

Trial Hearing
WITNESS: KEN-OTP-P-0800

(Open Session)

ICC-01/09-01/20

1 International Criminal Court
2 Trial Chamber III
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. Paul Gicheru - ICC-01/09-01/20
5 Presiding Judge Miatta Maria Samba
6 Trial Hearing - Courtroom 3
7 Wednesday, 16 February 2022
8 (The hearing starts in open session at 9.32 a.m.)
9 THE COURT USHER: [9:32:54] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE SAMBA: [9:33:18] Good morning again, everyone.
13 Mr Karnavas, Mr Steynberg and team, a very good morning to you.
14 We're going to continue with the witness, cross-examination by the Defence.
15 May I take this opportunity to remind counsel about the speed in respect of asking
16 questions so as to help the interpreters.
17 And, Mr Witness, be minded that you are still under oath to say the truth, the whole
18 truth and nothing but the truth to this Chamber.
19 Mr Karnavas, your witness. And I know, Mr Karnavas, that, you know, you're quite
20 ready to start your cross-examination. You've heard the testimony of the witness
21 yesterday, and I'm sure you know exactly what you want of this case in the interest of
22 your client. But I, you know, just want to ask whether or not you mind giving me an
23 indication of how long you intend to deal with this witness in cross. Thank you very
24 much.
25 MR KARNAVAS: [9:34:37] Thank you.

1 Good morning, everyone in and around the courtroom.

2 I think I'm going to need a little bit tomorrow. I don't think it's going to be full two

3 days. I might be able to finish today. I don't know. You will see throughout

4 the course of the trial that I will be very efficient. I'm very mindful of the Court's

5 time. I don't beat about the bush. I go right to the subject matter. But when I have

6 to lay a foundation I'll do that. But - sorry, interpreters - but I will be very mindful

7 of keeping the pace so we can end by today or tomorrow.

8 PRESIDING JUDGE SAMBA: [9:35:14] Thank you very much, Mr Karnavas.

9 That said, could I ask the court officer to then mention the case and ask the parties to
10 introduce themselves.

11 Court officer, please.

12 THE COURT OFFICER: [9:35:25] Good morning.

13 This is the situation in the Republic of Kenya, in the case of The Prosecutor versus

14 Paul Gicheru, case reference ICC-01/09-01/20.

15 And for the record, we are in open session.

16 PRESIDING JUDGE SAMBA: [9:35:41] Thank you very much.

17 Mr Prosecutor, please.

18 MR STEYNBERG: [9:35:45] Good morning, your Honour. My name is

19 Anton Steynberg, senior trial lawyer. With me today, from my right,

20 Mariana Gutierrez; behind me, Laura Warrlich and Inbal Djalovski; and sitting quite

21 far away is Alice Zago, trial lawyer who is joining us today. Thank you.

22 PRESIDING JUDGE SAMBA: [9:36:05] Thank you very much.

23 Mr Karnavas, please.

24 MR KARNAVAS: [9:36:09] Good morning, Madam President. Good morning,

25 again, to everyone in and around the courtroom. Same composition as yesterday, so

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1 we can just go right through the questions.

2 PRESIDING JUDGE SAMBA: [9:36:19] Thank you very much, Mr Karnavas.

3 And for the record, I also note that Mr Gicheru is in court.

4 Mr Karnavas, your witness, please.

5 MR KARNAVAS: [9:36:27] Thank you. Thank you, your Honour.

6 WITNESS: KEN-OTP-P-0800 (On former oath)

7 (The witness speaks English)

8 QUESTIONED BY MR KARNAVAS:

9 Q. [9:36:34] Good morning, Witness.

10 A. [9:36:35] Good morning.

11 Q. [9:36:35] Are you an honest person?

12 A. [9:36:38] Yes, I am.

13 Q. [9:36:39] Okay. So other than that one lapse that you had that was brought up
14 by Mr Steynberg yesterday where, in his own words, you lied to the investigators,
15 other than that, on all your other dealings with the OTP, you were truthful?

16 A. [9:36:58] Yes, my Honour. And where there were issues within -- between me
17 and the OTP, I well explained myself to them.

18 Q. [9:37:10] Okay. Well, if I may correct you a little bit. I'm not an honour. I'm
19 just a lawyer. So Madam President is her Honour, but I'm just -- you don't need to
20 address me as "my Honour". Just answer the question.

21 A. [9:37:28] Thank you. I -- I am answering my question to Madam President.

22 Q. [9:37:31] All right. All right. So again, to make sure that I'm absolutely clear,
23 on all your dealings with the Prosecution you were truthful?

24 A. [9:37:46] Yes, I am a truthful -- a truthful person.

25 Q. [9:37:51] Okay.

1 A. [9:37:53] And where there are issues, I am ready to explain myself. And where
2 I have done a mistake, I'm a person who is ready to apologise.

3 Q. [9:38:02] All right. Okay. Well, let me make sure I understand you correctly.
4 When you don't tell the truth, you call it a mistake. You apologise and then all is
5 forgiven; is that what you're telling me?

6 A. [9:38:14] To me, everything I apologise for I expect not -- my -- my intention is to
7 be honest.

8 Q. [9:38:28] Okay.

9 A. [9:38:28] And it has been my intention throughout this case to be honest enough
10 to -- to -- to this court.

11 Q. [9:38:38] All right. And so I take it that the individuals that were mentioned in
12 passing by Mr Steynberg yesterday that have accused you or have asserted, I should
13 say, that you provided them with information in order for them to lie to the OTP
14 either to get on to the victims protection section or become part of the organisation, as
15 you call it. Those people are lying?

16 A. [9:39:11] Please repeat your question.

17 Q. [9:39:14] All right. Yesterday, Mr Steynberg asked you a question concerning
18 what others have said about you, that you have provided them with false information,
19 you've helped them confabulate, manufacture falsehoods in order to pass them
20 on -- pass themselves on as witnesses for the Prosecution.

21 A. [9:39:48] Personally, my Honour, I am not aware of such incidences. And to
22 the best of my knowledge, I have not manufactured or coached or -- or done anything
23 whatsoever to implicate anyone in this -- in -- I mean, to coach anyone in order to
24 appear here as a -- as a witness.

25 Q. [9:40:21] All right. That's your answer. And so if those individuals were to

1 say that that's exactly what you did, would they be lying?

2 A. [9:40:31] They will be lying, my Honour.

3 Q. [9:40:33] All right. And I take it if they're lying, they're liars?

4 A. [9:40:36] I have not finished my answer.

5 Q. [9:40:38] Oh, I apologise.

6 A. [9:40:41] My Honour, I come from a country where those in question can do
7 anything in order to protect themselves. They might influence even witnesses. As
8 evident to this case, what personally I underwent as a witness of this Court, I was able
9 to speak to the accused person in this Court, and having done things against what I
10 intended before. So the counsel here knows exactly that people like his client are
11 able to get even witnesses to come to this court and provide false information, such as
12 what the counsel is asking me. And on that matter, to the best of my knowledge, I
13 want to say that I have not coached anyone in order to become a witness of this court.

14 Q. [9:42:23] All right. That's a complete answer now.

15 So yesterday when Mr Steynberg said that that's exactly what number 7 said, that you
16 and number 18 did exactly that, number 7 would be lying; is that right? Yes or no?

17 A. [9:42:46] I hope -- I have to answer your question, not to direct me how I will
18 answer it, my counsel.

19 PRESIDING JUDGE SAMBA: [9:42:57] Maybe -- sorry -- sorry, Mr Karnavas.

20 Maybe if we ask the witness, do you have the list before you where Mr Steynberg
21 referred to a number 7, if at all, yesterday so you will be guided as to, you know, who
22 exactly Mr Karnavas is talking about? Do you have the list before you?

23 THE WITNESS: [9:43:26] I don't have any list today.

24 MR KARNAVAS: [9:43:33] Well, let's get him a list.

25 Q. [9:43:42] Now let me answer -- let me ask the next question. Number 7 has

1 testified under oath and has given several statements to Mr Steynberg's team - he can
2 correct me if I'm wrong - where he has repeatedly said that you coached him in order
3 for him to become a witness for the Prosecution early on in order for him to get into
4 the witness protection programme. Is he lying? Yes or no?

5 A. [9:44:23] If number 7 said so, he is lying.

6 Q. [9:44:28] And you're telling the truth?

7 A. [9:44:32] Solemnly the truth.

8 Q. [9:44:35] Okay. Thank you.

9 Now let's look at some statistics before we move on. The statistics I want to go
10 through are the number of times you've spoken with the Prosecution.

11 Now, the Court will have all the documentation in front of it and the Prosecution can
12 correct me, they can do their own calculation, but it seems to me that you've spoken
13 to the OTP approximately 58 times. You were questioned for -- over periods of
14 43 days for more than 164 hours. Does that sound about right?

15 A. [9:45:26] Your Honour, I have done -- I have not done such calculation, but I'm
16 aware I have appeared and gave statements to the officers of this Court at different
17 times. But personally I have no -- any statistics whatsoever. What I know is that I
18 have given my -- the statements to -- to the officers of this Court on several occasions.

19 Q. [9:46:02] All right. Thank you.

20 And it seems that -- we have the list from yesterday of all the documents that you
21 were shown. You ticked them off during the six-day session that you were with
22 the Prosecution, which we'll get to. It seems that you have generated approximately
23 734 pages of evidence. Would that be about right, the amount of pages that you
24 reviewed over the period of six days plus since you've been here?

25 A. [9:46:41] I repeat, my Honour, I have not done the calculation of number of

1 pages that I have given as evidence, but I am aware I have given sufficient evidence to
2 this -- to this Court both -- in both cases, case against Mr Ruto and Sang and also to
3 this current case.

4 Q. [9:47:08] Thank you. In our calculation, it shows 139 documents were shown
5 to you between 7 February and 12 February during this so-called proofing session; is
6 that correct?

7 A. [9:47:24] I confirm I have done the sessions and offered the paper that -- that
8 was here yesterday that I gave my ticks, and I have no objection to have done
9 the -- the exercise that was -- that I did last -- last week.

10 Q. [9:47:50] Okay. You call it an exercise. Can you explain how that exercise
11 went.

12 A. [9:48:06] My Honour, I was given the documents that have been accepted in this
13 Court as exhibits. And I went through them, read, and after finishing every
14 document I underwent -- I had to put a tick to ensure, to confirm that I have looked at
15 it and I have read it.

16 Q. [9:48:44] Now this wasn't the first time that you were proofed in this case.
17 There was an earlier session when you were proofed. Do you recall that? If you
18 don't I'll -- I'll refresh your memory.

19 A. [9:49:06] Please, you may remind me.

20 Q. [9:49:10] Okay. Well, it was the summertime when they flew you in here and
21 they spent three -- three days discussing your evidence. Do you recall that?

22 A. [9:49:31] What do you mean "summertime"?

23 Q. [9:49:35] Well, July. July 12, 13, 14.

24 A. [9:49:40] Yes, your Honour. I was brought here and I looked and asked
25 questions concerning the statements that I had given to the court officer.

1 Q. [9:50:03] And that was 2021, to make sure that we have it on the record?

2 A. [9:50:12] Yes, your Honour.

3 Q. [9:50:14] Okay. And by my calculation they spoke to you, or you spoke to
4 them, for a little bit over 10 hours - would that be right - over a period of three days?

5 A. [9:50:31] I confirm it was three days. I did not calculate the number of hours.

6 Q. [9:50:36] All right. By my calculation, during that three-day period, those
7 nine -- 10 plus hours, approximately 30 per cent of the time was spent going over this
8 incident that happened back in -- on (Redacted); is that -- does that ring a bell?

9 A. [9:51:10] Yes, it does.

10 Q. [9:51:12] Okay. So something that during the proofing session in the Ruto and
11 Sang case when Mr Steynberg said, well, I can understand that explanation that you
12 gave then, it was necessary for the Prosecution to bring you here before the charges
13 were confirmed in this case so they could iron out your answers concerning that
14 particular event.

15 A. [9:51:51] My Honour, it is my duty and was my duty to accept the call of this
16 Court whenever they asked me to appear. The protocol of when, how and who shall
17 do that is not under my powers. I would like to add that what I understand is that
18 this Court have efficient officers, qualified, proven that they can do their work as
19 required by law. And therefore, I want to make it clear that the intentions of
20 the officers who brought me at that time was to ensure that they bring to this Court
21 evidences that they have looked into and that I have also provided -- that I agree also
22 to have provided to the better of my knowledge that they are the true evidences.
23 And therefore, as a witness, I cannot get -- I cannot get into how the ICC offers their
24 services or does its work because I believe and trust to the officers that are working
25 under this Court.

1 Q. [9:54:04] Mr Witness, I'm not suggesting that you called them up. They called
2 you. That's what I'm -- and I'm trying to verify that whether during that three-day
3 period they were going over an incident that occurred back on 20 July 2013, which
4 Mr Steynberg had said in the proofing session in the Ruto and Sang case, well, that he
5 understood the reasons why you failed to mention that before. I just want that
6 verification that three days, three hours were spent covering that particular issue
7 during that -- that prepping session, that proofing session. Because that's what it
8 was, it was a proofing session, it wasn't an interview. That's what I'm suggesting.

9 MR STEYNBERG: [9:54:59] Is there a question there, your Honour?

10 MR KARNAVAS: [9:55:02] Yes, there is.

11 THE WITNESS: [9:55:03] My Honour.

12 MR STEYNBERG: [9:55:05] It sounded very much like argument from -- from
13 the bar to me, your Honour.

14 PRESIDING JUDGE SAMBA: [9:55:11] Yes, Mr Witness, answer the question,
15 please.

16 THE WITNESS: [9:55:15] My Honour, to the best of my knowledge, the counsel is
17 not asking me any question. He's trying to suggest how the ICC is supposed to
18 work instead of asking me sufficient questions. I beg your protection,
19 Madam President, that I am not brought into arguments on how ICC shall work.
20 Instead, I am guided on what I have taken oath to do concerning this case. I am
21 ready to solemnly say the truth, to the best of my knowledge, concerning the issues
22 that I have called to do on my desk as a witness.

23 PRESIDING JUDGE SAMBA: [9:56:09] Yes, Mr Witness, be assured that you're
24 protected by the Court. Be calm, do not feel intimidated. I'm sure you're not.

25 The Defence counsel, Mr Karnavas, is merely doing his job. His questions are clear, I

1 think. He is reminding you about a meeting of 2013, on 20 July. And what he
2 wants to know is whether or not when you were called last summer, when you came
3 here for those three days, three hours were spent with you by the Prosecutors or
4 investigators asking you as to whether or not -- or for you to tell what happened
5 during the meeting or whatever happened on 20 July 2013 that you know about.
6 That is basically his question.

7 Am I correct, Mr Karnavas?

8 MR KARNAVAS: [9:57:16] Absolutely. I couldn't have said it better, your Honour.

9 THE WITNESS: [9:57:23] I confirm I discussed that matter. I don't remember or
10 did I do any calculation of time, dear Counsel.

11 MR KARNAVAS: [9:57:33]

12 Q. [9:57:34] All right. Since you confirm it, we'll move on and we'll get to that at
13 another point where I was suggesting that it was a proofing session.

