

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, 4 March 2014
10 (The hearing starts in open session at 9.38 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: Thank you, Mr President. The situation in the Republic of
17 Kenya, in the case of The Prosecutor versus William Samoei Ruto and Joshua Arap
18 Sang, ICC-01/09-01/11, and we're in open session, your Honours.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you.
20 Appearances, please.
21 MS RENTON: Good morning, Mr President, your Honours. For the Prosecution
22 myself, Lara Renton, Anton Steynberg, Jasmina Suljanovic, our case manager,
23 Regina Weiss, and Peter Schotsman.
24 MR NARANTSETSEG: Good morning, Mr President. On behalf of victims,
25 myself, Orchlon Narantsetseg, and James Mawira.

26

Trial Hearing

(Open Session)

ICC-01/09-01/11

1 Thank you.

2 MR KIGEN-KATWA: For Mr Sang, your Honours, myself, Katwa-Kigen, Caroline
3 Buisman, Joel Bosek, Logan Hambrick and Honor Lanham.

4 MR HOOPER: Good morning. On behalf of Mr Ruto, Mr Khan, Ms Jayaraj, and
5 Ms Sullivan sitting in the back and Ms Lawrie behind.

6 PRESIDING JUDGE EBOE-OSUJI: Nice silk.

7 MR HOOPER: Yes, ran out of the other.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

9 We will go I believe straight to the question of protective measures for the witness, I
10 take it?

11 MS RENTON: Yes, your Honour. The Prosecution has no further submissions
12 other than its written filing, which was 1129, and of course we rely on the VWU
13 report. Thank you.

14 PRESIDING JUDGE EBOE-OSUJI: Defence counsel. Mr Kigen-Katwa, Mr Hooper,
15 who goes first?

16 MR KIGEN-KATWA: Your Honours, with your permission, I propose that Dr
17 Buisman does conduct the arguments on that issue.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you. Should we be in -- we can do this
19 in open session, can't we?

20 MR KIGEN-KATWA: On our part we have no objection to doing it in open session,
21 your Honours.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

23 MR HOOPER: No objection.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Let's then get the arguments.

25 MS BUISMAN: Good morning, Mr President, your Honours. Well, we take the

1 usual position and we object to the request for protective measures. I'm looking at
2 the Prosecution's submission, and this is 1129 at page -- this is paragraph 44 and 45.
3 This relates to this witness. Unfortunately we cannot read the submissions, because
4 paragraph 44, which relates to a series of events relating to the security, is all
5 redacted. So we cannot really comment on this, but we wanted to highlight the
6 standard.

7 Last time, on 20 February, you, your Honours, highlighted particularly the one
8 aspect of Article 68 relating to the psychological well-being of the witness being of a
9 great concern.

10 However, we did not take it that you were overriding the standard that you had
11 confirmed on an earlier decision. And I'm relating to -- I'm referring to 3 September
12 2013 decision 902, where you also look at Article 68, and you look at 1 and 2. And
13 you look at Article 64(2), (6) and (e), and you come to the following conclusion, this
14 is paragraph 11: You say that these articles give you the power to order protective
15 measures to protect the safety, physical and psychological well-being, dignity and
16 privacy of victims and witnesses, but you also say that these measures shall not be
17 prejudicial to or inconsistent with the rights of the accused to a fair and impartial
18 trial. This is paragraph 11.

19 And then you go on in paragraph 13, that on the basis of these considerations,
20 protective measures should be granted only on an exceptional basis following a
21 case-by-case assessment of whether they are necessary in light of an objectively
22 justifiable risk and are proportionate to the rights of the accused.

23 And in paragraph 14, you say that it is a case-by-case evaluation which requires an
24 individualized consideration of the risk in each particular case.

25 And then you also say that generalised assertions regarding the degree of domestic

1 support for trials can be sufficient for these purposes, but you say that security
2 situation in a particular territory may be pertinent when we consider the
3 circumstances of a particular witness.

4 So it still remains, even after what you said on 20 February, this remains the
5 standard, and the psychological well-being of a witness is one aspect of this is our
6 submission, and this is how we understand you to have meant that.

7 If we then look at the VWU report, we note that it is a rather generalised report. It's
8 not very different from the one relating to 409. We see only that there is no specific
9 recent threats. And the only thing that this VWU report is based on is the
10 perception of this witness, which goes to this one aspect of the assessment, namely
11 the psychological well-being, but it doesn't yet reach the level of an objectively
12 justifiable risk in our submission.

13 And then finally we see that the VWU again did not make its own investigation. It
14 relied on what the witness said. And the witness does say that people -- I hope I
15 can say this in public.

16 PRESIDING JUDGE EBOE-OSUJI: You may not say compromising things in public.

17 MS BUISMAN: Maybe for one second we could go into private then.

18 PRESIDING JUDGE EBOE-OSUJI: Private session then.

19 (Private session at 9.45 a.m.) Reclassified into open session

20 THE COURT OFFICER: We're in private session, your Honours.

21 PRESIDING JUDGE EBOE-OSUJI: Please continue.

22 MS BUISMAN: Thank you. The one thing I wanted to say is that this witness, she
23 submits that (Redacted). I
24 thought that might be risky in public. However, we submit that mere knowledge
25 does not translate into a threat.

1 So on the basis of the information that we have received, we submit there is no basis
2 to come to an objective viably justifiable risk even if this witness herself would feel
3 more comfortable testifying in private and under redacted pseudonyms. So these
4 are our submissions.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Mr Hooper, should we go back in public?

7 MR HOOPER: Yes, we can.

8 PRESIDING JUDGE EBOE-OSUJI: Public session then.

9 (Open session at 9.46 a.m.)

10 THE COURT OFFICER: We're in public session, your Honours.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 MR HOOPER: Well, your Honour well knows the position that's assumed by this
13 Defence team and has been consistently. And so we're supportive of the
14 application of the submissions rather than have just been made by Ms Buisman. At
15 the same time we understand the difficult position that you, the Judges, are placed in
16 when you receive the kind of application that the Prosecution has made and
17 supported as it is by the VWU.

18 We also, of course, in this case are aware of the material that was provided us on
19 Friday, the less redacted versions that were provided us Friday and yesterday
20 relating to various matters that have concerned this witness and the next witness.

21 And the Defence is again faced with the difficulty of preventing or presenting,
22 rather, an effective argument, if I can put it like that, in the light of or when
23 confronted with these relatively ill-defined and unspecified concerns.

24 We started investigating this witness effectively on Wednesday or maybe Thursday
25 of last week. That may give the Court at least a little indication of the investigatory

1 process that we operate necessarily witness by witness, particularly given the
2 manner in which witnesses are shuffled and presented to us.
3 Yet in that short period of time we've conducted investigations that the Prosecution
4 could and should have done which, again, and of course these are matters that will
5 be presented to the Court in due course, but again lead us as a Defence to consider
6 this witness part of a continuing scheme of deceit in this case.
7 The problem, therefore, is this, that we as the Court I know has seen repeatedly and
8 observed take a very different attitude towards the witnesses than that that's taken
9 by the Prosecution. We're concerned that the VWU do not, in fact, investigate these
10 complaints more fully than they do. That's been voiced before.
11 And our concern is that the principal reason why these witnesses are in fact seeking
12 the cloak of anonymity is because they do not want to be seen and recognised by
13 neighbours and by friends, by colleagues, and by wider society as the authors of the
14 deceit that they present to the Court.
15 That's our view. If you like that's our prejudice, but it's not ill-founded and we've
16 seen a litany of deceit in our submission already presented by the Prosecution to this
17 Court, witness after witness, and it does raise obviously a considerable concern.
18 But I go back to our recognition that it places you, the Judges, in a difficult situation
19 at this stage of the evidence, rather than after the evidence perhaps. But we do
20 support Ms Buisman's submissions this morning and, as you know, they are a
21 reflection and we repeat of the view that we've taken and submitted since the outset
22 of this case. Thank you.
23 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Hooper.
24 Prosecution, any reply?
25 MS RENTON: Just a very minor point, your Honours. The Prosecution recognises

Trial Hearing

(Open Session)

ICC-01/09-01/11

1 that each assessment must be individualised. However, we also think that they
2 must be considered in the broader context of the situation as it prevails in Kenya.
3 And as we have seen, while suspicion may not equal threat, there is certainly a risk
4 that it may escalate that way. Thank you.

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

6 Mr Narantsetseg, you were rising?

7 MR NARANTSETSEG: Thank you, Mr President, your Honours. We, the victims,
8 we would support the Prosecution's application. In our view those protective
9 measures requested by the Prosecution are justified and proportionate, at the same
10 time necessary, your Honour, and we fully agree with the recommendation
11 provided by the VWU.

12 Just a minor point to add, your Honour, before I finish. In our view, your Honours,
13 "objectively justified risk," what does it mean, your Honour? In our respective
14 submission your Honours should grant these protective measures, not only where
15 there has been explicit specific threat against witnesses, your Honours, but also
16 where there is a possibility for witnesses being exposed to such threats, your
17 Honour, as provided in the recommendation of the VWU.

18 We see that there is a possibility that this witness may face an objectively justified
19 risk and explicit threats in the future. Therefore, your Honours, in our conclusion
20 we support the Prosecution's request, and we believe that those usual menu of
21 measures should be granted. Thank you.

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

23 (Trial Chamber confers)

24 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We will render our
25 ruling now on the application. The ruling concerns the application the Prosecutor

1 made on 23 December 2013 requesting the usual menu of in-court protective
2 measures for Witness 442.

3 On 3 March 2014, the VWU provided its assessment as regards the need of this
4 witness for protection measures in the courtroom. The long and short of it is that
5 the VWU does recommend that those measures of protection be granted to the
6 witness, and the usual menu of protection being, of course, image and voice
7 distortion, the use of pseudonym during the testimony, limited sessions in private
8 session, in-camera sessions in order to prevent the identification of the witness, and
9 the redaction of public records where necessary, again, for purposes of protecting
10 the identity of the witness.

11 The Chamber is mindful of the submissions made by the Defence and by Victims'
12 counsel and we take those submissions into account. The Chamber is also mindful
13 of its previous rulings as regards protection of witnesses during testimony. The
14 Chamber is also mindful of events that have since occurred in the course of this trial
15 following the initial ruling of the Chamber on the in-court protective measures, in
16 particular the efforts made by some people to unmask and intimidate witnesses who
17 are testifying in the courtroom.

18 In light of all the elements bearing on the circumstances, the Chamber does grant the
19 request of the Prosecutor. That is the ruling.

20 MS RENTON: As the Court pleases, thank you.

21 MR HOOPER: Your Honour, before we proceed to the evidence, there are two
22 matters that I'd seek to raise, one in open and one in closed or private session.
23 Perhaps I can start with your Honour's leave in respect to the first matter and it is
24 this. Yesterday we received an e-mail courtesy of the Prosecution, we thank them
25 for that, relating to an updated schedule of assistance in relation to the coming

1 witness which details protective measures provided to P-442 in connection to her
2 status as a witness.
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 (Redacted). Then it has "Number of
7 individuals." (Redacted). And then the final
8 section is headed "Costs borne by," and in there the detail is again a repetition of the
9 earlier detail, quote, "OTP pending finalisation of a long-term self-sustainment plan
10 of the witness," close brackets.
11 Now, this is a witness that's been a witness for the Prosecution, certainly in contact
12 with the Prosecution since June of 2012. She provides a statement I think in
13 November of 2012. So she goes back now 18, 20 -- 21 months.
14 Now, reading this we interpret this as meaning that the VWU have had no particular
15 contact or responsibility or management of this witness and in particular has not
16 been in the position of providing funds of any kind of description either themselves
17 or through any agency to this witness in that period of time, at least until very
18 recently, when, of course, we had the VWU directly concerned, we assume, in the
19 management of passport and the costs and the arrangements for transfer of the
20 witness to The Hague in order to give evidence.
21 So our understanding is that it's been the Prosecution throughout who have funded
22 her, who have provided all the material support necessary for her in the past 21
23 months. And I mention that to the Court today and submit it would be helpful and
24 appropriate for the Prosecution to clarify that. As I say, we only got this yesterday.
25 Is that the position, or have the VWU also had a material input over and above the

1 transfer practicalities into this witness?

