

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 Carbuccia, and Judge Robert
7 Fremr
8 Trial Hearing
9 Tuesday, 28 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 of
17 Kenya, in the case of The Prosecutor versus William Samoei Ruto and Joshua Arap
18 Sang, ICC-01/09-01/11. We're in open session, your Honours.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 I see appearances remain the same.
21 MR STEYNBERG: Except, your Honour, I am back this morning, Anton Steynberg.
22 MR KIGEN-KATWA: It's the same, Mr President.
23 PRESIDING JUDGE EBOE-OSUJI: Thank you.
24 Mr Khan, the same?
25 MR KHAN: Mr President, your Honours, good morning. The appearances for the

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1 Defence of Mr William Ruto remain as before.

2 PRESIDING JUDGE EBOE-OSUJI: We will -- Mr Khan, we were in open or closed?

3 MR KHAN: Private session, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: And where do you want to begin in, private or
5 public?

6 MR KHAN: Your Honour, we can start with your leave in public session. I'm just
7 going to read into the record the transcript of the video that we played yesterday.

8 Q. Witness, good morning.

9 PRESIDING JUDGE EBOE-OSUJI: Before we do that, Mr Khan, just so we are on
10 the same page, you will be finishing by lunch time hopefully, if you can try and
11 finish before to accommodate any re-examination the Prosecution may have.

12 Prosecution, so far, do you anticipate re-examination?

13 MR GARCIA: Good morning, your Honours. Yes, I do, but for a short period. I'd
14 say 20 minutes at the most.

15 PRESIDING JUDGE EBOE-OSUJI: At the minute.

16 MR GARCIA: Yes.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, if you can kindly accommodate them,
18 finish before lunch break so they can -- on this side before lunch break so they can fit
19 in their own re-examination that would be good, with the hope of beginning the
20 examination of a new witness after lunch.

21 MR KHAN: Your Honours, I'll do my best.

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

23 QUESTIONED BY MR KHAN: (Continuing)

24 Q. Witness, you'll recall yesterday I showed you a video. Do you remember
25 that?

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1 A. That one of Mr Raila Odinga at the police station, your Honour?

2 Q. Yes.

3 A. Yes, your Honour.

4 MR KHAN: Your Honours, I'm just going to read the transcript of that into
5 evidence. It's KEN-D09-0028-0145 and the news reporter started saying, "It has
6 been five days since Rift Valley politician Jackson Kibor was arrested and brought to
7 the Rift Valley CID headquarters in Nakuru of allegations of incitement of violence
8 and since then the 74-year-old veteran is yet to be brought before court, and now
9 ODM leader Raila Odinga says that the police should either prosecute or release
10 Kibor.

11 Raila Odinga: If Mzee Kibor has committed a crime known in law, then the right
12 thing usually is for him to be taken to court and tried. We are not in any way trying
13 to plead innocence on behalf of Mr Kibor, but we are saying that the law must be
14 followed.

15 News reporter: Speaking at the Nakuru CID officers, Raila, who was accompanied
16 by six ODM MPs, demanded to see Kibor, who had been held at the Menengai ...",
17 M-E-N-E-N-G-A-I, "... police station. And after brief consultations with Kibor, who
18 had been wheeled in amidst tight security, Raila said that the old man was going
19 through -- said what the old man was going through was nothing short of
20 persecution.

21 Raila Odinga: And we have also discovered here that Mzee Kibor has not eaten
22 anything since morning. A man of Mzee Kibor's age ..." --

23 PRESIDING JUDGE EBOE-OSUJI: I thought I heard "Mzee Kibor."

24 MR KHAN: It is.

25 PRESIDING JUDGE EBOE-OSUJI: All right.

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1 MR KHAN: "... Mzee Kibor's age, 75 years of age, and he's ailing. Do you think it
2 is human? It is completely unacceptable.

3 News reporter: His lawyers insist that the police have no evidence to prosecute him
4 and should therefore release him forthwith. Police on the other hand say that they
5 will either charge him with murder or incitement, but while waiting from orders
6 from above with sources indicating that the police plan on snapping incitement
7 charges on the veteran politician."

8 Q. Witness, do you remember that, sir, what was said in the video?

9 A. That was what was said in the video, your Honour.

10 Q. And you accept, do you not, that Raila Odinga and the six ODM politicians he
11 was with were not asking for any kind of immunity for Mr Jackson Kibor, were
12 they?

13 A. Your Honour, what I would like to say is that that was the statement, the one
14 -- the one statement that the video has been brought to this Court. There were
15 many other statements which were made, including a statement which was made by
16 Honourable William Ruto and other ODM members regarding Mr Kibor. That was
17 the only statement which was produced in court, your Honour.

18 Q. And, Witness, you said yesterday you agreed with me that Jackson Kibor was
19 not in the video shot, was not one of those politicians visiting Jackson -- William
20 Ruto that day?

21 A. Your Honour, I agreed, and that's why I'm saying that that was not the only
22 statement which was brought during that time, your Honour.

23 MR KHAN: And, your Honour, I misspoke. William Ruto was not in the video
24 shot.

25 Q. That's right, isn't it?

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1 A. He was not there and he was not in that company, but he made a statement
2 also regarding the arrest of Mr Kibor, your Honour.

3 Q. But Mr William Ruto never called, did he?

4 A. He called --

5 Q. Witness, if I could finish, please, I'll be grateful.

6 A. Sorry, sorry.

7 Q. Mr William Ruto never said that Mr Kibor should not be prosecuted, did he?

8 You never heard that?

9 A. Your Honour, what I told this Court is that Mr Ruto was among the
10 politicians who called not only for the release of Mr Kibor, but also the release of the
11 youths who had been arrested connected to the post-election violence, your Honour.

12 Q. But, Witness, I want to stick to Mr Kibor. Did you ever hear Mr William
13 Ruto say that Jackson Kibor should not be prosecuted?

14 A. Your Honour, I didn't hear him saying he should not be prosecuted. But I
15 heard him saying that he should be released with immediate effect.

16 Q. And, Witness, that's simply not true, is it?

17 A. That is true, your Honour.

18 MR KHAN: Your Honours, we can move to another topic, but that would have to
19 be in private session.

20 THE WITNESS: Your Honour, okay, I would like to clarify something in private
21 session.

22 PRESIDING JUDGE EBOE-OSUJI: All right. We will go into private session and
23 you can clarify.

24 In the meantime, at page 4, line 7, I did not say, "I thought of Mzee Kibor." I said, "I
25 thought I heard of Mzee Kibor."

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- 1 We'll go into private session.
- 2 (Private session at 9.44 a.m.) Reclassified into open session
- 3 THE COURT OFFICER: We're in private session, your Honours.
- 4 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 5 Witness, please, it's important for you to wait for Mr Khan to finish asking his
- 6 question before you begin answering. It's important. Wait for him to finish and
- 7 then count in your mind, go up to five seconds, up to five --
- 8 THE WITNESS: Yes, your Honour.
- 9 PRESIDING JUDGE EBOE-OSUJI: -- before you start.
- 10 THE WITNESS: Yes, your Honour.
- 11 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 12 Mr Khan, we're in private session. Could you -- the witness wanted to clarify
- 13 something. Can you tell us what it is you wanted to add to your answer?
- 14 THE WITNESS: Not -- not to my answer, your Honour. In the first day, your
- 15 Honour, I said that it was in 1997, of which day it was the year that Mr Kibor
- 16 (redacted) by that time, your Honour.
- 17 But in that evening, and I have been wanting to clarify this for a long time, but I
- 18 always forget, in that evening I realised that it was not in 1997, it was in 1992,
- 19 whereby the multiparty system came to Kenya. And in 19 -- in that year 1992, Mr
- 20 Kibor rebelled against KANU, and he joined UDM. And he was seen at first
- 21 supporting Mr Kipkorir Demanger (phon). And later on President - the Retired
- 22 President Moi - was against Honourable William Ruto and Mr Kibor supported
- 23 William Ruto because he was also against the retired president, your Honour.
- 24 PRESIDING JUDGE EBOE-OSUJI: Noted.
- 25 Mr Khan, please proceed.

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1 MR KHAN:

2 Q. Witness, are you aware that the first time Uhuru Kenyatta
3 contested -- William Ruto contested any election, parliamentary election in Kenya
4 was in 1997, not in 1992? Are you aware of that?

5 A. I'm aware, your Honour. Your Honour, the first time for Honourable
6 William Ruto was in 1997.

7 Q. So it follows, does it not, that your contention that Mr Kibor was supporting
8 William Ruto in 1992 cannot be right?

9 A. I didn't, your Honour, I didn't say in 1992. I said in 1997.

10 MR KHAN: Your Honour, I'll move on.

11 PRESIDING JUDGE EBOE-OSUJI: You should.

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

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5 Q. Witness, are you aware that the election results and the swearing in of

6 President Mwai Kibaki were announced on 30 December 2007, not the 31st? Are

7 you aware of that?

