

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 Tuesday, 9 December 2014
10 (The hearing starts in open session at 9.37 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 are in open session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you.
21 Appearances?
22 MR GARCIA: Good morning, Mr President, your Honours. Appearances remain
23 the same for the Prosecution.
24 MR NARANTSETSEG: Good morning, Mr President, your Honours. For the
25 victims James Mawira, Amanda Wilmot, Charlotte Devinat and myself,

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1 Orchlon Narantsetseg.

2 Thank you.

3 MR BOURGEOIS: Good morning, Mr President, your Honours. Michel Bourgeois,
4 duty counsel for the witness.

5 MS BUISMAN: Good morning, Mr President. The team for Joshua Arap Sang
6 remains the same, except that Honor Lanham is not here with us today.

7 MR KHAN: Mr President, your Honours, good morning. Ms Leigh Lawrie, our
8 co-counsel, has joined us today. Otherwise, we remain the same as yesterday.

9 PRESIDING JUDGE EBOE-OSUJI: Thank you.

10 Let us go briefly into private session.

11 *(Private session at 9.39 a.m.) Reclassified as Open session

12 THE COURT OFFICER: We are in private session.

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

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

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- 1 (Redacted)
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- 12 (Redacted)
- 13 (Redacted)
- 14 (Redacted)
- 15 *(Closed session at 9.44 a.m.) Reclassified as Open session
- 16 THE COURT OFFICER: We are in closed session, Mr President.
- 17 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 18 (The witness enters the courtroom)
- 19 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 20 We will now -- we were in open session yesterday, right, Mr Khan? We ended in
- 21 open, or closed?
- 22 MR KHAN: We ended, I believe, in open.
- 23 PRESIDING JUDGE EBOE-OSUJI: All right. Let's go back into open.
- 24 MR KHAN: I'm grateful.
- 25 (Open session at 9.45 a.m.)

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

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

3 Mr Khan will continue -- Witness, welcome back. Mr Khan will continue his
4 cross-examination in a moment.

5 Ms Bossette?

6 THE COURT OFFICER: Indeed, Mr President.

7 Yesterday during the last minute of the cross-examination of the Mr Sang Defence
8 team, due to a miscommunication, we gave the wrong EVD number to the document
9 that were played to the witness. Consequently, I wanted to rectify the information I
10 gave yesterday and I wanted to inform the parties and the participants that the
11 document bearing the number KEN-D11-0015-0120 will bear the number
12 EVD-T-D11-00077. And the document KEN-D11-0019-0177 will bear the number
13 EVD-T-D11-00078. The modification have been done under eCourt.

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

15 Mr Khan.

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

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

18 QUESTIONED BY MR KHAN: (Continuing)

19 Q. Witness, good morning.

20 A. Good morning.

21 Q. You will recall yesterday we were discussing your account, the account you
22 gave the Prosecution regarding the -- your attendance at the Koitalel Samoei
23 memorial event on 19 October 2005; you remember that?

24 A. I remember that, your Honour.

25 Q. And it's right, is it not, that Koitalel Samoei is a hero in Kenya?

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1 A. Yes, he is.

2 Q. He's revered as a very courageous person who fought and lost his life fighting
3 against the British; is that right?

4 A. That is.

5 Q. And it's also correct, is it not, that he has a special place in the hearts of the
6 Kalenjin community because he himself was a Kalenjin; isn't that right?

7 A. That's right.

8 Q. And casting your mind back to October 2005, there was some controversy about
9 the event; do you remember that?

10 A. I remember -- yes, I remember the controversy.

11 MR KHAN: Mr President, your Honours, I refer to tab 26. And if it could be -- it's
12 a public document. If it could be put on the screen, KEN-D09-0043-0150.

13 Q. And, Witness, I'm going to put a document on the screen in a moment and it's
14 from the Daily Nation newspaper dated Tuesday, October the 18th, 2005.

15 And I'm going to read a little bit of the article in the bottom right-hand corner entitled
16 "Leaders split over Kibaki's presence at Koitalel's fete." And you'll see the first
17 paragraph and I quote:

18 "Nandi leaders are divided over President Kibaki's presence at tomorrow's centenary
19 celebrations of legend Koitalel arap Samoei.

20 While one group welcomed the president at the function, another told him to keep off,
21 saying the festival was a purely Nandi affair.

22 Those in ... opposition are led by Eldoret South MP David Koros, the Reverend

23 Maritim Rirei ..." R-I-R-E-I "... of the Anglican Church of Kenya, Councillors David
24 Ng'etich, William Rotich, Thomas Tallam and Joseph Ng'etich of Kapsabet."

25 And perhaps I can check the spelling. Yes, Thomas Tallam, Joseph -- that's correct.

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1 Now, Witness, that's correct, isn't it, that there was some controversy, one group of
2 particularly Kalenjin leaders thought it should be a purely Nandi affair. Do you
3 remember that?

4 A. Those are politics. Yeah, I can see here.

5 Q. Yes. And you don't see Mr Ruto's name there, do you, in that list I've read out?
6 Mr Ruto's not mentioned as being opposed to President Kibaki's attendance, is he?

7 A. I can't see him.

8 Q. And then going down to the bottom of the page, first column --

9 PRESIDING JUDGE EBOE-OSUJI: You were checking the spelling.

10 MR KHAN: Yes, Ng'etich.

11 PRESIDING JUDGE EBOE-OSUJI: Yes.

12 MR KHAN: N-G-'-E-T-I-C-H. I'm grateful, Mr President.

13 Q. And at the bottom of that page again on the first column the Nation
14 correspondent recorded, and I quote:

15 "The President is expected to attend the marking of 100 years since the laibon's killing,
16 and later address a rally in Nandi Hills Town."

17 Laibon is L-A-I-B-O-N.

18 Laibon, what does that mean, Mr Witness? It means leader, does it?

19 A. Laibon is a -- is a -- I think it's a Maasai word which also resemble a healer
20 leader.

21 Q. And if you go to the top of the next page, and I quote:

22 "Sources said Agriculture minister Kipruto Kirwa, assistant minister Stephen Tarus
23 and former nominated MP Mark Too had invited the Head of State to the
24 celebrations.

25 But Mr Koros accused the three of inviting Mr Kibaki against the community's

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1 wishes.

2 The celebrations ...":

3 "The celebrations were a purely Nandi affair said councillor Ng'etich and his group,
4 and accused Mr Kirwa and Mr Tarus of planning to hijack the festival and turning it
5 into a Banana rally by inviting the Head of State."

6 And we can go a little bit further down that column, and I quote:

7 "'There is a danger of turning what was meant to be a cultural event into a political
8 function,' said the chairman of Release Political Prisoners (RPP), Mr Ng'ang'a ..."
9 N-G-'-A-N-G-'-A "... Thiong'o ..." T-H-I-O-N-G-'-O "... yesterday."

10 So, Witness, that's the state of play. There was a little bit of discussion and
11 opposition to His Excellency President Kibaki coming because a certain element in the
12 Kalenjin community thought that the event would be hijacked into a political rally; is
13 that right?

14 A. That is perceptions, but otherwise Kibaki was just coming because (Redacted)
15 (Redacted)

16 Q. Witness, if you could just stop there for a moment, please, and I'll move on to
17 something else.

18 PRESIDING JUDGE EBOE-OSUJI: Are you cutting the witness off from finishing his
19 answer?

20 MR KHAN: Well, Mr President, I see the colour of the light, but if the Bench is --

21 PRESIDING JUDGE EBOE-OSUJI: I see. You're right.

22 MR KHAN:

23 Q. Witness, I'm going to go to a -- well, the second document.

24 Your Honours, there's another Article at tab 27.

25 PRESIDING JUDGE EBOE-OSUJI: Why don't we do this. Let's go to private

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1 session.

2 *(Private session at 9.55 a.m.) Reclassified as Open session

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

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 (Redacted)

6 (Redacted)

7 MR KHAN: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

9 MR KHAN: Yes.

10 Q. (Redacted) is

11 that right?

12 A. Yes.

13 PRESIDING JUDGE EBOE-OSUJI: All right. (Redacted)

14 (Redacted), but the witness may now finish.

15 MR KHAN: And, your Honour, I'm happy to lead him on it.

16 Q. And you told the Prosecution that it was on that occasion Mr Kirwa invited His
17 Excellency Mwai Kibaki to go to the memorial event on the 19th; is that right?

18 A. Yes. As a Nandi -- one of the Nandi leaders, he used the occasion to invite
19 him to grace to occasion, not a -- as a national leader, not as a Nandi.

20 Q. (Redacted)

21 A. (Redacted)

22 (Redacted)

23 (Redacted)

24 Q. (Redacted)

25 (Redacted) is that right?

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1 A. (Redacted)

2 (Redacted)

3 (Redacted)

4 Q. I'm grateful. And, Witness, as we're still in private session, I think His Honour,
5 the President, made it clear I interrupted you not out of discourtesy but simply
6 because we were in public session.

7 A. Yes, your Honour.

8 MR KHAN: So I hope you appreciate that.

9 Mr President, with your leave, perhaps we can move into a public session again.

10 PRESIDING JUDGE EBOE-OSUJI: We will return to open session.

11 (Open session at 9.58 a.m.)

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

13 MR KHAN: I'm grateful.

14 And, Mr President, I'm now referring to the document at tab -- well, before I move on.

15 Q. In fact, Witness, did you see the report in the newspaper that we've previously
16 went through, October 18th, 2005, regarding "Leaders split over Kibaki's presence at
17 Koitalel's fete"? Do you remember that story?

18 A. I cannot remember very well, but I can still remember that there was some
19 things.

20 Q. But the -- the content of what was -- is said in this document you recall that is
21 actually reflective of the debate that was taking place at the time, the two camps, as it
22 were?

23 A. There was no really two camps, it is like actually they want to take -- they have
24 already assumed that Koitalel day will be a special day for some leaders to endorse
25 some particular leaders to their -- to the community; otherwise, if Kibaki could come,

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1 could divert things to change, that's why there were these kind of controversy and --

2 Q. So they --

3 A. And David Koros actually was in behalf of Ruto, I think so.

4 Q. And this kind of controversy that's reported in the newspaper --

5 A. Yes.

6 Q. -- that's accurate; is that right?

7 A. It can be accurate, but that was not the position. They want to take the Koitalel
8 day to be their special day to endorse some individual.

9 MR KHAN: And, Mr President, I think there's a correction that's needed to page 11,
10 line 6, which is not a proper record of what the witness actually said. Perhaps I'll
11 just put it again.

12 Q. So, Witness, you accept that the newspaper article that we've gone through is
13 reflective, is an accurate report of the different views that existed amongst the
14 Kalenjin community about President Kibaki's attendance at the Koitalel Samoei event
15 on 19 October; is that right?

16 A. I can take that position but it was not the right start, because Kibaki was a
17 president of the Republic of Kenya.

18 MR KHAN: Mr President, I'd ask for that document to be exhibited with the Court's
19 leave.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

21 MR GARCIA: Your Honour, the Prosecution objects. The problem that I have with
22 this is that the witness, first of all, doesn't admit or doesn't confirm having read this
23 article at the time. And despite the numerous efforts of Mr Khan of having him accept,
24 confirm the content of it, the witness has not confirmed that either. So that's the
25 problem that I have and that's why the Prosecution is objecting.

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1 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman?

2 MS BUISMAN: We have no objection.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

4 MR KHAN: My response, Mr President? Mr President, in my respectful
5 submission, the witness, at least my understanding of the record, it's there in the
6 transcript, is that he said that the report is broadly accurate, although of course he
7 gives a different slant as to what really was existing under the surface of that debate.
8 Your Honour, given that he's at least accepted on the surface the accuracy of the
9 report, in my respectful submission it can be exhibited.

10 PRESIDING JUDGE EBOE-OSUJI: The document is admitted as the next Ruto
11 Defence exhibit.

12 THE COURT OFFICER: The public document KEN-D09-0043-0150 will bear the
13 number EVD-T-D09-00298.

14 MR KHAN: I'm grateful.

15 Q. And, Witness, we're going to go to another document now with the Court's
16 leave. It is at tab 27, and it is KEN-D09-0043-0153. And while it's being put on the
17 screen -- sorry, tab 28, it's my mistake, tab 28.

18 And whilst it's being put on the screen, it's headed, it's from Daily Nation On The
19 Web, headed, I quote:

20 "Kenya: Avoid Politics at Koitalel's Fete, Warn MPs."

21 It is dated 19 October 2005. And after a report from Nairobi, and I quote from the
22 first paragraph:

23 "President Kibaki should not use today's centenary celebrations of legend Koitalel
24 Arap Samoei to campaign for the Banana team, said two MPs yesterday.

25 Mr Henry Kosgey and Mr William Ruto said that the President was welcome to grace

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1 the occasion, which will give Mr Samoei the status of a national hero for resisting
2 British occupation of Kenya.
3 Political speeches should be avoided on the occasion to mark 100 years since the
4 Nandi laibon was killed by the British, said Mr Kosgey, the Tinderet MP.
5 He told the Nation by phone ..." quote "We welcome all people invited, but they
6 should bear in mind that this is a solemn occasion. The Nandi will take great
7 exception to anyone who politicises the celebrations." End quote.
8 "They should not be used by either the Orange or Banana groups to campaign, said
9 Mr Ruto, the Eldoret North MP, who, however, said that, President Kibaki was free to
10 attend the occasion on the family's invitation.
11 'If the family has welcomed him, we (the Nandi) have no problem.' He said, 'We, in
12 the Orange camp, will be there as invited guests.'" End of quote.
13 So, Witness, you recall that William Ruto, Mr William Ruto had no problem with His
14 Excellency Mwai Kibaki gracing the event. His only point was that no party, Banana
15 or Orange, nobody should use that occasion for politicking. That's the truth, isn't it?
16 A. But they already, they have already prepared the ground. That is why the
17 leader from -- perceived to be Banana group who were not allowed during the day,
18 during the -- that particular day, and nobody was allowed to speak if there was
19 anything to do with. And that's why I was saying that Ruto was having a say.
20 That's why Kibaki was allowed to speak, and because he was actually allowing the
21 people to give him some respect, otherwise the rest of the leaders who were perceived
22 to be in -- in Banana by then, they were not even allowed to speak as Nandis or either
23 Kalenjins, because they were perceived to be the other side.
24 Q. You see, Witness, we'll come to that in a moment, but what I'm putting to you --
25 A. Yes.

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1 Q. -- is that you have a very distorted view of what took place. And I'll give one
2 example, and you can respond to it. Upon what basis do you say that David Koros
3 was acting on behalf of Mr William Ruto when he was saying that President Kibaki
4 shouldn't come to the event? What's your basis, guesswork or what?

5 A. Not guesswork, because he was an MP, and he was an Orange supporter by
6 then. And whatever he said could say just to take the point to the ground.

7 Q. So Mr Ruto couldn't speak for himself; is that what you're saying?

8 A. No. Mr Ruto could say "Okay, come," but just only for the sake -- but only his
9 feet -- foot soldiers already work, already talk what is needed in the ground and that
10 is again what the peoples get.

11 Q. Witness, you are under oath. That contention that David Koros is doing the
12 bidding of Mr William Ruto, a fellow back-bench MP, is nothing but complete
13 speculation, isn't that the truth?

14 A. I cannot call it speculations, but because he is a leader, and Ruto was a national
15 leader by then, it doesn't mean that he's just -- he was sent by any people to say that.
16 Anybody can say that even if Ruto -- Koros was independent talking, he is already
17 sending the message to the crowd on behalf of the Orange side.

18 Q. And just one small issue. Laibon, the word that we mentioned previously,
19 laibon actually is a spiritual leader, isn't that right? It is not a political leader.
20 Koitalel Samoei was viewed by the Nandis as a spiritual leader, isn't that right?

21 A. That -- that -- it is right. That's why the people who -- who disrupt that day,
22 I think they have been cursed by the same person, because when they use this
23 occasion to disrupt the Koitalel Day if he was a (indiscernible) leader.

24 PRESIDING JUDGE EBOE-OSUJI: I'm sorry. You said, Witness, that people who
25 disrupted that day had been cursed? What was your testimony? Can you repeat

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1 what you said?

2 THE WITNESS: Cursed, because if they use the occasion, which could be a
3 spiritual -- to respect somebody who was actually respected by the community, and
4 they just use politics, whether they are in direct politics or to disrupt or to stop other
5 leaders who have a right to be the same community not to speak on the same occasion,
6 that is not respect to the Koitalel Samoei.

7 PRESIDING JUDGE EBOE-OSUJI: The word you used was?

8 THE WITNESS: Cursed.

9 PRESIDING JUDGE EBOE-OSUJI: Cursed.

10 THE WITNESS: Yeah.

11 PRESIDING JUDGE EBOE-OSUJI: All right, cursed.

12 Now, let me also understand what you had said earlier about the banner of figures, if
13 I may use that expression, between Mr Kibaki and Mr Ruto. Was your point that
14 Mr Ruto had a say, that he spoke on the occasion, and being on the Orange side,
15 because of that it was viewed as acceptable to have Mr Kibaki also speak on the
16 occasion because he was on the Banana side. I want to understand what you are
17 saying.

18 THE WITNESS: Orange Ruto as quote in the Nation that I have just seen here, that
19 he is coming there as part as welcoming from the Orange side, and I know Kibaki was
20 not coming as a Banana. He was coming as a national leader. He was not coming
21 as an -- as Orange or whatever or Banana. He was coming as a national leader.
22 And even the leaders who were there, they want to take occasions just celebrate, but
23 they were not given chance just because they were perceived to be in Banana team.

24 PRESIDING JUDGE EBOE-OSUJI: All right.

25 THE WITNESS: Yes.

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1 PRESIDING JUDGE EBOE-OSUJI: And why did you say it was -- why did you say
2 that it was acceptable or it was accepted that Mr Ruto also spoke?

3 THE WITNESS: Yeah, during this time Ruto convinced the community to give
4 Mr Kibaki respect. That's why Kibaki was actually given a chance to speak without
5 any interference. He was -- in fact, he was so angry about what happened on that
6 occasion.

7 PRESIDING JUDGE EBOE-OSUJI: Who was so angry?

8 THE WITNESS: Kibaki himself.

9 PRESIDING JUDGE EBOE-OSUJI: All right, I'll leave it there.

10 Mr Khan, please proceed.

11 MR GARCIA: Your Honour, if I may simply, at page 15, line 5, I believe it's
12 inaudible. Perhaps that should be cleared up. I think the witness said "foot
13 soldier," but I'm not so sure about that.

14 PRESIDING JUDGE EBOE-OSUJI: What line?

15 MR GARCIA: 15, page 15, line 5. "But only his ..." and I think he referred to "foot
16 soldier."

17 PRESIDING JUDGE EBOE-OSUJI: Yes, he did. He did refer to foot soldiers.

18 MR GARCIA: And I think that should be put in the record. And obviously "curse,"
19 the word "curse" appears at line 21 instead of "cast. At line 6 -- at page 16, line 1,
20 "cast" as well should be "cursed," and at lines 8 and 9 every time the word "cast"
21 appears it should be "curse."

22 MR KHAN: I'm grateful.

23 Q. Witness, did you see a segment of the crowd be cursed that day?

24 A. Yes, I was there.

25 Q. Can you describe the curse? Did you see a curse being cast on people in the

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1 crowd?

2 A. I'm saying if as a Nandi, if you disrupt, then you are already cursed, because
3 actually you distract a laibon, which is you call also as a spiritual leader, which was
4 supposed -- that thing that happened that particular day could not be good for
5 anybody who was having respect to the Koitalel Samoei should not -- even whether
6 he was here or whatever, all people should go there to respect that particular day.

7 Q. Witness, once again it is useful sometimes just to listen to the question.
8 Sometimes an explanation is helpful and sometimes an answer can be "Yes" or "No."
9 Did you see a curse being cast on part of the crowd on 19 May -- 19 October 2005?

10 Did you see it or not?

11 A. No.

12 Q. So that is complete speculation on your part, isn't it, that there was a curse?

13 A. I didn't say there was a curse on a particular day. I'm saying whoever done
14 that is cursed, because they didn't do the right thing. The people who -- who do the
15 wrong thing at that particular day.

16 Q. And, Witness, again, you are of course under oath and that's why I'm asking
17 you just to take your time and think carefully.

18 You have no evidence about a curse ever being cast upon people who attended the 19
19 October event, do you?

20 PRESIDING JUDGE EBOE-OSUJI: I think the understanding, Mr Khan, is that the
21 witness was giving his own views as to whether or not a curse resulted or would or
22 should result -- should be the consequence of people politicising the event. That
23 should be a reverent religious affair.

24 MR KHAN: I'm most grateful.

25 Q. So, Witness --

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1 PRESIDING JUDGE EBOE-OSUJI: Line 7, the word was "reverent," not "reverend."

