

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

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 and Joshua Arap
5 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 Tuesday, 8 October 2013
10 (The hearing starts in open session at 9.41 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please call the case.
16 THE COURT OFFICER: Good morning. Situation in the Republic of Kenya in the
17 case of The Prosecutor versus William Samoei Ruto and Joshua Arap Sang, case
18 reference ICC-01/09-01/11, and for the record we are in open session.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 Mr Omofade?
21 MR OMOFADE: Good morning, Mr President, your Honours. The Prosecution
22 would just like to add that trial lawyer Lucio Garcia has joined the Prosecution team,
23 just for the record. Thank you very much.
24 PRESIDING JUDGE EBOE-OSUJI: In order to avoid calling for appearances every
25 morning, I think we will just -- if any counsel wants to announce change, they can let
26
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1 us know so we don't go through the rote of doing it all the time. I take it there's no
2 more changes in appearances? Okay.

3 Mr Omofade, you may proceed.

4 WITNESS: KEN-OTP-P-0326 (On former oath)

5 QUESTIONED BY MR OMOFADE: (Continuing)

6 Q. I'm going to ask you some more questions this morning, and I'd like to focus
7 this morning on the ODM's strategy in the campaigning for the 2007 elections in
8 Kenya. Do you remember we were talking about that yesterday?

9 A. Yes, I do.

10 Q. And do you recall telling us that part of the ODM strategy generally was the use
11 of banners, rallies and the like in the various provinces, in order to drum up support
12 for the party and ultimately, hopefully, to win the elections. You recall that?

13 A. Yes, I do.

14 Q. Now, bearing in mind that the ODM headquarters was based in Nairobi, which
15 was the capital, how was the strategy implemented in the various provinces?

16 A. ODM had its key leaders whom -- most of them were Pentagon members were
17 the key leaders. They have aspirants, but for the key leaders as the Pentagon, the
18 Pentagon were having a responsibility of how to reach and co-ordinate their
19 provinces where they were coming from through the party structure on the ground.

20 Q. And you've used the word "co-ordinate." Does that mean that co-ordinators
21 were utilised in the various provinces by the key Pentagon members?

22 A. Yes.

23 Q. And help us, if you can. What would be the role that these co-ordinators
24 played in the implementation of the strategy of the ODM in the provinces?

25 A. The co-ordinators, most of them were coming from each and every province.

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1 In the structure of ODM leadership, we had a body called a national elections board
2 which had some co-ordinators representing every region, and these co-ordinators,
3 most of them were seconded to help co-ordinate elections through the ODM Pentagon
4 key leaders who could go and identify some of them on the ground and present them
5 to the board and co-ordinate the elections.

6 Q. Would it be fair to say, therefore, that the co-ordinators themselves ought to be
7 familiar with the provinces where they were co-ordinating?

8 A. Yes.

9 Q. And are you aware of how many co-ordinators represented the ODM in each
10 province?

11 A. Yes, I can remember some of their names.

12 Q. Could you help us, please?

13 PRESIDING JUDGE EBOE-OSUJI: Witness, please remember that we're now in
14 open session. Again to remind you, your voice is distorted and your image is not
15 being broadcast to the outside world, but when you answer questions, keep in mind a
16 need to not unnecessarily lace into your answers information that may reveal who
17 you are to those who may know you listening from the public.

18 You may proceed with your answer.

19 THE WITNESS: Your Honour, I would like to have -- there was a list which was
20 given, so I don't have it on my desk.

21 MR OMOFADE: Your Honours, it appears that the PIS list that was handed
22 yesterday probably needs to be placed in front of the witness.

23 MR KHAN: Your Honour, can I just say before that's done that the name of
24 co-ordinators cannot possibly identify this witness, and that can and should be done
25 in public, in my respectful submission.

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1 MR OMOFADE: And, your Honours, we are in public session. The witness has
2 indicated that the response proposed might impact on that, and I think we should be
3 fair to the witness in this case.

4 MR KHAN: Your Honour, I'm always fair to witnesses. My submission was not
5 unfair; it was simply that the question related to co-ordinators. There's no need to
6 refer to those individuals by way of any pseudonym. That was my only point. It's
7 not one of fairness or otherwise.

8 PRESIDING JUDGE EBOE-OSUJI: I might have actually confused the witness by my
9 reminder at the time that I did it.

10 Witness, my -- the reason I reminded you about being in public is not that you should
11 not give names that anybody may know, apart from you. I was only reminding you
12 that be careful with other answers you may give, for instance, in giving these names,
13 to inject any personal connection you may have with them, any of them, that sort of
14 information. But I believe that giving just the names should not be a difficult thing
15 to do, unless you think it is, in terms of revealing your own identity. Not the
16 identities of the names or the identities of the co-ordinators; you may give that. It's
17 your own identity that we're worried about being revealed.

18 THE WITNESS: Your Honour, as I'll be mentioning some of these names and
19 probably they know that it can reveal their background where I'd worked.

20 PRESIDING JUDGE EBOE-OSUJI: Would you be the only one who would know
21 that these people were co-ordinators, or would this be information that any ODM
22 party member would know?

23 THE WITNESS: Your Honour, I'm not the only one who knows.

24 PRESIDING JUDGE EBOE-OSUJI: Then you may give the names.

25 THE WITNESS: Okay.

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1 MR OMOFADE:

2 Q. So --

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

4 Q. So, Mr Witness, could we start with each province, and if you name the
5 province first and then, in relation to that province, then proceed to name any of the
6 co-ordinators that you recall. Could you do that, please.

7 A. Okay. I'll start with the Nyanza Province. The co-ordinator was retired
8 Justice Richard Kwach.

9 Q. And I'm afraid, Mr Witness, we're going to have to proceed through the same
10 process that we had yesterday, by requesting that you also spell some of the names
11 that we might not be familiar with in this courtroom. I believe Richard is a common
12 name. The second name, could you spell that?

13 A. K-W-A-C-H.

14 Q. Thank you. And were there any other co-ordinators for Nyanza Province?

15 A. Nyanza was also subdivided into two. Mr Kwach was also helping -- being
16 helped by the executive director, Madam Janet Ong'era.

17 Q. And I believe you named her yesterday. The transcript reflects the correct
18 spelling.

19 A. And also the treasurer was also from Nyanza, so there were three people:
20 Mr James Omingo Magara.

21 Q. So would it be fair to say Mr Magara was the third co-ordinator in the Nyanza
22 Province?

23 A. The three I've mentioned were co-ordinating Nyanza. Madam Janet and
24 Mr Magara were co-ordinating part of Kisii region and Justice retired Kwach was
25 partly of Luo region, Luo ancestor region.

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1 Q. Would that be all for Nyanza province or are there any others?

2 A. They had also constituencies, co-ordinators, and aspirants, so could reach the
3 people on the ground.

4 Q. In that case, we can leave it there for now. Could we move on to the next
5 province, please.

6 A. There was Western Province. It was being co-ordinated by Mr Kubasu,
7 Flavian.

8 Q. And could you help the transcript with the spelling, please?

9 A. K-U-B-A-S-U, Flavian.

10 Q. And was Mr Kubasu Flavian the only co-ordinator for the Western Province?

11 A. Western Province was in charge of the running mate, Mr Musalia Mudavadi,
12 and he's the one who had Mr Kubasu on the ground to help him.

13 Q. Okay. And were there any other co-ordinators for the Western Province that
14 you recall?

15 A. There were a number of aspirants who were also -- had been nominated to run
16 with the ODM ticket.

17 MR KHAN: Your Honour, could I just ask, were these topics raised in the proofing
18 session by the Prosecution because they've not been disclosed to us, this information?

19 MR OMOFADE: If my friend seeks confirmation from me, no, they weren't raised in
20 the proofing session.

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

22 MR OMOFADE:

23 Q. Witness, could we then proceed to the next province, please?

24 A. We had Coast Province. The key Pentagon leader who was representing there
25 was Mr Najib Balala and the co-ordinator was Dr Mutana Lewa.

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1 Q. And again, Witness, the painful process of spelling the name out, please?

2 A. M-U-T-A-N-A, Mutana. The second name is Lewa, L-E-W-A.

3 Q. And to your knowledge was Dr Lewa the only co-ordinator, or were there other
4 aspirants who you may not necessarily go into -- were there others helping him?

5 A. Yes.

6 Q. We have three provinces now. Could you proceed to the next province?

7 A. We had also Central Province. It was being co-ordinated by Madam
8 Mubing'aru.

9 Q. And are you able to spell Mubing'aru for the record, please?

10 A. M-U-B-I-N-G apostrophe A-R-U.

11 Q. And was she the main co-ordinator, or were there others or simply others
12 helping her?

13 A. There were some people on the ground helping her.

14 Q. And then the next province, please?

15 A. We had Upper Eastern. It was being co-ordinated by Mr Joseph Nyagah, who
16 was one of the key Pentagon leaders.

17 Q. And was he the only co-ordinator in the Upper Eastern Province, or did he
18 simply have others who were assisting him?

19 A. There were others who were assisting him, but I don't know their names. I
20 can't recall.

21 Q. That's fair enough. Could we move on to the next province, please?

22 A. There was also Eastern, which was being co-ordinated by Madam Ngilu. She
23 was being assisted by other co-ordinators down on the ground, but I don't know their
24 names.

25 Q. Thank you. And would that be Madam Charity Ngilu?

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1 A. Yes.

2 Q. And another province, please, Witness?

3 A. There was also Rift Valley Province, which the ODM Pentagon leader was
4 Mr Ruto, Samoei -- William, I mean.

5 Q. And do you recall who the co-ordinator or co-ordinators were for the
6 Rift Valley Province?

7 A. Rift Valley was co-ordinated. There was North Rift and South Rift.

8 Q. So could we start with the North Rift, please?

9 A. There was a co-ordinator by the name Josephine Kuluo.

10 Q. And would Kuluo be properly spelled as K-U-L-U-O?

11 A. Yes.

12 Q. And was there also a co-ordinator in charge of the South Rift?

13 A. There was a co-ordinator called Olekna Koitamet.

14 Q. And could you help with the spelling, Witness?

15 A. O-L-E-K-N-A K-O-I-T-A-M-E-T.

16 Q. And do you know what particular role these particular individuals played in
17 the Rift Valley on behalf of the ODM?

18 A. First of all, they were overseeing the nomination process of ODM during the
19 ODM nomination period. They were also working on some of the campaign
20 material to be distributed within the area. They could also help in case of a dispute
21 during the nomination process. The returning officers, who were also on the ground,
22 could also report to them on their nominated candidates. They could also through
23 the leader co-ordinate rallies; preparation for rallies.

24 Q. And would it be fair to say, therefore, that the co-ordinators on the ground
25 reported directly to the key Pentagon leader?

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1 MR KHAN: Your Honour, I'd ask that there be no leading on this issue. It should
2 be elicited in the proper manner.

3 MR OMOFADE:

4 Q. Who did these co-ordinators report to directly?

5 A. The co-ordinators were reporting to the National Elections Board and also to
6 the -- they had to give information to the Pentagon member; their key Pentagon
7 member.

8 Q. And the two names you've provided us with as regards the Rift Valley, do you
9 know who these co-ordinators reported to?

10 A. Yes. They are to report to the key Pentagon leader and also to the chairman of
11 the elections board, Mr Richard Kwach. The key Pentagon member for that area was
12 Mr William Ruto and the chairman was Richard Kwach.

13 Q. Now, let's backtrack a bit. How did these co-ordinators come to be nominated
14 and appointed?

15 A. The co-ordinators were introduced and appointed by the key Pentagon
16 members who were in charge of their provinces.

17 Q. In that case, do you know who appointed Josephine Kuluo for the North Rift
18 and Olekna Koitamet for the South Rift?

19 A. It was -- it was the ODM key Pentagon member of the -- who was representing
20 Rift Valley who appointed them.

21 Q. And that -- would that be Mr William Ruto?

22 A. Yes.

23 Q. Now, you've referred earlier to the nominees, the nominations, and that the
24 co-ordinators were responsible for the nominations in the various provinces. What
25 nominations are we talking about?

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1 A. The ODM Party nomination.

2 Q. And perhaps I wasn't precise enough, but the nominations for which position
3 within the ODM?

4 A. There was parliamentary seats representing constituencies and civic seats
5 representing wards.

6 Q. And to your knowledge would the key Pentagon member who had appointed
7 co-ordinators, would that key Pentagon member also have influence over the
8 nominees?

9 A. Yes, because they were capable of knowing the party loyalist who will also
10 serve the party's interest and work within the party policy and manifesto. So they're
11 to go for candidates who were loyal to the party, so they had influence.

12 Q. And just to clarify, these were nominations and nominees for the party
13 candidacy rather than for the actual position in government; is that fair to say?

14 A. Yes. This was during party nomination, not the general -- the general election.

15 Q. And if those nominees were successful and subsequently won the general
16 election, would those nominees, therefore, become the actual government
17 representative in the various constituencies?

18 A. Yes.

19 Q. Do you know what influence, if any, Mr Ruto had over the nominees for the
20 Rift Valley Province?

21 A. I can't remember well because things were being judged at the elections board
22 chairman desk. Of course, there were a lot of election complaints, disputes, during
23 the nomination time, and it would have been resolved at the level of the chairman
24 board -- chairman of the board of elections.

