

Trial Hearing
Witness: KEN-OTP-P-0442

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of the Prosecutor v. William Samoei Ruto and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion and Judge Robert
7 Fremr
8 Trial Hearing
9 Monday, 10 March 2014
10 (The hearing starts in open session at 9.33 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. 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 very much.
20 Appearances?
21 MS RENTON: Good morning, your Honours. For the Prosecution, myself, Lara
22 Renton, Lucio Garcia, Regina Weiss, Peter Schotsman and Jasmina Suljanovic.
23 Thank you.
24 MR NARANTSETSEG: Good morning, your Honours. For victims, Orchlon
25 Narantsetseg and James Mawira. Thank you.

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1 MR KIGEN-KATWA: For Mr Sang, myself, Katwa-Kigen, Honor Lanham, Logan
2 Hambrick and Rong Xin.

3 MR HOOPER: And good morning. And on behalf of Mr Ruto, Ms Jayaraj, Ms
4 Alagendra, Ms Lawrie, Ms Sullivan, Mr Khan and myself. Thank you.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We will continue with
6 the witness's cross-examination.

7 Witness, welcome back to the stand. Mr Kigen-Katwa will ask you questions. It is
8 his turn to ask you questions. I will remind you again of the need for you to listen
9 carefully to the questions asked and answer just that question. Try very much,
10 very, very hard to answer just the question set out and asked you directly. Try to
11 avoid trying first to let us see how you develop your answer to the question before
12 you get to the answer. Answer it directly.

13 Do not give us why you are answering it the way you are answering it before
14 answering it. Answer the question first, and then if the lawyer wants to ask you
15 why, then that's a second question that the lawyer can ask you, and then you answer
16 that question of why at the time that it is specifically asked of you.

17 Do not argue with the lawyer. Also, do not ask the lawyer questions yourself. The
18 only question you may ask the lawyer is if you don't understand the question he has
19 asked you then you can tell him, "I do not understand what you mean by this. Can
20 you please repeat so I can understand." Do not ask him questions back in a manner
21 that amounts to you arguing with him about what you're saying. Do you
22 understand?

23 THE WITNESS: (No audible response)

24 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Katwa --

25 MR HOOPER: Your Honour, I'm sorry to intercede at this moment. There is the

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1 question of various documents.

2 PRESIDING JUDGE EBOE-OSUJI: That you need to put in?

3 MR HOOPER: Yes.

4 PRESIDING JUDGE EBOE-OSUJI: All right.

5 MR HOOPER: So it's a bit irritating, disconnected as it is, but Ms Jayaraj I'm sure
6 will sort it out rather better than I might.

7 PRESIDING JUDGE EBOE-OSUJI: That's why we said before we like these
8 documents put in at the point that they're discussed. I know from time to time it
9 may not be possible, but let's try and avoid the habit of proceeding and then moving
10 the thing in at the end.

11 Before we proceed, two housekeeping matters. The submissions on excusal we will
12 take in the afternoon.

13 MR HOOPER: Can I just --

14 PRESIDING JUDGE EBOE-OSUJI: Unless --

15 MR HOOPER: Today would be inappropriate from our standpoint for the simple
16 reason until the Prosecution can confirm that its Witness 28 is going to come first,
17 then the argument is less -- (Overlapping speakers)

18 PRESIDING JUDGE EBOE-OSUJI: We're coming to that.

19 MR HOOPER: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: We're coming to that. So we will be taking the
21 submissions in the afternoon on that. Now, you've also received last week, last
22 Friday, I take it, communication as to the post-Easter scheduling, provisional as it
23 were, from 29 April to 23 May. It is provisional to be confirmed.

24 There is no secret to it. I had requested the Presidency to be relieved of my duties
25 in the Banda case, and that is why it is provisional indication of scheduling. As

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1 soon as the Presidency communicates the position, we'll see where we take it from
2 there. All right.

3 So you'll do your documents now?

4 MR HOOPER: I'll do the documents now, yes, please. Thank you.

5 MS JAYARAJ: Good morning, your Honours. The first item that we would
6 request be MFI is KEN-D09-0031-0056, and that is at your Honours' tab 10 and it's a
7 letter.

8 PRESIDING JUDGE EBOE-OSUJI: The document will be marked for identification.

9 THE COURT OFFICER: Thank you, Mr President. KEN-D09-0031-0056 will bear
10 the following number, MFI-T-D09-00180, and will be registered as confidential.

11 MS JAYARAJ: Thank you. Your Honours, the next item would be
12 KEN-D09-0031-0057 at your Honours' tab 11, and that's a newspaper article from the
13 Standard in relation to the term "tsunami" that was used. We request that this be
14 given an EVD number.

15 MS RENTON: Your Honour, in my submission it should only be given an MFI.
16 The relevant portions of the information were read into the record, and as opposed
17 to the other information, given that there is no authenticity as to the truth of the
18 contents, I think that the record is explicit enough if it's an MFI.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

20 MS JAYARAJ: Yes, your Honour, we agree that the item would be MFI.

21 PRESIDING JUDGE EBOE-OSUJI: Then document marked for MFI.

22 THE COURT OFFICER: This document will bear the following number,
23 MFI-T-D09-00181.

24 MS JAYARAJ: Thank you. The next item is also a newspaper article,
25 KEN-D09-0031-0058, at your Honours' tab 12, and we request this too be MFI.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Document marked for identification.
- 2 THE COURT OFFICER: This document will bear the following number,
- 3 MFI-T-D09-00182.
- 4 MS JAYARAJ: Your Honours, the next item at your Honours' tab 8 is
- 5 KEN-D09-003 --
- 6 PRESIDING JUDGE EBOE-OSUJI: What tab did you say, 8?
- 7 MS JAYARAJ: Tab 8.
- 8 PRESIDING JUDGE EBOE-OSUJI: All right.
- 9 MS JAYARAJ: Yes, it's KEN-D09-0031-0004 and it is the photograph of who the
- 10 Ruto Defence says is the (Redacted).
- 11 PRESIDING JUDGE EBOE-OSUJI: What do you want done with it?
- 12 MS JAYARAJ: We request that that please be given an EVD number.
- 13 PRESIDING JUDGE EBOE-OSUJI: Ms Renton?
- 14 MS RENTON: No objection. The witness recognised it, although obviously a
- 15 different person.
- 16 PRESIDING JUDGE EBOE-OSUJI: Document would be admitted as the next in the
- 17 Ruto Defence exhibits.
- 18 THE COURT OFFICER: This document will bear the following number,
- 19 EVD-T-D09-00183, and will also be referenced as Ruto Defence Exhibit Number 183.
- 20 It will be registered as a confidential document.
- 21 MS JAYARAJ: Thank you. The next item is at your Honours' tab 31. It's
- 22 KEN-D09-0031-0084 and it's a photograph of the officer commanding the station and
- 23 we request that it be given an MFI number.
- 24 PRESIDING JUDGE EBOE-OSUJI: The document will be marked for identification.
- 25 THE COURT OFFICER: This document will bear the following number,

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1 MFI-T-D09-00184.

2 MS JAYARAJ: Thank you. The last item, your Honours, is KEN-D09-0031-0088,
3 and that is the photograph of an individual that the witness recognises and identifies
4 and so we request it be given an EVD number.

5 PRESIDING JUDGE EBOE-OSUJI: What tab?

6 MS JAYARAJ: Your Honours, that is not in the bundle. I do not recall this
7 material.

8 MS RENTON: No objection, your Honour. The witness recognised the individual.

9 PRESIDING JUDGE EBOE-OSUJI: I've seen the photo. The document would be
10 accepted as the next in the Ruto Defence exhibits.

11 THE COURT OFFICER: This document will bear the following number,
12 EVD-T-D09-00185 and will be known as Ruto Defence Exhibit Number 185. It will
13 also be registered as a confidential document.

14 MS JAYARAJ: Thank you. Your Honours, the last thing we need to do is to
15 provide the time-stamps of a video that was played to the witness and that's just to
16 be read into the record. The video was of the Kapsabet demonstration. The ERN
17 number is KEN-OTP-0026-4596 and it's also prosecution Exhibit Number 24, and the
18 time-stamps that were played to the witness is at 1 minute 37 seconds to 1 minute 57
19 seconds, 10 minutes 53 seconds to 11 minutes 45 seconds and 19 minutes 48 seconds
20 to 20 minutes 20 seconds. Thank you, your Honours.

21 PRESIDING JUDGE EBOE-OSUJI: Next time, please do this at the time the material
22 is being looked at.

23 Ms Renton, I take it you have no comments on this. We will leave it at that for now.

24 Mr Kigen-Katwa?

25 WITNESS: KEN-OTP-P-442 (On former oath)

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1 (The witness speaks Swahili)

2 QUESTIONED BY MR KIGEN-KATWA:

3 Q. Good morning, Witness.

4 PRESIDING JUDGE EBOE-OSUJI: We are in open session.

5 MR KIGEN-KATWA: Yes, your Honour. I would like to start in open session.

6 Q. Witness, you said that you used to listen to Kass FM station. My first
7 question is how frequently did you listen to Kass FM station?

8 A. Yes, I listened to all the programmes.

9 Q. I meant how frequently, Witness. Were you listening to it every single day
10 the whole day, or how would you describe the frequency on the intervals of your
11 listening to Kass FM?

12 A. I did not quite understand your question.

13 Q. Witness, were you listening to Kass once in a week, twice in a week, or how
14 many times in a week?

15 A. I used to listen to that radio station whenever I was at home.

16 Q. Are we to take it then, Witness, that you used to listen to it every single day?

17 A. Whenever I was at home, yes. Even when I was at the market, if I was next
18 to someone who had a radio set, I was able to listen to that radio station.

19 Q. Now, Witness, you haven't quite answered my question, but it's okay, I'll
20 move on. Other than Mr Sang, could you name any other broadcasters that you
21 used to listen to from Kass FM?

22 A. I think there were a number of them, but I was not interested in them. I was
23 more interested in listening to Mr Sang.

24 Q. So can we take it that you cannot recall the name of any of the, any of the
25 other broadcasters other than Sang?

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1 A. Really, I didn't pay any interest to the others. I was only interested in Mr
2 Sang.

3 Q. Now, about Mr Sang, do you recall what was the name of his programme or
4 programmes?

5 A. Yes, I do remember some of his programmes. There was a programme
6 known as Lene Emet. Then there was another one and I don't -- I no longer
7 remember the name of that programme, but he -- he did run another programme.
8 In any event, I was more interested in the Lene Emet programme.

9 Q. Now, Witness, you said you used to listen to Kass FM, but you can't
10 remember any of the other broadcasters. Could I ask you, other than Lene Emet
11 programme which you used to hear according to you from Mr Sang, could you tell
12 us any other names of any other programmes you used to listen to from Kass FM?

13 A. I have just told you that I do not remember the names of the other
14 programmes.

15 Q. Now, Witness, did you also say that Kass FM broadcasters broadcasted in
16 Kalenjin only?

17 A. That is what I heard. Mr Sang's programmes were in the Kalenjin language,
18 and I do not know whether he used the Swahili language on any other programmes.

19 Q. Witness, you met the Prosecution on 28 February. And at paragraph 23, it is
20 recorded that you said that you heard Kass FM use Kalenjin only. What is exactly
21 stated in the clarification note is that at paragraph 19, the only language P-442 heard
22 on Kass FM was Kalenjin.

23 Now, the question I want to ask you, Witness, is: Is it your proposition that
24 Kalenjin used to use only -- Kass FM used to use only Kalenjin and not any other
25 language?

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1 A. Well, I do not know whether Kass FM used other languages. Maybe Sang
2 can confirm that to the Court?

3 Q. And Lene Emet programme, which you say was the only one you are familiar
4 with, what times was it broadcasted?

5 A. 8.30 to 9.30 and around 4 p.m. You see, those are the times when I would
6 leave the house, or it was at that time that our family members were having their
7 breakfast.

8 Q. Witness, I am very particular about that. I would like you to be very sure.
9 Is it your testimony as testimony from your knowledge absolutely that in fact the
10 programme used to be from 8.30 to 9.30?

11 A. This is what I said, from 8.30 to 9 --

12 THE INTERPRETER: And the interpreter corrects it was "around those hours," not
13 "around 4 p.m." from the previous answer.

14 THE WITNESS: (Interpretation) So I would listen to the programme from 8.30 to
15 about 9 a.m. or 9.30, but then there was another broadcast from around 2.30 to 3.30
16 p.m.

17 MR KIGEN-KATWA:

18 Q. And, Witness, do you recall having told the Prosecution on (Redacted)
19 (Redacted) that during the election period, you used to listen to radio and
20 especially Kass FM regularly, be informed about what was going on. The
21 programme on Kass FM was directed at the native people in Nandi Hills. During
22 the election period it was every morning from 8.00, 8 a.m. to 9.30. Do you recall
23 that, Witness?

24 A. Would you please kindly repeat your question so that I can understand it?

25 Q. The question is simply this, Witness, that you said in September 2012 that the

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1 programme was in fact from 8 a.m. to 9.30 a.m.?

2 A. Yes.

3 Q. And you'd like to change the time now to say 8 a.m. to 9.30 as opposed to 8.30
4 a.m. to 9.30 a.m.?

5 A. I think it must have been from 8 a.m. or 8.30. There shouldn't be much
6 difference between those two times. You're simply trying to confuse me. So it was
7 just that time frame which I was referring to.

8 PRESIDING JUDGE EBOE-OSUJI: Can you hold on for a minute now. Private
9 session for a second.

10 *(Private session at 9.59 a.m.) Reclassified into open session

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

12 (Redacted)

13 (Redacted).

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Open session at 10.00 a.m.)

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

24 PRESIDING JUDGE EBOE-OSUJI: Thank you.

25 Mr Katwa, please proceed.

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1 MR KIGEN-KATWA:

2 Q. Now, Witness, this Lene Emet programme would be broadcasted once in a
3 day, isn't it?

4 A. No, not just once a day.

5 Q. How many times, Witness, and what times?

6 A. In the morning and in the evening.

7 Q. And what times in the evening, Witness?

8 A. I think I've answered your question.

9 Q. Witness, I will insist that you tell us what times you said the programme was
10 repeated in the afternoon, in the evening.

11 A. I told you from 2.30 in the afternoon or 3 in the afternoon.

12 Q. And, Witness, could you confirm that to the best of your knowledge it was
13 only those two times that Lene Emet would be broadcasted?

14 A. Sometimes the programme was broadcast three times. There was one
15 particular point in time when the programme was broadcast more often than what I
16 told you.

17 Q. Now, how many times, how many days of the week was the programme,
18 Witness?

19 A. Every day, but myself I didn't listen to the programme on Saturday. So
20 throughout the whole year I did not listen on Saturdays, you see, myself, Saturday
21 as of December, but usually during the week I would listen to the programme at
22 home. I can't tell you how often the programme was broadcast per week, but I can
23 tell you that I listened to it several times.

