

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 International Criminal Court
2 Trial Chamber V(a) - Courtroom 1
3 Situation: Republic of Kenya
4 In the case of The Prosecutor v. William Samoei Ruto
5 and Joshua Arap Sang - ICC-01/09-01/11
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera Carbuccion
7 and Judge Robert Fremr
8 Trial Hearing
9 Friday, 11 October 2013
10 (The hearing starts in open session at 9.37 a.m.)
11 THE COURT USHER: All rise.
12 The International Criminal Court is now in session.
13 Please be seated.
14 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
15 Court officer, please call the case.
16 THE COURT OFFICER: (Interpretation) Good morning. Situation in the
17 Republic of Kenya, case of The Prosecutor versus William Samoei Ruto and Joshua
18 Arap Sang, ICC-01/09-01/11. We are in open session. Thank you.
19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
20 Appearances remain the same?
21 MR OMOFADE: For the Prosecution, your Honour, yes.
22 PRESIDING JUDGE EBOE-OSUJI: Defence?
23 MR KHAN: For the Defence of Mr Ruto, your Honour, yes.
24 MR KIGEN-KATWA: For Mr Sang, Mr President, I'm joined by Judy Mionki, our
25 case manager.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 MR NARANTSETSEG: We remain the same, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. We want first to attend
4 to some housekeeping matters before we invite the witness back into the courtroom.
5 For some of these housekeeping matters we will be in the open session and for some
6 I anticipate we may go into private session, as we received some requests from the
7 Prosecution I understand to discuss certain things.

8 First of all, as regards the things we can attend to in the open session, Mr Khan, you
9 will be completing your cross-examination within the hour, you said?

10 MR KHAN: Well, your Honour, overnight we've discussed further with my learned
11 friend, lead counsel for Mr Sang, and what we will do, because we've redistributed
12 certain issues, is we will honour our promise that my learned friend gave that we'll be
13 finished with this witness today and we anticipate that will -- with more than enough
14 time for the Prosecution, in the event they have anything to ask in re-examination.
15 So this witness will be finished today, your Honour, but your Honour because of the
16 redistribution I will take -- I may well take longer - and in fact I anticipate I will take
17 longer than the hour - but accumulatively there'll be no change between the two
18 teams.

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

20 MR KIGEN-KATWA: I confirm that is the arrangement that we have, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: Of course, much depends on the Prosecution's
22 possibility of re-examination. So far, Mr Omofade, do you see that so far you will be
23 re-examining?

24 MR OMOFADE: Your Honours, as we see it at the moment, there are a few discrete
25 issues that we might want to explore in re-examination. Of course I don't know how

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 the rest of Mr Khan's cross-examination will pan out, nor do I know how

2 Mr Kigen-Katwa's will pan out, but we anticipate that, whatever time is remaining,

3 this is something we should be able to clear up in about 30 minutes.

4 PRESIDING JUDGE EBOE-OSUJI: But are you saying -- are you anticipating the

5 remainder of Mr Khan's cross-examination and Mr Kigen-Katwa's in that rough

6 estimate you've given?

7 MR OMOFADE: The estimate is based on what's been explored so far.

8 PRESIDING JUDGE EBOE-OSUJI: That leads us to the second issue, which is the

9 Victims and Witnesses Unit need of course to plan ahead whether there is a need for

10 them to bring the next witness within the premises on stand-by. I see Mr Khan

11 shaking his head. I take it Mr Kigen-Katwa too?

12 MR KIGEN-KATWA: Mr President I think it's very unlikely that we could take

13 another witness today.

14 MR OMOFADE: And, if it helps, I share the view expressed opposite.

15 PRESIDING JUDGE EBOE-OSUJI: So then we can reassure the VWU that they need

16 not bring another witness to the premises on stand-by.

17 All right. With that cleared up, is there anything else we can safely discuss in the

18 public session, a matter of housekeeping?

19 MR OMOFADE: There is, your Honours. The witness order that I provided

20 yesterday morning, we did say that we've managed to accommodate some of the

21 requests of the Defence and find three further witnesses who are able to fill the gap

22 provided by 356.

23 The order that I provided yesterday was 487, 535 and then 268 if there's time left.

24 Now, in the course of yesterday, we gleaned certain information that leads us to

25 believe that 535 will no longer be the second in line. Rather, it will be 268. So the

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 order doesn't change that much -- well, the number of witnesses doesn't change. The
2 witnesses themselves don't change. It's just the order in which we call them. So it
3 would now be 487, 268 and 535 if there's enough time left in this session.

4 PRESIDING JUDGE EBOE-OSUJI: Does that not accentuate Mr Kigen-Katwa's
5 anxiety? We will let him speak for himself, of course.

6 MR KIGEN-KATWA: It very much does, Mr President. I had hoped that they
7 could even put him further down the list. The situation becomes very aggravated
8 when he's moved up, Mr President.

9 PRESIDING JUDGE EBOE-OSUJI: So your concern was that, as things were
10 yesterday, by the Prosecution's revision as of yesterday 268 would have posed a
11 problem if he -- or I don't know if it's a he or she. If that witness had come as a third
12 witness indicated, but now that the witness is being moved up to be the second that
13 would make matters worse for you, is that it?

14 MR KIGEN-KATWA: Yes, Mr President. I'm worse off.

15 MR OMOFADE: Well, the fact of the matter, your Honours, is there are too many
16 competing interests, and if the Prosecution has to bend over further backwards we'll
17 actually be flat on our backs. We have managed to accommodate the Defence to the
18 extent that 356 is one that they prefer not to deal with in this session. We've
19 provided 535. Unfortunately, due to circumstances beyond our control, we are
20 unable to proceed with that witness.

21 What we are trying to do is to balance the expeditiousness of the proceedings by
22 trying to ensure that we deal with as many witnesses as possible within this session
23 and at the same time accommodate my friends for the Defence.

24 So 487 is a certainty. Apparently, there's no difficulty. The only difficulty seriously
25 seems to be that Mr Kigen-Katwa's team alone has difficulties with 268. Now, this is

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 a witness whose statement has been disclosed well in advance. I can't see any reason
2 why they shouldn't be able to proceed. And, even as we speak, I look at the calendar
3 and I think we're still giving at least three weeks' notice to Mr Kigen-Katwa that this
4 witness, who is a very, very narrow witness, a crime-base witness, that this witness
5 will proceed.

6 PRESIDING JUDGE EBOE-OSUJI: When did you disclose the statement of 268 to
7 the Defence?

8 MR OMOFADE: Would your Honours forgive me? I'll just consult.

9 Your Honours, I'm told that the statement was disclosed on 30 November, which is
10 almost a year ago, and a further lesser redacted version was disclosed in April this
11 year, so it bears reason that there's adequate time been provided to Mr Kigen-Katwa
12 and his team to explore what they need to explore with this witness.

13 MR KIGEN-KATWA: Mr President?

14 PRESIDING JUDGE EBOE-OSUJI: Mr Katwa?

15 MR KIGEN-KATWA: Yes. Mr President, on reconsideration and in consultation
16 with Ruto's team, I do not want to stand out as being a difficulty on this issue and we
17 can proceed as proposed by the Prosecution, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: Okay, thank you very much. It's good to have
19 that matter resolved and cleared up. So we will then proceed in the order indicated.

20 MR OMOFADE: I'm grateful, your Honours.

21 PRESIDING JUDGE EBOE-OSUJI: Is there anything else we need to discuss in open
22 session, or we may safely discuss in open session?

23 MR OMOFADE: The other matters, your Honours, need to be discussed in private
24 session.

25 PRESIDING JUDGE EBOE-OSUJI: All right. So we'll go into private session, then,

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 for the next phase of the discussion.

2 (Private session at 9.48 a.m.) Reclassified into open session.

3 THE COURT OFFICER: (Interpretation) We are in private session, your Honour.

4 MR OMOFADE: Your Honours, the further matter that I proposed to raise is one
5 that might have already come to the Bench's attention as well, and it's the fact that in
6 the course of Mr Khan's cross-examination yesterday there were a number of slip-ups
7 by the witness to the extent that redactions had to be made repeatedly to the
8 transcripts.

9 Now, some of these issues to my mind ought to have been anticipated by counsel and,
10 if we are having at least four redactions within the space of 40 minutes, then that's at
11 least one redaction too many, we say.

12 Now, I note that Mr Khan avoided referring to the PIS form, which is available, and
13 many of these instances -- and I don't propose to go into them, but many of these
14 instances could have been cured if resort was made to the PIS form.

15 So I only place this on the record, and I say that we all of us within the courtroom
16 have a responsibility towards the protection of information that could reveal the
17 identity of the witness. While the Prosecution is diligently managing and
18 monitoring this, there's an obligation on both sides to monitor the disclosure of
19 information that might reveal the identity of the witness.

20 I say no more on the issue. I'm sure your Honours might have noticed as well.

21 PRESIDING JUDGE EBOE-OSUJI: You meant -- you meant, of course, an obligation
22 to anticipate that certain questions may provoke witnesses giving certain answers that
23 may cause problems.

24 MR OMOFADE: That certain questions, or certain lines of questioning, might
25 anticipate -- might provoke certain responses.

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: Yes, yes.
- 2 MR KHAN: Your Honour, of course one can always endeavour to approach things
- 3 with even greater care, but also the Court should be mindful, in my respectful
- 4 submission, that sometimes one would reveal the very information which the PIS
- 5 form is meant to conceal by an open session saying (Redacted)
- 6 (Redacted). Then, later on, when the issue (Redacted)
- 7 (Redacted) becomes peculiar to the witness, everybody will know what it's shorthand for,
- 8 so I was very careful actually to -- maybe there were a couple of slip-ups and almost
- 9 slip-ups, but sometimes I will, and it was quite conscious, on various occasions
- 10 (Redacted)
- 11 (Redacted)
- 12 (Redacted). So, your Honour, that's what I'd ask the Bench to be alive to.
- 13 Your Honour, I will undertake again to be cognizant of this danger but I was, as far as
- 14 I was capable, given my own limitations yesterday.
- 15 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I don't believe that there is any
- 16 suggestion, nor do we think that there was bad faith on your part. It's just these
- 17 things, you know how it is, you've been in this field for a long time, these things
- 18 happen. We can talk around an issue in -- and then mask certain information but
- 19 then somewhere down the line, when things are put together, it becomes obvious
- 20 what the masked might have been. So that's the point, so the essence of it of course
- 21 is that we all need to be extra vigilant, especially in the circumstances of a case like
- 22 this, where some people are actively interested in finding out who is talking and then
- 23 putting out their names in public. No criticism, just that we all need to be more
- 24 careful at this stage.
- 25 MR KHAN: I'm most grateful.

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Yes.

2 MR OMOFADE: And, your Honours, the other issue is a minor matter as well. We
3 received further disclosure from Mr Kigen-Katwa's team yesterday in relation to
4 matters they proposed to rely on in the course of their session of cross-examination.
5 Now, at 4.04, four minutes past 4.00 yesterday, we received two items. Now, these
6 items were not even accessible to us as of 7.00 last night. In effect, this breaches the
7 deadline of 24 hours that they were meant to comply with.

8 We don't take issue with these particular documents. I bear in mind that one of
9 them is a translation of a previous video or audio recording that was provided well
10 within the time limit, but I just place it on the record as well that the very spirit
11 behind the rule, that this information should be provided in advance, the spirit of it is
12 to enable the Prosecution to be able to at least assess and analyse the information itself
13 rather than just to have it and, say, tick a box and say we've provided disclosure.

14 PRESIDING JUDGE EBOE-OSUJI: Are you objecting or not?

15 MR OMOFADE: On this occasion, no.

16 MR KIGEN-KATWA: Mr President, with your permission, may I acknowledge that
17 it is true that I made the disclosure very late. May I also acknowledge that I am
18 aware that I was in breach of the requirement. May I express that I'm apologetic
19 about it. I already approached the Prosecution, specifically, Mr Omofade, and asked
20 him what his position was, and I must say I'm very grateful to him that he said he will
21 accommodate me this time round, but it's not something I take for granted. Thank
22 you, Mr President, and your Honours.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you, Mr Kigen-Katwa.

24 On this matter, as you -- all sides should have noticed from the last time it occurred,
25 the 24-hour rule is a rule of fairness for the opposing side. There will come a time

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 when the shoe would be on the other side as well. But, for now, it's a rule of fairness
2 and the inclination, of course -- this is not a ruling, just giving the inclination. The
3 inclination, of course, is when the rule is breached, it will be more or less that the
4 party breaching it would then be at the mercy of the opposing side. So if they
5 decided to waive the right to object, that would be it, but when they insist on pressing
6 the objection, we are likely to grant it. That the matter not be used, that's
7 indicated -- on this occasion, clearly the Prosecution has indicated that they are not
8 objecting, so that's the end of the matter. Okay.

9 Do we have any more --

10 MR OMOFADE: None from this side, your Honour.

11 PRESIDING JUDGE EBOE-OSUJI: Any more housekeeping matters?

12 MR KIGEN-KATWA: None from our side, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: Court officer, can we bring down the blinds, then,
14 and invite the witness back in.

15 (Closed session at 9.56 a.m.) Reclassified into open session.

16 THE COURT OFFICER: (Interpretation) We are in closed session, your Honour.

17 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please invite the witness back on to
18 the witness stand.

19 While that is being done, were we in public or private session yesterday, Mr Khan?

20 Did we adjourn --

21 MR KHAN: I believe it was public, but I'm sure the court officer will let us know.

22 PRESIDING JUDGE EBOE-OSUJI: At any rate, you do intend to proceed in public?

23 MR KHAN: Yes, please.

24 (The witness enters the courtroom)

25 PRESIDING JUDGE EBOE-OSUJI: Can we go now to public session.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 (Open session at 9.57 a.m.)

2 THE COURT OFFICER: (Interpretation) We are in open session, your Honour.

3 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Witness, welcome back.

4 Mr Khan will continue his cross-examination of you. We are in public session and

5 remember the reminder I'd given you in the past. Whenever we were in public

6 session, the reminder remains: Please, listen carefully to the question the lawyer is

7 asking you, try not to give more answers than are required, especially when those

8 answers may cause you to supply information that are unique and personal to you

9 that may lead people to try and discern who you may be.

10 Mr Khan.

11 WITNESS: KEN-OTP-P-0326 (On former oath)

12 QUESTIONED BY MR KHAN: (Continuing)

13 Q. Good morning, Witness. I trust you're well rested?

14 A. Good morning.

15 Q. I trust you're well rested today.

16 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I think we can proceed.

17 MR KHAN:

18 Q. Witness, you remember on 6 October, on the second day that you gave evidence,

19 you will recall that you attended (Redacted) on 25 December 2007. Do you

20 remember saying that?

21 A. I do.

22 Q. And you say that at that building, you saw Najib Balala, Mr William Ruto and

23 Mr Raila Odinga; is that correct?

24 A. Yes.

25 MR KHAN: And, your Honour, if we can go into private session for probably one

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 minute?

2 PRESIDING JUDGE EBOE-OSUJI: We go into private session. You said for a
3 minute. One minute.

4 (Private session at 10.01 a.m.) Reclassified into open session.

5 THE COURT OFFICER: (Interpretation) We are in private session, your Honour.

6 MR KHAN:

7 Q. And Witness, you said in your evidence that when (Redacted)

8 (Redacted). Do you remember saying that?

9 A. Yes.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 MR KHAN: Your Honour, we can go back into public session, with your leave.

15 PRESIDING JUDGE EBOE-OSUJI: We will go back into public.

16 (Open session at 10.02 a.m.)

17 THE COURT OFFICER: (Interpretation) We are in public session, your Honour.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, please proceed.

19 MR KHAN: I'm grateful.

20 Q. And Witness, and for the Prosecution it's page 83, line 21 of your transcript, you
21 said, Mr Witness, that you saw Joshua Sang, who asked to meet with Mr Ruto and
22 Mr Kosgey. Do you remember saying that?

23 A. Yes.

24 Q. And they met in the office that you describe; is that right, in the room that you
25 describe?

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 A. Yes.

2 MR KHAN: Your Honour, if we could go into private session again for 30 seconds?

3 PRESIDING JUDGE EBOE-OSUJI: Private session.

4 (Private session at 10.03 a.m.) Reclassified into open session.

5 THE COURT OFFICER: (Interpretation) We are in private session, your Honour.

6 MR KHAN:

7 Q. And Witness, you told the Court that you observed Mr Sang and Mr Ruto and

8 Mr Kosgey (Redacted); is that right?

9 A. Yes.

10 Q. Do you remember what (Redacted)? Do you know what

11 (Redacted)?

12 A. Yes.

13 Q. What (Redacted), Witness?

14 A. I was (Redacted)

15 Q. And how long (Redacted)

16 (Redacted)? How long were (Redacted)?

17 A. It was -- it was (Redacted). I took, like, one hour.

18 Q. One hour. (Redacted); is that

19 right?

20 A. Yes.

21 MR KHAN: Your Honour, we can go into public session, with your leave.

22 PRESIDING JUDGE EBOE-OSUJI: Let's go to public session.

23 (Open session at 10.05 a.m.)

24 THE COURT OFFICER: (Interpretation) We are in public session, your Honour.

25 MR KHAN:

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. And, Witness, you say that you overheard Mr Ruto telling Mr Sang, in the
2 presence of Mr Kosgey, that he would go for a presentation at the Media House. Do
3 you recall saying that?

4 A. I do.

5 Q. And you later clarified, Witness, that by Media House, you were referring to
6 Kass FM; is that right?

7 A. Yes.

8 Q. And you say that this was at about 11 a.m. in the morning; is that right?

9 A. Yes.

10 Q. And a time came, you said, that you heard Mr Ruto on Kass FM after the
11 meeting you've described; is that right?

12 A. Yes.

13 Q. And you say that was in the evening of 25 December; is that correct?

14 A. Yes.

15 Q. Witness, you don't -- and the conversation you heard on the radio, or the voice
16 of Mr Ruto that you describe appearing on the radio that evening, was in Kalenjin; is
17 that right?

18 A. Yes.

19 Q. And you don't understand the Kalenjin language, do you, Witness?

20 A. No, I don't understand.

21 Q. Now, you told the -- and, Witness, why did you decide to listen to the radio
22 station which is broadcast in a language that you do not understand?

23 PRESIDING JUDGE EBOE-OSUJI: Now, Witness, you will answer that question, but
24 be careful about injecting personal information in a bid to elaborate. But the
25 counsel's question to you was: Why would you listen to a radio programme being

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 presented in a language you do not understand?

2 THE WITNESS: My interest was he was our leader - he was our political leader - so
3 I could try to follow up how people were receiving his information on the ground.

4 MR KHAN:

5 Q. Witness, there were Kamba vernacular stations that broadcast in the Kamba
6 language in Kenya during 2007; is that right?

7 A. Yes.

8 Q. Charity Ngilu is from the Kamba community, is she not?

9 A. She is.

10 Q. She was a Pentagon member; correct?

11 A. Yes.

12 Q. Did you follow programmes that were broadcast in the Kamba language in
13 which she appeared?

14 A. I never followed.

15 Q. Okay, I'll move on. We'll come back to some of these issues, Witness, but you
16 told the Prosecution -- you told the Court, I should say, that in the broadcast that you
17 describe you were told -- and let's not mention who told you, but you were told that
18 Mr Ruto was reaching out for people to vote for the ODM; is that correct?

19 A. Yes.

20 Q. And you said -- again at page 85 of the transcript of 6 October, you told the
21 Court that that's because the ODM -- explained because the ODM is the party with the
22 good policy which is going to solve the issue of the people and their needs; is that
23 right?

