

1 International Criminal Court

2 Trial Chamber V(A) - Courtroom 1

3 Situation: Republic of Kenya

4 In the case of The Prosecutor v. William Samoei Ruto

5 and Joshua Arap Sang - ICC-01/09-01/11

6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion

7 and Judge Robert Fremr

8 Trial Hearing

9 Wednesday, 11 September 2013

10 (The hearing starts in open session at 9.37 a.m.)

11 THE COURT USHER: All rise.

12 The International Criminal Court is now in session.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

14 Court officer, if you could kindly call the case again. Thank you.

15 THE COURT OFFICER: Yes, Mr President. Situation in the Republic of Kenya, in

16 the case of The Prosecutor versus William Samoei Ruto and Joshua Arap Sang, case

17 reference ICC-01/09-01/11, and for the record we are in open session.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

19 Now we are continuing the proceedings we started today. Are there any changes in

20 appearances?

21 MS BENSODA: No, Mr President, your Honours.

22 PRESIDING JUDGE EBOE-OSUJI: Thank you.

23 MS BENSODA: Same representation.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

25 And the Defence?

26

1 MR KHAN: No change, your Honours.

2 MR KIGEN-KATWA: None on my side.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

4 Mr Kigen-Katwa, it's your turn to make your opening statement now. I know I
5 didn't ask Mr Khan yesterday when he spoke how long he was going to, but could
6 you indicate so we can -- for purposes of planning?

7 MR KIGEN-KATWA: President, I would take about 45 minutes, with the possibility
8 of getting into an hour.

9 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

10 You may proceed. Thank you.

11 MR KIGEN-KATWA: Mr President, your Honours, my client, Mr Sang, wishes to
12 express profound solidarity with and sympathy for all the victims of post-election
13 violence.

14 This trial highlights another phase of their situation as victims, to the extent to which
15 the Prosecutor did not conduct proper investigations in relation to this issue, and to
16 give witness to those victims.

17 My client, Mr Sang, does not belong to this Court. Indeed, this is because he never
18 belonged, as alleged, to any network. And we would like to underline at this point
19 that we observed that the Prosecution has two factions of the allegations of
20 organisation. One is that the organisation is constituted of the Kalenjin as a
21 community; the second allegation which is contained -- the allegation in respect to the
22 Kalenjin is what was alleged or stated by the Prosecutor when they were making their
23 opening address and in other circumstances.

24 However, the pre-trial brief, the public pre-trial brief, indicates that the allegation is
25 founded on an organisation in the name of the ODM. He never belonged to an

1 organisation which he served as a media liaison, whether it is ODM or Kalenjin, or
2 served in a function of advertising meetings of illicit nature or inciting the
3 perpetrators of crimes against either the Kikuyu or the PNU supporters, as the
4 Prosecutor alleged. The picture painted of Mr Sang, my client, by the Prosecution
5 does not resemble the real Mr Sang, on the one hand, and his intentions and actions in
6 the period 2007/2008, around the unfortunate event of the violence.

7 Mr Sang, contrary to the -- to what the Prosecution claim, is a law-abiding citizen.

8 He was instrumental in calling for peace and calm in the period of violence, and his
9 character is greatly and extensively governed by the Christian values which he was
10 brought up in. In short, he's innocent of contributing to the commission of the
11 crimes charged as -- and has confidence in his innocence and his vindication.

12 It is acknowledged that the allegations against Mr Sang arise against an unfortunate
13 backdrop of political competition which has continued in Kenya and beyond to this
14 Court. The ICC process has been politicised since the beginning and political
15 opponents of his friend, Mr Ruto, the first accused, have been capitalised on this
16 forum as another way to frustrate his influence and his political career. At this point,
17 I would like to reflect the concerns that Mr Sang has asked me to especially address to
18 your Honours.

19 The first issue that Mr Sang would like to highlight is that the Prosecution have
20 disclosed some material to him which includes some audio, some video, and some
21 transcripts of what is alleged to have been broadcasted by him. All those materials,
22 none of them reflect him as either advertising meetings for clandestine or illegitimate
23 purposes or inciting anybody to violence or co-ordinating violence as alleged by the
24 Prosecution. And so, as I speak before you and being privy to the content of what
25 has already been availed and disclosed to Mr Sang, I can say as an absolute that none

1 of the material that has been given to him contains those allegations. And he poses
2 the question - and this is a question he poses as a very fundamental issue - as to
3 whether it is possible or there's any likelihood of a conviction based on what -- of
4 people whose character and integrity has been put to question in the name and style
5 of the Prosecution witnesses, vis-à-vis my client's insistence on his innocence,
6 insistence on his integrity and material available to show that he actually can support
7 his contention that he is a person of integrity. And he struggles to understand
8 whether or not it can be said that there is any case at all against him that has been
9 maintained by the Prosecution since the year approximately 2010. He struggles with
10 the question whether the Prosecution, in the absence of any material showing that he
11 was either inciting or co-ordinating violence or advertising for meetings to plan
12 violence, in the absence of any of those materials, whether it can be said that the
13 Prosecution have any prospects of proving their case beyond reasonable doubt, as
14 they alleged yesterday morning when they were making their opening address.
15 He poses the question to this Court in the background of the fact that it is expected
16 that the burden of proof is on the Prosecution and their burden is to discharge proof
17 beyond reasonable doubt.

18 It is our contention that the Prosecution have not been able to bring any tapes to
19 either support the allegation that he was inciting violence or coordinating violence or
20 advertising for meetings either because the Prosecution have not looked for it, or they
21 have looked for it, have them, and are withholding them; and if that were the case,
22 then it must be because they are withholding them because it is inconsistent with the
23 narrative that they would like to make.

24 My client, Mr Sang, is confident that he will make his case on the basis that he's -- on
25 the basis of his confidence in his innocence, the extent to which he has been able to

1 prepare witnesses or, rather, to interview prospective witnesses, all of who were
2 listeners of the Kass FM station, which he's said to have broadcasted from and
3 all -- the assembly of all that material supports and reflects the fact that whether you
4 interpret what he says expressly or by implication, he actually neither incited nor
5 co-ordinated violence nor advertised for meetings, as alleged by the Prosecution.
6 Mr Sang prays very much that this Court looks beyond the words of the Prosecution
7 witnesses and beyond the mere allegations they make, which is unsupported by any
8 material whatsoever. On our part as this Defence team, we have assured him that
9 the standards of this Court are international and that the Court will determine this
10 case in a situation and in circumstances that the Judges are separate and distinct from
11 the Prosecution, and even where he has lost faith in the Prosecution, he still has faith
12 in the Judges that they will look for proof beyond reasonable doubt and that they will
13 look for real material that supports the allegation of the Prosecution.
14 At this point, I would request the permission of the Court to play a tape that in a way
15 reflects his character and his person.

16 (Playing of the audio excerpt)

17 MR KIGEN-KATWA: My Lord, your Honours, we had a failed transcript, the
18 English translation. I don't know. It is on the screen, my Lord, your Honour.
19 Your Honour, if you could press -- I'm told it's available if you press the "PC1."

20 PRESIDING JUDGE EBOE-OSUJI: "PC1"?

21 MR KIGEN-KATWA: Your Honour, President --

22 PRESIDING JUDGE EBOE-OSUJI: Will this be part of the real --

23 MR KIGEN-KATWA: It's the exact transcript of what he's --

24 PRESIDING JUDGE EBOE-OSUJI: One second. There is confusion here. There
25 must be some technical difficulty. I can't get it still, sorry.

1 Sorry about the interruption. Now we're back. I've got the transcript now. Thank
2 you.

3 (Playing of the audio excerpt)

4 MR KIGEN-KATWA: Your Honours and Mr President, I would like to make out
5 what he says in English, only parts that are relevant for purposes of illustrating what
6 kind of a person he is and what action he took in the year 2007/2008.

7 This issue -- this tape is made around the period of 2 January 2008 and was
8 pre-recorded after the events - the unfortunate events - of Kiambaa church which is
9 part of this case.

10 And what he says at para -- the first part of what he addresses when he makes the
11 first address is that, "Greetings, Kalenjins, wherever you are today," and when he says
12 "Greetings, Kalenjins," it has to be understood that this was a Kalenjin station and it
13 was addressing itself to the Kalenjin community.

14 "Greetings, Kalenjins, wherever you are today. I would like to proclaim to you
15 Kalenjin listeners a message of peace. That is Kenya is crying for peace. Everyone
16 is crying for peace. A little child is crying for peace. An adult is crying for peace.
17 A woman is crying for peace. A man is crying for peace. A grandfather is crying
18 for peace. So is a grandmother. Everyone is crying for peace.

19 Our Kalenjin people, when it is so difficult, nothing compares to peace. Peace
20 enables one to do whatever he or she likes. Peace enables people to live together in
21 brotherhood. Peace dispels worry from people. Everyone longs for peace in Kenya
22 at this time."

