

Trial Hearing
WITNESS: KEN-OTP-P-0613

(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, 23 February 2022
8 (The hearing starts in open session at 9.32 a.m.)
9 THE COURT USHER: [9:32:58] All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE SAMBA: [9:33:17] Well, good morning, everyone.
13 Madam Court Officer, can you mention the case, please.
14 THE COURT OFFICER: [9:33:29] Good morning, Madam President.
15 This is the situation in the Republic of Kenya, in the case of the Prosecutor versus Paul
16 Gicheru, case reference ICC-01/09-01/20.
17 And for the record, we are in open session
18 PRESIDING JUDGE SAMBA: [9:33:44] Thank you very much.
19 Can the parties introduce themselves please.
20 MR STEYNBERG: [9:33:48] Good morning, your Honour. Anton Steynberg for the
21 Prosecution. I'm back again today. And with me, Mariana Gutierrez, acting
22 associate legal officer, and assisting us remotely, Grace Goh, case manager.
23 Thank you, your Honour.
24 PRESIDING JUDGE SAMBA: [9:34:07] Thank you very much.
25 Mr Karnavas.

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1 MR KARNAVAS: [9:34:12] Good morning, your Honour and good morning to
2 everyone in and around the courtroom. Michael Karnavas for Mr Gicheru, Suzana
3 Tomanović and Noah Al-Malt.

4 PRESIDING JUDGE SAMBA: [9:34:23] Thank you very much.

5 And for the record I note that Mr Gicheru is in court.

6 Good morning, Madam Witness.

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8 (The witness speaks English)

9 THE WITNESS: [9:34:34] Good morning, your Honour.

10 PRESIDING JUDGE SAMBA: [9:34:36] I note that the Prosecution is now calling
11 Witness P-0613 as the third witness.

12 MR STEYNBERG: [9:34:44] I confirm that, your Honour.

13 I can also confirm that the next witness is on track to go after this witness. I'm still
14 waiting for an update on -- on the witness who had to be rescheduled due to
15 the logistical issue I mentioned earlier.

16 PRESIDING JUDGE SAMBA: [9:35:04] Thank you very much.

17 Before commencing, the Chamber notes briefly that protective measures are
18 confirmed to this witness by virtue of decision number 276, and that the VWU
19 recommends no further protective measures.

20 Madam Witness, you are going to testify before the International Criminal Court, and
21 on behalf of the Chamber I would like to welcome you to the courtroom.

22 THE WITNESS: [9:35:42] Thank you, your Honour.

23 PRESIDING JUDGE SAMBA: [9:35:44] I will now ask that -- let me just confirm, you
24 have a document before you, don't you, a solemn undertaking?

25 THE WITNESS: [9:35:50] I have, your Honour.

1 PRESIDING JUDGE SAMBA: [9:35:51] Thank you. Can you read out that
2 undertaking for the Court, please.

3 THE WITNESS: [9:35:57] I solemnly declare that I will speak the truth, and the
4 whole truth and nothing but the truth.

5 PRESIDING JUDGE SAMBA: [9:36:04] Thank you very much.

6 And you understand and agree to what you have just read, don't you?

7 THE WITNESS: [9:36:12] I understood, your Honour.

8 PRESIDING JUDGE SAMBA: [9:36:14] Very well. We will continue.

9 Madam Witness, let me now explain to you the protective measures that the Chamber
10 has put in place for your testimony. The following measures are put in place to
11 protect you:

12 Voice and face distortion has been put in place for you for the duration of your
13 testimony. This means that no one outside the courtroom can see your face or hear
14 your real voice during your testimony.

15 There will also be the use of pseudonym, so in accordance with that, we will all refer
16 to you only as Madam -- only as "Madam Witness" to make sure that the public does
17 not know your name

18 when you answer questions; that will not give away who you are. We will do so in
19 open session, which means that the public can hear what is being said in the
20 courtroom, even though they will not make out your voice.

21 When you are asked to describe anything that relates specifically to you, or you are
22 asked to mention facts that might reveal your identity, we will do so in private
23 session. In private session, there is no broadcast and no one outside the courtroom
24 can hear your answer. If ever anything gets said during public session, which
25 should have been said in private session, we will do our best to protect that

1 information. Your testimony will be broadcast on a daily basis, so we can remove
2 any such remarks from the public broadcast.

3 The Prosecution has also prepared a list, so that you can safely make reference to
4 information which might identify you. The Prosecution will explain this to you
5 when it begins its testimony.

6 And lastly, I also have a few practical matters you should have in mind when giving
7 your testimony. Everything you say here in this courtroom is interpreted and
8 written down. It is, therefore, important to speak clearly and at a slow pace. Please
9 speak into the microphone, and only start speaking when the person asking you the
10 question has finished. To allow for the interpretation, everyone has to wait a few
11 seconds before starting to speak.

12 If you have any questions yourself, raise your hand so we know that you wish to say
13 something.

14 Have you understood all that I have said, Madam Witness?

15 THE WITNESS: [9:39:52] I have understood, your Honour.

16 PRESIDING JUDGE SAMBA: [9:39:57] Thank you very much.

17 So we will now start with your testimony.

18 Mr Steynberg, your witness.

19 MR STEYNBERG: [9:40:08] I'm grateful, your Honour.

20 QUESTIONED BY MR STEYNBERG:

21 Q. [9:40:13] Good morning, Madam Witness.

22 A. [9:40:19] Good morning.

23 Q. [9:40:21] I'm going to try my best to speak slowly, at about this pace, and I
24 would be grateful if you could also try to follow this pace, which will give the
25 interpreters and the stenographers enough time to record what you're saying as the

1 Judge has cautioned you.

2 I would like you, please, first to look at the protected information list that should be
3 on the desk in front of you. It's the one with the big red stop sign on the front. I
4 think it's just lying -- yeah, can you look in the front of your witness binder, if there's
5 a document that looks like this. If not, then let me know and I'll hand a copy to the
6 court officer.

