

Trial Hearing
Witness: KEN-OTP-P-0743

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang
5 - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera-Carbuccia
7 and Judge Robert Fremr
8 Trial Hearing
9 Tuesday, 20 January 2015
10 (The hearing starts in open session at 9.36 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please, the case.
16 THE COURT OFFICER: (Interpretation) Thank you, your Honour.
17 Situation in the Republic of Kenya, in the case of The Prosecutor versus William
18 Samoei Ruto and Joshua Arap Sang, ICC-01/09-01/11.
19 We are in open session.
20 PRESIDING JUDGE EBOE-OSUJI: Thank you.
21 Any changes in appearance, Mr Steynberg?
22 MR STEYNBERG: Good morning, your Honours. No changes for the Prosecution.
23 PRESIDING JUDGE EBOE-OSUJI: Thank you.
24 Mr Narantsetseg?
25 MR NARANTSETSEG: Good morning, your Honours. The same as before, thank

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1 you.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you.

3 MR KIGEN-KATWA: Good morning, your Honours. Mr Sang's team remains the
4 same.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Ms Alagendra?

7 MS ALAGENDRA: Good morning, Mr President, your Honours. For the Ruto
8 team we are joined by Ms Shalini Jayaraj.

9 PRESIDING JUDGE EBOE-OSUJI: That's the only change?

10 MS ALAGENDRA: Yes, your Honour.

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

12 First the Chamber's ruling of Mr Khan's request of yesterday. The request is granted
13 to the extent that Mr Ruto is excused for Thursday and Friday, but he will return for
14 Monday and Tuesday.

15 MR KHAN: I'm most grateful.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you.

17 Witness, welcome back. And, Mr (Redacted) we also note -- are you there? Sorry,
18 I do not see you.

19 MR (Redacted): (Via video link) Yes, I am, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: We note your appearance on the record.

21 Now, we are in open session, Mr Steynberg.

22 MR STEYNBERG: Your Honours, we may continue in open session for a while.

23 PRESIDING JUDGE EBOE-OSUJI: All right.

24 Mr Witness, welcome back. Mr Steynberg will continue questioning you. In a
25 moment I will ask him how much longer he intends to be with you, but in the

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1 meantime I want to remind you of the advice I gave you yesterday to listen carefully
2 to the question that is asked of you. Make sure you understand it. Once you
3 understand the question, answer just that question, give the answer that is required,
4 strictly required by the question and nothing more. If the answer requires "Yes" or
5 "No," just say "Yes" or "No." If somebody asks you again, "Witness, are you sitting
6 down?" The answer should be "Yes," not to say "Yes" and you start explaining why
7 somebody should know that you are sitting down. Just "Yes" or "No" if that is what
8 is called for by the question.

9 Stop there and let the questioner ask you any additional question if the answer you
10 gave is not enough. If they ask you the additional question, again, answer it as
11 simply as possible and stop and wait for the next question. That is how we do it in
12 an efficient manner. Do you understand?

13 WITNESS: KEN-OTP-P-0743 (On former oath)

14 (The witness speaks Swahili)

15 (The witness gives evidence via video link)

16 THE WITNESS: (Interpretation) I understand.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, please proceed.

18 MR STEYNBERG: Thank you, your Honours.

19 QUESTIONED BY MR STEYNBERG: (Continuing)

20 Q. Good morning, Mr Witness.

21 A. Good morning.

22 Q. Mr Witness, if you remember when we finished off yesterday afternoon we
23 were just clarifying certain things that were said by Mr Ruto at a harambee on or
24 about 15 October 2007; do you recall that?

25 A. Yes, I remember.

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, hold on please. I promised to ask
2 you how long you intend to be with the witness.

3 MR STEYNBERG: Yes, thank you, your Honours, for the reminder. Unfortunately,
4 yesterday things were proceeding far slower than I had hoped. Perhaps with
5 your Honour's advice this morning to the witness we might see more swift progress,
6 but at the rate we were proceeding yesterday, I don't anticipate that I will finish
7 before some time on Thursday morning. I will of course try to hurry it up and I will
8 try to focus on the most important issues.

9 Unfortunately there is a lot of material to cover with this witness. He's made a
10 number of previous statements that I'm probably going to have to deal with, and I do
11 expect at a certain stage to have to make an application, the nature of which
12 your Honours will appreciate. So my present estimate is Thursday morning.

13 PRESIDING JUDGE EBOE-OSUJI: Noted. We will try and move it along so that
14 we hope to be done before that time. You're an experienced lawyer, so I'm sure you
15 will know how to approach matters, whether to move on with certain lines of
16 question and also what matters have been covered by other witnesses.
17 Proceed.

18 MR STEYNBERG: I'm grateful, your Honours.

19 MS ALAGENDRA: Your Honours, if I may just for a minute make a very humble
20 suggestion, is that could we possibly even see whether we could proceed for some
21 parts in English, because yesterday one of the issues we did have was the translation
22 that was coming through.

23 PRESIDING JUDGE EBOE-OSUJI: Let's revisit that question later, if possible in the
24 format in which we discussed that sort of question yesterday. You know what I
25 mean.

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1 Mr Steynberg, proceed.

2 MR STEYNBERG: Thank you.

3 Q. Now, Mr Witness, when we finished off yesterday you had told the Chamber
4 that Mr Ruto had made references to a place called Kimaiyo and had asked the
5 question "Is there any Kimaiyo in Central?" Do you remember that?

6 A. I remember.

7 Q. And you clarified that Kimaiyo is a place located in Nandi and Marakwet
8 country; is that correct?

9 A. It's not a place. It's the name of a person. These are names that are found
10 amongst the Nandi community and within the Marakwet community.

11 Q. I see. And what did you understand Mr Ruto to be trying to convey when he
12 said "Is there any Kimaiyo in Central?" What was the meaning of all this?

13 A. It's to say that the Kikuyu came to our area and don't want us, us Nandi, to go
14 live where they live in Central. So they want us to give them our votes.

15 Q. Thank you. All right. You told us yesterday that Mr Ruto had said that the
16 Kikuyu should be driven out, and you said that this was well received by the large
17 crowd that was present. Do you recall that?

18 A. Yes, I remember that. It's not that they agreed, but they were very happy, they
19 rejoiced.

20 Q. And you also said the crowd hailed Mr Ruto; is that right?

21 A. Yes.

22 Q. All right. I'd like to move on then from this meeting. After this date, after 15
23 October 2007, what was the attitude of the Kalenjin people in your area towards the
24 Kikuyu?

25 A. It wasn't just the Kikuyu, it was also the supporters of the PNU who began to

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1 receive threats. They received threats from members of the ODM.

2 Q. Did you witness any incidents in which Kikuyu or PNU supporters were
3 threatened by members of the ODM?

4 A. I too received threats. It wasn't just other people, I received threats too.

5 Q. Well, let's start with you. What threats did you receive?

6 PRESIDING JUDGE EBOE-OSUJI: Is this something we can discuss in the open
7 session?

8 MR STEYNBERG: Your Honours, no, we should go into private session. Thank
9 you.

10 PRESIDING JUDGE EBOE-OSUJI: Witness, do not answer yet. We will go into
11 private session.

12 *(Private session at 9.48 a.m.) Reclassified as open session

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

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

15 Witness, you can now answer the question.

16 Mr Steynberg, can you repeat the question?

17 MR STEYNBERG: Yes, thank you, your Honours.

18 Q. I had asked you about the attitude towards the Kikuyu and PNU supporters,
19 and you mentioned that you yourself had received threats. Let's deal with that first.
20 What threats did you receive, sir?