2 We've had a sum expended by the Prosecution of three-and-a-half thousand euros,
3 which is certainly higher than the bread and butter sums that we've been getting
4 from the Prosecution in respect of most of the other witnesses. So it's with that sum
5 in mind and this e-mail received yesterday, it seems to us that the VWU have indeed
6 been excluded from any responsibility for support. But we would very much
7 welcome confirmation of that from the Prosecution this morning before the witness
8 gives evidence, if they have that information at hand, of course.

9 PRESIDING JUDGE EBOE-OSUJI: Now, I would take it Mr Sang joins in that, Mr
10 Kigen-Katwa? Counsel for Sang joins?

11 MR KIGEN-KATWA: Yes, we do. Yes.

12 PRESIDING JUDGE EBOE-OSUJI: Okay.

13 MS RENTON: Your Honours, I can confirm the Defence understanding is slightly
14 incorrect. But rather than saying any more in public session, the Prosecution is very
15 happy to confirm the situation as it stands now and as it has recently changed to the
16 Defence in an e-mail.

17 PRESIDING JUDGE EBOE-OSUJI: You will respond in an e-mail? That's what
18 you are saying?

19 MS RENTON: Yes, we can clarify the situation for the Defence by e-mail.

20 PRESIDING JUDGE EBOE-OSUJI: Right.

21 MR HOOPER: All right. Well, we can always go into private session. And,
22 indeed, my application is with your Honour's leave to go into private session to raise
23 the next matter, which relates to the material that we discussed Friday or Thursday, I
24 should say.

25 You may remember there were I think then four statements from this witness, 442,

1 three statements, and one witness from the next witness to come, 469, all in redacted
2 form. We made an application that we be served with a less redacted form.

3 Now, because of the background of those statements, I thought it more appropriate
4 to deal or discuss those, make my submission in respect of those in private session.

5 PRESIDING JUDGE EBOE-OSUJI: Private session then.

6 (Private session at 10.03 a.m.) Reclassified into open session

7 THE COURT OFFICER: We're in private session, your Honours.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Hooper.

9 MR HOOPER: Well, I've indicated already the area of concern to us relating as it
10 does to these statements. The Prosecution were good enough to provide far less
11 redacted statements to us on Friday evening, that is four of them, the four that we
12 had in their totally redacted, almost totally redacted form last week. And they
13 provided us with a further statement made by 469 in less redacted form. And they
14 served that on us, disclosed that to us yesterday. So we now have five statements in
15 less redacted form. I don't know, they run to about 30/40 pages, I suppose,
16 altogether.

17 Now, the difficulty is this, and -- just give me one moment. I might have a copy.
18 I'm sorry, I don't have a hard copy for your Honours, but basically the problem is
19 this: That they are far less redacted, and I daresay someone has taken a lot of
20 trouble to present them to us in this now less redacted form, but throughout the
21 entire five statements the redactions that have been made are just gaps with the
22 word "Redaction." I don't know if I'm making myself clear.

23 We have some -- thank you very much. Mr Katwa has kindly provided some hard
24 copies. There is probably only one in respect of each, yes.

25 Anyway, any one of those will give you an idea, looking at any one of those the

1 difficulty that confronts the Defence, because what's happened is that there is no
2 pseudonym employed. And there is an awful lot of reference to particular names
3 throughout each of these five statements.
4 So by subtracting the names, you're left with an unintelligible narrative. So a
5 witness will say or the witness will say, "On such-and-such a day perhaps, I met
6 blank and blank and blank said and later I met blank with blank," and it goes on like
7 that. So they have extracted the narrative effectively by doing this.
8 Now, the better way and the proper way in our submission for those redactions to
9 have been made so that they are of assistance to the Defence by remaining as
10 intelligible as possible is where a particular person is named, that that person is
11 given a pseudonym, X or Y or Z, and that that pseudonym is used in respect of that
12 person in a consistent manner, consistent both within the context of each individual
13 statement, but also, of course, (Redacted)
14 (Redacted)
15 (Redacted). And it's
16 only in that way that we can, as it were, get a spine of narrative through these
17 statements.
18 I spent several hours last night going through these statements trying to make sense
19 of them, and it's not possible. One gets a very over-fragmented view of an
20 important history and account that's being related here.
21 So what I'm asking is that the Prosecution provide the Defence with the selfsame
22 redacted format, but where there are particular persons involved, they are assigned
23 an ABC, XYZ pseudonym, as simple as that, so that we can see and follow the
24 narrative that's concerned.
25 Now, that's my first application in respect of these statements. As I say, at the

1 moment, they are of very little assistance to the Defence whatsoever.

2 The second thing is this: There is reference to a meeting by 442 in the second of her
3 statements at paragraph 34 with the Prosecution on (Redacted). And we invited the
4 Prosecution yesterday to provide us with any investigator's note or record in respect
5 of that meeting to see what essentially the OTP's recollection of that meeting was
6 and the Prosecution have not been inclined to share that with us. And we'd asked
7 for that, it's part of the narrative, and indeed we'd ask for similar, albeit redacted,
8 records of meetings with each of these witnesses on each and every occasion that
9 they have met the Prosecution over the past year, the past year being the effective
10 period of time that these concerns have been discussed and raised by them.

11 There is also a reference yesterday in --

12 PRESIDING JUDGE EBOE-OSUJI: The second -- your second request is provisions
13 to you of Prosecutor's investigation -- sorry -- investigator's note, is that it, of
14 meetings with the witness?

15 MR HOOPER: Yes. I mean, this isn't, as it were, the same class of internal work
16 material that is generally protected. And it is generally, we say, falls within a class
17 of material which is disclosed once a witness is a witness, i.e. what is a witness
18 saying in respect of certain events? What record is there? And generally we've
19 had that kind of material disclosed.

20 Let me just turn up a particular paragraph, I've got it to hand here, and it's in the
21 second of her -- this is 442's second statement, dated (Redacted).

22 PRESIDING JUDGE EBOE-OSUJI: What is the OTP reference number?

23 MR HOOPER: Paragraph 34.

24 PRESIDING JUDGE EBOE-OSUJI: No, no. The OTP, the KEN-OTP thing.

25 MR HOOPER: Oh, the OTP number? The document is KEN-OTP-0111-0352.

1 And the particular page is 0111-0359. And I'm sorry I haven't had copies of these
2 provided to the interpreters and stenographers, but my reference to the documents
3 will be in any event brief.

4 In paragraph 34 of (Redacted), the witness says, "On (Redacted), I spoke with ICC
5 investigators and advised them about the incidents I talk about in this statement.

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 So what was discussed with the OTP, there is her account, and in my submission it
12 would be a proper disclosure to us, if the Prosecution have a record by their own
13 officers of that and other meetings with this witness or the other witness, 469, in the
14 course of the time that she is a witness and has been disclosed indeed to the Defence
15 as a witness in February of 2013, that such continued contact be disclosed to us.

16 PRESIDING JUDGE EBOE-OSUJI: Was this one of the materials disclosed to you as
17 a result of the order made on Thursday?

18 MR HOOPER: Yes, yes, indeed.

19 PRESIDING JUDGE EBOE-OSUJI: Yes.

20 MR HOOPER: On Thursday we were in possession, as you know, of those, of four
21 of these five statements, but in very much redacted form, and we now have them in
22 a less redacted form.

23 PRESIDING JUDGE EBOE-OSUJI: Are you saying this material was not in the
24 initial disclosure made to you? Paragraph 34 wasn't visible to you last week?

25 MR HOOPER: No.

1 PRESIDING JUDGE EBOE-OSUJI: Before the order of the Chamber.

2 MR HOOPER: No. As far as I can recall, no. In fact, the disclosed paragraphs are
3 very, very discrete as they say and only refer to an account of (Redacted)
4 (Redacted).

5 So that was the area there.

6 So we had asked, we had asked what is the OTP's record of that conversation?

7 PRESIDING JUDGE EBOE-OSUJI: All right. So second request.

8 MR HOOPER: That's the second request.

9 PRESIDING JUDGE EBOE-OSUJI: All right. OTP's investigator's notes of
10 meetings with the witness.

11 MR HOOPER: Yes, indeed.

12 PRESIDING JUDGE EBOE-OSUJI: Yes, okay.

13 MR HOOPER: Or, indeed, it may not even be the investigators, it might be other
14 members of the Prosecution team.

15 And, finally, yesterday we were provided by the Prosecution with the corrections
16 that the coming Witness 442 has made to her statement together with additional
17 information that arose in the course of the Prosecution's discussions with that
18 witness over the weekend. And at paragraph 43 of those corrections, the witness is
19 referring to one of the statements that were provided us last week, the ones that are
20 the subject of my submissions early this morning.

21 And at item 43, she's explaining the document that she provides to the Prosecution.

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 PRESIDING JUDGE EBOE-OSUJI: Was it not the -- is it the same thing as the

18 (Redacted) we were talking about?

19 MR STEYNBERG: (Microphone not activated) I beg your pardon. It was a partial

20 page of (Redacted)

21 (Redacted).

22 MR HOOPER: If your Honours just give me one moment for some clarification.

23 Your Honours will appreciate we haven't had a lot of time to discuss this amongst

24 ourselves. It might be there is one matter that I'll be assisted by. (Counsel confer)

25 MR HOOPER: Yes, thank you for giving me that time. In fact, now we're still on

1 course as it were, and I can merely confirm that, yes, we won't -- I'm going back
2 several paragraphs as it were -- that paragraph 34 was redacted. We weren't given
3 that material in a less redacted form until Friday, Friday evening at all.
4 So coming back, if I may, to the annex and to its relevance and to its relevance to that
5 paragraph I just read out for these further details provided by 442, (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted).

9 So now whatever it is, and it is of no interest to the Defence, the content of that
10 particular redacted material at the back of the annex, but in our submission we
11 should have sight of it, because we might be able to make some sense of it. We
12 might be able to, for example, (Redacted).

13 And so it has an obvious importance in terms of the --

14 PRESIDING JUDGE EBOE-OSUJI: Why is that, Mr Hooper?

15 MR HOOPER: Because of the authenticity of the document. And it is that element
16 that we'd be looking at and looking at this particular document. After all, here is a
17 (Redacted)
18 (Redacted)
19 (Redacted)

20 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, one second. You were interested
21 in (Redacted)?

22 MR HOOPER: We have (Redacted).

23 PRESIDING JUDGE EBOE-OSUJI: Okay.

24 MR HOOPER: And we have the (Redacted)
25 (Redacted) --

1 PRESIDING JUDGE EBOE-OSUJI: Right.

2 MR HOOPER: -- which is (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 PRESIDING JUDGE EBOE-OSUJI: I understand. I understand that. Are you now

7 making arguments as to the relevance of the -- let's refer to it as (Redacted)

8 (Redacted), because the Chamber made a ruling already saying that material will not

9 be disclosed, because in the Chamber's appreciation of the material it is not relevant.

10 Now, are you saying it is relevant? And can you tell us why you're effectively

11 arguing for reconsideration of a ruling, isn't it?

12 MR HOOPER: Well, I wouldn't put it quite as highly as that because, of course,

13 when you, the Judges, came to that document, and we were in the same position last

14 Friday, we hadn't seen it or we didn't know about (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

1 (Redacted).

2 PRESIDING JUDGE EBOE-OSUJI: Let's -- well, so that we can move things along,
3 we've spent a lot of time on that item 3. So your item 3 is your request for that
4 (Redacted) to be or decide if we're going to use that expression to do --

5 MR HOOPER: I'd move away from (Redacted), and I'd merely put it in this
6 way, our application is to have sight of (Redacted)
7 piece of paper.

8 PRESIDING JUDGE EBOE-OSUJI: Fair enough. I want us to understand what we
9 are talking about. So what you're requesting is to be able to inspect that material?

10 MR HOOPER: Yes.

11 PRESIDING JUDGE EBOE-OSUJI: All right.

12 MR HOOPER: And if it's (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 PRESIDING JUDGE EBOE-OSUJI: So you're asking -- your fourth request is who is
22 (Redacted)?

23 MR HOOPER: Who is (Redacted)?

24 PRESIDING JUDGE EBOE-OSUJI: All right.

25 MR HOOPER: And, I mean, I raise that now. I haven't asked previously for that,

Trial Hearing

(Private Session)

ICC-01/09-01/11

1 because these are matters that were being looked at last night. And I haven't had
2 that opportunity, but --

3 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Hooper, can we wrap it up? It's
4 now we've been one hour here already.