7 A. [9:41:12] Yes.

8 Q. [9:41:13] You have it?

9 A. [9:41:17] It's binder 1?

10 Q. [9:41:19] Yes.

11 MR STEYNBERG: [9:41:19] Your Honour, I think I might have forgotten to hand
12 that up to the witness. May I just give another copy to the court officer, please.

13 PRESIDING JUDGE SAMBA: [9:41:28] Certainly.

14 MR STEYNBERG: [9:41:53]

15 Q. [9:41:54] This is a document that her Honour referred to earlier. And you'll see,
16 turning to page 2, there's a list of locations, which continues on to page 3. And then
17 there's a list of organisations, which continues on to page 4. And a list of persons,
18 which continues on to page 6. In fact, page 7. And finally, at the last page there are
19 some personal details of you -- of yourself.

20 Can you confirm that during the course of the witness preparation I went through
21 these personal details with you and you confirmed their correctness?

22 A. [9:42:50] Yes.

23 Q. [9:42:51] All right.

24 And do you confirm their correctness today under oath, Madam Witness?

25 A. [9:42:56] Yes.

1 Q. [9:42:58] Thank you. Then moving on.

2 By way of introduction, is it correct, Madam, that you were a witness for the
3 Prosecution in the Ruto and Sang case?

4 A. [9:43:18] Yes, I was.

5 Q. [9:43:21] And is it correct that you provided various statements and testimony
6 in that case regarding the post-election violence and, in particular, various planning
7 meetings allegedly attended or organised by William Ruto?

8 A. [9:43:41] Yes.

9 Q. [9:43:44] Now, besides these statements you gave to the Prosecution in what I
10 can call the main case, the case against Mr Ruto and Mr Sang that dealt with the
11 post-election violence, did you also give other witness statements to the Prosecution?

12 A. [9:44:03] Yes.

13 Q. [9:44:06] And what were those statements about, Madam? Remembering we
14 are in public session.

15 A. [9:44:13] It was for -- for tampering.

16 Q. [9:44:21] Tampering?

17 A. [9:44:23] Yes, with witnesses.

18 Q. [9:44:26] Tampering with witnesses. Thank you.

19 Now, Madam Witness, I can inform you, as I explained during the witness
20 preparation, that in order to make these proceedings more efficient, the Chamber has
21 ruled that the Prosecution may submit into evidence your prior statements. Do you
22 understand?

23 A. [9:44:52] I understand.

24 Q. [9:44:55] Provided you do not object to this.

25 A. [9:44:58] No objection.

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1 Q. [9:45:00] You have no objection to the Prosecution handing in your prior
2 statements?

3 A. [9:45:03] Yes.

4 Q. [9:45:04] Thank you.

5 In that case, in your testimony today, I'm not going to ask you about each and every
6 matter which is contained in your various statements, and I think by my last count 11
7 concerning witness tampering. But rather I will focus on what the Prosecution
8 considers to be the most important aspects or at least aspects on which I would like to
9 ask you certain further clarifications.
10 Do you understand?

11 A. [9:45:40] I understand.

12 Q. [9:45:43] But please bear in mind that the lawyers -- the lawyer for the Defence,
13 who will question you after me, and possibly the Judge may question you on any
14 matter, including matters in which I have not questioned you, provided they are
15 relevant to the case. Okay?

16 A. [9:46:06] That's fine.

17 Q. [9:46:08] All right. Now during the course of Friday, Saturday and Sunday you
18 went through witness preparation process; is that right?

19 A. [9:46:29] Yes.

20 Q. [9:46:30] And on the desk in front of you there should be a list, a table, the first
21 page of which has yellow highlights on it. Do you see that?

22 A. [9:46:42] Is it binder 1?

23 Q. [9:46:52] I think it should be a loose piece of paper.

24 Perhaps the --

25 PRESIDING JUDGE SAMBA: [9:46:56] No, no, it should be in the binder. Can you

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1 check binder 1 and see, Madam Witness?

2 THE WITNESS: [9:47:12] I've got it. Thank you.

3 MR STEYNBERG: [9:47:14] All right. Thank you. Thank you, Madam Court
4 Officer.

5 Q. [9:47:17] Do you recognise this document?

6 A. [9:47:19] Yes, I recognise. And I went through and signed it.

7 Q. [9:47:24] All right.

8 For the record, your Honour, this is the list of material shown to the witness during
9 the witness preparation session. It's also annex A to the witness clarification log
10 provided to my learned friends, and the ERN is KEN-OTP-0160-1579.

11 Your Honour, just a note for the Defence, the disclosure process of this document is
12 still under way, so it has not been formally disclosed, but of course we have provided
13 the list to the Defence. So what they don't have is the document with the ticks, but
14 that's in the process and it should be coming in the next disclosure package.

15 All right. You say you signed the document. Besides the signatures, did you make
16 any other marks on this document?

17 A. [9:48:27] Yes, I put my initials.

18 Q. [9:48:30] Mm-hmm.

19 A. [9:48:32] And tick -- put tick and X.

20 Q. [9:48:38] All right. And the ticks and Xs, what do they signify?

21 A. [9:48:44] Saying I have read.

22 Q. [9:48:48] You have read the document corresponding to the tick; is that correct?

23 A. [9:48:52] Correct.

24 Q. [9:48:53] All right. Now I'm going to focus, to start off with, on the documents
25 that are highlighted in yellow. So those are on the list items 1 to 47.

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1 And, your Honour, the documents are in the corresponding tabs of the court binder
2 which the Prosecution has prepared for the Chamber and the witness.

3 Now, these are your prior statements on the matter of the -- what we call the Article
4 70 case, or the witness tampering case, as you called it. And you confirm that you
5 have read all of these documents; is that right?

6 A. [9:49:43] Yes, I've read it.

7 Q. [9:49:46] You also made a few clarifications of certain documents, mainly
8 corrections to your personal details, one or two other spelling issues. Subject to
9 those clarifications, do you confirm under oath today -- under oath today, the truth
10 and correctness of these documents to the best of your knowledge and recollection?