8 A. Your Honour, I am aware that the results were announced on 30th, but the

9 swearing in ceremony was on 31st, your Honour.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

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12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, that will be the last question before
13 the morning break, and we will resume at 11.30.

14 The witness will be let out of the courtroom for now until 11.30. The blinds will
15 come down then.

16 (Closed session at 11.00 a.m.) Reclassified into open session

17 THE COURT OFFICER: We're in closed session, your Honours.

18 (The witness stands down)

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, are we still on track for finishing
20 sometime at least 20 minutes before lunch?

21 MR KHAN: Your Honour, I'll do my very best. If you can give me just one
22 moment before you rise, I would be grateful.

23 Your Honour, I wonder with your leave if we could come back in private session for
24 a moment without the witness before I go into my next topic?

25 PRESIDING JUDGE EBOE-OSUJI: Yes, we can do that.

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- 1 MR KHAN: I'm grateful.
- 2 PRESIDING JUDGE EBOE-OSUJI: Without the witness, you say?
- 3 MR KHAN: Without the witness indeed.
- 4 PRESIDING JUDGE EBOE-OSUJI: Okay. We will rise now.
- 5 THE COURT USHER: All rise.
- 6 (Recess taken at 11.01 a.m.)
- 7 (Upon resuming in private session at 11.33 a.m.) Reclassified into open session
- 8 THE COURT USHER: All rise.
- 9 Please be seated.
- 10 THE COURT OFFICER: We are in private session, your Honours.
- 11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 12 Mr Khan, you called for a short session in private session without the witness?
- 13 MR KHAN: Yes, your Honour. There's two matters, the first of which is that the
- 14 witness gave evidence yesterday in which he denied ownership of a particular
- 15 (Redacted). Your Honour, I didn't anticipate that, but I had realised
- 16 at the time he testified yesterday that we had not put in a document which showed
- 17 (Redacted).
- 18 Now, your Honour, this, of course, was not given to the Prosecution within 24 hours,
- 19 but it was an oversight. Now, your Honours, my learned friends have kindly
- 20 indicated that they will object to me putting this document to the witness, and that
- 21 gives rise to my present application.
- 22 As a preface, your Honour, I will say that all parties, of course, within the realms of
- 23 our respective responsibilities are officers of the Court.
- 24 And, your Honour, I will say that on 23 January we say that in breach of Prosecution
- 25 (Redacted)

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9 (Redacted)

10 Your Honour, all parties, of course --

11 PRESIDING JUDGE EBOE-OSUJI: What you're -- what you're saying is that you

12 accepted in good faith that there was an oversight --

13 MR KHAN: Indeed. Indeed.

14 PRESIDING JUDGE EBOE-OSUJI: -- on the part of the Prosecution on --

15 MR KHAN: Indeed.

16 PRESIDING JUDGE EBOE-OSUJI: -- on those occasions?

17 MR KHAN: And, your Honour, we didn't seek some tactical device or asking for

18 additional time or making a big fuss. We moved on because all parties, we know

19 we're joined together in an endeavour to do a serious job that we've both -- both

20 parties have been engaged to perform.

21 Your Honour, it doesn't make sense, in my respectful submission, to require this

22 witness to come back another time. There is a one-page document that I want to

23 put to the witness and simply say, "Does that help refresh your memory that that's

24 (Redacted)

25 Your Honour, it's my respectful submission that notwithstanding the usual order of

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1 the Court that all disclosure be given 24 hours in advance --

2 PRESIDING JUDGE EBOE-OSUJI: Well, Mr Khan, you've made your point. It was
3 an oversight, isn't it?

4 MR KHAN: Yes.

5 PRESIDING JUDGE EBOE-OSUJI: Do we need to belabour that point so we can
6 move on. Remember you've got to finish before lunch.

7 MR KHAN: Yes, your Honour. So my application is that I will make an
8 application now to be able to put that to the witness to confront him. That's my
9 application.

10 Your Honour, then there's a second matter once that's been ruled upon.

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 PRESIDING JUDGE EBOE-OSUJI: All right.

23 Prosecution?

24 MR GARCIA: Your Honour, on many --

25 PRESIDING JUDGE EBOE-OSUJI: First of all, they have pitched the issue as a

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1 matter of oversight, and they said on your part you've also committed oversights
2 and they did not hold you to it. Why are you holding them to this now? That's the
3 issue.

4 MR GARCIA: Your Honour, it's not a question of two wrongs make a right, but the
5 Prosecution's position is this: In the past and even in this present cross-examination
6 there have been documents -- one occasion an email was sent to us during the
7 cross-examination or right before it, in violation of the 24-hour rule, where the
8 Defence wanted to use certain documents to cross-examine, and the Prosecution has
9 not been firm in stating well, you can't use it. We've allowed them to use it. We've
10 made exemptions not only for this witness but for other witness, whether it be for
11 Mr Kigen-Katwa or for Mr Khan. We've done it on various occasions. And I think
12 even the Court has reminded Defence counsel in the case of the first witness that it's
13 important to send all the material to the Prosecution so we can have time to
14 investigate the matters.

15 PRESIDING JUDGE EBOE-OSUJI: Right. What is the prejudice to you?

16 MR GARCIA: Your Honour, it's not a question of -- I don't think, respectfully
17 submitted, of what is the prejudice to the Prosecution.

18 PRESIDING JUDGE EBOE-OSUJI: No, no, no, no, it has to be. You have to start
19 from the prejudice. We know that yes, the rule is there. We understand that. The
20 rule there, but in this instance you cannot say it's not a question of prejudice. Then
21 it becomes a little difficult to say there is no prejudice suffered, still they cannot come
22 in when they feel that it is part of the case they need to make.

23 MR GARCIA: Your Honour, the prejudice is always the same. If these documents
24 are sent to the Prosecution in the midst of a cross-examination, we don't have the
25 time to react and investigate the material that's being sent to us and determine

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1 whether it's authentic, what objections we are going to be making on the document.
2 Those are always the main concerns of the Prosecution has with these documents,
3 and that's why the Chamber sought it important in that the conduct of proceedings
4 decision to indicate a 24-hour limit to this. And we've reminded the Defence on
5 many occasions to send the documents as soon as possible.
6 Mr Khan has stated that this was unanticipated in his -- in his mind that there would
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 And there's another issue as well, your Honour. If you want -- if the Court wants to
15 consider what is the importance of this to the Defence, it's on a collateral matter. It's
16 (Redacted)
17 (Redacted)
18 (Redacted)
19 (Redacted)
20 (Redacted)
21 (Redacted)
22 (Redacted)
23 (Redacted)
24 (Redacted)
25 So there is no prejudice to the Defence in coming afterwards in their case and

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1 leading this evidence properly through an expert witness who will indicate where he

2 (Redacted)

3 (Redacted)

4 PRESIDING JUDGE EBOE-OSUJI: One second. But are you saying that if the

5 Defence has the material in hand while the witness is on the stand, that they should

6 not put the matter to the witness and then call their expert witness later? I don't

7 understand your argument.

8 He says that what they want to do is to see if this document will refresh the witness's

9 memory. Why don't we just -- what's the difficulty with that? I'm not making any

10 ruling. I just want to prompt your submission so we can get fully what it is that's

11 bothering you about it.

12 MR GARCIA: I understand, your Honour. And I think that my response -- my

13 initial response was the one that I gave the Court. It's the principle. It's the fact of

14 the matter that if we allow these -- the Prosecution already makes many exceptions.

15 We receive late transcripts, translations or things that come at the last minute and

16 they're just one document or one page, and we decide, obviously, to let it go and just

17 let the Defence go ahead, but I just want the Defence to be reminded that it's quite

18 important that we do receive these documents in good time so we have the chance to

19 really verify, because it's one document already -- obviously, and it seems quite

20 simple, but in the end it has important consequences. That's the principle.

21 And just one -- one last element. When you look at the document, your Honour,

22 there is no apparent date on it. So once again, to the merit of what's the use and

23 what is it going to yield to cross-examine or confront the witness with a document

24 (Redacted)

25 already disagreed with. Those are my problems on the merits of showing it to him.

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1 But the principle is the same. We'd like all the documents that they're going to be
2 using in cross-examination to be sent as soon as possible. And this is the same
3 pleading I met -- I made a week ago. And on an element which is important, the
4 Defence should be able to send this in due time.

5 PRESIDING JUDGE EBOE-OSUJI: Whatever we rule, whatever the ruling of the
6 Chamber, and we're not -- I'm not making this ruling right now, I will consult with
7 my colleagues, but whatever the ruling is, the Chamber stresses the importance of
8 disclosure of these materials according to the conduct of proceedings decision we
9 made.

10 (Trial Chamber confers)

11 PRESIDING JUDGE EBOE-OSUJI: Again, with the earlier reminder or stress that I
12 indicated fully in mind, the Chamber is of the -- the Chamber's ruling is that the
13 Defence should be allowed to put this document to the witness, and let's see how it
14 goes.