5 MR HOOPER: Yes. So there is all the matters that I wish to raise. Thank you,
6 your Honours.

7 PRESIDING JUDGE EBOE-OSUJI: All right.

8 Mr Kigen-Katwa, if you are joining, we can just shortly reference it and leave it at
9 that.

10 MR KIGEN-KATWA: Yes, Mr President. Mr Hooper had indicated that he would
11 be raising the four items, and we join him, Mr President. Thank you, your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you.

13 Prosecution?

14 MR STEYNBERG: Thank you, your Honours. This is a matter which I was dealing
15 with on Friday, so I may as well continue with it. Perhaps it would be easier to start
16 in reverse orders. We are in private session? Yes.

17 As for who is (Redacted), the Prosecution cannot shed any further light other than what is
18 contained in the statement of the witness where (Redacted)
19 (Redacted).

20 PRESIDING JUDGE EBOE-OSUJI: So we are clear on that, is it something which in
21 your view the Defence can ask the witness while on the stand?

22 MR STEYNBERG: We have no objection, your Honours.

23 As for the (Redacted), your Honours, your Honours have seen it. In my
24 submission it appears to be plain that Mr Hooper's surmise that this was simply
25 (Redacted)

1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 Turning then if I may to the issue of the pseudonyms, the Prosecution submission is
7 that it has complied fully with the order of the Chamber to provide a lesser redacted
8 version in which we are authorised to redact (Redacted)

9 (Redacted).

10 And perhaps it would -- a good starting point would be to just remind ourselves of
11 the context of the disclosure and of the information which the Defence now seek a
12 lesser redacted version or more information.

13 These are matters, statements submitted by (Redacted)

14 (Redacted)

15 (Redacted).

16 They are statements containing information which the Prosecution does not seek to
17 lead in support of its case. The information does not relate to the facts and
18 circumstances set out in the DCC, which are the matters of primary interest in my
19 submission in these proceedings.

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, there are two things there. Of
25 course, I can understand why you began your submission by saying that the

1 Prosecution is fully compliant with the redaction orders. I say I can understand
2 why you would begin with that submission, but beyond that question, whether or
3 not you're fully compliant, the Defence, what I understand them to be saying is
4 having received the redactions you've made, and they do not question -- sorry -- the
5 lifting that has been done -- and I did not understand Mr Hooper as suggesting bad
6 faith on your part in the way it's been done.

7 The point is beyond that, they are saying having received the material, the lesser
8 redacted material, it could be done differently in a way that would make it easier for
9 them to make more sense of it. And he'd suggested using consistent pseudonyms
10 to help him understand the narrative that's going on. Do you have difficulty with
11 that?

12 MR STEYNBERG: Yes, your Honours, I'm afraid that I do for the following reasons,
13 and I was about to get to that. But it's in my submission, it's a weighing, a
14 balancing exercise which the Chamber must perform. And the reason why I start
15 dealing with the background in the context of the request is that I submit that this is
16 an important factor in deciding where the balance of convenience and the balance of
17 fairness lies. So from the starting point that we have complied, I'll move on from
18 there.

19 The concern of the Prosecution is that if -- the more information that is given, the
20 easier it will make it for the Defence to identify exactly (Redacted)
21 (Redacted). And, indeed, that seems to be, and they can correct
22 me if I am wrong, but that seems to be behind or one of the reasons behind this
23 request, so they can (Redacted)
24 (Redacted)
25 (Redacted).

1 But as the Prosecution has noted and noted in its original request, (Redacted).
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 And we submit that if the Defence, for instance, know that (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 Now, balanced against that, the Prosecution submits is the utility of the Defence
12 being able to put together an exact account of what happened. As I've said, this is
13 not information the Prosecution will seek to lead. Of course, if the Defence wishes
14 to cross-examine on it, we may assert our right to enter the open door, as it were, but
15 in the normal circumstances we do not seek to lead this evidence.
16 How important, therefore, is it for the Prosecution to have this exact account of
17 (Redacted)? The purpose, if I understood your Honour's order on
18 Friday correctly, was to provide the Defence with some sort of narrative or the
19 narrative underlying (Redacted), which was, as I remind
20 the Chamber, the initial reason for the disclosure in the first place. There were two
21 reasons: one was because of (Redacted)
22 (Redacted)
23 (Redacted).
24 And in the Prosecution's submission, the material disclosed in the form it is
25 disclosed is sufficient to allow the Defence to investigate those two issues, and that

1 to now foresee the Prosecution to go and redo this whole thing and insert ones and
2 twos or As and Bs and Cs there is (a) unnecessary and (b) may further prejudice
3 what we submit may further prejudice the investigation of these matter in what we
4 submit is an ever ballooning disclosure obligation which threatens, and I don't say
5 this lightly, but which seriously threatens the ability of the OTP to protect its
6 witnesses and to protect the integrity of these proceedings.

7 And, your Honours, on a matter which is so clearly a collateral issue to this case, we
8 submit, we say that enough is enough, and a line should be drawn. But, of course,
9 if your Honours order us to do so, we can in due course submit those pseudonyms.

10 We simply say it's not required, and it may be prejudicial, and we would resist that
11 on those grounds.

12 Finally, on the issue of the investigator's note, the response to the Defence was that
13 whatever is contained in this note, and it was disclosed in a telephone conversation
14 with the witness, has been kept in the subsequent statement. There is nothing more
15 to disclose.

16 What should be noted is that this investigator's note is the record of the impressions
17 gained by the investigators who spoke to the witness (Redacted)
18 (Redacted).

19 I note that it was done without the assistance of an interpreter. So what we have
20 here is an impression by an investigator of what was conveyed to them by the
21 witness.

22 We submit that the primary source of the information which was kept in a statement
23 signed by the witness, confirmed by the witness is the record which contains the
24 same information and is sufficient for disclosure in these purposes. We have no
25 objection to having -- providing a copy of the investigator's note to the Chamber so

1 they can satisfy themselves that there is no additional disclosable content. We say
2 everything has been captured. There is additional information relating to (Redacted)
3 (Redacted)
4 (Redacted).

5 But on the issues at hand, we submit that there has been full disclosure, but we're
6 happy to provide a copy of that to the Chamber.

7 And on the basis of this one note, it seems that my learned friend is now expanding
8 his request for all communications for the last year between the OTP and this
9 witness. Well, I submit he's not even begun to lay a foundation for that. And until
10 he's done so, I don't think I need to respond to that. But we say that, your Honours,
11 the issue of disclosure, the Prosecution tries in good faith to disclose everything we
12 assess to be disclosable. We do try to apply our minds to it and to look at the matter
13 from the other side as it were, but in these circumstances we submit that the
14 disclosure obligations are ballooning to such an extent that it is far beyond what was
15 ever contemplated by the drafters of the Rome Statute.

16 Unless there are any questions, your Honours, those are my submissions.

17 PRESIDING JUDGE EBOE-OSUJI: One question on the meeting notes with the
18 witness. What would be the prejudice caused if you say that the meeting notes do
19 not say more, except for what you've indicated, (Redacted), and
20 things like that. But in terms of the forensic matter, they don't say more than what
21 has already been disclosed. What prejudice then is caused by disclosing it, even
22 though it may be surplusage?

23 MR STEYNBERG: Well, your Honours, in the first instance the document will have
24 to be redacted, and that's going to be another several hours taken by an OTP
25 representative to do what we submit is unnecessary. And the marginal effort

1 required to do this is perhaps in the larger scheme of things not that great, but it is a
2 cumulative issue. And incrementally the pressures and the obligations that are
3 being demanded by the Defence and being upheld by various Chambers is getting to
4 a level that threatens to overcome the resources of the Prosecution, and we submit
5 that simply at a certain stage a line needs to be drawn.

6 We submit we have in this case complied with our disclosure obligations. We are
7 happy to provide the material to the Chamber. And if the Chamber orders it can be
8 done, but we submit that there are far better --

9 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, one can see certain arguments
10 and then the value becomes immediately apparent, but are you saying that the
11 argument of ballooning obligation on the OTP is something that should be taken into
12 account in making disclosure orders? You put that, you introduced that, and it is
13 something that you should have thought about. Are you saying because it is too
14 much, therefore, materials should not be disclosed to the Defence?

15 MR STEYNBERG: Your Honours, what I'm saying is that disclosure decisions
16 should be taken on the basis of obligations which are applied to the Prosecution by
17 the Rome Statute and the Rules, and that chambers should not take the view that, oh,
18 if it's not too much effort, just give it to the Defence, even though it might not strictly
19 be required.

20 PRESIDING JUDGE EBOE-OSUJI: Have we indicated that?

21 MR STEYNBERG: No, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Or is that because I said if there is no prejudice
23 caused why not disclose?

24 MR STEYNBERG: That was the trigger that led me down this road of argument,
25 yes, your Honours.

- 1 PRESIDING JUDGE EBOE-OSUJI: All right.
- 2 MR STEYNBERG: Your Honours, unless you have any further questions?
- 3 PRESIDING JUDGE EBOE-OSUJI: One minute of reply.
- 4 MR HOOPER: I can sympathise with Mr Steynberg, it is a nuisance, but our object
- 5 isn't in order to go off and nobble the nobblers. It's in order to have an intelligible
- 6 narrative and I'm sure Mr Steynberg can see that it makes sense. And indeed, for
- 7 example, dealing with intermediaries, the Court has previously asked that
- 8 pseudonyms be provided for the reason that your Honour said, consistent
- 9 pseudonyms to understand the narrative. That's all we're asking for. Thank you.
- 10 MR KIGEN-KATWA: Nothing, Mr President.
- 11 (Trial Chamber confers)
- 12 PRESIDING JUDGE EBOE-OSUJI: Open session, please.
- 13 (Open session at 10.46 a.m.)
- 14 THE COURT OFFICER: We're in open session, your Honours.
- 15 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 16 We will not be able to get to this witness before 11.30. The Chamber will rise now,
- 17 deliberate on the new requests made by the Defence and we will return at 11.30.
- 18 THE COURT USHER: All rise.
- 19 (Recess taken at 10.47 a.m.)
- 20 (Upon resuming in open session at 11.40 a.m.)
- 21 THE COURT USHER: All rise.
- 22 Please be seated.
- 23 THE COURT OFFICER: We are in open session, your Honours.
- 24 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We will go into the
- 25 private session to render the ruling on the application made this morning.

1 (Private session at 11.41 a.m.) Reclassified into open session

2 THE COURT OFFICER: We are in private session, your Honours.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. The Chamber renders
4 its oral ruling on the Defence requests made in the course of the discussions this
5 morning.

6 The Defence requested pseudonyms for persons referred to in Witness 442's
7 statements which were disclosed to the Defence in lesser redacted form last Friday
8 following the Chamber's order. That's the first prayer of the Defence.

9 The second prayer is that the Prosecutor discloses OTP meeting notes with
10 Witnesses 442 and 469.

11 The third request is for the right to inspect the material (Redacted)
12 (Redacted) following the disclosures made
13 on Friday. We shall refer to that as (Redacted).

14 And the fourth request from the Defence is for more information to be given to them
15 as to who is (Redacted).

16 The Chamber rules as follows:

17 In relation to the pseudonyms, the Chamber notes that the Prosecution had fully
18 complied with the Chamber's oral decision of last Friday by providing to the
19 Defence the lesser redacted material. However, in view of the Defence submissions
20 and in reviewing the lesser redacted statements in the Defence's possession, the
21 Chamber appreciates the difficulties faced by the Defence.

22 The Chamber considers that the provision of consistent pseudonyms throughout the
23 statements of Witnesses 442 and 469 sufficiently strikes the balance between
24 preserving the rights of the accused without prejudicing the Prosecutor's ongoing
25 investigation. This request is granted. And the Prosecution is to provide new

1 versions of the relevant statements to the Defence without delay.

2 This does not mean that the witness's testimony will not commence until then. The
3 witness's testimony will commence promptly.

4 As regards the request for OTP meeting notes, the Chamber recalls its findings in a
5 previous composition on the disclosability of Prosecution screening notes, in
6 particular the decision of 20 May 2013 entitled "Decision on Defence request to be
7 provided with screening notes and Prosecution's corresponding requests for
8 redactions."

