

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 Monday, 8 December 2014
10 (The hearing starts in open session at 9.34 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: Thank you, Mr President.
17 The situation in the Republic of Kenya, in the case of The Prosecutor versus William
18 Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
19 We're in open session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you.
21 Appearances?
22 MR GARCIA: Good morning, Mr President, your Honours. Appearances are the
23 same for the Prosecution.
24 MR NARANTSETSEG: Good morning, Mr President, your Honours. For the
25 victims Orchlon Narantsetseg, James Mawira and Amanda Wilmot. Thank you.

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

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

5 MR KHAN: Good morning, Mr President, your Honours. The team for Mr Ruto
6 remains the same, save that Mr Essa Faal will not be with us this week. I'm grateful.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you. Mr Khan, you will start your
8 cross-examination in a minute.

9 But first, Witness, welcome back. As you heard me say, Mr Khan will start his
10 cross-examination in a minute, but first we want to give the reasons for a decision the
11 Chamber rendered late in the evening last Friday, 5 December 2014, concerning the
12 redaction on certain information in the metadata of four documents that the Ruto
13 Defence intends to use during their cross-examination of Witness 658.
14 During the Court session last Friday, 5 December 2014, the Defence of Mr Ruto raised
15 an urgent matter with the Chamber concerning their redaction of sources of four
16 documents it intends to use during the cross-examination of Witness 658, Prosecution
17 witness.

18 The Ruto Defence submitted that the persons who are the sources of the documents
19 are witnesses for the Ruto Defence. Therefore, they contended according to the
20 Chamber's redaction protocol information related to such potential witnesses may be
21 automatically redacted without the need for further justification.

22 In any event, the Ruto Defence pointed out, according to paragraph 58 of the
23 redaction protocol, the Chamber has the discretion to rule as appropriate in relation to
24 the lifting of redaction of the type contemplated by the relevant provision of the
25 redaction protocol.

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1 The Prosecution objected to the proposed redaction and submitted that they are not
2 justified. The Prosecution argued that the overriding principle of the redaction
3 protocol is that redaction is permitted only when there is a potential risk arising from
4 disclosure.

5 Having heard the submissions later in the evening of 5 December 2014, the Chamber
6 directed the Defence for Mr Ruto to either disclose the sources of the documents or
7 withdraw them from the list of material to be used during their cross-examination of
8 Witness 658.

9 The Chamber finds that the redaction requested or proposed by the Defence of
10 Mr Ruto is not warranted by the redaction protocol in the circumstances of use of a
11 document for purposes of cross-examination of an opponent's witness. The
12 redaction protocol was designed to provide general guidelines for a regime of
13 redactions that would be appreciably fair and reasonable with an aim of reducing ad
14 hoc litigation in respect of every such redaction. It would be patently unfair to
15 permit a party to use a document to cross-examine an opponent's witness in the
16 course of a trial without disclosing the source of the document to the party whose
17 witness is being cross-examined. The redaction protocol was not intended to permit
18 that kind of ambush in the trial process.

19 The Chamber has had occasion to indicate in the past in the context of ex parte
20 hearings and filings that deprivation of information to the opposing party in the
21 course of the proceeding remains an exceptional measure that may be justified as a
22 shield. It is seldom ever justified as a sword. The same principle applies here.
23 That is the ruling.

24 Mr Khan, you --

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

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1 THE WITNESS: Excuse me, your Honour. Private?

2 PRESIDING JUDGE EBOE-OSUJI: Let me finish.

3 Mr Khan, you said you will be with this witness for how long?

4 MR KHAN: Mr President, I'll be as quick as I can, but I anticipate perhaps until
5 Friday. I will endeavour to finish the witness, my cross-examination of the witness
6 by Friday, by the end of Friday.

7 PRESIDING JUDGE EBOE-OSUJI: All right. You have to keep in mind that that
8 may not be permitted because as you are aware, the OTP had to be compelled to
9 conclude their cross-examination -- their examination-in-chief at a certain point and
10 so was the Sang Defence.

11 We will keep that in mind, the number of hours the OTP used and the Sang Defence
12 used. We wouldn't be looking at any disequilibrium treatment of parties who
13 examine this witness.

14 We will go into private session.

15 MR KHAN: I'm grateful.

16 (Private session at 9.43 a.m.) * Reclassified as Open session

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

18 PRESIDING JUDGE EBOE-OSUJI: Yes, Witness.

19 THE WITNESS: (Redacted)

20 (Redacted)

21 (Redacted)

22 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

23 (Redacted)

24 THE WITNESS: (Redacted)

25 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

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- 1 THE WITNESS: (Redacted)
- 2 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 3 (Redacted)
- 4 (Redacted)
- 5 MR KHAN: (Redacted)
- 6 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 7 MR KHAN: (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 13 (Redacted)
- 14 MR GARCIA: (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 (Redacted)
- 18 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 19 (Redacted)
- 20 (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 (Redacted)
- 25 (Redacted)

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1 Yes, Mr Kigen-Katwa?

2 MR KIGEN-KATWA: Mr President, it has nothing to do with the current issue.

3 Mr President will recall we had very kindly requested for a brief moment to take up
4 an issue that came in the course of a couple of questions you asked, being particularly

5 in reference to a song that the witness said was playing, and Mr President you had

6 indicated that when we are ready we could indicate to the Chamber so that the

7 Chamber can consider our request. Mr President, we are ready and we request your

8 indication as to if you could hear us before the Ruto team goes, or after their session?

9 We would prefer to do it before the Ruto team does their cross-examination, but we
10 place ourselves in your hands, Mr President.

11 PRESIDING JUDGE EBOE-OSUJI: And how long do you think this will take?

12 MR KIGEN-KATWA: Mr President, we would ask on the outer side for 30 minutes,
13 but we expect to be much less than that, Mr President. It is an audio of four minutes,
14 but we will stop from point to point just to highlight what is contained in the audio.

15 The Chamber will recall that we've gone through this process and we expect to be
16 much shorter, but just on the outer side we would ask for an allocation of 30 minutes.

17 PRESIDING JUDGE EBOE-OSUJI: We will rise now, but first in closed session so the
18 witness will be ushered out of the courtroom. Then we will rise and come back at
19 10.

20 Closed session.

21 (Closed session at 9.49 a.m.) * Reclassified as Open session

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

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 (The witness stands down)

25 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

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- 1 THE COURT OFFICER: All rise.
- 2 (Recess taken at 9.49 a.m.)
- 3 (Upon resuming in private session at 10.10 a.m.) * Reclassified as Open session
- 4 THE COURT USHER: All rise.
- 5 Please be seated.
- 6 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted)
- 13 THE WITNESS: (Redacted)
- 14 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 (Redacted)
- 18 (Redacted)
- 19 (Redacted)
- 20 (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 (Redacted)
- 25 (Redacted)

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- 1 THE WITNESS: (Redacted)
- 2 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 3 (Redacted)
- 4 We will go to open session.
- 5 (Open session at 10.14 a.m.)
- 6 THE COURT OFFICER: We're in open session, Mr President.
- 7 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 8 Mr Kigen-Katwa, the Chamber has considered your request and we grant it, but not
- 9 to the extent of 30 minutes. You have 20 minutes to deal with the material you have
- 10 in mind. Please proceed.
- 11 Witness, the lawyer for the Sang Defence team have been given permission to a deal
- 12 with a certain matter concerning -- did you say the song?
- 13 MR KIGEN-KATWA: Yes, Mr President.
- 14 PRESIDING JUDGE EBOE-OSUJI: Yes. So they have been given leave to deal with
- 15 that before Mr Khan starts his cross-examination.
- 16 Mr Khan, the Chamber will have you reorganise your -- organise your
- 17 cross-examination so that you end by Thursday, no later. Thank you.
- 18 MR KHAN: I'm grateful. Mr President, the end of Thursday?
- 19 PRESIDING JUDGE EBOE-OSUJI: Yes.
- 20 MR KHAN: I'm grateful.
- 21 PRESIDING JUDGE EBOE-OSUJI: But no later than that.
- 22 MR KIGEN-KATWA: Mr President, this is a witness who was being conducted by
- 23 Ms Buisman. I request for your permission to just deal with this section because it is
- 24 Kalenjin and so that we can conclude it faster then in view of the language, with your
- 25 permission?

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1 PRESIDING JUDGE EBOE-OSUJI: Proceed. Proceed.

2 QUESTIONED BY MR KIGEN-KATWA:

3 Q. Now, Mr Witness, good morning.

4 A. Good morning, your Honour.

5 Q. You said that there was a song "Kimi Bek Kwenet" which was sang since the
6 year 2005, isn't it?

7 A. Yes, your Honour.

8 Q. Please confirm that it is your testimony that the song was played way into the
9 year 2007?

10 A. Yes, I can confirm that it started as from 2005 all through sometimes 2007.

11 Q. Could you confirm if it is still being played currently when you last heard Kass
12 FM, way past the election of 2007?

13 A. But after elections of 2007 it's not sang regularly, but during that time of before
14 referendum of 2005 was commonly sang and thereafter.

15 Q. My question is, after the year 2007 was it -- did you ever hear it being played
16 after the election 2007 up to the last time you listened to the station?

17 A. But not -- I could not listen to it again.

18 MR KIGEN-KATWA: Now, I will take you to an audio of 25 December 2007, which
19 we have been through with you, and I want you to listen to the -- to the audio. I
20 want you to confirm if that is the song you heard.

21 Your Honours, the audio itself is KEN-D11-0013-00281, and it is at tab 14.

22 With the permission of the Court, I will request the court officer to avail a copy of the
23 transcription we used previously of the audio and the witness to be given one copy.

24 Your Honour, we will be going to page 0583, and for the witness on the audio of 25th
25 it is on page 15. I am sorry, Mr President, I didn't intend that the witness be given a

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1 copy, if it could be retrieved from the witness. I meant the audio itself be given to
2 the witness. I will request that it be put on eCourt page, the audio of 25th, page
3 0583.

4 Q. Witness, can you see it?

5 A. No.

6 MR KIGEN-KATWA: May I read the transcription and translation again? It is the
7 first page is KEN-D11-0014-0568 and the page we are interested is
8 KEN-D11-0014-0583.

9 And with the assistance of the court officer I can give the witness a hard copy in the
10 meantime as it's being settled.

11 Q. Now, Witness, you can see at page 15 the line starting with "Interlude,
12 Mr Sang." You can see that, Mr Witness?

13 A. Yes. Yes, your Honour.

14 Q. I'll play for you the song and request if you recognize the song, please.

15 Mr President, we will play time stamp 29.31, time stamp 29.31 to 30.23.

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

17 MR KIGEN-KATWA:

18 Q. Mr Witness, could you confirm that is the song you heard?

19 A. Yes, it's the same.

20 Q. And just to be very clear, are you saying that after the elections in the year 2007,
21 you've not heard this song played at all since then?

22 A. I'm just saying I cannot confirm.

23 Q. Okay. Thank you, Mr Witness. Am I to understand that it could have been
24 played, but you didn't hear it?

25 A. Yes, your Honour.

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1 MR KIGEN-KATWA: Now, I want you to listen closely. I want you to -- I will stop
2 at various points just to confirm with you whether you've heard (indiscernible).

3 Your Honour, I will play to time stamp 30.37.

4 PRESIDING JUDGE EBOE-OSUJI: What version are you playing? Are you playing
5 the song as played on Kass FM, if it was played on Kass FM at the time or are you
6 playing a version of the song from another source? You know what I mean when I
7 say "from another source"?

8 MR KIGEN-KATWA: May I apologise? I should have explained that, Mr President.
9 In the last session when this issue came up, we indicated, Mr President, that this
10 audio was played in the station, and we have particular recording of that song in the
11 transmission of 25 December 2007, whose transcript and translation is what we've
12 given, we've highlighted to the Court and we've given to the witness.

13 So what we are playing is what was played in that programme, Mr President. And
14 this is --

15 PRESIDING JUDGE EBOE-OSUJI: One second. Are you looking at what we see at
16 page 15?

17 MR KIGEN-KATWA: Yes, Mr President. What is at page 15 is the observation of
18 Mr Sang immediately after the song, and so that there is explanation. We did not
19 translate the part of the song in the transcript and the translation.

20 PRESIDING JUDGE EBOE-OSUJI: What I'm asking is, sorry, wondering is whether
21 you are going to play the song so that it is clear to the witness and to everyone that
22 the song you are playing was the version played as Kass FM? Meaning there should
23 be some sort of bracketing information before the song and after the song, the version
24 that was played on Kass FM. Can we do it that way?

25 MR KIGEN-KATWA: Yes, Mr President. I had intended to extend it beyond the

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1 song and have Mr Sang's comment, but I could start with immediately before.

2 PRESIDING JUDGE EBOE-OSUJI: Yes, why don't you do that for our purposes as
3 well.

4 MR KIGEN-KATWA: Mr President, we had played the song from time stamp 29.31.

5 We are starting with 29.00 just to put words immediately before that.

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

7 MR KIGEN-KATWA: Witness, I would like you to just confirm what you've heard is
8 what is at page 14 of the document you have.

9 Your Honours, it's KEN-D11-0014-058. And we have looked at the last paragraph.

10 PRESIDING JUDGE EBOE-OSUJI: Should be 0582, isn't it?

11 MR KIGEN-KATWA: Yes, I'm sorry, Mr President. 0582.

12 PRESIDING JUDGE EBOE-OSUJI: At page 14 native to the document itself?

13 MR KIGEN-KATWA: Yes, Mr President.

14 PRESIDING JUDGE EBOE-OSUJI: All right.

15 MR KIGEN-KATWA:

16 Q. Witness, you heard the words to the effect that:

17 "The law does has not allow a soldier to engage in politics as all. The only assistance
18 they can provide to the electoral commission is to provide security so that violence
19 does not break out. A soldier cannot be a party's or an individual's agent. A soldier
20 who is on duty or on leave is not allowed by the electoral laws to do that. As such,
21 dear listeners, today is difficult, and we all need to know what is happening, and that
22 is why we just want to know what ..." is -- "... what it is so we are able to guard
23 ourselves against such things."

24 You confirm, Mr Witness, that's what you heard Mr Sang say immediately before the
25 song, isn't it?

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1 A. Yes, your Honour.

2 MR KIGEN-KATWA: Thank you, Mr Witness.

3 PRESIDING JUDGE EBOE-OSUJI: And for the record, this is the comment came
4 apparently from page 14 after the discussion of the statements of Mr Raila Odinga, is
5 that it?

6 MR KIGEN-KATWA: Yes, Mr President. Thank you very much.

7 PRESIDING JUDGE EBOE-OSUJI: Statements to, if you can again for the record tell
8 us what Mr Raila Odinga's statements were to the effect of.

9 MR KIGEN-KATWA:

10 Q. Mr Witness, you recall from the last process of cross-examination that we
11 played an audio of Mr Raila expressing concerns about the likelihood of fake ballot
12 papers, the use of administration policemen as agents of PNU and the use of motor
13 vehicles to transport both the agents and the fake ballot papers. Do you remember
14 that, Mr Witness?

15 A. I remember, but --

16 PRESIDING JUDGE EBOE-OSUJI: It's all right. You can now proceed. We just
17 want to capture the context on record, Witness.

18 Proceed, Mr Kigen-Katwa.

19 MR KIGEN-KATWA: I'll proceed with the time stamp 30.23 to 30.37 and stop there
20 to ask the witness one question.

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

22 MR KIGEN-KATWA: Mr President, we have stopped at time stamp 30.47.

23 Q. Mr Witness, could you confirm you heard a prayer for the young ones?

24 A. I could hear, your Honour, but actually what exactly the meaning of what I was
25 saying previously about this song is that it doesn't mean that I am not disputing that

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1 it's a Christian song, but my position - and many people could have think by that
2 time - is that these songs generally was giving the Kalenjin community that they are
3 in trouble at that particular time, that time in 2005 and later, so that need to be taken
4 over to the other side. I'm not disputing that it's talking about helping young and
5 any other issues that I have. A song can be put any other suit to mean what it was
6 sang at that particular moment.

7 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, you've -- I think you've
8 made that point, but the question from the lawyer is whether you heard in the words
9 of this song played up until this point reference to young people?

10 THE WITNESS: Yes, your Honour. I heard that.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 Proceed, Mr Kigen-Katwa.

13 MR KIGEN-KATWA:

14 Q. Witness, then if you recall the song, could you confirm if you recall it makes
15 reference to the following people? Do you recall if it makes reference to women?

16 A. Your Honour, I know the songs. It can be put any good words at that
17 particular moment, but -- I can remember that, but actually what --

18 Q. Thank you, Mr Witness. Do you remember it making reference to elders?

19 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you need to play the song as it
20 was played on Kass FM at the time. Let's get to the end of it and get to the other side
21 of the song, as in what was said - if anything was said - during that broadcast after
22 playing the song. Let's proceed and then you can ask the witness questions later
23 from what was actually played.

