

CONSTITUTION OF KENYA REVIEW COMMISSION

(CKRC)

NATIONAL CONSTITUTIONAL CONFERENCE

(NCC)

VERBATIM REPORT OF

MEETING BETWEEN CKRC COMMISSIONERS

AND

MEMBERS OF PARLIAMENTARY SELECT COMMITTEE (PSC)

HELD AT COUNTY HALL, NAIROBI

ON

26.02.04

CONSTITUTION OF KENYA REVIEW COMMISSION

NCC – MEETING BETWEEN CKRC COMMISSIONERS AND MEMBERS OF PARLIAMENTARY SELECT COMMITTEE (PSC), HELD AT COUNTY HALL, NAIROBI ON 26TH FEBRUARY 2004

PRESENT

Chair - Hon. Paul Muite

Commissioners

1. Com. Nancy Baraza
2. Com. Bishop Bernard Njoroge
3. Com. Riunga Raiji
4. Com. Mosonik Arap Korir
5. Com. Pastor Zablon Ayonga
6. Com. Keriako Tobiko
7. Com. Charles Maranga
8. Com. Wanjiku Kabira
9. Com. Kavetsa Adagala
10. Com. Domiziano Ratanya

11. Com. Abid Ali-Aroni
12. Com. Ahmed Hassan

Parliamentary Select Committee

1. Hon. Kipkalya Kones
2. Hon. Kipruto Arap Kirwa
3. Hon. Norman Nyaga
4. Hon. Joseph Khamisi
5. Hon. Njoki Ndung'u
6. Hon. Yusuf Haji
7. Hon. Godana Bonaya
8. Hon. Godfrey Kariuki
9. Hon. Daniel Khamasi
10. Hon. Peter Kaindi
11. Hon. Christopher Murungaru
12. Hon. Henry Kosgey
13. Hon. Kiraitu Murungi
14. Hon. Mutula Kilonzo
15. Hon. George Saitoti
16. Hon. Kivutha Kibwana.

The meeting was called to order at 3.20 p.m. with Honourable Paul Muite in the Chair.

Hon. Delegate Paul Muite: I would like to call the meeting to order and I would like to start by again welcoming the Commissioners. I think this is the third joint meeting that we are having and of course Honourable Members and the Commissioners will remember any past meeting, we briefed the Commissioners on the decision which the PSC had arrived at regarding Amendments to section 47 of the Constitution and the reasons thereof, laws of sections 27 and 28 of the CKRC Act.

It was you the Commissioners who requested the time to go and internally discuss the decision and when we met for the second meeting, you also informed us that you needed more time to consider the proposed Amendments and your Vice-Chair who was with you in that last meeting said that you expected to finalize by Wednesday, yesterday, suggested that we could meet today in order for the PSC to hear your reactions and your views on the proposed Amendments; and in the absence of the Vice-Chair I would leave it to whoever you have agreed upon to brief us and to do so and I leave it over to you now.

Com. Abida Ali-Aroni: Thank you, Chairman. In the Commission we have first Vice-Chair and two other Vice-Chairs and I happen to be one of them. So, I am here representing the Commission in that capacity and wish to give the apologies of our first Vice-Chair, Salim who had a prior engagement in Mombasa that he could not cancel.

Chair, after our meeting with you on the 23rd of February, the Commission appointed a Task Force of nine persons and mandated that Task Force to critically examine the current legal framework governing the Review Process and to identify any legal impediments or obstacles in the review laws and to make recommendations that the Task Force felt were necessary for

purposes of a successful review. At a special meeting of the Commission held yesterday at 3.00 o'clock at Serena Hotel, the Task Force did report back to the Commission and at yesterday's meeting, there were a few concerns raised, namely that we would have liked as a Commission to have seen alternatives in that report of the Task Force and also the fact that we needed to have said more on the issue of the referendum. However, in that meeting, the report of the Task Force was unanimously carried with two Commissioners dissenting; we had almost a full house with seventeen Commissioners in attendance and three who sent their apologies.

Now my task this afternoon is to present to you the report of the Commission and hope that you will find it fruitful and useful in your discussion. Thank you. It is my belief that you have copies of the report from the Commission.

Hon. Delegate Paul Muite: I believe copies were distributed. Is there any member who does not have a copy? I think every member has a copy. From your Sub-Committee, it would appear that you have reached a majority decision or a consensus decision of the Commission agreeing to the Amendments to Section 47 and also to 27 and 28 and you have in fact gone a little further and proposed the Amendments and that really is a summary of this report from my reading of it.

Com. Abdia Ali-Aroni: That is so Mr. Chairman, we have recommended Amendments to Section 47 of the Constitution and Section 27, 28, Section 4 and Section 33 of the Review Act. So, that in brief is really our feeling about the laws governing the Review Process.

Our mandate today Mr. Chairman is to present that report and we are hoping that you will be able to study it and we will not really engage in discussions of the same.

Hon. Delegate Paul Muite: Of course the position is that the Parliamentary Select Committee itself had appointed its own Sub-Committee, which examined Section 47 and also Sections 27 and 28, CKRC Act. So, the PSC had itself adopted a report of its own Sub-Committee recommending Amendments to those Sections. So, I would ask whether members have got any comments to make without really reopening the matter because this is a matter we have gone over and we-- Yes, Honourable Nyaga. Honourable Nyaga and then Honourable Bonaya, in that order.