2 MR KHAN: I'm grateful. Mr President, I'd ask to exhibit the document that we've
3 just referred to. It's at tab 28.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

5 MR GARCIA: Once again, your Honour, the Prosecution objects. The witness did
6 not confirm having read this document, and I think he's explicitly this confirmed the
7 content in it. Actually he hasn't confirmed it. I don't see that on the record. One
8 question was put to him. The witness answered. The witness did not confirm the
9 content on this document.

10 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman?

11 MS BUISMAN: We do not object.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, reply?

13 MR KHAN: Mr President, I don't see anywhere in the witness's testimony where he
14 said he disconfirmed or he denied the contents.

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

17 THE COURT OFFICER: The public document KEN-D09-0043-0153 will bear the
18 number EVD-T-D09-00299.

19 MR KHAN:

20 Q. And, Witness, you also said I think today - and you also said to the
21 Prosecution - that a time came in that event when William Ruto intervened during
22 President Kibaki's speech. Do you remember saying that?

23 A. I'm saying at a time Mr Ruto gave no -- like an advice to the group that they
24 should give Kibaki respect.

25 Q. And that was during the speech of President Kibaki; is that right?

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1 A. During -- by -- by -- I think by that time. I can -- I can't remember exact the
2 period of time he was talking about that, but he was. Yeah.

3 MR KHAN: And just for the record, your Honour, that's at tab 3 of the Prosecution's
4 file at 0427.

5 Q. And you also told the Prosecution, when you were interviewed, that Mr Ruto
6 said to the crowd and to President Kibaki that, "We are together ..." -- quote, "We are
7 together, but people will not vote for the constitution." Do you remember saying
8 that?

9 A. I said some of the words that Mr Ruto was talking in Swahili was actually good
10 words, but some of the words that he was talking in Kinandi were inciting. That's
11 what I put.

12 Q. No, but Witness I'm not talking at this stage about good or bad words. I'm
13 asking do you remember? Otherwise, I can show you --

14 A. Yes, yes.

15 Q. -- the transcript.

16 A. Yes.

17 Q. Do you remember telling the Prosecution that Mr Ruto spoke about the
18 constitution?

19 A. Yes, your Honour.

20 Q. And that your account to the Prosecution was that Mr William Ruto told the
21 audience and President Kibaki, "We're not going to vote for the constitution"?

22 A. Yes, your Honour.

23 Q. That's your account, isn't it?

24 A. Yes, your Honour.

25 MR KHAN: Mr President, with your Court's leave I'd ask to play a video,

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1 KEN-D09-0043-0238.

2 And, Witness, if you can watch this carefully and then I'll ask you some questions.

3 THE COURT OFFICER: Mr Khan, is the video public?

4 MR KHAN: Yes, the video is public. And, in fact, we can play from two minutes
5 and eight seconds in fact.

6 (Viewing of the video excerpt KEN-D09-0043-0238)

7 MR KHAN: Actually, Mr President, on second thoughts perhaps it's not much at the
8 beginning. Maybe right from the beginning it should be played. It's only another
9 few seconds.

10 PRESIDING JUDGE EBOE-OSUJI: Do we have a transcript? Can you indicate
11 where it is?

12 MR KHAN: Yes, it's at -- it's at tab 31 of the Defence's first binder. The ERN again
13 is KEN-D09-0043-0482.

14 And I'm happy to give a copy of the transcript and translation to the witness as well,
15 if it's of help.

16 Q. Witness, I think for the time being just keep that there with you. You can close
17 it, Witness, and firstly watch this screen.

18 A. Okay.

19 Q. And then your full attention is on what's spoken on the video.
20 So we can play from the beginning, please.

21 (Viewing of the video excerpt KEN-D09-0043-0238)

22 MR KHAN: And if it can just be stopped there for a moment?

23 Q. Witness, you recall this is a video of the event on 19 October 2005; is that right?

24 A. Yes, your Honour.

25 MR KHAN: And we are paused it now at time stamp 45 seconds, for the record, and

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1 we can continue playing please.

2 (Viewing of the video excerpt KEN-D09-0043-0238)

3 MR KHAN: If you can pause it? Sorry, if we can go back a moment and then just
4 pause it? So we're -- just the next frame, please. So we're paused at time stamp one
5 minute and 34 seconds.

6 Q. Witness, do you recognize the gentleman with the blue-striped tie on the front
7 of -- left of that photograph, of that still?

8 A. Yes, I remember.

9 Q. And who is that person?

10 A. It's the Honourable -- the late then Minister for Internal Security, Honourable
11 Michuki.

12 MR KHAN: Yes, I'm grateful.

13 If we can continue playing, please?

14 (Viewing of the video excerpt KEN-D09-0043-0238)

15 MR KHAN: And if we can pause it there?

16 Q. Witness, if you can pay special attention, the man in the red tie at the front that's
17 Mr William Ruto, isn't it?

18 A. Yes, your Honour.

19 Q. Can you see behind him, just behind him and to the right, a very good looking
20 gentleman with a bald head like me? Keep your eye on him and see if you can
21 recognize who it is, please, if you can keep playing?

22 A. Which one?

23 Q. Just behind. He's wearing a blue and white T-shirt, it seems like, or shirt. Just
24 behind the gentleman next to Mr William Ruto. So look to the right of
25 Mr William Ruto. You'll see a man in a blue suit and a white tie, and behind him,

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1 one row behind, you see a man currently looking to one side. And we'll play it and
2 you can see as he moves if you can recognize who it is.

3 (Viewing of the video excerpt KEN-D09-0043-0238)

4 MR KHAN:

5 Q. Do you recognize that person as Maina Kiai?

6 A. I can see.

7 Q. And you agree that person is Maina Kiai, sitting immediately -- almost
8 immediately behind Mr William Ruto?

9 A. I agree.

10 MR KHAN: Thank you.

11 If you can keep playing, please, and that's at time stamp 1 minute and 46 seconds.

12 Thank you.

13 (Viewing of the video excerpt KEN-D09-0043-0238)

14 MR KHAN: And if it can be stopped there, please. And we stopped it at seven
15 minutes and 56 seconds -- seven minutes and 58 seconds.

16 Q. Witness, that was Mr William Ruto speaking, wasn't it?

17 A. It was.

18 Q. Now, you have a transcript in front of you and if you could please go through it
19 as I'm reading, and I read from KEN-D09-0043-0482, at 0483, starting from lines 27.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, as you do that, is it the case that
21 Mr Ruto during that speech spoke in both Kiswahili and Kalenjin?

22 MR KHAN: Indeed.

23 PRESIDING JUDGE EBOE-OSUJI: Is that the case?

24 MR KHAN: Indeed.

25 PRESIDING JUDGE EBOE-OSUJI: All right. While you read the transcript, tell us

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1 when he's speaking in what language.

2 MR KHAN: Indeed.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you.

4 MR KHAN: I'll do that. I'm grateful.

5 Q. Witness, I'm reading on the document you have 0483, at lines 27, and it's a
6 translation of what Mr William Ruto said in Swahili, and I quote, "Your Excellency
7 the President of the Republic of Kenya, First Lady Lucy Kibaki, Cabinet Ministers
8 who are present, fellow Members of Parliament, visitors who have come from other
9 areas ..."

10 Is that a correct translation of what William Ruto said, Witness?

11 A. It is, yeah.

12 Q. At two minutes and 39 seconds, at line 31, Mr William Ruto then speaks in
13 Kalenjin, is that right, Witness?

14 A. Yes, your Honour.

15 Q. And the translation of that at lines 53 -- 33, and I quote, "The Kalenjin people
16 greetings to you!" End quote.

17 Witness, is that a proper record of what Mr Ruto said?

18 A. (Overlapping speakers)

19 Q. I'm sorry?

20 A. Yes, your Honour.

21 Q. And at line 39, again, Mr William Ruto says, and I quote, "Greetings to you
22 again!"

23 Do you see that?

24 A. (No audible response)

25 Q. Sorry, could you repeat your answer please?

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1 A. I say yes.

2 Q. And it's a translation from Kalenjin; is that right?

3 A. Yes, your Honour.

4 Q. And at 43, for a third time, Mr William Ruto gives his greetings, and I quote,
5 "Greetings to you!" End quote.

6 That's also a proper translation of what Mr William Ruto said in Kalenjin; is that
7 right?

8 A. Yes, your Honour.

9 Q. And if you go to the next page, Witness, at the top of the page between lines 45
10 and 48 you see Mr William Ruto speaking in Swahili; is that right?

11 A. Yes, your Honour.

12 Q. And at lines 49 he says and I quote:

13 "Your Excellency the President we welcome you here as our President during this
14 memorial of our hero Koitalel Samoei Arap Turgat who lost his life fighting for the
15 rights of our people. We would like this great man, our leader, a hero, to be given all
16 the respect that he deserves, a leader who lost his life fighting for the rights of the
17 citizens." End quote.

18 Witness, is that a proper translation of what's recorded in the Swahili?

19 A. It is.

20 Q. Sorry, could you repeat that, please? Could you repeat your answer? I think
21 the microphone -- no, it's fine.

22 And at -- you see the crowd applauding at line 54, and then between lines 56 and 58
23 Mr Ruto is also continuing to speak in Swahili; is that right?

24 A. Yes, your Honour.

25 Q. And he says this, and I quote at lines 59, quote:

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1 "We would like history to be well written so that people who sacrificed their lives for
2 us should be given a chance to be honoured in order for our country to be
3 independent and this Kenya to sovereign state." End quote.

4 Is that a true translation of the preceding words in Swahili?

5 A. Yes, it's direct.

6 Q. And after that you'll see at line 63 square brackets, "[Kalenjin]" and lines 64 to 65
7 what's written there is "Kalenjin," isn't it?

8 A. Yes.

9 Q. And at lines 67 and 68 Mr Ruto says this, doesn't he --

10 Your Honour, before I go there, I'm told at line 67 -- your Honours, at lines 67, and I
11 quote, Mr Ruto says this, "Kalenjin people I want you to be ..." quiet -- your Honour, it
12 says "quite," but it's -- it's clearly a typo, "Kalenjin people I want you to be quiet so ...
13 we can talk ok?

14 Let us greet each other by waving our hands Kalenjin people."

15 Witness, with the correction I've put of "quiet," "Kalenjin people I want you to be
16 quiet so ... we can talk ok? Let us greet each other by waving our hands Kalenjin
17 people," is that a proper translation of the preceding words in Kalenjin?

18 A. It is.

19 Q. And you will recall you saw waving on the video as Mr Ruto said that; is that
20 right?

21 A. Yes, your Honour.

22 Q. And then at line 70 to 73, again, that's in Kalenjin, isn't it? Is that right?

23 A. Yes, your Honour.

24 Q. And at 75, line 75 of page 0484, Mr Ruto says this, and I quote, "I would like to
25 say this and I want you ..." all "...to pay attention.

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1 Today we are gathered here, the people of milk, we the Kalenjin people, from Kericho
2 where when a tree falls, the impact can be felt here in Nandi. From Keiyo, where
3 their circumcision rites are never disclosed to anyone apart from the Keiyos." End
4 quote.

5 Witness, that's a true translation of the preceding words, isn't it?

6 A. Yes, your Honour.

7 Q. And then at line 80 to 82, again, that's Kalenjin, isn't it?

8 A. Uh-huh.

9 Q. Is that right?

10 A. Yes, your Honour.

11 Q. And at lines 84, the translation is this, and I quote:

12 "From Tugen, with our people from Aroor ..." A-R-O-O-R "... and Lembus who never
13 slave for anyone. From Marakwet to Pokot where when they see a cow, they crawl.
14 What about our people from Mt Elgon, the place for our grandfathers where we all
15 come from? And Nandi who you cannot show contempt."

16 Now, Witness, is that a true translation of the preceding sentences?

17 A. Yes, your Honour.

18 Q. And if you can turn over the page, please.

19 PRESIDING JUDGE EBOE-OSUJI: Witness, if at any point you are unsure and you
20 also want to listen to the -- or, watch the video again, indicate that need. Do you
21 understand?

22 THE WITNESS: Yes, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 MR KHAN:

25 Q. And over the page at 0485, so KEN-D09-0043-0485, you see between 89 -- lines

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1 89 to 91 what's written is Kalenjin; is that right?

2 A. 80, 80?

3 Q. 89 to 91, that's Kalenjin, isn't it? At the top of the page.

4 A. Yes, your Honour.

5 Q. And then the translation starts at line 93, and I quote:

6 "I would like to urge you all ..." --

7 PRESIDING JUDGE EBOE-OSUJI: So -- one second. So the question marks in front

8 of the numbers, that may be what caused the hesitation, would be in the nineties, isn't

9 it? These should be nines? In the line numbers, mine --

10 MR KHAN: Sorry, your Honours, in mine there's no question marks.

11 PRESIDING JUDGE EBOE-OSUJI: Really?

12 MR KHAN: Could I --

13 PRESIDING JUDGE EBOE-OSUJI: In mine at page 4, we have -- it looks like the

14 word -- the letter "9" appears to have been -- sorry, the figure "9" appears to have been

15 systematically replaced by the question mark in a box.

16 MR KHAN: Mr President, I'm told it's the PDF printing that's contorted the text.

17 PRESIDING JUDGE EBOE-OSUJI: All right.

18 MR KHAN: So it's not in my copy. Perhaps we can give you a clean copy that

19 doesn't have that --

20 PRESIDING JUDGE EBOE-OSUJI: All right.

21 MR KHAN: -- computer --

22 PRESIDING JUDGE EBOE-OSUJI: It doesn't matter.

23 MR KHAN: -- mutilation.

24 PRESIDING JUDGE EBOE-OSUJI: Yes, I see on the screen that problem is not there.

25 It's okay.

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1 MR KHAN: I'm grateful. So, Mr President, with your leave, I'll read the translation
2 starting at line 93, and I quote:

3 "I would like to urge you all, let this step that we have taken today in coming here, to
4 pay Respect for our grandfather, our leader Samoe, be the beginning of us uniting
5 together and Becoming one like the children of one parent." End quote.

6 Q. Witness, is that a true translation of the preceding three lines in Kalenjin?

7 A. Yes, your Honour.

8 Q. And line 97, William Ruto -- to 99, Mr William Ruto is still speaking in Kalenjin,
9 isn't he?

10 A. Yes, your Honour.

11 Q. And at lines 101, I'll read the translation, and I quote:

12 "I urge you Kalenjin people so that our coming here today be the beginning of our
13 talks and unity for the Kalenjins who are gathered here and wherever they are. We
14 thank Samoe Koitalel Arap Turgat for joining together the umbilical cord of all the
15 Kalenjins to become one this day." End quote.

16 Witness, is that a true translation of what's there -- what's preceding it?

17 A. (No audible response)

18 PRESIDING JUDGE EBOE-OSUJI: Witness, you say it is?

19 THE WITNESS: Yes, it is the correct.

20 MR KHAN: Yes, I'm grateful.

21 Q. And then at lines 105 to 106, once again, that's Kalenjin, isn't it?

22 A. Yes.

23 Q. And Mr William Ruto at 108 to 109 he's saying, and I quote:

24 "We cannot talk beyond this today because we have visitors. We will talk another
25 day when we are alone. Thank you." End quote.

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1 Is that a true translation?

2 A. (No audible response)

3 Q. Witness, perhaps you --

4 PRESIDING JUDGE EBOE-OSUJI: Witness --

5 MR KHAN:

6 Q. -- can just speak into the microphone so that the court reporters can pick up
7 your answer. Your answer was "It is;" is that right?

8 A. Yes, your Honour.

9 Q. And you saw that after those last words of Mr Ruto, "Thank you," that was the
10 end of his speech, wasn't it?

11 A. Is, yeah.

12 Q. So, Witness, there was no mention in this speech about the constitution, was
13 there?

14 A. Maybe it was edit, I cannot remember.

15 Q. Sorry, can you repeat your answer. I asked you there was no mention of the
16 constitution, was there?

17 A. According to these things, but I remember he was -- he talk about it.

18 Q. There's no mention about guns, is there?

19 A. Where did I say mention about guns?

20 Q. Witness, just answer my question. Is there any mention of guns?

21 A. No, even my testimony I didn't name guns.

22 Q. There's nothing there that's inciting, is there?

23 A. I'm saying he was talking in the manner giving the strong word in Kalenjin
24 every community to be one, using their terms which is -- I can call it in Kalenjin
25 "cherseet," to give them courage.

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1 Q. Witness, I went through yesterday many pages of transcripts in which you
2 repeatedly said Mr William Ruto was inciting the crowd. You didn't hear anything
3 inciting here, did you?

4 A. I'm saying it was inciting language, that's why there was nothing like -- even the
5 other group was not given time to talk.

6 Q. Witness, leave aside your view of fairness and other groups having a speech
7 and having airtime or talk time. Just try and focus on my question. We've played
8 the speech of Mr William Ruto on 19 October 2005. Will you agree with me after
9 having watched the video and gone through the translation that there's nothing
10 inciting that he said? Would you agree with me or not?

11 A. No.

12 Q. You don't agree?

13 A. Yes.

14 Q. Okay. What is inciting?

15 A. There are so many words here in Kalenjins --

16 Q. Okay.

17 A. -- which give some strong words to the Kalenjin that --

18 Q. Can you point -- have a look at the transcript. What is inciting?

19 A. (Speaks a foreign language)

20 PRESIDING JUDGE EBOE-OSUJI: What line?

21 MR KHAN:

22 Q. What line?

23 A. I can't remember. He was talking about Nandis.

24 Q. You've got a document in front of you. Please refer us to the line numbers and
25 we'll go through it.

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- 1 A. Between line 86 to 87.
- 2 Q. Lines 86 to 87. And what's the phrase?
- 3 A. In Nandi. (Speaks a foreign language)
- 4 Q. And you think that's inciting?
- 5 A. It is.
- 6 Q. "Che musar" is porridge, isn't it?
- 7 A. (Speaks a foreign language) Something you cannot -- that's maybe I'm having
- 8 the wrong translations, but if you tell somebody (Speaks a foreign language) you
- 9 cannot talk with.
- 10 Q. "Che musar," let's take it step by step, because the Judge --
- 11 A. That is the translations.
- 12 Q. -- the Judges want to try to understand --
- 13 A. Yes.
- 14 Q. -- your testimony as against the transcript and the translation which you agree
- 15 is correct. "Che musar" is porridge, isn't it?
- 16 A. Yes.
- 17 Q. Yes. And it's a normal Kalenjin phrase, isn't it, that a Nandi, even a Nandi
- 18 child, you cannot wipe the porridge off the child's face. That's the normal phrase,
- 19 isn't it?
- 20 A. That's the way you put it simply because you are not a Nandi, but the word
- 21 itself is you are giving somebody courage.
- 22 Q. Would you agree with me that's a normal proverb in Kalenjin, that even with
- 23 your children, you say --
- 24 A. But --
- 25 Q. Sorry, witness. Let me finish. That you say even to Nandi children, and it's a

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1 saying about Nandis, that even a Nandi child, you can't wipe the porridge off the
2 child's face, is that right?

3 A. If you go to a group of people who are really in charge and tell them you are
4 Nandis who are not being -- somebody -- I cannot put it directly if -- (Speaks a foreign
5 language) Somebody who cannot be joked with.

6 Q. Witness --

7 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, one second. What the witness is
8 communicating is that those words of praise have a tendency to charge up the people
9 who are the subjects of the praise.

10 Is that what you are saying, Witness?

11 THE WITNESS: Yes, your Honour.

12 MR KHAN: I'm grateful.

13 MR GARCIA: Also, your Honour, if I may, I think the record needs to be corrected
14 in certain regards. I think the witness has said twice somebody who cannot be -- it
15 reads "choked with," with I think it's "joked with." And at page 31, line 7, another
16 question, another matter needs to be also put on the record. And I think it is "so it
17 was edited" and not "headed," that the witness spoke about. That was his answer to
18 Mr Khan's question.

19 MR KHAN: Mr President, I don't need to revisit it, because I put the interpretation
20 and the witness agreed with it.

21 Q. Witness, let me go through the extracts that I read yesterday.

22 And for my learned friend I'm looking at page 96 of yesterday's transcript.

23 And I read out at between lines 19 to 24 your account to the Prosecution, Mr Witness,
24 and you said that, "Mr Ruto encouraged people to continue that struggle and fight for
25 our rights. He told people to be ready."

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1 And at 1289, "Yeah, to be ready to fight for the land, because foreigners were in good
2 numbers in the area."

3 Witness, those words are never said by Mr William Ruto; would you agree with me?

4 A. If I can recall he said. Maybe it was edited, but I cannot confirm here.

5 Q. Well, Witness, leave your speculation about editing. Just let's talk about the
6 video that we've given to the Judges and the Court, and we say it's the full video, the
7 unedited video as far as Mr Ruto's speech is concerned. There's nothing about
8 foreigners, is there?