24 Q. And, Witness, was it ever -- was it exclusively Sang who used to run the
25 programme, or are there instances when there was somebody other than Sang in the

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1 programme?

2 A. Unless you tell me that there were two Mr Sangs at Kass FM, because I used
3 to listen just to Arap Sang and that's all.

4 Q. Did you ever hear Sang co-host a programme with anybody else?

5 A. Never, no one else hosted the programme.

6 Q. Now, Witness --

7 THE INTERPRETER: "Not just a single person. There were others," corrects the
8 Swahili interpreter.

9 MR KIGEN-KATWA:

10 Q. I'll put the question again to you, Witness. Are you saying Sang would run
11 the programme with other people, or it was only Sang?

12 A. I said that I heard Sang.

13 Q. Now, Witness, in closed session you told us that you used to listen to Kass FM
14 more especially in December because you were advised by somebody. I do not
15 want you to say who it was who told and recommended to you to listen to Kass FM,
16 but do you remember having told us that?

17 A. Yes.

18 Q. Now, Witness, a moment ago when I asked you a question, you said you used
19 to listen to Kass FM the whole year. Could you confirm that in fact you used to
20 listen to Kass FM the whole of December, the whole of January, and the whole of
21 February 2008?

22 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you will have to take that
23 question again and put a year to the months.

24 MR KIGEN-KATWA: Yes, Mr President.

25 Q. Witness, could you confirm that apart from you having listened to the Kass

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1 FM the whole year as you testified earlier on, you actually listened to it in December
2 2007, January 2008, and February 2008?

3 A. I haven't yet understood your question properly.

4 Q. Did you listen to Kass FM in the period of December 2007, Witness?

5 A. Yes.

6 Q. January 2008?

7 A. Yes.

8 Q. February 2008?

9 A. Yes.

10 Q. March 2008?

11 A. Yes.

12 Q. Now, Witness, you said when you were testifying that you never heard Sang
13 plead for peace when you listened to him including the whole year which you have
14 said and including January to March 2008. Does that remain your position that you
15 did not hear Sang at any time ask for peace?

16 A. He never did that.

17 Q. Now, you also said that you used to listen to Kass FM station and
18 programmes other than those ones of Sang. Can you recall if you heard Kass FM as
19 a station plead for peace?

20 A. Today is the first time I've heard such a statement.

21 Q. And lastly on that issue, Witness, if either Sang or Kass FM had asked for
22 peace, you would have heard it considering how frequently you used to listen to
23 that station, isn't it?

24 PRESIDING JUDGE EBOE-OSUJI: Counsel, you need to avoid the argumentative
25 question. This seems argumentative, don't you think? It does. So you need to

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1 rephrase it.

2 MR KIGEN-KATWA: Yes, Mr President.

3 Q. Witness, if either Sang or Kass FM had pleaded for peace, you would have
4 heard it, isn't it?

5 A. I never heard those calls for peace.

6 Q. Now, Witness, I want to ask you a few questions about the 2005 referendum
7 that you referred to. And on 4 -- on 3 January, you said that the campaigns for the
8 referendum went on to December 2005. Did you say that, Witness? Do you recall
9 saying that? Sorry.

10 MR KIGEN-KATWA: Your Honours, and for the Prosecution, I'm looking at
11 transcript 98, page 62, line 1.

12 MS RENTON: Sorry. I just believe my learned friend meant to say 3 March then,
13 not 3 January, or 4 March.

14 MR KIGEN-KATWA: I'm sorry, it's actually 4 March. I'm sorry about that. I'll
15 put the question again to the witness.

16 Q. Witness, on 4 March you said this, "I think that the campaigns continued to
17 November. The campaign ended in November, or rather I am sorry, the campaign
18 continued up to December, and then the referendum took place."
19 Do you recall saying that, Witness?

20 A. Yes.

21 Q. So, Witness, when were the votes casted for the proposed constitution?
22 Which date?

23 A. I don't remember the date.

24 Q. And do you remember the month?

25 A. It was November or December. I don't exactly remember the month even.

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1 Q. And, Witness, at page 57 of the same transcript you had said this, "Yes, in
2 2005, Kenya had to vote a new constitution. We had two constitutions on the table.
3 There was Boma constitution and another constitution, the title of which I no longer
4 remember. So we had to ..." -- "... we had to choose between two constitutions."

5 And, Witness, do you remember saying that?

6 A. Yes.

7 Q. And it is therefore your testimony that when people went to cast their votes
8 either in November or December, you say you don't remember when, they were
9 choosing between one constitution as opposed to another constitution. There were
10 two constitutions.

11 A. Could you please repeat the question?

12 PRESIDING JUDGE EBOE-OSUJI: Counsel, before you repeat, does that follow
13 from the testimony?

14 MR KIGEN-KATWA: It does, Mr President, because at line 11 of page 57 this is the
15 testimony, "Yes, in 2005, Kenya had to vote a new constitution. We had two
16 constitutions on the table." And then at line 14 it says, "I no longer remember. So
17 we had to choose between two constitutions."

18 Q. Witness, my question is you said in your testimony there were two
19 constitutions on the table, and then you went on to say Kenyans had to choose
20 between two constitutions. And I just wanted you to clarify to the Court it is your
21 testimony that in 2005, when Kenyans went to -- went for referendum, they were
22 making a choice between two constitutions?

23 A. The way you've put the question to me I don't understand it, because when
24 you say that the Kenyans had to vote and choose between two constitutions I don't
25 understand what that means.

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1 Q. Witness, you already confirmed recalling that you said there were two
2 constitutions on the table. You also said you remember that Kenyans had to choose
3 between two constitutions. And all I'm asking you is that it is your testimony that
4 when people are going to cast their votes in 2005 by way of referendum, they were
5 choosing between two drafts of constitution, isn't it?

6 PRESIDING JUDGE EBOE-OSUJI: Witness, okay, let's approach it this way. The
7 lawyer is saying -- he said when you testified earlier about the referendum that you
8 had said at some point that the word "two constitutions," and "Kenyans had to
9 choose between two constitutions."

10 The question now for you is: Are you saying that what the referendum was about
11 was for Kenyans to choose between two constitutions, or are you saying something
12 else about what the referendum was about?

13 THE WITNESS: (Interpretation) You explained to me and I understand. The
14 people of Kenya had to vote for a constitution beyond those two. So they had to
15 vote in favour of one constitution amongst those two.

16 PRESIDING JUDGE EBOE-OSUJI: Now, I want you to -- this is not about the
17 answer you've given now, but when I ask -- even when I ask a question, if you don't
18 understand it, also tell me you don't understand my question. I don't want you to
19 assume that because I have asked you the question then you must answer it, even if
20 you don't understand. Please feel free, even when I try to rephrase a lawyer's
21 question, if it's still not clear, it is your right to indicate that it is still not clear so we
22 can try harder.

23 We want you to understand every question that you are answering. Do you
24 understand me? Did you understand that last question I asked you?

25 THE WITNESS: (Speaks English) Yes.

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1 THE INTERPRETER: Yes, I understand.

2 PRESIDING JUDGE EBOE-OSUJI: All right. What you can tell us now again is
3 what your understanding of the referendum was about. Can you tell us what you
4 understood the referendum to be about keeping in mind that you had somewhere
5 said earlier that there were two constitutions, and Kenyans had to choose. Tell us
6 what you understood was going on in the referendum, what was it about. What
7 were Kenyans supposed to do in the questions asked or question asked in the
8 referendum?

9 THE WITNESS: (Interpretation) There were two constitutions - well, two draft
10 constitutions - that had been put forward after everyone was asked to vote in favour
11 of the constitution that he or she preferred.

12 MR KIGEN-KATWA: Do I proceed, Mr President?

13 PRESIDING JUDGE EBOE-OSUJI: Thank you, Witness.

14 Yes, Mr Kigen-Katwa.

15 MR KIGEN-KATWA:

16 Q. Witness, did you also say that the constitution, the draft constitution of 2005
17 was called Kibaki draft? For the record, I am looking at transcript number 98, line
18 13 to 17, page 47.

19 A. No, I didn't put it that way. I think the word "Kibaki" was somewhere else
20 and there is another meaning rather than that.

21 Q. Witness, I will read to you what you said. The question you had been asked
22 was this, "Witness, you said that Mr Sang said that the constitution was meant to
23 grab the Kalenjin land away from the Kalenjin people. Did he say who would take
24 the land away?" And your answer is this, "Yes, he said that. According to several
25 people, including myself, that constitution was known as the Kibaki constitution.

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1 And so when it happened, they say that the Kikuyu people were very numerous,
2 and so if the constitution was voted in, no one would be allowed to have more than
3 30 acres, so they had to do everything to ensure that the constitution was not
4 accepted; otherwise their land would be taken away."

5 Witness, do you recall having said that?

6 A. Yes, I remember I said that. I don't know whether I can put it any clearer in
7 relation to that constitution.

8 Q. Witness, all -- my question is very limited to whether or not according to you
9 that draft was called Kibaki draft. That's all.

10 A. There was the Orange and there was the Banana, and the Kalenjin thought
11 that the Banana was Kibaki's constitution. That is why I said that there were two
12 constitutions, the Orange and the Banana. So the Kalenjin -- well, some people
13 thought that the Banana was Kibaki's constitution, and the Nande said that Kibaki
14 wanted to take the land and give it to the Kikuyu and that way -- so, you see, that is
15 why people were called upon not to vote for that. That's what I said in my
16 statement.

17 MR KIGEN-KATWA: Mr President, could I request that the transcript at page 21,
18 line 19, be corrected to read -- it should be "30 acres," not "13 acres."

19 PRESIDING JUDGE EBOE-OSUJI: Yes, that's what I heard you say. Yes, 30.

20 MR KIGEN-KATWA:

21 Q. And, Witness, at page 57, you had been asked the question,
22 "Witness, you mentioned that in 2005 Kenyans were about to vote a new
23 constitution. Did Sang talk about this topic on the radio?"

24 And your answer was this, "Yes, in 2005" --

25 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, pace.

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1 MR KIGEN-KATWA: I'll be slower, Mr President.

2 Q. Your answer was this, Witness, that there was, "Yes, in 2005, they had to vote
3 a new constitution. We had two constitutions on the table. There was Boma," and
4 Boma is just written "Boma" and left hanging.

5 Witness, was it your intention to say the other one was Boma draft?

6 A. As far as I know, there was a constitution, if I remember correctly, a
7 constitution that was being discussed in Boma, but I don't know anything else about
8 the Boma constitution.

9 MR KIGEN-KATWA: Mr President, at page 57 -- at page 22, line 18, it is not that I
10 said "page 37." I actually said "Page 57, line 11 to 13," and that is the transcript,
11 transcript 98, of 4 March 2014.

12 Q. Now, Witness, two last issues I want to cover with you on that issue. The
13 first one is that it is your testimony that that draft had suggested that people should
14 have not more than 30 acres, is that what you said?

15 A. That was the point of view held by the Kalenjins and I think this is what I
16 have already told you, and that is what is also included in my statement.

17 Q. Okay, Witness, I'll just read it to you and it's okay you're saying that is not
18 what you said. This is what you said, "And so when this happened ..." -- sorry, may
19 I say that this is transcript 98 of 4 March 2014, line 13 to 17. You said, "Answer:
20 When this happened they said that the Kikuyu people were very numerous, so if the
21 constitution was voted in no one would be allowed to have more than 30 acres. So
22 they had to do everything to ensure that the constitution was not accepted.
23 Otherwise their land would be taken away from them."

24 PRESIDING JUDGE EBOE-OSUJI: Is that different from what she just said in the
25 last response to you, Mr Kigen-Katwa?

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1 MR KIGEN-KATWA: I will admit it's not necessarily inconsistent. I just wanted to
2 put the question again, just to be sure that she means what she's saying now as
3 opposed to the proposition, and then I'll leave that issue, Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Well, if we do that every time that there is
5 clarity, we may stay here forever if lawyers ask questions that way. You can do it
6 once then, but let's watch it please.

7 MR KIGEN-KATWA: I will, Mr President.

8 Q. Witness, is it your testimony that the limit of 30 acres maximum was in the
9 draft?

10 PRESIDING JUDGE EBOE-OSUJI: No, that's not fair. She said that her
11 understanding was -- what she said was that was the point of view communicated
12 across by Kalenjins.

13 MR KIGEN-KATWA: I will ask a different question altogether from there, Mr
14 President.

15 Q. Witness, do you recall what the draft, what the draft of the constitution or
16 those drafts of the constitution said about land ownership in terms of maximum
17 acreage and minimum acreage?

18 A. The draft constitution was written in such a way that some of its paragraphs
19 dealt with land issue. That draft constitution also covered a lot of topics, although I
20 did not read the paragraphs myself, I learnt from Mr Sang that the draft constitution
21 targeted Kalenjins, because it was being said that no one should own more than 30
22 acres of land.

23 I believe in any event that I have already answered this question stating that initially
24 this was the understanding or the statements made by the Kalenjins or the proposals
25 from the Kalenjins.

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1 Q. And, Witness, my question would be very narrow to this effect, had you seen
2 the draft of the constitution, the drafts of the constitution, the sections on land in the
3 drafts of the constitutions that were being discussed?

4 A. I really do not know how to answer you.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you have to ask another
6 question. I believe she already answered that question, did she not?

7 MR KIGEN-KATWA: She hasn't, Mr President.

8 PRESIDING JUDGE EBOE-OSUJI: Okay. Now, look at line 4, line 5 to 6, on the
9 current page. Isn't this what you are getting at?

10 MR KIGEN-KATWA: No. What I'm getting at, Mr President, is whether she
11 herself had seen what the draft said as opposed to what Mr Sang was interpreting it
12 to say.

13 PRESIDING JUDGE EBOE-OSUJI: She said "... although I did not read the
14 paragraph myself."

15 MR KIGEN-KATWA: I will leave that issue there, Mr President.

16 Q. Now, Witness, in transcript number 98 at page 59, this is what you said,
17 "Mr Sang talked about the constitution. I think that Kass FM station was in ODM
18 camp, in fact, in the Orange camp." Do you remember that, Witness?

19 A. Yes.

20 Q. And so it is your testimony, Witness, that in the year 2005 when discussions
21 were being conducted about the draft constitution, ODM had taken a position?

22 A. The position of the ODM was represented by an orange.

23 Q. And when you talk of ODM, you're talking of Orange Democratic Movement
24 as a political party, isn't it?

25 A. I'm sorry, I did not understand your question.

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1 Q. You already said that ODM was on the side of Orange in the 2005 referendum
2 campaigns, and I just wanted you to clarify that the ODM you're referring to is
3 Orange Democratic Movement as a party?

4 A. Yes.

5 Q. Now, Witness, it is your testimony that Sang campaigned against the said
6 draft. Do you know whether the draft was successful, received the most votes in
7 Rift Valleys for years or not, do you know?