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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5 MR GARCIA: Your Honour, one point on a different matter altogether and before
6 we do go back into cross-examination. Yesterday -- and I've spoken to Defence
7 counsel about this issue. Yesterday Defence counsel Mr Khan used a schedule
8 expense sheet to cross-examine the witness and determine -- and I think that the
9 cross-examination on that point was simply to determine the total amount that had
10 been paid to Witness 356, either by the OTP or -- from OTP money or money from
11 VWU.

12 Now, we noticed yesterday during the cross-examination that there might have been
13 an error, and we verified and indeed there has been a question of double accounting,
14 an amount that appears in the schedule 3,367 has been accounted for -- it has been
15 accounted for twice. So, therefore, the final total amount is 3,365 -- 67 US dollars
16 too much.

17 So the witness obviously confirmed while I think he was looking. I'm not sure. I
18 don't think that this schedule expense sheet has received an EVD. We verified. It
19 hasn't received an EVD.

20 Two options are open. I explained -- I offered one option or explained this option to
21 Defence counsel Mr Khan would be simply to read into the Court record that the
22 total amount in the expense schedule should be one amount and not the other,
23 excluding, you know -- subtracting the \$3,367.

24 Mr Khan is in disagreement with that. I think that it's the most reasonable way to
25 proceed. If not, I'm going to have to go back into re-examination and raise this

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1 issue with the witness and simply have him confirm with the new document that the
2 final total is the 17,000 and not 20,000.

3 PRESIDING JUDGE EBOE-OSUJI: If there is an error, we are in Mr Khan's
4 cross-examination, and if you've spotted something in his questioning that produces
5 an answer that you think calls for clarification, if he refuses to agree with you, your
6 option would be to seek to re-examine, and then we will -- I am not saying we are
7 going to grant leave, but we will examine that question at that time.

8 MR KHAN: Your Honour, just so there's no confusion, my learned friend had said
9 he would deal with this issue after I had finished my cross-examination. It's not a
10 matter of -- of refusal. I have a document from the Prosecution. My questions
11 were based upon that.

12 The witness has accepted under oath that he received these payments. And the
13 document I have been given does not repeat once -- it does not repeat any figure, so
14 the figure of 3,367 appears only once in this document. So I'm not willing without a
15 proper basis and receipt of any background to go behind that.

16 The proper way, as I've said, is for a proper investigation to be done. The
17 investigator always -- we're going to be seeking to call an investigator later -- can
18 clarify it, but I'm not able at this moment in the middle of a cross-examination to
19 make a concession countering the witness's evidence under oath.

20 PRESIDING JUDGE EBOE-OSUJI: We will take it in a normal stride of events in a
21 criminal trial.

22 So we will bring the witness back it.

23 Mr Khan, you will still have to finish at the indicated time despite the discussion
24 we've had.

25 Blinds down. Please bring in the witness.

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1 (Closed session at 12.01 p.m.) Reclassified into open session

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

3 (The witness enters the courtroom)

4 PRESIDING JUDGE EBOE-OSUJI: Welcome back, Witness. Let's go into private
5 session now. Blinds up around the witness.

6 (Private session at 12.02 p.m.) Reclassified into open session

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

8 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, please.

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

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Trial Hearing
Witness: KEN-OTP-P-0356

(Private Session)

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Trial Hearing
Witness: KEN-OTP-P-0356

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Trial Hearing
Witness: KEN-OTP-P-0356

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Trial Hearing
Witness: KEN-OTP-P-0356

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Trial Hearing
Witness: KEN-OTP-P-0356

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23 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

24 THE COURT USHER: All rise.

25 (Recess taken at 12.59 p.m.)

Trial Hearing
Witness: KEN-OTP-P-0356

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1 (Upon resuming in private session at 2.39 p.m.) Reclassified into open session

2 THE COURT USHER: All rise.

3 Please be seated.

4 THE COURT OFFICER: We're in private session, your Honours.

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

6 Mr Garcia?

7 MR GARCIA: Your Honour, the appearances are different for the Prosecution
8 team. Two other people have added themselves. They are Regina Weiss, who is
9 right behind me, and Ms Lara Renton as well.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you for noting that. Can we proceed?

11 MR GARCIA: Yes, your Honour. The Prosecution has no further questions for the
12 witness. There is just one outstanding issue, and it can be resolved quite efficiently
13 and fast. The Court recalls that I had raised this whole issue regarding the
14 witness-related expenses in the private session.

15 A question -- what had happened initially is that a document was provided to the
16 Defence containing the disbursements that have been made to Witness 356.
17 Unfortunately it was inaccurate in the sense that certain amounts had been
18 duplicated.

19 We've spoken to Defence counsel of both teams, and there is no objection from the
20 Defence that we simply introduce a document, the corrected document regarding
21 the OTP witness-related expenses for 356 which contain the correct amounts, and
22 that will be sufficient. So I'm grateful to the Defence for that.

23 PRESIDING JUDGE EBOE-OSUJI: So it's agreed upon now by both sides?

24 MR KHAN: Indeed, Mr President. It may be useful, both documents can be given
25 an MFI number, but we agree with my learned friend's presentation of the position

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Witness: KEN-OTP-P-0356

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1 that there was a clerical error and it can be corrected accordingly.

2 Your Honour, the two ERN numbers are KEN-OTP-0123-0019, which is the form that
3 was put to the witness. And then the new one, the amended one which we can
4 accept, KEN-OTP-0124-0004.

5 MR GARCIA: And just for the record, and so we can see this in the future, what
6 had happened is that two amounts had been duplicated, 3,367 and 157.54. So they
7 were only paid once in actuality.

8 PRESIDING JUDGE EBOE-OSUJI: The point is noted. And that will be the end of
9 your re-examination?

10 MR GARCIA: And the Prosecution has no further questions for the witness.

11 MR KHAN: Your Honour, there is just one matter. It can be done in the absence
12 of the witness, maybe while the other witness is coming up, and that's the exhibits.

13 PRESIDING JUDGE EBOE-OSUJI: Witness, we've come to the end of your
14 testimony with us. We thank you very much for coming. The Court will review
15 your testimony at the end of the trial and then decide as will have to be done.

16 We know it is not an easy experience for witnesses to come and testify. As I told
17 you in the beginning, the lawyers were doing their job. Nothing they asked you is
18 personal from their perspective to you. They are just wanting to get to the bottom
19 of the truth and the story.

20 I thank you for coming and safe journey back. Thank you.

21 THE WITNESS: Thank you, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: Can we bring down the blinds and let the
23 witness out of court, please.

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0356

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- 16 (Closed session at 2.44 p.m.) Reclassified into open session
- 17 THE COURT OFFICER: We're in closed session, your Honours.
- 18 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 19 (The witness is excused)
- 20 PRESIDING JUDGE EBOE-OSUJI: Mr Khan?
- 21 MR KHAN: Mr President, I'm grateful. With your leave I'd like to seek the
- 22 admission of certain exhibits. The first, your Honour, is Defence PIS 1 and PIS 2
- 23 that was shown to the witnesses -- witness and referred to in testimony.
- 24 Your Honour, if that's done, the next exhibit is the last video we showed, which is
- 25 KEN-OTP-0073-0206. Your Honour, it's a (Redacted). It's prima facie authentic

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1 and authenticated by the rule -- by the witness, and I'd ask that it be admitted into
2 evidence.

3 PRESIDING JUDGE EBOE-OSUJI: To begin with, there is no difficulty with the
4 PISs I take it, Prosecution?

5 MR GARCIA: No objection with the PISs.

6 PRESIDING JUDGE EBOE-OSUJI: So PISs will be admitted as next in the series.
7 Court officer, what we will do, we know that we should have treated these materials
8 at the point they were being discussed during the testimony, because considering
9 that counsel was moving to make up time we decided to let things go,
10 but let's proceed this way. Mr Khan, you will do one document at a time, we'll take
11 the reaction from your opponent, we'll make a ruling, and then we'll take it one at a
12 time, at the end of which the court officer will then log in according to the ruling.

13 MR KHAN: I'm grateful.

14 PRESIDING JUDGE EBOE-OSUJI: Yes.

15 MR KHAN: So, your Honour, the next one was the video, KEN-OTP-0073-0206,
16 tracks 1 and 2. The witness confirmed that it was (Redacted) in the
17 video, confirmed that that was the (Redacted). And it's my
18 submission that that's clearly relevant and authentic and should be admitted.

19 PRESIDING JUDGE EBOE-OSUJI: The statement taken by (Redacted)?

20 MR KHAN: Indeed, the (Redacted), the first is the (Redacted). The next will be the
21 (Redacted).

22 MR GARCIA: No objection from the Prosecution.

23 PRESIDING JUDGE EBOE-OSUJI: No objection. The evidence is accepted as an
24 exhibit in the Ruto Defence case. Next one?

