thank you very much, Mr. Chairman. In many ways you have actually given our answer to you yourself when you said that we have met you before and that you would be satisfied with the answer that we have heard you, we will go and deliberate and come back to you, or something to that effect.

Mr. Chairman, the notice for this meeting reached us only a short while ago. We have a letter here dated February the 18th, which was yesterday. This morning informally sitting together we heard there was going to be a meeting. One or two of us said we read in the papers that there was going to be a meeting between the PSC and CKRC officials and yet, it was not until today, as I said, that we heard about it. The official letter to each and every one of us reached us I think half an hour before we came this way. In fact most of us had to more or less tell our Committees in the various Tents that we have been called to a meeting and, therefore, we may need to postpone deliberations in the Tents at a very, very crucial time of our work. We are very, very busy at the moment trying to finalize things having come back from Mombasa, having debated the various Chapters here and there and with a lot of input which we wanted to “sell” to our Committee members.

Nevertheless, Mr. Chairman, in short then, we really came entirely unprepared to give you any response to any of the issues you raised with us, notably the issue of 47, 27 and 28. We appreciate very much the problems that seem to have arisen because of that, we have certainly taken note of the various opinions and views expressed on those issues and we assure you that given time as a Commission we will get together again to discuss this. We shall perhaps ask you to meet us again when we are really prepared and to thrush out these issues at another meeting. In other words, Mr. Chairman, I want to agree with Honourable Ligale’s point that perhaps you should arrange for another meeting when both sides are prepared. It will be very useful to the Commission if the ideas you mentioned in your own introduction – someone called it a lecture – would be given to us in writing, if such issues were raised in a letter to the Commission for us to deliberate upon and come back to you with something substantial by way of responses to those issues. Thank you, Mr. Chairman.

Com. Alice Yano: Thank you, Chair. Mine is a Point of Clarification. I have heard generally that we are here to consult and maybe find a way forward. From what also I heard from you, Chair, and several members of the PSC, a Committee has already met and the PSC has taken a position to amend the Constitution, Section 27 of the CKRC Act and also Section 28. Now, my question is this, Chair, what is the role of CKRC as at now? If that decision has already been taken by the engine, that is the PSC, then of what importance will the decision of the CKRC make to the decision you have come up with? Thank you, Chair.

Hon. Paul Muite: I think that is an issue that perhaps we should respond to at this point in time. Yes, a decision has been made and the reasons for that decision have been explained to you, but the PSC and Parliament itself would very much want to continue acting in partnership with the CKRC. In the drafting of those amendments we would like the involvement of CKRC. The principle has been agreed upon, has been made, we need to amend, but in terms of wording for example, you know, the parameters of those amendments, we see a role for CKRC. We would like full participation in discussing, in debating the precise amendments and their extent. Yes?

Com. Idha Salim: Mr. Chairman, I think I would like to ask Commissioner Hassan and then Commissioner Githu also to contribute to the discussion. Hassan.

Com. Ahmed Issack: Thank you, Mr. Chairman. Maybe you cannot see me but I am sure you can hear me. I think you had mentioned that the ten-man Committee of the PSC had made a report. I think if it is possible, instead of, as the Vice-Chairman said, sending us a letter, perhaps you could circulate to us a copy of that report as we deliberate ourselves on the issues that you have raised. And it is also unfortunate that perhaps before consulting us or before taking our observations, you have already made the decision to do those amendments and that now perhaps you want to share the blame, the fallout, (*Laughter*) with CKRC. It would have been much better if you had not made up that mind, but waited for the Commission also to give you their input. Thank you very much.

Hon. Paul Muite: We want to share the credit and the glory. (*Laughter*). Commissioner Githu, then Commissioner Kavetsa.

