

STRATHMORE

# Constitution-making from the Middle

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*Civil Society and Transition Politics  
in Kenya, 1992-1997*

WILLY MUTUNGA



FOREWORD BY YASH PAL GHAI

## CHAPTER 7

# MASS ACTION

### Introduction

The constitution-making project was a monologue. The reformists were talking to the Kenya Africa National Union (KANU) that did not recognise their rights as citizens to speak to their Government. And KANU was not consulting its citizens on this burning issue. The orders that President Moi gave the nation on 10 October 1996 were non-negotiable. He ordered that comprehensive constitution-making was to take place after the general elections. The reformists rejected this order as illegal, immoral and illegitimate. The reformists were united in one specific call: minimum or facilitative constitutional, legal and administrative reforms that were pegged to a free, fair and peaceful general election to be enacted and implemented before the election. The opposition political parties, haunted by the 1992 electoral defeat by KANU, wanted the election field levelled and wholeheartedly supported these minimum reforms. The religious organisations demanded these reforms. Even the most conservative of foreign interests, in the name of gradualism, talked of prioritised minimum reforms, the minimum of the minimum. So, the principle of minimum reforms was broadly accepted. The Moi-KANU regime would gradually be isolated on this issue. This, in part, explained why the Inter-Parties Parliamentary Group (IPPG) initiative was

such a relief to many of the stakeholders, the foreign interests, the political parties and, of course, the religious organisations. The IPPG initiative cemented this broad consensus, which all these stakeholders could live with. The Moi-KANU regime, however, was not persuaded to embrace minimum reforms through dialogue. Rather, it was mass action that brought the regime to realise that Kenyans had no faith in the capability or willingness of the Moi-KANU regime to carry out any reforms. Therefore, a transition into an interim government or a government of national unity was the only alternative that could guarantee minimum and comprehensive reforms.

The period of mass action in Kenya started on 3 May 1997, and ended on Kenyatta Day, 20 October 1997. Before the general election, from 29 to 30 December 1997, rallies were organised by the politicians allied to the National Convention Assembly (NCA), but in substance, they were the rallies of those politicians seeking to be elected to Parliament. Mass action took various forms: rallies, demonstrations, processions, strikes, sit-ins, vigils, prayers, and parading coffins of the dead at police stations before burials. All these activities were in defiance of the law. The Moi-KANU regime was right when it said that the law was being broken. Action was premised on the legal theory that immoral and evil laws require defiance and disobedience. This legal theory states that laws of a repressive government should not be obeyed.<sup>1</sup>

Mass action challenged the legitimacy of the existing legal order. The colonial and neocolonial laws that denied Kenyans the freedom of expression (through demonstrations,

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<sup>1</sup> See Kibwana K, 'The right to civil disobedience' in Kibwana K, Peter CM, and Oloka-Onyango J (eds), *In search of freedom and property: Constitutional reform in East Africa*, Claripress, Nairobi, 1996, 362.

rallies, processions and marches, for example) were immoral, illegitimate and unconstitutional, and so were the colonial and neocolonial laws subverting the citizen's freedom of movement, expression and assembly. The Moi-KANU regime was asked to repeal such laws, but refused. Now the citizens used their residual legal powers which gave them the right to defy and disobey a government that would not perform its terms of the social contract. That there was a conflict of legal theory between law and morality, between law and order and freedom, was now immaterial. The middle-class project in constitution-making felt very strongly that if mass action worked, it would prevent the other alternative, armed struggle, an option that Kenyans discussed openly. The movement spared the regime the wrath of the Kenyan people by generating hope that changes could come about peacefully.

Mass action had its negative consequences: death; illegal looting; suits against the members of the Management Committee and the Executive Council of NCA; criminal charges against youth who formed the main army in the mass action; the setting up of private armies and militia by the Moi-KANU regime [*Jeshi la Mzee* ('The army of the old/big man'), for example] to intimidate the reformists; and repression and torture. Mass action also had its positive attributes: the building of a culture of resistance to an illegitimate authority; the struggle against the culture of fear and silence; the courage of the middle class to stand up to be counted without political fences to straddle; and the revelation that the Kenyan comprador class and their foreign masters were frightened, as all oppressors are, when the oppressed stand up to combat oppression.

## Setting the stage: Constitutional reform working session for the youth, 27-30 March 1997

This working session was held in the wake of the National Youth Convention (organised by the Youth Agenda)<sup>2</sup> which was held 7-11 March 1997. It was a specialised follow-up of that National Youth Convention, touching on the issue of constitutional reform, and in preparation for the National Convention scheduled for 3 to 6 April 1997. It was yet another workshop that 4Cs organised for a specific sector or social force to have crucial input in the constitution-making process.

The working session supported comprehensive reforms through a process of national convention that was transparent, participatory and truly representative of all shades of opinion and interest groups in Kenya. The session was of the view that the minimum reforms that had been adopted by the National Convention Planning Committee (NCPC) were an agenda of the opposition politicians to defeat KANU in the election. These reforms were for contesting power and had nothing to offer to

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<sup>2</sup> The National Youth Convention of 1997 was attended by 235 youth representatives from all over the country. The proceedings declarations are now published in *The National Youth Convention 97: A summary report*, Claripress, 1997. The objectives of the National Youth Convention 97 are stated on page 2 of the publication as follows:

1. To provide a Forum for the youth to discuss/debate issues affecting them locally and nationally, and draw up a Youth Agenda to be put at the centre of the national debate;
2. To provide a dignified and organised channel of expressing youth options;
3. To highlight the youth's contribution to the development of this country;
4. To facilitate the youth's contribution to the national debate on constitutional debate and the democratisation process;
5. To review the country's current political situation and give a youth's position in relation to the run-up to the 1997 General Elections; and
6. To encourage 'youth-youth' interaction and therefore facilitate the shaping of a common vision among the youth and to spur them into a more proactive response to the problems that besiege them.

other stakeholders. The minimum reforms could polarise the country further. The time, cost and energy required to agitate for these reforms would be the same as agitating for comprehensive reforms. The former, in fact, could prove to be too difficult for KANU to accept as it was a recipe for its loss of political power. The session urged that the minimum reforms reflect the interests of other stakeholders and that they be seen as facilitative of the comprehensive reforms. The session suggested that five reforms be included in the NCPC package: a commitment to create a government of national unity after the election to oversee comprehensive reforms within a set time-frame; the State-owned media to be run independently by law and made accessible to all shades of opinion; constitutional amendments to be ratified by a referendum; youth to be represented in the electoral management body; and there should be no polls before the facilitative reforms are in place.

The session made certain observations that were reflected by Kenya's political reality. First, history showed that when the process of constitutional reform is entrusted to politicians, the process stops as soon as the politicians achieve their objectives. And, secondly, since the Government always seemed adamant in its refusal to facilitate desired changes, the youth (and other reformists) needed to draft an acceptable constitution outside the laid down legal mechanisms and find a way of forging the political will required to implement these changes. The preparedness of the youth in the issues that were to be debated in the First Plenary of NCA (First Plenary) was to be felt in the deliberations and the ultimate declarations and resolutions of the Assembly.

## Setting the Stage: The First Plenary of the National Convention Assembly

The First Plenary took place in Limuru between 3 and 6 April 1997.<sup>3</sup> It was attended by 510 delegates representing the following sectors: religious organisations, professional organisations, farmers, pastoralists, fishermen and fisherwomen, retailers, wholesale traders, industrialists, bankers, NGOs, community-based organisations, people with disabilities, women's groups, youth and students, minorities, pressure groups, artisans, the landless and slum dwellers, *matatu* operators and other transporters, Kenyans in exile, the labour movement, politicians and political parties, landlords and tenants, children's rights organisations, Kenya's language groups, the academic sector, cultural groups, entertainers, the media sector and other sectors and interests.

The First Plenary established and constituted the NCA, the alternative people's parliament. It gave an extension to the life of the NCPC until the Assembly carried out elections for the structures of NCA at the end of the First Plenary. The NCPC, therefore, directed the affairs of the Assembly for three days.

The Assembly set up four committees; namely, Minimum or Facilitative Reforms, Alternative Options in the Absence of Passage of Minimum or Facilitative Reforms, Convention Rules and Procedures, and the Constitutional Structure of the National Convention. The committees worked diligently, and their reports were included in the Declaration and Resolutions

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<sup>3</sup> 36 years prior to the date of this publication in 1999, the pro-West faction in KANU was able to isolate the nationalists and radicals in the party at Limuru. The late Jaramogi Oginga Odinga and Bildad Kaggia quit KANU to form the Kenya's People's Union, which the Kenyatta-KANU regime banned in 1969. The de facto one-party dictatorship of the Kenyatta-KANU regime reared its ugly head.

of the Assembly.<sup>4</sup> The Declaration and Resolutions of the Assembly reflected the political manifesto of the First Plenary. It set out the objectives of the Convention and the strategies for pressuring the Moi-KANU regime to undertake minimum or facilitative reforms before the general election of 1997. The minimum or facilitative reforms related to constitutional, legal, and administrative changes to guarantee free and fair elections. NCPC adopted its version of minimum reforms at an earlier retreat in Limuru on 15 November 1996; these were adopted and endorsed by the Assembly.<sup>5</sup> There were additions to these reforms that specifically dealt with the powers of and the election of the President.<sup>6</sup> Other new reforms touched on nominated members of Parliament (MPs). These reforms suggested the nomination of these members from special interest groups, and that those who contest and lose in the general election should not be nominated to Parliament. The suggested reforms also required the barring of nominated MPs from holding the offices of Speaker and Deputy Speaker. They were also to be vetted and confirmed by 65% of the vote in Parliament.

Among other minimum constitutional reforms were provisions that would reflect a multi-party democracy, namely: the funding of all political parties by the Government; barring of elected leaders from defecting from their parties before the

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<sup>4</sup> The declaration and resolutions of the First Plenary is part of the archives of this book.

<sup>5</sup> It is these NCPC reforms that the Working Session for the Youth, 27-30 March, condemned as an agenda for the politicians.

<sup>6</sup> These were: The President should be bound by the Constitution and the country's laws; the President should not have the power to summon, prorogue and/or dissolve Parliament (that is, Parliament should have its own timetable). The President would also require the approval of 2/3 of the MPs in appointing senior members of the Government. On the election of the President, any person above the age of 18 years should be eligible to vie.

end of their terms; guaranteeing the security of all candidates contesting in an election; and undergoing induction and orientation courses for new MPs and civic leaders to assist them in coping with their tasks. There was a specific call to amend Section 82(3) of the Constitution to add the prohibition of discrimination on the basis of sex or gender.

