

Trial Hearing
Witness: KEN-OTP-P-0516

(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 Carbuccia and Judge Robert Fremr
7 Trial Hearing
8 Thursday, 25 September 2014
9 (The hearing starts in open session at 9.38 a.m.)
10 THE COURT USHER: All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 THE COURT OFFICER: Good morning. We are in open session, Mr President.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 The case, please, court officer.
16 THE COURT OFFICER: Situation in the Republic of Kenya, in the case of The Prosecutor
17 versus William Samoei Ruto and Joshua Arap Sang, case number ICC-01/09-01/11.
18 PRESIDING JUDGE EBOE-OSUJI: Thank you.
19 Appearances?
20 MR STEYNBERG: Good morning, your Honour. We are without Jasmina Suljanovic this
21 morning. Otherwise the Prosecution remains the same.
22 MR NARANTSETSEG: Good morning, your Honours. The same. Thank you.
23 MR HOOPER: It's as it was yesterday, except I didn't announce Mr Faal. He joined us
24 yesterday, as you doubtless observed, and he's with us again today.
25 MS BUISMAN: Good morning, Mr President. Today you'll hear from me, so I'll introduce

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1 the team. It's Kigen-Katwa, the lead counsel; Logan Hambrick; Honor Lanham; we're also
2 joined by Marie-Ange Ukwigize, our intern; and Joshua Arap Sang is present also today.
3 PRESIDING JUDGE EBOE-OSUJI: And in Nairobi, Mr Karathe, are you with us?
4 MR KARATHE (via video link): I am, Mr President.
5 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We're in open session.
6 Before we get into the matter of the continuation of the testimony of this witness, first
7 I note that the witness is not with us now. On the request of the Prosecutor, the
8 witness has been asked to stand by and will be called in later. But before we get to
9 the matter concerning the witness, a few housekeeping matters.
10 Now, after hearing the counsel yesterday on the matter of scheduling and the fitting
11 in of the three witnesses mentioned in the discussion yesterday, including Witness
12 (Redacted), the Chamber's position is this. In light of what we heard, we will now move the
13 testimony of Witness (Redacted) and (Redacted) over to the period starting 17 November. So we
14 will not be taking those witnesses during the current session but in the session
15 starting 17 November.
16 But (Redacted) we will have to fit in in this session, and we will continue with that witness
17 and finish that witness with no unnatural breaks. When I say "unnatural breaks," I
18 say that in -- keeping in mind Mr Kigen-Katwa's request for the 6th -- for a break on
19 the 6th. We will not be taking a break on the 6th, but if the witness is finished before
20 that or on that date, that's fine, we will adjourn whenever we finish.
21 The reason is, we're mindful of -- it was not a capricious denial of a request to break
22 on the 6th, but mindful of an ICC holiday on the 3rd and also the Kenyatta status
23 conference scheduled for the 7th and the 8th, if we took a break on the 6th in the
24 middle of the witness's testimony, it means we would have interrupted the testimony
25 midstream for six days, and that is not something we want to do.

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1 So we will, once we start with (Redacted), we will continue until we complete (Redacted) in the
2 natural course of events and then adjourn whenever we finish that process. That is
3 the Chamber's indication on the scheduling.

4 (Trial Chamber confers)

5 PRESIDING JUDGE EBOE-OSUJI: On another matter, Mr Steynberg, concerning (Redacted), and I
6 speak of (Redacted) -- let's go into private session, please.

7 (Private session at 9.44 a.m.) * Reclassified as Open session

8 THE COURT OFFICER: We are in private session now, Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: This matter now concerns the volume of the material the
10 witness will have to review before commencing testimony. For now just let us limit
11 ourselves to is it the case that -- to the following question, limit ourselves to the following
12 question: There is a statement as a separate matter from the record of interview, a transcript
13 of interview, is that the case? So there was an interview that resulted in the production of
14 transcript of that interview and from that your office distilled a statement of the relevant
15 portions; is that what happened?

16 MR STEYNBERG: Regrettably not, your Honour. It was rather the other way around.
17 The witness began by making a witness statement. (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 So although there may be some overlap between the written statement and the audio
22 recorded statement, unfortunately, they are -- they are distinct. And if -- I'm
23 thinking ahead, as you caution witnesses not to do, your Honours, but if the
24 suggestion is that it would be sufficient to merely review the written statement, I'm
25 afraid that I don't think that would be sufficient.

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1 PRESIDING JUDGE EBOE-OSUJI: Would it not be possible -- I merely make the inquiry
2 now before we decide whether to make an order or a direction in that regard. You must
3 have in mind what you want to ask of the witness or what you expect the witness to testify to
4 for purposes of the inquiry before us and, with that in mind, produce -- in some jurisdictions
5 they call that a will-say, but we can use the technical name -- a summary of anticipated
6 testimony from this witness with those points in mind. And those points need to be critical,
7 not just every point of interest, but critical points you're interested in. Distill that into a
8 summary and then point the witness to the parts of the transcript where that sort of
9 information is contained in no more than 40 pages of the transcript -- I'm continuing -- and
10 then that is given to the witness today, so the witness starts focusing on those areas, rather
11 than having to go through 800 pages and with all the stresses that come with it with a view to
12 coming to testify.

13 MR STEYNBERG: Your Honours, it -- I'm sure it would be possible to produce a summary.
14 I would have to consult with Ms Zago, who is dealing with that witness, to find out a little
15 more about the timelines required. I know she has been working on it for some time now.
16 However, I am pessimistic that we would be able to distill the important features into 40
17 pages out of 800. I suspect it wouldn't -- probably be more likely 140 pages of relevant
18 testimony, bearing in mind which -- bearing in mind that the question and answer form of the
19 transcripts is not very dense. So 40 pages will probably cover maybe what you might cover
20 in five pages of an ordinary statement. So my estimation, without having conducted a
21 thorough examination, is that that would be a little optimistic.

22 PRESIDING JUDGE EBOE-OSUJI: So you're saying it is possible to do the will-say and then
23 point the witness to about 140 pages of the transcript material where the information you're
24 interested in will be contained?

25 MR STEYNBERG: Your Honours, that is entirely an estimation on my part. I must confess

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1 I'm not familiar enough with the transcripts at this stage, it's not been my witness, to speak
2 with any accuracy, but from my past experience of transcripts and of the amount of really
3 relevant material contained in the transcripts, I would estimate that about a fifth would
4 probably be -- would probably be more or less an accurate estimate.

5 PRESIDING JUDGE EBOE-OSUJI: When I use the expression "critical information," I use
6 that advisedly. Information that is not repetitive when one considered other testimony that
7 has been heard, that is not duplicative when you considered the admissions that may have
8 been made in the case so that other witness may have testified to something and we can leave
9 those at that. But there may be unique information that the witness -- that you expect out of
10 the witness and we focus on those. And you say we cannot do that in 140 pages or less, a lot
11 less?

12 MR STEYNBERG: Your Honour, it is my estimate that we can. It's just that I'm obviously
13 reluctant to commit myself to something when it is really guess-work.
14 (Trial Chamber confers)

15 MR STEYNBERG: Your Honours, if I may also draw your attention, in any event, to an
16 email I've just received from VWU, and I'll just read it verbatim. I sent a query last night as
17 to whether or not the witness would be ready to start on Friday and this is the response I have
18 just received at 9.45.

19 PRESIDING JUDGE EBOE-OSUJI: Let's not discuss that now. There's a reason why I say
20 that. Let's do this: Whatever that information is, keep that in mind, and let's come back at
21 11.30, after the morning break, with your inquiry about what we've just discussed, the
22 possibilities in that regard. We have to move on with this case and the idea that the witness
23 should be expected to review 800 pages with the expectation or the concern that all those 800
24 pages will be material he would have to deal with in his testimony is something that we find a
25 little worrying on our part, and this case has to move on, so let's -- there comes a point where

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1 the Prosecutor has to decide -- or a party, not just the Prosecutor, what they really need out of
2 all the material available to them and ignore the rest and concentrate on what they really,
3 really need in a case and move on.

4 Come back to us at 11.30 with your inquiries of your colleagues who are dealing with
5 this and let us know where things stand definitively at that stage.

6 MR STEYNBERG: I will do so, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you.

8 MR KHAN: Mr President, there's an additional matter that I'd like to raise in private session
9 if I may. It's a matter of --

10 PRESIDING JUDGE EBOE-OSUJI: We are in private session, but as you know, Mr Karathe is
11 on the other end.

12 MR KHAN: Indeed. Mr President, it's a matter of quite some concern. I have copies I'd
13 like to hand up to the Bench, three copies, if the court officer could assist.

14 Your Honours, at 8.14 p.m. yesterday, we received -- please. Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: Is that in relation to the next witness coming up?

16 MR KHAN: The present --

17 PRESIDING JUDGE EBOE-OSUJI: Sorry, the current witness, current?

18 MR KHAN: Indeed.

19 PRESIDING JUDGE EBOE-OSUJI: All right.

20 MR KHAN: And can I confirm this is not going to the remote office. It should be confined
21 to this courtroom at the moment.

22 PRESIDING JUDGE EBOE-OSUJI: You do not want the --

23 MR KHAN: The witness or --

24 PRESIDING JUDGE EBOE-OSUJI: -- the counsel --

25 MR KHAN: Indeed.

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- 1 PRESIDING JUDGE EBOE-OSUJI: -- to be part of the discussion.
- 2 MR KHAN: Probably it's better not so there's no --
- 3 PRESIDING JUDGE EBOE-OSUJI: All right.
- 4 MR KHAN: -- suggestions of impropriety.
- 5 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Karathe, we have to cut the feed to
- 6 Nairobi at the request of counsel.
- 7 MR KARATHE (via video link): I do appreciate that.
- 8 MR KHAN: Mr President, I hope by now --
- 9 PRESIDING JUDGE EBOE-OSUJI: Let's see for Ms Toumaj to confirm.
- 10 MR KHAN: Indeed. I'm grateful.
- 11 THE COURT OFFICER (via video link): Okay. I'm going to switch off the volume now. I
- 12 confirm that we cannot hear anything anymore.
- 13 PRESIDING JUDGE EBOE-OSUJI: You cannot hear me?
- 14 THE COURT OFFICER (via video link): I can hear you through my headphones, but the
- 15 transmission room cannot hear anything.
- 16 PRESIDING JUDGE EBOE-OSUJI: All right.
- 17 MR KHAN: Mr President, I'm grateful.
- 18 I've handed up to the Bench --
- 19 (Pause in proceedings)
- 20 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Khan.
- 21 MR KHAN: Mr President, I'm grateful. I've handed to your Honours an investigation
- 22 report which was received yesterday evening at 8.14 p.m. in the evening, and it was an email
- 23 that was -- it was a disclosure that was given in response to a specific request in fact from the
- 24 Sang Defence team.
- 25 Your Honours will see that this is an investigator's note dated from 8 November 2012.

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1 Of course we don't see from the top right-hand corner the date it was filed or the date
2 it was updated, but it was dated 8 November 2012, and I've got very significant and
3 real concerns as to why on earth this was not disclosed to the Defence previously.

4 Your Honours, the contents are very important not only to the witness that is on the
5 stand at the moment, but was matters that were clearly relevant and should have
6 been disclosed to Prosecution (Redacted) as well.

7 Your Honours, we haven't got it. If one looks at the content, and perhaps it's easier if
8 I just read it:

9 (Redacted)

10 (Redacted)

11 And, your Honours, I pause there because the Prosecution have asked at least two
12 days of questions regarding dates of meetings with (Redacted) in fact
13 had given a statement.

14 And, your Honour, the SMS is reproduced:

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 Your Honour, this is material that by any analysis should have been disclosed to the
15 Defence. Two years almost have gone by since this has been in the custody of the
16 Prosecution and we get it when the witness is already on the stand and on the day
17 examination-in-chief is due to finish and cross-examination start and only when we
18 asked for it, and it shouldn't require the Defence on every issue to look at the
19 omissions, failings and gaps in the Prosecution for them to discharge what are after
20 all statutory obligations that are incumbent upon them as public servants and
21 ministers of justice.
22 Your Honours, this information was not given to us when - we are in private
23 session - (Redacted) was on the stand. Why not? Your Honours, the Bench do
24 not speak in vain, and there have been previous occasions in this Kenya situation
25 where very strenuous, very well-founded and very regrettable criticism has come

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1 from the Bench lamenting that the disclosure system of the Prosecution is simply not
2 working. And, your Honours, despite those strident criticisms, well-founded
3 criticisms, it doesn't appear things are improving.
4 Now, your Honours, we should not have to wait for a miscarriage of justice before
5 there is -- the Prosecution get their act together. And, your Honours, given this
6 further disclosure breach - and there's a series of late disclosure, there's a series of
7 non-disclosure in the Kenya situation - I do formally ask that the Bench require, to
8 ensure the fair trial rights of Mr William Ruto and Mr Joshua Sang, that a particular
9 disclosure officer be appointed by the OTP to ensure that their statutory duties are
10 being fulfilled, because it's not enough, it seems to us, that the Prosecutor has overall
11 control and individuals perhaps are overlooking basic disclosure obligations.
12 In the Halilovic case at the ICTY, where similar systemic failings of disclosure, the
13 Bench there ordered the Prosecution to appoint a disclosure officer and put other
14 systems in place as well to make sure they did their job.
15 Your Honour, a fair trial is simply not possible unless we get what we are entitled to.
16 The Prosecution can't keep it under the table to produce it at the last minute, or
17 produce it only when it's specifically requested from the Defence. Something is not
18 working, it should work, we have a right that it works; and, your Honours, given the
19 catalogue of error and omissions and failings by the OTP I do ask the Bench to step in,
20 under your overall overarching powers to ensure a fair trial, to require them to
21 appoint one person as a disclosure officer to make sure this doesn't happen again
22 before it's too late.
23 And, your Honours, we sent an email yesterday for an explanation. We haven't -- or
24 early this morning. We haven't had an explanation as yet. I took the liberty of
25 speaking to Mr Steynberg and my learned friend said he doesn't know yet. He'll

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1 look into it. Well, that's not good enough.

2 PRESIDING JUDGE EBOE-OSUJI: All right, Mr Khan. We've heard you.

3 Mr Steynberg?

4 MR STEYNBERG: Yes, thank you, your Honours.

5 MS BUISMAN: Mr President, can I just add, because we were sending the email out, I just
6 wanted to specify we obviously share the observations and we also share the request. We
7 did ask for this information ourselves on 23 September of this year, and the reason was that
8 the witness -- two days ago indeed, Mr Steynberg. The reason was that this witness was
9 specifically mentioning this meeting with (Redacted) where he mentioned that there was an email
10 they sent out from an Internet café in Eldoret. That was the reason we sent out this request.
11 We were not aware of that.

12 So I just wanted to point that out, because it is indeed a serious violation in our view
13 and we should have received this without having to ask for it.
14 Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: And you're saying the title of the document beneath
16 "Investigator Report" says "Email message from (Redacted)"?

17 MS BUISMAN: Indeed, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg?

19 MR STEYNBERG: Thank you, your Honours.

20 I submit, with respect, that my learned friend's application is not well-founded. In
21 the first instance I point out that we disclosed on 13 December 2013 an (Redacted)
22 (Redacted) which specified that (Redacted) was the person who introduced as
23 (Redacted) so the fact of the introduction of these witnesses by
24 (Redacted) has been known to the Prosecution -- to the Defence for almost ten
25 months.