25 Q. You've kindly helped about dispute resolution. How were they funded? You

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1 said there had to be rallies in the various provinces. The nominees for the
2 Rift Valley Province, do you know how they were funded in order to get elected?

3 A. For candidates who were not able financially, the party could give them some
4 amount of money. Also, if he is also close or a friend to the ODM key Pentagon
5 leader, he could also talk and he could get some assistance.

6 Q. When you say, "He could also talk and get some assistance," what do you
7 mean?

8 A. He could talk with the ODM key Pentagon member representing that region
9 and can help him.

10 Q. So the nominees for the Rift Valley Province, are you aware of whether the key
11 Pentagon leader for that province, Mr Ruto, are you aware of whether he provided
12 any financial assistance to them?

13 A. I can't be specific that he provided for them financial assistance, but being that
14 they were close and loyalist, they had maybe assisted.

15 Q. Do you know which candidates ended up being the nominees for the
16 Rift Valley Province under the ODM ticket?

17 A. There were quite a number of candidates because almost 90 per cent of the
18 parliamentary seats were from the ODM side, and I -- I might not have known all
19 their names, but I know a few.

20 Q. And you told us yesterday that the key Pentagon member would have quite a
21 lot of influence in their respective provinces. Would it be fair to say that Mr Ruto
22 was really influential in the Rift Valley Province?

23 A. Yes.

24 Q. You've also told us that the majority ethnic group in the Rift Valley Province
25 was Kalenjin. Do you remember telling us that?

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1 A. Yes.

2 Q. And do you know what Mr Ruto's ethnicity is?

3 A. I know he's from Rift Valley and he's a Kalenjin, but there are sub-tribes within
4 Kalenjin.

5 Q. And we've talked about the political influence. Within the Kalenjin ethnic
6 group, would you say that Mr Ruto also holds some influence?

7 A. Yes.

8 Q. And what makes you say this?

9 A. Mr Ruto's effort was seen during the campaign time and even during elections
10 time because he could afford to garner the support of the region where he comes from
11 and he consolidated a big support for ODM, and that also automatically indicates that
12 he was having a support from the region where he comes from because most of the
13 members of parliament were from ODM and he campaigned seriously and delivered
14 for ODM within the area of Rift Valley.

15 Q. And that relates to the political influence and support. But help us, please,
16 with amongst the majority Kalenjin ethnic group within the Rift Valley, what position
17 did he hold there?

18 A. Within the political structure, by then Mr William Ruto was our kingsman in
19 ODM for Rift Valley.

20 MR KHAN: Perhaps it can be clarified: Is it "kingsman" or "kinsman"?

21 PRESIDING JUDGE EBOE-OSUJI: I was going to wait. I was expecting the
22 Prosecutor to clarify the reference. I'm sure he will. If not, I will ask the question.

23 MR OMOFADE: Indeed, your Honour, I was minded to.

24 Q. The -- well, what do you mean by "kingsman"?

25 A. He was the king of that region, first of all.

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1 Q. And when you refer to king, do you mean K-I-N-G?

2 A. Yes.

3 Q. And when we were -- when you were testifying yesterday, you attempted to
4 provide the ethnic composition of the Rift Valley. Do you remember doing that?

5 A. I can remember. I said that the majority tribe were Kalenjin.

6 Q. And would it be fair to say that you also said there were Luos, Kisii, Kikuyu
7 within the Rift Valley as well?

8 A. Yes.

9 Q. So when you say that Mr Ruto was the king of the Rift Valley --

10 MR KHAN: I would ask that my learned friend be a little bit careful. There's been
11 a number of questions, in fact going from page 11, line 9, where my learned friend has
12 been leading on these issues.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let's do it this way. If you have any
14 objection, at the point where you have it, I think the proper thing would be for you to
15 object at that point. It's problematic if you didn't object to a question and then you
16 come back later to say you should have objected but due to your own good graces,
17 you didn't; now you are. It doesn't help us. I think the best thing is at the point
18 where an objectionable question is asked, object at that point and then we'll deal with
19 the ruling and move on.

20 MR KHAN: My objection in that case is the question does not reflect the previous
21 answer given by the witness.

22 PRESIDING JUDGE EBOE-OSUJI: The current question --

23 MR KHAN: In that sense, it is leading.

24 PRESIDING JUDGE EBOE-OSUJI: The current question, you mean?

25 MR KHAN: Indeed, the current pending question is not -- does not reflect the

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1 previous answer given. To that extent, it is misleading and I object.

2 MR OMOFADE: Your Honour, just for the record, and I'm reading from the record

3 what the witness said when I asked, "What do you mean by 'kingsman'?" He said,

4 "He was the king of that region, first of all." I then proceeded to ask -- and accept the

5 witness is not referring to the Rift Valley, what I proposed to do was to ask him if

6 Mr Ruto was therefore the king of the Rift Valley. But what I will ask the witness

7 therefore is:

8 Q. What region was he the king of?

9 A. Hello?

10 Q. I'll repeat the question.

11 A. Repeat it, yeah.

12 Q. When you said Mr Ruto was the king of that region, what region were you

13 referring to?

14 A. Rift Valley.

15 Q. And then my next question will therefore be: Are you saying he was king over

16 all the ethnic groups in the Rift Valley, the ones that we mentioned earlier?

17 A. He was representing the whole of Rift Valley.

18 Q. How do you know he was the king?

19 PRESIDING JUDGE EBOE-OSUJI: You mean of the Rift Valley?

20 MR OMOFADE: In this context, all my questions are in respect of the Rift Valley.

21 THE WITNESS: Can you repeat your question?

22 MR OMOFADE:

23 Q. The question was: How do you know that he was the king of that region?

24 MR KHAN: Well, your Honour, can I just say the reason I objected earlier, so it's

25 clear, is the witness's first answer was quite clear and he was talking about the ODM

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1 structure and that was the genesis question and my learned friend is trying to widen
2 it.

3 Your Honour, it is objectionable, but your Honour if my friend thinks it is relevant
4 and is not misleading then I will leave it to him. But, your Honour, he was very
5 clear in the testimony. He talked about king of the ODM and now it's being
6 morphed quite deliberately, I say, into something else.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, you may proceed.

8 MR OMOFADE: Your Honours, if we're reading the same transcript, my transcript
9 says "king of the region."

10 PRESIDING JUDGE EBOE-OSUJI: You may proceed with your question.

11 MR OMOFADE: Indeed, your Honour.

12 Q. So, Mr Witness, how do you know that Mr Ruto became a king?

13 A. First of all, if you look at the Pentagon members, each and every Pentagon
14 member had a task to deliver. So they were representing their regions and Mr Ruto
15 was representing Rift Valley and he was heading that Rift Valley, the same to the rest
16 of other Pentagon members.

17 Q. We -- I attempted to make this clarification earlier and you've told us that
18 Mr Ruto -- that his ethnic group is Kalenjin. Are you aware of any title that he has
19 amongst the Kalenjin?

20 A. I can say that I know quite a number of titles he has, but during that time of
21 politics he was crowned to be the elder leading that place.

22 Q. And which place --

23 PRESIDING JUDGE EBOE-OSUJI: One second, please.

24 If you could hold the question, Mr Omofade, you may ask it later, but just for the
25 transcript I want to clarify what the witness just said.

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1 Witness, the transcript reports you as saying this, quote, "I can say that I know quite a
2 number of titles that he has, but during that time of politics he was crowned to be the
3 elder leading that place," unquote.

4 What I need you to clarify now is the first part. Did you say you can say he
5 knew -- you knew quite a number of titles, or were you saying you were unable to say
6 that?

7 THE WITNESS: Your Honour, I can say -- I do say that I don't know if he has got
8 other titles --

9 PRESIDING JUDGE EBOE-OSUJI: Fair enough, that's fine.

10 Mr Omofade, please proceed.

11 THE WITNESS: -- apart from the political one.

12 MR OMOFADE:

13 Q. Mr Witness, I notice you're glancing repeatedly at the Defence direction.

14 Could you address the Judges when you respond to your questions, please?

15 PRESIDING JUDGE EBOE-OSUJI: It's best, actually, that you -- you are here to talk
16 to us and your testimony you are giving to the three of us sitting up here. So, yes, do
17 concentrate your attention on us.

18 MR KHAN: Your Honour, can I just say that a fair way of putting it should have
19 been fair. The witness has been looking at my learned friend since yesterday, when
20 he answers a question, and for my learned friend to put the question in that manner is
21 really unfair and I'd ask him to reflect over it.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan is also correct that the witness had also
23 been looking at Mr Omofade in the course of his testimony. He'd been looking to the
24 questioner, he'd been looking at us and he'd also been looking at Mr Ruto's side of the
25 courtroom. So the -- or the Defence, rather, side of the courtroom.

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1 So it's -- but do concentrate your attention to us, Witness. We are not criticising you
2 that you've done anything wrong so far, keep that in mind, but just so that we avoid
3 any unnecessary discussions about this in future.

4 THE WITNESS: Your Honour, I also request -- because I'm a human being, I also
5 need to be given a space to look round. So I don't think I'm doing any big mistake in
6 that. So maybe if I look this side, or the other side, please let people take it equal
7 because everybody is here to get what I'm saying. Everybody is here to listen to
8 what I'm saying.

9 PRESIDING JUDGE EBOE-OSUJI: You are quite right. You're a human being.
10 You need to be -- we do not want to put you -- we do not want to put you in a
11 strait-jacket where you look only in one direction, but try -- as much as possible, look
12 more at us than elsewhere. Thank you.

13 THE WITNESS: Thank you.

14 MR OMOFADE:

15 Q. And, Mr Witness, can I also say that I do not mind if you do not look at me at all.
16 I would rather you look at the three Judges opposite you when I'm asking you
17 questions.

18 The last question that I was asking you is: Which place do you refer to when you
19 said he was the king of that place?

20 A. I said Rift Valley.

21 Q. And are you therefore saying he was king over all of the ethnic groups in the
22 Rift Valley?

23 A. Yes.

24 Q. Who crowned him king?

25 A. Mr Ruto was crowned by the community of Rift Valley and also the other

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1 Pentagon members also went when he was being crowned.

2 Q. Do you know when this happened, the year?

3 A. It was in 2007. Just taking a lot of time, so I can't remember the month and the
4 date.

5 Q. Would it be before the elections in 2007, in any event?

6 A. Yes.

7 Q. Do you know which other Pentagon members attended this coronation?

8 A. Yes.

9 Q. Did all of the other Pentagon members attend?

10 A. It was not all of them, but I can remember Raila Odinga attending and some of
11 the politicians, some of the Luo elders, some of the Kalenjin elders.

12 Q. And how did you personally get to know about this event?

13 A. It formed when the political season had started and the ODM leaders had
14 started looking for votes.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Prosecutor, one second please.

16 Witness, you've listed some of the ethnic elders that attended. You said some of the
17 Luo elders attended the coronation. You also said some of the Kalenjin elders
18 attended the coronation. Do you know whether any Kikuyu elders had also
19 attended the coronation?

20 THE WITNESS: I don't know.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 MR OMOFADE:

23 Q. And, Witness, just for the sake of the transcript the question I posed to you was,
24 "How did you personally get to know about this event?", and the transcript appears to
25 have missed part of your response. Do you think you could repeat it for the Court,

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1 please?

2 A. As I had said earlier on, it was -- political season had started, so the ODM as a
3 party had started looking for votes on the ground and (Redacted)
4 (Redacted)

5 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, you need to move on.

6 MR OMOFADE:

7 Q. But although you say -- you list the number of people who attended, but how
8 did you get to know of the event?

9 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade.

10 MR OMOFADE: Your Honour, I'll move on from this.

11 Your Honours, the next phase of my questions have to be in private session. I've
12 tried as much as possible to compartmentalise my questioning, but it looks like the
13 next phase of questioning should be in private.

14 PRESIDING JUDGE EBOE-OSUJI: For how long are we looking here? We have 15
15 minutes to break-time.

16 MR OMOFADE: Up to the break-time and certainly for the next session as well.

17 PRESIDING JUDGE EBOE-OSUJI: Well, let's go into private session and see how it
18 goes.

19 (Private session at 10.44 a.m.) Reclassified into open session

20 THE COURT OFFICER: We are in private session, your Honour.

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

22 Mr Omofade, the reason I told you to move on, (Redacted)
23 (Redacted)
24 (Redacted)
25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 MR OMOFADE: (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 Q. Mr Witness, we're now in private session. Do you recall telling us yesterday

9 (Redacted) Do you

10 remember that?

11 A. Yes.

12 Q. And I know you also referred to other premises that the ODM had. Could you
13 tell us, if any, what premises the ODM also had at the time of the elections?

14 A. Apart from Orange House which is located along Menelik Road, next to Yaya
15 Centre. There was also another office in Upper Hill, Nairobi, called Raila Odinga
16 Centre; in short, ROC.

17 Q. So when you say "Raila Odinga Centre," is this an acronym for "ROC"?

18 A. Yes.

19 Q. We are in private session.

20 Were there any other premises that you know of?

21 A. There was also another one next to Lavington estate called Pentagon House.

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 Q. And what activities were carried out by the ODM at ROC House?