The list of minimum or facilitative administrative reforms had the following additions: the support for affirmative action; the declaration of wealth by all presidential candidates; and the establishment of a truly independent and non-partisan media commission to run the media sector. The minimum or facilitative reforms suggested by the NCPC and relating to colonial repressive laws were adopted with the inclusion of the Outlying Districts Act<sup>7</sup> and the Special Administrative Districts Act.<sup>8</sup>

The First Plenary also set up the organs of the Assembly: the Council of Spiritual Patrons, Council of Political Parties' Leaders, the Provincial Convention Assembly,<sup>9</sup> the District Convention Assembly, the Divisional Convention Assembly, Locational Convention Assembly, the Sub-locational or Ward Convention Assembly and the National Convention Executive Council (NCEC). NCEC comprised the 3 conveners of the First Plenary, all members of the NCPC, 16 representatives of the 8 provinces of Kenya and an additional 6 representatives of the youth and students. The sub-committees of NCPC; namely, the Technical, Credentials, Public Relations, and Management, became committees of the Assembly. Other

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<sup>7</sup> *Outlying Districts Act* (No 104 of 1902).

<sup>8</sup> *Special Administrative Districts Act* (No 105 of 1934).

<sup>9</sup> These three structures were rejected by the First Plenary. The Provincial Convention Assembly was reinstated by the Fourth Plenary of the National Convention Assembly that took place on 26-28 February 1998.

committees that were established in compliance with the concept paper, *Njia ya kufikia katiba mpya, The way to the new constitution: Towards the national convention* were: the Constitution-making, National Peace and Reconciliation, Economic Rehabilitation and Reconstruction, Governance, Human Rights and Democracy, Mobilisation for the National Convention, Transnational Arrangements, and Time-frame for Implementation Committees. The Implementation Committee was set up at the inaugural meeting of NCEC to carry out the resolutions of the First Plenary. The Management Committee comprised the conveners (two more were to be elected to represent the women and the youth constituencies) and all the chairs of the committees of the Assembly. The slogan of the NCPC was '*Katiba mpya nuru ya nchi yetu.*' The motto of NCA was '*Katiba mpya nuru ya Kenya.*' The NCEC later adopted the slogan 'NCEC-NURU'.

One of the great highlights of the First Plenary was the discussion on constitutional reforms, among other issues in the open people's forum. The representatives took a whole day to give their views on Kenya's problems and possible solutions. Possible solutions included revolutionary action. It was in this forum that it became clear that radical political action was needed. It was in this forum that 'the lectures, papers and retreats' were rightly seen to have exhausted their usefulness. Constitutionalism and the success of a new constitution were, it is true, a question of creative constitutional engineering based on serious engagement of the minds. They were also a matter of serious political campaign and mass mobilisation. It was felt that the minds of intellectual leaders in 4Cs and NCPC had been engaged for too long. There was need to extract the necessary political action from the chaff of the many papers that had been written on constitutional issues. It was also in this forum that

one could see clearly how class interests in the political projects could be articulated. The youth groups were organised and very determined to make an impact on the constitutional project. The political parties were also there ensuring the narrow project of competition for political power held sway. The representatives of the various sectors of civil society were the controllers and managers of the event. The silent battle among members of the management sub-committee of NCPC on the agenda of the First Plenary reflected a division between those who saw the proceedings as yet another seminar and those who saw the proceedings as the beginning of mass action in Kenya.

While there was a broad consensus on the need for constitutional reform, the debate on minimum versus comprehensive reforms was very lively. The struggle for minimum constitutional, legal and administrative reforms took center-stage because these reforms were pegged on free, fair and peaceful elections. 1997 was an election year and Kenyans put their interests in the forthcoming general election, which was to be held later that year. What was important, however, was the fact that these reforms would lay a firm foundation for comprehensive and fundamental changes to the constitution. These reforms formed clearly a bridge that would merge the middle and community constitution-making initiatives. Without minimum constitutional, legal and administrative reforms, access to Kenyan communities in urban and rural areas would remain the monopoly of KANU. The narrow and partisan civic education conducted by KANU, the culture of fear and the monopoly of ruling ideas would never be controverted unless this monopoly was broken. Democratisation demanded that ideas contend at the community level in the entire country.

The debate on the issue of agitating for minimal constitutional, legal and administrative reforms highlighted some con-

cerns of those who opposed the minimum reforms. The dangers they warned about were real. For example, the enactment and implementation of these reforms could close further debate on comprehensive reforms, like the repeal of Section 2A of the Constitution did in 1991. The repeal of Section 2A decreed multi-partism, which was equated with democracy and created political euphoria that inhibited the discussion on comprehensive reforms.<sup>10</sup> It was true that there were political forces that would support reforms pegged to elections and nothing else. There were forces within the political parties that did not want the powers of the Executive changed. The Executive was one of the supreme targets for in-depth discussion in the constitution-making process: The Executive in Kenya was dictatorial, undemocratic and empowered one individual excessively – whose power was used to affect all societal, socio-economic, political, philosophical, cultural and spiritual realms of life. In the area of governance, the effects of that excessively empowered Executive had to be debated. It would be found that this institution was negatively reflected in all other societal problems in Kenya. It was important to realise that the political forces that wanted the powers of the Executive left intact were crucial in the support of the minimum reforms. This was not the right time for those forces calling for comprehensive reforms to separate with these political forces.

The First Plenary brought presidential powers under the purview of minimum reforms very properly. Before the advent of comprehensive overhaul of the Constitution, it was suggested that the presidential appointments of senior Government officials (in particular those who may have a crucial bearing on

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<sup>10</sup> See Chapter 4 for a brief comment of the repeal of Section 2A of the Constitution.

the electoral process) be sanctioned by a 65% vote in Parliament. The presidential election would then require a simple majority even if the requirement that the winning candidate garner at least 25% of the vote in five provinces were maintained. The run-off between the top two candidates in the event of failure to get the winner would require a victory by a simple majority. Illegal presidential decrees would be banned as would the use of the administrative and security arms by the President in electoral processes.

The First Plenary also advanced other minimum or facilitative reforms that related to the Executive. Demands were made to change the Constitution to make coalition governments possible. A government of national unity after the general election, which was demanded under minimum or facilitative reforms, could democratise and decentralise presidential powers. This constitutional change would also provide for independent candidates to contest in elections, giving room for constitutional reform candidates who needed not belong to any political party to contest.

It was arguable that transitional arrangements could be the best alternative to the crisis that gripped the country. A presidential candidate who was committed to these reforms and wanted to be transitional was perhaps the alternative that was needed. The agenda for such a candidate would be simple: to provide an environment in which Kenyans could debate their societal problems and create a new social order. Constitutional reform would be the entry point to discuss many of these issues. Minimum or facilitative reforms would be implemented upfront by such a candidate and, ultimately, a free, fair and peaceful election would be conducted under a new constitution that was drawn within the transitional period. Such a candidate needed not give solutions to any problems, although they would have

their own opinions. It was necessary to provide for political space for the nation to discuss these solutions. It was also arguable that various sectors of civil society would indeed produce such a candidate if the political organisations could not guarantee such a commitment.

It was also argued that these minimum reforms had been overtaken by events, that they would have been useful had they been implemented two or three years earlier. They would have formed a firm basis for the agitation of fundamental reforms. Given the fact that the general election was to take place in 1997, the argument was that it was wise to agitate for maximum reforms. The possibility of the minimum reforms project hijacking the broad comprehensive constitutional project would cease if agitation of the fundamental restructuring of the Constitution was undertaken with full force.

It was further argued that the word 'minimum' was impolitic and thus needed to be removed. The argument was that politically, where one negotiated on the maximum, the minimum was the result. This argument failed to appreciate the 'tactics' of the minimum reforms project. The comprehensive reforms project was not, and never had been, compromised. This was very clear from the work of 4Cs. The minimum reforms project kept the pressure for comprehensive constitutional reforms alive. The value of the argument that minimum reforms were facilitative of comprehensive reforms was very powerful. Indeed, this issue of the content of minimum reforms was aggressively debated at the First Plenary.

Minimum reforms, it was argued, needed to be renamed facilitative reforms. It was felt that the word 'facilitative' would capture the essence of the function of the reforms. It was not just an issue of semantics, as some argued. However, it was impolitic to discard a discourse that was three years old and

perhaps create confusion. The compromise was for NCA to keep both words. The reforms would be categorised as ‘minimum or facilitative’ reforms.

There was merit in these arguments on minimum reforms. It was very crucial that the constitutional reform debate did not abate. There would be no heightening of the political stakes for the Moi-KANU regime to cave in to the demands of constitutional reform if this happened. The ruling party could ignore the calls for minimum reforms and adhere to its argument that reforms would come after the general election. The debate in support of minimum reforms kept the pressure for fundamental reforms on the agenda. The debate also opened up strategic debates on what would happen should the reforms not be implemented.

The debate on options was important in keeping up the pressure on the Moi-KANU regime to concede to constitutional reforms. And the debate for fundamental reforms was reinforced by the debate on minimum reforms as long as the Moi-KANU regime refused to consent to a dialogue on reforms. No one intended to agitate for minimum reforms after the general election. Abandoning the campaign and agitation for minimum reforms then meant that the Moi-KANU regime’s offer that reforms take place after a flawed election would be accepted. And who could say that the Moi-KANU regime would keep its promise of carrying out such reforms after elections? If the Moi-KANU regime caved in to the demands on minimum reforms, there would be need to devise a new strategy. This strategy would be to argue that minimum reforms were no longer useful and that it was necessary to agitate for a maximum programme that included these minimum reforms. However, that strategy depended on agitating for minimum reforms as the short-term political strategy. As long as the Moi-KANU regime did not

accept these reforms, it was strategically dangerous to abandon the debate and surrender its objectives to the programme of the regime. Abandoning the call for minimum reforms would defuse the pressure on the Moi-KANU regime and give it room to manoeuvre against the maximum programme for constitutional reform. It was arguable that it was through the agitation for minimum reforms that minor concessions from KANU were attainable. Once any concession was given, it would be consolidated and used to further the demands for comprehensive reforms.

