

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion and Judge Robert
7 Fremr
8 Trial Hearing
9 Tuesday, 29 October 2013
10 (The hearing starts in open session at 9.50 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please announce the case.
16 THE COURT OFFICER: (Interpretation) Good morning. Situation in the
17 Republic of Kenya, in the case of The Prosecutor versus William Samoei Ruto and
18 Joshua Arap Sang, case number ICC-01/09-01/11, and we are in public session.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 Appearances the same, I take it?
21 MR GARCIA: Same for the Prosecution, your Honours.
22 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
23 MR HOOPER: It remains the same on behalf of Mr Ruto.
24 PRESIDING JUDGE EBOE-OSUJI: Thank you.
25 MR KIGEN-KATWA: It remains the same, Mr President.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

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

2 MR NARANTSETSEG: We remain the same, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you.

4 We started late due to technical problems with the system; the courtroom system. I
5 understand it has now been resolved and the transcript is working as it should.

6 That's good news.

7 We also have some other issues, logistical and procedural I take it issues, to begin
8 with.

9 Prosecutor, you do -- I suppose we must go into private session to do this?

10 MR GARCIA: Yes. Good morning, your Honours. Indeed we should go into
11 private session. I will not take much of the Court's time with it. Five minutes at the
12 most.

13 PRESIDING JUDGE EBOE-OSUJI: All right. We move straight into private session
14 then.

15 (Private session at 9.52 a.m.) Reclassified into open session

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

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 MR GARCIA: Now, your Honours, when we left off yesterday there was this whole
19 matter – (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 What it boils down to, your Honour, what we found out, is that (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted), if you will. There is no way of (Redacted)
9 (Redacted)
10 (Redacted)
11 So it leaves us with the fact that unfortunately there is no short-term solution. I'm
12 not sure -- I think that the only solutions would be -- (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted). I'm
17 not sure that this second option would be agreeable to the Chamber, or to the parties,
18 even the Prosecution.
19 (Redacted)
20 (Redacted)
21 unfortunately there is no short-term solution to that.
22 So that's basically what I wanted to inform the Chamber on. I think that what we
23 can do is proceed. I will be asking for private session for most part of the witness's
24 testimony, because it will deal with specific matters regarding his line of work or
25 things that are identifying, (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 However, I'm in the Court's hands as to -- I think that we should -- we can continue.

2 (Redacted) but we should continue nonetheless.

3 PRESIDING JUDGE EBOE-OSUJI: When you say "We should continue," you mean
4 back to the regular mode of relaying the -- the delayed transmission to the public,
5 which is a delayed relay (Redacted)?

6 MR GARCIA: Indeed, your Honour. I'm obviously in the Court's hands on this
7 matter because the question of the security of the witness or protection of the witness
8 is a Court responsibility, generally, not only the Prosecution's, but unfortunately there
9 is no short-term solution for this matter and I'm not sure if the Court would be
10 agreeable to conducting the rest of his testimony in private or closed session.

11 PRESIDING JUDGE EBOE-OSUJI: The -- have you -- this is not something we will
12 solve now, but how to resolve this you say that one proposal mentioned would be to
13 (Redacted). What about this
14 other thing (Redacted)

15 (Redacted)

16 (Redacted)

17 MR GARCIA: (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 PRESIDING JUDGE EBOE-OSUJI: Well, whether -- we don't -- as I said, it is not
23 something that we can resolve now before continuing. I'm saying keep that in mind.
24 The OTP staff, you must have some people in the logistics department of your
25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 doable.

2 MR GARCIA: Indeed, your Honour. What we will do is we will liaise with the

3 Registry and with the technical staff, and we'll determine if anything can be done for

4 future witnesses (Redacted)

5 (Redacted).

6 PRESIDING JUDGE EBOE-OSUJI: I see Mr Hooper was rising.

7 MR HOOPER: Thank you, your Honour.

8 Well, of course, it's wholly appropriate for any party or participant who has a concern

9 (Redacted) to raise it with the Chamber, but we are very

10 surprised that it's being raised by the Prosecution at this time. After all, there's been

11 trials now conducted in this very courtroom for the last five years with witnesses who

12 regularly appeared under protective measures of, may I say, a greater sensitivity

13 perhaps than even the current witness. Yet, throughout that time, the Prosecution

14 has never raised a complaint (Redacted) in

15 fact has effected and yet now suddenly there is a problem.

16 Our position is that there is no problem, that there is no risk and we're puzzled as to

17 why the Prosecution are raising one in this way at this time. Of course my friend's

18 comments on this, his subjective comments, are of course of interest to you, the

19 Judges, but really it's wholly inappropriate for the Prosecution in these circumstances

20 to as it were be the arbiters (Redacted). It would

21 surely be a matter for the relevant technical people in -- of this Court to address and

22 to assist the Court.

23 And, finally, (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted). And that's

5 the way it works, (Redacted)

6 So -- so are we to understand from what the Prosecution is saying that there's

7 (Redacted)

8 (Redacted) I don't understand that is the position.

9 PRESIDING JUDGE EBOE-OSUJI: Well, Mr Hooper, first of all the Prosecutor is

10 not -- I don't think they are presuming to be the arbiters, nor do we understand that

11 that is what is happening. They are raising a concern which you yourself recognise

12 as legitimate.

13 But beyond that, I do not accept the proposition (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 MR HOOPER: Well, to a degree, yes, but it has to be seen against this background:

20 (Redacted). And so when that

21 (Redacted)

22 (Redacted). It's somewhat different. In other

23 words, (Redacted)

24 (Redacted).

25 PRESIDING JUDGE EBOE-OSUJI: Yes, but if there are some (Redacted)

26

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted) that is a risk, isn't it? I would think that that is a risk.

5 MR HOOPER: Well -- well, yes, in an extreme example (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted). Mr Garcia was in a case -- we were in a case together in this court for

9 several years. This issue was never raised by the Prosecution in -- and we had

10 witnesses in that case, the Katanga and Ngudjolo case, of extreme sensitivity.

11 PRESIDING JUDGE EBOE-OSUJI: But did you in that case also have a similar -- the

12 same feature we've encountered here of some people actively on the hunt for

13 witnesses who are testifying so that they can out them, as it were, on websites and

14 intimidate them? I'm not sure. We don't need to compare.

15 MR HOOPER: No, no.

16 PRESIDING JUDGE EBOE-OSUJI: But there are some -- there are some -- I don't

17 think that the Prosecutor's concern is unwarranted here.

18 MR HOOPER: All right.

19 PRESIDING JUDGE EBOE-OSUJI: And, Mr Garcia, we do not need to debate this

20 matter.

21 MR HOOPER: All right. Well, obviously this is something that needs to be then

22 fixed, particularly if it raises this question mark and concern in your Honour's mind

23 and that of your colleagues of course. So how best to go about it?

24 PRESIDING JUDGE EBOE-OSUJI: That is the question.

25 MR HOOPER: Frankly, we should pause and get the people who are the specialists

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 in this. (Redacted)
2 (Redacted). I am sure this is a matter that must have been
3 addressed and must have been answered in a satisfactory manner, and that's
4 particularly true in terms of its practice in other -- other countries where the focus of
5 the charge and the crime is far, far narrower and therefore its participants more easily
6 defined than in this case.

7 PRESIDING JUDGE EBOE-OSUJI: All right. So we will proceed
8 as -- Mr Kigen-Katwa, briefly please so we can --

9 MR KIGEN-KATWA: Mr President, the first thing that we would like to observe,
10 Mr President, is that this issue is raised by one side and that one side is the
11 Prosecution -- or probably let me start from this position: That the Court having
12 made a ruling in terms of the witness protection, we respected that and we would
13 wish to have it given optimum effect. Yes, we come from that position.
14 Mr President, we are concerned with a situation where the concerns, as expressed
15 from the side of the Prosecution, is treated as a fact. Mr President, the Prosecution
16 themselves already applied for closed session.

17 PRESIDING JUDGE EBOE-OSUJI: Okay, let me stop you there. It's not about
18 treating it as a fact, or not. The point is the Prosecutor are not saying (Redacted)
19 (Redacted)

20 (Redacted). They want that to be
21 done, from what I understand. But what they are saying is that (Redacted)
22 (Redacted)

23 and I don't believe that you dispute that proposition. I don't think you are disputing
24 that.

25 MR KIGEN-KATWA: I'm in haste to confirm that that's our position, Mr President.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Precisely.

2 MR KIGEN-KATWA: Now, the point of disagreement with the Prosecution is that

3 (Redacted). We do not necessarily

4 agree with that, Mr President, and we would have wished that somebody else who

5 has no interest in this matter could comment on that issue, Mr President.

6 You will observe already that the Prosecutor --

7 PRESIDING JUDGE EBOE-OSUJI: What is the prejudice you are worried about?

8 MR KIGEN-KATWA: The prejudice we are concerned with, your Honour, is an

9 attempt to procure a situation where these proceedings are conducted in a closed

10 session, or most of the substance of the proceedings are conducted to the exclusion of

11 the public. That's our concern, really.

12 PRESIDING JUDGE EBOE-OSUJI: All right. We're not there yet. Let's not argue

13 that point then. If that is your worry, we've already indicated that this witness will

14 proceed in -- as much as possible in the public. If the Prosecutor comes and says,

15 "(Redacted)

16 (Redacted)," then we can argue your prejudice and your concern, but until then

17 let's just call the witness and proceed.

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

19 PRESIDING JUDGE EBOE-OSUJI: Thank you.

20 MR KIGEN-KATWA: But allow me just to say this, Mr President: That whatever

21 measures are taken, we would really as parties be interested in participating. Even

22 those meetings the Prosecution is saying they have with the technical team, we can't

23 understand why we wouldn't be involved in them.

24 And lastly, your Honour, even a decision is to be made on this issue for any increase

25 in protective measure, or whatever issues, we would pray that you source the

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 information and ascertainment (Redacted) from a party other

2 than the Prosecution themselves.

3 Thank you, Mr President.

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

5 Let us call in the witness and proceed. Can you please bring down the blinds and

6 bring in the witness.

7 (Closed session at 10.08 a.m.)

8 MR HOOPER: Your Honour, while this is -- we're being closed in, as it were,

9 obviously this witness needs to be dealt with this week and I see a very judicial nod of
10 your head in respect of that.

11 PRESIDING JUDGE EBOE-OSUJI: Yes, I did nod my head.

12 MR HOOPER: And we appreciate that we are sitting a little longer tomorrow and

13 the next day. I'm wondering whether we would have -- clip a half-an-hour off the

14 lunch break today, with the consent of the interpreters and the other court staff and of

15 course your Honours, in order to win back a bit of time with this witness.

16 We think that we can finish him this week, but inevitably these inroads into the time,

17 as we know, and counsel's underestimation of the time they're going to take,

18 conspires to put us into risk and we wouldn't want that particularly this week.

19 PRESIDING JUDGE EBOE-OSUJI: Sorry, let me clarify what you are -- your motion

20 is. To bring back you say half-an-hour, or one hour?

21 MR HOOPER: Well, just have an hour for lunch instead of an hour-and-a-half.

22 PRESIDING JUDGE EBOE-OSUJI: All right. So the lunch break you're saying

23 should be half-an-hour?

24 MR HOOPER: Yes. I mean, if we had lunch from 1.30 'til 2.30, or from 1 'til 2, we'd

25 win back half-an-hour.

Trial Hearing
Witness: KEN-OTP-P-0268

(Closed Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: Ah, you want to cut down the lunch break to one
2 hour instead of --
- 3 MR HOOPER: Yes, yes.
- 4 PRESIDING JUDGE EBOE-OSUJI: I see your point.
- 5 MR HOOPER: It's unusual for the workers for -- to call for longer hours, but --
- 6 PRESIDING JUDGE EBOE-OSUJI: I mean, it is, but you are -- I see your point. I
7 wanted to make sure what it is.
- 8 MR HOOPER: Yes.
- 9 THE COURT OFFICER: (Interpretation) Mr President, we are in closed session ...
10 (No interpretation)
- 11 PRESIDING JUDGE EBOE-OSUJI: And while the witness is being brought in,
12 that -- that's a very reasonable suggestion it seems to us.
- 13 Prosecutor, do you have difficulty with that? Mr Kigen-Katwa?
- 14 MR GARCIA: No difficulty whatsoever, your Honour.
- 15 MR KIGEN-KATWA: I have none, Mr President.
- 16 PRESIDING JUDGE EBOE-OSUJI: All right. So we will --
17 (The witness enters the courtroom)
- 18 PRESIDING JUDGE EBOE-OSUJI: All right, thank you. So we will be rising at 1
19 and coming back at 2.
- 20 Can we go back into private (sic) session?
- 21 MR GARCIA: Your Honour, we are in private session.
- 22 PRESIDING JUDGE EBOE-OSUJI: I am sorry, were we in open session yesterday?
- 23 MR GARCIA: We were in public session yesterday when we left off.
- 24 PRESIDING JUDGE EBOE-OSUJI: Yesterday. So we go back into public session?
- 25 MR GARCIA: Yes, your Honour.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: That's what I meant to say.

2 (Open session at 10.13 a.m.)

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

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

5 Mr Garcia, before you proceed, there was a matter -- a little procedural matter that
6 your side raised yesterday about the possibility of continuation beyond 1 November,
7 and this witness -- after this witness have you -- do you have another witness already
8 in the country?

9 MR GARCIA: Yes, we do, your Honour. We have another witness on standby.
10 Actually, the preparation meeting is going on today for that witness.

11 PRESIDING JUDGE EBOE-OSUJI: All right. And, Counsel, can we all revert after
12 lunch to discuss the possibility of leaving open the week after 1 November up until
13 around 8 November?

14 MR HOOPER: Certainly, but your Honour won't be too surprised that the Defence
15 are reluctant to engage in that process, but perhaps as your Honour says at 2 o'clock
16 we can --

17 PRESIDING JUDGE EBOE-OSUJI: Yes.

18 MR HOOPER: -- discuss the matter.

19 PRESIDING JUDGE EBOE-OSUJI: I'm signalling it. This is not an order yet to
20 remain available. I'm saying let's talk about the possibility.

21 MR HOOPER: Yes. I mean the Defence concern is largely one over the next
22 continuous period, where there is work to be done that can't be done while we're
23 here.

24 PRESIDING JUDGE EBOE-OSUJI: I understand that.

25 MR HOOPER: Yes.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: You had said it before.
- 2 MR HOOPER: Yes.
- 3 PRESIDING JUDGE EBOE-OSUJI: But if we clipped back one week and leave it at
- 4 that for now.
- 5 MR HOOPER: Yes.
- 6 PRESIDING JUDGE EBOE-OSUJI: Right.
- 7 MR HOOPER: Well --
- 8 PRESIDING JUDGE EBOE-OSUJI: That would not, in any event, be --
- 9 MR HOOPER: Yes, your Honour, certainly.
- 10 PRESIDING JUDGE EBOE-OSUJI: Yes.
- 11 Witness, welcome back. We hope you rested well.
- 12 Mr Garcia will continue his questions to you. Again, please remember to listen
- 13 carefully, first carefully to the question being asked, make sure you understand the
- 14 question the lawyer IS asking you and then answer it as briefly as you can and
- 15 directly to the point. Thank you.
- 16 WITNESS: KEN-OTP-P-0268 (On former oath)
- 17 QUESTIONED BY MR GARCIA: (Continuing)
- 18 Q. Good morning, Mr Witness.
- 19 A. Good morning, your Honour.
- 20 Q. Now, Mr Witness, when we left off yesterday we were -- you were discussing
- 21 the fact that you had attended two rallies: One in Kapsabet and one in Nandi Hills.
- 22 Now, just for the record, is it clear that both rallies were Orange rallies?
- 23 A. Your Honour, may I make it clear that those are not two rallies. In 2005
- 24 running to 2007 there are many rallies, so possibly I might have attended more than
- 25 two rallies in those places.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 Q. Thank you, Mr Witness.

2 PRESIDING JUDGE EBOE-OSUJI: Counsel, can you hold on a minute please.

3 Please proceed.

4 MR GARCIA:

5 Q. Thank you, Mr Witness, for that clarification. So I understand that you
6 attended more than two rallies, but I'd like to come back to those two rallies you were
7 speaking to us about yesterday; the two rallies that we went on during the
8 referendum period. You mentioned that you were in Kapsabet, one rally in
9 Kapsabet and one in Nandi Hills. Now, my question was were they both Orange
10 rallies?

11 A. Your Honour, there were many rallies in Nandi Hills and Kapsabet, I don't
12 want to limit it to two, but of course they were Orange rallies.

13 Q. Thank you for that clarification, Mr Witness. Now, I'd like to just take them
14 individually if you can recall certain details. Now, the rally in Nandi Hills, do you
15 remember where exactly in Nandi Hills this rally would have taken place?