11 A. [9:50:16] Yes, I confirm.

12 Q. [9:50:20] Right.

13 MR STEYNBERG: Your Honour, I should say at this stage -- I should have placed it
14 on the record at the beginning, that during the clarification session the witness was
15 given the warnings in terms of Rule 66(3) and Article 70. In other words, she is
16 aware of her duty to tell the truth and the penalties should she not do so. The
17 Prosecution also explained her rights under Rule 74, although the Prosecution does
18 not consider that Rule 74 will be implicated with this witness.

19 Q. And you -- Madam Witness, just to confirm, you have no objection to the
20 Prosecution handing these statements into evidence?

21 A. [9:51:11] No objection, your Honour.

22 Q. [9:51:16] Thank you very much.

23 Perhaps I can just, while I'm on this subject, ask you to turn to the -- page 10 of this
24 document, where you'll see from 127 to 129 some purple highlighted items. Do you
25 have that?

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1 A. [9:51:43] Yes, I have.

2 Q. [9:51:45] These are the transcripts of your evidence in the Ruto and Sang case.

3 Can you confirm you also read those?

4 A. [9:51:54] I read it, your Honour.

5 Q. [9:51:56] And the following items are highlighted in blue, items 130 to 133, and
6 these are your witness statements in what I've called the main case, the Ruto and Sang
7 case. And have you also read those?

8 A. [9:52:14] Yes, I read it, your Honour.

9 Q. [9:52:17] Thank you.

10 MR STEYNBERG: [9:52:18] Your Honour, for the record, the Prosecution does not
11 consider these relevant for the Prosecution's case, so we do not propose to submit
12 these documents into evidence, but of course they're available to my learned friend to
13 use as he deems fit.

14 Your Honour, the Prosecution will submit in the normal fashion into evidence the
15 documents listed from items 1 to 47, being the prior recorded testimony of the witness
16 concerning the Article 70 case.

17 If the Court will bear with me, please.

18 (Counsel confers)

19 MR STEYNBERG: [09:53:28] Sorry, your Honour, I'm looking for an elusive Post-it.

20 I should just place on record the ERN of the witness clarifications. It is

21 KEN-OTP-0160-1594. And I place this on the record since the witness has confirmed
22 the truth of her prior statements subject to these clarifications.

23 For the sake of completeness, the preparation log is KEN-OTP-0160-1587. All right.

24 Q. [9:54:23] Now, Madam Witness, just to provide some background to the
25 statements that I wish to put to you, is it correct that after you made your initial

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1 witness statements to the Prosecution investigators -- the date of your initial
2 statement, I can just place it on the record, is 1 and 2 December 2012, but is it correct
3 that at some stage after that you were relocated to location number 12? You can just
4 have a look at the locations on the PIL list.

5 Do you have location 12? It's on page --

6 PRESIDING JUDGE SAMBA: [9:55:49] Court officer, please help the witness.

7 MR STEYNBERG: [9:55:51] It's on page number 2, Madam Witness. Page 2.

8 PRESIDING JUDGE SAMBA: [9:55:56] Can you help the witness, please.

9 Thank you.

10 MR STEYNBERG:

11 Q. [9:56:21] All right. You won't find it on the other document.

12 A. [9:56:28] Sorry about that.

13 Q. [9:56:30] No, no problem. Do you have location 12 on the list, page 2?

14 A. [9:56:34] Yes, your Honour.

15 Q. [9:56:35] And is it correct you were relocated there? Now I don't want to give
16 exact dates, we're in public session, but sometime prior to April 2013; is that correct?

17 A. [9:56:50] Correct, your Honour.

18 Q. [9:56:53] All right. And while you were in that location, did it come to your
19 attention at any time that people back home, back in Kenya, were looking for you?

20 A. [9:57:05] Yes, your Honour.

21 Q. [9:57:06] And how did this come to your attention?

22 A. [9:57:10] Through -- via phone call.

23 Q. [9:57:18] Through a phone call?

24 A. [9:57:20] Yes.

25 Q. [9:57:21] Right. And now we're going to practice using this list again, and if

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1 you can turn -- starting on page 4, if you can identify using this list the number of the
2 person from whom you received that call. Bearing in mind it's a long list, it goes on
3 for just over three pages. And it's roughly alphabetical by Christian names.

4 A. [9:59:12] Yes, your Honour.

5 Q. [9:59:14] What is the number of the person that contacted you?

6 A. [9:59:18] Five-three, your Honour.

7 Q. [9:59:20] Person number 53. Good. Do you -- can I ask, do you have a pen
8 with you there?

9 A. [9:59:28] No.

10 Q. [9:59:29] Sorry, Madam Court Officer, to trouble you again. Could the witness
11 be given a pen please.

12 Perhaps you can just put a cross next to that one so you can find it more easily next
13 time, because we'll be coming back to this gentleman from time to time.

14 A. [9:59:52] Thank you.

15 Q. [9:59:53] All right. Now, I'll come back to this conversation with person 53 in
16 a moment, we will have to do that in private session. But just to continue the
17 narrative to set the scene. And you can -- you can put that document aside for now,
18 Madam.

19 A. [10:00:31] Okay.

20 Q. [10:00:33] So this gentleman phoned you and gave you a report to the effect that
21 there were people looking for you. What did you do as a result of that report? Did
22 you tell anyone?

23 A. [10:00:50] Yes, your Honour, I told the investigators.

24 Q. [10:00:56] And can you recall how soon after the call you told the investigators?

25 A. [10:01:04] Immediately after the phone call.

1 Q. [10:01:07] Thank you.

2 MR STEYNBERG: [10:01:09] Your Honour, for the record, I'm not going to call up
3 the document, but this is dealt with in the statement at tab 1. It's
4 KEN-OTP-0102-0178, at page 0180, paragraph 13. And as I go I will give these
5 references so that the person reading the record in weeks or months to come will be
6 able to find the relevant material in the Rule 68 statements.

7 Q. [10:01:46] Madam, then, as a result of your report about this phone call to the
8 investigators, what did they ask you to do? What were you asked to do?

