

Trial Hearing
Witness: KEN-OTP-P-0409

(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
5 and Joshua Arap 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 Wednesday, 26 February 2014
10 (The hearing starts in open session at 9.36 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please call the case.
16 THE COURT OFFICER: (Interpretation) Thank you, Mr President. Situation in
17 the Republic of Kenya, in the case of The Prosecutor versus William Samoei Ruto
18 and Joshua Arap Sang, ICC-01/09-01/11. We are in open session.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 I take it appearances remain as they have been?
21 MR PUGLIATTI: Mr President, good morning. We're joined once again by
22 Mr Steynberg, who wasn't in the last session.
23 MR NDERITU: On our side the appearances remain the same. Thank you.
24 MR KIGEN-KATWA: Our appearances remain the same, Mr President.
25 MR KHAN: And likewise, Mr President.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

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

2 Witness, welcome back to the courtroom and Mr Khan will continue asking you
3 questions.

4 Mr Khan, we're in the open session.

5 MR KHAN: I'm grateful. And, your Honour, before I go into that and proceed
6 with my cross-examination, I'd ask that we assign an exhibit number to the
7 document that I showed the witness -- sorry, that I questioned the witness about
8 yesterday, which is KEN-D09-0030-0428, and it's the last -- document at the last tab.
9 It's from the Victim and Witness Unit. So, your Honour, I'd ask that that be given
10 an exhibit number please.

11 PRESIDING JUDGE EBOE-OSUJI: Why do we give it an exhibit number? I
12 thought you extracted the information you wanted and put questions to the witness
13 and the witness responded to it. Do we need --

14 MR KHAN: Your Honour --

15 PRESIDING JUDGE EBOE-OSUJI: -- to do more than that? One second. Do we
16 need to do more than that and why?

17 MR KHAN: Your Honour, it's of course a document given by the Prosecution and
18 through the Victim and Witness Unit created from the Victim and Witness Unit. It
19 relates to the testimony, so in my respectful submission when, at the end of the day
20 or at any point, in fact, your Honours have to assess the transcript, you will have
21 reference to the actual document that formed the basis of the questions that was
22 created from the VWU and transmitted to the Defence. Your Honour, it just helps
23 demonstrate the context and ensures that in the future a full record is available.
24 The witness has confirmed the contents. There's no questions about authenticity
25 and the like, and so it's my respectful submission it be part of the record.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 Your Honour, a time may come indeed when the classifications and the record in
2 this case are open not just to academics but to other members of the international
3 community and the public. And, your Honour, it would be useful, in our respectful
4 submission, for that record to be complete so that those that wish to study this case
5 and be aware of it have relevant documents as part of the case file.

6 Your Honours, I do ask that it be given an exhibit number, but I'm in your Honours'
7 hands.

8 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

9 MR PUGLIATTI: Well, Mr President, the propositions contained in that document
10 were put to the witness and my learned friend had free rein to elicit whatever
11 propositions he thought relevant. And he put the propositions he did, and the
12 witness gave the answers that he did, and those answers are now on the record.
13 And so for the purposes with which the document was used in the
14 cross-examination we say the record is complete.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I think we should leave it at that.

16 MR KHAN: Your Honour, in that case perhaps it can be marked for identification.
17 Your Honour, because the usual -- the witness cannot read, so it doesn't -- your
18 Honour, the questions have been put --

19 PRESIDING JUDGE EBOE-OSUJI: All right. Okay. See, it would be -- let's not
20 argue about it. We'll mark it for identification.

21 MR KHAN: Your Honour, in that case I'll continue and I'm grateful for that. And
22 the questioning now --

23 PRESIDING JUDGE EBOE-OSUJI: One second. Let's finish the process.

24 THE COURT OFFICER: (Interpretation) Document KEN-D09-0030-0428
25 confidential will be assigned the code MFI-T-D09-00142.

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 MR KHAN: I'm grateful. And, Mr President, your Honours, with your leave I'd
2 ask that we move into private session.

3 PRESIDING JUDGE EBOE-OSUJI: Private session. And for how long, Mr Khan?

4 MR KHAN: Your Honour, it would be quite some time. Perhaps all of this
5 session, in fact.

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

7 *(Private session at 9.41 a.m.) (Reclassified as Open session)

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

9 WITNESS: KEN-OTP-P-0409 (On former oath)

10 (The witness speaks Swahili)

11 QUESTIONED BY MR KHAN: (Continuing)

12 Q. Mr Witness, you told the Prosecution, you told the Court that on the night of
13 27 December 2007 you were awoken from your sleep by your father; is that right?

14 A. That is true.

15 Q. (Redacted)

16 A. (Redacted)

17 Q. Yes. So -- and I'm just referring to your statement to the Prosecution. You
18 do say that. You say that you were living on some land in (Redacted)
19 (Redacted)?

20 A. That is true.

21 Q. (Redacted)

22 (Redacted)

23 A. That is correct.

24 Q. Yes. Thank you. And then you say that a time came when you went with
25 your family to (Redacted). Do you remember saying that?

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

- 1 A. I did say that.
- 2 Q. I'm grateful. And you spent two nights at (Redacted), correct?
- 3 A. That is correct.
- 4 Q. The second night you stayed there was immediately after the first night,
- 5 correct?
- 6 A. Yes.
- 7 Q. Now, you remember being asked about how many people were staying at (Redacted)
- 8 (Redacted). Do you remember being asked about that?
- 9 A. I remember that.
- 10 Q. And you said you couldn't remember because it was dark, correct?
- 11 A. Yes.
- 12 Q. But there were -- according to you, were there many people there or only a
- 13 few people?
- 14 A. There were neither many nor few.
- 15 Q. Well, was it in the tens or the hundreds or the thousands? Can you give an
- 16 assessment in those categories?
- 17 A. There were tens of them.
- 18 Q. And you were there with your wife and children and your father; is that
- 19 right?
- 20 A. That is correct.
- 21 Q. Now, you say that the men were, if I can use the word, guarding. They were
- 22 waiting outside (Redacted) or on the perimeter of (Redacted). How many men
- 23 were standing with you?
- 24 A. I no longer remember. I do not know precisely how many of them were
- 25 there.

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 Q. Of course it's a -- must have been a scary event to you if you were there. The
2 people -- the men that were there with you, were they also Luhya or from other
3 communities?

4 A. Most of them were Luhya.

5 Q. And the ones that were not Luhya, where did they come from, which
6 community of Kenya did they originate from?

7 A. In that region there were many more Luhya, but there were also Kisii.

8 Q. And I'm talking still about not the region but the very specific location of
9 (Redacted). So am I to understand you that at (Redacted) there were
10 people seeking refuge there from the Luhya community, Kisii and the Kisii
11 community? Is that right?

12 A. That is correct.

13 Q. Now, sometimes -- you may agree with me sometimes one forges a bond of
14 friendship with people that you've gone through something with. Do you
15 remember the names of any of these people that were with you at (Redacted)
16 (Redacted) at that time?

17 A. It is not possible for me to remember because we could not engage in
18 conversation.

19 Q. You told the Court, Mr Witness, that you saw during one of the nights
20 people -- you saw lights as if men were walking around at night with torches outside
21 (Redacted). Do you remember saying that?

22 A. That was outside of (Redacted), but there was a road next to that school and
23 that is where these people were.

24 Q. Yes. And presumably, according to you, you were standing on the perimeter
25 because you were seeking to guard the women that you say and the children that

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 you say were inside; is that right?

2 A. That is correct.

3 Q. So did you not speak with these other men and discuss what would you do if
4 these men with torches approached (Redacted) Didn't you discuss with these
5 other men that were standing with you?

6 A. We were not next to each other. That is why we could not discuss.

7 Q. Can you remember the name of one person, just one, outside your family that
8 you say was with you in 2007 at (Redacted)?

9 A. Most of the people that I knew were members of our family.

10 Q. And that includes your father (Redacted); is that correct?

11 A. Yes, they were there.

12 Q. And your father's full name is (Redacted)

13 (Redacted). That's

14 your father's full name?

15 A. That is true.

16 MR KHAN: Your Honour, just for the record, (Redacted).

17 PRESIDING JUDGE EBOE-OSUJI: And (Redacted)?

18 MR KHAN: (Redacted). I'm grateful.

19 Q. So, Witness, just to be clear, outside your father or outside your family, can
20 you name any person, Kisii or Luhya, that you say was with you on those nights of
21 2007, just to be clear?

22 A. I do not know anyone.

23 Q. And the women, where were they staying?

24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we've been on this line of question

25 now for some time and I'm trying to understand where it is going. It's not apparent

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 to me what we are seeking to establish by it. Would it be that this witness did not
2 take refuge or what? I'm not --

3 MR KHAN: Your Honour, I'll come to that. It's clearly relevant, but I'll come to
4 that in a different way. I want to, of course, get the picture from the witness first
5 before I put certain things to him, which is the normal way or at least it's one way of
6 doing it.

7 PRESIDING JUDGE EBOE-OSUJI: Indeed, but it's also so that the Chamber is not
8 anxious to stop the line of inquiry, it helps to let the Chamber know where it is
9 going, because we don't want to wait until you're taking your time to get to the
10 point.

11 MR KHAN: Your Honour, I think, has answered the -- where I'm going in the
12 question. I would be grateful if I say no more than that at the moment. Your
13 Honours, it will just be a couple of questions on the school and then I'll come back to
14 it a little bit later.

15 Q. Witness, where in that (Redacted) compound were the women and children?
16 Where were they staying?

17 A. They were inside the school.

18 Q. I'm grateful. And, Witness, you also say that unfortunately in that -- in the
19 aftermath of the 2007 violence, (Redacted)
20 (Redacted); is that right?

21 A. Yes, that was my testimony.

22 Q. (Redacted).

23 That's correct, is it not?

24 A. That is correct.

25 MR KHAN: And (Redacted).

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 Q. And you were clear that since that day unfortunately (Redacted)

2 (Redacted)?

3 A. Yes.

4 Q. (Redacted)?

5 A. At that time one could not get any assistance from the police.

6 Q. At any time later did you make a report to any police station in Kenya

7 regarding the – (Redacted)?

8 A. Yes. I do recall that I reported the matter to the police at some time.

9 Q. At which police station?

10 A. Well, what I said, actually, was that I never filed any report with the police.

11 Q. Did you ever go, for example, to the Kenya Red Cross or any other

12 organisation in 2007 or 2008 or 2009 and report (Redacted)

13 A. When I went to seek refuge at the location where I was, there were no Red

14 Cross workers at that place.

15 Q. Did you ever go to any journalist or newspaper and ask them to -- ask them to

16 help, (Redacted) after all this time?

17 A. No. I did not enjoy anybody's support. I got no support from anywhere

18 whatsoever. (Redacted), but we did not receive any assistance

19 in that connection.

20 Q. Did you report that (Redacted)?

21 A. No. We were not living in the same location, and that is why I did not

22 provide that information.

23 Q. Witness, I'm going to go back to (Redacted).

24 MR KHAN: And, your Honours, I'd ask to be put on the screen, it's tab 22,

25 KEN-D09-0030-0023, if that could please be put on the screen?

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 Q. Witness, you see a photograph that's displayed on your monitor. Can you
2 see that? Do you recognise that, Witness?

3 A. This is not very clear to me and I cannot say that I recognise this location from
4 the photograph.

5 MR KHAN: If we could put another photograph on the screen.

6 KEN-D09-0030-0025. If that could be put on the screen, I'd be grateful. Your
7 Honour, it's at tab 24.

8 Q. Witness, would you agree with me that that shows -- in panorama that shows
9 (Redacted) and its premises; is that correct?

10 A. Yes, that is correct.

11 MR KHAN: And if we could also show at tab 23, KEN-D09-0030-0024. Thank you.

12 Q. Witness, that's the hall inside the school; is that correct? That's the hall
13 inside -- the main hall inside (Redacted); is that right?

14 A. I am not in a position to confirm that, because when I was there it was
15 night-time, and I do recall that men were not allowed to enter that hall.

16 Q. Had you entered (Redacted) on any other occasion before 2007 or was that the
17 only time?

18 A. I had gone by the school previously.

19 Q. You hadn't been inside the school building itself before 2007; is that right?

20 A. That was at the time when the building of the school started. I was at that
21 location, but I was not interested in going into the buildings.

22 Q. So you've never been inside the building of (Redacted), am I
23 understanding you correctly, sir?

24 A. Yes.

25 Q. What was the name of the headmaster of that school?

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 A. His name was (Redacted).

2 Q. If you could look at a photograph.

3 MR KHAN: And, your Honours, it's at tab 26 and it's KEN-D09-0030-0027. Your

4 Honour --

5 Q. Mr Witness, do you recognise the person on the -- on the screen? Do you

6 agree that's (Redacted)?

7 A. I do not think that that is (Redacted).

8 Q. (Redacted)

9 (Redacted)

10 (Redacted)

11 A. (Redacted)

12 Q. (Redacted)

13 A. I do not know his family name.

14 Q. (Redacted)

15 (Redacted)

16 A. That is correct.

17 Q. (Redacted)

18 (Redacted)

19 A. Yes, I agree with you because he has been living at that area or at that location

20 for a very long time.

21 Q. And, in fact, you're aware that he lives (Redacted)

22 (Redacted) and that's where he lives? You know

23 that, don't you, Witness?

