

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 Thursday, 15 January 2015
10 (The hearing starts in open session at 9.39 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, the case please.
16 THE COURT OFFICER: (Interpretation) Thank you, your Honour.
17 Situation in the Republic of Kenya, in the case of The Prosecutor versus
18 William Samoei Ruto and Joshua Arap Sang, case reference ICC-01/09-01/11.
19 We are in open session, your Honour.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
21 Are there any changes in appearance since yesterday?
22 MR STEYNBERG: Yes, your Honours. This morning Ms Lara Renton is not with
23 us and I'm back, your Honours, Anton Steynberg. May I also take this opportunity
24 to congratulate Lucio Garcia on his recent and long overdue appointment as P-4 trial
25 lawyer.

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- 1 MR NARANTSETSEG: Good morning, your Honours. The same, thank you.
- 2 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 3 MR KOECH: We are the same, your Honour.
- 4 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 5 MR HOOPER: Yes, we are constituted in the same way.
- 6 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 7 Let's do this. For -- and, Mr (Redacted), we note your presence as well.
- 8 MR (Redacted): (Via video link) Thank you, Mr President.
- 9 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 10 In terms of planning, this witness's testimony needs to finish tomorrow, by tomorrow,
- 11 because of the logistics involved in the next witness's testimony. It's particularly
- 12 intricate.
- 13 Ms Zago, you have 30 minutes. I will cut you off at the end of 30 minutes. After
- 14 that we move straight to the testimony of -- sorry, the cross-examination. So who
- 15 will go first on the Defence side?
- 16 MR KOECH: I believe we will, your Honour.
- 17 PRESIDING JUDGE EBOE-OSUJI: All right.
- 18 And, Mr Hooper, would you be cross-examining as well and how long if so?
- 19 MR HOOPER: Yes, I may be, your Honour. Perhaps we could have shorter lunch
- 20 breaks in order to achieve the --
- 21 PRESIDING JUDGE EBOE-OSUJI: I still would need your indication of time to see if
- 22 it is necessary to do that.
- 23 MR KOECH: For our part, your Honour, we intended to cross-examine for a period
- 24 of three days. We will squeeze it into lunch-time tomorrow, maybe to spill over a bit,
- 25 but we'll try to finish by the lunch hour tomorrow.

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- 1 PRESIDING JUDGE EBOE-OSUJI: You will try to finish by lunch tomorrow?
- 2 MR KOECH: Yes.
- 3 PRESIDING JUDGE EBOE-OSUJI: When you say "by lunch," you mean before or
- 4 after?
- 5 MR KOECH: By the lunch-break.
- 6 PRESIDING JUDGE EBOE-OSUJI: You will be done before the lunch-break
- 7 tomorrow?
- 8 MR KOECH: We hope to.
- 9 PRESIDING JUDGE EBOE-OSUJI: All right.
- 10 MR KOECH: Yes.
- 11 PRESIDING JUDGE EBOE-OSUJI: And, Mr Hooper, how long so far do you
- 12 anticipate your cross-examination will take if any? You said you may.
- 13 MR HOOPER: Yes, I may.
- 14 PRESIDING JUDGE EBOE-OSUJI: And how long do you think?
- 15 MR HOOPER: Well, your Honour's set the time limits and so I know the -- I won't
- 16 exceed that.
- 17 PRESIDING JUDGE EBOE-OSUJI: All right, thank you. Let's proceed then.
- 18 Ms Zago, your 30 minutes begins now. Do we go in closed, or private session or do
- 19 we remain in open session?
- 20 MS ZAGO: Private session, please.
- 21 PRESIDING JUDGE EBOE-OSUJI: Let's go to private session.
- 22 By the way, if -- sorry.
- 23 *(Private session at 9.42 a.m.) Reclassified as Open session
- 24 THE COURT OFFICER: (Interpretation) We are in private session, Mr President.
- 25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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1 You don't have to take 30 minutes. It would be much appreciated if you can do it in
2 less time than that.

3 MS ZAGO: I'll do my best, Mr President. Thank you.

4 WITNESS: KEN-OTP-P-0789 (On former oath)

5 (The witness gives evidence via video link)

6 QUESTIONED BY MS ZAGO: (Continuing)

7 Q. Sir, good morning.

8 A. Good morning to you.

9 Q. Yesterday I questioned you about your original statement to the Prosecution,
10 and for the sake of clarity that is at tab 1 and the ERN number is 0087-0277. It would
11 be good if you had it in front of you.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

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1 MS ZAGO:

2 Q. Isn't it correct, sir, that on (Redacted) you were interviewed again by the

3 Office of the Prosecutor? And I'm referring to document 0097-0408 at tab 4.

4 If the court officer could also pull it up.

5 Sir, do you have the document in front of you?

6 A. Yes. Yes, I'm told.

7 Q. This is your statement to the -- to the OTP; is that correct?

8 A. That is correct.

9 Q. And is it correct that the initials at the bottom right of this page are yours?

10 A. Yeah, that is correct.

11 Q. And at page 8 of this document, the last page of this document, four last digit

12 0415, there is a signature at the end?

13 A. That is correct.

14 Q. And that is your signature, correct?

15 A. Correct.

16 Q. And isn't it true, sir, that in your statement, in this statement, you told the

17 investigators that on (Redacted) you had spoken to (Redacted) and that (Redacted)

18 quote, "... told me that he had been told that I had gone with 'those' people meaning

19 the ICC ... I asked him who had told him this and he told me that he was aware that

20 I was a witness (Redacted) . He asked me not to do it because it would bring

21 suffering upon my family (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 End of quote.

3 Did you tell this to the investigators?

4 A. Yes, I did.

5 Q. Is this true?

6 A. Indeed, that is true.

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

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7 (Redacted)

8 (Redacted)

9 Q. And isn't it a fact, sir, that in the same interview you told the investigators that
10 from (Redacted) repeatedly asked you to withdraw as a witness?

11 A. That is correct.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

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21 (Redacted)

22 Q. Sir, isn't it a fact that in the same interview with the Office of the Prosecutor,
23 you told the investigators that on (Redacted) also called you and
24 told you that she "... had heard that ..." you were "... an ICC witness ..." and that you "...
25 should not ..." testify "... because it was very dangerous and ..." I quote, "... would put

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1 the entire family at risk." Isn't that true?

2 A. That is true.

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

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1 A. Yeah, that is true.

2 Q. Sir, isn't it a fact that most of your family was against you testifying in this case
3 for the Prosecution?

4 A. That is a fact.

5 Q. And that most of your family wanted you to withdraw from the process?

6 A. That also is a fact.

7 Q. And this is what made you recant and withdraw as a witness; isn't that a fact?

8 A. Yeah, but not entirely true. I have enlisted other various reasons why I wanted
9 out of the process and I think the information is available to you.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

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1 PRESIDING JUDGE EBOE-OSUJI: Ms Zago, two minutes.

2 MS ZAGO: Yes.

3 Q. Sir, isn't it true that you're still protecting your family by not giving evidence
4 (Redacted)

5 A. That is -- that's possible of course.

6 Q. Sir, I put to you that the reason why you haven't provided the Court with
7 information -- incriminating information (Redacted) in this case is because
8 you fear for your family and yourself as in fact you told the Court on Monday; isn't it
9 true?

10 A. Well, let me put it this way: I have given reasons why I withdrew from the
11 case, all right? So pushing me to what you would want to believe that that is the
12 reason why I withdrew from the case will not help this process. The fact is I have
13 reasons why I wanted to withdraw. One was my family situation. Secondly is the
14 (Redacted)

15 I had so many other reasons. I don't know why you're sticking to the fact that I was
16 protecting my family. Everybody does that. I protect my family.

17 PRESIDING JUDGE EBOE-OSUJI: Ms Zago, we have to leave it there.

18 MS ZAGO: Yes, Mr President. I am completed.

19 The only remaining issues would be to seek EVD numbers to a certain number of
20 documents with your leave.

21 PRESIDING JUDGE EBOE-OSUJI: How many are those?

22 MS ZAGO: Seven.

23 PRESIDING JUDGE EBOE-OSUJI: We would like to do these things as they occur,
24 as I indicated earlier.

25 MS ZAGO: Yes, sir.

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1 PRESIDING JUDGE EBOE-OSUJI: Proceed.