24 MR KIGEN-KATWA: Witness, I will play to time stamp 30.57 and I will request you
25 to check if you can hear reference -- the reference to each people.

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

2 MR KIGEN-KATWA:

3 Q. Witness, you've heard reference to women?

4 A. Yes, your Honour.

5 MR KIGEN-KATWA: Mr President, for expedition can I run the whole song and

6 then ask the questions because I think the witness --

7 PRESIDING JUDGE EBOE-OSUJI: That's what I said.

8 MR KIGEN-KATWA: Witness, I will play the song. It is four minutes, and we've

9 spent some time, up to time stamp 33.39 and then we will play what Sang says

10 thereafter. Just listen very keenly and identify the people it refers to.

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

12 MR KIGEN-KATWA:

13 Q. Witness, I will kindly request you to confirm, did you hear reference to elders?

14 A. Yes, your Honour.

15 Q. Did you hear reference to sickness or illness?

16 A. Yes, your Honour.

17 Q. Did you hear reference to AIDS?

18 A. Yes.

19 Q. Ebola?

20 A. Yes, your Honour.

21 Q. The rich?

22 A. Yes, your Honour.

23 Q. The poor?

24 A. The same.

25 Q. Mr President -- okay, and then you heard Mr Sang step in immediately after

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1 reference to the poor, isn't it?

2 A. Yes.

3 Q. Now I want to read into -- in English what Mr Sang said and ask you if you
4 recall that's what you heard him say. That we -- Mr President, I'm looking at page
5 0583, the English translation at paragraph 3:

6 "We are in the middle of a water mass, we are in the middle of a water mass, that is
7 the song, and we are now in such a situation. Let's get a word from the studio ..."
8 Mr Witness, do you recall that that's how far we went on this audio?

9 A. Yes, your Honour.

10 Q. Now, Mr Witness, I just want to ask a very few follow-up questions. The first
11 one is the contention that Mr Sang's -- he was playing this song with a view to saying,
12 "We need to support. We need to all rally behind Mr Ruto so as to cross the water."
13 You remember that was your testimony?

14 A. I said during my testimony he comes to remember that these songs was sang to
15 rally people to think that they are in the middle of the problem; that is the middle of
16 the water. This song itself. I'm not disputing the words in the -- in the -- in the
17 music.

18 PRESIDING JUDGE EBOE-OSUJI: Witness, the point now is his question was that
19 it's about a reference to Mr Ruto, or the relation of this song to Mr Ruto. Can you
20 ask the question again? Can you please answer that question?

21 MR KIGEN-KATWA: Yes, may I ask it differently in view of the witness's answer.

22 Q. Mr Witness, to the best of your understanding of that song, did it have any
23 reference to Ruto or it is merely saying, "We just want to cross the water"?

24 A. It doesn't talk about Ruto as itself because this is a Christian song, but the
25 meaning that I was talking about is that it was giving some emotions to the listeners

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1 that they are in trouble at that particular moment and it is different from what I have
2 been saying that Sang was using the same time to rally people behind the Honourable
3 William Ruto.

4 Q. Now, Mr -- Mr Witness, as you can see from that page 15 we've just looked at,
5 Mr Sang is saying, "We have a situation," and that was in the year 2007, isn't it?

6 A. Yes, your Honour.

7 Q. You would agree that at that time there was the situation of the elections, isn't
8 it?

9 A. Perfect.

10 Q. And in the year 2005 you are saying there was the situation of the draft
11 constitution, isn't it?

12 A. Yes, your Honour, but -- yes.

13 Q. And the song says that, "We pray for the -- for God's assistance to come out
14 of ..." whichever situation, whether it is sickness, or the situation of youth, or women,
15 isn't it?

16 A. Agreed, according to the wording of the song.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you've exceeded the
18 30 minutes even though we allowed you 20. Two more minutes.

19 MR KIGEN-KATWA:

20 Q. Mr Witness, when you said Mr Sang announced a fundraising, was this song
21 still playing?

22 A. As I have said earlier, that I could still remember more about the previous songs.
23 Previous time, yeah.

24 Q. I put it to you, Mr Witness, that Mr Sang did not announce any fundraising
25 whatsoever. What do you have to say to that?

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1 A. According to my recollection, I can remember he was referring those
2 fundraising.

3 Q. Lastly, Mr Witness, did you listen to an audio of 20 September 2005 when
4 Mr Sang hosted two lawyers, one Grace Kiptui and Mr Kurgat, lawyers to analyse the
5 draft and advise listeners to listen, understand and make a choice of whether to
6 support or reject the constitution? Did you hear that audio?

7 PRESIDING JUDGE EBOE-OSUJI: What has that got to do with the song?

8 MR KIGEN-KATWA: It has in the sense, Mr President, that the song is -- according
9 to the testimony of the witness was supposed to rally people behind one position, and
10 it is our defence that Mr Sang provided that platform for all parties and all sections to
11 make their case. And so I'm just asking the witness whether he has any recollection
12 of that balance by Mr Sang, as opposed to what is purported in the playing of the
13 song.

14 PRESIDING JUDGE EBOE-OSUJI: The question is disallowed. We have to end it
15 here, Mr Kigen-Katwa.

16 MR KIGEN-KATWA: May I just correct page 18, line 23? The word should be
17 "studio" not "stadium."

18 And, Mr President, there was an audio which we -- which we played of 7 March 2007
19 which had not -- we had -- we would pray to have it produced as an exhibit in the
20 Defence of Mr Sang.

21 PRESIDING JUDGE EBOE-OSUJI: A song you played -- an audio you played when?

22 MR KIGEN-KATWA: On Friday, Mr President. 7 March 2007. The audio itself is
23 KEN-D11-0015-0120, the transcription and translation is KEN-D11-0019-0177 and it
24 was generally on the subject of resolutions and Mr Sang's invitation to listeners to call
25 in and indicate whether they support the desire of the leaders that the peoples of Rift

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1 Valley do rally behind ODM and Ruto. And the witness said he remembers that
2 general proposition although according to him in other instances Mr Sang would still
3 ask people to support Mr Ruto.

4 On the basis of the witness' recognition of the general subject matter which is the
5 subject of his testimony, we pray that that audio 7 March 2007 be produced as an
6 exhibit in Mr Sang's Defence.

7 PRESIDING JUDGE EBOE-OSUJI: This is the audio that talked about the -- was it
8 the Rift Valley declaration or something like that?

9 MR KIGEN-KATWA: Yes, Mr President. And in part also was answering the
10 question as to whether or not Mr Sang used to disconnect people who were
11 discussing anti-PNU -- anti-ODM and anti-Ruto calls.

12 PRESIDING JUDGE EBOE-OSUJI: All right.

13 Mr Garcia?

14 MR GARCIA: Your Honour, I don't believe that the witness clearly stated having
15 heard that broadcast in the past, and I understand that Defence counsel at the time
16 Ms Buisman didn't ask for it to be tendered into evidence. I think it should be
17 simply MFI'd.

18 MR KIGEN-KATWA: May I confirm, Mr President, the witness did not say he heard
19 that specific audio, but he said he recognized the general tendency being that Mr Sang
20 would occasionally give a chance to callers who were calling whether they are against
21 ODM or against Mr Ruto and that on these audios he realises that Mr Sang did not
22 disconnect any of them here. He however says there were other instances when he
23 used to disconnect.

24 And, Mr President, the gist of our Defence and the use of this audio is merely to show,
25 number one, Mr Sang gave a chance to both people supporting ODM and those

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1 against, supporting Mr Ruto and those opposed to him, and that he did not
2 disconnect anybody, he gave people a chance, including people who said that if
3 Mr Ruto became president, he would be a dictator like Idi Amin. That's really the
4 point we were trying to answer in using this audio, Mr President.
5 We submit it is a very direct answer to the proposition and an issue that the witness
6 has raised, and in view of the similarity or in view of the direct relevance and answer
7 to the question or the inference raised by the witness, we pray that it be admitted as
8 an exhibit, Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: Is it part of the materials covered by the Lamaone
10 affidavit?

11 MR KIGEN-KATWA: Yes, it is, Mr President.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

13 MR KHAN: No objections. Thank you.

14 PRESIDING JUDGE EBOE-OSUJI: The document will be admitted as the next
15 Sang -- the audio and the transcript related to it will be admitted as the next Sang
16 Defence exhibit.

17 MR KIGEN-KATWA: Thank you very much, Mr President, and I thank the witness.

18 THE COURT OFFICER: The document KEN-D11-0015-0129 will bear the number
19 EVD-T-D11-00081. Its related transcript bearing number KEN-D11-0019-0177 will
20 bear the number EVD-T-D11-00082. Both documents are public.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 Witness, that now brings to an end the cross-examination of the Sang Defence team.
23 We had reopened it for them to put in those extra questions to you.
24 Now Mr Khan will begin his own cross-examination.
25 Mr Khan, we are in public session.

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1 MR KHAN: I'm grateful, Mr President, your Honours.

2 QUESTIONED BY MR KHAN:

3 Q. Witness, my name is Karim Khan and I represent Mr William Ruto. Do you
4 understand?

5 A. Yes, your Honour.

6 Q. You first spoke to the Prosecution in this case in April 2010; do you remember
7 that?

8 A. Yes, I do.

9 Q. And you were interviewed quite a few times starting in August 2010; that's
10 right, isn't it?

11 A. Yes, your Honour.

12 Q. And in the four-and-a-half years since, you have been thinking an awful lot
13 about this case, haven't you?

14 A. I don't know what you mean about that.

15 Q. You've been following proceedings very closely; that's right, is it not?

16 A. Not so much.

17 Q. In fact, you've been watching proceedings online quite extensively; is that right
18 or not?

19 A. Not regularly.

20 Q. In fact, you've been discussing proceedings with other Prosecution witnesses;
21 isn't that right?

22 A. What I can say at -- there is nothing I could discuss much about anything, your
23 Honour.

24 Q. Witness, you have been discussing the proceedings in this case against William
25 Ruto extensively with people that you know to be other Prosecution witnesses; isn't

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1 that the truth?

2 A. Not true, your Honour.

3 Q. And in fact, you have had secret meetings with people you know to be

4 Prosecution witnesses; isn't that right?

5 A. There is no meeting that we have doing, your Honour.

6 Q. In fact, and don't tell the Court where, but you've had secret meetings and you
7 were so panic-stricken when you saw a car with people from the Prosecution inside it
8 you jumped and hid in the bushes; isn't that right?

9 A. I can't remember what you are talking about, your Honour.

10 Q. How many times have you jumped in the bushes, Mr Witness?

11 A. Which bushes exactly?

12 Q. When you see a car with people from the Prosecution inside it, how many times
13 when you've seen such a vehicle have you hidden in the bushes?

14 A. I have never -- I have never do that, your Honour, unless you -- you -- you clear
15 me about what is going on.

16 Q. And you hid in the bushes because you knew that you were not supposed to
17 discuss the ICC case in the manner that you have been doing; isn't that right?

18 A. It is nothing I can -- I can say about that, your Honour. I don't know which
19 bush you are talking about.

20 Q. Do you agree you have met other Prosecution witnesses and discussed the ICC
21 case with them?

22 A. That is your opinion, your Honour.

23 Q. Witness, can you enlighten us. Do you agree that you have met other
24 Prosecution witnesses and discussed the ICC case with them?

25 A. I have -- I have met some people, but not discussing ICC issue, your Honour.

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1 Q. And were you concerned, Mr Witness, when you met these witnesses that you
2 may be caught out, it may be found out by the VWU or by the OTP that you were
3 meeting these witnesses? Were you concerned about that?

4 A. There is nothing could -- about our meeting is nothing of concern with the -- the
5 case, your Honour.

6 Q. Witness, I'm asking hopefully straightforward questions. (Redacted)

7 (Redacted)

8 (Redacted)

9 A. I cannot recall, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, easy with unique events.

11 MR KHAN:

12 Q. Witness, were you yourself concerned that your various phones would be
13 requested by the Prosecution and the messages that you had been sending seen?

14 A. Nobody has ever talked me about that, your Honour.

15 MR KHAN: Your Honours have a bundle, two bundles, in front of you. In the
16 second bundle, your Honours, you'll find at tab 198 a telephone intercept with this
17 witness that was commissioned by the Office of the Prosecutor and it's

18 KEN-OTP-0145-0142. And at page 0143 it quotes, and this is the OTP summary of
19 that transcript, and I quote, "Conversations" --

20 PRESIDING JUDGE EBOE-OSUJI: Before you do that, should we not go to private
21 session?

22 Let's go to private session in any event. Private session.

23 (Private session at 10.56 a.m.) * Reclassified as Open session

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

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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1 (Redacted)

2 (Redacted)

3 MR KHAN: Mr President, can I just say in relation to that matter, as we're in private
4 session, it's my respectful submission that these issues in fact can be mooted in public
5 because we have a situation where known to the Prosecution witnesses know the
6 identity of other Prosecution witnesses, they're all in it together, and so it is not
7 putting the witness in peril in any way, shape or form by simply talking in the
8 abstract about communications with Prosecution witnesses.

9 Your Honours, I of course --

10 PRESIDING JUDGE EBOE-OSUJI: I note the --

11 MR KHAN: -- will be guided by the Bench but that's --

12 PRESIDING JUDGE EBOE-OSUJI: Yes, the --

13 MR KHAN: -- my submission.

14 PRESIDING JUDGE EBOE-OSUJI: -- the guidance has been indicated. The
15 redaction order is not the general reference to discussion with Prosecution witnesses.
16 It is a specific reference.

17 MR GARCIA: And, your Honours, actually the Prosecution also wishes that all
18 questions being put to the witness on these matters of intercepts be done in private
19 session given the fact that there is a lot of personal information in these intercepts,
20 and evidently if the question is put to the witness and the witness wants to answer
21 freely, he needs to be able to express himself freely.

22 Other -- on another point as well, the question of OTP investigative methods as well,
23 and if questions are put on that, that should be done in private session as well. So
24 this is why we believe all of this issue regarding the intercepts should be canvassed in
25 private session with the witness.

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1 PRESIDING JUDGE EBOE-OSUJI: Why should OTP investigation methods be in
2 private? Is it part of the witness protection measures?

3 MR GARCIA: Your Honour, not -- not necessarily, but they are OTP investigative
4 methods and we don't necessarily want that to be in public domain. We understand
5 that these have been disclosed obviously to the Defence so that they may do a
6 cross-examination fully and they can ask the witness questions on this matter, but we
7 don't believe that this needs to be aired publicly neither. I think that there is a
8 balance to be done in this regard.

9 MR KHAN: Mr President, we say what the -- what we allege to be the scheming and
10 conduct of individuals the Prosecution put forward as witnesses of truth is very
11 relevant and it can be done in public. It's not rocket science that investigative
12 agencies can record phones and so that issue is one that we say has no merit at all.

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

14 MR KIGEN-KATWA: Mr President, we would pray that these issues be discussed in
15 the public. We can't see any reason why it should be in closed session, including the
16 investigative methods, Mr President. We don't think there is anything very unique
17 or different in the style the Prosecution has adopted for purposes of this case that
18 would need to be protected.

19 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman, my apologies to you. The
20 question should have come to you. It's just that Mr Kigen-Katwa was the last lawyer
21 on your team that spoke, but we've heard your submissions.

22 (Trial Chamber confers)

23 PRESIDING JUDGE EBOE-OSUJI: The Chamber's ruling would be to proceed with
24 the intercept communications in private session, but the Chamber does not accept the
25 proposition that every OTP investigation method necessarily needs to be discussed in

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(Private Session)

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- 1 private session including the fact of conducting intercept operation.
- 2 Mr Khan, proceed.
- 3 MR KHAN: I'm grateful, Mr President. I wonder given the time if we should rise
- 4 and --
- 5 PRESIDING JUDGE EBOE-OSUJI: Yes, it is time for the morning break.
- 6 Witness, we will take our morning break now and reconvene in 30 minutes.
- 7 Closed session.
- 8 (Closed session at 11.02 a.m.) * Reclassified as Open session
- 9 THE COURT OFFICER: We're in closed session, Mr President.
- 10 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 11 (The witness stands down)
- 12 PRESIDING JUDGE EBOE-OSUJI: Court will rise.
- 13 THE COURT OFFICER: All rise.
- 14 (Recess taken at 11.02 a.m.)
- 15 (Upon resuming in open session at 11.37 a.m.)
- 16 THE COURT USHER: All rise.
- 17 Please be seated.
- 18 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 19 We are in open session.
- 20 Mr Khan?
- 21 MR KHAN: Mr President --
- 22 MR BOURGEOIS: (Interpretation) Mr President, your Honour, in my capacity as
- 23 duty counsel I do not often have to address the Court, but allow me to make a little
- 24 statement on Rule 74(10) of the Rules.
- 25 PRESIDING JUDGE EBOE-OSUJI: We are in open session, you know that?