24 A. Yes, he lives (Redacted).

25 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I come back to you --

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 MR KHAN:

2 Q. Mr Witness --

3 PRESIDING JUDGE EBOE-OSUJI: -- in relation to my earlier intervention when I

4 asked you. It is still not clear what this line of question is intended to serve.

5 The witness testified that he was present at rallies while your client made certain

6 speeches, according to him. And now we are talking about him whether or not he

7 took refuge at (Redacted). I don't get it. That's what I'm -- I'm not saying that you

8 may not be up to something, but I'm not sure what it is.

9 MR KHAN: Your Honour --

10 PRESIDING JUDGE EBOE-OSUJI: And we've been here for a long time.

11 MR KHAN: I'll get straight to the -- cut to the chase.

12 Q. Witness, (Redacted),

13 wasn't he?

14 A. I no longer remember the dates, but I know that he was (Redacted) who used

15 to live in that area for a very long time.

16 Q. You see, the truth is this, Mr Witness, (Redacted)

17 (Redacted), and you didn't spend even one night

18 there in 2007; isn't that right?

19 A. No, that is not the truth.

20 Q. You're taking events of 1992 and things that happened to you and your family

21 and misrepresenting them as having taken place in 2007. Mr Witness, isn't that the

22 truth?

23 A. No, that is not true.

24 Q. Are you aware -- it's public information -- that in 2007 (Redacted)

25 (Redacted)? Are you aware of that, Witness?

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 A. Yes. That is how things were, (Redacted).

2 Q. And, in fact, the results of councillor were announced at about 9 p.m. on 27 of
3 December 2007, and (Redacted), was announced the winner of the
4 local elections for councillor. Are you aware of that, Witness? That's at about 9
5 p.m. on the 27th.

6 A. Please kindly repeat your question.

7 Q. (Redacted)

8 (Redacted)

9 (Redacted)

10 A. Ordinarily, people go to their various voting centres to listen to the results or
11 to follow the results. They go there in order to become aware of all the results or
12 the full results of the elections.

13 Q. Are you aware, Witness, that on 27 December 2007 there were many people at
14 (Redacted) celebrating or commiserating with the victors and losers of the
15 local council elections that had just been announced?

16 A. People could not celebrate, because the conflict had already broken out, and
17 so people were not celebrating at that time.

18 Q. Well, Witness, there was no conflict at all that had broken out on the night of
19 27 December; isn't that right?

20 A. What I know is that the conflict broke out in Kenya on the 27th, even before
21 the election results were announced.

22 Q. And, Witness, you told the Court that when you were woken up by your
23 father, you stayed at your house that night and only the next day did you go to
24 (Redacted); is that right?

25 A. Yes, that is correct.

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 Q. Do you remember giving a victim's application in November of 2011 in which
2 you said, when you saw burning, you ran straight to (Redacted)? Do you
3 remember that or not?

4 A. No, that is not what I said.

5 MR KHAN: Well, I'll come back to that, Mr President, a little bit later. It's at tab
6 56. I'll come back to that later.

7 Q. Witness, are you aware that on 28 December 2007 it was so peaceful (Redacted)
8 (Redacted)
9 (Redacted)? Are you aware of that?

10 A. I do not remember where he was.

11 Q. (Redacted)

12 (Redacted)

13 (Redacted) Are

14 you aware of that?

15 PRESIDING JUDGE EBOE-OSUJI: Witness, don't answer that question.

16 Mr Khan, why would you suppose that this witness would be aware of that?

17 MR KHAN: Well, your Honour, the witness says he's there at the time when all
18 this is taking place.

19 PRESIDING JUDGE EBOE-OSUJI: You're saying that this witness would be in a
20 position to know that (Redacted)?

21 MR KHAN: Your Honour, I'm asking him if he's aware of it.

22 PRESIDING JUDGE EBOE-OSUJI: Then we don't want to make that sort of
23 argument to the Court through the witness. You can make that at another time.

24 MR KHAN:

25 Q. Witness, are you aware that in 1992 your (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 (Redacted)?

2 Are you aware of that, or am I wrong?

3 A. On that day we didn't seek refuge at that location. Well, if you follow my
4 statement or testimony, you would find out what I have said in that connection.

5 Q. Witness, I've read your statement and I'm asking you, (Redacted)

6 (Redacted)

7 (Redacted), but that was in 1992; is that correct?

8 A. That is not true.

9 MR KHAN: Now, Witness, I'm going to show you a photograph of some land and
10 I want you to confirm if this is the land where your father was staying, you say, in
11 2007. And, your Honours, it's tab 7, KEN-D09-0030-0008.

12 Q. Witness, can you recognise that photograph as showing your father's home
13 where he was staying, you say, in 2007?

14 A. Yes.

15 MR KHAN: So let me show you another photograph as well, and it's at tab 12,
16 KEN-D09-0050-0013 -- sorry, KEN-D09-0030-0013. I apologise.

17 Q. That was your -- the home of your parents; is that right?

18 A. Yes, this is in fact the house, but it looks different from how it was before.

19 MR KHAN: Yes, it's a long time, Witness. We'll move on.

20 Your Honours, tab 14, KEN-D09-0030-0015, if that could please be put on the
21 screen?

22 Q. (Redacted)

23 (Redacted)?

24 A. I can see the photograph, (Redacted)

25 Q. Can you see a -- in the photograph it looks like (Redacted)? Can you see the

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted)

3 A. When looking at this photograph, you really cannot see an overview, a
4 general view.

5 MR KHAN: Let me try another picture, or photograph, at tab 15,

6 KEN-D09-0030-D016.

7 Q. And, your Honour and Mr Witness, (Redacted)

8 (Redacted) Please let us know if you can

9 recognise that, the next photograph, KEN-D09-0030-D016.

10 PRESIDING JUDGE EBOE-OSUJI: You must convert to a question that the
11 witness will need to respond to, Mr Khan. The proposition you put in that what
12 that shows, it has to be a question for the witness to react to.

13 MR KHAN:

14 Q. Witness, can you see that photograph?

15 A. Yes, I can see it.

16 Q. Can you now recognise this photograph as showing the area (Redacted)
17 (Redacted)? Is that
18 correct?

19 A. As I have told you, I can see the photograph. You showed me my father's
20 house before and I admitted that that was the house indeed.

21 Q. So let me put it another way. (Redacted)
22 (Redacted)? That's your evidence?

23 A. Yes.

24 Q. (Redacted)?

25 A. No, I do not agree with you.

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 MR KHAN: Your Honour, if we could turn to --

2 THE WITNESS: (Interpretation) (Redacted).

3 MR KHAN:

4 Q. Let's go to tab 20, Mr Witness, KEN-D09-0030-0021. Witness, do you
5 recognise the gentleman in the photograph as (Redacted)?

6 A. Yes, I know him. He was a neighbour.

7 Q. (Redacted)?

8 A. Yes.

9 Q. (Redacted)

10 (Redacted)?

11 A. Yes.

12 Q. Would you agree with me that where -- in the photograph where (Redacted)
13 (Redacted)? Is that
14 right?

15 A. I cannot know that. (Redacted)

16 (Redacted).

17 Q. (Redacted)

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, Mr Khan, hold the question. This
19 witness has admitted that the distance between (Redacted)
20 (Redacted)

21 (Redacted), if it were. Why are we spending so much time on
22 this?

23 MR KHAN:

24 Q. I'm correct, am I not, Witness, that where you were living you say in 2007,
25 (Redacted)?

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 A. (Redacted).

2 Q. Yes, I know you and (Redacted)

3 (Redacted). That's right, isn't it? (Redacted)

4 (Redacted)?

5 A. I do not agree with you.

6 Q. (Redacted)

7 (Redacted)?

8 A. I do not really understand what you are saying. Are you saying that there

9 were houses where -- next to each other and then afterwards you say one was on

10 one side and the other on the other side? It's difficult to understand.

11 Q. You say that your -- you've identified a house that you say your father was

12 living in in 2007. You agree with me so far; is that right?

13 A. Yes.

14 Q. (Redacted)

15 (Redacted)

16 (Redacted)?

17 A. (Redacted)

18 (Redacted)

19 Q. (Redacted)

20 (Redacted)?

21 A. (Redacted).

22 Q. Yes. Witness, my question was -- let me put my question again. Your

23 (Redacted)

24 A. Yes, that is correct.

25 Q. (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 PRESIDING JUDGE EBOE-OSUJI: (Redacted)?

3 MR KHAN:

4 Q. (Redacted)

5 (Redacted)?

6 A. (Redacted)

7 (Redacted)

8 (Redacted)

9 Q. Witness, I'm putting it to you very straightforwardly and remember you're
10 under oath. (Redacted)

11 (Redacted)

12 A. (Redacted).

13 Q. (Redacted)

14 (Redacted)?

15 A. No, that is not correct.

16 Q. (Redacted)?

17 A. (Redacted)

18 (Redacted).

19 Q. You don't have the title deeds showing you owned that land in 2007, do
20 you?

21 A. (Redacted)

22 (Redacted)

23 (Redacted)

24 Q. Witness, I don't want to jump from plot to plot. I'm being quite specific.

25 I'm trying to -- I'm talking about where you say you were living in 2007. We've

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

- 1 talked about (Redacted)
- 2 (Redacted)
- 3 (Redacted)
- 4 A. (Redacted)
- 5 (Redacted)
- 6 Q. Do you have the title deeds for the land on which you lived, yes or no?
- 7 A. Yes, I have it.
- 8 Q. And where is it?
- 9 A. Read my statement.
- 10 PRESIDING JUDGE EBOE-OSUJI: Okay, let's do this. Mr Khan, one second.
- 11 Mr Khan, you need to think whether this is really material to the issues, but
- 12 before -- while you think about that I want to ask the witness a question.
- 13 Witness, you said that there was and probably still is a small -- sorry. (Redacted)
- 14 (Redacted). How difficult
- 15 (Redacted)?
- 16 How easy, or difficult, was it (Redacted)?
- 17 THE WITNESS: (Interpretation) It was not difficult at all (Redacted).
- 18 PRESIDING JUDGE EBOE-OSUJI: How would somebody (Redacted)? Did
- 19 somebody just (Redacted)? How did
- 20 somebody (Redacted)?
- 21 THE WITNESS: (Interpretation) (Redacted)
- 22 (Redacted).
- 23 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 24 Mr Khan, you may now resume, but you may consider to move along.
- 25 MR KHAN:

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 Q. Witness, you are aware, are you not, that (Redacted)

2 (Redacted)

3 (Redacted)

4 A. I did not say that.

5 Q. Do you agree with me (Redacted)

6 (Redacted)

7 (Redacted)

8 A. No, that is not true.

9 Q. And, Witness, it's been a long time, 22 years I say, since you've lived there,

10 (Redacted)

11 (Redacted)

12 A. (Redacted).

13 PRESIDING JUDGE EBOE-OSUJI: It's now 11 o'clock.

14 MR KHAN: I'm grateful.

15 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, we will rise and return at

16 11.30.

17 Can we bring down the blinds, court officer.

18 *(Closed session at 10.59 a.m.) (Reclassified as Open session)

19 THE COURT OFFICER: (Interpretation) We are in closed session, your Honour.

20 (The witness stands down)

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

22 MR KIGEN-KATWA: Mr President and your Honours, I have a very urgent

23 application to make. The nature of the application is I am requesting for the

24 excusal of my client to go and see a doctor. He is in extreme pain and it's a

25 situation we have tried to tolerate and hope will go away, but it's become

Trial Hearing
Witness: KEN-OTP-P-0409

(Closed Session)

ICC-01/09-01/11

1 unbearable. We are constrained to request for his excusal to be absent in the next
2 two sessions, and we propose that he comes back with the medical documents to
3 show the need for him to have gone there and the necessity for the excusal.

4 Your Honours, I appreciate that the rule requires that --

5 PRESIDING JUDGE EBOE-OSUJI: Now, before you proceed, have you discussed
6 this with Prosecution counsel?

7 MR KIGEN-KATWA: I did discuss, but it is quite a while ago and like I
8 explained it --

9 PRESIDING JUDGE EBOE-OSUJI: All right. Before you argue the point,
10 Prosecution, an excusal has been requested on medical grounds. Do you oppose?

11 MR PUGLIATTI: No opposition, Mr President, and we note that our learned
12 friend has previously indicated that Mr Sang's health was not good at the moment.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, one second.

14 MR KIGEN-KATWA: May I just say one thing which will go into your
15 consideration, Mr President? Mr Sang is not very familiar with the environment
16 here and I propose that he be accompanied by my colleague, Logan Hambrick, for
17 purposes of seeking that medical attention, and so the excusal is for him to be
18 accompanied by her.

19 (Trial Chamber confers)

20 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, the request is granted. For
21 now we will take your word for it. It's up to you if you're going to tender medical
22 records later, but the Chamber at this point does not require it. If in future we do,
23 we will let you know --

24 MR KIGEN-KATWA: Thank you very much, your Honours.

25 PRESIDING JUDGE EBOE-OSUJI: -- for a future request of that nature.

Trial Hearing
Witness: KEN-OTP-P-0409

(Closed Session)

ICC-01/09-01/11

1 The Chamber will rise.

2 MR PUGLIATTI: Mr President, sorry. Just before the Chamber rise, in granting
3 that application is the Prosecution to understand that Mr Sang has waived his right
4 to be present for those sessions?