21 A. (Redacted)

22 (Redacted)

23 Q. (Redacted)

24 A. You want me to give the name or the number? Number 13 on the list.

25 Q. Thank you, Mr Witness. Thank you, Mr Witness. We are in private session,

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- 1 but it's good to get into the habit of using the names.
- 2 PRESIDING JUDGE EBOE-OSUJI: The numbers you mean.
- 3 MR STEYNBERG: The numbers, I beg your pardon.
- 4 Q. But we can say that we're dealing with (Redacted) is that
- 5 correct?
- 6 A. Yes, it was him. There was another person. I don't see the name here.
- 7 Q. Can you give us the name, please, in private session?
- 8 A. (Redacted)
- 9 Q. Is that spelt (Redacted) or perhaps (Redacted)
- 10 A. It ends with (Redacted)
- 11 Q. Very well.
- 12 A. Oh, I just see that name, it's person number 2.
- 13 Q. I see. Now, who is person number 13?
- 14 A. (Redacted)
- 15 Q. And what party did he support?
- 16 A. (Redacted)
- 17 Q. And why (Redacted)
- 18 (Redacted)
- 19 A. He said this: (Redacted)
- 20 (Redacted)
- 21 Q. And who was this (Redacted) person?
- 22 A. He was (Redacted)
- 23 Q. And (Redacted)
- 24 A. (Redacted)
- 25 MR STEYNBERG: Thank you, your Honours. We can return to public session.

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1 PRESIDING JUDGE EBOE-OSUJI: We go back to public session now.

2 (Open session at 9.53 a.m.)

3 THE COURT OFFICER: (Interpretation) We are in open session.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 Mr Steynberg?

6 MR STEYNBERG: Thank you, your Honours.

7 Q. Mr Witness, I'd like to return to my earlier question which was related not so
8 much to you but to other people. So can you tell us whether you witnessed any
9 incidents in or around Turbo in which other persons were threatened because they
10 were PNU supporters or Kikuyu?

11 A. I saw some of those things.

12 Q. Please tell us what you saw.

13 A. Some young people were taken, transported by tractor, and they were calling
14 out, shouting, saying, "The Kikuyu and all those who support PNU must start
15 travelling, must be on their way." That was the day after the elections.

16 Q. And what was the ethnicity of these young people?

17 A. They were Nandi.

18 Q. And to whom did the tractor belong, do you know?

19 A. Well, right now I don't remember, but I do remember that there was a vehicle
20 that belonged to someone by the name of Tumaini. It was a pickup kind of vehicle.
21 And as for the other vehicles, I don't remember.

22 MS ALAGENDRA: Your Honours, if I may at this point, what we heard from the
23 Swahili interpretation was the witness said this was happening before the elections
24 and not after. So if this could be clarified, it would be helpful.

25 MR STEYNBERG: Yes, thank you, your Honours. I'm grateful to my learned

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1 friend.

2 Q. Did you say this happened before or after the elections, Mr Witness? Can you
3 remember the date?

4 A. Before the elections.

5 Q. Do you recall the date when this happened?

6 A. I don't remember the day, but it was a few days after the meeting that was held
7 on the 15th.

8 Q. Are you referring to the harambee on 15 October 2007?

9 A. Yes.

10 Q. All right. You say you don't recall who the tractor belonged to. Did you tell
11 the investigators when you made your statement who that tractor belonged to, sir?

12 A. I don't remember, but I might have said it.

13 MS ALAGENDRA: Your Honours, there's a name appearing at page 9, line 13. If
14 we could have that cleared up for the record.

15 MR STEYNBERG: Yes, I'll come to that as well, your Honours.

16 Q. I'd like to show you your statement dated 10 to 14 July to see if that refreshes
17 your memory.

18 MS ALAGENDRA: Your Honour, there is a name on the record. Perhaps that
19 should be cleared first?

20 MR STEYNBERG: All right. Well, I'll get to that as well. I was going to do them
21 both of at the same time.

22 Q. But you mentioned a name earlier that the pickup belonged to a certain person.
23 Can you repeat that name?

24 A. The name of that person is not on the list.

25 Q. That's fine. You can just give us the name, please, sir.

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1 A. That's not his name. It's Tumaini, that's his nickname.

2 Q. All right. Just to get that from the record, you said "Tumaini." Is that

3 T-U-M-A-I-N-I?

4 A. Yes, that's right.

5 Q. Before I get to show you your statement, where were these youths being
6 transported on the tractor and on the pickup?

7 A. There were a great many of these youth. It was impossible to take them all in
8 that pickup.

9 Q. Do you know where they were going?

10 A. Yes.

11 Q. Please tell us.

12 A. They were walking about in Tarmbo -- Turbo, rather, city.

13 Q. Which party were they supporting, these youths?

14 A. The ODM party.

15 Q. All right. Returning then to the issue of the owner of the tractor --

16 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, is it a tractor or a pickup? Is
17 there a difference and does it matter?

18 MR STEYNBERG: Your Honours, I have an understanding, but perhaps I should
19 ask the witness so I don't lead him.

20 Q. Mr Witness, you've mentioned a tractor and you've mentioned a pickup. Was
21 this a correction or were there two vehicles that you saw?

22 A. I saw a pickup and a tractor.

23 MR STEYNBERG: All right. Relating to the tractor, Mr Court Officer, can you
24 please call up KEN-OTP-0029-0131, at page 0139.

25 PRESIDING JUDGE EBOE-OSUJI: Do we have a bundle?

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1 MR STEYNBERG: Yes, thank you, your Honours. If the Court will bear with me?

2 It's number 1 in the first bundle, your Honours, the first tab in the first bundle. This
3 is the statement that was referred to yesterday.

4 THE COURT OFFICER: (Via video link) The document is being displayed, page
5 0131.

6 MR STEYNBERG: Can you please display page 0139, Mr Court Officer? The
7 witness has already identified this document.

8 THE COURT OFFICER: (Via video link) The page is being displayed right now.

9 PRESIDING JUDGE EBOE-OSUJI: Did he -- has he identified this document,
10 Mr Steynberg?

11 MR STEYNBERG: My understanding was that I showed this document to the
12 witness yesterday.

13 PRESIDING JUDGE EBOE-OSUJI: In what context?

14 MR STEYNBERG: In a memory refreshing context, your Honours, but I see my
15 learned friend rising. I might be mistaken.

16 MR KIGEN-KATWA: I recall it was the document in tab 2, Mr President.

17 PRESIDING JUDGE EBOE-OSUJI: That seems to be my own recollection as well.

18 MR STEYNBERG: I apologise, your Honours.

19 Q. Mr Witness, do you see the initials at the bottom of that page? Without
20 reading them out, do you recognize those initials?

21 A. Yes, I do recognize it.

22 MR STEYNBERG: And, Mr Court Officer, can we just please call up page 0132?

23 Q. And, Mr Witness, when that page is up I'll ask you to identify the signature in
24 the middle of that page, please.

25 A. That's fine.

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1 Q. Is that your signature, sir?

2 A. Yes, it is my signature.

3 Q. And if you look at the top of the page there's some dates. Can you confirm this
4 is a statement you made to the OTP from 10 to 14 July 2010?

5 A. Yes.

6 MR STEYNBERG: Thank you.

7 Mr Court Officer, can we please return then to the previous page, 0139?

8 Your Honours, while that's being done, I note your Honours' request that documents
9 be admitted as they're referred to, but I think it's premature to admit documents that
10 are simply used for memory refreshing. If it becomes necessary, I will do so at a
11 later stage.

12 PRESIDING JUDGE EBOE-OSUJI: You're interested in 0139?

13 MR STEYNBERG: Yes, your Honours, specifically paragraph 51.

14 PRESIDING JUDGE EBOE-OSUJI: Witness, can you look at the bottom of that page.
15 Is that your initial? Do you see your initial on the page that the court officer will
16 show you?