It can be said that one of the achievements of NCA was realising that the Moi-KANU regime was not going to support any reforms either before or after the elections. The focus was on political pressure against the regime.<sup>11</sup> Challenging and

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<sup>11</sup> It is important to reproduce here the resolutions of the First Plenary, which bear witness to this pressure:

The National Convention Assembly (NCA) resolves that the following concrete activities necessary to pressurise the passage of facilitative reform will be undertaken, that is:

1. Present to the representatives of the Kenyan people at Kamukunji the recommendations of the NCA on 3 May 1997 and then on 24 May 1997 at all provincial headquarters;
2. Kenyans will hold weekly and whole day open air joint interdenominational prayers on Fridays of each week beginning on the first Friday of May 1997 to pray for the passage and implementation of reforms;
3. Political parties, the religious sector and NCA organs will hold joint meetings at the district level with immediate effect to popularise the reform agenda and necessary action to secure compliance. Such meetings will be concluded by peaceful demonstrations;
4. Each political party, aspiring presidential, parliamentary and civic candidate should commit to minimum or facilitative reforms and the pursuant action necessary for their reform agenda. The NCA shall inform Kenyans about those who do not support the reform agenda. These shall be exposed and disowned by the NCA;
5. The Government should establish an inclusive Electoral Commission drawing membership from nominees of Government, opposition and the organised sectors of civil society. The President, should, therefore,

engaging the State on constitutional reform was on the political agenda of the stakeholders of the reform movement. There was definitely political will among Kenyans for change, and the following months were going to be interesting as Kenyans were mobilised in support of change. Still, the danger of a divided civil society loomed as shown by the Catholic Church failing to send a representative to the Assembly. Two important leaders in the opposition; namely, Kenneth Matiba and Raila Odinga, did not attend although they sent strong delegations. They were associated with the idea of a 'conference' and not a convention. They wanted a conference that would subvert the status quo. It remained to be seen whether the forces of such a conference would deflate the pressure for constitutional reform, which

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appoint to the Electoral Commission an equal number of nominees suggested by the opposition and civil society as those already appointed. Further, the electoral commissioners should elect their own chairperson and vice-chairperson. In the meantime, the NCA hereby establishes a parallel non-partisan broad-based Electoral Commission which will monitor the entire process;

6. The NCA will mobilise Kenyans to use all available options to invalidate the electoral process if the government proceeds with elections without passing reforms;
7. Parliamentarians should give priority attention to the reform agenda in the House, and a series of activities should be planned for forcing attention on the agenda during the current session. In particular, the pro-democratic parliamentarians shall support a motion before the House which seeks to secure passage of the reform agenda;
8. Civil mass action in the form of Kenyans gathering in Nairobi at provincial, district and locational headquarters after the first week of June 1997 and remaining there until reforms are passed and implemented. Leaders should be part of the mass action. The NCA will protect those who participate in the mass action.
9. The holding of a national strike at a date to be determined by the NCEC (National Convention Executive Council); and
10. Disobey with immediate effect the unconstitutional provisions in the Public Order Act, which have never been obeyed by the ruling party and all other unconstitutional and oppressive laws, which deny or limit the citizen's freedom of assembly, association and expression.

had been germinating since Limuru. It would be important to revisit the events between July and December 1992 when the convention did not take place. This time, however, NCA had taken place, and nobody expressed it better than Martin Shikuku at the end of the proceedings when he said: ‘Thank God I have lived to see the start of the convention that I have supported since 1990.’<sup>12</sup>

The discussion on the resolutions of the First Plenary was also lively and reflected the interests of the various social groups. If anyone doubted the truism that constitutional reform reflected different class interests, then Limuru was the proof of it. The discussion on amnesty and the retirement of the President was definitely personalised by the delegates. It dealt specifically with the future of President Moi. Those opposed to amnesty said that it would set a dangerous precedent. Others argued that succeeding governments would focus on the ills of the preceding governments and peg their political survival on that and nothing else. There was need to make sure that this did not happen by deciding on succession issues upfront. Others felt that issues of amnesty should involve all citizens to determine what was right for the nation.

The emphasis on the national good was emotionally articulated by Dr Gibson Kamau Kuria who said that as a former detainee and exile, he would be the last person to call for President Moi’s amnesty. However, Kuria was warned against personalising the issue. A compromise was struck by the delegates on the issue of amnesty: Yes, the President would have amnesty and proper retirement, but he would have to support the reform process!

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<sup>12</sup> This statement was said with such drama including a sorrowful voice that nobody in that Convention could forget it. I did not!

The leaderships of both the National Council of Churches in Kenya (NCCCK) and the Episcopal Conference of Catholic Bishops opted to send observers to the convention.<sup>13</sup> Indeed, only the NCCCK actually did.<sup>14</sup> The Presbyterian Church of East Africa (PCEA), the Methodist Church of East Africa and the Supreme Council of Kenya Muslims (SUPKEM) spearheaded participation by religious organisations. Reverend Samuel Macharia Muchuga, Dr Reverend Timothy Njoya and Sheikh Munir Mazrui played key roles in the meeting. Muchuga's warning to religious organisations to embrace constitutional reform unconditionally was loudly and appreciatively applauded: 'When your house is on fire, what is there to observe?'<sup>15</sup>

The National Council of NGOs had its first voluntary sector consultation on constitutional reform on 3 April 1997. The declaration of this consultation sent a powerful message to the deliberations of the First Plenary:

That we immediately begin an intensive and comprehensive reform process. The speed and scope of this process must be based on the level of consciousness and preparedness of the masses. This long-term process must ensure full public information and participation, facilitate minimum reforms for free, fair and peaceful elections and involve all interest groups and political parties including the ruling party in the process.<sup>16</sup>

The consultation also agreed that four values; namely, freedom, democracy, transparency and social justice must be incorporated in the process of constitution-making so that they are reflected in the final document. The consultation then

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<sup>13</sup> The details behind these decisions are discussed in chapter 5.

<sup>14</sup> NCCCK's observer was Martin Kahue who wrote confidentially that the NCA's activities were confrontational.

<sup>15</sup> As clearly heard by the author.

<sup>16</sup> From the archives of NCA-NCEC.

specified six criteria for the selection of an effective process or mechanism to adopt for the reforms. The consultation resolved that the mechanism(s) had to be:

- a) inclusive, non-partisan and reconciliatory of all sectoral and specific group interests;
- b) open and transparent for all to see;
- c) capable of listening to and informing all Kenyans through civic education and mass media;
- d) people-driven, with particular emphasis on the economically disadvantaged and marginalised;
- e) visionary and capable of engaging in advocacy on behalf of the voiceless; and
- f) time-bound, practical and sustainable for a long-term process.

The consultation specifically recommended three mechanisms: the establishment of a national convention; the formation of a transitional government of national unity, with all parties having at least five seats; and the establishment of a constitutional commission within the National Council of NGOs to sustain the voluntary sector consultation. At the time of this consultation, the National Council of NGOs collective forum of all registered NGOs, under the *Non-governmental Organisations Co-ordination Act, 1990*, had a membership of 760 NGOs. It was also clear that the voluntary sector comprised over 40,000 civic groups in the various organised sectors of civil society. The Networking Committee of the National Council of NGOs had done a great job in maintaining solidarity between registered and unregistered NGOs.<sup>17</sup>

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<sup>17</sup> Davinder Lamba chaired this committee as well as the Caucus on Constitution Reform of the National Council of NGOs.

The discussion on the minimum or facilitative reforms was a contest among the political parties, the civic sector and the youth who were urging for the abandonment of the minimum agenda. The compromise was that if the minimum or facilitative reforms were not enacted before 30 June 1997, NCA would abandon that crusade and agitate for comprehensive and intensive reforms.

As discussed above, youth groups such as the National Council of NGOs held consultations before the First Plenary. Among the crucial issues they addressed were the minimum or facilitative reforms.<sup>18</sup> The youth groups were also emphatic on the political and mobilisational features of the constitution-making project. In their view, the ideas generated on the project had to be tested on the ground to precipitate a crisis for KANU. They pledged their sacrifices including 'making Kenya ungovernable if constitutional reforms were not undertaken'. They produced specific resolutions which they successfully demanded had to be carried separately from the plenary resolutions. They successfully fought for more representation at NCEC and, on the whole, radicalised the proceedings of the First Plenary.

Very powerful youth leaders emerged out of this process who would be a great asset to NCA/NCEC.<sup>19</sup> And it is unforgettable that the youth gave NCA its national anthem in the Second Plenary of the NCA. The melody is the same as Kenya's National Anthem, but the words are radically different

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<sup>18</sup> Mainly the Youth Agenda, the National Youth Movement, the Kenya University Students Association and Muungano Wa Vijiji youth groups from the slums of Nairobi. ILISHE Mombasa had also sent its youth representatives to represent the group. The main discussion is canvassed above.

<sup>19</sup> I will not give the names of these heroes and heroines. Patriots know who they are!

and powerful too. A national anthem for the NCA was very symbolic; in it, the status quo was rejected as illegitimate.<sup>20</sup>

Each popular group and association had its say in the people's forum. For example, the representatives of the unregistered People's Party of Kenya (PPK) addressed the issue of land, and their contribution found its way into the resolutions on economic, social and cultural issues. The High Priest of the Tent of the Living God, Ngonya wa Gakonya, also attended and used the platform to explain his political associations. He, again,<sup>21</sup> denied ever having joined KANU. He was heckled by the youth, but the convenors of the Convention ensured he was heard although he did not convince the youth of his loyalty to the constitution-making project.

## **Mass action**

The first show of mass action was on 3 May 1997. A rally was called at the Kamukunji grounds. The purpose of the rally was educative. NCEC was to discuss the resolutions of the First Plenary with the Kenyan people. The Kamukunji grounds have a history. During the struggle for independence, the African politicians and those who supported their cause among the South Asian-Africans and European-Africans held rallies there. Kamukunji is located in an area that used to be called 'Eastlands' during the colonial period. As an open field for the African railway workers and the residents in African estates nearby, it was ideal for rallies. The independence debates took place there. Political parties went to Kamukunji to discuss whatever political issues they were agitating for.

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<sup>20</sup> The National Anthem of the NCA is part of the declaration and resolutions of the Second Plenary of the National Convention, part of the archives in this book.

<sup>21</sup> The issue is dealt with in Chapter 2.