16 A. I remember attending a rally in the stadium. Yeah, at the stadium.

17 Q. Can you tell us what is the name of the stadium?

18 A. It is basically Nandi Hills Stadium. I have no need to be in Nandi Hills
19 Stadium.

20 Q. Would you be able to tell us, Mr Witness, when exactly this rally would have
21 taken place in 2005? What month?

22 A. During the eve of referendum and even after referendum, but again I can't
23 remember the exact dates and days and months.

24 Q. And just so we're clear on the matter, you say "During the eve of
25 referendum ..." Can you tell us what month the referendum was held in 2005?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. I don't remember.

2 Q. Now, the rally in Kapsabet, do you remember where it would have taken place
3 in Kapsabet exactly?

4 A. Kapsabet Stadium.

5 Q. And the same question as for the Nandi Hills. If you are able to respond, do
6 you remember when this would have occurred, the rally in Kapsabet? What time of
7 the year of 2005?

8 A. I don't remember the time. I don't remember the dates and days.

9 Q. Mr Witness, would you be able to tell us for the Nandi Hills Orange rally in
10 what languages were the politicians speaking?

11 A. Sometimes Kiswahili, English, a local language, and I remember also Raila
12 addressing -- he once addressed in Luo language.

13 MR GARCIA: Your Honours, could we go into private session for a minute?

14 PRESIDING JUDGE EBOE-OSUJI: Private session.

15 (Private session at 10.22 a.m.) Reclassified into open session

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

17 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

18 MR GARCIA:

19 Q. Now, you said, Mr Witness, that the politicians were speaking in the local
20 language. What is -- what was the local language?

21 A. The local language is Kalenjin.

22 Q. Now, you mentioned yesterday that the politicians - the local politicians - who
23 were Kalenjin were using Swahili words such as "madoadoa" and "kwe-kwe."
24 (Redacted)?

25 A. "Kwe-kwe" and "madoadoa" are Swahili terms and anybody can use it, and I

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 don't remember (Redacted).

2 Q. Thank you for that. I'm reading your response and you say that you don't
3 remember (Redacted), but would you be able to tell the Court if
4 indeed the politicians - the local Kalenjin politicians - were using words similar to
5 "madoadoa" or "kwe-kwe" (Redacted)?

6 A. I don't remember. Those words "madoadoa" and "kwe-kwe" was used in a
7 wide-spread manner, so I can't remember specific.

8 PRESIDING JUDGE EBOE-OSUJI: Counsel -- sorry, Witness, the question is this:

9 The words "madoadoa" and "kwe-kwe," (Redacted)? Is
10 there words that are roughly similar, or that convey the same message or meaning,
11 (Redacted)? Are there (Redacted)
12 "madoadoa" and "kwe-kwe"?

13 THE WITNESS: I don't know, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Is it also the case that you would not know if any
15 such roughly equivalent terminology (Redacted) was used?

16 THE WITNESS: Yeah, I don't know, your Honour.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 MR GARCIA:

19 Q. Mr Witness, do you know the word (Redacted)?

20 A. Yes, your Honour.

21 MR HOOPER: I just rise here. I don't see this in any statement that I've been
22 served. I see no focus in the statement on meetings in 2005. My friend seems to be
23 off on an expedition here, of which I've no notice, and of course we're dealing with
24 2005 and not with really the matters at issue, 2007.

25 MR GARCIA: There is notice, your Honour, at paragraph 17 of the witness's

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 statement. It's obvious that a statement will not comprise every detail of information
2 and some questions must be posed in open session when the witness is present with
3 us. The witness can respond. The Defence is not prejudiced in any manner. It has
4 been given notice of what's at paragraph 17 and following in the witness's statement.

5 PRESIDING JUDGE EBOE-OSUJI: Where is the tab? In what, tab 1?

6 MR GARCIA: This is tab -- that would be tab A, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Tab A.

8 MR GARCIA: Yes.

9 PRESIDING JUDGE EBOE-OSUJI: Paragraph 17, you say?

10 MR HOOPER: Well, you see, what's happened here is we've had the answers from
11 the witness, for which we're grateful, and then my friend's put to him, "What about
12 (Redacted)" There's never been any mention of "(Redacted)" by this witness, so it
13 really is a shocking example of leading a witness.

14 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, how do you say the word "(Redacted)"
15 appears in 17 -- paragraph 17?

16 MR GARCIA: Your Honour, what I was saying is that as for the notice of what the
17 witness is speaking about, the meetings in 2005, the notice is at paragraph 17. As for
18 that word, it doesn't appear in paragraph 17.

19 PRESIDING JUDGE EBOE-OSUJI: All right, then you're leading. That's a leading
20 question. The question is overruled. The objection is sustained.

21 MR GARCIA: We can go back into public session, your Honours.

22 PRESIDING JUDGE EBOE-OSUJI: We go back to public session.

23 (Open session at 10.28 a.m.)

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

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 Please proceed.

2 MR GARCIA:

3 Q. Now, Mr Witness, you mentioned that the politicians - the local
4 politicians - used words like "madoadoa" and "kwe-kwe." Can you tell the Court
5 how the people reacted when the politicians would use these words?

6 MR HOOPER: Well, again, in what circumstances? Are we talking about a
7 meeting he attended on a date he didn't remember? In what context is this question
8 to be rooted that we can now better understand its significance?

9 MR GARCIA: I'm going to reframe my question, your Honour.

10 Q. Now yesterday, Mr Witness, you stated to the Court that you heard at these
11 rallies the words "madoadoa" and "kwe-kwe" being used by the local politicians.
12 What I want to know is that at these rallies, when the politicians would use these
13 words in the speeches that they were giving, what was the reaction of the people that
14 were attending the rallies?

15 A. I can't remember, your Honour.

16 Q. You also stated, Mr Witness, that William Ruto, Raila Odinga and Mudavadi
17 were present at these rallies. I'd like to know, if you can recall obviously, do you
18 remember Mr Mudavadi making any speech at these rallies?

19 A. Your Honour, he must have made a speech, but I can't remember the details of
20 the speech.

21 PRESIDING JUDGE EBOE-OSUJI: Witness, the question was, "Do you remember if
22 Mr Mudavadi made a speech?" If you remember him making a speech you can say,
23 "Yes." If you don't, do not tell us that "... he must have ..." We want you to -- we
24 want your answer to be responsive to the question. If you remember -- he may have
25 made a speech, or maybe not. It doesn't help us to tell us that "... he must have ..." if

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 you don't remember. You need to tell us whether or not you remember him making
2 a speech.

3 THE WITNESS: I don't remember, your Honour.

4 MR GARCIA:

5 Q. And as for Mr Raila Odinga, do you remember if he made a speech?

6 A. I remember, your Honour.

7 Q. Unless you remember the exact details, can you tell us what was the general
8 speech about that he made?

9 A. It was about rallying people to -- not to support the constitution draft, and I
10 remember him also talking in the Luo language.

11 Q. Now, as for Mr Ruto, do you remember if he gave a speech during these
12 rallies?

13 A. I don't remember.

14 Q. Would you be able to tell us, Mr Witness, if these rallies or what was said at
15 these rallies was broadcasted on the radio at the time?

16 A. I don't remember.

17 MR GARCIA: Thank you for those clarifications, Mr Witness. Your Honours,
18 I'd like to go into private session for about ten minutes.

19 PRESIDING JUDGE EBOE-OSUJI: Private session.

20 (Private session at 10.33 a.m.) Reclassified into open session

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

22 PRESIDING JUDGE EBOE-OSUJI: Thank you.

23 MR GARCIA:

24 Q. Now, Mr Witness, I'd like for us to speak about 2007 now. Did you ever
25 attend any pre-election meetings in 2007?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Can you be more specific? "Pre-election
2 meetings" is a very vague concept.

3 MR GARCIA:

4 Q. Did you -- Mr Witness, did you ever attend any pre-election meeting in
5 (Redacted) during the 2007 period?

6 A. Yes, your Honour.

7 Q. Can you tell the Court where this meeting was held?

8 A. There is a meeting that was held at the (Redacted).

9 Q. Can you tell the Court how you came to be attending -- how you came to
10 attend this meeting (Redacted)?

11 A. A friend introduced it to me - his name is (Redacted)- and he told me,
12 "There is a meeting at (Redacted). (Redacted)
13 (Redacted)."

14 PRESIDING JUDGE EBOE-OSUJI: (Redacted), you said?

15 THE WITNESS: (Redacted).

16 PRESIDING JUDGE EBOE-OSUJI: How do you spell that?

17 THE WITNESS: (Redacted).

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.

19 MR GARCIA:

20 Q. And just for the record, it's at line 9, your friend's name is (Redacted),
21 spelled out (Redacted)? Is that exact, Mr Witness?

22 A. Yes, your Honour.

23 Q. Thank you.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, is that the same person as
25 person number 1 on the PIS?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 THE WITNESS: Yes, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: All right. What we try to do, so that there is no
3 confusion since we may be going in and out of private session -- now we are in
4 private session, as you see the light is green, but in order to avoid confusion it's best
5 to use the numbers against the names of persons indicated in the PIS as well as
6 locations. Use the references as in "Person number 1" on the PIS even when we're in
7 private session.

8 The reason for staying with that system is to avoid any confusion that may arise if we
9 do go into open session. If you get used to mentioning people by their names then
10 you may subconsciously do the same in the public session, whereas it's safer if you
11 kept referring to "Person number 1" even in private session.

12 All right?

13 THE WITNESS: Yes, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 MR GARCIA:

16 Q. Now, Mr Witness, would be able to tell the Court when approximately in 2007
17 this meeting would have been held at the (Redacted)?

18 A. It was 2007. I can't remember the month, but likely mid-2007.

19 PRESIDING JUDGE EBOE-OSUJI: And again sorry to butt in, but (Redacted) I
20 understand is the same as location number 1, isn't it, on the PIS?

21 THE WITNESS: Yes, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Thank you. So we just speak about "Location
23 number 1" for (Redacted).

24 MR GARCIA: I'm grateful, your Honour.

25 Q. Mr Witness, can you tell us approximately how many people were attending

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 this meeting on that day?

2 A. There were roughly about a hundred people.

3 Q. Would you be able to tell us what ethnic groups these people belonged to?

4 A. (Redacted) your Honour.

5 Q. And can you tell the Court, Mr Witness, what happened at this meeting?

6 A. While we were there, we were introduced (Redacted). There were (Redacted)

7 (Redacted).

8 MR GARCIA: Just for the record, 24, line 5, is (Redacted).

9 Q. Now, Mr Witness, did these -- you said that there were (Redacted)

10 (Redacted) did

11 they represent anyone or were they there on behalf of anyone?

12 A. (Redacted) people should prepare to

13 vote in Raila.

14 Q. Just so that it can be clear for the transcript, Mr Witness, you said t "... prepare

15 to ..." is it "... follow Raila," because I have here "... to fall in Raila"? What is it you're

16 willing -- you wish to tell us?

17 A. Prepare to follow Raila, or rather vote in Raila.

18 PRESIDING JUDGE EBOE-OSUJI: I heard "... vote in Raila." That's what the

19 witness had said the first time.

20 MR GARCIA:

21 Q. Just to be clear, Mr Witness, did you say "... to vote in Raila?"

22 A. Since Raila was looking for -- wanted to be the president, I think those were

23 preparatory stages. "Follow" and "vote in" to me means the same. To follow a

24 politician, to prepare to vote in a politician, basically the same, your Honour.

25 MR KIGEN-KATWA: Mr President, with your permission?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Yes?

2 MR KIGEN-KATWA: I was wondering whether we could not lead this evidence in
3 open, considering the number of people who were in attendance?

4 PRESIDING JUDGE EBOE-OSUJI: No, let's stay in closed.

5 MR GARCIA:

6 Q. Now, Mr Witness, was there a person who was the master of ceremony during
7 the meeting?

8 A. Yes, your Honour.

9 Q. Can you tell us who this person was?

10 A. (Redacted), your Honour.

11 Q. And at the time who was (Redacted)? Was he related to any political
12 party?

13 A. (Redacted) is a local politician and he later became the (Redacted)
14 (Redacted), your Honour.

15 Q. Now, if I understand you correctly, you said that at the time he was a local
16 politician. Can you tell us with which party he was affiliated?

17 A. At the time I didn't know the party, but later on he would become an ardent
18 Orange supporter.

19 MR GARCIA: Just for the record, at line 17 is "... an ardent ODM (sic) Orange
20 supporter."

21 Q. Can you tell us the ethnicity of (Redacted)?

22 A. (Redacted) is a Nandi.

23 Q. And am I correct in stating that a Nandi is one of the subtribes of the Kalenjin;
24 is that correct?

25 A. Yes, your Honour.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Q. Now, in regards to Mr (Redacted), do you know anything about his prior
2 political experience before being a local politician?

3 A. He's been there for long. (Redacted)
4 and he ended up becoming (Redacted) for a while, but he's been in political
5 scene for long.

6 Q. (Redacted).
7 Could you just explain to us what was the KANU Youth Wing?

8 A. During Moi's tenure, there were -- KANU had a youth wing, those who were
9 young supporters for the party, and it was a very powerful institution by then. They
10 were very powerful to an extent they could arrest anybody they deem they wanted to.

11 Q. You also said in regards to this (Redacted) that he ended up becoming an
12 (Redacted). An (Redacted) for which area exactly?

13 A. I don't know exactly which area, but it's (Redacted) area.

14 Q. Can you please spell that to us, the name of the area that you've just
15 mentioned?

16 A. (Redacted).

17 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, in this case we've heard a lot of
18 details, back stories as it were as people would say, that definitely are interesting to
19 listen to, but we do have a trial and the scope of relevance is defined in the Document
20 Containing the Charges on the charges part of it mostly. So we need to be careful
21 about how much we delve into details to elicit -- they are interesting certainly for the
22 curious, but we have a trial. Thank you.

23 MR GARCIA: If I may, your Honours? Indeed, and when we look at the updated
24 DCC (Redacted)
25 in the updated DCC, as well as some of the information - actually most of the

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 information - that I thought necessary to elicit. So it is actually relevant information.

2 PRESIDING JUDGE EBOE-OSUJI: No. I'm not saying "No" to you. I'm saying

3 maybe there's a misunderstanding. I said that the relevance is defined in the charges

4 part of the DCC. We do not want to spend an eternity litigating background

5 informations that are interesting to know, but do not end up really, really addressing

6 the charges. That's all I'm saying.

7 MR GARCIA: Thank you, your Honour, and I can assure the Chamber that I'm

8 asking only the questions that I feel are really necessary and I'll move on.

9 Q. Mr Witness, in regards to this meeting that you attended, could you tell us
10 what was the reaction of the people attending to what was being said by these
11 (Redacted)?

12 A. The (Redacted) appeared to me they were preparing people for -- (Redacted)
13 (Redacted). There are some people who didn't like. Some liked. I know of one,
14 number 2, who didn't like, who got agitated and he stated that, "(Redacted)
15 (Redacted)," and he was alluding that it was not good for people to
16 be (Redacted).

17 Q. And a last question on this matter: What was the reaction of the (Redacted)
18 that were present to what was being stated?

19 A. Towards the end, what I can remember is many who attended, particularly
20 ladies, were dissatisfied in the sense that they were not given any money later on. It
21 seems they had been promised that they'll be given money as allowance for attending
22 the meeting.

23 Q. Did you attend any other meetings of this sort prior to the elections in 2007?

24 A. No, your Honour.

25 Q. I understand that at this point in 2007 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted). (Redacted) did you learn

2 of other meetings or were you able to attend other meetings?

3 A. (Redacted). I was an (Redacted). I have been an (Redacted) for

4 so long.

5 Q. Now, Mr Witness, let's move on from that subject. Did you attend any rallies

6 in Kapsabet during the 2007 period?

7 A. I attended many rallies, but I can remember a rally I attended in 2007,

8 December.

9 Q. Do you remember the exact date? You mentioned December 2007. Do you
10 have a date?

11 A. Likely to have been 5 December, your Honour.

12 Q. Now can you tell the Court, Mr Witness, if you attended that rally out of
13 simple interest, or were you acting -- or was it (Redacted)
14 (Redacted)?

15 A. It was (Redacted) for me to attend rallies in Kapsabet (Redacted)
16 (Redacted), and again (Redacted) I would find
17 myself attending those rallies.

18 Q. And just so we can be clear on the matter, if you did attend -- when you did
19 attend this rally, (Redacted) or ...?

20 A. I can't quite clearly remember.

21 MR KIGEN-KATWA: With your permission, Mr President, could I request that we
22 go with a public -- to a public session?

23 PRESIDING JUDGE EBOE-OSUJI: No, we're not going to public session. We're
24 remaining in private for now.

25 MR GARCIA: Just to reassure my colleague, I just have a couple more questions of

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 this identifying nature and then we can go into the whole rally in public session.

2 Q. Now, Mr Witness, when you did go to this rally, were you cautious in any
3 which way?

4 A. Your Honour, it was an ODM rally and anti-Kikuyu sentiment was high, you
5 remember from referendum going towards election, and the Kikuyu sentiment had
6 been build up -- had been building up.

