

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 Thursday, 21 November 2013

10 (Upon commencing in open session at 9.38 a.m.)

11 THE COURT USHER: All rise. The International Criminal Court is
12 now in session. Please be seated.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Court officer,
14 please call the case.

15 THE COURT OFFICER: Good morning. Bonjour. (Interpretation)
16 Situation in the Republic of Kenya, in the case of The Prosecutor versus
17 William Samoei Ruto and Joshua Arap Sang, case number ICC-01/09-01/11.
18 And we are in open session, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Appearances,
20 please.

21 MR STEYNBERG: Good morning, Mr President, your Honours. For the
22 Prosecution, I appear this morning, Anton Steynberg; and with me, Ade
23 Omofade; Lara Renton; a new face, Mr Peter Schotsman from the Language
24 Services Unit who will be providing the Prosecution language support for
25 Swahili witnesses; Thomas Franzinger; and case manager Grace Goh.

1 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Kigen-Katwa, your
2 team?

3 MR KIGEN-KATWA: Good morning, Mr President and your Honours.
4 For Mr Sang, Mr Sang is present and he's represented by myself,
5 Katwa-Kigen, Caroline Buisman, Logan Hambrick, Joel Bosek, and Honour
6 Lanham.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

8 MR KHAN: Good morning, Mr President, your Honours. Mr Ruto, who
9 has been excused, is represented by Mr David Hooper of Queens Counsel;
10 Shyamala Alagendra of counsel; Ms Leigh Lawrie, legal consultant; Shalini
11 Jayaraj at the back; and Ms Grace Sullivan. Your Honours, my name is
12 Karim Khan.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Before we get
14 to the matter of the witness testimony, Witness 535, a few housekeeping
15 matters. Prosecutor, can you tell us now how many witnesses we will be
16 hearing in this session?

17 MR STEYNBERG: Your Honour, I sent an update by e-mail earlier
18 this week to summarise. The first witness, Witness 535 is present and
19 ready to testify. After that, the picture is less rosy. Witness 469 was
20 assessed medically on -- I believe it was Monday and was found not yet
21 fit to travel. She was asked to come back again on Friday for a further
22 assessment. However, in the interim, one of the investigators who met
23 with her, who is, of course, not a medical expert, but conveyed to me
24 that her condition does not appear to be improving and she remains
25 pessimistic that she will be able to, in fact, travel on Friday. Indeed,

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1 if she is able to travel, her assessment is that she would require, in
2 any event, frequent breaks which would probably extend her evidence well
3 into the following week.

4 With respect to the expert, unfortunately he's declared himself
5 unavailable due to other commitments which he's unable to divest himself
6 of. He requests that he be called during January, February or March next
7 year, when his commitments at the university will be less. So,
8 unfortunately, the prognosis is that an apart from the witness currently
9 before court, unless things improve dramatically with Witness 469, it is
10 likely that we will only have one witness.

11 (Trial Chamber confers)

12 PRESIDING JUDGE EBOE-OSUJI: It does not appear that firm plans
13 can be made on the basis of the second witness, so it is prudent to
14 seriously consider other alternatives. The expert is not available so,
15 again, we cannot plan on that. I mean, we rule that out.

16 During our last discussions on this thing, there was the matter
17 of -- was that Witness 36?

18 MR STEYNBERG: It was Witness 32, I believe, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: 32? Sorry, 32.

20 MR STEYNBERG: And there were other two witnesses which the
21 Prosecution mentioned. I think it was 128 and 109.

22 PRESIDING JUDGE EBOE-OSUJI: Yes. I would urge that while we
23 deal with the testimony of Witness 535, for us to again revisit the
24 possibility of calling any of those other witnesses, shorter ones. I
25 know that for strategic reasons there are times that counsel will prefer

1 to move a certain way. Counsel on both sides. But the need to move at
2 speed may require that adjustments be made and we can't always have the
3 world as we want it.

4 MR STEYNBERG: I will indeed make the necessary inquiries at the
5 first opportunity.

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

7 MR KHAN: Mr President, can I just say, if it assists, I know my
8 learned friend had some concerns about time estimates, for Witness 32, if
9 that witness was to come up, I can say that I do not envisage that I will
10 need days with the witness and I think he's a witness definitely that we
11 could finish, start and finish, next week if he could be brought over to
12 The Hague. So I hope that reassures my learned friend and gives some
13 insight to the Chamber.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?

15 MR KIGEN-KATWA: Mr President, I adopt the same position as
16 Mr Ruto's team.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you --

18 MR KHAN: Your Honour, can I just say, because as far as the
19 other two are concerned, the preference would be Witness 32 because from
20 what I recall, the state of preparedness for the other two was not all
21 that we would wish because they were much further down the order. So,
22 your Honours, our preference would be Witness 32. Of course, that
23 Witness 32 was part of the eight witnesses that we originally asked to be
24 called first, so we are relatively prepared for that witness and so there
25 would be no delay that the Defence would have to -- there would be no
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1 application for adjournment that the Defence would have to make for
2 Witness 32.

3 PRESIDING JUDGE EBOE-OSUJI: Now to give the oral reasons for our
4 excusal of Mr Ruto from today's sitting.

5 First I begin with the procedural history.

6 The request for it excusal was made in the context of a broader
7 discussion about the court's calendar for the remainder of the year.
8 This discussion was initiated in light of developments in the Kenyatta
9 case. It is to be recalled that in the original judicial calendar that
10 was in place in the Kenyatta case, the case was to be in session from 12
11 November until the Christmas break. That necessitated an adjournment of
12 the Ruto case because of the common personnel and logistical support for
13 the two cases.

14 But on 31 October, the Kenyatta case was adjourned and put over,
15 rather, commencement of that case was put over to the 12th, from 12
16 November when it was supposed to start, to 5 February 2014.

17 That then freed up time for activity in the Ruto case.
18 Consequently, on 1 November 2013, the parties and participants were
19 invited to make submissions on the possibility of using up the freed-up
20 time to do some work in the Ruto case. The Prosecution indicated that it
21 needed two to three weeks to line up its witnesses and requested that at
22 the conclusion of the hearings in 2013 the court adjourn until 13 January
23 2014. Both Defence teams submitted that the hearing should be adjourned
24 after 8 November until January 2014.

25 On 4 November 2013, further discussion occurred on the matter.

1 The parties agreed to discuss whether two witnesses could be called
2 between 8 November and 9 December 2013. The Prosecution submitted that
3 for logistical reasons, the witnesses it intended to call could not start
4 before 20 November. The Ruto Defence wished to start on 18 November.

5 Yet again, the discussion continued and culminated on 8 November
6 2013. The Chamber invited submissions from parties and those submissions
7 were received. The option was put forth again on whether to start on the
8 18th or the 20th November 2013. The Chamber notes that the Ruto Defence
9 wished to commence with the next witness on 18 November 2013 while the
10 Prosecutor indicated that in order to call its witnesses, it wished for
11 the hearing to commence no later than 20 November 2013.

12 On 8 November, after hearing the parties, the Defence for Mr Ruto
13 raised the matter of excusal of Mr Ruto from presence at trial from 18 to
14 21 November 2013 and made their request accordingly. The request was
15 stated to be for purposes of allowing Mr Ruto to be in the Republic of
16 Kenya while the president of Kenya attended a meeting of African and Arab
17 states which has implications for national security and regional
18 security. The Prosecution objected to the request, arguing that
19 alternative measures short of excusal were available, specifically the
20 Prosecution raised the possibility of starting the next hearing on 22
21 November 2013. The legal representative for victims also opposed the
22 request. Against the foregoing background, the Chamber ruled
23 on 8 November as follows:

24 One, that the hearing would resume again on 21 November 2013, in
25 hopes of completing the testimony of two witnesses by 29 November 2013;

1 and two, that the request for excusal regarding this date was granted
2 with reasons to follow.

3 Mr Ruto's counsel filed a waiver of presence for the hearing of
4 21 November 2013.

5 The Chamber recalls that among the limitations to the Trial
6 Chamber's discretion under Article 63(1) of the Statute, as set out by
7 the Appeals Chamber in its judgement of 25 October 2013, the absence of
8 the accused can only take place in exceptional circumstances. The
9 Chamber considered that the relevant meeting which the president of Kenya
10 was scheduled to attend outside of Kenya is one of exceptional
11 importance. The Chamber noted the arguments of the Ruto Defence that
12 Mr Kenyatta's attendance at this meeting necessitated Mr Ruto, in
13 accordance with the Constitution of Kenya to be in Kenya for the period
14 of 18 to 21 November 2013. The Chamber also considered the request in
15 view of the parties' other submissions regarding the court's schedule and
16 its obligation to conduct the trial in an expeditious manner. In
17 particular, the Chamber recalled that further hearings in this case
18 before the end of the year had only been scheduled following the recent
19 adjournment of the Kenyatta case announced only on 31 October 2013.

20 Therefore, it could have been reasonably expected that Mr Ruto
21 would be in Kenya at that time and would have been able to attend
22 ordinarily to his duties as deputy president of Kenya.

23 The Chamber also notes that this excusal is limited to a single
24 day and considers that granting the request will result in Mr Ruto's
25 absence only for a period which is strictly necessary. Such a limited

1 excusal is consistent with absence from trial remaining the exception and
2 not the general rule in this case.

3 The Chamber also notes that Mr Ruto's explicit waiver has been
4 duly submitted to the Chamber and considers that his rights will be fully
5 ensured in his absence through representation by counsel. It is for
6 these reasons that the Chamber granted the request for Mr Ruto's excusal
7 in today's proceedings. That is the end of the ruling.

8 Moving forward, there was a matter that was brought to the
9 Chamber's attention in the last days. Are counsel now prepared to speak
10 to it? Mr Steynberg?

11 MR STEYNBERG: Which matter is your Honour referring to?

12 PRESIDING JUDGE EBOE-OSUJI: The matter of the excusal of
13 Mr Ruto.

14 MR STEYNBERG: Yes, your Honour, we are prepared to speak. Well,
15 we have, of course, submitted written submissions in this regard. And
16 the genesis of this request was information that was conveyed to the ICC
17 and, of course, to the Prosecution by the ASP to the effect that the
18 Kenyan delegation had changed and that it would henceforth be led by
19 Mr Ruto and not the previous leader, who I believe was the honourable
20 Samuel Chepkonga, MP. The ASP was requested to adjust the speaking list
21 accordingly. The speaking list is arranged, as I understand it, in
22 accordance with seniority of the speaker --

23 PRESIDING JUDGE EBOE-OSUJI: Do we have evidence of that?

24 MR STEYNBERG: Your Honour, this was conveyed orally during a
25 meeting on Tuesday or was it -- I think it was on Tuesday, your Honour,

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1 but I have not appended anything. I made that submission in my filing

2 but I've not -- I have nothing in writing which I can append to that.

3 The crux of the matter, of course, is that this led to the
4 Prosecution sending a request for confirmation of certain facts to the
5 Defence. In this request, the Prosecution brought to the attention of
6 the Defence the information which it had in its possession, which
7 indicated that Mr Ruto would attend and possibly address the ASP meeting
8 on 20 November, as the leader of the Kenyan delegation. We brought to
9 their attention that this appeared to be at odds with Mr Hooper's
10 submission on the 8th which indicated Mr Ruto's presence would be
11 required in Kenya on that day and the following day.

12 And as a result of this information, we posed three succinct and
13 clear questions to the Defence. The first was whether the circumstances
14 as put forward by Mr Hooper on the 8th had changed and, in particular,
15 whether Mr Kenyatta would still be attending the meeting or whether he
16 would be, in fact, back in Kenya. The second question was, given what
17 appeared at that stage to be changed circumstances, whether Mr Ruto would
18 indeed now be able to attend the hearing today. And the third was
19 whether or not the Defence accepted that the Chamber's previous orders
20 relating to the discussion of the merits of the case in the media would
21 also apply to discussions by Mr Ruto in any address he might make to the
22 ASP.

23 PRESIDING JUDGE EBOE-OSUJI: Okay. Mr Steynberg, perhaps
24 I should have put it this way when I invited you. The Defence filed a
25 written response on the matter.

1 MR STEYNBERG: Yes.

2 PRESIDING JUDGE EBOE-OSUJI: My question should actually have
3 been whether you still wished to pursue your original application in
4 light of the submissions that the Ruto Defence have made in writing.

5 MR STEYNBERG: Your Honour, of course, that is a slightly
6 different question and the answer is that if indeed Mr Ruto, as it now
7 transpires, was not to be in The Hague on 20 and was not to address the
8 ASP and is indeed required in Kenya, then the basis for the request falls
9 away. Of course, if the Defence had simply said as much in response to
10 what I believe was a very clear request, then there would have been no
11 need to submit the request to the Chamber and involve the Chamber in the
12 first place. But that having been clarified, or the facts having now
13 changed, I'm not sure which it is, the request is no longer necessary and
14 I would submit it is now moot.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan --

16 MR KHAN: Mr President, we, of course --

17 PRESIDING JUDGE EBOE-OSUJI: -- noting that the Prosecutor says
18 the request is now moot, do you have any response?

19 MR KHAN: With your leave, your Honour, yes, because the Defence
20 response was absolutely proper. We couldn't have been clearer. We said
21 that the deputy head of state, Mr William Ruto would be leading the
22 delegation at the ASP, which is correct. We said that we are aware of
23 all relevant court orders and they would be continued to be complied
24 with, and we also told the Prosecution that in the event there was any
25 change of circumstance, we would bring that immediately to the attention
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1 of the Chamber and the Prosecution. In those circumstances, for the
2 Prosecution to have relied once again on back-room gossip and hearsay is
3 really lamentable. This is a heavily worked Defence team, an overworked
4 Defence team. We have very important matters to grasp, some of us have
5 been on this case for only four or five months, and for the Prosecution
6 to waste, we say, court time needlessly in this manner is really
7 regrettable and I said so in the filing, your Honour.

