

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 and

7 Judge Robert Fremr

8 Trial Hearing

9 Friday, 8 November 2013

10 (The witness enters the courtroom)

11 (The hearing starts in open session at 9.38 a.m.)

12 THE COURT USHER: All rise. The International Criminal Court is
13 now in session. Please be seated.

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

15 Court officer, please call the case.

16 THE COURT OFFICER: (Interpretation) Situation in the Democratic
17 Republic of Kenya, in the case of the Prosecutor versus William Samoei
18 Ruto and Joshua Arap Sang, case number ICC-01/09-01/11. We are in open
19 session, your Honour.

20 PRESIDING JUDGE EBOE-OSUJI: Appearances remain the same, I take
21 it.

22 MS RENTON: Yes, your Honour, for the Prosecution.

23 MR FAAL: Slight changes for the Defence of Mr William Ruto. He
24 is represented by David Hooper, QC; Leigh Lawrie; Grace Sullivan; and I
25 am Essa Faal. The accused is excused from attending.

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1 MR KOECH: Mr President, for Mr Sang, Mr Sang is present. And he
2 is represented by Mr Katwa-Kigen, lead counsel; Logan Hambrick; and
3 myself, Philemon Koech.

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

5 MR NARANTSETSEG: The same for the victims, your Honour. Thank
6 you.

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

8 Witness, welcome back to the stand, and Mr Faal will continue his
9 cross-examination.

10 Mr Faal, we're in open session.

11 MR FAAL: Yes, Mr President.

12 WITNESS: KEN-OTP-P-0423 (On former oath)

13 QUESTIONED BY MR FAAL: (Continuing)

14 Q. Welcome back, Mr Witness. I still have some questions for you.

15 I would first like to discuss the situation in Yamumbi in 2007 December.

16 Mr Witness, you will agree with me that Yamumbi shares a boundary
17 with Langas; is that right?

18 A. Yes.

19 Q. And to go to Langas from some parts of Lemok, Simat, and
20 Kapsaret, one would have to pass through Yamumbi; is that right?

21 A. Yes.

22 Q. And before the announcement of the presidential election results,
23 there was no violence in Yamumbi; correct?

24 A. Yes.

25 Q. The situation in Langas was different, wasn't it?

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Witness: KEN-OTP-P-0423 (On former oath) (Open Session)
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1 A. No.

2 Q. Mr Witness, are you aware that violence erupted in Langas on
3 29 December 2007?

4 A. I no longer remember the day.

5 Q. Are you aware, Mr Witness, that before the announcement of the
6 presidential election results on 30 December 2007, there was already
7 fighting going on in Langas?

8 A. I wasn't aware of that.

9 Q. It is your testimony, Mr Witness, that you are not aware that
10 Kikuyus were fighting with Luos in Langas before the announcement of the
11 results of the presidential elections?

12 A. What I said was the following: If there had been conflict
13 between the tribes before the elections, that was in the framework of the
14 electoral campaign.

15 Q. Mr Witness, the question related to the days -- few days before
16 the announcement of the presidential election results. Were you aware
17 that there was fighting in Langas between Kikuyus and Luos on 29 December
18 2007? If you are not aware, just let us know.

19 A. No, there was no war.

20 Q. Yamumbi also borders Kipkenyo on the side of Huruma, doesn't it?

21 A. Yes.

22 Q. Are you aware, Mr Witness, that on the day of the announcement of
23 the results on 30 December 2007, Kikuyus chased away Luos and Luhyas from
24 Pilot in Huruma; are you aware of that?

25 A. No, I'm not aware of that.

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1 Q. Are you aware, Mr Witness, that thousands of people of Luo and
2 Luhya ethnicity were camped at Kipkenyo at 30 December 2007 after leaving
3 their homes in Huruma?

4 A. No, I wasn't aware of that.

5 Q. On 30 -- you testified that on 30 December after the announcement
6 of the results, Nandis burnt 10 houses -- about 10 houses at the border
7 of Yamumbi. Do you remember that?

8 A. Yes, I remember.

9 Q. Mr Witness, you know that Langas is a big trading centre for
10 Kalenjin milk sellers. Are you aware of that?

11 A. Yes.

12 Q. Are you aware, Mr Witness, that on 31 December 2007, early in the
13 morning, Kalenjin milk sellers were attacked and killed in Langas?

14 A. I was not aware of that either.

15 Q. So, Mr Witness, as far as you are concerned, everything was well
16 up to the time of the announcement of the presidential election results
17 on the evening of 30 December 2007?

18 A. Yes.

19 Q. And the violence that follows was a surprise, wasn't it?

20 A. Please could you repeat your question so that I can better
21 understand it?

22 Q. I said the violence that followed after the announcement of the
23 results was a surprise, wasn't it? In Yamumbi.

24 A. No.

25 Q. What do you mean by "no"?

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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1 A. When I said that, what I want to say is that there was a plan.

2 Q. And you were aware of this plan. That's your testimony?

3 A. Yes.

4 Q. And you still remained in Yamumbi even though you were aware of
5 that plan?

6 A. Yes.

7 (Redacted)

8 (Redacted)

9 A. I would like to answer you giving you certain details.

10 Q. Mr Witness, the question is: Did you take any steps to remove
11 yourself and your family from Langas -- from Yamumbi. It's a question of
12 a "yes" or a "no."

13 A. No.

14 PRESIDING JUDGE EBOE-OSUJI: Witness, that does not mean you
15 cannot give details that you had in mind to give, but we will do that in
16 closed or private session.

17 Mr Faal, I think we should do that right now.

18 MR FAAL: As your Honour pleases.

19 PRESIDING JUDGE EBOE-OSUJI: Yes. We go to private session
20 briefly.

21 (Private session at 9.54 a.m.)

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

24 PRESIDING JUDGE EBOE-OSUJI: Thank you.

25 Now, Witness, you say that you will like to give certain details

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1 to that question. Please proceed and give those details. We are now in
2 private session.

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 PRESIDING JUDGE EBOE-OSUJI: Thank you.

13 Counsel, do you want follow-up into that?

14 MR FAAL: No.

15 PRESIDING JUDGE EBOE-OSUJI: I want to know whether we will go
16 back to public session.

17 MR FAAL: We can go back to public session. I do not wish to
18 pursue this issue any further.

19 PRESIDING JUDGE EBOE-OSUJI: All right. We go back to public
20 session, then.

21 (Open session at 9.56 a.m.)

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

24 PRESIDING JUDGE EBOE-OSUJI: Thank you.

25 Please proceed, Mr Faal.

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1 MR FAAL:

2 Q. Mr Witness, you testified about seeing people killed, and the
3 first person you mentioned is person number 8. Do you remember that?

4 PRESIDING JUDGE EBOE-OSUJI: It appears he not have his PIS. Can
5 somebody give him a copy of the PIS please.

6 MR FAAL: Thank you very much, Mr President. He should be given
7 the PIS from the Prosecution, and there is also a Defence PIS which
8 should also be given to him, but I haven't quite got into that one.

9 PRESIDING JUDGE EBOE-OSUJI: Let's not give him the Defence PIS
10 yet until you are ready to use it with him.

11 MR FAAL: All right. Thank you very much, Mr President.

12 PRESIDING JUDGE EBOE-OSUJI: For now --

13 MR FAAL: Much obliged.

14 PRESIDING JUDGE EBOE-OSUJI: -- it's enough to give him the
15 Prosecution PIS.

16 MR FAAL: May I also ask that the Prosecution kindly provide us
17 with a copy of their PIS.

18 Q. So, Mr Witness, you have the PIS in front of you. What I want to
19 establish is the chronology of events who you saw killed first. You have
20 mentioned some individuals, person number 8. You have also mentioned
21 person number 9 and person number 10. Could you tell us from your
22 recollection who was killed first, second, and third?

23 A. I think that the first person who was killed is the person at
24 number 8.

25 Q. And who was killed second, do you recall?

26

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Questioned by Mr Faal (Continuing)

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1 A. Person number 9.

2 Q. And who was killed third?

3 A. Person number 10.

4 Q. And, Mr Witness, person number 10 was killed on 31 December 2007;
5 is that right?

6 A. I no longer remember the date.

7 Q. Mr Witness, you recall testifying that person number 10 was taken
8 to the hospital. Do you remember that?

9 A. Yes.

10 Q. And it was your testimony that he did not make it. He died,
11 either on the way to the hospital or at the hospital, but he didn't make
12 it. He died.

13 A. Yes, that is correct.

14 Q. And you were showed a document by the Prosecution which indicated
15 that he was admitted to the hospital on 31 December 2007. Do you
16 remember that?

17 A. Please kindly repeat your question.

18 PRESIDING JUDGE EBOE-OSUJI: Counsel, you might want to make
19 reference to the mode in which the document was shown to the witness.

20 MR FAAL:

21 Q. Mr Witness, you would recall that a document was put on the
22 screen for you to look at. You were also provided with a hard copy which
23 contains a list of names of individuals who were injured and taken to the
24 hospital. Do you remember now?

25 A. Yes, I do.

26

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1 Q. And do you remember seeing the name of person number 10 on that
2 document as having been admitted into the hospital on 31 December 2007?

3 A. Yes.

4 Q. And, Mr Witness, are you familiar with death certificates that
5 are issued in Kenya?

6 A. Yes, I'm familiar with that document.

7 MS RENTON: Your Honour, I leave it to my learned friend, but we
8 do not dispute the date of the death. So unless there is an additional
9 purpose for showing the death certificate.