2 MS ZAGO: Thank you, Mr President.

3 I would seek the PIS to be given an EVD number.

4 PRESIDING JUDGE EBOE-OSUJI: That will be done.

5 MS ZAGO: The second document is the first statement that the witness provided
6 the OTP with, which is 00 -- KEN-OTP-0087-0277, and the Prosecution seek to tender
7 this document for impeachment purposes without prejudice later on to bring a Rule
8 68 application.

9 PRESIDING JUDGE EBOE-OSUJI: Counsel?

10 MR KOECH: With a caveat, your Honour, that it is not for the truth of its contents,
11 that has happened before.

12 PRESIDING JUDGE EBOE-OSUJI: You have no objection?

13 MR KOECH: Yes, indeed.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 Mr Hooper?

16 MR HOOPER: As far as I'm aware, no other statement has gone in or been MFled,
17 so I object.

18 MS ZAGO: With respect to the witnesses who have been -- the Prosecution has been
19 granted hostility applications, they have all been admitted.

20 PRESIDING JUDGE EBOE-OSUJI: That seems to be my recollection, Mr Hooper.

21 MR HOOPER: Well, I'm wrong about then -- wrong about that then if that's -- if
22 that's the position.

23 PRESIDING JUDGE EBOE-OSUJI: Do you object now with that understanding?

24 MR HOOPER: For one of the witnesses it was admitted that I can recall, obviously
25 not for truth of its contents.

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1 PRESIDING JUDGE EBOE-OSUJI: We will admit, Mr Hooper.

2 MR HOOPER: Can I say it would be helpful if overnight we'd had a list of the
3 documents that it was sought to be put in because we would probably have agreed
4 then one way or the other and save this process.

5 MS ZAGO: The --

6 PRESIDING JUDGE EBOE-OSUJI: That's a suggestion for the future, Ms Zago and
7 the Prosecution.

8 The document is admitted.

9 MS ZAGO: Thank you, Mr President.

10 The second -- the third document is the third witness statement to the OTP which is

11 KEN-OTP-0097-0408 and the Prosecution also seeks to tender this document for
12 impeachment purposes only.

13 PRESIDING JUDGE EBOE-OSUJI: Mr Koech?

14 MR KOECH: No objection with the same caveat as the other.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

16 MR HOOPER: Yes, on the same basis.

17 PRESIDING JUDGE EBOE-OSUJI: Document admitted.

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

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- 14 (Redacted)
- 15 MS ZAGO: The last document is the email submitted by the witness to the Office of
- 16 the Prosecutor and it is KEN-OTP-0142-0033.
- 17 PRESIDING JUDGE EBOE-OSUJI: Truth or impeachment?
- 18 MS ZAGO: Truth of the content.
- 19 PRESIDING JUDGE EBOE-OSUJI: Mr Koech?
- 20 MR KOECH: Accepted on the same basis for the truth of its contents.
- 21 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?
- 22 MR HOOPER: I'm on the same basis as previously.
- 23 PRESIDING JUDGE EBOE-OSUJI: Document admitted, again noting Mr Hooper's
- 24 caveat for the last three documents in relation to his part of the case.
- 25 MS ZAGO: May I take this opportunity to indicate that the list of documents is

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1 standardly provided to the Defence five days in advance of the witness's testimony,
2 the documents that the Prosecution intends to use during the testimony of the witness,
3 and this was done also in the case of this witness.

4 PRESIDING JUDGE EBOE-OSUJI: Yes, but the point still is that that's why we -- it
5 makes more sense to deal with admission issues immediately upon treating the
6 document so that all counsel are on the same page at that time, because when we jam
7 everything together at the end of the process it might cause some difficulties with
8 lawyers remembering exactly - the Court also - the document that was being admitted
9 at the end of the process.

10 MS ZAGO: I'm guided, Mr President. Thank you. And I'm grateful for the extra
11 time that the Prosecution was allowed to complete its examination today.

12 PRESIDING JUDGE EBOE-OSUJI: Thank you.

13 Mr Koech, before you proceed, the court officer would have to do the protocols of
14 logging in these documents.

15 THE COURT OFFICER: (Interpretation) Thank you.

16 The PIS form relating to Witness 0789 will be given the following code: 0001-0111.

17 The document KEN-OTP-0087-0277_R07 will be given the form EVD-T-OTP-00263.

18 Document KEN-OTP-0097-0408_R02 will be given the code EVD-T-OTP-00264.

19 Document KEN-OTP-0112-0125 will be given the code EVD-T-OTP-00265.

20 Document KEN-OTP-0112-0126 will be given the code EVD-T-OTP-00266.

21 Document KEN-OTP-0112-0129 will be given the code EVD-T-OTP-00267.

22 And finally document KEN-OTP-0142-0033 will be given the code EVD-T-OTP-00268.

23 These seven documents are confidential.

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

25 Witness, the Prosecution has finished its examination-in-chief. Mr Koech, counsel

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1 for Mr Sang, will now begin his cross-examination.

2 Mr Koech?

3 MR KIGEN-KATWA: With your permission, Mr President, and just for the record,
4 my learned colleague had the handwritten notes' ERN number wrong. She said it is
5 0012-0125. It should be 0112-0127.

6 MS ZAGO: That is --

7 PRESIDING JUDGE EBOE-OSUJI: Ms Zago?

8 MS ZAGO: The ERN -- yes, Mr Kigen-Katwa is absolutely correct. Thank you.

9 THE COURT OFFICER: (Interpretation) Thank you, sir.

10 Document KEN-OTP-0127 will be given the following code: EVD-T-OTP-00265.

11 PRESIDING JUDGE EBOE-OSUJI: So that's the correction made there.

12 Mr Koech, proceed.

13 MR KOECH: Thank you, Mr President.

14 QUESTIONED BY MR KOECH:

15 Q. Mr Witness, good morning.

16 A. Good morning to you.

17 Q. My name is Philemon Koech from the Sang Defence team and I'm going to ask
18 you questions in cross-examination. Is that (Redacted) ?

19 A. Understood.

20 Q. Now first and foremost, Mr Witness, you do confirm, don't you, that you are
21 before this Court today to testify only because of the summons issued by the Court?

22 A. Yes, I am here not by will or by voluntary means, but it is because in compliance
23 of a subpoena that was handed to me late last year.

24 (Redacted)

25 (Redacted)

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17 (Redacted)
18 (Redacted)
19 (Redacted)

20 Q. Mr Witness, you met the Prosecution for the first time in (Redacted), isn't it?

21 A. That is correct.

22 Q. Witness, you'll be shown another document.

23 For the court officer it is the statement - the original statement - of the witness, which
24 is at tab 2 of our documents, and has been admitted in evidence. It is exhibit 263, the
25 ERN number being KEN-OTP-0087-0277.

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1 Mr Court Officer, please take the witness to page number 0281, which is traditional
2 page number 5, and to paragraph 18 to 19. Once that is done, please confirm to me.

3 A. Yes, I can see the document.

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

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6 (Redacted)

7 Q. Mr Witness, you have cited family pressure as one of the reasons for
8 withdrawing from this process as you call it; is that true?

9 A. That is correct.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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7 (Redacted)

8 Q. So in a nutshell, Witness, your family was extremely shocked when they learned
9 that you are participating in this process?

10 A. That is true, Counsel.

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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10 MR KOECH: I would like to show you a document.

11 And Mr President, court officer, it is KEN-OTP-0130-0636, a report dated (Redacted)

12 (Redacted) and it's on our tab 7.

13 PRESIDING JUDGE EBOE-OSUJI: That's not already in evidence, I take it?

14 MR KOECH: No, it's not even been alluded to.

15 Let me know when the document has accessed the document, please. When the

16 witness, sorry.

17 THE COURT OFFICER: (Via video link) The document is presented to the witness,
18 first page.

19 MR KOECH: All right. Thank you, court officer.

20 I would like to go straight to paragraph number 2 in that particular report.

21 Q. Mr Witness, do you see that, the portion starting --

22 A. Yes, I do.

23 (Redacted)

24 (Redacted)

25 (Redacted)

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- 16 (Redacted)
- 17 (Redacted) So the feeling at that
- 18 point is going on or going to stand by that statement or cooperating, because at that
- 19 point now I was a Prosecution witness, that would mean now being able to go all the
- 20 way to testify on the statement.
- 21 Q. Thank you, Mr Witness. Now, I want you to go further down to the paragraph
- 22 starts -- which starts, "At 18:05 ..." You are there?
- 23 A. Yes, yes, yes.
- 24 (Redacted)
- 25 (Redacted)

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9 Q. And in that sentence, I mean the -- the second sentence in that paragraph, you
10 have said that you have not received any threats that would influence your decision;
11 is that right?