Hon. Delegate Norman Nyaga: Chair, I want to thank you for the opportunity given to me to make just a few comments and I do not want to go into the substantive report that has been presented to us. I want to confess through you, that I went to Bomas of Kenya this morning and we held a Plenary meeting and we were given copies of what has just been presented to us but I had also come with a copy that I was given. Looking at the two, they are literary the same, word for word. I get a bit concerned because we as PSC have been holding our meetings and when we met with the Commissioners they also requested for time so as to be able to go and look at our recommendations and then they would come with theirs which has come today. However, this report which has been presented has been caused by Plenary to be discussed even before we received it as PSC

and I found it odd that a report that was going to be presented by the Commissioners this afternoon, became subject of the Plenary this morning and I can report to the Chair and those who may not have been there that when we were given this report, we were told to go and look at it in our various Committees tomorrow and report back on Monday at the Plenary where we shall discuss the same report.

The question I am raising is, how did this report become a subject for Plenary discussion before it was even presented to us? I think it would be good for us to sort of know that from the Commissioner. Thank you.

Hon. Delegate Paul Muite: Yes, Honourable Godana.

Hon. Delegate Godana Bonaya: Mr. Chairman, perhaps it is actually right that it occurred at this stage. Actually to answer Honourable Nyaga, Mr. Chairman, some of us have multiple hands, we are not just Delegates or members of this Committee as you are. In my case I am also a Vice-Chairman of the Conference and conflicts between different organs in this process sometimes put us in an embarrassing and uncompromising position. This morning at the Steering Committee, this report surfaced and it was the subject of a stormy rancour, not disturbance but debate which-- Because the Chairman was somehow involved and I had to make his position known at which point I had to actually take over the Chairmanship of the Committee and I can only say that in the end it was all rancour that I had to stop the debate by adjourning when there were too many people who still wanted to take the floor.

I want to make this very clear, this process, my own wish, I wish we never adopted this process; we took this position, two or three years ago. When we adopted it we said we would go with it. I wish we can get through this process again in the shortest possible time. I am not sure this is also not part of a scheme to drag this process for another six months, another one year. I think this Conference should end by the 19th of March, the Constitution can pass or fail in Parliament. Ultimately Parliament has the responsibility but I want to state this and I think this is very embarrassing, particularly for the Commissioners, but also for this Select Committee. The Chairman is not here, the Secretary to the Commission is not here, the Rapporteur is not here, the bench Chairman, my learned colleague has said she is one of the Vice-Chairpersons, and the Commission decided yesterday, the position of the Chairman, the Secretary, the Rapporteur and some of the other Commissioners who have not turned up, turned out this morning, as explained to us, their position is that that was not a valid meeting of the Commissioners and I think the Commission is so badly divided that we are being dragged into the Commission's internal wars.

Now, you want to know how this thing came up? It is a pity, it is unfortunate but it did not come up today, it came up before the Commissioners divided and somehow the document was distributed there. I even asked the question of the Commissioners; if the Chairman, the Secretary, the Rapporteur and other Commissioners are saying this is not proper, when you come to our meeting this afternoon, how will we treat you? As individuals coming to the meeting, with individual capacities or as the Commission? And I think this is an important issue. Are we treating this as a report of the Commission, if in fact the

other part of the Commission is saying it was not a validly held meeting, if infact they say they were not invited? The Secretary says, invitations of the Commission from the Select Committee should come through his office and it did not come through his office. The Chairman says it did not come to his office.

So, I just wanted to make that observation because I was in the Chair when this rancour matter arose and I wish in fact it does not go to be the subject of further rancour in the Plenary. As I have some other meeting to attend to, I wish to leave, I beg your permission.

Commissioners: We need to answer him.

Com. Abida Ali-Aroni: Can we respond while Honourable Godana is here with us?

Hon. Delegate Paul Muite: I will do that, but before I give you that opportunity and the floor to respond, I want to appeal to both Honourable Colleagues on this side and to the Commissioners that we remain focused on the Agenda for today without reopening many matters. For example even we ourselves as Parliamentary Select Committee, if you remember when the Commissioners came here last time, we had a fairly sort of exchange, robust exchange, we do not need to go into all that because we had made a decision that we deal with the Commission as an institution. In fact under the CKRC Act, the Commission is an institution and I believe they act on a majority vote. So, sometimes when you cannot persuade everybody to share your decision, and there comes a point where you have got to go along by the majority votes but I think it will be dangerous and not right for us as PSC to travel that route to find out who voted for and who did not. I have looked at this and it appears to be signed by a majority of the Commissioners, it has been presented by the first Vice-Chairperson and really let us make a decision on what we want to do with the report on the basis that we ourselves had made a decision and they have now made a decision so that we can move forward. Commissioner Aroni you can just--

Com. Abida Ali-Aroni: Thank you, Mr. Chairman. I wish to make it very clear from the onset that the Commission is not divided; I think those are the words of Honourable Godana and others like you who believe so. The Commission did not distribute this document; the document is not a secret document and was available to all Commissioners yesterday after our meeting. However, a member of the PSC namely Honourable Raila Odinga distributed it this morning to the Steering Committee, it did not simply surface. I think we need to get our facts right on that position.