Com. Githu Muigai: Thank you very much, Mr. Chairman. I want to thank you for the opportunity to say something about the deliberations this afternoon. You are the second Committee that we are meeting in our short but rather eventful career as a Commission. When we first appeared before the Parliamentary Committee, the first one, we had very, very good discussions in which we developed the consensus that the political responsibility for the Review process is entirely in the hands of politicians and that is yourselves, and the technical responsibility is in our hands as a Commission. For our part we have tried to do the best we can, we have not always succeeded, we have had a lot of-- As you know better than most people, we have been criticized a lot for things we did, others we did not do, and so on and so forth.

Historically – and I believe I speak for my colleagues – part of the problem that attended this process very, very early on, is that the technical competence of the Commission has never been exploited. The Kenyan people - and to some extent Parliament - placed its faith in the single office of the Chairman. All the amendments that we now worry about and complain about were amendments that were effected without any deliberations by this Commission in any forum. We read of the amendments in the Press as many people did, but that is a historical problem. Mr. Chairman, we would agree with you – at least I would in my personal capacity – that Section 47 creates a mine field, a terrible mine field. My opinion in this matter has not changed over

the last eleven years, the first time I wrote about it was in 1990. For my part, I have no doubt that the amendment that converted Kenya into a Single Party State was unconstitutional and untenable, because it could not be done within the logic of Section 47. Indeed, the amendment that converted Kenya from the Dominion into the Republic in 1964 was unconstitutional to the extent that it created a presidency that was not elected by anybody, but was voted into office by the stroke of the amendment.

So, this, Mr. Chairman, for my part, I would be among those who would say, a genuine problem exists for any honest legal and political opinion on this question. The problem as I see it is precisely as my former Chairman, Dr. Godana, has said.

In my very humble view, we have two ways to go about this. It is to say to ourselves, we are the leadership of this country, if a problem is visibly in front of us, we must address it no matter the consequences. Now, we can address it today or we can wait for the piecemeal problem to present itself and address it in a piecemeal version. Unfortunately that decision is not on this side, it is on that side. When we should do what should be done, is your responsibility.

I think I would speak for my colleagues in saying that on the technical question of what should be done to Section 47 – if you agree something should be done – and what should be done to Section 27 and 28, we would be more than happy to provide an input. I am particularly heartened by the assurance of the Honourable Minister, that the Government remains committed to a Constitution within the time frame that we have suggested. We on this side would have therefore very little reason to take issue with an argument that says, “let us fine tune the law to clear any impediment from the way.”

My own personal suggestion respecting the opinion of my Chairman would be that, because we are the leadership of this country and because we must take responsibility, we should set up a technical team. I do not want to anticipate what the technical team would come up with, but I would propose a joint technical team of the PSC and the CKRC, and we would leave them to advise us jointly what it is they are able to agree upon that can be sold to a bigger audience. Thank you, I am sorry I took long.

Hon. Paul Muite: Thanks. Commissioner Adagala, did you want to--

Com. Kavetsa Adagala: Yes, very briefly. I sit here and I worry, because supposing the process ended a year ago or within one hundred days of the new Government, I am frightened of what would have happened because now we are talking about this in a very analytical way as if these things did not exist before. For us, actually we are not mesmerized, we have discussed this issue so many times, as Commissioner Githu said. So, it is kind of interesting to hear this new discussion of it, and it is insightful. But I sit and I shudder, probably not as a Commissioner but as a grandmother, what would have happened to this country?

Secondly, I thought that PSC has oversight of the process, and I think, well, not that I think, it is so and I would have thought that these things even last year, even the year before, would have been discussed, even at the time of changing referendum. But then that is so much water under the bridge.

The second thing I just want to say, at the end of the discussion we have said that CKRC can join PSC and we work out-- The last time we did that and Commissioner Salim, Honourable Uhuru, His Excellency the Vice President and – there is someone else there – Honourable Muite sat there and we really said-- It was suggested anyway that we should announce this together, we did, and then it was said, CKRC should put it in the Press, and our very eager Secretary did it very promptly and then everybody drew away and all the flak fell on CKRC. As usual, we have become used to this, so we did not really-- It was another day, you know, so we went from November 17th and to December something and to January 12th and we took it all. This is another entrapment. We will take it as that but we want you to know, it is an entrapment you are putting us in.