23 Your Honours, I would like to put some emphasis on that part where I have just read
24 where he says, "Peace enables one to do whatever he or she likes. Peace enables
25 people to live together in brotherhood," and to underline that that part where he asks

1 for brotherhood, he is not saying a brotherhood amongst Kalenjins to the exclusion of
2 anybody else.

3 He goes on to say, "We are -- elections are past. We should keep peace to all people
4 or everyone in Kenya who may be engaged in wrongdoing and is not keeping peace,
5 or is breaching the peace. We would like to pray for peace. That please, all of us,
6 let's keep peace as Kenyan people. Let us keep peace wherever we are. This is
7 what we need.

8 All people whom we have heard about, including others that we heard, that people
9 have burned a church with people inside." Your Honours, this is a very direct
10 reference to the Kiambaa church where it is alleged he was also involved in.

11 "All people whom we have heard about, including others that we heard, that people
12 have burned a church with people inside; all Kalenjin people. If it is the Kalenjin
13 people who have done such acts, such an act should never be committed by a human
14 being.

15 No child should be burned, no man should be burned and no adult should be burned.
16 No one should -- no one who has sought refuge in God's house, where the Lord is
17 glorified, should be burned. When a person has reached there, he has gone to seek
18 the Lord to cover him. It is wrong and it is not befitting for any human being to
19 engage in such an act, so we are pleading for peace. Peace. Peace. Please, please,
20 at Kass FM we are appealing for peace."

21 The last pieces that I wish to read out are, "Wherever you are, burning, destruction
22 and killing should not be meted out on any person created by God to destroy and cut
23 short the life of a person created by God. Desist from any act that may destroy peace.
24 Refrain from any act that may incite to do evil.

25 That is the message from Kass that please, please, let us keep peace. Let us refrain

1 from destruction. Let us refrain from any killings that criminal -- killings that
2 criminal or other persons may execute. Let us keep peace now and always. Peace,
3 peace, our people."

4 Your Honours, we have the recollection that the Prosecution played some tapes
5 and -- in the opening address. None of the tapes that were played related to
6 Mr Sang. We would have expected that if there was any material -- we would have
7 expected that if there was any material that incriminates Mr Sang -- and we've always
8 maintained that there is none. If there was any, the Prosecution would have in part
9 played it in their opening address.

10 Your Honours, I also pray that three issues do emerge prominently from that audio
11 that we've just played. The first one is the plea he makes for peace, including
12 condemning what had happened in Kiambaa church and his plea that that is not a
13 character of the Kalenjin people.

14 Now, it is alleged that he was the one who was co-ordinating, or mobilising, or
15 martialling Kalenjins to the violence that occurred, but here he is seen to be doing the
16 exact opposite.

17 The other issue I wish to highlight is his emphasis in his conviction in God. He says,
18 "Wherever you are, burning, destruction and killing should not be meted on any
19 person created by God."

20 And lastly he says he is making this plea for peace on his own behalf and on behalf of
21 the station he was working at; that is Kass FM.

22 Your Honours, as evidence will show, whether on the part of the Prosecution or on
23 the part of the Defence if we get there, it will become apparent that in fact Mr Sang is
24 not on record as doing any of the things alleged against him, and it's not so much
25 because the Prosecution didn't get it, but it is because it doesn't exist anywhere.

1 In essence, we say that the Prosecution has missed the purpose for which the Statute
2 was formulated, being to try criminal culpability. Instead, the Prosecution has
3 placed its resources and statutory privileges at the disposal of political competitors of
4 my client's co-accused.

5 We also contend that the case has focused a spotlight on the Prosecution's duties
6 under Article 54, but particularly its obligation to investigate exculpatory materials on
7 an equal basis with incriminating materials. This trial will be as much about
8 Article 54 failings as it is about criminal culpability.

9 To date, the Prosecutor and her predecessor has not put her questions to the accused,
10 Mr Sang, and other people adversely mentioned. Your Honours will recall that the
11 Prosecution presented a certain charge where a number of people are mentioned,
12 allegedly either serving in the function of financiers, or a military arm of the
13 organisation and so on and so forth, and it is our contention that none of those people
14 have been approached by the Prosecution to ask their side of the story. That poses
15 the question as to whether or not the Prosecution discharged or gave any attention at
16 all to the requirement that they also investigate exculpatory material.

17 The accused offered the Prosecution an opportunity to ask him his side of the story.

18 For reasons unknown to the Defence, the Prosecution avoided taking up the option.

19 Mr Sang suspects that this was because the Prosecutor feared that Mr Sang's narrative
20 would be inconsistent with the Prosecutor's wishes.

21 Mr Sang is aware that the first accused went as far as -- the first accused, his
22 co-accused, went as far as seeking to meet the Prosecution at his own cost to no avail,
23 as the Prosecution avoided asking him questions which culminated in this trial.

24 As to the people the Prosecution set out in her chart to illustrate the existence of a
25 network, it is unfortunate that they came to learn of existence of their names for the

1 first time when the Prosecutor announced their names and they were never given a
2 chance to defend themselves and to demonstrate their innocence, or to show that in
3 fact the allegations made against them cannot be true on basis of the material they
4 would have to show their innocence and their unavailability for the network.

5 Arap Sang says that this trial deliberately addresses -- Mr Sang prays that in the
6 course of this trial, this Court kindly deliberately addresses the question of whether or
7 not it can be said that the Prosecution has discharged its Article 54 obligations to
8 investigate exculpatory material if the suspects and other people adversely mentioned
9 have not been invited to respond to the allegations proffered by the Prosecution.

10 And our insistence that adequate investigations were not done is supported by the
11 fact that when the current Prosecutor visited Kenya, she was told to her face that -- in
12 fact, when she visited Kenya for outreach purposes, she was told to her face that no
13 investigations had been done and nobody had come to inquire from them what had
14 happened. It is of significant importance to us to observe that it was said --

15 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, the interpreters, they will need
16 you to slow down so they can interpret properly.

17 MR KIGEN-KATWA: I was just putting emphasis on the fact that when the
18 Prosecutor visited Kenya for outreach purposes, it was put to him directly that no
19 adequate investigations had been done by the people who are said to be victims of
20 this violence, and whose victimhood we do not contest. Those same people
21 observed that, in fact, Mr Sang was not deemed to have been one of the people who
22 are culpable, and so the material that the Prosecution has against Mr Sang, their
23 source is perplexing.

24 The Prosecution does not have a case against Mr Sang, nor does it have a case against
25 the Kalenjin network. This explains why the case has mutated to a point where the

1 current case has changed in many details from the Prosecution's original case. For
2 instance, the aggressors and the victims kept changing. In the Prosecution's original
3 case in December 2010, the network was allegedly responsible for committing crimes
4 against murder, predominantly within 25 kilometres from the house owned by
5 Mr Ruto in Sugoi, where he allegedly held meetings to plan violence.

6 When the Prosecution realised that there were no deaths and all the neighbours of
7 Mr Ruto were intact, and three years down the line, in September 2013 as we stand
8 trial now, the allegations are changing to that the violence was meted out in
9 Uasin Gishu and Nandi districts by Kalenjins and not by ODM, as the Prosecutor did
10 in her opening address, and that the targets were Kikuyus, Kisiis and Kambas, which
11 is at variance with the original case that the targets of the attacks were limited to
12 Kikuyus and Kisiis in the year 2010.

13 It was also originally alleged by the Prosecution that the target of the violence was to
14 influence the elections of the year 2007. When we appeared in the Pre-Trial
15 confirmation hearings and demonstrated that the violence happened after the
16 elections had been done, the Prosecution changed their story and in the close of that
17 confirmation proceedings said that the objective of that violence was the 2013
18 elections. The elections, the 2013 elections, have come and passed, and now the
19 Prosecution, in their amended charges, do not have a time target.

20 So today the question remains: Why would Sang and others create a network to stir
21 up violence? What was their motive or interest or purpose in doing so?

22 The Prosecution says that Mr Sang sought to exploit the historical tensions between
23 Kalenjin and Kikuyu for his own political and personal ends. The Defence say there
24 is none. There were no political ends he sought, there were no personal ends he was
25 seeking, and there was no benefit he would get from that violence. The

1 Defence -- why would it be in Mr Sang's own political and personal interest to seek to
2 exploit these historical tensions? What was there to gain for him personally? The
3 Defence say "nothing." Why is it -- why is Mr Sang here waiting for trial to
4 commence before the ICC?

