

Trial Hearing
Witness: KEN-OTP-P-0789

(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 Wednesday, 14 January 2015
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 call the case.
16 THE COURT OFFICER: (Interpretation) Thank you, Mr President. Situation in
17 the Republic of Kenya, in the matter of The Prosecutor versus William Samoei Ruto
18 and Joshua Arap Sang, ICC-01/09-01/11.
19 We are in public session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
21 Appearances, are they the same, or are there any changes?
22 MS ZAGO: The only change is that Mr Steynberg is not present this morning.
23 Thank you, Mr President, and good morning your Honours.
24 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
25 MR NARANTSETSEG: The same, your Honours. Thank you.

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- 1 MR KOECH: No changes, your Honour, and Mr Sang is present.
- 2 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 3 Mr Hooper?
- 4 MR HOOPER: And the Ruto defence is constituted in the same manner. Thank
- 5 you.
- 6 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 7 Mr (Redacted)
- 8 MR (Redacted) (via video link): I'm here assisting the witness.
- 9 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 10 Welcome back, Witness.
- 11 And we are in open session.
- 12 Ms Zago, you will continue.
- 13 MS ZAGO: I will continue, Mr President. I suggest that perhaps we might briefly
- 14 go into private session to remind the witness of certain precautions.
- 15 PRESIDING JUDGE EBOE-OSUJI: Some things, all right. We will go into private
- 16 session for that purpose then.
- 17 MS ZAGO: Thank you.
- 18 *(Private session at 9.38 a.m.) Reclassified as Open session
- 19 THE COURT OFFICER: (Interpretation) We are in private session, Mr President.
- 20 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 21 WITNESS: KEN-OTP-P-0789 (On former oath)
- 22 (The witness gives evidence via video link)
- 23 QUESTIONED BY MS ZAGO: (Continuing)
- 24 MS ZAGO:
- 25 Q. Good morning, sir.

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1 A. Good morning.

2 Q. Yesterday before the break you mentioned that you (Redacted) attended the
3 installation of Mr Ruto as a Kalenjin elder in Eldoret in mid-2006. I'd like now to ask you
4 some follow-up questions, (Redacted)
5 (Redacted)
6 (Redacted) Is that clear to you?

7 A. That is clear.

8 MS ZAGO: Then we will go now in public session.

9 PRESIDING JUDGE EBOE-OSUJI: So, Witness, again, I want to underscore what the
10 lawyer has told you. We are going into public session now. Be very careful to not
11 indicate anything that's unique in the public session that would lead people to
12 connect that you (Redacted) all right?

13 THE WITNESS: Your Honour, well, (Redacted), so
14 I don't know if I'm going to divorce that from the information that I'm going to give.

15 PRESIDING JUDGE EBOE-OSUJI: I'm sure you can try. I know you're able to do that.
16 You can give the information from the perspective of somebody who's there. You were not
17 the only one who was there, (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 THE WITNESS: That's clear.

22 PRESIDING JUDGE EBOE-OSUJI: Thank you.

23 We will now go to the public session.

24 (Open session at 9.41 a.m.)

25 THE COURT OFFICER: (Interpretation) Mr President, we are in public session.

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1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 MS ZAGO:

3 Q. Sir, to your knowledge, what was the purpose of this gathering, the gathering
4 that we just mentioned?

5 A. It was to install Mr William Ruto as the Kalenjin elder.

6 Q. What do you mean by installing Mr Ruto as a Kalenjin elder? What does it
7 mean?

8 A. It means -- well, it is self-explanatory. It is to install him as a Kalenjin elder.

9 An elder is somebody who is respected, who is in position of authority and who
10 would more or less like speak on behalf of the community.

11 Q. And what happened during this gathering?

12 A. Well, I don't know all the details, but, of course it was a gathering, people came,
13 and Ruto was there with other group of elders and he was supposed to be installed as
14 an elder.

15 Q. Can you describe what you observed during this event?

16 A. Well, there were so many leaders who were -- who were invited or who were
17 there. Many leaders spoke and there were very many people who attended the
18 gathering.

19 Q. Who were these leaders who spoke?

20 A. There were various leaders, but mostly the ones I remember is Raila Odinga
21 was there. Other leaders were Musalia Mudavadi and others -- an array of leaders
22 from across --

23 Q. From across what?

24 A. From across the community and from other communities.

25 Q. From across which community?

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1 A. There were leaders from the Luhya community. There were others from the
2 Luo community. There were very many leaders. I cannot remember all of them.

3 Q. And you also said that there were very many people who attended?

4 A. That is correct.

5 Q. Can you tell us more or less how many people you observed attending this
6 gathering?

7 A. Well, it was a huge gathering. I cannot -- you know, it was not like in a
8 stadium where you can know the seating, you know, the seating space. But it was
9 just open ground and there were very many people. I cannot, you know, put a
10 figure to it.

11 Q. Without necessarily speculating, could you please give us an indication whether
12 the number of people were in the fifty, hundred, thousands, could you please give us
13 an indication?

14 A. Well, of course I will have to speculate, because I don't know exactly the
15 number, but between 20 -- let me say 20,000 to 50,000.

16 Q. And you said before that it was in Eldoret, but where exactly in Eldoret?

17 A. Yeah, there's a sports ground in Eldoret.

18 Q. And what is the sports ground exactly?

19 A. Actually the name is called Eldoret Sports Ground.

20 Q. Yes, I'm trying to understand is it a specific location, is it a building, is it an
21 open space? What is it exactly?

