

**CONSTITUTION OF KENYA REVIEW COMMISSION  
(CKRC)**

**NATIONAL CONSTITUTIONAL CONFERENCE  
(NCC)**

**VERBATIM REPORT OF**

**PLENARY PROCEEDINGS, HELD AT  
BOMAS OF KENYA**

**ON**

**15<sup>th</sup> September, 2003.**

**VERBATIM REPORT OF PLENARY PROCEEDINGS HELD AT BOMA OF  
KENYA, ON 15<sup>TH</sup> SEPTEMBER, 2003**

The meeting commenced at 9:50 am with Prof. Yash Pal Ghai in Chair.

**Prof. Yash Pal Ghai:** Good morning Delegates. Could I please ask you to take your seats? The prayer this morning will be said by Reverend Macharia Muchunga Sheikh Ali Shee and Orié Rogo Manduli in that order so could I please first ask Reverend Macharia to lead us in prayers and can I request you all please to stand up.

**Hon. Delegate Rev. Macharia Muchunga:** Let us pray. Our Father and our God, we come before you and bow our heads because you are our God and we have no other God to go to. We come to you under all circumstances. We are happy even when we are sad. When there are calamities and even when we have no calamities. We come to you God because you are the giver of life. You are our sustainer. When we leave everyday, every hour because you have allowed us to live. We want to thank you even at this moment for the way you have continued to sustain us. We want to thank you for this land. We want to thank you for giving us each of us to leave together as brothers, and to glorify you on this earth. Sometimes we don't do it. Sometimes God we let you down. Forgive us and in particular this morning I ask you Lord to look at our nation. And if there is a national sin, I ask you to forgive because we cannot proceed God unless you forgive us and cleanse us so that we are fit to walk with you in the future. Come Father come among us. It is at this time that we need you most. It is also at this time of crisis that we are called upon as leaders, to stand as leaders and give our people hope. Help us to do that for we pray in Jesus name. Amen.

**Hon. Delegate Orié-Rogo Manduli:** Thank you Lord. For another week in deliberation of a very important function for this nation. Thank you Lord for all the wonderful Delegates that you put together to help complete a job that all the eyes of Kenyans and indeed, the eyes of the world are focused on. It is a noble job dear Lord. It is a job of putting our nation in order for us today, for those coming tomorrow and those who will come years after we have all gone and no more. We thank you Lord for the fellowship that we enjoy here as Delegates and the responsibility that you put on our backs. It is a great responsibility dear Lord because we are not here as individuals. We come here speaking on behalf of your great people, the people of Kenya

in all their corners, in all their chores, in all their aspirations, in all their hopes and their hope is focused clearly and definitely on the deliberations and the results that we hope to give them dear Lord before Christmas. Dear Lord we want to put in your very tender hands our fallen brother Dr. Odhiambo Mbai. Dr. Odhiambo Mbai was an epitome of a good Delegate. He was gentle, so knowledgeable. The man was a fountain of wisdom and a fountain of knowledge and the man was so modest. Looking at Odhiambo Mbai before you know him you wouldn't believe that he has an idea, he has any idea why he is here. If he opens his mouth and you ask yourself, where have they been hiding this man in Kenya all these years? Why hasn't this man been given a bigger role to play, a bigger voice to speak. But at this Conference, our brother Odhiambo Mbai in a gentle, (inaudible) beautiful manner spoke in a manner that will be heard. His wisdom will sound in this country for generations to come. We want you dear Lord to give us the energy and the strength and the faith to carry on where Dr. Odhiambo Mbai has left and we want you to give us the courage not to fear, nor to curl up, not to go backwards but to go forward and complete, particularly now that we have him to complete for along with all the noble Kenyans that have brought us here. And I know that each Delegate here, each man, each woman is resolved and stronger than ever now and is ready to sacrifice what it takes to see that the people of Kenya have a new dispensation. We thank you for the leadership we have, our Chairman who played a great role yesterday at the hospital, he was there he was concerned, he did everything possible as a leader of this delegation here, as a head of what is going on here. Everything was done for our dear brother but it was not possible to keep him with us. In your hands we know he is safe but we also need you to make sure that we are safe here to complete the job. We pray for the leadership of this country, of this nation and we thank you for the leadership. We also pray for the rain we thank you for the rain that you have brought and we want you to know that we believe that it is only with you and through you that what we are set here to achieve will be achievable. Thank you very much and we pray and ask all this in the name of your precious Son who also shed his blood like Odhiambo Mbai shed his blood yesterday, Jesus Christ the Lord. Amen.

**Hon. Delegate Sheikh Ali Shee:** Bismilahi Rahmani Rahim. Kwa jina la Mola Muumbaji wa mbingu na ardhi na viumbe vyote. Tumesimama mbele Yako eh Mola tukiwa wanyonge, tukiwa na huzuni. Ee Mola tupe nguvu, tupe subira, tupe hekima, tupe uwezo wa kuvumilia kupambana na maovu yote ambayo yanatokea, maovu ambayo yanasukumwa na maongozi ya kishetani. Ee Mola sisi hatuna nguvu, nguvu zetu zinategemea uwezo Wako na nguvu Zako na kuungwa

mkono nawe. Ee Mola tupe uwezo wa aina hiyo ili tuweze kufanya kazi ngumu ambayo tumekuwa nayo, kazi ya kutengeza muongozo, Katiba ambayo itaongoza nchi hii. Ni jambo la kusikitisha ee Mola wetu kuona (inaudible) wengine wameingizwa na fikira za shetani. Zimeanza kuwatawala na kuleta mvurugano, kuleta fitina na mvutano kwenye mkutano kama huu. Mola tunakuomba utupe nguvu tuweze kuondoa hila kama hizi, kusimama pamoja na kujenga pamoja. Ee Mola bariki nchi hii, uwabariki wananchi wetu na uwape nguvu familia ya marehemu Mbai ametuaga, ambaye tumekuwa naye katika wiki hii iliopita. Ee Mola tubariki na utupe nguvu zako. Amina.

