

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

**NATIONAL CONSTITUTIONAL CONFERENCE
(NCC)**

Verbatim Report of

PLENARY PROCEEDINGS, HELD AT THE BOMAS OF KENYA

ON

08 SEPTEMBER, 2003

CKRC – NCC PLENARY PROCEEDINGS HELD AT BOMAS OF KENYA ON

08.09.2003

Meeting was called to order at 10.00 a.m. with Professor Yash Pal Ghai in the chair.

Prof. Yash Pal Ghai: Could I please ask Rev. Musungu to begin and the others to follow. Rev. Musungu. Could I please ask you all to stand up for prayers?

Hon. Delegate Rev. Musungu Maina Patrick: (PRAYERS)

God Almighty we thank You and we adore You for we know without You, we are nothing. We thank You for being faithful to us as a people and as a Nation because we have seen Your hand of Grace during the last fourteen days when we have mourned the demise of our late Vice President, who was one of us as an Honourable Delegate in this Conference.

We thank You because you have continued to guide us and to bring peace and calmness among Kenyans and we pray that that sobriety will continue to prevail in the cause of today's deliberations. We ask for Your intervention upon the Commissioners, the Secretariat, the Steering Committee and all Honourable Delegates and in so far as today we dispatch into Technical Working Committees, give us Your Grace and give us Your sufficiency for the day. Let your mercy prevail and let Your wisdom prevail. We thank You and we praise You for we desire peace, we desire understanding, we desire tolerance and forbearance among us all. For this we ask in the precious name of our Lord and our Saviour, Jesus Christ, AMEN.

Hon. Delegate Sheikh Ali Shee: Bismillahi Rahmani Rahim. Kwa jina lako Wewe Muumbaji wa mbingu na ardhi, tunakuomba baraka zako na neema zako na hekima zako zitawale kwenye akili zetu, fikra zetu na tabia zetu. Wewe Mola, tunakushukuru kwa uwezo uliotupa wa kuvumilia msiba ambao nchi hii imekuwa nao, kwa kupoteza kiongozi ambaye ameitumikia nchi hii. Tuna shukrani kwa subira hiyo ambao wametuwezesha kudumisha hali bora katika nchi hii yetu na leo tumerudi tena ee Mola, tunakuomba tena uzidi kutubariki, kutupa nguvu na busara, hekima, ili tuweze kuendelea na kazi hii ngumu. Kazi ambayo itasaidia nchi hii, itasaidia wananchi wako, raia wako, watumishi wako.

Ee Mola endelea kutupa nguvu tena na kutupa afya, wote wale ambao wanaifanya kazi hii. Twakuomba Wewe hatuna mwingine isipokuwa ni Wewe, utubariki – AMIN.

Hon. Delegate Dorcas N. Mbelersia: Baba katika jina la Yesu, ninasema ni asante asubuhi ya leo, umekuwa mwema kwetu usiku kucha, tunaona jua na tunasema ni asante. Mwenyezi Mungu, ulikuwa nasi tulipoagana kimwili. Baba tumerudi tunaanza kazi yetu. Hii kazi tumetumwa na watu wengi lakini tunajua ya kwamba, tukihitaji neema yako na hekima yako vile ulimpatia Solomon, Baba tunakuita. Tunajua ya kwamba mwenye hekima nzuri na mwenye muunganishi mwema ni Wewe Baba.

Yesu mwana wa Mungu, katulinde siku hii yote. Yote ambayo tunaenda kuzungumzia Baba itoke kwako. Mwenyezi Mungu, ninamuomba Chairman wetu, Prof. Yash Pal Ghai azidi kuongoza hili kongamano mpaka siku ya mwisho, ili tupatie wanakenya ile Katiba ambayo wanatarajia kutoka kwetu.

