

Trial Hearing  
Witness: KEN-OTP-P-0800

(Open Session)

ICC-01/09-01/11

1 International Criminal Court  
2 Trial Chamber V(a) - Courtroom 1  
3 Situation: Republic of Kenya  
4 In the case of The Prosecutor v. William Samoei Ruto and Joshua Arap Sang  
5 - ICC-01/09-01/11  
6 Presiding Judge Chile Eboe-Osuji, Judge Olga Herrera-Carbuccia  
7 and Judge Robert Fremr  
8 Trial Hearing  
9 Wednesday, 26 November 2014  
10 (The hearing starts in open session at 9.40 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, the case.  
16 THE COURT OFFICER: Good morning.  
17 Yes, Mr President. Situation in the Republic of Kenya, in the case of The Prosecutor  
18 versus William Samoei Ruto and Joshua Arap Sang, case reference ICC-01/09-01/11.  
19 And for the record we are in open session.  
20 PRESIDING JUDGE EBOE-OSUJI: Thank you.  
21 Appearances?  
22 MR STEYNBERG: Good morning, your Honours. For the Prosecution one change  
23 this morning, Alice Zago replaces Regina Weiss for today.  
24 MR NARANTSETSEG: Good morning, your Honours. For the victims,  
25 Orchlou Narantsetseg, James Mawira and Charlotte Devinat. Thank you.

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1 MR (Redacted): Good morning, your Honours. (Redacted) for the witness.

2 Thank you.

3 MR KIGEN-KATWA: Good morning, your Honours. Mr Sang continues to be  
4 present and his team remains the same. Thank you.

5 MS ALAGENDRA: Good morning, Mr President, your Honours. For the Ruto  
6 Defence team we remain the same.

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

8 And, Witness, welcome back to you. Mr Kigen-Katwa will now start asking you  
9 questions in cross-examination on behalf of Mr Sang.

10 Mr Kigen-Katwa.

11 Before he rises, Ms Alagenda, I see you are on your feet.

12 MS ALAGENDRA: Indeed, your Honour. Just one short matter. During my  
13 cross-examination I had made reference to a particular (Redacted) analysis report and  
14 I think your Honours wanted to know what was that report, and for the sake of  
15 completeness and for your Honours' understanding, I have handed a copy of the  
16 report to the court officer so that your Honours will -- will have a copy and you can  
17 see what the report was that I was referring to and this is with the agreement of my  
18 learned friend.

19 PRESIDING JUDGE EBOE-OSUJI: If it is with the agreement of your learned friend,  
20 that's something else, but I don't recall that we said we wanted to know what it was  
21 about. Did we say that?

22 MS ALAGENDRA: It was my understanding, your Honour, I think the Court  
23 wanted to know what was this report and whether or not we had a copy and if we  
24 could provide it to your Honours.

25 MR STEYNBERG: My recollection, your Honours, is you asked Ms Alagenda if

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1 there was a copy of this in the bundle and she said no but offered to provide one and  
2 I think your Honours accepted that.

3 Your Honours, if I can help, I do intend to refer to this in re-examination in any event  
4 so it would be just as well if your Honours had a copy.

5 PRESIDING JUDGE EBOE-OSUJI: All right.

6 Both parties have an interest in having this document in, so that's something else.

7 The reason I say that I do not particularly recall that we were interested in it as such,  
8 as opposed to if you made reference to it whether we had it. So that's something else.

9 Thank you. But if both parties want it in, so it comes in.

10 MS ALAGENDRA: Thank you, your Honours.

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

12 WITNESS: KEN-OTP-P-0800 (On former oath)

13 THE WITNESS: Good morning.

14 PRESIDING JUDGE EBOE-OSUJI: Before you start, you were still talking about two  
15 sessions you say?

16 MR KIGEN-KATWA: Yes, that's my intention, Mr President.

17 PRESIDING JUDGE EBOE-OSUJI: That is your intention. Can we also try and deal  
18 with the documents at the point. We started with a certain expediency in the past  
19 and it's beginning to turn into a general rule. We don't want that. You know what  
20 I mean, the expediency of having to put in the documents afterwards through writing.  
21 That's not what we want to see as the practice. When there is necessity for that for  
22 any reason we can entertain it, but it's preferable to process the documents at the time  
23 of reference to them, the exhibits I mean.

24 Thank you.

25 MR KIGEN-KATWA: Thank you, Mr President. Mr President, I would request to

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1 go into a private session for about seven minutes.

2 PRESIDING JUDGE EBOE-OSUJI: A private session then.

3 \*(Private session at 9.45 a.m.) Reclassified as Open session

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

5 QUESTIONED BY MR KIGEN-KATWA:

6 Q. Now, Mr Witness, I would like to start with putting on record your identity in  
7 terms of your -- what you used to do and basically they are rhetorical questions.

8 The first one is that you confirm that you -- or, rather, you would agree with me that  
9 you are a (Redacted), isn't it?

10 A. Yes.

11 Q. In your CV you also said that you are a (Redacted) and went on to say that you  
12 used to (Redacted)

13 (Redacted), isn't it?

14 A. Repeat that question.

15 Q. In your screening notes, you said specifically that apart from (Redacted)

16 (Redacted)

17 (Redacted), isn't it?

18 A. Yes, (Redacted)

19 (Redacted)

20 (Redacted)

21 Q. Thank you, Mr Witness. It's really not contentious, so I would just request that  
22 you just answer my questions so that we can spend more time, but let me put on  
23 record the words used exactly in describing that issue.

24 And, your Honours, I have reference to tab 8 of our bundle and the document

25 reference is KEN-OTP-0086-0136 being screening notes of 8 October 2012.

1 And this is the way the investigator summarised his understanding of what you  
2 explained. This is what you said, (Redacted)  
3 (Redacted)

4 Do you recall that, Mr Witness?

5 A. Yes, that's just what I've explained.

6 Q. Mr Witness, you also describe yourself as being a (Redacted), isn't it?

7 A. Yes.

8 Q. And I presume in (Redacted), because I recall you said you used to  
9 attend (Redacted) with some people, isn't it?

10 A. Yes, I was -- I was -- I was a (Redacted)

11 (Redacted)

12 Q. Thank you, Mr Witness. You also said that you were a (Redacted) and you  
13 particularly (Redacted) at a certain point, isn't it?

14 A. Yes.

15 Q. You were also a (Redacted)

16 (Redacted), isn't it?

17 (Redacted)

18 (Redacted)

19 Q. Thank you, Mr Witness. My point in -- my point is really that you were (Redacted)  
20 (Redacted) isn't

21 it?

22 A. Yes.

23 Q. Mr Witness, you also confirm that you at a certain point were a (Redacted)  
24 (Redacted) in Kenya, isn't it?

25 A. Yes.

1 Q. Lastly you said that you are a (Redacted)

2 (Redacted), isn't it?

3 A. Yes, (Redacted).

4 Q. Now, Witness, you will also confirm that you understand Kalenjin, isn't it?

5 A. Yes.

6 Q. May I ask you, Witness, do you consider yourself Kalenjin (Redacted)

7 (Redacted)?

8 A. I've stated that (Redacted)

9 (Redacted)

10 (Redacted)

11 Q. When people ask you, Mr Witness, and I want to ask you also, (Redacted)

12 (Redacted)

13 A. When I am asked that question (Redacted).

14 Q. And so you generally hold yourself out as a Kalenjin, isn't it?

15 A. Yes.

16 MR KIGEN-KATWA: That is really my question. Thank you very much, Witness.

17 Mr President, at this point I am prepared to go to an open session.

18 PRESIDING JUDGE EBOE-OSUJI: Before we do, on this matter of (Redacted),

19 Witness, you said -- what appears here in this document, screening note is, quote,

20 (Redacted)

21 (Redacted) Unquote.

22 Now, there is nothing wrong with that, (Redacted).

23 (Redacted). I want you to not worry there. There may be any

24 suggestion not doing anything wrong with that, but what I am interested in is

25 whether it means the same thing as what you said earlier, that's (Redacted)

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1 (Redacted)

2 THE WITNESS: Yes, I explained when I was asked that at -- when I go -- when I got  
3 issues that (Redacted)

4 (Redacted)

5 (Redacted)

6 PRESIDING JUDGE EBOE-OSUJI: What I'm interested in is the matter of (Redacted)

7 (Redacted)" quote and unquote. Did you (Redacted) or

8 not?

9 THE WITNESS: Yes, (Redacted).

10 PRESIDING JUDGE EBOE-OSUJI: Thank you.

11 Please proceed.

12 MR KIGEN-KATWA: May I confirm, Mr President, that that is a matter of great  
13 interest to us, the distinction between (Redacted)

14 and that's why I asked the question. Thank you.

15 PRESIDING JUDGE EBOE-OSUJI: Proceed, please.

16 Open session now you say?

17 MR KIGEN-KATWA: Yes, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: We go to open session.

19 (Open session at 9.53 a.m.)

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

21 PRESIDING JUDGE EBOE-OSUJI: Thank you.

22 MR KIGEN-KATWA:

23 Q. Now, Mr Witness, we went through a series of issues that we would want to  
24 exercise caution not to discuss with the result of identifying you. I will -- all my  
25 questions, however, will be based on your knowledge on all those identities.

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1 Now, related to that, could you confirm that in view of all these roles you used to  
2 play you -- it of necessity required you to read Kenyan newspapers?

3 A. Yes.

4 Q. Could you confirm also that of necessity it required you to listen to the radio?

5 A. Yes.

6 Q. May I enquire were you listening to Kass FM radio only, or many other radio  
7 stations?

8 A. It depended on the programmes that I wanted to listen.

9 Q. Thank you, Witness. So my understanding is that you used to listen to other  
10 stations, isn't it?

11 A. Yes.

12 Q. You also used to watch TV and you were familiar with political events in Kenya,  
13 isn't it?

14 A. I used to watch TV.

15 Q. Now, Mr Witness, in your statement to the Prosecution,  
16 particularly -- particularly paragraph 53, you have very specifically and boldly said  
17 that Kass FM radio station belonged to one Mr Joshua Kule. Do you recall having  
18 said that, Mr Witness?

19 A. Yes, I said according to my understanding I thought it belonged to Joshua Kule.

20 Q. And you maintain the same position, isn't it, Mr Witness?

21 A. Yes, according to my understanding I believe that it belongs to Joshua -- Joshua  
22 Kule. That is according to what I think Kass FM.

23 MR KIGEN-KATWA: Thank you, Mr Witness. Your Honours, the statement is  
24 reference KEN-OTP-0082-0187 at page 0197.

25 PRESIDING JUDGE EBOE-OSUJI: Now, you remember my first advisory to you,

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1 Mr Kigen-Katwa, that we deal with documents as we treat them. You've so far dealt  
2 with the screening note. Do you want to leave it at that? I want to avoid, as I said  
3 earlier, this offside agreements between counsel to tender documents we dealt with in  
4 court.

5 MR KIGEN-KATWA: May I apologise, Mr President. I had intended to be very  
6 diligent about it. I would like to produce it. Sorry about having missed out. I  
7 intend still to refer to it, but may I request that it be produced as Mr Sang's next  
8 document in evidence?

9 PRESIDING JUDGE EBOE-OSUJI: Any objection, Prosecutor?

10 MR STEYNBERG: Your Honours, well, I observe that it was not this witness who  
11 created the document. He has not signed it, but he has identified and confirmed  
12 some of the contents so on that basis we do not object.

13 PRESIDING JUDGE EBOE-OSUJI: Ms Alagendra?

14 MS ALAGENDRA: Your Honours, our position is that the reference, the portion of  
15 the document which my learned friend is referring to, has been read into the record  
16 and that should be sufficient.

17 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa wants to tender it and the  
18 Prosecutor doesn't object. The document will be marked as the next in the Sang  
19 exhibit.

20 MR KIGEN-KATWA: Mr President, could I come back to it when I'm making  
21 further reference to the document because I still intend to make reference to it?

22 PRESIDING JUDGE EBOE-OSUJI: Well, let's put it in now.

23 THE COURT OFFICER: Mr President, the document reference as

24 KEN-OTP-0086-0136\_R03 will be attributed reference EVD-T-D11-00056 and it's a  
25 confidential document.

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1 PRESIDING JUDGE EBOE-OSUJI: Thank you.

2 MR KIGEN-KATWA:

3 Q. Now, Mr Witness, how frequently were you listening to Kass radio, Kass FM?

4 A. I've said it depended on the programmes that I wanted to listen to and --

5 Q. Witness, may I ask you the question: Were you listening to it on daily basis,  
6 for instance?

7 A. Not daily.

8 Q. How frequently in a week could you say you used to listen to it, even if it's not  
9 very accurate? On average how many times in a week?

10 A. I can say frequently.

11 Q. That would be every once in two days, or every once in three days?

12 A. Maybe once a day, or twice.

13 Q. And may I ask you the time range? Would you say you used to listen to it  
14 from the year 2005?

15 A. Yes, probably there.

16 Q. And would you put your listening to it as far as the year 2012?

17 A. Even 2014 before I came here.

18 Q. Thank you very much, Mr Witness. Now, in your screening notes you said  
19 you used to listen to Mr Sang's programme. Could I confirm if it was the only  
20 programme you are listening to, or you used to listen to any other programmes in  
21 Kass FM?

22 A. I used to listen to news, I used to listen to Heshimu Ukuta. I used to listen to  
23 music in which camps I'd -- along the day, and it was not only about the Sang's  
24 programme.

25 MR KIGEN-KATWA: Mr President, the spelling of Heshimu Ukuta is

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1 H-E-S-H-I-M-U and Ukuta is U-K-U-T-A.

2 Q. Isn't it, Mr Witness?

3 A. Yes.

4 Q. Now, Mr Witness, over that period, could you tell us apart from Mr Sang if you  
5 know any other broadcasters?

6 A. I don't recall their names.

7 Q. Okay, Mr Witness. May I ask you -- could you tell the Court what were the  
8 timings -- how frequently was Kass FM broadcasted? At what days of the week was  
9 it broadcast?

10 A. Repeat the question.

11 Q. Kass -- Lene Emet programme, Lene Emet programme --

12 A. Yes.

13 Q. -- it used to run on what days of the week?

14 A. Most days of the week we had Lene Emet early in the morning.

15 Q. Was it from Monday to Monday or on -- the question is really whether it was on  
16 Mondays, or Tuesdays, or from Monday to Monday, or what kind -- or weekends?  
17 What days of the week?

18 A. Personally I used to listen to it in the mornings before as I was preparing to  
19 move -- to move out. So mostly I listened to it early mornings when I was preparing  
20 to get out to job. That -- I will say me, personally, I used to listen to it  
21 during -- during the week from Monday to Friday and sometimes when I -- when I  
22 woke up early during the weekends, but mostly it was during the weekdays.

23 Q. So it is your testimony, let me just be sure I understand you, that most of the  
24 times you would catch it in the morning on weekdays, but from time to time you  
25 would stumble on it over the weekends; is that what you're saying?

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1 A. Yes.

2 Q. Now, you made some effort to explain that it was in the morning. Could you  
3 give us the time? What was the period in the morning that it used to run?

4 A. I -- I got it before 8.30 in the morning. Before 8.30, or -- so it could start maybe  
5 earlier than that.

6 Q. Am I to understand that you don't know the time when it used to run from  
7 what -- exactly what time it started up to what time it would end?

8 A. I don't recall the exact time that it started.

9 Q. Now, Mr Witness, you already testified that Mr Sang used to host the  
10 programme, isn't it?

11 A. Yes, he was the one who was hosting the programme.

12 Q. Now, my question is: Was he the only one hosting, or did you encounter a  
13 situation where he was hosting with somebody else?

14 A. In most cases it was him.

15 Q. Thank you. I understand you said "most cases", but are there occasions when  
16 you heard him host it with anybody else?

17 A. No.

18 Q. On the other hand, do you recall he -- the programme having been hosted by  
19 somebody else other than Mr Sang?

20 A. I don't.

21 Q. And these observations you're making is your experience of the period 2005 to  
22 2014 as you said being the period you used to listen to Kass FM, isn't it?

23 A. Lene Emet used to have a lot of listeners --

24 Q. Mister --

25 A. -- when Mr Sang was in studio.

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1 Q. Mr Witness --

2 A. So after that it is not quite famous. So I used to listen to Lene Emet when  
3 Mr Sang was in the studio.

4 Q. And what you're saying is that you never heard anybody else host the  
5 programme and you never heard Mr Sang host the programme with anybody else  
6 over the period of the year 2005 to the year 2014, isn't it?

7 A. In person I did not.

8 Q. Did you -- do you recall any programme you heard Mr Sang host in the year  
9 2013?

10 A. No.

11 Q. 2014?

12 A. No.

13 Q. 2012?

14 A. Apart from Lene Emet, that was catching my mind so much, I don't recall any  
15 other programmes.

16 Q. No, my question is specifically did you hear Mr Sang host any programme in  
17 the year 2012?

18 A. I don't remember.

19 Q. Now, Mr Witness, you said that you used to monitor Mr Sang's programme,  
20 didn't you? You recall having told the Prosecution that?

21 A. (No audible response)

22 MR KIGEN-KATWA: Your Honours, I have reference to the screening notes  
23 KEN-OTP-0086-0138 -- sorry, 0136 at page 0138.

24 Q. And, Mr Witness, I will read the words you used.

25 PRESIDING JUDGE EBOE-OSUJI: Where is -- what tab, please?

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1 MR KIGEN-KATWA: I apologise, Mr President. It is tab 8.

2 PRESIDING JUDGE EBOE-OSUJI: The same as the last one?

3 MR KIGEN-KATWA: Yes, Mr President.

4 Q. Mr Witness, this is what the investigator recorded as you having explained to  
5 him. Third --

6 A. Sorry. Sorry, let us wait to see it on the screen.

7 Q. I don't want you to see it, Mr Witness. I just want to read it and then you will  
8 confirm to us.

9 Now, this is what he says you said: "December 26, 2007: The Molo Line buses  
10 perceived to be owned by Kikuyus, due to their name ... were attacked ..." And then  
11 you go on the say, "Prior to this ..." -- Mr President, I will ask to go to private session.

