

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, 24 October 2013

10 (The witness enters the courtroom)

11 (Upon commencing in open session at 9.35 a.m.)

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

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

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

19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. I take it
20 appearances remain the same.

21 MR OMOFADE: The same for the Prosecution.

22 PRESIDING JUDGE EBOE-OSUJI: Defence, appearances remain the
23 same?

24 MR HOOPER: They do.

25 MS BUISMAN: Also for us, Mr President.

1 MR NARANTSETSEG: The same, your Honour. Thank you.

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

3 Mr Hooper, we are in public session. You may continue your
4 cross-examination.

5 Witness, welcome back. We are now in public session, as you
6 heard me say, and Mr Hooper will continue asking you questions. I issue
7 you the same reminder I've always done. You are under oath to tell the
8 truth, and also, please be sensitive to the need to protect your identity
9 when we are in open session, as we are now. Thank you.

10 MR HOOPER: Your Honour, before I come to further question the
11 witness. There is the issue of the exhibits yesterday which have now
12 been sorted out, I'm informed. And I'm grateful to those who assisted in
13 doing that. The first one is D09-0023-0027. And the second -- I say the
14 second. In fact the second has now been marked and instead of the
15 markings for the stadium and for Huruma Grounds being on the same
16 document, they are two separate documents, separately marked. So could
17 I ask for the first one, the one that shows Stadium 64 to be the first,
18 as it were, of those two exhibits, and the second obviously the Huruma
19 Grounds? Thank you very much.

20 THE COURT OFFICER: So the document KEN-ICC-0001-0008,
21 confidential document, which is an annotated version of document
22 KEN-D09-0023-0027, will bear a number EVD-T-D09-00071. The following
23 document, which contains two pages, as explained before with two
24 markings, will have the following numbers: So the document number is
25 KEN-ICC-0001-0009, first page, and the second page, KEN-ICC-0001-0010,

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1 confidential document. It is an annotated version of document

2 KEN-D09-0023-0028 and will have the EVD-number, EVD-T-D09-0072.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you. Colloquially, Court
4 Officer, that means the last document would be Ruto Defence Exhibit 72?

5 THE COURT OFFICER: Indeed, your Honour, Ruto Defence Exhibit
6 number 72.

7 PRESIDING JUDGE EBOE-OSUJI: And the first one would be
8 colloquially known as the Ruto Defence Exhibit 71.

9 THE COURT OFFICER: Exactly, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Hooper, is there
11 more? Is that it?

12 MR HOOPER: That's it, yes. There was a newspaper article that
13 was put up. I'll come back to that and may add it at the end after we've
14 had a discussion. There was a difficulty with that one and I don't think
15 it was resolved. Very well.

16 WITNESS: KEN-OTP-P-0487 (On former oath)

17 QUESTIONED BY MR HOOPER: (Continuing)

18 Q. Well, good morning, Mr Witness.

19 A. Good morning.

20 Q. Nice to see you again there. Now, yesterday we left it the
21 64 Stadium rally, and what you'd -- and we were talking about basically
22 what you claimed to have heard being said. I'm not going to go through
23 all that again, but you said at one point that Mr Ruto had said two or
24 three Kalenjin words. Do you know what those words were?

25 A. I can't remember exactly, but this was what I'm sure,
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1 100 per cent sure he said those words.

2 Q. All right. So there were some words of Kalenjin but you can't
3 remember what it was. Very well. I notice again when you spoke to the
4 Prosecutor back in November last year, that you said there -- you
5 described what you heard, and you said, "He spoke in Swahili," and there
6 is no mention of any Kalenjin being spoken.

7 A. Yes, I didn't mention that for the Prosecutor.

8 Q. In any event, you can't remember what it was. It wasn't anything
9 that struck you or you remember. Would that be right?

10 A. Repeat?

11 Q. You told us you don't remember what he said in Kalenjin, so
12 perhaps we can conclude it wasn't very important, whatever it was. Would
13 that be fair?

14 A. Yeah, yes, it was important.

15 Q. It was important or it wasn't important?

16 A. It is so many years, I think it -- I remember it. It was
17 important, it is important. I can't say -- only if I can say that maybe
18 I'll tell you it's important, it was important.

19 Q. What was important -- sorry. I'm sorry to interrupt you. What
20 was important about it?

21 A. The meaning of those words.

22 Q. Well, what words were they? You can't remember.

23 A. I can't remember but they were important.

24 Q. And do you understand Kalenjin? Do you speak Kalenjin? Let's
25 start there. Do you speak Kalenjin?

26

1 A. One or two words only speak.

2 Q. And the one or two words you speak, were those the one or two
3 words Mr Ruto uttered?

4 A. Probably, probably.

5 Q. All right. Now, in the course of your evidence, when you were
6 answering questions to -- when the Prosecution were asking you questions,
7 you said for the first time ever that Mr Ruto used the word "grabbers"
8 and you gave us the Swahili word yesterday that you claim that he used.
9 First of all, do you accept that when you were seated in that chair on
10 Tuesday, that was the first time that you ever used the word for
11 grabbers? That was the first time you ever told anyone that that was a
12 word that he had used?

13 A. He used that "grabbers" to refer it to Kikuyu community.

14 Q. Well, so you tell us that you had four or five hours with the
15 Prosecution last week, and 15 hours with them in November of last year,
16 and obviously they were keenly interested particularly in these words
17 that Ruto, you claim, was saying, but you didn't tell them he used the
18 word "grabbers" in 20 hours of your conversation. Why was that?

19 A. It is because the message I got and the way you say that Ruto
20 (* indiscernible) used -- he could use any -- he could refer any word
21 concerning Kikuyu. He could use any words. He could use big words, he
22 could use any words that came to his mind when he was on a -- on a
23 meeting.

24 Q. Yes.

25 A. And one thing, I remember it is five years, and it is possible
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1 that I could not have crammed (* Realtime transcript read in error
2 "recounted") everything that was spoken in these meetings.

3 Q. Well, first of all, of course we all agree, particularly after
4 five years, you're going to forget things and you're not going to
5 remember everything that was said. But you see, sir, what you've said
6 concerned you, what you've said you remember and what concerned you is
7 about a sentence or two, you see. It's not very much to remember. Now,
8 are you saying that when you spoke to the Prosecutor in November, and
9 again last week, that you didn't remember that Mr Ruto had used the
10 Swahili word for "grabbers"? Is that what you're saying? And that you
11 only remembered when you sat in that chair two days ago? Is that the
12 position?

13 A. You mean I remembered when I talked to the Prosecution in two or
14 three days ago?

15 Q. No. I'm saying the first time you ever said it, over 20 hours of
16 interview, you never mentioned it to the Prosecutor. That's why it's not
17 in our statements. The first time you ever said he used the word
18 "grabbers" was on Tuesday, sitting there. You'd never said it before.

19 A. Yes. I -- because to the best of my knowledge, I know grabbers
20 and Kikuyu means one thing.

21 Q. All right.

22 PRESIDING JUDGE EBOE-OSUJI: Counsel, just so the record is clear
23 on one thing, witness, did you say -- everyone, I'm looking at page 1 --
24 sorry, page 6, lines 1 and 2. Did you say, you remember it was five
25 years ago and it is possible that you could not recount everything or did
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1 you say it is possible that you did not cram everything? What did you
2 say?

3 THE WITNESS: I did not cram everything that was said in the --

4 PRESIDING JUDGE EBOE-OSUJI: All right. So the word there that
5 appears, "recount," I thought I heard "cram," at line 2.

6 MR HOOPER:

7 Q. In any event, your account of the words that you say struck you
8 and concerned you, you've changed those words every time you have spoken
9 about them. Do you accept that?

10 A. They mean the same. If I mean grabbers and I mean Kikuyu, I mean
11 the same thing.

12 Q. So we've gone from the example as we saw yesterday, we've gone
13 from his saying, as you told the Prosecution in November, that those
14 people who were not satisfied with the ODM leadership should be put in a
15 pickup through to Kikuyus, you said, should be put in a pickup or that he
16 used the word "Kikuyus" and that he also used the word "grabbers." So
17 what is it amongst these various accounts?

18 A. On my account, yes, maybe at the time -- I know you can't
19 understand what was -- and his intention what was in there, no matter
20 what it meant, when I mean Kikuyus were referred as grabbers. Let me
21 tell you, during this time of 2007 campaign, Kikuyus, it was like every
22 40 -- the rest of 41 tribes in Kenya were against Kikuyu, and the leaders
23 during this -- during this campaign, and even the local people like me,
24 where I was, they were all against Kikuyu. So anything they could have
25 said -- they said so many things and anything they could have said
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1 against the leadership of what -- I mean what ODM will -- manifesto --
2 manifesto of -- I don't know how to explain. But manifesto of ODM,
3 anything they could say against it meant Kikuyu. So everything they --
4 anything bad they mentioned, they mentioned Kikuyu even without
5 mentioning the word "Kikuyu."

6 Q. All right. So are you saying that the ODM was against Kikuyu?

7 A. Local people, they were against Kikuyu. And they were hundred
8 per cent sure that Kikuyu will never win in that election.

9 Q. It's just from what you said, are you saying it was ODM who were
10 against Kikuyu?

11 A. Of course, yes.

12 Q. Right. Now, we've heard in this trial, with an earlier witness,
13 and I'm not going to go through it in detail here, but there were --
14 there was a significant body or number of officers of the ODM group,
15 party, who were Kikuyu. That's right, isn't it?

16 A. That's right.

17 Q. I have a list here of various names, both nationally and locally.
18 I'm not going to take up time going through that. We've heard of it
19 before. And Kikuyu are well-represented amongst the -- in the political
20 structure of ODM. That's right, isn't it?

21 A. That's right.

22 Q. And yet you say ODM was against Kikuyu.

23 A. Yes, at this -- where I was in Eldoret, especially in Eldoret as
24 a whole, all the area was, I am 100 per cent sure they were against
25 Kikuyu. I can't talk about the whole of country, but I'm talking
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1 especially where I was and that's in Eldoret.

2 Q. Now, this word "grabbers" that you refer to, did you ever hear
3 Raila Odinga use that word?

4 A. Of course, of course, they used it, and even if they used it,
5 they -- it means the same thing, it means Kikuyu. They referred grabbers
6 as Kikuyu.

7 Q. Now, you say that you were very upset with Ruto's statements and
8 so you left before the end of the speech and also because the crowd
9 became agitated. Did you leave alone when you left the stadium?

10 A. There were other people but I -- I think we were two or three,
11 but after a short distance I went alone.

12 Q. That's what I'm coming to. Did these workmates of yours, did
13 they go with you? Did they leave with you?

14 A. I can't remember whether they followed me because we were -- but
15 (* indiscernible) -- (* overlapping speakers) we came out of the stadium
16 together.

17 PRESIDING JUDGE EBOE-OSUJI: Okay. Counsel, let's be careful.

18 MR HOOPER: Yes.

19 PRESIDING JUDGE EBOE-OSUJI: Okay.

20 MR HOOPER:

21 Q. We are in open session.

22 A. Oh.

23 Q. It's all right. You haven't -- you've not said anything that's
24 identifying to yourself so don't worry about that.

25 PRESIDING JUDGE EBOE-OSUJI: Not yet, not yet, I'm
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1 saying let's --

2 MR HOOPER: (Microphone not activated)

3 PRESIDING JUDGE EBOE-OSUJI: Exactly.

4 MR OMOFADE: Your Honours, for the transcript, page 8, line 24, I
5 believe the word missing is "country." "I can't talk about the whole of
6 the country."

7 MR HOOPER: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: Yes.

9 MR HOOPER:

10 Q. Now, this phrase, 41 against 1, relates to the fact that there
11 are 42 tribes identified generally in Kenya; is that right?

12 A. It's correct.

13 Q. And in 2005, there was a referendum. The referendum sought to
14 change the constitution; is that right?

15 A. That's correct.

16 Q. And people had wanted a change of constitution for a long time,
17 or a large number of Kenyans had wanted a change of constitution; is that
18 right?

19 A. Yes.

20 Q. And essentially what the change was to be was that the state was
21 to be decentralised, that the power and power -- the power and control of
22 resources that was based in Nairobi could be diffused throughout the
23 country and that each province could benefit by -- by that system.

24 Essentially, is that correct?

25 A. According to me, I knew that constitution was politicised and

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1 people understood the word "majimbo," that whenever -- whenever -- when
2 they wanted to change constitution, they wanted Eldoret -- Kenya to be an
3 majimbo state. And the way I understood it and most of the people, local
4 people, understood this change, they understood that -- they had
5 understood that if we change to majimbo, it means every tribe should go
6 back to its -- where it was originated. That is to say, the Kalenjin
7 will remain in Rift Valley. Luo will go to Nyanza. Every tribe -- Kamba
8 will go to Ukambani. That is how local people understood that majimbo to
9 mean.

10 Q. Well, that may have been your take of it, but this question of a
11 changed constitution had been something that President Kibaki had
12 promised that he would do, and in 2005, there was a referendum on a
13 change of constitution, but many people in Kenya saw it as a constitution
14 that had been so fiddled with by Kibaki that it didn't really change
15 things. That was the problem, wasn't it? And they voted no. They said
16 no, we don't want this kind of change, we want a better change.
17 Essentially, that was the problem in 2005, wasn't it?

18 A. Yes. The constitution was rejected. And if I can give you a
19 reason why it was rejected, according to myself. According to me, it was
20 rejected because it was supported -- yes, it was supported by mostly PNU
21 and that is -- I mean, that is -- when I say "PNU," I mean it was
22 supported by Kikuyu. And when it was politicised, the other -- the other
23 group -- that is because in Kenya there is -- they believe in loyal
24 leaders. So because Raila Odinga, Ruto and Ngilu and the rest belongs to
25 other tribes, so local people, local (* indiscernible) saw the -- saw it

1 that these other 42 tribes had become together and only Kikuyu person --
2 only Kikuyu tribe is the one who is supporting this constitution. So
3 they reject it on those grounds but not because the constitution was bad.

4 Q. Would it not be fairer to say that 41 tribes were against
5 Kibaki's idea of the changed constitution and that those 41 also included
6 some Kikuyus who, themselves, were against the change that Kibaki was
7 proposing? Wouldn't that be fair? Do you understand the question? Did
8 you --

9 A. Repeat?

10 Q. Certainly. Well, perhaps I'll reformulate it to make it, I hope,
11 a bit clearer. In the referendum, the vast majority of Kenyans, the
12 41 tribes, if you like, voted no to Kibaki's changed -- suggested change
13 of constitution. Those who voted yes were largely Kikuyu; is that right?

14 A. Those who voted yes, yes, they were largely Kikuyu.

15 Q. But there were also Kikuyu who voted no?

16 A. I can't -- I can't deny that.

17 Q. For example, your president today, Uhuru Kenyatta, he voted no,
18 didn't he?

19 A. I don't know how he voted.

20 Q. Oh, I should think nearly everyone in Kenya would know which way
21 he voted.

22 PRESIDING JUDGE EBOE-OSUJI: Counsel, that's overruled.

23 MR HOOPER: Very well.

24 Q. You don't know that Uhuru Kenyatta voted no, said no to Kibaki?

25 A. I don't.

1 Q. Now, this 41 to 1 really came from that time, from the 2005
2 referendum; is that right? That's where that phrase came from, from
3 2005?

4 A. They have been there, the other tribes have been there in Kenya.

5 Q. But this phrase of 41 against 1, it came about because many
6 people, it was a popular saying, saw that the only people in Kenya who
7 voted yes for the constitution were some of the Kikuyu? That's right,
8 isn't it?