5 The Defence submits that while there may have been political reasons for targeting
6 Mr Ruto in Case 1 and Mr Kenyatta in Case 2, Sang was the unfortunate victim of
7 unfortunate collateral damage. The Prosecution needed an even number on both
8 sides in Case 1 and 2, and being a popular presenter at Kass FM, a major Kalenjin
9 radio station, the Prosecutor pointed -- as the Prosecutor pointed out in her opening
10 address, Mr Sang was so unlucky as to become the third suspect on the Kalenjin side.
11 Until almost three years after his name was publicly disclosed as an ICC suspect, the
12 case against him remains empty, and as earlier explained, there is no material against
13 him to contradict his position that he is innocent, that his integrity is intact, and that
14 there is no material to dispose -- to displace what he has always maintained.

15 When the Prosecutor landed in Kenya to conduct investigation, his predecessor came
16 into contact with some Kenyan political brokers, civil societies - zealous civil
17 societies - and some ethnic-minded individuals who wished to use the ICC to shape
18 Kenya's future - political future. The people the Prosecution met were opportunists
19 and who seized the chance to use ICC process for their own purposes. The NGOs
20 joined in, in their desperate desire for donor funding, and strove to find ways to make
21 themselves relevant, exploited the difficult situation of victims, and took it upon
22 themselves to protect Prosecution witnesses.

23 Some of the donors readily resourced the efforts of the NGOs, as it was a subject that
24 easily attracted a location of funds from humanitarian perspective. Potential
25 witnesses then seized on the opportunity to better their own lives and circumstances,

1 with little regard for conscience or consequences. Economic circumstances and the
2 possibility of profit through participation in this case has influenced the content of the
3 witness testimony and has encouraged the provision to the Prosecution of false
4 testimony. It would seem that the Prosecution was eager to co-operate with these
5 disgruntled sectors of Kenyan society and their foreign well-wishers. What has
6 resulted is a marriage of convenience that has lasted to date.

7 We submit that the Prosecution should have been aware of these undercurrents and
8 made more conscious effort to remain neutral and independent and not to be used as
9 pawn of Kenyan politics.

10 The Prosecution has subsequently used the allegation of witness security and
11 welfare -- witness welfare matters to attract donor funds through partner organisation.

12 The Prosecution has not been very forthcoming with the disclosure of expenses
13 incurred on behalf of the witnesses, and this makes it more difficult for your Honours
14 to assess their candour. We trust that in the course of time this will come out.

15 As it turns out, it is evident that the witnesses were collected by political forces and
16 NGOs and this forms the core of the Prosecution's case. The Prosecution relies on
17 the representations made before domestic processes dealing with post-election
18 violence as well as assertion -- and these are the same assertions that are made in this
19 Court. However, the Prosecution has failed to sufficiently investigate its own
20 witnesses as a separate issue and their motivation for participation in this process.

21 As a consequence, the Prosecution has assembled witnesses whose personal integrity
22 and truthfulness is in question, and Mr Sang prays that this Chamber stays alive to
23 the question of credibility of these witnesses.

24 For instance, it will be observed that the Prosecution witnesses seem to have the
25 superhuman characteristics of being omnipresent and having infinite resources.

1 They claim to have travelled extensively to all meetings and rallies, they have access
2 to cameras, videos, video equipment; they can use guns, bows, arrows, and seem to
3 listen to Sang's radio programme on Kass FM, despite having expressed disapproval,
4 and on a full-time basis. Mr Sang submits that it is unrealistic and undermines the
5 credibility of the -- these witnesses, these characteristics that these witnesses claim to
6 have.

7 Mr Sang prays that the Court gives attention to the quality of the Prosecution
8 witnesses. If the violence took place, if it was planned, if it was organised, if it was
9 co-ordinated, there should be professionals and other peoples in the ranks of the
10 witnesses, including, for instance, teachers, policemen, doctors, lawyers, and et cetera.

11 At the close of the case, we will invite a reflection on the question of whether or not --

12 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa --

13 MR KIGEN-KATWA: Yes, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: -- watch the pace.

15 MR KIGEN-KATWA: Okay, your Honour.

16 At the close of the case, we will invite a reflection on the question of whether the
17 witnesses are a fair representation of Kenya as a society as a whole and/or a fair
18 sampling of the Kalenjin community who constitute the bulk of the so-called linkage
19 witnesses and organisation.

20 We would also like attention to the fact that all linkage witnesses are associated with
21 the political party at that time, PNU: Party of National Unity. A reasonable person
22 would therefore question the bias and political motive of such witnesses. We would
23 have expected the investigations could have paid careful attention to this aspect
24 before relying on such witnesses to parade Mr Sang before this Court for trial. It
25 would seem that the Prosecution preferred to maintain a blind eye to this aspect.

1 Mr Sang has been formally charged in this Court. Essentially, the Prosecution
2 alleges that Mr Sang participated by contributing to the criminal activity of an
3 organisation vaguely called "the network." This network is purportedly organised in
4 a hierarchical structure and has capacity to cause widespread and systematic harm.
5 The Prosecution claims that the network is comprised of five components from their
6 chart yesterday: Political, traditional elders, financiers, media, and military. That
7 was the structure they presented, the chart they presented yesterday.
8 The Prosecution through their witnesses says the post-election violence crimes were
9 organised around pre-existing traditional Kalenjin rituals and structures, and those
10 are the words of the Prosecutor. These include Kalenjin circumcision ceremonies,
11 Kalenjin marriage engagements, Kalenjin elders, related process of inauguration into
12 being a Kalenjin elder. It included Kalenjin women, it included Kalenjin leaders, it
13 included Kalenjin athletes, it included Kalenjin soldiers, it included Kalenjin
14 businessmen, Kalenjin professionals. Even an entity called EMO, which is part of
15 the Prosecution case, the only exists -- extensive investment vehicle available to
16 common people among the Kalenjins has been put to trial.
17 From time to time -- and this is inconsistent to what the Prosecution have attempted
18 to do and what they actually attempted to do at the press event that we had on the
19 first day, on the 9th. From time to time, the Prosecutor has attempted to explain
20 unsuccessfully that what is on trial are individuals, and the emphasis is on
21 individuals and not a community. However, the Prosecutor's opening address
22 yesterday morning suggests the exact opposite. The Prosecutor said, and I will
23 quote him verbatim -- I say "verbatim" for emphasis, "Politically, Mr Ruto's associates
24 within the network included prominent and influential local politicians and
25 community elders," and "community" that is used by the Prosecutor there is later on

1 explained.

2 The Prosecutor went on to say this, "They gave their endorsement to the plan by
3 appearing at public rallies and supporting Mr Ruto's rhetoric, as well as contributing
4 to his war chest. Financially, the network received funding from wealthy Kalenjin
5 businessmen and community foundations," and the community foundation here is
6 later on explained.

7 Then he goes on to say, "The network drew on existing tribal structures to strengthen
8 and legitimatise its existence and objective. The network drew on existing tribal ...",
9 and that is Kalenjin structures, "... to strengthen and legitimatise its existence and
10 objective."

11 He went on to say, "Traditional Kalenjin elders endorsed and blessed Mr Ruto as their
12 leader in 2006 as we have just seen," and that is in reference to the tape that was
13 played. "They exploited tradition. They contributed funding and recruited youth
14 to take part in attacks. They helped to coral (sic) people ..." I don't know what he
15 means by "coral" there. "They helped to coral (sic) people to the preparatory
16 meetings and acted as watch-dogs on their community to ensure participation by
17 every Kalenjin youth in the area, meted out punishment for those that did not support
18 William Ruto or his political party, such as public humiliation, flogging and forcing
19 them to pay penance in livestock, some of which were used to feed the warriors on
20 the ground, and afterwards they were perform ..." -- "... they performed cleansing
21 ceremonies to absolve the youths of any crimes they had committed during the
22 violence.

23 Therefore, your Honours, while it may ..." -- this is I'm just quoting him still.

24 "Therefore, your Honours, while it may not have resembled a traditional state or a
25 state-like organisation, this ad hoc network nevertheless satisfies the requirements of

1 an organisation for the purposes of contextual elements necessary for crimes against
2 humanity."

3 Your Honours, we would like to observe at this point that, inconsistent with the
4 Document Containing the Charges against my client alleging that the organisation
5 was ODM, it is very clear from the presentation of the Prosecutor yesterday that what
6 is on trial is actually a community it is structure -- and its structures.

7 Your Honours, my client has asked me also to lament at the impression created of this
8 community, that it is a community that is engaged in flogging and forcing people to
9 pay penance by releasing livestock, that they are cheated into the impression of
10 innocence by alleged cleansing ceremonies, and your Honours we will endeavour in
11 both cross-examination and in our defence to show that this is furthest from the truth
12 and that the community - that the Kalenjin community - described by the Prosecution
13 is everything except what the Prosecution has said.

14 In this regard it is instructive to read some paragraphs of what is contained in the
15 public pre-trial brief, and I have picked on the one aspect of the attack on the alleged
16 edifice called "the organisation," being the aspect of their circumcision ceremonies.