24 A. Yes.

25 MR OMOFADE: Your Honours, I just rise because I believe my friend refers to 8

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 October, rather than the 6th.

2 MR KHAN: 6 October. I'm grateful.

3 Q. Day 2 of your testimony, Witness. So you said "Yes" to my last question. So
4 that was your evidence to the Prosecution, that you were told by somebody, whose
5 name we are not going to mention, that there was a radio show that you heard a
6 snippet of and you were told that on that show Mr Ruto was saying people should
7 vote for the ODM because it's a good party that will solve the needs of the people of
8 Kenya; is that right?

9 A. Yes.

10 Q. But, Witness, my learned friend then read to you what was included in your
11 statement to the Prosecution, that you gave over five days in September of last year,
12 and then you said this and let me read what you said. You said, "Whoever ..." -- and
13 you ascribed these words to Mr Ruto, from what you were told. "Whoever is not
14 understanding what ODM means to him or her is just an outcast and he's just a weed
15 within a good crop and let them come out during voting day and vote for ODM.
16 Yeah." Do you remember saying that?

17 A. I do.

18 Q. According to you, Witness, what was conveyed to you on your account that was
19 campaign talk; is that right?

20 A. Yes.

21 Q. From what you say was told to you by the person whose name we won't
22 mention, you didn't form the view that there was anything wrong or objectionable
23 with what Mr Ruto was said to have spoken; is that right?

24 A. Yes.

25 MR KHAN: Now, your Honour, I have to go into private session for a few minutes,

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 please, with the Court's leave.

2 PRESIDING JUDGE EBOE-OSUJI: We go into private session.

3 (Private session at 10.13 a.m.) Reclassified into open session.

4 THE COURT OFFICER: (Interpretation) We are in private session, your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, one second. You see, we began this
6 morning with a discussion about sensitive information being released, and I must say
7 that in the course of yesterday I saw those things happening and (Redacted)

8 (Redacted) Also

9 now, when we are in public session, it may -- it will be a better idea if we refrained
10 from either asking questions or making statements about certain things that the
11 witness is not; for example in terms of ethnicity, things of that nature. It might make
12 it safer if we do not eliminate what he is not from a broader pool.

13 MR KHAN: Your Honour, I'll be so guided and I did pause before I asked the
14 question to which your Honour is referring, but there are 42 different communities in
15 Kenya, each with a rich linguistic history, and so I didn't form the view - and after I
16 consulted also with senior counsel, Mr Hooper, we formed the view - that that would
17 not imperil the witness in the least, but I'll be so guided.

18 PRESIDING JUDGE EBOE-OSUJI: Yes.

19 Court officer, do you know if the VWU had forwarded to the Defence the concerning
20 (Redacted) that I spoke about a few days ago? All right. It should be given to
21 Defence counsel, both of them, so they could see perhaps some of what I'm talking
22 about.

23 MR KHAN: I'm grateful.

24 PRESIDING JUDGE EBOE-OSUJI: All right.

25 Mr Khan, you can proceed.

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 MR OMOFADE: And perhaps I should just raise this again? Just for the court
2 record, the transcript being referred to is 8 October. The 6th is a Sunday. He
3 started testifying on the 8th. I know my friend made an error, but just for the record.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, please proceed.

5 MR KHAN: I'm grateful and my thanks to my learned friend. It's been a long time
6 since we've had a weekend, so all the days blur.

7 PRESIDING JUDGE EBOE-OSUJI: And you want to work on Saturday too, if
8 I recall?

9 MR KHAN: Your Honour, we are ever dedicated to the interests of justice. I'm
10 grateful.

11 Q. Witness, you told the Court on 8 October, and also earlier today, (Redacted)
12 (Redacted)

13 (Redacted) where Mr Sang and

14 Mr Kosgey and Mr Ruto were, you say? (Redacted)

15 (Redacted); is that right?

16 A. Yes, (Redacted)

17 Q. Yes. (Redacted)

18 (Redacted)

19 A. (Redacted)

20 Q. And the three people that you mentioned, they were inside the room; correct?

21 A. Yes.

22 Q. (Redacted) is that right?

23 A. (Redacted)

24 Q. And (Redacted), is that right, that

25 you've already mentioned to the Court?

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

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Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

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2 (Redacted)

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4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 Q. And you say that Mr Ruto and Mr Kosgey and Mr Sang were talking. They
17 weren't shouting, were they?

18 A. They were talking.

19 Q. Okay. We'll move on from that topic, but your recollection is quite clear that's
20 what's happening and (Redacted); is that right?

21 A. Yes.

22 Q. Now, you gave evidence to the Court previously and you said that you spoke to
23 the Prosecution (Redacted). Do you remember saying
24 that?

25 A. Yes, I do.

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, you've changed subject now? We are
2 still in private --

3 MR KHAN: No, it's linked. It's linked. I'm coming back to the same --

4 PRESIDING JUDGE EBOE-OSUJI: It's all linked?

5 MR KHAN: Yes.

6 PRESIDING JUDGE EBOE-OSUJI: But we are still in private session?

7 MR KHAN: Yes, indeed.

8 Q. Now, Witness, you also spoke to the Prosecution on (Redacted)as well, didn't
9 you? You had another conversation with them? And for the record and for my
10 friend's convenience it's KEN-OTP-0086-0132, screening notes. Do you remember
11 that?

12 A. Yes.

13 Q. This second time you spoke to the Prosecution, if the first was two hours, how
14 long was this one, sir?

15 A. It was around five -- five to ten minutes.

16 Q. Five to ten minutes. Witness, the reason I ask you this is because you said
17 something different to the Prosecution. You told the Prosecution, when you were
18 screened on that date on (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted). Do you see the difference in your two stories, Witness?

22 A. (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 Q. But Witness, I just asked you, it could have been a minute ago, and you were
2 very clear that (Redacted)

3 (Redacted)

4 A. When -- (Redacted)

5 Q. In any event, Witness, (Redacted)

6 (Redacted)

7 A. Pardon?

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 A. I was, yes.

14 MR KHAN: Yes. Your Honour, I'll move on. Your Honour, we can go back with
15 your leave to public session.

16 PRESIDING JUDGE EBOE-OSUJI: We go back to public session.

17 (Open session at 10.26 a.m.)

18 THE COURT OFFICER: (Interpretation) We are now in public session, your
19 Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Thank you.

21 Mr Khan, proceed.

22 MR KHAN: I'm most grateful, Mr President, your Honours.

23 Q. And, Witness, I put it to you that that conversation is completely fabricated.

24 Mr Ruto never appeared on the radio that day, and the reason why you couldn't
25 remember the word "weeds" when you first gave your account to their Honours is

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 because it was never said; is that right?

2 A. Not right.

3 Q. And I put it to you, Witness, that you were somewhat reluctant to lie under oath
4 until the time the Prosecution read your statement in which you had given that lie
5 that such words emanated from the mouth of Mr William Ruto, and that's why you
6 changed your story and said -- or that's why you suddenly said, "Yes, now my
7 memory is refreshed." It's because you realised first time round it was a lie and you
8 were a little bit reluctant to go along with it; is that right?

9 A. Not right.

10 Q. Witness, you have a clear recollection, do you, of the events of 25 December
11 2007; is that right? You're under oath, Witness.

12 A. Yes, I do remember.

13 Q. Now, Witness, a time came when you attended a public press conference at
14 Orange House; is that right? There was a large conference, many people from
15 everywhere, and you came along with those people; is that right?

16 A. Yes.

17 Q. And, Witness, you told the Court that the press were in -- were out in force at
18 Orange House on that day. Do you remember saying that?

19 A. I said the press were present.

20 Q. In fact, Witness, you told the Court - this is page 36 of the transcript of 8 October
21 2013 - that, for example, many radio stations were there, including Ramogi. Do you
22 remember saying that?

23 A. Yes.

24 Q. You said Kass FM was there; is that right?

25 A. Yes.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. You said Kamensha (phon) was there; is that right? Kameme, sorry. I can't
2 read my own handwriting. Kameme was there; is that right?

3 A. Yes.

4 Q. You say that Citizen was there?

5 A. Yes.

6 Q. You say Maisha was there? Page 81. Maisha was there too?

7 A. Yes.

8 Q. And you say TV stations were there as well?

9 A. Yes.

10 Q. And you gave a list, like K24 and all the rest, yes?

11 A. Yes.

12 Q. Now, Witness, you have a clear recollection, you say, and you're under oath.

13 What would you say if I told you that Radio Maisha was not even in existence, hadn't
14 even started, in 2007? What would you say to that?

15 A. I can say that I counted -- I counted it. Maybe I was wrong to count it.

16 Q. Witness, do you know -- you know this is a criminal trial, don't you, Witness?

17 A. Yes.

18 Q. You know you've been informed by the Prosecution and by His Honour, the
19 President, about the importance of telling the truth, haven't you?

20 A. Yes.

21 Q. You know, Witness, that in a criminal trial, even more than usual in life, it's
22 important to be specific and accurate?

23 A. Yes.

24 Q. Witness, my learned friend, Mr Kigen-Katwa, will come back to this briefly, but
25 Radio Maisha for your information was launched on 24 May 2010. I'll move on to

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 another topic.

2 PRESIDING JUDGE EBOE-OSUJI: Before you do, I think it's important for me to
3 refresh the -- basically let the witness know what perjury is about.

4 Witness, so you're not confused or -- so you're not confused, the -- the offence of lying
5 is intentionally lying; that is when a witness deliberately lies to the Court. It does
6 not include human errors that may be made, just so you know. What we want you
7 to do is to do your best as a human being and tell us the truth. You need not worry
8 that in every little detail in which you err that there will be prosecution against you.
9 What the problem is, is when a witness sits on the witness stand and wants to tell the
10 Court a lie.

11 Now, having said that, beyond whether or not a witness lies in court, even in
12 instances where they may not have intended to not tell the truth, there is also a
13 question of the value of their testimony. So that a witness who just sits there and
14 doesn't think carefully before they answer questions and then they drop in
15 information that may be wrong, although they may not have intended to lie, therefore
16 they may not be prosecuted, but then that sort of information will be useless to the
17 Court. It will have been a waste of the witness's time and a waste of the Court's
18 time.

19 Do you understand the differences I'm making?

20 THE WITNESS: Yes, I do.

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 Mr Khan, please proceed.

23 MR KHAN: I'm grateful, Mr President and your Honours.

24 Q. Witness, the speech you say you heard on 25 December and from what was
25 described to you about it from person 20, your understanding it was part of the

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 campaign? It was a campaign speech; is that right?

2 A. Yes.

3 Q. Are you aware, Witness, that there was no campaigning in the Republic of
4 Kenya on 25 December 2007?

5 A. There was a campaign.

6 MR KHAN: And, your Honour, I will -- let me put something to the witness, and
7 your Honours for the record it's the report of the Commonwealth Observer Group on
8 the Kenyan General Election, Chapter 5, page 18, headed, "The Campaign," and we'll
9 submit this in due course from the Bar table with the Court's leave.

10 Q. Let me read this to you, Witness: "All campaigns were to officially conclude 12
11 hours before polling day, though in reality we observed that all the presidential
12 candidates formally concluded their campaigns on 24 December, prior to Christmas
13 Day." Can you hear that, Witness?

14 A. Yes, I've heard what you have read.

15 Q. Are you aware that 25 December 2007 is Christmas Day?

16 A. In the calendar it's Christmas Day.

17 Q. And, Mr Witness, what would you say if I said that there is a church full of
18 people in Eldoret who will testify that Mr Ruto was up in church in Eldoret on
19 Christmas Day? What would you say to that?

20 A. I can say to my knowledge he was at (Redacted)

21 Q. And if I put it to you that Witness 20 - sorry, person 20 - on the form in front of
22 you also denies categorically ever saying any such thing to you, would that make you
23 reconsider your evidence under oath to this Court?

24 A. I -- I talked to her and she talked to me about that.

25 Q. And that, in fact, the only extraordinary press conference that we've been able to

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 find that took place on Christmas Day took place (Redacted), but at
2 Pentagon House, and that's one that Raila Odinga attended with no other Pentagon
3 member. Are you aware of that, Witness?

4 A. I'm aware of the one which took place at (Redacted).

5 Q. And Mr Odinga had been in church in the morning, and after church in Nairobi,
6 he then went to Pentagon house and, without Mr Ruto or Pentagon members, and
7 gave a conference regarding his concerns about preparation for rigging the election.
8 Are you aware of that, Witness, of that press conference at Pentagon?

9 A. I'm aware of the one which took place at (Redacted).

10 Q. Okay. I'll move on, Witness. Witness, when you spoke to the Prosecution in
11 September 2012, last year, you were shown a video.

12 And, your Honour, I will seek to play that video. It's KEN-OTP-0028-0055. It's the
13 Prosecution evidence. It's not in the binder. And I'd ask that that be played, with
14 the Court's leave.

15 THE COURT OFFICER: (Interpretation) Your Honour, with your permission, this
16 document is currently classified as confidential, so it's impossible to show it in public
17 session. Either we go into private session or the video or the extract which is going
18 to be played has to be reclassified as public.

19 MR KHAN: Your Honour, it's a video of an interview, a TV statement of
20 Mr William Ruto. It was referred to in public in the opening.

21 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, do you have any objection to
22 the -- this video being shown in the public session?

23 MR OMOFADE: Your Honours, no objection. It's a public material and it's a
24 Prosecution document -- material as well.

25 PRESIDING JUDGE EBOE-OSUJI: Court officer, let's play it.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 THE COURT OFFICER: (Interpretation) Yes, your Honour. Thus, the document
2 shall be reclassified as public. I note that there are 12 portions of this video. Should
3 I play all portions or one in particular?

4 MR KHAN: File 08, please. File 08.

5 (Viewing of the video excerpt KEN-OTP-0028-0055)

6 MR KHAN: I'm grateful.

7 Q. Witness, do you remember being shown this video by the Prosecution when
8 you met them last year?

9 A. Yes.

10 Q. And let me read to you what you said about that video and the words that you
11 have just uttered, and it's page 28 of your statement, paragraph 139. You said this,

12 Witness: "If he," meaning Mr Ruto "was sincere, he could have just asked them to
13 stop and the violence would have ended. To understand his set of mind, listen

14 carefully to his statement at 0038 to 0053: 'To avoid any act of violence, any act of the
15 looting, any act of destruction which is unnecessary.' This implies" -- this is what

16 you say about it: "This implies that his people can cause deaths and destruction of
17 properties when it is necessary. He could have just asked them to stop the violence

18 without mentioning the necessity. No violence is necessary. I was also telling you
19 that Ruto was in charge of Rift Valley. You can see on this video he's talking as an

20 elect member of Eldoret North and as leader of the Rift Valley and there is no one else
21 from the Pentagon with him."

22 Do you remember saying that, Witness?

23 A. Yes, I do.

24 Q. And am I right that one of the reasons you thought he was talking as a member
25 elect, elect member of Eldoret North, was because nobody else from the Pentagon was

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 with him; is that right?

2 You say this: "You can see on this video that he's talking as an elect MP of
3 Eldoret North and leader of the Rift Valley and there is no one else from the Pentagon
4 with him."

5 So my question is: Is it because nobody else from the Pentagon was with him that
6 you also thought he was speaking as a constituency leader of Eldoret North? Is that
7 right?

8 A. Because he was addressing the -- the people.

9 Q. Yes. And because he was addressing the people, in what capacity, according
10 to you? As a Member of Parliament of Eldoret North, correct?

11 A. As an elected Member of the Parliament.

12 Q. And the reason you thought in your statement that he was talking as an elect
13 MP of Eldoret North and not in a wider capacity was because nobody else from the
14 Pentagon was with him; is that right?

15 A. Not -- that's not right.

16 Q. Why did you add this at the end of your sentence, and please explain it to us,
17 "He was talking as an elect MP of Eldoret North and leader of the Rift Valley and
18 there is no one else from the Pentagon with him"?

19 A. Mr Ruto could have just advised people to stop violence because that had -- that
20 found when people have died even within Eldoret area where the church was set to
21 ablaze and around 35 to 40 people had lost their life and the violence was still on.

22 Q. Witness, did you attend that press conference?

23 A. No.

24 Q. You say Ruto was alone. Was he alone in that press conference?

25 A. Because it was a video played to me, and that is what was brought before me.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. Fair enough. Let me play the video so you can actually see who was present
2 and in what capacity Mr Ruto was speaking. And I'd ask to play
3 KEN-D09-0020-0010. And if you could watch that, Witness, and I'll have some
4 questions for you once it's finished.

5 (Viewing of the video excerpt KEN-D09-0020-0010)

6 MR KHAN: If it could be put back, I think, at 035 seconds, I would be grateful. At
7 035 seconds.

8 (Viewing of the video excerpt KEN-D09-0020-0010)

9 MR KHAN:

10 Q. And, Witness, you can see the people and the screen, correct, on the table?

11 A. Yes.

12 Q. Can you see Raila Odinga in the brown jacket in the middle?

13 A. Yes.

14 Q. Can you see Musalia Mudavadi?

15 A. Yes.

16 Q. Can you see Charity Ngilu in the pink, on the -- on the right as you're watching
17 the screen, can you see that?

18 A. The figure is not clear.

19 Q. Can you identify the man in the jeans and the sweatshirt bending over? That's
20 William Ruto or can you not tell?

21 A. Yes.

22 Q. And can you see on the extreme right - just half a face, unfortunately - that's
23 Mr Kosgey? Can you say that is correct or not?

24 A. From whom?

25 Q. On the extreme right, that's Henry Kosgey, then next to -- next to William

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Ruto, in the sweatshirt and the blue jeans. Can you recognise him or not, William
2 Ruto?

3 A. There is a face which has been cut.

4 Q. We can keep playing it. I'll move on if you can't tell too clearly. If it can be
5 played again. I'm grateful.

6 PRESIDING JUDGE EBOE-OSUJI: Can this thing be played in slow motion? The
7 reason I say it is so that we can get -- roll it frame by frame. The witness said he
8 could not clearly identify the person you mentioned, Charity Ngilu, I believe. I don't
9 know.

10 MR KHAN: If it's possible, it's an excellent idea, your Honour. I'd be grateful.

11 And if that technical facility is available, I would ask that we go back and then --

12 THE COURT OFFICER: (Interpretation) Your Honour, we would have to test that
13 because this would be a first. We would have to try to see whether that is possible.

14 Otherwise, we could do a test during the break, determine whether it is possible, and
15 then play it after the break.

16 PRESIDING JUDGE EBOE-OSUJI: Let's give it a try. Let's give it a try and see.

17 MR KHAN: And if we could go back perhaps to, once again, to 35 seconds, even 34
18 seconds and then try it. Even from 30 seconds, it may be not a bad idea.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I understand that it may be a
20 challenging task at the moment, so let's move on. Perhaps, why don't we then roll it
21 normally again to see if it -- there a point at which you would like to freeze-frame.

22 MR KHAN: I'm grateful. So if we could start again and -- and similarly, the
23 witness can be asked to pay close attention, and if the witness can identify either
24 Mr Kosgey or Mr Ruto or Charity Ngilu, if he could say so as it rolls again from the
25 start.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. Do you follow, Mr Witness, what we are asking?

2 A. Yes.

3 Q. Thank you so much.

4 (Viewing of the video excerpt KEN-D09-0020-0010)

5 MR KHAN:

6 Q. Witness, did you see just a couple of seconds ago a clearer shot?

7 A. Yes, I've seen that.

8 Q. And could you identify William Ruto and Charity Ngilu?

9 A. Yes.

10 MR KHAN: Your Honour, if it could be run to the end, and I'm grateful for the
11 Court's assistance.

12 PRESIDING JUDGE EBOE-OSUJI: So you want the playing to continue?

13 MR KHAN: Just to continue to the end, I would be grateful.

14 (Viewing of the video excerpt KEN-D09-0020-0010)

15 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade?