9 A. Mm-hm.

10 Q. And in 2007, amongst the 41 tribes, it was -- and it's generally
11 correct to believe that at least six of them voted PNU, i.e. for Kibaki,
12 the Meru, for example; that's right, isn't it? Would you agree?

13 A. I agree.

14 Q. The Embu, Mbere --

15 A. I agree.

16 Q. -- Kamba --

17 A. I agree.

18 Q. -- Tharaka and Kisii? So it's not 41 against 1, is it? All
19 right.

20 A. I am speaking about where I was, the place I was, so if you tell
21 me about Ukambani and the rest, I don't know how they spoke -- used this,
22 but I am speaking about Eldoret. That is where I was and that's how the
23 people were speaking in that area.

24 Q. I thank you very much.

25 MR HOOPER: Can I just help with some spelling? In respect of
26

1 those -- those tribes? Was it okay? Did they come out? Does it need
2 spelling? Right. Okay. We've got the Meru, M-e-r-u. The Embu,
3 E-m-b-u; Mbere, M-b-e-r-e; Kamba, K-a-m-b-a; Tharaka, T-h-a-r-a-k-a; and
4 the Kisii, K-i-s-i-i.

5 MR OMOFADE: I don't know if counsel is also going to correct the
6 transcript but I see on page 11 there are some missing words. The
7 line 18 seems to be -- well, I recall hearing "they believe in loyal
8 leaders," and I believe the name after Ruto in line 19 was Ngilu.

9 MR HOOPER: Yes, I can't remember.

10 Q. All right. So Kikuyus in some description or other, being put in
11 the back of a pickup and sent back to Central. These are the words that
12 you complain about. And that was quite a shocking thing to say, wasn't
13 it?

14 A. Yes.

15 Q. Now, we've heard how the media and national television were there
16 that day. Did you ever see any reference to those shocking words in any
17 television broadcast, radio broadcast, or national newspaper?

18 A. As far as I know, they could not have reported those words, they
19 could have not reported.

20 Q. So, sir, are you saying it was not reported?

21 A. Yeah. And I say it was not reported because in every meetings,
22 they -- maybe political rally, they don't report the whole word that was
23 talked in that rally but they pick areas that they -- they find is
24 suitable to inform the public.

25 Q. Well, are you saying if something that was shocking was said like
26

1 that, that it wouldn't be reported?

2 A. Of course, yes. Of course, yes.

3 Q. Why wouldn't it be reported?

4 A. I'll give you my view. It wasn't reported because it was somehow
5 like a secret.

6 Q. But you told us this rally was cram packed with tens of thousands
7 of people, including Kikuyu. And there were police there too, weren't
8 there?

9 A. The police, yeah, I think they were present.

10 Q. Kikuyus there?

11 A. Huh?

12 Q. Kikuyus were there?

13 A. Pardon? Kikuyus police or --

14 Q. Well, Kikuyus generally. As we know, you and your friends, for
15 example, were there?

16 A. Well, they know. Maybe can you repeat your question?

17 Q. Well, I don't need to. I think we covered that earlier. And the
18 PNU, they would have been very happy to have made a lot of fuss about
19 something like that, if it had been said, wouldn't they?

20 A. They will not be happy --

21 Q. If that had been said --

22 A. Yes?

23 Q. -- the opposing parties would have been all over it, wouldn't
24 they?

25 A. Yes.

26

1 Q. Yes?

2 PRESIDING JUDGE EBOE-OSUJI: Counsel, can you rephrase without
3 putting the word "all over it"?

4 MR HOOPER: All right.

5 Q. If that or something like it had been said at the rally, it would
6 have received considerable attention from the opposing parties, from
7 Kibaki's party, wouldn't it?

8 A. Those people were there (* indiscernible). Let me answer this
9 way. You say that if something of that sort could have been mentioned,
10 Kibaki's political arm, let me call them politicians, those who were on
11 Kibaki's side could -- could oppose it publicly. Is that what you mean?

12 Q. They would have said: Look at what this man is saying, voters of
13 Kenya, look what this man is saying. Kikuyus, listen to what he's
14 saying, you can't possibly vote for this man. He's going to put you in
15 the back of a pickup and send you back to Central.

16 A. Yes, of course.

17 Q. Of course, you say.

18 A. Yes. He said -- when he said these -- that -- only that word
19 Kikuyu we'll put in a pickup and taken to Central, it spread in Eldoret
20 town. By the following day, even a five-years-old child could tell you
21 what was said.

22 Q. So you say. But not a breath of that in any press report,
23 television report, radio report, no complaint by the PNU, no complaint by
24 any Kikuyus, to any authority?

25 A. I told you -- I told you, with the best of my knowledge, they
26

1 could not have reported that because it was in a secret way. It was in a
2 code, let me say that.

3 Q. In a secret way?

4 A. Yes.

5 Q. At a huge public rally?

6 A. I don't know maybe -- I know you do not understand well Kenyan
7 politician.

8 PRESIDING JUDGE EBOE-OSUJI: Counsel, it looks like things
9 getting into an argument with the witness. We have to move on.

10 MR HOOPER: Yes, I'm moving on.

11 Q. Now, I'm going to show you some videos.

12 A. Yes.

13 Q. They are of ODM rallies held in Eldoret in 2007, and you will see
14 them and you can help me as we go along identify places, people, perhaps
15 even that hat you spoke about?

16 A. Yes.

17 Q. And we can see the size and nature of these rallies. And there
18 are three rallies that we are going to look at. We'll deal with them in
19 the order in which they took place. And having gone through all of them,
20 I will then have a question to ask you.

21 Now, the first rally that we are going to show you, we'll show
22 you a video, just one video, and this is a rally that took place, or it's
23 our case that it took place, on 19 August 2007. I see you're making a
24 note and please do because it will assist you as we go through these
25 things. So this first rally, 19 August 2007?

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1 A. Yes.

2 Q. ODM rally. All right?

3 A. Okay.

4 Q. What I'm going to do is we'll -- we'll play that and you can, of
5 course, understand it.

6 MR HOOPER: For those of us who don't speak Swahili or any other
7 language that might be used, Nandi or whatever, there is, in fact, a
8 transcript at tab 2, which is KEN-D09-0023-0005. The duration of this
9 video is quite short. It's just over three minutes. And it is, I hope,
10 fairly self-explanatory, and I think that we'll be seeing on it various
11 people including Raila Odinga, and, in fact, Mr Ruto. And the video
12 itself is D09-0023-0004. And it hasn't been played before. So this is
13 the first time you, the Judges, will be seeing it. And we are operating
14 from this side so hopefully it will all go well.

15 PRESIDING JUDGE EBOE-OSUJI: So you are giving the thing a trial
16 run, the new system?

17 MR HOOPER: (Microphone not activated)
18 (Viewing of the video excerpt)

19 MR OMOFADE: I believe the witness is saying something.

20 THE WITNESS: I can't see anything.

21 MR HOOPER: (Microphone not activated) I should, of course, add
22 that this is a public -- a public document too so I assume it will be
23 going out.

24 PRESIDING JUDGE EBOE-OSUJI: Court officer, what is happening?

25 MR HOOPER: Perhaps the Court can do it, if it's --
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1 (Trial Chamber and Court Officer confer)

2 PRESIDING JUDGE EBOE-OSUJI: We will not lose hope with the
3 experiment we started. We will try it again. But for now, the court
4 officers will try and play the video from their own station. During
5 break, they will again go through the system to make sure that parties
6 can play their videos and everyone will see it at the same time.

7 MR HOOPER: Yes.

8 THE WITNESS: It's playing now.

9 PRESIDING JUDGE EBOE-OSUJI: They will try.

10 MR HOOPER: Shall I repeat the video we want, or I think the
11 Registry have it. Do you need the number again? No. Thank you very
12 much.

13 PRESIDING JUDGE EBOE-OSUJI: The witness said he's got the feed.
14 (Viewing of the video excerpt)

15 MR HOOPER: Right. Thank you.

16 Q. So at the beginning of that clip, we would hear the reporter
17 voiceover announcing on behalf of KTN Weekend Prime, that they were at
18 the 64 Stadium in Eldoret. And you can confirm, can you, that that was,
19 in fact, the 64 Stadium in Eldoret? Can you confirm that, sir?

20 A. Yes, it was in Eldoret.

21 Q. All right. 64 Stadium?

22 A. Yes.

23 Q. And we could hear the English that was spoken. I have the
24 benefit of the transcript here and perhaps I can read in the translation
25 that I have. And after the reporter has spoken and all he says is in
26

1 English, and he ends by saying:

2 "So one by one, the big five came up to show their faces in the
3 rally attended by 58 legislators."

4 And then we saw Mr Ruto and he was saying: "We do not want any
5 more confusion." And then he spoke in Swahili. He said the coming --
6 saying today -- I'll read it all.

7 "We do not want any more confusion. Today we are saying the
8 coming general elections, the coming general elections is going to be
9 between the people who believe this country belongs to a few and those of
10 us who believe this country belongs to all of us."

11 And after that, we saw Musalia Mudavadi and he was saying, and he
12 spoke in both English and in Swahili, but taken together he said:

13 "I'm saying this because I would like us to ask ourselves, can
14 ODM afford another dislocation? Can it afford another dislocation? So
15 we are saying that collectively we are going to work together and we are
16 going to be together and we are going up to the end."

17 And then we saw Raila Odinga, and he said, and again I translate:

18 "On Tuesday this week, there in Nairobi, on the 14th, King
19 Solomon made a decision and said: These are the owners of ODM. He took
20 the baby and gave it to its rightful owners, isn't he? That is the
21 original ODM."

22 And then the reporter concludes by saying that Eldoret, the scene
23 we saw, was the ground for the relaunch of ODM original. So that was the
24 beginning, that was the launch for ODM for the election of 2007.

25 And the words I've read, does that -- the translation that I read
26

1 out, does that fit in with what you heard?

2 A. Yes, there is maybe one thing I wonder.

3 Q. What's that? Perhaps you can tell us?

4 A. As you said he said Kenya does not belong to few, maybe something
5 of that, that it belongs to all of us. I wonder who are these -- are
6 these few -- who are these few he was referring there.

7 Q. Yes?

8 A. I wonder who was it because Kenya belongs to everybody.

9 PRESIDING JUDGE EBOE-OSUJI: Witness, okay. That's not what the
10 lawyer is asking you now. He's not asking us to get into a discussion of
11 what was meant by the speakers you saw on the video. That is not the
12 exercise. What he's asking you is whether you agree that the translation
13 he read back roughly is consistent with what you heard on the video.

14 THE WITNESS: Yeah.

15 MR HOOPER:

16 Q. Very well. And it was the relaunch of ODM, it was the first
17 major rally for ODM in the 2007 election run; is that right?

18 A. Yes.

19 Q. And I don't know if you confirm that you saw in that clip a man
20 called Henry Kosgey? Did you see him?

21 A. Yes, I saw him.

22 Q. He's a Kalenjin, of course. And then we had Najib Balala. Do
23 you know what ethnicity he has? He's from Coast, I know. Do you know if
24 he a member of any particular ethnic group?

25 A. I know he's from Coast but I don't know his ethnic group.

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Q. Right. Raila Odinga, of course, who of course we know is Luo.

2 A. Yes.

3 Q. Is that right? Joe -- is it Nyagah? Nyagah, where does he come
4 from?

5 A. Nyagah, he comes from Central.

6 Q. Then we saw Mr Ruto, of course. Mr Mudavadi, and what group is
7 he?

8 A. He comes from Western.

9 Q. There was no Charity Ngilu there, was there? She wasn't there?

10 A. Was there --

11 Q. Well, she wasn't on the film?

12 A. She was not there or she was there?

13 Q. Not there, I suggest she hadn't yet joined, moved from where she
14 was into ODM. That came a bit later. Doesn't matter. It's a negative
15 and I understand the problem. And we saw a hat. Mr Odinga was wearing a
16 hat, wasn't he?

17 A. Yes.

18 Q. We'll come back to hats.

19 A. Yes.

20 Q. All right. Now, in terms of the date, we have some newspapers
21 from the next day, which help us anchor the date firmly because we didn't
22 hear the date, of course, in the tape, and for legal reasons we want to
23 be firm about the date.

24 MR HOOPER: So that's the reason that we are going to ask for
25 D09-0023-0012 to be put up on the screen, please. All right. So is that

26

1 up on the screen? Here it is. And we will see it's a copy of the "Daily
2 Nation," a much respected paper in Kenya. It's dated, we can see at the
3 top, Monday, 20 August 2007. It's a public document. And if we look at
4 the report, we can see right at the beginning in the first paragraph it
5 reads:

6 "Orange Democratic Movement leaders held their first public rally
7 yesterday since the split with Mr Kalonzo Musyoka and put up a show of
8 unity."

9 So there we have it. Their first public rally yesterday and we
10 see if we look down, Eldoret North MP, the host of the rally, that's
11 William Ruto, the first to take the vow. And then we have Najib Balala,
12 Joseph Nyagah, Musalia Mudavadi, and lastly, Mr Raila Odinga.

13 PRESIDING JUDGE EBOE-OSUJI: Counsel, what's Mr Nyagah, is he
14 also a featured as a member of the Pentagon? I don't recall now.

15 MR HOOPER: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: What's his ethnicity?

17 MR HOOPER: He's Meru.

18 PRESIDING JUDGE EBOE-OSUJI: All right. Thanks.

19 MR HOOPER: Excuse me.

20 (Defence counsel confer)

21 MR HOOPER: In fact, I'm corrected. He's Mbere, which is, as it
22 were, more central than Meru, if I can put it that way, but there we are.
23 I'm just leaving this.

24 Q. Under the photograph, and we can see Mr Ruto there, you recognise
25 that hat, I take it? Do you recognise the hat?

1 A. Yes.

2 Q. Secret hat? Well, you laugh but that's what it was yesterday.

3 PRESIDING JUDGE EBOE-OSUJI: Counsel, we --

4 MR HOOPER: I'm sorry.

5 Q. And he's holding, we see a clutch of microphones there and
6 I merely mention that, that that obviously relates what we call the
7 strawberry, raspberry and peach there, relates to the colours. We see
8 that in the video itself. And we saw the numbers, the huge numbers that
9 attend these rallies. And we can see, in front of Mr Ruto, apart from
10 the three microphones he's holding, he's -- there is another half a dozen
11 or so, more than that perhaps, national television, all the stations
12 there, radios, and the crowd stretching out as far as one can see. And
13 in the distance, we can see the -- though there is no seats, there is a
14 raised area all the way around the stadium for spectators obviously to
15 watch matches, and whatever. So there we have it. That's I think we
16 have another -- another newspaper dealing with that.

17 MR HOOPER: And I ask for that to go up. That's D09-0023-0013.
18 In fact, can I just pause there a moment. I've got the sequence wrong.
19 Can I have the sequence another way? Can we instead show first the front
20 page and then come to what is the second page? So D09-0023-0011 is the
21 first page of the "Standard" newspaper.

22 PRESIDING JUDGE EBOE-OSUJI: So they are not the same newspaper?
23 It's not --

24 MR HOOPER: We were setting aside the first "Nation" newspaper
25 and now we are looking at the "Standard," but there's two pages from the
26

1 "Standard." So we'll start with the front page. And we see there the
2 "Standard" in its banner and underneath the banner, Monday, August 20,
3 2007. And there on its front page, and its main story, under the
4 headline: "Defining moment, inaugural rally, new look ODM holds its
5 first public rally, and Raila, Ruto, and Musalia lead team in declaring
6 no turning back." And we can see in that photograph there, the large
7 crowd. Looking at these crowds, they are mainly men, aren't they? You
8 don't get many women at these rallies; is that right?

