

Trial Hearing
Witness: KEN-OTP-P-0658

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang
5 - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera-Carbuccia
7 and Judge Robert Fremr
8 Trial Hearing
9 Friday, 5 December 2014
10 (The hearing starts in open session at 9.36 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please, the case.
16 THE COURT OFFICER: Yes, Mr President. Good morning.
17 Situation in the Republic of Kenya, in the case of The Prosecutor versus William
18 Samoei Ruto and Joshua Arap Sang, case reference ICC-01/09-01/11, and for the
19 record we are in open session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
21 Appearances?
22 MR GARCIA: Good morning, Mr President, your Honours. Appearances remain
23 the same for the Prosecution.
24 MR NARANTSETSEG: Good morning, your Honours. Same as yesterday. Thank
25 you.

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1 MR BOURGEOIS: Good morning, Mr President, your Honours. Mr Bourgeois,
2 duty counsel.

3 MS BUISMAN: Good morning, President. The team for Mr Sang remains the same
4 today.

5 MR KHAN: Mr President, your Honours, good morning. The Defence team for
6 Mr Ruto remains the same, save that Dato' Shyamala Alagendra is not in court, but
7 she will join was at -- after lunch.

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

9 Witness, welcome back. Ms Buisman will continue her cross-examination.

10 Ms Buisman, we are in open session and how much longer do you expect to remain
11 with this witness?

12 MS BUISMAN: I will my utmost to finish today.

13 PRESIDING JUDGE EBOE-OSUJI: Yesterday you said lunch-time.

14 MS BUISMAN: No, I said afternoon.

15 PRESIDING JUDGE EBOE-OSUJI: Afternoon.

16 MS BUISMAN: (Overlapping speakers)

17 PRESIDING JUDGE EBOE-OSUJI: You said in the afternoon. All right. Proceed.

18 WITNESS: KEN-OTP-P-0658 (On former oath)

19 QUESTIONED BY MS BUISMAN: (Continuing)

20 Q. Good morning, Witness.

21 A. Good morning.

22 Q. Yesterday I wanted you to listen to an audio of 25 December and this relates
23 directly to the 26 December event. Do you recall that, the rumour about the fake
24 ballots?

25 A. Yes, your Honour.

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1 MS BUISMAN: So I would like now with the assistance of the Court, I would like
2 that document to be placed in front of the witness and listen to the tape.

3 PRESIDING JUDGE EBOE-OSUJI: What tab again? What tab and binder?

4 MS BUISMAN: Yes, it's the main cross binder for this witness, it's tab 14. It's
5 25 December evening programme. It is already in evidence. The audio is
6 KEN-D11-0013-0028 and the EVD number is EVD-T-D11-00048. And the
7 transcription and translation is KEN-D11-0014-0568 and the EVD number for the
8 transcription is EVD-T-D11-00049.

9 Q. Mr Witness, do you have the document in front of you?

10 A. Yes, your Honour.

11 MS BUISMAN: Then I would like you to go to page 9 of the document and this is
12 time stamp 17.17 up to 19.27 and it is -- the KEN page is 0575. And if I have the floor,
13 I would like to play now.

14 PRESIDING JUDGE EBOE-OSUJI: Did you say 0575?

15 MS BUISMAN: Indeed.

16 PRESIDING JUDGE EBOE-OSUJI: That says page 7.

17 MS BUISMAN: It's page 9.

18 PRESIDING JUDGE EBOE-OSUJI: 05 --

19 MS BUISMAN: No, you are right. It is page 7, 7 to 9. Thank you.

20 PRESIDING JUDGE EBOE-OSUJI: Page 7.

21 Witness, are you at page 7?

22 THE WITNESS: Yes, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 (Playing of the audio excerpt KEN-D11-0013-0028)

25 MS BUISMAN:

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1 Q. Mr Witness, are you with us because it's at the very end of page 7, starting in
2 English, "We have to talk about the rigging of elections ..." Could you follow that?

3 A. The last end of the -- okay, I can be there.

4 Q. Did you recognize the voice?

5 A. Yes, your Honour.

6 Q. Could you please tell us who that was?

7 A. This is the former prime minister, the Honourable Raila Odinga.

8 Q. The first voice, could you recognize the first voice?

9 A. It says -- no, the first voice was for Sang.

10 Q. Yes. And just to be clear, at page 7 for the Kalenjin it starts halfway, more or
11 less, in the second paragraph in Kalenjin, starting with "Lakini ng'alek ..." Can you
12 see that, Mr Witness?

13 PRESIDING JUDGE EBOE-OSUJI: Can you -- can you identify the line number?

14 MS BUISMAN: Yes, in English it's the last paragraph, the third line from below.

15 PRESIDING JUDGE EBOE-OSUJI: Let's be on the same wavelength now. What I
16 have at page 7, the last paragraph you say in English begins with, "I do not even
17 want ..." Is that the paragraph?

18 MS BUISMAN: That is the paragraph --

19 PRESIDING JUDGE EBOE-OSUJI: Okay.

20 MS BUISMAN: -- but the beginning is the third line from below and it starts with,
21 "We have to talk about the rigging of elections ..."

22 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, do you see that?

23 THE WITNESS: I can't see where it says "Lakini." Where is that place?

24 MS BUISMAN:

25 Q. If you go to -- it's on the page, the third paragraph. It's in Kalenjin and --

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- 1 PRESIDING JUDGE EBOE-OSUJI: All right, wait.
- 2 Do you see below the word "Sang" appears --
- 3 THE WITNESS: Yes.
- 4 PRESIDING JUDGE EBOE-OSUJI: -- Witness, Sang appears? All right. Do you
- 5 see the Kalenjin text there?
- 6 THE WITNESS: I can see that, but I can't --
- 7 PRESIDING JUDGE EBOE-OSUJI: All right. Okay. At the end of that paragraph
- 8 in Kalenjin, begin from the bottom of that paragraph, count up, one, two, three, four,
- 9 five, six from the bottom. Do you see that?
- 10 THE WITNESS: Yes, I can see that.
- 11 PRESIDING JUDGE EBOE-OSUJI: Okay. You see "Lakini"?
- 12 THE WITNESS: Yes.
- 13 PRESIDING JUDGE EBOE-OSUJI: All right.
- 14 Proceed.
- 15 MS BUISMAN: Just we will start again from that particular place so everyone can
- 16 follow.
- 17 (Playing of the audio excerpt KEN-D11-0013-0028)
- 18 MS BUISMAN:
- 19 Q. Mr Witness, could you hear that?
- 20 A. That is Mr Sang.
- 21 Q. Thank you. So we will just carry on now and for -- we are starting now at page
- 22 8 with Raila and I'll just read this into the record and you tell me if it's correct:
- 23 "We have to talk about the rigging of elections because people have called me and
- 24 texted me that there exist certain vehicles ... and right now we have a message from
- 25 Orange through Raila Odinga that we wish to discuss. Before that, let us listen to his

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1 message before we can progress."

2 Is that what you heard?

3 A. Yes, your Honour.

4 MS BUISMAN: So let us now continue with Raila's message.

5 (Playing of the audio excerpt KEN-D11-0013-0028)

6 MS BUISMAN:

7 Q. Mr Witness, did you follow that?

8 A. I follow, your Honour.

9 Q. And can you confirm in which language he speaks?

10 A. He speaks in Swahili.

11 Q. And just to be clear, you already said this was Raila Odinga. That's right, isn't
12 it?

13 A. Yes, your Honour.

14 Q. And you recognize the voice?

15 A. Yes, your Honour.

16 MS BUISMAN: And for the record we stopped at 18.24 and let us continue.

17 Q. I will read first into the record the English translation and then we go on, and
18 you tell me, please, if it's a fair translation:

19 "We are reliably informed that AP officers have been hired by PNU for the purpose of
20 trying to steal votes. Those officers left Embakasi ..." yesterday "... night travelling in
21 City Hopper and Kenya Bus Service buses. They have been transported to Rift
22 Valley, Western and Nyanza provinces. Their job is to be Kibaki's agents. They
23 will report tomorrow then they will take part in the elections on 27th. Their aim is to
24 cause chaos during voting or when the votes are being counted, so that people do not
25 vote because of chaos or that the election results are spoilt because of the chaos that

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1 they will have started."

2 Mr Witness, is that what you heard?

3 A. Yes, your Honour.

4 Q. It's a fair translation?

5 A. Yes, your Honour.

6 MS BUISMAN: Thank you.

7 Let us continue, please.

8 (Playing of the audio excerpt KEN-D11-0013-0028)

9 MS BUISMAN:

10 Q. Mr Witness, could you follow that?

11 A. Yes, I do.

12 Q. So I'll read the English into the record and you tell me again if it's a fair

13 translation, and for the record we stopped at 19.26:

14 "We also have received reports that they will be armed, and we want to condemn

15 such actions in the strongest terms. What we are talking about are not just

16 allegations or propaganda but confirmed reports. We stated that this morning I

17 went to see the officer in charge of elections in my constituency - Lang'ata, and while I

18 was in his office, two of those AP officers talked to my officers and they personally

19 confirmed that they had been sent to do that. We are stating that this is unlawful,

20 because the law and the constitution do not allow public servants to participate in

21 elections as agents. They can only vote like everyone else but they are not allowed to

22 be employed as agents by any party because they are public servants who are being

23 paid by the government to protect all citizens - those on the side of ..."

24 Mr Witness, was that a fair translation?

25 A. Yes, it is.

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1 Q. Thank you. Is this, Mr Witness, a message that you heard at the time?

2 A. Are you saying is it a message which I heard the time of what?

3 Q. At the time in 2007, around -- you know, before the 26th. Is that a message you
4 heard?

5 A. I heard on 26th.

6 Q. Raila Odinga's message?

7 A. No, no. I heard Sang message.

8 Q. But were you aware that Raila Odinga had conveyed this message before?

9 A. I didn't listen to this directly, but what I heard is the following morning when
10 Sang was broadcasting it, but I didn't know that it was -- I didn't hear that the first for
11 Raila.

12 MS BUISMAN: So I would like now to go to --

13 PRESIDING JUDGE EBOE-OSUJI: One second.

14 Witness, you said you heard Mr Sang broadcasting this message. What message?

15 THE WITNESS: That the cars -- there is some -- people to block the roads, that there
16 is allegations that the cars are bringing the fake ballot papers and this is -- this -- this
17 information during 26 make a lot of things -- create a lot of tension in Eldoret and
18 which later cause some vehicles burned.

19 PRESIDING JUDGE EBOE-OSUJI: All right, okay. Now, we want to get on record
20 clearly what you heard at the time and did you say you didn't hear it on the 26th but
21 the next day? Was that what you said?

22 THE WITNESS: I didn't hear this one for the Raila, though it is -- look like the same
23 message that Sang was conveying the following day on 26th, but I didn't hear him,
24 Raila.

25 PRESIDING JUDGE EBOE-OSUJI: You did not hear --

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1 THE WITNESS: Maybe --

2 PRESIDING JUDGE EBOE-OSUJI: -- Raila himself --

3 THE WITNESS: -- it was there, but I didn't listen to the radio.

4 PRESIDING JUDGE EBOE-OSUJI: One second, please. At the time what you are
5 saying is you did not hear Raila's voice conveying this message?

6 THE WITNESS: Yes, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: All right. Either on the 26th or in the days after
8 that, did you ever hear Mr Raila Odinga's voice conveying this message on the radio?

9 THE WITNESS: I didn't hear, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: All right, thank you very much.

11 Ms Buisman, please continue.

12 MS BUISMAN: Yes.

13 Q. And, Mr Witness, yesterday you told us that you heard Mr Sang read out
14 number plates; is that correct?

15 A. Yes, your Honour.

16 Q. I would like to go to page 11 of the same document, which is
17 KEN-D11-0014-0579, and it's time stamp 22.01 up to 23.04 and it starts -- it's the last
18 paragraph. So in -- in Kalenjin it starts at "Nambarit age ko ..." Do you see that,
19 Mr Witness?

20 A. Yes.

21 MS BUISMAN: And the English translation is to be found on page 12, which is 0580,
22 and I would like to listen to this now.

23 (Playing of the audio excerpt KEN-D11-0013-0028)

24 MS BUISMAN:

25 Q. Mr Witness, did you hear that?

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1 A. Yes, your Honour.

2 Q. Could you tell us who that was who was reading out?

3 A. This is one of the broadcaster of Kass, Mr Silas Tarus.

4 Q. Thank you. So you can confirm that at page 11 where it says "Sang" that's an
5 actual error, correct?

6 A. But the name -- the voice I could hear is for Silas.

7 Q. Yes.

8 PRESIDING JUDGE EBOE-OSUJI: That's what she's asking you. She's saying what
9 you heard was Mr Silas Tarus' voice --

10 THE WITNESS: Yes.

11 PRESIDING JUDGE EBOE-OSUJI: -- and not the voice of Mr Sang?

12 THE WITNESS: Yes, your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 MS BUISMAN:

15 Q. So can you then also confirm that the person on 25 December who was reading
16 out these number plates was not Mr Sang, but it was Silas Tarus? You do agree with
17 that, right?

18 A. Your Honour, what I was saying that I heard Mr Sang on 26th announcing the
19 number. I don't know the time, the periods. Either Mr Silas Tarus, which I can
20 confirm his voice because I know him, announce this.

21 MS BUISMAN: Yes, thank you. I would like to go to another passage which starts
22 at pages 0597 to 0598 which corresponds to page 29 up to 30. The time stamps are
23 01.00.21 up to 01.01.40.

24 Q. Mr Witness, are you with me?

25 A. Page 20?

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1 Q. Page 29.

2 A. Okay.

3 Q. And if you see that page, we start where it says "Sang" in Kalenjin and then after
4 that the next paragraph is the translation. Do you see that?

5 A. Yes, your Honour.

6 MS BUISMAN: So I would like to play that now.

7 (Playing of the audio excerpt KEN-D11-0013-0028)

8 MS BUISMAN:

9 Q. Mr Witness, could you follow the audio?

10 A. Yes, I do, your Honour.

11 MS BUISMAN: And for the record we stopped at 01.00.53.

12 Q. Mr Witness, did you recognize the voice?

13 A. Yes, your Honour.

14 Q. Would you tell us who it was, please?

15 A. Mr Joshua Sang.

16 Q. I'd like to read the paragraph into the record in English and again I'll ask you if
17 it's a fair translation:

18 "Thank you very much, Kalenjin people, you are still tuned in to today's programme,
19 in which we have been discussing these papers, and wondering: Is it true that those
20 vehicles exist - because not everything is to be believed - as these ODM leaders
21 claimed? We would like also to hear from your side; have you seen these vehicles?
22 Are these claims true? The most important thing that we impress upon you as Kass
23 FM is that peace is paramount. Let's maintain peace, our Kalenjin fraternity on such
24 a day, because we have told you that someone can provoke you, or you could
25 provoke someone. This is not a day of anger; this is a day of great endurance." End

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1 quote.

