

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 Friday, 28 February 2014
10 (The hearing starts in open session at 9.49 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please announce the case.
16 THE COURT OFFICER: (Interpretation) 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, case number ICC-01/09-01/11. We are in public session.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 Appearances appear to remain the same?
21 MR PUGLIATTI: That's correct, Mr President.
22 MR NDERITU: The same.
23 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
24 Mr Khan?
25 MR KIGEN-KATWA: The same, Mr President.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 2 MR KHAN: And likewise, your Honour.
- 3 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
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- 18 (Redacted)
- 19 (Redacted)
- 20 (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 (Redacted)
- 25 Let's go to private session now.

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 We remain in private session. We understand that there's some matters to be
5 addressed by the parties still?

6 MR PUGLIATTI: Mr President, that's correct. We recall at the end of yesterday's
7 session that your Honours informed the Prosecution that we would have a chance to
8 respond to the submissions of Mr Khan and so as those matters go quite well beyond
9 the specific instance of this witness, those would be addressed by Mr Steynberg, but
10 we also understand from our learned friends that there's an application that they're
11 making this morning as well and I'll be responding to that.

12 PRESIDING JUDGE EBOE-OSUJI: Sorry, there's an application? You say you
13 understand --

14 MR PUGLIATTI: We understand from our learned friends that they'll be making
15 an application this morning and on that I'll be responding.

16 PRESIDING JUDGE EBOE-OSUJI: All right.

17 Yes, Mr Steynberg?

18 MR STEYNBERG: Thank you, your Honours. Your Honours will recall that we
19 ended yesterday with the issue which had been raised by the Bench relating to the
20 Defence practice, not only with this witness but also with previous witnesses, of
21 presenting the witness with a series of photographs (Redacted)
22 for what it would seem was the sole purpose of identification.

23 Your Honours, we do share the Chamber's concerns regarding this practice and
24 indeed that was why we flagged the issue, especially with relation to (Redacted)
25 (Redacted)

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1 We recognise, your Honours, that there is a duty upon the Defence in terms of the
2 conduct of proceedings decision to challenge witnesses with evidence which they
3 intend to later use to impeach the credibility of the witnesses. However, we submit,
4 your Honours, that in the circumstances of this case, and in particular the
5 circumstances of this witness, the Defence have gone too far. Indeed we submit,
6 your Honours, that this has amounted to an abuse of process.
7 The practice must be seen in the context of the case and of this witness's particular
8 circumstances. Your Honours, we have seen -- we have heard much about
9 interference with witnesses. We've heard much about the general condition in
10 Kenya, the antithesis towards the ICC in its investigations, particularly in the Rift
11 Valley, and the specific circumstances of this witness who has reported (Redacted)
12 (Redacted) And we have seen attempts
13 to ascertain the identity of witnesses as and when they come to testify before the
14 courts on the internets and on blogs, and we submit that the same is going on on the
15 ground on Kenyan soil.
16 Now, in these circumstances one must place oneself in the position of the witness
17 and look at his perception when being shown a parade of photographs (Redacted)
18 (Redacted)
19 (Redacted). And is it unreasonable, your Honours, to think that in the
20 mind of the witness the message that is being conveyed is, (Redacted)
21 (Redacted)? In the mind of the witnesses -- I
22 need not speculate the motives of the Defence in doing this, but in the mind of the
23 witnesses is that unreasonable?
24 One must ask oneself in a mafia trial if a witness is shown a picture (Redacted)
25 (Redacted) --

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, please let's try and -- let's not
2 over-make the point.
3 MR STEYNBERG: I take your Lordship's point, but in the Prosecution's submission
4 the witnesses in this case, (Redacted) -
5 (Redacted) - and if we do not act responsibly as Prosecution, as
6 Defence and as the Chambers, there's a real risk to these witnesses.
7 Which must bring me to a second issue which arises, and that is the manner in which
8 this evidence has been obtained. Now, my learned friend raised -- in response to
9 your Honours' query or concerns, launched an attack on the method of the
10 Prosecution's investigation. This is relevant because they accuse us of not having
11 followed up (Redacted)
12 (Redacted), but your Honours there's a very good
13 reason why the Prosecution doesn't do this and that is because we are mandated
14 with a duty to ensure the safety and security of witnesses (Redacted)
15 The manner in which the Prosecution conducts its investigations (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Redacted)
20 (Redacted) We
21 submit, your Honours, that the manner in which the Defence have conducted their
22 investigations in this case is nothing short of reckless.
23 I refer your Honours to the photograph of (Redacted), which is to be found
24 at tab 34. (Redacted)
25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 Now, we don't know the source of these photographs, unfortunately, because the
6 metadata source field has been redacted in some of them, certainly the ones at 34
7 and 35. So we don't know whether these are taken by members of the Defence
8 team, their investigators or indeed some intermediary, but I must say that it does
9 raise grave concern that the Defence are going and interviewing people in situ and
10 what appears to be in a public manner in circumstances where a situation of threat
11 can reasonably be anticipated.

12 As regards the alleged failure of the Prosecution to obtain other records such as
13 official records, et cetera, I think I've made the point before, but the Prosecution
14 cannot simply walk into Kenya and start going to police stations and demanding
15 official records. There are channels through which we have to operate, official
16 channels through which we've attempted to operate, and the results of those
17 attempts are on record and perhaps will be demonstrated in due course in an
18 appropriate filing.

19 The ability of the Prosecution to operate, particularly in the Rift Valley, is severely
20 limited. And perhaps this is amply illustrated by a rather comical incident, if I can
21 put it like that, which happened -- which was widely reported in November where
22 certain United Kingdom diplomats holding a meeting with civil society members in
23 the Rift Valley were unceremoniously evicted from a hotel because they were
24 believed to be somehow linked to the ICC. It was reported in the BCC on 22
25 November 2013 and widely throughout the Kenyan media.

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1 PRESIDING JUDGE EBOE-OSUJI: Has that happened to you?

2 MR STEYNBERG: Your Honours --

3 PRESIDING JUDGE EBOE-OSUJI: To the Office of the Prosecutor I mean?

4 MR STEYNBERG: It hasn't happened to us because --

5 PRESIDING JUDGE EBOE-OSUJI: All right. Let's --

6 MR STEYNBERG: -- we do not take those risks.

7 PRESIDING JUDGE EBOE-OSUJI: Okay. Well, if it happens, you can complain
8 about it.

9 MR STEYNBERG: No, no, we're not complaining about that, your Honours. The
10 point I'm seeking to make is that our ability to operate in the Rift Valley is severely
11 curtailed and, if somebody is even suspected of working for the ICC, this is the
12 treatment they receive, or for the Prosecution in any event. In fact, it was no less
13 than the deputy governor of Uasin Gishu county who apparently ejected them.
14 So the point I make to sum up is that we do object to the process which has been
15 followed by the Defence. Although there is a legitimate -- there may be a legitimate
16 forensic purpose behind it, we submit that it has gone too far. We submit that the
17 Defence complaints about Prosecution investigation are, in fact, a red herring when
18 it comes to this complaint or this issue but are in any event unjustified.

19 (Redacted)

20 (Redacted)

21 (Redacted). And -- well, I'll leave it at that.

22 We do look forward to the disclosure of my learned friend's dossier on Article 70.

23 We trust that along with the evidence there will be full disclosure of any

24 intermediaries that were used and sources of this evidence, because as my learned

25 friend is keen on saying, what's good sauce for the goose is indeed sauce for the

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1 gander. And we would hopefully have disclosure of all the details at the

2 appropriate moment. Thank you, your Honours.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

4 MR KHAN: Mr President, my learned friend Mr Hooper, with his typical

5 eloquence and humour, said a few days ago that he was making a bit of a -- making

6 a bit of a moan. We've heard a bit of a moan from the Prosecution, but in fact the

7 underpinnings of the submission are not only speculative. They are offensive and

8 very revealing because -- let's step back for a moment.

9 What the Prosecution are saying is they have the truth, they're the possessors of the

10 truth, and when the Defence reveal that the emperor's got no clothes, that the

11 allegations are bunkum, are nonsense, the only possibility is foul play, community

12 interference, extraneous factors, it cannot -- it's impossible - it cannot be the case -

13 because it comes from that office that they've got it wrong.

14 Your Honours, my learned friend's submissions on the one hand lead one to ruefully

15 smile, even chuckle, but underneath them, when one lifts or turns the page, they are

16 matters of deep concern to the Defence bar, because they amount to an attempt to

17 stifle proper defence investigations. They have a chilling effect on the conduct of

18 the Defence doing their job in full cognizance of the applicable professional

19 standard.