Mwenyezi Mungu, tunakurudishia shukrani vile ulitulinda katika msiba tuliokuwa nao. Tumeungana tena tukiwa hai na tunasema ni asante. Mwenyezi Mungu, siku hii yote, tunawaomba wale wote ambao tunaenda kuwa nao, wale ambao wataenda kuongoza vikundi mbali mbali, Mwenyezi Mungu itakuwa kutokana na mapenzi yako. Baba Kenya nzima kwa jumla tunajiombea. Baba Mwenyezi Mungu, midomo yetu na ndimi zetu, ziwe na fungo nzuri. Uweke chapi vizuri kwa sababu tunajua ya kwamba tunaweza kuropokwa yale ambayo yanaweza kuvunja vyote lakini najua ya kwamba Baba ukiwa nasi ukituongoza, yote yatakuwa mema kwa sababu Wewe ndiye Muongozi Mwema, Wewe ndiye Mwenyekiti Mwema na jina lako litukuzwe kwa sababu Wewe ni Mwema.

Baba nisiloomba katika kongamano hili kwa siku ya leo, utazidi kututimizia kwa sababu Wewe ni Mwema na Wewe ni Mzuri na ni kwa Jina la Yesu aliye Bwana na Muombezi wetu – AMEN.

Prof. Yash Pal Ghai: We will have the National Anthem, so please remain standing.

NATIONAL ANTHEM.

Prof. Yash Pal Ghai: Thank you. Today I have to swear in two new Delegates, Rev. Margaret Muchai and Rashmin Chichness. They are replacing two Delegates who due to different reasons had to resign. They are replacing Ruth Kamau and Shashi Raval, so I will please ask Margaret Muchai and Rashmin Chichness to come forward and I will swear them in, in the normal way.

I believe you are both affirming? Okay, will you please then raise your hands and then repeat after me, when I say I, then you say I and mention your name and then repeat what I say after that.

Affirmation of Oath:

Prof. Yash Pal Ghai: I, being appointed a Delegate to the National Constitutional Conference -

Hon. Delegate Rev. Margaret Muchai: Rev. Margaret Muchai, being appointed a Delegate to the National Constitutional Conference ..-

Prof. Yash Pal Ghai: I, Chichness you also say I and your name, ... being appointed a Delegate to the National Constitutional Conference –

You should do it together please! Being appointed a Delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly declare and affirm, that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions, and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill will or prejudice and to the end that in the exercise of the functions and powers of such Delegates, I shall at all times be guided by the national interest.

Hon. Delegate Rev. Margaret Muchai: I, Rev. Margaret Muchai, being appointed a Delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly declare and affirm, that I will faithfully and fully, impartially and to the best of

my ability, discharge the trust and perform the functions, and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill will or prejudice and to the end that in the exercise of the functions and powers of such Delegate, I shall at all times be guided by the national interest.

Hon. Delegate Rashmin Chichness: I, Rashmin Chichness, being appointed a Delegate to the National Constitutional Conference under the Constitution of Kenya Review Commission Act, do solemnly declare and affirm, that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions, and exercise the power devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill will or prejudice and to the end that in the exercise of the functions and powers of such Delegates, I shall at all times be guided by the national interest.

Prof. Yash Pal Ghai: Thank you. Please sign your oath form, the affirmation form and I welcome you to the Conference and look forward to your contributions.

Communication from the Chair:

Prof. Yash Pal Ghai: Hon. Delegates, I want to welcome you back to our deliberations. We all witnessed the way in which the Nation mourned the sad demise of the Vice President, we had a very dignified period of mourning, remembering well a much admired and loved person. We needed to be reminded by many people during this period of mourning of the principles and goals that the late Hon. Michael Wamalwa stood for among which of course was his passionate commitment to political form. We noted that he was one of the pioneers of the movement for reform which gave birth to this particular process and his ardent wish which he expressed to us when he came to the opening of the Conference that we should proceed with due speed and give the country -- or which the country had been long waiting for, a good democratic Constitution.

I had asked you when we adjourned to reflect upon his words, to reflect upon the situation in which we find ourselves as a country and as a people and strengthen our resolve to give the people a good Constitution in a timely fashion.