17 THE WITNESS: (Interpretation) Yes, it is my signature.

18 MR STEYNBERG:

19 Q. Mr Witness, please read paragraph 51 and tell us if that refreshes your memory
20 as to who the tractor belonged to?

21 A. I have read it.

22 Q. And who does the tractor -- who did the tractor belong to, sir? You can use the
23 PIS.

24 A. To the person at number 17.

25 Q. Thank you, sir. All right, I'd like to move on then to a different matter. Just

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1 one second.

2 MS ALAGENDRA: Your Honours, can I ask that the document be taken off the
3 screen please?

4 MR STEYNBERG: Yes, Ms Court Officer, please remove the document.

5 THE COURT OFFICER: (Via video link) The document has been removed. The
6 only document that remains is the PIS.

7 MR STEYNBERG:

8 Q. Perhaps just before I move away, these youth that were travelling around on
9 these vehicles you said they were addressing the people and telling people that didn't
10 support -- well, let me find your exact words. Yes, "... shouting saying, 'The Kikuyu
11 and all those who support the PNU must start travelling, must start -- must be on
12 their way,'" from page 9. How were they making themselves heard to the people in
13 Turbo?

14 A. I'm sorry, would you please kindly repeat your question?

15 Q. How were these youths conveying their messages? How were they conveying
16 the message to the crowds around them, to the people around them?

17 A. The Kikuyu were frightened, as well as Nandi supporters, of the PNU.

18 MR STEYNBERG: I think I'm going to move on, your Honours.

19 MS ALAGENDRA: Your Honours, I think the witness didn't understand the
20 question. Perhaps in fairness the question should be repeated?

21 PRESIDING JUDGE EBOE-OSUJI: If the Prosecutor wants to do that?

22 MR STEYNBERG: Your Honours, I'm mindful of the advice you gave me this
23 morning in knowing when to leave something and move on and I think -- I think
24 we've spent enough time on this -- on this incident.

25 Q. Mr Witness, can you recall an occasion - and I don't think this will be in

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1 dispute - where political parties had to present their nomination papers to the
2 Electoral Commission of Kenya, the ECK? Do you recall that event?

3 A. You used a word which I did not quite understand when you were asking your
4 question. Please kindly repeat your question.

5 Q. All right. Prior to the elections in 2007, is it correct that the political parties had
6 to nominate their candidates and inform the Electoral Commission who their
7 candidates would be?

8 A. Yes.

9 Q. And is it correct that this was done by parties handing in papers with the names
10 of their candidates to the Electoral Commission officials?

11 A. Yes, that's correct.

12 Q. Do you remember the date when this took place?

13 A. It was on 14 December 2007.

14 Q. Where were you on that date, Mr Witness?

15 A. I was in Eldoret town.

16 Q. And on that date, sir, did you attend any meetings?

17 A. I did not attend any meeting, but towards the evening when Ruto was
18 addressing his supporters I was nearby and I was able to hear what was going on.

19 Q. And where -- where did that take place that Mr Ruto was addressing his
20 supporters?

21 A. It was at the Eldoret Municipality Grounds.

22 Q. Mr Witness, did you ever make any statement to the effect that you attended a
23 meeting on 14 December 2007?

24 A. Yes, I remember that I said so.

25 Q. Did you say so to the Prosecution, sir, in your first statement?

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1 A. Yes, I said so to the investigators, not to the Prosecutor.

2 MS ALAGENDRA: Your Honours, I don't know where my learned friend is going
3 with this, but the witness has not seemed to have said he has forgotten anything
4 about whether or not he attended a meeting and so, if we're going to do a memory
5 refreshing exercise, then we object to that.

6 MR STEYNBERG: No, your Honours, I'm not going to do a memory refreshing
7 exercise. I'm placing on record what is effectively a recantation of this version.

8 PRESIDING JUDGE EBOE-OSUJI: Is it? I thought the next question would
9 be -- once he said to remembered, then the question would be, "What is it? Did he
10 attend the meeting or not?", then take it from there.

11 MR STEYNBERG: That was in fact where I'm going, yes.

12 Q. What meeting did you tell the investigators you attended on that date?

13 MR KHAN: Mr President, I do apologise. I do object. Your Honours, there's only
14 two -- we must, in our respectful submission, maintain some kind of procedural
15 consistency.

16 My learned friend has a right to examine in accordance with the Rules. Now,
17 your Honours, in relation to previous statements there is two options: One is an
18 application to refresh his memory in the event and only in the event that the witness
19 says that he doesn't remember, and your Honours decide that in those circumstances
20 and notwithstanding witness preparation he should be entitled to see the statement or
21 the transcript previously made.

22 The other is if the Prosecution seek to impugn the credibility of the witness that they
23 themselves have called, in which case an application for hostility is the appropriate
24 way, and that must be done in the normal fashion, not by the back door, by stealth,
25 but properly, and that is not --

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1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, no, no, no, no. Let's watch our
2 language. Let's not bring in back door and stealth. Make your submission as a
3 matter of factual submission. Let's avoid characterisations, okay.

4 MR KHAN: Your Honour, the Prosecution do not have a right in our respectful
5 submission to start cross-examining a witness in relation to matters that the witness
6 has not -- that have not been elicited in the proper fashion. The Prosecution -- the
7 witness's testimony was very clear in relation to the 14 December 2007 that he in the
8 evening heard a portion of what Mr Ruto is said to have said on that day.
9 For the Prosecution out of nowhere to cross-examine the witness and lead him, either
10 it's leading or it's cross-examination to refer him back to something previously said
11 when the witness has not raised that under oath in evidence is improper. So,
12 your Honours, the question was not permissible in our respectful submission. If the
13 Prosecution wish to raise matters that were said previously by the witness, there's a
14 way to do it, but it can't be mixed to evidence in-chief. It's completely inappropriate.

15 PRESIDING JUDGE EBOE-OSUJI: Let's break it down. What exactly was the run
16 of question that you're objecting to, so we are all on the same page?

17 MR KHAN: Your Honour, the objection was the Prosecution --

18 MR STEYNBERG: Your Honours, I'm sorry to interrupt, but I wonder if the feed --

19 MR KHAN: I'm on my feet.

20 MR STEYNBERG: -- could be cut off first to the witness before my learned friend
21 continues. I don't think it's appropriate that the witness listens to this debate.

22 PRESIDING JUDGE EBOE-OSUJI: That's a good observation. Let's cut the feed to
23 the remote location.

24 And then, Mr Khan, as a matter of fact, frame by frame, put the question or the
25 questions the Prosecutor asked and what's wrong with them.

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1 MR KHAN: Mr President, I'll wait for the --

2 PRESIDING JUDGE EBOE-OSUJI: Yes.

3 MR KHAN: -- green light from the court officer.

4 PRESIDING JUDGE EBOE-OSUJI: At the remote location, is the feed cut?

5 THE COURT OFFICER: (Via video link) Mr President, I have lowered the volume.

6 The witness is not able to hear what is being said. Only counsel and myself can
7 follow the debate.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

9 MR KHAN: I'm grateful.

10 Mr President, I note that my learned friend himself was the first to raise the word
11 "recantation." It came from the lips of the Prosecution, not from the Defence.

12 But what was completely inappropriate we say is page 16, line 8, "Mr Witness, did
13 you ever make any statement to the effect you attended a meeting on 14
14 December 2007?" "Yes, I remember that I said so."

15 What was the Prosecution trying to do? They were clearly setting the witness up for
16 an application for hostility, trying to get in we say inappropriately a previous
17 inconsistent statement to impugn the evidence under oath.