16 MR OMOFADE: Your Honours, the reason I rise is for obvious reasons. What we
17 are hearing now is a completely different language. I wonder if there is any
18 questions going to be posed on what's being shown now rather than just listen to -- I
19 don't know if there is a translation also being referred to.

20 PRESIDING JUDGE EBOE-OSUJI: Well, let us see what the Defence counsel does.

21 MR KHAN: I'm grateful and, your Honour, the key bit is who's there at the moment.

22 And, of course, Kenya has Swahili as the official language. English is also spoken.

23 So at most events, of course, the official language of Swahili is spoken and also

24 English for non-Swahili speakers.

25 PRESIDING JUDGE EBOE-OSUJI: So let's keep playing the tape, then. Counsel,

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 tell us when you're done with this.

2 MR KHAN: I will, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: Pardon me?

4 MR KHAN: I will.

5 PRESIDING JUDGE EBOE-OSUJI: All right.

6 (Viewing of the video excerpt KEN-D09-0020-0010)

7 MR KHAN:

8 Q. Mr Witness, after hearing more of the tape, more of the recording and seeing the
9 context with all the other Pentagon members present, including Raila Odinga and the
10 others, are you willing to reassess your assessment that -- and agree with me that
11 Mr William Ruto was, like Raila Odinga, calling for peace in Kenya? Do you agree
12 with me now, after watching the full video that was not shown to you before?

13 A. Yes.

14 MR KHAN: Your Honour, I'm grateful. And with that I would ask that, if the
15 Court is so minded, it may be a convenient time to break and I'll move to a new topic
16 after the break.

17 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Before we do that, just so the
18 record is clear, in the course of our discussion about what you wanted to do with the
19 tape, you said just for those who were there. I take it it's more than that for you.
20 The value of the video isn't just about the people who were present but also the words
21 that Mr Ruto had spoken on the occasion?

22 MR KHAN: Indeed. And, your Honour, I would also ask that the videos be given
23 an exhibit number, at the Court's pleasure.

24 PRESIDING JUDGE EBOE-OSUJI: So it will be -- Prosecution, any objection?

25 MR OMOFADE: No objection, your Honours.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: The video will be marked as the next in the series
2 of exhibits for the Ruto Defence.

3 THE COURT OFFICER: (Interpretation) Your Honour, the video which was
4 shown, KEN-D09-0020-0010, public document, will be given the following reference
5 number: EVD-T-D09-00034 and shall be shown as Exhibit 33 from the Ruto Defence
6 team.

7 PRESIDING JUDGE EBOE-OSUJI: The record will so reflect.

8 MR KHAN: And your Honour, also the first video that was shown to the witness in
9 his interview with the Prosecution in September, which is KEN-OTP-0028-0055, file 08,
10 that was also shown, I would also ask that that be given an exhibit number.

11 PRESIDING JUDGE EBOE-OSUJI: Isn't it the same video?

12 MR KHAN: Your Honour, one -- the portion shown to him that's referred to in his
13 statement that was the subject of my first questioning is that portion alone.

14 The second exhibit is the larger portion, and both are relevant of course to the
15 questions I've put regarding the witness's understanding and the account he gave to
16 the Prosecution in September. So, your Honour, I would ask that for clarity it may
17 be good to have both extracts given separate evidence numbers, albeit that they are
18 related; the larger one includes the smaller, indeed.

19 PRESIDING JUDGE EBOE-OSUJI: Fair enough. The Prosecution, any objection to
20 that?

21 MR OMOFADE: The same applies, no objection.

22 PRESIDING JUDGE EBOE-OSUJI: The shorter extract that counsel has referred to
23 will also be admitted, the next in the Ruto Defence exhibits.

24 THE COURT OFFICER: (Interpretation) Yes, your Honour. KEN-OTP-0028-0055,
25 file 8, public document, will be given the following number: EVD-T-D09-00035, and

Trial Hearing
Witness: KEN-OTP-P-0326

(Closed Session)

ICC-01/09-01/11

1 will be known as Exhibit number 35 from the Ruto Defence team.

2 PRESIDING JUDGE EBOE-OSUJI: The court record will so reflect. That will bring
3 us to the end of the morning session. We will take our break now for 30 minutes and
4 then we will come back -- sorry, it's now less, it should be less than 30 minutes. We
5 will come back at 11.30. But we will bring down the blinds first and escort the
6 witness out of the courtroom and then the court will rise.

7 (Closed session at 11.04 a.m.) Reclassified into open session.

8 THE COURT OFFICER: (Interpretation) Your Honour, while that's being done,
9 and I can confirm that we are in closed session, to ensure that the files are complete,
10 I would like to make a small correction, page 32, line 13, of today's transcript. The
11 document D09-0034 will be referenced as follows: Exhibit number 34 from the Ruto
12 Defence team, not 33 as was said earlier.

13 PRESIDING JUDGE EBOE-OSUJI: So it will be that. So the Court will rise.

14 (The witness stands down)

15 THE COURT OFFICER: All rise.

16 (Recess taken at 11.05 a.m.)

17 (Upon resuming in open session at 11.34 a.m.)

18 THE COURT USHER: All rise.

19 THE COURT OFFICER: (Interpretation) We are in open session, your Honour.

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

21 Mr Khan, I see you're putting on your robe.

22 MR KHAN: I'm grateful.

23 Q. Mr Witness, I'm going to move to another topic.

24 PRESIDING JUDGE EBOE-OSUJI: Witness, again we have resumed. We are still in
25 open session. I know we've gone in and out of open and private session. Please do

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 not be confused when we do that. One way you can remind yourself is in front of
2 you, you do see a contraption there with lights. Right now it's showing red. Can
3 you look beyond the microphone? Do you see the light? It's like an incomplete
4 traffic light. When it's red, it means we are in open session. Red means be careful
5 what you say. And when it's green, that's we are in private session. When the light
6 is green it means we are in private session and so you can speak freely. So it is now
7 red, which means we are in open session. Always keep that in mind.
8 Again, the point is not to stop you speaking the truth. Please do testify to the best of
9 your ability and, if there is any information you feel might be best given in private
10 session, you can also indicate it so we can note what's worrying you and whether we
11 can do this in private session.

12 Mr Khan, please proceed.

13 MR KHAN: I'm grateful, Mr President and your Honours.

14 Q. Witness, on the first day of your evidence before this Court, on 7 October, you
15 spoke about attending a rally in Kitale. Do you remember that?

16 A. Yes.

17 Q. And you told -- you said that that rally was at the beginning of or early
18 December 2007; is that correct?

19 A. Yes.

20 Q. And you placed it because there was a death of an ODM aspirant at the same
21 time. There was a funeral for an ODM aspirant at the same time; is that right?

22 A. Yes.

23 Q. And you told the Court, Mr Witness, that at that rally you heard Mr Ruto say
24 this, and I will read it. It's page 89 of the transcript. Mr Ruto said, "Let the people
25 of the Rift Valley vote for ODM, because ODM is the party with a good manifesto.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 It's the party which is going to deliver truthful leadership. It is the party which is
2 going to solve people's problems, which people have faced for a long time, and it is
3 time for them to have relief and more so for the landless people. It's a time they are
4 also going to be given their piece of land. It's a time and a time where the errors
5 of ..."" - ""... the era of hyenas ..."" you later clarified, I believe - ""... for those people, or
6 hyenas -- for those people who get a big piece of land has to be returned so the
7 landless can be resettled,"" and he welcomed ODM members in that area and then
8 later he gave the flag-bearer the podium to talk." Do you remember saying that,
9 Mr Witness?

10 A. Yes, I do.

11 Q. And you remember saying that took place at Kitale; is that right?

12 A. Yes.

13 Q. And in fact it took place at the Kenyatta Stadium in Kitale; is that right?

14 A. I never mentioned the name of the stadium.

15 Q. Do you know the name of the stadium, Witness, or do you not know?

16 A. I can take the geographical area it was in Kitale, yes.

17 Q. It was --

18 A. But I'm not certain about the name of the stadium.

19 Q. Okay, it was a large area outdoors; is that right?

20 A. Yes.

21 Q. And it was the main event in Kitale that day, because there were a million
22 people present that day you said; is that correct?

23 A. Yes, there were people, many.

24 Q. You said in your evidence that you estimated there were maybe a million
25 people present; is that right or not?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 A. Yes.

2 Q. And, Witness, that was the -- according to your evidence, that's the only time
3 you ever heard allegedly Mr Ruto use the word "hyenas;" is that right? It was in
4 Kitale?

5 A. During that Kitale rally.

6 Q. Yes. And you didn't hear him use that word, apart from at Kitale rally; is that
7 right?

8 A. I was specific about the rally I attended; that one in Kitale.

9 Q. Witness, did you ever hear -- you never heard any other speech, did you, any
10 other talk, on your own account, where -- where Mr Ruto used the word "hyena"? Is
11 that right, or is that wrong?

12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, one second. Are you putting a fresh
13 proposition to him that it is the case that Mr Ruto may not have used that or would
14 not have used the expression "hyena" at any other event, or are you saying that
15 according to the witness that was the only time Mr Ruto had used the expression?
16 There is a difference.

17 MR KHAN: Your Honour, I'll put it more simply.

18 Q. Witness, so you know, we deny Mr Ruto ever said any such thing at all at Kitale,
19 but are you saying that apart from Kitale you heard Mr Ruto use such language on
20 other occasions, or is that the only time you recall him using that phrase?

21 A. I'm talking about the time I attended the rally in Kitale, where he was one of the
22 speakers.

23 Q. I'm grateful. Witness, a very simple question: Did you ever hear Mr Ruto use
24 that phrase in any other rally you attended; "Yes" or "No"?

25 A. Yes.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. And where was that, Witness?

2 A. There was also a rally at Uhuru Park.

3 Q. And you're saying that he used that phrase in Uhuru Park; is that right? He
4 used that word "hyena" in Uhuru Park; is that correct?

5 A. I'm not certain.

6 Q. So could you ponder over the question that I asked a moment ago, Witness?

7 I asked, apart from the event in Kitale, did you ever hear William Ruto use the word
8 "hyena" at any other rally you attended? What is a truthful answer, Witness?

9 A. I heard him for the rally of Kitale.

10 Q. And in regards to Uhuru Park, did you hear him or you didn't hear him use that
11 word? Did you hear him use the word "hyena," or did you not hear him use that
12 word "hyena"?

13 A. I can't recall, because it's a long time and it may be --

14 Q. Okay, Witness, I'll come to that in a moment. You're very clear in your
15 evidence that the meeting you attended in Uhuru Park was the very last ODM
16 campaign rally of the election; is that right? (Your Honour, that's page 80 of the
17 transcript of day 1.)

18 A. Yes.

19 MR KHAN: And, your Honour, from page 80 onwards:

20 Q. You mention a few times, Mr Witness, that that was the last campaign rally of
21 the ODM in the 2007 election. Do you remember saying that under oath?

22 A. Yes.

23 Q. The very last campaign rally of the ODM?

24 A. Yes.

25 Q. Witness, are you aware that the only campaign rally that took place in Uhuru

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Park in the month of December 2007 was for the PNU on 24 December 2007 and for
2 the ODM-K on 23 December 2007? Are you aware of that? There was no ODM
3 rally in December in Uhuru Park?

4 A. There was ODM rally in Uhuru Park.

5 MR KHAN: Your Honour, I'd refer the Bench to tab 22 and I'd ask that

6 KEN-D09-0020-0006 be put on the screen.

7 Q. And, Witness, if you can see what's on the screen. Before that's done, perhaps
8 let me ask this question: What would you say if I told you that the last ODM rally in
9 2007 was at the Nyayo Stadium; the Nyayo National Stadium? That was the location
10 of the last ODM rally of 2007? Would I be right, or would I be wrong?

11 A. You're wrong, but there were rallies in Nairobi.

12 Q. If I put it to you, Witness, that the last ODM rally was in Nyayo Stadium, I'd be
13 wrong; is that right?

14 A. The last ODM rally was in Uhuru Park.

15 MR KHAN: Your Honour, now I'd ask that the document be put on the screen,
16 please, KEN-D09-0020-0006.

17 Q. And, Witness, if you can look at that document, you'll see it's from the Daily
18 Nation, it's dated Tuesday, the 20 -- 25 December 2007, so it's on Christmas Day.
19 Below the heading it says, "Two days to election. Now the choice is yours." Can
20 you read that, Witness?

21 A. Yes.

22 Q. Okay. And it says, "After two months of intense campaigns, top contenders in
23 the State House race hold final rallies in the city." Can you read that? You can read
24 that?

25 A. Yes.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. Now, if you go to the picture on the right, it's a picture of Raila Odinga
2 acknowledging the crowd, or waving to the crowd. It can be made bigger, with the
3 assistance of the court officer. You will see that the caption to that photograph is that,
4 "ODM presidential candidate, Raila Odinga, flashes ...", in fact, "... a yellow card,
5 which he said was the warning voters gave his rival during the 2005 referendum.
6 Mr Odinga later flashed a red card, symbolising his intention to unseat the president
7 during Thursday's elections."

8 The next bit is the important bit, Witness. "He was addressing ODM's last rally at
9 the Nyayo National Stadium in Nairobi yesterday." Could you read that? The "...
10 last rally at Nyayo National Stadium yesterday," can you read that?

11 A. Yes, I am reading that.

12 MR KHAN: Now, lest there be any misunderstanding, I want to before I put
13 questions go to another document, which is tab 23, your Honour -- and, your Honour,
14 perhaps before it's changed, in fact, I'm directed to read, because I'm trying to not take
15 too much time, the photograph under President Kibaki, "President Kibaki
16 acknowledges greetings from the crowd as he arrived at Uhuru Park in Nairobi,
17 where he held his last campaign rally yesterday." That's 24 December. "He
18 criticised his opponent's development record, saying there was nothing to show for
19 the years they had been in government."

20 Q. Can you see that, Witness?

21 A. Yes.

22 Q. So this newspaper says that on 24 December there was a PNU rally, the last one
23 held by President Kibaki and the PNU, at Uhuru Park. You can see that, yes?

24 A. Yes.

25 MR KHAN: I'm grateful. Then if we could go to KEN-D09-0020-0008, and

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Mr President and your Honours it's at tab 23 of the bundle that you have before you.

2 PRESIDING JUDGE EBOE-OSUJI: Are you done with --

3 MR KHAN: Yes, indeed. The other one --

4 PRESIDING JUDGE EBOE-OSUJI: -- 22?

5 MR KHAN: Indeed, your Honour. I'd be grateful if the other one could be taken
6 off the screen and replaced with KEN-D09-0020-0008.

7 PRESIDING JUDGE EBOE-OSUJI: But shouldn't you pose the question to the
8 witness after showing what appears at tab 22?

9 MR KHAN: Well, your Honour, I was going to put the questions together after
10 seeing both documents, but I can do it now.

11 PRESIDING JUDGE EBOE-OSUJI: It's up to -- sorry, if you're going to do it later --

12 MR KHAN: Yes.

13 PRESIDING JUDGE EBOE-OSUJI: -- you may do it in your own time.

14 MR KHAN: I'm grateful.

15 If the new document could be put on the screen, I'd be grateful. If you made it a
16 little bit larger.

17 Q. And, Witness, you'll see this is again the front page of the Daily Nation from
18 Nairobi, printed in Nairobi, Monday, December 24, 2007, and underneath the date,
19 "Three days to elections." It's headed, "Last minute pledges," and it says in the
20 headline, "Kalonzo promises prosperity as he winds up campaign with city rally."
21 Importantly, "Kibaki and Raila to hold parallel meetings today."

22 Can you see that?

23 Now, if you look at the first paragraph, and I'll read it, the journalists David Mugonyi
24 and Jeff Otieno report in the Nation that "The curtain falls on election campaigns
25 today with the two leading presidential candidates holding their final rallies in

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Nairobi. President Kibaki of PNU is expected to address a rally at Uhuru Park,
2 while his main challenger, ODM's Raila Odinga, will be at the Nyayo National
3 Stadium - about two kilometres away."

4 Can you read that?

5 Now, Witness, if you go under the photograph, there is a caption between the three
6 photographs on the front page of the Daily Nation of 24 December 2007, and you'll
7 see this caption: "ODM-K presidential candidates Kalonzo Musyoka (above)
8 addresses supporters during his last campaign rally at Nairobi's Uhuru Park
9 yesterday." That's 23 December. "Left: President Kibaki greets PNU supports in
10 Malindi Town when he took his campaigns to the Coast." And so on.

11 Witness, you've seen that article now?

12 A. Yes, I've seen.

13 Q. So, seeing these articles and these news reports, I'm asking you to recall whether
14 or not now it refreshes your memory and that in fact you accept you were wrong
15 when you say that the last ODM rally in Nairobi - the last ODM rally - was in Uhuru
16 Park in December 2007. Do you change your testimony before this Court?

17 A. I said our last rally at Uhuru Park, the ODM rally at Uhuru Park.

18 PRESIDING JUDGE EBOE-OSUJI: What date was that again? In your testimony,

19 Witness, you said the last rally was at Uhuru Park. Do we recall the date he put?

20 MR KHAN: Your Honour, the witness can help actually on that. It would be
21 useful to get it again. He said at the end of December but --

22 MR OMOFADE: Your Honours, there was no precise dates and that's my
23 recollection. We should be fair to him.

24 PRESIDING JUDGE EBOE-OSUJI: Please proceed, Mr Khan.

25 MR KHAN:

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. Witness, you said in your evidence that that rally was in December of 2007; is
2 that right?

3 A. Yes.

4 Q. And you said in evidence that that rally came after the Kitale rally which was in
5 the earlier part of December; is that right?

6 A. Yes.

7 MR KHAN: Your Honour, I'd ask to show a video, KEN-D09-0020-0005.

8 Q. And, Witness, you will be watching a video of the only ODM rally in Uhuru
9 Park in that election campaign and it was in October, 6 October 2007.

10 MR KHAN: Your Honour, if that would be played.

11 Your Honour, the transcript is at tab 21, for the Bench's information, and if the copy of
12 the transcript -- and for my learned friend, Mr Omofade, it's KEN-D09-0020-0016. So
13 my learned friend can also follow the transcript of what's being played.

14 THE COURT OFFICER: (Interpretation) Your Honour, with your leave, this video
15 is currently classified as confidential in the eCourt system. I suppose it could be
16 reclassified as public. I await your instructions.

17 MR KHAN: Mr President, your Honours, it's a Defence document and I would
18 ask -- it should be public and I ask it be reclassified. If it's currently classified as
19 confidential, it was broadcast all over Kenya.

20 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, I take it you see no issue with that?

21 MR OMOFADE: I don't, your Honour.

22 PRESIDING JUDGE EBOE-OSUJI: We will play the video, then, and the necessary
23 reclassification will be done later.

24 MR KHAN: And for the assistance of the court officer, for the information, I would
25 ask that it be played until the expiration of six minutes.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, I see an inscription on the screen right
2 now before the video starts playing that says 6.10.2007. Who put that inscription
3 there?

4 MR KHAN: Your Honour, that doesn't appear from the -- we got it like this from the
5 Media House. And, your Honour, we'll lead evidence in due course that that's the
6 only ODM rally that took place in 2007 during the election campaign.