We now have during this particular session, three weeks left and we must make very good progress and try to achieve a new Constitution within this calendar year. The Steering Committee will come back to this Conference in a day or two but the detailed program for this particular session for which we have three weeks to go and then the resumption if we are not able to finish as soon as possible in November. I think we now have a big challenge because as you know some people are trying to discredit this Conference. People are saying that this Conference is not capable of producing a Constitution and that the tasks must be transferred to some other institution. People are also saying that the Delegates are so concerned about their own self-interest, that they have no interest in concluding this important task.

I want us all to prove these critics wrong, because I humbly believe that the Delegates to this Conference are perfectly capable of producing an excellent Constitution. I know from my work with you over the last few months that you are all dedicated to this task, that you now have a full understanding of the issues and that when we proceed to the Committees, we will have a good exchange on the basis of the draft that we have been collectively debating for these few months.

I therefore urge you all to work diligently and in a simplest way so that we can show Kenyans that we have the capacity and the willingness to conclude our work in a timely fashion and so that history may judge us all kindly.

The Steering Committee met this morning to discuss the program for this round. We discussed the question of Working Committees; some Delegates said that the list of Committee Members which was distributed this morning, does not represent accurately, the preferences of the Delegates as to the Committees in which they want to sit. As you know we have had some difficulty in composing a final list because some Committees are over subscribed and others are under subscribed and we tried during the break to produce a better balance between the different committees. In doing so, perhaps we moved some Delegates to Committees which they do not seem very keen to serve on.

The Steering Committee therefore resolved that after this brief meeting and now at the Plenary, that all the Provincial Coordinators will meet with the Delegates from the Provinces in different tents and the Secretary will shortly tell us which Province will meet in which tent.

The coordinators along with the Delegates from the provinces will then meet to look at the list of Committees that is now available and indicate where they think there has been an error, or what change of membership they would propose. When the Coordinators have finished this work with the Delegates, then the Coordinators will meet with the Convenors of the Technical Committees, Convenors of other sectors, of other categories of Delegates, and with the Rapporteur-General, to finalize the list. We hope that this exercise can be completed by lunch time because at lunch or immediately after lunch, at 2.00 p.m.; I would like the Steering Committee to meet again, very briefly, to endorse the final list of committee membership.

After that, perhaps it may be possible for the Committees to meet, if we have finalized the list, and begin discussions of the relevant Chapters, maybe use the time this afternoon to discuss the procedures that are to be followed. We have had meetings, just before the adjournment, with the Convenors, and have discussed with them the guidelines for the procedures of the Committees. And so, perhaps the Convenors and the members of the Committees can take this opportunity to review those procedures and to begin with the task of adopting the Chapters, if possible, today but certainly by tomorrow.

I am going to ask the Secretary to tell us which tents have been reserved for which provinces. But before I do that, I should also like to say that the Commission has been working through this period of mourning. We have made progress on a new draft for the Chapter on Devolution, Chapter ten. You remember that the Commission made a report to the Plenary before we adjourned and we had a full debate on that and on the basis of the report of the Commission and the comments of the Delegates, a draft is now being prepared and we expect that it will be concluded by today or first thing tomorrow morning.

We also looked at the first steps in which the Delegates discussed the question of Culture and the drafters are again trying to prepare some drafts which will be ready today and we would like the Chair of the *Ad hoc* Committee on Culture to look at those draft Articles with her Committee.

Finally, we also looked or we did an audit of the Constitution from the perspectives of reform direction. The last thing this Conference did when we adjourned, was to endorse the Motion that

an audit be done of the Draft Constitution to ensure that adequate provisions have been made for reform direction. This audit was prepared and some suggestions have been made. On the whole, the view was that the draft Constitution does indeed contain very many provisions for reform directions, but that one or two Articles could just be strengthened and one or two new Articles could be introduced. What we propose to do is to bring these three documents to the Plenary as soon as possible and then send them to the relevant Committees. But I hope we will provide more information on that tomorrow morning.

So, what I want to do now is to ask the Secretary to tell us where the different groups will meet and I repeat that we will adjourn this Plenary soon so that Delegates can go to the provincial tents, meet with the Coordinators, look at the list of Committee members, if they are not happy with the list, instruct their Coordinators as to the changes they would like to see. The Coordinators then will meet with the Convenors of the Technical Committees as well as Convenors of other categories of Delegates and the Rapporteur-General and together they will finalize the list, which we shall take to the Steering Committee at 2.00 o'clock for endorsement. Then with that, the Committees can meet briefly this afternoon to begin their work, particularly today, discussing the procedures to be followed. Thank you. I now call upon Mr. Lumumba to give us this information.