5 PRESIDING JUDGE EBOE-OSUJI: That's a good point.

6 MR KIGEN-KATWA: We do confirm, Mr President, and if need be we can put
7 that in writing.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 MR KIGEN-KATWA: Yes.

10 PRESIDING JUDGE EBOE-OSUJI: We will rise.

11 THE COURT USHER: All rise.

12 (Recess taken at 11.04 a.m.)

13 *(Upon resuming in private session at 11.36 a.m.) (Reclassified as open session.)

14 THE COURT USHER: All rise.

15 Please be seated.

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

17 Mr Kigen-Katwa, any reports?

18 MR KIGEN-KATWA: Mr President, he went to see the doctor on the fourth floor.
19 He's been given a prescription and he's on his way home to --

20 PRESIDING JUDGE EBOE-OSUJI: All right. I indicated during the grant of the
21 excusal that we'll get back to you in procedure for the future. As we said, we said
22 it's up to you to show the doctor's certification. On this occasion is an exceptional
23 measure. The Chamber feels that for future purposes, yes, we will be requiring a
24 doctor's certificate to show the attendance, to show the attendance, that's one.

25 But if definitely the doctor's certificate is inevitable, if upon consultation the doctor

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 says the accused person needs to be excused for any period of time from the
2 courtroom, we will again be requiring medical certificate from the doctor saying
3 that. So we thought we should make that clear on the record. So we don't want to
4 be understood to have said that we would not be asking for a medical certificate
5 from a doctor. All right?

6 MR KIGEN-KATWA: Thank you very much, your Honour. Our understanding is
7 that we have to supply them. His condition is probably something that might
8 recur. We would want to maintain our good record.

9 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Good.

10 MR KIGEN-KATWA: Thank you very much, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, before we continue, we're in private
12 session. We don't want to have this discussion in public session and in the presence
13 of the witness. Where are we going with this thing? So far we feel that we've
14 spent a lot of time discussing refugee places and whether or not the witness was
15 there. We've also spent a lot of time discussing parcels of land.

16 For the Chamber, we want to get to the heart of the issue, and we do not want to feel
17 that we've been worrying the fringes of the issues. We want to get to the heart of
18 the matter.

19 MR KHAN: Your Honour, I'm grateful for the opportunity to clarify. Our case, as
20 we said at the outset, we believe this witness is coming here to deceive. And the
21 clear evidence from (Redacted)

22 (Redacted)

23 (Redacted)

24 was not in that vicinity at all in 2007. It's made up.

25 And I put it to the witness about the school, that you stayed there. (Redacted) says

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 he stayed with the family in 1992. 2007, there was nobody staying at that school.

2 And my account, and it's for closing speeches, is to draw it together that this witness
3 is lying actually. He's putting untruths forward. (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted). And so that's further evidence that his account is untruthful as opposed
7 to mistaken.

8 And so, your Honour, in our respectful submission it's one of the foundations, one of
9 the pillars of what we'll allege later on is a deliberate attempt to mislead this Court.

10 PRESIDING JUDGE EBOE-OSUJI: All right. Can we begin -- I will -- the Chamber
11 will be asking you to go straight to if you do have questions about the rallies. I
12 know that Mr Kigen-Katwa spent some time on that matter and, although one could
13 say it wasn't his issue, but his familiarity of Kalenjin of course was something we
14 kept in mind in allowing him to cross-examine on that.

15 But if you have any questions on that aspect of the witness's testimony, we would
16 like to get that out of the way. If you want to return to these other credibility issues
17 you can, but we don't want a situation where we spend a lot of time with this and
18 then we run out of time for you to deal with the actual testimony of the witness
19 against your client.

20 So if we are pressed for time, and we feel we must cut you off at some point, we
21 want to do that after we've heard testimony about all your cross-examination of the
22 witness about the rallies. Let's begin with that.

23 MR KHAN: Well, your Honour, if I could be heard on it? I gave an
24 intimation -- of course, I will not take longer than the Prosecution, I gave my
25 undertaking that I'll be finished by tomorrow and I will do my very best to be

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 finished by the end of tomorrow and significantly earlier if possible.

2 But, your Honour, of course we have the advantage of knowing the evidence we've
3 investigated. It's only been served on the bench now. And so there may be
4 method in the madness that may appear at first blush to be --

5 PRESIDING JUDGE EBOE-OSUJI: Yes, of course, we appreciate --

6 MR KHAN: And so, your Honour, I wish to do the rallies in a certain location,
7 because, your Honour, when we are saying -- it's a serious allegation --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, hold on.

9 THE INTERPRETER: Microphone, please.

10 PRESIDING JUDGE EBOE-OSUJI: I'm indicating how we want you to proceed on
11 this matter, because we have here a large bundle of documents you have supplied.
12 You've already also indicated that you would be doing some video and tapes and all
13 that, and we know those things do take time. We've been here before when we've
14 had estimates of time, and we've overrun by a long, long shot.

15 So let's do the rallies. We don't want to now spend time on the parcels of land or
16 place of refuge. If you can get beyond that, later on you may return to it.

17 MR KHAN: Your Honour, I'll do as instructed. My preference would be to do
18 rallies after lunch and to finish off these issues that I say are relevant to credibility.
19 Your Honours, one of the reason for this is, is that one wishes to, when we say that
20 there is a witness telling untruths, is to make the witness realise the game is up, so
21 that by the time we get to the rallies the witness may actually finally decide under
22 oath to tell the truth. And, your Honours, if we take it in a different sequence in
23 which he's boxed himself in to what we say is a brazen lie, it's difficult then to go
24 back.

25 So, your Honours, I would ask -- I will do what the Bench instruct, but my

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 preference was to deal with credibility more, because I want to give the witness -- I
2 will be asking for Article 70 for this witness. I will be asking for Article 70
3 proceedings to be investigated.

4 PRESIDING JUDGE EBOE-OSUJI: Yes. Do what we urge for now, please. Let's
5 begin with that and then, as I say, you can come back to this other matter later on,
6 okay?

7 MR KHAN: So, your Honours, the instruction of the Bench is I should leave my
8 cross-examination now and go to rallies and leave these other issues?

9 PRESIDING JUDGE EBOE-OSUJI: Yes. You may return to them, that's correct.

10 MR KHAN: Sobeit.

11 PRESIDING JUDGE EBOE-OSUJI: Just so you don't misunderstand us, we are not
12 saying you may never ask questions on those issues again. That is not the ruling.
13 The ruling is let's deal with these other issues first and then, if --

14 MR KHAN: Your Honour --

15 PRESIDING JUDGE EBOE-OSUJI: -- later on you want to come back to this issue,
16 we will take it in then.

17 MR KHAN: Your Honour, I will do so of course out of respect for the Bench, but I
18 will note that there is a plan to my cross-examination and that plan of course is being
19 set aside, but I will act accordingly.

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

21 Can you please bring down the blind and invite the witness into the courtroom.

22 Thank you.

23 *(Closed session at 11.45 a.m.) (Reclassified as Open session)

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

25 MR KHAN: Your Honour, and I will just for the record, because we must as

Trial Hearing
Witness: KEN-OTP-P-0409

(Closed Session)

ICC-01/09-01/11

1 counsel prepare a record, that I do note that if my earlier cross-examination that I
2 planned had succeeded, it may be that I would not need to ask any questions about
3 rallies because the witness would accept he was not there, but your Honours I will
4 be guided by the Bench as instructed.

5 (The witness enters the courtroom)

6 PRESIDING JUDGE EBOE-OSUJI: Thank you. Do we now go public?

7 MR KHAN: Yes, I'm grateful.

8 PRESIDING JUDGE EBOE-OSUJI: Okay. Public session.

9 (Open session at 11.46 a.m.)

10 THE COURT OFFICER: (Interpretation) We are in public session, Mr President.

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

12 Witness, welcome back. Mr Khan will continue asking you questions. This is to let
13 you know that that red light is on, which tells you that we're now in public session.

14 Now, I want you to again remember what I told you earlier, you must listen
15 carefully, although I have not reminded you of that since Mr Khan started asking his
16 questions. I want you to listen, to listen carefully to Mr Khan's questions and
17 understand the questions he's asking you, and then you give your answer to his
18 questions very truthfully.

19 I do not want you to get into an argument with lawyers who are asking you
20 questions or ask them questions back yourself. That is not how the Court system
21 works. You will answer his questions. And as I already advised you when you
22 arrived, you should not worry about the fairness of the questions being asked of
23 you. The judges here are here, and part of our job, a large part of it, is to ensure that
24 witnesses are not asked unfair questions, all right?

25 So Mr Khan will continue his questions of you. Listen to his questions, understand

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 them, and then answer, okay? Thank you.

2 MR KHAN: I'm grateful. Mr President, before I start, I would ask for the kind
3 assistance of the court officer. I am going to play a couple of videos in due course.
4 And because I wasn't expecting to play them now, we have the references, but if my
5 learned friend can assist with, once I give the EVD numbers to actually put them on
6 and play them in the usual way, I would be grateful.

7 PRESIDING JUDGE EBOE-OSUJI: Before we proceed, you did in the exercise so far
8 that we've seen some materials, what do you want to do with them? I realise we're
9 in public session.

10 MR KHAN: Yes, your Honour. Maybe it's a good opportunity. At tab 24, which
11 is KEN-D09-0030-0025, the witness confirmed that that was the school. I'd ask that
12 that be exhibited.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you know we've rejected in the past
14 these sort of clearly stitched-up panoramic shots. It used to be the case in the past
15 that photographs required the calling of the photographer to testify, but that's been
16 dispensed with in modern times. But then technology comes in where we have
17 stitching technology.

18 Are you saying that this is shot from a wide-angle camera that did not require
19 stitching? If it involved the technology called stitching, we will not accept it.

20 MR KHAN: Your Honour, I'm grateful for that. Unless people outside
21 misunderstand, the stitching is not anything inappropriate. It's a technical process,
22 I understand.

23 Your Honour, it was taken with an iPhone, as simple as that. But the witness -- the
24 point is weight can be decided later. And we of course hope that the Bench will
25 come and have a site visit after the Prosecution case. But, your Honour, the witness

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 has accepted that's the premises, and so weight can be accorded later.

2 PRESIDING JUDGE EBOE-OSUJI: Do you have the separate frames of these photos
3 that I presume were combined together to form the panoramic image?

4 MR KHAN: Your Honour, my colleague that took the photograph, I was present, is
5 in the field. But my understanding, I won't say more than that, is one doesn't stitch
6 it. One has a feature where you can take a photograph in a different way, but I
7 didn't actually operate the phone. My friend did.

8 PRESIDING JUDGE EBOE-OSUJI: All right. That's the difficulty. Let's not -- let's
9 mark this for --

10 MR KHAN: Sobeit.

11 PRESIDING JUDGE EBOE-OSUJI: -- ID for now --

12 MR KHAN: I'm grateful.

13 PRESIDING JUDGE EBOE-OSUJI: -- pending clarification. And if you can have
14 separate frames, if that's what's happened, let us know as well.

15 MR KHAN: I'm grateful. And, your Honour, the next is KEN-D09-0030-0027,
16 which is a photograph of the principal of that establishment. I'd ask that that be
17 marked for identification. The witness couldn't recognise the photograph.

18 PRESIDING JUDGE EBOE-OSUJI: It will be marked for identification.

19 MR KHAN: Your Honour, at tab 7 is the father's house that the witness identified
20 as being the place that he was staying in 2007. And that's KEN-D09-0030-0008.

21 PRESIDING JUDGE EBOE-OSUJI: Prosecution, any objection?

22 MR PUGLIATTI: To that item, no objection.

23 PRESIDING JUDGE EBOE-OSUJI: That will be admitted as the next in the Ruto
24 Defence Exhibits.

25 MR KHAN: Your Honour, the next KEN-D09-0050-0013 is at tab 12. It's another

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

- 1 view of the house that the witness said that's the house, but it looks a little bit
2 different from when he last saw it. I'd ask that that be given an exhibit number,
3 please.
- 4 PRESIDING JUDGE EBOE-OSUJI: Prosecution?
- 5 MR PUGLIATTI: Again, no objection to that item.
- 6 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next in the Ruto Defence
7 Exhibits.
- 8 MR KHAN: Your Honour, the next two will just be, my request will be that they be
9 marked for identification. The first is tab 14, which shows a geological feature,
10 that's what I put to the witness, KEN-D09-0030-0015.
- 11 PRESIDING JUDGE EBOE-OSUJI: It will be marked for ID.
- 12 MR KHAN: And, your Honour, another is KEN-D09-0030-D016, which was the
13 path just before that.
- 14 PRESIDING JUDGE EBOE-OSUJI: Again, it will be marked for ID.
- 15 MR KHAN: And, your Honour, the last in fact, and I'm grateful to my learned
16 friends Ms Lawrie and Ms Alagendra is at KEN-D09-0030-0021. It's a photograph
17 of an individual that the witness recognized, the pointing photograph.
- 18 PRESIDING JUDGE EBOE-OSUJI: Okay. Why are we tendering it? For the
19 individual, or for --
- 20 MR KHAN: Yes. Well, your Honour, it relates to the testimony that he recognised
21 the individual and where the person lived and the proximity.
- 22 PRESIDING JUDGE EBOE-OSUJI: Now, what do you want us to do with this,
23 mark for ID?
- 24 MR KHAN: Marked for identification.
- 25 PRESIDING JUDGE EBOE-OSUJI: All right.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 MR KHAN: Sorry, exhibited, your Honour. He's accepted the individual in the
2 photograph as being the person whose name was given in private, and also that the
3 home of that person, and I don't say more in public, that the home of that person has
4 a certain proximity to the home of his father. The word "hill."