**Prof. Yash Pal Ghai:** We will have the National Anthem now, after that we will observe a Minute of silence ...

**(National Anthem)**

**Prof. Yash Pal Ghai:** We observe a Minute of silence now. Thank you. Could you please take your seat if you are standing. Honorable Delegates yet once again we gather together on a sad occasion this time it is the assassination of one of our most distinguished Delegates, Dr. Odhiambo Mbai, who as you know was Chairing the Committee on Devolution. I had not met Dr. Mbai before this Conference began and I got to know him a little bit during this period, I was very impressed by his gentleness, by his sharp intellect and by his commitment to the process. He and I did not always agree on some aspects of the Devolution debate but I was always impressed by the clarity of his mind, his willingness to listen to my arguments and to dedicate himself completely to that Committee as an impartial Chairperson. The Rapporteurs tell me that he conducted the proceedings with great impartiality. He encouraged Delegates to reach consensus and in a very short time on very complex subject that Committee made remarkable progress. That is the kind of model of decision making that we wanted in this Conference where we exchanged views vigorously, we listen to others and we try to reach a consensus. His loss is grievous to this Conference, to the University of Nairobi where he was the head of the department of Political Science and to the country. I had the occasion last week to address this (inaudible) when I referred to allegations of bribery and intimidation, attempts to subvert if not derail the process through these tactics. I then made a plea that we all re-dedicate ourselves to the sacred task that we have been called on to perform in this assembly. I had pleaded with those who were engaging in this tactics to desist and let the Delegates who were clearly committed to the completion of this process to carry on with the task. I had not at that time foreseen that we

would have one of our Delegates killed. I do not know the motives, I do not know who killed him. But it is true that one of, through an act of violence, one of our Delegates has been removed from us. There is supreme irony in this because the Constitution is a system of rules for an orderly society where we respect difference, where we tolerate diversity indeed we cherish diversity and where people are free to engage in public affairs, with the protection of the Government and of society.

A death like this is a negation of all that a Constitution stands for. And here we have assembled and have been working for months to give ourselves and our children a Constitution that will protect the fundamental values of society. So I am lost for words to express my sorrow, my disappointment and my anger. I think we have to re-dedicate ourselves and if there are Delegates among us who have no wish to be part of this noble exercise, I would ask them to resign and leave us to carry on with our task.

**(clapping)**

In my work in many countries on the Constitution, there is one lesson that I learned that if the Government of the day is not interested in reforms, it is exceedingly hard to bring about reforms.

**(clapping)**

I am not suggesting that the Government is not interested in reforms but I do know that some senior officials have put obstacles in our way. I myself have begun to be dis-credited by this people, there is a campaign against me to de-legitimize this august body and personally I think we have to stand steadfast in our resolve not to be intimidated and to carry on with our responsibilities.

**(clapping)**

At the Steering Committee this morning, we resolved how we should conduct our proceedings today. And it was agreed unanimously that we all need to meet together as we are meeting now, and to express our sorrow and to express our condemnation of this cowardly act and to re-affirm our commitment to the process to re-confirm confidence in this assembly to complete the task at hand.

**(clapping)**

The Steering Committee also agreed that we would have a formal Motion which will be introduced by the Honorable Shikuku, one of our wise elderly members and I therefore now invite him to introduce that Motion. Honorable Shikuku.

**Hon. Delegate Martin Shikuku:** Thank you very much Mr. Chairman for giving me this opportunity to debate or to move a Motion for debate on this very sad day when we have lost our colleague and on top of it a Convenor of a very important Committee of this Conference. Mr. Chairman, I do not know whether I shall be able to move this Motion in a manner I thought I should because I am a very sad man. Sad because this process started 40 years ago and we are just about to conclude it, then we have this mis-fortune. Mr. Chairman, the aim of moving this Motion as the aims are three:-

1. By the end of this Motion, the Honorable Delegates in this Conference shall make up their mind whether to run away from this Conference or to stay on until they conclude the business they were sent to do here.
2. We want to make it known to those who are engaged in this diabolic maneuvers to scuttle this Conference that we have laid our hands upon the plough, and we shall not look back, that they should know.

**(Clapping)**

3. In the course of this debate, we are going to keep out emotions. We want to debate the matter and give it seriousness, without emotions but let us make it very clear for those engaged in this diabolic exercise that we are not afraid. Personally I am not afraid of death, so are you I guess. **(clapping)** Those who are engaged in this diabolic business must know some of them we know them, so what there was because some of them when things get hot, they take off. But some of us never take off. We never took off during the colonial days, we never took off during Kenyatta's regime, we never took off now during recent regime of Moi and we have no intention of taking off during Kibaki's regime.

Having said that I want now to give you the symptoms of what has now accumulated into the loss of our own brother here. This gentleman Mr. Speaker I had not known him before as you said

but during the course of this time we have been at this Conference, I managed to learn who he was. He was a gentleman, he was a man committed to this course and I regret he has left before he completed this course so, he wants us who are left behind to ensure that this course goes through. **(clapping)**

Mr. Chairman, the symptoms are as follows. There was this attempt of bribery in the past what we call Bomas. This time it was even intensified. Mr. Chairman I want to remind all those who carry out their debates outside this Conference, they have the freedom to do so, but let not them mislead the masses in this nation. And we call upon the masses in this nation to become, let their peace, let them maintain peace in this nation. In the meantime, the investigation will be carried out as to who was behind this heneous exercise. We want peace, wananchi of Kenya I appeal to you this debate is not to arouse to call upon wananchi to bring dis-order. No, we want there to be order Mr. Chairman, and peace and calmness. And we leaders here we are now going to show we are capable of leading this nation.

**(clapping)**

The symptoms Mr. Speaker, why are we here? We are here because wananchi were asked to give their views as to what they want as far as the Constitution of the Republic of this country is concerned. Mr. Chairman, the Constitution for the Kenya Review Commission (CKRC) went round the country, evidence was taken. Every constituency, evidence was taken. Political parties gave their stand. And the other day we were briefed by Mr. Oyugi, Prof. Oyugi who gave us what KANU said, though their memorandum was not dated. What DP said, what NARC said. What Kenya Peoples Party said and in all these a part from Kenya Peoples Party, it was clearly stated, wananchi wanted the powers of the President to be reduced and they should have Prime Minister. **(clapping)** And they should have a Prime Minister. Mr. Chairman, I challenge those who are misleading the nation to tell us when were they talking of the Executive Prime Minister. This is one of the things to scuttle this Conference and they don't want to rig, they are busy for other things. Let them rig and they will find wananchi have spoken and our job is to make sure we translate what the people spoke into a Constitution.

