

1 International Criminal Court

2 Trial Chamber V(a) - Courtroom 1

3 Situation: Republic of Kenya

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

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

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

7 and Judge Robert Fremr

8 Trial Hearing

9 Friday, 1 November 2013

10 (The hearing starts in open session at 9.36 a.m.)

11 THE COURT USHER: All rise. The International Criminal Court is

12 now in session. Please be seated.

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

14 Court officer, please announce the case.

15 THE COURT OFFICER: Good morning.

16 (Interpretation) Situation in the Republic of Kenya in the case

17 of the Prosecutor versus William Samoei Ruto and Joshua Arap Sang,

18 ICC-01/09-01/11. We are in public session.

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

20 Appearances?

21 MR GARCIA: Same for the Prosecution, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper.

23 MR HOOPER: Yes. We remain the same on behalf of Mr Ruto.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa.

25 MR KIGEN-KATWA: It remains the same, Mr President.

1 PRESIDING JUDGE EBOE-OSUJI: Mr Narantsetseg?

2 MR NARANTSETSEG: Same for the victims. Thank you.

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

4 Quick housekeeping matter. As you would have noted, the Kenyatta
5 case has now been adjourned over to February. We don't need to discuss
6 the implication of that to our case today, but it's something we would
7 like for counsel and everyone to think about and we will return to it and
8 take submissions on it before we adjourn this session on whether we
9 cannot use the opportunity to have more sittings in the Ruto case in the
10 time that's now been freed up, which ordinarily would have been shared
11 with the Kenyatta case. It is just something we thought we would trace
12 for all sides to think about, and then, as I said, before we adjourn for
13 the session we will return to the question.

14 MR STEYNBERG: Thank you, your Honour. In fact, we have been
15 discussing it yesterday and again this morning. I know my learned friend
16 Mr Hooper is anxious to get started this morning so he proposed that we
17 would address it sometime during the course of the day. My concern is if
18 we leave it right until the end of the session, with the logistical
19 arrangements that need to be made with VWU, we will be eating in -- very
20 far into whatever time is remaining for the recess. So if your Honours
21 are minded to continue before the recess, then the sooner we get a
22 decision, the more likely it is that we will be able to make some sort of
23 a substantial in-roads into the case during this session.

24 I know my learned friends are not disposed to continue before the
25 recess. I'm sure they will explain why, but I think it boils down to

1 preparation time.

2 I believe my learned friend Mr Khan also wishes to raise, at some
3 stage during the day, the issue of the request for excusal of the first
4 accused, Mr Ruto, next week. Perhaps with the leave of the Chamber this
5 matter could be discussed either after the tea adjournment or a
6 immediately after the lunch adjournment today so that we can get a
7 decision sooner rather than later.

8 MR KHAN: I'm grateful, Mr President. Good morning, your
9 Honours. My learned friend has correctly intimated that we would wish to
10 raise the issue of the application to excuse Mr Ruto next week. I had
11 highlighted that as a motion earlier in the week. So, your Honours,
12 whenever there's a slot before the end of today, I'd be grateful for a
13 few minutes to make the application formally and to get, hopefully, a
14 ruling from your Honours.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you. We will -- of course
16 we're open to receive submissions on those procedural matters, but in
17 light of the fact that we are in some sort of time press with two
18 witnesses, we would like to make as much as possible the most headway
19 that we can with those two.

20 So without further ado, let's bring in the witness and continue.
21 The blinds will come down and the witness will be let in.

22 MR KHAN: Mr President, while that's being done, just for
23 planning purposes, the application I would intend to make orally would be
24 no more than five to ten minutes. I'm grateful.

25 (Closed session at 9.44 a.m.)

1 THE COURT OFFICER: (Interpretation) We are in closed session,
2 your Honour, and the witness shall be brought into the courtroom.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Rojas.

4 (The witness enters the courtroom)

5 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back and thank you
6 for joining us again. Mr Hooper will continue with your
7 cross-examination. Again to remind you to listen carefully and answer
8 his questions to the best of your ability and recollection. Thank you.

9 THE WITNESS: Yes, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: We go -- Mr Hooper, so I can make
11 the announcement at the same time, are we returning to open session?

12 MR HOOPER: Well, we're dealing with the word -- the one word
13 first and then looking at the -- seeing if we can identify the man. So
14 those two issues from the tape. So the first one -- the first issue is a
15 (Redacted)

16 PRESIDING JUDGE EBOE-OSUJI: All right.

17 MR HOOPER: So --

18 PRESIDING JUDGE EBOE-OSUJI: Why don't we then -- let's go into
19 private session.

20 MR HOOPER: Yes.

21 (Private session at 9.44 a.m.)

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

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 Mr Hooper, please proceed.

25 WITNESS: KEN-OTP-P-0268 (On former oath)

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 (The witness speaks English)

2 QUESTIONED BY MR HOOPER: (Continuing)

3 Q. Good morning, Mr Witness.

4 A. Good morning.

5 Q. We're in private session. And do you have the bundle there and
6 do you have the transcript, in particular, of the rally? And I think for
7 your purposes -- excuse me.

8 MR HOOPER: I think it's not in the bundle, I think it's a loose
9 document and it's the -- it's not in the bundle -- it's not in that
10 bundle. It's another document. Oh, it is? Thank you very much.

11 PRESIDING JUDGE EBOE-OSUJI: We again have tab IJ. Is that it?

12 MR HOOPER: That's it, yes. Thank you.

13 PRESIDING JUDGE EBOE-OSUJI: And what lines again?

14 MR HOOPER: And we're looking at line 314, 315, which reads:
15 Unidentified speaker 25, US25, singing through a microphone. (Redacted)
16 (Redacted), so it's a song or -- but the word
17 that's used, we understand, is the word (Redacted) which is
18 (Redacted) is the word that was said. It's been
19 listened to and that's our account. So what I'm going to do is play the
20 very, very brief section where that word, we say, appears.

21 Q. And, Mr Witness, don't worry about the transcript so much. If
22 you can help me by paying acute attention to the words, it's not quite
23 clear, and see if you can hear, as we think we can, the word (Redacted)
24 being said. And I'll play it now.

25 MR HOOPER: And that's at time-stamp 15 and 11 seconds.

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 (Video-clip played)

2 MR HOOPER:

3 Q. Now, Mr Witness, did you manage to hear in that phrase the word
4 (Redacted)

5 A. Yes, your Honour.

6 Q. And we discussed that word and its entomology yesterday and I
7 don't need to revisit that. Now, the second matter that we were going to
8 look at today and which I'd like to go to is the section dealing with the
9 unknown speaker 48 at our page 16, line 522, which is, I suppose, a sort
10 of chant or -- well, he's using the microphone. We can see what he says.
11 And it's time-stamp 27.20. And I'm going to play it, and what I'd like
12 you to do is -- we're not translating or looking for a particular word
13 here. What I'm asking you to do, Mr Witness, is look at it. Perhaps we
14 can freeze it once it gets going, and I want to ask you if you recognise
15 the person who's at the microphone. Here we go.

16 (Video-clip played)

17 PRESIDING JUDGE EBOE-OSUJI: Stop, please. (Redacted)

18 MR HOOPER: Yes.

19 PRESIDING JUDGE EBOE-OSUJI: Can we do this in public?

20 MR HOOPER: Yes, we can.

21 PRESIDING JUDGE EBOE-OSUJI: And then we go into private to
22 discuss it.

23 MR HOOPER: Very well.

24 PRESIDING JUDGE EBOE-OSUJI: Yes.

25 (Open session at 9.50 a.m.)

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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

2 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

3 MR HOOPER: Right.

4 Q. Here we go. Watch the screen.

5 (Video-clip played)

6 MR HOOPER:

7 Q. Now, did you recognise who that person was?

8 A. No.

9 Q. As far as you know, he's not -- this was not -- he was not an ODM
10 official, personality, in the area as far as you know; is that right?

11 A. I don't know nothing about it.

12 Q. And from what we could see or what you've seen from the rest of
13 the video, it would appear that it was running an open microphone; in
14 other words, anyone could come up and say -- and get whatever off their
15 chest if they wanted to. That was the position, wasn't it?

16 A. I don't know.

17 Q. Yes. Now, let's -- all right, now let's move from that then to
18 some other matters and go back, if we may, to what we were discussing
19 yesterday in respect of --

20 PRESIDING JUDGE EBOE-OSUJI: Do we do this in private?

21 MR HOOPER: No, I'm fine with open.

22 PRESIDING JUDGE EBOE-OSUJI: All right.

23 MR HOOPER: Yes.

24 Q. And we were talking yesterday, you may recall, of certain things
25 and the like. Just one moment. And we're dealing with certain things

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1 relating to -- well, let me just ask you this. Just going back - we're
2 in open now, aren't we? Yes - just going back to what that man was
3 saying, again, as I put to you yesterday, that's the sort of strongest
4 phrase that we find on -- that's in the tape, the videotape of that
5 demonstration of the 3rd of January. That's right, isn't it?

6 A. I'm not getting you.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, perhaps we can put on
8 record what the person is saying. Is it -- especially the part that you
9 were now addressing.

10 MR HOOPER: Yes. Let's go -- let's go back to it, then.

11 Q. On the translation we have, what he says on -- at page 16 on the
12 translation - and I'll read it through:

13 "My point is to say that Kibaki should leave office at State
14 House as from today, not tomorrow. He should leave today and take his
15 wife back to Othaya."

16 PRESIDING JUDGE EBOE-OSUJI: And here we are looking at line 519?

17 MR HOOPER: Yes.

18 PRESIDING JUDGE EBOE-OSUJI: Okay.

19 MR HOOPER: Unidentified speaker or speakers: "Yes, yes. That's
20 what we want and what we'd like also to ask -- not to ask but want,
21 rather, is for Raila to come here to Eldoret so we can swear him in
22 officially." Cheering. And all the Kikuyus shout back: "Central."
23 "Where should all the Kikuyus go?" "To Central." "And where should
24 Raila go?" "Up." "State House. Raila, State House," is the response.
25 "Raila, State House, Raila, State House. The father of our nation.
26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 State House."

2 Q. Now, as far as that is concerned, that phrase, "all the Kikuyus,
3 Central, where should all the Kikuyus go, to Central," that's the
4 strongest phrase in this entire video; would you agree? No one else
5 expresses themselves like that?

6 A. Somehow.

7 Q. I'm sorry, I didn't quite hear you.

8 A. Somehow.

9 Q. "Somehow." What do you mean by that, "somehow"?

10 A. When you say "the strongest," I really don't get it quite clear
11 because it seems others also alluded to the same.

12 Q. And from the context, there may be an ambiguity here, but it
13 could equally, this phrase, "all the Kikuyus, Central, where should all
14 the Kikuyus go, to Central," equally be consistent with them talking
15 about Kibaki and the circle around him, the Kikuyus around him rather
16 than Kikuyus in general. Do you agree?

17 A. I don't agree.

18 Q. Thank you very much. Now yesterday we were talking --

19 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, can we stop please. Did
20 you take into account line 539 to 540?

21 MR HOOPER: Well, it goes on to read -- well, I'll address it.
22 It goes to read, at 539: Thank you, our citizens from Kapsabet, and we
23 will join up with other Kenyans, bearing in mind that we have suffered.
24 And then the phrase: "Thieves are the Kikuyus, isn't it like that?"
25 Which is, in fact, we would say is a mistranslation and should read:
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Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 "Theft belongs to the Kikuyus." And the theft -- the theft that is being
2 spoken about there is the theft of the election, isn't it?

3 A. No.

4 Q. All right. Well, what theft are you -- do you say that it
5 belongs to?

6 A. Even in ordinary sense, you -- there are existing prejudices
7 against Kikuyus in the sense that they've been branded thieves.

8 Q. All right. Okay.

9 PRESIDING JUDGE EBOE-OSUJI: I think for the completeness of the
10 context on that part, it will be fair to take this whole thing up to line
11 553 at least.

12 MR HOOPER: I will.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 MR HOOPER:

15 Q. And it reads on:

16 "They tried to steal night and" -- response back: "Day-time."
17 "And anyone who claims that we've stolen anything here in Kapsabet, we've
18 never stolen anything. No one has stolen anything." Cheering. "You
19 forget about them, they should leave by all means. We want to go right
20 now. We came here for peace. We didn't come for war and we've cast our
21 votes in peace and justice." And an unidentified speaker 49 adds: "And
22 for Raila." And back to 48: "And for Raila. We voted for Raila. We
23 didn't vote for guns to be in charge of us -- sorry, to be in charge. We
24 voted for justice. And that justice is a leader who will lead us for
25 five years and even us, let the likes of Ruto to stay in Nairobi, knowing
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1 there are real men here in the Rift Valley."

2 That's the completion. And in fact, that last phrase, we didn't
3 vote for guns to be in charge, is in fact to be in charge of us, is the
4 meaning, is it not?

5 A. Which line is that, your Honour?

6 Q. Line 550. It's a small translation point and I don't want to get
7 stuck into translation. That last phrase, by the way, "and even us, let
8 the likes of Ruto to stay in Nairobi, knowing that there are real men
9 here in the Rift Valley," was that -- in fact, is there a tone there, a
10 sense there of grievance by the speaker that Ruto is out of touch with
11 the Nandi there, being in Nairobi?

12 A. I understand differently. Let Ruto stay in Nairobi, he has
13 representation on the ground.

14 Q. All right. Now, the next man, in fact, while we're on this and
15 this was played yesterday, you might remember, by my friend in ask -- in
16 chief with you when he was -- the Prosecution were questioning now, you
17 might remember that this was a man in a pink shirt with a big hammer and
18 shouting who was identified as Edwin Kosgey with the nickname Saitoti --
19 can we just confirm that Edwin Kosgey is no relation to Henry Kosgey,
20 "Kosgey" being just a very common name amongst the Nandi; is that right?

21 A. Your Honour, do I answer this in public?

22 PRESIDING JUDGE EBOE-OSUJI: Do you know if Edwin Kosgey is
23 related to Henry Kosgey? If you know, you can say yes; if not, you can
24 say no.

25 MR GARCIA: Your Honour, if I may just suggest, can we can go

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1 into private session, please.

2 PRESIDING JUDGE EBOE-OSUJI: All right. We will go into private
3 session.

4 (Private session at 10.03 a.m.)

5 THE COURT OFFICER: (Interpretation) Mr President, we're in
6 private session.

7 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

8 MR HOOPER:

9 Q. Yes, the question was: Can you confirm that the Kosgey mentioned
10 there is no relation to Henry Kosgey, "Kosgey" being a common name
11 amongst the Nandi?

12 A. No blood relation.

13 Q. All right.

14 MR HOOPER: So we can go back into open.

15 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, why was that a difficult
16 thing to say in public?

17 MR GARCIA: Your Honour, I noticed that it was causing a certain
18 amount of discomfort for the witness, so I was wondering if perhaps he
19 had something else to say on the matter, but he didn't, so it was a
20 precautionary move.

21 PRESIDING JUDGE EBOE-OSUJI: Let's go back to public.

22 (Open session at 10.05 a.m.)

23 THE COURT OFFICER: (Interpretation) Mr President, we're in
24 public session.

25 MR HOOPER:

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1 Q. Edwin Kosgey no blood relation of Henry Kosgey. Now, can we come
2 back to where we left off last night or yesterday afternoon. We were
3 talking about certain things that Mr Ruto spoke about. Let me just
4 remind you what we were discussing there. I'd asked you whether you
5 acknowledged - reading from the transcript at T63, 115 - I'm asking you:

6 "Do you acknowledge he has certain themes? He has a strong
7 economic theme, first of all, doesn't he?" And you agreed. "His concern
8 as a politician -- he's concerned to raise the standard of living of all
9 Kenyans. Is that right?" And you said: "That's right." And I asked
10 you: "He's very concerned that there are the multi-rich in Kenya and the
11 dirt poor, who are the bulk of Kenyans; is that right?" And you said --
12 agreed that that's right.

13 And moving to another theme I asked you: "Well, in respect of
14 devolution, taking power from the centre and placing it in what -- in
15 other counties has been a constant theme with Mr Ruto, hasn't it?" And
16 you said: "I don't dispute that." So that's where we left off on that
17 subject yesterday.

18 Another theme that you may have been able to identify that was
19 again a constant in many of his public announcements was the issue of
20 work and work for young people. Is that right?

21 A. Generally right.

22 Q. Because the problem of youth unemployment is a very big problem
23 in Kenya, isn't it?

24 A. Yes.

25 Q. I understand that 70 per cent of the population of Kenya are aged
26

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1 under 30. Would you agree with that statistic?