9 A. Yes.

10 Q. There are some women there, but not many. You can see one, in
11 fact. Maybe she's a member of the press. And we can see the press there
12 and their cameras, or some of them. And we see then a photograph at the
13 bottom with the five Pentagon members as they came to be known, the five
14 key players in the ODM movement, and we can see that the journalists
15 write, on the left column:

16 "Original Democratic Movement, ODM, began what it described as
17 its grand march to State House with a bold 'no turning back' message that
18 reverberated across Eldoret's 64 Stadium."

19 MR OMOFADE: Mr President, I'm wondering if at some point there
20 will be a question to the witness because it looks like counsel is
21 testifying now. I think the article speaks for itself. If it's going to
22 go in the record, it should. If not, there should be a question at some
23 point.

24 MR HOOPER: Well, I'm bringing to my friend's attention, and more
25 perhaps significantly the witness's, and of course to you, your Honours,
26

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1 those relevant parts of the page that need to be considered in the
2 context of this evidence. And it's important, in my submission, that
3 evidence is seen in context.

4 PRESIDING JUDGE EBOE-OSUJI: What Mr Omofade is asking is: Isn't
5 this better done by way of question and answer to the witness?

6 MR HOOPER: Very well. I'll try and endeavour to do that.

7 Q. Well, what I've said is right, is that -- you follow what I've
8 been saying? You don't disagree with what I've formulated so far from
9 this paper? What I've read?

10 PRESIDING JUDGE EBOE-OSUJI: I think you've said a lot. Maybe we
11 should take it in stages.

12 MR HOOPER: Very well.

13 Q. Well, here is a "Standard" newspaper relating to an ODM inaugural
14 rally on 19 August 2007 at Eldoret 64 Stadium. And on this material,
15 Mr Witness, do you accept that there was a rally of that kind at the
16 64 Stadium on 19 August 2007?

17 A. Correct.

18 Q. Correct. And do you agree that on the photograph we can see, as
19 I've described, a largely male audience with a large media contingent at
20 the foot, it would appear, of the podium on which the speakers addressed
21 the crowd?

22 A. Yes.

23 Q. And at the bottom, we have a picture of the five leading members
24 of the Orange Democratic Movement?

25 A. Yes.

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Q. Thank you very much.

2 MR HOOPER: And if we now move to the second page of that
3 document, that newspaper, page 2, that's D09-0023-0013 --

4 PRESIDING JUDGE EBOE-OSUJI: Is it tab 6?

5 MR HOOPER: Which is at tab 6, thank you, your Honour.

6 Q. Now, I'm not going to read all this out. But if we look down
7 column 1, about halfway down, we see a reference to Charity Ngilu. And
8 it says:

9 "Health Minister, Mrs. Charity Ngilu appeared to push for a new
10 Kambi unity even as the new ODM front took shape. See separate stories."

11 And that's because she is not yet in the ODM. That's right,
12 isn't it? She was still in another group at that time? Is that right?

13 A. Yes.

14 Q. And then we see in the third column Mr Ruto is referred to and
15 I'll read what it says about him and what he said.

16 "Raila said the 64 Stadium meeting was aimed at drawing the
17 line" -- I'm sorry, Ruto. I'm reading relation to Mr Ruto, sorry.

18 "Ruto said the 64 Stadium meeting was aimed at drawing the line
19 that would decide the future of the country ahead of the December
20 elections. 'We do not want any more confusion in the party. This is the
21 defining moment. And we are now prepared to meet President Kibaki,
22 retired president Moi, Mr Simeon Nyachae, among others, against the ODM
23 -- and others against the ODM team,' Ruto said. This is a defining
24 moment for Kenyans to know" -- well, that's someone else speaking,
25 Balala. It goes on, though, to say that: "He said," this is Balala
26

1 said, "the decision on who the ODM flag bearer would be had been
2 concluded at the meeting of elders and that September 1 would merely
3 rubber stamp the choice."

4 So just pausing there, at this meeting August, which is the
5 relaunch of the ODM, they hadn't yet chosen who was going to be the
6 standard bearer, that is, who was going to be the presidential nominee on
7 behalf of the ODM; is that right?

8 A. Yes.

9 Q. (Microphone not activated) -- spelling Nyachae, N-y-a-c-h-a-e.
10 All right. So there we have, I think, all the material that I want you
11 to look at at this stage in relation to this opening rally, the relaunch
12 of ODM 2007, at the 64 Stadium, 19 August. Now, you, of course, weren't
13 at that meeting, were you?

14 A. I didn't get your question.

15 Q. I've shown you all that but we know that you yourself, you
16 weren't there. You weren't there in August. You didn't attend that
17 rally, did you?

18 A. No (* indiscernible).

19 Q. No, no. Did you hear anything about what was said there or not?

20 PRESIDING JUDGE EBOE-OSUJI: Did you understand the question?

21 THE WITNESS: He asked me whether I heard anything what was said
22 there.

23 PRESIDING JUDGE EBOE-OSUJI: Counsel, you might want to rephrase
24 so that there is a distinction between hearing what was said on the video
25 he watched or hearing what was said at the rally real time, at the time.
26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
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1 MR HOOPER:

2 Q. Yes, I'm talking back then in 2007, in August, big rally in
3 your -- in your town, Eldoret. Can you remember what was being said
4 about it at the time?

5 A. At that time?

6 Q. Yes.

7 PRESIDING JUDGE EBOE-OSUJI: Witness, you have to not shake your
8 head or nod because the transcript will not recognise that. You have to
9 say something. If he asks you a question you have to say "yes," not even
10 "yeah." You have to say "yes" or "no," and just don't shake your head or
11 nod it. Thank you.

12 THE WITNESS: Sure.

13 MR HOOPER:

14 Q. Now in the course of that video we saw a hat. Was this the hat?

15 MR OMOFADE: I just -- before the hat comes in, I think the
16 answer, the witness's response to the earlier question ought to be
17 reflected in the transcript. I think he said no. Perhaps --

18 PRESIDING JUDGE EBOE-OSUJI: He did shake his head. Counsel, can
19 you take the question again?

20 MR HOOPER: Yes, sure.

21 Q. Yes. The question was to the effect of, at the time, back in
22 2007, when this -- this rally had taken place, did you at the time hear
23 anything about the rally? And you'd said I think -- well, did you hear
24 anything about that rally?

25 A. I remember I heard that ODM were coming but I didn't hear any --
26

1 no, let me say I didn't -- I don't know what (* indiscernible).

2 Q. All right. Now in the course of the -- that video, we saw
3 Mr Ruto wearing a hat similar to this one; is that right?

4 A. Yes.

5 Q. And what do you recognise are the symbols on this hat?

6 A. That's Kenyan flag.

7 Q. So it's what I'd call a baseball hat or we can all see what it is
8 but for the transcript --

9 PRESIDING JUDGE EBOE-OSUJI: Transcript watch, counsel, you have
10 to do that.

11 MR HOOPER:

12 Q. This is something that I'd call a baseball hat. It's got the
13 Kenyan symbol, coat of arms, as we call it, its symbol?

14 A. Yes.

15 Q. National symbol on the front. And it's composed of the
16 particular greens and reds and black and white?

17 A. Correct.

18 Q. Constitutes the Kenyan flag?

19 A. Correct.

20 Q. That's correct, isn't it? And it's a very nice hat, isn't it?
21 Can't raise any objection to this hat, can you?

22 A. Correct, it's correct.

23 Q. Is --

24 MR HOOPER: If there is a correction to the transcript, let me
25 know where it needs to be.

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 PRESIDING JUDGE EBOE-OSUJI: Line 4.

2 MR HOOPER: Line 4, oh, yes. The answer at line 4 should read:

3 Kenyan flag. Thank you.

4 Q. Now, we've got just under ten minutes to go before our break.

5 I'm going to ask that we see another video and hope that we can surmount
6 any difficulties.

7 MR HOOPER: The number of the video that I'd like played is
8 D09-0023-0018.

9 Q. And for the benefit of you, Mr Witness, it's again a short video
10 of an ODM rally, this one taking place, we say, on 10 November 2007.
11 (Viewing of the video excerpt)

12 MR HOOPER: Can you stop it, please. Just a moment, thank you.
13 It was a bit too quick that time. I'm grateful that it's up and running
14 there. November 10, 2007. Again at the 64 Stadium. And this video is
15 from National Television. And tab 8, for your Honours and my friends,
16 has the relevant translation.

17 So if that can be played. Thank you.
18 (Viewing of the video excerpt)

19 MR HOOPER: All right. Now, before we come to go any further,
20 I'm wondering if I can have some exhibit numbers for the material that's
21 been put in in this morning's session, and then we can come back after
22 the break perhaps and carry on with where we are.

23 So the first exhibits that we would like, there is 13 that have
24 been referred to this morning. That's going to take a bit of time. I'm
25 wondering if perhaps that could be sorted out after -- during the break,

1 or do you have numbers ready? You have numbers ready. So do you want me
2 to nominate the particular items? All right. First one, I'll just use
3 the last letters, 0044?

4 MR OMOFADE: Well, only if numbers have already been got already,
5 the Prosecution does have a view (* overlapping speakers) --

6 PRESIDING JUDGE EBOE-OSUJI: I was going to -- before we -- we
7 shouldn't skip these things. Would there be any objections, of course,
8 before we start giving numbers?

9 MR OMOFADE: There will be objections to some of the material.

10 PRESIDING JUDGE EBOE-OSUJI: Why don't we take it, then, one at a
11 time. Counsel, you raise the one you want to go in and we take them
12 seriatim.

13 MR HOOPER: Very well. The first one is the video of 19 August,
14 64 Stadium, 0023-0044.

15 MR OMOFADE: Okay. I believe this is 19 November -- 19 August
16 video. Yes, it was shown to the witness. He doesn't say he was there.
17 There is no suggestion that the witness was there at that particular
18 rally. At the very best, it could be marked for identification but we
19 don't think an exhibit number ought to be assigned to this.

20 MR HOOPER: I think the appropriate thing here so to give it a
21 number. It's got *prima facie* authenticity. You can see the nature of
22 the video and its source. It doesn't mean that the Prosecution can't in
23 the future, if something turns up in respect of it, raise that matter,
24 but it places things in a proper context in terms of the transcript, and
25 in a few or several months down the line, it's quite significant to have
26

1 a given exhibit number in a sequential order.

2 PRESIDING JUDGE EBOE-OSUJI: Wait a minute, counsel. Prosecutor,
3 did the witness not say that the video did depict 64 Stadium?

4 MR OMOFADE: Yes, which is why we agree with it being marked for
5 identification. But precisely the opposite of what Mr Hooper says is
6 what I say: The -- if down the line a witness is likely to come forward
7 to actually say, Yes, I was present during this rally, then that's the
8 time this ought to be assigned an exhibit number. But for the time
9 being, it's been shown to the witness, certain aspects of it have been
10 identified, we could mark it for identification. The other thing that
11 I note is that --

12 PRESIDING JUDGE EBOE-OSUJI: But what I'm saying is the witness
13 does in the video identify the 64 Stadium.

14 MR OMOFADE: In fact he does more than that. He identifies
15 individuals in the video. My submission is that that is not sufficient
16 for it to be assigned an exhibit number.

17 MR HOOPER: Your Honour, can I just, I hope, help?
18 (Trial Chamber confers)

19 PRESIDING JUDGE EBOE-OSUJI: The video will be admitted into
20 evidence and assigned an identification number -- sorry, an exhibit
21 number.

22 THE COURT OFFICER: The video material number KEN-D09-0023-0004,
23 public, will be assigned an EVD number, EVD-T-D09-00073 and it can be
24 called alternatively as Ruto Defence Exhibit number 73.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, we need to stop now and

1 take it up again when we -- rather, continue with the exercise when we
2 return at 11.30.

3 MR HOOPER: Yes, very well. Well, all I can say is I think my
4 friend can see the particular items that the Defence are going to seek to
5 be admitted, which will include the hat. So that's altogether -- well,
6 it's what it is. So I don't know if when we come back my friend can
7 perhaps be prepared to deal with any objections.

8 PRESIDING JUDGE EBOE-OSUJI: If you also want to discuss with him
9 in the meantime so that we don't get into the debate.

10 MR HOOPER: Yes, I agree.

11 PRESIDING JUDGE EBOE-OSUJI: I must say something, though.
12 I hope you'll be prepared to deal with it at some point. On the last
13 video that is shown, you've not addressed it with any question and
14 answer, but you will, of course, explain what the symbolism of the hammer
15 is doing in the -- at the rally. There is some large-size symbols,
16 I take it, of hammers.

17 MR HOOPER: Yes.

18 PRESIDING JUDGE EBOE-OSUJI: So we want to know what that means
19 and what --

20 MR HOOPER: Indeed. I understand.

21 PRESIDING JUDGE EBOE-OSUJI: Thanks. We will bring down the
22 blinds and let the witness out, and then we will take our break.

23 (Closed session at 11.04 a.m.)

24 (Redacted)

25 (Redacted)

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Recess taken at 11.04 a.m.)

5 (Redacted)

6 (Upon resuming in open session at 11.40 a.m.)

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

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

9 THE COURT OFFICER: We are in open session, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Mr Hooper, so
11 we have admitted the first video, isn't it? So as I --

12 MR HOOPER: Yes, yes, it's --

13 PRESIDING JUDGE EBOE-OSUJI: I understand it's Ruto Defence
14 Exhibit 73. Is that it?

15 MR HOOPER: Yes. That's as far as we've got and we've got
16 another seven items.

17 PRESIDING JUDGE EBOE-OSUJI: All right. Before we continue with
18 the exercise of admitting materials on to the record as exhibits or for
19 identification, can you confirm how long you will remain with this
20 witness? Mindful of the Prosecutor's indication of interest in
21 re-examination, the Victims and Witnesses Unit will need to line up the
22 next witness and when they need to do that, they want to know.

23 MR HOOPER: I think at this point that 268, the next witness,
24 should be brought for tomorrow and not dealt with today.

25 PRESIDING JUDGE EBOE-OSUJI: All right. Still I want to know

1 when you will finish.

2 MR HOOPER: I honestly do not think that I can finish in this
3 session and probably about an hour into the next. I am reluctant to be a
4 hostage to fortune or at least to expedition, but the Chamber has seen
5 that one does get inevitably a little bogged down with maps and plans,
6 which are necessary and helpful, perhaps a bit more than one would like.
7 But I'm not going to, I hope, deal overmuch with the details of this
8 gentleman's unfortunate experiences subsequent to the election results
9 coming in. I will discuss with him certain matters relating to that.

10 So can I say that, for my part, I'd hope to finish by this
11 afternoon, and with a good following wind, I hope I can finish in time
12 for any few questions that might be coming from my colleague Ms Buisman
13 or indeed to allow for re-examination --

14 PRESIDING JUDGE EBOE-OSUJI: All right.

15 MR HOOPER: -- by Mr Omofade.

16 PRESIDING JUDGE EBOE-OSUJI: Fair enough. We also need to know
17 what to keep out, so how much of the hat we want to keep hearing about
18 and things of that nature.

19 The -- there is litigation to be done on protection measures
20 regarding the next witness. There will have to be submissions from both
21 sides. I assume you know the recommendation of the Victims and Witnesses
22 Unit.