17 This is what he said in the public pre-trial brief at paragraph 71, "In December 2007, a
18 traditional circumcision ceremony and training for Kalenjin youths took place in
19 Kapchumba (near Huruma.) This ceremony and training lasted throughout
20 December. Another circumcision ceremony also took place at Chandoni in the forest.
21 Approximately 10,000 people attended this month-long ceremony and training.

22 These youths returned from this ceremony initiated as warriors and ready to fight."

23 Then the public pre-trial brief goes on at paragraph 122, "Training was organised for
24 Kalenjin youths to prepare them to participate in the attacks. Traditional
25 circumcision ceremonies were used to train youths to use traditional weapons such as

1 bows and arrows, to administer oaths of secrecy (violations of which were punishable
2 by death) and oaths to follow orders and the guidance of elders, and to perform
3 blessings and sacrifices. Youths also received training specifically for the purpose of
4 post-election violence, including how best to burn down houses and how not to leave
5 any traces of evidence and use of firearms."

6 Your Honours, it is extremely strange that it could be said by the Prosecution that
7 these ceremonies are used to train people on how to burn houses, together with all the
8 allegations that it is a month-long ceremony in a community that takes their children
9 to school and cannot afford a whole month for such a function.

10 The Prosecution has manipulated the culture of the edifice they referred to as "the
11 organisation," being the Kalenjin. They have manipulated the said culture and
12 structures to fit awkwardly into the elements of crimes against humanity through a
13 fictional network. In consequence, it appears that one becomes a criminal by virtue
14 of being an African Kalenjin.

15 The Prosecution has put sinister spin on all aspects of Kalenjin culture, that the
16 network exploited pre-existing structures including circumcision, getting engaged to
17 get married, state of being an elder, the age process of getting to become an elder.

18 The Prosecution also implicates Kalenjin women, Kalenjin athletes, retired Kalenjin
19 members of military, or rather retired military people who are Kalenjins, Kalenjin
20 businessmen, Kalenjin media entrepreneurs and Kalenjin foundation in the name and
21 style of EMO.

22 And in consequence of what I have just highlighted to you, your Honours, being
23 partly what the Prosecutor said and partly what is contained in the public pre-trial
24 brief, it becomes very clear and apparent that what is on trial are not individuals. It
25 is actually a community and its culture.

1 It will be observed from the names that the Prosecutor had in their charge yesterday,
2 together with other materials that are contained in the substance of the public
3 pre-trial brief, that prominent Kalenjins who have held important positions
4 internationally have also been roped in and their reputation tarnished. Such
5 individuals include but are not limited to: Ambassador Bethwell Kiplagat, who is
6 mentioned in that public pre-trial brief; General Lazarus Sumbeiywo; Dr Kipchoge
7 Keino; one Mr Micah Cheserem; and others including Judges who are Kalenjin.
8 Your Honours, some of the allegations are extremely outlandish, to the extent for
9 instance of saying that a foundation by the name EMO has a bank with financial
10 resources in the sum of Kenyan shillings 1.2 billion and owned the biggest or the
11 tallest building in the centre of Nairobi.
12 It is public knowledge - and the Prosecution should have been able to notice this very
13 easily if they had visited Kenya, or if they had been diligent in their
14 investigation - that the tallest building in Nairobi houses the Central Bank and Kenya
15 Revenue Authority and is the Times Tower in Nairobi.
16 There are other extremely outlandish issues which I do not want to raise at this point
17 and we will raise in the course of trial.
18 The Kalenjins that have been described by the Prosecution are constituted of diverse
19 ethnic groups and they have wide-ranging political affiliations. They do not belong
20 to one political entity, as the Prosecution allege.
21 It is therefore lamentable that in this day and age the Prosecution is placing -- is
22 throwing the traditions and customs of entire people under the weight of criminal
23 justice system when they would have -- there are more deserving issues to which the
24 Prosecutor would have applied his attention to.
25 As the Prosecution puts it, Mr Sang was a popular broadcaster on Kalenjin language

1 station. We state that this programme Lee Nee Emet, which has been referred to,
2 was a platform for the education of Kalenjin people on wide-ranging issues which
3 affected their daily lives, such as farming, social morals, commerce, enterprise,
4 politics and legal issues. Listeners tuned in and called in to debate on such issues.
5 It was just a platform for inter -- to create an interactive opportunity for listeners in a
6 vernacular language, and the use of the vernacular language is because they were
7 familiar and comfortable with that language. It now seems that, in part, Mr Sang is
8 being punished for his efforts to bring together and consolidate the Kalenjin people
9 on lawful and legitimate matters of political choices and entrepreneurship.
10 Kalenjin expressions, which may have been used during this programme and which
11 are -- which have been woefully misinterpreted by the Prosecution and
12 misunderstood by the Prosecution, have been given criminal meaning. However,
13 the use of Kalenjin proverbs, metaphors, idioms and others is a part of any
14 community's rich history. Such colour to language exists in all cultures.
15 Chinua Achebe, the renowned and celebrated author, has had occasion to explain that
16 "proverbs ...", in communities, "... are palm wine with which words are eaten."
17 Proverbs used in Kalenjin -- Kalenjin proverbs, metaphors and idioms used in
18 Kalenjin should not be judged using Western standards, or any other criteria that
19 gives incorrect interpretation.
20 Mr Sang would like to pose the question as to whether anything remains in the name
21 of the entity called "Kalenjin" if the two were to eventually be convicted owing to the
22 existence of their culture and their lifestyle, as postulated by the Prosecution, in
23 criminalising Kalenjin circumcision, Kalenjin marriage and so on and so forth?
24 The Prosecution in focusing its efforts on attempting to create a criminal Kalenjin
25 network, allegedly with pre-planned violence to follow the 2007 election, has

1 suppressed the effect of the disputed results of 2007 elections.

2 It should not be forgotten that the successful -- or the person who was elected as the
3 president in those elections was sworn-in late in the night and after election observers
4 had been locked out. It is also on record that the Chair -- the Chief Executive of the
5 Electoral Commission then, the late Samuel Kivuitu, acknowledged long before there
6 was any violence that, if the elections were mishandled, there was a likelihood of
7 resulting in violence.

8 Your Honours, to the best of our knowledge, even the very act of obtaining a
9 statement from the late Mr Kivuitu was not done by the Prosecution.

10 It remains Mr Sang's position that post-election violence broke out as a spontaneous
11 reaction to failed elections and irresponsible management of the situation by the
12 Electoral Board in Kenya. The theory taken by the Prosecution in this case gives no
13 explanation to the occurrence of previous cycles of violence and other violent
14 incidents occurring throughout the country. These include the 1952 emergency, the
15 1982 coup, 1992 general elections violence, and 1997 general elections violence.

16 And at this point, your Honours, I would like to invite the Court to some important
17 and significant issues.

18 The first one is that the first accused who is said to have been the part of -- the first
19 accused, who is said to have been assisted -- to have recruited the assistance of the
20 second accused, my client, was not a contestant in the 1992 elections, neither was he a
21 contestant in the 1997 elections, neither was he a contestant in the 2007 elections
22 together with the accused in case number 1, Mr Uhuru Kenyatta. We would pray
23 that this is juxtaposed with the fact that in their attempt to participate in the elections
24 in 2002, the two of them, that is, the first accused in this case and the accused in case
25 number two, when they lost elections in that period, in the year 2002, number one,

1 your Honour, your Honours, they considered defeat. That is a significant thing,
2 your Honour.

3 The second one is that in that period when they were contestants, there was no
4 violence. Again, in the year 2012, when they were contestants, there has not been
5 any violence, the elections that were just done early this year.

6 Your Honour, the Prosecution would probably want to attempt to argue that the 2013
7 elections attracted no violence because of the existence of this case. We would like to
8 draw attention to the fact that in the year 2002, when the two of them were in the
9 political arena, there was no ICC, there was no violence, and they had the grace to
10 concede defeat.

11 The allegations by the Prosecution purporting that the first accused, allegedly with
12 the help of the second accused, desired to evict the Kikuyus and other non-Kalenjins
13 from the areas referred to being The Rift -- the Uasin Gishu and Nandi District is,
14 number one, illogical considering that the first accused needed to get national
15 leadership; and if he had to succeed, he needed to get at least 25 per cent support of
16 other tribes and constituencies. It would have been foolish on the part of the first
17 accused to seek to get evictions and to still expect to get 25 per cent votes in all other
18 areas in Kenya to successfully obtain national leadership.

19 It is also inconsistent with logic that whereas these charges relate to only one province,
20 that is, Rift Valley, the violence that occurred in the year 2007 was in six out of eight
21 provinces.