7 Q. You're saying that "... the Kikuyu sentiment was high." Can you explain that?

8 A.(Redacted) had reached a level, your Honour, whereby (Redacted) people would
9 show it openly that they didn't like to be associated with Kikuyu, or anything Kikuyu.

10 MR GARCIA: Now, I just want to make it clear for the record. You say "...
11 anti-Kikuyu sentiment was high."

12 Q. (Redacted) are you referring -- who are you referring to?
13 What ethnic groups exactly?

14 A. Majorly Kalenjins, but of course there were Luos and Luhyas.

15 Q. Now, I understand, Mr Witness, am I correct in stating, (Redacted)
16 (Redacted); is that correct?

17 A. Yes, your Honour.

18 Q. Now, did that cause any problems for you when you would attend -- when
19 you did attend this rally in the month of December 2007?

20 A. Your Honour, since I had understood the political situation, at times it
21 would -- (Redacted).

22 Q. What were you fearing, exactly?

23 A. Your Honour, (Redacted)
24 (Redacted).

25 PRESIDING JUDGE EBOE-OSUJI: The question would be what would be that

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 danger?

2 THE WITNESS: Fear of -- fearing harm to my person.

3 MR GARCIA:

4 Q. And who were you fearing might cause this harm to your person?

5 A. ODM supporters, your Honour.

6 Q. Thank you for that clarification, Mr Witness. I'd ask that we go in public
7 session, but just before, Mr Witness, just to be clear that until now we've been
8 proceeding in private session and I will be asking the Court to go into public session,
9 where I'll be asking further questions on what you did see and hear during this rally
10 in Kapsabet in the month of December 2007, and so always be careful of what you say
11 not to identify yourself.

12 A. Yes, your Honour.

13 MR GARCIA: Your Honours, public session, but I see the time. I'm not sure how
14 many questions I'll be able to fit in the next two minutes. Maybe it --

15 PRESIDING JUDGE EBOE-OSUJI: Well, we will proceed and we can make use of
16 the time.

17 (Open session at 10.57 a.m.)

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

19 PRESIDING JUDGE EBOE-OSUJI: Please proceed, Mr Garcia.

20 MR GARCIA:

21 Q. Now, Mr Witness, in regards to this rally that was held at Kapsabet
22 Stadium -- Kapsabet, pardon me, on 5 December 2007, can you tell us where exactly
23 in Kapsabet the rally was held?

24 A. Kapsabet Stadium, your Honour.

25 Q. Does Kapsabet Stadium go by another name, Mr Witness?

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 A. No, your Honour. Oh, wait. Your Honour, it's Kipchoge Keino Stadium.

2 Q. Thank you, Mr Witness. Can you tell us approximately how many people
3 were attending this rally at Kipchoge Keino Stadium?

4 A. There were very many thousands of people who attended the rally. It was a
5 big rally, your Honour.

6 Q. And can you tell us briefly what the rally was for?

7 A. It was for drumming support for ODM party since election was approaching.

8 Q. Was there any publicity done before the rally was held?

9 A. Yes, your Honour. Publicity was done through the vernacular stations and
10 there was -- there was a car that was going around the town announcing about it.

11 Q. Now, you mentioned vernacular stations. Which -- were there any Kalenjin
12 vernacular stations that publicised this rally?

13 A. Kass FM.

14 Q. Would you be able to tell us who would be the presenter who would publicise
15 this -- these type of rallies?

16 A. I don't quite clearly remember who -- who were the -- who was announcing,
17 who was giving announcement.

18 Q. Now, in regards to the people who were attending this rally, could you tell us
19 about the ethnicity of these people?

20 A. Majorly Kalenjins, but of course there were Luos, Luhyas.

21 Q. Would you be able to tell us how these people -- how they arrived there?

22 A. Public transport is what they used to come there, your Honour.

23 Q. Now, do you recall, Mr Witness, who was present? What politicians were
24 present at this rally on 5 December?

25 A. Local politicians. There was Honourable Elijah, there was Honourable Koech,

Trial Hearing
Witness: KEN-OTP-P-0268

(Closed Session)

ICC-01/09-01/11

1 there was Mudavadi, there was Ruto and others I cannot remember.

2 MR GARCIA: Your Honours, do you wish for us to continue? I'm seeing the time.

3 Obviously, I'm mindful of it.

4 PRESIDING JUDGE EBOE-OSUJI: How many more questions do you have on
5 this -- in this line on the stadium?

6 MR GARCIA: Much more than a couple of minutes, your Honour. Maybe 15/20
7 minutes.

8 PRESIDING JUDGE EBOE-OSUJI: All right, we will take our morning break now
9 and we will come back at 11.30. The blinds will come down for the witness to be
10 escorted from the courtroom.

11 (Closed session at 11.04 a.m.) Reclassified into open session

12 THE COURT OFFICER: (Interpretation) Mr President, we are in closed session
13 and the witness will be taken out of the courtroom.

14 PRESIDING JUDGE EBOIE-OSUJI: Thank you very much. Please escort the
15 witness out and then we will rise.

16 (The witness is excused)

17 MR HOOPER: Your Honour, while the witness leaves, can I just say there's been a
18 technical problem this morning both in respect of eCourt and in respect of webmail,
19 which is the way we communicate of course with the OTP, and the result is we've
20 been unable to serve or disclose our material for -- possible material for use in
21 cross-examination, which I wanted to disclose first thing this morning in case with a
22 good wind we happened to be on cross-examination tomorrow. I don't think at the
23 moment that's realistic, but there is a problem. We're going to serve it now
24 via -- well, we'll just print something out and give it, instead of electronically.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you've known the Chamber's

Trial Hearing
Witness: KEN-OTP-P-0268

(Closed Session)

ICC-01/09-01/11

1 position on this. I mean, this is something between the parties.

2 MR HOOPER: Yes, but it's been affected unfortunately by matters beyond our
3 control, if I can put it like that, and so I'm just flagging that up.

4 PRESIDING JUDGE EBOE-OSUJI: Let's hope they understand that.

5 MR HOOPER: Yes.

6 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

7 THE COURT USHER: All rise.

8 (Recess taken at 11.05 a.m.)

9 (Upon resuming in open session at 11.39 a.m.)

10 THE COURT USHER: All rise.

11 Please be seated.

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

13 PRESIDING JUDGE EBOE-OSUJI: Merci.

14 Please proceed, Mr Garcia.

15 MR GARCIA:

16 Q. Now, Mr Witness, when we left off before the break, I'd asked you the question
17 of what politicians were present at this rally and you stated that there was Elijah.

18 Now, could you tell us the full name of Elijah please?

19 A. Elijah Lagat.

20 Q. So the last name is L-A-G-A-T; is that correct?

21 A. Yes.

22 Q. You also mentioned a Mr Koech; is that correct?

23 A. Yes, your Honour.

24 Q. And that is spelled K-O-E-C-H?

25 A. Yes, your Honour.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 Q. Can you give us the first name of Mr Koech?

2 A. John Koech. John, your Honour.

3 Q. Now, in regards to Mr Elijah Lagat, you said he was a local politician. With
4 which party was he?

5 A. ODM, your Honour.

6 Q. Now, at that time was Mr Elijah Lagat occupying any function in the
7 government, or was he nominated for a function?

8 A. He was an MP nominee on ODM party.

9 Q. Can you tell us for what constituency he was an MP nominee?

10 A. Emgwen constituency.

11 Q. And am I correct in stating that the Emgwen constituency is one of the -- at the
12 time was one of the four constituencies in the Nandi District? Is that correct?

13 A. Yes, your Honour.

14 Q. You've also mentioned Mr John Koech. Can you tell us if he was affiliated
15 with a political party?

16 A. He was also an ODM member of parliament nominee for the constituency of
17 Mosop.

18 Q. And can you tell the Court where the Mosop constituency is?

19 A. It is in Nandi County.

20 Q. Now, Mr Witness, do you remember how much time this Kapsabet rally lasted?
21 How many hours?

22 A. It -- it lasted -- okay, people starting thronging in right from morning hours, 11
23 in the morning, but of course main speakers came in later at around -- around 3, 3 or 4,
24 and the meeting ended late in the evening around 5.

25 Q. Do you know how Mr Ruto came to the meeting -- to the rally, sorry?

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 A. He is likely to have used a chopper.

2 Q. Now, you say that, "He is likely to have used a chopper." On what do you
3 base that on?

4 A. I've been attending many rallies and, you know, chopper is normally used in
5 many rallies, your Honour, and since I have been to many rallies I -- I'll use the word
6 "likely" not to confuse many rallies that I have been attending.

7 Q. Now, just to be clear on this matter, did you see Mr Ruto arrive at other rallies
8 during that period in a chopper -- in a helicopter, I'm sorry?

9 A. Yes, your Honour.

10 Q. Now, Mr Witness, do you remember if there was a speaking order for the
11 politicians that were present at this rally of 5 December 2007?

12 A. Yes, your Honour.

13 Q. And what was the speaking order?

14 A. What I can remember is the main speakers, they spoke later after others had
15 spoken.

16 Q. So just so that we can be clear on the matter, it would start with which
17 politicians?

18 A. Normally from the local politicians, those are the councillors, and then it
19 moves upwards, members of parliament and then probably senior politicians who are
20 holding ministerial positions, and then the party luminaries will make the
21 penultimate part of the speaking order.

22 Q. And in this case, do you remember exactly who were the councillors or the
23 nominees for councillors who started speaking?

24 A. I don't quite clearly remember, your Honour.

25 Q. And you said that it would end normally with the luminaries. On this

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 occasion, on 5 December 2007, who was the last person to give a speech at the rally?

2 A. It was Mudavadi and then Ruto.

3 Q. Now, would you be able to tell the Court - do you recall - what the speakers
4 said? For example, Mr Elijah Lagat, do you recall what he would have said during
5 the rally?

6 A. I can't recall, your Honour.

7 Q. Do you recall what Mr Mudavadi would have stated at that rally?

8 A. I can't recall word by word, but it was basically policy speech.

9 Q. I understand it was basically a policy speech, but what was the general ideas
10 that he was conveying about policy?

11 A. I can't remember.

12 Q. Now, as for Mr William Ruto, do you recall what he said during his speech at
13 that rally?

14 A. I can't remember everything, but of course I remember the part when he talked
15 in Kalenjin and basically he chided -- he chided Moi for supporting Kibaki and I
16 remember he said something to the effect that Kikuyus are enemies and whoever
17 supports Kibaki is a witch.

18 Q. Now, let's start with this last statement you've made. You said that Ruto
19 would have said, "... whoever supports Kibaki is a witch."

20 Your Honour, could we possibly go into private session a couple of minutes please?

21 PRESIDING JUDGE EBOE-OSUJI: Yes, we will go into private session. For how
22 long did you say, a couple of minutes? Two minutes, literally?

23 MR GARCIA: I would say five minutes, your Honour. I'll try and be as brief as
24 possible.

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

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 (Private session at 11.50 a.m.) Reclassified into open session
- 2 THE COURT OFFICER: (Interpretation) We are in private session, your Honour.
- 3 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 4 Counsel, before you proceed, one question to the witness. I don't know if you have
- 5 elicited this, but we need to establish this once and for all in the transcript so we don't
- 6 ask it -- sorry, in private session, so we don't ask it again in open session.
- 7 But, Witness, do you (Redacted)?
- 8 THE WITNESS: Yes, your Honour.
- 9 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 10 Proceed, please.
- 11 MR GARCIA:
- 12 Q. Now, Mr Witness (Redacted)
- 13 (Redacted)?
- 14 A. (Redacted).
- 15 Q. (Redacted)
- 16 (Redacted)?
- 17 A. (Redacted).
- 18 Q. (Redacted)?
- 19 A. (Redacted).
- 20 Q. (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 A. It is the same.
- 24 Q. So both (Redacted)?
- 25 A. They are the same, your Honour.
- 26

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: But the witness did not spell -- did he say
- 2 (Redacted), or did he say (Redacted)?
- 3 MR GARCIA: I heard (Redacted).
- 4 THE WITNESS: Yes, yes, (Redacted).
- 5 PRESIDING JUDGE EBOE-OSUJI: So your spelling of (Redacted)--
- 6 THE WITNESS: Yes, your Honour.
- 7 PRESIDING JUDGE EBOE-OSUJI: -- (Redacted)?
- 8 THE WITNESS: Yes, your Honour.
- 9 PRESIDING JUDGE EBOE-OSUJI: Okay.
- 10 MR HOOPER: Just excuse me. (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (Redacted)?
- 14 MR GARCIA: I can clarify the matter, your Honour.
- 15 Q. Mr Witness, you mentioned initially (Redacted) and there is (Redacted)
- 16 (Redacted)
- 17 (Redacted)?
- 18 A. (Redacted)
- 19 PRESIDING JUDGE EBOE-OSUJI: Are you a (Redacted)?
- 20 THE WITNESS: I am, your Honour.
- 21 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 22 Proceed.
- 23 MR GARCIA:
- 24 Q. Now, Mr Witness, you are obviously (Redacted); is that correct?
- 25 MR HOOPER: I'm sorry. There is an important matter to address and that is what

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 word was used? (Redacted).
- 2 PRESIDING JUDGE EBOE-OSUJI: But, Mr Hooper, surely you can ask that in
- 3 cross-examination.
- 4 MR HOOPER: Yes, I can. Thank you.
- 5 PRESIDING JUDGE EBOE-OSUJI: Please proceed, Mr Garcia.
- 6 MR GARCIA:
- 7 Q. So I understand, Mr Witness, (Redacted)
- 8 (Redacted)
- 9 (Redacted)?
- 10 A. (Redacted)
- 11 (Redacted).
- 12 PRESIDING JUDGE EBOE-OSUJI: But quite apart from the past (Redacted)
- 13 (Redacted) ?
- 14 THE WITNESS: Yes, your Honour.
- 15 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 16 (Redacted)?
- 17 THE WITNESS: Yes, your Honour.
- 18 PRESIDING JUDGE EBOE-OSUJI: Please proceed, Mr Garcia.
- 19 MR GARCIA:
- 20 Q. Now, Mr Witness, you being there obviously, (Redacted)
- 21 (Redacted) --
- 22 MR HOOPER: Again, are we in private still?
- 23 PRESIDING JUDGE EBOE-OSUJI: Yes, we are.
- 24 MR HOOPER: Well, this is perhaps unnecessary, your Honour, in fact the last bit
- 25 which was a matter that's important and should be in public perhaps.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, did you --

2 MR GARCIA: Your Honour, it's quite importantly actually that we do remain in

3 private session, (Redacted) I think

4 we must err on the side of caution in these matters. I'm not going to be long.

5 (Redacted)

6 (Redacted), and afterwards we can go back into public session and cover the

7 rest of the rally.

8 PRESIDING JUDGE EBOE-OSUJI: All right, proceed.

9 MR GARCIA:

10 Q. Now, Mr Witness, (Redacted)

11 (Redacted) Can you tell us who exactly this was referring to? What

12 ethnic groups?

13 A. Kalenjins who supported Kibaki.

14 Q. Can you tell us, Mr Witness, if you recall what was the reaction of the people

15 upon hearing this; the people that attended the rally?

16 A. I can't remember exactly.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, it is difficult to understand

18 why -- (Redacted) - the last question you

19 asked - and the answer that he gave.

20 MR GARCIA: Quite right, your Honour. I'm trying to obviously limit myself to

21 simply all sort -- the different types of questions (Redacted).

22 Unfortunately, sometimes one question or two that comes to mind I take the occasion

23 to answer it. I'd rather not go back into public session and ask it and truncate the

24 witness's testimony.

25 I'm trying to put everything -- obviously all the content that can be in private session

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 led in private session, but unfortunately, yes, there are questions that could have been
2 done in public session and I'll try and limit those.

3 MR HOOPER: Your Honour's right. (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted) ?

7 MR GARCIA: Your Honour, that's not the question. I mean, it's obvious the
8 witness is here and I'm not going to say any more on that.

9 PRESIDING JUDGE EBOE-OSUJI: All right.

10 MR GARCIA: But there is a certain context to all of this and that's exactly why I'm
11 erring on the side of caution.

12 PRESIDING JUDGE EBOE-OSUJI: Well, the concern is the answer that was
13 given -- anyway, please proceed.

14 MR GARCIA:

15 Q. Now, Mr Witness, you also said that Ruto - Mr Ruto - would have said that
16 Kikuyus are enemies; is that correct?

17 A. Yes, your Honour.

18 Q. Now, how did you interpret that at the time, that statement?

19 A. Your Honour, to me an enemy is just that, an enemy; somebody you cannot
20 relate with.

21 MR GARCIA: Your Honour --

22 Q. (Redacted)

23 (Redacted)

24 A. (Redacted).

25 Q. (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. (Redacted).

2 Q. (Redacted)

3 A. Yes, your Honour.

4 MR GARCIA: Just to be clear, the transcript at line 10 of transcript 43, page 43, says
5 (Redacted).

6 Q. But I understand, Mr Witness, that it's "(Redacted)," correct, and not "(Redacted)"
7 as in (Redacted)? (Redacted)?

8 A. "(Redacted)." It's "(Redacted)," your Honour.

9 Q. Thank you, Mr Witness. Now, you've stated that Mr Ruto spoke about and
10 used the (Redacted) Can we clarify that

11 point? Do you recall whether Mr Ruto (Redacted)

12 (Redacted), during this rally?