12 PRESIDING JUDGE EBOE-OSUJI: Private session.

13 \*(Private session at 10.09 a.m.) Reclassified as Open session

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

15 THE WITNESS: Your Honour, I -- I request to look at what is being read to me  
16 because it is -- if it -- if I'm being told about things I said and they're on record, why  
17 should I not look at it?

18 PRESIDING JUDGE EBOE-OSUJI: That is generally the case, but there may be from  
19 time to time when counsel may want for a certain reason not for that to happen and  
20 the Court will give some allowance and then see where it goes to see whether you are  
21 being treated fairly in the circumstances.

22 Proceed. Where are you looking at?

23 MR KIGEN-KATWA: Mr President, I am looking at page 3, which is page 0138, the  
24 second paragraph, Mr President, starting with the date 26 December 2007.

25 Q. Witness, this is -- I just want to know whether you have any recollection of what

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1 you told the investigator, so that should explain why I'm not giving you the  
2 document.

3 Now, this is what the investigator says very specifically in reference to what I am  
4 interested in: "Prior to this, (Redacted) was monitoring Joshua Sang ... broadcasting  
5 his Kass FM Lene Emet show, for Kalenjins to use their own ..." -- "... to use their own  
6 companies, buses and hotels because the Kikuyus are taking over ... resources."

7 Mr Witness, do you remember having told the Prosecution that?

8 A. Yes, I remember.

9 Q. Now, at page 4, page 0139, paragraph -- paragraph 5 - bullet number 8,  
10 Mr President and your Honours - this is what you said: "When (Redacted),  
11 (Redacted) he continued to monitor Sang's show."

12 PRESIDING JUDGE EBOE-OSUJI: Now, Mr Kigen-Katwa, as I said, you were given  
13 some leeway the last time to do it. It seemed to me that all you did was read what  
14 was on the text. Why shouldn't the witness see that, or -- if that is the exercise you  
15 intend to pursue? It is of course one thing if a lawyer wants to, for legitimate  
16 purposes, test the memory of the witness on the stand, they are entitled to do that, but  
17 if the lawyer is reading out something already to the witness, what is wrong with the  
18 witness seeing the text that the lawyer is reading out in the first place?

19 MR KIGEN-KATWA: Mr President, my interest in these two paragraphs is limited  
20 to the use of the word "monitor" Mr Sang's programme. That's all I'm interested in  
21 and I just wanted to ask the witness if he has a recollection having made  
22 representations that he listened -- he monitored Mr Sang's programme. That's all I'm  
23 interested in.

24 PRESIDING JUDGE EBOE-OSUJI: But if you are going to put it in the form of a  
25 leading question in that way, which you are entitled to do, why shouldn't the witness

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1 see where you are taking the words from?

2 MR KIGEN-KATWA: Mr President, I can move on from -- from that point. I could  
3 ask him the questions that I intended to ask him from that point.

4 PRESIDING JUDGE EBOE-OSUJI: Remember I'm not stopping you from doing this.  
5 All I'm saying is that it seems to me that the witness should be able to see it if that is  
6 the approach you're taking. If you had wanted him to try and come up with the  
7 words he was using on his own, that's something else, but that's not what you're  
8 doing. Do you understand?

9 MR KIGEN-KATWA: Yes, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: So what do you want to do? You want to move  
11 on, you say?

12 MR KIGEN-KATWA: Yes, Mr President.

13 PRESIDING JUDGE EBOE-OSUJI: All right then. Let's move on.

14 MR KIGEN-KATWA:

15 Q. Now, Mr Witness, it is your position that you are actually monitoring Mr Sang's  
16 programmes in the year 2005, 2009 up to 2012 when you met the Prosecution, isn't it?

17 A. Yes, Sang's programme was very famous that when he spoke, the whole day  
18 of -- most day -- most time of the day people will continue talking about what was  
19 spoken about in the programme Lene Emet.

20 Q. Now, Mr Witness, the business of monitoring the programme, was it your own  
21 initiative, or were you asked by anybody to do the monitoring?

22 A. I was not asked by -- by anyone, but everyone when -- most Kalenjins when it  
23 comes to Lene Emet everyone will -- will go to listen to that programme and influence  
24 that Lene Emet had through Mr Sang was so great that made most of the Kalenjins to  
25 listen to the programme.

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1 Q. Thank you, Mr Witness. Now, could I ask you did you give the Prosecution an  
2 audio of any of the programmes you heard Mr Sang present?

3 A. No, because I was not recording.

4 Q. Okay, Mr Witness. We also have received the disclosure from the Prosecution  
5 and am I right to say that you did not give the Prosecution any notes you wrote  
6 pursuant to your monitoring Mr Sang's programme?

7 A. I didn't understand your question.

8 Q. My question is in the course of monitoring you made some observations which  
9 culminated in your statement to the Prosecution as against Mr Sang, isn't it?

10 A. I didn't get you, please.

11 Q. Did you write any notes on what Mr Sang was broadcasting, Mr Witness?

12 A. Notes? No.

13 MR KIGEN-KATWA: Mr President, I would request that we go back to the open  
14 session.

15 PRESIDING JUDGE EBOE-OSUJI: Open session.

16 (Open session at 10.17 a.m.)

17 PRESIDING JUDGE EBOE-OSUJI: Here is a note to remind everyone of the  
18 five-seconds rule.

19 Witness, again five seconds. Remember the pauses. Thank you.

20 THE COURT OFFICER: Thank you, Mr President. We are in open session.

21 MR KIGEN-KATWA:

22 Q. Now, Mr Witness, you confirm that you did not give Prosecution any audio you  
23 recorded about Mr Sang's programme because you didn't record and you did not give  
24 the Prosecution any notes because you did not write any notes.

25 May I ask you, Witness, are you in a position to tell this Court on a specific day in

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1 terms of the day, the month and the year when you listened to Mr Sang's programme  
2 from start to the end including the subject of discussion?

3 A. I remember in the year 2006 when he mentioned the name of person number 1  
4 and person number 6. I also remember in 2007, when he was talking about Molo  
5 Line and 2NK buses having ferried ballot papers to Eldoret and other parts of the  
6 country.

7 Q. Okay. Thank you, Mr Witness. We will come to those two. I think you  
8 already testified on those two. Now --

9 PRESIDING JUDGE EBOE-OSUJI: Perhaps the record should reflect that the witness  
10 had to think about it. Not that there was anything inordinate about him thinking  
11 about it. It wasn't extraordinary. The reason I note it is that on the transcript you  
12 will see a flow. That may not be accurate to what transpired in the courtroom, but  
13 that's enough. Again, that's not to say at all that the hesitation was inordinate at all.  
14 Thank you.

15 MR KIGEN-KATWA:

16 Q. Now, Mr Witness, it is your testimony generally against Mr Sang that he was  
17 using language that was inciteful against the Kikuyus and I'm quoting you. You  
18 used the words "inciteful information against Kikuyus." That's your testimony, isn't  
19 it?

20 A. Yes.

21 Q. And to substantiate that you said you recall he used two proverbs. One is in  
22 reference to milk and the other one is in reference to rats and the third one is in  
23 reference to a song you said he used to play, isn't it?

24 A. Yes.

25 Q. Now, just for the record again, what did you say he used in terms of a reference

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1 to milk?

2 A. (Pause) People of milk he used to mean the Kalenjin and, therefore, people  
3 who were in -- in Rift Valley were the people of milk.

4 Q. Could you, just for the record, say exactly how he said it? Did he say it in  
5 English?

6 A. No. In Kalenjin he said, "Bikab chego nenyonet emet."

7 PRESIDING JUDGE EBOE-OSUJI: Do you have a pen and paper? Please, if you  
8 can write out the phrase in Kalenjin and spell it word-by-word for the record, please.  
9 Thank you.

10 MR KIGEN-KATWA:

11 Q. Witness, could I attempt the spelling, then you confirm?

12 A. Yes.

13 Q. Bikab is B-I-K-A-B. Next word chego is C-H-E-G-O. The third word  
14 nenyonet is N-E-N-Y-O-N-E-T. And the last word is emet, E-M-E-T.

15 Is that correct, Mr Witness?

16 A. Yes, that is correct.

17 Q. Now --

18 A. And -- on --

19 PRESIDING JUDGE EBOE-OSUJI: All right. One second. Witness, you go.

20 THE WITNESS: On the second -- on the second about rats, in Kalenjin, he said  
21 "Ngoya muriat kobo got nebo." If a rat is bad, it belongs to -- it belongs to -- it  
22 belongs to its house. It's like saying if somebody is bad, so long as he's a Kalenjin  
23 he's still ours.

24 PRESIDING JUDGE EBOE-OSUJI: All right. Can we have a spelling of that  
25 phrase?

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1 MR KIGEN-KATWA:

2 Q. Mr Witness, I will attempt the spelling and then you confirm if I am correct.

3 Ngoya is N-G-O-Y-A. And the next word is muriat, M-U-R-I-A-T. And the next

4 word is kobo, K-O-B-O. Then the next one is got, G-O-T. And the last word is nebo,

5 N-E-B-O.

6 Is that correct, Mr Witness?

7 A. Yes.

8 PRESIDING JUDGE EBOE-OSUJI: Now, Mr Kigen-Katwa, the witness explained the

9 meaning of the last phrase, or sentence. What was the first one, the bikab chego

10 phrase? What did that mean?

11 MR KIGEN-KATWA: I intended to cross-examine on it, Mr President. Probably --

12 PRESIDING JUDGE EBOE-OSUJI: You will?

13 MR KIGEN-KATWA: Yes.

14 PRESIDING JUDGE EBOE-OSUJI: All right, okay.

15 MR KIGEN-KATWA: Thank you.

16 Q. Now, Mr Witness, the first phrase "Bikab chego nenyonet emet" literally means

17 "People of milk, the country's ours," isn't it?

18 A. Yes.

19 Q. Now, Mr Witness, it is true that the Kalenjin people value cows very much, isn't

20 it?

21 A. Yes.

22 Q. It is also true that they value milk a lot, isn't it?

23 A. Yes.

24 Q. And in consequence they generally consider themselves to be people of cows

25 and milk, isn't it?

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1 A. Yes.

2 Q. Mr Witness, it is also true that this is an expression that has always been there  
3 even before Mr Sang ran the programme at Kass FM, Lene Emet, isn't it? It is an  
4 expression that pre-existed Mr Sang?

5 A. Yes, but this time it was used for a purpose.

6 Q. It is also true, Mr Witness, that that expression is still there even now and even  
7 politicians use in reference to Kalenjin people, isn't it?

8 A. Yes, it depends on how they want to use it.

9 Q. Now, Mr Witness, let me give you a chance to explain. What is the issue you  
10 have with the way Mr Sang was using that expression?

11 A. At that time, people who are not Kalenjins, bikab chego, were not -- were felt by  
12 the Kalenjin to be not part of them in Eldoret and areas which surrounded it. That is  
13 why those people who are not Kalenjins were perceived to be enemies.

14 Q. Thank you, Mr Witness.

15 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, we need to put in at line 25 the  
16 words that the transcript says "(speaks Kalenjin)." I believe the witness said -- used  
17 only the first two words "bikab chego".

18 MR KIGEN-KATWA: That is the way I heard it, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: Yes, so it needs to be in there.

20 Now we move on, please.

21 MR KIGEN-KATWA: I trust I don't need to spell it although I see --

22 PRESIDING JUDGE EBOE-OSUJI: No, you don't. You've already spelled the  
23 words, so the first two words of that phrase can come in. The court reporters will fix  
24 it later.

25 MR KIGEN-KATWA: Although they have referred to it as a pick-up.

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1 Q. Now, Mr Witness, it is true that in the Rift Valley area generally there are people  
2 other than Kalenjins who understand Kalenjin, isn't it?

3 A. Yes, I agree a few who are not Kalenjins may understand the language.

4 Q. Now, let's talk about this other second expression about a rat, Mr Witness. The  
5 literal meaning of that is that if a rat is bad it belongs to the house where it is residing,  
6 isn't it?

7 A. Yes.

8 Q. Now, Witness, you will confirm that that expression is used mostly in reference  
9 to a family member, that if a family member is bad he belongs to that home, isn't it?

10 A. That is when it is used the way it's supposed.

11 Q. Thank you, Mr Witness. And you would also confirm that this is an  
12 expression that has always been in Kalenjin even before Mr Sang presided over the  
13 Kass FM programme, Lene Emet, isn't it?

14 A. Yes.

15 Q. And, Mr Witness, your problem the way you have testified is the context in  
16 which that word was used?

17 A. Yes. This is context, "ngoya muriat kobo got nebo" was used to campaign for  
18 ODM especially when people were using the platform of Kass FM to campaign that  
19 they should vote from council, member of parliament and president on -- on the same,  
20 they -- on -- on suit. In fact, they were using the word -- the word -- the word "suit".  
21 So even those people that may be -- those people who were for other parties and they  
22 were not among -- they were not ODM people, even though had good policies, this  
23 phrase was used to undermine other people, especially from -- from PNU because it  
24 was saying that even if somebody is -- is bad, as long as he's for -- he's -- he's -- he is  
25 a -- he is on the -- on the -- on the -- on the -- on the ODM and on -- in Eldoret and

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1 most parts of Rift Valley the Kalenjins supported ODM, then that person was good to  
2 be voted in.

3 So even -- so from then by use of this phrase, those people who were not Kalenjins  
4 and those people who were not supporters of PNU were perceived to be enemies.

5 Q. Now, Mr Witness, may I ask you could you kindly confirm that as far as you're  
6 concerned this address was meant to the whole of the Rift Valley area?

7 A. Kass FM is --

8 Q. Please just answer the question.

9 A. No, Kass FM is a radio station which people were listening across Rift Valley in  
10 the country and I believe also people who are across borders --

11 Q. Thank you.

12 A. -- could listen to the radio.

13 Q. And you will confirm that you said that they wanted -- the word I think you are  
14 looking for is three-piece suit, is it?

15 A. Yes.

16 Q. And at the apex of ODM was Honourable Raila Odinga, isn't it?

17 A. Yes.

18 Q. Could you confirm that he is a Luo, not a Kalenjin?

19 A. I confirm.

20 Q. Could you also confirm that there are some places in Rift Valley who had  
21 representation of people who were not Kalenjins?

22 A. Yes, I'm not saying everyone who contested was a Kalenjin.

23 Q. And, Mr Witness, these concerns about the use of the word "milk" and "rat", the  
24 way you understood Mr Sang to have been communicating, isn't it, it is your  
25 understanding of what he was trying to say?

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1 A. Yes, mine and most people who listened to these phrases.

2 Q. Now, Mr Witness, I would like to move on to something else about what you  
3 said you heard Mr Sang say in relation to ballot boxes. Do you remember testimony  
4 on that point?

5 And I have particular reference to page 40 of the transcript of 18 November 2014.

6 And this is what you had said, Mr Witness, "It was announced in the morning in Kass  
7 FM, your Honour, that elections ..." that elections "... -- people to be cautious because  
8 elections would be rigged ... it was said by people who were calling the station that  
9 the buses had transported ballot boxes to ... Brookside."

10 Do you recall testifying to that effect, Mr Witness?

11 A. Yes.

12 Q. Now, it is your testimony that it was in a programme in Kass FM. Now I  
13 would like to play to you an audio and I would like you, in the first instance, to  
14 confirm to me whether you recognise the voice that is being played as opposed to the  
15 content.

16 Your Honour, I have reference to the audio of 25 December 2007, and that is in tab 12  
17 of our bundle, and the reference is KEN-D11-0013-0281. That is the audio. May I  
18 say again the reference? KEN-D11-0013-0028.

19 PRESIDING JUDGE EBOE-OSUJI: And you say the transcript is at tab 12, you say?

20 MR KIGEN-KATWA: Tab 12, Mr President, sorry. Tab 12, Mr President, sorry.

21 Tab 12 -- tab 13. Tab 13, Mr President, sorry.

22 PRESIDING JUDGE EBOE-OSUJI: And that would be the -- with the document  
23 reference number ending at 05 -- 0568, is that it? 0568? Okay.

24 MR KIGEN-KATWA: Yes, Mr President. The transcript -- the transcript reference  
25 is KEN-D11-0014-0581. I will take it again, D11-0014-0568.

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1 PRESIDING JUDGE EBOE-OSUJI: That is what I have.

2 MR KIGEN-KATWA: Mr President, I would like to start with playing time stamp  
3 12.11 to 12.16 and, Mr President, my interest is whether the witness can recognise the  
4 voice.

5 Q. Mr Witness, I will play the audio and request you to confirm if you recognise  
6 the voice. That's okay?

7 A. Yes.

8 (Playing of the audio excerpt KEN-D11-0013-0028)

9 MR KIGEN-KATWA:

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

11 A. Please play it again.

12 (Playing of the audio excerpt KEN-D11-0013-0028)

13 THE WITNESS: I didn't recognise. It was too short.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, besides the brevity of the clip,  
15 what about the fidelity of the sound, you know what I mean? In terms of, I mean,  
16 we know depending on the recording device the -- we want to be sure that what we  
17 hear is true to the original version. I say that because you can have voice distortion  
18 not intended, not intended. Sometimes voice distortions are intended, as the one we  
19 do with the voices of witnesses who are protected and who are testifying, but it can  
20 also have unintended voice distortion.

21 MR KIGEN-KATWA: May I confirm, Mr President, that to the best of my  
22 knowledge it is exactly the audio sourced from Kass FM. It is an audio which we've  
23 played a couple of times in this stage -- in this court and it is actually an exhibit,  
24 Mr President.

25 PRESIDING JUDGE EBOE-OSUJI: Not just that you got it at source, I mean you can

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1 say that much, but on the other end whoever gave it to you -- anyway, I think we  
2 should keep that in mind when we ask witnesses questions about that sort of -- that  
3 kind of question, that is.

4 Let's proceed.

5 MR KIGEN-KATWA: For the record, Mr President, may I indicate that to the best of  
6 my knowledge the voice is exactly as it was and that is as much as I can say.

7 PRESIDING JUDGE EBOE-OSUJI: Yes, I think that is as much as you can say.

8 MR KIGEN-KATWA: Thank you.

9 PRESIDING JUDGE EBOE-OSUJI: So let's proceed. I just want us to keep that in  
10 mind, that's all.

11 MR KIGEN-KATWA:

12 Q. Witness, what I will do is I will make -- I will make the audio a little longer so  
13 that -- you said your problem is the extent of the audio, is it?