8 A. As far as I know, I do not know whether it is the people of the Rift Valley who
9 made it possible for the constitution to be adopted or not. And I'll stop at that,
10 because I don't know whether it is because of the people of the Rift Valley that the
11 constitution was adopted or passed. In Kisumu, in the Western Province, there
12 were people who supported the Orange movement.

13 Q. Witness, I want to show you a document showing the statistics of the 2005
14 referendum and see if you can make any comments about it.

15 PRESIDING JUDGE EBOE-OSUJI: Why?

16 MR KIGEN-KATWA: Mr President, because the testimony in respect to Mr Sang
17 was that he campaigned against that draft referenda, that draft constitution, and by
18 extension mobilised people presumably against the constitution, and I just wanted to
19 show the statistics of how that constitution fared not only in the area where the
20 programme was broadcasted to, but in the rest of Kenya.

21 PRESIDING JUDGE EBOE-OSUJI: How does that assist in the cross-examination of
22 this witness? The witness has given her testimony and also answered, said what
23 she said in the last answer. How does it assist us to stay here and show her
24 statistics of how the votes were cast? Isn't that argumentative?

25 MR KIGEN-KATWA: Mr President and your Honours, my understanding of the

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1 intention of the Prosecution in adducing that evidence is to suggest that Mr Sang
2 had influence over the people to whom he was broadcasting, and that in part the
3 reason why that constitution and the land elements in it were unsuccessful is
4 because of Mr Sang's influence. And all I'm seeking to do in going through those
5 statistics is to demonstrate that that draft constitution was not an issue -- was not
6 rejected only by the people in Rift Valley, many other people, Mr President. In fact,
7 only one, one province put in votes above 50 per cent in support of that draft.

8 PRESIDING JUDGE EBOE-OSUJI: But is that inconsistent with the witness's last
9 answer, because you're here, you have a witness and you're cross-examining the
10 witness and this is not an expert witness who you might want to use to prove certain
11 other propositions in terms of opinion?

12 The witness has said she does not know how well or not the Rift Valley population
13 assisted in the outcome. She also said she knows of other people in other regions,
14 specifically in Kisumu, who voted for ODM in the referendum.

15 MR KIGEN-KATWA: Mr President, I will leave that issue, but I maintain that the
16 intention of adducing that evidence was to show the inference of Mr Shang (sic) --
17 Mr Sang. And all I'm trying to do in showing the statistics is that the only
18 distinction that Sang has from well over 80 per cent of the other Kenyans was that he
19 was heard on radio, but many other people held the same view as Mr Sang, only that
20 they didn't have a station from which they could broadcast, at least to the extent
21 available to this Court.

22 PRESIDING JUDGE EBOE-OSUJI: So what would you expect this witness to tell
23 you? That's what I'm getting at. I'm not saying that you may not have reason, or
24 there may not be forensic value to you putting in the statistics when the issue is
25 really engaged, but what do you expect this witness to do with it?

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1 MR KIGEN-KATWA: To consider that up to 80 per cent of Kenyans did not want
2 that, that draft constitution, Mr President, which is an information which you do not
3 have to the extent to which the Prosecution has adduced the evidence. The extent
4 of the Prosecution's evidence is that constitution was rejected. Part of the efforts to
5 reject the constitution were the instance of Mr Sang. You do not have the
6 information on the rest of the Kenyans, what their position was, Mr President.
7 That's all I was trying to get to.

8 MS RENTON: Your Honours, I don't think, as you've already mentioned, that the
9 witness is really in a position to comment on that. She's given her own opinion, she
10 can't comment on the reliability of the statistics and, if my learned friend wishes to
11 introduce that evidence, perhaps it's better to introduce it in another way.

12 MR KIGEN-KATWA: Mr President, I do not want the issue belaboured. I can
13 leave it. You do not need to rule on that issue. I can – I can leave that issue.

14 PRESIDING JUDGE EBOE-OSUJI: So you're withdrawing it.

15 MR KIGEN-KATWA: I'm leaving it where it is, Mr President.

16 PRESIDING JUDGE EBOE-OSUJI: All right.

17 MR KIGEN-KATWA: Yes. However, I would request to be allowed to ask one
18 question as a general proposition.

19 Q. Witness, are you aware that up to 80 per cent of Kenyans actually rejected that
20 draft constitution?

21 A. I know nothing about that.

22 Q. Now, Witness, I want us to go to the 2007 elections. 2007 elections, do you
23 recall when it was that people went to vote?

24 A. I have not quite understood your question. Please kindly repeat it?

25 Q. In 2007 people went to cast their votes for presidential, parliamentary and

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1 civic offices, and I'm asking you which date was set for casting votes, Witness?

2 A. It was on the 27th.

3 Q. I take it it is 27 December. And when were the results of the elections
4 announced, Witness?

5 A. Which elections are you talking about?

6 Q. I'm talking about the results of the presidential elections, Witness, in the year
7 2007?

8 A. I do not remember clearly. If I'm not mistaken, it was on the 30th. The 30th,
9 maybe the 31st. Between the 30th and the 31st.

10 Q. And, Witness, it is your testimony that you watched the events at the
11 Kenyatta International Conference Centre, KICC, through Citizen TV and you also
12 heard on Kass FM. Was that your testimony?

13 A. Yes, I did so, but I do not remember the date. It was either the 30th, or the
14 31st. Yes, on the 31st. I don't have a clear recollection.

15 Q. Now, Witness, I want to take you to specifically what you said about Mr
16 Sang, and that is to be found in transcript 99 of 5 March 2014. Could you confirm
17 that the six allegations you've made about Mr Sang, the first one is at page 19 -- page
18 3, line 19 to 21, where you said that, "Mr Sang was talking about the developments in
19 the announcements of the results. He went on to say that the votes were stolen"?
20 If the transcript could be corrected, I said page 19, one-nine, line -- transcript 99,
21 page 3, line 19 to 21.

22 Witness, do you recall having said that Sang announced that votes had been stolen?

23 A. Yes, that is what I said.

24 Q. And, Witness, I am very particular. Do you recall that the basis of you're
25 saying it was a question put to you by the Prosecution, "So on the morning of 31

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1 December, what did Mr Sang say, if anything, about the results of the presidential
2 elections?" Do you recall that the question was put to you in respect to the period
3 of 31 December 2007?

4 A. Mr Sang -- well, in any event, please repeat your question.

5 Q. Witness, there are six things that you said Sang did on 31 December. The
6 first one is you said that Mr Sang announced that votes had been stolen. Do you
7 recall that?

8 A. Yes.

9 Q. The second one, Witness, was that people should come out and fight for their
10 rights. Do you recall saying that?

11 A. Yes.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, all on the 31st?

13 MR KIGEN-KATWA: I want to list them and then go back to the dates, so that they
14 all fall in one instead of asking one against the date.

15 PRESIDING JUDGE EBOE-OSUJI: What I mean is all these allegations, are you
16 saying she's testified that she heard them on 31 December?

17 MR KIGEN-KATWA: Yes, Mr President, and I propose to give the page numbers of
18 the transcript for the record.

19 PRESIDING JUDGE EBOE-OSUJI: I'm not disputing you. I'm concerned now
20 about the witness's ability to follow your question. So if the date is of the essence,
21 then let's keep that uppermost in her mind that you're saying that she had testified
22 that on 31 December 2007, being the date, that she heard X, Y, Z, so that she knows
23 that you're interested in the date as well.

24 MR KIGEN-KATWA: Yes, the date is of essence and so I'll put the question again.

25 Q. Witness, the issue of you telling people to -- that Sang said people should

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1 come out and fight for their rights is at page 3, line 25, and page 4, line 1, being that
2 you said these things, or that Sang said these things, on 31 December 2007. Do you
3 recall saying that, Witness?

4 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, what is happening is this:
5 Mr Kigen-Katwa is saying that during your testimony you had testified and said that
6 you heard Sang say certain things on 31 December 2007. Now, Mr Kigen-Katwa is
7 going to tell you what it was you had said earlier that you heard Mr Sang say on 31
8 December 2007.

9 THE WITNESS: (No interpretation)

10 PRESIDING JUDGE EBOE-OSUJI: He will go after those allegations one after
11 another, but you keep in mind that he is saying that you testified that you heard
12 these things said by Mr Sang on 31 December 2007.

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

14 Q. The third thing is that you said that there were some youths. Some were
15 saying Sang is saying the truth. Others were saying Sang is not saying the truth.
16 Do you recall that, Witness? I am not saying the location where you said you met
17 the youth.

18 A. I still do not understand your question. You have said that some youths
19 were saying something. What were they saying? I did not quite understand that
20 part of your question.

21 MR KIGEN-KATWA: Mr President, I will leave that and come back to it in private
22 session.

23 Q. Now, Witness, you also said that Mr Sang said that -- you said that someone
24 called in to Mr Sang's programme and both Mr Sang and the caller agreed to urge
25 people that they should not accept the results. Do you remember saying that?

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1 A. Yes.

2 MR KIGEN-KATWA: I'm looking at page 11, line 15, and page 12, line 1, of the
3 transcript 99.

4 Q. The next thing that you said is that people in Kakamega and Kisumu had
5 already come out to fight for their rights. Do you remember saying that, Witness?

6 A. Yes.

7 PRESIDING JUDGE EBOE-OSUJI: That's what Mr Sang had said?

8 MR KIGEN-KATWA: Yes, that that's what Mr Sang had said.

9 PRESIDING JUDGE EBOE-OSUJI: All right.

10 Witness, he's saying you had also testified that on 31 December 2007 you heard Mr
11 Sang say that.

12 THE WITNESS: (Interpretation) Yes.

13 MR KIGEN-KATWA:

14 Q. Lastly, Mr -- lastly, Witness, and correct me if I am wrong, you also said that
15 Sang called on people in Kapsabet to attend Elijah Lagat's rally. Well, you didn't
16 say whether it was a meeting, or a rally, or a demonstration, but that Sang
17 announced that people should go for what Sang had -- Elijah Lagat had called for in
18 Kapsabet. Do you recall that, Witness?

19 A. (No audible response)

20 MS RENTON: Sorry. Could I just get a reference for that last?

21 THE WITNESS: (No interpretation)

22 MR KIGEN-KATWA: The reference is page 45 to 46, transcript 99.

23 Q. And, Witness, it is your testimony that Sang called for that -- called for people
24 of Kapsabet to go for that meeting on 31 December 2007, isn't it?

25 A. Yes.

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, look at the clock. Tell us
2 when it's convenient to break off and return.

3 MR KIGEN-KATWA: Mr President, could I have transcript at page 13 corrected? I
4 recall the witness said "Yes" to the question I had put to her as to whether or not
5 Sang called for people to attend Elijah Lagat's meeting on 31st, line 13.

6 PRESIDING JUDGE EBOE-OSUJI: I heard "Ndiyo."

7 MR KIGEN-KATWA: Yes, and that is "Yes."

8 On our way out, Mr President, could I request for a private session just to put the
9 last proposition so that when I come back I come to the substance of my testimony?

10 PRESIDING JUDGE EBOE-OSUJI: Private session.

11 *(Private session at 11.01 a.m.) Reclassified into open session

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

13 MR KIGEN-KATWA:

14 Q. Witness, do you recall - for the Prosecution, this is transcript 99, page 8, line
15 20 to 24 - (Redacted), some saying
16 Sang was telling the truth, others saying that Sang may not have been saying the
17 truth? Do you recall that, Witness?

18 A. Yes.

19 Q. And that was also on 31 December 2007, isn't it?

20 A. Yes.

21 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, let's break now. Okay.

22 Witness, we'll take our morning break and then come back at 11.30. Blinds come
23 down, please.

24 *(Closed session at 11.02 a.m.) Reclassified into open session

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

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- 1 (The witness stands down)
- 2 PRESIDING JUDGE EBOE-OSUJI: Court will rise.
- 3 THE COURT OFFICER: All rise.
- 4 (Recess taken at 11.02 a.m.)
- 5 (Upon resuming in open session at 11.38 a.m.)
- 6 THE COURT USHER: All rise.
- 7 Please be seated.
- 8 THE COURT OFFICER: We are in open session, your Honours.
- 9 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 10 Witness, welcome back.
- 11 Mr Kigen-Katwa, we are in open session.
- 12 MR KIGEN-KATWA: Yes, Mr President. I would like to proceed in open session.
- 13 Q. Now, Witness, do you recall if there was any time when Mr Sang was off air
- 14 in the period of December 2007 and January 2008?
- 15 A. No, I don't remember that.
- 16 Q. So it is your testimony that he was on air to the best of your recollection
- 17 throughout December and throughout January 2008, December 2007 and January
- 18 2008?
- 19 A. Yes.
- 20 Q. Now, Witness, the question I put to you was whether you were aware of Sang
- 21 having been off air. I want to ask you as a separate question: Are you aware of
- 22 any ban that was put on all media houses banning them from live broadcast in the
- 23 period of December 2007 to January 2008?
- 24 A. He continued to broadcast. I *don't remember what you are talking about.
- 25 Q. I will ask you again, Witness. I thought I heard the opposite of what is

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1 written there. Do you recall that there was a time when there was a ban on live
2 coverage in Kenya?

3 A. Yes.

4 Q. Now, I want to show you a document in respect to that which specifically
5 mentions Kass FM and by extension Mr Sang.

6 MR KIGEN-KATWA: Mr President, I request to make reference to tab 3 on the
7 large binder and the reference is OTP-0046-0014 particularly at page 0022. With the
8 permission of the Court, I request to give the witness a hard copy. And,
9 Mr President, for expediency I had marked the part that I would like to refer to. I
10 thought I should mention on record that I have marked the part that the witness is
11 being shown.

12 THE WITNESS: (Speaks English) Sorry?

13 PRESIDING JUDGE EBOE-OSUJI: What are you looking at, Mr Kigen-Katwa?

14 MR KIGEN-KATWA: I will want to take the witness to page 0022, your Honour,
15 which makes reference to the footnote at 0022 which makes specific reference to Kass
16 FM. Your Honours, I have particular reference to footnote number 84.

17 Q. Witness, can you see the part that is marked on the document you've just been
18 given?

19 A. Yes.

20 Q. I will read it slowly in English and then you will let me know if you can see
21 that and I will ask you a question. It says this, "Kass FM, which was closed down
22 for three days by the government -- by the government prior to referendum for
23 supposed incitement, practiced a high level of self-censorship following
24 government's ban on live media coverage imposed on 30 December 2007, when it
25 switched to playing music and airing occasional recorded statements calling for

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1 calm. In turn -- for calm. In turn, many listeners switched to alternative
2 broadcasters such as BBC World Service."

3 Can you see that, Witness?

4 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, why is this being put to this
5 witness? It may well be that what's contained there may or may not be
6 inconsistent -- let's assume, assume it at its strongest that it is inconsistent with this
7 witness's testimony. Why should we be referring to it or receiving it onto the
8 record, what you've just read in?