13 A. I can't recall, but it's either (Redacted) Both are -- both are the
14 same.

15 Q. Now, Mr Witness, from what you recall, did Mr Ruto say anything else in
16 regards to the upcoming elections?

17 A. I can't recall, your Honour.

18 Q. Now, amongst the politicians, was there any mention made of Kibaki?

19 A. Possibly, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Does that mean you're not sure?

21 THE WITNESS: I'm now -- I can now remember. I remember he said that Kibaki
22 has reduced -- has taken away all jobs and has reduced (Redacted) people to be
23 boda-boda operators.

24 MR GARCIA:

25 Q. Is that all you recall? Do you recall anything else that Mr Ruto would have

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 said?

2 A. Not anything else, Mr -- my Honour.

3 Q. Now, when you said that Mr Ruto stated that Kibaki had reduced or had taken
4 away all jobs, which jobs was he referring to?

5 A. He was referring to jobs in the civil service.

6 Q. Can you just possibly explain to that -- explain to us further what jobs in the
7 civil service? What had happened?

8 A. When Kibaki took over, he -- there was a talk that Kalenjins were sacked and
9 many Kalenjins were occupying top positions in the government.

10 Q. You stated also that -- that Mr Ruto would have said that the people, or -- and
11 he would have said, "... has taken away all jobs and has reduced our own people to be
12 boda-boda operators." What are boda-boda operators? Can you explain that?

13 A. In Kenya boda-boda operators are people who ride bicycles, who ferry persons
14 or goods on bicycles and sometimes motor bikes.

15 MR HOOPER: Your Honour, again one looks back over the last 15 questions and
16 really why -- why are we in private? Why does the Prosecutor feel these are
17 questions that identify this witness?

18 MR GARCIA: We can go into public session.

19 MR HOOPER: We only -- we have to act on counsel's word as to the questions he's
20 going to put and if we're led to believe they are identifying then of course we have to
21 be cautious, but when they're not we've all been led up the garden path.

22 PRESIDING JUDGE EBOE-OSUJI: We're going back -- one minute, the witness
23 wants to say something.

24 Please.

25 THE WITNESS: Your Honour, when I was coming over, I sought not to be identified

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 even through my ethnicity. I don't want people there to know (Redacted) is giving
2 testimony. There has been tendencies in social media for people to say that the first
3 witness was a (Redacted), there was another witness who was a (Redacted) and I
4 don't know how they get this. (Redacted)

5 (Redacted)

6 (Redacted). A (Redacted) same. A (Redacted) same. So -- and I happen also to
7 have followed the first proceedings and though they -- (Redacted)

8 (Redacted)

9 (Redacted)

10 MR HOOPER: Your Honour, may I merely observe that I think in every case the
11 ethnicity of the witness has been made public through the Prosecution. It's not been
12 a matter that's ever been hidden in this case.

13 MR GARCIA: Your Honour, I'd say that it's inappropriate for Defence counsel to cut
14 in when the witness has wanted to say something to the Court. It's not a question of
15 a debate and I understand that the witness is just explaining his -- his worries to the
16 Chamber, and it's not for Defence counsel to cut in and to respond to that, or to
17 debate to that.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper did not cut in. I understood that the
19 witness had already finished his concern. Mr Hooper was only making an
20 observation. It's for the Chamber to discuss the matter with the witness.

21 Witness, we understand your concern and we also understand that -- the concern of
22 every witness who testifies. There is necessarily a balance that needs to be struck
23 between needs of witnesses, protection, psychological well-being and also the right of
24 the public to participate in proceedings and also the right of the parties to have the
25 case done in the public. So that is a legitimate balance that we're trying to strike, and

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 efforts have been made to conceal your identity and we have gone to the lengths of
2 even indicating that discussions about your line of work will only be done in private
3 session.

4 We do have that voice distortion mechanism that we will have to continue to use.

5 We feel that, when all the factors are taken into account, the extent to which we've
6 gone to conceal your identity you will -- any lingering worries that may persist as a
7 result of (Redacted) will have been sufficiently addressed by other things
8 that are not revealed about who you are.

9 So that's where we are at the moment, okay?

10 THE WITNESS: Yes, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 So we will go into private (sic) session. What we will do again is ask those questions
13 that are not identifying of the witness, and the witness try again not to inject
14 information about yourself into your answers. Now, if you have to speak more
15 deliberately (Redacted), try to do that as well.

16 Thank you.

17 MR GARCIA: I understand your Honour meant going back into public session?

18 PRESIDING JUDGE EBOE-OSUJI: That's what I meant to say. So we'll go back into
19 public session.

20 (Open session at 12.12 p.m.)

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

22 PRESIDING JUDGE EBOE-OSUJI: Thank you.

23 Please proceed, Mr Garcia.

24 MR GARCIA:

25 Q. Now, Mr Witness, in regards to this rally that was held on 5 December 2007, do

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 you know who organised it?

2 A. It was a major rally and normally major rallies are organised by top leadership.

3 Q. And the top leadership would be whom, exactly?

4 A. Top leadership would be party leaders and party luminaries.

5 Q. Now, just so that we can be clear, when you're speaking about the party
6 leaders we are speaking about the ODM?

7 A. Yes, your Honour.

8 Q. Now, Mr Witness, could you mention to us or state to us who are these party
9 leaders of the ODM, or luminaries, who would have most likely organised this rally?

10 A. There was Mr Raila Odinga, Mr Musalia Mudavadi, there was
11 Mr William Ruto, there was Nyaga, there was Henry Kosgey and others, your
12 Honour.

13 Q. Now, Mr Witness, you have mentioned a person by the name of Nyaga. The
14 spelling N-Y-A-G-A, is that the correct spelling?

15 A. Yes, your Honour.

16 Q. Could you possibly give us the full name of this person, Mr -- this Nyaga, if
17 you know it obviously?

18 A. Mr Honour, I can't for now. There are many Nyagas in my country who have
19 been prominent and I tend to confuse their names.

20 Q. You've also mentioned a Mr Henry Kosgey. Can you tell us what was his
21 position in the ODM party?

22 A. He was the chairman.

23 Q. Do you remember, Mr Witness, if there was anyone who was acting as masters
24 of ceremonies for this rally on 5 December?

25 A. I don't remember, your Honour.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 Q. Was there a police presence in the stadium during the rally?

2 A. I don't remember, your Honour.

3 Q. Now, during this rally, you said it started at about 11 o'clock that people
4 started arriving. Was it possible to make comments that went against the ODM, or
5 the ODM party line?

6 A. I remember there was a -- there were running battles in the morning at around
7 11. There were Elijah supporters who were fighting with Kosgey Junior supporters.

8 Q. Now, just so that we can be clear, you're saying Elijah's supporters. Are we
9 speaking about Elijah Lagat?

10 A. Yes, your Honour.

11 Q. And you've also mentioned Kosgey Junior. Who are you speaking about
12 exactly?

13 A. Kosgey Junior is the current MP of Emgwen and I remember was also
14 contesting to be a member of parliament.

15 Q. I know we have been referring to him as "Kosgey Junior," but what is his
16 name?

17 A. Your Honour, his other name is Alex Kosgey.

18 Q. Is this the son of Henry Kosgey?

19 A. Yes, your Honour.

20 Q. Now, Mr Witness, do you remember what the dispute was about between both
21 Alex Kosgey and Elijah Lagat?

22 PRESIDING JUDGE EBOE-OSUJI: Is that a relevant information that we need for
23 the charges?

24 MR GARCIA: Your Honours, it's a bit difficult to answer this question with the
25 witness present. It's obviously going to become relevant at some point. Maybe not

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 in the examination-in-chief, but certainly at --

2 PRESIDING JUDGE EBOE-OSUJI: All right, that's all I need to know.

3 MR GARCIA: Indeed.

4 PRESIDING JUDGE EBOE-OSUJI: That's all I need to know.

5 MR GARCIA: That's why I'm --

6 PRESIDING JUDGE EBOE-OSUJI: If you are saying that you anticipate it will be
7 relevant, then proceed.

8 MR GARCIA: Indeed. And just to reassure the Chamber, I'm eliciting details that
9 might be important to just determine the exact date when this rally occurred.

10 PRESIDING JUDGE EBOE-OSUJI: Witness, please, I noticed that in all your answers
11 you have been ending with "your Honour" and you are correct that your answers to
12 counsel's questions are addressed to us, the Judges, but don't feel that you must say
13 "your Honour" with every answer to a question. It's up to you, but I'm just letting
14 you know you don't have to say it all the time, but you can if you want.

15 MR GARCIA:

16 Q. Now, Mr Witness, just briefly, I don't think we need to get into it in detail, but
17 what exactly was the nature of the dispute between Mr Alex Kosgey and Mr Elijah
18 Lagat during the rally?

19 A. Elijah Lagat and Alex went into party nominations, and it so happened that
20 Elijah emerged to be the party nominee of ODM and he had the ticket to fight for
21 the -- for the membership of parliament. Kosgey managed to join another party, and
22 during that rally there was a debate that, since Kosgey had migrated to another party,
23 he was not entitled to join ODM major rally.

24 Q. Thank you for that clarification, Mr Witness. Just one other question in
25 regards to the people that were attending, were PNU supporters welcomed during

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 that rally?

2 A. It is -- it was -- I think it's difficult to have known who was a PNU supporter.

3 Q. I'm gonna just reformulate that question, but people who were supporting
4 PNU openly that -- would that have been possible during this rally on 5 December?

5 A. No, that was a no-go zone for PNU supporters.

6 Q. Do you recall any incidents regarding PNU supporters that were there
7 present?

8 A. I remember an isolated case whereby a young person who wore a PNU T-shirt
9 was attacked and his T-shirt torn.

10 Q. Now, Mr Witness, do you recall if there were any journalists who were present
11 during the rally?

12 A. Yeah. Yes, your Honour. In fact, the rally was live, live on Kass FM, and
13 there were other many journalists for different media houses having been a major
14 rally.

15 Q. Now, you say that the -- the rally was aired live on Kass FM. How do you
16 know that exactly?

17 A. I could hear some radios as I was coming to the stadium.

18 MR GARCIA: Your Honours, if we could go into private session for about five
19 minutes?

20 PRESIDING JUDGE EBOE-OSUJI: Go back to private session.

21 (Private session at 12.23 p.m.) Reclassified into open session

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

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 MR GARCIA:

25 Q. Now, Mr Witness, do you recall having met the OTP on (Redacted)?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 You met (Redacted); is that correct?

2 A. Yes, your Honour.

3 Q. Now, do you remember on (Redacted) you would have made a sketch of Kipchoge

4 Keino Stadium? Do you recall that?

5 A. Yes, your Honour.

6 MR GARCIA: Your Honours, I'd like to elicit the help of the court officer so I can

7 give a -- just a document, a copy of that annex, to the witness. It's Annex C,

8 KEN-OTP-0074-0368.

9 PRESIDING JUDGE EBOE-OSUJI: Do you want them to pull it up, or come to you
10 and take up -- collect a hard copy?

11 MR GARCIA: Actually, your Honours, we can put it up. Maybe that'll be easier
12 and more efficient.

13 MR HOOPER: Can I just say that (Redacted)'s name we have on our statements as
14 being present, but the other name that was mentioned - and I won't mention it - has
15 never been -- is redacted. We've never known that name. It's just been uttered in
16 public.

17 PRESIDING JUDGE EBOE-OSUJI: In private session, you mean.

18 MR HOOPER: Oh, in private session.

19 PRESIDING JUDGE EBOE-OSUJI: But --

20 MR HOOPER: But it's never been disclosed. Oh, I'm wrong. I'm corrected. It is
21 on the latest copy, I'm sorry.

22 PRESIDING JUDGE EBOE-OSUJI: Okay.

23 MR HOOPER: I withdraw my comment.

24 PRESIDING JUDGE EBOE-OSUJI: All right.

25 THE COURT OFFICER: (Interpretation) Mr Garcia, would you please repeat the

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 reference for this document because I cannot find it in the English transcript?

2 MR GARCIA: It's KEN-OTP-0074-0368. I have a physical copy, if that will help?

3 PRESIDING JUDGE EBOE-OSUJI: If you can find a way to send it to the witness, at
4 any rate, it's always -- I always find it useful if hard copies are also provided to
5 witnesses who are looking on screens.

6 That will be the document at tab D, is that it, Prosecutor?

7 MR GARCIA: Yes, it is, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: It is on screen now, is it? Yes.

9 THE COURT OFFICER: (Interpretation) Yes, Mr President. Document

10 KEN-OTP-0074-0368, unredacted, is now being displayed within the courtroom and
11 shown to the witness.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you.

13 MR GARCIA:

14 Q. Now, Mr Witness, you've had a chance to just look at that document briefly.

15 It says "Annex C" on the left-hand side. Is this indeed a sketch that you drew for the
16 OTP of Kipchoge Keino Stadium?

17 A. Yes, your Honour.

18 Q. If we look at the right-hand corner, there is a date "(Redacted)" Is that your
19 signature, or initials?

20 A. Yes, yes.

21 Q. Now, Mr Witness, just so that we can understand this sketch, I understand that
22 on the left-hand there are two points which you've indicated as "My point" and "My
23 point." Are we to understand that those are the places where you were positioned
24 during the rally?

25 A. Those are the places I could remember, but I could also have been moving

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 around.

2 Q. Now also, Mr Witness, we see that at the top in the middle there is an
3 indication, "Terrace VIP;" is that correct?

4 A. Yes, your Honour.

5 Q. Can you tell us who was at this "Terrace VIP"? What people were there?

6 A. Ordinary persons.

7 Q. And can you tell us where the politicians were when they made their speeches?

8 A. VIP dais.

9 Q. Okay. Just so that record is clear, it's where we had the indication "VIP," is
10 that correct, in the middle, top middle?

11 A. (No audible response)

12 Q. I'm sorry, Mr Witness. Perhaps you didn't hear my last question. From what
13 I understand, that the politicians when they were making their speech they were at
14 the place which is indicated as "VIP;" is that correct?

15 A. Not the terrace. Near the VIP dais, there were tents around there. The other
16 VIP it used to be VIP terrace, but the structures there are not good any more.

17 Q. I'm sorry, there might be just a little confusion between "terrace" and "dais."

18 You see in the middle there is an indication, Mr Witness, that says, "Alternative VIP
19 Dais (Temporary)"? Do you see that indication?

20 A. Yeah, temporary.

21 Q. Okay. Now --

22 A. What happened, your Honour, is that in this case VIP didn't go to their
23 permanent VIP terrace simply because it is not in good conditions and at the VIP dais
24 there are tents for VIPs.

25 Q. Okay. So just -- just so we can be clear on the matter, when the politicians

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 were speaking were they at the "Alternative VIP Dais"?

2 A. Yes, your Honour.

3 Q. Was there a platform located there?

4 A. Yes, your Honour, a temporary platform.

5 Q. Now, when we look at the places that you've indicated as "My point," what
6 distance were you from the -- from the VIP dais, the temporary platform, where the
7 politicians were speaking?

8 A. My estimation could be (Redacted)
9 (Redacted).

10 Q. Now, I understand that there were many people there at the rally. Were you
11 able to see clearly the politicians that were speaking?

12 A. A politician would stand on a -- a dais, you know? It was a raised dais.

13 Q. So is that a "Yes" to my question?

14 A. Yes, your Honour.

15 Q. Now, also from that distance were you able to hear well what was being stated
16 by the politicians?

17 MR HOOPER: You see, if you give someone an inch they take a mile, don't they? I
18 didn't object to the first question, "Could you hear clearly?" -- "Could you see clearly?"

19 PRESIDING JUDGE EBOE-OSUJI: Objection is sustained.

20 MR HOOPER: Thank you.

21 MR GARCIA:

22 Q. Now, Mr Witness, from the position that you were at, I notice you've put two
23 points "My point," "My point," can you tell us what was your view from there?

24 A. It was clear, your Honour.

25 Q. Now, as for the politicians, I understand they were speaking and they were on

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 a platform. Was there anything used to -- to broadcast what they were saying in the
2 stadium?

3 A. Powerful public address system.

4 Q. Now, Mr Witness, as to what the politicians were saying, from where you were
5 were you able to hear what they were saying?

6 A. Yes, your Honour.

7 Q. And just one last question: At what time, approximately, did you arrive at
8 the stadium on that day?

9 A. (Redacted)

10 (Redacted).