7 PRESIDING JUDGE EBOE-OSUJI: No, it's not about -- it's not an extended
8 discussion.

9 MR KHAN: Yes.

10 PRESIDING JUDGE EBOE-OSUJI: I just want to know for the record because we
11 will be using this --

12 MR KHAN: I'm grateful.

13 PRESIDING JUDGE EBOE-OSUJI: -- when we are evaluating the evidence --

14 MR KHAN: Of course.

15 PRESIDING JUDGE EBOE-OSUJI: -- eventually.

16 MR KHAN: Your Honour, that comes from the Media House.

17 PRESIDING JUDGE EBOE-OSUJI: Right.

18 MR KHAN: And I believe that was not broadcast in Kenya. Once it starts, that's
19 the portion that was broadcast.

20 PRESIDING JUDGE EBOE-OSUJI: I take it that's the same with the last video we
21 saw, where there was an introductory inscription also from the Media House.

22 MR KHAN: Indeed.

23 PRESIDING JUDGE EBOE-OSUJI: All right.

24 MR KHAN: I'm grateful.

25 (Viewing of the video excerpt KEN-D09-0020-0005)

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 MR KHAN:

2 Q. Witness, you've seen that video now. Is that in fact the video you attended,
3 the -- is that in fact the rally you attended, which was the opening rally of the ODM
4 political campaign in 2007?

5 A. (No audible response)

6 Q. Could it have been this one, Witness?

7 A. This might be one. It's one of them and there was another one.

8 Q. Witness, you see, what I am putting to you: Is it possible you confused -- you
9 heard in English Mr Ruto mention wolves and sheep. Is it possible you confused
10 hyenas with the wolves that are mentioned in the English segment of his speech? Is
11 that possible?

12 A. Pardon? Your question?

13 Q. Is it possible, Witness, now that I've refreshed your memory with a video of the
14 only ODM rally at Uhuru Park --

15 PRESIDING JUDGE EBOE-OSUJI: No, no, the witness has not accepted that that is
16 the only ODM rally at Uhuru Park.

17 MR KHAN: Your Honour, I'll --

18 PRESIDING JUDGE EBOE-OSUJI: You may put that proposition to him, but so far
19 he has not accepted it and so let's --

20 MR KHAN:

21 Q. Witness, let me put it like this in that case: Is it possible that you have
22 confused yourself and said Mr Ruto mentioned hyenas, when in fact the wildlife that
23 he mentioned were wolves? Is that possible that you confused yourself and what
24 you recollected is exactly what was said in this video?

25 A. What has been said in this video is the word "wolves."

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. So you're maintaining that the word "wolves" -- sorry, the word "hyenas" was
2 uttered by Mr Ruto?

3 A. From this video, the video you played, he has used the word "wolves."

4 Q. From the rally you say you attended -- let me re-put that.

5 Do you still maintain, after seeing this video and seeing the various newspaper
6 articles that we've shown you, that there was still a further ODM rally in December
7 2007?

8 PRESIDING JUDGE EBOE-OSUJI: You mean at Uhuru Park?

9 MR KHAN: At Uhuru Park, indeed.

10 THE WITNESS: There were some other rallies. This was not the only rally which
11 was conducted by ODM at Uhuru Park.

12 PRESIDING JUDGE EBOE-OSUJI: Counsel, permit me to interject one question
13 here.

14 Witness, you and counsel have been discussing use of words, "wolves," "hyenas."

15 Now, you've seen this video and we also know that sections of the speech were in
16 Kiswahili, it seemed. In the Kiswahili part of the speech, does the term "hyena"
17 appear?

18 THE WITNESS: The word "wolf" has appeared in English version.

19 PRESIDING JUDGE EBOE-OSUJI: But what about in the Swahili version? Did you
20 hear the word "hyena" used?

21 THE WITNESS: No.

22 PRESIDING JUDGE EBOE-OSUJI: Thank you.

23 Counsel, please proceed.

24 MR KHAN: Yes. And, your Honour, just in relation to the question that was
25 posed from the Bench regarding the date, I refer the Court and the record to the

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

- 1 evidence of the witness of 7 October 2013, page 74, lines 10 to 18, when the witness
2 said that the rally he attended at Uhuru Park was immediately before voting day.
3 PRESIDING JUDGE EBOE-OSUJI: I recalled that, but I was trying -- I wanted to be
4 sure whether there was a specific date put to it.
5 MR KHAN: Your Honour, the evidence is as it is.
6 PRESIDING JUDGE EBOE-OSUJI: That's the extent of it.
7 MR KHAN: I'm grateful. Yes.
8 Witness, I don't want there to be confusion about this, because the final ODM rally, as
9 you've seen from the newspapers, was at Nyayo Stadium on 24 December. That was
10 the last ODM rally and the Court will see further evidence in due course, but I want
11 you to listen to that and see maybe if something was said there that will trigger your
12 memory.
13 Your Honour, I would ask to play KEN-D09-0020-0009 and I'd ask that the court
14 officer be so kind as to stop at 7.47. Your Honour, the transcript is transcript 25 - tab
15 25 - and the reference is KEN-D09-0020-0031.
16 THE COURT OFFICER: (Interpretation) Mr President, once again this video is
17 classified as confidential, but I imagine that it can be played in open session?
18 MR KHAN: I would be grateful if it could be played in open session - public
19 session - and also be reclassified, if that's necessary. I'm grateful.
20 PRESIDING JUDGE EBOE-OSUJI: We will proceed. We will proceed accordingly.
21 (Viewing of the video excerpt KEN-D09-0020-0009)
22 PRESIDING JUDGE EBOE-OSUJI: Can we pause? Did we lose the audio?
23 MR KHAN: I believe so.
24 PRESIDING JUDGE EBOE-OSUJI: You lost it as well?
25 MR KHAN: Your Honour, yes.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: All right.

2 Prosecutor you lost it, I take it, as well?

3 MR OMOFADE: We lost it as well, your Honour.

4 THE COURT OFFICER: (Interpretation) Mr President, it would appear that this is
5 a problem which arises even with the original. There is no audio sound at this spot
6 of the video in the original document -- in the original video. We could replay the
7 video and see what happens, but as of now we are playing this video as we have it in
8 the eCourt system.

9 MR KHAN: Your Honour, maybe we can try again? I've listened of course to the
10 original that we gave and it's got sound throughout.

11 PRESIDING JUDGE EBOE-OSUJI: Strong sound throughout?

12 MR KHAN: Yes, very clear. Very clear.

13 (Pause in proceedings)

14 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, is it possible for you to proceed and
15 return to this later so we don't --

16 MR KHAN: Your Honour, it will not make the cross-examination that coherent and
17 so I'd ask that -- I know it's inconvenient, but if we can just try perhaps one more time
18 and see if we get sound second time lucky?

19 PRESIDING JUDGE EBOE-OSUJI: Perhaps if we restarted the video, whatever
20 computer system, and then reset -- restarted the thing, it might work. I don't know.
21 I'm just suggesting.

22 MR OMOFADE: Mr President, perhaps to occupy the time, your Honour asked a
23 question earlier as regards whether a precise date was placed on the rally in
24 December. My friend Mr Khan kindly pointed the Chamber to -- directed the
25 Chamber to page 74 of the transcript, but I recall there was a bit of a discourse on this

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 issue and Mr Khan asked whether it was immediately before the voting day, and then
2 I posed the following series of questions to the witness, and just for the completeness
3 of the record perhaps this ought to be there.
4 I refer to page 75 of the 7 October transcript and this is when I asked him, I said:
5 "When you said just before voting, do you mean the day of voting or do you mean
6 days or the day before voting?"
7 And the witness responded: "It was when we were nearing the voting day."
8 Question: Do you remember exactly how many days before voting? If you don't
9 remember, please don't hazard a guess."
10 He says: "No, it's a long time."
11 And then I asked: "And just for the sake of clarity, you have said you recall it to be
12 the last rally before the elections. Do you remember if it was a few days, a few
13 weeks, before the election day?"
14 "It was a few days."
15 And I believe that's more accurate than "immediately before voting day."
16 MR KHAN: Yes, that's correct.
17 PRESIDING JUDGE EBOE-OSUJI: Thank you. And the video seems to be up on
18 the display. Hopefully, we'll get better luck this time. Shall we play it again?
19 Mr Khan, you will have to move on and then during the break we will -- you might
20 actually also assist the technicians to see if you --
21 (Viewing of the video excerpt KEN-D09-0020-0009)
22 PRESIDING JUDGE EBOE-OSUJI: We have to move on. We have to move on.
23 MR KHAN:
24 Q. Witness, we'll come back to that. There's been technical difficulties so I will
25 show you that hopefully after the break. But you were very clear. In fact, you said,

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 I believe, to the Prosecution, you were certain about your evidence regarding the
2 Kitale rally that you attended; is that right? And your evidence, at transcript
3 page -- 7 October 2013, was that William Ruto spoke at that rally in Kitale. Do you
4 remember?

5 A. (No audible response)

6 Q. Sorry, could you move a little bit closer to the microphone because it wasn't
7 recorded. Let me put my question again. You told the Prosecution -- told the Court,
8 I should say, on 7 October 2013, the first day you gave evidence, that you attended a
9 rally in Kitale where there were a million people or thereabouts in attendance. Do
10 you remember saying that?

11 A. I do.

12 Q. And that was the rally where you said that there was a mention of hyenas. Do
13 you remember? You said it was that Mr William Ruto said it's a time where the era
14 of hyenas, for those people who get a big piece of land has to be returned? Do you
15 remember?

16 A. I remember.

17 Q. And knowing the importance of your evidence and that this is a criminal trial
18 and it's important to be accurate so that the Judges can do justice in this case, are you
19 clear in your recollection that William Ruto spoke at Kitale and said those words?

20 A. Yes.

21 Q. No hesitation at all about whether or not you're right?

22 A. He talked at the rally.

23 MR KHAN: Your Honour, I would ask to play KEN-D09-0020-0021, and it's at tab 24,
24 but your Honour, what we are relying upon in fact is the video and what is said in
25 English on the live broadcast, or on the broadcast that was made, and if that could be

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 played. And it's -- for my learned friend, the Prosecution, it's KEN-D09-0020-0155.

2 And your Honour will pay attention no doubt, and the Bench, to the reference to the

3 burial of an activist. Once again, it's public.

4 (Viewing of the video excerpt KEN-D09-0020-0021)

5 MR KHAN:

6 Q. Witness, you never attended the Kitale rally at all, did you?

7 A. I attended.

8 Q. Or you would have known that the only person that spoke was Raila Odinga

9 and that Mr William Ruto did not speak at all.

10 A. According to what has been displayed, that is only about Raila.

11 Q. Witness, I'm putting it to you that you are trying to deceive this Court. Be very

12 clear what I'm saying: I put it to you you're trying to deceive this Court knowingly

13 when you say under oath that William Ruto spoke at the rally in Kitale and that you

14 attended the rally at Kitale because, as we've seen, he didn't speak at all. What do

15 you have to say about that?

16 A. I attended the rally in Kitale.

17 Q. Are you aware, Witness, that the majority of voters in Kitale, in Trans-Nzoia, are

18 Luhya, they are in the majority? Are you aware of that?

19 A. I would have to go on leave to know the number of people.

20 Q. Are you aware that in the 2007 elections, Kalenjin -- only one Member of

21 Parliament who was Kalenjin got a seat in that region and two MPs from the Luhya

22 community were elected? Are you aware of that?

23 A. Yes, I'm aware, but they were elected with ODM ticket.

24 Q. And you deny that you're deceiving the Court when you say you actually went

25 to Kitale on that -- for that rally?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 A. I went for this rally.

2 MR KHAN: Your Honour, I'll move on. I'll say no more about this topic for the
3 moment.

4 PRESIDING JUDGE EBOE-OSUJI: Now, Witness, I know that you've been on the
5 witness stand for quite some time - we understand that - but you have to lean
6 forward when you speak into the microphone because everything you say is
7 important and needs to be recorded on the transcript. Thank you.

8 MR KHAN: Your Honour, because of the technical difficulties I'll have to move
9 away from the issue of rallies and come back to it later. Your Honour, I will go now
10 to another issue.

11 PRESIDING JUDGE EBOE-OSUJI: Does it mean you have more videos to play or is
12 it just the one remaining that we lost the -- we didn't have the sound file?

13 MR KHAN: Your Honour, the one remaining on this topic, and perhaps before
14 I move, with the Court's permission, I ask that we give exhibit numbers to the items
15 that have been shown and at least mark them for identification.

16 PRESIDING JUDGE EBOE-OSUJI: Including the one with the -- that had the
17 challenges for the audio?

18 MR KHAN: I think the one that's challenged -- well, your Honour, it can be marked
19 for identification now but probably the better way of doing it is once the technical
20 issues have been sorted out, we can mark it for identification. But it was played in
21 court so, strictly speaking, it should be marked for identification, but I'm in the
22 Court's hands.

23 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, any objection?

24 MR OMOFADE: Well, Mr Khan did ask for exhibit numbers to be assigned and then
25 said to be marked for identification. We restrict this to being marked for

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 identification. There is no way of evaluating whether we have the complete
2 coverage of these rallies in the video clips that have been shown so, at the very most,
3 at the height, these should be marked for identification. As regards the last -- the
4 clip that was problematic, what I would suggest is that we endure for the time being
5 and see if the efforts to rectify matters can be performed. If not, then identification
6 as well.

7 MR KIGEN-KATWA: Mr President, I appreciate the technical problems that have
8 arisen. I just want to say that I'm starting to get desperate for time, Mr President.
9 I'm saying this just in case we have to come back to it and if it affects the time that
10 I was expecting to use, which was in some two hours that I had indicated to the
11 Prosecution. That's approximately the time I need.

12 PRESIDING JUDGE EBOE-OSUJI: Fair enough. The matter now, Mr Omofade, if
13 we are going to mark them for identification, we should do that all through, including
14 the clip with the defective audio. There is no harm in marking it for identification,
15 subject to further use later, see what use, if any, can be made of it.

16 MR OMOFADE: Well, this is a difficulty. I don't know if my friend will end up
17 relying on it.

18 PRESIDING JUDGE EBOE-OSUJI: But if he does, we know what happened. What
19 I mean by "we know what happened" is that it did not have an audio we could look at,
20 so he cannot rely on an audio we did not hear.

21 MR OMOFADE: Your Honours, I don't have any strong views on this. For
22 identification, it's fine.

23 MR KHAN: And for accuracy, there was audio which then stopped but, your
24 Honour, perhaps we can just move on instead of spending precious time. And I'm
25 happy -- in fact, according to the Prosecution's own stance, the public broadcasts

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 should be exhibited but, your Honour, for the time being and just not to spend time,
2 they can be MFI'd and we can seek to tender them later.

3 PRESIDING JUDGE EBOE-OSUJI: We will mark all of them for identification.

4 THE COURT OFFICER: Your Honour, also the two media press articles that were
5 presented?

6 MR KHAN: Yes, that's KEN-D09-0020-0021 and KEN-D09-0020-0155, so they're the
7 videos, and then the news articles, KEN-D09-0020-0006 and KEN-D09-0020-0008.

8 PRESIDING JUDGE EBOE-OSUJI: Now, the court officer's question is will all of
9 them be marked for ID or will the newspaper articles be treated differently?

10 MR KHAN: Well, your Honour, all public -- the newspaper articles should actually
11 be exhibited. That would be the correct position, consistent with the Prosecution's
12 own policy, and your Honour, when it comes to --

13 MR OMOFADE: Can I say --

14 MR KHAN: If I can finish, please. Sorry. When it comes to issues, so we don't
15 spend time in the future, all parties will exhibit documents. The probative value and
16 the weight of those documents will be decided by the Bench at a later stage, so of
17 course it's without prejudice to the Prosecution seeking to advance evidence to rebut
18 them or other comment on them but, your Honour, on the issue of admissibility, the
19 conditions must be quite narrow: It's relevance and probative. And, your Honours,
20 we say that these news articles should be exhibited.

21 PRESIDING JUDGE EBOE-OSUJI: I take it Mr Omofade was not going to object?

22 MR OMOFADE: We could have short-circuited that.

23 PRESIDING JUDGE EBOE-OSUJI: So the court officer, the newspaper articles would
24 be admitted as exhibits next in the series for the Ruto Defence and only the videos
25 will be marked for identification. The videos and their transcripts, that's correct,

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

- 1 marked for identification.
- 2 THE COURT OFFICER: (Interpretation) Yes, your Honour. Document
- 3 KEN-D09-0020-0006 shall bear the following number, EVD-T-D09-00036 and will be
- 4 referenced as Exhibit 36 from the Ruto Defence team.
- 5 Document KEN-D09-00020-0008 will bear the number D09-0037 and shall be known
- 6 as Exhibit 37 from the Ruto Defence team. Document KEN-D09-0020-0005 shall bear
- 7 the number EVD-T-D09-00038, referenced as Exhibit 38 from the Ruto Defence team.
- 8 KEN-D09-0020-0016 will be given the number D09-00039, Exhibit 39 from the Ruto
- 9 Defence team.
- 10 Video KEN-D09-0020-0009 will be given number MFI-T09-00040. Transcript
- 11 KEN-D09-0020-0031 will be given the number MFI-T-D09-00041.
- 12 Video KEN-D09-0020-0021 will be given the number MFI-T-D09-0042. And
- 13 transcript KEN-D09-0020-0155 will be given number MFI-T-D09-00043.
- 14 All these documents, videos and transcripts, are public items and all the videos shall
- 15 be marked for identification; namely, given MFI numbers. And any discrepancies
- 16 shall be corrected at a later date.
- 17 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 18 MR OMOFADE: Mr President, it may be an error but lines 27 and 28 of the
- 19 transcript appear to have the first video clip that ends in 0005, appears to have it as
- 20 bearing an exhibit number rather than an MFI number. I don't know if this is what
- 21 the court officer did say.
- 22 PRESIDING JUDGE EBOE-OSUJI: The one bearing Exhibit 38?
- 23 MR OMOFADE: That's the one, your Honour.
- 24 THE COURT OFFICER: Your Honour, document - or, rather, video
- 25 KEN-D09-0020-0005 will be given the number MFI-T-D09-00038.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: The correction is now made. Thank you.

2 MR KHAN: I'm grateful. I'll move on to another issue and the final issue of my
3 cross-examination, subject to coming back for a few minutes for the video, with the
4 Court's leave.

5 Q. Witness, you gave evidence --

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, so you will be able to wrap it up in 16,
7 17 minutes?

8 MR KHAN: Your Honour, I will do my level best. I'll do my level best. Your
9 Honour, it may be that I go after lunch, but if I go after lunch - and I'll discuss with
10 my learned friend at the break - but I'll move as fast as I can move on this final section.
11 It's an important one. Is the break today 1.00 or 1.30?

12 PRESIDING JUDGE EBOE-OSUJI: 1.00.

13 MR KHAN: Let me move on, Mr President, with your leave.

14 Q. Witness, you gave evidence on 9 October regarding an allegation that
15 Mr William Ruto received some money. Do you remember that?

16 A. Yes.

17 Q. And it was your evidence that on 3 January - and it's page 30 of the
18 transcript - you arrived (Redacted); is that right?

19 A. Yes.

20 Q. And you heard person 4 on the sheet in front of you speak to William Ruto; is
21 that right?

22 A. Yes.

23 Q. And you heard person number 1 speak to person number 4 on the sheet in front
24 of you, instructing number 4 that some money needed to be given to Mr Ruto; is that
25 right?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 A. Yes.

2 Q. Now, I'm going to read what you said after that. You said that there was an
3 amount of money -- this is line 21 of the transcript, page 30, of 9 October, there was
4 a -- "There is an amount of money needed to be given to Mr Ruto because that -- by
5 that time, we were receiving reports from different places where the post-election had
6 taken place. People were dying. And the party was also trying to help those
7 people. Some of the people to move out, like Thika ..." you later added, "... people
8 were being killed and supporters of ODM could move, and other places where the
9 post-election was too much. So I heard him telling ..." number 4 - I'm adding that,
10 number 4 - "... to look for money and give it to Mr Ruto for him to send the money to
11 the people who were being attacked in the area to move."