9 MR KIGEN-KATWA: For two reasons, Mr President. The first one is that it
10 answers the question of whether or not Mr Sang was on air on the 31st as the witness
11 said.

12 The second one, Mr Witness -- sorry, the second one, your Honours, is that the
13 witness has very categorically said there were no peace messages aired by Kass FM,
14 whether by Kass FM itself or by Mr Sang. And this document, which is a product
15 of the Prosecution's own investigations, says the exact opposite of that testimony,
16 and we are using it as a basis to demonstrate --

17 PRESIDING JUDGE EBOE-OSUJI: So this is -- are you saying this is material from
18 the OTP?

19 MR KIGEN-KATWA: Yes, Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: All right.

21 MS RENTON: Sorry, your Honour. On the basis of someone else's article I'm not
22 sure that, other than what the witness can testify that she herself understood or
23 heard, it adds anything more to put the article rather than just simply state the
24 proposition and ask whether or not she agrees with it.

25 PRESIDING JUDGE EBOE-OSUJI: You may proceed.

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

2 Q. Witness, the first thing I want you to confirm is that you can see that it is
3 marked on that document that the ban was with effect from 30 December 2007. Can
4 you see that, Witness?

5 A. Yes. I can see that, but --

6 Q. Witness, you will also confirm that it says that Kass FM switched to playing
7 music and airing occasional recorded statements calling for calm. You can see that,
8 Witness?

9 A. As I was telling you, I wasn't aware that Kass FM was taken off the air in
10 December 2008, but I know that was after *2005 and 2006. That was when Kass FM
11 was taken off the air.

12 Now, when you talk about 2007 and 2008, I don't know anything about that.

13 Perhaps. I don't know. According to me, well, I know that Kass FM continued to
14 broadcast. You just read out an article saying that Kass FM was not allowed to
15 broadcast at that time. Perhaps. At that time Kass FM, Mr Sang had his own radio
16 station, his Kass FM.

17 Q. Now, Witness, I want to play an audio that was -- that was aired in the -- on 1
18 January 2008 in respect to what you said.

19 MR KIGEN-KATWA: Your Honours, that is KEN -- that is KEN-D11-0011-0044.

20 That is an audio of 1 January 2008, one day after the witness -- after the items that I
21 just listed as being the items that the witness said Mr Sang said on 31 December.

22 Your Honours, that is in the second binder, the core binder, bundle -- tab number 9.

23 Q. Witness, I will play the audio. I want you to listen and tell us if you recollect
24 having heard Sang say those words.

25 PRESIDING JUDGE EBOE-OSUJI: Did you say it's in the same binder?

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1 MR KIGEN-KATWA: No, it is in the other binder, Mr President, tab number 9, the
2 smaller binder. Mr President and your Honours, it is a 3 minutes -- 3 minutes, 23
3 seconds audio, and I very kindly request to be allowed to play those three minutes.

4 (Playing of the audio excerpt KEN-D11-0011-0044)

5 MR KIGEN-KATWA:

6 Q. Witness, to that extent, can you recognise the voice that you heard? Play the
7 audio again.

8 A. Could you repeat?

9 (Playing of the audio excerpt KEN-D11-0011-0044)

10 MR KIGEN-KATWA:

11 Q. Witness, I wanted to inquire from you if you recognise the voice?

12 A. Yes, I remember. I beg your pardon? Could you repeat your question?

13 Q. I was asking you whether you recognised the voice of Mr Sang. Do you?

14 A. That day I didn't listen, so I can't tell you whether it was him or not.

15 PRESIDING JUDGE EBOE-OSUJI: Witness --

16 THE WITNESS: (Interpretation) When he said that the children needed peace,
17 well, I don't know.

18 PRESIDING JUDGE EBOE-OSUJI: Witness, Mr Kigen-Katwa is asking you now,
19 having listened now, that we've all listened to a clip of the audio, he's asking
20 whether you recognise the voice who is speaking. Whose voice is it. do you know?

21 THE WITNESS: (Interpretation) Yes, it's Arap Sang.

22 MR KIGEN-KATWA: All right. We'll just play the audio and then we'll see.

23 (Playing of the audio excerpt KEN-D11-0011-0044)

24 MR KIGEN-KATWA:

25 Q. Now, Witness, could you confirm that the bottom line of that audio is to say

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1 that Sang was pleading for peace?

2 MR KIGEN-KATWA: Mr President, I'll just read the contents of it into the
3 transcript and then put the questions to the witness.

4 Q. Witness, you said you understand Kalenjin, isn't it? Okay.

5 A. Yes.

6 Q. Please confirm this is what Mr Sang says:

7 "Greetings, Kalenjin, wherever you are today. I would like to proclaim to you
8 Kalenjin listeners a message of peace; that is, Kenya is crying for peace. Everyone is
9 crying for peace. A little child is crying for peace. An adult is crying for peace. A
10 woman is crying for peace. A man is crying for peace. A grandfather is crying for
11 peace, so is a grandmother. Everyone is crying for peace. Our Kalenjin people,
12 when it is so difficult, nothing compares to peace. Peace enables one to do
13 whatever he or she likes. Peace enables people to live together in brotherhood.
14 Peace dispels worry from people. Everyone longs for peace in Kenya at this time.
15 Elections are past. We should keep peace. To all people, or anyone in Kenya who
16 may be engaged in wrongdoing and is not keeping peace, or is breaching the peace,
17 we would like to pray for peace; that please, all of us, let us all keep peace as Kenyan
18 people. Let us keep peace wherever we are. Peace is what we need.
19 All people whom we have heard about, including others that we heard that people
20 have burnt a church with people inside. Oh, Kalenjin people, if it is the Kalenjin
21 people who have done such acts, such an act would never be committed by a human
22 being. No child should be burnt; no woman should be burnt; no adult should be
23 burnt. No one who has sought refuge in God's house - where God is
24 glorified - should be burnt. When a person has reached there, he has gone to seek
25 the Lord to cover him. It is wrong, it is not befitting for any human being to engage

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1 in such an act. So we are pleading for peace, peace, peace. Please, please, as Kass
2 FM we are appealing for peace.
3 Peace is what we need in Kenya. Keep peace. Everyone should keep
4 peace - young person, keep peace; old man, keep the peace; old lady, keep the peace.
5 Let us pray a lot and desist from anything that may breach the peace, that may
6 destroy our country Kenya during this time - we assert that peace is what everyone
7 wants. Therefore, I would like to beseech everyone, everyone alive, that peace is
8 what the country needs.
9 Wherever you are burning -- wherever you are, burning, destruction and killing
10 should not be meted out on any person created by God; to destroy and cut short the
11 life of a person created by God -- by God. Desist from any act that may destroy the
12 peace. Refrain from any act that may incite to do evil.
13 That is the message from Kass, that peace -- that please, please, please, let us keep
14 the peace. Let us refrain from destruction. Let us refrain from any killing that
15 criminal or other person may execute. Let us keep the peace now and always.
16 Peace, peace, our people."
17 Now, Witness, the first question I want to ask you is that is a fair translation of what
18 you heard in Kalenjin, isn't it?
19 A. I would like to ask you a question. That extract is from which date?
20 Q. Witness, it is for 1 January 2008, but please, if you could answer the question
21 I've asked you. You confirm that is a fair translation of what you heard in Kalenjin,
22 a language that you say you understand?
23 PRESIDING JUDGE EBOE-OSUJI: Witness, now there are two things that you have
24 mentioned. You've asked the lawyer a question about the date, and that would be a
25 fair question that you raised for the Judges to keep in mind, and we are keeping it in

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1 mind.

2 But regardless of whether or not this audio was actually broadcast, let us not worry
3 about that now. Let us not worry about whether or not the audio you heard was
4 actually broadcast and heard by other people or yourself even.

5 The question now is forget about that and answer whether what you just heard in
6 Kalenjin has been fairly interpreted by Mr Kigen-Katwa.

7 THE WITNESS: (Interpretation) I think there are certain excerpts that were
8 skipped. For example, the people who were burned in the church, that those people
9 had to be condemned, you skipped that part and yet I heard it on the tape.

10 MR KIGEN-KATWA:

11 Q. Thank you, Witness. It is actually there, but I will read it again so that you
12 confirm.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, maybe we may have to go
14 back and take it in chunks, manageable chunks, as they appear to have been broken
15 down in your document. So is it possible? Can you manage that? So we can have
16 the tape played up until an indicated point of translation, you pause and then
17 translate and have the witness react chunk by chunk.

18 MR KIGEN-KATWA: Yes, Mr President. Only that it will take long and there are
19 so many audios, but I can do it.

20 PRESIDING JUDGE EBOE-OSUJI: Whether you want to play all the audios is your
21 question, but once you've engaged the process we need to do is correctly.

22 MR KIGEN-KATWA:

23 Q. Witness, we will do it slowly, small pieces and then we translate.

24 (Playing of the audio excerpt KEN-D11-0011-0044)

25 MR KIGEN-KATWA:

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1 Q. Witness, could you confirm this is the translation of the extent of what you've
2 heard:

3 "Greetings, Kalenjin wherever you are today. I would like to proclaim to you
4 Kalenjin listeners a message of peace; that is, Kenya is crying for peace. Everyone is
5 crying for peace. A little child is crying for peace. An adult is crying for peace. A
6 woman is crying for peace. A man is crying for peace. A grandfather is crying for
7 peace, so is a grandmother. Everyone is crying for peace. Our Kalenjin people,
8 when it is so difficult nothing compares to peace"?

9 Witness, you confirm that's what you've heard so far, isn't it?

10 A. Yes.

11 (Playing of the audio excerpt KEN-D11-0011-0044)

12 MR KIGEN-KATWA:

13 Q. Witness, please confirm this is what is -- you heard:

14 "Peace enables one to do whatever he or she likes. Peace enables people to live
15 together in brotherhood. Peace dispels worry from people. Everyone longs for
16 peace in Kenya at this time. Elections are past. We should keep the peace. To all
17 people, or anyone in Kenya who may be engaged in wrongdoing and is not keeping
18 peace, or is breaching the peace, we would like to pray for peace; that please, all of
19 us, let us keep peace as Kenyan people. Let us keep peace wherever we are. Peace
20 is what we need."

21 Witness, could you confirm that's what you've heard so far?

22 A. Yes.

23 (Playing of the audio excerpt KEN-D11-0011-0044)

24 MR KIGEN-KATWA:

25 Q. Witness, could you confirm -- you had said you didn't hear the bit that relates

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1 to the church. I'll read to you the translation of the part that you have heard:
2 "All people who we have heard about - including others that we heard that people
3 have burned a church with people inside. Oh, Kalenjin people, if it is the Kalenjin
4 people who have done such acts, such an act should never be committed by a human
5 being. No child should be burnt; no woman should be burnt; no adult should be
6 burnt. No one who has sought refuge in God's house - where the Lord is
7 glorified - should be burnt. When a person has reached there, he has gone to seek
8 the Lord to cover him. It is wrong, and it is not befitting for any human being to
9 engage in such an act, so we are pleading for peace, peace. Please, please, as Kass
10 FM we are appealing for peace."

11 Witness, could you confirm that is what you heard in Kalenjin dialect?

12 A. Yes.

13 Q. And, Witness, before we proceed you mentioned the issue of the church.
14 Your testimony is that this is in reference to the Kiambaa incident, isn't it?

15 A. I would not want to talk about Kiambaa. When you read the statement the
16 first time, you did not want to interpret what had been said into English. Now you
17 have just done that. You have just translated it.

18 Q. We will proceed, Witness. I had actually read it. You didn't hear.

19 (Playing of the audio excerpt KEN-D11-0011-0044)

20 MR KIGEN-KATWA:

21 Q. Witness, please confirm this is what you just heard:

22 "Peace is what we need in Kenya. Keep peace. Everyone should keep
23 peace - young person, keep peace; old man, keep peace; old lady, keep peace. Let
24 us pray a lot and desist from anything that may breach the peace, that may destroy
25 our country Kenya during this time - we assert that peace is what everyone wants.

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1 Therefore, I would like us to beseech everyone, everyone alive, that peace is what the
2 country needs now."

3 Witness, could you confirm that's a fair translation of what you heard?

4 A. Yes.

5 Q. We'll proceed, Witness.

6 (Playing of the audio excerpt KEN-D11-0011-0044)

7 MR KIGEN-KATWA:

8 Q. Witness, could you confirm this is the translation of what you've just heard:

9 "Wherever you are, burning, destruction and killings should not be meted out on
10 any person create by God; to destroy and cut short the life of a person created by
11 God. Desist from any act that may destroy the peace. Refrain from any act that
12 may incite to do evil. That is the message from Kass FM -- Kass, that peace -- that
13 please, please, please, let us keep the peace. Let us refrain from destruction. Let us
14 refrain from any killings that criminal or other persons may execute. Let us keep
15 the peace now and always. Peace, peace, our people"?

16 Witness, could you confirm that's what you heard?

17 A. I heard that.

18 MR KIGEN-KATWA: Mr President, I would ask that line 11 be corrected to say
19 that -- I will read the whole sentence, "Wherever you are, burning, destruction and
20 killing should not be meted out on any person created by God; to destroy and cut
21 short the life of a person created by God."

22 Q. Now, Witness, you will recall that the incident in Kiambaa referred to in this
23 audio happened on 1 January 2008. Do you recollect that, Witness?

24 A. (No interpretation)

25 Q. Witness, do you recall hearing this from Kass FM?

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1 A. Please repeat your question.

2 Q. I'm asking, Witness, this three-minute peace message, do you recall having
3 heard it on Kass FM in January 2008?

4 A. I did not hear it.

5 Q. Witness, I want to play to you another audio made on 4 January 2008 and see
6 if you have any recollection of having heard it.

7 MR KIGEN-KATWA: Your Honours, it's KEN-D11-0013-0061 and that is in the
8 same bundle, tab 13. The translation is KEN-D11-0014-0001.

9 PRESIDING JUDGE EBOE-OSUJI: Did you say the same bundle? There is no tab
10 13.

11 MR KIGEN-KATWA: The small binder, Mr President.

12 PRESIDING JUDGE EBOE-OSUJI: Sorry, my -- I was looking for -- I didn't notice
13 the tab 13 was a different colour binder -- tab. Sorry.

14 (Playing of the audio excerpt KEN-D11-0011-0044)

15 MR KIGEN-KATWA:

16 Q. Witness, do you -- would you confirm that that is the voice of Mr Sang?

17 A. Yes.

18 Q. Now, Witness, I would read what you just heard in Kalenjin and then you
19 will -- I'll ask you a few questions:

20 "Greetings, Kalenjin people wherever you are tuned in to Kass FM. This is Joshua
21 Arap Sang, saying we are well here in Nairobi. What I would like to appeal to our
22 Kalenjin people is the matter that God's servants already requested; along with
23 political leaders - led by William Ruto - that all Kalenjin people, wherever you are,
24 please open roads."