2 A. Come up again?

3 Q. That 70 per cent of the population of Kenya is aged under 30;
4 it's a very young population?

5 A. Maybe.

6 Q. And in relation to work, another issue is that -- that he
7 identified, and others, was that there was a concentration of work and
8 opportunity at the centre in Nairobi that would be better if it was more
9 fairly distributed throughout the country. That was another constant
10 theme, was it not?

11 A. Maybe. I don't have details.

12 Q. And then I'd asked you if you'd come to hear of - directly or
13 indirectly - his statement of being ready to work with all the people of
14 Kenya, including the people of Central. And I think you said you
15 couldn't recollect that specific reference that I -- that I'd referred
16 you to.

17 Can you recall ever hearing him say on another occasion in
18 Kapsabet and at Eldoret these words: "We have said we don't want
19 tribalism. For a person to be born into a particular tribe is not his or
20 her fault. It is the wish of God."

21 Do you remember him saying words to that effect at any time?

22 A. I don't recall.

23 Q. And while we are on this general theme, if I can put it like
24 that, and we're in open session -- so bearing in mind we're in open
25 session, there's no difficulty that I see, do you recall Mr Ruto on the

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1 television or on the radio, because you may not have had access to
2 newspapers at the time, but on the radio and television, do you recall
3 him making very specific calls for an end to the violence of the
4 post-election violence? Do you recall him making statements calling for
5 peace? Calling for an end to the violence in the first few days of
6 January 2008? Can you recall him saying things like that?

7 A. I don't recall.

8 MR HOOPER: Now, can we just go into private session for a
9 moment.

10 PRESIDING JUDGE EBOE-OSUJI: Private session.

11 (Private session at 10.11 a.m.)

12 THE COURT OFFICER: (Interpretation) Mr President, we're in
13 private session.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 MR HOOPER:

16 Q. On the 2nd of January, we have a clear record - and we've seen it
17 already in this Court - of these words being said. I'm going to say them
18 to you. These are Mr Ruto's words on television on the 2nd of January:

19 "We have said very clearly and loudly that we want a peaceful
20 nation. We're asking Kenyans, wherever they are across the country, that
21 we want to protest against what happened to us in this country but we
22 want to do it peacefully. We abhor any acts of violence. We ask Kenyans
23 to shun and to avoid any acts of violence, any acts of looting, any acts
24 of destruction of property which is unnecessary. We are telling our
25 people across the country that burning property, destroying life, and
26

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1 engaging in acts of violence is actually against the democracy we are
2 fighting for. We want every Kenyan to be heard to participate in freedom
3 of association and freedom of expression, but within the limits of
4 peace."

5 And that was a statement that was played and replayed on national
6 television and carried by the main television companies in those early
7 days of January. Now -- now I've read it to you, do you recall hearing
8 that? Does it ring a bell? Is it something that you recall him now
9 saying or words to that effect?

10 A. No, I don't recall.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, it's up to you to manage
12 your own cross-examination, but do you think it might help if you
13 played --

14 MR HOOPER: No.

15 PRESIDING JUDGE EBOE-OSUJI: All right.

16 MR HOOPER: No, I doubt it with this witness somehow.

17 Q. And I'm -- we've seen it and I've said it and the exact words,
18 and what I'd like to ask you, Mr Witness, is this: Did you have access
19 to television in those early days of January?

20 A. Not in the early week of January and probably I went to the
21 estate twice to watch news. But, of course, for a while there was a
22 radio, and again, I didn't listen to the radio throughout.

23 Q. All right. You didn't hear -- let me just read something else to
24 you. This is a peace appeal made by Mr Ruto on the radio on the
25 3rd of January (Redacted), and I'll read it in its
26

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1 translation that I have as follows.

2 "We are trying to work in paths of peace to look until we find
3 the truth for our people and all of us who voted. We want to ask
4 everybody. I heard there was a big war and apprehension in different
5 parts of Kenya, in Eldoret, in Kericho, Sotik and parts of Kisumu, Busia,
6 and Mombasa, and Nairobi, many parts. I want us to ask, let us be
7 tranquil. We want peace in this country. We don't want to use paths
8 which are unlawful. We want to use a lawful path until we find our
9 truth. I want to implore the Kalenjin people, wherever they are, and all
10 the people of Kenya to leave the wars and the things that are going on
11 and then we look for peace so our land can forge ahead on a good path.
12 In the meantime, we want to ask for patience, and we implore the Kalenjin
13 people and all the people of Kenya to stay on a path of harmony and wait
14 so we can find a way to end the problems of the politics of our country
15 of Kenya in a peaceful way."

16 Now, that substantial speech by Mr Ruto played on the radio --

17 A. I can't remember.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper.

19 MR HOOPER: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: If you have the audio-visual
21 material on this, I will -- the witness will need to see it or listen to
22 it.

23 MR HOOPER: Well, the witness has no recollection of it and there
24 will be another opportunity for us to come to it. We will, without any
25 doubt, put it before the Court. But I'm mindful of the time and I'm
26

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1 mindful of the time this takes, but if the Court --

2 PRESIDING JUDGE EBOE-OSUJI: Yes. If you're not prepared
3 materially to do that, that's one thing. But I have difficulty
4 personally with certain words being read out. I'm not saying the words
5 are wrong, but we know this thing, whether it is present memory revived
6 or whatever the other expression is --

7 MR HOOPER: Right --

8 PRESIDING JUDGE EBOE-OSUJI: -- reading a text by somebody else
9 in an atmosphere that is not native to the circumstance of the original
10 making of the speech is not the same thing --

11 MR HOOPER: No --

12 PRESIDING JUDGE EBOE-OSUJI: -- as showing the material in its
13 original format to the person.

14 MR HOOPER: Your Honour's persuaded me. So I will seek to play
15 it and I hope that that's not going to prove any -- I don't think it will
16 prove particularly difficult.

17 PRESIDING JUDGE EBOE-OSUJI: That's not to say that after doing
18 it the memory will be revived, but at least it's best to give the witness
19 all the opportunity.

20 MR HOOPER: All right. Now, in relation to the television
21 scheme, we've heard that he didn't see television in those early days.
22 The Chamber has seen both -- has seen that particular clip twice, I
23 think. So I'm not proposing to re-visit that transmission at this moment
24 unless the Chamber feels it would be assisted again to see it. I don't
25 think the witness will be necessarily assisted. He didn't have
26

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1 television to watch, he says. But with the audio, the radio, let's play
2 that. And it's -- if I can find my reference. We have to trace it
3 through our own exhibit numbers. It's Defence Exhibit 34. And, yes, I'm
4 sorry, we're in private. Can we do this in public?

5 PRESIDING JUDGE EBOE-OSUJI: Yes, in public.

6 MR HOOPER: Sorry, 35, I'm told. Sorry, Defence Exhibit 35.

7 MR GARCIA: Your Honour, I understand that the -- that it is in
8 (Redacted) I think we should remain in private.

9 MR HOOPER: (Redacted). My note may be in error.
10 Let's play it and we'll see what it is, and we can then ask the witness
11 what it is.

12 MR GARCIA: As long as we stay in private session, your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: Let's try it out. Let's see what it
14 looks like in private session. Let us start and then we can see if we
15 can go back and re-start it in open or continue in open, rather.

16 (Video-clip played)

17 PRESIDING JUDGE EBOE-OSUJI: Okay. Let's go to public.

18 (Open session at 10.21 a.m.)

19 THE COURT OFFICER: (Interpretation) Mr President, we're in
20 public session.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 Please proceed.

23 (Video-clip played)

24 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper.

25 MR HOOPER: Very well. Thank you.

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 Q. Well, now that you've seen that first quote that I played to
2 you -- quoted to you, and my question is: Having seen the television
3 now, do you recall seeing that?

4 A. I don't recall. I don't think I saw it.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Now the next one.

7 MR HOOPER:

8 Q. When you say, "I don't think I saw it," do you think you may have
9 seen it but forgotten about it?

10 A. No, your Honour. If it happens in January, sincerely I -- I
11 wasn't privy to the televisions. And again, ...

12 MR HOOPER: Just give us a moment, your Honour, we'll try and
13 find the specific relevant part of the audio.

14 PRESIDING JUDGE EBOE-OSUJI: And this will be the radio
15 broadcast?

16 MR HOOPER: This is the radio broadcast --

17 PRESIDING JUDGE EBOE-OSUJI: Right.

18 MR HOOPER: -- which is in --

19 PRESIDING JUDGE EBOE-OSUJI: (* Overlapping speakers) --

20 MR HOOPER: Actually, it's in another -- yes -- we should be --

21 PRESIDING JUDGE EBOE-OSUJI: Let's go to private.

22 MR HOOPER: Private session.

23 (Private session at 10.24 a.m.)

24 THE COURT OFFICER: (Interpretation) Mr President, we're in
25 private session. And while we have the small break in the proceedings, I
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 would like to put on the record that the video which was played today
2 bears the following reference KEN-OTP-0028-0055, and it is an -- it's a
3 Defence exhibit by the Ruto Defence team which already appears on the
4 record as Exhibit Number 35 for the Ruto Defence team.

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

6 Mr Hooper.

7 MR HOOPER: I have an incomplete reference to it, which makes it
8 difficult amongst all the files to identify. Because as far as we know,
9 it may not have an ERN number. So can I leave this? I will come back to
10 it?

11 PRESIDING JUDGE EBOE-OSUJI: Yes. Some of your teammates --

12 MR HOOPER: Yes --

13 PRESIDING JUDGE EBOE-OSUJI: -- may find it while you move on to
14 something else.

15 MR HOOPER: Yes, it may take us, perhaps, over the midmorning
16 adjournment to find it but I'm confident we can find it and
17 (* indiscernible) sufficiently to play it. Let me just pass my own note
18 back so someone's got something to look at.

19 Very well. We'll come back to that.

20 Can we go back to -- well, no, we're going to stay in closed
21 session. Just one moment.

22 Q. I want to go now to the rally that was held at Kapsabet on the
23 5th of December, 2007.

24 MR HOOPER: And I'm -- I don't know what your Honour's preference
25 would be, whether this should be dealt with in private session or in open
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 session. It's to do with what the witness recalls occurred at that
2 rally. In itself, I wouldn't have thought that would be identifying.

3 PRESIDING JUDGE EBOE-OSUJI: Have we already touched upon that
4 rally?

5 MR HOOPER: Yes.

6 PRESIDING JUDGE EBOE-OSUJI: All right.

7 MR HOOPER: Yes, that's the one where Mr Ruto speaks and we're
8 dealing with the witness's recollection of what was said. That's the
9 area that we're going into. I don't think it in itself being one of many
10 thousands at that rally would be identifying. I've forgotten now whether
11 we were in open or closed session for that.

12 MR GARCIA: I think we were in open session, your Honour, but I
13 think we have to be very mindful (Redacted)
14 (Redacted), it should be done in private session.

15 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
16 (Redacted).

17 MR HOOPER: (Redacted).

18 PRESIDING JUDGE EBOE-OSUJI: Yes, we can go in open session.

19 MR HOOPER: Yes.

20 (Open session at 10.28 a.m.)

21 THE COURT OFFICER: (Interpretation) Mr President, we're in
22 public session.

23 MR HOOPER:

24 Q. Now, the 5th of December, 2007, there was a rally at the Kipchoge
25 Keino stadium in Kapsabet. It was an ODM rally. You've described it.

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

Page 23

1 You've described that there were thousands there. It was clearly a big
2 rally. It was plainly a main rally prior to the December election; is
3 that right?

4 A. Yes, your Honour.

5 Q. And you've explained how you went in the morning, you went away
6 and then you came back. And you've spoken about the speakers that you
7 can recall who were present. Can I just ask you this - don't provide us
8 with any names, of course, in answer to this question - when you went
9 there, did you go on your own or were you with anybody else?

10 A. There were -- we were -- I was following some groups.

11 Q. Well, let me put it like this, and again remember we're in open
12 session: Were you associated in some way with those groups or --

13 A. No.

14 Q. No. So did you go on your own or did you go with a friend, for
15 example?

16 A. On my own.

17 Q. Now, the large body of people there, given the area, they were
18 for the majority Nandi; is that right?

19 A. Yes, your Honour.

20 Q. Then there would be Luhyas?

21 A. Yes, your Honour.

22 Q. Luhyas in a significant number; is that right?

23 A. I don't understand by "significant number."

24 Q. Well, remember yesterday we were describing the general political
25 make-up of the area and you accepted, as a general figure, that about 30

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 per cent of the voting population of Kapsabet were Luhya; is that right?

2 A. Yeah, Luhyas were there.

3 Q. Yes. And not a few. A lot of Luhyas were there; is that right?

4 A. I don't know.

5 Q. There were Luos there and people from other ethnic groups,
6 including Kikuyu; is that right?

7 A. I don't know, but I'll presume Luos were there. But Kikuyus, I
8 don't know.

9 Q. Well, can you, looking at a person, not always, but in general,
10 could you tell looking at them whether they were Kikuyu as opposed to
11 Nandi?

12 A. From what I've known, your Honour --

13 PRESIDING JUDGE EBOE-OSUJI: Wait, wait. Let's go into private
14 session.

15 (Private session at 10.32 a.m.)

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

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

19 Witness, do you remember the question?

20 THE WITNESS: Yes, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: Proceed. And you were beginning to
22 say from what you --

23 THE WITNESS: From what I've known ever since, Kikuyus rarely
24 attend political rallies in -- where I'm coming from. But of course, you
25 wouldn't miss one or two Kikuyus, but they abhor political rallies. They
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 are too busy in their businesses.

2 MR HOOPER:

3 Q. All right. Just before we go out of a private session, can you
4 answer this question: Looking at a person, can you personally -- can you
5 look at a person, in general, and tell if they're Kikuyu by looking at
6 them?

7 A. It is presumptive. A Kikuyu will be known when he talks
8 Kiswahili, but you might presume that one is a Kikuyu by seeing their
9 complexion, but it's never accurate.

10 Q. All right.

11 MR HOOPER: So I think we can go back into open.

12 PRESIDING JUDGE EBOE-OSUJI: Yes --

13 MR GARCIA: Your Honour, just before we do go back, just a
14 reminder that if we are going to broach on what Mr Ruto would have
15 stated, (Redacted)
16 (Redacted).

17 PRESIDING JUDGE EBOE-OSUJI: Well, let's, first of all, listen to
18 it (Redacted)

19 MR GARCIA: I think, actually, we might have done the whole part
20 on what Ruto would have been -- Mr Ruto would have been stating in
21 private session, your Honour.

22 MR HOOPER: Well, that would seem to be something which certainly
23 should be in open session. It's an allegation --

24 PRESIDING JUDGE EBOE-OSUJI: We can listen -- we can play the
25 video (Redacted) was
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 used.

2 Mr Hooper, there is something I've noticed and this is not a
3 criticism as such, but the -- your microphone working, I'll suggest you
4 switch off immediately upon completion of your question. I notice you
5 ask the question and then wait then for the witness -- I'm not saying you
6 do it on purpose. It's --

7 MR HOOPER: (Microphone not activated)

8 PRESIDING JUDGE EBOE-OSUJI: -- instinctively, yes, but it is
9 better to switch off immediately upon completion of your question and
10 give the gap for the witness to begin.

11 MR HOOPER: Indeed. Now, can we freeze where we are because
12 we've found the audio and perhaps we can play it now.

13 PRESIDING JUDGE EBOE-OSUJI: All right. And then return to
14 the --

15 MR HOOPER: And return to the subject that I'm dealing with at
16 the moment.

17 PRESIDING JUDGE EBOE-OSUJI: All right. And that we do, where,
18 in private or public?

19 MR HOOPER: Well, we play it in public and if --

20 PRESIDING JUDGE EBOE-OSUJI: But it's (Redacted), isn't it?

21 MR HOOPER: I think it is, yes.

22 PRESIDING JUDGE EBOE-OSUJI: Let's do it in private, then.

23 MR HOOPER: All right.

24 MR GARCIA: Can we also have the ERN or the reference for this
25 audio?

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 MR HOOPER: We'll give -- we'll provide a copy. It's not --
2 hasn't got an ERN number, but it was played in the opening so it's not
3 the first time it's been or part of it's been heard.

4 (Audio-clip played)

5 MR HOOPER:

6 Q. We're in closed -- we're in private session, Mr Witness, and
7 you've heard -- you've heard that --

8 PRESIDING JUDGE EBOE-OSUJI: Do we have a transcript?

9 MR HOOPER: I have a transcript, but the transcription I've got
10 is part of another document. I've -- I can read the translation I've
11 got -- in fact, I've already read it into the transcript. It's -- but I
12 can read it again, (Redacted)
13 (Redacted). First of all, a preliminary question, perhaps, I
14 can ask of the witness and it's this:

15 Q. Mr Witness, did you recognise the voice of Mr William Ruto on
16 that tape?

17 A. No.

18 Q. Have you ever heard him speak before?

19 A. Yes, your Honour.

20 Q. All right. Does he not -- does the -- does the speaker not
21 introduce himself as William Arap Ruto, Member of Parliament of Eldoret
22 North on that tape?