2 Mr Witness, is that a fair translation?

3 A. Yes, your Honour.

4 Q. And do you confirm that Mr Sang is emphasising the importance of peace?

5 A. That is according to what I can hear now.

6 Q. And he is questioning whether or not this allegation is true. He's not taking it
7 as true, is it?

8 A. That is what I can read and you can also read here today.

9 Q. Thank you. I would like to take you to another passage -- sorry --

10 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman, what do you mean he is
11 questioning whether or not these allegations are true? Are you suggesting that he
12 was disputing the correctness of the allegations, or are you saying he is throwing up a
13 question up in the air objectively for people to -- to comment on? Those are two
14 different propositions.

15 MS BUISMAN: It is the latter, Mr President.

16 PRESIDING JUDGE EBOE-OSUJI: It is the latter.

17 MS BUISMAN: Our suggestion is that Mr Sang is trying to find out whether or not
18 the rumour is true.

19 PRESIDING JUDGE EBOE-OSUJI: Okay.

20 MS BUISMAN: And he is not taking it as a fact. That is our submission.

21 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Proceed.

22 MS BUISMAN: And we are proceeding in fact at page 30 and for the Kalenjin it's at
23 the end of 29. So it's the same passage.

24 (Playing of the audio excerpt KEN-D11-0013-0028)

25 MS BUISMAN:

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1 Q. Mr Witness, could you hear that?

2 A. Yes, I do.

3 Q. Could you follow it on the transcript?

4 A. Yes, your Honour.

5 Q. I will just read it out into the -- into the record in English and you can tell me
6 again if it is a fair translation, and we stopped at 01.01.24:

7 "If anyone steps on you, keep your cool; if someone does anything to provoke you,
8 keep your cool. Please, please, please Kalenjin people we beseech you in the name of
9 our Lord Jesus and in the spirit of Kalenjin that please, violence does not help in any
10 way. Avoid anything that can irk you. What we just want to establish is whether
11 these claims are true, or it is just a way for them to create disturbance so that ... You
12 know how one can get bitter when defeated. That is what we want to know, the
13 situation as it is, and to entreat people to be peaceful." End of quote.

14 Mr Witness, is that a fair translation?

15 A. It is, your Honour.

16 Q. And do you agree that again he is wondering whether these claims are true?

17 A. Yes, I can read it from now.

18 Q. So you do agree that he is questioning the ODM allegation?

19 PRESIDING JUDGE EBOE-OSUJI: The witness said that that is what the text says, or
20 the broadcast he just listened to.

21 MS BUISMAN: Yes.

22 So I would like to now go to the third paragraph, which is at page 30, starting in the
23 English at, "There is no day ..." and in Kalenjin "Mami betut ..."

24 (Playing of the audio excerpt KEN-D11-0013-0028)

25 MS BUISMAN:

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1 Q. Mr Witness, could you follow the audio?

2 A. Yes, your Honour.

3 Q. So I'll just read it in English and again you'll tell me it's a fair translation.

4 Quote:

5 "There is no day that voting can be done, indeed no ceremony can be done, when
6 there is violence. We should be tolerant and discard all (provocative?) thoughts. If
7 someone provokes you ..." you "... just ignore it. Let's await ..." the "... 27th, vote, and
8 let God give us a government; the president. He alone has chosen. Ours is just to
9 endorse; God has already chosen. Or what's your take, Araap Tanui?" End of
10 quote.

11 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman, the appearance of the word
12 "provocative" in the text appears in brackets with a question mark in there. What
13 does that tell us? It looks parenthetical in the text, doesn't it?

14 MS BUISMAN: Mr President, it means that provocative is one of the words it could
15 mean. It could be the "provocative" or "discard" and that is why it is in question
16 mark.

17 PRESIDING JUDGE EBOE-OSUJI: So the translator is indicating tentativeness about
18 the sense, isn't it?

19 MS BUISMAN: Indeed.

20 PRESIDING JUDGE EBOE-OSUJI: All right. We want to make sure that's reflected
21 on the record, because the way you read it, it appeared as if the word "provocative"
22 was a natural text in the passage, but it isn't. It's just there is a question mark about
23 whether that was what was meant.

24 MS BUISMAN: It's a very fair point, Mr President.

25 PRESIDING JUDGE EBOE-OSUJI: Yes, okay.

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1 MS BUISMAN:

2 Q. And again from what you read here you can confirm that Mr Joshua Arap Sang
3 is asking for patience and to stay calm. Do you agree?

4 A. As I can read here in the text and listen to the audio, that is the position, your
5 Honour.

6 MS BUISMAN: Thank you, Mr Witness. I would like to take you to the page 0614
7 for the -- up to 0616, and for the witness this is page 46 in the document. The time
8 stamp is 01.20.00-01.20.50.

9 Q. Mr Witness, are you there?

10 A. 46?

11 Q. Yes.

12 A. Yes, your Honour.

13 Q. And I want you to look at the end where in Kalenjin, so go to the bottom of that
14 page, and just above "Tanui" there is a sentence that starts with "Kale Araap Sang."
15 Do you see that?

16 A. Yes.

17 MS BUISMAN: That's where we will start and the translation starts on the next page.
18 Oh, no, it's actually on there under it. So we start playing that now.

19 (Playing of the audio excerpt KEN-D11-0013-0028)

20 MS BUISMAN:

21 Q. Mr Witness, could you follow that?

22 A. Yes.

23 Q. And which voices could you identify?

24 A. This is the voice of Mr Sang and that of Kipyego Arap Tanui.

25 Q. And you recognized his voice too?

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1 A. Yes.

2 Q. And I'm just going to read it into English. I have to place an apology on the
3 record. We went one paragraph above that. Did you -- despite that, could you
4 follow it?

5 A. Yes, your Honour.

6 MS BUISMAN: So I'll read one paragraph above it into the record as an English
7 translation. It says:

8 "Sms says arap Sang, says we saw yesterday on 24th up to 50 KBS vehicles in Njoro,
9 Elburgon and Molo. Who were being ferried in these vehicles? Is it riggers?

10 Robert in Molo.

11 Says arap Sang, we saw City Hopper vehicles in Kapsabet. Do we start? What are
12 you starting? No, Babu Kapchemoiywo, do not start anything."

13 PRESIDING JUDGE EBOE-OSUJI: You have to spell things.

14 MS BUISMAN: I will.

15 Q. Mr Witness, is this what you heard?

16 A. Yes.

17 MS BUISMAN: And just spelling for the record the name Babu, that's B-A-B-U and
18 then Kapchemoiywo is K-A-P-C-H-E-M-O-I-Y-W-O?

19 PRESIDING JUDGE EBOE-OSUJI: You also mentioned Elburgon. Can you spell
20 that?

21 MS BUISMAN: Yes, that's E-L-B-U-R-G-O-N.

22 Q. Mr Witness, did you hear in that first part that there was another voice to which
23 Mr Sang responded? Did you hear that, or do we have to listen to it again?

24 PRESIDING JUDGE EBOE-OSUJI: Can you play it again.

25 MS BUISMAN: Yes. So just up to -- we start just that paragraph up to "Tanui." So

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1 we start again at 1.20.00.

2 (Playing of the audio excerpt KEN-D11-0013-0028)

3 MS BUISMAN:

4 Q. So, Mr Witness, did you hear clearly that Mr Sang responded to a person called
5 Babu Kapchemoiywo?

6 A. Yes, your Honour.

7 Q. It's by SMS, so we didn't hear his voice. He was sending an SMS. And did
8 you hear Mr Sang's intervention saying, "What are we starting? No, do not start
9 anything"? Is that something you heard?

10 A. Yes, your Honour.

11 Q. Then I'll just read further into the record the English translation. We have then
12 Tanui who repeats what Mr Sang said. "Do not start anything." That is correct,
13 Mr Witness? You heard that too?

14 A. Yes, your Honour.

15 MS BUISMAN: And then for the English it's at the page -- the next page, 47 --

16 PRESIDING JUDGE EBOE-OSUJI: One second. The point being that the second
17 voice we heard will be the voice of Tanui? Is that it?

18 MS BUISMAN: Indeed, but the point being that Mr Sang is reading out an SMS and
19 is responding to what the SMS is saying. The SMS start and Mr Sang says, "Do we
20 start? What are we starting? ... do not start anything."

21 PRESIDING JUDGE EBOE-OSUJI: Yes, so there was an SMS being responded to by
22 Sang and then --

23 MS BUISMAN: And then Tanui takes over and says as well, "Do not start anything."

24 PRESIDING JUDGE EBOE-OSUJI: All right.

25 MS BUISMAN:

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1 Q. And that is correct, Mr Witness?

2 A. That is correct.

3 Q. And then I read into the transcript the last paragraph by Mr Sang -- oh, no,
4 that's by -- yes, by Mr Sang:

5 "... do not start, just hold them and ask them whether the vehicles have any of those
6 numbers read here. If they are, tell the police, tell the politicians especially, they will
7 help. Tell the politicians that here is the vehicle so that he can help you arrest it.
8 Do not burn anyone's vehicle, do not beat anyone, but hold those vehicles."

9 Mr Witness, did you hear Mr Sang say that on the audio?

10 A. Yes, your Honour.

11 Q. And is it a fair translation?

12 A. Yes.

13 Q. From what you read here, you agree he is saying not to use violence, not to burn
14 anyone's vehicle, but rather get the police involved? That's correct, is it not?

15 A. Your Honour, this is information I am just reading from here, but according to
16 me, I was talking about on 26th. Whether this information was there on 25th or 24th
17 or 23rd or any 20s, then I cannot dispute that it was there, but the information that
18 took place on 26th which led to the violence in the course of that day was on my
19 point.

20 Q. Yes, I just ask you now on the 25th in the evening you confirm that at this point
21 Mr Sang says report to the police and politicians, do not use violence, and he is not
22 saying block the roads; you agree with that, right?

23 PRESIDING JUDGE EBOE-OSUJI: Wait one second. Let's clear it up. Let's first
24 get the witness to respond to what the audio he just listened to right now and the
25 translation of it says. Once that is done, then the next stage would be to deal with

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1 the date, because you are putting the two things together and that may cause
2 confusion. The witness is saying that he's given his testimony about what happened
3 on the 26th according to him.

4 Now you've put in an audio that says what it says and the text. We want to avoid a
5 situation where a question is unfair to the witness as if -- I don't want to say any more
6 because -- you probably get where I'm heading. I'm trying to avoid pointing the
7 witness in the direction of any answer.

8 The point is let's settle first of all what he heard and what he's read and then we deal
9 with the date when that would have occurred.

10 MS BUISMAN:

11 Q. So, Mr Witness, just confirm that you heard -- on this audio you heard that
12 Mr Sang said, "Do not burn anyone's vehicle, do not beat anyone, but tell the police,
13 tell the politicians ..." That is what you heard on this audio?

14 A. Yes, your Honour.

15 MS BUISMAN: And just one correction for the record, the transcript - not for you,
16 Mr Witness - page 21, line 2, says "Do not beat Flynn" and that should be "Do not beat
17 anyone."

18 Q. Mr Witness, this is what you hear in the audio. Did you hear this at any time
19 in 2007?

20 A. I cannot confirm this, your Honour, but what I was saying that is about the date
21 of 26th when his numbering of vehicles were being announced by Mr Sang and that
22 day was the real -- it was supposed to be the real day of transporting
23 voters -- votes -- votes from Nairobi to their destinations where the election could take
24 place.

25 Q. Witness, thank you. I just want to -- you to listen to one more passage which is

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- 1 at pages 0592 up to 0594 which is at page -- sorry, it's at pages 24 --
- 2 PRESIDING JUDGE EBOE-OSUJI: Are you moving away?
- 3 MS BUISMAN: Yes.
- 4 PRESIDING JUDGE EBOE-OSUJI: On the current page, 47, what we see here are
- 5 they not at least one vehicle registration number? Do you see that?
- 6 MS BUISMAN: Sorry, what --
- 7 PRESIDING JUDGE EBOE-OSUJI: Did you deal with that part of the text, the
- 8 transcript?
- 9 MS BUISMAN: You mean following the discussion we had just now?
- 10 PRESIDING JUDGE EBOE-OSUJI: Yes. See on --
- 11 MS BUISMAN: At page 47?
- 12 PRESIDING JUDGE EBOE-OSUJI: At page 47 to page 48.
- 13 MS BUISMAN: Well, I did not because we have to select certain passages. We
- 14 didn't -- can't go through all of it.
- 15 PRESIDING JUDGE EBOE-OSUJI: Don't you think this is relevant to deal with?
- 16 MS BUISMAN: Mr President, I think the whole audio is relevant.
- 17 PRESIDING JUDGE EBOE-OSUJI: Right. The point is this: Is it Mr Sang who is
- 18 reading out a vehicle registration number?
- 19 MS BUISMAN: Mr President, our point is that the first person who reads out these
- 20 number plates is not Mr Sang. That is the point.
- 21 PRESIDING JUDGE EBOE-OSUJI: Yes, but in at page 47?
- 22 MS BUISMAN: He is receiving SMSs, Mr President. They are investigating. That
- 23 is what is happening throughout the audio. I mean we cannot play the whole audio.
- 24 PRESIDING JUDGE EBOE-OSUJI: But do you get my point?
- 25 MS BUISMAN: Indeed, but there are SMSs coming in.