20 Your Honours, I have the honour on my team, apart from David Hooper, Queen's

21 Counsel, to have Mr Essa Faal and Ms Shyamala Alagendra as very experienced

22 counsel. They were trusted by that office, by the Prosecutor herself: Mr Faal as the

23 senior trial attorney in the Darfur situation and Ms Alagendra also in that situation.

24 Your Honour, they have a long history of professional service to international

25 justice.

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1 It was Ms Alagendra and myself that conducted the investigations for these
2 witnesses, along with our team members in Nairobi. Mr Faal is there now in the
3 field.

4 The suggestion of the Prosecution that because we've revealed that their witness is
5 deceiving the Court -- as they have been wantonly deceiving -- that it's foul play is
6 absolutely lamentable. For the Prosecution to clutch at the straw of abuse of process
7 when the Defence have done that which the Prosecution should have done over the
8 last three years is a crying shame.

9 Your Honours, the issue of my learned friend about blogs and social media is to
10 conflate two issues. Nothing about that is relevant to this witness. But the
11 assertion that (Redacted) doesn't withstand a
12 moment's scrutiny. It's a desperate submission from an office, we say, which
13 unfortunately is desperately clinging to save face. And when that becomes the
14 primary objective, saving face, not doing justice, justice herself is in peril, and we say
15 this not as a rhetoric -- as a rhetorical flourish. We say it after considering this case.
16 Your Honours, the Prosecution had this case in their cross-hairs for the last three
17 years. And, your Honours, when we've spoken to our witnesses, all of our
18 witnesses, we don't reveal that -- who the focus of our investigations are. We don't.
19 And I'll pause there for a moment. And I don't need to go into the Prosecution use
20 of -- and the assistance they've received from people like USAID or foreign
21 governments, I won't go there, or intermediaries.

22 And, your Honours -- the revealing answer to your Honours' pertinent question
23 cannot be swept under the carpet because it doesn't assist the Prosecution. There's
24 no situation that the Prosecution can point to where their investigations have been
25 impeded. We say it's not the case that their investigations have been impeded. We

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1 say they have not investigated at all.

2 Now, your Honours, let's think about it fairly for a moment. The Defence received

3 disclosure. And I will say for the record, though I'm not obliged to say anything,

4 these investigations for this witness were done by Ms Alagendra and myself and my

5 assistants in Nairobi, two of us, over the last two/two-and-a-half weeks.

6 And as a matter of course, I will say it, because it's the truth, I don't get advance

7 clearance from William Ruto. I don't tell him where I'm going. I don't tell him I'm

8 going to speak to A, B and C. I don't. I've been given license to go where I want to

9 speak to who I want. And when I go to witnesses, when I make applications to

10 IEBC, I do it formally, either through Mr Katwa-Kigen's assistance as he has a law

11 office there to official bodies, or directly with my team members. So Mr William

12 Ruto doesn't even know about the people we've spoken to. I haven't gone through

13 all these witness statements with Mr William Ruto.

14 But, your Honours, what does one do? What should a competent, prudent junior

15 investigator fresh out of police academy, what would he or she do? Well, your

16 Honours, you're confronted with a witness statement in which a witness says he and

17 his family are expelled from an area. Now, the Defence want to find out, have a

18 view on the veracity of that witness's account.

19 Your Honours, the Prosecution argument again evaporates with the light of scrutiny,

20 we say, because one is not compelled to go (Redacted)

21 (Redacted)

22 (Redacted) Of course not.

23 But what you ask is: What happened to you? What did you see in 2007?

24 And with those very neutral questions that do not, contrary to my learned friend's

25 fallacious, completely spurious submissions, they do not imperil the witness. They

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1 allow one to get to the truth.

2 And this is why, your Honours, I made the submission yesterday. And it wasn't a
3 knee-jerk reaction. I said the Prosecution in this case, one of the lamentable features
4 is that they -- their conduct -- their office's conduct displays an unwillingness to cast
5 their net widely. They latch on desperately to an account that is of service to them
6 and that they don't seek to investigate their own witnesses.

7 Now, your Honours, let me say this -- let me say this: The Prosecution -- there are
8 many affidavits from so-called recanting witnesses. In fact, very serious allegations
9 are made by the Prosecution -- against the Prosecution by these witnesses, all kind of
10 allegations. Your Honours, the Defence don't desperately cling to those and accept
11 that as the truth. Many of those are lies. It's absolute bunkum, absolute nonsense.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, one second. Can you look at Article
13 68. Let's just try and figure out what we're talking about here. Take a look at
14 Article 68. Article 68(1), "The Court shall take appropriate measures to protect the
15 safety, physical and psychological well-being, dignity and privacy of victims and
16 witnesses." Let's stop there.

17 Now, can you pick up your bundle of documents and let's look at tab 35. Let's
18 begin with tab 35. You're at tab 35? Okay, just look at it carefully. Look also at
19 tab 34. All right, look at tab 18.

20 I don't know whether you get the point. The point is this: One would say
21 that -- we're all in private session now amongst ourselves as lawyers. One would
22 say that a colloquial view of a case against your client is -- as I say, colloquial view,
23 forget about what the charges say -- is a case of the abuse of a position of power in a
24 very violent way.

25 Now, we've seen images which you have shown us of your client on campaign trails.

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1 Him and his friends are all looking very well fed. We've seen the home of your
2 client. You've shown us all that. We've seen images of your client being
3 interviewed by journalists and all that - all images of power - and then we see this by
4 the witness who's on the stand (Redacted)
5 That's the point. It's about delicacy sometimes.
6 Now, it may well be that you feel that this is the best way to defend your client.
7 That is a decision for you and your team to make, whether or not that works.
8 And, of course, this is not a jury trial. We are professional Judges, but still we have
9 an obligation to consider some other things. So part of the assessment that must be
10 made is the forensic value of the line of inquiry being pursued with all those images
11 relative to how the witness on the stand sees this whole thing.
12 They come from this sort of background we're seeing in these images. They come
13 here, they sit in that seat and looking at you and looking at us sitting up here and all
14 these strangers they have never seen before. What are they thinking in their minds
15 when the circumstances such as appear in these images are dragged out before them
16 while they're sitting there and asking questions?
17 Now, you don't need to respond to this. It's simply a matter of thinking whether
18 you think this is the best strategy to defend your client, but there comes a point
19 where we will say enough is enough of certain things. That's just the bottom line.
20 MR KHAN: Your Honour, I'm grateful for that and I understand from one
21 perspective what your Honour is saying. The difficulty is this and it's twofold:
22 Witnesses have been given -- it's never in any jurisdiction, and I will maintain that,
23 that giving evidence, it's not -- one should not expect to be wrapped in cotton wool.
24 It is a contest to the truth. Now, your Honour, questions of course are asked
25 respectfully, but we're trying to get to the truth.

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1 Now, of course witnesses may be surprised, because if of course witnesses have
2 come through forensic questions by a party in which an account has been asked and
3 then you try to get to the truth by looking at inconsistencies or other investigative
4 knowledge, they will realise that it's not easy to deceive. But, your Honours --

5 PRESIDING JUDGE EBOE-OSUJI: It depends on how it is done.

6 MR KHAN: Yes.

7 PRESIDING JUDGE EBOE-OSUJI: I do not at all -- I mean we've all done this sort
8 of thing we're doing before, that it's always -- everything that occurs in the mind of
9 Defence lawyers a strategy needs to be pursued. Again, it's up to you. One's not
10 lecturing you, but the point here is we get to the point where we say, all right, there
11 is something that Article 68(1) says, and it is not outside the realms of proper
12 advocacy in the ordinary course, even in national jurisdictions, for counsel to
13 consider whether certain questions and certain matters should be pursued in
14 cross-examining a witness. That's all.