14 So let me move on to your CV. And here we may need to go into private session,
15 your Honour, so we don't identify anything that might reveal who this person is.

16 PRESIDING JUDGE SAMBA: [9:57:57] Madam Court Officer, can we go into private
17 session, please.

18 (Private session at 9.58 a.m.)

19 THE COURT OFFICER: [9:58:14] We are in private session, Madam President.

20 (Redacted)

21 (Redacted)

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- 24 (Open session at 10.11 a.m.)
- 25 THE COURT OFFICER: [10:11:15] We are back in open session, Madam President.

1 PRESIDING JUDGE SAMBA: [10:11:19] Thank you very much.

2 Yes, Mr Karnavas, go ahead.

3 MR KARNAVAS: [10:11:22] Thank you, your Honour.

4 Q. [10:11:23] So yesterday you said when questioned why you lied, you said that
5 you were in fear and you had to make up something on the spot. Do you recall
6 saying that?

7 A. [10:11:44] I said I covered my friend.

8 Q. [10:11:48] You covered your friend. But then you said that you -- you weren't
9 expecting to be questioned that way and so you had to make a spontaneous -- give
10 a spontaneous explanation and that's why -- that's why you lied, it was spontaneous?

11 A. [10:12:08] Yes.

12 Q. [10:12:10] So it wasn't something that you had thought of before, it was
13 something that just came to you out of instinct, self-preservation, fear, you needed to
14 sort of come up with a story and lo and behold there was number 7. You knew he
15 had withdrawn, or you had heard about it, and so he's an easy target, let's mention
16 him, put him into the picture and that would be the end of the story, right?

17 A. [10:12:41] I knew I was bound to come back and -- and tell -- and tell the truth.

18 Q. [10:12:48] But that wasn't my question, now, was it? We're going to get to you
19 were bound to tell the truth. Now, I'm asking you if I have it right, that this was
20 something spontaneous that you thought up right on the spot. You were being
21 pressed, you said, hey, okay, this person is the one, right?

22 A. [10:13:10] Yes.

23 Q. [10:13:10] Okay. Thank you.

24 So I won't read then and we'll spare everybody the time.

25 Now, that was on 25 March; is that correct? When you had that -- that was

1 a person-to-person interview, 2014, March 25, that is when you went there, right?

2 A. [10:13:37] I don't remember the dates.

3 Q. [10:13:37] Okay. You don't remember the dates, but you reviewed the -- all
4 these documents. You told us yesterday, you ticked off all these boxes, please don't
5 have amnesia now.

6 A. [10:13:50] You have just told me, also, that there were so many pages and you
7 gave me the number of pages.

8 Q. [10:13:55] Okay. All right. Fair enough, fair enough. My fault. You have
9 got me there. I have a document here that says -- that says 25 March and 26, and
10 what have you, but that's when you were questioned in person. Right?

11 A. [10:14:08] Yes.

12 Q. [10:14:08] Now, help me out here. About 11 days earlier on
13 14 March 2014 - this was glossed over by Mr Steynberg - you actually had a call from
14 the investigators, right?

15 A. [10:14:28] I don't remember.

16 Q. [10:14:28] You don't remember. You don't remember looking -- seeing it, all
17 those documents that you read? I have it here. I'll refresh your memory. You had
18 made contact with the OTP saying, hey, I want to come back into the fold. I want to
19 be part of the organisation again. Please take me back. And then they called you
20 back and said, okay, and they had this conversation and that was on 14 March 2014.
21 And I have it right here. Does that ring a bell now?

22 A. [10:14:57] Yes, I know I -- I made -- I accepted to go back.

23 Q. [10:15:01] Okay. But they called you, right? You had a conversation on
24 the phone?

25 A. [10:15:09] Yes.

1 Q. [10:15:10] Okay. Now we're going to go through this and we're going to take
2 some time. And I apologise for everybody, but there's so much because you told us
3 you're a truthful person and I just want to get to the bottom of all of this.
4 When they called you they immediately began tape-recording you; isn't that a fact?
5 It's a "yes" or "no", "I don't know". There's no need -- it's not -- it's not a tricky
6 question. I'll let you know when it's a tricky question.

7 A. [10:15:48] When I was given a call I didn't -- I didn't know I was being recorded.

8 Q. [10:15:51] Okay. They did tell you, however, that you were a suspect. They
9 viewed you as a suspect.

10 A. [10:16:02] On the call?

11 Q. [10:16:03] Yeah, on the call. We're going to go through it right now. Now,
12 you can say "I don't remember". That's a good -- that's a safe one?

13 A. [10:16:10] Indeed I don't remember.

14 Q. [10:16:12] Okay. Good. All right.

15 Well, let's go through this. And now I'm going to refer to -- I'm referring to -- it's on
16 tab 29. It's KEN-OTP-0145-0439. That's the beginning. It's dated 14 March 2014.
17 I'm on page 2, which is 015 -- no, 045-0441. You should be getting -- is the gentleman
18 seeing this on the screen or -- I don't want to be accused of -- you have some
19 documents over there, the binders. I believe that's -- that's for your assistance.

20 PRESIDING JUDGE SAMBA: [10:17:09] Could -- Mr Court Officer, can you help
21 the witness, please.

22 MR KARNAVAS: [10:17:17] Yeah. And there's nothing on the screen over here, so
23 probably he doesn't have it, but ...

24 PRESIDING JUDGE SAMBA: [10:17:22] Can you -- can you help with the binder
25 before the witness, please. Defence binders. I think it's binder number 1.

1 MR STEYNBERG: [10:17:29] Your Honour, I see the document is on the screen now.
2 Perhaps it can just be made larger if my learned friend will give the line reference.
3 MR KARNAVAS: [10:17:39] Line reference. I'm going to be reading a whole lot, so
4 it might -- he might want to get to the binder itself because we went to the trouble to
5 get it for him. But I'm going to be starting with line 43.
6 So it's tab 29, the first page should be 0145-0439, dated 14 March 2014. Yeah, tab 29.
7 That's what I'm told, so I'm telling you.
8 You don't have a copy. Okay.
9 MS TERZIEVA: [10:18:49] (Microphone not activated) your Honour, may -- may I
10 interrupt for a moment?
11 PRESIDING JUDGE SAMBA: [10:18:58] Yeah, what do you want to say?
12 MS TERZIEVA: [10:19:01] In light of the Trial Chamber decision of yesterday, I
13 wonder whether this line of questioning shouldn't be in private session.
14 MR KARNAVAS: [10:19:08] No.
15 PRESIDING JUDGE SAMBA: [10:19:09] Well, I was going to ask Mr Karnavas, or
16 advise that when he thinks that we should go into private session he lets
17 the court officer know.
18 MR KARNAVAS: [10:19:20] Yes, your Honour. As far as I'm aware of, I'm not
19 going to be going into anything that should be kept from the public. And nothing
20 that will reveal this particular gentleman's -- and I will be very slow about this and
21 methodical. I'm very mindful of his security concerns. And we may disagree on
22 positions, but I'm very mindful of that.
23 So, now, if we could --
24 Q. [10:19:54] Do you have the -- do you have that page? It's page number 2 and
25 on the bottom you see 0145-0441. Do you have it?

1 A. [10:20:05] Yes.

2 Q. [10:20:06] Okay. Well, I don't want to take charge of the Court, but you
3 could -- the gentleman can relax a little bit, the court officer.

4 Thank you very much.

5 Okay. So let's start with line 43.

6 "OK" -- this is the interviewer, interviewer 1, by the way. On the first page you'll see
7 who it is. No name, but it's an OTP investigator.

8 "OK. The other thing is, when we do this, I'm going to ... we are going to interview
9 on tape, OK?"

10 Answer, that's you, "Yes".

11 Interviewer: "The reason being we want" - I'm sorry, I'll have to slow down a little
12 bit - "The reason being we want you -- we want your full honesty this time, and we
13 want to tell us -- and we want you to tell us the complete truth. So, what we are
14 going to do is record our interview with you."

15 Answer: "Yes."

16 Let me pause. Does that ring a bell? Is it coming back to you? Because I know it
17 was foggy, initially, but is it coming back?

18 A. [10:21:27] Yeah.

19 Q. [10:21:27] Okay. Good.

20 So we go on, line 49:

21 " ... and what that means is ... at the moment we have information that you also may
22 have interfered with other witnesses. So we want to talk to you about that, even
23 though we are after those most responsible, but we would like to interview you about
24 your role and the role of others. Do you understand that?"

25 Answer: "OK, fine."

1 I move on. At this point, the next line they ask you whether you want -- whether
2 you want a lawyer.
3 "You may need to have a lawyer present".
4 Line 57: "But I want you to think about [it]".
5 I'm going to pause here for a second. They're asking you to think about it. All
6 right.
7 And then on line 60 or 59:
8 "I have to -- I have to give you some warnings, but we still need your continued
9 assistance, but you need to be one hundred per cent honest" and me and this
10 individual "because we already have information that you also, after you left us, were
11 involved in witness tampering. So if you do come to us, you have to be completely
12 honest with us, otherwise I am not interested in talking to you."
13 Now let me pause here. You told us earlier that you have been honest with
14 the Prosecution except this one itty-bitty time that had to do with something else. It
15 had to do with a recording, a clandestine, unauthorised recording.
16 Do these warnings -- we haven't even started yet, but so far, do you get
17 the impression that the OTP investigators see you as an honest person? Because that
18 was my first question and you said, yes, you are an honest. Do they see you as an
19 honest person thus far? If counsel needs to object, she can object, you know, she's
20 getting all exited. Go ahead, object.
21 MS TERZIEVA: [10:24:01] Yes. I'm sorry to interrupt again.
22 PRESIDING JUDGE SAMBA: [10:24:04] Mr Karnavas, turn your mic off please.
23 Mr Karnavas.
24 MS TERZIEVA: [10:24:08] I'm sorry to interrupt again, your Honour, but this line of
25 questioning is entering into a territory which, in my view, is covered by

1 the Trial Chamber decision of yesterday. So I would respectfully request that we go
2 into private session. I don't know what the witness will answer and how things will
3 unfold, but out of an abundance of caution I would request that we go into private
4 session for -- for this line of questioning.

5 MR KARNAVAS: [10:24:30] May I be heard? May I be heard?

6 PRESIDING JUDGE SAMBA: [10:24:34] Please, Mr Karnavas.

7 MR KARNAVAS: [10:24:35] Just because the individual lied and was dishonest, as
8 we will see, doesn't mean that he's going to be charged. He hasn't been charged thus
9 far. What I'm trying to establish is, because now his character for honesty is at issue.
10 So I'm -- I think it's perfectly fair, it is perfectly fair to go through all of
11 the admonitions put to him and why they thought he had been less than truthful, in
12 fact, why he had lied to them.

13 Now -- relax for a second.

14 Now, if we want to go into private session, I have no problem in going -- doing this
15 entire trial in private session, but if the Prosecution is going to bring this individual
16 here and this person is going to be giving speeches about how he was threatened and
17 how this and how that, and I'm not able to let the public also know that this person is
18 a first-class confabulator, then I think it's not a fair -- an open public -- trial. But I am
19 willing to go private if that's what -- you know, it will save us some time and it saves
20 counsel from having to jump up and down and -- I can see her finger being itchy
21 every so often, making me nervous.

22 MR STEYNBERG: [10:25:53] Your Honour, if I may, on this point I would
23 actually -- the Prosecution would support the request of Rule 74 counsel. The issue
24 is not the honesty of the witness, but the issue is that the subject matter being
25 discussed and what's being put to the witness in this interview by the interviewers is

1 his alleged involvement in witness tampering. Answers to that, and I don't
2 know -- also don't know what answer he will give, but answers to that question may
3 indeed invoke issues related to Rule 74. So for this -- for this part of the questioning,
4 I would request we go into private session, your Honour.

5 PRESIDING JUDGE SAMBA: [10:26:26] Yes. Well, Mr Karnavas has not really
6 touched on that. I cannot tell what the witness's answer would be to Mr Karnavas's
7 questions or concerns. If the subject of the witness in his answer were to touch on
8 him interfering with other witnesses, then I agree we have to go into private session.
9 As I say, I do not -- I do not know what his answer would be or what he wants to say,
10 but if he were really to say that he -- you know, to state his role interfering with other
11 witnesses, you know, thus incriminating him, then I'm afraid we'll have to go into
12 private session.

13 MR KARNAVAS: [10:27:19] Madam President -- relax, relax for a second.
14 Madam President, I will endeavour to tiptoe around the issue of that and get all
15 the other ammunitions -- admonitions that are being given to the gentleman.
16 Therefore, counsel here need not worry that anything untoward will come out, you
17 know, during the presentation that the Prosecutor may latch on to and prosecute him
18 as a result.
19 So if I may proceed.

20 PRESIDING JUDGE SAMBA: [10:27:53] Well, he's given the assurances. You know,
21 nobody was going -- was saying that he would be prosecuted. For what?

22 MR KARNAVAS: [10:28:01] I don't know. That's it. So --

23 PRESIDING JUDGE SAMBA: [10:28:03] Mr Karnavas, just a moment. I see
24 the witness raising his hand.

25 Do you want to say anything, Mr Witness?

1 THE WITNESS: [10:28:09] Yes, your Honour. I have two things to say, your
2 Honour. One is that the counsel keep referring me as a liar, even though it is his
3 line of asking questions. I will request that the counsel respect my integrity because
4 if I was a liar all the information that I have brought to this court will not be here.
5 But the information I brought to this Court is of substance. That's why we are
6 discussing about it today.

7 Number two, my Honour, is that it's my request that when I'm being asked questions
8 of this manner, of this subject where it involves where I will mention others, that we
9 take the subject to the private session as put forward by the lawyers in this Court.

10 Thank you.

11 PRESIDING JUDGE SAMBA: [10:30:00] All right. In respect of your first concern,
12 Mr Witness, you know, counsel calling you a liar, I would really ask that, you know,
13 you calm down. Remember yesterday -- during your testimony yesterday you gave
14 certain instances, and including even this morning, where you said I said this but
15 then I meant this. So you lied? That was the question by the Prosecutor. And to
16 sum, you answered yes and gave your reasons. I'm sure counsel does not mean to,
17 you know, demean you in any way or to, you know, cast aspersions on your integrity.
18 So just calm down and answer the questions. If calm down and just answer his
19 questions, you know, then things will be smooth.

20 As to -- I don't know, as I say, whether or not you'll be, you know, mentioning names
21 in respect -- in respect of his assumption that you interfered also with other witnesses.
22 And if that is your position, then, as I said, Mr Karnavas, I think we should go into
23 private session, okay? So that the witness is in fact very, very, very comfortable.

24 Thank you.

25 Madam Court Officer, can we go into private session, please.

1 (Private session at 10.31 a.m.)

2 THE COURT OFFICER: [10:31:39] We are in private session, Madam President.

3 (Redacted)

4 (Redacted)

5 (Redacted)

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Trial Hearing
WITNESS: KEN-OTP-P-0800

(Private Session)

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Trial Hearing
WITNESS: KEN-OTP-P-0800

(Private Session)

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Trial Hearing
WITNESS: KEN-OTP-P-0800

(Private Session)

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Trial Hearing
WITNESS: KEN-OTP-P-0800

(Private Session)

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1 (Redacted)

2 (Open session at 10.42 a.m.)