10 MR FAAL: I thank the Prosecution for admitting that fact. We
11 are only doing this because the witness did clearly state in his
12 testimony that he didn't remember the dates, but since it's been
13 considered then I'll move onto something else.

14 Q. Mr Witness, you talked about having been present when person
15 number 10 and 11 were attacked and killed. Do you remember that?

16 A. Yes.

17 Q. And you describe person number 10 as having been disemboweled.
18 Do you remember that?

19 A. Yes.

20 Q. You also talked about the killing of person number 11. You, in
21 fact, said that he was cut into pieces and put in a sack. Do you
22 remember that?

23 MS RENTON: Your Honour, actually, in fact, I don't believe that
24 the witness testified that person number 11 was -- was killed. It was
25 quite clear that he was -- he was merely injured quite seriously but he
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1 was injured (* overlapping speakers) --

2 MR FAAL: I consider that was a slip, Mr President. And thanks
3 for the clarification.

4 Q. Person number 11 was attacked and was cut into pieces and put in
5 a sack. Do you remember that?

6 A. Yes.

7 Q. And you were called to come and take -- to come and collect your
8 corpse, as they put it, but when you went there you found out that he was
9 still breathing. He was still alive.

10 A. Yes.

11 Q. So, Mr Witness, we have these two incidents: One, a person who's
12 been disemboweled; and two, a person who'd been cut to pieces and put in
13 a sack. Is that right?

14 A. That is correct.

15 Q. Well, Mr Witness, were you truly present and witnessed these two
16 events?

17 A. Yes.

18 Q. Mr Witness, are you surprised that the medical record for person
19 number 10 did not -- excuse me. Are you surprised to know that the
20 medical record for person number 10 does not support your testimony?
21 There is nothing in it suggesting that he was disemboweled.

22 A. Please kindly repeat your question so that I may understand it.

23 Q. I'll simplify it. Are you surprised to note that the death
24 certificate of person number 10 does not show that he was disemboweled?

25 PRESIDING JUDGE EBOE-OSUJI: Counsel, instead of asking witnesses
26

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1 whether they would be surprised to know, why don't you simply put your
2 proposition in concrete terms to the witness?

3 MR FAAL: I would proceed as guided, Mr President.

4 Q. Are you surprised to note, Mr Witness, that person number 10 died
5 of cardiorespiratory arrest due to shock and head injury due to multiple
6 cuts?

7 PRESIDING JUDGE EBOE-OSUJI: Counsel that -- hold on. I'm
8 thinking about this question. We have to be fair to the witness.
9 Cardiovascular arrest, multiple cuts --

10 MR FAAL: To the head.

11 PRESIDING JUDGE EBOE-OSUJI: -- to the head. Doesn't that
12 require a medical expert to exclude other possibilities?

13 MR FAAL: Mr President, if a person is disemboweled, I think it
14 is something that would ordinarily appear on the -- the death certificate
15 if that actually did occur, because it's so dramatic. But, I mean, I do
16 take your point. I mean, the medical record clearly show that the
17 multiple cuts this person suffered was to the head. It doesn't say to
18 the stomach.

19 PRESIDING JUDGE EBOE-OSUJI: Proceed.

20 MR FAAL:

21 Q. Do you have anything to say to the fact that the medical record
22 does not show that this person received any cuts to the stomach?

23 MS RENTON: Your Honour, to be fair to the witness, the medical
24 record simply is the cause of death. That's all it's demonstrating, so I
25 think it's only fair to show -- to explain that to the witness. It's not
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1 an explanation of all the injuries that a person may have suffered.

2 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated).

3 MR FAAL: Mr President, the Defence still maintenance its

4 previous submissions that if a person had been disemboweled, this is

5 definitely something that would ordinarily appear on the certificate.

6 But we leave the point and move on. All we want to demonstrate is that

7 there is nothing to support the statement of the witness, that person

8 number 10 was indeed disemboweled. So I'll move on and leave that point.

9 Q. Now let's talk about person number 11 who you saw cut into pieces
10 and put in a sack. Do you remember telling us that?

11 A. Yes, I do.

12 Q. Mr Witness, person number 11 was treated and discharged that same
13 day in -- at the hospital. Are you surprised by that?

14 A. Please, can you explain your question further or your
15 proposition?

16 Q. I am saying that person number 11 was treated and discharged from
17 the hospital the same day he was taken to the hospital. Are you
18 surprised by that?

19 A. I do not understand that, the fact that one was treated and
20 released to go back home.

21 Q. The document you were showed yesterday by the Prosecution shows
22 that person number 11 was treated and discharged. What do you say to
23 that?

24 MS RENTON: Sorry, can counsel please give details of which
25 document he's referring to?

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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1 MR FAAL: I am referring to KEN-OTP-0011-0640 under
2 specifically -- please bear with me, Mr President. Let me just find it.
3 602 -- 642, rather, line 164.

4 MS RENTON: Just a correction for the record, I did show that
5 document to the witness but not in respect of that person yesterday.

6 PRESIDING JUDGE EBOE-OSUJI: Private session.

7 MR FAAL: Yes, Mr President.
8 (Private session at 10.19 a.m.)

9 THE COURT OFFICER: (Interpretation) We're in private session,
10 Mr President.

11 PRESIDING JUDGE EBOE-OSUJI: Counsel, are these the same person?

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 MR FAAL: -- and do that now that the Prosecution has indicated
23 that the person number 11 they were referring to is not necessarily the
24 person listed in this document. So I'll go ahead and confirm this with
25 the witness with your permission, your Honour.
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Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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8 MS RENTON: Your Honour, I object to that. On the basis of the
9 document, it's not actually clear what the date of discharge for all
10 these people necessarily was. We know he was admitted but -- on a
11 certain day, but I don't believe that the record necessarily reflects
12 that that was also the date of discharge.

13 MR FAAL: Mr President, I think the record for people who were
14 admitted and not discharged immediately does -- does say that the people
15 are admitted and the ward is stated. This document just says: (Redacted)
16 (Redacted) The only interpretation that we can give to it is that this
17 person was discharged. But in any case, Mr President, we would, at the
18 Defence case, call the hospital staff and they will explain the record.

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

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Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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1 (Redacted)

2 MR FAAL: Thank you very much, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: Yes.

4 MR FAAL: At the appropriate stage we would determine what is
5 important for us and what is not. Thank you.

6 So, Mr President, I'll ask that we go into public session and I
7 move away from this particular point.

8 PRESIDING JUDGE EBOE-OSUJI: Public session.

9 (Open session at 10.29 a.m.)

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

12 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

13 MR FAAL: Thank you, Mr President.

14 Q. Mr Witness, you testified yesterday that the Nandi attackers had
15 guns. Do you remember that?

16 A. Yes.

17 Q. Those individuals who carried guns, were they police officers or
18 were they civilians?

19 A. I said that they were civilians.

20 Q. So it is your testimony that the Nandi civilians that attacked
21 Yamumbi also carried guns?

22 A. Yes.

23 Q. Did they use those guns?

24 A. Yes.

25 Q. And did they use them on human beings?

Witness: KEN-OTP-P-0423 (On former oath) (Open Session)
Questioned by Mr Faal (Continuing)

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1 A. Yes.

2 Q. Do you recall yesterday when you testified and you said that you
3 stood a distance away where you could not be reached by the arrows. Do
4 you remember that?

5 A. Yes.

6 Q. At this time, did the attackers also have guns?

7 A. Yes.

8 Q. Did they use the guns at you?

9 A. Yes.

10 Q. And, Mr Witness, do you recall when you were asked by the
11 Prosecution what weapons did the attackers carry, you said they carried
12 bows and arrows, sticks and clubs. Do you recall that?

13 A. Yes.

14 Q. You never included guns at that time, did you?

15 A. Please kindly repeat so that I should better understand you.

16 THE INTERPRETER: Overlapping speakers.

17 PRESIDING JUDGE EBOE-OSUJI: Indeed. I did not hear what Mr Faal
18 was saying.

19 MR FAAL:

20 Q. The question I asked was: You never included guns in that
21 answer, did you?

22 PRESIDING JUDGE EBOE-OSUJI: I heard that question, but I thought
23 you said something else when the witness was saying.

24 MR FAAL: Oh, no, it was in fact my learned friend Mr Koech who
25 wanted to say something, who wanted to address the Court --

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1 PRESIDING JUDGE EBOE-OSUJI: Oh, sorry, Mr Koech. Sorry.

2 MR KOECH: Yes, indeed, Mr President. I think there is a slight
3 problem in translation because the Kiswahili version that is coming out
4 of "guns" is actually "weapons," not the name of "guns" in Kiswahili. I
5 think that's where the problem is. Yes, the word that's coming out is
6 "weapons."

7 PRESIDING JUDGE EBOE-OSUJI: Mr Faal, why don't you then repeat.
8 The interpreters have now heard the difficulty that Mr Koech mentioned.
9 I'm sure the next interpretation will be correct the next time around.

10 MR FAAL:

11 Q. Mr Witness, your testimony came out as you saying that the Nandi
12 attackers had guns. What do you mean when you use the word which was
13 translated or which was, rather, interpreted as "guns"? Do you mean a
14 gun that is fired or you meant "weapon"? Could you clarify what you
15 meant?

16 A. Let me explain what you have just asked. Can you be more
17 specific? Can you be more elaborate, please?

18 MR FAAL: Mr President, I would obtain the Kiswahili word for
19 "gun" from my learned colleagues to the left, and I would put that to the
20 witness to see whether that is what he meant.