9 A. [10:01:57] They asked me to have a meeting with them.

10 Q. [10:02:04] With the investigators?

11 A. [10:02:05] Yes.

12 Q. [10:02:07] And at that meeting did you provide a statement to them?

13 A. [10:02:10] Yes.

14 Q. [10:02:11] All right. And besides that, regarding these calls and any further
15 calls you might receive, what were you asked to do?

16 A. [10:02:21] They asked me to record the conversation.

17 Q. [10:02:28] I see. And how were you going to record that conversation?

18 A. [10:02:35] Your Honour, first I was recording through my phone, and then later
19 they gave me recorder.

20 Q. [10:02:52] A recording -- a recording device, a recorder?

21 A. [10:02:55] Yes, correct.

22 Q. [10:02:57] Thank you. So they asked you to record these conversations. What
23 was your -- what was your response? What was your attitude to that request?

24 A. [10:03:06] I agreed.

25 Q. [10:03:10] You agreed to do that.

1 A. [10:03:12] Correct.

2 Q. [10:03:13] Now, just for absolute clarity, was any pressure put on you? Did
3 anybody threaten you or coerce you to do these recordings?

4 A. [10:03:29] Not at all, your Honour. It was on my own decision to do that.

5 Q. [10:03:34] Thank you. And maybe I can just ask you, why did you agree?

6 A. [10:03:40] I agreed because I wanted justice for the victims of post-election
7 violence. And when I saw calling me and asking me to be paid, I didn't need that
8 money. The victims need that money. That's why I decide.

9 Q. [10:04:18] Okay. Thank you.

10 Now, is it correct, Madam Witness, that over the ensuing months, you, in fact,
11 recorded a number of conversations -- and we will deal with the persons involved in
12 a moment, but these recordings were provided to the investigators; is that right?

13 A. [10:04:47] Yes. After the recording, I handed over to the investigators,
14 your Honour.

15 Q. [10:04:55] And this happened periodically. From time to time, you'd hand over
16 the recordings and you'd make a statement about what had happened; is that right?

17 A. [10:05:04] Correct, your Honour.

18 Q. [10:05:05] Right. I'd like to -- I'd like to direct your attention then, please, to the
19 other list, so the list with the highlights, so you can have these two documents handy.
20 That and the protected information list. And if you can turn to page 2, and I'd like
21 you to look at the green highlighted items. And let me know when you are there.
22 Do you have --

23 A. [10:05:39] I'm in there, your Honour.

24 Q. [10:05:42] Okay. Thank you. Can I just -- can we just start off with item 48,
25 and you'll see that in the second column there's a green highlighted number ending in

1 0153-0526. And in the second column, I'm not going to read it all out because we are
2 in public session, but it says: Transcript of audio-recorded phone conversation
3 between you and various other people. You see that?

4 A. [10:06:18] I can see, your Honour.

5 Q. [10:06:19] And then in the third column -- sorry -- the fourth column, which is
6 headed, ERN electronic registration number of -- you're still on page 2.

7 A. [10:06:41] Page 4.

8 Q. [10:06:42] No, no, no. I didn't -- sorry. I didn't ask -- I said column 4.

9 A. [10:06:44] Oh, okay.

10 Q. [10:06:45] As you were, back to page 2, please, sorry. Okay.

11 A. [10:06:57] Yeah.

12 Q. [10:06:57] So we're -- we're still at item 48. If you -- if you take your finger -- do
13 you have it?

14 A. [10:07:07] Yes.

15 Q. [10:07:07] If you take your finger across to the fourth little box there with the
16 green highlight, and you'll see the number there 0106-0908_01. Do you have that?

17 A. [10:07:26] Yes.

18 Q. [10:07:27] Okay. And I haven't got your exact copy, but there should be a tick
19 or a cross next to that -- next to that item; is that right?

20 A. [10:07:37] Yes.

21 Q. [10:07:38] Okay. Now, this is the reference number of the first recording on the
22 list. And I'd just like you to confirm please whether or not you had an opportunity
23 to -- or whether that recording or a portion of that recording was played to you
24 during the witness preparation session.

25 A. [10:07:57] Yes, your Honour.

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1 Q. [10:08:00] And that's why you've ticked that or crossed that item, correct?

2 A. [10:08:04] Yes.

3 Q. [10:08:05] Thank you. And then if we then go down the list, all the way down
4 from 48 to - goodness, you were busy - 126. On roughly every second item, there
5 should also be a tick or a cross in the fourth column corresponding to the recording of
6 a conversation. Correct?

7 A. [10:08:39] Correct, your Honour.

8 Q. [10:08:42] All right. Madam, I know it's difficult, but if I can just ask you, when
9 you are turning the pages to try not bump the microphone because that will mean
10 that nobody else will be able to hear what -- what's being said, if anything, and I'll try
11 and stop talking while you're changing pages.

12 Okay. So can we accept then that each of these crossed items in the fourth column
13 was played to you or a portion was played to you during the witness preparation; is
14 that right?

15 A. [10:09:20] Correct, your Honour.

16 Q. [10:09:21] And did you have the opportunity to compare those to the
17 corresponding transcripts in the second column?

18 A. [10:09:28] Yes, your Honour.

19 Q. [10:09:30] And were you able to identify these as recordings that you had made
20 and to confirm the speakers - as recorded on the transcripts - the identities of the
21 speakers?

22 A. [10:09:42] Yes, your Honour.

23 Q. [10:09:45] Thank you very much.

24 MR STEYNBERG: [10:09:50] Your Honour, I believe that satisfactorily deals with the
25 formalities. The Prosecution will be tendering these -- all of these recorded material

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1 and their corresponding transcripts and translations into evidence through the
2 normal manner after the witness has testified.