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(Private Session)

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1 MR BOURGEOIS: (Interpretation) It's a general statement, Mr President. Maybe
2 we could deal with it in private session if that's fine, because it might have a bearing
3 on the rest of the proceedings? So I agree with you that we could move into private
4 session so that I can make my observations, Mr President.

5 PRESIDING JUDGE EBOE-OSUJI: All right. Private session briefly.

6 (Private session at 11.38 a.m.) * Reclassified as Open session

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

8 MR BOURGEOIS: (Interpretation) (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0658

(Private Session)

ICC-01/09-01/11

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- 19 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 20 MR KHAN: (Redacted)
- 21 (Redacted)
- 22 (Redacted)
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- 25 (Redacted)

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- 11 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 12 (Redacted)
- 13 MR GARCIA: (Redacted)
- 14 (Redacted)
- 15 (Redacted)
- 16 (Redacted)
- 17 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
- 18 (Redacted)
- 19 MR GARCIA: (Redacted)
- 20 (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 (Redacted)
- 25 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

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Witness: KEN-OTP-P-0658

(Private Session)

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- 1 (Redacted)
- 2 MS BUISMAN: (Redacted)
- 3 (Redacted)
- 4 (Redacted)
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- 7 (Redacted)
- 8 (Redacted)
- 9 (Redacted)
- 10 PRESIDING JUDGE EBOE-OSUJI: (Redacted)
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(Private Session)

ICC-01/09-01/11

1 (Redacted)

2 (Redacted)

3 MR BOURGEOIS: (Interpretation) (Redacted)

4 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 Mr Khan, we're in private. Do we remain here? As we said, (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 MR KHAN: Mr President, alive to that, it would be more prudent to stay in private
14 session.

15 PRESIDING JUDGE EBOE-OSUJI: How long do you think we will stay in private
16 session?

17 MR KHAN: Approximately 20 minutes. I hope 20 minutes, no more than that.

18 PRESIDING JUDGE EBOE-OSUJI: All right.

19 Proceed.

20 MR KHAN:

21 Q. Witness, have you discussed the ICC case with other individuals that you know
22 to be Prosecution witnesses?

23 A. Your Honour, if in case there is any discussion it is based on our personal daily
24 life, and some organs of the Court, that is VWU, is generally on our face-to-face
25 complaint that we may have as individual and also related (Redacted)

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1 (Redacted) It is purely if it -- anything would touch with that then it is

2 really related to our -- to the (Redacted) your Honour.

3 Q. Witness, which individuals have you discussed the ICC case with?

4 A. I'm talking about personal difference, personal things that I arise in connections

5 with (Redacted) That is mainly

6 I can talk about that in -- in this Court, your Honour.

7 Q. Witness, for example, maybe it helps refresh your memory, have you followed

8 proceedings whilst speaking on the phone to other Prosecution witnesses?

9 A. Your Honour, anything that is public in the proceedings, I have a right to follow
10 the proceedings, but not to stay in the phone or whatever to say -- to change

11 anybody's mind or to change anybody to think otherwise. That is not my position,
12 your Honour.

13 Q. Witness, I'm trying to ask straightforward questions, and let me try again,
14 because perhaps it's my fault. Maybe I didn't make myself understood.

15 Have you followed proceedings of this Trial Chamber in the Ruto case whilst
16 simultaneously speaking to somebody, people that you know to be Prosecution
17 witnesses?

18 A. There is nothing like that, your Honour, but I may come and follow or see what
19 is in the -- in the public regarding the -- the -- the -- the proceedings. But that's
20 necessary means that I am talking directly and changing any Prosecution witness
21 regarding this, your Honour.

22 Q. Yes. So to be clear, I'm not talking for the time being about you sitting alone
23 watching proceedings that are broadcast. I'm saying whether or not you have
24 followed proceedings with other Prosecution witnesses, speaking to them about
25 proceedings at the same time; have you done that or not?

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1 A. I have clearly said, your Honour, I have been following the proceedings, but if
2 in case I make any comment concerning the ICC and the proceeding, this is just what
3 is in the public, your Honour.

4 Q. So what is the answer, Witness, to my question? Have you followed
5 proceedings in this Court whilst discussing the same with people you know to be
6 Prosecution witnesses?

7 A. My answer is still clear, your Honour, that even in case there is any discussions
8 is based on naturally our personal problems or any things that we may need in the
9 Court, (Redacted)
10 (Redacted)

11 Q. Witness, for example, let me be -- try to be even clearer. For example, have you
12 watched proceedings and then discussed with anybody that the evidence that's heard
13 is not correct, the witness on the stand should have said something else? Have you
14 ever discussed that?

15 A. I can't remember that.

16 MR KHAN: Your Honours, I will read in -- we are in private session -- a section of
17 the document at tab 198 of the Defence bundle. It is KEN-OTP-0145-0142 at 0143.

18 Q. And, Witness, I'm going to read you a document which is (Redacted)
19 (Redacted) You know (Redacted), don't
20 you?

21 A. I know him.

22 Q. You know him to be a Prosecution witness?

23 A. I know him.

24 Q. You know him to be a Prosecution witness, isn't that right?

25 A. That is the position. I know him.

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1 Q. Witness, I'm not here, please, to argue with you, and I'm trying to ask very
2 specific questions, some of which you can answer "Yes" or "No."

3 My question isn't just whether you know him, it's you know that (Redacted) is a
4 Prosecution witness. So can you answer that?

5 A. Yes, your Honour.

6 Q. Now, I'm going to read the summary. Before I get to the summary, Witness, if
7 you can answer this question: Witness, which individuals, which Prosecution
8 witnesses have you discussed the ICC process with? Can you give us some names,
9 please?

10 If the document can be taken off the screen just for the moment.

11 Witness, I'm asking you a different question, not about what's on the screen. Can
12 you recall which Prosecution witnesses you have discussed anything to do with the
13 ICC with?

14 A. Your Honour, be specific on who -- who I'm supposed to talk about.

15 Q. Well, Mr Witness, I'm asking you to answer the question, please. You know
16 certain people are Prosecution witnesses, don't you?

17 A. Even if I know, I could not know exactly if they are.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, do you have difficulty putting closed
19 questions to the witness on this?

20 MR KHAN: Mr President, in fact, sometimes open questions are a good indication
21 about a witness's willingness to answer in a certain way. So, your Honour, I'll move
22 on.

23 PRESIDING JUDGE EBOE-OSUJI: That is true, but we can't stay on it forever, so
24 there comes a point where counsel has to move on --

25 MR KHAN: Yes, indeed.

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1 PRESIDING JUDGE EBOE-OSUJI: -- or do something different with the questioning.

2 MR KHAN:

3 Q. Witness, I'll go back to the document that's on the screen, that could be put on
4 the screen again, please, at 0143. And I'm just going to read the top part to you and I
5 quote from the summary. Quote:

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 A. (Redacted)

21 (Redacted)

22 (Redacted) If there is any conversation in regard to that, it's

23 nothing to change with the current proceeding, your Honour. Nothing to do -- that

24 could change my position as a witness and either anybody, because I'm not even

25 (Redacted)

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1 Q. Witness, do you remember discussing about Witness (Redacted) evidence with
2 (Redacted); yes or no?

3 A. I cannot remember even when was (Redacted) was when in the box, because I don't
4 know even that witness.

5 Q. And, Witness, this information, so I'm not misleading you, it comes from the
6 Prosecution.

7 A. Yes, it --

8 Q. Witness, please.

9 A. (Overlapping speakers)

10 Q. Witness -- Witness, please, allow me to finish.

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 A. My recollection is not -- I cannot remember very well. But if I can be talking
16 with (Redacted) yes, I may talk with (Redacted) regularly on -- after watching -- seeing what is
17 taking place. But, your Honour, this one is purely -- I didn't know much as you can
18 see about that lady who was -- who -- the person who was talking. It's just a
19 comment that it's talking like this, but nothing to do with this, your Honour.

20 MR KHAN: Well, your Honours, I'll move on.

21 Q. (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 A. I can see that, your Honour.

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1 Q. (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 Witness, do you remember having a -- such a discussion with (Redacted) about
7 what witnesses should have said?

8 A. I can't remember, your Honour.

9 Q. (Redacted)

10 (Redacted)

11 (Redacted)

12 A. I can see that, your Honour.

13 Q. (Redacted)

14 (Redacted)

15 A. No.

16 Q. (Redacted)

17 (Redacted)

18 A. Your Honour, I have a right to have a -- (Redacted)

19 (Redacted)

20 Q. (Redacted)

21 A. (Redacted)

22 Q. (Redacted)

23 A. (Redacted)

24 Q. (Redacted)

25 A. (Redacted)

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1 Q. Do you remember advising (Redacted) to get -- now we're in private session.

2 (Redacted)

3 A. I can't remember that.

4 Q. Do you remember discussing with (Redacted) the fact that (Redacted)

5 (Redacted)

6 A. I can't remember that because actually, particularly I am not coming from her

7 locations.

8 MR KHAN: Your Honour, it is tab 231(h) of your binders. The ERN is

9 KEN-OTP-0145-0216. (Redacted)

10 (Redacted)

11 (Redacted)

12 A. Maybe the spellings is not clear.

13 Q. Your full name is what?

14 A. (Redacted)

15 Q. And also (Redacted) You're known as (Redacted) is that right?

16 A. I'm not (Redacted)

17 Q. Are you known as (Redacted)?

18 A. Maybe the spelling is wrong, but that is not me.

19 Q. How do you spell your name, (Redacted)

20 A. This is -- I don't understand this, but maybe it could mean (Redacted)

21 Q. And can you spell your name, (Redacted)

22 A. (Redacted)

23 Q. And do you recall when you see (Redacted)

24 (Redacted)

25 (Redacted) quote unquote. Quote,

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1 (Redacted) Unquote.

2 Do you remember having that conversation?

3 A. If I was not the one who was talking about it, I can't remember it.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, so that we're not lost, where are we
5 going with this? Beyond the assessment as to the value of this line of question to
6 your case, which you would have the lead in making that kind of assessment, the
7 Chamber also has an interest in making sure that the questioning is efficient and
8 relevant to the issues. Where are we going with this?

9 MR KHAN: Your Honour, we say it is relevant on at least two separate bases.
10 First, it provides a separate isolated indicia of the willingness of this witness to speak
11 the truth under oath. That's the first aspect, particularly given the fact that the full
12 transcripts are going to be provided in due course. That is an important control as it
13 was -- as it were in due course for the Chamber.

14 Secondly, your Honour, what we see here is an orchestrated attempt by the witness,
15 we say, and witnesses to collude and speak with each other behind the backs of VWU
16 for what we say and will say are improper purposes. So, your Honours, it is
17 relevant to further evidence, in fact, of the genesis of this case and what's actually, we
18 say, infected it throughout, witnesses getting -- putting their heads together to discuss
19 matters and then coming to Court, motivated by interests that have nothing to do
20 with justice and everything to do with (Redacted) and their own economic betterment.

21 PRESIDING JUDGE EBOE-OSUJI: The point can be made very quickly and moved
22 on with the questioning so we don't dwell on it. And also let's take care what we do
23 with propositions, discrete propositions of persons who may have spoken in the
24 telephone intercept again and what you want to make of those. Let's proceed.

25 MR KHAN:

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1 Q. Witness, do you recall telling (Redacted)

2 (Redacted)

3 Your Honour, that's tab 231(b), KEN-OTP-0145-0246.

4 Do you remember that, Witness? (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 A. You know, that one is actually if I talk about that, you know, (Redacted)

10 (Redacted)

11 (Redacted)

12 Q. Witness, did you discuss with (Redacted) -- your Honours, tab 231(f),

13 KEN-OTP-0145-0074. Did you have a discussion with (Redacted) about which

14 side you'd give evidence for, and you weighed and assessed the advantages of giving

15 evidence to each side? Do you remember that conversation?

16 A. Which side, your Honour, because I can't --

17 Q. Well, Witness, just think, cast your mind back. Did you ever discuss with

18 (Redacted) -- did you ever have a discussion with (Redacted) about whether

19 or not you would give evidence for the Prosecution or for the Defence?

20 A. I've never planned to give any evidence to the Defence. If -- if -- I don't know

21 how could I know about how to give out my testimony to, because I've already give

22 out my testimony to investigators way back, 2010, and some -- some days have been

23 in 2011 and '12. So there is nothing I could also fear -- fear to say, but actually

24 general fear is about what could happen next after I testified.

25 Q. Witness, did you ever have a discussion with (Redacted) about the

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1 advantages of giving evidence to the Prosecution compared to the advantages of
2 giving evidence to the Defence? Do you remember that conversation?

3 A. I can't remember, your Honour, because I can't remember imagining giving to
4 the Defence my testimony.

5 Q. Witness, do you remember having a conversation with (Redacted) on 3
6 July 2014 - tab 231(g), KEN-OTP-0145-0221 - about a plan of yours to go and meet
7 (Redacted)

8 A. I can't remember, your Honour.

9 Q. Do you remember, Witness, being warned by (Redacted) that you're
10 putting yourself in danger by meeting the lady, and I quote, and it goes over to 0222, I
11 quote, (Redacted)

12 (Redacted)

13 (Redacted) End quote.

14 Witness, do you remember having a conversation with (Redacted) where it was
15 said that your plan to meet (Redacted) could amount to witness interference? Do
16 you remember that or not?

17 A. I can't remember because anything to do with any interference, because I cannot
18 interfere with somebody whom I don't know his test -- her testimony or interfere with
19 anybody who I cannot take to anybody's for any benefit, your Honour.

20 Q. Witness, I don't want to mislead. Let me be quite clear. I'm not saying there
21 was interference at this stage. I'm simply asking do you recall a conversation with
22 (Redacted) that such a secret meeting that you planned could amount to witness
23 interference?

24 A. I can't remember because my conversation with (Redacted) can take long time. We
25 were talking about many things.

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1 Q. Do you remember going out and meeting (Redacted)?

2 A. No, I didn't meet her in any way, your Honour.

3 MR KHAN: Your Honours, I'll go to tab 202 of the Defence binder. And,
4 your Honour, it's KEN-OTP-0145-0230, and I --

5 Q. And, Witness, this is (Redacted) by the Prosecution of this Court

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 Do you remember, does that help refresh your memory about your secret meeting
16 with (Redacted)

17 A. I can't remember, your Honour, but I've never meet -- or see any OTP official
18 passing by, because this is just a comment from somebody whom I don't know just
19 commenting on my conversation with (Redacted)

20 Q. Do you remember, Witness, telling (Redacted) that when you
21 were coming back from the meeting with (Redacted) you jumped in the bushes to
22 hide from the OTP that were passing by? Do you remember saying that or not?

23 A. I have never met with this kind of meeting, but I can't remember, I can't recall,
24 your Honour. But it says just jumping to the bush after meeting, this is I think is the
25 position of this -- (Redacted)

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1 (Redacted)

2 Q. So you deny having that conversation; is that right?

3 A. Whether I have a conversation that is not kind of this nature, but this -- (Redacted)

4 (Redacted)

5 Q. Witness, I didn't understand your question. I'm sure it is my fault. Do you
6 recall having that conversation with (Redacted) about you hiding in a bush, or do
7 you say you never had any such conversation?

8 A. I'm saying if I had any conversation, I can't remember, because it was my
9 conversations. I've never seen OTP passing vehicles somewhere. I can't remember
10 one.

11 MR KHAN: Witness, your Honours, I'll go to tab 231(d) and it is

12 KEN-OTP-0145-0090.

13 Q. And at page 0091, Witness, I want you to hear this bit of an (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted) Do you remember that

20 conversation with (Redacted) or does that also escape your memory?

21 A. Your Honour, I can't understand even the topic about what we are discussing at
22 that moment.

23 Q. Witness, it goes on, and I quote:

24 (Redacted)

25 (Redacted)

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1 (Redacted) End quote.

2 Do you remember having a conversation with (Redacted) in which he said that

3 (Redacted) could implicate you (Redacted) the conversations

4 you had -- you had both been having with her and the topics you had both been

5 discussing? Do you remember that, Witness?

6 A. I can't remember because these conversations I think it is regularly it's -- because

7 he's saying (Redacted) because I cannot remember actually this kind of

8 conversation. If there is -- actually because it cannot be -- I cannot deny something

9 like this, but actually I can't remember what -- why and what led to this because it is

10 something new to me. (Redacted)

11 (Redacted)

12 Q. Witness, you've come to this Court and you say you can recall incidents back

13 in 2005 and I'm asking about incidents just a few months ago. You're saying you

14 have no recollection of them; is that right?

15 A. The problem here is, one, (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 MR KHAN: Your Honours, I would refer the Bench, there's many other documents,

21 but I'm trying to be alive to the Bench's guidance. Your Honours, tab 231(l),

22 KEN-OTP-0145-0157.

23 Q. Witness, do you remember (Redacted)

24 (Redacted)

25 (Redacted) Do you remember that, Witness, or do you have no recollection?