23 MR HOOPER: I don't actually. I know the objections by my
24 friend, and I wouldn't be surprised what the suggestion of the VWU unit
25 is in the light of that.

26

1 PRESIDING JUDGE EBOE-OSUJI: All right. Prosecutor, is it the
2 case that -- have you seen the Victims and Witnesses Unit's
3 recommendation regarding Witness 286 (sic), is it?

4 MR STEYNBERG: Your Honour, if I may, I've been informed of it.
5 My learned friend Mr Garcia has prepared to -- he will be leading that
6 witness and he will be prepared to address the Court on that issue, if we
7 may deal with it like that.

8 PRESIDING JUDGE EBOE-OSUJI: All right. So there are no
9 surprises, the recommendation is a complete blackout of the evidence of
10 this witness in view of special circumstances. If that report has not
11 been given to the Defence, Registrar, kindly forward it to the Defence,
12 the recommendation of the Victims and Witnesses Unit. The VWU is
13 directed to do that. And if there is any special reason to redact
14 anything from that, then they should let us know, but the Defence should
15 have the report to enable them to make their submissions. As a matter of
16 fact, they should be getting those reports anyway as a general rule,
17 subject to any special reason to redact information from the reports.

18 MR HOOPER: Thank you very much for flagging that up. Obviously
19 it's a significant matter and a matter of general principle in the case,
20 and Mr Khan will be addressing the Chamber in respect of that.

21 PRESIDING JUDGE EBOE-OSUJI: Yes. When we get to it.

22 MR STEYNBERG: Your Honour, may I just add that the Prosecution
23 has not been receiving the actual reports. We, on inquiry, are normally
24 told what the recommendation is but no more than that. So if it's going
25 to be provided, could it be provided to all parties, please?
26

1 PRESIDING JUDGE EBOE-OSUJI: Most certainly. I somehow had
2 assumed you'd been getting it since it is your witness that the report
3 concerns. But if it is not the case, most certainly the Prosecution
4 should also get the report, and also essentially the recommendations of
5 the Victims and Witnesses Unit should be shared to both -- to counsel on
6 both sides and the victims' counsel as well, again subject to any need
7 for necessary redactions that need to be made.

8 MR HOOPER: We are very grateful for that order and now
9 your Honour will appreciate that hitherto we've not been informed of
10 these matters, a bit further in the dark perhaps than your Honour and
11 your Honour's colleagues may have thought. Can I just make a correction
12 to the transcript? At line 20 of page 36 it should read "Witness 268"
13 and not "286." So 268, please. Thank you.

14 PRESIDING JUDGE EBOE-OSUJI: I imagine that was my mistake and
15 yes, indeed.

16 MR HOOPER: Thank you.

17 PRESIDING JUDGE EBOE-OSUJI: So we continue, then, Mr Hooper,
18 with the exercise of you registering the materials you've looked at,
19 isn't it?

20 MR HOOPER: Yes, yes. And we've done the first one, as
21 your Honour has correctly stated, and can we ask that the translation
22 also be exhibited. That's D09-0023-0005. Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: Prosecutor?

24 MR OMOFADE: I mean, if the video recording is admitted, we can
25 hardly struggle with the translation. The only caveats that I place is
26

1 the usual one, subject to confirmation that this is accurate in terms of
2 translation.

3 PRESIDING JUDGE EBOE-OSUJI: And Mr Sang's Defence?

4 MS BUISMAN: We have no objection, Mr President.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you. The transcript will also
6 go in as next in the Ruto Defence exhibits.

7 MR HOOPER: The first of three extracts of newspapers. That's --
8 oh, I'm sorry, you want to read that in. I'm sorry.

9 THE COURT OFFICER: The transcript number KEN-D09-0023-0005 will
10 be admitted as the EVD-number, EVD-T-D09-00074. Alternatively it can be
11 called as Ruto Defence Exhibit number 74.

12 MR HOOPER: Thank you. The next one is the article from the
13 "Daily Nation" we saw, and that's 0023-0012.

14 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

15 MR OMOFADE: Can I short-circuit matters by saying the three
16 newspaper articles, the Prosecution's position is that these should not
17 be exhibited. They should be, at the very best, marked for
18 identification purposes. All that's happened is that the witness has
19 identified certain locations and certain individuals within the photos -
20 and I emphasise the photos - contained in these articles. As to the
21 content, there is no evidence as to the veracity of what's reported in
22 the newspaper articles themselves. If a witness is going to come at some
23 future time and attest to the veracity of the contents and when it was
24 published, that's a different matter entirely. This witness can't.

25 PRESIDING JUDGE EBOE-OSUJI: Could we -- is it possible, then,
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1 for you to consider splitting your consideration of the matter as between
2 the photos, the image, being admitted -- or, rather, the material being
3 admitted for purposes only of the image or the photos but not for the
4 commentary around the photos?

5 MR OMOFADE: The -- that would ideally be our position. The
6 difficulty with that is it's admitted or it's not admitted. So I say the
7 middle ground is to actually mark it for identification purposes. We
8 know the witness has identified certain images therein and that's as far
9 as we go. And it's for that very reason that there is a middle ground of
10 marking for identification purposes rather than actually admitting into
11 evidence. Then the split between the two becomes rather difficult to
12 maintain.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, can you reply not only in
14 terms of your original position but also my suggested amendment?

15 MR HOOPER: Yes. The difficulty I'd submit is essentially this:
16 What is MFI? This marked for information? Identification, sorry. It's
17 essentially a documentary limbo. Where does it go in the future?

18 What I'm looking to, and doubtless your Honour is too, is the day
19 when, of course, arguments and particularly written arguments are
20 formulated, and we have then submissions made relating to transcripts.
21 Those transcripts will then refer to, for example, to take the "Nation"
22 newspaper, that Witness X looked at the "Daily Nation" newspaper of a
23 certain date and it was produced. Now, unless it's exhibited and becomes
24 part of the documentary scheme of the trial, it will make no sense.

25 There will be no sense made of the questions and answers and the extent
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1 of them and the relevance of them that are made by a particular witness.

2 Now, I can't be criticised for not reading every word, for
3 example, of a newspaper report and no one is suggesting here essentially
4 that anyone should consider the contents of newspapers as automatically
5 of truth. Of course not. And one looks therefore at the purpose for
6 which these particular newspapers have been referred and the purpose was
7 quite clearly to deal with, first of all, the date. That was important.
8 Secondly, the place and the various indicia of place that appears on the
9 face of the document. It might be in a subsequent to a photograph. It
10 might be as a consequence of images in a photograph. It might be a
11 particular collection of microphones that we can see. It might be a
12 particular hat that's worn. It might be all of these things.

13 So the general content of a newspaper in this case, and for the
14 purposes for which this Defence is entering the document, is in that
15 light. But it shouldn't be necessary in the future that the Defence, for
16 example, revisits these documents in a bar table motion and repeats and
17 repeats the entry of a document or the like. So what I'd submit is that
18 it makes sense for a document that's been shown to a witness and upon
19 which the witness has actively commented - and may I say in terms of this
20 witness, in a helpful and enlightening manner - that in those
21 circumstances that document should be admitted. And we are surprised
22 that the Prosecution have taken this particular view.

23 PRESIDING JUDGE EBOE-OSUJI: That is not what the Prosecution is
24 saying. They are not saying that in those circumstances should these be
25 admitted? Yes, of course, the marking for identification is quite
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1 rightly, as you indicated, it puts the material in a purgatory, so to
2 speak, pending something else happening to rescue it from there and that
3 something else that will need to happen will be when you call another
4 witness who comes and rescues the document from purgatory, either by
5 testifying more authoritatively to the document from the perspective of
6 authenticity and then the document comes in or, rather, you revisit your
7 application.

8 MR HOOPER: Well, first of all, in respect of, for example, the
9 "Standard" newspaper, it may be this -- this -- of course this witness
10 hasn't read this newspaper but he quite accepted the general content and
11 purpose for which that article was produced. Now, the Prosecution in
12 their bar table motion have, of course, argued that where they produce
13 documents that are contemporaneous with events and do not in fact, as it
14 were, fall under any suspicion because they have been generated for the
15 purposes of trial, that they be admitted. And in the same way, here is a
16 document that on the face of it is exactly what we would expect. It's a
17 newspaper. No one is suggesting that the Defence have gone out and
18 manufactured this and printed it off or anything like that. It's what it
19 is. It's what you would have found on the newsstands all over Kenya on
20 20 August.

21 Now, that's produced for its date and other aspects of the -- of
22 its commentary which were acknowledged to the extent that they were
23 acknowledged, by this witness. We would have to go back to the
24 transcript line by line and see exactly which bits of that were
25 acknowledged, but that's something to be done in the future.

1 In terms of the party who may come along and rescue the document
2 from limbo, we are not dealing here with Section 73 of the Criminal
3 Justice Act in my country or where there is a particular statutory
4 regimen for the introduction of documents. We are dealing here with, in
5 fact, court practice. And it's very much a matter for you, the judges,
6 subject, of course, to the statute and rules to determine the kind of
7 information that comes before you and to admit evidence or not to admit
8 it. In terms of newspapers, they will get eventually the weight that
9 they deserve and no more than that. We are aware of that.

10 But why this coy hesitation in terms of MFI labels in respect of
11 a document that is so clearly what it is and which has been clearly put
12 in for the purpose for which clearly it was put and in respect of which,
13 in respect of each and every document, this witness has to some extent or
14 other made his observations which are now part of that transcript? So it
15 makes sense to have these exhibited, to be brought into the -- to be
16 brought into the documentary matrix of this trial.

17 PRESIDING JUDGE EBOE-OSUJI: All right. Let me stop you there.
18 Have you addressed the middle ground that I had suggested, which is
19 whether the document alternatively could be admitted solely for the
20 purposes of image or images on them?

21 MR HOOPER: Well, I'd submit that there is not -- shouldn't be
22 limited just to the images. The images certainly, that's a first step,
23 and I suppose that that would be in terms of an area that we're probably
24 very familiar (* overlapping speakers) --

25 PRESIDING JUDGE EBOE-OSUJI: I know -- I know -- I know that's
26

1 your original position, but I'm asking you now to consider this other
2 specific proposal or suggestion. Is it in your position that it all
3 comes in or nothing at all, or are you prepared to go for the more
4 limited position, if need be?

5 MR HOOPER: I'm ready to go to the more limited position if need
6 be, but I'd have a rider to that, not a rider, an addition to that and
7 that is that it's the images. But, for example, the date, the date on
8 the newspaper, it's not an image, but that's a very important part of the
9 project that led to these particular exhibits being brought in, and so
10 there is one. The second one might be supposing -- I can't quite
11 remember, we were dealing with Charity Ngilu, whether she was there or
12 not, that part of portion which the witness looked at, if he agreed with
13 it, and only if he agreed with the proposition in light of what's said,
14 that again becomes a relevant part of the matrix of the trial in the
15 document. So it's in those terms.

16 PRESIDING JUDGE EBOE-OSUJI: Okay. We've heard enough on this.
17 We have to move on. Mr Omofade.

18 MR OMOFADE: Except your Honours proposed to make a ruling now.
19 Mr Steynberg did want to address you because this is a matter that
20 probably runs through the entire case, the admissibility of certain
21 documents or not.

22 PRESIDING JUDGE EBOE-OSUJI: Briefly, Mr Steynberg, in one
23 minute.

24 MR STEYNBERG: Thank you, your Honours. I'll try to keep it to
25 one minute. As my learned friend points out, this is indeed a matter
26

1 which is going to come up repeatedly throughout the Prosecution case and
2 it seems that the Prosecution and Defence have a fundamentally different
3 view of the production of evidence and the appropriate time to produce
4 evidence. It is the Prosecution's view that the statutory framework and
5 the jurisprudence of this court make it clear that we are -- we have
6 essentially an adversarial process where each - I'm being told to slow
7 down - where each party takes turns to prove its case and to adduce its
8 evidence. Now, at the end of the Prosecution case, its case may be
9 judged on the strength of whether it's produced sufficient evidence to go
10 forward. At that stage, the -- if we succeed, the Defence will have
11 their opportunity. What we wish to avoid is to have the Defence put in
12 all sorts of evidence on the Defence case which should not appropriately
13 be adduced at this stage and then rely on that evidence come the midway
14 mark.

15 What we say is, of course, the Defence are at liberty to show
16 documents to witnesses for the purposes of disproving or -- disproving
17 the reliability or accuracy of their testimony. And, of course, whatever
18 the witness says about that, whether they agree to portions if they
19 dispute portions, that is captured on the record. The document is marked
20 for identification in case there is any doubt about what was being agreed
21 to and what was not being agreed to, but it is sufficient that the
22 witness's evidence on these points are captured. The document itself
23 should only be admitted as evidence on the basis if the witness is able
24 to identify it or authenticate it or there is some other sufficient
25 connection between the witness and the document as this Court has already
26

1 ruled, this Chamber has already ruled in its -- but in the absence of
2 that, what we don't want is to have documents and videos with all sorts
3 of other evidence polluting the record and we don't know what is to be
4 taken into account and what not.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, I think we've heard
6 you.

7 MR KHAN: Mr President, very briefly, with your leave. As the
8 Prosecutor said, this is a fundamental division between the Prosecution
9 and the Defence that has implications for the case. Contrary to the
10 submissions put forward, Mr President, that this material pollutes the
11 case, we say that this material casts significant light on a -- and
12 illuminates the case. Now, your Honours --

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan -- Mr Khan, one second. Can
14 you take seat for a minute?

15 (Trial Chamber confers)

16 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, sorry to cut you short but
17 I believe we've heard all we need to hear on this matter.

18 MR KHAN: Grateful.

19 PRESIDING JUDGE EBOE-OSUJI: All right. The ruling of the
20 Chamber is the newspaper articles are admitted only for the image, only
21 for the image or the images, rather.

22 MR HOOPER: Can I ask if that extends to the dates?

23 PRESIDING JUDGE EBOE-OSUJI: No, just the images.

24 MR HOOPER: Well, obviously I'm not going to -- I fully accept
25 your judgement, but it may be because of the general importance of the
26

1 issue that perhaps at some time the matter could be perhaps more fully
2 argued. I think your Honour may agree with that. It's not an easy
3 area --

4 PRESIDING JUDGE EBOE-OSUJI: Just for the record, I didn't know
5 whether the transcript captured you right. Can you see what it says
6 about what it attributes to you? Is it that you fully accept or you're
7 not going to accept, I'm not sure, the judgement on the matter.

8 MR HOOPER: I fully accept.

9 PRESIDING JUDGE EBOE-OSUJI: Fair enough. We just wanted to
10 clarify that.

11 MR HOOPER: Oh, yes. Never argue with the Judge is my tradition.

12 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

13 MR HOOPER: But your Honour will appreciate that this is an
14 important matter that, I think your Honour would agree, deserves to be
15 revisited at perhaps greater length, and whether or not we persuade your
16 Honours on a future occasion, as the trial develops, we will see.

17 PRESIDING JUDGE EBOE-OSUJI: We will take it then at that point.

18 MR KHAN: Your Honour, can I just say, because I wasn't allowed
19 to speak, that at line -- page 45, line 10, unfortunately it was
20 Mr Hooper that was speaking, it's not myself. I haven't addressed this
21 issue in response to --

22 PRESIDING JUDGE EBOE-OSUJI: I noticed that as well.

23 MR KHAN: -- Mr Steynberg's submissions that were allowed.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you. So, court officer, we
25 will going to admit the newspaper -- can you assist her with what it
26

1 is --

2 MR HOOPER: Sorry, can I just say line 11, page 41, should read
3 "news" and not "noose," or perhaps "news" in American but news.