23 A. He introduces himself, but the voice didn't become clear to me
24 that this is Ruto.

25 Q. Well, let me ask you this. Did you hear the speaker say: "This
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 is William Arap Ruto, Member of Parliament of Eldoret North"?

2 A. Yes, your Honour.

3 Q. And did the speaker go on to say: (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 Did he say that?

9 A. Yes.

10 Q. (Redacted)

11 PRESIDING JUDGE EBOE-OSUJI: Mr -- Mr Hooper, it looks like we
12 have to reconsider this line of questioning with this witness that says
13 he did not recognise the voice.

14 MR HOOPER: Let me put it like this.

15 Q. Having heard the speaker introduce himself as William Arap Ruto,
16 Member of Parliament of Eldoret North, do you accept that that's who it
17 was, that it was William Ruto speaking?

18 A. When he talked, I didn't get clear to know the person, but at the
19 end he introduces himself as William Ruto and --

20 Q. And do you accept that's what --

21 A. -- and I'm surprised because I didn't get to know the person.

22 Q. Yes. Perhaps the problem, sir, is simply this: That you've
23 hardly ever heard William Ruto speak in public. Is that right?

24 A. No, I've heard him speak.

25 Q. And how often and where?

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 A. What I can say is that I can't recognise his voice.

2 Q. Do you dispute that the speaker on that tape is William Ruto or
3 are you willing to accept, given the introduction, that it is
4 William Ruto?

5 MR GARCIA: I object, your Honour. That's about the fourth or
6 the fifth time that the question has been asked and the witness can't
7 help anymore. He's explained that he can't determine whether it is or
8 not Mr Ruto. So I think another question or the same -- same question
9 would only yield the same response from the witness. I think Mr Hooper
10 should move on to something else.

11 PRESIDING JUDGE EBOE-OSUJI: The objection is sustained.

12 MR HOOPER: Very well. We'll come back to the tape and its
13 authenticity in other circumstances, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: The objection -- sustaining the
15 objection does not mean you may not explore the same material with
16 somebody else who can better assist you with it.

17 MR HOOPER: Yes. But I think I'm still entitled to ask some
18 questions of this witness. I won't go into it in great detail.

19 Q. But, Mr Witness, whoever was the speaker - and clearly we say
20 it's Mr Ruto - that is quite clearly a very clear call for peace, is it
21 not?

22 MR GARCIA: I object, your Honour. Now that the witness has
23 stated that he doesn't recognise the voice, I don't see what the purpose
24 or the relevance is of determining if the person on the audio recording
25 says one thing or another. It has no more relevance. That's why I think
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 we should move on to another topic.

2 PRESIDING JUDGE EBOE-OSUJI: The objection is sustained.

3 Counsel, that is a material the Chamber can make for itself --
4 judgement the Chamber can assess for itself on the basis of the plain
5 text of the message when we get a translation of it.

6 MR HOOPER: Yes, but this witness can help (Redacted)
7 (Redacted)-- whoever it is, and we can therefore root his
8 observation in the subsequent transcription we will provide.

9 PRESIDING JUDGE EBOE-OSUJI: (* Overlapping speakers) --

10 MR HOOPER: He's listened to it and it was a simple question:
11 Was this a message of peace by the speaker.

12 PRESIDING JUDGE EBOE-OSUJI: The ruling has been rendered.

13 MR HOOPER: Very well.

14 So let's go back to open session.

15 PRESIDING JUDGE EBOE-OSUJI: We go back to open session.

16 (Open session at 10.45 a.m.)

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

19 MR HOOPER:

20 Q. Would it surprise you to know that the Defence have met several
21 Kikuyu who were present at that rally?

22 A. It will surprise me.

23 Q. Kikuyu who were there and found nothing offensive in the speeches
24 that were made. Does that surprise you?

25 A. It will surprise me.

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 Q. Very well. Now, being a substantial rally, is it right that the
2 national media were present?

3 A. Possibly.

4 Q. Did --

5 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, we're now back to the
6 rally?

7 MR HOOPER: Yes, we're back on -- we're back on the -- on the
8 rally itself.

9 PRESIDING JUDGE EBOE-OSUJI: On the -- did you say 5th of
10 December?

11 MR HOOPER: The 5th of December.

12 PRESIDING JUDGE EBOE-OSUJI: Yes.

13 MR HOOPER:

14 Q. And just dealing with rallies, you remember I was asking you
15 yesterday what other rallies you went to and you couldn't remember any
16 other rally you went to in 2007. Do you remember?

17 A. No.

18 Q. Well, let me ask you again. What other rallies did you go to in
19 2007?

20 A. I don't remember.

21 Q. Well, let me ask you this: You can't remember, but do you think
22 that kind of rally would have been covered by the national radios,
23 televisions, or newspapers?

24 A. Yes, possibly.

25 Q. Did you ever read or see any criticism of anything that was said
26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 at that rally?

2 A. No.

3 Q. I think I've asked you this before but let me ask you again in
4 this context. It's right, is it not, that there were Kikuyu prominent in
5 the ODM, in the structure of the ODM; that's right, isn't it?

6 A. I know of only Mr Nyagah, coming from Embu. He's an Embu, but of
7 course, a Kalenjin will treat Embus as Kikuyus.

8 Q. I'm looking at what you said to the Prosecution at paragraph 33.

9 You say there:

10 "There were local journalists from 'The Nation' and 'The
11 Standard' who attended this rally ..."

12 Does that help you as to whether there was media there?

13 A. Of course I'm aware of local journalists from those media houses.

14 Q. Can you recall what any other speaker said at that rally?

15 A. Generally many issues were on policy, policies of ODM.

16 Q. Well, can you remember anything specific that anyone said?

17 A. I can't remember the specifics.

18 Q. (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 Do you remember telling us that several days ago?

25 MR GARCIA: Your Honours, can we go into private session, please?

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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

2 (Public session at 10.51 a.m.)

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

5 MR GARCIA: Your Honours, I'm being cautious, but some of this
6 matter I'm quite sure was treated in private session initially, and it's
7 (Redacted) what Mr Ruto would have
8 stated at this rally. So I think it's quite important that we be logical
9 and continue in private session if Mr Hooper is going to broach that
10 subject in full and allow -- I think we have to be fair with the witness.
11 If he's going to be comfortable in testifying, it should remain in
12 private session, as it was done initially.

13 PRESIDING JUDGE EBOE-OSUJI: Indeed, if that quote that came in
14 now was received in private session, it should not be brought out in the
15 public session. I don't know, but let's -- I don't recall now, but if
16 that's the case, then it should not be in private session --

17 MR HOOPER: It's --

18 PRESIDING JUDGE EBOE-OSUJI: Sorry, it should not be in open
19 session.

20 MR HOOPER: (Redacted).

21 PRESIDING JUDGE EBOE-OSUJI: Was it in open session?

22 MR HOOPER: As far as I can see it is.

23 MR GARCIA: I have an indication that it was in private,
24 actually. And I can give the reference to the --

25 MR HOOPER: Very well. Let's --

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 PRESIDING JUDGE EBOE-OSUJI: Well, let's remain in private for
2 this part.

3 MR GARCIA: It was in private session, your Honour.

4 MR HOOPER: Can you give me the reference for that, please? I
5 see we're in open session (Redacted), and then we don't go into
6 private session until after this segment is read -- we go into private
7 session (Redacted). So it's in open session, isn't it?

8 MR GARCIA: If the Court will allow, I'm sure that (Redacted)
9 (Redacted) was done in private. I'm looking for the reference.

10 PRESIDING JUDGE EBOE-OSUJI: All right. Fair enough. There is
11 no -- as I said, it was a word of caution. We can proceed in private
12 session for this part.

13 MR GARCIA: Just to -- last word on that matter. I've just found
14 the term (Redacted) and (Redacted) of that was done in private
15 session. And that's what the witness is going to be referring to when he
16 testifies.

17 MR HOOPER: Yes, but I haven't got there yet.

18 MR GARCIA: I know that this might seem like a laughing matter
19 for some members of the Defence counsel, but this is quite serious. For
20 the witness to be able to testify and to do so comfortably, he must be
21 allowed to do it in private session. It's not a laughing matter; it's
22 quite serious.

23 MR HOOPER: Yes, well, I can assure my friend that this side well
24 appreciates the seriousness of crimes against humanity. We don't need
25 any instruction like that.

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 MR GARCIA: I made that comment because of what I observed on the
2 other side and what was heard and I think it was heard by everyone in
3 this chamber.

4 PRESIDING JUDGE EBOE-OSUJI: All right. Okay. Enough. Enough.

5 MR HOOPER: We don't, you know, perhaps (* overlapping
6 speakers) --

7 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, Hooper, let's proceed in
8 private session for this part.

9 MR HOOPER: All right.

10 Q. And just to reassure you, Mr Witness, that the bit that I've read
11 out was in open session. Let me say it again:

12 "I can't remember everything" -- let me go to the question. This
13 is from the Prosecution.

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 So that's what you said on the 29th of October?

21 A. Yes, your Honour.

22 Q. All right. Now, the first thing is this: Would it be fair to
23 say that your memory of events, of the rallies and rally, and this
24 particular rally in particular, is not very good? Would it be fair to
25 say that, your memory isn't very good after all these years?

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 A. Your Honour, I think I've not gotten clearly to that point. When
2 I said I remember -- I can't remember the -- I can't remember generally
3 the other part of the speech and speakers, it was on policy issues, but
4 this aspect I remember, the aspect that has been brought up in (Redacted)
5 (Redacted).

6 Q. And is it your evidence that when he said (Redacted)
7 (Redacted) is it your evidence that you recall clearly that he
8 said that?

9 A. Yeah, it is my evidence, your Honour.

10 Q. And is it clearly your recollection that the word used was
11 (Redacted) Is that, again, something you have a clear recollection
12 about?

13 A. If not (Redacted) it's (Redacted)

14 Q. So (Redacted) or (Redacted) is that something you clearly remember
15 or not?

16 A. It means the same thing.

17 Q. Is it something you clearly remember, his use of one of those
18 words?

19 A. Yes, your Honour. Yes, your Honour.

20 Q. And --

21 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, so that the transcript
22 gets you completely, the last question was: "Is it something you clearly
23 remember, his use of one of those words," was the question from counsel.
24 And, Witness, you say: Yes, your Honour, yes. Is that the case?

25 THE WITNESS: Yes, your Honour, it's either (Redacted) or
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 (Redacted)

2 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, I had to do that because
3 you were cut off, overlapping microphone.

4 MR HOOPER: Thank you, your Honour.

5 Q. And in relation to the other part of your recollection you said
6 this:

7 "He said something to the effect that Kikuyu are enemies."

8 What do you mean by "something to the effect that Kikuyus are
9 enemies"? Did he say: Kikuyus are enemies?

10 A. He said Kikuyus are enemies.

11 Q. Could he, for example, not have said Kikuyus are enemies, but
12 that Kibaki is an enemy, for example? Is that what you heard?

13 A. Kikuyus are enemies.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, hold your question. Now,
15 if we are not going to bring back the word (Redacted) or (Redacted) and if
16 we are not going to bring back that this part of the speech (Redacted)
17 (Redacted), I think we can manage the rest of the testimony in public,
18 although I see that it's 11.00. (Redacted)

19 (Redacted)

20 (Redacted). But now that we've established the
21 words of interest to you (Redacted), it is --

22 I believe that the rest of the discussion can be conducted in public.

23 That's what I'm saying.

24 MR HOOPER: It is.

25 Q. We just want to establish that the key feature of your evidence,
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 Mr Witness, is the use of the word (Redacted) or (Redacted), that's the
2 first thing you say you clearly remember. The second thing you say you
3 clearly remember is that he used these words that Kikuyus are enemies.
4 Do I understand you right?

5 A. Yes, your Honour.

6 MR HOOPER: (Microphone not activated) ... break with your
7 Honour's leave.

8 PRESIDING JUDGE EBOE-OSUJI: We'll take our break and you will
9 continue with that line of inquiry; is that it?

10 MR HOOPER: Yes.

11 PRESIDING JUDGE EBOE-OSUJI: All right.

12 MR HOOPER: Well, I'm moving now to the -- to an associated
13 matter.

14 PRESIDING JUDGE EBOE-OSUJI: What I'm trying to do is to what
15 extent we can safely continue in public with that line of inquiry,
16 because, as I said, if we re --

17 MR HOOPER: When we come back, we'll need to be in private
18 session, and then it will be a melange, I think, of in and out --

19 PRESIDING JUDGE EBOE-OSUJI: I see.

20 MR HOOPER: -- as we go through the morning.

21 PRESIDING JUDGE EBOE-OSUJI: All right.

22 MR HOOPER: Inevitably, I'm afraid, your Honour. But we'll keep
23 it -- we all have this interest, your Honour knows that very much, to
24 stay in the open as much as we can.

25 PRESIDING JUDGE EBOE-OSUJI: I know.

Witness: KEN-OTP-P-268 (On former oath) (Closed Session)
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1 All right. Let's go into public to tell the audience that we are
2 adjourning.

3 (Open session at 11.02 a.m.)

4 THE COURT OFFICER: (Interpretation) Mr President, we're in
5 public session.

6 PRESIDING JUDGE EBOE-OSUJI: All right. We will now adjourn for
7 the morning break and come back at 11.30. And the witness will now be
8 let off the witness-stand for the morning break.

9 (Closed session at 11.03 a.m.)

10 THE COURT OFFICER: (Interpretation) Mr President, we're in
11 closed session.

12 PRESIDING JUDGE EBOE-OSUJI: (Previous translation continues) ...
13 escort the witness off.

14 (The witness stands down)

15 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.

16 THE COURT OFFICER: All rise.

17 (Recess taken at 11.04 a.m.)

18 (Upon resuming in open session at 11.36 a.m.)

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

20 THE COURT OFFICER: (Interpretation) Mr President, we're in
21 public session.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, before you proceed, a
23 quick announcement, we will also be clawing back 30 minutes of the lunch
24 break into the proceedings, as we did in the last two or three days. So
25 we will rise at 1.00 and return at 2.00.

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1 MR HOOPER: I'm grateful. Thank you.

2 You may proceed. We're in open session. But before you do, it
3 doesn't seem as if we've processed all the videos or the audio-visual
4 material played on to the record. Mr Rojas will do that.

5 THE COURT OFFICER: (Interpretation) Yes, Mr President. For the
6 purposes of a complete record of the hearing, I would like to mention
7 that the first video that was shown to the witness on page 5, lines 23,
8 page 6, line 13, and page 7, line 2 of today's transcript will be given
9 the reference KEN-OTP-0026-4596. That is the video that was played
10 yesterday and admitted as Exhibit Number 24, OTP Exhibit, 0024-OTP
11 Exhibit. The fourth video that was displayed today or was played today
12 is not yet in the eCourt system and will only be processed during the day
13 when received from the Ruto Defence team, as has been indicated during
14 the break. Once we would have recorded the document in the eCourt
15 system, it will then be assigned an ERN number. Thank you very much.

16 PRESIDING JUDGE EBOE-OSUJI: I thought that was an audio as
17 opposed to video. The one, Mr Hooper, you said was only played at the
18 opening statement, but has not got an ERN number. That was an audio
19 recording as opposed to a video. Wasn't that the case?

20 MR HOOPER: Yes, it was.

21 PRESIDING JUDGE EBOE-OSUJI: So it needs to come in --

22 MR HOOPER: Yes, can we deal with that --

23 PRESIDING JUDGE EBOE-OSUJI: -- into the system.

24 MR HOOPER: -- at 2.00, by which time we hope it's got an ERN
25 number.

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Questioned by Mr Hooper (Continuing)

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1 PRESIDING JUDGE EBOE-OSUJI: All right.

2 MR HOOPER: Thank you. And just can I -- and also just provide
3 some video time-stamps in respect of sections that were shown yesterday,
4 just to read it into the transcript so they're not completely orphaned,
5 as it were.

6 The chanting, do you remember we saw the chanting, that was 19.30
7 to 20.51 on the videotape. We saw the crowds at the start, your Honours
8 will remember that, marching along the road with their branches. That
9 was at 1.44 to 2.53. And we had also that section with an unknown
10 speaker, 48, who remains unknown despite the exercise this morning. And
11 he was played yesterday and the video stamp there was 27.20 to 29.33.
12 Yes, I'll deal with that at 2.00. Thank you very much.

13 Q. Now, Mr Witness, we're dealing with the ODM rally, of course --

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

15 MR HOOPER: Yeah, and I was just about to say and the matters I
16 want to deal with need to be in private session and I hope for not much
17 longer than ten minutes.