25 Do you want to say something, Witness?

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1 A. Can you go back a little bit?

2 Q. Witness, that is what it says: "Greetings, Kalenjin people, wherever you are
3 tuned in to Kass FM. This is Joshua Arap Sang, saying we are well here in Nairobi.
4 What I would like to appeal to you Kalenjin people is the matter that God's servants
5 already requested; along with political leaders - led by William Ruto - that all
6 Kalenjin people, wherever you are, please open roads. Open roads so that food
7 ..." --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, all right, what is the point of
9 this particular exercise? Is it something you can put to the witness as a general
10 proposition arising from the audio before we see how we proceed? I realise the last
11 time was you read the whole translation and put it to the witness, and when we
12 didn't get anywhere, we went back and started doing it piece by piece.

13 We don't have to do it exactly in that way. It may well be, if we know where we're
14 going, then we will decide to proceed with the chunk-by-chunk reading to begin
15 with, as opposed to going through the end and coming back to read segment by
16 segment.

17 MR KIGEN-KATWA: Mr President, I could read what has already been played in
18 Kalenjin and then ask the witness if it's a fair translation and then ask two questions
19 on it.

20 PRESIDING JUDGE EBOE-OSUJI: Yes, but if you do that and the witness again
21 could not -- after receiving a big load of translation, if she could not respond to the
22 fairness of the translation, then we go back and start again.
23 You know what the central message of the audio you've played says and what point
24 you want to make. Are you able to make that point, put it to the witness, we get her
25 reaction and then see if we need to go back and take each translation one at a time?

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1 MR KIGEN-KATWA:

2 Q. Witness, could you confirm that the totality of that message is that Joshua
3 Sang was pleading with people that they please open roads?

4 A. Yes. Mr President, this is what I would like to propose, that we proceed the
5 way that we did with Mr Kigen because there are things that I wanted to hear, that
6 is, the recording is played in Kalenjin, that enables me to understand and then I will
7 react.

8 MR KIGEN-KATWA: Mr President and your Honours, I must apologise. That I
9 think should have been how I should have conducted it. If I could do it and I will
10 be conscious about that in the next one.

11 PRESIDING JUDGE EBOE-OSUJI: Yes. That's what I was thinking how we should
12 proceed.

13 MR KIGEN-KATWA: Again, I apologise. I will do that.

14 PRESIDING JUDGE EBOE-OSUJI: So we have half-an-hour to go to lunch break
15 time. So we go back and start again with segment-by-segment translation or
16 interpretation.

17 MR KIGEN-KATWA: Yes, Mr President. I understood the witness to prefer it that
18 way.

19 (Playing of the audio excerpt KEN-D11-0011-0044)

20 MR KIGEN-KATWA:

21 Q. Witness, you confirm this is what you've heard so far:

22 "Greetings, Kalenjin people wherever you are tuned in to Kass FM. This is Joshua
23 Arap Sang saying we are well here in Nairobi. What I would like to appeal to our
24 Kalenjin people is the matter that God's servants already requested; along with
25 political leaders - led by William Ruto - that all Kalenjin people, wherever you are,

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1 please open roads."

2 Witness, that's what you heard, isn't it?

3 A. Yes.

4 (Playing of the audio excerpt KEN-D11-0011-0044)

5 MR KIGEN-KATWA:

6 Q. Witness, confirm this is what you've heard in Kalenjin:

7 "Open roads so that food may reach those in need of it. Open roads so that people

8 who have experienced various problems may reach the hospitals; there are expectant

9 mothers who need to deliver, but this is difficult for them to reach the hospital.

10 Further, open the roads so that a traveller may go his way."

11 Witness, that's what you heard in the Kalenjin audio, isn't it?

12 A. Yes.

13 (Playing of the audio excerpt KEN-D11-0011-0044)

14 MR KIGEN-KATWA:

15 Q. Witness, this is what -- the translation:

16 "Open the roads so that the Red Cross workers may reach people who are in need of

17 humanitarian assistance, such as food or taking such people to hospital. Also, food

18 is a basic need for everyone, but now it cannot reach the market. We appeal that

19 you open roads so that those foods may reach the market; that people may gain

20 access to food."

21 Witness, you confirm that's what you've just heard, isn't it?

22 A. Yes.

23 (Playing of the audio excerpt KEN-D11-0011-0044)

24 MR KIGEN-KATWA:

25 Q. Witness, this is what the translation says:

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1 "There are so many people who cannot now reach their places of work. Their one
2 major concern is that they may lose their jobs for failure to arrive in time.
3 Therefore, we would like to appeal in all humility to everyone everywhere to open
4 every road that is closed and to allow those people with assistance to reach those
5 people in need."

6 Witness, that's what you've just heard, isn't it?

7 A. Yes, I understand.

8 (Playing of the audio excerpt KEN-D11-0011-0044)

9 MR KIGEN-KATWA:

10 Q. Witness, the translation is that:

11 "Further, religious and political leaders have appealed that we refrain from any form
12 of violence, because we see that destruction has pervaded many areas, worst still,
13 people have turned -- have turned one to another. Roads are closed and people are
14 forced to pay so that a vehicle may -- that could be of help to people may pass. So if
15 life has become -- so life has become extremely difficult in many areas.

16 That is why we are saying let us open roads wherever you are. And also people
17 should move away from roads because so much is going on now. So much power
18 has arrived, and it may affect people in a big way that tomorrow may bring much
19 sorrow in terms of lives lost. Therefore, open roads and keep the peace in Kenya.
20 Thank you very much. Let's do so. I am Joshua Arap Sang."

21 Witness, do you confirm that is a fair translation of the Kalenjin that you've just
22 listened to?

23 A. Yes.

24 Q. Now, Witness, in your testimony you had said that you experienced a lot of
25 roadblocks on your way to the place that you said you went to, isn't it?

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1 A. Yes.

2 MR KIGEN-KATWA: Sorry, Mr President. I was just confirming that whether the
3 journey to Eldoret was in open session and I'm told it was.

4 Q. Witness, you can hear Sang asking people to avoid the roadblocks the way
5 you said you experienced, isn't it?

6 PRESIDING JUDGE EBOE-OSUJI: Can you repeat that question?

7 MR KIGEN-KATWA: I will leave that question, Mr President. I will ask a
8 different one.

9 PRESIDING JUDGE EBOE-OSUJI: But you heard what I said, whether you could
10 repeat the question. I didn't say leave it. It's up to you. If you want to -- you
11 don't have to ask it, but if you wanted the witness to answer it, I wanted it repeated.
12 But if you want to abandon it, then that's your question.

13 MR KIGEN-KATWA: Let me ask another one first, Mr President.

14 Q. Witness, do you recall hearing Sang make that plea for peace and opening of
15 roads?

16 A. That's just on your audio.

17 Q. Witness, do you have any recollection if you could have heard Kass FM on 4
18 January 2008?

19 A. I didn't listen to Kass FM on 4 January 2008. 4 January I was fleeing that day.
20 You can tell me briefly what Kass FM radio had broadcast.

21 Q. It broadcast what you've just heard, Witness. What of 1 January 2008,
22 Witness, did you listen to Kass FM broadcast?

23 A. I was listening.

24 Q. And --

25 A. Please, you said 1 January? No, I didn't -- I wasn't listening that day.

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1 Q. Witness, I want to show you and you said you used to watch Citizen TV, isn't
2 it?

3 A. Yes.

4 MR KIGEN-KATWA: Mr President, I would like to make reference to tab 23 of the
5 other binder, the bigger binder, tab 23, and it is a short video I would like to play.

6 Your Honours, the video is KEN-OTP-0048-0094 and the transcript is

7 KEN-OTP-0054-0111.

8 (Viewing of the video excerpt KEN-OTP-0048-0094)

9 MR KIGEN-KATWA:

10 Q. Now, Witness, could I ask you, you've seen one Honourable Raphael Tuju,
11 isn't it?

12 PRESIDING JUDGE EBOE-OSUJI: Can you spell that for the record.

13 MR KIGEN-KATWA: Raphael is R-A-P-H --

14 THE INTERPRETER: From the French booth, the witness is fiddling with the
15 console and there is too much interference.

16 PRESIDING JUDGE EBOE-OSUJI: Witness, the interpreters are requesting that you
17 can leave the microphone and all those things alone in front of you, or even papers
18 in front, and if you don't need to shuffle them, you can leave them alone because
19 when you make any noise, it interferes with the ability of court reporters and
20 interpreters to hear what's being said.

21 MR KIGEN-KATWA: Raphael is R-A-P-H-A-E-L. Tuju is T-U-J-U.

22 Q. Witness, do you know somebody by the name Honourable Raphael Tuju?

23 A. Yes, I do know him. I've heard of him.

24 Q. Do you recall that he was the minister in charge of communication in the year
25 2007/2008?

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1 A. No, I don't know that.

2 Q. You've seen one Honourable Moses Wetangula, isn't it, Witness?

3 MR KIGEN-KATWA: I will give the spelling if that will assist the witness. Moses
4 is M-O-S-E-S and Wetangula is W-E-T-A-N-G-U-L-A.

5 Q. Witness, do you know somebody by the name Moses Wetangula,
6 Honourable?

7 A. Yes. I've heard of Moses Wetangula, but I've just heard people talking about
8 him.

9 Q. So you don't know what he was doing in the year 2007 as we went to
10 elections?

11 A. I knew him when he was at foreign affairs. I know that he was Minister of
12 Foreign Affairs. I don't know when he changed. I don't know.

13 Q. Witness, you also saw one Honourable Uhuru Kenyatta, isn't it?

14 A. I saw him in Kapsabet in 2005. That was the first and last time. At that time
15 they had come to campaign, the orange and the banana campaign during the
16 referendum.

17 Q. Witness, my question is that you've seen him in the video, isn't it?

18 A. I'd like to say that your question -- I beg your pardon. You're asking the
19 question as if it was a long time ago. You have to ask me the question whether I
20 had just seen. When you say "Did you see?" it's like it was in the past. For Moses
21 Wetangula I gave the wrong answer. Even for Raphael I gave a bad answer.

22 Q. Witness, the first question is have you seen Uhuru Kenyatta in the video I've
23 just played?

24 A. Yes.

25 Q. Now, do you recall what he was doing in the year 2007 in terms of cabinet or

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1 parliament?

2 A. Yes. I don't remember. I do remember that at that time he was chairman of
3 KANU at that time.

4 Q. Now, Witness, there's somebody also that has just been -- the last person you
5 saw on the video, one Wachira Waruru. Do you -- do you know him?

6 A. Not at all.

7 Q. Now, Witness, what was playing before I stopped the video was a
8 statement --

9 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you must spell Wachira
10 Waruru for the record.

11 MR KIGEN-KATWA: Wachira is W-A-C-H-I-R-A and Waruru is W-A-R-U-R-U.

12 Q. Now, Witness, do you know somebody -- did you know somebody by the
13 name John Michuki?

14 A. What time are you talking about?

15 Q. 2007, Witness.

16 A. I'd like you to repeat that question because you just showed me a video and
17 you asked me questions whether I knew these various people on the video. For the
18 time being, you're talking to me about Michuki. I don't know how to answer. Is it
19 in relation to the video that you just played or is this a general question?

20 Q. Witness, John Michuki is mentioned in the video, but he's not -- he's not
21 shown in the video, so I'm asking you as a general question whether you know John
22 Michuki and what he was doing in the year 2007.

23 A. I think that he was in charge of internal security, unless I'm mistaken, or he
24 was in charge of --

25 THE INTERPRETER: Inaudible.

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1 THE WITNESS: (Interpretation) Yes. I think it was internal security, unless I've
2 forgotten.

3 MR KIGEN-KATWA:

4 Q. You're actually right, Witness. Now --

5 PRESIDING JUDGE EBOE-OSUJI: So the Michuki, the spelling we see in line 12 is
6 the same at line 1, isn't it?

7 MR KIGEN-KATWA: That's correct, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 Q. Now, Witness, you've heard in that video clip that John Michuki had put a
10 ban on live broadcast on media houses. Did you -- do you recall having heard that
11 from the video?

12 A. I do not understand that question. Could you ask me the question again?

13 Q. Witness, I want to play for you the -- I want to play again the video. I want
14 you to listen if you can hear the name of Michuki and if you can hear anything about
15 ban on media, live coverage.

16 (Viewing of the video excerpt KEN-OTP-0048-0094)

17 MR KIGEN-KATWA:

18 Q. Witness, did you hear the name of John Michuki?

19 A. (No interpretation)

20 Q. And did you hear that he had issued an order banning live coverage?

21 A. (No interpretation)

22 Q. Okay. I want you to listen to the response by the person appearing on the --

23 THE INTERPRETER: Overlapping speakers. Impossible to interpret.

24 PRESIDING JUDGE EBOE-OSUJI: Witness, what was your last answer when the
25 lawyer asked you if you heard that Mr Michuki had issued an order banning live

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1 broadcast or live coverage? What did you say? What was your response? It did
2 not come through, so we want to hear it.

3 THE WITNESS: (Interpretation) I haven't understood.

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

5 MR KIGEN-KATWA:

6 Q. Witness, shortly before the person who is on the screen came on, there was a
7 comment by somebody who was reading news. And what I'm asking you is
8 whether you heard that voice indicating that John Michuki had issued an order and
9 the order was to ban live coverage. I was asking you whether you heard that.

10 A. Well, here is -- I've heard it here, but personally I can't tell you when that was
11 broadcast.

12 Q. Okay, Witness. So what you are telling us - just to be sure I've understood
13 you - is that in the year 2007 you didn't hear anything about a ban of live broadcast?
14 You've heard it for the first time in this court; is that what you're saying, Witness?

15 A. I told you that when the broadcasting ban was put in place, personally I heard
16 when Kass FM was prohibited from broadcasting. I didn't hear it myself. I learned
17 about it from other people, namely, that Kass FM had been prohibited from
18 broadcasting in 2006. So if you tell me that, we can't understand one another. I
19 don't know when you produced that, but in 2007, no radio station was prohibited
20 from broadcasting in 2007.

21 Q. Okay. I'll play on the audio, Witness, and then we'll see.

22 PRESIDING JUDGE EBOE-OSUJI: One second.

23 Witness, you've mentioned two years, one was 2006, I don't know whether -- that's
24 what we heard from the interpretation, and another one 2007 in relation to broadcast
25 or banning broadcast. What are you saying, can you tell us again in your own

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1 words again what you said happened in 2006 which may or may not have happened
2 in 2007.

3 THE WITNESS: (Interpretation) In 2006 -- no. Allow me to explain. In 2005
4 there was the campaign. Many media houses encouraged people to vote, and the
5 president said the work has been done. The people have already voted and they
6 called upon people to work in 2005. They stopped politics. In 2006 the politicians
7 continued and that is when the minister of communications stated that any person
8 who encourages people on his radio station, and at that time the radio station would
9 be prohibited from broadcasting. At that time the radio station Kass FM was
10 banned.