12 A. That is correct.

13 Q. And that's what you told the Prosecution investigators?

14 A. That is correct, Counsel.

15 Q. And further you have said that you had not received any offer for money; is that
16 right?

17 A. Yes. There was of course this concern of when you say you're reconsidering
18 your position everybody is always quick to say, "Have you been offered money?
19 Have you been and done this and done that?", but that was not the case in this
20 scenario.

21 Q. What do you mean by everybody is quick to say this and that?

22 A. Yeah. Well, you know the state of issues of witness, Counsel, is that when for
23 example I agreed to operate with -- with the OTP, it is -- it has been reported that they
24 say the ICC offered money for people to give evidence. Now, on the other case is
25 that when I met my handlers on the ground and told them, "I want to change my

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1 position," they were also quick to say, "Have you been offered money to change your
2 position?" And that is why I told them that I was not offered any money and I was
3 not interested in the part of money and it has not happened even at this point in time.

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 MR KOECH: Mr President, I would wish to tender this document in evidence as an
8 exhibit right here at this juncture.

9 PRESIDING JUDGE EBOE-OSUJI: Ms Zago?

10 MS ZAGO: We have no objections, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

12 MR HOOPER: No objection.

13 PRESIDING JUDGE EBOE-OSUJI: The document admitted as the next in the Sang
14 Defence exhibits.

15 THE COURT OFFICER: (Interpretation) Document KEN-OTP-0130-0636_R02 will
16 be given the EVD number T-D11-00081-Conf.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 MR KOECH: Next, Mr Witness, I want to take you to another document and, court officer, it
19 is KEN-OTP-0138-0601 filed on (Redacted)

20 PRESIDING JUDGE EBOE-OSUJI: Tab and bundle?

21 MR KOECH: Sorry, Mr President. The tab in my bundle is tab 8.

22 THE COURT OFFICER: (Via video link) The document is being shown to the
23 witness.

24 MR KOECH:

25 Q. Mr Witness, you can see a short report there and if I can -- I can take you

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1 through it. It is filed on (Redacted) isn't it?

2 A. That is correct.

3 Q. And it is an investigator's report?

4 A. That is correct.

5 Q. And it concerns a telephone conversation with someone called (Redacted)

6 A. That is correct.

7 Q. And that is yourself, Mr Witness, isn't it, (Redacted) --

8 A. Yeah.

9 (Redacted)

10 (Redacted)

11 Q. And it refers at the very first opening of the letter to a conversation on (Redacted)

12 (Redacted) isn't it?

13 A. That is correct.

14 Q. And I will read the whole letter, it is not very long. And it says, Mr Witness,

15 (Redacted)

16 PRESIDING JUDGE EBOE-OSUJI: Report, isn't it?

17 MR KOECH: Sorry?

18 PRESIDING JUDGE EBOE-OSUJI: You referred to a letter, but it is a report, so we're

19 not looking for a letter later on.

20 MR KOECH: I'm guided, Mr President.

21 Q. It says this, and I quote:

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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- 13 (Redacted)
- 14 Sorry, Mr President, I also wish similarly to tender this document in evidence.
- 15 PRESIDING JUDGE EBOE-OSUJI: Ms Zago?
- 16 MS ZAGO: No objections.
- 17 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?
- 18 MR HOOPER: No objection. Thank you.
- 19 PRESIDING JUDGE EBOE-OSUJI: The document admitted.
- 20 THE COURT OFFICER: (Interpretation) Document KEN-OTP-0138-0601 will be
- 21 given the EVD number T-D11-00083 -- 82, rather, confidential.
- 22 MR KOECH: Thank you.
- 23 Q. Mr Witness, you recall participating in a clarification or proofing exercise with
- 24 the Prosecution in you say Friday, isn't it?
- 25 A. That is correct.

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1 MR KOECH: Mr President, I'm referring to the clarification document or notes, and
2 it is at our tab 6 in the first bundle. The ERN is KEN-OTP-0148-0043. If it can be
3 brought up before the witness.

4 Q. Witness, can you see the document?

5 A. Yes.

6 MR KOECH: Mr Court Officer, please take him to page 9, which is 0051.

7 THE COURT OFFICER: (Via video link) Page 9 is being shown.

8 MR KOECH:

9 Q. Mr Witness, go with me to the heading "Final Prosecution's Clarification."
10 Have you seen that in the middle of the page?

11 A. That's so.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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19 (Redacted)

20 MR KOECH: Mr President, for this and more reasons to come, I wish to tender this
21 document in evidence as well.

22 MS ZAGO: No objections, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: No objection.

24 And Mr Hooper?

25 MR HOOPER: No objection.

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1 PRESIDING JUDGE EBOE-OSUJI: Admitted as the next Sang Defence exhibit.

2 THE COURT OFFICER: (Interpretation) The Registry would like to inform the
3 participants that the document is not yet in eCourt. As soon as it will be uploaded in
4 the days to come, then it will be given the EVD number T-D11-00083. That is
5 document KEN-OTP-0148-0043.

6 MR KOECH:

7 Q. Now, Mr Witness, I want to proceed to another topic altogether. Mr Witness,
8 in the course of the elections period, the counting of votes and the release of results in
9 the year 2007, there was a ban on live media broadcasts, wasn't there?

10 A. That is correct.

11 Q. And it was declared by the then Minister for Internal Security, Mr Michuki, isn't
12 it?

13 A. That is correct.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Koech, do we need to remain inside for this
15 part of the testimony?

16 MR KOECH: Unfortunately, yes, Mr President, (Redacted)
17 (Redacted)

18 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Proceed then.

19 MR KOECH:

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

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1 (Redacted)

2 MR KOECH: Mr President, this is -- the audio is KEN-D11-0013-0058. That is the
3 audio. The transcript is at our tab 11 -- sorry, yeah, in the -- in the core binder and it
4 is KEN-D11-0014-0083. It has already been marked for identification and it is
5 MFI-T-D11-00073. If we could have the floor to play that particular audio.

6 (Playing of the audio excerpt KEN-D11-0013-0058)

7 PRESIDING JUDGE EBOE-OSUJI: Can you repeat that message.

8 MR KOECH: Yes, Mr President.

9 (Playing of the audio excerpt KEN-D11-0013-0058)

10 PRESIDING JUDGE EBOE-OSUJI: Is this a separate message from a certain message
11 where Mr Ruto had said "which is unnecessary"?

12 MR KOECH: It is the same message, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: This one says "violence is unnecessary," but I do
14 recall seeing another or hearing another message where the syntax was "which is
15 unnecessary," the word "which" appeared. It doesn't appear in the clip that's played,
16 or is it a different part? That need not detain us now, but it is something of interest.

17 MR KOECH: Yes.

18 PRESIDING JUDGE EBOE-OSUJI: We want to make sure that we are -- there are no
19 two messages that appear differently.

20 MR KIGEN-KATWA: Do I have your permission to explain, Mr President?

21 PRESIDING JUDGE EBOE-OSUJI: Well -- go on, please.

22 MR KIGEN-KATWA: Yes. Mr President, the -- Mr Ruto's peace messages are only
23 two, this one and another one, which is already an exhibit. This was marked for
24 identification. I think I have a recollection which is what Mr President may be
25 referring to, being a situation where a witness said that by saying violence which is

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1 not necessary he could have been saying that the violence --

2 PRESIDING JUDGE EBOE-OSUJI: (Overlapping speakers)

3 MR KIGEN-KATWA: Yes. But indeed from our -- from our position we've played
4 continuously only two peace messages, this one and another one which is an exhibit.

5 And I must apologise, I don't remember whether it was an audio and that witness
6 was saying and it was this peace message, but I understand the context of that.

7 PRESIDING JUDGE EBOE-OSUJI: On both sides of the case we need to make sure
8 we get the two messages so we can see them side by side and so that we --

9 MR KIGEN-KATWA: Mr President --

10 PRESIDING JUDGE EBOE-OSUJI: -- know the nature of the evidence we have. It
11 may well be that there were two separate messages broadcast.

12 MR KIGEN-KATWA: On my part, Mr President, may I undertake that my team will
13 pull out that particular scenario where that witness made that comment and
14 communicate with the Prosecution.