18 PRESIDING JUDGE EBOE-OSUJI: All right. We will go into private
19 session for ten minutes, hopefully less if we can help it.

20 (Public session at 11.41 a.m.)

21 THE COURT OFFICER: (Interpretation) Mr President, we're in
22 private session.

23 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

24 MR HOOPER:

25 Q. You told us yesterday how, when you were contacted by Ms (Redacted),
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 which (Redacted)
2 (Redacted), you went and saw (Redacted)
3 (Redacted) a VHS tape, is that right, of the rally of the
4 5th of December; is that right?

5 A. Yes, your Honour.

6 Q. (Redacted) the tape of the demonstration that
7 we saw yesterday and earlier today; is that right?

8 A. Yes, your Honour.

9 Q. And these were both VHS tapes, were they?

10 A. No.

11 Q. The rally was a VHS tape. Just remind me, the demonstration,
12 what was that on? What format?

13 A. CD.

14 Q. You then go to (Redacted) with your friend (Redacted) Do you know
15 (Redacted) other name?

16 I'll ask again, can you give me (Redacted) other name?

17 A. (Redacted) is what I can remember.

18 Q. Well, who was (Redacted) First of all, was he a (Redacted)

19 A. Yes, your Honour.

20 Q. Where did he live?

21 A. We worked (Redacted) that was there. He lived in
22 (Redacted).

23 Q. He lived in (Redacted). And when you say (Redacted) the
24 (Redacted)

25 A. He was a (Redacted)

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 Q. But you don't know his name?

2 A. The other name I can't remember. I've known him as (Redacted),
3 yeah.

4 Q. Where does he live today?

5 A. I don't know.

6 Q. When did you last see him?

7 A. It's been quite a while. It's been long.

8 Q. Was he with you (Redacted)

9 (Redacted)

10 A. No.

11 Q. Did you travel together to (Redacted)

12 A. Yes -- no, no.

13 Q. That's a no, I take it?

14 A. It's a no. It's a no.

15 Q. You stayed in a hotel for three days. (Redacted)

16 (Redacted)

17 The question was: (Redacted)

18 (Redacted)

19 A. Yes.

20 Q. And you were at the hotel for three days; is that right?

21 MR GARCIA: Your Honours, just before we continue, I'm sorry to
22 interrupt, but I heard Mr Hooper say (Redacted) I'm wondering if that's
23 what he meant by his question.

24 MR HOOPER: Yes, thank you very much. You're correct, I meant
25 (Redacted) of course.

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 Q. (Redacted), the hotel in (Redacted) where you were put up to discuss
2 (Redacted). You were there for three days
3 at that hotel; is that right?

4 A. During the night.

5 Q. For three nights then; is that right?

6 A. Probably three nights, probably three nights.

7 Q. And was (Redacted) with you at that hotel during that time?

8 A. Yeah, I remember we -- we were in a hotel but different rooms.

9 He had his room, I had my room.

10 Q. And that was paid for by Ms (Redacted) was it?

11 A. All expenses taken care of by (Redacted)

12 Q. And what was the name of the hotel? Was it (Redacted)

13 A. No, I don't remember the name of the hotel.

14 Q. Thank you. Was it the (Redacted)

15 A. Not (Redacted) -- not (Redacted)

16 Q. When you went to (Redacted) and stayed there to discuss your
17 (Redacted), you took the VHS tape and the CD with you; is that right?

18 A. Yes.

19 Q. And you watched the tape - and I'm concerned now just with the
20 tape of the rally of the 5th of December - you (Redacted)
21 and -- is that right?

22 A. Plus (Redacted).

23 Q. Ms (Redacted) was (Redacted), was she not?

24 A. Yes.

25 Q. And you and (Redacted) what you say are -- is (Redacted)

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 (Redacted) things said on the tape that you then had; is that right?

2 A. Yes, your Honour.

3 Q. And those notes (Redacted) were then typed up by
4 someone else (Redacted); is that right?

5 A. I think it was done by the (Redacted), the personnel there
6 who typed (Redacted).

7 Q. And that was the document that was produced, your Exhibit F to
8 the statement.

9 PRESIDING JUDGE EBOE-OSUJI: Would that be the document at tab G?

10 MR HOOPER: Yes, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: The ERN -- sorry, KEN-OTP that ends
12 with 3 -- 0373?

13 MR HOOPER: Yes.

14 Q. Now, in that document -- can we get a copy of that to you.

15 PRESIDING JUDGE EBOE-OSUJI: The record should reflect that I
16 said "ends with 0373."

17 MR HOOPER: I have a paper copy. May be quick -- quicker to just
18 put this before the witness.

19 Q. I just want you to look at that. Does the phrase "Kikuyu are
20 enemies" appear? Let me put it like this, Witness. It's right to say
21 that the phrase, simple three words, "Kikuyu are enemies" does not
22 appear; is that right?

23 A. Paragraph one, two, three, four, five -- paragraph five has an
24 "enemy" --

25 Q. Just listen to my question. Do the words, (Redacted),
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 "Kikuyu are enemies" appear in that document?

2 A. No, I'm not seeing.

3 Q. Now, can I have that document back and can I ask you to confirm
4 that you watched the entire videotape of the 5th of December rally while
5 you were in (Redacted); is that right?

6 A. Yes, your Honour.

7 Q. Did you hear the words "Kikuyus are enemies"? Did you hear those
8 three words when you listened to the tape or not?

9 A. Reference was made to that effect.

10 Q. Simple question: When you watched the videotape, did you hear
11 those three words spoken by Mr Ruto, "Kikuyus are enemies"?

12 A. (Redacted)

13 Q. Did you hear on the videotape the words that you clearly
14 remember, as you told us just before the break and before and yesterday,
15 Mr Ruto said: "Kikuyus are enemies"? Did you hear that on the
16 videotape?

17 A. Difficult question to answer.

18 Q. Well, let's try yes or no. Did you hear those three words said
19 on the videotape, "Kikuyus are enemies, (Redacted) Yes or no?

20 A. No.

21 Q. Now, those tapes, both the V HS tape of the rally and the CD of
22 the demonstration, (Redacted)
23 and that was the last you saw of them at that time; is that right?

24 A. Yes, your Honour.

25 Q. Were you shown -- when was the last time you saw the video of the
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 5th of December ODM rally at Kapsabet? When was the last time you
2 watched it or any part of it?

3 A. At Kapsabet or Eldoret?

4 Q. Well, there's no rally at Eldoret -- did I say "Eldoret"? I said
5 Kapsabet. There's no rally, you never mentioned a rally at Eldoret. I'm
6 asking you about the rally at Kapsabet. When was the last time you saw
7 that videotape or any part of it was the question.

8 A. When we were preparing (Redacted), at the
9 hotel.

10 Q. All right. Later you were shown a video of the 5th of December
11 rally by the Prosecution when they were investigating this case with you;
12 is that correct?

13 A. There was -- yeah, I was shown a video.

14 Q. And you watched the entire video; is that correct?

15 A. Yes, your Honour.

16 Q. Was that the video that you (Redacted) or a
17 direct copy of the video (Redacted)

18 A. It didn't look like the one (Redacted)

19 Q. And what distinguished it from your previous videotape do you
20 say?

21 A. In the previous videotape, from the start, there was some
22 skirmishes and it captured that, running battles between supporters of
23 Elijah Lagat and Alex Kosgey. And then in the end of what I provided is
24 the speeches, particularly the speech of Mr William Ruto (Redacted)
25 But the one that I was shown by the OTP didn't have that part of
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
Questioned by Mr Hooper (Continuing)

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1 (Redacted)

2 Q. When you say "didn't have that part (Redacted)," which part are
3 you referring to?

4 A. The part that Mr William Ruto gave a speech (Redacted)

5 Q. Did the bit that the OT -- or the video the OTP showed you, as
6 far as you can remember, did it have the words: "The Kikuyus are
7 enemies"?

8 A. No.

9 Q. Did it have the word (Redacted) or its synonym, the other word,
10 (Redacted) did it have that?

11 A. No.

12 Q. Is that the bit you're referring to when you say it didn't have
13 the bit (Redacted) where Mr Ruto spoke? Is it those two bits that you
14 are complaining were missing --

15 A. The entire speech he gave (Redacted).

16 Q. Now --

17 A. Including those -- those terms.

18 Q. I see. And when did you last -- when were you last shown any
19 part of that video? Were you shown it in your preparation for your trial
20 evidence last week or so?

21 A. No, I wasn't shown it.

22 Q. Now, when you watched it with the Prosecution, and you watched
23 all of it, leaving aside what you say was omitted which made you think it
24 was not the same tape (Redacted), in all other respects was that a
25 video of the 5th of December rally that you attended?
26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 MR GARCIA: Your Honour, unless I'm missing something, the
2 witness has stated that he wasn't shown the video. The question of
3 Mr Hooper presumes that he did. And, in fact, he wasn't shown that video
4 so that's the -- that's what happened.

5 MR HOOPER:

6 Q. I'm not talking, of course, Mr Witness, of last week. I'm
7 talking when you were shown the entire video by the OTP when they were
8 questioning you. And you've told us that you watched the entire video
9 and I'm asking you: Was the video that you watched in other respects,
10 i.e., except for the bit you say was not on the -- or the two bits that
11 you didn't see which made you think it was a different video,
12 nevertheless, if it was a different video or not, was it of the same
13 occasion? Was that, as far as you could see, the video or a video of the
14 rally on the 5th of December, 2007, that you attended?

15 A. I could not tell if it was for the same occasion, I could not
16 tell.

17 Q. Well, let's have a thought about that for a moment --

18 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, tell me when you think it
19 is safe to go back to public session.

20 MR HOOPER: We can go back into public session.

21 PRESIDING JUDGE EBOE-OSUJI: Right here we're discussing
22 comparison of --

23 MR HOOPER: Yes -- no, we can go into public session.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Let's go to public
25 session.

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 (Open session at 12.05 p.m.)

2 THE COURT OFFICER: (Interpretation) We're in public session, your
3 Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 Please proceed.

6 MR HOOPER:

7 Q. So we're talking of a video of a rally of -- an ODM rally on the
8 5th of December, 2007. You had previously seen a video of that back in
9 2008. I'm now concerned with the video that you were shown by the
10 Prosecution in the course of your evidence to them back in (Redacted)
11 (Redacted)
12 (Redacted). You'd have to sit in that chair for two
13 weeks for us to hope to attain that length of time. So very long session
14 with the Prosecution. In the course of that, you were shown a video
15 which you watched in its entirety, as you told us. That's correct, isn't
16 it?

17 A. Yes.

18 Q. You didn't think that that was the same video that you had seen
19 before. My question now is: Having seen that video, was it the -- was
20 it of the same rally you attended?

21 A. It looked familiar, but I don't think.

22 Q. You don't think?

23 A. I could not tell. I could not tell.

24 Q. This is a Prosecution video obtained by the Prosecution dated the
25 5th of December, ODM rally at Kapsabet with various people talking,
26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Mr Langat, William Ruto for 20 minutes, Mudavadi. It was the same rally,
2 wasn't it, Mr Witness?

3 A. No. It didn't appear to me as the same rally. I could not make
4 differences -- the differences I could not -- in fact, to me, the place
5 looked familiar but I could not tell the differences.

6 Q. All right. Well, I'm going to, in fact, play that entire video
7 to you and we'll take it in bits as we go along and we'll examine it
8 together. But what we will find, of course, is that the word (Redacted)
9 will not appear in it and nor will there be a reference to Kikuyus being
10 enemies. And I hope that in the course of this exercise we can refresh
11 your memory of a rally that you did attend. I'm not in the position of
12 showing you a video of a demonstration that you didn't attend. I'm going
13 to show you a video of a rally with Mr Ruto on the 5th of December that
14 you claim you did attend. All right. And we'll see if we can jog your
15 memory as we go along. You look towards the Prosecution --

16 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, can we play the video?

17 MR HOOPER: Yes, we can.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.

19 MR HOOPER: Now, your Honour, there are certain documents here
20 which would be useful to your Honour and to my friends and, indeed, to
21 the witness. The video itself is KEN-OTP-0036-0101. That's the video
22 that we'll be asking to play and we'll be playing certain parts. The
23 video itself is quite long. There's certain parts of it that I'm going
24 to show the witness, and when we come to the speech of Mr Ruto, I'll play
25 that in its entirety. And what I propose to do is to play sections of it
26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 and pause. And in the meantime, I'm going to invite your Honours to look
2 at the translation of what is being said which is --

3 PRESIDING JUDGE EBOE-OSUJI: Remember, Mr -- we're now in a
4 public --

5 MR HOOPER: We are --

6 PRESIDING JUDGE EBOE-OSUJI: We have established certain --

7 MR HOOPER: Yes, indeed --

8 PRESIDING JUDGE EBOE-OSUJI: -- landmarks in the private session.
9 We will keep it that way. So let's not --

10 MR HOOPER: We'll keep it that way. I will observe that and we
11 can deal with any discrete matter --

12 PRESIDING JUDGE EBOE-OSUJI: In private.

13 MR HOOPER: -- in private, yes. And the translation you'll be
14 assisted by is KEN-OTP-0090-0545. There's a transcript of the actual
15 words spoken at KEN-OTP-0090-0244. The translation is at your tab 10.
16 The transcript, which we may as a discrete matter, I emphasise a discrete
17 matter, come to, is at your tab 16.

18 PRESIDING JUDGE EBOE-OSUJI: Who will play it? Will it be the
19 Registry or the Defence?

20 MR HOOPER: No, we are. I'm being very kindly assisted by
21 Ms Sullivan, who has to bear the burden largely, but I'm sure it will be
22 all right. It's not an easy position, in all fairness, and I'm sure
23 she's going to do it a lot better than I could. We're going to start --
24 well, first of all, can we just ensure that your Honours have that tab.
25 Your Honours have found the start of the rally?
26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 PRESIDING JUDGE EBOE-OSUJI: Tab 10 you said, or tab 16?

2 MR HOOPER: That one is - I've lost my tabs already - tab 10.

3 Now, tab 10 is the translation into English. And if I can take you to
4 page -- the cover page of that, over the cover page, an unnumbered page,
5 you will see this is OTP document, date of the recording 5th of December,
6 2007, location Kapsabet, then you'll see the duration, 1 hour, 47-plus
7 minutes. Then we have languages, and the languages are Kalenjin,
8 Swahili, Luhya, and English. The evidence registration number of the
9 original is provided. There are some named speakers listed there; that's
10 not in dispute, as we'll see.

11 And what I propose to do is, to some extent, invite your Honours
12 to multitask and as we play the video to follow the video, as it were,
13 with one eye and keep an eye on the translation. But that becomes more
14 significant, may I say, when we come to the speech. And the first speech
15 we come to is that of William Ruto, and his speech starts at line 969.
16 And your Honours will see, having started at 969 where it's indicated
17 "William Ruto," thereafter referred to as WR, his speech goes on on the
18 transcript here to line 1716 on page 50. At 1 -- at page 50, we can see
19 that Mr Mudavadi's introduced, and his speech then goes on until the --
20 more or less the close of the -- of the transcript at page 57. So we're
21 going to effectively start, for reasons that will become evident in due
22 course, with the arrival of Mr Ruto at that rally and Mr Mudavadi. So
23 that's the point we're going to start with, and then we'll move directly
24 from there to the speech itself.

25 PRESIDING JUDGE EBOE-OSUJI: So happily we will not be sitting
26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 through the entire 1 hour --

2 MR HOOPER: No --

3 PRESIDING JUDGE EBOE-OSUJI: -- 47 minutes.

4 MR HOOPER: No --

5 PRESIDING JUDGE EBOE-OSUJI: Okay.

6 MR HOOPER: If at any time the Judges -- you, the Judges, want to
7 see the rest of the video, it's -- it's -- well, it's what one expects,
8 it's a rally and it's film of various people sitting about. And then
9 there's a -- we may indicate just a portion where there's about a dozen
10 or more individual speakers, the sort of warm-up group, as it were, I
11 suppose. And then we come to the main event.

12 PRESIDING JUDGE EBOE-OSUJI: Yes, all right. Let's then begin --

13 MR HOOPER: Yes, thank you.

14 So this is the rally and first of all we've got an image on the
15 screen.

16 Q. And can I just ask you this, Mr Witness, as we look at that,
17 that's clearly Kapsabet; is that right?

18 A. Yes, your Honour.

19 Q. And it's on time-stamp 28.30 --

20 A. Yes.

21 Q. Just to orientate ourselves, we can see the mosque just on the
22 other side of the wall; is that right?

23 A. Yes, your Honour.

24 Q. And which stadium is that?

25 A. Kipchoge Keino.

26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Q. So here we go.

