

Trial Hearing  
Witness: KEN-OTP-P-0356

(Open Session)

ICC-01/09-01/11

1 International Criminal Court  
2 Trial Chamber V(a) - Courtroom 1  
3 Situation: Republic of Kenya  
4 In the case of The Prosecutor v. William Samoei Ruto  
5 and Joshua Arap Sang - ICC-01/09-01/11  
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccia and Judge Robert  
7 Fremr  
8 Trial Hearing  
9 Wednesday, 22 January 2014  
10 (The hearing starts in open session at 9.37 a.m.)  
11 THE COURT USHER: All rise.  
12 The International Criminal Court is now in session.  
13 Please be seated.  
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.  
15 Court officer, please announce the case.  
16 THE COURT OFFICER: Thank you, Mr President. Situation in the Republic of  
17 Kenya, in the case of The Prosecutor versus William Samoei Ruto and Joshua Arap  
18 Sang, ICC-01/09-01/11, and we're in open session, Mr President.  
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.  
20 Appearances I see remain the same. Mr Steynberg nods.  
21 MR STEYNBERG: Correct, your Honour.  
22 PRESIDING JUDGE EBOE-OSUJI: And Defence counsel as well? Thank you.  
23 We will continue with the witness's examination-in-chief.  
24 Thank you very much, Witness, and welcome back. Mr Garcia, you said you have  
25 15 minutes. I know I asked some questions at the end of the day. In fact, I did not

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1 finish my questions, but you can proceed. If I need to return, I will do that on  
2 completion of your own exercise.

3 MR GARCIA: Thank you, your Honours.

4 PRESIDING JUDGE EBOE-OSUJI: I also notice that you may not have put on  
5 record every -- as in tender into -- as in acquiring exhibit numbers on all of the items  
6 you had canvassed so far; is that correct?

7 MR GARCIA: That is correct, your Honour, and I thank the Court for its reminder  
8 that we received yesterday. Indeed I hadn't finished with the video, and I will ask  
9 the Court to have it tendered into evidence along with the transcript and the  
10 translation after my -- I have a couple of additional questions on than matter. And  
11 there was one other document that was cited in that email and I'm very grateful to  
12 the Court. I will be asking that document as well to be tendered into evidence.

13 PRESIDING JUDGE EBOE-OSUJI: We will do that. Yesterday on the video there  
14 was a frozen frame with people standing. Was that where we stopped? You  
15 freeze-framed it somewhere.

16 MR GARCIA: Yes, your Honour. I have the time stamp. I think it's 1 minute 33,  
17 but I will have concluded my questions -- upon thinking about this last night, I'll not  
18 have -- I'll have just one additional question on the matter for the witness and then  
19 I'll go on to another topic which I feel is more important at this point.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you. If you will not start with that  
21 frozen frame, at the end of it could you kindly put it up, please.

22 MR GARCIA: We can put it up immediately, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: All right.

24 MR GARCIA: Thank you.

25 PRESIDING JUDGE EBOE-OSUJI: Where it appeared to have been opposed where

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1 we were discussing the significance of the regalia and a standing -- a number of  
2 people standing for what might have been a photo opportunity, I'm not sure.

3 MR GARCIA: We have an image on the screen, your Honour, and that might have  
4 been just a couple of seconds before where we stopped it yesterday.

5 PRESIDING JUDGE EBOE-OSUJI: Maybe one of your colleagues can attend to it.

6 If you have other questions, you can continue and we'll return to it. What we're  
7 looking -- what I'm looking for is there was a shot of an image that apparently would  
8 be Mr Ruto standing with other people we've seen in the course of this testimony,  
9 other personalities we might have seen including the gentleman from the coast, as  
10 well as, I believe, Mr Musalia might have been the case. So if we can find that. We  
11 don't need to delay matters and look.

12 MR GARCIA: If the Court will just give me one minute, I hear that one of my  
13 colleagues has maybe found the exact reference.

14 PRESIDING JUDGE EBOE-OSUJI: That is it. Okay. Is it possible for us to get a  
15 more comprehensive view of all those standing?

16 MR GARCIA: We've just -- we're playing the -- the video, and it's going to get to  
17 the point where they're all standing, your Honour, and we'll stop it at that point and  
18 I'll ask the witness some questions in that regard.

19 PRESIDING JUDGE EBOE-OSUJI: It's all agreed that we're now seeing Mr --

20 WITNESS: KEN-OTP-P-356 (On former oath)

21 QUESTIONED BY MR GARCIA: (Continuing)

22 Q. Mr Witness, I understand you have it before you -- before your screen. Can  
23 you tell us who we're seeing on the screen at this point?

24 A. It was --

25 PRESIDING JUDGE EBOE-OSUJI: That -- go on. That was Mr Odinga, wasn't it?

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1 MR GARCIA:

2 Q. Now, Mr Witness, you see before you we have a shot of the video. Can you  
3 tell us who is in that video, starting from the person dressed in yellow. Who is that  
4 person?

5 A. Raila Odinga, your Honour.

6 Q. So the time stamp is 1.28.17. Now, the person standing immediately to the  
7 right of Mr Raila Odinga, can you tell us who that person is?

8 A. Musalia Mudavadi, your Honour.

9 Q. And to the right of Mr William Ruto, can you tell us who that is?

10 A. Najib Balala, your Honour.

11 Q. Can you give us the spelling, please.

12 A. N-A-J-I-B, then B-A-L-A-L-A, your Honour.

13 Q. Can you tell us who that is?

14 A. He was a member of parliament in Coast province, your Honour.

15 Q. Is this a person of Kalenjin ethnicity?

16 A. No, your Honour.

17 Q. What ethnicity?

18 A. He is from Coast, your Honour.

19 MR GARCIA: I understand line 24, page 4, it's Musalia Mudavadi just for the  
20 transcript.

21 Q. Now, are you able to identify the person who is in red?

22 A. Ole Ntimama, your Honour.

23 Q. I'm sorry, Mr Witness. Could you repeat that, please?

24 A. Ole Ntimama, your Honour.

25 Q. And can you please spell the name out for us?

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- 1 A. O-E-L-E (sic), then N-T-I-M-A-M-A, your Honour.
- 2 Q. Can you tell the Court who this person is?
- 3 A. He was a member of Narok constituency, your Honour.
- 4 Q. Can you please repeat the last part of your answer, " ...a member of ..."?
- 5 A. Narok constituency, your Honour.
- 6 Q. Is it N-A-R-O-K? Is that the spelling, or can you give us a spelling?
- 7 A. Yes, your Honour, it is.
- 8 Q. So it's N-A-R-O-K constituency?
- 9 A. Yes, your Honour.
- 10 Q. Can you tell us of what ethnicity this person is?
- 11 A. He is a Maasai, your Honour.
- 12 MR GARCIA: So the answer is Maasai, line 3, page 6.
- 13 Q. Now, Mr Witness, you've seen these images, these extracts that I've --
- 14 PRESIDING JUDGE EBOE-OSUJI: One second, please.
- 15 You said Mr Ole Ntimama is the gentleman standing next to Mr Balala, you say?
- 16 THE WITNESS: Yes, your Honour.
- 17 PRESIDING JUDGE EBOE-OSUJI: All right. And you say he's a Maasai?
- 18 THE WITNESS: Yes, your Honour.
- 19 PRESIDING JUDGE EBOE-OSUJI: We also see somebody else right at the -- after
- 20 him to his -- standing to his right, Mr Ntimama's right. We have seen that person
- 21 before.
- 22 THE WITNESS: He's Honourable Ngaiseri, your Honour.
- 23 PRESIDING JUDGE EBOE-OSUJI: How do you spell that?
- 24 THE WITNESS: N-G-A-I-S-E-R-Y (sic), your Honour -- R-I, your Honour.
- 25 PRESIDING JUDGE EBOE-OSUJI: Again, for the completion of the narrative, who

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1 is he?

2 THE WITNESS: He is a member of parliament again from Maasailand, your  
3 Honour.

4 PRESIDING JUDGE EBOE-OSUJI: We saw him in an earlier shot; is that correct?

5 THE WITNESS: Yes, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you.

7 MR GARCIA:

8 Q. Now, Mr Witness, initially during your testimony you were speaking to us  
9 about -- about the fact that you had seen on TV -- Citizen TV, I believe it is, images of  
10 Mr Ruto being pronounced Kalenjin spokesman and pronounced king.

11 Now, I showed you different extracts from a video that you've seen different people  
12 speaking, Mr William Ruto as well. Are you familiar with those extracts? Have  
13 you seen them before, those images?

14 A. I only saw them in Citizen TV when -- after the meeting, your Honour.

15 Q. Okay. So that's exactly what I wanted to confirm with you. Are you telling  
16 us that the -- some of these extracts that you've seen in the video, they're the same as  
17 the ones you would have seen on Citizen TV of that ceremony where Mr William  
18 Ruto would have been pronounced spokesperson and king? Are they the same?

19 A. Yes, your Honour.

20 Q. Thank you, Mr Witness.

21 MR GARCIA: Your Honours, I'd like to introduce into evidence the video itself

22 KEN-OTP-0033-0102 as well as the transcript and the translation of that video.

23 PRESIDING JUDGE EBOE-OSUJI: Any objection? No objection. The materials  
24 would be introduced as the next exhibits in the Prosecutor's exhibits.

25 THE COURT OFFICER: Thank you, Mr President. The video KEN-OTP-0033-0102

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1 will bear the following EVD number, EVD-T-OTP-00037, the transcript of the video  
2 KEN-OTP-0069-0127 will bear the EVD number EVD-T-OTP-00038 and the  
3 translation of the transcript KEN-OTP-0085-1200 will bear the EVD number  
4 EVD-T-OTP-00039. All three items will be registered as public items. Thank you,  
5 Mr President.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you.

7 Prosecutor, are you done with your questions on the video?

8 MR GARCIA: Yes, I am done with those questions.

9 PRESIDING JUDGE EBOE-OSUJI: All right. I have a few for the witness.

10 Witness, we're now looking at that frozen image and you've told us who we see.

11 You answered the Prosecutor's question about the ethnicity of Mr Balala, and you

12 said he is not Kalenjin. Who apart from Mr Ruto appearing on this frozen image is

13 Kalenjin?

14 THE WITNESS: Your Honour, the one who is behind Mr Raila Odinga, Mr Musa

15 Sirma, your Honour.

16 PRESIDING JUDGE EBOE-OSUJI: All right. So Mr Odinga is not Kalenjin?

17 THE WITNESS: Yes, your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: And Mr Mudavadi is not Kalenjin?

19 THE WITNESS: Yes, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Mr Ole Ntimama is not Kalenjin, is he?

21 THE WITNESS: He is not, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: And Mr Ngaiseri is also not Kalenjin?

23 THE WITNESS: Yes, your Honour.

24 PRESIDING JUDGE EBOE-OSUJI: All right. What about political parties? Is

25 there any of these gentlemen who is not a member of the ODM?

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1 THE WITNESS: At that time they were all in ODM, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: All of them in the ODM?

3 THE WITNESS: Yes, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you. That's all.

5 You may ask follow-up questions, Prosecutor.

6 MR GARCIA:

7 Q. Now, Mr Witness, just one follow-up question. If you look at your screen, I  
8 think you can -- you can see Ms Lina in the background; is that correct?

9 A. Yes, she's behind Mr Ole Ntimama, your Honour.

10 Q. Now, from what I understand, she is a person of Kalenjin ethnicity; is that  
11 correct?

12 A. Yes.

13 Q. Thank you, Mr Witness. Now, I'd like to just change subject with you.

14 Now, yesterday during your testimony, page 79 of the real-time transcript, you told  
15 the Court that Mr Jackson Kibor was given a position whereby he was a member of  
16 the Kalenjin council of elders. Do you recall that?

17 A. Yes, your Honour.

18 Q. Can you tell the Court when he would have been given this position within  
19 the Kalenjin council of elders?

20 A. I don't know the date or the month, your Honour, but there was a meeting  
21 whereby he was elected as Kalenjin council of elders, your Honour.

22 Q. Now, I understand that this would have been after the meeting that we've  
23 seen at the Eldoret Sports Club; is that correct?

24 A. Your Honour, I'm not sure, and I don't want to say, but -- I'm not sure, but  
25 there was a day whereby some elders were elected as members of Kalenjin council of



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1 elders, your Honour.

2 Q. Without being able to give us an accurate or an exact date, do you remember  
3 what year this would have been in? If you're not sure, then just say that -- I mean  
4 just tell that to the Court.

5 A. It was in 1997, your Honour -- 2007, your Honour.

6 Q. All right. So it was in 2007. Now, can you tell us -- or can you tell the Court  
7 what is it that you know about this Kalenjin council of elders. What is that exactly?

8 A. Your Honour, it was my first time to hear of Kalenjin council of elders in 2007,  
9 because since then we had no -- there was nothing known as Kalenjin council of  
10 elders, and it came through Kass FM, and Kalenjins were advised that they -- they  
11 had been lost for many years and we have to regroup each other. And it started just  
12 that way to a moment whereby we saw people have been elected as members, your  
13 Honour.

14 Q. Now, you say that this came through Kass FM. Do you remember who  
15 exactly at Kass FM spoke about the Kalenjin council of elders?

16 A. Your Honour, it was spoken both by Mr Joshua Sang and some other -- there  
17 was Kalenjin which was in -- abroad, I don't think it's London. It -- they were the  
18 people who were -- who were bringing that knowledge to the people -- to the  
19 Kalenjin community through Kass FM, your Honour.

20 MR GARCIA: All right. At Line 25 of page 10 the witness says "There were  
21 Kalenjin ..." and I think which were abroad.

22 Q. You mean abroad in London; is that correct?

23 A. Yes, your Honour.

24 Q. Now, you --

25 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, do you want to clarify the sense in

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1 line 15? Did he mean to say that since 2007 there was nothing known as Kalenjin  
2 council of elders, or did he mean to say before 2007 there was no such thing?

3 MR GARCIA: I will be clarifying.

4 Q. Mr Witness, before I go on to my other questions, you stated at the start of  
5 your response, "It was my first time to hear of Kalenjin council of elders in 2007  
6 because since then we had no -- there was nothing known as Kalenjin council of  
7 elders." Now, can you explain that a little bit further to the Court. Is it 2007 the  
8 first time you heard about it or is it something else?

9 A. Your Honour, it came only in 2007. Before 2007 there was nothing known as  
10 Kalenjin council of elders.

11 Q. Now, you say you heard this on Kass FM and that Mr Joshua Sang would  
12 have spoken about it. Do you remember on what programme?

13 A. It was -- it was in Lene Emet, and there was another programme again in the  
14 evening whereby Joshua Sang was also hosting the programme. I don't remember  
15 the name of the programme, your Honour.

16 Q. You've also said that, and I quote you, "They had been lost for many years  
17 and we had to regroup each other." What exactly was said by Mr Sang? Can you  
18 explain that a little bit further for the Court?

19 A. Your Honour, there's a belief in Kalenjin that when Kipnyole was killed, it  
20 brought calamity to the Kalenjin community, your Honour, and some few people  
21 were saying that we are trying to cleanse what happened because they believed their  
22 king was killed by fellow Kalenjins and they had to cleanse what happened.

23 Q. Just to go through your response to clarify, you started by saying, "Your  
24 Honour, there's a belief in Kalenjin that when Kim ...", and can you tell us the name  
25 of the person that you referred to?

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1 A. The king -- the last king of the Kalenjin, Samoei. I don't remember the other  
2 name.

3 Q. Okay. So it's the person that you mentioned yesterday?

4 A. Yes, your Honour.

5 Q. Samoei?

6 A. Yes, your Honour.

7 Q. The last king of the Kalenjin. And you say that when he was killed it  
8 brought calamity to the Kalenjin community; that's correct?

9 A. Yes, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: Now, is it -- would that be Koitalel Samoei?

11 THE WITNESS: Koitalel Samoei, your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: All right. But what did you refer to him as in --  
13 What's that line again, Prosecutor? We need to get the record straight on that.

14 MR GARCIA: That's page 12, line 8/9.

15 PRESIDING JUDGE EBOE-OSUJI: Can you spell the terminology you used? Did  
16 you say "Kimnyole" or "King Yole"?

17 THE WITNESS: Kipnyole, but -- but it's Koitalel, your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: All right. We know who you're referring to, so  
19 let's proceed.

20 MR GARCIA:

21 Q. All right. So you said that it had brought calamity to the Kalenjin  
22 community, but what was Mr Sang saying on Kass FM regarding the council of  
23 elders?

24 A. Your Honour, I didn't understand whatever it meant by that council of elders,  
25 because it had nothing to do with the kingship or the family of the late Kipnyole,

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1 because yesterday I told you that kingship was only in Kalenjin about the family of  
2 Koitalel Samoei, and what was done to me, it was only in a political way of some  
3 few people, not representing the whole community, your Honour.

4 Q. Now, just so we understand you well, are you speaking about the council of  
5 elders at this point, that it was just political?

6 A. It was political, your Honour.

7 Q. Now, I understand that maybe you didn't understand why this council of  
8 elders was -- was being formed, but could you tell us what Mr Joshua Sang was  
9 saying about it. What was he telling the people on the air?

10 A. Your Honour, he was saying that the Kalenjin community, we have been left  
11 behind for a very long time, and each time we stand by ourself and we come and we  
12 be strong under the -- under the leadership of the Kalenjin council of elders, your  
13 Honour.

14 Q. And did Mr Joshua Sang mention who was part of this council of elders, who  
15 were the people that were -- the members?

16 A. Your Honour, he didn't mention them before they were elected, but after they  
17 were elected is when they were mentioned -- he mentioned some names, your  
18 Honour.

19 Q. All right. You say that they were elected. Do you -- can you give us more  
20 information on when this would have happened and where?

21 A. I don't remember where and when exactly they were elected, but it was in  
22 2007, your Honour.

23 Q. Can you tell us who would have elected them, the members of the council of  
24 elders?

25 A. Your Honour, that is something I didn't know, because the community was

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1 not called to select a person, or even in our village we were not asked that there is a  
2 selection of people, you can select someone to be a member of the council of elders,  
3 your Honour. I don't know the formula of which they used to select the members,  
4 your Honour.

5 Q. All right, thank you.

6 A. But what I understand, the council of elders came from each community of  
7 the Kalenjin community, your Honour -- each tribe of the Kalenjin community.

8 Q. All right. Just to understand that last point and just to be clear, were there  
9 people of other ethnicity other than the Kalenjin ethnicity who were part of this  
10 Kalenjin council of elders?

11 A. Your Honour, in Kalenjin there are subtribes and they came from each  
12 subtribe just like the Nandi, the Keiyo, the Marakwet, and members came from all  
13 those subtribes, your Honour.

14 Q. All right. So just so that we understand you clearly, the members were all  
15 Kalenjin, of Kalenjin ethnicity?

16 A. Yes, your Honour.

17 Q. Now, could you tell the Court who were these elected members of the  
18 Kalenjin council of the elders?

19 A. Your Honour, I remember just a few. I remember retired Major Sumbeiywo.  
20 I remember John Koech.

21 Q. So the first name you mentioned is Mr John Sumbeiywo; is that correct?

22 A. Yes, your Honour.

23 MR GARCIA: And for the record, it's S-U-M-B-E-I-Y-W-O.

24 Q. Major Sumbeiywo; is that correct?

25 A. Yes, your Honour.

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1 Q. And the other name you gave is John Koech?

2 A. Yes, your Honour.

3 MR GARCIA: And just for the record, it's K-O-E-C-H.

4 Q. Can you give us -- do you recall other members who had been elected to this  
5 Kalenjin council of elders?

6 A. I don't remember, but Honourable Ruto was made the spokesman, your  
7 Honour.

8 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, one second.

9 Witness, could you kindly spell that Kipnyole or Kimnyole? You've used that  
10 terminology a few times.

11 THE WITNESS: K-I -- K-I-P-N-Y-O-L-E.

12 PRESIDING JUDGE EBOE-OSUJI: All right. So that when the court reporters  
13 correct the record, it needs to be correctly reflected. Thank you.

14 MR GARCIA:

15 Q. And just, Mr Witness, so we can understand that last response, you  
16 said -- you said that the Honourable Ruto was made the spokesman?