3 THE COURT OFFICER: [10:42:37] We are back in open session, Madam President.

4 PRESIDING JUDGE SAMBA: [10:42:41] Thank you very much.

5 Mr Karnavas.

6 MR KARNAVAS: [10:42:45] Thank you. Thank you, Madam President. I'm

7 a little rusty, so apologies.

8 Q. [10:42:52] All right. Now -- so you had the phone call on the 14th, now it's 25th
9 so, if my math is correct, you had 11 days to think about it. Because they told you,
10 think about it, come only if you're going to tell us the truth, the whole truth and
11 nothing but the truth, right? And you had 11 days to think about, you thought
12 about it and that's why you went, right?

13 A. [10:43:16] Yes.

14 Q. [10:43:18] Okay. Now we're going to get to the -- the lie. But before that, I'm
15 going to put to you this, that that lie that you said earlier was spontaneous that you
16 said yesterday it just, you know, you were overwhelmed by the fear of these -- these
17 investigators, that was actually a lie, that you lied yesterday on the stand when you
18 said it was spontaneous, and today. Because I suggested -- I put to you, sir, that
19 during that 11-day period you were getting your ducks in a row for your lie and you
20 were thinking of a very creative lie to give to the Prosecutors, that you had no
21 intention, no intention of telling them the full truth. What do you say?

22 A. [10:44:11] That is not the matter.

23 Q. [10:44:16] Okay. Now let's go to the document and let's see how this interview
24 begins.

25 And I think this is important, your Honour, because it goes, again, to show, one, his

1 intentions, and also those of the investigators, in answering the question as to
2 whether they put him in fear and what have you.

3 So now I'm looking at tab 30. Now you're going to have to go to tab 30. Now you
4 know how to do it so we don't have to have anybody assist you. I'm looking at
5 KEN-0 -- KEN-OTP-0135-0041. That's the first page. It says 25 March 2014, track 1.
6 And we'll start at 0135-0047. So if you look at that document and you go to
7 page number 6, that's probably the easiest way to find it.

8 And I'm going to start with line 211. And when you get there let us know.

9 A. [10:45:36] Page 6, 211, I'm there.

10 Q. [10:45:39] You're there. Good.

11 All right. So interviewer 1. And it looks like, if we look at the first page, the two
12 interviewers are the same that were in the previous conversation, the telephone
13 conversation that you had. So we're not going to mention names.

14 So anyway, interview 1 goes:

15 "OK. I'm going to ask you because the situation is very serious, I'm going to ask,
16 we're going to record everything that you say but I need your full and frank honesty
17 in everything you tell me."

18 And you say, line 214: "Yes, of course. Yes."

19 Let me stop right here. I take it you understood the question that was posed to you
20 by the interviewer and that's why you answered "Yes, of course. Yes."

21 A. [10:46:32] They required me to say the truth and I answered an affirmative.

22 Q. [10:46:36] Well, that's a different -- that's a -- well, I didn't ask you whether
23 they -- I'm asking you did you understand the question?

24 A. [10:46:43] Yes, the (Overlapping speakers).

25 Q. [10:46:45] Okay. And so when you said, "Yes, of course, yes", you knew exactly

1 what was expected of you?

2 A. [10:46:51] Exactly.

3 Q. [10:46:52] Okay. Now, 215, line 215: "This is very serious."

4 And then they talk about, you know, they're looking at your security "and I need you
5 to be completely honest". Because as you told us yesterday, there was almost a quid

6 pro quo, you wanted security and had something from them. They wanted

7 something from you, you wanted something from them, right? You wanted them to
8 assist you with your security situation and that's why you called them back to say can

9 I come back into the fold, into the company. And they said yes, but you got to tell us
10 the truth. Am I putting it right?

11 A. [10:47:35] Yes, indeed.

12 Q. [10:47:36] Okay. So -- so they say: "I suspect that you're -- OK, I'm going to be
13 up front with you as well." No hidden agendas.

14 "I suspect that you -- you've been potentially playing both sides on the same point,
15 OK?" You understood what he meant by "both sides"?

16 A. [10:48:03] Yes.

17 Q. [10:48:03] Okay. And then he goes on:

18 "That doesn't matter and I'm not really concerned about that. What I'm concerned
19 about is this security threat and we have to address it. So I want you to be full and
20 frank with me ... I want you to be open and to tell me the full truth because it is going
21 to be very difficult for us to move and to do anything for you if you're full and frank
22 with me ..."

23 Do you see that?

24 A. [10:48:39] Yes.

25 Q. [10:48:39] Okay. And then it goes on: "You just need to know, all right? This

1 is, as I said, this is no way a plot to trick you in any way. No plot to trick you in any
2 way."

3 Now, when they were saying these things, were they saying it in a threatening
4 manner, that you felt fear for your life that somehow they were going to arrest you
5 and take you away? That's a question. I had an inflection at the end.

6 A. [10:49:22] What's the question please?

7 Q. [10:49:24] The question is when they were telling you these things, when he says
8 that "this is not a trick question", this is not -- I'm not trying to trick you, they're
9 saying if we're going to try and help you, you have to be full and frank with us, okay?
10 When they were saying that and they actually were -- were they not on your side,
11 were they not trying to help you?

12 A. [10:49:40] I said I was also observing their body language. The people I met
13 before -- this was not the first time I had met the investigators and I observed their
14 body language. The way they were expressing themselves was quite different with
15 the previous occasions, that's why I had my fears.

16 Q. [10:50:01] Okay.

17 A. [10:50:02] But after a little time, I was comfortable and we went on with our
18 discussion.

19 Q. [10:50:12] All right. Okay. Can you just explain to me, what do you mean by
20 "body language"? I mean, what was it? Were they flexing their muscles, doing
21 something? You know, like breaking pencils? What exactly were they doing that
22 were giving you this impression that somehow they were out to get you -- to arrest
23 you and to put you in fear. Please describe that for us so we can have the full
24 picture.

25 A. [10:50:38] I observed the way they were asking me these questions, the way they

1 were -- they were -- they were -- the way they appeared to me was quite different to
2 the previous occasions. That's what I mean.

3 Q. [10:50:47] Okay. Was there -- are you saying their tone was too high or
4 aggressive?

5 A. [10:50:50] At times the tone had changed. At times they were -- they were not
6 as much as friendly as they used to be. I found some differences.

7 Q. [10:51:02] Okay. So not as friendly as I'm being with you right now?

8 A. [10:51:06] You are never friendly.

9 Q. [10:51:08] Okay. All right. Okay.

10 Well, all right. Well, let's go to line -- line 27. Yeah, 227. It says: "But we need to
11 get the right information from you to be able to respond to that because as we said,
12 this is serious, particularly if you want -- if you want our assistance."

13 Okay. I move on. They ask you on line 233:

14 "What's your motivation for turning up today? Why have you decided to turn up
15 today? And be honest with me."

16 Meaning, be honest with me as to your motivation. Do you see that? Do you see
17 that, Witness?

18 A. [10:51:57] Yes, I see.

19 Q. [10:51:58] Okay. And, of course, the part that I want to focus on --

20 PRESIDING JUDGE SAMBA: [10:52:06] Be mindful of the name in the next
21 paragraph, Mr Karnavas.

22 MR KARNAVAS: [10:52:11] Yes, yes, yes.

23 Q. [10:52:19] I'm on the next page. It's 0135-0050. Apologies.

24 You say that you were seen back in the community -- this is on line 324 -- you were
25 seen back in the community. They were relieved from attacks and something and

1 that the community was very ready to attack those people. So you were talking
2 about your security situation in that, right?

3 A. [10:52:53] Yes.

4 Q. [10:52:54] Okay. And that's one of the reasons -- that was the motivating factor
5 that you had decided that you were going to go there and this time you're going to
6 tell them the truth, right?

7 A. [10:53:07] That's one of the reasons.

8 Q. [10:53:08] Okay. To save some time I'm not going to -- I'll skip the rest because
9 the name is there, but let's go into the next page, which is 0135-0051. And I'll -- if
10 you could focus your attention on line 366, it says: "I would like to interview, but it's
11 a formal interview, a full and frank interview with you about your involvement as
12 well as who's instructed you, give you the opportunity to hear what evidence that we
13 have in the witness intimidation case."

14 Do you see that?

15 A. [10:54:03] Yes, I do.

16 Q. [10:54:04] In other words, the investigators were prepared to provide you with
17 some information about what they knew, hoping that you would be truthful with
18 them. So, in other words, they had some information, they were going to share it
19 with you, and they were hoping that you would share with them your information so
20 that maybe they could have a complete picture, right?

21 A. [10:54:31] Yes, of which I did after the end of the three days.

22 Q. [10:54:35] We'll get to that. Trust me. I'm going to allow you to speak as
23 much as you want when we get to that part. I just want to get through this.

24 So when we get to 372, line 372: "As I said before, I want you to be open to us. And
25 it will be a tell-all." A tell-all. Did you understand what he meant by saying

1 "tell-all"?

2 A. [10:55:05] Tell everything.

3 Q. [10:55:06] Tell everything. Incidentally, again, I don't want to get ahead of
4 myself, but it's almost too tempting not to. By this point, you already had
5 that -- that -- clandestine, that unauthorised interview, had you not, back on
6 (Redacted), right?

7 A. [10:55:36] I don't understand.

8 Q. [10:55:37] This is -- this interview here is after, since we're in March 2014, and
9 they're saying this is a tell-all. The unauthorised -- the unauthorised meeting that
10 you had on (Redacted), do you think at that stage that was also part of the tell-all and
11 that you should have volunteered that information? It's a yes or a no.

12 A. [10:56:12] Yes, they were still continuing with the investigation.

13 Q. [10:56:15] Right. And again, not to get ahead of myself, it wasn't until
14 the proofing session, the proofing session in the Ruto and Sang case months later after
15 many, many discussions with you that the OTP brought it to your attention and said,
16 hey, by the way, we noticed here that you had this secret meeting, it was they who
17 brought it up, right?

18 A. [10:56:43] The same matter I had already discussed earlier on even before that
19 time.

20 Q. [10:56:47] You had discussed your unauthorised --

21 A. [10:56:52] With the investigators during our -- our -- during the time when I was
22 doing the -- the recording and I handed over the recordings to the investigators.

23 Q. [10:57:01] Okay. Let me --

24 A. [10:57:01] At that time, I was -- the recordings were all given --

25 Q. [10:57:01] Sir --

1 A. [10:57:01] And, therefore, I spoke about the recording not in -- during this time
2 you are talking about only. I had already spoken about it several times or
3 (Overlapping speakers).

4 Q. [10:57:21] Sir, I didn't ask you whether you turned over the recordings, okay?

5 A. [10:57:24] You asked me if I have -- I have spoken about the recording before.

6 Q. [10:57:28] Sir, sir, if I may, just answer this question. The Prosecutor brought it
7 to your attention, and it was Mr Steynberg who was present and we have the video,
8 we may even get to see it, where he's raising it for the very first time that, hey, by
9 the way, we just discovered that you had this unauthorised meeting. It was them
10 that brought it to your attention and not you the other way around. And I'm not
11 suggesting that you didn't turn over the tapes. I'm suggesting you never revealed
12 that you had a meeting with that gentleman on that particular --

13 A. [10:58:09] To who?

14 Q. [10:58:10] To the Prosecution, to the investigators.

15 A. [10:58:12] To the investigators?

16 Q. [10:58:13] Yes.

17 A. [10:58:16] If we may look in the records --

18 Q. [10:58:18] Is it yes or no?

19 A. [10:58:19] Excuse me.

20 Q. [10:58:20] Okay. Go ahead.

21 A. [10:58:22] If you may look, if you may take your time to look into the documents
22 of when -- when I handed over the recording, all the information you are asking me
23 about was discussed then. It was during this time that we were meeting -- at the
24 meeting you are talking about, that we -- we also spoke about.

25 Q. [10:58:49] Okay.

1 A. [10:58:49] And I was invited to speak about it by the -- by the -- by
2 the Prosecution during that time, but it does not mean that it was the first time that
3 I was discussing about that matter.

4 Q. [10:59:00] All right. I just want to make sure, under oath --

5 PRESIDING JUDGE SAMBA: [10:59:05] Mr Karnavas, I think this a good time to
6 break.

7 MR KARNAVAS: [10:59:09] Can I just get this one last question in, your Honour.

8 PRESIDING JUDGE SAMBA: [10:59:13] Okay. Please, yes.

9 MR KARNAVAS: [10:59:13]

10 Q. [10:59:14] Okay. I just want to make sure, I want to commit you to this, help
11 me out here. Under oath you're saying that you actually brought it to their attention,
12 not just giving them the tape, you actually discussed that meeting that you had with
13 that gentleman on (Redacted), that unauthorised meeting. Okay. Now, if -- now,
14 let me finish. If you need time to think about that before you answer it, we can take
15 the break, because you're getting into dangerous territory. I'm just telling you right
16 now.

17 PRESIDING JUDGE SAMBA: [10:59:44] It's not just about even the meeting.

18 Maybe the witness needs to know - and that would be in private session - which
19 gentleman you are talking about. Maybe he needs to refresh his memory. So let's
20 break off --

21 MR KARNAVAS: [11:00:00] (Overlapping speakers).

22 PRESIDING JUDGE SAMBA: [11:00:01] -- and when we come back, he'll look at the
23 list, he'll refresh his memory and answer your question.

24 Thank you very much.

25 So we'll break for 30 minutes. We'll meet again at 11.30.

1 THE COURT USHER: [11:00:18] All rise.

2 (Recess taken at 11.00 a.m.)

3 (Upon resuming in open session at 11.32 a.m.)

4 THE COURT USHER: [11:32:25] All rise.

5 Please be seated.

6 PRESIDING JUDGE SAMBA: [11:32:41] Good morning, again.

7 Mr Karnavas. We'll continue with the cross-examination, please.

8 MR KARNAVAS: [11:33:01] Very well.

9 Q. [11:33:04] Sir, did you have an opportunity to think about the question that I
10 posed?

11 A. [11:33:13] Please pose again the question.

12 Q. [11:33:15] Does that mean that you didn't think about it?

13 A. [11:33:19] I requested that you pose again the question.

14 Q. [11:33:21] I understand what you requested, and I -- I posed the question, and
15 I -- you were given an opportunity to think about your answer over the last
16 30 minutes.

17 PRESIDING JUDGE SAMBA: [11:33:31] And remember, Mr Karnavas, I'd asked that,
18 you know, a particular document be put before the witness so if you look at the
19 document, the list of persons, and tell him exactly the person you are talking about.

20 MR KARNAVAS: [11:33:48] Yes, yes. Thank you, your Honour. Thank you.

21 Q. [11:34:00] We're talking about the meeting with the individual, if you have your
22 list of persons there, is number 2. Do you recall that? We're talking about that
23 meeting on the evening that was unauthorised.

24 A. [11:34:14] Yes.

25 Q. [11:34:15] Okay. You agree it wasn't authorised? In fact, you admitted it

1 yesterday.