4 PRESIDING JUDGE EBOE-OSUJI: It is newspaper articles. All right
5 we will take those in and then move on.

6 MR HOOPER: We are on to --

7 PRESIDING JUDGE EBOE-OSUJI: If you can assist her, nominate the
8 particular documents so we can take them one at a --

9 MR HOOPER: Yes --

10 PRESIDING JUDGE EBOE-OSUJI: -- time.

11 MR HOOPER: -- so the next one is 0023-0012, which is the "Daily
12 Nation."

13 (Defence counsel confer)

14 THE COURT OFFICER: So the document KEN-D09-0023-0012, public,
15 will be admitted as EVD-T-D09-000 -- I'm sorry, 00075.

16 PRESIDING JUDGE EBOE-OSUJI: And that will be Defence, Ruto
17 Defence Exhibit 75.

18 MR HOOPER: It would, your Honour, yes.

19 PRESIDING JUDGE EBOE-OSUJI: Proceed.

20 MR HOOPER: 0023-0013, that's the "Standard," page 2.

21 MR OMOFADE: Your Honour, the only reason I rise now is that this
22 particular exhibit doesn't contain any image that's been referred to. It
23 was only the text, I recall, that Mr Hooper read out.

24 MR HOOPER: Yes.

25 MR OMOFADE: I wonder if we need to litter the record with this.

26

1 MR HOOPER: I'll correct that by referring to the image shortly,
2 if need be. So I'll take the witness to the image if that's what my
3 friend requires.

4 PRESIDING JUDGE EBOE-OSUJI: That's all right. It has an image
5 and it does indicate Stadium 64 and that's good enough. Let's not spend
6 time litigating that. It goes in for the image as well.

7 MR HOOPER: (Microphone not activated).

8 THE COURT OFFICER: So the document KEN-D09-0023-0013, public,
9 will be attributed an EVD-number EVD-T-D09-00076. Alternatively it can
10 be called as Ruto Defence Exhibit number 76.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 MR HOOPER: First page of the "Standard" newspaper, 0023-0011.

13 THE COURT OFFICER: The document KEN-D09-0023-0011, public
14 document, will have a number EVD-T-D09-00077. It will alternatively be
15 called as Ruto Defence Exhibit number 77.

16 MR HOOPER: Video 0023-0018.

17 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

18 MR OMOFADE: Well, the Prosecution maintains its position as
19 regards the videos. Firstly the completeness of the particular videos
20 and the fact that there is no way of authenticating the content thereof.

21 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, is this the video with
22 hammers?

23 MR HOOPER: Yes. We can show it again. It's some time since we
24 saw it but we will be showing it again anyway, but it falls into the same
25 category as the earlier video.

26

1 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, you're saying you're not
2 objecting?

3 MR OMOFADE: We hear your Honour's ruling on this. I just go on
4 the record to say that our position remains the same. Of course, we
5 can't go behind the decision your Honours made.

6 PRESIDING JUDGE EBOE-OSUJI: Yes, but the difference was, has
7 this witness been asked any questions on the second video? I don't think
8 so.

9 MR HOOPER: In those circumstances, we can carry on and come back
10 round to it, as it were. I'd be helped, though, whether my learned
11 friends, having seen the various documents we produced in relation to the
12 first video, are in a position to accept that that rally on 19 August was
13 an ODM rally at Stadium 64 on 19 August 2007? It would save a lot of
14 time in the long run if we could know that and perhaps the subsequent
15 matters we come to. Cuts through a lot actually.

16 (Prosecution counsel confer)

17 MR OMOFADE: I'm sorry, your Honour. I've just been conferring
18 on this and we would rather discuss this *inter partes* with the Defence
19 and come back to it. I'm not able to make that admission now.

20 PRESIDING JUDGE EBOE-OSUJI: It looks like, Mr Hooper, you'll
21 have to carry on with your questions, then.

22 MR HOOPER: And just before I do so, can I just make one very
23 brief observation. I notice Mr Steynberg, when he helpfully addressed
24 us, referred to this clearly being an adversarial system where the
25 Prosecution and the Defence have to prove their cases. The Defence don't

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
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1 have to prove a case. The Prosecution have to prove a case. The Defence
2 do not have to prove anything. It's a very fundamental attitude which,
3 well, I'm sure was just misspoken by Mr Steynberg when he said what he
4 did. I say no more about that.

5 PRESIDING JUDGE EBOE-OSUJI: And we don't need to debate the
6 point.

7 MR HOOPER: Well, it's some time now, in fact, quite an hour
8 and --

9 PRESIDING JUDGE EBOE-OSUJI: You have 45 minutes. You will have
10 45 minutes of question time for this witness until lunchtime.

11 MR HOOPER: Well, indeed. Can we show that video again? And
12 I'll ask questions in relation to it.

13 PRESIDING JUDGE EBOE-OSUJI: Court officer, can you run it again,
14 please?

15 MR HOOPER: You know which video it is. It's 0023-0018. Thank
16 you.

17 (Viewing of the video excerpt)

18 MR HOOPER:

19 Q. Mr Witness, we saw a big orange hammer being held up there at one
20 point and I want to ask you about that. Do you agree that the symbol of
21 the hammer was, in fact, a play on words between hammer and Hummer,
22 Hummer being the vehicle of choice of Raila Odinga, i.e. Raila Odinga had
23 that big American brute of a vehicle known as the Hummer and he drove
24 around in that, and people went from saying Hummer to hammer and it
25 became a symbol very much associated with him? Do you agree with that?
26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
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1 A. Yes, Odinga had a Hummer car.

2 Q. And the hammer that we see that becomes very popular for ODM is a
3 play on that word "Hummer," pronounced like "hammer" in Kenya, and it
4 became -- and that was the reason, wasn't it?

5 PRESIDING JUDGE EBOE-OSUJI: Do you know that, Witness?

6 THE WITNESS: Whether that word represent the --

7 PRESIDING JUDGE EBOE-OSUJI: Whether the word -- the lawyer is
8 asking you -- in the video you saw hammers?

9 THE WITNESS: Yes.

10 PRESIDING JUDGE EBOE-OSUJI: And his question to you is: Is it
11 the case that that hammer somehow was a corruption of the word for the
12 motor vehicle Hummer that is associated with Mr Odinga? Do you
13 understand that to be the case? You see Hummer the vehicle and then
14 Hummer the car. Sorry, hammer the --

15 THE WITNESS: I understand the question.

16 PRESIDING JUDGE EBOE-OSUJI: -- sledgehammer, and then you see
17 Hummer the vehicle. Are they confusion of the same thing, as far as you
18 understand?

19 THE WITNESS: Yes, according to me, might mean the same thing.

20 MR HOOPER: All right. Now, I've got again a translation, which
21 is at tab -- tab 8 on your Honour's bundle, and is D09-0023-0019.

22 Q. And we can see there as we heard first of all in English that --
23 the voiceover was telling us that Raila was touring North Rift region for
24 the first time since his nomination to lead the ODM race to the house on
25 the hill. And that they made their way through Eldoret town and went to
26

1 64 Stadium in Eldoret. You just pausing there, in fact from the shots
2 you saw, can you confirm that that was at Stadium 64 in Eldoret?

3 A. It was 64.

4 Q. Thank you. Then Raila Odinga stated in Swahili, and I translate
5 from -- I read from my translation, he stated:

6 "During the nomination process, anyone who will lose will join
7 hands with the one who will have won."

8 And then a little after him, we saw Musalia Mudavadi, did we not,
9 we saw him, and -- well, first of all, before I move to him, do you agree
10 Raila Odinga said that during the nomination process, "anyone who will
11 lose will join hands with the one who will have won"? Do you agree with
12 that? He said that?

13 A. Yes, he said.

14 Q. And do you agree that the -- Mr Mudavadi stated, again in
15 Swahili:

16 "I want us to have a Raila win, and in English we say, we don't
17 want a simple majority, we want a convincing majority"? Do you agree
18 that he said all that?

19 A. Yes, he said.

20 Q. And then we saw Mr Ruto, and again he spoke in Swahili; is that
21 right?

22 A. Right, right, right.

23 Q. And he said:

24 "Before you ask us for the opportunity to have five years, we are
25 asking what miracles are you going to do in those five years which you
26

1 couldn't do in 35 years?"

2 Do you agree that he said that?

3 A. Yes.

4 Q. Then we had Charity Ngilu, and she makes an appearance. And did
5 you recognise her?

6 A. Yes, she is Charity Ngilu.

7 Q. And she spoke in Swahili, which my translation interprets as
8 follows:

9 "He used all of us. He stood on honourable Raila Odinga's
10 shoulders, on honourable Ngilu's, on honourable Wamalwa's, honourable
11 Kalonzo's, all those he used their shoulders to go to the top, then let
12 them go."

13 Did you hear him say that?

14 A. Yes.

15 Q. And to whom was he referring, do you know -- she, I'm sorry, to
16 whom was she referring?

17 A. I think it was President Kibaki.

18 Q. Then we had Raila Odinga, again speaking in Swahili, and it
19 translates as follows:

20 "Are we fighting in Mount Elgon? Aren't we fighting in Tana
21 river? Aren't we fighting in Kuresoi? Is there devolution there? Is
22 there devolution there?"

23 Do you agree that those were his words?

24 A. I didn't understand -- I didn't understand your question.

25 Q. I'm just reading the interpretation that I have of what Raila
26

1 Odinga said towards the end of the transcript we just watched.

2 PRESIDING JUDGE EBOE-OSUJI: Counsel, do you need to dwell on
3 that with this witness?

4 MR HOOPER:

5 Q. I'd like him to agree that that was said. It's where he says,
6 "tu na pigana (* phon) Mount Elgon," right? In English: "Are we
7 fighting in Mount Elgon?" Do you remember Raila Odinga saying that on
8 the --

9 A. Yes, yes, I saw it on the video.

10 Q. Okay. And did he say: "Aren't we fighting in Tana river?"

11 A. Yes, he said.

12 Q. And did he say: "Aren't we fighting in Kuresoi?"

13 A. Yes, he said.

14 Q. And did he say: "Is there devolution there? Is there devolution
15 there?" Did you hear him say that?

16 A. Majimbo.

17 Q. Majimbo, yeah.

18 A. Yes.

19 Q. Yes, all right. And then it goes on, as we heard that tape:

20 "The team now moves to Western Kenya beginning tomorrow and will
21 later in the week launch the ODM party manifesto, a day after Raila hands
22 in his presidential nomination papers."

23 Now, at that stage, would you agree that the ODM party manifesto
24 hadn't yet been -- been launched?

25 A. I agree.

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
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1 Q. That's in November, mid-November, or November the 10th. And
2 would you agree that that would be about November 10th of 2007 when that
3 rally took place in Eldoret?

4 A. Yes, yes, I've seen it.

5 Q. All right.

6 MR HOOPER: I've got a document but it has no image on it, so
7 I think I won't trouble the Court with that, in those circumstances.

8 So there we are.

9 Q. Now, let's just come, then, to this November 10th rally. This is
10 the second rally, of course, at 64 Stadium held in 2007 by ODM. And
11 I accept you weren't at that rally either, were you?

12 A. I -- I don't think that is the one I attended.

13 Q. You attended one in December, didn't you?

14 A. Yes, but not -- I don't think it's that one. It's not that one.

15 Q. No, no, indeed not. Now, we also saw, in that video - and
16 I don't need to go back to playing it - now and again we got a glimpse of
17 what you called a shed, the structure, the small -- well, structure that,
18 at one side of the pitch with the corrugated roof. Did you see that in
19 the video?

20 A. Yes.

21 Q. Thank you. All right. And now we come to the final video, and
22 this is, we say, on 20 December in Eldoret, ODM rally, it's on 20
23 December, make your note, and this is at Huruma Grounds, Huruma Grounds,
24 it's the other place.

25 MR HOOPER: So can we just play that, please? And that is
26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
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1 D09-0021-0041.

2 PRESIDING JUDGE EBOE-OSUJI: Counsel, why don't we register the
3 video now, the one we've watched, so on the transcript these things got a
4 more logical order to it.

5 MR HOOPER: That was 0023-0018, please.

6 PRESIDING JUDGE EBOE-OSUJI: Prosecution, I take it you had
7 anticipatorily stated that you do not object.

8 MR OMOFADE: Well, what I had said is your Honour has ruled on
9 the previous video and we don't want to go behind that ruling. Our
10 reservations of this kind of material going on the record remain the
11 same.

12 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Sang Defence?

13 MS BUISMAN: No objection, Mr President.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you. The video will be
15 admitted as the next in the Ruto Defence exhibits. No doubt, Mr Hooper,
16 you also want the transcript in.

17 MR HOOPER: Oh, yes, indeed, and the transcript number is
18 0023-0019.

19 PRESIDING JUDGE EBOE-OSUJI: On the same basis as before --

20 MR HOOPER: Indeed.

21 PRESIDING JUDGE EBOE-OSUJI: -- the transcript will be admitted.

22 THE COURT OFFICER: Document or the video material number
23 KEN-D09-0023-0018, which is public, will be admitted into evidence under
24 the number EVD-T-D09-00078. It will be called alternatively as Ruto
25 Defence Exhibit number 78.
26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 The transcript to the audio-video material, confidential until
2 otherwise requested, under the number KEN-D09-0023-0019, will have a
3 number EVD-T-D09-00079. And alternatively, it is the Ruto Defence
4 Exhibit number 79.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Mr Hooper,
6 please proceed.

7 MR HOOPER: Thank you very much. So in respect of that video,
8 I've nominated it. Shall I mention it again, 0021-0041? Can we see
9 that?

10 (Viewing of the video excerpt)

11 MR HOOPER:

12 Q. All right. So you -- you saw all that, and let me ask you some
13 questions about that. First of all, did you hear at the beginning, it
14 was said that it was seven days to go before -- before the elections?

15 A. Yes.

16 Q. So we can place, and indeed it's our position that that rally
17 took place on the 20th, 20th of December?

18 A. Yes.

19 Q. And you would accept that? Did you know about that rally?

20 A. Yes, I knew about it.

21 Q. You heard about it, did you?

22 A. Yes.

23 Q. All right. And do you accept that the 20th of December was the
24 date it took place?

25 A. Yes.

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Q. All right. But you didn't go to that rally?

2 A. This is the rally I went to.

3 Q. It is?

4 A. Yes.

5 Q. Oh, I see. I'm sorry. So that was the rally you went to. All
6 right.

7 A. Yes.

8 Q. Before I come back to that, let me just ask you a few things
9 about what was said. Now, it, in fact, started off, as we know, in
10 another place.

11 MR HOOPER: I don't think it's necessary for me to translate what
12 was said there unless your Honour feels you would be assisted by that.
13 You have the transcript. At tab 11, that is, I'm sorry.

14 PRESIDING JUDGE EBOE-OSUJI: If the transcript is already
15 there --

16 MR HOOPER: Yes.

17 PRESIDING JUDGE EBOE-OSUJI: -- then we might as well move on.

18 MR HOOPER: Yes, certainly. But I'll deal with the Huruma
19 Grounds section also with the witness, of course.

20 Q. First of all, Raila spoke and he spoke in Swahili, and I want you
21 to tell me whether you agree that he said the following, that he said:

22 "Orange below, orange in the middle, and orange on top, yes,
23 three-piece suit. We do not want spots."