17 A. Yes, your Honour.

18 Q. Now, previous to this in your testimony yesterday you said he was the  
19 spokesman of the Kalenjin community. What was he in reference to this council of  
20 elders, Kalenjin council of elders?

21 A. He was the spokesman -- he was made the spokesman of the community.  
22 And according to what I heard from Joshua Sang, he was someone who could say  
23 anything and it could be done, because he was the last person the Kalenjin  
24 community to rely on, your Honour.

25 Q. So there's -- just so we can understand that a bit better, the Kalenjin

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1 community included, from what you're saying, the Kalenjin council of elders; is  
2 that -- is that correct or is that incorrect?

3 A. They -- they are all Kalenjins, your Honour, that are included.

4 Q. Now, can you just elaborate a bit more. You said that you heard from Joshua  
5 Sang that he was someone who could say anything and it could be done.

6 A. Your Honour, I can bring an example of after the post-election  
7 violence -- when the post-election violence was going on, Honourable Ruto didn't  
8 speak anything, but I remember one day he went to Kass FM -- and again, I don't  
9 know if he started with Citizen TV or he started with Kass FM, but in Citizen TV I  
10 remember he talked to the nation and he asked all Kenyans to stop war, but when he  
11 was in Kass FM he talked even in Kalenjin, and he asked people that they should  
12 unblock the roads which they were blocked and stop fighting.

13 And, your Honour, it was respected even in my village, and over radio I heard that  
14 all -- because it was Joshua Sang who was speaking again that day. He was saying  
15 some -- for example, a certain place the roads are clear, calm has come back, and I  
16 knew that the Kalenjins were really adoring William Ruto or they were respecting  
17 his words, because immediately after he spoke, the roads were -- were unblocked  
18 which were blocked.

19 And it came to my mind that the first day which the fighting started, especially in  
20 the area of the Kalenjin community, if Honourable Ruto could have gone to Kass FM  
21 or could have gone to any TV or radio station and asked the Kalenjins to stop  
22 fighting, the fighting could not have gone -- or the damages which were done  
23 couldn't have been done to that extent, your Honour.

24 Q. Now, just for the record, page 17, line 16 is "The Kalenjins were really adoring  
25 William Ruto"; that's correct, Mr Witness?

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1 A. Yes, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Now, Witness, also I need to remind you again  
3 to try and observe some pause between the completion of the Prosecutor's questions  
4 and your beginning to answer so that the interpreters don't struggle too hard to  
5 catch up to what you're saying, and also speak at a moderate pace. Thank you.

6 MR GARCIA:

7 Q. Now, Mr Witness, in regards to this, what you've just told us about when  
8 Mr William Ruto went on Kass FM, do you remember when this would have  
9 occurred, in what month?

10 A. It was in January 2008, your Honour.

11 Q. Would you be able to tell us approximately what day in January?

12 A. I'm not sure, but it was on 5 January, your Honour.

13 Q. Now, you say that this was stated on Kass FM. Do you remember if it was  
14 stated on a particular programme?

15 A. It was not in a particular programme, your Honour. He went to Kass FM  
16 and he talked to Kalenjin listeners in Kalenjin language, your Honour.

17 Q. And while Mr William Ruto was doing that at Kass FM, do you know  
18 what -- where Mr Joshua Sang was?

19 A. I don't remember, your Honour, but I heard him later on he was telling the  
20 Kalenjin community that William Ruto has told us to calm down and has told us that  
21 talkings are going on and we should have to calm down as he has said, your  
22 Honour.

23 Q. Now, you say, Mr Witness, there was a result in that in your village  
24 something happened. What happened there?

25 PRESIDING JUDGE EBOE-OSUJI: Do not tell us your village. Just tell us what



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1 happened.

2 MR GARCIA:

3 Q. I'm -- (Redacted). What happened in

4 your village once Mr William Ruto got on the radio on Kass FM at the date which

5 you mentioned and said what you told the Court? What happened?

6 A. The roads were opened, your Honour, and the youths came back home, your

7 Honour, which were manning the roads, your Honour.

8 Q. Just one clarification, Mr Witness. In response to one of my questions

9 regarding Mr Joshua Sang as to where -- where he was, you say that, "I don't

10 remember, your Honour, but I heard him later on he was telling the Kalenjin

11 community that William Ruto has told us to calm down and has told us that talkings

12 are going on." What were these talkings? Do you remember that?

13 A. It was -- your Honour, I remember. It was talks between the PNU and ODM.

14 Peace talks were -- had been started, your Honour.

15 Q. Do you remember where these talks were going on, what place?

16 A. I only remember it was in Nairobi, your Honour.

17 Q. And you say that it would have been -- Mr Sang would have said this later

18 on. Was this on the same day, or a day afterwards, or can you be a little more

19 precise?

20 A. I'm not sure, but as from that day which Ruto had gone to Kass FM, Joshua

21 Sang had been emphasising peace, your Honour. He was talking only about peace,

22 your Honour.

23 Q. And one last question on this whole issue, Mr Witness. When Mr Sang was

24 speaking or Mr Ruto was speaking on the radio on that day on Kass FM, was this

25 something that was live or was this something that had been recorded previously?

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1 A. It was live in -- it was live at Kass FM and it was also live at Citizen TV, your  
2 Honour.

3 MR GARCIA: If I can have 30 seconds, your Honour?

4 Your Honours, I don't have any more questions for the witness.

5 Thank you, Mr Witness.

6 I'd like to just introduce into evidence the PIS document. I have an amended PIS  
7 document with one correction. So one amended PIS with number 15 has been  
8 amended so that it corresponds to what the witness told us in testimony.

9 I'll ask as well for the introduction into evidence of document KEN-OTP-0073-0307,  
10 which is a sketch that was shown to the witness. The witness confirmed that it was  
11 his and we'll also ask for the introduction of that item into evidence, Prosecution  
12 evidence.

13 PRESIDING JUDGE EBOE-OSUJI: Where is that tab again?

14 MR GARCIA: Tab 2, your Honour.

15 PRESIDING JUDGE EBOE-OSUJI: Any objections from counsel from the Defence  
16 side?

17 MR KHAN: No objection, your Honour.

18 MR KIGEN-KATWA: No objection, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: The documents will be received into the record.

20 MR GARCIA: If I could solicit the help of the court officer for the amended PIS  
21 which can be put into the record, the paper copy.

22 THE COURT OFFICER: Thank you, Mr President. The initial PIS as well as the  
23 amended PIS will bear the following number, KEN-PIS-0001-0026, and document  
24 KEN-OTP-0073-0307 will bear the EVD number EVD-T-OTP-00040 and will be  
25 registered as confidential.

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- 1 PRESIDING JUDGE EBOE-OSUJI: So that will be Prosecution exhibit number 40.
- 2 Thank you.
- 3 Witness, the Prosecutor has finished asking you questions in his examination in  
4 chief. Now it will be the turn of the Defence counsel to ask you questions as well.  
5 Please keep in mind the advice given to you earlier. Listen carefully, make sure you  
6 understand the questions before you start answering them and also try to observe  
7 the pauses we've talked about so that your testimony could be accurately and  
8 correctly recorded.
- 9 Mr Kigen-Katwa, you said you will go first.
- 10 MR KIGEN-KATWA: I'm ready, your Honour.
- 11 PRESIDING JUDGE EBOE-OSUJI: You are ready. Do we have an idea of how  
12 long you might take?
- 13 MR KIGEN-KATWA: Your Honours, as at close of day yesterday I had expected  
14 that I would take two sessions, but there's so much material that has been alleged  
15 against my client today, in all likelihood I will take three sessions, Mr President.
- 16 PRESIDING JUDGE EBOE-OSUJI: So you will be finishing by tomorrow, that's  
17 what you say?
- 18 MR KIGEN-KATWA: I think definitely by tomorrow, yes, your Honour.
- 19 PRESIDING JUDGE EBOE-OSUJI: Fair enough.
- 20 MR KIGEN-KATWA: Yes.
- 21 PRESIDING JUDGE EBOE-OSUJI: Please proceed. We are in open session. Do  
22 you want to be in open session starting off?
- 23 MR KIGEN-KATWA: Yes, Mr President.
- 24 QUESTIONED BY MR KIGEN-KATWA:
- 25 Q. Now, Mr Witness, you say you used to listen to Kass FM, isn't it?

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1 A. Yes, your Honour.

2 Q. And you said you used to listen to it approximately how frequently?

3 A. Maybe -- in the evening always, but in the morning maybe three times in a  
4 week, your Honour.

5 Q. Okay. And you said that Mr Sang's programme would mainly be in the  
6 morning; is that what you said?

7 A. Yes, your Honour.

8 Q. And so the presumption is that you used to listen to -- whenever you would  
9 listen to the Kass FM you would be listening to Sang within the period of the  
10 morning section of the day, isn't it?

11 A. Yes, your Honour.

12 Q. And what programme was that, Mr Witness?

13 A. Lene Emet, your Honour.

14 Q. Mr Witness, do you have any recollection of Mr Sang having ran any other  
15 programme other than the Lene Emet programme that you say you heard him  
16 conduct?

17 A. Yes, your Honour. In the evenings there was another programme, although  
18 he was not running it alone always, but I don't remember the name of the  
19 programme, your Honour.

20 Q. So, according to you, he had another programme in the evening, and you  
21 don't remember the name of that programme?

22 A. It was not a programme run by Joshua alone, your Honour. Sometimes it  
23 was run by other broadcasters, your Honour.

24 Q. Mr Witness, so that we are clear, the issues you've raised today as against  
25 Mr Sang, including the allegations that he used the word "murkelda," that he used

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1 the word "kapchelit," that he used the word "weeds," were they specifically in the  
2 Lene Emet programme or what is the -- what is your explanation on that?

3 A. It was in the Lene Emet programme, your Honour.

4 Q. Thank you, Mr Witness. Now, on that issue of Lene Emet programme, you  
5 said you would listen to it about two or three times in a week in the morning.

6 Could I ask you for approximately since when did you listen to Mr Sang in that  
7 programme?

8 A. I don't remember the period of which I had listened to it, your Honour.

9 Q. Could you give us a rough estimate, even in terms of years, since which year?  
10 2005? 2000? 2001? Could you give us a rough estimate of the time from when  
11 you recall you started listening to him?

12 A. I can't remember, your Honour.

13 Q. And do you recall if he used to run it exclusively or he had any other people  
14 with whom he used to run that programme?

15 A. Your Honour, most of the times he was running it alone, and maybe when he  
16 was not there, there could be other people who could run it, your Honour.

17 Q. So you acknowledge that the other people would be running the programme,  
18 isn't it?

19 A. Yes, your Honour.

20 Q. Could you tell us who are these other people to the best of your recollection,  
21 Mr Witness?

22 A. There was a lady, your Honours. I don't remember the name, your Honour,  
23 but there was a lady who -- who could run the programme when -- when Joshua  
24 Sang was not there, your Honour.

25 Q. So it is your testimony that other than Sang, there was only one other people

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1 who was a lady or there were other people, more than one person?

2 A. Mostly it was the lady who was running, but sometimes another broadcaster  
3 could run, but I don't remember their names now, your Honour.

4 Q. Now, Mr Witness, to the best of your recollection, in what language was  
5 Mr Sang running the programme?

6 A. Kalenjin, your Honour.

7 Q. Did he run it in any other language other than Kalenjin to the best of your  
8 recollection?

9 A. Your Honour, maybe during 2007 when -- as I had told the Court, when  
10 someone who is not a Kalenjin had came to Kass FM to sell policies of his party or a  
11 party and he was not a Kalenjin, Joshua Sang could change his topic and speak in  
12 English or Swahili, your Honour.

13 Q. Now, Witness, you said that -- in the course of your testimony the last three  
14 days, is it true that you said that there were occasions when village elders assisted in  
15 the -- did you say Mr Sang was promoting Mr Ruto? First of all, let's start there.

16 A. Yes, your Honour. During the campaign season of 2007 Mr Joshua Sang was  
17 openly -- was openly campaigning for Honourable William Ruto, your Honour.

18 Q. And what of Mr Kibor?

19 A. Mr Kibor, in the crossroad, he was also campaigning for William Ruto, and  
20 there is a day whereby he went to Kass FM also to campaign for William Ruto, your  
21 Honour.

22 Q. You also mentioned one Mr Isaac Maiyo, didn't you?

23 A. I mentioned him, your Honour.

24 Q. And according to you, whom was he campaigning for?

25 A. He was also campaigning for William Ruto, your Honour.

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1 Q. Now, Mr Witness, all these people who were campaigning for Mr Ruto, that is  
2 Joshua Sang, Jackson Kibor, Isaac Maiyo, they were campaigning for Mr Ruto as  
3 opposed to who?

4 A. In 2007 Mr Ruto was opposed to one Mr Chelilim, your Honour.

5 Q. Could you give the Court the spelling of that name, Mr Witness?

6 A. C-H-E-L-I-L-I-M, your Honour.

7 Q. And what was the objective? What was the intention? They were  
8 campaigning for Mr Ruto with what objective?

9 A. Your Honour, the best of my knowledge, the people were not even against  
10 Mr Chelilim, but they were against the first president -- the second president, Daniel  
11 Moi, because Mr Chelilim was supported by President Daniel Moi, your Honour.

12 Q. Mr Witness, my question is more to this effect: You say Mr Sang was putting  
13 in every effort to promote Mr Ruto, isn't it?

14 A. Yes, your Honour.

15 Q. You say the same about Mr Jackson Kibor and Mr Isaac Maiyo, isn't it?

16 A. Yes, your Honour.

17 Q. And my question is, they were supporting him with a view to what, so that  
18 what would happen?

19 A. Your Honour, William Ruto had in one point decided that he will be the  
20 president of Kenya. He will stand for the presidency of Kenya.

21 Q. Let me -- let me put it this other way, Mr Witness. They were all seeking to  
22 procure the election of Mr Ruto, isn't it?

23 A. Yes, your Honour.

24 Q. Thank you, Mr Witness. Now, you also said that there were instances when  
25 village elders were also assisting in these campaigns. Is that what you said also?

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1 A. Yes, your Honour.

2 Q. And did you say also council of elders assisted to this effect?

3 A. Yes, your Honour.

4 Q. And did you say also all elected leaders?

5 A. Yes, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, I don't want to take you off  
7 your stride, but at a point when your question about -- leading question about the  
8 election of Mr Ruto came in, the witness had before that -- immediately before that  
9 talked about Mr Ruto being a candidate for presidency of Kenya. Is that what the  
10 election you spoke about was directed at?

11 MR KIGEN-KATWA: Mr President, I can ask questions in respect to that and  
12 probably get the witness to explain.

13 Q. Mr Witness, you -- when I asked you what was the purpose of all these  
14 contentions you make about promoting Mr Ruto, you said that on the other side was  
15 retired president. Did you say that?

16 A. Yes, your Honour.

17 Q. Could you tell the Court what is the name of that individual you are referring  
18 to?

19 A. Daniel Moi, your Honour.

20 Q. And could you tell us whether it is your contention that he was seeking an  
21 elective post as against Mr Ruto?

22 A. President Moi was not seeking an elective post by that time, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: Witness, when you say -- you answered  
24 counsel's question that eventually that the purpose of Mr Sang and Mr Kibor  
25 campaigning for Mr Ruto was for Mr Ruto to get elected. To get elected into what



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1 office?

2 THE WITNESS: First of all, they were -- in that time before you were elected to be a  
3 president, you must have to been elected as an MP, and they was two seats -- two  
4 seats of which Ruto was vying. He was vying first for the member of parliament of  
5 Eldoret North and the president of Kenya, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you.

7 MR KIGEN-KATWA:

8 Q. Now, Mr Witness, I want to ask you a few questions about the video that you  
9 identified, and the first question I want to ask you is -- do you recall that video, first  
10 of all, Mr Witness, the one we watched yesterday and this morning?

11 A. I saw it in Citizen TV, your Honour.

12 Q. Now, my question, Mr Witness, is first of all, is it you who obtained that  
13 video for the Prosecution?

14 A. No, your Honour.

15 Q. And, Mr Witness, is it your testimony that that is the exact video that you had  
16 seen earlier before you came to come and testify?

17 A. I saw it, your Honour. I saw it in Citizen TV. That was the ceremony which  
18 was conducted at Eldoret Sports Club, your Honour.

19 Q. Mr Witness, I think I've understood you that you could recognise the  
20 ceremony, isn't it?

21 A. Yes, your Honour.

22 Q. My question is, is that the exact video that you had seen in respect to that  
23 ceremony or is it a video that reflects what you may have seen earlier on as at the  
24 ceremony?

25 A. Your Honour, the video which I saw, I saw it even more than I saw in that

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1 news because it was cut in short with the news, but the way it was played since  
2 yesterday it was even longer than what I saw, your Honour.

3 Q. So, Mr Witness, what you're saying is what you saw previously was shorter  
4 than what you saw when you came to court, isn't it?

5 A. Yes, your Honour.

6 Q. And the one you saw in court was more detailed than any other video you  
7 had seen previously, isn't it?

8 A. I don't understand your question, your Honour.

9 Q. Did you say that the one you had seen earlier had been cut for purposes of  
10 news?

11 A. Yes, your Honour.

12 Q. And this one was much longer, isn't it?

13 A. Yes, your Honour.

14 Q. With more content, Mr Witness?

15 A. Yes. It -- it -- it show -- it show everyone who was there, and maybe by that  
16 time I didn't have time to look for all people who were there, your Honour.

17 Q. Now, Mr Witness, when you looked at that video, did you see Mr Sang  
18 anywhere in that video when the Prosecution gave you?

19 A. I didn't see him, your Honour.

20 Q. You would also confirm that you never heard him speak?

21 A. I never heard him speak on the video, your Honour.

22 Q. And so when you testified that Mr Sang was present, it is based on other  
23 circumstances other than the face of the video, isn't it, Mr Witness?

24 A. Yes, your Honour.

25 Q. Now, Mr Witness, did you attend that function?

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1 A. I didn't attend, your Honour.

2 Q. Now, Mr Witness, it is your testimony that it is the Prosecution who invited  
3 you to the video when you -- when you were sitting with them to prepare to come  
4 and testify, isn't it?

5 A. Yes. I saw the video first when I came here, your Honour, but I had seen it at  
6 Citizen TV in Kenya in 2008, your Honour.

7 Q. Now, Mr Witness, I want us to relate that with what you said about Mr Sang.  
8 Mr Witness, you said about Mr Sang that he used the word "murkelda," did you?

9 A. Yes, your Honour.

10 Q. You also said that he used the word -- the word "kapchelit"?

11 A. Yes, your Honour.

12 Q. You also said that he used the word -- he said that weeds should be removed?

13 A. Yes, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Counsel, it will help if these terminologies are  
15 spelt again. I know they were spelt earlier yesterday, but it might make it easier for  
16 court reporters if we spell them again as you come upon them.

17 It would also be very helpful if all counsel who anticipate using some terminology  
18 could give the list of it ahead of time to the court reporters. It would make it easier  
19 for their work and for everyone's work. Possibly also consider speaking notes, the  
20 advisability of sharing speaking notes with interpreters and court reporters. From  
21 my own experience, I found it very useful.

22 So unless there's some serious reason why you don't want to do that, it is strongly  
23 recommended that those sorts of information be provided to the court reporters in  
24 good -- and interpreters in good time for them to also familiarise themselves with  
25 them and create their dictionaries for the record. Thank you.