After independence, the late President Kenyatta built Uhuru Park. Uhuru Park was surrounded by what is called 'First World' in the city of Nairobi. It was surrounded by beautiful skyscrapers of Nairobi. It had clean grounds and a man-made lake. It was cool there on a hot day, in particular, at the presidential dais which is situated next to the lake. It had a great public address system and an uninterrupted supply of electricity. The park also bordered the Anglican All Saints Cathedral. The park was a continuous one (separated only by Delamere Avenue, now Kenyatta Avenue) and used to be called Central Park. In the early 1970s, the Jomo Kenyatta-KANU regime allowed Aga Khan capital to construct the Serena Hotel on the northern side of the park. In 1988, President Moi constructed his '10 Great Years Monument' in the northern part, reducing the park area further. The northern part of the park is now commonly referred to as Central Park while the southern part is called Uhuru Park. In the early 1990s, Professor Mathaai of the Green Belt Movement had to lead the city dwellers and Kenyans to successfully prevent yet another desecration of the park: this time, the building of a media complex of sixty floors in front of which President Moi's statue was to stand as tall as 9 of those floors. Uhuru Park is a recreation park for Kenyans of all social groups, and the city of Nairobi owed it to them to keep it so. Many poor families in Nairobi visited the park over the weekends to stroll around or for boat rides on the lake. Many workers in Nairobi who could not afford to buy themselves lunch walked to the park and took naps. Uhuru Park was pretty and provided a welcomed contrast to the concrete buildings of the city centre.

President Jomo Kenyatta made Uhuru Park the area from which he supported his politics of 'developmentalism.' He never tired of reminding Kenyans how developed and modern Kenya was. In the setting of Uhuru Park, even those who knew that

Kenya was not developing could be convinced otherwise while they were there. Kamukunji was forgotten. It became dirty and neglected. Jomo Kenyatta never went there because he did not want to see the consequences of 'developmentalism' while he spoke: dirt, slums, abject poverty, stench and noise pollution. President Moi has gone there to give some of the grounds to the informal sector there. Soon, the Kamukunji grounds would cease to exist and become just an idea – a symbol of the political activism that used to take place there.

Since the 1960s, therefore, Kamukunji came to symbolise 'Not Yet Uhuru'.<sup>22</sup> The opposition to Jomo Kenyatta-KANU regime went to Kamukunji to also symbolise 'Not Yet Democracy'. And the pro-democracy movement pleaded its case there in 1990 and 1991 among the Kenyan people. It was no accident that the *Saba Saba* struggles of 1990 were waged there. It was no accident that in November 1991, the pro-reform movement led by the Forum for Restoration of Democracy (FORD) defied the Moi-KANU regime's colonial repressive laws at Kamukunji. Although the rally did not take place, it was a turning point in the struggle against the Moi-KANU dictatorship. It is no accident that meetings at the universities were called *kamukunjis* to symbolise the battles for academic freedom and students' material welfare, and against the authoritarianism and corruption of the university leadership. It is no accident that KANU was determined to physically wipe out the Kamukunji grounds and kill the spirit of national independence and democracy.

When the NCA went for its Kamukunji *rally* on the morning of 3 May 1997, the physical playing field was getting smaller. The encroachment by the State had never ceased. But the spirit

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<sup>22</sup> Uhuru Park symbolised 'Whose Uhuru!'

of resistance was still alive. Despite KANU's warning that Kenyans should not attend an illegal rally, Kenyans came out in large numbers. The Kamukunji field was surrounded by the police, strangling the resistant and democratic spirit of Kamukunji. The police attacked the people, and the people defended themselves. A procession from Nairobi city centre led by Dr Reverend Timothy Njoya and Reverend Samuel Macharia Muchuga, both of PCEA, was attacked viciously by a group of thugs, thieves, muggers, cut throats and murderers calling itself *Jeshi la Mzee*. This 'army', stole the bibles (in beautiful leather casings) of the two clergymen. *Jeshi la Mzee* was an illegal private army comprising criminals and members of the disciplined forces. Like any other private army, *Jeshi la Mzee* was funded by the State, and a politician from the ruling party.

The standoff between the citizens and the police continued until it got dark. The police had clear instructions not to allow anyone in the grounds. Through persistence, the MPs who attended were able to get into the field, and this act was greeted with great joy by *wananchi*. It was a minor, but significant success for the pro-democracy movement. Later, the two clergymen got into the grounds supported by the pressure of *wananchi*. As the standoff ended, the police and the *Jeshi la Mzee* joined forces and attacked the people as they left Kamukunji.

The Kamukunji rally wrought its problems. The small businesses around the grounds had their wares destroyed and stolen. Their owners were understandably furious. The rally also happened to be held on their market day, so their sales were subverted. The security system set up by NCA/NCEC was not sufficient. It lacked 'intelligence' that could have avoided the attacks of *Jeshi la Mzee*. The procession could have been forewarned about the dangers of the route it took. In addition, there was no proper retreat in the standoff. NCA/NCEC did not

have a general to command its troops. The thieves and gangs that took advantage of the situation to commit crimes could not be stopped for lack of capacity in the security detail on the side of NCA/NCEC. The political point (that the pro-democracy movement was capable of addressing Kenyans) in the rally had been made even the day before the rally when a team of politicians and one of the co-convenors of NCA/NCEC made a trip to the Kamukunji. The trip took the police by surprise.<sup>23</sup> The group addressed the people at Kamukunji grounds. The element of surprise here was important because it was always possible to address the people in venues when the police were caught unawares.

People were injured at Kamukunji. A member of NCEC was beaten unconscious by members of *Jeshi la Mzee* when he defended the clergymen.<sup>24</sup> Other people were arrested during and after the confrontations. They were taken to court. Casualties had not been planned for by NCA/NCEC although this was expected. NCA/NCEC had to discuss these issues of planning and casualties for the future. Fortunately, NCA/NCEC, the Law Society of Kenya and a few of the human rights NGOs agreed to give free legal aid. On the medical side, Dr Ling Kituyi opened her clinic for the casualties of the mass action in Nairobi.

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<sup>23</sup> The organisers of this brilliant strategy were Martin Shikuku and James Oren-go. They summoned the press for a conference at Parliament buildings and then asked the press corp to follow a motorcade that took them to Kamukunji grounds. The grounds were examined. The press was shown where the platform would be and I made a press statement as one of the co-convenors of the NCA. The motorcade then made a procession back into town on a great people's tour. Before the police could hear the procession from their informers, 'Generals' Shikuku and Oren-go had led their troops back to Parliament.

<sup>24</sup> Abdi Sheikh known fondly by the NCEC as the 'Warlord'. He was part of the thin security that the NCEC was able to organise.

On the night of the Kamukunji, thieves broke into Katiba House, the premises of 4Cs, and stole a computer, printer, all diskettes, gas cooker and 16 pressure lamps. It was clear that whoever was responsible was interested in information. If backup diskettes had not been maintained, the entire 4Cs database would have been lost. The theft was also meant to slow down mass action and inconvenience 4Cs, which not only housed the NCA/NCEC, but was the mother and father of NCA/NCEC. 4Cs had to incur unnecessary expenses cleaning the offices of intelligence bugs or explosives. 4Cs had to strengthen its security by hiring more guards. 4Cs did not have funding for an alarm system, and by the time funds were available for this purpose, the premises had been broken into again. After deliberation, the Steering Committee of the 4Cs suspected that the thefts and break-ins were means of State intimidation.

The spectre of opposition disunity was seen at Kamukunji. The Solidarity Alliance of Matiba and Raila did not attend the rally. They had tried unsuccessfully to persuade NCEC to postpone the rally to 3 June 1997. NCEC turned down the request saying that the Alliance was part of the decision to hold the rally on 3 May 1997. The request was also too late. A lot of publicity work had already been done for the rally before their request was made.

The Kamukunji rally of 3 May 1997 was the first step in a long journey of mass action. The publicity of the rally was done through the print media. An attempt was also made to advertise the rally through the British Broadcasting Corporation (BBC) and the Kenya Broadcasting Corporation (KBC), but it was not successful. Handbills announcing the rally were distributed by NCA/NCEC's youth constituency during a football match between Kenya and Guinea on 27 April 1997. Other handbills were distributed at Labour Day celebrations on 1 May 1997.

The police confiscated the paper caps, part of the publicity material on the eve of the rally. They went to the printers and took them. NCEC sought compensation for the cost of the paper caps from the State without success.

It was also encouraging to see the Kenyan middle class, in particular the professionals, in large numbers at Kamukunji. They had driven to the neighbouring estates and parked their cars and then walked to the grounds. The concern shown by the middle class, reflected by showing support in large numbers, was a new phenomenon in Kenya. Ordinarily, the middle class would end their concerns at the realm of ideas. However, the middle class had experience in activism in schools, colleges and universities. The leaders of the mass action at Kamukunji though, no doubt, were youth. In organising wananchi, challenging and intimidating the police, singing, debating with the police, evacuating the injured, protecting their leaders and implementing their resolution at Limuru that they would make the country ungovernable if the reforms were not carried out,<sup>25</sup> the youth displayed great courage.

On the morning of 31 May 1997, the Kamukunji took place at Central Park. This time the demonstrators were able to enter the park from various routes. The police were overpowered, and there was much celebration. The police were then ordered to clear the park. The demonstrators were tear-gassed by the police, and they used the various exits. There was a stampede and many demonstrators were hurt. The night before the rally, the barbed wire surrounding the park was cut to make various exits in anticipation of a police attack. Njoya and Muchuga were

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<sup>25</sup> The resolutions of the youth on the sacrifices they were ready to make for the reforms are part of the declaration and resolutions of the First Plenary, part of the archives in this book.

again among the demonstrators. Njoya had carried his bible and bottles of mineral water. He used the water to wash the faces of a few people that were tear-gassed blind. A standoff followed and the police made sure only a few people remained in Central Park. The tourists in the nearby Serena Hotel had a bird's eye view, and some of the teargas was blown their way. Some cried out against the beating of demonstrators escaping the teargas. The international solidarity from the international people, not their governments, was encouraging.