11 I never heard any talk about other bans. If I were to say such a thing I would be
12 lying to the Court, but in 2007 no station, no media house, was prohibited from
13 broadcasting. Even that video you just showed me, that is after the violence. That
14 was in 2008. As for 2007, I have no idea. This video was from 2008 when we were
15 at the showgrounds. I can see that. There even was someone who had a television
16 set at the showgrounds. What you're talking to me about here, I have no idea.

17 PRESIDING JUDGE EBOE-OSUJI: All right. There's something I want you to
18 clarify. When you were answering the last question for me, much of what you said
19 was in Kiswahili, but I heard you say in English in there "2006 only". Did you say
20 that, "2006 only"? And what were you saying when you said "2006 only"?

21 THE WITNESS: (Interpretation) I said that it was only in 2006 that I saw with my
22 own eyes and I heard that Kass FM radio had been banned. And it did not take
23 long because at that time the president was coming from Kipsamoite. He was in
24 Kipsamoite and he gave orders. There was violence between the Luhyas and the
25 Kalenjin. I was coming from Eldoret. The women with whom I was told me, "Tell

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1 that idiot of yours to allow Kass radio to broadcast." And this was in 2007.

2 THE INTERPRETER: It was in 2006, corrects the Swahili interpreter.

3 PRESIDING JUDGE EBOE-OSUJI: Right. Mr Kigen-Katwa, let's leave it there and
4 take it up at 2.30.

5 Witness, we will adjourn now for the lunch break and then we will come back at
6 2.30. Thank you.

7 Blinds down, please.

8 *(Closed session 1.05 p.m.) Reclassified into open session

9 THE WITNESS: (Interpretation) I have one request. I would like to ask to be able
10 to return a little bit late because I feel rather unwell. (Redacted)

11 (Redacted) Even though I am here, I have been making a lot of efforts
12 since Friday. I don't feel well and I have not been feeling well since Friday, but
13 please allow me to come back a little bit late, but I will stay right here in the court up
14 'til the last minute.

15 PRESIDING JUDGE EBOE-OSUJI: We will have the Court Registry attend to your
16 request for medical attention. The Victims and Witnesses Unit will meet with you.
17 We will keep our 2.30 date still. We will come back at 2.30 and we will have other
18 business to discuss possibly other than the testimony in any event. It may well be
19 that that will give you enough time for the rest you've requested. There are some
20 law that lawyers have to talk that doesn't concern you. So we will come back at 2.30
21 and do that. In the meantime, the Victims and Witnesses Unit will attend to you.

22 (The witness stands down)

23 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

24 THE COURT OFFICER: All rise.

25 (Recess taken at 1.07 p.m.)

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1 (Upon resuming in open session at 2.36 p.m.)

2 THE COURT USHER: All rise.

3 Please be seated.

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

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

6 The witness had requested a slight extension to the lunch break before we rose. We

7 told her that we would at any rate be discussing some legal logistical -- well, not

8 logistical, but some legal question, and she will be joining us. So we understand

9 she's on standby, as soon as signalled, she'll be joining us.

10 But in the meantime the matter of the excusal request -- sorry, not request -- the

11 excusal matter. We gave notice that we will require presence of Mr Ruto

12 throughout the testimony of Witness 28.

13 And Mr Hooper said somewhat that the ball is in the corner of the Prosecution to

14 verify that that witness is indeed attending during the session after Easter.

15 Ms Renton, who will speak to that?

16 MS RENTON: My colleague, Mr Garcia.

17 MR GARCIA: Good afternoon, your Honours. Simply in this case regarding the

18 Witness P-19, P-19, P-28, both witnesses, I understand that Mr Hooper is questioning

19 whether indeed they will be coming to testify in the post-Easter schedule, scheduled

20 session. The thing is we still have to meet them this week, probably on Friday and

21 early next week, so at this specific moment we're not able to inform the Chamber or

22 confirm that they will indeed be present during the post-Easter session that has been

23 scheduled on Friday.

24 I understand that Mr Hooper has indicated that maybe the submissions should be

25 postponed until we have certainty in that regard. We can make our submissions

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1 today if the Court pleases, or if not, maybe the more reasonable way of going about
2 this is to wait for the Prosecution to be able to speak with both these witnesses, to
3 confirm the fact that they will be able to attend on the post-Easter session, and at that
4 point, well, then maybe we can debate the whole question of, I understand the
5 Chamber wanted to hear our submissions on the matter of Mr Ruto's presence, and
6 maybe that might be the time, the appropriate time for it.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, why do we have to wait until
8 confirmation?

9 MR KHAN: Mr President, with your leave, I will address this issue. Your
10 Honours, we are grateful for the intimation that was given by the Bench last week.
11 And the starting point, of course, is Mr Ruto himself has stated on many occasions
12 that he will comply with any and all orders of the Trial Chamber, and if the Trial
13 Chamber require his attendance, it goes without saying he will be here.
14 I think my learned friend, Mr Hooper, and we discussed matters last week, was
15 raising a practical matter, because it's anticipated that the testimony of P-28 will be
16 very significant in terms of duration. I think maybe I would anticipate the
17 Prosecution, we have a time estimate, but they will be at least a week, a working
18 week, in-chief. The Defence will be at least that, and I've spoken to my learned
19 friend Mr Katwa-Kigen for Mr Sang and they will also take at least one week. So I
20 think it fair to say that even if there is no interruptions and legal argument, it
21 will -- it could well take four weeks to deal with that issue.
22 Now, your Honours, until we have a clear intimation from the Prosecution
23 regarding when they hope P-28 to start, we are not in a position to make any
24 submissions to the Bench about whether or not we would ask for the Court to allow
25 some dispensation within that period.

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1 So, your Honours, what I would ask is that the Prosecution do let us know in a more
2 concrete manner when they anticipate P-28 will come. Your Honour, and it's not
3 only related in fact to the issue of Mr Ruto's attendance. P-28's transcripts alone
4 amount to more than 3,000 pages. It's a very hefty lot, detailed interview over a
5 considerable amount of time that the Prosecution engaged in with this witness.

6 And, your Honours, for our own preparations, it's not a witness that we can simply
7 pick and run with. We want to know when this witness is going to be required to
8 come into the witness box.

9 So, your Honours, the second motivation that compels, we say, clarity from the
10 Prosecution at the earliest possible juncture, and we'd ask that my learned friend use
11 his best endeavours to give us as soon as possible a more concrete date when P-28 is
12 coming.

13 My learned friend Mr Hooper has also intimated we think, and we've sent an e-mail
14 to my learned friend the senior trial attorney, Mr Steynberg, that we think it wholly
15 unrealistic in our humble and respectful submission that we could deal with both
16 P-19 and P-28 in one session. The Prosecution estimation if I was right for P-19 was
17 14 hours, and it can be corrected if I am wrong, and I think for P-28, 12. Well, your
18 Honours, P-28 will be very extensive, and we previously said that it may be more
19 prudent, more realistic and more effective to focus on getting P-28 for the sake of
20 argument here straight after Easter.

21 And we have quite a few witnesses, for example, P-13 and P-32, that the Prosecution
22 have previously described as fillers that could quite easily in our estimation, of
23 course not privy to the knowledge of the Prosecution, could be put in to be fillers
24 and to fill any gap that may exist in the event that P-28's testimony does not fill the
25 entire period.

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1 But what seems clear to us at least is that there is no realistic possibility at all of
2 dealing with both P-28 and P-19 in one court session.

3 So, your Honour, I'd also ask that that be, that my learned friends for the Prosecution
4 take cognizance of that. It's not the Defence raising a difficulty. It's simply a
5 practical reality that we're not going to deal with both of those witnesses. We
6 would very strongly welcome clarity that we get P-28 after Easter. That will help
7 us, of course, with Mr Ruto's diary, any submissions that we may wish to make to
8 the Bench, and another witness, for example, P-13 or P-32 or any other witness that's
9 more bite size, if I can put it that, that would fill the post-Easter court schedule.

10 Your Honour, underlining all of that is the assurance of Mr Ruto that he'll comply
11 with orders of the Court. I'm grateful.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Khan. Mr Garcia, the
13 suggestion about again taking another look at the feasibility of taking both 28 and 19
14 has now been made again and we are sure you will take that into account, but at any
15 rate we are looking at P-28, isn't it?

16 MR GARCIA: That's correct, your Honour. We wanted to call Witness P-28 as our
17 first witness post-Easter, yes, indeed.

18 PRESIDING JUDGE EBOE-OSUJI: When can you get back, how quickly can you
19 get back with confirmation that that witness will be coming indeed?

20 MR GARCIA: I would say, your Honour, that we could get back to the Chamber
21 and to the parties and participants by next week. I'm unable to give more
22 specificity as to a precise date, but we need to speak to them either the end of this
23 week or next week.

24 PRESIDING JUDGE EBOE-OSUJI: All right. We will leave it at that on that
25 particular matter.

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1 One more matter, again, a general, for general consideration is at some point we will
2 have to remind you of your tab, as in we made an order at the beginning indicating
3 the time allotment for the case for the Prosecution. At some point we'll be returning
4 to that to see how much time, where we are on that, by that I mean I'm reminding
5 you of your time.

6 In light of Mr Khan's indication of the voluminous nature of this witness's
7 anticipated evidence, I will urge you again to revisit the question of admitted facts so
8 that we don't have to be taking witnesses through matters that are largely dealt with
9 by admission or cumulative evidence we've already heard on certain matters that
10 should be reasonably non-contentious. Again, you don't need to respond to it. I'm
11 just reminding you to keep that in mind so that we can cut down the amount of time
12 witnesses spend on the stand.

13 We will now bring in this Witness 442. Blinds down, please.

14 *(Closed session at 2.48 p.m.) Reclassified into open session

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

16 MR KHAN: Mr President, while the witness is being brought in, I'm very grateful
17 to my learned friend for his indication that by the end of next week they'll be able to
18 clarify somewhat. I wonder because, your Honour, on Monday, we have until
19 Friday, I wonder if my learned friend and the Office of the Prosecution could make
20 their best efforts to give us an indication by the end of this week. It would just
21 obviously aid significantly with our own mission plans and investigations, and it
22 would be most welcome.

23 PRESIDING JUDGE EBOE-OSUJI: It is a request, and Mr Garcia, I'm sure, can try
24 and accommodate that to the extent possible.

25 MR GARCIA: Indeed, your Honours, we will do our best in that regard.

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, how are we doing in terms of
2 your time schedule?

3 MR KIGEN-KATWA: I'm still hopeful to finish by end of day tomorrow, Mr
4 President.

5 (The witness enters the courtroom)

6 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back. I understand that the
7 Victims Unit have attended to you and that you can try and continue until the end of
8 today, and they will take you to see a doctor after the court session today. So let's
9 continue on that note. And if it becomes too difficult, let me know, all right?

10 Mr Kigen-Katwa, I take it we'll go back to public, or do you want to remain in --

11 MR KIGEN-KATWA: Public, Mr President.

12 PRESIDING JUDGE EBOE-OSUJI: All right. Public session.

13 (Open session at 2.53 p.m.)

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

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

16 MR KIGEN-KATWA:

17 Q. Now, Witness, I wanted to watch the remainder of the video, and then I'll ask
18 you a few questions.

19 (Viewing of the video excerpt KEN-OTP-0048-0094)

20 MR KIGEN-KATWA:

21 Q. Now, Witness, you've heard that the person addressing the media there is the
22 chairperson, media council. Did you hear that, Witness?

23 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, can you finish
24 that -- (Overlapping speakers)

25 THE WITNESS: (Interpretation) This is the first time I'm hearing about it today.

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1 PRESIDING JUDGE EBOE-OSUJI: Can we have that -- let the person on the video
2 complete what he's saying.

3 MR KIGEN-KATWA: Okay.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 (Viewing of the video excerpt KEN-OTP-0048-0094)

6 MR KIGEN-KATWA: Mr President, it was just coming to an end actually, that's
7 why I stopped it, because we are going into somebody else now.

8 PRESIDING JUDGE EBOE-OSUJI: Yes, yes. You have now finished it. Thanks.

9 MR KIGEN-KATWA:

10 Q. Witness, did you recognise the person who was speaking?

11 A. No, I do not know that person.

12 Q. But you confirm having heard him say this:

13 "The order is impractical and cannot be implemented within the realities of our
14 operations. This order undermines the democratic gains that this country has

15 made. We feel that this order is an overreaction by the minister considering that the
16 media has upheld professional standards in the coverage of elections."

17 You heard that, Witness, isn't it?

18 A. I do not understand your question.

19 Q. Witness, I am just restating what the person you saw in the video said and
20 this is what he said:

21 "The order is impractical and cannot be implemented within the realities of our
22 operations. This order undermines the democratic gains that this country has

23 made. We feel that this order is an overreaction by the minister considering that the
24 media has upheld professional standards in the coverage of the elections."

25 And, Witness, the question I'm asking is: Did you hear that in the video?

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1 A. No.

2 MR KIGEN-KATWA: Mr President, I will proceed to the next -- the next person in
3 the video.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, at some point you might give
5 a thought to whether there is any significance to -- did you said that was Mr Wachira
6 Waruru?

7 MR KIGEN-KATWA: Yes, Mr President.

8 PRESIDING JUDGE EBOE-OSUJI: -- any significance to what he was saying
9 towards the end about what the media would and would not accept. Did that mean
10 anything factually?

11 MR KIGEN-KATWA: Mr President, my interest in the item as I assume is obvious
12 is to show that there was in fact an order banning live coverage.

13 PRESIDING JUDGE EBOE-OSUJI: But there was also the other side of it. How
14 was that order received and implemented in fact?

15 MR KIGEN-KATWA: I've alive to that, Mr President.

16 PRESIDING JUDGE EBOE-OSUJI: Yes.

17 MR KIGEN-KATWA: Mr President will recall that that is the reason why I started
18 with the first document I referred to being the writing by one Gabrielle Lynch where
19 we looked at a footnote which addresses that question, Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: Whether or not it addresses that question is a
21 matter to be debated at the right time. While you have a witness on the stand and
22 you are putting certain things to her, I thought you might -- but you'll keep that in
23 mind at any rate.

24 MR KIGEN-KATWA: I will keep it in mind. I am however choosing not to ask her
25 at this point that question, Mr President.

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1 MR KIGEN-KATWA:

2 Q. Witness, I want you to look at the next speaker and confirm if you recognise
3 him. And I will very kindly request if you could listen kindly to what he says. I
4 will read out back what he has said. He is speaking in English.