15 PRESIDING JUDGE EBOE-OSUJI: You can do that, but I also think that there may
16 have been a video or audio of precisely that message being delayed with that syntax
17 "which is unnecessary."

18 MR KIGEN-KATWA: Thank you, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you.

20 MR KOECH:

21 Q. So, Mr President -- Mr Witness, sorry, you heard that message?

22 A. Yes.

23 Q. Do you recall that it was played on Kass FM?

24 A. Yes.

25 Q. Do you recall that it was part of a news item?

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1 A. That is correct.

2 (Redacted)

3 (Redacted)

4 MR KOECH: My apologies, Mr President, I was mistaken. The message was
5 uplifted from a news item.

6 Q. Mr Witness, is that so?

7 A. That is correct.

8 Q. Thank you, Mr Witness.

9 PRESIDING JUDGE EBOE-OSUJI: As I've indicated earlier, we must keep
10 movements of the head to the barest minimum when proceedings are ongoing.

11 MR KOECH:

12 Q. Mr Witness, let me read out the message once again and then you can confirm if
13 that's what you heard on the -- on what we've just played.

14 The transcription says, "ODM believes" I'm quoting now, "that the loss of life, the
15 destruction of property that is going on in our country is unnecessary, unwarranted
16 and should stop immediately. Urgent steps should be taken. We are prepared as
17 the ODM to make urgent steps towards resolving this issue. We just hope the other
18 side realises the urgency with which the situation in our country needs to be dealt
19 with."

20 Is that what you heard, Mr Witness?

21 A. That is correct, sir.

22 Q. Is that what was played on Kass FM in those days?

23 A. Yes.

24 Q. And this was during the period of the ban, wasn't it?

25 A. That is correct.

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6 MR KOECH: Mr President, I wish to tender it into evidence. As it is now it is -- it
7 has an MFI number. We wish to exhibit it.

8 PRESIDING JUDGE EBOE-OSUJI: Ms Zago?

9 MS ZAGO: No objections, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

11 MR HOOPER: No objection, your Honour. Would it be helpful for me to indicate
12 the source of the other document or other words which was in fact taken from a video
13 of an ODM press conference held on 2 January and which bears the number
14 KEN-D09-0020-0010, that's the video, and the transcript translation is
15 KEN-D09-0028-0301.

16 And the words that are relevant, as it were, the concluding words of a sentence where
17 Mr Ruto says, quote, "... destruction of property which is unnecessary." Unquote.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Hooper. That's very helpful.

19 We will be looking at those. What I'm interested in is to see if there's a precise texts
20 of the same message but for the words of interest, that is -- but that need not detain us
21 now.

22 MR HOOPER: No.

23 PRESIDING JUDGE EBOE-OSUJI: That can be done in the course of the proceedings.

24 It may not be something we need to dwell on now, but I do recall that it was in a
25 video material that I --

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1 MR HOOPER: Yes, it's a different --

2 PRESIDING JUDGE EBOE-OSUJI: -- saw that.

3 MR HOOPER: It's a different --- it's Ruto Defence 34.

4 PRESIDING JUDGE EBOE-OSUJI: All right.

5 MR HOOPER: Exhibit that is, 34.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you. So the document now under
7 consideration, Mr Koech, can you give us the reference again so that we can say
8 admitted.

9 MR KOECH: Yes, Mr President. The first is the audio, which is KEN-D11-013-0058,
10 and the MFI is MFI-T-D11-00026, and the transcript is KEN-D11-0014-0083,
11 MFI-T-D11-00073.

12 PRESIDING JUDGE EBOE-OSUJI: The document or the materials are admitted.

13 MR KOECH: Mr President, may I --

14 THE COURT OFFICER: (Interpretation) Document KEN-D11-011-013 will be
15 given the reference number EVD-T-D11-0026.

16 Document KEN-D11-0014-0083 will be given the reference number EVD-T-D11-0073.

17 Both documents are public in nature.

18 MR KOECH:

19 Q. Mr Witness, you earlier said that this was at the period when there was a ban on
20 live coverage in the media; generally across the media?

21 A. That is correct.

22 (Redacted)

23 (Redacted)

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9 MR KOECH: Mr President, at this juncture I want to exhibit or to introduce into
10 evidence the transcript that the witness -- of the interview the witness had with the
11 (Redacted)

12 The transcript is in two parts and the first part bears the following ERN number. It's
13 in our tab 3 and it bears the following ERN number: KEN-OTP-0147-0388. And the
14 second one, as I read earlier, is KEN-OTP-0147-048.

15 MS ZAGO: Thank you, Mr President.

16 The Prosecution does object to the admission of this document into evidence as it
17 would equal admission of a prior consistent statement of the witness. The witness is
18 available to answer questions, counsel can put questions concerning that interview to
19 the witness directly and therefore there is no necessity for these transcripts of that
20 interview to be admitted. As I said, it would be tantamount to admitting a prior
21 consistent statement.

22 Thank you, Mr President.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Koech?

24 MR KOECH: Mr President, the test that should be applied to this document is that
25 of relevance and also to consider the economy of having a document which came out

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1 of a participation -- a process where the Prosecution participated. In reality, it
2 should be an agreed document. I do not see that the objection is meritorious.

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15 (Redacted)

16 (Redacted)

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19 (Redacted)

20 (Redacted)

21 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

22 MR HOOPER: Your Honour, as far as the objection's concerned -- well, the

23 application is concerned, we have no objection to this document being admitted.

24 In terms of the Prosecution's objection to it being a previous consistent document, this

25 is of course their witness and Rule 68 essentially applies to -- I would have thought it

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1 could apply generally, but it was drafted with a view to really Prosecution witnesses,
2 essentially the calling party's witnesses, and that's not the position here.

3 And there's also the argument that, far from being a consistent statement, it's perhaps
4 essentially also inconsistent with some aspects of his primary evidence; that is the
5 evidence of the statement provided to the calling party.

6 PRESIDING JUDGE EBOE-OSUJI: Ms Zago, any reply?

7 MS ZAGO: The Prosecution submits that the principle of orality has been enshrined
8 in the Statute and underscored by this Chamber on many occasions. The witness is
9 available to this Court to testify. The witness should be in a position and will be in a
10 position to answer any questions concerning this wit -- this interview or any other
11 interview or any other document.

12 If there is an inconsistency or consistency that should be explored with the witness in
13 court, and for this reason the fact that or the requirement that counsel ask these
14 questions in -- in the Prosecution's submission is necessary and we reiterate that
15 introducing the statement under these circumstances with this witness would again
16 be inconsistent with the principle of orality and there is no necessity for the
17 transcripts to be admitted.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper likes to say that, "We're in
19 uncharted waters."

20 MR HOOPER: Well, these aren't so uncharted. There's -- there's nothing --

21 PRESIDING JUDGE EBOE-OSUJI: We're coming -- no, no, no, I'm not talking to you
22 yet.

23 MR HOOPER: There is nothing to prevent --

24 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, I didn't -- I did not invite you for a
25 submission.

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1 MR HOOPER: No. Well, can I just add just one aspect?

2 PRESIDING JUDGE EBOE-OSUJI: Yes.

3 MR HOOPER: And that is there's nothing to prevent my friend going through every
4 line of this statement --

5 PRESIDING JUDGE EBOE-OSUJI: Precisely and that's where I'm going. One
6 second. Yes, all right.

7 And that's the nature of it, Mr Koech. The reason I began that way was how many
8 items of enquiry do you intend to pursue that is covered by these materials?

9 MR KOECH: (Redacted)

10 (Redacted) and a few other things, but generally the peace

11 messages which take a long time to play over and over again. We had focused on a
12 particular audio which has not been exhibited before.

13 PRESIDING JUDGE EBOE-OSUJI: And the audios were transcribed in the
14 transcript?

15 MR KOECH: Yes, they are. They are transcribed and they were transcribed by the
16 Prosecution.

17 (Trial Chamber confers)

18 PRESIDING JUDGE EBOE-OSUJI: The Chamber will exercise the discretion to
19 admit this document now, but we do not want it to form a precedent for all purposes.
20 The reason why we exercised this discretion at this time is because we've required the
21 cross-examination to finish and we want this witness to complete his testimony by
22 tomorrow. In those circumstances, on an exceptional basis, we will not require
23 Mr Koech to go through all the items one by one, including playing all those videos
24 that have been transcribed.

25 The document, again on that exceptional note -- or documents, you say? Two of

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1 them?