24 Do you remember him saying that?

25 A. Yes.

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 PRESIDING JUDGE EBOE-OSUJI: Counsel, don't forget to turn off
2 your microphone.

3 MR HOOPER: Right.

4 Q. Did you -- do you remember him saying that?

5 A. Yes.

6 Q. Sorry, I didn't get your answer?

7 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated).

8 MR HOOPER:

9 Q. Yes?

10 A. Yes.

11 Q. And then we have the next matter, where Raila is speaking again,
12 and he says:

13 "I will" something "all this group, you know. Those Goldenberg
14 people, those Anglo leasing people, we will not protect them from the
15 law. I will let the law do its job. Take them to the courts to answer,
16 and our property which they stole, they returned some of it to the people
17 of Kenya."

18 Did you hear him say that?

19 A. Yes, I've heard.

20 Q. And did you hear him say that you -- when you were at the rally
21 you heard him say that, did you?

22 A. What was said here was said on the rally.

23 Q. Yes, and you heard at the rally as well, you heard him say that
24 at the rally?

25 A. Oh, Mr Raila?

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Q. Yes.

2 A. At the rally, I left before he could speak -- you're asking about
3 Raila or you're asking about -- because I'm --

4 PRESIDING JUDGE EBOE-OSUJI: Wait, wait, wait.

5 THE WITNESS: (* Indiscernible)

6 PRESIDING JUDGE EBOE-OSUJI: Counsel, I think the witness has
7 answered that question. He said he left the rally before Mr Odinga spoke
8 and that is what he said all along.

9 MR HOOPER: Well, he said it just now again, yes.

10 MR OMOFADE: What I wanted to make clear is the question seemed
11 to be blurred. We've played a video clip to the witness. It appears
12 that counsel is asking questions as regards what the witness heard being
13 said in the video clip and then it appears also he's conflating that with
14 what the witness heard when he was present at the rally. I think the
15 distinction ought properly to be made for the witness.

16 PRESIDING JUDGE EBOE-OSUJI: That is indeed -- Mr Hooper, that's
17 a tip from your friend. In fact that's what happened. You began your
18 question with whether the witness heard that on the video, but by the
19 time you finished, you had also spliced in the question whether he heard
20 it at the same time.

21 MR HOOPER: Yes, I accept that. It is my lack in clarity. Very
22 well.

23 Q. And then did you also hear on the video Mr Odinga saying this.
24 I translate:

25 "I'll make sure that our civil servants, the teachers, the
26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 police, all the civil servants, will get their due according to the law
2 of our country."

3 Can you confirm he said that on the video?

4 A. On the video.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, can you take the first
6 part of your question again? Because this is something that needs to be
7 clearly on the record, whether the first part of the attributions you
8 made to Mr Odinga, whether the witness, listening to the video, actually
9 hears that on the video.

10 MR HOOPER: Yes.

11 PRESIDING JUDGE EBOE-OSUJI: Regardless of whether he was at the
12 rally or not. But --

13 MR HOOPER: Very well. In relation to the bit I just read or the
14 one before?

15 PRESIDING JUDGE EBOE-OSUJI: The one before.

16 MR HOOPER: All right. Certainly.

17 Q. So let me start again. Perhaps that's the easiest way,
18 Mr Witness. I'm going to go through things again. So if it's
19 repetition, I apologise. I'm asking you whether you heard on the video
20 Raila say the following:

21 "I will something all this group, you know," we don't know what
22 the word is. "Those Goldenberg people, those Anglo Leasing people, we
23 will not protect them from the law. I will let the law do its job. Take
24 them to the courts to answer, and our property which they stole, they
25 return some of it to the people of Kenya."

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Did you hear him say that on the video?

2 A. Yes, yes, I heard.

3 Q. And similarly, on the video, did you hear him say:

4 "I'll make sure that our civil servants, the teachers, the
5 police, all the civil servants, will get their due according to the law
6 of our country"?

7 A. Yes.

8 Q. And then we saw a clip of Mr Ruto speaking, where the translation
9 reads, and tell me if you agree that he said these words:

10 "Kibaki will go back home because he's been defeated. Okay?
11 What they are relying on right now is stealing votes. We are telling
12 them those who have planned to steal votes, we already know them. There
13 are no votes that will be stolen because we are alert."

14 Do you remember he said that?

15 A. Yes, part from his speeches --

16 MR OMOFADE: Well, on the video or --

17 MR HOOPER: Yes, on the video.

18 THE WITNESS: Yes.

19 MR HOOPER:

20 Q. Yes?

21 A. On the video.

22 Q. And finally, Mr Kosgey stated:

23 "Youths, all of them, let's vote 100 per cent."

24 Again, did you hear Kosgey say that?

25 A. On the video, yes.

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Q. On the video?

2 A. Yes.

3 Q. And that's that.

4 MR HOOPER: Can we have the video admitted?

5 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

6 MR OMOFADE: Your Honours, it appears that this has already been
7 admitted. It might be that there is already an exhibit number, not with
8 this witness, but in any event there is no objection.

9 PRESIDING JUDGE EBOE-OSUJI: I understand that what had happened
10 in the past was it was MFI'd. I see Mr Khan nodding. Faal as well, you
11 led this video into evidence, wasn't it?

12 MR FAAL: Mr President, it was marked for identification at that
13 time. It is possible that Mr Hooper may ask that it be admitted into
14 evidence but I --

15 PRESIDING JUDGE EBOE-OSUJI: That is what he's asked for. So we
16 want to know the state of it on the previous occasion when we saw it.

17 MR FAAL: It was marked for identification, and Mr Hooper has the
18 number. Thank you.

19 PRESIDING JUDGE EBOE-OSUJI: We have the number as well. So what
20 is it?

21 THE COURT OFFICER: It has been marked for identification as MFI
22 T-D09-00062.

23 PRESIDING JUDGE EBOE-OSUJI: So we will now convert 62 into
24 exhibit number, Ruto Exhibit 62. Court officer, please proceed with what
25 you need to do on the record.

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 THE COURT OFFICER: So the document KEN-D09-0021-0041, public,
2 audio-video material, previously given number MFI, will be now bearing
3 number EVD-T-D09-00062. It will be called alternatively as Ruto Defence
4 Exhibit number 62.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you. And the transcript as
6 well.

7 MR HOOPER: And the transcript as well.

8 MR OMOFADE: As regards the transcript, no objections subject to
9 the usual reservations.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you. Court officer, please
11 proceed.

12 THE COURT OFFICER: The transcript of this audio-video material
13 number KEN-D09-0021-0042, previously given MFI number, will bear
14 EVD-number T-- EVD-T-D09-00063, and will have -- alternatively can be
15 called as Ruto Defence Exhibit number 63.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Mr Hooper,
17 please proceed. In the course of your questioning -- never mind. Please
18 proceed.

19 MR HOOPER:

20 Q. So are you now saying that you were at that?

21 A. Yes, that is the meeting I attended. I've remembered because
22 I've seen the -- I've seen how it was.

23 Q. You've seen how it was?

24 A. My memory remember.

25 Q. Do you remember yesterday you told us that you'd heard there was
26

1 a meeting that was going to be at Huruma Grounds but it was changed at
2 the last minute to the 64 Stadium and you'd gone along there?

3 A. Yes, I remember there was something, there was a meeting.
4 I can't remember that it was supposed to be on Huruma Ground but it was
5 changed to be at the last minute and it went to the 64 Stadium but --

6 Q. But in your mind's eye yesterday, it was quite plain, as it has
7 been for the last year in what you've said, that the meeting you attended
8 was at the 64 Stadium. Do you remember?

9 A. Yes, yes, I said it was in 64 Stadium but it's long ago, long ago
10 away because I have seen the way the meeting was and I can remember
11 how -- how it was now. My mind refreshed. It is possible I -- I had a
12 confusion before.

13 Q. You see --

14 A. Now --

15 Q. I'm sorry, you were about to say something. I don't want to
16 interrupt you.

17 A. Yes, go ahead.

18 PRESIDING JUDGE EBOE-OSUJI: Before you proceed, please let's
19 clarify a few matters on the record. At line 2, there were two words
20 there that were missing before "remember" appears. I believe he said,
21 "my memory," and then also said "remember." That's what I remember, what
22 I recall. Now -- and also line 14, the missing word or words are: "It
23 is possible," said, "It is possible I had a confusion before."

24 Counsel, please proceed.

25 MR OMOFADE: Mr President, just while we are on the transcript,
26

1 page 62, lines 11 and 12, was the part where I made my intervention
2 regarding the admission of the transcripts. It seems to have been
3 attributed to Mr Hooper rather than myself.

4 PRESIDING JUDGE EBOE-OSUJI: That is indeed the case. We --
5 Mr Hooper, please proceed.

6 MR HOOPER:

7 Q. So let me just put my position clear so that you understand.

8 A. Yes.

9 Q. The main part of your testimony that I've been concerned with is
10 the words that you say Mr Ruto uttered at a meeting, a rally, in December
11 of 2007.

12 A. Yes.

13 Q. And right up until this moment, you've been very clear in your
14 mind that the rally you attended, the only rally of any size you attended
15 in 2007, was at the 64 Stadium. That's correct, isn't it?

16 A. In my mind, it was -- in my mind, it was -- it was 64 Stadium.

17 Q. And in 2007, we know that you didn't attend any other rally.
18 That's right, isn't it, of any size?

19 A. No.

20 Q. You told us of attending Huruma Grounds and you accepted that may
21 have been in September, with Jonathan Bii, with a gathering of a hundred
22 or 200 people. You remember telling us that?

23 A. Yes.

24 Q. But your recollection of the rally where you heard Mr Ruto speak
25 was, of course, a rally with tens of thousands of people; is that right?
26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

Page 68

1 A. Yes.

2 Q. And the Pentagon members; is that right?

3 A. Correct.

4 Q. In December?

5 A. Yes.

6 Q. Is that right? And quite clearly in your mind, as you related
7 it, at Stadium 64?

8 A. Yes, in my mind it was -- I remember it was at 64 Stadium.

9 Q. And I want to be clear what my position is in respect of that,
10 and that is this: You didn't attend any rally at all in December, did
11 you? You've made that up.

12 A. I attended that rally. I attended one rally, and that is what I
13 have remembered when you showed me the video. There were other rallies.
14 I didn't say I attended them. If I could have attended because the
15 events that were there -- I could not remember the event -- what was up
16 there. But I remember the events which were on this video you have
17 played. That's why I say this is the one I attended.

18 Q. I suggest, sir, with respect, that you have changed your evidence
19 because you know the game is up?

20 A. No.

21 Q. You've suddenly realised the error that you've made. You didn't
22 go to any rally, did you?

23 A. I went to this rally. I stick to that. I went there.

24 Q. And that was a rally that you went with your workmates, was it?
25 As you described yesterday?

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 A. Yes, I remember it was the rally that I attended.

2 Q. That's the rally that you went from work because others had
3 insisted you go; is that right?

4 A. That is the rally, yes. I remember it very clearly.

5 Q. That's the rally where you went through the gate into the
6 football stadium, or not?

7 A. About the gate -- going to the gate of 64 Stadium might be I've
8 confused, but this is the rally I attended.

9 Q. That was the rally where you remembered standing there in the
10 stadium, looking at the shed over there; is that right?

11 A. That is the rally I attended. I still insist that is the rally
12 I attended. Whenever I said I was in the stadium, I can confuse my mind
13 because stadium -- there were so many other activities taking -- which
14 took place in the stadium which is not a political rally and I -- and
15 were attended by the people. I could have confused my mind. But in my
16 mind, I remembered it was in 64 Stadium in my mind, but I have remember
17 -- after looking at the video, this is the meeting I attended the -- the
18 -- with the -- this is the gathering I attended, let me say. There is
19 not any other one.

20 Q. There is no shed, is there, at Huruma Grounds?

21 A. There is no shed.

22 Q. But you told us that you saw them all sat in the shed?

23 A. 64 Stadium there is a shed.

24 Q. Yes. But at Huruma Grounds, there isn't?

25 A. No.

26

1 Q. So how does your mind play the trick of seeing these people in a
2 shed that's not there?

3 A. There was a -- there was a platform where they were standing.

4 Q. And we heard yesterday you can't give us really any detail about
5 anything that anyone says; is that right?

6 A. Yes, and that -- there was a -- what made me remember this
7 meeting, it is the way they were and the way they spoke. Maybe you could
8 have played that first part a bit -- a bit longer.

9 Q. They look the same in all the meetings, don't they?

10 A. Pardon?

11 Q. They look the same in all the meetings?

12 A. I don't --

13 Q. Well, they don't look very different in any of the meetings, do
14 they? There is nothing particular about that meeting. What was
15 particular about that meeting that made you think, oh, that's the meeting
16 I attended?

17 A. Speech.

18 Q. Now, you didn't say anything there about pickups and putting
19 Kikuyu in them and sending them back to Central, did he?

20 A. In the video he didn't say it. You played a very short -- short
21 script. You could have played the whole script, the whole speech of it.

22 Q. And in November last year, for whatever advantage you may have
23 perceived, you went to the Prosecutor, you, and you made up a story about
24 being at a rally and you knew you had to say something bad about Mr Ruto
25 and you did, but you got the rally wrong. You got the words wrong. You

Witness: KEN-OTP-P-0487 (On former oath) (Closed Session)
Questioned by Mr Hooper (Continuing)

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1 made it up, didn't you?

2 A. (* Indiscernible)

3 Q. You made the story up?

4 A. No, no, no, no, no.

5 PRESIDING JUDGE EBOE-OSUJI: Counsel, I think it's beginning to
6 get argumentative now.

7 MR HOOPER: (Microphone not activated)

8 PRESIDING JUDGE EBOE-OSUJI: We will adjourn now and return at
9 2.30. We will bring down the blinds and let the witness out of the
10 witness stand for now.

11 Witness, we will be taking our luncheon break. You are still
12 under oath. Please do not discuss your testimony with anybody during
13 lunch. Thank you.

14 THE WITNESS: Yes.

15 (Closed session at 1.01 p.m.)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Recess taken at 1.02 p.m.)

22 (The witness enters the courtroom)

23 (Upon resuming in open session at 2.39 p.m.)

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

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

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 THE COURT OFFICER: We are in open session, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you, Court Officer.

3 Mr Hooper, the question again, when should the Victims and
4 Witnesses Unit line up the next witness?

5 MR HOOPER: Tomorrow morning is my estimate, yes.

6 PRESIDING JUDGE EBOE-OSUJI: All right. So they shouldn't bother
7 doing it today?

8 MR HOOPER: No, no.

9 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, welcome back to
10 the stand, and we are -- your cross-examination continues. We are in
11 open session.

12 THE WITNESS: Okay.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, please try to switch off
14 your microphone immediately upon completion of a question.

15 MR HOOPER: I certainly will, and I'll try and -- there we are.
16 If I can see that red light at the top, it might help me. Thank you.

17 PRESIDING JUDGE EBOE-OSUJI: It would be better if these
18 microphones were protruding from the -- your dais there so you can switch
19 it on and off, but apparently it's not, so we have to --

20 MR HOOPER: (Microphone not activated).

21 Q. Good afternoon, Mr Witness.

22 A. Good afternoon.

23 Q. All right. So now you've moved your rally, as it were, from
24 64 to Huruma. That's right, isn't it? And I'm not going to ask you many
25 more questions about that, but you may remember saying yesterday and
26

1 again today that you'd heard, or thought you'd heard, all the Pentagon
2 members, other than Raila Odinga, speaking. For example, Najib Balala,
3 you remember him speaking; is that right?