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- 1 MR KIGEN-KATWA: Mr President, we will endeavour to ensure that terminology  
2 that are exceptional that we may use are in the hands of the interpreters. I will start  
3 again, Mr President, with a view to having the spellings in place.
- 4 Q. Now, Mr Witness, you said that Mr Sang used the word "murkelda", didn't  
5 you?
- 6 A. I did, your Honour.
- 7 Q. Could you confirm that murkelda is M-U-R-K-E-L-D-A?
- 8 A. Yes, your Honour.
- 9 Q. You also said he used the word "kapchelit"?
- 10 A. Yes, your Honour.
- 11 Q. And the spelling is K-A-P-C-H-E-L-I-T?
- 12 A. Yes, your Honour.
- 13 Q. You also said that he used the word "weeds" and that's in English, isn't it?
- 14 A. Yes, your Honour.
- 15 Q. You also alleged that Mr Sang said that Kikuyus are thieves. Did you say  
16 that?
- 17 A. Yes, your Honour.
- 18 Q. You also said that Mr Sang said that a constituency cannot be created in urban  
19 centres, including Eldoret, isn't it?
- 20 A. Yes, your Honour.
- 21 Q. Now, Mr Witness, in respect to the situation that obtained on the video, the  
22 Prosecution were able to show you something in support of their argument, do you  
23 recall that, in terms of showing you the video in -- in support of the contention of  
24 Mr Ruto being (indiscernible). Do you recall that, Mr Witness?
- 25 A. No, your -- no, your Honour. I had stated that before in my statement.

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1 Q. But you didn't give the Prosecution anything in support of that yourself, did  
2 you?

3 A. Your Honour, maybe they didn't ask me more details, and if they could have  
4 asked me, I could have told them, your Honour.

5 Q. Thank you, Mr Witness, but the question and the situation remains that you  
6 did not come with anything yourself, isn't it, Mr Witness?

7 A. I didn't come with any video to prove that, your Honour.

8 Q. Now, on these allegations against Mr Sang, murkelda, kapchelit, Kikuyus are  
9 thieves, a constituency cannot be created in urban centres, that PNU is not your  
10 mother, did you avail the Prosecution any audio in support of that allegation,  
11 Mr Witness?

12 A. No, your Honour.

13 Q. And in similar way that they did on the video, did they show you any audio  
14 that shows Mr Sang saying any of those things, Mr Witness?

15 A. No, your Honour.

16 Q. Now, Mr Witness, starting with the murkelda, could you tell the Court when  
17 exactly did you hear it?

18 A. It was in 2007, your Honour. I don't remember the month or the date, your  
19 Honour.

20 Q. You have no recollection of the month or the date. What of the issue of the  
21 weeds, Mr Witness?

22 A. It was also in 2007 where -- whereby -- I think it was 2006, your Honour,  
23 whereby there were claims that some constituencies should be divided, your  
24 Honour. I don't remember the real year or month, your Honour.

25 Q. Okay. Mr Witness, so that we don't repeat, I'll just give you the list. Just tell

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1 us if you have any recollection of exactly when you heard any of the following: You  
2 also have the allegation that Mr Sang used the word "kapchelit". You also say that  
3 Mr Sang said "PNU is not your mother." You also say that Mr Sang said that  
4 "Kikuyus are thieves." In that list that I've just read -- I've just explained to you, do  
5 you recall possibly when you heard Mr Sang saying them?

6 A. Your Honour, it's -- it's only the one -- the one of the weeds which I'm not  
7 sure if it was 2007, but the others were in 2007. I don't remember the date or the  
8 month, your Honour.

9 PRESIDING JUDGE EBOE-OSUJI: Counsel, look at line 10. Is that the term you  
10 used?

11 MR KIGEN-KATWA: Mr President, the word I had used is kapchelit, and the  
12 spelling is K-A-P-C-H-E-L-I-T.

13 Q. Now, Mr Witness, you recall that yesterday you said you could not recall one  
14 of the items which have -- which turned out to be that you couldn't recall that  
15 Mr Sang had used the word "weeds". Do you recall that, Mr Witness?

16 A. Yes, your Honour.

17 Q. Mr Witness, I want to show you the same document that was shown to you in  
18 trying to refresh your memory and then I'll ask you a few questions.

19 MR KIGEN-KATWA: Your Honours --

20 PRESIDING JUDGE EBOE-OSUJI: Counsel, in fairness to the witness, you might  
21 ask him question to clarify. I thought he had used a different word in Kalenjin and  
22 was asked what the meaning was, and he said the meaning was weeds. So I don't  
23 know if anything turns on the phrasing of your question, but we need to keep that in  
24 mind.

25 MR KIGEN-KATWA: Mr President, it is exactly the reason why I want to ask the

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1 question in terms of the phraseology used.

2 PRESIDING JUDGE EBOE-OSUJI: Thanks.

3 MR KIGEN-KATWA: With your permission, your Honours, I would like the  
4 witness to be given a copy of the document KEN-OTP-0081-0801 with particular  
5 reference to page 17 and 18, which is 0081-0818 to 0081-0819.

6 PRESIDING JUDGE EBOE-OSUJI: Do we have it in any tab?

7 MR KIGEN-KATWA: We do not, your Honour, but you recall you asked that  
8 question exactly the Prosecution when they sought to refresh the witness's memory.  
9 We were able yesterday to pull it up to the screen, and I would request the same. I  
10 have a hard copy for the witness, Mr President.

11 MR GARCIA: Just a reminder that it is confidential, this document. Thank you.

12 MR KIGEN-KATWA: Mr President, my recollection is that indeed it is true it is  
13 confidential, and we were able to conduct it in the open session. I think it is the  
14 bringing up and the circulation that should be limited to the court premises.

15 MR GARCIA: That's correct, your Honour. That's how we proceeded yesterday.

16 MR KIGEN-KATWA: If the court officer could assist to hand over the document to  
17 the witness.

18 Q. Now, Mr Witness, based on the recollection that you were taken through  
19 yesterday, could I ask you, was it you who suggested the idea that Mr Sang may  
20 have used the word "weeds" to the Prosecution, or was it the Prosecution who  
21 suggested it to you, Mr Witness?

22 A. Your Honour, it's me who gave to the Prosecution when I first met them, your  
23 Honour.

24 Q. Mr Witness, what of the use of the word "murkelda," was it you who  
25 suggested it or was it the Prosecution who did, Mr Witness?

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1 A. I -- I did it. I gave them on my first meeting with them, your Honour.

2 Q. Now, Mr Witness, you have a document before you. I want to request you to  
3 look at page 18. Can you see that, Mr Witness? It's the second page. Line 600,  
4 Mr Witness. Can you see that?

5 A. Yes, your Honour.

6 Q. Mr Witness, I will read it and please confirm that what I am reading is what  
7 you can also see being the interview that you had with the Prosecution. But just  
8 before that, could you confirm that is the exact interview you had with the  
9 Prosecution, Mr Witness?

10 A. Yes, I confirm, your Honour.

11 Q. I will read, Mr Witness, "Interviewee: Are you are asking me about if there is  
12 any -- if there is other Kalenjins who are insulting the Kikuyus or what?"  
13 Mr Witness, could you confirm that is yourself speaking?

14 A. Yes, it's me, your Honour.

15 Q. And the person interviewing you asks you, "No, I am going to ask a more  
16 direct question." Can you see that, Mr Witness?

17 A. Yes, your Honour.

18 Q. And this is what the question -- this is the question that you asked -- as the  
19 direct question you're being asked, "Did you hear Mr Joshua Sang in December  
20 2008 -- 2007 or November 2007 referring to the Kikuyu in other derogatory terms like  
21 murkelda, the stained teeth? Did he use other language to describe them?" Can  
22 you see that, Mr Witness?

23 A. I see it, your Honour.

24 Q. Could you confirm that it is the person interviewing you who is suggesting to  
25 you that Mr Sang could have used the word "murkelda," Mr Witness?



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1 A. Your Honour, when you go back to where I started the story of Joshua Sang,  
2 you could see that it was me who brought all those things -- all those names to the  
3 Prosecution. The problem there was the person who was translating. We didn't  
4 understand each other, your Honour.

5 MR GARCIA: Your Honour, I'm going to object at this point. It's just on the  
6 basis -- I mean, I understand that my learned friend is free to do what -- what  
7 he -- what he can do legally, obviously, in cross-examination, but we have to be fair  
8 to the witness. And I'd refer my colleague to 0 --

9 MR KIGEN-KATWA: Mr President --

10 PRESIDING JUDGE EBOE-OSUJI: Wait. No, no, no, no. It's not necessary. The  
11 witness has indicated -- I don't know if you listened to the witness's answer.

12 MR GARCIA: I did listen to the witness, obviously. I don't --

13 PRESIDING JUDGE EBOE-OSUJI: Does that --

14 MR GARCIA: -- want to -- I --

15 PRESIDING JUDGE EBOE-OSUJI: Wait, wait. Does that not address the concern  
16 you want to now refer to?

17 MR GARCIA: It does address the concern, obviously. It's the witness's testimony,  
18 but I'm just -- I just wanted to pinpoint to my -- to my learned friend --

19 PRESIDING JUDGE EBOE-OSUJI: All right. Let's --

20 MR GARCIA: -- counsel for Defence --

21 PRESIDING JUDGE EBOE-OSUJI: Let's see --

22 MR GARCIA: -- a reference.

23 PRESIDING JUDGE EBOE-OSUJI: Let's see if it's necessary to do that.

24 MR GARCIA: Because obviously it's the testimony and Defence counsel can use  
25 certain things or put propositions to the witness as long as they're reasonably based.

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1 In this case --

2 PRESIDING JUDGE EBOE-OSUJI: This witness doesn't seem to need that help at  
3 this point. He had told the Defence counsel that no, he was the one who had  
4 introduced the terminology to the OTP. He told -- he said that clearly, so let's not  
5 argue about that.

6 MR GARCIA: And just on that -- yes, indeed. And just on that point, the  
7 Prosecution reserves itself the right to come back in re-examination with specific  
8 references on this -- on this specific issue which is of importance.

9 PRESIDING JUDGE EBOE-OSUJI: We'll get to that if we need to.

10 MR KIGEN-KATWA:

11 Q. Mr Witness, it is true that previously murkelda had come up, isn't it? That's  
12 what you are trying to explain, isn't it?

13 A. It was me who told the Prosecution, and it was only that the translator, we are  
14 not -- he was not getting me, and that's why the question came back to me again. It  
15 was asked the question of which I had said, your Honour.

16 Q. Now, Mr Witness, let's leave the issue of murkelda aside. If you could go to  
17 line 627, can you go there, Mr Witness -- 626, actually. On the same page,  
18 Mr Witness. Are you there, Mr Witness?

19 A. 626, your Honour?

20 Q. Yes. Could you confirm -- I will read from 626 to 634 and then to the next  
21 page, that "That's not your name and you exactly know my name. I know your  
22 name. You are called somebody and then I called you another name. That's yours.  
23 I don't think that's good." And then that's -- that's what you're explaining, isn't it,  
24 Mr Witness?

25 A. Yes, your Honour.

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1 Q. Now, at 628 you said -- you are asked: "I'm going to ask you a few more  
2 direct questions about this." And then you say "Yes". "Did you -- while you  
3 listened to Mr -- to Joshua Sang's show, did you hear any words -- I have to say it in  
4 English because I don't know Kalenjin. Yes, like 'We need to remove the weeds,' in  
5 fact, referring to other people?" Can you see that, Mr Witness?

6 A. I see, your Honour.

7 Q. Now, Mr Witness, you will confirm that unlike the use of the word  
8 "murkelda," the word "weeds" had not been used anywhere previously in your  
9 interview, isn't it?

10 A. It is me who came up with all those words, your Honour. If you go back, if it  
11 was not written, it was me who talked about it. Even it was in a video, the video of  
12 which I played -- I was talking can be played, and it was me who spoke about it,  
13 your Honour.

14 Q. Mr Witness, we have access to what the Prosecution did with you when you  
15 are preparing to come and testify. And you had seen this statement previously,  
16 Mr Witness, isn't it?

17 A. Yes, I did, your Honour.

18 Q. To the extent and to the limit of my question, it is true that the word "weeds"  
19 had not been used or recorded anywhere in the interview, Mr Witness, before this  
20 line 630, isn't it?

21 A. I don't understand the question, your Honour.

22 Q. Mr Witness, all I am asking you is this interview of -- that we are referring  
23 to -- Mr Witness, my information is that this interview was sometime in (Redacted) --  
24 PRESIDING JUDGE EBOE-OSUJI: Let's be careful.

25 MR KIGEN-KATWA: Yes, yes, Mr President.

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1 Q. And that prior to the date that the word was suggested to you, the word  
2 "weeds" had not been used. That's all I'm asking you, Mr Witness. Could you  
3 confirm that even when you looked at the statements in preparing to come and  
4 testify, you can confirm that before it being put to you in this way I've just read, the  
5 word "weeds" had not been used in your interviews with the Prosecution?

6 A. Your Honour, I can say that when I was coming to prepare, there were some  
7 things that I added on my statement itself. It was not suggested to me, but I  
8 remembered myself and I requested that if it's possible I can add on my statement,  
9 your Honour.

10 Q. I'm grateful, Mr Witness, but that's not quite exactly what I'm saying,  
11 Mr Witness. We are not talking of January 2014. I'm talking of July of some years  
12 back when the interview was conducted and the issue of the weeds came. And, Mr  
13 Witness, all I am asking you is, before the Prosecution suggested to you that Mr Sang  
14 could have used "weeds", you yourself are not on record anywhere as having used  
15 the word "weeds", Mr Witness?

16 A. Your Honour, there is nothing that the Prosecution suggested or asked me if  
17 either Mr Sang or Mr Ruto said or did. It was me who was giving my testimony or  
18 my words to the Prosecution, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, do you think it is fair to ask  
20 the witness to point out from this statement or transcript where he would have used  
21 those terminology before so we have a clean, clear picture of the point you are  
22 making?

23 MR KIGEN-KATWA: I could ask him, Mr President, if that's --

24 PRESIDING JUDGE EBOE-OSUJI: And he may not have to do that right now. He  
25 may need some time, perhaps during a break, to look at the material. That would

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1 also be fair.

2 MR KIGEN-KATWA: I'm very happy with that, Mr President. That's absolutely  
3 satisfactory to me.

4 MR KHAN: Well, your Honour, I will object for the witness to be given access to  
5 his transcripts in the middle of testimony in circumstances where he's been proofed  
6 over days, read the material over days, and indeed after the proofing once again  
7 requested the statements and once again was given them for a whole day.

8 So, your Honours, I would be objecting. It's inappropriate, and it would -- it would  
9 hamper, we say, your Honours' assessment of this witness -- this witness's  
10 testimony.

11 PRESIDING JUDGE EBOE-OSUJI: That's a fair point you make, Mr Khan. Of  
12 course what that means is the Prosecutor was rising to point out certain instances in  
13 the transcript where certain words might have been used in a word context, so we  
14 also need to keep all that in mind.

15 So for now we will not give the witness the transcript to review over a break, but the  
16 Prosecutor will need to come back to -- to the matter in a more pointed manner later  
17 on.

18 MR KIGEN-KATWA: I'm obliged, Mr President and your Honours. I -- my  
19 understanding is that we leave the issue as it is and the -- that the Prosecution can  
20 take it up in re-examination. I think that's the best solution.

21 Now, just to wrap up the issue, Mr President, I can see you're looking at the time, I  
22 want to ask the witness two more questions on that issue.

23 Q. Now, Mr Witness, you -- when you -- your memory was refreshed on that  
24 issue, you used a Kalenjin word as being the equivalent of weeds. Do you recall  
25 that, Mr Witness?

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1 A. Yes, your Honour.

2 Q. Could you tell the Court what was that word?

3 A. Chemulbai, your Honour.

4 Q. And could you give the Court the spelling or could you confirm that what I  
5 am spelling is correct, that it is C-H-E-M-U-L-B-A-I?

6 A. That is correct, your Honour.

7 Q. Now, Mr Witness, I've just shown you the transcript of your interview with  
8 the Prosecution. Could you kindly confirm to the Court that in that transcript that  
9 Kalenjin word is not there?

10 A. It's not there, your Honour. I -- I only said it in English, your Honour.

11 Q. Could you also confirm, Mr Witness, that it was actually your testimony to  
12 the Prosecution that this word was used by another politician. And I will read for  
13 you what you said, "In fact, it was not Joshua who I heard from first. There was  
14 somebody. I hope it was there. There was another, another politician who was  
15 with Joshua at Kass FM in the morning at Lene Emet, and the first day for me to hear  
16 about the weeds is from the mouth of that politician." Do you recall that,  
17 Mr Witness?

18 A. Yes, your Honour. I say that the first person who used the word was a  
19 politician who was at Lene Emet, but later on Joshua used the word several time,  
20 your Honour.

21 Q. Yes. Actually, you went on to say this, Mr Witness, "I can't remember who  
22 he was and then severally I heard Mr Joshua saying that." That's what you said?

23 A. Yes, your Honour.

24 Q. Now, with the precision of memory recollection that we have come to  
25 encounter from you, could you tell us who was this politician, Mr Witness?

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1 A. I can't remember, your Honour.

2 Q. Could you tell us when it is that Mr Joshua Sang was conducting this  
3 interview and used this word?

4 A. I don't remember. It was in Lene Emet, your Honour, because that was the  
5 most programme which Joshua used to air, your Honour.

6 Q. But that's not quite my question, Mr Witness. My question is more of can  
7 you recall when it was that it was used, Mr Witness?

8 A. It was in 2007, your Honour. I don't remember the month or the year.

9 MR KIGEN-KATWA: Mr President, in view of the time, I wouldn't mind stopping  
10 there.

11 PRESIDING JUDGE EBOE-OSUJI: Indeed we have to take our morning break now.  
12 We will bring down the blinds and let the witness off the stand.

13 \*(Closed session at 11.01 a.m.) (Reclassified into Open session)

14 THE COURT OFFICER: We are in closed session, Mr President.

15 PRESIDING JUDGE EBOE-OSUJI: Witness will be led from the stand now.

16 (The witness stands down)

17 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

18 THE COURT USHER: All rise.

19 (Recess taken at 11.01 a.m.)

20 (Upon resuming in open session at 11.37 a.m.)

21 THE COURT USHER: All rise.

22 Please be seated.

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

24 Mr Kigen-Katwa, please continue.

25 MR KIGEN-KATWA:

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1 Q. Now, Mr Witness, you said that Mr Sang used the word "murkelda" at the  
2 station, didn't you?

3 A. Yes, your Honour.

4 Q. Mr Witness, could you confirm if according to you Mr Sang -- if you heard  
5 that word for the first time from Mr Sang, or you had heard it before?

6 A. I heard it first from Mr Sang, your Honour.

7 Q. Before that you had never heard the word "murkelda"?

8 A. I had never, your Honour.

9 Q. And, Mr Witness, is it true that there are people in the Kalenjin community  
10 who are called murkelda?

11 A. Yes, your Honour. They're the Kipsigis community, who have tinted teeth,  
12 your Honour.

13 Q. So it's also -- it is true that Kalenjins themselves use that word in description  
14 of the teeth, isn't it?

15 A. Yes, your Honour.

16 Q. Now, Mr Witness, outside using it as a description of the teeth, isn't it also  
17 true that there are people whose official name is murkelda?

18 A. I've never heard one, your Honour.

19 Q. Now, Mr Witness, when Sang used the word "murkelda" according to you at  
20 the studio, if it was offensive the way you described it, it would also have offended  
21 the Kipsigis who have tinted teeth, as you say, isn't it?

22 A. Your Honour, the Kipsigis understand Kalenjin language and if they heard  
23 Mr Sang talking about murkaros (phon), referring people about on murkelda, they  
24 could have known that actually that he was referring to other people, because they  
25 were listening to what he was saying.



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1 Q. Now, Mr Witness, you used the word -- the three words that you had used in  
2 the interview I just referred you to were "murkelda," which we've gone through,  
3 "weeds" and "kapchelit, " and I want you to just confirm this to the Court, that you  
4 explained to the Prosecution why you consider those words to be -- you were asked  
5 whether or not the words are bad, isn't it?

6 A. Yes, your Honour.

7 Q. Could you confirm this is what you told the Prosecution as the reason why,  
8 according to you, those words are bad that you said? You asked, "I don't think this  
9 a good thing because I cannot tell you now a sharpener."

10 Or let me -- the witness, I'll ask -- I'll just take you through how the interview went.  
11 You're asked whether you knew the exact meaning of "kapchelit" and then the  
12 interview went on to this effect, "I don't think it is a good thing, because I cannot tell  
13 you now a sharpener."

14 Then you went on to say, "That's not your name and you know exactly -- and you  
15 exactly know my name. I know your name. You are called somebody and then I  
16 call you another name that is not yours. I don't think that's good."