5 PRESIDING JUDGE EBOE-OSUJI: I want to understand why then we are
6 admitting it for exhibit, for what purpose?

7 MR KHAN: Your Honour, an individual will come later on who is a Defence
8 witness, and I don't want any confusion about who the person is or where the
9 person lived at the time. So, your Honour, when this witness has seen the
10 photograph --

11 PRESIDING JUDGE EBOE-OSUJI: So let's separate the issues. You are not seeking
12 to admit that particular exhibit for the landscape. You are admitting it merely for
13 the person shown on the photo, is that it?

14 MR KHAN: No, your Honour. It's both. The witness was asked very clearly, "Do
15 you know the person?" He gave the name. That's one ground of -- that's one
16 ground of admissibility by itself. If it was a black background, of course, the
17 evidence could go in, but the witness went further and accepted that that person
18 whose name was given in private session lived on a certain elevation.

19 And, your Honour, the matter of weight can be discussed later. I'll say no more at
20 the moment. The bottom line is, your Honour, it should be exhibited, and we can
21 argue about weight and admissibility and probative value at a later point, unless
22 your Honour wishes to hear more submissions, in which case we may have to go
23 into private session.

24 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

25 MR PUGLIATTI: Mr President, if it is going to be exhibited, it should be for the sole

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 purpose of identifying the individual. When the photograph was put to the
2 witness, a number of propositions relating to that image were put to the witness.
3 He agreed with some. He did not agree with all. It's in the record what those
4 propositions were and his responses. So we submit it's sufficient to exhibit the
5 photo simply for identifying the individual, and on that basis we wouldn't object.

6 PRESIDING JUDGE EBOE-OSUJI: We would accept the exhibit for purely the
7 person shown in the photo and not for the landscape.

8 MR KHAN: Your Honour, and can I just for the record refer the Bench to page 20,
9 line 17, to the end in which the questions were given, but your Honour I'll move on.

10 PRESIDING JUDGE EBOE-OSUJI: We'll move on. I know what you are saying,
11 but that testimony is not necessarily particular to the landscape indicated in the
12 picture as such.

13 MR KHAN: I'm grateful.

14 PRESIDING JUDGE EBOE-OSUJI: Yes.

15 THE COURT OFFICER: (Interpretation) Document KEN-D09-0032-0025,
16 confidential, will be marked for MFI-T-D09-00143. Document KEN-D09-0030-0027,
17 confidential, will be marked as MFI-T-D09-00144. Document KEN-D09-0030-0008
18 will be given the EVD number EVD-T-D09-00145. Document KEN-D09-0030-0013,
19 confidential, will be marked as EVD-T-D09-00146. Document KEN-D09-0030-0015
20 will be marked as MFI-T-D09-000147. Document KEN-D09-0030-0016 will be
21 marked as MFI-T-D09-00148. Document KEN-D09-0030-0021 will be marked as
22 EVD-T-D09-00149. All these documents are confidential.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Khan.

24 MR KHAN: I'm grateful.

25 Q. Mr Witness, you said yesterday that you -- and over the last few days that

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 you attended rallies that you've spoken about, and you've spoken about the

2 Honourable Henry Kosgey quite a bit; is that right?

3 A. That's right.

4 Q. And the account you've given the Court is that Honourable Kosgey in 19 -- in

5 2007 was going around these rallies telling people to get rid of Kikuyus and Kisiis

6 and Luhyas and Luos and everybody who is not Kalenjin; isn't that right?

7 A. I didn't say that he was asking people to drive out people who were not from

8 the Kalenjin ethnic group.

9 Q. Everybody except the Kalenjin should be uprooted and thrown out, kicked

10 out of the Rift. That's your evidence to this Court, is it not?

11 A. That's not what I said.

12 Q. You didn't tell the Court that he was going around repeating identical words

13 at these five rallies you've spoken about saying "uproot the trees," which you meant

14 to be everybody except the Kalenjin. Is that what you said, or have you changed

15 your mind?

16 A. (No interpretation)

17 PRESIDING JUDGE EBOE-OSUJI: Interpretation?

18 THE WITNESS: (Interpretation) That's right.

19 MR KHAN:

20 Q. He was violently against the PNU led by Honourable Kibaki; is that right?

21 A. That's right.

22 Q. Are you aware that the son of the Honourable Henry Kosgey was standing as

23 a PNU candidate in the 2007 elections? Are you aware of that, Witness?

24 A. I knew that Kosgey was the one who was representing the ODM.

25 Q. Are you aware that Henry Kosgey, the Honourable Henry Kosgey has a son

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 Alex Kosgey who was standing as a PNU parliamentary candidate in 2007?

2 A. I didn't know.

3 Q. Let's see if this triggers your mind. Are you aware that he had failed, he had
4 not succeeded, Mr Alex Kosgey, in getting the nomination for ODM for the Emgwen
5 constituency, and so he crossed over to NARC and stood under the PNU umbrella in
6 2007? Does that help your recollection?

7 A. I don't remember, because it wasn't my region, nor was it my electoral
8 district.

9 Q. Did you watch the confirmation proceedings in this case, Witness?

10 A. No, I didn't. I'm just here now.

11 Q. You didn't watch any of the confirmation hearing in this case, is that what
12 you are telling the Court?

13 A. Yes, I did not listen to them.

14 Q. Do you have friends, Witness? Don't tell me who they are. Do you have
15 friends, people you speak to, have lunch with or coffee with?

16 PRESIDING JUDGE EBOE-OSUJI: Witness, you can say "Yes" or "No" to that
17 question, but do not mention who your friends may be, if you have friends.

18 THE WITNESS: (Interpretation) Yes, I do have friends. I'm not short of friends.

19 MR KHAN:

20 Q. I'm glad to hear it, Witness. Did you speak with your friends about the
21 confirmation hearing that was being broadcast in Kenya? Did you discuss what
22 was happening in court?

23 A. No, I didn't talk to them about that.

24 Q. Did they speak to you about it, about the confirmation of charges hearing
25 against William Ruto, Henry Kosgey and Joshua Sang?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 A. No.

2 Q. Witness, you applied to be a victim in this case in 2011 before the
3 confirmation of charges hearing. Were you not interested to know what was
4 happening in this case that you had applied to be part of?

5 A. It was when I was accepted. That was when I listened, and I started to take
6 an interest in this trial.

7 Q. Are you aware that Allen Kosgey's son -- sorry -- Honourable Henry Kosgey's
8 son, who represented him in the confirmation hearing, is Mr Allen Kosgey? Had
9 you read about that or heard about that or knew about that, Allen Kosgey, the son of
10 Henry Kosgey? Are you aware of the name?

11 A. I don't know.

12 Q. Had you ever heard that he was married to a Kikuyu lady? Have you heard
13 about that?

14 A. I never heard any talk about that.

15 Q. Now, Witness, I'll go to another topic. You gave evidence yesterday about
16 the nationwide campaign that was the ODM strategy in 2007.

17 MR KHAN: And, your Honours, I'll refer the Bench to tab 104. And I'd ask be put
18 on the screen KEN-D09-0030-0176.

19 Q. And to save time, Witness, I will just read a section to you. It's from a news
20 report from the Daily Nation dated Thursday, December 20, 2007. And it's headed
21 "Tight Schedule For Raila As He Hunts For Votes," And then underneath it it says,
22 "ODM candidate uses aircraft to cover wide areas and spends an hour at each rally."
23 And I would be grateful for my learned friend, the court officer's, assistance in
24 zooming in on the third column directly under the photograph that starts, "On
25 average, Mr Odinga ..." It's the third column I'm particularly interested in and it's

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 the third paragraph from the bottom.

2 And, Witness, let me read this to you, it says – sorry, just one moment. And so from

3 the top I'll read it, "On average, Mr Odinga spends ..." -- no, in fact I do apologise.

4 Let me go to the preceding paragraph, "Mr Odinga is usually accompanied by ODM

5 Chairman Henry Kosgey." So this is the bottom of the second paragraph, "Mr

6 Odinga is usually accompanied by ODM Chairman Henry Kosgey to most of his

7 meetings. Mr Kosgey allows only a local ODM parliamentary candidate and Mr

8 Odinga to address the gatherings."

9 And then it goes on in the next paragraph, "On average, Mr Odinga spends about an

10 hour-and-a-half at one rally. ODM has two presidential campaign teams. One is

11 headed by Mr Odinga himself and includes ODM Pentagon members Charity Ngilu

12 and Najib Balala. The other is led by Mr Musalia Mudavadi, Mr Odinga's running

13 mate, who works with ODM Pentagon members William Ruto and Joe Nyaga,

14 Nyaga."

15 Witness, you would agree with me, being interested in ODM politics, being a

16 member, that usually at campaign rallies, Mr Ruto went with Musalia Mudavadi,

17 and Mr Kosgey normally went with Mr Odinga and Charity Ngilu and Najib Balala.

18 When they were not together, that's how they divided their work up; is that right?

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, is this witness in a position to answer

20 that question?

21 MR KHAN: Your Honour, this is the witness that stated he joined the ODM party,

22 being interested in politics, and went out, wasn't a passive bystander, but went on

23 vehicles and went to five different rallies to hear what the ODM was saying. So in

24 my respectful submission, he was in Kenya he says at the time. It was a nationwide

25 election campaign, saturated press coverage, and it's something that he would have

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 known either from television, from newspapers, from headlines or from gossip in
2 the local coffee shop. And it is something that he can answer and we'll see in a
3 moment if he can.

4 PRESIDING JUDGE EBOE-OSUJI: So you think he's then in a position to testify to
5 the ODM strategy, campaign strategy at the time?

6 MR KHAN: Your Honour, the question is in fact not the strategy. He answered
7 that yesterday, in fact, that ODM was seeking to ask questions regarding the whole
8 of the country. It's regarding the division of responsibilities, that in seeking to
9 promote that message, the ODM campaign message, the ODM leadership was
10 divided. Henry Kosgey, Honourable Henry Kosgey, Honourable Raila Odinga,
11 Charity Ngilu, Najib Balala on one hand, and Musalia Mudavadi, team A, the main
12 team, Musalia Mudavadi, William Ruto, and Joe Nyaga.

13 So, your Honour, in my respectful submission this is something that was on
14 television in Kenya all the time. Anybody who was following politics, let alone
15 somebody who had gone a step further and had become a member of a political
16 party would be able to speak that that was the case.

17 PRESIDING JUDGE EBOE-OSUJI: That's your -- that will be your argument at the
18 end of the day. You may put a question to the witness, if you are talking about a
19 division of the campaign, if he's in a position to answer it.

20 MR KHAN:

21 Q. Witness, are you aware that usually -- I'll try again. Are you aware, Witness,
22 that usually Henry Kosgey accompanied the Honourable Raila Odinga to campaign
23 rallies, and they were also accompanied by Charity Ngilu and Najib Balala? Are
24 you aware of that?

25 A. No, I'm not in a position to know about that.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 Q. Yes. And are you aware that the usual partner at campaign meetings of
2 Musalia Mudavadi was Honourable -- was Mr William Ruto and also Joe Nyaga?

3 A. I'm not in a position to know about that.

4 MR KHAN: Your Honours, we'll go to tab 54. And the ERN is

5 KEN-OTP-0103-3147. It's from the Standard newspaper, 7 December 2007.

6 Q. And, Witness, I'll read it to you before it comes on the screen, so you can just
7 focus on my words. It starts, "ODM presidential running mate, Mr Musalia
8 Mudavadi, has dismissed President Kibaki's just concluded tour of Western Province
9 as inconsequential."

10 And then three paragraphs below it says, "Mudavadi and William Ruto are in a
11 campaign trail in the North Rift. Yesterday they addressed crowds in Kipkaren,
12 Selian, Kapseret, and Kesses in Mosop and Eldoret East constituencies. They urged
13 voters not to be lured by empty promises. Speaking at Kipchoge Keino stadium in
14 Kapsabet, Ruto said ...", quote-unquote, "False prophets were moving around the
15 country trying to scare Kenyans.' He said, 'Those opposing the majimbo system of
16 government were the same people who opposed multiparty democracy, yet they
17 were now enjoying the fruits.'"

18 So my question to you, Witness, does this help refresh your memory that William
19 Ruto and Musalia Mudavadi used to campaign very frequently together?

20 A. I don't agree.

21 Q. You don't agree or you don't know, Witness?

22 A. I don't know.

23 Q. Are you aware or had you heard that they had addressed crowds in
24 Kipkaren, Selian, Kapseret and Kesses and Eldoret East? Had you heard about
25 those rallies that William Ruto and Musalia Mudavadi spoke at?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 A. I'm not in a position to know.

2 Q. Witness, did you attend an ODM rally in Kapsabet at the Kipchoge Keino
3 stadium?

4 A. I was never at a rally at Kapsabet.

5 Q. But your evidence to this Court is clear, is it not, from the rallies you've
6 spoken about, the three rallies that you say you heard Mr Ruto speak, he was telling
7 the audience that that area was really for Kalenjin, and non-Kalenjins, including the
8 Luhya, should be booted out; is that right?