2 (Video-clip played)

3 MR HOOPER: All right. So we're paused at 31.51.

4 Q. We've seen this quite dramatic entry into the arena and we can
5 see Mr Mudavadi in the shot there and we've seen Mr Ruto. Do you agree?

6 A. Yes, your Honour.

7 Q. Clearly an ODM, Orange everywhere, an ODM rally; that's right,
8 isn't it?

9 A. Yes, your Honour.

10 Q. And does that refresh your memory?

11 A. Perhaps, yes.

12 Q. Right. Perhaps, yes. All right. Now we'll just move to another
13 section.

14 MR HOOPER: We're going to go to line 481 on page 14. Yes.

15 (Video-clip played)

16 MR HOOPER:

17 Q. And as we come to the rally itself, we have there at -- we can
18 see our line 483 of the translation where it reads:

19 "The grace of God. Thank you, God, for your love. Thank you,
20 God, for this day because you chose us to do your work."

21 And then there's -- do you agree that there's a prayer that
22 starts off the rally?

23 A. I don't have the translation.

24 Q. Oh, I'm sorry. Let me get to the tab. Tab 10. Do you have tab
25 10 there?

26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 A. Which one?

2 Q. Yes, it's in your bundle. But irrespective of the translation,
3 do you accept that in Swahili we heard a prayer?

4 A. Yes.

5 Q. Very well.

6 MR HOOPER: Thank you. I'm reminded by Ms Sullivan to, of
7 course, read in the dates -- the time-stamps that we've played. So let
8 me catch up with those. It's 28.30 to 31.51, which is the entry. And
9 then we've got 32.10 to 32.41, which is the prayer. And let me just
10 discuss a matter with Ms Sullivan for a moment. We're just going to jump
11 quickly through the next section, pausing now and again just to
12 illustrate that there's different speakers shown on this tape --

13 PRESIDING JUDGE EBOE-OSUJI: The purpose of course is what,
14 memory refreshing?

15 MR HOOPER: Memory refreshing and maybe in due course
16 identification, but at the moment I'm limited to memory refreshing. Just
17 go through it.

18 (Video-clip played)

19 MR HOOPER:

20 Q. Do you recognise that speaker?

21 A. Yes, your Honour.

22 Q. And that's at 33.51. And who is that?

23 A. General August in Cheruiyot.

24 Q. All right. Is that General Cheruiyot?

25 A. Yes, your Honour.

26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 (Video-clip played)

2 MR HOOPER:

3 Q. And then we saw eight people who are, again, speakers. I don't
4 know if we can now break it up as to which ones they are. That was --
5 that clip was 33.51 to 34.08.

6 (Video-clip played)

7 MR HOOPER:

8 Q. So there's a brief clip there. Did you recognise the speaker
9 before this lady spoke?

10 A. No -- it rushed.

11 Q. All right. Well, we can -- do you recognise the lady here?

12 A. Yes, your Honour.

13 Q. And who's that?

14 A. She's Mrs Tiony. Mrs Tiony, she's a vet by profession.

15 Q. And that's at 34.31 on the time -- time of the tape and we can
16 see at 538, that's Daktari (* phon) Bernadette Tiony?

17 PRESIDING JUDGE EBOE-OSUJI: Can you spell -- Witness, can you
18 spell the name.

19 MR HOOPER: Tiony. It's spelled here as --

20 THE WITNESS: T-i-o-n-y.

21 MR HOOPER: All right --

22 PRESIDING JUDGE EBOE-OSUJI: Sorry.

23 MR HOOPER: Which apparently means "vet."

24 PRESIDING JUDGE EBOE-OSUJI: One second. Did you say C-i-o-n-y?

25 THE WITNESS: T-i-o-n-y.

26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 PRESIDING JUDGE EBOE-OSUJI: T-i-o-n-y.

2 THE WITNESS: Ti.

3 PRESIDING JUDGE EBOE-OSUJI: And you said she is a vet by
4 profession?

5 MR HOOPER: And it means --

6 THE WITNESS: Yes, your Honour. Yes, your Honour.

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

8 Mr Hooper.

9 MR HOOPER: And Tiony is her designation, I understand. It means
10 vet. She is a veterinary -- no, it's a name. All right.

11 (Video-clip played)

12 MR HOOPER: Pause there, please. Date stamp 35.23.

13 Q. And do you recognise who that is?

14 A. No, your Honour.

15 Q. Just while we stay on that, do you recognise who the next four
16 gentlemen are, taking them in order, the first man with a blue shirt
17 closest to the camera first, do you recognise him?

18 A. The other one at the extreme from my -- from my right

19 (* overlapping speakers) --

20 PRESIDING JUDGE EBOE-OSUJI: Do you mean -- do you mean the one
21 wearing a suit standing behind the person wearing an orange shirt?

22 THE WITNESS: The one in blue shirt looked like former councillor
23 of Kapsuswa --

24 MR HOOPER:

25 Q. All right. So we're clear. Let's start with this man with his

26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 arm raised, all right, and you don't know who that is, as I understand

2 it. The man next to him, do you recognise who that is?

3 A. No.

4 Q. The man next to him in the orange, do you recognise who that is?

5 A. The orange is no, but the one with a blue shirt --

6 Q. Don't -- let's take it in turn. We come to the fourth one, who
7 is the man behind the man -- he's the man behind the man with the orange
8 shirt. Who's that?

9 A. I cannot recognise.

10 Q. And the last man, we just see his head, do you recognise him?

11 A. Yes.

12 Q. And who is that?

13 A. That is Babira Ndeta.

14 Q. Do you remember seeing those men at the rally?

15 A. I think I remember seeing some but I don't remember seeing all.

16 Q. Can you possibly spell the last man's name that you mentioned?
17 Can you spell that for us, please, for the record.

18 A. Babira, B-a-b-i-r-a. The other name I can't spell it clearly,
19 but it's Ndeta.

20 Q. All right.

21 A. Ndeta, N-d-e-t-a.

22 Q. All right.

23 A. And the one with the blue shirt is former councillor who is
24 currently the county rep. I can't remember the name.

25 Q. Thank you very much. Now we're just going to come to Mr Ruto's

26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 own speech, but before I get there I want to deal with the man who
2 introduces him. And if we go to our page 27, we have the translation
3 there and that's at line -- well, he's been speaking for a while, perhaps
4 before that. I think he starts speaking at 937. We can see EL and we
5 can see from the assigned names that that would appear to be Elijah
6 Lagat, Elijah Lagat, L-a-g-a-t. And if we can just find his portion.
7 (Video-clip played)

8 MR HOOPER: Very well.

9 Q. Now, that's Mr Elijah Lagat, do you agree?

10 A. I agree.

11 Q. And who was he in the scheme of things, as it were? Was he the
12 MP or the -- this is before the election, of course. Was he the
13 present -- he became the MP for Emgwen Constituency, did he not?

14 A. I think he had been nominated -- yeah, he had been nominated MP
15 nominee.

16 Q. Right. So MP nominee standing in the elections, 2007, and was he
17 successful in those elections?

18 A. Yes, your Honour.

19 Q. All right. So it's Elijah Lagat and he's introducing Mr Ruto,
20 and let us just see the translation, which is at page 27, where he says
21 this, line 948, and it's the bit we just heard and I'll ask you to
22 confirm that this is what he did say:

23 "Before I give you the programme, there are people who wrote that
24 if he became -- becomes the representative, then the -- the people from
25 other ethnic groups will be chased away. And I want to -- to assure you

26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 that I don't -- those stories. It's the same kind of propaganda they
2 waged against honourable Raila that they started spreading, and I believe
3 the same people are still involved. So let's watch out. If there is one
4 party that doesn't promote tribalism, it's the ODM. So we can assure you
5 that we, people from the ODM, aren't tribally minded. Therefore, I don't
6 want to take too much time. I'd like to welcome honourable William Ruto
7 so he can welcome and welcome honourable welcome."

8 And is that a fair translation of the words that we just heard
9 spoken in Swahili?

10 A. Which bit? I think I'm lost.

11 Q. Well, we saw Mr Lagat speaking and this I've just read out is the
12 translation of what he said. Do you agree that it's a fair
13 representation of what he said?

14 A. Yes.

15 Q. Now, we're going to come now to William Ruto and I'm going to
16 play now from 969, line 969 to -- all the way through to 1050. And this
17 is all in Swahili, of course. So we'll start there and if we can follow
18 it, keep an eye on the page as to the translation. You, of course, will
19 understand what's being said in any event, but if you can follow the
20 translation it will be helpful to us as well. So let's start with this
21 process.

22 (Video-clip played)

23 MR HOOPER:

24 Q. So we got as far as I think -- we are at time 1 minute and 10 --
25 sorry, 1 hour and 10, and line 1058. Now, with the help of the

26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 transcript we can see that he greets people, he speaks then about the
2 Orange Movement's triumph in 2005 when he gave these people, the
3 government, a good haircut, that's the reference to that, isn't it?

4 A. Yes.

5 Q. And then he focuses on the PNU and basically derides the PNU for
6 being an unknown party of 30 different parties with no PNU chairman, no
7 Secretary-General, and he takes the crowd with him, as it were, in
8 respect of laughing at the PNU and its structure; is that right?

9 A. Yes.

10 Q. And then we come and I'll play the next segment and I want to go
11 from where we are, which is line 1057, if you have that, Mr Witness, I
12 will be grateful. Put your finger on that, we're going to start there,
13 and we'll carry on to 1128, over the page, and I hope I'll be stopped
14 when we get there. So let's play the next section, please.

15 (Video-clip played)

16 MR HOOPER:

17 Q. All right. Thank you for following that, Mr Witness. So we now
18 have another segment and one of the themes we were discussing yesterday
19 and early today of -- of Mr Ruto's political themes - and by the way, we
20 are at 1.02.22. And what we see there is his reference to Kenya being
21 the third-most unequal country in the world and he speaks of Kenya "where
22 there are a few billionaires and millions of poor that we ODM oppose."
23 That he talks at line 1078 of "when we talk about a Kenya to be proud of,
24 we mean a Kenya that all of us can be proud of." And he talks about:
25 "If you don't have a job, do you have anything to be proud of?" And he
26

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1 says at line 1093: "If there's an election this year, we want to change
2 the government. We want to put in place a government of the ordinary
3 people at the grass-root level." He speaks about power for 40 years
4 being people voting, being politics, but in fact power goes to Nairobi
5 and those who benefit, he says at 114, are in Nairobi and those who are
6 at the grass roots, at 1125, he says, remain destitute. And again,
7 that's a fair representation of what he said in that section. Do you
8 agree, Mr Witness?

9 A. I agree.

10 Q. Thank you very much. We'll play the next section. And this is
11 from line 1128 in that part.

12 (Video-clip played)

13 MR HOOPER:

14 Q. All right. Thank you. Just pausing there. So if we just recap
15 from our translation in brief, he's saying: Cast your vote here. We
16 don't want the power to go to Nairobi anymore. We want it to come to the
17 base. And the theme he touches on here is, again, a theme that we dealt
18 with yesterday of devolution of power from the centre to the other areas;
19 is that right?

20 A. Yes, your Honour.

21 Q. Thank you. And he goes on to say, for example, when a factory is
22 built in Nairobi, a factory is also built in Kapsabet. When there's a
23 nice white-collar job in Nairobi, it should be also available in
24 Kapsabet. When there are opportunities for business or employment in
25 Nairobi, they should be available at home. And then he turns on
26

Witness: KEN-OTP-P-268 (On former oath) (Open Session)
Questioned by Mr Hooper (Continuing)

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1 Kibaki -- he's saying Kibaki has refused this. He wants the nice jobs to
2 continue to remain in Nairobi. And then -- and the assets, he says,
3 should continue to remain in Nairobi, is what Kibaki wants. Is that
4 right so far, that's essentially what he's said so far? Is that right?

5 A. Yes, your Honour.

6 Q. And then he says this: Power to remain in Nairobi because he,
7 Moi, Michuki, Karume, Uhuru, and Nyachae have benefitted from the
8 government in Nairobi and that's why they say it should continue like
9 that.

10 Now, just pausing there. Moi, we're obviously quite clear who
11 he's talking about there, it's the ex-president Moi who'd ruled
12 effectively Kenya for 24 years until 2002; is that right?

13 A. Yes.

14 Q. And Moi was Kalenjin, of course?

15 A. Yes.

16 Q. And then it continues that he talks about the disadvantages
17 there, of people being advantaged in Nairobi with jobs, but here you have
18 no job. Your wife is selling vegetables in the market, and your children
19 are pushing handcarts or running motor taxis and that he suggests there
20 should be change, change so, he says at 1190, so that the children of
21 local people from the grass root, that your children have the same
22 opportunities to secure a job, to do business, as Moi's and Kibaki's
23 children.

24 And again, is that a direct translation of what he said?

25 Mr Witness, looking at line 1190, is that, in fact, what he's

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Witness: KEN-OTP-P-268 (On former oath) (Open Session)
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1 saying, so that the children of local people from the grass root, your
2 children have the same opportunities to secure a job, to do business, as
3 Moi's and Kibaki's children; is that correct?

4 A. Yes.

5 Q. Thank you. And then he goes on emphasising that. And he
6 concludes this little section, if I can put it like that: "Here in
7 Kapsabet, do you want things to continue as Kibaki is saying or do you
8 want us to bring change and install Raila?" And the crowd say: "Let's
9 install Raila." "Do you want us to bring change?" "Yes." "Do you want
10 us to bring change?" "Yes." And that's the end of that section.

11 And is that, again, a fair representation of what he was saying
12 up until 1 hour, 5 minutes, and 20 seconds, if I can put it like that?

13 A. Yes.

14 Q. Thank you. Play the next section which is basically from the
15 next page, our page 36, at 1223, talking about change and continuing into
16 the next theme which we'll see, and I'd like this to continue so that we
17 hear it up to line 1292, the very bottom of page 37. Thank you.

18 (Video-clip played)

19 MR HOOPER:

20 Q. All right. And just briefly if we can deal with this section.
21 Just before we look at it, it's right to say that Moi, who hadn't wanted
22 a multi-party system in Kenya and resisted it, he resisted it by claiming
23 that it would lead to tribalism; is that right?

24 A. Yes, your Honour.

25 Q. And here we see Mr Ruto referring to that, and to a phrase that

Witness: KEN-OTP-P-268 (On former oath) (Closed Session)
Questioned by Mr Hooper (Continuing)

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1 Mr Moi had used about cutting down a hard tree with a razor blade and
2 exalting the multi-party system. We see: "The multi-party system, is it
3 good or not?" And the crowd cry back: "It's good." And then arguing
4 that basically the people in power were duping the ordinary people and he
5 includes in that Kibaki, Moi, and others; is that right?

6 A. Yes, your Honour.

7 Q. And he ends up with that phrase, that they, the government, as it
8 were, those in power, they meet, they talk, and they say an idiot will
9 always remain stupid, that is, that the voters are stupid basically, and
10 that he concludes by saying: Well, these idiots have seen the light,
11 these people have seen the light and there will be change. Is that a
12 fair representation of what is said in this section?

13 A. Yes, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper --

15 MR HOOPER: (Microphone not activated) -- 1 hour, 8 minutes, and
16 21, and given the time.

17 PRESIDING JUDGE EBOE-OSUJI: That's a good place to leave it --

18 MR HOOPER: Yes.

19 PRESIDING JUDGE EBOE-OSUJI: -- for lunch break.

20 MR HOOPER: Yes. Thank you.

21 PRESIDING JUDGE EBOE-OSUJI: The blinds will come down and the
22 witness will be let out.

23 (Closed session at 1.02 p.m.)

24 THE COURT OFFICER: (Interpretation) Mr President, we're in closed
25 session.

1 PRESIDING JUDGE EBOE-OSUJI: Will you please escort the witness.

2 (The witness stands down)

3 PRESIDING JUDGE EBOE-OSUJI: The Chamber will rise.

4 THE COURT OFFICER: All rise.

5 (Recess taken at 1.02 p.m.)

6 (Upon resuming in open session at 2.05 p.m.)

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

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

9 PRESIDING JUDGE EBOE-OSUJI: We will take submissions on the two
10 housekeeping matters that you indicated in the morning we would take up.

11 We want to finish both matters by 2.20. So -- by 2.20.

12 MR STEYNBERG: Thank you, your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: We will speak to the question of
14 what to do with the time that has been freed up by the Kenyatta case,
15 explore the possibility of using some of that time to do this case. The
16 week of the 11th is out of the question. The other side of that week,
17 let's see what else we can do.