11 Q. (Redacted)

12 (Redacted). Can you give us an estimate, if you remember, (Redacted)

13 (Redacted)?

14 A. I came back around -- (Redacted).

15 Yeah, (Redacted).

16 Q. And can you tell us, Mr Witness, when is it that the speakers would have
17 started giving their speeches? At what time, approximately?

18 PRESIDING JUDGE EBOE-OSUJI: Counsel, you need to watch the conditional you
19 put in your questions. I know it may be a manner of speaking privately, but I think
20 we want to know what happened, if the witness perceived it, not what would have
21 happened or could have happened.

22 MR GARCIA: I'm grateful, your Honour.

23 Q. Mr Witness, do you know at what time the speakers - the politicians - would
24 have started speaking? What time during the day?

25 A. On --

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Do you know -- do you know what time they
2 started speaking?

3 THE WITNESS: No, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, please proceed.

5 MR GARCIA:

6 Q. Now you stated, Mr Witness, that you (Redacted). Had
7 the -- had the politicians started speaking already at that time?

8 A. Yes, your Honour.

9 Q. Do you remember which ones?

10 A. Main politicians. In the morning local politician would speak, anybody
11 would speak, but when the main politician arrived that was now where the real
12 programme was to be conducted.

13 Q. And just to be clear on the matter, Mr Witness, when Mr Ruto spoke, were you
14 there present?

15 A. I was there.

16 MR GARCIA: Your Honours, I would like to have Annex C submitted and
17 introduced as an exhibit - a Prosecution exhibit - in the case.

18 PRESIDING JUDGE EBOE-OSUJI: Any objection, Mr Kigen-Katwa?

19 MR KIGEN-KATWA: None, Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

21 MR HOOPER: No objection.

22 PRESIDING JUDGE EBOE-OSUJI: That document would go in as the next
23 Prosecution exhibit.

24 THE COURT OFFICER: (Interpretation) Yes, your Honour. KEN-OTP-0074-0368,
25 a confidential document, will be given the following number EVD-T-OTP-00019 and

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 shall also be known as OTP exhibit 19.

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

3 Please proceed, Mr Garcia.

4 MR GARCIA: Your Honours, we will need to continue in private session.

5 PRESIDING JUDGE EBOE-OSUJI: In private session?

6 MR GARCIA: Yes.

7 PRESIDING JUDGE EBOE-OSUJI: Proceed.

8 MR GARCIA:

9 Q. Now, Mr Witness, I'd like to ask you some questions about voting day, 27
10 December 2007. Can you tell us what you were doing on that day?

11 A. I was (Redacted).

12 Q. You state that you were (Redacted). Were you (Redacted)?
13 (Redacted)?

14 A. I had been (Redacted)
15 (Redacted)

16 Q. Now just very briefly, Mr Witness, what exactly were (Redacted)
17 (Redacted)? (Redacted)?

18 A. I was (Redacted)
19 (Redacted). So my (Redacted)
20 (Redacted).

21 Q. Did you yourself vote on that day?

22 A. Yes, your Honour.

23 Q. Where did you vote?

24 A. (Redacted)

25 Q. Now, Mr Witness, did you visit (Redacted) on that day?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. Yes, your Honour.

2 Q. (Redacted)

3 A. (Redacted)

4 (Redacted)

5 MR GARCIA: Your Honours, I ask the Defence, because maybe it might be a more
6 efficient way of proceeding on that. I don't think that there is anything contentious
7 in this part. The witness provided a sketch (Redacted). Perhaps it
8 would be more efficient to just use that sketch immediately so that we don't have to
9 use up the Court's time on a matter which I don't think is debated by any of the
10 Defence teams.

11 PRESIDING JUDGE EBOE-OSUJI: Sorry, where are we now? Is this on a tab? Is
12 that tab B?

13 MR GARCIA: Indeed, your Honour, it is tab B.

14 PRESIDING JUDGE EBOE-OSUJI: And what do you say you propose to do? You
15 want to just tender it and we leave it at that?

16 MR GARCIA: What I'd like to do, your Honour, is just have it so that the witness
17 can consult it and we can go through it much more efficiently, rather than having
18 open-ended questions and have him determine (Redacted).

19 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, any objection?

20 MR KIGEN-KATWA: No objection, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

22 MR HOOPER: No objection.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 MR GARCIA: I'm very grateful to the Defence for that.

25 I'd like to have document KEN-OTP-0074-0366 displayed for the witness on the

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 screen, and also I'd solicit the help of the court officer so that the witness can have a
2 physical copy of that same document.

3 PRESIDING JUDGE EBOE-OSUJI: The witness has the document - a physical
4 copy - and also the document is on display on the monitor.

5 Mr Garcia?

6 MR GARCIA:

7 Q. Now, Mr Witness, you see the document that's before you. There is at the top
8 left-hand corner an indication of "Annex A." Do you see that?

9 A. Yes.

10 Q. It's entitled, "2007 (Redacted)," and at the far right there is a date
11 of (Redacted) and that is your signature or initials; is that correct?

12 A. Yes.

13 Q. Am I correct in stating that this is indeed a sketch that you drew for the OTP
14 during your interview with the OTP?

15 A. Yes.

16 Q. Now, I'd like for us to use this sketch for your questions so as to make it more
17 efficient. Can you tell us (Redacted)
18 (Redacted)

19 A. (Redacted).

20 Q. Thank you, Mr Witness. And I also see that you've indicated (Redacted)
21 (Redacted) Is that (Redacted)? Is that correct?

22 A. Yes.

23 Q. Now, how was the situation (Redacted)
24 (Redacted)?

25 A. (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 Q. (Redacted)?

3 A. (Redacted)

4 (Redacted)

5 (Redacted)

6 Q. Now, you said that, (Redacted) Do you know what

7 ethnicity these people were?

8 A. Kalenjins.

9 Q. Can you tell us what age, approximately?

10 A. There were young men and there were men -- men of middle age.

11 Q. (Redacted)

12 (Redacted)

13 A. (Redacted)

14 (Redacted).

15 Q. (Redacted)

16 (Redacted)

17 A. Yeah.

18 Q. Did they tell you where they had heard these rumours?

19 A. They had heard it from the radio, Kass FM.

20 Q. Did they tell you who was behind these illegitimate ballots?

21 A. I can't remember. I can't remember.

22 Q. (Redacted)

23 A. (Redacted)

24 (Redacted)

25 (Redacted)"

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Q. (Redacted)

2 (Redacted)

3 A. They talked a lot, but I can't recall it. I don't have a recollection of it.

4 Q. (Redacted)?

5 A. (Redacted)

6 (Redacted)

7 (Redacted)

8 Q. Mr Witness, this -- this place, (Redacted), can you tell us first of all if it's a -- is
9 it a village? Is it a town? What is it exactly?

10 A. It is a village.

11 Q. And can you tell us what is the -- what is the ethnicity of the people that live in
12 this village?

13 A. Predominantly Kalenjins.

14 Q. Now, you said that you were finally (Redacted). What made them (Redacted)?

15 A. (Redacted)

16 (Redacted) And, of course, after -- when -- when the

17 (Redacted)

18 (Redacted).

19 Q. (Redacted)

20 A. Likely, but I can't remember everything.

21 Q. (Redacted)

22 (Redacted)?

23 A. (Redacted).

24 Q. (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 Q. And just so that we can be clear on this matter, Mr Witness, when you're
6 saying that they were cautious and that there was this whole question of people
7 maybe stealing votes, who were these people that would possibly steal votes?

8 A. Anybody deemed connected to PNU. Anybody deemed connected to PNU.
9 I'm certain about that.

10 Q. You say that you're certain about that. Can you explain why?

11 A. PNU was the other party that was not popular in this place, or rather it was
12 Kibaki's party and, you know, the locals had -- didn't like anything to do with Kibaki
13 during 2007 election.

14 Q. Now, I understand that after that, after leaving that -- (Redacted)

15 (Redacted)

16 (Redacted). Is that correct?

17 A. Yes, your Honour.

18 Q. (Redacted)?

19 A. (Redacted)

20 Q. (Redacted)

21 (Redacted)?

22 A. (Redacted).

23 Q. So it's (Redacted); is that correct?

24 A. Yes.

25 Q. (Redacted) , what was the situation

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 there on voting day?
- 2 A. It was calm. (Redacted).
- 3 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 4 (Redacted) is that correct?
- 5 THE WITNESS: Yes, your Honour.
- 6 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 7 THE WITNESS: (Redacted).
- 8 PRESIDING JUDGE EBOE-OSUJI: So --
- 9 THE WITNESS: (Redacted)
- 10 (Redacted)
- 11 PRESIDING JUDGE EBOE-OSUJI: All right. (Redacted)
- 12 (Redacted)?
- 13 THE WITNESS: Yes, your Honour.
- 14 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 15 (Redacted). Thank you.
- 16 MR GARCIA:
- 17 Q. (Redacted)
- 18 (Redacted)
- 19 (Redacted)
- 20 A. The only strange thing that I saw (Redacted). I didn't like
- 21 what I saw there. (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 (Redacted) so I sensed something fishy.
- 25 Q. Do you remember, Mr Witness, if you encountered other (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted)

3 A. (Redacted). They were inquisitive and
4 worried, (Redacted).

5 Q. And just for the record, (Redacted)

6 (Redacted) Can you help us with that?

7 A. By the time I was filling in this annex, the name is -- the name is quite difficult
8 to remember. I think it's something to do with (Redacted). Yeah.

9 Q. Could you possibly help us with the spelling of that name?

10 A. (Redacted), but I may not be exact in terms of spelling, but
11 pronunciation is closer to that. (Redacted).

12 Q. Thank you, Mr Witness, for that. You said (Redacted) the people were
13 very inquisitive and they were inquisitive and worried. They were worried about
14 what exactly?

15 A. (Redacted)

16 (Redacted).

17 Q. (Redacted)

18 (Redacted)

19 A. Kalenjins.

20 Q. And just so that we understand the situation better, were you approached by
21 these people (Redacted)? How did that happen exactly (Redacted) ?

22 A. (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Counsel, we will have to leave it there for the
2 luncheon break. As we are cutting short the lunch by 30 minutes, we might as well
3 leave it there and we come back at 2. The blinds will come down and the witness
4 will be escorted out of the courtroom.

5 Witness, we will take our lunch break now and it gives you some break as well, but
6 please do not discuss your testimony.

7 THE WITNESS: Yes, your Honour.

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

9 THE COURT OFFICER: (Interpretation) We're in closed session, Mr President, and
10 the witness will be escorted out of the courtroom.

11 (The witness stands down)

12 PRESIDING JUDGE EBOE-OSUJI: Merci.

13 The Court will rise.

14 THE COURT OFFICER: All rise.

15 (Recess taken at 1.03 p.m.)

16 (Upon resuming in open session at 2.04 p.m.)

17 THE COURT USHER: All rise.

18 Please be seated.

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

20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We will -- I hope we can
21 do this in five minutes or less, the matter of scheduling next week. So beyond the 1st
22 and we are locating the possibility of sitting up to 8 November.

23 Mr Khan, will you speak to it?

24 MR KHAN: Mr President, yes. We've discussed this issue, and we're mindful of
25 the fact that the witness is in situ and of course the preference of everybody is that

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 witnesses spend as short a possible time in The Hague. They are always keen to get
2 back home.

3 So, your Honour, in these circumstances the Defence would be able to remanage and
4 reorganise our own commitments, but your Honours what we will ask for, because of
5 the -- Mr Ruto's own commitments and that he was operating under the presumption
6 of the Court schedule that he be excused for next week, the trial takes place in his
7 absence. We say that in the circumstance of this case, balancing the interests of the
8 victim, that would be an appropriate way of proceeding, but certainly we would be
9 able to be here next week if the Court were so minded.

10 Your Honour, I can give more submissions if necessary, but in a nutshell that's it.

11 PRESIDING JUDGE EBOE-OSUJI: All right. Let's limit ourselves now to at least
12 counsel proceeding then until the 8th. When we come to the point of whether to
13 excuse Mr Ruto, we'll take up that matter.

14 MR KHAN: I'm grateful.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you. We will not deal with that today.
16 Mr Kigen-Katwa?

17 MR KIGEN-KATWA: Mr President, on our part as counsel and in view of the
18 circumstances we could possibly extend, but my client would be in extreme difficulty
19 in being present over that period. He had made commitments on family issues,
20 some of which arose earlier and had to be rearranged to accommodate him - his
21 absence - and it would be an extremely difficult situation if he were to be required to
22 be present.

23 PRESIDING JUDGE EBOE-OSUJI: Again we will deal with that at the time, but we
24 don't -- we do not want to be in a situation where this is conditional on the presence
25 of the accused persons.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 MR KIGEN-KATWA: Yes. May I apologise, Mr President. It was not my
2 intention to make it -- to suggest that it is conditional, but it's just a difficulty we have,
3 Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.
5 Prosecutor?

6 MR STEYNBERG: Your Honour, if I understand your Honour's instructions
7 correctly and we are not going to debate the presence of the accused, then it becomes
8 a very simple matter for the Prosecution simply to say that we are in favour of the
9 matter proceeding until the evidence of 423 can be completed.
10 Your Honour will have noticed that I have been absent this morning, because we
11 have been busy with the witness preparation session, and if this matter is disposed of
12 I will ask to be excused again so that we may continue.

13 (A video begins to play)

14 MR HOOPER: A video in the wings intruded, I'm sorry.

15 MR STEYNBERG: I thought the applause was for me.
16 So I don't know whether your Honours are also disposed to deal any further with the
17 schedule - sitting schedule - after 8 November, which is a matter which is obviously
18 weighing heavily on -- on the Prosecution's mind and I'm sure also on the Defence
19 teams' mind?

20 PRESIDING JUDGE EBOE-OSUJI: All right. For now what we want to do is limit
21 ourselves to accommodating the witnesses who are already here, and I understand
22 that we have only two including the witness now on the stand.

23 MR STEYNBERG: That is correct, your Honour.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Let's not call any more witnesses
25 beyond those two.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 MR STEYNBERG: We have not made any arrangements beyond that.

2 PRESIDING JUDGE EBOE-OSUJI: Fair enough. So we will then proceed until 8
3 November and we will all make speed to -- to complete those two witnesses within
4 the time.

5 And the Prosecutor also - Mr Garcia, I mean - both of you cut out the -- some of the
6 details and exploring them, so we don't need to know the colour of the goose that was
7 met along the way. Getting to the main point for us to -- will help. Thank you.

8 MR STEYNBERG: Thank you, your Honour. We will do our best.

9 May I just suggest, though, that -- so that we don't find ourselves in a difficult
10 situation, should your Honours rule for instance that the accused do need to be
11 present next week, that they should in the interim see whether any arrangements can
12 be made which would allow them to be present and, if they're not able to, then that
13 matter will have been addressed by the time we get to it.

14 PRESIDING JUDGE EBOE-OSUJI: Well, we have the decision of the Appeals
15 Chamber on the matter here, so I'm sure the -- that counsel will know how to
16 structure their -- will know what to do when we get to that point in order to address
17 the question.

18 MR STEYNBERG: As the Court pleases, your Honour.

19 Perhaps I will wait until the witness has been led in before I make my excusal?

20 PRESIDING JUDGE EBOE-OSUJI: All right, let's bring down the blinds and bring in
21 the witness then.

22 (Closed session at 2.11 p.m.) Reclassified into open session

23 THE COURT OFFICER: (Interpretation) Mr President, we are in closed session
24 and the witness will be brought into the courtroom.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Mr Garcia, we were in public session. Did we -- were we the last time?

2 MR GARCIA: We were in private session, your Honour.

3 PRESIDING JUDGE EBOE-OSUJI: Do you wish to remain in private, or can we go
4 to the public?

5 MR GARCIA: Yes, your Honour. I think we need to -- actually, we need to remain
6 in private session for the upcoming portion of his testimony.

7 PRESIDING JUDGE EBOE-OSUJI: For how long?

8 (The witness enters the courtroom)

9 MR GARCIA: I will try and be as efficient as possible. I would say about 25/30
10 minutes.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 We can now proceed straight to private session.

13 (Private session at 2.12 p.m.) Reclassified into open session

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

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

16 Mr Garcia, please proceed.

17 MR GARCIA:

18 Q. Good afternoon, Mr Witness.

19 A. Good afternoon.

20 Q. Now, Mr Witness, when we left off before the lunch break, you were telling us
21 about the incidents that happened (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 A. Any stranger and any supporter of PNU.
- 2 Q. Now, Mr Witness, is it correct that at one point (Redacted)
- 3 at (Redacted)?
- 4 A. Yes.
- 5 Q. (Redacted)
- 6 A. (Redacted). There were (Redacted)
- 7 (Redacted)
- 8 (Redacted).
- 9 Q. Were there any (Redacted) who were present?
- 10 A. Yeah, I saw (Redacted).
- 11 Q. We are speaking about (Redacted); is that correct?
- 12 A. Yes, your Honour.
- 13 Q. Was there any (Redacted) present?
- 14 A. I don't remember seeing one.
- 15 Q. Now, Mr Witness, in your testimony this morning you mentioned that Mr Elijah
- 16 Lagat was a nominee candidate actually for the MP of the Emgwen constituency; is
- 17 that correct?
- 18 A. Correct.
- 19 Q. And who was opposing him on the PNU side in that constituency?
- 20 A. Tarus. Stephen Tarus.
- 21 Q. Now just for the record Stephen is spelled S-t-e-p-h-e-n; is that correct?
- 22 A. Yes, your Honour.
- 23 Q. (Redacted)
- 24 (Redacted) ?
- 25 A. (Redacted).