22 A. Yeah, that's exactly what I said. It was an open space. The space -- the place
23 is called Eldoret Sports Ground.

24 Q. You said that the leaders -- some of the leaders who attended also spoke. What
25 did they say?

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1 A. Well, there was just ordinary sentiments of a rally and of course most of them
2 were praising or were -- had a lot of praises for the leader who was being installed.

3 Q. What do you mean ordinarily sentiments of a rally? What do you mean by
4 that?

5 A. Well, the event was installing of William Ruto as a Kalenjin elder and most of
6 the leaders were praising or had, you know, words of praise for the leader who was
7 being installed.

8 Q. Was there anybody presiding over this event?

9 A. Well, of course the gist of the event was there were leaders, specific leaders,
10 who were tasked to perform the installation; otherwise, it was just an -- a rally where
11 of course probably there was an MC and just leaders speaking and then they go to
12 the -- to the installation part of it.

13 Q. Sir, did you say there was an MC, or could you please spell the word that you
14 used?

15 A. MC is a master of ceremony, like somebody who would coordinate or moderate
16 the rally or the event, of course who was supposed to welcome leaders and to
17 probably say who was there and to give the -- you would say the schedule of the -- or
18 the programme of the rally or of the event.

19 Q. So was there an MC or not?

20 A. There was a master of ceremony.

21 Q. Who was it?

22 A. I have no way of knowing who it was.

23 Q. What was the language spoken at this event?

24 A. It was mostly English or Kiswahili because it was a rally that everybody
25 attended.

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1 Q. And these other people who attended, not the leaders that you mention or other
2 leaders, but the other people who attended, who were they?

3 A. With all due respect, Counsel, I might not be able to be in a position to know
4 who exactly attended the rally. It was a rally in Eldoret town. A lot of people came.
5 I cannot be able to know who exactly attended the rally.

6 Q. Do you know if these people attending were from a particular region or town in
7 Kenya?

8 A. Well, for me it will be speculation, but because it was Mr Ruto was being
9 installed, I would imagine that a bigger chunk of those who attended may have come
10 from the Kalenjin community and also the residents of Eldoret, the Luo community,
11 Luhya, Kamba, Turkana, Maasai, anybody who would have -- might have had an
12 interest in attending that rally.

13 Q. You mentioned that Mr Ruto at this event was being installed as a leader. The
14 leader of what or whom?

15 A. I said he was being installed as a Kalenjin elder.

16 Q. And you also just mentioned that there was an installation part of this event.
17 Could you please clarify, was it a separate event or was the same event that you
18 attended?

19 A. No, it was in the same rally, but there were specific instances where there were
20 blessings or special blessings from other elders from the Kalenjin community which
21 was done in a separate room within the -- there was a -- a building and there was a
22 next room where the -- the elders went there to give special blessings for Mr Ruto.

23 Q. Which elders?

24 A. The elders from the Kalenjin community.

25 Q. And did you attend? Were you present at this blessing in this separate room

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1 that you mention?

2 A. No, I did not attend. It is for few chosen people to give blessings and this is a
3 private ceremony done by chosen elders.

4 Q. And how do you know about it?

5 A. I come from the Kalenjin community. I know their customs and traditions.

6 Q. And what happened after these special blessings?

7 A. Well, Mr Ruto and accompanied by the other leaders came back to the venue of
8 the -- of the -- of the gathering.

9 Q. Did Mr Ruto say anything at this event?

10 A. Yeah, of course after coming from the special blessings and having been now
11 installed as a Kalenjin elder, he had his time to now talk to the gathering.

12 Q. What did he say?

13 A. I don't remember the specific words, but I know he was talking about now that
14 he was a Kalenjin elder and he thanked and appreciated those in -- in attendance.

15 Q. Did he say anything else?

16 A. Beyond what I've just said?

17 Q. Do you have any recollection of Mr Ruto saying anything else that you just
18 said?

19 A. I have no further recollection.

20 Q. Was there any reaction to Mr Ruto's addressing the gathering?

21 A. Well, as it was expected of course there was a lot of jubilation and you would
22 say happiness from those who were in the attendance.

23 Q. Did the other leaders who were present address Mr Ruto or said anything after
24 he returned from the blessings?

25 A. Yeah, other leaders of course still had, you know, addressed Mr Ruto at the

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1 gathering insofar as now that he's a Kalenjin elder and they were just full of praises
2 for him.

3 Q. And during this ceremony or this gathering, how was Mr Ruto dressed?

4 A. Well, in Kalenjin tradition of regalia.

5 Q. Can you explain what is the Kalenjin tradition of regalia?

6 MR HOOPER: Can I just -- I don't know where we're going on this because I've
7 certainly never had any notice of anything that Mr Ruto was meant to say from this
8 witness's statement, and secondly, the Prosecution produced at an earlier point a
9 video where we can see how he's dressed, for example, and indeed what he says. So
10 I don't know quite where we're going on this. We've had no notice.

11 PRESIDING JUDGE EBOE-OSUJI: Ms Zago?

12 MS ZAGO: On the point of notice, I respectfully direct my learned colleague to
13 certain portions of the witness's statement, in particular --

14 MR HOOPER: Yes, I've had no notice of anything that Mr Ruto is said to have said
15 from this witness's statement. Perhaps you can confirm that.