9 MR GARCIA: Your Honour, we object to that manner of putting the question to the
10 witness. The witness has replied twice to certain elements that are not found on this
11 video that has been played, and the witness has said that maybe there was editing
12 because he remembers something of that nature. So I understand that the video is
13 being put by the Defence to a Prosecution witness. There is no evidence on the
14 record for the moment of the fact that it is complete, that it is full. We just have a
15 chain of custody, and we have Defence counsel leading evidence in that regard.
16 I think we need to be fair with the witness. If the question is simply what is -- what
17 this video that has been shown to the witness and to confirm that nothing appears of
18 that matter, well, then that should be it, and not actually have the premise in the
19 question that the video is full, that it is complete, and that it is not there, and then that
20 the witness has to explain that absence.

21 PRESIDING JUDGE EBOE-OSUJI: Is that -- is that what Mr Khan was asking? If
22 you look at line 6, he says, "Leave your speculation about editing. But a video that
23 we've given to the Judges and the Court and the full video ..." I see the difficulty,
24 yes.

25 Mr Khan, you need to rephrase.

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1 MR KHAN: Yes.

2 Q. Witness, my question is quite simple. You've listened to a video, have you
3 not?

4 A. I have.

5 Q. On that video did you hear anything about Mr Ruto talking about foreigners?

6 PRESIDING JUDGE EBOE-OSUJI: To the extent that you've just seen the video
7 played to you, that is the limit of that question.

8 THE WITNESS: That is what I can hear.

9 MR KHAN:

10 Q. So, Witness, try to answer the question. Sometimes "Yes" or "No" can be a
11 proper answer.

12 Let me refer you to my question yesterday at page 96 of yesterday's transcript. You
13 said:

14 "And he encouraged people to continue that struggle and fight for our rights. He
15 told people to be ready, yeah, to be ready to fight for the land because foreigners were
16 in good numbers in the area." Unquote.

17 Nothing like that was said on the video you've just heard; isn't that right?

18 A. On the video. But I remember him said.

19 Q. See, I put it to you, Witness, that you're so jaundiced and so adamantly insistent
20 to stick to your previous narrative that you're absolutely unwilling to speak the truth
21 to this Court; isn't that right?

22 MR GARCIA: I object, your Honour, that's argumentative.

23 PRESIDING JUDGE EBOE-OSUJI: Objection sustained.

24 MR KHAN:

25 Q. Let's go to another area, Witness.

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1 You said yesterday, I read out yesterday at page 97, at lines 15 of the transcript that,
2 and I quote:

3 "And this call upon the Sabaot to get rid of the Luhyas, to get rid of them from the
4 province."

5 Mr Ruto said nothing, did he, about Luhyas in that speech that you've just heard?

6 A. I didn't hear it be here.

7 Q. Well, do you want to hear it again or do you accept he said nothing about
8 Luhyas in the speech you've just heard and in the transcript you've just read?

9 A. But according to my recollections, I still remember it.

10 Q. He didn't even talk about the Sabaot people, did he?

11 A. Ba kuga (phon)

12 Q. Let me move on, Witness.

13 PRESIDING JUDGE EBOE-OSUJI: Can you give that answer again, Witness?

14 THE WITNESS: When -- it is about his speak from Kone (phon).

15 PRESIDING JUDGE EBOE-OSUJI: Now, listen, what we want to get on record
16 which is not there because it appears as "inaudible" is when the lawyer said, "He
17 didn't even talk about the Sabaot people, did he?"

18 THE WITNESS: Yeah.

19 PRESIDING JUDGE EBOE-OSUJI: You responded. What was your response?

20 THE WITNESS: I've said he talk about (Speaks foreign language) which is people
21 from Mount Elgon.

22 MR KHAN: Well, Mr President, in fact I withdraw that question, in fact, because I
23 spoke in error in any event.

24 PRESIDING JUDGE EBOE-OSUJI: All right.

25 Witness, this I should have asked you earlier, but did you use the expression

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1 "cherseet"?

2 THE WITNESS: Hmm?

3 PRESIDING JUDGE EBOE-OSUJI: Earlier on did you say that -- did you use the
4 word "cherseet"?

5 THE WITNESS: I can't --

6 PRESIDING JUDGE EBOE-OSUJI: "Cherseet" when you were talking about the
7 praise?

8 THE WITNESS: "Cherseet," yes.

9 PRESIDING JUDGE EBOE-OSUJI: Is that what you said?

10 THE WITNESS: Yes, your Honour.

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

12 THE WITNESS: C-H-E-R-S-E-E-T.

13 PRESIDING JUDGE EBOE-OSUJI: C-H-E-R-S --

14 THE WITNESS: Double E-D.

15 PRESIDING JUDGE EBOE-OSUJI: E-E-T?

16 THE WITNESS: Yes.

17 PRESIDING JUDGE EBOE-OSUJI: And what do you say that means?

18 THE WITNESS: Cherseet, to encourage people to be strong.

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

20 Mr Khan, proceed.

21 MR KHAN:

22 Q. Witness, Mr Ruto didn't say anything about Kikuyus in that speech, did he?

23 A. According to here what's said, he was not referring to Kikuyus as what I have
24 said earlier. He's saying (Speaks a foreign language) to visitors.

25 Q. In fact, the only mention of visitors or guest is right at the end at line 108 when

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1 Mr Ruto says, "We can't talk beyond this today because we have visitors."

2 It's right, isn't it, that President Kibaki doesn't speak Kalenjin; isn't that right?

3 A. But they had a malat kot. So when he said that the house is not smeared, that
4 we cannot talk much that particular day because, yeah, he could not talk much
5 because it was in a public, maybe that way.

6 Q. Maybe that way. But I'm saying, Witness, what Mr Ruto was saying was that
7 it's rude to speak in the presence of the head of state in a language he doesn't
8 understand, so we can speak no more today in Kalenjin. Isn't that what Mr Ruto was
9 saying?

10 A. No. When he said "malat kot," that say you cannot talk anything. Men who
11 say "malat kot" in Nandi to mean that you cannot talk something really -- something
12 secretive when a visitor is there, but you can talk, but -- because he was talking in
13 Nandi.

14 Q. So none of this, none of this that we've seen in the video and that we've read in
15 the transcript is about Mr Ruto inciting people to kill or expel Kikuyus or Luhyas;
16 would you agree with me?

17 A. If -- if I can see this, but what I have say inciting language is still inside this -- in
18 this document, which I refer. If I can still remember what I talk with the Prosecution,
19 I talk about every community. That is what's actually reflected here.

20 Q. So what you describe as inciting are words that have an effect on the crowd. Is
21 that what you call inciting, Witness?

22 A. Yes. It's direct words which has been used for long time ago describing, yes,
23 your Honour.

24 Q. So old proverbs, in other words; is that right?

25 A. Yes, your Honour.

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1 Q. Now, apart from those old proverbs or, in fact, including these old proverbs,
2 there's nothing that Mr Ruto said about kicking out Kikuyus or Luhyas from the
3 North Rift; isn't that right, Witness?

4 A. I'm saying, your Honour, if I remember, according to my recollections, that's
5 what I have also said earlier, that this is some of the things I heard that day.

6 Q. Witness, I'm trying to get your answers for the record regarding what you've
7 just heard and what you've read. Mr Ruto doesn't say anything about protecting the
8 land, does he?

9 A. If -- according to this document, he didn't talk about the land.

10 Q. Yes. And Mr Ruto doesn't say anything about getting rid of Kikuyus, does he?

11 A. I'm saying on this thing, I'm not saying according to my testimony.

12 Q. Witness, your testimony please rest assured will be properly evaluated by the
13 Judges. I'm asking about what you've heard on the video and what you've read.
14 There's nothing about Mr Ruto telling the crowd Luhyas should be kicked out,
15 nothing like that, is there?

16 A. I was standing that he was inciting the -- the -- the public, the Kalenjin.

17 Q. Is there anything in the video we've just watched and in the transcript we've just
18 heard about kicking Luhyas out of the North Rift? There's not, is there, Witness?

19 A. But I cannot remember that side which I say -- I've already put my indications
20 earlier, your Honour. Let's put that question to rest because I've already said that
21 there were some words that he used that were inciting.

22 Q. Witness, there's no words in this transcript about kicking Luhyas or Kikuyus or
23 foreigners out; isn't that the truth?

24 MR GARCIA: I object, your Honour. This is becoming argumentative. I think the
25 witness has clearly stated -- well, he's stated on a couple of occasions that there's a

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1 distinction as to what he's heard, what he's read in the transcript and what he -- what
2 his recollections are of that event. Those are two things that the witness keeps on
3 coming back with.

4 So I think he is confirming and I think it's argumentative to the extent that we can all
5 read what is in that transcript and what is not in that transcript. So I don't think the
6 witness needs to confirm that over and over.

7 MR KHAN: Mr President, the Prosecution's talked previously about fairness to the
8 witness and we talk about fairness to the accused. The witness should not be
9 allowed to sidestep and evade very straightforward questions by meandering, and we
10 have a right, we say, to press the witness.

11 It's a very straightforward question, "Is there anything about Luhyas or Kikuyus in
12 the transcript or in the video?", and we're entitled we say to an answer, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: You're entitled to an answer, but there comes a
14 point where you have to move on when you've covered the field and move on and
15 decide what you leave to arguments.

16 MR KHAN: Mr President, in that case just two questions before the break with your
17 leave?

18 Q. Mr Witness, there's nothing in this speech you've just heard and the transcript
19 you've just read about Mr Ruto telling subgroups to defend the borders of their
20 communities. Nothing about that, is there, to defend the borders against Kikuyus
21 for example?

22 A. I can say that in this document I cannot see that.

23 Q. And nothing in the video?

24 A. Yes, your Honour.

25 Q. In fact what Mr Ruto's speech was about was the need for the Kalenjin

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1 community to be united and be together; isn't that right?

2 A. Under him.

3 Q. He doesn't say that does he, Witness, at all?

4 A. It was -- it was a really -- this is selective document. That's what I'm saying.

5 It is -- actually if it was put in their group and then could have -- I remember some of
6 the things which I cannot see here.

7 MR KHAN: Mr President --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we will leave it there for now for the
9 morning break.

10 MR KHAN: I'm grateful.

11 PRESIDING JUDGE EBOE-OSUJI: We will be back in 30 minutes.

12 We'll go into closed session to usher the witness out of the courtroom.

13 *(Closed session at 11.04 a.m.) Reclassified as Open session

14 THE COURT OFFICER: We're in closed session, Mr President.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you.

16 (The witness stands down)

17 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

18 THE COURT OFFICER: All rise.

19 (Recess taken at 11.04 a.m.)

20 (Upon resuming in open session at 11.35 a.m.)

21 THE COURT USHER: All rise.

22 Please be seated.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 Witness, welcome back.

25 Mr Khan, continue.

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

2 Q. Witness, you remember saying yesterday that supporters of the "Yes" campaign
3 were not allowed to speak on 19 October 2005; do you remember saying that?

4 A. Yes, your Honour.

5 Q. For example, you said Stephen Tarus wasn't allowed to speak. Do you
6 remember saying that?

7 A. Yes, your Honour.

8 MR KHAN: Your Honours, I seek to play the same video, KEN-D09-0043 -- sorry,
9 KEN-D09-0043-0238, and in the transcript it's at 0487.

10 PRESIDING JUDGE EBOE-OSUJI: What is that tab again? I just closed it.

11 MR KHAN: Mr President, it's tab 31 of the first bundle, and the ERN starts at
12 KEN-D09-0043-0482, and the extract I'm going to play is at 0487.

13 So if that could be played starting from 12 minutes and 44 seconds.

14 (Viewing of the video excerpt KEN-D09-0043-0238)

15 MR KHAN: If that can be stopped.

16 Q. Witness -- and we're stopping at 13.41.

17 Witness, you saw the person that was speaking on the earlier portion of the video.

18 Perhaps we can just rewind it and get a time stamp.

19 You saw the person speaking previously, this person on the screen, at time stamp
20 13.24, 13 minutes and 24 seconds. Can you recognize that person?

21 A. I recognize.

22 Q. That's Stephen Tarus, isn't he?

23 A. Yes, your Honour.

24 Q. And he was speaking, was he not?

25 A. Because I was --

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1 Q. Was he speaking, Mr Witness?

2 A. He was speaking, but let me put --

3 Q. Mr Witness --

4 A. -- it in record, your Honour, so that you cannot take it this one, you can hear the
5 backgrounds, it was shouting, even he shout his speech in less than two -- less than a
6 minute because even he was saying thank you at last minute but the shouting was not
7 even heard -- they could not even listen to him, the background.

8 Q. Witness, you said yesterday he didn't speak --

9 A. He --

10 Q. -- do you accept -- Mr Witness, allow me to finish, please, and the President will
11 allow you to give your answer.

12 Witness, you accept he spoke on 19 October 2005; is that right?

13 A. I accept he speak by just even the noise was higher, but he was trying to talk at a
14 high voice so that he could pass his message, but he could not allow to speak, but he
15 was -- the background was so bad. I was there, mister -- your Honour.

16 Q. In fact, Witness, you were trying to paint a picture to the Prosecution that was
17 quite different from reality; isn't that right?

18 A. It's not right, your Honour. I'm just talking what -- what was there. And I'm
19 not refusing that he talked that particular time, but he talked at the top of the voice
20 to -- so he was passing his message using the whole (indiscernible) to talk.

21 MR KHAN: Mr President, I will refer to tab 29 of the bundle, of the Defence bundle,
22 the first binder, KEN-D09-0043-0154, and it's a front page of the Daily Nation Nairobi,
23 Thursday, October 20, 2005, and it is a public document.

24 Q. At the bottom there is a short article "MPs storm out of Nandi festival. Kibaki
25 leads freedom fighter's centenary celebrations."

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1 And in the first column, the second paragraph it says, and I quote -- sorry, in the
2 second paragraph -- in the second paragraph, and I quote:
3 "President Kibaki appeared surprised when MPs Gideon Moi, (Baringo Central),
4 Charles Keter (Belgut), Joseph Lagat (Eldoret South), Nick Salat (Bomett), Noah arap
5 Too (Ainamoi), Paul Sang (Buret) and Eldama Ravine's Musa Sirma ..." S-I-R-M-A "...
6 stormed out of the fete after being denied a chance to address the crowd of more of
7 30,000."

8 Do you see that, Witness?

9 A. I can see that. That was maybe because of the time, but they --

10 Q. Sorry, Witness, do you see that?

11 A. I can see the story.

12 Q. Yes. And, Witness, for example Charles Keter was part of the "No" campaign,
13 wasn't he?

14 A. Yes, your Honour.

15 Q. In fact, all the people who stormed out were part of the "No" campaign; isn't
16 that right? All the names listed there are members of the "No" campaign; isn't that
17 right?

18 A. You divert to the -- to the group that went out maybe because they didn't get
19 chance to speak, but the other group was -- get the chance but they didn't get a chance
20 because of the -- a lot of noises in the background. And I wish you could have been
21 there and I wish the whole group would be -- the picture could show the public in
22 this when Mr Tarus was speaking and then you could see for yourself.

23 Q. Witness, you accept that, for example, Mr Gideon Moi, he stormed out of the
24 fete?

25 A. Maybe he stormed because out of the time he didn't get to speak, not because he

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1 could deny to speak.

2 Q. You agree he left the fete?

3 A. I can remember even walk -- he -- I was seeing -- I see them walking out.

4 Q. Charles Keter, you recall that he left the centenary event on 19 October?

5 A. On -- let me put it clear, because they didn't get chance to speak because of the
6 time, not because they could not refuse like the other group which was denied to
7 speak freely.

8 Q. So you confirm, Witness, that it's true that all these people stormed out of the
9 fete on 19 October 2005? That's a correct report by the Daily Nation; is that right?

10 A. It is correct --

11 Q. Yes.

12 A. -- but not because they were denied to speak, but because they didn't get chance
13 because of the time. Not like the other group when -- which they wanted to speak
14 but they were shout out.

15 Q. You see, Witness, what I'm putting to you is that -- well, Stephen Tarus that
16 you've -- we've seen previously, he was a minister, wasn't he?

17 A. He was assistant minister by then.

18 Q. And President Kibaki of course was the head of state?

19 A. Yes, your Honour.

20 Q. And other ministers also spoke, didn't they?

21 A. I'm telling you --

22 Q. For example --

23 A. -- as I said, even during my testimony I said the whole group, whenever they
24 want to stand, they could stand (indiscernible) shouting down and it was a pressure
25 from the group.

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1 Q. You see, what I'm saying, Witness, and I want to be quite clear about it, is
2 there's no -- the complaint on that day, in fact, was that members of the "No"
3 campaign that Mr Ruto was part of, members of the "No" campaign, MPs, they
4 stormed because they thought they had not been given proper time, not as you say
5 that it was ministers who were denied deliberately a chance to speech -- speak.

6 A. Your Honour --

7 Q. That's right, isn't it?

8 A. -- if you -- if this video is good, let's play the whole group, then -- then we can
9 see that this is fairness here then. I know that the group left because of -- they didn't
10 given chance.

11 Q. And did the Prosecution show you this video?

12 A. I was narrating my story. They were not -- I didn't give out any audio because
13 maybe they didn't get chance to get it.

14 Q. Did they ask you for it, if you had a copy?

15 A. No, I don't have a copy.

16 Q. Did the Prosecution ask you, "Do you have a copy of that event of inciting?"?

17 A. I'm --

18 Q. Did they ask you?

19 A. I'm not an expert to give out my testimony. I was just giving out my testimony
20 the way I knew about the event.

21 Q. Witness, did the Prosecution ask you whether or not you had a video --

22 A. If they ask --

23 Q. -- of 19 October 2005 event?

24 A. If they ask, I cannot remember. If they ask, I cannot remember, your Honour.

25 MR KHAN: Mr President, I'd ask to tender as an exhibit firstly the Daily Nation

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1 article, KEN-D09-0043-0154. The witness -- it's not made with criminal proceedings
2 in mind. It's contemporaneous and the witness accepts that he recalls the
3 individuals named therein leaving the event on 19 October 2005 and I'd ask that it be
4 exhibited, please.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

6 MR GARCIA: No objection, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman?

8 MS BUISMAN: We have no objection.

9 PRESIDING JUDGE EBOE-OSUJI: The document is admitted as the next Ruto
10 Defence exhibit.

11 MR KHAN: Mr President, I'm most grateful.

12 And also I'd ask that the video and the accompanying transcript also be exhibited.

13 The video that we've played and has been seen is KEN-D09 --

14 PRESIDING JUDGE EBOE-OSUJI: One thing at a time, Mr Khan.

15 MR KHAN: So firstly the video, Mr President.

16 PRESIDING JUDGE EBOE-OSUJI: Let's do the -- the court officer
17 will -- (Overlapping speakers)

18 MR KHAN: Ah, I'm so grateful. I do apologise.

19 PRESIDING JUDGE EBOE-OSUJI: Yes.

20 THE COURT OFFICER: The newspaper article bearing number KEN-D09-0043-0154
21 will bear the number EVD-T-D09-00300.

22 MR KHAN: Thank you so much.

23 Next, Mr President, the video, which is KEN-D09-0043-0238, and the accompanying
24 transcript which the witness has confirmed is a proper transcription of what's been
25 played and translation at tab 31, KEN-D09-0043-0482. I'd ask that those two also be

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1 exhibited, please.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

3 MR GARCIA: The Prosecution has no objection, but a reservation as to the integrity
4 as to whether that is indeed the full video or not, but we don't object to it going into
5 evidence.

6 MR KHAN: And --

7 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman?

8 MS BUISMAN: We have no objection.

9 PRESIDING JUDGE EBOE-OSUJI: The video and the accompanying transcript are
10 admitted on to the record as the next Ruto Defence exhibits.

11 THE COURT OFFICER: The public video KEN-D09-0043-0238 will bear the number
12 EVD-T-D09-00301.

13 The related transcript bearing number KEN-D09-0043-0482 will bear the number
14 EVD-T-D09-00302.

15 Both documents are public.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you.

17 MR KHAN: I'm grateful.

18 And, Mr President, can I say for the record that we do invite the Prosecution, without
19 delay, to subject that video to any expert analysis with a view, as officers of the Court,
20 whether or not they wish to challenge it or waive any objection. So we do invite
21 them to subject it to analysis without delay.