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 Q. (Redacted)
- 2 A. (Redacted).
- 3 Q. (Redacted)
- 4 (Redacted)
- 5 A. (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 Q. (Redacted)
- 9 (Redacted)
- 10 A. (Redacted).
- 11 Q. Can you tell us of what ethnicity these people were?
- 12 A. Predominantly Kalenjins.
- 13 Q. Now, Mr Witness, you stated that the atmosphere was anticipatory. Could
- 14 you tell us a little bit more? What were the Kalenjins anticipating?
- 15 A. They were anticipating their candidate to win right from the presidency down
- 16 to the civic level.
- 17 Q. Were there any worries about what would happen during the election, who
- 18 would win?
- 19 A. Okay. Many were -- had fears that presidential election will not go their way.
- 20 Q. And it would not go their way for what reason?
- 21 A. The story was that votes would be stolen.
- 22 Q. Can you recall, Mr Witness, who was spreading that story that the votes would
- 23 be stolen?
- 24 A. Senior politicians of ODM party in numerous rallies up until -- I have stated
- 25 that.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Q. Now, Mr Witness, can you name these senior politicians of the ODM party that
2 would have stated this in the rallies?

3 A. I may not remember all of them, but I remember a statement that was to the
4 effect that "Wakiiba watacha mtemaguni". "If they steal our votes, they'll face the
5 music."

6 Q. Now, Mr Witness, if you can help us, I understand -- is this in Swahili (Redacted)
7 (Redacted) what you just stated?

8 A. It is in Swahili.

9 Q. Now, could you just repeat to us slowly so we can -- and actually spell out the
10 words that you've just stated. We have the first word, W-A-K-I-B, but I'm not sure if
11 that's the correct spelling.

12 A. W-A-K-I-I-B-A W-A-T-A-C-H-A M-M-T-E-M-A-G-U-N-I.

13 Q. Now, do you remember who would have stated this? Which politician?

14 A. Excuse me.

15 Q. Let me repeat my question, Mr Witness. Do you remember what politician
16 would have said this during the rally?

17 A. Nearly all politicians of ODM. It was a common feature.

18 Q. Can you possibly name for us the ones that you remember saying it?

19 A. Raila Odinga was -- commonly loved to use -- to issue the statement to that
20 effect.

21 Q. Any other politician to your recollection?

22 A. Possibly others may have used, but I don't have recollection.

23 PRESIDING JUDGE EBOE-OSUJI: So the record is clear, at line 9 the -- the words or
24 the sentence you said in Swahili, "Wakiiba watacha mtemaguni," you gave the
25 meaning as, "If they steal our votes, they will face the music."

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 THE WITNESS: Yes, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: All right. I just want the record to be clear there
3 at line 9.

4 Mr Garcia, please proceed.

5 MR GARCIA:

6 Q. Now, Mr Witness, when the politicians that you say would use this expression,
7 "If they steal our votes, they will face the music," what did that mean? What did it
8 mean in the context?

9 A. Basically they'll face the consequences, but I don't know further.

10 Q. And what would be the consequences?

11 A. I don't know what they meant.

12 Q. If I ask you was it something good, or something bad?

13 A. Definitely something bad.

14 Q. Now, you've stated "If they steal our votes ..." When the politicians - the ODM
15 politicians - would say, "If they steal our votes ...," who are they referring to? Who
16 are "they"?

17 A. The PNU team.

18 Q. Thank you, Mr Witness, for those clarifications. Now, Mr Witness, I'd like for
19 us to speak about what happened the day after, 28 December 2007. Were you in
20 (Redacted) on 28 December?

21 A. Yes, your Honour.

22 Q. Did you learn finally who had -- who had been elected MP for the Emgwen
23 constituency?

24 A. Yes, your Honour.

25 Q. And who was that?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. Elijah Lagat.

2 PRESIDING JUDGE EBOE-OSUJI: Counsel, do we remain in private session for
3 this?

4 MR GARCIA: Well, your Honour, it's -- I would say that (Redacted)
5 (Redacted) and we are going to be leading into
6 the -- the witness's account of what he did immediately after, which is (Redacted)
7 (Redacted). So it's --

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 MR GARCIA: -- the type of information that I think we need to --

10 PRESIDING JUDGE EBOE-OSUJI: All right.

11 MR GARCIA: -- remain in private session.

12 PRESIDING JUDGE EBOE-OSUJI: That's all right. Let's proceed.

13 MR GARCIA:

14 Q. (Redacted)

15 (Redacted)?

16 A. (Redacted)

17 (Redacted)

18 (Redacted).

19 Q. What did you do afterwards?

20 A. Afterwards I hanged (sic) around (Redacted), and around 10 I went to a
21 (Redacted) to -- to follow the results (indiscernible) and to watch the television as I
22 followed the results on the -- that were streaming in the media houses.

23 Q. What was the atmosphere like on that day (Redacted) ?

24 A. You could see that people were -- people were really, really anticipating Raila to
25 win. And even when I went to the hotel, people are not -- every time they see Raila

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 topping, as the results are streaming in the media houses, people would be happy.

2 You could see in their faces. But up to around 11 in the morning, people started

3 worrying because it seems Kibaki was closing the gap.

4 Q. Now, these people that you're referring to that said -- you're saying that they
5 were worried, what ethnic group were they from?

6 A. Kalenjins. Of course, we're Luos.

7 Q. And just for our information, (Redacted), what are the ethnic groups that live
8 there?

9 A. Majorly Kalenjins, but it's cosmopolitan.

10 Q. Did you observe any incidents in (Redacted) on that day?

11 A. (Redacted). They were
12 unhappy. As I said, we were receiving results and it seems Kibaki was closing the
13 gap and you would see people throwing tantrums and (Redacted) suggestion
14 that they were not happy about performance of Kibaki.

15 Q. Did you observe any incidents with the police being involved?

16 A. Right. (Redacted), I went out. When I went out, 200 metres
17 away from me I saw some commotion and I saw some persons running and I saw
18 some policemen following those who are running and I realise things were not good.
19 In fact, there is somebody who had a bicycle. He came down towards where I was
20 and knocked somebody out of there. He was also escaping what was happening.
21 So immediately I realise things are not good, I went to my house and (Redacted)
22 (Redacted). Running battles are -- has already started.

23 So in my mind I thought it was better for me to think of relocating (Redacted).

24 Q. And just so that we're clear, these people that were being chased after by the
25 police, do you know what ethnicity they were?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. (Redacted)

2 (Redacted)

3 (Redacted)

4 Q. Now, you said that you (Redacted) about what

5 was transpiring outside. What did you do afterwards?

6 A. I told (Redacted) to prepare to start packing, so that if anything -- because I had

7 not made a decision that we are going to move, but I told (Redacted), "You just prepare.

8 Let me still go and monitor the situation."

9 When I came back to town, things were not good. I realised that people are saying

10 that there are some groups who were -- who were breaking into some shops

11 belonging to Kikuyu, so I decided to go back to emphasise to (Redacted) that, "I think

12 we should -- we should move."

13 Meanwhile, I called (Redacted). (Redacted) had a car and I thought I should actually

14 prepare her so that -- so that she can come and pick us.

15 Q. Now, Mr Witness, we are going to be continuing with that, but just please

16 always remind yourself of the fact that you have a list in front of you and see -- if you

17 do see the name of the person that you're referring to, try and use the number that

18 corresponds to that person. You mentioned (Redacted) ?

19 A. Number 17.

20 Q. Thank you, Mr Witness. Now, I'm going to ask you more questions in regards

21 to what you did exactly, but I just want to clarify one item with you. You stated that,

22 when you did go out to monitor the situation, you had heard that some groups were

23 breaking into Kikuyu places. Do you know what -- who these people were in these

24 groups?

25 A. I didn't know who they were, but it's I heard something to the effect that some

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 matatu touts -- matatu is the public service vehicle used in Kenya.

2 Q. Do you know anything about the ethnicity of these groups that were breaking
3 into Kikuyu-owned places?

4 A. Many matatu operators are Kalenjins, but of course you wouldn't miss to find a
5 Luhya.

6 Q. So just so that we're clear on this matter: This is not something that you
7 observed, but something that you heard?

8 A. I heard.

9 Q. Now, Mr Witness, you said that you called your -- you called person number 17.
10 Did the person number 17 come over to your residence to pick you up (Redacted)
11 (Redacted)

12 A. When I called (Redacted) was also worried. I think (Redacted) had heard the
13 same stories that was doing the rounds (Redacted).
14 (Redacted) happened to have been from a tribe called (Redacted), distant cousins of
15 (Redacted). So (Redacted) was also worried and in fact (Redacted) endorsed my idea
16 of relocating (Redacted).

17 Q. Before we continue, Mr Witness, just one clarification because I'm reading the
18 transcript here. I asked you if you knew who the people were in the groups that
19 were breaking into Kikuyu places and you mentioned -- you stated, "I didn't know
20 who they were, but it's as if they had something to the effect that some ..." and it says
21 her "matter to touts." So I just want to clarify: Do you mean that they were matatu
22 drivers? Is that it?

23 A. Matatu touts are conductors; conductors who -- who act as agents at the bus
24 park.

25 MR GARCIA: Thank you. So line 17 should be corrected to that effect. It's indeed

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 matatu touts that the witness spoke about.

2 PRESIDING JUDGE EBOE-OSUJI: And I believe the witness said "bus park" --

3 MR GARCIA: Indeed, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: -- at line 15.

5 MR GARCIA:

6 Q. (Redacted)

7 (Redacted)

8 A. (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 Q. And what happened afterwards?

13 A. At around 3, we happened to have waited for (Redacted) for quite a while. At

14 around (Redacted) and we took our luggage, put it in the car and there we were. I

15 took (Redacted). There we were going to -- relocating to (Redacted)

16 (Redacted), number 7.

17 Q. Now, you're saying that you were going to your -- to the residence of person

18 number 7 on your list of persons. Did you indeed make it over to a residence?

19 A. We went to -- we didn't use -- from (Redacted), there is main road that connects

20 (Redacted). The other one goes to (Redacted). We didn't use the main

21 road. In fact (Redacted) said, "Let us use some shortcut, because we don't know how

22 the main road is. Maybe it's not safe." So we used a shortcut. We went to a place

23 called number 11, where (Redacted), number 17, lived, and we picked (Redacted),

24 number 8, and together we drove to -- to number 12.

25 Q. Did you encounter any problems in arriving at number 12?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. While going there were no problems, but along the road you would find groups
2 of people seated, listening to the radio, and we ended at number 12 safely.

3 Q. Now, you said there were groups of people seated listening to the radio. Was
4 this something unusual, or was it usual in the circumstances?

5 A. I thought maybe since it was election period they were receiving updates from
6 the radio while in groups.

7 Q. So, Mr Witness, I understand that you arrived at list of places number 12; is that
8 correct?

9 A. Yes, your Honour.

10 Q. Now, did you at any time attempt to return back to (Redacted)?

11 A. Yes, your Honour. We stayed there until around 6 in the evening. In fact, (Redacted)
12 (Redacted) insisted that we have supper, because I had planned to come back. (Redacted)
13 (Redacted) had planned to come back with her husband and I had planned to come
14 back to watch over my house. So at 7, when we attempted coming back, we were
15 surprised to find roadblocks at number 13. Roadblocks and fire had been lighted up
16 on the road.

17 Q. Now, could you tell us at this roadblock that you encountered at the place
18 number 13, who did you see there?

19 A. It was in the evening, and assisted by the firelight I saw some youths and it's as
20 if there were -- there were running battles with administration police.

21 Q. And you say you saw some youths. Can you -- are you able to determine what
22 ethnicity they were, these youths?

23 A. (Redacted) is basically predominantly Kalenjins.

24 PRESIDING JUDGE EBOE-OSUJI: That's location number 13?

25 THE WITNESS: Location number 13, yes, your Honour.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 MR GARCIA:

2 Q. Do you remember approximately how many youths there were at this
3 roadblock?

4 A. No, I didn't count. It was not possible to count.

5 Q. Would be able to tell us if there were more or less than ten youths?

6 A. (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 Q. Do you remember, Mr Witness, you said there was a roadblock, but what was
11 this roadblock made of?

12 A. Rocks and fire.

13 Q. You also mentioned that there seemed to be battles between the police and the
14 youths. Could you explain a little bit more on that point?

15 A. It is as if some administration police wanted to clear the -- the roadblock.

16 Q. And what was happening?

17 A. Youths were running around. I think the police - the administration
18 police - were not enough to manage the situation.

19 Q. So what happened after -- you said there was a conversation with a man who
20 was on the road. What happened afterwards? Did you manage to cross the
21 roadblock, or did you return?

22 A. (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 Q. Now, (Redacted) that you're speaking about, what ethnicity (Redacted)?

5 A. (Redacted) is a (Redacted).

6 Q. So what did you do after these middle-aged men told you that there were
7 roadblocks ahead?

8 A. We decided to get back to number 12 so that we can go and see how we can
9 have our sleep.

10 PRESIDING JUDGE EBOE-OSUJI: (Redacted) who is a (Redacted), what number is
11 she on the list?

12 THE WITNESS: Number 17.

13 PRESIDING JUDGE EBOE-OSUJI: Number 17, okay.

14 MR GARCIA:

15 Q. And just one last question on this matter regarding the roadblocks. The first
16 roadblock that you encountered, you said that you saw youths there. Do you
17 remember if these youths were -- had any weapons, or were they armed?

18 A. No, I didn't see. It was getting a bit darker.

19 Q. Thank you for that, Mr Witness. Now, I understand that you returned back
20 from where you had come. How much time did you stay there for?

21 A. I stayed there for -- for many days. I stayed there for many days until towards
22 the end of January; around end of January.

23 Q. Now, just to be clear, you stayed at in the list of places it's number 12 until the
24 late January. Is that exact?

25 A. Number 12.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Q. Now, Mr Witness, in the days that followed, 29/30 December, did you observe
2 anything from inside -- from the house, or from outside the house?

3 A. While in the compound, I -- I could see some young men passing by. I was
4 made to understand they were going to -- to (Redacted).

5 Q. And do you know why they were going to (Redacted)?

6 A. I didn't know up to that level - up to that time - the reason they were going to
7 (Redacted).

8 Q. (Redacted)

9 (Redacted)

10 A. Yeah, (Redacted) was there, your Honour.

11 Q. (Redacted)

12 (Redacted)

13 A. (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 Q. And what could happen if she was noticed by passers?

18 A. (Redacted)

19 (Redacted)

20 Q. (Redacted)

21 A. Yes, your Honour.

22 Q. Now, were you able to observe from -- well, actually, what is the distance from
23 the place where you were at to (Redacted), approximately?

24 A. It is -- it's about -- if you travel by the road (Redacted), but if -- if
25 there was a straight line I think it's less than that.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Q. Were you able to observe anything that was occurring in (Redacted) while you
2 were there?

3 A. Yes. There was a time we observed smoke - huge smoke - bellowing (sic) up
4 while at 12, and (Redacted), number 10, would tell us that is a -- that is somebody's
5 premise burning. There was a popular Kikuyu business lady who had (Redacted)
6 shops. I don't remember the name, but (Redacted) would tell us that that Kikuyu's
7 business premise has been burnt down.

8 Q. Now, (Redacted) who told you this, where was she at the time when she was
9 telling you that the Kikuyu premises had been burnt down?

10 A. She was in (Redacted). That is (Redacted) number 10.

11 Q. Did you observe anything else while you were there at this location? I
12 understand you were there until late January.

13 A. Youths were passing by. Sometimes they pass by with stolen goods. I saw
14 one struggling with a huge sofa coming from (Redacted). Some were going with
15 cattles that they have stolen.

16 Q. Now, these youths that you saw passing by, the ones that were going with
17 cattles that they had stolen, do you know what ethnic group they were?

18 A. They were Kalenjins.

19 Q. And you say that the cattles had been stolen. How did you know that they had
20 been stolen?

21 A. I was -- I was told by (Redacted) who stayed at farm 12. It seems
22 to -- the young men who were in farm 12 knew those who were going with stolen
23 cows.

24 MR GARCIA: And just for the record, line 21, page 87, it says, "I saw one struggling
25 with a huge ...", and I think the word that's missing is "sofa," "... coming from (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)."