25 MR KHAN: Your Honour, the next is KEN-OTP-0108-0559. That was at tab 17.

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1 And that's a (Redacted).

2 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

3 MR GARCIA: No objection, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: No objection. Evidence accepted.

5 MR KHAN: Your Honour, the third, KEN-OTP-0073-0209 at tab 25, again, it's

6 another statement given to (Redacted). The witness confirmed his signature, so it's

7 been authenticated, and it's relevant, and I'd ask that it be admitted into evidence.

8 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

9 MR GARCIA: No objection.

10 PRESIDING JUDGE EBOE-OSUJI: The document is accepted as an exhibit in the

11 Ruto Defence case.

12 MR KHAN: I'm grateful. Mr President, your Honours, the fourth is

13 KEN-OTP-0104-0663. And that's at tab 37 of the bundles. It's an investigator's

14 report. The witness agrees that he (Redacted). He confirmed in

15 cross-examination the contents of the report. He confirmed that questions had been

16 asked by the Prosecution, that it was a high claim. He disagrees that he said that an

17 (Redacted), but in our

18 submission that's a matter of weight, not admissibility, and I'd ask that it be

19 admitted.

20 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

21 MR GARCIA: No objection from the Prosecution.

22 PRESIDING JUDGE EBOE-OSUJI: Evidence accepted as the next Ruto Defence

23 exhibit.

24 MR KHAN: Your Honour, after that, for the sake of formality, I think we've already

25 mentioned -- well, I'll deal with that at the end.

1 The next, your Honour, is KEN-D09-0028-0146 at 0191. That's at tab 82. Your
2 Honour, that's the (Redacted)
3 (Redacted). The witness looked at the document and confirmed that the (Redacted)
4 page related to him.

5 Your Honour, of course, you may take dispute regarding the contents, but he
6 confirmed it related to him. It's relevant to assessing the witness's credibility, and
7 your Honours in due course may give it such weight as appropriate. But, your
8 Honours, I'd ask that that also be given an exhibit number.

9 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

10 MR GARCIA: The prosecution objects. If we look at transcript 81, page 71, and it's
11 line 22 to 24, the witness says: "I can see, your Honour, but if you can see I don't -- I
12 don't trust that it was real." And then he mentions "But the date is written (Redacted)
13 (Redacted)." So the witness disagrees.

14 I think there was kind of a large question that was put to the witness whether he
15 recognised, but there is no evidence on the record as to the authenticity of this
16 document. And the practice has been that with records or documents or videos that
17 the witness disagrees with the content, that they be given simply an MFI number.

18 MR KHAN: Your Honour, can I just say the witness was confused, if you recall, by
19 the stamp, the date that it had been received by the Defence. He was then taken to
20 the (Redacted), where the date was written in manuscript at the (Redacted).

21 Your Honour, of course there may be issues regarding authenticity and all the rest of
22 it that was (Redacted). But, your Honour, the witness accepted
23 that that (Redacted) related to him, and in my respectful submission it's relevant and
24 should be admitted. I can say no more than that.

25 PRESIDING JUDGE EBOE-OSUJI: The document will be marked MFI.

1 MR KHAN: I'm grateful. Your Honour, the next document is KEN-D09-0028-0283,
2 which was at tab 80 of your Honours' bundle. That's the (Redacted)
3 (Redacted). Your Honour, the witness was taken through the document,
4 confirms that it related to (Redacted). It was (Redacted), I should say. It
5 correctly detailed the (Redacted)
6 (Redacted), and the name was given by the
7 witness.
8 Your Honour, the witness had previously in cross-examination testified that a
9 person called (Redacted). Of course,
10 he did dispute the authenticity of the document being at variance with his testimony
11 regarding dates. But, your Honour, that's a matter for weight in our respectful
12 submission. On the principle of identity of concepts, which your Honour has
13 previously referred to, and the nature of the documents and the elements that have
14 been verified by the witness, it's my respectful submission it's relevant, and it's
15 probative, and it should be admitted into evidence and at the end of the day
16 accorded such weight as your Honours deem appropriate.

17 PRESIDING JUDGE EBOE-OSUJI: So we do not understand the concepts of
18 identity of concepts indicated, there is a difference between when a witness is
19 testifying in chief and testifies a certain way in chief, and in cross-examination the
20 witness is taken back to events to which the witness had testified, and some
21 materials that resonate in that event becomes an issue. There is a difference
22 between that in terms of identity of concept versus identity of concept where the
23 witness had not testified to a certain event, but in cross-examination certain new
24 events are brought up, and then that generated a discussion, and then some
25 materials that may resonate in this new event becomes an issue. I want us to keep

1 those sorts of distinctions in mind.

2 MR KHAN: I'm grateful, your Honour. In that case the base will be simply before
3 he was shown the document, the witness was asked questions and verified
4 important elements before he was given sight of the document. The elements that
5 he testified about were contained in the documents, and we say, therefore, it has
6 sufficient indicia of reliability given the free admissibility regime that should operate
7 in this Court, and we'd ask that it be tendered on that basis.

8 MR GARCIA: Your Honour, when the witness was asked questions regarding this
9 document, and I refer the Defence counsel and the Chamber to page 81 of transcript
10 81, line 16 and 17, the witness stated "This is a great lie, your Honour. I would like
11 to see the (Redacted). This is a fake document, your Honour."

12 So on the same basis that the previous document was given an MFI, I think that this
13 one also must be given an MFI in light of the fact that the witness disagrees in whole
14 with the document and qualifies it as a fake.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, the document will be marked MFI.

16 MR KHAN: I'm grateful. Your Honour, the next document is KEN-D09-0028-0145,
17 which is a video of Honourable Raila Odinga calling for the release of Mr Jackson
18 Kibor. Your Honour, the witness accepted that the Honourable Odinga had called
19 for Mr Kibor's release. The witness agreed that that call was also on the news.
20 Your Honours, it's our respectful submission that the video on that basis is relevant,
21 and it's probative, it is a true record of what transpires, and it should be given an
22 exhibit number.

23 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

24 MR GARCIA: Prosecution has no objection to that precise video being given an
25 EVD.

1 PRESIDING JUDGE EBOE-OSUJI: The video is accepted as the next in the Ruto
2 Defence exhibits.

3 MR KHAN: I'm grateful, Mr President. The next is KEN-OTP-0107-0561, which
4 was at tab 40 of your Honours' bundles. That's an investigator's report. The
5 witness accepted the content of the report. He remembers that he (Redacted)
6 (Redacted). He changed (Redacted)
7 (Redacted) detailed in the document to (Redacted). But,
8 your Honour, that's the only part of the -- the only issue he took with it. It's
9 relevant, it's probative. The disparity regarding (Redacted) is a matter of
10 weight, and it's minor. And we say it should be given an exhibit number.

11 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

12 MR GARCIA: The prosecution objects, your Honour. Prosecution recalls that the
13 Chamber had inquired as to the relevance of this line of questioning at the time that
14 it was broached by Defence counsel. It actually wasn't explored completely,
15 completely exhausted with the witness because of the lack of relevance. I suggest
16 that it should only be given an MFI, if anything, because it was I think at one point
17 shown to the witness.

18 PRESIDING JUDGE EBOE-OSUJI: So is your objection only on grounds of
19 relevance?

20 MR GARCIA: Yes, your Honour.

21 (Trial Chamber confers)

22 PRESIDING JUDGE EBOE-OSUJI: The document will be marked as the next in
23 the -- is accepted as the next Ruto Defence exhibit. The witness did not deny the
24 document.

25 MR KHAN: I'm grateful. The next, your Honour, is KEN-D09-0028-0249, which

1 was at tab 87. Now, your Honour, that's the (Redacted)
2 document. The witness agrees, agreed in testimony today, that he had that phone
3 number between the (Redacted). He accepts that he
4 (Redacted), and he
5 agrees that (Redacted). On
6 that basis, it's relevant, it's been authenticated by the witness, and it should be
7 admitted.

8 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

9 MR GARCIA: Your Honour, yes, indeed, the witness did confirm his phone
10 number. He also confirmed (Redacted), but the problem with this document for the
11 Prosecution is that (Redacted) reviewed with the witness, and he
12 confirmed I think (Redacted). There is
13 (Redacted) pages to this document. So as to the authenticity of the rest of them, of the rest
14 of the entries in this document, no questions were asked of the witness. So that's
15 the major problem for the Prosecution. And given that, that problem, given the fact
16 that it wasn't completely covered with the witness, I don't think we do have -- or the
17 Defence did not establish the authenticity of this document.

18 PRESIDING JUDGE EBOE-OSUJI: But the witness accepted the correctness of the
19 document to the extent that it was, the contents were reviewed with him.

20 MR GARCIA: (Redacted) reviewed with him, your Honour, that's the
21 problem, on the (Redacted) page. There is (Redacted) pages to this document. To say obviously
22 that (Redacted) have been confirmed from the witness is one thing, but that
23 everything else in this document of (Redacted) pages is correct, that was never reviewed
24 with the witness, we don't have that on record.