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1 A. What is the -- the conference is between who and what and which side?

2 Q. Do you remember a discussion (Redacted) in which (Redacted)

3 (Redacted) and yourself are speaking (Redacted)

4 (Redacted) Do you remember that or not?

5 A. (Redacted)

6 Q. Well, Witness --

7 A. Or, maybe somebody was sitting with somebody and then somebody could -- I

8 could talk with somebody because (Redacted)

9 Q. Witness, do you remember a discussion between yourself, (Redacted) and

10 (Redacted) in which all three of you are speaking and discussing certain matters?

11 Do you remember that or not?

12 A. Maybe -- I can't remember, but if I can say -- I can't remember because what

13 kind of messages are we talking about?

14 Q. You don't remember.

15 Witness, do you remember (Redacted) updating you and (Redacted) about

16 what had transpired between herself and ICC officials? Do you remember that, or

17 that's forgotten by you?

18 A. I can remember one time (Redacted) was saying that the lady is complaining that he

19 might not be -- she might be taken somewhere, but I don't know where, but that one

20 is only I can remember.

21 Q. Have you been advising her on (Redacted)

22 A. No, your Honour.

23 Q. Have you advised her to (Redacted) and milk the system?

24 A. No, your Honour. I cannot do that.

25 Q. Witness, I'm going to read this part of KEN-OTP-0145-0157. Quote:

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 A. I can't remember doing that, your Honour.

6 Q. (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 Do you see that?

11 A. I can see it, your Honour.

12 Q. (Redacted)

13 (Redacted)

14 MR GARCIA: I object, your Honour, that's redacted information at that point.

15 PRESIDING JUDGE EBOE-OSUJI: The witness can answer the question.

16 THE WITNESS: I can't remember, your Honour, but here is just -- is according to
17 what I can recollect, this is just a pure complaint that she might not be sure about the
18 future and that is only to say that maybe according to what I can remember this -- you
19 know, everything, everybody, every individual could fear about the future after
20 testifying in this kind of case. The future of individual, even me myself, I have been
21 having several issues with VWU concerning the future because actually as a witness
22 it's -- you don't know what will happen about -- after this, and this is a very great
23 concern and I'm very worrying and I don't know what maybe whoever was taking
24 this conversations to be relevant actually in the basis -- and this actually was dealing
25 with fear, mostly it was about the fear -- future but not related to changing anybody's

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1 mind concerning the testimony or her testimony, your Honour.

2 Here actually I'm still even worried about the future of myself (Redacted) and if I
3 share with anybody, that is purely on fear, not to -- to do or to influence anything to
4 do with the case, your Honour. And I could -- that's why I was always saying that,
5 actually any conversation that might have take place between me and (Redacted) from
6 way back since we meet, that's nothing to do with changing or influencing anybody,
7 your Honour.

8 MR KHAN:

9 Q. And, Witness, some of these fears you talk about, you're talking about things
10 like education for your children; is that right, that's one of the things?

11 A. That is common and it is actually I did it and I explained it even to -- and that
12 is -- everybody's worry about that.

13 Q. And accommodation is one of the concerns; is that right?

14 A. That is --

15 Q. Yes or no, Witness?

16 A. -- one of the fear, your Honour, (Redacted) and you
17 don't know what will happen after you testify. That is the fear. First of all the fear.
18 And anything to do with the right -- anybody's -- any rights that you can get after
19 getting any human being are entitled to be living in certain conditions, your Honour.

20 Q. Concerned about the businesses for (Redacted) is
21 that right?

22 A. I'm --

23 Q. That's one of the -- that's one of the concerns, Witness, yes or no?

24 A. When I talk about -- the particular thing I was talking about is (Redacted)
25 (Redacted) and the reason why (Redacted) it

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1 was not my wish in the original plan, but it happens because of some issues that
2 happened which it will take a long time before we discuss. VWU knows about that.
3 They are in records with VWU. And (Redacted) even now (Redacted)
4 (Redacted)

5 Q. And why did your wife leave? Why did she leave?

6 A. No, that one is different. I cannot talk about that.

7 Q. Is it because you would beat her?

8 A. Without -- about that -- (Redacted)

9 Q. And, Witness, a concern of yours from the beginning of your contact with the
10 Prosecution was to get (Redacted) wasn't it? It was to leave Kenya and come to the
11 west, that was your overarching priority from the beginning of your relationship with
12 the OTP; isn't that right?

13 A. That one, when I was in Kenya I was not even sure when I will testify and
14 whatever. In fact -- in fact, I was among the people who were supporting the local
15 tribunal and I've never -- know -- I note -- even when I was in the other side when
16 I was giving my testimony, I never know, I was not even given that you will go
17 anywhere, it is something that you could -- nobody has ever give me any direction
18 that after you testify, you can go to anywhere. I could not be -- just be motivated by
19 something which I have never know, which I have never believed about it.

20 PRESIDING JUDGE EBOE-OSUJI: Witness, you said when you were on the other
21 side giving your testimony, what do you mean by that?

22 THE WITNESS: When I was even in (Redacted) or even when we start conversing
23 with -- with OTP to -- on phone. Nobody -- even before, earlier, I've --

24 PRESIDING JUDGE EBOE-OSUJI: You meant when you were giving your
25 statement to --

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1 THE WITNESS: Yes. Yes.

2 PRESIDING JUDGE EBOE-OSUJI: -- to the OTP?

3 THE WITNESS: Yes. But there was nothing like a promise you will go anywhere.

4 PRESIDING JUDGE EBOE-OSUJI: All right.

5 MR KHAN:

6 Q. Witness, isn't the case in fact you beat your wife even when she was pregnant
7 and she was rescued and sent away from you? Isn't that the case?

8 PRESIDING JUDGE EBOE-OSUJI: What is the relevance of that question, Mr Khan?

9 MR KHAN: Your Honour, it goes indeed to the reliability of this witness when you
10 put together at the end of this the kind of man he is and the lies we will establish that
11 he has told this Court and the Prosecution that he's a man unworthy of belief in any
12 form at all.

13 MR GARCIA: And the Prosecution objects to that question, your Honour. It has no
14 relevance either to the credibility of the witness or to his narrative. It shouldn't be
15 allowed.

16 PRESIDING JUDGE EBOE-OSUJI: Of course beating someone's wife is an odious
17 conduct for anyone to engage, but what relevance particularly does it have to the
18 credibility of the witness, Mr Khan?

19 MR KHAN: Your Honour, I'll move on and -- to another topic with your leave.
20 Your Honours, tab 231(a), KEN-OTP-0145-0244.

21 Q. Witness, do you remember having a discussion with (Redacted) on 30
22 July 2014 when you discuss about monthly payments to your -- promises of monthly
23 payments to your family and then at 0244, and I quote:

24 (Redacted)

25 (Redacted)

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1 End quote.

2 Do you remember telling (Redacted) that it would be a great advantage to you if
3 somebody in Kenya was jailed? Do you remember that or not, witness?

4 A. I cannot remember, your Honour, because I cannot know who was supposed to
5 be jailed.

6 Q. Witness, did you think if somebody was to be jailed in this process it would
7 help your (Redacted) case be believed; is that what you thought? "If somebody was
8 jailed, it makes my case more believable"; is that what you thought or not?

9 A. I can't remember, your Honour.

10 Q. Witness, is there a reason why you were so concerned over many, many
11 meetings and discussions with the Prosecution to delay your testimony until (Redacted)
12 (Redacted) because you were thoroughly concerned that you would be
13 exposed, your lies would be exposed and your (Redacted)? Is
14 that why you wished to delay matters?

15 A. I've been having two issues: One of them is VWU can even give the Court
16 about that. (Redacted)
17 (Redacted) and that is purely every caring parents can think about that
18 and we have been discussing about that and I have been telling OTP about that, that I
19 am not sure (Redacted) It's nothing related to
20 I fear to testify, whatever, because I was entitled to say the truth and the truth -- I'm
21 still here in the Court to say the truth.

22 Q. You see, Witness, what I'm suggesting is you remember before this trial started
23 there was a discussion about a Defence application that eight witnesses testify at the
24 outset, first, and do you remember telling the Prosecution early on that you didn't
25 want to testify until much later until your (Redacted) had been decided? Do

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1 you remember saying that?

2 A. And if I say about that, your Honour, there is nothing related with this because
3 actually after you testified you can be rest assured I -- I was thinking that in case I
4 testify at this particular moment before I am settled, whether -- whether we -- or,
5 VWU was also promising that (Redacted) which is very common
6 to anybody.

7 Q. Witness, at the time you said you would not be willing to testify until your
8 (Redacted) had been determined (Redacted)
9 (Redacted) weren't you, (Redacted)
10 you said you didn't want to testify until your (Redacted) had been finally determined (Redacted)
11 (Redacted) isn't that right?

12 A. That -- that is to be sure about the future, your Honour. That is nothing to do
13 with whatever. My testimony I have been postponing because of -- basing on the
14 same reasons, until I know, because everybody has their supporters.

15 MR KHAN: Mr President, I have traversed the areas as quickly as I could. I could
16 spend longer with it but, your Honour, I would ask to MFI the documents I have
17 shown. Your Honours, there is a total of nine. If I could with your leave, at this
18 stage, give the ERN numbers to the documents.

19 Mr President, your Honours, the first document is KEN-OTP-0145-0142; the second is
20 KEN-OTP-0145-0216; the third is KEN-OTP-0145-0216; the fourth is
21 KEN-OTP-0145-0074; next is number five comes KEN-OTP-0145-0221; thereafter
22 KEN-OTP-0145-0230; then KEN-OTP-0145-0090; then KEN-OTP-0145-0157; and then
23 at number nine KEN-OTP-0145-0243. I just want to --

24 THE COURT OFFICER: Mr Khan, could you please confirm that the third document
25 is ending by 246.

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- 1 MR KHAN: I'm most grateful. Thank you for your clarification.
- 2 PRESIDING JUDGE EBOE-OSUJI: Are you done, Mr Khan?
- 3 MR KHAN: Mr President, I'm just verifying one matter, the document at tab 202.
- 4 Yes, that's also put in at number six. Your Honour, that's it. I'm grateful.
- 5 PRESIDING JUDGE EBOE-OSUJI: The document will be marked for identification.
- 6 THE COURT OFFICER: The document KEN-OTP-0145-0142 will bear the number
- 7 MFI-T-D09-00283.
- 8 The document KEN-OTP-0145-0216 will bear the number EVD-T-D09-00284.
- 9 PRESIDING JUDGE EBOE-OSUJI: You mean MFI.
- 10 THE COURT OFFICER: Indeed, Mr President. Will bear the number
- 11 MFI-D09-00285.
- 12 The document KEN-OTP-0145-0074 will bear the number MFI-T-D09-00286.
- 13 The document KEN-OTP-0145-0221 will bear the number MFI-T-D09-00287.
- 14 The document KEN-OTP-0145-0230 will bear the number MFI-T-D09-00288.
- 15 The document KEN-OTP-0145-0090 will bear the number MFI-T-D09-00289.
- 16 The document KEN-OTP-0145-0157 will bear the number MFI-T-D09-00290.
- 17 And finally, the document KEN-OTP-0145-0243 will bear the number
- 18 MFI-T-D09-00291.
- 19 All nine documents are confidential.
- 20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 21 Mr Khan.
- 22 MR KHAN: I'm most grateful. Mr President, with your leave, we could go into
- 23 public session.
- 24 PRESIDING JUDGE EBOE-OSUJI: Open session.
- 25 (Open session at 12.41 p.m.)

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

2 PRESIDING JUDGE EBOE-OSUJI: Thank you.

3 Mr Khan.

4 MR KHAN: I'm grateful.

5 Q. Witness, you recall that on Thursday last week you testified about events in
6 Eldoret on 26 December 2007; do you recall that?

7 A. I do.

8 Q. And you will recall last week my friends in the team for Mr Sang played an
9 audio tape of the Honourable Raila Odinga on the programme chaired by
10 Joshua Sang on Christmas day; do you remember that, talking about AP officers and
11 the allegation that -- the fear that they were being engaged in rigging ballot boxes?
12 Do you remember that?

13 A. I remember seeing but I didn't hear myself.

14 Q. Witness, it's right, is it not, that at that time the fears of rigging were not
15 confined just to Eldoret but they were concerns that spread across the entire length
16 and breadth of Kenya; is that right?

17 A. I'm talking about my area.

18 Q. But, Witness, you followed the television; is that right?

19 A. Yes, your Honour.

20 Q. You followed the radio?

21 A. Yes, I do.

22 Q. And so as an informed individual I'm asking do you recall that at that time, by
23 26 December, there were news, for example, in Nyanza province that two officers of
24 the administration police were tragically killed because it was suspected they were
25 moving marked ballot papers; do you remember that, Witness?

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1 A. I remember very well, but I remember even talking in my testimony
2 that -- commenting on that, your Honour, earlier.

3 Q. Well, Witness, what we'll do we'll show you a video and perhaps it will help.
4 Your Honours, we seek to show KEN-D09-0022-0002. And the transcript,
5 Mr President, your Honours, is at tab 36.

6 PRESIDING JUDGE EBOE-OSUJI: What volume?

7 MR KHAN: Volume 1.

8 (Viewing of the video excerpt KEN-D09-0022-0002)

9 MR KHAN: Mr President, I will read into the record the transcript of that video. It
10 is KEN-D09-0036-0150, at 0151. And I quote:

11 "News reporter: Barely a few hours to the polls and electoral violence has reared its
12 head with sporadic scenes of violence being witnessed in various parts of Nyanza
13 Province."

14 The news reporter continues and I quote:

15 "In Homa Bay three administration police are reported to have been killed over
16 allegations that they were ferrying already marked ballot papers. In
17 Oyugis ..." O-Y-U-G-I-S "... the situation isn't different. Two administration police
18 were last night killed by a gang of people over similar allegations. This morning, a
19 Nissan matatu was banned in Oyugis Kasipul-Kabondo Constituency."

20 PRESIDING JUDGE EBOE-OSUJI: Is that banned?

21 MR KHAN: Your Honour, it says "banned." It should be "burnt".

22 THE COURT USHER: Burnt.

23 MR KHAN: Indeed. I'm grateful.

24 It continues and I quote:

25 "The locals ambushed the occupants of the car claiming they were PNU sympathisers.

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1 The visibly agitated crowd was chanting ODM slogans claiming they will not allow
2 room for rigging."

3 After 47 seconds the news reporter continues and I quote:

4 "Area provincial police officer, Chris Kahindi ..." K-A-H-I-N-D-I- "... confirmed 72
5 administration police were dispatched to the area."

6 He continued and I quote:

7 "In Awendo ..." A-W-E-N-D-O "... tension was high, with locals barring any vehicle
8 plying the route, before conducting a search for any signs of ballot papers. Despite
9 this, preparations ahead of tomorrow's elections went on smoothly with returning
10 officer Nyakach ..." N-Y-A-K-A-C-H "... social hall for Lodanga ..." L-O-D-A-N-G-A
11 "... saying they were set for the big day.

12 Cathy Ochienga ..." O-C-H-I-E-N-G-A "... for Channel One News."

13 Witness, do you remember seeing that report at the time?

14 A. No.

15 Q. Do you remember that incident, that being big news that two AP officers were
16 tragically killed on that day -- sorry, three AP officers, so five in total. Three AP
17 officers killed ferrying marked ballot papers and then two others killed by a gang
18 over similar allegations elsewhere. Do you remember reading that in the
19 newspapers or seeing it on TV?

20 A. I can't remember, your Honour, but I recall as if there was some -- one which
21 was between Kericho and Kisii area which was burned and a BP was killed, but I can't
22 recall this one but if it was there, it's in records, but I can't remember.

23 MR KHAN: Yes, I'm grateful.

24 Your Honour, with the Court's leave I'll also show a document at tab 38 and it's

25 KEN-D09-0035-0116.

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1 Q. And, Witness, I just want you to look at the last column when that gets on the
2 screen, KEN-D09-0035-0116. And I'll read it while it comes on to the screen. It is
3 headed in the last column "National News Thursday December 27" headed "Raila
4 storms Nairobi hotel over election rigging claim, " by a Nation correspondent and
5 reporter.

6 Quote:

7 "Presidential candidate Raila Odinga was one of those who stormed a city hotel
8 yesterday on allegations that some individuals were buying voter's cards.

9 But when the ODM presidential candidate arrived at Ngong Hills Hotel ..."

10 N-G-O-N-G "... there were no such people.

11 He said he had been called to the hotel by an aide over suspicious goings-on.

12 Mr Odinga said Kenyans would not accept the outcome of the flawed elections. He,
13 however, cautioned his supporters against engaging in violence." End quote.