21 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

22 MR FAAL:

23 Q. Mr Witness, when you said the Kalenjin -- the Nandi attackers had
24 guns, were you referring to "bunduki"?

25 A. No.

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1 Q. Thank you very much, Mr Witness. That clarifies the point. Now,
2 Mr Witness, we are going to talk about --

3 PRESIDING JUDGE EBOE-OSUJI: Counsel, I don't think that
4 clarifies the question. Let me ask him that, please.

5 Witness, you -- you've heard counsel use the expression in
6 Swahili "bunduki" to refer to fire-arms which shoot bullets. The
7 question to you is: Did you observe at any time in 2007 whether or not
8 the assailants that you described as Nandi attackers use "bunduki"?

9 THE WITNESS: (Interpretation) No.

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 Please proceed.

12 MR FAAL: Thank you very much, Mr President.

13 Mr President, may I ask that we go into private session.

14 PRESIDING JUDGE EBOE-OSUJI: For how long?

15 MR FAAL: About five minutes, Mr President. No -- five to ten
16 minutes, maximum.

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

18 (Private session at 10.39 a.m.)

19 THE COURT OFFICER: (Interpretation) We are in private session,
20 Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

22 MR FAAL:

23 (Redacted)

24 (Redacted)

25 (Redacted)

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Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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10 (Redacted)

11 Q. So if I show you a photograph of person number, you would be able
12 to recognise him, wouldn't you?

13 A. Yes.

14 MR FAAL: Mr President, I would avail photos of the person we
15 believe is person number 1 and then ask the witness to confirm whether
16 that is, in fact, person number 1 he refers to. We ask, also, that the
17 photograph be put on the screen. It is KEN-D09-0025-0016.

18 Court officer, kindly put it on the screen, please.

19 PRESIDING JUDGE EBOE-OSUJI: While the court officers are pulling
20 up the document, could you, through the witness, for purposes of
21 completeness of the record, explain what these words of affection would
22 mean?

23 MR FAAL: I will do that.

24 (Redacted)

25 (Redacted)

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10 (Redacted)

11 (Redacted)

12 PRESIDING JUDGE EBOE-OSUJI: All right. Please proceed.

13 MR FAAL: Thank you.

14 Q. Thank you very much, Mr Witness. Mr Witness, if you look at the
15 screen, you would see the photograph of a person. Do you recognise this
16 person?

17 A. I do not know him.

18 (Redacted)

19 (Redacted)

20 PRESIDING JUDGE EBOE-OSUJI: Are you saying this is not person
21 number 1?

22 THE WITNESS: (Interpretation) It is not him.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 Please move on.

25 MR FAAL:

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Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
Questioned by Mr Faal (Continuing)

Page 24

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23 A. Let me say this: Kipkenyo, Kapteldon, Simat, Lemok, all these
24 places are the same farm. None of those farms are far away from each
25 other. All those farms are together in the same place. If I told you
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Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
Questioned by Mr Faal (Continuing)

Page 25

1 that they prepared the arrows in Kapteldon and then later on I said
2 Kipkenyo, then you really have to understand me. The border between
3 Kipkenyo and Kapteldon, I cannot tell you, I am unable to tell you
4 because these are farms inhabited only by Nandis, so I really do not know
5 where the border is between Kipkenyo, Kapteldon, and Simat. I am not
6 able to tell you where the borders are because these are farms that
7 belong to the Nandis only.

8 Q. Mr Witness, just two minutes ago I asked you whether Kapteldon
9 and Kipkenyo were different, and you said yes.

10 PRESIDING JUDGE EBOE-OSUJI: Counsel, I think the question is
11 now -- with the witness. You might want to move on.

12 MR FAAL: Thank you very much, Mr President.

13 Q. Mr Witness --

14 MR FAAL: Mr President, excuse me, perhaps this is a convenient
15 time to take break.

16 PRESIDING JUDGE EBOE-OSUJI: Indeed. And how are you doing?

17 MR FAAL: I am doing pretty well, Mr President, indeed. Perhaps
18 maybe 10, 15 minutes after -- after the -- after we resume, I should be
19 able to wrap it up.

20 PRESIDING JUDGE EBOE-OSUJI: Good news.

21 MR HOOPER: Can I just indicate, your Honour, that I've got a
22 matter to raise with the Chamber, and a convenient time to raise it might
23 be after this break at 11.30. It probably would take about ten minutes.

24 PRESIDING JUDGE EBOE-OSUJI: About ten minutes.

25 MR HOOPER: Yes.

Witness: KEN-OTP-P-0423 (On former oath) (Closed Session)
Procedural Matters

Page 26

1 PRESIDING JUDGE EBOE-OSUJI: And so --

2 MR HOOPER: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: -- in total we're looking at 20, 30
4 minutes depending on the nature of --

5 MR HOOPER: Yes, it's to deal with an issue -- well, an overview
6 of the witness position for when we come back, and, consequent on the
7 dates that we're now sitting, an application for excusal in respect of
8 the dates 18th, 19th, and 20th because of the meeting -- the African
9 Union and Arab League third meeting which takes place on the 19th and
10 20th.

11 PRESIDING JUDGE EBOE-OSUJI: All right. Let's excuse the witness
12 and then take our break. When we come back, the witness will not be
13 coming immediately into the courtroom. That's why I wanted to get an
14 idea of the time it would take to discuss what needs to be done. So we
15 will bring down the blinds and escort the witness from the courtroom.
16 (Closed session at 11.04 a.m.)

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

19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much. The witness
20 may be escorted from the courtroom, then.
21 (The witness stands down)

22 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.
23 (Recess taken at 11.05 a.m.)

24 (Upon resuming in open session at 11.35 a.m.)

25 THE COURT USHER: All rise. Please be seated.

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

2 Mr Hooper.

3 MR HOOPER: Yes. May it please, your Honour. The matter in fact
4 that I sought -- seek to raise, as we now know, we are sitting now for
5 the week of 18 November and the week of 25 November with a view to the
6 Court receiving the evidence of two Prosecution witnesses. There has
7 been some uncertainties as to which witnesses are going to be called, and
8 I've been able to discuss this matter further with Mr Steynberg this
9 morning, and I think we all take the view and agree that it would be an
10 unfairness to the Defence to learn only on Thursday of next week, i.e.
11 with just the weekend between then and the start of the hearing for these
12 two witnesses, to only learn then who the two witnesses are to be.

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 MR STEYNBERG: Sorry, to interrupt, 469, your Honours.

17 MR HOOPER: I'm sorry. I can't read my own writing.

18 PRESIDING JUDGE EBOE-OSUJI: 469.

19 MR HOOPER: 469.

20 PRESIDING JUDGE EBOE-OSUJI: And let's try to keep the
21 submissions discreet in terms of the details --

22 MR HOOPER: Yes.

23 PRESIDING JUDGE EBOE-OSUJI: -- considering that we've heard much
24 of certain things in private session.

25 MR HOOPER: All right.

1 PRESIDING JUDGE EBOE-OSUJI: But we know who they are.

2 MR HOOPER: Yes. All right. Are we in open or in private then
3 at the moment?

4 PRESIDING JUDGE EBOE-OSUJI: We're in open.

5 MR HOOPER: Um --

6 PRESIDING JUDGE EBOE-OSUJI: We're in open, do you want to go
7 into private?

8 MR HOOPER: It may be best. Talking about these matters and the
9 following matter, perhaps it would be best to be in private session, yes.

10 PRESIDING JUDGE EBOE-OSUJI: All right. We will go into private
11 session.

12 (Private session at 11.37 a.m.)

13 THE COURT OFFICER: (Interpretation) We're in private session,
14 your Honour.

15 MR HOOPER: (* Previous translation continues)... I touched on
16 that particular detail.

17 PRESIDING JUDGE EBOE-OSUJI: Let me -- this is not a ruling we
18 are going to make, but for purposes of our discussion so we can all be --
19 let's consider this a brainstorming for now. What we are thinking is to
20 have 469 and 535 and the expert witness lined up for testimony in the
21 week of the 18th, preferably if we can start on the 18th that would be
22 better, but if not, our default position of starting on the 20th. The
23 reason I mentioned three is so that any two of those three would be taken
24 during that period we have in mind. So that's what we are thinking.

25 Now --

26

1 MR HOOPER: Well --

2 PRESIDING JUDGE EBOE-OSUJI: This is not a ruling as I say, just
3 to put on the table the thinking here at the moment.

4 MR HOOPER: Well, great minds obviously think alike because
5 Mr Steynberg and myself discussing this this morning came to that
6 conclusion as well, that 469 and 535 are, as it were, the preferred
7 witnesses and the probable witnesses, and it's highly probable at least
8 one of those will be available, so it was then a question of finding one
9 alternate. And that alternate, because we can't induce our friend to
10 invite (Redacted) here, is -- is the expert Maupeu. Professor Maupeu has
11 some scheduling difficulties, as I understand it, because he has teaching
12 obligations in the University of Pau in that lovely bit of France where
13 he teaches, but he -- he will be available, that's my understanding from
14 Mr Steynberg, as the backup, as it were.

15 So, in other words, we seem to have come in line with your
16 Honour's and your Honour's colleagues thinking, that that is the
17 position. So we'll perm two out of those three witnesses and the Court
18 will have its two witnesses for the week of the 18th to the 25th. I say
19 the 25th. Of course, the conclusion of the second week is the 29th.