18 Now, your Honours, my learned friend can make an application, and we'll respond to
19 that application holistically, because we say this, particularly in this case, where the
20 witness has undergone many hours of witness preparation and for almost a month in
21 July 2014 was extensively interviewed by the Prosecution and has given a
22 narrative -- it is not like previous applications. Your Honour, the Prosecution should
23 have asked the witness his evidence.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Let me stop you. Look at line 2,
25 page 16. Line 2 the answer was -- first the question, first the question on line 1, quote,

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1 "And on that date, sir, did you attend any meetings?" That's the question.

2 And then the answer, "I did not attend any meeting, but towards the evening when
3 Ruto was addressing his supporters, I was nearby, and I was able to hear what was
4 going on." Unquote.

5 MR KHAN: Indeed. And if the Prosecution were conducting matters in what we
6 say is the normal way, they would say: Well, what happened at that event? What
7 did you hear Mr Ruto saying? How many people were present? What was your
8 proximity to Mr Ruto? Can you remember what he said?

9 Your Honour, the reality is belied by the Prosecution injecting in the next question,
10 "Did you ever make any statement to the effect you attended a meeting on 14
11 December 2007?"

12 Why were the Prosecution doing that? Your Honour, it is obvious in our respectful
13 submission, it is absolutely obvious that the Prosecution were trying to get in a
14 statement and a narrative which this witness has repudiated, not in some unknown
15 affidavit --

16 PRESIDING JUDGE EBOE-OSUJI: All right, let's stop.

17 Mr Steynberg, so we don't -- as I said earlier, in this Chamber we try to avoid
18 procedural rigmarole if there is no point to it. What are you interested in? Are you
19 interested in the witness attending a meeting as such, or are you interested in whether
20 anything was said by anybody on any particular occasion?

21 MR STEYNBERG: Your Honours, what I'm interested in is to find out whether the
22 witness is standing by or departing from a version which he gave to the Prosecution
23 earlier.

24 PRESIDING JUDGE EBOE-OSUJI: Does the version matter? Again, remember, are
25 we interested in procedure, fighting questions of procedure standing on versions if

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1 what really should be the issue is the substance? Are you interested in the witness
2 attending -- having attended a meeting or a version that he gave earlier, or are you
3 interested that now the witness is on the stand for the witness to tell us whether or
4 not he heard anything?

5 MR STEYNBERG: Your Honours, if I can answer it this way: On a previous
6 occasion when I requested a witness -- permission to cross-examine a witness and the
7 witness to be declared hostile, my learned friend stood up and objected at length
8 saying that the proper procedure was first to establish with that witness whether
9 what he had said in his previous statement was false or correct, and I was obliged to
10 go through that statement paragraph by paragraph virtually to establish which parts
11 of the statement were true and which parts were correct.

12 I was on the cusp of establishing whether or not something the witness had
13 previously said to the Prosecution was correct or not, which would then have led to
14 another procedure, and I would have asked the Chamber for permission to confront
15 that witness with his earlier statement to establish the contradiction, and from there
16 on the ultimate objective would be at the appropriate time to make an application to
17 have this witness declared hostile.

18 But, your Honours, my respectful submission is that the objection is premature. We
19 haven't even got to that yet, but --

20 PRESIDING JUDGE EBOE-OSUJI: Maybe we can go beyond that argument by you
21 answering the question I asked you. Are you interested in the witness having
22 attended a meeting as such, or are you interested in the witness having heard
23 something? Here the witness is telling, saying -- whether or not he attended the
24 meeting, and if that's important to you you may pursue it, but if what's -- what's more
25 important is the witness having said, quote, "Towards the evening when Ruto was

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1 addressing his supporters, I was nearby, and I was able to hear what was going on."

2 Unquote.

3 I do not know whether that's what's of interest to your case or whether you want to
4 insist on placing the witness at a meeting that he attended. I'm not cutting you off.
5 I just want to know what the issue is so we know where we go from here.

6 MR STEYNBERG: Thank you, your Honours. I think I understand now. My
7 interest is the latter. Whatever the witness has to say now about the events of the
8 evening, the event I'm interested in is a different event at a different occasion at a
9 different time. When I asked the witness did he attend any meetings, he says, "I did
10 not attend any meetings" and then he starts to tell us about what happened in that
11 evening. I'm interested in an earlier event, which the witness now appears to be
12 saying he did not attend.

13 PRESIDING JUDGE EBOE-OSUJI: You are interested in the meeting or whether the
14 witness was somewhere and heard Mr Ruto saying something?

15 MR STEYNBERG: Yes, your Honours. I'm interested in a version that the witness
16 gave previously that he was at another meeting at a different location on that date
17 and heard Mr Ruto say certain things and do certain things.

18 PRESIDING JUDGE EBOE-OSUJI: All right. I'm still not clear where we stand,
19 Mr Steynberg. Is it something you can pursue from the latter part? Is it possible
20 and really the issue is resolved by, for now by you exploring what appears at line 2,
21 the latter part of line 2, quote, "Towards the evening when Ruto was addressing his
22 supporters, I was nearby, and I was able to hear what was going on." Don't you just
23 explore that and we see where we go?

24 MR STEYNBERG: Your Honours, I'm happy to do so. I don't think it's -- I can't see
25 how it's going to solve my dilemma, but I'm happy to do so and we can take it from

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1 there.

2 PRESIDING JUDGE EBOE-OSUJI: I think so. Let's begin with that and then if you
3 want to return to the matter of a meeting -- as I said I'm not stopping you if that is
4 important to your case -- but maybe we should deal with this first and see where we
5 go from here.

6 MR STEYNBERG: As the Court pleases.

7 PRESIDING JUDGE EBOE-OSUJI: Court officer, you can bring back the witness.

8 What I mean by that is you can let him in on the proceedings in terms of the audio.

9 THE COURT OFFICER: (Via video link) Yes, Mr President. The witness can hear
10 us and hear the debates again.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 MR STEYNBERG:

13 Q. All right. Thank you for your patience, Mr Witness. I'd like to clarify
14 something you said before, before we got involved in legal discussions.

15 You mentioned that on the evening of 14 December you were nearby when Mr Ruto
16 addressed his supporters, and you heard what he said. Tell us, please, what it is that
17 Mr Ruto told his supporters on that occasion.

18 A. He said to his supporters that they were not ignorant and were not part of the
19 government that was to be reformed. He also said that it was possible that the PNU
20 party would -- might be preparing to steal votes, and for them that was not going to
21 be acceptable. And he said that it would be a good thing if for each Kikuyu after the
22 elections, no matter what party might win, be it ODM or PNU, that they pack up their
23 things and go home along with all of those people who supported the PNU.

24 I believe those were the points that I still remember.

25 Q. Thank you. And besides that speech that Mr Ruto made in the evening to his

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1 supporters in Eldoret, did you attend any other meetings that day?

2 A. No.

3 Q. And did you hear Mr Ruto speak at any other occasion on that day?

4 A. No.

5 MR STEYNBERG: Thank you. Your Honours, then perhaps we should do things
6 more formally. May I request permission to confront this witness with a prior
7 inconsistent statement on this issue?

8 PRESIDING JUDGE EBOE-OSUJI: Ms Alagendra?

9 MS ALAGENDRA: Yes, I'm not clear whether my learned friend wants to confront
10 the witness on a particular issue or to refresh his memory. The preceding might be
11 different.

12 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, let's begin with refreshing
13 memory and then if memory is not refreshed, then we move to the next step.

14 MR STEYNBERG: Very well, your Honours.

15 Q. Mr Witness, I'm going to ask you to look at something that you told the
16 Prosecution earlier in the statement you saw earlier today.

