

1 International Criminal Court
2 Pre-Trial Chamber II - Courtroom I
3 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and
4 Judge Cuno Tarfusser
5 Situation in the Republic of Kenya - ICC-01/09-01/11
6 In the case of the Prosecutor versus William Samoei Ruto,
7 Henry Kiprono Kosgey, and Joshua Arap Sang
8 Confirmation of Charges Hearing
9 Monday, 5 September 2011
10 The hearing starts at 2.28 p.m.
11 (Open session)
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE TRENDAFILOVA: Good afternoon. Please be seated.
15 On behalf the Chamber, let me welcome the Office of the
16 Prosecutor, the representatives on behalf of the Prosecutor, the Defence
17 teams of Mr. Ruto, of Mr. Kosgey, and of Mr. Sang. Madam Chana, the
18 Legal Representative of the victims that have been granted participatory
19 status and rights in these proceedings.
20 Today we proceed with our work, but let me give first the floor
21 to the Court Officer to call the case. Please Court Officer.
22 COURT OFFICER: Thank you, Madam President. Good afternoon.
23 Good afternoon, your Honours. This is the Situation in the
24 Republic of Kenya, in the case of the Prosecutor versus
25 William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, case

1 number ICC-01/09-01/11. Thank you, your Honours.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you, Court Officer.

3 Following our schedule, we have to proceed with the presentation
4 of the Defence team of Mr. Kosgey and thereafter we shall pass on to the
5 Defence team of Mr. Sang if there is time left.

6 Before I give the floor to the team of Mr. Kosgey, I just would
7 like again shortly to remind you what actually I have explained in the
8 beginning of this Confirmation of Charges Hearing, that the evidence that
9 the parties are going to present should be relevant to the case pending
10 before the Chamber, that when the parties refer to evidence, they should
11 give the EVD number and the last four digits of the document ID number,
12 or at a minimum, the page or paragraph number. They must also indicate
13 the level of confidentiality. The parties should also refrain from using
14 anonymous witnesses' and victims' names. They should only refer to their
15 respective numbers. And finally, the Bench invites the parties to make
16 efforts to avoid repetitive arguments.

17 Having said this, I invite Mr. Oraro, as lead counsel, to start
18 presenting the case on behalf of the Defence team for Mr. Kosgey.

19 MR. HOOPER: Madam President, before that happens, can I just
20 make a very brief mention of one matter. Your Honour may recall on
21 Saturday, in the course of Mr. Murei's evidence, it emerged that he had
22 made two previous statements, so he said, and indeed that was the case as
23 we --

24 PRESIDING JUDGE TRENDAFILOVA: We have received them.

25 MR. HOOPER: Indeed. I just want to put it plainly to those

1 interested in knowing what's happening here, that those statements have
2 been obtained. They were obtained as quickly as we could, as you well
3 understand. They were served on the Chamber and the parties, including
4 the victims' representative, this morning. They are therefore now
5 available.

6 The -- I mention it essentially now, because Mr. Murei is due to
7 leave Holland to return to Kenya tonight. Both witnesses called on
8 behalf of Mr. Ruto are, in the normal course of affairs, due to return
9 tonight. I've been able to contact VWU, they've made all the necessary
10 arrangements for that, and I've alerted them to the possibility that if
11 either the Chamber or any party wishes to seek to have recalled
12 Mr. Murei, that that is something that needs to be addressed urgently in
13 order to prevent that course of events taking -- taking effect. So we
14 essentially are quite -- quite happy to proffer, as it were, that witness
15 for further re-examination, for example, if needs be.

16 We'd also wish to stress that as the Chamber has seen, those --
17 those statements that have been served, there was nothing to hide.
18 They're totally consistent with his evidence, and that's a very
19 significant point, and indeed the Defence would be making a formal
20 submission to the Chamber to have both those statements admitted formally
21 as evidence in this case, late though it is, in order not to prejudice of
22 interests of Mr. Ruto.

23 I understand the Chamber's already indicated that it would prefer
24 in any event to have a short filing to accompany those statements.
25 That's in hand. There may be a further statement we can provide that is

1 relating to the taking of those statements, we're seeking that, in which
2 case we hope to have that by tomorrow and the filing. So I just want to
3 put the Chamber in the picture as to what's gone on.

4 PRESIDING JUDGE TRENDABILOVA: Thank you, Mr. Hooper. I -- you
5 have to rest assured that the Chamber is in the picture. We have
6 received the two documents as promised by Mr. Katwa, Counsel Katwa.
7 Thank you very much for this.

8 With regard to your suggestion that you're going to make a kind
9 of a filing regarding some statement, I would like to say that the
10 Chamber wouldn't accept this filing just because the Chamber was acting
11 *proprio motu* pursuant to its responsibilities under Article 69(3), the
12 second sentence, that provides for an independent *proprio motu* power of
13 the Chamber when the Chamber identifies some piece of evidence that are
14 important for the establishment of the truth. Of course, given the
15 specific task assigned to the Pre-Trial Chamber at this stage of the
16 proceedings, we are assigned with the duty to request the submission of
17 this evidence, but this is just what the Chamber has to do on its behalf,
18 and this doesn't mean that the parties could be granted an additional
19 extension of some deadlines for disclosing documents that -- because the
20 disclosure deadline has already expired.

21 Thank you very much, Mr. Hooper.

22 MR. HOOPER: The only matter is that we were concerned that
23 perhaps in the circumstances the Chamber at least may have deserved a
24 fuller explanation about this, because it was an incident that cast
25 something of a shadow on us which was undeserved. This was an error.

1 Some erroneous decisions may have been taken, but it was an error, and on
2 the face of those documents I think it was quite plain that that was the
3 case, because there's clearly nothing to hide in those statements.

4 PRESIDING JUDGE TRENDAFILOVA: We understand, Mr. Hooper. I'm
5 very much sorry, because we would like to proceed with our business from
6 the schedule today. We're not discussing now these two statements. It
7 was our duty. We did it following an oral decision to be taken by the
8 Chamber. We have received these two statements just before coming to the
9 courtroom. We are going to study after we finish today with the three
10 court sessions, and if need be, we are going to come to you to ask for
11 some explanations. But let me very shortly confer with my colleagues
12 whether they consider it necessary to have another session with Mr. Murei
13 as the second witness for Mr. Ruto. Just a moment.

14 (Trial Chamber confers)

15 PRESIDING JUDGE TRENDAFILOVA: So it doesn't take us long. The
16 Chamber is unanimous. We do not need to keep Mr. Murei away from his
17 home country. So the Victims and Witnesses Unit will be instructed to
18 assist Mr. Murei in his journey back to Kenya.

19 Now, Mr. Hooper, could we just --

20 MR. HOOPER: (* Overlapping speakers)

21 PRESIDING JUDGE TRENDAFILOVA: -- stop exchanging all the time --

22 MR. HOOPER: Well, your Honour, no. I admire the speed of the
23 Chamber's decision. Presumably, the Registry will inform VWU, otherwise
24 we will. It's just so that I know that they're wait --

25 PRESIDING JUDGE TRENDAFILOVA: It is the responsibility of the

1 Registry --

2 MR. HOOPER: Thank you.

3 PRESIDING JUDGE TRENDAFILOVA: -- to assist the Defence teams
4 following the Regulations of the Court and the Regulations of the
5 Registry. So they will do their job as expected. And just with regard
6 to your comment that we were expeditious, there are different levels of
7 complexity of the legal issues, and this was not a very difficult one to
8 be handled for the time that it took the Chamber to do its job.

9 So, would you, Mr. Oraro, please take the floor. You're welcome
10 to proceed. The floor is over to you for the rest till we are to make
11 the break.

12 MR. ORARO: Thank you, Madam President. Madam President,
13 your Honours, for the purposes of today's appearance, Mr. Kosgey is
14 represented by me, George Oraro, Mr. Matthew Ryder, Mr. Julius Kemboy,
15 Mr. Allan Kosgey, Ms. Michelle Butler, Mr. Steve Powles, and
16 Ms. Liane Aronchick.

17 Having sat in these proceedings for the last few days and heard
18 all the analysis presented by the Prosecutor, the Defence team of
19 Mr. Kosgey is of the humble view that for the limited purpose of the
20 confirmation hearing, there's sufficient disclosed material on record for
21 this Chamber to effectively discharge its mandate as set out in --

22 PRESIDING JUDGE TRENDAFILOVA: Excuse me, Mr. Oraro. I would
23 like to confer with my colleagues on an issue.

24 (Trial Chamber confers)

25 PRESIDING JUDGE TRENDAFILOVA: Mr. Kosgey and Mr. Oraro, I was

1 consulting my colleagues on the number of -- of members of your team, and
2 there are actually seven. We have been informed since the very first day
3 of the confirmation hearing that a decision was taken that only four
4 members of each Defence team could be present in the courtroom. The
5 Judges of this Chamber do not object that there are seven in this case,
6 that the courtroom doesn't appear to be so much overcrowded, but how many
7 of you are going to take the floor? Not more than --

8 MR. ORARO: Madam President, I'm the only one taking the floor.
9 They are only here to listen.

10 PRESIDING JUDGE TRENDABILOVA: To support you morally and with
11 their knowledge and experience.

12 MR. ORARO: And if need be, physically.

13 PRESIDING JUDGE TRENDABILOVA: Thank you.

14 MR. ORARO: Thank you, Madam President.

15 Madam President, having sat in these proceedings for the last few
16 days and heard all the analysis presented by the Prosecutor, the Defence
17 team of Mr. Kosgey is of the humble view that for the limited purpose of
18 confirmation hearing, there is sufficient disclosed material on record
19 for this Chamber to effectively discharge its mandate as set out under
20 Article 61 of the Statute.

21 Consequently, the Defence team determined that not much value
22 would be added by calling a live witness as previously intimated. In so
23 doing, the Defence team hopes to further contribute to the efforts
24 already put in place to comply with statutory requirements respecting the
25 expeditiousness of these proceedings.

1 We therefore commence the Defence presentation which I shall
2 present in two parts. Part one shall deal with an analysis of the
3 Prosecution presentation of the organisation and the so-called network.
4 And in part 2, I will deal with evidentiary analysis encompassing the
5 Prosecution presentation of the elements of the crime and liability of
6 Mr. Kosgey.

7 Madam President, your Honours, these represent the outer limits
8 of the time lines -- the outer limits of what we want to present and we
9 are alive to the need not to be repetitive. We shall therefore observe a
10 level of flexibility and, if possible, save on time.

11 Now, I'll go to the issue of the organisation according to the
12 Prosecution evidence.

13 Out of abundant caution and to save time, we request the Chamber
14 to treat references in the presentation as confidential unless otherwise
15 stated. And we shall indicate as we make each reference that it is
16 confidential. It is only in places where we are not mentioning any
17 confidential material that we shall proceed.

18 As has been reiterated, the events which occurred in Kenya
19 following the 2007 elections were indeed grave as has been demonstrated
20 before you, and we are of the view that they cannot be minimised. For
21 the purpose of these proceedings, however, it remains the burden of the
22 Prosecution to offer concrete and tangible proof demonstrating a clear
23 line of reasoning underpinning the specific allegations they have made
24 against Mr. Kosgey, and that has been the finding of this Chamber in
25 previous proceedings.

1 To begin with, the contextual elements under Article 7(2) require
2 that the attacks directed against any civilian population be committed
3 pursuant to or in furtherance of a State or organisational policy.
4 Mr. Kosgey submits that he has absolutely no connection with any alleged
5 organisation.

6 In order to attribute responsibility to Mr. Kosgey under
7 Article 25(3)(a), the Prosecutor would have to prove the following: Not
8 just that Mr. Kosgey shared a general common plan, that is to create
9 uniform voting bloc as has been specified by the Prosecution, but that he
10 specifically knew and approved the fact that the common plan necessarily,
11 and not just potentially, involved the commission of the offences of
12 murder, forcible deportation and persecution, which were to occur from
13 30 December to the end of January 2008. In other words, it is not enough
14 for the Prosecutor to argue that he intended and contributed to the first
15 crime, and as a result, is responsible for all the other crimes committed
16 as a result of the first crime.

17 Two, that Mr. Kosgey made an essential contribution to the
18 realisation of each of the three crimes, murder, persecution, and
19 forcible deportation. Indeed, indirect co-perpetration requires the
20 Prosecutor to demonstrate that the defendant made an essential
21 contribution to the plan and that he possessed the power to frustrate its
22 execution.

23 And lastly, in the limited propositions I wish to make for the
24 purposes of this opening, that Mr. Kosgey exercised effective control
25 over the physical perpetrators such that his will controlled them and

1 their identity and volition was irrelevant.

2 We shall be able to demonstrate to you that, at the end of the
3 day, when all disclosed materials are examined, it will be self-evident
4 that the entire case against Mr. Kosgey is in the main anchored on the
5 evidence of one unreliable, undisclosed, heavily redacted and
6 uncorroborated evidence of a single Prosecution witness known as
7 Witness 0006.