22 This trial is an insult to Kenya government, the Kenyan people, the Kenyan
23 institutions, the Kenyan judiciary and Africa as a whole. If Mr Sang was really on air,
24 broadcasting incite -- broadcasting incitement, advertising for meetings to plan
25 violence and co-ordinating violence, when he was, as the Prosecution have attempted

1 to explain, he was speaking from the position of an opposition to the government and
2 when there was a ban on live broadcasts, the question that arises is whether the
3 Prosecution wants this Court to believe that he could, in the face of government ban
4 and blackout of -- blackout on media live coverage, that he could do that and remain
5 unarrested and unnoticed.

6 The Prosecution would have you believe that during post-election violence, with all
7 the Kenya police, the criminal investigation department, the national security
8 intelligence service and provisional administration officials, on one hand, were all
9 deaf to his words and unable to stop him when he was making all this incitement,
10 co-ordinating violence, and allegedly advertising for meetings to plan violence.

11 We have Mr Sang here on trial. He is a confident Christian whose conviction is
12 disposed to condemn commission of any crime, as was evident from the tape we just
13 played, including murder, torture, and any actions that would cause destitution as is
14 reflected in the three counts against him. He has always stated and lived by his
15 convictions. Prior to the tragedy of the Prosecutor's interest in Kenya, he had never
16 encountered any criminal process, even at the lowest level and at the smallest scales
17 of his village in Seum, in Kitale. He cannot therefore comprehend how he can be
18 deemed to be an international criminal by the Prosecution at international level when
19 everyone who grew up with him knows him best -- who knows him best and who
20 taught him in school, who associated with him in church and all his colleagues at the
21 media station where he worked, and other places he worked, together with his
22 immediate and extended family, including his father, Mr Ketel, his mothers E. Ketel
23 and L. Ketel, and his wife, Truphena, and his children, that he respects the law and is
24 a role model.

25 All people who know Mr Sang and who have afforded themselves a chance to meet

1 him and interact with Mr Sang mourn and regret what the Prosecution have alleged
2 against him. He is more sinned against than sinning.

3 Mr Sang has been accused as having broadcasted all that has been alleged against him
4 from the station Kass FM, and we would also like to highlight his place in that radio
5 station. Mr Sang was an insignificant individual who undertook his limited role as a
6 journalist to give a platform to the public to learn, to make choices, to be entertained
7 in Kalenjin dialect. In consequence of his modest performance, he gained respect
8 and high regard of many people.

9 His trial is conducted against the background of three -- two important facts. The
10 first one is that he was a junior staff member at the radio station. Number two, he
11 was not a shareholder in the state radio station and did not share in the station's
12 profits. He had no political clout. He obtained no benefit from this situation - this
13 violent situation - and the only benefit he got in the course of his services at the
14 station was his remuneration.

15 Your Honours will of course know that he is on legal aid. He did not have free hand
16 at the station to do what he wished to do. He was under supervision and under
17 management. He had to follow the station's internal policies, procedures, and ethics.
18 He has subsequently been forced to resign from Kass FM because the Prosecution
19 continued to make allegations against him long after bringing him and arraigning
20 him in this Court.

21 In January 2008, Mr -- when the violence was raging, Mr Sang, as I've already
22 explained, not only preached peace, but mobilised for peace. He himself and others
23 at the Kass station pre-recorded peace messages which were played in compliance
24 with government's ban on live broadcasts, which was in force at that time.

25 The allegation by the Prosecution that he co-ordinated violence is false, as I have

1 already explained, and at this point I would like to show -- to play a tape to show his
2 efforts to mobilise not only himself, but others to endeavour for peace.

3 (Playing of the audio excerpt)

4 MR KIGEN-KATWA: That is the first tape that we would like to play. In the same
5 sitting, which was on 1 January 2008, we would like also to play a second tape by a
6 second person who was in the company of that person.

7 (Playing of the audio excerpt)

8 MR KIGEN-KATWA: Your Honours, we would like to play the third tape.

9 (Playing of the audio excerpt)

10 MR KIGEN-KATWA: Your Honours, those three tapes -- those -- that's one
11 incident that was done on 1 January 2008, at the initiative and instance of my client,
12 Mr Sang, who mobilised these three people to come and plead for peace.

13 Your Honour, three things I would like to observe from those tapes.

14 The first one is that the first person there, one Bishop Silas Yego, belongs to a church
15 by the name AIC, African Inland Church. This is approximately the second biggest
16 church in Kenya and therefore carries weight.

17 The second person there, one Ambassador Bethwell Kiplagat, is a very achieved
18 diplomat and who -- and assisted in obtaining peace in Sudan, in Mozambique and in
19 Somalia. The third person there, one General Lazarus Sumbeiywo, retired --

20 PRESIDING JUDGE EBOE-OSUJI: One second.

21 MR KIGEN-KATWA: Yes, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, I do not know whether you'd
23 given the names to the stenographers, but it will help generally for purposes of
24 proceedings that counsel spell names - place names and people's names - so that it
25 makes life easier for the stenographers as they write. Thank you.

1 MR KIGEN-KATWA: Your Honour, we did provide those names. We did provide
2 names, even in the transcript, your Honour.

3 Your Honour, I was explaining that the third individual there, one retired General
4 Lazarus Sumbeiywo, is also an achieved diplomat who has his hand also in the peace
5 that was obtained in Sudan and in Somalia.

6 And, your Honour, I just want to put emphasis on the very conscious and deliberate
7 action on the part of my client to seek out these individuals, who carry influence and
8 weight, to ask them to come and make their contribution in seeking for peace. Your
9 Honour, we wish to submit that this reflects a person who was not given to violence,
10 but who had every wish that there would be peace.

11 Your Honour, all the three people seek leave -- seek that there be peace and pray for
12 peace. They all ask that there be dialogue, and it is very significant what retired
13 General Sumbeiywo says in his first paragraph -- in the first three sentences he makes
14 where he says, "Greetings, Kalenjin people. My name is Lazarus Arap Sumbeiywo.
15 I was here the other day speaking to you, the day the election results were released.
16 I told you to enforce cultural restrictions on our actions, lest people engage in
17 wrong-doing, lest we do evil."

18 And, your Honour, I just want to put emphasis -- your Honours, I want to put
19 emphasis on his plea not only in abstract, but also founded on culture, on the Kalenjin
20 culture that the Prosecution is putting on trial, where he says, "I plead that you go
21 back to your culture and observe that, in fact, in a cultural context you wouldn't be
22 seen to seek to engage in any criminal acts," including murder, deportation and
23 destitution, as the Prosecution allege.

24 I wish to play the last tape in terms of my client's effort to plead for peace. This last
25 tape is very significant, because this reflects his relationship with the first accused and

1 his effort to get and plead for peace; a completely diametrically opposite position
2 from what the Prosecution allege.

3 (Playing of the audio excerpt)

4 MR KIGEN-KATWA: Your Honours, the voice you've just heard, which must be
5 familiar, is the voice of the first accused in his characteristic eloquence pleading for
6 peace.

7 In part he says that, "As ODM people, we are trying to talk so that we can solve these
8 issues in a peaceful manner," and that of course is consistent with the whisper that we
9 saw in the tape played yesterday. "We continue to talk with people in the nation of
10 Kenya and those from other countries. Gordon Brown, the Prime Minister of Britain,
11 talked with Honourable Raila. Also Honourable Raila talked with many people
12 from different countries. We are trying to bring -- to find a solution to the issues that
13 transpired in the elections.

14 I would like to appeal to Kalenjin people, wherever they are, and the people of Kenya
15 to preserve and renounce violence. Let us desist from any actions that would ruin
16 peace in our country, Kenya, so that we may find a peaceful solution to these issues
17 and that every voter in the just concluded elections might find justice. We are trying
18 to find a peaceful solution on behalf of the people -- on behalf of the people and all of
19 us who voted, so we would like to appeal to all people."

20 Your Honours, I'm sorry I said the last tape, but I have one more, your Honour, and
21 then that should be the last one.

22 Your Honour, the last tape represents my client's efforts to mobilise his colleagues at
23 the Kass FM station to plead for peace at that time.

24 PRESIDING JUDGE EBOE-OSUJI: Before you play the tape, how much longer do
25 you plan to go after the tape, noting that it is 11 o'clock now? Would that be the last

1 in your opening statement, the last segment, or would you need some more time?

2 MR KIGEN-KATWA: (Microphone not activated)

3 PRESIDING JUDGE EBOE-OSUJI: Why don't we take the morning break here now
4 then, is it -- would it work with you, and then we'll come back at 11.30? Is that -- or
5 would that be terribly inconvenient for your purposes?

6 MR KIGEN-KATWA: No, it wouldn't be terribly inconvenient. Of course, if we
7 could do another 15 minutes and get done, I would be happier, but if it's not possible,
8 I'm okay with that, your Honour.

9 PRESIDING JUDGE EBOE-OSUJI: Why don't we just rise for the morning break and
10 come back and then you can continue.

11 THE COURT USHER: All rise.

12 (Recess taken at 10.59 a.m.)