17 For the record, your Honours, it's KEN-OTP-0029-0131, and if I can ask the court
18 officer to call up page 0140?

19 THE COURT OFFICER: (Via video link) The page is being displayed at paragraph
20 54.

21 MR STEYNBERG:

22 Q. Mr Witness, can you please start by confirming are those your signatures at the
23 bottom of that page? I mean your initials, I beg your pardon.

24 A. I confirm that those are my initials.

25 Q. And can I ask you please then to read through paragraphs 54 to 58 and please

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1 let us know when you're finished?

2 MR KHAN: Mr President, while that's being done can I address the Bench perhaps
3 if the microphone in the remote location can be turned off?

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we don't want you intervening. You
5 have to decide whether you do -- you are the counsel on duty for this witness or it's
6 Ms Alagendra.

7 MR KHAN: Mr President, with your leave --

8 PRESIDING JUDGE EBOE-OSUJI: We have to have some ordered.

9 MR KHAN: Indeed. Mr President, on this issue I will be addressing
10 your Honours.

11 PRESIDING JUDGE EBOE-OSUJI: We don't want to split it. One person at a time.
12 So we -- let there be some orderliness. You can consult with your colleague, confer
13 with her, and then she can make submissions, but we -- I do not want the situation
14 where we have two lawyers.

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

16 PRESIDING JUDGE EBOE-OSUJI: Yes.
17 Mr Steynberg?

18 MR STEYNBERG: Thank you, Mr --

19 MR KHAN: Your Honour, I apologise. Dato' Shyamala Alagendra will be making
20 the application so we do ask that the sound be turned off for the remote location --

21 PRESIDING JUDGE EBOE-OSUJI: I see.

22 MR KHAN: -- while the Bench can be addressed.

23 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Okay, I understand now.

24 Mr Court Officer at the remote location, could you switch off the sound for the
25 witness?

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1 THE COURT OFFICER: (Via video link) Yes, Mr President. The witness cannot
2 hear the debate. The sound has been cut off.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you.
4 Ms Alagendra?

5 MS ALAGENDRA: Your Honours, we're still not clear on the procedure that's being
6 followed because this witness has not said that he has forgotten about any meeting he
7 attended prior to what he's just explained that he saw take place in a field, and for
8 that reason, your Honour, we object to this process which my learned friend is calling
9 "memory refreshing."

10 PRESIDING JUDGE EBOE-OSUJI: Objection overruled.

11 MR STEYNBERG: Thank you, your Honours. For the record I didn't call it
12 memory refreshing. I had made an application to confront the witness --

13 PRESIDING JUDGE EBOE-OSUJI: Yes, you did --

14 MR STEYNBERG: -- and I'm following --

15 PRESIDING JUDGE EBOE-OSUJI: -- you did and the Chamber's ruling is that it is
16 more appropriate first for you to see if the witness's memory may be refreshed, if that
17 is the case, it is for a witness to have a look at something to say "I stand by what I said
18 earlier."

19 MR STEYNBERG: As the Court pleases. If we may return then to the remote
20 location?

21 PRESIDING JUDGE EBOE-OSUJI: It is also a matter of fairness to a witness that
22 witnesses who come to court are not confronted in cross-examination by the party
23 that called them at every opportunity. So it is fair first to see whether the problem
24 the witness was facing was a problem of having forgotten what was said earlier, or
25 whether a witness genuinely says "I was wrong on the earlier occasion and now what

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1 I'm telling the Court now that I'm under oath is the position."

2 MR STEYNBERG: Yes. Thank you, your Honour. I do take to heart that advice.

3 In present procedure, in present circumstances, as my learned friend has already
4 alluded to, there are reasons to believe from later statements made by this witness
5 that memory refreshing may not help, but I'm happy to take it one step at a time.

6 PRESIDING JUDGE EBOE-OSUJI: Yes.

7 MR STEYNBERG:

8 Q. Mr Witness, can you hear me again?

9 PRESIDING JUDGE EBOE-OSUJI: Witness, are you with us?

10 THE WITNESS: (Interpretation) I hear you.

11 MR STEYNBERG:

12 Q. All right. Thank you, Mr Witness. Having read through those paragraphs I
13 referred you to a few minutes ago, does that refresh your memory on whether or not
14 you attended a different meeting on 14 December 2007?

15 A. I remember that that meeting was not held and, if I had understood, perhaps
16 this is something from the Prosecutor.

17 Q. I'm sorry, I don't follow your answer. What do you mean "... this is something
18 from the Prosecutor"?

19 PRESIDING JUDGE EBOE-OSUJI: Witness, what is the situation? The Prosecutor's
20 question to you earlier before you were shown the document was whether you had
21 attended a meeting on 14 December 2007 at which Mr Ruto had spoken. Other than
22 the event you testified to earlier where you said in the evening you happened to be
23 nearby --

24 THE WITNESS: (No interpretation)

25 PRESIDING JUDGE EBOE-OSUJI: -- wait, wait -- and heard Mr Ruto say something,

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1 the next question was whether apart from that other event, had you attended any
2 other meeting on 14 December 2007, your answer was "No." And then your
3 previous statement was shown to you, paragraphs 54 to 58, you have read them.
4 Now, having read those paragraphs, what is your position? You are now before the
5 Judges and you are telling us -- you are giving us your direct evidence. What is your
6 position? Did you attend any other meeting on 14 December 2007 or not?

7 THE WITNESS: (Interpretation) No.

8 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, take it from there.

9 MR STEYNBERG: Thank you, your Honours.

10 However, I should advise the Chamber and advise counsel that we are getting into an
11 area where Rule 74 may be engaged. This might be an appropriate juncture to move
12 into private session.

13 PRESIDING JUDGE EBOE-OSUJI: We move into private session then.

14 *(Private session at 10.45 a.m.) Reclassified as open session

15 THE COURT OFFICER: (Interpretation) We are in private session.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you.

17 MR STEYNBERG:

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25 PRESIDING JUDGE EBOE-OSUJI: All right. Thank you, Witness.

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1 Counsel, it's time for the morning break. We will be taking it now. When I come
2 back, Mr Steynberg will take over his examination-in-chief and I will be withdrawing
3 from the arena of questioning on this matter. I just wanted to know what this was
4 about in order to know how to navigate this area.

5 Mr Kigen-Katwa?

6 MR KIGEN-KATWA: Mr President, I was wondering whether I could highlight
7 some translation issues before we break, or I could come back to them?

8 PRESIDING JUDGE EBOE-OSUJI: Let's deal with that later when we come back.

9 MR KIGEN-KATWA: Obligated, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: Witness, we will be taking our morning break
11 now and so you should also take yours for 30 minutes. Bye-bye.

12 THE COURT USHER: All rise.

13 (Recess taken at 11.01 a.m.)

14 (Upon resuming in open session at 11.33 a.m.)

15 THE COURT USHER: All rise.

16 Please be seated.

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

18 Welcome back, Witness.

19 We're in open session.

20 Mr Steynberg, please, continue.

21 MR KHAN: Mr President, I do apologise. Before that's done, with your leave

22 Mr Ruto would like to address the Bench on the issue of translation for two minutes.

23 MR RUTO: Thank you, Mr President, your Honours. I would -- as a person who
24 understands Kiswahili and English very well and having studied Kiswahili all the
25 way to secondary school, I have seen the translation that is going on here and,

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1 Mr President, the translation is really bad. In fact, part of the reason why you can't
2 make head or tail of what the witness is saying is contributed to a very great extent by
3 the Kiswahili translation.