5 MR KIGEN-KATWA: And your Honours and Prosecution, I'm referring to

6 KEN-OTP-0054-0124. That is the page number, and it is tab 23.

7 (Videotape KEN-OTP-0054-0124 was played in open court)

8 MR KIGEN-KATWA:

9 Q. Witness, did you see the person there? Could you confirm that is Raila
10 Odinga, Honourable Raila Odinga?

11 A. It is him.

12 Q. Now, Witness, I will read out what he has said, and I will request you to
13 confirm that that's what you heard him say:

14 "We can only now rely on international media. That is why we want to appeal to
15 you to be available so we can talk to you, because there is no way that we can reach
16 the people of Kenya, even if we want to tell the people to be calm, there is no way
17 we can reach them."

18 Witness, do you remember Honourable Raila Odinga saying that in that video?

19 A. (No interpretation)

20 Q. And in 2007, what was the status of Honourable Raila Odinga in the period
21 December 2007 and January 2008?

22 A. I beg your pardon, can you repeat, please?

23 Q. Witness, what I was asking you is whether you know what was the status of
24 Honourable Raila Odinga in political circles in the period December 2007 into
25 January 2008?

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1 A. I know that he was the ODM presidential candidate.

2 (Viewing of the video excerpt KEN-OTP-0048-0094)

3 MR KIGEN-KATWA:

4 Q. Witness, do you know the person who was shown on the video?

5 A. I saw Alfred Matua, and I heard him speak. I heard Kosgey -- I saw Kosgey.

6 Q. And, Witness, in the period 2007 December to January 2008, do you recall
7 what office Alfred Matua held in the government?

8 A. He was the government spokesperson.

9 Q. Now, Witness, this is what he said. I want you to confirm that's what you
10 heard him say:

11 "This is a temporary measure. We hope to lift it within a day or two once the
12 emotions get down. So it is not a ban on media or media freedom. It's just telling
13 and it is actually meant to for vernacular stations, especially not even television,
14 where people are calling in or people are inciting others to take up arms and burn
15 houses of their neighbours. We are saying listen to the content first before you air
16 it. And you can air it three seconds later or 30 seconds later. It is not telling you
17 that you cannot broadcast or that you cannot use your content."

18 Witness, do you recall having heard the government spokesman say that?

19 A. I have just seen him here now, and I heard him speak.

20 Q. Witness, I want to show you the last person in this video that I want to make
21 reference to. Please listen to him carefully and then I'll read out what he has said.

22 (Viewing of the video excerpt KEN-OTP-0048-0094)

23 MR KIGEN-KATWA:

24 Q. Now, Witness, you confirm we had seen this person Raphael Tuju earlier on,
25 isn't it?

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1 A. I saw him, but I had not yet seen him on this video.

2 Q. Now, Witness, could you confirm this is what you heard him say just in the
3 video that I've just shown you:

4 "Now, you don't take 10-year-olds and 14-year-olds who don't -- who cannot even
5 vote too seriously. I think it's a bit of incitement. In fact we know this specific
6 incitement came from one FM station. We dealt with that FM station. This
7 particular announcer was removed from air, because he had said that if another -- if
8 the announcement of the election is other than the ODM candidate, then you now
9 get out of your house, of your homes and go to the, you know, go to the streets and
10 do what you can to stop this from happening. That specific announcer in -- in a
11 tribal language, and it caused a lot of mayhem. But we will deal with that. We did
12 deal with that."

13 Witness, you confirm having heard this in the video I've just shown you?

14 A. I do not know whether it is my interpreter who is not interpreting correctly or
15 whether it is you, Mr Katwa, because he asked me "did you." This means that it
16 would refer to information that I would have had a long time ago. So I would like
17 you to ask that question again, because the question is being put to me in the past as
18 if this is something we talked about a very long time ago.

19 Q. Witness, all I've asked you is whether you've just heard it in the video that
20 I've just played right now?

21 A. Yes, I heard what he said.

22 Q. Now, Witness, the last set of questions I want to ask you on this issue is,
23 having heard all those people, Raphael Tuju, Honourable Raphael Tuju, Honourable
24 Raila Odinga, Waruru, Wachira Waruru, you still maintain that there was no ban of
25 live broadcast in the period end of December 2007 and January 2008?

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1 A. I have just stated that I did not hear it. However you have just played a
2 video, but you did not tell me which month and which year this video was recorded
3 in.

4 Q. Witness, did you know if there was any other Kalenjin, any other FM station
5 that was broadcasting in Kalenjin?

6 A. I do not know, because I did not listen to those other stations. The station I
7 was listening to was Kass FM. Now, if there had been any other radio stations, I
8 know nothing about that.

9 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, on this matter of some ban on
10 live broadcasts, you know, have you really established a disagreement with the
11 witness or, if I might approach the proposition from a different angle, a meeting of
12 the mind on what is meant by live, banning live broadcast? The witness is saying
13 that as far as she was concerned, the broadcast kept on going. Might she be
14 thinking that talking about a blackout completely for a period where there is no
15 broadcast at all or continuous broadcast that would have been delayed broadcast,
16 like we do for the proceedings of this court, so that somebody who was not there,
17 who might not have been at the source of it, the stream of events may not know that
18 there is a delayed broadcast.

19 MR KIGEN-KATWA: Mr President, I think the witness has confirmed that to the
20 best of her knowledge there was an incident when Kass FM was closed in the year
21 2006, which we contest. However, I could put the proposition to him whether he
22 has an understanding between closure and ban of live broadcast. I would,
23 however, wish to explain that our proposition remains that when the ban was put in
24 place, Kass FM did not air anything except music and peace messages. That is
25 actually our case.

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1 PRESIDING JUDGE EBOE-OSUJI: So then there we go. So your proposition was
2 that during the period, there was a complete non-broadcast of Kass FM
3 programmes, not just a delayed broadcast of some of the programmes, is that it?

4 MR KIGEN-KATWA: Absolutely, Mr President, absolutely. Now, the only
5 messages that were aired were peace messages, including the two that we've played
6 and others, and all these were pre-recorded and were replayed several times.

7 PRESIDING JUDGE EBOE-OSUJI: Proceed. You said you wanted to ask her
8 whether she appreciated the difference between delayed broadcast and closure
9 completely, or rather ban on live broadcast, which means delayed broadcast was
10 permitted versus ban as in complete blackout of broadcasts.

11 MR KIGEN-KATWA:

12 Q. Now, Witness, it is -- you testified a while ago that to the best of your
13 knowledge there was a ban on Kass FM in the year 2006. Do you remember that,
14 Witness?

15 A. Yes.

16 Q. Now, the question I'm asking you in respect to January -- December 2007 and
17 January 2008 is that there was an order from government saying that there should be
18 no live broadcast at the moment of the event, rather that there should be delay in
19 broadcasting whatever the stations collected. Do you understand the difference,
20 Witness?

21 A. I am not able to distinguish between pre-recorded broadcasts and live
22 broadcasts. You see, even when we talk about the year 2006, I was not aware that
23 Kass FM was under a ban at that time. I only learnt about those things in 2007,
24 2008, and at that time Kass FM was broadcasting its programmes normally.
25 Now, the video that you have just shown --

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1 Q. Let me just ask you very directly like this, Witness, were you aware of any
2 order issued by the minister in charge of internal security regulating how media
3 houses were to delay their broadcasts?

4 A. No, I don't know.

5 MR KIGEN-KATWA: Mr President, I would like to leave that issue there, because
6 my understanding is she's not aware completely about the ban, whether it was
7 delayed one way or the other.

8 Q. Now, Witness, I want to ask you if you are aware of the following vernacular
9 stations. And please without explaining, just confirm whether you know it or you
10 don't know. Do you know an FM station called Chamgei FM station broadcasting
11 in Kalenjin in Kenya?

12 PRESIDING JUDGE EBOE-OSUJI: Spelling.

13 MR KIGEN-KATWA: The spelling is C-H-A-M-G-E-I.

14 THE WITNESS: (Interpretation) There was a radio station known as Chamgei FM,
15 which still exists to this day and is still known as Chamgei FM.

16 MR KIGEN-KATWA:

17 Q. Witness, do you know another station called Egesa broadcasting in Kisii?
18 And the spelling of Egesa is E-G-E-S-A.

19 A. I heard about Egesa, and that was some time ago. But I haven't heard about
20 it again. However, I think there is a point on which we do not agree, Mr Katwa. A
21 short while ago, you, you played a video which I listened to and I watched it. Now,
22 when I look at that video, let us imagine that it was Citizen, would I be able to tune
23 to MTV whereas I'm watching Citizen at the same time as I'll be watching MTV? I
24 have already pointed that out to you. I was listening to Kass FM. Maybe there
25 were other programmes, but I don't know.

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1 MR KIGEN-KATWA: I would like the transcript to be corrected at page 82, line 17,
2 to state that it was broadcasted in Kisii language. Kisii is K-I-S-I-I.

3 Q. Witness, are you aware of a station called Inooro which broadcasts in
4 Kikuyu? And the spelling of Inooro is I-N-O-O-R-O.

5 A. Yes, I know that station. It still exists to this day.

6 Q. A station called Mulembe. Mulembe is M-U-L-E-M-B-E. And it broadcasts
7 in Luhya. And Luhya is L-U-H-Y-A.

8 A. Well, that station is not called Mulembe. It is called Murembe (phon) FM in
9 the Luhya language. That radio station exists even to this day.

10 Q. And a station called Musyi, M-U-S-Y-I, and it broadcasts in Kamba. Kamba
11 is K-A-M-B-A.

12 A. No. I don't know that station.

13 Q. A station called Muuga. Muuga is M-U-U-G-A. And it broadcasts in Meru.
14 Meru's spelling is M-E-R-U.

15 A. That station still exists to this day.

16 MR KIGEN-KATWA: Line 18 of the transcript, Muuga, the spelling of Muuga is
17 M-U-U-G-A.

18 Q. Witness, there is a station called Wimwaro. Wimwaro is spelled
19 W-I-M-W-A-R-O. And it broadcasts in Embu. The spelling of Embu is E-M-B-U.
20 Are you aware of that station, Witness?

21 A. No, I do not know it.

22 Q. Witness, there is a station called Ramogi - Ramogi is spelled R-A-M-O-G-I -
23 And it broadcasts in Luo and Luo spelling is L-U-O. Are you aware of that station,
24 Witness?

25 A. Yes, I know it.

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1 Q. Witness, there is a station by the name Radio Ma --

2 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, how many more radio stations
3 in non-English are you going to list?

4 MR KIGEN-KATWA: Probably one last one, Mr President. I had more than that,
5 but I'll just do one last.

6 Q. Witness, are you aware of a station called Kitwek FM, and the spelling of
7 Kitwek is K-I-T-W-E-K, which broadcasts in Kalenjin?

8 A. Yes, I know the Kitwek station which still exists, by the way.

9 Q. Now, the last question I want to ask you, Witness, is I want to show you a
10 document, and then I am done with this issue of the live ban.

11 MR KIGEN-KATWA: And that is, your Honours, at tab 17. And the reference is
12 KEN-0TP -- OTP, sorry, -0010-0021, tab 17. With your permission, your Honour, I
13 request to have the witness look at that document.

14 Q. Now, Witness, that document is a letter dated 30 December 2007 written to
15 one Dr Bitange Ndemo, permanent secretary, ministry of information and
16 communication. Can you see that, Witness? And, Witness, you can see at the
17 bottom it is --

18 A. I can see it.

19 Q. I'm sorry. And you can see at the bottom it is signed by one Honourable
20 John Michuki, Minister of State for Provincial Administration and Internal Security.
21 Can you see that, Witness? Now, it states that reference --

22 A. Yes, I can see it.

23 Q. Now, it states that "Reference: Invoking the powers under section 88 of the
24 Kenya Communications Act 1998 in the interest of public safety.

25 In the interest of public safety and tranquillity, I hereby direct you to invoke the

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1 powers under section 88 of the Kenya Communications Act 1998. You are further
2 directed to review the impact of its implementation and report to me accordingly."
3 You can see that, Witness? Witness, can you see that? Lastly, you see it is copied
4 to the --

5 A. Yes, I can see it.

6 Q. Lastly, you can --

7 THE INTERPRETER: From the Kiswahili booth, Mr President, would Mr Katwa be
8 kindly reminded to wait for interpretation from the Kiswahili booth. Thank you.

9 MR KIGEN-KATWA: I will. I'm sorry about that.

10 Q. Now, Witness, I wanted to ask you that you lastly notice that it is copied to
11 the commissioner of police, one Major General Hussein Ali, and the director of --
12 Director General Communication Commission of Kenya. You can see that,
13 Witness?

14 A. Yes, I can see it.

15 MR KIGEN-KATWA: Mr President, I would like to seek to produce the documents
16 I have referred to as exhibits at this point so that I leave that subject.

17 Mr President, the first item I wish to pray to have produced as an exhibit is at tab 3.
18 It is an article written by one Gabrielle Lynch. It is document OTP-0046-0014 at
19 page 0022. Mr President, it addresses directly the testimony of the witness and is a
20 prosecution document. I pray that it be exhibited to us, it be admitted as an exhibit.
21 I just put emphasis on the fact that we want to put in page 0022.

22 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

23 MS RENTON: I believe it was only a three or four line footnote which was actually
24 referred to, so if anything should be admitted, I think perhaps it should just be
25 admitted to that specific portion or in its entirety. I don't see why one specific page

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1 should be selected out of everything else.

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

3 MR KIGEN-KATWA: Mr President, in the article that's the only relevant part to the

4 media issues, and it was the only part that is relevant to the testimony of this

5 witness, Mr President. And if the Prosecution's concern is that they would rather

6 we produce the footnote alone, we really don't have an objection to that. We're

7 happy to have the footnote because that's actually the concentration of our concern.

8 PRESIDING JUDGE EBOE-OSUJI: Her point was you've read in the footnote.

9 Why do you need to -- want to tender the document just for a footnote you've

10 already read in, or if you want to put in the document then the whole thing comes

11 in? That's what she's saying.

12 MR KIGEN-KATWA: Mr President, the extent to which I have explained the article

13 and its relevance to the witness, I am okay if it is marked for identification.

14 PRESIDING JUDGE EBOE-OSUJI: Marked for identification.

15 MR KIGEN-KATWA: Mr President --

16 PRESIDING JUDGE EBOE-OSUJI: Yes, go on, Mr Kigen-Katwa.

17 MR KIGEN-KATWA: Mr President, looking at the transcript, I understood the

18 Prosecution to be agreeable to have the portion that we referred to admitted as an

19 exhibit, and we would pray that that is admitted as an exhibit, Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: Is that your position?

21 MS RENTON: The portion referred to is on the record. So if that's all that's going

22 in, then it can be MFI and the record is complete.

23 PRESIDING JUDGE EBOE-OSUJI: Let's mark this for identification. Okay, move

24 on.

25 THE COURT OFFICER: This document will bear the following number, EVD -- no.

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1 Sorry. MFI-T-D11-00036.

2 MR KIGEN-KATWA: Mr President, the next item we pray to have admitted as an
3 exhibit is the audio of 1 January 2008, and it is KEN-D11-0011-0045 being the peace
4 message of 1 January 2008 by Mr Sang and in respect to which the witness confirms
5 recognising the voice.