8 The Defence was clear. We are not here to satiate the curiosity
9 of the Prosecution regarding the intentions of an assembly of state party
10 member except to the extent that it impinges upon any order of the Court.
11 No order of the Court was impinged upon. As the filing reveals and as my
12 learned friend Mr Hooper stated in court, His Excellency, the president
13 of the Republic of Kenya was in Kuwait at the time of filing. He's due
14 back today, and today, as we indicated, Mr William Ruto will be leaving
15 Kenya to fulfil his obligations here in court.

16 Your Honour, the whole tenor of the application was regrettable.
17 We also disparaged and deprecated the rudeness of the Prosecution to
18 refer to the president of Kenya as Kenyatta. Your Honour, he is not an
19 accused in this case. At the very least, the president of Kenya can be
20 afforded a degree of respect in this case where he's not an accused.
21 Mr Ruto should be called Mr Ruto. We are not insisting upon
22 His Excellency, but, your Honour, it does smack of spite and we do
23 deprecate it, not only the tone, the lack of necessity for it, but, your
24 Honour, they've wasted the resources of this court and they've put the
25 Defence to the trouble of responding to a matter that there was no need
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1 to respond to, given the very clear response that we gave that we are
2 cognizant of all orders of the Court. We are complying with them, and we
3 will apprise the Court in the usual manner if there was any change of
4 circumstance.

5 Your Honour, those are my responses and I'm most grateful.

6 PRESIDING JUDGE EBOE-OSUJI: So your point is that you as
7 counsel were not aware of any change in circumstances that might have led
8 the Prosecutor to their application. For instance, he was saying that
9 there were some requests made for the change of speaking order at the
10 ASP --

11 MR KHAN: Your Honour --

12 PRESIDING JUDGE EBOE-OSUJI: -- in order to accommodate Mr Ruto's
13 speech.

14 MR KHAN: Well, your Honour, it seems the Prosecution isn't even
15 clear on that point because they don't know who said what to whom where
16 in these back-room discussions. There is no formal filing, no
17 documentation, no letter, that's been presented; whereas the Prosecution
18 has been able to lay their hands on and disclose the letter, the official
19 letter from the president of the republic giving the credentials for the
20 deputy president to lead the delegation as well as the alternate members,
21 the Attorney General and the cabinet secretary for foreign affairs.

22 Your Honours, at the time the Prosecution contacted us, it's our
23 understanding that the president of Kenya was in Kuwait at that summit.
24 He was in Kuwait for that summit at the time we responded. This is --
25 there was absolutely no need for this filing and -- your Honour, so there
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1 is no change of circumstance.

2 PRESIDING JUDGE EBOE-OSUJI: Your point was that there was no
3 evidence of any request to alter the speaking order at the ASP to your --
4 as far as you know.

5 MR KHAN: Not to my knowledge. Not to my knowledge. I don't
6 know -- I can't obviously say whether or not it was raised by other
7 members without instruction, all the rest of it, not to my knowledge.

8 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you.

9 Prosecutor, indeed, the -- just to note, we've indicated before
10 that in these proceedings, we require civility from both sides to one
11 another and also to witnesses and accused persons, and we had indicated
12 that common titles are to be used. We want to remind the parties of
13 that. It applies not only in oral submissions in the courtroom but also
14 in written matter that are filed in court.

15 MR STEYNBERG: As the Court pleases, your Honour. I should point
16 out, of course, that both Mr Ruto and Mr Kenyatta were addressed as such
17 initially and then by way of shorthand, subsequently, were referred to by
18 surname. So in the Prosecution's view, the necessary civility had been
19 observed and it was a question of economy.

20 PRESIDING JUDGE EBOE-OSUJI: No, the convention, as I understand
21 it, is you can say "Chile Eboe-Osuji" the first time and subsequently
22 "Mr Eboe-Osuji" repeatedly. That is the convention that's --

23 MR STEYNBERG: As the Court pleases. And of course, as regards
24 my learned friend's other submissions that his response was clear, the
25 Prosecution obviously takes issue with that. In our submission, the
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1 response was opaque to the point of being evasive. And had my learned
2 friend simply said that your information that Mr Ruto will be in The
3 Hague on the 20th is incorrect, your information that he will be speaking
4 is incorrect, that nothing has changed, then this filing and all of this
5 brouhaha that has emerged around it would, of course, have been
6 unnecessary.

7 Of course, if my learned friend had also confirmed, as was
8 requested, that their understanding was that the Chamber's orders that
9 Mr Ruto should not make statements in the media pertinently applied to
10 any statements to be made at the ASP or that he was not going to speak,
11 again the matter would have rested there. But my submission, your
12 Honour, is no matter how much spin can be put on this, the plain wording
13 of the answers and the response are there for all to see. And I have
14 nothing further to add than that.

15 MR KHAN: Well --

16 PRESIDING JUDGE EBOE-OSUJI: I think, Mr Khan, we can leave it at
17 that.

18 MR KHAN: Well, your Honour, just one thing and I'll say no more.
19 Your Honour, I don't accept and I think the use of "spin" is rather
20 unfair, but I'll say no more.

21 PRESIDING JUDGE EBOE-OSUJI: We will now move to the next -- to
22 the real matter of the day which is Witness 535. There is a matter we
23 need to attend to and that would be submissions concerning his protection
24 in the courtroom, an application of which has been made by the
25 Prosecutor. We will -- it is something we can deal with in the public

1 session, Mr Steynberg?

2 MR OMOFADE: Your Honours, I will address you on this matter.

3 And to the extent that your Honours have seen the Prosecution's filing,
4 there is nothing further to add. It only remains if your Honours have
5 further questions, then it may be that we have to go into private
6 session.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you. There will be oral
8 submissions, would there be, from the Defence on the matter? Can you
9 safely speak to it in the public session or is it safer to be in private
10 session?

11 MR KHAN: I think -- your Honour, I'm advised private. I was
12 going to say public but I think better to be cautious so private.

13 PRESIDING JUDGE EBOE-OSUJI: All right. We will go into private
14 session for submissions on the protection of the witness.

15 *(Private session at 10.10 a.m.) Reclassified as Open session

16 THE COURT OFFICER: (Interpretation) We are in private session,
17 Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Khan?

19 MR KHAN: I'm grateful, Mr President. The application, of
20 course, was filed by the Prosecution, dated 18 November 2013. It speaks
21 for itself. And the application is predicated it seems upon two distinct
22 limbs. The first is it's stated that the activities in the Kenyan
23 parliament and the vote there, at paragraph 7, has exacerbated concerns
24 and had a chilling effect. And, your Honours, secondly, that the
25 resolution by the assembly of heads of states of the African Union had
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1 the same effect and therefore witnesses think, apparently, that they
2 can't give evidence or that those statements have an effect of chilling.

3 Your Honours, we say that's devoid of any merit at all.

4 In the case of this witness, it's very important to note that the
5 witness has not been intimidated or threatened or approached in any way
6 since the events of 2008, when, of course, the whole of Kenya was in
7 turmoil. Your Honour, it's interesting to note that two days after this
8 filing, so two days after the Prosecution filing, the Victim and Witness
9 Unit came to the identical agreement with the Prosecution regarding the
10 protective measures that are appropriate in this case.

11 Your Honour, the reason that the Victim and Witness Unit say that
12 it's necessary in their e-mail of 20 November is because of past
13 incidents in the Kenya situation, in this case in particular. Well, your
14 Honours, that by itself, the historic incidents can't have a bearing, we
15 say, on the risk that must be faced or that could be faced by Witness
16 535.

17 We also say that the Victim and Witness Unit have regrettably got
18 the standard wrong. They are looking at the test being whether or not
19 there is a risk that the witness can be identified. Your Honour, we say
20 that's wrong. The test should be whether or not there is any risk that
21 the witness has an objectively justified reason to fear that he will be
22 harmed or threatened or intimidated or suffer psychological damage as a
23 result of the fact of his giving evidence entering the public domain.
24 Your Honour, so the VWU have not, we say, applied their mind to that very
25 crucial distinction. It cannot automatically be inferred that simply
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1 because a witness is known, that a witness is going to suffer damage, and
2 that's one of the underlying problems that we've got so far in this -- in
3 this application.

4 Your Honour, the other aspect that is a matter of concern to the
5 Defence is that in the Prosecution's application, they do say --

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let me stop you there. You
7 say that since the witness had not been intimidated or received any
8 objective indications of threat since his identity was revealed, right,
9 to the Defence, but is that the question? Or is it the matter of what
10 others may do? It is presumed that the Defence would, of course, not
11 reveal the identity of the witness, whose identity the Defence has
12 received; but it's another matter, isn't it, that others who come to know
13 about the witness testifying will do nothing at all to harm or intimidate
14 the witness. Isn't that what you should be addressing, the latter?

15 MR KHAN: Your Honour, I'll be so guided. But the fact that the
16 witness has not encountered any difficulty from any quarter on account of
17 his involvement with the ICC at all is, we say, very relevant.

18 PRESIDING JUDGE EBOE-OSUJI: Your point needs to be, isn't it,
19 that the whole world knows that this is an ICC witness but nothing has
20 happened to him. Can you make that argument?

21 MR KHAN: Well, your Honour, I will come to that because, in
22 fact, it does seem that it's not a secret that this person is a witness
23 because, your Honours, would have noted, of course, at paragraph 15 that
24 Prosecution -- (Redacted)
25 (Redacted). So, your Honours, I'd like explanation from the
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1 Prosecution regarding that. It seems that Prosecution witnesses know
2 that each other are witnesses. I'm not sure the basis of that
3 conversation. Nothing has been disclosed. It's important that that --
4 this filing is the day before the proofing. We don't have disclosure of
5 that conversation between those two Prosecution witnesses or what was
6 told to the OTP, so there an issue here of disclosure that in due course
7 I'll ask the Chamber address by way of order.

8 PRESIDING JUDGE EBOE-OSUJI: Notwithstanding that, though, the
9 fact that one witness may have rightly or wrongly contacted another
10 witness is a different proposition, is it not, from the fact that
11 everyone in Kenya knows that the latter witness or the subject witness is
12 a witness for the Prosecution in this case? Not only knows but
13 legitimately knows.

14 MR KHAN: Your Honour, of course, the whole of Kenya, I fully
15 accept, do not know that this witness is going to be a witness for the
16 Prosecution, but, your Honour, I'll make two observations if I may. The
17 first is, one cannot control -- your Honour has spoken before about
18 people trying to join up the dots and find out. Your Honour, there is
19 curiosity. There is also mischief and there's also criminality. There
20 is a whole gradation. One can't in this 21st century stop the social
21 media and all the rest of it, and one could say, one could put forward a
22 very respectable argument that one of the best ways of preventing such
23 activities is, where possible, witnesses should give evidence in the
24 open. That would satiate proper understandable curiosity about who is
25 speaking to what facts.

1 Your Honour, what the VWU does not seem to be doing at all is
2 trying to brief the witness and reduce concerns of the witness that may
3 be reduced. How could they do that? Your Honour, they could, for
4 example, repeatedly say or tell a witness, a Prosecution witness, that
5 the Defence have publicly in court, in opening and many times in other
6 fora, said: Witnesses should have nothing to fear. They should come and
7 speak openly. We have repeatedly said that anybody who harms or
8 intimidates or threatens or obstructs a witness should be prosecuted, and
9 we welcome any witness, any witness, whether it's incriminatory or
10 exculpatory, any witness who comes here to tell the truth.

11 Your Honour, if the witness knows that, a witness may feel more
12 confident about letting the world know that they are a witness. Your
13 Honour, if it was you or I, with respect, if anybody is given an option
14 of giving evidence anonymously or giving evidence publicly, many
15 individuals would say: I'd rather have the shutters down and give
16 evidence privately. Your Honour, that's a matter of -- that is not a
17 subjective choice of the witness.

18 PRESIDING JUDGE EBOE-OSUJI: Yes, but it's not only a subjective
19 consideration of the witness that the VWU must take into account. They
20 have to also take into account the objective concerns, objective factors
21 in the case, such as deliberate enterprise somewhere to unmask witnesses
22 and expose them. Something the VWU is aware of and worries them in their
23 job. Are they supposed to ignore that?

24 MR KHAN: Your Honour, they are not supposed to ignore it, but
25 with regret, I'm not able to simply adopt uncritically the findings of
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1 the VWU because when one reads their reasoning, which has a
2 quasi-judicial quality about it, it's a recommendation to the Bench at
3 the very least, there is precious little objective evidence except
4 reference to effectively the first witness in this case. Well, your
5 Honours, how long can the Defence right be curtailed because of a
6 historic breach by persons unknown, not connected with the Defence? And
7 regarding which the Defence is still not completely in the picture? Your
8 Honour, if --

9 PRESIDING JUDGE EBOE-OSUJI: By the way, perhaps I should inform
10 you that -- you understand that there may be two versions of the VWU
11 report in order to accommodate the concerns they raised when first we
12 directed them to make sure you were supplied with information about their
13 recommendation. There is a fuller version that, instead of redacting
14 material so they give you the lighter version, and they give the fuller
15 version that would amount to unredacted material to the Chamber. So
16 that's the compromise.

17 MR KHAN: I'm grateful.

18 PRESIDING JUDGE EBOE-OSUJI: I don't want you to operate under
19 the assumption that what they provided to you is all there is by way of
20 their report.