Later that afternoon, the police chased the demonstrators into the city streets. They beat up everybody in sight. There was no police protection of shops, and looting took place. Again *Jeshi la Mzee* was in action, and there was evidence that they did the looting under police protection. It was at this rally that it became clear that this 'army' had an interesting composition. It comprised the private 'army' of gangsters, cutthroats, thieves, muggers and hooligans as well as the law and order police in civilian clothes. This discovery was made under very painful circumstances. Dr Omari Onyango, one of the convenors<sup>26</sup> of the

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<sup>26</sup> The other was John Munuve, whom along with Suba Churchill Meshack, the Chair of the Implementation Committee, performed a great role in leading the Mass Action Task Force which became Saba Saba Task Force. Munuve, a student leader at the University of Nairobi, was expelled from the University on 15 May 1981. He and other leaders had organised a demonstration. He lived in exile in Tanzania and Zimbabwe and completed his studies in both countries. He was the Chief Executive Officer, National Council of NGOs, April-October 1997. He contributed heavily to the mass action. It is Munuve who dusted off the resolutions on constitutional reforms of the National Council of NGOs and implemented them. He gave the Council a radical profile it never had before. It is ironic that this success cost him his job at the Council. After his six-month probationary period was over, the Council slighted him in his profession by alleging that he did not deliver. During that period, the Council was undergoing an external audit and, there was not much Munuve could do. What he delivered in mass action did not count. It was during this period of mass action that President Moi threatened to deregister the Council (the Council is a statutory body and can only be extinguished by an Act of Parliament, a

Task Force on Mass Action (which became the Saba Saba Task Force after 7 July 1997), was set upon by hoodlums in civilian clothes. They beat him and drew their guns. The uniformed police did not stop the attack as according to journalists who were covering the attacks.<sup>27</sup> The attackers left him with a head wound. They had stalked him as he mistook them for other demonstrators. They beat him up and dragged him to an alley and would perhaps have killed him if the journalists did not rescue him. As if this was not enough, the police harassed Mrs Onyango, his wife, the following week.

The Kamukunji on 31 May 1997 was attended by all opposition party leaders. All, without exception, were targets of teargas. Demonstrators who sustained injuries were treated at Kituyi's clinic. One death was reported: this was the first martyr of the NCA pro-democracy movement. Eric Otieno was reported killed by the police after the rally. His family said that he was not at the rally and that he had not been anywhere near the city centre. NCEC handed over this police killing to the Kenya Human Rights Commission (KHRC) for investigation. NCEC helped with his burial expenses.

The Moi-KANU regime's propaganda machinery was now aimed at the NCEC. The looting was said to be the work of reformists. They were breaking the law. The South Asian-Africans and Africans whose shops were broken into and looted

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detail that did not refrain the President from threatening and intimidating the Council). It is very likely that the timorous souled Executive Committee of the Council chose the easy way out: sacrifice the CEO and not defend him.

<sup>27</sup> The names of these gallant journalists are known by Dr Omari Onyango. Unfortunately, Dr Onyango had been in exile since 10 August 1997, when a contingent of heavily armed police stormed the offices of the 4Cs looking for him. The police said they wanted to 'talk' to him about the looting that took place after the Nane Nane rally.

implied that NCEC was racist and anti-South Asian-Africans.<sup>28</sup> Later some South Asian-Africans and some Africans with businesses in Nairobi sued NCEC for damages sustained during the looting.<sup>29</sup> NCEC had to respond to these allegations. It had been argued and implied by the KANU regime that the blame for the destruction of the property of Kenyans and the injuries sustained in both Kamukunjis rested with the constitutional reformists. It was argued that the reformists should have applied for a licence whether or not the law required them to do so. In turn, it was argued that the Government, which was committed to the rule of law and respect for human rights, would have granted the licence and, therefore, the Kamukunjis would have been peaceful. The Moi-KANU regime also argued that the hawkers and the kiosk-owners had only themselves to blame for the destruction of their property because of supporting the reformists. The regime, which contended to be committed to the rule of law and respect for human rights, implied that it would not have destroyed or demolished their property had the hawkers and kiosk owners heeded the regime's call to stay out of both Uhuru Park and Central Park.

The arguments in defence of the reformists included the fact that the responsibility of guaranteeing the protection of property and lives of Kenyans was, and always is, solely that of the Government. Kenya's laws provided for the arrest and

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<sup>28</sup> It is important to note here that among the politicians supporting the NCEC, two of them had consistently made racist attacks against Asian-Africans; Kenneth Matiba and Martin Shikuku. Raila Odinga had come close on some occasions to joining the Matiba-Shikuku bandwagon. The existence of racism in Kenya could not be denied.

<sup>29</sup> 35 members of the NCEC (out of the 62) were sued. The plaintiffs chose the names of the Management Committee and all the politicians in the NCEC. The suit has not been heard to date. In addition, to my knowledge it has never been heard subsequently. I believe this suit was instituted to stop NCEC/NCA from further mass action.

prosecution of law-breakers, and did not state that law-breakers had themselves to blame where they fell victim to 'mob justice/violence'. Governments that fail to guarantee the protection of citizens' lives and property lose the legal and moral authority to rule. The reformists never advocated the use of violence: they comprised individuals and institutions known for their calls for peaceful reforms. The Government did not protect the lives and properties of the Kenyans when it knew that ordering the police to disperse a peaceful procession would result in theft, hooliganism, looting and stealing. The police were expected to be stationed all over town to stop such looting, not to beat up Kenyans and, of course, not to participate in the looting and stealing themselves. The Moi-KANU regime had assured the foreign missions and organised sectors of civil society that it did not believe in the need to licence public rallies and that soon the *Public Order Act*, which required the licensing of public rallies, would be repealed. If the Government was credible on this issue, then it should not have called upon the police to disperse the demonstrators on the basis of a law it was going to repeal. Yet, the regime argued that it respected the rule of law and that the law was the law until Parliament repealed it.

According to NCA/NCEC, this was a very immoral position. If that were the case, why did the police not stop those who participated in the unlicensed demonstration organised by the Honourable Shariff Nassir in Mombasa? The selective justice that had resulted in arresting and charging Kenyans with behaving in a manner that was likely to cause a breach of the peace (owing to the interference by the police, there was no peace on 31 May 1997.) was meant to intimidate the wananchi to keep away from pro-democracy rallies. If this were not the case, then why were the convenors of the rally and the political leaders not charged? The reformists, the business community,

the hawkers and owners of *kiosks* in Nairobi had been victims of Government-sponsored organised violence, and the victims were divided and asked to blame each other for the violence and chaos.

NCEC was satisfied that the manner of mobilisation of the people for the rally at Central Park was done well and that NCEC had courageously led the people in the park. Again, the youth, reinforced by university students, courageously carried out their tasks. Although the rally was dispersed, NCEC felt it was organised better than the first Kamukunji. However, NCEC noted that, once again, security was not thorough, and the public address system that was hired was very poor. Rev. Njoya could not use it to give instructions to the people in the park when the police struck.

The arena of mass action shifted from the streets and parks to the so-called August House, Parliament, on 19 June 1997. This was the budget day and NCEC decided to popularise the clarion call 'No reforms, no budget'. NCEC's MPs were going to disrupt the reading of the budget by using and also disobeying the Standing Orders of Parliament. NCEC's other members were to mobilise the public for a procession through the city streets. However, the procession was not possible because of the presence of the police and the *Jeshi la Mzee*. In a meeting at All Saints Cathedral after reviewing the security situation in the city, members of NCEC decided that it would be dangerous to attempt a procession. A procession would cost NCEC more casualties, and it was clear NCEC was not in a position to protect the members of the public from the police and *Jeshi la Mzee*. It was also feared that such a procession would result in further looting and the beating up of members of the public by police.

A procession, however, led by the homeless children, took place towards the evening. In the first part of the afternoon,

the homeless children had sung Moi's praises; now, they joined the procession singing 'Moi Must Go!'. Some NCEC members who were in town and who still wanted to participate in a demonstration joined the homeless children now that their message had changed!

The first hour of the reading of the budget was televised. Some members of NCEC were able to see it on TV. NCEC MPs, led by James Orengo, then disrupted the proceedings.<sup>30</sup> The disruption was planned and executed brilliantly. President Moi sat in his chair motionless and felt the heat of the constitution-making project. The placards that NCEC prepared for the MPs were now shown on KBC TV. After this, the broadcast was cut off. The debate was not televised live anymore creating such anger that the students of the University of Nairobi immediately marched to the TV station to demand the restoration of the programme. The police were waiting for them, aided by *Jeshi la Mzee*. Street battles started near the university and the students' halls of residence. These battles went on until the police withdrew, their teargas exhausted for want of more supplies, and made useless by the pouring rain.<sup>31</sup>

The disruption of the budget was a successful action of civil disobedience. What KBC TV did was indicative of what the reformists knew all along: the TV station would never air

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<sup>30</sup> Orengo is a brilliant debator. He combined his oratory skills with his mastery of the Standing Orders to stall the reading of the budget. The defiance of the Standing Orders began after this strategy was undertaken. The Speaker shouted himself speechless. The walkout was the last strategy. The disruption was a success, and although a suit in the High Court seeking a declaration that the budget was not read in law was dismissed, the opinion of Kenyans was against that of one judge. KBC-TV later tried hard to show that the budget was read but could not completely wipe out the background noise.

<sup>31</sup> Charity Ngilu, who was one of the presidential candidates, went to the University to arbitrate in the dispute. She was teargassed and ran for her dear life. Her dash for life was covered in still and video cameras.

anything about the Moi-KANU regime that was negative. KBC Radio and TV ceased to be public in the eyes of Kenyans that day. The truth about them emerged in their illegal disruption of the live coverage of the reading of the budget speech. Both media served the Moi-KANU regime, and for them that was non-negotiable. This was evidence that the reformists would use for its full propagandistic value against the Moi-KANU regime.