4 And, therefore -- and partly it is because the Kiswahili translation is coming from our
5 brothers from Congo and --

6 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Ruto, let's leave it at that. We've
7 noted your point. Your point is that the Kiswahili --

8 MR RUTO: Yeah.

9 PRESIDING JUDGE EBOE-OSUJI: -- is not good enough.

10 MR RUTO: So what I was saying, Mr President, is in East Africa there are shades of
11 Kiswahili.

12 PRESIDING JUDGE EBOE-OSUJI: All right. Let's -- thank you for that
13 information.

14 MR RUTO: I would really -- in fact, looking at it, the witness's English is far better
15 than the Kiswahili translation.

16 PRESIDING JUDGE EBOE-OSUJI: We've noted your observation on the record.

17 And Mr Kigen-Katwa from time to time has also assisted in making certain
18 corrections on the matter.

19 Mr Steynberg, proceed.

20 MR STEYNBERG: Thank you, your Honours. I believe my learned friend

21 Mr Katwa wanted to address certain issues and there's also a spelling correction I
22 need to make as well.

23 MR KIGEN-KATWA: Would you like me to do that in the open session,
24 Mr President?

25 PRESIDING JUDGE EBOE-OSUJI: Let's go to private.

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1 *(Private session at 11.36 a.m.) Reclassified as open session

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

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15 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, should we go back to the open?

16 MR STEYNBERG: No, your Honours. I believe that we were in fact in private
17 session.

18 PRESIDING JUDGE EBOE-OSUJI: Oh, we were in private session.

19 MR STEYNBERG: Yes. Yes.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, this matter of translation, this is
21 not the first time we've encountered difficulties with it. At some point something
22 needs to be done.

23 MR STEYNBERG: Your Honour, you're preaching to the converted. This has been
24 the Prosecution position for some time. Unfortunately, this is not a matter which is
25 in the realm of the Prosecution control.

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1 MR KIGEN-KATWA: Mr President, I have a suggestion to make on that issue.

2 Mr President, could I suggest that initially we could attempt a scenario where the
3 witness receives the question in English and possibly answers in Kiswahili and then
4 we'll see how it works?

5 PRESIDING JUDGE EBOE-OSUJI: Did we not try that before and got into
6 problems?

7 MR KIGEN-KATWA: Not with this witness. We've not tried that with this witness,
8 Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: Not with this witness but with another witness
10 we have.

11 MR KIGEN-KATWA: I think it could work on this witness, Mr President. We have
12 encountered him speaking in English and it was adequate. It was better than some
13 of the other witnesses we have dealt with. I think it's just a question of giving him
14 opportunity to get used to it and then it should work, Mr President.

15 I would suggest still that we try having him receive the question in English and then
16 we see how -- his comprehension of the language.

17 PRESIDING JUDGE EBOE-OSUJI: I will invite the observations of the interpretation
18 booth as to the feasibility of proceeding that way. We don't want to start and run
19 into greater difficulties.

20 Interpreters, the suggestion now is that the witness receives the question in English
21 and then he may answer in Kiswahili.

22 MS ALAGENDRA: Your Honours, perhaps before the interpreters give their
23 opinion, could I also very humbly make another suggestion?

24 PRESIDING JUDGE EBOE-OSUJI: Yes.

25 MS ALAGENDRA: Which is for the witness to proceed giving his evidence in

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1 English, and wherever he finds it difficult, then as an exception do Swahili.

2 PRESIDING JUDGE EBOE-OSUJI: We have interpretation net, as it were, in the
3 background.

4 THE INTERPRETER: Message from the interpreters: We would be pleased to
5 continue interpretation from Kiswahili into English and, as for the feasibility of
6 sending the English to the remote location, we will consult our colleagues.

7 PRESIDING JUDGE EBOE-OSUJI: All right. The problem is your preference is the
8 one that's causing difficulty, interpreters, yes, that's how we've been doing it and all
9 these complaints have been -- are now being registered and we're trying to see if we
10 can improve on the situation, but we don't want, in an effort to improve on the
11 situation, to make it worse. That's why we are consulting the interpreters. Consult
12 and get back to us.

13 Mr Steynberg, let's see if we can work in English, Ms Alagendra's suggestion, and to
14 have interpretation as a net, protective net, when we run into difficulty in English.

15 MR STEYNBERG: As the Court pleases.

16 PRESIDING JUDGE EBOE-OSUJI: What do you think?

17 MR STEYNBERG: Your Honours, we can try that way, we can try it that way. In
18 my -- in the witness preparation session we did use an interpreter, but it was much
19 easier when the interpreter is sitting next to the witness and only -- it's not going
20 through the French as well, but perhaps we can try this.

21 PRESIDING JUDGE EBOE-OSUJI: Okay.

22 MR STEYNBERG: I just wanted to clarify two other issues, but perhaps you first,
23 your Honour.

24 PRESIDING JUDGE EBOE-OSUJI: Yes.

25 Witness, can you hear me?

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1 THE WITNESS: (Interpretation) Yes, I can hear you.

2 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, we know that your

3 preference is to have interpretation, but we're having difficulties. You see, either

4 way it looks like we have difficulties. It's a matter of when one is faced with that sort

5 of situation to choose which of the lesser difficulty to proceed with.

6 One is your own difficulty that you want -- you prefer to have interpretation, and that

7 is a request or a preference that the Chamber has allowed you up until this time.

8 But the other difficulty is that in using interpretation, we are also having problems

9 understanding you and the concern is maybe it is because of interpretation that is

10 resulting in that.

11 Now, it is not to blame the interpreters. There are all kinds of other arrangements

12 that may -- we have to keep in mind. One of them is the way the system works.

13 We also have French into the whole thing. So your question is asked, it is

14 interpreted I believe into French and then into Kiswahili, and then when you answer

15 your question in Kiswahili, it is translated or interpreted into French before it comes

16 out back in English.

17 In all of that, meaning may get lost. There is a movie that's called "Lost In

18 Translation." We want to be sure that that is not what's happening here.

19 In light of that, we want you now to speak in English. Listen to the question in

20 English. Answer it in English. We have interpreters on standby. If we have

21 difficulty, then we will call them in from time to time, but in the meantime it will

22 be -- let's see if we can make more progress with you working in English.

23 We want to be sure that we understand what you are saying, and we also want to be

24 sure that you do understand what is being said. Do you understand?

25 THE WITNESS: (Interpretation) I have understood you.

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1 PRESIDING JUDGE EBOE-OSUJI: Thank you. Thank you. I want you to
2 understand that the idea is not to overrule your preference because we want to. It's
3 just that we want to proceed in a way that does not result in any misunderstanding of
4 what you are trying to tell us.

5 So from now on you speak in English. The Prosecutor will speak to you in English
6 and we'll see how we go with that. All right?

7 THE WITNESS: (Speaks English) Yes.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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7 MR STEYNBERG: If the Court will bear with me, please?

8 (Pause in proceedings)

9 MR STEYNBERG: Just one or two clarifications I would like to make before I move
10 to the next stage.

11 Q. You've mentioned that (Redacted) and (Redacted) were close
12 allies of Mr Ruto. What do you mean by that?

13 A. They were people who could relay direct message from Ruto or if anybody
14 could want to visit Mr Ruto, they could take them there very easily because Ruto was
15 becoming -- it was actually becoming difficult to see Ruto without -- or to go to Ruto's
16 home.

17 Q. And what was the relationship according to you between Mr Farouk Kibet and
18 Mr Ruto?

19 MS ALAGENDRA: Your Honours, can we have some basis of knowledge for the
20 last answer?

21 MR STEYNBERG: Your Honours, that would seem to be a matter that could be
22 clarified on cross-examination.

23 PRESIDING JUDGE EBOE-OSUJI: Indeed. Proceed.

24 MR STEYNBERG:

25 Q. Mr Farouk Kibet, how do you know Mr Farouk Kibet?

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1 A. Mr Farouk Kibet was actually one of the biggest friends or confidantes, because
2 with him, he could do anything. By then you could not even go to report to the
3 police just because of the Defence from Mr Ruto.

