

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 and Joshua Arap
5 Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion and Judge Robert
7 Fremr
8 Trial Hearing
9 Thursday, 23 January 2014
10 (The hearing starts in open session at 9.35 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. The Situation in the Republic
17 of Kenya, in the case of The Prosecutor versus William Samoei Ruto and Joshua
18 Arap Sang, ICC-01/09-01/11.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 The Prosecution appearances I see remain the same.
21 MR STEYNBERG: The same, your Honour, except I'm back this morning.
22 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?
23 MR KHAN: Mr President, good morning. There is no change to the Defence team
24 of Mr William Ruto.
25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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- 1 MR KIGEN-KATWA: Mr President, there is no change in Mr Sang's Defence.
- 2 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 3 MR KIGEN-KATWA: Thank you.
- 4 PRESIDING JUDGE EBOE-OSUJI: I see there is a change in the victims' counsel
5 representation?
- 6 MR NDERITU: Yes. Good morning, Mr President, your Honours. Today I am
7 back here, Wilfred Nderitu, counsel for the Victims, assisted by Mr Orchlou
8 Narantsetseg and Ms Caroline Herzig. Thank you.
- 9 PRESIDING JUDGE EBOE-OSUJI: Welcome back, Mr Nderitu.
10 And Mr Bourgon?
- 11 MR BOURGON: Good morning, Mr President. No change in the representation of
12 Witness 356. Thank you.
- 13 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
14 Mr Kigen-Katwa, please continue.
- 15 And, Witness, good morning and welcome back.
- 16 WITNESS: KEN-OTP-P-356 (On former oath)
- 17 QUESTIONED BY MR KIGEN-KATWA: (Continuing)
- 18 Q. Good morning, Mr Witness.
- 19 A. Good morning, your Honour.
- 20 Q. Now, Mr Witness, in your testimony you generally explain that when I
21 played to you an audio yesterday also you said that, much as you noticed that Mr
22 Sang was pleading for peace before elections, in fact there was no violence before the
23 elections. Is that your position still, Mr Witness?
- 24 A. There was no -- any violence before the elections, your Honour.
- 25 Q. And, Mr Witness, in your estimation when -- about when did the violence

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1 end?

2 A. It ended in 2008, your Honour.

3 Q. I understand, Mr Witness. I mean, could I put it to you that it was
4 approximately 15 January? By 15 January violence was over?

5 A. Your Honour, in my home village there was no violence by 5 January, your
6 Honour.

7 Q. Thank you very much, Mr Witness. The other thing I wish to clarify, Mr
8 Witness, so that I don't need to play the audio before elections where Mr Sang
9 pleaded for peace, please could you confirm that from what you heard Mr Sang
10 saying at the station he actually asked people to maintain peace before elections?

11 A. I confirm, your Honour.

12 Q. Now, Mr Witness, thank you for that. It was further your testimony that
13 some time when there was violence, Mr Sang and Mr Ruto were at the station - at
14 Kass FM station - pleading for peace and, according to you, violence ended when
15 they did that. Is that what you said, Mr Witness?

16 A. Yes, your Honour.

17 Q. You also said, Mr Witness, that you had heard Mr Ruto make a plea for peace
18 at Citizen -- was it Citizen Radio, or Citizen TV?

19 A. It's Citizen Television, your Honour.

20 Q. Now, Mr Witness, I want to play an audio of what exactly Mr Ruto said at
21 Citizen TV and please confirm me that's what you heard. Thank you.

22 MR GARCIA: I'm sorry, but could we have the ERN or the reference number of the
23 audio or video that's going to be played?

24 MR KIGEN-KATWA: It is KEN-D11-0013-0058. And I'm sorry I missed that, to
25 read that ERN number.

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1 MR GARCIA: Is there a tab as well in the bundle?

2 MR KIGEN-KATWA: It is -- Mr President and your Honours, it is an audio in
3 English and so we didn't make out a transcription, neither did we -- it's not in the
4 tab. Mr President, it is about a minute long audio, so I'll play the whole of it.

5 PRESIDING JUDGE EBOE-OSUJI: It is -- it is audio, not video?

6 MR KIGEN-KATWA: It is audio, Mr President.

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

8 MR KIGEN-KATWA:

9 Q. Mr Witness, may I ask you the first question being do you recognise the voice
10 of the person speaking?

11 A. Honourable William Ruto, your Honour.

12 Q. And, Mr Witness, is that the audio you heard being broadcasted from
13 Citizen?

14 A. I can't confirm, your Honour, because what I heard was in the television.
15 And I can't remember the exact words which honourable Ruto used that time. So I
16 can't confirm, your Honour.

17 Q. Did you say you can't remember the words that Honourable Ruto used at that
18 time?

19 A. Your Honour, I can't say it was the exact date because I don't remember how
20 many days William Ruto came to the station to speak, but if it was the one which
21 was in Citizen TV maybe I could have recognised, your Honour.

22 MR GARCIA: Just one clarification if I may. At line 15 I think the witness said, "I
23 can't confirm" and not "can." I think that's an error.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, before you proceed, if you
25 looked at tab -- sorry, line 8 where the audio was played, it merely says "Audio

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1 recording played in open court." The text of that does not appear. Now, I
2 understand there is a Court policy adopted before this case and used in other cases
3 that audio and video are not transcribed on the record. One could see a practical
4 reason for that. Sometimes this could be very long. Other times they could be in a
5 language that is foreign to the language or languages of the court.

6 But we cannot be wedded to a certain technicality when the reason for a certain
7 policy may not apply. In this instance, the audio you played is very short. We
8 should be able to get it on the record. What can be done is you, Mr Kigen-Katwa,
9 can repeat yourself what we hear on the audio so that we have the text of the audio
10 on the record.

11 MR KIGEN-KATWA: I'm obliged to you, Mr President, and I request to do that
12 through the witness in terms of what he heard.

13 PRESIDING JUDGE EBOE-OSUJI: Why don't you just read out the thing? It might
14 be more straightforward. And the Prosecution, they will I'm sure hold you to it if
15 they think you've misread.

16 MR KIGEN-KATWA: Mr President, we have not transcribed the audio and
17 that's -- Mr President, I had a few questions that I intended to ask the witness in
18 consideration of him having heard the audio. If I could go through those questions
19 and if there is need still for me to have that on record, I could happily do that, Mr
20 President.

21 PRESIDING JUDGE EBOE-OSUJI: There is a need. There is a need and that's
22 why that should not be too difficult, is it?

23 MR KIGEN-KATWA: No.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Just the tape is played, it's paused,
25 you read out what we heard, and then resumes, you'll read out until we get the text

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1 on the record. You can even have one of your colleagues do it.

2 MR KHAN: Mr President, with your leave, another way perhaps of doing it is that
3 the tape can be played and stopped every so often, the transcribers in the court can
4 transcribe it in bite-sized pieces and we can just verify, or Mr Kigen -- Mr
5 Katwa-Kigen can verify and all parties if that accords to what's been played.

6 PRESIDING JUDGE EBOE-OSUJI: What I am trying to do, I'm trying to get around
7 a policy.

8 MR KHAN: A policy, indeed.

9 PRESIDING JUDGE EBOE-OSUJI: Yes. I've also been told that it's logistically
10 better if what I suggested is done because of the need for interpretation.

11 MR KIGEN-KATWA: If the court officer could assist?

12 PRESIDING JUDGE EBOE-OSUJI: What seems to be the problem?

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

14 MR KIGEN-KATWA: Mr President, I have the whole text with me. If I could read
15 it and then we can play it just to counter-check what is --

16 PRESIDING JUDGE EBOE-OSUJI: You do have the text?

17 MR KIGEN-KATWA: Yes, I have it with me, sir.

18 PRESIDING JUDGE EBOE-OSUJI: All right, okay. Play the video -- I'm sorry, the
19 audio first and then you read the text.

20 MR KIGEN-KATWA: Obligated, Mr President.

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

22 MR KIGEN-KATWA:

23 Q. Mr Witness, this is what the text says:

24 "ODM believes that the loss of life, the destruction of property that is going on in our
25 country is unnecessary, unwarranted and should stop immediately. Urgent steps

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1 should be taken. We are prepared as ODM to make urgent steps towards resolving
2 this issue. We just hope that the other side realises the urgency with which the
3 situation in our country needs to be dealt with."

4 Mr Witness, you recall that's what you heard in the audio, isn't it?

5 A. Yes, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Can you review the text?

7 MR KIGEN-KATWA: I'll go back to it again, Mr Witness. Yes, I can see the word
8 "English" was inserted at line 18. That shouldn't be there, Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: Should it also say "warranted" or
10 "unwarranted"? I don't know.

11 MR KIGEN-KATWA: It is "unwarranted," Mr President. "... unnecessary,
12 unwarranted and should stop immediately," and then "... that we hope the other
13 side realises the urgency with which the situation in our country needs to be dealt
14 with and that urgent steps should be taken."

15 PRESIDING JUDGE EBOE-OSUJI: All right. Let's start again, Mr Kigen-Katwa.
16 Can you read it again beginning -- from the beginning. "ODM believes ...", can you
17 start from there?

18 MR KIGEN-KATWA: Yes, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: And read slowly.

20 MR KIGEN-KATWA: I will:

21 "ODM believes that the loss of life, the destruction of property that is going on in our
22 country is unnecessary, unwarranted and should stop immediately. Urgent steps
23 should be taken. We are prepared as ODM to make urgent steps towards resolving
24 this issue. We just hope the other side realises the urgency with which the situation
25 in our country needs to be dealt with."

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1 PRESIDING JUDGE EBOE-OSUJI: Prosecution, do you have any difficulty with the
2 text as read out, that that's what was played in the audio?

3 MR GARCIA: No, your Honour. I have no difficulty with that. It seems that's
4 what was played. But in the future simply I've noticed that the jurisprudence of
5 other Chambers has been to only admit audio if it has a proper transcript and a
6 translation if necessary for the Court. This was the case in Katanga as well as in the
7 Lubanga case.

8 So I understand this is a short, a shortcut, a short brief extract from an audio, but in
9 the future it would be preferable if we did have a transcript.

10 PRESIDING JUDGE EBOE-OSUJI: The point is noted and we will review that
11 practise of the other Chambers and see what they did and why.

12 Mr Kigen-Katwa, proceed. Now you can ask your questions of the witness. The
13 point was to get the text on record.

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

15 Q. Now, Mr Witness, could you confirm that from what you heard, Mr Ruto is
16 talking on behalf of ODM, Mr Witness?

17 A. Yes, your Honour.

18 Q. Mr Witness, you will confirm that nowhere does he say he's speaking on
19 behalf of Kalenjin, isn't it?

20 A. Yes, your Honour.

21 Q. Now, Mr Witness, you also said that Mr Ruto went to Kass FM and
22 made -- and pleaded for peace, isn't it?

23 A. Yes, your Honour.

24 Q. I would like to play you a different audio, which should be what was
25 broadcast at Kass FM, and I will ask you to comment on it?

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1 For the court record it is MFI-T-D09-00089 and it is at tab 15. Mr President, we are
2 playing the entire tape. It should be about 30 seconds, like the other one. The
3 other one was 34 seconds. Sorry, I'm told it is 2 minutes and 17 seconds.

4 (Playing of the audio excerpt MFI-T-D09-00089)

5 MR KIGEN-KATWA: I would ask the assistance of the court officer to assist us
6 with the transcript and translation.

7 Q. Now, Mr Witness, as the exact transcription and translation of that document
8 is being given to you, could you confirm that is the peace message you said was
9 made by Mr Sang and Mr Ruto that you said you heard at Kass FM?

10 A. It is, your Honour.

11 Q. Thank you very much, Mr Witness. And, Mr Witness, you confirm this was
12 approximately 1 January 2008?

13 A. I'm not sure of the date, but it is the message that William Ruto gave at Kass
14 FM, especially to the Kalenjin community, your Honour.

15 Q. Mr Witness, I can understand if you can't remember because of passage of
16 time, but are you in a position to give us a rough estimate of the timeframe? When
17 approximately, when could it be?

18 A. Before 5 January, your Honour.

19 Q. Before 5 January. Thank you very much.
20 And would you confirm if you heard it more than once, or you heard it only once,
21 Mr Witness?

22 A. I heard him live at Kass FM, your Honour.

23 Q. I understand, Mr Witness. Well, I understand that you are saying you heard
24 it being conveyed to you live, but could you recall if you heard it once, or could it
25 have been replayed?

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

2 Q. And, Mr Witness, when you heard it, was it about one day after election, two
3 days after elections, or do you have an idea? I know you say it couldn't be beyond 5
4 January.

5 A. Some days after election, your Honour, and some things after the fights that
6 erupted in Kenya, your Honour.

7 Q. Now, Mr Witness, so that the rest of court is with us, I will read out to you the
8 English translation of what you heard and request you to confirm if that is correct.

9 PRESIDING JUDGE EBOE-OSUJI: Before you do, is line 9 correct in the answer?
10 Witness, you're recorded as answering, "Some days after election, your Honour, and
11 some things after the fights that erupted in Kenya."

12 A. Your Honour, I have said -- I said, "Some days after the election and some
13 days also after the fight had erupted in Kenya."

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 MR KIGEN-KATWA:

16 Q. Now, Mr Witness, confirm this is what Mr Ruto who you said was
17 accompanied by Mr Sang said:

18 "William Arap Ruto of Eldoret North, I would like to take this opportunity to wish
19 the Kalenjin listeners and the people of the nation of Kenya a blessed new year and
20 every success in the New Year that has God's blessings. I would like to tell our
21 Kenyan Kalenjin listeners that there is serious insecurity in the country. There are
22 issues surrounding the elections that have been very complicated.

23 As ODM people, we are trying to talk so that we can solve those issues in a peaceful
24 manner. We continue to talk with the people in the nation of Kenya and those from
25 other countries. Gordon Brown, the prime minister of Britain, talked with

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1 Honourable Raila. Also Honourable Raila talked with many other people from
2 different countries. We are trying to find a just solution to the issues that transpired
3 in the elections.

4 I would like to appeal to the Kalenjin people wherever they are and the people of
5 Kenya to persevere and renounce violence. Let us desist from any action that may
6 ruin peace in our country Kenya so that we may find, we may find a peaceful
7 solution to these issues and that every voter in the just concluded elections may find
8 peace. We are trying to find a peaceful solution."

9 PRESIDING JUDGE EBOE-OSUJI: Wait, wait, wait. Did he say "may find peace, "
10 or "may find justice"?

11 MR KIGEN-KATWA: I'm sorry, Mr President:

12 "... may find justice. We are trying to find a peaceful solution on behalf of the
13 people and all of us who voted so that -- so we would like to appeal to all people. I
14 have heard that there is much violence and insecurity in many areas in Kenya, in
15 Eldoret, in Kericho, in Sotik, in Kisumu, Busia, Mombasa, Nairobi, and many other
16 places.

17 PRESIDING JUDGE EBOE-OSUJI: Can you spell?

18 MR KIGEN-KATWA: The spellings.

19 PRESIDING JUDGE EBOE-OSUJI: Good.

20 MR KIGEN-KATWA: I think Eldoret, everybody has that. Kericho is
21 K-E-R-I-C-H-O, Sotik is S-O-T-I-K. Kisumu is familiar. Busia is B-U-S-I-A.
22 Mombasa and Nairobi is familiar:

23 "We appeal that, please, let us exercise restraint. Let there be peace in this land.
24 We do not want to use unlawful methods. We want to use peaceful means until we
25 find justice. So I would like to appeal to the Kalenjin people wherever they are and

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1 all the people of Kenya that we refrain from violence and pursue peace so that our
2 country may prosper.

3 So we would like to appeal for patience and beseech the Kalenjin people and all
4 people of Kenya to live in peace and wait as we seek solution to the political
5 problems of our country in a peaceful manner."

6 And, Mr President, that is in KEN-D09-0024-0013 to 0014.

7 Q. Mr Witness, could you kindly confirm that that's a fair translation of what
8 you heard in Kalenjin?

9 A. It's a fair translation, your Honour.

10 Q. Now, Mr Witness, you say Mr Sang had accompanied Mr Ruto when this plea
11 was made. Could you confirm that you've not heard Mr Sang's voice anywhere on
12 this clip?

13 A. Your Honour, I didn't say that Mr Sang accompanied Mr Ruto. I said Mr
14 Sang was in Kass FM when Mr Ruto went to Kass FM, your Honour.

15 Q. Thank you, Mr Witness. Could you then confirm that you do not hear Mr
16 Sang's voice anywhere in that clip?

17 A. Your Honour, not only Mr Sang's voice, but there is no any voice of any Kass
18 FM presenter who was hosting Mr Ruto at that time, your Honour. So I cannot say
19 that Mr Sang was not there, because there is no any other presenter who has been
20 given that he was hosting Honourable Ruto at that time, your Honour. And I still
21 maintain that at that time it was Mr Sang who was in the studio when Mr Ruto went
22 to Kass FM, your Honour.

23 PRESIDING JUDGE EBOE-OSUJI: Right. So let us understand what you've just
24 said. When you say not only the voice of Mr Sang did you not hear, but you did not
25 hear the voice of any other presenter who might have introduced Mr Ruto, are you

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1 referring to what happened at that time, what you heard on Kass FM at that time, or

2 are you referring to the audio that has just been played to you in the courtroom?

3 THE WITNESS: Your Honour, I'm referring to the audio.

4 PRESIDING JUDGE EBOE-OSUJI: That has just been played in the courtroom?

5 THE WITNESS: Yes, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you.

7 MR KIGEN-KATWA:

8 Q. And in your own words, Mr Witness, why do you come to the conclusion that
9 Mr Sang and Mr Ruto were at the station when this audio was being broadcasted?

10 A. Your Honour, I can say this was the audio, because I remember that Mr Sang
11 was the one who was welcoming Mr Ruto. And he had earlier told the Kass FM
12 leaders -- listeners that Mr Ruto is going to speak with the Kalenjin community on
13 Kass FM, your Honour.