8 Madam President, your Honours, we shall shortly demonstrate that
9 not only is the evidence of Witness 0006 wholly unreliable, but the
10 Prosecution, too, found material parts of his evidence to be wanting in
11 many respects and indeed didn't rely on it for the purposes of the
12 disclosures they have made so far.

13 It is the case of the Prosecution that at the heart of these
14 tragic events is an alleged network conceived for the purposes of
15 expelling members of the Kikuyu, Kamba, and Kisii communities referred to
16 by the Prosecutor as PNU supporters. The objective, we are told, was,
17 (a) to create a uniform support and serve the alleged -- served the
18 alleged perpetrators and form uniform voting support for ODM in the
19 Rift Valley. So the first policy which the organisation the Prosecutor
20 has put forward was supposed to perform was to expel these communities
21 and create a uniform voting bloc, which was a political purpose.

22 The next purpose was, in fact, a curious one, and it is claimed
23 by the Prosecution that it was intended that PNU supporters be stopped
24 from celebrating in the event that PNU succeeded in the coming elections.
25 I will be able to show you, Madam President, your Honours, that this

1 theory is derived from Witness 0006. In fact, it is only Witness 0006
2 who came up with that theory. And even the Prosecutor, in his opening
3 address, is now running away from that theory.

4 The basis of the theory you will find in the witness's transcript
5 at EVD-PT-OTP-00382 at 020.

6 Significantly, this objectives -- objective differs from
7 everybody who has carried out in the inquiry into the tragic events of
8 2007, and consistent with what has been disclosed, I will only refer you
9 to two reports which have been put forward by the Prosecution. And the
10 first report I would wish to refer you to is a report entitled "CIPEV
11 report," and it is found at EVD-PT-OTP-00001-0364 at 0398 to 0413, where
12 it is stated as follows -- and this is what the commission established by
13 the Kenya government following the Annan negotiations established, and
14 they came up with a conclusion consistent with a previous conclusion
15 which was arrived at by an earlier commission to this persistent violence
16 and known as the Akiwumi Commission. When you go through this report you
17 will find that their finding was that there were three underlying reasons
18 for clashes. One was ambitions by the Kalenjins of recovering what they
19 think they lost when the Europeans forcibly acquired their ancestral
20 land. That was one proposition.

21 The second one was the desire to remove foreigners derogatorily
22 referred as "madoadoa" or "spots" from their midst. The reference was at
23 that time mainly to Kikuyu, Kisii, Luo and other communities who had
24 found permanent residences in the Rift Valley. And lastly, it was
25 political and ethnic loyalty. So this has been the consistent problem in

1 Rift Valley.

2 Now, the other commission which looked into what had happened in
3 the Rift Valley and came up with a proposition was the Kenya human rights
4 report "On the Brink of the Precipice - A Human Rights Report on
5 Post-Election Violence," and you will find it at EVD-PT-OTP-00001-0002 at
6 page 0027, paragraph 33 to 77, where it states as follows:

7 "As Nick has noted, the media hyperbole of the violence aside --
8 the media hyperbole of the violence aside, the events -- the events of
9 December 2007 elections and the post-election violence have many
10 continuities with Kenya's recent past. Broad national level
11 socio-political and economic dynamics, as well as localised state society
12 and community context interacted to generate the conditions germane to
13 the crisis, historical injustices and land grievances."

14 So this has been the basis of this problem for a long time in the
15 country, and it is not as was purported by Witness 0006.

16 Madam President, your Honours, you will note that arising from
17 this uncertain position by the Prosecutor, he was want to submit in his
18 opening address before this Chamber on the 2nd of September, in the
19 transcript you'll find it at page 65, line 15 to 20, and this is what he
20 said:

21 "Ruto and Kosgey community in the Rift Valley believe that these
22 decisions usurp their ancestral land, and instead of leading their
23 community to a proper solution of the land problem, Mr. Ruto and
24 Mr. Kosgey capitalised on the existing tensions and animosity caused by
25 the redistribution of land and using the -- using the usage, the election

1 as an excuse to trigger the attacks."

2 So the position of the Prosecution, as they realise how futile
3 the proposition of Witness 0006 was, has been shifting and now they have
4 arrived at a position consistent with every inquiry which has gone into
5 this matter.

6 Madam President, your Honours, in the context of Article 7(2),
7 the organisation which has been identified by the Prosecutor as the
8 instrument through which violence in the Rift Valley was carried out is
9 what is described in the DCC and all other documents as a multi-faceted
10 network. It is allegedly predicated on the existing structures in the
11 Kalenjin community, and you will find this in the DCC from paragraph 43
12 to paragraph 46.

13 It is necessary for the Prosecution, first and foremost, in order
14 for them to claim that Mr. Kosgey was a co-perpetrator, to establish --
15 sorry, Madam President. Sometimes I go a bit fast, so I --

16 PRESIDING JUDGE TRENDAFILOVA: Yes. Thank you very much.

17 MR. ORARO: Yes, sorry. I will reduce my speed.

18 PRESIDING JUDGE TRENDAFILOVA: Even a little bit slower makes
19 your point stronger.

20 MR. ORARO: Thank you, Madam President.

21 Now, as I was saying, it is necessary for the Prosecutor, in
22 order to lay a claim against Mr. Kosgey as a co-perpetrator, to first
23 commence by laying a nexus between Mr. Kosgey and the so-called network.
24 In the context -- in the context of evidence disclosed before this Court,
25 it is alleged that the network comprised of five separate heads existing

1 within the Kalenjin community.

2 Now, the first head which the Prosecutor alleges is the political
3 part of the network. The DCC is not very specific on the role of
4 political component, but is alleged to -- to be providing a forum for
5 leaders, that is, Ruto and Kosgey, to develop their plan and organise
6 direct perpetrators. You will find this at paragraph 46 of the DCC.

7 It is also alleged to have been providing financing through
8 contribution by the then-Members of Parliament. It is suggested that
9 this group comprised, among others, Members of Parliament affiliated to
10 ODM. According to the Prosecution, they claim that these Members of
11 Parliament attended a number of what is claimed to be preparatory
12 meetings. When we go through the meetings, we shall be able to
13 demonstrate to you, Madam President, your Honours, that in none of these
14 meetings did Mr. Kosgey attend. Rather, Mr. Kosgey is introduced by way
15 of an alleged series of meetings in December 2007 in Nandi, three weeks
16 before election, only by Witness 0006.

17 The next limb of this so-called network was called the media, and
18 the media which was identified for this purpose was Kass FM, a Kalenjin
19 broadcasting station which was claimed to be not only spreading network
20 views but also collecting funds through a series of events.

21 The Prosecution, in its own evidence, disclose materials showing
22 that Mr. Kosgey's own supporters expressed their grave concern and utter
23 dismay at how the very media outlet which the Prosecution claim he was
24 using was disparaging him.

25 My Lady, may I -- sorry. Madam President, may I now request that

1 this -- the Chamber directs the proceedings to convert to a private
2 session, because I would wish to refer to a confidential document.

3 PRESIDING JUDGE TRENDAFILOVA: Please, Court Officer, would you
4 organise the private session.

5 (Private session at 3.03 p.m.)

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5 (Open session at 3.08 p.m.)

6 COURT OFFICER: Madam President and your Honours, we are now back
7 in open session. Thank you.

8 MR. ORARO: So that the Prosecution itself produced a document
9 showing the relationship between Mr. Kosgey and Kass FM, yet Witness 0006
10 alleges that Mr. Kosgey was part of the group of people who recruited
11 people to ring and spread network views at Kass FM. And you will see
12 that in EVD-PT-OTP-00489 at 442 to 443.

13 It is further important to note that through the Defence, we have
14 filed document EVD-PT-D10-00105, which at page 4, paragraphs 11 to 15,
15 show that throughout the relevant period, Mr. Kosgey was invited only
16 once to Kass FM and that was in March 2010.

17 PRESIDING JUDGE TRENDAFILOVA: I'm sorry. The young lady, what
18 is the purpose of -- you're disturbing the counsel for the Defence team
19 of Mr. Kosgey --

20 MR. HOOPER: I need assistance, IT assistance, and it's not
21 unusual for them to come into the court and assist us --

22 PRESIDING JUDGE TRENDAFILOVA: Yes, but still --

23 MR. HOOPER: -- so I hope that's all right with the Chamber.
24 Yes, I'm sorry to my friend. They're very discreet.

25 PRESIDING JUDGE TRENDAFILOVA: No. Let the technical problem be

1 fixed and then Mr. Oraro will proceed.

2 MR. HOOPER: Thank you very much.

3 PRESIDING JUDGE TRENDAFILOVA: Thank you.

4 MR. HOOPER: Thank you. I didn't want to disturb the
5 proceedings. I'm sorry if that disrupted my friend in any way, but thank
6 you.

7 PRESIDING JUDGE TRENDAFILOVA: Yes. Every counsel has to be
8 given the best working environment. So, Mr. Oraro, would you proceed,
9 please.

10 MR. ORARO: Thank you, Madam President.

11 Needless to state, March 2010 was well after the 2007
12 disturbances.

13 It is important to stress, however, that we are not in any way
14 suggesting that Kass FM was involved in any of the activities alleged by
15 the Prosecution. All we are saying is that if their theory is that
16 Mr. Kosgey, together with others or alone, used Kass FM for the suggested
17 purposes, then their own disclosed evidence express to the contrary.

18 The third limb of their so-called multi-faceted network was the
19 elders. It is the Prosecution case that part of the network comprised
20 the elders, whose purpose was, among others, to support co-ordination,
21 recruit, and conduct blessings.

22 Again, the evidence disclosed does not create any nexus between
23 Mr. Kosgey and the elders in any of the three meetings he said he
24 attended. Whether -- whether it is the purported Elders Day of
25 1st October 2005, which has been disclosed in the Prosecution evidence,

1 or the alleged meeting of 2nd November 2007, or the alleged meeting of
2 15th April 2007, Mr. Kosgey was not there. These are found at
3 EVD-PT-OTP-00146. And at this stage I will request that we go into the
4 confidential session again so that these documents can be displayed.

5 PRESIDING JUDGE TRENDAFILOVA: Please, Court Officer.

6 (Private session at 3.15 p.m.)

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20 (Open session at 3.26 p.m.)

21 COURT OFFICER: Madam President, your Honours, for the record,

22 we're back in open session. Thank you.

23 MR. ORARO: Madam President, your Honours, you will note that the

24 Prosecution completely failed to connect Mr. Kosgey with any of the limbs

25 of their alleged network and only brings him in through this so-called

1 Witness 0006.

2 Early in these proceedings, it was suggested that Emo, which was
3 claimed to be a Kalenjin institution, was central to what was going on,
4 but from the recent presentation, it is obvious that now a muted position
5 has been taken in respect of that. But even in respect of Emo, there is
6 no single document connecting Honourable Kosgey with Emo.

7 In short, taking the Prosecution case at its highest level to the
8 extent that allegation by the Prosecution that violence in Nandi and
9 Uasin Gishu is alleged to have been carried out by the network, the
10 Prosecution has singularly failed to create any nexus between Mr. Kosgey
11 and the network.

12 Madam President, your Honours, it is no exaggeration to state
13 that the foundation of the Prosecution allegations against Mr. --
14 Mr. Kosgey is predicated on a number of planning meetings which they
15 claim were carried out by the network.

16 The first of such meetings was the meeting of 30th December 2006.
17 As we have shown when we displayed EVD-PT-OTP-00272, Mr. Kosgey did not
18 attend that meeting.

19 Now, I will seek your indulgence once more to request that we go
20 to private session in order to display the command which was alleged at
21 that meeting.

22 PRESIDING JUDGE TRENDAFILOVA: Please, Court -- Court Officer,
23 please.

24 (Private session at 3.31 p.m.)

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14 (Open session at 3.34 p.m.)

15 COURT OFFICER: Madam President, your Honours, we're back in open
16 session. Thank you.

17 PRESIDING JUDGE TRENDAFILOVA: The floor is over to you again,
18 Mr. Oraro.

19 MR. ORARO: Thank you, Madam President.

20 Now, further, part of the exaggerated claims for this meeting is
21 that maps identifying areas of the targeted communities were distributed,
22 and that is at EVD-PT-OTP-00275. Further, it is also alleged by the
23 Prosecution that at this meeting assignments of geographical control was
24 made, and you find that at EVD-PT-OTP-00544 at 574 to 579. Both in the
25 transcripts by the witnesses the Prosecution is relying upon and on the

1 documents they produced at their exhibit -- as their exhibits, Mr. Kosgey
2 does not feature in any way at all.

3 If at all these meetings took place, which regrettably, in my
4 humble submission, the Prosecution has not established, then Mr. Kosgey
5 did not participate in them at all at this critical stage of the genesis
6 of the organisation, or the network, as they call it.