Lastly, I would just like to ask that I have been asked several times and maybe others have also been asked, “if there is consensus building, why is it that it is not the PSC which is doing it?” Thank you very much.

Com. Idha Salim: With your permission, Mr. Chairman, Commissioner Kangu would like to come in now.

Com. Mutakha Kangu: Mr. Chairman, I want to abide by what our Chair has said, but I would just make one comment. There may or may not be a legal problem, but in my mind the biggest problem in this country is political. It is not legal, it is political, based on mistrust that has crept into the Kenyans, encouraged by politicians. So, the solution to this problem should first start at building trust at the political level. If the leaders can build trust among themselves and send messages to their people, then these legal, or what appears to be legal problems, can be very easily solved. Thank you very much.

Hon. Paul Muite: Honourable Khamisi.

Com. Idha Salim: Mr. Chairman, we had not quite finished, unless you want us procedurally--

Hon. Paul Muite: No, no, no.

Com. Idha Salim: We just talk from all round the table? We have another Commissioner or two who would like to come in.

Com. Charles Maranga: Yeah, I just have something small.

(Consultations on the floor).

Com. Idha Salim: Mr. Chairman, with your permission, can Commissioner Maranga come in now? With due apologies to Honourable Joe Khamisi.

Com. Charles Maranga: Mr. Chairman, mine is maybe a point that you know very well we are at a very critical stage at the Bomas and it is important that we have a time frame to whatever we are proposing to be done. I think that is important, because then we do not want to send out any signals which are confusing. That is all I wanted to say, thank you.

Hon. Paul Muite: Anyone else on your side, Mr. Chairman? Okay, *Mheshimiwa* Khamisi.

Hon. Joe Khamisi: Thank you, Mr. Chairman. I think a very significant point has been made here by one of the Commissioners, that this is a very political problem that we have and, as he correctly said, I think this political problem has been created as a result of mistrust between politicians. But having sat here for these few minutes, I see that this mistrust appears to have permeated even within this hall and the PSC is now accused again of attempting to entrap the CKRC. I think this is a very serious matter, Mr. Chairman, but I think it is a factual matter.

Now, having said that, I would like to just say that I have no problem personally with the decision that was made by the Committee of ten lawyers that produced the report that eventually made its way to the *Kamukunji*. However, listening to the Minister for Constitutional Affairs, he made it very clear that we are here today to try to decide on areas to be amended on those sections that are in contention and I think we have wasted quite a bit of time actually discussing this issue and I am wondering when we are going to embark on this duty of trying to amend these areas and, two, who is responsible for that amendment? Is it a combined committee of PSC and CKRC or is it the job of the PSC to spearhead the amendment? I think we would like to have that cleared so that we know exactly where we stand.

Finally, on the appointment of the additional nine members, I would just want to clarify that several of our members who were supposed to be in this Committee did not receive their letters. Now, I am wondering whether this was an oversight because I checked with at least two of our members and by this afternoon they had not received their invitations to this meeting. So, I just wanted that to go on record, Mr. Chairman.

Hon. Paul Muite: Honourable Wetangula, then Honourable G.G. Kariuki and the Honourable Kivutha Kibwana. If we can sort of bring it towards an end.

Hon. Moses Wetangula: Mr. Chairman, thank you very much.

Hon. G.G. Kariuki: Mr. Chairman, I think mine is like a Point of Order or Point of Procedure, I do not know what it is. But we had a very good proposal from Commissioner Githu that we embark on selecting a committee of technicians who would go

and look into these problems and come back here with recommendations. I think we should be talking about that, that could be a way forward instead of repeating how politicians mistrust each other. That is normal in politics, it is not a surprise. (*Laughter*). In any game of power, and that is what we are doing even now, we are mistrusting one another; the Commission is mistrusting us, we are mistrusting some of the Commissioners, because it is a game of power and that in politics is a virtue also.