13 (Upon resuming in open session at 11.34 a.m.)

14 THE COURT USHER: All rise.

15 Please be seated.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

17 Mr Kigen-Katwa, you may continue. You were about to play a video or something,
18 or a tape.

19 MR KIGEN-KATWA: I was requesting, with your leave, to play the last tape that I
20 had.

21 (Playing of audio excerpt)

22 MR KIGEN-KATWA: Your Honours, in that tape it will be observed that
23 Mr Sang -- or rather, under the leadership of Mr Sang, all people at that moment who
24 were working for Kass FM were mobilised to seek and plead for peace, and this is a
25 pre-recorded tape that was played on 1 January 2008, and the reason it was

1 pre-recorded is because there was a live ban in Kenya that live broadcast was not
2 allowed to be done. And your Honours will see that Mr Sang starts off the plea for
3 peace and then he is followed by all the others who are seeking that peace do prevail.
4 At this moment, your Honours, I will request, as was indicated in the directions, for
5 an opportunity to have my client say something before I conclude. Thank you, your
6 Honour.

7 PRESIDING JUDGE EBOE-OSUJI: How long would this take?

8 MR KIGEN-KATWA: It should not take more than seven minutes, your Honours.

9 PRESIDING JUDGE EBOE-OSUJI: You may proceed.

10 MR KIGEN-KATWA: Thank you.

11 MR STEYNBERG: I beg your pardon, your Honours. Before we continue with this,
12 I don't recall that my learned friend notified me that the accused would be making
13 statements at this time. Was this discussed in any of the status conferences?
14 Perhaps I might have missed it.

15 PRESIDING JUDGE EBOE-OSUJI: Is that an objection from you then?

16 MR STEYNBERG: It is, your Honours.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa.

18 MR KIGEN-KATWA: Your Honour, our recollection is that we were allocated two
19 hours. How would we spend our two hours was up to us and it included the
20 window to have our clients speak. Your Honour, there was no indication that we
21 needed to issue any notice to anybody, so that's how we exercised that option.

22 PRESIDING JUDGE EBOE-OSUJI: Fair enough. You may proceed. Mr Sang may
23 make the seven-minute statement.

24 MR KIGEN-KATWA: Thank you very much, your Honours.

25 MR SANG: Mr President, your Honours. Thank you so much for according me

1 this opportunity.

2 This is the man, Joshua Arap Sang, standing before this Court today. In my entire

3 life, I've never stood before any court because I am a law-abiding person. I've lived

4 my life as a Christian, with all the Christian values, and that is shown by where I've

5 worked and where I started my work as a broadcaster. I've worked in three stations

6 to date: The first station, being a Christian station by the name Sayare, and this was

7 my first station, where I hosted programmes in three languages, Kalenjin, which came

8 one hour daily; English; and Kiswahili. I went again to another station Biblia

9 Husema Broadcasting. Translated: "The Bible Says." I worked there for two years

10 and I also presented in two languages: Kalenjin and English and

11 Kiswahili -- Kalenjin and Kiswahili. I used to have only one programme on

12 Saturday, speaking Kalenjin.

13 2005, Kass FM station started, and as always every person who looked for greener

14 pastures, I got an opportunity to be among the pioneers in that station. And here I

15 stand that in the almost one and-a-half or two years that Kass FM was on air, the

16 Prosecution has brought allegation of criminal intent upon me, things that I could not

17 have done for the last seven years in the other stations, but they think I could do in

18 two years in Kass FM just because Kass FM was a station targeting the Kalenjin. As

19 a broadcaster, the language used was Kalenjin, and I had nothing to do with that.

20 This was our job and I'm supposed to reach a target prepared by the owner of the

21 station as when they were starting their station. I stood and I got the job,

22 professionally did my job, knowing the code of ethics for broadcasting and journalism,

23 and abided by it. But here there is a notion painted that Arap Sang that was on air

24 on Kass FM was in a network and the main aim of the network is to evict a section of

25 Kenyans in the Rift Valley.

1 Kass FM broadcast internationally. It's on line. Even here in Netherlands, when
2 I'm in my room, I listen to Kass FM. So, for the Prosecution to get a section of
3 witnesses from a party, bring them before the Court - or they will bring them - on the
4 notion that Arap Sang was inciting, instructing, co-ordinating, directing attacks on a
5 section of the Kenyan population disturbs me, kills my broadcasting life because I
6 believe I was born a broadcaster.

7 When I was young I used to listen to radio, BBC and many local radio stations in
8 Kenya, with the urgent need to be a broadcaster one day, and thank God I became
9 one and I'm still one. But here I stand, the Prosecution bringing allegations that
10 want to cut short my broadcasting life, the life that I enjoy on microphone, educating,
11 entertaining, informing people, regardless of their tribes. It's disturbing. And more
12 so, Kass FM is one of the many vernacular stations in Kenya, and all the other stations,
13 their targets are different tribes. We have a station targeting the Kikuyus, the Luos,
14 the Luhyas, and Kass FM is not the only Kalenjin station in Kenya. But what to say?
15 Here I am, and I thank God that my innocence has given me enough courage to come
16 this far. My God, my Creator, has also given me that courage, and the Defence that I
17 have. And I know one day if this Court will stand by justice, I'll be vindicated. I
18 believe the Judges before this Court will hear and determine all this one day and find
19 this innocent journalist and will free the innocent journalist.

20 I want to say that I am one person who has stood in the community and I have been
21 given different opportunities to serve, especially in the church because that's where I
22 belong. Currently I am the patron of my local church which we are building. I
23 am -- in my life I've been a praise and worship leader in our church, Eldoret AIC
24 Fellowship. I've been -- -- I'm currently the patron of a choir of a church. If really
25 this Arap Sang is a criminal, would these people from the church and the setting in

1 the Bible look upon me and give an opportunity to serve in different departments of
2 the church? The answer is definitely no. The Prosecution has the wrong person
3 here and one time, one day, the world, Kenya, and everyone will know the truth.
4 They say I was instructing, co-ordinating, and directing attacks in Eldoret.
5 Mr President, your Honours, I was in Nairobi and this is where Kass is located. My
6 family, my young family, was in Eldoret by then. My wife, my 3-year child, my
7 5-month-old child were in Eldoret. And here a foolish Arap Sang, according to the
8 Prosecution, directing attacks on Kikuyus, Kisiis and Kambas, as they say, at the heart
9 of Eldoret, where my wife is, and more so, living in a Kikuyu house, would I be that
10 so silly, so stupid, not to be concerned about my family? Telling people to attack the
11 other tribes while my own are in Kikuyu house, inside the battle-field, as they say,
12 Eldoret? I'm a caring father and husband. I couldn't do that. Sorry. I couldn't
13 do that.

14 I hosted different pre-broadcasts, including the current sitting President who by then
15 was in the other party, PNU: His Excellency Uhuru Kenyatta. I hosted my
16 co-accused, who is currently the Deputy President, the Republic of Kenya, His
17 Excellency William Ruto. I hosted people across the Kenyan diverse cultures. Kass
18 was not for Kalenjin, listened by Kalenjin. We are intermarried. My own first
19 cousin is married to a Kikuyu, and I'm sorry for her, the husband died the other day
20 in Zuba (phon), but they have kids. Would I have chased them, for my sister to miss
21 her husband?

22 I don't want to speak much today, but I hosted everyone and that will be shown by
23 my Defence team. And I remember even towards the election, when the listeners
24 were on me saying I have hosted too much PNU members than the ODM and you
25 listen from my recording what I told them. They were accusing me of hosting PNU

1 members, and why there were so many is because they had bought air time. ODM
2 had bought good air time. I was not hosting them. The programme was not mine.
3 It was a sponsored programme.
4 During campaigns, all media houses can tell you that that is the time to get revenue,
5 to get -- I could say it's a prime-time to get money, because politicians, parties, buy
6 airtime to sell their policies. So I was not bringing ODM to sell policies to the
7 Kalenjin, because not only the Kalenjin votes would have put them in power. In
8 Kenya, you need everyone's vote. It counts.
9 So --

10 PRESIDING JUDGE EBOE-OSUJI: Mr Sang, I don't mean to interrupt you, but your
11 counsel said you would be speaking for about seven minutes and I want to remind
12 you that time is up.

13 MR SANG: Okay. Give me two --

14 PRESIDING JUDGE EBOE-OSUJI: When will you wrap up?

15 MR SANG: Two minutes.

16 PRESIDING JUDGE EBOE-OSUJI: Okay.

17 MR SANG: This case, today as I stand a jobless man, I resigned from Kass because
18 this is where the Prosecution says I was doing my criminal things, as they say,
19 because I couldn't stand any more. I couldn't do my programme. They would not
20 allow. I resigned, and to date I'm not -- I'm not seeking for any job because I want to
21 deal with this animal; these allegations of crime against humanity.
22 I am not and I will never be a criminal in my life. Surely this shortest journalist in
23 Kenya, as I stand here, the Government of Kenya by then, stated very well by the
24 mainstream media, one time raided their premises on suspicion that they were
25 preparing to publish a material that was a threat to national security.