7 And with this, I would pause and ask a critical question. Are
8 there substantial grounds to believe that a meeting creating what is
9 alleged to be a network with the agenda as specified could be convened
10 and not attended by Mr. Kosgey if the Prosecution is alleging that he was
11 a co-perpetrator? Is it possible?

12 Is it also possible that if he did not attend and he's a
13 co-perpetrator, he would then be excluded from the hierarchy of what is
14 termed as a "flow of command" by the Prosecution on witness's exhibit?

15 Let us now proceed to the other meetings alleged by the
16 Prosecution in their evidence.

17 The next meeting the Prosecution allege in connection with the
18 so-called network is a meeting of 2nd September 2007 at Sirikwa Hotel,
19 and that is found at EVD-PT-OTP-0547 at 707. Again, Mr. Kosgey is not
20 connected with this meeting at all. The list of attendants are there,
21 and by the Prosecution on evidence, no presence of Mr. Kosgey.

22 Another alleged meeting takes place on 2nd November 2007. The
23 list of attendees is found at EVD-PT-OTP-00285. Again, Mr. Kosgey is not
24 in attendance.

25 Further meetings are alleged to have taken place on 6th December

1 2007, 13th December 2007. See EVD-PT-OTP-00557 at 978, and
2 EVD-PT-OTP-00544 at 588 respectively. No allegation is made that
3 Mr. Kosgey attended any of these meetings.

4 Although we shall shortly address in detail the alleged meetings
5 in Nandi according to Witness 0006, the Defence would at this point like
6 to refer to a meeting alleged to have taken place on 14th December 2007,
7 and it is important to note that this is the only meeting in which one
8 witness, contradicting all the other witnesses, as an afterthought
9 introduces the name of Mr. Kosgey in the meeting of 14th December 2007 on
10 unknown date. The date of transcript has not been specified.

11 There are two Prosecution witness -- witnesses that speak about
12 this alleged meeting. They are Witness 0002 and Witness 0008. Both
13 witnesses give lists of alleged attendees, and you will find this at
14 EVD-PT-OTP-00765. I would wish to request that we go on to a private
15 session so that this can be displayed. I do apologise most sincerely for
16 getting back to private session from time to time.

17 PRESIDING JUDGE TRENDAFILOVA: Our Court Officer is very kind.
18 Please.

19 (Private session at 3.44 p.m.)

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12 Page 26 expunged – Private session.

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1 (Open session at 3.49 p.m.)

2 COURT OFFICER: Madam President, your Honours, for the record,
3 we're back in open session. Thank you.

4 PRESIDING JUDGE TRENDABILOVA: Please proceed, Counsel Oraro.

5 MR. ORARO: Most importantly, when looking at the evidence
6 produced by the Defence of Mr. Kosgey, and that will be found in
7 EVD-PT-D10-00025 at page 4, column 2, last paragraph, the "Standard"
8 newspaper in Kenya of the 15th December 2007 reported, which was the
9 fact, that Mr. Kosgey was that day in the Nyanza province attending a
10 function addressed by Prime Minister Raila Odinga and Professor Anyang
11 Nyong'o. So there is public document which is the "Standard" completely
12 contradicting this version of events which, as you go through the
13 transcript, you will note is alleged to have commenced around 1400 hours.

14 The Defence has also taken the opportunity to file helicopter
15 logs showing the movement of the helicopter which they had used on that
16 occasion and where they were at what time. It is EVD-PT-D10-00024. And
17 the suspect has made a statement explaining his whereabouts on that date,
18 and that is EVD-PT-D10-00103, paragraph 49.

19 Now, I would wish, with your permission, to say at least two
20 things concerning the suspect's statement.

21 In considering the probative value to be attached to the
22 suspect's statements, I will humbly request this Chamber to take into
23 account that there was at no time any request either by the OPT -- OTP,
24 office the public prosecutor, or the Kenya government police for any
25 statement or explanation from the suspect. However, upon the mention by

1 the Chief Prosecutor that he had applied for summons before this
2 Chamber - I believe that was on 15th of December, 2010 - the suspect
3 immediately went public and wrote to the office of the public prosecutor,
4 indicating his willingness to cooperate in any investigation they would
5 wish to carry out. To his statement, communications thereafter between
6 the suspect and the Office of the Prosecutor has been displayed.

7 It is my humble submission that the statement by the suspect
8 ought to be considered in the context of not a person under summons to
9 this court explaining his position but a person who at all times was
10 ready, willing, and able to contribute to the investigation because he
11 has nothing to hide and that remains the position.

12 Now, Madam President, your Honours, again taking the Prosecution
13 case at its highest level, if any organisation existed, and so far the
14 Prosecution has not been able to prove that, the Prosecution has
15 singularly failed to adduce material evidence to connect Mr. Kosgey to
16 all the planning stages of such organisation if at all. Consequently,
17 there are no substantial grounds to believe the claim by the Prosecution
18 there -- that there was a network and that Mr. Kosgey was either the
19 deputy or the treasurer as originally alleged in application for summons
20 or a prominent person in the organisation as now stated.

21 Now, with that -- with that, I would now wish to go to my second
22 limb, and, Madam President, at your discretion, we may either adjourn now
23 or I may start my second limb.

24 PRESIDING JUDGE TRENDAFILOVA: Counsel Oraro, we are to make a
25 break - I was looking at the clock - and after the break you will resume

1 with your second limb.

2 MR. ORARO: Thank you, Madam President, your Honours.

3 PRESIDING JUDGE TRENDAFILOVA: So, thank you. Half an hour

4 break, as we all know.

5 COURT USHER: All rise.

6 Recess taken at 3.57 p.m.

7 On resuming at 4.30 p.m.

8 (Open session)

9 COURT USHER: All rise.

10 PRESIDING JUDGE TRENDAFILOVA: Please be seated. We are again in

11 session, and the floor is over to you, Counsel Oraro.

12 MR. ORARO: Madam President, your Honours, from the analysis we

13 have undertaken, it is clear that the Prosecution case against Kosgey

14 rests almost entirely on his alleged involvement in three of the eight

15 meetings. Specifically, even by the Prosecution's own contention,

16 Mr. Kosgey is confined to Nandi District, and you will find that at

17 paragraph 47 of the DCC where the Prosecution allege as follows: Given

18 Ruto's position as the Kalenjin leader, Kosgey's authority was

19 subordinate to Ruto. When Ruto oversaw attacks throughout the

20 Rift Valley, Kosgey oversaw attacks that were executed in Nandi District.

21 That does not conform with the charges which have been levied

22 against Mr. Kosgey and which start with count number 1, the count of

23 murder, where it is alleged that from on or about 30th December 2007 to

24 the end of January 2008, William Samoei Ruto and Henry Kiprono Kosgey

25 committed or contributed to the commission of crimes against humanity in

1 the form of murder in the locations including Turbo town. And Turbo town
2 is not in the Nandi District. The greater Eldoret area, Huruma, Kiambaa,
3 Kimumu, Langas and the Yamumbi. Kapsabet town and Nandi Hills town in
4 Uasin Gishu and Nandi District, Republic of Kenya, in violation of
5 Article 7(1)(a) and 25(3)(a) of the Rome Statute.

6 Similar wording has been adopted in the case of the charge at
7 count 3 of deportation or forcible transfer of population constituting a
8 crime against humanity.

9 Again, similar wording has been included at count 5 in respect of
10 persecution as a crime against humanity.

11 So that while by their facts they purport to support a case
12 against Mr. Kosgey jointly with Honourable Ruto only in Nandi, by their
13 charge Mr. Kosgey is charged with crimes against humanity arising both in
14 Nandi District and Uasin Gishu District.

15 It may also be obvious that in part -- not may but is obvious
16 that all these charges are only supported by one witness, Witness 0006.
17 No other witness alleges to have been present at these meetings which
18 took place in Nandi in December 2007 on dates which have been redacted.
19 No other witness provides any real suggestion that Mr. Kosgey was part of
20 some network.

21 In the event, they are four striking and unusual features of the
22 allegations against Mr. Kosgey, and to that extent, the charges against
23 Mr. Kosgey become distinctly different from the charges against all the
24 other people charged in these proceedings.

25 One, they hinge entirely on the evidence of -- they hinge

1 entirely on the evidence of one witness. That evidence is of the lowest
2 probative value because of the manner in which it has been presented at
3 this hearing, and I will humbly submit to this Chamber on why I say so.
4 The evidence from that one witness in relation to Mr. Kosgey is not
5 supported by any -- in any meaningful way by any other Prosecution
6 witness. And lastly, there are inconsistencies between the evidence of
7 Witness 0006 and the other aspects of the whole of the Prosecution case.
8 In other words, Witness 0006 completely contradicts the Prosecution
9 theory.

10 It is axiomatic that in order for this Chamber to confirm these
11 charges, it must have substantial grounds to believe the allegations made
12 in the Prosecution -- Prosecutor's evidence. In Mr. Kosgey's case, that
13 fundamental guiding principle condenses into a single simple proposition.
14 In order to have substantial grounds to believe the allegations against
15 Mr. Kosgey, this Chamber would have to have substantial grounds to
16 believe that in spite of all the contradictions by Witness 0006, he still
17 has adduced evidence with a probative value to justify a finding that
18 there are substantial grounds to believe what he says.

19 We humbly submit that such grounds do not exist.

20 Taking the Prosecution's own evidence at its very highest and
21 making every proper allowance of how the Prosecution may choose to
22 present its evidence at this stage, there is no realistic basis on which
23 it could be said that there are substantial grounds for believing
24 Witness 0006 in relation to Mr. Kosgey.

25 The evidence of -- against Mr. Kosgey is being presented before

1 this Chamber in a way that entirely fails to reach even the basic
2 standard the Prosecution must satisfy at this stage, and it is for that
3 reason that we say that these charges, subject to your discretion, ought
4 not to be confirmed.

5 Now, I will now go to specific features of Witness 0006's
6 evidence.

7 I begin by saying that it is the discretion of the Prosecutor to
8 choose how to present their evidence. They may choose to keep certain
9 information and evidence secret from the Defence for any number of
10 reasons, including protective measures. That is -- that is a course the
11 Prosecutor has chosen in relation to Mr. Kosgey's case, and we have to
12 respond to the Prosecution case on that basis, but important to take into
13 account that there are consequences of the Prosecution not revealing
14 relevant evidence to the Defence.

15 Two points are particularly important. Number one, the Court
16 will only assess the Prosecutor's case on the basis of what has been
17 disclosed to the Defence. Whatever may or may not have been said or
18 disclosed *ex parte* will be put out of the Court's mind.

19 The less information the Prosecutor gives to the Defence to allow
20 the scrutiny of its evidence, the less weight the Court will place in
21 that evidence, and in assessing its probative value, it will take
22 cognizance of the extent to which the Prosecutor has decided to request
23 for redactions.

24 Both -- both those are simple principles, and they apply in
25 relation to Witness 0006.

1 First, the Prosecutor has asked for all the details of
2 Witness 0006 to be redacted. We understand the necessity to redact the
3 name, but what has been redacted is more than the name. That means that
4 for the purposes of this hearing, the Court will have to approach this
5 evidence on the basis that we do not know who this Witness 0006 is -- is.
6 More importantly, we are impeded from assessing any information about him
7 which would allow us to know whether he may or may not be a reliable
8 witness. He may well be someone whose credibility is at its very lowest
9 end of the scale for any number of reasons. We simply do not know.

10 The Court must also proceed on the basis that we do not know what
11 his motivation for giving evidence is. There are three pages in the
12 document which allude to this. They remain a mystery. The very basic
13 material that you need to know, what sort of payments or inducements have
14 been offered to him, or what sort of immunity from prosecution has been
15 given to him are all unknown insofar as this hearing is concerned.

16 For these reasons, we shall set out particular quotes to show
17 that the content and manner of his allegations suggest a witness who did
18 not take a balanced view of Mr. Kosgey.

19 Second and perhaps more significantly, the key details of his
20 evidence have also been withheld. In particular, Mr. Kosgey and this
21 Court have not even been told the dates of the meetings which are
22 supposed to constitute the crucial evidence of his involvement in these
23 offences. This is an unusual and surprising feature in a case of this
24 nature, for how does Mr. Kosgey to defend himself?

25 The Prosecution's schedule of meetings reveal that of the eight

1 alleged meetings which form the core of the Prosecution case, only the
2 dates which relate to Mr. Kosgey have been redacted and remain unknown.
3 All the other dates have been disclosed. And in respect of meetings
4 which are alleged to have been attended by between 40 to 60 people.

5 While in relation to the other aspects of the Prosecution case
6 this information has been provided, when it comes to the case relating to
7 Mr. Kosgey, this key information is omitted. We submit that this impacts
8 gravely on how his alleged involvement has to be approached and merits
9 special consideration.

10 I would wish to humbly submit that in accordance with
11 Regulation 52, the requirement is that a statement of facts, including
12 the time and place of the alleged crimes, which provide sufficient legal
13 and factual basis to bring the person or persons to trial, and most
14 importantly, including relevant facts for the exercise of jurisdiction of
15 the court should be provided to the defendant.