14 Q. Now, Mr Witness, okay, we'll come back to that. Let's just clear a few issues
15 from --

16 MR GARCIA: Your Honour, if I may, I think that it's a bit unfair for the witness in
17 this circumstance, I understand where my colleague from Defence is going, but it's
18 only a clip of 2 minutes 17 seconds, so clearly the whole clip has not been played for
19 the witness. I understand that Defence counsel has access to these clips. And
20 perhaps it would be best if we could put the entirety of what was stated on that day
21 or what happened on that day so that the questions can be put to the witness and it
22 can be fair for him.

23 If we're asking him simply "Do you hear the voice of Mr Sang, because that's what
24 you've said in the past," but it doesn't appear, this is only 2 minutes 17 seconds of it.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Garcia, again, it looks like that witness didn't

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1 need that intervention from you. The witness has made it very plain what he's
2 saying. I think we understand his point.

3 MR KIGEN-KATWA:

4 Q. Now, Mr Witness, you confirmed that, you've already confirmed that it was
5 played some time before 5 January, isn't it, 2008?

6 A. Yes, your Honour.

7 Q. Now, could you confirm that in the audio clearly Mr Ruto is speaking on
8 behalf of ODM?

9 A. Yes, your Honour. He was speaking on behalf of ODM. And, your Honour,
10 I would like to say that I do not -- we have many press conferences were made by
11 ODM after the post-election violence. And I -- I cannot say this is the statement, the
12 whole statement which Honourable Ruto made, because I can't remember how
13 many times he made statements on behalf of ODM, your Honour.

14 Q. Mr Witness, much as you say Mr Ruto could have made many statements,
15 you still remain in the position you had confirmed a moment ago when I asked you
16 that you actually heard this specific one, even if there are many others that he may
17 have made, isn't it?

18 A. I remember parts of words that I heard, but I'm not sure that this is the one I --
19 I listened to. But I remember Honourable Ruto calling for peace among the
20 Kal -- especially among the Kalenjin community, that's the parts that I heard, but I'm
21 not sure if this is the one I listened to or I confused it with another one with the same
22 words, your Honour.

23 Q. So, Mr Witness, it is possible that you have mixed up the audios you heard or
24 what Mr Sang broadcasted, isn't it?

25 A. Your Honour, I'm, I'm not sure if this is the audio of which Mr Sang was

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1 playing, because I have not seen Mr Sang welcoming Mr Ruto to the studio, your
2 Honour.

3 Q. Thank you, Mr Witness. I promise you to come back to that issue of Mr Sang
4 inviting Mr Ruto and whether the tape is complete. But if you could just answer a
5 few more questions for me on, this what you've just heard.

6 The first, the other thing other than that he spoke for ODM is that in fact he says that
7 we are talking with the people of Kenya, isn't it, Mr Witness?

8 A. Yes, your Honour.

9 Q. Mr Witness, when he says he's talking with people of Kenya, you confirmed
10 that nowhere in the audio does he say, "We are talking with the Kikuyu," isn't it?

11 A. No, your Honour.

12 Q. Mr Witness, you confirmed that Mr Ruto says, "I appeal for peace from you
13 people of Kalenjin and all people of Kenya," isn't it?

14 A. Yes, your Honour.

15 Q. Mr Witness, could you confirm that nowhere did you hear Mr Ruto saying, "I
16 order you people of Kalenjin to stop violence"?

17 A. Your Honour, I have -- I confirm I have not heard it and I have never stated in
18 my statement that Mr Ruto made an order, your Honour.

19 MR KIGEN-KATWA: Mr President, at this point I would pray to be allowed to
20 have this audio produced as an exhibit together with the transcription and the
21 translation.

22 PRESIDING JUDGE EBOE-OSUJI: Any objection?

23 MR GARCIA: Yes, the Prosecution objects. Initially I think the witness has stated
24 that he confirmed and then afterwards he seems to revise his decision. He says he's
25 not certain. On that basis the Prosecution submits that there is no evidence

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1 regarding the authenticity of this audio recording and that, therefore, it should only
2 be given an MFI number.

3 Also, your Honour, one other concern of the Prosecution is that we've only
4 been -- the witness has only been played 2 minutes and 17 seconds of an audio, and
5 the witness clearly expressed the desire to listen to more of it to clearly establish
6 whether, yes or no, it is the same, it is the same broadcast that he heard at the time.

7 So that's also a major concern for the Prosecution, and that's one of the reasons why
8 we believe the Chamber should only give a mark for identification number.

9 The Defences will be free afterwards in its own case to bring someone to
10 demonstrate and to prove the authenticity of that recording, that it is what it
11 purports to be.

12 (Trial Chamber confers)

13 PRESIDING JUDGE EBOE-OSUJI: The Chamber will admit the document as the
14 next exhibit in the Sang Defence case. The Chamber has confidence that the
15 witness's answer had mapped out the issue to be debated at a point of use of this
16 material if those issues remain pending.

17 THE COURT OFFICER: Thank you, Mr President. The audio KEN-D09-0024-0012
18 will bear the following number, EVD-T-D11-0024, and will be known as Sang
19 Defence exhibit number 24. The transcription KEN-D09-0024-0013 will bear the
20 following number, EVD-T-D11-00025, and will be known as Sang Defence exhibit
21 number 25. Both items will be registered as public.

22 MR KIGEN-KATWA: Mr President, we would also pray that item
23 KEN-D11-0013-0058, being the first audio I played, be marked for identification.

24 MR GARCIA: Your Honour, the Prosecution objects on the same basis. The
25 witness clearly stated, and it's page 5, lines 23, 24, that he can't confirm that that was

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1 the same recording that he had heard at the time on Citizen TV. So on that basis the
2 Defence has not established the authenticity of that recording, and in our opinion it
3 should be given only an MFI number.

4 PRESIDING JUDGE EBOE-OSUJI: You then agree with the Defence counsel. He
5 only asked for the material to be marked for identification. So they will be marked
6 for identification.

7 THE COURT OFFICER: Thank you, Mr President. The audio KEN-D11-0013-0058
8 will bear the following number, MFI-T-D11-00026 and will be registered as public.

9 PRESIDING JUDGE EBOE-OSUJI: Line 3, I actually did not say "don't." I said
10 "then." "So you then agree with the Defence counsel."

11 Move on, Mr Kigen-Katwa.

12 MR KIGEN-KATWA:

13 Q. Mr Witness, you're clearly quite knowledgeable on Kenya, on Kenyan issues
14 having told us about a number of things. You recall that in fact there was a time
15 when the media had a fight with government of a ban of live coverage, do you, Mr
16 Witness?

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

18 Q. Do you recall that there was a time immediately after the President Kibaki
19 had been sworn in when there was a ban on media making live coverage of news
20 and other news items?

21 A. I'm not aware, your Honour.

22 Q. You have no knowledge whatsoever that there was a ban on live coverage?

23 A. I didn't hear, your Honour.

24 MR KIGEN-KATWA: Mr President, I'll leave that issue there. I will take it up with
25 another witness.

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1 PRESIDING JUDGE EBOE-OSUJI: How much longer do you have? Have you
2 come to the end of your cross-examination?

3 MR KIGEN-KATWA: No, Mr President, I'm sorry.

4 PRESIDING JUDGE EBOE-OSUJI: Can you give us an idea of how much longer
5 you propose to go?

6 MR KIGEN-KATWA: It is possible I will take this session and the next one, Mr
7 President. I will cut it as short as possible, Mr President.

8 PRESIDING JUDGE EBOE-OSUJI: Proceed.

9 MR KIGEN-KATWA: Thank you.

10 Q. Now, Mr Witness, you said you have a very clear recollection of Mr Sang
11 having invited Mr Ruto to the station and giving him a chance to express himself,
12 isn't it? And that's when you said after his broadcast violence subsided?

13 A. Yes, your Honour.

14 Q. Now, I want to play an audio and then I will ask you a few questions.

15 Mr President, I am referring to a Prosecution document at tab 12 that is

16 KEN-OTP-0075-0042 and I propose to play time stamp 000 seconds to 1 minute 38
17 seconds. Mr President, I will use the English translation which is at tab 13, and with
18 the assistance of court officer I would request to give the witness a copy of the
19 translation. The translation is KEN-OTP-0106-0312.

20 Mr Witness, please listen.

21 (Playing of the audio excerpt KEN-OTP-0075-0042)

22 Q. Mr Witness, that audio is exactly what you are describing it -- describing, isn't
23 it?

24 A. No, your Honour. This is a total different day that Honourable Ruto went to
25 Kass FM, your Honour.

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1 Q. What is the difference between what you adduced as evidence and this audio,
2 Mr Witness?

3 A. Your Honour, this audio was -- Ruto was there when the Kalenjin community
4 had requested through Kass FM that we would like to hear the voice or to hear or
5 William Ruto to come to Kass FM, but what I was saying is that William Ruto was
6 making a statement put on Kass FM and in Citizen TV. It was not that it was a
7 request from the people. This was played late after the post-election violence, your
8 Honour.

9 Q. Now, Mr Witness, let's just confirm, first of all, what you've just said. You
10 have the recollection that Mr Ruto's visit to the station is as a result of requests made
11 by people that he goes and addresses them from Kass FM, is that what you are
12 saying?

13 A. Yes, your Honour.

14 Q. Mr Witness --

15 PRESIDING JUDGE EBOE-OSUJI: And in relation to which broadcast do we have
16 that circumstance you just described and the witness spoke about, that is, people
17 requesting that he attend the station and address them? Was it in relation to the
18 transcript we are looking at now or in relation to the other broadcast he's talking
19 about? Can we clarify that?

20 MR KIGEN-KATWA: Mr President, yes, we could clarify that. And with the
21 permission of the Chamber, may I read the English translation of what we just
22 heard, after which that question will immediately get answered.

23 Q. Mr Witness, this is what Mr Ruto said --

24 PRESIDING JUDGE EBOE-OSUJI: No, no, no. What I want is the witness's
25 answer. I don't know if I've assisted in muddling it up possibly. But the witness

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1 said that, answered your question and said definitely not the same thing he was
2 talking about.

3 MR KIGEN-KATWA: Mr President, that answer is exactly on the translation.

4 PRESIDING JUDGE EBOE-OSUJI: His answer, the witness's answer. Witness, all
5 right.

6 MR KIGEN-KATWA: May I ask him?

7 PRESIDING JUDGE EBOE-OSUJI: Again.

8 MR KIGEN-KATWA:

9 Q. Mr Witness, you say Mr Ruto went to the station because people had asked
10 that he goes there and addresses them from Kass FM, didn't you?

11 A. Yes, I said so, according to the audio, which is played now, your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: Good, which is played now. Thank you.

13 MR KIGEN-KATWA:

14 Q. And could you confirm this is what it says so that it goes on record, Mr
15 President:

16 "Joshua Sang" -- before that -- before I do that, Mr Witness, could you confirm how
17 many people do you hear in the audio?

18 A. I con -- I confirm Mr Joshua Sang, your Honour.

19 Q. Did you hear anybody else other than Mr Joshua Sang, Mr Witness?

20 A. Maybe you repeat the audio and then I'll listen to it very well?

21 Q. Could you recall if you heard the voice of Mr Ruto?

22 A. Yes, Honourable Ruto and Joshua Sang, your Honour.

23 Q. Thank you, Mr Witness. I will read:

24 "The Honourable William Samoei Araap Ruto, who is the member of parliament of
25 Eldoret North in Uasin Gishu district. He is also one of the leaders of the ODM,

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- 1 who are referred to as Pentagon. Today he is in the studio as you had requested
2 that you wanted him to come and to talk to you, because in the year after elections
3 you have not been able to talk to him. Today you get a chance through Kass so that
4 you can listen to what he has to say and ask all questions that you have and
5 especially on the one question that you wanted answered. He's here to answer that.
6 Welcome, Honourable."
7 And then William Ruto says this:
8 "Thank you very much, Arap Sang. I want to take this opportunity to greet all
9 Kalenjin people wherever they are. I would like to wish them a happy new year."
10 Then Sang says this:
11 "Thank you very much. There are people who are ready to listen to you,
12 Honourable. I even heard the people of America saying 'No sleep.' It will be
13 midnight there, but they say they will not sleep. They are ready to listen to you
14 until you finish. Then they can sleep. Let me welcome you to the studio today, the
15 first day this year. Like you said, happy new year. It is really a happy new year to
16 most people like you, like you said.
17 First, we want to thank you very much, because you are able to retain or hold on to
18 your seat of Eldoret North. The people of Eldoret had given you the seat for the
19 second or third time, because in the beginning it was difficult. There was a saying
20 that people said that in Eldoret North: No one goes back. Once is enough, but you
21 were able to obtain the seat."
22 Mr Witness, that's what you heard in Kalenjin, isn't it?
23 A. Yes, your Honour.
24 Q. Now, Mr Witness, you will confirm that in that audio Mr Ruto says "happy
25 new year," being the year 2008, isn't it?

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1 A. Yes, your Honour.

2 Q. You also confirm that on the face of it you can see Mr Sang saying this is the
3 first time that Ruto is going to the station, isn't it? I can see you are smiling, Mr
4 Witness.

5 A. Your Honour, Mr Sang said clearly that it was the first time for Honourable
6 Ruto to talk to the Kalenjin people and the first time for the Kalenjin people to talk to
7 Honourable Ruto, not that Honourable -- that it was the first time for Honourable
8 Ruto to address Kenyans or Kalenjins through Kass FM, your Honour.

9 Q. And, Mr Witness, so that I close that issue, you have no order yourself to
10 show that Mr Ruto had gone to Kass FM earlier than the date of this audio, isn't it?

11 A. Yes, your Honour.

12 Q. Now, I want you to look at the first page of that audio and that is
13 KEN-OTP-0106-0313. Can you see that, Mr Witness?

14 A. Repeat again, your Honour.

15 Q. Mr Witness, could you look at -- you were given two pages, isn't it?

16 A. Yes, yes, your Honour.

17 Q. I want you to look at the first page. The court officer will assist you. It is
18 the page with KEN-OTP-0106-0313. Can you see that, Mr Witness?

19 A. Yes, your Honour.

20 Q. Could you tell the Court what date it bears?

21 A. 20 March 2008, your Honour.

22 Q. And you would agree by 20 March 2008 violence had already disappeared,
23 isn't it?

24 A. Kenya was peaceful by then, your Honour.

25 MR KIGEN-KATWA: Mr President, that's all I wish to say on this document. I

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1 would like to have it produced as an exhibit. I'm sure Prosecution has no objection,
2 because it is their own document. I would like to have both the audio and the
3 translation and the transcription produced as exhibits.
4 MR GARCIA: Prosecution has no objection, your Honour.
5 PRESIDING JUDGE EBOE-OSUJI: The document will be received into the record
6 as the next in the Sang Defence exhibits, the audio and the transcript.
7 MR KIGEN-KATWA: And the translation, Mr President.
8 PRESIDING JUDGE EBOE-OSUJI: The audio and the transcript and its translation.
9 THE COURT OFFICER: Thank you, Mr President. The audio,
10 KEN-OTP-0075-0042, will bear the following number, EVD-T-D11-00027. The
11 transcript, KEN-OTP-0106-0312, will bear the following number, EVD-T-D11-00028.
12 The first item will be known also as Sang Defence exhibit number 27 and the second
13 item is Sang Defence exhibit number 28.
14 Could Mr Kigen-Katwa please repeat the ERN number of the translation of the
15 transcript?
16 MR KIGEN-KATWA: The translation is KEN-OTP-0075-0042, the transcription is
17 KEN-OTP-0075-0042 and the audio is KEN-OTP-0075-0042. Just a second, I'm sorry.
18 May I? May I?
19 THE COURT OFFICER: Okay, so the document KEN-OTP-0099-0531 will bear the
20 EVD number EVD-T-D11-0029. Thank you, Mr President. And also, sorry, this
21 item will be known as Sang Defence exhibit number 29.
22 PRESIDING JUDGE EBOE-OSUJI: Out of curiosity, Prosecutor, why do we have
23 two ERN numbers, one inside and then a different one at the foot of the page?
24 MR GARCIA: I think the first one, your Honour, refers to the ERN of the recording
25 itself, the audio. The second one is the ERN of the transcript of the translation itself.

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1 PRESIDING JUDGE EBOE-OSUJI: But if that's the case, we see that the translation
2 is not an audio. It also has an ERN. The same problem occurs in the translation.
3 We have 0042 ending in the body, and then the footer, the footer of the page is
4 different. It can cause confusion sometimes.

5 MR GARCIA: Your Honour, it's actually referring to the same one. When you see
6 evidence registration number 0075-0042, that's the audio, I presume, the original
7 piece of evidence. And at the bottom you have obviously a distinct ERN for the
8 transcript and another one for the translation, which are different ERNs.

9 PRESIDING JUDGE EBOE-OSUJI: And what is 0041 then?

10 MR GARCIA: I don't see the 0041. I have before me 016-0312, which is a
11 translation, and 016-0477, which is the transcript of the audio.

12 PRESIDING JUDGE EBOE-OSUJI: If you go to tab 12, go to tab 12. We have
13 evidence registration number ERN in the body of that page, the first page.

14 MR KIGEN-KATWA: Mr President --

15 PRESIDING JUDGE EBOE-OSUJI: Anyway, it needn't detain us, but --

16 MR GARCIA: Maybe counsel for Defence, were you referring to tab 13 or tab 12
17 just to --

18 MR KIGEN-KATWA: It's tab 13, Mr President.

19 MR GARCIA: And there is the reason for the confusion. 12 is a different ERN. 13
20 is the one we're speaking about. So there is no, there is no problem with the ERNs
21 at all. Tab 13 is referring to 0075-0042 as the original piece of evidence. And the
22 transcript is tab 14, and it's also referring to the same item of evidence. There is no
23 confusion. Tab 12 is referring to another item of evidence and I understand that
24 wasn't the audio that was played to the witness.