1 Do you think that government with all functional systems would have told Arap Sang,
2 being on air as the Prosecution says on 1, 2, 3 and 4 January 2008, instructing,
3 directing and co-ordinating attacks? Would the government have waited for me
4 while they could have raid -- while they raided a station on suspicion and here there's
5 somebody saying it on air for four days, according to them? The government just
6 was so lenient to me? Was I too short to be noticed by law?
7 I want to say I'm a law-abiding citizen and, if the Prosecution could have investigated
8 and not allowed itself to be misled, they would have not -- they would not today have
9 the wrong person in this Court.

10 God bless.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

12 Mr Katwa?

13 MR KIGEN-KATWA: In conclusion, your Honours, we insist on the innocence of
14 Mr Sang and we insist on the position we've just indicated that, whereas they have
15 abandoned an infinite volume of evidence showing that in fact he is neither a
16 war-monger, nor did he participate in any way in the violence, whereas that material
17 is abandoned there is not the least iota of any evidence incriminating him, either in
18 terms of the Prosecution having disclosed it or in terms of its existence, and the reason
19 why we are confident of non-existence of anything incriminating him is because he
20 didn't commit any wrong.

21 We insist that it will be impossible for the Prosecution to make their case against our
22 client -- against my client, leave alone making the case beyond reasonable doubt.

23 It is our view that this case will eventually reflect the three categories of victims: The
24 first victim being -- the first set of victims being the victims of post-election violence;
25 the second victim being Mr Sang, who is a victim of the weight and the might of the

1 Prosecutor; and the third victim being the community that the Prosecutor has, in the
2 abundance of his judgment or lack of it, found fit to bring here for trial.

3 Your Honours, in the opening address by the Prosecutor yesterday, she stated that in
4 support and to demonstrate the guilt of my client and that of the first accused they
5 proposed to call a sum of 22 witnesses. In the course of the same submissions, they
6 reflected the fact that some of the witnesses may have abandoned their interest to
7 come and testify in this case.

8 It is also a fact that they had given us indication that they proposed to call initially 42
9 witnesses. It is our view -- much as we do not want to speculate or to go into the
10 details of the issue, it is our submission - and very strongly so - that whichever
11 witnesses may have stepped aside is on account of no other reason other than the fact
12 that the weight of evidence does not support what they have -- they initially proposed
13 to say, and secondly that their conscience must have come to weigh on them and
14 informed their decision not to come and testify.

15 Further, we would like to say that we remain instead of an indication that there are 42
16 witnesses, and if as the Prosecutor said yesterday the number has reduced to 22, it is
17 only fair that we should know who they are so that we do not spend any more of our
18 resources on people who are not coming to testify and so we would like to know who
19 those people are.

20 Your Honour, the sum of what I have said and the sum of what my client has said
21 and what we have already presented to the Court by way of the audiotapes shows the
22 contrary of what the Prosecutor said. The Prosecutor said, and we must say
23 recklessly, that Mr Sang is the voice of violence. It is our position that in fact
24 Mr Sang comes out as a voice of peace, as a voice of reason, as a voice of balance, and
25 we would invite the Prosecutor in view of all the material that there is, including

1 what we have played and what more we have in stock, to consider withdrawing the
2 charges against Mr Sang. It is very clear, in closing, that this case brought against
3 Mr Sang is one big mistake.

4 On all those grounds, your Honours, we propose that, if the Prosecutor insists on
5 proceeding with this case, to show that in fact Mr Sang is innocent and that it is an
6 insult to the intentions of the Rome Statute to have presented him to this trial.

7 Thank you, your Honours.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you very much, Mr Katwa, but it is palm
9 oil, you know? I mean your reference to the Achebe quote, it is a proverb in its own
10 right about how you ate your roast yam. It works better if you dipped it in palm oil
11 than in palm wine.

12 MR KIGEN-KATWA: Yes, I am more pleased that the President is aware of that.

13 PRESIDING JUDGE EBOE-OSUJI: But we got your point.

14 MR KIGEN-KATWA: Thank you, Mr President.

15 PRESIDING JUDGE EBOE-OSUJI: There was the outstanding matter yesterday
16 about the Prosecutor's need to reply, as it were.

17 MR STEYNBERG: Your Honours, there are just two matters which I would like to
18 reply to with respect to Mr Khan's address yesterday. One -- and both of them are
19 under the nature of misrepresentations which I might have stood up and objected to
20 at the time, but I didn't want to interrupt the flow of my learned friend's presentation
21 and so I thought it would be better to address them afterwards.

22 The one relates to the mis-characterisation of the Prosecution's case.

23 MR KHAN: Your Honour, I'm sorry --

24 MR STEYNBERG: I'm just outlining the two and my learned friend will be given an
25 opportunity to --

1 PRESIDING JUDGE EBOE-OSUJI: One second.

2 At this point, Mr Khan, we are taking submissions on whether or not to grant the
3 Prosecutor a reply.

4 MR KHAN: I'm grateful.

5 PRESIDING JUDGE EBOE-OSUJI: So he is outlining what he wants to reply to.

6 MR STEYNBERG: One relates to the mis-characterisation of the Prosecution's case
7 that Mr Ruto was motivated by ethnic hatred. Now, my learned friend repeated that
8 at least three times and I wish to address that issue because that is not our case.

9 The second issue relates to my learned friend's repeated references to the videos that
10 he played and the video clips as evidence. That is another issue I would like to have
11 an opportunity to address, because the Prosecution's submission is that it is not
12 evidence.

13 In addition to that, there are three matters that arose this morning from my learned
14 friend for Mr Sang which I would also seek leave to respond to. The first is his
15 mis-characterisation of the Prosecution's case as an indictment of the Kalenjin people
16 and the Kalenjin traditions. Again, inaccurate.

17 The second relates to various tapes and extracts of tapes that he's played, and the
18 third - which he has in fact invited the Prosecution response on - that's related to
19 again his misstatement of the Prosecution's opening address that we intend to call
20 only 22 witnesses, because that's not what we said.

21 And on those discrete matters I imagine I would need less than ten minutes for all of
22 it, and this is in response to a full four hours of submissions from my learned friends
23 and only on issues where in the Prosecution's submission they were inaccurate.

24 Thank you, your Honours.

25 PRESIDING JUDGE EBOE-OSUJI: One question for clarification. You said arising

1 from Mr Kigen-Katwa's opening statement you needed to respond to something
2 about tapes. You didn't say --

3 MR STEYNBERG: Oh, indeed. I beg your pardon, your Honours.

4 PRESIDING JUDGE EBOE-OSUJI: -- the outline of --

5 MR STEYNBERG: The simple issue is that we are criticised --

6 PRESIDING JUDGE EBOE-OSUJI: Without the submissions. You don't need to
7 make the submissions.

8 MR STEYNBERG: Yes.

9 PRESIDING JUDGE EBOE-OSUJI: Just a little more on what is it about the tapes
10 then?

11 MR STEYNBERG: The objection is, or the complaint is, that he has played selective
12 extracts of tapes and he's stated confidently that the transcripts and the recordings
13 will demonstrate his client's innocence. What we wish to say is something about the
14 disclosure of the full and original tapes.

15 PRESIDING JUDGE EBOE-OSUJI: Ok, fair enough.

16 MR STEYNBERG: That is all.

17 PRESIDING JUDGE EBOE-OSUJI: Well, I'll hear from Mr Khan.

18 MR KHAN: Your Honour, I think all of us in this room have done trials before. It's
19 unheralded for the Prosecution to seek a second opening speech under the guise of
20 clarifications. Of course there's fundamental disputes, because we're here when we
21 say we shouldn't be, we're here when we say there is a travesty of justice underway
22 and, your Honour, it's quite right that there is absolute disagreement between the two
23 sides.

24 But, your Honours, as far as the video clips are concerned -- well, let me start with the
25 first issue. The issue of time is irrelevant. The Prosecution had the same time that

1 was given to me. We had two hours for the Prosecution, two hours for the Defence
2 of Mr Ruto, two hours for the Defence of Mr Sang and it was allowed - clearly
3 allowed - and the Prosecution didn't object to it that the Defence amongst themselves
4 could agree the most economical way of using that time up so that there was -- to
5 avoid unnecessary overlap. I liaised with my learned friend, Mr Katwa Kigen, we
6 did precisely that and we were all - both of us - within the hours that were allocated
7 without objection to the Defence.