16 It is trite that for an attack to attract the jurisdiction of the
17 court, it must meet the contextual elements of such attack, that is, that
18 the attack must be directed against a civilian population pursuant to or
19 in furtherance of an organisation policy. These dates relate to alleged
20 meetings in furtherance of an organisation or an organisational policy.

21 As stated by the Chamber in the Bemba case, the DCC shall
22 include, *inter alia*, a statement of facts, including the time and place
23 of the alleged crimes which provide a sufficient legal and factual basis
24 to bring the person or persons for trial, including relevant facts for
25 the exercise of that jurisdiction.

1 The purpose of disclosure to enable Defence to prepare
2 adequately. Mr. Kosgey has been hamstrung in his defence and has been
3 denied the opportunity to adequately prepare his defence, a factor which
4 I must humbly request this Honourable Chamber to consider when dealing
5 with this evidence to establish whether there has been substantial ground
6 to believe the Prosecution case.

7 In the absence of specific dates on the alleged meetings,
8 Mr. Kosgey has been constricted on his ability to respond to the charge.
9 The Defence has attempted to piece together the dates available from the
10 disclosed documents and assumed that reference to meetings at Kipkarren
11 must have been around 5th or 6th December 2007. There were also
12 unredacted dates in the Swahili version of the transcript of Witness 0006
13 referring to the dates of 14th and 17th December 2007. See
14 EVD-PT-OTP-00484 at 254 and 257.

15 In this regard, Mr. Kosgey has been reduced to putting together
16 what would respond to these dates, including media reports and flight
17 logs establishing his whereabouts on these dates so that this Court can
18 have sufficient evidence from which to determine whether substantial
19 grounds have to -- have been established to believe that he ever attended
20 any meeting in Nandi, because his position is that he has never attended
21 any meeting of the nature suggested, and that is contained in the
22 evidence he has filed, and it remains that once he is provided with the
23 specific dates, he will be able to explain his whereabouts on those
24 dates. And therefore, in considering sufficient grounds to believe, one
25 of the factors I would request this Chamber to take into account is

1 whether there would be substantial grounds to believe, if as soon as the
2 Prosecution is able to provide the dates, the suspect is able to offer
3 credible alibi evidence, which Mr. Kosgey has been denied.

4 It is also important to take into account that in considering
5 redactions, there is a duty placed on the Prosecution by Article 68(1) to
6 ensure that such measures shall not be prejudicial to or inconsistent
7 with the rights of the suspect and fair and impartial trial.

8 With that, may I now come to the inconsistency between the
9 evidence of Witness 0006 and the Prosecution case.

10 There are three or four main areas which go to the very heart of
11 the Prosecution case, where the evidence relied on by the Prosecution is
12 absolutely inconsistent with the Prosecution case.

13 First, the Prosecution alleges that this alleged network was
14 first established by -- at the meeting of 30th December 2006. It is also
15 alleged that at this meeting generals were appointed, and in respect of
16 that, I would wish to refer to EVD-PT-OTP-00286, from 0035 to 0094, and
17 that maps were produced identifying targeted areas, EVD-PT-OTP-00544 at
18 0052 to 00571, and 00574 to 0576. We have referred to this in the
19 previous -- previous submission when I was proceeding before we went for
20 a break.

21 As stated when I was referring to this, it was evident that
22 Mr. Kosgey was not at these meetings and cannot be claimed to be one of
23 the people who, according to the Prosecution, were in -- in what I may
24 term as establishment meeting.

25 Now, Witness 0006 is the only person to allege that Mr. Kosgey

1 attended meetings in Nandi. All these meetings were on unspecified dates
2 in December, all were in Nandi, two at Cheramboss's house and one at
3 Mberia's house.

4 It is glaring that while others do not describe him at all,
5 Witness 0006 described Mr. Kosgey as the mastermind of the plan
6 beforehand. So that, on the one hand, we have all the witnesses talking
7 about, according to the Prosecution, how this network had been
8 established since 2006 and had a series of meetings both in early 2007
9 and late in 2007, including December, Witness 0006 comes and says the
10 mastermind behind the plan was Honourable Kosgey. And you find this at
11 EVD-PT-OTP-00382, at paragraphs 165 and 167.

12 The question you ask yourself: How does he become a mastermind
13 of a plan which had been, according to the Prosecution, operating since
14 2006 with a hierarchical order and which had continued with, according to
15 the Prosecution again, carrying out a series of meetings and collecting
16 funds?

17 At the commencement of my submission, I had also referred to
18 another distinguishing feature of Witness 0006. He was the one who came
19 up with the theory adopted by the Prosecution as the policy of the
20 network but now attempted to be abandoned, and that was the theory that
21 the network was formed to form a uniform ODM voting zone, contrary to
22 what everybody else has found.

23 It is also glaring in that respect to note that Witness 0006
24 would come with this proposition of Mr. Kosgey being the mastermind when
25 all the other evidence which the Prosecution has disclosed does not show

1 that he was involved in formation, appointment, and financing according
2 to the Prosecution evidence.

3 At best, the evidence of Witness 0006 is inconsistent with the
4 other Prosecution witnesses as to when the network started and who was
5 playing the key role. At worst, the Prosecution's own witnesses reveal
6 that Witness 0006 is out of sync with them. He is an unreliable witness.

7 Madam President, your Honours, the charts you saw in the
8 Prosecution presentations are not diagrams that come from any witness.
9 They were charts which were conceived for the purposes of submission
10 before you. And in my humble submission, at this stage of confirmation,
11 it may be more helpful to examine the actual evidence rather than charts
12 drawn by either of the parties for the purposes of their submissions.
13 And in respect of that, there are two charts which I would wish to have
14 displayed, and for that purpose I request that we proceed to a private
15 session. They are ...

16 PRESIDING JUDGE TRENDAFILOVA: Please, Court Officer.

17 (Private session at 5.08 p.m.)

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11 (Open session at 5.15 p.m.)

12 COURT OFFICER: Madam President, your Honours, for the record,

13 we're back in open session. Thank you.

14 PRESIDING JUDGE TRENDAFILOVA: Counsel Oraro, please proceed.

15 MR. ORARO: Thank you, Madam President.

16 No other witness claims -- no other witness claims that

17 Mr. Kosgey was either involved in creating the alleged network or held

18 such prominent position within the alleged network. To the contrary, all

19 the other witnesses do not feature Mr. Kosgey in the hierarchy of the

20 alleged network.

21 Again, Witness 0006's allegation is significantly at odds with

22 that of the other witnesses when he emphasised this at EVD-PT-OTP-00489

23 at 0454. He says, and I quote:

24 "So these reports to generals, I think the generals report

25 directly to Kosgey and Ruto. I don't know if there were others there.

1 From there on, they report directly to Raila."

2 So what he is doing is contrary to the Prosecution's theory of
3 what were the positions of the network, he places Ruto and Kosgey as
4 joint equal deputies in the organisation.

5 Suffice it to state that the Prosecution by itself dismissed this
6 naive proposition as they could not justify why Raila, a member of
7 another ethnic community and a presidential candidate, could be the head
8 and finance an organisation in one district out of over a hundred
9 districts in Kenya, purportedly to create in that district a uniform
10 voting pattern. In the event this proposition was contrary to the case
11 established by the Prosecution beginning with the alleged meeting of
12 30th December 2006 or that the allegation -- or the allegation that the
13 network was exploiting existing Kalenjin structures.

14 In the result, the evidence of Witness 0006 in material
15 particular is at odds and contradicts the foundation of the Prosecution
16 case.

17 Now, I come to the next contradiction, and that is in relation to
18 collection of finances.

19 When it comes to the issue of finances, the Prosecution alleges
20 that the network was being financed through collections, and they have
21 listed organisations which were helping in this connection, and that ends
22 up with the suggestion of the collection of over a billion shillings as
23 at 13th December 2007, and I did refer to that, and that is
24 EVD-PT-OTP-00544 at 0588.

25 Witness 0006 again comes and says, "Why do you worry about

1 collections? The whole of this violence was financed by Mr. Kosgey,
2 Mr. Raila, and Mr. Ruto." Again, completely at odds with what is the
3 Prosecution case theory.

4 You will also find, when the Chamber goes through the evidence,
5 that even on an insignificant issue as blessings, the Prosecution theory
6 was that blessings were carried out by elders through sprinkling of
7 animal blood. This witness theory is that the blessings were through
8 holding of hands and there were no elders.

9 So beginning with the policy, the -- the hierarchical order, the
10 financing, the blessings, he completely contradicts the evidence of all
11 the other witnesses.

12 In my humble submission, there cannot be any other reason for
13 this other than that this is evidence which ought to be considered of the
14 lowest probative value and cannot be relied upon as a basis for
15 confirming the charges against the suspect.

16 In order to provide a sprinkling of justification, hopefully, to
17 corroborate the evidence of the Prosecution, there was an attempt to rely
18 on witness summaries. The Prosecution disclosed a number of non-ICC
19 witness summaries. Regrettably, those witnesses' summaries do not
20 corroborate the assertion of Witness 0006. But even before I arrive at
21 what is being relied upon, I would wish to generally state that the
22 origin of these witness summaries, apart from the general suggestion that
23 there were internally displaced persons, is not clearly disclosed. It is
24 therefore not possible to comment upon their reliability in any
25 meaningful way.

1 The Prosecution has also not provided this Chamber with any
2 appropriate way of assessing this evidence in accordance with existing
3 principle. It is unclear whether the witnesses are giving direct
4 evidence of things they themselves witnessed or mere hearsay accounts of
5 what they heard. It is also unclear whether any of these witnesses are
6 prepared to give evidence before the ICC. In the six months since the
7 issuance of summons, it is notable that the Prosecution has not
8 apparently taken any further statement from any of these purported
9 witnesses.

10 The Prosecution appear to rely on one witness, Witness 0021, and
11 his evidence is a summary contained in EVD-PT-OTP-00507. And the only
12 reason reliance is placed upon this witness is because there is no
13 evidence of Mr. Kosgey spreading hate speech, and this summary purports
14 to say that Mr. Kosgey and other politicians, in Nandi town and in other
15 meetings, referred to the necessity of getting rid of the "weeds." That
16 does not corroborate the evidence of Witness 0006 at all.

17 It is important to note that no specific meeting is mentioned,
18 and there is no way of responding to that allegation. In the event by
19 itself, the allegation does not corroborate the existence of an
20 organisation or a network.

21 It is unclear when these things were allegedly said. Moreover,
22 as I have said, it is unclear whether this witness heard it himself.

23 The other witness the Prosecution tries to rely on is another
24 anonymous witness summary, and it is classified as Witness 0022, is
25 EVD-PT-OTP-00508. And what he states is that he believes, not he knows,

1 but he believes that violence was organised beforehand. Ruto and Kosgey
2 separately financed the youths to commit violence. The probative value
3 of this evidence is completely of low value, and it cannot support the
4 very grave allegations which have been made by the anonymous
5 Witness 0006. I would, in that respect, wish to draw the normal caution
6 that a witness summary is of extremely low value and cannot corroborate
7 the evidence of a single unreliable witness, particularly where that
8 witness's evidence contradicts all the other available evidence and
9 particularly where that summary does not support whatever is alleged by
10 the unreliable witness in material particular.

11 Of significance, these are summaries prepared by the Prosecution
12 for their purpose. The anonymity of these statements combined with their
13 separate summarised form is such that it is impossible to fully determine
14 their probative value. It is not even clear whether any of these
15 witnesses have been contacted by the OTP or if they are the same people
16 who have given any other evidence.

17 Now, there was also an attempt to rely on a report by Kenya
18 National Commission of Human Rights entitled "On the Brink of the
19 Precipice - A Human Rights Account of Kenya's Post-Election Violence,"
20 and it is contained in EVD-PT-OTP-001 -- 00001 to 00002, and the only
21 passage the Prosecution wished to rely on was an annex to the report
22 stating what they called a list of alleged perpetrators. And in that
23 respect, the report stated that Mr. Kosgey held several meetings with
24 Nandi Hills councillors and other opinion leaders at Septon House within
25 Septon Estate. The meeting, it is believed, was for planning and

1 organising violence. The assertion, as far as we see, may not be more
2 than mere belief, but of significance, since the allegation had been
3 made, the suspect took the opportunity to file evidence with this Chamber
4 from a Mr. Kenneth Tarplee who is the owner of Septon Estate, and in it
5 he confirms that there is no place known as Septon Guest House. It is
6 EVD-PT-D10-00101.

7 Madam President, just one minute, with your permission to have --

8 PRESIDING JUDGE TRENDAFILOVA: You have the time.

9 (Defence counsel confer)

10 MR. ORARO: The suspect did not even stop there. He went further
11 and confirmed to this Chamber that he has a guest house in Nandi, but it
12 is not Septon Guest House, and he filed with this Chamber evidence
13 showing that this guest house, at the material time, was leased to
14 Eastern Produce, an international company, and the person who was
15 managing it on behalf of that company has not only sworn -- provided a
16 statement confirming there were no meetings at that place at that time,
17 but also provided the list to this Chamber. And this is consistent with
18 the repeated position of the suspect that he really has nothing to hide.
19 If only he can be told what are the actual charges against him, he's able
20 to answer because of his absolute belief that he had nothing to do with
21 this violence.