14 Then the next line:

15 "The presidential candidate claimed there were indications that the Government
16 planned to rig today's elections." End quote.

17 Witness, do you remember that report that Raila Odinga was inspecting on this
18 occasion a city hotel looking for fake ballots, seeing there were none, but then telling
19 his supporters be calm but be vigilant? Do you remember that?

20 A. I can't remember, but this story might be there because it is already in records,
21 but this specifically story is mainly about Raila, but what I was testifying earlier was
22 about what happened on 26th.

23 Q. Yes, but you recall the -- the incident at the time or the situation at the time that
24 there was great tension in Kenya because there was a real concern that there was a
25 plan afoot by the incumbent PNU government to rig the elections and that was the

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1 case throughout Kenya; is that right?

2 A. Yes, it was that, your Honour, but I'm still insisting that my position was what
3 happened during 26th in Eldoret.

4 Q. Witness, we'll come to that maybe after -- after lunch. In the next five minutes
5 I'm going to come to 26 December 2007.

6 And you gave evidence last week that there was this concern about rigging, you
7 mention Raila Odinga's name, you mention Mr William Ruto's name, and you said
8 that -- it was said particularly by Mr William Ruto that "... if the elections are rigged,
9 people will see fire." Do you recall that testimony last week?

10 A. Yes, I do.

11 Q. And I think in fact the -- under direction from the President you gave us the
12 Swahili words and the words in fact are "Tuna sikia wanataka kuiba kura wajaribu
13 watakiona chemchkuni."
14 Tuna, T-U-N-A.

15 A. Yes.

16 Q. Next word, sikia, S-I-K-I-A. Next word wanataka, W-A-N-A-T-A-K-A. Next
17 word kuiba, K-U-I-B-A. Next word kura, K-U-R-A. Separate word, wajaribu,
18 W-A-J-A-R-I-B-U. And then watakiona, W-A-T-A-K-I-O-N-A. And then the last
19 word you gave as chemchkuni, C-H-E-M-C-H-K-U-N-I.

20 Do you remember that, Witness?

21 A. Yes, if I can remember.

22 Q. Now, Witness, in those words -- well, put it this way: You said these were
23 Swahili words, didn't you?

24 A. Yes.

25 Q. And the Swahili word for fire is moto, isn't it, M-O-T-O?

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1 A. Yes.

2 Q. The word for fire is not in these seven words that you gave the Prosecution, is
3 it -- that you gave the Court?

4 A. The word chem chema kuni (phon), the way I see, it has several interpretations,
5 not directly. Chem chema kuni, the person must face some consequences, whether it
6 is fire or whatever, translated direct I see fire, chem chema kuni. Kuni is a
7 fire -- kuni is firewood.

8 Q. Well, Witness, let's go step by step. You agree that the Swahili word of moto,
9 M-O-T-O, is not there? You agree with that?

10 A. I can agree but --

11 Q. Yes.

12 A. -- what is the meaning -- what is the meaning of kuni?

13 Q. Now, you are familiar, are you not, with a Swahili proverb "Wataona cha
14 mtema kuni."

15 A. Cha mtema kuni, yes, they will see some -- yes.

16 Q. And for the record that's four words, wataona, W-A-T-A-O-N-A. Next word
17 cha, C-H-A. Next word mtema, M-T-E-M-A. And the last word kuni. You're
18 familiar with that -- those words, aren't you?

19 A. I'm familiar with that words but that word itself is meaning something. I use it,
20 fire, because it was also talking about kuni and what I actually meaning it's actually
21 they will see some -- yeah, something. It's like warning.

22 Q. In fact, just so the Bench can clarify, this is a well-worn a well-used Swahili
23 proverb, isn't it? Even with children you say that proverb? You say, "Don't do this
24 or there will be trouble." That's what it means?

25 A. That's why he was inciting the public that the government side will see the fire

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1 if they rig elections. That was the word from the Honourable Ruto.

2 Q. Witness, we'll go to your understanding a little bit later, maybe after lunch, but
3 I'm putting to you that the words you've -- I've read out, "Wataona cha mtema kuni,"
4 these are the words you say Mr Ruto employed?

5 A. Yes, your Honour.

6 Q. And these words are a Swahili proverb, aren't they?

7 A. It is.

8 Q. And perhaps even you with your children, other people with their children,
9 they use this phrase regularly, don't they, "Don't do this or there will be trouble"?

10 A. They can use unless they have seen something is going to happen, but at this
11 particular moment, the situation which was taking place, Ruto was using to incite the
12 public this message.

13 Q. And you say these phrase "Wataona cha mtema kuni," "Don't do this or there
14 will be trouble," that's a correct translation, isn't it?

15 A. It is a clear translation, sir.

16 Q. This was actually said prior to the elections during campaigns when
17 Mr William Ruto is on the campaign trail and he's saying, "Look, be vigilant. We've
18 heard there's going to be rigging, but telling the government if you do rigging like -- if
19 you do rigging, there will be trouble," just like a father will do to a child; isn't that
20 right?

21 A. That is the position if he was that -- but my position was different.

22 MR KHAN: Mr President, perhaps that's a convenient time.

23 PRESIDING JUDGE EBOE-OSUJI: Yes, but before we do, so the quarrel is with the
24 word kuni, is that it, or does it include mtema kuni in your proverb?

25 MR KHAN: Your Honour, I think really the issue - and my learned friend Mr Katwa

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1 Kigen will correct me when I'm wrong - I think it's actually "cha mtema kuni" is the
2 issue of contention. And the interpretation I've put, which the witness has said is
3 correct, is it means there will be -- you know, you'll be -- you'll get in trouble.

4 PRESIDING JUDGE EBOE-OSUJI: So it will be chem cha kuni (phon), you said?

5 MR KHAN: So the expression, the proverb, and it can even be looked at in the
6 Indiana website and others, wataona, W-A-T-A-O-N-A, and then three words, cha
7 mtema kuni, which is "If you do that, you will get in trouble." And it's a Swahili
8 proverb in common usage in Kenya and --

9 PRESIDING JUDGE EBOE-OSUJI: All right.

10 MR KHAN: -- and I think the witness has accepted that.

11 PRESIDING JUDGE EBOE-OSUJI: You see the thing is in the version of the phrase
12 that the witness had introduced, do we see the occurrence of "cha mtema kuni"?

13 MR KHAN: Mr President, I think the spelling is different, but I did put to the
14 witness, and I can clarify it again, that the proverb Mr Ruto, that I read out, the four
15 words, is the proverb he says he heard Mr Ruto use. Your Honour, if there's
16 ambiguity, I can ask that again.

17 PRESIDING JUDGE EBOE-OSUJI: Yes, you need to clarify that.

18 MR KHAN:

19 Q. Mr Witness, can you clarify. The proverb that I read out,
20 "Wataona cha mtema kuni," is the proverb you say you heard Mr Ruto say in the 2007
21 elections; is that right?

22 A. Yes, your Honour.

23 MR KHAN: I'm most grateful.

24 And, Mr President, with that, if it's the Court's desire, perhaps we can --

25 PRESIDING JUDGE EBOE-OSUJI: Are you continuing with that proverb or --

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1 MR KHAN: No, I'm leaving that issue.

2 PRESIDING JUDGE EBOE-OSUJI: All right.

3 Witness, the proposition --

4 Before I ask the witness a question, Mr Khan, maybe you should set the stage. Does
5 it matter if what was conveyed at the time was there will be trouble, or must it be
6 there will be fire, as far as you're concerned?

7 MR KHAN:

8 Q. Witness, it's correct, isn't it, the word "moto," the Swahili word for fire, was not
9 used by Mr Ruto, was it?

10 A. I've already said that if I can reverse what I am already saying, the meaning of
11 mtema kuni -- maybe I didn't explain, maybe I used the word "fire," but it's actually
12 warning somebody. It's already directly using -- kuni is firewood, your Honour, in
13 English, it's a firewood. Cha mtema kuni is something you will face if such a thing
14 will happen. That's what he was using directly and by then it was meaning PNU are
15 planning to rig elections which was a plan of -- of them to incite the public to be ready.
16 Already they were seeing that it's already planned.

17 Q. You see, Mr Witness, what I've been trying to do is to leave aside for the
18 moment the interpretation you give certain words --

19 A. Yes.

20 Q. -- and deal with the words themselves that you say were uttered. So I'm
21 correct, am I not, that the word "fire," "moto" is not used by Mr William Ruto? That's
22 right, isn't it?

23 A. Yes, but --

24 Q. And what you're saying is the word chemchkuni doesn't mean fire, it means
25 trouble or something else.

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1 A. It can mean that way. It can be interpret in either way, your Honour?

2 MR KHAN: Your Honour, I'm content to leave it there.

3 PRESIDING JUDGE EBOE-OSUJI: We will then --

4 MR KHAN: (Overlapping speakers) evidence can be called on this issue.

5 PRESIDING JUDGE EBOE-OSUJI: Yes, we will leave it at that and then of course the
6 Prosecution may re-examine on it if need be.

7 We will now rise for lunch and we will go into closed session so that the witness may
8 be ushered out of the courtroom.

9 (Closed session at 1.04 p.m.) * Reclassified as Open session

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

11 (The witness stands down)

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

13 (Recess taken at 1.04 p.m.)

14 (Upon resuming in open session at 2.34 p.m.)

15 THE COURT USHER: All rise.

16 Please be seated.

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

18 Witness, welcome back.

19 We are in open session and Mr Khan will continue his cross-examination.

20 Mr Khan?

21 MR KHAN: Mr President, your Honours, I'm grateful. Before I recommence, your Honour,
22 there was a newspaper that I put to the witness that was at tab 38, KEN-D09-0035-0116. I'd
23 ask for that to be marked for identification, please.

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

25 MR KHAN: I'm grateful.

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1 Q. Mr Witness --

2 THE COURT OFFICER: The public document KEN-D09-0035-0116 will bear the number
3 MFI-T-D09-00292.

4 MR KHAN: I'm grateful.

5 Q. Witness, when you were interviewed by the Prosecution in October of -- August 2010,
6 you requested and were given a set of the audio recordings of those interviews; is that right?

7 A. In October?

8 Q. In August of 2010?

9 MR KHAN: Your Honour, I'm looking at tab 67, Defence binder tab 67,
10 KEN-OTP-0037-0104.

11 Q. Witness, do you remember signing the receipt from the Office of the Prosecution
12 acknowledging receipt of 25 audio tapes? Do you remember that or not?

13 A. No. Is that -- if I answer that -- is that not to show that I will -- show the public that I
14 may have such things.

15 Q. Witness --

16 PRESIDING JUDGE EBOE-OSUJI: Witness, you can answer the question.

17 THE WITNESS: Yes, I have. Yes.

18 MR KHAN: I'm grateful for that.

19 Your Honours, I'll refer to tab 154 of the second binder.

20 Q. Witness, did you in fact tell the Prosecution -- and, your Honour, that tab is
21 KEN-OTP-0142-0119.

22 Did you tell the Prosecution on 9 September 2013 -- well, your Honours perhaps we
23 go to private session for a moment.

24 PRESIDING JUDGE EBOE-OSUJI: Indeed. Private session.

25 (Private session at 2.38 p.m.) * Reclassified as Open session

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

2 MR KHAN: I'm grateful.

3 Q. Mr Witness, did you tell the Prosecution on the 6th -- on 9 September 2013 that you

4 (Redacted)

5 (Redacted)

6 A. I can't remember what -- what -- (Redacted)

7 PRESIDING JUDGE EBOE-OSUJI: Do you have difficulty with showing this document to

8 the witness?

9 MR KHAN: No, no. No, Mr President. In fact we can show both, but firstly

10 KEN-OTP-0142-0119, if that could please be put on the screen?

11 Q. And Witness, I'm reading the second paragraph, and I quote:

12 "On 9 September 2013, OTP representatives called (Redacted) The witness said he was at the

13 (Redacted)

14 (Redacted) End

15 quote.

16 Do you remember telling that to the Prosecution in September of last year?

17 A. I can't remember.

18 Q. Witness, do you remember that before you were -- before you started your testimony

19 here, before their Honours last week, you took part for about ten days in witness preparation

20 with members of the Office of the Prosecution? Do you remember that?

21 A. Yes, I -- I do.

22 Q. Did at any point, did they ask you to hand back these tapes and other material? Did

23 they ever ask you "Please, hand it back before you start giving evidence"?

24 A. Never I've been asked about that.

25 MR KHAN: Your Honours, we can go to open session.

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1 PRESIDING JUDGE EBOE-OSUJI: Open session.

2 (Open session at 2.40 p.m.)

3 THE COURT OFFICER: We're back in open session, Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 MR KHAN: And Mr President, I'd ask to exhibit the document at tab 67. It comes from the
6 Office of the Prosecution KEN-OTP-0037-0104 and also to exhibit the document at tab 154.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia.

8 MR KHAN: KEN-OTP-0142-0119. I'm grateful.

9 MR GARCIA: Your Honour, I don't see the purpose of exhibiting these documents. The
10 proposition has been put to the witness, one of them is an investigator's report, that's tab 154,
11 and another one is an acknowledgment of receipt, that's obviously -- and that's tab 67. If the
12 witness confirms 67 I have no problem with that one. The investigator's report, I believe that
13 the proposition should simply be put to the witness. It's not the witness who's made that
14 investigator's report and I think our practice has been with other investigator's report to
15 simply MFI them.

16 PRESIDING JUDGE EBOE-OSUJI: Has that been the practice in relation to investigator's
17 reports?

18 MR GARCIA: There have might been some exceptions, your Honour, but I do believe that
19 investigator's reports, since they don't origin from the witness himself, he's not able to confirm
20 anything that's written in them, he's not the author of the investigator's report, I think we
21 should MFI it.

22 The other document, the receipt, he signed it so he can confirm having signed it.

23 And I think then it would be appropriate to put it in as an exhibit.

24 MR KHAN: Mr President, the Court record of course speaks for itself. It's my recollection
25 even screening notes have been exhibited on occasion.

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1 Your Honours these are documents coming not from the Defence but from the Prosecution's
2 office. There is no question about its authenticity. It's part of disclosure. Your Honour,
3 the weight, if any, of any of these documents will be given, will be decided by the Bench in
4 due course, but we say these are matters that can properly be exhibited at this stage.

5 PRESIDING JUDGE EBOE-OSUJI: At tab 67 you might as well show the witness the
6 document since you showed him --

7 MR KHAN: Yes, of course.

8 PRESIDING JUDGE EBOE-OSUJI: -- the one at tab --

9 MR KHAN: Indeed.

10 PRESIDING JUDGE EBOE-OSUJI: -- 154.

11 MR KHAN: With the court officer's assistance if KEN-OTP -- not for the public outside, it
12 has a signature. KEN-OTP-0037-0104, if that could be put on the monitor of the witness,
13 please.

14 Q. Witness, can you see that document?

15 A. Yes, I can remember because this is original one because I -- they remain with original
16 one.

17 Q. And is that your signature, sir?

18 A. It is.

19 MR KHAN: Yes, I'm grateful.

20 (Trial Chamber confers)

21 PRESIDING JUDGE EBOE-OSUJI: The two documents will be admitted as the next in the
22 Ruto Defence exhibits.

23 Mr Khan, before we proceed, an oversight there. Ms Buisman, I should have called
24 on you first. My apologies for that.

25 MS BUISMAN: We have no objection.

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- 1 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 2 THE WITNESS: Your Honour, let me --
- 3 PRESIDING JUDGE EBOE-OSUJI: One second. One second, please.
- 4 The two documents will be admitted as the next in the Ruto Defence exhibits.
- 5 THE COURT OFFICER: The document KEN-OTP-0037-0104 will bear the number
- 6 EVD-T-D09-00293; and the document KEN-OTP-0142-0119 will bear the number
- 7 EVD-T-D09-00294. Both documents are confidential.
- 8 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 9 Witness, you were about to say something. Remember, we're in open session. We
- 10 have admitted these documents. You should wait for Mr Khan to ask you questions.
- 11 And if there is something you want to say about these documents let's wait to see if
- 12 his questions would give you the opportunity to say those things, if not before he
- 13 moves on remind me, or I'll try to remember to get back to you to see if there is more
- 14 you need to say. Do you understand?
- 15 THE WITNESS: (Microphone not activated)
- 16 MR KHAN: Mr President, if it helps, I'm intending to leave that matter and move to
- 17 something new.
- 18 PRESIDING JUDGE EBOE-OSUJI: You're done?
- 19 MR KHAN: Yes, indeed --
- 20 PRESIDING JUDGE EBOE-OSUJI: All right.
- 21 MR KHAN: -- with your leave.
- 22 THE WITNESS: Then I can --
- 23 PRESIDING JUDGE EBOE-OSUJI: Say what you --
- 24 THE WITNESS: -- clarify what exactly. Here is the position where they say I am receiving
- 25 original -- I'm giving out -- handing over the original documents from Prosecution. This

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1 is -- these things is when I was hand over my interview. So there was two copies, which was
2 being made. And I accept that the original document which was -- that is tapes were with
3 the Prosecution. And I was given a copies, which I have until then. Some -- maybe some
4 perceptions that I was to hand over some document later is not the right one. I -- after the
5 interview, the two tapes were being taken at the same time, so I take the copies after being
6 asked if I would like to have them copies. I said I could have the copies. And the original
7 one I sign to confirm that the Prosecution have them at the end of my interview.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 THE WITNESS: Yes.