2 A. [11:34:20] Yes.

3 Q. [11:34:20] And I do want to add one clarification. You said that they had
4 requested. Isn't it a fact that they had ordered you not to meet -- not requested, but
5 ordered?

6 A. [11:34:35] I was advised not to meet him.

7 Q. [11:34:37] Well, I didn't ask whether you were advised. You were ordered.
8 It's either a "yes, I was ordered." "No, I was not ordered. I was merely advised."
9 Or, "I don't recall."

10 A. [11:34:52] I remember I was told not to meet him.

11 Q. [11:34:54] I beg your pardon?

12 A. [11:34:55] I was told not to him.

13 Q. [11:34:59] You were told not to meet him. In other words, you were ordered
14 not to meet him? I'm insisting on an answer.

15 You said you were advised. There's a difference between being advised and being
16 ordered. So which of the two? And I suggest that you were ordered.

17 A. [11:35:22] Okay, yes.

18 Q. [11:35:23] "Yes" what?

19 A. [11:35:26] As you say, I was ordered.

20 Q. [11:35:28] Okay. And you stand by that? I don't want you to feel as if I'm
21 putting words into your mouth, or that I'm intimidating you to the point where you
22 may need to seek protection from the Court.

23 A. [11:35:44] To me, to your answer, because I already gave several --

24 Q. [11:35:50] Okay.

25 A. [11:35:52] -- several answers now to the same question. I would like you or this

1 Court to understand that I was -- when I asked if I can -- I can meet him the same -- on
2 the same day, I was actually told not to meet him.

3 Q. [11:36:11] Okay. Okay, that's fine. Now -- and I just want to make -- get one
4 point of clarification out of all of this. I had indicated that it wasn't until you met
5 with the Prosecution, I think it was sometime in November 2014, when you were
6 proofed for the Ruto and Sang case, that that's when that meeting first came to light
7 and they questioned you about it; is that right?

8 A. [11:36:42] Yes, they did.

9 Q. [11:36:43] Okay. And prior to that, prior to that, you had not mentioned to
10 the investigators that you had that meeting.

11 A. [11:36:59] I remember I had -- I had not mentioned.

12 Q. [11:37:03] Okay. You say you remember. Did you remember that during
13 the break, or -- I just want a solid answer that you did not tell them at all until they
14 brought it up.

15 A. [11:37:16] What I know is that the investigator -- the investigators brought it up
16 at a certain period that I had -- there is -- there is a recording which I had not
17 discussed about.

18 Q. [11:37:30] Right.

19 A. [11:37:32] What I don't remember is the exact -- is the exact time.

20 Q. [11:37:36] Okay.

21 A. [11:37:37] But I remember, surely, that I had not spoken about this with
22 the -- with the -- with the investigators until when they brought the matter
23 (Overlapping speakers).

24 Q. [11:37:48] Okay. All right. And we're going to get to that date. And I
25 understand, to be fair with you, that yesterday and today - and I'm not contesting

1 this - that you did in fact turn over the tapes that you had. You just failed to mention
2 that -- that meeting.

3 A. [11:38:03] That is it.

4 Q. [11:38:04] Okay. All right. And you failed to mention that meeting even
5 though, at least as we indicated earlier, the -- the investigators wanted you to have
6 a tell-all, that the -- when they invited you in March 25, 2014, they told you that
7 this -- that they wanted a tell-all interview with you where -- in other words, where
8 you would tell it all; the good, the bad, the ugly. All of it. Right?

9 A. [11:38:45] Yes.

10 Q. [11:38:46] All right. And subsequent -- you didn't tell them on that instance,
11 during that -- those days of interviewing, you didn't tell them about that meeting,
12 right?

13 A. [11:38:59] You just mentioned that I -- that we discussed about the meeting.

14 Q. [11:39:03] You discussed the meeting when you had a proofing session. This
15 would be in November 2014. Here we are in March. And what I'm suggesting is,
16 you had plenty of opportunities to mention that and you just -- it just sort of slipped
17 your mind. It wasn't on the radar.

18 A. [11:39:26] I didn't understand completely what you are -- what you are asking,
19 because we just concluded that the investigators at a certain point brought up this
20 issue of the first recording, and I explained about the recording.

21 Q. [11:39:43] Okay. All right. I don't want to spend too much time on this, but
22 based on what we have, based on what we've read, the first time it's brought up - and
23 it's brought up by the Prosecutor himself. We have it on video during the proofing
24 session - is during that period. It's in November. In other words, they say, "Hey,
25 we have just uncovered that you had this meeting." They had no clue, they were

1 clueless.

2 Now, how that slipped, you know, through their fingers -- we can blame them for not
3 looking at all the -- the tapes. But the bottom line, as you said yesterday, the next
4 day when you had the -- the -- the meeting that was supposed to take place, okay, you
5 said three times you met with the investigators on that day, you spoke to them. And
6 thereafter, you never failed -- you never mentioned it. And you indicated yesterday
7 that, because you -- you folks were in a hurry, there was too many things going on,
8 and you couldn't find the time to say, "Oh, by the way, I met with this person last
9 night, even though you told me not to."

10 A. [11:41:04] Yes, I have indicated -- or I have -- I have said that I did not inform
11 the investigators immediately about the meeting. However, I handed over all
12 the recordings that I -- of my conversation with person number 2.

13 Q. [11:41:24] Okay. All right. Now let's go back -- all right. We'll -- we'll skip
14 this. We'll -- we'll get to that at some other point. I just wanted to make sure
15 that -- to get your -- your understanding. I wanted your understanding of what
16 "tell-all" means. Tell-all to me means you have to tell it all. But this was something
17 that just slipped; is that right?

18 A. [11:41:55] Tell-all means that I shall not -- that I tell them everything that I know.

19 Q. [11:42:01] All right.

20 A. [11:42:02] That is the meaning of tell-all, the way I understood it.

21 Q. [11:42:07] Now let me -- let me go on with the same -- what happened on that
22 same date, on -- we're still on the document. And now I'm going to skip through
23 some parts and we're going to go to 0135-0051. Same document, tab 30. Just
24 a few -- you know, a couple of pages later. And you're told, again -- this is line 367:
25 "I would like to interview you but in a formal interview, a full and frank interview,

1 with you about your involvement ..." and so on.

2 Do you recall that?

3 A. [11:42:49] Which line are you reading?

4 Q. [11:42:51] I'm reading at 3 -- 367. 366, actually. It would be, like, "I would like
5 to interview you." So they want a formal interview. They're informing you. A
6 formal interview where they're going to record you, but, first, they're also going to
7 advise you of your rights, right?

8 A. [11:43:20] Yes.

9 Q. [11:43:20] And so you understood that, at that point, because of
10 the representations that they had made, that you were going to be treated as
11 a suspect -- that you were being treated as a suspect, right?

12 A. [11:43:39] I didn't understand that.

13 Q. [11:43:42] Well, had they not brought it to your attention 11 days earlier when
14 they said, "We want to interview formally, and we want to tape-record it"? What
15 part of that did you not understand?

16 A. [11:43:55] At -- every time that I -- that I was interviewed by the -- by -- by
17 the investigators, it was -- at every time it was formal. There is no time that has been
18 informal. Including this time, it was formal. And, therefore, to say this time was
19 formal, I don't know whether you are saying other times that the -- the investigators
20 interviewed me was informal.

21 Q. [11:44:26] Okay. Let me -- let me clarify that. Yesterday it was brought to
22 your attention that on previous occasions, when you were -- had these conversations
23 with them, you would sit down, there would be an exchange for days, hours, and
24 then the investigators would produce a summary report of what was all said, what
25 was shown to you, but there was no formal recording. So no one can look at those

1 days and say, "Okay, this was the question posed. This was the answer given."

2 Question, answer, question, answer. None of that.

3 At the end, you were given a summary where you were to read it, make any
4 corrections, initial it, right?

5 A. [11:45:17] No. At most occasions, there were -- there were recordings.

6 Q. [11:45:23] Okay. Are you suggesting that there are recordings that
7 the Prosecution has that they haven't turned over to the Defence? Because that's
8 what you're suggesting right now.

9 A. [11:45:34] All these matters that we -- we -- that I -- I gave in the previous -- in
10 the previous case, because I remember, most cases where I met with the investigators,
11 they -- they did -- this was not the first recording that they did on me. There are
12 many other instances where I met them and the -- the same transcript -- I mean,
13 the paper that I signed were also -- were also recorded.

14 Q. [11:46:00] Okay. So let me make sure that I got this crystal clear. And you
15 might be confusing with the word "recording". So let me -- let me clarify it, and then
16 maybe you can help me out here.

17 On the previous occasions, that is, before the 15th, before the telephone call on
18 14 March 2014, when you met with the OTP investigators, on those occasions, surely
19 they were maybe typing things out and then sharing you the summary and then you
20 signing it and initialling the date -- the pages. That's different from tape-recording
21 when you have question, answer, question, answer, the entire event.

22 And let me just say one thing before you answer. We don't have any of such
23 recordings transcribed prior to this particular date. So is it -- could you be mistaken?

24 A. [11:47:14] My Honour, I remember most of the occasions, even in
25 the previous -- in the previous -- in the previous case, that when I was having my

1 interviews with the investigators, at other occasions, they were -- they were having it
2 recorded.

3 Q. [11:47:33] Okay. Now, if we look at the same page, 0135-0051 -- I don't want to
4 belabour the point, and the Prosecution is free to correct the record at any point.

5 Line 366, it says: "I would like to interview, but in a formal interview, a full and
6 frank interview." Okay.

7 So they're mentioning formal interview, and they've already told you before that
8 they're going to tape-record you. Do you agree with that?

9 A. [11:48:07] Yes, this is what they have said here --

10 Q. [11:48:09] Okay.

11 A. [11:48:10] -- in this conversation.

12 Q. [11:48:11] Okay. And what did you think that they meant by, "We're going to
13 tape-record you. We want a formal interview. We want to read you your rights.
14 You have the right to have a lawyer. Think about it, but we want the full -- full
15 truth"? What was your understanding of what was expected of you?

16 A. [11:48:29] My Honour, it was not my first interview. And at ever other
17 interview, those are the wordings you are given by the investigators when
18 they -- when they are letting you to give -- to give -- to give an evidence. And, to me,
19 they were -- these are the normal procedures of where investigators ask you to give
20 the -- to give the truth, to know that you are -- you are -- you are committed, that you
21 will sign the document, that at times you will be recorded. All these -- all these
22 things are stipulated before you start giving your -- your evidence.

23 Q. [11:49:13] Okay. But before they didn't suggest that you had the right to
24 a lawyer to be present to -- to advise you. This was the first time. It was first
25 mentioned on 14 March during a telephone conversation, because they told you, "If

1 you come, you know, you have the right to a lawyer." And then they advised you
2 again before they began the questioning, the formal interview, that, "By the way, you
3 have a right to a lawyer." This was the first time, was it not?

4 A. [11:49:47] Yes, I think it was the first -- it was the first time,
5 including -- including being searched, being standing up and being searched in
6 the pockets, if there's a reason was happening -- I was carrying something. That one
7 was the first time. That's why I said I had -- I saw some big differences, including
8 being searched. I had never -- they had never gone to that extent where they were
9 searching my pockets to search my -- to search -- and to undergo searching. That is
10 when I said I had -- I was -- I was -- I started to see some differences, and I was
11 shocked and I was -- I was in fear.

12 Q. [11:50:22] Right. Okay. They didn't manhandle you when they were
13 searching you? They weren't rough on you?

14 A. [11:50:22] I didn't say they were rough.

15 Q. [11:50:29] No, I'm asking. I'm asking. They were not rough, were they?

16 A. [11:50:32] They were not.

17 Q. [11:50:33] Okay. They are gentle then?

18 A. [11:50:34] Yeah. But it was the first time they were doing that.

19 Q. [11:50:36] Okay. And that sort of took you back. That sort of was unsettling
20 for you, that --

21 A. [11:50:42] That's what I saw, that things are different.

22 Q. [11:50:44] Things are different. Right. Because you had already been warned
23 11 days earlier that they thought that you were a double player. You had been
24 warned earlier that you were a double player.

25 A. [11:51:03] In the conversation we've seen that, so ...

1 Q. [11:51:06] Okay. Now, again, I want to go back to yesterday's testimony
2 because -- and today where you say you were so much in fear, and so forth, and that's
3 why this spontaneous story came out regarding your first meeting with Mr Gicheru
4 where you name a particular individual, which is number 7, that number 7 is
5 the person that took you, okay. And we're going to get to that. All right.
6 And you want to paint the picture, and you want Madam President to understand
7 that you were -- that your -- your judgment or your -- your thinking capabilities were
8 so clouded by fear that this spontaneous story came out. That's what you wanted us
9 to get from you yesterday and today, right?

10 A. [11:52:03] No. I wanted -- for purpose of record, I explained even to the -- to
11 the investigators concerning this matter. And I said, by the time we were meeting
12 with the investigators, I didn't imagine even that I will finish the -- the meeting
13 because of the situation that I was in with them. The way they -- I said I -- I saw
14 them. The way I saw their body language and how they were -- the interview on
15 that day, I thought I will be -- I will -- I will -- if I'm not arrested, I will go back home.
16 I never imagined that I was going to -- to be in agreement with them in anything.

17 Q. [11:52:48] Okay.

18 A. [11:52:49] So, therefore, at first, at first I did not want to reveal this -- this person
19 number 4 who actually introduced me to Mr Gicheru.

20 Q. [11:53:07] We're going to get to that. But you mentioned the word "arrest".
21 I'm looking at this document here, and I don't see anywhere where they give
22 the indication that they have any intention of arresting you.

23 A. [11:53:27] It is not my testimony that they gave indication. But I am saying
24 that --

25 Q. [11:53:31] You felt that. You felt that.

- 1 A. [11:53:33] I'm saying that I felt that --
- 2 Q. [11:53:34] Okay.
- 3 A. [11:53:35] -- that could -- could have happened.
- 4 Q. [11:53:39] And that feeling -- and that feeling motivated you to -- or inspired
- 5 you to give that spontaneous story about who introduced you to Mr Gicheru.
- 6 A. [11:53:56] I said I was in fear. And two, I thought I will be going back home.
- 7 And if I go back home and I have revealed the person who took me to your client,
- 8 then I will be in danger.
- 9 Q. [11:54:14] Okay. But did you not go there because you wanted them to help
- 10 you out, you wanted security?
- 11 A. [11:54:23] But looking at them, I have explained several times that, at that
- 12 moment, I was not very sure that they will be giving me that security.
- 13 Q. [11:54:35] Okay.
- 14 A. [11:54:36] And looking at -- at the way they appeared to me.
- 15 Q. [11:54:39] So when they told you -- when they were telling you, "We're more
- 16 concerned about the security issue, and we want to help you, but you have to tell
- 17 the truth", you didn't believe them. You thought that they were lying.
- 18 A. [11:54:58] Before I settled down and I stopped being in fear, I was having my
- 19 doubts on what they were telling me.
- 20 Q. [11:55:08] Having the doubts that they were actually been honest with you.
- 21 A. [11:55:12] Yes, because --
- 22 Q. [11:55:13] That they were being dishonest.
- 23 A. [11:55:17] I thought -- I thought things were very different.
- 24 Q. [11:55:19] That they had evil or pernicious motivations themselves. They were
- 25 trying to trick you. Even though they were saying, "We're not here to trick you", you

1 thought they were trying to trick you.