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- 1 PRESIDING JUDGE EBOE-OSUJI: And who's reading them out on the audio?
- 2 MS BUISMAN: Yes, but the first person who reads out these number plates is
- 3 someone else. They are given to Mr Sang throughout the programme by other
- 4 people.
- 5 PRESIDING JUDGE EBOE-OSUJI: Right. The question is whether the last
- 6 time -- let me back up. The last time you made the point that it was, did you say,
- 7 Tarus, who had read out the numbers, and not Sang, even though the transcript at
- 8 that place indicated that it was Mr Sang and you say it was a mistake and the
- 9 witness's testimony was to that effect also, that it was a mistake, to indicate the name
- 10 as Sang instead of Tarus?
- 11 Is it the same thing going on here at page 47? Can we clear that up? Because if it is
- 12 the case that the dispute arises as to whether Sang had read out number plates on the
- 13 radio it is a matter of relevance that you bring those instances in if you are going to
- 14 argue about it later on, even in terms of rebroadcasting it.
- 15 So if it is a mistake here --
- 16 MS BUISMAN: Can I ask my lead counsel --
- 17 PRESIDING JUDGE EBOE-OSUJI: Yes, please.
- 18 MS BUISMAN: -- to answer you on this, please?
- 19 MR KIGEN-KATWA: Thank you very much, Mr President.
- 20 Mr President, we are prepared to live with the fact that Mr Sang read these number
- 21 plates provided the understanding is that he presented his programme as a
- 22 programme where he is inviting people to say their number plates.
- 23 First of all, Raila says that I have confirmed that there is rigging. Then subsequently
- 24 number plates are read from the press conference at which these number plates are
- 25 read, and then he presents in this programme saying, "We don't know whether it is

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1 true or not true. You people outside there, could you call in and confirm whether or
2 not you have seen these vehicles." And subsequent to that, he is -- there are
3 telephone calls coming into the station there are SMSs coming in and there are emails.
4 And he is merely reproducing what the callers in the SMSs and the emails are saying,
5 saying "We have seen this vehicle. We have seen this vehicle."
6 The other rider, of course, we would want to make on that point is that he also says,
7 or at least one of the people says "We've seen this vehicle. Should we set on it?"
8 And he says, "No, maintain peace, report to the police and to the politicians."
9 So, Mr President, in very direct answer to your question, yes, it is Mr Sang reading
10 the number plates here but on the understanding that he is reading SMSs, emails and
11 callers in.
12 PRESIDING JUDGE EBOE-OSUJI: I'm not sure we are looking at number plates
13 here on page 47 and 48. It may well be only one number plate. Be that as it may,
14 the witness's testimony is to the effect that he heard Mr Sang at some point reading
15 out number plates and you've gone through questions to him to the -- suggesting that
16 Mr Sang didn't. That's the question. And we are saying if that is the case we need
17 to be careful wherever we see Mr Sang reading out number plates on the transcript.
18 We need to recognize that out of fairness to the witness. The witness may -- we
19 don't know whether he tuned in at some point and heard someone reading something
20 without prejudice to what may have occurred before.
21 MR KIGEN-KATWA: Mr President, may I make this concession that if it were to
22 turn out that the witness's testimony or position is that Sang was reading number
23 plates and that the number plates he was reading were a result of call ins, SMSs and
24 emails we are prepared to live with that, Mr President.
25 PRESIDING JUDGE EBOE-OSUJI: And we can argue about what that means when

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1 the time comes. We all know the law about libel and that sort of thing, whether
2 republishing something is as bad as the initial publication. But we will get to that
3 argument when the time comes.

4 MR KIGEN-KATWA: We will come to that, Mr President --

5 PRESIDING JUDGE EBOE-OSUJI: All right.

6 MR KIGEN-KATWA: -- at least as our -- we are presenting a set of facts. We are
7 not dealing with the law with the witness.

8 PRESIDING JUDGE EBOE-OSUJI: Yes.

9 MR KIGEN-KATWA: We are just presenting the facts and my effort as it is as I
10 speak to you is to explain the context and the nature of our evidence that where Sang
11 comes in reading number plates he is reading them as a result of call ins or referring
12 to the press statement already made by the ODM.

13 PRESIDING JUDGE EBOE-OSUJI: All right.

14 Proceed, Ms Buisman.

15 MS BUISMAN: Mr President, one final point. I haven't put to the witness that
16 what he said was not true on this issue. We just wanted to give the background.

17 PRESIDING JUDGE EBOE-OSUJI: It is not about not being true. It is that if he said
18 he heard Mr Sang reading out number plates we don't know what your
19 cross-examination is when you are putting to him somebody else who read number
20 plates that was not Mr Sang. So we are wanting --

21 MS BUISMAN: We are putting in the context of how this all came about.

22 PRESIDING JUDGE EBOE-OSUJI: Yes. Proceed, please.

23 MS BUISMAN: So the next page we are going to is 0592 up to 0594. This is at time
24 stamps 47.23 up to 50.31 and the page numbers are pages 24 to 26.

25 Q. Witness, are you there?

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- 1 A. Yes, I'm there, your Honour.
- 2 MS BUISMAN: And we will start from where you see the name "Tarus" and I would
- 3 like to play that now.
- 4 (Playing of the audio excerpt KEN-D11-0013-0028)
- 5 MS BUISMAN:
- 6 Q. Mr Witness, could you hear that?
- 7 A. Repeat again.
- 8 Q. The audio?
- 9 A. Yes, your Honour.
- 10 MS BUISMAN: We can do that.
- 11 (Playing of the audio excerpt KEN-D11-0013-0028)
- 12 MS BUISMAN: There is a problem with this time stamp, so let's go to the next which
- 13 is -- it's time stamp 1.53 up to -- 1.53.47 up to 1.54.33.
- 14 PRESIDING JUDGE EBOE-OSUJI: Page number of the transcript?
- 15 MS BUISMAN: Yes, it is page number 73 and that is KEN-D11-0014-0641 up to 42.
- 16 It's page 73 of the document up to 74.
- 17 Q. Are you with me, Mr Witness?
- 18 A. Page 73, yes.
- 19 Q. And you see Mr Sang there, right?
- 20 A. Yes. Yes, your Honour.
- 21 MS BUISMAN: So we would like to listen to it right now.
- 22 PRESIDING JUDGE EBOE-OSUJI: Mr Sang below the word "interlude," is that it?
- 23 MS BUISMAN: Indeed.
- 24 PRESIDING JUDGE EBOE-OSUJI: Okay.
- 25 (Playing of the audio excerpt KEN-D11-0013-0028)

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1 MS BUISMAN:

2 Q. Mr Witness, could you hear that?

3 A. Yes, your Honour.

4 Q. Can you please identify the voice?

5 A. It's Mr Sang, your Honour.

6 Q. Did you hear this before, in 2007?

7 A. I didn't hear Mr Honour -- your Honour, but here Mr Sang is just praying to
8 God. So here I cannot comment about it because it's something related to God.

9 Q. So let me just read into the record the English translation and again you'll tell
10 me if it's a fair translation:

11 "... listen to the prayers of Kenyans. If there is a bad thing that someone is planning,
12 God hear their prayers. Because, it is good that, if Kibaki wins, he wins with your
13 blessing, oh God, if Raila wins with your blessing, God, it is your will, if Muiru wins
14 with your blessing, that is your will, if Kalonzo wins, it is with your blessing, God.
15 That is your will, God; and we accept it as the people of Kenya. Any other thing that
16 goes against that, everlasting God ... God protect our country as you have protected it
17 in peace all these days. Thus, I want to urge the Kalenjin people to maintain peace,
18 and not to be the ones breaking the law or doing anything that's unacceptable. We
19 won't accept."

20 Mr Witness, is that a fair translation?

21 A. It is, your Honour.

22 Q. Can you confirm that at this -- from this audio you hear that Mr Sang is saying
23 whoever wins, wins with God's blessing? Do you confirm that?

24 A. According to this one -- this context.

25 Q. And he is urging people to maintain the peace?

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1 A. Yes, your Honour.

2 Q. Thank you. And then I would like to go to page 1, which is 0569, which is at
3 time stamp 10.04 to 10.22.

4 A. Page?

5 Q. It's number 1, the very beginning of the document.

6 (Playing of the audio excerpt KEN-D11-0013-0028)

7 MS BUISMAN:

8 Q. Mr Witness, could you hear that?

9 A. Yes, I do.

10 Q. And could you tell us what it said?

11 A. (No audible response)

12 Q. I'll just read it and you tell me if it is correct. It said, "It is Tuesday, 25th of
13 December 2007." Is that what you heard?

14 A. (No audible response)

15 PRESIDING JUDGE EBOE-OSUJI: Can you play it again?

16 MS BUISMAN: Yes.

17 (Playing of the audio excerpt KEN-D11-0013-0028)

18 PRESIDING JUDGE EBOE-OSUJI: What is the question? What is the answer?

19 MS BUISMAN:

20 Q. First of all, you heard that, Mr Witness?

21 A. Yes.

22 Q. And I'm just going to read into the record the English translation and you tell
23 me if it's correct. Quote:

24 "Thank you very much Kalenjin people. It is Tuesday 25th of December 2007. This
25 is the day we meet again on air ..."

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- 1 Is that indeed what he said?
- 2 A. Yes, your Honour.
- 3 MS BUISMAN: Thank you.
- 4 For your understanding, we just wanted to put the date of the audio into the record.
- 5 And now we clarify the time stamp for the one that we wanted to play earlier. The
- 6 time stamp is correct. It's 47.23 to 50.31.
- 7 Q. It's at page 23 and if you are there, Witness, I will tell you where we will start.
- 8 In the paragraph following the name of "Tarus" we go to the bottom, the third line up,
- 9 and in Kalenjin it says, "Ko ngot ko iman." Do you see that, Mr Witness?
- 10 A. "Ko ngot ko iman?
- 11 Q. Yes, at page 23.
- 12 A. That's the line of Mr Tarus?
- 13 Q. Yes, towards the end.
- 14 A. Towards the end, okay.
- 15 Q. Yes, you've found it?
- 16 A. Yes.
- 17 MS BUISMAN: And in English it starts at, "So, in case these reports ..."
- 18 So if everything -- if everyone is with me, we will play the audio now.
- 19 (Playing of the audio excerpt KEN-D11-0013-0028)
- 20 MS BUISMAN:
- 21 Q. Mr Witness, could you follow?
- 22 A. Yes, I do.
- 23 Q. And can you please identify the voices?
- 24 A. It is the voice of Mr Tarus.
- 25 Q. As well as Mr Sang.

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1 A. Mr Sang and also Mr Tanui.

2 Q. Yes, thank you.

3 And for the record we stopped at 48.02 and let me just read this and you tell me if it's
4 a fair translation. So starting with Tarus:

5 "So, in case these reports we have received from Raila Odinga are true, there is a
6 possibility that they have been appointed as agents and, like he has said, they are
7 armed, they have ..."

8 Then it's Mr Sang saying, "Guns".

9 And then Tarus saying, "Yes guns."

10 And then Sang says, "Mmmmh mmmh."

11 Is that indeed a fair translation, Mr Witness?

12 A. Yes, it is.

13 Q. And then Tarus responds saying:

14 "So if they go to the polling stations with guns - assuming that what Raila is saying is
15 true - then the people of Kenya will not exercise their electoral rights. They will not
16 vote in peace as required, because these people will not come as soldiers, they will
17 come in the name of ..."

18 Did you hear Mr Tarus say that?

19 A. Yes.

20 Q. And then Mr Sang responds, "Dressed like everybody else." Is that correct,
21 Mr Witness? Is that a fair translation?

22 A. (No audible response)

23 PRESIDING JUDGE EBOE-OSUJI: Mr Buisman, you will need to take us to where
24 Mr Raila Odinga said that anyone would come with guns.

25 MS BUISMAN: Mr President, the message of Mr Raila Odinga is repeated

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- 1 throughout the audio, but the very first time --
- 2 PRESIDING JUDGE EBOE-OSUJI: No, no, no, no. About guns.
- 3 MS BUISMAN: Just to repeat that message?
- 4 PRESIDING JUDGE EBOE-OSUJI: Where Mr Odinga specifically said that anyone
- 5 would come with guns.
- 6 MS BUISMAN: Can I just read out into the record the English translation rather than
- 7 listen to the audio?
- 8 PRESIDING JUDGE EBOE-OSUJI: Yes, please.
- 9 MS BUISMAN: We will actually locate the exact place where he is saying that.
- 10 Could I just move on in the meantime?
- 11 PRESIDING JUDGE EBOE-OSUJI: Yes, you may.
- 12 MS BUISMAN: To not waste time, I'm just going on with the audio and then we
- 13 come back to Raila's message.
- 14 So if we can play the audio again at 48.02.
- 15 (Playing of the audio excerpt KEN-D11-0013-0028)
- 16 MS BUISMAN:
- 17 Q. Mr Witness, did you follow that?
- 18 A. I follow.
- 19 MS BUISMAN: And for the record we stopped at 48.56.
- 20 Q. And I'm just going to read the English translation into the record and then again
- 21 I will ask you if it is correct. Starting with Tarus:
- 22 "Agent.
- 23 SANG: Mmmmh mmmh.
- 24 TARUS: So if what Raila has said happens to be true, then democracy in Kenya is
- 25 still way off, I wonder, Timothy ...

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1 SANG: Timothy is present.

2 TANUI: Let Timothy say something.

3 TIMOTHY: Thank you very much Sang. We are seeing that this news we have
4 received today is shocking, following reports we have received and what the ODM
5 leader Raila Odinga has talked about. Furthermore, a few weeks ago ... a week and a
6 half ago, we heard about these AP officers from Embakasi APTC where they were
7 being trained. And that is not all Sang, he has also stated that there were other
8 senior leaders in government, including Cyrus Kitwai, together with ... there was also
9 a vehicle belonging to one leader which was used in this - belonging to Beth Mugo."

10 Mr Witness, is that a fair translation of what you heard?

11 A. It is, your Honour.

12 Q. And can you indeed confirm you heard Timothy speak?

13 A. In this audio I can -- I -- yes.

14 Q. As well as Tanui?

15 A. Yes, your Honour.

16 Q. As well as Sang?

17 A. Yes, your Honour.

18 Q. As well as Tarus?

19 A. Yes, your Honour.

20 MS BUISMAN: Thank you.

21 And if we just carry on until the end and then we come back to Raila. So let us just
22 carry on the next -- at where we stopped.

23 (Playing of the audio excerpt KEN-D11-0013-0028)

24 MS BUISMAN:

25 Q. Mr Witness, did you hear that?

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1 A. I heard that, Mr -- yes, your Honour.

2 Q. So let me just read the translation into the record:

3 "You will see that this is a big racket as far as this country's elections are concerned.

4 Even now when you look at this country's constitution ... let us even begin with

5 agents, who is an agent? That is what you have just explained. An agent is that

6 one said to be coming from within a particular region, who have expressed an interest

7 in being one. As such, we see that if an agent comes from a different area ... then it

8 contravenes the law."

9 Is that a fair translation?

10 A. It is.

11 MS BUISMAN: So I'll stop here. Just going back to Raila's message, I am looking at

12 page 29 of the document. It's KEN-D11-0014-0597 and I'm reading out -- it starts -- in

13 English it starts at the second line from the top and it says, "We have also received

14 reports that they will be armed ..."

15 Are you with me, Mr President?

16 Q. Mr Witness?

17 A. Page 28 or 29?

18 Q. 29. And for you it is actually 28 because you are looking at the Swahili. In

19 English it's -- it says, "We have also received reports that they will be armed ..." Can

20 you find that in Swahili?

21 PRESIDING JUDGE EBOE-OSUJI: At what page, 29?

22 MS BUISMAN: Yes, in English it's 29. In Swahili it's 28.

23 Q. Can you follow from the English, Mr Witness?

24 A. I follow, but it's talking about only weapons, not really guns.

25 Q. Just reading in -- yes, and I've found it in Swahili. At page 28 it's halfway

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1 through, "Tena tumepata habari eti watakuwa ..." Do you see it?

2 A. Yes.

3 Q. So that's it, "We have also received reports that they will be armed, and we want
4 to condemn such actions in the strongest terms".

5 To put the Swahili on the record, "Tena tumepata habari eti watakuwa wamebeba
6 silaha na wataingia nayo kwenye kutuo ya kupigia kura".