PLO Lumumba: Thank you, Mr. Chairman. This is how the tents are allocated.

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|--------------------------|---------------|
| ➤ Nairobi Province | Tent number 1 |
| ➤ Nyanza Province | Tent number 2 |
| ➤ Central Province | Tent number 3 |
| ➤ Coast Province | Tent number 4 |
| ➤ Eastern Province | Tent number 5 |
| ➤ Western Province | Tent number 6 |
| ➤ North Eastern Province | Tent number 7 |
| ➤ Rift Valley Province | Tent number 8 |
| ➤ Political Parties | Tent number 9 |

Prof. Yash Pal Ghai: On the formation of Technical Working Committees, as I reported this morning, some questions were raised about the composition of the different Technical Working Committees and some Delegates had not been placed on the Committees that they had preferred. This morning the District Coordinators and other coordinators met members of the groups and at one o'clock the Convenors and the Rapporteur General met to finalize the list by two o'clock and they had to break for lunch they had finalized the membership of all Technical Working Committees and now they had started the meeting a few minutes ago to conclude the membership of all Technical Working Committees.

Our expectation is that by six o'clock or so, an agreement will have been reached on the composition of all the Committees. We will then publish this list hopefully tonight or first thing in the morning. Our intention is that the Technical Working Committees should meet at 8.30 tomorrow morning to start their work. Therefore, when you come tomorrow morning, you will have lists of all the Committee membership and you can find the Committee in which you are serving and the tents in which the Committee is meeting.

Our intention is that for tomorrow, Thursday and Friday, we will conduct our Working Committees. On Wednesday, we shall meet in Plenary to receive a Draft on three topics. We mentioned that this morning. The first will be the Draft on Devolution which is being drafted on the basis of the report that the Commission presented to the Plenary and the subsequent discussions by the Delegates on that report. Similar procedure will be followed in relation to the Draft section on Culture and we will also be able to present you with some Draft on Affirmative Action following the debate on the last Friday before we adjourned. Therefore much of Wednesday will be devoted to receiving and debating these three documents and then on Thursday Committee work will resume.

We hope that the Committees can make good progress. Of course we have set aside time the following week for Committee work as well. The Program Committee has planned to meet on Friday at lunchtime to review the progress of the different Committees and then we will be in a better position to assess exactly how much time we need to give to Technical Working Committees. At this stage, it is a little difficult to say how long the Committee work will take but we hope that within the next few days, the Technical Working Committees will complete their so

that we have sufficient time before the 26th of September for the presentation of the reports of the Committee to the Plenary where decisions will be made.

If we succeed in that, then the technical drafting team can begin the work of translating our recommendations into a Draft Constitution which will be harmonized through the records and then when we meet hopefully in November, that Draft will be ready for adoption but we have to see how we proceed. My own view is that we try to complete Technical Committee work in the next few days, after all no Technical Working Committee is going to have more than one Chapter. An equivalent of one Chapter will have given you about 15 to 20 Articles and surely we should be able to deal with them over a period of 4 or 5 days. However we will review progress on Friday and we will be in a position to give you the program for the following week after that examination.

I do not really have very much more to say except that as we agreed in Bomas I, we will provide some additional time for general comments on each of the Chapters in each of the relevant Technical Working Committees. Therefore, the plan is that from 8.30 am to 9.30 am, the Technical Working Committees will receive comments from those Delegates who are not members of those Technical Working Committees. Therefore, before you resume work in your technical Working Committee at 9.30 am, you will have an hour when you can sit in the Committee where you wish to present a proposal and so though you may not be able to sit throughout the proceedings of the Committee, you will have a chance to present your views and we will see how this works, whether we need an hour or less or more we can determine that on the basis of the experience of tomorrow and Thursday. I have no further announcements to make at this stage so if you are not involved in some Committee work, you can usefully spend your time reading the two Draft reports that we have distributed today but which of course have already been formally presented. I therefore look forward to seeing those who are in the Steering Committee at 8 o'clock, and others at 8.30 am in your separate tents when the Technical Committee Work will begin in earnest. Thank you very much indeed. I wish you a good day.