4 Q. My question was how did you know him?

5 A. Then I'm not understanding the question.

6 Q. All right, let me ask you this. Have you met Mr Kibet personally yourself?

7 A. No.

8 Q. So how do you know that he was a confidante of Mr Ruto's?

9 A. From people like (Redacted) and (Redacted) and other peoples.

10 Q. What about (Redacted) have you met him?

11 A. Yes.

12 Q. And what was his relationship like with Mr Ruto, if you know?

13 A. I don't be in a position to explain the type of relationship. By then they
14 were -- the relationship is -- was actually more close.

15 (Redacted)

16 (Redacted)

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17 (Redacted)

18 (Redacted)

19 MR STEYNBERG: Thank you.

20 Your Honours, may I ask that the feed be turned down while I make an application?

21 PRESIDING JUDGE EBOE-OSUJI: Court officer, please turn down the audio feed to
22 the witness.

23 THE COURT OFFICER: (Via video link) Mr President, I confirm that the audio has
24 been cut.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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1 Mr Steynberg?

2 MR STEYNBERG: Thank you, your Honours. At this stage I would like to make
3 the formal request that this witness be declared a hostile witness as has been done
4 with several of the previous witnesses.

5 As with those other witnesses, your Honours, my submission is this witness has

6 (Redacted)

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1 But for the time being, your Honours, we submit that the fact that this witness has
2 deviated from -- materially from almost all of the important aspects of his statements
3 is in and of itself sufficient basis to allow the Prosecution to impeach his evidence
4 through the way of the means of cross-examination, to confront him with other
5 material which we have from this witness and from other sources (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 MS ALAGENDRA: Your Honours, Mr Katwa will be addressing you first, but
10 before that, your Honour, just for us to prepare our submissions we'd like to know
11 from the Prosecution who do they allege (Redacted)

12 PRESIDING JUDGE EBOE-OSUJI: That is if we do grant the application, they will
13 be making that plain through their questioning at the time if we grant the application.

14 Mr Kigen-Katwa?

15 MR KIGEN-KATWA: Mr President, in your earlier decision on the issue of the
16 criteria to be applied in determining whether or not to declare a witness hostile,
17 criterion number three was whether the testimony of the witness before the Court has
18 been in whole or in part deliberately or systematically inconsistent with prior
19 statement. And criterion number four, which is related, is whether the witness has
20 become systematically adverse against the calling party by not deliberately
21 impugning the credibility of the case of the calling party, but also by appearing
22 systematically to support the case of the party opposed in the interest of the calling
23 party.

24 Your Honours, in principle we oppose the application to declare this witness hostile.
25 We contend that this witness does not have the character which may have weighed

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1 on your minds in deciding in respect to previous witnesses the aspect of appearing to
2 systematically support the case of the opposed party.

3 Your Honours, I make this argument from the premises that (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 May I say that in terms of his testimony in respect to the opposing party, he has
13 already adduced or given testimony that is adverse to the Defence and especially to
14 my client, the second accused, and for those reasons therefore he can't be said to be
15 predisposed or to be taking a posture inclined towards assisting the Defence.

16 Mr President, for all those reasons I pray that you do not find that this witness
17 deserves to be declared hostile.

18 PRESIDING JUDGE EBOE-OSUJI: Ms Alagendra?

19 MS ALAGENDRA: Your Honours, firstly we adopt the submissions of my learned
20 friend, Mr Katwa, but for the Ruto Defence, your Honour, we request your Honours
21 to stand back and to have a look at what is transpiring in relation to this particular
22 witness.

23 Since he started testifying, your Honours, he has given very incriminatory evidence.

24 He's spoken about an October 15th meeting, where Mr Ruto has called for the eviction
25 of Kikuyus, and today in his testimony he's introduced another call for eviction on the

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1 evening of 14 December. It was not part of his previous evidence.

2 Furthermore, your Honour, even before the witness started testifying (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 And, your Honour, it's clear that this witness has not been systematically adverse.

9 As far as the Ruto Defence is concerned he's departed from an account concerning a

10 meeting where allegedly guns and gas cylinders were distributed, but the Prosecution

11 knows from their own evidence that the submission of nomination papers, for

12 example, did not take place on that date. They were on full notice, your Honour,

13 even if my learned friend wants to challenge that this witness (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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17 (Redacted)

18 (Redacted)

19 (Redacted)

20 And for all these reasons, your Honour, we object and we ask that my learned friend
21 continue his examination-in-chief in the usual way without leading questions.

22 Thank you, your Honour.

23 MR NARANTSETSEG: Mr President, thank you very much.

24 I will keep my intervention very short, your Honour. On behalf of the victims, we
25 support the Prosecution's application. It is a fact that (Redacted)

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1 (Redacted) Your Honours, the
2 Defence counsel and Ms Alagendra argues that this witness has maintained some
3 portions of his statement concerning for example Mr Ruto's speech at the public
4 gathering, your Honour.
5 But, your Honour, the decision you have made on 8 September last year defining the
6 special criteria for granting application for hostile witness, your Honour specifically
7 stated that the divergence or derogation from the previous statement may be in whole
8 or in part, your Honour.
9 Well, your Honours, we might admit that this witness has maintained some minor
10 portions of the statement he has given to the Prosecution, but according to our
11 observation, your Honour, we believe that this (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted) we believe that by testifying this
19 way this witness has become adverse to the Prosecution case.
20 And also we noted in accordance to our respectful submission, by testifying this way,
21 (Redacted)
22 (Redacted)
23 This concludes our submission, your Honour. Therefore, we support the
24 Prosecution's application.
25 Thank you.

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1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 Mr Steynberg, reply?

3 MR STEYNBERG: Thank you, your Honours. I see we only have a few minutes
4 left, so I'll try to be brief.

5 At the outset I should object to my learned friend giving evidence from the bar as it
6 were as to (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

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13 (Redacted)

14 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, before you sit, two minor -- two
15 points, one of them on (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 MR STEYNBERG: No, your Honours. (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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1 PRESIDING JUDGE EBOE-OSUJI: I see.

2 MR STEYNBERG: (Redacted)

3 (Redacted)

4 PRESIDING JUDGE EBOE-OSUJI: (Redacted)

5 (Redacted)

6 MR STEYNBERG: Indeed, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: All right. Now, the matter, one substantive
8 matter that the Defence have raised in their submissions is that the criterion of
9 consistent or systematic departure from a previous statement or indeed the other
10 criteria and not -- do not exist in isolation, but they exist as indicia of determining the
11 complaint of the calling party, which complaint is or should be the absence of desire
12 on the part of the witness to tell the truth at the instance of the calling party. That
13 being the case, question: Is your position that there is an absence of desire on the
14 part of this witness to tell the truth when the witness, according to Mr Kigen-Katwa's
15 submissions and Ms Alagendra, testified, amongst other things, that Mr Ruto gave a
16 public speech in which he said Kikuyus must be driven out of the Rift Valley region?
17 What was the expression again? I believe "Onge mande kokoechu," if I remember.
18 Can you speak to that briefly?

19 MR STEYNBERG: Indeed, your Honours. In short, the Prosecution's reply is yes,
20 that is our position. It is true that the witness has given snippets of evidence that he
21 has confirmed, snippets of the previous evidence which he gave us which are
22 incriminating in nature, but we say far less incriminating than the complete version
23 which he had given us previously, indeed, almost peripherally so.

24 As regards Mr Sang's client, the only incriminating piece of evidence was in respect of
25 an incident I believe that occurred some time in 2005 I think he said it was when a

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1 certain aspect he testified about --

2 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa's client, you mean?