2 Q. Is that correct? You saw someone with a huge sofa?

3 A. Yes, your Honour.

4 Q. Now, I understand, Mr Witness, that it was in late January that you (Redacted)
5 (Redacted) to Kapsabet; is that correct?

6 A. Possibly. Possibly. I might have lost track of time, but if not late January,
7 early January -- late January, it's early February, around there.

8 Q. Thank you for that clarification, Mr Witness. Now, I'd like to ask you some
9 questions in regards to this (Redacted) to Kapsabet. Who exactly -- which -- what
10 (Redacted) with you?

11 A. Before I (Redacted) to Kapsabet, it happened -- it so happened that my -- the
12 person number 8 had been facilitated (Redacted), but he didn't (Redacted) to Kapsabet. I
13 was told the district commissioner of (Redacted) helped him move to the airport, where he
14 could -- where he boarded a military chopper and headed to Nairobi for safety.

15 Q. Now, I understand, Mr Witness, that person number 8 is a person of (Redacted)
16 ethnicity; is that correct?

17 A. Yes, your Honour.

18 Q. Now, were people of this ethnicity also in danger at that time?

19 A. Kalenjins, few Merus, as Kikuyus.

20 Q. Okay. So is your answer "Yes" to my question then?

21 A. I beg your pardons?

22 Q. I'm sorry. My question was if it's correct that (Redacted) as well were in
23 danger, just as (Redacted)?

24 A. Yes, your Honour.

25 Q. Now, Mr Witness, when you did (Redacted) to Kapsabet, did you go back in

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 your car -- in a car?

2 A. I boarded public service vehicle. I went to point 13.

3 Q. Were there (Redacted)?

4 A. No, I went alone to point 13, if I can remember. I took a public service vehicle
5 for -- for town.

6 PRESIDING JUDGE EBOE-OSUJI: When you say "public service," do you mean
7 public transport?

8 THE WITNESS: Public transport, yes, your Honour.

9 PRESIDING JUDGE EBOE-OSUJI: Matatu?

10 THE WITNESS: Yes, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 MR GARCIA:

13 Q. Now, when you were (Redacted) in this public service vehicle, a matatu, what
14 was the first place you reached?

15 A. Point 13. Of course I took a matatu before point 13, but it was near point 13.

16 Q. And when you did reach destination number 13, what did you see or observe
17 there?

18 A. There were youths - a group of youths - and of course there were huge rocks.
19 There was a roadblock.

20 MR HOOPER: Sorry to interrupt the witness.

21 Your Honour, at this point -- and one can see from the statement that there is going to
22 be quite a lot of subsequent detail, which I anticipate my friend may allude to in
23 respect (Redacted), which is at the end of January or the beginning of February as I
24 understand it. There's also reference in the statement to a subsequent journey from
25 (Redacted).

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 I'd merely, of course, make the obvious comment that on the charges we have we're
2 dealing as far as Kapsabet is concerned with the dates between 30 December and 16
3 January, as the temporal ambit of the charges relating to Kapsabet, and in relation to
4 (Redacted) we are dealing of course with a temporal margin of, at the moment in any
5 event, 1 January until 4 January, with an appeal still pending in respect of one or two
6 days prior to 1 January.

7 I don't think we're concerned with Nandi Hills Town further, but again the ambit
8 there is 30 December until 2 January.

9 So that's the focal point of the Prosecution case, and against that backdrop of course
10 the questions that my friend asks will need to be pointed and relevant; relevant that is,
11 in my submission, to that temporal ambit in the charges.

12 I should also mention, without I hope giving evidence, that there is later in
13 January/February a separate and distinct series of incidents related to another, if I can
14 put it, political situation involving a local MP who gets killed and the reactions to that
15 in quite a separate affair. So there's that also to be borne in mind, of course, as I'm
16 sure my friend is attentive to do.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, the point does not get to a matter of
18 objection I take it at this stage, but rather a question of keeping the questions relevant
19 to the charges.

20 MR GARCIA: I understand, your Honour, that it isn't an objection, maybe just a
21 warning from Defence counsel, but what I'd like to say to the Chamber is that the
22 evidence that the witness will give on these issues is extremely relevant. It's
23 circumstantial evidence, and we shouldn't confuse the evidence regarding the
24 temporal scope of the charges with the evidence that the Prosecution can lead to
25 prove what happened during the temporal scope that we have charged exactly and

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 this is quite relevant information.

2 The question about roadblocks, the fact that they existed at this point, we will have
3 evidence in the future demonstrating that they existed at a certain point prior to or
4 immediately after the post-election violence as well.

5 So it's all circumstantial evidence which goes to demonstrate that, yes, indeed during
6 the time period that has been charged - that the accused have been charged - there
7 were roadblocks, there were people who were being asked to identify themselves as
8 to whether -- what was their ethnic group.

9 So it's extremely relevant circumstantial evidence, your Honour, and it goes to the
10 context as well.

11 PRESIDING JUDGE EBOE-OSUJI: Yes, yes, but how far in time is -- are we thinking
12 of in terms of period of relevance?

13 MR GARCIA: Well, your Honour, this is a couple of weeks after 16 January, so it's
14 quite relevant. Actually, if my colleague --

15 PRESIDING JUDGE EBOE-OSUJI: So you consider what happened at the end of
16 January to be relevant?

17 MR GARCIA: Your Honour, it is quite relevant actually. It's circumstantial
18 evidence. What the Prosecution will be leading is that these roadblocks existed there
19 for a certain amount of time. Obviously this witness is only able to give you a
20 certain portion of the time, what he observed, but other witnesses will come and
21 confirm that the roadblocks existed before and obviously it's to the demonstration
22 that the modus operandi was the same that will demonstrate that indeed during the
23 temporal period in the charges these roadblocks existed.

24 MR HOOPER: Well, I don't know if I can help, but there is no dispute that there
25 were roadblocks thrown up over quite a large area at this time and relevant to

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Kapsabet during the relevant period.

2 PRESIDING JUDGE EBOE-OSUJI: So they do not contest the presence of roadblocks,
3 Mr Garcia.

4 MR GARCIA: I understand that, your Honour, and what I'll do is that if it will
5 facilitate the testimony of the witness I'll lead a little bit more, but what's important is
6 the evidence he regards -- the witness is going to provide us in regards to what was
7 going on at these roadblocks and how they were trying -- the people that were there,
8 the Kalenjin youths, were attempting to identify Kikuyus and other people apart from
9 the Kalenjin.

10 PRESIDING JUDGE EBOE-OSUJI: All right. Well, let us not dwell on it for now.
11 Mr Hooper has signalled the difficulty he has and we will be reminded of that when
12 the time comes and then we will see how we do with our ruling. Thank you.
13 What I mean is, Mr Hooper, if it begins to trouble you too much, you can raise the
14 objection at that time as he goes along.

15 MR HOOPER: Yes.

16 PRESIDING JUDGE EBOE-OSUJI: Yes.

17 MR HOOPER: I mean, we're dealing with the relevance of ex post facto events and
18 to the extent to which they can be reasonably implied back as a course of conduct, and
19 in any event -- well, we will see where we go. Thank you.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, please proceed. Remember, we have
21 to finish two witnesses by 8 November also.

22 MR GARCIA: I do understand, your Honour, and I'm going as fast as possible and
23 as efficiently as possible to finish by lunch-time tomorrow, as I had explained to the
24 Court.

25 Q. Now, Mr Witness, when you did arrive at this first -- at this roadblock, can you

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 tell us what happened there?

2 A. There were some youth and some middle-aged men. I think I took a matatu
3 before -- shortly before we arrived at point 13, and I saw huge boulders of rocks that
4 are used to lay there to barricade the road. And what the youth were doing was
5 to -- to pave way. Every time a car comes closer, they remove some stone for the car
6 to proceed.

7 Q. Now, when you arrived there, what did the youths do?

8 A. (Redacted). I think we were (Redacted)
9 (Redacted). He was -- I was (Redacted), and I happened also to have
10 (Redacted), number 12, and there were -- they were all manning the
11 roadblock. They were checking in if there is a Kikuyu, or some would shout, "Is
12 there a Mungiki in the car."

13 Q. Now, when they did approach the matatu, in what language were they
14 speaking, these youths?

15 A. They were speaking in Kalenjin.

16 Q. And how would they greet the people in the matatu, or the driver?

17 A. Ordinary greetings. Ordinary Kalenjin greetings.

18 MR GARCIA: Just one clarification, your Honour. At page 94, line 6, it's Mungiki
19 and not "Monkiki" in the car.

20 Q. Now, Mr Witness, the youths that you saw there, can you tell us of what
21 ethnicity they were?

22 A. (Indiscernible).

23 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, I am not sure that you've helped
24 much with your correction of the transcript. Perhaps you can spell it.

25 MR GARCIA: Yes, indeed, your Honour. "Is there a Mungiki ...", so Mungiki

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 would be M-U-N -- I would ask the witness, actually. I don't want to be --

2 Q. Mr Witness, when you say "Mungiki," can you spell that for the record please?

3 PRESIDING JUDGE EBOE-OSUJI: It's M-U-N-G-I-K-I, isn't it?

4 THE WITNESS: M-U-N-G-I-K-I, but again this is not a Kalenjin word. It's a

5 Kikuyu word. A Kalenjin would pronounce Mungiki, but a Kikuyu would

6 pronounce Mongiki (phon).

7 PRESIDING JUDGE EBOE-OSUJI: Well, it is a word we have encountered in the

8 proceedings. We can move on.

9 MR GARCIA:

10 Q. Thank you for that, Mr Witness. Could you tell us what ethnicity they were,

11 these youths that were at the roadblock on that day?

12 A. Kalenjins.

13 Q. Were you able to determine whether these youths were armed? Did they have

14 any weapons?

15 A. I didn't see weapons, but I saw the man -- the elderly -- the middle-aged man

16 had a walking stick.

17 Q. Were you able to cross this roadblock eventually?

18 A. We crossed.

19 Q. Now, was that the only roadblock that you encountered on that journey (Redacted)

20 to Kapsabet?

21 A. We met other two roadblocks. The immediate one was a bit -- it had many

22 youth who were manning that roadblock.

23 Q. Can you tell us where this other roadblock was, the one that you encountered

24 immediately afterwards?

25 A. There is a point and I cannot remember the name of that point, but it's before

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 you reach Kipsigak junction.
- 2 MR GARCIA: Now, your Honours, just to facilitate the testimony of the witness on
- 3 this point and maybe render it more efficient, there is a sketch that the witness drew
- 4 for the OTP regarding the positioning of these roadblocks. Maybe it would be easier
- 5 if the witness had this with him and we can direct him through it and it could be done
- 6 much faster?
- 7 PRESIDING JUDGE EBOIE-OSUJI: Where is it?
- 8 MR GARCIA: This is Annex D and it's tab C.
- 9 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, do you have any difficulty with
- 10 it?
- 11 MR KIGEN-KATWA: I have none, Mr President.
- 12 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?
- 13 MR GARCIA: It's tab E, your Honour.
- 14 MR HOOPER: There's no objection.
- 15 MR GARCIA: Just for the record, your Honour, it's tab E. I'm grateful for the fact
- 16 the Defence has no objection and I'd just solicit the help of the court officer so that a
- 17 paper --
- 18 PRESIDING JUDGE EBOE-OSUJI: Not quite, not quite. Counsel, we're looking at a
- 19 different document. Counsel, can you please tell us at tab E do you have difficulty
- 20 with the -- is it the same position as before?
- 21 MR KIGEN-KATWA: It should be Annex D. I have no problem with that.
- 22 MR HOOPER: Yes, and I confirm that.
- 23 PRESIDING JUDGE EBOE-OSUJI: No difficulty?
- 24 MR HOOPER: No difficulty, your Honour. Thank you.
- 25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Please proceed.

2 MR GARCIA: I'm grateful to the Defence for that. If I could just have the help of
3 the court officer so that a hard copy of the -- of this document can be given to the
4 witness?

5 THE COURT OFFICER: (Interpretation) KEN-OTP-0074-0369, confidential version
6 without any redactions, will be shown to the witness and will be soon displayed on
7 the screen.

8 MR GARCIA:

9 Q. Now, Mr Witness, if I can just draw your attention to the fact that on the
10 left-hand corner of this document it says "Annex D" and it's entitled "(Redacted)
11 (Redacted)," and if we look at the right-hand corner there is a date
12 "(Redacted)." Is that your signature - your initials - that we see there?

13 A. Yes, your Honour.

14 Q. And this is indeed a sketch that you drew?

15 A. Yes, your Honour.

16 Q. Now, Mr Witness, you've indicated to us already that you encountered a
17 roadblock and I can see on this sketch that at the position identified as number 13 you
18 have indicated "RB." Is that roadblock?

19 A. Roadblock, that is it.

20 Q. You also say that you encountered a second roadblock; is that correct?

21 A. Yes.

22 Q. Now, if we look at the same line - and there's arrows pointing in the
23 direction - there's another "RB" with "X"s. Is that the place where you would have
24 encountered the second roadblock?

25 A. It was set so it was a major one.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: Counsel, I think we have these "X"s. Sorry, can
2 you -- so that we are clear on the record, which one are we referring to now?
- 3 MR GARCIA: The second roadblock, your Honour. It's -- there are arrows
4 pointing, obviously, and it's going towards Kipsigak.
- 5 PRESIDING JUDGE EBOE-OSUJI: All right. So the first one is one at (Redacted)?
- 6 MR GARCIA: That's correct, your Honour, number 13.
- 7 PRESIDING JUDGE EBOE-OSUJI: And then -- yes, and then going further up is
8 "RB." So that's where we are, the very next one?
- 9 MR GARCIA: That's correct, your Honour.
- 10 PRESIDING JUDGE EBOE-OSUJI: All right.
- 11 MR GARCIA:
- 12 Q. Now, can you tell us, Mr Witness, how many youths you encountered at this
13 second roadblock?
- 14 A. There were many. There were many. About 50.
- 15 Q. Do you remember if they had any weapons? Were they armed in any which
16 way?
- 17 A. They had sticks and -- I didn't see a weapon, but I saw sticks. Some -- some
18 were having walking sticks.
- 19 Q. Can you tell us of what ethnicity these were, these youths?
- 20 A. Kalenjin.
- 21 Q. Now, can you just briefly tell us what happened when the matatu arrived there?
- 22 A. I think they -- this is the point where I learned that these youths would solicit
23 for money from the -- from the driver, and seemingly it seems they were given some
24 money and the common name for that money was "Protection fee so that we can
25 protect. You give us some money so that we can protect you."

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Q. Now, were these youths looking for anybody?

2 A. Yeah, it was the norm for them to check in -- into the car if there is somebody
3 from another tribe.

4 Q. Were you able to pass this roadblock?

5 A. Yes.

6 Q. Just one last question on this roadblock. What was the roadblock made of
7 exactly?

8 A. Stones.

9 Q. Did you encounter any other roadblock on the road (Redacted) Kapsabet?

10 A. Kipsigak.

11 Q. Can you describe to us what you encountered there?

12 A. There were stones, but this roadblock seemingly had been eased up.

13 Q. Just so that we can be clear, Mr Witness, I'm not sure I've understood you. You
14 said that, "These roadblocks seemingly had been ..." and all we have here is "haste
15 up." What exactly had happened to this roadblock?

16 A. We didn't overstay there. It seems it was -- it was open.

17 Q. Were there any youths at this roadblock?

18 A. They were along the road. They were seated along the road.

19 Q. So from what I understand you weren't approached - the matatu wasn't
20 approached - by these youths?

21 A. I don't remember, but it seems these youth were -- were taking a rest.

22 Many -- many were seated alongside the road. I didn't -- perhaps there is one who
23 came to approach the car, but I don't remember.

24 Q. Now, after this roadblock, Mr Witness, did you manage to arrive at your
25 destination, Kapsabet?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted) and what have you?" In the car, (Redacted)

6 (Redacted)

7 Q. Now, just so that we're clear, at line 100 -- actually, page 100, line 4, it says "...

8 the Mango roadblock ..." Is it Namgoi rather, Mr Witness? N-A-M-G-O-I, is that

9 what we should read?

10 A. Yes, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, one second.

12 Please proceed.

13 MR GARCIA:

14 Q. Now, Mr Witness, you just spoke to us about an individual and I think his name

15 is on the list of persons at number 13; is that correct?

16 A. Correct.

17 Q. Now, can you explain to us what is it exactly that happened with this person at

18 number 13?

19 MR HOOPER: Well, excuse me. Of course it's a matter for, your Honour, but we

20 are concerned with what this witness saw and heard himself in the sense of his own

21 experience, and a recital now of what several people or other different people may

22 have said, or things that he may have heard, are we really assisted by that?

23 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

24 MR GARCIA: If I can assure the Chamber that it's just so that the witness can

25 explain his account to the Chamber. (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted). So it's only for that information.