2 A. [11:55:33] I wanted to be sure that they were telling me the truth.

3 Q. [11:55:36] Okay. Well, they do tell you something more, because we're going
4 on. This is the same interview.

5 If we look at line 394: "That's why I'm saying to you that you need to be open and
6 accountable and you need to be full and frank. There can't be any half, you can't be
7 half right."

8 You see that? You see that?

9 A. [11:56:09] Yes, I see it.

10 Q. [11:56:11] Okay. And then it goes further down. If we look at -- starting with
11 line 403: "This is an opportunity -- this is an opportunity for you -- for you to hear
12 what we have and for you to effectively tell us."

13 So they're telling you, "We're going to tell you what we know about what you've been
14 up to, but this is an opportunity for you to tell us as well", right? Do you see that?

15 A. [11:56:42] Yes.

16 Q. [11:56:43] Did you understand it at the time?

17 A. [11:56:46] Yes.

18 Q. [11:56:46] Okay.

19 THE INTERPRETER: [11:56:47] Message from the English booth: Could counsel
20 please slow down and observe a pause between question and answers.

21 MR KARNAVAS:

22 Q. [11:56:48] And it goes on: "But bearing in mind we're talking [about] you about
23 your security and relocating" --

24 PRESIDING JUDGE SAMBA: [11:56:55] Mr Karnavas, can you slow down, please,
25 for the interpreters.

1 MR KARNAVAS: [11:57:00] Okay. Apologies. Apologies. It's that

2 Mediterranean character. Okay.

3 Q. [11:57:11] "... bearing in mind we're talking ... about -- we're talking to you about
4 your security and relocating for your security so we're talking -- we're taking this very
5 seriously."

6 Now, when they said that, did you believe them that they were taking it seriously?

7 A. [11:57:32] They were very serious, I say, the way they looked.

8 Q. [11:57:36] Okay, okay. "We're not talking about Scheveningen prison for your
9 security".

10 You know where Scheveningen prison is? You know what they meant by that,

11 "We're not talking about Scheveningen prison for your security"?

12 A. [11:57:55] That they were not taking me to prison.

13 Q. [11:57:57] They weren't taking -- by the way, it's not so far from here. It's pretty
14 nearby. So they were saying, "We're not going put you in prison for your security.
15 We're not going arrest you. We're not going to imprison you."

16 So -- and I take it you understood it at that point in time, right?

17 A. [11:58:16] Yes.

18 Q. [11:58:17] Okay: "... we're talking about relocating you out of the country, and
19 this is on instructions from the prosecutor."

20 So not only are they saying, "We're worried," but they're -- they're getting instructions
21 from the Prosecutor.

22 Now, when you heard that, were you still in fear for your -- you know, of these
23 people, that some -- that they were going to arrest you or do something harmful to
24 you? It's a yes or a no.

25 A. [11:58:56] When we continue the conversation, you will reach to a point where I

1 stopped being worried.

2 Q. [11:59:02] Okay. Well, they keep talking though, because they seem to be not
3 convinced that they've gotten the point across to you. Because if you go on to
4 the next page, 0135-0052, on line 410 -- okay. Towards the end, it says: "As I say,
5 we need your full honesty. We can't have half-truths."

6 Now, I haven't counted how many times they've said "honest truth" and what have
7 you, but doesn't this seem thus far into the interview that it's a recurring theme, that
8 they think that you have been less than honest?

9 A. [11:59:52] Yes, because I was -- I was -- I looked to be in fear.

10 Q. [11:59:57] Okay. So --

11 A. [11:59:58] And I -- and I know the investigators could also -- could also see
12 my -- my worries.

13 Q. [12:00:06] Okay. So let me make sure I got this straight, Mr Witness. Help me
14 out here. There's this interview. They're looking at you. They see fear in your
15 expression. And to sort of calm you down from your fear, they say, "We need your
16 full honesty, and we can't have half-truths." Is that what you're trying to tell us, that
17 they can -- that's what's going on at that moment?

18 A. [12:00:37] As you've seen, they have spoken about -- about -- about this on
19 several occasions in this interview.

20 Q. [12:00:43] I understand, but that's --

21 A. [12:00:45] And it's my -- it's -- it's my -- I think -- I mean, it's my thinking that
22 this is done because of -- they are repeating this to me in -- in order to make sure that I
23 tell -- I tell the truth and not -- and not to trick them.

24 Q. [12:01:05] Right. Because -- because, you know, if they wanted to calm you
25 down, they would say, "Don't worry. Don't worry. Don't worry. Trust us. Trust

1 us. We're the, you know, the ICC investigators." They would be putting you at
2 ease. Instead they're telling us, "Tell us the truth. Tell us the truth. Tell us
3 the truth." Does that sound like they thought that you had been truthful in the past,
4 yes or no?

5 A. [12:01:35] Concerning this conversation, what I had done actually to
6 the investigators, what -- what I had done by -- by leaving and going -- and going
7 back home was not good. And that is why they wanted me, now in this
8 conversation, to tell them the truth of what happened, how it happened, and
9 everything that I knew concerning -- concerning my departure and now that I'm back.

10 Q. [12:02:01] Okay. And that's exactly what they wanted?

11 A. [12:02:04] Yes.

12 Q. [12:02:05] So, later on, when they say, at line 425: "I don't think there's any point
13 in doing it," meaning the interview, "if you're not prepared to be honest with me."
14 Okay, it's not about tricking you but I need you to be completely honest with me."
15 That's what they wanted?

16 A. [12:02:31] Yes.

17 Q. [12:02:31] Because they thought that you had not been completely honest in
18 the past?

19 A. [12:02:40] Yes.

20 Q. [12:02:41] Okay. Thank you.

21 A. [12:02:42] And, actually, because I left.

22 Q. [12:02:43] And actually -- okay, you left.

23 And then you say -- you say, "I will be honest with you." This is in line 427, okay?

24 Take it in. Read it carefully.

25 Tell me if I misread it.

1 A. [12:03:01] You did read well.

2 Q. [12:03:02] Okay. "I will be honest with you."

3 Now, we haven't -- you haven't even -- the interview hasn't even started, but now

4 you're giving assurances, you're giving assurances to these investigators. "Now that

5 I've come back, now that I know that I'm a suspect, now that I know what you want, I

6 will be honest with you." Right?

7 A. [12:03:22] Without the line that I know that I was a suspect.

8 Q. [12:03:26] You didn't know by that point you were a suspect? Okay. All right.

9 All right. We'll move on.

10 They go on, 430:

11 "Ok. Do you want to put some thought in as to whether or not you want a lawyer

12 present?"

13 And you say: "No, I don't think so."

14 Now the issue of the lawyer had come up previously. You had 11 days to think

15 about a lawyer. So you just said no, right?

16 A. [12:04:02] Yes.

17 Q. [12:04:03] Okay. Now let's look at line 433:

18 "OK. Again, if at any stage throughout the interview you want to discontinue, it is

19 not compulsory, it's completely up to you. So if you say; 'No, I've had enough, you

20 know, you're tricking me, you can leave'. There's no obligation for you to stay at any

21 stage throughout the interview. But I will warn you throughout the interview at

22 every step that you don't have to stay, [that] you can leave if you like." And then

23 later on it ends with, "So are you prepared to do that?"

24 Now, when they were saying these words, were you still in fear? Does these -- does

25 these words sound like they're trying to threaten you when they are saying, "You can

1 leave at any time. You can stop the interview"?

2 A. [12:05:12] You can see how long it has gone before we came to this.

3 Q. [12:05:16] I'm asking you what you're thinking at this point in time. I'm not
4 asking about what they're doing. It's very clear what they're doing, but I'm asking
5 you --

6 A. [12:05:26] (Overlapping speakers)

7 Q. [12:05:27] -- does this sound from you that they were threatening you to arrest
8 you, that they were putting you in fear when they're saying, "There's the door. You
9 can leave at any time. You can have a lawyer. You can talk to us. You can leave"?
10 Does that sound like they were threatening you?

11 A. [12:05:45] Again, I did not say that they -- they did -- that they did harass me or
12 do anything of that nature. I said I felt that I was in that situation.

13 Q. [12:05:59] And from their body language when they were saying these things?

14 A. [12:06:02] So it is not my testimony that the investigators actually did put me in
15 fear or intimidated me or make -- or made me feel -- or -- or, actually -- I mean,
16 did -- did -- did anything that was -- that was maybe by force. No. I'm saying, out
17 of my own feelings --

18 Q. [12:06:27] Okay.

19 A. [12:06:27] -- because of the treatment that I underwent, internally I felt
20 that -- that there was -- there was some difference on how they were -- they were
21 handling me this time round.

22 But you can see the investigators continuing even to give me more assurances, that if I
23 need to go home at any time, I can go. At this point I started to -- to calm down,
24 knowing that there is no issue. I started to -- to -- and to see that there is -- there
25 is -- there is no issue of arrest and things like that (Overlapping speakers).

1 Q. [12:07:05] Okay. All right. I'm glad to hear that.

2 So now you're calming down because they further go on to say on line 442: "Sorry,
3 one other thing; if you do [not] want -- if you do want to go we are going to pay for
4 your transport back. So it's not like if you don't cooperate with us we're going to go;
5 'OK ..."

6 So they're saying, "You know, we paid for you to come over here. We'll pay for you
7 to go back. You don't want to talk to us, no harm, no foul, no problem." Right?
8 They're willing to pay for you to go back.

9 A. [12:07:49] Yes.

10 Q. [12:07:49] Okay. And I take it, that really calmed you down.

11 A. [12:07:52] Yes, I started to calm down.

12 Q. [12:07:54] When you say you started, you know, how long did it take for you to
13 calm down? I mean -- I don't know. I mean, you tell me.

14 A. [12:08:05] I started to calm down.

15 Q. [12:08:10] And then he says -- the other interviewer says: "We're not going to
16 treat you bad. If you want to go, you can go." Right?

17 A. [12:08:20] Yes.

18 Q. [12:08:20] So at this point you're pretty calm, right?

19 A. [12:08:27] At that point I started to calm down.

20 Q. [12:08:29] Okay. You started to calm down. You knew you weren't going to
21 be arrested at that point, right?

22 A. [12:08:35] Yes.

23 Q. [12:08:36] Okay. You knew that you could terminate the interview at any point
24 and that they would pay for you to go back?

25 A. [12:08:43] Yes, they had informed me of that.

1 Q. [12:08:50] And so right after that they want to jump into the issue about how it
2 was that you met Mr Gicheru, right?

3 A. [12:09:00] Yes.

4 Q. [12:09:01] Okay. I mean, in fact, that was part of the -- of the reason for you
5 going there. You know, that's one of the reasons that they wanted to talk to you
6 about, right?

7 MR STEYNBERG: [12:09:16] Your Honour, may I ask my learned friend to give
8 a reference to the question he's referring to. I don't recall that it was put to this
9 witness that they asked him about Mr Gicheru. I think they --

10 MR KARNAVAS: [12:09:26] Well, we're going to get there. We're going to get
11 there. I'm just -- (Overlapping speakers)

12 MR STEYNBERG: [12:09:30] I'm just concerned that you're misleading the witness
13 by putting something to him that wasn't said to him.

14 MR KARNAVAS: [12:09:37] All right. Well, I take -- I take exception to
15 the characterisation of misleading. Far be it. I'm giving the witness an opportunity.
16 It's a predicate. Now he either remembers or he doesn't. And I have the file here.
17 So if he doesn't remember, I'll go through it.

18 THE WITNESS: [12:09:54] My Honour, every conversation that we had with
19 the investigators was given to this Court as -- is given to this Court as statement.
20 And I will request that the counsel will guide me through the -- the documents as we
21 go so that I don't give any information contrary to what is in the statement. Because
22 everything that we did on that day was recorded. It is -- it is there in form of
23 recording and in form of hard copy.

24 Now I will make my request that when the counsel is referring to a document that
25 is -- that is recorded and -- and -- and given to this Court, that he gives me

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1 the -- the way we have done on the other pages, line by line, so that -- so that there
2 is -- I may not -- I may not give other words, especially noting that I'm under oath to
3 say the truth.

4 If I say anything that is -- that may mislead what is really recorded and -- and put
5 here, it will be misleading to this case.

6 PRESIDING JUDGE SAMBA: [12:11:12] Thank you, Mr Witness.

7 MR KARNAVAS: [12:11:13] I'll be very mindful, Madam President.

8 PRESIDING JUDGE SAMBA: [12:11:18] Yes.

9 MR KARNAVAS:

10 Q. [12:11:19] And I apologise, Witness, if I gave you the impression that I'm trying
11 to mislead you, as suggested by Mr Steynberg. To the contrary.

12 If we look at -- before we go into the -- the issue of whether you were asked to tell all
13 about your -- who it was that introduced you to Mr Gicheru, or how you got involved
14 in witness tampering, witness intimidation, or what have you, if we could look at
15 document 0135-0054.

16 What tab is that at, do you know?

17 PRESIDING JUDGE SAMBA: [12:12:08] That is 31.

18 MR KARNAVAS: [12:12:11] Okay. Thank you. Thank you, your Honour.

19 Q. [12:12:16] So, anyway, I just want to go through, very quickly, if you could look
20 at these pages, 0135-0057, 58, and 59. Just kind of give them a quick glance. They
21 again are reading you -- informing you of your rights, and they're telling you that
22 the interview can cease at any time. If you look at it, and then, if you can confirm
23 that, then we can move on.

24 A. [12:12:54] Yes, there were those confirmations.

25 Q. [12:12:58] Okay. (Microphone not activated)

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1 Here is where you may need to go into private session, because I'm going to --

2 PRESIDING JUDGE SAMBA: [12:13:20] Madam Court Officer, can we please go into
3 private session.

4 MR KARNAVAS: [12:13:27] And we could start by looking at document --

5 PRESIDING JUDGE SAMBA: [12:13:31] Just a moment, Mr Karnavas. We are not
6 yet in private session.

7 MR KARNAVAS: [12:13:34] Sorry, sorry, sorry. I'll get there.

8 (Private session at 12.13 p.m.)

9 THE COURT OFFICER: [12:13:39] We are now in private session, Madam President.

10 (Redacted)

11 (Redacted)

12 (Redacted)

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12 (Redacted)

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14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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22 (Redacted)

23 (Redacted)

24 (Open session at 12.40 p.m.)

25 THE COURT OFFICER: [12:40:41] We are back in open session, Madam President.

1 PRESIDING JUDGE SAMBA: [12:40:44] Thank you very much.

2 Mr Karnavas.

3 MR KARNAVAS: [12:40:46] Okay. Thank you, Madam President.

4 Q. [12:40:48] Now you say it's a private place, actually. That's on -- that's in
5 page 0135-0068, line 498. So they're asking you some details. They say, "You know,
6 is it an office complex." And you say, "No, it is a private place actually; it's a nice
7 place upstairs. It's a good" --

8 PRESIDING JUDGE SAMBA: [12:41:19] Which tab are you talking about?

9 MR KARNAVAS: [12:41:21] I'm on the same document. It's tab 31, your Honour.
10 And I'm still on the document -- the first page is 0135-0054. And my apologies.
11 At this point I'm on page 1 -- 0135-0068. I was hoping to move it up a little bit faster,
12 but ...