12 Do you remember saying that, Witness?

13 A. I do.

14 Q. And is that your recollection? Is that accurate?

15 A. Yes.

16 Q. And, Witness, you later said, at page 32, that the sum given was 300,000
17 shillings; is that right?

18 A. From the information I heard.

19 Q. And it was to help to transport -- let me read it. "To help the youths to have
20 transport to move from the most affected areas." Do you remember saying that?

21 A. Yes, I remember.

22 Q. And that's your recollection, is it?

23 A. Yes.

24 Q. So the money was -- that was sent, according to you, to Jackson Kibor, was to
25 help them leave an area that was being attacked; is that right? To move from that

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 place?

2 A. Yes.

3 Q. And your understanding was it was to move people from an affected area into
4 safety; is that right?

5 A. Yes.

6 Q. To help the victims that were suffering; is that right?

7 A. Yes.

8 Q. Okay, now that's clear. And just one thing, Witness, and that's the only time
9 that you heard Mr William Ruto talking about money, that's the only time you heard
10 a conversation, according to you, involving William Ruto and money; is that right?

11 A. Yes.

12 Q. So you mistook -- misspoke, I'm not saying it's more than that. You misspoke
13 when you told the Prosecution yesterday, at page 26, that you overheard a
14 conversation about money on 31 December as well? You mean it was on 3 January;
15 is that right?

16 A. Pardon?

17 Q. You've just told the Court that the -- that that occasion, 3 January, was the only
18 time you ever heard any conversation involving Mr Ruto and the issue of money, and
19 you agreed with me; is that right?

20 A. (No audible response)

21 Q. And my next question was: When you told the Court yesterday, at page 26 of
22 the transcript, that that conversation was on 31 December, that was a slip. That was
23 an accidental slip-up. You meant 3 January; is that right?

24 A. After post-election -- after post-election was on.

25 Q. Yes, okay. So yesterday, when you said it was on 31 December, was that

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 wrong? Did you mean 3 January as being the only time when that
2 conversation -- you heard such a conversation regarding money and William Ruto?

3 A. It was on 3rd.

4 Q. I'm grateful.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let me -- Mr Witness, so we are clear on
6 the record, on how many occasions did you hear a discussion about Mr Ruto
7 receiving money?

8 THE WITNESS: I meant the discussion I heard after post-election was on, which
9 was the date after 31st.

10 PRESIDING JUDGE EBOE-OSUJI: Just listen to my own question. I'm trying to
11 recall in total on how many occasions did you hear? If it's only once, you can say
12 that. If it's more than once, you can say that. On how many occasions did you hear
13 any discussion about Mr Ruto being given money?

14 THE WITNESS: Only that one.

15 PRESIDING JUDGE EBOE-OSUJI: Thank you.

16 MR KHAN: I'm grateful.

17 Q. Witness, I'm putting it to you that your whole account about this money is also
18 nothing but a complete tissue of lies? It's a complete fabrication, isn't it, Witness?

19 A. Not a lie.

20 MR KHAN: Your Honour --

21 PRESIDING JUDGE EBOE-OSUJI: You have to lean forward again, please. Thank
22 you.

23 MR KHAN: Your Honour, I have to go into private session for 30 seconds.

24 PRESIDING JUDGE EBOE-OSUJI: Private session, then.

25 (Private session at 12.54 p.m.) Reclassified into open session.

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 THE COURT OFFICER: (Interpretation) We are in private session, your Honour.

2 PRESIDING JUDGE EBOE-OSUJI: Thank you.

3 Mr Khan, proceed.

4 MR KHAN:

5 Q. Witness, you've told the Court already that (Redacted)

6 (Redacted); is that right?

7 A. Yes.

8 Q. (Redacted), do you recall?

9 You've told the Court (Redacted). Do you remember what time you
10 left (Redacted)

11 A. I left at around 7.

12 MR KHAN: Your Honour, we can go back to public.

13 PRESIDING JUDGE EBOE-OSUJI: We go back into public session.

14 (Open session at 12.55 p.m.)

15 THE COURT OFFICER: (Interpretation) We are in public session, your Honour.

16 MR KHAN:

17 Q. Witness, are you aware that there was an ODM rally scheduled to take place at
18 Uhuru Park on 3 January 2008?

19 A. The rally -- the rally were over.

20 Q. Listen to my question. Are you aware that a massive, massive rally was due to
21 take place - was planned to take place - at Uhuru Park on 3 January 2008? Are you
22 aware of that, or not? A protest rally?

23 A. I'm aware a mass action was called from the time election results was
24 announced.

25 Q. Witness, I'm talking about 3 January and I'm putting it to you that it was known

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 throughout Kenya that there was a mass protest rally planned for Uhuru Park for 3
2 January 2008. Are you aware of that, or not?

3 A. I am aware.

4 Q. It was a Thursday; correct?

5 A. 3 January.

6 MR KHAN: Your Honour, I will advise -- request the Bench to be so kind as to turn
7 to tab 88, and if a copy - a hard copy - can be given to the witness? It's
8 KEN-D09-0020-0108 until 0113. And you can show my learned friend. It's the same
9 document. Your Honour, it can be put on the screen as we are waiting, to save time,
10 and your Honour it's a BBC Timeline dated 3 January 2008 headed, "At a glance:
11 Kenya unrest," and as a timeline it goes in reverse chronological order.

12 Your Honour, going to KEN-D09-0020-0112, I will read that the BBC was reporting at
13 10-minutes-past-6 GMT, in the morning, 0610 hours GMT, that, "The BBC Ian Pannell
14 on the front line between the police and the opposition supporters of Raila Odinga on
15 the edge of Nairobi's Kibera slum says that people can be heard cheering - vowing
16 that they will attend the rally called by their leader. But a solid wall of riot police in
17 maroon helmets, batons, shields, tear gas and water cannon, is vowing not to let them
18 pass."

19 Can you see that, Witness?

20 A. (No audible response)

21 MR KHAN: Your Honour, to save time I'm just going to move on and put a series of
22 questions at the end, so I can squeeze it in if I can.

23 Q. Witness, if you can just look up from that to "0744 GMT" and I'll read it, "Five
24 minutes ago Archbishop Desmond Tutu arrived at the Orange Democratic
25 Movement's headquarters, journalist Patrick Smith tells the BBC. As he got out of

Trial Hearing

(Open Session)

ICC-01/09-01/11

Witness: KEN-OTP-P-0326

1 his car he was besieged by journalists. He said he was here to attend the All Africa
2 Conference of Churches, but his mission was also to seek peace and reconciliation in
3 Kenya. He is now meeting with ODM leader, Raila Odinga, and may also be seeing
4 President Moi Kibaki.

5 At 8 a.m., which is page 0111, KEN-D09-0020-0111, you'll note, Witness, that, "The
6 BBC's Noel Mwakugu says as he drove into Nairobi from the west the towns on the
7 outskirts of the capital seem empty."

8 And then going up at 3-minutes-past-9, it's said that looking down on a part of Kenya,
9 a Kibera slum there, part of Nairobi "... a huge shanty town ...", the journalist says he
10 can "... see a sea of rusty roofs trailing into the distance. Plumes of black smoking are
11 rising from burning tyres."

12 At 0951 you will see, Witness, "Kenyan opposition leaders leave their Nairobi
13 headquarters en route to a scheduled rally, which police have banned, as a crowd of
14 supporters surge behind them, a Reuters news agency says."

15 And at -- on page 0110, that's KEN-D09-0020-0110, you'll see at 1112 GMT it says, "An
16 ODM leader, William Ruto, confirms Thursday's rally is off, saying: 'We shall end
17 our meeting here. As ODM we are peaceful people. We don't want any more lives
18 lost. Our fight is not with ordinary Kenyans. Our fight with is with Mwai Kibaki.'"

19 And then to get a flavour of the whole day, 0109, at 1328 GMT, it's reported, and
20 I quote, "The scene at Nairobi's morgue 'defies description,' Orange Democratic
21 Movement leader Raila Odinga says after seeing some of the bodies of the estimated
22 300 people killed in violence since Sunday. 'We can only describe it as genocide on a
23 grand scale,' AP news agency quotes him as telling journalists."

24 So, Witness, that was the day in question, wasn't it?

25 A. Yes.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 MR KHAN: Yes. Your Honour, I will play -- I have other videos to play, but I'm
2 not going to. Just one video of Archbishop Desmond Tutu, KEN-D09-0020-0107, if
3 that could be played? Short -- it's very short.

4 PRESIDING JUDGE EBOE-OSUJI: It's now 2-minutes-past-1. How long will this
5 take?

6 MR KHAN: Your Honour, it's a very short video clip. It's a very short video clip,
7 but it can be played now or otherwise it can be played after lunch as the Court
8 pleases.

9 PRESIDING JUDGE EBOE-OSUJI: Let's --

10 MR KHAN: Play now if possible. It may be convenient, because it flows from --

11 PRESIDING JUDGE EBOE-OSUJI: All right. Okay, let's play it.

12 (Viewing of the video excerpt KEN-D09-0020-0107)

13 MR KHAN: There's no sound, obviously. Your Honour, I think --

14 PRESIDING JUDGE EBOE-OSUJI: If you need it for the sound, then we have to
15 stop.

16 MR KHAN: Your Honour, in that case, unless we can try one more time, but -- your
17 Honour, in that case, if we can play it after the -- after the break.

18 Your Honour, the other matter, as the Court is about to rise, according to the Court's
19 order, is I'd also ask that we extend today's sitting by 5 p.m. if it's amenable to the
20 Court, if that's possible? That would make sure that everybody's needs are
21 accommodated. We've lost quite a bit of time, because of the technical issues which
22 were really not of our making.

23 (Trial Chamber confers)

24 PRESIDING JUDGE EBOE-OSUJI: Mr Khan --

25 MR KIGEN-KATWA: Mr President? With your permission, Mr President?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Yes?

2 MR KIGEN-KATWA: Mr President, again I stand to say I am requesting for
3 five -- sorry for two hours, Mr President, and the estimate of two hours is very
4 conservative. I do not mind where those two hours will be obtained from. I just
5 request that it be secured for me, Mr President and your Honours.

6 PRESIDING JUDGE EBOE-OSUJI: Unfortunately, we cannot sit beyond the 4 o'clock
7 indicated. The reasons for that are beyond our control. We would have if possible
8 accommodated that, but not on this occasion.

9 MR KHAN: Your Honour, would the Court be so kind, because everyone is anxious
10 that the witness be -- finish his testimony, could we shorten or abridge the lunch
11 break?

12 PRESIDING JUDGE EBOE-OSUJI: We will have to start at 2. We will have to work
13 harder. Normally, it should be at 2.30 but we will start earlier at two o'clock, so we
14 abridge the lunch break. We understand that it may inconvenience some people that
15 we are abridging the lunch break, but we have to.

16 MR KHAN: I'm most grateful, your Honour, and to everybody involved.

17 PRESIDING JUDGE EBOE-OSUJI: We will stop it now and bring down the blinds.
18 Let the witness out and then we'll come back. We will rise.

19 (Closed session at 1.07 p.m.) Reclassified into open session.

20 THE COURT OFFICER: (Interpretation) We are in closed session, your Honour.

21 PRESIDING JUDGE EBOE-OSUJI: Escort the witness out.

22 (The witness stands down)

23 PRESIDING JUDGE EBOE-OSUJI: The court will now rise.

24 (Recess taken at 1.08 p.m.)

25 (The witness enters the courtroom)

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 (Upon resuming in open session at 2.04 p.m.)

2 THE COURT USHER: Please be seated.

3 THE COURT OFFICER: (Interpretation) Mr President, we are in public session.

4 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, please proceed. Mr Khan, you have
5 to try and finish this thing in the next 15 minutes.

6 MR KHAN: I will do so, your Honour.

7 PRESIDING JUDGE EBOE-OSUJI: And those videos, we have to figure out another
8 way of bringing them in. It doesn't have to -- they don't have to come in through
9 this witness, if you want to use them.

10 MR KHAN: I'm grateful. Your Honour, I will, God willing, finish within the 15
11 minutes indicated.

12 Before the break we were seeking to show a video and that's at KEN-D09-0020-0107
13 and I'm told that the relevant section have managed to solve the technical issues they
14 were having. If that could be played please.

15 PRESIDING JUDGE: So we can -- what you're saying is we can do that and still be
16 within your 15 minutes?

17 MR KHAN: Indeed. It's short, very short.

18 Q. And, Witness, if you can, when you are watching the screen, pay particular
19 attention to whether or not you can see Mr Ruto in the camera shot.

20 (Viewing of the video excerpt KEN-D09-0020-0107)

21 MR KHAN:

22 Q. Witness, did you see Mr William Ruto during that piece of video we showed
23 you? Could you see him?

24 A. Yes.

25 Q. And I put it to you that that's what William Ruto was doing on 3 January 2008,

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 nothing at all to do with money, like you have told this Court. What do you have to
2 say about that?

3 A. Mr Ruto came (Redacted) on that day.

4 Q. Let me interrupt you because I also don't want you to stray into areas as we are
5 in public session. Do you agree with me that you are telling untruths to this Court,
6 or do you disagree with me?

7 A. I disagree.

8 MR KHAN: Your Honour, regarding the allegations regarding money that Mr Ruto
9 received directly or indirectly, 300,000 shillings, to send up to Jackson Kibor, I put it
10 to you that you are deliberately fabricating that evidence and you have been
11 fabricating that evidence since the moment you met the Prosecution. Is that correct?

12 A. I have not been fabricating.

13 MR KHAN: Your Honour, I would refer briefly to some documents. The first is at
14 tab 17, which should be confidential, it can be shown to the witness,
15 KEN-D09-0020-0001. But, your Honour, I can move on. It's simply a request for
16 information. Publicly, I can move on to KEN -- at tab 18, KEN-D09-0020-0002. If
17 that can be put on the screen, and that's a public document.

18 Q. And, Witness, if you can look at the screen and what you'll see,
19 KEN-D09-0020-0002. And, Witness, before it comes up I'll describe it to you, to save
20 the Court time. It's a state -- a letter from the branch manager of Co-operative Bank
21 of Kenya dated 17 September 2013, the Parliament Road branch that you mentioned
22 when you gave evidence to the Prosecution, and the branch manager states, "We
23 acknowledge receipt of your request dated 16 September 2013," which the judges
24 have got at tab 17. And she says, "We hereby forward certified statements for the
25 only two ODM accounts held with us."

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 And, Witness, you told the Court that ODM had two accounts, didn't you? Do you
2 remember saying that?

3 A. Yes.

4 Q. And then the account numbers are listed and then she states: "As you will see
5 from both account statements, there were no transactions made from any of the two
6 accounts on 2, 3, 4 or 5 January 2008." Can you see that, Witness? Can you read
7 that?

8 PRESIDING JUDGE EBOE-OSUJI: Counsel, I think we can move away. We can
9 move on.

10 MR KHAN: Tab 19, it's KEN-D09-0020-0003. If that can be put quickly on the
11 screen.

12 Q. But Witness, I will -- I can exhibit these later for the sake of time, but
13 Witness -- let that be put on the screen so at least one of the two statements. So I'll
14 just put one of the two, so 003.

15 And, Witness, when you look at this statement very briefly you'll see between the 31
16 December and 31 January, the account number specified in that statement of the
17 Orange Democratic Movement of Kenya had but three withdrawals, on 30 January, 35
18 shillings, 300 shillings for a maintenance fee, and 1250 for I think statements issued.
19 So no other transactions between 31 December and 31 January. So I put it to you,
20 Witness, once again, what it shows is that your account is false when you say that you
21 can give evidence that money was given or withdrawn from this account and given to
22 Mr Ruto. What do you have to say about that? Are you willing to reconsider your
23 evidence or not?

24 PRESIDING JUDGE EBOE-OSUJI: Did he really say that, or did he say deduction
25 made from conversation with somebody else?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 MR KHAN:

2 Q. I put it to you, your account of being told about such withdrawals is fabricated,
3 as is the contention that you were told that money had been given to Mr Ruto. Does
4 this inform your evidence to the Court, or did it not make a jot of difference,
5 Mr Witness?

6 A. From the bank statement given, I'm not able to tell, because it was something
7 that --

8 Q. Witness, you don't see a withdrawal for 300,000 shillings in that statement, do
9 you?

10 MR OMOFADE: Well, maybe he should be allowed to finish his answer first and
11 then counsel can pose the next question.

12 MR KHAN:

13 Q. Witness, had you finished your answer, or not?

14 A. From what I'm seeing, I'm not seeing 300,000.

15 Q. I'm grateful.

16 MR KHAN: Your Honour, I will move on because I don't want to take time. There
17 is another statement as well but I can exhibit it later. I'll also go to

18 KEN-D09-0020-0158.

19 Q. And, Witness, it's a letter from James Omingo Magara dated 7 October 2013,
20 addressed to the Defence teams of Honourable William Samoei Ruto and Joshua Sang,
21 and he says this, that "I was the ODM National Treasurer in 2007 and was involved in
22 logistics and the planning of party meetings and rallies and I wish to state as follows ...
23 " "... that there was no ODM meeting at Uhuru Park in December, 2007. The last
24 ODM rally in Nairobi was at Nyayo National Stadium on the 24th December 2007."
25 And if you turn over the page to ERN ending -- the next page, yes, 159, you'll see an

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 affidavit. 159, the next page, please, and I'll start reading it for the sake of time.

2 Paragraph 3, "The Honourable James Omingo Magara ... " " ... hereby make oath and

3 state as follows:" at paragraph 3, "That the rules and regulations of the party did not

4 permit the treasurer to make any hard cash advancement and/or payment to any of its

5 nominees be it presidential, parliamentary or civic."

6 And at paragraph 5, Witness, you'll note that he says, "That I wish to state

7 categorically that at no point in time during my tenure as the treasurer of the party

8 was any money given out to Hon. William Samoei A. Ruto." And you'll see at

9 0160 --

10 PRESIDING JUDGE EBOE-OSUJI: Let's do it this way: I believe that what you owe

11 this witness, whom you've been cross-examining for some time now, is a duty to put

12 to him that his account is wrong or false, or however you choose to characterise it.

13 I think it's the way you should do that and you've done that sufficiently. We

14 should -- let's not go through every document that may be tendered as evidence to

15 prove your proposal on the point. It's enough to put the thing to him so you satisfy

16 the duty of fairness, your duty of fairness to him. So that later on, if you needed to

17 prove this, your proposition, no one will say that you've been unfair to the witness,

18 that you had not put your proposition. But if we now started introducing every

19 document and video, it will put the witness here for a long time and we don't have

20 time for that.

21 MR KHAN:

22 Q. Witness, I'll move on. Witness, I don't want you to be under any illusion. I'm

23 putting to you that you've quite deliberately concocted not a mistaken but a

24 fraudulent and false account and peddled it as if it were the truth. Do you agree

25 with me that that is precisely what you have done?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 A. From my statement, as I -- as I was told from the people I -- I happened to talk
2 with, that to my knowledge, that is what happened.

3 Q. And I put it to you that you've deceived and conned your way all the way to
4 The Hague and you haven't stopped lying even now. What do you have to say
5 about that, Mr Witness?

6 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let's leave it there for the day.