20 PRESIDING JUDGE EBOE-OSUJI: Going to the 29th.

21 MR HOOPER: Yes.

22 As far as the Defence is concerned, I think the Court can well
23 appreciate from things that have been previously said, that we are
24 extremely reluctant to find ourselves going into the first week of
25 December, given the other obligations and duties that fall on this team

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1 in respect of preparation for other witnesses to come later next year and
2 investigations. I think the Court appreciates and knows now that a
3 substantial number of this team also are busy conducting or will be busy
4 conducting necessary investigations. So --

5 PRESIDING JUDGE EBOE-OSUJI: But on that note, you will be wise
6 to have a buffer period of, say, the 2 and the 3 of December in reserve
7 as a buffer period in case it is needed, while all efforts are made to
8 complete the testimony in November. That is, again, something we are
9 thinking of.

10 MR HOOPER: Right. Well, we blanch somewhat at the thought of
11 having to go into December. It may sound just two more days, but it
12 means people remaining here from the Friday as opposed to being in Kenya
13 and certain difficulties that arise from that. But perhaps that's,
14 bearing in mind what your Honour said, something that we can perhaps
15 usefully address, if it needs addressing, it may well not need
16 addressing, when we get closer to that time.

17 So the position is this: That the sooner we start, of course,
18 the sooner the two witnesses will be dealt with and heard, and so our
19 obvious preference - and clearly that of the Chamber - is to start on the
20 18th of this month, the Monday, so that we have the full week. Now I
21 mention that because I know Mr Steynberg's got some reservations still as
22 to whether 469 or 535, clearly his preferred witnesses, whether either
23 one of them will be able to give evidence prior to the Wednesday, the
24 20th, or even the 21st.

25 Of course that problem could be addressed is Mr Maupeu himself is
26

1 available to kick off, as it were, on the 18th. For our part we've
2 indicated that we don't think we're going to be a great deal of time with
3 Mr Maupeu. The Prosecution, I think, have pencilled him in because he's
4 got a report that's got to be presented to the Chamber and then some
5 supplementary questions --

6 PRESIDING JUDGE EBOE-OSUJI: Yes.

7 MR HOOPER: -- and that's a day for the Prosecution.

8 PRESIDING JUDGE EBOE-OSUJI: And, Prosecutor, I take it, if he
9 comes to testify, his testimony will be completely in the public session,
10 isn't it?

11 MR STEYNBERG: I haven't applied my mind to it, but I can't think
12 of any reason why it should not be.

13 PRESIDING JUDGE EBOE-OSUJI: Yes. That's one more thing. It
14 will be nice to surface from private session and swim in the open for
15 once uninterrupted with a witness and that would be where he comes in,
16 some other advantage of having him. My own preference, that is.

17 MR HOOPER: So we think he will be two or three days all together
18 in his evidence. There will be a translation, obviously, of his evidence
19 because I -- I assume, and I think -- I see Mr Steynberg nodding, that
20 he'll be giving his evidence in French, and it will be perhaps to some
21 extent technical evidence. But in any event, obviously it's going to be
22 translated and that will put a certain break on the time in which he can
23 be -- he can be heard.

24 So that's the position at the moment and so to that extent we
25 needn't trouble your Honour as to -- as to the witnesses that are going
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1 to be called because it's -- it's settled and --

2 PRESIDING JUDGE EBOE-OSUJI: All right.

3 MR HOOPER: -- and clear.

4 PRESIDING JUDGE EBOE-OSUJI: So to wrap it up, it looks like your
5 submissions are consistent with the current thinking of the Chamber.

6 So --

7 MR HOOPER: Indeed.

8 PRESIDING JUDGE EBOE-OSUJI: So why don't we leave it there,
9 then.

10 MR HOOPER: And the only concern we have is that we'd like to
11 start on the 18th, the Monday, so that we get through those witnesses in
12 good time and hopefully before the 29th, so that there is no risk at all,
13 if that is done, that we go over to the 2nd and the 3rd of December.
14 Those reserve dates.

15 PRESIDING JUDGE EBOE-OSUJI: All right. Why don't we leave it
16 there, Mr Hooper, and hear from Mr Steynberg.

17 MR HOOPER: There is one other matter that, in fact, has an
18 overlapping -- an overlap with that issue --

19 PRESIDING JUDGE EBOE-OSUJI: Is that that excusal?

20 MR HOOPER: It is.

21 PRESIDING JUDGE EBOE-OSUJI: Why don't we settle the dates first
22 and then deal with the excusal.

23 MR HOOPER: Yes, very well.

24 MR STEYNBERG: Your honours, I'm afraid that the two subjects are
25 inextricably linked. Mr Hooper wants to insist on starting on the 18th

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1 but yet he'll be asking for the excusal of his client for the first three
2 days. For the reasons mentioned, the Prosecution's strong preference is
3 to start only on the 20th or preferably when Mr Ruto is available as, I
4 believe, on the 21st. We submit that the issue of arranging the court
5 schedule to ensure that the accused can be present is the first matter
6 which, in terms of the Appeals Chamber's ruling --

7 PRESIDING JUDGE EBOE-OSUJI: No, no --

8 MR STEYNBERG: -- needs to be --

9 PRESIDING JUDGE EBOE-OSUJI: - no, no, that's not how we
10 understand it. We do not see it as inextricably linked. Let's, first of
11 all, settle the dates and then we will deal with the excusal.

12 MR STEYNBERG: With respect, your Honour, the Prosecution takes a
13 different position on that issue. And I refer your Honours to paragraph
14 61 of the Appeals Chamber's judgement where the Appeals Chamber states
15 quite clearly --

16 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, I've heard your
17 submission. I'm saying let's deal with the -- I hear you and we know
18 what you're referring to. We want to first discuss the question of the
19 dates. That's what we had in mind. If we did not have that application
20 for excusal, we would still be dealing with scheduling.

21 MR STEYNBERG: Very well. On that issue, your Honours, on the
22 availability of witness -- well, the Prosecution's preference, as I've
23 stated on numerous occasions, is to call the Kenyan witnesses and to lead
24 the evidence of the -- the actual witnesses before getting to issues of
25 secondary witnesses, expert witnesses and the like.

1 The position of 469, (Redacted)

2 (Redacted)

3 (Redacted)

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 (Redacted)

17 (Redacted)

18 The other witness, 535, (Redacted)

19 (Redacted). And as my learned friend has

20 correctly informed the Chamber, we have contacted Mr Maupeu, Witness 464,

21 who has indicated that is teaching classes until mid- to late December.

22 His preference would be to testify in the first three months of next year

23 when he has no classes, but at a push he could make himself available.

24 For all of these reasons and the reasons I have mentioned

25 earlier, it would not be our preference to call him now. We would not

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1 want to inconvenience him unnecessarily. So the Prosecution's position
2 would still be that we should start no sooner than the 20th or possibly
3 the 21st, depending on the outcome of the Defence's second submission.
4 We consider that there is still a good possibility we could finish by the
5 end of the following week, the 29th, but we do second the Chamber's
6 suggestion that we should have a couple of buffer days of the -- in the
7 following week. I'm confident we'd be able to finish by no later than
8 the 2nd of December.

9 PRESIDING JUDGE EBOE-OSUJI: Again, I want to be clear where we
10 are with 535. Are you then able to start with 535; is that it?

11 MR STEYNBERG: No, your Honour, (Redacted)

12 535 (Redacted).

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted) 469, (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

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9 (Redacted) Witnesses
10 128 and 409. (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)
14 (Redacted)
15 (Redacted)
16 (Redacted)
17 (Redacted)
18 (Redacted) 469. (Redacted)
19 (Redacted) 535 (Redacted).
20 (Redacted)
21 (Redacted)
22 (Redacted)

23 MR STEYNBERG: Your Honours, the expert witness would be the most
24 certain of the three, but I would not like to abandon the other two. So
25 my preference would be -- and I don't think it would be an inordinate
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1 inconvenience for the Defence to be able to prepare for those three
2 witnesses, bearing in mind that Mr Maupeu was one of the top ten
3 witnesses. The other two witnesses were previously due to testify. So I
4 presume there must have been by now some investigation and preparations
5 done. So we will endeavour to call the two crime-base witnesses, but in
6 the event that either of them fall out, we will endeavour then to have
7 Mr Maupeu here to testify. And of course, as soon as we have
8 confirmation we will let all parties know.

9 PRESIDING JUDGE EBOE-OSUJI: So the situation is this, let me see
10 if I can summarise it, is in the event of an inability to start with
11 either 469 or 535 by the 20th, we would certainly be starting with Maupeu
12 on the 20th. Is that the understanding?

13 MR STEYNBERG: That is the understanding, your Honours. Subject
14 to the second question, it may be the 21st but --

15 PRESIDING JUDGE EBOE-OSUJI: Your second question pertains to the
16 excusal; right? We will deal with that. I just want us first of all to
17 get our minds around the dates and then Mr Hooper will stand up again and
18 address the submissions on excusal.

19 MR STEYNBERG: Very well. I think that adequately explains it,
20 your Honours.

21 PRESIDING JUDGE EBOE-OSUJI: Okay. So we're now settled on that.
22 Either 469 --

23 MR KIGEN-KATWA: Mr President --

24 PRESIDING JUDGE EBOE-OSUJI: -- 535 or certainly Maupeu starting
25 on the 20th.

1 Mr Katwa.

2 MR KIGEN-KATWA: Mr President, first of all, I am extremely
3 surprised that an issue as important as the dates could be settled
4 without having Mr Sang heard on it.

5 Mr President, I think that's an issue which we should very
6 much -- that when a substantial issue like that is in issue, we be heard.

7 Mr President, we have no problem with all the issues that have
8 been discussed and I am complaining only to the extent that it's a weight
9 issue on our part.