22 Madam President, your Honours, my submissions have been based
23 solely on the evidence as presented of the Office of the Prosecutor, of
24 the Chief Prosecutor, and any evidence I have referred to on behalf of
25 the suspect was merely to show that apart from internal contradictions

1 within the evidence produced by the Prosecutor, the suspect, although not
2 bound by law, and although without obligation to do so, has gone out of
3 his way to show that within the limited information given to him, he was
4 at all times ready to address any matter which suggested that he was in
5 any way involved not even within the contextual requirements of this
6 Chamber and the Statute, but in any event, that is how concerned he was
7 about this issue.

8 A few general points I would like to mention, and I would like to
9 indicate that I am almost coming to an end of my -- the end of my
10 submissions.

11 I would like to repeat that Mr. Kosgey is 64 years old, and as I
12 said at the beginning, he has been a Member of Parliament for Tinderet
13 constituency in the Rift Valley from 1979 until present day, and he's
14 been winning with large majorities. This is an area substantially
15 occupied by the Nandi community.

16 In my humble submission, his seat can be considered a safe seat,
17 and the level of his support is such that even if those who belong to the
18 opposite party vote against him, there is no doubt that he would still
19 have succeeded.

20 I would also wish to say that as a consequence of how the
21 electoral commission of Kenya dealt with the issue and treatment of
22 compilation of presidential results, there were great concerns and
23 serious legitimate concerns with the way the electoral commission was
24 dealing with the matter.

25 It's not disputed that violence was occasioned throughout Kenya.

1 It's not disputed that the most affected area was Rift Valley. The only
2 thing which is in dispute is whether this violence was all spontaneous or
3 some was planned, and on behalf of the suspect, all I would wish to say
4 is that he genuinely doesn't know, and he genuinely did not participate.

5 And in order to emphasise his good faith, it is a matter not
6 undisputed in -- on record that Mr. Kosgey's response to the premature
7 announcement of the election result was measured and calm. In his plea
8 to the chair of ECK, that is the Electoral Commission of Kenya, and that
9 can be viewed from the videotape by the Prosecution of the declaration of
10 results, he was one of the most reasonable participants in that
11 altercation, and all he had asked for was postponement of the
12 announcement pending independent verification. This was not a man who
13 would have wished, from what can be seen from his reaction, to exploit
14 that situation for a preconceived reaction to the election result as is
15 now claimed by the Prosecution.

16 Madam President, sorry, my learned friend would like to draw my
17 attention to one matter. I'm almost finished.

18 PRESIDING JUDGE TRENDABILOVA: Of course. Do the best job as a
19 Defence counsel.

20 (Defence counsel confer)

21 MR. ORARO: Now, what I would like to humbly conclude with, is to
22 say that the violence in Kenya was very unfortunate, and all of us
23 Kenyans regret what happened. So long as proper investigation can be
24 done and culprits made to account, it would be for the benefit of Kenyans
25 and for the benefit of those -- all of those who are interested in Kenya.

1 In my humble submission, as we have pointed out, and I would not -- I'm
2 not suggesting that any -- any person has been properly investigated, but
3 restricting myself to Mr. Kosgey, I would wish to humbly state that no
4 such investigation had been carried out in respect of Mr. Kosgey, and it
5 would be really unfortunate if the charges against him are confirmed on
6 the basis of the evidence so far disclosed by the Prosecution, which is
7 not only unsatisfactory, but has denied him that fundamental right of
8 fully placing before this Chamber all the necessary best evidence in his
9 possession so that if the case is confirmed, it can go forward with the
10 realisation of a proper trial for a man against whom there is sufficient
11 evidence to establish substantial case to believe.

12 Madam President, your Honours, in the final analysis, the
13 evidence disclosed against Mr. Kosgey is not only of low probative value
14 but fails to establish important contextual elements of connecting him to
15 the organisation as a co-perpetrator or otherwise. It fails to establish
16 that first objective test of co-perpetration and which is that there was
17 a common plan between Mr. Kosgey, Mr. Ruto, and Mr. Sang to carry out
18 these human rights offences.

19 In my humble submission, Madam President, your Honours, there are
20 no substantial grounds to establish that Mr. Kosgey was in any way
21 involved in the violations made out in the DCC.

22 Madam President, that marks the end of my case, and I take this
23 opportunity to thank the Chamber and the staff, the Prosecution, and all
24 my learned friends in the Defence. Thank you, Madam President.

25 PRESIDING JUDGE TRENDAFILOVA: Thank you, Counsel Oraro. Thank

1 you very much.

2 I would suggest that we make half-an-hour break now because I
3 wouldn't like when the Defence team of Mr. Sang would commence with its
4 presentation to be interrupted in ten minutes. So we shall meet at
5 20 minutes past 6.00.

6 Now the hearing is adjourned for half an hour.

7 COURT USHER: All rise.

8 Recess taken at 5.46 p.m.

9 On resuming at 6.20 p.m.

10 (Open session)

11 COURT USHER: All rise.

12 PRESIDING JUDGE TRENDABILOVA: Please be seated.

13 We come to the last session for today, and the floor is over to
14 the team of Mr. Sang. I would only ask you, Counsel Katwa, to speak a
15 little bit slowly so that the interpreters could do their job.

16 Well, I'm posing a question on behalf of the Chamber, actually,
17 now. Judge Tarfusser reminded me of this question to you. How much time
18 do you envisage to need for your presentation of the case of Mr. Sang?
19 Not with some precision, but still approximately how much time you think
20 you would need.

21 MR. KIGEN-KATWA: Approximately three hours, Madam President and
22 your Honours.

23 PRESIDING JUDGE TRENDABILOVA: So we shall proceed tomorrow if we
24 do not finish today.

25 MR. KIGEN-KATWA: Most obliged, Madam President.

1 PRESIDING JUDGE TRENDAFILOVA: So, the floor is over to you.

2 MR. KIGEN-KATWA: Madam President and your Honours, thank you for
3 the opportunity to present the case for Mr. Sang.

4 Madam President, Mr. Sang is the only suspect who in this case
5 has been charged under Article 25(3)(d), the effect of which is that his
6 alleged crime is in the form of contribution. And it is alleged that he
7 contributed to crimes of murder, deportation and transfer, and
8 persecution, and that his contribution was a contribution towards an
9 organisation that had a policy with criminal intent and discharged its
10 criminal objective in a widespread and systematic manner.

11 Madam President, I propose to commence my presentation on
12 item number 2 and 3 of the schedule you gave us, being the items of
13 widespread and systematic, and in the course of that, I will have
14 addressed the first item, which is attack.

15 Madam President, it is alleged that my client's contribution was
16 for purposes -- was for criminal purpose of expelling Kikuyus, Kambas and
17 Kisiis from Rift Valley, and secondly, to punish the three communities,
18 the Kikuyus, the Kambas and the Kisiis, in the event of their succeeding
19 in the elections for the year 2007.

20 Madam President, my client's only contribution, looking at the
21 document containing charges and all the statements, is concentrated in
22 his function as a journalist and the broadcasts he made. There are four
23 heads of the broadcasts that he is alleged that he contributed through.
24 The first one is that he broadcasted propaganda that was anti-PNU and
25 perpetuated anti-PNU rhetoric; number two, that he encouraged the network

1 in its course of violence, that he coordinated and redeployed members of
2 the network to perpetuate the violence, and that he also funded the
3 violence by receiving calls from prescreened callers whose information
4 was to advance the same violence.

5 The second form of his contribution in the course of the
6 broadcast is that he publicised and broadcasted the events of preparatory
7 meetings.

8 The third manner with which he contributed is that he contributed
9 by announcing the events of fundraising. And Madam President and your
10 Honours, although we will come back to the issue, we wish to mention that
11 the witnesses have mentioned only one fundraising in respect to my
12 client, and that is a fundraising allegedly held at Sirikwa Hotel in
13 Eldoret, Kenya.

14 Lastly, that he committed -- or, rather, contributed to the crime
15 by use of coded language, and the allegation of the use of coded language
16 is contained in the statements of Witness 0001 and 0008.

17 Madam President, in support of their case, the Prosecution have
18 produced two segments of evidence. The first segment of evidence is the
19 witness statements. The second set of evidence is transcripts.

20 Madam President and your Honours, at this point we wish to
21 mention that the transcripts that have been produced by the Prosecution
22 are transcripts that relate to the period 18th of January, 2007, to
23 15th December 2010. From January 2008, sorry, not January 2007.
24 Madam President and your Honours, we will in the course of time pose the
25 question that the allegations by all the suspects relate to crimes that

1 were allegedly committed in the period 30th December 2007 to 1st January
2 2008 and highlight the fact that the transcripts that relate and support
3 the allegations of the witnesses have not been produced.

4 Madam President, it will be our submission that all the
5 transcripts support the fact that our client did not commit any crime,
6 both what the Prosecution has produced and what they failed to produce.
7 Madam President and your Honours, the material the Prosecution has
8 produced by way of supporting their case and in seeking that my client's
9 charges should be confirmed is contained in Exhibit D-OTP -- OTP-002 --
10 OTP-00440. Madam President, we would like to refer to some of the texts
11 that show what my client contributed as produced by the Prosecution and
12 in form of incriminating evidence.

13 Madam President, with your permission, I wish to refer to the
14 exhibit produced by the Prosecution, being a BBC transcript at page --

15 COURT OFFICER: Sorry to interrupt you, counsel. If you can
16 kindly repeat the correct pronunciation of the earlier exhibit you just
17 mentioned. I don't think the number you mentioned previously is actually
18 an exhibit number. Thank you.

19 MR. KIGEN-KATWA: It is OTP-40071 (* sic). And we would like to
20 make reference to what is contained -- what is contained at page 20 of
21 the said text. The exhibit, Your Ladyship and your Honours, is
22 EVD-PT-OTP-00471.

23 Madam President and your Honours, in that exhibit the presenter
24 is reflected at page 120 as saying this, and this is what the Prosecution
25 wished to rely on in saying that my client is guilty:

1 "Presenter: I believe these are compromise. It is better to
2 talk to persons in order to have peace. Do not dwell on what he has
3 done. Be tolerant. Do not look at mud with which they have smeared
4 themselves. Just persevere until time passes. Those who have said we'll
5 negotiate with them are not saying they like them for what they did, but
6 they have probably realised that there's no other way apart from finding
7 peace and use dialogue to seek the truth."

8 Madam President, this is the first day, the first day that the --
9 this is the -- the Prosecution have produced their transcripts with
10 effect from 18th of January, 2008, and this is the first date in terms of
11 that disclosure.

12 Madam President, we would also wish to make reference to what is
13 contained after his -- my client's name was announced as one of the
14 suspects who is to stand trial for reasons of the post-election violence.
15 Madam President, in his case there was a lot of consternation. This is
16 what he said to the public:

17 "We have been named, three of us from Kalenjin community,
18 including Mr. Ruto, Mr. Kosgey, but it makes me wonder about the fighting
19 which occurred in Kibera, Mombasa, Kakamega, Central, North-Eastern and
20 all over. I was the only one mentioned from the media. Did I incite all
21 people in Kenya? Do they all understand the language? I would, however,
22 like to tell -- I would, however, like to tell people not to worry.
23 Although it is painful, The Hague has hosted other people." And then he
24 goes on.

25 "Some of these things can make you laugh, but I would like to

1 tell you not to worry. You can air your views in the stations, but do
2 not engage in any fighting. The Jesus I have is alive and is not on a
3 journey. The Prosecutor is a person, but the Court is there and the
4 truth will come out, and even if we go, we will return. Jehovah said
5 that we should not give thanks -- that we should give thanks in all
6 things and I believe Court wants to reveal the truth in all this. I tell
7 you to persevere. I am at work. Ruto, Kosgey, Uhuru, Mudora (* phon),
8 are still at work. You can be angry, but do not take any negative
9 action."

10 And in response to a call-up, part of the case against my client
11 is that he was receiving calls from prescreened callers with a view to
12 finding violence and one of the callers calls and tells him this:

13 "I am disturbed by what was said yesterday. Mr. Sang was one who
14 was telling people not to touch anyone. There is no single day he asked
15 people to go out and kill. Doesn't the Prosecutor know who told people
16 to go to the roads and what they are -- what they were told to do? They
17 also forgot about people who are fighting for the positions. I wish them
18 all the best as they go up road, that they return to Kenya well."

19 Madam President, the whole of the transcript produced by the
20 Prosecution is exactly on the same tone. There is nowhere where the
21 alleged coded language is captured. There is nowhere in the whole text
22 where Sang is reflected as saying either expel Kikuyus or Kambas or
23 Kisiis from Rift Valley or that anybody should be punished in the event
24 he succeeds in the elections.