22 Your Honour, one last question on this topic and perhaps we should go into private
23 session for a moment.

24 PRESIDING JUDGE EBOE-OSUJI: Before we do, can you bring back on to the screen
25 KEN-D09-0043-0484?

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- 1 Witness, can you look at lines 67 and 68 and also line 75. Sixty-seven and 68, that's
2 Mr Ruto and he says, quote:
3 "Kalenjin people, I want you to be quiet so that we can talk ok?
4 Let us greet each other by waving our hands, Kalenjin people." Unquote.
5 And then at line 75 he also says, quote, "I would like to say this and I want you to pay
6 attention." Unquote.
7 What do you think he's doing there?
8 THE WITNESS: Actually he's doing that at a particular moment when he was
9 talking because there was a lot of cheering at that particular moment.
10 PRESIDING JUDGE EBOE-OSUJI: Was it cheering him --
11 THE WITNESS: Yeah.
12 PRESIDING JUDGE EBOE-OSUJI: -- or was it a lot of noise, the same sort of noise
13 that Mr Tarus was experiencing, or were the noises different?
14 THE WITNESS: No, it's different. This one is different, but the other one, who was
15 Tarus, just wanted no team to talk.
16 PRESIDING JUDGE EBOE-OSUJI: All right, thank you.
17 Counsel, you can ask follow-up questions from all that.
18 MR KHAN: I'm grateful.
19 Q. In fact, Mr Witness, in that extract Mr Ruto is calming the crowd down and
20 telling them to be quiet because they were very noisy, weren't they, on that day?
21 They were very noisy?
22 A. Not everybody, your Honour.
23 Q. Well --
24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the witness says the noise experienced
25 by Mr Ruto was different in order and type from the noise experienced by Mr Tarus.

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1 MR KHAN: Mr President, the video's in evidence. I'm not going to belabour the
2 point. Your Honours can look at it, and I invite the Prosecution, as officers of the
3 Court, to subject it to analysis and to consider their position with this witness.

4 Mr President, we can go into private session.

5 *(Private session at 11.52 a.m.) Reclassified as Open session

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

7 MR KHAN:

8 Q. Witness, you remember telling the Prosecution -- well, you remember you gave
9 a statement (Redacted) Do you remember that?

10 A. Yes, your Honour.

11 Q. And in that -- in fact it was an affidavit, am I right?

12 A. Yes, your Honour.

13 Q. And in that affidavit you said that Martha Karua, the Minister of Justice, was
14 present on 19 October 2005. Do you remember that?

15 A. I denied that, your Honour. And even during my preparations I just remove it
16 because I think the lawyer, (Redacted) put -- insert that for the Honourable. I think
17 I don't know why he put it, but --

18 Q. Witness, I'm coming there. Do you accept that in your -- and, your Honours,
19 it's at tab 53 of the Prosecution binder. Do you accept that in (Redacted) -- in your
20 affidavit (Redacted) you said that Martha Karua was present on 19
21 October 2005?

22 A. But I had already --

23 Q. Yes, I'm coming to the explanation. Do you accept that is what's stated in your
24 (Redacted) affidavit?

25 A. That is -- but it's not original what I am saying it's me.

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1 Q. And you clarified in your preparation session that in fact Martha Karua was not
2 present at the rally. That's right, isn't it? You clarified it to the Prosecution?

3 A. Yes, your Honour.

4 Q. And you told the Prosecution that in fact you told the lawyer drafting the
5 affidavit that Martha Karua was not present and that person still included Martha
6 Karua's name; is that right?

7 A. That is what I can say.

8 Q. Yes. And (Redacted) was your -- was the lawyer assisting you take the
9 affidavit; is that right?

10 A. Yes, your Honour.

11 Q. And this lawyer, (Redacted)
12 (Redacted); is that right?

13 A. I can't remember. It was not (Redacted) -- which I just went in person myself. (Redacted)
14 (Redacted)

15 Q. Witness, just so we can be clear, is it in fact the case (Redacted)
16 (Redacted) to you?

17 A. No.

18 Q. Or that (Redacted)?

19 A. No.

20 MR KHAN: Your Honours, I will leave it.

21 Q. And (Redacted); is that right?

22 A. I can -- he is a lawyer, (Redacted) or whatever. Even -- even
23 the lawyer appearing here was representing also the athletes during that time.

24 Q. Well, is (Redacted) well-known -- was he well-known particularly at that
25 time as being (Redacted) as a lawyer and a supporter of the

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1 (Redacted) Is that right, or not?

2 A. If that's the position then I cannot confirm that, but he was just a lawyer.

3 MR KHAN: Your Honours, I'm grateful. We could go into open session.

4 PRESIDING JUDGE EBOE-OSUJI: Open session.

5 (Open session at 11.56 a.m.)

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

7 MR KHAN:

8 Q. Witness, we are in public session, but dealing with 2005 and your narrative to
9 the Prosecution over many, many days and to the Court since last week, you confirm
10 that in 2005 the main concern of the "No" campaign was to unite as many Kenyans as
11 possible to defeat the proposed constitution; is that right? That was their aim? It
12 was to defeat the proposed constitution put forward by President Kibaki?

13 A. Yeah, of course if any group wanted to - their group to win, either "No" or "Yes."

14 Q. And the version of the constitution that was promulgate -- that was put forward,
15 that was proposed by President Kibaki, that's called the Bomas Draft, B-O-M-A-S;
16 isn't that right?

17 A. It was not proposed, but it was -- that thing was made by the Ruto parliament.
18 I'm not a parliamentarian. I know -- I don't know even -- I will not talk as a lawyer,
19 but I was just saying it was a draft constitution which come through some process
20 which I cannot explain that because I'm not an expert on that.

21 Q. Are you aware, because it was in newspapers and TV at the time, that that
22 constitution that was being voted upon that that was called The Bomas Draft? Are
23 you aware of that, or you don't know?

24 A. I can remember it. Yes, I can remember there was something like that.

25 Q. And the proposal that the "No" campaign wanted adopted, that was called The

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1 Kilifi Draft. Do you remember that?

2 A. If we got such a details, I cannot remember, your Honour.

3 Q. And as part of the quest to defeat the proposed constitution in the constitutional
4 referendum of 2005, it stands to reason, does it not, that the "No" campaign wanted as
5 many votes as possible? You agree with that, do you?

6 A. They used their own propaganda to -- to -- to win, and some of the words that
7 were said even that, "After this constitution passed, then your lands will be taken
8 away," was not even -- I don't think it was there, but it was their propaganda.
9 Anyway, finally they win.

10 Q. And in, as part of that aim, they had -- the "No" campaign had various rallies.
11 That's right, isn't it?

12 A. They do.

13 Q. For example, they had a rally at 64 Stadium in 2005. That's right, isn't it?

14 A. Yes, your Honour.

15 Q. And there were very prominent members of all communities - all ethnic
16 communities - in Kenya that were part of the "No" campaign; isn't that right?

17 A. Yes, your Honour.

18 Q. For example, Mr Uhuru Kenyatta, as he then was, he was a prominent member
19 of the "No" campaign, wasn't he?

20 A. Yes, your Honour.

21 Q. And it's right, isn't it, that Uhuru Kenyatta is a member of the Kikuyu
22 community?

23 A. Yes, your Honour.

24 Q. Tony Gachoka, he is a well-known Kenyan, isn't he?

25 A. Yes, your Honour.

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1 MR KHAN: G-A-C-H-O-K-A, Gachoka.

2 Q. And he's also a Kikuyu; is that right?

3 A. Yes, your Honour.

4 Q. And Mumbi Ngaru, N-G-A-R-U, another well-known Kikuyu member of the
5 "No" campaign; you know that lady, do you?

6 A. I know.

7 Q. Yes. And you know the lady -- you know also she's a member of the Kikuyu
8 community?

9 A. Yes, she is.

10 Q. So members of the whole community is part of the "No" campaign; that's right,
11 isn't it?

12 A. Yes, your Honour.

13 Q. And you attended the rally at the 64 Stadium in Eldoret in 2005; is that right?

14 A. I cannot remember that.

15 MR KHAN: Well, let's play the video.

16 Your Honour, the transcript's at tab 45 and I'd ask to play KEN-D09-0042-0553.

17 PRESIDING JUDGE EBOE-OSUJI: Is it already part of the evidence of the case,
18 admitted?

19 MR KHAN: Mr President, it's already been MFI'd. It hasn't yet been exhibited.

20 Q. And before we play it, Mr Witness - it can just stay on the screen - in your
21 statement to CIPEV -- your Honours, it's tab 53 of the Prosecution's binder.

22 In your statement to CIPEV, and it is KEN-OTP-0036-0064, you said this, at paragraph
23 4, and I quote:

24 "That the referendum ..." -- you made oath and state as follows, quote:

25 "That the referendum campaigns all people supported the draft constitution were

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1 regarded as Kikuyu sympathisers therefore the enemies who should be attacked and
2 silenced. ODM leaders held two rallies at Stadium in Eldoret and one at Kapsabet
3 showground in which the leaders incited the people against Kikuyu. The banana
4 supporters held a rally at Huruma grounds under tight security because of the
5 hostility of the orange supporters." End quote.

6 Now, Witness, when you went over -- you went over the CIPEV statement with the
7 Prosecution last week, didn't you?

8 A. Yes, your Honour.

9 Q. And you made some corrections, but you didn't correct that. So I take it that
10 that's a true statement in your affidavit that you stand by?

11 A. It is.

12 Q. I'm grateful.

13 Mr President, if we could proceed, please, to play the video.

14 MR GARCIA: Just for the record, your Honour, I understand Mr Khan said that it
15 was last week. It was actually from 10 to 20 November, the preparation session.

16 MR KHAN: Yes, I'm grateful to my friend.

17 Mr President, I'm referring to the transcript at tab 45, which is KEN-D09-0042-0554,
18 starting with the time - and I'll just play a couple of extracts - KEN-D09-0042-0559, so
19 at page 559, starting from line 121.

20 (Viewing of the video excerpt KEN-D09-0042-0553)

21 MR KHAN: And we can just stop it there for a moment?

22 Q. Witness, can you see some words written on the microphone stand where
23 Mr Ruto is speaking in Eldoret 64 Stadium? Can you see those words?

24 A. Let me clarify here. Mr Chomba is a businessman giving out these things.
25 Even -- even -- even PNU or whatever, also even us, we went to hire the same, so

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1 any -- whatever it is Chomba, you want to refer it because he was a Kikuyu, he was
2 having these machines.

3 Q. Witness, the question I think was quite straightforward. Can you see some
4 words written on the stand?

5 A. It's Chomba, that's what you want to say.

6 MR KHAN: Yes, thank you.

7 We can continue playing, please.

8 (Viewing of the video excerpt KEN-D09-0042-0553)

9 MR KHAN: Yes, it can be stopped there, please, at time stamp 12.56.

10 Q. Witness, that's the Eldoret 64 Stadium, isn't it?

11 A. Yes.

12 Q. And you attended this rally; that's right, isn't it?

13 A. I can't recall, your Honour.

14 MR KHAN: Well, let's go through what Mr Ruto said.

15 And perhaps with the court officer's assistance we could give the witness a copy of
16 the transcript and translation?

17 Q. And, Witness, if you can turn to page 6 of that document at -- for the Court
18 records it's KEN-D09-0042-0559, page -- pagination is page 6 in the normal page
19 numbering.

20 Can you see that?

21 A. Yes.

22 Q. And you see at lines 121 it records Mr William Ruto speaking. Can you see
23 that?

24 A. Yes.

25 Q. And I'm going to read this into the record and if there's anything I say that you

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1 think is not said by Mr Ruto in the video you've just heard or a translation that you
2 don't agree with, please just let me know. Can you do that for me?

3 A. Mmm-hmm.

4 Q. I'm sorry, you have to say "Yes" or "No" just for the transcript. Would
5 you -- would you be able to do that, sir?

6 A. Repeat the question.

7 Q. If you -- I'll read out the English --

8 A. Mmm-hmm, yes, your Honour.

9 Q. -- and if I say anything that doesn't correspond, that is inaccurate, in relation to
10 the Swahili text in the document you've got or something that doesn't correspond to
11 what you've heard on the video, can you please interrupt me?

12 A. Yes.

13 Q. Could you do that?

14 A. Yes, your Honour.

15 MR KHAN: Thank you very much.

16 I'm going to start reading, Mr President, with your leave, at line 127, and I quote

17 Mr William Ruto. Quote:

18 "Something that is good sells itself but something bad goes around marketing itself.

19 If this constitution is good, this faction being ..." led "... by Honourable Kibaki and

20 Mr Kiraitu Murungi, why is all this money being distributed in market places if this

21 constitution is good? Isn't it true this constitution has problems? That is why it is

22 being distributed everywhere. Something else, there are some leaders who are

23 telling us that the retired President does not have a right to comment on this issue

24 because he is ... retired. Let me ask you Kenyans, did ..." President "... Moi retire as

25 a President or as a Kenyan?"

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1 At line 135, the crowd respond and then the translation at 136:
2 "As a Kenyan!"
3 At 138, Mr Ruto, continues and I quote:
4 "And if ..." someone "... if somebody has retired as a President, has he retired as a
5 Kenyan?" End quote.
6 And at 142 the crowd respond, quote: "No!" End quote.
7 And I go over the page, Mr Witness, to 1560, and do stop me anytime if there's
8 anything wrong with the translation.
9 At 1560 Mr Ruto says this, and I quote:
10 "He is a Kenyan like us and he has a right to comment and give his views. And
11 those ... who are going round saying that Moi should not talk, we are telling them that
12 Moi will talk whether they like it or ..."
13 The crowd respond, "Not!"
14 At 154, line 154, Mr Ruto continues speaking. The translation at 156 says this, quote:
15 "Finally, especially as far as the Rift ..." is "... the Rift Valley is concerned. There is
16 this saying by the Swahili people that say bygones are gone and that we should focus
17 where?"
18 The crowd respond, "Ahead!"
19 At 162, Mr Ruto speaks some more and the translation at 167 is this, and I quote:
20 "We should focus on what is there now and on the future. We are shocked that in
21 this constitution, we are being accused that us people from Uasin Gishu we have been
22 fighting other people. Is that what we want here in Uasin Gishu or do we want to
23 co-exist peacefully with others? Do we want to co-exist with others or do we want
24 cases?"
25 And the crowd respond: "Kuishi pamoja!"

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1 The translation at 173, quote:

2 "To co-exist with others!"

3 You've heard that, Witness? You've heard that?

4 A. Yes.

5 Q. And that was the response of the crowd that you heard on the tape; is that
6 right?

7 A. Yes, your Honour.

8 Q. And at 176, Mr Ruto continues and I quote:

9 "Those ones who would like us to live with others let's raise up our hand."

10 And the crowd raised their hands.

11 You saw that, didn't you, Witness?

12 A. Yes, your Honour.

13 Q. And at 186 the translation continues of Mr Ruto's words in Swahili, and he's
14 speaking Swahili, isn't he?

15 A. Yes, your Honour.

16 Q. 186, quote:

17 "That is okay. This is because we ..." want "... to live together as brothers and sisters
18 without discriminating whether you are tall, what your age is, what your tribe is or
19 what your religion is. As Uasin Gishu people we would like to live harmoniously as
20 brothers and sisters from Kenya, and we do not want laws that will come to divide us
21 so that we go to the courts to accuse each other. Have we understood each other?
22 And that is why I am requesting people from Uasin Gishu District and my fellow
23 Kenyans; what are we going to say on 21st?"

24 At 193 the crowd say, "No."

25 Mr Ruto continues, quote:

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- 1 "What are we going to say on 21st?" End quote.
- 2 And the crowd at 198 say, "No."
- 3 At 201 Mr Ruto says, and I quote:
- 4 "And what are we going to vote for?"
- 5 And at 204 on page 0562 the crowd respond, "Orange!"
- 6 And then at 208 Mr Ruto says, quote:
- 7 "Everyone who has an orange or who doesn't have to raise up your hands so that we
- 8 can see. Just raise up your hands all those people who will vote for Orange."
- 9 You see all of that, Witness?
- 10 A. Yes, your Honour.
- 11 Q. That was the speech of Mr William Ruto. There's nothing inciting in any of
- 12 that, is there?
- 13 A. What is the meaning of the word "wazembe"?
- 14 Q. Witness, please, you are here to answer my question, not the other way round.
- 15 There's nothing inciting in this? If there is, please point the Court's attention to it.
- 16 A. There is.
- 17 Q. Okay. What is inciting?
- 18 A. "Kuna wazembe."
- 19 Q. What line are you on, Mr Witness?
- 20 A. I heard in the video.
- 21 Q. Take your time. Just go through the transcript. You've got the
- 22 Kalenjin -- you've got the Swahili and the English. Please point out what you think
- 23 is inciting.
- 24 A. It is 124.
- 25 Q. Line 124. And what is the inciting language, Witness, that you say is inciting?

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- 1 A. "Wazembe. Kuna baathi ya viongozi wazembe."
- 2 Q. Can you tell me exactly which line? That's on 124?
- 3 A. 124.
- 4 Q. And could you please just repeat the word?
- 5 A. Wazembe.
- 6 Q. So is it the word -- and correct me if I'm wrong. It's the second word from the
- 7 end of that line?
- 8 A. Yes.
- 9 Q. W-E-Z-E-M-B-E (sic)?
- 10 A. Yes.
- 11 Q. Okay. What does that word mean, and you can use the translation below or
- 12 give another translation if you wish?
- 13 PRESIDING JUDGE EBOE-OSUJI: It is W-A-Z, by the way. That's how it is spelt
- 14 on the transcript.
- 15 MR KHAN: Yes, W-A-Z-E-M-B-E. I'm grateful.
- 16 THE WITNESS: But there's no translation. If you say in English, there's no --
- 17 Q. Okay. What do you say that word is?
- 18 A. If I can say, the word "wazembe" is not the right word to use and especially in a
- 19 public gathering like that as a person of Honourable William Ruto could not use that.
- 20 If there is anybody who is not expecting retired president to talk, he should
- 21 not -- "wazembe," he's not "wazembe."
- 22 Q. "Wazembe" means lazy; is that right?
- 23 A. No. "Wazembe," if I can say "mzembe," if you -- it is commonly referred to as
- 24 somebody -- it's like you target that person. No, it's not the right word to use.
- 25 Q. What word do you say is the right word for "wazembe"?

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1 A. "Wazembe."

2 PRESIDING JUDGE EBOE-OSUJI: What do you say it means, "mzembe" and

3 "wazembe?" What would those --

4 A. Wazembe is plural.

5 PRESIDING JUDGE EBOE-OSUJI: Yes, "wazembe" is the plural form.

6 THE WITNESS: "Wazembe" is somebody who's actually -- it's a -- I can call it an
7 abusive word, anyway. It's not -- it's not -- it's commonly used to somebody who is
8 not, yeah -- it's not lazy as the Judge referred with -- which the Honour.

9 PRESIDING JUDGE EBOE-OSUJI: Do you think you can tell us what you
10 understand the word itself to mean?

11 THE WITNESS: I cannot talk directly, but it is always commonly word used to talk
12 to somebody. When you tell somebody "we mzembe," it's you are accusing that
13 person, abusing that person. Not actually -- it's not the right word to use.

14 MR KHAN:

15 Q. Accusing somebody of what, Witness?

16 PRESIDING JUDGE EBOE-OSUJI: Abusing somebody.

17 THE WITNESS: Yes.

18 MR KHAN:

19 Q. Can you help us a little bit more? Abusing them in what way?

20 A. Like --

21 Q. I mean, it's a criminal court. Please don't feel shy if you think there's a
22 meaning - a translation - of the word "wazembe" --

23 A. If -- if -- if you tell me --

24 Q. --please give it to the Court?

25 A. -- in a Swahili I cannot tell directly the meaning, but if you tell this -- a person,

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1 even I tell you "we mzembe," that's not -- it's a -- I'm not saying you -- I'm not saying
2 you are lazy.

3 Q. Okay. Witness --

4 A. "We wani (phon) mzembe."

5 PRESIDING JUDGE EBOE-OSUJI: All right. Let's do this. Witness, look at the
6 sentence in Swahili. It begins with "Jambo lingine ..." I think that's it. "... kuna
7 baathi ya viongozi wazembe ..."

8 THE WITNESS: Yes.

9 PRESIDING JUDGE EBOE-OSUJI: What does that mean, just that sentence, the
10 whole sentence? Can you read it out yourself? Read out the whole sentence and
11 tell us exactly what it means, if you can?

12 THE WITNESS: Yeah, "Ndio inafanyiwa nini." Let me wait. "Jambo lingine, kuna
13 baathi ya viongozi wazembe ambao wanatuambia ya kwamba mstaafu Rais hawezi
14 kusema kwa sababu yeye amekwisha staafu." That is directly. Yes, I can say the
15 other words which are (indiscernible) for they don't want the president to say, to talk,
16 it's okay, it's okay, but the word "wazembe" is what I can refer that it's not actually
17 should have him using that word because always it's common and I can
18 even -- because I cannot translate directly to Swahili, because I cannot remember by
19 now, but I want to do further meaning from other sources the word "mzembe." You
20 can know that it is not the right word. It's abusive word, your Honour.

21 MR KHAN: Mr President, perhaps with your leave -- I don't want to go through
22 Google Translate, but perhaps your Honours will authorise the witness to read that
23 paragraph or at least that line in Swahili and we'll have the assistance of the court
24 interpreters to translate it?