21 MR KHAN: Well, your Honour, I leave it to the Bench. My
22 preference, of course, would be the proper unredacted version should be
23 given to us because it's very difficult to make cogent submissions if
24 material evidence or material information is kept from us. So, your
25 Honour, what I'm referring to is an e-mail sent at 1748 on 20 November
26

1 from the Victim and Witness Unit, so it's an e-mail, and that's the basis
2 of my information. It's really one paragraph regarding the concerns,
3 stating there has been no threats or intimidation and all the rest of it.
4 The witness stating, apparently after the options of witness protection
5 have been explained, that he would prefer that kind of protection, and
6 then an analysis -- your Honours, the analysis of the VWU we have seen in
7 relation to P487. That was a witness that was willing to give evidence
8 publicly and the VWU still it seems rather -- has retreated to what's
9 become the normal, the typical recommendation of protective measures.
10 And we say the Court should be loathe, of course, to have an overly
11 paternalistic attitude to a witness.

12 But in any event, in this case, the VWU recommendation is
13 disproportionate because the whole reasoning of witness protection, the
14 whole rationale must be exceptional and it's far too easy and glib, we
15 say, to simply say: Well, the Kenya 2 -- Kenya 1 case is exceptional,
16 and therefore, the norm effectively should be these kind of measures
17 imposed. Your Honours, of course, has experience from other courts and
18 it's for the Prosecution to make applications, but my own experience
19 prosecuting domestically and internationally, your Honour will know as
20 well, is sometimes the best protection for a witness is to give evidence
21 openly. It seems counterintuitive, but actually that is the experience I
22 know that's been encountered in the Charles Taylor case at the Special
23 Court for Sierra Leone and many other circumstances as well. So we say
24 the reasoning put forward does not really pass muster at all. Definitely
25 not to the extent of restricting a right.

1 Your Honour, the other matter which -- the Court, of course, is
2 the only forum that is empowered to consider is balancing the
3 recommendation of the VWU, witness-centric approach, with the rights of
4 the Defence. That is not an exercise that is an ingredient even of the
5 recommendation put forward by VWU. It's not a factor. It's something
6 they don't consider. They make a recommendation in isolation and it
7 cannot be used in practice to trump what we say is an established
8 principle which is the principle of publicity of proceedings.

9 PRESIDING JUDGE EBOE-OSUJI: And they do trust that the Chamber
10 can --

11 MR KHAN: Of course.

12 PRESIDING JUDGE EBOE-OSUJI: -- strike the right balance as we
13 did with the last witness --

14 MR KHAN: Indeed, your Honour, and --

15 PRESIDING JUDGE EBOE-OSUJI: -- when they made a recommendation,
16 the VWU made a recommendation and we did not follow all of it.

17 MR KHAN: Indeed.

18 PRESIDING JUDGE EBOE-OSUJI: Do you have anything else more to
19 say so we can --

20 MR KHAN: Your Honour, I think that's the gist of it.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 MR KHAN: I'm grateful.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?

24 MR KIGEN-KATWA: Mr President, on our part, we -- we wish to go
25 on record as lamenting the seeming standard approach given by the VWU to
26

1 the witness protection. Mr President, you made the observation that one
2 of the concerns that should be shared by VWU and ourselves is that if
3 there does exist somewhere a deliberate enterprise to place a witness at
4 risk, then that is a consideration that even the Chamber itself would be
5 concerned with and we completely share. We have no question about that.

6 Now, Mr President, looking at the recommendations made in this
7 case, there are three criteria upon which the Prosecution have -- sorry,
8 the VWU have asked for protective measures, which protective measures
9 sought are shared with the Prosecution. The three is: Number 1, the
10 wishes of this witness; the second one is the concerns from the Kenyan
11 parliament and probably the senate; and thirdly is the decision by the
12 African Union Assembly.

13 Mr President, it is our submission that those three
14 considerations, which are the same considerations that keep coming up in
15 respect of each of the witnesses, is not an objective criteria as
16 observed by the Chamber.

17 Mr President, if we are to add value to this issue of whether or
18 not protective measures should be -- what protective measures should be
19 given to the witnesses, if we are to add value, it is our submission that
20 we should be given access to what has been filed, what is unredacted, so
21 that we can comment on them. Because if we comment on the limited issues
22 raised and which clearly do not raise any objective measure, do not
23 create an objective test that this protective measures are necessary,
24 then we are at a disadvantage and it also stays the proceedings.

25 Mr President, the only objective thing that the VWU have said is
26

1 that this witness, since January 2013, when his name was disclosed, has
2 not suffered any threat, and that is the only thing that we would think
3 should inform the need that this witness should feel comfortable to
4 testify in the open. This additional argument that he would not feel
5 comfortable to testify without in-court protection measures,
6 Mr President, is to place the trial and especially the concerns of the
7 Defence at the pleasure of the wishes of the witness. For those reasons,
8 Mr President and your Honours, we insist that in this instance, there do
9 not exist justifiable reasons to give the protective measures sought and
10 that this witness should testify in the open.

11 Thank you, Mr President and your Honours.

12 MR KHAN: Your Honour, just two points if I may. Ms Lawrie has
13 reminded me, because it may be relevant to the Prosecution's application
14 regarding this -- the parliamentary activities in Kenya and the rest,
15 that the opinion poll relied upon by the Prosecution themselves in its
16 first application for protective measures indicated, in fact, that
17 opposition to the court was not as pervasive as the doomsday scenario
18 that the Prosecution now put forward as existing in the Republic of
19 Kenya.

20 The second matter, your Honour, is that your Honours, of course,
21 have the statement, access to the statement. This witness could quite
22 easily be a Defence witness in reality. He could quite easily be a
23 Defence witness, and one way perhaps, your Honour, if the Bench is so
24 minded, is even in -- with the shutters down tell the witness, you know,
25 about the importance of testifying, that of course there are measures
26

1 here for prosecuting people, and nobody should feel fear at all or have
2 any chilling effect to speak the truth. No court can operate without
3 witnesses speaking the truth and we can't have a fair trial without
4 witnesses speaking the truth, but we want that done in public because it
5 does generate a lot of Defence evidence and also the public do have a
6 right to know and it's an important safeguard.

7 So, your Honour, what I do suggest to the Chamber is to consider
8 whether or not it would be useful for the Bench yourselves to put some
9 questions to the witness and -- before making that final determination,
10 and your Honours would be able to draw -- gain an impression of whether
11 or not the witness really is concerned and nervous and whether or not it
12 would affect his psychological well-being or whether or not we can go in
13 public, as, you know, in all kind of courts all over the world, witnesses
14 are willing to stand up and be counted. And in reality, one can say,
15 well, the actors here are senior and this is a very glamorous court, of
16 course, but in practice, when one has prosecuted and defended in inner
17 city tenement blocks an individual who has had a brick thrown through the
18 window that actually gives evidence in those circumstances may be in real
19 terms under much more direct threat than witnesses before this court.
20 It's a matter of perspective.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Narantsetseg? You
22 were rising? Please proceed.

23 MR NARANTSETSEG: Thank you, Mr President and your Honours. In
24 our respectful submission, the victims, we would like to support the
25 Prosecution's request following the Witness Victims Unit's
26

1 recommendation. We believe that in the circumstances, those limited use
2 of in-court protective measures are justified and proportionate, at the
3 same time necessary, your Honour. One shouldn't, I guess, double-guess
4 the intentions of the Victims Witnesses Unit in this case. In fact, the
5 fact that this witness has received threat in the past, the fact that
6 itself is enough reason to grant those specific measures, in our
7 submission, your Honour. And this concludes our respectful submission,
8 thank you.

9 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Omofade, any reply?

10 MR OMOFADE: Very limited, your Honour. I can't second guess the
11 assessments of the Victims and Witnesses Unit but all I do say is that
12 some degree of deference ought to be given to their -- not only their
13 assessment but also their expertise, and I believe your Honours have also
14 pointed this out in the past. So suffice to say that the Prosecution's
15 application is what it is. As regards developments over and above the
16 general assessment of the situation in Kenya, leaving aside how the
17 information got to this particular witness, (Redacted)
18 there have been some further incidents. It's plain to see that this
19 witness coming before the court, 535, (Redacted)
20 (Redacted)
21 (Redacted) there seemed to be some -- and I believe what it is (Redacted)
22 (Redacted)
23 I believe that of itself should raise certain signals as regards the
24 protection of this particular witness. So over and above that and aside
25 from our filing I have nothing further to add.

1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 MR KHAN: One important point if I may in relation to that last
3 issue. It is important that (Redacted), in fact, states that (Redacted)
4 (Redacted)
5 (Redacted) does not make any suggestion,
6 not a line, not a word, that he's been intimidated or threatened or
7 harassed because of that and so to the extent that there is any empirical
8 evidence, the evidence is contrary to the Prosecution's own submission
9 that protective measures are necessary because otherwise a witness's -- a
10 witness whose identity is known will be harmed. (Redacted)
11 (Redacted) there is a complete absence of
12 harm, so, your Honour, we say that works against the Prosecution and
13 militates in favour of a public hearing. I'm grateful.

14 PRESIDING JUDGE EBOE-OSUJI: Granted it's acknowledged, but next
15 time, please ask for leave before --

16 MR KHAN: I apologise.

17 PRESIDING JUDGE EBOE-OSUJI: -- speaking out of your turn.

18 MR KHAN: I do apologise.

19 PRESIDING JUDGE EBOE-OSUJI: We've heard submissions. Let's go
20 to public session.

21 (Open session at 10.34 a.m.)

22 THE COURT OFFICER: (Interpretation) We are in open session,
23 Mr President.

24 (Trial Chamber confers)

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

1 The Chamber will deliver its ruling on the application for the
2 protection in the courtroom, protective measures to be accorded to
3 witness -- Prosecution Witness 535.

4 On 18 November 2013, the Prosecution requested protective
5 measures in the form of, one, image and voice distortion; two, use of
6 pseudonym during testimony; three, limited sessions in camera, to prevent
7 identification; and, four, a redaction to public records where necessary.

8 On 20 November 2013, the VWU submitted their recommendations to
9 the Chamber. In sum, they recommended that the measures urged by the
10 Prosecution be granted for this witness.

11 The Chamber has received oral submissions from counsel for both
12 Mr Ruto and Mr Sang, as well as counsel for victims. Having considered
13 the request by the Prosecution and the assessment provided by the VWU, as
14 well as the oral submissions made by counsel in private session, the
15 Chamber hereby grants the application in the following measures:

16 The use of pseudonym for the duration of the trial; voice and
17 image distortion for the witness; testimony to be given in private
18 session when necessary for purposes of preventing dissemination of
19 identifying information about the witness; and that portions of
20 transcripts generated from private session be classified accordingly and
21 redactions made.

22 That is the order of the Chamber.

23 Prosecutor -- oh, I see that we have about 20 minutes to morning
24 break but we can get in a few questions within that time, at least
25 introductory matters.

1 MR OMOFADE: We certainly can, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Is the witness on hand?

3 MR OMOFADE: To the best of my knowledge, yes.

4 PRESIDING JUDGE EBOE-OSUJI: The blinds will come down for the
5 witness to be brought in, then. While that is being done, I see Mr Khan
6 on his feet.

7 MR KHAN: I'm grateful. Your Honour, it's early days but I
8 wonder, perhaps, if my learned friend is in a position to give an
9 indication as to the estimate for the length of examination-in-chief of
10 this witness. It would be -- an indication would be very much
11 appreciated.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, you know, of course, why
13 that request is being made.

14 MR OMOFADE: I know why it was made, your Honours. The testimony
15 of this witness is expected to be relatively short. At the very most,
16 I expect the testimony to finish by the first session of tomorrow. We
17 might even be sooner than that.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.

19 *(Closed session at 10.40 a.m.) Reclassified as Open session

20 MR KHAN: Mr President, again with your leave, I can inform my
21 learned friend that I have a CD of material because of the -- a courtesy
22 copy, I can provide it now. It will be served in the normal way but if
23 he wishes to have receipt now, of course I can provide it. The material
24 that we intend to use in cross-examination.

25 MR OMOFADE: Your Honours, that would be fine as long as the
26

1 formal disclosure takes place at the first opportunity, hopefully before
2 the next session.

3 THE COURT OFFICER: (Interpretation) Mr President, we are in
4 closed session.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 (The witness enters the courtroom)

7 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, can you put on record
8 whether you gave the witness the cautions?

9 MR OMOFADE: Your Honours, the caution as regards 66(3) as well
10 as the Rule 74 caution, both were delivered two days ago during the
11 witness preparation session.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you. Can we go to public
13 session now?

14 (Open session at 10.41 a.m.)

15 THE COURT OFFICER: (Interpretation) We are in public session,
16 Mr President.

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

18 Witness, welcome to the courtroom. Whenever a witness comes --
19 when I say "welcome to the courtroom," I want -- I sincerely mean that
20 they should feel comfortable in the courtroom because the courtroom
21 belongs to you, as it belongs to all of us sitting in here. So you feel
22 comfortable as you are with us to give your testimony.

23 The court officer will administer an oath to you.

24 THE WITNESS: (Interpretation) Would you like me to read the
25 document out to you?

Witness: KEN-OTP-P-0535 (Open Session)
Procedural Matters

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1 PRESIDING JUDGE EBOE-OSUJI: Yes.

2 THE WITNESS: (Interpretation) I solemnly undertake to speak the
3 truth, the whole truth and nothing but the truth.

4 WITNESS: KEN-OTP-P-0535
5 (The witness speaks Swahili)

6 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. That is what
7 we expect from you while you are with us today, just to speak nothing but
8 the truth and the whole truth. You do that through questions and
9 answers. The lawyer for a Prosecution will ask you question. Mr Omofade
10 will begin today, and when he's finished, the lawyer for Mr Ruto and the
11 lawyer for Mr Sang will also take their turns in asking you questions.
12 It is important that you listen very, very carefully to the questions
13 they will ask you, and then answer their questions very truthfully, to
14 the best of your ability.