Secondly Mr. Chairman, it is common knowledge that the Chairman of the Commission has not and record will bear me right, for the last one year presided over any meetings of the Commission. That is number one.

Secondly, our Secretary this morning made it very clear that he has no intentions of attending any meeting of the Commission that touches on the subject matter, out of conscience. We do not have the office of a Rapporteur General as far as the

Commission is concerned, so, the Rapporteur General is an office within the National Conference, Okoth Ogendo is a Commissioner like any of us.

The procedure in the Commission is that, in the absence of the Secretary, he seconds and we have somebody seconded from the office of the Secretary here and it is not the first time that we have appeared before you without the Secretary.

Thirdly Mr. Chair, I wish to draw to your attention that the meeting of yesterday had seventeen Commissioners and three apologies which in essence means that twenty Commissioners were together. The quorum of the Commission is fourteen, therefore our meeting was duly conducted and I want to believe that we have with us twenty Commissioners also who are interested in pursuing this matter to its logical conclusion. We cannot pull along with us five Commissioners who have decided to isolate themselves. I therefore wish you could note that we are together as a Commission and if there is a problem surely it is not within the Commission. We want to believe the problem is on your side. Thank you.

Hon. Delegate Paul Muite: Honourable Njoki with that clarification do you still want to--

Hon. Delegate Njoki Ndung'u: Yes, thank you. I am actually more of a technocrat than a politician, I think I will approach it that way. Thank you very much Commissioner Aroni for your clarification, I was just actually going to support you on that and I think we should continue from where we left off last week which is that you would look at our report and bring back what you thought and any additions. Let me congratulate you for actually going further than we did. I think in our legal Committee we thought that we had covered all the basis but of course we did not and in terms of your Amendments on the referendum, in terms on your recommendations on the completion of the Commissioners' work which has always been an issue in the past but somehow our Committee did not address that.

Also the closure of Constituency forums, I really think your Amendments are simple, they are direct, they are not political and I think that they will actually accelerate the institution of the National Constitutional Conference and accelerate the closure of the Review. I just want to congratulate you and I will be one of the members of the Committee that will be willing to go along with your recommendations. Thank you.

Hon. Delegate Paul Muite: Any other views? Yes, Honourable G.G.

Hon. Delegate Godfrey Kariuki: Mr. Chairman, I want also to thank the Commission for the job well done. Personally, I would not want to feel as if the Commission is defending itself as a result of any act outside their office and because we are in a political world where some people are pursuing their political interests, they should be allowed to do so and it is important to know the source of distribution. It is important for our own political purposes. I think our main reason for wanting to meet the Commission has been fulfilled, what we expected that the Commission will come and support the Parliamentary Select

Committee in this dispensation, I think that has been accomplished. So, I think we are now together, we should now find a way of starting the ball rolling now other than talking about who did what because I think it is important that we move on. Kenya belongs to all of us and we have to be prepared to take the bull by the horn because ultimately we will be responsible of any crisis which may occur as a result of us not behaving like leaders of this country.

Therefore, Mr. Chairman, I support the proposals here, the stand by the Commission, I think we go by it and thank them once again for agreeing to support us, to support the national cause because we know even ourselves, not only the Commission appears divided, we are also divided. That is why I would want to tell the Commissioners not to be worried about their small division, ours is more serious than yours; but just because we are pursuing different interests but this one which is together with us is going to be now concluded as a national interest that we are all pursuing. Thank you very much.

Hon. Delegate Paul Muite: Actually I prefer the position taken by Commissioner Aroni and I would like to say also that the Parliamentary Select Committee is not divided, it is one team, but there are people with different views, but we will remain members of one team despite the different views that we quite have.

Honourable Members, as a way forward, would it be right then-- Yes, Honourable Mutula Kilonzo.

Hon. Delegate Mutula Kilonzo: Thank you, Mr. Chairman. First of all I wish to apologize for coming late. I learnt about the meeting rather late and secondly I am sure you would like to hear a dissenting voice, knowing you I am sure as the Honourable members--

Hon. Delegate Paul Muite: It is always a pleasure.

Hon. Delegate Mutula Kilonzo: Yes of course. Allow me to say that I would like to join the voice of those who are saying this is wrong because I know they are there and that this is wrong. I do not support and I will not support these ideas. I think with all due respect to the Commission, I believe they are acting *ultra vires* to the Act and I think they have overreached themselves, I believe that the Act is very clear as to their responsibilities, I also believe very strongly that they have a responsibility under the Act to offer consensus to the country and as I listened to my learned friend Commissioner Aroni saying that five Commissioners have opted to isolate themselves, I was reminded of the famous and will always be the famous observations that in the majority of cases if you find that somebody has a silent voice, the more you must listen to them and I am totally convinced and I stand to be corrected, I doubt whether you will succeed, Mr. Chairman, in correcting me that we cannot be carried by mere numbers, mere fact that twenty Commissioners, for that matter even if they were twenty six, come here to the PSC and suggest some of the proposals I have seen in this document. It does not necessarily mean that we should start singing like birds and saying that they are the new messiahs. We have to interrogate the Act, we have to interrogate the spirit of Bomas, we have to interrogate the wishes and desires of the Kenyan people and I am satisfied without a doubt, that any

attempt, at this late hour to interfere with provisions of Section 47 all the provisions of Section 47 on the Constitution and Sections 27 and 28 of CAP 3 is a terrible mistake and will not be understood by this country coming at this late hour