3 PRESIDING JUDGE EBOE-OSUJI: So basically state of mind.

4 MR GARCIA: Indeed, your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: All right, let's just keep it limited.

6 MR GARCIA:

7 Q. Now, Mr Witness, once again the question is: In regards to this person number
8 13, can you explain what happened?

9 A. This person, number 13, (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted) And, you know, (Redacted), and I thought maybe

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 Q. Thank you for that clarification, Mr Witness. Just one matter. You said that,
18 "It was said that he's the one manning the (Redacted)," roadblock, I imagine?

19 A. Yes, your Honour.

20 Q. Now, Mr Witness, you said that your fear was that, "... (Redacted)

21 (Redacted)

22 (Redacted)." Could you explain that to the Court?

23 A. (Redacted)

24 (Redacted)

25 (Redacted).

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

2 THE WITNESS: (Redacted).

3 MR GARCIA:

4 Q. You said, Mr Witness, "... (Redacted)

5 (Redacted)?

6 A. Exactly.

7 PRESIDING JUDGE EBOE-OSUJI: "(Redacted)," he said.

8 THE WITNESS: (Redacted). And there is also another aspect. (Redacted) could be

9 knowing that I'm (Redacted) and that could cause trouble.

10 MR GARCIA:

11 Q. You say "... (Redacted)

12 (Redacted)

13 (Redacted)?

14 A. It was a clarion call. Nearly all (Redacted) didn't want somebody to do. They

15 (Redacted)

16 (Redacted). If it is, (Redacted)

17 (Redacted). And this is a call that had been there through political rallies

18 and even in the radio. Even in the radio, (Redacted) was -- was really promoting this

19 idea (Redacted).

20 Q. (Redacted)

21 A. (Redacted)

22 Q. And what would happen, Mr Witness, (Redacted)

23 (Redacted)

24 A. Harm possibly could be meted on them.

25 Q. Now, Mr Witness, you mentioned that you had to use another route to get to

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 Kapsabet; is that correct?

2 A. Yes, your Honour.

3 Q. (Redacted)

4 (Redacted)

5 A. (Redacted)

6 (Redacted)

7 MR GARCIA: Now, Mr Witness, I'm going to ask the Chamber in a couple of

8 seconds to go into public session and I'd like you to (Redacted)

9 (Redacted). I'd just like to remind you as well that we're

10 going to be in public session and, if you need to absolutely refer to anyone, list a

11 person or a place, take your time in responding and please refer to the PIS document

12 that you have in front of you.

13 Your Honour, I'd request that we do go into public session please.

14 PRESIDING JUDGE EBOE-OSUJI: We go now back to public session then.

15 (Open session at 3.34 p.m.)

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

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 MR GARCIA:

19 Q. Now, Mr Witness, can you please describe to the Court what you saw in

20 Kapsabet when you arrived there?

21 A. Buildings, business premises, had been broken into. I saw some houses,

22 residential houses. Some had been broken into. Window -- windows were missing.

23 Some doors were missing. Other buildings had been burned down.

24 Q. And in what part of Kapsabet did you see this?

25 A. The business centre and four residential houses - some residential houses - in

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 the residential sites of the town.

2 Q. Now, I'd like to start, Mr Witness, with the business premises. Can you tell us
3 who these business premises belonged to? What ethnic group?

4 A. Kikuyus.

5 Q. What about the residences?

6 A. Kikuyus.

7 Q. Now, Mr Witness, was there any manner in distinguishing business premises
8 that belonged to Kikuyus from those that didn't?

9 A. There was -- there was -- it was Kikuyu business premises was -- was known, so
10 as a matter of fact I knew some business premises belonging to Kikuyus and I was
11 met by the ugly sight that those business premises had been ruined.

12 Q. Was there any other way of identifying businesses that belonged to Kikuyus
13 from those that didn't?

14 A. There was an inscription. There was an inscription - a very common
15 inscription - that identified whose building is this.

16 Q. Now, first of all, can you tell us what that inscription was?

17 A. Buildings, business premises, belonging to Kalenjins had inscription written
18 K-I-T-W-E-K, and you would find that those buildings were intact with that
19 inscription and perhaps that was a way of identifying the owners of the business
20 premises.

21 Q. Can you tell us, Mr Witness, in what language is this word, "Kitwek"?

22 A. It's Kalenjin.

23 MR GARCIA: I'd ask that we go into private session just one minute, your Honour.

24 PRESIDING JUDGE EBOE-OSUJI: We go briefly back to private session.

25 (Private session at 3.39 p.m.) Reclassified into open session

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 THE COURT OFFICER: (Interpretation) We are in private session, your Honour.
- 2 MR GARCIA:
- 3 Q. Mr Witness, (Redacted)?
- 4 A. (Redacted).
- 5 Q. (Redacted)?
- 6 A. (Redacted).
- 7 Q. Mr Witness, (Redacted)
- 8 (Redacted)?
- 9 A. (Redacted).
- 10 Q. (Redacted)?
- 11 A. (Redacted).
- 12 Q. (Redacted)?
- 13 A. (Redacted).
- 14 Q. (Redacted)?
- 15 A. (Redacted)
- 16 (Redacted).
- 17 Q. (Redacted)
- 18 (Redacted)?
- 19 A. (Redacted).
- 20 Q. Would you be able to recall, Mr Witness, when you (Redacted)
- 21 (Redacted)?
- 22 A. I can't recall specific time.
- 23 Q. Was that after the referendum in 2005?
- 24 A. It came along before referendum. (Redacted)
- 25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted).

3 MR GARCIA: I'd ask, your Honour, that we go back into public session please.

4 PRESIDING JUDGE EBOE-OSUJI: We will go back to public session.

5 (Open session at 3.42 p.m.)

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

7 PRESIDING JUDGE EBOE-OSUJI: Thank you.

8 MR GARCIA:

9 Q. Now, Mr Witness, would you be able to tell us how many of these business
10 premises were destroyed when you -- when you saw?

11 A. What I can say it's many, many business premises and -- and even residential
12 houses. Some Kikuyu premises may not have been destroyed after all, because
13 maybe a Kalenjin friend would go and inscribe the same term, "Kitwek," and you
14 know when others come, when they see that inscription they'll not touch it.

15 Q. Can you tell us, Mr Witness, if you recall, what was used to make these -- to
16 make these inscriptions with that word on it, "Kitwek"?

17 A. Oil - dark oil - paint. Sometimes they -- they use permanent markers just to
18 write it, write the term, using permanent markers.

19 Q. Did you find out, Mr Witness, who was burning these premises and residences?

20 A. I didn't see who was burning the business premises. They were
21 burned -- many were burned when I was away.

22 PRESIDING JUDGE EBOE-OSUJI: Counsel, before you move on, I see you've
23 moved away from the word "Kitwek," have you?

24 MR GARCIA: Yes, your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: Right, let me ask mine now.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

1 Witness, you said that the word in a sense gave protection to the property that bore
2 it?

3 THE WITNESS: Yes, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: And you said that sometimes some Kalenjin
5 friends may inscribe the word on the home or property of a Kikuyu and that property
6 would then not be touched.

7 THE WITNESS: Yes, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: Could it also be the case that some Kikuyus, if
9 they knew that that was a word of protection, could themselves inscribe the word on
10 their property?

11 THE WITNESS: Possibly.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you. So you didn't know who was really
13 putting the words on the property?

14 THE WITNESS: I didn't know.

15 PRESIDING JUDGE EBOE-OSUJI: Thanks.

16 Mr Garcia, please proceed.

17 MR GARCIA:

18 Q. The question I asked you, Mr Witness, is if you found out who was behind or
19 who had burnt these business premises and these houses?

20 A. I heard that it was Kalenjin youths and it was said that many came from the
21 villages; deep recesses of the villages.

22 Q. Mr Witness, as to this information that you heard that it was Kalenjin youths,
23 and only if the name appears on your list of persons, can you tell us if this was
24 information that was just general information, or did this come from someone in
25 particular?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. General information.

2 Q. Now, Mr Witness, while you were there in Kapsabet, did you see any houses
3 burning?

4 A. I saw one house being brought down, being burned, and I came to learn it -- it
5 belonged to not a Kikuyu, but it belonged to a Gusii, another tribe that fell victims
6 thereafter after Kikuyus had been displaced.

7 Q. Were you able to observe, Mr Witness, who was -- who burnt this house down?

8 A. (Redacted)

9 (Redacted)

10 (Redacted)

11 Q. (Redacted)?

12 A. (Redacted).

13 Q. (Redacted)

14 (Redacted) ?

15 PRESIDING JUDGE EBOE-OSUJI: One second.

16 THE WITNESS: I was standing -- oh.

17 MR GARCIA: One second.

18 PRESIDING JUDGE EBOE-OSUJI: Let us go into private session for a quick second.

19 MR GARCIA: I am most grateful, your Honour. Indeed, yes.

20 (Private session at 3.51 p.m.) Reclassified into open session

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

22 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, can you safely go over this area in the
23 public session?

24 MR GARCIA: I'd rather, with the Court's permission, that I ask a couple of
25 questions in private session and maybe move on to another topic in public.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: All right.
- 2 MR GARCIA:
- 3 Q. Now, Mr Witness, when you did mention (Redacted)
- 4 (Redacted)
- 5 (Redacted)?
- 6 A. Yes, your Honour.
- 7 Q. And can you just explain to us what exactly you saw in reference to (Redacted)
- 8 (Redacted)
- 9 A. (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 Q. (Redacted)
- 14 A. (Redacted), who
- 15 (Redacted).
- 16 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 17 (Redacted)
- 18 (Redacted)
- 19 (Redacted)
- 20 (Redacted)
- 21 MR GARCIA: I'm most grateful, your Honour. Indeed.
- 22 PRESIDING JUDGE EBOE-OSUJI: Please proceed.
- 23 MR GARCIA:
- 24 Q. (Redacted). Were
- 25 you able to determine what they were saying?

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 A. (Redacted).

2 Q. (Redacted)

3 (Redacted)

4 A. (Redacted).

5 Q. (Redacted)

6 (Redacted)

7 A. Yes, your Honour, from that direction.

8 Q. And can you tell us how far away he was from the burning house when you
9 saw him?

10 A. Probably 150 metres. The house was 200 metres -- about 200 metres away from
11 me, and I saw him 50 metres from -- away from me, coming from that direction.

12 Q. (Redacted)

13 (Redacted)

14 A. No, I can't remember.

15 Q. And just so we're clear on this matter, did you actually see the house when it
16 was put on fire, or when you saw it it was already on fire?

17 A. It was already on fire.

18 Q. Was there any looting going on?

19 A. I presumed. I didn't take note.

20 PRESIDING JUDGE EBOE-OSUJI: I need to be clearer with that answer. When
21 you say you didn't take note, what do you mean?

22 THE WITNESS: I heard --

23 PRESIDING JUDGE EBOE-OSUJI: It could mean whether you were writing down in
24 notes. It could also mean that you did not notice yourself.

25 THE WITNESS: I did not notice.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 MR GARCIA:

3 Q. Mr Witness, while we are in private session, I just want --

4 MR HOOPER: Can I -- can I just clarify one matter there? There was a question
5 that was asked at page 111, at line 14, where my friend in fact included in the question,
6 "... where were the youths, the ones that you saw were burning the house?", and
7 there's been no mention of his - the witness - seeing any youths burning the house at
8 all.

9 MR GARCIA: I think, your Honours, that that's been cleared up by the witness.

10 PRESIDING JUDGE EBOE-OSUJI: In what way?

11 MR GARCIA: The witness stated that he wasn't there when the house was -- when
12 the people were -- the person or persons would have started the fire.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, does that satisfy you?

14 MR HOOPER: No, not quite, because they could have still remained around the
15 house, the people who set fire to the house, and been there. There's no -- there's
16 no -- there was no reference and has been no reference by this witness to any youths
17 in association with that house. All he sees is he sees the house burning.

18 And I hope my friend is going to clarify also the actual source, that of course he'll be
19 aware of, as to the cause of discontent - the root of the discontent - that it's said indeed
20 by this witness (Redacted)

21 (Redacted). And this
22 incidentally, of course, is in early February of 2008.

23 MR GARCIA: Your Honours, Mr Hooper has the opportunity to cross-examine the
24 witness on any facts he wants to put to the witness and this is not the time to do it in
25 front of the witness, especially during the Prosecution's examination-in-chief.

Trial Hearing
Witness: KEN-OTP-P-0268

(Private Session)

ICC-01/09-01/11

1 MR HOOPER: Indeed. Indeed. My point is I shouldn't have to cross-examine on
2 this.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, we will proceed.

4 MR GARCIA: Now, your Honours, I see the time. It's one-minute-to-4. I still
5 have some questions for the witness and --

6 PRESIDING JUDGE EBOE-OSUJI: Maybe -- why don't we clear up one thing, the
7 matter of whether or not the witness had seen youths burning houses.

8 MR GARCIA: Indeed, your Honour.

9 Q. Mr Witness, just so that we can be clear on the matter, when you first saw this
10 house burning did you see any youths?

11 A. Yes, your Honour. There were youths at the site of the burning house.

12 Q. And when say, "There were youths at the site ...," what distance were they from
13 the burning house and what were they doing?

14 A. Not far from the burning house.

15 Q. When you say "not far," Mr Witness, approximately how many feet or
16 metre -- metres were they away from the house?

17 A. A few metres. A few metres.

18 Q. And did you see them do anything? What were they doing there, a few metres
19 away from the house that was burning?

20 A. As the house was burning, they were all standing around the house and I
21 thought maybe they wanted to loot.

22 Q. Did they indeed do anything? Did they loot, or anything, the house
23 afterwards?

24 A. No, I didn't stay for long to take notice of that.

25 MR GARCIA: Thank you for the clarifications, Mr Witness.

Trial Hearing
Witness: KEN-OTP-P-0268

(Open Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: We will leave it there for the day.
- 2 We now go back into public session.
- 3 (Open session at 4.02 p.m.)
- 4 THE COURT OFFICER: (Interpretation) We are in public session, your Honour.
- 5 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 6 Mr Garcia, we will adjourn for the day, but how much longer do you intend to detain
- 7 the witness in examination-in-chief?
- 8 MR GARCIA: Your Honours, I stated initially that I expected to be finished
- 9 tomorrow by lunch and I will try and make that happen.
- 10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 11 Counsel, are you in a position now to indicate how much time you will need for this
- 12 witness in cross-examination? Are you in a position? I'm not asking you to -- to
- 13 hold you to anything.
- 14 MR HOOPER: I'd think three sessions, normal size sessions.
- 15 PRESIDING JUDGE EBOE-OSUJI: All right, we will adjourn now.
- 16 Witness, we will be adjourning for the day. You will come back tomorrow at 9.30,
- 17 and please do not discuss your testimony overnight with anyone.
- 18 THE WITNESS: Yes, your Honour.
- 19 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 20 The curtains will come down and the witness will be escorted from the courtroom.
- 21 (Closed session at 4.03) Reclassified into open session
- 22 MR KHAN: Mr President, can we clarify? Tomorrow morning, is it a 9 a.m. start
- 23 or a 9.30 a.m. start? I thought it was 9 a.m., but --
- 24 PRESIDING JUDGE EBOE-OSUJI: 9.30.
- 25 MR KHAN: I'm grateful.

Trial Hearing
Witness: KEN-OTP-P-0268

(Closed Session)

ICC-01/09-01/11

1 THE COURT OFFICER: (Interpretation) We are in closed session and the witness
2 will now be escorted out of the courtroom.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you.

4 (The witness stands down)

5 MR KIGEN-KATWA: With your permission, Mr President, I had something I
6 wished to raise in the absence of the witness.

7 PRESIDING JUDGE EBOE-OSUJI: Can we go into public session, or do you want to
8 remain in private?

9 MR KIGEN-KATWA: I would rather not, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: All right.

11 Please proceed.

12 MR KIGEN-KATWA: Mr President, there is the issue of the protective measures for
13 the witness. It was in passing alluded to and we would like to have your
14 clarification, your Honours, (Redacted)

15 (Redacted) It is our position that it doesn't need to be protected, but out of caution
16 we would rather that you determine that issue as to whether or not (Redacted)
17 (Redacted) and that, if we have to ask any questions relating to that
18 situation, we must conduct it in closed session.

19 PRESIDING JUDGE EBOE-OSUJI: I think it's safer to do that in closed session.

20 MR KIGEN-KATWA: I am obliged, Mr President. I wish it was otherwise.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 The Court will now rise.

23 THE COURT USHER: All rise.

24 (The hearing ends in closed session at 4.05 p.m.) Reclassified into open session

25 RECLASSIFICATION REPORT

Trial Hearing

(Closed Session)

ICC-01/09-01/11

Witness: KEN-OTP-P-0268

- 1 Pursuant to Trial Chamber V(a)'s Decision, ICC-01/09-01/11-981, dated 24 September
- 2 2013, and the instructions in the email dated 17 January 2014, the version of the
- 3 transcript with its redactions becomes Public.