25 PRESIDING JUDGE EBOE-OSUJI: That's a good suggestion.

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1 MR KHAN: I'm most grateful.

2 So the document is on --

3 PRESIDING JUDGE EBOE-OSUJI: But we -- Mr Khan, that suggestion would not
4 work.

5 MR KHAN: Let me try something else.

6 Q. Witness, are you aware -- you know the word "mzembe", M-Z-E-M-B-E? Are
7 you aware of that word, M-Z-E-M-B-E? And if you wish to write it down, please feel
8 free.

9 A. Uh-huh.

10 Q. That means lazy, doesn't it? It's the single of lazy?

11 A. If it's lazy, the meaning, then what I know -- what I know in Kenya if you are
12 being told "mzembe" it's not something you are being told lazy.

13 Q. And I put it to you that "wazembe" is the plural of lazy. Do you agree with
14 that, or not?

15 A. I cannot agree, but I can just put interpretations what it's always meaning when
16 you are in there.

17 Q. But the Prosecution have got the audio and they can also have their own
18 translation to see if it's wrong, but you're saying in the whole video you've heard
19 that's what you say is inciting; is that right?

20 A. Yes.

21 Q. All right.

22 A. And also I can put that if somebody could say there is some people, the like of
23 Kibaki, who are distributing money, which mean even -- no, they were using some
24 money to campaign, but here -- and also when he say that, "This constitution will
25 make us to come and have some cases," it's already quoting some -- first

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1 some -- which -- some quotations which I'm already saying that they're quoting some
2 sensitive word to make people believe that actually what they are saying, without
3 saying that maybe this constitution could later mean that people could have some
4 truth and -- but he was just telling people that this thing is going to give some cases
5 and people were now taking that position.

6 Q. So the mention about money being distributed you say that's an example of
7 incitement; is that right?

8 A. If I can talk directly the way he was meaning Kibaki and Murungi, and Murungi
9 was actually somebody who is actually by then he was somebody perceived as a main
10 supporter of Banana. And even if you say -- we say here all communities were there,
11 but actually the main targets were Kikuyus even during that particular moment. It
12 doesn't mean whether Uhuru was there, or whatever, or who else who have said, but
13 actually during the campaign what was there it was the propaganda which was
14 created to give a perception that whoever's supporting the other group was like
15 having many things. Like what is already taken that, cases, land, it was there, but I
16 cannot -- it is not reflecting in this particular video. But some of the section, even the
17 way Honourable was talking, he is saying that "We mzembe. Wazembe," other
18 leaders.

19 Q. So --

20 PRESIDING JUDGE EBOE-OSUJI: Now back to that word again, "wazembe."

21 Witness, of course it would have been much more helpful if we had known exactly
22 what that word means according to you, beyond just it being abusive, but it seems
23 that you say you are not able to directly translate the word now.

24 THE WITNESS: Yes.

25 PRESIDING JUDGE EBOE-OSUJI: All you are saying is that it is an abusive word; is

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1 that it?

2 THE WITNESS: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: Who would be the subject of that abuse? Who
4 is being abused by the word "wazembe"?

5 THE WITNESS: He was talking about other leaders, which mean the leaders who
6 were referring to the Banana team or whatever. Other leaders. I cannot just put it
7 on myself, but what is there -- was there in the ground was actually somebody who
8 was by then supporting the draft and mainly the leaders who were actually head of
9 this group.

10 PRESIDING JUDGE EBOE-OSUJI: So in the context of that passage, would it then be
11 those who were saying that, according to him, that the former president did not have
12 a right to comment on the matter? Would they be the ones being abused, those who
13 would have been saying that, if anybody said that?

14 THE WITNESS: Yes, because he was referring to supporting the retired president,
15 but he called the leaders who actually said this to be "wazembe."

16 PRESIDING JUDGE EBOE-OSUJI: Thank you.

17 I will leave it at that, Mr Khan.

18 MR KHAN:

19 Q. Mr Witness, so now watching that video and pointing out the language
20 "wazembe" that you say is inciting, does that help you refresh your memory that
21 that's the rally that you attended in Eldoret 64 Stadium?

22 A. I'm saying, your Honour, you're just seeing this, but I cannot remember
23 real -- I can remember the messages which was said. It was almost the same.

24 Q. Well, we'll play some more because you remember on the event you attended
25 Mr Uhuru Kenyatta, as he then was, he came, didn't he, to the rally at 64 Stadium?

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1 A. (No audible response)

2 MR KHAN: So let's play some more and I'll ask you some questions, and if we can
3 play the section starting at -- the transcript is 0563, and the time stamp is after
4 13.49 -- sorry, after -- in fact, it has to be at 13.22 - 13 minutes and 22 seconds - we
5 start.

6 (Viewing of the video excerpt KEN-D09-0042-0553)

7 MR KHAN:

8 Q. And, Witness, in fact you'll note that I made a mistake earlier. In fact the
9 government draft it was -- was the Kilifi Draft and I'll just say that for the record, but
10 you saw Uhuru Kenyatta speak; is that right?

11 A. Yes, your Honour.

12 Q. And I'm going to read what Mr Uhuru Kenyatta said at the 64 Stadium and he
13 said this -- and once again, Witness, feel free to follow the transcript and please tell
14 their Honours if the translation -- anything in the translation is missing or incorrect,
15 or if the transcript doesn't accord with what you heard on the video.

16 MR GARCIA: Your Honour, if it can just be placed on the record as well that, and
17 I've been observing the video and listening to the sound, that there are at the
18 minimum three edits in the speech of Mr Uhuru Kenyatta. So that's what I would
19 like to have placed on the record.

20 MR KHAN: Your Honours, counsel should always be careful to say such matters in
21 the presence of a witness, but I'm not disputing otherwise. The Prosecution thus far
22 have not alleged that Mr Uhuru Kenyatta was trying to get rid of Kikuyus, so I don't
23 think really that's a matter of great controversy. Your Honours, we can proceed with
24 the Court's leave to line 233, and I quote -- and, Witness, please intervene -- feel free
25 to intervene if there's any --

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1 A. Page?

2 Q. At page 10, the normal pagination.

3 And for the Court it is 0563.

4 Tell me when you are there.

5 A. I'm there, your Honour.

6 Q. So if you go to the top of the page, please, and you'll see at line 233, Mr Uhuru

7 Kenyatta says this, and I quote:

8 "Let us say 'No' to Kilifi. What do we say? 'No' to Kilifi. Raise up your hands the
9 people who have said 'No' to Kilifi." End quote.

10 You heard that, Witness?

11 A. I've seen the draft, yeah.

12 Q. And by "Kilifi" Mr Kenyatta is referring to the draft constitution; is that right?

13 A. Yes.

14 Q. And that's the constitution that was being put forward by the government; is
15 that right?

16 A. Yes, your Honour.

17 Q. And you see at line 236 it records the crowd, quote:

18 "(Raising their hands)"

19 You saw the crowd raising their hands, did you?

20 A. Yes, your Honour.

21 Q. And then at lines 241 the translation is this, and I quote:

22 "Okay. This Kenya belongs to many tribes and especially you as residents of Eldoret
23 North you are a mixture of different tribes, many tribes. Will you agree to be given a
24 constitution that is going to divide you and make you fight each other?"

25 The crowd at line 246, say, "No!"

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1 You heard that, Witness?

2 A. Yes, your Honour.

3 Q. And that's a proper translation of what was said by Mr Uhuru Kenyatta in the
4 video?

5 A. Yes, your Honour.

6 Q. And he continues, and the translation at 256, and I quote:

7 "Raise up your hands those ones who would like to live in peace. All these people
8 are saying 'No' to Kilifi draft. We are running short of time and I have told you that
9 we have come many of us. Let us go back to the table. We talked, we begged them
10 and asked them why do you want Kenyans to fight each other, come we sit, come we
11 talk. Now where it has reached the decision ..." - and I'm continuing on to page 0564,
12 line 260 - "... reached the decision will not be made by Uhuru or Raila or Kalonzo or
13 Kibaki, the decision will be made by Kenyans. First let Kenyans voice be heard and
14 then thereafter we shall sit and talk, but first let Kenyans be heard and we are
15 confident that Kenyans will say 'No' to the Constitution. We are here with ..." and
16 then it is ellipses at 14.45.

17 Witness, you heard that, did you?

18 A. Yes, your Honour.

19 Q. And that's a true, an accurate translation of what Mr Uhuru Kenyatta, as he then
20 was, was saying in the video; is that right?

21 A. Yes, your Honour.

22 Q. And so, Witness, there's nothing that Mr Uhuru Kenyatta is saying that is
23 inciting against the Kikuyu people is there?

24 A. He's a Kikuyu himself.

25 Q. Please just try and answer the question. There's nothing Mr Uhuru Kenyatta

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1 says that's inciting, is there, against the Kikuyu community?

2 A. But he's -- according to what he is saying, he's propagating the same
3 propaganda which was created that the new draft constitution would divide people
4 and actually the way he was so -- he was following the same suite that other leaders
5 were talking, that is part of their campaign to win.

6 Q. Mr Witness, sometimes, as I said repeatedly, an answer can be yes or no and
7 then maybe explained. Is there anything Mr Uhuru Kenyatta said that was inciting
8 people against his own community? There's not, is there?

9 A. Yes.

10 Q. Is there something inciting or is there nothing inciting in what Mr Uhuru
11 Kenyatta says?

12 A. Me, I cannot confirm -- I cannot see anything or I hear anything that may be
13 related to inciting, but also the message is there, that is they are sending that if they
14 vote -- if they get a new constitution they will be -- they will fight to each other.

15 Q. Witness, will you agree with me politics is about competing messages, isn't it?

16 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, do you have to ask that question to this
17 witness, or is it better argued in submissions? What the witness is saying isn't
18 it -- Witness, is it your testimony that Mr Kenyatta's speech, as you've heard it, is the
19 same sort of speech that Mr Ruto had given; is that what you're saying or not?

20 THE WITNESS: It is also at the -- almost the same but this is also if they win, if the
21 constitute -- the other draft constitution will -- will make it through, Kilifi, then people
22 will fight each other, but this is according to your creations. This is also part of the
23 inciting, if I can say this. Suppose it wins -- because anyway they have some
24 messages to use -- yeah.

25 MR KHAN:

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1 Q. So your understanding of incitement is where somebody says something bad
2 will happen if a certain policy is pursued; is that right?

3 A. Yes, maybe some leaders could mean good but some of them are the worst
4 because they take it -- they take it to the mwanahinch (phon) who -- and if really
5 doesn't know exactly what is this and whenever he sees somebody who is not -- who
6 is for that constitution, it's sort of like he is supporting something which is going to
7 defy them. And now the -- something else will happen. That's why there was a lot
8 of pressure to the people who were then supporting the constitution.

9 Q. Yes. And, Witness, now seeing Mr Uhuru Kenyatta speak does that help
10 refresh your memory that that was a rally at 64 Stadium that you attended in 2005?

11 A. It's not. I didn't enter any rally that Kenyatta was there.

12 Q. (Redacted)

13 (Redacted)

14 (Redacted)

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, were we in the green zone when you
16 mentioned that or not last time?

17 MR KHAN: We were, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: All right.

19 MR KHAN: But, your Honours, we can go into private session, but thousands
20 of -- anyway, we can go into private session.

21 PRESIDING JUDGE EBOE-OSUJI: Private session.

22 *(Private session at 12.41 p.m.) Reclassified as Open session

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

24 PRESIDING JUDGE EBOE-OSUJI: Thank you.

25 MR KHAN:

Trial Hearing
Witness: KEN-OTP-P-0658

(Private Session)

ICC-01/09-01/11

1 Q. Witness, I put a very simple question to you that your assertion in your affidavit,
2 (Redacted) affidavit, that ODM members at rallies at Eldoret were inciting people
3 against the Kikuyu community is complete nonsense; it's untrue, isn't it?

4 PRESIDING JUDGE EBOE-OSUJI: Question overruled. You have to ask a different
5 question.

6 MR KHAN:

7 Q. Witness, do you agree --

8 PRESIDING JUDGE EBOE-OSUJI: Wait one second, Mr Khan. This is the second
9 time you have done this. We will not be characterising the witness or witnesses who
10 appear here in questions of counsel. Ask questions as a matter of fact.

11 MR KHAN:

12 Q. Witness, you swore false affidavit to (Redacted) when you said that
13 there was incitement at ODM rallies in Eldoret in 2005 against the Kikuyu community,
14 that is deliberately made up by you, isn't it?

15 A. No, your Honour.

16 MR KHAN: Your Honours, we can move on.

17 I would ask to exhibit -- well, your Honours, perhaps MFI this particular video.

18 PRESIDING JUDGE EBOE-OSUJI: All right.

19 MR KHAN: It is already MFI'd so we can just leave it as it is at the --

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

21 MR KHAN: Please.

22 PRESIDING JUDGE EBOE-OSUJI: Open session.

23 THE COURT OFFICER: Mr Khan, we do not have any MFI number for the video.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Let's go to open session and we can
25 do that there.

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Witness: KEN-OTP-P-0658

(Open Session)

ICC-01/09-01/11

1 (Open session at 12.43 p.m.)

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

3 PRESIDING JUDGE EBOE-OSUJI: Thank you. Ms Bossette, is it that Mr Khan
4 didn't give you the MFI the last time, or that there is no MFI at all for the video?

5 THE COURT OFFICER: The document doesn't have any MFI at all, Mr President.

6 PRESIDING JUDGE EBOE-OSUJI: All right.

7 Mr Khan, you wanted --

8 MR KHAN: Your Honours, Mr President, in fact I stand corrected. I think there's
9 an application that was put in writing to have it MFI'd but, your Honour, I would
10 actually ask to have it exhibited and the reason for this is the witness has seen it, he
11 has identified the individuals in it, namely Uhuru Kenyatta and Mr William Ruto,
12 and he has identified what he says is an example of what he says, he believes to be
13 inciting words or at least one inciting word at 0559, the word "wazembe".

14 Your Honours, because of that and that the comments really speak for themselves, I
15 would ask that it be exhibited and if it is indeed an inciting word I'm sure the
16 Prosecution will not object.

17 MR GARCIA: Your Honour, the witness has clearly stated that this is not a rally that
18 he attended at that time and the whole point of the questions Mr Khan was just to get
19 the witness to refresh his memory and see if he could get him to confirm that, which
20 he hasn't, so I think the first instinct of Mr Khan having it MFI'd is the right one.
21 This is how we've proceeded with other videos.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the document will be MFI'd.

23 MR KHAN: I'm grateful.

24 THE COURT OFFICER: The video bearing number KEN-D09-0042-0553 will bear
25 the number MFI-T-D09-00303.

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(Private Session)

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1 The related transcript bearing number KEN-D09-0042-0554 will bear the number
2 MFI-T-D09-00304.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, proceed. How much time do you
4 have with this witness? I know we put a deadline of no later than Thursday evening
5 to you, but if you can finish sooner than that that's even better.

6 MR KHAN: Mr President, the last section on the 64 Stadium took longer than I had
7 hoped. There is, in fact, a lot of material to deal with. I'll do my best to try to finish
8 by Thursday. Of course I will - I understand the sentiments of the Bench - and try to
9 speed things up. Some matters yesterday, for example, an allegation regarding 1
10 October I just touched and moved on, but I'll do my best to move swiftly.

11 PRESIDING JUDGE EBOE-OSUJI: Do. But you're ending on -- at any rate there
12 will be no extension on Thursday, the Thursday indication, so you know that.

13 MR KHAN: Yes, I was grateful for that indication.

14 PRESIDING JUDGE EBOE-OSUJI: The concern now is that you try and even get us
15 sooner to your finish line than Thursday.

16 MR KHAN: I'm grateful. I'll do my very best.

17 Mr President, could we go into private session for a moment, please?

18 PRESIDING JUDGE EBOE-OSUJI: Private session.

19 *(Private session at 12.47 p.m.) Reclassified as Open session

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

21 MR KHAN: I'm grateful.

22 Mr President, I just want to put on the screen for a moment, it is the Prosecution's tab
23 53, but for the witness KEN-OTP-0036-0064 at page 0065. And the paragraph at
24 paragraph 7 should be highlighted, please, or be enlarged.

25 Q. And, Witness, while that's being done, I'm going to just read you another

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1 paragraph of your affidavit (Redacted)

2 (Redacted) that you went over during your

3 witness preparation with the Prosecution and which you didn't change.

4 If paragraph 7 could be enlarged.

5 And, Witness, I'm going to read paragraph 7 of that document, and I quote, you state,

6 and I quote that:

7 "At a rally in Kapsabet on 5 December 2007, Hon Kones and Hon Ruto vowed that

8 they will fight the Kikuyu on heaven and in earth because they supposedly sacked the

9 Kalenjin and taken their land and therefore could not live together." End quote.

10 Witness, you remember saying that, do you?

11 A. I think during the preparations I just put not the way it was put it. Maybe

12 the -- about the especially Kones, I didn't say that he was in the rally. That's what I

13 said during the preparations.

14 Q. So you agree that your assertion, your (Redacted) affidavit that Honourable Ruto

15 and Honourable Kones vowed to fight Kikuyu on earth and in heaven is incorrect; is

16 that right?

17 A. That's the statement, but I used the -- the words Ruto used in Kapsabet where

18 Kones was not there was the word "enemies," bunyot chi (phon), someone who is

19 voting for the Kikuyu is an enemy.

20 Q. So just to be clear, Witness, the word "fight," the words you attribute to Mr Ruto,

21 fighting Kikuyu on heaven and -- on earth and in heaven, that was not said by

22 Mr Ruto in Kapsabet; is that right?

23 A. What I said in Kapsabet, actually he was using the word "enemy" in Kapsabet

24 and many other words that he used. And I have a support of that.

25 Q. Witness, I'll try once again. I know --

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, Mr Khan, have you settled a
2 foundation for this document?

3 MR KHAN: Well, your Honours, we've got information in proofing. But,
4 your Honours, let me do it in a longer way.

5 Q. Witness, could you go to -- and if you could show on the screen 0064.
6 Witness, while that's being done, you gave a statement, an affidavit (Redacted)
7 (Redacted) is that right?

8 A. Yes, your Honour.

9 Q. And you had -- you've already told the Court under oath that you were assisted
10 by a lawyer, (Redacted), to prepare that affidavit; is that right?

11 A. Yes, your Honour.

12 Q. And you went through that affidavit with the Prosecution in proofing before
13 you started testifying; is that right?

14 A. Yes, your Honour.

15 Q. And you accepted that the affidavit that you went through with the Prosecution
16 is the affidavit that (Redacted); is that right?

17 A. That is it.

18 MR KHAN: Your Honour, I don't think there's a dispute from the Prosecution that
19 this is the affidavit, and in light of that I would intend just to move forward.

20 PRESIDING JUDGE EBOE-OSUJI: Witness, are you saying that this was the
21 affidavit (Redacted)?

22 THE WITNESS: This is. But the contents I even rectified, that even in front of the
23 charge now, that the words that is wording there putting Kones and Ruto was not the
24 real -- what I -- I use it.

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

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(Private Session)

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1 MR KHAN:

2 Q. Yes, in fact you gave some clarifications in your preparation with the
3 Prosecution and it is in the Judges' binders, but let me just clarify one thing. When
4 you originally -- (Redacted) that to the Prosecution, didn't you?

5 A. I do, your Honour.

6 Q. And (Redacted) you said that Mr Kones was
7 at that rally, didn't you?

8 A. I talk about that earlier --

9 Q. Yes.

10 A. -- your Honour, but I say I -- I -- I just said no, he was not there.

11 MR KHAN: Your Honour, I'm not going to belabour the point. It's OTP binder 2 at
12 tab 17, KEN-OTP-0028-1246 at lines 1270 to 1272 and 781 to 813.

13 Q. Witness, what I'm saying is that you said Mr Kones was there until you saw the
14 video with the Prosecution -- together with the Prosecution and realised after
15 watching the video that that was wrong. That's right, isn't it? You only corrected
16 that account when you saw the video with the Prosecution?

17 A. That is not the position, your Honour, which I have. I have the position that
18 what I have already talk and preparations and my point is what exactly I'm using is
19 what I've already said, your Honour.

20 MR KHAN: And, your Honour, just for the record I'll read 792 of that transcript,
21 and I quote, "... and that Mr Ruto speaks on it."

22 PRESIDING JUDGE EBOE-OSUJI: Again, OTP binder 1?

23 MR KHAN: Binder 2.

24 PRESIDING JUDGE EBOE-OSUJI: Binder 2.

25 MR KHAN: Your Honour, tab 17. And line 7 -- well, from 781 until 813, but I was

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1 particularly referring to for the sake of time 792, in which he discusses a VHS video,
2 that's line 787, and he describes that it's three hours long at line 790. And at 792 he
3 says, the witness states that Mr Ruto speaks on it and the late Kipkalya Kones speaks
4 on it and also line 792.