7 Mr Kigen-Katwa needs to start his cross-examination.

8 MR KHAN: Your Honour, I'll be literally four minutes and I'll move on, with your --

9 PRESIDING JUDGE EBOE-OSUJI: That will have gone beyond your 15 minutes by
10 much.

11 MR KHAN: Well, Your Honour, I tried to be --

12 PRESIDING JUDGE EBOE-OSUJI: You're already past it.

13 MR KHAN: Your Honour, one more document and I will sit down. I understand
14 my learned friend does not object. We've discussed these issues also.

15 PRESIDING JUDGE EBOE-OSUJI: Okay. The witness -- We'll need to complete
16 this witness today --

17 MR KHAN: Your Honour, I've said --

18 PRESIDING JUDGE EBOE-OSUJI: -- and that includes. One second. That
19 includes any re-examination.

20 MR KHAN: Your Honour, I've said that we will finish it today. I don't know -- I've
21 spoke to my learned friend briefly about re-examination, but it must be remembered
22 that we are seeking to move on as quickly as we can to confront a witness that we say
23 is deceiving this Court, or trying to deceive the Court, and your Honour, we have
24 taken less time than the Prosecution had in chief. But, your Honour, I'll move on.

25 Q. Witness, you came out of hibernation after five years, five years of silence, after

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 the post-election violence, to give your account to the Prosecution because you
2 thought you could receive certain financial and other benefits by becoming an OTP
3 ICC witness, didn't you?

4 A. No.

5 MR KHAN: Your Honour, I put on tab 38 of the bundle and it's

6 KEN-D09-0020-0048.

7 Q. And, Witness, you were seeing articles like this one from the Star newspaper
8 headed, "ICC gives 14 witnesses lifetime protection," dated 11 July 2011, in which the
9 people of Kenya were being told by many, many articles that there was lifetime
10 protection on offer, witnesses would not return home to Kenya after the trials, that
11 they could be allocated -- can it be put on the screen, please? Can it be put on the
12 screen, please, KEN-D09-0020-0048? And that they could be allocated safe houses in
13 European countries. It goes on, I won't belabour the point, but you thought after
14 having really not gone out and told the truth to Waki or to Kenyan Human Rights,
15 being frustrated back home you thought this was a lifeline of possibilities and that's
16 why you've deliberately tried to deceive the Court; isn't that right?

17 A. I never read that paper and --

18 Q. Yes.

19 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let's leave it there. You can make
20 these submissions to the Court at the end of the case.

21 MR KHAN: I'm grateful, your Honour.

22 Your Honour, before my learned friend rises, I'd ask that exhibit numbers be given to
23 the video of Desmond Tutu, showing Desmond Tutu, KEN-D09-0020-0107. If I may
24 be permitted to go on with the Co-operative -- the letter from the Co-operative Bank,
25 KEN-D09-0020-0002, and then the one also ending 0003. I'd ask that those

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 documents -- the video be admitted into evidence and the other two letters be marked
2 for identification.

3 PRESIDING JUDGE EBOE-OSUJI: Any objection?

4 MR OMOFADE: The video MFI -- sorry, the video EVD and then the others for ID
5 and that's fine.

6 PRESIDING JUDGE EBOE-OSUJI: So, court officer, the video will be admitted as
7 evidence exhibit next in the series for the Ruto Defence and the other two documents
8 are to be marked for identification Ruto Defence.

9 THE COURT OFFICER: (Interpretation) Yes, Mr President. Document
10 KEN-D09-0020-0017, which is a public video, will be marked as EVD-T-D09-0044 and
11 will be identified as exhibit number 44 for the Ruto Defence team.

12 Documents KEN-D09-0020-0002 will be given the reference MFI-T-D09-0045, and
13 document KEN-D09-0020-0003 will be marked as MFI-T-D09-0046. Thank you.

14 MR KHAN: Your Honour, the Star article ending 0048 I'd ask to be given an exhibit
15 number, and then the letter from James Magara, KEN-D09-0020-0158, should be
16 marked I say for identification please.

17 PRESIDING JUDGE EBOE-OSUJI: Was that not done already?

18 MR KHAN: Your Honour, I understand it wasn't, but I also see the court officer
19 shaking his head and so I'd ask that that be rectified before I end my
20 cross-examination. And, if it is, then I'm finished.

21 MR OMOFADE: Your Honours, this particular Star publication appears to be an
22 internet printout, so on this occasion we would say the best that my friend can do is
23 mark it for identification.

24 MR KHAN: Your Honour, it's up to my friend. If the Bench think that that can't be
25 relied upon at this stage it can be MFI'd, but your Honour I think it's a small point.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: Let's mark it for identification.
- 2 THE COURT OFFICER: (Interpretation) Yes, Mr President. Document
- 3 KEN-D09-0020-0058, which is a public document, will be given the -- will be marked
- 4 for identification as MFI-T-D09-0047. Document KEN-D09-0020-0048 will be MFI'd
- 5 as MFI-T-D09-0048. Thank you.
- 6 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 7 Mr Khan, that's it for you?
- 8 MR KHAN: It is and I'm much obliged, Mr President, your Honours.
- 9 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?
- 10 MR KIGEN-KATWA: Mr President, as indicated earlier by the Chamber, we have
- 11 made binders of all the documents we will be relying on, and with your permission,
- 12 Mr President, I would request that the binders be given to the Judges.
- 13 Secondly, Mr President and your Honours, I intend to use only about nine items of
- 14 the totality of 40 items I had put in my binders, owing to the difference between the
- 15 witness's initial contentions and what he adduced in court, so I will be using only a
- 16 fraction of the binders.
- 17 Thirdly, Mr President and your Honours, all the items I'll be referring to today -- and
- 18 this is for the court officer. All the documents I'll be referring to today are public
- 19 documents, so there is no confidentiality in them.
- 20 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 21 MR KIGEN-KATWA: Mr President, I would request that we go into a closed session
- 22 for approximately four minutes.
- 23 PRESIDING JUDGE EBOE-OSUJI: We have to go into closed session again,
- 24 members of the public. We occasionally need to do this out of the need to protect
- 25 the identity of witnesses who are enjoying protection under the Court's Protection

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

- 1 Programme. So we will go into --
- 2 MR KIGEN-KATWA: Mr President, sorry, I meant private session, not closed
- 3 session.
- 4 PRESIDING JUDGE EBOE-OSUJI: Yes. I'm sorry, private session. Private session
- 5 of course means the public can see us, but they cannot hear us. So we'll go into
- 6 private session.
- 7 (Private session at 2.29 p.m.) Reclassified into open session.
- 8 THE COURT OFFICER: (Interpretation) Mr President, we are in private session.
- 9 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 10 MR OMOFADE: Mr President, I know your Honours haven't gone into timelines
- 11 just yet, but if indeed we are going to complete this testimony today, I wonder if
- 12 Mr Kigen-Katwa can give an indication of how long he's going to take?
- 13 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, that's a fair request, and also
- 14 out of a need to complete it today, including allowing the Prosecution some time to
- 15 re-examine.
- 16 MR KIGEN-KATWA: Roughly about one-and-a-half hours, Mr President. Only
- 17 that I wonder why Mr Omofade thought he should ask me for time, as opposed to the
- 18 other counsel, but I will do it within one-and-a-half hours in all likelihood,
- 19 Mr President.
- 20 PRESIDING JUDGE EBOE-OSUJI: I think it was because you were the last to speak
- 21 and you hold his privilege to re-examination at this stage.
- 22 MR OMOFADE: Well, but more importantly because a deal seems to have been
- 23 done between both counsel in terms of time allocation and that's why I ask for
- 24 timelines now.
- 25 MR KHAN: Your Honour, can I say that Rule 140 is also there in --

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let's discuss this another time, please.

2 MR KHAN: Yes.

3 QUESTIONED BY MR KIGEN-KATWA:

4 Q. Mr Witness, how are you?

5 A. Fine.

6 Q. Now, Mr Witness, I will -- the interest of my client, Mr Joshua Sang, is limited to
7 the issues you alleged involved him on 25 December 2007. Do you remember
8 explaining the events of that day?

9 A. Yes.

10 Q. And do you remember specifically that your contention was that Mr Sang was
11 (Redacted)?

12 A. Yes.

13 Q. And that in fact he met one Mr Ruto and one Mr Kosgey at which a
14 communication was made to him that Mr Ruto would be calling on the Kass FM
15 station that evening? You recall that?

16 A. I recall.

17 Q. Now, Mr Witness, I would like to cross-examine you in an open session, but
18 prior to that I just need to tell you that Mr Sang is tried as a media person. You
19 understand that, (Redacted)

20 A. Yes.

21 Q. (Redacted)

22 A. (Redacted)

23 Q. (Redacted)

24 A. (Redacted)

25 (Redacted)

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

1 Q. That's okay, Mr Witness. Then my questions are based on the fact that in your
2 testimony you create the impression that you have an understanding of the media
3 workings, and so when I ask you the series of questions I will ask you from the -- in
4 the public session, you should understand where I'm coming from. Is that okay,
5 Mr Witness?

6 A. (No audible response)

7 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you ask him specific questions
8 and, if you have a specific impression at that point where you ask the question, then
9 you can let him know that -- whether or not to confirm your impression, as opposed
10 to uploading or front-loading rather -- front loading an impression that is supposed to
11 cover everything before moving in. So let's take it one question at a time.

12 MR KIGEN-KATWA: Mr President, I just wanted to lay the basis of my asking him
13 the series of questions I want to ask. Mr President, I would ask that we go into
14 public session.

15 PRESIDING JUDGE EBOE-OSUJI: We will go into public session now.

16 (Open session at 2.34 p.m.)

17 THE COURT OFFICER: (Interpretation) We are in open session, your Honour.

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

19 MR KIGEN-KATWA:

20 Q. Mr Witness, could you tell the Court if you know where Kass FM station is
21 located in Nairobi in Kenya?

22 A. I -- I don't know the building name.

23 Q. Do you know even at the very least the street where it is located?

24 A. No.

25 Q. Thank you, Mr Witness. And I would request if you could move closer to the

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 microphone and if you could be -- could be comfortable with my questions. You
2 don't need to be hesitant. Now, you were aware that from time to time Honourable
3 Raila went to Kass FM to campaign for ODM? You know that?

4 A. He visited quite a number of media houses.

5 Q. Mr Witness, I will insist on Kass FM specifically. Are you aware, or are you
6 not aware, that from time to time he went to Kass FM to appeal for votes?

7 A. I'm aware.

8 Q. Now, with that recollection, Mr Witness, could you tell the Court what was the
9 name given to Honourable Raila in Rift Valley during the course of ODM campaigns
10 in the period leading up to the 2007 elections?

11 A. I know they call him Raila.

12 Q. You have no knowledge of a nickname given to him in Rift Valley?

13 A. No.

14 Q. Now, Mr Witness, you, in the course of the cross-examination this morning and
15 probably also in your testimony in-chief, you had said that you went to Kitale rally,
16 didn't you?

17 A. Yes.

18 Q. Am I also correct in saying that in your statement to the Prosecution, you said
19 you managed to visit all constituencies prior to the 2007 elections?

20 MR OMOFADE: Perhaps counsel could provide a reference for that. I don't recall
21 seeing it anywhere.

22 MR KIGEN-KATWA: Mr President, it is in his screening notes. Mr President,
23 I would ask that the question be answered. It's okay if he has no recollection to that
24 effect. I am okay with that answer.

25 PRESIDING JUDGE EBOE-OSUJI: Witness, the question you have to answer now is:

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Do you recall telling the Prosecution that you had visited all the constituencies? Do
2 you recall saying that? It's a matter of what you recall and what you don't. You
3 need not elaborate, just "Yes" or "No." Do you recall that --

4 THE WITNESS: No.

5 PRESIDING JUDGE EBOE-OSUJI: -- if you did say that to the Prosecution or to
6 anyone else?

7 THE WITNESS: I recall I visited constituency -- some constituencies, but not the
8 whole 200 and --

9 MR KIGEN-KATWA:

10 Q. Mr Witness, thank you for your answer, I appreciate it, but my question still
11 remains: Do you recall telling the Prosecution that in screening notes (Redacted)
12 and to quote what you said, you said 326 "... attended several campaign rallies and
13 travelled to all 210 constituencies in Kenya. He was on presidential campaign team.
14 However, he did not attend any rally in Eldoret because he was concerned with
15 presidential campaigns rather than parliamentary level."

16 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, do you have that document in
17 the pile?

18 Do not answer the question yet, Witness.

19 MR KIGEN-KATWA: Yes, Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: Where is it?

21 MR KIGEN-KATWA: Mr President, it is document KEN --

22 PRESIDING JUDGE EBOE-OSUJI: Tab, tab in your bundle.

23 MR KIGEN-KATWA: Yes, Mr President. Could I come back to that on the tab,
24 Mr President? I have the reference, the ERN number, I could come back to that
25 shortly.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: The reason I say that is some -- if it is a screening
2 note, you know there is a difference between a screening note and a statement of a
3 witness? If a screening note is something somebody else recorded and got an
4 impression, it is fair to check with the witness whether that is what indeed he said to
5 whoever created the screening note, supposed to -- assuming that that is indeed what
6 he had said to the maker of the record in question.

7 MR KIGEN-KATWA: Mr President, thank you. I anticipated all that. First of all,
8 Mr President, it is on tab number 8, and Mr President, in respect to the issue you've
9 just raised, I posed the question to him whether he recollects telling the Prosecutor.
10 I did not ask him whether he said it himself.

11 MR OMOFADE: Your Honours, that's not correct. What counsel asked is: Do
12 you recollect telling the Prosecution in your statement, and this is why I posed the
13 objection. I said I don't recall seeing that anywhere. If counsel could point us to the
14 statement, that would be fine.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, you will proceed on the basis
16 of the screening note and what you need to do with the witness on the matter of
17 screening notes.

18 MR KIGEN-KATWA: I will pose the question one last time.

19 Q. Mr Witness, do you recall telling the Prosecution that you had gone to all the
20 210 constituencies in Kenya prior to the 2007 elections?

21 A. I recall I said I managed to travel in a number of constituencies, not the 210.

22 Q. Now, Mr Witness, in respect to Mr Sang specifically, do you know whether or
23 not he has any ownership of the Kass FM station?

24 A. I'm aware that he was a presenter but not having ownership.

25 Q. Thank you. And Mr Witness, you appreciate that there is a difference between

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 a presenter and a reporter, don't you?

2 A. (No audible response)

3 Q. Sorry, Mr Witness, if you could say that a little louder, I don't think it came in.

4 A. Yes.

5 Q. When you referred Mr Sang as a presenter, you are being very deliberate, as
6 opposed to saying that he's a reporter, isn't it?

7 A. A presenter can also be a reporter.

8 Q. Do you recall having encountered Mr Sang at any occasion when he conducted
9 himself as a reporter as opposed to being a presenter?

10 A. I never visited the station.

11 Q. Now, Mr Witness, I want to ask you a few more questions, then I play an audio.
12 It is not your testimony that in any way Mr Sang was part of the ODM Pentagon, is it?

13 A. He was not an ODM Pentagon member.

14 Q. Mr Witness, it is also not your testimony that Mr Sang ever attended any ODM
15 meetings as an ODM member, isn't it?

16 A. Yes.

17 Q. Could we just be sure of that answer? Your answer "yes" is to say that he
18 never attended any ODM meetings as a member of ODM, isn't it?

19 A. He never attended ODM meeting as a member of ODM, but he could have
20 attended a meeting as one of the media people.

21 Q. Thank you, Mr Witness. It is also true, Mr Witness, that you do not know what
22 party Mr Sang belonged in the period building up to the year -- to the 2007 elections,
23 do you?

24 A. I don't know the party he belongs to as individual.

25 Q. Now, Mr Witness, at the various points in the course of your testimony, you

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 suggested that you occasionally listened to Kass FM, didn't you?

2 A. I -- I was interested when one of our leader had gone to any media, so I could
3 try to follow up or try to know how he's reaching the people.

4 Q. Thank you, Mr Witness. And could you confirm that, to your knowledge,
5 from time to time, Mr Sang hosted people of different political divides, not only
6 ODM?

7 A. I was only interested when one of the people being hosted in the station was
8 from our party.

9 Q. Mr Witness, may I get your answer to the question I was asking you? Is it that
10 you do not know that Sang hosted anybody from any other party or that you did not
11 listen to him when he was hosting another party?

12 A. I did not listen when he was hosting another party.

13 Q. Now, Mr Witness, your testimony was to the effect that Mr Sang was (Redacted)
14 (Redacted) on the day that you said, and I put it to you that you are
15 mistaken, Mr Witness.

16 A. I am not mistaken.

17 Q. Now, Mr Witness, I want to show you -- to play to you an audio showing that
18 Mr Sang was at Kass FM studio on the said date. Now, prior to doing that, I would
19 like ask you, did you say Kass FM broadcasted only to Rift Valley?

20 A. For the people he could reach, depending on the language, which was the
21 broadcaster often could use, mostly for the people understanding the language of
22 which it was Rift Valley.

23 Q. May I ask you, Witness, whenever Honourable Raila was attending, was
24 campaigning at Kass FM, was he using Kalenjin?

25 A. I never -- I did not happen to follow up when Raila was at Kass FM.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Q. And is it your testimony that the Kass FM station used only Kalenjin exclusively,
2 24 hours?

3 A. I'm not aware of the Kass FM programmes.

4 MR KIGEN-KATWA: With your permission, Mr President, I would like to play
5 what is contained in tab number 40, KEN-D11-0010-0004.

6 PRESIDING JUDGE EBOE-OSUJI: You said it's tab 40? What tab?

7 MR KIGEN-KATWA: The tab is 27, the video -- the audio.

8 PRESIDING JUDGE EBOE-OSUJI: Tab 27.

9 MR KIGEN-KATWA: And Mr President, I would like to play only five samples of
10 the entirety of that audio, and I would request that that audio be counter-referenced
11 with the translation which has been availed, which is KEN-D11-0010-0003, at tab 40.

12 PRESIDING JUDGE EBOE-OSUJI: Tab 40. That's what I was asking for. Tab 40
13 is the transcript.

14 MR KIGEN-KATWA: Yes, Mr President. May I clarify that the audio is tab 27 and
15 the translation is at tab 40.

16 PRESIDING JUDGE EBOE-OSUJI: Thank you. The audio then to be played.

17 MR KIGEN-KATWA: Mr President, I would like to initially ask that segment at time
18 stamp 1.59 to 2.20 be played.

19 THE COURT OFFICER: With your permission, your Honour, it would seem that the
20 document 1100-1004 as mentioned by the counsel does not correspond with the video
21 but corresponds with a page of a transcript of a video, the second page of the
22 transcript with the reference CD-11-0010-0003.

23 MR KIGEN-KATWA: Mr President, the reference is KEN-D11-0009-0011.

24 PRESIDING JUDGE EBOE-OSUJI: Court officer, have you located it?

25 THE COURT OFFICER: Yes, your Honour. It will shortly be played.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 (Audio excerpt played)

2 MR KIGEN-KATWA: Mr President, I'd ask that --

3 PRESIDING JUDGE EBOE-OSUJI: Can we pause it, please? Okay. Are we
4 listening to Christmas music or --

5 MR KIGEN-KATWA: (Microphone not activated)

6 (Audio excerpt played)

7 MR KIGEN-KATWA: That's all I wish to play at this moment, Mr President.

8 Q. Mr Witness, you could hear that? Did you hear that? Now I would like to
9 read to you the English translation of what was just said by the person who was
10 speaking. Could you, even as I proceed to read, could you confirm that you
11 recognise that voice as belonging to Mr Sang, who you say you know?