10 PRESIDING JUDGE EBOE-OSUJI: (Microphone not activated).

11 MR KIGEN-KATWA: It's a weight issue on our part, Mr President,
12 that we really --

13 PRESIDING JUDGE EBOE-OSUJI: We are not going to settle anything
14 without hearing you, but we wanted to firm up understandings and then we
15 move on, as in firm up understandings between the Ruto Defence and OTP on
16 one thing and then we bring you in. It doesn't mean that we were going
17 to render a decision without hearing from you.

18 MR KIGEN-KATWA: I am most grateful, Mr President. Mr President,
19 on our part we would like to indicate that my client's instructions is
20 that we don't mind starting either on the 18th or on 20th or on 21st. We
21 have no problem with either of that.

22 Secondly, Mr President, we are happy to start with either of the
23 four witnesses that were already in the air. One is Mr Maupeu, the other
24 one is 469, the other one is 535, and the other witness is 32. And I'm
25 saying this just in case the circumstances of the Prosecution are such
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1 that in their estimation it is possible to bring in place of either 535
2 or 469.

3 And lastly, Mr President, my client would have really wished to
4 have to not be in court in December. He has no problem with the
5 provision of the buffer dates in December. But if it were possible to
6 have completed by December, he would be very happy.

7 That, I just wanted to express that position on the part of my
8 client, Mr President. Thank you.

9 PRESIDING JUDGE EBOE-OSUJI: So, Mr Katwa, again, to wrap the
10 whole thing up around you as well, the understanding is either 469 or 535
11 or the expert witness Maupeu starting either on the 18th or the 20th?

12 MR KIGEN-KATWA: Yes, Mr President, and also number 32.

13 PRESIDING JUDGE EBOE-OSUJI: Number 32, that's (Redacted), isn't it?

14 MR KIGEN-KATWA: Yes, Mr President.

15 PRESIDING JUDGE EBOE-OSUJI: We're not considering him now.

16 MR KIGEN-KATWA: I'm obliged. That's okay with us.

17 PRESIDING JUDGE EBOE-OSUJI: We know you indicated that
18 preference. All right. Done now. Okay.

19 Mr Hooper.

20 MR HOOPER: Right.

21 PRESIDING JUDGE EBOE-OSUJI: You can then deal with your other
22 issue, the second one.

23 MR HOOPER: Just before we pass to that. I hadn't realised,
24 speaking to my friend this morning, Mr Steynberg, that there was just a
25 one per cent chance of 469 coming. I -- I'd -- I'd misunderstood -- or

1 perhaps --

2 MR STEYNBERG: I beg your pardon, your Honours. I said "by the
3 18th." Not "coming at all."

4 MR HOOPER: All right. Well, it's just that (Redacted)

5 (Redacted)

6 just over a weeks' time seems rather removed. But anyway, we -- we can

7 but hope. I hope whichever two witnesses are to come will be clearly --

8 the Defence would be clearly informed by, at the very latest, Thursday of

9 next week. I say Thursday because 535, as I understand it, (Redacted)

10 (Redacted)

11 (Redacted), so by the Thursday his position should be

12 clear and we should know what the position is.

13 Of course, if 469, (Redacted)

14 (Redacted) for the 18th, then, of course, the Defence would, again,

15 very much wish to know as soon as possible that that is the situation.

16 So really, I just want to secure the Defence position to this

17 extent: That the witnesses that the Prosecution will be in a position to

18 call and will call from the 18th, if it be the 18th, are clearly notified

19 to the Defence no later than Thursday of next week.

20 Now if I can come to the other matter. This is an application --

21 PRESIDING JUDGE EBOE-OSUJI: Before you do --

22 MR HOOPER: Yes.

23 PRESIDING JUDGE EBOE-OSUJI: -- please, one second. I have not

24 heard from Mr Narantsetseg. Sorry, I should have done that before

25 inviting you to speak to your second application, which concerns the

1 excusal. So I'm saying we should hear from Mr Narantsetseg as to the
2 schedule. Do you have any observations?

3 MR NARANTSETSEG: I'm grateful, your Honour. I don't have any
4 observation. Thank you.

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

6 Mr Hooper, please carry on.

7 MR HOOPER: Yes, this is an application for the excusal of
8 Mr William Ruto.

9 PRESIDING JUDGE EBOE-OSUJI: Can we now go in open session. The
10 reason we would remain in private session for that sort of thing is if
11 Article 70 -- is that (2) -- 70(2) concerns are engaged.

12 MR HOOPER: I don't think there is a difficulty going into open
13 session. My only hesitation was whether there was any security element
14 in stating any particular person's movements. But given the --

15 PRESIDING JUDGE EBOE-OSUJI: That's Article 70(2) concern.

16 MR HOOPER: Yes. But given the public nature of the meeting that
17 is the basis for application, I don't think that that situation arises.

18 PRESIDING JUDGE EBOE-OSUJI: All right. We will go into open
19 session, then.

20 (Open session at 12.02 p.m.)

21 MR HOOPER: Yesterday at --

22 THE COURT OFFICER: (Interpretation) We are in public session,
23 Mr President.

24 MR HOOPER: (* Previous translation continues) ... a letter from
25 the Ministry of Foreign Affairs and International Trade, a copy of which

1 I've provided, and can I ask be passed up to you, the Judges. My friend
2 Mr Steynberg has seen it. I haven't shown it to Mr Narantsetseg yet.
3 Perhaps I could get passed a copy over to him as well so that he can see
4 the nature of the document. Indeed, I've got copies as well for your
5 Honour's colleagues. Perhaps I can ask that that be passed as well.

6 PRESIDING JUDGE EBOE-OSUJI: Yes, Mr Hooper. Proceed.

7 MR HOOPER: The letter, save for one spelling mistake or word
8 mistake, you'll see, is plain on its face. So the position is this:
9 That on the 19th and 20th there is the third Africa Arab Summit being
10 held in Kuwait. I've passed another document up to you which is just
11 something I took from the internet last night which sets out, in effect,
12 essentially what it is about, and you'll see in the first paragraph that
13 there is to be a -- an Arab African summit in Kuwait in November which
14 include calls to bolster co-operation in the fields of politics, et
15 cetera. It will also include further co-ordination of the Arab African
16 position towards political issues of common interest, especially regional
17 security and peace.

18 And the Court, of course, will be aware that the African Union
19 itself, which I think is composed of just over 40 African states, and the
20 Arab League, which is composed of 22 Arab states, though some of whom are
21 also members of the African Union, with the exception of Syria which is
22 presently suspended, are meeting, and it's the heads of state who are
23 meeting, and that's on Tuesday and Wednesday of the week after next. So
24 that is clearly, in our submission -- and the Chamber won't need
25 reminding of the constitutional difficulties that then present themselves
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1 to the head of state, i.e., Uhuru Kenyatta, in respect of his attendance
2 at a such a meeting in the absence of the deputy president. So the
3 deputy president's presence is required on Kenyan soil in order to permit
4 the president to go and attend this quite exceptional regional political
5 summit of the heads of state of the African and Arab world.

6 Such a meeting presents, we submit, and the need consequently on
7 that for Mr Ruto to be present in Kenya presents an exceptional
8 circumstance, such as would, one would have thought, comply even with my
9 friend's Mr Steynberg's views of compliance with the criterion that were
10 established in the Appeals Chamber's decision 10/66. The question, if
11 that is right, therefore, is: Is there any alternative measure?

12 As far as the Prosecution are concerned, the alternative measure
13 of not sitting at all until the 21st becomes attractive because it also
14 helps them to the extent of having, they hope, one of the crime-scene
15 witnesses or both of the crime-scene witnesses available to the Chamber.
16 But from what we've heard this morning, in respect of one of those
17 witnesses, great uncertainties obviously subsist and the position in
18 respect of the second one is still also unclear.

19 The position, we submit, would be that in order for the Court to
20 use its time effectively in these circumstances, it would seem sensible
21 for the Prosecution to consider calling Mr Maupeu and such other
22 witnesses then becomes available in that order and to be able to, in
23 fact, be here on the 18th. That would be clearly a very effective -- a
24 more effective use of the Court's time.

25 In terms of this meeting, Mr Ruto's presence in Kenya is
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1 compelling. If we start -- if we don't sit, if that's the alternative
2 suggested, and we don't sit until the Thursday, right at the end of that
3 week, the risk is that we will then go on into December. And that will
4 have, as has already been argued, and I don't repeat in detail, an
5 adverse affect on the Defence's preparations for the rest of this trial.
6 It is our submission that the Court should sit on the 18th, that the
7 Prosecution should provide a witness for that Court, if it's the expert,
8 so be it, and that in the circumstances, exceptional circumstances, in
9 our submission, can be established through the circumstances relating to
10 this important summit taking place and the consequence of that in terms
11 of Mr Ruto's position.

12 I'd also --

13 PRESIDING JUDGE EBOE-OSUJI: I would expect the Prosecutor to
14 argue, I don't know if they will, but that -- are you asking to have your
15 cake and eat it too, in the sense that if Mr Ruto has to be excused,
16 wouldn't you make some sacrifices too, the Defence, in terms of pushing
17 the sitting date into December? Assuming, of course, that the
18 interpretation on the application of the Appeals Chamber's alternative
19 measures criterion poses any difficulty.