25 (Trial Chamber confers)

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1 PRESIDING JUDGE EBOE-OSUJI: The document is accepted as the next in the
2 Ruto Defence exhibit. We will deal with the Prosecutor's concern when it comes to
3 submissions and what to make of the document beyond what was reviewed with the
4 witness at the time.

5 MR KHAN: I'm grateful, Mr President, your Honours. The next document is
6 KEN-OTP-0106-0729, which was at tab 38. Your Honour, that's the investigator's
7 report regarding the --

8 PRESIDING JUDGE EBOE-OSUJI: OTP?

9 MR KHAN: OTP-0106.

10 PRESIDING JUDGE EBOE-OSUJI: No, no, no. You mean OTP investigator's
11 report?

12 MR KHAN: Indeed.

13 PRESIDING JUDGE EBOE-OSUJI: All right.

14 MR KHAN: In which (Redacted)
15 (Redacted). Your Honour, it's
16 authentic. We say it's been received by the Prosecution and served on the Defence.
17 We say it's clearly relevant to an assessment of the credibility of this witness. Your
18 Honour, the fact that the witness disputes its contents is a matter of weight, not
19 admissibility. And, your Honour, we say that it's an important tool, one of many
20 that should be given an exhibit number so your Honours can use it when assessing
21 the veracity of this witness's account and making assessments of credibility.

22 PRESIDING JUDGE EBOE-OSUJI: Prosecution?

23 MR GARCIA: Your Honour, I just wanted to make sure that the document itself
24 was put to the witness and not simply the assertion in it. If it was put to the
25 witness, then obviously it should receive an EVD, and we have no objection to it. If

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1 it wasn't, and it was simply an assertion, then it need not go in the list of exhibits for
2 the Defence.

3 PRESIDING JUDGE EBOE-OSUJI: The document is accepted as the next in the
4 Ruto Defence exhibits. We will argue the value at the time of submissions.

5 MR KHAN: Your Honour, then I will ask that two documents be given an exhibit
6 number, in fact, I'd asked previously they be given an MFI number. The first is

7 KEN-OTP-0123-0019. Your Honour, that's the old document, the one that I put to
8 the witness that he accepted of OTP witness-related expenses in the sum of (Redacted)
9 (Redacted).

10 PRESIDING JUDGE EBOE-OSUJI: As the one, the one that has just been corrected?

11 MR KHAN: That's the old one, yes. So together with it should be the new one,
12 which is KEN-OTP-0124-0004. And I'd ask that both be given exhibit numbers.

13 PRESIDING JUDGE EBOE-OSUJI: So double zero double four is the correction?

14 MR KHAN: The correction is triple zero four. Triple zero four.

15 PRESIDING JUDGE EBOE-OSUJI: Sorry, my mistake. I thought you said "double
16 zero zero four. "

17 MR KHAN: Yes, indeed.

18 PRESIDING JUDGE EBOE-OSUJI: Sorry. So that is a correction. All right.

19 Prosecution?

20 MR GARCIA: That's correct, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: Any objection?

22 MR GARCIA: No objection.

23 PRESIDING JUDGE EBOE-OSUJI: The document then is accepted as the next in the
24 Ruto Defence exhibits.

25 MR KHAN: And, your Honour, then I would ask that one document be given an

1 exhibit number. It's KEN-OTP-0073-0249 at 257. It's tab 24. It's the (Redacted)
2 (Redacted). The witness accepted in testimony that he had (Redacted)
3 (Redacted)
4 (Redacted). Your Honour, on that basis I'd ask it be given an exhibit number.
5 PRESIDING JUDGE EBOE-OSUJI: Prosecution?
6 MR GARCIA: No objection, your Honour.
7 PRESIDING JUDGE EBOE-OSUJI: That document accepted as the next in the Ruto
8 Defence exhibits.
9 MR KHAN: And, your Honour, the last item, and I'm grateful for the Court's
10 patience, is KEN-D09-0028-0010 at tab 5. Your Honour, it's a (Redacted)
11 (Redacted) and the witness denied its contents, but I'd ask that it be given an MFI
12 number. It was put to him.
13 PRESIDING JUDGE EBOE-OSUJI: Prosecution?
14 MR GARCIA: No objection, your Honour.
15 PRESIDING JUDGE EBOE-OSUJI: Document accepted as the next in the Ruto
16 Defence exhibits. And that's the end of it?
17 MR KHAN: Indeed. I'm most grateful.
18 THE COURT OFFICER: Thank you, Mr President. Tracks 1 and 2 of video
19 KEN-OTP-0073-0206 will bear the following number, EVD-T-D09-00110 and will
20 also be referenced as Ruto Defence exhibit number 110.
21 Document KEN-OTP-0108-0559 will bear the following number, EVD-T-D09-00111
22 and will also be referenced as Ruto Defence exhibit number 111.
23 Document KEN-OTP-0073-0209 will bear the following number, EVD-T-D09-00113
24 and will also be referenced as Ruto Defence exhibit number 113.
25 Document KEN-D09-0028-0146 at page 0191 will bear the following number,

1 MFI-T-D0-900114.

2 Document KEN-D09-0028-0283 will bear the following number, MIF-T-D09-00115.

3 Video KEN-D09-0028-0145 will bear the following number, EVD-T-D09-00116 and

4 will also be referenced as Ruto Defence exhibit number 116.

5 Document KEN-OTP-0107-0561 will bear the following number, EVD-T-D09-00117

6 and will also be referenced as Ruto Defence exhibit number 117.

7 Document KEN-D09-0028-0249 will bear the following number, EVD-T-D09-00118

8 and will also be referenced as Ruto Defence exhibit number 118.

9 Ken -- document KEN-OTP-0106-0729 will bear the following number,

10 EVD-T-D09-00119 and will also be referenced as Ruto Defence exhibit number 119.

11 Document KEN-OTP-0124-0004 will bear the following number, EVD-T-D09-00120

12 and will also be referenced as Ruto Defence exhibit number 120.

13 Document KEN-OTP-0073-0249 at page 0257 will bear the following number,

14 EVD-T-D09-00121 and will also be referenced as Ruto Defence exhibit number 121.

15 Document KEN-D09-0028-0010 will bear the following number, MFI-T-D09-00122.

16 And now the two documents, the two PIS documents will bear the following PIS

17 number, KEN-PIS-0001-0036.

18 And all the mentioned items will be registered as confidential.

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

20 Mr Khan, there was something else that has been brought to my attention. There

21 was a certain item that was annotated in the course of this witness's testimony. You

22 brought him back to --

23 MR KHAN: Yes. And I didn't assign an exhibit number to that; is that right? I'd

24 ask that that be given an exhibit number also, please.

25 PRESIDING JUDGE EBOE-OSUJI: One difficulty is how do we locate it in the

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1 record now?

2 THE COURT OFFICER: Your Honour, the document will be put in the eCourt
3 system.

4 PRESIDING JUDGE EBOE-OSUJI: Counsel, I was saying it was a delicate and
5 precise exercise at the time you did it, I seem to recall. How do we -- can we trace it
6 on the record? Now, there is no difficulty putting it in. But it just -- how we can
7 track it, more or less.

8 MR KHAN: Your Honour, if it's got an EVD number now, then, of course, this
9 would be in the record identifying it as being the document that the Defence put to
10 the witness in cross-examination, which he identified. And hopefully that would be
11 a way of tallying the documents in the archives with the document that we put to
12 the witness that was unmarked and which he marked during cross-examination.

13 PRESIDING JUDGE EBOE-OSUJI: All right. Can you describe it?

14 MR KHAN: Yes.

15 PRESIDING JUDGE EBOE-OSUJI: Can you give this to --

16 MR KHAN: Would the court officer?

17 PRESIDING JUDGE EBOE-OSUJI: Give this to Mr Khan. If you can describe it
18 with enough tags so we can track it later.

19 MR KHAN: Yes. And, your Honour, while that's being done, just so the court
20 officer can look at it, it seems that KEN-OTP, KEN-OTP-0104-0663, which was the
21 investigator's report, to which the Prosecution had no objection, that may not have
22 been given an exhibit number or called out.

23 And, your Honour, the second thing is that the (Redacted) that we

24 sought to be admitted should be admitted, we say, in full. And that's

25 KEN-OTP-0073-0249. So there is no confusion, it's the whole of the document that

1 should be admitted, not just the first page.

2 PRESIDING JUDGE EBOE-OSUJI: Yes, indeed.

3 MR KHAN: Your Honour, as far as the (Redacted) is concerned, this is a

4 (Redacted), KEN-OTP-0073-0315, which was an unmarked (Redacted) presented

5 by the witness to the Prosecution purportedly showing (Redacted)

6 (Redacted) who he described as being (Redacted)

7 (Redacted). During cross-examination, the witness was shown it, he was asked

8 questions about it, and he put a number 3 on one of the (Redacted)

9 (Redacted), and he gave evidence under cross-examination as to who that

10 person was. And the Defence pointed out that number was quite different to the

11 person he had previously indicated during examination in chief. So, your Honour,

12 hopefully that's a way of describing the document.