7 And I have to spell that. It's T-E-N-A, new word tumepata T-U-M-E-P-A-T-A, new
8 word habari H-A-B-A-R-I, new word eti E-T-I, new word watakuwa

9 W-A-T-A-K-U-W-A, new word wamebeba W-A-M-E-B-E-B-A, new word silaha

10 S--I-L-A-H-A, new word na N-A, new word wataingia W-A-T-A-I-N-G-I-A, new

11 word nayo N-A-Y-O, new word kwenye K-W-E-N-Y-E, new word kutuo, K-U-T-U-O,

12 new word ya Y-A, new word kupigia K-U-P-I-G-I-A, new word kura K-U-R-A.

13 PRESIDING JUDGE EBOE-OSUJI: And the audio, can we listen to that audio?

14 MS BUISMAN: Yes, we can. Can we do that after the break, or do you want to do
15 it now?

16 PRESIDING JUDGE EBOE-OSUJI: Indeed, that's the point to take our morning
17 break.

18 Witness, we will now take our morning break for 30 minutes and then we will resume
19 at 11.30.

20 THE WITNESS: Thank you, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: We will go into closed session to usher the
22 witness out of the courtroom and then we will rise from there.

23 Closed session.

24 *(Closed session at 11.00 a.m.) Reclassified as Open session

25 THE COURT OFFICER: We are in closed session, Mr President.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 2 (The witness stands down)
- 3 PRESIDING JUDGE EBOE-OSUJI: Court will rise.
- 4 THE COURT OFFICER: All rise.
- 5 (Recess taken at 11.01 a.m.)
- 6 (Upon resuming in open session at 11.33 a.m.)
- 7 THE COURT USHER: All rise.
- 8 Please be seated.
- 9 THE COURT OFFICER: Mr President, we are in open session.
- 10 PRESIDING JUDGE EBOE-OSUJI: Thank you very much, court officer.
- 11 Ms Buisman?
- 12 Witness, welcome back.
- 13 MS BUISMAN: Thank you, Mr President.
- 14 So we will play that message from Raila Odinga. It is our preference just to do the
- 15 passage, but if you want to hear the whole thing again then --
- 16 PRESIDING JUDGE EBOE-OSUJI: Yes, just the passage is fine.
- 17 MS BUISMAN: Yes.
- 18 So this is -- it is at -- actually, we go to page 8. It's the same message, starting at page
- 19 8, 0576. The time stamp is 17.35 up to 17.58.
- 20 PRESIDING JUDGE EBOE-OSUJI: Page 8, you say?
- 21 MS BUISMAN: Yes, and it is at the beginning of Raila's message.
- 22 PRESIDING JUDGE EBOE-OSUJI: At page 8?
- 23 MS BUISMAN: Yes.
- 24 It's two parts that we wanted to play. The one is at 17.35 up to 17.58 and then 18.24
- 25 up to 18.31. Page 8, 0576.

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1 (Playing of the audio excerpt KEN-D11-0013-0028)

2 MS BUISMAN:

3 Q. Mr Witness, do you hear that?

4 A. Yes.

5 Q. So I'll just read it out in English:

6 "We are reliably informed that AP officers have been hired by PNU for the purpose of
7 trying to steal votes. Those officers left Embakasi yester night travelling in City
8 Hopper and Kenya Bus Service buses. They have been transported to Rift Valley,
9 Western and Nyanza provinces."

10 That is correct, right?

11 A. Yes, that is correct.

12 MS BUISMAN: So then let's go to the second part, which is at time stamp 18.24 up
13 to 18.31.

14 (Playing of the audio excerpt KEN-D11-0013-0028)

15 MS BUISMAN:

16 Q. Did you hear that?

17 A. Yes.

18 Q. I'm just reading the English into the record:

19 "We have also received reports that they will be armed, and we want to condemn
20 such actions in the strongest terms."

21 That is what you heard, right?

22 A. Yes, your Honour.

23 Q. Now, Mr Witness, this message of Raila Odinga was already in the newspapers
24 as of the 24th. For instance, in The Standard of 24 December this is already there.

25 Do you accept that, or do I have to place it in front of you?

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1 A. I can't remember.

2 MS BUISMAN: So can I just very quickly place in front of you tab 9. This is

3 KEN-D09-0039-0043, EVD number T-D09-00263?

4 PRESIDING JUDGE EBOE-OSUJI: Tab 9, you say?

5 MS BUISMAN: Tab 9 of the cross-examination bundle.

6 PRESIDING JUDGE EBOE-OSUJI: All right, hold it there.

7 We will go to tab 9, but in the meantime while we are at tab 14 in the audio you've

8 played and the text of the transcript of which you've read on to the record, is it correct

9 to say that -- the transcript as we see it is at page 8. Is it correct to say that it is

10 exactly the same material that we see at page 28?

11 MS BUISMAN: It is exactly the same message that's being repeated over and over

12 again --

13 PRESIDING JUDGE EBOE-OSUJI: All right.

14 MS BUISMAN: -- throughout the audio.

15 PRESIDING JUDGE EBOE-OSUJI: All right, thank you.

16 So you say we go next to tab 9?

17 MS BUISMAN: Indeed.

18 Could the court officer please place it in front of the witness?

19 Q. Do you have it in front of you, Mr Witness?

20 A. Yes.

21 Q. Do you see at the left of that first page a column with the title, "State denies

22 rigging claims"? Do you see that?

23 A. Yes, your Honour.

24 Q. And this is all about Mr Raila Odinga's allegation -- it's not just Raila Odinga's.

25 It's the ODM's allegation of this attempt to rig the elections. Do you see that?

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1 A. Uh-huh.

2 Q. So our point is as early as 24 December 2007 the Kenya's biggest papers are
3 already reporting on these allegations before you heard Kass. Do you accept that
4 now you see this newspaper?

5 A. I can accept that there was a rigging allegations which made by ODM, but I'm
6 still insisting that it was on 26th when Sang was announcing this number of vehicles
7 that brought in fake ballot papers. I cannot dispute that there was allegation
8 by -- rigging allegations which is also part of my testimony.

9 Q. Thank you, Witness. Just do you also accept that on the 26th what is being
10 reported is again this ODM allegation? There's no report of anything that was said
11 of Kass allegations? Do you accept that, or do I have to place another newspaper in
12 front of you? If you accept it, we move on. I know you maintain your testimony,
13 but --

14 A. Yes. Your Honour, I can see that these things is there by records, but my -- my
15 still believing that Sang used the radio on 26th to read out the numbers and make
16 people to go to the -- to block the roads.

17 Q. And just to make it very clear to you, we are not disputing that you've heard
18 Mr Sang. He might have summarised what other people have reported. It is our
19 position what we've heard throughout this audio on 25 December, discussing the
20 likelihood of rigging, the use of administration police and the use of motor vehicles,
21 these are the allegations that are brought out initially by Raila Odinga and it's been
22 discussed, as you heard, by journalists like Tarus Silas, Tanui and Timothy. That
23 you heard, correct?

24 A. I heard.

25 Q. And can you also confirm that Tanui is -- his name is Kibyego K-I-B-Y-E-G-O,

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1 Arap A-R-A-P, Tanui T-A-N-U-I, and he also uses the name Kwombo Chepkosgei?

2 Are you aware of that? Can you confirm that?

3 A. I know him and I know he's a broadcaster from initially Kass FM.

4 Q. And you confirm that his other name is Kwombo Chepkosgei?

5 A. It is.

6 MS BUISMAN: Let me spell that for the record. That's K-W-O-M-B-O, Chepkosgei,

7 C-H-E-P-K-O-S-G-E-I.

8 Q. So, Mr Witness, as I said, we accept you heard Mr Sang, we put it to he did not
9 ask people to block the roads, he in fact asked people to stay calm the evening before,
10 but we do accept you heard him. We do not accept he was the one spreading this
11 rumour. Do you understand my proposition?

12 A. I understand your proposition, but also I cannot deny -- I cannot refuse that he
13 was on 26th talking the same message, but I cannot deny that he use on 26th evening,
14 because though I didn't listen myself to that programme, maybe because of -- maybe
15 I was busy at that particular moment, I can do -- stand by what I heard on 26th.

16 Q. Yes. And just --

17 PRESIDING JUDGE EBOE-OSUJI: What programme did you say you did not listen
18 to because you were probably busy?

19 THE WITNESS: This one which I was given transcripts, this on audios on 25th
20 evening.

21 PRESIDING JUDGE EBOE-OSUJI: All right, thank you.

22 MS BUISMAN: Yes, and what you heard was after the 25th we just heard. I put
23 the date on the record.

24 Q. There's one more thing I want to put to you. I'm putting to you that Sang, he
25 was neither the one who was, as I said, distributing the rumour, he was simply trying

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1 to uncover the truth about this allegation. Having heard this audio, would you
2 accept that?

3 PRESIDING JUDGE EBOE-OSUJI: I think we can move on, Ms Buisman.

4 THE WITNESS: Okay, I can --

5 PRESIDING JUDGE EBOE-OSUJI: It is all right. It is all right, Witness.

6 We can move on, Ms Buisman.

7 MS BUISMAN: I will move on to an entire different area.

8 Q. Witness, in your testimony did I understand you to say that Mr Sang made
9 Ruto?

10 A. Made what?

11 Q. Did he promote him as a Kalenjin leader?

12 A. Yes, your Honour.

13 Q. And if I understood you well --

14 PRESIDING JUDGE EBOE-OSUJI: So your question now is about promoting, not
15 about making; is that it?

16 MS BUISMAN: Well, I changed because the witness did not understand "made."
17 That's what I understand.

18 PRESIDING JUDGE EBOE-OSUJI: All right.

19 MS BUISMAN:

20 Q. Did he make him as someone famous in the region?

21 A. Yes, your Honour.

22 Q. And he promoted him as a Kalenjin leader of the region?

23 A. Yes, your Honour.

24 Q. Being Rift Valley?

25 A. Yes, your Honour.

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1 Q. Then you said that any message that would criticise Mr Ruto would be cut off
2 by Mr Sang?

3 A. Yes, your Honour.

4 Q. And that he would have a lot -- he would give a lot more time to people who
5 were promoting Ruto?

6 A. Yes, your Honour.

7 Q. Witness, are you aware of a meeting that was held in Kajiado in the Maasai
8 Safari Lodge, where some Rift Valley leaders endorsed Ruto to be the leader of
9 Rift Valley? Have you heard of?

10 A. I don't -- I'm not aware of the meeting.

11 Q. Just for the record, I'll spell Kajiado K-A-J-I-A-D-O.

12 (Microphone not activated) ...not here about this meeting. Are you aware that at
13 some point in time leaders of the Kalenjin community promoted Ruto as their leader?

14 A. I can understand that, but this part of the scheme and the mouthpiece to prepare
15 that to be prepared was Sang.

16 Q. Are you aware of the Eldama Ravine resolution?

17 A. Eldama Ravine declar -- what?

18 Q. I'll spell it.

19 A. Eldama Ravine?

20 PRESIDING JUDGE EBOE-OSUJI: Eldama Ravine.

21 THE WITNESS: Yes.

22 MS BUISMAN:

23 Q. Are you aware of that?

24 A. I can't remember the date, but I can remember about such a meeting which then
25 MP Musa Sirma was organising, I cannot remember very well, but yes, I can

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1 remember.

2 Q. Can you tell us what the resolution was?

3 A. This is one of the declaration that Ruto is a leader.

4 Q. And --

5 PRESIDING JUDGE EBOE-OSUJI: What was -- sorry. MP, what MP? What is the
6 spelling --

7 THE WITNESS: Musa.

8 PRESIDING JUDGE EBOE-OSUJI: -- at line 4?

9 THE WITNESS: Musa is M-U-S-A and Sirma is S-I-R-M-A.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 MS BUISMAN:

12 Q. It was the resolution where William Ruto was elected as the leader of the
13 Rift Valley?

14 PRESIDING JUDGE EBOE-OSUJI: Witness --

15 MS BUISMAN:

16 Q. Do you confirm that?

17 PRESIDING JUDGE EBOE-OSUJI: -- was that your understanding?

18 THE WITNESS: That -- I can't recall properly, but I -- in my mind I remember about
19 that meeting which was -- Ruto was declared as the leader of Rift Valley by leaders.

20 MS BUISMAN:

21 Q. And do you accept that this was also a resolution by which it was decided that
22 William Ruto would be the one who to seek presidency on behalf of Rift Valley?

23 A. I can remember, but yes, that is the --

24 Q. And do you accept, do you agree with me that since Moi's departure, various
25 people have sought to be the foremost leader in the Rift Valley and that includes

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1 Henry Kosgey, Nicholas Biwott, Kipruto Kirwa and William Ruto? Do you accept
2 that?

3 A. I accept that, but I was saying that despite that those leaders wanted to be one of
4 the leaders, Sang could use Kass FM to promote one, William Ruto, among those
5 leaders you have mention.

6 Q. To seek the presidency of the country?

7 A. Presidency, leadership of the community. We have -- we have -- we want also
8 our -- our bull, call it our bull, kirgit. Yes.

9 Q. Do you recall what was the position of the ordinary people at this endorsement
10 of William Ruto as opposed to the political leaders? Do you know what the position
11 was of the ordinary people on this decision?

12 A. After a long time of promoting Mr Ruto through Kass FM, Ruto become the top
13 leader whom nobody else could challenge him, especially even calling in programmes
14 everywhere, then Sang was the one -- if you mentioned somebody else, you could not
15 go well with Sang.

16 Q. So do you then recall what Sang's position was about this particular resolution?

17 A. I don't -- I cannot remember unless I know from you.

18 Q. But you see here he endorsed Ruto; that's correct?

19 A. Yes, promoting among the other leaders.

20 PRESIDING JUDGE EBOE-OSUJI: Can we get the spelling at line 11? Is that the
21 correct spelling?

22 Witness, you mentioned, I believe, the Kalenjin word for bull. You said "our bull."
23 What did you use?

24 THE WITNESS: Kirgit.

25 PRESIDING JUDGE EBOE-OSUJI: How do you spell that?

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1 THE WITNESS: K-I-R-G-I-T. Kirgit.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you.

3 MS BUISMAN:

4 Q. Were there any other endorsements of the other leaders like any other leader
5 than William Ruto, were they also endorsed at that meeting when the resolution came
6 out?

7 A. I can't recall now what exactly happened in that meeting.

8 Q. But the decision of the leaders was to -- for Ruto to seek presidency?

9 A. But promotion of Ruto started as early as 2005, that it's been -- even during
10 Koitalel Day in 19 October that was when Ruto was actually started being promoted
11 by the same radio, through Kass FM by Sang.

12 MS BUISMAN: I would like us to listen to another audio and this is an audio
13 already heard yesterday. It's 7 March 2007.

14 PRESIDING JUDGE EBOE-OSUJI: Spellings, please, line 16. Let's watch out for
15 these things. Whenever there is a new word introduced, we should pause to capture
16 it on the record at that time. I believe the witness said Koitalel Day.

17 THE WITNESS: Yes, your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: Okay. That will be K-O-I-T-A-L-E-L; is that it?

19 THE WITNESS: Yes, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you.

21 MS BUISMAN: Yes, thank you.

22 So I would like to go to 7 March 2007 and this is at tab 37 of the main
23 cross-examination binder. The number of the audio is KEN-D11-0015-0120, this is
24 the audio, and the transcription is KEN-D11-0019-0177, transcription and translation.
25 And this is at -- we are going to time stamp 4.07 up to 4.27.