My own position, Mr. Chairman, is very well known and I am happy you said that we are not divided, we only have different views, because my views in this area are very well known and those are that Section 47 is adequately drafted and created to allow for the enactment of a new Constitution for this Country. I believe that the proposals that Honourable members are praising, which suggest that the timetable, that also the contents of the Bill that comes out of Bomas should then be subjected to not only interrogation but even approval in the manner of Amendment in the manner that the Constitution of Kenya Review Commission has recommended is an abuse of the authority and power, infact it is an abuse of the office that is created by the Constitution of Kenya Review Commission Act, that any sober approach to this matter would suggest that the only forum should be Bomas, that forum should be conducted under Cap (3)(a), that is CKRC Act and the Constitution as presently formulated.

The amendments that the Group now calling itself the CKRC are proposing are completely unacceptable, this is only a segment of a group and I would like to take this opportunity in conclusion Mr. Chairman, because I was only expressing and an opposing view which already you know, to say that there comes a time in the history of a country when the men and women should stand up and be counted. The men and women who will be counted are those are going to stick by the country's wishes as expressed to the CKRC in the original proposals and those who support what is going on in Bomas. I am afraid I am in the minority group in the PSC and I want to be counted in that minority group. I would like to express my sincere and very honest disagreement with the proposals of the CKRC as well as the proposal of the PSC if it is to proceed with these amendments. Thank you.

Hon. Delegate Paul Muite: I will give the floor to the Honourable Minister, but before doing so, can I appeal to all of us who wish to contribute, to use temperate language, respectful language even where we are expressing the dissenting views so that Honourable Mutula Kilonzo, we had that here before you came in, that we as Parliamentary Select Committee accept that the Commission is here as a Commission as an institution. Therefore, to refer to them as a group of people calling themselves Commissioners, perhaps is not a very respectful way of referring to people who we have entrusted a very heavy responsibility and which they, by and large over the last couple of years, have been doing Honourable Kiraitu.

Hon. Delegate Kiraitu Murungi: Thank you Chair. First I would like to thank the Commission most sincerely for the effort that they have put in to give us very very clear proposals on amendment both to the Constitution and to the Constitution of Kenya Review Commission Act, Section 27, 28 and the other proposals. In fact we are surprised at how they were able to work and produce such a long document within such a short time. So, I sincerely thank and congratulate them.

(Inaudible).

First, as usual I would like to disagree with the Senior Counsel Mutula Kilonzo for saying that the Commission acted *ultra vires* of the Acts in coming up with this report. I am sure he has done so because lately he has been so busy he has not even had time to read this report. If you look at the last page Mr. Chairman, page 9, the Commission clearly explains its mandate for making this recommended amendments. It says that, in fact it is as if they were anticipating the objection raised by the Senior Counsel that, “some concerns have been raised as to whether the Commission has any mandate in law to recommend amendments to the review laws. Such concerns, in our view, are not well founded as the current Section 26 (4) of the Review Act expressly empowers the Commission to recommend such interim amendments to the Constitution and other laws as may be necessary for the fulfillment of the objects and purpose of the review process”.

I think this adequately answers the suggestions relating to the jurisdiction in capacity of information to make these amendments. In fact they cover both the Constitution and the Act. Chairman I think the only question left for us is, what do we do with this very good report? Do we accept it, do we adopt it as the Parliamentary Select Committee and after adopting it if we do, what is next? So, I think for me those are the issues and I would have no hesitation at all in supporting those who say that we should adopt the report as it is very comprehensive without any amendments whatsoever and there be, after that, the proposals recommendations extracted so that we can present them to the body of members of Parliament before the Kamukunji next week. So, with me I am very happy, we can adopt it.

Hon. Delegate Paul Muite: I noticed Senior Counsel the Hon. Mutula Kilonzo shaking his head in agreement, actually nodding, (*Laughter*) when that particular Section was pointed out--

Hon. Delegate Mutula Kilonzo: Mr. Chairman, I happen to be a naturally happy man. When the Honourable Minister said that as usual he must differ with me I found it rather interesting. However, the fact is that I take what you say very seriously, I believe that we should be temperate even as we discuss the Constitution and I hope that the majority that you seem to be now, realize that this is only an accident and realizes that you must re-think your position and not oppress the minority, whose voice I am expressing right now. Also, seek the intervention of the Commissioners that they be a little more sober and realize that they are making a mistake. I do not agree with the views that they have expressed.