16 MS ZAGO: I can --

17 PRESIDING JUDGE EBOE-OSUJI: But haven't we moved beyond that point,
18 Mr Hooper, about what the witness was supposed to have said?

19 Ms Zago, are you still questioning the witness about, if anything, Mr Ruto would
20 have said?

21 MS ZAGO: No, your Honour. It was a natural follow-up question from the flow of
22 the questioning. I believe it's uncontroversial if I ask a witness a follow-up question
23 that is naturally following up from his answers.

24 MR HOOPER: Very well. There is --

25 PRESIDING JUDGE EBOE-OSUJI: I thought it was about what was -- (Overlapping

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1 speakers)

2 MR HOOPER: Yes, we've all done that.

3 MS ZAGO: This is going to be the highlight of this trial.

4 MR HOOPER: As I've said, we've all done that at some time in our careers.

5 PRESIDING JUDGE EBOE-OSUJI: Are you all right?

6 MS ZAGO: Thank you, Mr President, I am.

7 MR HOOPER: Yes.

8 PRESIDING JUDGE EBOE-OSUJI: The point, Mr Hooper, was that, if I recall, was
9 the question about how Mr Ruto was dressed and it was at that point that you rose.

10 MR HOOPER: Yes, and I'm -- well, I rose in respect of speech because I've had no
11 notice of that and it was several questions asked on that. And, secondly, in respect
12 of dress, I'd merely underscore this at this stage that the Prosecution are aware that
13 they've got a video of these -- of this ceremony clearly showing what Mr Ruto is
14 wearing. And I wouldn't want them to, as it were, be in a position of misleading the
15 Court.

16 MS ZAGO: On this subject, the witness is clearly in a position to provide further
17 explanations as is just mentioned concerning the Kalenjin tradition which obviously
18 the video and the images cannot explain or contextualize. Therefore, the witness has
19 knowledge, he comes from a specific community and he will be in a position to assist
20 the Court in understanding what the dressing means.

21 PRESIDING JUDGE EBOE-OSUJI: Proceed.

22 MS ZAGO: Thank you.

23 Q. Sir --

24 A. Go on.

25 Q. -- I asked you before if you could explain what is the Kalenjin tradition of

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1 regalia that you referred to?

2 A. Well, the --

3 PRESIDING JUDGE EBOE-OSUJI: The traditional regalia that you mentioned, that's
4 what the lawyer is asking about at this stage if you can just focus on that.

5 THE WITNESS: Are you saying the meaning of the regalia?

6 PRESIDING JUDGE EBOE-OSUJI: First, if you can first describe it and then we take
7 it in stages.

8 THE WITNESS: Well of course I've heard the counsel say that they had a video of
9 how he was dressed and so perhaps you will -- she will help me to know exactly, but
10 there was a shield, animal skin and a spear with the head -- there was the head --

11 PRESIDING JUDGE EBOE-OSUJI: Headdress.

12 THE WITNESS: Head gear, yeah, put on the head.

13 MS ZAGO:

14 Q. Anything else?

15 A. No.

16 Q. And what is the meaning of this regalia that you described?

17 A. Well, traditionally it's always worn by elders in the community.

18 Q. And this would be the Kalenjin community, correct?

19 A. That is correct.

20 Q. How long did this gathering last?

21 A. It was a day's event.

22 Q. But did you recall how many hours it lasted?

23 A. Well, if I can recall, it started probably at 10 a.m. in the morning and ended
24 around about 1600 hours.

25 Q. What was the end result of this gathering?

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1 A. Well, it was the fact that Mr Ruto was installed as a Kalenjin elder.

2 Q. And what was the meaning of that?

3 A. That Mr Ruto was now officially an elder of the Kalenjin community.

4 MS ZAGO: Mr President, with your permission could we go to a private session
5 please?

6 PRESIDING JUDGE EBOE-OSUJI: Yes, we would.

7 Witness, was there feasting on this event?

8 THE WITNESS: Well, I'm not sure, but I'm sure people had some meals to eat.

9 I don't recollect that properly.

10 PRESIDING JUDGE EBOE-OSUJI: For this business of making speeches alone and
11 meetings, we will go into private session.

12 *(Private session at 10.05 a.m.) Reclassified as Open session

13 THE COURT OFFICER: (Interpretation) We are in private session, Mr President.

14 (Redacted)

15 (Redacted)

16 (Redacted)

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12 (Redacted)

13 Q. And you said before that this ceremony was to install Mr Ruto as a leader?

14 A. That is correct.

15 Q. Is there -- is there a particular word in Kalenjin to refer to a leader?

16 A. Well, I -- I can't remember.

17 Q. Do you need some time to think about it?

18 A. Yeah, maybe you can ask me eventually when I -- when we are going to go for a
19 break and then I can remember.

20 Q. Please think about it and I'll return to that later.

21 A. All right.

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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12 (Redacted)

13 Q. Do you recall what was the main -- what were the main topics in the PNU
14 political agenda?

15 A. Well, I cannot really recall their, the PNU for example, manifesto, but I know
16 that it was about the re-election of Mwai Kibaki, who was the sitting president then
17 for a second time in office.