25 MR KIGEN-KATWA: Mr President, Mr Garcia is correct.

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1 PRESIDING JUDGE EBOE-OSUJI: That's correct?

2 MR KIGEN-KATWA: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: All right, sorry about that. Then let's continue.

4 MR KIGEN-KATWA:

5 Q. Now, Mr Witness, you said yesterday and the day before yesterday that Mr
6 Sang mobilised people to compose and constitute a council of elders. Did you say,
7 Mr Witness, that?

8 A. I didn't say he mobilised people, but I said he advised -- he advertised
9 through Kass FM, your Honour, and also he hosted people who came to teach the
10 community about the Kalenjin council of elders, your Honour.

11 Q. Now, Mr Witness, you also said that -- what was the timeframe you put to
12 this event, Mr Witness?

13 A. I said before the elections of 2007, your Honour.

14 Q. Okay, thank you. Before the elections of 2007.
15 Are you in a position to give an estimate of the time?

16 A. I am not sure about the month or the year, but it was before 2007, your
17 Honour.

18 Q. And if you say it is before 2007 you could be referring to the year 2006, Mr
19 Witness?

20 A. I'm not sure of the year, your Honour, but it was before 2007.

21 Q. And, Mr Witness, is it your testimony also that the council of elders was put
22 together with a view to assisting Mr Ruto in his election bid?

23 A. Your Honour, what I said is that in the past years, the Kalenjin community
24 didn't have the Kalenjin council of elders. And I say that in my own view it came
25 only because of political reasons of few people, your Honour.

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1 Q. Mr Witness, I thought you had very specifically said it was meant to assist Mr
2 Ruto. But feel free to change your position if you want to change.

3 MR GARCIA: Your Honours, I would like if Mr -- if Defence counsel is going to be
4 referring the witness to something he said in his testimony, that to be fair to the
5 witness, that the passage or the extract be reread to the witness so that if there is a
6 confrontation, the witness knows exactly what Defence counsel was speaking about.

7 PRESIDING JUDGE EBOE-OSUJI: That's a fair point, Mr Kigen-Katwa.

8 MR KIGEN-KATWA: Mr President, I will look for it as I proceed with other
9 questions. I'll come back to framing that question specifically.

10 PRESIDING JUDGE EBOE-OSUJI: You should have had it upfront going to see
11 what the witness said. Please proceed.

12 MR KIGEN-KATWA:

13 Q. Now, Mr Witness, do you recall some of the people that Mr Sang hosted?

14 A. For now I can't recall, your Honour.

15 Q. Could one of them be, you mentioned John Koech?

16 A. I can't recall who, who exactly, because they were there many times, your
17 Honour.

18 Q. I just want to suggest a few names if you recall, Mr Witness. What of
19 Augustin Cheruiyot, Mr Witness?

20 A. No, I didn't hear Augustin Cheruiyot, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: Spell. Koech, I can see that's probably easy to
22 get. But please spell these names when you use them.

23 MR KIGEN-KATWA: Koech is K-O-E-C-H and Cheruiyot is C-H-E-R-U-I-Y-O-T.

24 Q. Mr Witness, you also mentioned Jackson Kibor. Could he have also been
25 interviewed by any chance?

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1 A. There was a time whereby he was at Kass FM, but I'm not sure if it was
2 because of the Kalenjin council of elders, your Honour.

3 MR KIGEN-KATWA: And Kibor is K-I-B-O-R.

4 Q. You also said one John Seii. Did you say that, Mr Witness?

5 A. Yes, your Honour.

6 Q. Was he interviewed at the station on this issue?

7 A. Your Honour, the only thing that I can say is that I don't want to say what I'm
8 not sure of. I don't remember for now.

9 Q. And, Mr Witness, it is you heard -- and you said it was done repeatedly, isn't
10 it? It's not once, isn't it?

11 A. They came several times, because they were introducing the, the issue to the
12 Kalenjin community, your Honour.

13 Q. Now, Mr Witness, I want to play an audio for you of one of those instances
14 that Mr Sang hosted people interviewing and popularising the idea of composing a
15 council of elders. I want you to listen to it, and then I'll ask you a few questions.

16 MR KIGEN-KATWA: Mr President, that is at tab 19. The audio is
17 KEN-D11-0013-0067 and I propose to play time stamp 49.21 to 53.06.

18 MR GARCIA: Could we have a reference as to what pages? I understand the time
19 stamp, but --

20 MR KIGEN-KATWA: That would be at D11-0013-0219. I would request for the
21 assistance of the court officer to give the witness the transcript.

22 (Playing of the audio excerpt KEN-D11-0013-0067)

23 Q. Mr Witness, do you recognise the voice of the person speaking?

24 A. Joshua Sang, your Honour.

25 Q. And, Mr Witness, it is one of those events when Mr Sang was seeking to

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1 mobilise people to support the idea of composing and constituting a council of
2 elders, isn't it?

3 A. Yes, your Honour.

4 Q. I want you to -- Mr Witness, do you recall having heard this particular audio?

5 A. I can't say I recall, your Honour, because I heard many of them. I can't say it
6 was particularly this one.

7 Q. And so it could be this one amongst others, isn't it, Mr Witness?

8 A. It could be, your Honour.

9 (Playing of the audio excerpt KEN-D11-0013-0067)

10 Q. Mr Witness, I will read the English translation of what you just heard and
11 then I'll request you to let us know if that's a fair translation; a fair translation of
12 what you heard:

13 "Thank you very much, house of Kalenjin wherever you are tuned in. This time has
14 come for Kass Lene Emet today, this Friday as had been indicated in the past two
15 weeks in view of the Kalenjin people. The time has come to launch a Kalenjin
16 council of elders. Different elderly men have come to the studio and have discussed
17 many issues related to this setting up of council of elders.

18 I know there are some who have made comments to the effect that women should
19 not have been included following the list that I had read out. We will have guests
20 who will join us so that they can explain this to you.

21 Where is all this leading? What we have in place is a facilitating committee to stay
22 at the process and facilitate the selection of individuals to drive the process. As
23 such we have here with the studio some elders who will expound on this issue and
24 provide direction until they have -- until we have the Kalenjin council of elders. I
25 know each community has elders whether Nandi, Keiyo, Kipsigis, each community

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1 has, but our target is to see how we can come together in order to have one Kalenjin,
2 one with membership of the elders and professionals so that we can serve the
3 community.

4 We have often talked about the issues that touch on the community that sometimes
5 leaves you wondering what can be done to save the community."

6 Kipsigis is spelled K-I-P-S-I-G-I-S, and Keiyo is spelled K --

7 PRESIDING JUDGE EBOE-OSUJI: It is spelled correctly.

8 MR KIGEN-KATWA:

9 "And if we lack excellent ideas from people who are able to see it and do it, it
10 becomes difficult, because when issues emerge, we have to rely on politicians. Yet
11 sometimes they are overwhelming issues where even they could require ideas or any
12 other form of help or even with church members, sometimes which they could reach
13 out and get help from someone else, whether social or economic.

14 Generally we require a group of people that can examine these issues and address
15 them in a good manner. So one way is this council of elders, which is a union of all
16 Kalenjin people, the 10 communities including Kipsigis ...", which I just spelled, "...
17 Nandi ...", which is N-A-N-D-I, "... Keiyo, Tugen ...", T-U-G-E-N, "... Marakwet ...",
18 M-A-R-A-K-W-E-T, "... Pokot ...", P-O-K-O-T, "... Saboat ...", S-A-B-A-O-T, "...
19 Terik ...", T-E-R-I-K, "... Sengwer ...", S-E-N-G-W-E-R, "... and Ogiek," O-G-I-E-K:

20 "I know we previously said there were seven, leaving out Sengwer and Ogiek and
21 Terik, but the elders felt that there were other Kalenjin groups that we ought to reach
22 out to bring, to reach out, bring closer, and live with in unity. So we will be finding
23 out where all this is leading and where all -- where the plans have reached thus far.
24 So with us here at the studio today we are privileged to have representatives who
25 will tell us about the progress and the direction of all this. I am Joshua Arap Sang

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1 and with me in the studio we have Major John Araap Seii, who will salute you."

2 Seii -- Araap Seii is A-R-A-P (sic) and Seii is S-E-I-I.

3 And then you have Seii saying, "Thank you very much."

4 "And then we also have John Sambu," who says "Thank you very much."

5 And then Mr Sang says, "Sambu, please greet the people again."

6 And Mr Sambu says, "Greetings all Kalenjins. I greet you today and would like to

7 appreciate the opportunity you have given us to come and speak to you."

8 And then Sang says, "In addition, dear listener, we have elder and a senior

9 professional among the Kalenjin community, Professor David Some."

10 And Mr Some says, "Greetings, Kalenjin people."

11 Sambu is spelled S-A-M-B-U, Araap is A-R-A-A-P, Some is spelling S-O-M-E.

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

13 A. Yes, your Honour.

14 Q. And, Mr Witness, you know that Major John Seii was actually elected the

15 chairman of the first council of elders, isn't it?

16 A. He was elected later, your Honour.

17 Q. And, Mr Witness, you recognise his voice in the audio?

18 A. I'm not used to his voice, your Honour, but Mr Sang was introducing him as

19 "Mr Seii. "

20 Q. And, Mr Witness, do you know one Professor David Some?

21 A. I've heard of him, your Honour.

22 Q. Are you in a position to recognise his voice by any chance, Mr Witness?

23 A. No, your Honour.

24 MR KIGEN-KATWA: Mr President, considering the witness's recognition of this

25 audio, I would pray that it be produced as an exhibit, as an exhibit, Sang's Defence

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1 exhibit. I will pray that the audio itself, KEN-D11-0013-0067 and the translation,
2 which is both translation and transcription, KEN-D11-0013-0200 be produced as
3 exhibits.

4 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

5 MR GARCIA: Your Honour, given the fact that the witness did seem to indicate
6 that he did recognise it, the Prosecution is not objecting.

7 PRESIDING JUDGE EBOE-OSUJI: The audio and the transcripts will be received
8 into the record as the next in the Sang Defence exhibits.

9 THE COURT OFFICER: Thank you, Mr President. And the audio

10 KEN-D11-0013-0067 will bear the following number, EVD-T-D11-00030 and will also
11 be referenced as Sang Defence exhibit number 30. Its translation,
12 KEN-D11-0013-0200, will bear the following number, EVD-T-D11-00031 and will
13 also be referenced as Sang Defence exhibit number 31. Both items will be registered
14 as public documents and public items. Thank you.

15 MR KIGEN-KATWA:

16 Q. Now, Mr Witness, I just want to ask you a few questions from the audio that
17 you just heard. Could you confirm that according to Joshua, he's saying that this is
18 not one, but a series of interviews and publicising the intention to compose a council
19 of elders?

20 A. Yes, your Honour. I agree he even said it was not the first one. There were
21 others before that one, your Honour.

22 Q. And, Mr Witness, having initially heard these and many others, you would
23 agree that eventually from this process that Mr Sang was doing at the station, that
24 the council of elders was eventually constituted, isn't it?

25 A. I can't say it was because of Mr Sang, your Honour. It was Mr Sang who was

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1 working for Kass FM, and he was hosting people who were coming to sell the idea
2 of the Kalenjin council of elders for the people, your Honour.

3 Q. Thank you, Mr Witness. So it is now your testimony that it was not Sang's
4 idea alone. It was an idea shared by Sang with other people, isn't it?

5 A. Yes. I said in my statement, your Honour --

6 MR GARCIA: Objection, objection, your Honour. Now, if Defence counsel is
7 going to want to put to the witness that in the past he's had a statement which is
8 different from what he's saying today, then I once again to be fair to the witness --

9 MR KIGEN-KATWA: Mr President, I object to this.

10 MR GARCIA: -- let's reread or let's read the part of the transcript where the witness
11 would have allegedly made the statement.

12 PRESIDING JUDGE EBOE-OSUJI: Counsel, can we not have two lawyers standing
13 up at the same time? That's not necessary. It leads to cross-talking. I'm sure the
14 microphone didn't pick up everything that was said.

15 So, Mr Garcia, can you go again, please?

16 MR GARCIA: Briefly put, your Honour, simply, if Defence counsel wants to put to
17 the witness that in the past in his testimony he said something different or he's held
18 a different position, then I think it should be reread to him first and ask him if this is
19 his position still or if he has changed his position. That's all. We have to be fair to
20 the witness at all times.

21 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?

22 MR KIGEN-KATWA: Mr -- your Honours, it is true I stood up and switched on my
23 microphone in the course of Mr Garcia's presentation. My concern is that in all
24 probability, Mr Garcia knows where I want to go and I'm very disturbed and
25 concerned if in the name of an objection an answer is suggested to the witness. And

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1 that's my concern and Mr Garcia knows that, too. I've related it to him on this issue.

2 I would really wish that he abstains from that. Now, in specific reference --

3 PRESIDING JUDGE EBOE-OSUJI: Now, wait just one second. So the record is

4 clear, are you suggesting that Mr Garcia had suggested the answer in his

5 intervention?

6 MR KIGEN-KATWA: I wouldn't go as far as that, but, Mr President --

7 PRESIDING JUDGE EBOE-OSUJI: What I heard him say is that if you are going to

8 contradict the witness on the basis of the supposition that the witness had testified in

9 specific terms, that it's only fair that you first put those terms to the witness. That's

10 what I heard him say. Unless I missed something, that doesn't contain an answer to

11 a question.

12 MR KIGEN-KATWA: Mr President, my question to the witness at that moment

13 was based on his answer immediately before the next question that I asked. It is not

14 based on any previous comment or observation he made.

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

16 MR KIGEN-KATWA: Do I proceed, Mr President, notwithstanding the time, Mr

17 President?

18 PRESIDING JUDGE EBOE-OSUJI: Yes, indeed, we are passed the morning break

19 time. We will take a break now. The blinds will come down, and then the witness

20 led out of the courtroom. Thank you.

21 *(Closed session at 11.02 a.m.) Reclassified into open session

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

23 (The witness stands down)

24 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

25 (Recess taken at 11.03 a.m.)

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1 (Upon resuming in open session at 11.36 a.m.)

2 THE COURT USHER: All rise.

3 Please be seated.

4 THE COURT OFFICER: We are in open session, Mr President.

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

6 The court officer will make a correction on the ERN number on the transcript. I
7 helped in confusing her. But also, Counsel, please, when you have a document to
8 enter or exhibit to enter, it will be very, very helpful and avoid confusion if the ERN
9 number is read out ahead of time accompanying the announcement -- or the request
10 to tender the material onto the record.

11 MR KIGEN-KATWA: I will watch out on that, Mr President.

12 THE COURT OFFICER: Thank you, Mr President. The correct ERN number of the
13 recently admitted EVD-T-D11-00029 is KEN-OTP-0106-0477.

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 Mr Kigen-Katwa, please continue.

16 MR KIGEN-KATWA:

17 Q. Mr Witness, the last question I asked you was -- I had asked you to confirm
18 that, "Having initially heard these and many others, you would agree that eventually
19 from this process that Mr Sang was doing at the station, that the council of elders
20 was eventually constituted?" Do you remember that question, Mr Witness?

21 A. Yes, your Honour.

22 Q. And, Mr Witness, your answer was, "I can't say it was because of Mr Sang,
23 your Honour. It was Mr Sang was working for Kass FM and he was hosting people
24 who were coming to sell the idea of Kalenjin council of elders for the people, your
25 Honour." Do you recall that, Mr Witness, as your answer?

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1 A. Yes, your Honour.

2 Q. And the next question I had asked you is that you confirm that the idea of the
3 council of elders was not an idea exclusively conceived by Mr Sang?

4 A. It was not started by Sang, your Honour.

5 Q. And, Mr Witness, Mr Sang, together with the other people who promoted the
6 idea, eventually managed to create the council of elders, isn't it?

7 A. Yes, your Honour.

8 Q. Now, Mr Witness, one last question on the part that we played. Could you
9 confirm that in that audio Mr Sang is saying that the purpose of the council of elders
10 is to bring together all the ten subtribes of Kalenjins?

11 A. I confirm, your Honour.

12 Q. And also to advise politicians and to advise church members and to generally
13 give advice?

14 A. I heard politicians, not church members, your Honour.

15 Q. Now, Mr Witness, I want to play a small part of the interview that Mr Sang
16 subsequently conducted on the same audio.

17 PRESIDING JUDGE EBOE-OSUJI: I hope it's not about church members, is it?

18 MR KIGEN-KATWA: Mr President, we -- it is part of what we played. I don't
19 want to go back there. I can live with the answer that the witness has given.

20 PRESIDING JUDGE EBOE-OSUJI: Fair enough.

21 MR KIGEN-KATWA: Yes. Mr President, I want to play time stamp 17.7 -- 17.54 to
22 18.01, and that is at page D11-0013-0201. And with the assistance of the court
23 officer, I would request to give the witness the time -- the --

24 PRESIDING JUDGE EBOE-OSUJI: Did you mention the tab and transcript?

25 MR KIGEN-KATWA: Mr President, I did. It is tab 19 and the reference is

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1 KEN-D11-0013-0200. Mr President, I request for just one half a minute.

2 Q. Mr Witness, please listen.

3 (Playing of the audio excerpt KEN-D11-0013-0200)

4 Q. Mr Witness, could you confirm what you heard? The small clip that I've just
5 played says, "Today's newspapers ..." -- "Today's newspapers. Today is Friday the
6 18th of September 2009. Arap Sang in the studio." Then you have a voiceover lady
7 who says, "Together with me, Triza Cherorot, and we are -- and we are looking at
8 today's newspapers. In the Standard one headline says 'A Man With One Option.'
9 Can you confirm that is what you heard, Mr Witness?