You know, under the law because there are very learned lawyers here, under the law, the fact that you have power to make recommendations or even to amend yourselves does not mean that you can amend yourself out of existence. If you look at the proposal, they have made up under section 47, they are defeating the very purpose of the original Section 47, because it says when you ever consider amending it, you must replace it with a similar section. It is the only section entrenched in the Constitution. When I say they are *ultra vires* they are *ultra vires* because they have not considered these provisions adequately. So, allow me for giving me this second chance to express my views but understand that when I say group of people I do not mean any disrespect to these people I have worked with them for many many years, but I hate the fact that they have allowed themselves to be split into two. This is because five out of 27 is a very large number when you are talking about a

Constitution, we want a consensus; they are the ones who should help in us building a consensus. Thank you Mr. Chairman.

Hon. Delegate Paul Muite: Honourable Saitoti.

Hon. Delegate George Saitoti: Thank you very much Mr. Chairman. My apology for coming late. I also want to join those who have spoken before in congratulating the Commission for having worked very very quickly to come out with this particular document. On that call, I also want to echo some of the views that were expressed at *Kamukunji*, that is where members of Parliament do meet to rather informally because the Commissioners may not have been there. But during those deliberations at the *Kamukunji*, and it was very, very clear although we did not need to vote at all, that Members of parliament felt that there was a need really, to re-look at the various sections of the Act including of course, this Section 47 of the Constitution which I think you dug into. Now, the reason-I hope it was 47, 47 yeah.

Now, the main reason that motivated many of the members here was the fact that: One, it was important to ensure that no loopholes were left there which tomorrow could be exploited and therefore frustrate this process of Constitution making. Number two, to be able to pass any Constitutional Bill into effect, it is the mandatory that two-thirds majority be garnered. As a matter of fact, the Speaker would not in anyway call for the division after the debate is completed unless he is assured there is a quorum and the quorum for any discussion on the Constitutional Bill must actually be two-thirds majority. So, it was therefore felt that we really needed to ensure that a great deal of work is done so that by the time the vote is put, at least there would have been some consensus among members of Parliament otherwise you will not have two-thirds majority and then, I think many of us were at great pains to point out that, you know like other Bills, where members must actively vote against it.

In the case of the Constitutional Bill, amendment Bill, those members who may not want to vote for a Bill, all they need to do is absent themselves and therefore deny the requisite two-thirds votes which are required. Now, I think members of Parliament are very keen that indeed this whole Constitutional process be completed on time. Therefore it is important to make sure that all the necessary staff are put into place which will ensure there is consensus. So, while I know many of us may have our own different views, but my observation at the last *Kamukunji* was that indeed we wanted to see some of these in amendments and that is why we did agree on a Committee, to really look into this one. So, in essence, I think what the Commission has done is very much along the way of thinking-we are thinking about it. I don't want now to argue on the merits and the demerits of whether the Commission has got the legal status, I think you have already stated clearly that you do have the mandate to have formulated what you have come with and to us, therefore, (?) follow what we actually do. I think for us as Members of this Select Committee, is that we can therefore take this document, either the Attorney General Drafts the Amendment Bill and then we do report or present it to *Kamukunji* (?). Once again, I want to commend the Commission for a job very well done.

Hon. Delegate Paul Muite: Let me just very briefly actually agree with Honourable Mutula Kilonzo, that perhaps when people are in a majority it is precisely at that time that they need to be very careful, to examine carefully the merits of any

decisions that we want to make, to ensure that it is in the long-term interest of the country. I think that is a very timely reminder and I am sure that Honorable Members will also bear that in mind. So, in order to move forward is there consensus on the proposal by the Honourable Kiraitu? Yes *Mheshimiwa* Kibutha Kibwana.

Hon. Delegate Kibutha Kibwana: Thank you, very much Chair, I think I have also very quickly looked at this report and I want to join everybody else in terms of really saying how well thought out it is, how comprehensive it is in terms of the issues and it means that the a Commission has put a lot of thought into this very important issues. I listened also to Senior Counsel Honourable Mutula Kilonzo and it is quite unusual for Mutula to make general arguments without being very very substantive--meaning that perhaps even Mutula Kilonzo does appreciate that this work has a lot of merit.

Having said that, I think I just want to very briefly from looking at this report, say that what the Commission deemed to have done is also motivated by history in terms of when a proposal of the referendum was made, the general referendum, that proposal was actually diluted by the then Select Committee without the participation of the Commission. So the Commission is merely rehabilitating something that was asked by many Kenyans in terms of speaking on the Constitution as a whole. So, one cannot actually fault to the Commission for doing something that was asked by many people and there was even agreement between the Select Committee and the *Ufungamano* about the referendum.

Secondly, as Professor Saitoti has said, if the Commission helps us so that there is no doubt that this new Constitution will be covered by Section 47 and it will come into being via the old Constitution. That is really something very prudent and one should not really quarrel with that attempt to, for the Commission, to ensure that all this work that the Commission has done along side other Kenyans does not come to naught. So, really, many of these changes are to protect the Constitutional Review process and I think all people of good will need to see them that way.

Having said that, I think the two proposals by both Honourable Kiraitu and Honourable Professor Saitoti, to the effect that we adopt this report and that this report is forwarded to the Attorney General for the Technical Drafting presentation to the *Kamukunji* because under normal circumstances, *Kamukunji*-it is better for them to look at a concise document rather than something that is ten paged and so on. So, I want to second the proposals by the two colleagues in terms of we adopt this report and this report is handed to the Attorney General so that the Attorney General can now draft it in the language of what would be the Draft in the Constitution on the line of what has been suggested here for presentation to the *Kamukunji* on Tuesday. Thank you, very much and I really appreciate the work of the Commission and I think the majority--Democracy is also about the majority and sometimes also the minority must be careful not to become a tyrannical minority.