Hon. Moses Wetangula: Thank you, Mr. Chairman. Mr. Chairman, if you realize when I walked in I was late and when I walked into this hall, I was shocked to see Commissioners here because I am in a Committee called Consensus Building Committee, which is sitting in the school of KCB. Mr. Chairman, the Chairman of this group is there, Professor Ghai, and when I said I was leaving to come to this meeting, he told me that there is no meeting, the Commissioners are not going there. I was surprised to see them here and now I understand where the problem lies.

Mr. Chairman, to cut a long story short, I think the most important thing is that we must deliver a Constitution to this country and the circus that has been sometimes rearing its head in the process is not very encouraging. I can give you an example. Yesterday we spent five hours trying to agree on the structure of Government. Today the Chairman of the Commission walks in, demands an opportunity to speak and tells off everybody and tells us we have no right to mutilate his work and tells us that we are trying to cause confusion, yet he has set up a Committee to build consensus. What I suggest, Mr. Chairman, is, I think we should focus on what we ought to do, ignore his sideshows, respond to what Githu Muigai has suggested, form a joint Technical Committee and I would suggest that the Attorney General being a member of this Committee can be the Convenor of such a committee. We can sit even throughout the weekend because we are only talking of three Sections, two in the Act and one in the Constitution. This Committee can meet again on Monday, we can report back progress in readiness for reporting to the *Kamukunji* on Tuesday. Because time is not on our side, I believe it will be a shame if by June we go back to Kenyans and say, “sorry, the June deadline cannot be met, we give you another one”. Thank you, Mr. Chairman.

Hon. Paul Muite: Yeah, Honourable Kibwana and then Nancy.

Hon. Bonaya Godana: Point of Order.

Hon. Paul Muite: Yes, *Mheshimiwa* Godana.

Hon. Bonaya Godana: Mr. Chairman, I hear as if we are discussing a proposal. Frankly, I think it will be out of order. I think the Vice Chairman of the Commission on behalf of the Commission did say they need to withdraw, go and consult, and I think let us allow the Commissioners to leave and the rest of us perhaps stay behind for some minutes to see how we can correct what needs to be corrected. I am also a bit worried when I hear from the presentation by my good colleague, Honourable Wetangula, about the position of the Chairman in the Commission. I would want to believe that we are dealing with a Commission with a head. If they have a problem there, I do not think really as a Select Committee, at this stage we

should begin to deal with the Commission minus the head. I think we would be pulled into their own domestic matters, it is not proper. So, I suggest we do not discuss the proposal which is on the table. We can discuss the idea of the proposal as the Select Committee and the nine political party representatives, minus the Commissioners.

Hon. Paul Muite: Can we hear the views of Honourable Kivutha Kibwana, then Commissioner Nancy.

Hon. Kivutha Kibwana: Thank you, the Chair. I think having very carefully listened to this conversation, I want to revisit what Commissioner Githu and Honourable Moses Wetangula suggested, but also to acknowledge that the proposal by the Vice Chair of the Commission and the leader of the Commission to this meeting, also be recognized. That is to say the Commission on the basis of this discussion and on the basis of the report that they will get, the report of the Technical Committee as approved by the PSC on the Constitution, be given to them and we could ask the Commission, because we have a *Kamukunji* of Tuesday and as the Commission itself has stated, what is happening at Bomas is at an advanced stage, so, the faster-- I think Commissioner Maranga also talked about the time frame, so the sooner the Commission has the opportunity to discuss, and we could ask them perhaps to create time at the earliest convenience, but also we leave here with a knowledge that part of what the Commission could consider is for a group, a joint Technical Committee to be composed of the ten members of this Sub-Committee and ten members from them and the Attorney General, as was suggested, to be the Convenor so that there is a group of twenty one, or five-five of both those two groups and the Attorney General. Because I think if we merely say, "let the Commission go and think" and so on, actually by postponing certain decisions I think we might eventually make the situation worse off than what it would be. So, my plea to the Commission would be yes, the Commission to discuss within its ranks, but also to go with this proposal from this group, all of us, that either we have ten from the Commission and ten – which was the Technical Committee – or if that is seen to be too much, five-five with the A.G. as the 21st or the 11th, and then we also give a time frame so that, as Wetangula suggested, by Monday, we actually meet again together and we are able to say that from the work of that group, after the Commission met, after that group met, we recommend whatever we recommend.