15 MR KHAN: Yes. And, your Honour, the difficulty is in a domestic system -- let
16 me say that with certainty. I've been a senior crown prosecutor, I've done serious
17 cases in domestic jurisdictions and I can say it with a high degree of confidence in
18 relation to this witness and other witnesses that have gone before. If I were
19 prosecuting in those cases back home, as the witness left, I would have withdrawn
20 the witness. I would have told the Bench I'm not relying upon those witnesses.
21 Now, the Defence is under peril. Our client is facing the most serious charges, the
22 possibility of a very long sentence of imprisonment. Now, your Honours, when
23 we're faced with the Prosecution -- and, unfortunately, I know -- hopefully there's
24 changes. There's a very good Deputy Prosecutor. Fatou Bensouda herself is a
25 good woman. She means well. It'll take time to put systems in place. But when

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1 you get an office that we do say is trying to show it hasn't absolutely failed in its
2 statutory duties and any evidence presented is rejected, whether it's teachers or land
3 records or, you know, (Redacted) evidence or phone records or electoral
4 records or whatever it is, I mean cumulatively it's all rejected, why? Why is it
5 rejected? Why is the Prosecution not thinking maybe they've got it wrong?
6 Your Honour, in our respectful submission it's simply because they believe in the old
7 days of Catholicism, and still today, there is a principle of papal infallibility. Well,
8 that's fine in the religious sphere, but there's no such thing as prosecutorial
9 infallibility. All of us as Defence, myself included, our team, you must always
10 labour under the realisation we may get it wrong. And that's the difficulty for the
11 Defence, because whatever we present, it's business as usual, whereas we said at the
12 outset every day this trial continues is a miscarriage of justice because a man is here
13 that should not be here.
14 Now, your Honours, I get the point about the disparity in wealth, but your Honour
15 it's a two -- it's a double-edged sword for the Prosecution, because we say for some
16 of these very poor people, like this witness, can't -- (Redacted)
17 For the first time when he came here he said he couldn't read, but let's accept that his
18 reading is not absolutely fluent. Your Honours, the Prosecution are -- have not
19 investigated whether or not that can act as an inducement.
20 I've said previously what happens in asylum cases. So, your Honours, what's not
21 fair given the presumption of innocence is that we be given a double whammy. Not
22 only we have -- we have a right to the presumption of innocence, we didn't choose to
23 be charged. The Prosecution chose Mr Ruto, who was at the time a member of
24 parliament and has subsequently become the deputy president of the Republic of
25 Kenya. That is something that's not the fault of the Defence.

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1 But, your Honour, what we have to investigate is also motive. (Redacted)
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted) And the Prosecution -- I don't know what drum one must beat and what
12 trumpet one must seek to blow to wake up a Prosecution that is unwilling to
13 conceive it may have got it wrong.
14 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, two more minutes.
15 MR KHAN: And, your Honour, the converse of that is every time the Prosecution
16 encounter difficulties, they will raise the spectre of Article 70 and foul play.
17 This witness is seeking to rob his (Redacted). And, your Honours, maybe that's
18 why if one wants to get into the mind of a witness, he's so concerned because he's
19 claiming all this land, (Redacted) in his victim
20 application for land that was never ever his. (Redacted)
21 He clicked -- ticked on the form. He wants the money to go to him and not the
22 (Redacted) And that's one of the motives, to rob (Redacted)
23 Your Honours, we have a legitimate forensic interest to ask those types of questions.
24 And whilst our investigations are deep to the best of our ability, they are because we
25 are in peril. Mr Ruto is in peril and anything less than the most in-depth

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1 assertion -- investigations would be dereliction of duty.

2 And, your Honours, if it came halfway through my cross-examination, the
3 Prosecution, it dawned on them or the penny dropped that maybe this witness had
4 ulterior motives or was not capable of belief, all they need to do is ask for the witness
5 to be excused and withdraw him.

6 But, your Honour, even now, the Prosecution, after all this cross-examination, they
7 are vigorously maintaining the veracity of that witness and actually asserting foul
8 play on the Defence to the extent that, (Redacted)
9 (Redacted) Speculative and all the rest of it.

10 So, your Honour, that's my submission on that issue.

11 The second, your Honour --

12 PRESIDING JUDGE EBOE-OSUJI: I think the Prosecution was talking about what
13 operates in the mind of the witness, not necessarily that that's what you are doing.

14 The point Mr Steynberg was making -- and, in fact, that was my point as
15 well -- when a witness is sitting there and confronted with all these things, what are
16 they thinking and what does that do to their psychological well-being?

17 Why don't we leave it at that.

18 MR KHAN: Your Honour, just two things with your leave. The witness is
19 thinking, we say, "I've been caught out. I've been caught red handed, my hand in
20 the cookie jar. My plan of an easy ride, an easy life and an easy flight home has
21 been -- is in peril." That's what the -- that's why the witness is concerned.

22 Your Honours, I would also ask, the second matter, and my learned friend
23 Mr Pugliatti referred to, I seek your leave to play a short tape. (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 Your Honours, I have a transcript. We produced a transcript, if that could be given

3 to the Bench, and your Honour I've given a copy to my friends for the Prosecution.

4 I would ask to play --

5 PRESIDING JUDGE EBOE-OSUJI: This was recorded when?

6 MR KHAN: (Redacted)

7 MR PUGLIATTI: Mr President, I wonder if we could hear arguments on the

8 admissibility of this before it's handed up to the Bench. I'm aware that the Bench is

9 a Bench of professional judges, but we make that request nonetheless.

10 MR KHAN: Well, your Honours, I'd ask for it to be handed up. We all know --

11 PRESIDING JUDGE EBOE-OSUJI: Let's see the material.

12 MR KHAN: (Redacted)

13 (Redacted) And, your Honour, we have

14 the audio which we're happy to play. It's two minutes if your Honours wish to

15 hear. And my learned friends for the Prosecution may see how we conduct our

16 investigations. No coerciveness. Absolutely appropriate. With our mandate to

17 help your Honours determine the truth even if that truth is to expose the absolute

18 falsity and specious nature of the Prosecution. Your Honours, I will indicate --

19 PRESIDING JUDGE EBOE-OSUJI: Your application is?

20 MR KHAN: Your Honour, my application is that I'm going to ask questions I

21 want -- I would ask for the Court's leave to put questions to the witness regarding

22 this and, if possible, even to play the audio.

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 And, your Honours, I want to put it to the witness, I don't want there to be

7 accusations of undue influence or oppressive conduct. And that it's only because

8 he was confronted with phone records of a -- or phone details that were quite

9 specific that he knew that his Safaricom number, the details of his usage was in the

10 hands of the Defence. (Redacted)

11 (Redacted)

12 (Redacted)

13 So, your Honours, I didn't want to have a drama or objections from the Prosecution

14 when the witness is in the stand; I wanted advanced permission that the Bench was

15 happy with me to briefly discuss that.

16 Your Honour, I will say I'm not intending to ask really any questions about the

17 (Redacted) and I'm going to move

18 to land issue and basically that's it, I'm not going to be long, but your Honours I

19 wanted the Bench to be comfortable with what I'm intending to do and I'm sorry

20 sometimes these are matters that take a little bit of time and it's because of the

21 serious nature of the charges. Your Honours, I'm not asking to play the video --

22 the audio. If your Honours wish to hear the audio, I'm happy for that to be played

23 inter partes. I've got nothing to hide.

24 Your Honours, the final point is I will be contacting the Prosecutors at the Bench

25 now and I will ask Ms Bensouda, the learned Prosecutor, that an independent

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1 lawyer be appointed by her. I'm not asking at the moment that an outside agency
2 be brought in. I'm asking that an independent person be appointed reportable --
3 reporting only to Mr James Stewart and Ms Fatou Bensouda. And I'm content to
4 give and co-operate fully with that independent person reporting not to this trial
5 team, to Ms Bensouda and James Stewart only so that this witness can be
6 investigated for Article 70, because as an officer of the Court and somebody that
7 believes in this institution, that would be honoured and delighted to prosecute or
8 act for the victims, I think one cannot sit comfortably if we have reason to believe,
9 at the very lowest, that witnesses believe they can pull the wool over the eyes of
10 this institution by lying.

11 And, your Honours, the final point is one would hope that the Prosecution would
12 view the assertions of witnesses of interference by the Defence with as much
13 circumspection as the Defence view allegations of Prosecution interference with
14 witnesses that have recanted. Your Honour, if there's sauce for the goose, sauce
15 for the gander, that's where it should apply.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti?

17 MR PUGLIATTI: Mr President, your Honours, I'll keep my response --

18 MR KHAN: I'm sorry, your Honour. And just for the record we've already
19 provided information to Ms Bensouda and James Stewart on another matter in
20 relation to Article 70 earlier this year -- last year. So, your Honours, the bona fides
21 of the Defence and this team really, I would say, is absolutely beyond reproach.

22 And there is an additional comfort zone to my learned friends that I do not seek
23 advanced clearance when I'm meeting X, Y and Z from the client. I'm grateful.