10 PRESIDING JUDGE EBOE-OSUJI: Okay.

11 MR KHAN: That's very clear, Witness. Thank you very much.

12 THE WITNESS: Okay.

13 Q. I'm going to move on to another issue, but you recall, Witness, before lunch we went
14 through some newspapers and other reports regarding killings of AP officers in Nyanza and
15 tension and problems in other parts of Kenya on 26 December. And it's right, is it not, that in
16 Eldoret nobody was killed on 26 December 2007; that's right, is it not?

17 A. On 26 December, yes, I can confirm nobody was killed, but there was blockage of roads,
18 which is also --

19 Q. Yes.

20 A. -- an illegal thing.

21 Q. Yes. Witness, we -- none of us want to detain you here longer than necessary. And
22 one way of making it as efficient as possible is just try your best to focus on the question that I
23 put rather than other issues because the Court has heard the evidence of blockage, and we'll
24 come to that in due course.

25 A. Okay. Thank you, your Honour.

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1 Q. Now, Witness, you testified on Thursday of last week regarding an incident on 26
2 December 2007 at the police station in Eldoret. Do you recall that?

3 A. I recall.

4 Q. And you said that you saw somebody called Farouk Kibet with some councillors who
5 had been out and about since 10 a.m. on that morning; is that right?

6 A. Yes, your Honour.

7 Q. And in fact, those councillors were already at the Eldoret Police Station at the time you
8 arrived; isn't that right?

9 A. Yes, your Honour.

10 Q. And you've given evidence that you saw Mr Farouk Kibet speak. Do you remember
11 that?

12 A. Yes, your Honour.

13 Q. And after he spoke, you then saw Mr William Ruto and Henry Kosgey; is that right or
14 not?

15 A. It's right.

16 Q. Now, you gave evidence about a demonstration at the police station; you remember
17 that?

18 A. Yes.

19 Q. And you say that a time comes when Mr William Ruto addresses the crowd; do you
20 recall that?

21 A. Yes, your Honour.

22 Q. And he tells people to be patient, to calm down; do you recall that?

23 A. I recall.

24 Q. In fact, are you aware that Mr William Ruto and Mr Henry Kosgey went inside the
25 police station and with the OCPD, before coming out to the crowd, and saying "There's

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1 nothing here. Calm down." Do you remember that?

2 A. I remember.

3 Q. And when the William Ruto and Henry Kosgey said this, you also said on Friday that
4 the people in the crowd were still not convinced. Do you remember saying that?

5 A. Yes, your Honour.

6 Q. And indeed, you gave evidence that after that, despite the calming words of Mr William
7 Ruto, a Kikuyu ladies' Safaricom booth was pushed down. Do you remember speaking
8 about that issue?

9 A. Yes.

10 Q. Because the crowd was angry; is that right? The crowd was angry? It was annoyed?

11 A. Yes, they were already incited. Yeah.

12 Q. They didn't believe -- they believed that there was rigging going on; is that right?

13 A. That is -- you are shortening what I've -- what I believe.

14 Q. Yes.

15 A. But if I put it in short I can say, okay, they were angry after being incited, yes.

16 Q. Yes. Now, after Mr William Ruto told the crowd to be patient and calm down, the
17 crowd not convinced moved off towards the Brookside Dairy; is that right?

18 A. Yes, your Honour.

19 Q. Now, you gave evidence about a Nissan Patrol being at the police station. Do you
20 remember saying that?

21 A. Yes, your Honour.

22 Q. And I accept there was a Nissan Patrol there at the Brookside station. But casting your
23 mind back, I know it's seven years, do you recall in fact that Mr William Ruto was in a green
24 Range Rover? Could that be right?

25 A. No.

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1 Q. You see the OCPD and other Kikuyus - other members of the Kikuyu community - at
2 Eldoret police station. That's right, isn't it?

3 A. Yes.

4 Q. And you also see Kikuyus - members of the Kikuyu community - at Sosiani Bridge; is
5 that right?

6 A. There were so many people. I cannot -- that's why I say I cannot remember their
7 ethnicity.

8 Q. Well, if it helps you, at page 46 of the transcript on Friday, in answer to a very direct
9 question from the Prosecution, you confirmed that Kikuyus were there at Sosiani Bridge.
10 Does that help refresh your memory that there were Kikuyus there; is that right?

11 A. I see that. Yes, I know about that.

12 Q. And the OCPD was also there; is that right?

13 A. Yes, your Honour.

14 Q. Now, I put it to you, if you could cast your mind back seven years, that in fact what
15 happened is the crowd being discontent with the news that there was no evidence of rigging
16 at the police station went on to Brookside Dairy and Mr William Ruto and the OCPD followed
17 the crowd but stopped at Sosiani Bridge. Are you with me?

18 A. Yes, your Honour.

19 Q. And what I'm putting to you is in fact they stopped at Sosiani Bridge and they didn't
20 actually -- neither the OCPD nor Mr William Ruto went up to Brookside. Could that be
21 right?

22 A. No.

23 Q. And maybe, Witness, that's why when you answered the Prosecution about what were
24 the MPs doing up at Brookside, you say at page 26, "They were just standing around doing
25 nothing." In fact you don't have a recollection of Mr William Ruto up at Brookside at all, do

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1 you?

2 A. What I've already said it's what I can remember, your Honour.

3 Q. So a point comes, anyway, where you stop at Sosiani Bridge and you say Mr William
4 Ruto is opposite Shakers?

5 A. Yes.

6 Q. A restaurant called or a hotel called Shakers; is that right?

7 A. Yes, your Honour.

8 Q. And in fact you tell the Court that you are 2 metres from Sosiani Bridge; is that right?

9 A. Yes, your Honour.

10 Q. You're on the side of Sosiani Bridge closer to Brookside; is that right?

11 A. Yes, your Honour.

12 Q. How -- what is -- how long is that bridge, Sosiani Bridge? How many metres?

13 A. Yeah, maybe 6 or so metres.

14 Q. So 6 or so metres and you're 2 metres away from it. Now the distance from the bridge
15 to Shakers is about 50 to 60 metres; is that right?

16 A. 50 to 60?

17 Q. How far is it from Shakers Restaurant to the bridge?

18 A. I'm not -- I'm not aware about the metres, but I didn't measure it. It's not far. It's just
19 distance I think until the end of the building, or not even the end of the building.

20 Q. The distance from Shakers --

21 A. The bridge.

22 Q. -- to the bridge --

23 A. Yes.

24 Q. -- is how far? If you look at -- use the -- can you use the courtroom as a guide? Is it as
25 long as this courtroom, or much shorter than the courtroom?

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- 1 A. Maybe this. Longer that way to this side.
- 2 Q. So the length of the courtroom?
- 3 A. Maybe, yes.
- 4 Q. All right.
- 5 A. But I'm not confirming exactly.
- 6 Q. Right. And you say that from Mr William Ruto the furthest member of that group is
- 7 500 metres away. Do you remember telling that to the Court on Friday?
- 8 A. The farthest member?
- 9 Q. I beg your pardon?
- 10 A. The farthest member, or what?
- 11 Q. Yes. The furthest person from the group you said is 500 metres away?
- 12 A. Yes, if I can approximately, but I cannot confirm it's 500 metres. I think so, yeah, that
- 13 direction.
- 14 Q. So there are people behind you? That's right, isn't it?
- 15 A. There were people behind me but not so many, but ahead towards Eldoret town.
- 16 Q. And people to the side of you? That's right, isn't it?
- 17 A. Yes, there were.
- 18 Q. Many people in front of you?
- 19 A. Yes, of course, your Honour.
- 20 Q. A lot of noise?
- 21 A. Yes, there was.
- 22 Q. Yes. And it's then you say, when you're by the bridge, that you hear the account you
- 23 gave the Court of what Mr William Ruto says and the response "Othaya," is that -- is that
- 24 right?
- 25 A. That is right.

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1 MR KHAN: Now, Witness, I want to play a video and I'll ask you some questions.

2 Your Honour, the video is KEN-D09-0018-0098, that's at track 4, and the transcript is
3 at tab 40.

4 PRESIDING JUDGE EBOE-OSUJI: Before you do that, we need to make an effort to reflect
5 the measurement estimated by the witness. I know it may be difficult and the last time I
6 tried I was thinking feet and talking metres last time.

7 Now, the length of the courtroom, the reason is if this goes on appeal whoever is
8 dealing with the thing needs to be able to visualize what we're talking about.

9 MR GARCIA: Your Honours, if it may help the Court, I know that we enquired as to the
10 dimensions of the court and senior trial attorney Mr Steynberg informs me that it was 18.8
11 metres. That's the information we got about the length of this courtroom, so that -- that can
12 assist the Court.

13 MR KHAN: Mr President, I'm happy to accept that. Perhaps, because it may be useful
14 going forward, if the Prosecution could be so kind as to obtain in due course something from
15 the Registrar dealing with the dimensions and we can make a stipulation and that can be
16 useful in future?

17 PRESIDING JUDGE EBOE-OSUJI: Yes, it would. It will be.

18 MR GARCIA: We have that information, your Honour, and we can -- we can put it on the
19 record once again if need be.

20 PRESIDING JUDGE EBOE-OSUJI: Yes. Discuss it, both sides, and then let us know what
21 the Registrar says.

22 Mr Khan, please proceed.

23 MR KHAN: And, Mr President, from the transcripts at tab 40, KEN-D09-0018-0129. It
24 needn't be put on the screen just yet. And the bit I'm going to play is at KEN-D09-0018-0132
25 from under time stamp 1029, round about there, but if it can just be played at the moment,

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1 please?

2 (Playing of the video excerpt KEN-D09-0018-0098)

3 MR KHAN: That's enough.

4 And before I ask you some questions, Witness, let me just read from 0132, line 104:

5 "William Ruto ..." and I quote "We will tell him 'Be defeated.' The other day, so that

6 you really know that this is a government of the rich, or maybe it was yesterday,

7 Kibaki was going ..." for "... lunch where one person would pay 1 million shillings.

8 My fellow Kenyans, rich people are coming together to collect money, so that they

9 can oppress us, is that what you want?

10 Crowd: No.

11 William Ruto: They are meeting as the rich, paying 1 million shillings for a plate of

12 food, so that work continues (kazi iendelee) ..." I-E-N-D-E-L-L-E (sic) "... as they

13 oppress us. They continue with a 1 million plate of food while we stay without

14 lunch and have air burgers. Do you agree with that? Mr Kibaki should just pack

15 his belongings and go back home.

16 Crowd: Applause.

17 William Ruto: He packs his bags and goes where?

18 Crowd: Othaya!

19 William Ruto: He goes where?

20 Crowd: Othaya!

21 William Ruto: Now if you as a resident of Eldoret, maybe you see a picture or 2 of

22 Kibaki, let me talk to these people who are followers of Kibaki. If someone here is ..."

23 owned "... by Mr Kibaki, better be quick. You find him so that he pays you quickly.

24 Because after the 27th, his address will change and will be PO box.

25 Crowd: Othaya!

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1 Now where will you get him. Are we together?" End quote.

2 And that can be taken off the screen, please.

3 Your Honours, a correction to the transcript at line 16. It is at page 87 of the real time.

4 It is "... someone here is owed ...", not owned.

5 And, your Honour, I played for the record time stamp 10.30 - 10 minutes and 30

6 seconds - until 12 minutes and 10 seconds.

7 Q. Witness, do you recognize those words?

8 A. I can recognize, but I don't know if it was really the same meeting.

9 Q. Watching that video, seeing the crowd being addressed by William Ruto and the
10 response coming, "Othaya! Othaya!", is that the incident in fact that you are narrating to the
11 Court?

12 A. I don't think it's that one. I mean if it's that one, I cannot remember if it's that -- the
13 same message.

14 Q. Yes. You see, I put it to you, Witness --

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, do we have the verification of the translation of
16 the transcript? We know that -- is there a transcript that what we have is a translation? Do
17 you remember how we did it with the Sang examination and also to annex them with the
18 Prosecution?

19 MR KHAN: Yes. Mr President, we have the translation. Normally there's an attestation at
20 the end.

21 Q. Witness, if you could help us with the Court's leave, what I've read is that an accurate
22 translation of what you heard in -- on the video?

23 A. It is not. Maybe repeat it again and after some times, but that one is not exactly.

24 That's what --

25 MR KHAN: Okay, we can play it again, but --

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- 1 PRESIDING JUDGE EBOE-OSUJI: Let's play it again.
- 2 MR KHAN: Your Honour --
- 3 PRESIDING JUDGE EBOE-OSUJI: Witness, listen carefully. Listen carefully to what is
4 being said on screen what the audio visual material is saying and later on Mr Khan will read
5 back the translation and then you tell us whether that is what is being said.
- 6 MR KHAN: Mr President, can I just clarify, is the witness saying that the translation isn't the
7 same as what he heard on the screen or that what he heard on the screen is not the same as
8 what he narrated as taking place ... (Overlapping speakers).
- 9 PRESIDING JUDGE EBOE-OSUJI: Never mind that.
- 10 MR KHAN: Okay.
- 11 PRESIDING JUDGE EBOE-OSUJI: Let's just play the thing again.
- 12 MR KHAN: Okay, I'm grateful.
- 13 PRESIDING JUDGE EBOE-OSUJI: Thanks.
- 14 (Playing of the video excerpt KEN-D09-0018-0098)
- 15 MR KHAN: I'm grateful.
- 16 Q. Now, Witness, I can read you the relevant portion again, and if you could please assist
17 the Court. The section I read in English I want you to please inform their Honours if that's
18 the -- if that's an accurate translation of what you have just heard Mr Ruto say on the video.
19 And I'm starting at line -- for time at line 108, Mr William Ruto and I quote:
20 "They are meeting as the rich, paying 1 million Shillings for a plate of food, so that
21 work continues (kazi iendelee) as they oppress us. They continue with a 1 million
22 plate of food while we stay ..." out for "... lunch and have air burgers. Do you agree
23 with that? Mr Kibaki should just pack his belongings and go back him.
24 Crowd: Applause. "
25 William Ruto: "He packs his bags and goes where?"

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1 Crowd: Othaya!

2 He goes where?

3 Crowd: Othaya!"

4 William Ruto: "Now if you are as a resident of Eldoret, maybe you see a picture or 2
5 of Kibaki, let me ..." tell these people "... let me talk to these people who are followers
6 of Kibaki. If someone here is ..." owed "... by Mr Kibaki, better be quick."

7 PRESIDING JUDGE EBOE-OSUJI: "Owed." You said "owned."

8 MR KHAN: I beg your pardon.

9 Q. "If someone here is owed by Mr Kibaki, better be quick. You find him so that he pays
10 you quickly. Because after the 27th, his address will change and will be PO Box ...

11 Crowd: Othaya." Closed brackets.

12 Witness, is that an accurate translation?

13 A. It is.

14 Q. Great. And that can be taken off the screen, please.

15 Witness, now, having this played to you twice, is this -- are these words the words you say
16 Mr William Ruto -- Mr William Ruto spoke on 26 December?

17 A. The Othaya is there. He -- he said about Othaya, but exactly word is not. I don't think
18 it is the same.

19 Q. But could it -- could it be correct, Witness -- and as I said, it's seven years ago, but is it
20 the case in fact that what Mr Ruto was saying is where should Mr Kibaki go and the response
21 is Othaya? In fact, that's what you heard on 26 December, if anything was said at all.

22 Could that be right? Is that possible?

23 A. Not possible, because what I heard was exactly what I said yet on Friday. That's why
24 I'm saying maybe the side which was talking, we didn't take any video that -- in that side, but
25 what I heard is Othaya, yeah.

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1 Q. See, this video --

2 A. One pick up and go to when --

3 Q. Yes. See, this video you see Mr Ruto standing on a white coloured Range Rover. Did
4 you see that or not?

5 A. I can see that.

6 Q. Yes. And in fact, that video is taken from November, 23 November 2007, but, Witness,
7 I showed it to you because Mr Ruto has never in his life said "Kikuyus, go to Othaya." And
8 that's why I was giving you an opportunity to carefully search your memory and to say
9 whether or not if anything was said at all it was, "Where should Kibaki go? Where should
10 Mr Kibaki go?" And that response was "Othaya."