13 PRESIDING JUDGE EBOE-OSUJI: And also that particular annotation of putting

14 number 3 on one of the persons (Redacted) was an exercise done during

15 cross-examination by you.

16 MR KHAN: That's correct, your Honour. I'm most grateful. And if I can return

17 this, I think it's the original document. Thank you.

18 THE COURT OFFICER: Thank you, Mr President. Indeed it seems that I have

19 omitted to give a number to KEN-OTP-0104-0663, which is the number will be

20 EVD-T-D09-00112, and it will be referenced as Ruto Defence exhibit number 112.

21 As for the annotated (Redacted), it will bear the number EVD-T-D09-00123, and this

22 document will be uploaded into the eCourt system.

23 PRESIDING JUDGE EBOE-OSUJI: We will now proceed to the next item on the

24 agenda, which is the next witness, but before we do that there is the matter of the

25 submissions on protective measures, isn't it?

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(Closed Session)

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1 MR GARCIA: With the Court's permission, if we could just take one minute for the
2 team member who is going to be leading this witness, Ms Regina Weiss, to take my
3 position. I'll be leaving the courtroom, with the Court's permission obviously.

4 PRESIDING JUDGE EBOE-OSUJI: Proceed.

5 MR STEYNBERG: Your Honours, with the leave of the Chamber, there is one
6 further matter, one preliminary matter which has come to my attention which I feel I
7 should raise, and that is the fact that the next witness, Witness P-128, is a dual status
8 victim witness and thus one of the witnesses in respect of whom the Court's order
9 for the presence of Mr Ruto applies.

10 It's been brought to my attention that Mr Ruto is not present at the moment. I don't
11 know what my learned friends have to say about it, but on the face of it it would
12 seem that he would be in contempt of this order. I ask my learned friend to clarify,
13 please.

14 MR KHAN: Indeed, your Honour.

15 PRESIDING JUDGE EBOE-OSUJI: One second, one second.

16 (Trial Chamber confers)

17 PRESIDING JUDGE EBOE-OSUJI: The Court's ruling was not that whenever a dual
18 status witness victim is testifying Mr Ruto must be present. That was not the
19 ruling. The condition was when victims present their views and concerns in person
20 then Mr Ruto needs to come in, needs to be present at the time.

21 MR STEYNBERG: Thank you for the clarification, your Honours. Then in that
22 case I misinterpreted your Honours' order.

23 PRESIDING JUDGE EBOE-OSUJI: It's not your fault. I can see how the confusion
24 could have arisen.

25 MR STEYNBERG: As the Court pleases.

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(Closed Session)

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1 PRESIDING JUDGE EBOE-OSUJI: Yes.

2 MR KHAN: And, your Honour, can I just for my learned friend, it's helpful to look
3 at the Trial Chamber's clarification that was rendered on 23 September 2013 at page 8
4 of the transcript, lines 8 to 17, when your Honour in fact made the point quite clear.
5 So, your Honour, that's a useful reference I think.

6 PRESIDING JUDGE EBOE-OSUJI: All right. We will then -- Mr Weiss -- I'm sorry.
7 Ms, sorry.

8 MS WEISS: Ms Weiss, yes.

9 PRESIDING JUDGE EBOE-OSUJI: Thank you. You will be taking the next
10 witness. Why don't we go into -- where do we normally take submissions on
11 protective measures, in closed or open session? I forget now.

12 MS WEISS: Private session, I understand, your Honour.

13 PRESIDING JUDGE EBOE-OSUJI: Private session. All right, we'll go into private
14 session then to take submissions.

15 (Private session at 3.21 p.m.) Reclassified into open session

16 THE COURT OFFICER: We're in private session, your Honour.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you.

18 Ms Weiss, please proceed.

19 MS WEISS: Your Honour, the Prosecution rests on its written submissions in filing
20 1129 for matters of in-court protective measures.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 Mr Khan? Mr Kigen-Katwa?

23 MR HOOPER: Yes. I'll take this witness and I'm not going to revisit the
24 submissions that had been previously made. I think the Chamber well appreciate
25 the Defence position in respect of openness, which of course we respect and

1 understand the Court also wishes. In respect of this witness I'll say no more than
2 that because it's a matter for you, the Judges.

3 In respect of this witness there is one matter, and that is that we see from the witness
4 profile that we received a few days ago that this witness is (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted). That's the extent of the information we have.

8 And so we'd ask that the Victim and Witness Unit and/or the Prosecution divulge to
9 the Defence all the material, redacted if necessary, to the extent necessary, relating to
10 that particular (Redacted), because our position is that it would be wholly without
11 any foundation and maybe, therefore, a matter that goes to the witness's credibility
12 in due course.

13 While I'm on my feet, we received a PIS document. And the objective as we
14 understand it of the various listings there on the second page relate to matters that
15 are not generally to be referred to in public session. And it strikes us that the
16 Prosecutor is perhaps going -- throwing a rather wider net than necessary. When
17 you look at item 8 under locations, (Redacted)

18 (Redacted).

19 And also under persons, the generality of item 6, (Redacted). The other matters
20 we say -- we say little about. We don't know quite how the Prosecution want to
21 approach this witness, whether in fact they want to name the place, for example, not
22 so much (Redacted), but the location at 1, whether that would lead us, if we didn't
23 mention it in public, whether it would need us to having more open session than
24 perhaps otherwise. That's a possibility.

25 Another possibility is consider the extent to which we could have a more open

1 evidence if, example, his ethnicity was in fact also not, not revealed.

2 PRESIDING JUDGE EBOE-OSUJI: Ms Weiss?

3 MS WEISS: Your Honour, in my submission --

4 MR KIGEN-KATWA: Mr President.

5 PRESIDING JUDGE EBOE-OSUJI: Yes, please. Sorry about that.

6 MR KIGEN-KATWA: Mr President, on the part of Mr Sang, we reiterate and

7 emphasise on our desire and wish for public hearings. We also continue to lament

8 our recommendation for protective measures based solely on the concerns and the

9 wishes of a witness as opposed to a forensic examination of the basis and the

10 justifications of those concerns.

11 And in the particular instance of this witness, we know that it is of late that this

12 witness has said (Redacted). The particulars of

13 that (Redacted) are not indicated.

14 Lastly, Mr President, so that it has any meaning, we would pray that another

15 standing order be made that the rider that the VWU has put that they're

16 investigating the (Redacted) should be eventually disclosed to

17 this Court and to the Defence so that it is known whether it is well founded or

18 otherwise.

19 For all those reasons, Mr President, on Mr Sang's part we would have wished to

20 have this witness testify in the open. Thank you, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you very much, Mr Kigen-Katwa. Sorry

22 for the omission, as I chose to get the Prosecutor -- the Prosecution's response to

23 those issues.

24 MS WEISS: Your Honour, with respect to the matter of the protected locations on

25 the PIS sheet, it's my submission, your Honour, that they only relate really to a very

1 limited number, and they are areas and places and people which if spoken about in
2 public session could reveal the identity of the witness.

3 So the locations and these persons on the PIS will enable most of this witness's
4 testimony to be conducted in public session, preserving the publicity of the
5 proceedings, all the while protecting the identity of the witness.

6 My submission is that these do not go beyond the parameters of protecting the
7 witness and those locations, and they have been scaled back as much as possible in
8 the Prosecution's view for protecting the witness. Your Honour --

9 PRESIDING JUDGE EBOE-OSUJI: Including (Redacted)?

10 MS WEISS: In the context of the questions I intend to ask in public session, it would
11 certainly give away this witness's movements at a particular time and a particular
12 date. And if anyone was privy to that information, it could easily identify who that
13 person is, who the witness is.

14 PRESIDING JUDGE EBOE-OSUJI: And (Redacted)?

15 MS WEISS: The same goes for (Redacted) because it was on the same trip that I
16 will ask him questions in public session, that he goes to (Redacted)
17 (Redacted).