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1 And can the document be placed in front of the witness, please?

2 PRESIDING JUDGE EBOE-OSUJI: At what page are we going to be looking at?

3 MS BUISMAN: Page 1, which is KEN-D11-0019-0178.

4 THE WITNESS: Page?

5 MS BUISMAN: Well, can we go -- in fact, we go straight to the topic which is time
6 stamp 2.43 up to 15.45 -- I correct myself, 9.43 up to 15.45 and this is at page 5.

7 Q. Are you with me, Mr Witness?

8 A. Yes, your Honour.

9 Q. We start where you see the name "Joshua Sang"?

10 A. Up or down? Up?

11 Q. Not the very up, but the second time you see the name mentioned.

12 A. Okay.

13 MS BUISMAN: "Kalenjin listeners ..." in English. So if everyone is there, I would
14 like to play it now.

15 (Playing of the audio excerpt KEN-D11-0015-0120)

16 MS BUISMAN:

17 Q. Did you hear that, Mr Witness?

18 A. I hear.

19 Q. So I will just read out for the record the English translation. Quote:

20 "Kalenjin listeners, our topic today is on what you know or have heard of. Leaders
21 from Rift Valley met yesterday. Someone may say, but I did not attend the meeting,
22 but leaders met yesterday at the Maasai Safari Lodge in Kajiado Central, which is part
23 of Rift Valley. The leaders agreed and outlined about six resolutions, now named
24 Maasai Lodge Declaration, on behalf of the people from Rift Valley. Rift Valley is
25 home to all communities. It is a cosmopolitan province." Quote -- end of quote,

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1 and for the record we stopped at 10.24.

2 Is that a fair translation, Mr Witness?

3 A. It is.

4 Q. And does this correspond with the resolution we just talked about?

5 A. Yes, your Honour.

6 MS BUISMAN: Thank you.

7 I'd like to continue where we started off.

8 (Playing of the audio excerpt KEN-D11-0015-0120)

9 PRESIDING JUDGE EBOE-OSUJI: You know when to pause? Are you playing the
10 whole thing to the end?

11 MS BUISMAN: No.

12 PRESIDING JUDGE EBOE-OSUJI: Okay.

13 MS BUISMAN: We were just about to stop.

14 PRESIDING JUDGE EBOE-OSUJI: All right, proceed.

15 MS BUISMAN: Are we at the end? It's one more word, yes.

16 (Playing of the audio excerpt KEN-D11-0015-0120)

17 MS BUISMAN:

18 Q. Mr Witness, did you hear that?

19 A. Yes, I heard that.

20 Q. So I will read into the record the English translation: "The leaders who met
21 came from Turkana, Mount Elgon, Trans-Nzoia, Marakwet, Keiyo, Laikipia, Samburu,
22 Narok, Narok North, Narok South, Bomet, Kericho, Bureti, Nandi North, Nandi
23 South, Nakuru, Baringo and Baringo East districts. That is all the districts in the
24 entire Rift Valley and these comprised of the Kalenjins and non-Kalenjins.
25 Majority of those who attended were leaders from Rift Valley, who include Kalenjins

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1 and the Maasai - who are considered by many to be Kalenjins too. There were also
2 people from Samburu and Turkana communities. In the meeting, a number of issues
3 were agreed upon, but I want to focus on only two issues. The other issues do not
4 concern the residents of Rift Valley Province." End of quote.

5 Mr Witness, could you hear that?

6 A. Yes, your Honour.

7 Q. Is it a fair translation?

8 A. It is.

9 Q. And do you accept that, when they're talking about "the cosmopolitan
10 province," is it true that all these tribes are in the Rift Valley; Kalenjins and
11 non-Kalenjins?

12 A. Yes, they are talking about Maasais and Samburus, but actually bear in mind
13 that Kikuyus are there in Rift Valley.

14 MS BUISMAN: Thank you.

15 So let us move on to the next passage and we continue from 11.34. That's where we
16 stopped.

17 (Playing of the audio excerpt KEN-D11-0015-0120)

18 MS BUISMAN: Can we please ask the Court's assistance? We have a problem with
19 the sound.

20 (Playing of the audio excerpt KEN-D11-0015-0120)

21 MS BUISMAN:

22 Q. Mr Witness, could you follow the audio?

23 A. Yes, your Honour.

24 Q. And I'll read out the English translation:

25 "Other issues discussed include; issues of administration, reason as to why we need

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1 leadership in this country and how leadership has been in this country. However,
2 the areas I want ... to emphasise and know if you agree with, is on the issue of a
3 political party. The meeting resolved, in point number four: That Rift Valley will
4 support ODM party, and believe that ODM is the party they will use to get leadership
5 and end poverty in this country."

6 And for the record we stopped at 12.16.

7 Is this a fair translation, Mr Witness?

8 A. It is.

9 MS BUISMAN: Thanks. And I would just like to move on.

10 PRESIDING JUDGE EBOE-OSUJI: Before you do, so it is part of your case, is it, that
11 this resolution it's saying that everyone in the Rift Valley would support the ODM
12 party? Is that the point of the resolution?

13 MS BUISMAN: The point of the resolution is that Honourable William Ruto to be
14 their presidential candidate in ODM in Kenya, or to run for president in the country.
15 That is the point.

16 PRESIDING JUDGE EBOE-OSUJI: Perhaps I should have been clearer. So what
17 has now been read on to the record thus far, is the understanding then that so far it is
18 telling us that the resolution is to the effect that everyone in the Rift Valley would
19 support the ODM party?

20 MS BUISMAN: Mr President, it's a resolution taken by leaders of the community,
21 but that is their assumption.

22 PRESIDING JUDGE EBOE-OSUJI: Yes, that is the point -- that is the point of their
23 resolution. Isn't that it, the point?

24 MS BUISMAN: Yes, but that is -- there are some, but not everyone is of course
25 supporting this resolution, but we'll come to that.

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1 PRESIDING JUDGE EBOE-OSUJI: We want to understand the point of -- we're
2 trying to find out what happened in the post-election violence and that is why we're
3 holding this trial, isn't it, and we want to know what was said at any point in time?

4 MS BUISMAN: The point is not that everyone must vote for William Ruto.

5 PRESIDING JUDGE EBOE-OSUJI: I'm not talking about William Ruto now. I'm
6 saying you've read something on to the record. Quote:

7 "The meeting resolved, in point number four: That Rift Valley will support ODM
8 party, and believe that ODM is the party they will use to get leadership and end
9 poverty in this country." Unquote.

10 My question is this is saying that everyone in Rift Valley will support the ODM. Is
11 that what it is saying?

12 MS BUISMAN: That is the -- that is what the leaders want indeed.

13 PRESIDING JUDGE EBOE-OSUJI: Okay.

14 And if you go further up in the text, further up you read above time stamp 10.57, after
15 the enumeration of the district in the Rift Valley, we have the quote, quote, "That is all
16 the districts in the entire Rift Valley and these comprised of the Kalenjins and non
17 Kalenjins." Unquote.

18 The point then to be that the effect of that resolution in point number four that we've
19 looked at was to the effect that not only the Kalenjins in the Rift Valley to support the
20 ODM party, but also non-Kalenjins in the Rift Valley was to support the ODM party;
21 was that the point?

22 MS BUISMAN: Well, that is the intention, but like any political leaders, they're
23 saying they want their supporters with support, not that -- it's not saying that
24 everyone in Rift Valley will, but it is according to the leaders --

25 PRESIDING JUDGE EBOE-OSUJI: The intent.

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- 1 MS BUISMAN: -- their intention, yes.
- 2 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 3 MS BUISMAN: As much as they can, yes.
- 4 PRESIDING JUDGE EBOE-OSUJI: Please proceed.
- 5 MR KHAN: Mr President, can I just add a note of caution of submissions regarding
- 6 one party's view of a document in the presence of a witness.
- 7 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, there are so many documents put in
- 8 this case, and as the point becomes relevant, I will ask questions -- the Chamber will
- 9 ask questions we need to keep in mind.
- 10 MR KHAN: Indeed, Mr President.
- 11 PRESIDING JUDGE EBOE-OSUJI: Yes.
- 12 MR KHAN: Just to note it for the record.
- 13 PRESIDING JUDGE EBOE-OSUJI: Yes, yes, yes.
- 14 Move on. Ms Buisman, continue.
- 15 MS BUISMAN: Yes. And just to make it very clear, we're talking about the
- 16 position of the leaders not the community.
- 17 PRESIDING JUDGE EBOE-OSUJI: Proceed.
- 18 MS BUISMAN: Yes.
- 19 (Playing of the audio excerpt KEN-D11-0015-0120)
- 20 MS BUISMAN:
- 21 Q. Mr Witness, did you hear that?
- 22 A. Yes, I hear.
- 23 Q. Let me just read into the record the English translation and you tell me if it is
- 24 fair. Quote:
- 25 "Other issues discussed include; issues of administration, reason as to why we need

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1 leadership in this country and how ..." this "... leadership has been in this country.
2 However, the areas I want ... to emphasise and know if you agree with, is on the issue
3 of a political party. The meeting resolved, in point number four: That Rift Valley
4 will support ODM party, and believe that ODM is the party they will use to get
5 leadership and end poverty in this country.
6 They urged all Kenyans to unite and support ODM party because it has a national
7 outlook - the supporters come from different regions. They also asked all Kenyans
8 to back ODM. They also resolved to continue seeking to win power in the country in
9 order to end the suffering facing the Kenyan people, like insecurity, unemployment,
10 poverty and many others.
11 Another resolution passed is number five, that; Rift Valley has endorsed the
12 honourable William Samoei Kipchirchir arap Ruto to be their presidential candidate
13 in ODM Kenya, or to run for president in this country. The people from Rift Valley
14 said he has demonstrated exceptional leadership qualities."

15 Mr Witness, is that a fair translation?

16 A. It is, your Honour.

17 MS BUISMAN: For the record we stopped at 13.17.

18 I will now move on to another time stamp which is 18.07, which is at page number 10,
19 it's KEN-D11-0019-0187, that's the page, and the time stamp ends -- it's 18.07 up to
20 18.55.

21 Q. Are you there, Mr Witness?

22 A. Yes, your Honour.

23 Q. And I'm going to the last part of Joshua Sang. It says 18.7. Do you see it?

24 A. Mmm-hmm.

25 MS BUISMAN: 07, yes. So let us listen to it now then.

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1 (Playing of the audio excerpt KEN-D11-0015-0120)

2 MS BUISMAN:

3 Q. Mr Witness, did you hear that?

4 A. Yes, your Honour.

5 MS BUISMAN: So let me read into the record the English translation:

6 "And so listeners, what do you say about yesterday's resolutions? Do you agree or
7 not? That is what the leaders resolved, how about you as an individual? That is
8 what we are asking you today. If you do not agree, say it, if you agree, say it as well,
9 so that we know, because we reach the people of Rift Valley and those who spoke in
10 the meeting are their leaders. Do you agree with them?"

11 And, Mr President, then there was something about the SMS. I'm not sure I need to
12 translate that.

13 PRESIDING JUDGE EBOE-OSUJI: Okay.

14 MS BUISMAN:

15 Q. Mr Witness, is that a fair translation of what you heard?

16 A. It is.

17 Q. And you agree that Sang was asking the public to say whether or not they
18 supported this position taken by some of the leaders?

19 A. It is, your Honour.

20 Q. Thank you.

21 Then I'd like to go to an -- the next time stamp which is 47.07, up to 47.26. It's at
22 page 33 and it's -- the KEN page is 0210.

23 Mr Witness, are you there?

24 A. Where? 44?

25 Q. 33.

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1 A. Yes, 33, yes. Page 33.

2 Q. And you see it's page 33, at the bottom you see time stamp 47.07, underneath
3 there is the name Joshua Sang. Can you see that?

4 A. Page 33, yes. Okay.

5 MS BUISMAN: So that's where I would like us to play the audio.

6 (Playing of the audio excerpt KEN-D11-0015-0120)

7 MS BUISMAN:

8 Q. Mr Witness, did you hear that?

9 A. Yes.

10 Q. So I'll just read it into the transcript and you tell me if it's fair:

11 "You are listening to Kass FM, Nairobi. There are SMS here. Josiah Kosgey in
12 Kapisimba in Siongiroi says No. He says he spoke in Transmara to say lets us bow
13 down to the Maasais or something like that ... he says No. That is from Jo Kosgey."
14 Is that what you heard?

15 A. Yes, your Honour.

16 Q. And did you hear Mr Sang reacting at all to this response of "No"?

17 A. No.

18 Q. Because that was someone opposing William Ruto, correct, and no intervention
19 from Mr Sang?

20 PRESIDING JUDGE EBOE-OSUJI: Is that -- does that follow?

21 MS BUISMAN: I'm asking the witness.

22 PRESIDING JUDGE EBOE-OSUJI: No, no. The question that the person was --

23 MS BUISMAN: Opposing the resolution.

24 PRESIDING JUDGE EBOE-OSUJI: All right. There are different things in the
25 resolution and you picked out opposing William Ruto.

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1 MS BUISMAN: As the --

2 PRESIDING JUDGE EBOE-OSUJI: And then there's --

3 MS BUISMAN: -- elected leader.

4 Q. The question that was posed earlier was whether the people agreed with the
5 choice of William Ruto as the leader and here Mr Joshua Arap Sang is listening to
6 someone, an SMS, and he says "No." That is correct, isn't it, Mr Witness?

7 A. Yes.

8 PRESIDING JUDGE EBOE-OSUJI: No to what? That's what I'm saying. Do we
9 see it? Is it apparent?

10 As I recall you skipped a few -- some gaps, is there not, between the last time the
11 resolutions were mentioned and the point where Mr Ruto's name was mentioned,
12 skip again, count SMS, and somebody says "No," and you're asking the witness to say
13 that's "No" to William Ruto?

14 MS BUISMAN: It is. I mean, it's hard, because I can't read out the entire audio, so
15 we have to take excerpts. It will be clear later on, Mr President.

16 PRESIDING JUDGE EBOE-OSUJI: Maybe when it is clear you can then pose that
17 question. Right now it is not a fair question for this witness. Maybe your difficulty
18 is a problem to you, but that shouldn't be an unfairness to the witness.

19 MS BUISMAN: So let's move on. I just have to correct spelling here at page 59, line
20 2. It is, I will spell the names that I read out Josiah, J-O-S-I-A-H, Kosgey,
21 K-O-S-G-E-Y, and the other name was Kapisimba, K-A-P-I-S-I-M-B-A. Siongiroi,
22 S-I-O-N-G-I-R-O-I.