18 Prosecutor, can you speak to it in two, three minutes?

19 MR STEYNBERG: Yes, your Honour, I'll be very brief. The
20 Prosecution's position is as follows: We would require, I would
21 estimate, two weeks from the time of notification, at least, to line up
22 the witnesses. That's the time that the VWU have alerted us they would
23 require. It should be possible logistically, certainly, to line up two,
24 possibly three short witnesses before the Christmas --

25 PRESIDING JUDGE EBOE-OSUJI: Christmas break.

1 MR STEYNBERG: -- recess. Yes. I don't -- I don't -- I don't
2 think it's feasible to go into any of the insider witnesses or the
3 linkage evidence, the more complex ones before the break. My learned
4 friends have indicated they would require, in any event, sufficient time
5 to prepare for that, and so would we. The statements of these witnesses
6 are voluminous, between 20 and 25 lever arch files worth of transcribed
7 interviews. So there's a lot of preparation involved.

8 PRESIDING JUDGE EBOE-OSUJI: So when you say two, three short
9 witnesses are possible to take in before the Christmas break, have you
10 discussed it with the other side?

11 MR STEYNBERG: I have, your Honours, and my understanding is that
12 the Defence would prefer not to continue, and -- because of their need
13 for further investigations. One other request from the Prosecution's
14 side, when we do resume in the new year, especially if we are to resume
15 with one of these larger witnesses, because of the time that will be
16 taken simply to read through -- for the witnesses simply to read through
17 voluminous statements, such as I've alluded to, the Prosecution would
18 prefer if we did not start immediately on the 6th of January with a
19 witness like that, and, if possible, if we could start one week later or
20 towards the end of that week. Our preference would be for the
21 13th of January. But obviously we're minded of not wasting Court time
22 and we're in the Court's hands.

23 MR KHAN: Mr President, your Honours, good afternoon. I'm
24 grateful. Your Honour, we've previously addressed the Bench regarding
25 certain difficulties of the Defence regarding its preparedness to
26

1 actually commence this case. And I think your Honours may agree with us
2 that we had every expectation that we would plan around the court
3 schedule that had been provided to us. Your Honours, of course we're not
4 blind to the fact that space has become available by dint of the decision
5 to push back the commencement of case number 2. However, your Honours,
6 in deciding what is fair in this case, we are of course confident that
7 your Honours will not view this case, as it were, a stuffing or a filler
8 to fill up gaps in the Court's diary. We're quite confident --

9 PRESIDING JUDGE EBOE-OSUJI: Mr -- Mr -- Mr Khan, let's focus on
10 the thing. Nobody is talking about filler. This is whether or not you
11 are able to and then what your difficulties are. Let's just focus on
12 those concrete considerations.

13 MR KHAN: Yes, your Honour, I was coming to that, and I'll go
14 straight to that point. Your Honour, it would cause us, as my learned
15 friend intimated we told him, very real difficulties. We have planned
16 investigations. My learned friend, Ms Alagendra, is our chief of
17 investigations, and already we have arranged matters so that various
18 tasks, various work that needs to be done in Nairobi is done between now
19 and the new year. Now, your Honours, the Court will be aware that
20 witnesses or people of interest to the Defence have their own lives.
21 They're not always available at our request, according to our
22 convenience. And, your Honours, also, of course, unlike members of the
23 Prosecution, the Defence is in a unique position. We're not relocated
24 here with families and all the rest. And the team that I have the honour
25 of leading come from all corners of the earth, and various individuals
26

1 have also made, in addition to professional responsibilities, personal
2 travel plans based upon our belief that once we finished, in fact, today,
3 as was intended, because of the court schedule, we would not be coming
4 back until the new year.

5 So, your Honours, for those combined reasons, of course I can
6 give more detail if necessary, we would strongly request that the rights
7 of Mr Ruto would be best served in these circumstances to proceed with
8 the earlier calendar that we've been led to believe or that we understood
9 would be applicable, and that would give the Defence very important time,
10 both to conduct necessary investigations over the period until the new
11 year, but, also, on a related matter, allow team members to fulfil the
12 travel plans, the bookings, that they've already had, to have a bit of a
13 Christmas break as well with their families in different parts of the
14 world.

15 So, your Honours, for those two reasons, we do humbly request
16 that the Bench consider the various difficulties and the various demands
17 of the Defence and that we come back. There's no objection, I hear what
18 my learned friend, Mr Steynberg, says regarding the nature of witness
19 preparation. Your Honours, if you -- if the Court was decided to come
20 back on the 13th of January, that would be fine. We are, of course,
21 willing, as always, to do our best to accommodate the concerns and comply
22 with the decisions of the Trial Chamber. But for the reasons I've
23 already sought to adumbrate, it is our respectful submission that we
24 should adjourn at the end of next week, whenever we're finished with the
25 next witness and we do not come back until the new year.

26

1 Your Honour, that's my submission on this issue.

2 PRESIDING JUDGE EBOE-OSUJI: All right.

3 Mr Katwa.

4 MR KIGEN-KATWA: Mr President, the last time we spoke with the
5 Prosecution, we had expressed our wish and desire to resume approximately
6 January the 13th, next year. And the reasons are variously that we would
7 like to have used that time, the break that was scheduled, to conduct
8 further investigations and also to attend to family issues, both in terms
9 of the team members and the client.

10 Lastly, Mr President, is whatever decision is made by yourselves,
11 we would pray that we have an advised indication on the part of the
12 Prosecution as to what witnesses they propose to call; i.e., we will
13 acknowledge that we have been in correspondence with them on that issue
14 but we would like to have -- they were consulting and last thing, I
15 think, they would communicate to us. We would really like that to be
16 part of the decision that is made by the Court.

17 PRESIDING JUDGE EBOE-OSUJI: All right.

18 Mr Narantsetseg.

19 MR NARANTSETSEG: Thank you, your Honour.

20 From our side we have carefully listened to the respective
21 submissions made by the parties, but, in our view, we believe that the
22 Court should ensure that these proceedings are conducted as expeditiously
23 as possible, since victims have been waiting for the start of this trial
24 for many, many years, and we believe that after next week the court
25 should resume. Let's say, one or two weeks' break maximum would suffice,

1 in our view.

2 Also, after the recess, the winter recess, we also believe that
3 when the recess ends at the 6th of January, court should start -- should
4 resume these proceedings in order to ensure that these proceedings are
5 conducted as fast, as rapid, as possible. Thank you.

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

7 We have five minutes, less than that, to deal with the second
8 issue and that is the matter of the requests for excusal.

9 Mr Khan, you said you would be very brief. Can you make your
10 submissions in two minutes? You said you've already --

11 MR KHAN: Yes, perhaps in private session in that case.

12 PRESIDING JUDGE EBOE-OSUJI: All right. We'll go into private
13 session.

14 (Private session at 2.15 p.m.)

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

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 Mr Khan, please.

19 MR KHAN: Mr President, I'm grateful. Your Honours are familiar
20 with the decision of the Appeals Chamber, so I'm not going to regurgitate
21 that. As the Court is aware, the Court calendar that had been provided
22 to the Defence for some time intimated that today would be the last day
23 of proceedings and there would be a recess. Your Honours, the Defence
24 tried to accommodate the concerns of the Chamber and, of course, very
25 cognisant of the fact that a witness was here in situ, and because of
26

1 that we re-arranged our own responsibilities to the extent that we are
2 able so that we would be able to do our job next week. However,
3 your Honours, our own responsibilities as counsel, important though they
4 are, of a completely different nature, completely different scale, to the
5 responsibilities of Mr Ruto as deputy head of state of a country of
6 40 million people. And, your Honours, a diary and various commitments
7 have already been engaged upon that are not matters only for the
8 sovereign authority of Kenya, but impact upon various other countries and
9 a region as a whole. Now, your Honours, I can say in private session
10 that there is an important, a very important combined summit in
11 South Africa that the president has to attend on Monday and Tuesday of
12 next week and that's a summit of the South African Development Community,
13 SADC, and the International Conference on the Great Lakes region, very
14 often known by its acronym, ICGLR. Your Honour, it's a very important
15 meeting. It deals with the M23 problem and the militia in Congo that
16 needs to be disarmed and which has rendered half of that country
17 ungovernable --

18 PRESIDING JUDGE EBOE-OSUJI: So you are saying it is a regional
19 security issue?

20 MR KHAN: Indeed.

21 PRESIDING JUDGE EBOE-OSUJI: All right, then --

22 MR KHAN: And the second issue on -- on Wednesday, there is a
23 state visit of the president of Kenya to Botswana that's already been
24 arranged on the presumption that the deputy head of state would be in
25 Kenya. Your Honour, Mr Ruto himself on Thursday has a very important
26

1 meeting -- two important meetings. I've got the full diary here. But
2 between 9.00 and 12.00, the foreign ministers of Somalia and Kenya, along
3 with delegations led by the United Nations High Commission for Refugees,
4 I believe it's the Africa director, but there may be people from Geneva
5 as well, but I think the African director are dealing with a tripartite
6 agreement negotiating with the repatriation of more than a million
7 refugees. And Mr Ruto is chairing; that's part of his responsibilities.
8 And it had been slotted in here in part because of the Court's diary.
9 And, your Honour, between 2.00 p.m. and 4.00 p.m., there's an important
10 meeting, in fact, with the World Food Programme, US Aid, the Japanese
11 International Co-operation Agency, as well as various ministers,
12 agriculture, devolution, environment, water, dealing with a looming
13 drought issue in Kenya. And, again, that's part of the responsibilities
14 of Mr Ruto as deputy head of state. Your Honour, these are matters that
15 can't be rearranged. Looking at the various indicia or various
16 considerations put forward by the Chamber, by the Appeals Chamber, and
17 alive to the fact that the witness is here in situ, an adjournment is not
18 an option. These are responsibilities and functions of an exceptional
19 nature, and we say by dint of the Appeals Chamber decision these are
20 matters that are well within the autonomy and the discretion of the
21 Trial Chamber. Very critically, we are not seeking, as the
22 Appeals Chamber cautioned at paragraph 63, a blanket excusal, nor are we
23 seeking that a carte blanche be given. We are asking that on a
24 case-by-case basis for the reasons we have put in, that your Honours are
25 requested to exercise your discretion, so to excuse Mr Ruto from next
26

1 week. He will be represented by his legal team and, your Honours, if the
Court is so minded, of course a waiver will be given to that effect.

Your Honours, those are my submissions, and I'm grateful.

PRESIDING JUDGE EBOE-OSUJI: Thank you.

Mr Steynberg.

MR STEYNBERG: Thank you, your Honours.

The concern that the Prosecution has is chiefly to the results of
this request. Since the Appeals Chamber had granted its decision on
Friday -- last Friday, we have sat for one week, we will be sitting for
one other week. If your Honours are minded to grant this application,
the result will be that out of the two weeks we have sat since the
decision has been granted, the first accused will have been in Court for
only two days. It seems to me, your Honours, with respect to my learned
friend and respect to the Court, that the result of such a decision would
be that the excusal is really now becoming the rule rather than the
exception. I do acknowledge, however, that the schedule change was a
late schedule change and that is a matter which the Court will take into
account. I do acknowledge that the functions are important, but as I
have said in previous arguments, Mr Ruto's functions will inevitably be
important, that as a function of his job. But if it is not to become the
rule, then your Honours will have to, in my submission, look very closely
at whether or not this sort of request should be granted. I'll say
nothing more than that.

PRESIDING JUDGE EBOE-OSUJI: Are you opposing or not?

MR STEYNBERG: Your Honours, yes, for the record I do oppose.

1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 All right. We will render our ruling -- I'm sorry. Before you
3 do, Mr Katwa, we don't need to hear from you. This doesn't concern
4 you -- your client.

5 But, Mr Narantsetseg, please.

6 MR NARANTSETSEG: I'm grateful, your Honour. Mr President,
7 your Honours, we oppose Ruto Defence request seeking Mr Ruto's excusal
8 absence from the trial proceedings throughout next week. While we
9 understand that Mr Ruto had purportedly made business commitments in
10 light of the Trial Chamber's decision on the scheduling of this trial, we
11 believe that this alone cannot justify his excusal this time. In fact,
12 the Appeals Chamber judgement is quite clear. The Appeals Chamber gave a
13 six-fold criteria that were very strict and unambiguous, and the
14 Appeals Chamber specifically said that discretion of the Trial Chamber in
15 this case is limited and must be exercised with caution. I believe that
16 we need to analyse the legal and factual basis of this request against
17 these six criteria. I would just exclude the two obvious requirements,
18 meaning that signed waiver and continued representation of the counsel in
19 the accused's absence which could be easily met by the Ruto Defence, I
20 believe. I will address the four remaining criterias. The first one is
21 the absence of the accused can only take place in exceptional
22 circumstances and must not become the rule. In our view, your Honours,
23 exceptional circumstances should relate not only to the nature of the
24 reasons given -- reasons for given excusal but also the frequency or the
25 amount of excusal requests during the proceedings. It appears that,
26

1 your Honours, given the volume of the excusal requests that have been
2 granted so far, the absence of Mr Ruto verges on being the rule not the
3 exception, in our view.

4 Secondly, the possibility of alternative measures must have been
5 considered, including the changes to trial schedule, short adjournment,
6 et cetera. In our view, your Honours, you have indicated the trial will
7 adjourn in one week's time and at least one or two weeks, so it must be
8 possible for Mr Ruto to take advantage of this adjournment and personally
9 address those issues as one of his responsibilities as deputy president
10 of the country.

11 Thirdly, we in our submission -- any absence must be limited to
12 that what's strictly necessary. That's another requirement made by the
13 Appeals Chamber. In light of my submissions made on the previous point,
14 we believe that the excusal in this case is not necessary.

15 Your Honour, I would like to make my last point in private
16 session if possible.

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

18 MR NARANTSETSEG: We are in private session. I apologise. The
19 last criteria, decision as to whether the accused may be excused from the
20 attending part of his trial, must be taken on a case-by-case basis with
21 due regard to the subject matter of the specific hearing that the accused
22 wouldn't attend during the period which the excusal has been requested.
23 Your Honour, in this -- on this criteria we would like to stress the fact
24 that the witness who will be testifying next week will likely to give
25 evidence in chief that is of direct relevance to Mr Ruto's alleged acts
26

1 and conducts. I might not need to remind your Honours that in your last
2 decision rejecting Mr Sang's -- the first request, your Honours by
3 majority reached the same conclusion on the relevance of the testimony of
4 the witness who is on the stand to Mr Sang's alleged acts and conduct.
5 So in the totality of the circumstances, your Honour, we believe that
6 this request should be rejected, and in conclusion we oppose this
7 request. Thank you.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

9 We will render our decision.

10 (Trial Chamber confers)

11 PRESIDING JUDGE EBOE-OSUJI: We will render a decision shortly
12 but we will adjourn briefly and come back in ten minutes.

13 MR KHAN: Mr President, if I can say two things: The first thing
14 is contrary to what my learned friend for the Legal Representative of the
15 Victims has said, the volume of excusal, of course, thus far it's only
16 three days. And it would be improper, in our respectful submission, to
17 view those three days in isolation and not in the context of Mr Ruto's
18 co-operation throughout these proceedings, and in particular from the
19 commencement of the trial.

20 Now, your Honour, the second aspect is the next witness, dealing
21 with one of the six criteria, is not a victim witness. Of course,
22 every witness should be relevant, otherwise they wouldn't be here, but,
23 your Honours, they are not a victim witness. Their counsel is present.
24 And accordingly, we say when one balances the various interests that the
25 Appeals Chamber have identified with the legitimate interests of the
26

1 state of the Republic of Kenya and these very important matters that will
2 occasion massive inconvenience not only to a country but to a region and
3 not only are not matters that Kenya unilaterally can change because of
4 the responsibilities for other international actors, we say that the
5 application is well-founded. Your Honours, those are my brief
6 submissions in response.

7 PRESIDING JUDGE EBOE-OSUJI: All right.

8 Let's go into public session.

9 (Open session at 2.28 p.m.)

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

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

13 We will rise for -- just so the -- for the record in open
14 session, in private session we heard a request for the excusal of Mr Ruto
15 for the proceedings of next week. The Chamber has heard arguments. We
16 will now rise for ten minutes and deliberate on it and come back.

17 THE COURT USHER: All rise.

18 (Recess taken at 2.29 p.m.)

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

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

21 PRESIDING JUDGE EBOE-OSUJI: The Chamber has deliberated on the
22 request to excuse Mr Ruto for the proceedings next week. The Chamber
23 unanimously grants the request, reasons will be given on Monday.

24 MR KHAN: I'm most grateful.

25 PRESIDING JUDGE EBOE-OSUJI: We will now bring down the blinds

1 and bring in the witness so we can proceed.

2 (Closed session at 2.40 p.m.)

3 THE COURT OFFICER: (Interpretation) Mr President, we are in
4 private session and the witness will be escorted into the courtroom.