11 A. But -- but I'm talking about 26th.

12 Q. Yeah.

13 A. That's why I'm saying what the wording of that word is different.

14 Q. Witness --

15 Your Honours, we can -- we can move on, please.

16 Witness, you've said already that in that group were certain human rights monitors; is
17 that right?

18 A. Yes.

19 Q. Human rights activists?

20 A. Yes, your Honour.

21 Q. And there were journalists as well; is that right?

22 A. Cannot be -- but because that particular day or what -- not published in the media. It
23 cannot be -- Eldoret is full of medias. It cannot be without media people.

24 Q. Yes.

25 A. Yes.

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1 Q. And if something had taken place you would expect it to be published in the
2 newspapers; is that right?

3 A. Maybe there was a lot of words.

4 Q. Yes.

5 A. But like Brookside was -- was -- was put, if I can still recall. But those of police stations
6 and the Brookside -- the bridge, I can't see were any ever made published in any paper.

7 MR KHAN: Your Honours, I will seek to put to the witness at tab 37 of the binder 1 --

8 PRESIDING JUDGE EBOE-OSUJI: Are you moving away from the video and the transcript,
9 or are you still returning to it?

10 MR KHAN: Your Honour, I will leave it except I would seek to MFI the document and the
11 transcript, the video and the transcript, but otherwise I'm not going to put further questions.

12 PRESIDING JUDGE EBOE-OSUJI: Why don't you do that now?

13 MR KHAN: Your Honour, the video KEN-D09-0018-0098 -- your Honour, it's already in
14 evidence, so perhaps I don't need to --

15 PRESIDING JUDGE EBOE-OSUJI: It is already in evidence.

16 MR KHAN: Indeed, I'm grateful.

17 PRESIDING JUDGE EBOE-OSUJI: The video and the transcript.

18 MR KHAN: Yes, I'm grateful to Ms Sullivan.

19 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you.

20 MR KHAN: Your Honour, going to tab 37, and I'd ask that the following newspaper be put
21 on the screen, KEN-D09-0035-0115. It's a Daily Nation -- page of the Daily Nation dated
22 Thursday December the 27th, 2007, so the day after the alleged incident, and if that could be
23 put on the screen, please.

24 PRESIDING JUDGE EBOE-OSUJI: Now, we've seen this before. I don't know if you are
25 going to refer to the same news story, but if this were in evidence -- it's already in evidence,

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1 you need to say it upfront so we don't --

2 MR KHAN: Mr President, it's not in evidence as yet.

3 PRESIDING JUDGE EBOE-OSUJI: It isn't yet? Okay.

4 MR KHAN: So if that could be put on the screen.

5 Q. And, Witness, if you could go to the second part -- if it could be scrolled down please to
6 the second story, "Rigging fears ignite violence in towns as APs stage sit-in against new gun
7 order."

8 And you'll see, Witness, at the bottom of the first column -- well, in fact from the top, it says,
9 and I quote:

10 "A vehicle transporting election materials was yesterday reduced set on fire in Eldoret Town.
11 The half tonne pick-up carrying ballot boxes, papers and other material for today's
12 General Election was from Chepkorio in Eldoret South constituency and was
13 heading ..." towards "... heading to Kaptubei polling centre in the same area."

14 And at the bottom of that column it talks about the relevant incident that you've been
15 speaking about, Witness. Quote:

16 "Earlier, hundreds of residents stormed the police station after word went round that
17 a Mololine bus had been impounded with the papers.

18 ODM chairman Henry Kosgey and Pentagon member William Ruto called for calm
19 but warned the government not to attempt any rigging." End quote.

20 Witness, you've -- you've read that?

21 A. Yes, your Honour.

22 Q. And do you see this in the newspapers at the time?

23 MR GARCIA: I object, your Honour. I object. I understand that this has been a manner of
24 cross-examining certain witnesses to put a newspaper article and to -- and I think the
25 argument underlying this is the fact that since it wasn't reported in the newspaper article,

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1 then it didn't happen. And this is the type of questions that have been put to some witnesses.

2 I think that's inappropriate.

3 This is a subject matter for argumentation. If the Defence wants to put in this
4 newspaper through a bar table motion and argue that because it wasn't -- this incident
5 that the witness reported wasn't reported on, then it didn't happen and then the
6 credibility of the witness is not -- that the witness is not credible on this matter, that's
7 another point.

8 I don't see how it is helpful to ask the witness to confirm what we can all read the fact that it
9 wasn't or it was reported in this newspaper article. I don't see how that's helpful at all for
10 the -- and I don't see how the witness can -- can answer questions on this matter.

11 It's based on the premise that all the incidents on 26 December, including what Mr Ruto
12 would have said at Sosiani River would have been publicised in the newspaper at the time.
13 So I don't think it's helpful in any which way to ask the witness questions on what is in the
14 newspaper article or to draw any inferences from it.

15 PRESIDING JUDGE EBOE-OSUJI: We've heard you. One second.

16 Mr Khan?

17 Mr Garcia, the question from Mr Khan was, "And do you see this in the newspapers
18 at the time?"

19 Mr Khan, what is your --

20 MR KHAN: Mr President, I was trying to untangle the objection. There is nothing
21 remarkable about the question I put forward and there's simply no merit in what my learned
22 friend thinks --

23 PRESIDING JUDGE EBOE-OSUJI: Objection overruled.

24 MR KHAN: I'm grateful.

25 PRESIDING JUDGE EBOE-OSUJI: Proceed.

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1 MR KHAN:

2 Q. Witness, did you read this report in the newspapers on 27 December?

3 A. Maybe I read it, but exactly what was -- as I have said, yes, it is there when you see the
4 paper, maybe I didn't read or I read it a long time ago, but I was reporting what happened on
5 26th in my testimony. And that is what I said earlier even -- even last week. But the way
6 the story is being written here, like the car was burned, I said it was burned the same day on
7 26th, that is in my testimony by the same rioting group, which was Ruto and his group
8 was -- was with them during the day.

9 Q. Yes, Witness. What we're saying here is that this newspaper is reporting the previous
10 day's events. So it's 27 December newspaper reporting the incident of the 26th, and the
11 reporters from the Nation state that Henry Kosgey and Pentagon member William Ruto called
12 for calm. That's right, isn't it?

13 A. After confirming at police station, that is what they said and that is what is even in my
14 testimony.

15 MR KHAN: And going to tab 34 -- now, your Honour, that last document is D09-0035-0115
16 and, your Honour, I'd ask that it be exhibited.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

18 MR GARCIA: I don't see the witness having confirmed read this -- reading this article at the
19 time, your Honour, in the evidence. So we object.

20 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman?

21 MS BUISMAN: We have no objection.

22 PRESIDING JUDGE EBOE-OSUJI: The document is admitted as the next in the Ruto
23 Defence exhibits.

24 MR KHAN: Most grateful.

25 THE COURT OFFICER: The public document KEN-D09-0035-0115 will bear the number

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1 EVD-T-D09-00295.

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

3 MR KHAN: Mr President, if we can go to private session just for two minutes. I apologise
4 the microphone wasn't activated.

5 Mr President, if with your leave we could go into private session for two minutes I would be
6 grateful?

7 PRESIDING JUDGE EBOE-OSUJI: Private session.

8 (Private session at 3.22 p.m.) * Reclassified as Open session

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

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 MR KHAN: And Mr President, I'm referring to a document, provided by (Redacted)
12 (Redacted) to the Prosecution, KEN-OTP-0068-0042. And I wish to
13 read a couple of paragraphs at 0043.

14 PRESIDING JUDGE EBOE-OSUJI: Where is it?

15 MR KHAN: Your Honour, it's page 2, it's at tab 34. The first binder, tab 34.

16 Q. Mr Witness, you know (Redacted) don't you, (Redacted)
17 (Redacted)?

18 A. Yes, I know him.

19 Q. And you know also, do you not, (Redacted)?

20 A. No, I don't know (Redacted)

21 Q. I'm going to read you -- and you're aware, aren't you, that various organisations,
22 including the Kenya Human Rights Commission, were monitoring the 2007 elections, don't
23 you?

24 A. Yes.

25 Q. Yes. Now, this is what (Redacted) says and I quote:

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1 "On 26 December 2007 during midday a word went around the Eldoret town" hall "that the
2 election had been rigged for Eldoret North with the presence of administration police
3 guarding the boxes.

4 As I was travelling to police station (Eldoret), tension was so immense and as I
5 approached the police station I found a huge crowd gathered around the police
6 station citing rigging irregularities and a vehicle was burning and it was suspected it
7 was carrying the materials. Few moments Hon. William Ruto arrived in the police
8 station and cooled down the temperature of the crowd and promised the people that
9 things will go on well as they are vigilant of the process of rigging." End quote.

10 Witness, that's precisely what happened that day, isn't it, that William Ruto requested
11 by the OCPD came and calmed a volatile situation down; isn't that right?

12 A. In my -- in my testimony, your Honour, I said clearly at the police station that they told
13 people to calm down, but what I say that Farouk Kibet was talking Kikuyu and/or Masiendi
14 (phon), but here he's not -- he's -- yes, he's reflecting what happened during that day. And
15 what he supported is exactly what happened at that police station, which is also like my -- my
16 testimony. And I cannot dispute that either because there -- at some point he say "mtulia,"
17 "Cool down," but at the Brookside -- at the Sosiani River opposite.

18 Q. Yes, because, Mr Witness, what I'm suggesting is Mr William Ruto never ever in his life
19 has said "Kikuyu get out." So I'm putting it to you very squarely you're mistaken about that.
20 Is that possible?

21 A. Not possible, your Honour.

22 Q. And that's why, Mr Witness, the human rights monitors, like (Redacted) and the
23 newspapers, accurately report Mr William Ruto calming a volatile situation down. They get
24 it right and your recollection is not correct; do you agree with that?

25 A. The way the media is putting that they report at the police station which they say

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1 actually it was actually Mr Ruto calmed down the peep -- public after confirming at the police
2 station. That is also my position. But what was -- he said at the -- at the river -- river
3 Sosiani is different than what he said. What captured by the media and human rights
4 activist is also the same, that the car was burned, but even -- I can even dispute this guy
5 because the car was burnt around evening, but he's talking about midday.

6 MR KHAN: Mr President, if we can go into open session, before we do that I'd ask to exhibit
7 the document from (Redacted) KEN-OTP-0068-0042.

8 I think the witness's account was that the contents of the extract that I read were correct and in
9 accordance with his own testimony. Your Honour, it's an OTP document and on that basis
10 combined we say can be exhibited with the Court's leave.

11 MR GARCIA: And we object, your Honour. It's basically testimonial evidence and,
12 therefore, on that basis if the Defence wants to bring in a witness to come and contradict what
13 this witness is testifying about, he should bring in a witness into the box and this person can
14 be subjected to cross-examination to see the reliability of this information.

15 I understand the Defence has on other occasions tried to put in as well other items of evidence
16 that are testimonial in nature, such as this one, and the Chamber has on every occasion
17 refused that and they've been MFI'd at best. So that's the Prosecution's submissions on the
18 matter.

19 MR KHAN: Mr President --

20 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman first.

21 MS BUISMAN: We have no objection.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

23 MR KHAN: Mr President, the only observations I can make is that, number one, it's a
24 Prosecution document; number two, it's not made with the view to the criminal proceedings
25 before this Court, but it's a contemporaneous document prepared by Kenya Human Rights

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1 Commission given to the Prosecution and that's how we've got it.

2 There are internal indicia of reliability because the witness has accepted that the
3 contents accord with at least part of his testimony.

4 Your Honour, of course it's a matter of weight at the end of the day but, your Honour,
5 we say it can be admitted but, of course, we're in the Court's hands.

6 PRESIDING JUDGE EBOE-OSUJI: Is it cumulative on the point?

7 MR KHAN: Cumulative in relation to -- to the testimony of the witness?

8 PRESIDING JUDGE EBOE-OSUJI: Yes.

9 MR KHAN: Well, your Honour, it goes --

10 PRESIDING JUDGE EBOE-OSUJI: And the newspaper.

11 MR KHAN: -- it goes beyond it because what we do say is this is accurate reporting that
12 needs at the end of the day to be considered by the Bench when assessing the witness's own
13 account. I'm grateful.

14 (Trial Chamber confers)

15 PRESIDING JUDGE EBOE-OSUJI: This document, although testimonial in nature, is
16 different from the nature of the other documents, testimonial-type documents that the
17 Defence had tried to introduce in the past, and we rejected. This is in the sense that this
18 comes from the Office of the Prosecutor. On that basis, the Chamber will admit it as the next
19 Ruto Defence exhibit.

20 MR KHAN: I'm most grateful.

21 THE COURT OFFICER: The document KEN-OTP-0068-0042 will bear the number
22 EVD-T-D09-00296. The document is confidential.

23 MR KHAN: I'm most grateful.

24 PRESIDING JUDGE EBOE-OSUJI: Thank you.

25 MR KHAN: Mr President, with your leave, if we could go into public session?

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1 PRESIDING JUDGE EBOE-OSUJI: We go into open session.

2 (Open session at 3.31 p.m.)

3 THE COURT OFFICER: We're in open session, Mr President.

4 MR KHAN: I'm grateful.

5 And with the assistance of the court officer, I'd ask that the photograph at tab 67 be put on the
6 screen. It's a public document, KEN-D09-0043-0531. Tab 66, I apologise.

7 PRESIDING JUDGE EBOE-OSUJI: Tab 66?

8 MR KHAN: Tab 66.

9 PRESIDING JUDGE EBOE-OSUJI: And you say it's a public document?

10 MR KHAN: Yes, it's a photograph, KEN-D09-0043 --

11 PRESIDING JUDGE EBOE-OSUJI: Public or private document?

12 MR KHAN: Public.

13 Your Honour, the person has been spoken to it and this can be done publicly.

14 PRESIDING JUDGE EBOE-OSUJI: Proceed.

15 MR KHAN:

16 Q. Witness, you know that person, do you?

17 A. I may know him, but it seems the face is not as I know.

18 Q. Is that the person you described as the driver of the Nissan motor vehicle on 26
19 December 2007? The brown man you described him as. Is that him?

20 A. I can't -- I can't remember if -- his name.

21 Q. Well, if I give the name John Perrymore, P-E-R-R-Y-M-O-R-E, does that help jog your
22 memory that that photograph is John Perrymore?

23 A. Yes, I know him. If you mention the name I can -- I can know who this is.

24 Q. Now, putting the name to the face, can you recall that he was the driver of the Nissan
25 motor vehicle that you described being outside the police station in Eldoret on 26 December?

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1 A. Yes, your Honour.

2 Q. And in fact, you said that he's a Kalenjin. In fact, are you aware he's a South African
3 national?

4 A. No, not -- this one is not the one, then I don't know this one.

5 Q. Are you aware, in fact, that his wife is Kikuyu?

6 A. I'm not aware.

7 Q. Are you aware in fact that Mr William -- Mr William Ruto himself has two sisters who
8 are married to Kikuyus? Are you aware of that?

9 A. I'm not aware.

10 Q. Are you aware that Mr William Ruto has nephews who are half Kikuyu?

11 A. I don't aware about the details of the family of Mr William Ruto.

12 Q. Are you aware that one of Mr William Ruto's chief campaigners in the 2007 election was
13 a Kikuyu, Joseph Njoroge?

14 A. I don't know Njoroge.

15 Q. You've never heard that name Joseph Njoroge?

16 A. I've never.

17 MR KHAN: Your Honours, I'll move on.

18 Q. Your Honour, I see --

19 PRESIDING JUDGE EBOE-OSUJI: Is it spelled correctly on the transcript, the last name?

20 MR KHAN: I'm grateful. Yes, Njoroge is correct and Joseph is correct.

21 PRESIDING JUDGE EBOE-OSUJI: Proceed.

22 MR KHAN: I'm grateful.

23 Mr President, I'd ask to exhibit the photograph KEN-D09-0043-0531.

24 PRESIDING JUDGE EBOE-OSUJI: Prosecution? Ms Buisman?

25 MS BUISMAN: No objection.

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1 PRESIDING JUDGE EBOE-OSUJI: The Prosecution does not object as well. That wasn't
2 captured on the record. Now it is.

3 The document is admitted as the next Ruto Defence exhibit.

4 THE COURT OFFICER: The public document KEN-D09-0043-0531 will bear the number
5 EVD-T-D09-00297.

6 MR KHAN: I'm grateful.

7 Q. Witness, just a last question on that issue. Are you aware that the person who
8 does -- who did all the sound systems, sound engineering, loud speaker set up for Mr William
9 Ruto in 2007 was somebody called Choma, C-H-O-M-A, known as Rasta Choma?

10 A. I don't know.

11 Q. And he's a well-known Kikuyu. Are you aware of that?

12 A. I'm not aware of the people who were in the campaign team. What I was exactly
13 talking about is that he's no -- he's the -- the guy was (indiscernible) on that particular day. If
14 I can remember it was K-R or K-A or K-G. That's -- I cannot forget the number, but actually
15 it was David -- the person who was there was David Masoi (phon).