8 Your Honours, there's no argument that the Prosecution can put forward that would
9 negate the reality that they played no evidence, have no tapes and no videos. The
10 fact now they seek to squirm out of the embarrassing situation --

11 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let me stop you right there. We're
12 taking submissions now on the procedural matter of whether or not the Prosecutor
13 may respond, or rather reply -- reply. We wouldn't want you to start making
14 submissions that have not yet been made in substance.

15 MR KHAN: Your Honour --

16 PRESIDING JUDGE EBOE-OSUJI: It's just on the procedural matter.

17 MR KHAN: Your Honour, there's no right of an opening - a second opening. The
18 Prosecution, as I alluded to yesterday, if they do not decide to drop this case and
19 insist on going forward, will have the course of the whole of the Prosecution case to
20 disprove what we have stated in our opening.

21 As far as the arguments about the videotapes, we all accept - let there be no
22 ambiguity - we stated in the hearing, the status conference before the opening, that
23 the materials that the parties put forward, both for the Prosecution and for the
24 Defence, does not have the status of evidence in proceedings, but it is evidence that
25 we will rely upon in the course of proceedings to show how fabricated and

1 nonsensical are the Prosecution's contentions that are in reality repugnant to any
2 sense of justice.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, okay, I think I've got your point.

4 Your argument is that there is no right of reply. Thank you very much.

5 Now, The Chamber's ruling on it is this. Yes, in the guiding documents of the Court

6 there is no explicit guidance to be had, but there were -- we're not at all in a

7 wilderness on this point. It is accepted and the tradition of adversarial litigation that

8 the principle is: A party makes submissions, a responding party responds, and the

9 first party that spoke may exercise a right of reply on any new matters arising from

10 what the responding party had said. And if one looks at Regulation 24 - Regulation

11 24 of the Court's Regulations on written submissions - it does deal with written

12 submissions, I know, but the principle of it is still indicated there. So it's a matter of

13 granting -- seeking leave from the Chamber as to whether there's any new matter

14 arising upon which the right -- or, rather, privilege of reply may be exercised in

15 regard of.

16 That being said, it is our view that the Chamber may grant leave for reply, but not on

17 everything. As the matter has been outlined, we will not -- we will grant

18 Prosecution limited time to respond to limited issues. They will not include

19 evidence. So the reference to evidence, we would not receive a reply on. The

20 reference to tapes, the same issue, we will not receive any reply on that. But it will

21 be fair to correct any mis-characterisation of the case in terms of what the case is

22 about and what the case is not about. It also assists the Defence, in my view, in

23 knowing the parameters or the contours of the case.

24 So the Prosecutor, we give you five minutes only to respond to matters of

25 mis-characterisation.

1 MR STEYNBERG: Thank you, your Honours. I'm grateful for the opportunity.

2 I'm grateful for my learned friend's clarification that of course these videos are not
3 evidence, because that was what was described and --

4 PRESIDING JUDGE EBOE-OSUJI: Before you proceed, on that note, I think I should
5 actually make it clear on the record, yes, it was the understanding in the matters
6 preceding the opening statements or the commencement of the case that nothing used
7 as video or audio or visual aid in opening statements should be understood to be
8 evidence in the case. Matters of litigation of the admissibility of certain material will
9 be dealt with at an appropriate time in the course of the proceedings. Thank you.

10 MR STEYNBERG: Your Honours, and although this wasn't dealt with yesterday at
11 the opening -- at the status conference on Monday - I beg your pardon - because we
12 weren't given notice, I presume the same will apply to the unsworn statement of
13 Mr Sang, that that will not be evidence until it's repeated under oath.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, proceed with your comments.

15 MR STEYNBERG: Thank you, your Honours.

16 My learned friend for Mr Ruto mentioned on at least three occasions throughout his
17 opening address that the Prosecution are alleging that his client hates Kikuyu. "This
18 man who hates Kikuyu," "A man who's driven by ethnic hatred" are two of the quotes
19 that I have selected. But that is not the Prosecution case, your Honours.

20 We do not say that the accused by driven by any endemic or inherent enmity towards
21 the Kikuyu people. We say that he was driven, yes, by a thirst for power or a quest
22 for power and that he exploited existing tensions between the Kikuyu and the
23 Kalenjin because the Kikuyu were, for the most part, supporters of his opponents, the
24 PNU, and it suited him politically. So the fact that his sisters may be married to a
25 Kikuyu or that he may have had Kikuyu running partners in subsequent --

1 PRESIDING JUDGE EBOE-OSUJI: Mr -- I must stop you on that. This is a matter
2 you can litigate in the course of the case.

3 MR STEYNBERG: As the Court pleases, your Honours.

4 Then, since we've dealt with the lack of evidence of the video, we move on to
5 Mr Sang.

6 Counsel for Mr Sang says that the Prosecution's case is about an indictment of the
7 Kalenjin people and the Kalenjin tradition. Again, that is manifestly not our case.
8 We say that Mr Ruto and his network, including elders in the Kalenjin tradition, have
9 hijacked -- sorry, in the Kalenjin ethnic group hijacked those traditions, hijacked those
10 oathing and circumcision ceremonies, venerable ceremonies, in order to advance their
11 political ends.

12 Then on the issue of the witnesses, what I said was, in my opening address: The
13 Prosecution will present up to 22 victims and witnesses, common Kenyan people who
14 will describe the attacks on each of these locations. I was referring to witnesses,
15 so-called crime base witnesses, who will testify as to actual events. I was not saying
16 that the Prosecution was now limiting its witness list to 22 people. So I hope that
17 clarifies that misunderstanding. And I think I've exhausted the opportunity you've
18 given me. Thank you, your Honours.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.

20 Moving forward now -- before I move forward, Mr Nderitu is here There
21 was -- during your submission yesterday, I didn't want to again interrupt or come
22 back to it yesterday, but on the matter of investigation of witness interference,
23 perhaps you should know that it is not this Chamber's responsibility to either
24 investigate witness interference or even -- it's not clear yet that the Chamber will try
25 any such allegations as a procedure in the Court that involves investigation and

1 prosecution of Article 70 offences, and we are looking at the matter going through the
2 usual manner of bringing cases before the Court. So when you in your
3 remarks -- we just didn't want you to create the impression in the victims' minds that
4 it is this Chamber that will investigate witness interference and prosecuting. Just to
5 clarify that little matter.

6 Moving forward then, Prosecution, you -- I take it you don't have any witness to
7 present until --

8 MR STEYNBERG: Indeed, your Honours, the situation remains as I described on
9 Monday. The first witness is en route. In fact, she should be arriving in The Hague,
10 if not today, then tomorrow. And we do anticipate - unless something goes
11 drastically wrong - we will be in a position to continue on Monday -- on Tuesday, I
12 beg your pardon.

13 PRESIDING JUDGE EBOE-OSUJI: On Tuesday. Monday being --

14 MR STEYNBERG: A public holiday.

15 PRESIDING JUDGE EBOE-OSUJI: -- a public holiday. It is a shame really because
16 we were hoping to proceed today, but that is the reality we have.

17 On that note, we will adjourn. I see Mr Khan rising.

18 MR KHAN: Yes, your Honour. I think there's been previous orders of the Court
19 regarding the Defence entitlement to have at least the next ten witnesses in order.

20 Because the first three witnesses have withdrawn, we don't know who are going to
21 come -- who's going to be the fourth witness. And I would ask that an order be

22 given that the Prosecution send us a revised list of the next ten witnesses starting
23 from next Tuesday - hopefully by the end of today because they should know and

24 VWU, no doubt, would know who those witnesses are - and that way we can prepare
25 ourselves internally and that would be very helpful.

1 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg?

2 MR KHAN: We don't know -- sorry, I apologise. We don't know actually who is
3 the second witness. Is it 464 or is it 326? And, again, so we can manage our
4 allocation of work properly and efficiently, I would ask that the Prosecution be
5 required to tell us who is their second witness as soon as possible.

6 I'm grateful, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, do you have any difficulty with
8 the proposal?

9 MR STEYNBERG: That is an eminently fair request and we will be happy to provide
10 Mr Khan with that.

11 Just for the record, we intend to follow as much as possible the existing witness list.

12 The second witness, because he is European based -- we would prefer to call as many
13 of the Kenyan witnesses as we can and "get them out of the way" isn't perhaps the
14 right word, but to get their evidence on record as swiftly as possible. And
15 Witness 464 can come at short notice, but we will provide a list by the end of the day
16 to my learned friends.

17 PRESIDING JUDGE EBOE-OSUJI: By the end of today?

18 MR STEYNBERG: Indeed.

19 PRESIDING JUDGE EBOE-OSUJI: Fair enough. That settles the matter then,
20 Mr Khan.

21 MR KHAN: I'm grateful to my friend and your Honours.

22 PRESIDING JUDGE EBOE-OSUJI: In the absence of any other matters arising, we
23 will adjourn and reconvene on Tuesday at 9.30.

24 (The hearing ends in open session at 12.16 p.m.)