14 A. Yeah, let's play it a bit longer.

15 MR KIGEN-KATWA: Okay, Mr Witness.

16 (Playing of the audio excerpt KEN-D11-0013-0028)

17 MR KIGEN-KATWA:

18 Q. At least you have enough sample, Mr Witness. Do you recognise that voice?

19 A. If not distorted, it is like that of Joshua Sang.

20 Q. Let me just ask you again. So to your knowledge this is Mr Sang's voice, isn't  
21 it?

22 A. Yes, I think it is Mr Sang.

23 MR KIGEN-KATWA: Now, Mr Witness, I will play for you another voice starting  
24 with time stamp 21.34 to 21.47.

25 (Playing of the audio excerpt KEN-D11-0013-0028)

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1 MR KIGEN-KATWA:

2 Q. Mr Witness, may I ask you if you recognise that voice?

3 A. That one seems distorted.

4 Q. Well, Witness, it is not distorted. It is exactly the way it was when it was  
5 broadcast. Do you recognise it?

6 A. Play it again.

7 (Playing of the audio excerpt KEN-D11-0013-0028)

8 THE WITNESS: I still feel it's Mr Sang.

9 MR KIGEN-KATWA:

10 Q. So the record can indicate that it is your testimony that the voice reading those  
11 number plates is Mr Sang's voice, isn't it?

12 A. Yes.

13 MR KIGEN-KATWA: Now, I will play you the second last voice and see if you can  
14 recognise it. Time stamp 1.48 -- sorry, time stamp 48.14 to 48.20.

15 (Playing of the audio excerpt KEN-D11-0013-0028)

16 MR KIGEN-KATWA:

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

18 A. No, but it is not Sang's.

19 Q. So for this voice you categorically say it is not Mr Sang's. Now I will play the  
20 last voice -- I will leave that issue there, Mr Witness.

21 Mr Witness, may I ask you a couple of questions in respect to this voice recognition.

22 You -- is it your testimony that you -- that is the voice you heard, voice number 1 and  
23 voice number 2 for Mr Sang, that is the voice that you used to hear from the year 2005  
24 to 2012 as you say you used to listen to Mr Sang?

25 A. Apart from the voices, introduction was done every morning when the

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1 programme starts. "Nitok ko Lene Emet. Ko Joshua Arap Sang in the studio."  
2 "This is Lene Emet. It's Joshua Arap Sang who is in studio." So apart from just  
3 hearing the voice the way you are doing here, from most of the times the name of the  
4 person who was in the studio at that time will also be done.

5 Q. Thank you, Mr Witness. So let me understand you. You would identify  
6 Mr Sang because he has identified himself in the station, or are you in a position to  
7 recognise his voice?

8 A. After listening to the way he speaks, to the use of language he can use, the use  
9 of idioms, the use of stories, the use of songs, in Kass FM no one else was using as  
10 much as -- as much of these kind of languages the way Mr -- Mr Sang did. So you  
11 could easily tell when you hear of a story, or clips of news, that actually that one was  
12 Mr Sang speaking.

13 Q. So you recognised Mr Sang by the idioms and the stories he used to place in  
14 the -- in his broadcast?

15 A. Voice also and introduction.

16 Q. Okay. Mr Witness, I'll just be very direct with you.

17 Your Honours, I will bring to the court after the break the exact time -- the exact page  
18 locations that I have played. I do not have the pages, but I will put to the witness the  
19 propositions as a result of that.

20 Mr Witness, do you know a broadcaster by the name Mr Kipyego Arap Tanui who  
21 broadcast in style of Kwomba Chepkoske?

22 A. Yes, at times I heard about -- about the programme.

23 MR KIGEN-KATWA: Mr President, may I spell? Kipyego Arap Tanui is Kipyego  
24 is K -- I see it has got in the right spelling. His broadcast name is, Kwomba  
25 Chepkoske, is K-W-O-M-B-O and Chepkoske is C-H-E-P-K-O-S-K-E.

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1 Q. Mr Witness, would you be surprised that in fact the first voice belongs to this  
2 gentleman called Kipyego Arap Tanui, who has been a broadcaster and a co-host of  
3 this programme for many years as way back as the year 2006?

4 A. Then he speaks so closely to Mr Sang.

5 Q. So you are surprised?

6 A. I am not surprised.

7 Q. And would you be surprised that the voice of the second person is completely  
8 unrelated, being the voice of one Mr Silas Tarus?

9 A. I'm not surprised about voices, because sometimes you might give a voice  
10 that -- you might bring voices which are very close to Mr Sang's and that one I'm not  
11 surprised.

12 Q. And for the record the third voice is one Timothy Chepsoi, and that's a different  
13 person and the witness confirms that as far as he's concerned it's not Mr Sang's voice.  
14 The spelling of Timothy is Timothy and Chepsoi is C-H-E-P-S-O-I.

15 THE WITNESS: Yes, that one was far from the voice of Mr -- of Mr Sang.

16 MR KIGEN-KATWA: Thank you.

17 Q. Now, apart from the point I was making that the voice -- the first voice belongs  
18 to a completely different person who has been at the station for long, are you  
19 surprised that this Mr Kipyego Arap Tanui on occasions would co-host the  
20 programme with Mr Sang and would himself host the programme alone? Would  
21 you be surprised at that?

22 A. No, but the programme was not enjoyable as it would be when Mr Sang was on  
23 studio.

24 Q. So you are saying that you sometimes go to Lene Emet programme and would  
25 find that it is not enjoyable and it is because Mr Sang is not the one broadcasting it?

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1 A. Lene Emet -- Lene Emet programme will be very enjoyable when Mr Sang was  
2 in studio.

3 Q. Thank you. I just want you to answer my question very directly. Are there  
4 instances when you went to the station or you tuned into the station and found that it  
5 is being broadcast by somebody else and found it comparatively less entertaining  
6 than when Mr Sang is broadcasting it?

7 A. Yes, at times I would go to the programme and find it is people just call in from  
8 outside, issues discussed are not interesting to me, so I could not -- I could not -- I  
9 could not enjoy it, but I -- I really enjoyed the programme when Mr Sang was on  
10 studio.

11 Q. You were Mr Sang's fan, are you?

12 A. Or use of these idioms, songs and short stories. When used properly, I would  
13 really admire Mr Sang.

14 Q. So, Mr Witness, let me just ask you very directly at this point. So your initial  
15 testimony that throughout the period of your listened -- your listening to this station,  
16 you heard Mr Sang being the sole person broadcasting the Lene Emet programme  
17 was mistaken because now you admit that there were instances when somebody else  
18 was hosting it, isn't it?

19 A. No, I'm saying Lene Emet was associated with Mr Sang because Mr Sang was  
20 mostly the host of that programme. If anyone else hosted the programme, that one  
21 I don't know, but if asked I'll say I know Joshua Arap Sang to be the host of Lene  
22 Emet -- Lene Emet programme in Kass FM.

23 Q. I will say to you --

24 PRESIDING JUDGE EBOE-OSUJI: One second, before you do. This may be caught  
25 in correction, but just in case, to avoid mistakes, line 24, quote, "When used properly I

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1 would really admire Mr Sang", unquote, was a continuation of the witness's answer.

2 It was not a question from Mr Kigen-Katwa.

3 Please proceed.

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

5 Q. Mr Witness, before I play you the next part of the audio, I put it to you that you

6 were never listening to that programme and if you were you would have

7 recognised -- you would have been able to confirm that those voices I played are not

8 Mr Sang's voice?

9 A. I used to listen to the programme and I've told you the voices you've just

10 brought before this Court are voices which are so close to that of mister -- that of

11 Mr Sang, and I wish you would play voices of Mr Sang and play voices of those

12 people. You see, it will not be very far. And that is why I'm saying that I recognise

13 those voices to be Mr Sang's because they were so close, if not him.

14 Q. And, Mr Witness, it is your testimony that even after six years of listening to

15 Mr Sang from the year 2005 to the year 2012 you could still be mistaken on his voice

16 because they are very close to the other ones, isn't it?

17 A. I cannot commit myself before this Court to say that I listened every day from

18 2010 to 2012 because -- or, 20 -- or, 2006 to 2012 because there are instances where I

19 did not listen, there are instances where -- where I was in different programmes. We

20 were not able to -- I was not able to tune to the -- to the Kass FM, but I want to

21 confirm before this Court that I listened to Kass FM and what I've given as evidence

22 of what I heard is about what we've spoken about.

23 Q. Now, Mr Witness, you -- we already are aware that you were generally from

24 location number -- number 9 and sometimes you'd be at location number 7. Let's say

25 you generally were in locations number 7, 8 and 9, isn't it, Mr Witness?

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1 A. Not 7, but 9, 8.

2 Q. Okay, that's fair enough, Mr Witness. The question I want to ask you covers all  
3 that period -- all that area. Could you tell the Court what was the wavelength, what  
4 was the FM number at which you could catch Kass FM in that general area, the  
5 general area of the wider Eldoret region?

6 A. Was it -- I think it's 89.9, though I don't remember quite well.

7 Q. And, Mr Witness, you can't recall notwithstanding that your work was actually  
8 to monitor and I am distinguishing between listening and monitoring?

9 MR STEYNBERG: Your Honours, the witness never said that it was his work to  
10 monitor. That's not on the record as far as I know.

11 PRESIDING JUDGE EBOE-OSUJI: We can deal with that more fully in private  
12 session if you wish to pursue it, but the -- at line 4 the witness did say 89.9 he thought.  
13 Was that what you said about the wavelength?

14 THE WITNESS: Yes, I think it was 89.9.

15 PRESIDING JUDGE EBOE-OSUJI: Yes, the reason I say it is on the transcript it says  
16 "9.9." There's a lot of difference between 89.9 and 9.9.  
17 Please continue.

18 MR KIGEN-KATWA:

19 Q. Now, Mr Witness, I would like to play an audio -- I would like to play for you  
20 an audio and we will deal with both the voice and the substance of what he said.  
21 And, your Honours, that is at tab 13, the same tab 13, KEN-D11-0013-0028, and the  
22 time stamp I wish to play is 28.31 to 29.32. And, your Honours, that is -- I'll give the  
23 page number shortly.

24 PRESIDING JUDGE EBOE-OSUJI: All right. It's time for morning break, but before  
25 we do, what is your position, Mr Kigen-Katwa? It's 89.9, was that the frequency?

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- 1 MR KIGEN-KATWA: Mr President, it is not. It is actually 90.0.
- 2 PRESIDING JUDGE EBOE-OSUJI: All right. We will rise and return at -- return in
- 3 30 minutes, but the witness will need to be ushered out first, so we go to closed
- 4 session for that.
- 5 Did you say 90.0 or 96.0?
- 6 MR KIGEN-KATWA: 90.0, Mr President.
- 7 PRESIDING JUDGE EBOE-OSUJI: 90.0.
- 8 MR KIGEN-KATWA: Yes.
- 9 PRESIDING JUDGE EBOE-OSUJI: Thank you.
- 10 \*(Closed session at 11.02 a.m.) Reclassified as Open session
- 11 THE COURT OFFICER: We are in closed session, Mr President.
- 12 PRESIDING JUDGE EBOE-OSUJI: Court will rise.
- 13 THE COURT OFFICER: All rise.
- 14 (The witness stands down)
- 15 (Recess taken at 11.03 a.m.)
- 16 (Upon resuming in open session at 11.40 a.m.)
- 17 THE COURT USHER: All rise.
- 18 Please be seated.
- 19 PRESIDING JUDGE EBOE-OSUJI: Thank you very much.
- 20 Mr Kigen-Katwa, before you continue, Mr (Redacted), we understand you had a prior
- 21 commitment at the Special Tribunal to -- for 30 minutes' appearance scheduled at
- 22 what time again?
- 23 MR (Redacted): Your Honour, it's --
- 24 PRESIDING JUDGE EBOE-OSUJI: From 2.45 --
- 25 MR (Redacted): -- 2.45 until 3.15.

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1 PRESIDING JUDGE EBOE-OSUJI: All right. I understand that there has been some  
2 discussions on what is possible. In order to accommodate Mr (Redacted), we will  
3 continue to -- from now 'til 1.30. We will take our lunch-break at that time and  
4 return at 3.30 and then continue until 5. That should give enough time for Sang  
5 Defence to complete and the Prosecution to re-examine the witness, all right?

6 MR KIGEN-KATWA: Yes, Mr President.

7 MR KHAN: Mr President, I do apologise. It may be useful just to confirm if the  
8 hearing finishes at 3.15 at the STL building that my learned friend can pack up his  
9 belongings and get here in that time to have an effective start at 3.30.

10 PRESIDING JUDGE EBOE-OSUJI: Indeed. I'm sure Mr (Redacted)-- that's a good  
11 point, Mr Khan. As soon as your hearing is complete, if you can also quickly rush  
12 down, please, and remind our colleagues at the STL about the commitment you have  
13 here as well. We're trying to accommodate you and their own proceedings. I'm  
14 sure they will also try to do the same for us.

15 Thank you.

16 MR STEYNBERG: Your Honours, if I may assist? If my learned friend finishes by  
17 the lunch-break, as he has indicated he will and he confirmed again this morning, I  
18 will need no more than an hour for re-examination, possibly considerably less than  
19 that. So even if we were only to start at 4 o'clock, we can still comfortably finish I  
20 believe by 5.

21 PRESIDING JUDGE EBOE-OSUJI: Our experience has always been to not take  
22 things like that for granted, but as I've announced it let's proceed in that way, and  
23 that includes Mr (Redacted) trying as much as possible, please, to shorten, if you can,  
24 proceedings on the other side, your appearance, and get over here immediately. As  
25 soon as you arrive let everyone know so we can all be ready to come back and, if we

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1 need to do that, even sooner than that so be it. Thank you.

2 Mr Kigen-Katwa, please continue.

3 MR KIGEN-KATWA: Mr President, may I place on record something that the  
4 witness said but which we are told the court reporters were not able to capture, that is  
5 at page 33, line 3. The witness had said that Mr Sang used to introduce his  
6 programme as "Nitok ko Lene Emet ..." And the spelling is N-I-T-O-K. The second  
7 word ko is K-O. Lene is L-E-N-E. And Emet is E-M-E-T.

8 PRESIDING JUDGE EBOE-OSUJI: Thank you. Please proceed.

9 MR KIGEN-KATWA:

10 Q. Now, Mr Witness, as at the year 2014 when you came -- when you said you  
11 travelled, who was hosting the Lene Emet programme? You said you were still  
12 listening up to the year 2014.

13 A. I said I still listened Kass FM up to 2014, but my favourite programme in Kass  
14 FM then, just recently, was not the Lene Emet, so I've been listening to Heshimu  
15 Ukuta and other programmes, not -- not Lene Emet.

16 Q. Thank you. Now, Mr Witness you said you used to listen to Kass FM -- Lene  
17 Emet programme over the weekend; did you say that?

18 A. You asked if I was tuning to Kass FM how -- how frequently, I said I will listen  
19 mostly the Lene Emet during the -- the weekdays between Monday and Friday and  
20 sometimes pop in to Kass FM also during the weekends.

21 Q. And Lene Emet programme itself?

22 A. Mostly during the weekdays.

23 Q. Now I will play to you the same audio, time stamp 28.31 to about 29.

24 Your Honours, that is found -- that -- that is the audio KEN-D11-0013-0028 at  
25 KEN-D11-0014-0577.

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1 PRESIDING JUDGE EBOE-OSUJI: Do we have a tab again?

2 MR KIGEN-KATWA: Yes, that's the same tab 13, Mr President. Sorry.

3 I will request the assistance of the court officer to give the witness a copy of the  
4 transcript.

5 MR STEYNBERG: Thank you. Your Honours, if I can kindly ask my learned friend  
6 since there are no time stamps recorded on the transcript if he could also just perhaps  
7 point us to the paragraph we should be following.

8 PRESIDING JUDGE EBOE-OSUJI: That's a useful suggestion.

9 MR KIGEN-KATWA: I will be looking at paragraph -- the last paragraph at page  
10 0577.

11 THE WITNESS: Sorry, page?

12 MR KIGEN-KATWA: Witness, just go to page 9. Page 9 coincides with 0577.

13 (Playing of the audio excerpt KEN-D11-0013-0028)

14 MR KIGEN-KATWA:

15 Q. Mr Witness, can you follow? Are you able to follow, or do you want me to  
16 assist you? Can you follow the -- what is being said on the transcript?

17 A. Yes.

18 MR KIGEN-KATWA: Thank you. Let's go.

19 (Playing of the audio excerpt KEN-D11-0013-0028)

20 MR KIGEN-KATWA:

21 Q. Now, Mr Witness, I will read in English what you just listened to and please  
22 confirm this is what you heard in Kalenjin.

23 Mr President, that is at paragraph 3, "Thank you very much." Starting with the  
24 words "Thank you very much."

25 Now, this is what Mr -- do you recognize that voice, Mr Witness?

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- 1 A. Yes, it is Sang's voice.
- 2 Q. You're more sure this time around?
- 3 A. That is his voice.
- 4 Q. Okay.
- 5 A. You hear it is very close to what -- what I was saying.
- 6 Q. Okay. Please confirm to me that this is what you heard him say:
- 7 "Thank you very much. That was Prime Minister Raila Odinga. Dear listener, he
- 8 says he has proof of what he's speaking about. We even saw on KTN TV these
- 9 vehicles transporting those papers, transporting equipment and recruits who had
- 10 recently been in training in Embakasi. They have been taken to go and work for
- 11 PNU in the areas mentioned so that if you are not sure of whom to vote for, you vote
- 12 for them. That is one way of stealing.
- 13 That is why we are here today, dear listener, to discuss - we are not saying that
- 14 someone is stealing but according to these statements, and you ... know - are there
- 15 new people who have been brought to you?" Is that what we are hearing -- "Is what
- 16 we hearing true? Mr Tarus was also there and he has the statement made by
- 17 Honourable Odinga (or rather ODM); so we want him to read out the numbers of
- 18 those vehicles so that people can tell us if they have seen any of them, or if what we
- 19 are hearing it propaganda."
- 20 Now, Witness, at that point the audio was stopped. I want to go on and, Mr Witness,
- 21 I would like you to listen to the song that comes after that.
- 22 A. Sorry, it's like I heard somewhere say "ng'olyo ne tesetai." There is something
- 23 going on and I didn't see that one translated to English in this. I'm around the end of
- 24 your -- of the audio I listened. There was "ng'olyo ne tesetai," but in English here
- 25 I don't know whether I'm wrong, I don't see it translated in English.