5 MR HOOPER: Your Honour, while the witness is on his way, there
6 comes (Redacted) and what I was
7 proposing to do is just play that through and then afterwards we can go
8 back into closed session and I can deal with segments varying from the
9 transcript I hope, though, quite briefly.

10 PRESIDING JUDGE EBOE-OSUJI: (Redacted)--

11 MR HOOPER: No --

12 PRESIDING JUDGE EBOE-OSUJI: And. It's --

13 MR HOOPER: No, it's goes from one to the other, essentially, to
14 the end.

15 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

16 MR HOOPER: Yes.

17 PRESIDING JUDGE EBOE-OSUJI: How long is this?

18 MR HOOPER: It must be about ten minutes.

19 PRESIDING JUDGE EBOE-OSUJI: Right. Let's listen to that in
20 private session.

21 MR HOOPER: All of it?

22 PRESIDING JUDGE EBOE-OSUJI: Yes.

23 MR HOOPER: Very well.

24 (Private session at 2.42 p.m.)

25 THE COURT OFFICER: (Interpretation) Mr President, we're in

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1 private session.

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

3 (The witness enters the courtroom)

4 MR HOOPER: (Redacted)

5 (Redacted).

6 PRESIDING JUDGE EBOE-OSUJI: Okay. Open session.

7 (Open session at 2.42 p.m.)

8 THE COURT OFFICER: (Interpretation) We're in open session,

9 Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 Mr Hooper, please proceed.

12 MR HOOPER: Thank you.

13 Q. Mr Witness, we're on page 38 of the transcript and we're starting

14 from --

15 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, one second. Can we

16 briefly - sorry to do this - go back into private session for just one

17 second.

18 (Private session at 2.43 p.m.)

19 THE COURT OFFICER: (Interpretation) Mr President, we're in

20 private session.

21 (Trial Chamber confers)

22 PRESIDING JUDGE EBOE-OSUJI: What we were thinking is you

23 remember the concern we had was in view of the psychological component of

24 it in relation to the witness, (Redacted)

25 (Redacted), it might cause a worry. (Redacted)

26

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1 (Redacted)

2 (Redacted)

3 (Redacted) So we can

4 play that through in public and then come into private session.

5 MR HOOPER: Very well. So --

6 PRESIDING JUDGE EBOE-OSUJI: But the thing is whether that causes
7 havoc to your cross-examination strategy.

8 MR HOOPER: No --

9 PRESIDING JUDGE EBOE-OSUJI: Hopefully not.

10 MR HOOPER: No, no, not havoc. What --

11 PRESIDING JUDGE EBOE-OSUJI: Yeah, being --

12 MR HOOPER: Let me -- yes, I can deal with it like that. So we
13 can go into open session now and I'll do a short bit and then I'm going
14 to do a melange and we carry straight -- so we play -- after this short
15 bit, (Redacted)

16 (Redacted). So there will be a mix. So people listening (*
17 overlapping speakers) --

18 PRESIDING JUDGE EBOE-OSUJI: We'll hear both, all of it?

19 MR HOOPER: Obvious reason why we've -- we've -- yes.

20 PRESIDING JUDGE EBOE-OSUJI: Yes. Yes, all right. So we will --
21 witness, we will go into public and counsel will play all the tape (Redacted)
22 (Redacted), listen to that in public, and then come
23 into private to discuss.

24 All right. Let's go public.

25 THE WITNESS: I don't have the page.

26

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1 MR HOOPER: (Microphone not activated) -- Mr Witness, top of the
2 page 1293 where we left off, and for the time-stamp we're starting at
3 1 minute -- sorry, 1 hour, 8 minutes, 21 -- 8 seconds.

4 THE WITNESS: Page 38?

5 MR HOOPER:

6 Q. Yes, 38, that's with the English translation, the English
7 translation --

8 A. I don't think I have --

9 Q. -- is probably the better one for you to follow and then to keep
10 a keen ear out, in particular when we get into another language.

11 A. I don't have it.

12 Q. It's tab 10, yes.

13 A. It goes up to page 33.

14 Q. Well, maybe you haven't got the right document. Let's make sure
15 you've got the right document. Have you got it? So let's get you to
16 page 38.

17 (Open session at 2.47 p.m.)

18 THE COURT OFFICER: (Interpretation) Yes, Mr President, thank
19 you. We're now in public session.

20 MR HOOPER:

21 Q. Right. Good afternoon, Mr Witness. We're in public session and
22 we're starting at page 38, which is right at the top of the page there,
23 1293, "applause from the crowd" it reads, and I'll just take you for a
24 little bit and then we'll stop. So if we can start it now.

25 (Video-clip played)

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1 MR HOOPER:

2 Q. All right. Just pausing there and can we recap in English what
3 the position is that's being addressed there. He's addressing them
4 basically on devolution and any fears that people might have about
5 devolution; is that right?

6 A. Yes, your Honour.

7 Q. Now, in particular, let me read at line 1308, he says:

8 "If you are a Luhya, don't be deceived. They say 'you know, with
9 this devolution, you'll be chased out.' If you've bought a farm here,
10 whether you are from Western Province or from Pokot or from Lamu or from
11 Vanga, if you have your farm here, this is your home. Do you understand
12 me? Yes. And the constitution guarantees the rights of every Kenyan.
13 Do you understand me or not? We do. Kenyans fighting against Kenyans is
14 not on ODM's agenda. ODM's struggle is against the poverty,
15 unemployment, and discrimination that we've experienced in Kenya during
16 all these years. Kenyan fighting each other" -- sorry, "that's indeed
17 our struggle. Do you understand me or not? We do. Kenyans fighting
18 each other. If you want to know about it, ask Moi and Kibaki. They're
19 the ones who know about that."

20 And then a little later on he says at line 1337:

21 "Therefore, don't be deceived about devolution when they claim
22 you will be chased out. Local governments will ensure that your children
23 will get the same opportunities as the children of those who are
24 well-known in Nairobi. At the moment, you don't have any opportunities.
25 In Kenya, as it is now, for you to get a good business you must
26

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1 necessarily be well-known in Nairobi. Your father has to be well-known
2 for you to get business opportunities or work and we say that we want the
3 children of all Kenyans, whether they're well-known or not, to have the
4 same opportunities."

5 And that is an accurate translation, indeed, of what was being
6 said in that segment of the tape; is that right --

7 MR GARCIA: Your Honour, I'm going to object to these -- this
8 type of -- this line of questioning and this procedure on two points.
9 When we started -- when Mr Hooper started out this whole exercise of
10 re-playing video, and I think we've heard about 45 minutes of it, if not
11 more before lunchtime, the objective was -- and this is what was stated
12 by Mr Hooper, was refreshing the witness's memory. And I think it's on
13 that ground that the Court permitted that the video and the extracts be
14 re-played to the witness. But now what's become obvious and this was --
15 this started right before the lunch is that the only thing that Mr Hooper
16 is actually doing is have portions of this video re-played and reading
17 these portions into the transcript. There are no questions to the
18 witness as to whether this refreshes his memory on the live issue which
19 is whether this is indeed or not a video of the 5th of December. And on
20 that point, your Honour, I'd like to just state to the Chamber that it's
21 plainly visible that the video itself has many edits and it cuts at many
22 opportunities and many places. So I'm not sure where Mr Hooper is going
23 at this point. It's already five minutes to 3.00. Mr Hooper stated that
24 he was going to finish before lunch, and now Mr Hooper simply embarked on
25 an exercise of reading portions of the translation and putting them into
26

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1 the transcript without any visible aim or legitimate aim, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper.

3 MR HOOPER: I don't know where to begin. This is, I remind my
4 friend, an OTP exhibit. He produced a video of events that this witness
5 was not at. The Prosecution did not produce a video which the
6 Prosecution claim is a video of a rally on the 5th of December at
7 Kapsabet. It's a most extraordinary decision taken by the OTP. We can't
8 understand it.

9 Now, this witness started off by saying, perhaps coyly, he wasn't
10 too sure, but I think his concession was having seen the helicopter
11 arrive and the other matters that he concedes this was or might well be
12 the rally that he attended. I do have questions to him, of course. At
13 the moment I'm interested to present him with the totality of it, to give
14 him the opportunity to see the totality of it, to make it plain for those
15 who don't understand either the languages what it is that's being said,
16 and to present this Prosecution witness with the opportunity to address
17 the issues that necessarily arise from this -- from this demonstration.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, one second.

19 Prosecutor, did you play part of this video to the witness?

20 MR GARCIA: Not during the examination-in-chief, no.

21 PRESIDING JUDGE EBOE-OSUJI: You did not play part of any part of
22 this video to the witness during examination-in-chief?

23 MR GARCIA: No, your Honour.

24 MR HOOPER: Which is a matter of grave concern to us. It amounts
25 to a misstep on the part of the Prosecution. We're here to assist you,

26

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1 the Chamber, as is the witness. Quite plainly with this video it's
2 wholly necessary to look at it, for him to look at it, to look at it in
3 these circumstances. We're looking at it quite neutrally. And when
4 we've completed that viewing and we're satisfied that it contains the
5 contents that we're relating as we go through it, then of course I will
6 be asking questions. (* Overlapping speakers) --

7 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you may proceed. The
8 concern, of course, is if the exercise had begun with a predominant
9 understanding that it was about refreshing memory. We need to keep that
10 in view.

11 MR HOOPER: Indeed.

12 Q. So, first of all, Mr Witness, I summarised the transcript we have
13 in front of us, really -- well, I've done more than that, I've read some
14 parts of it. And, first of all, do you agree that this transcript fairly
15 represents the words that are spoken on that video?

16 A. Yes, your Honour.

17 Q. And to what extent has your memory been refreshed in playing this
18 video?

19 A. To some extent.

20 Q. Well, let's continue. Now, what I'm going to do, instead of
21 starting and stopping, it may be easier if we start now or re-commence
22 now Mr Ruto talking. This is at 1 minute -- sorry, 1 hour, 10 minutes,
23 and 32 seconds. And I'll continue it all the way to the end of what he
24 says, which is about 10 minutes, I think. So let's -- let's look at
25 that. I might stop it once or twice, but not to ask any questions, just
26

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1 to make sure we're in the same place and on the same page, as it were,
2 and then we'll go through it, all right? And then I'll have some
3 questions. We'll go back to this point. So we're starting again, and
4 let me just identify approximately where we are so that we can come back
5 to it. We're going to start at line 1352, that's on page 39 of the
6 English transcript, and we're going to continue playing it to the
7 conclusion of Mr Ruto's speech.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, before you proceed in
9 that manner, in view of the announcement of what you say you will do, I
10 would like you to go to line 1465 in the -- not in the English transcript
11 but the other one.

12 MR HOOPER: (Microphone not activated)

13 PRESIDING JUDGE EBOE-OSUJI: KEN-OTP -- let's go to
14 KEN-OTP-0090 --

15 MR HOOPER: (Microphone not activated) your Honour, I'm not
16 necessarily armed with this transcript at the moment. Can I just bring
17 it up. (Microphone not activated) -- sorry. Line 1465. Ah, yes,
18 I've --

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

20 MR HOOPER: -- got your point.

21 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated) going to
22 turn off your microphone.

23 MR HOOPER: I think I've got your point -- yeah -- no --

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

25 MR HOOPER: -- no, no. We're going to play all the way through.

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1 PRESIDING JUDGE EBOE-OSUJI: Yes. All right.

2 MR HOOPER: So just a reminder, we're at -- I lost it now.

3 That's all right. We're at 1353 on page 39 and we're starting the video
4 now. Thank you.

5 (Video-clip played)

6 MR HOOPER: All right. Page 44, and we're approximately at
7 line 1500, about there, just so that we all have approximately the same
8 point on our transcript. Thank you.

9 (Video-clip played)

10 PRESIDING JUDGE EBOE-OSUJI: All right --

11 MR HOOPER: We're on 1641, page 48.

12 PRESIDING JUDGE EBOE-OSUJI: All right. I'd like us to go into
13 private session.

14 (Public session at 3.15 p.m.)

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

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 Mr Hooper.

19 MR HOOPER: I'm just saying we're on 1639 -- 1640 on page 48.

20 PRESIDING JUDGE EBOE-OSUJI: All right. Do you want to keep
21 playing?

22 MR HOOPER: Yes, there's just one short lap to go really --

23 PRESIDING JUDGE EBOE-OSUJI: All right. Hmm?

24 MR HOOPER: Yes, we'll play this until 1716, line 1716, on the --

25 PRESIDING JUDGE EBOE-OSUJI: All right.

26

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1 MR HOOPER: (* Overlapping speakers) --

2 PRESIDING JUDGE EBOE-OSUJI: Can we go back into public session
3 and continue.

4 (Open session at 3.16 p.m.)

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

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

8 Mr Hooper, of course it's your cross-examination --

9 MR HOOPER: Yes --

10 PRESIDING JUDGE EBOE-OSUJI: Yes.

11 MR HOOPER: -- we've got a couple of the transcript to go so
12 if --

13 PRESIDING JUDGE EBOE-OSUJI: And following -- and following --

14 MR HOOPER: The English and the tape --

15 PRESIDING JUDGE EBOE-OSUJI: (* Overlapping speakers) --

16 MR HOOPER: It's working out.

17 PRESIDING JUDGE EBOE-OSUJI: We'll continue. Okay.

18 MR HOOPER: Very well. So for everyone, including the witness --

19 PRESIDING JUDGE EBOE-OSUJI: (* Overlapping speakers) --

20 MR HOOPER: (* Overlapping speakers) -- 1640 and we can play now.

21 Sorry, 1647, I'm corrected. Thank you.

22 (Video-clip played)

23 MR HOOPER: All right --

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

25 MR HOOPER: Um --

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

2 MR HOOPER: Well, I'm quite happy to do that, it's 17 minutes
3 long. There's one particular part I'd like to refer to, and I also want
4 to, as it were, show the end of the video and the leaving of Mr Ruto.

5 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated) -- few
6 minutes of this --

7 MR HOOPER: This is -- just for the record this is Mr Mudavadi
8 now coming to address people --

9 PRESIDING JUDGE EBOE-OSUJI: By now we all know him.

10 MR HOOPER: Yes.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Mudavadi.

12 MR HOOPER: Yes, a very distinctive gentleman.

13 PRESIDING JUDGE EBOE-OSUJI: Yes. Let's roll the tape a little
14 more.

15 MR HOOPER: Certainly.

16 (Video-clip played)

17 PRESIDING JUDGE EBOE-OSUJI: You can take over your
18 cross-examination.

19 MR HOOPER: (Microphone not activated)

20 THE INTERPRETER: Microphone.

21 MR HOOPER: I just want to go to line 1837, 1837, just do a short
22 section. We can see and ask the witness to follow what is said. It's
23 1837, Mr Mudavadi --

24 PRESIDING JUDGE EBOE-OSUJI: At page 53?

25 MR HOOPER: Yes, it's at page 53, it's harder to find, of course,

26

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1 on the tape. If you can just bear with me a moment. So we're starting
2 the tape at 1 hour --

3 PRESIDING JUDGE EBOE-OSUJI: There's an indication --

4 MR HOOPER: -- 35 minutes and 3 seconds.

5 (Video-clip played)

6 MR HOOPER: Yes, we've just skipped a small bit, but we're now at
7 the top of page 55 and he's just mentioned Mount Elgon, so we're about
8 line 1893 and we'll just play this little section.

9 (Video-clip played)

10 MR HOOPER: And there's a little more in the same vein. Can we
11 just go then to the -- towards the end and leaving of the politicians,
12 particular purpose --

13 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, we will rise at 4.00 and
14 adjourn for the week and you will have been done by this witness by then?

15 MR HOOPER: Your Honour, I doubt it, no. I will need a little
16 bit longer because we've got time taken up this morning with audios and
17 the like, and we lost about an hour and we lost a little bit this
18 afternoon. It's significant material, your Honour. There's --
19 Mr Mudavadi seems to be saying there's no shortcuts, and unfortunately
20 that's proved true. But I'd want to go through the matters with the
21 witness and deal with two other issues before I've completed
22 (* overlapping speakers) --

23 PRESIDING JUDGE EBOE-OSUJI: That means you want to continue with
24 this witness next week?

25 MR HOOPER: On Monday, yes. I won't be very long on Monday, but

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1 it's -- it's quite inevitable.

2 PRESIDING JUDGE EBOE-OSUJI: And after that Mr Kigen-Katwa will
3 do his own?

4 MR HOOPER: Yes.

5 PRESIDING JUDGE EBOE-OSUJI: And we have another witness to go?

6 MR HOOPER: Yes. All right. Thank you.

7 So we'll just go to the end here for reasons that I'll come to
8 later.

9 (Video-clip played)

10 MR HOOPER:

11 Q. All right. So that's much of the tape and certainly all the
12 recorded speech on that from Mr Ruto and much of Mr Mudavadi's and their
13 entry and exit. And having seen all that, Mr Witness, was that the rally
14 you attended on the 5th of December, 2007 --

15 A. Yes, your Honour.

16 Q. It was.

17 Now, let us just try and finish the exercise, as we've had it all
18 in various -- perhaps we could go into closed session, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: We go into closed -- into private
20 session.