10 A. Yes, your Honour.

11 MR KIGEN-KATWA: The spellings, your Honours, is Triza is T-R-I-Z-A and
12 Cherorot is C-H-E-R-O-R-O-T.

13 Q. Now, Mr Witness, from the document I gave you, the transcription and
14 translation that you have, could you tell the Court what is the date of that audio?

15 A. 18 September 2009, your Honour.

16 Q. Mr Witness, could you confirm it also says Friday?

17 A. Your Honour, it is 18 September 2009. No Friday, your Honour.

18 Q. Mr Witness, if you don't mind, just look at the whole line. Let me read it to
19 you, "Today's newspapers. Today is Friday the 18th of September." Could you
20 confirm that, Mr Witness? That is page 2, Mr Witness. Page 2, line 1 -- line 2.

21 A. Yes, your Honour. I confirm.

22 PRESIDING JUDGE EBOE-OSUJI: Did you also hear that in the audio?

23 THE WITNESS: The audio has not been played, your Honour.

24 MR KIGEN-KATWA:

25 Q. Mr Witness, it was, but let's play it again.

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1 (Playing of the audio excerpt KEN-D11-0013-0200)

2 THE WITNESS: I confirm, your Honour.

3 MR KIGEN-KATWA:

4 Q. You confirm having heard Friday 18 -- and 18 September 2009, isn't it,
5 Mr Witness?

6 A. Yes, your Honour.

7 Q. You also confirm that it indicates that one of the newspapers, specifically the
8 Standard newspaper, has a report headlined "A Man With One Option"?

9 A. Yes, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: One moment. It needs to be indicated between
11 lines 6 and 7 that audio was played, after which the witness said he confirmed.

12 MR KIGEN-KATWA:

13 Q. Now, Mr Witness, you would in that circumstance confirm that, in fact, the
14 council of elders was composed in the year 2009 or subsequent to September 2009 as
15 opposed to the year 2007 when you said?

16 A. Your Honour, I have not listened to the audio, and what was said there is
17 nothing about the council of elders, your Honour. What I've heard, there is nothing
18 about the council of elders, your Honour.

19 Q. Mr Witness, do you remember us playing an audio which was to this effect, I
20 will read what -- what we went through a moment ago.

21 PRESIDING JUDGE EBOE-OSUJI: Counsel, before you do that, you know what the
22 confusion is, don't you? The confusion was that the witness has not listened to the
23 entire audio. You began your questioning the last time by going to the middle.
24 I'm presuming that it is still the same audio. We don't know. I'm presuming.
25 You went to the middle of the transcript we see here, you asked him questions, but

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1 now you've gone to the beginning of the transcript. So that is the confusion. It's
2 not the witness's failure to see it. It's just he hasn't seen it.

3 MR KIGEN-KATWA:

4 Q. Mr Witness, this is the same audio I played to you a moment before we went
5 for break which had these words, "Thank you very much house of Kalenjin,
6 wherever you are tuned in. The time has come for Kass Lene Emet today, this
7 Friday, as has been indicated in the past weeks, in view of the Kalenjin people, the
8 time has come to launch a council of elders." Do you recall that, Mr Witness?

9 A. Your Honour, I recall, and I would like to say that when Joshua Sang was
10 talking to the three elders he was saying it was evening. It was not in the morning,
11 your Honour, and this one is in the morning, your Honour.

12 Q. Mr Witness, I will give you the transcript. I quite don't remember having
13 heard "evening, " but I'll give you the transcript and then you can look at it and
14 identify where the Friday is said.

15 PRESIDING JUDGE EBOE-OSUJI: Can you play the audio again?

16 MR KIGEN-KATWA: Mr President --

17 PRESIDING JUDGE EBOE-OSUJI: The clip -- the clip --

18 MR KIGEN-KATWA: -- the earlier one?

19 PRESIDING JUDGE EBOE-OSUJI: No, no, no, the clip he just heard.

20 MR KIGEN-KATWA:

21 Q. Mr Witness, we will play again the clip whose document you have before you
22 now.

23 PRESIDING JUDGE EBOE-OSUJI: So as to help the witness with his proposition
24 that what he heard was in the morning, the morning broadcast.

25 (Playing of the audio excerpt KEN-D11-0013-0200)

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1 MR KIGEN-KATWA:

2 Q. Mr Witness, could you confirm whether there is any indication of what time
3 of the day it is from the audio you just listened to?

4 A. This was in the morning, your Honour.

5 Q. And is that found in the transcript and the audio you just listened to,
6 Mr Witness?

7 A. Yes, your Honour.

8 Q. Could you -- could you point out where that is, Mr Witness, from the
9 transcript you have?

10 A. I can -- I can read it, your Honour. "Today's newspaper. Today is Friday,
11 the 18th day of September 2009. Arap Sang in studio," your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: Apart from that -- I noticed you read the
13 transcript. Apart from the transcript, having listened to the audio clip, was there
14 anything indicated in the audio clip that told you that what you heard was in the
15 morning?

16 THE WITNESS: Yes, your Honour. They were reviewing magazines in the
17 morning, your Honour.

18 MR KIGEN-KATWA:

19 Q. Mr Witness, I would like to give you a transcript, page 26 of the same audio,
20 and that is KEN-D11-0013-0225, and I would like you to look at it and confirm if you
21 can see the time of this broadcast.

22 Mr Witness, could you confirm that at page 26, KEN-D11-0013-0225, this is what
23 Mr Sang says:

24 "Yes, dear listener. The time now is 7.02 in Nairobi. My request to you is that you
25 keenly pay attention to the discussion so that when we ask questions later, we will

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1 have understood the discussion. We started this discussion on Friday where we
2 have hosted elders to address emerging issues among Kalenjin. In our
3 investigation, we agreed that one thing where we have failed is that -- is that we
4 have no community plans to protect our community, rules and regulations. So, we
5 reached the decision that the root cause of this is we no longer have a sitting of
6 council -- sitting of elders or council of elders to guide our ways."

7 Can you see that, Mr Witness?

8 A. I confirm, your Honour.

9 Q. Are you able to estimate the time of this broadcast from that, Mr Witness?

10 A. Your Honour, what I was saying is that the first audio, it was in the evening
11 and they were three people who were being interviewed by Mr Sang, and this is -- if
12 it was a continuation, I can't say this was in the morning, your Honour.

13 Q. Mr Witness, would it help you if I played the same audio so that you -- you
14 confirm where you heard evening, Mr Witness?

15 A. Yes, your Honour, I would.

16 MR KIGEN-KATWA: Your Honours, I will play again the first audio, which is at
17 page 20, KEN-D11-0013-0219 all the way to KEN-D11-0013-0222, page 23.

18 ((Playing of the audio excerpt KEN-D11-0013-0219 to KEN-D11-0013-0222))

19 MR KIGEN-KATWA:

20 Q. Mr Witness, could you confirm if you have heard anywhere that it is evening
21 this far?

22 A. Your Honour, I confirm it was in the morning, your Honour.

23 Q. Additionally, Mr Witness, just to be sure, you heard Mr Sang in the time
24 stamp 49.21 say, "Thank you very much house of Kalenjin wherever you are tuned
25 in. This time has come for the Kass Lene Emet today this Friday, as has been

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1 indicated in the past weeks, in view of the Kalenjin people, the time has come to
2 launch a Kalenjin council of elders." Do you remember having heard that in
3 Kalenjin, Mr Witness?

4 A. I confirm, your Honour.

5 Q. Mr Witness, the particular reference to Kass Lene Emet is made in that audio,
6 isn't it?

7 A. I didn't understand your question, your Honour.

8 Q. That audio says specifically the programme is Kass Lene Emet?

9 A. It was Lene Emet, your Honour.

10 Q. And you confirmed earlier on in the entirety of your testimony that that
11 programme is normally conducted in the morning, isn't it?

12 A. Yes, your Honour.

13 Q. Now, Mr Witness, I just wanted you to confirm that you were mistaken in
14 saying that the council of elders was put together in the period around 2007, that, in
15 fact, it was put together past September 2009, the date of this audio?

16 A. Your Honour, I would like to say one thing. I -- I have not even known the
17 relationship between the 18 September 2009 and the day which is only known as
18 Friday from the other thing. There is no date for this. It's only a Friday. Then
19 again, your Honour, when you listen to Mr Sang clearly, he says that it was a
20 continuation, it was -- if at all this can be proved yes that it was on 18 September
21 2009, Mr Sang had earlier on said that it was a journey which was continuing. It
22 didn't start on 18 September 2009, your Honour.

23 Q. Mr Witness, you had earlier on told us that this is one of the audios you heard
24 Mr Sang calling up to people to support the idea of the council of elders, isn't it?

25 A. Your Honour, I said maybe it's one of which I have heard, because I heard

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1 many of them, your Honour.

2 Q. May I ask you very directly, Mr Witness, is there any possibility that you are
3 mistaken as to when the council of elders was put together?

4 A. There is no possibility that I am mistaken, your Honour.

5 Q. And you want to say you are absolutely sure that it was before the year 2007?

6 A. What I can say, your Honour, is that --

7 MR GARCIA: I object to that. Just one second. Your Honour, I object to that.

8 For a couple of minutes already we've been dealing with this subject matter of the
9 creation or the formation of the council of elders. As I've stated before, it's
10 sometimes useful to just reread the parts of the transcript where the witness spoke
11 about that, the creation of the council of elders, because it's not as clear-cut as
12 Defence counsel is putting it to the witness. And now we're entering a realm where
13 the questions are even more specific, and we still haven't reread that portion to the
14 witness.

15 I can give the reference number to Defence counsel, if he wishes, on this point and he
16 can reread. It's not as clear-cut as the questions would seem it to be. And I think
17 we need to be fair with the witness on -- in this regard, which is important, because
18 he's testified on it, and clearly now there's a bit of confusion on the matter.

19 PRESIDING JUDGE EBOE-OSUJI: Objection overruled.

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

21 Q. Mr Witness, let me ask you sequentially the question. Do you recall me
22 asking you when the council of elders was put together, Mr Witness?

23 A. I don't recall, your Honour.

24 Q. You don't remember me asking you when could the council of elders have
25 been put together?

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1 A. I -- I recall, your Honour, and I answered it was before 2007.

2 Q. Thank you very much, Mr Witness. That's exactly what you said. Now, my
3 question, Mr Witness, is this: Having seen that this broadcast that was made by
4 Mr Sang was September 2009, would you admit that you could be mistaken as to
5 when the council of elders was composed?

6 A. Your Honour, my -- my answer is that even though it was 18 September 2009,
7 there was a journey of which it started, and we have not yet known when exactly did
8 the idea come out to the Kalenjin community. It's only -- we are only seeing 18 of
9 September. And Mr Joshua Sang on the audio was direct that it was a journey and
10 it was not the first -- it was not the first people whom he was hosting. He said he
11 has been hosting many people, your Honour.

12 Q. Mr Witness, I just want you to speak for yourself. I want you to answer the
13 question very directly. Could you be mistaken as to when the council of elders was
14 created? Just answer that question directly?

15 A. I am not mistaken, your Honour, and I can say that creation -- I don't
16 know -- I don't understand the meaning of creation, and I would like to be told the
17 meaning of creation, because what I understand by creation is what exactly the idea
18 came and being sold to the Kalenjin community, your Honour.

19 Q. Mr Witness, all I'm saying is that before the year 2009 there was no council of
20 elders. Would you agree with that?

21 A. Your Honour, even on the -- even listening to the audio which Joshua was
22 speaking, he was mentioning that there were some people who have been selected
23 from various parts or from various communities, and I understand that was the
24 process of the council of elders, your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: But the lawyer's question is -- you need to listen

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1 to it. He's now asking you a question from your own understanding. He's saying
2 that there was no council of elders before 2009. He's asking you whether or not you
3 agree with that suggestion he makes.

4 THE WITNESS: I don't agree, your Honour.

5 MR KIGEN-KATWA: Mr President, to avoid arguing with the witness, I'll move on
6 to a different part of my cross-examination.

7 PRESIDING JUDGE EBOE-OSUJI: Yes, move on. Please move on.

8 MR KIGEN-KATWA:

9 Q. Now, Mr Witness, I want to play another part of the same audio for you and
10 that is KEN-D11-0013-0243. I'm playing time stamp 1.34.24 to 1.37.15, and I request
11 the assistance of the court officer.

12 (Playing of the audio excerpt KEN-D11-0013-0243)

13 Q. Mr Witness, have you been able to trace the place in the transcript?

14 A. It is page 43, I can -- give me the page, your Honour.

15 Q. Mr Witness, it is page 44, the last paragraph, and you can see "90%"
16 somewhere.

17 A. Yes, your Honour.

18 Q. Okay. Just follow it as it plays, Mr Witness.

19 (Playing of the audio excerpt KEN-D11-0013-0243)

20 Q. Mr Witness, I request that you listen to me and confirm this is -- if this is what
21 you heard in Kalenjin:

22 "Thank you so much, Sambu. There are those who also think that this idea is
23 another political tool. I think 90% of a person's life revolves around politics, and
24 when such a thing comes up they say it's a political idea. They only want to use it
25 to popularise the person they want. So I just want to know what is -- what it is that

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1 will unite the people in this upcoming conference. What is the proportion of
2 politics in the formation of the council? Are there political leaders driving this
3 initiative for their benefit, or is it a Kalenjin affair? We want to ascertain that it is
4 an independent process with no links to politics."

5 Then, "Thank you ..." -- this is what Mr Sambu responds:

6 "Thank you, Joshua, for raising that question because it is in everybody's mind.

7 Wherever we go we are asked the same question. Even when we went to Kapsabet,
8 the first thing they asked us is who has sent us.

9 Whenever we have gone, after starting off this process, Sang, people have been
10 categorical that they neither want political activists nor anybody in active politics,
11 nor political aspirants, nor sycophants. I don't know the term for sycophant."

12 And then Sang says: "One who follows another blindly."

13 Then Sambu goes -- then Sambu goes on: "Yes, Seii -- yes, Seii says it is one who
14 belongs to another. That's enough."

15 And then goes on:

16 "To conclude, there is nothing political in this all the way from the grassroots. We
17 have spent our money in all meetings we have held, including those held in Eldoret
18 for the past two months. Nobody has given us a hand. So I would like to assure
19 our people that this thing is clean, we are doing it for the benefit -- for the future
20 benefit of our people."

21 Mr Witness, is that a fair translation of what you heard?

22 A. It is, your Honour.

23 Q. Now, Mr Witness, I want you to look at page 46, KEN-D11-0013-0245, and
24 confirm the last sentence is this.

25 Your Honour, I'll read the whole paragraph:

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1 "To conclude, there is nothing political in all this all the way from grassroots. We
2 have spent our money in all meetings we held, including those held in Eldoret for
3 the past two months."

4 Can you see that, Mr Witness?

5 A. The last paragraph, your Honour, of page 46?

6 Q. Yes, the English -- the English paragraph of what we just heard, Mr Witness,
7 starting with the words "To conclude ..."

8 A. Yes.

9 PRESIDING JUDGE EBOE-OSUJI: It's in the middle -- in the middle of the --

10 THE WITNESS: Yes, your Honour.

11 MR KIGEN-KATWA:

12 Q. Mr Witness, my interest is in the use of the words "... for the past two
13 months." Can you see that, Mr Witness?

14 A. Yes, your Honour.

15 Q. And, Mr Witness, if this interview was being conducted in September, two
16 months would mean that the process of putting together the council of elders started
17 two months before September, which brings it to about July, isn't it, Mr Witness?

18 A. Yes, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: And the witness responded merely to your
20 mathematical calculation.

21 MR KIGEN-KATWA: I am happy with that answer, Mr President, even if it's a
22 question of just answering a mathematical question.

23 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, please do make a note to
24 explore, if it doesn't take you out of your stride, at some point, in the last portion you
25 read in there was a reference to "upcoming conference." We will be interested in

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1 knowing what that is about.

2 MR KIGEN-KATWA: It is part of my questions, Mr President. I intend to cover
3 that.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you.

5 MR KIGEN-KATWA:

6 Q. Now, Mr Witness, you will also confirm that the emphasis placed by Mr Seii,
7 who you confirm later on became the chairman, and Mr Sambu, who was being
8 interviewed, is that this process is non-political?

9 A. As they -- as they said, your Honour, I remember they said so -- or Mr Joshua
10 was asking them so, because the people from the grassroots were crying it is a
11 political issue, and they were trying to tell the people it is not a political issue, your
12 Honour.

13 Q. Thank you very much, Mr Witness. So you would confirm that, in fact,
14 Mr Sang emphasised that it is a non-political initiative?

15 A. I confirm, your Honour.

16 PRESIDING JUDGE EBOE-OSUJI: Line 8 the witness said "... people from the
17 grassroots were crying," were crying.

18 Please proceed.

19 MR KIGEN-KATWA:

20 Q. Now, Mr Witness, I would like to take you to a different issue, being
21 the -- Mr President, I would like to go to tab 21 and I would like to play an audio for
22 the witness and then ask him a few questions.

23 Mr President, the audio is KEN-D11-0013-0071 and I propose to play time stamp
24 12.42 to 19.21. The translation of the portion I want to play is at D11-0013-0274. I
25 would request for the assistance of the court officer to give a copy to the witness.

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1 (Playing of the audio excerpt KEN-D11-0013-0071)

2 MR KIGEN-KATWA:

3 Q. Mr Witness -- Mr Witness, do you recognise that voice?

4 A. I don't recognise the voice, your Honour.

5 MR KIGEN-KATWA: I would request to give -- I would request the court officer to
6 give him this document.

7 (Playing of the audio excerpt KEN-D11-0013-0071)

8 MR KIGEN-KATWA:

9 Q. Mr Witness, can you recognise the voice that has just come up?

10 A. Joshua Sang, your Honour.

11 Q. And, Mr Witness, can you see the transcript of what you're looking at at page
12 3, D11-0013-0274?

13 A. Page 3?

14 Q. Yes, page 3, please.

15 A. Yes, your Honour.

16 Q. Okay, we'll go on with the audio. Please follow it.

17 MR GARCIA: One minute. One minute, if we can just stop that.

18 Your Honour, I understand, and maybe Defence counsel can correct me, that this is
19 not a broadcast of something that was aired on Kass FM. Is that correct?