15 In doing this, it's important for you to give us only evidence
16 that you, yourself, perceived. It's important for you to remember what
17 it is you saw, what it is you heard, what you felt and things like that,
18 from your own perspective. That is what's more important for us. Please
19 do not try to guess at answers to questions. If you do not understand
20 the question, try not to think what you think the question is about when
21 you don't understand it. If you do not understand the question, tell the
22 lawyer asking you the question that you do not understand the question
23 and they will repeat it.

24 Once you have understood it, then you begin with your answer.

25 Keep it short and simple.

26

Witness: KEN-OTP-P-0535 (Open Session)
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1 There is a procedure that helps also to ensure that your answers
2 are recorded properly. That is speak slowly but not very slowly. Also
3 speak in little chunks of information, because there are some
4 interpreters who are also assisting us understand what you are saying,
5 and they will require some pauses while you speak, so you don't speak
6 continuously without a break. Speak in little chunks, take a break so
7 that they can interpret. As well as the court reporters as well, they
8 are recording what you're saying. They also need some pauses from you
9 when you give your answers, for them to be able to do their work.

10 If you keep those in mind, it will be -- your testimony before
11 the court would have been helpful, and we will thank you very much for
12 coming.

13 Prosecutor?

14 MR OMOFADE: Your Honours, I'm grateful. There is a PIS form
15 that's been handed out. I've asked that it not be placed in front of the
16 witness until he's taken the oath. I wonder if that could be done now.

17 PRESIDING JUDGE EBOE-OSUJI: Have you distributed it already?

18 MR OMOFADE: To the parties, yes, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: Do we have a copy?

20 MR OMOFADE: Your Honours, it might be in the bundles that have
21 been placed in front of you.

22 PRESIDING JUDGE EBOE-OSUJI: I see it, yes.

23 QUESTIONED BY MR OMOFADE:

24 Q. Good morning, Mr Witness.

25 A. Good morning.

Witness: KEN-OTP-P-0535 (Open Session)
Questioned by Mr Omofade

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1 Q. My name is Ade Omofade. I'm be asking you some questions this
2 morning on behalf of the Prosecution. Do you understand that?

3 A. Yes.

4 Q. We've met previously. We met two days ago during a witness
5 preparation session. Do you recall that?

6 A. Yes, indeed.

7 THE INTERPRETER: Message from the English booth: Could counsel
8 please be informed that there has been frequent overlapping of
9 microphones so far. Thank you.

10 MR OMOFADE: Your Honours, there is a CV of the witness that has
11 been prepared and kindly agreed to by both Defence teams.

12 PRESIDING JUDGE EBOE-OSUJI: That is in the PIS?

13 MR OMOFADE: Your Honours, it's at page 3 of the PIS, the English
14 version, and there a translated Swahili version at page 4 of the PIS.

15 And, your Honours, because this has been agreed to, what I propose to do
16 is to simply ask the witness to read through the Swahili version on
17 page 4 and to acknowledge or to state whether or not he agrees with the
18 information therein.

19 PRESIDING JUDGE EBOE-OSUJI: Witness, can you read that to
20 yourself but not aloud, please, review the information provided? That's
21 what the Prosecution wants you to do. Do not read it out aloud.

22 MR OMOFADE:

23 Q. And just to guide the witness, Mr Witness, please turn to the
24 last page, page 4, and you will see that that part is in Swahili. If you
25 read that quietly to yourself, please.

Witness: KEN-OTP-P-0535 (Private Session)
Questioned by Mr Omofade

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1 A. I do not understand which page you are referring to.

2 PRESIDING JUDGE EBOE-OSUJI: Can somebody go point out the
3 Swahili page appearing at page 4?

4 MR OMOFADE:

5 Q. Do you have the relevant part now, Mr Witness?

6 A. Yes. Would you like me to read the page?

7 PRESIDING JUDGE EBOE-OSUJI: Can you read it to yourself? Do not
8 read it out aloud. The lawyer wants you to review the information that
9 appears on that page, because he will ask you later to confirm whether
10 you agree with it. But for now, just read it silently to yourself.
11 Don't read it out aloud.

12 THE WITNESS: (Interpretation) The information contained in the
13 document is correct.

14 MR OMOFADE:

15 Q. Thank you, Witness. I'm going to ask you a few further
16 questions.

17 MR OMOFADE: Your Honours, I think we probably ought to go into
18 private session, just for about few minutes.

19 PRESIDING JUDGE EBOE-OSUJI: We go into private session now.
20 *(Private session at 10.54 a.m.) Reclassified as Open session

21 THE COURT OFFICER: (Interpretation) We are in private session,
22 Mr President.

23 PRESIDING JUDGE EBOE-OSUJI: Please proceed, Mr Omofade.

24 MR OMOFADE:

25 Q. Mr Witness, from the document you've just read, you've indicated
26

Witness: KEN-OTP-P-0535 (Private Session)
Questioned by Mr Omofade

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1 (Redacted).
2 Do you see where you've confirmed that?
3 A. Yes, I did see that.
4 Q. (Redacted)
5 A. (Redacted)
6 Q. (Redacted)
7 A. (Redacted)
8 Q. Perhaps my question wasn't clear. (Redacted)
9 (Redacted)
10 A. (Redacted)
11 Q. (Redacted)
12 (Redacted)
13 A. (Redacted)
14 (Redacted)
15 Q. And, Mr Witness, when I ask you questions subsequently about
16 (Redacted), you will see on page 2 of the -- of the document in front
17 of you, that it is listed as location number 1. Do you see that?
18 PRESIDING JUDGE EBOE-OSUJI: Witness, do you see location number
19 1 at page 2?
20 THE WITNESS: (Interpretation) Yes, I can see it.
21 MR OMOFADE:
22 Q. (Redacted)
23 (Redacted)
24 (Redacted), I would advise to refer to (Redacted)
25 as location 1. Do you understand that?
26

Witness: KEN-OTP-P-0535 (Private Session)
Questioned by Mr Omofade

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1 A. Yes. Now I do understand you.

2 Q. And the second location that you mentioned, which was (Redacted),
3 you will see as location 2 on the list in front of you. And for the
4 record, I spell (Redacted). Do
5 you see that, Mr Witness?

6 A. Yes, I can see said location.

7 PRESIDING JUDGE EBOE-OSUJI: Witness, the -- that document you
8 have in front of you, the reason why it is created is to allow you to
9 testify by referring to the numbers you see instead of the names of
10 places and persons. If you look at that document at that page 2, you see
11 certain numbers. It says on the first part, locations, there are five
12 locations, 1, 2, 3, 4, 5. And then on the second part of the document
13 are lists of persons, numbered 1 to 12. What we want you to do when we
14 are in public session is to be referring to the numbers only, so you will
15 say "location 1" if you're referring to (Redacted) or "location 5" if
16 you are referring to (Redacted). And then further down, you say "person
17 number 1," "person number 2" and so on but never the names. Do you
18 understand?

19 THE WITNESS: (Interpretation) Yes, I do understand now.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, I think we will take a
21 break now and come back at 11.30.

22 MR OMOFADE: Indeed, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: And when we come back, do we go into
24 public session?

25 MR OMOFADE: Private session for probably just a minute longer

Witness: KEN-OTP-P-0535 (Closed Session)
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1 while I explore one or two other locations and that's it.

2 PRESIDING JUDGE EBOE-OSUJI: All right. We will go -- we'll take
3 our break now and come back at 11.30, but we will bring down the blind
4 first and escort the witness.

5 -* (Closed session at 11.03 a.m.) Reclassified as Open session

6 THE COURT OFFICER: (Interpretation) We are in closed session,
7 Mr President. And the witness will be shown out of the courtroom.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Please
9 proceed.

10 (The witness stands down)

11 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

12 (Recess taken at 11.04 a.m.)

13 (The witness enters the courtroom)

14 * (Upon resuming in closed session at 11.36 a.m.) Reclassified as Open session

15 THE COURT USHER: Please be seated.

16 THE COURT OFFICER: (Interpretation) We are in private session,
17 your Honour.

18 *(Private session at 11.37 a.m.) Reclassified as Open session

19 PRESIDING JUDGE EBOE-OSUJI: You wanted a few minutes in private
20 session?

21 MR OMOFADE: Yes, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Go ahead, please.

23 MR OMOFADE:

24 Q. Mr Witness, in (Redacted) location 1, where you
25 lived, was it your own house, or did you rent it?

Witness: KEN-OTP-P-0535 (Private Session)
Questioned by Mr Omofade

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1 A. (Redacted)

2 Q. (Redacted)

3 A. (Redacted)

4 Q. (Redacted)

5 A. (Redacted)

6 Q. (Redacted)

7 (Redacted)

8 A. (Redacted)

9 Q. Now, just help us briefly about location 1. You are (Redacted). Can
10 you tell the Court what other main ethnic groups lived in location 1?

11 A. In this place, there were people from different ethnic groups.

12 Q. And which of these ethnic groups would you say formed the
13 majority?

14 A. The locality in place number 1 had several ethnic groups living
15 there, but mainly it was Nandi people who lived there.

16 Q. And by "Nandi," do you mean the Kalenjin?

17 A. Yes. It's the Kalenjin tribe.

18 Q. And just finally, before we go into public session, you've
19 mentioned (Redacted), and you've also mentioned (Redacted). Are these
20 separate towns or are they part of Huruma?

21 A. I didn't really follow your question. Would you mind repeating
22 it, please?

23 Q. You've told us about (Redacted), which is location 1. You've
24 also told us about (Redacted), which is location 2. My question was: Are
25 these --
26

Witness: KEN-OTP-P-0535 (Private Session)
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1 MR KHAN: Your Honour, can I ask my friend not to lead, please?

2 There is ways of verifying, of course, the localities without leading.

3 MR OMOFADE:

4 Q. Is (Redacted) in Huruma?

5 A. Yes. (Redacted) is in Huruma. It is one of the localities
6 which is situated in this region which is called Huruma.

7 Q. Mr Witness, I'm now going to go -- ask that we go into public
8 session and I'm going to ask you some very general questions about Huruma
9 itself. Please be careful not to reveal any information that suggests
10 (Redacted). Do you understand
11 that?

12 A. Yes. I follow you. Thank you.

13 MR OMOFADE: With that, Mr President, may we go into public
14 session, please?

15 PRESIDING JUDGE EBOE-OSUJI: Yes, but before we do, Witness,
16 you've told the Court that (Redacted) is one of the places in Huruma.
17 Can you also tell us about (Redacted)? Is (Redacted) the same place as
18 (Redacted) ?

19 THE WITNESS: (Interpretation) Yes. That is correct.

20 PRESIDING JUDGE EBOE-OSUJI: What is correct?

21 THE WITNESS: (Interpretation) (Redacted) is the same thing as
22 (Redacted).

23 PRESIDING JUDGE EBOE-OSUJI: So you are telling us that (Redacted)
24 and (Redacted) are the same town?

25 MR OMOFADE: Mr President, I believe he said locality, rather
26

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1 than town but --

2 PRESIDING JUDGE EBOE-OSUJI: Fair enough. That's why I looked at
3 you.

4 Is (Redacted) exactly the same place as (Redacted) ?

5 THE WITNESS: (Interpretation) No. These are different places.

6 PRESIDING JUDGE EBOE-OSUJI: You've said that (Redacted) is in
7 Huruma. What about (Redacted)? Where is it in?

8 THE WITNESS: (Interpretation) I didn't follow your question, sir.

9 PRESIDING JUDGE EBOE-OSUJI: I said, you've told us that
10 (Redacted) is in Huruma, and I'm asking you what about (Redacted)? Is
11 it also in Huruma or is it in a different place?

12 THE WITNESS: (Interpretation) (Redacted) is in Huruma as well.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 Counsel, is there any question arising that you want to ask in
15 private session before we go into public?

16 MR OMOFADE: We can go into public.

17 PRESIDING JUDGE EBOE-OSUJI: All right. We will go into public.

18 Witness, we will now go into public session. As the lawyer had
19 advised you before, when we are in public session, it's important that
20 you keep your answers -- make sure in your answers you do not give
21 information that will identify who you are. The type of information we
22 don't want you to give in public session are not only your name and where
23 you live or the names of your relatives or your friends, but also
24 information about events that you observed in situations that are unique,
25 situations that there are people who know that you were in those
26

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1 situations and you were with them. So if you give that sort of
2 information in public, those people who might have known you were in
3 those situations might be able to deduce that it is you talking about the
4 situation itself.

5 The point is not that you should not give that sort of
6 information at all. The point, rather, is that that is the sort of
7 information we want you to give in private session. So be careful what
8 information you give in public session, to not reveal your identity, to
9 not reveal your identity.

10 Now, there is something I need to point out to you. If you look
11 in front of you now, can you try to look at me, all right, there is a
12 green -- a button there that's -- something there that is lit up green.
13 Do you see that green light? There is a green light. Can you see it?
14 Towards your right, after the screen. Yes, that's it. Exactly.

15 So when we are in private session, meaning it is safe for you to
16 give any kind of information, including your name, that light would be
17 green. But as you will see in a moment when we go into public session,
18 it will turn red. The meaning why -- the meaning for red light is it
19 reminds you that you are in public session so do not give out identifying
20 information. So that is a reminder for you. But I will also be
21 assisting in reminding you. So will the other lawyers in the courtroom.

22 So we will now go into public session. And you will see the
23 light turn red.

24 (Open session at 11.50 a.m.)