17 Could you confirm that's the explanation you gave the Prosecution?

18 A. I confirm, your Honour.

19 Q. And you confirm that your testimony that the Kikuyus were abused by the  
20 use of the word "murkelda" is on account of this explanation I've just read out, Mr  
21 Witness, isn't it?

22 A. Your Honour, the Kikuyus were not offended because maybe they didn't even  
23 know or hear what Joshua Sang was saying, but what I was trying to say is that  
24 Joshua Sang was trying to talk about the Kikuyus in a way that he was not direct  
25 saying to Kikuyus, but he was using the names, your Honour.

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1 Q. Mr Witness, my question is a bit different if you could understand me. What  
2 I'm asking you, Mr Witness, is the meaning that you -- the explanation that you give  
3 that these words were bad is for the reason that somebody knows your name, and  
4 this is another name, the way you've explained to the Prosecution, isn't it?

5 A. Yes, your Honour.

6 Q. Now, Mr Witness, you said that Mr Sang said that the opportunity would be  
7 given to everybody to air their views and you used the word "a cow," did you, Mr  
8 Witness?

9 A. I didn't catch you, your Honour.

10 Q. Did you say that Mr Sang said there is a cow to be milked in relation to -- to  
11 give him opportunity to add their political opinions as they're the politicians, Mr  
12 Witness?

13 A. Yes, your Honour.

14 Q. Could you explain again what you meant by that, Mr Witness?

15 A. Your Honour, I mean I was talking about Kass FM is a business company of  
16 broadcasting. Mr Sang was talking about other people from other political parties  
17 who were coming to KASS FM to air or to sell their policies to the Kalenjin  
18 community and I was saying that Mr Joshua Sang welcomed them. After they left,  
19 he was explaining to the Kalenjin community that Kass FM is just a cow to be milked  
20 and let them come sell their policies, but when they have gone we know where our  
21 votes could go to, your Honour.

22 Q. According to you, this is what Mr Sang said and he said after the people who  
23 were being interviewed had left, isn't it?

24 A. Yes, your Honour.

25 MR KIGEN-KATWA: Now, Mr Witness, I want to play an audio where the word

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1 "cow" in Kalenjin is used. I wanted to confirm if that is the audio that you listened

2 to and then I'll ask you a few questions.

3 Your Honours, I would like us to go to tab 18, your Honour. Your Honour, I am

4 referring to audio reference KEN-D11-013-0040 and the transcript D11-0013-0067 and

5 I propose -- I'm sorry, court officer. The right number for the translation is

6 KEN-D11-0013-0090.

7 Your Honour, I propose to play time stamp 44.25 to 46.16 shortly for the witness.

8 Your Honour, as that is being set, I request to give a copy of the translation, which is

9 a transcript, so that he can follow as the audio is played. Your Honours, in our

10 bundle at tab 18 it is at page 33 and the particular reference is KEN-11-013-0132. I

11 apologise to the court officer, but I would request her to assist me and have the

12 witness look at that particular page, page 33.

13 Q. Now, Mr Witness, if you're at page 33, we will play the audio. If you could

14 attempt to follow what is being said on the audio against what is typed, then I'll ask

15 you a few questions. Is that okay, Mr Witness?

16 A. Yes, your Honour.

17 Q. Thank you.

18 (Playing of the audio excerpt)

19 Q. Mr Witness, I just want to be sure, can you follow it on the -- can you see it?

20 A. Yes, your Honour.

21 Q. You can see it on the -- on the -- on the document? You have it, do you?

22 A. Yes, your Honour.

23 Q. I will go on.

24 (Playing of the audio excerpt)

25 Q. Mr Witness, could you confirm if you recognise the voice of the person who

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1 has just started talking?

2 A. I recognise the voice of Joshua Sang, your Honour.

3 Q. Thank you, Mr Witness. I would request you to listen to the rest of what he  
4 says.

5 (Playing of the audio excerpt)

6 Q. Mr Witness, so the rest of the Court is with us, I will read the English  
7 translation of what you've just listened to and request you to confirm if that's a fair  
8 translation of what you've heard. Do you understand, Mr Witness?

9 A. Yes, your Honour.

10 MR GARCIA: Just before, your Honour, could we just have the exact reference for  
11 the translation and the bundle; the number - the tab number - for the translation as  
12 well?

13 MR KIGEN-KATWA: Yeah, it's okay, I can give again. It is KEN -- KEN-D11. It's  
14 tab 18, KEN-D11-0013-0122.

15 Q. Now, Mr Witness, confirm this is what the translation -- this is the English  
16 translation of what you've just heard:

17 "Hello, Araap Sang. Araap Bundi from Kapsete. The thing I would like to ask you,  
18 Kirwa, is how can -- how can relax yet we are suffering? It's so irritating when you  
19 say they let him go back again. Ask him if he's original Kalenjin, or you are just  
20 taking back this government. So, Araap Sang, I have thought that those who are in  
21 PNU should join us. It's really a waste."

22 Can you -- are you seeing that, Mr Witness?

23 A. Yes, your Honour.

24 Q. And could you confirm for the Court's record that this is a caller calling into  
25 the programme Lene Emet and raising those concerns?

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1 A. Yes, your Honour.

2 Q. And I'll now read how Mr Sang reacts and this is what he says:

3 "Okay, thank you. Thank you so much, Araap. Ah, someone says ..." --

4 PRESIDING JUDGE EBOE-OSUJI: Is there any issue about the accuracy of the  
5 translation?

6 MR KIGEN-KATWA: Your Honour, considering the questions I want to ask the  
7 witness, I would be happier if he himself satisfies himself that the Kalenjin -- the  
8 translation of the Kalenjin audio is a fair translation so that when I ask him the  
9 questions we are -- we are operating from the same --

10 PRESIDING JUDGE EBOE-OSUJI: That's exactly what I'm saying. When are you  
11 going to ask him that question?

12 MR KIGEN-KATWA: Your Honour, the other concern I have is that I would like  
13 also the translation to go on record. I don't know how otherwise I would do that,  
14 other than having either to read it or to have the witness read it, and I thought it  
15 would be faster if I read it.

16 PRESIDING JUDGE EBOE-OSUJI: You already read it. What I'm asking is  
17 whether you want to have the witness confirm that that is a fair translation of the  
18 Kalenjin words we heard?

19 MR KIGEN-KATWA: Mr President, I can do that again. I just asked him the first  
20 part and he says it's okay. I wanted to go paragraph by paragraph, with your  
21 permission --

22 PRESIDING JUDGE EBOE-OSUJI: All right.

23 MR KIGEN-KATWA: -- if that's okay with your -- your Honour?

24 PRESIDING JUDGE EBOE-OSUJI: Did he say? I must have missed it.

25 MR KIGEN-KATWA: May I ask him again, your Honour?

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1 PRESIDING JUDGE EBOE-OSUJI: Yes, whether what you just read out in English  
2 is a fair translation of what appears above in Kalenjin.

3 MR KIGEN-KATWA:

4 Q. Mr Witness, I've just read out in English -- I've read out a translation in  
5 English of what we just listened to and I wanted to ask you: Is it a fair translation of  
6 what you heard in Kalenjin and what is transcribed on the document I gave you?

7 A. Yes, your Honour.

8 Q. Thank you very much, Mr Witness. Now, I want to read the part, the  
9 response of Mr Sang, and then I'll ask you again if it's a fair translation of what Mr  
10 Sang says. Is that okay, Mr Witness?

11 A. Yes, your Honour.

12 Q. Thank you. This is what Mr Sang says:

13 "Okay, thank you. Thank you so much, Araap. Someone says he does not want  
14 the PNU people. So this is what I'm saying, some people have just bought to talk,  
15 but we will listen to them. We are in the lake, but do not let your heart get  
16 disturbed. The ODM team will be here tomorrow to tell us their manifesto. On  
17 Monday we will host the ODM guys. So us, we will stand and listen to our people  
18 wherever they are. Politics aside, we will be looking for where the truth of people  
19 lies."

20 Mr Witness, you've seen that, isn't it?

21 A. Yes, your Honour.

22 Q. Is it a fair translation of what you just listened in Kalenjin, Mr Witness?

23 A. Yes, your Honour.

24 Q. In fairness to you, Mr Witness, you will also confirm that the use as I'm  
25 instructed of the word "cow" in the Kalenjin fashion that you just listened to it, isn't

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1 it?

2 A. Yes, your Honour.

3 Q. You will also confirm that in fact that word may not have been used in the  
4 English translation, but it is a general fair translation of what you heard, isn't it?

5 A. Yes, your Honour.

6 Q. Thank you very much, Mr Witness. The last bit of what --

7 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, so we are clear on the point  
8 about cows, are you saying that the word "cow" appears in the Kalenjin version, but  
9 does not appear in the English translation?

10 MR KIGEN-KATWA: Yes, your Honour, I wish to make that concession.

11 PRESIDING JUDGE EBOE-OSUJI: Can you point out the phrasing where the word  
12 "cow" in Kalenjin appears?

13 MR KIGEN-KATWA: I can, your Honour, presumably through the witness.

14 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

15 MR KIGEN-KATWA:

16 Q. Mr Witness, on your left column you will see on top of the page "Sang." You  
17 can see that? And then you see "translation" then "caller number 1". You can see  
18 that, Mr Witness?

19 A. Yes, your Honour.

20 Q. Then you can see "transcription," "translation," then "transcription," isn't it?

21 A. Yes, your Honour.

22 Q. Now, from where I've read, I want you to count four lines and then we will  
23 read the sentence that has the word "cow." Can you see where it starts with the  
24 word -- with the word A-K-O and then the second word is K-O-R-A? Can you see  
25 that, Mr Witness, in the Kalenjin transcription?

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1 A. You can read it and then I will understand where you are, your Honour.

2 MR KIGEN-KATWA: For the Court, it is at exactly line 6 after the word -- the  
3 third -- the second "transcription."

4 Mr President, am I allowed to read in or should I play the audio?

5 PRESIDING JUDGE EBOE-OSUJI: Why don't you read the text, we can start with  
6 that, and we can spell it out, because it might be better if you spoke it and the  
7 transcript will get it since the transcript is not captioning audio plays.

8 MR KIGEN-KATWA: I noticed, Mr President, that you're presuming I speak their  
9 dialect.

10 PRESIDING JUDGE EBOE-OSUJI: You have spoken it in the past, so that obviates  
11 our presumption.

12 MR KIGEN-KATWA: I'll read it, Mr President.

13 (Speaks Kalenjin) "Ako Kora ii, tany komeche ke...kebai, komeche kwai ne, eh? Mi  
14 ng'alek kora yu ak ne ak ne, ko mangan sine, mamuchi amwa yotok missing' lakini  
15 kalen kityo ii, meime...meimgei eng' muguleldo."

16 Q. Can you see that, Mr Witness?

17 A. I can see where it is written, your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: So, Mr Kigen-Katwa, later on if we can highlight  
19 that passage and give it to the court reporters so they can reflect it on the record  
20 correctly.

21 THE WITNESS: Your Honour, I've seen it.

22 MR KIGEN-KATWA:

23 Q. Now, Mr Witness, can you see that the word "cow" has been used in that  
24 sentence?

25 A. Yes, your Honour.



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1 Q. Would you tell the Court what is the word for the cow in that sentence?

2 A. It meant Kass FM, your Honour.

3 Q. Thank you, Mr Witness. That's not what I'm asking you. From the text of  
4 the passage, can you see the equivalent of the word "cow"?

5 A. Yes, your Honour. "Tanyi."

6 Q. Could you spell it for the Court record, Mr Witness?

7 A. T-A-N-Y-I, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: So that will be the fourth word in from line 6.

9 MR KIGEN-KATWA: That's true, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 MR KIGEN-KATWA:

12 Q. Now, Mr Witness, I want you to go to page 34. Can you go there, if you  
13 don't mind? The EVD number is KEN-D11-0013-0123. Mr Witness, confirm that  
14 what I'm reading is a translation - a fair translation - of what you heard in Kalenjin  
15 and what is transcribed there. Are you at page 34, Mr Witness?

16 A. Yes, your Honour.

17 Q. "So if there are people like him, let them come and present their views so that  
18 tomorrow they would not blame us that we did not give them chance, or when we  
19 are defeated, they will say we did not listen to them. Is it the truth? That is why  
20 we are here, our listeners. Do not get disturbed. Do not get disturbed. If you  
21 have decided they have ..." -- "... if you have decided the way someone has put, no  
22 one will remove your vote from your pocket. It is still there."

23 Can you see that, Mr Witness?

24 A. Yes, your Honour.

25 Q. Could you confirm that's a fair translation of what was -- you heard in

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1 Kalenjin and what is transcribed?

2 A. Yes, your Honour.

3 Q. Now, Mr Witness, is this the audio that you were referring to yesterday when  
4 you testified and said Sang talked that other parties on Kass FM have a relationship  
5 like a cow and a situation of milking, Mr Witness?

6 A. No, your Honour. Sang used the word "cow" in many occasions. That was  
7 not the one I was saying, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: All right. Counsel, please. Now, I thought  
9 you were going to get the witness to tell us what sentence -- the sentence translates  
10 into, the sentence that contained the word "cow" that you read in, Mr Kigen-Katwa?  
11 You can put it directly to the witness. It might be easier to tell the witness that this  
12 is what it means, isn't it?

13 MR KIGEN-KATWA:

14 Q. Mr Witness, the paragraph that I read and the one you said you were able to  
15 locate making reference to a cow, could you confirm that what Mr Sang is saying is  
16 that the cow needs to be fed? Could you confirm that's what he said?

17 A. I confirm, your Honour.

18 Q. Okay. Mr Witness, now I was asking you whether this is the audio you were  
19 referring to yesterday and you were explaining that Mr Sang used the phrase "cow"  
20 several times, isn't it?

21 A. Yes, your Honour.

22 Q. Could you just confirm that your explanation to the Court of the word -- of  
23 the use of the word "cow" by Mr Sang is consistent with this audio you just listened  
24 to?

25 A. Your Honour, the word "cow," Joshua Sang was referring Kass FM as a cow

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1 which needs to be feed -- to be fed, your Honour.

2 Q. And, Mr Witness, do you understand this audio to be saying exactly the same,  
3 because that's Mr Sang's position, that that's exactly what he meant?

4 A. He said so, your Honour.

5 Q. And is this one of the audios that you heard? You say he used it several  
6 times. Is this one of the audios that you heard Mr Sang using the phrase "cow"?

7 A. I don't remember if I heard it, but for now I had used the term "cow" again,  
8 your Honour.

9 PRESIDING JUDGE EBOE-OSUJI: So what you're saying Mr Sang is saying in the  
10 passage that Defence counsel read out means that Kass FM is a cow that needs to be  
11 fed?

12 THE WITNESS: Yes, your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 MR KIGEN-KATWA: Mr President, at this point I would request that the audio I've  
15 just referred to be put in as a Defence -- Mr Sang's Defence exhibit.

16 MR GARCIA: And the Prosecution objects to that. I think we've gone through this  
17 various times in the past and the Court's rulings have been clear. If the witness -- in  
18 this type of evidence, whether it be a video or an audio, if the witness is not able to  
19 confirm that this is something that he heard in the past live on the radio, then we've  
20 been continuously and systematically giving those audio and the translation and  
21 transcript MFI numbers.

22 That is exactly what has happened, and I can refer the Chamber to transcript 49  
23 where the Chamber deals with the video and the Chamber explicitly states that, if  
24 the witness had confirmed seeing it or if the Prosecution agreed to that, then it  
25 would be given an EVD number and not an MFI.

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1 The issue -- what is at issue here is what -- if the audio that has been put to the  
2 witness is what it purports to be. A broadcast, or a live broadcast, that was  
3 broadcasted at one point is really what it is. The witness has not been able to give  
4 any evidence in that regard, so on those bases I think that it should be maintained as  
5 simply an MFI for the moment.

6 PRESIDING JUDGE EBOE-OSUJI: Response?

7 MR KIGEN-KATWA: Mr President, we would insist on our request to have it  
8 produced. The first thing I would like to say is that the witness has confirmed that  
9 the substance of what he heard is consistent with the testimony that he adduced and  
10 which we concede, Mr President, for the record, that Mr Sang used that expression.  
11 Secondly, your Honours, Mr -- the witness confirms that he recognises Mr Sang's  
12 voice in this instance and which has a very direct bearing on the testimony adduced.  
13 Thirdly, your Honours, we have put in at tab 4 a confirmation from the station - Kass  
14 FM station - which kept the records of these audios, confirming that in fact this  
15 audio was -- was aired on the day that we have indicated it was aired, being 28  
16 November 2007.

17 Lastly, your Honours, it will be recalled that the witness said that these events took  
18 place, or this audio and the substance of what he alleged was made in the year 2007,  
19 and that is exactly the same period that this audio, as we contend, was aired and was  
20 confirmed by Kass FM.

21 For all those reasons, your Honours, we submit that there is a nexus between this  
22 witness and the audio, which the witness has been able to recognise, at least the  
23 elements of his testimony and Mr Sang's voice, and secondly that it has been verified  
24 by the custodians of the audio. Mr President, we pray that the audio be admitted as  
25 an exhibit together with the translation of the transcription.

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1 MR GARCIA: If I may, your Honour? The information or the affidavit that we see  
2 at tab 4 is completely inadmissible at this point. Defence counsel will have to lead  
3 evidence of this affidavit and bring the person who has signed the affidavit. I  
4 understand it's a Mr Lamaon - Julius Lamaon - from Kass FM KALE Company  
5 Limited.

6 Defence counsel cannot simply lead into evidence an affidavit of a witness who has  
7 not come to court to testify, especially during the Prosecution's case, so I don't think  
8 that the Court can take into consideration any of the information that's written down  
9 in this affidavit.

10 As for this question of the witness being able to identify the voice of Joshua Sang,  
11 we've already gone through this type of debate in the past regarding other videos  
12 and other audio recordings and the Chamber's decision has always been clear.

13 Transcript 49, page 102, is the Chamber's decision regarding a video. Now, the  
14 Chamber's decision is clear in that it states that if the witness is not able to give any  
15 evidence as to the authenticity, which is basically has he heard it in this case in the  
16 past, then it should not be admissible as an EVD number but as an MFI.

17 PRESIDING JUDGE EBOE-OSUJI: Can you read exactly the ruling of the Chamber  
18 on the occasion word-for-word?

19 MR GARCIA: Yes, indeed, your Honour. So it's at transcript 49, page 102, lines 9  
20 to 12. The Chamber states and held, "The difficulty in this case is the witness saying  
21 she did not see these materials at the time, or these videos at the time. That's what  
22 makes the difference. If she had seen them or agreed, the Chamber would have  
23 been inclined to treat these videos as was done in the past. So on that basis the  
24 videos will be marked MFI."

25 So these were -- in this case it was a question of videos, but in the case -- and I

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1 suggest to and I submit to the Chamber in the case of the audio, we've also applied  
2 the same reasoning. If the witness is not able to speak as to the authenticity of an  
3 audio recording by stating in this type of case that he's heard it in the past, then he's  
4 heard it live as a broadcast on Kass FM, then it should only be an MFI because the  
5 main problem and what is at issue is the authenticity: Is the audio recording  
6 authentic? Is it something that was honestly broadcasted at a certain point in time?  
7 There is absolutely no evidence on this point from this witness. The witness says  
8 clearly it is not the audio that he heard. He says, yes, they are speaking about  
9 similar things, but it's not the one. That's what we have on record for the moment.  
10 MR KHAN: Mr President, if I could address this issue because it deals with also an  
11 issue of principle? It's our respectful submission that the scheme under the Rome  
12 Statute is not one that puts in strict rules of admissibility. Indeed, the converse.  
13 The principle is in favour of the free admissibility coming before the Chamber with  
14 clear safeguards that there must be sufficient indicia of reliability and a prima facie  
15 showing of relevance.  
16 Your Honours, my learned friend of course has spoken to affidavits. That is  
17 something in the nature of the evidence. The prima facie content of what was  
18 played seems to me to be clearly relevant, coupled with the affidavit we say there  
19 aren't sufficient indicia of liability and so there should be no prohibition as a matter  
20 of principle with simply giving it an exhibit number. Of course, this is not  
21 conclusive as to authenticity, it is not conclusive as to veracity and it is without  
22 prejudice for the Prosecution to bring any evidence in rebuttal.  
23 And, of course, the Defence -- if the Defence wish any evidence to be given proper  
24 weight it would be appropriate to bolster it where necessary, but your Honour that  
25 needn't be done at the outset when one is seeking admissibility.