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- 1 MR STEYNBERG: Your Honours, I'm sorry to interrupt. I don't know if anything  
2 turns on it, but I also thought I heard some English words being mentioned during  
3 the course of that. I thought I heard the words "electoral commission" and I thought  
4 I heard the word "television" which I don't see reflected in the transcript.
- 5 MR KIGEN-KATWA: Mr President, I will play the audio again for both.
- 6 THE WITNESS: Yes.
- 7 PRESIDING JUDGE EBOE-OSUJI: I also did hear "electoral commission" mentioned,  
8 but you can play it again.
- 9 MR KIGEN-KATWA: Mr President, just a minute. Just one second.  
10 We will play it, Mr President.
- 11 PRESIDING JUDGE EBOE-OSUJI: Witness, were you looking at the transcript when  
12 it was playing the last time when the audio was playing?
- 13 THE WITNESS: Yes.
- 14 PRESIDING JUDGE EBOE-OSUJI: Thank you.  
15 (Playing of the audio excerpt KEN-D11-0013-0028)
- 16 MR KIGEN-KATWA: Mr President, may I apologise. It is actually page 14, I'm  
17 sorry. That -- it's actually page 14 which is 0582.
- 18 PRESIDING JUDGE EBOE-OSUJI: At page 14 indeed there is "electoral commission"  
19 referred to, but if you want to play -- I think you should play it again.
- 20 THE WITNESS: Yes.
- 21 MR KIGEN-KATWA: Yes, I will play it, Mr President.
- 22 PRESIDING JUDGE EBOE-OSUJI: Can you hold on.  
23 Mr --
- 24 MR KIGEN-KATWA: Mr President, that would be paragraph number 3 starting  
25 with the words "House of Kalenjin ..."

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1 PRESIDING JUDGE EBOE-OSUJI: Does it continue to page 15?

2 MR KIGEN-KATWA: Yes, Mr President. I just stopped immediately before we got  
3 to page 15, which is where the song -- where the song starts and I intend to play the  
4 song.

5 PRESIDING JUDGE EBOE-OSUJI: The reason I say that, Witness, can you look at  
6 the last sentence in Kalenjin appearing in the second paragraph at page 15. Under  
7 the name "SANG," there's a big paragraph. Do you see the last sentence there? Is  
8 that what the word -- the phrase you were looking for?

9 THE WITNESS: That I've just mentioned?

10 PRESIDING JUDGE EBOE-OSUJI: Yes, there was a phrase you said you heard that  
11 didn't --

12 THE WITNESS: No, no.

13 PRESIDING JUDGE EBOE-OSUJI: All right.

14 Please continue.

15 (Playing of the audio excerpt KEN-D11-0013-0028)

16 MR KIGEN-KATWA:

17 Q. Mr Witness, can you follow that? You can see that now?

18 A. Yes.

19 Q. If you could follow with your finger so that you can --

20 A. I'm following with my finger.

21 MR KIGEN-KATWA: Thank you. Thank you.

22 (Playing of the audio excerpt KEN-D11-0013-0028)

23 MR KIGEN-KATWA:

24 Q. Witness, are you -- this is the -- you can confirm what you followed in Kalenjin  
25 is what you could see transcribed, isn't it?

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1 A. Yes.

2 MR KIGEN-KATWA: Now, I will read in English. Mr President, and your

3 Honours, may I apologise. I just got it wrong the initial instance. This is the

4 English translation:

5 "House of Kalenjin, those are statements by Raila Odinga and Fred Gumo who is

6 contesting for Westlands seat, while Raila is contesting for the presidency on an ODM

7 ticket as well as contesting for the Lang'ata parliamentary seat. According to reports

8 that we had also received but could not broadcast until were sure he has said that he

9 has confirmed, he has even seen. I also saw ... that is why our program was

10 delayed -- we were watching a program where we saw vehicles that were

11 transporting those soldiers.

12 The law does not allow a soldier to engage in politics at all. The only assistance they

13 can provide to the electoral commission is to provide security so that violence does

14 not break ... A soldier cannot be any party's or individual's agent. A soldier who is

15 on duty or on leave is not allowed by the electoral laws to do that. As such, dear

16 listener, today is difficult, and we all need to know what is happening, and that is

17 why we just want to know what it is so we are able to guards ourselves against such

18 things."

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

20 A. Yes.

21 Q. Now, Mr Witness, I want to -- you confirm -- I know I had asked you earlier on

22 a voice that I played earlier. Could you confirm this is the voice of -- whose voice

23 this is?

24 A. The voice we've just heard?

25 Q. Yes.

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1 A. Sang's voice.

2 MR KIGEN-KATWA: Thank you.

3 Now I want to play the next bit of that audio. You will recall that you had said

4 yesterday there was a certain song that according to you used to be played by

5 Mr Sang at the station. I would like you to listen to it and let us know if you have

6 any recognition of it.

7 PRESIDING JUDGE EBOE-OSUJI: Can we hold on for a quick second while that is

8 being set up. There's a phrase there, "We all need to know what is happening."

9 Could it be what the witness heard before when he was looking for the word, "What  
10 is going on?", or what?

11 Ms Alagendra?

12 MS ALAGENDRA: Your Honours, I apologise to interrupt, your Honour, but

13 I think our transcripts have stopped for some reason.

14 PRESIDING JUDGE EBOE-OSUJI: Mine too.

15 The suggestion was whether we should -- the court officer's suggested we go into

16 private session. For technical reasons, if anything is said in public session it may

17 now be more difficult to deal with, but the question is do you see any worry of

18 compromising? What I mean by compromising is identity compromising

19 information coming out in this series?

20 MR KIGEN-KATWA: Absolutely none, Mr President.

21 PRESIDING JUDGE EBOE-OSUJI: All right. Let's stay out here, but let's continue

22 while the Court Registry tries to reset the system for the transcript. But we will

23 continue.

24 My question was that the "What is happening?" that appears at page 15, could that be

25 the -- could that be the phrase you were looking for when you say you were looking

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1 for the phrase "What is going on"? Could it be the same thing, "What is

2 happening?" "What is going on?"

3 THE WITNESS: Yeah, what I was reading in English on the previous page was  
4 not what was -- because he had confused the pages. Now what we have seen in this  
5 page 15 is the translation of the -- of the audio.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you. We will leave it at that.

7 MR KIGEN-KATWA: Now, we will move on and, your Honour, I'm playing time  
8 stamp 29.32 to 30.22 for purposes of a song that the witness said was used to incite.

9 And, Mr President, it's partially translated at page 15 of the -- sorry, page 0583 of the  
10 same transcript.

11 (Playing of the audio excerpt KEN-D11-0013-0028)

12 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, are you playing this for a  
13 specific purpose? We like the music, but we want to know -- okay.

14 MR KIGEN-KATWA: Mr President, I intend to go through the -- I intend to go  
15 through the song later on. The point I wanted to make at this point is the witness  
16 having recognized Mr Sang's voice and the song having played immediately  
17 thereafter, whether he can recognize it so that we can situate it before I come to deal  
18 with the song later on.

19 PRESIDING JUDGE EBOE-OSUJI: So there is a specific reference apart from  
20 reminding the music -- the witness of the music he said he loved on the show and we  
21 don't want to do that.

22 MR KIGEN-KATWA: I just want him to confirm that is the song. That's really the  
23 whole purpose of -- at this point in time.

24 Q. Now, Mr Witness, you've heard that song, isn't it? Do you recognize it?

25 A. I know the song.

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1 MR KIGEN-KATWA: You seem to like it also.

2 Now, Mr President, I will move to -- I will come back to the song later on,

3 Mr President. I just want to go back to what was said by Honourable Raila, and that

4 would be time stamp -- Mr President, I will play time stamp 28.00 and, Mr President,

5 that would be at page 4 -- 581.

6 (Playing of the audio excerpt KEN-D11-0013-0028)

7 MR KIGEN-KATWA:

8 Q. Mr Witness, can you recognize that voice?

9 A. Yes, the voice for Raila Odinga.

10 MR KIGEN-KATWA: Now, Witness, I will play out his presentation a little longer,

11 then you will -- we will discuss what he says.

12 (Playing of the audio excerpt KEN-D11-0013-0028)

13 MR KIGEN-KATWA:

14 Q. Now, Mr Witness, do you recall having heard Mr Honourable Raila

15 complaining about the use of APs to rig elections?

16 A. Yes, specifically he did it in Kass FM.

17 Q. And in your testimony, Mr Witness, you had said about what you heard

18 Mr Sang said. And I have reference to page 40 that I had read this earlier on. You

19 had said that mister -- you heard Mr Sang announce in the morning that there

20 was -- there were vehicles being used to rig election; is that what you had said earlier

21 on, Mr Witness, in your testimony?

22 A. Yes.

23 Q. Mr Witness, could you confirm this is the audio you had heard Mr Sang

24 commenting about the administration police and the balloted boxes.

25 A. I don't know whether it is this one because up to where you played I have

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1 not -- I have not heard him talk of -- I've heard him just talk about that there is  
2 something going on that he will like people to -- to guard themselves on such things.

3 Q. I'll play you the same audio starting from -- you recall that you heard him  
4 saying that you've heard, yourself, Mr Raila talking, isn't it, at page 15 of the  
5 transcript?

6 A. Yes, what I've just said I was quoting the last -- the last words he was -- after the  
7 speeches of Raila Odinga. At the last sentence of his -- of the translation.

8 MR KIGEN-KATWA: I'll play you what Mr Raila said from time stamp 27 so that  
9 you can situate yourself on the issue that was being discussed.

10 (Playing of the audio excerpt KEN-D11-0013-0028)

11 MR KIGEN-KATWA:

12 Q. Now, Mr Witness, I will read in English --

13 PRESIDING JUDGE EBOE-OSUJI: One second, please. Witness, don't lose your  
14 concentration on what you just heard, but I want to make sure that everybody knows  
15 that the transcript restarted a little while ago. Just we note it on the record when it  
16 stopped, so I thought I should also let us know we're back now.

17 Please continue.

18 MR KIGEN-KATWA:

19 Q. Mr Witness, I will read in English what you heard Mr Raila say, if you could  
20 confirm that's what he said.

21 And it is about the fifth line from page 13, page KEN-D11-0014-058 (sic), Mr President,  
22 starting with the words "There is an aim to cause chaos ..."

23 PRESIDING JUDGE EBOE-OSUJI: 058 what?

24 MR KIGEN-KATWA: 0581, Mr President, and it is about the fifth line from the  
25 bottom after the words "elections on 27th".

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1 Q. And this is what he said:

2 "There ..." is a "... aim ... to cause chaos during voting or when the votes are being

3 counted so that people do not vote because of chaos or that the election results are

4 spoiled because of the chaos that they will have started. We have also received reports

5 that they will be armed, and we want to condemn such actions in the strongest terms.

6 What we are talking about are not just allegations or propaganda but confirmed

7 reports. We stated that this morning I went to see the officer in charge of elections in

8 my constituency -- Lang'ata, and while I was in his office, two of those AP officers

9 talked to my officers and they personally confirmed that they had been sent to do that.

10 We are stating that this is unlawful, because the law and the constitution does not

11 allow public servants to participate in elections as agents. They can only vote like

12 everyone else but they are not allowed to be employed as agents by any party because

13 they are public servants who are being paid by the government to protect all

14 citizens - those on the side of government, and those on the opposition side."

15 Mr Witness, is that a fair translation of what you heard Mr Raila say in Kiswahili?

16 A. Yes.

17 Q. Now, Mr Witness, you will confirm that, at this point, the witness is

18 complaining about -- Mr Raila is complaining about the use of administration

19 policemen either to cause chaos or to manipulate elections, isn't it?

20 A. Yes, he has used the Kass FM platform to complain about this.

21 Q. Now, Mr Witness, the question I had put to you is this is the subject that you are

22 saying you heard Mr Sang address at Kass FM when you were testifying earlier on,

23 isn't it?

24 A. The same subject.

25 MR KIGEN-KATWA: Now, Mr Witness, I would like to play for you time stamp

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1 48.14 to 48.20 on the same audio.

2 Mr President, that is at page -- Mr President, that is page 0593.

3 Witness, it is page 25.

4 (Playing of the audio excerpt KEN-D11-0013-0028)

5 MR KIGEN-KATWA:

6 Q. Witness, I will read in English what was said.

7 Your Honours, it is the second paragraph at page 593, which is to this effect:

8 "Thank you very much ..." Mr "... Sang. We are seeing that this news we have

9 received today is shocking, following reports" that "we have received and what the

10 ODM leader Raila Odinga has talked about. Furthermore, a few weeks ago ... a

11 week-and-a-half ago, we heard about these AP officers from Embakasi APTC where

12 they were being trained. And that is not all Sang, he has also stated that there were

13 other senior leaders in government, including Cyrus Kitwai (sic), together with ...

14 there was also a vehicle belonging to one leader which was used in this - belonging to

15 Beth Mugo."

16 Mr Witness, is that --

17 PRESIDING JUDGE EBOE-OSUJI: Can you spell the words Gituai and Mugo.

18 MR KIGEN-KATWA: The spelling of Gituai is K-I-T-W-A-I. And Mugo is

19 M-U-G-O. And Cyrus is C-Y-R-U-S, not Silas.

20 Q. Now, Witness, is that a fair translation of what you just heard the speaker say?

21 A. Yes.

22 MR KIGEN-KATWA: Lastly I want to play for you time stamp 21.34 to 21.47 which  
23 is at page 579. Witness, that is page 11.

24 (Playing of the audio excerpt KEN-D11-0013-0028)

25 MR KIGEN-KATWA:

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1 Q. Witness, you will confirm this is what you heard from a different voice other  
2 than Mr Sang.

3 "The vehicles he has mentioned are, KAZ 178R belonging to KBS (KBS No. 812, a  
4 Nissan Diesel), KBA 034 ... belonging to City Hoppa (No. 485)..."

5 And then Mr Sang comes in and says:

6 "First of all, aren't the City Hopper buses supposed to ply Nairobi only? So if you  
7 have seen them in Eldoret, Kapsabet, Kabarnet, Mombasa, Kisumu, wherever else ..."  
8 and then it goes on. "Other numbers are KAZ 025 (sic) belonging to City Hopper."

9 Witness, that's a fair translation of what you heard in that clip, isn't it?

10 A. Yes.

11 Q. Mr Witness, you will therefore confirm that the complaint about the alleged  
12 rigging started with media presentation by Honourable Raila Odinga, isn't it?

13 Let me rephrase that question. I see you have some difficulty. You have heard  
14 from the voice of Honourable Raila complaining about the likelihood of the elections  
15 being rigged, isn't it?

16 A. Yes, many people spoke about it, but it was taken serious when it was  
17 announced in Kass FM.

18 Q. Thank you very much, Mr Witness. That's actually all I wanted you to confirm.  
19 So you confirm that it was a public issue in Kenya, isn't it? It was an issue that was  
20 widely discussed in Kenya, isn't it?

21 A. There were rumours, that's what I agree.

22 Q. And lastly on that subject you can see that the number plates are being read by  
23 somebody other than Mr Sang, isn't it?

24 A. Yes, I have heard on this -- on this audio someone else giving number plates and  
25 Mr Sang commenting that if they he -- if they have been seen -- if they have seen the

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1 same vehicles in Eldoret, Kisumu, or anywhere in the country.

2 Q. And Mr Witness, you will confirm -- do you know this gentleman by the name  
3 Cyrus Gituai? I will spell his name again C-Y-R-U-S and Gituai is G-I-T-U-A-I.

4 A. No.

5 Q. You do not know him to have been the permanent secretary in charge of  
6 internal security in Kenya?

7 A. No.

8 Q. And lastly on this issue, Mr Witness, you recall this is an issue which was in  
9 Kenyan media, KTN, Standard newspaper, Nation newspaper? You recall that,  
10 Mr Witness?

11 A. About?

12 Q. The issue of the alleged election rigging.

13 A. I agree it became a subject and it also went to press.

14 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, in light of your question about  
15 Mr Cyrus Gituai and the suggestions you made, you need to reconcile the spellings.  
16 In the last occasion the spelling on the transcript was -- is C-Y-R-U-S, the last name is  
17 K-I-T-W-A-I, and now you've spelled Cyrus Gituai. Yes, you did spell C-Y-R-U-S,  
18 but the last name you spelled on the record just now is different. Are we talking  
19 about the same person?

20 MR KIGEN-KATWA: We are talking of the same person, Mr President. May I  
21 apologise? The person who transcribed and translated for us made a mistake. The  
22 correct spelling is the second one that I have made, Mr President, and it is in the  
23 public domain in Kenya that that is the correct spelling.

24 PRESIDING JUDGE EBOE-OSUJI: And why don't we put the question to the  
25 witness again whether the variation in spellings, because he was looking at the

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1 transcripts -- whether that makes a difference to his answer as to familiarity with this  
2 person or knowing who this person -- of whom this person might have been.

3 MR KIGEN-KATWA:

4 Q. Mr Witness, in the initial instance I had given you a spelling of Gituai as  
5 G-I-T-W-A-I. The correct spelling is G-I-T-U-A-I. Cyrus Gituai. Do you --

6 A. Spell it again.

7 Q. The correct spelling is G-I-T-U-A-I, Cyrus Gituai. Do you -- do you know him?

8 A. I don't know him.

9 Q. And --

10 PRESIDING JUDGE EBOE-OSUJI: What about of him? Do you know of him?

11 THE WITNESS: I was aware there was Cyrus who was working in security -- in  
12 charge of security in Kenya. I don't know the second -- the second name, that's why  
13 I said I don't know him, but I know of a Cyrus who was in charge of security.

14 MR KIGEN-KATWA:

15 Q. Now, Mr Witness, I will move on to a different issue about the song that you  
16 said you heard Mr Sang play and we -- Mr President, we are looking at tab 4, and it is  
17 a video reference KEN-D11-0020-0084 at 0085 and the transcription is  
18 KEN-D11-0020-0086 at tab 4 again, Mr President.