9 A. I never said that.

10 Q. Is it your evidence, Mr Witness, or is it not that the message that you have
11 attributed to Mr William Ruto at these three meetings was, one, was that
12 non-Kalenjins, including the Luhya, should be uprooted and chased away, or is that
13 not your evidence?

14 A. I didn't say it that way. I said that they called upon people using figurative
15 language.

16 Q. And your evidence to the Court is the figurative language that you have
17 attributed to William Ruto was meant to convey a message that non-Kalenjins,
18 including the Luhya, should be chased away from the area. Is that right or not, sir?

19 A. That's right.

20 Q. I'm going to play you, Witness, a prosecution video, a video the Prosecution
21 have given to the Defence. And it's KEN-OTP-0036-0101. I'd ask that that could be
22 played from 1.08.38. So 1 minute -- 1 hour 8 minutes and 38 seconds until 1 hour 10
23 minutes and 11 seconds. And, your Honours, it's at tab 63 and I'm interested at
24 lines 1345.

25 PRESIDING JUDGE EBOE-OSUJI: Lines 1345, you said?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 MR KHAN: Your Honour, at page 38 and 39 on the transcript you have under tab
2 38, and it's from lines 1308 to 1342. So page 38 and 39 on the hard copy of the
3 transcript and at tab 38 from 1308 to on the next page line 1342. Your Honour, it's
4 been previously exhibited already as Ruto Defence Exhibit 86, 86.

5 Your Honour, I think the tab if I misspoke is at 63, tab 63. It's my fault.

6 PRESIDING JUDGE EBOE-OSUJI: No, you did say 63.

7 THE COURT OFFICER: Mr Khan, is the video public or confidential, please?

8 MR KHAN: I'm grateful. I'm grateful. It's public. Thank you.

9 (Viewing of the video excerpt KEN-OTP-0036-0101)

10 MR KHAN: Your Honour, I was just suggesting on the screen the frame could be
11 moved a little bit to the right-hand side, but your Honour we can continue. It's fine.

12 (Viewing of the video excerpt KEN-OTP-0036-0101)

13 MR KHAN: I'm grateful.

14 Q. Mr Witness, we haven't been given any tape or any video of the words you
15 say Mr Ruto said at these rallies, but I want to read in English for the record what
16 the Prosecution have given us that he did say.

17 PRESIDING JUDGE EBOE-OSUJI: Are you saying that this is a Prosecution video?

18 MR KHAN: This is Prosecution evidence given to the Defence.

19 PRESIDING JUDGE EBOE-OSUJI: The video?

20 MR KHAN: The video and the translation. So the translation I'm reading is

21 KEN-OTP-0090-0584 from line 1308 and it's Ruto Defence team exhibit number 88.

22 That's the translation.

23 Q. Witness, this is what Mr Ruto says in Kapsabet, "If you are a Luhya, don't be
24 deceived. They say you know with this devolution you will be chased out. If you
25 have bought a farm here, whether you are from Western Province or from Pokot or

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 from Lamu or from Vanga, if you have a farm here, this is your home." There is
2 applause from the crowd.
3 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, it might assist the record if you
4 reflected the words within quotation marks, because you read on and I noticed
5 that --
6 MR KHAN: Okay, I'm grateful.
7 PRESIDING JUDGE EBOE-OSUJI: -- there is something in quotes there.
8 MR KHAN: Indeed. Then in parenthesis it says, "Applause from the crowd" at
9 1.09.06, and Mr Ruto then says: "Do you understand me?"
10 The crowd says: "Yes."
11 And he says: "And the constitution guarantees the rights of every Kenyan."
12 An unidentified speaker of the crowd then says "Yes."
13 Mr William Ruto says: "Do you understand me or not?"
14 The response is: "We do."
15 He then says this: "Kenyans fighting against Kenyans is not on ODM's agenda.
16 ODM's struggle is against the poverty, employment, unemployment, and
17 discrimination."
18 The response is: "Yes."
19 And he continues: "That we have experienced in Kenya during all these years." In
20 square brackets below it says "There is applause from the crowd" at 1.09.34.
21 Mr Ruto continues and says this: "That -- that's indeed our struggle. Do you
22 understand me or not?"
23 The response is: "We do."
24 He emphasises again: "Kenyans fighting each other. If you want to know about it,
25 ask Moi and Kibaki. They're the ones that know about that."

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 There is applause from the crowd in square brackets and he says: "Are you with me
2 or not?"
3 The response is: "Yes, we are."
4 And then he says this: "And all of them are with the PNU. They're the experts
5 who know about it."
6 And in square brackets "There is applause from the crowd" and the response from
7 the audience: "That party."
8 And Mr Ruto then says: "Are we together?"
9 The response is: "Yes, we are."
10 He says: "Do you understand me?"
11 The response is: "Yes."
12 And then to make it absolutely clear he says this, Witness, Mr Ruto says this, Mr
13 William Ruto: "Therefore, don't be deceived about devolution when they claim you
14 will be chased out."
15 An unidentified speaker says: "No."
16 And Mr Ruto says: "Local governance will ensure that your children will get the
17 same opportunities as the children of those who are well known in Nairobi."
18 There is an unintelligible response from the crowd.
19 And he says: "At the moment you don't have any opportunities."
20 Did you follow all of that, Witness?
21 A. I followed what he said, but I am not sure that this rally is linked to or similar
22 to the rallies that took place at Nandi Hills.
23 Q. Let's stick with this rally first. Did you understand what Mr William Ruto
24 said to the many, many, many people appearing on that video? Did you
25 understand the message that he was saying?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 A. Yes, I did.

2 Q. The message is clear, is it not, that don't believe this disinformation?

3 Wherever you come from, if you've got land, there is a constitution. You're
4 protected by the law. Isn't that the message?

5 A. Yes, that is what he said.

6 Q. Yes. And he's specific, apart from talking about Western Province and Pokot
7 and Lamu and Vanga, he's saying, "Luhyas, don't be deceived." You heard that bit,
8 didn't you? "Don't be deceived. You will not be chased out."

9 A. Yes, I heard that.

10 Q. And in fact, Mr Witness, that was the constant message of Mr William Ruto,
11 not your account that he wanted to cleanse and get rid of Luhyas and other people
12 from the Rift. Do you agree with that?

13 A. I do not agree with you. You see, I did not attend all the political rallies.

14 Q. And, Witness, the reason why there is no video given by the Prosecution or
15 found by us of any words like that at any of these rallies is because Mr William Ruto
16 never said anything other than he -- anything else except that he wanted a Kenya
17 where all people lived freely and safely.

18 PRESIDING JUDGE EBOE-OSUJI: Counsel, move on. That is argumentative
19 anyway, so we don't want to stay here and wait for the witness to answer to that.
20 You can move on. You can make that argument later on to the Chamber.

21 MR KHAN:

22 Q. Now, Witness, you spoke yesterday about attending a rally at Nandi Hills
23 stadium. You will recall that?

24 A. Yes.

25 Q. And you also testified that apart from that one rally you attended, you never

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 heard of another ODM rally in the 2007 election campaign that was held at Nandi
2 Hills stadium; isn't that correct?

3 A. No, that is not what I said.

4 Q. Did you not say yesterday that you had not heard about any other rally at
5 Nandi Hills stadium during the 2007 election campaign, except the one that you say
6 you attended and that you spoke about? Isn't that exactly what you said to the
7 Court yesterday?

8 MR PUGLIATTI: If I could just ask for a reference for that quotation?

9 MR KHAN: I'm sure my learned friend can find it until I get the exact reference.

10 Q. Witness, it should be fresh in your memory. Is that what you said yesterday
11 or not?

12 A. Yes, I do remember.

13 Q. So you agree with me now that's what you said yesterday, correct?

14 A. Yes.

15 Q. And thousands of people were in attendance at that rally, correct?

16 A. Yes.

17 Q. A major event at Nandi Hills stadium and in the area? Is that a fair
18 assessment?

19 A. Yes.

20 MR KHAN: Now, your Honour, I'll turn the Bench's attention if I may to tab 83.

21 And I'd ask to be put on the screen KEN-D09-0030-0142. If that could please be put
22 on the screen, I would be grateful.

23 Q. Mr Witness, do you recognise what is shown in that photograph?

24 A. Yes, I can see a field on that photograph.

25 Q. Where is it?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 A. I don't know. I'm not able to recognise that location.

2 MR KHAN: Okay. Let's try again, under the same tab, KEN-D09-0030-0144. It's
3 the third photograph, your Honour, your Honours.

4 Q. Witness, can you recognise the field now or not?

5 A. I think that it is the Nandi Hills field.

6 Q. And where is the Nandi Hills stadium in reference to this field?

7 A. The Nandi Hills field is near the police office, and the road that passes there
8 goes towards the market.

9 Q. And where is the stadium in relation to the field, the Nandi Hills stadium?

10 A. It is not far from town.

11 Q. How far from this field, sir? Five minutes, ten minutes by car or shorter?
12 How far?

13 A. On foot it would take you five minutes.

14 Q. And so the stadium, can you describe it to the Court?

15 A. (No audible response)

16 MR KHAN: The photograph can be taken off the screen. Thank you.

17 Q. Mr Witness, if you can describe the Nandi Hills stadium?

18 A. I know that if you come from the police office and turn away from the road
19 leading to the market and move a little bit, you will find a road going to the
20 cemetery. It is this very road that leads further on to the stadium at a turn.

21 Q. And it's about five minutes from this field that you've identified, is that right,
22 five minutes by car -- five minutes on foot from the field that you've seen in the
23 photograph; is that right?

24 A. Yes, that is correct.

25 Q. You've never been to Nandi Hills stadium in your life, have you, Witness?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 A. I am familiar with Nandi Hills. Nandi Hills is my town.

2 Q. Witness, I said, my question was: You have never been to Nandi Hills
3 stadium in your entire life; is that right?

4 A. I have already been to the Nandi Hills stadium.

5 MR KHAN: Your Honour, if we can play a video. And the transcript will be at tab
6 53, but the ERN is KEN-D09-0030-0055.

7 PRESIDING JUDGE EBOE-OSUJI: Is it already an exhibit?

8 MR KHAN: Mr President, no.

9 THE COURT OFFICER: (Interpretation) Mr Khan, would you please confirm that
10 this is a public video?

11 MR KHAN: I'm grateful. I should have said so. It is public. Thank you.

12 (Viewing of the video excerpt KEN-D09-0030-0055)

13 MR KHAN:

14 Q. Witness, I suggest to you the photographs you saw a moment ago, the
15 photographs of the field is in fact Nandi Hills stadium. Would you agree with that,
16 or not?

17 A. I do not agree with you. I see a very large crowd, and at the end I was able
18 to see the reporter speaking from Kisumu. And I don't know that area.

19 Q. Witness, the field, the empty field that you saw just before this video, that
20 field is in fact the place known as Nandi Hills stadium; is that right?

21 A. What I said is that it appears to be that.

22 Q. Witness, I can put on the screen again if it helps you, do you remember
23 looking at a photograph just before this video of a field, a large field? Do you
24 remember seeing that just before this video?

25 A. Yes.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Counsel, so we don't go through this for
2 nothing, the witness's testimony when you showed him the field and put the
3 proposition to him that that was the field, something to that effect, his testimony was
4 it appears to be so. That's what I recall.

5 So the question now is whether there is no place called a field, and there is only the
6 stadium? In other words, are we eliminating the suggestion hanging in the air that
7 there are two different places in Nandi Hills, one place is a field, the other place is
8 the stadium, are we saying that that is not the case?

9 MR KHAN: I'm grateful, Mr President.

10 Q. Witness, your evidence is that the stadium, Nandi Hills stadium that you are
11 talking about is five minutes from a field; is that right?

12 A. Yes, that is what I said.

13 Q. And it's in fact five minutes from the field that you saw on your screen a
14 moment ago; is that correct?

15 A. According to me, it takes five minutes to go from Nandi Hills to that field.

16 Q. So to be clear, Mr Witness, your evidence is there is a stadium and also a field
17 that you've recognised in the photograph; is that right?

18 PRESIDING JUDGE EBOE-OSUJI: No, no, let's take it one stage at a time. Let's
19 not splice the propositions. Let's first of all establish whether there is a stadium and
20 then a field. Once we've done that, then we can go to the process of whether the
21 field is what he recognised in the photo.

22 MR KHAN:

23 Q. Witness, is it the case, is it your evidence that in Nandi Hills there is a location
24 called Nandi Hills stadium and then also a field?

25 PRESIDING JUDGE EBOE-OSUJI: A different place called a field.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 THE WITNESS: (Interpretation) No, that is not the case. In Nandi Hills I know
2 that there are two different fields. There is the Nandi Hills stadium and then there
3 is another field where golf is played, but there was no rally held at that other field.

4 MR KHAN:

5 Q. I'll do this the long way, Witness. Let's go back to tab 83.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, can you look at the clock now and tell
7 us when -- you've got two minutes.

8 MR KHAN: Your Honour, we can always break now.

9 PRESIDING JUDGE EBOE-OSUJI: All right and return.

10 MR KHAN: There may be a number of questions I think to take the witness
11 through.

12 PRESIDING JUDGE EBOE-OSUJI: All right. So we might as well take the lunch
13 break at this time.

14 Witness, we will now be taking our lunch break. We will be resuming the hearing
15 at 2.30. The court officer will usher you out of the courtroom once the blind is
16 down. Thank you.