25 THE COURT OFFICER: (Interpretation) We are now in public session.

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, proceed, please.

2 MR OMOFADE:

3 Q. So, Mr Witness, I would like to ask you some general questions
4 about Huruma. Do you know what part of Kenya Huruma is located at?

5 A. Could you repeat the question, please?

6 PRESIDING JUDGE EBOE-OSUJI: Counsel, is it not something that
7 could be led? I see Mr Khan nodding. Mr Kigen-Katwa?

8 MR KIGEN-KATWA: I have no objection.

9 PRESIDING JUDGE EBOE-OSUJI: Yes.

10 MR OMOFADE: I'm grateful for that indication.

11 Q. In that case, is Huruma in the Rift Valley?

12 A. Yes.

13 Q. And is it part of the Eldoret North constituency?

14 A. Yes, that is true.

15 Q. Do you know how far it is from Eldoret town? This is Huruma.

16 A. I would say that the distance is six kilometres from Eldoret.

17 Q. And do you know if Huruma is divided into different locations, or
18 is it just one town?

19 A. I would like you to repeat your question, please.

20 MR KHAN: Your Honour, this is an important issue. I've objected
21 once and my learned friend carried on. Perhaps the witness can just be
22 asked to describe the geographical ambit of Huruma rather than the
23 question put in a leading manner. And take it from there.

24 PRESIDING JUDGE EBOE-OSUJI: There any -- do you contest the --

25 MR KHAN: Yes.

26

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1 PRESIDING JUDGE EBOE-OSUJI: -- fact of --

2 MR KHAN: Yes, the composition of Huruma is in dispute. The
3 geographical scope. So what my learned friend should do is get the
4 witness to describe the geographical ambit of the place that he says is
5 Huruma and questions will feed off that, rather than to put options to
6 the witness that don't emanate from the witness's own testimony.

7 PRESIDING JUDGE EBOE-OSUJI: Response?

8 MR OMOFADE: Well, the response is a basic one. The witness has
9 testified about Huruma already. And we have heard testimony about
10 localities. And what I put to the witness was in the alternative, is it
11 one location, or are there different locations. The answer is inherent
12 in the witness's previous answer anyway.

13 MR KHAN: Your Honour, we've seen already from a previous witness
14 that the Defence has already made inroads regarding the geographical
15 scope of the charges, so it's for obvious reasons I'm asking my learned
16 friend to exercise care regarding these questions. It's for obvious
17 reasons. And it can be done in a very non-controversial manner simply by
18 asking the witness can he describe Huruma. He can mark it on a map, he
19 can delineate it, he can say what are the boundaries of that town. But,
20 your Honour, options should not be put to a witness, the fact of an
21 option being put does not actually cure the defect that I was raise --
22 that I stood to caution against. Your Honour, that's my respectful
23 submission.

24 PRESIDING JUDGE EBOE-OSUJI: Your preference is for the question
25 to be put from the perspective of describing the geography of Huruma.

26

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1 That would be a very long and involved process. There are too many
2 things involved in that kind of exercise, to be put in that manner. This
3 is a matter on which we will exercise a discretion to allow leading
4 questions in a limited way. The witness had already indicated by a
5 previous answer or previous answers, there are at least two places inside
6 Huruma. Counsel is now pursuing that. He can proceed.

7 MR KHAN: I'm grateful. And, your Honour, just for the --

8 PRESIDING JUDGE EBOE-OSUJI: Before we proceed, I want to note
9 that counsel's question, Prosecution counsel's question at the moment is
10 about the divisions, if so, in Huruma.

11 MR OMOFADE: I'm grateful, Mr President.

12 Q. Mr Witness, you wanted me to repeat the question and my question
13 was: Is Huruma one town or city, or is it divided into different
14 locations or localities?

15 A. Huruma is a locality. Have I answered your question, though?

16 Q. You've answered it to some extent, but are there any other
17 locations within Huruma? Can you help us there?

18 PRESIDING JUDGE EBOE-OSUJI: Witness, before you help him there,
19 you've already given us two localities within Huruma. If there are any
20 other localities within Huruma, can you now mention, apart from those two
21 you've already mentioned?

22 THE WITNESS: (Interpretation) I would like to ask you: Do you
23 want me to describe the locality or location, or the different localities
24 or sublocations which go to make up Huruma?

25 MR OMOFADE:

26

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1 Q. Okay. Let's start with the sublocations that make up Huruma. Do
2 you know what they are?

3 A. No.

4 Q. Do you know the different localities that make up Huruma?

5 A. Yes.

6 Q. Could you tell us what the different localities are?

7 A. The first one is in number 1, and the others are number 2, and
8 number 5. These are the localities which I know of.

9 MR OMOFADE: Your Honours, I think we should go into private
10 session for just a minute, please.

11 PRESIDING JUDGE EBOE-OSUJI: All right. We will do that but
12 then -- Witness, you've mentioned that numbers -- locations numbers 1, 2
13 and 5 are the locations in Huruma that you know of. Are there any other
14 locations in Huruma that you do not know of?

15 THE WITNESS: (Interpretation) Yes. There are some that I do not
16 know.

17 PRESIDING JUDGE EBOE-OSUJI: We will now go into private session.
18 Did you say for a minute or two, Mr Omofade?

19 MR OMOFADE: It may well be longer. I intend -- yes.

20 PRESIDING JUDGE EBOE-OSUJI: For a short while.

21 MR OMOFADE: For a short while.

22 PRESIDING JUDGE EBOE-OSUJI: Can you give a general idea so that
23 people can know?

24 MR OMOFADE: Probably five minutes.

25 PRESIDING JUDGE EBOE-OSUJI: All right.

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1 *(Private session at 12.02 p.m.) Reclassified as Open session

2 THE COURT OFFICER: (Interpretation) We are in private session,
3 Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please proceed.

5 MR OMOFADE:

6 Q. Mr Witness, your -- where you -- where you lived, which is
7 location 1, do you know if it was part of any wider, any larger location
8 in Huruma?

9 A. Yes.

10 Q. Which location was it part of?

11 A. Could you please repeat your question, counsel?

12 Q. Where you lived in Huruma, what location -- I'll take it again.
13 Location 1, was it part of a wider location in Huruma?

14 A. I do not recall.

15 PRESIDING JUDGE EBOE-OSUJI: Counsel, this may be where Mr Khan's
16 preference can assist in a limited, focused way. If the witness knows
17 divisions and subdivisions in Huruma. That is in the sense of if Huruma
18 is arranged that way, administratively.

19 MR OMOFADE: Save, your Honour, that I've already explored
20 sublocations, and I don't want to confuse the witness any further. So
21 I think I will leave it at that.

22 Would your Honours forgive me for a minute, please?
23 (Prosecution counsel confer)

24 MR OMOFADE: Mr President, we can go into public session now,
25 please.

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1 PRESIDING JUDGE EBOE-OSUJI: We go back into public session.

2 (Open session at 12.05 p.m.)

3 THE COURT OFFICER: (Interpretation) We are in public session,
4 Mr President.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 MR OMOFADE:

7 Q. Mr Witness, in 2007, were you still residing at location 1?

8 A. Yes.

9 Q. And do you recall the major event that happened in Kenya in 2007?

10 A. Yes, I do remember.

11 Q. What was that?

12 A. There was an ethnic war.

13 Q. It's accepted that the elections in Kenya took place in December
14 2007, but I'd like to ask you about the beginning of 2007. What was the
15 atmosphere like in location 1 earlier on in 2007?

16 A. At the beginning of 2007, the situation was not good because we
17 were in the run-up to the elections.

18 Q. And what do you mean when you say "the situation was not good"?

19 A. People were very concerned, due to the preparations that were
20 afoot for the elections.

21 Q. And what was the atmosphere like amongst the different ethnic
22 groups that lived in location 1?

23 A. At the outset, the situation was good and we got on very well
24 with the other ethnic groups. We would work together well, and we would
25 conduct business together, without any problems at all.

26

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1 Q. And when we are talking about the ethnic groups, could you help
2 us as to the main ethnic groups that lived in location 1?

3 A. There are the Kikuyu, the Kalenjin, these are the majority ethnic
4 groups or tribes living in location number 1 on the list.

5 Q. And in this time that you said the atmosphere was not very good,
6 what was the relationship, what was the atmosphere, between the Kikuyu
7 and the Kalenjin?

8 A. Could you please repeat your question?

9 Q. The -- in the period before the election --

10 MS ALAGENDRA: Your Honour, if I may just interrupt, the witness
11 has said that the atmosphere between the different tribes was very good
12 and they lived very well together. That was the last answer that he
13 gave.

14 MR OMOFADE: Well, that's not exactly the case. He earlier said
15 that the situation where -- and I'm reading from line 15 to 16:

16 "At the beginning of 2007, the situation was not good because we
17 were in the run-up to the elections."

18 And that's what I'm following up on.

19 MS ALAGENDRA: But, your Honour, to the specific question of the
20 relationship between the ethnic groups, the witness was very clear. He
21 said:

22 "... the situation was good and we got on very well with the
23 other ethnic groups."

24 That's from lines 20 to 24.

25 PRESIDING JUDGE EBOE-OSUJI: Counsel, you need to settle that
26

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1 matter, then.

2 MR OMOFADE: Well, yes.

3 PRESIDING JUDGE EBOE-OSUJI: As a matter of factual question and
4 answer.

5 MR OMOFADE: I think it's quite clear. The witness prefaced what
6 he said by saying at the outset, and -- okay.

7 Q. Witness, at the outset, the relationship between the ethnic
8 groups was good. Did that change at any point?

9 A. Yes, it did change.

10 Q. Did it change between the Kalenjin and the Kikuyu in location 1?

11 A. Yes, it did change.

12 Q. So, please tell us what happened and how that relationship
13 changed in the build-up to the elections in December 2007.

14 A. The situation changed in 2007 because even our neighbours began
15 to change. One might, for example, say hello to a neighbour and he
16 wouldn't return the greeting. It was as if you had committed a crime
17 against your neighbour. That is how the situation began to change.

18 Q. And you are Kikuyu. Was this your neighbours who were Kikuyus
19 that were not saying hello to you, or was it from other ethnic groups?

20 A. The situation changed. It was not the Kikuyu who did not want to
21 greet the Kikuyu as such. It was the Nandis or Kalenjins who changed.
22 They no longer greeted us as they had done in the past. Previously, we
23 would cooperate, we would exchange courtesies, but in that year, they
24 changed, and we would no longer talk to each other, as we had done
25 previously.

26

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1 Q. Apart from the Kikuyu -- the Kalenjin no longer talking to the
2 Kikuyu, as they did before, did the Kalenjin behave in any other way
3 towards the Kikuyu in location 1?

4 A. Could you please repeat your question?

5 Q. You've told us that in the period before the election, the
6 Kalenjin stopped saying hello, greeting the Kikuyu. My question was:
7 Did the Kalenjin behave in any other way towards the Kikuyu in that
8 period?

9 PRESIDING JUDGE EBOE-OSUJI: Counsel, why don't you round that
10 question up, since you are Prosecutor: Or the Kikuyu behaved towards the
11 Kalenjin in any other way?

12 MR OMOFADE: Mr President, perhaps I could pose the follow-up
13 question after he responds.

14 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

15 MR OMOFADE:

16 Q. Mr Witness, my question was: In the period leading up to the
17 elections, you've told us that the Kalenjin were no longer greeting the
18 Kikuyu. Did the Kalenjin behave in any other way towards the Kikuyu in
19 that period?

20 A. I have not yet quite grasped what you said. Could you please
21 repeat?

22 PRESIDING JUDGE EBOE-OSUJI: I'll try. Witness, what the lawyer
23 is asking is this: You've told the Court that relationships between the
24 ethnic groups began to change in 2007, and you told the Court that one
25 indication of that change in relationships was that Kalenjins would not

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1 return greetings to them by Kikuyus. Counsel is trying to find out
2 whether that is the only thing that happened that told you that
3 relationships had broken down. Was there something else that happened in
4 2007 that made you conclude that relationships had broken down?

5 THE WITNESS: (Interpretation) Yes. For example, some Kalenjin no
6 longer came to do their shopping in Kikuyu shops.

7 MR OMOFADE: And I suppose the fair question that your Honour
8 asked me to pose --

9 Q. Did the behaviour of the Kikuyu also change towards the Kalenjin
10 in this period?

11 A. (Redacted)

12 Q. (Redacted)

13 (Redacted)

14 A. (Redacted)

15 MR KHAN: Mr President, I wonder if we could go into private
16 session for a moment.

17 PRESIDING JUDGE EBOE-OSUJI: Private session.

18 MR OMOFADE: I was going to request it myself.

19 *(Private session at 12.22 p.m.) Reclassified as Open session

20 THE COURT OFFICER: (Interpretation) We are in private session,
21 Mr President.

22 MR KHAN: (Redacted)

23 (Redacted)

24 (Redacted)

25 PRESIDING JUDGE EBOE-OSUJI: Yes. That was bound to happen if
26

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1 you put that question in public.

2 MR OMOFADE:

3 Q. Mr Witness, I asked you if you had experienced this yourself.

4 Can you tell the Court what happened to you?

5 A. Yes. It did happen to me.

6 Q. Please tell us what happened, or what you experienced.

7 A. (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 Q. And did you -- did Mr -- did number 5 on -- I'm just clarifying

13 that the witness said number 5. Did you say number 5 on the list,

14 Mr Witness?

15 A. Yes.

16 Q. (Redacted)

17 (Redacted)?

18 A. Could you please repeat your question?

19 Q. (Redacted)

20 (Redacted)?

21 A. Are you talking about the people named on this list?

22 MR OMOFADE: Well, I'm in the hands of the Defence to some

23 extent.