19 I will request the witness -- if the court officer could assist to retrieve the transcript  
20 from the witness and to give him the -- if the other transcript could be retrieved first?  
21 Now, Mr Witness, may I ask you this song you said -- you said it is called -- could you  
22 say it again? What was the name of the song?

23 A. Kimi beek kwenet.

24 Q. Mr Witness, what kind of a song is it?

25 A. Kind of a song? I don't understand what you are --

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1 Q. Is it secular, is it -- do you have any description for it?

2 A. I can say it's a Kalenjin song.

3 Q. Do you have any idea -- you've listened to it several times, isn't it? You've  
4 already said you are very familiar with it?

5 A. I know the song.

6 PRESIDING JUDGE EBOE-OSUJI: Can you spell it again, Mr Kigen-Katwa, for the  
7 record --

8 MR KIGEN-KATWA: Yes.

9 PRESIDING JUDGE EBOE-OSUJI: -- so court officers don't have to go looking for it.

10 MR KIGEN-KATWA: Yes, Kimi is K-I-M-I, Beek is B-E-E-K and kwenet is  
11 K-W-E-N-E-T.

12 Q. That's correct, Mr Witness, isn't it?

13 A. Yes.

14 Q. Now, Mr Witness, your testimony was that it has been sung since the year 2005  
15 referendum period into the period of 2007 elections and we've just heard it. And  
16 could you confirm that you've heard it in full several times?

17 A. Yes, I know the song.

18 Q. Now, Mr Witness, does it mention Kalenjins anywhere?

19 A. It doesn't, but it depends how you understand it.

20 Q. Now, Mr Witness, I will read into the record what you had said about this song.  
21 You said at page 3 -- at page 3 in the transcript of 18 November 2014, "It was played in  
22 the station which provoked the Kalenjins." And at page 33, line 12, you said,  
23 "Mr Sang continued to play the song that I mentioned earlier, instigating enmity  
24 between Kalenjins and Kikuyus." And at page 33, line 22 to 25, you said in relation  
25 to the song that, "Mostly the leaders of the Kalenjin used this platform to pass

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1 information to the Kalenjin community against Kikuyus."

2 Do you recall that, Mr Witness?

3 A. Yes.

4 Q. And it remains your testimony that this song was used to incite Kalenjins  
5 against Kikuyus?

6 A. Yes.

7 Q. Could you explain yourself in what sense it was inciting?

8 A. Kimi beek kwenet, the song is saying that we are in the middle of the sea.

9 According to what the Kalenjins understood, the song meant that the Kalenjin people  
10 would remain in the middle of the sea not until when we have taken our -- we  
11 are -- we have taken over power; that is when we are on the other side of the sea.

12 And in relation to how it instigated enmity between the Kalenjin and the Kikuyus is  
13 that those people who were against -- who were not pro-Kalenjins then were making  
14 the Kalenjin people to remain in the middle of the sea. So those people who were  
15 not pro-Kalenjins were taken to be the enemies and obstacles for the Kalenjin to get to  
16 the other side of the sea.

17 Q. Thank you, Mr Witness. So you say it doesn't mention Kalenjins. Does it  
18 mention Kikuyus?

19 A. I've said it is -- when you're using a song to communicate, it does not come  
20 straight. Don't expect to see the word "Kalenjin" or "Kikuyus" in that song, and I  
21 know you also understand that, but it is -- it is used in a manner that will pass  
22 message without the other person noticing or knowing exactly what is said, but when  
23 you are a native who understand that -- that the language of that -- of that -- of the  
24 message being passed through that song then you will know what it means and that  
25 is what I have just explained. It does not mention Kalenjin, it doesn't mention the

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1 Kikuyu, but the message that -- the internal message of the song that was sent to the  
2 Kalenjin people is what matters.

3 Q. Mr Witness, I will very kindly request you to just answer my question very  
4 directly as I ask you. Does it mention any weapons?

5 A. No.

6 Q. Does it mention any cultural activities of Kalenjins?

7 A. No.

8 Q. Now use your own words, what does the song say? Just describe to the Court  
9 what does the song say?

10 A. I've said "We are in the middle ..." -- if I have to direct translate it the way you  
11 are requesting me to do is that, "We are in the middle of sea." That is the theme of  
12 the song.

13 Q. And so what? It can't be saying that for 11 minutes, saying "We are in the  
14 middle of the sea" for 11 minutes, so what more does it say?

15 A. Praying God that he makes us to go to the other side of the sea, sail through the  
16 sea.

17 Q. Does it mention Kenya?

18 A. No.

19 Q. Does it mention any country?

20 A. No, and I've not said it mentions a country.

21 Q. Do you know if it mentions groups in terms of either Kalenjin age set, or  
22 Kalenjin youths, or youths generally, or elders, or women, or the disabled, or the sick?  
23 Do you know if it mentions any of those?

24 A. I understand the song to be passing a message, but doesn't mention what you're  
25 asking.

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1 Q. Mr Witness, I put it to you that in fact you have no knowledge of that song?

2 A. I know you're entitled to your opinion. I'll not get into an argument, but I'll  
3 repeat that the message passed is what I have testified about.

4 Q. Now in the course of your testimony to the Prosecution that this song is inciting,  
5 did the Prosecution -- when they were preparing you to come and testify, did  
6 they -- did you play the song with them and explain what you had in mind to the  
7 Prosecution?

8 A. I have my statements which explains everything that we've done with the  
9 Prosecution concerning that particular matter.

10 PRESIDING JUDGE EBOE-OSUJI: His question was whether you played the song to  
11 the OTP and took them through the song?

12 THE WITNESS: No, I don't -- I didn't. I don't have any audio of the song, but I  
13 know the song.

14 MR KIGEN-KATWA:

15 Q. And so, Mr Witness, if Mr Sang says that the song makes reference to the young  
16 people, to women, to elders, to the sick, he would not be saying the truth about what  
17 is contained in that music in view of what you say?

18 A. If --

19 PRESIDING JUDGE EBOE-OSUJI: That's argumentative now. You need to stick  
20 with the facts, or to the facts, Mr Kigen-Katwa. If you're saying that those references  
21 are in the song you can put it on the record or to the witness to react to, but to tell him  
22 that it is not -- that he is not telling the truth that is argumentative necessarily.

23 MR KIGEN-KATWA:

24 Q. Now, Mr Witness, let me ask you something very wild. Does it mention, for  
25 instance, Ebola or malaria?

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1 A. I've not heard about that, or I don't know. The parts I know about the song  
2 does -- does not speak about it. If it speaks on other parts, I don't know.

3 Q. Does it mention the fights in Congo, the fights in Rwanda, the fights in Somalia?  
4 Does it mention any of those countries?

5 A. No, I've not heard about it.

6 Q. The last question I want to ask you before we play the audio: Does it mention  
7 cancer, or diabetes, or HIV/AIDS?

8 A. The parts I know doesn't speak about it.

9 MR KIGEN-KATWA: Okay, we will play the audio.

10 Mr President, that is at tab 4 and I will start with playing time stamp 00 to 030 for  
11 purposes of identification.

12 Q. And as the audio is being found, do you know who sang the song, Mr Witness?

13 A. No.

14 Q. And do you know which subtribe in the Kalenjin community it is sang in?

15 A. The way I hear it it is Nandi.

16 Q. How many subtribes are there in Kalenjin, Mr Witness?

17 A. There are many. We have the Nandi, we have the Keiyo, we have the Kipsigis.  
18 We have the --

19 Q. May I stop you? Mr Witness, just tell me how many there are.

20 A. There are many, not unless I count.

21 Q. I will play the audio, Mr Witness. We will play the first few seconds and  
22 please confirm that's what you know the song to be, which is the same thing we  
23 played earlier on from Kass.

24 (Viewing of the video excerpt KEN-D11-0020-0084)

25 MR KIGEN-KATWA:

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1 Q. Is that the song you are talking about, Mr Witness?

2 A. Yes.

3 Q. Have you ever seen this video version of the -- this song?

4 A. No.

5 MR KIGEN-KATWA: Now I would like to take you to time stamp 1.10 to time  
6 stamp 2.16. Please listen closely. I will ask you specific questions about what it  
7 says.

8 (Viewing of the video excerpt KEN-D11-0020-0084)

9 MR KIGEN-KATWA:

10 Q. Sorry. Mr Witness, you will confirm that you heard from that part I have  
11 selected? And, your Honours, I have particular reference to time stamp 1.10 to 2.16,  
12 which is at page 0087, that it says "It prays for the young ones."

13 A. What is the question?

14 PRESIDING JUDGE EBOE-OSUJI: The question would be: Did you hear the  
15 reference to "the young ones" in the lyrics of the song?

16 THE WITNESS: Yes.

17 MR KIGEN-KATWA:

18 Q. And in particular it says, "We are in the middle of the sea. Take us to the shore,  
19 oh, Father. We are in the middle of the sea. Take us to the shore, oh, Father.  
20 There are the young ones who would wish to see you. Do take them. Allow them  
21 to praise you." You heard that, Mr Witness, isn't it?

22 A. Yes.

23 Q. You also heard on time stamp 1.40 to 1.50 that he makes reference to women,  
24 isn't it?

25 A. Yes.

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1 Q. And for the record it says, "We are in the middle of the sea, oh, Father. We are  
2 in the middle of the sea. Take us to the shore, oh, Father. There are some women  
3 who would wish to see you. Do take them" -- "Do take care of them so that they may  
4 praise you, oh, Jesus."

5 A. That is.

6 Q. And lastly time stamp 2.08 to 2.16, did you hear a reference to "elders"?

7 A. Yes, it speaks about the old.

8 Q. And he says, "We are in the middle of the sea, oh, Father. We are in the middle  
9 of the sea. Take us to the shore, oh, Father. There are the elders who would wish to  
10 see you." I would like to play you another time stamp, time stamp 2.52 to 3.15.

11 (Viewing of the video excerpt KEN-D11-0020-0084)

12 MR KIGEN-KATWA:

13 Q. Witness, you will confirm you've heard him "... pray for the rich"?

14 A. Yes.

15 MR KIGEN-KATWA: Your Honour, the time stamp "... for the rich ..." is 2.52 to 3.00,  
16 where it says, "We are in the middle of the sea. Take us to the shore, oh, Father.  
17 There are some rich people who would wish to see you. Do take us ..." -- "Do take  
18 care of them so that they may praise you, oh, Jesus." That is at page 0089.

19 Q. Witness, you also heard him pray for the poor?

20 A. Yes.

21 Q. And it is to the effect that, "We are in the middle of the sea. Take us to the  
22 shore, oh, Father. There are some poor people who would wish to see you. Do take  
23 care of them so that they may praise you, oh, Jesus."

24 And, Witness, you also heard him pray for the sick, isn't it?

25 A. Yes.

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1 Q. And it is to the effect that, "We are in the middle of the sea. Take us to the  
2 shore, oh, Father. Very true, there are illness -- illnesses here where we are. When  
3 we seek you out, Father, do show us your favour, Jesus."

4 Mr President, I will move out to time stamp 3.57 to 4.12.

5 (Viewing of the video excerpt KEN-D11-0020-0084)

6 MR KIGEN-KATWA:

7 Q. Witness, you heard him pray for those who have ukimwi, who have AIDS?

8 A. Yes.

9 Q. And the words he uses are, "We are in the middle of the sea. Take us to the  
10 shore, oh, Father. There is HIV/AIDS here on earth where we are. When we call  
11 out to you, Father, do take care of us, Jesus." You also heard him mention Ebola,  
12 isn't it?

13 A. Yes.

14 Q. And he says, "We are in the middle of the sea. Take us to the shore, oh, Father.  
15 There is Ebola here on earth where we are. When we call on -- when we call out to  
16 you, Father, do take care of us, Jesus."

17 Mr President, at page 60, line 16, the witness's answer that he heard mention of  
18 illnesses is not captured. I would pray that it be captured to the effect that he says,  
19 yes, he heard the singer pray for the ill.

20 PRESIDING JUDGE EBOE-OSUJI: Yes, he did answer the question in the  
21 affirmative.

22 MR KIGEN-KATWA: Mr President, I will pray to play time stamp 5.18 to 5.32 -- to  
23 5.58.

24 (Viewing of the video excerpt KEN-D11-0020-0084)

25 MR KIGEN-KATWA:

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1 Q. Witness, do you confirm you heard him say, "There is our nation, oh, Father"?

2 You heard him say that?

3 A. Yes.

4 Q. And for the record he says, "We are in the middle of the sea, oh, Father. We

5 are the in middle of the sea. Take us to the shore, oh, Father. There is our nation,

6 oh, Father. Do take care of us so that we may seek you always." Witness, you also

7 heard him say he is praying for his village, isn't it?

8 A. Yes.

9 Q. And for the record he says, "We are in the middle of the sea, oh, Father. We

10 are in the middle of the sea. Take us to the shore, oh, Father. There is our village,

11 oh, Father. When we call out to you, take us ashore, oh, Father."

12 Now, Witness, I will play for you time stamp 6.59 to 7.50, which should be the second

13 last bit.

14 (Viewing of the video excerpt KEN-D11-0020-0084)

15 MR KIGEN-KATWA:

16 Q. Witness, you heard him pray for Tanzania, for Uganda, for Somalia and for our

17 Kenya?

18 A. Yes.

19 Q. And it says that, "We are in the middle of the sea, oh, Father. There is

20 Tanzania, oh, Father. And show them your favour so that they may seek you, oh,

21 Jesus."

22 And in respect to Uganda, he says, "There is Uganda, oh, Father Take care of them so

23 that they may seek you -- seek you out forever."

24 And on Somalia he says, "There is Somalia, oh, Father. Do take care of them so that

25 they may praise you forever."

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1 And on Kenya he says, "There is our Kenya, oh, Father. Do take care of them so that  
2 they may praise you forever."

3 Lastly, I will play for you time stamp 8.33 to 9.25, Mr Witness.

4 Your Honours that is at 0093 to 0094.

5 (Viewing of the video excerpt KEN-D11-0020-0084)

6 MR KIGEN-KATWA:

7 Q. Witness, you can see -- you said you don't know the -- the people who sang that  
8 song. I'd like you to see from the screen who they are.

9 If it could be played time stamp 8.43.

10 (Viewing of the video excerpt KEN-D11-0020-0084)

11 MR KIGEN-KATWA:

12 Q. Mr Witness, you can see the people who sang that song Bureti Superstars?

13 A. Yes.

14 Q. Is this information new, or you didn't know who sang it?

15 A. I didn't know who sang it.

16 MR KIGEN-KATWA: Okay, we'll go on.

17 (Viewing of the video excerpt KEN-D11-0020-0084)

18 MR KIGEN-KATWA:

19 Q. Witness, you've heard him in that bit pray for superstars and for our churches,  
20 isn't it?

21 A. Yes.

22 Q. And for the record he says:

23 "We are in the middle of the sea, take us to the shore, oh, Father.

24 There are superstars, oh, Father.

25 When we call you, Father so that we can praise you eternally."

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1 And on the churches he says:

2 "Take us ashore for sure!

3 Make us praise you.

4 There are churches, oh Father.

5 When we call ..." on "... you, Father, show them your favour."

6 Witness, you also saw that repeatedly on the screen they showed churches and Jesus,

7 isn't it?

8 A. I saw churches.

9 Q. Did you see Jesus?

10 A. No.

11 PRESIDING JUDGE EBOE-OSUJI: You may want to look at the transcript for where

12 it is begging for spellings.

13 MR KIGEN-KATWA: Mr President, may I come to spellings a little later?

14 Mr President, at this moment I pray -- Mr Witness, this audio was obtained from the

15 YouTube. Have you ever heard it outside Kass FM, Mr Witness?

16 A. No. I don't have -- I've never -- I have not heard of it anywhere else.

17 Q. Now, I'd like you to look at time stamp 02.12 and then tell us if you can see

18 Jesus there. Can you see it?

19 A. Yes.

20 Q. Your Honour, for the record it's time stamp 2.12.

21 Witness, with what I have taken you through, do you still maintain that you have

22 ever listened to this song at all?

23 A. Yes.

24 Q. And you also still maintain that it incites Kalenjins against Kikuyus?

25 A. Yes, my testimony is about the hidden meaning of how that song was used at

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1 that time. Otherwise, what you've just explained on a direct translation of what the  
2 song is talking about I have no problem with your translation.

3 MR KIGEN-KATWA: Mr President, I pray at this moment to produce the audio  
4 KEN-D11-0020-0084 at 0085 and the translation and transcription KEN-D11-0020-0086  
5 as Sang's Defence exhibits.

6 PRESIDING JUDGE EBOE-OSUJI: Is it only audio? I thought it was video as well.

7 MR KIGEN-KATWA: And video, I'm sorry, Mr President.

8 PRESIDING JUDGE EBOE-OSUJI: Any objection?

9 MR STEYNBERG: No objection, your Honour. Only to note that on the screenshot  
10 shown to us I note that this video was uploaded on 14 October 2011. I'm not sure if  
11 anything turns on that, but no objection to the admission.

12 PRESIDING JUDGE EBOE-OSUJI: Ms Alagendra?

13 MS ALAGENDRA: We have no objections, your Honour.

14 PRESIDING JUDGE EBOE-OSUJI: The audiovisual material and the transcript will  
15 be admitted as the next in the Sang Defence exhibits.

16 THE COURT OFFICER: Mr President, the audio-video excerpt referenced as  
17 KEN-D11-0020-0084 public excerpt will be attributed reference EVD-T-D11-00057.

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.

19 THE COURT OFFICER: Sorry, Mr President. The item referenced as  
20 KEN-D11-0020-0086 public document, the transcript of the audio excerpt, will be  
21 attributed reference EVD-T-D11-00058.

22 Thank you.

23 PRESIDING JUDGE EBOE-OSUJI: Thank you.

24 Mr Kigen-Katwa, do you have a CD of this song with the sleeve and everything?

25 MR KIGEN-KATWA: Mr President, we availed -- what we availed is what we

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1 downloaded from the YouTube which is exactly the same thing that was being played  
2 by Kass FM, Mr President. I don't know if that answers your question, Mr President.