25 Madam President, we will pray that the transcript that was

1 produced by the Prosecution be -- allegedly as incriminating, be studied
2 with a view to arriving at the irresistible conclusion that my client was
3 indeed a peace-maker and endeavoured in his small way as a broadcaster to
4 seek people to maintain peace.

5 Madam President, may we also express surprise and shock that the
6 same exhibit the disclosure produced by the Prosecution's office is a
7 broadcast -- a translation into English of what was broadcasted in the
8 Kalenjin language. It was disclosed as confidential. Madam President,
9 we are surprised at what reason and justification there could have been
10 in treating it as confidential when it was what was actually broadcasted
11 openly, other than the Prosecution probably wanting to conceal their lack
12 of evidence against my client.

13 Madam President, I have explained that, in fact, the Prosecution
14 have produced material for the period commencing 18th January 2008 and
15 nothing in respect to the material dates in the DCC. The material dates
16 in the document containing charges are the date 30th, 31st December 2007,
17 and 1st December 2007. That is the only period the violence -- 1st
18 January 2008, I'm sorry, Madam President. And over all that period there
19 is no material that has been produced.

20 On our part, Madam President and your Honours, we went out of our
21 way to produce what was broadcasted by Mr. Sang on the 1st of August --
22 1st of January, 2008, and I've supplied to the Prosecution.
23 Madam President, that document is our Exhibit EVD-D11 -- EVD-PT-D11-038.

24 With your permission, Madam President, this is an audio recording
25 of the type of peace messages that my client was pleading that people

1 should maintain at the height of violence and this is what my client is
2 heard on the recorded audio saying:

3 "Hello, the family of Kalenjin, wherever you are. Today I only
4 want to tell you, listeners of Kalenjin, a word of peace, that the
5 country of Kenya is crying peace. Everybody is crying peace. A small
6 child is crying peace, and all the person is crying peace. A woman is
7 crying peace, an old man is crying peace. A grandfather is crying peace,
8 or grandmother. Everybody is crying peace.

9 "Our family of Kalenjin, when it is hard and it becomes so hard
10 there is nothing beyond peace. Everybody needs peace. Peace gives
11 people time to do their work. Peace gives people -- person a chance
12 whatever he decides to do. Peace is what everybody needs in the land of
13 Kenya at this present time. Elections are over. Peace is an important
14 factor that we must keep for all people and everybody in the land of
15 Kenya who may be going -- who may be doing unreasonable actions at this
16 time and not keeping or shaming peace. We want to pray for peace saying
17 all of us, let us keep peace as people wherever we are. Peace is what we
18 need. Everybody, we have heard some others (* indiscernible) that people
19 were in it."

20 Madam President, in this peace message my client begs and pleads
21 for peace on 1st of January, 2008, which is part of what is contained in
22 the document containing charges where it is alleged that my client
23 contributed towards the violence, particularly the dates that occurred in
24 Kiambaa.

25 Madam President, at this point we wish to highlight the fact that

1 the Office of the Prosecutor itself has acknowledged that with effect
2 from 31st of December, 2007, and owing to the violence that broke out on
3 30th of December, 2007, there was a ban on live coverage in the media.
4 The ban, your Honours, was to the effect that there would be no live
5 coverage. In other words, there would be no covering of events live at
6 the moment as it occurred but could be reported much later.

7 Madam President, in line with that directive from the government
8 which did not give for room of choice, my client was compelled to
9 withdraw from having to broadcast any live messages.

10 Madam President, in support of that, we rely, as I said, on what
11 the Office of the Prosecutor produced, and that is EVD-PT-OTP-00440.

12 We also rely on our own material we produced, being
13 EVD-PT-D11-0013.

14 Madam President, in all these materials it is clear that there
15 was -- the minister in charge of information, and therefore the media,
16 had given a ban from the -- with effect from 31st December 2007 for a
17 whole period of one month. Madam President, we pray that that situation
18 be juxtaposed with what is said by Witness 0006 and Witness 0008. Both
19 Witness 0006 and Witness 0008 state categorically that my client, in the
20 period of 28th December 2007 up to 3rd of January, 2008, was busy at the
21 station coordinating violence. In other words, he was at the station
22 live and giving instructions. And like we've just said, there was in
23 fact a ban on live coverage, and so it was not possible to coordinate the
24 violence if at all, unless the violence could be coordinated many days
25 after.

1 Madam President, with your permission, I would like to make
2 reference particularly and read out a passage made by Witness 0006. That
3 is EVD-PT-OTP-00222, paragraph 101, where he said, and this is the same
4 thing said by Witness 0006 and Witness 0008:

5 A Nandi commentator called Joshua Sang used to present a
6 programme called "Lene Emet," meaning "How is the country?" Before the
7 year -- before 2007 elections, this programme was broadcasted from
8 6.00 a.m. to 9.00 a.m. and also in the evening around 7.00 p.m. However,
9 following the announcement of presidential results, the programme was on
10 air for three full days, 30th December 2007, the 31st December 2007, and
11 the 1st January 2008. The programme was broadcasted day and night. Sang
12 was not helped by anyone to broadcast this programme. He seemed to be
13 very vocal. The other programmes were suspended during these three
14 days."

15 Madam President, we wish to invite your Honours to two
16 observations in respect to that issue. The first one, Madam President,
17 is that to the extent to which the Prosecution's office have acknowledged
18 as a fact that there was a ban on live coverage, it is therefore a fact
19 that my client could not possibly be at the station to coordinate the
20 violence, as said by this Witness 0006 and Witness 0008, in the period of
21 30th December 2007 to 3rd January 2008.

22 The second issue, Madam President and your Honours, that we wish
23 to invite the -- this Chamber to take into account is that within the
24 sense of reason, it is inconceivable, as he said in this case, that my
25 client was at the station from 30th, 31st December of 2007, and

1 1st January 2008, day and night throughout, and it is very specifically
2 said "was not helped by anyone to broadcast." Madam President, it is
3 intended to say my client was awake for all the four -- all the three
4 days, day and night, broadcasting without a break. And, Madam President,
5 we pray that you find even on that detail that the Prosecution's
6 ingenuous attempt to allege that my client committed a crime is
7 completely unbelievable and impossible.

8 Madam President, in finishing the issue of the alleged
9 propaganda, we wish to invite you again by way of emphasis, and this is
10 an emphasis which we regret we may have to repeat, that there is not a
11 single transcript supporting any of the alleged words used by my client
12 towards fanning and advancing violence. The inverse is in fact the
13 truth, that in fact he sought for peace.

14 Madam President and your Honours, with your permission, I would
15 also wish to make reference to Witness -- to the Defence
16 Witness D11-00038, one Mr. Sirma, who has explained that my client
17 invited all leading Kalenjin political leaders and religious leaders to
18 record a statement with a view to seeking for peace. And,
19 Madam President, in view of the fact that there was ban of live coverage,
20 the said Sirma, who is a technical expert in media, recorded the peace
21 messages which were played and replayed at the station in view of the
22 government's ban. And for emphasis, the ban was not a ban -- the ban was
23 not a ban to complete broadcast but to transmitting live coverage.

24 And, Madam President and your Honours, on that account, I wish to
25 mention that, in fact, in the same peace messages, the first suspect in

1 this case with whom it is alleged my client was in a conspiracy to commit
2 a crime also contributed his plea for peace in the same tape recordings
3 of -- the same audio recordings for peace, and that, Madam President and
4 your Honours, is contained in our -- the exhibit I've just referred to.

5 Madam President, we know many people have levered under the
6 mistaken impression that Kass FM broadcasts from Eldoret town or, rather,
7 Rift Valley. The truth is that it broadcasts from Nairobi town where the
8 government sits. Madam President, Kass FM broadcasts not only to Kenya
9 but even outside the country and is on internet. We wish to make all
10 these emphasis with a view to saying that if the Prosecution were
11 interested at all in knowing the truth, it would be the easiest thing to
12 get the transcripts to confirm, in fact, whether our client committed the
13 crimes alleged.

14 Moving on to the allegation that my client fanned the violence by
15 receiving and allowing access to prescreened callers who had coded
16 communication to fan violence. Madam President, we have produced the
17 machine used by his employer, Kass FM, and the machine itself is called a
18 hybrid machine, and the particulars of that machine is our exhibit number
19 D11-00009. Madam President, we have quoted including the specifications
20 of that gadget with a view to saying that gadget is incapable of the
21 function of allowing a prescreened caller. All the callers that were --
22 all the people who made calls to the station received attention by
23 coincidence, because callers are so many, and so there would be no
24 possibility of having prescreened callers.

25 Madam President, we have also enclosed as exhibit number D11-002

1 a research done by BBC station showing that it is possible to get
2 printouts of all calls and short messages from the network providers in
3 Kenya, the mobile network providers. And, Madam President, even assuming
4 for one moment, and this is not being said by the Prosecution, even
5 assuming it were true that it is not -- Kass FM was hostile to produce --
6 to avail those transcripts, there were so many other alternatives to seek
7 to complement the allegations of the witnesses. Such opportunities
8 included getting transcripts from these network providers or getting them
9 from the regulator of the media institutions in Kenya, and that is the
10 Communication Commission of Kenya and the Ministry of Information itself.

11 Madam President, we invite the Court's attention also that the
12 Prosecution have produced, as I have related, transcripts of the period
13 18th January 2008 to December 2008 -- 2008. In the same sense,
14 therefore, it should be possible for them to have gotten for the period
15 preceding and period relevant to these charges, being the period of
16 29th December to 1st January 2008.

17 Madam President, we have also availed to the Court recorded
18 statements of people who have in ordinary course of time listened to
19 Kass FM and who have said that, in fact, it is not true that my client
20 made any comments whose effect was to seek to evict anybody from
21 Rift Valley or, in the alternative, to punish anyone if they succeeded in
22 elections. Madam President, those witnesses are D11, Witness number
23 0017, number 18, number 19, number 20, number 23, number 25, number 26,
24 28, 30, 32, 33, 34.

25 Madam President, we have taken a sampling of as much variety of

1 listeners as possible, including individuals who are not Kalenjins by
2 tribe but who understand the Kalenjin language. We've also included a
3 sampling of people who support the political party called the PNU, which
4 is allegedly the targeted party. And in those statements which are
5 signed, those witnesses say, yes, we are unhappy with the situation of
6 being victims of violence, everybody was a victim, but it is untrue to
7 allege that Sang in any way contributed to any such violence or was part
8 of any plan.

9 Madam President and your Honours, on that account I wish to
10 submit that, in fact, the allegation -- the first limb of the allegation
11 that my client participated in perpetuating disbursement of propaganda
12 seeking to evict or punish anybody has no basis and the charges in that
13 respect should not be confirmed.

14 Your Honours, the second respect in which my client is said to
15 have committed the crimes is that he invited -- he participated by -- or,
16 rather, contributed by announcing preparatory meetings and on occasions
17 attending those preparatory meetings. Madam President, my client has
18 recorded a statement which has been availed to the Court being
19 Exhibit D11-00048.

20 In that statement, Madam President and your Honours, it is
21 alleged that my client attended at least four meetings. The four
22 meetings are 30th December 2006, 15th April 2007. They were -- the
23 meeting of 30th December 2006 is allegedly in the home of the first
24 accused, William Ruto, at his home in Sugoi. The second meeting of
25 15th of April, 2007, is allegedly also -- is allegedly in Molo town.

1 The -- the third meeting is the one of 2nd of November, 2007, at the
2 first accused's home in Sugoi. And last -- and then the meeting of
3 6th of December, 2007, at the home of the first accused again -- sorry,
4 at Kipkarren -- at Kipkarren. And lastly, a meeting of the 14th of
5 December, 2007.

6 Madam President and your Honours, in the statement recorded by my
7 client and presented to this Court, D11-00048, he has explained that he
8 was nowhere near any of those meetings.

9 In respect to the first meeting of 30th December 2006 at Sugoi,
10 Turbo, my client has shown that he was in fact at his home in
11 Trans-Nzoia, presiding over the finals of a football tournament that he
12 presides over -- that he sponsors. Madam President, we have produced
13 photographs of the event and the visitors and guests he had invited to
14 participate and to honour and grace the occasion. Madam President, the
15 photographs and the statements of these witnesses are available.

16 Madam President, with your permission, we would like to seek
17 permission to display the photographs showing the whereabouts and the
18 company that my client kept on 30th of December, 2006, and that is
19 Exhibit number D11-0001, four 0s and 1.

20 Madam President --

21 PRESIDING JUDGE TRENDAFILOVA: Shall we have this displayed?

22 COURT OFFICER: Your Honour, I'm just waiting for the counsel to
23 indicate the confidentiality status of this document.