8 A. ROC was mainly meant for resource mobilisation.

9 Q. And could you explain that a bit, please? What do you mean by resource
10 mobilisation?

11 A. There were some of the ODM activist and members who were in that office
12 helping the party, and more so the party presidential candidate, to mobilise resources
13 from friends within Kenya, outside Kenya, for campaign.

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 A. Yes, I do.

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1 Q. Could you give names of any of the persons who worked there?

2 A. I think I'll use this PSI sheet, or I'll just call the names?

3 PRESIDING JUDGE EBOE-OSUJI: You can call the names. We are now in private
4 session.

5 THE WITNESS: Thank you. (Redacted) Mohamed Ishakia. He was at the Pentagon
6 House.

7 MR OMOFADE:

8 Q. Any other names that come to mind?

9 A. (Redacted) Caroli Omondi. (Redacted) Caesar Asiyo.

10 Q. Do you recall any others? If you don't, please tell us.

11 A. (Redacted) also Major retired Idriss.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 Q. Now, the building named the Pentagon House, do you know why it was so
17 named?

18 A. The Pentagon House, the flag bearer of the ODM party and its Pentagon
19 members in some circumstance or -- they were meeting there.

20 Q. And how do you know that they met there, the Pentagon members?

21 A. At Orange House there were a lot of activities going on and Pentagon House
22 was quite convenient because they could meet there privately without interference
23 from public.

24 Q. And do you know how regularly the Pentagon members would meet at
25 Pentagon House?

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1 A. I'm not sure.

2 Q. Do you know who would attend such meetings? Would it be only the
3 Pentagon members?

4 A. It was Pentagon members and maybe some of their friends - their close
5 friends - or advisers.

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 Q. Did you ever discover what discussions had taken place after such meetings?

15 A. Unless if the Pentagon members maybe they have met, then they have come for
16 a press briefing at Orange House, is when the public can get what they've discussed.

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 A. There were quite a number of press briefings at Orange House. I can recall
21 there was a time that the faction, political party, Party of National Unity, PNU, had
22 spreaded a rumour that the member of parliament for Narok, Mr Ole Ntimama, is
23 dead, so they had to meet and come back to Orange House and have a public briefing
24 at Orange House and even Mr Ntimama himself could also stand and say that, "I'm
25 still alive. I'm not dead."

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1 Q. And is this the only press briefing that you recall, or were there others?

2 A. There were several press briefings. Like there was a time when unknown
3 people came to the office at night and stormed the Orange House and broke into the
4 office and took some of the computer machines, and the Pentagon had to rush and
5 meet at the Pentagon and then later they proceeded to Orange House to have a public
6 press briefing and they talked.

7 MR KHAN: Your Honour, we're dealing with public press meetings. Is there any
8 reason for this to be in private session?

9 MR OMOFADE: Your Honour, (Redacted)
10 (Redacted)

11 MR KHAN: Your Honour --

12 PRESIDING JUDGE EBOE-OSUJI: And also -- Mr Khan, also -- we also need to be a
13 little flexible with these things. The question of the Prosecution, remember, had to
14 do with (Redacted) and so on
15 and so forth and so it led to certain answers the witness gave which perhaps the
16 Prosecution pursued. So we have to leave some sort of leeway. Remember, there
17 will be transcripts - redacted transcripts - to be published later.

18 But, Mr Omofade, it's now 11. Can we leave it here, or is there a question you must
19 ask now?

20 MR OMOFADE: No, we can certainly leave it here. I will take it up after the break.

21 PRESIDING JUDGE EBOE-OSUJI: All right. So we will rise for the morning break
22 after the witness has been escorted, if the blinds can come down now so that can
23 happen.

24 (Closed session at 11.03 a.m.) Reclassified into open session

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

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- 1 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 2 The witness will now be escorted out of the courtroom.
- 3 (The witness stands down)
- 4 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.
- 5 THE COURT OFFICER: All rise.
- 6 (Recess taken at 11.03 a.m.)
- 7 (Upon resuming in private session at 11.33 a.m.) Reclassified into open session
- 8 THE COURT USHER: All rise.
- 9 Please be seated.
- 10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 11 THE COURT OFFICER: Your Honour, for the record we are in private session.
- 12 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 13 Mr Omofade, please proceed.
- 14 MR OMOFADE: Your Honours, just for the record, the Prosecution team there's
- 15 been a slight change over the short break. The case manager, Grace Goh, has left and
- 16 she's replaced by Jasmina Suljanovic. She sits to the third row on my left.
- 17 PRESIDING JUDGE EBOE-OSUJI: So how much longer do you think we will be in
- 18 private?
- 19 MR OMOFADE: Your Honour, I believe probably at least an hour.
- 20 PRESIDING JUDGE EBOE-OSUJI: Another hour?
- 21 MR OMOFADE: Yes.
- 22 PRESIDING JUDGE EBOE-OSUJI: All right.
- 23 MR OMOFADE: Your Honours, it may even extend beyond that. What I've tried
- 24 to do is most of the information that I -- that at least I will be eliciting is information
- 25 (Redacted)

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1 (Redacted)

2 Of course I can't legislate for the responses that the witness might give, but as your
3 Honour pointed out it may be that certain of those responses could be in public, but
4 the questions I'll be posing will relate to private.

5 PRESIDING JUDGE EBOE-OSUJI: All right. Try as much as possible to -- basically
6 to precision questioning, so that only questions that really go to identity are asked in
7 private session. So the rest will be discussed in the public session. That would be
8 encouraged.

9 We know, of course, that the -- sometimes a witness may give more in an answer than
10 the question strictly calls for, but if we can anticipate when that might happen and
11 avoid such questions and ask them in open session that would be better.

12 Thank you.

13 MR OMOFADE:

14 Q. Witness, you were -- before the break you were talking about a press conference
15 that took place in Orange House. Do you remember telling the Court about that?

16 A. Yes.

17 Q. And do you remember telling the Court that the Pentagon members were
18 present at that meeting; that press meeting?

19 A. Yes.

20 Q. Do you recall which press -- which Pentagon members were at the particular
21 press conference you referred to?

22 A. One is Raila Odinga, another one William Ruto, Najib Balala, Joseph Nyagah --

23 MR KHAN: Your Honour, I do apologise. We are dealing with a statutory right
24 here regarding public hearings and it's not for me of course to advise my learned
25 friend opposite, but one way of doing it is to distinguish between (Redacted)

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1 (Redacted), which can be in private, and then go back into public and ask
2 certain questions.
3 This series of questions regarding a public meeting that was public at a press
4 conference that the press were at, I fail to see with the greatest of respect why this
5 should be deprived -- you know, the public who have come here to hear court
6 proceedings should not be allowed to hear what's going on.
7 Your Honour, so one way of approaching it is to go into private, ask the witness the
8 basis of the knowledge and then go into public and say, "Okay, what happened?"
9 Your Honour, the only aspects that should be in my respectful submission kept
10 private are those where the irresistible inference from the public testimony would be
11 that none other than the witness is the person that is speaking, and your Honour
12 when things are broadcast that proposition can't hold water in my respectful view.
13 So, your Honour, I would ask my learned friend, so that we don't have to have a
14 whole hour - a whole session - in private, to conduct questions maybe in a modified
15 way. Of course I don't mean any disrespect by it, but that's maybe a constructive
16 proposal as to how we can protect the rights of the witness, whilst protecting the
17 rights of Mr Ruto to a public hearing.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, response to the observation?

19 MR OMOFADE: The only thing I did was recap on the witness's earlier testimony
20 and follow up with a question as to those present. This is a meeting, this is a press
21 conference, (Redacted) and this is what I intend to
22 pursue. (Redacted)

23 PRESIDING JUDGE EBOE-OSUJI: The concern of the Defence is that if it was a
24 public event, a press conference that members of the media attended, why would it be
25 something peculiar to this witness in terms of his identity (Redacted)

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1 (Redacted)

2 MR OMOFADE: Ordinarily it wouldn't, but the witness did tell us yesterday that

3 (Redacted) It's in that

4 context that I propose to pose my question.

5 I hesitate to mention all this in the presence of the witness --

6 PRESIDING JUDGE EBOE-OSUJI: Yes, that's understood.

7 MR OMOFADE: -- but my friend has raised it.

8 PRESIDING JUDGE EBOE-OSUJI: Okay. Well, as indicated earlier, try keeping the

9 question in this phase close to the identity of the witness so that we don't sort of carve,

10 you know, broad swathes that bring in things that are matters of public information

11 and knowledge as well.

12 MR OMOFADE: I'll certainly do so, your Honours.

13 Q. Now, Witness, you've told us -- you told us yesterday, when you were testifying,

14 that -- and I recall what you said as follows, (Redacted)

15 (Redacted)

16 Do you remember telling us that?

17 A. Yes.

18 Q. And this press conference that you referred to earlier, is it in that context that

19 (Redacted)

20 A. Yes.

21 Q. (Redacted) You've

22 already told us those who were present.

23 MR KHAN: Your Honour, now that a basis has been laid as to (Redacted)

24 (Redacted), it's my respectful submission that without any jeopardy at all and fully

25 respectful of the rights of the witness we can go into public session.

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, is that the only reason why we're
2 in private session or is there anything else, any other questions you may have relating
3 to the identity?

4 MR OMOFADE: There are a few more --

5 PRESIDING JUDGE EBOE-OSUJI: It seems that --

6 MR OMOFADE: -- we could --

7 PRESIDING JUDGE EBOE-OSUJI: -- as Mr Khan was suggesting, and I was actually
8 thinking the same thing, if it is a case that you established that (Redacted)
9 (Redacted) and you bring all that in, then can we
10 not -- would it not be safe then to go to the public session to say, "About the press
11 conference, what was said" and that sort of thing? Do you see danger in proceeding
12 in that way?

13 MR OMOFADE: Your Honours, it's just to pre-empt having to go in and out every
14 five minutes that I do this, but we can certainly give this a try and, hopefully, it might
15 become clear why I've chosen this avenue rather than the one suggested by Mr Khan.

16 PRESIDING JUDGE EBOE-OSUJI: All right. All right. Is there anything else that
17 touches -- any other questions about unique identifying information to this witness
18 you also want to raise now that we're in private session so we don't go in and out of
19 private session? Now we know you've talked about him (Redacted)
20 (Redacted) so we put a marker, so to speak, on that and pick up the discussion again
21 later in public session. But is there something else you want to ask now that relates
22 uniquely to the identity of the witness?

23 MR OMOFADE: Would your Honour forgive me for a minute.

24 Your Honour, the -- what I attempted to do, and I did say I would try and do this
25 when I addressed you yesterday, what I attempted to do yesterday was to deal with

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1 background information in private session and for the rest of the afternoon -- the
2 morning and the afternoon, we continued in public session. What I've done now is
3 to regroup the material that I intended to explore with this witness and ensure that
4 most of it flows, rather than going back and forth.

5 Now, I will attempt in this context, in light of what your Honour says, I will attempt
6 to pose certain questions that do not require us to remain in private session, but I can't
7 guarantee that we won't have to go back and forth. It's very, very difficult. I can't
8 anticipate the witness's response.

9 PRESIDING JUDGE EBOE-OSUJI: All right. Why don't we then go into public
10 session now that we are talking -- we've more or less bookmarked the press
11 conference. Then we can go into public session, discuss the -- what was said and all
12 that. And the witness, while we're in public session, remember do not inject your
13 personal identity into your answers. So we'll go into public session to discuss what
14 was said and what was heard at the public press conference.

15 (Open session at 11.48 a.m.)

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

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

18 Mr Omofade, please proceed.

19 MR OMOFADE:

20 Q. Witness, you were telling us about a press conference that took place and that
21 members of the Pentagon were present. What transpired at this press conference, do
22 you recall?

23 A. As I said, therefore --

24 PRESIDING JUDGE EBOE-OSUJI: Witness, remember, just answer -- listen to the
25 Prosecutor's question carefully and try to limit your answers to the questions he

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1 asked you. Try not to again inject your personal identifying information in your
2 answers now that we are in public session. Thank you.

3 Prosecutor, kindly repeat the question.

4 MR OMOFADE:

5 Q. The press conference that you referred to where the Pentagon members were
6 present, do you recall what transpired during this press conference? And a simple
7 "yes" or "no" will probably answer that.

8 A. Yes.

9 Q. Do you recall why the press conference was called?

10 A. Yes.

11 Q. Help us, why was it called?

12 A. There were a group unknown -- unknown group which came to the office and
13 stole some of the property, so the ODM key leaders had to address the people because
14 there was a lot of uncertainty from the ground, people were intending to know what
15 happened and what had -- what the people who stormed the office took. So they
16 had to let the public know.

17 Q. And did the Pentagon members address the media, and what did they say?

18 A. There was a press conference and they had to meet there, and then the
19 secretary-general gave out the press conference -- the press briefing.

20 Q. And do you remember what the briefing was? What were the press told?

21 A. The brief was about -- they were condemning the act of those people who
22 stormed the office and took the ODM property.

23 Q. Was there any mention of who might have been responsible for the theft of
24 property?

25 A. The idea was -- the general view was it could have happened due to the other

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1 party were intending to know more information about ODM. That's why they went
2 further to storm and took some of the info -- they're just having information.