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1 The mode of communication of that information, in my respectful submission, is not a
2 matter which is relevant - or until two days ago was not a matter that was
3 relevant - for the preparation of the Defence.
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted) There had been absolutely no
15 indication of this prior to his taking the stand.
16 At that time it is true that we received a request, but at that time the information -- the
17 Prosecution took the step of extracting the information from (Redacted)
18 (Redacted) putting it into an
19 investigator's note and disclosing it.
20 If two days was not quick enough for my learned friends, I apologise for that, but in
21 reality I have been in court and on my feet for both of those two days. My time is
22 finite as well, and there are logistical issues which unfortunately do have to take place
23 for the compilation of investigators' notes, the registration of that information and the
24 disclosure of same, including redactions and the necessary security checks.
25 So I apologise that it took two days, but I submit that we did what we had to do at the

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1 time we had to do it.

2 PRESIDING JUDGE EBOE-OSUJI: I don't think that their complaint is that it took two days
3 from the point they made the request until the point you produced it. From what I
4 understand, their complaint is that this is something that should have been disclosed to begin
5 with, before -- as part of the regular disclosure obligations of the OTP. That's my
6 understanding. I don't think the complaint is about the two days from the point of their
7 request to when you produced it.

8 MR STEYNBERG: I understood the -- well, I understood the complaint to be both but, yes,
9 obviously the nub of the complaint is that it was not disclosed in the first place.
10 In my submission, your Honours, the critical information contained in this document,
11 the fact that these witnesses were introduced by (Redacted), has been disclosed. In
12 addition, all payments made by the Prosecution to (Redacted) have been disclosed.
13 The details that (Redacted) gave regarding these witnesses were assessed and, in the
14 assessment of the Prosecution, there was nothing there which was required for the
15 preparation of Defence, certainly nothing that was exculpatory, and for that reason
16 we were content that what had been disclosed was sufficient to meet the Prosecution's
17 disclosure obligations until this witness came to court and gave the version he has
18 given.

19 MR HOOPER: Can I just say that obviously Mr Khan's concern is to the generality of the
20 problem of disclosure because this isn't, as we know, and hasn't been an isolated incident and
21 I emphasise that it is not by any means unique to this case. We experienced extensive
22 disclosure problems in for example the Katanga case and again invited the Prosecution to
23 appoint or have a proper system of reviewing material for disclosure. That was, what, two
24 or three or four years ago now? We've repeated that request when we re-met difficulties.
25 Now in respect of this particular witness, who obviously I'm taking, when one looks

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1 at the schedule that we received - which if you haven't got it in front of you will a
2 little later, I needn't produce it just now - that my friend refers to is really an apology
3 for the fact that the more extensive document, the original document, wasn't
4 disclosed, it is on one view a misleading -- a misleading document. It reads "1
5 November 12 ..." --

6 PRESIDING JUDGE EBOE-OSUJI: Did you say we have that?

7 MR HOOPER: I don't think you have our bundle yet, but it literally is just a line. So I
8 can -- I can pass up our bundle. Shall I do that? I can do that now, if you wish?

9 PRESIDING JUDGE EBOE-OSUJI: Yes, why don't you do that so that we're looking at what
10 it is you're talking about.

11 MR HOOPER: Yes, I'll do that now and then you've got it.

12 PRESIDING JUDGE EBOE-OSUJI: What tab?

13 MR HOOPER: It's -- sorry, I'm looking at the -- another bundle which I've got. In terms of
14 ours, I think it's tab 4, tab 4 and you'll see the very first line there it's got (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted) and then the match is made and the Prosecution contact this witness on
18 the 9th as a product of all that.

19 But when one looks at the document, we see that that isn't, as it were, the objective
20 position, but based on the comments that are contained in this particular document,
21 which has now been disclosed.

22 This isn't just a matter of little importance, which the Prosecution may be forgiven for
23 overlooking because it was beyond their own sense of the geography of the case, it was on, as
24 it were, the other side of the hill. That's not this position because what we see here in this
25 document is what is proved to be, and may be in this case, as the Defence will assert, the

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- 1 fundamental flaw in the way in which the Prosecution investigate cases, working --
- 2 PRESIDING JUDGE EBOE-OSUJI: Let's do -- one second, please.
- 3 (Trial Chamber confers)
- 4 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you say there is a fundamental flaw in the
- 5 way the Prosecution investigate cases. Let's do this: This is something, in light of the way
- 6 Mr Khan presented it and the way you've also approached the matter, this is not something
- 7 we will be ruling upon orally on the spot. We will require you to file papers on this. File
- 8 whatever requests that Mr Khan began with, formalise it in written material and have the
- 9 Prosecution respond formally, and we'll deal with it, so that we can move on with this.
- 10 MR HOOPER: But if I can just with one final sentence really encapsulate what we say is the
- 11 problem --
- 12 MR STEYNBERG: Your Honour, your Honour's ruled and --
- 13 MR HOOPER: -- and it's -- and it's this, that this deals with (Redacted) that's the
- 14 problem. That's the flaw.
- 15 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, let's leave it at that.
- 16 MR HOOPER: Right.
- 17 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 18 We will move on to the next matter. Mr Steynberg, your application?
- 19 MR STEYNBERG: Yes, thank you, your Honours. Firstly, I've expressed my gratitude to
- 20 my learned friends for the concession they were prepared to make yesterday, however, on
- 21 reflection, the Prosecution would prefer not to proceed at the sufferance of the -- at the
- 22 pleasure of the Defence. We would prefer to follow the procedure that the Chamber has laid
- 23 down with the previous witnesses and formalise the issues.
- 24 And, accordingly, I formally request that the present witness be declared hostile.
- 25 Your Honours, in your Honours' ruling at transcript 131, page 94, your Honours set

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- 1 out various factors to be considered, non-exhausted factors but factors to be
2 considered in a declaration for hostility. I don't tend to spend too much time on this,
3 but I do submit that it is apparent from --
- 4 PRESIDING JUDGE EBOE-OSUJI: Yes. One second. The court officer reminded me that
5 Nairobi is still not with us. I think we should bring Nairobi in, including Mr Karathe.
- 6 THE COURT OFFICER (via video link): Yes, Mr President. I'll bring Mr Karathe back into
7 the room.
- 8 MR STEYNBERG: And, your Honours, I don't think there is any need to stay in private
9 session for this.
- 10 PRESIDING JUDGE EBOE-OSUJI: Fair enough.
- 11 THE COURT OFFICER (via video link): Mr President, Mr Karathe is back into the
12 transmission room.
- 13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
14 Open session.
- 15 (Open session at 10.17 a.m.)
- 16 THE COURT OFFICER: We are in open session, Mr President.
- 17 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 18 MR STEYNBERG: Thank you, your Honours. As just stated, the Prosecution formally
19 requests that the present witness, Witness 516, be declared hostile. The Prosecution submits
20 that it is apparent from the witness's evidence thus far that he has deliberately and
21 systematically departed from his prior statement to the Prosecution. He has resiled from
22 almost every incriminating aspect of that statement and, in our respectful submission, has
23 been unable to provide a consistent or credible reason why he has departed from his
24 statement.
- 25 PRESIDING JUDGE EBOE-OSUJI: You mean incriminating in the sense of evidence that

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1 would tend to incriminate the accused in this case?

2 MR STEYNBERG: Indeed, your Honours. Incriminating evidence for use in the present

3 Prosecution, the reason for which he was interviewed and called as a witness.

4 Obviously, he is a witness who has not been cooperative with the Prosecution. He's

5 refused to testify voluntarily and had to be summons before the Court. He has also

6 refused to consult with the Prosecution in witness preparation prior to his evidence.

7 As to his demeanour, your Honours, I submit that this witness has been extremely

8 evasive, far more evasive even than the previous two witnesses in my submission.

9 There are -- the transcript is peppered with examples of this, but I refer your Honours

10 to transcript 142, pages 27, line 22, to page 32, line 14, when I asked the witness

11 questions about the atmosphere amongst the ODM and PNU supporters and amongst

12 the Kalenjin and Kikuyu in his area.

13 Your Honour, I submit also his hostile has been -- sorry, his demeanour has been

14 generally hostile to the Prosecution. He's been uncooperative, and for all of these

15 reasons I submit that there is more than adequate grounds for the Chamber to make

16 the formal ruling at this point.

17 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman, Mr Hooper, who goes first?

18 MS BUISMAN: It is going to be us. Thank you, Mr President.

19 It's interesting to hear the application of my learned friend. The first time I stood up

20 to make my application, or to dismiss the application for hostile witness in the first

21 instance, the first witness, he told me it's like we are coming from a different

22 courtroom. And I feel that -- the same situation. I do feel we've been sitting in a

23 different courtroom.

24 When my learned friend says he's extremely evasive, I couldn't disagree more. I

25 think this has been a witness who's really tried to answer questions. There has been

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1 misunderstandings, that's for sure, but to say evasive, the least.

2 But let me start with, I think, the most important point of your decision. Before you
3 go into the criteria that was just pointed out by Mr Steynberg, you say that the
4 application founded upon a complaint of hostility, and I quote you, "is an instrument
5 of justice to the effect that without the remedy being sought, a criminal trial may
6 never get at the truth."

7 Well, we have yesterday given an alternative that was dismissed by the Prosecution.

8 We have suggested we can go on with this witness, we can allow you to
9 cross-examine him and -- so there is no need in this particular situation to make this
10 application.

11 You've heard us two days, we've been relatively silent, especially the Sang team, but
12 also the Ruto team, we've basically made no objection, and there has been lots of
13 leading questions. So first of all, there is really no need and, on that, on the basis of
14 your decision, this is not a situation where such an application should be made.

15 But going through your criteria, the first is the general --

16 PRESIDING JUDGE EBOE-OSUJI: What perhaps Mr Steynberg might worry about, he
17 hasn't said this, why he did not accept your offer, was that the offer came with a qualifier that,
18 yes, he may ask leading questions until the point that the Defence objects. What is he
19 expected to do with that if you say, yes, we can -- let's pass up the opportunity for the Court
20 to declare the witness hostile and give the Prosecutor the right, as it were, to cross-examine
21 and ask leading and closed questions, but then you say, well, you do that because of giving
22 you the licence which we may take away any time it suits us.

23 Would you accept that if you were in his position?

24 MS BUISMAN: Well, Mr President, I'm surely not suggesting that we're waiving our right to
25 object to leading questions as of now, but I think if you look at what has happened until now,

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1 he's been able to go through the statement, he's gone to the witness, the witness has given his
2 explanations. The explanations are not the ones that the Prosecution wishes to hear, but
3 there's not been a situation where he couldn't go further with this witness. He said what he
4 said.

5 And as I said, until now, we've barely made an objection, and we have considered
6 that we will even allow further and let him go through the statement and put certain
7 propositions to this witness where appropriate --

8 PRESIDING JUDGE EBOE-OSUJI: The point is -- the point is are you insisting on your
9 earlier offer that, yes, he may go ahead and ask leading questions until you say no, he may no
10 longer ask leading questions?

11 MS BUISMAN: Yes, although I think is -- now there is an application that we're responding
12 to, so I think that's now moot.

13 PRESIDING JUDGE EBOE-OSUJI: Perhaps not. If you made your position clear, then he
14 will have an opportunity to react to it. He said -- he started to say that he wasn't prepared to
15 go at your sufferance. That's the point. He wasn't prepared to go at your leave. He wants
16 to have the right to cross-examine the witness and ask those questions. So if you -- it
17 shouldn't be a matter of a privilege he's enjoying because you've allowed him to enjoy that
18 privilege. That's the concern.

19 MS BUISMAN: Well, I'm in a difficult position. We are prepared not to object, at the same
20 time that should not be a waiver full stop. It also depends how he's going to go about it.

21 PRESIDING JUDGE EBOE-OSUJI: All right then.

22 MS BUISMAN: So maybe we just go on with this application --

23 PRESIDING JUDGE EBOE-OSUJI: Yes.

24 MS BUISMAN: -- and we don't get in a difficult situation later on.

25 The four criteria: First of all, we are dealing with a general demeanour of hostility,

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1 and the second one is impression of evasiveness on the part of the witness. I'll
2 discuss these two jointly.
3 Obviously, we have some difficulties to even assess the demeanour because we are
4 dealing with someone who's speaking in a different language. There has been
5 difficulties in translation. My lead counsel stood up from time to time, not always,
6 because we don't want to interrupt the proceedings. There has been difficulties with
7 video transmission, and also both teams have made that point. Sometimes it's hard
8 to see him, sometimes it's not. So there has been difficulties I think in general to
9 assess the demeanour of this witness.
10 But even with these difficulties, it's our position that there is no -- he's not presenting
11 himself in a hostile manner. He did give immediate response to the subpoena. He
12 was very nervous, as we heard him say, and I think it was already addressed by my
13 learned colleague from the Ruto Defence.
14 He had a -- he had a meeting with the VWU and he even expressed his desire to start
15 his testimony a day late, which was not granted, but he was here. He's been here.
16 He's -- he's answered all questions from all sides.
17 The Prosecution says he's not co-operative because he didn't want to speak to them
18 prior to the testimony. Well, that too, in our submission, is not at all a sign of
19 non-cooperation, because he's been, in general, he's been polite to everyone.
20 And most importantly, he's -- unlike the other two witnesses, he has not incriminated anyone
21 from the Prosecution side. So -- because that was a very strong argument on the other side
22 in earlier applications that he was implicating and was making serious allegations against the
23 Prosecution. He hasn't done that.
24 And, in fact, it's been put to him, Mr Steynberg did ask him the question, "Was it the
25 Prosecution or was it a third party?" And he said, "No, it wasn't the Prosecution; it

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1 was a third party." So I think that's very important in terms of co-operation.
2 Also we've had some discussions about his statement that was taken without an
3 interpreter, and it seemed to be the suggestion on the other side that he has no
4 difficulty with his English. And Mr Steynberg put it to him, "You've gone through
5 your statement before you came to testify. The VWU gave you that opportunity.
6 And that statement was in English, was it not?" And he said -- he was -- he
7 had -- first of all, he said he had complained because it was too short a time span that
8 was given to him to prepare, and second of all, he did say he was provided with an
9 interpreter.
10 So it's clear to us throughout his testimony that his English is -- he's not very
11 comfortable in English. And I hear from my Swahili-speaking colleagues that his
12 Swahili is really good, he does feel very comfortable in Swahili, but then there is the
13 translation difficulty.
14 In terms of -- because the main issue seems where he lived, it's true that --
15 PRESIDING JUDGE EBOE-OSUJI: All right. Ms Buisman, I don't mean to cut you short,
16 but your position is that you do not accept the characterization of the witness as of hostile
17 demeanour, as being evasive? That's so far what you're speaking to. But the Prosecution
18 also addressed the matter of the test of extensive degree of divergence between testimony and
19 prior statement.
20 Can you speak to that?
21 MS BUISMAN: Yes, indeed. To cite you specifically, you say, "... in whole or in part
22 deliberately or systematically inconsistent with the prior statement." Well, deliberate, that's
23 surely true, because he is saying that half -- part of his statement he made before was false, so
24 he's taking this opportunity to explain which parts were false.
25 Systematically, I submit, no, there's a lot that he's saying which he accepts. And

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1 surely -- because the fourth point is that he's systematically adverse to the party
2 calling him, and one of the ways to look at that is to show that he's now supporting
3 the opposite party. And neither of these are true.
4 And I'm discussing them together, because I think they go together. There's lots of
5 examples. For instance, he's confirmed the meeting. He already stated in his
6 statement he wasn't there, a meeting that took place, there were like -- where he
7 wasn't sure about the number of 2,000, but he did say there was this meeting, and he
8 did say that he was afraid to go. He thought it wouldn't be -- it might be
9 problematic for him to go. He confirmed that. That's not -- that's -- first of all, that's
10 something he has said before. Second of all, it's not something that supports our
11 case.
12 He's also said that (Redacted) -- can we go into private, please?
13 PRESIDING JUDGE EBOE-OSUJI: We go to private.
14 (Private session at 10.31 a.m.) * Reclassified as Open session
15 THE COURT OFFICER: We're in private session, Mr President.
16 MS BUISMAN: I apologise for that. Maybe that can be redacted from the public transcript.
17 PRESIDING JUDGE EBOE-OSUJI: It will have to be. Proceed.
18 MS BUISMAN: So he confirms as someone who was an (Redacted)
19 (Redacted)
20 (Redacted) but that itself only to us shows how -- how credible he is. There is no reason
21 for him to retract that (Redacted)
22 To do what? Not to support our case or to be adverse to the Prosecution. He's simply
23 correcting an added detail that he gave as he simply -- he put it himself, he put it like that.
24 He added details to give credence to his statement. And some of his statement was
25 part on -- part based on hearsay, some of it he sort of added an extra detail so that he could

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1 become a witness.