20 MR KIGEN-KATWA: Mr President, this was aired from Kass FM. I can explain,
21 but I don't -- I would rather explain that after the witness has listened.

22 MR GARCIA: I just wanted to make sure on that point. It seemed -- I didn't have
23 any other indication on the document.

24 MR KIGEN-KATWA: And this was aired on 24 October 2009.

25 Q. Mr Witness, please listen.

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1 (Playing of the audio excerpt KEN-D11-0013-0071)

2 Q. Mr Witness, I would like to make out the English translation of what you just
3 heard and request you to confirm if that's what you heard. Could you confirm that
4 you heard the voice of somebody who refers to himself as Major John Seii?

5 A. I confirm, your Honour.

6 Q. Could you confirm that that John Seii invited Mr Joshua Sang to address the
7 crowd?

8 A. I confirm, your Honour.

9 Q. And this is what Mr John Seii said, "...Joshua Sang became the anchor-man for
10 doing that. Welcome, Joshua. I want you to speak two words. Please stand there
11 so that these people can see you."

12 Then Mr Sang talks to this effect:

13 "The good thing is that even if you cannot see me, you can hear me. I was not
14 denied that. Minister, leaders, chairman and the house of Miot, greetings. I am
15 happy because all we spoke of did not go in vain. We now have the opportunity to
16 complete the plans of Miot community. We have said many things and I have come
17 far. We have wondered as to where our destiny is and who will take us there.

18 After brainstorming with the elders that came to the studio, we came the
19 resolution -- with a resolution. We know that there are many things that have been
20 poking our eyes, passing words, lost jobs and decay in moral fabric. All these
21 happened because we had lost something and that is what we are searching for now.

22 I can now praise God because it is finally here. What can be more important than
23 when Kitwek, the ten siblings of Miot unite? We need to do -- what we need to do
24 is look back and find when the rains started beating us. We lost our way because
25 we were no longer meeting together to discuss issues. We all spoke individually

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1 and you saw where we ended. I do not want us to go back to what was -- what has
2 happened, but it is possible for us to move from here to where God, Kenya and our
3 community are pleased."

4 MR KIGEN-KATWA: The spelling of Miot is M-I-O-T and Kitwek is K-I-T-W-E-K:
5 "When the moral fabric decays, there will be -- where will we be headed? It is good
6 and I am filled with joy when members of Kitwek meet like this to find direction.
7 There is only one issue and I hope that God will intervene and touch our hearts.
8 When we were planning this meeting, we decided that this meeting should not be
9 financed by an individual but rather by the community so that it is not owned by the
10 individual financing it."

11 Page 61, line 27 should say -- should state -- line 17 should state, "There is only one
12 issue and I hope that God will intervene and touch our hearts."

13 I will proceed:

14 "However, it is a shame after completing our meeting, these people are leaving with
15 a debt. We are leaving here happy that we have come together as Miot, yet we live
16 with a debt because we are mean with God and -- with what God has given us. If
17 we want the community to move forward, everyone should contribute what they
18 can. I urge therefore that we as we come to the end of this meeting we should have
19 a small fundraising so that we can complete this work. I know that there are those
20 that have sent their contributions and I thank you. I know you did not do it for
21 the -- for personal benefit but so that you can leave a better world for the coming
22 generations. We are no longer worried about the welfare of the Mina ...", that's
23 Maina, "... and the Chumo age sets. We can take care of those."

24 Maina is M-A-I-N-A and Chumo is C-H-U-M-O:

25 "We take care of those. I am worried about our children and those that will come

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1 after them. What will protect them is a home without politics, denominational
2 differences and individuality. That is the home of Miot. I thank this meeting and I
3 pray to God that we may never turn back. Let us -- let us no longer look down
4 upon ourselves and air our dirty linen. It was said that Makibalekei kelat ...", and
5 the spelling of that is M-A-K-I-B-A-L-E-K-E-I and then K-E-L-A-T, "... and that our
6 traditional rituals should not be shared with outside communities but today we are
7 the ones -- they are the ones presiding over it. It is very sad. Thank you."
8 Page 62, line 16, should -- line 16 should state that, "Let us no longer look down
9 upon ourselves and air our dirty linen."

10 Q. Mr Witness, is that a fair translation of what you heard?

11 A. It is, your Honour.

12 Q. Thank you very much, Mr Witness. I want to play another part of the same
13 audio, time stamp 2.25.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, what's your point? With the
15 witness, that is. We don't want to sit and listen to all kinds of audio and transcript
16 hoping that you will make the point eventually. If you can make the point, it's
17 better to do that so it orients us in terms of what the point is about.

18 MR KIGEN-KATWA:

19 Q. Mr Witness, you said that you listened to Kass FM live broadcast of the
20 council of elders meeting at which the council members were elected, didn't you?

21 A. I didn't say I listened to it live, your Honour, but I listened to it. When I
22 listen now, I agree that I listened to it, your Honour.

23 Q. You confirm that you heard this broadcast?

24 A. Yes, your Honour.

25 Q. And it is a broadcast of the process at which the elders sat and elected their

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1 officials, isn't it, Mr Witness?

2 A. Yes, your Honour. I can say it was the process -- I don't know if it was the
3 process of which they were already elected or they were electing themselves there,
4 your Honour, but that was the function of that day, your Honour.

5 Q. And, Mr Witness, you remember the audio that we -- I played just
6 immediately before this and said that we will be going into a conference to elect the
7 council of elders? Do you recall that from the previous audio?

8 A. Yes, your Honour.

9 MR KIGEN-KATWA: Mr President, I trust I have laid basis to go on to the next
10 item? Thank you very much, Mr President. The time stamp is 2.25.37 to 2.28.44
11 and that is found at D11-0013-0288.

12 Q. Mr Witness, if you look at page 17 -- if you could confirm you have page 17
13 with you?

14 A. Yes, your Honour.

15 MR KIGEN-KATWA: We will play the audio now.

16 (Playing of the audio excerpt KEN-D11-0013-0071)

17 MR GARCIA: Your Honour, just -- just before we move on, I'm sorry to disrupt my
18 colleague, it's just at line -- page 63, lines 13 to 15, I understand a precise question
19 was asked by Defence counsel. I've been trying -- I'm rereading the answer, and it's
20 not -- it's not very clear. I'm not sure if we could -- if Defence counsel could
21 possibly revisit that just to clarify what was said by the witness.

22 It's page 63, lines 13 to 15, your Honour. It's a question of whether he actually
23 heard it or not, and the response, I'm not sure if it's been transcribed correctly, if
24 that's the problem, or if that's verbatim what the witness said. It's just a clarification
25 in that regard.

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1 PRESIDING JUDGE EBOE-OSUJI: Okay.

2 Witness --

3 THE WITNESS: Your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: -- counsel's question to you was this: At the
5 time his question was, "Mr Witness, you said you listened to Kass FM live broadcast
6 of the council of elders meeting at which the council members were elected, didn't
7 you?", and the transcript records your answer as this, "I didn't say I listened to it live,
8 your Honour, but I listened to -- when I listen now, I agree that I listened to it, your
9 Honour."

10 THE WITNESS: Yes, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Can you repeat that, what were you trying to
12 tell the Court?

13 THE WITNESS: Your Honour, I was saying that I didn't mention into my statement
14 that I listen -- I listened to it live, and when I heard it from the audio, I recall that I
15 listened to it live, your Honour.

16 PRESIDING JUDGE EBOE-OSUJI: We will leave it at that. Please proceed.

17 MR KIGEN-KATWA:

18 Q. Mr Witness, the translation may not be exactly accurate, but I want you to say
19 that it is a fair translation of what you heard in Kalenjin, that the voice you heard
20 was of one Mr Major Seii who said this:

21 "Let us be patient so that we can quickly wrap up. Let me read resolutions that we
22 have come up with. These are: All the Kalenjin sub ethnic groups have resolved to
23 the Kokwetab Kap Miot."

24 And the spelling of Kokwetab is K-O-K-W-E-T-A-P (sic), Kap is K-A-P and Miot is
25 M-I-O-T:

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1 "Kokwetab Miot has resolved to bring reconciliations among and between members
2 and neighbours. The headquarters for the Kotap Miot will be Eldoret. Kokwetab
3 Miot resolves to form committees that will advise the council. It has resolved that
4 its main role is to act as an umbrella organisation for the various ethnic councils of
5 the Miot community and members in activating, advising, directing and offering
6 support to the diverse communities and shall be non-political. It resolves that all
7 members of the Miot community over the age of 55 shall be eligible for
8 membership."

9 "... shall be eligible ...," sorry. May I read that again:

10 "The Miot council shall retain ..." – sorry:

11 "It resolves that all members of the Miot community over the age of 55 years shall be
12 eligible for membership. The Miot council shall retain the right to admit those that
13 are eligible. The chairman of the council shall chair council meetings and be the
14 official voice of Miot."

15 Could you confirm that that's what you heard, Mr Witness, generally?

16 A. I confirm, your Honour.

17 Q. Could you confirm also, Mr --

18 PRESIDING JUDGE EBOE-OSUJI: Counsel, when you say "generally", I couldn't
19 help but intervene to say that is a word that should be taken advisedly, because it
20 would appear to me that I heard in English words like -- words like "cultural", a
21 phrase like "general development." I thought I heard that in the audio. Does that
22 appear on the transcript, the translation?

23 MR KIGEN-KATWA: Mr President, I must say that the reason why I used the word
24 "generally" is out of the consciousness that there are some words which were spoken
25 in English but even then are not here. And I apologise for this.

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1 PRESIDING JUDGE EBOE-OSUJI: I thought I should flag it so that when later on
2 we argue about what the witness agreed to, we have to keep in mind that we were
3 talking about generally. Please proceed.

4 MR KIGEN-KATWA: Only that I would like that to apply only to this audio,
5 Mr President. I am comfortable with the rest.

6 PRESIDING JUDGE EBOE-OSUJI: I don't want to go so far. I'm just noting it's up
7 to you and the parties to make submissions you will need to make when the time
8 comes.

9 MR KIGEN-KATWA: I'm obliged, Mr President. I'm sure the Prosecution will
10 take whatever objections they have.

11 Q. Mr Witness, I would like to ask you another question. You will recall that at
12 the end of this audio and which is not in this translation, Major Seii says that "I am
13 saying this as the chairman of the Miot council," isn't it?

14 A. Yes, your Honour.

15 Q. Now, a few questions, Mr Witness. The first one is that you heard Mr Sang
16 in the first audio speak. Could you confirm that you didn't hear him make any
17 reference to Mr Ruto?

18 A. I didn't, your Honour.

19 Q. Could you also confirm that in this council of elders meeting it was resolved
20 very specifically that it shall be non-political?

21 A. I confirm, your Honour.

22 Q. Now, Mr Witness, I would like to take you lastly to page 1,

23 KEN-D11-0013-0272. Do you have it with you, Mr Witness, page 1?

24 A. Yes, your Honour.

25 Q. Thank you, Mr Witness. Could you confirm on the face of it the date of the

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1 recording of that audio, on the face of it?

2 A. 24 October 2009, your Honour.

3 PRESIDING JUDGE EBOE-OSUJI: By "on the face of it" we mean what the
4 document says?

5 MR KIGEN-KATWA: Yes, that's what I mean, Mr President. Mr President, at this
6 point I request to produce this audio together with the translation as an exhibit, as
7 Mr Sang's Defence exhibit. The audio is KEN-D11-0013-0071 and the translation is
8 KEN-D11-0013-0272.

9 PRESIDING JUDGE EBOE-OSUJI: Any objections?

10 MR GARCIA: The witness has confirmed that he heard that live, so the Prosecution
11 doesn't object but always with the same caveat that subject to a verification of the
12 translation further on. If we do see something, then we'll raise it with the Chamber.

13 PRESIDING JUDGE EBOE-OSUJI: The document will be admitted, but I must say
14 that the matter of the date of broadcast has not been explored with the witness. It
15 has not been explored with the witness.

16 MR KIGEN-KATWA: I'm very conscious of that, Mr President. That's why I asked
17 him on the face of it.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you. The document is accepted then as
19 the next in the Sang Defence exhibits.

20 THE COURT OFFICER: Thank you, Mr President. The audio KEN-D11-0013-0071
21 will bear the following number, EVD-T-D11-00032, and will also be referenced as
22 Sang Defence exhibit number 32. Its translation KEN-D11-0013-0272 will bear the
23 following number, EVD-T-D11-00033, and will also be referenced as Sang Defence
24 exhibit number 33. Both items will be registered as public.

25 PRESIDING JUDGE EBOE-OSUJI: Thank you.

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1 Mr Kigen-Katwa, we have ten minutes to lunchtime. How are we doing?

2 MR KIGEN-KATWA: In all likelihood I'll finish, Mr President.

3 Q. Mr Witness, did you say in the generality of your testimony that Mr Sang was
4 anti-Kikuyu? Did you say Mr -- that, Mr Witness?

5 A. I said, your Honour.

6 Q. And do you recall him accommodating the views of Kikuyus at Kass FM?

7 A. Your Honour, I said that Mr Sang was -- or Kass FM was a business station,
8 and I can't say that Mr Sang was accommodating anyone, but it was the right of
9 anyone so long as you have bought air time, you can go to Kass FM, your Honour,
10 and air whatever you want to air.

11 PRESIDING JUDGE EBOE-OSUJI: Line 14, the gap there is an important one, isn't
12 it? The expression was "anti-Kikuyu".

13 MR KIGEN-KATWA: That's true, Mr President.

14 Q. Now, Mr Witness, I'd like to play an audio and the audio is D11-0011-0030,
15 and it is at tab 9. I would like to play time stamp 1.37.06 to 1.44.48 and I request the
16 court officer to assist to give the witness the document.

17 The particular part that I want to play is at page KEN-D11-0012-0207 and I will play
18 that, Mr Witness. That is at page 3, Mr Witness, if you are there.

19 (Playing of the audio excerpt D11-0011-0030)

20 Q. Mr Witness, do you recognise that voice?

21 A. I can only recognise the voice of Joshua Sang, your Honour.

22 Q. And, Mr Witness, if I were to tell you that is the voice of Mr Joseph Kaguthi,
23 does that come back to mind?

24 A. I -- I'm not used to his voice, your Honour.

25 MR KIGEN-KATWA: Mr President, Kaguthi is K-A-G-U-T-H-I.

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1 Q. Mr Witness, I would like to move on to time stamp 1.43.13 and ask you a few
2 questions after you've listened to it.

3 (Playing of the audio excerpt D11-0011-0030)

4 Q. Mr Witness, do you still recognise the voice of Mr Sang on that audio?

5 A. I recognise, your Honour.

6 Q. And do you recognise the voice of anybody else other than Mr Sang in that
7 audio?

8 A. Honourable President Uhuru Kenyatta, your Honour.

9 Q. I would like to play for you another audio from the same audio, that is time
10 stamp 1.47.12 to 1.48.40 and that is page 5, KEN-D11-0012-0209.

11 (Playing of the audio excerpt D11-0011-0030)

12 Q. Mr Witness, I would like to read out to you what Mr Sang has said and if you
13 could confirm that's what you heard. And that's at page 5, Mr Witness, if you are in
14 a position to -- and page 5 is KEN-D11-0012-0209:

15 "So today I would like to thank you for listening to us today. For those who called
16 in we did not pick up, forgive us. It's because we do not have time. And I have
17 seen very many questions coming to us via SMS. And because you gave them the
18 questions, they were -- they were not mine, all I do is to transmit it, give it to them.
19 Even if they did not respond to the questions here, they will respond to them in their
20 meetings. So I have given them the questions to ponder. To go and investigate
21 one by one what is disturbing the Kalenjin people. And to you listener, it's not just
22 the Kalenjin, even the Luhyas, if they have any problem with the Kalenjins, to sit
23 down and decide where they have a problem -- where have the problems come
24 from. If it is between the Kisii and the Kalenjins, they should sit down and decide
25 what the problem is. This is because we do not want conflict. Just the other day

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1 we tried to calm people when trouble arose in Kisii, people got a bit agitated, and
2 they decided to do -- to do (conflict). We see that even if it is the Chingororo ...",
3 and Chingororo is -- Chingororo spelling is C-H-I-N-G-O-R-O-R-O:
4 "... Chingororo is made up of three or four boys who have decided to live that life.
5 It's not the entire Kisii population that started the conflict. And that is why we are
6 saying dear listener, when things erupt, we should not blame the entire tribe for
7 things that -- for things like that. Let us see where they came from. We have
8 elders, we have elders, they should sit down and decide on the root cause of the
9 problem, because our generation, those of us who were born just recently, we want a
10 different Kenya. A Kenya for all Kenyans. One that will live without tribalism but
11 will respect -- with respect. And so, listener, I say thank you."

12 Could you confirm, Mr Witness, that that's a fair translation of what you heard?

13 A. It is, your Honour.

14 MR KIGEN-KATWA: Page 72, line 1, should read, "This is because we do not want
15 conflict. Just the other day we tried to calm people when trouble started -- when
16 trouble arose in Kisii. People got a bit agitated and they decided to do (conflict)."

17 Q. Now, Mr Witness, you heard another audio -- Mr President, I don't know if I
18 could request for ten minutes in the next session? I will definitely not go beyond
19 ten minutes.