20 MR HOOPER: Well, I'd submit that the Chamber was perhaps quite
21 correct in approaching these issues, albeit that one touches upon the
22 other, approaching these issues in a separate manner. First of all, the
23 Chamber's decided to sit on the 18th. The Prosecution is in a position
24 to provide this Chamber with a witness on the 18th. Let's not lose
25 sight, also, of this, the background to our sitting. We know that
26

1 this -- we are sitting because of the consequence of what happened in
2 respect of another case and that the need, of course, for this Court to
3 exercise expedition in respect of the current trial.

4 But what has happened is that the Defence are placed in a
5 position that they didn't foresee and hadn't taken into account until, of
6 course, that situation arose. And what the Defence has hitherto argued,
7 and repeats today, is that we have, I hope, demonstrated in every sense
8 our co-operation to facilitate the wishes of the Chamber, as correctly we
9 must do. But we've done that. And all this time that we're spending now
10 or in these further weeks, two weeks that have been set aside, are weeks
11 that would have been spent effectively in terms of necessary preparations
12 in respect of important witnesses that are due to come in the
13 not-so-distant future.

14 I'm surprised to be standing here and finding myself addressing
15 court dates in December, the 2nd and 3rd of December already. That
16 period of time is not so distant for us. And it follows that, given also
17 that we have a Christmas period to address and a New Year period to
18 address, and as has already been said, a team that is necessarily going
19 to be fragmented all over the world during that period, to come back then
20 to - and we are not clear of the date, of course, when we will be
21 sitting, but we anticipate about, I don't know, the 10th or so of
22 January, something like that - it really doesn't give us very long.

23 So I'd say this: In a way we've made our sacrifices and we ask
24 the Chamber not to -- not to impose a further sacrifice on us. It's not
25 a question of having our cake and eating it. It's a question of using
26

1 the best time that the Court can, taking all these factors into
2 consideration. And taking all those factors into consideration, we've
3 got a date, we've got a clear week, the week is the week of the 18th, the
4 subsequent week is the 25th, we can do our witnesses in that time. And
5 we have, against that, this extraordinary and exceptional event of the
6 African Union and the Arab states meeting together, and we don't have to
7 look far out of the windows of our lives to know what that implies in
8 terms of security of the area.

9 I'm sure the Court itself and your Honours don't dispute for one
10 moment the compelling need for the president of Kenya to be there and the
11 consequent result that has on Mr Ruto's whereabouts.

12 So we fall back on this, if we're dealing, for example, with
13 Mr Maupeu, the expert, does Mr Ruto really need to be here in those
14 circumstances? If we're dealing here with a crime-scene witness, perhaps
15 of the quality of witnesses we've seen so far, does Mr Ruto really need
16 to be here as opposed to fulfilling those obligations?

17 So taking it all in all, where is the balance? Your discretion,
18 of course. Where is the balance? And the balance is we have a clear
19 slot, those two weeks, and it gives us the opportunity, then, of moving
20 from the Hague -- this is the point, we're here and people are here, and
21 what we need is a time when we don't have to go and come back. We can go
22 to Kenya, we can start again our investigations on a proper footing. We
23 need to do that sooner rather than later, and we hope that if we start on
24 the 18th --

25 PRESIDING JUDGE EBOE-OSUJI: Mr Hooper, can you wrap up in two
26

1 minutes?

2 MR HOOPER: Yes, certainly.

3 We hope that if we start on the 18th, this team would be
4 effectively investigating and preparing again, not by the 29th but by,
5 perhaps, the midpoint of that week. What we don't want is to risk losing
6 the best part of another week at this time of year because we've run into
7 the first week of December.

8 So all in all, we'd submit, let's sit on the 18th. Here's quite
9 an exceptional circumstance. The alternative is there but it shouldn't
10 be imposed on the Defence. Not a cake and eat it situation, but rather,
11 a cake -- not a cake, rather a Defence that has hitherto complied with
12 all that the Chamber's asked, and asks, really, that the benefit of being
13 able to stop the trial process in this sense sooner than later.

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

15 Mr Steynberg.

16 MR STEYNBERG: Thank you, your Honour. Your Honour, accurately
17 predicted what my argument will be.

18 Firstly, a couple of corrections, perhaps. The Chamber did not
19 decide to sit on the 18th. Your Honours expressed a --

20 PRESIDING JUDGE EBOE-OSUJI: I thought I -- didn't he say "if"?

21 MR STEYNBERG: My understanding was -- well, if I'm wrong, the
22 fact is --

23 PRESIDING JUDGE EBOE-OSUJI: (* Overlapping speakers) ...

24 MR STEYNBERG: -- your Honours have not made that decision. I --

25 PRESIDING JUDGE EBOE-OSUJI: No, we have not made that decision.

26

1 I understood him, I took him to say "if the Chamber decided to."

2 MR STEYNBERG: Yes.

3 PRESIDING JUDGE EBOE-OSUJI: But --

4 MR STEYNBERG: So the position was, as we left on the occasion,
5 that your Honours asked the parties to agree on a two-week period or a
6 period sufficient to hear two witnesses somewhere between the 18th of
7 November and the 13th of December. My learned friend's preference was to
8 start on the 18th and, for various reasons which I have indicated, my
9 preference was to start on the 25th.

10 I propose as a compromise the 20th. For the reasons we've
11 discussed in the previous argument and mainly the availability of
12 witnesses.

13 Now my learned friend wants to insist that despite the fact that
14 he wishes his client to be excused for the first three days of the period
15 18th, 19th, and 20th, we should, nevertheless, start on the 18th with a
16 witness that the Prosecution does not want to call. And all for what?
17 For the convenience of the Defence team.

18 Now, my learned friend has dressed it up in fancy clothing, but
19 stripped down, it boils down to that: The convenience of one team must
20 take preference over the convenience of the other party. And in doing
21 so, also allow the accused to be excused which will then be for - let me
22 calculate, 5, 6, 7, 8, 9 -- 10 days out of the first 12 days since the
23 Appeals Chamber has handed down its ruling that the accused may be
24 excused in exceptional circumstances and that it should not be the rule.

25 PRESIDING JUDGE EBOE-OSUJI: The operative concept is exceptional
26

1 circumstances, not counting days and subtracting them from another
2 number, isn't it, exception circumstances.

3 MR STEYNBERG: Your Honours, the -- the concepts are inextricably
4 linked. And if I look at the -- the first of the six considerations that
5 the Appeals Chamber sets out, I'll quote from paragraph 62:

6 "The absence of the accused cannot -- can only take place in
7 exceptional circumstances and must not become the rule."

8 And the only way to determine whether it's the rule or the
9 exception is to look at the -- is to look at the time-period for which
10 he's been excused and the time-period for which he attends, in my
11 submission. These things are cumulative.

12 But leaving that aside --

13 PRESIDING JUDGE EBOE-OSUJI: Was the Appeals Chamber not dealing
14 with their criticism of the second part of the original Ruto relief
15 granted by the Trial Chamber, where the Trial Chamber said yes -- or by
16 majority, yes, there is discretion; and then secondly, the conditions for
17 the exercise of that discretion which the Appeals Chamber criticised as
18 essentially granting a carte blanche to the accused to stay away for the
19 trial, more or less.

20 MR STEYNBERG: Your Honour, the --

21 PRESIDING JUDGE EBOE-OSUJI: Isn't that what the Appeals Chamber
22 was talking about there?

23 MR STEYNBERG: The Appeals Chamber was certainly dealing with its
24 consideration of the correctness of the discretion as exercised by the
25 Chamber in its decision, but I'd submit that it cannot be boxed so

26

1 narrowly as to avoid the plain meaning of the -- of the test which is
2 Appeals Chamber has -- has laid down. And taking it by way of analogy,
3 if, for example, this trial were to sit for another seven months, and of
4 that time at the end of the trial we calculate that the accused was only
5 here for a week, then would that not be the rule that he was excused
6 rather than the exception. I submit that there is no escaping that
7 logic.

8 But, your Honours, my submission is that we don't even need to
9 get into that debate at this stage. I do not concede necessarily that
10 the conditions themselves are exceptional. I've already argued that the
11 ordinary duties of the president require him to travel and this is not
12 something which, in my view, would be exceptional, but we don't need to
13 even get there. Because in my respectful submission, my learned friend's
14 application must fail on the second leg, which is the one that we've been
15 discussing, that is that of alternative measures.

16 The Prosecution has suggested the date of the 20th. It now
17 appears that my -- that the accused will, in fact, will be available from
18 the 21st. We are arguing about one day. And, in my submission, the
19 clear solution to this is simply that we agree now that we start on the
20 21st and the accused -- the Chamber need not engage itself in this
21 decision any further.

22 (The Trial Chamber confers)

23 MR HOOPER: Can I just add one thing and that is that my friend
24 may -- I may be astray and my friend may be astray in saying ...

25 I just wanted to say that if the summit -- well, the summit takes
26

1 place on the 19th and the 20th in Kuwait, and I would have thought that
2 the president would remain in Kuwait for the night of the 20th, getting
3 back to Kenya on the 21st, and unlikely to release the deputy president
4 for the night flight on the 20th. It's more likely he'd be making his
5 way on the 21st. And I noticed last time, in fact, as I recall, that we
6 expected Mr Ruto to arrive during a day flight because he -- he was able
7 to, he got the night flight. So he's not someone who -- who knows --
8 he's not lingering, if I can put it like that, at all. But it's very
9 probable in those circumstances that if he's to come, he won't be here
10 until the 22nd, if permitted to do so.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, that's a new argument?

12 MR STEYNBERG: It is a new argument and it's based only on
13 supposition, your Honours. It would appear to me to be that if the
14 summit finishes on the 21st, I would be surprised -- on the 20th, I would
15 be very surprised if there weren't regular flights between a regional hub
16 like Nairobi and - where was it? - Kuwait that would not allow the
17 president to return on that date.