2 And it's entirely credible when -- when he on the one hand says, "(Redacted)

3 (Redacted)

4 (Redacted) that then there -- a detail here and there that he changes

5 only to us shows that this is now a person who wants to tell truth.

6 And well, there are some more examples here. At page 47, this was yesterday, he

7 did confirm that (Redacted)

8 (Redacted) And

9 he actually -- this is something he confirms at page 47 of the transcript. And at page

10 52 of the transcript, that's where he is talking about the political meeting that he still

11 confirms was taking place, although he wasn't there.

12 He's also said things, and this is the day before, this is 23 September, he did confirm

13 that Mr Ruto was the leader of the Kalenjins. He says what he knows about people.

14 He knows what -- he says that he knows Mr Kibet physically, and he clarifies what he

15 doesn't know. He also says that Mr Farouk Kibet could have been appointed or not

16 by Mr Ruto or publicly. He just simply doesn't know.

17 So the bottom line is that at the end of the day, it's really not so black and white. It is

18 someone who has tried to answer questions and it's not the answers that the

19 Prosecution wants to hear, but it doesn't make him adverse to the Prosecution. And

20 that's one thing even in your latest decision you have pointed out that a hostile or

21 adverse witness is not merely a witness whose testimony has become unfavourable to

22 the case of the party who called that witness.

23 So on that basis we request that this application should be rejected. Thank you.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

25 MR HOOPER: Well, one's strong suspicion is that the reason that the Prosecution wished to

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1 have this witness categorized as a hostile witness is in order to enter into that process and put
2 matters relating to Article 70 investigations, if I can put it in a general sense like that.
3 And rather strangely in the case of this particular witness, as we indicated yesterday,
4 we're not actually objecting to those matters being put -- to those matters being put
5 to -- to the witness.

6 So in raising the issue as to whether this witness truly qualifies as a hostile witness,
7 I'm doing so against that back-drop that I'm not actually opposing the Prosecution --

8 PRESIDING JUDGE EBOE-OSUJI: Before you --

9 MR HOOPER: -- asking questions they want.

10 PRESIDING JUDGE EBOE-OSUJI: Before you continue, the matter of where we are, if you're
11 not going to mention identifying information, like Ms Buisman did, I think we can safely go to
12 public session, go back, unless you want to address identifying information.

13 MR HOOPER: No. I mean, unless I blunder into it, I don't -- I hope not to, but --

14 PRESIDING JUDGE EBOE-OSUJI: We will then go --

15 MR HOOPER: -- there's always an attendant risk.

16 PRESIDING JUDGE EBOE-OSUJI: We'll go to public.

17 (Open session at 10.36 a.m.)

18 THE COURT OFFICER: We are in open session, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Hooper.

20 MR HOOPER: So essentially yesterday I was for our part offering Mr Steynberg, as it were,
21 an open and unimpeded road for questioning, but the question as to whether this witness
22 truly qualifies as a hostile witness is not clear cut. It's not clear cut as the previous witnesses
23 have been, one of whom probably could stand as a definition of adverse.

24 This witness hasn't trod that path at all. He's given an account. There were and has
25 been undoubted departure from what he told the Prosecution in his original

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1 statement or as we would normally put it, he has not come up to proof, but not
2 coming up to proof should not entitle the calling party to have him qualified and
3 categorized as a hostile witness because of a failure to come up to proof. And when
4 one looks at this witness in the round, we find that he speaks of nduru, of screams, of
5 smoke and fire and houses burning, of people fleeing, of pillage of cows and the rest
6 of it.
7 So in terms of general crime scene evidence related to Turbo, this witness in fact does conform
8 factually and does not depart from what one would gather was the situation.
9 In other areas right from the beginning, for example, he was asked how did Mr Ruto
10 become a leader and he said he didn't know.
11 And when one looks at his statement, he tells us that he became a leader because he
12 was anointed as such as Kipchoge Stadium and he thinks that was in 2002.
13 Well, we know that's not right. We know that's wrong and that, therefore, when the
14 witness says, "I don't know now," when one looks at his answer to the Prosecution,
15 we can see that he didn't know then.
16 And then he goes on through the particular aspects that the Prosecution anticipated
17 his evidence would deal with, or at least at one time did, and he's resiled now from
18 membership or claims he was no -- not a member, as we know, of a particular group,
19 a role that would have given him of course the basis and motive for -- for doing
20 certain things.
21 We know that he's spoken about his political membership. I don't think there's been
22 a departure there. He says that there were meetings at Mr Ruto's place.
23 Just one moment.
24 No, I was just ensuring the witness wasn't within earshot of what I was saying and of
25 course he isn't.

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1 We see, as far as the meeting at Mr Ruto's place, you can see in his statement that he
2 talks about them being held on three consecutive days. We know that's not the case.
3 We've had previous evidence of that. He's wrong about that. He's wrong about
4 that.

5 When we see the meeting at Farouk Kibet's home, which he says he attended in his
6 statement, he says that was untrue and he didn't attend and there's a departure from
7 that; that in the context of his phoning 326 in order to report.

8 And a meeting in Beshiebor --

9 PRESIDING JUDGE EBOE-OSUJI: Isn't the test, Mr Hooper, about -- quite apart from
10 whether or not demeanour displayed hostile animus or whether the witness has been evasive,
11 but on the test of an extensive degree of departure or divergence between testimony and
12 statement, isn't that what we are looking for? You bring the testimony and you bring the
13 statement and you look at both of them to see if there has been a departure. Isn't that the test?
14 Do we -- does it matter whether the witness was right or wrong in the prior statement?

15 MR HOOPER: Well, it's an aspect of it because, as it's already been said and we can observe,
16 this witness has given an explanation for his departure while at the same time asserting to
17 you that he's telling the truth, and hostility is in part a finding that the person in respect of
18 whom the calling party seeks to have declared hostile, that that party is undesirous of telling
19 the truth.

20 Now, I agree with your -- with the comment that was made in your decision that that
21 places you in perhaps a situation you should not be seen to be in. We're not a judge
22 and jury, where a judge can make a finding of fact like that but the issues go to the
23 jury and there's no issue of prejudice arising as a result of a finding of fact by judges
24 of untruthfulness. I understand that. And you categorise, therefore, this
25 application as being undesirous of telling the truth according to the calling party, and

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1 I accept that that is an appropriate criterion to apply and to be applied in that way.

2 But the problem here isn't it this? That the Prosecution are saying, "We, the

3 Prosecution, say he's undesirous of telling the truth," but they can't put their finger on

4 what the truth is. I bet they can't even tell us or prove where he lives, because the

5 very basic investigations of seeking corroboration for this witness, as with many

6 others, it hasn't been done. Indeed that was part of the motive that we heard this

7 witness express for his reason for saying certain things, that he knew that he wouldn't

8 be found out, or at least it was a risk worth taking.

9 PRESIDING JUDGE EBOE-OSUJI: All right, Mr Hooper. Two minutes to round up. We
10 want to --

11 MR HOOPER: So it really comes to this. The Prosecution are really saying, "We have a
12 concept of what the truth is and we'd like this witness in fact declared hostile so that we can
13 assert it to him," but they do so in part without a proper basis.

14 And I said at the outset of my submission, in a way we offered the open road
15 yesterday to the Prosecution and it really is an issue of the propriety of calling this
16 witness hostile in the particular circumstances in which he gives his evidence, but the
17 objective of the Prosecution, as I understand it, is to put Article 70 material.

18 We don't stand in the way of that because there isn't really any substance to it. All
19 the Article 70 material will show is what you will find and see was a very, very
20 worrying threat made by OTP investigators to this witness that, unless he co-operates
21 with them and comes to them, they're going to disclose his name. That is quite a
22 shocking, shocking process that we're going to see, and I don't mind you, the Judges,
23 seeing it, but the problem is that it doesn't actually advance the Prosecution's case.

24 And so where we're going on this, the extra material as it was that they've got to put
25 to this witness isn't the kind of material that you saw previously with the other

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1 witness.

2 PRESIDING JUDGE EBOE-OSUJI: Excuse me, did you actually say that there was a threat
3 made to a witness that unless he co-operates his name will be disclosed?

4 MR HOOPER: Yes.

5 MR STEYNBERG: Which is quite incorrect, your Honours. I will explain in due course.

6 MR HOOPER: Well I may have put a particular shine on it, but in all seriousness you'll see
7 that that's effectively what happens. What the investigators say is this, "Something terribly
8 serious has come up. You're at risk. You're at increased risk. We can't protect you where
9 you are, i.e. in Kenya. You're going to have to come out. But if you don't come out, then all
10 we can do and will have to do in fulfilment of our duties is to ask the Kenyan government to
11 protect you." That's how it's played and you'll see that. I put no -- I've put no shine on that.
12 So that was all in pursuit of Article 70 material. I can understand the motive for it,
13 because they wanted to put perhaps this witness in the same position in hold and
14 grasp as they did the last one, but it doesn't depart from whether it's an appropriate
15 threat.

16 But that's where we're going, and I only mention that -- I mention that because that's
17 the nature of the evidence. We're going to -- we're not going to, as it were, find here
18 the kind of material or conversations that we heard in respect to the last witness.
19 We're not going down that road, but --

20 PRESIDING JUDGE EBOE-OSUJI: All right. We will leave it at that, Mr Hooper.

21 MR HOOPER: Yes.

22 MR NARANTSETSEG: Thank you very much, Mr President, for this opportunity.

23 We support the Prosecution's application. In our observation, the manner this
24 witness answered his -- answered the questions posed by the Prosecution meets most
25 of the requirements your Honours set on 8 September.

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1 We note three things, your Honour. Firstly, we -- in our observation this witness has
2 been evasive. We can cite many examples, one of which this witness has been
3 answering questions to the -- using very generic terms and the Prosecution counsel, in
4 our observation, had to repeat his questions several times in order to get a specific
5 answer from this witness.
6 Secondly, your Honour, we also note the extensive degree that this witness has
7 departed from the main points of the statement he had given to the Prosecution's
8 investigators.
9 Your Honours, there has been some issues whether, you know, this witness has
10 acknowledged certain facts, but your Honours have established in your decision that
11 the departure can be in whole or in part.
12 Of course the issue whether certain homes were burned or not, that's a matter of
13 public knowledge, your Honour. The fact that he acknowledged, you know, certain
14 properties were burned or destroyed, that's not a matter of dispute. The real dispute
15 is who is responsible for those destructions.
16 Thirdly, your Honour, we also note that the -- this witness has -- appears to be
17 deliberately impugning the Prosecution's case. The Defence counsel argues that he
18 didn't in fact accuse the Prosecutor's investigators, but that's another issue, your
19 Honour.
20 This witness has accused the other Prosecution witnesses of deliberately fabricating
21 evidence. Your Honour, that of course deliberately impugns the Prosecution's case.
22 Your Honour, also this witness appears to be clearly supportive of the Pros -- Defence
23 case, excuse me.
24 Your Honour, this witness said repeatedly that he has been enticed by the
25 Prosecution's investigators by the offer of a good life. This is clearly in line with one

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1 of the Defence allegations, especially the Ruto Defence made repeatedly, that all
2 Prosecution witnesses are lying because they are coming and testifying in order to get
3 benefits from the ICC. Your Honours, in our observation, this clearly supports the
4 Defence case.

5 To conclude, your Honour, we believe that the Prosecution's application should be
6 granted. Your Honours well-noted that declaring a witness hostile, that's a specific
7 tool of justice - you know, that's designed for the ascertainment of the truth in a
8 judicial proceeding - and the Prosecution shouldn't be left at the mercy of the Defence
9 counsel when he conducts his examination.

10 Therefore, your Honour, we believe that the Prosecution counsel has gone as far as
11 possible using neutral forms of questioning. Therefore, we believe that it's time for
12 your Honours to allow the Prosecution counsel to cross-examine this witness using all
13 avenues possible. This is, your Honour, in our submission essential for the
14 ascertainment of the truth.

15 This concludes our submission, your Honour. Thank you.

16 MR STEYNBERG: Thank you, your Honours.

17 My learned friend has taken my first point, and that of course is that this witness is
18 indeed supporting the Defence case by impugning the credibility of two of our
19 Prosecution witnesses, including one who's given important incriminating evidence
20 in (Redacted) particularly against accused number 1, and the timing of the injection of
21 Witness (Redacted) is of particular interest to the Prosecution given that it coincides almost
22 exactly with his renewed contact with the OTP.

23 The Prosecution submits that this is not just a case of a witness not coming up to
24 proof. This witness has, in our calculations, denied 80 out of 114 paragraphs of his
25 statement. Of those 114 paragraphs, another 20 are probably warnings and

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1 explanations.

2 My learned friend for Mr Sang has tried to identify certain areas where he might have
3 agreed with his statement. It's apparent that these are all matters that are either
4 inconsequential, or undeniable, or matters that are so well-known that really this
5 evidence doesn't take the Prosecution's case any further.

6 The Prosecution submits that much has been made of the issue of translation; the fact
7 that this statement was made in English. It's interesting that, having gone through
8 the statement, the witness has not identified a single instance where what is recorded
9 in the statement is according to him now incorrectly translated, not once. So that, in
10 my respectful submission, is a red herring.

11 Your Honours, as to the last issue on which my learned friend raised, what he has
12 omitted to put in -- he might not have put the spin on it, but he's omitted to put the
13 context. The context in which this contact was made was that your Honours had
14 granted the Prosecution's request to summons these witnesses.

15 In order to effectuate these summonses, the Prosecution was obliged to transmit to
16 the Kenyan government not only the identity of these witnesses, but also their
17 telephone numbers, their addresses and material which until then had not been at
18 least officially disseminated beyond the parties in this Court.

19 It was to that increased risk that the Prosecution referred, and we submit that it was
20 entirely in keeping with our duty, as we always do when there is a change in the risk
21 circumstances, to contact the witnesses and give them the opportunity at least, the
22 offer, to benefit from protection. As it transpires, the witness turned us down in that
23 connection.

24 So in my submission, your Honours, this witness has clearly departed systematically.
25 He's not simply forgotten to mention certain aspects of his evidence, as other

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1 witnesses who might not come up to proof may do, but he's positively asserted that
2 he lied to us and lied to us with a particular purpose which fits in with the broad
3 scheme of the Defence allegations.
4 Your Honours, as to my learned friends for Mr Ruto's submissions that we don't have
5 the smoking gun, as it were, like we did with the last witness, well that is true to some
6 extent and it is also true that my cross-examination beyond the scope of the
7 statements will be more limited than the past witnesses, but there are still some
8 important matters which I need to explore, particularly the reason for his now
9 recanting which I wish to put to this witness and one or two other matters. I don't
10 expect it will be very long, but I do need to do it, your Honours.

11 (Trial Chamber confers)

12 PRESIDING JUDGE EBOE-OSUJI: We will adjourn and come back at 11.30.

13 THE COURT USHER: All rise.

14 (Recess taken at 10.56 a.m.)