17 MR STEYNBERG: Your Honours, can I perhaps indicate at this stage before we go
18 into closed session that I have received a response from the VWU on the proposition
19 which the Court asked us to investigate yesterday afternoon. If I could perhaps do
20 that before the witness returns after the lunch hour, I can inform the Court of the
21 circumstances.

22 PRESIDING JUDGE EBOE-OSUJI: All right. Can you do it quickly before we
23 adjourn?

24 MR STEYNBERG: I would like to properly read the email yet. I've just received it

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 now.

2 PRESIDING JUDGE EBOE-OSUJI: Okay, okay. So we'll do it after lunch then.

3 *(Closed session at 1.00 p.m.) (Reclassified as Open session)

4 THE COURT OFFICER: Mr President, we're in closed session.

5 (The witness stands down)

6 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

7 THE COURT OFFICER: All rise.

8 (Recess taken at 1.01 p.m.)

9 *(Upon resuming in private session at 2.35 p.m.) (Reclassified as open session)

10 THE COURT USHER: All rise.

11 Please be seated.

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

13 Mr Steynberg, we're in private session.

14 MR STEYNBERG: Thank you, your Honours. As I mentioned before the luncheon

15 adjournment, I have had a response from the VWU unit regarding the inquiry of the

16 Chamber yesterday. They are, unfortunately, not in favour of the witness

17 commencing on Monday.

18 Apart from the fact -- in fact, they don't refer to this, but I know that would mean

19 that they would have to conduct various procedures over the weekend on Sunday,

20 but apart from that their concern is that the witness should commence her testimony

21 in a proper and prepared psychological and physical condition.

22 They point out that the witness will have, by the time she arrives in The Hague,

23 undergone a journey of several days, including a lengthy bus journey and an

24 overnight plane ride, and with only one day's break, well, then the entire weekend

25 will be subject to witness preparation, psychological assessments, in-court protective

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 measure assessments and witness familiarisation. They feel that for her to start on
2 Monday morning would be -- would be really asking too much of the witness.
3 I have investigated the possibility with my learned friends of dealing with the
4 in-court protective measures arguments on Monday afternoon to save some time.
5 However, they inform me that they do not anticipate lengthy arguments in this
6 regard and will, to a large extent, rely on their previous arguments. So it seems that
7 that will not save us too much time. But the good news is we should be able to start
8 with the witness almost straightaway on Tuesday morning.
9 I do feel, your Honours, that seven days should be sufficient for this witness.
10 PRESIDING JUDGE EBOE-OSUJI: I take it there are no reactions from the Defence
11 one way or the other?
12 MR KHAN: Mr President, my learned friend has put the matters very fairly
13 regarding the Defence position.
14 (Trial Chamber confers)
15 PRESIDING JUDGE EBOE-OSUJI: All right. We will start -- we will resume on
16 Tuesday --
17 MR STEYNBERG: Thank you, your Honours.
18 PRESIDING JUDGE EBOE-OSUJI: -- to start with that witness.
19 We will now bring in the witness for continuation of cross-examination.
20 Mr Khan, you're standing?
21 MR KHAN: Your Honour, just for the sake of -- of the record, in light of the ruling,
22 page 62, line 21 my learned friend actually indicated that they would be able to start
23 first thing on Tuesday morning, which is of course what the Judges have ordered.
24 The transcript says Monday morning at page 62, line 21. So that should be
25 corrected.

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: What the Judges said?
- 2 MR KHAN: What was submitted by my learned friend, Mr Steynberg.
- 3 PRESIDING JUDGE EBOE-OSUJI: All right, Tuesday. We all understand that.
- 4 We will bring in the witness then. Blinds down, please.
- 5 *(Closed session at 2.39 p.m.) (Reclassified as Open session)
- 6 THE COURT OFFICER: (Interpretation) We are in closed session.
- 7 (The witness enters the courtroom)
- 8 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back.
- 9 Mr Khan, we're back to public, I take it? Yes.
- 10 So let's go to the open session, court officer.
- 11 (Open session at 2.41 p.m.)
- 12 THE COURT OFFICER: (Interpretation) We are in open session, your Honour.
- 13 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 14 Witness, we're back in open session and Mr Khan will continue asking you
- 15 questions.
- 16 Mr Khan.
- 17 MR KHAN: I'm grateful.
- 18 Q. Mr Witness, before lunch I was asking you some questions regarding Nandi
- 19 Hills stadium and the field in Nandi Hills. Do you recall that?
- 20 A. Yes, I do remember.
- 21 Q. And, Witness, I want to clarify, and I'll read what was said -- what you said
- 22 before the break.
- 23 And I'm referring to page 57, for my learned friends, of the Transcend real-time
- 24 transcript at line 5.
- 25 And, Witness, I asked you, "And where is the stadium in relation to the field, the

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 Nandi Hills stadium?"

2 And you replied, "It's not far from town."

3 I asked, "How far from this field, sir? Five minutes, ten minutes by car or shorter?

4 How far?"

5 And you answered, "On foot it would take you five minutes." Do you remember

6 saying that?

7 A. I remember that's what I said.

8 MR KHAN: Yes, I'm grateful. And if we could now put on the screen

9 KEN-D09-0030-0146, I'd be grateful.

10 Q. Witness, you can see that photograph on the screen, can you?

11 A. Yes, I can see it.

12 Q. And that's the field we were talking about before lunch; is that right?

13 A. No.

14 Q. What is this?

15 A. It's not that one. This field is different from the one that I had seen, because

16 here I can see an antenna tower.

17 Q. Do you recognise this antenna tower? Is it part of the field, or is it

18 somewhere else?

19 A. I can see that this antenna is not very close to the field.

20 Q. Do you recognise this field?

21 A. No.

22 Q. But this is not the stadium. This is -- this photograph does not show the

23 Nandi Hills stadium according to you; is that right?

24 A. Yes.

25 Q. Does the Nandi Hills stadium have any wall marking its perimeter?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 A. No.

2 MR KHAN: The photograph can be taken off the screen, please.

3 Q. Witness, I put it to you that if you are at the Nandi Hills stadium, you would
4 have recognised these photographs as relating to that very stadium. Are you with
5 me?

6 A. No, I disagree.

7 Q. And do you reject and deny my contention that these photographs that I've
8 shown you now and before lunch relate to Nandi Hills stadium? You say I'm
9 wrong, don't you, Witness?

10 MR PUGLIATTI: I'm sorry to interrupt. What we understand is that the
11 interpretation for the question at line 23 was perhaps not the clearest once it made its
12 way into Swahili, and for the sake of the record, we gratefully request that question
13 is put again as plainly as possible so it can be translated in a way that the witness
14 would understand. And I'm grateful.

15 MR KHAN: I'm grateful. I'll certainly put it again.

16 Q. Witness, the photographs I have shown you now and before lunch show
17 Nandi Hills stadium. Is that right or wrong?

18 THE INTERPRETER: Message from the Swahili interpreter: Could the witness be
19 asked to repeat his answer?

20 PRESIDING JUDGE EBOE-OSUJI: Witness, let's -- the lawyer has shown you some
21 photographs. The last two or three photographs he has shown, especially the last
22 one, he is saying that those are photos of Nandi Hills stadium. Do you accept that
23 those are photos of Nandi Hills stadium?

24 THE WITNESS: (Interpretation) There's a photograph that I saw that is of Nandi
25 Hills.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: We are now concerned with the Nandi Hills
2 stadium, and Mr Khan is saying that the photographs he has shown you since
3 you've been on the stand, the last photographs he has shown you about two or three
4 photographs he's shown you and we've looked at, he is saying that those are
5 photographs of Nandi Hills stadium, stadium. Do you agree that those are photos
6 of Nandi Hills stadium?

7 THE WITNESS: (Interpretation) One of the photographs that was shown to me is
8 a photograph of Nandi Hills stadium because there's a building that I saw and which
9 I recognised.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, do you think we can take it one at a
11 time again and see if he can identify that photo?
12 Now, before Mr Khan goes through all the photographs, you saw the last
13 photographs -- the last photo he showed, the one with the mast. Is that the one you
14 are talking about? Does that tell you that that photo with the mast on it is a photo
15 of Nandi Hills stadium?

16 THE WITNESS: (Interpretation) No.

17 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Khan, can we look at the others
18 again?

19 MR KHAN: Of course, Mr President.

20 Q. Witness, I'd ask to be put on the screen KEN-D09-0030-0142.

21 PRESIDING JUDGE EBOE-OSUJI: You are looking at a photo on your screen now.
22 Is that the one you say shows Nandi Hills stadium?

23 THE WITNESS: (Interpretation) No.

24 MR KHAN: I'm grateful. Then I would ask for 0144 to be put on the screen,

25 KEN-D09-0030-0144.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: There is yet another photo now on the screen.

2 Do you recognise whether this photo shows Nandi Hills stadium?

3 THE WITNESS: (Interpretation) No, it's not that photograph.

4 MR KHAN: Your Honour, with your leave I'm going to go back to the video,
5 because they're the only photographs I've shown the witness besides the last one, the
6 one with the mast, that the witness is very clear on does not relate to the Nandi Hills
7 stadium. I didn't show any other photographs.

8 PRESIDING JUDGE EBOE-OSUJI: So you've exhausted the photos you've shown
9 him?

10 MR KHAN: Indeed.

11 PRESIDING JUDGE EBOE-OSUJI: All right. And he does not recognise any of
12 them as Nandi Hills stadium, so you want to --

13 MR KHAN: I'll proceed with my cross-examination. The only -- because I was
14 going to repeat it anyway because of the luncheon adjournment and put the video
15 in, although I was playing the video for other purposes, but I will put the video in.
16 So with the great kind assistance of the court officer, I'd ask that we play once again
17 KEN-D09-0030-0055, the transcript of which appears at tab 53, your Honours.

18 (Viewing of the video excerpt KEN-D09-0030-0055)

19 MR KHAN: If the video could be paused, please.

20 Q. And, Witness, please, any time you see anything that you think is or you say
21 is Nandi Hills stadium that you recognise, please just shout out and give an answer,
22 please, and we'll stop it. Have you seen it so far, Nandi Hills stadium?

23 A. No, I haven't recognised it yet.

24 Q. I'm grateful, but if you do see it, please just speak and we'll stop the video; do
25 you understand?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, in order to assist the witness, are we
2 playing this so that the witness can look out for the stadium?

3 MR KHAN: Well, your Honour, given the witness's answer that he's seen the
4 stadium, I want it to be played. And I'm just -- I was playing it for other purposes
5 as well, but if he recognises the stadium in the video, of course he should say so and
6 we'll pause it so it can be recorded in the transcript. I'm grateful.

7 If the video could be restarted, I'd be grateful.

8 PRESIDING JUDGE EBOE-OSUJI: Resumed or restarted?

9 MR KHAN: Resumed.

10 (Viewing of the video excerpt KEN-D09-0030-0055)

11 PRESIDING JUDGE EBOE-OSUJI: Can we pause the video. Can you roll back one
12 frame because the witness had indicated at some point there were some buildings he
13 had seen, so let's see.

14 MR KHAN: Yes. And I also saw the witness moving closer to the microphone, but
15 it would be useful.

16 PRESIDING JUDGE EBOE-OSUJI: Yes, Witness.

17 THE WITNESS: (Interpretation) In the field where -- that he showed me and there
18 were -- there was no population. This was Nandi Hills field.

19 PRESIDING JUDGE EBOE-OSUJI: You're looking at a -- are you talking about the
20 image that is now on the screen or are you talking about something else?

21 THE WITNESS: (Interpretation) I'm talking about other photographs that he
22 showed me at the beginning when he started showing the photographs. One of the
23 photographs represented this location.

24 PRESIDING JUDGE EBOE-OSUJI: All right. You said, "One of the photographs
25 represented this location." When you say "this location," what are you referring to?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 THE WITNESS: (Interpretation) There is a field, a stadium, that he showed me. I
2 saw it amongst the photographs that he showed before. There is a building that I
3 recognised in that photograph.

4 PRESIDING JUDGE EBOE-OSUJI: All right. Do you recognise anything from the
5 photographs you are now -- from the image you are now looking at on the screen?

6 THE WITNESS: (Interpretation) No.

7 PRESIDING JUDGE EBOE-OSUJI: All right. Let's finish playing this video and
8 then, Mr Khan, you again bring back your photos, if that -- unless you want to move
9 on. All right.

10 MR KHAN: If we can continue with the video, I'd be grateful.

11 Q. And, Witness, if you see anything that you recognise as the Nandi Hills
12 stadium, please just interject. Thank you.

13 (Viewing of the video excerpt KEN-D09-0030-0055)

14 MR KHAN:

15 Q. So, Mr Witness, you didn't see the Nandi Hills stadium in that video, just to
16 be clear; is that right?

17 A. Yes.

18 PRESIDING JUDGE EBOE-OSUJI: Can you clarify the answer, please.

19 MR KHAN:

20 Q. Did you see the Nandi Hills stadium in the video you just watched?

21 A. I didn't see it.

22 Q. Now, Witness, I just want to read you an extract of what was said.

23 MR KHAN: Your Honours, I can read the whole thing, but there was one particular
24 portion I wanted to read, and it was said in English, a part of it, but -- and for the
25 reference of the transcript, it's KEN-D09-0030-0058, and I'll start from line 54 and I'll

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 go to line 62.