23 MS BUISMAN; So can we then go to the next time stamp, which is 48.29, which is at
24 page 35.

25 (Playing of the audio excerpt KEN-D11-0015-0120)

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1 MS BUISMAN:

2 Q. Mr Witness, did you hear that?

3 A. Yes, your Honour.

4 Q. Let me read it out into the record. The time stamp is 48.29 up to 49.11. We
5 stopped a bit earlier, 48.58. So let me read it out:

6 "Kimalel ..." K-I-M-A-L-E-L "... Kinyozi ..." K-I-N-Y-O-Z-I "... says yes. He says he
7 believes whoever does not agree is cursed. No, they are not. They cannot be
8 cursed because everyone has a right. That is from Ngarwa in Nanyuki Barracks."

9 Ngarwa is N-G-A-R-W-A in Nanyuki, N-A-N-Y-U-K-I, Barracks:

10 "No, they cannot be cursed. Let us not go there because everyone has a right to
11 choose whoever they want."

12 Is that what you hear, Mr Witness?

13 A. Yes, your Honour.

14 MS BUISMAN: If we can just play the next two lines so we can see for Mr President
15 what we are talking about.

16 (Playing of the audio excerpt KEN-D11-0015-0120)

17 MS BUISMAN:

18 Q. Mr Witness, did you hear that?

19 A. Yes.

20 Q. And if I can read it into the record. "Chepkergo ..." C-H-E-P-K-E-R-G-O "... in
21 Segero ..." S-E-G-E-R-O "... says yes Ruto can do it. But he may become another Idi
22 Amin. Those are your thoughts."

23 Mr Witness, do you agree hearing this, was this a fair translation?

24 A. It was.

25 Q. And do you agree to Mr Sang's response to this person whose SMS he's reading

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1 out is "Those are your thoughts." That is correct, is it not?

2 A. Yes.

3 Q. And that is a response to someone referring to Ruto being able to do it, but he
4 may become another Idi Amin. That's right, is it not?

5 A. It's right.

6 Q. But Joshua Sang says, "Those are your thoughts."

7 Do you agree from the other paragraph just above it where we talk about other
8 people calling in who say that anyone who does not agree is cursed. Look at
9 Mr Sang's reaction. He says, "No, they cannot be cursed. Let us not go there
10 because everyone has a right to choose whoever they want." They are Sang's words,
11 aren't they?

12 A. Yes.

13 Q. Mr Witness, does this not show that Mr Sang is open to different opinions?

14 A. According to what I can see here, but not all the time.

15 MS BUISMAN: Thank you, Witness.

16 And just for the record, this last part we read out was between 48.58 up to 49.11

17 PRESIDING JUDGE EBOE-OSUJI: While Ms Buisman settles -- where are we?

18 You're thinking about your next line of question or consulting for that, is that it?

19 MS BUISMAN: My lead counsel would like the floor.

20 PRESIDING JUDGE EBOE-OSUJI: While you're consulting --

21 Witness, you did say something about the Koitelesh Day celebration of 19 October.

22 THE WITNESS: Yes, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: 2005.

24 THE WITNESS: Yes, your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: And your testimony was to the effect that as of

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1 that date, Mr Sang had already started or started on that date to promote Mr Ruto as
2 the top-most Kalenjin leader. Was that your testimony?

3 THE WITNESS: Yes, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: What happened on the Koitelesh day? And how
5 was it that you formed the view that Mr Sang was promoting Mr Ruto as the
6 top-most Kalenjin leader on that date?

7 THE WITNESS: Earlier before that day Ruto -- Sang had already promote in his
8 morning show that we want to be united into one community, and any person who
9 was against that particular could not be in the good books. And also they heard
10 that -- and Ruto was actually -- he was promoting Ruto as one of the person who was
11 actually fighting for them. And yet by then he was in the -- he was supporting -- he
12 was against the draft constitution, which alleged that maybe if that constitution be
13 pass, then the -- the -- the soil of the Rift Valley will be taken over by Kikuyus.
14 So by then whoever was supporting against -- who was not supporting the -- who
15 was supporting the draft constitution by then was an enemy of the community, and it
16 was provoked through the radio by Sang. And by then already the line had been
17 drawn, whoever who was not in the line of Ruto was not been given even chance,
18 even during Koitelesh Day. He was not actually -- nobody was given a chance from
19 the Kalenjin community who was not -- who was then with PNU side. And I can
20 call -- it was not PNU by then, it was NARC. But actually it was not.
21 All leaders were shut down, but Ruto was a hero on that day. This was the creation
22 of Sang who started earlier. And even there was a song which was sang all every
23 time. It was creating like something emotional when it was sang, that Kalenjin are in
24 the middle of the water, and then pray to God to take them up to the other -- the other
25 side of the river, so which mean Ruto was the one who taking them -- who was

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1 leading them by then.

2 And actually during Koitelet Day nobody was hallowed, including all ministers, all
3 everybody, apart from Ruto, who was given I heard welcome on that particular day,
4 and this is was because of Sang's propaganda on that time.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Counsel, of course you can always ask follow-up questions on both sides from the
7 ones I ask.

8 This is for you, Ms Buisman. Mr Kigen-Katwa can also respond to it. There have
9 been references to the Eldama Ravine resolution. Is it in evidence? Do we have
10 that evidence of that resolution on record?

11 MS BUISMAN: No, but we could of course produce it.

12 PRESIDING JUDGE EBOE-OSUJI: You have been making references to it, so I was
13 wondering whether one can see what it looks like?

14 MS BUISMAN: I was commenting on the audio, But it is not in evidence.

15 PRESIDING JUDGE EBOE-OSUJI: All right. Please proceed.

16 MS BUISMAN:

17 Q. I would just like to on your earlier, because it will also respond now to this
18 witness, I want to clarify what this debate is about. At page 6, this is something that
19 we went through with you, and we are focusing on only two issues that you heard,
20 there was point number four and number five. I just want to put it clearly so we
21 know what we're dealing with.

22 Number four is that "Rift Valley will support ODM party and believe that ODM is the
23 party they will use to get leadership and end poverty in this country." It is
24 something I read out, it is at page 6.

25 And then issue number five is at page 7, and it is that the "... Rift Valley has endorsed

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1 the honourable William Samoei Kipchirchir arap Ruto to be their presidential
2 candidate in ODM Kenya, or to run for president in this country."

3 And so there is one about ODM specifically and another about William Ruto. But
4 the question that is being discussed throughout is -- starts at page 10. And I could of
5 course have the witness listen to it, or I can just read it out for everyone's information.

6 PRESIDING JUDGE EBOE-OSUJI: We don't -- it is up to you. My intervention at
7 that point was that you asked the witness to respond to a specific proposition you had
8 put that wasn't clear. That was all. Somebody sent a text message saying "No," and
9 you asked the witness that "No" was no to Mr Ruto as leader. But up 'til that point it
10 wasn't clear that that was what the "No" in the text message was, and that was what
11 made it unfair for the witness to answer. But then you continue to explore that
12 theme, and now you've made your point.

13 MS BUISMAN: Well, Mr President, we did go through the introduction, and we did
14 go specifically through all these points, number four and number five. And also at
15 number ten is actually where the question is posed. And since it is not clear, let me
16 just put it in the record.

17 This is at page 10 of the same document. And initially this is Joshua Sang saying, "It
18 may also be seen from the perspective that Uhuru Kenyatta is interested; he is the son
19 of the late leader, Raila Odinga too is interested -- he is the son of a former leader."

20 PRESIDING JUDGE EBOE-OSUJI: We have to move on. See, there is no --

21 MS BUISMAN: Then you see --

22 PRESIDING JUDGE EBOE-OSUJI: One second. Wait, wait, wait, wait, wait. It's
23 for counsel to choose their question in a way that clearly points the witness to the
24 proposition being made. It may be that sometimes such propositions are not easily
25 made on the basis of the material available. It's for counsel to consider whether they

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1 want to pursue it or want to abandon it and go for a clearer proposition. That is all.

2 So we understand your difficulty. You -- there's a lot of text between the mention of

3 "Ruto" and the mention of "No" in the SMS text.

4 MR KHAN: Mr President, if it assists, just in relation to page 33, just above the "No,"

5 on the same page, one sees at 44.06 that a caller, John Milgo, phones in and says, "We

6 are fully in ODM. We are at the centre of it. We also support Honourable Arap

7 Ruto," and it goes on unquote. And, your Honour, then it's very clear at 14.25 there's

8 adverts, and then immediately thereafter at 14.07 we have the "No" interjected. So

9 that's the context and of course the Bench will make of it what they think is

10 appropriate.

11 PRESIDING JUDGE EBOE-OSUJI: Yes, that context wasn't clear at the point of

12 asking the question to the witness, but we can move on.

13 MS BUISMAN:

14 Q. Mr Witness, we just heard you respond to a question from the President, and

15 obviously we are going through this audio where Mr Sang is going through these

16 questions and what we're trying to put to you is that he is asking people's opinions.

17 He's not imposing his opinions. From what you've heard so far, would you agree

18 with that?

19 A. Yes. According to what we have passed through, he was just keeping -- he

20 was just moderating the message.

21 Q. Yes. And then I'd like to -- for one last part of this audio which is at page 58.

22 This is KEN page 0235 and it's time stamp 1.31.24 up to 1.33.32.

23 A. 56?

24 Q. It is page 58. Are you with me, Mr Witness?

25 A. Yes, I am.

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- 1 MS BUISMAN: Can we just start at -- yeah, let's play it.
- 2 (Playing of the audio excerpt KEN-D11-0015-0120)
- 3 MS BUISMAN:
- 4 Q. Mr Witness, did you hear that?
- 5 A. Yes, your Honour.
- 6 Q. Did you recognize this voice, Mr Witness?
- 7 A. I recognize for Sang, but the caller, yes. Yeah, the caller.
- 8 Q. Did you not recognize the voice of the caller?
- 9 A. Yes, I hear what he was saying, but I -- I cannot recognize who is he but, yes,
- 10 I could hear.
- 11 Q. Do you know a person called Magerer Arap Lugui Moita? I will spell that:
- 12 M-A-G-E-R-E-R, Arap A-R-A-P, Lugui L-U-G-U-I and then Moita M-O-I-T-A. Is that
- 13 someone you're familiar with?
- 14 A. No, I don't know.
- 15 Q. So you do not know that this is a PNU member?
- 16 A. I don't know. If he's coming from far end of Kericho, I cannot know.
- 17 Q. Thank you, Witness. Well, I'm going to read this into the record in English and
- 18 I start with Joshua Sang saying:
- 19 "Thank you. Kass FM halo. Yes.
- 20 Caller: How are you Joshua.
- 21 Joshua: I am fine.
- 22 Caller: I totally disagree with ODM. ODM has really divided the Rift Valley. Let
- 23 us not lie to each other.
- 24 Joshua Sang: How did it divide it?
- 25 Caller: I wish there was another party that could unite the Kalenjin people just like

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1 Kass FM has done. Kass FM has ... brought together Kalenjin people as one station.

2 But you see when ODM was established, all interim positions were given to North
3 Rift (Valley).

4 Caller: Why did they not give some positions to South Rift (Valley) - the Kipsigis?

5 It has been considered that these people are only there to tether the cow for others to
6 milk.

7 Joshua: But! There is Honourable Noah Arap Too and Honourable Kiplalya

8 Kones ... Please listen first. I am simply asking, are they Kipsigis or not. Noah

9 Arap Too and Kipkalya Kones are in ODM interim ..."

10 Mr Witness, can you confirm that that is a fair translation?

11 A. It is, your Honour.

12 MS BUISMAN: Thank you.

13 Just carry on then the audio.

14 (Playing of the audio excerpt KEN-D11-0015-0120)

15 MS BUISMAN: And for the record we stopped at time stamp 1.33.032.

16 Q. Mr Witness, could you hear that?

17 A. Yes, your Honour.

18 Q. So let me read the English into the transcript:

19 "What I am saying is this, the presidential candidate is hailing from North Rift, the

20 chairman of (the party) comes from North Rift. The rest are irrelevant. They

21 should have considered a Maasai, or hand the position of chairman to Kipsigis. Or

22 Ntimama, because he was interested.

23 Caller: This is turning out to be like the case in 2002. Chaman Buch ... " -- and I will

24 spell that. C-H-A-M-A-N, Buch BUCH:

25 "... (Paul Sang) and Arap Salat pleaded for the position of nominated MP, which went

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1 to Esther Keino."

2 K-E-I-N-O:

3 "Otherwise, it would have given to someone ..." -- "... it would have been given to

4 someone from North Rift. In 2005, when we were in Kasarani, where Arap Ruto

5 won as secretary general and Uhuru as chairman, it was Arap Too who begged for

6 the position. It was a case of pleading. It would have gone to North Rift. So, why

7 wasn't even Anthony Kimeto ..." -- and I will spell that: Anthony K-I-M-E-T-O:

8 "... named as chairman. I don't agree with them. Kibaki is even better because he

9 has attempted to balance issues. Thank you. This is Magerer Arap Lugui Moita."

10 I will spell that: M-A-G-E-R-E-R, Arap, Lugui L-U-G-U-I and then Moita M-O-I-T-A.

11 And then:

12 "Joshua: Thank you. Those are the views of Matarit. "Kass FM hello."

13 Mr Witness, could you -- is that a fair translation?

14 A. It is.

15 Q. And this person, do you know a name called Matarit, M-A-T-A-R-I-T?

16 A. I don't know, your Honour.

17 Q. Because that is his real name.

18 Mr Witness, if you hear this, is it fair for me to say that Mr Sang gave this person a lot

19 of airtime although he was opposed to Mr Ruto and ODM? Is that a fair

20 proposition?

21 A. That is what he did that particular time.

22 Q. And at no time did Mr Sang interrupt him, did he?

23 A. He didn't, yes.

24 Q. Thank you. And having heard this audio, do you still stand by your testimony

25 that Sang cut off people with opposite views?

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1 A. Yes, I do, your Honour.

2 Q. Views pro-ODM, views pro-Ruto, you still stand by your testimony that he
3 would cut them off?

4 MR GARCIA: Argumentative, your Honour. The witness has already answered.

5 PRESIDING JUDGE EBOE-OSUJI: The witness can answer.

6 THE WITNESS: Yes, I stand by my testimony.

7 MS BUISMAN:

8 Q. Because I want to propose to you the reason -- you were talking about frequent
9 callers with whom he was a lot more patient and were a lot more online. I
10 propose - I put it to you - that the reason they were online all the time is because they
11 made a lot of effort, time and money to be heard on Kass FM, not because Sang gave
12 them preferential treatment. Is that a proposition you can accept?

13 A. Your Honour, I do also try my best to call, but somebody somewhere wins and
14 this listener I have been saying could end up even twice. What -- if I am using the
15 same, trying to call without non-stop and I cannot go through, I didn't say Sang give
16 permission to that person, but I don't know. Maybe they have special phone to call
17 through even if --

18 Q. And --

19 A. -- even when -- if I have a phone I want to call, even 20 shillings, Kenya
20 shillings, can make a call, can say even hello, but why I could not call through.

21 Q. But they could have more than one phone, Mr Witness.

22 Is it possible you got it wrong? Is it possible that it is because people were paying
23 more money, more time, had more phones and that is why they're more on air? Is
24 this a possibility, Mr Witness?