**(clapping)**

Today we are now seeing Mr. Chairman yes there is freedom of speech but I thought I raised some time back, I said, since you have been sworn as Honorable Delegates here, let us confine our views in this house but we were told, we need a bit of democracy, people to say anything they want outside. We are not going to encroach on their freedom, I agree. But today there are people holding meetings asking wananchi why they want a Prime Minister, Executive or otherwise. The wananchi gave their views, the views were written down, they have been compiled into the report now before us. Why are they going out again? Did you tell them to go out again?

**(clapping)**

This is a part of scuttling of this Conference and we want to tell them here and now, some of them are escapees. If they don't cherish this nation and things get out of control and I hope they will not, they will run again and come back again when things have cooled.

**(clapping)**

Mr. Chairman, these people are good at inciting but we are not going to fall prey to their temptation, but only to warn them, we will not move but they will move. This time we will not allow them to come back again. Mr. Chairman that is one of the moves to scuttle this Conference. The other day, and I thank the Honorable Delegates you saw beyond the plans that were at foot. There was almost scuttling of this Conference but the Delegates saw beyond it. You adjourned this Conference for ten Minutes and you came back after that commotion which took place here and I don't want to mention it, you know it. We came back and we continued our business, that went. The other day again Mr. Chairman which you also said from the Chair about this bribery and money been handed out to Delegates to scuttle this Conference. And even some of them big men were engaged in asking the Delegates not to attend until they are paid the fifteen thousand shillings. The big men inciting Delegates not to attend. I am glad the Delegates saw beyond that again and I wish to congratulate that man, I don't see him, his name...

**Interjection:** Yialle

**Hon. Delegate Martin Shikuku:** Yialle, thank you, who took and I don't know if Mr. Chairman if he had your permission, he went and got hold of the microphone and asked those



who assemble here waiting for fifteen thousand told them you are being misled, let us go to the committees and they went. That did not scuttle the Conference, we continued. There have been Motions in various Committees where some people are now giving their ideas not based on what the wananchi said. They are now bringing their own new ideas not based on what wananchi said and some of the Delegates have even said Mr. Chairman that those wananchi don't know, they are ignorant. You are here to make sense out of what they said. I remember I told one of them, if you underrate the intelligence of your electors, you are treading on a very dangerous ground and you are likely not to see that house until Jesus comes back. Mr. Chairman, today because all those other things, public meetings, what, what, what, the bribery and now this, did not work, they have gone further to get rid of one of us. This is something we are not going to take lying down, no. And we must debate this Motion without emotion and tell them, we are ready all to die and let them know if they are capable of killing, they can also be killed. **(clapping)** Oh no, I am not inciting the Conference but one thing I know, I come from the Luyha community. We don't believe in killing leaders even amongst the Luhyas, you don't kill a leader. This was a leader, you don't kill a leader and when you do we normally don't kill that person you have commissioned to kill the leader. We give him food, a place to sleep and God knows what, we calmly wait and look for who sent him, and we look from the other side a person of the stature of the one who has died and that one is also taken away by us, not to involve small people, no, we take another one on the other side. That is why it is called *Mundu khu Mundu*. **(clapping)**

Mr. Speaker, that is more economic Mr. Chairman because if we go on killing small people who don't know what is happening, then we are wrong. *Mundu khu Mundu* (one, one). Then we wait again until they stop. **(clapping)** So let them know one by one not involve all. Therefore Mr. Chairman, I would like to not pretend that this conference can turn itself into an investigation Committee. The Government owes us that duty of finding out who did what he did to our colleague. That is the job for the Government, the NARC Government to find out because we cannot turn ourselves into what we call the investigation Committee. I end by saying this Mr. Speaker, no attempt of whatever style will scuttle this Conference and I appeal to all those brothers of mine who are engaged in going round the country as if they are looking for second opinion from the wananchi to stop because those are the enemies of this Conference. Thank you Mr. Chairman and Mr. Chairman are the Delegate Number 582 with the name of Njuguna Kungu, I want to ask him to second the Motion and I would like Mr. Chairman if it is possible...Mr. Speaker you are asking me to read the Motion. Mr. Speaker what I read or what I

said in the Steering Committee and now here, this is a matter that requires no notice of Motion but my Motion in synopsis is that this Conference conveys its deep sorrow to the family of the late Dr. Mbai. Secondly that we resolve, we condemn this cowardly action against our own brother and that we shall continue from where he left and under no circumstances shall we run away from the duty given to us by wananchi. Thank you Mr. Chairman.

**(clapping)**

**Prof. Yash Pal Ghai:** Could I ask Delegate 582 to speak now please.

**Hon. Delegate Njuguna Kungu:** Thank you Mr. Chairman. My name is Njuguna Kungu. Mr. Chairman, I stand to support the Motion as moved by the previous speaker that this Conference continues to condemn the heinous act of murdering, the cold blooded murder of Dr. Mbai and that we shall continue with the deliberations of this Conference. Mr. Chairman, this is a very sad day for this Conference. It is also a very sad day for our nation. If I remember rightly Mr. Chairman in the last Conference, Bomas I, Dr. Mbai, in his contribution to the Chapter which he now convenes, caused the re-visiting of the Chapter by the Commission and a task force was created to re-cast the Chapter in the Draft Bill. It is a great loss to us because this is a voice of reason which guided us in Bomas I and which was contributing in directing us in various capacities. I remember that I happened to have met Dr. Mbai last week on Thursday and he told me Kung'u, there are forces in this place trying to scuttle in this process. We must meet more often and consult and make sure that we deliver to the people of Kenya what they wanted and what they asked when they sent us here at the Conference'. Dr. Mbai asked me to meet him more often and consult. I read it Mr. Chairman, that he was telling me to address the Conference that it was his wish that the Delegates in this Conference should meet more often, consult and make sure that this process continues as it was intended by the people of this country.