9 The Chamber considers that the reasoning in that decision should guide the
10 disposition of the present request. In particular, the Chamber in the decision of 20
11 May 2013 discussed the disclosability of screening notes in paragraphs 19 to 23, and
12 part of the Chamber's decision on that occasion was to the extent that the screening
13 notes of witnesses that the Prosecution intends to call at trial constitute records of
14 information provided by the witness during an interview, they will most certainly
15 qualify as documents material to the preparation of the Defence within the meaning
16 of Rule 77 of the Rules.

17 The Chamber sees no reason why these investigative notes are not disclosable for the
18 same reasons. The portion of the Defence request in that regard is also granted
19 subject to the direction that the Prosecution may redact portions of these notes.

20 These redactions may be for matters for which the Chamber authorised redactions
21 last Friday and for matters subject to ongoing redaction in the redaction protocol
22 such as Prosecution work product.

23 Coming now to the matter of the (Redacted). The Chamber has already
24 permitted the redaction of this information and sees no reason to reconsider its
25 previous ruling in the matter. The Defence has in particular not put its request

1 beyond the realms of a fishing expedition. This request is rejected, but the Defence
2 may ask the witness questions about the back of the (Redacted) in a manner which
3 does not prompt the witness to reveal other redacted information.
4 Finally, as regards (Redacted), the Chamber notes that the Prosecution has no more
5 information on this person and has no objection to the Defence asking questions
6 about this person while the witness is on the stand, the next witness is on the stand.
7 The Defence will have to deal with the matter in that way. For these reasons, the
8 Chamber partially grants the relief sought by the Defence.
9 This concludes the Chamber's oral decision.
10 MR STEYNBERG: As the Court pleases.
11 PRESIDING JUDGE EBOE-OSUJI: The witness will now be ushered into the
12 courtroom. We go back into public session for that to be done. First closed session
13 to bring in the witness and then we will go into public session.
14 (Closed session at 11.50 a.m.) Reclassified into open session
15 THE COURT OFFICER: We are in closed session, your Honours.
16 MS RENTON: Your Honours, if I could just place on the record that the two
17 warnings were given to the witness during her preparation session.
18 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
19 (The witness enters the courtroom)
20 PRESIDING JUDGE EBOE-OSUJI: Public.
21 (Open session at 11.50 a.m.)
22 THE COURT OFFICER: We are in open session, your Honours.
23 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
24 Court officer, please administer the declaration.

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 Witness, welcome. Before I do my traditional welcome to witnesses, the court
2 officer will administer the oath or solemn declaration to you. Please repeat after
3 her.

4 THE COURT OFFICER: "I solemnly declare that I will speak the truth, the whole
5 truth and nothing but the truth."

6 WITNESS: KEN-OTP-P-0442

7 (The witness speaks Swahili)

8 PRESIDING JUDGE EBOE-OSUJI: We did not get interpretation.

9 THE COURT OFFICER: Your Honours, I'll repeat again.

10 PRESIDING JUDGE EBOE-OSUJI: Can we please have interpretation for the
11 record.

12 THE COURT OFFICER: "I solemnly declare ..."

13 THE WITNESS: (Interpretation) "I solemnly declare ..."

14 THE COURT OFFICER: "... that I will speak the truth ..."

15 THE WITNESS: (Interpretation) "... that I will speak the truth ..."

16 THE COURT OFFICER: "... the whole truth ..."

17 THE WITNESS: (Interpretation) "... the whole truth ..."

18 THE COURT OFFICER: "... and nothing but the truth."

19 THE WITNESS: (Interpretation) "... and nothing but the truth."

20 PRESIDING JUDGE EBOE-OSUJI: Thank you, Witness, and welcome to the Court.

21 When I say welcome to the Court, I don't mean to make you feel like a stranger in
22 the courtroom. I want you to feel like you are a part of this process and that this
23 courtroom belongs to you, and it does belong to you as it does to any one of us
24 sitting in here.

25 You have sworn to tell the truth, the whole truth and nothing but the truth. That is

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 exactly what we expect from you. That is how witnesses assist the Court in doing
2 their work and this is done by truthfully answering the questions that the lawyers in
3 this courtroom will be asking you. The first lawyer to ask you questions would be
4 the Prosecution lawyer, Ms Renton. She will ask you questions in your examination
5 in chief, and when she finishes asking you questions, the Defence lawyers will ask
6 you questions as well. And the lawyer for Mr Ruto and the lawyer for Mr Sang,
7 they will all take their turns asking you questions. From time to time it is the case
8 that the lawyer for victims would also ask questions if they make a request to ask
9 questions.

10 In all of this, there are lots of questions being asked you, and it is of course often the
11 case that witnesses, they feel irritated by so many questions, some of which might be
12 repetitive and some of which might be pointless to the witness. We would ask you
13 to ignore all of that, whether it's repetitive or whether it seems pointless to you.

14 Sometimes witnesses also worry that the questions being asked of them may be
15 unfair. Again, we will reassure you to not worry about fairness of questions
16 because that is the job of the Judges to make sure that you are not abused because
17 you are in the courtroom and lawyers have the right to ask you questions. We will
18 only allow questions to be asked of you that are fair and appropriate. What that
19 then means is if we don't ask you to not answer a question, please answer it.

20 What we will require of you is to listen very carefully to the questions that are being
21 asked, make sure you understand each question as it is asked and then respond to
22 that question as briefly as possible.

23 Try not to guess at answers to the question. Make sure you understand what it is
24 you are being asked. Also try not to get too worried about: Where is this all
25 leading? Why is he asking me this question? Is he trying to prove something or

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 not? No. Just concentrate on the question, make sure you understand it and then
2 answer it as truthfully as you're able to.
3 Do not guess. If you do not understand the question the lawyer is asking you,
4 please feel free to say you do not understand the question, and the lawyer will
5 repeat the question.
6 If you follow these basic guidelines, you would have assisted us in our search for the
7 truth, and your visit to the Court would have been worth the while.
8 Now, there is something that it's very easy to ignore and that is the -- how the work
9 is done and how your testimony is recorded in the records of this Court. For that
10 purpose, I will ask you to please keep in mind people who had helping us do the
11 work -- who are helping your testimony get recorded correctly. I'm thinking here
12 about the court reporters, whom you don't see in the courtroom, they're up there,
13 and the interpreters who are also over there. They do the job of making sure that
14 your testimony is accurately captured and recorded in the court records.
15 For you to help them, it's important for you to speak at a moderate pace. Do not
16 speak too fast and also do not speak too slow. It's also important for you to avoid
17 overlapping with the lawyer who is asking you a question, because the interpreters
18 and the court reporters are not in the courtroom. They cannot hear you directly.
19 They can only hear you through the microphone. So it's important that at all times
20 only one person is speaking on the microphone to avoid overlap.
21 When two people bump into each other in the microphone, then the interpreters
22 would not make out what is being said. So for us to avoid that bumping into each
23 other, it's important for you to observe a short gap between the completion of the
24 question being asked of you and you beginning to answer.
25 We try to observe what we call the five-second rule. That's in your mind you try

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 and count in your mind up to five quickly, one, two, three, four, five, something like
2 that, in your mind. So that creates enough gap for the next person who is
3 being -- who is speaking to be heard correctly.
4 I will leave it at that in terms of the introductory remarks. From time to time I may
5 need to remind you of some of these things.
6 But before I stop talking and turn over to the lawyers, there is one more matter and
7 that is the matter of identification. The Court has granted the Prosecutor's request
8 that your identity be protected while you are testifying. The reason for granting it
9 is -- or the purpose of that is to ensure that people who are listening from the public
10 or on television as the case is ongoing do not easily identify that it is you who is
11 testifying. So we're not using your real name. We're only using your pseudonym
12 and you will be referred to as "Witness 442."
13 You need to assist us in making sure that those measures work. You will need to
14 take care to avoid mentioning your real name in your testimony when we are in the
15 public session or the names of your relatives or close friends or where you live or
16 where they live or even certain information that is so unique that only you would
17 have been there when such an event happened or only you might have known about
18 it so that somebody else who knows that you know that information, when they hear
19 you testifying about it in public can say well, it could only be Witness 442 who is
20 testifying there, so they figure out who you are. Try not to give that sort of
21 information in your answer when we are in the public session.
22 Now, this does not mean that you don't tell us about those sorts of information,
23 including your name or names of relatives and friends, but it only means that when
24 there is a need for that sort of material, for that sort of information to be given by
25 you, we will go into private session when members of the public will not know or

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 hear what you're saying at all.

2 So with that in mind, I will now invite Ms Renton for the Prosecution to start asking
3 you her questions. As I said, from time to time we may need to remind you of some
4 of these things. Thank you.

5 Ms Renton. We're in public?

6 MS RENTON: Yes, we're in public. Thank you. I was just making sure that the
7 interpretation -- the Swahili interpretation had finished for the witness.

8 QUESTIONED BY MS RENTON:

9 Q. Witness, can you understand me and hear me clearly?

10 A. Yes, I can hear you.

11 MS RENTON: I'm going to start by asking for some personal details, and for that
12 reason I will ask the Judges if we can move into private session, please.

13 PRESIDING JUDGE EBOE-OSUJI: For how long do you think you will need to be
14 in there?

15 MS RENTON: Perhaps ten minutes.

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

17 (Private session at 12.05 p.m.) Reclassified into open session

18 THE COURT OFFICER: We're in private session, your Honours.

19 MS RENTON:

20 Q. Witness, do you have a piece of paper in front of you which says
21 "CV/Personal Information" at the top? If you have that in front of you, I'd like to
22 ask whether you're comfortable for you to read it to yourself or whether you would
23 prefer me to read it out to you and for you to confirm the information?

24 A. I would like you to read it out to me.

25 Q. That's no problem. I'll read it quite slowly and I'll ask you to confirm each

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

- 1 detail as I read it. The first is, is your name (Redacted)?
- 2 A. Yes, that is my name.
- 3 Q. Have you also used the names (Redacted)?
- 4 A. Yes, I also go by that name.
- 5 Q. Are you Kikuyu ethnicity?
- 6 A. Yes, I am of the Kikuyu ethnic group.
- 7 Q. Do you understand and speak the Kikuyu language?
- 8 A. Yes, I do understand and speak Kikuyu.
- 9 Q. Do you understand and speak the Swahili language?
- 10 A. Yes, I do understand Kiswahili and I speak Kiswahili, the language.
- 11 Q. Do you understand and speak the Nande language?
- 12 A. Yes, I do understand and speak Kinande.
- 13 Q. Do you understand and speak some English?
- 14 A. Yes, I do understand a little bit of English and I speak some English as well.
- 15 Q. Were you born in (Redacted)?
- 16 A. Yes, that is correct, going by what my parents told me (Redacted)
- 17 (Redacted).
- 18 Q. (Redacted)?
- 19 A. (Redacted).
- 20 Q. (Redacted)?
- 21 A. (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 (Redacted).
- 25 Q. (Redacted)?

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 A. (Redacted).

2 (Redacted)

3 Q. Witness, did you attend (Redacted)

4 (Redacted)?

5 MR HOOPER: Can you not lead on education, please. Thank you.

6 PRESIDING JUDGE EBOE-OSUJI: No, no, no. You can lead on education. We

7 note that you're not accepting that, but let her lead anyway. Yes.

8 THE INTERPRETER: The witness said "Yes."

9 MS RENTON:

10 Q. (Redacted)?

11 A. (Redacted).

12 Q. Did you attend (Redacted)?

13 (Redacted)

14 A. Yes. (Redacted).

15 (Redacted)

16 Q. (Redacted)

17 A. (Redacted).

18 Q. (Redacted)

19 A. (Redacted).

20 Q. Thank you for confirming that information, Witness. You can now put that

21 piece of paper just to the side of the desk and I will continue my questions.

22 MS RENTON: I have a few more questions in private session and then we can

23 move to public session, your Honours.

24 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

25 MS RENTON:

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 Q. Witness, you confirmed that you're of the Kikuyu ethnic group. How did
2 you come to understand and speak the Kinande language?

3 A. (Redacted)
4 (Redacted).

5 Q. Yes, Witness? Please proceed.

6 A. I think I did not explain properly. (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted).

10 Q. (Redacted)
11 (Redacted)

12 A. (Redacted).

13 Q. In the year 2007, where were you living?

14 A. I used to live in (Redacted), in Nandi county.

15 Q. How far is (Redacted) from the centre of Kapsabet town?

16 A. I think it is about (Redacted)
17 (Redacted).

18 Q. (Redacted).

19 (Redacted). Did you do that work in 2007?