Hon. Delegate Paul Muite: Yes, Hon. G. G. Kariuki.

Hon. Delegate: Godfrey Kairuiki: I want to support the proposals by the two gentlemen there, but with a small amendment. Mr. Chairman, we have reached almost to a consensus in a political document, not a legal document at all yet.

This is a document, which is supposed to be discussed by *Kamukunji* as a whole, because our mandate was to discuss with the Commission and have a consensus and then go back to *Kamukunji* because, I think it will be a little bit unwise to take the horse before the cat. We should first of all go back to *Kamukunji* and tell them, the Consensus is a, b, c, d, shall we then proceed? This is because we want to go with these people together. We want to carry them with us, and if possible and this is not a secret matter, the Bomas of Kenya Delegates need to know through whichever way that this process is taking place, because it is not a secret. Let us not have a confrontation between Bomas of Kenya and Parliament before the time. So, I think they also, majority of Bomas of Kenya men and women would support the idea of dealing with this matter to its proper conclusion. So, I suggest that Mr. Chairman, we report back this matter to *Kamukunji* and then we get from there a go a head.

Hon. Delegate Mutula Kilonzo: Point of Order, Mr. Chairman.

Hon. Delegate Paul Muite: Yes Honourable Mutula.

Hon. Delegate Mutula Kilonzo: Thank you, is it in order, I stand to be guided, to seek to adopt or even to discuss forwarding a document of this nature when it does not meet the requirements of the Acts and the regulations? As I understand it, the CKRC can only make recommendations of this nature through a resolution. I cannot see a resolution, the document I have been given, Mr. Chairman comprises, one headed, The Constitution of Kenya Review Commission, Decision of the Commission dated 26th February, and is annexed to a piece of paper which is signed by seventeen people and it is actually not a resolution and much as I know I am in the minority, I cannot carry the day here, I would like to seek guidance from you, Mr. Chairman, as to the procedure to be adopted because the Commission can only recommend resolutions that are recognized by law and this is not a resolution. Thank You.

Hon. Delegate Paul Muite: Yes, *Mheshimiwa* Njoki Ndung'u.

Hon. Delegate Njoki Ndung'u: I know we do not disagree too much with my colleague Honourable Mutula Kilonzo, but today I have to say this. I think it is important when you are going into the interpretation of law, to go into depth. In terms of the Commission having a resolution, is it a written one? Does it come in any certain format, or actually does the report they present, can that be a resolution? I think there are no specifics but I would like to propose the way forward in terms of agreeing with my colleagues on the adoption of this report and a combination of two things. We have a *Kamukunji* on Tuesday. I think because even in our own Sub-Committee we had made the resolution that once we adopt our report that we would ask the Attorney General to draft amendments. I think it is only fair that we go to *Kamukunji* with this report and with some draft amendments coming from the Attorney General, so that we can discuss both and take a decision from there. I see it is unnecessary and it is vexatious to ask MPs to come for one day and then go and do the task, which we can do now, and then ask them to come another day. I think we can combine both. If there is need to publicize both these reports, which has already

back to Bomas anyway, and even the amendments coming from the Attorney General's office we can print and give them to Bomas Delegates. There is no secret in this process which we are doing. It is transparent and it is for Kenyans.

So, this is my proposal, that we adopt this report and we combine what we do at *Kamukunji*. One, is to table this report and to report on the agreement of this meeting and secondly to say that the Attorney General, as the Legal Advisor for Government, having looked at both the reports of the PSC and the Commission, has proposed the following amendments and therefore, get Parliamentarians with very specific materials to look at. Thank you.

Hon. Delegate Paul Muite: You know, Honourable members I do not think there is much difference between what the Honourable G. G. Kariuki suggested and what is being said because he was saying, let us remember that this is a political process, you know, not purely legal and we need to carry our members with us. I did not myself understand the Honourable Kiraitu and the Honourable Saitoti to be saying that we pre-empt, rather it is to make it easier for Honourable members at the *Kamukunji* to focus on something specific. So, we will take this report to *Kamukunji*. The Attorney General in the meantime will be asked to make a draft, amendment views, so that when members are deliberating they will know precisely what they are deliberating. Because in the absence of that, then we would have to call them again when the Attorney General has reached-Honourable Nyagah do you still-or shall I give an opportunity to Commissioner Hassan, do you still wish --

Com. Ahmed Hassan: Thank you Mr. Chairman, with the permission of my colleagues, I think what we were hearing in the debate would have been best done when the Commission had the excuse by the Committee. Mr. Chairman, you invited us here, you gave us a task, we went back and did the task and we have brought back a report. As to how you are going to deal with it, my humble view is that perhaps you could have excused us because we have become phantasm officials in this particular instance and you could perhaps then debate among yourselves including those who have the minority view as to whether it is actually necessary or not. I will have proposed that perhaps you allowed us, with the exception of my Chairman, that we are now excused and go and you continue debating and agree on what to do with the report. As to those who say that the Commission is not duly constituted without a Chairman, I think with tremendous respect to use the words of our own Chairman, "that is utter nonsense", the Commission is a body corporate.