Hon. Delegate Levi Ahindikha: Thank you very much, Mr. Chairman. My names are Levi Ahindikha, District Delegate number 379 from Kakamega District. Mr. Chairman, when we

resumed Bomas II, we talked about Culture and we agreed that we shall have a Technical Working Committee for Culture. What is the position, Mr. Chairman? Thank you.

Prof. Yash Pal Ghai: I have discussed this question with the Chair person of that Committee, Professor Wangari Maathai and what we have agreed is that we would make available to her and through the members of the *Ad hoc* Committee, the Draft sections that have been now prepared to reflect debate that we had. Then it would really be for the *Ad hoc* Committee to consider whether in view of the progress made, they want to hand that Draft over to the regular Committees or whether they wish to continue to work as an *Ad hoc* Committee. I therefore presume that Professor Wangari will get in touch with the members of that Committee later today or the first thing tomorrow, I will be in a position to give her the Draft sections today --I think our drafting team has done that --and then it will be for the *Ad hoc* Committee to determine how they want to proceed from now onwards. 392?

Hon. Delegate Paul Nakitare: Thank you Honourable Chair, for giving me this opportunity. Honourable Chair, my name is Paul Nakitare, Delegate 392 from Bungoma.

First, I would like to appreciate the efforts of the Commission for coming up with the document on Culture. Honourable Chair, you will recall that we have persistently pushed the issue of Culture but to some of us it seems like this particular issue is not holding out very well. I thought Honourable Chair, that having come up with this very good document, it needed --although you have answered this one, --a Technical Committee and as the name technical implies, that we will examine the necessity for capturing the spirit of Culture in the Constitution but the confusion that is brought about by the decision you have made is that those same members of the *Ad hoc* Committee on Culture are also members of other technical committees and since we are starting tomorrow with the work of the technical committees, I do not see how these people are going to be able to function. I would have suggested that in the spirit of the debate we had the other day on the issue of culture and if we all subscribe to the fact that Culture is very important knowledge of our efforts at the moment to constitute a Constitution, there should be a Technical Working Committee really to delve into these particular issue along side other Committees.

Honourable Chair, it is my plea and if the Honourable members would also agree with me that this Honourable Delegates or Plenary, should support the idea really of forming straight away a Technical Working Committee on Culture to advice it on the essence of this very important body of knowledge of our Constitution. I thank you Mr. Chairman.

Prof. Yash Pal Ghai: Yes, I see your point and I think we all agree on the importance of Culture. Maybe the *Ad hoc* Committee could have a meeting where they can look at the Draft Articles. You already of course have the report and if then this *Ad hoc* Committee considers that there is need for further technical work, then they can advice the Steering Committee on how they would like to proceed. I request Professor Wangari to convene a meeting and make the documentation available and then if the *Ad hoc* Committee wants to continue, either *Ad hoc* or Technical Working Committee, they can make a formal recommendation to the Steering Committee and we will see how we proceed from there. 381?

Hon. Delegate Rita Katamu: Thank you, Honourable Chairman. My names are Rita Katamu, Delegate number 381 from Butere, Mumias district. I want to thank you for the efforts you are making and I understand or I believe that the Technical Working Committees in which we are supposed to move tomorrow are very important.

You have trained the Rapporteur on how to handle the Committees. You have also trained the Conveners on how to handle the Committees. I want to request that because the procedure of the committees are very important, I wish to request that we also get sensitized on how to handle ourselves in the Technical Committees since sometimes we may be found off balance because not all of us are familiar with the Parliamentary style of handling affairs. Therefore, kindly spare time and sensitize these Honourable Delegates on how to handle themselves in the Technical working Committees. Thank you very much.