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1 The Prosecution in my respectful submission has disclosed, of course, an  
2 understandable but I would say misplaced opposition to Defence documents and  
3 Defence evidence that's been used in these proceedings from being assigned exhibit  
4 numbers.

5 Your Honour, a time may come, of course, where the Defence say there is no case to  
6 answer. That's not a theoretical possibility. We have a right to make a submission  
7 of no case to answer.

8 PRESIDING JUDGE EBOE-OSUJI: But we're not doing that now, so can you speak  
9 to the issue.

10 MR KHAN: No, your Honour. So, your Honours, we say as a matter of principle  
11 it is for the Bench to decide whether or not evidence is admissible. The test for that  
12 should be relevance, that's made out, and indicia of reliability, not conclusive proof.  
13 And, your Honours, we say if that's made out it should be admissible, but one can't  
14 say that evidence can't be admitted simply because it's not definitively proved.  
15 That is a licence to prevent the Defence effectively from getting evidence in until a  
16 Defence case.

17 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Khan, we'll leave it there.

18 MR KHAN: Your Honour, can I say one additional thing? A factor that may  
19 militate in favour of the argument put forward is sometimes it's simpler to put  
20 evidence and quicker and more expedient and fairer at this stage, rather than calling  
21 100 or 150 Defence witnesses later on if that's necessary.

22 Your Honour, I'm most grateful.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you have referred to the  
24 affidavit appearing at tab 4.

25 MR KIGEN-KATWA: Yes, Mr President.

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1 PRESIDING JUDGE EBOE-OSUJI: If I see that this affidavit is a list of items that  
2 runs to -- would it be 74 items?

3 MR KIGEN-KATWA: Yes, Mr President, and that particular item we are referring  
4 to is in that affidavit as item number -- item number 29, your Honours. Item  
5 number 29, reference KEN-D11-0013-0073.

6 PRESIDING JUDGE EBOE-OSUJI: How do we establish that link to item number  
7 29?

8 MR KIGEN-KATWA: Mr President, the link is in the sense that, if you see the first  
9 column, Mr President, it indicates the item. The second column is the date of the  
10 audio, which is exactly the same date that the document I've just referred to and the  
11 audio I've just referred to relates to 28 November 2007. And it relates to an  
12 interview between one Mr Joshua Sang and William Kirwa, which is exactly the  
13 content of that audio. Lastly, it relates to an opportunity given to a political party  
14 called PNU to come and sell what they stand for as a political party and which is  
15 exactly the event that obtains on the audio.

16 PRESIDING JUDGE EBOE-OSUJI: At this stage we are dealing with the audio, not  
17 just the transcript, isn't it?

18 MR KIGEN-KATWA: Yes. Yes, Mr President, and I'm happy enough if the audio  
19 could go in.

20 PRESIDING JUDGE EBOE-OSUJI: The audio is the source information that  
21 generated or from which the transcripts were generated, isn't it?

22 MR KIGEN-KATWA: Absolutely, Mr President, yes.

23 PRESIDING JUDGE EBOE-OSUJI: So that's what we -- our main focus now is the  
24 audio.

25 MR KIGEN-KATWA: Yes, Mr President.



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1 PRESIDING JUDGE EBOE-OSUJI: All right.

2 MR KIGEN-KATWA: Mr President, with your permission, may I say two things in  
3 reaction to what Mr Lucio said?

4 PRESIDING JUDGE EBOE-OSUJI: Before you do that, I want us to see how we  
5 sufficiently tie the audio to item 29 --

6 MR KIGEN-KATWA: Mr President, I can --

7 PRESIDING JUDGE EBOE-OSUJI: -- without producing who it is that says, "This is  
8 from our record. This is the audio, I'm identifying the audio and it came from an  
9 ordinarily record or from our archives." How do we do that now?

10 MR KIGEN-KATWA: Mr President, I understand the question to be that you want  
11 me to demonstrate that there is a relationship between the audio that I proposed to  
12 produce and the item number 29 in tab 4.

13 PRESIDING JUDGE EBOE-OSUJI: Yes, for purposes of deriving sufficient cover  
14 under the affidavit.

15 MR KIGEN-KATWA: I am happy to do that, Mr President, through the witness if  
16 that's okay?

17 PRESIDING JUDGE EBOE-OSUJI: All right.

18 MR KIGEN-KATWA:

19 Q. Now, Mr Witness, I would request that I play out for you another part of the  
20 same audio and then I'll ask you a few questions, Mr Witness. I would like to play  
21 time stamp 00 to 100 - zero minutes zero seconds to one minute - and that for the  
22 court officer is in KEN-D11-013-091.

23 And as that is being set, Mr Witness, you can look at the document you've just been  
24 given, page 2. You are at page 2, Mr Witness?

25 A. Yes, your Honour.

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1 Q. Now, Mr Witness, just briefly before I ask you to listen to the audio and ask  
2 you a few questions, could you confirm that in your testimony to the Prosecution  
3 you made reference to Kass FM as a radio station and some of the people you know  
4 work there?

5 A. Yes, your Honour.

6 Q. Could you confirm if you know the chief executive of Kass FM?

7 A. Joshua Chepkwony, your Honour.

8 Q. Do you know another name at the Kass FM? Do you know anybody else at  
9 the management level?

10 A. I know Joshua Lamaon, your Honour. I don't know if the other name is  
11 Joshua, but Lamaon, your Honour.

12 Q. Would you be saying Julius Lamaon, Mr Witness?

13 A. Yes, your Honour.

14 Q. Now, Mr Witness, I want to play out for you time stamp 00 to 100 and if you  
15 could very kindly just look from the top, Mr Witness. You can see that, Mr  
16 Witness?

17 (Playing of the audio excerpt)

18 Q. Now, Mr Witness, can you recognise the voice of the person speaking?

19 A. Joshua Sang, your Honour.

20 Q. And are you able to locate from the transcript what he's -- where he's  
21 speaking?

22 A. Yes, your Honour.

23 Q. Thank you, Mr Witness. Let's just go and listen, eh?

24 (Playing of the audio excerpt)

25 Q. Now, Mr Witness, I would start by asking you to confirm if the English

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1 translation of what you've heard is correct and could you confirm this is what Mr

2 Sang says:

3 "Seventh, we are going to decide what we want in coming five years. So we need to

4 do keen soul searching as Kalenjin community so that we can know which side is

5 sweet? Which side is good? On which side do we want to be? On what

6 matter -- on that matter I would like to request you as listeners to listen to all sides so

7 that when the time comes you will be able to make the right decision through a large

8 voter turn-out that will define general direction for our people: In which

9 government, how they will stay, and what they will be doing. Therefore, we want

10 to listen to the current situation as there are those saying 'Kibaki Tena,' so we want

11 to ask ourselves that those who are saying 'Kibaki Tena' are saying it in which way?

12 Similarly those who are saying 'ODM Tosha,' are saying so for what reason?"

13 Mr Witness, could you confirm that what I've just read is a fair translation of the first

14 paragraph of the transcription?

15 A. I confirm, your Honour.

16 MR KIGEN-KATWA: For the Court record, that is KEN-D11-0013-0091.

17 Q. Mr Witness, I'll read the translation of the second part and this is what it

18 states:

19 "Our task is to give them a chance to present their views, for us to present ours.

20 This is just talking. No one is going to forcefully remove your vote from your

21 pocket. Therefore, let us just listen so that on 27 December we will vote according

22 to knowledge you have acquired."

23 Could you confirm that's a fair translation, Mr Witness?

24 A. I confirm, your Honour.

25 Q. Then the next one is:

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1 "So in the studio today we have one of our own professionals and a leader in the  
2 Kalenjin community. He is one of those who got a chance to serve in the current  
3 government under President Kibaki, that is Honourable William Araap Kirwa.  
4 Welcome."

5 Could you confirm that's a fair translation, Mr Witness?

6 A. I confirm, your Honour.

7 Q. Lastly, Mr Witness, this statement is made:

8 "Thank you, Araap Sang. I would like to say hi to all Kalenjin people wherever they  
9 are, my people from Murgusi, hi to all of you."

10 Can you see that, Mr Witness?

11 A. Yes, your Honour.

12 Q. You confirm it's a fair translation of what is in English?

13 A. It is fair, your Honour.

14 MR KIGEN-KATWA: For the Court record that is KEN-D11-0013-0092.

15 Q. Now, Mr Witness, you have already confirmed to us that you recognised the  
16 voice of Mr Joshua Arap Sang. You've also seen reference to one Honourable  
17 William Arap Kirwa. Can you see that, Mr Witness?

18 A. Yes, your Honour.

19 Q. Do you know him, Mr Witness?

20 A. I heard him during 2007, your Honour, but I don't know him personally, your  
21 Honour.

22 Q. So you know him by reputation, but you don't have personal knowledge of  
23 that individual?

24 A. Yes, your Honour.

25 Q. Mr Witness, are you in a position to confirm that the voice you heard at page

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1 3, KEN-D11-0013-0092, is the voice of that Mr William Kirwa who you said you've  
2 heard in the past in the year 2007?

3 A. I don't recall his voice, your Honour. I can't confirm, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Witness, did you listen to that broadcast at the  
5 time?

6 THE WITNESS: I don't remember listening to that programme, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, I see --

8 MR KIGEN-KATWA: With your permission, may I ask just a question related to  
9 what you've just asked, Mr President?

10 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

11 MR KIGEN-KATWA:

12 Q. Mr Witness, this would be about the third time when you are being asked  
13 whether you listened to that programme and you say you don't recall, isn't it, Mr  
14 Witness?

15 A. Yes, your Honour.

16 Q. May I understand the sense in which you say you don't recall? Is it in the  
17 sense that you may have heard it, but can't quite remember whether it's exactly the  
18 same one?

19 A. Yes, your Honour. I might have heard it, but I might not remember for now.

20 Q. May I ask you, Mr Witness, and it borders -- it borders on repetition, but may  
21 I ask you the substance of what Mr Sang says in terms of cows is the sense in which  
22 you were adducing evidence yesterday about what Mr Sang was saying, isn't it?

23 A. Your Honour, I've said that Mr Sang used the word "cow" in different days  
24 during 2007, and what he was saying here he was -- the only meaning that I  
25 understand is the same is about Kass FM is a business company.

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1 But it doesn't mean that -- because I've read or I've listened to him, it doesn't mean  
2 that the word which he has used, "cow," means that the whole audio what he said  
3 was only for that day, but the word "cow," the same same thing, it was meaning Kass  
4 FM has to be paid so as to air.

5 PRESIDING JUDGE EBOE-OSUJI: All right, thank you. One second.

6 (Trial Chamber confers)

7 PRESIDING JUDGE EBOE-OSUJI: We will admit the audio and the translations,  
8 and the witness's clarification that there is an identity of concepts between what he  
9 testified to before in the sense of Kass FM being a cow is sufficient to warrant  
10 admission of the evidence at this stage.

11 MR KIGEN-KATWA: Thank you very much, your Honours.

12 THE COURT OFFICER: Thank you, Mr President. The audio KEN-D11-0013-0040  
13 will bear the following number EVD-T-D11-0020 and will also be referenced as Sang  
14 Defence Exhibit Number 20. Its translation KEN-D11-0013-0090 will bear the  
15 following number, EVD-T-D11-00021, and will also be referenced as Sang Defence  
16 Exhibit Number 21. Both items will be registered as public.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 MR KIGEN-KATWA:

19 Q. Now, Mr Witness, I will take you back to the first audio that we played,  
20 which is page 33 and that is KEN-D11-013-0122. Mr Witness, could you confirm  
21 that from the playing of that video -- audio, sorry, and what you heard, it is true that  
22 the caller called when -- when Mr William Kirwa was still at the studio making his  
23 presentation?

24 A. Yes, your Honour.

25 Q. In which case, Mr Witness, you would agree that Mr Sang in this case,

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1 assuming you have other cases when he made those comments afterwards, at least  
2 in this case he made the comments when the visitor was still at the studio, isn't it, Mr  
3 Witness?

4 A. Yes, your Honour.

5 Q. Thank you, Mr Witness. Mr Witness, looking at the first part of the audio,  
6 could you confirm a couple of things that I've just taken you through that Mr Sang  
7 said? The first one is Mr Sang says they will accommodate all political parties?

8 A. Yes, your Honour.

9 Q. And that is contained in KEN-D11-013-0091, extending to KEN-D11-013-0092.  
10 Could you also confirm that Mr Sang at the introduction said that what he was  
11 broadcasting on that day was paid for by PNU?

12 A. Yes, your Honour.

13 Q. Do you confirm that both in the first transcript, the first audio that I played,  
14 D11-0013-0092, and the one at page 33, D11-0013-0122, Mr Sang says that the station  
15 will remain available for everybody to come and air their positions?

16 A. Yes, your Honour.

17 Q. He also said that nobody will take away your vote from your pocket, isn't it,  
18 in both instances?

19 A. Yes, your Honour.

20 Q. He also said that the station will be available to enable the population  
21 understand and make informed choices on 27 December 2007 when they go to cast  
22 their votes?

23 A. I can. I confirm, your Honour, but no written date, your Honour.

24 Q. Mr Witness, if you look at page 3, KEN-D11-01, 0013-0092 -- are you there, Mr  
25 Witness?

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1 A. Page 3?

2 Q. Yes, Mr Witness.

3 MR KIGEN-KATWA: Now, Mr President, as that is being done, I would request for  
4 a correction in the transcript, page 74 -- page 73, line 18 to 19. The question I put to  
5 the witness was that "The votes belonging to ..." -- "The votes will not be removed  
6 from the pockets of the population."

7 PRESIDING JUDGE EBOE-OSUJI: Votes, V-O-T-E-S.

8 MR KIGEN-KATWA:

9 Q. Now, Mr Witness, at page 3 you will confirm at paragraph 2 that this is what  
10 Mr Sang said:

11 "Our task is to give them a chance to present their views for us, for us to present  
12 ours. This is just talking. No one is going to forcefully remove your vote from  
13 your pocket. Therefore, let us just listen so that on 27 December we will vote  
14 according to knowledge you have acquired."

15 Is that correct, Mr Witness?

16 A. Yes, your Honour.

17 Q. And so you confirmed the date which you said was not there is actually there,  
18 indicating the date of the elections, isn't it?

19 A. Yes, your Honour.

20 Q. Two last questions on that issue, Mr Witness. Could you confirm which to  
21 the best of your recollection -- you say you knew a bit of Mr William Kirwa from  
22 what you heard. Could you confirm which political party he belonged to?

23 A. He was in PNU, your Honour.

24 Q. And could you confirm which political party Mr Ruto belonged to?

25 A. ODM party, your Honour.



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1 Q. And, Mr Witness, what you heard at page 33 was an attack on Mr William  
2 Kirwa, telling him in the Kalenjin audio that you heard that if the station is unable to  
3 host anybody better than him then the station should either play music, or close up.  
4 Did you see that, Mr Witness? Do you recall that?

5 A. I heard. I heard, your Honour.

6 Q. And could you confirm, Mr Witness, that Mr Sang defended Mr William  
7 Kirwa saying, "Let everybody have his day"?

8 A. I confirm, your Honour.

9 MR KIGEN-KATWA: Mr President, I would like to move on to something  
10 different.

11 Q. Mr Witness, you said that Mr Sang used the word "kapchelit," did you?

12 A. Yes, your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: Spell.

14 MR KIGEN-KATWA:

15 Q. Could you confirm the spelling of "kapchelit" is K-A-P-C-H-E-L-I-T?

16 A. Yes, your Honour.

17 Q. Now, Mr Witness, you clearly are knowledgeable. You have explained  
18 yourself as understanding Kalenjin culture and Kalenjin history. Could you tell the  
19 Court again, did you say "kapchelit" is a reference to the Kikuyus?

20 A. I didn't say -- Joshua Sang was not -- was mentioning to them instead of  
21 saying "Kikuyu" he could use "kapchelit," your Honour. That's what I say.

22 Q. And, Mr Witness, your understanding is that that word makes reference to  
23 Kikuyus? That's what I'm asking you.

24 A. He was referring Kikuyus as "kapchelit," your Honour.

25 Q. Now, Mr Witness, I play -- I want to play to you an audio where that word is

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1 used. That is at tab number 17 in our bundles, your Honours. That is KEN -- the  
2 audio is KEN-D11-013-0039 and I would like to play time stamp 318 to 500. The  
3 transcription is at page -- tab 17 and it's KEN-D11-013 -- 0013-0290. I'll say it again.  
4 KEN-D11-0013-0290. I'll play the audio.

5 Mr Witness, I'll give you the document containing the transcription. I want you to  
6 listen as you follow with the document and then I'll ask you a few questions.

7 Mr Witness, we will play the audio if you can follow. We are looking at page  
8 number 2, Mr Witness, where it starts with the words "Interviewed," and  
9 that is for the court record KEN-D11-0013-0291 to KEN-D11-0013-0292.

10 (Playing of the audio excerpt)

11 Q. Mr Witness, could you confirm if you recognise the voice of the person who  
12 has been speaking before the one we just immediately started?

13 A. Joshua Sang, your Honour.

14 Q. And do you recognise the voice of the next person?

15 A. I don't recognise, your Honour.

16 Q. I'll request you to listen to it a little more.

17 (Playing of the audio excerpt)

18 Q. Mr Witness, do you recognise the voice of this new person?

19 A. I recognise Pastor Chemaswet, your Honour.

20 Q. Thank you, Mr Witness. I just want to go on a little more. I would request  
21 you to keep a very close ear for the word "kapchelit" that you have referred to.

22 Then I'll ask you a few questions. Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: Can you spell the last word for the record?

24 MR KIGEN-KATWA:

25 Q. Mr Witness, could you confirm that the spelling of Pastor Chemaswet? This

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1 pastor is the usual pastor and Chemaswet is C-H-E-M-A-S-W-E-T?

2 A. I confirm, your Honour.

3 Q. Please, Mr Witness, listen.

4 (Playing of the audio excerpt)

5 Q. Mr Witness, I will ask you to kindly confirm that this is a fair translation of  
6 what you just heard. The first one is the second last paragraph at page 2, which  
7 says:

8 "Yes, dear listener, thank you very much. Thank you very much. This is the time  
9 for our programme this evening. As I told you yesterday, dear listener, we  
10 continue to listen to programmes by those who paid for air time in order to speak  
11 about their aspirations or things we need to know."

12 Could you confirm, Mr Witness, if that's a fair translation of that first paragraph?

13 A. I confirm, your Honour.

14 Q. The next paragraph:

15 "So today I have one of the sponsored programmes. By 'sponsored' we mean those  
16 programmes whereby individuals have paid for air time so as to discuss issues that  
17 they wish to share with you either as Kalenjin people or as people of Kenya. So this  
18 evening, dear listeners, I will be running a one-hour session sponsored by a team  
19 that calls themselves Kibaki Tena."

20 Can you see that, Mr Witness, and could you confirm its fair translation?

21 A. I confirm, your Honour.

22 MR KIGEN-KATWA: For the record, Kibaki Tena is -- Kibaki is K-I-B-E -- B-A-K-I  
23 and Tena is T-E-N-A.

24 Q. Mr Witness, this is the next paragraph:

25 "As such I have with me here at the studio guests from the region, from that region,

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1 and they wish to represent that side. And we also have someone else to represent  
2 the other side so that we can get to know the truth, and after listen -- and after  
3 listening, after all someone has said that the ear is a lake. You can then make an  
4 informed choice. So I would like to welcome you, wherever you may be tuned in.  
5 My name is Joshua Arap Sang."

6 Could you confirm that's a fair translation?

7 A. I confirm, your Honour.

8 Q. The next paragraph here --

9 PRESIDING JUDGE EBOE-OSUJI: Counsel, also remember to read with moderate  
10 speed. I do not know whether you already gave the text to the court reporters, but  
11 even so it's always good to be so that they catch up, as well as the interpreters as  
12 well.