3 PRESIDING JUDGE EBOE-OSUJI: You heard the Prosecutor, the note he put on  
4 record.

5 MR KIGEN-KATWA: Yes, I do, Mr President. He said he doesn't know if anything  
6 turns on it. If an issue as to whether there is a later version of the song I don't know  
7 if that's what he had in mind, but we will deal with it, Mr President, but it is our  
8 position, which I can say positively myself, that it's exactly the same thing, Mr  
9 President. Nothing has changed about it.

10 PRESIDING JUDGE EBOE-OSUJI: Something may or may not turn on it in the sense  
11 that if a suggestion is that there may have been a reissue of this song, so that what we  
12 see now may not be what was the original version, that would have been played --

13 MR KIGEN-KATWA: Mr President --

14 PRESIDING JUDGE EBOE-OSUJI: -- in full at the time and material time, something  
15 may then turn on that.

16 MR KIGEN-KATWA: Likely we are very confident about that, Mr President, but  
17 may I say, Mr President, that the source from where we had uploaded is -- shows that  
18 it was placed there on October -- it was -- it was uploaded on 14 October 2011. And,  
19 Mr President, we are prepared to correspond with the Prosecution and even to avail  
20 them a statement from the producers of the song if it becomes an issue in contention.

21 PRESIDING JUDGE EBOE-OSUJI: We will continue.

22 MR KIGEN-KATWA: And we are anyway prepared to play the song from the  
23 programme itself, Mr President. We thought it would be more effective when it's  
24 played as a video.

25 PRESIDING JUDGE EBOE-OSUJI: Proceed, please. This is your case.

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

2 Q. Mr Witness, you said that to the best of your recollection from the period when  
3 you were listening to Mr Sang you heard him make comments which were  
4 anti-Kikuyu. That was your testimony, isn't it?

5 A. Yes. By use of these words that -- this -- like I said, by use of the "bikab chego,"  
6 "ngoya muriat kobo got nebo," the song --

7 Q. Now, the question I want to ask you is having said that you understood him to  
8 be inciting Kalenjins against Kikuyus using all these expressions in this song, having  
9 said that, do you recall having heard him say very explicitly to Kalenjins that you  
10 have to coexist with other tribes?

11 A. Yes. What I am -- what I am -- what I am talking about is not the language that  
12 you can go to speak generally straight away on vid -- on -- on -- on air, but Sang was  
13 using a hidden language which will be understood by the Kalenjins and when he  
14 wanted to come straight, he will just speak now very nicely like any other journalist  
15 who is -- who is -- who is open to his mind, but when he turns around to -- to incite  
16 using these idioms and songs you will get a different message from what  
17 you will -- you will hear him speak openly on -- on air.

18 So the Sang of the right part that he was speaking clearly on air will speak on  
19 coexistence, the need to stop the war and so forth, but when he turns to be the song of  
20 the idioms that has a hidden meaning then you will get a different message.

21 So I applaud him for having spoken on directly and I wish he could have maintained  
22 that from the beginning without using these hidden language to incite, or rather  
23 remain impartial as a -- as a -- as a -- as a journalist or as a presenter in Kass FM so  
24 that people will not -- will not associate chaos and fighting with the programme he  
25 was conducting. That was my problem.

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1 Q. So just for the record, Mr Witness, so you say Mr Sang -- you recall having  
2 heard Mr Sang explicitly ask people to remain peace and to coexist, isn't it?

3 A. Yes, at times he will speak, that was true.

4 Q. And, Mr Witness, we went through your credentials in closed session. Based  
5 on that general knowledge, and we are being careful not to have your identity  
6 disclosed, you would agree that you are aware that there are institutions in Kenya to  
7 monitor the media, isn't it?

8 A. Yes.

9 Q. And this includes the Communication Commission of Kenya and the media  
10 council, isn't it?

11 A. Yes.

12 Q. You also confirm that, to the best of your knowledge, there is an entity called  
13 Synovate which keeps records of what was broadcasted, isn't it?

14 A. Repeat that one.

15 Q. Do you know a body called Synovate?

16 A. Yes.

17 Q. You also know that they keep records of what was said by the broadcasting  
18 houses, isn't it?

19 A. Yes.

20 Q. And lastly you have already confirmed that there are many people in Rift Valley  
21 who would be -- who would understand Kalenjins when in fact they are, amongst  
22 other tribes, Kikuyus, isn't it?

23 A. Yes.

24 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa --

25 THE WITNESS: Not only -- not only Kikuyus, but people who have not -- even the

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1 other tribes, like I've heard people like Luhya at times, those who have stayed with  
2 the Kalenjins for so long, they were -- they are able to speak in -- in that language, but  
3 there's difference between speaking the language and understanding when it goes  
4 deep to hidden meanings of certain words that might be used for certain purposes.

5 PRESIDING JUDGE EBOE-OSUJI: Line 11, we need a spelling.

6 MR KIGEN-KATWA: The spelling, Mr President, is S-Y-N-O-V-A-T-E, Synovate.

7 Q. Now, Mr Witness, I will play you one peace message that was made by Mr Sang  
8 and I will ask you to confirm if this is one of the ones you heard.

9 Mr President, this is KEN-D11-0011-0044 and the translation is D11-0011-0045 and it is  
10 in the -- our core binder tab 9, that would be the binder we've always used.

11 PRESIDING JUDGE EBOE-OSUJI: Before we go there, did you say the song, Kimi  
12 Beek, the song we heard, that there is -- the version you had in mind or the -- you and  
13 the witness are talking about was played on the Lene Emet programme at the  
14 material time?

15 MR KIGEN-KATWA: May I get the answer from the witness, Mr President?

16 Probably that's better.

17 PRESIDING JUDGE EBOE-OSUJI: No, no, no. It's from you, actually. It's  
18 addressed to you. When I asked you whether there was a CD and you said -- in  
19 responding to me you said, yes, you thought it would be more effective to play the  
20 video version you downloaded from YouTube.

21 MR KIGEN-KATWA: This is true, Mr President. You will recall that we played the  
22 version that was played at the station in the morning in a programme of 25  
23 December 2007. He has played -- Sang spoke a little, then he played the song, then  
24 we went to the voice of Mr Raila. Then for purposes of the digest with the witness,  
25 Mr President, we've used the video version of the same audio.

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1 PRESIDING JUDGE EBOE-OSUJI: Forget the video version from YouTube for now.  
2 We will want to hear the extent to which the song was played on the programme at  
3 the time.

4 MR KIGEN-KATWA: And Mr President will recall that the witness said he has  
5 heard that song only in Lene Emet programme and in full, specifically there, and he  
6 says he's not heard it outside the Lene Emet programme -- or, rather, he's not heard it  
7 outside Kass FM. He's not heard it independent of listening to the station.

8 PRESIDING JUDGE EBOE-OSUJI: And you see why that -- why it is important then  
9 that we see or hear the version that was played on the programme, if that is where the  
10 witness heard it.

11 MR KIGEN-KATWA: Yes, Mr President.

12 THE WITNESS: Your Honour, I didn't say I've heard it in full. I've said I've heard  
13 the song in Kass FM.

14 PRESIDING JUDGE EBOE-OSUJI: We don't need to do that now. We will come  
15 back later so you might deal with other matters you have in hand. When we come  
16 back we will do that. Thank you.

17 MR KIGEN-KATWA: Mr President, just for the record, it is at page 25 of the  
18 transcript at tab 16, KEN-D11 -- sorry, KEN-D11-0014-0568.

19 Mr President, I would like to play another audio for the witness --

20 PRESIDING JUDGE EBOE-OSUJI: Sorry, what's at tab 25?

21 MR KIGEN-KATWA: The excerpt of the song, Mr President. Tab 13, it's tab 13,  
22 page 15. And, Mr President, for the record this is what the witness says he heard  
23 from the year 2005 to the year 2014 over -- over -- spread over that period any way.  
24 Mr President, I would like to play an audio in the core binder, tab 9, whose reference  
25 I've just played -- I've just read out, KEN-D11-0011-0045, and the audio itself is

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1 KEN-D11-0011-0044.

2 PRESIDING JUDGE EBOE-OSUJI: Tab 9?

3 MR KIGEN-KATWA: Yes, Mr President, of the core binder.

4 PRESIDING JUDGE EBOE-OSUJI: Core binder.

5 MR KIGEN-KATWA: Yes. Thank you.

6 PRESIDING JUDGE EBOE-OSUJI: How many binders do you have? Two?

7 MR KIGEN-KATWA: Yes, Mr President, and there is a core binder being a binder

8 we always use. It contains peace messages and a couple of other things that we

9 repeatedly use. I think the court officers could assist.

10 PRESIDING JUDGE EBOE-OSUJI: This is not a binder you've handed up for

11 purposes of examination of this witness necessarily?

12 MR KIGEN-KATWA: Mr President will recall that we always had one binder that

13 we had indicated we would be reusing. We had emailed -- we had sought the

14 assistance of the court officers to have it brought. We apologise if it's not there. We

15 could -- it's a small black binder, Mr President. We probably have to come back to it.

16 PRESIDING JUDGE EBOE-OSUJI: I do not recall that arrangement. I know in the

17 past you have made reference to core binder, but I did not understand that that was

18 to be brought to the court all the time for your cross-examination. It was used for

19 I believe one witness; I remember that. I don't know if it was used another time.

20 It's better to have these things to resubmit them whenever you want to refer to such

21 material because no one has it now.

22 MR KIGEN-KATWA: Mr President, then I will go to a different audio and deal with

23 something different. I will go to the binder that is before the Court, tab 16, reference

24 KEN-D11-0013-0029, that is the audio, and the translation is KEN-D11-0019-0252. I

25 will start with playing time stamp 00.51 to 2.12.

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1 Q. Mr Witness, I would like you to listen to that audio, confirm if you recognize the  
2 voice and if it is one of the broadcasts that you heard from Mr Sang. We will go  
3 through the questions.

4 (Playing of the audio excerpt KEN-D11-0013-0029)

5 MR KIGEN-KATWA:

6 Q. Mr Witness, you -- do you recognize the voice?

7 A. Yes, he has already introduced himself.

8 Q. Okay. And you have heard him mentioned that it is the -- it's Monday, the 6th,  
9 isn't it? You've also heard him say that since a raid to the Standard newspaper, you  
10 heard that, isn't it?

11 A. (Overlapping speakers)

12 MR KIGEN-KATWA: Mr President, with your permission, I'll read into the record  
13 what has just been said.

14 "Kass FM -- Kalenjin Radio. I would like to give my thanks for such a great day that  
15 the Jehovah has given us, this Monday, 6th, that we can be able to share and learn  
16 from our programmes on such a day as this. My name is Joshua Arap Sang ... I  
17 welcome you saying you are welcome to today's programme and would like to thank  
18 Jehovah for the rains, and for the many things ... he continues to do for our Kenyan  
19 community and for the Nandi community.

20 Today we talk ..." -- "Today as we talk we would like to know what is happening in  
21 the country and ... the country's mood ..." in "... Lene Emet. From the time the  
22 Standard Group was raided - the Standard Newspaper and KTN television - much  
23 has been said, dear listeners, to a point where the country could be said to be at a  
24 position that can be described as a difficult part of the journey."

25 Mr Witness, you confirm having heard that?

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1 A. Only the part you've talked about Nandi, it's saying Kalenjin.

2 PRESIDING JUDGE EBOE-OSUJI: Witness, I know it's been -- you've been on the  
3 stand or on the seat for a long time, but the pauses you still need to observe.

4 There was an answer at line -- between line 23 and 24.

5 MR KIGEN-KATWA: The question, Mr President, was whether he is aware of a raid  
6 to the Standard -- whether he has heard comment to the effect that there was a raid to  
7 the Standard newspaper and -- to the Standard newspaper.

8 Q. Witness, you said yes, you --

9 A. Yes.

10 Q. -- you heard that? And you also said that you remember having heard it being  
11 said that it is Monday, the 6th, isn't it?

12 PRESIDING JUDGE EBOE-OSUJI: Pause. Pause five seconds.

13 MR KIGEN-KATWA:

14 Q. Now, Witness --

15 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, what was the word at line 17,  
16 at the end of line 17?

17 MR KIGEN-KATWA: It was a "raid" to the Standard newspaper.

18 PRESIDING JUDGE EBOE-OSUJI: How do you spell that? Sorry, raid?

19 MR KIGEN-KATWA: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: Raid?

21 MR KIGEN-KATWA: Yes.

22 PRESIDING JUDGE EBOE-OSUJI: So the word is already there, R-A-I-D?

23 MR KIGEN-KATWA: Yes, Mr President.

24 PRESIDING JUDGE EBOE-OSUJI: Okay, sorry.

25 MR KIGEN-KATWA:

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1 Q. Now, Mr Witness, I would like to play the rest of what Mr Sang said in the first  
2 part of introducing the subject of his discussion on that day and initially I will play  
3 time stamp 1.35 to 5.00.

4 MR KIGEN-KATWA: Mr President, I will request for the assistance of the court  
5 officer to give a copy to the witness.

6 Q. Mr Witness, you will kindly look at page 1 and for the record that is page  
7 D11-0019-0253 and we will be going through it to page 0254.  
8 (Playing of the audio excerpt KEN-D11-0013-0029)

9 MR KIGEN-KATWA:

10 Q. Mr Witness, I just want to be sure you are with -- can you follow it? Have you  
11 been able to locate where it is?

12 A. No. Is it --

13 Q. That is the translation. There is no Kalenjin transcription. If you could look at  
14 the end of paragraph 2 with the words, "A difficult position is difficult because of the  
15 acts of raiding or surprising one without following appropriate procedure." Are you  
16 there, Mr Witness?

17 A. Yes.

18 MR KIGEN-KATWA: Okay. The audio will proceed from "When this happened".  
19 (Playing of the audio excerpt KEN-D11-0013-0029)

20 MR KIGEN-KATWA:

21 Q. Witness, were you able to follow it?

22 A. Yes.

23 Q. Now, at page 2, which is 0254, could you confirm that Mr Sang has said that the  
24 thing they want -- he wants to have discussed is -- these are his words, "... I want us to  
25 discuss and help one another to find ways to avoid such and thus be able to take care

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1 of this nation ..." Can you see that, Mr Witness?

2 A. Yes.

3 Q. And you also see that --

4 PRESIDING JUDGE EBOE-OSUJI: So what is -- there needs to be a question, another  
5 question. You've asked him, "Can you see that?" So that is on the transcript.

6 There should be another question.

7 MR KIGEN-KATWA: I want to ask -- just to form it and then ask the main  
8 proposition, Mr President, with your permission.

9 Q. Mr Witness, you also see that he says, "... this country does not belong to the  
10 Kalenjin, nor to the Kikuyu, nor to the Luhya, nor to the Luo, nor to Kamba alone. It  
11 does not belong to any religion." You can see that, Mr Witness?

12 A. Yes, I also see how he has used the terminologies in Kalenjin to express the  
13 Kamba, the Luhya, Lemek, Kapchelit to mean -- so I'm getting the meaning of the  
14 Kalenjin strong words to mean these tribes.

15 Q. Yes, Mr Witness. Now, those references, let's take up that what you've just  
16 said, references to the Kikuyu, to the Luhya, to the Luo and to the Kamba. Is it  
17 something you had heard Mr Sang use previously?

18 A. I've stated that I've heard him use these words which are -- which are idiomatic  
19 and he's capable of using them in his programme. Like what he has just used here  
20 now, if you may listen to the -- what you've just played, the Kamba, he doesn't say  
21 Kamba in Kalenjin, he says Kapchelit. When he's talking about Luhya, he doesn't  
22 say -- he's saying -- he's talking about Lemek. A Kalenjin would understand Lemek  
23 to mean Luhya and Kapchelit to mean Kamba.

24 MR KIGEN-KATWA:

25 Q. For purposes of record, the spelling of Kapchelit is K-A-P-C-H-E-L-I-T and

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1 Lemek is L-E-M-E-K, isn't it, Mr Witness?

2 A. Yes.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, now we have to stop here for  
4 purposes of the break, but when I tried to stop you earlier to say there's another  
5 question and you kept going, the witness's last -- just last answer accentuates the  
6 difficulty I had in mind which was you read a text -- what we're looking at here you  
7 say is not a transcript of the audio but a translation. Now, we know the audio is in  
8 Kalenjin, so when you read the translation in the absence of the transcript in the  
9 native language of the audio, it is important to ask the witness whether what is  
10 reflected in the translation is what he heard in the native language of the audio so that  
11 there is no confusion so we don't down the line start running into difficulties.  
12 We have to rise now and when we come back we'll take it from here. We will be  
13 returning at 3.30 and to go until 5, again to accommodate Mr (Redacted) who  
14 promised to see what he can do to speed up his appearance and return quickly.  
15 And as soon as he gets back, he will let the court officer know, so we should all be on  
16 standby to see if we can come sooner so we can also finish sooner. Thank you.  
17 Closed session, please.

18 \*(Closed session at 1.30 p.m.) Reclassified as Open session

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

20 PRESIDING JUDGE EBOE-OSUJI: Thank you.

21 (The witness stands down)

22 PRESIDING JUDGE EBOE-OSUJI: Court will rise.

23 THE COURT OFFICER: All rise.

24 (Recess taken at 1.31 p.m.)

25 (Upon resuming in open session at 3.35 p.m.)

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1 THE COURT USHER: All rise.

2 Please be seated.

3 THE COURT OFFICER: Mr President, we are in open session.

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

5 Mr Kigen-Katwa.

6 Witness, welcome back.

7 MR KIGEN-KATWA:

8 Q. Now, Witness, I played out to you an audio before we went for break, that  
9 audio did not have a transcription. And the first question I wish to ask you is  
10 whether after following the -- the translation it is a fair reflection of what was said in  
11 Kalenjin?

12 A. Yes.

13 Q. Now, before we went to break also you said you observed that the words used  
14 in reference to the Luhya, the Luo and Kamba are not necessarily the exact Luhya,  
15 Luo and Kamba, but different words, isn't it?

16 A. Meaning -- words that to Kalenjin it gives -- it give those meanings.

17 Q. And you particularly mentioned the word "Kapchelit." You confirm that  
18 Kapchelit is the common word used by Kalenjins in reference to Kambas, isn't it?

19 A. Yes, that is the word that means Kamba.

20 Q. You also confirm that the word "Lemek" is generally used to make reference to  
21 the Luhyas, isn't it?

22 A. Yes.

23 Q. Now, you also --

24 PRESIDING JUDGE EBOE-OSUJI: That -- okay, I see it now. Sometimes when we  
25 hear the "Yes" it does not resonate on the headphone, but I see it in the transcript.