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

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- 1 PRESIDING JUDGE EBOE-OSUJI: Proceed, Ms Zago.
- 2 MS ZAGO: Thank you, Mr President.
- 3 PRESIDING JUDGE EBOE-OSUJI: We must take our morning break now.
- 4 Witness, it is time for the morning break. We will rise for 30 minutes and return
- 5 then.
- 6 The Court will rise.
- 7 THE COURT USHER: All rise.
- 8 (Recess taken at 11.00 a.m.)
- 9 (Upon resuming in open session at 11.36 a.m.)
- 10 THE COURT USHER: All rise.
- 11 Please be seated.
- 12 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 13 Ms Zago, we are in the public session. How long do you expect to finish? Are we
- 14 still -- you did indicate that you will be finishing today and that remains the case?
- 15 MS ZAGO: I'll make all attempts to finish by the end of today. Certain -- the
- 16 testimony has taken a certain turn and it might --
- 17 PRESIDING JUDGE EBOE-OSUJI: One second now. Let's hold on.
- 18 (Redacted) -- let's go into private session for a minute.
- 19 *(Private session at 11.37 a.m.) Reclassified as Open session
- 20 THE COURT OFFICER: (Interpretation) We're in private session, Mr President.
- 21 PRESIDING JUDGE EBOE-OSUJI: Delete from the delayed broadcast my mention
- 22 of (Redacted) just now. I don't know if that's already taken for granted that the public
- 23 knows that. But can the witness be excused for a minute, or how do we do this? Is it
- 24 possible to just cut the audio but then that will cut out Mr (Redacted) as well, isn't it?
- 25 It will cut out Mr (Redacted). Why don't we excuse the witness for a second.

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1 THE COURT OFFICER (via video link): Yes, Mr President. The witness will be
2 excused.

3 PRESIDING JUDGE EBOE-OSUJI: Yes.

4 (The witness exits the video-link room)

5 THE COURT OFFICER (via video link): Mr President, the witness has been taken
6 out of transmission room. Do you want us to hear what is going to be said, or do
7 you want me to cut the audio also?

8 PRESIDING JUDGE EBOE-OSUJI: No, no. You can leave it on. That's the reason
9 why we excused him.

10 THE COURT OFFICER (via video link): Understood, Mr President.

11 PRESIDING JUDGE EBOE-OSUJI: Yes.

12 Ms Zago?

13 MS ZAGO: Mr President, in light of the answers that the witness has been providing
14 as of the end of yesterday and today, the Prosecution is seriously envisaging the
15 possibility at some point to bring a certain application. However, we would like to
16 in fairness to the witness and also in light of the procedure that your Honours have
17 laid down in the past for other witnesses in similar circumstances, that we go through
18 the process of attempting to refresh the memory of the witness, provide the
19 possibility of -- to the witness to explain the certain -- if there are inconsistencies or
20 still maintain inconsistencies, and then the Prosecution, depending on the answers of
21 the witness to this process of refreshing memory and confronting, with your leave,
22 the witness with certain parts of a statement. The Prosecution is contemplating
23 bringing an application to declare this witness hostile.

24 PRESIDING JUDGE EBOE-OSUJI: We have to be careful generally by comments not
25 about your indication of possibility of an application for hostile witness, but even so,

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1 but in general we need to be very careful to make the questioning relevant.

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13 So think about these things. We don't need to get into a debate about them. Just

14 letting you know so that we keep it relevant. We don't want to go through an

15 exercise when at the end of it it doesn't help us in the process, that's all I'm saying.

16 MS ZAGO: Thank you, Mr President. I'm guided.

17 PRESIDING JUDGE EBOE-OSUJI: So we will bring the witness back in.

18 Do we remain in private session?

19 MS ZAGO: Yes, please, Mr President.

20 (The witness enters the video-link room)

21 THE COURT OFFICER (via video link): The witness is back in the transmission

22 room, Mr President.

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

24 Witness, we had to excuse you because there was some discussions we needed to

25 have about the general direction of the case that did not require your presence. Also

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1 it would not have been appropriate for you to be in when we conducted that
2 discussion, just so you know, but Ms Zago will now continue your
3 examination-in-chief.

4 Ms Zago, please proceed.

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10 Q. And I also asked you before whether there was a term, a word in Kalenjin for
11 leader and you said that you will think about it.

12 A. Yeah.

13 Q. Have you thought about it? Do you have an answer?

14 A. Yes.

15 Q. What is your answer?

16 A. Well, an elder who has been installed in that manner would be referred to as
17 boyob kook.

18 Q. Could you please spell it for the record.

19 A. B-O-Y-O-B and K-O-O -- K-O-O-K. Also, it could be also referred informally as
20 kirgit, K-I-R-G-I-T.

21 Q. And is -- what is the literal meaning of this word?

22 A. Yeah, the first word would be an elder or a respectable, you know, elder in
23 the -- society. The next word is, as I said, it is used informally and the analogy is
24 derived from a herd of cattle that has maybe a big bull and the bull ordinarily would
25 be leading the herd to either water, watering point, or to a grazing area and it would

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1 be used informally to refer to an elder or to a leader in that community.

2 Q. Are we speaking about the Kalenjin community?

3 A. That is correct.

4 Q. And was this specific word "kirgit" ever used in the context of this installation
5 ceremony?

6 A. Yeah, various leaders, especially those from the Kalenjin community, who
7 would use that word when addressing the -- those who were in attendance.

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22 PRESIDING JUDGE EBOE-OSUJI: Ms Zago, can you hold on to that question for a
23 minute. I want to clear something up with the witness.