18 Your Honours, I don't think it would be unreasonable to expect
19 some degree of flexibility to allow Mr Ruto to make it back here on the
20 20th.

21 PRESIDING JUDGE EBOE-OSUJI: Flexibility on the part of who?

22 MR STEYNBERG: On the part of himself and his colleague,
23 Mr Kenyatta.

24 PRESIDING JUDGE EBOE-OSUJI: Oh. Not the part of the Court.

25 MR STEYNBERG: Your Honour, I think the Court has shown a

1 remarkable degree of flexibility already, but there are limits. But, of
2 course, the other solution is -- is we can start on the 22nd. That would
3 be the -- the fallback position.

4 PRESIDING JUDGE EBOE-OSUJI: All right. We will adjourn for five
5 minutes and come back. Not so fast, I've forgotten Mr Narantsetseg.

6 We got used to be being gracious and --

7 MR NARANTSETSEG: Thank you, your Honour. I don't get to speak
8 much but on these issues we have to make our submission. Thank you.

9 Mr President, your Honours, we victims would again oppose
10 Mr Ruto's --

11 PRESIDING JUDGE EBOE-OSUJI: Mr Narantsetseg, let me make it
12 simple for you. You support the Prosecution's position, isn't that the
13 case, on the excusal application?

14 MR NARANTSETSEG: Yes, we do, but we would also like to make one
15 point quite clear on the perspective of victims.

16 PRESIDING JUDGE EBOE-OSUJI: Okay. Make that one point, please.

17 MR NARANTSETSEG: Okay. As your Honour requested, our submission
18 on the two points that I had prepared, but just to save time, let me just
19 go to the point. We are still in private session, no?

20 PRESIDING JUDGE EBOE-OSUJI: Yes. No, we're in open session.

21 MR NARANTSETSEG: Can I ask for private session because this was
22 the last point I was going to make.

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

24 (Private session at 12.27 p.m.)

25 THE COURT OFFICER: (Interpretation) We are in private session,
26

1 Mr President.

2 MR NARANTSETSEG: Your Honour, the last requirement set out by
3 the Appeals Chamber is the requirement that the decision as to whether
4 the accused may be excused from attending part of his trial must be taken
5 on a case-by-case basis with due regard to the subject matter of the
6 specific hearing that the accused wouldn't attend during the period for
7 which the excusal has been granted.

8 Your Honour, I understand that the scheduling of the witnesses,
9 the order of the witness -- witness, these issues haven't been settled --
10 settled yet. I wasn't privy to discussion between Mr Steynberg and
11 Mr Hooper about the other witnesses, but as Mr Steynberg has indicated
12 during the previous occasion and also today, that the appearance of the
13 two witnesses currently proposed are not final and not guaranteed. (Redacted)
14 (Redacted)
15 (Redacted). And as an alternative, the Prosecution did propose
16 calling Witness P128 and P409 who are both dual-status witnesses, your
17 Honour.

18 And I would submit that whether the accused should be excused or
19 remain in the courtroom at certain states of the trial is an important
20 matter for hundreds of victims who are following these proceedings in
21 Kenya and also especially when they come to testify. For sake of
22 expeditiousness, I wouldn't make full substantive submissions on the
23 party. But let me simply quote this small part of the Appeals Chamber
24 judgement issued on 25th of October. In paragraph 49, the Appeals
25 Chamber says that:

26

1 "Furthermore, the continuous presence of an accused from his or
2 her own trial would have a detrimental impact on the morale and the
3 participation of the victims and witnesses. More broadly, the presence
4 of the accused during the trial plays an important role in promoting
5 public --"

6 THE INTERPRETER: Mr President, could counsel be advised to slow
7 down for the interpreters.

8 MR NARANTSETSEG: I'm sorry. I apologise to the interpreters.
9 In footnote 92, the Appeals Chamber cited a judgement from the European
10 Court of Human Rights, which stated that:

11 "It's of capital importance that a defendant should appear, both
12 because of his right to a hearing and because of the need to verify the
13 accuracy of his statements and compare them with those of the victims
14 whose interests need to be protected and of witnesses."

15 And lastly, your Honours, in their separate opinion, Judge
16 Kourula and Judge Usacka also insisted that -- paragraph 8, I'm quoting:

17 "In interpreting Article 63, paragraph 1 of the Statute it seems
18 indisputable that the establishment of the presence of the accused as a
19 requirement is consistent with gravitas of proceedings and important from
20 the aspect of the victims of alleged crimes and the international
21 community as a whole."

22 (Redacted)

23 (Redacted) Witness 128

24 and also 409, we would insist that the presence of Mr Ruto is necessary,
25 simply put, your Honour. And in -- this concludes our submission, your

1 Honour. Thank you.

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

3 MR HOOPER: Can I just reassure my friend to this extent. My
4 understanding is that there is no question of either of those witnesses
5 being called in --

6 PRESIDING JUDGE EBOE-OSUJI: He made his --

7 MR HOOPER: Yes, I'm --

8 PRESIDING JUDGE EBOE-OSUJI: -- his submission conditional,
9 "should."

10 MR HOOPER: Yes, certainly. Thank you.

11 PRESIDING JUDGE EBOE-OSUJI: We will rise as indicated, five, ten
12 minutes, and then come back.

13 (Recess taken at 12.31 p.m.)

14 (Upon resuming in open session at 12.38 p.m.)

15 THE COURT USHER: All rise. Please be seated.

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

18 PRESIDING JUDGE EBOE-OSUJI: The Chamber issues its ruling. We
19 will be brief. Our decision is that we will resume again on the 21st of
20 November in hopes of completing the two witnesses to be called by the
21 29th, that's completing their testimonies by the 29th of November. And
22 the two witnesses would be any two of the following: Witnesses 469, 535,
23 or the expert witness Professor Maupeu.

24 As for the excusal request, the Chamber will grant the excusal
25 for the 21st of November and the reasons will follow.

Witness: KEN-OTP-P-0423 (On former oath) (Closed Session)
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1 That completes our ruling on the matter.

2 MR STEYNBERG: As the Court pleases.

3 PRESIDING JUDGE EBOE-OSUJI: All right.

4 Court officer, is the witness on hand to be brought in? Yes,
5 please, can you bring down the blinds and invite the witness back on the
6 seat.

7 Yes, that's why -- if we can bring down the blinds and invite the
8 witness in.

9 Mr Faal, you promised to finish in 10, 15 minutes, so that gives
10 you 20 minutes.

11 (Closed session at 12.40 p.m.)

12 THE COURT OFFICER: (Interpretation) We are in closed session,
13 Mr President.

14 (The witness enters the courtroom)

15 PRESIDING JUDGE EBOE-OSUJI: Open session, right?

16 MR FAAL: Open session, Mr President.

17 PRESIDING JUDGE EBOE-OSUJI: All right. Let's go back to open
18 session.

19 (Open session at 12.42 p.m.)

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

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

23 Witness, welcome back. Mr Faal will continue his questions of
24 you.

25 MR FAAL:

Witness: KEN-OTP-P-0423 (On former oath) (Open Session)
Questioned by Mr Faal (Continuing)

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1 Q. Welcome back, Mr Witness. You told the Court that the Nandi
2 attackers were using small objects made of aluminium when they were
3 setting houses on fire. Do you recall that?

4 A. Yes.

5 Q. You also said that this item, this object enhanced the fire in
6 the -- in the houses, correct?

7 A. Yes.

8 Q. And that the young Nandi men would come later to retrieve those
9 objects. Do you recall that?

10 A. Yes.

11 Q. And you testified that you were of the mind that they did this
12 with a view to making sure that nobody would know what this little object
13 was. Do you recall that?

14 A. Yes.

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

26

Witness: KEN-OTP-P-0423 (On former oath) (Open Session)
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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted)

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 Q. Mr Witness, you know there was an investigation in Kenya by the
14 Waki Commission about what happened in the post-election violence. Do
15 you remember that?

16 A. I did not understand your question. Can you repeat it, please?

17 Q. Are you aware that there was an investigation about the
18 post-election violence in Kenya called the Waki Commission? Are you
19 aware of it?

20 A. Yes.

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 Q. Who did you tell?

25 A. If I understood your question correctly, there were people who

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
Questioned by Mr Faal (Continuing)

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1 came to the Showground after members of the population had taken refuge
2 there at the Showground. At that time I was in Yamumbi. I was told that
3 certain people had come to the Showground and were taking down the
4 statements of the victims. When I arrived there, I found that there were
5 many people there. I approached one of those people and I gave them my
6 statement. I cannot tell you which -- who that person was because they
7 did not identify themselves. They simply took down notes about the
8 testimonies, the statements being given to them, and then I returned to
9 Yamumbi.

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 Q. When you spoke to the Prosecution --

15 MR FAAL: One second, Mr President. Let me confer with my
16 colleagues.

17 Mr President, may I ask that we go into private session for two
18 minutes.

19 PRESIDING JUDGE EBOE-OSUJI: Private session, then.
20 (Private session at 12.53 p.m.)

21 THE COURT OFFICER: (Interpretation) We are in private session,
22 Mr President.

23 PRESIDING JUDGE EBOE-OSUJI: Please proceed.

24 MR FAAL: Mr President, the only reason why I asked for private
25 session is that my colleague, Ms Lawrie, had suggested that the
26

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
Questioned by Mr Faal (Continuing)

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1 Prosecution were indicating that this issue should be dealt with in
2 private session, but I do believe that it was dealt with in public
3 session by the Prosecution. It's, in fact, already in the news that the
4 witness talked about an explosive item being used to burn houses in
5 Yamumbi. That was the reason why I dealt with it in public session. But
6 if the Prosecution wants that this issue be dealt with in private
7 session, we -- we would be inclined to do so.