3 Q. And when you refer to "the other party," which party do you think this was?

4 A. The Party of National Unity coalition.

5 Q. Would that be the PNU, is that the right acronym?

6 A. Yes.

7 Q. Now, this press conference, do you know which media organisations were
8 represented there?

9 A. There were quite a number of media houses, but majorly you can count just the
10 mainstream of media in Kenya like KTN, Nation TV, Citizen, K24; and others were
11 also there.

12 Q. Now the -- are those television stations that you've mentioned?

13 A. Yeah, those are television stations. There were also other radio stations.

14 Q. Now, regarding the radio stations, were there both national and regional radio
15 stations, do you recall?

16 A. Yes. There were vernacular stations. There were national, those could
17 address people in Swahili and English.

18 Q. And the vernacular stations, what languages or what regions would they be
19 covering or broadcasting to?

20 A. There are quite a number of vernacular media stations and the royal media
21 services. Almost every tribe has a vernacular station, but the -- Ramogi was there,
22 Kass was there, Kameme, Inooro, Radio Citizen, Radio Maisha, and others.

23 Q. You mentioned Kass. This is one of the radio stations you mentioned
24 yesterday in the course of your testimony as well. What region was Kass FM
25 broadcasting to mainly, do you recall? Do you know that?

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1 A. Kass is for the Kalenjin.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Prosecutor, now that you've got that out of
3 the way, maybe you might want to refer to get some spellings straightened out on the
4 transcript.

5 MR OMOFADE: Your Honours, I will certainly do so. These are radio stations that
6 the witness also mentioned yesterday.

7 Q. But could you help us with some spellings, Mr Witness. Ramogi, how do you
8 spell that?

9 PRESIDING JUDGE EBOE-OSUJI: I think we have Ramogi already, but if you look
10 at the transcript, you see signs of more or less stress on the transcript and some
11 notations there. I do not recall whether -- was that Inooro?

12 THE WITNESS: Inooro.

13 PRESIDING JUDGE EBOE-OSUJI: Inooro, whether that's already on the record, and
14 others.

15 MR OMOFADE:

16 Q. Was there one called Kameme, did you say?

17 A. Yes.

18 Q. How do you spell that?

19 A. K-A-M-E-M-E.

20 Q. And I think one of the ones you also mentioned sounded like Radio Maisha.
21 How are you spelling Maisha?

22 A. M-A-I-S-H-A.

23 Q. And you say Kass is for the Kalenjin. Would it therefore be fair to assume that
24 Kass would have been broadcasting mainly to the Rift Valley?

25 A. Yes, for that specific tribe.

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1 Q. At this particular press conference, do you recall who the representative of
2 Kass FM was?

3 A. I cannot recall.

4 Q. Do you know any of the presenters or representatives of Kass FM?

5 A. Yes, I do.

6 Q. Which ones do you know?

7 A. I know Joshua Sang.

8 Q. Do you know any others?

9 A. No.

10 Q. And do you see Joshua Sang here today?

11 A. Yes.

12 Q. Do you recall if Joshua Sang was present at this particular press conference?

13 A. No.

14 Q. Do you think he might have been present?

15 MR KIGEN-KATWA: Mr President, I would object to that.

16 (Trial Chamber confers)

17 PRESIDING JUDGE EBOE-OSUJI: Objection is sustained.

18 MR OMOFADE:

19 Q. When I asked you earlier if you know any representatives of Kass FM, you
20 named Joshua Sang. How did you come to know that he was a representative of
21 Kass FM?

22 A. (Redacted)

23 (Redacted)

24 PRESIDING JUDGE EBOE-OSUJI: Now, one second.

25 Prosecutor, the witness is -- again, you might want to consider how or when and

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1 where we pursue this line of questioning, but the witness's -- your question to the
2 witness, the earlier question I mean, was, "Do you know any of the presenters or
3 representatives of Kass FM?" The witness said, "Yes, I do," that was at line 17, but
4 your last question focused on representatives. Now, is there a difference between a
5 representative and a presenter?

6 MR OMOFADE: Indeed, your Honour. The question as previously posed was
7 presenter or representatives. This time I left out the presenter.

8 Q. Mr Witness, the question that I posed extends to presenters as well?

9 PRESIDING JUDGE EBOE-OSUJI: No, what I mean is the earlier question might
10 have been imprecise in terms of the answer you elicited from the witness "Yes" to it.
11 If you're going to take off from that, you need to specific which.

12 MR OMOFADE: I understand. I appreciate that, your Honour.

13 Q. Witness, Joshua Sang, to your knowledge was he a presenter, was he a
14 representative, or was he both for Kass FM?

15 A. Joshua Sang is a presenter.

16 PRESIDING JUDGE EBOE-OSUJI: Now, if you're going to ask him how he knew
17 that, you need to be careful.

18 MR OMOFADE: Certainly, your Honour. I'll follow up with one question first and
19 we might have to go into private session.

20 Q. Do you know what he presented on Kass FM?

21 A. I know he's just one of the Kass presenters, but the programmes I've not
22 followed.

23 Q. And do you know what language he presented his programme in?

24 A. Kalenjin.

25 MR OMOFADE: Your Honour --

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1 PRESIDING JUDGE EBOE-OSUJI: Again I hate to come in here, but I must.

2 Witness, when you say you know he's just one of the Kass presenters, but the
3 programmes you've not followed, I need some clarity. Are you saying you
4 know -- you do not know what programmes he presented, or are you saying you
5 know the programme he presented but you've not followed it?

6 THE WITNESS: I don't know the programme he presents, but I know he's a
7 presenter.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

9 MR OMOFADE: Your Honours, at this time probably we ought to go into private
10 session for some further questions.

11 PRESIDING JUDGE EBOE-OSUJI: For how long?

12 MR OMOFADE: Again, I would anticipate about ten minutes while I follow up on
13 this line of questioning.

14 PRESIDING JUDGE EBOE-OSUJI: Fair enough. We'll go into private session, but
15 try and make it less than ten minutes if you can.

16 MR OMOFADE: I will try, your Honour.

17 (Private session at 12.07 p.m.) Reclassified into open session

18 THE COURT OFFICER: We are in private session, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you.

20 Mr Omofade, please proceed.

21 MR OMOFADE:

22 Q. Witness, how do you know that Joshua Sang is a presenter on Kass FM?

23 A. I came to know about this when (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted) That's when I know that he's a presenter.

5 Q. And --

6 MR KHAN: Your Honour, can I just say, so the Court's alive to it, I'm told by my
7 learned friend, Ms Alagendra - and I did see - that a gentleman came to the corner
8 and was peering in. I think security have escorted him, but your Honours I raise it
9 in case the Bench wishes to make any inquiries.

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

11 MR OMOFADE:

12 Q. (Redacted)

13 A (Redacted) he had to

14 have a talk with both the leader - the Pentagon leader - representing Rift Valley and
15 the chairman.

16 Q. And the Pentagon leader representing Rift Valley is Mr Ruto. The chairman,
17 Mr Kosgey, (Redacted) this particular meeting between them,
18 or this talk I believe was the correct term you used?

19 A. When they were talking about how the ODM Pentagon leader could go to the
20 station and also have a talk with the people of Kalenjin radio.

21 (Redacted)

22 (Redacted)

23 Q. What language were they speaking in?

24 A. They spoke in Swahili and it was a general Swahili and English.

25 Q. Could you be more precise (Redacted)

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1 A. (Redacted) he will be, or he will -- the leader, the Pentagon leader,
2 will be with him on the studio.

3 Q. And by "the Pentagon leader," because the other person was the chairman -- by
4 "the Pentagon leader," do you refer -- who do you refer to?

5 A. Mr Ruto.

6 Q. And do you know if this talk on the radio eventually took place?

7 A. Yes.

8 Q. Do you recall the time period when this talk took place?

9 A. Between the -- between the ODM Pentagon leader or with Mr Kosgey, to be
10 clear?

11 Q. Between Mr Ruto and Mr Sang on Kass FM.

12 A. It was around 10 a.m. in the morning.

13 Q. And how did you get to know that it was 10 a.m. in the morning? Did you
14 know it in advance, or did you find out later?

15 A. I heard (Redacted) telling me that Mr Ruto is on air and he's reaching out the
16 people in Kalenjin.

17 Q. (Redacted) And we are in private session now so feel free to
18 name.

19 A. (Redacted)

20 Q. (Redacted)

21 A. I can't remember well.

22 Q. You referred to (Redacted)

23 (Redacted)

24 A. Yes.

25 Q. (Redacted)

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1 A. (Redacted)

2 MR KHAN: And, your Honour, sorry to interrupt. My learned friend has elicited a
3 time. We haven't got a date as yet; it would be helpful. I'd be grateful.

4 MR OMOFADE: Your Honours, I will come back to it. I asked for the time period,
5 but I will come back to it later on.

6 MR KHAN: Your Honours, with respect, we've talked about a meeting. My
7 learned friend has elicited a time for the talk that he's talk -- that he's speaking about
8 and, your Honour, in my respectful submission it's only fair to the Defence to let us
9 know when the alleged interview took place.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I'm not sure the question of -- concept
11 of fairness comes into it because the witness will not be leaving the stand immediately
12 after his testimony from the Prosecutor's examination-in-chief. This will be
13 something definitely that will be within your right as a cross-examiner to zero in on,
14 and if the Prosecutor is leaving gaps, legitimate gaps, in their own
15 examination-in-chief, that will be their problem, I would imagine.

16 MR KHAN: Your Honour, the reason I say fairness is it is an issue of fairness
17 because we have a right, of course, to know what is being said when a meeting took
18 place, so we're in a position to prepare to question this witness. Your Honours, it's
19 not something that should be hidden, it should be elicited at the first opportunity.
20 And, your Honour, because my learned friend has thought it necessary to take a time,
21 which is his prerogative, it automatically follows that we should get a time and a date.
22 Otherwise, what use is the time, your Honour?

23 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you can explore that in your
24 cross-examination. I'm saying -- the Prosecution said he would get to it later, and
25 let's leave it at that. And if he doesn't get to it, then you will cross-examine on the

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1 matter.

2 MR KHAN: I'm grateful.

3 MR OMOFADE: The point precisely, your Honour, I do intend to get to it

4 afterwards. There's -- I don't think it's fair to interrupt the flow of the witness.

5 We're on a particular issue. It's important that he finishes with this and then I'll

6 come back to it. Let's be orderly.

7 Q. (Redacted)

8 (Redacted)

9 A. Yes.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 A. Yes.

19 Q. Now, you referred to (Redacted) Mr Ruto being on air and

20 reaching out to the people in Kalenjin. (Redacted)

21 I don't know if you heard my question. The question was: (Redacted)

22 (Redacted) this talk to the people -- or this reaching out to the people in

23 Kalenjin?

24 A. (Redacted) Mr Ruto was reaching the Kalenjin community and he has

25 requested for the people of Kalenjin to vote for ODM. Also, he urged the Rift Valley

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1 as a whole to vote for ODM because ODM is the party which has got good views,
2 good values, good leadership for the people.

3 Q. Was there anything else?

4 A. No.

5 Q. And did you eventually discover that this talk on the radio by Mr Ruto took
6 place?

7 A. Pardon?

8 Q. Did this talk with Mr Ruto, this talk on Kass FM, did it actually take place?

9 A. Yes.

10 Q. Did you hear it? Leaving aside whether (Redacted), did you hear it?

11 A. Yes.

12 Q. And did you eventually discover what was said?

13 A. (Redacted)

14 Q. And what language, to your knowledge, was being spoken?

15 A. He was speaking Kalenjin.

16 Q. (Redacted)

17 A. Yes.

18 Q. (Redacted)

19 A. (Redacted)

20 Q. And what transpired (Redacted) after this
21 broadcast?

22 A. I can't recall.

23 Q. We'll -- we'll come back to it. At the moment, just to clarify what was being
24 raised earlier, do you recall the time period when this broadcast on Kass FM took
25 place involving Mr Ruto?

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1 A. The broadcast was in the month of December.

2 Q. And could you help us with the year? It may be obvious but please help us.

3 A. 2007.

4 Q. And was this before the elections, or afterwards?

5 A. Before elections.

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

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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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 A. No.

8 Q. Do you know what language they spoke when Mr Ruto and (Redacted) spoke?

9 A. They could speak in English, Swahili, sometimes maybe their language.

10 Q. And is that Kalenjin?

11 A. Yes.

12 Q. Incidentally, do you know what (Redacted) does now? (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 Q. And do you know when this was?

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 MR KHAN: Your Honour, can I just say I don't know if we are in the business of

24 eliciting conjecture, or whether or not there is a distinction between made -- to be

25 made between what a witness knew and what a witness heard, as opposed to what a

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1 witness could guess? The probative value and therefore the relevance and the
2 admissibility of the latter, in my respectful submission, is highly questionable.

3 PRESIDING JUDGE EBOE-OSUJI: Of course, Mr Khan, at the end of the day we are
4 the ones that will assess the value of all these questions and answers.

5 MR KHAN: Your Honours, I'll say no more.

6 MR KIGEN-KATWA: Mr President --

7 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Kigen-Katwa?