3 PRESIDING JUDGE SAMBA: [10:10:22] Noted. Thank you.

4 MR STEYNBERG: [10:10:24]

5 Q. [10:10:26] Now, Madam Witness, as I've mentioned, the Prosecution will tender
6 into evidence the detailed statements you've made concerning, amongst others, all of
7 these conversations with all of the people that you recorded. But I'd like to -- you to
8 indicate, please, to the best of your knowledge, which of the persons listed in the
9 protected information sheet - so, the other document - you had recorded
10 conversations with.

11 MR STEYNBERG: [10:10:57] Your Honour, I'm happy to do this in public session,
12 but it will probably take some time for the witness to go through what's a fairly
13 lengthy list. Alternatively, we could go into private session and she can mention the
14 names and I can direct her to the appropriate place.

15 PRESIDING JUDGE SAMBA: [10:11:15] To the numbers?

16 MR STEYNBERG: [10:11:19] To the numbers, yes.

17 PRESIDING JUDGE SAMBA: [10:11:24] Well, let's go briefly into private session so
18 that we make progress.

19 (Private session at 10.11 a.m.)

20 THE COURT OFFICER: [10:11:36] We are in private session, Madam President.

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23 (Open session at 10.28 a.m.)

24 THE COURT OFFICER: [10:28:47] We are back in open session, Madam President.

25 PRESIDING JUDGE SAMBA: [10:29:00] Thank you very much.

1 Mr Steynberg.

2 MR STEYNBERG: [10:29:03] I'm grateful, your Honour.

3 Q. [10:29:04] Now, Madam Witness, we're going to try to proceed in public session,
4 and, again, I caution you to be very careful not to mention details that might identify
5 you and to use the list of protected information whenever you want to refer to
6 persons or places.

7 Perhaps I can just summarise. While we were in public session, you told us about
8 various conversations you had with person number 53 and how he was requested,
9 well, how he was present when there was a request by the accused - and I think I can
10 say this in public session since (Redacted) - was asked to get
11 a photograph of you.

12 Besides the various phone calls you had and you recorded, were there any
13 discussions with any of the persons whom you were interacting about a meeting,
14 a face-to-face meeting in location number 12?

15 A. [10:30:34] Yes, your Honour.

16 Q. [10:30:37] And with which person or persons did you have discussions about
17 arranging such a meeting?

18 A. [10:30:47] Person 53.

19 Q. [10:30:53] Yes. Anyone else?

20 A. [10:30:57] Person 43.

21 Q. [10:31:37] Yes. Is that it, or is there anybody else from your recollection?

22 A. [10:31:51] No. There was one, but he came, but he met someone else, and then
23 he went back to Kenya and give me a call and say that he has met someone. I should
24 get in touch with that person so that I can get the whole -- full information.

25 Q. [10:32:09] All right. And for the record, can you please identify on the list the

1 person who called you and the person with whom you were supposed to meet,
2 bearing in mind that it's alphabetical by first name, that should help you to find them.

3 A. [10:32:59] Person 62, your Honour.

4 Q. [10:33:01] Okay. So what -- let me just -- let me not lead you on this. What
5 did person 62 do? Can you just repeat, because you mentioned two -- two persons.

6 A. [10:33:18] Person 62 called me and told me that he came to location
7 number -- location number ... number 12.

8 Q. [10:33:47] All right. And what did he do there?

9 A. [10:33:51] He -- he met another witness.

10 Q. [10:33:55] And do you have that -- the number of that witness?

11 A. [10:34:00] Ah ... Person number 63, your Honour.

12 Q. [10:34:53] Thank you very much. And so he told you he had come to location
13 12 and met with person number 63.

14 And what else did he say?

15 A. [10:35:03] He said that he has left all information to person number 63. I
16 should look for him so he can give me the full details of the meeting.

17 Q. [10:35:15] All right. I'll leave it at that, I think, for now. Bear with me, please.
18 All right. Now, you said you had -- there were discussions then with persons 53 and
19 43 about meeting with you at location 12. Did that meeting ever take place?

20 A. [10:35:57] No, your Honour, it didn't take place, because the investigators asked
21 me to -- they arranged the meeting, and then they asked me to go to the location.
22 And I give the call to person number 53, and he told me he will be there in five
23 minutes. So he told me he's already -- he slept in location number ... Number --

24 Q. [10:36:31] The same location?

25 A. [10:36:33] Yeah, the same location, number 12.

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1 Q. [10:36:35] Location 12. Perhaps you can just make a mark next to that as well
2 so you can find it.

3 A. [10:36:39] Yes. So he said that he arrived at night, he slept there, so it was
4 during the day. So he told me that he will be in that location, and then he can have
5 lunch. And then I was in that location, I waited. It was turning like 12 past. He
6 never turned up. So I gave him a call, and I asked him, why isn't he here. Is he lost
7 in the location.

8 Q. [10:37:14] All right. I think I'm going to have to stop you. I don't want to get
9 too much into the specifics, because you are in public session.
10 But is it correct for the reasons that he provided to you that the meeting did not, in
11 fact, transpire?

12 A. [10:37:31] Correct, your Honour.

13 Q. [10:37:34] All right.

14 MR STEYNBERG: [10:37:38] Your Honour, I'm afraid I am going to have to move
15 back into private session for the --

16 PRESIDING JUDGE SAMBA: [10:37:48] I'm just, you know, thinking about
17 Mr Karnavas's concerns. We're not having any, you know, dates.

18 MR STEYNBERG: [10:38:03] Yes, yes.

19 PRESIDING JUDGE SAMBA: [10:37:48] If you can ask questions to that effect when
20 you are ready, please.

21 Are you suggesting we go back to private session?

22 MR STEYNBERG: [10:38:03] Yes, please, your Honour.

23 PRESIDING JUDGE SAMBA: [10:38:06] Madam Court Officer, can we go back to
24 private session, please.

25 (Private session at 10.38 a.m.)

- 1 THE COURT OFFICER: [10:38:14] We're in private session, Madam President.
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24 (Open session at 10.59 a.m.)