24 MR. KIGEN-KATWA: It is public.

25 COURT OFFICER: Thank you very much.

1 MR. KIGEN-KATWA: Sorry about that.

2 As it is being uploaded, I could proceed with comments
3 surrounding that incident.

4 COURT OFFICER: Counsel, just for the record, I would kindly need
5 further clarification, because in Ringtail we have this document as
6 confidential.

7 MR. KIGEN-KATWA: We have no document confidential. We are ready
8 to have it disclosed --

9 COURT OFFICER: As a public document.

10 MR. KIGEN-KATWA: Yes.

11 COURT OFFICER: Okay. Thank you very much.

12 MR. KIGEN-KATWA: Madam President, that photograph shows the
13 tournament at which my client was presiding on 30th of December, 2006,
14 and the various people he was with and who can confirm and verify that,
15 in fact, for the whole day of 30th of December, 2006, my client was not
16 at the home of the first accused with a view to the various things
17 allegedly done on the 30th of December, 2006. The events alleged he is
18 first of all to plan violence, and secondly, to pick commanders, as one
19 variety of the allegations.

20 Madam President, I would like to mention that the witnesses who
21 have been shown on the photographs and who confirm that my client was not
22 in Sugoi are Witness D11-00031, Boniface Walumbe Wambwile; Witness number
23 D11-0021, Davis Bosire Omariba (* phon). And, Madam President, I would
24 like to pause and mention the fact that this Witness number 0021 is by
25 tribe a Kisii and would therefore be one of the targets of attack by my

1 client if he was part of any conspiracy.

2 The next witness is Julius Kosgei Kinyor (* phon). It is
3 photograph 0008 also, Exhibit D11-0008. Madam President, the other two
4 witnesses we wish to make reference to is Witness number D11-0035.
5 Madam President, Witness number D11-0031 is an advocate by profession and
6 was the main guest of honour, one Simon Lilan.

7 Madam President, we submit that if the Prosecution had
8 endeavoured to countercheck the empty allegations of the anonymous
9 witnesses, they would have realised that in fact my client was nowhere
10 near the home of the first suspect on 30th of December, 2006. And for
11 avoidance of a doubt, we wish to highlight the fact that it -- when we
12 say our -- my client was not at the venue on 30th December 2006, it is
13 not the same as saying that there was any meeting at the home of the
14 first suspect.

15 Madam President, the next meeting that my client is alleged to
16 have attended -- Madam President, we wish to clarify that the second
17 photo is an exhibit for purposes of another argument. The first
18 photograph tow the only one relevant for the purposes of this argument
19 and for the period of 30th December 2006.

20 The alleged meeting of 15th April 2007, a Sunday, where it is
21 alleged that dogs were slaughtered, and politicians and youths took a
22 oath by consuming dog blood, is an event that neither occurred and, most
23 importantly, my client did not -- was nowhere near the said Molo Milk
24 Plant. Madam President, we have availed the statement from my client,
25 Exhibit number 48, but in addition to that, Madam President, we have

1 explained in that statement that, in fact, my client was on a journey
2 from Finarol (* phon) and had slept in Bomet, whereafter he travelled to
3 Nairobi. He did not stop at Molo and was not there.

4 Madam President, the next meeting which we wish to highlight my
5 client as not having attended is the meeting of 2nd of November, 2007.

6 Madam President, counsel for the second accused has already played out
7 the slides of the attendees of that meeting. That list includes my
8 client, and in view of the fact that that slide has been viewed, we do
9 not wish to go into private session to review it. We will only make
10 reference to it.

11 It is alleged that on the 2nd of November, 2008, my client was at
12 a meeting with the first accused at Sugoi for purposes of what Witness
13 0008 in his own words says was a very important meeting, and the
14 highlights of what number -- Witness number 0008 says was a very
15 important meeting is, number one, that it was attended by about
16 2.000 people. Number two is that everybody who was in attendance was
17 placed for purposes of commencing violence. Number three is that guns
18 were distributed to the people present or at least the commanders.
19 Number four is that coordinators were picked and in the words of the
20 eighth accused (* sic) he says they were elected not picked, they were
21 elected.

22 It is alleged that in this meeting the first accused uttered
23 words to the effect that this is a period of Kenyans versus Kikuyus. And
24 lastly of significance to us is that the next meeting following this one
25 of 2nd of November, 2007, is that the next meeting or follow-up meeting

1 which would be on 14th of December, 2007.

2 Madam President, the Witness number 0008 additionally says that
3 my client was present together with the first accused and participated --
4 or, rather, contributed in the business of planning this violence.

5 Through the statement of the first accused -- of the third
6 accused, we have explained that he was actually at Kass FM station in
7 Nairobi, which is over 320 kilometres away from the alleged -- from the
8 home of the first accused where the alleged meeting was held, and the 320
9 kilometres in the condition of that time of the roads would be a distance
10 of over six hours.

11 Madam President, in the statement made by my client as to his
12 whereabouts at that time, he has explained that he was at his station and
13 at work in the morning at 6.30 a.m. to 9.00 a.m. in the morning, and then
14 again was at the station broadcasting at 6.30 p.m. to 9.00 p.m. In the
15 interim period, he stayed at the station.

16 Madam President, we have not on our part given that up the
17 Prosecution did not investigate and we are very sure that the audiotape
18 recording of the events of what happened at Kass FM on 2nd of November,
19 2007, will confirm what we are saying, that in fact my client was at the
20 station and could not have travelled to Sugoi for the meeting alleged
21 with the first accused.

22 Madam President, in addition to his own statement, there is a
23 statement by the employer of my client, the managing director one
24 Mr. Julius Lamaon. That statement is Exhibit number D11-00036. The
25 employer confirms that Joshua Sang, as an employee of Kass FM, was on

1 duty for the full day on the said 2nd of November -- 2nd of November,
2 2007.

3 Madam President, in addition to the denial of being in that
4 meeting by my client through an affidavit -- through a statement signed
5 and through the statement signed by his employer vis-a-vis the anonymous
6 statements of the Prosecution, we wish also to indicate that in fact we
7 had the opportunity to meet Mr. Cheramboss as a witness of the first
8 accused and the question was put to him directly as to whether or not he
9 was present on 2nd of November, 2007, at Sugoi, as alleged by Witness
10 number 0008, and the said witness said he was not there.

11 Madam President, that assertion was not controverted by the Prosecution.
12 In fact, they did not ask any question to contest the circumstances, the
13 context, and the whereabouts of that witness on the 2nd of November,
14 2007.

15 Madam President, without looking at the slide so as not to go
16 into private session, as we do not desire that, we seek to recall the
17 mind of the Court to the fact that in the schedule of the people alleged
18 to have been at the meeting is one Mr. Frederick Kapondi as one of the
19 perpetrators or co-perpetrators. Madam President, through Exhibit number
20 D11-00043 and which we pray to display, we have shown that in fact
21 Mr. Kapondi was incarcerated at that period. D09-00043.

22 COURT OFFICER: Counsel, for the record as well, we have this
23 document as confidential in Ringtail. Can you confirm that it is --

24 MR. KIGEN-KATWA: It is a public document.

25 COURT OFFICER: Thank you very much.

1 MR. KIGEN-KATWA: And I apologise for that.

2 With your permission, your Honours, I would like to read briefly
3 what it says. Reference -- this is a letter which was written by my firm
4 with a view to confirming the whereabouts of Mr. Frederick Kapondi in the
5 period including the 2nd of November, 2007. And the commissioner of
6 prisons, Kenya prison services states:

7 "Reference is made to your letter dated 4th August on the quoted
8 reference and the quoted reference is confirmation if Frederick Chesebe
9 Kapondi was in custody of the prison's officers throughout the period of
10 April 2007 to 14th of December, 2007."

11 And it goes on to state:

12 "Frederick Kapondi was admitted in Bungoma prison on 17th April,
13 charged with various criminal offences. He remained in Bungoma prison
14 until 29th June, when he was transferred to Kakamega main prison. On
15 14th December 2007 he was released from Kakamega main prison on the
16 instructions of the chief magistrate Bungoma court. Therefore the
17 subject was in the custody of Kenya prisons for the period extending from
18 17th April 2007 to 14th December 2007."

19 In respect to that document, Madam President, we wish to
20 emphasise the fact that the commissioner of prisons is explaining that
21 this alleged Kapondi who attended this meeting was in a continuous sense
22 in prisons over that period and could not physically have been in the
23 meeting at the home of the first accused on 2nd of November, 2007, as
24 alleged.

25 Accompanying that letter Madam President, are two newspaper

1 reports by the "Standard" newspaper and by the "Nation" newspaper, which
2 are part of the same exhibit, and we wish to highlight the fact that the
3 newspapers were reporting the item of the release of Kapondi as a news
4 item. We pray that the fact of that reporting in circumstances
5 completely unrelated to litigation be given credit for what it is,
6 especially in juxtaposition with the allegations of witnesses who are
7 testifying in circumstances that were targeted at creating -- or, rather,
8 as investigating this criminal case. And we pray that the independence
9 and the context of the taking of those statements be such as to assign a
10 higher level of credibility to the fact of Kapondi not being possibly at
11 the meeting and in the circumstances to find that, in fact, the witness
12 number 0008 in the allegation was dishonest.

13 And, Madam President, we are saying very consciously that Witness
14 0008 was lying. We are not saying he had an oversight, he had forgotten
15 or anything, we are saying very directly that he was lying.

16 Madam President, this Frederick Kapondi is the one and only
17 person alleged by all the witnesses as being the supplier of the guns
18 that were allegedly to be used to fan violence and these guns,
19 Madam President, to repeat what I said as the very important business of
20 that meeting, were distributed on 2nd of November. Madam President,
21 what -- and, your Honours, what that would mean is that by 2nd of
22 November, Kapondi, who was in the cells, has already procured and availed
23 the guns to be used for the violence. We pray that you do find that in
24 fact this is not true.

25 Madam President, we wish to come to the host who is alleged to

1 have hosted this event, the first accused. And in regard to the first
2 accused, we wish to pray for permission to view our exhibit -- or,
3 rather, the exhibit of the first accused, D09-00054 at 0020.
4 EVD-PT-D09-00054 at 0020, and this document is not confidential.

5 Your Honours, the exhibit is a video showing the whereabouts and
6 the circumstances of the first accused who was supposed to have hosted
7 the meeting.

8 PRESIDING JUDGE TRENDAFILOVA: I just ask, are there some
9 problems?

10 COURT OFFICER: Yes, your Honour. We are having a little bit of
11 a technical glitch in the system, but we're trying to get it rectified.

12 PRESIDING JUDGE TRENDAFILOVA: Well, okay.

13 COURT OFFICER: Your Honour, the reason we're having this problem
14 is because the file is -- is a very huge one, and it's taking some time
15 to be able to come up on the system. If counsel can move over to another
16 document in the meantime. Thank you.

17 MR. KIGEN-KATWA: Yes, I can do that, your Honours. I can
18 proceed and come back to it when it is uploaded.

19 Now, the video we will shortly look at will show the whereabouts
20 the first accused who is supposed to have hosted the meeting of 2nd of
21 November, 2007. The video will show four aspects. The first one is that
22 the first accused who is supposed to have hosted my client was in fact
23 not at home but was in a place called Kapkatet. Madam President and your
24 Honours, that is a distance of 160 kilometres away from his home.

25 Madam President, my client was in the company of many people who

1 would verify his whereabouts. One of the people with whom he was in
2 company was the Prime Minister of Kenya. The first accused was with the
3 Prime Minister. He was in the company of a very huge crowd, all of who
4 would confirm, if the investigation had been done, that in fact he was
5 there for more or less the whole day.

6 Madam President, from the list that was displayed to this Court
7 by the counsel for the second accused, some of the other people allegedly
8 at the home of the first accused for purposes of the meeting include one,
9 the late Kipkalya Kones, Isaac Ruto, Zakayo Cheruiyot, and Franklin Bett.
10 Your Honours, the video shows that these people were actually with the
11 first accused -- the first suspect, sorry, the first suspect in Kapkatet
12 and could not have been at his home to host either the people with whom
13 he was in the said Kapkatet nor my client, the third accused, nor anybody
14 else for that matter.

15 Your Honour, I don't know if I should move on to the next point
16 and come back to the same issue.

17 PRESIDING JUDGE TRENDABILOVA: Let us save time. Move to the
18 next point and when this video is uploaded then we shall come back.

19 MR. KIGEN-KATWA: We have it on our laptop. I don't know if the
20 Registry could be assisted by that.

21 PRESIDING JUDGE TRENDABILOVA: What is your view? Here it is.

22 (Video-clip played)

23 MR. KIGEN-KATWA: Madam President ...

24 (Video-clip played)

25 MR. KIGEN-KATWA: Your Honour, we pray that it be noticed that

1 that is exactly the person who is said to be the first suspect and who is
2 supposed to have been hosting the event on the said 2nd of November,
3 2007. And like I said, in highlighting that video, Madam President and
4 your Honours, we pray that the Court takes note of the volume and the
5 size of the crowd, all of who can confirm, number one, whether in fact
6 the first accused was there the whole day on 2nd of November. And the
7 witnesses are of such a high integrity as to include the Prime Minister
8 himself. And if the investigations had been done, in fact, that point
9 would have come out.