Mr. Chairman, this process is unstoppable and for those who are against it, let them be told that there are many Mbais in this Conference who are willing to die to make sure that the process of Constitution making is successfully completed. The process has cost a lot of life to the people of Kenya and it has taken a long time and those who think they will derail the process, they are on a collision course against the people of this country. They are on the collision course against those who sent them here. Mr. Chairman, I want to echo your view that the process of Constitution making, if the Government of the day is not supporting it, it is very difficult to advance it. Can

we have the assurance Mr. Chairman, because it is not enough for the Ministers to make statements and say, 'we are committed' and yet out there, they are sabotaging the very process.

Those who assassinated Dr. Mbai, and we have every reason to say it is assassination because the circumstances lead to that because nothing was taken from his place, I wish to be corrected on that but those who took away the life of Dr. Mbai, let them be told that this Conference and the Nation is determined and resolved to finish it's work. To conclude Mr. Chairman, I would want to appeal to those members who are also Delegates in this Conference not to take the agenda of Constitution making outside this Conference. Let us have it done it here and finish in the proper manner instead of seeking second opinion. With those few words Mr. Chairman, I beg to second. Thank you.

**Prof. Yash Pal Ghai:** I don't want to read out the entire Motion and there were three basic points which, one that; we convey our deep sympathy to the family of Dr. Mbai, that we condemn this cowardly act and that we reaffirm our commitment to complete this task and not run away from our responsibilities. Honourable Delegate number 424.

**Hon. Delegate Thomas Nyabote Aburi:** Thank you, Mr. Chairman. My name is Thomas Nyabote Aburi, Delegate number 424 representing Kisii Central and Nyanza Province Provincial Coordinator to this Conference. Mr. Chairman, I stand here with a lot of sorrow and sadness to mourn my captain, who was steering a ship heavily loaded with cargo on a wavy shark invested sea that has taken years but the service crew will make sure that the ship docks safely. When Jesus Christ was on this earth, the Jews and the Pharisees connived with one of his Apostles Judas Iscariot to take his life. In his wisdom, Judas said the price of taking the Son of God was 32 silver pieces. The Pharisees knew that by the absence of Jesus Christ, then the gospel could not spread and that could be the end of Christianity. Little did they know that the blood of Jesus Christ could strengthen the 11 Apostles excluding Judas who hanged himself when he realized what the shameful act had caused unto the most innocent of the Son of God. This is Dr. Odhiambo Mbai.

Those of us who knew him very briefly, you could meet him and not know for sure that he was such a learned and full of wisdom the way he was as he exhibited in this Conference. Those of us from Nyanza, we are the bereaved family and we shall not mourn openly to show how bereaved

we are but we shall be mourning heavily in darkness to show shadows of Satan how strong we are. Those are the Delegates of this Conference. We are not going to be intimidated and dictated by those who claim to be in the know, to make us run away from this place.

The process of Constitution making is indeed political and for any meaningful political gain, there must be bruises and one bruise that has been given to us is the innocent killing of Dr. Odhiambo Mbai. I stand here to assure all Kenyans that we as delegates and I believe were elected on goodwill will stand by me to condemn the strongest terms, the shameful killing and shedding of innocent blood. What man worth his salt or manhood will actually kill an innocent man? I solely support the Motion and condemn the heinous killing of my brother Dr. Odhiambo Mbai. Thank you, Mr. Chairman.

**Prof. Yash Pal Ghai:** I call on Delegate number 320 now, please.

**Hon. Delegate Kiriro Wa Ngugi:** Thank you very much Mr. Chairman. My name is Kiriro wa Ngugi, District Delegate from Kiambu. Over the course of last week, two people two people spoke to me and after I have made my comments, I would like Honourable Delegates to decide for themselves whether those two in the event of them talking to me are connected. The first person was Prof. Odhiambo Mbai and he was summoning me to his Committee and gave me details of where he wants me to cover. The reason being that my work on Devolution is indeed well-known to CKRC and during the second presentation by Commissioner Kangu, I had the honour of my name being mentioned. I would like to assure the Committee on Devolution that I shall perform the task that I promised Mbai and come and discuss as he requested. May his soul rest in peace.

The second person who spoke to me is a NARC Member of Parliament and out of the blue, he told me, 'Kiriro, you may not realize it. You need me as a friend because you are in serious trouble'. I am sending this message deliberately. I am mentioning it so that you decide whether are connected by my third comment. The real threat to the concentration of power in the presidency does not infact lie in the Prime Minister's debate. A view shared between me and the late Professor is that the real decongestion of the Presidential power will happen at the success of Devolution.

Fellow Delegates, is it therefore surprising that it is the Chair of Devolution that stands dead? And the shenanigans of political rallies are talking about Prime Minister, is this threat on me and my work is published on Devolution? Is the comment from this NARC Member of Parliament empty? I will come to that. You are going to hear both here and in the press. Let us not rush to condemn before we investigate. What I am going to say is that the very people who asked the question, 'Who killed Father Kaiser?' are the very people who rushed then, please hear me out, they are the very people who rushed out to point and now they are going to be persuading you not to point. *Waswahili husema, 'ukiona vyaelea vimeundwa'*.

My only regret over the last regime is that we did not speak out early enough and my message to the current NARC Government is that Kenyans have learned and this is indeed the message from this hall, that we shall speak out and very soon even though we are unhappy, we shall continue and they should take these comments in the positive light that we have a right to speak out as early as possible because if we don't, the signs have shown that we may be in for another quarter century of tyranny. Therefore, go in peace, Professor. We shall continue with this work and we shall not be intimidated. Thank you very much.