2 Q. Witness, you heard Honourable Raila Odinga say in Swahili that, "Kibaki will
3 come here this week, isn't it? I want to tell you when he comes he should be
4 welcomed. Okay? Because I also went to campaign at their place in Othaya.
5 Okay."

6 Did you hear that, Witness?

7 A. Yes, I heard those words.

8 Q. And he was -- Honourable Raila Odinga was telling people, effectively, not to
9 be violent but to welcome the president of the country in his area because he had just
10 also previously campaigned in Othaya which was President Kibaki's home area; is
11 that right?

12 A. That is correct.

13 Q. Did you recognise any of the scenes on the video that we just played?

14 A. There is a building that I recognised. It looks similar to a building that I
15 knew.

16 Q. Did you recognise a building on the video that we just played?

17 THE INTERPRETER: From the Swahili booth, can the witness be requested to
18 repeat his answer?

19 MR KHAN:

20 Q. Witness, could you be so kind as to repeat your answer?

21 A. This is what I said: There is a building that I believe looks like a building in
22 Nandi Hills.

23 PRESIDING JUDGE EBOE-OSUJI: The lawyer's question is that did you recognise
24 that building from the video? When you looked at the video that was shown, did
25 you recognise that building you said looked familiar to you? Was it on the video?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 THE WITNESS: (Interpretation) Yes.

2 MR KHAN:

3 Q. Witness, my question will be quite straightforward, and just tell the Court yes
4 or no or do you not know. Did you see anything on this video that showed the
5 Nandi Hills stadium?

6 MR KHAN: I think the video can be taken off the monitor at the moment.

7 THE WITNESS: (Interpretation) Yes.

8 MR KHAN:

9 Q. And from what you saw, are you confident that what was on the video was
10 the Nandi Hills stadium?

11 A. I can confirm that because of the crowd.

12 Q. So from the crowd you could identify that what was shown was the Nandi
13 Hills stadium; is that right?

14 A. Yes, that is what I said.

15 PRESIDING JUDGE EBOE-OSUJI: Witness, what was it about the crowd that told
16 you it was Nandi Hills stadium that you were looking at?

17 THE WITNESS: (Interpretation) It is because there were many people in that
18 stadium on that day.

19 MR KHAN:

20 Q. So, Witness, given that there were many people in that stadium on the day, is
21 this the rally you attended?

22 A. Yes.

23 Q. Witness, I put it to you that what was shown is a rally of Honourable Raila
24 Odinga in Kisumu, Nyanza Province. That's right, isn't it?

25 A. There was a rally held by Raila Odinga in Nyanza.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 Q. And you attended that rally as you've said in evidence; is that right?

2 A. I attended the Nandi Hills rally.

3 Q. Witness, did you hear -- and I'll read because I didn't get to it -- 0058 of the
4 transcript -- well, you wouldn't have heard. It was in English. The news reporter
5 said between lines 57 and 62, and I quote, "The ODM presidential candidate had
6 begun his campaigns in Mosop and Nandi Hills in the morning in the company of
7 Pentagon member Najib Balala and ODM Chairman Henry Kosgey. At the same
8 time, another ODM group led by presidential running mate Musalia Mudavadi and
9 William Ruto were in Rarieda ..." R-A-R-I-E-D-A, Rarieda. I'm grateful. "... and
10 Ugenya." U-G-E-N-Y-A. "In Rarieda ODM's engineer Nicholas Gumbo is battling
11 it out with Minister Raphael Tuju and lawyer Otiend Omolo of NARC." Raphael
12 Tuju, T-U-J-U, and the lawyer Otiend, O-T-I-E-N-D, surname Omolo, O-M-O-L-O, of
13 NARC.

14 You heard that, did you, Witness?

15 MR NDERITU: Mr President, your Honours, I rise to bring to the attention of the
16 Chamber that the Swahili interpretation is far from a faithful interpretation of the
17 question that is being put to the witness.

18 MR KHAN: Let me try again in that case.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, maybe in little chunks of propositions.

20 MR KHAN:

21 Q. Witness, did you hear the news reporter say that when the presidential
22 candidate Raila Odinga was in Mosop and Nandi Hills, William Ruto and Musalia
23 Mudavadi were in a different part of Kenya?

24 A. I heard that.

25 MR KHAN: I'm grateful. And, your Honours, with your leave I would take the

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 witness and put into the record at tab 86 -- tab 86 of the bundle so we have a date for
2 that rally. It's KEN-D09-0030-0158. It's the Daily Nation from Monday, December
3 17, 2007 referring to what took place the previous day prior to publication, that's 16
4 December, and it says that Mr Odinga -- in the third paragraph. "Mr Odinga told
5 ODM rallies in Mosoriot ..." M-O-S-O-R-I-O-T "... Nandi Hills, and Kobojoji ..."
6 K-O-B-O-J-O-I "... in Nandi North and Nandi South districts that the ECK should
7 petition President Kibaki to stop interfering with its work of conducting the
8 elections."

9 And then at the bottom paragraph, "Speaking in Nandi Hills in Tinderet
10 constituency, Mr Odinga said ODM Chairman Henry Kosgey stood with him in
11 hard times. Mr Raila asked the voters to give himself and Mr Kosgey the highest
12 number of votes on voting day."

13 Witness, are you aware that the rally that you say you saw on the video took place
14 on December 16, 2007?

15 A. That was not the rally I attended.

16 Q. Are you aware Honourable Raila Odinga, along with Najib Balala and others,
17 led the ODM to a rally at the Nandi Hills stadium on 16 December 2007?

18 A. I was not aware of that concerning December.

19 Q. And is that because, Witness, you were nowhere -- you were not in the Nandi
20 Hills region in December 2007 at all?

21 A. I was in Nandi Hills.

22 Q. You couldn't have missed a massive rally led by Raila Odinga at Nandi Hills
23 stadium on 16 December 2007 if you were in the area; isn't that the case?

24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you know that question is
25 argumentative.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 MR KHAN:

2 Q. Witness, you never -- Witness, William Ruto never attended a rally at Nandi
3 Hills stadium during the election campaign of 2007 along with Henry Kosgey; isn't
4 that right?

5 A. That is not correct.

6 MR KHAN: Now, your Honours, I'll move to another rally.

7 Q. And, Witness, you've testified that another rally that you say you attended
8 once again where Honourable Kosgey and William Ruto were speaking about
9 chasing away non-Kalenjins was at Kapchorwa. Do you remember saying that
10 yesterday and previously?

11 A. I remember.

12 MR KHAN: And, your Honours --

13 Q. Witness, can you describe where that rally took place? Can you describe the
14 physical location of that rally to the Court?

15 A. It was at the field.

16 Q. Yes. Can you describe the scene? Is it open fields on -- around the -- well,
17 you've said in court, in fact, in fairness to you, that it's at a -- on a football field; is
18 that right?

19 A. Yes.

20 Q. And can you describe what is around the football field? Is it open tea
21 plantations? Are there buildings? Is it a forest? What's around the place where
22 the rally you say was held?

23 A. There was grass and also buildings.

24 Q. What type of buildings?

25 A. Residential buildings.

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 Q. How many residential buildings were around the football field?

2 A. It is not possible for me to give you the number of buildings. I arrived there
3 and I went to the field, but I saw buildings around that field.

4 MR KHAN: Your Honour, perhaps with the assistance of the court usher, we can
5 ask the witness to draw on the -- on the ELMO a sketch so we can see where the
6 buildings were. Your Honour, I say that noting that he's previously drawn maps
7 for the Prosecution.

8 So, your Honours, if -- if the court usher can assist, the ELMO could be put up, a
9 piece of paper can be put and the witness can draw the outline. If it can be done on
10 the screen, so be it. I'd be delighted.

11 THE COURT OFFICER: (Interpretation) Mr Khan, can you clarify please. Do
12 you want him to sketch directly on the screen or on a sheet of paper?

13 MR KHAN: A piece of paper perhaps. If -- it can be done on the screen if a screen
14 shot then can be taken by way of an exhibit, but it's -- I'm not asking him to annotate.
15 I'm asking him to draw on a blank screen or on a blank page a diagram of the rally.

16 PRESIDING JUDGE EBOE-OSUJI: The rally or the field?

17 MR KHAN: First of all, the field.

18 PRESIDING JUDGE EBOE-OSUJI: Yes, Witness.

19 THE WITNESS: (Interpretation) I would like to ask the Court -- well, you see, I
20 can't sketch this because this a field. We went into the field and there were some
21 houses around the field, but I don't agree to sketch that.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we have to move on.

23 MR KHAN: Your Honours, I'm entitled, of course, to elicit relevant and probative
24 evidence, and it's my submission when we dispute the veracity of this witness's
25 account, given that he's shown capacity to the Prosecution when they think it's

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 helpful to them to draw a sketch, map of an area, to draw the football field and to
2 mark in crude blocks where he says the houses were so that your Honours will get
3 an understanding of the physical layout which may later on help your Honours
4 assess the rest of his account. Your Honours, I will then ask him to place where
5 people were sitting and all the rest.

6 PRESIDING JUDGE EBOE-OSUJI: It's difficult to discuss these things in the
7 presence of the witness.

8 MR KHAN: Your Honour, perhaps we can ask why the witness does not agree.

9 Q. Witness, can you hear me?

10 A. Yes.

11 Q. Could you tell their Honours why you are reluctant to draw the football field
12 and the residential accommodation that was around it?

13 PRESIDING JUDGE EBOE-OSUJI: Let's go into private session for a brief moment.

14 *(Private session at 3.32 p.m.) (Reclassified as Open session)

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

16 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, the lawyer is asking you
17 why you find it difficult to draw a sketch for him.

18 THE WITNESS: (Interpretation) I asked not to draw it because it's a place we
19 went to just once. So it's difficult to recognise everything because we just went
20 there once. I can't remember the entire place and how it's laid out. I only went
21 there once.

22 MR KHAN: Mr Witness -- your Honour, we can go into public session. I won't
23 insist on the drawing. Can I just ask one question?

24 Q. Witness, did you draw a map to the Prosecution -- for the Prosecution? Did
25 you draw it yourself?

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 A. Yes, I draw it because it was a place that I was quite familiar with and I was
2 used to that place.

3 MR KHAN: Your Honours, with your leave we can go into public session.

4 PRESIDING JUDGE EBOE-OSUJI: We can go to public session.

5 Mr Pugliatti, what's the problem?

6 MR PUGLIATTI: Mr President, before we do, just out of fairness to the witness, I'd
7 ask if my learned friend could clarify whether the map that the witness drew for the
8 Prosecution is of the same location or of a different location.

9 PRESIDING JUDGE EBOE-OSUJI: I think Mr Khan is not pursuing the matter any
10 more.

11 MR PUGLIATTI: Very well.

12 PRESIDING JUDGE EBOE-OSUJI: Unless you think it has a direct bearing to the
13 question of the layout of -- is it Kapchorwa or Kapchowa? Kapchorwa?

14 MR KHAN: I'm told by my learned friend, Mr Katwa-Kigen, that that's correct.

15 PRESIDING JUDGE EBOE-OSUJI: Kapchorwa?

16 MR KHAN: Kapchorwa. I'm grateful.

17 MR PUGLIATTI: We won't press it any further.

18 PRESIDING JUDGE EBOE-OSUJI: All right. Good. We then go into public
19 session.

20 (Open session at 3.35 p.m.)

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

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, please proceed.

23 Q. Witness, I understand with the passage of time some things are not clear, but
24 can you help the Court and give an estimate as to how many residential buildings
25 were around the football field?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 A. As I said, there were some houses alongside the stadium, but I couldn't tell
2 you the exact number of houses.

3 Q. Were the houses all on one side of the football field or all around the football
4 field on all four sides?

5 A. When you're in the middle of the stadium, you can see houses around the
6 entire stadium.

7 Q. And the houses, are they quite close to the stadium or are they -- well, are
8 they close to the stadium?

9 A. There are some houses close to the stadium.

10 Q. And the stadium, does it have a wall around it between the houses and the
11 stadium?

12 A. No.

13 Q. And can you give an estimate as to how many residential buildings are
14 around the football stadium?

15 A. I'm not in a position to know that.

16 Q. Does the stadium have seating?

17 A. No.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, does anything turn in calling it
19 "football field" or "football stadium" --

20 MR KHAN: Your Honour --

21 PRESIDING JUDGE EBOE-OSUJI: -- at Kapchorwa?

22 MR KHAN: Your Honour, I was using the witness's words as reported in the
23 transcript, but, your Honour, I don't think anything turns on it.

24 Q. Witness, apart from residential buildings, did you see any other buildings
25 around the football stadium or football field?

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 A. I can't make a distinction between residential buildings and other buildings
2 because my goal, you see, was just to go to the stadium for the rallies. But what I
3 do know is that there were rallies and also some buildings around.

4 Q. Did you see any storehouses around the football field?

5 A. I'm not in a position to know whether there were any shops --

6 Q. Witness, it may have been lost --

7 A. -- or storehouses.

8 Q. Did you see a hospital around the football field or close to the football field?

9 A. We went into the stadium and I didn't have time to walk around the outskirts
10 of the stadium to see what there was there.

11 Q. So it's correct you didn't see a hospital, is that right, or a clinic?

12 A. That is correct.

13 Q. Did you see a school?

14 A. I saw some buildings, but I don't know whether they were a school.

15 Q. And the -- we'll start with tab 111 and it's KEN-D09-0030-0263. And that's at
16 tab 12 -- sorry, 112. Do you recognise that photograph, Witness?