2 MR KOECH: Yes, they are in two parts with different ERN numbers.

3 PRESIDING JUDGE EBOE-OSUJI: Admitted at this stage.

4 THE COURT OFFICER: (Interpretation) The first part of the document, beginning
5 with number ERN KEN-OTP-0147-0388, will bear the reference number
6 EVD-T-D11-0084.

7 The second part of the document, bearing ERN number KEN-OTP-0147-0408, will be
8 provided with a reference number EVD-T-D11-00085.

9 MS ZAGO: Mr President, might I seek a clarification on --

10 PRESIDING JUDGE EBOE-OSUJI: The ruling?

11 MS ZAGO: -- the ruling?

12 PRESIDING JUDGE EBOE-OSUJI: Yes, proceed.

13 MS ZAGO: During this interview with the witness, several audio -- audios were
14 played and some of the audios had already been admitted before this Chamber. If
15 I'm not mistaken, there is one audio that is KEN-D09-0024-0012 which has not been
16 previously admitted. Therefore, I asked whether all these audios are also admitted
17 through this statement of or transcripts of the interview with the witness, and if so,
18 whether the Prosecution will have an opportunity to re-examine the witness if
19 necessary on those audios?

20 PRESIDING JUDGE EBOE-OSUJI: Mr Koech?

21 MR KOECH: Mr President, unless we did not get the EVD correctly, what we have
22 in our record shows that that particular audio, KEN-D09-0024-0012 bears the EVD
23 number EVD-T-D11-00024, and it was produced by our colleagues on the other side.

24 PRESIDING JUDGE EBOE-OSUJI: What? Sorry, what was -- is that a question or a
25 response to Ms Zago's observation?

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1 MR KOECH: It is a response just to say that it is already an exhibit and her concerns
2 would not be well founded in those circumstances.

3 PRESIDING JUDGE EBOE-OSUJI: So what you're saying is that the audio Ms Zago
4 is concerned about is already in evidence?

5 MR KOECH: Exactly, Mr President. That's what I'm saying.

6 MS ZAGO: If that is correct, I'll -- it doesn't appear in my chart in front of me, but if
7 this is correct, I'll certainly withdraw that application. However, I might seek further
8 clarifications if that is the case.

9 PRESIDING JUDGE EBOE-OSUJI: All right, let's put it this way, in a more
10 straight-forward way, the admission of those transcripts do not import evidence that
11 have not already been admitted before this Chamber to the extent that extraneous
12 evidence are indicated they are not admitted so that we can settle that matter.
13 I've been informed that at least on the MFI, not admitted. At any rate, the ruling is
14 that we are not sweeping in onto the record evidence that the Chamber has not
15 admitted.

16 MS ZAGO: As the Court pleases.

17 PRESIDING JUDGE EBOE-OSUJI: And secondly as we'll need to make clear, that
18 the reason we admitted those materials, we've explained, it is not necessarily on the
19 submissions of Mr Koech on the basis of Rule 68(3). I want to be clear on that as
20 well.

21 There is a question hanging in the air, if everyone recalls, as to whether -- as what is
22 testimony and what is not. I think that's necessarily a part of what we may look at
23 when we consider the construction of Rule 68.

24 So let's proceed, Mr Koech.

25 MR KOECH: Thank you, Mr President. I would now like to call up the same

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1 document and, Mr Court Officer, to show the witness, page KEN-OTP-0147-0397,
2 spilling over to the next page 398. And once it is before the witness, please confirm
3 it to me.

4 PRESIDING JUDGE EBOE-OSUJI: Where is the tab now?

5 MR KOECH: Tab 3, Mr President.

6 PRESIDING JUDGE EBOE-OSUJI: Still where we are?

7 MR KOECH: The same document, yes.

8 PRESIDING JUDGE EBOE-OSUJI: All right.

9 MR KOECH: Just page 8 in the traditional pagination; 0397.

10 THE COURT OFFICER: (Via video link) The document is being shown to the
11 witness.

12 MR KOECH:

13 Q. Mr Witness, go to the bottom of page 8, or page 0397, at line 310.

14 Mr Witness, you got there?

15 A. That is correct.

16 Q. Now, I want to read between item 310 to 321 where you say "Yeah."

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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21 MR KOECH: Sorry, Mr President, for the delay.

22 Q. Now, Mr Witness, during your testimony in-chief you said that Arap Sang
23 would from time to time invite people to give civic education to his listeners and at
24 other times he would give the basic civic education lessons himself; is that correct?

25 A. That is correct.

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1 Q. And he did that in 2005 during the referendum and in 2007; is that correct?

2 A. That is correct.

3 Q. In fact --

4 MS ZAGO: Might I ask that my counsel give us the specific reference through the
5 transcripts to the witness testimony, please.

6 MR KOECH: Yes, indeed. Mr President, the transcript is transcript number 176, at
7 page 37 and also at page 65.

8 Q. So, in fact, Mr Witness, on 14 December 2007, Mr Sang undertook such a task,
9 didn't he? Do you recall any such event of his hosting civic educators or giving basic
10 civic education lessons themselves on their --

11 A. I might not be in a position to remember exactly the dates, but I still stick to my
12 information that that is what he used to do on air during that period.

13 MR KOECH: Now, Mr President, we want to play an audio.

14 Q. Mr Witness, you will listen to the audio or the portion that we will play and
15 then I will take you through whatever comes out of that audio.

16 PRESIDING JUDGE EBOE-OSUJI: Before you do that I have been handed a note
17 indicating that indeed, Mr Koech, that the material in dispute of time was not MFied
18 but was admitted as evidence. Again, just to -- for the completeness of the record,
19 do I announce this correction, but it of course doesn't affect the ruling of the Chamber
20 on the matter.

21 Proceed.

22 MR KOECH: Mr President, the audio is KEN-D11-0013-0089. And the
23 corresponding transcript or transcription is KEN-D11-014-0294. It is at our tab 14,
24 Mr President, in the bundle. It is in the second binder, written on the margin as
25 binder number 2.

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1 Mr President, we will be playing initially time stamp 1.23, that's 2.0 to 2.06, which is at
2 the page ending at 0295. The transcript --

3 PRESIDING JUDGE EBOE-OSUJI: Is it already an exhibit in the case?

4 MR KOECH: It is an MFI, Mr President.

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

6 MR KOECH: It is MFI -- in fact, MFI-T-D11-00041.

7 (Playing of the audio excerpt KEN-D11-0013-0089)

8 MR KOECH:

9 Q. Mr Witness, did you hear that?

10 A. Yes, Counsel.

11 Q. You heard the song that played on the audio?

12 A. Yes, and to my recollection I said that (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 Q. And it is sung by a musician called Makiche, isn't it?

22 A. Yeah, Geoffrey Rotich, that's correct.

23 MR KOECH: Now, Mr Court Officer in (Redacted) please bring up the transcript at
24 page 0297, then we will play the next portion of the -- of the audio to the witness.

25 Mr President, the time stamp I will be playing is 7.43 to 9.57.

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1 Q. Mr Witness, have you gotten the page?

2 A. That is correct.

3 Q. Okay, we'll play the audio. You follow the transcription -- the translation there,
4 then you will confirm to us if it's an accurate reflection of what has been played on the
5 audio.

6 (Playing of the audio excerpt KEN-D11-0013-0089)

7 PRESIDING JUDGE EBOE-OSUJI: Mr Koech, can we pause. How much longer are
8 we going to listen to this?

9 MR KOECH: Only 10 more seconds, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: Even so, is there any dispute that Mr Sang used
11 the opportunity of his programme to give civic education?

12 MS ZAGO: Mr President, just to have the record accurate, the witness -- I checked
13 the references that were provided. The witness referred to Mr Sang's role or
14 function as a civic educator in respect of the constitutional reform in 2005.

15 Now, I'm looking at this document and the date appears to be 14 December 2007. So
16 it is in another context; therefore --

17 PRESIDING JUDGE EBOE-OSUJI: Even so, even so, even so, is it an issue that
18 Mr Sang in the -- whenever could have used his show to inform the citizens of what
19 the government -- their relationship with their government would be and what
20 citizens should be doing at particular times, say during referendum voting or
21 elections, how that should be done? Is there an issue about that in terms of civic
22 education?

23 Maybe I wasn't clear. What I see is a scenario where one could say, well, one has a
24 legitimate role as a broadcaster, but then there are other things also that one uses the
25 opportunity to do that may not be legitimate. Is that an issue, or are you saying that

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1 he never used his role in the station to do civic education? Is that the position of the
2 Prosecutor?