13 Q. [12:41:56] Do you have that, sir? Do you have that section?

14 A. [12:41:59] I will get that now.

15 Q. [12:42:01] Why don't you get it. Let us know when you have it.

16 A. [12:42:48] Tab 31.

17 Q. [12:42:49] You have it?

18 A. [12:42:50] Yes.

19 Q. [12:42:51] Okay. So if we look at --

20 A. [12:42:55] What page?

21 Q. [12:42:57] We're looking at page 14. That would be 0135-0068. If you look at
22 the bottom, look at 14.

23 A. [12:43:16] Page 14.

24 Q. [12:43:17] Okay. So at the very top it mentions, you know, location number 19.
25 You say, you know, location number 19 is a hotel. Do you see that? And then you

1 say, "So upstairs is where we met." Do you see that?

2 A. [12:43:40] Yes.

3 Q. [12:43:40] Okay. That was the detail that you provided, the location and where
4 you actually met, right?

5 A. [12:43:52] The place, it is location of where I -- of the cover story that I used, that
6 I -- that we met (Overlapping speakers).

7 Q. [12:43:59] Right. Right. That's a detail to your cover story.

8 And then later on, on line 496, they ask you if it's an office complex. And you say,

9 "No" - this is on line 498 - "it is a private place ... It's a good place where people can
10 sit." You see that?

11 A. [12:44:21] Yes.

12 Q. [12:44:21] So you pick the location. It's a private but open to the public. And
13 all of that is true, by the way, right, the location?

14 A. [12:44:30] That location exists.

15 Q. [12:44:32] Yeah. And everything that you're saying, that it is -- it's not a -- it's
16 not a -- an office complex. It's actually, you know, a private place, as you say, right?

17 A. [12:44:44] It is a restaurant.

18 Q. [12:44:46] Okay. All right. And then it goes on. "Did somebody take you
19 there and introduce you." And you say, "No, no, [no] ... No, we were seated with my
20 friend who was introducing me to him. And we sat, [and] I went ... my friend called
21 me and told me to go. He said," location number 19, "upstairs ... [when] I found
22 them [sitting] there."

23 Do you see that?

24 A. [12:45:18] Yes.

25 Q. [12:45:19] Okay. These were details that you provided. Minor details but

1 details, nonetheless, right?

2 A. [12:45:28] I have admitted that I used that cover story to cover my friend
3 (Overlapping speakers).

4 Q. [12:45:33] No, I just want to -- I understand. I understand. But now I want to
5 go through this cover story.

6 A. [12:45:37] (Overlapping speakers)

7 Q. [12:45:37] Because the point I'm trying to make is that there's a lot more to story
8 than, "Oh, I just lied about this person." Okay?

9 Then there's a reference to this individual and where he had been. Right? On
10 the same page.

11 A. [12:45:59] Yes.

12 Q. [12:46:00] Okay. Now, if we go to the next page, because the story is a little
13 disjointed. The Court will have an opportunity to read this and unscramble some of
14 it, but the way the story came out during the interview was a little disjointed. But at
15 some point, on the next page -- and this is 0135-0069, page number 15 for you, for
16 your assistance. If we look at line 526 to 530. Look at that for a second.

17 Here you are saying that that person was in X country. I don't see it on the location
18 chart. That you had been trying to get a hold of him, and then you just met him.

19 "And I met him now when I went to," location number -- number 5, "when he was
20 introducing me to Gicheru."

21 Do you see that? 529-530, those are the lines.

22 A. [12:47:27] Yes, I do.

23 Q. [12:47:27] And then, like a good interviewer who is listening to the answer and
24 allowing the next question to be a follow-up, the interviewer goes: "Can I ask you,
25 how did [you] get in contact -- how did he get in contact with you?" Meaning

1 number 7. And then you say: "We met in town. Just coincidence." Very
2 spontaneous. There's no interruption here. "We met in town, just coincidence
3 because I was in town doing shopping with my family and we just met on the streets.
4 It was a surprise to get, and he knew that I was, I told him I had to withdraw too
5 because -- I had to withdraw too because of the pressure I was getting. The safe
6 house and the demands [and] I wanted -- [and] I wanted [where we] -- were not met."
7 "What I wanted were not met," basically, that's what you are saying.
8 "Probably he said," so now you're imagining this conversation of this imaginary
9 meeting. "He said ... actually he said the same thing was happening to him when
10 he was in," that particular country. "And after chatting for some time now he said
11 that he knew Mr Gicheru and actually out of what we did together, I knew also about
12 Mr Gicheru and I knew what he was capable of doing. And my fears actually were
13 about him when I was in town. Now here is a person who could actually introduce
14 me to him and make me safe maybe."

15 Those details are yours, right?

16 A. [12:49:35] Yes.

17 Q. [12:49:36] And this is an imaginary meeting that you're having, that you're
18 telling the investigators, right?

19 A. [12:49:44] Yes, to cover my friend.

20 Q. [12:49:45] Right. And in order to make the imaginary meeting more
21 convincing, more convincing, more believable, you provide them with this imaginary
22 conversation that you are having with this imaginary person of this imaginary
23 situation, right?

24 A. [12:50:06] I have told you I have --

25 Q. [12:50:11] No. I'm just asking --

1 A. [12:50:12] -- I covered my friend with -- with (Overlapping speakers).

2 Q. [12:50:14] I understand you covered your friend. But I'm suggesting, this is
3 what you're doing: On the spot, you're coming up with an imaginary scenario of
4 what transpired, right? And in the midst of it, you also have an imaginary
5 conversation. Do I have it right?

6 A. [12:50:36] Yes.

7 Q. [12:50:37] Okay. We can agree on that?

8 A. [12:50:40] Yes.

9 Q. [12:50:41] Okay. And then it goes on. And then there's more detail about
10 the meeting and the conversation, and that pretty much ends the day of March 25,
11 25 March 2014, right?

12 You don't correct that story on that particular day, or do you?

13 A. [12:51:30] I don't remember the exact date I did it, but out of the records that we
14 have seen now, the day have ended. I have corrected it the next day (Overlapping
15 speakers).

16 Q. [12:51:44] Okay. All right. Well, let me help you out here. Let me help you
17 out here. And we have 10 minutes left. I --

18 PRESIDING JUDGE SAMBA: [12:51:49] Thank you, Mr Karnavas. I was going to
19 remind you.

20 MR KARNAVAS: [12:51:52] Yeah. And, you know, perhaps, because it may take
21 a little bit more than 10 minutes, I don't mind going -- I think I'm sufficiently prepared,
22 but I'm at your disposal if you wish to ...

23 PRESIDING JUDGE SAMBA: [12:52:06] If you know it will be more than 10 minutes,
24 then this is the right time to break for lunch. We'll continue after lunch, please.

25 MR KARNAVAS: [12:52:15] Yes, yes, I think that would be wonderful. Thank you.

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- 1 PRESIDING JUDGE SAMBA: [12:52:19] Thank you very much, Mr Karnavas.
- 2 THE COURT USHER: [12:52:25] All rise.
- 3 PRESIDING JUDGE SAMBA: [12:52:36] I think we'll break for lunch. We'll meet at
- 4 2.30. Thank you.
- 5 (Recess taken at 12.52 p.m.)
- 6 (Upon resuming in open session at 2.31 p.m.)
- 7 THE COURT USHER: [14:31:27] All rise.
- 8 Please be seated.
- 9 PRESIDING JUDGE SAMBA: [14:31:53] Good afternoon, again, all.
- 10 We continue with the cross-examination of P-800.
- 11 Mr Karnavas, please.
- 12 MR KARNAVAS: [14:32:08] Thank you, your Honour.
- 13 Q. [14:32:19] Okay, Witness, now I would like to turn to tab 1. It's 0135-0103.
- 14 PRESIDING JUDGE SAMBA: [14:32:37] Tab?
- 15 MR KARNAVAS: [14:32:40] Tab 1. At least that's what ...
- 16 (Counsel confer)
- 17 Q. [14:32:57] So it's in the first binder, sir, tab 1. You should see it's 26 March 2014,
- 18 track 2 of your interview. Are you with us?
- 19 A. [14:33:21] Yes.
- 20 Q. [14:33:21] Okay. Good. And have you found the page? I'm going to be
- 21 referring to page 2. That would be 0135-0105.
- 22 A. [14:33:34] Yes, I'm there.
- 23 Q. [14:33:35] Okay. You're there. Good. Now, I think we left off where, you
- 24 know, 25 March 2014 ended with you leaving the impression with the investigators
- 25 that person number 7 was involved in -- took you to meet Mr Gicheru. Do you recall

1 that?

2 (Microphone not activated)

3 PRESIDING JUDGE SAMBA: [14:34:23] Your mic is off, Mr Karnavas.

4 MR KARNAVAS:

5 Q. [14:34:28] Do you recall that, sir? When we left, on 25 March 2014 is when
6 you -- you ended the interview on that day giving the impression to the investigators
7 that you had told the truth and the truth was that it was person number 7 that had
8 introduced you to Mr Gicheru in location number 5. Do you recall that?

9 A. [14:35:16] Yes. By that date I had not revealed the person --

10 Q. [14:35:20] Okay.

11 A. [14:35:20] -- the person who took me to Mr Gicheru (Overlapping speakers)

12 Q. [14:35:25] When you say you hadn't revealed, you mean, not to put too fine
13 a point on it, you had lied?

14 A. [14:35:32] I had not revealed the true person who took me there.

15 Q. [14:35:36] Well, you had lied as to -- you know, you lied saying it was this
16 person as opposed to saying it was somebody else?

17 A. [14:35:43] I had covered my friend.

18 Q. [14:35:47] And in covering your friend, were you not lying, sir?

19 PRESIDING JUDGE SAMBA: [14:35:52] Mr Karnavas, the witness has answered.

20 MR KARNAVAS: [14:35:54] Okay. Very well. Very well.

21 Q. [14:35:56] All right, so the next day the interview begins and this is the day of
22 the revelation, when you're going to -- the big reveal, you're going to tell the truth,
23 right?

24 A. [14:36:10] Yes.

25 Q. [14:36:11] Okay. Now if you look at page 2 of this document that you have in

1 front of you, and it's 0135-0105, it starts with basically, on line 37, if you kind of look
2 at it very quickly, with them reminding you that you had left. They -- you know,
3 they were supposed -- you were supposed to meet with them, but they had lost
4 contact with you around 5 and 6 August. Right?

5 A. [14:36:49] Yes.

6 Q. [14:36:50] Do you recall that? Do you recall them calling you and trying to
7 arrange a meeting and not being able to get a hold of you?

8 A. [14:37:04] I don't recall vividly, but must be the dates that I went back to --

9 Q. [14:37:12] Okay. Well, you don't recall the dates vividly or you don't recall
10 them looking for you, calling you?

11 A. [14:37:25] They have confirmed that they did not get me on phone.

12 Q. [14:37:28] I'm not worried about what they confirmed, I'm asking you. Do you
13 recall them trying to get a hold of you and them telling you that -- that you were
14 unavailable?

15 A. [14:37:41] Yes, they told me in this meeting --

16 Q. Right.

17 A. [14:37:46] -- that they looked for me at these dates and that I was not available.

18 Q. [14:37:50] And in fact you gave them some explanation as well, right?

19 A. [14:37:54] Yes.

20 Q. [14:37:54] And do you recall that explanation? Remember when I talked about,
21 you know, the 10 Commandments and number 7, and I refreshed your memory about
22 what number 7 was?

23 MR STEYNBERG: [14:38:13] I believe you said it was adultery, Counsel.

24 MR KARNAVAS: [14:38:15] Yeah, yeah. Well, I wasn't asking you, I was asking
25 the witness. But thank you for reminding us.

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1 Q. [14:38:24] Do you recall that?

2 A. [14:38:27] I recall you asking --

3 Q. [14:38:29] Yeah. And do you recall telling the investigators that you were
4 indisposed because you were with your girlfriend? You had turned off your phone,
5 you were unavailable, you mentioned your girlfriend. Do you recall that? It's
6 either a "yes" or a "no".

7 Well let me back up. Let me -- in all fairness, did you have a girlfriend when you
8 were in that location?

9 A. [14:39:02] There are some questions -- (Overlapping speakers)

10 Q. [14:39:04] Well, did you have a girlfriend?

11 A. [14:39:06] -- I need to answer when I am in -- in a -- in a private (Overlapping
12 speakers)

13 Q. Okay, private session. We'll go into private session.

14 PRESIDING JUDGE SAMBA: [14:39:14] Yes, let's go into private session, please.

15 (Private session at 2.39 p.m.)

16 THE COURT OFFICER: [14:39:26] We are in private session, your Honour.

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

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Trial Hearing
WITNESS: KEN-OTP-P-0800

(Private Session)

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19 (Open session at 3.10 p.m.)
20 THE COURT OFFICER: [15:10:43] We're back in open session, Madam President.
21 PRESIDING JUDGE SAMBA: [15:10:46] Thank you very much.
22 Mr Karnavas, please.
23 MR KARNAVAS: [15:10:48] Thank you, Madam President.
24 Q. [15:10:53] Let me -- let me get this straight. I'm a little confused here. Help
25 me out.

- 1 You're in a location that's rather secure, right? This is before coming to -- coming
2 back to your -- to location number -- what was it, number 5, number 5, right? Before
3 coming to location number 5, where you met or was met by your friend.
- 4 PRESIDING JUDGE SAMBA: [15:11:49] Person number 4.
- 5 MR KARNAVAS: [15:11:52] Person number 4.
- 6 Q. [15:11:55] You were in a secure environment, were you not?
- 7 A. [15:11:58] I was.
- 8 Q. [15:11:59] You were in a secure environment because you were worried for your
9 own protection?
- 10 A. [15:12:09] Sorry, can --
- 11 Q. You were worried --
- 12 A. [15:12:10] -- you repeat.
- 13 Q. [15:12:11] You were worried about your own -- your security, that's why you
14 were there?
- 15 A. [15:12:16] Which place?
- 16 Q. [15:12:19] Place number 6.
- 17 A. [15:12:28] Yes, that's why I was there.
- 18 Q. [15:12:30] You were there -- you were there in fact for your own security
19 purposes, right?
- 20 A. [15:12:35] Yes.
- 21 Q. [15:12:36] And you had folks looking after your security, had you not? Isn't
22 that right?
- 23 A. [15:12:45] I have confirmed.
- 24 Q. [15:12:46] Okay. And you leave, on your own, right? You left that area?
- 25 A. [15:12:57] Yes.

1 Q. [15:12:58] You didn't inform the people that are watching over you, that are
2 responsible for your security, VWU, or others or whoever, right?