10 Madam President, the next meeting we wish to highlight -- or,
11 rather, before we proceed from that point, Madam President, the same
12 witness has specifically said that the meeting was held at the home of
13 the first accused and the dignitaries -- the first suspect and that the
14 dignitaries were seated at the balcony of his home. Madam President and
15 your Honours, we will pray that the drawings of the home of the first
16 accused whose -- of the first suspect, which we have supplied as
17 D09-00010, and the photographs of his home, which we have produced as
18 D09-00023, will show that in fact his home has no balcony, as a matter of
19 fact. And, Madam President, it only shows the extent to which this
20 Witness 0008 is capable of imagination.

21 Madam President, we do not wish it to miss the attention of this
22 Honourable Court that in the list of the people said to have attended
23 that meeting, there is one person by the name Sebei (* phon), allegedly
24 from North Uganda, and one brigadier Djuwaji (* phon) from Central
25 Equatorial, and another person from Southern Sudan. Some of the names

1 are redacted. We pray that it be of significance to this Honourable
2 Court that the Prosecution was unable to produce any material than the
3 mere name for each of these people without any details.

4 Your Honours, I would like to proceed from that point to the
5 meeting of 2nd of December, 2007 -- 6th of December, 2007, which alleges
6 that my client was in Turbo, Salient, Kipkarren. Madam President, much
7 as the Prosecution have alleged that place is in Uasin Gishu District, it
8 is in fact in Nandi District. Madam President, my client has in his
9 statement D-0038 -- 48 has stated that he was on that whole day at
10 Kass FM station in Nairobi and was nowhere near Turbo, which is about 330
11 kilometres from Nairobi and which is over six hours away.

12 Madam President, in addition to his own statement, he has a
13 statement signed by his employers' managing director and which we have
14 annexed as D11-0036, which also shows that he was in fact at Kass FM
15 station Nairobi the whole day and could not possibly be at Turbo.

16 Lastly, Madam President, we have displayed as an exhibit the list
17 of the programmes that he ran on that day, and the -- that list of
18 programmes is Exhibit EVD-PT-11-00013.

19 Madam President, as part of his work on that day, he hosted three
20 members of public at his programme, and those people include Dr. Joseph
21 Misoi of -- Dr. Joseph Misoi. Number two is one Professor Edward Kiugen,
22 and one Mr. Isaaiah Cherutikwan (* phon). All these people are people of
23 good and high standing in society. And the Prosecution could possibly
24 have established the truth of the whereabouts of my client on 6th of
25 December, 2007, if they were interested in establishing the truth beyond

1 the mere allegation of their anonymous witnesses.

2 The next meeting, Madam President, is the meeting of 14th of
3 December, 2007. Madam President, like I already said, in the meeting of
4 2nd of November, Witness 0008 said that the next meeting would be the
5 14th of December to follow up the very important meeting which included
6 the distribution of guns.

7 Madam President, Witness number 0008 and number 0002 are the ones
8 who have supplied the allegation of a meeting on 14th of December, 2007.
9 In this meeting, it is alleged that 20.000 people attended at the home of
10 the first suspect, that my client, the third suspect, was the master of
11 ceremony in that function. Number three, that commanders were elected.
12 And the commanders are the self-same three people. One, Mr. Cheramboss
13 who was present today -- who was present -- who testified for the first
14 accused -- first suspect. Number two is one Augustin Cheruiyot, and the
15 third commander is one General Koech.

16 Your Honours, we invite your notice to the fact that this is the
17 second time the same three commanders are being elected again, having
18 allegedly been elected on December 30th, 2006. And, Madam President, the
19 statement used in respect of this election -- alleged elections on 14th
20 December is not re-election. It is treated as if it is the initial
21 election.

22 It is alleged that apart from the three commanders, all
23 politicians attended, both the current politicians and the aspiring
24 contestants for parliamentary seats and that guns were distributed again
25 on this 14th of December. It is of significance also that Witness 0008

1 says that the meeting was wound up at 1.00 because the first suspect was
2 in a rush to go and submit his papers, his nomination papers.

3 And we wish to say the following about this meeting: The first
4 thing is that the allegation of the second and the eighth witnesses are
5 untrue, because my client was actually at Kass FM broadcasting station in
6 Nairobi on that day, and therefore was not in Turbo, which is over 320
7 kilometres, as I have said, and which is over six hours away.

8 In support of that contention, my client has supplied his
9 statement, Exhibit number 36 -- sorry, 48, and his employer Mr. Julius
10 Lamaon has also supplied a statement confirming he was in employment and
11 that exhibit is D11-0036.

12 Other than those two exhibits to demonstrate and support the
13 contention that my client was away from Sugoi, we have also stated in the
14 statement that he had hosted some three -- some two people. One is
15 Mr. Moses Lesonet who subsequently became a Member of Parliament through
16 a political party by the name ODM, and another person by the name Philip
17 Meli, who was also seeking election through a political party called NAK.

18 Madam President and your Honours, the first witness for the first
19 suspect, Mr. Cheramboss, was present in court and the question was put to
20 him directly as to whether or not he was in attendance in this meeting of
21 14th December 2007, and he stated categorically that in fact he was not
22 in attendance, contrary to what Witness 0008 said. And unlike the
23 meeting of 2nd of November, the Prosecution -- the Office of the
24 Prosecutor in fact put the question to him as to whether or not in fact
25 he was there, and he said he was not there. And the next thing that the

1 Prosecution asked him, "Even if you are not there, could it possibly be
2 the case that the meeting could not have been there?" Madam President,
3 we wish to emphasise on the detail that in fact the allegation of the
4 second and the eighth accused person should be treated -- the second and
5 the eighth witnesses should be treated with the circumspection that
6 results from the fact that they were clearly not saying the truth.

7 Madam President and your Honours, at this point we also wish to
8 highlight the whereabouts of the first suspect, and we pray to play the
9 video showing his whereabouts, which is Exhibit number D-0054 at 0013.

10 COURT OFFICER: Counsel, could you please for the correctness of
11 the record rightly pronounce the exhibit number so we can -- thank you.

12 MR. KIGEN-KATWA: Yes. The Exhibit is D0 --

13 COURT OFFICER: It should start with EVD- --

14 MR. KIGEN-KATWA: EVD-PT-D09-00054 at 0013.

15 (Video-clip played)

16 PRESIDING JUDGE TRENDAFILOVA: Counsel Katwa, are you playing a
17 video, or you will proceed with your presentation? Are you playing a
18 video now?

19 MR. KIGEN-KATWA: Yes, Madam President. It's playing, actually.

20 PRESIDING JUDGE TRENDAFILOVA: Counsel Katwa, there is no sound
21 to this video. Is there?

22 MR. KIGEN-KATWA: Yes, that's true. We don't have the sound,
23 Madam President.

24 PRESIDING JUDGE TRENDAFILOVA: And would you explain the
25 relevance of this video to -- to your presentation?

1 MR. KIGEN-KATWA: Yes, Madam President. That display is a
2 reflection of the whereabouts of the first suspect on the 14th of
3 December, 2007, being particularly that he was at Amagoro. That would be
4 about 160 kilometres away from this -- his home where it is alleged that
5 he had a meeting and where it is alleged that the third suspect was in
6 attendance.

7 Madam President and your Honours ...

8 PRESIDING JUDGE TRENDAFILOVA: We were just making comments that
9 we've seen Mr. Ruto.

10 MR. KIGEN-KATWA: Yes, Madam President.

11 PRESIDING JUDGE TRENDAFILOVA: But not Mr. Sang.

12 MR. KIGEN-KATWA: That's exactly the point we wanted to make,
13 Madam President, that the statement of the second and the eighth witness
14 is Mr. Ruto, the first suspect, was at his home on 14th of December,
15 2007, hosting my client, the third suspect, and we have explained that my
16 client was at his -- at the station in Nairobi at work. And the host --

17 PRESIDING JUDGE TRENDAFILOVA: Thank you. Yes.

18 MR. KIGEN-KATWA: I'm most obliged --

19 PRESIDING JUDGE TRENDAFILOVA: I got the link.

20 MR. KIGEN-KATWA: I'm most obliged. Madam President, we probably
21 would also want to mention that it be noticed the volume of the crowd
22 with which the first suspect was keeping -- the company he was keeping
23 and that it includes the Prime Minister. And for that reason, it is
24 possible to corroborate and ascertain whether or not in fact on 14th of
25 December, 2007, the first suspect was at home to an extent to which he

1 could host my client and have the guns distributed.

2 Your Honours, it is of very significant importance to us also
3 that the eighth witness says that this 14th of December, 2007, was a
4 nomination day for purposes of parliamentary nominations. And for the
5 reason that it was a day for nomination of parliamentary contestants, the
6 first suspect was obliged to hurry up the meeting he had, which included
7 distribution of guns, so that by 1.00 he would be on his way to hand over
8 his nomination papers. And if he were to do anything at all at his home,
9 it could be only between the morning up to 1.00. Madam President,
10 looking at the video and the meeting he was in, it is not conceivable nor
11 possible for him to have been at home at 1.00, deliver his nomination
12 papers, and possibly participate in that.

13 Madam President, we also wish to highlight the fact that these
14 videos were obtained from the media and more particularly in this case
15 from the Nation newspaper -- Nation TV. And, Madam President and your
16 Honours, if the Prosecution were interested in establishing this fact, it
17 would be very easy for them to have gotten it the same way we did, and we
18 only got it from one of the many media stations from which this
19 information could be obtained.

20 Madam President and your Honours, we have mentioned the fact of
21 the nomination. We would wish to additionally add the fact that the
22 nomination for parliamentary seats in Kenya were actually held on 22nd
23 and 23rd November 2007. Madam President, the impression created by this
24 Witness 0008 is that he is a Kenyan and he's very familiar with the
25 goings-on in Kenya, and it is exceedingly perplexing if he could miss out

1 on an important an incident as nominations as he has done in this case,
2 and we only submit on our part that it goes to demonstrate how dishonest
3 he is in alleging on a fact that we should have a common ground on, being
4 the nomination on 14th of November, when in fact it was on 23rd -- on
5 14th of December, 2007, when in fact it was on 22nd and 23rd November
6 2007.

7 Madam President, in the same list of 14th of December, 2007, it
8 is alleged that Frederick Kapondi was also in attendance in his role as
9 the supplier of guns. Madam President, we have supplied Exhibit
10 EVD-PT-D09-0043 at 0002, being a letter from the prison services, which I
11 do not need to read, and two supporting newspaper cuttings.
12 Madam President, the newspaper cutting specifically states that
13 Mr. Kapondi was released on the said 14th of December, 2007, and the time
14 of his release was 11.00 in the morning. And as I already read from the
15 letter, he was released from Bungoma court. Madam President, the
16 distance from Bungoma court to Sugoi, the home of the first suspect, is a
17 distance of over 150 kilometres and requires approximately 3 kilometres
18 to reach -- three hours. Sorry, three hours. Madam President, we submit
19 that if he were to leave at 11.00 upon his release, assuming that were
20 possible at all, he wouldn't be in time to arrive at the meeting within
21 the terms of the -- of the eighth witness so as to attend the meeting and
22 still spare time for the first suspect to go and present his nomination
23 papers at 1.00. And, Madam President, we wish that the incredibility of
24 the allegation of that first -- that eighth witness be taken into
25 account.

1 PRESIDING JUDGE TRENDAFILOVA: Counsel Katwa, we are approaching
2 the deadline for today's session because we cannot go beyond one hour and
3 a half. So do you have a lot regarding your plans, how to present your
4 case, or you're going to proceed tomorrow?

5 MR. KIGEN-KATWA: I definitely would have to proceed tomorrow,
6 Madam President.

7 PRESIDING JUDGE TRENDAFILOVA: You will have to, but I'm not
8 interrupting you at some very important point of your presentation.

9 MR. KIGEN-KATWA: I could stop there, Madam President.

10 PRESIDING JUDGE TRENDAFILOVA: So today we have advanced. I
11 thank you very much, Counsel Katwa. I thank very much the counsel for
12 Mr. Kosgey. And I would like to express our genuine thankfulness to the
13 interpreters, to the court reporters, to the stenographers, to the
14 security officers, to everyone who is today in the courtroom, the
15 Prosecutor's team as well, Madam Chana as well. Of course, to the
16 public. I would like to wish you a very good evening. We adjourn the
17 hearing, and tomorrow at 2.30 we shall proceed with your presentation and
18 thereafter the questioning of the witnesses presented by the Defence of
19 Mr. Sang.

20 MR. KIGEN-KATWA: I'm most obliged, Madam President.

21 PRESIDING JUDGE TRENDAFILOVA: Have a good evening. We adjourn
22 the hearing.

23 COURT USHER: All rise.

24 The hearing ends at 7.49 p.m.

25