24 MR PUGLIATTI: Yes, Mr President, your Honours. As I was saying, I will keep
25 my responses to the application brief -- very brief because in our submission it's

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1 very clear and very evident that this application to use this material should be
2 rejected.

3 Putting aside that it's well out of time for the use of such material, the real core
4 issue as to why it should be rejected is that this is an out-of-court statement in the
5 truest sense of the word, and your Honours have ruled time and again that it
6 cannot be put before the witnesses the words and statements of third parties and
7 other individuals to rebut their evidence.

8 (Redacted)

9 (Redacted). So our question is when will it end? Every time the witness gives his
10 evidence, more evidence is produced on -- at the last moment with an application
11 to introduce it.

12 The appropriate manner in which the Defence should put this before the Chamber
13 is by calling a Defence witness during the Defence phase of the case should these
14 proceedings reach that phase. That is the appropriate procedure. There is no
15 reason for this evidence to be put before the Chamber in this specific incidents.
16 And that's it.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, one minute of reply. You don't
18 have to take it.

19 MR KHAN: Your Honour, I won't take it in fact. I'm grateful.

20 (Trial Chamber confers)

21 PRESIDING JUDGE EBOE-OSUJI: The Chamber's ruling on the application:

22 There is something called the collateral evidence rule. That rule is designed to
23 ensure that litigation -- it's a policy matter, common sense, there has to be an end to
24 litigation on questions that are collateral and generally this tends to fall in the zone
25 of challenges to credibility.

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1 Of course, there's some judgment call to be made how close is the matter and how
2 far away is it from real questions as to credibility.
3 The Chamber intends to operate by that policy on this question, and the rule will
4 be: Defence counsel can ask, put questions to the witness within reasonable limits
5 and he would have to leave it at that. There will not be any materials put to the
6 witness, either paper or video -- or audio, rather. That's the Chamber's ruling on
7 it, on this fresh application.

8 Mr Khan, you said you have some more questions in two areas; (Redacted)
9 (Redacted) and then the land issue. How long -- we would like you to
10 complete this thing by --

11 MR KHAN: Your Honour --

12 PRESIDING JUDGE EBOE-OSUJI: -- lunchtime.

13 MR KHAN: Yes, I'll do that. I'm grateful. And, your Honour, I will be -- I
14 apologise. I will be showing, lest there be any surprises once again, just briefly,
15 the photograph again with the -- (Redacted)
16 (Redacted), and ask the witness just two or three questions
17 about that, which is really relevant to (Redacted)
18 (Redacted), but your Honour it won't take very long.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you were about to say
20 something?

21 MR KIGEN-KATWA: Yes, Mr President. The issue that has been discussed so far
22 this morning I just wanted to observe that we haven't been heard, and we assume it
23 is because the witness and the testimony relates to the first accused and not
24 ourselves and that even observations are to be made and due accommodation
25 would be made to the fact that we've not been heard on that issue.

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, it's not in every -- we're not
2 going to operate by the template of by-roads that every time there's an issue
3 everybody has to be asked questions about it. There may be instances where a
4 matter is of concern to you and not to anybody else. It doesn't mean that we will
5 require Mr Khan to always respond and vice versa his own issues. The debate this
6 morning was not about your conduct of the examination. It was about Mr Khan's
7 and he's addressed it and we'll leave it at that.

8 MR KIGEN-KATWA: That's all. The only assurance I would like, Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: Yes.

10 MR KIGEN-KATWA: Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 We will bring down the blinds and invite the witness back in.

13 Mr Nderitu?

14 MR NDERITU: Yes, Mr President, your Honours. Before we do so, perhaps the
15 Chamber would be kind enough to just give directions on the issue that I had
16 raised yesterday?

17 PRESIDING JUDGE EBOE-OSUJI: Which issue?

18 MR NDERITU: There is an issue that I stood up on yesterday afternoon and --

19 PRESIDING JUDGE EBOE-OSUJI: The matter we directed you to file something
20 in writing, was that it?

21 MR NDERITU: Yes, and I did make a communication by way of email to the Trial
22 Chamber communications and I was informed that that was received. I do not
23 know whether there will be any need to take proceedings on the matter.

24 PRESIDING JUDGE EBOE-OSUJI: All right. We'll return to that after the
25 morning break.

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1 MR NDERITU: I'm much obliged.

2 (Closed session at 10.48 a.m.) * Reclassified as Open session

3 THE COURT OFFICER: (Interpretation) We are in closed session, Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti, while the witness is taking his
5 seat, so far do you see a need for re-examination?

6 MR PUGLIATTI: So far, no. The witness of course hasn't finished, but so far no.

7 (The witness enters the courtroom)

8 PRESIDING JUDGE EBOE-OSUJI: Witness, welcome back to the court. Mr Khan
9 will continue asking you questions, all right?

10 We will go to private session. Private session.

11 (Private session at 10.50 a.m.) * Reclassified as Open session

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

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 Mr Khan, please proceed.

15 WITNESS: KEN-OTP-0409 (On former oath)

16 (The witness speaks Swahili)

17 QUESTIONED BY MR KHAN: (Continuing)

18 Q. Mr Witness, good morning.

19 A. Good morning.

20 Q. We have about ten minutes, Mr Witness, before the morning break and I will
21 have just a few questions for you in these ten minutes. The first one is: When
22 you spoke to the Prosecution, did they ever ask you for documents regarding your
23 ownership of land? Did the Prosecution ever ask to get those documents from
24 you?

25 A. Yes, they did.

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1 Q. And when did the Prosecution ask you about those documents? When did
2 they ask you to get them those documents?

3 A. It is when I was filling out the form.

4 Q. Yes. Let's leave the form aside for a moment because that was your form to
5 the Victim and Witness Unit; is that right -- to the victim section?

6 A. No.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, so that there is no confusion with the
8 witness, is it possible to approach the inquiry from the perspective of apart from
9 the time of filling the form, was he at any other time asked by an ICC staff --

10 MR KHAN: Yes, that's much better.

11 PRESIDING JUDGE EBOE-OSUJI: -- for the title.

12 MR KHAN: Yes, I'm grateful.

13 Q. Mr Witness, apart from the time you filled in the form, was there any other
14 time when you were asked to obtain land documents by the ICC?

15 A. I have forgotten, but what I remember is that I handed over those
16 documents at some point.

17 Q. Now, you told the Prosecution that you went to some rallies with (Redacted),
18 (Redacted). Do you remember telling that to the Prosecution in 2012?

19 A. Yes, I do.

20 Q. Now, His Honour, the President, asked you about the -- whether or not you
21 knew the name of the father of (Redacted). Do you remember the
22 Presiding Judge asking you those questions?

23 A. Yes, I do remember.

24 Q. And you remember the learned Presiding Judge asking you questions
25 regarding the -- the last name of (Redacted)?

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1 A. Yes, I do remember.

2 Q. And you remember the learned Presiding Judge asking you where (Redacted),
3 (Redacted) lived in 2007?

4 A. Yes, I do remember.

5 Q. The Prosecution didn't ask you those questions in 2012, did they? The first
6 time they were asked was by His Honour the President?

7 A. Yes.

8 Q. Yes, I'm grateful. Did the Prosecution ever ask you regarding what phone
9 you were using in 2007?

10 A. Yes.

11 Q. Did you give them the phone number of the phone you were using in 2007?

12 A. I do not know whether it is that number that I gave them.

13 Q. Now, Mr Witness, I'm going to ask you a question. I don't need to know at
14 this stage names, but, to the best of your knowledge, (Redacted)
15 (Redacted)

16 A. (Redacted)

17 Q. Yes, I'm grateful.

18 MR KHAN: Your Honour, I can go into -- I can continue now, or maybe as we've
19 got only two minutes rise now and start the other issues after the break.

20 PRESIDING JUDGE EBOE-OSUJI: Is there anything you can do in the next few
21 minutes quickly, or is it a logical place?