15 (Upon resuming in open session at 11.32 a.m.)

16 THE COURT USHER: All rise.

17 PRESIDING JUDGE EBOE-OSUJI: We're in open session and we'll render a ruling on the
18 Prosecutor's application.

19 This is the third time that the Prosecution is making or has made an application to
20 have their witness declared a hostile witness. The first time was on the occasion of
21 the testimony of Witness 604. The second time was in relation to Witness 495.
22 On those previous occasions, the Chamber considered that the extensive degree to which the
23 testimonies of those witnesses had consistently and systematically diverged from their
24 statements, that the witnesses had given to the Prosecution, was enough to warrant having
25 those witnesses declared hostile and the applications of the Prosecution were granted on

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1 those occasions.

2 Similarly, the Chamber grants the application of the Prosecution in this instance for
3 the same reason. We feel called upon to explain that the factor of consistent and
4 systematic divergence between testimony and previous statement is not a factor that
5 floats in the air. It is a factor that necessarily takes its bearing from the central
6 question that the Court must answer in the case. In a criminal case that central
7 question is a question of the criminal responsibility of the accused person.

8 That concludes our ruling and the witness will be called in to continue his testimony.

9 MS BUISMAN: Mr President, if I may just very briefly? Just to clarify one thing: In
10 response to Mr Steynberg's submission at page 39, lines 1 to 5, this is in response to
11 Mr Hooper's submission, I just wanted to point out that the summons decision he's referring
12 to was issued on 17 April and the conversation that Mr Hooper was hinting at was taking
13 place in March, between 14 and 17, so I'm not sure -- well, maybe, he can clarify how these
14 two are related. Thank you.

15 MR STEYNBERG: Yes, your Honour, I was actually on the point of clarifying that. I'm
16 grateful for my learned friend pointing it out.

17 In fact -- well, this is the danger when one is confronted with facts on one's feet without time
18 to prepare. The -- certainly we did contact all the witnesses who are due to be summonsed
19 and apprised them from the increased risk as a result of that summons situation.

20 The situation with respect to this witness, there was an additional factor that preceded that,
21 however, and inter partes I can do no more than refer your Honours to filing number 1217
22 confidential ex parte, which dealt with the security issue -- a serious security issue pertaining
23 to another witness which impacted also upon this witness and it is in fact that which is being
24 referred to in these conversations.

25 Obviously because the sensitive nature, which your Honours will immediately appreciate

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1 when -- when time permits a review of the filing, we could not communicate that information
2 with the witness but it did, in our assessment, affect his -- his security, it was a serious matter
3 and it required immediate attention.

4 PRESIDING JUDGE EBOE-OSUJI: The filing number 1217, is it material that is available to
5 the Defence?

6 MR STEYNBERG: Your Honours, it is an ex parte matter, it is subject of a continuing order
7 of non-disclosure by the Chamber which the Chamber is due to review again shortly. The
8 date of the filing is 13 March 2014, although it refers to an incident that happened a few days
9 before that.

10 PRESIDING JUDGE EBOE-OSUJI: All right. We'll leave the matter -- Mr Hooper.

11 MR HOOPER: Yes. I'm grateful to my friend for his clarification and that -- the reason why
12 what was being said was being said was not as suggested, but --

13 PRESIDING JUDGE EBOE-OSUJI: Before you -- while you continue, is there any reason why
14 the witness cannot be brought in?

15 MR HOOPER: No.

16 PRESIDING JUDGE EBOE-OSUJI: All right.

17 Ms Toumaj, please bring in the witness.

18 THE COURT OFFICER (via video link): Yes, Mr President.

19 MR HOOPER: It may be a matter of relevance in my questioning of this witness as to the
20 background to what was said by the investigators to him and I -- your Honours has the point.
21 Thank you.

22 PRESIDING JUDGE EBOE-OSUJI: You will have to explore that in the course of
23 questioning.

24 MR HOOPER: I'm just wondering whether though the ex parte matter in some form,
25 redacted or otherwise, could be made known to the Defence.

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1 (The witness enters the video-link room)

2 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, you've got the point of Mr Hooper, I take
3 it. This is a matter that now looks like will become a matter for inquiry in -- as part of the
4 questioning of this witness, and to the extent that - was that 1217, yes - filing number 1217
5 may have a bearing on this, you need to review that material to see if there is no -- there's a
6 compelling reason to withhold it from the Defence still.

7 MR STEYNBERG: Your Honours, we will look at that. Unfortunately, the difficulty the
8 Prosecution is in is that circumstances have not changed since the last update. Therefore the
9 reasons that were placed before the Chamber still remain by and large valid. It is the subject
10 of a Chamber's order and any disclosure of this would have to be with the leave of the
11 Chamber.

12 PRESIDING JUDGE EBOE-OSUJI: Let's continue.

13 Witness, welcome back. We had to discuss some legal matters.

14 THE WITNESS: (No interpretation)

15 PRESIDING JUDGE EBOE-OSUJI: Yes. And Mr Steynberg will continue his questions to
16 you.

17 Mr Steynberg.

18 MR STEYNBERG: Thank you, your Honours.

19 WITNESS KEN-OTP-P-0516 (On former oath)

20 (The witness speaks Swahili)

21 (The witness gives evidence via video link)

22 QUESTIONED BY MR STEYNBERG: (Continuing)

23 Q. Good morning, Mr Witness.

24 A. (No interpretation)

25 PRESIDING JUDGE EBOE-OSUJI: Are we getting interpretation?

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1 THE WITNESS: (Interpretation) Good morning, Mr President.

2 MR STEYNBERG:

3 Q. Right. Mr Witness, do you recall yesterday I had questioned you regarding the
4 atmosphere in your area -- or, rather, let's shall we say the attitude in your area of ODM
5 supporters towards PNU supporters. Do you recall that?

6 A. Yes, I do remember.

7 Q. And after several questions I asked you whether you were able to tell us what was the
8 reaction of the Kalenjin community in your area to the announcement of Mr Kibaki as a
9 presidential winner and your answer was, "I do not know ..."

10 I'm referring your Honours to transcript 142, pages 29 to 30, edited transcript.

11 Do you maintain that you don't know what the attitude of the Kalenjins in your area was to
12 the victory by Mr Kibaki?

13 A. Yes, indeed. What I said is that the town is some two-to-three kilometres away and in
14 that part the various tribes live together. We went to the police post to seek protection.
15 And I do not know what happened outside of the police station -- the police post, rather.

16 Q. And as you sit here today, do you maintain that you still do not know what was the
17 attitude of the Kalenjin community towards Kibaki being announced as a presidential
18 witness?

19 A. When you say "today," what I can tell you is that I subsequently found out that politics
20 was different, even the people of the ODM were not happy when the PNU won because
21 people said that the elections had been rigged.

22 Q. And you also said, and I beg your pardon it wasn't yesterday it was the day before, also
23 at page 30, when I asked you why did the Kikuyu in your area in -- go to the IDP camp, leave
24 Turbo and go to the refugee camp, you said "I didn't understand why they went there." Do
25 you still maintain you don't know why the Kikuyus went to the refugee camp?

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1 A. Yes.

2 Q. Are you aware, Mr Witness, of any animosity among the Kalenjin community toward
3 the Kikuyu community at the time of the election and immediately after? Are you aware of
4 that?

5 A. Yes. As I stated a short while ago, it was because of political influences, but
6 subsequently they returned and they lived together, even today they live together, even
7 today.

8 Q. And when I asked you if you knew, when you said people were running away, who
9 was running away and who was chasing them in your area after the announcement of the
10 results, do you still say you don't know who was running and who was chasing?

11 A. My position is that I know nothing about it.

12 Q. You see, I want to put to you, Mr Witness, that you're not being entirely forthright with
13 the Court about these issues. I put to you that you could not fail to know that there was
14 serious animosity between ODM and PNU members after the election results; isn't that right?

15 A. This is what I can say: Following the 2007 elections, we came to 2008 when the conflict
16 began, but that was not the first conflict. There had been conflicts in 2002 already and
17 so -- rather, in 1992, and it was not the first time, and whenever there are elections
18 people -- there were elections people knew that there was going to be conflict because of what
19 had happened previously.

20 Q. All right. Please focus on the question, Mr Witness. I'm not asking about 2002. Is it
21 not correct that you did in fact know that there was serious tension and animosity between
22 ODM and PNU supporters in your area, both in the buildup to the election and immediately
23 after the results? Isn't that true?

24 PRESIDING JUDGE EBOE-OSUJI: Mr Witness, don't answer. Wait, wait, wait, wait.
25 Mr Steynberg, can you reformulate that question in a more straight-line manner.

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1 MR STEYNBERG:

2 Q. Do you agree, Mr Witness, that ODM supporters were enraged by the announcement of
3 Mr Kibaki as a presidential winner in your area?

4 A. Yes, I agree.

5 Q. And do you agree that that rage was directed towards PNU supporters in general and in
6 particular towards the Kikuyu in the area?

7 A. Well, I do not know. I do not know whether there was any hatred. What I know is
8 that, when the results were announced, the situation in the country deteriorated. I do not
9 know whether there was hatred, or animosity. ODM supporters conducted their campaigns
10 in the areas where there were people who supported the PNU, so I did not know that there
11 was a problem. What I know is that, when the results were being announced, it is at that
12 time -- it's at that time that things deteriorated within the country. I found out about it on
13 that day when the situation started with the announcement of Kibaki as having been the one
14 who won the elections.

15 Q. I put it to you, sir, that you knew very well that the reason why the Kikuyu were fleeing
16 to the IDP camp was because Kalenjin ODM supporters were launching attacks on them and
17 on their houses and burning houses, looting houses; is that not correct?

18 A. No, that is incorrect.

19 MR STEYNBERG: Your Honour, may we go into private session? I need to ask him some
20 more personal questions.

21 PRESIDING JUDGE EBOE-OSUJI: Private session.

22 (Private session at 11.53 a.m.) * Reclassified as Open session

23 THE COURT OFFICER: We are in private session, Mr President.

24 MR STEYNBERG: Thank you, your Honours.

25 Q. Now, Mr Witness, you testified or you confirmed previously paragraph 26 of your

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1 statement, and it's not necessary to go there now, but that there was a -- person number 4 on
2 the PIS - and I'll say it in private session, (Redacted)
3 (Redacted) is that
4 right?

5 A. Yes, indeed. (Redacted)

6 (Redacted)

7 (Redacted)

8 Q. Yes, thank you. You're correct. (Redacted)

9 (Redacted)

10 A. (Redacted) Before the

11 elections what we refer to as a sorting or selection of candidates took place, and this happens
12 during the primaries when you have five people who run against each other. So five people
13 cannot run against the candidate of the opposite party, so we have the primaries at our level
14 and out of the primaries only one person will end up being the candidate. The same
15 procedure was used even for the (Redacted)

16 (Redacted)

17 Q. Very well. Let me just read to you what you said in your statement, "(Redacted)

18 (Redacted)

19 (Redacted) So far is that correct?

20 A. (No audible response)

21 Q. If you can just --

22 PRESIDING JUDGE EBOE-OSUJI: Where are we looking at?

23 MR STEYNBERG: Sorry, I'm reading from paragraph 26, your Honours, of the statement at
24 tab 1. The ERN is 0087-0035.

25 PRESIDING JUDGE EBOE-OSUJI: Does the witness know where we are?

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1 MR STEYNBERG: Well, your Honours, I'm reading to him verbatim.

2 PRESIDING JUDGE EBOE-OSUJI: Witness, look at paragraph 26 of the statement.

3 MR STEYNBERG: Your Honour, I do also point out that if I read it it does get interpreted,
4 whereas if he reads it himself he only gets the English.

5 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

6 Yes, proceed.

7 MR STEYNBERG:

8 Q. All right. You heard what I read out, Mr Witness. Is that correct, that (Redacted)
9 (Redacted)? Is that right?

10 A. That is correct.

11 Q. You go on to say, "... (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 A. (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, I don't know what you want -- what you
21 have in mind to do with the story concerning (Redacted) but when you started the impression
22 might have been received that the exercise was to -- that the witness had said something
23 different in the statement. That was the impression I got. If that is the case, it would be fair
24 to put the entire paragraph to the witness to see if what is in the statement is really
25 inconsistent with the testimony he has given.

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1 Now, to now return and start asking the questions about the circumstances that are
2 not apparent from the -- on the face of the statement is something you may still do,
3 but first let's start with what you had in mind or at least what I thought you were
4 doing.

5 MR STEYNBERG: Sorry, your Honours, that was not my intention to show a contradiction
6 necessarily with the statement. These questions are in the whole context of the atmosphere
7 in the area and the relations between the PNU and the ODM. (Redacted)
8 (Redacted) and
9 that's what I hope to focus on. I have one more question and then we need to move on.

10 PRESIDING JUDGE EBOE-OSUJI: Yes, but just to make sure that later on there are no
11 misunderstandings. We don't know who -- we hope you remain in the case until the end,
12 but if you moved on to high office somewhere else and another Prosecutor steps in to
13 complete the case, we don't want different impressions to be received by those who take over
14 from you. So that is -- it's for that reason that the record needs to be as clear as possible
15 while we have the witness on the stand.

16 MR STEYNBERG: Very well, your Honours.

17 Q. Mr Witness, I'm going to finish the -- I think the next two or three sentences will do just
18 to give you the context. (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 A. Yes.

24 Q. All right. What I'm --

25 A. Yes, I understand you.

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1 Q. What I'm interested in is the fact -- do you confirm that (Redacted)
2 was not able to campaign in Kalenjin areas because they did not want the PNU there? Is that
3 correct?

4 A. (Redacted) did campaign and (Redacted) campaigns in areas where there were
5 (Redacted) that is in Turbo town, but in the surrounding areas, that is the rural
6 areas, the people were ODM. (Redacted) could go to ODM people, but the people wanted
7 ODM. The majority had accepted the ODM as their party, so it was difficult to persuade a
8 supporter of the ODM, or a member of the ODM, and so it was necessary to discuss with
9 those people. So my answer to you is that (Redacted) was not prevented from doing that.

10 Q. So are you saying that if (Redacted) had wanted to go to the ODM areas (Redacted) was
11 free to do so and there would have been no consequences? Is that what you're saying?

12 A. Yes, that is what I am saying.

13 Q. Very well. Let me move on to a different question.

14 And we can go back into public session, please, your Honours.

15 PRESIDING JUDGE EBOE-OSUJI: Back to public session.

16 (Open session at 12.05 p.m.)

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

18 MR STEYNBERG:

19 Q. All right. I'd like to return to the evidence you've given about the meeting, the
20 three-and-a-half -- the three-hour meeting that you had with persons 1 and 3 in Eldoret, and
21 in particular, I'd like to explore exactly when this took place.

22 Now, initially on -- two days ago, that would be Tuesday, I refer to transcript 142,
23 page 49, you said that this happened in October 2012, you said "I don't remember the
24 date, but I do know I was called three weeks later ... or three-and-a-half weeks later."

25 I asked you: "... by whom?"

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1 And you responded that it was the male investigator who called you. All right? You don't
2 need to look at your statement. You just listen to what I'm -- I'm telling you. Did you
3 understand what I read to you?

4 PRESIDING JUDGE EBOE-OSUJI: You may have to start again when you refer -- and this
5 has happened occasionally in the past on both sides; in mid-question you're referring to
6 transcript, the witness might think you were speaking to them in that part when you were
7 only trying to -- trying to inform the Chamber and parties on the other side where you're
8 getting your reference from, but it can be confusing to witnesses. It may have been he was
9 looking in his statement for that paragraph. I don't know, but let's take that question again.