**Prof. Yash Pal Ghai:** Delegate number 185, please.

**Hon. Delegate Sasura Abdi Tari:** Mr. Chairman, I am Delegate number 185, honourable Abdi Sasura. Mr. Chairman, I stand on a point of order guided by regulations governing this Conference, Regulation number 32 (1) (g). Mr. Chairman, when we are debating the demise of a friend in a brutal and cold-blooded manner, we are by extension talking about our own lives. Mr. Chairman, we cannot just stand here, debate, close the debate and proceed on without substantively putting to a stop any suspicions in the air. Mr. Chairman, the previous honourable Delegate who has just spoken has raised an issue of concern to me and I believe to all the Delegates.

Prior to the death of Prof. Odhiambo Mbai, there has been allegations of corruption that have been cited by you – the Chair and the Delegates – and we have let it pass through the Press and it has disappeared like that. Now, that it has touched on our lives Mr. Chairman, I beg to move understanding orders number 32 (1) (g) that one; the previous Speaker names the person who has intimidated him and under the same rule which does not require me to give the Chair any notice,

I beg to move that that Delegate who has threatened the person who has passed away or the Speaker be suspended from this Conference until the end of the Conference.

**Prof. Yash Pal Ghai:** Honourable Delegate number 320, do you wish to respond to that?

**Hon. Delegate Kiriro Wa Ngugi:** Mr. Chairman, I will stand guided by your legal mind. If you should rule that I name the person I shall henceforth name him. Mr. Chairman, how do I proceed?

**Prof. Yash Pal Ghai:** Just give me a minute please. Please give me a minute; I will be able to make a ruling in a second. As far as I can tell from a quick read of the rules of procedure, no Delegate can be compelled to make any statement. So, the decision Mr. Kiriro is entirely up to you. If you wish to name the person, you are free to do so and the rules of our procedure protect speakers for the freedom of expression.

**Hon. Delegate Kiriro Wa Ngugi:** Thank you very much Mr. Chairman. This is the way I will proceed; I will become an official complainant to the Attorney General of this country and I will name that person in the statement that I shall deliver to the Attorney General. For purposes of investigation, it should proceed because I have heard at the Steering – I am a member of the Steering Committee – and upon allegations that there was bribery, corruption at the Bomas of Kenya, the Attorney General was of the legal view that we should deliver a complainant to him. I am thus becoming official complainant to the Attorney General and we will see what he does with that evidence. Thank you very much.

**Prof. Yash Pal Ghai:** Who is raising a point of order? Yes Delegate number 12. What is your point of order, please?

**Hon. Delegate Abdul Bahari Ali:** Mr. Chairman, my point of order is that---my name is honourable Abdul Bahari Ali, Member of Parliament for Isiolo south. Mr. Chairman, we are here to discuss a very important national issue and a matter that has touched on the security of one of our Delegates and a matter that is very critical in the history of this country. The Delegate who has just spoken and who has vital information is a very important Delegate. Mr. Chairman,

knowing the history of this country in relation to people who have important and vital information regarding issues of this nature, can we now be assured that the security of this Delegate is protected? Can we get an assurance from the Attorney General that security of this Delegate is protected to the end? Thank you, Mr. Chairman.

**Prof. Yash Pal Ghai:** Mr. Attorney General, Delegate number 575, you have the floor if you wish to comment.

**Hon. Delegate Amos Wako:** Thank you Chairman for giving me the floor. First of all, I want to express my own sadness and sorrow at the ghastly manner in which Prof. Mbai passed away. The violation of the right to life is the most serious violation of them all and the fact that he has passed away at this time even makes it more tragic.

First of all, I want to refer honourable Delegates to the third schedule of the Constitution of Kenya Review Act which states that the Government of the Republic of Kenya, the Organs of the Review of the Constitution, Political Parties, Non Governmental Organizations and indeed all Kenyans shall agree to avoid violence or threats of violence or other acts of provocation during the review process. In as much as Prof. Mbai has lost his life, other hands of people in this country; that is not only a serious crime but it goes to the roots of the principles for a democratic and secure process for the review of the Constitution which is enshrined in the third schedule to the Act. And I want to assure in line with the mover of this Motion that investigations must be completed. I want to assure Delegates that already the Commissioner of Police is under my instructions to investigate this matter expeditiously and comprehensively so that we can know who the perpetrators are as a matter of urgency because that is in the national interest.

Mr. Chairman, I also want to touch on the issue of bribery and corruption. These are issues that we have discussed in the Steering Committee and we have agreed on the process on which this should be done, again in accordance with the sixth principle under the third Schedule to respect the independence of the Commission and its Members and I am glad that the Welfare Committee is already seeing to the matter and once they report to the Steering Committee and it comes to me, that matter will be investigated.

Thirdly, on the complaint that has arisen this morning, as soon as I receive that complaint, I can assure you that it will be respected. I can assure the Delegates that the Government of Kenya is committed to ensuring that this process comes to a conclusion. Thank you.

**Prof. Yash Pal Ghai:** Thank you. I now call on Delegate number 015.

**Hon. Delegate Billow Kerrow:** Thank you, Mr. Chairman. My name is honourable Billow Kerrow, Delegate number 015. Mr. Chairman, first and foremost I also stand up to support the Motion by Honourable Shikuku and to express my sorrow and grief over the death of our colleague Dr. Odhiambo Mbai. Mr. Chairman, it is clear that those who killed Dr. Mbai have an aim which is to scuttle this process and this did not start last night or yesterday when Dr. Mbai was killed. Mr. Chairman, from the day this Conference started, we have seen passionate efforts by people both within and without the Government who are determined to make sure that this Conference did not go forward. Mr. Chairman, in the recent weeks, this has heightened concerns about our security. The security of all the Delegates and the people of this country because, if this Conference does not go on well and does not conclude its objectives, it's anybody's guess that there will be sections of the society who will feel aggrieved and who will not maintain the peace and law and order that we have had in this country.

Mr. Chairman, the threats are not only in the form of bribery which all of us who are in this country know that bribery is a crime. It does not require the Steering Committee to form Committees or to ask Welfare Committees and other people to carry out investigations into a crime. I have been on record and last week I insisted that all these threats of intimidation which have been made in the media by amongst other people Assistant Ministers or even Ministers of this Government be investigated speedily by the Government but that was not done. Today, we have our brother who has lost his life and the argument has been the same one that has been given by Honourable Amos Wako just a few minutes ago, that we must get a complainant.