22 MR KHAN: It's a logical place, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: Right, then let's break it here.

24 Witness, we will again rise and we will bring you back in 30 minutes, all right?

25 Let's bring down the blinds and escort the witness, please.

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- 1 (Closed session at 10.58 a.m.) * Reclassified as Open session
- 2 THE COURT OFFICER: (Interpretation) Mr President, we're in closed session.
- 3 (The witness stands down)
- 4 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.
- 5 THE COURT OFFICER: All rise.
- 6 (Recess taken at 10.59 a.m.)
- 7 (Upon resuming in private session at 11.34 a.m.)
- 8 THE COURT USHER: All rise.
- 9 Please be seated.
- 10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 11 Mr Nderitu, we've looked at your communication, and we note that the point of it, of
- 12 course, was to request VWU to take such action as it deems appropriate, including
- 13 counselling and possible investigation. So we'll leave it at that.
- 14 And we understand that the matter has been referred to the Prosecution, or will be.
- 15 I'm asking you.
- 16 MR NDERITU: Sorry, I had not understood that to be --
- 17 PRESIDING JUDGE EBOE-OSUJI: The case?
- 18 MR NDERITU: -- a question from you.
- 19 PRESIDING JUDGE EBOE-OSUJI: All right.
- 20 MR NDERITU: But, indeed, I have confidentially shared this with the Prosecution.
- 21 PRESIDING JUDGE EBOE-OSUJI: All right.
- 22 MR NDERITU: Thank you.
- 23 PRESIDING JUDGE EBOE-OSUJI: So that too is a matter for them as it concerns the
- 24 need to do their investigation. Of course, that also implicates questions of duty of
- 25 disclosure on the part of the Prosecution on the matter.

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1 MR PUGLIATTI: We'll take that into consideration. I'm grateful for that.

2 PRESIDING JUDGE EBOE-OSUJI: Yes, and we'll leave it at that and continue.

3 MR KHAN: I'm grateful, Mr President. Before we proceed with the questioning of
4 the witness, with your leave I'd seek to -- I will seek to exhibit eight documents that
5 were put to the witness yesterday and two documents I'll seek to mark for
6 identification. And, your Honours, if we could deal with that now, I would be
7 grateful.

8 PRESIDING JUDGE EBOE-OSUJI: Proceed, Mr Khan.

9 MR KHAN: Your Honour, the first is at tab 39, Ken-D09-0030-0041. It's a
10 photograph of a mud track to Meteitei. It's public. The witness recognised the
11 road. On that basis, I'd ask that it be exhibited.

12 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

13 MR PUGLIATTI: No objection, your Honours.

14 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next Defence - Ruto Defence -
15 exhibit.

16 MR KHAN: I'm much obliged. Your Honours, the next is at tab 40,
17 KEN-D09-0030-0042. It's a photograph of a shop in Meteitei, again public. The
18 witness recognised the shop and the image in the photograph, and on that basis I'd
19 ask that it be exhibited.

20 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

21 MR PUGLIATTI: Again, no objection.

22 PRESIDING JUDGE EBOE-OSUJI: Then admitted as the next Ruto Defence exhibit.

23 MR KHAN: I'm grateful. The next is at tab 43, KEN-D09-0030-0045. It's another
24 scene of Meteitei, the main shopping centre. The witness recognised it. On that
25 basis, I would seek it to be admitted, again public.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Prosecution?
- 2 MR PUGLIATTI: Again, no objection.
- 3 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next Ruto Defence exhibit.
- 4 MR KHAN: I'm grateful. The next I'd seek to mark confidentially, have it
- 5 confidentially exhibited. It's at tab 56, KEN-OTP-0107-0218. It's the victim
- 6 application submitted by the witness. The witness confirmed his signature. He
- 7 denies, of course, some of the contents, but your Honours that goes, we say, to
- 8 credibility. Given that he accepts the signature, that it comes through the hands of
- 9 the Prosecution, so issues of both authenticity and reliability are properly dealt with,
- 10 I'd ask that it be given an exhibit number.
- 11 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti?
- 12 MR PUGLIATTI: There is no objection to that either.
- 13 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next in the Ruto Defence
- 14 exhibits.
- 15 MR KHAN: I'm grateful. Your Honours, the next four, four are all confidential at
- 16 tab 28, KEN-D09-0030-0029. It's a photograph of the witness's father and he
- 17 accepted in this instance that it was a photograph of his father and on that basis I'd
- 18 ask that it be exhibited.
- 19 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti?
- 20 MR PUGLIATTI: Yes, no objection to that.
- 21 PRESIDING JUDGE EBOE-OSUJI: Accepted as the next in Defence - Ruto Defence -
- 22 exhibit.
- 23 MR KHAN: Your Honour, the next, again confidential, tab 35, KEN-D09-0030-0037,
- 24 it's a group photograph. The witness refused to recognize (Redacted)
- 25 (Redacted). He denied that an individual put to him (Redacted), but he

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1 did accept that (Redacted). On that basis, I'd ask that

2 the photograph be admitted, (Redacted) and also denial or refusal to

3 answer the other questions.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti?

5 MR PUGLIATTI: Provided it's on the basis of the characterisation that my learned

6 friend made, there is no objection.

7 PRESIDING JUDGE EBOE-OSUJI: Admitted on that basis.

8 MR KHAN: Your Honour, the next is at tab 5, KEN-D09-0030-0006. It's a

9 photograph that was put to the witness as being of (Redacted). The

10 witness didn't accept that (Redacted), but he accepted he knew her.

11 And, your Honour, on that basis -- and he also said -- on that basis I'd ask that it be

12 exhibited.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti?

14 MR PUGLIATTI: Again, on that basis it's not objected to.

15 PRESIDING JUDGE EBOE-OSUJI: Admitted on that basis.

16 MR KHAN: And, your Honour, I'm grateful. And the last is at tab 3,

17 KEN-D09-0030-0004. It's a photograph of (Redacted) that the witness accepted is

18 (Redacted), and on that basis I'd ask that it be exhibited.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti?

20 MR PUGLIATTI: No objection.

21 PRESIDING JUDGE EBOE-OSUJI: Admitted.

22 MR KHAN: Your Honour, I'd then seek to mark for identification, in fact, it's three

23 documents. The first is a video, which is KEN-D09-0030-0052, and the

24 accompanying transcript which appears under tab 50 which is KEN-D09-0030-0053.

25 Your Honour, that's a news report about an ODM rally in Kisumu and it was played

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1 to the witness and questions were asked. On that basis, I'd ask that it be marked for
2 identification.

3 PRESIDING JUDGE EBOE-OSUJI: Isn't it already marked for identification? Is
4 this something new?

5 MR KHAN: Your Honour, my understanding is this -- another video was
6 exhibited. My understanding is that this one has not previously been exhibited. I
7 may be wrong on that. But, your Honour, this one I believe should be marked for
8 identification. The one that was previously exhibited was the one about three-piece
9 suit, the Raila Odinga one had previously an exhibit number. Your Honour, Exhibit
10 62 that was previously admitted was the one of the Honourable Raila Odinga.

11 PRESIDING JUDGE EBOE-OSUJI: All right. The court officer tells me that this is
12 something new.

13 MR KHAN: I'm grateful.

14 PRESIDING JUDGE EBOE-OSUJI: So we will mark it for ID then.

15 MR KHAN: I'm grateful. Your Honour, the next is under tab 60. I'd ask that it be
16 marked confidentially for identification. It's KEN-D09-0030-0080. Your Honour
17 made reference to the pages and the tabs when I was questioning the witness. It's
18 telephone records and, as they were referred to, I'd ask that so that we can look at all
19 matters later on they be marked for identification.

20 PRESIDING JUDGE EBOE-OSUJI: They're marked for ID.

21 MR KHAN: And, your Honour, the last one is at tab 59, KEN-D09-0030-0065,
22 confidentially. It's cell site reports of telephone usage. Your Honour, I referred to
23 the page when I was asking questions to the witness as the basis of questioning, and
24 on that basis I'd ask that the document be marked for identification.

25 PRESIDING JUDGE EBOE-OSUJI: Marked for ID.

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- 1 MR KHAN: I'm most grateful. And that's it, your Honours.
- 2 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Khan, you will now
- 3 continue -- sorry.
- 4 THE COURT OFFICER: (Interpretation) Thank you. Document
- 5 KEN-D09-0030-0041, a public document, will have the reference EVD-T-D09-00163.
- 6 Document KEN-D09-0030-0042, a public document, will bear the reference
- 7 EVD-T-D09-00164.
- 8 Document KEN-D09-0030-0045, a public document, will have the reference number
- 9 EVD-T-D09-00165.
- 10 Document KEN-OTP-0107-0218, confidential, will bear the reference
- 11 EVD-T-D09-00166.
- 12 Document KEN-D09-0030-0029, confidential, will be assigned the reference
- 13 EVD-T-D09-00167.
- 14 Document KEN-D09-0030-0037, confidential, will bear the reference
- 15 EVD-T-D09-00168.
- 16 Document KEN-D09-0030-0006, confidential, will bear the reference
- 17 EVD-T-D09-00169.
- 18 Document KEN-D09-0030-0004, confidential, will be assigned the reference
- 19 EVD-T-D09-00170.
- 20 Document KEN-D09-0030-0052, a public document, will bear the reference
- 21 MFI-T-D09-00171.
- 22 Document KEN-D09-0030-0053, a public document, will bear the reference
- 23 MFI-T-D09-00172.
- 24 Document KEN-D09-0030-0080, confidential, will be assigned the reference number
- 25 EVD-T-D09-00173.