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 Q. That's okay, Witness. The information that you've given us is fine for this
2 purpose. My next question is: Have you ever belonged to a political party?

3 A. Never. I have never belonged to any political party whatsoever. You see, I
4 had my personal issues to attend to and therefore did not belong to any political
5 party.

6 Q. Witness, I'll now ask the Judges to move into public session, so I'll remind you
7 to take care. The light in front of you will switch to red. I will be very careful in
8 my questions not to reveal any personal information, and I will ask that you follow
9 the Presiding Judge's instructions and take care not to do so in your answers.
10 Thank you.

11 MS RENTON: Your Honours, if we can move to public session.

12 PRESIDING JUDGE EBOE-OSUJI: We move to public session now.

13 (Open session at 12.22 p.m.)

14 THE COURT OFFICER: We're in open session, your Honours.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you. Ms Renton, proceed.

16 MS RENTON: Thank you, your Honours.

17 Q. Witness, because we've now moved to public session, I would ask that you be
18 very careful. Listen to my question. If possible answer yes or no, but just answer
19 the question that I have asked in order not to give any information that may identify
20 you. Do you understand?

21 A. Yes, I do.

22 Q. I'd like to ask you about Kapsabet town in 2007. Can you tell us which
23 ethnic groups lived in Kapsabet town at that time?

24 PRESIDING JUDGE EBOE-OSUJI: Ms Renton -- Witness, one second -- is there still
25 an issue about the composition of the town from the point of view of ethnicity?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 MS RENTON: I'd just like to ask two questions, your Honour. I believe that this
2 may assist the witness in answering the next one.

3 PRESIDING JUDGE EBOE-OSUJI: All right. Let's keep a close handle on that.
4 There was one announcement I forgot to make. This will be an appropriate time to
5 do so.

6 On Friday we will not be starting our hearing at 9.30 as usual. We would be
7 starting at 12, because the Katanga judgment is being delivered on that day and they
8 will be using this courtroom, and the smaller courtroom is not big enough for the
9 people involved in this case. So we start later.
10 Now, that creates some pressure on us in view of our schedule, indicated schedule
11 for the remainder of this period. Part of it may be addressed by our need to sit
12 extended hours, but that notwithstanding, we will be very keen in policing the
13 questioning in this case so that questions count. So we will not be drawing wide
14 berth to get to a point, if possible. Thank you.

15 MS RENTON: I'm guided, your Honours. I certainly don't want to lead in my
16 questions unless there are issues in which the Defence are happy for me to do so, so
17 that's how I prepared my examination. But certainly if I can speed it up or shorten
18 in any way, I will do my best.

19 PRESIDING JUDGE EBOE-OSUJI: The point is we need to make every question
20 count. That's all. Thanks.

21 MS RENTON:

22 Q. Witness, what were the -- what was the majority ethnic group that lived in
23 Kapsabet in 2007?

24 A. It was the Kalenjin.

25 Q. How many Kikuyus, if you are able to tell us, lived in Kapsabet town in 2007?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 A. I am not in a position to give you the exact number because I was not in a
2 position to know all of them. However, I can approximately say that there were
3 some 5 to 6,000 of them. But I cannot give you an exact figure because we did not
4 count all the Kikuyus at the time. All I can provide is an approximation.

5 Q. Thank you, Witness. Who were the Kapsabet councillors in 2007? I'm
6 asking about the councillors specifically.

7 A. At that time the councillors were the following Nyondo, Ishmael, Abdi,
8 Abembe (phon) and Talam. Correction -- small correction. You see, at that time
9 there were other councillors in addition to those whom I have already mentioned
10 and who were indeed running for the position of councillor on the ODM political
11 party ticket.

12 Q. Witness, what is the ethnicity of Councillor Nyondo?

13 A. He's Kalenjin.

14 Q. And Councillor Ishmael?

15 A. He too is Kalenjin.

16 Q. Councillor Abdi, what is his ethnicity?

17 A. He is Kalenjin.

18 Q. Councillor Pembe (phon)?

19 A. He is also Kalenjin.

20 Q. And Councillor Talam?

21 A. He too is Kalenjin.

22 Q. In 2007, who was the area nominated MP for that area?

23 A. I think there were many of them. We had Elijah Lagat and then someone
24 known as Cheruiyot. I did not know all of them. I knew only some of them. I
25 knew Elijah Lagat. I also knew the one known as Cheruiyot. I know that -- I

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 believe that he was the son of a former MP for Tinderet. There was also Tarus.

2 Q. What was the ethnicity of Elijah Lagat?

3 A. He was a Kalenjin.

4 Q. And Cheruiyot and Tarus, what ethnicity were they?

5 A. All of them were Kalenjin.

6 Q. I'd like to ask you some more details about some of these people but not all of
7 them. Councillor Nyondo, what can you tell the Court about him?

8 A. I'm sorry, I did not quite understand your question. What do you want to
9 know? His character? His way of living? I did not quite understand what you
10 want me to tell you.

11 Q. My mistake, Witness. Thank you. I will ask another question. Do you
12 know how long Nyondo was involved in politics?

13 A. I do remember that in 2002 he was into politics. I believe that he started
14 politics in 1999. That is what I think.

15 Q. Have you had any interaction with him? If you could just answer yes or no.
16 Thank you, Witness.

17 A. No.

18 Q. Are you aware whether Councillor Nyondo has a relationship with
19 Mr William Ruto?

20 A. I really cannot explain the relationship that this person had with Ruto,
21 because I was not very close to that person. I was not involved in politics, so I
22 really cannot tell you whether those people had any links or not.

23 Q. I'd now like to ask you some questions about Elijah Lagat. Do you know if
24 Mr Lagat and Mr Ruto had a political relationship?

25 MR HOOPER: Can I just interrupt here to say that there's an element of leading.

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 There's a qualitative element of leading in these questions. It is possible to
2 approach this kind of subject with a more open question, time saving or not.

3 PRESIDING JUDGE EBOE-OSUJI: The question was whether the witness knows if
4 there was any -- the question is allowed.

5 MS RENTON: Your Honour, thank you.

6 Q. Witness, I'll repeat my question. Do you know if Mr Lagat and Mr Ruto had
7 a political relationship?

8 A. As far as I know, both of them belonged to the same political party, the ODM,
9 but beyond that I cannot say much more, given that I didn't attend their meetings to
10 know whether he had any further links with Mr Ruto.

11 Q. Thank you, Witness. Which party was Tarus campaigning for?

12 A. I believe that Mr Tarus was in the PNU camp.

13 MS RENTON: Your Honour, I'd just like to ask one question in private session,
14 please.

15 PRESIDING JUDGE EBOE-OSUJI: Private session.

16 (Private session at 12.37 p.m.) Reclassified into open session

17 THE COURT OFFICER: We're in private session, your Honours.

18 MS RENTON:

19 Q. Witness, who was the area chief in 2007?

20 A. (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 MS RENTON: Thank you. Your Honours, we may move back into public session.

3 PRESIDING JUDGE EBOE-OSUJI: Public session.

4 (Open session at 12.39 p.m.)

5 THE COURT OFFICER: We're in open session, your Honours.

6 MS RENTON:

7 Q. Witness, did you listen to the radio in 2005?

8 A. Yes. Yes. I liked to listen to radio broadcasts. I listened to Kass FM and
9 Citizen Radio.

10 Q. Which programmes did you listen to on Kass FM?

11 PRESIDING JUDGE EBOE-OSUJI: In 2005?

12 MS RENTON: Sorry, yes.

13 Q. In 2005.

14 A. We listened to a programme hosted by Sang. Frequently in the mornings
15 there were programmes during which advice was given to farmers, and later on
16 Sang would host a programme. I do not know what the name of that programme
17 was. It was known as Lene Emet, which means the country.

18 Q. Witness, you've told us that sometimes the programs would give advice to
19 farmers. What others topics were discussed in 2005 by Joshua Sang?

20 A. I think that in 2005 Kenyans were about to vote a new constitution. Just a
21 moment. I would like you to kindly repeat your question once again. I want to
22 better understand it before giving you an answer.

23 Q. No problem. My question was: What other topics aside from farmer advice
24 were discussed in 2005 by Joshua Sang?

25 A. Which period are you referring to, that is during that year 2005? There is

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 early 2005, mid-2005 and the end of 2005. I would know -- I would like to know
2 which specific period you are referring to.

3 Q. Witness, you mentioned that in 2005 Kenyans were about to vote a new
4 constitution. Did Mr Sang talk about this topic on the radio?

5 A. Yes. In 2005 Kenya had to vote a new constitution. We had two
6 constitutions on the table. There was the Bomas constitution and another
7 constitution, the title of which I no longer remember. So we had to choose between
8 two constitutions, and there were discussions on this. Kivuitu made a proposal.
9 He took an orange in one hand and a banana on the other hand. The banana
10 represented yes and the orange represented no.

11 PRESIDING JUDGE EBOE-OSUJI: Witness, you remember the advice I gave you
12 earlier to listen carefully to the question and answer just that question. Don't worry
13 about giving a lot of details to your answer. The lawyer knows what questions to
14 ask and what they're looking for in asking you questions. If they ask -- if you
15 answer a question and they feel that you've been too brief and they want you to give
16 more details, they will ask you for more details. But what's important is for you to
17 listen to the question asked and answer that question.

18 What Ms Renton had asked you was whether Mr Sang had discussed about the new
19 constitution that Kenya was about to vote in 2005, whether he had that discussion on
20 his radio station. Can you answer that?

21 THE WITNESS: (Interpretation) Yes, he talked about it.

22 MS RENTON:

23 Q. Witness, you told us that there were two sides, the orange side and the
24 banana side. Which side did Mr Sang promote or discuss and talk about on his
25 radio show?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 MR KIGEN-KATWA: Mr President, I would object to that question. It
2 presupposes that Mr Sang had taken a position, and we would object to that
3 question as leading.

4 PRESIDING JUDGE EBOE-OSUJI: Ms Renton?

5 MS RENTON: Yes, sorry. I realised as I was speaking. I'll rephrase that.

6 Q. Did Mr Sang have any position on which side to vote for the constitution?

7 A. Yes, he had one.

8 Q. Which position did he have?

9 A. His position was the orange.

10 Q. Did he discuss why his position was the orange?

11 A. Yes, he explained it.

12 Q. Please tell us what he explained.

13 A. Mr Sang talked about that constitution. I think that the Kass FM radio
14 station was in the ODM camp, in fact, in the orange camp. He was appealing to the
15 members of the population to reject that constitution, because according to them,
16 that constitution was going to bring about radical changes. I remember that at one
17 point there were discussions when Mr Sang was discussing with someone, a man
18 from Kapsoit. They were analysing that constitution, and they said that the
19 constitution was not good because it would authorise women to have land rights,
20 and they also said that that constitution was meant to grab the Kalenjin land away
21 from the Kalenjin people and so it was necessary to reject that constitution.

22 Q. The man from Kapsoit that Mr Sang was discussing with, was he a guest on
23 the show, was he a caller on the show or something else?

24 A. I think that at that time anyone could call in by phone to make their positions
25 known, so they were discussing that constitution. This person called in on the

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 phone. There were three people who frequently called and asked questions. He
2 was not someone who had been invited to the studio. I simply listened to their
3 discussions which they were having over the phone.

4 PRESIDING JUDGE EBOE-OSUJI: Over the phone or over the radio? Oh, sorry.
5 Can you have that -- so it was a phone-in. I see. Okay.

6 MS RENTON: That's my understanding, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: That's all right.

8 MS RENTON:

9 Q. Witness, you've said that Mr Sang said the constitution was meant to grab the
10 Kalenjin land away from the Kalenjin people. Did he say who would take the land
11 away?

12 A. Yes. He said that. According to several people, including myself, that
13 constitution was known as the Kibaki constitution. And so when this happened,
14 they said that the Kikuyu people were very numerous, and so if the constitution was
15 voted in, no one would be allowed to have more than 30 acres. So they had to do
16 everything to ensure that that constitution was not accepted, otherwise their land
17 would be taken away from them.

18 Q. Witness, you've mentioned that people would call into the station. How did
19 they react? What did they say when they called in about the constitution?

20 A. They were angry when they called. Someone would even say that our
21 population had to be sensitised so that people should understand. There were
22 people who discussed that population very, very passionately.