3 MS ZAGO: Mr President, we'd submit that in this respect it would be the Defence
4 role to put into evidence what they believe Mr Sang's position is.

5 PRESIDING JUDGE EBOE-OSUJI: No, no, no, no. We want to make it relevant.
6 We do not want parties to be dragging onto the record or onto the issue things that
7 may not be an issue at the end of the day. That's the point. So if we leave it at that,
8 if your position is that Mr Sang never did civic education, then Mr Koech can show us
9 that he did. But if that is not your position, if you're focusing only on his citing
10 messages that are not civic education, then we limit the issue to those.

11 MS ZAGO: Mr President, the Prosecution is in a difficult position with respect to
12 stipulating to issues that are not clear or entirely clear; therefore, with your respect
13 I -- I'd like to take at least the lunch-break to consult further with Mr Steynberg as
14 well. However, the main -- the base line, the position is that the Prosecution has a
15 certain difficulty in stipulating to this fact because the facts are not clear.

16 PRESIDING JUDGE EBOE-OSUJI: All right, let's do this: You need to be reviewing
17 your case continuously to see when certain lines of question are embarked upon. If
18 that is something you will not argue in the end, something you will not take issue
19 with in the end, you can indicate so, so the counsel asking the question may know
20 whether to abandon that line of question and get to the issues that you really dispute.
21 That's what I'm trying to get at.

22 So if Mr Sang for example -- let's not say Mr Sang. Let's say a broadcaster, present
23 company excepted, is giving civic education but then uses that opportunity to
24 broadcast inflammatory message, that's something else than to say well, he never all
25 did civic education and all they did or all he did was broadcast inciting message.

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1 You see my point, the difference?

2 MS ZAGO: I understand entirely, Mr President, your proposition and your point.

3 PRESIDING JUDGE EBOE-OSUJI: Yes, let's continue.

4 Mr Koech, in the meantime continue.

5 MR KOECH: Thank you, Mr President.

6 PRESIDING JUDGE EBOE-OSUJI: We have to rise now for lunch and we come back
7 at 2.30.

8 THE COURT USHER: All rise.

9 (Recess taken at 12.58 p.m.)

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

11 THE COURT USHER: All rise.

12 Please be seated.

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

14 Mr Koech, we're in open session.

15 MR KOECH: We could go back to private.

16 PRESIDING JUDGE EBOE-OSUJI: Private session then.

17 *(Private session at 2.34 p.m.) Reclassified as Open session

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

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

20 Ms Zago, were you rising?

21 MS ZAGO: Yes, Mr President. Thank you. Apologies for interrupting.

22 On the matter of the stipulation concerning the civic educator function or role of

23 Mr Sang, I'd like to advise the Chamber that the Prosecution is in a position to

24 stipulate that at times Mr Sang performed the role of civic educator. However, this

25 is without prejudice to the fact that the Prosecution maintains that this is -- that this

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1 has no bearing on whether or not Mr Sang committed the offences that he is accused
2 of in these proceedings.

3 Thank you, Mr President.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 Mr Koech?

6 MR KOECH: Thank you, Mr President.

7 Q. Witness, good after lunch.

8 A. Good after lunch. You had lunch yourself.

9 Q. Sorry, before the break, you had heard an audio; isn't that right?

10 A. That is correct, Counsel.

11 Q. Could you kindly give the Chamber a rough interpretation of what it was all about, the
12 audio that you heard?

13 A. Well, of course, at the beginning it was a programme, a Lene Emet programme, which
14 began with (Redacted) a song that was played, and then his
15 introduction (Redacted) that Arap Sang did and went ahead to more or less like talk to the listeners
16 about the voting process, the requirements of voting, of the voter, and the kind of documents
17 that one would need in order to be able to vote.

18 Q. So is this one of the things you heard when you testified that Mr Sang could
19 occasionally give his own version of civic education?

20 A. That is correct.

21 Q. Now, Mr Witness, I will read into the record the full text of the translation. Then you
22 will confirm to the Chamber whether that is an accurate translation.

23 PRESIDING JUDGE EBOE-OSUJI: Why do we need to do that in light of Ms Zago's
24 observations, what she called stipulation? The point is they're not disputing that on occasion
25 Mr Sang would perform civic education, and the witness has said that what was played

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1 would have been an instance of such role having been played by Mr Sang. Do we need to
2 take it beyond that? If so, why?

3 MR KOECH: No. I'm duly advised, Mr President. We can leave it there, but of course
4 before we leave the document we want and apply that the audio and the transcript together
5 with -- yes, and the transcript and the translation be admitted into evidence.

6 PRESIDING JUDGE EBOE-OSUJI: Again, do we need to do that?

7 MR KOECH: Yes, Mr President, we need to do that, because there are parts of the same
8 audio which we are going to use for other purposes as well, it's not just for that particular
9 purpose.

10 PRESIDING JUDGE EBOE-OSUJI: All right. Let's move on until we get to those parts that
11 say something other than civic education.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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8 MR KOECH: Thank you, Mr Witness.

9 Mr President, I return to my initial application to produce these documents, the

10 translation -- or the transcript, the audio transcript and translation. The audio I think I've

11 given the ERN numbers, but I can repeat, KEN-D11-0013-0089, transcript KEN-D11-0013-0089,

12 and the translation is KEN-D11-0013 -- sorry, that last number is 0 -- let me read it again, the

13 translation, it is KEN-D11-0014-0294. I would like to produce them in evidence.

14 PRESIDING JUDGE EBOE-OSUJI: Ms Zago?

15 MS ZAGO: We do not object with the usual caveat with respect to the translations.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper?

17 MR HOOPER: No objection.

18 PRESIDING JUDGE EBOE-OSUJI: The document is admitted as the next in the Sang

19 exhibits.

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 PRESIDING JUDGE EBOE-OSUJI: Wait, wait. Let the court officer record the evidence.

24 THE COURT OFFICER: (Interpretation) Thank you. The audio KEN-D11-0013-0089 shall

25 be referenced EVD-T-D11-00041.

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- 1 The document KEN-D11-0014-0294 shall be referenced EVD-T-D11-00042.
- 2 PRESIDING JUDGE EBOE-OSUJI: Proceed, Mr Koech.
- 3 MR KOECH: The transcript, Mr President, has not been admitted. It's KEN-D11-0013-0089.
- 4 I would also wish to have it exhibited.
- 5 PRESIDING JUDGE EBOE-OSUJI: It's already admitted, isn't it?
- 6 THE COURT OFFICER: (Interpretation) That number corresponds to the audio.
- 7 PRESIDING JUDGE EBOE-OSUJI: So the audio has been given Exhibit 41 and the transcript
- 8 or translation is Exhibit 42.
- 9 MR KOECH: Mr President, the thing about this document is that the translation is in one
- 10 document, the transcript is in another. So that's why there is one more to be done, which is
- 11 the transcript I've just read out, KEN -- sorry, KEN-D11-0014-0253. And the translation is
- 12 KEN-D11-0013-0089.
- 13 THE COURT OFFICER: (Interpretation) Mr Koech, just to be sure, the audio document
- 14 KEN-D11-0013-0089; is that correct?
- 15 MR KOECH: That's correct. That's the document. I'm sorry.
- 16 THE COURT OFFICER: (Interpretation) So that was referenced EVD-T-D11-00041.
- 17 And now we have KEN-D11-0014-0294, which corresponds to the translation of the transcript.
- 18 MR KOECH: That's right.
- 19 PRESIDING JUDGE EBOE-OSUJI: And that is what we -- that is the document we looked at
- 20 and that has been admitted --
- 21 MR KOECH: Yes, indeed.
- 22 PRESIDING JUDGE EBOE-OSUJI: -- onto the record.
- 23 MR KOECH: Mr President, what's remaining is KEN-D11-0014-0253.
- 24 PRESIDING JUDGE EBOE-OSUJI: Where is that in the bundle?
- 25 MR KOECH: Yes, it is, in the bundle at tab 39.

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1 PRESIDING JUDGE EBOE-OSUJI: And you're saying that that is the native transcript?

2 MR KOECH: Yes, it is.

3 PRESIDING JUDGE EBOE-OSUJI: Of the audio?

4 MR KOECH: Yes.

5 PRESIDING JUDGE EBOE-OSUJI: Also admitted onto the record.

6 THE COURT OFFICER: (Interpretation) Thus KEN-D11-0014-0253, the transcript of the
7 audio that we just heard, will be referenced as follows: EVD-T-D11-00086.