16 Q. Yes. Witness, in fact there was a mistake on my part. I couldn't read my handwriting.
17 It's not Choma. It's C-H-O-M-B-A, Chomba. Does that help jog your memory, Rasta
18 Chomba?

19 A. Chomba is -- is having a business of such a kind of giving out his -- I know Chomba.

20 Q. He does sound systems and --

21 A. Yes, I know about that.

22 Q. And he's the person that actually everywhere when Mr Ruto is speaking in the North
23 Rift you'll see a microphone with his name on it. He does all the work for --

24 A. I cannot confirm --

25 Q. -- Mr Ruto?

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1 A. -- that it, but I know Chomba is doing those kind of things.

2 Q. And he's a Kikuyu, correct?

3 A. Yes, I know, but he's -- yes, I know.

4 Q. Now, Witness, we have about 25 minutes left. I'll try and do two subjects with you
5 briefly before the end of the day.

6 Now, you gave an account to the Court that you went on 1 October 2005, a long time ago, 1
7 October 2005, you went to Olainguse market square, and there you heard Mr Ruto speak.
8 Do you remember that?

9 A. Yes, your Honour.

10 Q. And the event you describe at Olainguse market square, it's right, is it not, that members
11 of the Kikuyu, Luo, Luhya as well as Kalenjin communities were all present? That's right, is
12 it not?

13 A. I didn't object that there was no community there like Kikuyu.

14 Q. Witness, if you could just try to answer "Yes" or "No" so it's clear.

15 A. Yes, Kikuyus are there. I can confirm that.

16 Q. Kikuyus were there. Luos were there?

17 A. I don't know if -- if Luos were there.

18 Q. Luhyas were there?

19 A. Some, yes, I know some Luhyas.

20 Q. And it's correct, is it not, Mr Witness that the North Rift, being a cosmopolitan society,
21 many Kikuyus, Luos, Luhyas and others who have lived for decades in that part of the world
22 they know Kalenjin; isn't that right?

23 A. Some of them know, but some of them could not know.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, watch, watch, watch out for the multi-barrelled
25 questions.

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1 MR KHAN: I'm grateful.

2 Q. For example -- for example, it's common knowledge in Kenya that Ken Wafula, he's a
3 Luhya, isn't he?

4 A. Yes.

5 Q. And he knows Kalenjin, doesn't he?

6 A. Yes.

7 Q. Yes. Witness, are you aware that there was no report in 2005 of any inciting language
8 levelled against Mr William Ruto? Are you aware of that?

9 A. Maybe it was not reported.

10 MR KHAN: Mr President, you'll see at tab 2 we have a referendum report. I'm not going to
11 go into that. That was done with the last witness by Dato' Shyamala Alagendra. Your
12 Honour, I will simply for the record refer you to the paragraphs page 28 to 35 of that
13 document dealing with incitement, page 39 to 42 dealing with hate speech, page 51 to 59
14 dealing with the use of unsavoury language. And your Honours may recall that the only
15 example of any criticism of Mr Ruto was gender insensitive language at page 61 when he says
16 don't be like women.

17 And, your Honour, that's KEN-D09-0042-0002. Your Honour, I'm not going to
18 belabour the point as we can make submissions in due course.

19 Q. Witness, it's simply not the case, is it, that you heard any inciting language by
20 Mr William Ruto on 1 October 2005? That's simply not true, is it?

21 A. It is true.

22 MR KHAN: Your Honours, we can move on to another topic.

23 Q. And, Witness, what you didn't speak about --

24 PRESIDING JUDGE EBOE-OSUJI: It may be because it wasn't asked.

25 THE WITNESS: Repeat again the last question that you just asked.

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1 MR KHAN:

2 Q. Mr Witness, you gave an account to the Prosecution about attending the Koitalel Samoei
3 memorial event on 19 October 2005. Do you recall that?

4 A. Yes, your Honour.

5 Q. And that was the centenary event of Koitalel Arap Samoei; is that right?

6 A. Yes, your Honour.

7 MR KHAN: That's K-O-I-T-A-L-E-L, Samoei, S-A-M-O-E-I, Koitalel Samoei memorial day.

8 Q. And you told the Prosecution that that was in presence of His Excellency the
9 President of the Republic of Kenya, His Excellency Mwai Kibaki; is that right?

10 A. Yes, your Honour.

11 Q. You also say that the Honourable Late Michuki was present?

12 A. Yes, your Honour.

13 Q. In fact, he's known as the strong man of Kenyan internal security; isn't he?

14 A. I knew him as Michuki, yes, your Honour.

15 Q. A very tough minister tackling crime, known for tackling crime strongly, isn't that right?

16 A. Yes, your Honour.

17 Q. And you say that Minister Mr Kirwa was present?

18 A. Yes, your Honour.

19 Q. Kalenjin?

20 A. Yes.

21 Q. The district commissioner was present?

22 A. Yes.

23 Q. The provincial commissioner was present?

24 A. Yes, your Honour.

25 Q. Many very senior and well-known people were all present on that day?

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1 A. Yes, your Honour.

2 Q. Leading human rights activists like Maina Kiai were present, weren't they?

3 A. There were so many people. Maybe he was, yes.

4 Q. Now, you tell the Prosecution that you hear very inciting language by Mr William Ruto
5 on that day. Do you remember saying that?

6 A. Exactly I remember.

7 MR KHAN: Very inciting language.

8 And, your Honour, I'm going to go through some extracts And at the end I will ask you some
9 questions, Witness.

10 Your Honour, at tab 3 of the Prosecution's binder, your Honours will find an
11 interview of 6 October -- 6 August 2010, KEN-OTP-0028-0389. And at 417, you say
12 for example, Witness, at line 963 that, and I quote:

13 "... all the ministers who were for the government who wanted to talk on that day
14 were not allowed to because even when they started or were about ... to speak, the
15 population ..." said "... No, No, No."

16 Do you remember saying that?

17 A. Yes, your Honour.

18 Q. At 0418, over the page, at line 985, you say this, and I quote:

19 "Yeah ... When Ruto spoke, he addressed all the communities and using a very inciting
20 language for each specific community, for example when he addressed the Nandi he told
21 them that nobody could stand in front ... uh ... in front of the Nandi when they were about to
22 do something."

23 And then down below at lines 993, you continue, and I quote:

24 "And because we are commemorating his ... uh ... uh ... 100 years of his death, we must be
25 prepared to die for the same cause to fight for our rights."

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1 Do you remember saying that, Witness?

2 A. I remember.

3 Q. And then at 997 you say and I quote:

4 "And when it comes to cast the vote for the referendum we need to defeat this referendum
5 and promote our rights."

6 Do you remember saying that?

7 A. Yes, your Honour.

8 MR KHAN: And, your Honours, at page 127, line 20 it should be Mr Kirwa, K-I-R-W-A, not
9 Mr Karua. I'm grateful.

10 Q. And, Witness, next page at 0420, you say at line 1058 to 1062 that:

11 "On that date ..." -- "On that day ... he ... it was to incite the Kalenjin community to fight."

12 Do you remember saying that?

13 A. I remember it.

14 Q. Then over the page 0421, line 1077:

15 "... now ... after tha ... using that language, people would go out to ..." the "... meeting and fight
16 the way they never fought before."

17 You continue, "That's the language that we use when we want to fight."

18 Do you remember saying that?

19 A. I don't know what -- because I was referring using the words of -- of Nandi.

20 Q. Yes.

21 A. Maybe it was translated. I cannot --

22 Q. But you said this, didn't you, that after -- let me go from 1074. You say "If somebody
23 used that language ..."

24 PRESIDING JUDGE EBOE-OSUJI: Can we look at the screen? Let's post it.

25 MR KHAN: Yes, we can, your Honours. 0421, please.

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1 Q. So at the top of 0421, and I quote at line 1074:

2 "If somebody used that language ..."

3 0177, "... now ... after tha ... using that language, people would go out of that meeting

4 and fight the way they never fought before.

5 That's the language that we use when we want to fight."

6 Do you remember saying that, Mr Ruto used the language that you use when you

7 want to fight?

8 A. Yes, your Honour.

9 Q. So that people would fight like they had never fought before; is that right?

10 A. Yes, your Honour.

11 MR KHAN: And, your Honour, then 0424 at line 1178.

12 Q. You said, and I quote:

13 "When he was inciting each tr... subtribe he used some local languages."

14 Do you remember saying that?

15 A. Yes, your Honour.

16 MR KHAN: And, your Honours, if we then go to tab 4 of the OTP binder, which is

17 KEN-OTP-0028-0444, and I would seek to go to 0482.

18 Q. You say at line 1279, and I quote -- talking about Mr Ruto, Witness, and I quote:

19 "And he encouraged people to continue that struggle and ... fight for our rights."

20 "He told people to be ready" at 1283.

21 At 1289, "... yeah, to be ready to fight for the land because foreigners were in good

22 numbers in the area." Unquote.

23 Witness, do you remember saying that?

24 A. Yes, your Honour.

25 Q. Mr Ruto saying "Fight for our rights, there are foreigners in the area"?

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1 A. Yes, your Honour.

2 Q. All right.

3 I'm grateful. At 1289, I misspoke. "Yeah" -- and I quote, "... yeah, to be ready to fight for the
4 land because foreigners were in good numbers in the area." Do you recall saying that?

5 A. Yes, your Honour.

6 Q. And then at 0484, line 1348 and 1349 you say, quote:

7 " ...they are words to incite meant to go to war ... to war without fear."

8 And at 1354, These "... are words that bring people together as a community and go
9 for war with courage and no fear." End quote.

10 Do you remember saying that?

11 A. Yes, your Honour.

12 Q. And then at 0488 you say this, at 1479, that Mr Ruto, you say, and I quote -- stated, and I
13 quote:

14 "And we ... want you to expand this area and liberate us all."

15 At 1484, "And this is to call upon the Sabaot ..." S-A-B-A-O-T "... to get rid of the
16 Luhyas ..." to get rid of them from the province. Sorry, 1487 is a clarification from
17 the investigator, and I quote, "Sorry, to get rid of them from the province?" question
18 mark. And you say at 1490, "Yes." Do you remember saying that?

19 A. Yes, your Honour.

20 Q. So Mr Ruto now telling people in that event: Luhyas, get out of the area as well, is that
21 right? Is that right?

22 A. I was saying that he was using some not direct words.

23 Q. But, Witness, you told the Prosecution, have I read it correctly that you're saying
24 Mr Ruto is telling the crowd and the Kalenjins, "Expand this area, liberate us all and get rid of
25 the Luhyas"?

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1 A. If that's words he was using directly, indirectly using that words.

2 MR KHAN: And I will go to tab 5, your Honours, at 049. Tab 5 is KEN-OTP-0028-0495.

3 Q. That Mr Ruto at line 44 said:

4 "I call upon you to be ready to protect our land."

5 At 47:

6 "And the expression that he used in Kinandi is a very strong word, and it's a very
7 inciting word."

8 Do you remember saying that?

9 A. Yes, your Honour.

10 Q. And then at 0498 you say at line 97, and I quote:

11 "... in the beginning, he indicates to get rid of the Kikuyu in the Rift Valley region."

12 Do you remember saying that?

13 A. Yes, your Honour.

14 Q. And it goes on at 0499. You emphasise again he means foreigners.

15 When the investigator says at 112:

16 "You haven't said to me at all that he says get rid of the Kikuyus from the Valley."

17 And then you say it's foreigners.

18 And at 0500, you say that when Mr Ruto tells the audience to be ready, he means two
19 things, at line 153 and 154, and I quote:

20 "It says to me two things: First, to be ready to vote; number second, be ready to get
21 out ... uh ... to get rid of the people ... uh ... from the ..." [phonetic] ... "our area." Do
22 you remember saying that?

23 A. Yes, your Honour.

24 Q. And then we jump to 0508. And you say that Mr Ruto was giving a message about
25 guns. Do you remember that?

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1 A. Yes, your Honour.

2 Q. And you say at 0508 at lines 411 -- at 409 that he says something, and I quote, about one
3 of the subgroups, the Marakwets and Keiyos, and I quote:

4 "That ... they have experience in something and he didn't mean ... that directly, because he
5 wanted to say that people know how to handle guns in that community."

6 Do you remember saying that?

7 A. Yes, your Honour.

8 Q. And at 0509, line 443 you say:

9 "... he went on to say, 'You are people who use things I don't need to mention here.'" End
10 quote.

11 Do you remember saying that?

12 A. Yes, your Honour.

13 Q. And at 458, you say -- sorry, at 456 you say, quote:

14 "Everyone who came out of, out of that place knew that he was reveesi ... [phonetic] referring
15 to guns, but he didn't say that directly."

16 Do you remember saying that?

17 A. Yes, your Honour.

18 Q. And at the previous page, 0508, you also said this at 432 and lines 433, quote -- you say
19 Mr Ruto says this, quote:

20 "You are powerful people and I know that you know how to handle this from your other
21 experience." End quote.

22 Do you remember saying all of that?

23 A. Yes, your Honour.

24 Q. It's completely made up, isn't it, Witness? Completely fabricated, isn't it?

25 A. No, your Honour. It's -- it's true.

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1 Q. You have a clear recollection under oath that Mr William Ruto on that event on the 19
2 October 2005 was telling Luhyas and Kikuyus to get out of the area?

3 A. I was saying that he was talking in a language that referred, and that is what I say,
4 Mr -- Mr -- Your Honour.

5 Q. And the president is there and the Minister for Internal Security, Honourable Michuki is
6 there, Mr Kirwa is there, isn't he? He's a minister.

7 A. He never get even chance to talk.

8 Q. Mr Kirwa --

9 A. If -- if the -- if the government had the powers, then they could have even even those
10 ministers to speak. And he was talking in a language that I could know that's inciting. So
11 don't put in a language like to intimidate me. I'm meaning what I said.

12 Q. Witness, Mr Kirwa knows Nandi, doesn't he?

13 A. Yes, he knows. But exactly he never give him a chance to speak.

14 Q. Mr Tarus --

15 A. He could not have powers --

16 PRESIDING JUDGE EBOE-OSUJI: Just one second.

17 THE WITNESS: He could not have even powers to speak that particular day, which means
18 he has no anything to do.

19 MR KHAN:

20 Q. Witness, Mr Tarus knows Nandi, doesn't he?

21 A. He knows, but he never speak either.

22 Q. And none of them to the best of your knowledge whispered in the ear of the minister of
23 internal security and said a back-bencher MP like Mr William Ruto is inciting the crowd to
24 kick out Kenyan citizens?

25 A. When you're talking in a -- in a language that mean that the community doesn't mean

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1 that he's talking directly. That's what I have been quoting in my -- my -- in my talk.

2 MR KHAN: Your Honour, I ask to play the video.

3 THE WITNESS: I went --

4 MR KHAN: Your Honour, I'd ask to play the video with the Court's leave?

5 PRESIDING JUDGE EBOE-OSUJI: It's 4 o'clock.

6 MR KHAN: Your Honour, could we stay for ten minutes to finish this topic? I think it
7 would be an appropriate place given we've gone through the witness's account of incitement
8 by William Ruto and we have a video of the full speech of William Ruto. It's about eight
9 minutes or thereabouts, maybe less than that, and your Honour that would be a proper place,
10 we say, to finish the day. Your Honours, otherwise I have to go through some of the same
11 territory tomorrow.

12 PRESIDING JUDGE EBOE-OSUJI: We can take it up tomorrow at 9.30.

13 MR KHAN: Your Honour, sobeit. I'm grateful.

14 PRESIDING JUDGE EBOE-OSUJI: Yes.

15 Witness, there is no need for you to feel intimidated by the question of the lawyer.

16 You just need to listen carefully to the questions and answer those questions one by
17 one. Do you understand?

18 THE WITNESS: I was saying he's trying to see me with big eyes.

19 PRESIDING JUDGE EBOE-OSUJI: All right. You are in court now and the Judges are here.

20 We do not allow witnesses to be treated unfairly. Keep that in mind.

21 We will take our adjournment for the day now, and we start again, we'll reconvene

22 again tomorrow at 9.30. Do not discuss your testimony with anyone overnight. Do
23 you understand?

24 THE WITNESS: Yes, your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We will go into closed session to

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- 1 lead the witness out of the courtroom and we adjourn after that.
- 2 (Closed session at 4.00 p.m.) * Reclassified as Open session
- 3 THE COURT OFFICER: We're in closed session, Mr President.
- 4 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 5 (The witness stands down)
- 6 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.
- 7 THE COURT OFFICER: All rise.
- 8 *(The hearing ends in closed session at 4.01 p.m.) Reclassified as Open session
- 9 RECLASSIFICATION REPORT
- 10 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 11 2013, the version of the transcript with its redactions becomes Public.