20 PRESIDING JUDGE EBOE-OSUJI: Try and make it shorter than ten minutes in the
21 next session.

22 MR KHAN: Your Honour, can I suggest perhaps -- no, objection of course, but
23 would the Court be minded that we sit at 2 instead of 2.30? And I'm not pressing
24 the point, but it's just --

25 PRESIDING JUDGE EBOE-OSUJI: No, we will -- we will come back at 2.30.

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1 MR KHAN: I'm grateful.

2 PRESIDING JUDGE EBOE-OSUJI: 2.30. Mr Kigen-Katwa, try and make it less
3 than -- try and do whatever you need to do in five minutes.

4 MR KIGEN-KATWA: I promise to try, Mr President.

5 PRESIDING JUDGE EBOE-OSUJI: Witness, it is now time for lunch break and we
6 will be rising for lunch and you will come back at 2.30. Thank you.

7 The blinds down, please, for the witness to be escorted from the courtroom.

8 *(Closed session at 1.02 p.m.) Reclassified into open session

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

10 (The witness stands down)

11 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

12 THE COURT USHER: All rise.

13 (Recess taken at 1.02 p.m.)

14 (Upon resuming in open session at 2.33 p.m.)

15 THE COURT USHER: All rise.

16 Please be seated.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, we will continue. I see that
18 my watch says 2.31 and the one on the computer says 2.33, but I'm sure we can move
19 on. You've got five minutes. That's what this is headed to.

20 MR KIGEN-KATWA:

21 Q. Mr Witness, good afternoon.

22 A. Good afternoon, your Honour.

23 Q. Mr Witness, you confirm -- could you tell the Court what is the ethnicity of
24 the two people you heard being interviewed by Mr Sang? We start with Joseph
25 Kaguthi.

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- 1 A. He is a Kikuyu, your Honour.
- 2 Q. And the second one?
- 3 A. He is a Kikuyu, your Honour.
- 4 Q. And who is the second one?
- 5 A. Honourable Uhuru Kenyatta, your Honour.
- 6 Q. And Mr Witness, you will confirm that Mr Sang was seeking that there be
7 harmony and coexistence in Kenya between all tribes, isn't it?
- 8 A. Yes, your Honour.
- 9 Q. Now, Mr Witness, did you listen to that particular audio?
- 10 A. I didn't listen to it, your Honour.
- 11 MR KIGEN-KATWA: Mr President, I would pray that that audio and its translation
12 be marked for identification. The audio is KEN-D11-0011-0030 and the translation
13 is KEN-D11-0012-0204.
- 14 PRESIDING JUDGE EBOE-OSUJI: They will be marked for identification.
- 15 MR KIGEN-KATWA: Mr President, that's all I had for this witness. Thank you.
- 16 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Kigen-Katwa.
- 17 THE COURT OFFICER: The audio KEN-D11-0011-0030 will bear the following
18 number: MFI-T-D11-00034. The translation KEN-D11-0012-0204 will bear the
19 following number: MFI-T-D11-00035.
- 20 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 21 Witness, Mr Kigen-Katwa has finished asking you questions. It will now be -- it
22 will next be the turn of Mr Khan. Mr Khan, it will be you, right?
- 23 MR KHAN: Yes.
- 24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan to ask you questions.
- 25 QUESTIONED BY MR KHAN:

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1 Q. Mr Witness, as the President of the Court mentioned, my name is Karim Khan
2 and I represent Mr William Ruto, who sits behind me. Now, it's correct, is it not,
3 that before you gave evidence before this Court, you spent some days reading the
4 transcripts of your interviews with the Prosecution that took place in (Redacted); is that
5 right?

6 A. It is correct, your Honour.

7 Q. And did you keep notes? Did you make notes during the hours that you
8 spent reviewing those transcripts?

9 A. I didn't make any notes, your Honour.

10 Q. Now, witness, you were -- you'll remember that you were interviewed by the
11 Prosecution (Redacted). Do you remember that?

12 A. Yes, your Honour.

13 MR KHAN: And for the record, your Honour, it's KEN-OTP-0081-0435.

14 Q. And, Witness, what I'm -- I'm going to read what you said and you tell me if
15 it's accurate and it's line 409 of the transcript. You had this question, Mr Witness, of
16 the Prosecution. You said, "If, for instance, I'm called by the Prosecutions to give
17 my witness in the ICC, would I be entitled to revise or receive the video?" Do you
18 remember being asked that question -- do you remember saying that?

19 A. I remember, your Honour.

20 Q. And the interviewer said, "To refresh your memory, you mean?" You said,
21 "Yeah." The interviewer, "So you remember?" You said, "Yeah." The interviewer
22 said, "Yes, of course." The other interviewee -- you said, "Okay." The other
23 interviewer said, "Of course." And then you said, "Okay. That was my question."
24 That's what took place, isn't it, during that interview?

25 A. Yes, your Honour.

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1 Q. And that was before you started giving the meat of your account during
2 that -- the interview on that particular day, is that right?

3 A. No, your Honour. I asked the question after we finished -- I had finished my
4 interview, your Honour.

5 Q. But that was -- you said that at the beginning of the interview that day, is that
6 right?

7 A. Your Honour, I asked after I had given my testimony to the Prosecution on
8 that day, your Honour.

9 MR GARCIA: I'm sorry, if Defence counsel could just repeat the number of the
10 ERN of the transcript. I understand --

11 MR KHAN: Yes, of course. It's --

12 MR GARCIA: -- he mentioned 0435, but we don't have a 0435. Is that the page
13 number, or the transcript number?

14 MR KHAN: It's KEN-OTP-0081-0435. It's page 12 of that transcript and it's -- I
15 won't give the month, but it's the -- the date is the 8th.

16 MR GARCIA: So it's transcript 0081-0423, is that correct, so it's the first page?

17 MR KHAN: Yes, that's the first page.

18 MR GARCIA: All right.

19 MR KHAN: That's the apparent number.

20 MR GARCIA: That's what I needed. Thank you.

21 MR KHAN:

22 Q. So, Witness, you remember saying that, don't you?

23 A. I remember, your Honour, but it was on the last day.

24 Q. And you're clear it's the last day of the interview?

25 A. I remember asking it on the last day, your Honour.

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- 1 Q. Witness, we'll move on from that. And on 6 and 7 and 8 January, you spent
2 almost the whole day reading your transcripts, didn't you?
- 3 A. Yes, your Honour.
- 4 Q. And that's January of this year?
- 5 A. Yes, your Honour.
- 6 Q. Indeed, Witness, we've been told by the Prosecution that between noon and
7 5.33 p.m. on the 6th you were busy with your transcripts; is that right?
- 8 A. Yes, your Honour.
- 9 Q. And the next day, Witness, on 7 January, between 9.30 a.m. and 5.37 p.m.,
10 again you were busy reading your transcripts; is that right?
- 11 A. Yes, your Honour.
- 12 Q. And the next day once again, 8 January, between 9.34 in the morning until
13 4.43 in the afternoon, you were busy reading the transcripts?
- 14 A. Yes, your Honour.
- 15 Q. And then on the 9th and the 10th you sat with the Prosecution, didn't you?
- 16 A. I did, your Honour.
- 17 Q. And I think on the 9th you spent -- excluding breaks, excluding all the breaks,
18 you spent about five-and-a-half hours with the Prosecution, didn't you?
- 19 A. Yes, your Honour.
- 20 Q. And then on 10 January you spent an hour-and-a-half going over your
21 evidence and answering questions that the Prosecution had; is that right?
- 22 A. Yes, your Honour.
- 23 Q. Witness, you were informed by the Prosecution and the Victim and Witness
24 Unit that your testimony was originally scheduled to start in this session on 15
25 January. You knew that, didn't you? You had been told that originally it was

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1 expected that you would start on the 15th?

2 A. It was 16 January, your Honour.

3 Q. On 13 January, after all these hours and days spending reading with the
4 transcripts, you called once again, you contacted the Victim and Witness Unit, and
5 you said you want to read the transcripts one further time, didn't you?

6 A. I did, your Honour.

7 Q. Those transcripts were given to you, weren't they?

8 A. I was given, your Honour.

9 Q. And on 14 January you read those transcripts for the day; is that right?

10 A. Half-day, your Honour.

11 Q. Witness, I don't want you to misunderstand me from the beginning. I'm
12 putting it to you that the reason from the beginning, within 24 minutes of your
13 interview that commenced on the 8th that I read out, that's 24 minutes into the
14 interview, the reason you expressed such interest in getting access to your
15 transcripts was because you're trying to remember a false story rather than recall
16 truthfully an event that took place. Do you understand me?

17 A. I understand you, your Honour.

18 Q. And isn't that the case, Witness?

19 A. It -- it is not true, your Honour.

20 Q. I'm grateful. I'll move on to another topic. Witness, yesterday you were
21 saying -- giving evidence regarding ceremonies and kingship, the Kalenjin
22 community. And you spoke about Koitalel Arap Samoei, do you remember that?

23 A. Yes, your Honour.

24 Q. Koitalel Arap Samoei of course is a legendary figure in Kenya, is that right?

25 A. Yes, your Honour.

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- 1 Q. Something all school children learn about in secondary school, isn't that right?
- 2 A. Yes, your Honour, even in primary school, your Honour.
- 3 Q. And did you study about Koitalel, Koitalel Arap Samoei in secondary school?
- 4 A. In primary school, your Honour.
- 5 Q. Now, you said, and it's page 12 of the transcript of yesterday, line 8 to 12, that
- 6 there was a belief in the Kalenjin community that calamity would occur to that
- 7 community because Koitalel had been killed by fellow Kalenjins. Do you remember
- 8 talking about that?
- 9 A. I remember, your Honour.
- 10 Q. And you described him as the last king of the Kalenjin, is that right?
- 11 A. Yes, your Honour.
- 12 Q. Are you aware that it's very known in Kenya that Koitalel Arap Samoei was,
- 13 in fact, cruelly beheaded by a British army officer, Colonel Richard Meinertzhagen?
- 14 That's M-E-I-N-E-R-T-Z-H-A-G-E-N. Had you heard about that?
- 15 A. I am aware, your Honour.
- 16 Q. In fact, so brutal a killing was it that, in fact, his head was sent by this army
- 17 officer to London so it could be examined as to why he was such a good military
- 18 strategist. Are you aware of that?
- 19 A. I'm aware, your Honour.
- 20 Q. And, in fact, he was with a group of Kalenjin, and he was attending what he
- 21 had been told by the British was a peace meeting, a peace pact meeting with Colonel
- 22 Richard Meinertzhagen. And under cover of that meeting, he was brought and
- 23 then executed. You're aware of that?
- 24 A. I'm aware, your Honour.
- 25 Q. And he had been told by his Kalenjin men that when he met the British, not to

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- 1 shake their hands, because if he shook the hand, it would identify him as the leader.
- 2 Are you aware of that?
- 3 A. I'm aware, your Honour.
- 4 Q. He was not, as you say, the last king of the Kalenjin, was he?
- 5 A. He was, your Honour.
- 6 Q. In fact, Mr Witness, he wasn't even a king at all, was he?
- 7 A. He was a king, your Honour.
- 8 Q. Executed by the British in 1905, he was in fact the first freedom fighter in
- 9 Kenya against colonial oppression; isn't that right?
- 10 A. It is right, your Honour.
- 11 Q. It's false, isn't it, Witness, given what you've said, that he was killed by the
- 12 Kalenjin? He was killed by the British, wasn't he?
- 13 A. Your Honour, the Kalenjins believed that Koitalel Samoei was killed by
- 14 Kalenjins because they were the one who were the traitors, who -- who -- they
- 15 believed that fellow Kalenjins were the ones who were traitors to the British
- 16 government against Koitalel Samoei, your Honour.
- 17 MR KHAN: Your Honour, I think unfortunately I wanted a little bit in public
- 18 session at least, but I think at this point I would have to go into private session.
- 19 PRESIDING JUDGE EBOE-OSUJI: Private session for how long?
- 20 MR KHAN: Your Honour, in all likelihood for the rest of the day.
- 21 PRESIDING JUDGE EBOE-OSUJI: Private session then.
- 22 MR KHAN: Your Honour, I may seek to come out five minutes before the end with
- 23 your leave and maybe ask a question that will summarise in a redacted form any
- 24 evidence that's elicited that may be useful.
- 25 *(Private session at 2.50 p.m.) Reclassified into open session

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1 THE COURT OFFICER: We are in private session, your Honours.

2 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

3 MR KHAN:

4 Q. Witness, you told the Prosecution, you told the Court, in fact, the first day you
5 gave evidence that you attended the (Redacted), is that right?

6 A. Yes, your Honour.

7 MR KHAN: Your Honours, I believe you've been handed Defence folders and the
8 Prosecution as well. Have they? Your Honour, it hasn't been done. I'd ask that
9 that be done first before I move on.

10 (Trial Chamber confers)

11 MR KHAN:

12 Q. Witness, before I go on with that topic, I want to address something that I
13 raised in the public session, and I couldn't go further because I don't -- didn't want to
14 reveal the dates. You were interviewed by the Prosecution on (Redacted)
15 (Redacted), weren't you?

16 A. Yes, your Honour.

17 Q. And the extract that I read out where you, at the very outset, were seeking
18 access to your transcripts or video so you could revise or refresh your memory, that
19 was on the very first day, on (Redacted), wasn't it?

20 A. Your Honour, I remember that the Prosecution told me that I could have been
21 given the copy of my testimony, but because of security reasons, they would not
22 have given me, and that's why -- that's the reason why I asked them if I would have
23 to review it before I testify, your Honour.

24 Q. And, Witness, you said this: You have this concern to get hold of your
25 evidence, of the story you were going to give to the Prosecution within the first 24

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1 minutes of the (Redacted) interview, isn't that right?

2 A. Your Honour, if -- if it -- if it was in the first day, it's that I had been told first
3 that it was supposed that I will be giving my testimony, but I would not be giving
4 my testimony because of security reasons, your Honour, and that's why I asked the
5 question, your Honour.

6 Q. Witness, my question is very simple. It was on the first day, not the last day,
7 isn't that right?

8 A. I don't remember, your Honour, if it was the first day or the last day.

9 Q. Witness, I'm going to ask the help of the Court to show you
10 KEN-D09-0028-0040, KEN-D09-0028-0040.

11 Your Honour, tab 28.

12 PRESIDING JUDGE EBOE-OSUJI: Of which binder? The transcripts binder, or the
13 other one?

14 MR KHAN: The other binder, your Honour, not the transcripts.

15 Q. Witness, you see on the screen a photograph. Is that the (Redacted)
16 (Redacted)?

17 A. Yes, your Honour.

18 Q. And (Redacted) for how many years?

19 A. (Redacted) years, your Honour.

20 Q. And (Redacted), is that right?

21 A. Yes, your Honour.

22 Q. (Redacted) stands for (Redacted), is that right?

23 A. Yes, your Honour.

24 MR KHAN: It can be taken off the screen.

25 Q. And (Redacted), is that right?

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- 1 A. Yes, your Honour.
- 2 Q. You (Redacted); is that correct?
- 3 A. Yes, your Honour.
- 4 Q. And thereafter you (Redacted); is that right?
- 5 A. I (Redacted), your Honour.
- 6 Q. And in (Redacted)
- 7 (Redacted); is that right?
- 8 A. Yes, your Honour. Yes, your Honour.
- 9 Q. Also known as (Redacted); is that right?
- 10 A. Yes, your Honour.
- 11 Q. And you were (Redacted); is that right?
- 12 A. The (Redacted), your Honour.
- 13 Q. So (Redacted)?
- 14 A. (Redacted), your Honour.
- 15 Q. And you (Redacted), Witness?
- 16 A. Yes, your Honour. (Redacted), your Honour, I'm sorry.
- 17 Q. Witness, you (Redacted), did you?
- 18 A. I attended, your Honour.
- 19 Q. You see the information we've received, Witness, is that you (Redacted)
- 20 (Redacted) and that's why you (Redacted)
- 21 (Redacted); is that right?
- 22 A. I did (Redacted), your Honour.
- 23 MR KHAN: Your Honours, I'd refer the Bench to tab 31 and I would ask to be
- 24 displayed on the screen KEN-D09-0028-0047.
- 25 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, we're there. I will only urge that you

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1 keep an eye to the forensic import of the line of question.

2 MR KHAN: Your Honours, understood. I'm grateful.

3 Q. Witness, can you see the bottom paragraph? It's dated (Redacted)

4 and it says, "(Redacted)

5 (Redacted)," and it's signed. Witness, (Redacted)

6 (Redacted), is that right or not?

7 A. Your Honour, I would like to say that it was (Redacted). And (Redacted)

8 (Redacted)

9 (Redacted)

10 your Honour.

11 MR KHAN: I'm grateful.

12 And, your Honour, if you could turn to tab 29 and I'd ask to be displayed

13 KEN-D09-0028-004. KEN-D09-0028-004.

14 PRESIDING JUDGE EBOE-OSUJI: What tab?

15 MR KHAN: Your Honour --

16 PRESIDING JUDGE EBOE-OSUJI: Are you sure it's 004? I know there might have

17 been some blacking out of the terminal numbers.

18 MR KHAN: Your Honour, it's KEN-D09-0028-0045. Sorry, I couldn't see the 5.

19 0045.

20 PRESIDING JUDGE EBOE-OSUJI: Indeed. It seems to me that it might not have

21 been 4 alone, and that brings into focus now the need to verify these numbers, if

22 possible, retranscribe them somewhere where they're legible. We may have

23 difficulty down the line trying to find these things when we need them for the

24 evaluation.