Mr. Chairman, our brother is not with us to complain to the Attorney General that his life was threatened. We are now alive and we are telling you that our lives are at risk because there are people who are determined to make sure that this Conference does not succeed. Mr. Chairman, let me turn to the Government. The Government has a responsibility and we have said it rightly that if the Government in any country is not committed to a process, that process will never



forward and we have seen it before and what we are seeing now is a repeat of that process. Mr. Chairman, it is not enough for the Government Ministers or the President to keep telling us that they are committed when in fact they are falling over themselves to make sure that this process does not go forward.

Mr. Chairman, what we have seen is for example, today we have seen a Government that has turned its eyes or its back to those people who have been outlawed. Last night we saw police providing security over a rally which attended by a party that has been banned and outlawed – the Mungiki – and a member of this Delegation not only addressing the Mungiki but literally participating in their actions. Mr. Chairman, if that Government can convince us that it is going to provide security, how can we believe it when they are not able to take action against a crime being done openly by people who have been outlawed.

Mr. Chairman, a threat of assassination was announced last month by a member who is a Delegate of this Conference. None other than a Minister of the Government honourable Raila asked the police to record a statement from that Delegate. Mr. Chairman, the Government did not lift a finger and no statement was recorded and he went away with a vague threat that those of you who are pushing these things, if you push the President to the wall, the history of this country is that assassinations will take place but the Government did not act.

Mr. Chairman, there have been arguments by others in Government and we have been told that the cost of this process is too much, we cannot afford this and it is a waste of time. The same Government is spending billions paying petitioners and all kinds of things and they cannot raise a few hundred millions to run this Conference. Mr. Chairman, we are not satisfied and personally I am not satisfied that the Government of this country is committed to this process. Mr. Chairman, I will give one last example; when this Draft was prepared, it was based on the views of the people of Kenya. The same people of Kenya who elected Kibaki yesterday can decide today that we will have not only a Prime Minister but that Prime Minister will be executive and will take office tomorrow and I think that decision must be respected. Thank you very much.

**Prof. Yash Pal Ghai:** Thank you. Honourable Delegate 366 on this side, please.

**Hon. Delegate Caroline Ruto:** Thank you very much Chair. My name is Caroline Ruto, Delegate number 366. It is with great sadness that we have lost Prof. Mbai but I take this opportunity to remind the forces that are against the reviewing of the Constitution that you can stop an army but you cannot stop an idea whose time has come. The wind of change is blowing and the time for reviewing the Constitution is now. It does not matter how much you intimidate us but we shall have a new Constitution. For those who take their debates outside Bomas, we are challenging you and we believe you have the intellectual capacity to come and argue it out here in Bomas. We are daring you. Thank you very much.

**Prof. Yash Pal Ghai:** Delegate number 599, please.

**Hon. Delegate Leslie Mwachiro:** Thank you, Chairman. I am Leslie Betawa Mwachiro, Chairman of Chama Cha Majimbo and a member of the Devolution Coommittee. I want to begin by conveying my condolences to the family of my friend Dr. Odhiambo Mbai and to this Conference and to the Committee on Devolution, we are indeed very saddened. Probably, I might shed some light as to what caused the death of Prof. Mbai. Soon after we had passed the levels of Devolution, he started receiving threats that he is moving the Technical Committee in the wrong way. He was warned by Members of Government in that Committee and some individuals who felt their interests were threatened if Devolution was enacted the way Prof. Mbai was trying to trying to Chair us.

Some people were particularly not happy with the level of 'sub-national' and it was described in the Committee that people were trying to bring back regionalism or federalism, whereas we just want to go back to the Districts and do away with the level of sub-national which is actually nothing more than just regionalism. Somebody in there did not want it and he appeared to be an agent of other people and I am sure he went over to his masters and told them Prof. Mbai is trying to bring *majimbo* or regionalism back and so me must be gotten rid off.

On Friday, Prof. Mbai was a very disturbed person and he did not look himself at all. Although some people pushed him to the wall to review that decision whereby we had said we will have four levels and the second level will be sub-national but he stood his ground and we could see people moving around in groups trying to plan something and I am sure he was even warned as Honourable Kiriro said. He was warned in his face and asked, 'what are you doing here? You should allow us to review whatever voting we took the previous day'.

The other thing, Mr. Chairman is that we are allowing Mungiki to operate here and we are saying nothing about it. Mungiki was mentioned that it was going to be used to make sure that Devolution does not take place. Devolution is actually the only thing which can basically cure the problems of the Prime Minister and the President because what we are trying to do there is devolve power vertically downwards from the President to the regions but not just horizontally and this is actually not being acceptable to some people.

So, Mr. Chairman, I think we should give ourselves security. I raised it during Bomas I that the security of this Conference was actually non-existent and now we have seen with our own eyes. We have lost a very important member of this Conference. Now, we are being smeared with bad words by the Press that we only want money without taking into account that our lives and our blood is what we are actually giving to this nation to get a good Constitution. So, we need to be protected that the Chair or the Commission will ensure that we will come here and go home and even in our own homes we will need protection if need be 600 policemen is not a big thing. All Delegates who are here can be accorded security by one armed security man at our places where we go and that way we will get total security. Thank you Mr. Chairman.

**Prof. Yash Pal Ghai:** Thank you very much. I now invite Delegate number 045 to speak.

**Hon. Delegate Martha Karua:** Thank you Mr. Chairman. May I begin by correcting my number, although I am holding number 045, my number is 044, it is just that I forgot my flap and I am using my neighbour's. My name is Martha Karua. Mr. Chairman, I stand to join the rest of the Delegates in mourning Dr. Mbai. It is true that the Government has the responsibility of guaranteeing the security of all citizens and of investigating a matter like this. The citizens too have a responsibility. Those with information cannot afford to hold it without being accomplices. Let anybody with information of how this very serious matter has occurred, forward it to the investigating agencies. It is not enough to just make allegations. We need to get to the bottom of this matter. It is not just about the security of the Delegates; it is the security of each and every of the 30 million Kenyans and if one act of lawlessness is left to go on unpunished, it creates further lawlessness.