25 THE COURT OFFICER: [10:59:03] We are back in open session, Madam President.

- 1 PRESIDING JUDGE SAMBA: [10:59:13] Thank you very much.
- 2 So we'll break up for 30 minutes and come back at 11.30. Thank you very much.
- 3 THE COURT USHER: [10:59:26] All rise.
- 4 (Recess taken at 10.59 a.m.)
- 5 (Upon resuming in open session at 11.32 a.m.)
- 6 THE COURT USHER: [11:32:37] All rise.
- 7 Please be seated.
- 8 PRESIDING JUDGE SAMBA: [11:32:52] Good morning, again.
- 9 Good morning, again. We'll continue with your testimony in chief, Madam Witness.
- 10 And Mr Steynberg will continue putting questions to you and we'll expect your
- 11 answers.
- 12 Mr Steynberg, your witness, please.
- 13 MR STEYNBERG: [11:33:15] Thank you, your Honour.
- 14 If I may just clarify one issue perhaps, before we continue with the witness, and it
- 15 concerns a comment my learned friend made before the break, which has been
- 16 troubling me regarding whether or not the evidence of the witness is on record.
- 17 Now, my understanding is that the Prosecution has requested, and the Chamber has
- 18 granted, the Rule 63 request to enter the prior recorded statements of this witness into
- 19 the record, subject only to the witness's lack of objection, which has been confirmed
- 20 today.
- 21 So my understanding is that obviously there's still some formalities to follow, but that
- 22 evidence is on record, which is not to say, of course, that I can lead this -- you know,
- 23 ask the question -- the witness leading questions on substantive issues, but that's
- 24 perhaps a separate issue.
- 25 So if I can just confirm that my understanding is correct, the evidence is on record, but

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1 when I'm dealing with substantive issues of evidence -- on issues that are in dispute, I
2 should not lead the witness, is that correct?

3 PRESIDING JUDGE SAMBA: [11:34:23] That is correct, Mr Steynberg.

4 MR STEYNBERG: [11:34:25] Thank you, your Honour. I'm so guided.

5 And, your Honour, I've also taken to heart the request of the Chamber earlier, and my
6 learned friend, to try and date some of these matters. And it's always a balancing act
7 to -- when one has Rule 68(3) to decide how much to actually lead and how much to
8 rest on the statements. But let me try and give a little bit of structure to what has
9 passed already before I return to the document, which I was dealing with because I
10 can do this while we're in open session, if I may.

11 Q. [11:35:01] Madam Witness, thank you for your patience.

12 If I may just return to the initial contact that you mentioned in your statement this
13 morning -- in your evidence this morning from witness 53. Do you know who I'm
14 talking about?

15 A. [11:35:26] Yes, your Honour.

16 Q. [11:35:28] Can you recall the date offhand as to when that call was received by
17 you?

18 PRESIDING JUDGE SAMBA: [11:35:39] And if you don't remember, Madam
19 Witness, you can say so.

20 THE WITNESS: [11:35:45] Your Honour, I don't remember, but it is on the record.

21 MR STEYNBERG: [11:35:52]

22 Q. [11:35:53] When you say it's on the record, are you referring to your witness
23 statement?

24 A. [11:35:56] Yes.

25 Q. [11:35:58] If I may, if my learned friend has no objection then, just refresh your

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1 memory as to some dates.

2 And I'd ask you to turn to the document at tab 1 of binder 1.

3 The ERN, for the record, is KEN-OTP-0102-0178.

4 And if you can turn to page 3 of that document, 0102-0180, page 3, and look at
5 paragraph 16. Are you with me?

6 A. [11:36:54] Yes, your Honour.

7 Q. [11:36:55] Do you have paragraph 16 in front of you?

8 A. [11:36:57] Yes, your Honour.

9 Q. [11:36:55] The heading of that section is - we're in public session: Telephone
10 conversations with person 53.

11 If you just read the first sentence of that paragraph - not out loud, just to
12 yourself - and let me know when you are done.

13 A. [11:37:14] I am done, your Honour.

14 Q. [11:37:25] And is your memory now refreshed, Madam Witness, as to the date
15 that you received that phone call from person 53?

16 A. [11:37:31] Yes, your Honour.

17 Q. [11:37:32] And for the record, what date is that?

18 A. [11:37:36] Your Honour, the date is 29 April 2023 at 20:14.

19 Q. [11:37:51] Would you like to just have another look at the year, Madam Witness.
20 We're not quite at 2023 yet.

21 PRESIDING JUDGE SAMBA: [11:37:57] Twenty-ninth April, which year, Madam
22 Witness?

23 THE WITNESS: [11:38:01] 2013.

24 MR STEYNBERG: [11:38:06] Thank you.

25 Q. [11:38:08] All right. Then as regards your report to the investigators, can I

1 direct your attention to paragraph 13 of the same page. And if you read the first
2 sentence please, to yourself of that paragraph, and please confirm the date on which
3 you informed the investigators.

4 A. [11:38:39] Your Honour, it was 15 May 2013.

5 Q. [11:38:44] All right. I'd like you to have another look. There's two dates in
6 that sentence, one is relating to a telephone conversation and one is relating to
7 a meeting.

8 A. [11:38:58] Your Honour, the meeting of 15 May 2023 was with investigators.

9 Q. [11:39:05] Yeah. And what was that meeting about?

10 A. [11:39:10] It was the following -- follow-up of the telephone conversation.

11 Q. [11:39:18] And what was the date of the telephone conversation?

12 A. [11:39:22] It was 29 April.

13 Q. [11:39:23] Are you reading from paragraph 13, Madam?

14 I'm talking about -- sorry, I might have misled you. I'm talking about the telephone
15 conversation you report to the investigators, not your telephone conversation with
16 person 53.

17 A. [11:39:40] Oh, sorry. It was 30 April 2020 --

18 Q. [11:39:42] 20 --

19 A. [11:39:43] '13.

20 Q. [11:39:43] 2013.

21 A. [11:39:44] Mm.

22 Q. [11:39:44] Thank you. All right.

23 And as you've already mentioned, the date that you made this statement was 15 May.

24 MR STEYNBERG: [11:39:55] For the record, your Honour, the same telephone
25 conversation is also dealt with in the next witness statement - I think I've already

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1 mentioned it, 0106-0910, at tab 4, from paragraphs 19 -- 18 onwards - but I won't go to
2 that now.