4 A. Yes, I remember. I said Pentagon members.

5 Q. And you heard them speaking at the rally when you were there?

6 A. Najib Balala.

7 Q. The man from Coast, the man in the white Stetson hat. You
8 remember him speaking?

9 A. Can't remember. I remember -- I can't remember.

10 Q. You can't remember, can you? You're going into your memory
11 problems again now, I suggest. See, he wasn't there, was he?

12 A. I think he was there. I think he was there. I think he was
13 there.

14 Q. What about Charity Ngilu, the only woman on the platform there?
15 Did you hear her? I think you said you heard her speaking; is that
16 right?

17 A. No, Ngilu, no.

18 Q. Didn't you say earlier that you had? Let me ask you about
19 Joseph Nyagah, a man from Central. Nyagah, did you hear him?

20 A. I didn't stay there long but -- I can't remember.

21 Q. Well, let me put it at its simplest. The rally you claim you
22 were at, who did you hear speak other than Mr Ruto?

23 A. I think there were -- there were -- somebody was welcoming them
24 because they said -- I remember they were late. This meeting was to
25 start at 10.00, at 10.00 in the morning, but when we arrived -- when
26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 I went there is when at least it was starting. And Nyagah, Nyagah, I
2 don't remember very well.

3 Q. So what time did you get there?

4 A. I think around 2.00 to 3.00.

5 Q. So let me --

6 A. That's all --

7 Q. Let me just ask again. Aside from Mr Ruto, who do you now say
8 you heard speak out of any of the Pentagon, including Charity Ngilu? Out
9 of the six, other than Ruto, out of the six, the five Pentagon members
10 and Charity Ngilu, who did you hear speak other than Mr Ruto?

11 A. I think Mudavadi (* Realtime transcript read in error "no one")
12 spoke.

13 Q. Sorry, I didn't catch that?

14 A. Mudavadi.

15 Q. Had you ever heard him speak at a rally? Mudavadi?

16 A. I usually hear him on the TV, I usually watch them on the TV.

17 Q. Have you ever been to a rally other than this one where he spoke?

18 A. Can't remember -- can't remember.

19 PRESIDING JUDGE EBOE-OSUJI: Counsel, pause. Witness, were you
20 about to add something to your answer?

21 THE WITNESS: I say I can't remember. You see, it's long and
22 I -- I didn't knew, if I knew I could have put this in memory, and I was
23 in -- not interested in politics. So I -- I used to hear them in TV,
24 maybe in the news. It's not something that I was so much interested.

25 PRESIDING JUDGE EBOE-OSUJI: All right. Counsel, the reason
26

1 I called for the pause this time was line 12. It's not what the witness
2 said. He said: "I think Mudavadi spoke." He did not say: "I think no
3 one spoke."

4 MR HOOPER: Thank you, your Honour. I missed that. If that
5 could be -- that's my recollection too, so if that could be corrected.

6 Q. And I think I'm right in saying, leaving aside television, you've
7 never been to a rally other than this one, you claim, where Mudavadi
8 spoke. This was the only rally you ever heard Mudavadi speak, that you
9 you've attended yourself; is that correct?

10 A. No, I have never been at another rally, yes.

11 Q. Never been to a -- "I've never been to another rally," you said,
12 I think; is that right?

13 A. That was your question, that's why I said yes.

14 Q. All right. So let me put the question again so we are not -- I'm
15 not misunderstanding you or you me. Aside from this rally at Huruma
16 Grounds in December 2007, have you ever been to any other rally where
17 Mudavadi spoke?

18 A. In 2007?

19 Q. In 2007.

20 A. Can't recall.

21 Q. Well, when could it be? We've heard about Huruma Grounds with
22 Jonathan C -- Bii, sorry. And we've heard about this one. So when --
23 he's not going to speak at Jonathan Bii's (* overlapping speakers) --

24 A. Jonathan Bii, of course, he was speaking. I was not interested
25 in what he was saying, and I told you I happened to be passing there,

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 I think.

2 Q. Yeah, indeed. But Mudavadi wasn't there, was he?

3 A. That's why I'm saying I think he was there. I think -- I think
4 he was there because --

5 MR OMOFADE: Well, I think we need to clarify where we are
6 talking about.

7 MR HOOPER: Yes, we do. I suspect -- well, maybe I'm wrong but
8 I think you understand what we are talking about.

9 Q. Was Mudavadi at Jonathan Bii's rally?

10 A. At this rally which was in Huruma, or any other rally?

11 Q. Yes, I think you understand where I'm coming from. My question,
12 let's go back to my question: Other than the ODM rally in December at
13 Huruma Grounds --

14 A. Yes.

15 Q. -- which you say you went to, and you think Mudavadi spoke, was
16 there any other rally that you attended in 2007 where Mudavadi spoke?

17 A. It's long time ago. I can't remember, because I had been --
18 there was other meetings, but those were not in 2007. I think the --
19 what do they call it? They were unity, they were - how do you call it? -
20 unity meetings. They were calling people from all this side, this side,
21 come together. They speak about peace after election. But it was after
22 the clashes.

23 Q. You see, at the Huruma Ground ODM meeting, the only --

24 A. Yes.

25 Q. Listen to the question, please. At the Huruma Ground ODM
26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 meeting, where you say you were present, where you think you heard other
2 ODM members speak, the only people who were ODM Pentagon members who
3 spoke or who were there on 20 December was Raila Odinga, who you say you
4 didn't hear speak --

5 A. Yes.

6 Q. -- and William Ruto. Nobody else.

7 A. I can agree with you because I can't recall. I can agree --
8 maybe I can agree with you, can't recall.

9 Q. There we go. All right. Now, I'd just like you to look, please,
10 at a newspaper article. Now, you've agreed the date that I put to you,
11 that it was 20 December; that's right, isn't it? You -- you accept that
12 20 December is the date of the Huruma ODM rally?

13 A. Yes.

14 Q. All right. But, nevertheless, I'm going to put in a newspaper
15 here.

16 MR HOOPER: Which is 0023-0031. If we can have that up on the
17 screen. Tab 18.

18 Q. While that's coming up to the screen as a public document, could
19 I just ask you, if you're willing to tell me, and you don't have to tell
20 me, but only if you want to tell me, who did you vote for in the election
21 on the 27th?

22 PRESIDING JUDGE EBOE-OSUJI: Witness, you don't have to tell him
23 that, but it's up to you, if you want to.

24 THE WITNESS: Don't want to say.

25 MR HOOPER:

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
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1 Q. But you can remember, can you?

2 A. Whom I voted for?

3 Q. Yes. Don't tell me, but you can remember who you voted for?

4 A. I can remember whom I voted for but the other people I cannot
5 remember. Remember councillors and others.

6 Q. All right. Have we got this on the screen and can you see it in
7 front of you, Witness? It's taken from the "Standard" newspaper, Kenyan
8 newspaper. It's dated, as we can see at the top, December 21, 2007,
9 Friday. And it has a headline: "Raila now calls for three-piece
10 voting." And I'm not going to trouble you with what that means. We've
11 met it before with another witness. And we can see a photograph there
12 of -- of Raila Odinga and of Mr Ruto, and there is another photograph to
13 the left, of a crowd, and it says underneath: "ODM supporters cheer
14 speakers during a campaign rally in Eldoret yesterday." And looking at
15 that photograph, and having had the benefit of seeing the video as well,
16 can you confirm that that photograph is, indeed, of ODM supporters at a
17 campaign rally in Eldoret on 20 December 2007? Can you confirm that for
18 me, Witness?

19 A. It's indicated there.

20 Q. Well, do you accept that that's the case? Does it accord with
21 your recollection? Now, where were you at Huruma Grounds in your mind's
22 eye? Do you remember you told us about 64 Stadium and how you were here
23 and how -- in relation to the shed? Where were you at Huruma?

24 A. I happened to (* indiscernible) at a place called Shauri, just
25 up, upper side of Shauri -- Shauri -- there is a mountain in that area.

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
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1 All that area is called Shauri. I happened to be there, at the other
2 side of the road.

3 Q. Did you happen to be just walking along the road to go there or
4 not?

5 A. I went with a matatu, public transport.

6 Q. Right. Well, thank you very much.

7 MR HOOPER: And I'm going to move now from that issue, and can we
8 have -- I think the last video was admitted before lunch. Can I ask for
9 this newspaper to go in to the extent that your Honour has already
10 indicated is acceptable?

11 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

12 MR OMOFADE: There is some difficulty. I see the date on the
13 newspaper article. If it's going in for the image on it, there is no way
14 of telling that this particular image relates to the rally that took
15 place the day before or any other rally. In fact, there is no way of
16 telling that this particular image is captured in the video clip that was
17 shown to the witness. So the utility of it, I -- I beg -- I don't see.

18 PRESIDING JUDGE EBOE-OSUJI: We do see hammers up in the air.
19 Anyway, we can admit the document for the image. We will argue about the
20 significance at the right time.

21 MR OMOFADE: I'm grateful, your Honour.

22 MR HOOPER: And I hope very shortly the Prosecution will be in a
23 position to have done those investigations that they should surely have
24 done years ago through public documents such as newspapers, in order to
25 get some idea of these dates. It's extraordinary that we are here today,
26

1 two or three years into this investigation, and the Prosecution are not
2 in a position to even concede to the Defence and to the Trial Chamber
3 itself that the certainty of certain dates relating to public rallies,
4 that they themselves have invoked as incriminating against the accused.
5 I'm not here to make a speech but it is extraordinary. And I am
6 distressed that the Prosecution appear to be taking a persistent attitude
7 of needless obstruction in respect of events and facts which can be
8 simply admitted. No good purpose can be served by this.

9 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, we can move on.

10 MR HOOPER: Thank you. I'm -- oh, yes, thank you. Sorry, Madam.

11 THE COURT OFFICER: The document KEN-D09-0023-0031, public, will
12 bear number EVD-T-D09-00080. It will be alternatively called as Ruto
13 Defence Exhibit number 80.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you, Court Officer.

15 MR HOOPER: Thank you.

16 Q. And thank you, Witness, for answering my questions with the
17 courtesy that you have. I'm going to move on to another subject, another
18 area, the area that you called, named for us as tumdo, which is, of
19 course -- concerns the Kalenjin tradition surrounding circumcision and
20 which I think you would recognise as a transition between boyhood and
21 manhood, common among the Kalenjin; is that right?

22 A. Yes, that's right.

23 Q. And not limited to the Kalenjin. The Kikuyu, too, have a
24 transition ceremony associated with circumcision; is that right?

25 A. It does not exist now.

1 Q. It doesn't exist now?

2 A. Correct.

3 Q. Very well. In any event, I'm not going to ask you any questions
4 about it, but the simple situation was that the place of ceremony which
5 was near you, what went on there was kept secret, as you told us,
6 transcript 54, page 22, and no one knows what goes on apart from the
7 Kalenjin, who keep this ceremony secret. And you said, "I can't say what
8 they were doing" and a lot of the events were at night and in darkness,
9 and I think we can deal with it like this. You can't really help me or
10 the Court very much about those traditions. Would that be fair?

11 A. I didn't get your question.

12 Q. My fault. It was a long question. Let me break it down or put
13 it simply. Given the general circumstances, would it be fair to say,
14 sir, that you're certainly no expert on Kalenjin tradition?

15 A. I'm not an expert.

16 Q. And indeed there is not very much you can tell us about the
17 circumcision ceremony?

18 A. Apart from what I saw I cannot say more.

19 Q. Let me leave the subject of tumdo and turn to the events that you
20 were concerned with, and let me start with 27 December. And I'm going to
21 take this shortly because I'm very keen, as I'm sure you are, that we
22 finish our questioning today. So 27th, you go to vote. Don't tell us
23 where. We are in public session still, right? You go -- you go and
24 vote, and at that time, everything, as you put it, was cool and normal.
25 Do you remember telling us that?

26

1 A. Correct.

2 Q. And the 28th, when you went down to work, it was the same. The
3 29th -- it comes to this. There were no problems that you saw really
4 until the night of the 30th and the announcement of the elections?

5 A. I remember on Saturday, that was on Saturday, there was a very
6 big demonstration in Eldoret. It was on Saturday, before the
7 announcement.

8 Q. But things didn't get difficult, if I can put it like that, until
9 after those election results; is that right?

10 A. That's right.

11 Q. And you were watching the television. I'm not going to go into
12 that in detail. But even you, from what you were watching, did you
13 think, well, these -- something strange is going on on the television?

14 A. Strange like?

15 Q. Well, you were watching it. Didn't you think what you were
16 watching was strange and unusual?

17 A. Yes, I was watching.

18 Q. You told us how -- you remember how the television you were
19 watching, citizen, was it --

20 A. Yes.

21 Q. -- suddenly went blank at a crucial point, and it was after that,
22 as you made your way -- I thought he said yes. Yes, sometimes you say
23 "yes" but it's not being picked up by the transcript. I can see you
24 shake your head and I hear "yes," but sometimes it doesn't come on the
25 transcript. In fact we had an earlier "yes" that was missing. Has that
26

1 come back? I'll come back to it, but there was an earlier answer where
2 the yes was missed. Very well. So you go back to location 2. Do you
3 have that piece of paper in front of you? Because we are in public
4 session. So I'm not going to mention names and if I do have to, I'll go
5 into private session.

6 A. Yes.

7 Q. And you -- you go back to your location at 2, and subsequently,
8 if I can deal with this quite quickly, you witness houses or two houses
9 being set aside -- set on fire. First of all, number 12's, and then
10 number 11's.

11 MR HOOPER: Just pausing there, I've had identified line 14,
12 that's page 75, line 14, where there was a no but it doesn't appear in
13 the transcript. No, there's no answer in the transcript. At this stage,
14 I don't know whether I can go back to it to ask the question.

15 Q. But can I just -- we've got a blank on the transcript, sir, so
16 I'm sorry to trouble you with it. I'm going to basically ask the
17 question in a shortened form?

18 A. Okay.

19 Q. Do you remember the newspaper, the last newspaper we showed you
20 of Huruma Grounds? Do you remember? I showed you a photograph --
21 I showed you a newspaper. And on the newspaper it had a picture of
22 Raila, a picture of Mr Ruto, and it had a picture of a crowd scene
23 holding hammers?

24 A. (* Indiscernible).

25 Q. Do you remember that? And I asked you to confirm and I'd like

Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 your answer again. Can you confirm that that is, in fact, a photograph
2 of the ODM meeting at Huruma Grounds on 20 December 2007?

3 A. I confirmed it was indicated. I said yes.

4 Q. Yes, you did, indeed. Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: Actually, what the witness said on
6 that occasion was that that is what the newspaper said.

7 MR HOOPER:

8 Q. And you confirmed it. Thank you very much. So back to this --
9 these events on the 30th and houses are burning.

10 MR HOOPER: Can we just go into private session for one -- a few
11 seconds?

12 PRESIDING JUDGE EBOE-OSUJI: We will briefly go into private
13 session now.

14 (Private session at 3.08 p.m.)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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Questioned by Mr Hooper (Continuing)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Open session at 3.10 p.m.)

6 THE COURT OFFICER: We are in open session, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Hooper, please
8 proceed.

9 MR HOOPER: Thank you, your Honour.

10 Q. Is it right that part of her house was also burnt, set fire to?
11 On the 30th?

12 A. I can't confirm.

13 Q. All right. Can you confirm that she is, in fact, Kalenjin?

14 A. Yes.

15 Q. All right. Thank you. Now, having seen that these houses had
16 been set afire, you and neighbours gathered together, as I understand it,
17 to defend your own homes; is that right?