Having given that specific proposal, I think I needed also to say that in 1998, at least the amendments which came through to the 1997 review law, had a lot of participation although there were some groups which were still not satisfied. The 2000 and 2001 and 2002 as Githu said, there may not have been as much consultation from the Commission, the Commission was not asked to give a lot of input. So, I think the position here is, although the Technical Committee and the Select Committee made a decision, that decision had to be presented to Parliament for Parliament's approval, to the informal *Kamukunji* and Parliament in its wisdom also asked the Commission to be part of this process so that this is more of a corporate decision so that I do not think that the Commission will be a rubberstamp. I think this is a matter where perhaps we bite the bullet together for the good of Kenya because we are convinced that these legal bottlenecks must be removed so that the process is positive.

And finally, something that I have personally been saying, but I think I have not been able to convince a lot of people yet, what really ultimately is at stake is, *Wanjiku* was able to say her position vis-à-vis what should be in the Constitution of Kenya, and I

think what has been eluding us is how the elite itself arrives at a consensus so that that consensus joins with the consensus of *Wanjiku* to give Kenya a Constitution. So, this thing which is being called “mistrust” or “competition” by G.G. it is really how you get a site for the elite to make a consensus so that actually this Constitution is now the Constitution of *Wanjiku* and the Constitution of *wasomi* or whatever you call the elite. And I think it is not a light matter, because if you make a Constitution without the consensus of the elite, you will not get far, just as much as if *Wanjiku* does not agree to the Constitution. Thank you. But my main contribution was the specific proposal.

Com. Idha Salim: Chairman, I think at this point if you would allow me, I need to state one thing very, very clearly, that when Commissioner Githu Muigai suggested a joint Technical Committee, he sprang that on us as fellow Commissioners but I think to be fair to him, he did say that was his personal view, not the Commission view. The idea had not been broached at the Commission level so I think with all due respect to Githu, we would like to throw this idea aside and forget about it, but we would like as a Commission to meet to discuss the idea of a Joint Commission but not to commit ourselves to it today.

Secondly, on the issue of the Chairman, the Chairman was busy elsewhere and in accordance with well-known positions, the law says that the First Vice Chairperson will stand in for him and obviously he will be briefed on what took place at this meeting.

Hon. Paul Muite: I had recognized Commissioner Nancy Baraza and Commissioner Bishop Njoroge but can we hear from his Excellency the Vice President before Commissioners Nancy and Njoroge take the floor. Thank you.

His Excellency The Vice President, Hon. Moody Awori: Thank you, Chair. Mine is just an appeal, a plea. I do not think that Kenyans want competition between various groups. We have got the Parliamentary Select Committee, we have got the Commissioners, we have got Bomas of Kenya, we have got Parliament and we have got even not as Parliament but *Kamukunji*. My appeal is, shall now go back and be Kenyans and refuse to be tied in the little compartments so that whatever document we end up with a certain compartment will get the credit. I just want to appeal that let us go back to be Kenyans. I do not think a Constitution can be written to satisfy everybody, but in a society there must be order. Just consider for instance the very simple rule, like the traffic rules. If now we have traffic rules for people who drive slowly and another one for the *matatus* and another one for others, what kind of driving will it be? Somebody arrived at a traffic rule which says, no matter how busy or how urgent your trip is, if it says red, then you must stop and wait until it changes to green. I just want to appeal to us that let us go back from our compartments and become Kenyans again because it does not matter. We know that indeed, a Constitution has two sides, there is the legal aspect and above all it is a political document. This is the reason why in all wisdom of Kenyans, we did have highly respected, highly qualified people as Commissioners. It does not matter whether we all agree or not, it is important that we must reach a consensus and above all the most important thing, let us remove the personal agenda from this. Let us not write a Constitution thinking what it will do for me or for you. It does not matter whether it is the *Wanjiku* Constitution or whether it is an organized Constitution. It is just a Constitution, an instrument that will help us, not just us but

generations to come to have law and order, to give a service to people.