24 Witness, my question to you is about these two words "boyob kook" and "kirgit". As
25 far as you know, can there be more than one boyob kook? Now, I don't know of the

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1 plural, but you know what I mean. Can there be -- in terms of boyob kook, can there
2 be more than one at a time?

3 THE WITNESS: Yes, of course. In any community or in -- particularly in Kalenjin
4 community, boyob kook is almost like a status so there could be several of them. But
5 if you're referring to one of them then it would be boyob kook.

6 PRESIDING JUDGE EBOE-OSUJI: All right. So the question naturally leads me to
7 the second terminology "kirgit". Can there be more than one at a time?

8 THE WITNESS: Yes, it's also the same thing, it is a matter of status, but as I've said
9 earlier that it was derived from an analogy of an herd of cattle and there could be one
10 bull in that. And you could have several herds and you could still have several
11 kirgits depending on what time you're referring to.

12 PRESIDING JUDGE EBOE-OSUJI: At the time of the installation of Mr Ruto as a
13 kirgit, was there another one at that time that you would recall?

14 THE WITNESS: Well, if my memory serves me right, it's at that point it was in terms
15 of the general political direction of that community. There are other boyob kook
16 who were of course in the community, but in terms of politics or in terms of national
17 politics, William Ruto was being projected as now that kirgit of the Kalenjin
18 community. Before that you would say he was the former president Daniel Arap
19 Moi who was the kirgit of the Kalenjin community insofar as the national politics was
20 concerned.

21 PRESIDING JUDGE EBOE-OSUJI: So do I understand it then that Mr Ruto would
22 have been the chief bull, if I may use that expression, of the Kalenjin community at
23 the time of his installation?

24 THE WITNESS: That is correct.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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12 Q. Sir, do you recall providing a statement to the Office of the Prosecutor on

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- 11 PRESIDING JUDGE EBOE-OSUJI: Proceed, Ms Zago.
- 12 MS ZAGO: Thank you, Mr President.
- 13 Q. Sir, did you recall giving a statement to the Office of the Prosecutor on (Redacted)
- 14 (Redacted)
- 15 A. Yes, I recall.
- 16 MS ZAGO: For the record, your Honours, I'm referring to the document in OTP
- 17 bundle under tab number 1, ERN number KEN-OTP-0087-0277, redacted version
- 18 number 5. And I'd also like to kindly ask the court officer to pull the document for
- 19 the witness to examine. Please show the witness the first page, which ERN number I
- 20 just called. Thank you.
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21 So the lawyer is free to ask you questions on the basis of that statement. What she's doing

22 now is what we call refreshing memory. If you looked at that and that

23 refreshed your memory, then you can proceed and say yes, you now remember

24 something. Anything can refresh your memory, (Redacted)

25 (Redacted) So you look at this

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1 statement to see if that refreshes your memory. If your memory is refreshed, then
2 you can tell the Court the truth as to what you now recall to be the case. It may well
3 be that refreshing the memory can refresh your memory in other directions as well.
4 So look at this statement and answer the question. If your memory is refreshed, then
5 you tell us what it now is according to you. Do you understand?

6 THE WITNESS: I understand, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you.

8 MR HOOPER: Your Honour, before we go on, can I just say that for our part we still
9 feel we're engaged in a somewhat novel procedure. Of course, we'll see what
10 questions result in terms of a memory-refreshing exercise, and I bear very much in
11 mind what your Honour has just said, that a statement, as it were, being roundly
12 compromised by previous or subsequent statements by a witness can still serve in
13 some respects as a memory-refreshing document.

14 But what I'm concerned about is that we can very easily be entering into a complete
15 artifice here, an artificial exercise of memory refreshing. And I say that because,
16 unlike previous witnesses that we've had, this witness has engaged with the
17 Prosecution and he sat with them as recently as earlier this month. They seem to
18 have spent a long time, the Prosecution, before they came to him that --

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

20 MR HOOPER: This is significant.

21 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, you must hold on. Let's be careful.
22 The witness is in the courtroom.

23 MR HOOPER: Yes, I appreciate that.

24 PRESIDING JUDGE EBOE-OSUJI: Yes.

25 MR HOOPER: There's nothing I'm going to say that he's unaware about that --

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1 PRESIDING JUDGE EBOE-OSUJI: All right.

2 PRESIDING JUDGE EBOE-OSUJI: -- or sign post, as it were, if I can put it like that.

3 PRESIDING JUDGE EBOE-OSUJI: Yes. Briefly, briefly then.

4 MR HOOPER: Very briefly. I've been given ten pages of clarifications by this
5 witness by the Prosecution. In other words, he sat down with the Prosecutor. He's
6 gone through his statement. They've discussed it with him. He's given his
7 explanations and clarification. He's done so paragraph it would seem by paragraph.
8 And so isn't this so-called memory-refreshing exercise that's being proposed now
9 artificial? It's wholly artificial.

10 The Prosecution have called their witness, set up their witness and now presumably
11 want to contradict their witness when they have had full notice, not only of his
12 position generally, but specifically in respect of paragraphs where he's given his
13 explanations. This is a very different situation to the other witnesses that the Court
14 has had. This is not a witness who would, for example, and I'm looking at your
15 decision of transcript 131 of 8 September of last year where you refer to certain criteria.
16 I'm not going to go through those now, but your Honour would be aware of them and
17 your Honour's colleagues would be aware of those.