Prof. Yash Pal Ghai: Thank you very much. You will remember that we had two or three hour session on this very question before adjournment. When two of my colleagues, three of my colleagues if I can include the Clerk of Parliament as a colleague, presented the guidelines for the work of the Technical Working Committees. We shall mainly be repeating that if we had another session. What the Conveners will do when the Committees first meet, will be to spend a

little bit of time discussing with the members of that committee the procedure and the members will have an opportunity to ask questions which the Convenors and the Rapporteurs will try to answer. It seems to me that we have already had three to four hours on these in this very room and we will mainly be repeating that if we had another session but your Rapporteurs and Chairs have been through workshops on this question and they will be able to assist you.

I have an announcement from Professor Wangari that the *Ad hoc* Committee on Culture will meet after this meeting maybe around 4.00 pm at the Tent on Culture and I will see if in the mean time, convey to her those Drafts and maybe a member of the Commission can be there to explain what the commission has done over the last fortnight on this matter. 594, can you please make it brief because people will have to go to this Culture meeting soon.

Hon. Delegate Orié Rogo Manduli: Thank you very much the Honourable Chairman and Honourable Delegates. It is nice for us to be back after two weeks of mourning, when we all bowed our heads, with tears for our beloved Delegate number two, the fallen and departed Vice President of the Republic. We are back now and are actually going on to the most important and most delicate area that brought us here. All the preparations that have gone before have been for what we begin tomorrow and as of today we were still busy making changes and sitting into our different Committees and I do hope that it ends today so that tomorrow we can really grapple with the work that we have to do for this country and wherever we are by tomorrow, I hope that we can all stay there and contribute because at the end of the day, it does not really matter where you are because you have got the opportunity to move into any other committee and listen and contribute.

Before we left for the unexpected two weeks break of mourning, a question had come up in the Steering Committee which I raised and I am bringing it up here in the Plenary now so that discussions begin. We are two weeks behind, that is a fact and there is no way we can finish this work when we have a two weeks deficit and this two weeks somehow must be given back to us in some way or other, in some form we must have two more weeks so that we can complete our work and this is something that as a Delegate and on behalf of my fellow Delegates, who I know are just as concerned on how these two weeks deficit should be made up, we are bringing it up

early so that those who are concerned and those who are discussing it, can realize that it is an important issue that must be looked at *clapping*.

In three weeks time we will break so that our Members of Parliament to go to Parliament. We would like this done in good time and early so that in three weeks time as our Members of Parliament break to go back, we are told in good time when we reconvene to complete this important exercise for this Nation but those two weeks must somehow be found and given to us so that we do not do a shoddy job and so that we are not short changed and the Nation is not short changed. It is very important. This is something that even as we go to committees should be discussed and agreed upon so that when we part in three weeks, it is not when people are running around like headless chicken trying to wonder if we will ever get the time or not. This is because the time will be needed and it should be discussed now and we should be told in very good time since we have other businesses that we do all of us in our areas of residences, areas of work and if we are going to be given some time in November, as was probably suggested during the Steering Committee, we would like to know when in November so that we can also prepare ourselves to be away and to be here in Nairobi to complete the exercise.

Other than that, I want to commend all of us for the diligent way and the very Honourable way in which we gave a send away to our Honourable Brethren and you probably notice that before we all parted to go to our various homes and backgrounds, we represented you. A big group of us went over to Runda and represented the Delegates quite to honourably. We mourned for you and on your behalf before we left here *Clapping*. That is something that should be taken note of. Thank you very much indeed Chairman. I just want to know that since now we are in small groups, somehow the matter of the two weeks deficit should be very seriously discussed and told in good time. Thank you very much Chairman, for giving me the opportunity. Thank you very much Delegates for listening to me *Clapping*.

Prof. Yash Pal Ghai: Thank you very much Honourable Delegate for those sentiments which I fully echo. I think the progress that we make is really in the hands of the Delegates. We will try in all different ways to recoup the time we have lost. One simple way to do that in part is to meet at 8.30 am sharp every morning and to work till about 6.00 pm or 7.00 pm. I have a Motion which was presented to me this morning by a Delegate which says that we should meet at 8.30