Finally, all my colleagues, in a country there can only be one leader. It does not matter whether you belong to the party that he is head of, he is the President of this country for everybody, for NARC, for KANU, for Civil Society, for the professionals and everybody. And we have to keep him credible. He has gone on record to say that we, and he did not confine himself to either the government or the party, he said we, all of us involved, will give Kenyans a Constitution by June. Why don't we allow him to be credible? Why don't we go back and be Kenyans? That is really my appeal to you. Thank you. (*Clapping*).

Hon. Paul Muite: I think that is a very nice summary and appeal by the Vice President. I would like to give the floor to Commissioner Nancy Baraza and Commissioner Bishop Njoroge and then we wind it up after that?

(Murmuring on the floor).

Hon. Paul Muite: By winding up I meant I summarize to see whether there is a consensus on the way forward and then we can all go home. Thank you.

Com. Nancy Baraza: Thank you, Mr. Chairman. I don't know if after the Vice President has spoken I need to but I think what I wanted to say, Mr. Chairman, has been captured by Dr. Githu Muigai, by our Vice Chairman and what Professor Kivutha Kibwana has said. We did not have much time to think about the agenda for today so I will go with what my vice-Chairperson has said that you give us a bit of time. We just want to say, as Dr. Muigai said, that these are problems that we all foresee at the Commission, it is not like we do not see them. So, given a bit of time we will go and consider the proposal that he has made and then we will come back to you. But these are problems that we all know, we grapple with at the Commission. We did come here this afternoon despite the short notice because we realize we are Kenyans, this is our country and we are leaders. We have led this country in various capacities. We are not going to abandon this country at this time. Thank you.

Hon. Paul Muite: Commissioner Bernard Njoroge.

Com. Bishop Bernard Njoroge: I do not think really I want to say much but I want to say that we are very happy that we are involved because when the 2002 Act was amended, we were not involved and this is a recognition that we have a role to play in this whole process and we have been in it for quite some time. I want also to add by saying, the First Vice is there by the authority of the Act when the Chairman is not there, so we are really constituted according to the Act now and the Chairman may have been busy elsewhere but I think this should be taken as a Commission duly constituted.

Hon. Paul Muite: I do apologize about the shortness of notice but I think in fairness to the PSC, I personally spoke with the

Clerk to the National Assembly wanting to confirm from him that the necessary notices had gone. Initially, this meeting had been scheduled for yesterday, Wednesday. When I spoke to him on Monday, the Clerk to the National Assembly informed me that the Secretary to the Commission had requested that the meeting be rescheduled from Wednesday, 10:00 am to Thursday at 3:00 O'clock. So, today's meeting was actually rescheduled to suit the Commission at the request of the Secretary. I do not think we need to go into too many details, let me just acknowledge on behalf of the PSC. But if indeed you received your invitation only today, then we certainly feel very happy that despite your extreme busy schedule, you found time to come.

Secondly, I hear what the Vice Chairman of the Commission is saying and I think it is a very fair position to take because it is unfair to ask you to make decisions on a matter where you have not had any time to in-house, digest and deliberate on, so that you can make a corporate decision. We hear that. On the other hand, there is the issue of time and as I said, at the moment one is not focusing on the precise nature of all the contents or the amendments which is where we would wish to have the involvement of CKRC. So, I wonder whether it is a reasonable way forward to suggest by way of conclusion, and we asked the Attorney General who is a member of the Committee of Lawyers that was mandated to look into this matters-- And incidentally just to digress a little, the Attorney General himself at the *Kamukunji* said that he belonged to the school of thought that says that Section 47 must be amended, needs to be amended. And he said he had given that advice consistently in the past but for one reason or the other his advice was never accepted. In fact it is in that context that he had published two Bills.