Mr. Chairman, let us not use this occasion to point fingers at each other especially in the manner we as Delegates have conducted this process. Let us re-examine ourselves and find whether our conduct as individuals and as Delegates have contributed to the difficult times we are in now. It is an act of corruption to falsely accuse other people. It is no less than an act of giving money which is unlawful and the recipient has also committed a crime. Let investigations be thorough and if there are people here who are available for sale equally together with those who are available to buy them, then they must leave this place and let the process continue untarnished.

Mr. Chairman, let people not use this unfortunate death of our brother to settle old scores with others and that is why I am advocating those with information, kindly forward it. It goes on to enhancing our security as Delegates and the security of all Kenyans, if we get to the bottom of this matter and we are saying, 'let us look at the responsibility, both of the Government and of us as citizens'. Mr. Chairman, we are national here and that is why we are here reviewing the Constitution. The Government is not just the Cabinet. The Government acts through technocrats who are your brothers, sisters, our sons and daughters. Just like Kenyans have given us as Delegates the job of making the Constitution for them. Let us look whether we have anything to do with the terrible things that are going on.

Mr. Chairman, an assassination or a murder is not only the preserve of the Government or those who are in power. It can also be organized by individuals and so let us wait for investigations and if someone has information that it is the Government, forward it. Mr. Chairman, it is this kind of behaviour that is a threat to the Review Process. I will speak without fear and say that anybody with information should give it. But if you encourage mob behaviour, then it cannot help and I am condemning those who do illegal things whether in Government or outside. I am not advocating for any lawlessness and I am not personally responsible for any criminal act. I am saying on behalf of myself as a member of the Government and having collective responsibility, you will not find murderers in this Government; you will find them elsewhere. Let investigations go on and those with information give it.

Finally Mr. Chairman, about the review process, it is time we knew that the Constitution Review Act provides on no issues on national importance. If nothing can pass without a 2/3rds majority and so we better therefore learn to speak to each other. These sideshows will not help at all. We

will have to reason together in order to give Kenyans a Constitution. I rest my case and I am saying I condemn the murder but I also condemn wild allegations.

**Prof. Yash Pal Ghai:** Honourable Delegate number 447 please.

**Hon. Delegate Kennedy Kiliku:** Thank you very much, Mr. Chairman. The behaviour, the movement and the utterances of the members of the NARC Government and especially Ministers has caused a lot of confusion in Kenyans. Mr. Chairman, one of the Delegates who is a Member of Parliament threatened you; threatened the Chairman of this Conference; and said you must leave while you should be in control. Are we going to take this debate outside? Personally, I am not convinced that the assurance from the Attorney General is genuine. We have witnessed killings in this country when he is the Attorney General. We have witnessed all kinds of killings and all the time we are told that no stone will be left unturned. How many stones has he turned? What moral authority can the Attorney General give this Conference the assurance? Up to now we don't know who killed Dr. Ouko and this yet another brother who has also gone.

We thought that with a new Government the assassination era had gone but it is now a new beginning but they should know that we are debating the views and the opinions of the Kenyans. Those enemies of democracy should know that we are not going to stop; we are unstoppable; and we are going to continue with this Conference and if we need a Prime Minister with all the Executive powers, we are going to have him because that is what the people said. It is a shame that the same people who were on top of their voices condemning the system last year, discussing and telling the people we want Presidential powers to be reduced are the same people now going to the same people saying "we don't want". What a shame; what a shame in this country? How are we going to have confidence in this Government?

Mr. Chairman, I support you that those who do not want this Conference must resign now. They should not be in here if they don't believe what we are going to have is for the Kenyans. Our brother who was a very diligent Kenyan, he is gone. Mr. Chairman, when he was given time to speak here and his five minutes got finished, we demanded for more time for him to speak because he was a voice of reason but they have killed him. Are you going to kill 600 hundred people everyday? That will take two years but the Constitution will have been complete. If you have planned to kill, continue but remember that your day is coming. Thank you very much.

**Prof. Yash Pal Ghai:** I call upon Delegate 124.

**Hon. Delegate Kiraitu Murungi:** My name is Kiraitu Murungi, Delegate No. 124. Mr. Chairman, I do not think that the Constitutional Review Process should also be intimidated by crowd. Mr. Chairman, I rise to support this Motion, this is indeed a very sad day for all of us and we want to condemn in the strongest possible terms, this heinous murder. Mr. Chairman, we have lost one of us and all those who knew Dr. Mbai, knew that he was a very committed Delegate and the Convenor of the Devolution Committee. Mr. Chairman, as the Government we are talking this matter very, very seriously ---(*uproar*) and we want to do very thorough investigations. Chairman, we want to establish the motives and identity of the killers of Dr. Mbai so that they can be arrested, prosecuted and punished, so that justice cannot only be done, but also seen to be done.

Mr. Chairman, the Government has already embarked on this intensive investigation and the Kenyans will soon be told the outcome of those investigations. Mr. Chairman Sir, I think it is very unfortunate if we as Delegates at this Conference politicize this crime, (*uproar*), so that we use it to serve our own functional interests. Mr. Chairman, as of now, I do not think that there is any Delegate here who knows who killed Dr. Mbai,---(*uproar*) we do not think there is any Delegate here who knows the actual motives for which Dr. Mbai was killed because these are the matters that we are investigating. If there is a Delegate with this information then that Delegate should give it to the Commissioner of Police. Mr. Chairman, it is very unfortunate to assume that Dr. Mbai was killed to scuttle this Conference (*uproar*). Those who have evidence that he was killed to scuttle the Conference, should report the matter to the Police. I plead with my brothers in the Conference to cool down and not to jump into hasty conclusions. We have stated as Government and no other than the Head of State himself has been here before you to say that this Government is committed to this process --- (*uproar*) and Mr. Chairman, the Government is doing everything possible to facilitate this Conference. The Government is providing resources for us to be here even this morning. So, Mr. Chairman, at least we should not assume that the Government is not interested, this is a promise we made, this is a promise we have to fulfill.