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1 Yes.

2 MR KIGEN-KATWA:

3 Q. Now, Mr Witness, you also said that you recall that from time to time Mr Sang  
4 would ask people to live in harmony and maintain peace, isn't it?

5 A. Yes, I explained that sometimes he would speak like that.

6 Q. And you confirm that you have seen that he has asked that all tribes live  
7 peacefully and in harmony for the posterity of Kenya in this audio, isn't it?

8 A. (Overlapping speakers)

9 Q. Now, I will read what we just heard in Kalenjin into the court record which is to  
10 this effect, "When this happened ..." -- Mr President, I'm reading from page 253.

11 Witness, that is page 1, paragraph 3 starting with the words "When this happened ..."

12 PRESIDING JUDGE EBOE-OSUJI: Please keep an eye on the transcript. There's  
13 something that's not working well. There are -- sometimes the witness's answer is  
14 not reflected.

15 MR KIGEN-KATWA: Yes, Mr President, I will endeavour to do that.

16 PRESIDING JUDGE EBOE-OSUJI: At line 12, for example, I think in the middle after  
17 you finished with your question, "... isn't it?", the witness did respond. And then  
18 you continued, quote, "Now I will read what we heard," but the witness's answer is  
19 not on record. That's what I mean.

20 MR KIGEN-KATWA: I see that, Mr President.

21 Q. Witness, I had asked you that could you confirm that you have seen that  
22 Mr Sang asked that all tribes live peacefully and in harmony for the posterity of  
23 Kenya in the audio and did you answer "Yes," Mr Witness?

24 A. Yes.

25 Q. Now, Witness, I will read what you just heard in Kalenjin which you confirm

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1 this is a fair translation of that this is what Mr Sang said, "When this happened, as you  
2 heard dear listeners, everybody tried to distance themselves from the act ..." --  
3 PRESIDING JUDGE EBOE-OSUJI: Remember to pace yourself slowly, please.  
4 MR KIGEN-KATWA:  
5 Q. "... both the people in government and others not in government. The  
6 government itself is divided in the middle on this issue; or rather people's opinions  
7 are divided on the action that was taken. Some people within government have  
8 condemned the act saying it is not proper while others have supported the action  
9 saying it is okay.  
10 If you follow this up, dear listeners - even though someone is minister, he/she is a  
11 minister of the government of Kenya; not a minister of his tribe nor an individual  
12 minister. Before the president appoints an individual and decides that he can work  
13 with that individual, he considers an individual with Kenya's interest at heart; he  
14 does not consider a person's tribal affiliation or where ..." he "... hails from.  
15 The reason I'm saying this, dear listeners, is so that we can discuss this issue, I would  
16 like us to ponder deeply on this issue that has the potential to bring hostility or  
17 enmity in Kenya. Though God gave us a beautiful country, and gave us good soils,  
18 and rain and peaceful coexistence, whereby we are ... happy living together in this  
19 country ... belonging to this country - a country that's the envy of others who wish ...  
20 they would get even a mere acre, or even a small portion of this country to place the  
21 head; for this is the country of Kenya, loved by all; a country, dear listeners, of people  
22 who love others. However, when this event occurred, there ..." were "... some who  
23 knew and others who did not. When you tried to look closely, dear listener, you  
24 find there is something, when you peek within, that leaves you wondering: What's  
25 within here?

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1 And it is this, dear listeners, that I want us to discuss and help one another to find  
2 ways to avoid such and thus ..." will be "... and thus be able to take care of this nation;  
3 for this country does not belong to the Kalenjin, nor to the Kikuyu, nor to the Luhya,  
4 nor to the Luo, nor to the Kamba alone. It does not belong to any ..." -- "... to any  
5 religion. This country belongs to anyone whose ID is inscribed "Kenyan citizen."  
6 Therefore, it is the right of every citizen to work together and forge national unity, so  
7 that we are able to move forward and take care of our country; and not with anger,  
8 revenge or malice - or tribalism."

9 Mr Witness, I would like to play a little more of that audio to you, but even before I  
10 do that, do you recall having listened to Mr Sang's programme on 6 March 2006? Is  
11 it one of the days when you heard Mr Sang?

12 A. Yes, around that time of the month.

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

14 I would like to play from time stamp 04.39 to 9.09.

15 (Playing of the audio excerpt KEN-D11-0013-0029)

16 MR KIGEN-KATWA:

17 Q. Mr Witness, I just want to be sure you can follow. Can you -- are you -- can  
18 you -- have you found the place in the translation? That would be paragraph 3,  
19 starting with the words "The reason behind my utterances ..." Are you there,  
20 Mr Witness?

21 A. Yes.

22 MR KIGEN-KATWA: Okay, just follow it.

23 (Playing of the audio excerpt KEN-D11-0013-0029)

24 MR KIGEN-KATWA:

25 Q. Mr Witness, I have stopped at time stamp 6.50. I would like to read in English

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1 what you've just heard and request you to confirm before we proceed.  
2 And this is what Mr Sang has said: "The reason behind my utterance, dear listeners,  
3 is that as this news develops, people say things that one ought to think twice about,  
4 and determine how we can all live together in this nation of Kenya so as to avert ...  
5 impending violence. This is because every time someone an issue that appears  
6 difficult, you soon begin to hear people say, 'Rwanda' and 'Burundi' - that we should  
7 take care of our country so that it does not go the Rwanda or Burundi way.  
8 So, how are we going to take care of this country so that tomorrow we do not go  
9 Rwanda way or ..." the way that we "... that were done in Rwanda? How are we  
10 going to take care of this country, dear listeners, so that ethnic violence does not erupt?  
11 Furthermore, what kind of talk or discussion could possibly lead people to do the  
12 kind of things that were done in Rwanda and Burundi? What is it that promotes or  
13 pushes individuals to see others that are not ..." -- "... that are not of their tribe as not  
14 being human? Furthermore we need to think about this, listeners, that  
15 tribalism - when we look at ourselves as Kalenjin, for instance - what is it that fosters  
16 our unity as a community, and what should ..." be -- "... what should we caution  
17 ourselves against so that even as we foster our unity as Kalenjin we also foster the  
18 unity of Kenyan nation?  
19 And this is not for the Kalenjin community alone, but for all the forty two tribes of  
20 this nation. What can be done so that every tribe upholds the rights of the country  
21 rights as well as their own individual community rights? Because tribalism is not  
22 about Kalenjin deciding to be united in undertaking their activities; no, that's not  
23 tribalism. As such, while we unite as Kalenjin community, what is it that we can do  
24 so that we can ..." at the "... same time sustain the country's unity? This is because as  
25 though we are seeking leadership, and everyone is seeking leadership, you are

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1 seeking to lead the whole nation, not the Kalenjin alone. At the end of the day, you  
2 will rule over all people in the nation, not the Kikuyu alone, or the Luhya, or the Luo  
3 only - no, you will rule over the whole country if you are elected as the ..." country "...  
4 country's president."

5 Mr Witness, is there -- is that a fair translation of what you have heard so far?

6 A. Yes.

7 MR KIGEN-KATWA: Mr President, I will request to correct page 83, line 20, the  
8 word effected there is "evade." It should be "avert any impending violence."

9 Q. Witness, I will play time stamp 6.20 -- 6.50 to 9.04.

10 PRESIDING JUDGE EBOE-OSUJI: "Avert ...", you said, A-V-E-R-T --

11 MR KIGEN-KATWA: Yes, Mr President.

12 PRESIDING JUDGE EBOE-OSUJI: -- "... any impending violence." All right. I'm  
13 sure eventually it will be captured.

14 Before we proceed, let's see.

15 Witness, you testified earlier that he has -- sometimes Mr Sang, according to your  
16 testimony, would be broadcasting messages of peace and coexistence, but at other  
17 times it would be broadcasting, according to you, inciting messages; is that your  
18 testimony?

19 THE WITNESS: Yes.

20 PRESIDING JUDGE EBOE-OSUJI: And counsel for Mr Sang has now asked you  
21 about the broadcast of 6 March 2006. Did you say you listened to it at the time?

22 MR KIGEN-KATWA: He had said yes, Mr President.

23 THE WITNESS: I said around in the month of March I listened to -- to Kass FM, but  
24 I don't remember exactly 6 March.

25 PRESIDING JUDGE EBOE-OSUJI: All right. The point would be with this message

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1 Mr Kigen-Katwa has been playing, would it have been something you heard on

2 Kass FM from Mr Sang?

3 THE WITNESS: No.

4 PRESIDING JUDGE EBOE-OSUJI: Continue, Mr Kigen-Katwa.

5 MR KIGEN-KATWA: Now, I'll play the last bit of the audio, Mr Witness, in relation  
6 to this time stamp, 6.50 to 9.04.

7 (Playing of the audio excerpt KEN-D11-0013-0029)

8 MR KIGEN-KATWA:

9 Q. Witness, I would request you to confirm if this is what you heard in Kalenjin  
10 from Mr Sang:

11 "So, how shall we maintain this unity, house of Kalenjin? So that we ..." -- "So that  
12 even as we seek to maintain our own unity as a community - just as other  
13 communities do - we also work towards national unity. For if and when a time  
14 comes that a minister defends the attack on a particular media station, we find that  
15 stations are divided along tribal and party lines; which is why you find an individual  
16 mentioning that Standard or some other, or that station belongs to KANU, that  
17 belongs to LDP, that is for the Kikuyu, that is for DP - what is this, our community?  
18 I find this an important point of discussion so that we can be able to take care for in  
19 truth this country is large, and the constitution allows each and every individual to  
20 live in any part of the country with full rights as long as that individual has  
21 purchased the place - not someone just coming and settling in someone else's place.  
22 But in the case of a willing buyer and seller, then one has a right to live in any place;  
23 but if we continue with this trend, then there are those that are bound to ask: So it  
24 (station) was closed because it belongs to KANU? Was it was closed as ours was the  
25 other time because it belongs to Kalenjin, or because it belonged to KANU, or some

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1 other? So we need to be vigilant so that such issues do not dent the Kenya's unity.  
2 National unity is most paramount so that as we move to have community unity, we  
3 first have to achieve national Unity. This is because if the country is not well, then  
4 no community will live well with its rights. It is important that we foster national  
5 unity so that we can now go back and foster community unity. So how can we you  
6 and I accomplish this and nurture this country including the leaders that we elected  
7 through dialogue. I had earlier asked what ..." is "... it that can push us towards  
8 violence as well as what is it that we can do to avoid going towards that path and  
9 keep in mind that unity is the pillar of the country and ... the community."

10 Witness, is that a fair translation of what you heard in Kalenjin?

11 A. Yes.

12 MR KIGEN-KATWA: Mr President, may I correct page 86, line 6, where the  
13 following words are missing "... maintain our own unity as a community."

14 Q. Now, Witness, I thought you had earlier said that you heard this audio, but you  
15 say you had -- you listened to Sang generally in the period of March 2006, but do not  
16 remember specifically having heard him broadcast this -- what I've just -- what I've  
17 just played to you?

18 A. Yes.

19 Q. However, Mr Witness, could you confirm, in line with what you said that you  
20 used to hear Mr Sang preach that people should live in harmony and should coexist,  
21 that this was the general tone and tendency of his message?

22 PRESIDING JUDGE EBOE-OSUJI: You will need to rephrase. Your question is that  
23 what you've just played will be consistent with the witness's testimony about those  
24 times when Mr Sang would preach or broadcast messages of peace and unity and  
25 national coexistence. Isn't that your question?

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- 1 MR KIGEN-KATWA: Yes, Mr President. Thank you very much.
- 2 THE WITNESS: Yes, I confirm that this is a time when he could speak preaching  
3 peace and coexistence.
- 4 PRESIDING JUDGE EBOE-OSUJI: And that this will be an example of that sort of --
- 5 THE WITNESS: Yes.
- 6 PRESIDING JUDGE EBOE-OSUJI: -- broadcast?
- 7 THE WITNESS: Yes.
- 8 PRESIDING JUDGE EBOE-OSUJI: Is that what you're saying?
- 9 THE WITNESS: Yes, your Honour. And before -- before you continue, I will like  
10 also to look at paragraph 3, line -- line -- line 4.
- 11 PRESIDING JUDGE EBOE-OSUJI: What page?
- 12 THE WITNESS: 0255.
- 13 PRESIDING JUDGE EBOE-OSUJI: All right. Page 3, okay.
- 14 THE WITNESS: "... not someone just coming and settling in someone else's place."  
15 And if you hear that in Kalenjin and what people actually believe about the Kikuyu to  
16 have just come to parts of Eldoret when just having brought by Kenyatta when  
17 they -- when he took -- when -- during independence, Kikuyu were -- most of the  
18 Kikuyu were brought to Rift Valley and parts of Eldoret by -- by -- by Kenyatta.  
19 And most people believe that their land - the Kalenjin believe that their land - was  
20 simply given out by Kenyatta at that time, and that is why at most times during  
21 campaigns and during -- and -- and -- and at -- during elections when people are  
22 looking for votes from the Kalenjin they will give examples and you will see that  
23 it -- it is also genesis of why we have tribal clashes of which people -- other people  
24 may term it as land clashes. And that is why in 1992 and people believe that  
25 by -- the Kikuyu people have just come to take their land, and it is easy to use a

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1 language that politicians use to make sure that people use that advantage to -- to fight  
2 the Kikuyu.

3 Therefore, it is not clear about what Sang is meaning by saying, "... not someone just  
4 coming and settling in someone else's place." If also taken in that perspective people  
5 might understand to mean that the kikuyu have just come to take their place, but he  
6 continues to talk about willing seller and willing buyer. This is when the exchange  
7 of money is -- is being done, not -- and be -- before that it's not just there was situation  
8 of just coming and settling without buying and without -- in someone else's -- in  
9 someone else's place.

10 So in Rift Valley it is believed to be the Kal -- to be -- the Kalenjin believe that it is  
11 theirs. It is -- it is theirs for -- for -- it is something which is theirs, not for anyone else.  
12 Anyone else who comes in not unless they have bought, but if not you are not part of  
13 that.

14 MR KIGEN-KATWA:

15 Q. And so, Mr Witness, all you want the Court to take note of is that to you what  
16 Mr Sang is saying in this part of saying willing buyer willing seller is not clear? All  
17 you want is that the point that it is not clear be flagged, isn't it?

18 A. Yes. To me if I look at it critically and put in mind what was happening at that  
19 particular time back at -- back in -- in Eldoret and parts of Rift Valley, I will look at  
20 this differently.

21 Q. Okay. If you could just answer my question very specifically. From the same  
22 audio, you recall that Mr Sang said that Kenya is big enough for all the 42 tribes?  
23 You remember he said that in this audio, isn't it?

24 A. Yes.

25 Q. He also said that everybody in Kenya is entitled to settle wherever he is, isn't it?

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1 A. Yes.

2 Q. And lastly he also said that wherever somebody has bought land he is entitled  
3 to settle there, isn't it?

4 A. Yes.

5 MR KIGEN-KATWA: Mr President, at this point I would -- I pray to have this audio  
6 and the translation produced as an exhibit in Mr Sang's defence. The audio is  
7 KEN-D11-0013-0029 and the translation is KEN-D11-0019-0252.

8 Mr President, I rely on the fact that the witness recognizes that this is the general  
9 nature of the peace messages that Mr Sang conveyed.

10 Mr President, we already -- the audio itself was notified to the Prosecution through an  
11 affidavit sworn by Mr Lamaon on 8 January 2014, Mr Lamaon being the Chief  
12 Executive of Kass FM from where the audio was sourced, and it is item number 2 in  
13 Mr Lamaon's affidavit and that affidavit was meant to authenticate the audio.

14 Mr President, it is very directly relevant to the issue being considered by the Chamber.  
15 The affidavit itself is KEN-D11-0013-0072. Mr President, I pray that that audio and  
16 the translation be admitted as an exhibit.

17 PRESIDING JUDGE EBOE-OSUJI: Any objection?

18 MR STEYNBERG: Yes, your Honours. The Prosecution maintains its objection to  
19 the admission of this sort of evidence, particularly based on an affidavit -- unattested  
20 affidavit of Mr Lamaon at this stage. The witness himself has not identified the  
21 affidavit -- the recordings, he hasn't heard the specific recording and in my respectful  
22 submission the authenticity of this needs to be established during the course of the  
23 Defence case.

24 I have no objection to it being marked MFI.

25 MS ALAGENDRA: We have absolutely no objection, your Honour, and we support

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1 the application.

2 MR KIGEN-KATWA: Mr President, just allow me something -- allow me to say  
3 something before you make a decision.

4 Mr President, may I make the observation that notice of the existence of this audio  
5 was given to the Prosecution as early as 8 January 2014, and we submit that the  
6 Prosecution have had enough time to investigate and establish the authenticity and  
7 the genuinity of this audio and, if their only concern is whether or not it is genuine,  
8 Mr President, we submit that they have had adequate time.

9 Mr President, on the issue that the witness has not confirmed this specific audio, we  
10 submit, Mr President, that this witness was brought to adduce evidence to the effect  
11 that Mr Sang was inciting. This audio itself answers that question very directly.  
12 Even if it is not exactly the audio that the witness listened to, the witness himself has  
13 said that he wasn't listening to the programme every single day and he admits that  
14 the general content and substance of this audio reflects generally what Mr Sang used  
15 to broadcast.

16 For all those reasons, Mr President, we submit that the audio and the translation meet  
17 the threshold and the criteria within which it -- they can be admitted and we pray for  
18 the exercise of your discretion to admit it as an exhibit.

19 MR STEYNBERG: I beg your pardon, your Honours, may I just respond very briefly.  
20 I can see your Honour is about to render a ruling, but I would just like to place on  
21 record firstly that it's not the Prosecution's job to authenticate material that the  
22 Defence want to hand in. But be that as it may, we've been trying for almost six  
23 months now to have access to this material in consultation with Mr Lamaon and with  
24 the knowledge of my learned friend unsuccessfully to date. So for my friend to say  
25 that we've -- we've not authenticated the material, it's a bit rich.