23 THE INTERPRETER: They discussed the constitution. Correction.

24 MS RENTON:

25 Q. Witness, did Mr Sang ever invite guests on to the radio show?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 A. I remember that there were many guests who were invited. At one point
2 Uhuru was invited. Ruto was also a guest, as well as Raila. So he invited several
3 people.

4 Q. What did Mr Ruto talk about when he came on to the radio show?

5 A. They talked about that constitution. They analysed the constitution in detail.
6 And after their discussions, Ruto himself said this, "I'm asking you, my brothers, let
7 us reject this constitution. Let us protect our assets or our wealth." This is what I
8 heard.

9 Q. Witness, you mentioned this Mr Sang invited Uhuru. Which camp was
10 Uhuru affiliated with in respect of the constitution?

11 A. At that time Uhuru was in the Orange camp.

12 Q. Witness, you've mentioned that Mr Ruto said, "I'm asking you, my brothers,
13 let us reject this constitution. Let us protect our assets or our wealth." Who did he
14 mean when he was referring to "my brothers"?

15 A. Based on what he was saying, I do not know which group he was referring to.
16 Was he saying that it was the Kalenjin who had to protect their assets, or was he
17 referring to Kenya as a whole? When he said "my brothers," I did not understand
18 what he meant by that.

19 Q. Which language did Mr Ruto speak when he appeared on Mr Sang's show?

20 A. Mr Ruto spoke in Kalenjin and later on he spoke a little bit of Swahili.

21 Q. Witness, did Kass FM continue broadcasting throughout the entire year 2005?

22 A. I think that the campaign continued up 'til November. The campaign ended
23 in November -- or, rather, I'm sorry. The campaign continued up to about
24 December and then the referendum took place and that particular issue came to an
25 end.

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: Ms Renton.
- 2 MS RENTON: I note the time. We can take a break now, if that's --
- 3 PRESIDING JUDGE EBOE-OSUJI: We can? All right.
- 4 Witness, we will take our lunch break now, and you will be rejoining us at 2.30.
- 5 And during that time, during your break, please do not discuss your testimony with
- 6 anybody. Thank you.
- 7 The court officer will bring down the blinds so that the witness will be ushered out
- 8 of the courtroom.
- 9 (Closed session at 1.00 p.m.) Reclassified into open session
- 10 THE COURT OFFICER: We are in closed session, your Honours.
- 11 (The witness stands down)
- 12 PRESIDING JUDGE EBOE-OSUJI: Court will rise. Oh, before we rise,
- 13 Mr Kigen-Katwa is on his feet.
- 14 MR KIGEN-KATWA: Yes, Mr President. I just wanted to inquire from Ms Renton,
- 15 I know it's so early, but whether she has an idea of how long she will take so
- 16 that -- for planning purposes on our side.
- 17 PRESIDING JUDGE EBOE-OSUJI: Ms Renton can assist.
- 18 MS RENTON: Yes, two days from when I started. So I'll finish the first session of
- 19 Thursday that would be.
- 20 PRESIDING JUDGE EBOE-OSUJI: Court will rise.
- 21 THE COURT USHER: All rise.
- 22 (Recess taken at 1.02 p.m.)
- 23 (Upon resuming in open session at 2.36 p.m.)
- 24 THE COURT OFFICER: All rise. Please be seated.
- 25 PRESIDING JUDGE EBOE-OSUJI: Thank you very much, court officer.

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 Witness, welcome back to the witness stand or to the seat, rather. Ms Renton will
2 continue asking you questions.

3 MS RENTON: Thank you, your Honour.

4 Q. Witness, I just have one or two more questions about what we were
5 discussing before the lunch break. I asked you a question about what was said on
6 Mr Sang's radio programme about taking the land away from the Kalenjin people. I
7 asked you, "Did he ...", meaning Mr Sang, "... say who would take the land away?"
8 And your response was, "Yes, he said that. According to several people, including
9 myself, that constitution was known as the Kibaki constitution; and so when this
10 happened, they said that the Kikuyu people were very numerous, and so if the
11 constitution was voted in, no one would be allowed to have more than 30 acres."
12 My question is: What was Mr Sang's view about what would happen to the land if
13 the constitution was changed?

14 A. Could you please ask your question again so I can understand properly?

15 Q. Yes. My question is, you referred to what other people thought would
16 happen if the constitution was passed, my question is: What did Mr Sang say about
17 what his thoughts were if the constitution was passed in terms of land rights for
18 Kalenjins?

19 A. I think that when Mr Sang was campaigning for the referendum to ensure
20 that it not pass, in actual fact he thought that if the constitution was approved, the
21 Kalenjin would lose their land, and he demonstrated to what extent that constitution
22 was a bad thing.

23 A young Kalenjin woman would ask for land back in her home area. So he said the
24 constitution wasn't good at all, and people shouldn't vote for it. For most people,
25 including myself, we said to ourselves that what was being said and what was being

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 broadcast or what was being aired when the campaign continued, many people
2 would swear at us and say that Kibaki wanted the constitution to be changed so that
3 we could have -- so that we could get lots of land, and that we would breed like
4 mice, we would have all these children. When the time came to vote on the
5 constitution, there were a great many problems. Some people didn't even sleep in
6 their own houses the night before. We were afraid, because the Kalenjin were
7 saying that we wanted the constitution because we saw what our interests were,
8 where our interests lay.

9 So a time came when the president realised, realised the problem in the Rift Valley.
10 And when we went to vote, we heard many people saying that Kibaki had sent his
11 young people, the young machuki (phon). And when we asked who that was, we
12 were told it meant soldiers who had come to ensure that the place was safe. So in
13 the final analysis, we were able to sleep, because we thought that there was a bit of a
14 lull.

15 In actual fact, the constitution said that if you belonged to the banana side, you had
16 to go towards Kibaki in the north; and if you were on the orange side, you had to
17 stay with -- you had to live in the Rift Valley. And that was a problem for me as a
18 Kikuyu person.

19 Q. Thank you, Witness. If I could go back to one thing that you said in that
20 answer, you said that the Kalenjin would lose their land. That was something that
21 Mr Sang was campaigning for if the referendum was passed. Who would the
22 Kalenjin lose their land to? Did he say that?

23 A. In actual fact, that policy was only based on one thing, because Kenyan law is
24 a kind of law that protects, that protects human rights and --

25 THE INTERPRETER: Overlapping speakers.

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Witness, the question Ms Renton asked you was
2 whether Mr Sang had indicated or whether he had said to whom the Kalenjins
3 would lose their land if the constitution was adopted in 2005. Can you just answer
4 just that question if you know the answer? If you don't, of course, you're free to say
5 you don't know the answer, but do you know? You said you listened to Mr
6 Khan -- Mr Sang at the time, did he indicate to whom the Kalenjins would lose their
7 land?

8 THE WITNESS: (Interpretation) The children of the uncle or the children of the
9 maternal uncle, in other words, the cousins, they would benefit.

10 MS RENTON:

11 Q. Who are the children of the uncle or the cousins? Who are those people?

12 A. The children of the maternal uncle are people from the Kikuyu group. Most
13 times the Kalenjin call us the children of the maternal uncles. At that time they
14 would refer to us in that way.

15 Q. Witness, what is the Kalenjin word?

16 A. In the Kalenjin language we say "kamama." They say "wachu kamama" or
17 the people that are called to waki --

18 THE INTERPRETER: Swahili spoken.

19 MS RENTON:

20 Q. Witness, just so the witness is very clear, could you just repeat the last part of
21 your answer? We have you say "kamama," but then we missed, missed what you
22 said after that. Could you just repeat?

23 A. Yes, I can repeat it. They said "kamama," in other words, the children of the
24 maternal uncles. They were also referred to as wakina mjomba. That means when
25 people talk about kamama, you must realise that that means people from the Kikuyu

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 ethnic group.

2 PRESIDING JUDGE EBOE-OSUJI: Ms Renton, if you know the spelling of those
3 terms, you can put them on the record yourself.

4 MS RENTON: "Kamama" I think is correct, but I'm actually not sure of the spelling
5 of the other terms that the witness used.

6 PRESIDING JUDGE EBOE-OSUJI: Witness, when was the other -- the lawyer is
7 saying she's got the spelling of "kamama." But there is another expression you
8 used. Was that a Kiswahili word or Kiswahili phrase?

9 THE WITNESS: (Interpretation) Yes. I said "kamama." That was the name that
10 was given to us. And I explained it in Swahili, "kamama," that is to say the children
11 of the wakina wajombe. They used the word "kamama."

12 PRESIDING JUDGE EBOE-OSUJI: "Wakina wajombe," was that what you said?

13 THE WITNESS: (Interpretation) Yes.

14 PRESIDING JUDGE EBOE-OSUJI: You can proceed. I believe that we have the
15 phonetic for it. I know you have your Kiswahili interpreter behind you. Perhaps
16 he can assist.

17 MS RENTON: Wakina, W-A-K-I-N-A, new word wajombe, W-A-J-O-M-B-E.

18 MR KIGEN-KATWA: Mr President, may I intervene at this point? The witness
19 definitely said "mjomba," and that is simply an uncle, it's the Kiswahili word for
20 "uncle," simply it.

21 PRESIDING JUDGE EBOE-OSUJI: But when the witness said "wakina wajombe,"
22 did she say that?

23 MR KIGEN-KATWA: Yes, she did, Mr President.

24 PRESIDING JUDGE EBOE-OSUJI: Okay.

25 MR KIGEN-KATWA: And the spelling is different from what has been spelled.

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 The spelling is M-J-O-M-B-A.

2 PRESIDING JUDGE EBOE-OSUJI: My limited Swahili tells me that it is singular,
3 isn't it?

4 MR KIGEN-KATWA: Yes, that is singular. And if it was plural you would have
5 W-A at the start.

6 PRESIDING JUDGE EBOE-OSUJI: I thought that was what Ms Renton had spelled.
7 Yes, all right. We can continue.

8 MS RENTON:

9 Q. Thank you, Witness. Going back to one of your earlier answers, you referred
10 many times to "us" and to "we," for example, when you said, "We were afraid.
11 Many people would swear at us. We could get lots of land. We would breed like
12 mice. We would have all these children." Who are you referring to when you say
13 "we" or "us"?

14 A. I was talking about people from the Kikuyu ethnic group.

15 Q. Witness, I'd now like you to turn your mind to the year 2007. Were you
16 present at any rallies or political gatherings during the year 2007?

17 A. I don't think I took part in a political rally.

18 PRESIDING JUDGE EBOE-OSUJI: In our discussion earlier, what I told you earlier,
19 listen to the question and answer it. If you listened carefully, you will see that the
20 answer to some of the questions could simply be "Yes" or "No." And then if that
21 isn't enough of an answer to the question, the lawyer will ask you more questions
22 about that if she's not -- if she wants more.

23 So the question this time was: Were you present at any political gatherings in 2007?

24 A. No.

25 Q. Were you present when any political speeches were made in the Kapsabet

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 area?

2 A. Yes.

3 Q. Without giving me any more detail at the moment, can you give me some of
4 the locations where you were when political speeches were made? And I'll ask you
5 some more questions after that.

6 A. There was one gathering that I attended at which the ODM delegates came to
7 Kapsabet.

8 Q. Which location? Where was that?

9 A. They went to Kipchoge stadium.

10 Q. Who went to Kipchoge stadium?

11 A. The ODM delegates.

12 Q. Can you recall which ODM delegates went to that stadium?

13 A. I remember some of them.

14 Q. Can you give us the names of those that you remember?

15 A. Yes. I remember the ones that I saw. I saw Henry Kosgey. I saw Elijah
16 Lagat. What's more at that particular time Raila was there as well. I also saw a
17 member of parliament, Arap Moi.

18 There were a great many delegates. I wasn't able to recognise all of them, but I
19 didn't spend a lot of time there, because I was just passing by, you see. I was able to
20 see those people who I've just mentioned, but there were a great many people
21 because, you see, it was all the ODM delegates.

22 Q. Do you recall when in 2007 this happened? Even an estimate would be
23 helpful if you can.

24 A. I beg your pardon? Could you repeat so I can understand properly?

25 Q. When in 2007 did this happen?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 A. I don't remember the exact date, but it was between November -- October,
2 rather, and September. I don't remember exactly what the date was.