24 PRESIDING JUDGE EBOE-OSUJI: Well, let's begin this way:

25 Witness, the person you mentioned at number 5, (Redacted)

26

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1 (Redacted). Do you know him?

2 THE WITNESS: (Interpretation) Yes, I do know him.

3 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

4 (Redacted)?

5 THE WITNESS: (Interpretation) Yes.

6 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

7 (Redacted)?

8 THE WITNESS: (Interpretation) No. I do not recall.

9 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade?

10 MR OMOFADE: I'm grateful, your Honour. We can go into public
11 session now.

12 PRESIDING JUDGE EBOE-OSUJI: Let's go to public session, then.

13 (Open session at 12.29 p.m.)

14 THE COURT OFFICER: (Interpretation) We are in public session,
15 Mr President.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please proceed.

17 MR OMOFADE:

18 Q. Mr Witness, do you know what political parties the Kalenjin that
19 lived in location 1, do you know what political party they mainly
20 supported?

21 A. Could you please repeat your question?

22 Q. The Nandis --

23 MS ALAGENDRA: Your Honour, just an observation from the Defence
24 is that we've noticed since the witness started testifying, on several
25 occasions he's asked for the questions to be repeated. And this is a

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1 witness, your Honour, who gave a very concise and understandable
2 statement to the Prosecution and the interview was done in English. So
3 perhaps I'm wondering if the Chamber is minded to ask the witness if he's
4 more comfortable perhaps speaking in English so we can avoid any
5 translation issues, if that is the problem, and perhaps he may be
6 permitted to switch between English and Swahili as he feels comfortable.

7 PRESIDING JUDGE EBOE-OSUJI: Prosecutor?

8 MR OMOFADE: Your Honours, I personally and I know my team have
9 not yet come to the conclusion that there is a translation issue. I'm
10 willing to give the witness the benefit of the doubt. If he wants a
11 question to be repeated, I have no hesitation in doing so and recouching
12 the question, if that helps him understand further. That said, it may be
13 that a clarification from your Honours, just to see that he is
14 comfortable with the translation rather than the language, the actual
15 translation process, will suffice.

16 PRESIDING JUDGE EBOE-OSUJI: Well, I'm not sure that the concern
17 is that there is an erroneous interpretation. That's not the point at
18 this stage. I don't think that suggestion has been made. But we have,
19 indeed -- I have observed the witness has asked for questions to be
20 repeated. I do not know whether that is a function of my advice, initial
21 advice, to him earlier that he make -- that he should understand the
22 question before answering them or whether it's associated with him paying
23 careful attention to interpretation. We don't know. But there has also
24 been quite some delay in responses from the witness, quite apart from
25 asking for questions to be repeated. That raises the question whether it

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1 will be more efficient overall for him to switch to English, if he has
2 that facility. The reason I ask you is do you have any concern about me
3 making that inquiry of the witness?

4 MR OMOFADE: I have no concern for your Honour to make that
5 inquiry, but I do suggest that the alternative proposition also be
6 explored, in terms of whether the translation is being properly
7 transmitted. I do know that there are different dialects of Swahili.
8 It's a language I don't speak myself, so even that might be a difficulty.
9 We just simply don't know.

10 PRESIDING JUDGE EBOE-OSUJI: That's a difficult inquiry to make
11 now. Why don't we do this?

12 Witness, Witness, I see from your -- from your CV that you
13 completed -- let's go to private session. I forgot that we are in --
14 *(Private session at 12.35 p.m.) Reclassified as Open session

15 THE COURT OFFICER: (Interpretation) We are in partial closed
16 session, Mr President.

17 PRESIDING JUDGE EBOE-OSUJI: Witness, I see from your CV that you
18 completed (Redacted). What
19 I want to find out from you is are you comfortable listening to questions
20 and answering them in English? At least listening to questions in
21 English? Are you comfortable with that?

22 THE WITNESS: (Interpretation) I have a preference for Swahili.
23 This will enable me to properly understand the questions and to answer
24 them properly.

25 PRESIDING JUDGE EBOE-OSUJI: It looks like that's as far as we
26

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1 can take it at this stage. We'll see. Let's continue and see how we do.

2 MR OMOFADE: Your Honours, just to confirm that, during the
3 witness preparation session, I made the same inquiry of the witness.
4 It's been disclosed to the Defence as part of the clarifications as well.

5 PRESIDING JUDGE EBOE-OSUJI: Right. Are we going back to -- we
6 are now in private session. Should we go back to public session,
7 Mr Omofade?

8 MR OMOFADE: We were in public. We can go back into public
9 session, yes.

10 PRESIDING JUDGE EBOE-OSUJI: Yes. Let's go back into public
11 session.

12 (Open session at 12.37 p.m.)

13 THE COURT OFFICER: (Interpretation) Mr President, we are in
14 public session now.

15 MR OMOFADE:

16 Q. Mr Witness, you've told us that both Kalenjin and Kikuyu lived in
17 location 1. Now, my question is, the Kalenjin, do you know what
18 political party majority of them supported in the period leading up to
19 the elections in 2007?

20 A. The Kalenjin supported the ODM.

21 Q. And are you aware of whether the ODM had any political rallies in
22 location 1 in 2007?

23 A. No.

24 Q. Do you know how the ODM supporters distinguished themselves from
25 other political parties?

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1 A. They had something that could distinguish them from other
2 political parties.

3 Q. Do you know what they had? Did they have specific posters or
4 banners or logos?

5 PRESIDING JUDGE EBOE-OSUJI: Counsel, your question was about
6 supporters distinguishing themselves.

7 MR OMOFADE: Yes, your Honour.

8 Q. Mr Witness, did you understand the question or do you want me to
9 repeat it?

10 PRESIDING JUDGE EBOE-OSUJI: I think you should rephrase that
11 question because the question moved from supporters and then other
12 political parties. Can you streamline it, in parallel senses, if
13 possible.

14 MR OMOFADE: Okay.

15 Q. Do you know how the ODM party identified itself? Do you know
16 what their logo or their symbols were?

17 A. Orange was their symbol.

18 Q. And the ODM supporters in location 1, how did they behave towards
19 the Kikuyu in location 1 in 2007?

20 A. I have a question that I would like to ask. I did not properly
21 understand the question through interpretation. I did not fully
22 understand what the interpreter said, and I did not properly understand
23 the question.

24 MR OMOFADE: Would your Honours forgive me for a moment, please?
25 (Prosecution counsel confer)
26

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, do you wish to pursue
2 that question and try again? A different approach, perhaps?

3 MR OMOFADE: I'll try in a different way.

4 Q. Were there people you knew in location 1 who supported the ODM?
5 Please just answer "yes" or "no."

6 A. Yes.

7 Q. And in the period leading up to the election in 2007, did you
8 talk to these people?

9 A. Yes.

10 Q. Did these ODM supporters say anything to you?

11 A. Yes. One of my clients, the person in location number 1, had a
12 vehicle and had put orange-coloured balls on his vehicle, and he said
13 that this political party would form the next government.

14 Q. And did this person say anything else to you?

15 A. He simply said that this political party would form the next
16 government.

17 Q. And you said that this is the person at location 1. Do you mean
18 the person at location 1 or person number 1?

19 A. I am referring to the person who is at location number 1 on the
20 list.

21 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, look at your
22 list. Are you talking about person number 1?

23 THE WITNESS: (Interpretation) Yes.

24 PRESIDING JUDGE EBOE-OSUJI: Or are you --

25 MR OMOFADE: I'm grateful, your Honour, I'm just receiving some
26

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1 clarification that there might have been a translation issue and that he
2 apparently did say "person number 1."

3 PRESIDING JUDGE EBOE-OSUJI: All right. Proceed.

4 MR OMOFADE:

5 Q. Apart from person number 1, the ODM supporters generally in
6 location 1, did you encounter any of them in the lead-up to the election?

7 A. Yes.

8 Q. Did any of these supporters say anything to you in this period?

9 A. Yes.

10 Q. What kind of things were they saying?

11 A. These persons said that their political party would head the new
12 government.

13 Q. Did they say what would happen when the new party headed the new
14 government?

15 A. I did not properly understand the question.

16 Q. Did these ODM supporters, did they say what would take place --

17 MS ALAGENDRA: Your Honour, perhaps the safest question would be
18 what exactly did they say, to stop at that, please.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade?

20 MR OMOFADE: Your Honour, that question is already at line 4.
21 I'm asking what they said afterwards.

22 MS ALAGENDRA: Perhaps that could be the question, then: What
23 did they say afterwards.

24 MR OMOFADE: I'd rather pose my question but I'm in your Honour's
25 hands.

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1 PRESIDING JUDGE EBOE-OSUJI: It is about making headway. If the
2 witness didn't understand the question, perhaps you could rephrase it to
3 make him understand it.

4 MR OMOFADE: That I could do.

5 Q. Mr Witness, the ODM supporters that were saying they would head
6 the next government, did they say anything else to you (Redacted)
7 (Redacted) ?

8 A. I still do not properly understand your question.

9 Q. Okay. Did you eventually vote in the election that took place in
10 December 2007?

11 A. Yes. I went to vote.

12 THE INTERPRETER: The interpreter did not fully understand the
13 last part of the witness's answer.

14 MR OMOFADE: And perhaps, your Honour, it might be -- maybe we
15 should go into private session for the last part.

16 PRESIDING JUDGE EBOE-OSUJI: Private session, then.

17 *(Private session at 12.56 p.m.) Reclassified as Open session

18 THE COURT OFFICER: (Interpretation) We are in private session.

19 MR OMOFADE:

20 Q. Witness, you've said you voted during the elections. What else
21 did you say?

22 A. At the location which is (Redacted)

23 Q. And do you remember where your voting station was (Redacted)?

24 A. (Redacted)

25 Q. (Redacted)

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1 Where were you the day after the voting day?

2 A. Before or after the vote?

3 Q. The voting day was on 27 December. I'm asking you where you were
4 on the following day, which would have been 28 December.

5 A. I was at home. I was working in my garden, mending my fence.

6 Q. And while you were mending your fence, did anything happen?

7 A. Yes. A young man came to see me. He said that the situation was
8 bad and that I should leave.

9 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, watch the clock.

10 MR OMOFADE: It's a convenient moment, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: All right. We will rise but
12 I want -- I normally wouldn't make this kind of transcript correction but
13 I noticed line 20 of the previous page, page 28 -- sorry, page 58, page
14 58, I did not say: "We are making headway," not that we are not.
15 I rather said: "It is about making head way." It's a small matter but
16 I thought I should note it.

17 We will now take our break and come back at 2.30. We will bring
18 down the blinds and let the witness out of the courtroom.

19 Sir, we are now going to take a break, our lunch break. Please
20 do not discuss your testimony during that time. Thank you.

21 *(Closed session at 1.01 p.m.) Reclassified as Open session

22 THE COURT OFFICER: (Interpretation) We are in private session.

23 THE INTERPRETER: Correction from the interpreter: We are in
24 closed session.

25 (The witness stands down)

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1 PRESIDING JUDGE EBOE-OSUJI: Court will rise and we will return
2 at 2.30.

3 (Recess taken at 1.03 p.m.)

4 (The witness enters the courtroom)

5 *(Upon resuming in private session at 2.38 p.m.) Reclassified as Open session

6 THE COURT USHER: All rise. Please be seated.

7 THE COURT OFFICER: (Interpretation) Your Honour, we are in closed
8 session -- in private session, correction.

9 PRESIDING JUDGE EBOE-OSUJI: We are back in private session. How
10 long? We should keep these things to the barest minimum.

11 MR OMOFADE: Your Honours, my recollection is that we were in
12 public session, open session, when we left off but I might be wrong.

13 PRESIDING JUDGE EBOE-OSUJI: All right. Do we then go into
14 open --

15 MR OMOFADE: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: Right. We go into open session now.
17 (Open session at 2.39 p.m.)

18 THE COURT OFFICER: (Interpretation) We are in open session, your
19 Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please proceed.

21 MR OMOFADE:

22 Q. Mr Witness, before the break, you were telling us about when you
23 were repairing your fence in your garden and somebody spoke to you. Do
24 you remember that? Do you remember telling us that?

25 A. Yes.

26

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1 Q. The person -- the person that spoke to you, do you see their name
2 on the list in front of you?

3 A. Yes.

4 Q. Could you tell us which number that person appears at?

5 A. It's number 2.

6 Q. And could you tell us exactly what this person at number 2, what
7 he said to you?

8 PRESIDING JUDGE EBOE-OSUJI: One second. I want to go into
9 private session for that answer.

10 *(Private session at 2.41 p.m.) Reclassified as Open session

11 THE COURT OFFICER: (Interpretation) We are in private session,
12 your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please proceed, Witness.

14 THE WITNESS: (Interpretation) When he came, he said that I had to
15 leave because the situation was very bad in that area.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, is that the extent of
17 the answer?

18 MR OMOFADE: Yes, your Honour, I thought it was sufficiently
19 vague to elicit in public session, but your Honours have taken the safer
20 approach.

21 PRESIDING JUDGE EBOE-OSUJI: Yes. We go back into public
22 session, then.

23 (Open session at 2.42 p.m.)

24 THE COURT OFFICER: (Interpretation) We are in public session,
25 your Honour.

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1 MR OMOFADE:

2 Q. And, Mr Witness, do you know what ethnicity this person 2 is?

3 A. He's a Kalenjin.

4 Q. And did you take these words seriously?

5 A. No. I didn't take it seriously.

6 Q. Did you stay in (Redacted) ?

7 A. Yes. I stayed there.

8 Q. You've been telling us about the first day after the election; is
9 that correct?

10 A. I don't remember.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, are you saying that the
12 conversation happened the first day after the election?