18 We have a very different situation to that. We have a witness who has sat with the
19 Prosecution and gone through it with them. And now they're like an Aunt Sally,
20 setting them up to knock them down. It shouldn't -- it's not a process of which I am
21 familiar. This is not --

22 PRESIDING JUDGE EBOE-OSUJI: But my question to you, Mr Hooper, does your
23 submission help the witness? Short of that, the Prosecution would have to make the
24 ultimate application on this; isn't that the case? Does that assist the witness then?
25 Because what they are -- they are taking it in stages. They have asked a question

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1 respecting a certain answer. Perhaps the answer might be within the compass of
2 even the clarification. They have those. And if they don't get the answer they're
3 expecting - and I don't know what it is they're expecting - they may have to move to
4 the next step; isn't that the case?

5 MR HOOPER: Well, I conceded at the outset that it might be that even where there's
6 been a going-through with a statement, that there may be parts of that statement
7 which can, as it were, legitimately be used as a memory-refreshing exercise. But I
8 merely indicate that in this case where the witness has sat down with the Prosecution
9 and the Prosecution have gone through paragraphs, they're not in a position of being
10 surprised and therefore this question of memory refreshing is an exercise that's taken
11 place before and it's artificial to suggest that this is the exercise that's being conducted
12 here. It's an artifice by the Prosecution.

13 PRESIDING JUDGE EBOE-OSUJI: All right.

14 MR HOOPER: And it's one that they've really called upon themselves.
15 So, yes --

16 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, we have to leave it there.

17 MR HOOPER: -- it might well be and I -- we'll see if Ms Zago goes to parts of this
18 particular statement, for example, that haven't been the subject of specific
19 clarifications and where the Prosecution are genuinely taken by the surprise --

20 PRESIDING JUDGE EBOE-OSUJI: All right. All right.

21 MR HOOPER: -- yes, we can see that's a possibility and we wait to see what in fact
22 develops.

23 PRESIDING JUDGE EBOE-OSUJI: All right.

24 MR HOOPER: Thank you, your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Let's leave it there.

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1 Ms Zago, proceed.

2 MS ZAGO: Thank you, Mr President.

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1 PRESIDING JUDGE EBOE-OSUJI: One second.

2 MR HOOPER: -- about all of his reasons.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, even if it did, my question is what
4 unfairness is it to any Defence, who would have been implicated by this witness's
5 testimony in his statement, if the witness said what he said and is now being given an
6 opportunity to answer questions and he said what he said, which you're relying on
7 for your present submissions? Isn't it something you would take up at the end of the
8 case and make your submissions and that's the end of it instead of us debating this
9 matter now?

10 MR HOOPER: Well, of course, one's not in a position now to see how we might be
11 at a later point, but at the moment we're trailing material, or material is being trailed,
12 before the finders of fact.

13 PRESIDING JUDGE EBOE-OSUJI: You see, if we agreed with your submission, the
14 matter would then be to discharge the witness right now. Isn't that the case?

15 MR HOOPER: I'm not saying that's the position. I'm saying the Prosecution have
16 called this witness and they have done so with eyes wide open.

17 PRESIDING JUDGE EBOE-OSUJI: So wait and let them finish their
18 examination-in-chief. If you need to cross-examine you will do so and, beyond that,
19 submissions will be made at the appropriate time.

20 Please proceed, Ms Zago.

21 MS ZAGO:

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Trial Hearing
Witness: KEN-OTP-P-0789

(Private Session)

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24 Q. Sir, please also look at document 0142-0033 under tab 21, OTP bundle. Do you
25 see it?

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1 A. So I'm told.

2 Q. Do you recognize it?

3 A. Yes.

4 Q. Were you the author of this letter?

5 A. Yes, I wrote it myself.

6 Q. And do you stand by its content?

7 A. Yes, in toto.

8 MS ZAGO: Thank you, sir.

9 Mr President, with your leave the Prosecution would like to make a certain
10 application at this point.

11 PRESIDING JUDGE EBOE-OSUJI: With the witness in the courtroom, or to be
12 excused?

13 MS ZAGO: Without the presence of the witness, thank you.

14 PRESIDING JUDGE EBOE-OSUJI: All right, Witness, can you step out for a
15 moment.

16 (The witness exits the video-link room)

17 THE COURT OFFICER (via video link): Mr President, the witness has been excused.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.
19 Proceed.

20 MS ZAGO: Thank you, Mr President. On behalf of the Prosecution, I would like to
21 formally request that the Chamber declare this witness hostile and allow the
22 Prosecution to cross-examine him. Your Honours in your decision of 8 September
23 last year, your Honours set out a series of factors, non-exhaustive, but factors to be
24 considered in the determination of hostility of the witness.

25 The Prosecution submits that today it is apparent that this witness's evidence so far

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1 and the witness's -- the witness himself has deliberately and systematically departed
2 from his previous statement to the Prosecution. He has resiled entirely from
3 incriminating aspect contained in that statement and on several occasions has
4 been -- he has been evasive in his general demeanour, been systematically, we submit,
5 adverse to the Office of the Prosecutor.

6 The crucial areas of incriminating evidence that the witness has departed from are, (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 For all these reasons the Prosecution respectfully requests that the Chamber declare
16 the witness hostile and allow the Prosecution to cross-examine the witness.