18 There are -- these locations are a precaution. If at the time it would seem in the
19 context of the question that the location will not endanger the protection of the
20 witness, then certainly we can revert at that time to say that location in open session.
21 Just with the matter of the threats and harassment, your Honour, I must revert to my
22 colleagues at the VWU for this information. Those are my submissions.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 (Trial Chamber confers)

25 PRESIDING JUDGE EBOE-OSUJI: On the specific matter of the (Redacted) or

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1 indication as the case may be of (Redacted), the
2 Chamber directs the VWU to disclose whatever information they have on the matter
3 at this stage to the Defence. The Chamber will render its ruling on witness
4 protection measures in the courtroom.
5 The Chamber received a request from the Prosecution on 24 December 2014 for
6 protective measures in the form of -- in the usual form, that is, image and voice
7 distortion, use of pseudonyms during testimony, limited sessions in camera to
8 prevent identification and redactions, if necessary, to public records. On 23 January
9 2014, the VWU provided its assessment to the Court recommending that the
10 requested measures be granted. We have now heard submissions from the Ruto
11 and the Sang Defence teams.
12 Having considered the request by the Prosecution and the independent assessment
13 made by the VWU, the Chamber grants the measures as requested. It is true, of
14 course, that the VWU did indicate in their report that they received information from
15 the witness that (Redacted). It is important to
16 stress that the decision of the Chamber is not motivated exclusively by that
17 (Redacted). That's the ruling of the Chamber.
18 The witness is on standby? Let's bring him in. Thank you.
19 Ms Weiss, have we -- do we have any indication as to the usual admonitions to the
20 Defence -- to the witness as in Rule 66(3) and Rule 74(1) advisory?
21 MS WEISS: Yes, your Honour. Those warnings were given to the witness during
22 the witness preparation session last week.
23 PRESIDING JUDGE EBOE-OSUJI: Thank you.
24 Let's bring down the blinds and welcome the witness to the courtroom.
25 MR KIGEN-KATWA: With your permission, Mr President? Mr President, I'd

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1 request for the Chamber's leave to have Mr Philemon Koech conduct the evidence of
2 this witness.

3 PRESIDING JUDGE EBOE-OSUJI: Very well, Mr Kigen-Katwa.

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

5 (Closed session at 3.34 p.m.) Reclassified into open session

6 (The witness enters the courtroom)

7 PRESIDING JUDGE EBOE-OSUJI: Open session, please.

8 (Open session at 3.34 p.m.)

9 THE COURT OFFICER: We're in open session, your Honours.

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

11 Witness, welcome to the ICC and welcome to the courtroom. I will tell you what
12 I've told other witnesses who have testified before you. I begin with that word of
13 welcome. I also tell everyone who testifies that when we say welcome, we do not
14 want to make you feel like a stranger in a strange place. We only say that because
15 we have been sitting here long before you joined us, and it's traditional to say
16 welcome to somebody who joins you.

17 The courtroom belongs to you, as it does to each one of us in this courtroom, the
18 lawyers and the Judges. So we want you to feel at ease during your testimony.

19 The exercise as you probably would have known if you've been following the case,
20 our inquiry about what happens in a case is done through questions and answers.

21 The lawyers will be getting information from you by asking you questions, and you
22 will respond by giving them the answers, if you can. In asking you those questions,
23 sometimes we have observed some witnesses might find some of the questions a
24 little disturbing, a little difficult. Sometimes the questions might appear pointless.

25 Why are they asking me this question? I know I've said this to people several times,

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1 even in the course of the testimony you would have said the same thing. So the
2 questions might appear repetitive or pointless, but do bear with the lawyers and
3 bear with us in answering those questions.
4 Do not be overly concerned about the fairness of the questions. It is an important
5 job that Judges have to make sure that lawyers do not treat you unfairly because you
6 are in the courtroom. So we will make sure that questions asked of you are fair. So
7 unless there is an intervention from any lawyer saying you should not answer any
8 question and the Judges have ruled, or unless the Judges have told you do not
9 answer any question, please concentrate on answering it - answering the question -
10 to the best of your ability.
11 The first to ask you questions would be the Prosecution lawyer. Ms Weiss will be
12 asking you questions at the beginning in your testimony. After that the lawyer for
13 the Defence, for the defendants, the lawyer for Mr Ruto and the lawyer for Mr Sang,
14 would also take their turns in asking you questions. Whatever happens, please
15 listen carefully to whoever is asking you questions, please listen carefully to the
16 questions being asked and do your best to answer it in a way that assists us in
17 assessing the value of the answers you give.
18 It's critical to remember at all times that you are here to tell the truth and that's what
19 is most important for us. To do that, make sure you understand the question you're
20 asked before you answer it and, once you start answering, try and be brief, as brief
21 as you can. Also try to concentrate on giving us information you observed yourself
22 first-hand. It could be what you saw or what you heard, what you felt at the time,
23 and sometimes it could be what you thought, but at all times keep it relevant to the
24 question asked of you.
25 Try not to guess at an answer. You're a human being. Often there is a lot people

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1 who don't know, don't see. If that is the case do feel free to say you do not know or
2 you don't remember if that's the case, but if you remember please answer truthfully.
3 There is also one small matter beyond the substance of your testimony and this is
4 very important. We want to make sure that we record everything you say correctly
5 and accurately. To do that, there are colleagues who will help with the
6 interpretation. If you look up there, you will see them. They'll be interpreting in
7 other languages. It could be Swahili for people in Kenya to follow. It could also be
8 French, because we also have keep records of the proceedings in French. And there
9 are court reporters on the other side who would be recording what you are saying.
10 To make their job easy, it's important that you speak at a moderate pace. Do not
11 speak too fast, also not too slow, but in a moderate pace that they can easily interpret
12 and they can easily record.
13 There is something we call the rule of the pause. That is observing a pause, a little
14 gap, between the completion of the question and your beginning to answer it. It's
15 important to observe that pause, because it enables the interpreters to catch up. It
16 also very importantly avoids the risk of overlapping speeches. You see we are
17 using microphones in the courtroom and you see the interpreters and the court
18 reporters are not inside the courtroom. The only way they can hear you is through
19 the microphone and the headsets they're wearing. So if two speakers are
20 overlapping, as in Ms Weiss for instance has not finished her question but you know
21 the answer and you start answering immediately, there is a risk that words will
22 collide and the interpreters would not get what you are saying. So it's important to
23 let her finish before you start answering.
24 That is all I can tell you now. It may be necessary from time to time for me to
25 remind you of these things, and with that again I will say welcome to you.

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1 Ms Weiss?

2 MR NDERITU: Mr President, your Honours --

3 PRESIDING JUDGE EBOE-OSUJI: I'm sorry, I need to mention one thing. Mr

4 Nderitu just rose. I forgot to tell you that he represents the victims in the

5 courtroom. He may be given permission also -- he has asked for him to ask you

6 questions after the Prosecution has finished asking you questions. The Chamber

7 may grant him that permission once we see how the testimony goes. So he may

8 also have questions for you as well. Again, the same rule that applies -- the same

9 rules that apply when the Prosecution and Defence lawyers are asking you questions

10 would also apply when -- if and when Mr Nderitu does ask you questions.

11 Mr Nderitu, is that what you were going to say?

12 MR NDERITU: I'm grateful. Yes, that was it.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you. Thank you. It will be brief for you

14 today, because as you see we are at quarter-to-4. We ordinarily adjourn for the day

15 at 4, but it's important to get going than not at all. We had other business before

16 you, including another witness who testified before. Thank you.

17 The swearing in, the oath.

18 WITNESS: KEN-OTP-P-128

19 (The witness speaks Swahili)

20 THE WITNESS: (Interpretation) I solemnly swear to tell the truth, the whole truth

21 and nothing but the truth.

22 QUESTIONED BY MS WEISS:

23 Q. Good afternoon, Mr Witness. Thank you for being here. My name is Regina

24 Weiss. I'm appearing for the Prosecution today. We've met before and it's nice to

25 see you again. Can you understand me properly?

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1 A. Yes, yes, I can hear you well.

2 Q. Mr Witness, as His Honour explained, I will be asking you some questions on
3 behalf of the Prosecution. I'll start with asking you some questions about your
4 personal background and your history, but before I do that I just want to address
5 one small issue. I understand that you speak both English and Swahili; is that
6 correct?

7 A. I can understand a bit of English and I speak Swahili.

8 Q. And you've chosen to give your evidence in Swahili today, as I see. I just
9 wanted to make one reminder and reiterate what His Honour has just explained to
10 you, that you always wait for the Swahili interpretation to be finished. I know it's
11 an easy trap to fall into when you can understand both English and Swahili. Do
12 you understand that?

13 A. Yes, I've understood.

14 Q. Witness, I'm going to start by asking you some questions about your personal
15 background and occupation and so forth and I will shortly ask the Chamber whether
16 I can do that in private session, but before I do that could I ask the court officer
17 please to give the witness the CV or Personal Information Sheet? It's the second
18 page of the PIS form.

19 And, your Honours, I think it's in the beginning of the bundles. Counsel have a
20 copy of this and, as I understand, the Defence have no difficulty with this document
21 and agree to its contents. There is English on one side, Swahili on the other.

22 Witness, if I can ask you, please, just take the time to read that to yourself and then I
23 will ask you whether the information contained is true and correct.

24 A. I'm in agreement with what I've just read.

25 PRESIDING JUDGE EBOE-OSUJI: Ms Weiss, one second please.

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1 Witness, about this document that the Prosecution has given you, it reminded me of
2 something that needs to be -- some other information I need to give you. You have
3 been granted the privilege of testifying by way of a pseudonym, so we know you in
4 the Court as "Witness 128, " and the reason for that is the need to protect your
5 identity from being known to the public.