Hon. Delegate Paul Muite: I had appealed to Honourable Commissioners to use temperate language, now it is my turn to protect my Honourable colleague, the Honourable Mutula Kilonzo, we may disagree with him but I cannot allow rude language to be used in reference to him. There are two reasons why--

Hon. Delegate Mutula Kilonzo: Was he talking about me, I thought he was talking about the Chairman of CKRC. I am incapable of that sort of thing. (*Laughter*).

Hon. Delegate Paul Muite: Commissioner Hassan, there are two reasons why we thought we should not release you too

early, the first reason is that we want you to have a cup of tea when we finish. I think it is not right for you to come and then we ask you to go without a cup of tea.

Com. Ahmed Hassan: My Chairman, we have been accused of coming to eat *mandazis* and tea here.

Hon. Delegate Paul Muite: You must give people the liberty to sort of say what they want to say. The second reason, which is a little bit more fundamental, is that we as a Parliamentary Select Committee would wish to provide some sort of air cover for you as a Commission. We do not want you to get all the hammering from Bomas, perhaps from even Members of Parliament, from the public, that you are the ones who are proposing these amendments, because you are not doing so alone, we invited you. So, rather than just ask you to go, we were thinking, if Honourable colleagues on this side agree, that since we have arrived at a consensus and it is us who want you to go and look at our proposals, we should have a joint press conference, after all this document has been distributed in Bomas, as of now, because it is only your document that has been distributed, the Kenyan people will be misled into thinking that you are on your own and you could be isolated and start getting hammerings. So, we were thinking that perhaps it would be fair for us to address the Media officially. So as to tell them that we have arrived at this consensus, we are the ones who requested you and the way forward is that we have adopted your report and we will be embracing it before the *Kamukunji* and asking the AG to come up with a Draft with that. Yes, Honourable Nyagah.

Hon. Delegate Norman Nyagah: Chair, I do not want to add anything else in thanking the Commission in the beautiful work that they have done. But, I think it is important I say the following: I was quite shocked when I looked through that Attendance List of the Commissioners that sat yesterday, they were 17 and the first Vice-chair has told us as much. But I think it is good sometimes to correct certain political statements that are made. If you were in Bomas of Kenya today, you would have been confronted by the Press, you would have been confronted by the Delegates to the effect that you formed the 18th person in the meeting yesterday and all this kind of transaction of statements coming, we want to be sincere as we talk in the Steering Committee. I was surprised that none of them mentioned you as the 18th person and I just wanted to find out from the Chair whether he was the 18th person or not in that meeting yesterday. Thank you.

Hon. Delegate Mutula Kilonzo: Mr. Chairman, similarly, if you agree to have a joint press conference with the said consensus, I assume you either allow me to withdraw or allow me to express the minority view, which I believe is also a very important view in the same press conference. Alternatively, I would rarely ever walk out on you Mr. Chairman, you know we all make a long way, but do not force me to do it today, because if you are calling a joint press conference in my presence, I will have to protest, because I do not agree with you. Thank you.

Hon. Delegate Paul Muite: The Honourable Mutula Kilonzo I think in order for us to move forward and really conclude this meeting, because I think we have exhausted the matter. I was going to suggest that do we accept and adopt the report by the Commission. Two, that the report – well, of course Mutula Kilonzo, I will ask the Secretariat as I always do, that if you feel sufficiently strongly as to demand, which I suspect you will, that your dissenting minority view be specifically noted and it will be

done and I am asking the Secretariat to do exactly that.

Hon. Delegate Mutula Kilonzo: Thank you very much for making my application for me, Mr. Chairman.

Hon. Delegate Paul Muite: And when we brief the Press, I will say that you made that request and it was granted. The second issue - so, the first one is that we accept and adopt the report. Two, that the report as adopted to be forwarded to the Attorney General together with the report by PSC on the basis of which the AG will draft amendment Bills of presentation to the MPs' *Kamukunji* next week. Is that all right?

(Discussion on the floor).

Hon. Delegate Paul Muite: Yes.

Hon. Delegate Chris Murungaru: Mr. Chairman, in support of our friends, the Commissioners or our partners, our colleagues in this review process, in their support and in order to clear any doubt whatsoever, Mr. Chairman, this report must be known to have come to us as Parliamentary Select Committee on the basis of the legal mandate that the Commission has in accordance with the Review Act to make proposals of the amendments made in the sections of the Act or any sections of the Constitution which they will find necessary to be amended to facilitate the smooth conclusion of this process. I say that Mr. Chairman, because I have heard in the Press and in the public places that what is being proposed to be done here is illegal. It must not be left in any doubt that it is perfectly legal for the Commission to do what they have done and to actually forward this report to us. Thank you, Mr. Chairman.

Hon. Delegate Paul Muite: Yeah. But, it is also perfectly legal Honourable Murungaru for Parliament to amend any Act of Parliament including the CKRC Act. So, even that is perfectly legal, our legality and authority flowing from the Constitution. Yeah, Honourable Maranga.