10 MR STEYNBERG: Thank you, your Honours. That's valuable advice.

11 Q. Mr Witness, just so you know, when I refer to the transcript, that's for the benefit of my
12 colleagues, from the Defence, and the victims and the Chamber, so that they can check that
13 what I'm putting to you is not incorrect or misleading and if it is they will stop me. But you
14 don't need to read it yourself. Just listen to what I'm saying and what's being translated to
15 you and try to understand that, okay?

16 A. Very well.

17 Q. So I'll repeat it. We were speaking about the three-hour meeting with persons 1 and 3,
18 you said it happened in October 2012. You don't remember the date, but it -- but you said,
19 "I was called three weeks later. Three weeks later or three-and-a-half weeks later." You
20 then confirmed that it was the male investigator who called you.

21 Then, for the parties, at page 50, you went on to say that, "Yes, I was called by an
22 investigator after three-and-a-half weeks. He called me and we spoke for a long
23 time and later we sat down together and we had a discussion." Do you remember
24 telling that to the Court?

25 A. Please kindly explain to me the people you are referring to, are they persons number 1

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1 and 3, or are you referring to the investigators?

2 Q. Mr Witness, I'm interested in the dates of your communications firstly with persons 1
3 and 3 and with the investigators. So what I'm interested in is that you told the Chamber that
4 you met with persons 1 and 3, the three-hour meeting, there's only been one that you've told
5 us about, and that it was three-and-a-half weeks later that you were called by the investigator.
6 Do you remember telling the Chamber that?

7 A. Yes, I remember that very well.

8 Q. And you went on to say that you spoke to the investigator for a long time, on the phone
9 presumably, "... and later we sat down together and we had a discussion." Do you recall
10 saying that?

11 A. I did not say that I had a long conversation with the investigator. What I said is that
12 after the meeting with the two people, that is persons number 1 and 3, and I do not
13 specifically remember the time, I received a phone call from the investigator who asked me to
14 go to location 4.

15 Q. And was that three-and-a-half weeks after the meeting you had with persons 1 and 3
16 that you received that phone call?

17 A. Yes. After having met with those two people, they took my name which they sent.
18 After one week, I really cannot remember exactly, I think it was one week afterwards these
19 people started calling me on the phone and we reached an agreement, and after
20 three-and-a-half weeks, I went to location 4 to meet with the investigators.

21 Q. You see, this is what I'm trying to clarify because now you're saying that it was after
22 three-and-a-half weeks that you went to location 4 and, in fact, later on in your evidence you
23 did state that the three-and-a-half week period that you were mentioning was the time
24 between your meeting with accused -- with witnesses -- with persons 1 and 3 and your
25 meeting in location 4 with the investigators.

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1 And what I'm trying to clear up is was it three-and-a-half weeks between the meeting with
2 persons 1 and 3 and your first phone call, or was it three-and-a-half weeks between your
3 meeting with persons 1 and 3 and your interview in location 4?

4 I'll repeat that last part which is what I'm interested in: Was it three-and-a-half
5 weeks from your meeting with persons 1 and 3 to the phone call from the investigator,
6 or was it three-and-a-half weeks between your meeting and the interview at location
7 4?

8 A. After the meeting with persons number 1 and 3, I spent three-and-a-half weeks before
9 my meeting with the investigators at location 4.

10 Q. All right. And one thing you seem to be fairly certain about is this period that it was a
11 period of three-and-a-half weeks. You've repeated that several times. Are you confident
12 that it was in fact three-and-a-half weeks between your meeting and the interview; is that
13 right?

14 A. I think that is how it is. I said that because I was estimating the time between my
15 meeting with these people and the time at which I went to location 4. I think it was
16 approximately three-and-a-half weeks because it was not up a month.

17 Q. All right. Well, I'm going to put it to you, Mr Witness, that three-and-a-half weeks
18 prior to your meeting with the investigators at location 4, on 20 November, it would have
19 been impossible for you to be meeting with number 3 in Eldoret. Any comment before I
20 proceed?

21 PRESIDING JUDGE EBOE-OSUJI: That sounds like an argument.

22 MR STEYNBERG: Your Honours, I intend to -- perhaps, I can ask to go into private session
23 and then I'll put it more directly.

24 PRESIDING JUDGE EBOE-OSUJI: Private session.

25 (Private session at 12.17 a.m.) * Reclassified as Open session

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1 THE COURT OFFICER: We are in private session, Mr President.

2 MR STEYNBERG:

3 Q. So let me be more direct, Mr Witness. I put it to you that three-and-a-half weeks prior
4 to your statement on the 20th, person number 3 was not in Eldoret. In fact, he was not even
5 in Kenya. Any comment?

6 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, you have to turn off your microphone
7 when you're conferring with your colleagues.

8 MR STEYNBERG: I beg your pardon, your Honour.

9 MR HOOPER: I'm wondering if my friend could also assist us as to more specific as to
10 the - we're in private - as to the (Redacted) dates. (Redacted)

11 MR STEYNBERG: Well, your Honours, I wonder if it's appropriate to make these sort of
12 comments --

13 PRESIDING JUDGE EBOE-OSUJI: Yes.

14 MR STEYNBERG: -- in the presence of the witness.

15 MR HOOPER: Well, it's appropriate for you to make -- for the Prosecution to make this
16 comment to the witness, because unless we've got something concrete, with these vague
17 questions, divided questions, confusing for me to understand, I'm unclear how clear it is to
18 the witness. With respect, wouldn't it be easier to ask very direct questions, giving very
19 specific dates to work around, so that he can approach the matter in fairness to him?

20 MR STEYNBERG: Your Honours, I will give the basis of my questions to my learned friend
21 and he can have -- (Redacted)

22 has been disclosed to him a long time ago, but please I would invite --

23 MR HOOPER: Well, wouldn't it be fairer, your Honour, for this -- for the Prosecution to put
24 specific dates to the witness and say, "(Redacted)

25 How does that fit in with your recollection of your dates when you give your statement on

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1 such and such a day?"

2 MR STEYNBERG: Your Honour, I object to this being conducted in the presence of the
3 witness. I really do.

4 PRESIDING JUDGE EBOE-OSUJI: All right.

5 MR STEYNBERG: Your Honours have granted me permission to cross-examine the witness
6 and I'm doing that in the manner of normal cross-examination where one commits a witness
7 to a version and then confronts him with facts, and for my learned friend to stand up and
8 anticipate the object of my cross-examination is, in my respectful submission, not proper and I
9 object to that.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, proceed.

11 MR STEYNBERG:

12 Q. Well, Mr Witness, the cat is rather out the bag now and so let me go straight to the point.
13 I put to you that three-and-a-half weeks before your interview on 20 November brings us
14 back to 27 October 2012, and I put to you that Mr -- person number 3 (Redacted)
15 (Redacted) so he could not have been
16 meeting you in Eldoret. What do you say to that?

17 A. The answers that I have just given you are true. I may -- I met that person on that date.
18 We met in the hotel where number 1 called me and I took the vehicle to go and meet with
19 number 3. So, as far as I'm concerned, there is no error. The answers that I have given you
20 are correct.

21 I'm saying this because I did not know the investigators. It is this person who
22 introduced me to them. When we wrote a report, it was in his name. We made that
23 statement. It was (Redacted) who told me. He told me this, "Let us send the
24 report and wait for the response." He told me that they had just discussed with that
25 person and he would call me on the phone. My telephone number was in the report.

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1 After that, that person called me on the phone and that is how come I went to location

2 4.

3 Q. Mr Witness, the Prosecution does not dispute that person number 3 provided us with
4 your contact details, but we do dispute that any meeting of the sort you've mentioned, the
5 three-hour meeting, took place and certainly that it took place at the time you say it took place.
6 Do you understand?

7 A. I do not know how to answer you because what I have just said is true. So I don't
8 know how I can answer you now.

9 Q. Is it not correct, sir, that you have been -- well, has anybody persuaded you --

10 A. This is my position --

11 Q. Mr Witness, I'd ask that you please confine yourself to answering the questions. If you
12 need to give further explanation, you can let the Chamber know. Has anybody asked you to
13 come to court and implicate persons 1 and 3 in inducing you to provide false evidence before
14 this Court?

15 A. No, when I came here it was to tell the Chamber the truth.

16 Q. I see. Now you've told us that your motivation for giving the false evidence against the
17 accused was in order to get -- was in order to be accepted as a witness and to get benefits from
18 the ICC; isn't that right?

19 A. Yes.

20 Q. And after you give -- gave your statements, you were in fact accepted as an ICC witness;
21 isn't that right?

22 A. Yes.

23 Q. Why is it that you stopped co-operating with the ICC? Why is it that we had to
24 summons you here then to become a witness?

25 A. When I went to location 4, after I arrived the statement was not -- my statement was not

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1 consistent with what I thought because I said certain things that did not correspond to the
2 truth. That is how I started to withdraw. I realised that I was not convinced and this was
3 not pleasant to me because what I had said was false. I realised that these people had misled
4 me and I needed to withdraw from the trial in order to be at ease.

5 (Redacted)

6 (Redacted)

7 because of that testimony. From that time on, up 'til today, I have never slept in
8 peace and it is for that reason that I decided to come and tell the truth here.

9 According to me, that is the only thing that would set me free and give me the joy of
10 living once more.

11 Q. Now, from what you told us, you knew from the outset that you were going to go and
12 tell lies and you were going to do so in order to get money. So what changed?

13 A. The difference is that the lies that I told there did not give me any joy anymore, so I
14 decided that it was no longer necessary to collaborate with the ICC in exchange for money,
15 whereas I had been telling lies. Later on I realised that those people wanted to use me in a
16 bad way and I did not agree with them.

17 MS BUISMAN: Excuse me, Mr President. Is there any reason this needs to be in private
18 because it's important information?

19 MR STEYNBERG: No, your Honours. I'm sorry, I forgot we were in private session.

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

21 (Open session at 12.30 p.m.)

22 THE COURT OFFICER: We are in open session, Mr President.

23 MR STEYNBERG:

24 Q. So if I understand your explanation, you said that you decided to come and tell the truth
25 here and that is the only thing that would set you free and give you the joy of living once

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1 more. Do I understand that you wanted to come and testify and tell the truth?

2 A. Yes, I came here to tell the truth.

3 Q. My question is you wanted to come and tell the truth before the Court; is that right?

4 A. I have just answered. I've just answered you, saying that I came here to testify and
5 give a testimony based on the truth.

6 Q. But the point, Mr Witness, is that you only came here because you were summonsed to
7 come here; isn't that right? Up until that time you weren't prepared to come and testify; do
8 you agree?

9 A. Yes, that is true, but before I had provided an affidavit and I don't know whether you
10 received it or whether you read it?

11 Q. No, we've never seen and we've never received or read any affidavit by you other than
12 the one -- other than the statement that you gave to the OTP. Tell us about this affidavit,
13 please.

14 A. This affidavit was written -- I wrote it last year. I went to Eldoret where I met a lawyer,
15 I told him what my position was and I told him that I wanted my case to be set aside so that I
16 no longer be required to testify before the ICC. Since then I have not seen that lawyer again.
17 In any event, I recently was summonsed to appear before the Court and that is why I felt that
18 I had to -- to testify because I needed to explain myself and given that I had already submitted
19 an affidavit.

20 Q. This (Redacted) was his name perhaps Paul Gicheru?

21 A. No. No, not that one.

22 Q. What was the name of this lawyer then?

23 A. (Redacted)

24 (Redacted)

25 Q. (Redacted)

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1 A. (Redacted)

2 Q. (Redacted)

3 A. (Redacted)

4 (Redacted)

5 Q. (Redacted)

6 A. (Redacted)

7 (Redacted)

8 Q. And was the purpose of deposing to this affidavit for the affidavit to be sent to the ICC,
9 to the Prosecution?

10 A. (Redacted)

11 Q. (Redacted)

12 A. All I told him is that I wanted to withdraw from this case. I did not tell him all my
13 secrets because that would have been self-incriminating. I simply asked him to send a letter
14 to the ICC on my behalf informing the ICC that I was going to withdraw from the case and
15 recant everything that I had said, but I didn't provide him with all the details.

16 Q. So you didn't tell him, for instance, about the three-hour meeting with persons 1 and 3
17 at which they asked you to lie to the OTP? You didn't tell him that?

18 A. No, I did not tell him everything. I simply told him that I wanted to withdraw my
19 statement from the case before the ICC.

20 Q. And since you made your statement in November 2012, is it correct that you've had a
21 number of contacts and conversations with members of the Prosecution; is that right?

22 A. Please kindly -- kindly repeat your question.

23 Q. Do you agree that since you made your statement at location 4, I'm talking about your
24 first statement in November 2012 to the OTP, between that date and now you've had a
25 number of contacts and conversations with members of the OTP, Prosecution; that's right,

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1 isn't it?

2 A. Yes, we have had some contacts on several occasions.

3 Q. And in any of those contacts did you admit that your initial statement was lies? Did
4 you -- did you ever admit that to the Prosecution?

5 A. No, I did not.

6 Q. In fact, isn't it correct that the first time you've mentioned it to anybody is when you
7 gave evidence here before the Court nearly two years later; isn't that right?

8 A. Sorry, I did not understand your question.

9 Q. Isn't it true that the first time you've mentioned that your -- you've told anyone that
10 your first statement was false and about this meeting with persons 1 and 3 was when you
11 gave evidence before this Court; that's right, isn't it?

12 A. What I have said before this Chamber is that when I went to location number 4, I
13 indicated that some parts of my statement were true and some were false.

14 Q. But that you -- you only indicated that for the first time here in Court, nearly two years
15 later, that's what I'm driving at; isn't that true?

16 A. I did not mention this to anyone because those who put questions to me did not ask me
17 any questions in that connection and in connection to this case, that is why I went to see the
18 lawyer to write or draft this affidavit which to my mind was the best way to proceed. Some
19 people had called me on the phone and I felt that this had no connection with the ICC which
20 is based in The Hague.

21 Q. Who are these people you're talking about that called you on the phone?

22 A. Staff of the ICC from the Witness Protection Unit.

23 Q. You understand that the Victims and Witness Protection Unit is independent from the
24 Prosecution; is that right?

25 A. I -- I did not know that. When they called me, they introduced themselves as staff of

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1 the ICC. You see, when somebody calls you from far away, you are not able to know
2 everything about that person. That is how they introduced themselves to me.

3 Q. All right. You said earlier that you were having trouble sleeping, you could get no
4 sleep and you could get no peace. Did you receive any threats as a result of your being an
5 ICC witness?

6 A. Let me say the following: In this case -- in fact, this case has made some people happy
7 and has made others unhappy. It is not a small case, as you know. Many people have
8 suffered because of it and, in particular, some of us, (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted) with the manner in which things are going. So this
13 is not something that necessarily gives one joy.

14 Q. All right. Now, please focus on the question, sir. I'm not talking about people in
15 general, I'm speaking about you in particular. Have you received any threats in connection
16 with your being an ICC witness?

17 A. Yes.

18 Q. And is it correct that you reported those threats, or at least some of them, to members of
19 the Prosecution? That's right, isn't it?

20 A. Yes. I went (Redacted) I also went to the police office, I saw the police boss, and
21 at all those offices I filed a report.

22 Q. All right. Again, listen to the question. I'm talking about reports to the Prosecution,
23 to the Prosecution, the investigators at the ICC. You reported it to us too, didn't you?