3 A. [15:13:12] Yes.

4 Q. [15:13:13] You don't inform the OTP investigators with whom you have been
5 collaborating with, right?

6 A. [15:13:25] I didn't inform anyone.

7 Q. [15:13:27] You did not inform anyone. And it wasn't because you didn't have
8 phones, right?

9 A. [15:13:34] That was not the reason.

10 Q. [15:13:36] Okay. And it wasn't the reason because you didn't have a SIM card
11 to go along -- or SIM cards, as we will find out, that was not one of the -- the reason,
12 right?

13 A. [15:13:49] It wasn't.

14 Q. [15:13:49] Okay. But you left that secure environment, leading us to believe
15 that you were really worried about your security, you leave that on your own without
16 giving notice to anybody and then you go to location number 5?

17 A. [15:14:08] Yes.

18 Q. [15:14:09] Okay. That's what I wanted to -- to establish.
19 And when I ask you the question that you had left, when you say the organisation, in
20 your terms, the way I should understand it, the organisation is the OTP, the ICC OTP,
21 right?

22 A. [15:14:40] You mean --

23 Q. [15:14:44] Well, I mean, occasionally is I read your -- as I read your interviews,
24 and maybe in some transcripts, you keep referring to the "organisation". And to me
25 it's code word or your way of expressing the ICC investigators, you know,

- 1 the investigative unit, the OTP.
- 2 A. [15:15:08] We will base that one to the conversation, if you may bring it forth so
- 3 that I can tell you what I meant by the word "organisation" there.
- 4 Q. [15:15:18] Well, was there another organisation that was involved that you were
- 5 involved in?
- 6 A. [15:15:22] We have spoken about organisations I worked in.
- 7 Q. Okay.
- 8 A. [15:15:25] We have spoken of -- and we are now talking about other
- 9 organisations (Overlapping speakers)
- 10 Q. [15:15:32] All right. Let's get back to the issue. You had left a secure area,
- 11 isn't it a fact that by that point, by leaving, you had abandoned the programme that
- 12 was protecting you?
- 13 A. [15:15:47] I had not left officially.
- 14 Q. [15:15:51] Okay. So unofficially you had left, but not officially?
- 15 A. [15:15:58] Yes, I decided to -- to -- to leave.
- 16 Q. [15:16:02] To leave. And part of leaving you had also decided to withdraw?
- 17 A. [15:16:06] Yes.
- 18 Q. [15:16:08] To withdraw as an OTP witness?
- 19 A. [15:16:11] Yes.
- 20 Q. [15:16:12] That was a voluntary decision?
- 21 A. [15:16:18] Yes.
- 22 Q. [15:16:19] Okay. So when, according to this new version of your story, you
- 23 arrived in location number 5 from the secure area of location number 6, you had
- 24 already left the programme of being an ICC -- an OTP witness for the Ruto and Sang
- 25 case, correct?

1 A. [15:16:52] I confirm that I had not left officially. I left the place number -- I left
2 place number 6 and we have seen that I have proceeded to place number 5 and I have
3 also seen the next destination. We can just continue to explore what happened
4 further.

5 Q. [15:17:34] Okay. Well, let me go back to the make-believe story. When
6 you -- when you told in the previous story that you had met person
7 number -- number 7, and that you had informed person number 7 that you had left
8 the programme, okay, in that -- was that one of the facts that was true or was that
9 a make-believe fact for that fake scenario that you were telling the investigators?

10 A. [15:18:10] My Honour, I've explained myself concerning that matter, and
11 that -- and on those -- on those all situation. And we have now come to
12 the statement which I confirm that they had -- this is the -- the -- the true part of
13 my -- part of my -- the -- the true testimony that I am giving --

14 Q. Okay.

15 A. [15:18:39] -- to this Court.

16 Q. [15:18:42] Had you represented to person number 4 that you had withdrawn?
17 Whether it's officially or unofficially, had you informed him when you arrived in
18 location number -- number 5?

19 A. [15:19:00] Person number 4, what I had informed him is that I had intentions to
20 with -- to withdraw as -- as a witness of this Court. He knew my intentions and I
21 had -- I had -- I had informed him of my intentions. And now he took me to your
22 client in order to solidify my intentions and actually recant.

23 Q. [15:19:32] Okay. So you had intended to withdraw?

24 A. [15:19:38] Yes. And that is why I left place number -- I left place number 6
25 because of those intentions.

1 Q. [15:19:46] And you went to place number 5?

2 A. [15:19:52] And I went to place number 5 and we have seen how the journey
3 continued.

4 Q. [15:20:01] Okay. And it's your -- it's your testimony today that, having
5 informed, you know, person number 4 of your intentions when you in fact had left,
6 physically at least and were -- was back in country, as it were, it was then that he
7 decided to take you to see Mr Gicheru?

8 A. [15:20:31] He made all the plans.

9 Q. [15:20:34] He -- okay.

10 A. [15:20:35] To see Mr Gicheru, according to the way they discussed with him.
11 And I was only given information that I was supposed to continue the journey to
12 the destination.

13 Q. [15:20:56] All right. Now forgive me if I don't readily accept your version.
14 But other than person number 4, do you have anything that would back up your story,
15 something that you can -- something tangible that you provided to the OTP,
16 something that verifies that in fact on this particular day you were met as you were
17 coming off the bus or on the street of location number 5, that you met person number
18 4, is there anything other than your word?

19 A. [15:21:43] Yes, my Honour. I would like to continue to inform this Court that
20 all the documents that the Court has accepted as exhibits contains even the recordings
21 that we did to person number, person number 2, after conversations with him in
22 the -- the two meetings, which reveals exactly who is concerned with taking witnesses
23 back home. And therefore I would like to answer an affirmative that I have given
24 sufficient evidence to this Court to show that the accused person is the one who was
25 receiving people back at home.

1 Q. [15:22:56] All right. So you're relying on that -- on the tape-recordings with
2 person number 2, your conversations with person number 2, if I understand you
3 correctly?

4 A. [15:23:15] Yes, my Honour, that -- that is one of my --

5 Q. [15:23:19] Okay, all right. And one of those recordings is of the unauthorised
6 meeting, right?

7 A. [15:23:29] Yes.

8 Q. [15:23:29] Now we're going to get to that. But let me put it to you this way.
9 We don't know what exactly you might have said to person number 2 and what you
10 might have agreed with person number 2 before you decided to turn on that
11 tape-recording, do we?

12 A. [15:23:58] I did record all conversations between me and person number 2.

13 Q. [15:24:03] So you say.

14 A. [15:24:04] And that was my intention to record him. That is why, even when I
15 went to this meeting which was unauthorised, I continued to record. If I had other
16 intentions, as you are putting to me, then I would not have recorded him in the first
17 meeting which was unauthorised.

18 Q. [15:24:29] All right. Can you provide us with any -- we're going to get to that
19 and we're going to go through it, but can you provide us anything concrete that
20 would show that there were no conversations between you and person number 2
21 when he arrived, when he stepped off the bus, to the time when you decided, in the
22 restaurant to begin tape-recording?

23 A. [15:25:00] That was the start of our conversation.

24 Q. [15:25:02] That's what you say. We have to accept your word on that, right?

25 A. [15:25:08] Yes, I recorded every conversation.

1 Q. [15:25:11] But we would have to accept your word that you're telling us
2 the truth. On this one -- on this occasion you're telling us the truth?

3 A. [15:25:18] In every occasion I have said it is the truth, it remains the truth.

4 Q. [15:25:21] But you have nothing to show otherwise to back that up, other than
5 we have the tape and we know when it started? We don't --

6 A. [15:25:30] I have -- I have given -- I don't know what other concrete -- other
7 concrete information you will want, apart from the true words, which comes not from
8 me but from person number 2 himself explaining plain and clear who is responsible,
9 who has sent him, how much people are paid by -- by your client and where
10 the money is coming from. All has been explained in the exhibits I have provided in
11 this Court.

12 Q. [15:26:01] Sir, isn't it a fact that you had a lot of phones?

13 A. [15:26:09] Telephones?

14 Q. [15:26:11] Yeah, mobile phones.

15 A. [15:26:13] Yes, I had several.

16 Q. [15:26:13] Okay, you had several. Now, you were under this -- under
17 protection in this secure environment. Were you supposed to have all those phones?

18 A. [15:26:25] When I made conversations with -- with my family, I had a phone to
19 do that. When I made conversation with anyone I was, I was -- I had informed
20 the -- the -- the investigators I -- I was having a phone to exactly do that.

21 (Redacted)-- in that -- in that -- in that -- in that location, place number -- place
22 number 6 and therefore every, every phone that I was having was -- was -- had -- had
23 a purpose why I was carrying that phone.

24 Q. [15:27:09] Okay. Now, was the OTP investigators and VWU aware of every
25 phone that you had? Yes or no?

1 A. [15:27:23] Yes, they knew of all the phones they had given, because most of the
2 phones I was carrying they are from them, apart from the one I was using myself to
3 do my private communications with my family.

4 Q. [15:27:35] Now you also had a lot of SIM cards, right?

5 A. [15:27:38] All the phones had different (Overlapping speakers)

6 Q. [15:27:41] I know the phones had SIM cards, but you also had SIM cards, you
7 were taking them, replacing them?

8 A. [15:27:47] I didn't -- I didn't have other SIM cards apart from the ones which
9 were on those phones.

10 Q. [15:27:54] And so when they were -- when they were examining the phones,
11 they would be able to see on each and every time that you used the phone who you
12 called or who called you, right?

13 A. [15:28:04] Yes.

14 Q. [15:28:06] Now is it your testimony today, under oath, that all the phones that
15 you were using and all the SIM cards that you were using were authorised by either
16 the investigators of the OTP or VWU?

17 A. [15:28:29] It is my testimony that apart from the phones that I used privately
18 that were not -- that were not for the purpose assigned by the officers of the Court,
19 they knew about -- about -- about that.

20 Q. [15:28:45] (Redacted);
21 (Redacted);

22 A. [15:29:00] I was not supposed to use my phones to do other -- that I could not
23 mix the -- the conversations.

24 Q. [15:29:16] Well, one of the things they were concerned about was your safety,
25 that you shouldn't be communicating with people that might, you know, know of

1 your whereabouts, for your own security, right? That was one of the reasons, no?

2 A. [15:29:34] I believe so.

3 Q. [15:29:36] And with the OTP investigators, they wanted to make sure -- they
4 wanted to be able to monitor, to monitor who you were calling and who was calling
5 you; isn't that a fact?

6 A. [15:29:52] It was not made to me -- told to me that they were monitoring my
7 conversations. Because every conversation that came through the -- through
8 that -- that phone, I was -- I was -- I was submitting the information to them. There
9 is no -- there is no day I was told, "Now, from today we are monitoring your
10 conversations with whoever you will be calling." What I was told is that when I get
11 communication from a suspicious person, I should immediately inform
12 the -- the -- the investigators.

13 Q. [15:30:34] Okay. Well, maybe "monitoring" is the wrong word and I confused
14 things.

15 Not monitoring in the sense that they're listening in, but they wanted to have access
16 to your phones and to your SIM cards so they would know, they would be able to
17 check them. And isn't it a fact, sir, that they would do that periodically and without
18 warning?

19 A. [15:30:58] I have told you -- I have told you -- or, rather, answered that there is
20 no one day I was told that they are monitoring my calls, or I was made that it
21 was -- otherwise, it will be -- it will -- it would be a burden to carry phones with you,
22 no -- you are -- you are -- it's like every time you -- you receive a call, you don't -- I
23 mean it will be very difficult to use the phones like that.

24 But I want to put it to you that the phones I was given had a certain use that I was
25 asked to use. For example, there are phones I could use, I could use for calling

1 the -- the VWU within where I was, and those -- and those phones I used for -- for my
2 daily -- for my daily communication. I could even sometimes lend
3 the phone -- the phones to my -- to a friend, remove the SIM card and put, because to
4 me it was not -- it was not -- it was not an issue to do that. If it -- if I had been told
5 that they will be monitoring periodically, as you have put it to me, then I would not
6 even have lended a -- my phone to -- to a friend to use. I would not have helped
7 a friend to use my phone.

8 Q. [15:32:41] Okay. So let me make sure I understand your testimony. Are you
9 saying - I don't want to put any words in your mouth - that at no time the OTP
10 investigators asked to -- asked for your phone in order to check to see who you had
11 called and who had called you? Did they ever do that? Yes or no. I don't need
12 a big speech.

13 A. [15:33:07] Excuse me, Counsel, you let me answer your question.

14 PRESIDING JUDGE SAMBA: [15:33:10] Mr Karnavas, allow the witness to answer
15 the question. We cannot just limit his answers to yes or no. Please.

16 MR KARNAVAS: [15:33:18] Very well, very well. Yes.

17 THE WITNESS: [15:33:23] Now, my -- the telephone that I was using, it came a time
18 when the telephones were -- were taken from me and they have been put
19 into -- into -- into a machine before me and I was told they are checking -- they were
20 trying to check some -- some communication that was of interest to them.

21 Then, if that answers your question, in one occasion I have witnessed -- I did witness
22 the officers of this Court arrive to the -- to the -- to this place and I gave the phones
23 for -- they were -- they said they had interest to check on some information.

24 MR KARNAVAS: [15:34:18]

25 Q. [15:34:19] Okay. So now you're saying that there were times when they took

- 1 your phone to check to see who you had called and who had called you?
- 2 A. [15:34:31] One occasion they did --
- 3 Q. [15:34:32] Only one occasion?
- 4 A. [15:34:34] Yes.
- 5 Q. [15:34:34] Not two?
- 6 A. [15:34:35] I remember of --
- 7 Q. [15:34:37] I'm just asking you, you said one.
- 8 A. [15:34:39] I remember -- (Overlapping speakers)
- 9 Q. [15:34:39] Is there one or more? Which of the two?
- 10 A. [15:34:44] I remember one occasion when I was asked for the phones, they were
- 11 put into the machine.
- 12 Q. [15:34:49] And where -- was that when you were here in The Hague, is that -- or
- 13 someplace else? You don't need to tell me that place.
- 14 A. [15:34:55] Not, not, not here.
- 15 Q. [15:34:57] Okay. So just one occasion you recall.
- 16 A. [15:34:59] I remember -- I remember one occasion.
- 17 Q. [15:35:02] Now I take it they told you the reason why they wanted to check
- 18 the SIM card and check the phone, right? They told you why they were doing that?
- 19 A. [15:35:14] They told me that they were looking for the vital information in
- 20 the phones.
- 21 Q. [15:35:18] All right. Well might they have been telling you -- might they have
- 22 been doing that because they also thought that you were having all sorts of private
- 23 communications, whether it was on that phone or your private phones which you
- 24 never disclosed to them, that you were talking with others?
- 25 PRESIDING JUDGE SAMBA: [15:35:38] Are you asking -- Mr Karnavas, are you

1 asking the witness as to, you know, the possible reasons why they were -- they asked
2 him to check his phone or?

3 MR KARNAVAS: [15:35:50] Yes, that's one -- that's one reason, yes.

4 PRESIDING JUDGE SAMBA: [15:35:53] Would he know the reasons why
5 the investigators -- did they tell him?

6 MR KARNAVAS: [15:35:57] He would have -- he would have been aware, they
7 would have told him why that he was looking -- or they were looking at his phone.