3 Q. Did any of the ODM delegates make speeches that you heard?

4 A. Would you please kindly repeat your question so that I may understand it?

5 Q. Did any of the ODM delegates make speeches, and if so, which ones?

6 A. Yes, the delegates made some speeches, and I do remember that yes, yes,
7 they, they made some speeches, yes, that is true.

8 Q. Please tell us the names of some of the people that spoke.

9 A. Mr Kosgey spoke, Raila also spoke, as well as Ruto. When Ruto was
10 delivering his speech, I had moved forward somewhat, and I was able to hear the
11 speeches that were delivered by Mr Kosgey and Raila.

12 Q. What did Mr Kosgey say when he gave his speech?

13 A. Mr Kosgey said the following: We need to support each other and kick out
14 those who took power and who belong to one ethnic group. He said that the
15 Kikuyus who were going to be part of the government, rather, that they
16 would -- that if the Kikuyu came to take power, they would urinate on them.

17 Q. Who would the Kikuyu urinate on?

18 A. The names were not mentioned. But he simply said "They had pissed on us"
19 or "They had urinated on us."

20 Q. Who was he referring to when he said "us"?

21 A. Going by what he said, he was referring to the Kikuyu when he said that if
22 Kikuyu were going to continue in power, they would urinate on the Kalenjins. That
23 was my understanding of what he meant.

24 Q. Were you -- do you know whether Mr Ruto said anything at this time or at
25 this event, rather?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 A. No, I do not know. I had moved forward somewhat and I know that he
2 delivered a speech, but it is Raila's speech which I listened to.

3 Q. What did Raila say when he gave his speech?

4 A. Raila asked the people to be united. He called on the people to be united and
5 to kick out those who had been in power and who belongs to a particular ethnic
6 group. He went on to say the following: Even if they try to steal or to rig the votes
7 or the elections, there will be a tsunami.

8 Q. What was the reaction of the crowd when these speeches were made?

9 A. When Mr Raila delivered that speech -- in fact, before his speech, Kosgey had
10 said that we were going to urinate on them, and this brought a lot of applause from
11 the crowd and excitement within the crowd. And when they were asked whether
12 they would accept that, they said no. Now, when Raila spoke and said that there
13 would be a tsunami, people were very happy and they applauded extensively at that
14 time. Now, the word "tsunami" then became popular and was used all over the
15 place.

16 Q. Which people used that word after it was said by Mr Raila?

17 A. Those who started to use that expression were the Kalenjins, the Luos and
18 some Luhyas as well. They too also used that expression.

19 Q. What was the majority ethnic group of the people in the crowd?

20 A. When he was delivering his speech, the majority were Kalenjini, but some Luo
21 people who were returning from work were also there to listen to Raila's speech.

22 Q. Was this the only occasion in 2007 where you were present for speeches made
23 by political figures in the Kapsabet area?

24 A. Other rallies took place in town, and during the campaigns as well, and also
25 in the countryside.

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 THE INTERPRETER: Correction from the interpreters: "So when the delegates
2 left, we remained behind with the chiefs and the delegates as the campaigns were
3 ongoing."

4 MS RENTON:

5 Q. Did you attend any of these other rallies that took place in town?

6 A. Well, there came a time when I was passing by some location at around 7.30
7 p.m. on my way back from work. I found that some councillors had gathered
8 together and were discussing ODM politics. So what I can say is that there were
9 rallies here and there. Even after the elections, some rallies also took place even
10 after the elections.

11 MS RENTON: Your Honour, if I could just move into private session for one or two
12 questions with your leave?

13 PRESIDING JUDGE EBOE-OSUJI: Private session.

14 (Private session at 3.10 p.m.) Reclassified into open session

15 THE COURT OFFICER: We're in private session, your Honour.

16 MS RENTON:

17 Q. Witness, what was the location of where you found the councillors gathered
18 together?

19 A. The councillors held meetings here and there and were able to meet at the
20 petrol station. And I know that there was another meeting of councillors at the
21 Keben hotel while other meetings took place at Nyondo's house, that is meetings of
22 councillors.

23 In a nutshell, therefore, the rallies or meetings that took place in town were at the
24 petrol station and at the Keben hotel. (Redacted), rather,
25 talked about these various rallies. And whenever a rally had taken place around

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 5.30 p.m., (Redacted). Now, when we asked them why they were
2 (Redacted), they told us that is just because they were going to rallies, and
3 that is how we found out that some rallies had taken place.
4 I also met some councillors at around 7.30 p.m. one evening at a building, a building
5 belonging to teachers. Across from that teachers' building, there were a number of
6 shops, and it is at that specific location that those people were positioned and having
7 their discussions.
8 Then there was a time also on one day at around 6.30 p.m. that they met at the bus
9 station having a discussion. I also witnessed another meeting that took place close
10 to the market square, near the shops located close to the market square. These are
11 the rallies which I witnessed myself, but the fact remains that several rallies were
12 held and people often said that they were going to attend a rally here and there. So
13 I don't know whether those rallies were held on a daily basis. What I have talked to
14 you about mainly is the rallies that I witnessed myself.

15 MS RENTON: Your Honour, we can move back to public session.

16 THE INTERPRETER: From the Swahili interpreter: The petrol station is called the
17 Sasa petrol station.

18 (Open session at 3.14 p.m.)

19 THE COURT OFFICER: We're in open session, your Honours.

20 MS RENTON:

21 Q. Witness, I'd like to ask you specifically about the event that happened at 7.30
22 p.m. where you found councillors gathered together discussing ODM politics. Can
23 you recall approximately what date that took place?

24 A. I am not able to remember the date. However, I can say that it was in the
25 month of October.

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 Q. October 2007; is that correct?

2 A. Yes.

3 Q. Which councillors did you see gathered there?

4 A. Councillor Nyondo, Ishmael, and Abdi. There were many people in
5 attendance as well.

6 Q. Did you hear what any of the councillors were saying?

7 A. Those councillors were talking openly, without hiding anything. They
8 openly declared that anyone who did not rally behind them would have to leave.

9 Q. If I could just ask you specifically can you recall, for example, what Councillor
10 Nyondo said?

11 MR HOOPER: Can I just ask my friend, can you let me have a reference in the
12 statement which provides the notice to us, of course? Can you give me a paragraph
13 in the statement that refers to this?

14 MS RENTON: For my learned friend the reference in the statement is paragraphs
15 61 to 67, although some of the details were clarified by the witness in the preparation
16 session.

17 PRESIDING JUDGE EBOE-OSUJI: Proceed, Ms Renton.

18 MR HOOPER: I'm very concerned because this appears to be completely different,
19 in fact, post -- post-election meeting, isn't it?

20 PRESIDING JUDGE EBOE-OSUJI: Ms Renton, proceed.

21 MS RENTON: If you'll just allow me one minute to find my place again.

22 Q. Witness, you've mentioned that Councillor Nyondo, Ishmael and Abdi,
23 amongst many other people, were in attendance and that you heard them talking
24 openly. Did you hear what, if anything, Councillor Nyondo specifically said?

25 A. Yes.

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 Q. Please tell us.

2 A. During the rally at that location, Councillor Nyondo spoke and said the
3 following: "There are enemies within us. There are enemies within us, in our
4 midst." And when asked who the enemy was, he answered: "Don't you know
5 them?"

6 At that time nothing was unknown to those councillors. They did not have any
7 secret discussions. The discussions were in the open. Even if you were Kikuyu,
8 they did not hide anything from you. They simply told you, "You are going to have
9 to go and live with Kibaki." You see, at that time politics was played quite openly.
10 So they said that there were enemies within their ranks at the time we were there.

11 Q. When he said "there are enemies in our midst," what did you understand him
12 to mean by that?

13 A. I understood that to -- in fact, within the prevailing circumstances, I
14 understood that to mean that the Kikuyu were the enemy. We were the enemy.
15 And why? Because it is when we arrived at that location at that specific time that
16 they changed their language and then went on to say that there were enemies
17 amongst them.

18 Furthermore, they used a Kalenjin word when we were there, that is at that location,
19 and we promptly understood what they meant.

20 Q. What was the Kalenjin word that they used?

21 A. When we arrived at that location, they said that those who have horns have
22 arrived, the people with horns had arrived. And so when they said those who have
23 horns, I personally immediately understood what they meant by that.

24 Now, I say so because quite often during the meetings that they held in secret, they
25 would ask questions to themselves to try to find out whether anyone with horns was

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 present in their midst. And when they were sure that there was no one with horns
2 in their midsts, then they would proceed freely to hold their meetings.

3 Now, when they said at that specific time that the people with horns had arrived at
4 that location, I immediately understood that they were referring to us.

5 MR HOOPER: Can I just -- sorry to interrupt. Can I just ask my friend again to
6 refer us to any reference to horns in the statement or corrections.

7 MS RENTON: There is no reference, but I'm obviously not asking leading
8 questions, and I can't control nor would I want to control the evidence that the
9 witness is giving. I'm asking questions based on the information that I have, and I
10 think that's all that I can do.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

12 MR HOOPER: Well, I think it's just significant to make the point while the evidence
13 is being given that this is the first time that any of this has ever been said, despite the
14 fact this witness spent 45 hours with the Prosecution, despite the fact she spent 9
15 hours last week. This is the first time that anything like this has been said.

16 MS RENTON: Sorry, your Honours, I think that's a matter that my learned friend is
17 more than entitled to take up in cross-examination. I don't intend to pursue it now.

18 PRESIDING JUDGE EBOE-OSUJI: So you're letting rest the matter of people with
19 horns?

20 MS RENTON: Yes, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: All right. Then proceed.

22 MS RENTON:

23 Q. Witness, when you talk about "them" and "us," who are you referring to?

24 A. Kikuyu.

25 PRESIDING JUDGE EBOE-OSUJI: I think it's more who do you mean by "us"?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 THE WITNESS: (Interpretation) Please kindly repeat your question and then I'll
2 provide an answer.

3 PRESIDING JUDGE EBOE-OSUJI: The question is, in your last few answers, you
4 had used the expression "us." And the question is who do you mean when you said
5 "us"?

6 THE WITNESS: (Interpretation) I'm referring to the Kikuyu.

7 MS RENTON:

8 Q. And who are you referring to when you say "they"?

9 A. Please kindly repeat your question and provide me the context in which I said
10 "them" and "us" so that I am in a position to provide a clear answer.

11 PRESIDING JUDGE EBOE-OSUJI: Ms Renton, let me do this.

12 Witness, you've told us that when you said "us," you were referring to Kikuyus.

13 Again, along the lines of the question I asked you, you remember you'd said "them,"
14 and you said "us." You've now told us that "us" meant Kikuyus. Who do you
15 mean when you were referring to "them" or "they"?

16 THE WITNESS: (Interpretation) I think that there were two different groups.

17 There was the Kalenjins and then there was us, the Kikuyu. In my statement or my
18 testimony, when I say they are coming or have arrived, I would be referring maybe
19 to Kikuyus. And it is only within a specific context that I might be able to tell you
20 who I'm referring to, and that's why I've asked for the question to be repeated so that
21 I can understand the exact question -- context.

22 PRESIDING JUDGE EBOE-OSUJI: Ms Renton, I think the witness has a point
23 actually, because depending on the context, it may be -- indicated group may be
24 broader. It may also be smaller, depending on who was involved in any discussion
25 at the time.

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 MS RENTON:

2 Q. That's very fair. Witness, one of the examples in an answer that you gave
3 earlier is you said "quite often during the meetings that they held in secret." Who
4 are you referring to when you say they held secret meetings?

5 A. Okay. Now I understand you. I was referring to the Kalenjins, to the
6 Kalenjin councillors who were holding secret meetings.

7 Q. Thank you for clarifying that, Witness.

8 I'd now like to move to the time of the election at the end of 2007.

9 MS RENTON: Your Honours, if I could just move into private session for a few
10 minutes.

11 PRESIDING JUDGE EBOE-OSUJI: Private session.

12 (Private session at 3.31 p.m.) Reclassified into open session

13 THE COURT OFFICER: We're in private session, your Honours.

14 MS RENTON:

15 Q. Witness, the election day was 27 December. Did you cast a vote on that day?

16 A. Yes, I voted.

17 Q. At which location did you vote?

18 A. I voted at (Redacted). There were -- correction -- there was a
19 polling station there.

20 Q. What was the atmosphere like at the polling station at (Redacted)
21 (Redacted) on that day?

22 A. I woke up in the morning at 6 a.m., and I got to the place and lined up.
23 There were many people. Everyone wanted to vote and then go off and carry about
24 his or her business. There were observers, of course. They were watching how the
25 election was unfolding. There were people from the PNU, and they were handling

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 the voting, the PNU. There were also people from ODM who were handling the
2 votes of their party. When we got there, we voted. Even KANU, even those
3 supporters were lining up. There were people who were saying: "Yes, I know
4 you're going to vote for Kibaki. Go ahead, but you must realise that later you'll
5 see." So I kept on going. I went and I voted. I'm talking about my own particular
6 case. So I went and voted.