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Koech, please.

2 MR KOECH: Mr President, in view of earlier concerns about the number of audios over the
3 issue of civic education, our next audio was going to be an audio of 20 December 2005
4 precisely on those issues of civic education.

5 For -- I would require direction, Mr President, if we need to go through that process
6 all over again. One particular audio which is very important to us, but if the
7 question of civic education is by other people as part of the testimony of the witness it
8 would not come out, then we'll leave it, Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, back to you?

10 MS ZAGO: I'm not sure I entirely understand whether "... the question of civic education is
11 by other people as part of the testimony of the witness ..." I'm not sure whether Mr Koech
12 referred to Mr Sang's role as civic educator, which we already indicated the Prosecution is
13 stipulating to that role at occasions.

14 With respect to the civic education function, or roles of other individuals, I would like
15 to seek further clarifications from Mr Koech, but in principle I believe that will not be
16 a relevant issue.

17 Thank you, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Koech, you've heard that. Unless the issue of civic
19 education is something that you are particularly interested in for some reason, but if it is just
20 to verify or confirm (Redacted) then
21 that's where the concern about economy - judicial economy - comes in.

22 MR KOECH: Yes, exactly. Mr President, there is an audio of 20 September 2005 and the
23 people who were in attendance, invited by Mr Sang to his programme, were two lawyers to
24 expound on the merits of the constitution, or to sensitise people on the constitution.

25 PRESIDING JUDGE EBOE-OSUJI: You can touch on it briefly (Redacted)

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1 and then move on, rather than get bogged down there.

2 MR KOECH: Understood, Mr President.

3 The audio itself is KEN-D11-0014-0187. The transcript and translation is

4 KEN-D11-0020-0115. If those can be brought up and we have the floor to play it?

5 PRESIDING JUDGE EBOE-OSUJI: What tab?

6 MR KOECH: And the tab is 32. Tab 32. Sorry, Mr President, it's actually tab 16, my

7 mistake, in binder number 1. We shall now play time stamps 1.51 to 4.06 at pages 0116-8.

8 The transcript will be page 176. It's transcript number 176 at page 37 and 65.

9 MS ZAGO: I apologise. I seek a clarification on the number of the tab. Is it tab one-six, or
10 six-zero?

11 MR KOECH: Number one-six.

12 (Playing of the audio excerpt KEN-D11-0014-0187)

13 MR KOECH:

14 Q. Mr Witness, did you hear that audio?

15 A. Affirmative.

16 Q. Could you kindly in summary give a summary of what Mr Sang was saying there?

17 A. Well, he was doing his evening programme. The programme was called Kusgong, it
18 was on a Tuesday and it was about law. He's saying in the programme that he has invited
19 learned people, he says -- he says learned people from our community, to come and teach us
20 about the proposed new constitution. He's also mentioning that people -- the reason why
21 people are talking about Orange and others are talking about Banana, but we want our
22 lawyers to take us from Chapter 1 and we go one by one in all the items that is in the
23 proposed constitution so that you make informed decision.

24 He also says that this is a chance for you to ask questions. Look for a pen and a

25 paper so that you are able to write down what you don't understand and you're able

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1 to ask the lawyers who are in the studio and they're there to teach them about the
2 new law.

3 He's also mentioning somewhere in his broadcast that he thanks the government for
4 giving -- for being -- for giving them a licence to broadcast in our own language.

5 Now it has become easy to teach the people using our own language.

6 He also mentioned that if -- if you have the proposed constitution with you, or if you
7 don't have look for somebody who has and you can go and sit together. Look for
8 paraffin, or look for something, and you can sit together with a neighbour or
9 somebody who has the proposed constitution and then go through it one by one with
10 the lawyers. And he -- he now introduces the lawyers, one of them as Grace Kiptui
11 and another one as Moses Kurgat.

12 Q. Thank you, Mr Witness. Did you recognise Mr Sang's voice in that audio?

13 A. Affirmative, Counsel.

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 MR KOECH: Thank you.

19 Mr President, we would wish to tender the audio, transcript and translation into
20 evidence and I will proceed to read the EVD -- the ERN numbers.

21 PRESIDING JUDGE EBOE-OSUJI: Ms Zago?

22 MS ZAGO: Yes, Mr President. We have two objections I'll start with to the admission of
23 this document. The first one is on the substance and the relevance of this set of audios and
24 correlated transcription and translation and the second one is a procedural one. The
25 procedural one is an objection the Prosecution has already raised in the past with respect to

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1 other materials. I understand that this specific audio and transcriptions are covered by an
2 affidavit by the CEO of Kass FM, which has not testified before the Court and the affidavit of
3 that particular individual is not before your Honours and is not a record or evidence in this
4 case. Therefore, this is the objection on the procedural, but our main point is on relevance.
5 Thank you, Mr President.

6 PRESIDING JUDGE EBOE-OSUJI: Taking it with relevance, Mr Koech?

7 Sorry, before I do that, I have to call on Mr Hooper and then give you, Mr Koech, the right to
8 reply.

9 MR HOOPER: I confess I haven't read it all. I'm on page 50. What it shows is an extensive
10 informative and balanced debate moderated by Mr Sang. I'd have thought that in the
11 context of what we've heard and the Prosecution case in respect of his imbalance allegedly
12 over the 2005 constitution is directly relevant to the Defence case for which it's being invited
13 the Court admit it.

14 MR KOECH: Mr President, starting on the issue of relevance, just to emphasise is that the
15 year two thousand -- the constitutional referendum of the year 2005 is very relevant to these
16 proceedings, not because of the Defence own position, but because of the way the Prosecution
17 case has been led. It is directly relevant.

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 PRESIDING JUDGE EBOE-OSUJI: Again, you see, the concern is what you say you're doing
22 with the material you're tendering. If there is no issue that from time to time Mr Sang did
23 conduct civic education or invited guests to his programme that did so, then that becomes
24 problematic to just tender the document simply to show that.

25 But if the purpose of tendering it goes beyond that for something else, then it is best

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1 for you to bring that other thing in and then after that seek to tender the document.

2 But if all you're doing is to show that Mr Sang had brought in lawyers to come and
3 educate the citizens about the constitution, it limits the relevance of that material. Of
4 course, Mr Hooper has enlarged upon that in his submissions and you haven't exactly
5 adopted his argument.

6 MR KOECH: First of all, Mr President, I adopt what Mr Hooper has said as regards this
7 particular audio.

8 But secondly, Mr President, this demonstrates a positive pattern of conduct on the part of
9 Mr Sang with regard to the high octane political issues of the day in the year 2005 to 2007. It
10 is relevant in our view, Mr President, if only to show that the media itself, the media house
11 itself, Kass FM, took it upon itself to inform the public on the content -- on the contents of a
12 document and not sway them, but give them a chance to make informed decisions.
13 That is the relevance of this document, and to show his neutrality, Mr President.

14 PRESIDING JUDGE EBOE-OSUJI: How does it show neutrality? Does the document show
15 us that there were debates in the sense that Mr Hooper had opened up that possibility, that
16 there were callers calling in, some in favour and some against, and that this transcript or the
17 audio, this accompanying audio, indicates Mr Sang's fairness in moderating the debate
18 amongst the callers; does it show it? And if so, show us where that is.

19 MR KOECH: Indeed, Mr President, it shows that. And I will take the Chamber to the
20 relevant portions. We need about two minutes to do that, Mr President.

21 Perhaps for convenience, Mr President, we could come back to this particular issue
22 tomorrow morning.

23 PRESIDING JUDGE EBOE-OSUJI: Yes.

24 MR KOECH: We'll move on to something else.

25 PRESIDING JUDGE EBOE-OSUJI: Move on and then when you make it that relevance, then

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1 bring back the question.

2 MR KOECH: Thank you, Mr President.

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 MR KOECH: So, Mr President, we're going to play an audio of 10 January 2008. The audio
18 is at tab 40 -- yes, it's on tab 48 and the ERN number is KEN-D11-0013-0063. The transcript
19 and translation, KEN-D11-0021-0004, which is actually in evidence, EVD-T-D11-0080. And
20 the reason why we are playing it is for particular discrete issue. The time stamp we are
21 going to play is 1.06 and to 1.55. And it's at page 0005.