The clarion call ‘No reforms, no budget’ gave birth to other clarion calls that were of mobilisational value to the constitution-making project. ‘No reforms, no elections’ was associated with the calls for the boycott of the elections. ‘No reforms, no beer’ was the call of a strike by the brewers. NCEC was able to collect various calls and popularise them. They emphasised that constitution-making was not about governance issues only; it covered all societal problems:

- No reforms, No elections
- No reforms, No new constitution
- No reforms, No human rights
- No reforms, No clean water
- No reforms, No accountability
- No reforms, No gender equity
- No reforms, No transparency
- No reforms, No clean environment
- No reforms, No good governance
- No reforms, No health care
- No reforms, No taxation
- No reforms, No 8-4-4
- No reforms, No entertainment
- No reforms, No national economy

- No reforms, No national survival
- No reforms, No democracy
- No reforms, No housing
- No reforms, No clothing
- No reforms, No employment
- No reforms, No food
- No reforms, No security
- No reforms, No justice
- No reforms, No land
- No reforms, No free press
- No reforms, No indigenous business
- No reform, No sports and leisure
- No reforms, No Harambee Stars
- No reforms, No culture
- No reforms, No foreign investment
- No reforms, No tourists
- No reforms, No riches
- No reforms, No drink
- No reforms, No hawking
- No reforms, No reproduction
- No reforms, No industry
- No reforms, No job security
- No reforms, No sustainable agriculture
- No reforms, No sustainable pastoralism
- No reforms, No rule of law
- No reforms, No independence of the judiciary
- No reforms, No multiparty politics
- No reforms, No livelihood and opportunities

- No reforms, No children's and youth rights
- No reforms, No vibrant civil society
- No reforms, No government of national unity
- No reforms, No peace
- No reforms, No academic freedom
- No reforms, No representation
- No reforms, No Moi

7 July, since the year 1990, was called Saba Saba, the Kiswahili equivalent of seven seven. The phrase Saba Saba was initially associated with the founding of Tanganyika African National Union (TANU) on 7 July 1954, and the day is a public holiday in Tanzania.<sup>32</sup> The Saba Saba battles in Kenya in 1990 were about the struggle against a one-party dictatorship and the demand for freedom and democracy. Football matches were organised in Kamukunji as part of the agitation. The police moved in to break up this peaceful event and killed 22 Kenyans, martyrs of the pro-democracy movement raging in the country. Immediately after these killings, both Kenneth Matiba and Charles Rubia were detained. The 'Anyona Four'<sup>33</sup> were charged with sedition. Raila Odinga, Dr John Khaminwa, Mohammed Ibrahim and Gitobu Imanyara were also detained.<sup>34</sup> There was no way NCEC was not going to commemorate the seventh anniversary of the Saba Saba struggles.

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<sup>32</sup> With the advent of multi-partism, Saba Saba in Tanzania was renamed 'Farmers Day' and remained a public holiday.

<sup>33</sup> George Anyona, Augustine Kathangu, Ngotho wa Kariuki and Professor Eduard Oyugi.

<sup>34</sup> I have discussed this early part of the pro-democracy movement in Mutunga W, 'Building popular democracy in Africa: Lessons from Kenya' in Oloka-Onyango J, Kibwana K and Peter CM (eds), *Law and the struggle for democracy in East Africa*, Claripress, 1996, 214-217.

On 7 July 1997, yet another act of civic action took place. Handbills addressing the purpose of Saba Saba were distributed in towns throughout the country. This mass disobedience of colonial and neo-colonial repressive laws was stopped with full police brutality. In Nairobi, the police did not allow the processions to take place. Nowhere in the country were processions allowed. In Nairobi, there was the usual standoff between the police and the demonstrators. The demonstrators defended themselves against police violence by throwing stones at the police. Later that afternoon, Saba Saba showed the murderous nature of KANU, and this was seen on TV screens throughout the country and all over the world.

The police chased people all over Nairobi, and in the process killed fourteen people. A lot of these killings were video-taped and carried live on CNN. The presidential guard and motorcade personnel stormed All Saints Cathedral, beat up and tear-gassed people who were praying in the church. The same people also beat up and maimed Njoya of PCEA. They also maimed one of the youth leaders in the NCEC, Kepta Ombati.<sup>35</sup> The pews of the church were bloodied; some of the furniture was broken, and the now exploded teargas canisters littered the church. The desecration of All Saints Cathedral was complete. The pictures of both Njoya and Kepta bloodied and writhing in pain were carried on the front pages of most of the influential papers in the West.

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<sup>35</sup> Kepta was one of the key leaders of the Youth Agenda and the National Youth Movement. He was also one of the youth leaders in the Steering Committee of the 4Cs. Kepta, more than anyone else, started the embryonic secretariat of the NCPC and later the NCEC. Working without pay for months, he worked with patriotic commitment. A great taker of minutes, he recorded the story of the NCPC and the NCEC in a true summary of what transpired. When recording the minutes for the Management Committee, he also kept it abreast and alive of the NCEC policies.

Among those beaten up on Saba Saba were Honourable Mwai Kibaki, Honourable Njoka Mutani, Honourable George Kapten, Honourable Kamau Icharia, all MPs. Mutani and Icharia sustained very serious injuries and were hospitalised. Icharia attended the cleansing ceremony at All Saints Cathedral on 13 July 1997, and told a moving story of the British soldiers who chased some *Mau Mau* freedom fighters who hid in a church in Lari, Kiambu District. The British soldiers did not follow them into the church, and the freedom fighters escaped with their lives. Some of the civilised deeds of the British occupation would always be raised among the barbarous and evil deeds of their occupation.

KANU got what it asked for, condemnation all round. The violence that the regime meted out was not new and was always expected. It was the degree of the violence that alarmed everyone. One of the positive consequences of Saba Saba was the birth of a dialogue with the Moi-KANU dictatorship a response from the dictatorship that is captured in the next chapter. NCEC buried its martyrs in Nyahururu and in other parts of the country. NCEC attended memorial prayers for some of the martyrs at Uhuru Park on 17 July 1997. Among the martyrs NCEC mourned was a young university student whom the police killed while he was writing an exam.<sup>36</sup>

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<sup>36</sup> Andrew Oganda Ominde from Korombo Village, Kisumu, Nyahera District. His lecturers who were invigilating the examination were not spared. They were brutally beaten up. The other martyrs of Saba Saba who were murdered by the police in Nairobi were John Wanyoike from Engashura Village, Nakuru Town; Daniel Mugendi Nyaga from Tharaka, Nithi District; James Mwangi Charagu from Mathioya Division, Murang'a District; and Emmanuel Mmbeshi from Kakamega. Peter Mathenge, Peter Njau Wainaina, Paul Njoroge Macharia, David Gatemi Kibari and Timothy Wainaina were all murdered by the police in Nyahururu, Rift Valley. David Kahuni Mutugi, a student at Kairi Boys Thika, and Paul Njoroge Macharia, a messenger at Thika Technical College, were both murdered by the police in Thika. Three people

It is important to acknowledge that since the First Plenary, NCEC gave press statements on a weekly basis on all the activities it was involved in. NCEC was in the papers daily, perhaps emphasising the sad truth that sad stories sell papers. The pro-reform movement received objective coverage in the *Sunday Nation* and the *Economic Review* consistently. The former gave the reformists' arguments along with the arguments of the anti-reform forces, a strategy of letting all ideas contend and a good marketing strategy for the paper. The latter was critical of the reformists without demonising them. The *Economic Review* always suggested where the reform movement was going wrong. It never spared the movement when it thought the movement was issuing empty threats.

A demonstration took place on 8 July 1997, demanding the release of Apiny Odhiambo, a long-serving political prisoner who had been jailed for participating in the abortive coup of 1 August 1982. This demonstration and procession was organised by the Release Political Prisoners (RPP) pressure group. The timing was perfect. Because KANU was being condemned the world over, it was not in a position to send the police after the demonstrators. This procession was peaceful, and gave birth to the clarion call 'No police, no violence; No Moi, no violence!'

NCEC sent a memorandum to the Intergovernmental Authority on Development (IGAD) on 9 July 1997, which stated that it viewed IGAD's meeting in Nairobi with a growing sense of betrayal. Nairobi was the venue of the 6<sup>th</sup> Assembly, and President Moi was the Chairperson. After stating the reforms demanded by NCEC, the memorandum detailed the

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also died in Kawangware, Nairobi, and their names have never been known. The names of the administration policeman who was beaten to death and that of a matatu ('mini-bus') driver who was killed after he fatally knocked down a school girl have never been known.

brutal response to these demands by the Moi-KANU regime. The memorandum noted what it saw as a striking example of hypocrisy: President Moi was threatening to resign as chair of the Sixth Assembly if there were no acceleration of the negotiations and dialogue to end the conflict in Southern Sudan, while his regime used force and blocked all avenues of dialogue to resolve an escalating crisis in Kenya. While IGAD could rationalise its lack of response on what was happening in Kenya on the basis of the principle of 'non-interference in domestic matters of other states,' IGAD needed to know that its mandate was precisely that.

The memorandum sought to know whether IGAD had the moral authority to mediate in the conflict in Southern Sudan if it could not show concern about the Kenyan situation. The memorandum demanded that IGAD immediately creates mechanisms for resolving the crisis in Kenya peacefully through the promotion of dialogue. It also demanded that the Moi-KANU regime respects its obligations undertaken under the African Charter on Human and Peoples' Rights, the International Covenant on Civil and Political Rights, the Universal Declaration on Human Rights and other international covenants and instruments protecting and promoting human rights. The Sixth Assembly was asked to publicly express concern over the continuing violations of the human rights of Kenyans. It was also requested to ask the Government of Kenya to immediately relinquish its role as the chair of the Assembly and host to the mediation of the conflict in Southern Sudan until the crisis was resolved.

On 13 July 1997, All Saints Cathedral, after its desecration was cleansed of this devilish stain in a combative mood by the God-fearing flock that attended the service. If the presiding bishop, Archbishop Dr David Gitari had given the clarion call of 'onward Christian soldiers' this call would have been heeded

and the people would have marched to State House.<sup>37</sup> Njoya was out of the hospital but still not well. He attended the service and confirmed to all that his life was saved by journalists.<sup>38</sup> He also confirmed that his attackers were from the presidential motorcade who claimed that the motorcade had been stoned while driving past the cathedral. Njoya went to the cathedral after successfully stopping battles between demonstrators and police. Shortly after his arrival, he was attacked by the presidential guard. On 15 July 1997, Kenyans, and perhaps the world, were shocked by a meeting between President Moi and the bishops from various denominations. NCA/NCEC saw this meeting as a sign of forgiveness by the religious leaders of the Moi-KANU regime for its Saba Saba atrocities. That, however, was the story of the Religious Community Mediation Team, which is told in the next chapter.

On 26 July 1997, there was a successful NCEC rally at the Makadara grounds in Mombasa. The police did not stop the rally. NCEC was able to popularise its reform agenda to the wananchi. The only interruption was when Karisa Maitha, then a known KANU activist, was found to have a gun.<sup>39</sup> The gun was taken from him by NCA/NCEC activists and later handed over to the police. A complaint was filed by NCEC only for the police to tell NCEC and the public that Maitha had a starter gun which, in law, is not a gun. He was not charged. Did Maitha not behave in a manner likely to cause a breach of the peace?

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<sup>37</sup> Part of this story is told in 'Mene Mene Tekel Urpasin' and 'Free, Fair and Peaceful Elections', in part of the archives in this book.

<sup>38</sup> The journalists were Andrew Mburu, a media consultant, and John Mburu (no relation to Andrew Mburu), working for Kyodo News Service (Japanese News Services).