24 A. Yes.

25 Q. And I'd just like to read something out to you and ask you to confirm if this is, in fact,

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- 1 the report that you gave to one of our investigators last year, in fact, on 24 June.
- 2 And for the parties the reference is KEN-OTP-0117-0905 and it's at tab 9.
- 3 Let me just read it out. Listen carefully, please, to the translation. (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 (Redacted)
- 7 (Redacted)
- 8 PRESIDING JUDGE EBOE-OSUJI: Can you hold it there. Hold it there. Private session.
- 9 (Private session at 12.52 p.m.) * Reclassified as Open session
- 10 THE COURT OFFICER: We are in private session, Mr President.
- 11 MR STEYNBERG: Apologies, your Honours. I should have done that in private session.
- 12 PRESIDING JUDGE EBOE-OSUJI: Yes. And also there's -- I'm sure your office is also
- 13 working on a number of other material that will need to be removed from the delayed
- 14 broadcast, (Redacted)
- 15 (Redacted)
- 16 (Redacted) There are other things as well. Yes, there has been a number of
- 17 information that should not have been in public, but the court officer will -- and the OTP
- 18 should look for those and clean them up for delayed broadcast.
- 19 MR STEYNBERG: As the Court pleases.
- 20 Q. Mr Witness, we're in private session. I'll continue from the second line. On the date I
- 21 mentioned -- well, in fact, I can give you the date now (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 MR HOOPER: Just one -- one matter. In the file do we have the redacted or the unredacted?
- 25 In the file I've got a redacted version, but there is an unredacted.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Mine are redacted as well.
- 2 MR STEYNBERG: Sorry, your Honours. I have an unredacted one in my file, but it seems
- 3 that was a clerical error. I read it assuming that I had the same that the Chamber and the
- 4 parties had, which is as it should be.
- 5 MS BUISMAN: Just for the record, ours is also redacted.
- 6 MR STEYNBERG: If the Chamber will give me a minute, I will call up the redacted version.
- 7 Your Honours, I'm informed that the redactions do not affect the portion that I will be
- 8 referring to. It's just a redaction to a member of our field staff and then some internal work
- 9 product at the end.
- 10 Q. So let me continue then. (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 (Redacted)
- 14 (Redacted)
- 15 Now, a few questions. Firstly, is it correct that (Redacted) and (Redacted)
- 16 is the same person?
- 17 A. (No audible response)
- 18 PRESIDING JUDGE EBOE-OSUJI: Witness, did you hear the question?
- 19 THE WITNESS: (Speaks English) No, Mr President.
- 20 MR STEYNBERG:
- 21 Q. I'm not sure why, but let me repeat the question.
- 22 Is it correct that (Redacted) is also known as (Redacted)? Is that right?
- 23 A. No. I don't know. I don't know that name -- or those names.
- 24 Q. Do you not know the name (Redacted) or (Redacted) is that what
- 25 you're saying?

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- 1 A. I do not know those names. I do not know that name.
- 2 Q. Which name do you not know?
- 3 A. Well, those names that you have just read out.
- 4 Q. Let us be perfectly clear. I've read you two names: One, (Redacted) two,
- 5 (Redacted) Are you saying you do not know either of those two names?
- 6 A. I do not know those names.
- 7 Q. You see -- sorry, you wanted to add something?
- 8 A. You have just mentioned two names. I do not know any of those names and I do not
- 9 understand anything.
- 10 Q. You're a hundred per cent sure you don't know the name (Redacted)
- 11 (Redacted)?
- 12 A. I know someone whose name is (Redacted) but you have put two names before
- 13 me. What am I supposed to understand? This doesn't make things easy for me.
- 14 Q. Mr Witness, I put to you that there was no possible confusion. I gave you two names --
- 15 MS BUISMAN: Well, we object to that. We are very confused on this side of the answer.
- 16 That's a really unfair comment and unnecessary.
- 17 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, you might want to just concentrate on the
- 18 question you have to put to the witness. And we have not overruled the question in
- 19 substance, so do not provoke objections by arguing.
- 20 MR HOOPER: Can I just say, can we be clear about the spelling. Is it (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, continue.
- 24 MR STEYNBERG: Yes.
- 25 Q. As you -- let me ask you again: Do you know either a (Redacted)

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1 (Redacted) or a (Redacted)? Do you know that person?

2 A. I know a person who is known as (Redacted). If you are referring to

3 (Redacted) then I know that person.

4 Q. I see. So is the fact that I spelt it with an (Redacted) instead of an (Redacted), is that what confused you?

5 PRESIDING JUDGE EBOE-OSUJI: Do you really need that question?

6 MR STEYNBERG: No, your Honour. Perhaps for argument.

7 Q. Final question on this point: Is it not correct that (Redacted) is the same person

8 as (Redacted)? Did you not tell that to one of the OTP investigators?

9 A. Mr Prosecutor, you are confusing me here.

10 MR HOOPER: Those were two questions wrapped up and compounded. If they're divided

11 it might be clearer, with respect.

12 MR STEYNBERG: Your Honour, I hoped I could wrap these questions up quickly, but --

13 PRESIDING JUDGE EBOE-OSUJI: I wanted you to wrap it up quickly and that's why we

14 have -- we did not adjourn on the hour.

15 MR STEYNBERG: All right.

16 Q. Mr Witness, I'm going to move on then and just put to you one or two final questions.

17 Do you know a person called Meshack Yebei?

18 PRESIDING JUDGE EBOE-OSUJI: All right. Let's do this, Mr Steynberg. When I say, "I

19 wanted you to wrap it up," it's not for you to cut out if you have -- it's on (Redacted)

20 or (Redacted) Once you're done with that matter - that person - then we will have

21 to adjourn. Are you done with him?

22 MR STEYNBERG: Your Honour, then let me just ask one question.

23 Q. Did -- did this incident happen that (Redacted)

24 (Redacted)

25 (Redacted) Did that

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1 happen?

2 A. There was a person (Redacted) and the name of that person is at number 11.

3 Otherwise, I do not understand the names that the Prosecutor is presenting to me. He is
4 confusing me. The person at number 11 (Redacted) and said what the Prosecutor has just
5 said.

6 MR STEYNBERG: Thank you, your Honours. We can leave it there then.

7 PRESIDING JUDGE EBOE-OSUJI: We will leave it at that and we will adjourn -- rise for the
8 luncheon break.

9 Witness, the Court will now take a break, and so will you, and we will meet again in
10 one-and-a-half hour's time.

11 The Court will rise.

12 THE COURT USHER: All rise.

13 (Recess taken at 1.07 p.m.)

14 (Upon resuming in open session at 2.38 p.m.)

15 THE COURT USHER: All rise.

16 Please be seated.

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

18 Let us go into private session for a few things.

19 MS BUISMAN: Mr President, I just wanted to place on the record that we are joined
20 by Rong Xin Choy, that could be in public, and I also had another observation but
21 maybe you wanted to go in private first?

22 (Private session at 2.39 p.m.) * Reclassified as Open session

23 THE COURT OFFICER: We are in private session, Mr President.

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

25 (Redacted)

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1 (Redacted)

2 On the second matter relating to that witness, Mr Steynberg, you were to speak to us.

3 We forgot to take up that matter at 11.30 on the transcript situation.

4 MR STEYNBERG: Yes, thank you, your Honours.

5 I have consulted with my colleague, who advises me that it would be possible to get

6 the summary together by the end of the day. However, she raised a number of

7 concerns including the fact that this is -- will be obviously quite a hasty last-minute

8 exercise that, although it may cover the aspects which the Prosecution might seek to

9 lead, we can't include also the aspects which the Defence might seek to question the

10 witness on and aspects of the transcript which might be covered by that.

11 Additionally, we would be most reluctant to commit ourselves, especially in such a

12 hasty manner, to not going beyond the areas of -- of the summary that might be

13 compiled.

14 We are also advised that it seems that the duty counsel for the witness will not be

15 ready to commence tomorrow. My understanding is that duty counsel will be

16 coming in on the weekend to complete his or her preparations, and it seems that it

17 may well be that certainly by Monday the witness will have had adequate time to

18 complete the read-through.

19 We are also a little concerned about the status of the summary. I mean, it's not

20 confirmed by the witness, it's not signed by the witness. It's simply the Prosecution's

21 understanding of the important areas. So --

22 PRESIDING JUDGE EBOE-OSUJI: It has -- it necessarily has to be that way in the

23 circumstances. You must have an idea of the specific material you wish to canvass

24 with this witness in a manner that is not cumulative or repetitive of other material we

25 have in the case, including admissions. So it has to be from your perspective what

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1 you seek to cover with the witness on the basis of the transcript you have.

2 And it should be possible, should it not, to confine -- to point the witness to those
3 areas of the transcript without prejudice of course to the Defence's -- the possibility of
4 Defence going to other areas, but at least from your perspective to point the witness to
5 the portions of the transcript you are interested in so that the witness can concentrate
6 on those for your purposes at least.

7 MR STEYNBERG: Your Honours, on the understanding that it is pointing the
8 witness towards the most important aspects of the statement, yes, it can be done.
9 Certainly given sufficient notice it could be done in advance. This has obviously
10 come at the 11th hour and has its own pressures, but certainly we can do our best.

11 MR KHAN: Mr President, if it assists, as a general proposition I would be usually
12 very cautious and reluctant to adopt such a procedure because it, on one view, it
13 looks like cherry-picking things out of context but, your Honour, I understand the
14 interests of the Bench to have such a document really to assist the witness and to
15 facilitate proceedings.

16 Your Honour, of course we must accept that both parties, including the Prosecution,
17 won't be limited to that document. It doesn't have an evidential status as such and
18 they would be at leave to go to the whole of the transcript, if leave is given to do that,
19 but what I would ask is the Bench to consider, Ms Zago of course is an experienced
20 lawyer and she is also an officer of the Court, what we say is the proper way of doing
21 it, rather than just getting bits that are favourable to the Prosecution, the Prosecution
22 can be entrusted to provide a fair summary document that is a fair reflection of the
23 evidence, so when the witness reads it he won't be focusing only on portions of the
24 testimony that may not be reflective of everything that he said.

25 Your Honours, that may meet the concerns of the proper administration of justice

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1 because then the witness would have an overview of what has been said. This of
2 course is one of the difficulties when transcripts are taken and the Prosecution don't
3 prepare a statement in those proceedings. I'm not saying it's always the wrong thing
4 to do. There's a lot of benefit in having a transcript, but, your Honour, it shouldn't
5 just be the areas of interest to the Prosecution and leaving aside completely areas that
6 may be of interest to the Defence. As officers of the Court, the Prosecution can put a
7 composite document synthesising both aspects. Of course it may not be perfect, of
8 course they'll do their best efforts, but at least it will be perhaps of some assistance on
9 this particular occasion.

10 As a general proposition, I do have concerns about the approach, but for the
11 particular witness, your Honours, I'd ask that some regard be had to what the
12 Defence has just stated.

13 PRESIDING JUDGE EBOE-OSUJI: First of all, let us cut the feed to Nairobi.
14 (Redacted) Yes.

15 MR STEYNBERG: Thank you, your Honours. Yes, we will communicate that as
16 soon as possible.

17 PRESIDING JUDGE EBOE-OSUJI: Yes.

18 Now, Mr Khan, the inclination to have a Prosecutor focus on the areas of interest is
19 not about cherry-picking, it's about the dictates of professionalism, that also we
20 recommend that they will use that professionalism to compile a fair summary of the
21 testimony, also includes that when they point out the areas of interest to them other
22 areas that pertain to that would also have to come in. That is the intent, not to have
23 the Prosecutor only highlight the portions of the testimony that incriminate.

24 MR KHAN: I'm grateful.

25 MS BUISMAN: Mr President, we have no objection to this way of procedure. I just

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1 wanted to -- I was wondering if the duty counsel is not available tomorrow and if this
2 witness has to go through a lot of evidence and he cannot start tomorrow, could we
3 perhaps start with at least the witness introduction and protective measures. I don't
4 believe that we need a duty counsel for that and that's how we can speed up matters.
5 MR STEYNBERG: Your Honours, I've certainly no objection to that, but if I may just
6 respond to my learned friend, Mr Khan's suggestion, this unfortunately rather raises
7 the spectre that I was fearing about this whole process that it will inevitably lead to
8 debate about what is a fair summary and what is not a fair summary, and we
9 obviously can't anticipate everything which might be relevant to the Defence, so
10 perhaps a better way of doing it would be for the Prosecution to indicate the areas it's
11 interested in, the Defence can indicate the areas that they are interested in and then
12 that can be combined because I can see that whatever I put together, or my team puts
13 together, it will inevitably be the subject of debate and criticism from the Defence.
14 MR KHAN: Your Honours, I decline that invitation. Of course, the Prosecution
15 have statutory obligations when it comes to an assessment of material likely to be of
16 relevance to the preparation of the Defence, and other similar assessments are made
17 routinely, but I'm not going to start highlighting in advance of examination-in-chief
18 the areas that are of interest to me in cross-examination. I'd ask -- the Prosecution, as
19 I've said, there's a Code of Conduct. Ms Zago is an experienced counsel. I am not
20 saying it should be an exercise in perfection, I'm not going to hold them to an
21 unrealistic standard, it is an effort, an initiative of the Bench effectively, to help move
22 proceedings forward in a way that advances and does not hinder the proper
23 determination and assessment of the witness.
24 All I'm saying is that in that the Prosecution use their best efforts to put forward
25 what's reflective, and your Honour has spoken about what that would entail. We

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1 are not asking for perfection, just a fair reflection of what is actually said.

2 PRESIDING JUDGE EBOE-OSUJI: All right. Let's leave it at that.

3 Ms Buisman?

4 MS BUISMAN: I think we share these observations to the extent that we also do not
5 think it is a good idea for us to indicate the portions that are relevant, but we are quite
6 happy for the Prosecution to come -- make their best efforts to come up with a
7 summary.

8 (Trial Chamber confers)

9 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, the document -- I think the ERN
10 number should be, KEN-OTP-0072-0397. Is this a statement of that witness?

11 MR STEYNBERG: Your Honour, I don't have the document to hand, but my
12 colleague will check.

13 PRESIDING JUDGE EBOE-OSUJI: You can -- somebody can hand up this to
14 Mr Steynberg and he will return it later.

15 MR STEYNBERG: Your Honours, I have established from Ms Zago that the
16 statement that the witness made does cover many of the areas which - yes, this is his
17 statement - which the Prosecution would intend to cover. There were -- there was
18 greater detail elicited on many of those topics in the --

19 PRESIDING JUDGE EBOE-OSUJI: Interview.

20 MR STEYNBERG: -- interview and there were additional topics that were -- that
21 were traversed as well.

22 PRESIDING JUDGE EBOE-OSUJI: What's of interest to me, the reason I drew your
23 attention to this document 0397 is I'm looking at page 0420 of that document. There
24 is an interpreter's certificate of somebody who said, "I have orally translated the
25 above statement from the English language to the Swahili language in the presence

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1 of ..." somebody mentioned "... who appeared to have heard and understood my
2 translation of this statement." And that would be that this witness needed to have
3 the 23 or 21 pages all told, including the frontest piece and the last -- and the
4 concluding material, 25 pages translated to him. Would he -- would we expect him
5 to be able to deal with 800 pages of transcript between now and when he starts on
6 Monday without something else being done to make the exercise more manageable?
7 MR STEYNBERG: Firstly, your Honours, if I can just indicate that those 800 pages
8 include both English and Swahili, so half of that document presumably the witness
9 will not be reading. He'll only be reading the Swahili portions, which should make
10 things go considerably faster.
11 Secondly, I'm informed that as of yesterday he had already done almost half the
12 statement, 300 pages. By the end of today presumably he will be substantially
13 further than that.
14 PRESIDING JUDGE EBOE-OSUJI: But you will not be asking him questions -- you
15 will not be using the Kiswahili transcript I imagine when you are asking him
16 questions.
17 MR STEYNBERG: I certainly won't be, your Honour, but presumably since he
18 required an interpreter for the purposes of the interview, he will also require an
19 interpreter for the purposes of -- of his evidence. So whatever questions I ask him
20 will be translated.
21 PRESIDING JUDGE EBOE-OSUJI: So we will do it this way: The Chamber's
22 direction is that the Prosecutor is to produce a summary of anticipated testimony of
23 this witness and then within 140 -- point out about -- no more than 140 pages in the
24 transcript where those materials are covered, keeping in mind what was said
25 earlier - it is a direction from the Chamber - about where the Prosecutor points out

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1 incriminating information in the transcript which conversely also has other areas in
2 the transcript that may, in the opposite direction, deal with the same material in the
3 sense of exonerating or qualifies such incriminatory material, that too has to be part of
4 the material to be pointed out to the witness within the pages indicated.