5 Your Honour, 792 is the investigator. And if one continues over the page to line 800
6 at 1271, page 1271, the witness confirms again Kipkalya Kones is a person that he
7 states is on the video. And, your Honour, I'm not going to go into it, the interviews
8 are there, but it is only when sitting with the Prosecution he is shown the video that
9 he says, "No, it's not Mr Kones. I got it wrong. It is Musalia Mudavadi, your
10 Honour."

11 Q. Witness, that's correct, isn't it?

12 A. I can't remember what we were talking (Redacted) all was, but what I've already
13 said, even during my -- when I'm still in the investigating room, I stand by what I
14 have -- I'm still saying about it.

15 Q. And you also say to the Prosecution, and again for the reference it is
16 KEN-OTP-0057-0623 at 0647, line 780 to 806, you say that in that rally, the video of
17 which you gave the Prosecution, people were holding banners emblazoned with the
18 words "The Kikuyu versus Kenyans." Do you remember that?

19 A. I can't recall, your Honour.

20 MR KHAN: Your Honour, I just refer for the record time stamps 18 minutes, 37
21 minutes -- well, the English, 18 minutes. "Emgwen, Raila is enough, Elijah is
22 enough." Your Honour, I'm just intending --

23 PRESIDING JUDGE EBOE-OSUJI: Can we do it on the screen?

24 MR KHAN: Your Honour, yes, of course.

25 So KEN-OTP-0057-0623 at 0647.

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1 PRESIDING JUDGE EBOE-OSUJI: What line again did you say?

2 MR KHAN: Lines 780 to 806.

3 And at 0647, at line 780 the witness talks about, and I quote:

4 "... there were banners ... they were brandishing banners ... and these banners said

5 "The Kikuyu versus Kenyans." End quote.

6 Mr Witness, there are no such banners on that video, are there?

7 A. Even there was no captured, it was there.

8 Q. Do you agree having watched the video with the Prosecution that there have no
9 banners that you could find stating "Kikuyu versus Kenyans"?

10 A. If it was not captured, it was there. "41 against 1" was there.

11 Q. And, in fact, "41 against 1" also was not there, was it, on the video?

12 A. If there was not in the video, then there was such messages.

13 Q. So on the video no banner "41 against 1" and no banner "Kikuyu versus
14 Kenyans." That's what you're saying?

15 A. I'm saying I can't recall when I was seeing (Redacted), but I can remember what I
16 use to say in the video, that if I -- if there was no banner or whatever, that is just
17 details that I cannot still recall, your Honour.

18 MR KHAN: Mr President, in the last two minutes what I would intend to do just for
19 time is read out time stamps of all the banners that appear in the video. And the
20 Prosecution of course can look into it if I've missed anything out, but your Honour
21 we've gone through each and every banner on the video, and none of those talk about
22 either "Kikuyus versus Kenyans" or "41 against 1."

23 PRESIDING JUDGE EBOE-OSUJI: Yes, proceed.

24 MR KHAN: Yes.

25 At 18 minutes, and I'm reading only the English, we have got the Swahili as well,

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- 1 "Emgwen, Raila is enough, Elijah is enough."
- 2 At 37 minutes, quote, "For justice, truth and progress vote Lagat." End quote.
- 3 At seven minutes and 13 seconds there is a banner "Vote for Orange Raila Odinga, the
- 4 people's president."
- 5 At seven minutes and 30 seconds there is a photograph of William Ruto, Mr William
- 6 Ruto of ODM.
- 7 At 12 minutes and 36 seconds there's a banner of Raila Odinga for president.
- 8 At 13 minutes and 37, there is a shot of the podium with a banner, quote unquote,
- 9 "Better Life."
- 10 At 16.44 there is a banner, quote unquote, "For Justice Truth and Progress Vote
- 11 Lagat."
- 12 At 16.56 on the video, the translation of the banner is, quote, "For Justice Truth and
- 13 Progress Vote Lagat."
- 14 At 21 minutes and 45 seconds there is a banner, a picture of William Ruto and
- 15 Mr Lagat.
- 16 At 23 minutes and 2 seconds there's a banner which cannot be read, it's unclear on the
- 17 video.
- 18 At 26 minutes and 45 seconds there is a banner, quote -- the translation, quote,
- 19 "Emgwen Raila is enough, Elijah is enough."
- 20 At 28 minutes and 22 seconds there is a banner, the translation of which is, quote, "For
- 21 Justice Truth and Progress Vote Lagat."
- 22 At 31 minutes and 17 seconds there is a picture of a youth holding a banner with
- 23 pictures of Mr Raila Odinga and Mr William Ruto.
- 24 At 1 hour, 5 minutes and 28 seconds there's a banner of a picture of Raila Odinga.
- 25 1 hour, 8 minutes and 31 seconds, a banner, "Vote Orange Raila Odinga The People's

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1 President."

2 At 1 hour, 12 minutes and 8 seconds, there's a banner, "Vote for Orange Raila Odinga
3 The People's President."

4 Just two more to go.

5 At 1 hour, 23 minutes and 31 seconds, there is a banner, "Vote for Orange Raila
6 Odinga The People's President."

7 And then the last one, 1 hour and 24 minutes, a banner of William Ruto, quote
8 unquote, "The Truth of the Matter - William Ruto." Unquote.

9 Q. Witness, can I just ask as we're in private session, (Redacted)
10 (Redacted)

11 A. (Redacted)

12 (Redacted)

13 Q. (Redacted)

14 A. I can't remember exactly (Redacted) my -- your Honour.

15 Q. You told the Prosecution (Redacted) at KEN-OTP-0028-1274; is that
16 right, or (Redacted)

17 A. I can't remember what we talk with (indiscernible). It's a long time,
18 your Honour.

19 Q. (Redacted)

20 (Redacted)

21 A. No, your Honour.

22 MR KHAN: And, your Honours, we can leave it there for the afternoon with your
23 leave.

24 PRESIDING JUDGE EBOE-OSUJI: Indeed. We will rise for our lunch-break and
25 come back at 2.30.

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- 1 We will now go into closed session.
- 2 *(Closed session at 1.03 p.m.) Reclassified as Open session
- 3 THE COURT OFFICER: We are in closed session, Mr President.
- 4 (The witness stands down)
- 5 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.
- 6 THE COURT OFFICER: All rise.
- 7 (Recess taken at 1.04 p.m.)
- 8 (Upon resuming in open session at 2.35 p.m.)
- 9 THE COURT USHER: All rise.
- 10 Please be seated.
- 11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 12 Witness, welcome back.
- 13 Mr Khan, please continue.
- 14 MR KHAN: I'm grateful, Mr President. I will have to go with your leave into private
- 15 session for about 10 to 15 minutes.
- 16 PRESIDING JUDGE EBOE-OSUJI: Private session.
- 17 MR KHAN: Thank you so much.
- 18 *(Private session at 2.36 p.m.) Reclassified as Open session
- 19 THE COURT OFFICER: We're in private session, Mr President.
- 20 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 21 MR KHAN:
- 22 Q. Mr Witness, just a few questions. (Redacted); is that right?
- 23 A. I can't remember now. Yes, think I know.
- 24 Q. Let me repeat it. (Redacted). That was (Redacted); is that
- 25 right?

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1 A. I cannot recall. (Redacted)

2 Q. And you remember giving your (Redacted), your affidavit (Redacted).

3 Did you give your identification number in that document?

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

5 MR KHAN: Well, perhaps let's place on the screen tab 53 of the Prosecution binder. And
6 the ERN is -- if you'll bear with me a moment.

7 I'm grateful. It's KEN-OTP-0036-0064. And perhaps we can go to the beginning of the
8 document. It can be put on the screen, please. If you can zoom into the top.

9 Q. Witness, I read and I quote, (Redacted)

10 (Redacted) Sorry, it's redacted on the screen, the phone number, but your identification
11 number (Redacted) that you see on the screen, that's your identification number. Does this
12 refresh your memory?

13 A. Even if -- I cannot -- even if I'm carrying my identity card, Kenyan identity card, I'm not
14 carrying it all the time to remember the number.

15 Q. Yes. You've already told the Court that this document you see on the screen, this is the
16 affidavit?

17 A. Yes, this is the affidavit, I can -- I can say okay, but I can say the names is mine, but I
18 cannot remember the number.

19 Q. Do you remember giving a number when that affidavit was prepared? Did you
20 remember getting out your ID card and giving the number to (Redacted)

21 A. I don't know what you are meaning about it --

22 Q. Well --

23 A. -- but I -- but I cannot confirm or deny that that one is my number, because I don't have
24 it now.

25 Q. Right. But can you recall that when you spoke to (Redacted) giving your

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1 affidavit, taking out your identification card and giving him a number? Do you remember
2 that or not?

3 A. I can remember, but -- yes, I can remember.

4 Q. Yes. So you took out an identification card. Did (Redacted), did you see him
5 write it down and put it in the affidavit?

6 A. Yes, I can remember, your Honour.

7 Q. And you went over this affidavit with the Prosecution before you gave evidence, and it's
8 correct, you didn't say that that was a wrong identification number, did you?

9 A. Your Honour, that one I cannot say whatever. If there was any correction for my
10 number, I cannot remember my -- your Honour.

11 Q. We can move on.

12 And your (Redacted) isn't it?

13 You remember that. (Redacted) that's right, isn't it?

14 A. Yeah, yeah, it is this.

15 MR KHAN: Yes. For the record, (Redacted).

16 Q. That's right, isn't it, Witness?

17 A. Yes.

18 Q. Yes. And your (Redacted); that's also right, isn't it?

19 A. Yes, your Honour.

20 Q. Yes, I'm grateful.

21 Now, Witness, you remember being interviewed by the Prosecution in (Redacted). And you
22 remember that you told them that you had a close friendship, a close association with
23 Mr (Redacted) and (Redacted). Do you remember that?

24 A. That is no problem. (Redacted)

25 (Redacted)

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1 Q. Yes. Witness, of course we're all under the control of their Honours and the President
2 of this Court, but I do want to impress upon you, if I may, that many of the questions I ask can
3 be answered "Yes" or "No", and often it's much more painless, it's much quicker just to say
4 "Yes" or "No" to questions that you can give those answers to. Do you understand? Do you
5 understand?

6 A. Yes, I understand, your Honour.

7 Q. So regarding (Redacted), you told the Prosecution that (Redacted)
8 (Redacted) that's right, isn't it?

9 A. If I can say that, your Honour, I cannot just jump into that, but, yes, if I say (Redacted)
10 (Redacted)

11 Q. Did you tell the Prosecution you (Redacted)
12 (Redacted)

13 A. Yes, your Honour.

14 Q. Yes. And you told -- and you told the Prosecution that (Redacted), correct?

15 A. That's no problem.

16 Q. And you've already said he was (Redacted). But (Redacted)
17 (Redacted) that's right, isn't it?

18 A. Yes, your Honour.

19 Q. (Redacted)

20 That's what you told the Prosecution.

21 A. It's no problem to be (indiscernible) with (indiscernible).

22 Q. So the answer is "Yes"; is that right?

23 A. Yes, your Honour.

24 Q. And you also told the Prosecution that some people -- you told the Prosecution some
25 (Redacted)

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- 1 (Redacted) is that right? That's what people thought.
- 2 A. That one I cannot answer that.
- 3 Q. (Redacted) I mean, I've got the reference; OTP tab -- folder 3 -- folder 3,
- 4 tab 48, at 0173.
- 5 But you told the Prosecution (Redacted)
- 6 (Redacted)
- 7 Do you remember saying that or not?
- 8 A. That is -- I can remember now that some people were saying that.
- 9 Q. Yes, thank you.
- 10 Now, moving onto (Redacted); is that right?
- 11 A. (Redacted)
- 12 Q. Yes, even than (Redacted). And he was (Redacted)
- 13 (Redacted) isn't that right?
- 14 A. Yes, it is.
- 15 Q. Also a (Redacted)
- 16 A. Yes, he was.
- 17 Q. (Redacted)
- 18 A. Of course, yes.
- 19 Q. Yes. (Redacted) is that right?
- 20 A. Yes, sir.
- 21 Q. Mr (Redacted); is that right?
- 22 A. Yes, (Redacted), yeah.
- 23 Q. And at the Kapsabet rally of 5 December 2007, the video -- (Redacted)
- 24 (Redacted)
- 25 A. I remember.

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- 1 Q. (Redacted)
- 2 (Redacted); isn't that right?
- 3 A. Yes, your Honour.
- 4 Q. And at that time (Redacted) is that right?
- 5 A. Yes, your Honour.
- 6 Q. (Redacted) weren't you?
- 7 A. Yes, I can confirm that.
- 8 Q. (Redacted) didn't he?
- 9 A. Eh? You say what?
- 10 Q. (Redacted)
- 11 A. No. (Redacted)
- 12 (Redacted)
- 13 Q. (Redacted)
- 14 (Redacted)
- 15 A. (Redacted)
- 16 Q. Yes. He has a right to --
- 17 A. (Redacted)
- 18 Q. Yes.
- 19 A. (Redacted)
- 20 (Redacted)
- 21 Q. (Redacted)
- 22 A. No.
- 23 Q. (Redacted)
- 24 A. (Redacted)
- 25 Q. And you've been receiving money from (Redacted); is that right?

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1 A. No. I'm -- what -- what kind of money I've been receiving? Money for (indiscernible)?

2 I have -- I was just -- I was just (Redacted). What money

3 you saying is he receiving? Politicians is not just to give out any money.

4 Q. Well, in 2008 did you receive money from (Redacted)? Was he paying you?

5 A. For what?

6 Q. For anything?

7 A. There was -- there was nothing that I could say. I could not say we didn't -- he didn't
8 give me anything. But he was not giving me money. For what purpose?

9 Q. Did he send you money, Witness?

10 A. For what purpose?

11 PRESIDING JUDGE EBOE-OSUJI: Witness, can you just answer the question whether or not
12 he sent you money? And if --

13 THE WITNESS: If --

14 PRESIDING JUDGE EBOE-OSUJI: One second. If by the time he finishes, he hasn't
15 addressed your concern, then we will get back to it.

16 THE WITNESS: Yes, your Honour.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?

18 MR KHAN: I'm most grateful, Mr President.

19 Q. Witness, did you receive any money in any form at any -- from (Redacted) in the
20 year 2008?

21 A. If I receive, I can't remember, your Honour.

22 MR KHAN: Your Honours, I would go to Defence binder 2 at tab 171 -- 177, in fact.

23 Perhaps with the court officer's assistance I can have a copy for the witness. If a copy can be
24 given to the witness.

25 Mr President, if you can just bear with me a moment, please? It's in fact my fault,

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1 Mr President, I was looking at the wrong tab, it's tab 178 and it's KEN-D09-0043-0524.

2 Q. Witness, can you see that document?

3 A. This is for when now?

4 Q. Witness, can you see the document in front of you?

5 A. I can see.

6 Q. And you say you can see -- at the top it says "Account Holder (Redacted)." Can you
7 see that?

8 A. Yes, your Honour. Yes.

9 Q. You can see that underneath it it says "Phone Number (Redacted)." You see that?

10 A. Yes, your Honour.

11 Q. You see below it says "From -- "Time Period", then "From "2007-12-01". Can you see
12 that?

13 A. 27 when?

14 Q. "2007-12-01". Can you see that?

15 A. I can't see.

16 Q. To the right of "From". So "Phone Number (Redacted)." And below that "From", and
17 then to the right - it's the American formulation - 1 December 2007 written as "2007-12-01".

18 A. I can't see, your Honour.

19 MR KHAN: Can I ask for assistance? I'm sorry, could the document just be brought back to
20 me? Let us make sure that the witness has been given the right document.

21 THE WITNESS: This one from here or here?

22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, can you highlight where you want to have him
23 look at and give the document or page back to him.

24 MR KHAN: Yes, he's got the right document. Your Honours, I want to look in fact at (Redacted)
25 (Redacted), which is at page --

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1 PRESIDING JUDGE EBOE-OSUJI: First of all, the witness is struggling with "From", the
2 period.

3 THE WITNESS: Page?

4 PRESIDING JUDGE EBOE-OSUJI: Do you see that, Mr Khan?

5 MR KHAN: Yes, Mr President. Let me try again.

6 Q. Witness, can you go to the last page of that document, please. It's page 35 of 35 on the
7 bottom. Yes, that's the one. Can you see at the bottom it's also written KEN-D09-0043-0523?
8 Can you see that?

9 A. Yes, your Honour.

10 Q. And at the top of the page you see your name; is that right?

11 A. Yes, your Honour.

12 Q. And you see a phone number?

13 A. Yes.

14 Q. That's your number, isn't it?

15 A. It's mine.

16 Q. Yes. And underneath it it says "From"; is that right, "From"?

17 A. Yes, yes.

18 Q. And then this particular M-Pesa record is "2008-08-01". Can you see that?

19 A. 08?

20 Q. "2008-08" --

21 A. Yeah.

22 Q. -- "-01".

23 A. Yes.

24 Q. And I put it to you that's 1 August 2008.

25 A. Yes, your Honour.

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1 Q. Then it says "To", that's the period of the bill, is 31 March 2010. Can you see that below
2 "2010-03-31".

3 A. Yes.

4 Q. Can you see that?

5 A. Yes, your Honour.

6 Q. All right. And you see underneath that you have seven columns. On the left column
7 it says "Date & Time". Can you see that?

8 A. Yes, your Honour.

9 Q. And then for the first one -- for the second one it says "2008-08-15". Can you see that?

10 A. Yes, your Honour.

11 Q. That's 15 August 2008.

12 A. Yes, your Honour.

13 Q. Can you see under the third column "Transaction Details" it written, "Funds received
14 from (Redacted) Can you see that?

15 A. I can see that.

16 Q. And then "Status" "Completed". Next column "Money In" "2,000". Can you see that?

17 A. Yes, your Honour.

18 Q. Did you receive that money?

19 A. Yes. That if -- I cannot refuse that (Redacted) has been my close friend.

20 Q. Yes.

21 A. And if he help me for any kind of money -- that one is just -- I don't know why you
22 are -- you are quoting him giving me money --

23 Q. Yes.

24 A. -- or because of politics that is already happening in Kenya.

25 Q. And, Witness, at the bottom of that page you'll see another entry, it's (Redacted).

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- 1 A. Yes.
- 2 Q. And it's written quote, "Funds received ... (Redacted) ... 2,000" shillings.
- 3 A. Yes, your Honour.
- 4 Q. Do you see that?
- 5 A. Yes, your Honour.
- 6 Q. You also received that; is that right?
- 7 A. Yes, your Honour.
- 8 Q. Yes, I'm grateful. And during the 2007 campaign, you've told the Court (Redacted)
- 9 (Redacted). In fact, (Redacted) weren't you?
- 10 A. Yes. (Redacted)
- 11 Q. Yes. (Redacted); is that right?
- 12 A. Yes, your Honour.
- 13 Q. And you know (Redacted) don't you?
- 14 A. I know him.
- 15 Q. He was (Redacted)
- 16 A. That's what I said.
- 17 Q. Yes. And you were the -- -you've already told the Court, but (Redacted)
- 18 (Redacted) that's also correct, isn't it?
- 19 A. It's correct to be there.
- 20 Q. Thank you so much. And in your -- in your witness preparation before you gave
- 21 evidence, you also told the Prosecution that whilst you were in Langas, you were staying at
- 22 the home of (Redacted) that's right, isn't it?
- 23 A. Exactly, your Honour.
- 24 MR KHAN: Mr President, we can go to public session with your leave.
- 25 THE WITNESS: Before we go to public session, I cannot understand why -- I didn't deny

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1 that (Redacted) had been giving me money, or any whatever, or to me in perception this
2 money was for what? He was just a friend like any other politician who can give to a friend
3 not to do with any -- to do with anything with this kind of -- in this proceeding, your Honour.

4 MR KHAN: Thank you, Witness.

5 With the Court's leave, Mr President, perhaps we can move on to another issue.

6 PRESIDING JUDGE EBOE-OSUJI: In open?

7 MR KHAN: In open, in open, please.

8 PRESIDING JUDGE EBOE-OSUJI: Open session.

9 (Open session at 2.57 p.m.)

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

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 Mr Khan.

13 MR KHAN: Mr President, before I go on, perhaps I can seek to exhibit the last document
14 that I showed the witness, KEN-D09-0043-0489. He was taken particularly to 0523. And,
15 your Honour, he has confirmed various details. In light of that, your Honours, it's my
16 respectful submission the document should be given an exhibit number.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

18 MR GARCIA: No objection, your Honour, as to the details that have been confirmed by the
19 witness.

20 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman?