I was trying to find out whether it is a reasonable way forward to say that the Attorney General be the Convenor of that Committee of 10, look into the precise amendments that should be formulated and as soon as the CKRC itself is able to meet in-house as an institution and make decision, then if they agree to be involved, then he will widen the involvement to include representatives of the CKRC, so that if that is widened, at least there can be some amendments on the table that can form the subject of discussion because that would save time. I do not know whether that is a reasonable way forward.

Response: Yes.

Hon. G.G. Kariuki: Mr. Chairman, I think listening to what you have said and what was said from the other side, I think it is only fair to allow the Commission to go and have a meeting with their colleagues and report to us on Monday their feelings so that we can also talk to the *Kamukunji* on Tuesday. There is no need for another Technical Committee from our end. You are going to give them the Minutes of your Technical Committee. Based on that they are going to discuss and see what they can come with on Monday. Thank you.

Hon Paul Muite: I hear the mantra *tosha* so does that represent-- Is it convenient to the Commissioners to come back on Monday?

(Inaudible responses from the floor).

Hon. Paul Muite: Could we agree on the time?

(Inaudible responses from the floor).

Hon. Paul Muite: I am hearing 10:00 O'clock is a better time. Sorry?

(Inaudible responses from the floor).

Hon. Paul Muite: If we are going to the *Kamukunji* on Tuesday, then we need a bit of time.

Hon. Joseph Khamisi: Mr. Chairman, is it possible to postpone *Kamukunji* until-- so that we give ample time to the Commissioners to work out something.

Hon. Paul Muite: But I hear the Commissioners saying that Monday will be okay. 3:00 O'clock on Monday. Let us fix it for 3:00 O'clock on Monday, we meet again and then we can take a decision. I thank you very much. Now, what happens is that always when we have meetings like this, sometimes individuals go saying different things to the Press and they go writing things. What do you suggest that we tell Press officially?

Com. Idha Salim: We are just in dialogue but no decisions.

Hon. Paul Muite: Very good. Can we now ask the Secretariat of Parliament to ensure that the CKRC immediately today or first thing tomorrow morning, that they get a copy of the Minutes and the Report of the Sub-Committee and also a Report by the full Committee here. In other words the whole bundle of the documents so that they can see the way that the deliberations went.

Com. Idha Salim: The issue of the Press, it was not clear to us exactly what will happen. We would suggest that this should be described merely as some consultations on the way forward without any specifics or details.

Com. Riunga Raiji: Chair, just to ensure that the spirit and the speed that we desire is maintained, I would suggest that those documents be delivered to our First Vice Chair who is today's Chair of the Commission, Professor Salim, by Parliamentary staff tomorrow morning; be personally addressed to Professor Salim.

(Inaudible discussions from the floor).

Hon. Paul Muite: We can actually improve on that and say that it will be brought by courier to the Bomas of Kenya and handed over to the Vice Chairman. To all the Press, this was a consultative meeting on the way forward and we will be having another meeting on Monday at 3:00 O'clock.

Com. Idha Salim: Mr. Chairman, I suggest the documents be sent to the Secretary--

Commissioners: No, no!

Com. Idha Salim: But we will be checking with him.

Commissioners: No, no!

Com. Idha Salim: There is a procedure we follow, we-- (*Uproar*). I think we have to follow the proper procedure. We have a Chairman, Mr. Chairman, and a Secretary. Any documents should go through the Chair, but of course we will be knowing about it and we will be checking with him and we will be having, hopefully, a full Commission meeting to discuss the documents.

Hon. Paul Muite: Again we like compromises in order to move forward. Can we take the official bundle to the Secretary of the Commission and give an unofficial bundle to the Vice Chairman?

(Inaudible responses from the floor).

Hon. Paul Muite: Are you happy with that?

Responses: Yes.

Hon. Paul Muite: If you are happy with that why are we unhappy? I do not think we need to over-discuss that issue. The important thing is for you to get the document. Okay.

The meeting adjourned at 5:25 pm.

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