13 MR OMOFADE: Yes, your Honour, but I'll rephrase the question.

14 Q. The conversation that you had with person number 2, this took
15 place the first day after the election; is that correct?

16 A. Yes. It was after the election.

17 Q. The second day after the election, did you find out what the
18 results were --

19 PRESIDING JUDGE EBOE-OSUJI: Hold off on the question. We need
20 to establish what the witness is saying in terms of the possibility of
21 precision of when the conversation happened because the answer he gave
22 does not crystalise that impression, that it was on the first day after
23 the election.

24 MR OMOFADE: Indeed, your Honour.

25 Q. Mr Witness, just asking you again, the conversation that you had
26

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1 with person number 2, how many days after the election did this take
2 place?

3 A. It was right before the election results were published.

4 Q. But do you remember how many days after the date that you voted?

5 A. It was two days after we had voted.

6 Q. When did the election votes start to be known in location 1, the
7 election results, rather? When did the election results start to become
8 known in location 1?

9 A. It was the second day after the elections.

10 Q. And did you get to know which of the candidates were in the lead?

11 PRESIDING JUDGE EBOE-OSUJI: We here are talking about election
12 results. Can you be precise as to which post we're talking about?
13 Because I understand it was multiple-post elections, so to speak.

14 MR OMOFADE: I'll phrase the question differently.

15 Q. Do you know who the presidential candidates were in the elections
16 in 2007?

17 A. I would like for you to repeat that question, please.

18 PRESIDING JUDGE EBOE-OSUJI: At this stage, let me do this. Hold
19 that question, counsel.

20 Witness, do you still wish to proceed with the interpretation or
21 would you rather speak -- or, rather, would you rather take the questions
22 in English?

23 THE WITNESS: (Interpretation) It would be better if the question
24 is put to me in English, because I have trouble understanding the
25 interpretation.

26

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1 PRESIDING JUDGE EBOE-OSUJI: We've heard before that there are
2 different dialects to Swahili and that may be the problem. We don't
3 know. But, Mr Omofade, it looks like we have to switch to English.
4 Well, you are already speaking English. The witness will have to listen
5 to your questions in English.

6 Sir, would you also prefer to answer in English or in Swahili,
7 your own answers, that is?

8 THE WITNESS: (Interpretation) I would like to respond in English.

9 PRESIDING JUDGE EBOE-OSUJI: All right. We will proceed in that
10 way. But something we need to watch out for, please, and I know I did
11 not mention it when I was advising you initially, when you came, try not
12 to overlap with the person asking you questions. By overlap, I mean you
13 need to observe a pause between him completing his question and then you
14 beginning to answer. We call it the five-second rule but anywhere from
15 three to five seconds should do, as long as you observe a pause. So do
16 not start answering immediately. Just observe a little pause and then
17 begin your answer in English.

18 MS ALAGENDRA: Your Honour, I wonder whether the witness is able
19 to hear because he's got his earphones and maybe --

20 PRESIDING JUDGE EBOE-OSUJI: Yes. We need to switch channels for
21 him to the floor channel, I believe.

22 Can you hear me now?

23 THE WITNESS: Yes, I can hear you.

24 PRESIDING JUDGE EBOE-OSUJI: Excellent. Please observe the
25 pause, that's what I was saying. Just the exchange we had now
26

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1 demonstrates what I'm talking about. When I said, "Can you hear me now,"
2 you immediately said yes, you could hear me. We would like a small
3 pause, five seconds would be a good pause to observe but anywhere from
4 three seconds to five seconds should do, but just don't start answering
5 immediately after the completion of the question. A little pause and
6 then you answer. All right?

7 THE WITNESS: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: That's good.

9 MR OMOFADE:

10 Q. And, Mr Witness, my earlier question was: Do you know who the
11 presidential candidates were for the elections in 2007?

12 A. Can only recall two but I can't remember the others.

13 Q. Do you know the names of the two you recall? Could you mention
14 them?

15 A. There was Mr Honourable Mwai Kibaki and honourable Raila Amolo
16 Odinga.

17 Q. And the second day after the elections --

18 MR KIGEN-KATWA: Mr President, I think there is a problem with
19 the trans -- page 61, line 3, the name of one of the candidates I think
20 is wrong.

21 MR OMOFADE: I believe it's been corrected at line 4 but --
22 I think -- I think it's obvious it was Mwai Kibaki and it's corrected at
23 line 4.

24 PRESIDING JUDGE EBOE-OSUJI: Yes. I see that.

25 MR OMOFADE:

26

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1 Q. Mr Witness, by the second day of the elections, were there any
2 indications of who of these candidates was leading in the elections?

3 A. Yes, first was Mr Mwai Kibaki who was leading. Then secondly
4 Mr Raila was leading.

5 Q. And by the third day, was this the same or was there a different
6 ranking in who was leading?

7 A. Yes, there was a difference. By that time, Mr Kibaki was the one
8 leading.

9 Q. And in location 1, what was the reaction of the ODM supporters
10 and the Kalenjin to this trend of election feed-back?

11 PRESIDING JUDGE EBOE-OSUJI: Can you rephrase?

12 MR OMOFADE:

13 Q. What was the reaction of the ODM supporters and the Kalenjin in
14 location 1 when they heard this news?

15 A. They refused the results and they were very angry.

16 Q. How did they react when they were angry?

17 A. They said that it couldn't be like that because Mr Raila was the
18 one who was leading. They started shouting, running, and saying they --
19 they can't accept the results.

20 Q. And did you see this yourself?

21 A. Yes, I saw.

22 Q. Do you -- I would like to ask you now about the announcement of
23 the final presidential election results. Do you understand that?

24 A. Pardon, your question?

25 PRESIDING JUDGE EBOE-OSUJI: Why don't you ask the question right
26

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1 away, counsel.

2 MR OMOFADE:

3 Q. Do you remember the day that the presidential election results
4 were announced?

5 A. Yes. It was around 6.00 p.m.

6 Q. And did you hear that announcement yourself?

7 A. Yes, I heard the results on radio.

8 Q. You said it was 6.00 p.m. Do you remember what date it was?

9 A. I'm not sure of the date.

10 Q. But did you hear who was announced as the winner, the
11 presidential candidate winner?

12 A. Yes. Mr Mwai Kibaki.

13 Q. And again, what was the reaction of the ODM supporters and the
14 Kalenjin in location 1 when this result was announced?

15 A. They said the results were not correct and they start shouting,
16 running, from position 2 -- location 2 towards location 1, shouting and
17 saying the results cannot be that, that difference big.

18 Q. And where were you when this shouting and running was taking
19 place?

20 A. I was in position -- in location 1.

21 Q. And how could you tell that these persons were ODM supporters and
22 Kalenjin?

23 A. To the results, they said that the results cannot be that, and
24 they were the people we knew.

25 Q. When you say these were "the people we knew," were you able to
26

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1 recognise some of these people?

2 A. Yes, I do.

3 Q. When you witnessed this shouting and running by the Kalenjin,
4 what did you do?

5 A. At that moment, when they were coming from position -- location 2
6 towards location 1, shouting, struggling with the results, they went
7 up -- that's the place they started burning houses. At that time is when
8 we went there to -- to help the Kikuyu members who were there.

9 Q. Okay. Firstly, do you know the number of these Kalenjin that you
10 say went up and started burning houses?

11 MS ALAGENDRA: Your Honours, if I may just clarify, my learned
12 friend has been asking the witness questions in relation to ODM
13 supporters and Kalenjin. And all of a sudden now we are just focusing
14 only on Kalenjin, so perhaps we could have more clarity on whether this
15 is one and the same group or ODM supporters includes other tribes, just
16 some more clarity.

17 MR OMOFADE: I'll clarify it with the witness.

18 Q. This group that you saw running and shouting, were they only ODM
19 supporters or only Kalenjin or were they Kalenjin ODM supporters?

20 A. These were Kalenjins, ODM supporters.

21 PRESIDING JUDGE EBOE-OSUJI: Do we mean Kalenjins who were ODM
22 supporters?

23 THE WITNESS: Yes, my Honour.

24 MR OMOFADE:

25 Q. And how could you tell that they were Kalenjin?

26

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1 A. These were the people we used to live with them, we knew them
2 very well.

3 Q. And then my earlier question was: Can you estimate a number of
4 this group that you said went up and started burning houses?

5 A. There were about 30 to 40.

6 Q. And can you describe what this group looked like? What were they
7 wearing, for instance?

8 A. That day they had only ordinary clothes.

9 Q. Do you know if they were carrying anything?

10 A. When they start burning houses they had bows and arrows.

11 MR OMOFADE: Your Honours, just for the transcript. I think line
12 21, I believe what I heard anyway was: "That day they had only ordinary
13 clothes."

14 PRESIDING JUDGE EBOE-OSUJI: That's correct.

15 MR OMOFADE:

16 Q. Now, you've told us that you recognised some of this group. They
17 were your neighbours. Just answer "yes" or "no," please. Do you know
18 the names of any of those that you recognised?

19 A. Yes.

20 Q. Now, please take a look at the list in front of you. Do the
21 names of any of these persons appear on that list?

22 A. Yes, please.

23 Q. Could you tell us which numbers they appear at? Or number?

24 A. Number 2 and number 3.

25 Q. And were any of number 2 or number 3 your neighbours?

26

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1 A. Yes. Both were my neighbours.

2 Q. And although it may be obvious, but do you know the ethnicity of
3 number 3? I believe you've given us the ethnicity of number 2 already.

4 A. Yes. He's a Kalenjin.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, you might as well round
6 up saying number 2 as well.

7 MR OMOFADE:

8 Q. And is it correct that number 2 is also a Kalenjin?

9 A. Yes, your Honour.

10 Q. Now, you said earlier that some of the Kikuyu went to help.
11 Firstly, about how many Kikuyu went to help when this was going on?

12 A. Yes. There were about 100.

13 Q. And where were you at this time when the group went to help?

14 A. Yes. I was among them.

15 Q. So please tell us what you and the remainder of this group, what
16 did you do to help the situation?

17 A. When we were there, we tried to warn them not to burn the houses
18 because we knew them, we were calling them by names, and we were trying
19 to help the Kikuyu women and children going down.

20 Q. When you tried to warn them not to burn the houses, did they
21 listen to you?

22 A. No, they didn't.

23 Q. You've told us that the 30 or 40 Kalenjin, they had bows and
24 arrows. Did your group of a hundred or so, did you have any weapons?

25 A. No, we didn't.

26

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1 Q. And did you manage to help the women and children that you had
2 gone to help?

3 A. Yes. A family of five slept at my house that night.

4 Q. Do you know how this family of five got to your house?

5 A. Yes, because we were the one who were helping them, to move from
6 where the houses were being burnt.

7 Q. And just to clarify, you said a family of five. Is this one
8 family with five members of the family, or is it something different?

9 A. This is -- was a family, a mother and his children, five
10 families.

11 Q. Are you saying there were five different families comprising of
12 mother and children?

13 A. Yes, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: You mean mothers and children?

15 MR OMOFADE: Indeed, mothers and children, your Honour.

16 PRESIDING JUDGE EBOE-OSUJI: Is that what you were saying,
17 Witness? There were several mothers, five mothers, at least, in the
18 family -- in the group that were at your house?

19 THE WITNESS: Yes, your Honour.

20 MR OMOFADE:

21 Q. And do you know what happened to the houses of these five
22 families?

23 A. Yes.

24 Q. Please tell us.

25 A. The houses were burnt completely.

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1 Q. And do you know the ethnicity of these five families that spent
2 the night at your house?

3 A. Yes. All were Kikuyus.

4 Q. And do you know how many houses were burnt in location 1 on that
5 particular day?

6 A. Yes. There were about 20 houses.

7 Q. And do you know the ethnicity of those who owned those 20 houses?

8 A. Yes, were Kikuyus.

9 MR OMOFADE: Mr President, can we go into private session for
10 just one minute? I have one or two questions.

11 PRESIDING JUDGE EBOE-OSUJI: Private session.

12 *(Private session at 3.22 p.m.) Reclassified as Open session

13 THE COURT OFFICER: (Interpretation) We are in private session.

14 MR OMOFADE:

15 Q. And, Mr Witness, (Redacted)

16 (Redacted)?

17 A. (Redacted)

18 Q. (Redacted)

19 A. (Redacted)

20 Q. (Redacted)

21 (Redacted)

22 A. Yes. (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

26

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1 Q. (Redacted)

2 (Redacted)

3 A. (Redacted)

4 Q. (Redacted)

5 A. (Redacted)

6 Q. And I just want to clarify with you where exactly were these 20

7 houses that were burnt? Where exactly were these houses located?

8 A. There is a hill up at position -- at location 1, that's the place

9 where the houses were.

10 Q. Were these houses on the hill in location 1?

11 A. Yes.

12 MR OMOFADE: Mr President, we can go back into private -- public

13 session.

14 PRESIDING JUDGE EBOE-OSUJI: Back to public session.

15 (Open session at 3.26 p.m.)

16 THE COURT OFFICER: (Interpretation) We are now in public session,

17 your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.

19 MR OMOFADE:

20 Q. You've told us that there were houses being burnt. Do you know

21 how these houses were set alight?

22 A. Yes. At that moment, the Kalenjin boys were running -- they were

23 throwing something, an object, that you could not see because it was

24 dark. They were throwing on the house and then the house get in flame.

25 Q. Now, I would like to ask you about the following day. You said

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1 these five families spent the night at your house. Did you also spend
2 the night at your house?