22 PRESIDING JUDGE EBOE-OSUJI: 0005, you say?

23 MR KOECH: 0005, yes, that's correct.

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

25 MR KOECH:

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1 Q. Mr Witness, you followed the audio, didn't you?

2 A. That is correct.

3 Q. Could you summarise what message Mr Sang was passing in this short audio?

4 A. Well, Arap Sang begins his programme by of course identifying himself as Joshua Arap
5 Sang and the programme. He also saying that this is a new year and he says this is a new
6 year for those who were able to make it, and it's a new year that new things are beginning and
7 new things that would include school.
8 He's also talking about that during the campaigns that different parties had done,
9 they talked about issues to do with school and education and curriculum.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 PRESIDING JUDGE EBOE-OSUJI: Should we expect to see in this recording any mention of
4 being off air and now being back and explaining why? I'm asking. Do you recall if that was
5 the case?

6 THE WITNESS: I don't know. I did not listen to the entire programme, but fully he
7 mentioned that in -- in due -- in the due course.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Koech, please proceed.

9 MR KOECH: No, it is -- Mr President, it is not in the audio at any point, so we'll just move
10 on to the next tab first so that we can take this together.

11 PRESIDING JUDGE EBOE-OSUJI: All right.

12 MR KOECH:

13 Q. First of all, Mr Witness, do you know someone does -- this person called Lucas Sang?

14 A. That is correct.

15 Q. You heard that he died in the post-election violence, did you?

16 A. Yes. He was a prominent athlete.

17 Q. And he died during the post-election violence in 2007/2008; is that right?

18 A. Yes, in 2008, that's true.

19 Q. Do you know the date when he was buried?

20 A. Well, if my recollection serves me right I think it was around 5th. I'm not -- I'm not
21 very sure about the date it was -- he was buried.

22 Q. We will show you a document next.

23 MR KOECH: Mr President, that's at tab 47.

24 Q. Mr Witness, can you see that?

25 Let me read in the ERN number first, KEN-D11-0005-0186. Could that be displayed

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1 to the witness, please?

2 Mr Witness, have you seen that?

3 A. Yes, Counsel.

4 Q. And there is a picture of someone there, isn't it?

5 A. Yes.

6 Q. And it says "Lucas Kipkemboi Sang"?

7 A. That is correct.

8 Q. Born 1963 and died in 2007?

9 A. That is correct.

10 MR KOECH: Next, Mr President, we want to display KEN-D11-0005-0187, which is the
11 other side of the same document with the same tab, just to flip it over.

12 Q. Mr Witness, have you seen that?

13 A. Yes. Yes, Counsel, I've seen it.

14 Q. Does it say at the top "Funeral programme"?

15 A. Yes.

16 Q. Does it show the date of 10 February the year of 2008 and that it was a Thursday?

17 A. This is the burial, not the death. Is that what you are referring to?

18 Q. No, I said the date, not the death, but the date --

19 A. Oh, okay.

20 Q. -- as 10 January 2008.

21 A. That is correct.

22 Q. Do you know where Mr Lucas Sang was buried?

23 A. Well, I did not follow where he was buried, but if I'm not mistaken it should be at his
24 home in Eldoret.

25 Q. Mr Witness, in those days, how were the state of roads in Kenya?

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1 A. You would say they were generally impassable.

2 Q. And how many hours would it have taken to drive from Nairobi to Eldoret?

3 A. Well, in normal, when it's -- it's peaceful on normal days, of course, it could take
4 between six and eight hours to drive, but those days if at all you would be able to pass it was
5 very difficult to travel to that part of the country at that time.

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 MR KOECH: Mr President, we would want to have the funeral programme marked for
22 identification to be produced later.

23 PRESIDING JUDGE EBOE-OSUJI: It will be so marked.

24 THE COURT OFFICER: (Interpretation) Public document KEN-D11-0005-0186 will be
25 given reference number MFI-T-D11-00087.

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1 MR KOECH: Thank you. For the record, Mr President, the audio is already in evidence.

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 PRESIDING JUDGE EBOE-OSUJI: Witness, maybe I should ask this of counsel, I don't know
5 Mr Kigen-Katwa whether this point has been covered in the past, is there any relationship
6 between Mr Lucas Sang and Mr Joshua Sang.

7 MR KIGEN-KATWA: Mr President, there is not a relationship. Mr Lucas Sang was much
8 taller than Mr Sang. There is absolutely no relationship.

9 PRESIDING JUDGE EBOE-OSUJI: It is not about the height. I mean family relations?

10 MR KIGEN-KATWA: I confirm, Mr President, that they have no relation whatsoever.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 MR KOECH: So Mr President, we are going to play another audio of 26 October the year
13 2007. It is in binder number 34, KEN -- sorry, binder number 2, tab 34, and it's
14 KEN-D11-0011-0030. It has an MFI number, MFI-T-D11-00034.

15 May I also spell the names that I've mentioned starting with Joseph Kaguthi, I'm sure
16 Joseph is the usual Joseph Kaguthi, K-A-G-U-T-H-I. Chris Murungaru is the
17 ordinary Chris, C-H-R-I-S, Murungaru is M-U-R-U-N-G-A-R-U and Uhuru Kenyatta
18 is U-H-U-R-U, second name K-E-N-Y-A-T-T-A.

19 May we have the floor to play the audio, Mr President?

20 (Playing of the audio excerpt KEN-D11-0011-0030)

21 MR KOECH: Mr President, I can see we are at 4 on the dot, but if we can get another five
22 minutes we'll be able to wrap up the issue of this particular audio?

23 (Trial Chamber confers)

24 PRESIDING JUDGE EBOE-OSUJI: Proceed. Five minutes.

25 MR KOECH: Thank you, Mr President. We are going to play time stamp 3.01 to 5.33,

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1 which is at page 0004 to 6. And the participants were discussing Kikuyu, Kalenjin relations.

2 (Playing of the audio excerpt KEN-D11-0011-0030)

3 MR KOECH:

4 Q. Mr Witness, you heard the audio?

5 A. That is correct.

6 Q. Was it -- it was in which language?

7 A. In Kiswahili and with some spots of English.

8 Q. Please summarise the substance of what Mr Sang was saying there. Did you recognise
9 the voice?

10 A. That is correct, sir.

11 Q. Please give us a summary of what you heard, please?

12 A. Well, of course, he introduced the programme, mentions his name. And he was telling
13 the listeners that probably this is the time you had been waiting for. As I've told you earlier,
14 that there will be a guest who will come to the studio, and now in the studio I have the
15 following guests: Uhuru Kenyatta, Chris Murungaru, Joseph Kaguthi.

16 And I think he went to a small break there, and then he came back and said -- and
17 started speaking in Kiswahili and said that: In the studio I have leaders from the
18 Kikuyu. And I know you'll have -- you're asking: You only have Kikuyus in the
19 studio today. And he is saying that it is good that we get to know about each other,
20 us as Kalenjins and them as Kikuyus.

21 He's also saying that we need to know why there is tension or there is difference
22 among these two communities. And he's saying that he feels that there is a lot of
23 bitterness among these two communities and that he alluded to a rally or to an event
24 that he had watched earlier or he saw on television a day before or previously where,
25 when a Kikuyu was speaking, they were speaking with a lot of bitterness, and the

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1 Kalenjin was also speaking with a lot of bitterness, and he's saying that it is not good
2 for the country and it's not good for peace and for development.
3 And he also says that these leaders have -- they have taken time to come to the studio,
4 because he asked them to come so that we talk to each other. You call in and
5 we -- we try to iron out if there is any issues that you want to raise to these leaders.
6 And he says that it demands a lot of discipline from the -- from the listeners or from
7 the callers who will call or those who would want to ask questions, and he went
8 ahead to say that Uhuru Kenyatta flew in from -- all the way from Mandera, and also
9 Chris Murungaru was a busy man and that he had taken the time to come to talk to
10 the people of Kalenjin.
11 PRESIDING JUDGE EBOE-OSUJI: Mr Koech, we have to leave it there for today.
12 MR KOECH: That's what I wanted to say, Mr President.
13 PRESIDING JUDGE EBOE-OSUJI: Yes.
14 Witness, we will adjourn for the day and convene the same time tomorrow morning.
15 Court will rise.
16 THE COURT USHER: All rise.
17 *(The hearing ends in private session at 4.05 p.m.) Reclassified as open session
18 RECLASSIFICATION REPORT
19 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
20 2013, the version of the transcript with its redactions becomes Public.