8 MR KIGEN-KATWA: -- may I on my part raise an objection to that question?

9 Mr President, the question is to the effect that, (Redacted)

10 (Redacted)

11 (Redacted) Mr President, that second part

12 of the question, (Redacted)

13 (Redacted) presupposes that (Redacted) which is

14 contrary to what the witness had said and we object to that extent, Mr President.

15 PRESIDING JUDGE EBOE-OSUJI: Actually, I'm not sure that the question is wrong.

16 I was thinking your concern might have been as to the former part of the proposition,

17 because the witness's answer does suggest "might have been" and not that he knew

18 (Redacted)

19 (Redacted) It's "might have been."

20 MR KIGEN-KATWA: Mr President, are you overruling me or sustaining?

21 PRESIDING JUDGE EBOE-OSUJI: Yes, I am overruling your objection and

22 explaining to you the basis for overruling it. Not that I needed to, but I thought I'd

23 let you know. So objection overruled.

24 MR OMOFADE: Your Honours, the way I framed the question was on the basis of

25 what the witness actually testified about. I was careful not to suggest (Redacted)

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1 (Redacted)

2 PRESIDING JUDGE EBOE-OSUJI: You proceed.

3 MR OMOFADE:

4 (Redacted)

5 (Redacted)

6 A. I can recall there is -- (Redacted)

7 (Redacted)

8 Also later -- when we were almost approaching the election day on a later date, also

9 (Redacted)

10 (Redacted)

11 Q. And just help us with some spellings, please. You said, (Redacted)

12 (Redacted) How are you spelling (Redacted)

13 A (Redacted)

14 Q. And was this his first name or his surname, do you recall?

15 A. That is his surname.

16 Q. Do you know his first name?

17 A. I can't recall the first name.

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 MR KIGEN-KATWA: Mr President, with your permission, on our part we have no

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1 objection to the name of (Redacted) being suggested to the witness.

2 MR OMOFADE: Your Honours, I asked -- I really don't understand the intervention.

3 I asked the witness if he knows the full name and he said he doesn't. Perhaps I

4 should then clarify?

5 PRESIDING JUDGE EBOE-OSUJI: The point Mr Kigen-Katwa is making is that, if

6 you have the full name of (Redacted) you might put it to the witness.

7 MR OMOFADE: I seem to understand the point my friend raises. The witness did

8 provide an initial first name in his statement, which was later clarified, and this is

9 why I emphasised on the first name. At the risk of leading the witness:

10 Q. Mr Witness, this is not (Redacted) is it?

11 A. It is not (Redacted)

12 Q. And to be fair to you, you did say (Redacted)

13 A. (Redacted)

14 (Redacted)

15 (Redacted)

16 A. No.

17 Q (Redacted)

18 A. (Redacted)

19 Q. I'm asking you because my initial question was, (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 MR KHAN: Your Honour, could I just ask, before my learned friend asks his next

25 question, that the transcript be rectified at page 51, line 10, to record the answer

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1 actually given. We all heard it.

2 MR OMOFADE: Your Honours, I believe the answer was "No," but I'll pose the
3 question again.

4 (Redacted)

5 (Redacted)

6 A. (Redacted) Pardon?

7 Q. (Redacted) yes.

8 A. In terms of ...?

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 Q. Okay. (Redacted) Silas Simatwo. Is

19 the correct spelling S-I-M-A-T-W-O?

20 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, before you proceed to Silas, if you
21 can hold that question. I have one clarification as regards (Redacted) for the witness.

22 Witness, when the Prosecutor asked you a certain question about (Redacted) the

23 question he had asked you was this, (Redacted) Your

24 answer was, "I am not sure, (Redacted)

25 (Redacted) So what I'm

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1 interested now is you said, "I'm not sure," relating to (Redacted). Now, as regards

2 (Redacted), what is the situation? Do you know (Redacted)

3 (Redacted) You're not sure, but you could say (Redacted)

4 (Redacted)

5 THE WITNESS: (Redacted)

6 (Redacted)

7 PRESIDING JUDGE EBOE-OSUJI: My question would be this: Do you know

8 (Redacted)-- I'm talking about what you know now as opposed

9 to what you might guess or surmise. (Redacted)

10 (Redacted)

11 THE WITNESS: I'm not sure.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you.

13 Prosecutor, please proceed with your next person.

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

15 Q. Mr Witness, I was referring you to Silas Simatwo and asking you first to confirm

16 the spelling of his name. Is it S-I-M-A-T-W-O?

17 A. S -- Simatwo, S-I-M-A-T-W-O.

18 (Redacted)

19 A. Silas was in charge of distribution of election materials, such as presidential

20 posters, banners, flyers --

21 MR KHAN: Your Honour, could I ask -- I do apologise and I do apologise to the

22 witness for interjecting, but I think this can go into public session, the allegations or

23 the suggestions regarding the role of Silas Simatwo. He can't possibly reveal the

24 witness's identity, but, your Honour, in my respectful submission, the public should

25 hear this.

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1 PRESIDING JUDGE EBOE-OSUJI: It depends, doesn't it, (Redacted)

2 (Redacted)

3 MR KHAN: Your Honour, the (Redacted) has been elicited in private

4 session. It goes back to my earlier submission, but the actual assertion regarding this

5 person's role, Silas's role, should be made public. Your Honours, there's no reason

6 for it to be held in private. Your Honour, this is why I sought to draw a distinction

7 between the basis of knowledge and then the subsequent evidence.

8 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, what's your response?

9 MR OMOFADE: The response is, for each of these individuals, I've been asking a

10 number of questions. (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 PRESIDING JUDGE EBOE-OSUJI: You can proceed. You can proceed.

15 MR OMOFADE:

16 Q. Mr Witness, before you were interrupted you were explaining the role of

17 Mr Simatwo (Redacted). Could you continue, please. I believe your last

18 response was, "Silas was in charge of distribution of election materials such as

19 presidential posters, banners, flyers," and it ended there. Do you know if he did

20 anything else?

21 A. He could also help during the rallies in Rift Valley to check whether the venues

22 to be occupied by the ODM during the rally was booked or --

23 Q. And, Witness, I only remind you to address your responses to the Bench.

24 It's -- it's an error that most of us fall into.

25 The Rift Valley, do you -- well, Silas, do you know if he -- do you know where he was

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1 from?

2 A. Silas comes from Rift Valley, but he also works in Nairobi. He works at
3 AMACO Insurance.

4 Q. And what ethnicity is Silas?

5 A. He's a Kalenjin.

6 Q. And you mentioned AMACO Insurance. Do you know who owns this
7 insurance organisation?

8 A. Silas's position is a director, but there are some shareholders, people who have
9 shares.

10 Q. And do you know any of the major shareholders of this company?

11 A. I'm not sure because I've not gone into the details, but from my knowledge
12 Mr Ruto is also a shareholder there.

13 Q. And do you recall the time period that Mr Simatwo, Silas, was working (Redacted)
14 (Redacted) Perhaps we should start this way: Do you know when he started?

15 A. That was in the month of (Redacted)

16 Q. And it may be obvious, but which year are we referring to?

17 A. (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 Q. Now, Witness, I've asked you earlier about meetings that might have taken

18 place (Redacted)

19 (Redacted)

20 (Redacted)

21 A. Pardon?

22 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, it's for you to leave the transcript

23 as you want it, but sometimes the choice of language might leave the testimony

24 unclear. It's one thing for a question to be problematic because it seems speculative.

25 It's another thing for counsel to create the record that will assist the Court. You've

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1 been asking a series of questions of what might have happened, and we're leaving
2 some of those questions there. In might well be better to frame questions in terms of
3 what did happen that the witness would be in a position to know.

4 MR OMOFADE: I'm grateful, your Honour. I see the point precisely.

5 Q. Were there -- Mr Witness, were there any meetings between (Redacted)
6 (Redacted)

7 A. There were.

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 Q. Were you present at any of these meetings?

13 (Redacted)

14 (Redacted)

15 A. No.

16 Q. Do you know who would have attended these meetings, apart from the
17 (Redacted)

18 (Redacted)

19 (Redacted)

20 Q. Do you know what was discussed at such meetings?

21 (Redacted)

22 Q. And in the time leading up to the elections on 27 December, do you know if any
23 such meetings took place (Redacted)

24 A. There were meetings.

25 Q. How did you know this? Is it -- how did you come to know this?

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 Q. And did you find out what transpired in those meetings after the meetings had
5 taken place?

6 A. The only thing we could get out of the meetings was press briefings when, after
7 they had met, they give out press briefings. So we could get the information on
8 press briefings when the secretary-general might be reading the press briefing.

9 MR OMOFADE: Mr President, I look at the time. I think this might be an
10 appropriate moment.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you. And I take it when we come back
12 we will be going into public session?

13 MR OMOFADE: Mr President, that's the intention. I intend to organise this in such
14 a manner.

15 PRESIDING JUDGE EBOE-OSUJI: We will now bring down the blinds, let the
16 witness out and take the lunch-break.

17 (Closed session at 1.02 p.m.) Reclassified into open session

18 THE COURT OFFICER: We are in closed session, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Please escort the witness
20 out.

21 (The witness stands down)

22 PRESIDING JUDGE EBOE-OSUJI: The Court will rise until 2.30.

23 THE COURT OFFICER: All rise.

24 (Recess taken at 1.03 p.m.)

25 (Upon resuming in open session at 2.33 p.m.)

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- 1 THE COURT USHER: All rise.
- 2 Please be seated.
- 3 THE COURT OFFICER: Your Honours, we are in open session.
- 4 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 5 Mr Omofade, we're in open session.
- 6 MR OMOFADE: Thank you, your Honour. The -- I've asked for the witness to be
- 7 kept out while I make a short submission. I anticipate that it will last about five
- 8 minutes, unless your Honours have any questions, and then there may well be
- 9 responses from the Defence for both accused persons. Your Honour, I would
- 10 request that we go into private session for the duration of the submissions.
- 11 PRESIDING JUDGE EBOE-OSUJI: Private session then.
- 12 (Private session at 2.34 p.m.) Reclassified into open session
- 13 THE COURT OFFICER: We are in private session, your Honour.
- 14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 15 MR OMOFADE: Your Honours, as I indicated, I've requested that the witness for
- 16 the time being be left outside the courtroom and I make the submissions to you based
- 17 on -- mindful of the fact that this is a professional Bench, rather than a jury.
- 18 Now, what has come to light in the course of this witness's testimony is the fact that,
- 19 on a number of issues that I've attempted to explore with him, his responses and the
- 20 accounts that he's given in Court today are not entirely consistent with the account
- 21 that he provided in the course of his witness statement.
- 22 Now, your Honours will be aware that that witness statement has been disclosed to
- 23 both Defence teams. Your Honours will also be aware that the witness not only
- 24 signed this statement, but in the course of a witness preparation session - and I recall
- 25 that it took place on (Redacted), relatively recently - the witness also

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1 confirmed the accuracy of the account that he provided in it. He did, of course,
2 make certain minimal additions and corrections.

3 The submission today is not to contradict the witness or cross-examine him, at least
4 not at this stage, but it's of course unknown whether it's simply a matter of lack of
5 recollection, or indeed a matter of having a different account entirely from the one
6 that he gave in his witness statement and the one that he confirmed when he was
7 prepared on (Redacted)

8 I can give your Honours a number of instances where --

9 PRESIDING JUDGE EBOE-OSUJI: No, no, no. I'm trying to understand the
10 purpose of your submissions, Mr Omofade. What are you -- where do you see this
11 leading to, your submissions?

12 MR OMOFADE: Your Honours, I was minded to provide instances and then to
13 make the proposal. I'll go on to the proposal, rather than suggest the instances.
14 The proposal is a two-stage process. In the first instance what we're seeking is in
15 those discrete instances where the witness appears to be vague in his recollection of
16 what he stated in his statement to attempt to elicit that information from him again,
17 and in the event that he still remains vague or inconsistent with his statement to
18 attempt to refresh his memory having of course confirmed with him the authenticity
19 of the statement that he provided.

20 Now, as I say, those instances, some of them arose yesterday. A couple of them also
21 arose this morning. We're of course mindful of what transpired in the course of the
22 testimony of the last witness, Witness 536. In that instance there was an instance of
23 dates and inconsistent dates provided, and of course this was raised at some point by
24 the Prosecution and eventually it became an issue under cross-examination.

25 Now, we feel that it's only fair firstly to the witness in the event that he simply has a

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1 problem recalling what he said prior. It's also a matter of fairness for the Defence,
2 and I do recall that my friend, Mr Khan, referred to the fact that this ideally ought to
3 have been raised in the course of the examination-in-chief of 536.

4 So the proposal at this stage is that I go to the particular instances where there appear
5 to be some difficulties with the witness's recollection. If those difficulties persist, on
6 those discrete areas to attempt to refresh his memory from the relevant portions of his
7 statement.

8 Now, depending on the responses that the witness then provides in the course of my
9 further questioning, that will determine whether or not we go a step beyond the
10 simple matter of refreshing his memory and whether we go into a position of
11 cross-examining him on those discrete areas where he appears to be inconsistent. Of
12 course, that would be with your Honour's leave.