Mr. Chairman, we want to condemn in the strongest possible terms all political assassinations in this Country. And Mr. Chairman, with the process of investigating even past political

assassinations all the way from Pio Gama Pinto, J.M. Kariuki, Tom Mboya, Robert Ouko and the others. Therefore Mr. Chairman, I think we will be completely misguided if we think that the Government is investigating past assassinations, only to support new assassinations in this Country. Mr. Chairman, the NARC Government believes in a democratic process, if we have any differences among ourselves, we are going to sit down and talk and the majority will carry the day. We do not think that bullets can kill ideas.

Mr. Chairman, let me send my own personal condolences to the family of Dr. Mbai and please let us wait for these investigations. Thank you.

**Prof. Yash Pal Ghai:** Thank you very much. I call upon Delegate 487.

**Hon. Delegate Baldip Singh Rihal:** Thank you Mr. Chairman, Honourable Delegates. Today indeed is a very sad day for us and from the Privileges, Discipline and Welfare Committee, I would like to pass very sincere condolences to the family of the late Dr. Odhiambo Mbai. I heard this news at about 10.00 O'clock last night, I was at one of our Sikh Temples attending a function, when I received a call on my mobile from non other than Shakeel. He told me that, "have you heard this news"? I said "No." He says that one of the Delegates to the Conference the Convenor of the Committee on Devolution has been assassinated. So, I felt very sad and grieved and therefore, I am also in full support of the resolution and the Motion that has been proposed by Honourable Martin Shikuku.

Now, whilst the other allegations of corruption that were brought out last week, let me inform Mr. Chairman the meeting here, what we are doing in the Discipline and Privileges Committee. The Secretariat and the Chairman of the Commission has prepared some guidelines for us to look at and see how this Committee can investigate those matters and then make appropriate recommendations as to what the future of that action will be. So, I am calling a meeting of my Committee at lunch time today at the 'Nyama Choma', so those members of my Committee who have not heard this before, please at lunch time do come to the 'Nyama Choma' tent when we will go into this matter.

Now, turning back to the issues that are here this morning, whilst we note that the Government Ministers are trying to defend the Government position as vigorously and as hard as they can,

last week when we started the debate in the Executive Committee because I am in that Committee as well and as you know the part of Devolution and the creation of the post of Prime Minister are hot issues, I made a proposal there and many of the Delegates in that Committee, supported me. I said that we invite the former Head of State to come and talk to us as an expert, come and tell us his 24 years experience, on how we run the Executive. So that we would be better educated, we would be better informed on what not to decide for the future. -- (*Clapping*) Then the other members who supported my view said that we should also invite the current President to come and address us once again. And I therefore would like to propose this morning Mr. Chairman and to the Honourable Delegates that Delegate Number 001 is a Delegate to this Conference --(*Clapping*).

We would like to invite Delegate 001 to come here to the Conference, please with all due humility and respect I am making this proposal, come here address us, sell us your ideas if you have changed for what you were sort of holding your views last year --(*Clapping*). Come and tell us why you are now changing your mind, why you have changed the goal posts. That will clear the whole air, that will clear the position of the Government once and for all. -- (*Clapping*). I think, he should not only come and address different Committees, we could arrange a special Plenary here so that we could all listen to his wisdom, all listen to what he has to say and then we would be in a better position to decide what we want to do for the future of this Country. We are not writing this Constitution for any individual. I think we have been saying it many times, -- (*Clapping*) and therefore, if we subscribe to this view, what is the fear, why can't Delegate 001 come here and tell us what his new ideas are. --(*Clapping*). We get intimidated when statements are issued in other forums, we would rather that this conference is on-going and therefore he comes here and addresses us at this Conference. Thank you Mr. Chairman. --(*Clapping*).

**Prof. Yash Pal Ghai:** Thank you. Honourable Delegates, I think we have heard different points of view expressed. I think it is time now to take a vote on this Motion, I will not read the Motion out fully but remind you again that Honourable Shikuku's Motion says that the Conference conveys its deep sympathy to the family of Dr. Mbai. That the Conference condemns this cowardly act against our brother and thirdly, that this Conference re-affirms its commitment to its task and will not run away from its responsibilities. Those who support it say Aye.



**Hon. Delegates:** Aye.

**Prof. Yash Pal Ghai:** Those who oppose it say Nay.

The Ayes have it. Now, give me a few minutes Honourable Delegates, before we adjourn. I want to remind you of the Motion again and I also want to remind you that there was an occasion not many days ago, when we re-affirmed our dedication to the task. That occasion was the time when we mourned the death of the Vice President. It should not be necessary for us to have to re-affirm these commitments on sad occasions. We have a continuing responsibility under the Act, under the other of office, under the mandate from the people of Kenya, to complete our task with as much speed as we can. We also have to and this point has emerged in our discussions, tried to engage in our debate, in the debate within the promises of Bomas. Nobody is denying anyone their freedom of expression to take issues outside Bomas. But the Review Act mandates this Body and this Body has been specifically elected and appointed for this task, it has the expertise, it is a culmination of a long process of Review and Consultation. It beholds us all to bring our ideas to this particular Conference and thrash it out here. So, I hope that in future, Ministers, MPs and others will not have long rallies, long press conferences to condemn what is going on here but bring their ideas here, bring their objections here, let us use this forum to give Kenyans a Constitution.

I will also remind you of your statements, that this Government is obliged to support this process. The Attorney General read this statement from a schedule to the Review Act, that all of us including the Government are obliged to support this process, to ensure there is no violence, to create an environment of the free exchange of views. So, please could I plead to all the Ministers here to ensure that the Government facilitates this process to the best of its ability.

Finally, or may be two more points I want to make. The question of the security and the protection of Delegates was raised in the Steering and has been raised here and I think we need to address this question further and we should do so. Finally, we would like the Government to conduct investigations as thoroughly and as quickly as possible and report to this forum as well as to the Republic of Kenya. The Attorney General has undertaken to do so, so has the Ministry