17 Thank you, Mr President.

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

19 Counsel for the Defence?

20 MR KOECH: Mr President, so far as we are concerned, the Prosecutor has for the
21 last one hour or so been actually cross-examining the witness without having him
22 declared hostile, and that is because in the clarification session that they had, at that
23 particular juncture the witness resiled from his previous testimony. We do not have
24 any legal reasons for objecting to his declaration of hostility, save it was said that in
25 reality cross-examination has already begun on this particular issue before this

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1 declaration of hostility, but other than that we have no objection to his being declared
2 hostile.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

4 MR HOOPER: We do. I see no basis upon which the witness can properly be
5 called hostile. It's not the same as adverse. The objectives that the Prosecution have
6 said is their object in having this declaration made is in order to cross-examine,
7 whereas Mr Koech has said and we have all observed that cross-examination has been
8 going on in fact much longer than just the hour because it started before the luncheon
9 adjournment.

10 PRESIDING JUDGE EBOE-OSUJI: But that's a separate matter, isn't that the case,
11 from whether or not there are grounds to declare the witness hostile?

12 MR HOOPER: Whether there is sufficient grounds? Well --

13 PRESIDING JUDGE EBOE-OSUJI: No, no, what I mean is Mr Koech said, well, the
14 thing had already been -- I think he said cross-examination had already begun. Let's
15 assume he said cross-examination has already been done.

16 MR HOOPER: Yes.

17 PRESIDING JUDGE EBOE-OSUJI: The question is that is a separate matter, isn't that,
18 from whether or not there are grounds to declare hostility to begin with?

19 MR HOOPER: Well, we are in really relatively uncharted territory as we know,
20 and I well appreciate the manner in which the Chamber has previously negotiated as
21 it were the obstacles that are presented by this kind of situation and generally observe
22 that of course you, the Chamber, have a wide discretion as to the manner in which
23 questions take place in the course of the trial, and I assume that it is on that exercise of
24 discretion that in fact the kind of questions that have been asked over the last few
25 hours have been tolerated and permitted.

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1 PRESIDING JUDGE EBOE-OSUJI: And there is no jury.

2 MR HOOPER: And indeed I don't in any way seek to criticise the exercise of that
3 discretion.

4 The situation though that we have here with this witness is not the same as the
5 position that we had with the previous witnesses. There may indeed have been a
6 departure from an original account given to the Prosecution, an account given in (Redacted)
7 (Redacted). But we have sitting beside that

8 an account by this witness as to his reasons for what in fact amounted to his hostility
9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 Now, this isn't a matter that's taken the Prosecution by surprise, because they have
15 been on notice as we have seen from the documents that have just been referred to,
16 they have been on notice for a considerable time that this was the position that this
17 witness was assuming, and we also know because as I have said already we have ten
18 pages of clarifications in which indeed many paragraphs are addressed, including
19 further paragraphs that have been referred to by way of reminding the witness his
20 memory of earlier events that were dealt with by the Prosecution in the course of their
21 meeting with the witness and where the witness in fact stated things and his
22 explanation for things.

23 So this isn't the situation, the classic situation where the caller of the witness finds
24 himself compromised and embarrassed and prejudiced by unexpected evidence from
25 his own witness, the classic situation of course that gives rise to the remedy of calling

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1 for or nominating or asking for a witness to be declared hostile in order to be
2 cross-examined.

3 And indeed if we look at the particular document the Prosecution have referred to at
4 their bundle tab 21, he deals with these matters and other matters in previous
5 correspondence as we have seen. But let us look at that particular item without just
6 making a brief reference to it as my friend has made.

7 (Redacted)

8 (Redacted)

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9 PRESIDING JUDGE EBOE-OSUJI: All right, Mr Hooper --

10 MR HOOPER: So there we've got that. I am just amazed that any Prosecutor can
11 then call a witness --

12 PRESIDING JUDGE EBOE-OSUJI: That is a criticism -- one second.

13 MR HOOPER: -- having that laid before them.

14 PRESIDING JUDGE EBOE-OSUJI: You can make that criticism at Bar Society
15 meeting, but right here in our ruling of 8 September did we not say that declaration of
16 hostility is without prejudice to the Chamber's ultimate determination regarding the
17 truthfulness of the witness's testimony? If that is the case, isn't this an argument you
18 can make at the right time?

19 MR HOOPER: The time is now, in my submission.

20 PRESIDING JUDGE EBOE-OSUJI: All right.

21 MR HOOPER: Here is -- here is a witness who you have had the opportunity of
22 seeing and again I acknowledge and appreciate that one of the critical nettle which
23 the Court knew that it had to approach with great care was what it described as
24 "uncomfortable concerns about premature findings of credibility" unquote and I
25 understood that and recognize that.

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1 What we have here --

2 PRESIDING JUDGE EBOE-OSUJI: See that's where we -- Mr Hooper, we have to
3 move on because we don't have a lot of time.

4 MR HOOPER: All right. Well, let me just wrap up with this, that on your criteria
5 has the witness been hostile in general demeanour? Has he? Or has he presented
6 himself as someone who is or may be telling the truth about his reasons and his
7 motives.

8 PRESIDING JUDGE EBOE-OSUJI: The Prosecution argues that the witness has been
9 in whole or in part deliberately or systematically inconsistent with the prior statement.
10 That was one of the criteria outlined earlier. Are you saying that hasn't happened?
11 That is what you must argue, isn't it?

12 MR HOOPER: What I'm submitting is that the label of hostile is an unnecessary
13 label. It was introduced into arguments at an earlier point, but to what extent we are
14 assisted by that I'd say in this kind of situation probably not very much if anything at
15 all.