12 A. The voice is over machine and is quite technical to know because of the sound
13 can change.

14 Q. So may I know, Mr Witness, you say you can't recognise Mr Sang's voice?

15 A. I can.

16 Q. And you recognise his voice from that clip that has just been played, that audio?

17 A. Yes, I can recognise.

18 Q. And you confirm that is Mr Sang's voice?

19 A. Yes.

20 Q. Now, may I read you what Mr Sang was saying? "I want to wish you a Merry
21 Christmas, Merry Christmas, Merry Christmas, Merry Christmas, Kalenjin people,
22 wherever you are. This is your opportunity to wish others a Merry Christmas and a
23 Happy New Year. So do come close, but before that, Merry Christmas, Happy New
24 Year, and peaceful elections on the 27th. That is our message from the studio. The
25 opportunity is yours."

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Mr President, that is contained at page 1 of the transcript which I just referred to,
2 KEN-D11-0010-0004.

3 PRESIDING JUDGE EBOE-OSUJI: So what's your question to the witness on it?

4 MR KIGEN-KATWA:

5 Q. Mr Witness, from that you notice Mr Sang was actually at the studio on the said
6 25th of December 2007, don't you?

7 A. He was at the studio.

8 Q. Thank you very much, Mr Witness.

9 Now, Mr Witness, I would like to move on to play another -- another segment of the
10 same audio, that is time 7.11, time stamp 7.11.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, would that be from the same
12 broadcast?

13 MR KIGEN-KATWA: Yes, Mr President, please.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, perhaps one way we can
15 proceed so we can make time, is if it's taking time for the video or the audio to be
16 pulled up, you can go to the transcript and we can deal with it, and then come back to
17 audio later, if you must.

18 MR KIGEN-KATWA: Mr President, I would be very happy to do that. I would only
19 ask then, I was going to play about six of them. I would only pray to play only one,
20 and if the court officer could listen to me, I would like to play 19.00 to 19.30, but
21 I could proceed with the other bits as he locates that segment of the audio, yes.

22 Now, Mr President, I would like at this moment, then, to go to page 9 of the transcript,
23 the same document.

24 PRESIDING JUDGE EBOE-OSUJI: That's at 0009.

25 MR KIGEN-KATWA: Yes, Mr President. Sorry, it is KEN-D11-0010-0012, page 9.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 And if it could be displayed to the witness, I'll just go directly there.

2 Q. Mr Witness, you can see that?

3 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, the information is that there is
4 technical problem. As you know, we've been having them today with the display.
5 We will have to work around those and move forward. In most instances, as I've
6 seen, these examinations -- cross-examination of this witness on these material, these
7 things would be a matter of putting propositions to the witness and if you need later
8 on to prove it - to prove it, rather, through other means - that may be done, but I'm
9 not sure that we should only do everything through a witness on the stand in
10 cross-examination. Put a proposition, if he answers the question, we move on, and if
11 you need to call witnesses later to prove your proposition, you would have put your
12 proposition to the witness. It would have been fair to him.

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

14 PRESIDING JUDGE EBOE-OSUJI: So let's proceed without audio for now.

15 MR KIGEN-KATWA: Mr President, I very much would like to play the one I've just
16 said, 19 to 19.30, and I don't mind coming back to it much later when they have
17 managed to sort it out. Mr President, may I request that if it is -- if we have technical
18 problems, if I could be allowed to give him a hard copy of the same transcript,
19 I should be able to read from the screen myself. In that case, Mr President, if he
20 could be given page 7 of the transcript -- it's actually page 9, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: It is page 9 of the transcript and I see that the
22 ERN number is the one ending with 0012. Is that it?

23 MR KIGEN-KATWA: Yes, Mr President. Mr President is it the one, 0010-0022? It
24 should be 22, Mr President. Oh, sorry, I'm looking at a different one. 1-2, yes,
25 Mr President, I apologise for that. Mr President, I would like to take the witness to

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 the first line of that transcript.

2 Q. And Mr Witness you have that, isn't it?

3 A. Yes, I have a document here.

4 Q. Mr Witness, then I want to read the first three lines of the top of the page, and
5 could you confirm this is what it said? "Lilian Chelimo, she says she is from Ohio,
6 has said I wish all people of Kosirai a Merry Christmas, together with her parents,
7 and siblings and friends." Can you see that, Mr Witness?

8 A. Yes, it's something I'm seeing that on the paper.

9 Q. Mr President, the next page I would like to make reference to is -- I will then ask
10 one question in respect to all the issues I have in mind, Mr President. I would like to
11 move to page 19 of the same document, Mr President, the page ending with 22.

12 PRESIDING JUDGE EBOE-OSUJI: And the witness has a copy?

13 MR KIGEN-KATWA: If he could be given, Mr President.

14 Q. Mr Witness, you can see the part starting with "Thanks. From Michigan."
15 Can you see that?

16 A. Yes.

17 Q. Now, could you confirm this is what it says, "Thanks. From Michigan,
18 America. We have Justus Koech, who says: How are you, Sir? (am very fine)
19 and happy this morning as we commemorate the birth of Jesus who came to serve us.
20 He says: Thank you very much for the good work you are doing for the Kalenjin
21 people. I want to wish all people from Kiboswa, Nandi North, a merry Christmas
22 and a happy New Year. I would also like to say this to all people: Please arise on
23 the 27th and remember only Araap Mibei; Koech for MP and Hesbon Metto for
24 Councillor. Thanks a lot. Thant's Justice Koech from Michigan, abroad."
25 You can see that?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 A. I can see.

2 MR KIGEN-KATWA: Mr President, I would like to make two last references to that
3 document, page -- sorry, the same page 19 I have a second reference.

4 Q. Mr Witness --

5 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, did you give interpreters your
6 bundle as well of documents? I take it not. The reason I say that, when you read,
7 remember the pace to read slowly.

8 MR KIGEN-KATWA: I intend to go slowly, Mr President. I apologise for that.

9 Mr Witness, you can see what is contained in the same page -- Mr President, I could
10 skip that. I want to lastly make reference to page 12 of the same document; page 12
11 which ends with 0015, if I could get assistance from the court officer?

12 Q. Mr Witness, you can see the part that reads, "All the way from
13 Fukoaka - Fukuoka, Japan - I fin Zablon Kimutai Chemwolo. He says greet ...", and
14 then it's, "... great ever pleasure; that it is time of great pleasure to convey Christmas
15 wishes to my brothers, including Elijah Kiprop, Kipkoech Ken, Kipchumba and his
16 sister Peris Chepchi ... Chebichi as well as Chepkorir, Chepkoech. He says and also
17 Father to Lokorii Chemwolo."

18 You can see that, Witness?

19 A. I can see.

20 Q. Now, Mr Witness, from those transcripts, you can confirm that in fact Kass FM
21 broadcasted to Ohio, America, Michigan and Japan, can't you?

22 PRESIDING JUDGE EBOE-OSUJI: Is he in a position to confirm where Kass FM
23 were broadcasting to?

24 MR KIGEN-KATWA: Yes, Mr President and your Honours.

25 PRESIDING JUDGE EBOE-OSUJI: Is it even what the proposition in the document

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 says?

2 MR KIGEN-KATWA:

3 Q. Mr Witness, you can see that?

4 A. Yes, I've seen it's reaching when people outside the country, from different
5 countries, and for the listener mostly for those people who get the Kass FM, because if
6 I can see the names it goes Kimutai, it goes Koech, it goes Rono, it goes Chelimo
7 (phon).

8 Q. Thank you, Mr Witness. My question is that it goes the Rift Valley that you
9 said Kass FM is limited to, doesn't it?

10 A. It reaches the people who might be abroad and they are from that region.

11 MR KIGEN-KATWA: Thank you, Mr Witness.

12 Mr President, may I inquire from the court officer if he's been able to get the time
13 stamp 19? Mr President, I could ask a few other questions, I don't know, whilst the
14 court officer sorts out the issue?

15 THE COURT OFFICER: (Interpretation) Mr President, there is no technical
16 problem. We can play the video now.

17 (Audio excerpt played)

18 MR KIGEN-KATWA:

19 Q. Mr Witness, may I ask you can you recognise that voice? Just a minute,
20 Mr Witness.

21 Mr President, I don't have a translation for that bit of the clip. With your permission,

22 Mr President, may I extract a confirmation of voice recognition from the witness?

23 Mr Witness, do you recognise that voice?

24 A. I recognise.

25 Q. Could you tell the Court whose voice that is?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 A. It is similar to the one of Raila Odinga.

2 Q. Is it Raila's voice, or is it similar to Raila's voice, Honourable Raila's voice?

3 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, do you need that precise
4 confirmation, or have you got enough? Similar to the voice of, does it make a
5 difference?

6 MR KIGEN-KATWA: Of course, I'm hopeful that he will say, "It's Raila," but it's
7 okay if he can't answer it.

8 Q. Mr Witness, is it Mr Raila's voice and, if it could help you, does it include the
9 nickname given to him in Rift Valley?

10 A. I've heard a voice. Yes, I'm seeing -- I've heard Araap Mibei.

11 Q. You now recollect that that was the name given to him in Rift Valley?

12 A. Yes.

13 MR KIGEN-KATWA: Thank you, Mr Witness.

14 Mr President, I would like to move on to document number -- at tab number 31,

15 Mr President, and if it could be put on the screen for the witness? As it's being put
16 on the screen, may I ask the witness a question? The reference is

17 KEN-D11-0009-0050.

18 Q. Mr Witness, having held various positions in respect to what you used to do in
19 the period around 2007, may I ask you: Do you know the chief executive of Kass FM,
20 one Mr Julius Lamaon?

21 A. (No audible response)

22 Q. You do not know him? I would like you to look at what is -- what has been
23 displayed at the screen.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, this might seem unfair to you,
25 but it is not and the reason is from now I intend to do this thing differently.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Yes, Mr Khan had done that and it was in the early days, as it were, but we won't do
2 it any more. We will not be putting statements of other witnesses, of who could be
3 other witnesses, to a particular witness to ask the witness on the stand to react, and
4 that includes when the case for the Prosecution -- when the case for the Defence is on.
5 How we will do it would be this: You put your proposition to a witness, they react
6 to it, either accept or not, and then if you need to call evidence later to prove your
7 proposition, which contradicts a witness, we will do it that way. We will not be
8 allowing all manner of witness statements to be put to a witness and asking the
9 witness to read it and then react to it. That's not an efficient way to do it and that is
10 actually not the proper way to do it.

11 So that's the ruling. Here you take the sum of what this thing says, put it to the
12 witness for him to react and then we move on from there.

13 MR KIGEN-KATWA: Thank you, Mr President, but since the document has been
14 displayed could you allow the line to be drawn after I've taken him through this
15 document, Mr President?

16 PRESIDING JUDGE EBOE-OSUJI: Okay.

17 MR KIGEN-KATWA: Thank you, Mr President. I really appreciate.

18 Q. Mr Witness, you can see the document that is displayed there. Could you
19 confirm that it shows that it is -- it has the head "Kass Media" on the top right?

20 A. Yes.

21 Q. Now, I would like to read the first four lines and just ask you one question
22 thereafter. The first one says that:

23 "1. The last date that Kass FM hosted William Ruto in 2007 was on the 21st of
24 December;

25 2. In the morning of 25 December 2007, Joshua arap Sang was on air with Pastor

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Chemaswet, broadcasting Christmas messages and sharing Christmas greetings sent
2 by listeners.

3 3. In the evening of 25 December 2007, Joshua Sang was co-hosting a program with
4 Kipyego arap Tanui. Enclosed is a statement signed by Kipyego arap Tanui to this
5 effect.

6 4. Neither the station nor Joshua arap Sang hosted, interviewed or otherwise
7 transmitted any interview of William Ruto on the 25th of December 2007."

8 Can you see that, Mr Witness?

9 A. I've seen.

10 Q. Thank you, Mr Witness. Lastly, just before I ask you the final question, is
11 could you look at the first line, the first paragraph of that letter, and confirm this is
12 what it says, "As Chief Executive Officer of KASS FM, I have been requested to
13 indicate whether William Ruto was hosted by KASS FM on the 25th of December
14 2007." Can you see that?

15 A. Yes.

16 Q. Mr Witness, in view of this letter, together with the audio I've just played a
17 moment ago, including the Christmas message from Honourable Raila, would you
18 like to confirm that in fact it is true that Sang was at Kass FM station on 25 December
19 2007 and not at the venue you said he was?

20 MR OMOFADE: I don't think that's the only proposition. I don't want to put
21 words into the witness's mouth, but I think it's a 24-hour day.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, you could have made that in your
23 closing submission.

24 MR KIGEN-KATWA: I thank you, Mr President, for protecting me.

25 Q. Mr Witness, would you like to confirm that in view of the audio that has been

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 played, together with the letter I've just shown you, that in fact Mr Sang was at the
2 Kass FM studio on 25 December 2007 and not at the location you adduced testimony
3 as having been where he was on that same day?

4 A. From the document I've just been given and shown it shows that Mr Sang was
5 at the station, but they have not indicated the time where he was -- when he was
6 talking with all these people who were sending the messages. So I could agree he
7 was in the station.

8 MR KIGEN-KATWA: Mr Witness, thank you very much for saying -- confirming
9 that from what you can see he was at the station. Mr President, may I protest that
10 part of the prejudice I have suffered from procuring the answer I wanted must be
11 because of the intervention of Mr Omofade.

12 PRESIDING JUDGE EBOE-OSUJI: Not necessarily, but move on please.

13 MR KIGEN-KATWA: Now, Mr President, I would like at this moment to request to
14 have the audio document, the translation and the letter produced as Sang's exhibits.
15 I hope the Prosecution does not object.

16 PRESIDING JUDGE EBOE-OSUJI: Any objection?

17 MR OMOFADE: If it's being marked for identification, we have no objection.

18 MR KIGEN-KATWA: Mr President, from all that has happened since we started this
19 trial, the criteria has been whether it is relevant and -- for the Prosecution and
20 whether it has probative value. Additionally, the Prosecution has maintained a
21 posture that when it's a public document it can be produced as an exhibit.
22 Mr President, I would be okay if the statement from Lamaon is marked for
23 identification, but I would request that the audio broadcast and the translation be
24 marked as exhibits, Mr President.

25 PRESIDING JUDGE EBOE-OSUJI: Mr Omofade, you should have no difficulty with

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 that, do you?

2 MR OMOFADE: Well, the translation we always have the usual difficulties in terms
3 of authentication. The audio broadcast, I can only provide the same caveat that I've
4 provided previously. It might be a clip of a certain broadcast. We don't have the
5 entirety. If the originals are going to be provided, then there's no difficulty at all.

6 PRESIDING JUDGE EBOE-OSUJI: So we will -- Mr Omofade, I believe you can deal
7 with that sort of thing in your closing submissions if the Defence chooses to rely on
8 these materials, but I think the audio we will receive in as the next -- and the
9 transcripts.

10 MR OMOFADE: And the transcripts.

11 PRESIDING JUDGE EBOE-OSUJI: Yes.

12 MR OMOFADE: I hope the statement isn't -- isn't --

13 PRESIDING JUDGE EBOE-OSUJI: No, the statement I'm not even sure we should
14 mark it for identification --

15 MR OMOFADE: Well, that's a separate matter.

16 PRESIDING JUDGE EBOE-OSUJI: -- but I think we can be generous and mark it for
17 identification now and see what counsel decides to do with it later.

18 MR OMOFADE: I'm obliged, your Honour.

19 PRESIDING JUDGE EBOE-OSUJI: So, court officer, we will receive the audio clips
20 and the transcripts as the next in the Sang Defence exhibits, and the statements of
21 Julius Lamaon will be marked for identification.

22 THE COURT OFFICER: (Interpretation) Yes, Mr President. Document

23 KEN-D11-0009-0011 is a public audio document, it shall be referenced

24 EVD-T-D11-0001 and shall be exhibit 1 for the Sang Defence team.

25 Document reference KEN-D11-0010-0003, a public document, a transcript, shall be

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 identified as EVD-T-D11-0002 and will be exhibit number 2 for the Sang Defence
2 team.

3 The third document, KEN-D11-0009-0050, is a public document and will be
4 referenced as MFI-T-D11-00003.

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

6 MR KIGEN-KATWA:

7 Q. Mr Witness, when I was inquiring from you whether in view of the audio and
8 the letter you would wish to confirm that Mr Sang was actually at the Kass FM studio
9 and not at the location you said, you said, "Yes, he was at the studio," but added the
10 rider that the time is not exhaustive, didn't you?

11 PRESIDING JUDGE EBOE-OSUJI: Can you come again, Mr Kigen-Katwa? You
12 need to put that question afresh.

13 MR KIGEN-KATWA: Yes, Mr President.

14 Q. Mr Witness, I'll go slowly. You recall that I asked you whether, in view of the
15 audio and the letter, you would be prepared to now confirm that Mr Sang was at the
16 studio?

17 A. From the letters I've seen, I've seen greetings messages from different people,
18 and I don't know the specific time and I don't know whom was -- who was at the
19 studio at that time when they were sending, because a message like that can be sent at
20 any time wherever any other person is in the studio, or --

21 Q. Now, Mr Witness, I wanted to ask you a different question. You had said that,
22 at a certain point in time on the said 25 December, both Mr Sang and Mr Ruto and
23 Mr Kosgey were together, didn't you?

24 A. Yes.

25 Q. Now, from the letter from Mr Lamaon, you've seen that the station says that,

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 "Neither the station nor Mr Joshua Arap Sang hosted, interviewed, or otherwise
2 transmitted any interview of Mr William Ruto on the 25th of December 2007"?

3 You've seen that, Mr Witness?

4 A. I've seen the letter, but the request of this letter, I don't know it was requested
5 from the station when.

6 MR KIGEN-KATWA: Mr President, I will move on to something else.

7 PRESIDING JUDGE EBOE-OSUJI: Please do.

8 MR KIGEN-KATWA:

9 Q. Now, Mr Witness, part of your testimony was that Honourable Raila was also in
10 the situation where Mr Sang and Mr -- Mr Sang, Mr Ruto and Mr Kosgey met. Isn't
11 that what you had said?

12 A. Please, if you can just be precise on your question.

13 Q. Mr Witness, it was your testimony that a short while before Honourable Ruto
14 and Honourable Kosgey met Mr Sang, they had been with Honourable Raila, isn't it?

15 A. (No audible response)

16 MR KIGEN-KATWA: Mr President, in view of the difficulty of the witness, we
17 could go into a closed session so that I put in context what I'm asking.

18 PRESIDING JUDGE EBOE-OSUJI: We will do that, but how much longer do you
19 intend to spend with this witness? And before you answer that question:

20 Prosecutor, so far do you see a need for any re-examination?

21 MR OMOFADE: Mr President, do you mean based on Mr Sang's cross-examination
22 alone?

23 PRESIDING JUDGE EBOE-OSUJI: So far up until now.

24 MR OMOFADE: Certainly, yes, there will be need for some. It will be conservative
25 as of now.

Trial Hearing
Witness: KEN-OTP-P-0326

(Private Session)

ICC-01/09-01/11

- 1 PRESIDING JUDGE EBOE-OSUJI: For how long?
- 2 MR OMOFADE: 20 minutes at the very most.
- 3 PRESIDING JUDGE EBOE-OSUJI: Because we are rising at 4. We will be inflexible
- 4 on that and the witness's testimony ends at 4 today and he will be discharged.
- 5 Mr Kigen-Katwa, let's go into private session.
- 6 (Private session at 3.31 p.m.) Reclassified into open session.
- 7 THE COURT OFFICER: (Interpretation) Mr President, we are in private session.
- 8 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?
- 9 MR KIGEN-KATWA:
- 10 Q. Mr Witness --
- 11 PRESIDING JUDGE EBOE-OSUJI: Can you do this and finish in ten minutes?
- 12 MR KIGEN-KATWA: If the witness could just answer my questions, Mr President,
- 13 I would actually possibly do that please.
- 14 Q. Mr Witness, you had said that -- prior to Mr Ruto, Mr Kosgey and Mr Sang
- 15 meeting and making the discussions you said they did (Redacted)
- 16 (Redacted), there had been a press conference at which Raila was also present, isn't it?
- 17 A. Yes.
- 18 MR KIGEN-KATWA: Now, Mr Witness, I put it to you that (Redacted)
- 19 (Redacted), and Mr President at this moment I would like to go into
- 20 open session.
- 21 PRESIDING JUDGE EBOE-OSUJI: For him to answer the question in open session?
- 22 All right, let's go into open session.
- 23 (Open session at 3.32 p.m.)
- 24 THE COURT OFFICER: Mr President, we are in open session.
- 25 PRESIDING JUDGE EBOE-OSUJI: Witness, we are now in open session and you

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 need to answer the question counsel posed to you, saying that the person he had
2 mentioned in his last question was not at the station. Do you agree with that, or not?