5 So it's for you to choose the best points you want to make out of that transcript and
6 we'll take it from there.

7 MR STEYNBERG: Your Honours, may I -- may I just, with respect, suggest a slight
8 modification? Because whatever summary we make is obviously going to be in
9 English, which will again have to be translated to the witness. What I would suggest
10 is that we would indicate the areas of interest, so it might be a meeting at point X on
11 point Y and then refer the witness to the relevant pages of the transcript that deal
12 with that meeting. So that way there's no spin, to use my learned friend's
13 phraseology, put on the evidence. We identify the topic and -- as one of importance
14 and the witness can then read verbatim what -- what he told us.

15 PRESIDING JUDGE EBOE-OSUJI: You can do it that way, but if -- try and -- the idea
16 is all that needs to come in within the 140 pages.

17 MR STEYNBERG: As the Court pleases.

18 Your Honour, we are still in private session. (Redacted)

19 (Redacted)

20 (Redacted)

21 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

22 MR STEYNBERG: (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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- 1 (Redacted)
- 2 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 3 (Redacted)
- 4 MR STEYNBERG: (Redacted)
- 5 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 6 (Redacted)
- 7 So let's go back to the business, scheduled business, of the afternoon.
- 8 Nairobi, you can now come back in.
- 9 THE COURT OFFICER (via video link): Yes, Mr President. We're back.
- 10 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 11 Witness, welcome back.
- 12 THE WITNESS: (Interpretation) Thank you.
- 13 MR KHAN: Mr President, I do apologise. Just a very minor matter. Page 77, line
- 14 15 it was Dr Buisman that was speaking, not myself, and at page 78, line 3, it was my
- 15 learned friend, Mr Steynberg, speaking, not Ms Buisman. Just for the record.
- 16 PRESIDING JUDGE EBOE-OSUJI: All right. Corrections need to be made.
- 17 We will go to open session.
- 18 (Open session at 2.59 p.m.)
- 19 THE COURT OFFICER: We are in open session, Mr President.
- 20 MR STEYNBERG: Thank you, your Honours.
- 21 Q. Now, Mr Witness, I hope not to keep you too much longer, but if you could
- 22 please listen carefully to the questions and answer just the question that I put to you
- 23 and try not to expand and go into other areas that you're not asked about, it will go
- 24 much faster, okay?
- 25 A. Very well.

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1 Q. Now, I'm just going to remind you -- well, I'm going to give you my
2 understanding of the evidence that you've given us regarding your meetings with
3 persons 1 and 3. Let me start by asking you one question. When person number 1
4 came to you and requested you to accompany her to meet person number 3, did you
5 know what the meeting was about or did you only find out when you arrived at that
6 meeting in Eldoret?

7 A. I received all that information when I got to the hotel.

8 Q. So it must have come as quite a surprise to you when you arrived at that
9 meeting and were suddenly asked to meet with the Prosecution and to give false
10 evidence to the Prosecution; is that right? Was it a surprise?

11 A. Yes, as I said earlier. I asked the question and I really stressed about the things
12 that were said to me, but in going by the answers that were given to me, there was
13 nothing serious in all of that.

14 Q. All right. Now, from what you've told us, during the course of this three-hour
15 meeting persons 1 and 3 explained to you what benefits you could receive; is that
16 right?

17 A. Yes.

18 Q. They explained to you what false evidence you should give to the Prosecution;
19 is that right?

20 A. That's right.

21 Q. They gave you details of a number of meetings that you were to talk about,
22 including dates, places, people who attended and events at that meeting; is that right?
23 At those meetings?

24 A. That's right.

25 Q. And you were also shown at least one, possibly more, sketches - sketch

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1 maps - which you had to commit to memory, correct?

2 A. They drew a sketch for me, but other information they gave me orally like
3 someone who sketches for you and gives you explanations in accordance with what
4 they want.

5 Q. And everything they told you during that three-hour meeting, is it correct that
6 you memorised all of that and repeated it later when you met the investigators?

7 A. That's right.

8 Q. And on the basis of that meeting, do I understand you correctly, you were able
9 to give a detailed statement to the investigators over a period of four days, a
10 statement which ran into 114 paragraphs; is that your evidence?

11 A. The statement that I gave (Redacted)? I beg your pardon.

12 Q. Sorry, what were you going to say?

13 MR KIGEN-KATWA: I think the witness wants us to go to private session,
14 Mr President.

15 PRESIDING JUDGE EBOE-OSUJI: Private session.

16 (Private session at 3.06 p.m.) * Reclassified as Open session

17 THE COURT OFFICER: We are in private session, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg?

19 MR STEYNBERG: Yes, your Honours. I think it was the witness's inadvertent
20 reference to (Redacted) I have asked for it to be redacted.

21 Q. Sorry, we're in private session. You can continue, Mr Witness.

22 A. I wanted to say this: What we talked about during three hours was in actual
23 fact part of the things that I knew, some of the things I knew, it didn't take me all that
24 time if it were things that I knew since I knew the places. I was not a foreigner in
25 that area. However, when it came to information from person number 12, I didn't

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1 have enough information.

2 And the persons that I mentioned, those are names that were given to me. All that
3 information that I was given couldn't have taken all that time. They told me
4 everything that person number 4 was going to ask me, the questions he was going to
5 ask me.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, I would like to take us out to the
7 public session.

8 MR STEYNBERG: Can I just, your Honours, clarify?

9 Q. Who are you referring to when you say person number 4 was going to ask you?
10 Person number 4 on the PIS is (Redacted)

11 A. I'm sorry, I didn't talk about number 4. I was talking about person number 12.
12 The sketch I made, in the sketch I didn't know where to put person number 12, and I
13 just explained that before I got to place number 4 I was told -- I was told everything.
14 And when I was interviewed it was just the residence of person number 12 that I
15 didn't know, but all other places, those were places I knew since I lived in that area,
16 except the residence of person number 12, because the other places I had gone to I had
17 gone by using shortcuts. That's why they gave me a lot more explanations. I
18 would go to those places often. That's what I said.

19 MR STEYNBERG: Public session, please, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Witness, we will go back to public session now
21 and take care to not disclose the -- any identifying information to you. Please take
22 care to avoid that. Also I will urge you to listen carefully to the question and answer
23 just that question in as few a number of words as possible and then stop for the next
24 question.

25 All right? Just answer questions as briefly as possible and then wait, and stop and

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1 wait for Mr Steynberg to ask you another.

2 THE WITNESS: (Interpretation) Very well.

3 PRESIDING JUDGE EBOE-OSUJI: Public session.

4 (Open session at 3.12 p.m.)

5 THE COURT OFFICER: We are in open session, Mr President.

6 MR STEYNBERG:

7 Q. But, Mr Witness, the places you speak about in your statement are not all places
8 you knew about. You told this Court, did you not, you have never been to the house
9 of Farouk Kibet; isn't that so?

10 A. That's right.

11 Q. And it's not just places, but it's events. You've given a detailed description of
12 the meetings and events which you say in your statement took place at the compound
13 of person number 13 after the election results, but you say you weren't there. So all
14 of that detail you had to memorise; isn't that correct?

15 A. I beg your pardon about the fact that I gave -- that I mentioned number -- the
16 number 13, but on the sheet of paper I have here I don't see number 13 so I can't
17 answer you. Could you give me the piece of paper that I had yesterday?

18 MR STEYNBERG: Yes, Madam Court Officer, that name was written in in
19 manuscript. Does he not have the same paper as yesterday?

20 THE COURT OFFICER (via video link): Mr Steynberg, the paper from yesterday
21 was shredded at the end of the hearing so we don't have that name.

22 PRESIDING JUDGE EBOE-OSUJI: All right. Why don't we go to paragraph 70 of
23 the statement, or even paragraph 61 I think, 61 does it, beginning at paragraph 61.

24 THE COURT OFFICER (via video link): Paragraph 61 is presented to the witness.

25 MR STEYNBERG: Thank you, your Honours.

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1 Q. Above paragraph 61 there's a heading, "Second day at ..." and then a name and
2 the word "... compound." Can you please write that name in as person number 13?

3 A. Thank you.

4 Q. And once you've done that, can you also add under "Locations" location
5 number 5 (Redacted)? All right. Let me know when you're finished please.

6 A. I've finished.

7 Q. All right. So while you have your statement, Mr Witness, look from paragraph
8 61, on page 11, the whole of page 12, the whole of page 13, 14, 15, 16, 17, 18 and half of
9 page 19, that's approximately 40 paragraphs -- 50 paragraphs. You had to -- you had
10 to memorise all of that, correct?

11 A. Yes.

12 Q. All right.

13 MR HOOPER: Can I just -- I think there's going to have to be a redaction.

14 MR STEYNBERG: Yes, we're on it. Thank you.

15 MR HOOPER: 21.

16 MR STEYNBERG: All right. Now, your Honours, perhaps -- no, we are in open
17 session. I can't do that now.

18 Q. I asked you earlier in a different context about a lawyer called Paul Gicheru.
19 Do you know such a lawyer?

20 A. I don't know him.

21 Q. Do you know a person by the name of Meshack Yebei, also known as Kimutai?

22 PRESIDING JUDGE EBOE-OSUJI: You can say "yes" or "no" for now.

23 THE WITNESS: (Interpretation) I know that name.

24 MR STEYNBERG: We'll get details perhaps in private session.

25 Q. Do you know a person by the name of Philip Bett, also known by the nickname

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1 Kipseng'erya, Kipseng'erya?

2 A. I don't know that person. I know the first person.

3 MR STEYNBERG: Your Honour, sorry, private session, please.

4 PRESIDING JUDGE EBOE-OSUJI: Private session.

5 (Private session at 3.20 p.m.) * Reclassified as Open session

6 THE COURT OFFICER: We are in private session, Mr President.

7 MR STEYNBERG:

8 Q. Tell us please, Mr Witness, how do you know Meshack Yebei?

9 A. (Redacted)

10 Q. And since you became a Prosecution witness, have you had any contact with

11 Mr Yebei?

12 A. Yes.

13 Q. And have you had any discussions about your being a Prosecution witness?

14 A. No.

15 Q. Is it not correct, sir, that -- well, did you not visit (Redacted)

16 (Redacted)? For my

17 learned friends this is KEN-OTP-0201-0178, at 0181.

18 MR HOOPER: And who is the source of that information, may I ask?

19 PRESIDING JUDGE EBOE-OSUJI: Let's not get into that now.

20 MR STEYNBERG: The source of the information is -- will be found at the ERN that

21 I've just given you.

22 Your Honour, my colleague has a different ERN. I will have to double-check it. It

23 could be 0102 and not 0201 as I said. I will double-check that.

24 PRESIDING JUDGE EBOE-OSUJI: Do we have a tab where it is?

25 MR STEYNBERG: No, your Honours. This comes from a different person and, in

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1 accordance with the Chamber's previous directions, I will not put the source to the
2 witness, but rather the proposition.

3 Q. So, Mr Witness, you heard the question. Did you visit (Redacted)
4 (Redacted)?

5 A. No.

6 Q. Have you ever --

7 MR HOOPER: May I say it surely is a fairness in those circumstances, if my friend,
8 as it were, is using that tactic of holding the paper in one hand and putting the matter
9 to the witness like that, that he at least nominates the source of that now rejected
10 allegation.

11 MR STEYNBERG: Well, your Honours, that's not the way we have proceeded thus
12 far. I am not holding any piece of paper in my hand. I am -- I am, for the benefit of
13 my learned friends, indicating the source, but I am questioning the witness on that
14 possibility, he's denied it and I'm prepared to move on.

15 PRESIDING JUDGE EBOE-OSUJI: Proceed.

16 MR STEYNBERG: The correct ERN is, in fact, 0102-0178, at 0181. I'm grateful to
17 my learned friend.

18 Q. Sir, were you ever offered money to withdraw as a Prosecution witness,
19 (Redacted)? And for my learned friends
20 0135-0200 at, amongst others, 0204. Is that correct, have you ever been offered
21 (Redacted) to withdraw as a witness?

22 A. No.

23 Q. Were you in fact paid (Redacted)?

24 A. No.

25 Q. You see, I put to you, Mr Witness, that in fact your version about being coached

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1 by persons 1 and 3 to give false evidence is a fabri -- is a fabrication and a recent
2 fabrication at that. Any comment?

3 A. I think I've said it several times and I'll repeat myself. We went to see people 1
4 and 3. We went to Eldoret. That's what I've said. I never invented anything and I
5 continue to state that it was person number 1 and number 3 who told me everything
6 that I was supposed to say.

7 Q. And, finally, I put it to you that it is as a result of improper interference that you
8 have recanted your version today and sought to implicate persons 1 and 3 in witness
9 tampering; isn't that right?

10 A. I confirm that if you look at the person who got me into that programme it is
11 that person. Just check your records.

12 MR STEYNBERG: Your Honour, that concludes the questions I have for this witness.

13 In fairness to the witness, I should just place on record that I've checked our records
14 in relation to his - we are in private session - his statement that he made an affidavit to
15 (Redacted)

16 (Redacted) It is also

17 contained as annex H of Prosecution filing 1120. The letter is dated (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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- 1 In fairness to the witness I thought I should place that on record.
- 2 PRESIDING JUDGE EBOE-OSUJI: You will give us copies of that material.
- 3 MR HOOPER: Just --
- 4 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 5 (Redacted)?
- 6 MR STEYNBERG: (Redacted). And, your Honours, I can make
- 7 copies, but the document is on the record, as I say, as an annex to Prosecution filing
- 8 1120, dated 29 November 2013.
- 9 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you were rising?
- 10 MR HOOPER: Your Honour, yes. It's just -- if we could confirm the spelling
- 11 because I think they are different -- different names.
- 12 MR STEYNBERG: Yes, I have spelt it, your Honours. The last spelling was given
- 13 as (Redacted) when the witness was testifying. This (Redacted) It may be
- 14 (Redacted) it may not, I don't know, but it seems that the coincidence is
- 15 sufficient that I should bring it to the Chamber's attention.
- 16 One last matter then before I wrap up is there are still -- there's still the outstanding
- 17 issue of the witness statement, which I will seek to admit, and the three remaining
- 18 annexes.
- 19 The witness statement, your Honour, is KEN-OTP-0087-0031.
- 20 PRESIDING JUDGE EBOE-OSUJI: Can we do that in public session?
- 21 MR STEYNBERG: We can, your Honours.
- 22 PRESIDING JUDGE EBOE-OSUJI: Public session.
- 23 (Open session at 3.31 p.m.)
- 24 THE COURT OFFICER: We are in open session, Mr President.
- 25 MR STEYNBERG: I'm grateful, your Honour.

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1 So the final matter then is the admission of the outstanding exhibits, the first being the
2 prior statement of this witness from 20-to-23 November 2012, KEN-OTP-0087-0031.

3 Your Honours, as with the previous two witnesses, the Prosecution requests
4 admission at this stage only for the purposes of impeachment. The Prosecution once
5 again gives notice to the Defence that it will seek subsequently to have the statement
6 admitted for the truth of its contents.