21 MR HOOPER: Into private session, yes.

22 PRESIDING JUDGE EBOE-OSUJI: Private.

23 (Private session at 3.38 p.m.)

24 THE COURT OFFICER: (Interpretation) Mr President, we're in
25 private session.

26

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1 MR HOOPER: Now I --

2 PRESIDING JUDGE EBOE-OSUJI: Thank you.

3 MR HOOPER: Thank you.

4 Q. So we're in closed session. Now, Mr Witness, obviously we've got
5 (Redacted). And Mudavadi (Redacted)

6 (Redacted). Let me ask you

7 this: Following it as you were, and I'm grateful that you did so, on the
8 transcript, the English transcript, (Redacted)

9 (Redacted)

10 A. Yes, your Honour.

11 Q. All right. So let me just recap then where -- where we left off
12 earlier when we were commentating as we went through it, and we had
13 gone -- if I can ask you to go to page 36. And at page 36 you may recall
14 we started the tape again -- I think we might have gone past that,
15 actually. Yes, I had gone past that. Let us go then to page 39, and you
16 may remember the last thing we dealt with with looking at the specific
17 part of the text was the issue of devolution. And then at page 39 and
18 over the page to 40, we have this issue of stealing votes, people are
19 saying -- daydreaming or dreaming that they will rig the election. They
20 cannot. And then at line 1387 we have in English this particular phrase,
21 which you can see, which is translated as: They will suffer unexpected
22 consequences.

23 Do you see that at line 1387? Is that right? Do you see that?

24 A. Yes, your Honour.

25 Q. All right. Now, very briefly, and forgive my pronunciation, but
26

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1 the Swahili I understand reads as this: (Swahili spoken), again I
2 apologise for my pronunciation but I hope it's understandable. And
3 then -- that's the phrase that's been translated as: They will suffer
4 unexpected consequences, but the phrase (Swahili spoken) is a phrase
5 that's used by, for example, parents to their children, isn't it?

6 A. It's used across the board.

7 Q. And it effectively means they'll get into trouble, does it not?

8 A. Yes, but not children only.

9 Q. (Microphone not activated) -- agreed, not children only. All
10 right. And then it goes on, we can see, stating he wants the poll to be
11 democratic. And then he moves on to page 42, this theme we discussed
12 yesterday of jobs for young people and he deals with it in the way that
13 he does there, through humour, pointing out some very elderly people's
14 appointments. Then he comes at page 42, to the issue of tribalism and
15 asking whether it's decreased or increased, and we can see that. And as
16 an example of that, he then talks about the Ministry of Finance, and he
17 names various people: Kimunya, Peter Kenneth, Kinua (* phon), Kiambu,
18 Ndungu (* phon), Waweru. And what have those people got in common?

19 A. They come from one region, they're Kikuyus.

20 Q. And the Ministry of Finance, of course, in Kenya is the
21 prime minister -- the prime ministry, isn't it? It's the most important
22 ministry?

23 A. Yes.

24 Q. And then he turns to -- if we look at page 44 onwards and he's
25 talking there of KANU. And just to help put that into context, until ODM
26

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1 came along, this was an area that had been always a staunch supporter of
2 KANU; is that right?

3 A. Yes.

4 Q. And the problem was in this election to try and get people not to
5 vote for KANU, which was now part of PNU, but to vote for a new party,
6 ODM; is that right?

7 A. Yes.

8 Q. And Arap Moi, who obviously had tremendous influence in this area
9 as a Kalenjin for so many years, tremendous influence, he had, in fact,
10 come out against ODM and for PNU; is that right?

11 A. Yes, who, Moi?

12 Q. President Moi as was, yes, the old President Moi. He'd come out
13 for PNU, for Kibaki?

14 A. Yes.

15 Q. On page 45 onwards, we can see that the theme there is one of
16 reciprocity. And just pausing there. What Mr Ruto was asking the (Redacted)
17 (Redacted) people to do, was, in fact, to vote for a Luo,
18 Raila Odinga, as president. That's right, isn't it?

19 A. Yes.

20 Q. Now, when we come to page 47 he says there at line 1602:

21 "Are you listening or not? We reached an agreement in Kapsabet.
22 Do not vote for somebody who will not vote for you. It's not logical.
23 Listen to me. Kibaki has no relations with us. There is nothing,
24 nothing. He is an enemy."

25 That's what he says, isn't it?

26

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1 A. Yes.

2 Q. And I don't know if you recall, but the word he used for "enemy"
3 was (Redacted), in fact he said it three times: He is an enemy,
4 an enemy, an enemy; is that right?

5 A. Yes.

6 Q. And the word (Redacted) just to be quite clear, is the singular for
7 "enemy," isn't it? It's not the pleural "enemies," it's (Redacted) an
8 "enemy "; is that right?

9 A. Yes.

10 Q. Now, just below there we see reference to the Mau people and
11 burnt houses and churches and schools. If you can, can you just briefly
12 explain what that's a reference to, the Mau people? Can you recall what
13 that would be about?

14 A. Basically sometimes there was an eviction of some people who were
15 occupying government forest and it happened that they were given notice
16 to leave the forest, to vacate the forest.

17 Q. Indeed, was the position this, that squatters or whatever people
18 had settled in the Mau forest and had been given some title documents and
19 that at one time before he got into office, Kibaki had said that he'd
20 recognise their status. When he got into office, he didn't keep that
21 promise and they were forcefully evicted, and dramatically so, houses
22 bulldozed down, houses set on fire, and the people pushed out; is that
23 right?

24 A. Yes.

25 Q. And in 2007 this was still a very sensitive issue because it had
26

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1 involved several thousand people -- several thousands of people in the
2 Mau forest; is that right?

3 A. Yes.

4 Q. And we can see him talking through that. And then if we come
5 over the page to 16 -- page 48, the next theme is he's talking about Moi,
6 who he's obviously criticised a lot in the previous part of the speech
7 and basically -- basically says that: Well, you know, whatever he's done
8 and is doing, we must respect him, but he talks about -- about Moi in a
9 more kindly way, saying they will take care of him. Just pausing there,
10 of course, at that time there was still Nandi in the area who were fond
11 of Moi, sympathetic to him; is that right?

12 A. Yes.

13 Q. And then we come towards the end of this speech and we can see on
14 our page 49 the essential things coming together in terms of voting.
15 Now, had you heard of a phrase, "the three-piece suit"?

16 A. That's commonly used.

17 Q. Commonly used.

18 A. Used to be -- okay.

19 Q. Yes.

20 A. It's common.

21 Q. Very common. But the three-piece suit was a voting -- voting
22 across the board: Voting for the councillors, ODM; voting for the MPs
23 ODM; and of course voting for the presidency ODM. Is that right?

24 A. Yes.

25 Q. And we can see that that's essentially what is being said here.

26

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1 We spoke about this at an earlier occasion when you agreed that, in fact,
2 as far as the parliamentary seat was concerned it was done and dusted.
3 There was going to be no difficulty. Lagat stood for the seat and he was
4 going to win it, wasn't he?

5 A. Yes.

6 Q. There was no problem with that?

7 A. Yes.

8 Q. The big problem was the presidency. People might vote ODM for
9 Lagat but vote Kibaki; is that right? That was the worry?

10 A. Yes.

11 Q. And here we have the emphasis, you know, voting for Raila Amolo
12 Odinga, of course Arap Mbai (* phon), of course a Luo, and that's being
13 emphasised. Is that right?

14 A. Right.

15 Q. And then we have Musalia Mudavadi who's a Luhya. That's right,
16 isn't it?

17 A. Yes.

18 Q. And the Luyhas amount to a substantial proportion of the voting
19 population in this area; is that right?

20 A. Yes.

21 Q. And he too talks about the haves and the have-nots, and we saw in
22 particular - at page 53 I'm looking, if I can ask you to turn to that -
23 he's been talking about Moi's sons, Jonathan Moi, Raymond Moi, and Gideon
24 Moi who were all sitting for seats as nominated potential members of
25 parliament of the Assembly; is that right?

26

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1 A. Yes.

2 Q. None of them, in fact, were voted in; is that right?

3 A. Yes.

4 Q. And Gideon Moi and his brother, in fact, were reputed by the
5 commissions into corruption, each to be worth in the region of 6- or \$700
6 million. Did you hear of that?

7 A. I don't have that information.

8 Q. Well, did you understand that Moi's sons were fabulously wealthy?

9 A. Yes.

10 Q. Very well. Now, Mr Mudavadi also spoke at length -- at some
11 length, rather, about tribalism, and I'm looking at page 55 of the
12 transcript, where he says at line 1897:

13 "We don't want to introduce tribalism. I'm a Luhya, Ruto is a
14 Kalenjin, Raila is a Luo, Nyanga is from Mount Kenya, Balala is from the
15 Coast, Charity Ngulu is from Ukambani. Tribalism, what are you talking
16 about?"

17 And a little later on, 1909, we can see Mudavadi really talking
18 about and criticising implicitly the existence of the political elite or
19 oligarchy that was being formed in Kenya in the PNU at -- where he says:

20 "But now they just go there and the line-up is short and simple.
21 When Kibaki leaves in 2012, Uhuru will take over. When Uhuru leaves,
22 they want Gideon Moi," son of, obviously, Moi. "When Gideon leaves,
23 Jimmy Kibaki," who is the son of Kibaki; is that right? Jimmy Kibaki was
24 President Kibaki's son or is President Kibaki's son?

25 A. Yes.

26

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1 Q. Waiting to inherit the Othaya seat -- and Othaya is where the
2 Kibakis have their stronghold, really, that was where they come from,
3 isn't it, Othaya?

4 A. Yes.

5 Q. All right. And again, he ends up emphasising the importance of
6 everyone voting ODM. As he says at line 1951:

7 "If we want any ODM drafts to be passed in parliament and to go
8 through all the councils, we have to make sure that Raila is president
9 and that parliament has enough ODM representatives to pass our policies.
10 We don't want a patchwork government, like with the PNU now, as it was
11 with the NARC."

12 And that's the conclusion of his speech. Very well.

13 Now, at no time here does -- would you agree, does Mr Ruto state
14 that Kikuyus are enemies, does he?

15 A. There is.

16 Q. Well, please show me.

17 A. 1602, page 47: "Are you listening or not? We have written
18 agreement in Kapsabet" --

19 Q. I'm sorry, can you just give me the --

20 A. Page 47.

21 Q. Page 47, yes, sorry. I missed my place. And which line are we?
22 Yes, 1623. Thank you. 1602, sorry?

23 PRESIDING JUDGE EBOE-OSUJI: Yeah.

24 MR HOOPER: Oh, 1602, yes. I had the wrong highlight.

25 Q. Yes, what's that?

26

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1 A. "Are you listening or not? We have written agreement in
2 Kapsabet. Do not fight for somebody who will not fight for you. It's
3 not logical. Listen to me. Kibaki has no relations with us. There is
4 nothing, nothing. He is an enemy."

5 Q. That's Kibaki, though, isn't it? Kibaki, the president, the
6 target of the whole rally who they want to unseat as president and
7 replace by Raila Odinga is the enemy --

8 A. Not really --

9 PRESIDING JUDGE EBOE-OSUJI: Counsel, let him finish.

10 MR HOOPER: Yes.

11 THE WITNESS: Not really. When you read the statement: "Do not
12 fight for somebody who will not for you -- who will not fight for you,"
13 it means do not fight for a tribe that will not fight for you. "It's not
14 logical. Listen to me, Kibaki has no relationship with us. There is
15 nothing, nothing. He's an enemy."

16 MR HOOPER:

17 Q. Now, you said that you clearly recall that what was said was:
18 "Kikuyus are enemies." Those were the words you claimed you had heard.
19 But do you agree, those words do not appear at any time in this
20 transcript?

21 A. Your Honour, when you go to page 46, 1589:

22 "I'm asking you, people from Kapsabet, will a Kikuyu from Kibaki
23 fight for a Kalenjin?"

24 Q. And would they?

25 A. Will a Kikuyu --

26

Witness: KEN-OTP-P-268 (On former oath) (Private Session)
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1 Q. Yeah --

2 A. -- from Kibaki fight for a Kalenjin?

3 Q. Yes. Would one of Kibaki's supporters vote for a Kalenjin?

4 A. No.

5 Q. No. That's a simple statement of fact, isn't it?

6 A. Pardon?

7 Q. In 2002, the Kalenjin had voted for whom in the presidential
8 election?

9 A. Both candidates, for Kibaki and Uhuru.

10 Q. The Kalenjin voted for KANU, didn't it?

11 A. But of course that time Kibaki also had substantial votes from
12 Kalenjin.

13 Q. But --

14 A. But of course Uhuru carried the day.

15 Q. No, he didn't --

16 A. In Kalenjin land --

17 Q. Yes, he carried the day, a Kikuyu. Uhuru Kenyatta, supported by
18 nearly all the Kalenjin; that's right, isn't it?

19 A. Yes, your Honour.

20 Q. And do you know who managed Uhuru Kenyatta's presidential
21 campaign in 2002?

22 A. Manage ...

23 Q. Who managed his campaign in 2002? Who managed Uhuru Kenyatta's
24 campaign to be president of Kenya in 2002? He lost it, but who
25 campaigned -- who was managing his campaign?

26

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1 A. When you say "who managed," to me it means the manager of the
2 campaign machinery.

3 Q. Exactly --

4 PRESIDING JUDGE EBOE-OSUJI: Counsel, I think you're beginning to
5 argue with the witness --

6 MR HOOPER: Well --

7 PRESIDING JUDGE EBOE-OSUJI: I thought your original question was
8 whether there was a statement to the effect that Kikuyus are enemies.
9 Now it looks like we're beginning to talk about who will vote for whom.

10 MR HOOPER: (Microphone not activated)

11 PRESIDING JUDGE EBOE-OSUJI: But while you do that, while you do
12 that, would -- I think we've run out of tape and let me see -- let me see
13 if I can squeeze out one information here.

14 MR HOOPER: Can I just rephrase the question very quickly.

15 Q. Who was managing support amongst the Kalenjin for Uhuru Kenyatta
16 in 2002?

17 A. It was Mr William Ruto.

18 Q. Okay. So we got that. Thank you.

19 PRESIDING JUDGE EBOE-OSUJI: Witness, now you see the statement
20 appearing at tab 6 -- sorry, the transcript appearing at tab 6, the
21 transcript (Redacted)
22 (Redacted)

23 THE WITNESS: Tab 6. I don't have --

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

25 Prosecution tab 6 -- sorry, tab G, tab G, tab G of Prosecution. But you

1 do remember you said that you transcribed a part of the speech (Redacted)

2 (Redacted)

3 THE WITNESS: Yes, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: -- which you said you gave to (Redacted)

5 (Redacted)

6 THE WITNESS: Yes, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: All right.

8 MR HOOPER: (Microphone not activated)

9 PRESIDING JUDGE EBOE-OSUJI: Yes. Can you ...

10 All right. Is it the case that the same speech is what appears

11 from page 46 of the large transcript we saw? Is it the same, page 46 to

12 page 48?

13 THE WITNESS: Yes, your Honour, it's part of it, yes.

14 PRESIDING JUDGE EBOE-OSUJI: All right. We can stop it there for

15 now because we've run out of tape apparently and we meet again on Monday.

16 And, counsel, feel free to ask follow-up questions from what I've

17 just asked.

18 MR HOOPER: Certainly.

19 PRESIDING JUDGE EBOE-OSUJI: All right.

20 MR HOOPER: Thank you.

21 PRESIDING JUDGE EBOE-OSUJI: Let us bring down the blinds and let

22 the witness out.

23 (Closed session at 4.08 p.m.)

24 THE COURT OFFICER: (Interpretation) We are in closed session,

25 your Honour.

26

1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 Please escort the witness out of the courtroom.

3 Witness, sorry, before you go. We will meet you again on Monday.

4 You are still on the stand. Please don't discuss your testimony over the
5 weekend.

6 THE WITNESS: Yes, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you.

8 (The witness stands down)

9 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.

10 THE COURT OFFICER: All rise.

11 (The hearing ends in closed session at 4.09 p.m.)

12 RECLASSIFICATION REPORT

13 Pursuant to Trial Chamber V (a)'s Decision, ICC-01/09-01/11-981, dated
14 24 September 2013, and the instructions in the email dated 17 January 2014,
15 the version of the transcript with its redactions becomes Public.