8 PRESIDING JUDGE SAMBA: [15:36:03] Do you want to ask him (Overlapping
9 speakers)

10 MR KARNAVAS: [15:36:06] I can -- I can go about it another way.

11 Q. [15:36:09] Were there times when the investigators were trying to verify, to
12 verify communications you claim to have had, phone calls you have had, were there
13 times when they -- to verify that information, they asked for your phone to check it?

14 A. [15:36:28] I have confirmed that there's a time the investigators asked for my
15 phone to check my vital information they wanted. And it also came a time thereafter
16 that I was informed that they wanted to see the people who had communicated to me.

17 Q. [15:36:55] And were you ever told that, for some reason or other, that
18 information wasn't on the phone or on the SIM card?

19 A. [15:37:04] Yes. I remember having been told that they have a few phone calls I
20 had reported that I had received that were -- that were not found on the telephone.

21 Q. [15:37:18] Okay. They were not found. Were they not found because there
22 was a technical problem, not found because maybe the SIM card was taken out, you
23 know, when you take out the battery and take out the SIM card and you lend
24 the phone and somehow it got erased? What was the reason?

25 A. [15:37:45] To me, the phone I was having at -- on use by that time will only keep

1 a certain number of -- of data of communication in the -- in the phone. And after
2 that, it automatically deletes.

3 The second reason I had for that, I believed to have -- to have -- to have caused that
4 one, is like I said before, at times I will leaned the phone to -- to -- to a friend to -- to
5 call and he could put his SIM card in the -- in the phone, and due to that, data also can
6 be lost.

7 Q. [15:38:30] And were you supposed to be doing that, lending your phone,
8 putting SIM cards in and out? Had they warned you against that for your own
9 safety purposes if nothing else?

10 A. [15:38:47] What I was warned about the phones is not to use the phones to call
11 my -- my country. And that one I did not. The person whom I was -- he was
12 asking to be helped to call was not even -- was -- was not even calling this location
13 that I was -- that I was -- location number -- is it number 6 -- let me see. Yeah, he was
14 not even calling -- most of the time he was not calling location number -- he does not
15 come from location number 6, he was calling another, another country. So I was
16 comfortable that I -- it was safe.

17 Q. [15:39:39] Were you calling person number 18 at all?

18 A. [15:39:53] Person number 18, I remember I -- I -- I had her number and during
19 the meeting between me and person number 2, I think I might have called -- I might
20 have called her.

21 Q. [15:40:23] And she was -- as far as I understand, I could be wrong, I might be
22 getting it wrong, she was in location number 6 as well, was she not?

23 A. [15:40:36] Yes.

24 Q. [15:40:36] Okay. And were you supposed to be contacting her and having
25 communications with her?

- 1 A. [15:40:47] Communicating, not -- no.
- 2 Q. [15:40:50] Okay. But you also visited her, right?
- 3 A. [15:40:58] I don't remember having visited her.
- 4 Q. [15:41:00] Okay. I don't want to -- well, we'll save that for another time. But
- 5 you don't recall actually going to see her physically?
- 6 A. [15:41:10] No, I don't recall.
- 7 Q. [15:41:12] Okay, when she might have been sick?
- 8 A. [15:41:23] She informed me that she was sick.
- 9 Q. [15:41:26] Okay. But you didn't visit her?
- 10 A. [15:41:27] I didn't.
- 11 Q. [15:41:28] Okay. All right. I might have it wrong. All right.
- 12 Now going back to what we were talking about, you said that at some point in your
- 13 story you and -- and person number -- number 4 go to Nairobi, right?
- 14 This is after when you first arrive in location number -- number 6 -- or number 5, you
- 15 immediately head off for Nairobi the next day. Right? When you arrive in number
- 16 5, person number 4 meets you, there's some phone calls and then you go off to
- 17 Nairobi; is that correct?
- 18 A. [15:42:37] Yes.
- 19 Q. [15:42:38] And you have conversations, and from what I understand, person
- 20 number 4 was going to be the contact person?
- 21 A. [15:42:54] Yes.
- 22 Q. [15:42:55] And so you had -- you had his -- his phone number, he had yours,
- 23 right?
- 24 A. [15:43:05] Yes.
- 25 Q. [15:43:06] And you also had Mr Gicheru's phone number?

1 A. [15:43:13] At what time?

2 Q. [15:43:15] Well, when you first met him, did he give you his phone number?

3 A. [15:43:25] I was asked that I should be able to call person number 4. I

4 remember there is a time, I'm not quite sure to what occasion, that Mr Gicheru gave
5 me a landline number which did not go through.

6 Q. [15:43:44] You mean it was dead, when you call up there would be -- it wasn't
7 functioning?

8 A. [15:43:51] It was -- yeah, no, at first it was -- it did not -- no one answered on it.

9 Q. [15:43:57] You mean it would ring but nobody would answer, as opposed to it
10 being dead? Which of the two?

11 A. [15:44:03] I didn't find anyone on line.

12 Q. [15:44:04] Okay. Was that his office number or was that a different number?

13 A. [15:44:10] It was a landline number which is not a -- you understand when I say
14 landline --

15 Q. [15:44:18] I think I get that. I think I get it. You know, you pick it up. But
16 what I'm asking, was that his office number?

17 A. [15:44:29] I don't know.

18 Q. [15:44:30] Okay. Do law firms in -- in Kenya in general, if you know, I mean
19 you were a paralegal, do you know whether they have landline numbers? Is
20 that -- or do they still use that? I don't know.

21 A. [15:44:44] Yes, they do use also landline and they use also --

22 Q. [15:44:50] All right. And normally -- and in Kenya, I don't know, maybe you
23 can help me out here, do lawyers in general have business cards in -- in Kenya?

24 A. [15:45:02] Yes.

25 Q. [15:45:02] Okay. So, so they haven't -- that's not something unique to say here

1 in the Netherlands or some other country? In Kenya lawyers have business cards,
2 right?

3 A. [15:45:17] Yes.

4 Q. [15:45:17] And help me out here. On business cards do they usually put down
5 information that is vital in case somebody wants to call that particular law office?

6 A. [15:45:32] Your question, please?

7 Q. [15:45:34] Does it have vital information, for instance --

8 A. [15:45:38] The business card?

9 Q. [15:45:39] Yes.

10 A. [15:45:40] Yes, it -- you get telephone numbers and --

11 Q. [15:45:44] You get -- you get address --

12 A. [15:45:46] Website, if it -- if it is there.

13 Q. [15:45:47] You get -- exactly. But let me go on. You know, you get an address,
14 right?

15 A. [15:45:51] Yes.

16 Q. [15:45:52] Because, you know, how else are you going to go there if you don't
17 know the address? You're going to get a landline. Like you said, most of them
18 have landlines, right?

19 A. [15:46:01] Yes.

20 Q. [15:46:02] And you're probably going to get a mobile phone as well, aren't you?

21 A. [15:46:08] Yes.

22 Q. [15:46:09] And you're going to get, as you said, maybe an email address?

23 A. [15:46:13] Yes.

24 Q. [15:46:14] Okay. And during this period, I don't know because I wasn't there at
25 the time, but during this period did they use the internet in -- in Kenya? Did people

1 use the internet? Did they have email addresses?

2 A. [15:46:39] I said yes.

3 Q. [15:46:40] Okay. All right. So all the information that you needed to know
4 about who Mr Gicheru is, where he can be located, physically, at least during
5 working hours, his landline, mobile, email, would have been readily available to you
6 from a business card, right?

7 A. [15:47:01] Yes.

8 Q. [15:47:02] You're shaking your head. Yes, okay, good. We need to get this on
9 the record so I don't mean to push you on this. Okay.

10 So it wasn't as if, if you needed to get hold of him, you didn't know him, right?

11 A. [15:47:18] I didn't know how.

12 Q. [15:47:20] Okay. You did not?

13 A. [15:47:21] I knew I had to call person number 4.

14 Q. [15:47:24] That's what you tell us.

15 Now, throughout -- through many, many interviews you've maintained, and we can
16 go through them probably tomorrow because we don't have enough time, you've
17 maintained that you never had -- other than this one instance where you had
18 a landline that wasn't working, nobody was answering, you were never ever
19 provided with any other number to be able to directly contact Mr Gicheru. That has
20 been your -- you have said that, have you not?

21 A. [15:48:02] I want to -- to say that there is a time where I was too much -- too
22 much pressed because I had someone who was sick in hospital and I -- I -- I
23 needed -- I needed -- I needed money to -- in order to pay his bills. And there is
24 a time I remember having sent a -- a text message to the phone of Mr Gicheru asking
25 for -- for the money because I wanted to -- I wanted to pay for the -- for

1 the -- for -- for -- I wanted to use the money, I was in need of -- of -- of money. And
2 he never responded.

3 So --

4 Q. [15:49:07] Your lawyer wants to speak.

5 MS TERZIEVA: [15:49:09] If I may interrupt, your Honour. I think maybe
6 the paragraph should be in private session, just in line of the decision of yesterday.
7 It's related to the testimony of the witness and money is mentioned, so for these
8 reasons. It may not be an offence under the jurisdiction of this Court, but it may be
9 in another jurisdiction and it may expose the witness at risk. So for this reason, I will
10 kindly request the last paragraph to be redacted from the transcript.

11 PRESIDING JUDGE SAMBA: [15:49:44] Actually, which paragraph, saying what?
12 I don't see anything -- I don't see anything that is actually wrong that ought not to
13 have been said in public.

14 MS TERZIEVA: [15:49:57] It's page 135, line 3 to 7.

15 PRESIDING JUDGE SAMBA: [15:50:13] Yes, he is just saying that he needed money.

16 MS TERZIEVA: [15:50:16] Yes.

17 PRESIDING JUDGE SAMBA: [15:50:16] For some personal purpose and he sent
18 a message to a telephone.

19 MS TERZIEVA: [15:50:21] Okay.

20 PRESIDING JUDGE SAMBA: [15:50:21] According to what he says, the accused's
21 telephone. But he received no response. What is wrong with that really?

22 MS TERZIEVA: [15:50:29] Well, it's subject to interpretation. I will -- if you -- I will
23 withdraw at this moment, but I will have to look at it again and (Overlapping
24 speakers)

25 PRESIDING JUDGE SAMBA: [15:50:46] No, no, but I think it is very clear. There is

1 nothing ambiguous about what he said. Thank you very much. Can you be seated.

2 Please, Mr Karnavas, can you please go on.

3 MR KARNAVAS: [15:50:53] Thank you, your Honour.

4 Q. [15:50:55] All right. So let me see if I can wrap this up in the next few minutes.

5 At one point you said that you needed some money because one of your relatives was
6 sick, right?

7 A. [15:51:15] Yes.

8 Q. [15:51:16] And they had to go to the hospital?

9 A. [15:51:19] He was in the hospital.

10 Q. [15:51:20] He was in the hospital. And of course there came a time when he
11 would have to pay the hospital bills?

12 A. [15:51:25] Yes.

13 Q. [15:51:26] And as I understand it, there was no money, you couldn't help out, so
14 your relative actually left the hospital without paying the bill on -- at that time at least,
15 right?

16 A. [15:51:39] Yes.

17 Q. [15:51:40] And you wanted to avoid that. You wanted to avoid that, you
18 wanted to help out your relative?

19 A. [15:51:46] Yes.

20 Q. [15:51:47] Okay. Now, here's where I'm a little confused. Maybe you can help
21 me out here, okay? Throughout your interviews with the OTP you have maintained
22 over and over and over and over again, because they've been asking you over and
23 over and over again, that you had no way of communicating with Mr Gicheru, that
24 you did not have a mobile number, that had to go through (Redacted). Would that
25 be fair, that you've repeatedly said that, yes or no?

1 A. [15:52:32] I remember you -- you having been told to let me answer your
2 question. Hope you remember that.

3 I --

4 PRESIDING JUDGE SAMBA: [15:52:41] Then go ahead and answer the question
5 now, Mr Witness.

6 THE WITNESS: [15:52:45] Yes, your Honour.

7 I maintained that from the time I went to see -- we went to see Mr Gicheru in Nairobi,
8 I -- the telephone number I had was a landline number. I have also said it has
9 come -- it came to a time when I was in dire need of money and I was trying to
10 push -- calling that number, there is no response. Person number 4 actually gave me
11 a number to just make a text in order to request for the -- for the -- for the funds.
12 And I did that without any response.

13 MR KARNAVAS: [15:53:44]

14 Q. [15:53:44] Do you recall what year was that? 2013, '14, '15, do you recall
15 the year?

16 A. [15:54:00] I don't.

17 Q. [15:54:00] Okay. Well, would it surprise you, sir, that, and I stand to be
18 corrected, I don't want to mislead you, but from all the evidence that was provided to
19 us from the Prosecution, all these documents, it's not until the first proofing session
20 for today, that is back in July 13, 2021 in the presence of Mr Steynberg when you first
21 say -- when you first mention anything about having this SMS? Does that come as
22 a surprise to you, that you're mentioning for the very first time that all of a sudden
23 now you have his mobile number, now you have a means of sending an SMS,
24 although you do say you never get a response? Does that surprise you?

25 A. [15:55:02] It is not a surprise because I am being honest.

1 Q. [15:55:06] Okay. So when the other times when they were asking you whether
2 you have his mobile number, that must have been before you got the SMS or you had
3 the SMS and you weren't telling the truth, or all of this that you're telling us here
4 today is another fairy tale, just the one you told the Prosecutors the day, you know,
5 before you came supposedly clean back on 25 March 2014?

6 A. [15:55:47] I can't remember those days that I was -- I was giving my -- my
7 statement. Now that it came to my mind when I was giving these statements in
8 the month of July, I could not hold it with me.

9 Q. [15:56:05] It was bothering you, it was a weight that you had to unload?

10 A. [15:56:09] No, because I know -- I actually know that I did send an SMS after
11 I -- because I was in dire need of this money and I was not getting, so I did write an
12 SMS to request for the -- for the -- for the fund. However, I was not answered. So I
13 just became even more clearer when I -- when I -- when I said this.

14 Q. [15:56:33] Okay. Well, thank you very much for your testimony today. We're
15 going to continue tomorrow, if you don't mind.

16 Your Honour, I think it's about time to ...

17 PRESIDING JUDGE SAMBA: [15:56:46] It's a nice time to end the session.

18 Okay, thank you very much, Mr Karnavas.

19 Mr Witness, I will thank you again for, you know, for your appearance today and for
20 your testimony for today and I will ask that you come on again tomorrow so that we
21 finish your cross-examination and, possibly if your counsel so wants, he may want to
22 re-examine you. But I want to remind you that you'd still be under oath and that
23 you should not discuss your testimony with any other person when you walk outside
24 the courtroom today until we meet again tomorrow in the morning at 9.30, about
25 the same time. And that's for all of us here. Okay?

Trial Hearing
WITNESS: KEN-OTP-P-0800

(Open Session)

ICC-01/09-01/20

- 1 Thank you very much.
- 2 THE COURT USHER: [15:57:34] All rise.
- 3 (The hearing ends in open session at 3.57 p.m.)