7 MR KHAN: Mr President, can I just say, because I think we have been beating
8 around the bush for quite a while, I would ask that perhaps the Bench schedule
9 sooner rather than later this issue of Rule 68. The Prosecution have raised it a
10 number of times. It seems a lot of questions are predicated and are said to be
11 relevant only because of their contention that Rule 68 is applicable, notwithstanding
12 the express words that it is not retroactive. Your Honours --

13 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let's not do that now. Let's just finish
14 with this.

15 MR KHAN: Your Honour, I wasn't seeking to argue it now, but perhaps the Bench
16 can consider --

17 PRESIDING JUDGE EBOE-OSUJI: I know.

18 MR KHAN: I'm grateful.

19 PRESIDING JUDGE EBOE-OSUJI: Yes.

20 For now the Prosecution is seeking to tender the statement into evidence for now, not
21 for the truth of the content but for the indicated purpose of impeachment, and when
22 the Prosecution wishes to change the status of these materials to something else the
23 Prosecution will let us know and the Defence will have their opportunity to deal with
24 the matter at that time.

25 Mr Hooper?

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1 MR HOOPER: No objection.

2 MS BUISMAN: On our part we object because if it's for the purpose of impeachment
3 we consider the transcript sufficient. All that was -- relevant material to impeach the
4 witness should have been used to impeach this witness and anything that hasn't been
5 used should not be tendered for the purpose of impeachment. That is our
6 submission.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you.

8 Any reply to that?

9 MR STEYNBERG: No response, other than to refer to the previous submissions on
10 that point.

11 PRESIDING JUDGE EBOE-OSUJI: The document will be admitted as the next
12 Prosecution exhibit.

13 THE COURT OFFICER: Mr President, item KEN-OTP-0087-0031, fifth redacted
14 version, confidential document, will be attributed reference EVD-T-OTP-00174,
15 exhibit number 174.

16 MR STEYNBERG: I'm grateful, your Honours. And I do confirm I omitted to say
17 that it should be the R05, fifth redacted version.

18 Your Honours, then the annexes: Annex 1, KEN-OTP-0087-0054, also RO5, I ask that
19 to be admitted for the same purpose and for the same reasons.

20 PRESIDING JUDGE EBOE-OSUJI: Defence?

21 MR HOOPER: No objection.

22 MS BUISMAN: No objection.

23 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next Prosecution exhibit.

24 THE COURT OFFICER: Item KEN-OTP-0087-0054, confidential document, will be
25 attributed reference EVD-T-OTP-00175, OTP exhibit number 175.

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- 1 MR STEYNBERG: Annex 2, your Honours, KEN-OTP-0087-0055_RO5. Once again,
- 2 I ask for that to be admitted.
- 3 PRESIDING JUDGE EBOE-OSUJI: Any objection?
- 4 MR HOOPER: No objection.
- 5 MS BUISMAN: No objection.
- 6 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next Prosecution exhibit.
- 7 THE COURT OFFICER: Document KEN-OTP-0087-0055 will be admitted as exhibit
- 8 number 176, attributed reference EVD-T-OTP-00176, confidential document.
- 9 MR STEYNBERG: Thank you. And finally, your Honours, annex 3 I ask that it be
- 10 admitted, KEN-OTP-0087-0056, also R05.
- 11 And that concludes the Prosecution's examination of this witness.
- 12 PRESIDING JUDGE EBOE-OSUJI: Any objection?
- 13 MR HOOPER: No, your Honour.
- 14 MS BUISMAN: None.
- 15 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next Prosecution exhibit.
- 16 THE COURT OFFICER: Item KEN-OTP-0087-0056 will be attributed reference
- 17 EVD-T-OTP-00177, Exhibit Number 177 for the Prosecution and it's a confidential
- 18 document.
- 19 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 20 Witness, the Prosecution has finished asking you their questions. Now it will be the
- 21 turn of the Defence counsel.
- 22 Who will go first? Ms Buisman, is that you or Mr Hooper?
- 23 Mr Hooper, they are pointing to you.
- 24 Mr Hooper, who is one of the lawyers for Mr Ruto, will begin asking you questions
- 25 now.

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1 Remember what I told you earlier. Again, listen to the questions carefully and
2 answer the question briefly and stop and let him ask you the next question. Take
3 care to not reveal identifying information when we are in the public session. We are
4 now in public session.

5 Mr Hooper.

6 QUESTIONED BY MR HOOPER:

7 Q. Good afternoon, Mr Witness. We've got just a little over 20 minutes together
8 this afternoon and then I will be able to ask you some further questions tomorrow,
9 and we certainly hope that we can conclude -- conclude your evidence by tomorrow.
10 Now, the first thing I want to ask you about is a matter that you have discussed quite
11 recently, and I believe that was in open, and that relates to your seeking or going to (Redacted)
12 (Redacted)
13 (Redacted) And you may recall you --

14 MR STEYNBERG: Sorry to interrupt, your Honours, but may we go into private
15 please?

16 PRESIDING JUDGE EBOE-OSUJI: Private session.

17 MR HOOPER: I hadn't appreciated that was identifying, but --
18 (Private session at 3.40 p.m.) * Reclassified as Open session

19 THE COURT OFFICER: We are in private session, Mr President.

20 MR STEYNBERG: I'm sorry, your Honours. My learned friend has made the same
21 mistake I made. Your Honours ordered that that part be redacted from the public
22 session.

23 PRESIDING JUDGE EBOE-OSUJI: Yes, indeed, that was the direction. It should
24 be -- should not be in the public.

25 MR HOOPER: All right. Well, perhaps I'm safer in closed -- in private, particularly

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1 towards the closing minutes of our sessions.

2 Q. But if I can come then -- we are now in private, so back to the question. You go
3 and see a (Redacted) You can't recall the company name. And I'm not disputing,
4 Mr Witness, that you went to see him, it's just if you can help us a bit further. Can
5 you remember where in Eldoret that was, where his office was?

6 A. The office was located on (Redacted)

7 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you may continue with that line if
8 you please, but as I understood the circumstances in which the name of the lawyer
9 came in, I thought the witness was replying to the Prosecutor's suggestion that the
10 witness only recanted or resiled from his statement the first time he showed up in
11 court to testify and the witness was saying that he had in fact gone on an earlier
12 occasion to a lawyer to indicate intent to resile. If I misunderstood, correct me.

13 MR STEYNBERG: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, was that it?

15 MR STEYNBERG: I beg your pardon. I don't think it was, your Honour. The
16 witness, as I -- as I recall, mentioned this incident spontaneously. He then confirmed
17 that he had not told the lawyer in his affidavit about the incident with persons 1 and 3
18 and it was only after that that I put to him then it was the first time that he had
19 mentioned it in court. So the sequence that your Honour postulated, I don't believe
20 that was correct.

21 PRESIDING JUDGE EBOE-OSUJI: All right. In that case, Mr Hooper, I probably
22 got it wrong so continue.

23 MR HOOPER: Yes, that was my understanding as well. So -- and I'd just --

24 PRESIDING JUDGE EBOE-OSUJI: Your understanding that I got it wrong or that --

25 MR HOOPER: Oh, I wouldn't go as far as that, but --

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1 PRESIDING JUDGE EBOE-OSUJI: Oh, no, you can certainly say that if that's what
2 you think.

3 MR HOOPER: My understanding was that the witness spoke about
4 going -- initiated the subject essentially or -- about going to see a lawyer and naming
5 him and saying that he had gone and -- to sign an affidavit and he added that he
6 didn't give details about 1 and 3 because that would be very self-incriminating. He
7 just kept it to the bare withdrawal --

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 MR HOOPER: -- from ICC.

10 PRESIDING JUDGE EBOE-OSUJI: All right. Continue.

11 MR HOOPER: And I think my friend's point was, "Ah, but you didn't say anything
12 about 1 and 3, did you?" And that was I think the thrust of his question.

13 Q. So my question is -- well, you've answered part of it. Thank you very much.
14 So it's (Redacted) Can you -- can you limit it
15 a bit more? If I went to Eldoret, tell me where I'd go to find this lawyer's office, if
16 you can do that?

17 A. I did not quite understand you.

18 Q. All right. All right. The lawyer you went to see -- and I'm not disputing you
19 saw a lawyer. I just want you to help me if we want to find him. So how do I find
20 him? I go to (Redacted) and where do I go?

21 A. (Redacted)

22 (Redacted)

23 (Redacted)

24 Q. All right, thank you. Now, here we are September 2014. Well, can you
25 remember when you went to see your lawyer there and signed that affidavit?

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1 A. I believe I heard you mention September 2014, but I believe it was 2013. I don't
2 know whether I answered your question.

3 Q. Lost in translation I'm afraid. Let me put it again. Can you remember which
4 month and year you went to see this lawyer?

5 A. I no longer remember very well. I believe it was in September or October. I
6 cannot remember clearly. I went there only once.

7 Q. All right. I have an investigator's report relating to February of this
8 year - which is at 0138-0581, I don't think it's in your bundles - where the investigator
9 says you agreed to meet and among the things to discuss were, quote, "The
10 circumstances behind his withdrawal as a witness," unquote. That's February. And
11 I mention that, Witness, not for your -- to ask a question of you essentially, but really
12 of the Prosecution, whether there was somehow notice at that point of withdrawal by
13 the witness? It just seemed odd to have that entry.

14 Now, Mr Witness, can I come to another matter that was raised just shortly ago and
15 that was the investigation report and that's -- I'm omitting the KEN-OTP generally, as
16 you appreciate, not for you, Witness, for the Court, it's 0141-0266 which was the
17 information report, your Honours, which of course we dealt with -- Mr Khan dealt
18 with first thing this morning.

19 In fact, let me come up to that in another -- in another moment. Let me go to
20 one -- one tab that we do have and that's tab 9. Can I go to tab 9, your Honour?

21 MR STEYNBERG: Your Honour, my bundle only goes up to tab 8.

22 MR HOOPER: I'm using the Prosecution bundle as much as I can as we become
23 familiar with it.

24 Q. This was a matter that was raised with you, Mr Witness, just a short while ago
25 and it concerned your account to the investigators on (Redacted) so we're

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1 going back just over a year, and that's the incident with (Redacted)

2 (Redacted)

3 (Redacted) Now, in respect of that, first of all, is it right that you said that and told the
4 investigators that? Is that correct?

5 A. Yes, I told them about it, but subsequently I decided that it was not important
6 because he told me that (Redacted) that that is also the
7 reason why I did not take it seriously.

8 Q. All right. But I can see, reading the account you gave as it's recorded, that you
9 said that he'd threatened you and it reads as follows: (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 And you add you went on your way without any further incident and you added you
16 advised that you called your trusted friend, who was (Redacted) number 1 on our list,
17 and you didn't call the OTP because you believed that the office was closed over the
18 weekend.

19 That's the record that we've got. And is that all correct, that that was (Redacted)

20 (Redacted)

21 (Redacted)? Is that correct?

22 A. Based on what you have read from that statement, I do not remember that
23 statement and I don't even remember having given that statement.

24 MR STEYNBERG: Your Honour, sorry, I didn't want to interrupt my learned friend
25 or the witness before he answered, but of course the one correction is that the note

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1 refers to (Redacted), not (Redacted). But I understand the witness has corrected that on his
2 version.

3 MR HOOPER: Oh, yes, I mean, I'm not going to get bogged down in that if I can
4 avoid it.

5 Q. So when I say "a statement," this is not your written statement or anything. It's
6 a note that someone else has made as a result of a phone call.

7 Well, let me ask you this: Do you remember, were there disclosures of names in The
8 Nation newspaper in Kenya last year? Do you remember?

9 A. I did not read that newspaper and I do not remember having said that. As you
10 know, we discussed a lot of things on the phone and it is not easy to distinguish
11 between all those pieces of information.

12 Q. Now, the other matter that is stated in this document is this: That you didn't
13 contact the OTP about it. The OTP contacted you about it because they had been
14 contacted by person number 1, who told them about it.

15 So do you remember telling person number 1 about that incident, discussing the
16 (Redacted) incident when he threatened you? Do you recall doing that?

17 A. It is a long time ago that I spoke with person number 1 and that person has even
18 moved house. I do not know where the person lives and where they took that report
19 from.

20 Q. All right. Well, thank you.

21 MR HOOPER: Can I for the record just say the document I was -- we were looking
22 at, I was looking at, was KEN-OTP-0117-0905 at our tab 9 in the Prosecution bundle.

23 PRESIDING JUDGE EBOE-OSUJI: That document needs to come into the record as
24 exhibit, so it needs to come in as yours, not necessary because you wanted it but
25 because --

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- 1 MR HOOPER: It is a convenient moment.
- 2 PRESIDING JUDGE EBOE-OSUJI: Yes.
- 3 MR HOOPER: Yes, understood. No objection.
- 4 MR STEYNBERG: I have no objection, your Honour.
- 5 MS BUISMAN: And we have no objection.
- 6 PRESIDING JUDGE EBOE-OSUJI: You have no objection.
- 7 Do we have the unredacted version?
- 8 MR HOOPER: Well, it's the same number, but it's not -- perhaps we can ensure that
- 9 after the adjournment with the Registry.
- 10 PRESIDING JUDGE EBOE-OSUJI: At any rate, it needs to come in now as the next
- 11 exhibit in the Ruto Defence case.
- 12 MR HOOPER: Yes. May I just say for the record that the unredacted -- there are
- 13 some redactions I think in the unredacted, but we can clarify that.
- 14 THE COURT OFFICER: Mr President, the only redacted version of this document is
- 15 the redacted version number 2, which is available in eCourt. And if you agree, I will
- 16 attribute the next exhibit number of the Ruto Defence team to redaction -- to version
- 17 number 2 of KEN-OTP-0117-0905.
- 18 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated)
- 19 MR KHAN: Microphone.
- 20 PRESIDING JUDGE EBOE-OSUJI: Was it the version that Mr Steynberg had shown
- 21 the witness during his questioning on this?
- 22 MR STEYNBERG: Your Honour, I didn't show the witness. I just read verbatim
- 23 from it. But my understanding, that it is R02. The portions that both my learned
- 24 friend and I referred to are the same in both versions. But it would be appropriate
- 25 for the redacted version to form part of the record. So R02 is the correct production.

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1 PRESIDING JUDGE EBOE-OSUJI: Then that's the one that comes in then.

2 THE COURT OFFICER: Yes, Mr President.

3 So item KEN-OTP-0117-0905 second redacted version, confidential document, will be
4 attributed reference EVD-T-D09-00265, Ruto Defence exhibit number 265.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Mr Hooper, it's 4 o'clock. So we can stop here and take it up tomorrow. And you
7 will be finishing tomorrow in good time that allows the Sang Defence to also finish
8 tomorrow?

9 MR HOOPER: Yes, it's all sorted out between us and we're fine.

10 PRESIDING JUDGE EBOE-OSUJI: Good.

11 MR HOOPER: And leaving of course my friend an opportunity as well.

12 PRESIDING JUDGE EBOE-OSUJI: To re-examine.

13 All right. Witness, we have come to the end of our proceedings for today. We will
14 convene again tomorrow and your questioning will continue tomorrow. Hopefully
15 it will also end tomorrow.

16 In the meantime, as we rise and overnight, do not discuss your testimony with
17 anybody from the minute you leave this courtroom until you join us again tomorrow.
18 Do you understand?

19 THE WITNESS: (Interpretation) Yes, I've understood, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: I said this courtroom is, in a manner of speaking,
21 yes, where you are is still an extension of the courtroom.

22 So the Court will rise.

23 THE COURT USHER: All rise.

24 (The hearing ends in private session at 4.03 p.m.)

25 RECLASSIFICATION REPORT

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- 1 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 2 2013, and the instructions in the email dated 23 January 2015, the version of the
- 3 transcript with its redactions becomes Public.