<sup>39</sup> Karisa Maitha was later to lose a KANU nomination and defected to the Democratic Party. He won the Kisauni parliamentary seat in Mombasa on the Democratic Party ticket.

NCEC's political rally in Kisumu on 6 August 1997 was in defiance of the law requiring licences for public gatherings. NCEC condemned the Likoni-Kwale violence, which I discuss below, at this political rally. After the rally, the entire NCEC leadership was detained at the Kisumu airport, and then deported from Kisumu back to Nairobi. The Kisumu market, however, did not open that day; NCEC saw this action as an expression of solidarity.

NCEC called for a national strike on 8 August 1997 (*Nane Nane* strike). However, NCEC did not have the capacity to monitor the success of the national strike all over the country. In Nairobi, however, it was a resounding success. Nairobi was a ghost town. Schools were closed, and few vehicles were seen in the city. NCEC monitored the situation from the grounds of All Saints Cathedral. There was no police presence in the city. An unplanned rally took place at Central Park.<sup>40</sup> When NCEC members heard of it while at All Saints Cathedral, a meeting of a few members of the Management Committee who were present took place. These members felt that the rally was not a good idea. The rally had not been planned, and the absence of police indicated that there may have been a political trap to discredit NCEC. It was, therefore, decided that NCEC politicians involved be advised to stop the rally. When NCEC members arrived at Central Park, it was too late to stop the rally. It was in full steam, and those present were enjoying their rare freedom of assembly. The rally proceeded, and its consequences dealt a serious blow to the pro-democracy movement.

First, there was the killing of an undercover policeman who was beaten to death around 11 am.<sup>41</sup> Several NCEC

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<sup>40</sup> A procession led by Raila Odinga, Paul Muite and James Orengo attracted more participants before reaching Central Park.

<sup>41</sup> Geoffrey Simiyu worked for the Special Branch.

officials tried very hard to save the policeman's life, but were unsuccessful.<sup>42</sup> Mob violence had reared its bloody head yet again, this time at an NCEC rally. As if this was not enough, the meeting went on to slight some NCEC politicians whom the crowd thought were not consistent in the constitution-making project.<sup>43</sup> Whatever was the basis of the crowd's views on this matter was a matter of debate among members of NCEC.<sup>44</sup>

Towards the end of the rally, the worst happened. It was alleged that the crowds were told that there were still 'Asian shops open. Close them.' There were debates as to who gave the order.<sup>45</sup> Whatever happened resulted in the rally ending with a dash into the city, resulting in extensive looting of shops. Since 31 May 1997, the shops in Nairobi had been barricaded with strong grills. The shops that were looted were the ones that were open, but there was also malicious damage to the ones that were closed.

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<sup>42</sup> Kivutha Kibwana and Reverend Samuel Muchuga were themselves lucky to avoid attacks as they intervened. They were protected by the NCEC youth.

<sup>43</sup> Martin Shikuku was given a chance to speak but could not because of persistent heckling. Norman Nyagah was clearly denied the chance to speak by the master of ceremonies, Dr Omari Onyango. It has been suggested this was deliberate, but the NCEC always denied it.

<sup>44</sup> It was alleged that this crowd's hostility was organised by Raila Odinga. He denied it. The assumption that the crowds attending rallies were organised to slight others is possible. Raila did not know Shikuku was going to attend the rally. It was unplanned. Mwai Kibaki, for example, was in a nearby hotel and came to the rally upon hearing about it. The NCEC did not plan it. It is possible that the politicians in the NCEC had planned it in their persistent battles to upstage each other. Some politicians, therefore, could have been unwelcome visitors.

<sup>45</sup> In a press conference that evening, Martin Shikuku and Lwali Oyondi suggested that it was an NCEC official although they did not disclose their name. On 10 August 1997, a huge contingent of armed police twice surrounded the offices of the 4Cs and demanded to see Dr Omari Onyango. They said that they wanted to question him on the events of Nane Nane. Dr Onyango, whom the NCEC was convinced beyond doubt was innocent, went underground for fear of arrest. I had gone to the mosque when the rally was still going on. By the time I got back, the rally had dispersed.

The slighting of some NCEC politicians in this rally would be quoted later as one of the justifications for some of them joining IPPG.<sup>46</sup> The Nane Nane rally gave the Moi-KANU regime enough ammunition to fight the pro-democracy movement. It was one rally that made the Government's accusation stick, however unjustifiable, that NCEC was fomenting violence and chaos. The reformists had shot themselves in the foot. The Moi-KANU regime's propaganda machine made sure that Kenyans forgot about all the killings that the regime had been responsible for and focussed on this unfortunate attack and the killing of a policeman. The reformists were also not spared in the issue of looting and destruction of property. The evidence within the ranks of NCEC was pointing an accusing finger at the NCEC itself as the cause of the order that resulted in the looting and destruction of property. This information became public.

In the week that followed, thirty-six youths who supported the NCEC were arrested and charged with the murder of the policeman killed on Nane Nane.<sup>47</sup> No thorough investigations took place when these arrests were made. Almost all of the

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<sup>46</sup> See Wa Karengi G, 'The genesis of NCEC and its association with political parties' *The CCD Reforms Digest*, November 1997, 24.

<sup>47</sup> Their names were: Meshack Wasonga Odera, Rogin Ochieng, Daniel Ochieng Ragen, Dan Onyango Orure, Collins Olale, Richard Asere, Erick Otieno Ogola, Tom Owino Mboya, Thomas Odhiambo Oduor, John Wilson Radido, George Oguda Majimbo, Gordon Omondi, Justus Ouma Ojwang', Benson Onyango Ogutu, Duncan Lumumba Kisila, Maurice Ochieng Oruaro, Benard Ochieng Kadundo, George Omollo Kwach, Maurice Genga Nyagol, Patrick Lumumba Owade, George Nyangira Oduor, James Opiyo Wandayi, Thomas Oduor Odhiambo, Joshua Dod Kenyatta, Alfred Ochanda, Benedicto, Otieno Marienga, Samson Ouma, Elijah Odhiamho Ongondo, Benjamin Otieno Odhuongo, John Otieno Owuor, Peter Otieno Michael, Michael Odour Okuma, Oscar William Juma Oballa, Collins Wasonga Awandu, Kenneth Otieno Ochuong and Peter Ouma Onyango. Nyagol was martyred when he died in Maximum Security Prison. After five months in custody, 28 of these youth were acquitted of murder charges. Odhuongo, Owuor, Otieno Michael, Odour Okuma, Oballa, Awadhu and Ochuong' were still awaiting trial for murder.

youths were associated with Raila's National Development Party. The arrests thoroughly intimidated the youth within the ranks of NCEC and definitely weakened NCEC operations. NCEC instructed Orengo to appear for them. One of the youths charged with the murder of the policeman died in remand prison.<sup>48</sup> Only seven of the arrested youth were charged with murder.<sup>49</sup> There was no evidence for the arrest of the twenty-eight youths. These arrests affected security in NCEC rallies because many of the youths were in the Saba Saba Task Force on Mass Action. The Task Force also handled security details for NCEC. The arrests also served as a move to weaken NCEC.

At Kamiti Maximum Security Prison these pro-reform youths formed a lobby group called the Nane Nane Patriotic Front whose objectives were to agitate for the realisation of comprehensive reforms; to demand the urgent improvement of prison conditions; to demand the representation of youth in the reform process as a fundamental stakeholder; and to work out strategies for their survival, having lost jobs, and their personal properties having been auctioned off by landlords. These youth rightly expressed disappointment for the failure of the political parties and NCEC to assist their families who were evicted by landlords and were thereby denied their fundamental needs. NCEC did not have the capacity to help out, but learnt very vital lessons. Mass action could not be sustained unless the victims got all the protection, support and appreciation worthy of such patriotism. Strategies needed to be designed to assist and compensate these youth and remember their sacrifices

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<sup>48</sup> His name was Maurice Genga Nyagol.

<sup>49</sup> Kivutha Kibwana and Reverend Samuel Muchuga were lucky not to be charged as they intervened to stop the violence that resulted in the murder of the policeman. It is likely the State did not want to charge such prominent leaders of NCEC with murder when the evidence pointed the other way.

and those of other patriots. NCEC needed to be different from the Moi-KANU regime that conveniently forgot the sacrifices made by Kenyans in the struggle for land and freedom.

In August, politically-instigated violence erupted in the Likoni-Kwale area of Coast Province, near the port of Mombasa. NCEC condemned the violence and called upon KANU to stop it. The entire story of this State violence against its own people was told in a KHRC's Report, *Kayas of deprivation, Kayas of blood*.<sup>50</sup> This report was researched and written by one of the directors of the KHRC, Professor Alamin Mazrui. One of Alamin Mazrui's findings is very important for the role played by NCEC. The report claimed that the violence was planned to stop the constitution-making project:

Intelligence sources have suggested that the Likoni-Kwale violence had a much grander agenda than the apparent transformation of the demographic equation in the area for the benefit of KANU candidates. This agenda is related to the "rise and fall" of the NCA/NCEC project. As the evidence presented earlier demonstrates, the organisation of the violence began within a month or so of the Limuru 1, a dramatic national event which sent strong shivers down the Moi-KANU spine and made the regime feel it had lost the political initiative to the NCA/NCEC.<sup>51</sup>

The report argued that the 'grander' plan of the violence in Likoni-Kwale was derailed by the IPPG initiative that allowed KANU to recapture the political initiative from NCA/NCEC, among other reasons.<sup>52</sup>

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<sup>50</sup> Mazrui A and Kenya Human Rights Commission, *Kayas of deprivation, Kayas of blood: Violence, ethnicity and the state in coastal Kenya*, Kenya Human Rights Commission, Nairobi, 1997.

<sup>51</sup> Mazrui A and Kenya Human Rights Commission, *Kayas of deprivation, Kayas of blood: Violence, ethnicity and the state in coastal Kenya*, 51.

<sup>52</sup> Mazrui A and Kenya Human Rights Commission, *Kayas of deprivation, Kayas of blood: Violence, ethnicity and the state in coastal Kenya*, 53.