21 MS BUISMAN: We have no objection.

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

23 THE COURT OFFICER: The confidential document KEN-D09-0043-0489 will bear the
24 number EVD-T-D09-00305.

25 MR KHAN: I'm grateful.

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- 1 Q. Witness, you recall telling the Prosecution when you were interviewed by them that you
2 saw dead bodies of Kalenjins and Luos in Kisumu Ndogo. Do you remember that?
- 3 A. (Overlapping speakers) ... your Honour.
- 4 Q. I'm sorry, we didn't get your answer.
- 5 A. Yes, your Honour.
- 6 Q. And Kisumu Ndogo, Kisumu, K-I-S-U-M-U Ndogo, N-D-O-G-O.
7 And you saw that on 1 January 2008; isn't that right?
- 8 A. Yes, your Honour.
- 9 Q. You saw bodies that had been decapitated; isn't that right?
- 10 A. Yes, your Honour.
- 11 Q. In fact, you said that you saw bodies that were chopped up and two human heads
12 separated from them; is that right?
- 13 A. Yes, your Honour.
- 14 Q. And those heads were put on stakes in the ground; is that right?
- 15 A. Yes, your Honour.
- 16 Q. And you told the Prosecution one of those heads was the head of a Kalenjin and one of
17 those heads was the head of a Luo; is that right?
- 18 A. I can't remember, your Honour.
- 19 Q. You don't remember telling that to the Prosecution?
- 20 A. Yes, your Honour.
- 21 MR KHAN: Your Honours, I'll move on. The reference in fact is tab 15 of the OTP bundle,
22 KEN-OTP-0028-1104 at lines 2631 to 2636.
23 And perhaps that could be put on the screen.
24 Your Honours, at -- of the real-time transcript at page 102, line 13, it should be Luo,
25 L-U-O, not Luhya, Luo.

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1 And with the Court's leave if the ERN I've just mentioned, if that page could be put
2 on the screen, I'd be very grateful, KEN-OTP-0028. And with the Court's assistance
3 if we can go to page 1184. And can you see, at 1184 -- your Honours, I'm looking at
4 lines 2631 to 2636, and I'll read it.

5 Q. You're asked by the Prosecution investigator, quote, "The 2 with their heads removed,
6 what ethnicity were they?"

7 Your answer at 2634, and I quote, is "One Kalenjin ..."

8 And at 2636 you say, "... and one Luo." End quote.

9 Now, does that help refresh your memory about what you saw in 2000 -- 1
10 January 2008?

11 A. Yes, your Honour.

12 Q. And you will confirm, won't you, that at the time you saw that, you were with person
13 number 29? Do you have the Prosecution PIS form in front of you, Witness?

14 A. I didn't say we are with somebody.

15 MR KHAN: Perhaps could -- is there a PIS form with the witness?

16 THE WITNESS: But I didn't say I was in -- I can't remember I say I was with anybody.

17 MR KHAN: Mr President, I wonder with the Prosecution's assistance if the witness could be
18 given a copy of their PIS form so I don't have to reveal things in public.

19 PRESIDING JUDGE EBOE-OSUJI: Indeed.

20 MR KHAN: I'm grateful. I'm grateful. And if the other documents can be taken away
21 from the witness please so he can just stay focused. I'm grateful. Thank you so much.

22 Q. Witness, if you could be so kind to look at page 3, and we're in public, just look at the
23 name at number 29. Can you see that name at number 29?

24 A. Yes, your Honour.

25 Q. You were with that person, weren't you, when you saw those two heads?

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1 A. No.

2 Q. And you told the Prosecution that after those beheadings, you saw members of the Luo
3 community who had been attacked come out holding white handkerchiefs?

4 A. Yes, your Honour.

5 Q. They were calling for peace, were they not?

6 A. They were calling for peace.

7 Q. They were calling for reconciliation with the Kikuyus, members of the Kikuyu
8 community; is that right?

9 A. That was what I said, yes.

10 Q. And all of this was after you say you have seen a Kikuyu lady give birth to a child who
11 is then executed in front of you; isn't that right?

12 A. Yes, your Honour.

13 Q. And you told the Prosecution, do you recall, that you had never seen anything like this
14 before in your life?

15 A. Yes, your Honour.

16 Q. And that -- can I ask, Witness, it was quite a vivid thing you saw, wasn't it? It was
17 quite a traumatic thing that one saw on that day, on 1 January, seeing these two heads on
18 stakes in the ground?

19 A. Yes, your Honour.

20 Q. And they were put in the ground to scare people; is that right? Is that what you
21 thought? It was put in the ground to scare people?

22 A. It was, your Honour.

23 Q. Can I ask when the President invited the legal representative of the victims to ask you
24 questions about any suffering faced by members of other communities, why didn't you
25 mention this very terrible incident?

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1 A. He was specifically mentioning if I can quote, that Kalenjin who were killed
2 by -- accidentally by the same community. That's what I remember him saying that. I
3 remember saying that, your Honour. I wanted to explain that further, he was saying no,
4 community, he was specifying that if I can still remember.

5 Q. And these individuals, these two victims, the Luo and the Kalenjin person beheaded,
6 they were killed by Kikuyus; is that right?

7 A. That is according to what the locality, the area, I can confirm maybe it was Kikuyus.

8 Q. And that's what you told the Prosecution that you thought and heard that they were
9 Kikuyus --

10 A. Yes, your Honour.

11 Q. -- who had committed the killings and beheadings; is that right?

12 A. Yes, your Honour.

13 Q. And when you were in Langas, you would have heard about the shootings by
14 Mr Gennaro Mwangi killing, he was a Kikuyu. You would have heard about that?

15 A. Died later but I don't (indiscernible).

16 Q. You heard that Gennaro Mwangi was the police OCS?

17 A. Yes, your Honour.

18 Q. That's officer commanding the station; is that right?

19 A. Yes, your Honour.

20 Q. And that he had been gunning down members of the Kikuyu -- Kalenjin community
21 and members of the Luo community on sight. You heard about that?

22 A. Yes, I heard that allegations, your Honour.

23 Q. In fact, no doubt you would have heard, because it's big news, he killed it said about 20
24 Kalenjin and Luos personally?

25 A. Yes, I heard that complaint, but I didn't confirm.

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1 Q. And you also heard about the killing of about 14 to 15 youths in Matunda?

2 A. That one was in public domain.

3 Q. In the public domain. And these were members killed, citizens killed by members of
4 the Kikuyu community; is that right?

5 A. According to what I heard, it was police who gunned down at a place called Matunda.

6 Q. In fact, is it right that you heard that GSU officers were present when these Kikuyu
7 youths committed those killings and the police officers did nothing?

8 A. What I can confirm is that, your Honour, what I say that it's the police who gunned
9 down the group, which were in large numbers, otherwise according to other report, it will say
10 they could have killed a lot of Kikuyus in hundreds the same day.

11 Q. The throats of these victims had been slit, hadn't they?

12 A. I cannot confirm how they were killed.

13 MR KHAN: Mr President, I seek to play a video, it's KEN-D09-0028-0124. The transcript,
14 Mr President, your Honours, is at the Defence second binder at tab 104.

15 If that could be played, please?

16 Mr President, it's a four-minute video and I think all of it perhaps can be played. It
17 may be quickest in the end.

18 (Playing of the video excerpt KEN-D09-0028-0124)

19 MR KHAN:

20 Q. Witness, you saw that?

21 A. Yes, your Honour.

22 MR KHAN: Mr President, I'm going to read the transcript at KEN-D09-0043-0557 into the
23 record.

24 Q. And, Witness, you have it -- we'll give you a copy and if you could go through it in the
25 way to which you've become accustomed. If you see anything I read that does not properly

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1 reflect what you have heard said on that video, please don't hesitate to let the Court know.

2 Do you understand?

3 A. Yes, your Honour.

4 MR KHAN: Yes. If we could please have the assistance of the court officer? Thank you so
5 much.

6 Q. And, Witness, if you could turn the page please to page 2, and at the top, line 2, it's
7 written and I quote:

8 "Background/Place of recording Kipsomba Ward, Eldoret North Speaker 1 ..." quote

9 "... Joseph Kiptanui Kosgei. He went to school until ... until I went to seek admission
10 for him in Kapng'etuny, some distance away."

11 That's K-A-P-N-G apostrophe E-T-U-N-Y:

12 "Okay ... Here are the papers. How come he has not returned? What is going on?

13 Baas, I waited ... Baas, I called his aunt asking 'Did the young man get there?' She
14 told me, 'He did not arrive.'" End quote.

15 It continues at line 19 and I quote:

16 "I wondered what had happened. We waited till morning. Then I said: Now
17 what shall we do really? With Grandma having just passed on ... and then now ...

18 We want to go to town but ... We had already rushed Grandma's dead body to town
19 so that ... she could not stay at home! The whole family ought to be informed that
20 Grandma had passed on."

21 Witness, you've seen that so far, have you?

22 A. Yes.

23 Q. All of that's a correct translation?

24 A. Yes. Yes, your Honour.

25 Q. Thank you. And at line 31 Speaker 1 continues and I quote:

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1 "So he went. After he had gone, in the evening he failed to return, so that we could
2 learn if he had met with Aunt or not. So, we waited. When night came, I asked
3 myself, 'What might have happened?' I stepped outside. Then I saw ..." lightning
4 "... or rather fire in the region of Matunda, burning kweeep!" K-W-E-E-P (sic). "Then
5 as we were ... waiting, news reached us that some people had been murdered in
6 Matunda. I rushed to find a policeman located in the lower side close here - an AP
7 policeman."

8 You've seen that?

9 A. Yes, your Honour.

10 Q. AP policeman is an administrative police officer, is that right? Administration police?

11 A. Yes, your Honour.

12 Q. And kweeep, K-W-E-E-P (sic), does that have any meaning on 0558? On page 0 -- on
13 page 2 it says that "... I saw ..." lightning "... or rather fire, in the region of Matunda, burning
14 kweeep!" K-W-E-E-P (sic). Is that just an expression, or it has any meaning?

15 A. You say I saw?

16 PRESIDING JUDGE EBOE-OSUJI: Isn't that onomatopoeic, Mr Khan?

17 MR KHAN: Yes, Mr President. I'm grateful and I'll go on.

18 Q. Witness, page 3 at line 43 --

19 A. Line 43.

20 Q. -- Speaker 1 continues and I quote:

21 "I told him, 'Please assist us. Call there just in case the name ... just in case my son is
22 there.' He called and responded, 'No. He was not seen. There are people who
23 were killed and thrown on the bridge.' The son to the Tirops, who live close here ... a
24 report reached us, indicating that he had been killed."

25 And at line 55 Speaker 1 continues:

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1 "Aas." A-A-S. "We kept silent. The Area Councillor said, 'It is okay. I will go
2 and report to the Sirikwa station AP police so that they can give us a vehicle.' Then
3 they went. Then ... I myself did not go. I sent Kipkoros ..." K-I-P-K-O-R-O-S "... my
4 brother here. He went. And when he reached there, he asked me, 'What is his
5 body shape like?' I told him."

6 And then in square brackets:

7 "[He narrates how he described his son to the uncle. Some of the words he used in
8 the description are not so clear.]" Close brackets.

9 And then the transcript and translation continues:

10 "His fingers were not very straight."

11 At line 64, Speaker 1 -- at 63 he breaks down and cries, and then he says and I quote:

12 "Then he told me, 'My brother, things have turned out badly. He is indeed dead.
13 He has been murdered, truly.'" End quote.

14 Witness, so far that's a proper translation, isn't it?

15 A. It is.

16 Q. And then over the page, please, at 0560, line 71, and I quote as Speaker 1 continues:

17 "So we made phone calls; we went; we used Kipseet's car." K-I-P-S-E-E-T
18 apostrophe S. "... Kipseet's car. Kipseet and the councillors assisted us. We went
19 all the way to Kitale, where we were shown the body. The neck had been
20 split ..." -- "... had been slit." "The neck had been slit. He was slaughtered like an
21 animal." End quote.

22 Witness, that's correct, isn't it?

23 A. That's correct.

24 Q. You heard him say that his son's neck had been slit?

25 A. Yes, your Honour.

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1 Q. It continues at line 76:

2 "Really, it was cut like this."

3 And then Speaker -- that's Speaker 3 at line 76.

4 And Speaker 2 at line 78 says:

5 "Condolences, old man; condolences."

6 And then at 80 a Speaker 4, another gentleman on the video, says:

7 "That's enough. That's enough."

8 And then beneath that at 83 - line 83 - Speaker 1 continues and I quote -- he mumbles

9 and then cries and then says and I quote:

10 "I had said I absolutely do not even want to remember any more, but ... Anyway.

11 Sosoo.

12 It is okay."

13 And at 92 it continues, quote:

14 "Because he was my son whom I loved completely. He was helping me in all tasks,

15 and ..." he "... had recently gotten married and had one child. So now, we ran

16 about - we were being driven around by the Councillor. Okay, we put them in

17 Kipseet's car. How many bodies? Five. There was one from Cheplelachbei ..."

18 C-H-E-P-L-E-L-A-C-H-B-E-I. "... there was one from Kosyin ..." K-O-S-Y-I-N. "...

19 there was a Turkana, and there was one from the Tirop family. We brought all of

20 them, and offloaded them."

21 Witness, that's a true translation, isn't it?

22 A. It is.

23 Q. And Speaker 1 continues, if you go over the page, please, to 0561, 0561 at line 104:

24 "And it became a challenge to bury him; the reason being that it was very difficult for

25 relatives and aunties to come. So we stayed, but eventually we decided to just bury

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1 him. What else could we do? Because it was no longer possible to obtain ..."

2 brackets "... (burial) ..." close brackets "... permits, or to do anything. All offices were
3 closed. So, we buried him."

4 And at line 110 the speaker continues, and at 113 the translation is given and I quote:

5 "Now when we viewed the body, it was quite a dreadful day for me even - ..." Then

6 in square brackets it says the name is mentioned and it's unclear, close brackets. "...

7 knows - as my mum had passed on, and I had not buried her. The body was in the

8 mortuary. And here was the boy - murdered."

9 At 118 Speaker 4 interjects and says, quote:

10 "This one killed, while burial preparations for the other were going on."

11 "This one killed, while burial preparations for the other were going on."

12 And then Speaker 1 continues at line 123 and I quote:

13 "And preparations to inter ..." I think it should be intern. "... to inter grandmother

14 were ..."

15 PRESIDING JUDGE EBOE-OSUJI: "Inter" is fine.

16 MR KHAN: I'm grateful.

17 PRESIDING JUDGE EBOE-OSUJI: That's burial, I-N-T-E-R.

18 MR KHAN: Yes.

19 Q. "... to inter grandmother were going on. And this became a hurdle! And this child

20 was one whom I had relied on ..." -- "... whom I relied on completely. When you see me cry

21 like this, it is because it was such a crisis."

22 And he continues at line 130:

23 "And that essentially is how my child was murdered. We came and buried him right

24 there. Indeed, if you want to go and see, you'll find two graves there - my mum's

25 and my son's."

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- 1 Witness, you've seen all of that?
- 2 A. Yes, your Honour.
- 3 Q. And you heard about that incident?
- 4 A. I heard about many people killed in Matunda.
- 5 Q. And you heard about the people in Langas being killed by Gennaro Mwangi gunning
- 6 people down in Langas? You heard about that?
- 7 A. Yes, I heard that complaint.
- 8 Q. And you saw beheadings, including the head of a Luo and a head of a Kalenjin
- 9 individual?
- 10 A. Yes, your Honour.
- 11 Q. Yes. And did you also hear about the killing of a young Kalenjin boy who was killed at
- 12 a Total petrol station?
- 13 A. I cannot recall in whole people were killed by then.
- 14 Q. But just before the Kapsabet demonstration of 3 January, did you hear at that
- 15 demonstration people were very upset --
- 16 A. Yes, they were.
- 17 Q. -- that a young Kalenjin boy had just been killed at the Total petrol station?
- 18 A. I heard about that, but yes I didn't --
- 19 Q. And Lucas Sang, of course, you heard that he had been hacked down and his body
- 20 burnt?
- 21 A. Yes, your Honour.
- 22 Q. And you heard that -- you knew he was a famous athlete?
- 23 A. Yes, your Honour.
- 24 Q. His body had been chopped to pieces and set on fire. You heard about that?
- 25 A. I heard that.

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1 Q. And he was actually very much a symbolic figure in the region, wasn't he, because he
2 was a very well respected Olympian athlete, isn't that right?

3 A. Yes, your Honour.

4 Q. And the Kalenjins are -- well, Kenyans, but particularly Kalenjins are very proud of their
5 athletes; is that right?

6 A. Yes, your Honour.

7 Q. He was a very well-known person in the community; is that right?

8 A. I don't know what you are meaning now, because what I have in my testimony is
9 different from what you are talking about.

10 Q. Well, do you accept, Mr Witness, under oath here that he was a very well-known
11 individual in the community, a prominent farmer?

12 A. That one you can say it in the -- in my testimony I say he was somebody
13 having those -- yeah, he was well-known.

14 Q. And he had particular status because he was a leading athlete?

15 A. That one I said, but it's in my testimony just like (indiscernible) that.

16 Q. Yes. You see, Witness, what I'm getting at is under cross-examination I've taken you to
17 beheadings, to the killing of 20 or so civilians, Kalenjin members, by the OCS in Langas;
18 you've heard the testimony of a family who have lost their son whose throat has been slit; and
19 you've given evidence also in the cross-examination regarding the killing of a young Kalenjin
20 boy at a Total petrol station.

21 Now, when you were asked on 3 December 2014, at page 81, and I quote from line 15,
22 the Presiding Judge said this:

23 "Now the point" -- and I quote, "Now the point is whether they were Kalenjins who were
24 attacked by persons who were not Kalenjins."

25 And then Mr Nderitu says, "Thank you, Mr President."

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1 Then the Presiding Judge makes it very clear what he wanted, what the Chamber was
2 interested. In at line 18, quote:

3 "Kalenjins -- Kalenjins attacked by non-Kalenjins."

4 And then Mr Nderitu puts the question at line 20: "Mr Witness, would you tell us if
5 you are aware of Kalenjins, persons from the Kalenjin community, who were attacked
6 by non-Kalenjins? And perhaps at the same ... time if you could give evidence as to
7 whether you're aware of persons who were ... supporters of the ODM who were
8 attacked by either non-Kalenjins or ..." non-Kalenjin "... supporters?"

9 Do you remember that -- "non-ODM supporters." Do you remember that?

10 A. Maybe I didn't take it clear what I was saying. I was answering the question from the
11 victim lawyer who use very short time to ask me if I know somebody from the same Kalenjin
12 community who was killed accidentally or by -- by whatever, by the same group of Kalenjins.
13 That's what I -- then I could say I kind of -- I don't know. I couldn't -- I don't know --

14 Q. And you were --

15 A. -- who was killed by the same Kalenjin.

16 Q. Yes. And Witness, your answer at the bottom of page 81 at line 25, and I quote, this is
17 your answer, Witness:

18 "Your Honour, to follow that angle, I cannot remember or if there is any, I hope there is, but I
19 cannot confirm that." End quote.

20 So, Witness, what I am putting to you is when you were given a very clear
21 opportunity by the legal representative of the victims, and in your presence the
22 Presiding Judge had made it very, very, very clear what he was interested in, you
23 were unwilling to recognize any deaths or suffering by members of the Kalenjin
24 community, weren't you?

25 A. I am saying by --

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- 1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan --
- 2 THE WITNESS: -- here I am very clear --
- 3 PRESIDING JUDGE EBOE-OSUJI: One second, one second.
- 4 Mr Khan, the witness said that he had understood at that time where -- the subjects of
- 5 enquiry was a little different at the time, so can we give him now the opportunity to
- 6 address that question afresh?
- 7 MR KHAN: Well, Mr President, I've gone through it.
- 8 PRESIDING JUDGE EBOE-OSUJI: All right.
- 9 MR KHAN: I can move on given the time.
- 10 PRESIDING JUDGE EBOE-OSUJI: You have. All right. Let's stay with your transcript,
- 11 Mr Khan --
- 12 MR KHAN: Yes.
- 13 PRESIDING JUDGE EBOE-OSUJI: -- 0560. Maybe you can assist with inquiry, but I'll try.
- 14 Witness, at line 95, the speaker number 1, speaking to the number of bodies, says
- 15 quote:
- 16 "How many bodies? Five! There was one from Cheplelachbei, there was one from
- 17 Kosyin, there was a Turkana, and there was one from the Tirop family." Unquote.
- 18 Do those references signify ethnicity, do you know?
- 19 A. It refers, but the place which I was talking about, like Oshen (phon) to where the late
- 20 killed is a -- about 15 kilometres, which means they must have been going somewhere to do
- 21 something.
- 22 PRESIDING JUDGE EBOE-OSUJI: And that's --
- 23 THE WITNESS: Yes, it is -- the place is okay. The place is okay.
- 24 PRESIDING JUDGE EBOE-OSUJI: No, but what I'm trying to get at so we can understand
- 25 what's going on at the time to the extent that you can assist us is whether these references to

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1 Cheplelachbei, you said there was one from that place?