7 After I voted, you must realise that the observers were just Kalenjin. And I saw that
8 with my own eyes. So I was saying that I went and I voted, and I went back to the
9 (Redacted). (Redacted). And then I went back home to my
10 house. Along the way, along the way back home --

11 PRESIDING JUDGE EBOE-OSUJI: For the record, I see now the witness with a
12 hand, movement of a hand to stop.

13 Now, Ms Renton, continue. Ask pointed questions so we can get this thing moving.

14 MS RENTON: Thank you, your Honour.

15 Q. Witness, when you were at the polling station and the people said, "I know
16 you're going to vote for Kibaki. Go ahead, but you must realise that later you'll
17 see." I have two questions about that, my first is which people said that?

18 A. Many people were lining up, men, women. It was quite a long line-up.
19 There were all kinds of people there. That is why I had got up early to go and vote.
20 Before the actual voting day there was something abnormal, something not right
21 going on amongst us, amongst the Kikuyu. The Kikuyu, we -- you see, we live
22 together, and we said to one another that we need to get up very early that morning
23 and go vote and then go back home, go back home.

24 Q. Witness, if I could just ask you to pause for a moment and remember his
25 Honour's instruction to listen very carefully to the question that I ask and do your

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 best to answer that question. If I need more detail, I'll ask another question.

2 So my question to you was: Who told you if you're -- "I know you're going to vote
3 for Kibaki. Go ahead, but you must realise that later you'll see"? My question is
4 who specifically said that?

5 A. Some young people behind us where we were lining up. There were
6 women. There was even one (Redacted)
7 (Redacted) was speaking in Kalenjin. I didn't pay any particular attention. I
8 thought it was a joke. But people behind me said, "You see, this is what happens.
9 This is what you get with Kibaki."

10 Q. What were the ethnicity of those people who were behind you in the line?

11 A. They were Kalenjin.

12 Q. And what did you think, what did you understand them to mean when they
13 said: This is what happens. You will see later.

14 A. I haven't understood your question. Please ask your question again so I can
15 understand properly.

16 Q. When the people said to you "... you must realise that later you'll see, " and
17 "...this is what happens, " what did you think when they said these things to you?
18 What did you understand them to be saying?

19 A. I would say that those words meant that they already had seen the dangers
20 coming, the dangers during that campaign. There were many warnings at that
21 time. So by saying those words I realised immediately what they meant by it.

22 Q. What did they mean according to your understanding?

23 A. Even beyond me the other people knew as well. We knew that if Raila were
24 to win or lose we would have to go away. I already had that information. So
25 when they said those things I was not surprised because we already knew, we

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 already were well aware of that. I knew that already there was a plan that had been
2 concocted. No matter how I voted, I knew what was going to happen. Nothing
3 was going to change.

4 Q. You said, "We knew that if Raila were to win or lose, we would have to go
5 away." Who do you mean when you say "... we would have to go away"?

6 A. The Kikuyu and the Kisii.

7 MS RENTON: Your Honours, we can move back into public session now.

8 PRESIDING JUDGE EBOE-OSUJI: Public session.

9 (Open session at 3.43 p.m.)

10 THE COURT OFFICER: We are in open session, your Honours.

11 MS RENTON:

12 Q. Witness, did you follow the counting and the announcement of the results of
13 the election?

14 A. Yes, I did.

15 Q. How were you following the counting and the announcement?

16 A. By that time, all the media were announcing the results, the votes obtained by
17 Raila and Kibaki. So, yes, I did follow the counting of the votes.

18 Q. And which media did you follow?

19 A. I was listening to Citizen, sometimes Kass FM and Bakayata Naroiyo (phon).

20 Q. Did you listen to Kass FM on the day of the election?

21 A. Yes. After I voted, I went back home, and I began listening to Kass FM.

22 Then after that I turned off the set and I started to listen to Citizen. It didn't last a
23 long time. I also turned off -- there is a reason why I don't want to say why I didn't
24 continue listening to Kass FM. I continued to listen for quite a while. Then after
25 that, at about 5 p.m., I went out to buy some milk. At that time --

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: I signalled to the witness to -- she could stop it
2 there so you can ask your next question.

3 MS RENTON: Thank you, your Honour. Perhaps, guided by the witness, may we
4 move into private session for a short while?

5 PRESIDING JUDGE EBOE-OSUJI: How long do you anticipate being in private
6 session?

7 MS RENTON: I'm not sure, but hopefully only one or two questions.

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

9 (Private session at 3.47 p.m.) Reclassified into open session

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

11 MS RENTON:

12 Q. Witness, you told us in your last answer that there is a reason why you don't
13 want to say why you didn't continue listening to Kass FM. Now that we're in
14 private session, can you explain that reason to us?

15 A. Yes, I can explain why. I was able to continue listening to Kass FM for a long
16 time because, you see, (Redacted) if I listen to Kass FM, I would
17 get the news about the progress of the country. (Redacted) that there were
18 problems in the country. That is why I was listening to Kass FM for a while, so I
19 could be aware of the events as they unfolded.

20 After that I stopped listening to the other stations and I continued to listen to Kass
21 FM since there was -- there were discussions going on broadcast via Kass FM.

22 MS RENTON: Thank you, your Honours. We can return to public session.

23 PRESIDING JUDGE EBOE-OSUJI: All right. We will return to public session.

24 But, Ms Renton, also, watch what -- the extent to which we will follow unexpected
25 information that comes in so we avoid an examination for discovery while the

Trial Hearing
Witness: KEN-OTP-P-0442

(Private Session)

ICC-01/09-01/11

1 witness on the stand, as it were. I noticed your question to the witness was whether
2 she had listened to Kass FM, and then this other thing came up, just so we watch it.
3 We'll go to public session.

4 (Open session at 3.50 p.m.)

5 THE COURT OFFICER: We're in open session, your Honours.

6 PRESIDING JUDGE EBOE-OSUJI: Please proceed, Ms Renton.

7 MS RENTON:

8 Q. Witness, talking about the day of the election, you said you listened to Kass
9 FM. What did you hear being broadcast on Kass FM on the day of the election in
10 the evening when you went home?

11 A. Kass FM was broadcasting a programme, and they said that the voting had
12 been held and that the ballots were being counted. And people have to be very
13 careful to make sure that their vote is not stolen. And Mr Sang stressed the point
14 saying, "Be careful. Keep your voices in every way so that ..." -- or, "Keep your
15 votes so that they can't be stolen."

16 Q. Did you continue listening to Kass FM on the days that followed?

17 A. After that day I continued listening to Kass FM. I will just say "Yes" in reply
18 to your question.

19 Q. Thank you, Witness. Can you recall, on the days that followed the election
20 day up until the announcement, can you recall anything that you heard Mr Sang say
21 on Kass FM?

22 A. I'd like you to repeat your question. You were talking about what happened
23 after the voting, or after the votes were counted?

24 Q. I'm talking about the day --

25 A. The -- after the results were announced?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 Q. Sorry. I'm talking about the days between the voting and the announcement
2 of the results. So those days between that period.

3 A. After voting, I continued to listen to Kass FM. So I continued listening to
4 their programmes and I was able to hear Mr Sang, who was talking about what had
5 happened in Chemilel. He was talking about some people who had been burnt
6 alive in sugar cane fields.

7 So I heard Mr Sang continuing to say how the results of the elections had turned out
8 and this -- before the results were actually announced, and there were signs that
9 votes had been stolen, that people wanted to steal votes.

10 And I would like to be given the opportunity to speak about what happened before
11 the ballots were counted and before and after the results of the election were
12 announced. I'd like to ask the Presiding Judge if I -- could I have an opportunity to
13 tell you what happened?

14 PRESIDING JUDGE EBOE-OSUJI: Witness, we will still have to, first of all, listen to
15 the questions the lawyer is asking because there are reasons why she's asking her
16 questions in the way that she's asking them. Let's first of all follow her with her
17 questioning. If at the end of the questioning you want to add something else that
18 she may not have covered in asking you questions, you can tell us then, and we will
19 see to what extent we can accommodate you with that. But it may also be that if
20 there is something you want to talk about in your mind, by the time she has finished
21 asking her questions you may see that she may get to those points, or you may have
22 the opportunity, in the course of her questioning, to answer or to talk about what
23 you want to talk. But for now we will stay with her and listen carefully to her
24 questions and then proceed in that way. Do you understand?

25 THE WITNESS: (No interpretation)

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 MS RENTON: Thank you, your Honour.

3 Q. Witness, what was Mr Sang's reaction to the announcement of the voting?

4 A. Mr Sang was very angry. He was very angry when he made the
5 announcement. He said that the votes had been stolen.

6 Q. Did he say anything else?

7 A. Yes. He said that the votes had been stolen, and they didn't -- he didn't
8 know where the other votes had come from in favour of the other side. He talked
9 about the places, and he said that Kibaki had stolen votes from Njuja, and he was
10 wondering whether those votes had come from those places. And he was saying
11 that Kibaki had stolen the votes. And he asked Mr Ruto -- for Mr Ruto, rather, to
12 stay at KICC until the final election results were announced.

13 He went on to say that Mr Ruto was a courageous man, he was following what was
14 going on and fighting for our rights, and he wasn't going to let our votes be stolen.
15 He wanted, you see, he wanted the voting results to be announced at night after
16 fleeing. At that time, there were many people who were calling in to the radio
17 station.

18 PRESIDING JUDGE EBOE-OSUJI: Ms Renton, again, I signalled the witness with a
19 hand to hold it there pending your next question. You may need to provide
20 direction. The question "Did he say anything else?" was too broad as you can see.
21 Not everything Mr Sang may have said would be of interest to you, would it?

22 MS RENTON: No, your Honour. You're correct. I note the time. Perhaps we
23 can break now?

24 PRESIDING JUDGE EBOE-OSUJI: Indeed. That would be a good place to stop.
25 You said you still have how much more time to spend with the witness?

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 MS RENTON: I said until the end of the first session on Thursday. I'm hoping that

2 I may be able to be a little bit shorter than that.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you.

4 MR HOOPER: And again, just to note it, there's no -- never been any reference to

5 Mr Sang saying anything about Mr Ruto at all. I think my friend will acknowledge

6 that, it's the first time it's been said.

7 PRESIDING JUDGE EBOE-OSUJI: You're talking about the statements provided?

8 MR HOOPER: Yes, that's right. And -- but your Honour was really saying to my

9 friend, well, you're only concerned with that bit, but it's news to my friend as well.

10 That's the point.

11 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, we have come to the end of

12 our sitting for today. You will join us again tomorrow at 9.30. And the Prosecutor

13 will keep on asking you questions tomorrow. Overnight, please, do not discuss

14 your testimony with anybody, okay? I see you are nodding, so we'll accept that to

15 be yes, you understand.

16 THE WITNESS: (Speaks English) Yes.

17 PRESIDING JUDGE EBOE-OSUJI: We will leave it at that for today.

18 THE WITNESS: (Interpretation) Yes, I understand.

19 PRESIDING JUDGE EBOE-OSUJI: Yes, I understand that. The blinds will come

20 down and the court officer will usher the witness out of the courtroom.

21 (Closed session at 4.02 p.m.) Reclassified into open session

22 THE COURT OFFICER: We're in closed session, your Honours.

23 (The witness exits the courtroom)

24 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

25 THE COURT OFFICER: All rise.

Trial Hearing

(Closed Session)

ICC-01/09-01/11

Witness: KEN-OTP-P-0442

- 1 (The hearing ends in closed session at 4.03 p.m.) Reclassified into open session
- 2 RECLASSIFICATION REPORT
- 3 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24
- 4 September 2013, and the instructions in the email dated 14 May 2014, the version of
- 5 the transcript with its redactions becomes Public.
- 6