13 Your Honours, those are the submissions.

14 PRESIDING JUDGE EBOE-OSUJI: In a moment I'll be receiving the response of the
15 Defence on the matter, but I note that during the course of the witness's testimony a
16 certain member of the -- your team was shaking the head. I'm not sure that's a
17 correct thing to do for different reasons. I need not indicate who was shaking their
18 head. The person must know who the person is. I'll leave it at that.

19 Defence response?

20 MR KHAN: Your Honour, I'm a little bit at a loss to know the nature of the
21 application. It seems the Prosecution are not seeking to make a submission -- are not
22 making a submission to declare their witness hostile, but they say that the witness's
23 account is not entirely consistent with the statement.

24 Your Honour, there are a lot of aspects to this. Of course, the statement taking
25 process was not videoed. We don't have a transcript. With all those normal

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1 limitations, it's not enough that a witness's statement is not entirely consistent and it's
2 not enough that the Prosecution may say the witness departs in some way.

3 What needs to be established in our respectful submission is that the witness, who has
4 been proofed, who has had an opportunity of reading the statement and has been told,
5 has been informed very importantly, that it's a criminal offence to lie, has forgotten.

6 Your Honour, only if the witness shows some difficulty at remembering something
7 do we get into the realm of a memory refreshing document. Your Honour, that's the
8 way forward, unless of course there's a discrete application that the Prosecution seek
9 to establish either a hostile animus on the part of the witness, or they are contending
10 that the witness is not desirous of telling the truth, which are of course the classical
11 tests of declaring a witness hostile.

12 But, your Honour, we are not there yet. The witness has been focused on
13 Mr Omofade's questions and we say, your Honours, that the best way of dealing with
14 it is let my learned friend continue to elicit all the evidence he wishes from the
15 witness. We're not even, according to the statement, all the way through yet. At a
16 certain point, if he thinks it necessary, an application can be made and we will
17 respond then.

18 Your Honour, I will say with due respect to my learned friend, Mr Omofade, that this
19 approach actually is far more preferable than the approach that was adopted with the
20 last witness, which we think was unfair, but your Honour whilst I concede that, I see
21 what he's trying to do, we're not there yet and the application should come later, if at
22 all.

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

24 MR KIGEN-KATWA: Mr President and your Honours, the -- it is our submission
25 that the Prosecution is completely wrong in making this request because -- our first

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1 ground is that the witness has at no instance suggested, either expressly or impliedly,
2 that he has a problem with recollecting issues that have been put to him, and so the
3 question of the need to refresh his memory cannot arise at all.
4 The second issue, Mr President and your Honours, is the question of the impression
5 you create of the witness as to whether he is being honest or he's not honest. And
6 before you engage yourselves in determining that question of whether or not he is
7 saying the truth, your Honours, we submit that the Prosecution have to lay basis.
8 Your Honour, the Prosecution have not laid any basis for you to suppose that this
9 witness could be saying anything less than the truth.
10 PRESIDING JUDGE EBOE-OSUJI: But we should not get ahead of ourselves,
11 Mr Kigen-Katwa. I don't think we're there yet. I don't think we're at the point
12 of -- the point you are making now. Mr Khan captured the point, it seems. There
13 are two things, so we are talking -- and you also as well, you also captured it. Are
14 we dealing with the loss of memory on the part of a witness, or are we dealing with a
15 need to declare one's witness a hostile witness? We don't know yet, but I'm not sure
16 that -- I do not agree that the Prosecution is entirely out of line in alerting
17 the -- everyone in the courtroom that they have a difficulty that they may be pursuing
18 by either of the -- the established procedures that some jurisdictions use, either to
19 refresh a memory -- if that is the case, of course, there needs to be a basis for that, or to
20 take it further than that and when we get to it, we will know. As you know,
21 the -- it's a more radical proposal to treat a witness as a hostile witness than merely to
22 seek to refresh a memory that may have been impaired, for any reason, due
23 to -- perhaps it could be the phrasing of the question or it could be any number of
24 reasons why the witness may no longer recall. So I think we can -- we've been
25 warned now that they are having difficulty that they intend to pursue. So should we

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1 just let them proceed with -- we see how they deal with that difficulty.

2 MR KIGEN-KATWA: Mr President, in that case then I'd rest my submissions by
3 making the observation that there is not a reason, any circumstance, to inform the
4 question as to whether or not this witness has any problem with recollecting what he
5 needs to adduce in this Court. And for that reason, putting the -- any material to
6 refresh his memory does not arise.

7 May I also say that the witness must be deemed, must be presumed to be saying the
8 truth in his testimony in Court, considering the oath under section -- Article 69, where
9 he commits himself to say the truth before the Court.

10 Thank you, Mr President and your Honours.

11 (Trial Chamber confers)

12 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, we will allow the Prosecution
13 to proceed and let's see how that goes. I'm not sure that it is established there is
14 some -- any specific formulas that needs to indicate whether or not a witness has lost
15 memory, unless some -- the right questions are put in that regard so that we can
16 establish whether that's the case or not. So the Prosecution will be allowed to
17 proceed and then we will take the matter as it comes.

18 MR KIGEN-KATWA: We are obliged, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, that should address your concern
20 hopefully.

21 MR OMOFADE: Your Honours, to the extent that we are being permitted to
22 proceed, the proposal that I made was to go over the discrete areas where the witness
23 appears to have had some difficulty - I emphasise the word "appears" - and should
24 the witness then not retain the version that he gave in court, to then remind him of his
25 statement and proceed from there. That's the proposal, and I need to know if that's

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1 what your Honours are giving sanction to.

2 PRESIDING JUDGE EBOE-OSUJI: But there's also -- there is also what appears to be
3 a good-sense suggestion by Mr Khan. I don't know if that's what he's saying, but
4 I -- if that isn't, this is what I'm saying. You might want to again flag those areas
5 where you may want to return, assuming they're the only areas. See how much else
6 we can do apart from those areas, and then come back and deal with these
7 problematic areas later.

8 MR OMOFADE: And, your Honour, that's an entirely useful suggestion and one
9 which I will proceed with.

10 PRESIDING JUDGE EBOE-OSUJI: On that basis, can we then move into the public
11 session to take the next segment of your examination-in-chief? We have been a lot in
12 private session.

13 MR OMOFADE: Your Honour, I do try. What I would ask is for the witness to be
14 brought in, for me to have a brief discussion about the -- particularly the PIS in the
15 context -- the PIS form in the context of the further questions I propose to go through,
16 and then we proceed into public session. So this would be about a minute with the
17 witness in private session and then into public session.

18 PRESIDING JUDGE EBOE-OSUJI: And also the public know that we will be in
19 public session for a minute and then come back.

20 MR OMOFADE: Your Honours, in any event the blinds would come down while
21 the witness is brought in. It might be that your Honours want to go into public
22 session first and give the heads-up to the public and then go back out. I'm grateful.

23 PRESIDING JUDGE EBOE-OSUJI: Why don't we go into public session then.

24 (Open session at 2.51 p.m.)

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

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

2 We see that members of the public might have been not following sections of the
3 testimony of the witness. Sometimes these things happen when some very -- when
4 identifying information may be elicited in the course of testimony of a protected
5 witness. So, if that has happened from time to time, that we've needed to go into
6 private session. We will do that again for another minute and then we will be back
7 in open session for the next segment of the Prosecutor's examination-in-chief. The
8 blinds will go down now so that we can bring the witness into the courtroom and
9 then we'll go into private session for a minute.

10 (Closed session at 2.53 p.m.) Reclassified into open session

11 THE COURT OFFICER: We are in closed session, your Honour.

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

13 The witness will be brought in now.

14 (The witness enters the courtroom)

15 PRESIDING JUDGE EBOE-OSUJI: We will go into private session now.

16 (Private session at 2.54 p.m.) Reclassified into open session

17 THE COURT OFFICER: We are in private session, your Honour.

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

19 Mr Omofade?

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

21 Q. Mr Witness, welcome back. Just to give you an idea of the approach I intend to
22 take in asking you questions for the upcoming session, I intend to ask you certain
23 questions that would probably relate to (Redacted)
24 (Redacted). Some of those
25 questions might also relate to people (Redacted)

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1 Now, the form that is in front of you now becomes more relevant and in some of the
2 questions I might be asking you, particularly in relation to (Redacted)

3 (Redacted) This is on the first page.

4 In relation to the second page, if I need to refer to certain individuals, I would
5 probably just refer to them as "person 1," all the way to 25. Do you understand that?

6 A. Yes.

7 Q. And because I'll be doing that when I ask my questions, I have no way of
8 knowing in advance what responses you are going to provide. So if you need to
9 refer to any of the locations that I listed on there, could you also respond in the same
10 manner, (Redacted) and the individuals that are contained
11 in it? If you need to take time to look at the form in order to identify anyone you
12 need to refer to, please take the time that is required. Do you understand?

13 A. Yes.

14 MR OMOFADE: In that case, your Honour, I'm happy for us to go into public
15 session.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you.

17 May we now go into the public session.

18 (Open session at 2.57 p.m.)

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

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

21 Witness, we're now in open session. Again, it means the members of the public are
22 able to hear your answers. In answering the questions, you need to take care not to
23 give or inject into your answers peculiar information that are unique to you that may
24 lead to someone attempting to figure out who you are.

25 With that in mind, the Prosecution will continue their examination-in-chief now.

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1 You've been given the Protected Information Sheet. You do need to refer to items on
2 the sheet according to the numbers and not the names. Thank you.

3 MR OMOFADE:

4 Q. Witness, I would like to ask you about the period leading up to the elections
5 that took place in Kenya on 27 December 2007. Were you in Kenya at that time?

6 A. Yes, I was in Kenya.

7 Q. And if we start from 25 December 2007, do you recall where you spent that day?

8 A. On 25 December, I spent most of -- most part of my time at (Redacted).

9 PRESIDING JUDGE EBOE-OSUJI: The witness was looking at the PIS when he said
10 (Redacted) The record will reflect that.

11 MR OMOFADE:

12 Q. And what time did you get to (Redacted) on 25 December?

13 A. Around 7 o'clock a.m. in the morning.

14 Q. And do you recall any significant event that took place in the morning of
15 December, the 25th?

16 A. I can't recall all of them, but there are a number of activities because we were
17 preparing for the voting day which was on 27.

18 Q. Do you recall seeing any of the key members of the Pentagon on 25 December?
19 And just "Yes" or "No" will do.

20 A. I can't recall.

21 Q. Was -- what time did you leave (Redacted)- on 25 December?

22 A. I left at around 7 in the evening.

23 Q. And could you walk us through your day? What did you do from 7 in the
24 morning when you arrived?

25 A. (Redacted)

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1 (Redacted)

2 (Redacted)

3 MR OMOFADE: Your Honour, please forgive me.

4 (Pause in proceedings)

5 MR OMOFADE: Your Honours, I had hoped this was unavoidable, but I'm afraid

6 we have to go into private session. It might be just for a minute or two and then

7 back out.

8 PRESIDING JUDGE EBOE-OSUJI: We will go into private session.

9 (Private session at 3.05 p.m.) Reclassified into open session

10 THE COURT OFFICER: We are in private session, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

12 MR OMOFADE:

13 Q. (Redacted)

14 (Redacted)

15 (Redacted)

16 A. I can recall there are some who attended.

17 Q. And do you know which ones attended?

18 A. I could recall Najib Balala. He came. Also Mr Ruto, Mr Raila.

19 Q (Redacted)

20 A. Yes.

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, (Redacted)

2 (Redacted) because if we are going in and out of private session we don't want confusion.

3 (Redacted).

4 MR OMOFADE: I will do that, your Honours.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 MR OMOFADE:

7 Q. Do you know if there was a meeting between the Pentagon members on that
8 particular day?

9 A. (Redacted)- it was normal that, (Redacted)

10 (Redacted)

11 Q. Do you know if there was any press conference following that meeting on 25
12 December?

13 A. They (Redacted) a meeting with the National Elections Board and the director
14 and the party leaders.

15 Q. And do you know if there was a press conference? You told us earlier that
16 usually after such meetings they would have a press conference. Do you know if
17 there was a press conference after this particular meeting?

18 A. I can't recall well.

19 Q. Did you see any members of the press at this -- (Redacted) on this particular
20 day?

21 A. Yes, the member of press were there.

22 Q. Do you recall seeing Mr Sang (Redacted) on this particular day?

23 MR KIGEN-KATWA: Mr President, I would object to that. That is clearly leading.

24 PRESIDING JUDGE EBOE-OSUJI: Isn't it a question he can say "Yes" or "No" to?

25 MR KIGEN-KATWA: Yes, my -- yes, Mr President, because the question has

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1 specifically mentioned the name which is supposed to be procured from the witness
2 and I would strongly object to that, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: Objection is sustained.

4 MR OMOFADE: Your Honours, it was in order to avoid having to list - which I've
5 done on a number of occasions now - all the press members that would normally
6 cover such events. Earlier this morning he -- the witness did mention one such press
7 media station. He referred to Kass FM and spoke specifically about Mr Sang. It's in
8 that context.

9 PRESIDING JUDGE EBOE-OSUJI: That -- that was in the context of another event,
10 not this one.

11 MR OMOFADE:

12 Q. Mr Witness, do you recall which media outlets were present (Redacted) on 25
13 December?

14 A. There were quite a number of media houses.

15 Q. Do you recall if there were radio stations represented at Kass -- (Redacted) on
16 that day?

17 A. There were quite a number of radio stations and television stations.

18 Q. And amongst the radio stations, you've given us a number of names previously,
19 do you know if any presenters or representatives of Kass FM were present?