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1 And lastly, document KEN-D09-0030-0065, confidential, will be given the
2 reference -- I'm sorry, correction by the court reporter -- the previous document
3 KEN-D09-0030-0080 will bear the reference MFI-T-D09-00173.

4 And the document KEN-D09-0030-0065 will be assigned the reference
5 MFI-T-D09-00174. Thank you.

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

7 Mr Khan, that's it?

8 MR KHAN: Your Honour, it is, and I'm most grateful.

9 PRESIDING JUDGE EBOE-OSUJI: All right.

10 MR KHAN: If we could go into private session, I would be grateful.

11 PRESIDING JUDGE EBOE-OSUJI: We are in private session.

12 (Private session at 12.08 p.m.) * Reclassified as Open session

13 MR KHAN:

14 Q. Witness, I'm going to ask you just a few questions, it shouldn't take too long,
15 regarding (Redacted), and hopefully we'll be done in five or ten minutes. Do you
16 understand?

17 A. Yes.

18 Q. (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 A. Yes, that is correct.

24 Q. (Redacted)

25 (Redacted)?

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- 1 A. (Redacted)
- 2 Q. (Redacted)?
- 3 A. Yes, that is correct.
- 4 Q. (Redacted)
- 5 (Redacted)
- 6 A. Yes, that is correct.
- 7 Q. (Redacted)
- 8 (Redacted)
- 9 A. No, I do not agree with you.
- 10 Q. (Redacted)
- 11 (Redacted)?
- 12 MR PUGLIATTI: I do apologise for rising. I wonder if the interpretation --
- 13 THE WITNESS: (No interpretation).
- 14 MR PUGLIATTI: I wonder if the interpretation at line 41, 1, could be fully clarified?
- 15 In our understanding, that's not correct.
- 16 PRESIDING JUDGE EBOE-OSUJI: All right, but the witness had answered at line 7.
- 17 What was that answer? Interpretation, there was something Witness answered that
- 18 should appear at page 41, line 7.
- 19 MR KHAN: Your Honour, perhaps I'll put it again. It may be quicker. I'm in the
- 20 Court's hands.
- 21 Q. (Redacted)
- 22 (Redacted)?
- 23 A. That is not correct.
- 24 Q. (Redacted)
- 25 (Redacted)?

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- 1 A. No, that is not true.
- 2 Q. (Redacted)
- 3 (Redacted)
- 4 (Redacted)?
- 5 A. (Redacted)
- 6 Q. I see. I put it to you, Witness, that you made up the loss (Redacted)
- 7 (Redacted) to add some suffering for your victim
- 8 application. Is that why -- is that right?
- 9 A. No, that is not true.
- 10 Q. And, Witness, you are, when you submitted your form to the Victim and
- 11 Witness Unit, you were claiming -- you are claiming, I should say, (Redacted)
- 12 (Redacted) in compensation; is that right?
- 13 MR KHAN: Your Honour, that's tab 56 and the reference is KEN-OTP-0107-0232.
- 14 Q. You say that your loss is more than (Redacted). That's
- 15 what you are claiming.
- 16 MR NDERITU: Mr President, your Honours, I'm on my feet just to bring to the
- 17 attention of the Court, there has been a lot of reference to Victims and Witnesses
- 18 unit, while I believe that the reference ought to be to Victims' Participation and
- 19 Reparation Section. This did happen yesterday, and it's happening again, just so
- 20 that we get it correct.
- 21 MR KHAN: My friend is quite correct. My friend is right.
- 22 Q. When you submitted your -- I apologise for that and thank you.
- 23 When you submitted your form to the victims' unit of the Court, you were claiming
- 24 (Redacted) for your loss - your alleged loss - in 2007; isn't that
- 25 right?

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1 A. That is correct.

2 Q. And, in fact, the (Redacted) that you are claiming for, none of that was yours,
3 was it?

4 A. I do not agree.

5 Q. Okay. Witness, I'll ask you some questions about land in a moment, but
6 before I finally leave the issue of (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 A. No, that is not correct.

11 Q. Who was it?

12 A. (Redacted)

13 Q. (Redacted)?

14 A. Yes.

15 Q. (Redacted) ?

16 A. (Redacted)

17 Q. Okay. Let's go to the land issue, Witness.

18 MR PUGLIATTI: As my learned friend indicated that he's moving to a new topic,
19 we would repeat our request that the matter at page 41, line 1, be clarified for the
20 record. The question is at page 40, lines 24, 25. We believe there is a problem with
21 the interpretation. We don't want to say more than that. If the question can be
22 clarified, or re-put, we're very grateful.

23 PRESIDING JUDGE EBOE-OSUJI: I'm sorry, what was the page again, reference?

24 MR PUGLIATTI: The question posed?

25 PRESIDING JUDGE EBOE-OSUJI: Page?

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1 MR PUGLIATTI: Is at page 40, lines 24 to 25, the last two lines. The answer the
2 witness provided as interpreted is at page 41, line 1.

3 MR KHAN:

4 Q. Witness, it will be the last question on the family. (Redacted)
5 (Redacted)?

6 A. (No interpretation)

7 PRESIDING JUDGE EBOE-OSUJI: Interpreters, what does "si ebiyo" (phon) mean?
8 What is happening with the interpretation? We're not getting any interpretation.
9 The witness said "si ebiyo." This is the second time it's happened. What is going
10 on?

11 THE INTERPRETER: That is not true.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, can you pose the question again
13 please.

14 MR KHAN: Yes, of course, your Honour.

15 Q. (Redacted)
16 (Redacted)?

17 A. That is not true.

18 MR KHAN: Your Honour, for accuracy my question was based on my wrong
19 reading of the papers in fact, so I'll withdraw for the record my question at page 43,
20 lines 23 to 24, regarding that (Redacted). I was misreading a
21 document before me. So the witness has denied it, but in any event I don't make
22 that assertion. It was based upon a misreading of documents.

23 Q. Witness, you in your statements to the Prosecution and in court, you talk
24 about going to (Redacted); is that right?

25 A. Yes.

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1 Q. And I've got the details, but you went there a few times is that right?

2 A. Not often. I did not go there often. It is only on the day on which we
3 sought refuge that I went there.

4 Q. But do you not give an account that you go to (Redacted). You spend a
5 night there. (Redacted). How many times did you
6 go to (Redacted) according to you, just after December, just after the elections of
7 2007?

8 A. There were many of us and he spoke to everybody in general. No questions
9 were put to people individually.

10 Q. Well, in your statement, for example, at paragraph 92 to the Prosecution, you
11 say that (Redacted); is that right?

12 A. That is not what I said.

13 Q. Let me read, Witness, page 15 of your statement to the Prosecution at
14 KEN-OTP-0080-0360. You say this at paragraph 92, "(Redacted),
15 was trying to speak to people. He told the people to be calm and said they would
16 make those -- make sure those who committed the crimes would be held
17 responsible."

18 Paragraph 93, "In the afternoon (Redacted) and I went back
19 myself to my place. I didn't find anything there."

20 PRESIDING JUDGE EBOE-OSUJI: Mr Khan.

21 MR KHAN: Too fast?

22 PRESIDING JUDGE EBOE-OSUJI: Yes.

23 MR KHAN:

24 Q. I'll start again. 93, "In the afternoon (Redacted) and
25 went back by my ..." -- "... and went by myself back to my place. I did not find

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1 anything there. I could not find my cattle, and my house was burned to the ground.

2 The houses around mine were not burned down. My parents' house was not

3 burned down, but they had taken the tin roof. (Redacted)

4 (Redacted)?"

5 Do you remember saying that to the Prosecution?

6 A. Some of the information has been added and it is not what I said.

7 Q. Right. And you also say in that statement that the next day, paragraph 99,

8 once again you go to the (Redacted); is that right?

9 A. Yes, that is correct.

10 Q. Yes. Could you please give the Court the name of (Redacted) that you saw in

11 2007?

12 A. I do not know his name, but I know that he was a state official and his title

13 was DO.