3 MR STEYNBERG: Indeed, your Honour. Yes, Mr Kigen-Katwa's client, Mr Sang,

4 yes. And it is true that he confirmed that Mr Ruto said certain

5 incriminating -- uttered a certain incriminating statement prior to, some months prior

6 to the election. But the evidence of the actual violence and the person involved in

7 the actual violence that would create the link with Mr Ruto he's now resiled from.

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 PRESIDING JUDGE EBOE-OSUJI: Thank you. We are past our lunch-break. We

13 will rise and when we come back we'll continue at 2.30 and make our ruling then.

14 THE COURT USHER: All rise.

15 (Recess taken at 1.03 p.m.)

16 (Upon resuming in open session at 2.37 p.m.)

17 THE COURT USHER: All rise.

18 Please be seated.

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

20 We are in open session.

21 Mr (Redacted) we understand you put in a request to address the Chamber.

22 MR (Redacted) (Via video link) Yes, your Honour. If we could go into private

23 session just to be on the safe side.

24 PRESIDING JUDGE EBOE-OSUJI: Private session.

25 *(Private session at 2.37 p.m.) Reclassified as open session

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1 THE COURT OFFICER: (Interpretation) We are in private session.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you.

3 Proceed.

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

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1 (Redacted)

2 PRESIDING JUDGE EBOE-OSUJI: All right, we'll leave it at that.

3 MR STEYNBERG: Yes.

4 Your Honours, I believe there's -- I believe I heard your Honour say 8 September 2014.

5 I see it's been recorded as 8 December. Did I hear correctly?

6 PRESIDING JUDGE EBOE-OSUJI: I meant to say September. I thought I said

7 September, but --

8 MR STEYNBERG: That's what I heard, too, your Honour.

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

10 All right, thank you, Mr (Redacted) Let's proceed with our ruling.

11 The Chamber -- we can go to open session for the ruling.

12 (Open session at 2.44 p.m.)

13 THE COURT OFFICER: (Interpretation) We are in open session.

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

15 The Chamber's ruling on the Prosecution application: The Prosecutor applied to

16 declare the witness now giving evidence as a hostile witness. The Chamber has

17 heard submissions of the parties and participants.

18 The Chamber recalls that in the ruling on 8 September 2014, the Chamber had noted

19 that the classic definition of a hostile or adverse witness, which definition has to all

20 intent and purposes been accepted into the stream of international criminal practice,

21 is that a hostile witness is a witness who is not desirous of telling the truth to the

22 Court and the instance of the calling party.

23 The Chamber considered on that occasion that an application founded on that

24 complaint by the calling party is an instrument of justice to the effect that, without the

25 remedy being sought, a criminal court may never get at the truth, and in the ruling of

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1 8 September 2014, the Chamber considered that such a complaint must be based on
2 objective factors and the Chamber outlined those factors.

3 They include: One, whether the witness has been hostile in general demeanour; two,
4 whether there is an impression of evasiveness on the part of the witness; three,
5 whether the testimony of the witness before the Court has been, in whole or in part,
6 deliberately or systematically inconsistent with a prior statement.

7 If I may pause to point out that in a subsequent ruling the Chamber clarified that in
8 this respect the inconsistency must be in relation to the material issue or issues before
9 the Court.

10 And I continue with the factors: And the fourth factor indicated by the Chamber
11 was whether the witness has become systematically adverse against the calling party
12 by not only deliberately impugning the credibility of the case of the calling party, but
13 also by appearing systematically to support the case of the party opposed in interest
14 to the calling party, and the Chamber indicated that these factors are not exhaustive.
15 We also wish to clarify that they are not cumulative.

16 The Prosecutor has now argued centrally in relation to this witness that it is the third
17 factor that is implicated mostly, and that is whether the testimony of the witness
18 before the Chamber has been, in whole or in part, deliberately or systematically
19 inconsistent with the prior statement. In that regard, it needs -- we need to revert
20 back to that factor to point out that it does say "in whole or in part".

21 In that regard, the Chamber notes that necessarily the question whether or not the
22 particular witness is telling the truth, whether it arises as an issue in the case, must
23 take its bearing from the undertaking or oath of the witness at the inception of the
24 testimony.

25 For the Court, for this Chamber, the undertaking is prescribed in Rule 66(1) which

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1 every witness has had to give before starting the testimony. And that undertaking is,
2 quote, "I solemnly declare that I will speak the truth, the whole truth and nothing but
3 the truth." Unquote.

4 The essence of the Prosecutor's submission is that yes, whereas the witness may have
5 spoken the truth, according to the Prosecutor, that the witness has not spoken the
6 whole truth and nothing but the truth.

7 It is on that basis that or against that background, rather, that one must appreciate the
8 third factor, which is whether the testimony of the witness before the Court has been
9 in whole or in part deliberately or systematically inconsistent with a prior statement.
10 Having considered the matter, the Chamber is satisfied that that has been met in this
11 case, and the Prosecutor's application is granted.

12 MR STEYNBERG: As the Court pleases, your Honours. Thank you.

13 May I ask that the witness be brought back into the remote location?

14 PRESIDING JUDGE EBOE-OSUJI: Yes. Court officer, bring back the witness.

15 Thank you.

16 Now, Mr Steynberg, we are in open session. Shall we remain in open session or go
17 into private session?

18 MR STEYNBERG: Your Honours, my concern is that the answers to my questions
19 may well implicate the witness in Rule 74 issues.

20 PRESIDING JUDGE EBOE-OSUJI: So we go into private session.

21 MR STEYNBERG: Unfortunately.

22 PRESIDING JUDGE EBOE-OSUJI: Yes.

23 MR STEYNBERG: I think we have to. May I proceed, sir?

24 *(Private session at 2.53 p.m.) Reclassified as open session

25 THE COURT OFFICER: (Interpretation) We are in private session.

Trial Hearing
Witness: KEN-OTP-P-0743

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 Witness, welcome back. The Prosecutor will continue asking you questions.

3 Remember, the questions will come to you in English and you answer in English as
4 well. And also remember what I had told you earlier, to just listen to the question
5 and answer that question and wait for the next question.

6 Also, I wish to remind you of the need to wait until the question has been completed
7 and then count to five in your mind before you start answering, count to five in your
8 mind to make sure there is no overlap between the question and your answer. Do
9 you understand?

10 THE WITNESS: Yes, I do understand, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 Mr Steynberg, proceed.

13 MR STEYNBERG: I'm grateful, your Honours.

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

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16 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, that will have to be taken up
17 tomorrow.

18 MR STEYNBERG: As the Court pleases, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you.

20 Witness, we have come to the end of our proceedings for today. We will now rise
21 and we will see you again tomorrow morning. In the meantime, remember the
22 admonition yesterday. You are not to discuss your testimony with anybody
23 overnight. Do you understand?

24 THE WITNESS: Yes, I do, your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

Trial Hearing
Witness: KEN-OTP-P-0743

(Private Session)

ICC-01/09-01/11

1 Yes, Mr Kigen-Katwa?

2 MR KIGEN-KATWA: Mr President, I just wanted to enquire on an update on the
3 time estimation from my learned friend.

4 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Steynberg. Can you update?

5 MR STEYNBERG: Your Honours, the good news is I don't think it's going to be any
6 longer than my initial estimate of Thursday morning. It may indeed be shorter. I
7 will try my best.

8 PRESIDING JUDGE EBOE-OSUJI: That's good to know. Thank you.

9 The Court will rise.

10 THE COURT USHER: All rise.

11 *(The hearing ends in private session at 4.01 p.m.) Reclassified as open session

12 RECLASSIFICATION REPORT

13 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
14 2013, the version of the transcript with its redactions becomes Public.