13 And, Witness, also remember to give that pause between the question -- the end of  
14 the question and your beginning to answer it.

15 MR KIGEN-KATWA: I apologise, Mr President. I'll be slower.

16 Q. Mr Witness, could you confirm this is a fair translation also?

17 A. I confirm, your Honour.

18 Q. "Here at the studio we have Jeremiah Araap Ng'etich. Welcome, Jeremiah.  
19 Greet the Kalenjin people and tell us more about yourself."

20 Is that a fair translation?

21 A. Yes, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Ng'etich for the record can you spell, please?

23 MR KIGEN-KATWA:

24 Q. Mr Witness, could you confirm that Ng'Etich is N-G with an apostrophe on  
25 top, E-T-C – sorry, may I say it again? N-G, with an apostrophe on top, E-T-I-C-H?

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1 A. I confirm, your Honour.

2 Q. And then he says:

3 "This is Jeremiah Ng'etich from Kibomet, Kitale. I wish to speak to the Kalenjin  
4 people about the history of the Kalenjin people and the people of Kap Mama ...", the  
5 into brackets "... (Kikuyus) with whom we have lived over many, many decades."

6 Is that correct, Mr Witness?

7 A. Here there is no brackets, but it's the words you have spoken is correct.

8 Q. Mr Witness, so what you are saying is that the words in brackets are not in  
9 Kalenjin, but the rest are a fair translation?

10 A. Your Honour, I'm saying that there is nothing which has been put to bracket  
11 here.

12 Q. In the English version, Mr Witness, if you see on page 4 on top, can you  
13 see -- you can see --

14 A. I was reading the Kalenjin version, your Honour.

15 Q. Oh, yeah, I appreciate what you are saying. So what you are saying is that  
16 the English translation has "Kikuyu" into brackets, which is not there in the Kalenjin  
17 transcription, isn't it?

18 A. Yes, your Honour.

19 MR KIGEN-KATWA: For the record, Kibomet is K-I-B-O-M-E-T and then Kitale.  
20 Kap Mama is K-A-P and then Mama, M-A-M-A.

21 Q. Mr Witness, the next paragraph:

22 "Thank you very much, Elder Jeremiah Ng'etich. As such, dear listeners, you have  
23 heard the focus of the talk as he has indicated. He will speak about the relationship  
24 among the Kalenjin and the Kikuyu communities right from pre-independence  
25 through post-independence to date."

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1 Is that a fair translation, Mr Witness?

2 A. Yes, your Honour.

3 Q. Then the next paragraph:

4 "We also have here with us, dear listeners, a historian who knows much about  
5 history, and he's going to unveil to us a true known history according to historical  
6 records and research, so that the elder can tell us his version of the history and the  
7 historian can also give us his insightful views. That's the reason he is here today.  
8 Pastor Peter Chemaswet."

9 Is that a fair translation, Mr Witness?

10 A. Yes, your Honour.

11 Q. The next paragraph, Mr Witness, at page 5, KEN-D11-0013-0294, is to this  
12 effect:

13 "He's not speaking on behalf of Kibaki Tena; rather he's here to give us a clear  
14 history as he knows it just like he has given us other historical exposés about many  
15 things or other different peoples of Kenya. Welcome, Pastor."

16 Do you confirm, Mr Witness?

17 A. I confirm, your Honour.

18 Q. And Pastor Chemaswet says this:

19 "I greet the Kalenjin community in Jesus Christ's name saying hi. Greetings  
20 Kalenjin people wherever you are."

21 A. I confirm, your Honour.

22 Q. Then Mr Sang says:

23 "Thanks a lot. Thus, dear listeners, we will proceed with today's programme in the  
24 manner I had indicated earlier, that this programme has been sponsored by Kibaki  
25 Tena. They have bought air time in order to pass across their message. I had also

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1 indicated that every party has the opportunity to buy air time in order to pass across  
2 their message to their people."

3 Is that fair, Mr Witness?

4 A. Yes, your Honour.

5 Q. Then, Mr Witness:

6 "Next week I believe that we can tell you that KADU has bought air time, and we  
7 will still -- we are still waiting for ODM Kenya and ODM to do the same so as to  
8 speak with the people of Kenya -- so as to speak with the people about current  
9 affairs, their aspirations and activities." Is that fair, Mr Witness?

10 A. Yes, your Honour.

11 Q. And lastly, Mr Witness:

12 "As elder Ng'Etich has said, today we are exploring the historical background of our  
13 interaction with the people of Koilegel, Mount Kenya, the Kikuyu. We will make  
14 efforts so that we can in future explore the history of the Kikuyu with Kapsome, the  
15 Luo, and the history of Kalenjin with Kapkong'ai, Kapkulusya. However, we are  
16 primarily interested in the history of our people's interaction ..." --

17 PRESIDING JUDGE EBOE-OSUJI: I hate to interrupt you, but I see a lot of gaps in  
18 the transcript so far. You need to be spelling those words where you encounter  
19 them. It will be difficult to read first and then go back and fill them in.

20 You used the word "Koilegel." You did not spell it.

21 MR KIGEN-KATWA: Mr President, I can spell them.

22 PRESIDING JUDGE EBOE-OSUJI: All the terminology you're bringing in, just spell  
23 them when you encounter them.

24 MR KIGEN-KATWA: I'll do that, Mr President.

25 Q. I will read that paragraph again, Mr Witness, that last paragraph:

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1 "As Elder Ng'Etich has said, today we are exploring the historical background of our  
2 interaction with the people of Koilegel, Mount Kenya ...", and Koilegel is spelled  
3 K-O-I-L-E-G-E-L, "... the Kikuyu. We will make effort so that we can in future  
4 explore the history of the Kikuyu with Kapsome, the Luo ...", Kapsome is  
5 K-A-P-S-O-M-E, "... and the history of the Kalenjin with Kapkong'ai, Kapkulusya ..."  
6 The spelling of Kapkongai is K-A-P-K-O-N-G apostrophe A-I. Kapkulusya is  
7 K-A-P-K-U-L-U-S-Y-A. "... the Luhya. However, we are primarily interested in  
8 the history of our people's interaction with those groups with political aspirations,  
9 because I do not think we would be able to complete the different histories of our  
10 two tribes."

11 Mr Witness, the audio went that far. Could you confirm that is a fair translation of  
12 what you heard?

13 A. It is, your Honour.

14 Q. Now, Mr Witness, you recall that our interest was in the use of the word  
15 "kapchelit." Do you recall that, Mr Witness?

16 A. Yes, your Honour.

17 Q. Could you confirm that you have seen the use of that word at page 6,  
18 KEN-D11-0013-0295, in the Kalenjin transcription and that you also heard it when  
19 you listened to the audio?

20 A. I didn't understand anything by the writings or the audio, your Honour.

21 Q. Do you want the audio played again so you see if you can trace that word, Mr  
22 Witness?

23 A. What I'm trying to say, your Honour, is that I didn't understand what is the  
24 meaning of the word -- the words which have been used here were for, but I  
25 understood what was the meaning of "kapchelit" at that time; what Joshua Sang was



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1 using "kapchelit" at that time.

2 Q. Thank you, Mr Witness. All I just want you to confirm for the word is that  
3 you've seen the use of the word "kapchelit" in this audio, both in terms of listening to  
4 it and in terms of the transcription that I have just given you. Could you confirm  
5 you've heard it and you've seen it?

6 A. I confirm, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, it's 1 o'clock.

8 MR KIGEN-KATWA: Yes, Mr President. I can resume in the afternoon.

9 PRESIDING JUDGE EBOE-OSUJI: Yes, we will be rising for the lunch break. The  
10 blinds will come down and the witness will be escorted from the courtroom.

11 \*(Closed session at 12.59 p.m.)(Reclassified into Open session)

12 THE COURT OFFICER: We are in closed session, your Honours.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 MR STEYNBERG: Your Honours, if I may just raise one issue for consideration  
15 later so that the parties can perhaps think about it over the lunch break? I can  
16 mention it in front of the witness or not. It doesn't matter. It just concerns our  
17 scheduling for the rest of the week.

18 PRESIDING JUDGE EBOE-OSUJI: One second. Can you please let the witness out  
19 while --

20 (The witness stands down)

21 MR STEYNBERG: Thank you. I've consulted with my learned friends about the  
22 proposed length of their cross-examination. Mr Kigen-Katwa informs me that he  
23 will probably take the rest of the day and into tomorrow. It seems that we are  
24 possibly proceeding a little bit more slowly than we might have been anticipating,  
25 but he can confirm that.

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1 My learned friend, Mr Khan, estimates he would take approximately three days,  
2 which will take us well into Monday, if not Tuesday of next week. We have  
3 another Kenyan witness lined up to follow that, Witness P-128, a fairly short witness.  
4 We estimate that we would be finished with that witness in total within two to three  
5 days.

6 However, the following witness, Mr P-464, Mr Maupeu, the expert witness, it seems  
7 we're going to run out of time before we can finish his evidence. The Prosecution  
8 estimates we will need one day to lead him, depending on whether or not his expert  
9 report is admitted.

10 Mr Khan has estimated, or Mr Hooper has estimated, two days for  
11 cross-examination, and that does not take into account any estimation of my learned  
12 friend for Mr Sang.

13 What the Prosecution would like to know, and perhaps this can be thought about  
14 over the lunch adjournment, is whether we would want to start with Mr Maupeu in  
15 circumstances where it seems almost certain we will not finish his evidence in the  
16 remaining time next week, or whether we should rather hold him over until the  
17 following session?

18 I just thought I would raise that and perhaps it could be discussed further at some  
19 stage during the day so we can relieve Mr Maupeu of waiting on tenterhooks, as it  
20 were.

21 PRESIDING JUDGE EBOE-OSUJI: That's a good point to make and we will trust  
22 that counsel will think about that and we can discuss that when we finish this  
23 witness's testimony. In the meantime, we will rise for lunch.

24 THE COURT USHER: All rise.

25 (Recess taken at 1.02 p.m.)

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

2 THE COURT USHER: All rise.

3 Please be seated.

4 THE COURT OFFICER: We are in open session, your Honour.

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

6 Mr Kigen-Katwa, please continue.

7 MR KIGEN-KATWA:

8 Q. Mr Witness --

9 PRESIDING JUDGE EBOE-OSUJI: Please do your best to speed it up in terms of  
10 cutting out what can be cut out and moving as quickly as we can. You've heard the  
11 Prosecutor's announcement, which we will be discussing at some point, but  
12 especially in light of that, let's try and move it along. Thanks.

13 MR KIGEN-KATWA: I will, Mr President.

14 Q. Mr Witness, I played an audio a moment ago which incorporated the use of  
15 the word "kapchelit". I don't know if you recall it, and if you would rather that we  
16 play it again, I don't know what you would wish, Mr Witness?

17 A. I recall, your Honour.

18 Q. Now, Mr Witness, the translation that I read to you of the part that makes use  
19 of the word "kapchelit" and which you confirmed was a fair translation says this,  
20 and please confirm if you consider it at page 6, that is D11-0013-0295. This is what  
21 it states, "We want to focus --

22 MR KIGEN-KATWA: Your Honours, that is at tab 17.

23 PRESIDING JUDGE EBOE-OSUJI: Page 6?

24 MR KIGEN-KATWA: Yes, page 6, KEN-D11-0013-0295.

25 PRESIDING JUDGE EBOE-OSUJI: As we did before, do you think you can read

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1 that line, maybe one line above it and one line below.

2 MR KIGEN-KATWA: I'll be very happy to do that, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: In the language.

4 MR KIGEN-KATWA: Yes.

5 PRESIDING JUDGE EBOE-OSUJI: The native language, so we can --

6 MR KIGEN-KATWA: I'm obliged, Mr President.

7 PRESIDING JUDGE EBOE-OSUJI: Thank you.

8 MR KIGEN-KATWA:

9 Q. Mr Witness, you have that text with you, page 6?

10 A. Yes, your Honour.

11 Q. I want you to see the part where the word "kapchelit" is used and I will read  
12 the sentence around there. Can you see the sentence which says, "Kimache kiro che  
13 makyingei ng'echerok; choto ko Kokoechu, komi President Mwai Kibaki, Chaluoek  
14 komi ne konyitot Raila Odinga, ak Kapchelit komitei ne konyitot, ara...ee Kalonzo  
15 Musyoka"? Can you see that, Mr Witness?

16 A. Yes.

17 Q. Could you confirm this is the translation in English, "We want to focus on  
18 political aspirations; that is, Kikuyu (President Kibaki), the Luo (Honourable Raila  
19 Odinga), and the Kamba (Kalonzo Musyoka)"? Can you see that, Mr Witness?

20 A. Yes, your Honour.

21 MR KIGEN-KATWA: Mr President, I assume these names are fairly familiar now.  
22 I don't need to spell them?

23 PRESIDING JUDGE EBOE-OSUJI: Yes, you don't need to spell Odinga and  
24 Kalonzo.

25 MR KIGEN-KATWA: Neither do I need to spell President Kibaki. I think that one

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1 is now familiar.

2 Q. Now, Mr Witness, could you confirm that on the face of that document it is  
3 evident that the kapchelit as used in that statement is a reference to Kamba people?

4 A. Yes, your Honour.

5 Q. And having taken you through that, Mr Witness, could you confirm that you  
6 could have been mistaken in thinking that kapchelit is a reference to Kikuyus when,  
7 in fact, it is a reference to Kambas, from your general knowledge?

8 A. Your Honour, I can say that both the Kamba and the Kikuyu at that time were  
9 only in PNU, so if Mr Sang was referring to the Kamba or the Kikuyu, they are all in  
10 PNU, your Honour.

11 Q. That's okay, Mr Witness. I understand your explanation. I would still want  
12 you to answer the question as I have asked you. Do you recollect now that, in fact,  
13 the word "kapchelit" is a reference to Kamba?

14 A. I cannot say it is because it is the first time for me to know that it refers to  
15 Kamba, but at first I thought it refers to the Kikuyu community, your Honour.

16 Q. And in your interview with the Prosecution and also in your presentation of  
17 evidence you say you have no understanding of what it means to make reference to  
18 somebody as kapchelit?

19 A. I -- I said, your Honour, that I don't know the meaning of the word  
20 "kapchelit". I didn't say that I don't understand who was referred to, your Honour.

21 Q. Mr Witness, when I played the audio to you at the start of the audio, you  
22 could see that it related to people coming to campaign for PNU, isn't it? That was  
23 time bought by PNU, isn't it?

24 A. Yes, your Honour.

25 Q. You would confirm to the Court that, in fact, this was the period before

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1 elections on the face of the -- of the audio?

2 A. Yes, your Honour.

3 Q. You also confirm that you recognise the voice of Mr Joshua Sang?

4 A. Yes, your Honour.

5 Q. You also recall the voice of Mr -- Pastor Chemaswet.

6 A. Yes, your Honour.

7 Q. You also can understand -- you also noticed the use of the word of "kapchelit"  
8 which is part of your evidence, isn't it?

9 A. I didn't get your question, your Honour.

10 Q. Let me put the question the other way, Mr Witness. Could this be either the  
11 programme or one of the programmes that you heard Mr Sang broadcasting and  
12 from which you became concerned that he had used the word "kapchelit"?

13 A. Your Honour, the programme which I heard, I had heard it before but not  
14 particularly that topic, but according to me, the times of which Joshua Sang used the  
15 words that I have said or in particular "kapchelit" was not in a programme whereby  
16 people were taught history of Kalenjin and other communities. It was during a way  
17 which Mr Sang could describe to the Kalenjin community how they have been used  
18 by the government of the former president Mwai Kibaki, and he was warning the  
19 Kalenjin community not to elect a Kikuyu again, and he was referring to them, your  
20 Honour.

21 Q. And it is your testimony, Mr Witness, that Mr Sang used that word in only  
22 one programme or in various programmes?

23 A. In various programmes, your Honour.

24 Q. And is this one of the programmes that Mr Sang used that word, Mr Witness?

25 A. I can't firm because I can't remember now, but he used it in several

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1 programmes, your Honour.

2 Q. And so it is your testimony that because of passage of time and probably him  
3 having used it several times, you can't confirm whether you heard this one  
4 specifically?

5 A. He could have used it, but I don't remember for now, your Honour.

6 Q. Now, Mr Witness, it is also true that the Kamba community or at least most of  
7 them at that time were in ODM Kenya, isn't it, Mr Witness?

8 A. ODM Kenya was part of PNU, your Honour. They were -- I can say that  
9 they were in PNU, your Honour.

10 Q. And isn't it true, Mr Witness, that they became -- they went into an  
11 arrangement with PNU after the elections, Mr Witness?

12 A. I don't remember, your Honour.

13 Q. Now, regardless of the relationship between PNU and ODM Kenya, you  
14 would confirm as a statement of fact that most Kambas were, in fact, in ODM Kenya,  
15 isn't it, Mr Witness?

16 A. Yes, your Honour.

17 Q. Now, Mr Witness, I want to ask you just a few more questions, then we are  
18 done with that audio. The first one is that you confirm that in this programme  
19 Mr Sang makes reference to various political parties that include KADU, ODM  
20 Kenya and ODM, isn't it?

21 A. Yes, your Honour.

22 Q. You will also confirm that he very specifically used the words that he is  
23 giving everybody an opportunity upon paying for air time to enable the public make  
24 informed choices, isn't it?

25 A. Yes, your Honour.

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1 Q. Mr Witness, you will also confirm that on the face of that audio Mr Sang does  
2 not express any preference for -- to any political party or to any individual?

3 A. I confirm, your Honour.

4 Q. It is also true that Mr Sang does not pressure anybody to go to either political  
5 party or to support anybody?

6 A. I confirm in that audio only, your Honour.

7 MR KIGEN-KATWA: Mr President, at this point -- and your Honours, at this point  
8 I want to pray that the audio and the transcript and the translation be admitted as an  
9 exhibit in this -- in Mr Sang's Defence?

10 MR GARCIA: Your Honour, the Prosecution objects to those -- the audio and the  
11 transcript and translation being adduced as exhibits. I don't want to reiterate what I  
12 had said initially, but I think there's a clear difference between what the witness has  
13 stated on the record regarding what he heard in this word "kepchelit" as from the  
14 last audio recording where there might have been room to think that he was  
15 referring to the same audio recording.

16 What we have on the record in regards to this specific audio recording is that the  
17 witness clearly states that the subject matter in which he heard "kepchelit" in the last  
18 audio recording was different from what he heard today. So on that basis, I think  
19 we need to put it in simply as a mark for identification, your Honour.

20 MR KIGEN-KATWA: Mr President, my understanding of what the witness said is  
21 that it is possible that it is one of the audios he heard. It's just that he can't confirm  
22 owing to recollection.

23 (Trial Chamber confers)

24 PRESIDING JUDGE EBOE-OSUJI: The document will be accepted as the next in the  
25 Defence exhibit. There is the identity of that terminologic "kapchelit" that was used.



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1 MR KIGEN-KATWA: I'm most obliged, Mr President.

2 THE COURT OFFICER: The audio KEN-D11-0013-0039 will bear the following  
3 number: EVD-T-D11-00022. Its translation KEN-D11-0013-0290 will bear the  
4 following number: EVD-T-D11-00023. Both items will be registered as public.

5 PRESIDING JUDGE EBOE-OSUJI: So I take it we are looking then at Sang Defence  
6 Exhibit 22 and Sang Defence Exhibit 23?

7 THE COURT OFFICER: Yes, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you.

9 MR KIGEN-KATWA: I'm most obliged. Mr President and your Honours, I wish  
10 to move to a different issue which is found at tab number 5 in the bundle.

11 Q. And, Mr Witness, I would like to play an audio of Mr Sang's broadcast and  
12 request you to confirm if you recognise his voice and then I'll ask you a few more  
13 questions.

14 MR KIGEN-KATWA: Mr President, the audio I seek to play is KEN-D11-0013-0023  
15 at tab number 5, and it was already marked as MFI-T-D11-00012, being an audio  
16 broadcast of 30 November 2007. I request for the assistance of the court officer to  
17 give a hard copy to the witness.

18 Q. Now, Mr Witness -- Mr Witness, the audio I want to play does not have a  
19 transcription. Only has a translation, so I will request that you listen to the audio  
20 and then we will confirm if the English translation is accurate.