3 A. Yes, your Honour.

4 Q. Can you tell us what happened the following day?

5 A. The following day, at lunchtime, the Kalenjin boys went on top of
6 the hill singing song. The time they were singing song, the number of --
7 the Kalenjin boys was increasing, the Kalenjins was increasing. The more
8 they sing, the more their number is increasing.

9 Q. You say "Kalenjin boys." Firstly, can you help us, what do you
10 mean by "boys"? Were they young boys or were they grown men?

11 A. Your Honour, for that, the -- the Kalenjins men and boys were the
12 one who were increasing.

13 Q. And you said they were increasing. Did you know -- can you give
14 an estimate of what number there were on this hill?

15 A. You could not say the exact numbers but the number were
16 increasing in thousands.

17 Q. And then you've said that they were singing. Do you know what
18 they were singing?

19 A. The song they were singing, they usually sing this song during
20 the circumcision.

21 Q. And how do you know this? Have you heard the song before,
22 yourself?

23 A. Yes. Yes. They used to practice their exercise just near area
24 1. Now we used to know because you could see them singing, having their
25 ceremony. You could hear the song.

26

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1 Q. And just to clarify, do you speak or understand Kalenjin
2 yourself?

3 A. Yes, I can distinguish Kalenjin from other tribes but I don't --
4 I don't know their language -- I don't know how to speak the language.

5 Q. You don't know how to speak it, but do you understand it either?

6 A. Yes, I can say this is a Kalenjin language.

7 Q. I'm just going to press you a bit further. If somebody says
8 something to you in Kalenjin, will you understand what that person is
9 saying?

10 A. No, your Honour.

11 Q. You've talked about the Kalenjin circumcision. Do you know when
12 this circumcision ceremony normally takes place?

13 A. Yes, during the December season.

14 Q. And you've also told us how there was singing on this particular
15 day, and the numbers were increasing. Do you know if these Kalenjin boys
16 and men were coming from within location 1 or from other places?

17 A. No, they were coming from other places.

18 Q. How do you know that?

19 A. Most of them who lived there, we know them, but those who were
20 coming were new to us.

21 Q. So this group of thousand or so Kalenjin, what did they do once
22 they were on that hill?

23 A. At that time, when they were singing, they were coming down the
24 hill, burning houses, going up, coming down like ants, burning houses and
25 going back.

26

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, just so you watch it,
2 the number. I'm not sure the witness said the group was thousand or so.
3 So if you want to make anything of the number, you need to clarify it.

4 MR OMOFADE: Indeed, your Honour.

5 Q. Mr Witness, remember I asked you earlier if you could estimate
6 the number of Kalenjin boys and men that grouped on this hill. What is
7 your estimate of the number?

8 A. They were in thousands. Around 1,000 and above but I'm not sure
9 of.

10 MR OMOFADE: Mr President, it's just a clarification for the
11 transcript. At line 2 of the current page, page 76, I believe the
12 witness said "during the December season."

13 PRESIDING JUDGE EBOE-OSUJI: Is there any dispute there? Okay.
14 Mr Khan says no dispute.

15 MR OMOFADE:

16 Q. Did you say, Mr Witness, that they were burning houses, going up,
17 coming down like ants, burning houses and going back up? Is that what
18 you said?

19 A. Yes, your Honour.

20 Q. And where were you at this time, you personally?

21 A. I was down the hill where I could see them, what they were doing.

22 PRESIDING JUDGE EBOE-OSUJI: The witness said "where I could see
23 them, what they were doing."

24 MR OMOFADE: Mr President, that's what I heard as well.

25 Q. And you said you were down the hill. Do you mean at the bottom
26

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1 of the hill?

2 A. Yes, your Honour.

3 Q. And is this the same hill where the thousands of Kalenjin boys
4 and men had converged?

5 A. Yes, your Honour.

6 Q. And were you alone at the bottom of the hill?

7 A. No, your Honour.

8 Q. Please don't give us names, but how many people were with you?

9 A. I can't tell the number but we were more.

10 Q. Can you help in terms of tens, hundreds or thousands?

11 A. We were in hundreds.

12 PRESIDING JUDGE EBOE-OSUJI: Again, Mr Omofade, pinpoint.

13 MR OMOFADE:

14 Q. Do you know how many hundreds you might have been? Was it
15 hundred, over a hundred? I know it might be difficult to estimate but
16 please try.

17 A. Can't confirm, your Honour.

18 Q. Do you know the ethnicity of the group you were part of?

19 A. Yes.

20 Q. What -- what ethnic group did your group belong to?

21 A. Kikuyu.

22 Q. And, please, can you describe your group? Was it men? Was it
23 men, women or children? Please help us.

24 A. Yes, we were Kikuyu men.

25 Q. Now, I want to go back to the group of thousand or more Kalenjin
26

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1 men that were on top of the hill. Do you know if they were carrying any
2 arms?

3 A. Yes. They had bows and arrows.

4 Q. What -- what time of the day was this event taking place?

5 A. It was during lunchtime.

6 Q. And you've already told us that you could see them from where you
7 were. Could you identify any of the group that was up there? Please
8 just answer "yes" or "no."

9 A. Yes, I could identify them.

10 Q. And please take a look at the list in front of you. Do you see
11 the names of any of the persons you could identify on that list?

12 A. Yes, your Honour.

13 Q. Could you tell us the numbers of the persons you identified?

14 A. Number 1, number 2, number 3, number 4 and number 5.

15 Q. So the first five on that list were amongst this group; is that
16 correct?

17 A. Yes, your Honour.

18 Q. And from where you were, at the foot -- at the bottom of the
19 hill, could you see if this group had any leader or leaders?

20 A. Yes, your Honour.

21 Q. And could you see who those leaders were?

22 A. Yes, your Honour.

23 Q. Were you able to recognise any of them?

24 A. Yes, your Honour.

25 Q. Again, take a look at the list in front of you. Do you recognise

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1 any of the names on that list as being amongst the leaders of this group?

2 A. Yes, your Honour.

3 Q. Please tell us which one or which ones.

4 A. Number 1, number 4 and number 5.

5 MR OMOFADE: Mr President, might we go into private session?

6 Probably for ten -- five to ten minutes.

7 PRESIDING JUDGE EBOE-OSUJI: Essentially until the end of the
8 day?

9 MR OMOFADE: It might just take us there. I might be able to do
10 it sooner.

11 PRESIDING JUDGE EBOE-OSUJI: All right. We go to private
12 session.

13 *(Private session at 3.48 p.m.) Reclassified as Open session

14 THE COURT OFFICER: (Interpretation) We are in private session.

15 MR OMOFADE:

16 Q. Mr Witness, you've referred to number 1 on the list as being
17 amongst the leaders of this group. Firstly, where does person number 1
18 live, do you know?

19 A. Yes, your Honour.

20 Q. Please tell us.

21 A. I've indicated in the sketch that I have. You could see the
22 position where the person I'm talking about, number 1, lives.

23 Q. When you were interviewed by the investigators (Redacted)
24 (Redacted), did you provide a sketch describing a number of locations in
25 the Huruma area?
26

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1 A. Yes, your Honour.

2 Q. And would it assist you if you had that sketch in front of you to
3 actually show the location you're referring to now and other locations
4 that we've been talking about?

5 A. Yes, your Honour.

6 MR OMOFADE: Mr President, the sketch in question is annex 1 to
7 the witness's statement. I wonder if a copy could be brought up on the
8 screen in front of the witness. The ERN number is KEN-OTP-0088-0581.
9 And it's a confidential document.

10 PRESIDING JUDGE EBOE-OSUJI: I notice that -- sorry, just one
11 second. Yes, please proceed.

12 MS ALAGENDRA: Your Honour, I was just going to say that we don't
13 have any difficulty with that document and the way in which my learned
14 friend is proceeding with it.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Kigen-Katwa?

16 MR KIGEN-KATWA: Neither do we, Mr President.

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

19 MR OMOFADE: I'm grateful for that indication. Just to correct
20 the record, though, the ERN number is KEN-OTP-0088-0581. I'm correcting
21 line 22.

22 PRESIDING JUDGE EBOE-OSUJI: That's what I heard you say earlier,
23 yes.

24 MR OMOFADE:

25 Q. Mr Witness, do you have the sketch on the screen in front of you?

26

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1 Can you see it at all?

2 A. Yes, your Honour.

3 MR OMOFADE: Now, your Honours, I'm wondering if it's possible --

4 I know there is a way of doing this, where the witness could be asked to

5 indicate on the ELMO the particular part of the sketch he's referring to.

6 I don't know if that could be done, if it has to be done with a hard

7 copy.

8 PRESIDING JUDGE EBOE-OSUJI: You mean the usual markup procedure?

9 MR OMOFADE: Indeed, indeed, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: Yes.

11 MR OMOFADE:

12 Q. Mr Witness, if the procedure is right, can you indicate where you

13 say person number 1 lives in relation to this sketch? If you could just

14 draw a circle around it?

15 A. (Marks).

16 Q. And perhaps to assist, if you just mark "number 1" next to the

17 circle.

18 A. (Marks).

19 Q. Now, just to have some context, can you indicate, if it's there,

20 can you indicate whereabouts the hill that you have been talking about,

21 where that appears on your sketch?

22 A. Pardon, your question?

23 Q. The hill where the thousand or more Kalenjin, where they were

24 gathered, does that appear on your sketch at all?

25 A. Yes, your Honour.

26

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1 Q. And can I ask you to mark just an X where that hill appears,
2 please?

3 A. (Marks).

4 Q. And just to help us as well, your group of a hundred or so Kikuyu
5 men, where were you in relation to this hill?

6 A. I indicate a mark?

7 Q. Yes, please.

8 A. (Marks).

9 Q. Now, I've asked you about the --

10 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, we have to try and trace
11 this on the record somehow. So we see that on the sketch, the residence
12 of person number 1 actually bears his name, (Redacted) is indicated on the
13 sketch. And (Redacted) you've indicated an X for the hill and there is a
14 word "hill" appearing there on the sketch. And (Redacted)
15 (Redacted), the witness has indicated an X as where they were, where the
16 witness and his group were at the time.

17 MR OMOFADE: Indeed, your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: That X might need to be a little
19 distinctive so the second X will have to be where the witness and his
20 group were, since the first X is already attributed to the hill, so the
21 bare X is where the witness is indicating they were at the time. So
22 let's proceed, try to use another legend for what else you want to do,
23 other than X.

24 MR OMOFADE: Perhaps the letter A might be more appropriate there
25 because that's something that hadn't been indicated on the sketch at all.

26

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1 Q. So, Mr Witness, could you, instead of the X that you have marked,
2 where you and your group were, if possible could you change it to a
3 capital letter A?

4 PRESIDING JUDGE EBOE-OSUJI: Let's not change it. That might be
5 a little clunky, just write A next to where you were, next to the second
6 X, write A, we know that's what it means.

7 THE WITNESS: (Marks).

8 PRESIDING JUDGE EBOE-OSUJI: Thank you very much so we have what
9 appears as XA for where they were. So let's proceed. Thank you.

10 MR OMOFADE:

11 Q. The second individual that you mentioned is person number 4.
12 Firstly, do you know where person number 4 lived in 2007?

13 A. Yes, your Honour.

14 Q. Could you tell us where, where he lived, please?

15 A. It's not indicated in the annex 1.

16 PRESIDING JUDGE EBOE-OSUJI: There was an overlap there. The
17 witness said that it is not indicated in annex 1. But are you able to
18 indicate it now, with the letter Y? Or sorry, sorry, instead of Y? Did
19 you say A before?

20 MR OMOFADE: B might be more appropriate but I'm in your Honour's
21 hands.

22 PRESIDING JUDGE EBOE-OSUJI: I think you're right. Let's do B,
23 so if we need to do other things so we have enough room in the alphabet.
24 So letter B, if possible.

25 THE WITNESS: (Marks).

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1 PRESIDING JUDGE EBOE-OSUJI: All right. We do see letter B. So
2 letter B is where person number -- is that 2, Mr Omofade?

3 MR OMOFADE: It's person number 4 on the PIS form.

4 PRESIDING JUDGE EBOE-OSUJI: Yes, sorry, person number 4.

5 MR OMOFADE: Your Honours, I'm looking at the time. I could be
6 here for a while.

7 PRESIDING JUDGE EBOE-OSUJI: All right. We will leave it there
8 for now. And take it up again tomorrow at 9.30. We will bring down the
9 blinds and let out the witness first, and then we will see to any
10 housekeeping matter we need to attend to quickly.

11 *(Closed session at 4.04 p.m.) Reclassified as Open session

12 THE COURT OFFICER: (Interpretation) We are in closed session.

13 PRESIDING JUDGE EBOE-OSUJI: Please escort the witness from the
14 courtroom.

15 Witness, we will be letting you off for today, now. You will
16 join us again at 9.30 tomorrow morning. Please do not discuss your
17 testimony with anyone overnight. Thank you.

18 (The witness stands down)

19 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, I see Mr Steynberg is
20 not in the courtroom.

21 MR OMOFADE: That's correct, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Any update on the next witness after
23 this?

24 MR OMOFADE: Your Honour, the only -- the only information I can
25 provide is I know efforts are going on frantically to try and be able to

1 give your Honour some information and it may be that tomorrow morning is
2 a more appropriate time.

3 PRESIDING JUDGE EBOE-OSUJI: To inquire about that?

4 MR OMOFADE: Yes, your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: Fair enough. So we will adjourn for
6 the day. The Court will now rise and we meet again tomorrow morning at
7 9.30.

8 *(The hearing ends in closed session at 4.05 p.m.) Reclassified as Open session

9 RECLASSIFICATION REPORT

10 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
11 2013, and the instructions in the email dated 10 December 2013, the version of the
12 transcript with its redactions becomes Public.

13