25 MR KHAN: Sir, I'm grateful.

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- 1 Q. Witness, if you can look what's on the screen -- maybe the top part can be
2 made larger -- (Redacted), you see a name, in private session, (Redacted).
3 That's you, isn't it?
- 4 A. Yes, your Honour.
- 5 Q. And you see that there's an (Redacted)
6 (Redacted) and that's because (Redacted)
7 (Redacted), did you?
- 8 A. Yes, your Honour. I said -- as I said, that (Redacted)
9 (Redacted), your Honour.
- 10 Q. And that's simply not true, is it, Witness?
- 11 A. It is true, your Honour. I (Redacted)
12 (Redacted), your Honour.
- 13 MR KHAN: Your Honour, I'll refer you to tab 26 and I'd ask to be displayed
14 Ken-D09-0028-0037. This time the ERN is legible.
- 15 Q. Do you see what's on the screen? It's a (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Redacted)
20 (Redacted) ..." -- I think it's a mistake
21 but, "... (Redacted)
22 (Redacted)
23 (Redacted)
24 (Redacted)
25 Witness, you didn't -- you didn't --

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1 A. Your Honour --

2 Q. Witness, if you can wait for my question, please. It's not true that (Redacted)
3 (Redacted), and it's not true that (Redacted), is it?

4 A. Your Honour, I (Redacted), and I (Redacted)
5 (Redacted), your Honour. And I (Redacted),
6 your Honour.

7 Q. In fact, (Redacted)
8 (Redacted)

9 A. That's a lie, your Honour.

10 MR KHAN: Your Honour, I would ask to be placed on the screen of the witness
11 KEN-D09-0028-0038.

12 Q. Witness, you'll see a (Redacted)

13 (Redacted). That's (Redacted)

14 (Redacted). And it states this, "(Redacted)," And it says, "(Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted) Is that right or not?

24 A. That's not true, your Honour. (Redacted)

25 (Redacted). That's not true.

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1 Q. Are you aware of this (Redacted)

2 (Redacted)?

3 A. I am not aware, your Honour. And there was no day that I had to (Redacted)

4 (Redacted), your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: You must spell.

6 MR KHAN: Your Honour, I had spelt it previously, but (Redacted).

7 Your Honour, yes, (Redacted) is the correct spelling. It was my mistake.

8 Q. Witness, you never (Redacted), did you?

9 A. I never (Redacted), your Honour.

10 Q. And, Witness, the reason I say that all this leading up to trying to persuade

11 you we say to tell the truth, that if you -- your Honours turn to tab 72. And,

12 Witness, you'll see in a moment at KEN-D09-0028-0085 a (Redacted)

13 (Redacted)

14 (Redacted). And, Witness, you'll see that on the screen and (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted) Have you read that,

19 Witness?

20 A. I've read, your Honour.

21 Q. And, Witness, the Judges have at tab 73 --

22 PRESIDING JUDGE EBOE-OSUJI: Before you go to 73, is (Redacted) spelled right?

23 MR KHAN: I'm sorry. Your Honour, it's spelt (Redacted).

24 PRESIDING JUDGE EBOE-OSUJI: (Redacted) as well?

25 MR KHAN: (Redacted).

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- 1 Q. Witness, I was saying that the Judges have got, it's been provided to the
2 Defence by the (Redacted)
3 (Redacted). And going through it meticulously your name doesn't appear. So that's
4 why I'm saying -- that's why I'm saying, Witness, that you have knowingly -- from
5 the beginning, in fact, from the very first bit of your evidence, you have knowingly
6 told a falsehood to the Court, haven't you?
- 7 A. No, your Honour. I (Redacted), your
8 Honour.
- 9 Q. Witness, I'll move on to another topic.
10 Witness, you told the Prosecution that the (Redacted);
11 is that right?
- 12 A. Yes, your Honour.
- 13 Q. And that you (Redacted); is that right?
- 14 A. Yes, your Honour.
- 15 Q. And you (Redacted)?
- 16 A. Yes, your Honour.
- 17 Q. Do you recall, Witness, (Redacted)?
- 18 A. I was young, your Honour, and I don't recall.
- 19 Q. Did you ever hear from any of (Redacted)?
- 20 A. No, your Honour. I don't recall, I don't recall.
- 21 Q. If I say it was (Redacted), would that be right, wrong, or you have no
22 idea?
- 23 A. It could be right, your Honour, because I was (Redacted) by that -- by then.
- 24 Q. Witness, you know full well that (Redacted)
25 (Redacted)? You know that, don't you?

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1 A. Your Honour, I know that, and I also know that (Redacted)

2 (Redacted), your Honour.

3 Q. So you accept (Redacted)

4 (Redacted), you accept that?

5 A. I accept, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: By "(Redacted)," what do we mean?

7 MR KHAN:

8 Q. You're (Redacted), are you, Witness?

9 A. (Redacted), your Honour.

10 Q. Why then did you tell the Prosecution that you were?

11 A. Your Honour, (Redacted)

12 (Redacted), your Honour. And that's according to (Redacted), your

13 Honour.

14 Q. There is no (Redacted), is there?

15 A. Your Honour, as I said before, (Redacted).

16 Q. And that's also a knowing falsehood, isn't it?

17 A. That's not true, your Honour. That's the fact, that is (Redacted), your

18 Honour.

19 Q. Because the reality is --

20 PRESIDING JUDGE EBOE-OSUJI: Now, wait. Wait. What is a falsehood?

21 Counsel --

22 MR KHAN:

23 Q. That's not true, is it, Witness?

24 PRESIDING JUDGE EBOE-OSUJI: What is? Let's nail what the proposition is to.

25 There's a number of propositions that precede it. One was whether he (Redacted)

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1 (Redacted). The other was whether (Redacted)

2 (Redacted). That was the last thing he said and you said that's not

3 true also, so let's nail exactly what it is we're talking about.

4 MR KHAN: Well, I'll deal with them both, your Honour, with your leave and I'm
5 grateful.

6 Q. Witness, it is not true that (Redacted) in

7 any way?

8 A. It is not true, your Honour.

9 Q. The reality is this, that (Redacted)

10 (Redacted), wasn't he?

11 A. I -- I -- I don't know about that, your Honour, because I was not there by then,
12 your Honour.

13 Q. And (Redacted); isn't

14 that right?

15 A. I am not aware, your Honour.

16 Q. You know full well that (Redacted), don't you?

17 A. I have never (Redacted)

18 (Redacted), your Honour.

19 Q. Well, let me see if this refreshes your memory.

20 Your Honours can turn, with your leave, to tab 49.

21 And, Mr Witness, I want you to -- I want you to look at a (Redacted),

22 KEN-D09-0028-0056. Witness, what was shown to you is (Redacted). You
23 recognise (Redacted), do you?

24 A. I recognise (Redacted), your Honour.

25 Q. In fact, a lot of people say that (Redacted). What do

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1 you think?

2 A. According to what, your Honour?

3 Q. Do you think (Redacted)?

4 A. I -- I don't think -- I don't think (Redacted)

5 (Redacted), your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let's have a focus on what this exercise
7 is about. The witness has not denied that the (Redacted) you referred to, (Redacted)

8 (Redacted). The witness

9 acknowledges that, that that's indeed the case, (Redacted). Why are we on
10 this line of inquiry now as to whether somebody else is (Redacted)?

11 MR KHAN: Your Honour, it goes to --

12 PRESIDING JUDGE EBOE-OSUJI: Is that an issue?

13 MR KHAN: Your Honour, what's in issue is the truthfulness of this witness. It's
14 our respectful submission that we've already confronted him regarding (Redacted)
15 (Redacted), and for the first time today after hours and hours of interviews he has
16 accepted that there is no (Redacted) and so
17 his credibility is very much in line.

18 Your Honours, I'll move on from the issue of (Redacted) to other issues, and your
19 Honours, hopefully it will become apparent why this is relevant we say to the
20 assessment of this gentleman's credibility.

21 PRESIDING JUDGE EBOE-OSUJI: Fair enough. So let's move away from who (Redacted)
22 (Redacted). That is not an issue in the case. The issue rather is
23 whether he had testified on a previous occasion that (Redacted)
24 (Redacted). That would be the
25 issue.

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1 MR KHAN: Your Honour, the issue is -- I agree with that, your Honour, but this is
2 a witness we say that has deliberately sought to paint himself as (Redacted)
3 (Redacted) to give some scintilla of substance to his testimony --

4 PRESIDING JUDGE EBOE-OSUJI: And you've made that point.

5 MR KHAN: -- to make himself valuable to the Prosecution. So, your Honours, I'm
6 going on that issue of (Redacted) now, not (Redacted), and submissions can be
7 made on his failure to mention that earlier at a later point.

8 Q. Witness, why did you never tell the Prosecution that you had (Redacted)
9 (Redacted)? You made it very clear that (Redacted),
10 but why did you not make it -- why didn't you make it clear to the Prosecution that
11 (Redacted)?

12 A. Your Honour, first of all, I have not said that (Redacted). I
13 made it clear that according to me, I knew that (Redacted)
14 (Redacted).

15 Secondly, your Honour, the Prosecution didn't ask me whether I -- I (Redacted)
16 (Redacted), your Honour.

17 Q. And a number of questions were posed by the Prosecution in the course of
18 your interview regarding which (Redacted)
19 was. You didn't think it pertinent, you didn't think it helpful to make it clear that
20 (Redacted)? You didn't think
21 that important, Witness?

22 A. Your Honour, my answer is still the same, that all of (Redacted)
23 (Redacted), because what I know is that (Redacted)
24 (Redacted), your Honour.

25 Q. And --

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- 1 A. And (Redacted), your Honour.
- 2 Q. And it flows from that, does it, that (Redacted)
- 3 (Redacted)? Am I right?
- 4 A. Your Honour, (Redacted)
- 5 (Redacted), your Honour.
- 6 Q. In fact, (Redacted); is that right?
- 7 A. Not (Redacted), but (Redacted), your Honour.
- 8 Q. And (Redacted), is that right?
- 9 A. That's right, your Honour.
- 10 Q. Many years after (Redacted); isn't that right?
- 11 A. That's right, your Honour.
- 12 Q. (Redacted)
- 13 (Redacted), is that right?
- 14 A. Yes, your Honour.
- 15 MR KHAN: And, your Honours, I'd refer you to tab 50, KEN-D09-0028-0057, if that
- 16 (Redacted) could be put on the screen.
- 17 Q. Do you recognise the (Redacted), Witness?
- 18 A. (Redacted), your Honour.
- 19 Q. His name?
- 20 A. (Redacted), your Honour.
- 21 Q. And Witness, moving on, you say that Mr Ruto, who sits behind me, that (Redacted)
- 22 (Redacted); is that right?
- 23 A. Yes, your Honour.
- 24 Q. Was that his full name?
- 25 A. (Redacted) your

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1 Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Can we have a spelling for that.

3 THE WITNESS: (Redacted), your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Witness, please also keep in mind the advice for
5 you to observe a pause between the completion of the question and your
6 commencement of an answer.

7 THE WITNESS: Yes, your Honour.

8 MR KHAN:

9 Q. And the (Redacted), you told the Court on 17 January that
10 (Redacted); is that right?

11 A. Yes, your Honour.

12 Q. Was that (Redacted)? Was that (Redacted)?

13 A. I have forgotten the other name, your Honour. And, your Honour, next is
14 that even I (Redacted). The name was just told to me, your Honour.

15 Q. You (Redacted)?

16 A. (Redacted), your Honour.

17 Q. (Redacted), you say, (Redacted), you must have spoken about
18 (Redacted). You must have learnt (Redacted), is that not right?

19 A. Your Honour, I am saying that I have heard (Redacted), but I don't -- I have just
20 forgotten (Redacted), your Honour.

21 Q. In fact (Redacted) simply means (Redacted), doesn't it? It doesn't
22 have any other meaning?

23 A. It is, your Honour. Even I can say that the (Redacted)
24 (Redacted), I don't know (Redacted), but I only know (Redacted)
25 (Redacted), your Honour.

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1 Q. Witness, I put it to you that if you had been (Redacted), if you had
2 been (Redacted), you would have known that the (Redacted)
3 (Redacted). You would have known that, wouldn't you?

4 A. Your Honour, I would say that the (Redacted) I'm saying I (Redacted)
5 (Redacted)
6 (Redacted)
7 (indiscernible), and that's -- that was all, your Honour.

8 PRESIDING JUDGE EBOE-OSUJI: Spell those two terms. You said --
9 (Microphone not activated).

10 THE WITNESS: Your Honour, (Redacted).

11 PRESIDING JUDGE EBOE-OSUJI: (Redacted) or (Redacted)?

12 THE WITNESS: (Redacted).

13 PRESIDING JUDGE EBOE-OSUJI: (Redacted) as in (Redacted), or (Redacted) as in (Redacted)?

14 THE WITNESS: (Redacted), your Honour.

15 PRESIDING JUDGE EBOE-OSUJI: (Redacted).

16 THE WITNESS: Yes.

17 PRESIDING JUDGE EBOE-OSUJI: Okay. (Redacted).

18 THE WITNESS: Then (Redacted), your Honour.

19 MR KHAN: Your Honours, if I may continue?

20 Q. Witness, I put it to you that the (Redacted) was never known
21 (Redacted). that's right, isn't it?

22 A. Your Honour, that's the (Redacted) -- I was not able to
23 remember (Redacted), your Honour.

24 Q. And Prosecution -- Witness, you told the Prosecution that (Redacted)
25 (Redacted) and you knew (Redacted). Do you recall saying that

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1 to the Prosecution?

2 A. Your Honour, I remember saying that I don't remember (Redacted), but (Redacted)
3 (Redacted), your Honour.

4 Q. Do you remember telling the Prosecution -- and it's KEN-OTP-0081-0482 at
5 513 for my -- for the Prosecution's reference. Do you remember saying to the
6 Prosecution that the (Redacted) and you
7 knew (Redacted)? Do you remember saying that?

8 A. I remember, your Honour, at our first meeting.

9 Q. Witness, in fact, (Redacted).
10 Are you aware of that?

11 A. I'm not aware of (Redacted), your Honour.

12 Q. And you're not aware of (Redacted) that you failed to
13 mention when you were interviewed by the Prosecution in detail regarding the
14 (Redacted)?

15 A. I'm not aware, your Honour.

16 Q. Witness, do you remember telling the Prosecution that the (Redacted)
17 (Redacted)
18 (Redacted)? Do you remember saying that?

19 A. Yes, your Honour.

20 Q. And you told the Prosecution that you know (Redacted)
21 (Redacted). Do you remember saying that?

22 A. Yes, your Honour.

23 Q. Do you know the (Redacted), by the way, (Redacted)?

24 A. (Redacted). I don't -- I don't know if it was
25 (Redacted)

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1 Q. You don't remember (Redacted)?

2 A. I don't remember the (Redacted) your

3 Honour.

4 Q. And (Redacted), is that right?

5 A. Yes, your Honour.

6 Q. Witness, actually, (Redacted). That's

7 actually the (Redacted). You got

8 the (Redacted) wrong, didn't you?

9 A. I was not aware of the (Redacted), your Honour.

10 Q. Were you aware that (Redacted), not (Redacted)?

11 A. Your Honour, the last time I visited (Redacted), your

12 Honour. I'm not aware of the other (Redacted), your Honour.

13 Q. And in fact, (Redacted) were -- do you know -- which (Redacted) do

14 you know, by the way? Just (Redacted) come to mind?

15 A. I don't recall for now, your Honour.

16 Q. So you don't know about (Redacted)? None

17 of these you know about?

18 A. I don't recall, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, again, we need to keep our eye on the

20 ball and try to understand the purpose of the question. Are you -- would it be that

21 demonstration of (Redacted) makes the evidence credible and lack of

22 (Redacted) does not? We need to determine why we're doing this.

23 MR KHAN: Your Honour, I'm restrained somewhat to answer in the presence of

24 the witness, but it's very clear the time the Prosecution spent in their interview on

25 (Redacted), the importance that they're seeking to place on (Redacted) Your

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1 Honour, it's relevant to credibility, but it's also relevant to other issues as well that I
2 could speak to. But, your Honour, that's I think all I can say in the presence of the
3 witness.

4 PRESIDING JUDGE EBOE-OSUJI: Fair enough. I'm not stopping you.

5 MR KHAN: I understand. I understand.

6 PRESIDING JUDGE EBOE-OSUJI: It's more than a hint, because at some point we
7 will be pressed for time. You know that.

8 MR KHAN: Your Honour, we're going to be going over until Monday anyway.
9 My estimate to the Prosecution was three days.

10 PRESIDING JUDGE EBOE-OSUJI: Not just that. There is the other witness to be
11 accommodated and we don't want to run the thing so close that the other witness
12 becomes an issue. You may have other questions, I don't know, that you need to
13 compare the value of those questions to that other witness versus certain questions
14 you are asking this witness.

15 MR KHAN: Your Honour, I'll move on. On the issue, while I'm addressing it,
16 we've had discussions regarding the next witness, and we're fully cognizant of the
17 Bench's timetable and that that witness will be finished by the end of next week and
18 I think the preparation we have for cross-examination has taken that into account.

19 Q. So, Witness, (Redacted) you've just made up, isn't it?

20 A. I didn't make up, your Honour. That's the (Redacted) that I know, your Honour.

21 Q. And you told the Prosecution that (Redacted)

22 (Redacted). Do you remember saying that?

23 A. I remember, your Honour.

24 Q. Why did you make that distinction if (Redacted)?

25 A. Your Honour, the Prosecution was asking me if (Redacted)

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1 (Redacted). They were not asking me if (Redacted)

2 (Redacted). They were asking me the (Redacted), your Honour.

3 Q. You see, Witness, what I'm going to be putting to you is you had ample
4 opportunity over many occasions to tell the Prosecution the true state of affairs, and
5 the reason you didn't is because you are trying to (Redacted)
6 (Redacted) in order to give a basis for your false story. Do you
7 understand what I'm saying?

8 A. That's a lie, your Honour.

9 Q. And Witness, you told the Prosecution yourself that the reason you gave them
10 the (Redacted) that was shown in the Prosecution's questioning was to show how
11 central you were, how (Redacted); isn't that right?

12 That's what you said?

13 MR GARCIA: I object. If Mr Khan wishes to put statements that the witness
14 would have stated before in his transcript, I would like to know the reference that
15 he's referring to. The fact that he would have said -- he was -- how central he was to
16 the (Redacted), I would like to have that reference.