14 Q. Witness, bear with me. Do you know the name of (Redacted) that you saw in

15 2007?

16 A. No, I do not know.

17 Q. But you'd been living, you say, in the area for quite a while?

18 A. Yes.

19 Q. (Redacted)

20 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, that's now argumentative.

21 MR KHAN:

22 Q. Witness, if one has -- is it correct that if one has, for example, a dispute that

23 cattle is going on your land, you would go to (Redacted) and get some assistance?

24 A. No, that is not how it works according to the Kenyan law.

25 Q. (Redacted)?

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1 A. I thought that they had all travelled.

2 Q. You see, Witness, I put it to you that the reason you can't mention the name of
3 (Redacted) in 2007 is you were not in the area. Is that right?

4 A. Well, I do not agree with you, because most often in Kenya, the person is
5 simply referred to as (Redacted), even if his name were Barasa or any other name
6 whatsoever.

7 Q. You say also that you went to (Redacted). You say
8 that in your victim's statement. What is the name of (Redacted) you saw in 2007?

9 A. I said that I went to (Redacted).

10 Q. So what is the name of (Redacted) you went to visit that you spoke to in 2007?

11 A. I was not able to speak to (Redacted) at his office, because he was having
12 meetings or he was talking to the crowds as such and therefore it was not possible to
13 talk to him one on one.

14 Q. What is his name? What was the name of (Redacted)
15 (Redacted)?

16 A. I have already told you that those people were simply referred to by their
17 title, (Redacted).

18 Q. Do you know the actual name of (Redacted)
19 (Redacted), yes or no, sir?

20 A. No.

21 MR KHAN: And, your Honour, just for the record, the reference to the DC is under
22 tab 56, Ken-OTP-0107-0232.

23 Q. Witness, would it surprise you that the (Redacted) in 2007 (Redacted)
24 was a woman, (Redacted), not a he, a female as opposed to a male. Would that
25 surprise you?

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1 A. I do not know whether you're talking about Nandi Hills, in which case I
2 would not agree with you.

3 Q. So your evidence is that (Redacted) Nandi Hills in 2007 was a male; is that
4 right?

5 A. I am not in a position to know (Redacted) Nandi Hills.

6 Q. Witness, is your evidence that the gender (Redacted) you -- that was in Nandi
7 Hills in 2007 was a male, was a man? Is that your evidence, he was a man? It was
8 a man that you saw that was (Redacted)?

9 A. I did not say that I went to Nandi Hills.

10 Q. Witness, I'll try to be even clearer. You say that (Redacted) in Nandi Hills
11 in 2007. You saw that (Redacted) speaking to the crowds and the people. Is that right
12 or not?

13 A. I was not talking about Nandi Hills. That is not true.

14 Q. Which (Redacted) are you talking about?

15 A. (Redacted).

16 Q. There is no (Redacted). That's the (Redacted), isn't it? It's the (Redacted)
17 that's based in (Redacted). The (Redacted) is based at Nandi Hills; isn't that right?

18 A. What I said is that the (Redacted), rather, was in (Redacted), and it is the
19 (Redacted) who was delivering a speech.

20 Q. Witness, being a Kenyan, you know full well the difference, the important
21 difference between being the (Redacted), don't
22 you? You know that very well indeed.

23 A. Yes.

24 Q. So I put it to you that the reason you don't know the name of (Redacted)
25 (Redacted) in 2007 is quite simple, you were not there. Do you agree with me?

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- 1 A. That is not true.
- 2 Q. Do you know the name of (Redacted) that was in that area in 1991?
- 3 A. No, I do not know.
- 4 Q. All right. Now, Witness, you gave evidence earlier that your father's home
5 was (Redacted). You agreed to that. Do you remember?
- 6 A. Yes.
- 7 MR KHAN: Your Honour, I will refer to tab 21, and for the record it's
8 KEN-D09-0030-0022.
- 9 Q. (Redacted)
- 10 (Redacted)
- 11 A. That is not correct.
- 12 Q. (Redacted)
- 13 (Redacted)
- 14 MR PUGLIATTI: Mr President, I believe the witness has already said that he
15 disagreed with the fact that (Redacted).
- 16 MR KHAN: Your Honour, I'm hoping the reference (Redacted)
17 (Redacted)
- 18 Q. (Redacted)
- 19 A. (Redacted)
- 20 Q. (Redacted)
- 21 (Redacted)
- 22 A. Yes.
- 23 Q. (Redacted)
- 24 (Redacted)?
- 25 A. Yes, (Redacted)

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- 1 Q. (Redacted)
- 2 (Redacted)
- 3 A. Yes, I do. (Redacted)
- 4 Q. (Redacted)
- 5 (Redacted)
- 6 A. I do not know.
- 7 Q. Now, Witness, I've asked you questions regarding the name of (Redacted)
- 8 (Redacted) in 2007. (Redacted)
- 9 (Redacted). There is an office of the assistant chief; is that right? The office of
- 10 the chief and the office of the assistant chief, you're aware of that, aren't you, sir?
- 11 A. Yes, I do.
- 12 Q. (Redacted)
- 13 (Redacted)?
- 14 A. Yes, that is correct.
- 15 Q. What is the name of the assistant chief that was in place in 2007?
- 16 A. (Redacted)
- 17 Q. (Redacted)?
- 18 A. (Redacted)
- 19 Q. (Redacted)
- 20 (Redacted)?
- 21 A. (Redacted)
- 22 Q. (Redacted)
- 23 (Redacted)
- 24 A. (Redacted)
- 25 Q. (Redacted)

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1 (Redacted)

2 (Redacted)?

3 A. I'm not in a position to know, because I do not know the white owner of that
4 land.

5 Q. (Redacted)

6 (Redacted)?

7 A. (Redacted).

8 Q. (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)?

12 A. That is not correct.

13 MR KHAN: Your Honours, I'm referring to tab 78, and while it's being done in fact
14 tab 77 can be put on the screen for a moment, KEN-D09-0030-0130.

15 Q. (Redacted)

16 (Redacted)

17 (Redacted)?

18 A. I do not agree with you.

19 MR KHAN: And if it could be scrolled up and then zoomed, I'm looking actually
20 right at the bottom, the last two lines on the screen, right at the bottom, (Redacted)

21 Q. (Redacted)

22 (Redacted)

23 A. That is correct.

24 Q. (Redacted)

25 (Redacted)

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1 (Redacted)

2 A. (Redacted)

3 Q. (Redacted)

4 (Redacted)

5 A. (Redacted)

6 MR KHAN: Your Honour, I'll move on, but just for the record the Bench will note
7 that on the other side of the page at page 0131.

8 Q. (Redacted)

9 (Redacted)

10 A. (Redacted)

11 MR KHAN: And, your Honour, just a couple of brief other questions hopefully.

12 And I'd ask that a document be put on the screen, KEN-D09-0030-0129. And, your
13 Honours, I'm referring also to tab 76, the translation, which is at tab 76,
14 KEN-D09-0030-0140.

15 Q. (Redacted)

16 (Redacted)?

17 A. (Redacted)

18 Q. (Redacted)

19 (Redacted)

20 A. (Redacted).

21 Q. And just look on the screen. Do you see on the screen in front of you about
22 four/five lines from the bottom, (Redacted) can you recognise (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 A. I do not know that.

4 MR KHAN: Your Honour, my next question is based upon 79, KEN-D09-0030-0132.

5 Q. (Redacted)

6 (Redacted)

7 (Redacted)?

8 A. (No interpretation)

9 MR KHAN: I would be grateful if there could be an answer that could be relayed
10 by the interpreters.

11 PRESIDING JUDGE EBOE-OSUJI: Can you ask the question again?

12 MR KHAN:

13 Q. (Redacted)

14 (Redacted)?

15 A. (Redacted)

16 Q. (Redacted)

17 (Redacted)?

18 A. (Redacted)

19 Q. (Redacted)?

20 A. (Redacted)

21 Q. (Redacted)

22 (Redacted)?