2 THE WITNESS: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: Would that indicate the ethnicity of what the
4 person -- the ethnicity of the --

5 THE WITNESS: Yes, the area is the -- the name of that place.

6 PRESIDING JUDGE EBOE-OSUJI: What ethnicity does that suggest to you?

7 THE WITNESS: This is the village called Cheplelachbei.

8 PRESIDING JUDGE EBOE-OSUJI: All right. When I say "ethnicity" some people say
9 "tribe".

10 THE WITNESS: Kalenjin.

11 PRESIDING JUDGE EBOE-OSUJI: I try not to use that word.

12 THE WITNESS: Kalenjin.

13 PRESIDING JUDGE EBOE-OSUJI: Kalenjin?

14 THE WITNESS: Yes, your Honour.

15 PRESIDING JUDGE EBOE-OSUJI: All right. And the other one, Kosyin.

16 THE WITNESS: Kosyin is also Kalenjin. It's a place.

17 PRESIDING JUDGE EBOE-OSUJI: And Turkana?

18 THE WITNESS: Turkana is a name of a Turkana, which is the person who was killed was a
19 Turkana. I think so.

20 PRESIDING JUDGE EBOE-OSUJI: And Turkanas and Kalenjins have ethnic affinity as in
21 relation, they -- ethnically related?

22 THE WITNESS: Not really, but there is -- they live in the same province and also -- yeah.

23 PRESIDING JUDGE EBOE-OSUJI: All right. Okay. And Tirop, the Tirop family?

24 THE WITNESS: It's Kalenjin.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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

2 And perhaps we could go to private session now.

3 PRESIDING JUDGE EBOE-OSUJI: Private session.

4 MR KHAN: Mr President, I'd ask, once again I'm a little bit dilatory, I apologise, just to
5 exhibit the video and the transcript that we've seen. The transcript KEN-D09-0043-0557 and
6 the --

7 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia?

8 MR GARCIA: Your Honour, I believe that the -- initially when Mr Khan was putting this to
9 the witness, the video and the transcript, it was an exercise to refresh the witness's memory on
10 certain events that would have occurred, but I don't think that -- that succeeded. I'm not
11 sure -- the witness did not confirm knowing about this particular incident, and it seems to me
12 that basically it's testimonial evidence in the form of a video.

13 PRESIDING JUDGE EBOE-OSUJI: Wasn't the point to put on record that Kalenjins were
14 killed? Was that the reason you brought the video in, Mr Khan?

15 MR KHAN: Indeed, Mr President.

16 MR GARCIA: Still, your Honour, it still remains testimonial evidence in the form of a video.
17 This -- this is the main issue. And obviously there are dangers of putting in untested
18 testimonial evidence in the Court record. In regards to this video, I understand that it's
19 simply a father telling a narrative of the death of his child but, notwithstanding that, the
20 principle still is that testimonial evidence must be tested before it goes in the Court record.

21 PRESIDING JUDGE EBOE-OSUJI: Ms Buisman?

22 MS BUISMAN: I'm sorry. We have no objection.

23 PRESIDING JUDGE EBOE-OSUJI: Witness, let me ask you again: From your appreciation
24 of the events at the time, from what you knew at the time, were Kalenjins also killed or do you
25 know that?

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1 THE WITNESS: I heard about this story of Kapsenbeuit (phon) area, about many youths
2 were killed, which youths really were -- were -- they were the same group of people who
3 were going to kill people at a certain shopping centre called Matunda, but they were catch up
4 in that place. But the community themselves who were killed were Kalenjin. I can confirm
5 that.

6 PRESIDING JUDGE EBOE-OSUJI: The video and the transcript are admitted as the next in
7 the Ruto Defence exhibits.

8 MR KHAN: I'm most grateful.

9 THE COURT OFFICER: The public video KEN-D09-0028-0124 will bear the number
10 EVD-T-D09-00306.

11 The related transcripts KEN-D09-0043-0557 will bear the number EVD-T-D09-00307.

12 This document is also public.

13 MR KHAN: I'm most grateful. And Mr President, with your consent, perhaps we could go
14 into private session.

15 PRESIDING JUDGE EBOE-OSUJI: For how long?

16 MR KHAN: Mr President, there may be -- for much of the session in fact -- maybe, in fact,
17 yes, I'm guided by Dato' Shyamala, perhaps I can do it maybe five minutes and then I can
18 come into public for a moment.

19 PRESIDING JUDGE EBOE-OSUJI: Private session.

20 *(Private session at 3.38 p.m.) Reclassified as Open session

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

22 MR KHAN: Thank you so much.

23 Q. Witness, you told the Prosecution and the Court that you worked at (Redacted)
24 (Redacted) Do you remember that?

25 A. Yes, your Honour.

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1 Q. What were you doing at (Redacted)? What was your job?

2 A. I was working (Redacted)

3 Q. And --

4 A. Manual working.

5 MR KHAN: Yes. And the spelling of (Redacted)

6 (Redacted)

7 Q. Witness, we're in private session. Could you let us know what was your salary
8 for that work?

9 A. I can't remember. It was too long, but it was so many -- but I was working (Redacted)
10 (Redacted)

11 Q. But can you give an estimate as to approximately how much you were earning?

12 MR GARCIA: Objection on relevance.

13 THE WITNESS: I can't remember, your Honour.

14 MR KHAN:

15 Q. Now, you told the Prosecution also that you worked as a shop assistant (Redacted)
16 (Redacted) Do you remember that?

17 A. No, I reject that one comes out.

18 Q. Well, let me do it in a different way. Do you remember telling the Prosecution
19 originally when you were interviewed that you had a job as a shop assistant (Redacted)
20 (Redacted)? Do you remember that?

21 A. I read, but it was not really -- I went there to work just in the morning to do things, but I
22 didn't work there.

23 Q. Because in your witness preparation, you actually recanted that and told the
24 Prosecution that was wrong, it's not true; is that right?

25 A. Yes, your Honour.

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1 Q. But can I ask you why did you tell the Prosecution you worked in that shop if you
2 didn't?

3 A. If I worked just to do something in the morning which is not official then I should say
4 no, it's not -- I should not put into my testimony.

5 Q. But you agree you told the Prosecution that it wasn't true?

6 A. But, your Honour, I have said, that is my position now that I didn't work there.

7 Q. Witness, primary education in Kenya is free, isn't it?

8 A. Yes, your Honour.

9 Q. Can you -- maybe it helps putting it a different way regarding (Redacted). Is it right
10 that (Redacted) of the type you have testified about, they earn
11 about, would have -- even today about a hundred to 200 shillings a day?

12 MR GARCIA: Objection on relevance, your Honour.

13 THE WITNESS: You want --

14 PRESIDING JUDGE EBOE-OSUJI: Witness, one second.

15 Mr Khan?

16 THE WITNESS: You want to --

17 MR KHAN: Mr President, the witness is here. It is relevant for reasons that will become
18 clear later.

19 PRESIDING JUDGE EBOE-OSUJI: How many questions to get to the relevant -- to make it
20 clear?

21 MR KHAN: Your Honours, I'm not going to do that just now. I'm going to do that later on
22 in my cross-examination.

23 PRESIDING JUDGE EBOE-OSUJI: All right.

24 MR KHAN:

25 Q. But, Witness, you can just let us know, is it --

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1 A. You want -- you want --

2 Q. -- approximately right a hundred to 200 shillings, or --

3 A. You want to deny that I didn't work there or what? What are you after?

4 PRESIDING JUDGE EBOE-OSUJI: Witness, listen.

5 THE WITNESS: Because I --

6 PRESIDING JUDGE EBOE-OSUJI: Witness, one second.

7 THE WITNESS: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: One second. I want you to listen to Mr Khan's questions
9 first, understand it, and then answer just that question. Mr Garcia is here, so are the Judges,
10 to make sure that the question is fair to you, okay? Just listen to the question, understand the
11 particular question and answer just that.

12 Mr Khan?

13 MR KHAN:

14 Q. Witness, if you can just help us, if I said that the daily rate for a manual worker in a (Redacted)
15 (Redacted) is about a hundred to 200 shillings, would I be far off, or could that be about
16 right?

17 A. I can't remember. It's long since I was there.

18 Q. Right. Now, I was going on about, moving on to primary education, and it's correct, is
19 it not, that primary education is free in Kenya?

20 A. Yes, your Honour.

21 Q. And you have told the Court already that you have (Redacted) children and (Redacted)?

22 A. Yes, your Honour.

23 Q. And could I ask, please, what are the age of your children, just their ages?

24 A. I have (Redacted)

25 Q. All right. Now, I can move on. I don't need to get more, Witness.

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- 1 Now, when you first contacted the Prosecution, you told them that you had (Redacted)
- 2 children and all (Redacted) were in primary school; is that right?
- 3 A. Yes, your Honour.
- 4 Q. And all (Redacted) of them were living in their rural home; is that right?
- 5 A. Yes, your Honour.
- 6 Q. Yes, thank you. Now, I'm going now to your jobs, so it's a new topic, away from your
- 7 family, sir. You joined (Redacted)
- 8 (Redacted) That's right, isn't it?
- 9 A. Yes, your Honour.
- 10 Q. And (Redacted) was a friend of yours at the time; is that right?
- 11 A. We were together in town, so I cannot say he can be a friend, can be anybody else.
- 12 Q. And (Redacted), you told the Court that you were working (Redacted)
- 13 (Redacted) isn't that right?
- 14 A. There was -- (Redacted)
- 15 Q. Yes. So that means you were not receiving -- you were not earning a salary; is that
- 16 right?
- 17 A. Yes, your Honour.
- 18 Q. Then a time came (Redacted)
- 19 (Redacted) do you remember that?
- 20 A. Yes, your Honour.
- 21 Q. (Redacted)
- 22 A. Yes, I get briefly, but not so much.
- 23 Q. How much did you get, sir?
- 24 A. I can't remember, but first -- I can't remember the amount, but sometimes refer, yeah.
- 25 But I cannot remember exactly.

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- 1 Q. Okay. And you told the Prosecution that (Redacted)
- 2 (Redacted) is that right?
- 3 A. If I can remember, yes.
- 4 Q. And at that point when (Redacted) is that right?
- 5 A. Yes, your Honour.
- 6 Q. And you've testified and told the Prosecution also that (Redacted)
- 7 (Redacted); is that right?
- 8 A. Yes, your Honour.
- 9 Q. And (Redacted)
- 10 (Redacted) That's right, isn't it?
- 11 A. If I can put that position, but (Redacted)
- 12 Q. But (Redacted) that was one of the things?
- 13 A. I can say one of them.
- 14 Q. And the other thing was (Redacted); is that right?
- 15 A. But he has so many including -- he was doing many things also, your Honour.
- 16 Q. Yes. Now, between (Redacted), you were working for your friend
- 17 (Redacted) that's right, isn't it?
- 18 A. That is briefly, yes, your Honour.
- 19 Q. Yes. And you were working (Redacted)?
- 20 A. Yeah, in -- yeah.
- 21 Q. What was your salary then, sir?
- 22 A. I can't remember any money, but it was -- I was helping him in making (Redacted)
- 23 (Redacted)
- 24 Q. Yes. I'm not denying you were helping him, I'm just asking, please cast your mind
- 25 back to (Redacted) --

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- 1 A. No.
- 2 Q. -- and let us know how much --
- 3 A. No.
- 4 Q. -- you were getting.
- 5 A. He could give me any amount of money because he was just a friend.
- 6 Q. Yes.
- 7 A. I could help him, but yes.
- 8 Q. Yes. So what money did you get in (Redacted) working for
- 9 (Redacted)? Can you remember or not?
- 10 A. I can't remember.
- 11 Q. You can't remember --
- 12 A. Yes, your Honour.
- 13 Q. -- (Redacted)? Okay. Now, can you remember, you were in fact based in (Redacted) for that
- 14 work; is that right?
- 15 A. Yes, your Honour.
- 16 Q. And at the time you were living in (Redacted)
- 17 A. Around that place, yes.
- 18 Q. And in fact, (Redacted) and (Redacted), it's only about 15 minutes' drive between the two
- 19 places?
- 20 A. Yes, your Honour.
- 21 Q. And between (Redacted) and (Redacted), you were also working for the (Redacted)
- 22 (Redacted); is that right?
- 23 A. Yes. After I came back, yeah.
- 24 Q. Yes. (Redacted)?
- 25 A. Yes, your Honour.

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1 Q. And what were you earning in between (Redacted) from (Redacted)

2 (Redacted)?

3 A. I can confirm from this side that I didn't get -- because he put me (Redacted)

4 (Redacted)

5 (Redacted), and then he was just giving me some money, but he was not actually

6 giving me a real salary.

7 Q. I'm talking, Mr Witness, about your earnings from (Redacted)

8 between (Redacted). Do you remember saying that you worked, you did some

9 work for (Redacted)?

10 A. Yes. (Redacted). That doesn't mean that I was getting any salary.

11 Q. Okay. Did you receive money --

12 A. No.

13 Q. -- for that work?

14 A. No.

15 Q. No money at all?

16 A. Sometimes (Redacted). But I didn't get, (Redacted)

17 (Redacted)

18 (Redacted)

19 Q. (Redacted) What money were you earning

20 from -- well, (Redacted) are you talking about?

21 A. (Redacted)

22 Q. (Redacted)

23 A. (Redacted)

24 Q. (Redacted)

25 A. Yes.

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- 1 Q. So what money did you get from (Redacted) in that period? That's my question.
- 2 A. I can't remember amount --
- 3 Q. Okay.
- 4 A. -- but it was not official that I get that money.
- 5 Q. Now, the (Redacted) was (Redacted); is that right?
- 6 A. Yes.
- 7 Q. And in fact, his full name is (Redacted); that's right, isn't it?
- 8 A. Yes, your Honour.
- 9 Q. (Redacted)
- 10 A. Yes, your Honour.
- 11 Q. And various other people worked for (Redacted). For example, (Redacted) used to work
- 12 for (Redacted); is that right?
- 13 A. Yes.
- 14 Q. Then he left and joined -- (Redacted)
- 15 A. Yes, your Honour.
- 16 Q. (Redacted)?
- 17 A. Yes, your Honour.
- 18 Q. (Redacted).
- 19 A. Yes, your Honour.
- 20 Q. (Redacted)
- 21 A. Yes, your Honour.
- 22 Q. (Redacted). Let me
- 23 move on. (Redacted), he was part of (Redacted), wasn't he?
- 24 A. Early, yes.
- 25 Q. (Redacted)

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- 1 A. In the early stage of (Redacted).
- 2 Q. Yes. He's the person that (Redacted)
- 3 (Redacted)?
- 4 A. Yes.
- 5 Q. A (Redacted)?
- 6 A. Yes.
- 7 Q. And (Redacted); is that right?
- 8 A. Yes, your Honour.
- 9 Q. He's (Redacted), isn't he?
- 10 A. Mmm-hmm.
- 11 Q. I'm sorry, could you give an answer please.
- 12 A. Yes, your Honour.
- 13 Q. Yes. Thank you so much. He's (Redacted); is that right?
- 14 A. Yes, your Honour.
- 15 Q. And he's somebody that you kept on speaking to even after you became an ICC witness;
- 16 is that right?
- 17 A. I've never speak to (Redacted). You can confirm that.
- 18 Q. And (Redacted). You remember that, don't you?
- 19 A. If he has, but he has never talked with me. Even if you can go and confirm with him,
- 20 I've never.
- 21 Q. Are you aware he (Redacted)?
- 22 A. I don't know. Yes, (Redacted).
- 23 MR KHAN: Mr President, I'll go to tab 80A of binder 1.
- 24 (Microphone not activated)
- 25 PRESIDING JUDGE EBOE-OSUJI: Your microphone.

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- 1 MR KHAN: Sorry, it's KEN-OTP-0101-2653 is the ERN for this document.
- 2 Q. Witness, are you aware that (Redacted)
- 3 (Redacted)? Are you aware of that?
- 4 PRESIDING JUDGE EBOE-OSUJI: Witness, did you hear the question?
- 5 THE WITNESS: Maybe I didn't read even the story. I cannot confirm.
- 6 MR KHAN: Mr President, I think we can go into public session for the remainder, I hope.
- 7 PRESIDING JUDGE EBOE-OSUJI: Public session.
- 8 (Open session at 3.53 p.m.)
- 9 MR KHAN:
- 10 Q. Witness, I've put to you a document --
- 11 THE COURT OFFICER: We're in open session, Mr President.
- 12 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 13 Mr Khan, you have another -- you have seven more minutes to the end of the proceedings for
- 14 today.
- 15 MR KHAN: Indeed. I'm most grateful, Mr President.
- 16 Q. Witness, I've put on -- on screen you'll see an article from the Mars Group Kenya
- 17 entitled "Politicians Intimidating Poll Violence Witnesses." Date: Wednesday 18
- 18 November 2009 by Mathews Ndanyi, N-D-A-N-Y-A -- I. You see that, don't you?
- 19 A. Yes, your Honour.
- 20 Q. And you're aware that one of his regular sources, if you turn the page, if you look at the
- 21 next page, 2654, at the first paragraph, you see one of the sources of Mathews Ndanyi is Ken
- 22 Wafula and the Centre for Human Rights and Democracy; is that right?
- 23 A. That's what I can see here.
- 24 MR KHAN: And, your Honours, if we can go then to tab 80B, KEN-D09-0020-0048, if that
- 25 could be put on the screen.

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1 Q. While it's happening, Witness, in relation to the article I've just referred to, "Politicians
2 Intimidating Poll Violence Witnesses," had you read that article? Had you read the article
3 about -- from Mathews Ndanyi?

4 A. I been reading his story, if I was in Kenya I could read it.

5 Q. And so you can confirm this article is written by him, it's the type of article he would
6 write dealing with witnesses at the ICC?

7 A. This is for when? This date of --

8 Q. Wednesday, 18 November 2009.

9 A. I cannot confirm when, but yes, I can confirm.

10 Q. He was writing those kind of articles, yes.

11 So we're now moving on to the next document at tab 80B, KEN-D09-0020-0048. And it's
12 from The Star, and (Redacted).

13 (Redacted)

14 And it starts, quote:

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted) End quote.

19 Can you see that?

20 A. Yes, your Honour.

21 Q. Then the next paragraph -- well, four paragraphs down, it says, it quotes an unnamed
22 source, quote:

23 (Redacted)

24 (Redacted)

25 (Redacted) End quote.

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1 You've seen that?

2 A. Yes, your Honour.

3 MR KHAN: And, your Honour, for the last three minutes perhaps we can go into private
4 session with the Court's leave.

5 PRESIDING JUDGE EBOE-OSUJI: Private session.

6 *(Private session at 3.57 p.m.) Reclassified as Open session

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

8 MR KHAN: Mr President, my next question is based upon tab, in the Defence second file,
9 tab 215, which is KEN-OTP-0129-0564. So it's at tab 215 of the second Defence binder, tab
10 215. And it's an investigative report dated 25 of July 2012.

11 Q. Witness, had you -- do you recall having discussions with (Redacted) in which
12 you had said that it was said that you were in contact with (Redacted)?

13 PRESIDING JUDGE EBOE-OSUJI: Let's stop for a minute.

14 THE WITNESS: I have --

15 PRESIDING JUDGE EBOE-OSUJI: One second, one second.

16 (Redacted)

17 (Redacted)

18 Mr Khan, proceed.

19 MR KHAN: I'm grateful.

20 Q. Witness, now, do you recall in (Redacted) having a discussion with (Redacted)
21 (Redacted) regarding your being in communication with (Redacted)?

22 A. I have never talked to (Redacted). That is even -- that (Redacted) may be there,
23 if -- if -- if he is your witnesses, then I don't know. I've never tell him that I've contact him.

24 MR KHAN: Mr President, if the document on the screen can be taken off? The ERN that I
25 wanted to be put on is KEN-OTP-0129-0564.

Trial Hearing
Witness: KEN-OTP-P-0658

(Private Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: It will be taken off. And we will adjourn here.
- 2 MR KHAN: I'm most grateful.
- 3 PRESIDING JUDGE EBOE-OSUJI: We go to closed session.
- 4 *(Closed session at 4.01 p.m.) Reclassified as Open session
- 5 MR KHAN: And if the other document can be taken off the screen, please.
- 6 THE COURT OFFICER: We're in closed session, Mr President.
- 7 PRESIDING JUDGE EBOE-OSUJI: The witness will be ushered out of the courtroom, please.
- 8 (The witness stands down)
- 9 PRESIDING JUDGE EBOE-OSUJI: Court will rise.
- 10 THE COURT OFFICER: All rise.
- 11 (The hearing ends in closed session at 4.01 p.m.)* Reclassified as Open session
- 12 RECLASSIFICATION REPORT
- 13 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 14 2013, the version of the transcript with its redactions becomes Public.