3 THE WITNESS: He was -- he was at the building 1.

4 MR KIGEN-KATWA: With your permission, Mr President, may I ask the court
5 officer to pull to the screen KEN-D11-0009-0054?

6 PRESIDING JUDGE EBOE-OSUJI: Do you have a tab?

7 MR KIGEN-KATWA: Yes, Mr President. It is tab number 33.

8 Q. Now, Mr Witness, even prior to you answering the question, could you indicate
9 to the Court what time you place on the contention that the meeting took place?

10 A. It was between -- between -- between -- between 9 to midday.

11 Q. You're talking of 9 a.m. to 12 p.m.?

12 A. Yes, around that time.

13 Q. Now, Mr Witness, I want you to look at that document I've just shown you and
14 can you see somewhere marked "3"? First of all, you can see some five photographs.
15 Can you see that?

16 A. Yes.

17 Q. You can see photograph number 2, can't you?

18 A. Yes.

19 Q. I want you to look at the notes referring to the photo number 2. Can you see
20 the writings at the bottom of the photos, to the left -- to the right of the photo
21 with -- the left of the photo number 5?

22 A. Yes.

23 Q. Now, Mr Witness, could you confirm this is what it says, "ODM presidential
24 candidate Raila Odinga (centre) during Christmas service at the All Saints Cathedral
25 in Nairobi yesterday. He is with his wife Ida and outgoing Narok MP William ole

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Ntimama." Can you see that?

2 A. I'm seeing.

3 Q. Mr Witness, is this the same date -- first of all, you can see the newspaper is
4 dated 26 December 2007, can you?

5 A. Yes.

6 Q. And that date and the text I've just read says "yesterday," which must be the
7 same date you said this meeting was held, isn't it?

8 A. Pardon?

9 Q. The yesterday of the 26th is 25 December, isn't it?

10 A. Yes, yesterday of 25th is -- yesterday of 26th is 25th.

11 Q. And the 25th is the same day you said the meeting was held, isn't it?

12 PRESIDING JUDGE EBOE-OSUJI: Counsel, I think you can move on. Your point is
13 made. You're trying to show that this is something that's different from what the
14 witness says. I think it's -- you don't need to dwell on the point.

15 MR KIGEN-KATWA: One more.

16 Q. Mr Witness, I want you to look at the line -- you can see photo number 5, isn't it?
17 You can see that, Witness?

18 A. Yes.

19 Q. I want you to read -- I want you to read the part immediately to the left of that
20 photo, and if you could confirm this is what it says: "Talking at All Saints Cathedral,
21 Mr Odinga asked ODM supporters to maintain peace even when provoked by their
22 opponents. 'They should desist from violence at all times. Adequate security has
23 been organised to ensure that our supporters vote without being intimidated,' he
24 added. He was addressing the media shortly before attending the service. After
25 the service, Odinga spent a quiet afternoon with his family at his Karen home."

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Can you see that, Mr Witness?

2 A. Yes, I can see.

3 Q. Mr Witness, and you don't need to take long. From this document, it is true
4 that Honourable Raila was not at the location you said he was. It said he went to
5 church and spent a quiet afternoon with his family at home. Can you confirm that,
6 Mr Witness?

7 A. From the document placed here, it doesn't indicate the time of the activities, and
8 it's a general.

9 Q. And so you insist that this press conference took place?

10 PRESIDING JUDGE EBOE-OSUJI: Counsel, I think you can move on.

11 MR KIGEN-KATWA:

12 Q. Now, Mr Witness, it is your contention that the press conference included
13 Honourable Raila, Honourable Balala, Honourable Charity Ngilu, Honourable Henry
14 Kosgey and Honourable William Ruto, isn't it?

15 A. I said it was attended by Pentagon leaders.

16 Q. Could you confirm if the names I've just mentioned were in attendance in that
17 press conference?

18 Mr Witness, if you could answer, please.

19 A. The press conference, they were.

20 Q. The people I've just said were in attendance, isn't it?

21 A. I said they were -- they were Pentagon leaders.

22 PRESIDING JUDGE EBOE-OSUJI: All right. Witness, what counsel is getting at is,
23 if you said "Pentagon leaders," it may be the case that some of them were there and
24 some of them were not. Counsel is asking you whether, according to your
25 recollection, the names he mentioned, the names of the Pentagon members he

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 mentioned, were also at the place, at the conference.

2 THE WITNESS: I can remember some were present.

3 MR KIGEN-KATWA:

4 Q. Mr Witness, I would really want you to be honest and tell us. Was

5 Honourable -- let me just go one person at a go. Was Honourable Najib Balala
6 present?

7 A. To my recollection, I can say he was present.

8 Q. Are you saying "he was" or "he wasn't"?

9 A. He was.

10 Q. Charity Ngilu?

11 MR OMOFADE: Your Honours, it's nothing to do with the questioning, it's actually
12 the timing. I know a lot of this was covered by my friend, Mr Khan, and I look at the
13 time. I think I've got probably 15 minutes to ask whatever questions I have.

14 MR KIGEN-KATWA: Mr President, I trust and believe I have not squandered my
15 time and I can't be blamed if I've not been able to cover more ground, for not having
16 covered the ground I wish to cover, but I could put the question to the witness a little
17 bit differently and see if it can move faster.

18 MR OMOFADE: It's not the point. The point is that counsel has encroached into
19 the time that I would ordinarily used, except your Honours have some other
20 arrangements in mind.

21 MR KIGEN-KATWA: Mr President, I'm entitled to defend my client and I'm not to
22 blame for the difficulty I'm in.

23 PRESIDING JUDGE EBOE-OSUJI: Right. You can do that but we also have to be
24 mindful of the needs of efficiency. When the witness has testified and where the
25 witness has testified to is clear on the record, there has been a tendency to go and

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 repeat and wait for the witness to confirm that he's said that. It doesn't assist. How
2 many more minutes do you think you'll need?

3 MR KIGEN-KATWA: Ten minutes, Mr President. And that means I'm abandoning
4 quite a number -- about half of the documents I intended to use.

5 PRESIDING JUDGE EBOE-OSUJI: Proceed.

6 MR KIGEN-KATWA:

7 Q. Mr Witness, in your testimony of 8 October 2013, at page 8, line 17 to 21, this is
8 what you said: "When elections were approaching, there was growing tension
9 showed by ODM top leaders. In fact, they were reading signals that PNU would rig
10 elections. This is the reason why on 25 December, at 10 a.m, the ODM held a press
11 conference at -- press conference. Present were Raila, Ruto, Balala, Ngilu, Kosgey
12 and other ODM leaders." Mr Witness, I just want you to confirm whether you stand
13 by that statement or you think the people who were in attendance had changed.

14 A. I stand by this statement.

15 MR KIGEN-KATWA: Mr President, I would like to have audio KEN-D11-0009-0061
16 played out.

17 PRESIDING JUDGE EBOE-OSUJI: What does it say? What is the point? Does it
18 contradict the witness's testimony on this point?

19 MR KIGEN-KATWA: It does, Mr President, although I am just wondering whether
20 you're being fair to me because this witness is obviously shrewd, and I would rather
21 have him answer the question without anticipating what I want to ask him.

22 PRESIDING JUDGE EBOE-OSUJI: We will make the determination on whether or
23 not he's shrewd. The point I make is we now need to be tighter in our questioning.

24 If an audio or an external document does not directly contradict the witness but it is
25 something counsel can call later as their own evidence, as their independent evidence,

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 that should be the way to proceed.

2 The habit of having a witness to speak to every video, every newspaper clipping and
3 every audio statement, we have to seriously reconsider as a manner of doing this trial.

4 MR KIGEN-KATWA: I thought, Mr President, that one of the other criterias is that
5 we should put to the witness and give him a fair chance to react to what we would be
6 presenting in the Defence.

7 PRESIDING JUDGE EBOE-OSUJI: Precisely, and he doesn't need a look at the video
8 or hearing of the audio or reading of a newspaper article to do that. That's the point
9 I'm making. We can look at the material you want to show now but --

10 MR KIGEN-KATWA:

11 Q. Now, Mr Witness, as the court officer I had requested that we play -- if you
12 could pause that. Mr Witness, could you confirm how many press conferences were
13 held on 25 December, to your recollection, where Honourable Raila was present?

14 A. (Redacted)

15 Q. Regardless of where. How many press conferences did Honourable Raila have
16 on 25 December?

17 A. I don't know because he worked on different places and maybe media could
18 follow him and he could give out a statement.

19 MR KIGEN-KATWA: Mr -- if the audio could be -- the video could be played,
20 Mr President?

21 PRESIDING JUDGE EBOE-OSUJI: Court officer, please play the video.
22 (Viewing of the video excerpt)

23 MR KIGEN-KATWA: In the interests of time --

24 (Viewing of the video excerpt)

25 PRESIDING JUDGE EBOE-OSUJI: Can we stop?

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 MR KIGEN-KATWA:

2 Q. Mr Witness, I want you to confirm that you can see Honourable Raila on that
3 video.

4 A. Yes.

5 Q. Do you know one Honourable Fred Gumo?

6 A. Yes, I know him.

7 Q. And can you see him in the video?

8 A. Yes.

9 Q. I'll ask you a couple of other people, Salim Lone, Tony Gachoka, Josiah Green
10 and Judge Ongaya, do you know them?

11 A. Yes.

12 Q. Can you see them in the video?

13 A. Yes, I've seen Salim Lone.

14 Q. And Tony Gachoka?

15 A. Maybe it has passed before us.

16 Q. And do you know one Mr Silvester Kasuku?

17 A. Yes, I know Mr Silvester Kasuku.

18 Q. You've been able to see that video. May I ask you if you have seen the
19 following people in that video? Ruto, Balala, Ngilu, Kosgey? Have you seen any of
20 those I have just read out?

21 A. I have not seen.

22 Q. Now, Mr Witness, one Mr Kasuku Silvester says very specifically that he was in
23 that press conference and that neither Joshua Sang nor William Ruto was in
24 attendance. What do you have to say about that?

25 A. The press conference I've just seen, I don't know it was from which location.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 MR KIGEN-KATWA: One last thing I would like to show the witness on that video,
2 then I close it, Mr President, is time stamp -- Mr Witness, you can see from that audio
3 that in fact the -- Mr President, I would like to make reference to time stamp 1.02.

4 (Viewing of the video excerpt)

5 MR KIGEN-KATWA:

6 Q. Mr Witness, you can confirm that in that clip it is very clearly stated that it was
7 on Christmas Day, isn't it?

8 A. Yes, it was on Christmas Day but maybe the bulletin, it doesn't shows that this
9 is the time he had this press conference because during the same day, you can get the
10 informations because there are a lot of reports he was in the church, he was in Karen,
11 so the location specifically is not stated. It's a general overview of the report of the
12 whole day. That's what I'm seeing here.

13 Q. Mr Witness, I want to move on to something else. Mr President, I have only
14 two sets of issues I want to cover, then I'm done.

15 Mr Witness, you were aware that campaigns closed on the 24th? Are you aware or
16 are you not aware that campaigns closed on 24 December 2007?

17 A. Campaign was supposed to close within 24 hours before the voting day.

18 Q. Now, Mr Witness, I would like you to -- I would like to -- if the court officer
19 could pull up document at tab number 19, D11-0008-0069.

20 Now, Mr Witness, you can see that document?

21 A. Yes, I can see it.

22 Q. I'd like to take you to the bottom of the picture bearing the image of Honourable
23 Raila. You can see that?

24 A. Yes.

25 Q. Now, I'd like to read this and you confirm if that is what is written there.

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, no, you will not do that.

2 Mr Khan already put this document and put the bottom part to the witness. Let's
3 not do that again.

4 MR KIGEN-KATWA: I'm okay with that, Mr President. If I could request for the
5 documents I just referred to to be produced as exhibits and if Mr President would
6 prefer, I could move to the last document, then we can mark all of them.

7 Mr President, I would like to move to tab number 34 and, Mr President, it is
8 document number KEN-D11-0009-0055 and extended to 0056.

9 PRESIDING JUDGE EBOE-OSUJI: Please proceed. You have until five more
10 minutes left on the tape and that will be it.

11 MR KIGEN-KATWA:

12 Q. Mr Witness, you can see that document? Mr Witness, you can see that
13 document with the heading, "Communication Commission of Kenya"?

14 A. Yes.

15 Q. Now, you had said Radio Maisha was in attendance on 25 December 2007 in the
16 press conference that you said was held, isn't it?

17 A. A context, where I had called the name Radio Maisha is when I was asked by
18 the counsel about to list the media bodies in Kenya, so I made --

19 PRESIDING JUDGE EBOE-OSUJI: Witness, stop.

20 Mr Kigen-Katwa, Mr Khan already put that proposition to the witness, that in 2007,
21 Radio Maisha was not even in existence and the witness said he may have misspoken.
22 Why are we looking at this document now?

23 MR KIGEN-KATWA: Mr President, I remember Mr Khan had put a rider that

24 I would be producing it. It's okay, Mr President, since the testimony is there,

25 I would request that the documents I've just referred to be marked as exhibits and the

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 documents, Mr President, is KEN-D11-0009-0061, being the video, being the press
2 conference held by Honourable Raila.

3 The other one is KEN-D11-0008-0069, being the Nation newspaper, and the third
4 document is KEN-D11-0009-0055, being the Radio Maisha letter stating when it was
5 incorporated, together with its certificate of incorporation, Mr President.

6 PRESIDING JUDGE EBOE-OSUJI: Prosecutor, any objections?

7 MR OMOFADE: The video, the usual caveats, hopefully at some point we are going
8 to get the originals of all these video clips.

9 The letter, the Radio Maisha letter, I don't know what -- all that's happened is it's been
10 shown to the witness. If this person is actually going to come and testify, that would
11 be the appropriate time when this is admitted into evidence. So even the letter, we
12 would say a MFI. I think there was a newspaper clip - I'm speaking off the top of my
13 head, your Honour - as for the newspaper clip, that could be given an exhibit number.

14 PRESIDING JUDGE EBOE-OSUJI: So we will admit the newspaper clip with a
15 montage of photos numbered 1, 2, 3, 4, up to 7, is that it?

16 MR KIGEN-KATWA: Yes, Mr President. I would also pray that the video be also
17 accepted, considering the way we have conducted ourselves.

18 PRESIDING JUDGE EBOE-OSUJI: Yes, the video too, so those we will admit --

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

20 PRESIDING JUDGE EBOE-OSUJI: -- as exhibits, Sang exhibits. Next in the series?

21 MR KIGEN-KATWA: The next one is the letter from Radio Maisha together with its
22 certificate of incorporation, and in respect of that I am prepared to undertake to avail
23 to the Prosecution the originals, at least for this.

24 PRESIDING JUDGE EBOE-OSUJI: Well, the Prosecution wants them MFI'd. Why
25 don't we -- let's admit them as that for now, marked for identification. If you and the

Trial Hearing
Witness: KEN-OTP-P-0326

(Open Session)

ICC-01/09-01/11

1 Prosecutor sort it out amongst yourselves, then we can revisit the question.

2 MR KIGEN-KATWA: I will take it, Mr President. I can have it marked as MFI.

3 Mr President --

4 THE COURT OFFICER: (Interpretation) Your Honour, if I've understood well, the
5 document KEN-D11-0009-0061, public document, will have the number EVD-0004,
6 Exhibit 4 of the Defence of Mr Sang.

7 The document KEN-D11-0008-0069, public document, will have the number
8 EVD-T-D11-0005, Exhibit number 5.

9 The third document, KEN-D11-0009-0055, public document, will have the number
10 MFI-T-D11-00006.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. Mr Kigen-Katwa, we are
12 out of time.

13 MR KIGEN-KATWA: Two questions, Mr President.

14 PRESIDING JUDGE EBOE-OSUJI: We don't have -- do we have more time on the
15 tape? It's a matter of tape now. It said you have one minute on the tape and then
16 you will close your cross-examination.

17 MR KIGEN-KATWA:

18 Q. Mr Witness, I put it to you that you were wrong - and I have not said you are
19 lying, I have said you are wrong - to allege that Mr Sang was at the place you said he
20 was on 25 December 2007. What do you have to say to that?

21 A. I am right in my statement.

22 Q. I put it to you, Mr Witness, that the long pauses you take when you've been
23 asked questions in respect to Mr Sang's presence in that venue is because you are
24 lying.

25 A. I'm not lying.

Trial Hearing

(Open Session)

ICC-01/09-01/11

Witness: KEN-OTP-P-0326

1 MR KIGEN-KATWA: Mr President, I will leave my cross-examination at that point
2 but may I still express my frustration. I feel rushed, Mr President. I don't know
3 whether to regret that I am the last one to be heard. I hope I'll be accommodated a
4 little bit more and better next time. Thank you, Mr President and your Honours.

5 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, we all feel rushed. These
6 things happen.

7 Witness, unfortunately, you have to come back on Monday for the Prosecution to
8 re-examine you for only 20 minutes and then the VWU will then advise -- are advised
9 to bring the next witness to proceed immediately after that. So we will bring
10 down -- that brings us to the end of today's proceedings. Mr Kigen-Katwa.

11 MR KIGEN-KATWA: My understanding of the pressure I was being put in is that
12 the witness must be -- must have left the location by close of the week. If he's still
13 there on Monday, Mr President, can I just be accommodated on what I had to forfeit?

14 PRESIDING JUDGE EBOE-OSUJI: No, no, Mr Kigen-Katwa. We will leave it at
15 that. We will bring down the shades -- sorry. Mr Kigen-Katwa, we are out of tape,
16 that's the thing. I don't mean to rush you now while you're on the stand, it's just that
17 all this stuff we are discussing actually is not being recorded. That's what I've been
18 told.

19 MR KIGEN-KATWA: Can we come back to it on Monday, Mr President?

20 PRESIDING JUDGE EBOE-OSUJI: You can continue your submissions on Monday.
21 It doesn't mean you'll be granted what you're requesting.

22 MR KIGEN-KATWA: That's okay, Mr President.

23 (Closed session at 4.04 p.m.) Reclassified into open session.

24 THE COURT OFFICER: (Interpretation) We are now in closed session, your
25 Honour.

Trial Hearing
Witness: KEN-OTP-P-0326

(Closed Session)

ICC-01/09-01/11

1 PRESIDING JUDGE EBOE-OSUJI: We will escort the witness and then court will
2 adjourn.

3 (The witness stands down)

4 PRESIDING JUDGE EBOE-OSUJI: The court will rise.

5 (The hearing ends in closed session at 4.04 p.m.) Reclassified into open session.

6 RECLASSIFICATION REPORT

7 Pursuant Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
8 2013, and the instructions in the email dated 3rd December 2013, the version of the
9 transcript with its redactions becomes Public.

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