3 Q. [11:40:24] Okay. Now we've been discussing a conversation, which I'll return
4 to in a moment, with person 53, the date of which I've already placed on record was
5 19 July.

6 But just to date another incident you've mentioned. You recall that you spoke this
7 morning about a planned meeting with person number 53 at location number 12 for
8 which the person never arrived. You recall that?

9 A. [11:41:00] Yes, your Honour.

10 Q. [11:41:02] And just to date that meeting -- well, can you recall the
11 specific - without saying it out loud - the specific location in location 12 where this
12 meeting was supposed to take place?

13 A. [11:41:22] Yeah, I remember it was --

14 Q. [11:41:27] Can you maybe then just have a look at the list and see whether you
15 recognise that location before I show you your paragraph -- the relevant paragraph.

16 A. [11:41:41] Your Honour, it was location number 11.

17 Q. [11:42:29] Location number 11. Thank you very much.

18 And with that information on record -- well, can you recall -- are you able to recall
19 today what the date of that meeting was? The planned meeting.

20 A. [11:42:47] It was on 29 April 2013.

21 Q. [11:42:54] Sorry, Madam, perhaps I'm misleading you. I'm not talking
22 about -- I'm talking about the planned meeting with person number 53 at location 11.
23 Do you remember that or would you like to refresh your memory on that?

24 A. [11:43:11] Your Honour, I would like to refresh my memory on a screen. It's
25 quicker on --

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1 Q. [11:43:22] Shall I call it on the screen?

2 A. -- on the screen.

3 MR STEYNBERG: [11:43:23] With the Court's permission then, I will ask the court
4 officer to call up --

5 MR KARNAVAS: [11:43:36] If I may be heard. On the screen -- if I may be heard,
6 your Honour. On the screen there's a lot more information, and so she's not just
7 refreshing her memory on the date, she's also refreshing her memory on what else is
8 on the screen.

9 So, if the source of the evidence is her memory, let her tell us that she doesn't
10 remember what happened or to give her testimony from her memory. But not from
11 the screen.

12 PRESIDING JUDGE SAMBA: [11:44:04] But if even she is -- I am looking at the tabs,
13 whatever documents we have here, you know, it's not only the date that she will see
14 from any document before us. It's basically the same that will appear on the screen.

15 MR KARNAVAS: [11:44:23] I understand, your Honour. Right now the gentleman
16 is trying to elicit her testimony. The testimony should be coming from the source of
17 the evidence, her memory. If she doesn't recall, she can look at a document, she can
18 refresh her memory. I don't have a problem.

19 Otherwise, what's the sense of having the witness here and going through this whole
20 exercise in direct examination if the evidence is already in and she's going to
21 constantly be looking at it and then -- and then reading from it, essentially.

22 So either she remembers or doesn't remember.

23 But I would prefer the evidence coming from the witness.

24 PRESIDING JUDGE SAMBA: [11:45:07] You have a point, Mr Karnavas.

25 MR STEYNBERG: [11:45:11] Your Honour, if I may briefly respond. I've already

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1 led the witness on the facts of this meeting and what happened. I don't -- I don't
2 propose to revisit that issue. The only thing I'm trying to do - and, this was actually
3 in response to a request by my learned friend - is to try and date some of these events
4 so we can bookmark them.

5 PRESIDING JUDGE SAMBA: [11:45:32] But, yes, if the dates -- if the documents are
6 in and you have them before you, why don't you just -- well, state the date.
7 State the date, please.

8 MR STEYNBERG: [11:45:39] Very well, your Honour, I'm quite happy to do that.
9 So I'm referring to, for the record - and please don't call this up then for the
10 Witness - to -- and I can't recall if I read the ERN already. It's the statement of the
11 witness dated 20 August 2013. The ERN is KEN-OTP-0111-0557. I'm reading from
12 paragraph 42, which is at page 0566. And the date of the meeting with person 53 at
13 location 11 is listed as 31 July. Thank you, your Honour. Very well.
14 Your Honour, with that, I will obviously continue to try and bookmark the dates as
15 we proceed, but that brings us more or less up to -- up to date. So if I may return
16 then to the document I was busy with in private session, I'd be grateful.

17 PRESIDING JUDGE SAMBA: [11:47:11] And would you like for us to do that in
18 open session, or --

19 MR STEYNBERG: [11:47:14] Sorry, I should have been more clear, your Honour. If
20 we can return to private session so that I may continue to deal with that document,
21 please.

22 PRESIDING JUDGE SAMBA: [11:47:23] Madam Court Officer, can we go back to
23 private session, please. Thank you.

24 (Private session at 11.47 a.m.)

25 (Redacted)

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- 14 (Recess taken at 1.00 p.m.)
- 15 (Upon resuming in open session at 2.32 p.m.)
- 16 THE COURT USHER: [14:32:40] All rise. Please be seated.
- 17 PRESIDING JUDGE SAMBA: [14:33:08] Good afternoon, everyone.
- 18 We continue with the examination-in-chief of Madam Witness P-0613.
- 19 Mr Steynberg, I know we were in private session last session, but we are now in
- 20 public session, please.
- 21 MR STEYNBERG: [14:33:31] Yes, thank you, your Honour.
- 22 I am going to have to ask to go back into private session probably for about 15
- 23 minutes, and then I will finish off in public session, and I don't expect I'll be longer
- 24 than maybe 45 minutes.
- 25 PRESIDING JUDGE SAMBA: [14:33:52] Yes, that's fine.

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1 Madam court officer, can we please move into private session.

2 (Private session at 2.34 p.m.)

3 THE COURT OFFICER: [14:34:06] We are in private session, Madam President.

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12 (Open session at 2.58 p.m.)