6 MS RENTON: Your Honour, the Prosecution has previously opposed the tendering
7 of a similar recording. We have objections to the authenticity and to the integrity.
8 All the witness did was recognise Mr Sang's voice. She said that she did not hear it
9 on the day that my learned friend says it was broadcast. If she had, that would be
10 one indicia of authenticity, but she didn't. We note from the chain of custody that it
11 was produced from the second accused, and without some independent evidence as
12 to its authenticity we don't think it should be admitted and your Honours have
13 made a ruling on a very similar item in the past. I can give a reference if you
14 require it.

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

16 MR KIGEN-KATWA: Mr President, what you said previously is that you would
17 deal with each item as it comes. And, Mr President, we insist that this audio as
18 indicia of authenticity in the sense that we already gave the Prosecution notice of our
19 intention to use this audio amongst others, and it is founded on an affidavit sworn
20 by one Julius Lamaon, who has sworn that he's the chief executive officer of the Kass
21 FM station, or rather the company that runs the Kass FM station. That particular
22 audio is specifically mentioned, is specifically mentioned at paragraph 54. And that
23 notice is KEN-D11-0013-0072 and it is an affidavit sworn on 8 January 2014. That is
24 in the smaller binder, your Honours, tab 1.

25 Your Honours will also recall that this witness very specifically says there were no

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1 peace messages made by Mr Sang. We submit that this document goes directly to
2 answer and to respond to that allegation made against Mr Sang.

3 Mr President, even if the issue of authenticity was a significant consideration in
4 determining whether or not to accept this document, we submit that that issue can
5 be addressed later on, the issue of its authenticity can be addressed later. We
6 submit that to the extent to which there is an indicia of authenticity and it directly
7 addresses issues raised in the testimony of this witness, it should be admitted as an
8 exhibit.

9 PRESIDING JUDGE EBOE-OSUJI: You began by saying you were tendering it
10 because the witness recognised the voice.

11 MR KIGEN-KATWA: Yes. And that creates the proximity, at least the initial
12 proximity to the, to the audio between the witness and the item we seek to exhibit,
13 Mr President and your Honours.

14 PRESIDING JUDGE EBOE-OSUJI: How did we deal with similar material in the
15 past?

16 MR KIGEN-KATWA: Mr President, in the past where we have produced audios,
17 which go to address what the witness has said specifically, you have allowed us to
18 exhibit them, even if the witness does not recognise that specific audio.

19 PRESIDING JUDGE EBOE-OSUJI: And even if there was no apparent indicium of
20 authenticity?

21 MR KIGEN-KATWA: In the past, your Honours, the affidavit sworn by the chief
22 executive of Kass FM has served to assist on the issue of the indicia of authenticity,
23 combined with the fact that the Prosecution have had noticed that we intend to use
24 them and have had opportunity to counter-check if they have any problem as to
25 whether or not those documents and those items were aired.

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1 PRESIDING JUDGE EBOE-OSUJI: That's a separate consideration, isn't it, that
2 you've given Prosecution advance notice that you were going to tend to it? It is
3 something different from saying that the affidavit of Kass FM manager was accepted
4 as authenticating the document. I'm not sure that's the case.
5 We will mark it for MFI for now. Can we -- you need to return to it later on. The
6 reason is because there has been so many attempts to introduce materials. I know
7 there were some instances where material had an apparent, apparent indicia of
8 authenticity. The question was whether a witness had viewed that sort of material
9 in the past. And I remember the ruling on one occasion was when we have such
10 documents that are apparently authentic, well, apparent indicia of authenticity, but
11 the witness had spoke -- although the witness did not preview it in the past, but had
12 testified during examination-in-chief on that matter, and the document itself goes to
13 address the subject that the witness had testified to in-chief, we had said we would
14 admit it notwithstanding that the witness had not seen it in the past. But that is
15 something different from just an audio recording that we don't see anything around
16 it that indicates whether or not it is authentic.
17 MR KIGEN-KATWA: Mr President would recall that Witness Number 356 already
18 testified and confirmed that peace messages were broadcasted in the period of end
19 of December into January 2008. And even on the basis of that, Mr President, we are
20 arguing that the Prosecution themselves through their own witnesses concede that in
21 fact peace messages were made.
22 Mr President, if I ought to, I would probably prefer that both this audio of 1 January
23 2008 and 4 January 2008 would be put on hold so that I collect together all the
24 arguments made with respect to production of the audios and come back and argue
25 the point.

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1 PRESIDING JUDGE EBOE-OSUJI: Yes, and that's what I was indicating. I said
2 that's why we should mark it for identification now subject to you returning later on
3 to argue your point about converting that to evidence.

4 What I see would be a scenario where if you have other evidence of authenticity, you
5 can argue it at a later point or, better still, if we get to the point of the evidence for
6 the Defence, you could also call evidence in that regard. Whichever comes first, we
7 can deal with it in that more flexible manner. Do you understand?

8 MR KIGEN-KATWA: I do, Mr President. I only seek to -- that I be allowed to
9 argue the point at the end of this witness's testimony with a view to seeking to have
10 this --

11 PRESIDING JUDGE EBOE-OSUJI: Yes, you can return to it later. It doesn't matter
12 when you do it.

13 MR KIGEN-KATWA: I'm obliged.

14 PRESIDING JUDGE EBOE-OSUJI: Yes. In the meantime counsel can also look at
15 the record and see how we've dealt with this in the past. So many of these things
16 happening, it is difficult to have a computer memory of all of that.

17 MR KIGEN-KATWA: The next audio, the next item I wish to seek to produce is the
18 video KEN-OTP-0048-0094 and the transcript KEN-OTP-0054-0119 being a Citizen
19 video on media ban.

20 Mr President, this video goes directly to answer the question as to whether or not
21 Sang said the six items that were allegedly said by Mr Sang on 31 December and
22 they're very directly relevant to the testimony of the witness.

23 Secondly, your Honours, this is the Prosecution's own document and we pray to that
24 extent it be admitted as Sang's Defence exhibits.

25 PRESIDING JUDGE EBOE-OSUJI: Ms Renton.

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1 MS RENTON: No objection for that item, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Then it is admitted as the next in the Sang

3 Defence exhibits.

4 THE COURT OFFICER: Thank you, Mr President.

5 The audio KEN-OTP-0048-0094 will bear the following number, EVD-T-D11-00037.

6 The transcript and translation KEN-OTP-0054-0119 will bear the following number,

7 EVD-T-D11-00038.

8 The two items will be also known as Sang Defence Exhibit Number 37 and 38 and

9 will be registered as public items.

10 MR KIGEN-KATWA: The next item I pray to have admitted as an exhibit, Mr

11 President and your Honours, is the letter from one John Michuki, which is at tab 17,

12 KEN-OTP-0010-021, together with the Communication Act of 1998, which is at tab

13 18, KEN-D11-0014-0324.

14 The relationship between the two is that the letter makes reference to the

15 Communication Act and particularly Section 88, and it is our view that the Chamber

16 would be better enabled to appreciate the issues discussed in it if they have the

17 advantage of the Statute itself.

18 Your Honours, may I mention also that this is the Prosecution's own document.

19 PRESIDING JUDGE EBOE-OSUJI: Ms Renton?

20 MS RENTON: Yes, indeed, the first letter is an OTP document. The second, which

21 was never referred to with the witness, is a Defence document. Even though the

22 letter is an OTP document, all that was done was my learned friend read it out and

23 asked the witness to confirm that that was in fact written on the piece of paper. I

24 don't really see that this is the correct procedure in order to have that and the

25 accompanying sections of the Communications Act admitted into evidence.

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1 MR KIGEN-KATWA: Mr President, may I first of all observe that in respect of this
2 item there is no issue of indicia of authenticity, so that the only question is its
3 probative value. And, Mr President, we've explained that it is our case that, in fact,
4 the period when it is alleged that Mr Sang made the comments that we were dealing
5 with, there was in fact a ban, and this letter goes directly to address that.

6 Now, I acknowledge that the Communication Act of 1998 that we have referred to is
7 not part of the Prosecution's documents, however, it is our submission that in the
8 exercise of your discretion, there is value in admitting also the Communication Act
9 so that there is a context and so that the context in which the letter was written can
10 be appreciated. We pray that it be admitted as an exhibit.

11 PRESIDING JUDGE EBOE-OSUJI: Ms Renton, are you objecting to both the letter
12 and the Communications Act, or one or the other?

13 MS RENTON: Seeing as they come as package, so to speak, I think it's most
14 appropriate that neither of them be admitted. If the Defence wish to establish that
15 this letter was in fact sent and reference the section of the Telecommunications Act,
16 then they may do that in the Defence phase of the case. There is absolutely no link
17 to this witness, so they haven't even passed the threshold of having some connection
18 to the witness's evidence apart from her own understanding of what was going on at
19 the time.

20 (Trial Chamber confers)

21 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa, the Chamber will not admit the
22 letter. We do see, yes, it came from the OTP, but you merely read out the letter and
23 there was no question really put to the witness on it. I was a little curious as to why
24 we are asked now to admit it. The witness has given her testimony. There are
25 other methods of trying to bring this sort of material in other than through this

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1 witness, is there not?

2 MR KIGEN-KATWA: I will look at --

3 PRESIDING JUDGE EBOE-OSUJI: Yes. Let's -- we will not be admitting it at this
4 time.

5 MR KIGEN-KATWA: The last item I wish to -- Mr President, do I understand that
6 it's being marked for identification?

7 PRESIDING JUDGE EBOE-OSUJI: If you seek to mark it for identification it will be
8 so done. Is that your request then?

9 MR KIGEN-KATWA: Yes, I would rather that it be marked.

10 PRESIDING JUDGE EBOE-OSUJI: All right. It will be marked for identification.

11 THE COURT OFFICER: Document KEN-OTP-0010-0021 will bear the following
12 number, MFI-T-D11-00039.

13 MR KIGEN-KATWA: May I proceed with my cross-examination?

14 PRESIDING JUDGE EBOE-OSUJI: Proceed, please. We have five minutes left.

15 MR KIGEN-KATWA:

16 Q. Now, Witness, you said that you heard Sang say that there was -- that work
17 had been done well, but had not been completed in Kericho, a place called -- you
18 called Nyagacho and Molo. Did you say that? And I'm looking at page 9,
19 lines -- page 9 and page 13 of transcript, transcript 100.

20 A. (No interpretation)

21 Q. You also said that Mr Sang used the words "kwekwe" and "munyot." Did
22 you say that, Witness?

23 A. That is correct.

24 Q. Now, Witness --

25 PRESIDING JUDGE EBOE-OSUJI: You might want to spell -- all right. The

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1 transcript has now got a spelling. There was no spelling of the second term at first,
2 but it's now got it. Proceed.

3 MR KIGEN-KATWA:

4 Q. Now, Witness, when did you say you heard Sang say these things?

5 A. It was between the 5th and the 7th, that is because at that time we had already
6 arrived at the showground. It was around the 7th or the 8th. I no longer
7 understand or rather remember the precise date, but I know that at that time we
8 were already at the showground.

9 Q. And, Witness, we take it that you are talking of either 5th, between 5 and 7
10 January 2008. Is it January, or which month, Witness?

11 A. No. It was not on the 5th or even the 6th or the 7th. I think that we arrived
12 on the 6th. It should have been around 10 January 2008.

13 Q. So do we take it that it is your testimony that these things were said on 10
14 January or -- I just want you to be sure whether you know the dates, or what is your
15 position about when it was broadcast?

16 A. I have just told you the date because there is an event that helped me to
17 remember. So it was around that date that I just gave you.

18 Q. You've given us 5th to 7th and then 6th --

19 A. No, I beg your pardon, it was not on the 5th, nor was it on the 6th, the 7th or
20 the 8th. It was from the 10th. I have just remembered.

21 Q. And, Witness, I want you to --

22 A. (Speaks English) Now just a minute -- (Interpretation) Please give me a
23 moment and I will tell you what happened after that announcement was made.

24 Q. Witness, you know we are in an open session, so I just want you to be careful
25 about it. If it's something you can say in open session, it's okay.

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1 A. It doesn't matter, because I can say it in open session.

2 Q. Please say it.

3 A. At that time the chief of Chemuswa had just been killed in Langas. We were
4 at the showground during that night. There were people who came and attacked
5 the showground. They went to Langas to kill people for the last time. It was then
6 that Mr Sang spoke.

7 Q. And, Witness, you said it was around 10th. Could you give us a range, it
8 was between 10th and when if it is a variety of dates, or was it exactly 10th?

9 A. I thought I just told you I do not know what else to say. I have just said that
10 it was from the 10th. I no longer remember the precise date. I have forgotten it.
11 And if I do remember, I will tell you tomorrow.

12 Q. I have understood you to that extent, Witness. All I'm asking is as much as
13 you may not remember the exact date, but it was around 10th, could you give us a
14 range of dates? Was it between 10th and 30th, between 10th and (inaudible), or
15 between -- what is the range of the period?

16 A. I have just told you that it was from the 10th, but I cannot tell you whether it
17 was on the 12th or the 13th specifically because I no longer recall. However, what I
18 know is that there is an event that took place at that time and thereafter no other
19 internally displaced person returned to the camp. At that time the person had
20 already arrived. Those who remained there were of the T-S --

21 THE INTERPRETER: And the interpreter didn't get the expression, but they were
22 receiving assistance from the Red Cross.

23 MR KIGEN-KATWA:

24 Q. Witness --

25 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, we have to adjourn, but do

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1 you have --

2 MR KIGEN-KATWA: Could I ask one question?

3 PRESIDING JUDGE EBOE-OSUJI: Pardon me?

4 MR KIGEN-KATWA: Could I just ask one question?

5 PRESIDING JUDGE EBOE-OSUJI: Yes.

6 MR KIGEN-KATWA:

7 Q. Witness, having told us it was 10th onwards, is it your testimony that it was
8 definitely not 8 January?

9 A. No, it was not on the 8th.

10 MR KIGEN-KATWA: I can leave it there, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: We will leave it there.

12 Witness, we will leave it there for now and come back tomorrow at 9.30. Please do
13 not discuss your testimony overnight. Thank you.

14 The blinds will come down and the witness will be ushered out of the Court.

15 *(Closed session at 4.04 p.m.) Reclassified into open session

16 THE COURT OFFICER: We are in closed session, your Honours.

17 (The witness stands down)

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

19 THE COURT OFFICER: All rise.

20 (The hearing ends in closed session at 4.05 p.m.) Reclassified into open session

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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- 1 (Redacted)
- 2 (Redacted)
- 3 (Redacted)
- 4 RECLASSIFICATION REPORT
- 5 Pursuant Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 6 2013, and the instructions in the email dated 14th May 2014, the version of the
- 7 transcript with its redactions becomes Public.
- 8