17 PRESIDING JUDGE EBOE-OSUJI: Objection overruled.

18 MR KHAN:

19 Q. Witness, do you know the (Redacted)?

20 A. I know (Redacted), your Honour.

21 MR KHAN: Your Honour, just for my learned friend, the reference is

22 KEN-OTP-0081-0610.

23 PRESIDING JUDGE EBOE-OSUJI: I already ruled on that.

24 MR KHAN: I'm grateful. Your Honour, I'll move on.

25 Q. You said, Mr Witness, that (Redacted). In fact, (Redacted)

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1 (Redacted)

2 (Redacted). You didn't know that, did you, Witness?

3 A. Your Honour, if that is the issue he is talking about, the (Redacted)

4 (Redacted) according to what I heard. (Redacted), your

5 Honour.

6 Q. Do you know the (Redacted)?

7 A. I don't know, your Honour, but I heard that (Redacted)

8 (Redacted), your Honour, and (Redacted), your

9 Honour.

10 Q. You haven't heard the (Redacted)

11 (Redacted)? You haven't heard that (Redacted)?

12 A. I have never heard it, your Honour.

13 Q. And that when (Redacted)

14 (Redacted). That's the case,

15 isn't it?

16 A. What I know is that the (Redacted)

17 (Redacted), your Honour.

18 Q. And in fact, (Redacted)

19 (Redacted), you know that, don't you?

20 A. That one is very clear. I know that, your Honour.

21 Q. You mention a (Redacted).

22 MR KHAN: And, your Honour, I'm trying to go through it. There's a lot of details.

23 I'll try to speed it up.

24 Q. You mentioned (Redacted). Do you

25 know (Redacted)?

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- 1 A. I don't remember (Redacted). I remember (Redacted), your Honour.
- 2 Q. But (Redacted) not even known as that, (Redacted)
- 3 A. (Redacted), your Honour.
- 4 Q. (Redacted)
- 5 A. If the (Redacted)
- 6 (Redacted), your Honour.
- 7 Q. And (Redacted)?
- 8 A. (Redacted), your Honour.
- 9 PRESIDING JUDGE EBOE-OSUJI: Can you spell.
- 10 MR KHAN: "... (Redacted)"?
- 11 PRESIDING JUDGE EBOE-OSUJI: No.
- 12 MR KHAN: (Redacted)
- 13 Q. Do you know the (Redacted)?
- 14 A. I don't know, your Honour. I only went when (Redacted)
- 15 (Redacted), your Honour.
- 16 Q. You've never been to (Redacted), have you?
- 17 A. I've never been to (Redacted). What I heard is that (Redacted),
- 18 your Honour. I don't even know (Redacted).
- 19 Q. You mentioned a (Redacted)
- 20 (Redacted). Do you know the (Redacted)?
- 21 A. I don't remember, but I know the (Redacted), your Honour.
- 22 Q. You don't know (Redacted)?
- 23 A. Yes, your Honour.
- 24 Q. (Redacted)?
- 25 A. I know (Redacted). I know (Redacted), your Honour.

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1 Q. And despite all your questioning and questions posed by the Prosecution and
2 your opportunity to give details, how was it, Witness, that being (Redacted)
3 (Redacted)?

4 A. If you could mention another name, I don't understand (Redacted). If you
5 could mention another name, I might remember who he is, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Before that's done, the previous page, at line 19,
7 it was Mr Khan that spelled the name.

8 Proceed, Mr Khan.

9 MR KHAN:

10 Q. You see, Witness, I'm saying the reason you don't know the (Redacted)
11 is because you've never been (Redacted) at all?

12 A. Your Honour, I think the (Redacted) he's talking about is (Redacted)
13 (Redacted), your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: Again, try and observe the pause between
15 Mr Khan finishing the question and you beginning to answer.

16 Now, you said the (Redacted) he's talking about is who? Can you spell?

17 THE WITNESS: I'm not sure if it's the one, but if it is -- because I don't know the
18 (Redacted), but I know that (Redacted).

19 PRESIDING JUDGE EBOE-OSUJI: Can you spell it?

20 THE WITNESS: (Redacted), your Honour.

21 MR KHAN:

22 Q. Witness, you mention knowing a (Redacted). Do you recall that?

23 A. Yes, your Honour.

24 Q. Do you know the full name?

25 A. (Redacted) is what I know, your Honour.

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1 Q. (Redacted), that's his name, isn't it?

2 A. I'm not aware of (Redacted). I'm not aware of (Redacted), your

3 Honour, your Honour, but I am aware of (Redacted).

4 Q. And you say you actually (Redacted)

5 (Redacted), don't you?

6 A. I -- I say I did, your Honour.

7 MR KHAN: Your Honour, if the Prosecution exhibit 32 could be put on the screen,

8 I'll be grateful.

9 PRESIDING JUDGE EBOE-OSUJI: Do you also have the ERN number so that -- or
10 EVD number?

11 MR KHAN: I do, your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: Can you give it to assist?

13 MR KHAN: It's KEN-OTP-0073-0315.

14 Your Honour, I apologise. It should be the next one, the annotated one, the next in
15 the series. Your Honour, I think it's the annotated one. I believe it's P-32, and it's
16 the one the witness put numbers on that corresponded with exhibit - Prosecution
17 exhibit - I bis that was I think P-33.

18 THE COURT OFFICER: Can it be KEN-OTP-00033?

19 MR KHAN: I hope so. Your Honour, I'm grateful. I've been told by my
20 colleagues it's KEN-ICC-0001-0002 and it was assigned P-32 as a shorthand. It's the
21 annotated one; the one the witness drew numbers on.

22 Q. Witness, if you can look, you identified the (Redacted)
23 (Redacted), is that right?

24 A. I can't see it for now, your Honour.

25 Q. Could it be made a bit larger perhaps?

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1 A. Your Honour, it's not seen at all.

2 THE COURT OFFICER: Mr President, the original is in the vault. If the court
3 usher can go and --

4 MR KHAN: Your Honour, the other way of course is the witness can simply mark
5 on the unannotated photograph (Redacted). It would mean another
6 exhibit, of course, but that's a way for the annotated version.

7 Your Honour, then with the Court's -- with the court usher's kind assistance, perhaps
8 if the witness can use the magic pen to mark the screen?

9 Q. And, Witness, I would ask you to mark again the (Redacted)
10 (Redacted).

11 MR GARCIA: Your Honour, I have a hard copy of the photo. Maybe that could be
12 of an assistance to the witness. I think we used the hard copy last time and it was
13 clearer for him.

14 MR KHAN: Your Honour, I would rather use the technology because sometimes
15 the pen is not legible. It's too dark? Okay, in that case the hard copy is fine. I'm
16 grateful for my friend's offer in that case.

17 Q. So, Witness, you've been given a clean copy of a photograph, which is
18 KEN-OTP-0073-0315, and you've been given some pens and a pen that will show up.
19 Could you please draw an arrow to the (Redacted)?

20 A. Your Honour, I can't see, see the (Redacted),
21 your Honour. It's too dark, your Honour.

22 MR KHAN: Your Honour, could I get clarification from the Prosecution if this is
23 the same quality of photograph that was previously marked by the witness?
24 Otherwise, perhaps a better quality could be obtained.

25 MR GARCIA: It should be. It is the identical copy, actually.

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1 MR KHAN:

2 Q. (Redacted)

3 (Redacted)

4 (Redacted)

5 MR GARCIA: I object, your Honour.

6 MR KHAN:

7 Q. And (Redacted)?

8 MR GARCIA: I object. First of all, if we are going to put a proposition to the

9 witness, I don't think it's proper for Defence counsel to be telling the witness that

10 (Redacted)

11 We've already had this type of questioning, and it has been disallowed by the Court.

12 I think the same ruling applies here.

13 PRESIDING JUDGE EBOE-OSUJI: Indeed the case. Counsel, let's not insert that

14 kind of information in the question.

15 MR KHAN: I'm grateful.

16 Q. Witness, that's not (Redacted), is it?

17 A. Your Honour, I can say that I was not given the original photo. And maybe I

18 made a mistake by indicating it was (Redacted), your Honour.

19 Q. (Redacted)

20 (Redacted)

21 A. I -- I was not given any opportunity to create anything about being close to

22 (Redacted), your Honour.

23 MR GARCIA: Your Honour, just if it might assist Defence counsel, we do have the

24 original, I understand it must be in the vault, and we can bring it down tomorrow

25 and have the witness look at it if it will help Defence counsel. It might be much

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1 more clearer, the original, and I think that's the one obviously that was used by the
2 witness initially to indicate the (Redacted) that were on it, if it could be useful to the
3 Court.

4 MR KHAN:

5 Q. Witness, am I correct that looking at this photograph, you can't (Redacted) all the
6 (Redacted) You can't (Redacted) today?

7 A. Your Honour, if I get the original copy, I'm sure I will (Redacted), your
8 Honour.

9 Q. Witness, we've been told already that this is an identical copy of one you
10 previously were able to mark. So what I'm asking you is from the photograph in
11 front of you, can you (Redacted) or not?

12 A. Your Honour, using this copy, I cannot (Redacted), but if I will use the original I
13 know (Redacted), your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: I would like that particular copy to be
15 introduced into the record, what is now before the witness. It needs to come in,
16 because at some point we may have to compare it to the original.

17 MR KHAN: Your Honour, I'll ask for it to be exhibited in due course.

18 PRESIDING JUDGE EBOE-OSUJI: Yes.

19 MR KHAN: Your Honour --

20 Q. Witness, do you remember just a couple of days ago marking a copy exactly
21 like that? Do you remember that?

22 A. I remember, your Honour.

23 Q. And you were --

24 PRESIDING JUDGE EBOE-OSUJI: Counsel, one second please. Let me correct
25 myself. When I said "original" I meant the copy that is in the vault, the annotated

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1 version. That's what I meant to say.

2 MR KHAN: I'm grateful, yes. Your Honour, no objection to that. Of course it
3 would be useful. But may I proceed in the interim?

4 PRESIDING JUDGE EBOE-OSUJI: Proceed, please.

5 MR KHAN: I'm grateful.

6 Q. Witness, you know, don't you, the importance of testifying in a criminal trial?

7 A. I know, your Honour.

8 Q. And you must have been told that if you're not sure of something you must
9 say, "I'm not sure." It's not allowed to simply guess.

10 A. I have not guessed, your Honour.

11 Q. Because (Redacted) at all, Mr Witness.

12 A. Your Honour, I said maybe I made a mistake by (Redacted)
13 (Redacted), your Honour, and I accept that, your Honour.

14 Q. Witness, I'm putting it to you that three days ago you were able (Redacted) with
15 great alacrity, with great ease with this other charge you prepared in the interview,
16 you purported to (Redacted), and today you're finding
17 it difficult. Is it because you're not telling the truth?

18 A. No, your Honour. I have stated that the photograph that I have been given is
19 not clear enough, your Honour.

20 Q. Witness, you also said in this court, you identified a (Redacted),
21 (Redacted). Do you remember (Redacted)?

22 A. Yes, your Honour.

23 Q. Could you mark on that picture where (Redacted) is?

24 MR KHAN: And if that could be put on the ELMO, please, your Honour?

25 Q. Witness, you've marked it with a line, have you?

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1 A. I marked it, your Honour.

2 THE COURT OFFICER: In order to view this document, can you please press on
3 "Docu Cam Witness" next to you.

4 MR KHAN:

5 Q. Witness, in fact, that person you've identified just now is the same person you
6 identified as number 3 when you were questioned by the Prosecution.

7 PRESIDING JUDGE EBOE-OSUJI: Counsel, before you do that, before you do that,
8 let us now at this point -- let us at this point -- this is the same document that the
9 witness could not identify (Redacted) on, is that it?

10 MR KHAN: That's it.

11 PRESIDING JUDGE EBOE-OSUJI: Fair enough. I thought we should make that
12 clear on the record.

13 MR KHAN:

14 Q. Witness, and that person that you've marked on the screen as number 3 is,
15 that's the person you call (Redacted), is that right?

16 A. Yes, your Honour.

17 Q. Witness, just a few days ago you identified that person as number 10,
18 (Redacted). Are you aware of that?

19 You've changed the identity of the person you've identified.

20 A. I'm not aware, your Honour.

21 Q. And you identified, Witness, the (Redacted)

22 (Redacted), you

23 identified that person just three days ago as (Redacted). Do you understand
24 how muddled your evidence is?

25 A. Your Honour, that's why I was requesting that I be given the original, the

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1 original photo, because even right now the (Redacted) in number 3, which he's talking
2 about, I recall (Redacted),
3 your Honour.

4 Q. And the person, in fact, Witness, in that (Redacted) that you identified three
5 days ago from the (Redacted) you want, that person is not (Redacted) That is not
6 (Redacted). That person that you identified with a number 3 a few days ago
7 when the Prosecution were asking you questions is, in fact, (Redacted)
8 (Redacted), and then the surname (Redacted)
9 (Redacted). Are you aware of that, witness?

10 A. I'm not aware, your Honour.

11 Q. (Redacted)
12 as you testified to when the Prosecution were asking you questions. Are you aware
13 of that?

14 A. I'm not aware, your Honour.

15 Q. Indeed, (Redacted) --

16 PRESIDING JUDGE EBOE-OSUJI: Did you mean (Redacted)?

17 MR KHAN: (Redacted) I'm grateful.

18 MR KHAN:

19 Q. And, in fact, (Redacted)
20 (Redacted). Are you aware of that?

21 A. I'm not aware, your Honour.

22 Q. (Redacted)
23 (Redacted)

24 isn't that right?

25 A. That's a lie, your Honour.

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1 Q. Witness, you say that you know the (Redacted). And you

2 gave evidence that (Redacted)

3 (Redacted). Do you remember saying that?

4 A. Yes, your Honour.

5 Q. Are you aware that even at the time of your alleged story of 2008, Mr William

6 Ruto had (Redacted) you've testified about? They're not (Redacted).

7 (Redacted)

8 A. I'm not aware, your Honour.

9 Q. (Redacted), Mr Witness. Are you

10 aware of that?

11 A. I'm not aware, your Honour. I'm aware of the (Redacted)

12 (Redacted), your Honour.

13 Q. And, Witness, the reason you have no clue about the (Redacted) apart from what

14 you may have heard as gossip is because you are (Redacted)

15 (Redacted), isn't that right?

16 A. That's not correct, your Honour. The (Redacted)

17 (Redacted), your Honour. And that is -- it is

18 actually before, your Honour, me to -- it was not possible for me to visit, to visit

19 Mr Ruto in Nairobi. Or when he comes home over the weekend, he was always

20 maybe with his wife, but not with his children, your Honour.

21 Q. And you deliberately told a story to the Prosecution giving (Redacted) and

22 giving an account that (Redacted), because you quite deliberately, Mr

23 Witness, were constructing an account that would be a launch pad for your

24 economic betterment, isn't that right?

25 A. Your Honour, there was no day I said (Redacted) Honourable Ruto. I said

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1 that he is (Redacted), your Honour. I didn't say (Redacted), your
2 Honour.

3 MR KHAN: Your Honour, I see the time. I'm most grateful.

4 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We will stand it down
5 there for today.

6 Witness, we will escort you from the courtroom and then you will rejoin us
7 tomorrow morning at 9.30.

8 THE WITNESS: Yes, your Honour.

9 PRESIDING JUDGE EBOE-OSUJI: Thank you.

10 The blinds will come down, and the witness will be escorted from the courtroom.

11 *(Closed session at 4.05 p.m.) Reclassified into open session

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

13 (The witness stands down)

14 PRESIDING JUDGE EBOE-OSUJI: Thank you.

15 Mr Kahn, how much longer?

16 MR KHAN: Today not a second, your Honour, but in total I hope to finish by the
17 end of Monday -- by the end of Monday. And, your Honour, we are confident, the
18 Prosecution, my learned friend Mr Steynberg kindly indicated that they estimated,
19 of course without binding them, that they may be a day or so with the next witness.
20 We've consulted and we have every expectation that we'll be finished with that
21 witness definitely next week. So there will not be a problem finishing the two
22 witnesses that are scheduled.

23 MR GARCIA: Just that there may be a re-examination, a short re-examination on
24 certain points with this witness.

25 PRESIDING JUDGE EBOE-OSUJI: So let's do our best to keep it as tight as we can.

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1 MR KHAN: Your Honour, I'm grateful.

2 And just two matters for the court officer. I'll deal with the exhibits tomorrow.

3 And the other matter is that Mr William Ruto will be, pursuant to the Court's order,
4 excused and will not be attending tomorrow. As a courtesy, I just want to tell the
5 Bench -- inform the Bench. We're most grateful. Thank you so much.

6 PRESIDING JUDGE EBOE-OSUJI: The Court will now --

7 MR NDERITU: Mr President, your Honours, before the Court rises, may I just
8 make a request for facilitation for a courtesy meeting with the next Witness P-0128
9 through VWU?

10 PRESIDING JUDGE EBOE-OSUJI: He is a dual status?

11 MR NDERITU: I beg your pardon, your Honour?

12 PRESIDING JUDGE EBOE-OSUJI: Is he dual status?

13 MR NDERITU: Yes, he is dual status.

14 PRESIDING JUDGE EBOE-OSUJI: Is there any difficulty with that, Prosecution?

15 MR GARCIA: No objection at all, your Honour.

16 PRESIDING JUDGE EBOE-OSUJI: The permission is granted.

17 MR NDERITU: I'm much obliged.

18 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

19 THE COURT USHER: All rise.

20 *(The hearing ends in closed session at 4.07 p.m.) Reclassified into open session

21 RECLASSIFICATION REPORT

22 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24

23 September 2013, and the instructions in the email dated 9 may 2014, the version of
24 the transcript with its redactions becomes Public.