21 (Playing of audio excerpt)

22 MR KIGEN-KATWA:

23 Q. Now, Mr Witness, I would request that you listen to me and confirm if what I  
24 have -- what I am reading is what you just heard in the audio, but before we do that,  
25 could you confirm if you recognise -- if there is any voice you recognise?

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1 A. I recognise the voice of Joshua Sang, your Honour.

2 Q. Mr Witness, secondly, may I ask you, is that the general format that the  
3 programme you said you used to listen to, being Lene Emet, would take?

4 A. Yes, your Honour.

5 Q. Could you explain that, Mr Witness. Let me put it to you so that it is easier.  
6 Could you confirm that it was generally in the nature that people would call in and  
7 express their positions?

8 A. Yes, your Honour.

9 Q. And you confirm that from the audio you just heard, somebody was calling  
10 into the programme and Mr Sang was listening to him and making his own  
11 comments?

12 A. Yes, your Honour, I confirm.

13 Q. Now, Mr Witness, I will read what was said in Kalenjin and then you confirm  
14 if it's okay. "What is happening is you see now the Luos. If it was not that we  
15 voted for Raila at Kasarani at that time, they would have left this party we are in, the  
16 ODM party. So the Luos look at the person. They are not looking at the party.  
17 That is how we are as well. We want a person that we can see his voice, that we can  
18 follow, that will lead us. We do not want to follow a party as well."

19 Mr Witness, could you confirm that is what you heard in the audio you just listened  
20 to?

21 A. I confirm, your Honour.

22 Q. Mr Witness, could you confirm that the person was -- what I have just read is  
23 the substance of what a caller made as opposed to what Mr Sang saying?

24 A. Yes, your -- yes, your Honour.

25 Q. I will go on reading, Mr Witness. Then Sang says, "I am asking. Yes, it is

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1 true you have spoken well. We look at someone who helps the people but in the  
2 party he is contesting under. Is there anything you know about that party? Have  
3 you ever sat down and asked where the party is headed and who is -- who is it  
4 supporting, of what service can it be to the people if they come to power?"

5 Mr Witness, could you confirm if that's a fair translation?

6 A. Your Honour, I confirm.

7 Q. Mr Witness, that's what --

8 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, what are you seeking to do  
9 with this material with this -- in relation to this witness? In other words, does it  
10 have a bearing as to the testimony he has given?

11 MR KIGEN-KATWA: Very directly, Mr President.

12 PRESIDING JUDGE EBOE-OSUJI: Very directly.

13 MR KIGEN-KATWA: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: Okay. Then proceed.

15 MR KIGEN-KATWA: Mr President, if you would rather I can ask the question so  
16 that we don't spend a lot of time and I can come to -- but I am very satisfied in  
17 myself that it is very relevant.

18 PRESIDING JUDGE EBOE-OSUJI: It might be helpful if you asked the question,  
19 unless there is a strategic reason why you don't want to ask it first. If not, it will  
20 help everyone if you ask the question so we see the relevance of it.

21 MR KIGEN-KATWA: What I would prefer, Mr President, is to ask the question  
22 rather than explain it to you what I am looking for.

23 PRESIDING JUDGE EBOE-OSUJI: That's what I mean. Use the question to make  
24 the point.

25 MR KIGEN-KATWA:

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1 Q. Now, Mr Witness, you've listened to that audio, isn't it?

2 A. Yes, your Honour.

3 Q. Now, in your testimony the last few days, Mr Witness, you said that Mr Sang  
4 was almost wholly and exclusively dedicating his broadcast to promote Mr Ruto,  
5 isn't it?

6 A. Yes, your Honour.

7 Q. Mr Witness, you would confirm that to the extent to which you've heard the  
8 audio, Mr Sang is insisting that people should be more interested in belonging to  
9 parties whose policies they understand as opposed to supporting an individual?

10 A. Your Honour, I can say that even in -- in the same audio that I listened and  
11 even in the paper Mr Sang was trying -- though he didn't mention the name of  
12 Mr Ruto, he was trying to tell people that they should look -- they should not look  
13 for the party, they should look for the person. And if they are going to look for the  
14 party, they should have to understand who the person they were supporting is.  
15 That's the message I got from the audio, and the same, same message is also written  
16 in the paper, your Honour.

17 PRESIDING JUDGE EBOE-OSUJI: Had you heard Mr Sang in the broadcast before  
18 at the time make that point?

19 THE WITNESS: He was always asking the Kalenjin community to rally behind  
20 Honourable William Ruto, your Honour.

21 MR KIGEN-KATWA:

22 Q. Mr Witness, I appreciate what you're saying. It is your explanation to this  
23 Court that at the end of the day, Mr Sang is asking people to support Mr Ruto, isn't  
24 it?

25 A. He was doing so, your Honour.

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1 Q. You are saying it is on the face of this document, this translation that you've  
2 just seen, isn't it?

3 A. Yes, your Honour.

4 Q. With the permission of the Court, I will read the next paragraph and then  
5 please let us know if it's a fair translation.

6 Then Mr Sang says, "So you do not see anything that the party can do for you? Has  
7 it not said what it can do for the people?" And then the caller says, "What is  
8 happening ... you see we Kalenjins, we had not known about political parties  
9 because KANU closed us off for a long time. When we decided to sing Jogoo of  
10 KANU, we sang all the way, so now we are about to open our eyes and also listen.  
11 So we will learn from this one."

12 Is that a fair translation, Mr Witness?

13 A. It is, your Honour.

14 Q. Mr Witness, the next thing said is this:

15 "Thanks, that is why we are learning today that it is important that in any party that  
16 you are in or that -- or any that someone tells you they want you to elect them under,  
17 it is important that you understand the party properly. If tomorrow it calls its  
18 national governing council, what are you going to decide? You know if you do not  
19 have any stake in a party, it is useless. You remember when KANU was divided,  
20 some went to Mombasa and said that they are in KANU original. We have elected  
21 ourselves. Another group went to Kasarani and announced that no, we are the ones  
22 who are in control. So that the only determinant was the numerical strength of one  
23 side, and a group which was full of money minded people. That is what held the  
24 party. But now ask yourself -- ask yourself, I'm not saying do not elect people ...  
25 those who have been sponsored by parties are your own, but I want -- but what I

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1 want to ask is, have you inquired from the ...", that must be "them", "... why they  
2 joined those parties, because I am aware that some people were paid to contest in  
3 different parties in order to give a semblance of national face, with the intention of  
4 showing people that so-and-so is in such-and-such party. It is good to know where  
5 the parties are heading, where they have come from and who it belongs to."

6 You can see that, Mr Witness?

7 A. I can see, your Honour.

8 Q. And could you confirm that's a fair translation of what you heard?

9 A. It is, your Honour.

10 MR KIGEN-KATWA: For the record, Mr President, there's the use of the word  
11 "Kasarani", and the spelling of Kasarani is K-A-S-A-R-A-N-I. There is also the use  
12 of the word "Jogoo" and that is J-O-G-O-O.

13 Q. And, Mr Witness, it is your testimony that the ultimate intention of Mr Sang  
14 there was to say that people should support Mr Ruto. Is that what -- you maintain  
15 that is what he said?

16 A. Your Honour, from what I heard myself, Mr Sang was encouraging the  
17 Kalenjin community to support Mr Ruto.

18 Q. Now, Mr Witness, I will play -- I will play out for you an extension of the  
19 same audio. Shortly after that, after what you've just gone through, I want you to  
20 listen and then I will ask you a few questions. And, Mr Witness, that is at page 3 of  
21 the same document. The page 3 is KEN-D11-0013-0027.

22 (Playing of the audio excerpt)

23 MR KIGEN-KATWA: Your Honour, the time stamp that I have just played is time  
24 stamp 27.35 to 29.23.

25 Q. Mr Witness, may I read the English translation of what you just listened to,

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1 and please let me know if in your assessment it's a fair translation, "Sang: I'm  
2 surprised that that caller said we are in party only because our own Mr Ruto is in it.  
3 So I am shocked."  
4 Mr Witness, is that what you heard in the Kalenjin audio?  
5 A. Yes, your Honour.  
6 Q. I'll go on, Mr Witness:  
7 "You are in a party just because of your person. You mean just like that and that is  
8 all? Well, that is not very bad. It is one of the considerations, but are you in a  
9 party just because Ruto is in it? If it happens that Mr Ruto is not there tomorrow,  
10 will you not be there? If he says we move to another party, will you follow him?  
11 Do you have anything that prompts you in your heart, you belong to a family. For  
12 me I belong to the family of Kap Tesot, I belong to Kap Tesot because of blood and  
13 parents and everything. I know that even if my parents disown, my I will not then  
14 belong to the Bitok family. No, I belong to Kap Tesot forever. And now you know  
15 when you say I belong to a party because of someone, if tomorrow he leaves, will  
16 you follow him that -- him and why? Do you know that party ideology is very  
17 important? America -- America, and I know the people from America will say so in  
18 due course, for America to get where it is, it is because of party ideologies and not a  
19 person. People take care of their party, like Labour party, Democrats, they know  
20 what the party stands for. Or they just come and say, let's go to PNU and you say  
21 yes it appears everybody is there. There are many parties in it. Do you know the  
22 sitting arrangements in that house? Or are you going and once there you find that  
23 beds have been prepared for others to sleep, and you get an armchair to get you  
24 through the night? And even ODM, I'm not talking PNU alone, if ODM  
25 tomorrow -- if in ODM tomorrow you are told to come and once you are inside, you

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1 are told these are the big parties that we know or that the people we know, are these  
2 ones and for you, although you voted for us, just hold on, let us first finish eating  
3 and if there are leftovers, we will consider you."

4 MR KIGEN-KATWA: Mr President and your Honours, that is KEN-D11-0013-0027.

5 Q. Mr Witness, is that a fair translation of what you heard in Kalenjin?

6 A. Yes, your Honour.

7 Q. Thank you very much, Mr Witness.

8 May I spell some words which were in the -- in what I just read. There is Kap Tesot,  
9 and the spelling is K-A-P then space T-E-S-O-T. And then Bitok is B-I-T-O-K.

10 Mr Witness, you will confirm that in this Mr Sang is asking people to be interested to  
11 know the policies of the party as opposed to following an individual, isn't it,  
12 Mr Witness?

13 A. Yes. Yes, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Counsel, always try to spell the words as you  
15 encounter them. That's easier for the court reporters.

16 MR KIGEN-KATWA: I apologise. It was my oversight. I realise that, Mr  
17 President. I will endeavour to do that.

18 Q. Lastly, Mr Witness, on that audio I would like to play time stamp 00 to 1.27  
19 just for the date when that -- that broadcast was made.

20 PRESIDING JUDGE EBOE-OSUJI: The record did not pick up on the time stamps  
21 you indicated.

22 MR KIGEN-KATWA: The time stamp I wish to play is 00 to 1 minute 27 seconds,  
23 Mr President. And that is at page KEN-D11-0013-0025.

24 (Playing of the audio excerpt)

25 MR KIGEN-KATWA:



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1 Q. Mr Witness, can you see where that is at page 1? Can you see that,

2 Mr Witness, that would be --

3 A. I have seen it, your Honour.

4 Q. May I request you to just follow it as we -- as the audio is playing, then we  
5 come back to it?

6 (Playing of the audio excerpt)

7 Q. Mr Witness, could you confirm this is the English translation of what you just  
8 heard:

9 "Please don't touch anybody. Don't touch anybody. Many people are mocking  
10 you but don't mind. Persevere, you -- persevere, you have persevered for four  
11 years and you are coming to an end, we have only 27 days to go."

12 Is that a fair translation, Mr Witness?

13 A. It is, your Honour.

14 Q. Thank you. Thank you, Mr Witness. Then it goes on to say:

15 "Only 27 days can make you be so angry to the extent that you could be jailed or  
16 put -- or put you under other unpleasant circumstances. So let us persevere and  
17 know that we are all in Kenya. Let us all love one another, love those other people  
18 because of the votes that we want, if you are in PNU you need votes from everyone.  
19 In ODM, you need votes from everyone, in ODM Kenya you need votes from  
20 everyone. Or in any other parties I will tell you, you need votes from everyone.  
21 What is important at this time to love the entire community of Kenya and bring  
22 them close. Bring all your friends close, if they were somewhat doubtful, bring  
23 them close. Tell them we are all together. Although I know there are many issues,  
24 people are bring forth -- that people bring forth to sow fear among the communities  
25 of Kenya. I tell you this -- I tell you this time stand firm and persevere. This time

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- 1 as many people have said, the country Kenya is depending on the Kalenjin  
2 community, because it is said that the Kalenjin has a heart of empathy. This  
3 Kalenjin has a heart that will not ... will see things and say this is excess. So this is  
4 the time to impress that state of empathy, ignore other things and save the country.  
5 Let us not be counted amongst those who destroy our country, let us protect it."  
6 Mr Witness, is that a fair translation of what you heard in Kalenjin?  
7 A. Yes, your Honour.  
8 Q. Mr Witness, thank you very much. Mr Witness, I would like you to confirm  
9 that you notice that Mr Sang is saying that this broadcast is being made 27 days  
10 before elections.  
11 A. Yes, your Honour.  
12 Q. And you will confirm those are the elections of 2007, isn't it, Mr Witness?  
13 A. Yes, your Honour.  
14 Q. Last few question, Mr Witness. You would agree that Mr Sang is pleading  
15 that people should keep peace, isn't it?  
16 A. Your Honour, as I read the statement which Mr Sang read that day, is touched  
17 many things which I had also raised in my statement, your Honour.  
18 For example, Mr Sang were telling people not to touch any other person.  
19 My -- what I wanted to say is that no one had touched anyone by that time or there  
20 was no -- in -- before election 27 days there was no any fight in Kenya.  
21 Again, your Honour, I saw -- just give me a minute.  
22 Q. Mr Witness --  
23 A. Your Honour, I saw that Mr Sang was say -- was saying that many people are  
24 mocking you, but I wondered how or which people were mocking the Kalenjin  
25 community, your Honour.

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1 Q. Thank you, Mr Witness. So that's the next question I was going to ask you,  
2 Mr Witness. You confirm that the tone and the substance of what you've heard in  
3 this audio, and which you confirm its translation herein, is some of the things you  
4 heard Sang say a few days before elections, isn't it, Mr Witness?

5 A. I didn't hear him saying that, your Honour. I don't want to lie that I heard.  
6 I just read it from this paper today.

7 Q. Mr Witness, did you testify that Mr -- you heard Mr Sang plead for peace  
8 sometime before elections?

9 A. It was after elections, your -- your Honour.

10 Q. And did you hear him seek peace before?

11 A. I didn't hear him seek peace before, your Honour.

12 Q. Now, Mr Witness, you also see that he says that we have to co-exist and all  
13 political parties will need votes from everybody else, including ODM, PNU and  
14 ODM Kenya?

15 A. I confirm that, your Honour.

16 MR KIGEN-KATWA: Mr President, at this point I would like to seek -- this is an  
17 audio that we had played earlier on, and it was marked as MFI-D11-00012. I would  
18 very much pray that it be admitted as an exhibit.

19 MR GARCIA: Your Honour, once again, the Prosecution is objecting to this being  
20 changed from an MFI to an exhibit. I understand that we have objected already for  
21 two prior audio recordings, and the Chamber has indicated certain specific items  
22 that would allow for these audio recordings to go in as exhibits.

23 I just want to reiterate the Prosecution's point and our main concern and the reason  
24 why I'm getting up every time Defence counsel for Mr Sang is trying to introduce  
25 these audio recordings is that there is absolutely no evidence on the record as to the

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1 authenticity of the audio recordings. What we have is simply the witness  
2 saying -- and, actually, in this case we don't have that, but the witness saying well,  
3 maybe he might have been saying something in that line of thought, or yes, I did  
4 hear him say this word.  
5 But there is no evidence on the record for the Chamber to determine whether the  
6 audio recording that we've heard actually was broadcast at the time which is  
7 purported -- which is indicated on the document, and that's the big danger and that's  
8 why I'm getting up every time and objecting to this going in as evidence.  
9 We run the risk of having -- and this is unfair to the Prosecution, having in the  
10 Prosecution's case a certain amount of evidence, audio recordings or videos which  
11 have been untested and for which there is absolutely no evidence, not an iota of  
12 evidence before the Chamber of their authenticity and which will have no value in  
13 the end.  
14 So once again, I'm objecting to this -- this recording going in. The witness in this  
15 case has stated quite clearly that he doesn't remember Mr Sang ever having said  
16 messages or given messages of peace prior to the post-election violence. Now, I  
17 understand Defence counsel for Mr Sang indicates that this is 27 days before the  
18 election, but we have no evidence on that point, no independent evidence, and we  
19 all know that Defence counsel can't lead evidence.  
20 So those are my submissions. Once again, I don't believe that -- in a complete  
21 absence of authenticity, I don't think we should accept this as an EVD.  
22 I think that the Chamber already established a clear line prior to the holidays and a  
23 clear ruling where the Chamber stated that if the witness clearly recognised a video,  
24 then it could be admitted as an EVD. We're departing from that ruling from what  
25 my submission is no reasonable -- no reason, no valid reason.

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1 MR KIGEN-KATWA: Mr President, could I be heard before the consultation?

2 (Trial Chamber confers)

3 PRESIDING JUDGE EBOE-OSUJI: We will admit the material. There's a  
4 difference, of course, between admitting the material because of identity of elements  
5 of the testimony of a witness and a document that's produced that relates to that.  
6 There's a difference between that and the alternate assessment that will be made in  
7 the end as to the weight that should be attached to the material admitted.  
8 Prosecutor, these things are not that compartmentalised as to say a ruling of the  
9 Chamber on a previous occasion. That draws such stark lines on things. It's a  
10 human process. We still have a judgment to make on these things. At the end of  
11 the day we will make our evaluation on the evidence. We will hear your arguments  
12 as to weight and matters of that nature.

13 There is, of course, a difference between where an opposing party tries to use a  
14 witness on the stand to put on record materials that do not touch on what the  
15 witness had testified to in the main with a view possibly to making a case, a no case  
16 submission as Mr Khan had indicated they may make.  
17 There's a difference between that and bringing -- trying to use a Prosecution witness  
18 to anchor a case of no case submission to be made ultimately. It's quite a different  
19 matter from where a witness for the Prosecution had testified to a certain matter and  
20 an opposing party wants to test that particular testimony on its own merit. I'm just  
21 explaining the ruling, not to an invite an argument.

22 We will then admit the material.

23 MR KIGEN-KATWA: I'm most grateful, Mr President.

24 THE COURT OFFICER: Thank you, Mr President. The audio KEN-D11-0013-0023,  
25 previously registered as MFI-T-D11-00012, will now bear the following number:

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1 EVD-T-D-11-00012. The translation KEN-D11-0013-0024, previously registered as

2 MFI-T-D11-00013, will now bear the following number: EVD-T-D11-00013.

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

4 THE COURT OFFICER: And also, sorry, they will be referenced as Sang Defence

5 exhibit number 12 and number 13.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you. I forgot to mention something I

7 should have mentioned earlier. An anchoring element to this material was the

8 witness's testimony that this material is still consistent with his earlier testimony,

9 specifically that his reading of it and what he heard still heard Mr Sang saying

10 support Mr Ruto ultimately. He did say that.

11 MR KIGEN-KATWA: Thank you, Mr President and your Honours.

12 Q. Mr Witness, I would like us to move to a different issue being the issue of the

13 video that you referred to yesterday and which you said the Prosecution showed

14 you and that you had watched in KTN. Do you recall that, Mr Witness?

15 A. Yes, your Honour.

16 Q. Now, Mr Witness, may I ask you, do you recall when that function was

17 conducted?

18 A. I don't remember the month or the date, your Honour, but I recall it was in

19 1997 -- 1997, your Honour -- 2007, your Honour.

20 Q. Now, Mr Witness, you also said that in that -- in the process of that event

21 Mr Ruto was made a king. Did you say that?

22 A. Yes, your Honour.

23 Q. Could you confirm, Mr Witness, that based on the video that the Prosecution

24 gave us and which you watched and also the one that Citizen showed, that none of

25 the speakers uses the word "Mr Ruto is a king"?