NCEC supported a demonstration organised by the Muslims for Human Rights (MUHURI) on 12 August 1997. The demonstration was called to protest the Likoni-Kwale killings. It defied the law requiring a licence for the procession and demonstration. The police blocked the demonstrators at Kenyatta Avenue in Mombasa, and the demonstrators retreated to Sakina Mosque. The demonstrators split up in small groups and reconvened at Makadara grounds in the centre of Mombasa town. The police were kept busy, through discussions, by a group of NCEC youths at Kenyatta Avenue, and by the time the policemen were informed of the movements of the demonstrators, they were already at the Provincial Commissioner's office. A petition was presented to some officials in the Provincial Commissioner's office condemning the Likoni-Kwale killings. The demonstrators called upon the Government to stop the killings.

On 10 October 1997, another mass action event, dubbed *Kumi Kumi*, was organised by NCEC. 10 October 1997 was also Moi Day, a public holiday. The message from NCEC was against attending the Moi Day rallies. Instead, NCEC urged Kenyans to hold mourning and reflection meetings in alternative venues. NCEC planned a rally at Kamukunji to test the strength for its call for constitutional reforms. Kenyans were given a chance to attend either a Moi rally or an NCEC rally. As expected, KANU viewed this as a provocation and did not allow the NCEC rally to take place. There was the usual police violence which resulted in arrests. Honourable Paul Muite, a Member of Parliament, was assaulted and his ribs broken in a brutal police attack. Other MPs who were assaulted were Henry Ruhii, Aloo Ageka and Benjamin Ndubai. Tirop Arap Kitur, the coordinator of RPP pressure group, and Ngengi Muigai of Saba Saba Asili were also injured. Over 150 Kenyans were

arrested, but released. The Moi rally was not well attended; the known KANU mobilisation strategy of renting crowds for such rallies did not work this time. The demands of the Kumi Kumi rallies were: No reforms, no elections; legislate the minimum reforms package advocated by NCEC and the religious sector (in particular, NCCK and the Episcopal Conference of Catholic Bishops (ECCB)); freeze the general election timetable; and all preparations for the elections be repeated after the passing of reforms.

The last activity on the NCEC mass action calendar was on Kenyatta Day, 20 October 1997. 45 years earlier, that day, the British declared war on the Land and Freedom Army of the Kenyan freedom fighters. A state of emergency was declared and Jomo Kenyatta was arrested, and subsequently tried on trumped-up charges and jailed for seven years. The British kept Kenyatta detained and then in restriction under detention laws until 1961 when he was released. There is no doubt among historians, and the British Government, that Kenyatta was innocent of the charges which alleged that he managed the Mau Mau war of independence. It was the radical wing of the Kenya African Union (KAU) that supported and ultimately carried out armed struggle against the British. The constitutionalists (reformists), Kenyans who were against armed struggle, told the British Government that changes were inevitable and that they could be undertaken peacefully. The British comprador class in Kenya, in the name of white settlers who thought they could maintain the status quo, did not heed the call of the reformists. A striking parallel here was the message (that changes had to come peacefully or through violence) that NCEC was giving KANU.<sup>53</sup>

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<sup>53</sup> I discussed my views on the Mau Mau War in Mutunga W, 'Building popular democracy in Africa: Lessons from Kenya', 204-206.

The issue of whether to boycott Kenyatta Day generated a heated debate within NCEC. One argument was that NCA had articulated noble ideals in its struggle for democratic change in the country. Some of these ideals included democracy, freedom, basic needs for all Kenyans, an independent national economy, respect for the rule of law and human rights, peace and security. These ideals had been adulterated and violated since the colonial era. National public holidays were supposed to reflect these ideals. To reinforce and respect these ideals, and in the spirit of Limuru-Ufungamano II (26 to 28 August 1997), NCEC would engage in other programmes during such national public holidays (except religious holidays). This had been done over Moi Day on 10 October 1997, and Kenyatta Day was, therefore, no exception.

One school of thought within NCEC argued against joining Moi and KANU in Kenyatta Day celebrations all over the country. Instead, this school suggested a series of activities, which included the honour of all heroes and heroines of the pro-democracy movement since the invasion and occupation of the Motherland by the British. According to this view, NCEC was to call upon Kenyans to participate in these activities in honour of fallen patriots. It was suggested that 20 October should be the day Kenyans celebrate the heroism of Kenyans for resisting the invasion and occupation of the Motherland by the British. NCEC also urged Kenyans to reflect on renaming Kenyatta Day: Heroes and Heroines Day or Freedom Day.

There were those in NCEC that were opposed to the boycott of the Kenyatta Day celebrations, arguing that it would be divisive, although this argument was not articulated properly and convincingly. These NCEC members were reminded by those who supported the boycott of the celebrations that if Kenyatta Day celebrations were not boycotted, NCEC would face the pervasive accusation that it was a movement to champion Kikuyu interests, whatever that meant. The issue, in short, was going to be ethnicised, and NCEC would be the loser in the propaganda war.

A compromise was reached. NCEC was not going to join Moi in the rallies, and thus would boycott them. The issue of renaming the day was dropped. NCEC would hold a rally in Nyahururu on 19 October 1997, and move on to Nyeri on Kenyatta Day. While in Nyeri, NCEC would plant a tree in honour of the late Dedan Kimaathi, Kenya's first Prime Minister, head of Kenya's Free Parliament and the Commander of the Land and Freedom Army. By doing so, NCEC would be paying special homage to all fallen patriots without whose sacrifices Kenyans would not enjoy the meagre freedom they now had. By honouring Kimaathi, NCEC dedicated its courage and the lives of its members to the ideals these patriots fought for. By honouring Kimaathi, NCEC would reflect its determination to put Kenya on a truly democratic trajectory.

The Nyahururu rally was held at Kamukunji grounds in Nyahururu town and the attendance was good, although the police disrupted it. The huge crowd that gathered displayed the determination to have the rally, but NCEC was not ready for the confrontation. Besides, NCEC leaders had been detained in Ol Kalou, and their release needed to be secured. One of the requests that was made by the people of Nyahururu who supported NCEC solidly was for the establishment of an NCEC structure in Nyahururu.

In Nyeri, a *mugumo* tree, a symbol of immortality among the Kikuyu people, was planted at Karunaini at midnight on the night of 19 to 20 October 1997. The *mugumo* tree was planted at the spot where Dedan Kimaathi was shot and captured by the British in 1956. The planting was done at midnight to prevent disruption by the police.<sup>54</sup> NCEC members went to the site the morning of 20 October 1997, and planted another *mugumo* tree. There were speeches and prayers, and before the ceremony was over, the police moved in and tried to stop the ceremony that had almost ended. They were resisted, and allowed the ceremony to end.

The police followed the NCEC motorcade which stopped at Ihururu Market. Here, a contingent of police ambushed the NCEC motorcade and tear-gassed it. A police chase followed into Nyeri town and on to Outspan Hotel. Alarmed tourists witnessed the trespass on the private property of the hotel and the arrests of NCEC activists.<sup>55</sup> The arrested activists were kept in Nyeri Police Station until 6 pm when they were released. The entire NCEC membership was then deported from Nyeri under the guard of the Nyeri police. They escorted the NCEC members to the border of Nyeri and Kirinyaga. NCEC had planned to conduct a 'meet the people tour' of Murang'a district after the tree-planting ceremony, but the arrests had rendered it impossible. Kenyatta Day celebrations in Nyeri were attended by about 50 people which was of great comfort to NCEC.

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<sup>54</sup> The NCEC youth under the command of Kabando wa Kabando, a former leader of Students Organisation of Nairobi University 1992 (SONU' 92), planted the tree. Wa Kabando became an activist with the Safina party.

<sup>55</sup> Among these were Orengo, Onyango-Midika and Eda Rubia. Wa Kabando was able to evade arrest, as did his comrades.

## Conclusion

The defiance reflected by mass action had confirmed the growing culture of resistance in the country inculcated in the Kenyan people. Divisions between the political parties, however, still plagued the pro-democracy movement. The religious groups, except the PCEA, had shown no interest in mass action although they condemned the violence.

One great opportunity that NCA/NCEC failed to take advantage of was the political environment of setting up its own grassroots structures in the various areas where NCEC was becoming popular. These structures definitely could have been created in Nairobi. Nyahururu, however, did request such a structure. Karunaini peasants had replanted the *mugumo* tree, which KANU's agents uprooted a few days after NCEC members planted it. The replanting of the *mugumo* tree by these peasants was an act of commitment to protect an NCEC project and, consequently, the peasants concerned automatically qualified to be NCEC's officials in Karunaini. The opportunity of creating NCEC's own popular grassroots structures was lost when the religious groups and politicians pulled out of the NCEC project.

Mass action definitely had an impact on KANU. Immediately after Saba Saba, 1997, Moi summoned religious leaders and asked them to mediate between KANU and NCEC. It was a bait that the religious leaders unfortunately swallowed. The Likoni-Kwale violence was also a desperate and heinous way for the regime to deal with the reform movement and the impact of mass action. Mass action had created a crisis for the Moi-KANU regime. It was forced to explore various options to end the crisis: whether through violence or dialogue.

Mass action resulted in MPs who did not support the radicalism of NCEC reviving their own political structures.

‘The book tells a fascinating story. The story is about the potential and limits of the role of civil society in promoting fundamental political and constitutional change. It tells of the struggles of the Citizens Coalition for Constitutional Change (4Cs) for a new political dispensation for Kenya. The 4Cs, as the movement became known, was led by a small number of highly dedicated and able intellectuals which made a major impact on Kenyan politics during the 1990s. It provided the only credible challenge, enjoying considerable legitimacy, to the regime of President Daniel Moi. It mobilised large sections of the community, operating in close collaboration with religious leaders, political parties, trade unions, women’s groups and professional associations. It promoted wide public discussions on constitutional reform and the purposes of public power. It set up a National Convention Assembly (NCA), which became a forum for negotiations on constitutional reform and provided an alternative site to Parliament for public debates and forging consensus.

‘Its approach was constructive and peaceful. It produced a draft constitution, which offered fresh perspectives on the role and organisation of the State. It received considerable sympathy and support from the foreign community, uneasy with the Moi regime, but unsure how to deal with it.

‘The 4Cs did achieve a measure of success; it can take much credit for the abolition of the one-party system. However, in terms of ensuring a fair and transparent framework for elections, the objectives and procedure for transition of power, securing the adoption of minimum constitutional reforms and, fundamentally, setting the State on a trajectory of constitutionalism, the 4Cs was less successful. Indeed the conclusion of the author, which seems to be shared by some other key leaders of the movement, is that in these they failed.’

*Professor Yash Pal Ghai, formerly, Chair, Constitution of Kenya Review Commission*



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