23 A. (Redacted)

24 Q. (Redacted)?

25 A. (Redacted)

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- 1 Q. (Redacted)
- 2 (Redacted)
- 3 (Redacted)?
- 4 A. (Redacted)
- 5 Q. (Redacted)?
- 6 A. Can you kindly repeat your question, please?
- 7 Q. (Redacted)
- 8 (Redacted)?
- 9 A. (Redacted)
- 10 Q. (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (Redacted)?
- 14 A. (Redacted)
- 15 Q. (Redacted)?
- 16 A. (Redacted)
- 17 Q. (Redacted)
- 18 (Redacted)
- 19 A. (Redacted)
- 20 MR KHAN: Your Honour, we can go into public session for my final questions
- 21 with your leave.
- 22 PRESIDING JUDGE EBOE-OSUJI: Public session.
- 23 (Open session at 12.43 p.m.)
- 24 THE COURT OFFICER: (Interpretation) We are in open session, your Honour.
- 25 MR KHAN:

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1 Q. Witness, can you hear me?

2 A. Yes, I can hear you.

3 Q. I put it to you that you have deliberately, knowingly given false evidence in
4 these proceedings, isn't that right?

5 A. That is not correct.

6 Q. You have told untruths, Witness, about being at -- taking refuge at the school
7 you mentioned in December 2007. You were not there, were you?

8 MR PUGLIATTI: Mr President, this is argumentative. All of these matters have
9 been put to the witness already, and he's just affirmed that he's not telling untruths
10 before the Court.

11 PRESIDING JUDGE EBOE-OSUJI: Sustained.

12 MR KHAN:

13 Q. Witness, you had three opportunities when you sent in your form to the
14 Victim and Witness unit to mention Mr William Ruto and you didn't mention him
15 once, did you?

16 A. I mentioned him.

17 Q. Witness, yesterday I went through the pro forma where there was mention of
18 Henry Kosgey, but no mention of William Ruto. And I went through a handwritten
19 document where there is mention of Henry Kosgey and former President Arap Moi
20 repeating certain words. But I didn't mention the typewritten form at

21 KEN-OTP-0107-0232, because in this form you also mention Henry Kosgey using
22 inciting language, and you make no reference at all to William Ruto, do you?

23 A. I do not know whether I mentioned that in the form.

24 Q. You see, Witness, you've already said that the form is accurate about you
25 claiming more than (Redacted) as claimed losses, but I put it to

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1 you that in that document you repeatedly say in relation to Mr Kosgey he termed
2 this, he did that. There is no mention of William Ruto; isn't that right?

3 A. I do not know whether it is the person who was taking down notes, who was
4 writing for me who made the mistake, because there was somebody who assisted
5 me.

6 Q. So same mistake in at least three different documents that you submitted; is
7 that right? That's your evidence, the same mistake in three different documents.

8 MR PUGLIATTI: Mr President, we're objecting at this point. If this matter
9 regarding page 0232 is going to be put to the witness, out of fairness to the witness,
10 we suggest that it be put in context and what is contained at that part of the
11 document be put to the witness so he can comment on it, because at the moment we
12 say the way it's being put is unfair.

13 MR KHAN: Your Honour, nothing unfair about it at all.

14 Q. Mr Witness, do you say, you agree that you said in that document that Henry
15 Kosgey spoke in Kalenjin?

16 A. Yes.

17 Q. And there is no mention of Mr William Ruto in that document that you
18 submitted, is there?

19 MR PUGLIATTI: We're objecting again and we're repeating our reasons for it.
20 This is being put to the witness we say out of context and we'd like it to be put with
21 the words that are on the page, the first paragraph.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Pugliatti, when we get to it, you should be
23 able to make that argument, I take it, or is this something you believe you must
24 explore in re-examination?

25 MR PUGLIATTI: It's the manner in which the question is being put, Mr President.

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1 PRESIDING JUDGE EBOE-OSUJI: All right. Noted. So you can argue about the
2 context later.

3 MR KHAN:

4 Q. Mr Witness, you only mention the name of William Ruto when the case
5 against Mr Henry Kosgey is no longer there, isn't that right? You only mention
6 William Ruto's name after the case against Henry Kosgey was not confirmed.

7 A. I did not give my statement on two occasions.

8 Q. Mr Witness, listen carefully please, I'll be grateful, and let me ask my last
9 question. Do you understand?

10 PRESIDING JUDGE EBOE-OSUJI: Mr Khan --

11 THE WITNESS: (No interpretation)

12 MR KHAN:

13 Q. You only mention the name of William Ruto as being involved in the election
14 violence of 2007 only after the case against Henry Kosgey is not confirmed by this
15 Court; isn't that the truth?

16 A. That is not correct.

17 Q. Because you knew that if you didn't mention Mr Ruto, you would have no
18 chance of compensation and no chance of any assistance that you've been given; isn't
19 that right?

20 PRESIDING JUDGE EBOE-OSUJI: Argumentative.

21 MR KHAN:

22 Q. The reason you mentioned Mr Ruto is because you hoped to receive benefits
23 by giving false evidence; isn't that right?

24 A. That is not correct.

25 MR KHAN: Your Honours, I have no further questions. I'm grateful.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 2 Mr Pugliatti, does it remain that you have no re-examination?
- 3 MR PUGLIATTI: Mr President, we'll leave it at that. No re-examination.
- 4 PRESIDING JUDGE EBOE-OSUJI: Mr Nderitu, the same goes for you?
- 5 MR NDERITU: Thank you, Mr President, your Honours. No further questions.
- 6 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. That brings us to the
- 7 end of the testimony of this witness.
- 8 Witness, we have -- the lawyers in this case have no further questions for you And
- 9 we thank you very much for coming and sitting and taking the questions. We
- 10 know that some of the questions may have been difficult, but we appreciate the fact
- 11 that you did come to testify.
- 12 We wish you safe travels as you travel back home. Thank you.
- 13 THE WITNESS: (Interpretation) Thank you.
- 14 PRESIDING JUDGE EBOE-OSUJI: We will bring down the blinds and usher the
- 15 witness out of the courtroom.
- 16 (Closed session at 12.54 p.m.) * Reclassified as Open session
- 17 THE COURT OFFICER: (Interpretation) We're in closed session, your Honour.
- 18 (The witness is excused)
- 19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I take it you need to process
- 20 documents, is it?
- 21 MR KHAN: Please, I'd be grateful, your Honour.
- 22 PRESIDING JUDGE EBOE-OSUJI: Yes.
- 23 MR KHAN: Five documents to mark for identification with the Court's leave.
- 24 Two at tab 76, KEN-D09-0030-0129, which is a Kalenjin document and -- sorry, a
- 25 Swahili document. And the next --

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1 PRESIDING JUDGE EBOE-OSUJI: All right. That will be marked for
2 identification.

3 MR KHAN: I'm grateful. The next is at 0140, so KEN-D09-0030-0140, which is the
4 translation, again marked for identification, please.

5 PRESIDING JUDGE EBOE-OSUJI: It will be so marked.

6 MR KHAN: I'm obliged. At tab 79, KEN-D09-0030-0132 to be marked for
7 identification with the Court's leave.

8 PRESIDING JUDGE EBOE-OSUJI: To be marked for identification.

9 MR KHAN: Your Honour, the next at tab 21, the land document,
10 KEN-D09-0030-0022 to be marked for identification with the Court's leave.

11 PRESIDING JUDGE EBOE-OSUJI: To be marked for identification then.

12 MR KHAN: And, Mr President, your Honours, the last one at tab 78,
13 KEN-D09-0030-0130, and I'll be grateful if that could also be marked for
14 identification.

15 PRESIDING JUDGE EBOE-OSUJI: It will be so marked.

16 THE COURT OFFICER: (Interpretation) Document KEN-D09-0030-0129,
17 confidential, will be given the reference MFI-T-D09-00175.

18 Document KEN-D09-0030-0140, confidential, will be given the reference
19 MFI-T-D09-0176.

20 Document KEN-D09-0030-0132, confidential, will bear the reference
21 MFI-T-D09-00177.

22 Document KEN-D09-0030-0022, confidential, will have the reference
23 MFI-T-D09-00178.

24 And lastly document KEN-D09-0030-0120, confidential, will be given the reference
25 MFI-T-D09-00179.

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1 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. That brings us to the
2 end of our proceedings for today. We will reconvene on Tuesday morning at 9.30.

3 MR KHAN: Your Honour, just one clarification. It must be my mistake. At line
4 24, the document is not 0120, it's 0130. I think it's my mistake and I apologise.
5 0130.

6 THE COURT OFFICER: (Interpretation) My apologies, Mr Khan. Document
7 KEN-D09-0030-0130 will bear the reference MFI-T-D09-00179.

8 PRESIDING JUDGE EBOE-OSUJI: The Court will now rise.

9 THE COURT USHER: All rise.

10 (The hearing ends in closed session at 12.59 p.m.)

11 RECLASSIFICATION REPORT

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