25 MR GARCIA: I object, your Honour. That calls for speculation.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Objection sustained.
- 2 MS BUISMAN: Well, then I move on from this point. And I see the time.
- 3 PRESIDING JUDGE EBOE-OSUJI: Indeed. We will take our lunch-break now.
- 4 We will come back at 2.30.
- 5 We go to closed session now for the witness to be ushered out of the courtroom.
- 6 *(Closed session at 1.00 p.m.) Reclassified as Open session
- 7 THE COURT OFFICER: We are in closed session, Mr President.
- 8 (The witness stands down)
- 9 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.
- 10 THE COURT OFFICER: All rise.
- 11 (Recess taken at 1.01 p.m.)
- 12 (Upon resuming in open session at 2.41 p.m.)
- 13 THE COURT USHER: All rise.
- 14 Please be seated.
- 15 THE COURT OFFICER: Mr President, we are in open session.
- 16 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 17 Witness, welcome back. In a moment Ms Buisman will continue.
- 18 Ms Buisman, how much more time? We want you to finish today, but we want you
- 19 to do it in good time for us to do some housekeeping matters. There is something
- 20 Mr Khan had put on the table for quite some time now.
- 21 Private session for a minute.
- 22 *(Private session at 2.42 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 (Redacted)

3 (Redacted)

4 On that basis, we'll need you to complete in good time for us to take in all of that. What are
5 we looking at, your timing?

6 MS BUISMAN: Well, Mr President, we sent you an email to ask for one half-hour extension
7 because, Mr President, some new issues have come up also in your questions; the song, for
8 instance, was mentioned, that wasn't mentioned before.

9 PRESIDING JUDGE EBOE-OSUJI: Extension meaning what?

10 MS BUISMAN: Half an hour.

11 PRESIDING JUDGE EBOE-OSUJI: To what point?

12 MS BUISMAN: Up to 4.30.

13 (Trial Chamber confers)

14 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman, we will need you to complete by 3.30 today.
15 Wrap up your cross-examination by 3.30, all right.

16 MS BUISMAN: Can we then go into Monday for half an hour?

17 PRESIDING JUDGE EBOE-OSUJI: No, no. We want to complete your cross-examination
18 by 3.30.

19 MS BUISMAN: Mr President, there are a lot of allegations made, particularly in the last two
20 hours of the in-chief, that was extended way beyond that were the expectations of Tuesday.
21 I'm not asking for a lot. This is the most important witness so far against my client.

22 PRESIDING JUDGE EBOE-OSUJI: 3.30.

23 MS BUISMAN: So far we have been very indulgent with time. This is the only time we're
24 asking to finish our issues. I really kindly request you to reconsider.

25 PRESIDING JUDGE EBOE-OSUJI: 3.30.

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1 We will go into open session for you to continue.

2 MS BUISMAN:

3 Q. Mr Witness --

4 (Open session at 2.44 p.m.)

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

6 MS BUISMAN:

7 Q. Mr Witness, I just want to make a proposition to you in response to what we were

8 talking about before the break. It's true, is it not, that you yourself did not accept Mr Ruto as

9 the best possible leader and the reason you're upset at Mr Sang is not because (Redacted)

10 (Redacted) cut other people off, it's because you perceived him as Ruto's supporter; is that not right?

11 A. Repeat the question again, your Honour.

12 Q. The reason you are saying what you're saying about Mr Sang is because you perceive

13 him as Mr Ruto's supporter; is that right?

14 A. No, your Honour.

15 Q. That has nothing to do with him cutting off people (Redacted) on the radio; is that right?

16 A. That is not the position. It's -- my position is clear that -- that what I have been saying
17 is what I understand, not because I don't like Ruto, or whatever. It's nothing to do with that.

18 MS BUISMAN: Can we go into private session, please.

19 PRESIDING JUDGE EBOE-OSUJI: Private session.

20 *(Private session at 2.46 p.m.) Reclassified as Open session

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

22 MS BUISMAN:

23 Q. Mr Witness, the Prosecution (Redacted)

24 (Redacted).

25 And with the Court's support, I would like this document to be placed in front of him. It's at

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- 1 tab 60 of the Prosecutor -- can we put it on eCourt please? It is KEN-OTP-0036-0091. It's
- 2 number 60 -- tab 60 of the OTP bundle number 3. This is on the screen? Yes.
- 3 And, Mr Witness, this is (Redacted).
- 4 If I can go to the last page at 0094. Can that be placed on the screen?
- 5 Do you see that, Mr Witness?
- 6 A. Yes, your Honour.
- 7 Q. So I suggest to you (Redacted); that is
- 8 correct, is it not?
- 9 A. I was not (Redacted)
- 10 (Redacted).
- 11 Q. (Redacted) that is correct, is it not?
- 12 A. (Redacted)
- 13 Q. (Redacted)
- 14 (Redacted)
- 15 A. (Redacted)
- 16 (Redacted)
- 17 (Redacted)
- 18 Q. (Redacted)
- 19 A. (Redacted)
- 20 Q. (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 A. (Redacted)
- 24 Q. (Redacted)
- 25 (Redacted)

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1 A. (Redacted)
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 Q. (Redacted)
6 (Redacted)
7 A. (Redacted)
8 Q. (Redacted)
9 A. (Redacted)
10 Q. (Redacted)
11 (Redacted)
12 A. (Redacted)
13 Q. (Redacted)
14 A. (Redacted)
15 (Redacted)
16 (Redacted)
17 Q. (Redacted)
18 A. (Redacted)
19 Q. (Redacted)
20 A. (Redacted)
21 (Redacted)
22 (Redacted)
23 Q. (Redacted)
24 (Redacted)
25 (Redacted)

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1 A. (Redacted)

2 (Redacted)

3 Q. So let's move to another event, 2005 when you say that Mr Khan -- (Redacted)

4 (Redacted)

5 (Redacted). You remember having spoken about that, right?

6 A. I spoke about it and it was clear.

7 Q. And you were -- because of that message (Redacted), you

8 say --

9 A. I say this.

10 Q. (Redacted)

11 A. Yes, your Honour.

12 Q. (Redacted)

13 A. Yes, your Honour.

14 Q. And this (Redacted)

15 (Redacted)

16 (Redacted)

17 A. That --

18 Q. -- that's right?

19 A. (Redacted)

20 (Redacted)

21 Q. So can I ask you (Redacted)?

22 A. I said even during my -- my cross-examination, I said clearly (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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- 1 (Redacted)
- 2 Q. And how -- what happened after?
- 3 A. That one --
- 4 Q. (Redacted)
- 5 A. (Redacted)
- 6 (Redacted)
- 7 Q. (Redacted)
- 8 A. (Redacted)
- 9 (Redacted)
- 10 Q. (Redacted)
- 11 A. That is -- (Redacted)
- 12 (Redacted)
- 13 Q. (Redacted)
- 14 A. (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 Q. (Redacted)
- 18 (Redacted)
- 19 (Redacted)
- 20 A. (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 Q. Mr Witness --
- 24 A. Yes.
- 25 Q. -- after all this --

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(Private Session)

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1 A. Yes, your Honour.

2 Q. -- you carry on listening -- well, no. Sorry. I have one more question. (Redacted)

3 (Redacted)

4 (Redacted)

5 A. (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 Q. (Redacted)

10 A. (Redacted)

11 (Redacted)

12 Q. (Redacted)

13 A. (Redacted)

14 Q. (Redacted)

15 Mr Witness, after all this, what happened to you? After (Redacted)

16 (Redacted)

17 (Redacted)

18 A. (Redacted)

19 (Redacted)

20 Q. (Redacted)

21 (Redacted)

22 A. (Redacted)

23 Q. (Redacted)

24 A. It is nothing to do with being not listening to the radio. I continue listening to the radio,

25 even the programme that Sang could bring which is more positive. I have not refused it.

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- 1 Even in 2010 I was also listening to it.
- 2 Q. While he's inciting people, you are listening. Why, Mr Witness? (Redacted)
- 3 (Redacted) Why?
- 4 A. That one I cannot confirm, your Honour. That is their position.
- 5 Q. Can I ask you one more question. All this time -- (Redacted)
- 6 (Redacted)
- 7 A. I was.
- 8 Q. (Redacted)
- 9 (Redacted)
- 10 A. (Redacted)
- 11 (Redacted)
- 12 Q. Thank you. We move on to another topic.
- 13 PRESIDING JUDGE EBOE-OSUJI: Still in private session?
- 14 MS BUISMAN: No. We can go back into public.
- 15 PRESIDING JUDGE EBOE-OSUJI: Open session.
- 16 (Open session at 2.58 p.m.)
- 17 THE COURT OFFICER: We are in open session, Mr President.
- 18 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 19 MS BUISMAN:
- 20 Q. Mr Witness --
- 21 A. Yes, your Honour.
- 22 Q. -- you were saying to us in your -- in the course of your testimony that you attended the
- 23 funeral of Lucas Sang, correct?
- 24 A. Yes, I do.
- 25 Q. And you said you were there briefly. Can you tell us what time, please?

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- 1 A. I can't remember the time, but after midday.
- 2 Q. And when you were there, was Mr Sang, Joshua Arap Sang, who you claim was present,
3 was he there?
- 4 A. He was.
- 5 Q. And you said he spoke?
- 6 A. Yes, your Honour.
- 7 Q. Who spoke before him?
- 8 A. He was almost the last person. There was Kibor and former MP Sumbeiywo and
9 Tabitha Seii.
- 10 Q. Who spoke after him?
- 11 A. Yes.
- 12 Q. Who spoke after him?
- 13 A. I'm saying I can -- I can remember the -- the three people I've mentioned.
- 14 Q. Okay. I would like you to listen to an audio which is an audio, it's tab 27 of the main
15 witness binder, the cross-examination binder. The audio is KEN-D11-0013-0063, and the
16 transcript and translation is to be found at KEN-D11-0021-0004.
- 17 PRESIDING JUDGE EBOE-OSUJI: While that is being --
- 18 MS BUISMAN: Could you please --
- 19 PRESIDING JUDGE EBOE-OSUJI: -- set up --
- 20 MS BUISMAN: -- bring it to the witness.
- 21 PRESIDING JUDGE EBOE-OSUJI: While that is being set up, at line 23 we seat the name
22 Peter Sang. Witness, did you say Peter Sang or Peter Seii.
- 23 THE WITNESS: Huh? I say Lucas.
- 24 PRESIDING JUDGE EBOE-OSUJI: Did you say Peter Sang --
- 25 THE WITNESS: Lucas.

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1 PRESIDING JUDGE EBOE-OSUJI: -- or Peter Seii?

2 THE WITNESS: Tabitha.

3 PRESIDING JUDGE EBOE-OSUJI: Tabitha. Tabitha, okay.

4 MS BUISMAN:

5 Q. So let us listen to time stamp 1.06 up to 1.55, which is at the first page, KEN page 0005.

6 (Playing of the audio excerpt KEN-D11-0013-0063)

7 MS BUISMAN:

8 Q. Mr Witness, could you follow that --

9 A. Yes, I follow.

10 Q. -- on the transcript?

11 A. I follow, your Honour.

12 Q. Thank you. Let me just read into the transcript the English translation, and you will
13 tell me whether it's a fair translation. Quote, "Thank you very much, dear listener wherever
14 you are tuned in this morning. This is Joshua Araap Sang' with you here in the studio on
15 this 10th day of January 2008. This is another new year, dear listeners, which the Lord has
16 given those of us who managed to reach this year, so that we can continue with our annual
17 programming. First of all, I would like to tell you, wherever you are, that this is another year
18 during which usual activities, such as school and others will go on. As such, today we'll
19 reflect back on a matter that relates to school. School, in what way? School as relates to the
20 implementation of the secondary school curriculum, as you have heard in the recent
21 campaigns by all parties."

22 Mr Witness, is this accurate and a fair translation?

23 A. It is, your Honour.

24 Q. Do you confirm that he's saying the "10th day of January 2008"?

25 A. Yes, your Honour.

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- 1 Q. Do you also confirm he says "This is another new year, dear listeners ..."?
2 A. I con --
3 Q. Do you --
4 A. I confirm that, your Honour.
5 Q. And then he also says that so, you know, "... which the Lord has given those of us, so
6 that we can continue with our annual programming."
7 A. Yes.
8 Q. Isn't that what he said?
9 A. Yes, your Honour.
10 Q. Mr Witness, does that not suggest to you that he's been off air and he's just come back
11 on air in this particular broadcast?
12 A. That one I cannot --
13 Q. Why otherwise on 10 January 2008 would he say "This is another year ... so ... we can
14 continue our annual programming"? Does that not suggest, Mr Witness, he was off air, he
15 just came back on?
16 A. That one I cannot confirm, your Honour.
17 Q. But you confirm the date, Mr Witness?
18 A. I confirm the date.
19 Q. Do you still stand by your testimony --
20 A. Yes.
21 Q. -- that Mr Joshua Arap Sang at that day, as you said the funeral was, was in -- at the
22 funeral?
23 A. I can confirm that, your Honour.
24 Q. So how can he be at two places at the same time --
25 A. It is not --

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1 Q. -- Mr Witness?

2 A. -- at the same time. Funeral cannot take place in the morning before 10.

3 Q. And you are aware that Nairobi is at least five hours driving, and if the weather is bad it
4 will be about eight. You are aware of that, aren't you?

5 A. I cannot confirm. Somebody may use even a plane. You cannot dispute that.

6 Q. Well, I --

7 A. Which is -- which is less than an hour.

8 Q. Well, let me -- I put it to you, Mr Witness, Joshua Arap Sang was not present at this
9 funeral. He was at the studio in Nairobi.

10 PRESIDING JUDGE EBOE-OSUJI: Witness, what do you say to that briefly?

11 THE WITNESS: Briefly I say he was.

12 MS BUISMAN:

13 Q. Thank you, Witness. I'd like to take you to one other portion in the audio, which is at
14 page 68. For the KEN page it's 0072, and it starts at 01.02.03 time stamp. Are you with me?

15 A. Which one?

16 Q. 68.

17 A. Yes.

18 Q. Are you with me?

19 A. I'm with you, your Honour.

20 Q. Starting at where it says "Interlude."

21 (Playing of the audio excerpt KEN-D11-0013-0063)

22 MS BUISMAN:

23 Q. Mr Witness, did you hear that?

24 A. I hear that.

25 Q. Do you recognise the voice?

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1 A. I cannot know exactly who he was.

2 Q. But it was not Mr Sang, was it?

3 A. Yes, your Honour.

4 Q. That you can confirm.

5 So I'd like to read the English translation of that passage into the record:

6 "We announce the death of athlete Lucas Kipkemboi Sang who was killed on 29th last
7 month. Son of the late Moses and Josephine of Kapchemma ... , Kapchemagilot."