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1 A. I didn't listen all the testimonies, but according to me on what I heard and  
2 what was done is that Mr Ruto was made -- voted spokesman and the king of  
3 Kalenjin community.

4 Q. That's okay by me, Mr Witness. All I want you to confirm that the idea that  
5 he's a king is the way you understood and neither the speakers that were on that  
6 occasion nor the Kenyan media that covered that event referred to Mr Ruto as a  
7 king?

8 A. I don't remember, your Honour.

9 Q. Could you -- could you confirm that you mean by not remembering is that  
10 you don't remember anybody referring to Mr Ruto as a king?

11 A. No, your Honour. Even Lina Kilimo referred him as a king. Many  
12 speakers, even Isaac Ruto refers -- referred him a king. Even the way he was  
13 dressed, it was dresses of a king.

14 Q. Mr Witness, did Ms -- did Lina say a bull or did she say a king?

15 A. By saying a bull, it was in parables, but it eventually meant a king, your  
16 Honour.

17 Q. So even your understanding of what Lina said is an interpretation of what she  
18 meant, isn't it?

19 A. He was referring Mr Ruto as a king when she said a bull, your Honour.

20 Q. Okay. And Mr Isaac Ruto did not use the word in English "a king", did he?

21 A. He was talking in Kalenjin, your Honour.

22 Q. But he didn't say "a king," did he?

23 A. It is long time, but I remember he used the word "laitoriat" and "laitoriat"  
24 means a king, your Honour.

25 Q. Okay, Mr Witness. We will look at that audio and confirm if actually he said

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1 that.

2 PRESIDING JUDGE EBOE-OSUJI: And, the witness, spell the word "laitoriat."

3 THE WITNESS: L-A-I-T-O-R-I-A-T, your Honour.

4 MR KIGEN-KATWA:

5 Q. And, Mr Witness, you are absolutely sure that he said that?

6 A. (Overlapping speakers) confirm because it's a long time, your Honour, since I  
7 heard the video, but I remember such word being used.

8 Q. May I ask you again, Mr Witness, I hope I'm not being unfair to you, you are  
9 absolutely sure that Mr Isaac Ruto used the word "king," "laitoriat"?

10 A. I'm not sure, your Honour.

11 Q. Mr Witness, it is --

12 PRESIDING JUDGE EBOE-OSUJI: One second. At line 16, the overlapping  
13 speaker difficulty is noted on the transcript. The witness said -- did you say, "I can  
14 confirm" or "I can't confirm"?

15 THE WITNESS: Your Honour, I said "I can't confirm."

16 MR KIGEN-KATWA:

17 Q. You're not in a position to confirm absolutely, isn't it?

18 A. I can't confirm, your Honour.

19 Q. Mr Witness, you also said that that function which you say Mr Sang attended  
20 made Mr Ruto a spokesman. Could you confirm that none of the speakers used  
21 that word also?

22 A. Your Honour, I have realised according to questions, I have realised that I  
23 mixed up two different functions, your Honour. There was a function of making  
24 Mr Ruto a king, and there was the function of making -- naming Mr Ruto as a  
25 Kalenjin who was standing for president, your Honour. It came to my mind right



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1 now, your Honour.

2 Q. And so the video is which one, Mr Witness?

3 A. I didn't see that video of which Mr Ruto was pronounced a king.

4 Q. And so it is now your testimony that there does exist another video where  
5 Mr Ruto was made a king?

6 A. Your Honour, I don't know if there is a video. But there was a date of which  
7 Mr Ruto was pronounced the king and spokesman of Kalenjin, and it was at the  
8 same venues, Eldoret Sports Club, your Honour.

9 Q. So, Mr Witness, can I then proceed with my cross-examination on the  
10 understanding that you are no longer insisting that the audio we looked at is the one  
11 which made Mr Ruto a king and a spokesman, the video?

12 A. The video, it's not the one, your Honour. It just came fully to my mind, your  
13 Honour.

14 PRESIDING JUDGE EBOE-OSUJI: You're saying the video we saw yesterday and  
15 continued with this morning during the Prosecutor's examination in chief was not  
16 the video or did not depict --

17 THE WITNESS: Your Honour --

18 PRESIDING JUDGE EBOE-OSUJI: -- Mr Ruto being made a king?

19 THE WITNESS: Your Honour, I'm saying that there were two different functions.  
20 And the function that I was saying that Mr Ruto was being pronounced the king is  
21 not the video that we watched.

22 PRESIDING JUDGE EBOE-OSUJI: Thank you.

23 MR KIGEN-KATWA:

24 Q. Mr Witness, I am concerned at both issues, the issue of being a king and the  
25 issue of being a spokesman. I understand you to have clarified that the video we

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1 watched is not the one that made Mr Ruto a king. Could you also confirm that  
2 equally that video is not the one which made him a spokesman?

3 A. I confirm, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, I don't -- do not intend to stop  
5 you necessarily, but your cross-examination now seems to be cross-examination  
6 concerning the part of the testimony dealing with Mr Ruto, and you are counsel for  
7 Mr Sang. I hope we will not have duplication at the end of the day. I know  
8 Mr Khan has signalled he will be cross-examining as well. I thought I should  
9 mention that so you know how much you lean on that theme in your -- in your  
10 cross-examination.

11 MR KIGEN-KATWA: I appreciate, Mr President. May I also say something that I  
12 very consciously and deliberately thought about, and so I'm asking the questions  
13 with that understanding, and I come from the position that he said that Mr Sang was  
14 there. On my charts, the testimony was later on withdrawn. It was said that  
15 Mr Sang spoke in that function. And I just wanted to be sure whether the witness  
16 insisted Mr Sang was there and witnessed the first accused being made a king.

17 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

18 MR KHAN: And, Mr President --

19 PRESIDING JUDGE EBOE-OSUJI: Again, I did not say to -- my intent, even if you  
20 want to act on behalf of Mr Ruto, it's between you and Mr Khan, but I'm saying we  
21 don't want duplication.

22 MR KHAN: Mr President, just to allay the concerns, there won't be duplication.  
23 We've discussed the way to conduct matters in quite some detail. So I can assure  
24 the Court there will not be unnecessary duplication.

25 MR KIGEN-KATWA:

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1 Q. Now, Mr Witness, in the course of my cross-examination and in the course of  
2 asking you the question as to whether or not that video shows Mr Ruto being made  
3 a king, you said part of what gives you confidence that he was being made a king is  
4 the attire he was wearing. You would like to withdraw that also, Mr Witness, isn't  
5 it, now that you say that was not the function of making him a king?

6 A. He was wearing it at the first place when he was made a king. And the  
7 manner of which he was wearing it on that day, he was also shown as a king, your  
8 Honour.

9 Q. Mr Witness, having withdrawn the contention that that was the event making  
10 him a king, I want to ask you now whether you want to alter the date which  
11 according to you that video was made? Do you now recall when that video was  
12 made?

13 A. I don't remember, your Honour. But the date that -- or the month that he  
14 was pronounced or made a king or the spokesman came before the date of which he  
15 was endorsed as the presidential candidate, your Honour.

16 Q. Mr Witness, my interest is actually the video that is already an exhibit. Do  
17 you know when it was made, when that function was conducted?

18 A. It was in 2007, your Honour.

19 Q. Now, Mr Witness, yesterday when we were looking at the video, you were  
20 shown a transcript of the process of what went on in that function. I would like to  
21 show you the same transcript.

22 MR KIGEN-KATWA: And I request for the assistance of the court officer.

23 Mr President, I'm referring to KEN-OTP-0069-0127 that was used by the Prosecution  
24 to take the witness through the audio's transcription and translation.

25 PRESIDING JUDGE EBOE-OSUJI: It's tab 20?

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1 MR KIGEN-KATWA: Yes, Mr President, it is tab 20.

2 Q. Mr Witness, do you recall having been shown that audio -- or that transcript?

3 A. Yes, your Honour.

4 MR GARCIA: Actually just for the information of the Chamber, I think it's tab 21.

5 We used the translation, not the transcript.

6 PRESIDING JUDGE EBOE-OSUJI: Indeed. But that should not preclude you if

7 you want to refer to something in tab 20.

8 MR KIGEN-KATWA: I'm most obliged. May I use it? I will make the point still

9 with that document.

10 Q. Mr Witness, I want you look at the first page of that document. Can you see

11 it? The cover page, Mr Witness, you can see that?

12 A. Yes, your Honour.

13 Q. Can you see the date of recording? The date of recording on left side,

14 Mr Witness?

15 A. 03 of 06, 2006, your Honour.

16 Q. You confirm that the Prosecution themselves state that the date of recording is

17 unknown, but it could be 3rd of June 2006 as estimated by them, isn't it?

18 A. It is what I see in the paper, your Honour.

19 Q. And, Mr Witness, a function of 2007 could not have been recorded in the year

20 2006, isn't it?

21 A. Yes, your Honour.

22 Q. Mr Witness, it is true that you could have been mistaken on the date of that

23 video, isn't it?

24 A. I was not mistaken, your Honour, but I said from the start that I'm not -- I'm

25 not sure of the year, your Honour.

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1 Q. And so you are not -- well, regardless, you are not sure it was 2007 even now,  
2 isn't it, Mr Witness?

3 A. On my mind I thought it was 2007, but I'm not sure if it was 2007.

4 Q. Having seen the Prosecution's document, do you still insist it was 2007,  
5 Mr Witness?

6 A. I can't insist, your Honour, because from the start I said I'm not sure of the  
7 year, your Honour.

8 Q. Thank you, Mr Witness. Now, most of your testimony, Mr Witness, where  
9 you say Mr Sang was in attendance, you had said --

10 MR KIGEN-KATWA: Mr President, I'll leave that issue.

11 Q. Mr Witness, I want us to go to a separate issue, and by way of laying bases,  
12 Mr Witness, did you say that Mr Sang advertised a meeting for council of elders?

13 A. It was not Mr Sang, but it was advertised by Kass FM and Mr Sang on  
14 his -- on his Lene Emet, he was telling people that the meeting will be there. But it  
15 was also advertised by Kass FM.

16 Q. Thank you, Mr Witness. So your testimony is that on the one hand, there  
17 was paid up advertisement for the meeting, and separately Mr Sang hosted  
18 programs to announce the coming of that meeting? Is that what you are saying, Mr  
19 Witness?

20 A. I'm not saying that Mr Sang hosted programmes, but in his programme he  
21 always reminded people that there will be a meeting, your Honour.

22 Q. And, Mr Witness, did you say also that he hosted some people who were to  
23 come and discuss the dynamics of that council of elders?

24 A. Your Honour, it was Mr Sang who was cautioning those people to let the  
25 Kalenjin community to be knowledgeable about the Kalenjin council of elders, your

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1 Honour.

2 Q. Now, Mr Witness, I have an audio that I would like to play out for you, and I  
3 would like you to confirm if in fact that audio is one of the audios you heard where  
4 Mr Sang is interviewing people, announcing the event, and preparing them for the  
5 creation of the council of elders.

6 MR KIGEN-KATWA: Mr President, I refer to tab 19, and it is audio  
7 KEN-D11-0013-0067, and I would like to start with time stamp 49.21 to 53 -- 53.06.

8 Q. Mr Witness, I request to give you a transcript and translation of the audio so  
9 that you can follow as we play the audio.

10 MR KIGEN-KATWA: I request the court officer to assist to hand over that  
11 document.

12 PRESIDING JUDGE EBOE-OSUJI: We have ten minutes left, in fact, less than ten  
13 minutes. I think eight minutes or so.

14 MR KIGEN-KATWA: Mr President, the -- I would really like to play the audio and  
15 cross-examine him in the same instance. And I would be happy to start with it  
16 tomorrow. I am aware that there was a pending issue of witnesses, and the  
17 remaining minutes could be spent on that.

18 PRESIDING JUDGE EBOE-OSUJI: Do you not have any other areas you will be  
19 getting to you might fit in within the time left?

20 MR KHAN: Your Honour, can I just clarify? There were discussions over the  
21 break between the Prosecution and the Defence regarding next week, and I  
22 understand, and the Prosecution can speak to it, but for one of their witnesses,  
23 clarity would be useful. And I think there's only about seven or eight minutes, so  
24 maybe the time could be usefully spent clarifying that issue for the scheduling for  
25 next week. Your Honour, I think that was the point my learned friend was alluding

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1 to.

2 PRESIDING JUDGE EBOE-OSUJI: I know that that's what he was alluding to. But  
3 we're more interested in the testimony of the witness on stand. So if there are some  
4 more questions that be explored at this time, we should do that if that's going -- if  
5 that's not easily done, then we will understand that.

6 MR KIGEN-KATWA: I could do one subject, a separate subject, Mr President.

7 PRESIDING JUDGE EBOE-OSUJI: Yes, let's get on with that.

8 MR KIGEN-KATWA:

9 Q. Now, Mr Witness, you said that one of the concerns you have about the way  
10 Mr Sang conducted his programmes is that he was urging people not to allow  
11 creation of a constituency in urban areas. Did you say that, Mr Witness?

12 A. Yes, your Honour.

13 Q. Mr Witness, you recall that in the history of Kenya the -- a commission was  
14 created called the Ligale Commission in 2010 to discuss rearrangement of the  
15 boundaries, constituency boundaries, both constituency and local authority  
16 boundaries, Mr Witness?

17 A. Yes, your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: Can you spell the word?

19 MR KIGEN-KATWA: Ligale is L-I-G-A-L-E.

20 Q. Mr Witness, that was in the year 2010, isn't it?

21 A. Yes, your Honour. I don't remember the year.

22 Q. But you would confirm generally it was after the 2007 elections, isn't it?

23 A. I don't remember, your Honour.

24 Q. Okay, Mr Witness. So we can rest the subject on the understanding that you  
25 do not recall whether it was before or it was after the elections, you're not sure of

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1 time, Mr Witness? It's okay if you can't remember.

2 A. Your Honour, I only say that I remember in 2007 it was that the constituencies  
3 was to be divided before the election of 2007, not after the election of 2007.

4 Q. At that circumstance, was there any national movement to change the  
5 boundaries, or was it just an idea that Sang was playing at the station?

6 A. It was proposed by the government, your Honour. It was only reactions that  
7 Mr Sang was giving to the people, your Honour, after the announcement of the  
8 government.

9 Q. So it is your testimony that it was a national issue? Everybody was  
10 discussing it?

11 A. Yes, your Honour.

12 Q. And you said this was also an issue that was featured in the Lene Emet  
13 programme?

14 A. Yes, your Honour. Not in Lene Emet only. Even people were invited also,  
15 to some politicians and some Kalenjin learned people were invited to -- to let people  
16 know about how the boundaries will be subdivided, your Honour.

17 Q. And even taking the format of Lene Emet programme, people would call in,  
18 others would visit a station, and they would express their positions about the -- what  
19 they would prefer by way of rearrangements of the boundaries, isn't it, Mr Witness?

20 A. Yes, your Honour.

21 Q. And you would agree that there were people supporting creation, various  
22 varieties of changes of the constituency boundaries, Mr Witness, isn't it?

23 A. There were many people, because many constituencies were bigger than the  
24 others. People were supporting that it should be subdivided, your Honour.

25 Q. And so it was a national debate all over, isn't it, Mr Witness?



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1 A. Yes, your Honour, I agree.

2 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, look at the clock.

3 MR KIGEN-KATWA: Mr President, I can stop there and I can confirm that subject  
4 is done. I can come back to the audio tomorrow.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you. We will now excuse the witness  
6 from the stand for now and discuss the outstanding logistical question that you had  
7 broached.

8 The witness, you will be excused for the day. We will welcome you back on the  
9 stand tomorrow. Thank you.

10 Can the blinds come down, please.

11 \*(Closed session at 3.57 p.m.) (Reclassified into Open session)

12 THE COURT OFFICER: We are in closed session, your Honours.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please escort the witness from the  
14 courtroom. Thank you.

15 (The witness stands down)

16 PRESIDING JUDGE EBOE-OSUJI: We'll go back to open session.

17 (Open session at 3.58 p.m.)

18 THE COURT OFFICER: We are in open session, your Honours.

19 PRESIDING JUDGE EBOE-OSUJI: Thank you. Since we all have our earpieces  
20 and microphones, while the blind is going up is there anyone who is going to report  
21 on where things stand about scheduling? Mr Garcia?

22 MR GARCIA: Yes, your Honour. Just briefly, Mr Steynberg spoke about this  
23 whole issue and the issue is basically whether we have Witness P-464 come down or  
24 not and start testifying.

25 PRESIDING JUDGE EBOE-OSUJI: That's the expert?

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1 MR GARCIA: Exactly, your Honour, that's the expert. What we have right now is  
2 we have witness P-128 who is waiting, and he's here in The Hague and so he's ready  
3 to start testifying. The question is when would Witness 128 start?  
4 The way things are progressing, I'm not sure, perhaps Mr Kigen-Katwa can give us  
5 more precisions on this, but it seem like he'll be finished tomorrow I imagine. If  
6 Defence counsel, Mr Khan, starts tomorrow in the last session, I think from what I  
7 understood of the conversation is Mr Khan would take three days to cross-examine  
8 this witness, which would put us to Wednesday approximately. If we start out  
9 with Witness 128 on Wednesday, we'll have we've estimated one day for  
10 examination in chief, that's Wednesday. Thursday presumably would be for  
11 cross-examination. I'm not sure how much time both Defence counsel will need for  
12 him.  
13 But what will happen obviously is that Mr -- the witness, the expert witness will  
14 have come here, and we might not be able to even start his testimony, or if we start,  
15 then it's going to have to be cut in two.  
16 The thing is that he's obviously a professor at the university, and every time he  
17 comes down here, he needs notice of a week. And he has to cancel obviously all his  
18 obligations, which are numerous, at the university.  
19 We spoke to Defence counsel, and what we would be suggesting is that the expert  
20 witness testify at the start of the next session in one turn, in one go as is it,  
21 examination in chief and the cross-examination.  
22 I understand that Defence counsel would need two to three days. Maybe Defence  
23 counsel will correct me on that. But in all it could take three or four days, his  
24 testimony. So clearly even if we do get to Witness 464, we will not be able to finish  
25 him in this session.

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1 PRESIDING JUDGE EBOE-OSUJI: That is the understanding of all counsel?

2 MR KHAN: Indeed, it is.

3 (Trial Chamber confers)

4 PRESIDING JUDGE EBOE-OSUJI: In the circumstances it is best not to invite the  
5 expert witness for this segment, so your agreed understanding seems reasonable to  
6 put his testimony over to the next segment.

7 MR GARCIA: Thank you, your Honour. We will advise the expert witness.

8 PRESIDING JUDGE EBOE-OSUJI: But still as regards 128, in view of the fact that  
9 we will stop cold on the 31st, all parties must make all efforts to fit in their questions  
10 within that time. Cut out what we don't really need and go to the crux of the  
11 matter. Thank you.

12 MR KHAN: Your Honour, we will endeavour to do that. Just for the record, there  
13 was one additional matter that I discussed with Mr Steynberg at his request. It was  
14 agreed to and I think it's right to record it. Mr Steynberg asked our understanding  
15 of our -- for our understanding of the witness protocol when it comes to experts.  
16 And we made it clear we don't say that it should apply to experts. They are in a  
17 different category. So I thought that view of the Defence should be recorded,  
18 because I think it has implications to the Prosecution regarding how they deal with  
19 the expert and what happens on his arrival. So, your Honour, that was what I  
20 wished to raise and put into the record.

21 PRESIDING JUDGE EBOE-OSUJI: And Prosecution, any reactions?

22 MR GARCIA: I'm grateful to counsel for the Defence to raise that. Indeed, that  
23 was agreed upon by Defence counsel from both teams and Mr Steynberg and the  
24 Prosecution.

25 PRESIDING JUDGE EBOE-OSUJI: The point is noted. We will now rise and

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1 reconvene tomorrow at 9.30.

2 THE COURT USHER: All rise.

3 (The hearing ends in open session at 4.03 p.m.)

4 RECLASSIFICATION REPORT

5 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September

6 2013, and the instructions in the email dated 9 May 2014, the version of the transcript

7 with its redactions becomes Public.

8