20 A. Yes.

21 Q. Could you tell us who was present on behalf of Kass FM?

22 A. I think Kass had a representative.

23 Q. And my question was: Could you tell us who it was that represented Kass FM
24 on that particular day?

25 PRESIDING JUDGE EBOE-OSUJI: Witness, it shouldn't take you 15 seconds to

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1 answer that question, and there were other pauses in the last questions. You're here
2 to help us. Please.

3 MR OMOFADE:

4 Q. Mr Witness, are you taking time to think about it, or -- I didn't hear a response
5 myself?

6 A. I'm not certain to the name of the person who was representing Kass FM.

7 Q. And just to clarify, is that that you don't recall the name, or that you don't
8 know?

9 A. Actually, there were quite a number of media houses which came to have
10 information.

11 Q. And my question was: Is it that you've forgotten who represented Kass FM, or
12 that you just do not know who represented Kass FM?

13 A. I forgot it.

14 Q. Do you remember, Mr Witness, giving a statement to the Office of the
15 Prosecutor in this case?

16 A. Yes.

17 Q. And do you remember the date or dates that you spoke to the Office of the
18 Prosecutor?

19 A. Yes.

20 Q. And what dates were those?

21 A. It was in (Redacted)

22 Q. Do you remember the dates or -- if you don't remember, I can help you. Did
23 you give a statement (Redacted)

24 A. Yes.

25 Q. And was the account that you gave to the representatives of the Office of the

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1 Prosecutor, was that an account that was true, to the best of your recollection?

2 MR KIGEN-KATWA: Mr President, I would have an objection to that question. I
3 would object to the attempt by the Prosecution to have a carte blanche commitment as
4 to the statement. I think my learned friend should be specific to a specific issue that
5 he's targeting.

6 PRESIDING JUDGE EBOE-OSUJI: The objection is sustained. Mr Omofade, isn't
7 the procedure to ask the witness whether showing him the statement will refresh his
8 memory and we'll see what might prompt memory to be refreshed --

9 MR KHAN: Your Honours --

10 PRESIDING JUDGE EBOE-OSUJI: -- as to specific --

11 MR KHAN: And, your Honour, I mean, of course we're in the Court's hands, but
12 my understanding was, given your Honour's earlier order, was that we continue first
13 with testimony before we go down this route. But that was my understanding of
14 what the Bench's decision was.

15 PRESIDING JUDGE EBOE-OSUJI: That was the indication, but it seems like there
16 may be other new areas, I'm not sure. So we may have a very -- let's proceed on this
17 one first and then we'll see.

18 MR OMOFADE: Your Honours, there are two things, the response to
19 Mr Kigen-Katwa, and I know his objection has been sustained. What I was seeking
20 to do, as is done in most jurisdictions, is to at least establish authenticity of the
21 statement itself and then take him to the specifics of the statement. Without the
22 witness confirming that he signed the statement, I will be loathe to actually take him
23 to specific parts to refresh his memory.

24 PRESIDING JUDGE EBOE-OSUJI: That is something different. Its authenticity is
25 quite different from eliciting a standing vouchsafing of the truthfulness of what has

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1 been said in a statement. It's a matter of the witness, if that was his statement, he
2 identified that that's his statement, and then we'll take it from there.

3 MR OMOFADE:

4 Q. Mr Witness, I'm going to show you a copy of the statement that you provided to
5 the Office of the Prosecutor, to have a look at the signature contained therein.

6 MR OMOFADE: I wonder if Madam Court Officer could show the witness a copy.
7 I have a version here.

8 Q. Madam (sic) Witness, the first page, just the cover page for the time being.

9 And just for the record, the ERN of the witness statement is KEN-OTP-0077-0606 and
10 it's R01 -- I beg your pardon, R03.

11 THE COURT OFFICER: Counsel, there are only two redacted versions of this
12 document, R01 and R02.

13 MR OMOFADE: I'm told it's R02, not 3.

14 Q. Witness, do you see the first page of the document in front of you?

15 A. Yes.

16 Q. And do you see your name on that statement, that document?

17 A. Yes.

18 Q. And if we go to the bottom of the front page, do you see your signature
19 thereon?

20 A. Yes.

21 Q. Which one of them is your signature? There are two -- I beg your pardon,
22 three signatures on the front page. Which one of them, the first, the second, or the
23 last?

24 A. The last.

25 Q. Now, if you --

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- 1 MR OMOFADE: Madam Court Officer, I wonder if the witness could just be shown
2 only the last page of that document; this is page 30.
- 3 Q. And again, Mr Witness, look to the bottom of that page. Do you see three
4 signatures?
- 5 A. Yes.
- 6 Q. And amongst them, do you see your signature?
- 7 A. Yes.
- 8 Q. Which one is yours?
- 9 A. (Redacted)
- 10 Q. So would that be the signature to the far right-hand side, the last on the right?
- 11 A. Yes.
- 12 MR KHAN: Can I just ask, is that signature or initials?
- 13 THE WITNESS: Initials.
- 14 MR OMOFADE:
- 15 Q. Are those your initials, Mr Witness?
- 16 A. Yes, they are my initials.
- 17 Q. Now, if you go further up on that page, do you see the subheading "Witness
18 Acknowledgement"?
- 19 A. Yes, I see.
- 20 Q. And below that there's some writing, about five lines, and then it says "Signed."
21 Do you see a signature in front of the word "Signed"?
- 22 A. I see a signature.
- 23 Q. And is that your signature?
- 24 A. It is mine.
- 25 Q. And below that we see a date of (Redacted)

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1 A. Yes.

2 Q. And just for the record I read the witness acknowledgement itself. It says,

3 "This statement has been read over to me in the English language ..." --

4 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, we're still not there yet. I think it
5 is enough now to ask the witness if this was his statement, and if that is his statement,
6 whether it refreshes his memory in the specific respect you're interested in.

7 MR OMOFADE: I will do that, your Honour.

8 Q. Now, is this your witness statement that you gave to the Office of the
9 Prosecutor?

10 A. It is my witness statement.

11 MR OMOFADE: I wonder if Madam Court Officer could turn to page --

12 MR KHAN: Your Honour, I object at this point. Your Honour, I don't see why,
13 unless there's a motion for reconsideration, that my learned friend is seeking to depart
14 from what was previously ordered by the Court; namely, to go through the witness's
15 evidence, elicit evidence that he wishes regarding the parameters of the statement,
16 and if the occasion arises after that's done, that in relation to certain areas the
17 Prosecution allege that the witness cannot remember, then the witness can be invited
18 to say whether or not the witness would be assisted by seeing a memory refreshing
19 document or not. But, your Honour, this partial piecemeal approach is fraught with
20 dangers, particularly because a statement contains various aspects, and unless the
21 Prosecution are going to redact portions, we're going to be here all year.

22 PRESIDING JUDGE EBOE-OSUJI: You made that -- Mr Kigen-Katwa, let's not beat
23 about the point.

24 Mr Khan, you made that objection before he started and I allowed him to proceed on
25 this specific issue, so let's continue with that.

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1 MR KIGEN-KATWA: Mr President, my issue is completely different, with your
2 permission.

3 Mr President, I think at this moment it's only fair that the witness is made to
4 understand, and I am saying this because I am concerned at the effort made by the
5 Prosecution to mix up issues of whether or not the statement as recorded is the truth
6 vis-à-vis authenticity. Mr President will recall that you stopped the Prosecution
7 from reading the witness acknowledgement which contains the words "the truth."

8 And, Mr President, with your permission, just one moment. Our concern is that --

9 MR OMOFADE: Your Honours, the only reason I interrupt is I hope my friend isn't
10 going to go into things that arguably shouldn't be done in the presence of the witness.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, let's move forward, please, on
12 this issue.

13 MR KIGEN-KATWA: Mr President --

14 MR OMOFADE: There are a number of ways to deal with this and I understand my
15 friend, Mr Khan's, remarks. The electronic version of the statement I understand has
16 been identified. It could be that I refer the court officer, or the legal officer, to the
17 relevant paragraph, that could be brought up on to the screen and then I could read
18 the relevant portion out on to the court record. In that case, the witness will be only
19 restricted to the portions that I'm ready to identify.

20 I don't know if that's convenient?

21 MR KHAN: Your Honour, given the Court's ruling, the other perhaps easier way
22 even - we have the statement before us - is my learned friend can simply read out
23 those extracts at first instance. We can see -- we have the statement in front of us.
24 That may be a quicker way, but --

25 PRESIDING JUDGE EBOE-OSUJI: Fair enough, let's do it that way.

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1 Mr Omofade, read the precise passage.

2 MR OMOFADE:

3 Q. Mr Witness, in paragraph 119 - I'm referring to page 24 of the witness statement
4 that you have signed - it reads, "When the election day was approaching, there was
5 growing tension showed by the ODM top leaders. In fact, they were reading signals
6 that the PNU would rig the elections. This is the reason why on 25 December 2007,
7 at 10 a.m., the ODM held a press conference at the Orange House. Present were
8 Raila, Ruto, Balala, Ngilu, Kosgey and other ODM leaders. Raila talked about the
9 upcoming elections and he warned the government about any attempt to rig the
10 elections."

11 I then move on to paragraph -- does that refresh your memory, Mr Witness, as to
12 whether a press conference actually took place (Redacted) on 25 December?

13 A. Yes.

14 Q. And do you confirm that those present were actually the members of the
15 Pentagon: Raila Odinga, Mr Ruto, Mr Balala, Madam Ngilu and Kosgey?

16 A. Yes.

17 Q. Moving on to paragraph 120, and I'll restrict myself to the first sentence
18 alone -- second sentence -- the first two sentences alone for now, "After the main press
19 conference, Ruto, Sang and Kosgey met. After the press conference, Sang (Redacted)
20 (Redacted) had a meeting with Ruto and Kosgey."

21 Does that refresh your recollection?

22 A. Yes.

23 Q. Does that refresh your memory?

24 A. Yes.

25 Q. And do you recall now that Mr Sang was present at the press --

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1 PRESIDING JUDGE EBOE-OSUJI: No, no, no. Mr Omofade, now we go back to
2 where we started. There was a question you asked the witness that prompted this
3 memory refreshment exercise. I think this is where we bring back the question so
4 that the witness now decides whether he maintains that answer he gave, which
5 resulted in all of this, or whether the memory refreshment might have achieved a
6 different result and we take it from there forward.

7 MR OMOFADE: I'm grateful, your Honour. I think the statement can be taken
8 away from the witness now and --

9 MR KIGEN-KATWA: With your permission, Mr President, could you --

10 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Kigen-Katwa?

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

12 Mr President, I think it is only fair for this witness also to be told that the only thing
13 that matters in terms of --

14 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, I know where I think you
15 might be headed and that will not be -- if what I'm thinking is correct, that may be
16 problematic. The witness is in here listening. If you wanted me to remind the
17 witness of something, whatever it is, it could be a procedural reminder, but he's on
18 the stand and I don't think we should go there.

19 MR KIGEN-KATWA: I am obliged, Mr President. Could I then, Mr President, very
20 kindly request you to also restrain the Prosecution from giving the impression to the
21 witness that he's not accurate in respect to the same issue which we are reading from
22 the same, Mr President.

23 PRESIDING JUDGE EBOE-OSUJI: You see, the witness is a human being like all of
24 us. Let's not put him to any higher standard than anybody else. Memories may
25 fade and may be refreshed and people continue from there. It does not mean that

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1 the Court has made any evaluation of this witness's testimony at this point.

2 So let's proceed on that basis.

3 MR KIGEN-KATWA: I'm obliged, Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, are you looking at perhaps page 73
5 from the bottom of that page --

6 MR OMOFADE: I believe --

7 PRESIDING JUDGE EBOE-OSUJI: -- to the next page, 74?

8 MR OMOFADE: Indeed, your Honour. I was trying to trace where I posed the
9 question.

10 Q. And, Mr Witness, the question was, "Can you tell us who was present on behalf
11 of Kass FM ..."?

12 A. Mr Sang was present there for Kass FM.

13 Q. And the remainder of my question which I didn't complete, "... on 25
14 December?" Is your answer still the same?

15 A. Yes.

16 Q. And could you tell us what happened that day?

17 A. The Pentagon members came to Orange (Redacted), for a press
18 conference. After they had realised that some of the -- their billboards were dropped
19 down -- damaged down along Uhuru Highway up to Westlands, which they used for
20 advertising their presidential candidate, and they have an idea that it was done by the
21 Party of National Unity, it was -- they were unhappy about that and, when they were
22 reacting about that issue, they said that, "We know ODM is going to win and the PNU,
23 or the government, should not steal the election." And they stressed about that issue,
24 and mostly it was stressed by the flag-bearer of the party, Raila Odinga, condemning
25 the act and assuring people that the ODM is going to win.

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1 Later, after the press conference, (Redacted)

2 (Redacted) Mr Sang (Redacted) say that, "I would like to meet with the chairman,

3 Mr Kosgey, and also to see one of the Pentagon members, Mr Ruto," (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 Q. And tell us if anything happened after that?