13 THE COURT OFFICER: [14:58:04] We are back in open session, Madam President.

14 PRESIDING JUDGE SAMBA: [14:58:20] Thank you very much.

15 Mr Steynberg, your witness, please.

16 MR STEYNBERG: [14:58:25] I'm grateful, your Honour. And perhaps just to briefly
17 summarise, while we were in private session, we've gone through a series of three
18 transcripts of recorded phone calls and meetings that the witness had with persons 53,
19 person 62 and person 14 on the list of witnesses. Sorry, the protected information
20 list.

21 Q. [14:59:03] One or two clarifications. In -- yes, I think I can deal with this in
22 public session.

23 In one of these discussions we mentioned, there was mention of a politician, an MP
24 from Eldoret East, who was called Arap Lagat, was described as Arap Lagat. Which
25 political party was he affiliated with at that time, if you know?

1 A. [14:59:50] I don't remember, your Honour.

2 Q. [14:59:51] All right, I'll leave that there then.

3 Then the last topic I just want to raise with you and give you an opportunity to
4 comment, are you aware that certain of the people who we've been discussing today
5 subsequently withdrew as witnesses and were summonsed to testify -- compelled to
6 testify in the Ruto and Sang case. Did that come to your attention?

7 A. [15:00:30] Yes, your Honour. I saw it online.

8 Q. [15:00:33] All right. And for the record these people testified after you did, is
9 that right?

10 A. [15:00:39] Yes, your Honour.

11 Q. [15:00:42] And did it ever come to your attention that these people discussed
12 you and things you had allegedly done during their evidence? Do you remember
13 that?

14 A. [15:00:55] Yes, your Honour.

15 Q. [15:00:56] All right. Now starting with person number -- I'm just trying to
16 think how I'm going to do this without making the connection, if your Honour could
17 bear with me please.

18 (Counsel confers)

19 MR STEYNBERG: [15:01:41]

20 Q. [15:01:44] I think it's easiest to do it this way, I'll just refer to these witnesses by
21 their witness numbers in the Ruto and Sang case, and then I won't be making any
22 connection with the persons we've discussed today, if that's in order.

23 A certain witness who testified under the number P-516.

24 MR STEYNBERG: [15:02:10] Sorry, your Honour, this is going to be impossible.

25 I'm going to have to ask to go back into private session, otherwise I'm not going to be

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1 able to make the connection.

2 PRESIDING JUDGE SAMBA: [15:02:26] Madam Court Officer, can we could go back
3 into private session, please. Thank you.

4 (Private session at 3.02 p.m.)

5 THE COURT OFFICER: [15:02:35] We are in private session, Madam President.

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8 (Open session at 3.11 p.m.)

9 THE COURT OFFICER: [15:11:09] We are back in open session, Madam President.

10 PRESIDING JUDGE SAMBA: [15:11:17] Thank you very much.

11 Mr Steynberg, continue, please.

12 MR STEYNBERG: [15:11:21] Thank you, your Honour.

13 Q. [15:11:22] Thank you, Madam Witness.

14 MR STEYNBERG: [15:11:24] That concludes my questioning for this witness.

15 I thank you for your patience, and I ask you please to extend my learned friend for
16 the Defence the same courtesy that you've given me. Thank you.

17 THE WITNESS: [15:11:37] Thank you, your Honour.

18 PRESIDING JUDGE SAMBA: [15:11:39] Thank you very much Mr Steynberg.

19 And Madam Witness, I am sure during your preparation, the Prosecution must have
20 told you that you will be cross-examined by Mr Karnavas, counsel for Mr Gicheru.
21 Is that so?

22 THE WITNESS: [15:11:57] Yes, your Honour.

23 PRESIDING JUDGE SAMBA: [15:11:59] Okay.

24 Mr Karnavas, it's your time, it's about 10 minutes after three. I don't know whether
25 you want to start. If you want to, we could, but if not --

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1 MR KARNAVAS: [15:12:08] Well, Your Honour, I will need about 10 minutes to set
2 up and so I leave it in your -- I'm in your hands. So I can probably assure the Court
3 that even were I to start today, I might not finish tomorrow because there's a lot of
4 documents that have been moved in and so we may be going into Friday.

5 So if you wish to break for the day, that's fine. If you want me to continue, I'll need
6 some time just to set up, provide the binders, but I'm ready to go.

7 MR STEYNBERG: [15:12:45] Your Honour, if it helps your decision in terms of
8 planning, I can advise that the next witness -- the witness preparation will only start
9 tomorrow, so he will not be ready to commence before Monday.

10 So we have the whole of Thursday and Friday available in any event.

11 PRESIDING JUDGE SAMBA: [15:13:01] Yes, so that witness -- I'm sure -- do you
12 want to assure the Chamber that that witness will be ready for Monday anyway?

13 MR STEYNBERG: [15:13:11] Your Honour, yes, that is the plan. Certainly from the
14 Prosecution side, all the necessary arrangements will be necessary for Monday, yes.

15 PRESIDING JUDGE SAMBA: [15:13:20] Thank you very much. Mr Karnavas, since
16 you've indicated that, you know, we'll go into Friday, maybe, you know, let's take
17 a rest and come back tomorrow when we are all fresh.

18 MR KARNAVAS: [15:13:34] Thank you, your Honour.

19 PRESIDING JUDGE SAMBA: [15:13:36] Madam Witness, we are going to break off
20 here for today, but when we come back tomorrow, Mr Karnavas will be putting
21 questions to you in cross-examination. Okay? After which maybe Mr Steynberg
22 may have questions for you in re-examination, but we are not yet there.

23 So what I want for you to do is, as you leave here, do not discuss your testimony with
24 anybody until we meet here again tomorrow morning --

25 THE WITNESS: [15:14:08] Yes, your Honour.

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- 1 PRESIDING JUDGE SAMBA: [15:14:09] -- is that understood?
- 2 Yes. So that said, we'll meet here tomorrow for 9.30.
- 3 The Court stands adjourned.
- 4 THE COURT USHER: [15:14:38] All rise.
- 5 (The hearing ends in open session at 3.14 p.m.)