8 PRESIDING JUDGE EBOE-OSUJI: Okay. We get your point.

9 Ms Renton.

10 MS RENTON: Your Honours, it's not the use of the object. (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

26

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
Questioned by Mr Faal (Continuing)

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1 (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted)

5 (Redacted)

6 (Redacted)

7 (Redacted). Before I proceed

8 further on this point, could you kindly describe for us what this item

9 looks like? I know you did say it's like a bullet, but -- and it's made

10 of aluminium. What else can you tell us about this item?

11 A. Very well.

12 Q. Please go ahead.

13 A. It was a small object. A small object. Something that was not
14 handcrafted. It was something manufactured or produced using a machine.

15 This was not something that was made by hand like an arrow. It was a
16 sophisticated machine-made object. That is the description that I can
17 give you of that object.

18 Q. How big was it?

19 A. About 4 centimetres in length, and it was quite big -- a little
20 big.

21 Q. Was it just a shell or did it have any components inside it?

22 A. There were -- or, rather, there were -- there was something in
23 that object, but what I recovered was what remained of the object after
24 it had exploded. And after examining the object, I realised that certain
25 black items or things were inside the item but they were no longer
26

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
Questioned by Mr Faal (Continuing)

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1 there -- had been inside the item but were no longer there. I have
2 already said that it looked like a bullet. It was like something that
3 had been consumed by fire, and there were smoke marks left on the object,
4 so one end of the object was open.

5 MR FAAL: Mr President, just to correct the transcript, I
6 understand from my colleagues who speak Kiswahili that the witness said
7 "4 inches" and not "4 centimetres." Perhaps I should just clarify that
8 with the witness.

9 Q. Mr Witness, did you say "inches" or "centimetres" when you
10 said -- when you answered to my question about how big it was?

11 A. I say the following: I didn't measure the object. If I show you
12 this blue pen, this object -- well, it was about the same size. But this
13 object was quite wide, a bit wide. The width was like my glasses here.
14 It was light. It didn't weigh anything much. It was made up of
15 aluminium. It was covered in aluminium. You know aluminium? Well,
16 that's like a light material. It -- it's a light material. I saw when
17 this object was thrown into the house -- well, it was easy to fire this
18 object.

19 PRESIDING JUDGE EBOE-OSUJI: I think the witness held up a Bic
20 ball-point pen to demonstrate the length, and he said that the width
21 would be the size of his glasses, that would be around 1 inch,
22 approximately.

23 MR FAAL: I'll agree with that, Mr President.

24 Mr President, I still have a few more questions to ask. I would
25 need about five more minutes, and it's now 1.00, so I am in your Honour's
26

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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1 hands.

2 PRESIDING JUDGE EBOE-OSUJI: Yes. We will take our lunch break.

3 Ms Renton, are you contemplating re-examination at this stage?

4 MS RENTON: Not at this stage, your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: All right.

6 Witness, we will take our lunch break and that also gives you
7 your own break as well, although you've been there for a short while but
8 I'm sure you need it. So we will come back. Why don't we say the usual
9 time.

10 MR FAAL: It is fine by me, Mr President.

11 MR STEYNBERG: Your Honour, may I --

12 MR FAAL: That would be 2.30, isn't it? Or 2.00?

13 PRESIDING JUDGE EBOE-OSUJI: What I meant by usual time would be
14 2.30. Can we do that --

15 MR FAAL: Mr President, if I am even given five minutes I can
16 really wrap it up.

17 PRESIDING JUDGE EBOE-OSUJI: Yes. All right, the court officer
18 will consult, see the possibility while I also consult with my
19 colleagues.

20 (The Trial Chamber confers)

21 PRESIDING JUDGE EBOE-OSUJI: Prosecution, do you have any
22 difficulty with that while the court officer are checking logistics,
23 tapes and all?

24 MS RENTON: No problem, your Honour.

25 PRESIDING JUDGE EBOE-OSUJI: All right. So we can just see if we
26

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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1 can sit through and get it over once and for all.

2 MR KIGEN-KATWA: We have no objection on our part. We would
3 really wish that we finish this session.

4 PRESIDING JUDGE EBOE-OSUJI: So it looks like we're fine with the
5 tape and everybody else. So we will then proceed, Mr Faal.

6 MR FAAL: Thank you very much.

7 PRESIDING JUDGE EBOE-OSUJI: Witness, we are not taking the break
8 I was talking about. Mr Faal may have only a short while, so if he
9 finishes in that time, we will be done completely with you then. So
10 we'll just sit there for a little while. Thank you.

11 MR FAAL:

12 Q. Mr Witness, I know that when you spoke to the Prosecution you --

13 PRESIDING JUDGE EBOE-OSUJI: All right. Proceed with your
14 question.

15 MR FAAL:

16 (Redacted)

17 (Redacted)

18 (Redacted)

19 (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 (Redacted)

26

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Questioned by Mr Faal (Continuing)

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1 (Redacted)
2 (Redacted)
3 (Redacted)
4 (Redacted)
5 (Redacted)
6 (Redacted)
7 (Redacted)
8 (Redacted)
9 (Redacted)
10 (Redacted)
11 (Redacted)
12 (Redacted)
13 (Redacted)

14 A. I would ask you to explain to me to tell me what place? Because
15 you've just given me a date, so to help me remember.

16 PRESIDING JUDGE EBOE-OSUJI: Counsel, why don't you put the
17 particulars of the meeting to the witness, and instead of asking him the
18 question, you can just put the proposition in a more direct way.

19 MR FAAL: The difficulty with that, Mr President, we do not have
20 the location because it's redacted, but I would provide the names of
21 people he spoke to. Maybe that would help jog his memory.

22 Q. Mr Witness, do you remember speaking to a person from the
23 Prosecution called (Redacted). Do you remember
24 that?

25 A. Yes.

26

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
Questioned by Mr Faal (Continuing)

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1 Q. And when you spoke to them, they recorded the information you
2 heard about the post-election violence, correct?

3 A. (No interpretation).

4 Q. And when you spoke to them at that time, you never mentioned
5 William Ruto, Mr William Ruto having been in any meeting; is that right?

6 A. I think that I answered the question that was put to me. Even if
7 I didn't mention a name, I think that I answered the question that was
8 put to me.

9 MR FAAL: (Previous translation continues)... Mr President.

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

11 Ms Renton.

12 MS RENTON: No re-examination, your Honours.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 Witness, we've now -- let's first of all go back in public
15 session.

16 MR FAAL: Mr President, while we move out of private session, I'd
17 just ask that the one document that was showed to the witness, the
18 photograph of a person, be marked for identification.

19 PRESIDING JUDGE EBOE-OSUJI: Any objection?

20 MS RENTON: No objection.

21 PRESIDING JUDGE EBOE-OSUJI: That will be done.

22 Mr Koech, any observations?

23 MR KOECH: No objection, your Honour.

24 PRESIDING JUDGE EBOE-OSUJI: We will accept the photo, mark it
25 for identification.

Witness: KEN-OTP-P-0423 (On former oath) (Private Session)
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1 Mr Koech, before I formally close the questioning, I take it you
2 do not have any questions?

3 MR KOECH: Certainly, your Honour.

4 PRESIDING JUDGE EBOE-OSUJI: Thanks.

5 MR KOECH: No questions at all.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you.

7 (Open session at 1.14 p.m.)

8 THE COURT OFFICER: (Interpretation) We're in open session, your
9 Honour. The document KEN-D09-0025-0016, confidential, will be given the
10 number MFI-T-D09-00092.

11 PRESIDING JUDGE EBOE-OSUJI: Thank you.

12 Witness, we now have come to the end of your questions and
13 your -- end of your testimony in court. The Prosecutor has finished
14 asking you questions, so has the lawyer for Mr Ruto. The lawyers for
15 Mr Sang did not have any questions to ask you. Thank you very much for
16 coming to assist us. We know you travelled from a long distance to come
17 in order to help us to understand what happened in 2007. It is a
18 difficult exercise for a lot of witnesses to come and sit and answer
19 questions from lawyers. Sometimes questions that seem very obvious to
20 them, to the witnesses, and sometimes questions that are repetitive, but
21 we appreciate the fact -- we appreciate the fact that you were able to
22 come and sit through those questions until the end. Thank you very much,
23 and good luck on your travel back.

24 THE WITNESS: (Interpretation) Thank you.

25 PRESIDING JUDGE EBOE-OSUJI: The blinds (* Overlapping speakers)

Witness: KEN-OTP-P-0423 (On former oath) (Closed Session)
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1 ... and the witness will be escorted from the courtroom.

2 (Closed session at 1.17 p.m.)

3 THE COURT OFFICER: (Interpretation) We're in closed session,
4 your Honour.

5 PRESIDING JUDGE EBOE-OSUJI: Thank you.

6 Please release the witness from the stand.

7 (The witness is excused)

8 PRESIDING JUDGE EBOE-OSUJI: And that concludes our sitting for
9 the week. We will reconvene on the 21st. The Court will rise.

10 The hearing ends in open session at 1.17 p.m.

11 RECLASSIFICATION REPORT

12 Pursuant Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September
13 2013, and the email's instructions dated 17th January 2014, the version of the
14 transcript with its redactions becomes Public.