12 (Redacted)

13 A. Yes.

14 Q. Did you -- what did (Redacted), if anything?

15 (Redacted)

16 Q. And (Redacted) what language or languages they were speaking?

17 A. They could speak some Kiswahili, English and Kalenjin, and (Redacted)

18 word that, "I will come ..." -- when Mr Ruto telling Mr Sang that, "I will come for a

19 presentation at the media house."

20 Q. Are you saying that -- well, I'll just repeat what you've said. You say, (Redacted)

21 (Redacted) the word, "I will come ..." -- when Mr Ruto telling Mr Sang that, "I will

22 come for a presentation at the media house." Could you explain what you mean by

23 that?

24 A. He will go to the radio station to have a talk with the people.

25 Q. Do you know which radio station he was referring to?

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1 A. Kass FM.

2 Q. Now, did you find out whether this radio interview eventually took place?

3 A. Yes.

4 Q. And did you find out what Mr Ruto said during this radio interview?

5 MR KHAN: Your Honour, he said he found out whether the interview took place.

6 It begs the question of course, but my friend can carry on.

7 MR OMOFADE:

8 Q. Did the radio interview actually take place?

9 A. It took place.

10 Q. Did you listen to it or how do you -- how did you find out? How did you
11 know?

12 A. I heard his voice over the radio and (Redacted).

13 But, actually, (Redacted) he was talking to -- reaching
14 the people of Kalenjin to vote for ODM.

15 (Redacted)

16 (Redacted)

17 Q. (Redacted) anything else that transpired in this radio
18 interview?

19 A. Yes.

20 (Redacted)

21 A. He was reaching the Kalenjin people and asking them to vote for ODM because
22 ODM is the party with the good policy which is going to solve the issue of the people
23 and their needs.

24 Q. Do you remember anything else (Redacted) was said by
25 Mr Ruto?

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1 A. I can't remember well, no. It's a long time.

2 Q. Would it help if you refreshed your memory from your witness statement?

3 MR KHAN: Your Honour, I think I'm going to object. I think maybe the witness
4 will have to be released for a moment while I make my submissions.

5 PRESIDING JUDGE EBOE-OSUJI: Court officer, can you bring down the blinds and
6 the witness can step out for a quick minute. Thank you.

7 (Closed session at 3.48 p.m.) Reclassified into open session

8 THE COURT OFFICER: We are in closed session, your Honour.

9 PRESIDING JUDGE EBOE-OSUJI: Mr Witness, if -- you will just step out for a little
10 while, while lawyers discuss some legal point, and then we'll bring you back. Thank
11 you.

12 (The witness stands down)

13 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Khan, we will take a minute for this
14 objection.

15 MR KHAN: Your Honour, there's two matters at least that come to mind. The first
16 is the Prosecution shouldn't gain a collateral benefit that arises from inappropriate
17 questioning. The proper question of course would have been to ask: Tell me
18 everything that you would -- (Redacted) Instead, what
19 Mr Omofade has done effectively is to get an answer and keep fishing for more
20 because it's not what he wants. "Anything else?" "Anything else?" Your Honour,
21 a point comes when a witness, of course, says "I can't remember if there's anything
22 else," but that's not a licence, we say, to put in something that purports to be a
23 memory refreshing document. And the key point is this: This witness was
24 screened in (Redacted) and was interviewed (Redacted) by the Prosecution.
25 In (Redacted). Mr Omofade spent over

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1 seven hours with this witness. Your Honour, there needs to be a real basis to say
2 that the witness has -- is not capable of remembering; otherwise what it is --

3 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the witness himself said, "I cannot
4 remember. It's been a long time."

5 MR KHAN: Yes.

6 PRESIDING JUDGE EBOE-OSUJI: That's the answer the witness gave.

7 Your objection is -- you objected when the Prosecutor started asking the witness
8 whether showing the statement will refresh the memory. Can we speak to that
9 objection? You were objecting to the Prosecutor being able to refresh the memory.

10 Can we stay focused on just that --

11 MR KHAN: Well, your Honour, the proper course --

12 PRESIDING JUDGE EBOE-OSUJI: -- discrete issue.

13 MR KHAN: Indeed. The proper course is the foundation to clarify from the
14 witness, "How well do you remember that date? Have you -- do you remember the
15 incident clearly (Redacted) Tell us (Redacted). And is
16 that the entirety of the conversation?" If the answer is, "Yes," that's it.

17 Simply because there is a difference between a previous statement and the testimony
18 elicited under oath doesn't simply give the Prosecution licence to put in a document
19 created under their authority - not with an investigating judge, under their
20 authority - to a witness. The proper application then is to declare the witness hostile.
21 And so, your Honours, one can't proceed in the manner that's being suggested, in my
22 respectful submission.

23 Your Honour, it's not enough simply to say, "I forgot," after a series of questions in
24 which the Prosecutor is saying, "What more? What more?"

25 PRESIDING JUDGE EBOE-OSUJI: Response?

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1 MR OMOFADE: Your Honour, in fact the question that --

2 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated)

3 Mr Kigen-Katwa, do you need to also join in on the objection?

4 MR KIGEN-KATWA: Mr President and your Honours, my objection was different
5 but related to that issue, and my understanding, Mr President and your Honours, is
6 that you restrained me from making the objection in the presence of the witness.

7 And with your permission, may I make the observations I wish to make?

8 Mr President, it is my position that the witness should be allowed to understand that
9 the weight of what he may have told the Prosecution is not the same as the weight of
10 what he tells this Court.

11 Secondly, that whatever he says in this Court attracts criminal sanctions, which is not
12 necessarily the same thing as would happen in respect to what was told to the
13 Prosecution. Mr President, the Prosecution themselves, at least in respect to three
14 questions, attempted to suggest to the witness that what was said was the truth and,
15 by extension, seemed to put in the mind of the witness that what was told to the
16 Prosecution was also told to the Court. And I very much pray that that line be
17 drawn to the witness so that the witness knows at what point an obligation arises.

18 PRESIDING JUDGE EBOE-OSUJI: But I had stopped the Prosecution from
19 proceeding to put to the witness the matter about having committed to tell the truth.
20 So that was dealt with.

21 Now, on this specific objection I take it you're not joining Mr Khan. You're not
22 disagreeing with him, it just is enough that he stated the objection he stated.

23 MR KIGEN-KATWA: I do not -- I support Mr Khan's objection, Mr President. Mr
24 President, on the issue, the only issue is whether or not the impression was removed
25 from the mind of the witness. I know the Court intervened, but the question

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1 remains whether the witness is labouring under the same impression that his
2 obligation to the Prosecution is the same obligation to the witness.
3 I will probably also want to just go on record, Mr President, as seeking on my part for
4 Mr Sang that that issue be put to the witness.

5 Mr President, I am in your hands. If you make a ruling that you disallow my
6 request, at that point be explain to the witness, I am agreeable. I only pray that it go
7 on record that I raised that line of the situation.

8 PRESIDING JUDGE EBOE-OSUJI: And that point was overruled at the time. It
9 remains so. Thank you.

10 Mr Omofade, you may respond.

11 MR OMOFADE: Your Honours, the response is a simple one. What was proposed
12 by Mr Khan was that we should simply ask the witness (Redacted)

13 And if one looks at the transcript, the very question that I posed to the witness,
14 page 85, and I'm looking at line 14, 14 to 15 -- I beg your pardon, I'm looking at line 17,
15 (Redacted) And then he goes on to give a response. It's only after he
16 gave that response that I provided the follow-up. The reason I raised this, and of
17 course I refer to the witness's subsequent answer, "I can't remember well. It's a long
18 time." The fact that the witness can't remember is what prompted the attempt to
19 refresh his memory. Except we need to go through the foundation yet again.

20 MR KHAN: Your Honour, can I just say very briefly one sentence. The important
21 thing, in my respectful submission, is the witness must notify -- be informed that it's
22 important to remember the event, not what is in the statement. It's a critical
23 difference. This is not a test of memory from a statement. The Court is interested
24 in the truth of the event, and, your Honour, the Prosecution must establish, in my
25 respectful submission, that there is a memory gap or the witness is labouring under

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1 difficulties regarding recollection of the event as opposed to what's in the statement.

2 (Trial Chamber confers)

3 PRESIDING JUDGE EBOE-OSUJI: The objection is overruled.

4 Can the witness be brought in quickly.

5 (The witness enters the courtroom)

6 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back. We're sorry we had to

7 excuse you from the stand briefly while the lawyers debated a legal issue.

8 The Prosecution had asked you a question whether you had recalled anything else

9 (Redacted) about the broadcast and you said you do not remember, "It's

10 been a long time," and the Prosecutor was asking you whether showing you your

11 statement will remind you of anything else (Redacted)

12 (Redacted).

13 We will take it from there. The Prosecutor is allowed to proceed on that basis.

14 MR OMOFADE: Your Honours, I do observe that we're in closed session, rather

15 than public -- private session.

16 PRESIDING JUDGE EBOE-OSUJI: The blinds can go up while you ask your

17 question. We're all wearing earphones.

18 MR OMOFADE: Indeed, your Honour.

19 (Private session at 3.59 p.m.) Reclassified into open session

20 MR OMOFADE:

21 Q. And as the Judge has said, Mr Witness, would it assist you if I showed you or

22 read out to you the relevant portion of the statement we spoke about earlier?

23 A. Yes, that can help me to refresh my mind.

24 Q. And I'm reading from page 24, paragraph 122, of your statement and it reads,

25 "Actually, Ruto went to the station that night and I heard him, (Redacted)

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1 (Redacted)

2 Ruto was calling on the Kalenjin community to vote ODM and saying that it was their
3 last chance. He also added that those who don't understand that ODM
4 means -- what ODM means are like weeds among good crops and they should be
5 removed and burnt. The underlying meaning ..." -- "The underlying meaning of this
6 statement is that those who don't support ODM are outcast and they should leave.
7 He added, 'Those who are ...' -- and this is in inverted commas. "'Those who are not
8 from our tribe should leave the area. They should leave our land. It was grabbed
9 in Moi's era,'" and it closes the quotes.

10 "The statement was made in Kalenjin (Redacted)

11 (Redacted)

12 (Redacted). According to me, this can be
13 treated as a hate speech, sending fears to people ..." --

14 PRESIDING JUDGE EBOE-OSUJI: Now, are we still quoting (Redacted)

15 MR OMOFADE: Your Honour, I veered into the last sentence which need not be
16 there.

17 PRESIDING JUDGE EBOE-OSUJI: So take it with the witness then where you
18 should.

19 MR OMOFADE:

20 Q. So, Mr Witness, I asked you if you recalled anything else (Redacted)
21 about Mr Ruto's speech during the interview with Kass FM. Does that refresh your
22 memory on (Redacted)

23 A. Yes.

24 PRESIDING JUDGE EBOE-OSUJI: Witness, at this stage the question to you would
25 be: If your memory has been refreshed, can you now tell the Court what you recall

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- 1 (Redacted) It need not be what's in the statement. It needs to be what your
2 memory, as you sit there, tells you about (Redacted) now that your memory
3 has been refreshed.
- 4 THE WITNESS: When (Redacted) what the ODM Pentagon member talked
5 about over the radio, (Redacted) he urged the Kalenjins that this is their best
6 chance and that was the time they are going to have a good leadership and let the
7 whole community vote for ODM, and whoever is not understanding what ODM
8 means to him or her is just like an outcast and he's just like a weed within a good crop,
9 and let them come out during the voting day and vote for ODM, yeah.
- 10 MR OMOFADE: Your Honours, I have more, but I look at the time. I don't know if
11 we're rising at 4 today?
- 12 PRESIDING JUDGE EBOE-OSUJI: Have you finished on this particular point?
- 13 MR OMOFADE: On this particular point, yes, your Honour.
- 14 PRESIDING JUDGE EBOE-OSUJI: About (Redacted)
- 15 MR OMOFADE: Yes, your Honour.
- 16 PRESIDING JUDGE EBOE-OSUJI: We should.
- 17 We will adjourn now and reconvene tomorrow at 9.30, but we will let the witness out,
18 as is normal, first.
- 19 (Closed session at 4.05 p.m.) Reclassified into open session
- 20 MR KHAN: And, your Honour, while that's being done, I wonder if my learned
21 friend could give an assessment as to how much longer he estimates he will be
22 in-chief?
- 23 MR OMOFADE: Your Honours, the original estimate was meant to be probably for
24 just an hour tomorrow morning. It may be that we're able to stick to that. It may be
25 that it will take just about 30 minutes more, but almost certainly in the first session

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1 tomorrow morning.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you.

3 THE COURT OFFICER: Your Honour, for the record, we were in private session
4 since 15.59 and we are now in closed session.

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

6 So we will escort the witness out and then the Court will rise.

7 (The witness stands down)

8 PRESIDING JUDGE EBOE-OSUJI: The Court will now rise and we will reconvene
9 tomorrow at 9.30.

10 THE COURT OFFICER: All rise.

11 (The hearing ends in closed session at 4.06 p.m.) Reclassified into open session

12 RECLASSIFICATION REPORT

13 Pursuant Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
14 2013, and the email's instructions dated 3rd December 2013, the version of the
15 transcript with its redactions becomes Public.

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17