Com. Charles Maranga: Mr. Chairman, I was just out of my own thinking and whatever, we are trying to be strategic and also being positive on the way the process is moving. Mr. Chairman, it would have been nice if you issued the statement as the PSC Chairman, that today you have received a report from the Commission which you are going to study as Parliamentary Select Committee and whatever will follow. Because, really that is not within our mandate, whatever you do after that. So, Mr. Chairman, it would be nice that the Commission has done its business, you allow us to withdraw and then you report accordingly. That would be the best way forward. Mr. Chairman, the trouble which is in Bomas and whatever, that is a storm in a teacup, some of us we are able to handle it, there is no problem. Thank you, Chair.

Hon. Delegate Paul Muite: Thank you. Yes Commissioner Aroni.

Com. Abida Ali-Aroni: Thank you, Chair. I think Maranga has indicated to you the position of the Commission, we will feel more comfortable if we could be left out of the press conference. Hoping that you will see sense in our suggestion, I wish you all the best in your journey towards the rest of the proposed amendments. Thank you.

Hon. Delegate Paul Muite: I was going to suggest if you agree, that I take the point by Commissioner Maranga but the Media is outside there, let them come in and take their photographs then you will go and then we shall address them. Is that all right?

Com. Charles Maranga: No problem.

Hon. Delegate Paul Muite: Bring them in. Yes, Commissioner Adagala.

Com. Kavetsa Adagala: I am not talking about the Press now. I just wanted to really humbly request that in part of our struggle to get the process to a successful end, if we could have PSC, since we are talking to you, we talked to the other groups also, just in consensus building even if it is within the Commission or under National Constitutional Conference and Parliament. I think it would be worth it if the PSC could spearhead this and also this is actually part of the reason why we came, because we want to see that we are working together. However, what happens is when very tall people like Murungaru with his ilk not there, is very visible in Bomas or the rest of you.

Kibwana has helped us a lot actually break ice but it really something-- If you could see what we did and those of you who can come over, I know that there are many obstacles on the way or many things in the past, but I think consensus building and conflict resolution is really important.

Hon. Delegate Paul Muite: That is a very noble suggestion and I do not want to speak for the Honourable Murungaru or the Honourable Kiraitu, but I have heard them say, that ever since they withdrew, a lot of progress appears to have been done in Bomas. (*Laughter*) So, perhaps their absence has expedited the process. But, we will consider that a very noble suggestion. Yes, Commissioner Hassan.

Com. Ahmed Hassan: We have been accused as a Commission of coming to go to the PSC when the Chairman of the PSC and the members of the PSC themselves have boycotted the Steering Committee and Bomas. And we are told if you are really serious about the review process try and persuade your partners to come to Bomas. (*Laughter*) So, I think it is high time as a Commission we also request you to please come back to Bomas.

Hon. Delegate Paul Muite: You know it is actually not a boycott at all. It is a strategic perhaps decision to permit deliberations. But, we are fully supportive particularly of the consensus building mechanism. So, give us an opportunity to sit as

PSC and make a decision on that. We in fact sat and there is a decision in the Minutes of the PSC that the consensus building efforts in Bomas be fully supported. And we keep in touch, we sent people and we get briefed, do not entertain any doubt at all, we do wish to do everything we can to promote consensus. But, you need to create the environment and that is being created now. In fact, even us what we are now doing is to try and achieve that very consensus. For example, you remember, I think the first time you came here, we suggested that one of the reasons for these amendments, is to provide a legal framework for accommodating any consensus arrived at, by the Consensus Building Committee. Because you were in Bomas without pretending around, you know that there are some very good decisions that have been arrived at by the Consensus Building Committee, but which are being shot down perhaps without being well thought through. Now, in the absence of legal mechanism like this, we will lose the opportunity of taking advantage of that sort of consensus, so, we hear you, just give us an opportunity and we will do something. Yes, Honourable Nyagah.

Hon. Delegate Norman Nyagah: Chair, I did not want to further this debate. But I want to take back your magnanimous decision that you had taken, that we cannot let the Commissioners go without a cup of tea. Now, if we allow the press to walk in here, then we will be sending them out without a quick cup of tea. We can all have a very quick cup of tea and as we sit down we can bring in the press after we have had that quick cup of tea and then we can let them go. Thank you.

Hon. Delegate Paul Muite: Let us ask them, because there are the ones to have – is that all right?

Hon. Delegate Charles Maranga: I think we are okay, we can go with or without.

(Discussion on the floor).

Hon. Delegate George Saitoti: I thank you, Mr. Chairman. We are in the spirit first of all now of finishing this job, why don't we finish it, together with the Press Statement, thereafter then we drink tea and then we enjoy our tea in a very convivial atmosphere that people can leave at will.

Hon. Delegate Paul Muite: I got the impression that for some reasons the Commissioners are Media shy and they did not want to be present when we talk to the Press. Is my impression accurate?

Com. Abida Ali-Aroni: Chair, our main problem is that we do not want to be involved in a question and answer session, if you assure that you will make your statement and ask the Press to leave, then we will be more than comfortable with that.

Hon. Delegate Paul Muite: Quite often Commissioner, in matters of this nature, even us, even when we are alone, we do not allow question because the issue is fairly clear. You have got our undertaking.