17 A. No, I don't recognise it.

18 Q. Let's go behind tab 114, and it's KEN-D09-0030-0265. Do you recognise this
19 photograph, sir? Do you recognise that, sir?

20 A. I recognise those trees.

21 Q. Where are those trees?

22 A. They are beside the stadium.

23 MR KHAN: Now, if we go to the next tab, it's 115, and it's KEN-D09-0030-0266. If
24 that could be put on the screen, I'd be obliged.

25 Q. Witness, like in the previous photograph, we are assisted with the goal posts

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 in the middle of the -- or towards the left of the photograph. Can you see the goal
2 posts in the photograph? Rather rusty goal posts before what looks like buildings
3 storing wood. Can you see that?

4 A. Yes, I can see that.

5 Q. And do you recognise this as being the football stadium or the football field
6 where the rally took place that you've described?

7 A. Yes. I recognise that it's this stadium thanks to those trees.

8 Q. And, Witness, using these goal posts as a reference point, not the trees, these
9 football posts as a reference point, can you tell us where you say Mr Ruto and
10 Mr Kosgey were standing? Was it -- was it here or was it in another part of the
11 field?

12 A. I can see that it is this stadium.

13 Q. Witness, if I'm one set of football posts where I'm standing here, and the
14 Prosecution is the other set of football posts, could you tell the Court where
15 Mr Ruto and Mr Kosgey you say were standing in relation to that football field I've
16 just conjured up?

17 Let's say that behind the Prosecution is the firewood storage, so it's this
18 photograph. Look at the photograph on the screen, on the screen, sir, and imagine
19 the goal posts that you see in this photograph with the firewood storage are by the
20 Prosecution. Can you describe where Mr Kosgey and Mr Ruto were addressing
21 the audience?

22 A. They would be on the side where I'm sitting here.

23 MR KHAN: Your Honour, could we go into private session for a moment.

24 PRESIDING JUDGE EBOE-OSUJI: Private session.

25 Mr Khan, the woodsheds were there at the time? Were they there at the time, do

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 you know?

2 MR KHAN: Your Honour, evidence can be led on that, but we're told they were
3 there at the time. And one can see from the goal posts there's not been much
4 renovation there.

5 *(Private session at 3.50 p.m.) (Reclassified as Open session)

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

7 MR KHAN:

8 Q. Witness, you told the Court that you attended that rally with some of your
9 friends, including (Redacted); is that right?

10 A. (No interpretation)

11 PRESIDING JUDGE EBOE-OSUJI: Translation, please. Interpretation, rather.

12 THE WITNESS: (Interpretation) That is true.

13 MR KHAN: Your Honours, I would refer the Bench to tab 89, and I'd ask that a
14 photograph be put on the screen, which is KEN-D09-0030-0166.

15 Q. Witness, do you agree with me that this photograph shows your friend
16 (Redacted)

17 A. That's him.

18 Q. I'm grateful. In fact his name is actually (Redacted);
19 isn't that right? He's known as (Redacted), but his proper name is (Redacted). Do
20 you agree with me?

21 A. I knew him by the name of (Redacted).

22 Q. And he moved to (Redacted) in 1986; is that right?

23 A. I don't know. I don't know which year he came.

24 Q. Would you be surprised to know that he says that he hasn't seen you since
25 (Redacted)?

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 MR PUGLIATTI: Your Honour, we're objecting to matters being put to the
2 witness about what another individual outside of the courtroom may have said and
3 being asked to comment on the comments of a third individual. This has been
4 ruled upon a number of times already.

5 PRESIDING JUDGE EBOE-OSUJI: Objection is sustained.

6 MR KHAN:

7 Q. You haven't seen that individual since (Redacted), have you?

8 A. That's right.

9 THE INTERPRETER: Correction from the Swahili interpreter: "That's not so."

10 MR KHAN:

11 Q. And let me put on another photograph, Witness. It's tab 90. KEN -- before
12 I do that, let me just clarify. Witness, you didn't attend any rally at Kapchorwa tea
13 estate with (Redacted), did you? You're making it up.

14 A. I disagree.

15 Q. Are you aware that (Redacted) has never been to Kapchorwa tea estate at all?

16 A. He's already been there. He's been there before.

17 MR KHAN: And if we can go to tab 90, KEN-D09-0030-0167, if that could be put
18 on the screen.

19 Q. That's your friend (Redacted), isn't it?

20 A. No, that's not him.

21 Q. Do you know (Redacted)

22 A. I know (Redacted).

23 Q. His father's name is (Redacted),

24 (Redacted). That's right, isn't it? His

25 father's name is (Redacted)? (Microphone not activated) -- how he

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 looked 20 years ago, Witness. Maybe that will help you.

2 PRESIDING JUDGE EBOE-OSUJI: What was that?

3 MR KHAN:

4 Q. I said see how he would look 20 years ago and see if that would help you
5 recognise the person in the photograph.

6 PRESIDING JUDGE EBOE-OSUJI: Are you saying that the photo is of 20 years
7 ago?

8 MR KHAN: Your Honour, the -- I'm not. I'm asking the witness to assist his
9 recollection that that is (Redacted), to think not about only the man in the
10 photograph of today, but how he would have looked 20 years ago or a decade ago.

11 Q. Does that person in the photograph have a resemblance to your friend (Redacted)
12 (Redacted)?

13 A. It wasn't 20 years ago.

14 Q. Does the person in the photograph look like (Redacted)

15 A. Yes, it's him.

16 Q. And I'm grateful. And he didn't attend any rally in Kapchorwa tea estate
17 with you, did he?

18 A. That's not so.

19 Q. In fact he hasn't seen you since 1992, has he?

20 A. That is not so.

21 MR KHAN: Your Honour, there is one more matter I'd like to go into public
22 session and that would be the last matter of today with the Court's leave, and then I
23 finish that particular topic and I can move on to other matters.

24 PRESIDING JUDGE EBOE-OSUJI: How long do you think that will take?

25 MR KHAN: Your Honour, I think it will take five to eight minutes I would think

Trial Hearing
Witness: KEN-OTP-P-0409

(Private Session)

ICC-01/09-01/11

1 at most, maybe five minutes, and your Honour we could end on that if the Court
2 will indulge me.

3 PRESIDING JUDGE EBOE-OSUJI: Five minutes.

4 MR KHAN: And, your Honours, I would ask the -- well, once we go into private
5 session.

6 PRESIDING JUDGE EBOE-OSUJI: Open session, you said?

7 MR KHAN: In public please, open session.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

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

10 MR KHAN:

11 Q. Witness, you're making it up that Mr William Ruto was at the Kapchorwa
12 tea estate with Mr Kosgey; is that right?

13 PRESIDING JUDGE EBOE-OSUJI: Are we supposed to be in public session?

14 MR KHAN: Public, I'm sorry.

15 PRESIDING JUDGE EBOE-OSUJI: Public session then.

16 (Open session at 4.02 p.m.)

17 THE COURT OFFICER: (Interpretation) We are in open session, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, please proceed.

19 MR KHAN: I'm grateful, Mr President.

20 Q. Mr Witness, on behalf of Mr William Ruto, I put it to you that you are
21 fabricating your account that Mr William Ruto was at the Kapchorwa tea estate at a
22 rally during the election campaign -- campaign period of 2007? Do you agree with
23 me, you're making it up?

24 A. I don't agree.

25 MR KHAN: And, your Honours, I'd ask the, first of all, the usher's assistance to

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 show a real exhibit. It's under tab 107. And we can display it on the screen as
2 well. It's KEN-D09-0030-0211. And I'd ask for the original to be perused by the
3 Judges so your Honours can see that it's in a -- there has been no pulling out of
4 pages or any monkey business, and you can assess what's contained therein. So it
5 can be shown to the Judges.

6 Your Honours, the actual page that should be displayed is 0241.

7 PRESIDING JUDGE EBOE-OSUJI: Court officer, can you pass that along to the
8 Prosecution.

9 MR KHAN: Your Honour, the spine is a little bit fragile.

10 PRESIDING JUDGE EBOE-OSUJI: I can see that.

11 MR KHAN: I'd be very happy for the Prosecution to subject this to forensic
12 analysis in due course. It's an important document. So if the court officer could
13 take it or the usher could take it from the Presiding Judge, I would be grateful.

14 Q. Witness, there's a document that will be on the screen in a moment and it
15 shows that Honourable Henry Kosgey attended that tea -- that tea estate on 20
16 December 2007.

17 MR KHAN: Is it on the screen? Your Honour, I understand there are some
18 technical difficulties with eCourt. So it can be put on the ELMO in fact so the
19 public can also see it. I would be grateful. It's a public document, so it can be
20 made public.

21 Q. Witness, I'm going to read -- you've got a visual there to look at, but I'm
22 going to read what's on the screen. It's from the visitors' book of Kapchorwa tea
23 estate. And it's the second page, the page on the left, yes. And on the left-hand
24 page, bearing the number 0241, on the left-hand page, under the date of 20
25 December 2007, there is a signature, and underneath it it says, "ODM chairman on

Trial Hearing
Witness: KEN-OTP-P-0409

(Open Session)

ICC-01/09-01/11

1 campaign trail for MP." Do you recognise that signature as the signature of

2 Honourable Henry Kosgey, Witness?

3 A. I'm not in a position to recognise it.

4 Q. Witness, the main point of this is the following: That the Honourable

5 Kosgey went to that tea estate on 20 December 2007, but Mr William Ruto was not

6 there at all. That's correct, isn't it?

7 A. That is not correct, because the rally -- Mr William Ruto was present in the

8 rally that I attended.

9 Q. And, Witness, you're aware that a tea estate has staff; you're aware of that,

10 are you? People work at tea estates?

11 A. Yes, I know that.

12 Q. And at no time during the 2007 campaign period did Mr William Ruto go to

13 that tea estate with Honourable Kosgey; that's right, isn't it?

14 A. Both of them were together in the rally that I attended.

15 Q. And, Witness, the last question of the day -- I've exceeded my five minutes.

16 I'll put it to you if you had actually gone to that tea estate, you would have known

17 that Henry -- Honourable Henry Kosgey went alone, and as indicated on the

18 bottom of that page "on campaign trail for MP," not as part of the presidential

19 campaign, "on campaign trail for MP," you would have known that, wouldn't you?

20 A. I knew that it was a political campaign.

21 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we'll leave it there for the day.

22 MR KHAN: I'm grateful, Mr President. The only aspect, just for the record, and

23 to state the obvious, the page is there. There is no signature or entry, including the

24 name of Mr William Ruto, on that page that's on the screen before you. Your

25 Honours, I've got no other questions for today, and we can resume tomorrow with

Trial Hearing
Witness: KEN-OTP-P-0409

(Closed Session)

ICC-01/09-01/11

1 the Court's leave.

2 PRESIDING JUDGE EBOE-OSUJI: We will rise and resume tomorrow at 9.30.

3 We will bring down the blinds and usher the witness out of the courtroom.

4 MR KHAN: Your Honours, this is real evidence. I'd ask that the Registry keep it.

5 And I'm happy for my learned friends to subject it to forensic analysis. So it's in

6 the Court's custody.

7 *(Closed session at 4.11 p.m.) (Reclassified as Open session)

8 THE COURT OFFICER: (Interpretation) Mr President, we are in closed session.

9 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, Judge Fremr has a question for you.

10 JUDGE FREMR: I will just wait until the witness will be escorted out.

11 (The witness stands down)

12 JUDGE FREMR: Okay. Mr Khan, just two short questions. First one, can you

13 tell me time when the pictures presented to -- picture of places presented to the

14 witness have been made? I guess it was 2014 or 2013?

15 MR KHAN: Your Honours, it's in the last -- I can get the exact date. It's in the

16 last four weeks.

17 JUDGE FREMR: Okay. And the second --

18 MR KHAN: Your Honour, the last -- last two weeks, in fact.

19 JUDGE FREMR: Fine. And second question, have you made any inquiry

20 whether the situation changed compared to 2007-2008, because, for example, the

21 antenna, whether this antenna was built in the past or --

22 MR KHAN: Your Honour, in relation to Nandi Hills stadium, even from the

23 Internet, one can see Raila Odinga at the Nandi Hills stadium with the same

24 telephone mast there. So that has not changed.

25 In relation to the Kapchorwa tea plantation, we've spoken to staff and managers

Trial Hearing
Witness: KEN-OTP-P-0409

(Closed Session)

ICC-01/09-01/11

1 there, and we've got no information that there's been any change. Your Honours,
2 of course we're not in the portion of the Defence case yet, but we've been told it's
3 the same, and sketches have been drafted that are in the bundle of materials that
4 have been presented to the Bench.

5 JUDGE FREMR: Thank you very much.

6 MR KHAN: I'm most grateful.

7 PRESIDING JUDGE EBOE-OSUJI: And we thank everyone for bearing with the
8 proceedings this late in the day. The Court will rise and we will meet again
9 tomorrow at 9.30.

10 THE COURT USHER: All rise.

11 (The hearing ends in closed session at 4.14 p.m.)

12 RECLASSIFICATION REPORT

13 Pursuant Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
14 2013, and the instructions in the email dated 14 August 2014, the version of the
15 transcript with its redactions becomes Public.