8 I think this is it. I will just give the -- yeah, let me spell it for the record: Moses is

9 M-O-S-E-S, Josephine of Kapchemma, K-A-P-C-H-E-M-A and then Kapchemagilot

10 K-A-P-C-H-E-M-A-G-I-L-O-T.

11 Mr Witness, we will not go through the whole audio. I want to put it to you that Mr Joshua
12 Arap Sang was not the one who announced the funeral. It was the person you just heard on
13 the 10th and not on the 9th. Do you accept that now you've heard that?

14 A. First of all, date announcement can announce more than one. Two, I may dispute even
15 the date that he was killed even if I'm not a member of the family.

16 MS BUISMAN: Just for the record, it was Moses Rono who announced this -- who made this
17 announcement.

18 Q. That's someone you're familiar with I think, right?

19 A. Yes, I know.

20 Q. Okay. And I just want to make it very clear to you as well that it is our position that on
21 10 January 2008 is when Mr Arap Joshua Sang came on air for the first time since the ban was
22 imposed immediately after the results were announced. Do you accept that, now you've
23 heard this?

24 A. I cannot accept, your Honour.

25 MS BUISMAN: I would like -- thank you, Witness. I would like this audio to be tendered,

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1 please.

2 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

3 MR GARCIA: Your Honour, I didn't hear the witness confirm that he heard this audio in the
4 past, and I think that is the threshold that we've been using at least to indicate a certain at
5 least prima facie the authenticity of this audio; the fact that it is indeed something that was
6 broadcasted at the date that the Defence is suggesting it was. No question has been asked on
7 that matter and no answer from the witness, so we have no evidence on the record. I object
8 on that basis.

9 MS BUISMAN: If I may briefly respond? We did put the date into the record and the
10 witness did confirm it. This is an audio that directly deals with an issue that was raised by
11 the witness and he does, of course, recognise Mr Sang's voice. I can ask him.

12 Q. Did you hear it at that time, this particular announcement?

13 A. What I have just said, I didn't hear exactly this when this guy was announcing, but I say
14 the announcing can be repeatedly by -- at the people. It cannot be once.

15 Q. Did you hear this one specifically?

16 A. If I could hear this one, I could not say it was Sang while it was somebody else because
17 I --

18 Q. You might have heard them both. Did you hear this one?

19 MR GARCIA: I object. That's argumentative. We should leave the witness complete his
20 answer.

21 THE WITNESS: So I didn't hear this one, but I heard Sang talking about this.

22 MS BUISMAN:

23 Q. Mr Witness, you did recall hearing an announcement about the death of Lucas Sang.
24 That's right, is it not?

25 A. It is, your Honour.

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1 MS BUISMAN: Mr President, on that basis on -- it's the identity, concept of identity as you
2 put it once, we really would like this audio to be tendered.

3 MR GARCIA: Your Honour, the major problem with that is that, even on the concept of
4 identities, I think we should -- we should not accept it as an element of evidence. I see that
5 Mr Sang himself is on the chain of custody, and that is of concern to the Prosecution because it
6 is -- I think it's being used obviously to contradict what the witness is saying regarding the
7 date at which he would have attended this funeral.

8 The witness is not able to state categorically actually whether this specific
9 announcement, whether he heard it or not. I understand the Defence counsel
10 mentions that the date is there, the 10th, but for all we know that could have been
11 inserted there, or the transcript, the audio itself, is not authentic. So that in my
12 opinion should not -- should not sway in favour of admitting this as an element of
13 evidence.

14 MS BUISMAN: Mr President, one last thing. We have an affidavit from Mr Lamaon in the
15 core binder at 28 which authenticates this particular audio, and also the OTP has not objected
16 to the tendering of various other audios in the past which have Mr Sang in chain of custody
17 and so we don't know why that is different now.

18 MR GARCIA: Actually we have, your Honour, to correct that. We have in the past
19 objected strongly and vigorously to the ones that Mr Sang was a part of chain of custody and
20 they were MFI'd by the Chamber and not put into evidence.

21 MS BUISMAN: They all have Mr Joshua in there.

22 PRESIDING JUDGE EBOE-OSUJI: Enough of the argument.

23 (Trial Chamber confers)

24 PRESIDING JUDGE EBOE-OSUJI: The document will be admitted as the next Sang Defence
25 exhibit. Mr Garcia, you can argue those points when the time comes -- or the material, rather,

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1 the audio and the transcript.

2 THE COURT OFFICER: Mr President, the audio reference KEN-D11-0013-0063, public item,
3 will be attributed reference EVD-T-D11-00079, and the transcript of the audio, reference
4 KEN-D11-0021-0004, public item, will be attributed reference EVD-T-D11-00080.

5 MS BUISMAN: Mr Witness -- I would like to go into private again.

6 PRESIDING JUDGE EBOE-OSUJI: Private session.

7 Keep an eye on the clock, Ms Buisman.

8 *(Private session at 3.16 p.m.) Reclassified as Open session

9 THE COURT OFFICER: We're in private session, Mr President.

10 MS BUISMAN:

11 Q. Mr Witness, you recall you have discussed an audio with the Prosecution in

12 (Redacted)? You remember that, right, (Redacted)

13 (Redacted) Do you recall that?

14 A. Yes, your Honour.

15 MS BUISMAN: And for the record, this is at tab 69 of the OTP bundle number 3.

16 Unless the Prosecution has a spare copy for the witness, I would like this to be on

17 eCourt on the --

18 Q. While that's being done, I just want to already talk about this. Mr Witness, you said

19 (Redacted). That's right, is it

20 not, Mr Witness?

21 A. Yes, your Honour.

22 Q. In fact (Redacted)

23 (Redacted). Is that something you are familiar with?

24 A. Yes, your Honour. Maybe the way I put the point, but that is the position.

25 Q. (Redacted)

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1 A. But I was talking about (Redacted)

2 (Redacted)

3 (Redacted)

4 Q. But you do agree with me (Redacted)

5 (Redacted)

6 A. (Redacted)

7 (Redacted)

8 Q. So is the answer "Yes," because I put it to you (Redacted)? Do
9 you agree with me?

10 A. I cannot refuse that. I cannot dispute that.

11 Q. And also (Redacted). Do you also
12 confirm that?

13 A. I do.

14 Q. Thank you, Witness. Let me just -- do you have the document in front of you?

15 A. No, your Honour.

16 MS BUISMAN: Sorry, I'd like page 65, which is 0420 -- I would like to be placed on eCourt.

17 The number of this document is KEN-OTP-0112-0353, EVD number EVD-T-OTP-00253.

18 Page 0420, is it on the screen? 0420. Is it there, yeah?

19 Q. I just want to bring to your attention, Mr Witness, line 2239, (Redacted)
20 (Redacted)

21 Can you see that?

22 A. Which one we're on, your Honour?

23 Q. Line 2239.

24 A. What line?

25 Q. It's the second line.

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1 A. Yes, I can see that, that said.

2 Q. And then I want you to go -- sorry. And then I want you to look at lines 2258. Do you
3 see that?

4 A. 2258.

5 Q. (Redacted)

6 Do you see that?

7 A. Yes, your Honour.

8 Q. And he is referring here (Redacted) is he not?

9 A. Yes, your Honour.

10 Q. And here, for confirmation, (Redacted)

11 (Redacted). Would you agree with that?

12 A. That is what he said, yeah, your Honour.

13 Q. And as for your (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 That is at the earlier page, but then it goes on saying at 2244: (Redacted)

18 (Redacted)

19 And 2246: (Redacted)

20 (Redacted)

21 "Do you agree?"

22 (Redacted)

23 What I'm putting to you -- and then 2254:

24 (Redacted)

25 2256: (Redacted)

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- 1 Mr Witness, is this not (Redacted)
- 2 (Redacted)
- 3 A. That is (Redacted).
- 4 Q. (Redacted)
- 5 A. Yes. (Redacted)
- 6 Q. (Redacted)
- 7 A. (Redacted)
- 8 Q. And as I just read out, just to emphasise, line 2258, (Redacted)
- 9 (Redacted)
- 10 And that is his main point about him (Redacted). Do you agree?
- 11 (Redacted) Do you agree?
- 12 A. (Redacted)
- 13 Q. Thank you, Witness.
- 14 The last thing, this came up in a question from the President. You were talking
- 15 about a song about the sea. This was -- you said there was a song, every time it was
- 16 sung it created emotional. And that song was about the Kalenjin being in the middle
- 17 of the water. You said that Ruto would be the one to take them to the other side of
- 18 the water.
- 19 That is what you said. And I just -- right?
- 20 A. No.
- 21 MS BUISMAN: We can go back into public.
- 22 PRESIDING JUDGE EBOE-OSUJI: Open session.
- 23 MS BUISMAN: Four more minutes, Mr President.
- 24 (Open session at 3.26 p.m.)
- 25 THE COURT OFFICER: We are in open session, Mr President.

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1 MS BUISMAN:

2 Q. You remember referring to this song about the sea, right?

3 A. Your Honour, I remember. And the way I put it, I said this song -- or, actually, it was
4 sang during that -- the period of 2005, even during the Koitalel, but it was not mentioning
5 Ruto. It was just like a Christian song when it's sung, but it's actually a song which was
6 actually show that the Kalenjin are in trouble. They have to be taken over to there.
7 That's -- they were asking God to take them to the other side.

8 MS BUISMAN: Mr President, with your indulgence, and then I'll -- that will be the end of
9 my cross-examination, we've heard this song before, but we have -- we do not have a
10 transcript or translation, but it was the song that was sung on 25 December 2007 at Kass FM.
11 We had this discussion last time. It is four -- is it four minutes? It's four minutes. And it's
12 our position that it says everything that we put earlier in an earlier situation in this Court, and
13 that is what we wanted to have on record because there was some discussion about the year.
14 (Trial Chamber confers)

15 PRESIDING JUDGE EBOE-OSUJI: How many minutes you say, four?

16 MS BUISMAN: It's about four minutes, yes.

17 PRESIDING JUDGE EBOE-OSUJI: All right. Proceed.

18 MS BUISMAN: Thank you.

19 Q. So we will now listen to this song as it was sung at Kass FM on 25 December 2007.

20 A. What about --

21 Q. I just want to -- you to confirm that that is the song that you know.

22 A. Yes, your Honour.

23 (Playing of the audio excerpt EVD-T-D11-00048)

24 MS BUISMAN: Mr President, we'll take this up at another time.

25 Q. Mr Witness, that was the end of my cross-examination. I thank you for your patience.

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1 PRESIDING JUDGE EBOE-OSUJI: Witness, were you about to say something?

2 THE WITNESS: I was ask meaning to -- about the meaning of that song, and it was

3 sang -- she wanted to sing the song of 2007, but this song was actually sang during the

4 Koitalel day, and whenever -- maybe they might want to say that this song is Christian song,

5 which is okay, but this song was reflecting to give an indication to the Kalenjin community to

6 mean that they are in trouble, they have to be taken over to another side.

7 This inciting -- though the song itself is a Christian song. That is what I could say.

8 Whenever it was put it, it was really rallying people together to -- to -- to say that

9 they're in trouble by them, your Honour. That is the position I have over that song

10 that I was put it.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 Ms Buisman, do you have any question arising from that answer?

13 MS BUISMAN:

14 Q. Just -- you confirm that this song refers to Ebola; it refers to malaria; it refers to Kenya;

15 Somalia; AIDS? Do you confirm that?

16 A. Don't tell me about the -- the Ebola, I don't know. I'm talking about the song Kimi Bek

17 Kwenet. So when you say that Ebola I cannot -- I -- how can I put it that place? I don't

18 know -- I don't know what to put it -- to reflect what I was just singing -- singing.

19 Q. Do you recall when you heard that song did you hear Ebola, Somalia? Did you hear

20 these themes being sung about?

21 A. Let me -- I can remind you that I heard the song "Kimi bek kwenet, oh baba, ilandech."

22 Take us from this side to the other.

23 PRESIDING JUDGE EBOE-OSUJI: What --

24 MS BUISMAN:

25 Q. What was -- I'm sorry.

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- 1 PRESIDING JUDGE EBOE-OSUJI: -- Ms Buisman is asking you --
- 2 THE WITNESS: Yes.
- 3 PRESIDING JUDGE EBOE-OSUJI: -- whether you agree -- or, whether you recall -- whether
- 4 you recall if you heard --
- 5 THE WITNESS: I cannot hear.
- 6 PRESIDING JUDGE EBOE-OSUJI: (Microphones overlapping).
- 7 THE WITNESS: If I can do what?
- 8 PRESIDING JUDGE EBOE-OSUJI: All right. Whether you recall hearing mention of Ebola,
- 9 AIDS, Kenya, Somalia, Uganda and so on as part of the lyrics, as part of the words of that
- 10 song; do you recall that?
- 11 THE WITNESS: You know this song can be sang -- because I what -- I could hear sang in
- 12 several way, tune, so I don't know. I can't remember that one, that -- that tune that is put
- 13 over. I can't remember that, your Honour.
- 14 PRESIDING JUDGE EBOE-OSUJI: All right.
- 15 MS BUISMAN: Just one last question just to put more.
- 16 Q. Children, women, elders; do you recall that in this song?
- 17 A. Yes, I can remember, but, yes, the -- the real meaning of being in trouble, that is what I
- 18 am standing to it.
- 19 MS BUISMAN: Thank you, Mr Witness.
- 20 Mr President, I have one request. Given that this came out just this afternoon, I
- 21 wonder if we get the proper broadcast of this particular song as it was sung at Kass
- 22 FM, could we play it after the cross of my learned colleague? That is all I would
- 23 want to do.
- 24 PRESIDING JUDGE EBOE-OSUJI: All right, revisit it when you are ready and then the
- 25 Chamber will consider your request at that point.

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1 MS BUISMAN: Thank you, Mr President.

2 PRESIDING JUDGE EBOE-OSUJI: Yes.

3 MS BUISMAN: Thank you, Mr Witness.

4 PRESIDING JUDGE EBOE-OSUJI: Witness, we will let you off now for the weekend. And
5 you will rejoin us on Monday at the same time.

6 But over the weekend do not discuss your testimony with anybody as I have told you in the
7 past; do you understand?

8 THE WITNESS: Yes, your Honour.

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

10 We will go into closed session to usher the witness out of the courtroom.

11 *(Closed session at 3.35 p.m.) Reclassified as Open session

12 (Redacted)

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Trial Hearing
Witness: KEN-OTP-P-0658

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19 PRESIDING JUDGE EBOE-OSUJI: All right.

20 We have heard your submissions on this matter. We will now rise and we will
21 reconvene on Monday.

22 Mr Khan, you will start your cross-examination then.

23 MR KHAN: I'm most grateful.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you.

25 Court will rise.

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- 1 MR KHAN: And, Mr President, I just will indicate also it does look like I'll be most of the
- 2 week just for Court planning.
- 3 THE COURT USHER: All rise.
- 4 (The hearing ends in closed session at 4.03 p.m.)* Reclassified as Open session
- 5 RECLASSIFICATION REPORT
- 6 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 7 2013, the version of the transcript with its redactions becomes Public.