16 What is the objective? What is the point? Where -- where do we get with the actual
17 evidence that's then introduced or the material that's introduced? Probably nowhere.
18 This is not a Rule 68 application after all. So if that is the only portal for admission
19 then what we really have here is really the exercise of the Bench's discretion that my
20 friend be permitted to cross-examine the witness given the disparity between present
21 evidence and his earlier account. My submission is that in fact hostility is irrelevant
22 to that. You have the discretion. If you feel that the Prosecution can assist the
23 Court by asking this question -- these questions of this witness to perhaps explain the
24 differences and the reasons for them, then for my part I wouldn't stand in any way in
25 face of that exercise of a discretion.

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1 PRESIDING JUDGE EBOE-OSUJI: That brings you back to Mr Koech's point that the
2 point --

3 MR HOOPER: That in fact that discretion has been exercised as I have
4 acknowledged and sat through for the last hour or so. So hostility with the various
5 barbs perhaps that that brings in its train perhaps isn't a matter that really need
6 concern us.

7 PRESIDING JUDGE EBOE-OSUJI: Okay. Now let's leave it there. Let's leave it
8 there.

9 MR HOOPER: If the Court is minded to continue to allow the Prosecution to
10 cross-examine the witness, I don't think it needs the label of hostility.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 Ms -- yes, go on please briefly.

13 MR NARANTSETSEG: Briefly, your Honour. Thank you very much, Mr President.

14 We support the Prosecution's application, your Honour. We highlight three facts.

15 First of all, this witness had recanted his previous statement given to the Prosecution

16 even before he appeared before your Honours. That's a fact. Secondly, your

17 Honours, according to our observation, this witness has departed consistently and

18 systematically from the main points of the statement he has also given to the

19 Prosecution. In our respectful submission, your Honour, that is also a fact.

20 Thirdly and lastly, your Honour, we also observe that this witness has been extremely

21 evasive. He declined, simply declined, to answer many pointed questions asked by

22 the Prosecution counsel by simply referring some of the personal feelings, personal

23 issues, (Redacted)

24 Your Honours, in conclusion we would submit that by becoming evasive and not

25 answering questions and also systematically departing from his previous statement

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1 this witness has become obviously adverse to the Prosecution's case and we believe
2 that in addition, the manner, the tone and content of this witness's testimony we can
3 also observe that this witness has become supportive of the Prosecution -- Defence
4 case, excuse me, (Redacted)

5 (Redacted)

6 So we conclude this way and we support the Prosecution's application. Thank you.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you very much, Mr Narantsetseg.

8 Prosecutor --

9 MR (Redacted) (via video link): Mr President, does the Court wish to hear me on this
10 issue? Because it may involve the self-incrimination of --

11 PRESIDING JUDGE EBOE-OSUJI: No, Mr (Redacted)

12 MR (Redacted): -- (overlapping speakers) statement.

13 PRESIDING JUDGE EBOE-OSUJI: Mr (Redacted) that will not be necessary. Thank
14 you very much.

15 Ms Zago, we are almost done for the day. Mr Koech raises the point that what is the
16 purpose? If you recall the ruling of 8 September does say that the purpose of
17 making such an application -- or such a ruling, rather, the purpose of making such a
18 ruling is to facilitate the calling party in further eliciting evidence which may assist
19 the Trial Chamber in the ultimate determination and Mr Koech says you have already
20 embarked upon that exercise. What is left? Anything more? Assuming we do
21 grant you your request.

22 MS ZAGO: Thank you, Mr President.

23 In our submission the criteria established by the Chamber are very clear to the
24 reasons and the grounds to declare a witness hostile. The purpose of
25 cross-examining the witness further is to precisely allow the Prosecution to use the

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1 necessary tools to assist the Chamber in appreciating the reasons that Mr Hooper has
2 referred to that led the witness to provide a certain testimony and allow the Chamber
3 in its later assessment of the totality of the evidence of this witness to assess and give
4 the weight that your Honours believe should be given at the end of the day with the
5 information that will be established and we submit will only in the present
6 circumstances the Prosecution will only be able to elicit from the witness under the
7 specific circumstances of a cross-examination.

8 I hear what Mr Koech has submitted before. However, in my respectful submission
9 these were the road map or the steps that were --

10 PRESIDING JUDGE EBOE-OSUJI: Your point is that --

11 MS ZAGO: -- established.

12 PRESIDING JUDGE EBOE-OSUJI: Your point is that you want to examine really the
13 motivation; isn't that it?

14 MS ZAGO: Yes, your Honour.

15 (Trial Chamber confers)

16 PRESIDING JUDGE EBOE-OSUJI: The Chamber grants the application. The
17 Chamber is satisfied that the criterion of deliberate or systematic inconsistency with
18 the prior statement is established.

19 Yes, we have heard the witness indicate why he said he had resiled from his previous
20 statement. The Prosecution's view is that they want to test those reasons. It is for
21 those reasons that the Chamber grants the request of the Prosecution.

22 Ms Zago, we will rise now, but we want you to finish the exercise within 30 minutes
23 tomorrow.

24 MS ZAGO: Thank you, your Honours. I will do.

25 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

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- 1 THE COURT USHER: All rise.
- 2 *(The hearing ends in private session at 4.02 p.m.) Reclassified as open session
- 3 RECLASSIFICATION REPORT
- 4 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
- 5 2013, the version of the transcript with its redactions becomes Public.