6 Occasionally we will be testifying -- we may need to go into private session. When
7 we are in private session, the public will not hear your testimony. Now, we hope to
8 be in public session most of the time so that the public can hear your testimony. But
9 when we're in public session, the public will not see you. There is some technology
10 that has been used to distort your voice and your image, so that the only people who
11 can hear you in your own natural voice and see you are those who are in the
12 courtroom. The shield around you, the blinds around you will stop people in the
13 gallery from seeing you.

14 Now, when we are in the public session, when we are in the public session as we are
15 now, there is a light in front of you that will light up red. Can you see it? There is
16 the button. Do you see that button? No, look at me. After your microphone, do
17 you see there is a little button there that has got a red light on. Do you see it,
18 beyond your -- yes. Point.

19 THE WITNESS: (Interpretation) Here, your Honour?

20 PRESIDING JUDGE EBOE-OSUJI: Yes. That's good right. That is it, that is it.
21 We're in public session. That's why it is now lit up red. If you look at it, there is
22 another button that is green. It is not lit up now. When we are in private session,
23 that means when members of the public cannot hear you, that button will be lit up
24 green. So when we have red, remember this, the reason -- there is a colour coding
25 that makes sense. The reason is the red tells you there is danger, be careful what

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1 you say.

2 Now, we want you to tell the whole truth, including your identity sometimes, but
3 when we have identifying information, things like your real name, names of your
4 relatives, where you live, where your relatives live, as well as some unique
5 information could be part of a story or an event that somebody can easily associate
6 you with because they know your connection to that story or to that event, and that
7 sort of information we want to hear as well, but we will hear those in the private
8 session when the light is green.

9 So when the light is red, try not to put your name, your identity, the identity of your
10 relatives, where you live, do not give that sort of information in an answer to a
11 question when we are in the public session. I hope you will remember all of that,
12 but we will try and remind you.

13 It is for that reason that the Prosecution has drawn up that document that has been
14 given to you. From time to time she will ask you person number indicated or
15 location number whatever it is on that document. That is part of the system that's
16 designed to make sure that the public do not know who you are. All right? Thank
17 you.

18 Ms Weiss, please.

19 THE WITNESS: (No interpretation)

20 PRESIDING JUDGE EBOE-OSUJI: Interpretation, please.

21 THE WITNESS: (Interpretation) Yes, I've understood.

22 MS WEISS:

23 Q. Witness, I will now start by asking you some questions on your personal
24 background and information about you. So this is one of those moments where I'm
25 going to ask His Honour for leave of the Court to go into private session for I would

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1 think no more than ten minutes. I may not make it by 4 o'clock, it may be a couple
2 of minutes tomorrow morning as well, but it won't be long. Ten minutes or so.

3 PRESIDING JUDGE EBOE-OSUJI: Private session then.

4 (Private session at 3.54 p.m.) Reclassified into open session

5 THE COURT OFFICER: We're in private session, your Honours.

6 MS WEISS:

7 Q. Witness, are you the (Redacted)?

8 A. Yes.

9 Q. And what is that (Redacted) called?

10 A. (Redacted).

11 Q. Witness, please explain what (Redacted).

12 A. This (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted).

17 Q. Witness, what (Redacted) are you speaking of? We're in private session, just to
18 remind you.

19 A. I'm talking about (Redacted)

20 (Redacted).

21 Q. Witness, the (Redacted);

22 is that correct?

23 A. Yes. When the (Redacted),

24 (Redacted).

25 Q. Witness, have you ever received (Redacted)?

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- 1 A. No, no, your Honour.
- 2 Q. Are you (Redacted)
- 3 (Redacted)?
- 4 A. No.
- 5 Q. How is the (Redacted)?
- 6 A. The (Redacted)
- 7 (Redacted)
- 8 (Redacted).
- 9 Q. Witness, are you still the (Redacted)?
- 10 A. Yes, I am. There haven't been any (Redacted). There haven't been
- 11 (Redacted).
- 12 Now I've been (Redacted).
- 13 Q. Are you still (Redacted)?
- 14 A. No.
- 15 MS WEISS: Your Honour, I'm mindful of the time. I'll continue?
- 16 Q. Witness, did you have any political affiliation in 2007?
- 17 A. Yes, I was.
- 18 Q. And can you explain which political party you were affiliated with?
- 19 A. I was a member of the (Redacted).
- 20 Q. And did you have an active role with the (Redacted) in 2007?
- 21 A. No, (Redacted)
- 22 (Redacted).
- 23 Q. And, Witness, what (Redacted)?
- 24 A. I was one of the (Redacted), your Honour.
- 25 PRESIDING JUDGE EBOE-OSUJI: Ms Weiss, one second please.

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1 (Trial Chamber confers)

2 PRESIDING JUDGE EBOE-OSUJI: Ms Weiss, we will allow you 'til about 4.20 to
3 settle things and with the grave indulgence and understanding of the court
4 interpreters and court reporters. Thank you.

5 MS WEISS: Much obliged, your Honour.

6 Q. Witness, you said that you were one of the (Redacted). Could you
7 explain what (Redacted)? What did you have to do?

8 A. My (Redacted)
9 (Redacted).

10 Q. And which area (Redacted)?

11 A. Mr President, the name of the (Redacted) was at number 2 on the list
12 which is on my left.

13 PRESIDING JUDGE EBOE-OSUJI: Ms Weiss, you can -- that's a good system. Let's
14 even in private session, let's have the witness still stay with the PIS system.
15 You can vocalise the name yourself. But, Witness, it's a good thing you did,
16 referring to the number and since we're in private session continue to do that still
17 even in private session, but the lawyers will know when it is safe to read out the
18 actual name of a person or place. Thank you.

19 MS WEISS:

20 Q. Thank you, Mr Witness. So you say number 2, (Redacted).

21 Mr Witness, do you have any political affiliation now?

22 A. No, Mr President. I have abandoned politics.

23 Q. Witness, where did you live in 2007?

24 A. In 2007, I was living in (Redacted).

25 Q. And where is that, Witness, in which district?

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- 1 A. Your Honour, (Redacted) is in that Nandi South region in the Rift Valley.
- 2 Q. And how long did you live there, Witness?
- 3 A. I lived there for (Redacted).
- 4 Q. How long does it take to (Redacted) to Nandi Hills town?
- 5 A. That can take just (Redacted).
- 6 Q. Witness, we already know that you understand English and Swahili. Do you
- 7 speak or understand any other languages?
- 8 A. I speak my native language, my mother tongue. In addition, with regards to
- 9 other languages, I have a basic knowledge, for example, I can ask for water to drink.
- 10 Q. Witness, so you say you speak your mother tongue. Could you tell the Court
- 11 what that is?
- 12 A. My mother tongue is Luhya.
- 13 Q. And you say the other languages, you have a basic knowledge. Could you
- 14 tell the Court what that language or languages are?
- 15 A. I understand Nandi a bit, Luo, and Kikuyu, but basic knowledge of them
- 16 really, like, for example, asking for water to drink.
- 17 Q. And, Witness, is it correct that Nandi is a dialect of Kalenjin?
- 18 A. Yes, your Honour.
- 19 MS WEISS: Your Honour, that concludes the evidence I wish to lead at this stage in
- 20 private session. We can go into public session, if your Honour so sees fit?
- 21 PRESIDING JUDGE EBOE-OSUJI: Why don't we then rest it there for today and
- 22 take it up tomorrow.
- 23 MS WEISS: Thank you, your Honour.
- 24 PRESIDING JUDGE EBOE-OSUJI: All right.
- 25 Witness, thank you for joining us. We will now be adjourning for the day. We

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(Private Session)

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1 know it was a short exercise for you, but tomorrow you will be joining us at 9.30.
2 Thank you.
3 Blinds down, please, and the witness led out of the court.
4 (Closed session at 4.12 p.m.) Reclassified into open session
5 THE COURT OFFICER: We're in closed session, your Honours.
6 (The witness stands down)
7 PRESIDING JUDGE EBOE-OSUJI: While the witness is being led out, Ms Weiss,
8 when do you anticipate completing your examination-in-chief noting the pace,
9 seeing we are now using interpretation.
10 MS WEISS: Your Honour, my estimation is no more than a day. So by the end of
11 the day tomorrow, if not in the middle of the afternoon session, but to see how we
12 go, I will be safe to say end of the day tomorrow.
13 PRESIDING JUDGE EBOE-OSUJI: Please try and see what can be shaved off from
14 tendered questioning. Thank you.
15 Court will rise.
16 THE COURT USHER: All rise.
17 (The hearing ends in closed session at 4.14 p.m.) Reclassified into open session
18 RECLASSIFICATION REPORT
19 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24
20 September 2013, and the instructions in the email dated 9 may 2014, the version of
21 the transcript with its redactions becomes Public.