18 A. Yes.

19 Q. And just before doing that, you had, in fact, gone down to where
20 number 11's house had been set on fire and there you saw a group of, let
21 me say youths, who were standing, as I understand it, on the other side
22 of the plot where that house stood, and who you assumed or believed had
23 caused the fire; is that right?

24 A. Yes, there were youth there.

25 Q. And that group comprised about 20 or 25 young people; is that
26

1 right?

2 A. Yes, around that number.

3 Q. And they were dressed in normal clothes; is that right?

4 A. Yes.

5 Q. And amongst them, you recognised some whom you had seen from time
6 to time in your neighbourhood as neighbours?

7 A. Yes.

8 Q. And you were surprised, as you told us on Tuesday, "we had no
9 grudge or any conflict between we and them." Do you remember saying
10 that? You were surprised that suddenly it appeared neighbours were
11 turning on you. Do you remember?

12 A. Yes, we hadn't any grudge.

13 Q. No grudge?

14 A. Yes.

15 Q. And not unsurprisingly, in those circumstances, you told us how
16 you attacked them and overpowered them?

17 PRESIDING JUDGE EBOE-OSUJI: Counsel, can you rephrase that, the
18 "not unsurprisingly"?

19 MR HOOPER:

20 Q. So having seen these houses burnt or burning, having seen this
21 group that you identified as the people who had done it, and concerned
22 with your own properties, and because they wouldn't listen to reason,
23 you -- your group attacked them and chased them away; is that right?

24 A. Yes, I said we chased them away.

25 Q. And I make no -- I make no criticism of you for this at all.

26

1 Don't think I do. But in doing so, is it right that, of course, you were
2 armed with what tools you could pick up to protect yourselves and your
3 homes, pangas, things like that?

4 A. Yes, some of our -- some of the people had them and others had --
5 are bringing (* indiscernible), piece of wood.

6 Q. And you overpowered that group and they ran away. Now, among
7 that group, you told us that you believe you recognised number 3 on our
8 list and number 1?

9 A. Yes.

10 Q. They were brothers?

11 A. Yes.

12 Q. Who lived opposite you?

13 A. Correct.

14 Q. You knew their father and their grandfather?

15 A. Correct.

16 Q. After seeing this, did you go and speak to the father about what
17 was going on?

18 A. Their father had died. He was not alive.

19 PRESIDING JUDGE EBOE-OSUJI: All right. The -- I wasn't going to
20 stop the question in substance except that I did not know what answer was
21 going to come. It might have been a little difficult.

22 MR HOOPER:

23 Q. Remember again that we are at all times at the moment in public
24 session. It's more my job in my questions than yours, all right? But
25 we -- we help one another the best we can, don't we?

26

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
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Page 88

1 A. Okay.

2 Q. All right. So the father had died, had he?

3 A. Mm-hm, correct.

4 Q. And was the grandfather living there? Don't give us any names.

5 A. He had died.

6 Q. So were the two, number 1 and number 3, at that time, you say
7 living -- living alone?

8 A. Yes, they had other (* Realtime transcript read in error
9 "another") sisters.

10 Q. Now, later, right at the end of your evidence --

11 MR OMOFADE: Sorry, I just want to correct the transcript.
12 I think the witness said: "They had other sisters." It says "another
13 sister."

14 MR HOOPER:

15 Q. Now, right at the close of your evidence, you said that when you
16 got back on the Friday after all these events, you found your house had
17 been burnt down, and you then said that number 1 and number 3 and number
18 4 had done it; is that right? Had burnt your house?

19 A. I cannot specifically say it was them but they were among this
20 group. It is -- I can call them leaders of the group and they were --
21 there were a lot of people who were burning these houses, yes, and they
22 was among.

23 Q. So the position is you think you saw them there that night, and
24 you believe, from what you saw and what happened to your house, that they
25 had something to do with the burning of your house too?

Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 A. On Friday, or at this night?

2 Q. Well, you have a belief that 1, 3 and 4 burnt your house?

3 A. Yes.

4 Q. But you don't know if they did or they didn't? That would be the
5 position?

6 A. They did it, because the house was burnt.

7 Q. But you just said -- well, on the Friday, when you went there,
8 you didn't see who burnt your house, did you? You weren't there when
9 your house was burnt?

10 A. Correct.

11 Q. All right. Now, since these events, over the years since then,
12 up until this year, from time to time you meet number 3, don't you?

13 PRESIDING JUDGE EBOE-OSUJI: Hold that question and answer. We
14 need to go into private session.

15 (Private session at 3.19 p.m.)

16 (Redacted)

17 (Redacted)

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Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
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Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
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24 (Open session at 3.25 p.m.)

25 THE COURT OFFICER: We are in open session, your Honour.

Witness: KEN-OTP-P-0487 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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

2 Mr Hooper, please proceed, with care, of course.

3 MR HOOPER:

4 Q. And let's move to the next day, the 31st, that's the Monday, all
5 right. So you had the voting day Sunday, now we are Monday, the 31st,
6 and that morning, you -- you sent the persons referred to at, I think, 7
7 and 8, in any event, away, and then you saw a group of Kalenjin forming
8 up and becoming a large number. And then one Kalenjin running near you
9 said words to the effect of: "Run and save your life." Do you remember
10 telling us that?

11 A. Correct.

12 Q. And others were shouting down: "Let them -- let them go." Do
13 you remember that?

14 A. That is correct.

15 Q. And given the numbers, you decided to -- abandon your position,
16 as it were, I suppose your home, and to run away or to flee. Now, at
17 that point, as you ran away, I just want to ask you this: Why didn't you
18 just, having decided that you'd go, having sent members of family away,
19 why didn't you just go to the safety of location number 1?

20 A. That is where I decided to go.

21 Q. You could have fled the area altogether?

22 A. I --

23 Q. If you'd wanted to, you could have gone all the way to location
24 1. That's my point. Yet you decided to stay in the area - I'm not going
25 to name it - which became a war zone, as you put it?

26

1 A. Correct.

2 Q. And would it be fair to say that though you were outnumbered, you
3 were part of the Kikuyu group who were resisting and trying to hold your
4 ground, trying to protect your area, as you saw it? Would that be a fair
5 way of putting it?

6 A. No.

7 Q. At any time that day, were you yourself armed with anything?

8 A. No.

9 Q. So why didn't you just get out of the war zone and go to safety?

10 A. Because location -- when we came to location 2 -- location 8 --
11 location 8 and location 9, it's almost the same area, and this area is
12 populated so we were afraid maybe could move further and meet our enemy.
13 So we decided to come here and see how things were going. We could have
14 gone on and got killed where we were heading.

15 PRESIDING JUDGE EBOE-OSUJI: Counsel, it's now 3.30 and we have
16 to rise at 4.00. In light of your promise to wrap this witness up today,
17 considering that the Prosecution has already indicated they've got
18 re-examination to do, when would be the time of your stopping?

19 MR HOOPER: Yes. Well, I appreciate the problem. I hope your
20 Honour appreciates we lost time, some three-quarters of an hour, just on
21 the issue of admissibility of certain items and some other time as well.
22 We've lost a good hour or so, probably more. I'm easily going to take us
23 up to 4.00, I'm afraid. I don't feel dreadfully guilty about that, but I
24 know I'm also a hostage to what I said which is exactly why I was
25 reluctant to do it, but I have matters, not many, to raise but they take
26

1 time. But I think what your Honour may be saying is, well, get on with
2 it.

3 PRESIDING JUDGE EBOE-OSUJI: Exactly, that's precisely the
4 points.

5 MR HOOPER: So let me get on with it and just ask a few
6 questions.

7 Q. Let me ask you this. Look, let's go to the point where one of
8 the attackers is shot dead and that's something you witness. There were
9 two Kikuyu administrative police, one of them shot that person dead.
10 Were they the same administrative police that had helped you the night
11 before or were they different?

12 A. I'm not sure they were the same because at night before there
13 was -- it was dark, could not know their face clearly. It was at night,
14 let me say that so -- I guess or I think they were the same ones.

15 Q. You think they were the same ones?

16 A. Yes.

17 Q. All right. Do you know their names? Don't tell us if you do.

18 A. No.

19 Q. But -- no you don't. The person they shot, in fact, was a Luo
20 youth; is that right?

21 A. I don't know, I really didn't know his ethnicity.

22 Q. Luo youth who used to work in Barclays Bank. Do you know that?

23 A. I don't know. I didn't know.

24 Q. And had himself been evicted from Pilot the night before. Pilot,
25 of course, being in Huruma. He'd been chased out of there by Kikuyu. Do

1 you know anything of that story?

2 A. No, no.

3 Q. All right. So let me pass over, then, if I may. You speak of
4 then being in location 10 where you saw lorries similar to those that you
5 had seen earlier. And just to be clear, we are of course still on 31
6 December, aren't we?

7 A. Correct.

8 Q. The Monday?

9 A. Yes.

10 Q. And you thought that those lorries may have belonged to Jackson
11 Kibor. Why did you think that?

12 A. When we came back, we were told those lorries belonged to Jackson
13 Kibor.

14 Q. So it's not something you -- it's not something you know. It's
15 something you heard?

16 A. Correct.

17 Q. Now, if we -- we are still in private session, I think.

18 PRESIDING JUDGE EBOE-OSUJI: No.

19 MR HOOPER: We're in open session or in private -- oh, yes, we --
20 can we go into private for just a moment for me to announce a name?

21 PRESIDING JUDGE EBOE-OSUJI: Private session.

22 (Public session at 3.34 p.m.)

23 (Redacted)

24 (Redacted)

25 (Redacted)

26

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Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
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Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
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Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
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Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
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Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
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Page 103 redacted – Private session.

Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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Page 104 redacted – Private session.

Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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Page 105 redacted – Private session.

Witness: KEN-OTP-P-0487 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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22 (Open session at 3.54 p.m.)

23 THE COURT OFFICER: We are in open session, your Honour.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Hooper, you can take
25 that question again.

1 MR HOOPER: Yes.

2 Q. The 30th of December, the night of the election results, did --
3 did -- on that night, I understand that Luos living in Huruma were chased
4 out that night by Kikuyus. They were attacked and chased out of Huruma.
5 Did you ever hear of that, that event?

6 A. No. What I heard, they volunteered to go and join Kalenjins, but
7 they were not killed. But I don't know because -- I don't know -- I was
8 not there but that is what I heard.

9 Q. And they came back with Kalenjin the next day and that's when the
10 big war was, you see, on the 31st.

11 A. Correct.

12 Q. I'm not sure if you do mean to agree with me on that but -- but
13 that's -- that's the position as we -- as we see it.

14 PRESIDING JUDGE EBOE-OSUJI: Well, it was a multiple-purpose
15 question. Maybe you take it one at a time.

16 MR HOOPER:

17 Q. Did you ever hear the following, that on the 30th of December,
18 the night of the elections, Kikuyus chased out Luos from Huruma? In
19 fact, you did answer it because you I think -- but give us your answer
20 again, please.

21 A. I heard they crossed on their own will. That's what I heard.

22 Q. That's what you heard. But do you agree, then, that a large
23 number of Luos, for one reason or another, left their homes in Huruma on
24 the night of the 30th?

25 A. Correct. I heard a large number of them left their homes.

26

1 Q. But you think they left their homes and belongings and -- on a
2 voluntary basis, do you?

3 A. No, they left their belongings behind.

4 Q. Well, they -- they must have felt under threat, mustn't they, to
5 have done that?

6 A. The way I heard, they were joining Kalenjins to reinforce them to
7 attack Kikuyu -- to attack Huruma because Huruma was a very big area and
8 I don't think Kalenjin could have entered Huruma. The way I heard it
9 they went there voluntarily to reinforce Kalenjin. That's what I heard.

10 Q. And did you hear that the next day, those Luos came back, this
11 time with the support of Kalenjin and tried to attack Huruma?

12 A. Correct.

13 Q. Do you remember that?

14 A. That one I heard, yes.

15 Q. But such an attack was doomed to fail because of the strength of
16 the Kikuyu in Huruma; isn't that right?

17 A. I can agree with you.

18 Q. And, in fact, apart from the drunk Kikuyu who you've spoken about
19 who was killed, was that the only Kikuyu that you heard was killed in
20 Huruma?

21 A. I believe there were many but I spoke -- I spoke of the man I
22 saw -- only what I saw in my answer, but I believe there were many.

23 Q. I suggest that there were very, very, very few Kikuyu killed in
24 Huruma, but there were Kalenjin and Luo and Luhya who were killed in
25 Huruma. What do you say to that?

26

1 PRESIDING JUDGE EBOE-OSUJI: What part?

2 MR HOOPER: In Huruma, it's --

3 PRESIDING JUDGE EBOE-OSUJI: What I mean is your question, can
4 you break it up? The part that concerns Kikuyus and there is a part that
5 concerns Luos and --

6 MR HOOPER: Let me deal with it in perhaps one other way, if
7 I may. It's a document we've seen before and it's at -- it's got an EVD
8 number. This one, EVD-T-D09-00064. And I'll bring this up and the
9 witness will see it. It's not the clearest document, as we noticed
10 before. And it's at tab -- and this will be my last issue, last matter,
11 and perhaps we can deal with it.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you have to finish today.
13 It is now almost 4.00 -- it is 4.00, in fact.

14 MR HOOPER: Let me just signpost it then rather than refer to it.
15 It's the document relating to bodies released from the Moi Teaching
16 Referral Hospital, which you may recall gives the names of people, their
17 tribe, date of death and place of death. And we can see there, and I'll
18 refer to it or we will refer to it in due course in this trial, in more
19 detail. I won't deal with this, then, with this witness, but we will see
20 there the numbers and proportions who come from Huruma to support the
21 contention that I just made. So very small.

22 Q. Now, it's 4.00 and I'm on a promise so that's the end of my
23 questioning of you. Thank you for your courteous replies to me. We have
24 our differences. You know what they are. And I wish you well. Thank
25 you.

1 A. Okay.

2 PRESIDING JUDGE EBOE-OSUJI: And the questioning was courteous as
3 well.

4 MR HOOPER: Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: Witness, that is the end of
6 Mr Hooper's questions to you in cross-examination. Sang Defence,
7 position remains the same?

8 MS BUISMAN: Indeed.

9 PRESIDING JUDGE EBOE-OSUJI: So there will be no questions from
10 the Defence lawyers of Mr Sang to you. We will be adjourning now and we
11 will return tomorrow. When we return tomorrow, the Prosecutor will have
12 a few questions for you in re-examination.

13 Mr Omofade, it has to be brief, of course. We want to know how
14 brief so that the Victims and Witnesses Unit will let us know -- sorry,
15 would know when to bring the next witness.

16 MR OMOFADE: It will be inside of 30 minutes. It could well be
17 far less than that but certainly not over 30 minutes in the morning.

18 PRESIDING JUDGE EBOE-OSUJI: All right. And also there will be
19 that litigation on the matter of the protective measures for the next
20 witness.

21 MR OMOFADE: Indeed. My learned colleague, Mr Garcia, will be
22 taking that witness and will address your Honours.

23 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, thank you. You
24 will return tomorrow to -- so we can finish up questions of you. You are
25 still under oath. Please do not discuss your testimony with anybody

1 overnight. Thank you.

2 THE WITNESS: Thank you.

3 PRESIDING JUDGE EBOE-OSUJI: Court officer, please bring down the
4 blinds and escort the witness out of the courtroom.

5 (Closed session at 4.03 p.m.)

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11 (The hearing ends in closed session at 4.04 p.m.)