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1 PRESIDING JUDGE EBOE-OSUJI: Noted. It is also noted that the witness's  
2 testimony as regards the material, in considering it we will of course also take into  
3 account his views as it relates to paragraph 3 at page 3 of the translation, where he  
4 discusses how certain references could be -- could have a different effect in the context  
5 at the time.

6 The document will be admitted as the next in the Sang Defence exhibits.

7 MR KIGEN-KATWA: Thank you very much, Mr President.

8 THE COURT OFFICER: Mr President, the audio excerpt KEN-D11-0013-0029, public  
9 item, will be attributed reference EVD-T-D11-00059.

10 The transcript of that audio excerpt will be attributed reference EVD-T-D11-00060.

11 It's a public item, and the reference of the transcript is KEN-D11-0019-0252, public  
12 item.

13 PRESIDING JUDGE EBOE-OSUJI: Thank you.

14 MR KIGEN-KATWA:

15 Q. Now, Mr Witness, I want to go to something different.

16 MR STEYNBERG: I beg your pardon, your Honour. I'm sorry to interrupt my  
17 learned friends, but I note the time. My learned friend said he would be finished by  
18 the lunch-break. We have 45 minutes left. Could he perhaps give an indication of  
19 how much longer he intends to be?

20 PRESIDING JUDGE EBOE-OSUJI: Indeed.

21 Mr Kigen-Katwa?

22 MR KIGEN-KATWA: Mr President, may I try ten minutes please?

23 PRESIDING JUDGE EBOE-OSUJI: Ten more minutes?

24 Proceed.

25 MR KIGEN-KATWA:

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1 Q. Now, Mr Witness, you recall that you said the name of person number 6 and his  
2 friend who was mentioned by Mr Sang in a certain situation culminating -- do you  
3 recall that, Mr Witness?

4 A. Yes.

5 MR KIGEN-KATWA: Mr President, so that I can move faster, I think I have no  
6 choice but to go to private session. I should be there for about four or five minutes.

7 PRESIDING JUDGE EBOE-OSUJI: Private session.

8 \*(Private session at 4.13 p.m.) Reclassified as Open session

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

10 MR KIGEN-KATWA:

11 Q. Now, Mr Witness, the exact words you used which are at page 36 and 37 of the  
12 transcript of 19 November 2014, is that -- the question was -- the question that was put  
13 to you was, "This letter, Mr Witness, what was it about?"

14 And you said that it was written after the names were mentioned and that it was  
15 mentioned in a programme by Mr Sang.

16 Do you recall that, Mr Witness?

17 A. Yes.

18 Q. And it is your testimony that the letter was written with a view to raising  
19 concerns about Mr Sang having mentioned the names of (Redacted)

20 (Redacted)

21 A. Yes.

22 Q. And the understanding is that the letter was complaining about the mentioning  
23 of those names, isn't it?

24 A. Yes, and how the -- the programme would open up for callers to continue  
25 talking without -- without -- without limits in the -- in the station.

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1 Q. Thank you, Mr Witness. And I will quote what you said. You said, "This  
2 letter was written after the names were mentioned." It is your -- that's the end of the  
3 quote. It is your testimony, Mr Witness, that the letter was written after, not before  
4 the names were called, isn't it?

5 A. Yes.

6 Q. And so to your recollection, Mr Witness, on that letter, the two are mentioned,  
7 the name of (Redacted) and (Redacted) is mentioned in the body of that letter.  
8 Is that your understanding and recollection?

9 A. I don't remember.

10 Q. Now, Mr Witness, you also said that (Redacted)  
11 (Redacted). Do you recall that?

12 A. Yes, (Redacted)

13 Q. Now, Mr Witness, would you be surprised that (Redacted)  
14 (Redacted)

15 A. I'm not surprised. I was giving my statement the way I know, not depending  
16 on someone else's statement.

17 Q. I put it to you, Mr Witness, that you have fabricated this allegation that  
18 (Redacted)

19 A. No. (Redacted)

20 (Redacted)

21 (Redacted)

22 (Redacted)

23 (Redacted)

24 (Redacted)

25 Q. However, in your testimony you did not say you were there. You were not

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1 there when (Redacted), isn't it?

2 A. Yes, but it is quite --

3 Q. Thank you.

4 A. -- (Redacted).

5 Q. And lastly, Mr Witness, do you recall that Mr Sang had criticised an attempt by  
6 people calling themselves Nandis to form a union of Nandis and Mr Sang criticised it  
7 and said the unity should be the unity of Kalenjins, not the Nandis? Do you recall  
8 anything to that effect?

9 A. I don't.

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

11 PRESIDING JUDGE EBOE-OSUJI: You have two minutes to round it up.

12 MR KIGEN-KATWA:

13 Q. Now, Mr Witness, I would like to play to you another message passed by  
14 Mr Sang of -- it is KEN-D11-0011-0044, that is the audio, and the translation is  
15 KEN-D11-0011-0045.

16 Mr President, I'm told you have the -- what I referred to earlier on as the core binders  
17 now, and it is at tab 9. It is the smaller -- yes, it is at tab 9, Mr President.

18 PRESIDING JUDGE EBOE-OSUJI: Still in private session?

19 MR KIGEN-KATWA: Mr President, I pray that we go to public session and if the  
20 court officer could assist to give out the --

21 PRESIDING JUDGE EBOE-OSUJI: Open session.

22 (Open session at 4.20 p.m.)

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

24 PRESIDING JUDGE EBOE-OSUJI: Thank you.

25 Mr Steynberg, just an indication, do you have an idea how much time you'll need?

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1 MR STEYNBERG: Your Honours, I would imagine 45 minutes. We've already  
2 passed that mark.

3 PRESIDING JUDGE EBOE-OSUJI: You had indicated before between 30 and 60  
4 minutes.

5 MR STEYNBERG: Indeed. I'm splitting the difference, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa.

7 MR KIGEN-KATWA: Let me do only this audio, Mr President.

8 PRESIDING JUDGE EBOE-OSUJI: How long will that take?

9 MR KIGEN-KATWA: It's a three-minute audio, Mr President.

10 PRESIDING JUDGE EBOE-OSUJI: All right.

11 (Playing of the audio excerpt KEN-D11-0011-0044)

12 PRESIDING JUDGE EBOE-OSUJI: Pause.

13 Why are we dealing with this, Mr Kigen-Katwa?

14 MR KIGEN-KATWA: Let me put the question to the witness.

15 Q. Witness, you recognize the voice, isn't it?

16 PRESIDING JUDGE EBOE-OSUJI: No, it doesn't matter. I'm saying why are we  
17 doing this? Yes, we see peace, peace, peace all over the transcript and the witness  
18 has testified that there were times when Mr Sang would broadcast messages of peace  
19 and other times not. Are you now putting him through one of those instances?

20 MR KIGEN-KATWA: Yes, Mr --

21 PRESIDING JUDGE EBOE-OSUJI: Why do you need to do that?

22 MR KIGEN-KATWA:

23 Q. Mr Witness, do you recall hearing Mr Sang make this broadcast for peace?

24 A. Yes, I've stated -- I have stated that, that at times I could hear him talk of  
25 messages of peace and I said that I longed that he could have maintained like that

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1 without getting to incitement and -- that was my testimony.

2 Q. Thank you, Mr Witness. But my question is did you hear this particular peace  
3 message, Mr Witness?

4 A. Yes, I remember hearing peace message and it's like this.

5 MR KIGEN-KATWA: Mr President, in that case then I will pray to produce it as an  
6 exhibit and rest my issue there.

7 Mr President, the audio itself is KEN-D11-0011-0044 and the transcript and translation  
8 is KEN-D11-0011-0045.

9 PRESIDING JUDGE EBOE-OSUJI: Any objection?

10 MR STEYNBERG: Your Honour, not in this instance.

11 MS ALAGENDRA: No objections, your Honour.

12 PRESIDING JUDGE EBOE-OSUJI: The document will be admitted as the next in the  
13 Sang Defence exhibit.

14 THE COURT OFFICER: Yes, Mr President.

15 The documents as referred to by counsel will be attributed respectively

16 EVD-T-D11-00061, public item, that's the audio excerpt, and EVD-T-D11-00062,  
17 transcript, public item.

18 Thank you.

19 MR KIGEN-KATWA: Thank you very much, Mr President.

20 I don't know whether you'd allow me two or three minutes, Mr President? There  
21 was the audio that you had raised an issue about as to whether it was played in the  
22 programme Kass FM, the song that we played an audio.

23 I have it within the content of the -- Mr Sang's programme and I was very anxious to  
24 play it so that it is clear that that is exactly the same audio. It is not exactly 11  
25 minutes like the other one. This one is four minutes. I just wanted to situate it in

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1 the course of the programme and that it is exactly the same.

2 And probably I should flag this, Mr President: That it was played since the year  
3 2005 and, much as consciousness of existence of Ebola is recent, it actually was there  
4 in the year 2005 and that audio was played as it is, Mr President. There is absolutely  
5 nothing added.

6 MR STEYNBERG: Your Honours, with respect, if the one audio is 11 minutes and  
7 the other's only four minutes, clearly they're not exactly the same. My suggestion is  
8 that my learned friend should transcribe that portion and provide the Court with an  
9 accurate transcript so that we can then compare the two. It is not necessary that this  
10 witness is present for that exercise.

11 PRESIDING JUDGE EBOE-OSUJI: Yes, indeed. That was going to be my ruling on  
12 the matter, so let's leave it at that.

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

14 May I just mention this, Mr President? That it is in the nature of radio broadcasts  
15 that you can play a whole song of 11 minutes in the course of broadcast, and so if it  
16 was played four minutes it's not because of any mischief.

17 PRESIDING JUDGE EBOE-OSUJI: We can argue about that.

18 MR KIGEN-KATWA: Thank you very much, Mr President.

19 PRESIDING JUDGE EBOE-OSUJI: We can argue about that.

20 MR KIGEN-KATWA: Thank you.

21 And thank you very much, Mr Witness, for answering my questions.

22 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg?

23 Witness, we have finished Mr Sang's lawyer's cross-examination of you and the  
24 Prosecutor would have some more questions in re-examination from matters arising  
25 from the questions of the Defence counsel.

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1 MR STEYNBERG: Thank you, your Honours.

2 If time permits, I might like to refer to another portion of the transcript -- of the audio,  
3 the transcript of which appears at tab 16 of the Sang Defence bundle. Unfortunately,  
4 since we have neither a Kalenjin transcript nor any time stamps on the English  
5 translation, it is impossible for me to find the relevant portion, so I'm going to request  
6 the assistance of my learned friend to provide us with a time stamp of  
7 KEN-0019 -- sorry, KEN-D11-0019-0252, page 7 of that which is 0259, from the  
8 second -- the third paragraph starting with "SANG," which starts, "Mzalendo has  
9 raised a very important and truthful issue ..." If I could ask that they could do that in  
10 the meantime and I'll continue with other matters. Thank you.

11 I believe I can start --

12 PRESIDING JUDGE EBOE-OSUJI: What tab did you say it is at?

13 MR STEYNBERG: Tab 16 of the Sang Defence bundle, your Honours.

14 Thank you.

15 QUESTIONED BY MR STEYNBERG:

16 Q. Mr Witness, we can start off in public session, but I just caution you again to be  
17 careful not to mention any identifying information and to use the Protection  
18 Information Sheet if necessary. It was suggested to you on more than one occasion  
19 by my learned friend for the Ruto Defence that your motive for becoming an ICC  
20 witness was in order to make -- to get money and benefits from the ICC. Do you  
21 recall that?

22 A. Yes, I recall.

23 Q. Did you in fact make money from the ICC?

24 A. No.

25 Q. Did you enjoy a luxurious lifestyle while under the care of the ICC?

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1 MS ALAGENDRA: Your Honours, in fact that was not the tone of my questions or  
2 the context of it, your Honour. It was monies and everything that he received --

3 PRESIDING JUDGE EBOE-OSUJI: We can argue about --

4 MS ALAGENDRA: -- under the guise of a witness protection programme and --

5 PRESIDING JUDGE EBOE-OSUJI: Ms Alagendra, let's not do that. You can make  
6 submissions.

7 MS ALAGENDRA: But the questions are not arising out of cross-examination.

8 PRESIDING JUDGE EBOE-OSUJI: It's the way the questions were asked.

9 MS ALAGENDRA: Indeed, your Honour.

10 PRESIDING JUDGE EBOE-OSUJI: Overruled. Overruled.

11 MR STEYNBERG:

12 Q. Did you enjoy a luxurious lifestyle?

13 A. No, in fact it was very hard for me.

14 Q. How was your lifestyle hard while you were in protection location number 1?

15 A. What I was receiving was too little, even that is why I -- at that time it was -- I  
16 felt impossible to continue and I had to leave.

17 Q. Now the payments which the OTP has made to you have all been disclosed to  
18 the Defence and my learned friend has chosen not to discuss these with you, but  
19 besides accommodation and food to eat what other sort of benefits did you enjoy  
20 while you were in protection?

21 A. It was medical and airtime.

22 Q. At a certain stage you left the protection location number 1 and subsequently  
23 during the course of this year you returned to ICC protection. It was put to you that  
24 you returned to ICC protection again in order to enjoy the benefits; is that correct?

25 A. No, because even when I was -- before I returned I was -- I had -- I was doing

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1 my job, I got -- I got -- (Redacted)

2 (Redacted)

3 (Redacted)

4 (Redacted) So it is not the reason why I

5 came -- I came back to ICC.

6 Q. And how do you compare your position now and your standard of living to  
7 what you were enjoying before you returned to the ICC? And, again, I've cautioned  
8 you to be careful not to inject identifying information.

9 A. It was better when I was doing my own job.

10 Q. All right. Now, it was also put to you --

11 MS ALAGENDRA: Your Honours, if I may just request? My learned friend's  
12 question in relation to "What is your position now?", is he referring to the position of  
13 the witness now in ICCP, just for us to be clear?

14 MR STEYNBERG: Yes, your Honour, I was.

15 Q. Did you understand me to be referring to your position now in protection and  
16 your position prior to your returning to protection? Is that how you understood my  
17 question?

18 A. Yes.

19 Q. Moving on, it was put to you that you and person number 22 -- if the Court will  
20 bear with me, please?

21 You and person number 22 firstly, and secondly you and person number 19, were  
22 providing false information to the IC -- to the OTP in order to scam money from us.  
23 You recall that?

24 A. Yes, I recall.

25 Q. What did you receive in return for providing information regarding witness

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1 interference, if anything?

2 A. Nothing.

3 Q. What did you receive in return for taking part in the operations -- I won't give  
4 any more detail than that, but taking part in the operations that the investigators  
5 requested you to take part in, if anything?

6 A. Nothing.

7 Q. And for that matter what did you receive in return for introducing other  
8 witnesses to the OTP, if anything?

9 A. Nothing.

10 MR STEYNBERG: Thank you.

11 Your Honours, I'm afraid the next matter I'm going to have to request to go into  
12 private session probably for about ten minutes.

13 PRESIDING JUDGE EBOE-OSUJI: Private session.

14 \*(Private session at 4.34 p.m.) Reclassified as Open session

15 THE COURT OFFICER: We're in private session, Mr President.

16 MR STEYNBERG: Thank you, your Honours.

17 Q. Now, Mr Witness, we're in private session now so you can speak freely. You  
18 were questioned by my learned friend regarding an alleged discrepancy between  
19 your version about the (Redacted) in which you  
20 were offered, as you say, 1.5 million Kenyan shillings. You said in evidence that you  
21 told (Redacted). You recall that?

22 A. Yes.

23 Q. My learned friend then quoted from you one sentence from your  
24 affidavit -- statement, I beg your pardon, KEN-OTP-0103-2473, at paragraph 30,  
25 where you are recorded as saying, "I refused (Redacted) offer and I have not received

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1 money or anything else from (Redacted) or any person regarding my assistance to the  
2 ICC." You recall that?

3 A. Yes.

4 Q. For the sake of completeness I would like to read the rest of that paragraph. I'll  
5 skip the next sentence and start with, quote, "(Redacted)

6 (Redacted)

7 (Redacted)" Unquote.

8 What did you mean when you said you "... wanted to (Redacted)

9 (Redacted)

10 A. I wanted to (Redacted)

11 Q. For what purpose?

12 A. So that I could inform the investigators the whole information.

13 Q. Thank you. Moving on to another matter, it was put to you by the Ruto  
14 Defence that you were listening to the evidence of (Redacted) when he gave his  
15 evidence this year. Do you recall that?

16 A. Yes.

17 Q. And you -- my learned friend read -- read to you a sentence from your interview  
18 of (Redacted), KEN-OTP-0144-0272, at 0285.

19 PRESIDING JUDGE EBOE-OSUJI: Tab?

20 MR STEYNBERG: Tab 45, your Honour, OTP bundle.

21 Q. And at line 464 it was read to you that, "... listening to ..." his "... testimony ...  
22 I believe it is him who was giving the other Tuesday ..." You remember that?

23 A. Yes.

24 Q. I'd like to carry on reading from two lines down, at line 467, towards -- from the  
25 fourth word -- sorry, 466, quote, "(Redacted)

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1 (Redacted), but this time around, listening to his testimony, as it was shown in  
2 the media, I heard him say a man, so I don't know whom that man is." Unquote.

3 What did you mean by "... listening to his testimony as it was shown in the media ..."?

4 A. The broadcast on Kenyan news.

5 Q. Besides the broadcast on Kenyan news, did you hear his evidence anywhere  
6 else?

7 A. No.

8 MR STEYNBERG: Thank you, your Honours.

9 Q. The third portion I'd like to deal with that was put to you by my learned friend  
10 for Mr Ruto was to deal with -- you were questioned about (Redacted) assisting you  
11 to get back into the community and this was an extract from your interview of  
12 (Redacted), KEN-OTP-0135-0113, at OTP tab 33 and the quote was read to you from  
13 0118.

14 Do you remember that?

15 A. Yes.

16 Q. Besides (Redacted) offering to assist you to get back into the community, did he  
17 offer you any other assistance?

18 A. He promised to give me money, 2 million shillings.

19 Q. Thank you. And in fact, from line 171, just below the portion my learned  
20 friend read out, the interviewer asks you, quote, "So, how did the issue of money  
21 come up? How was that discussed? And what did you have to do for it?"

22 Unquote.

23 And your response about four lines down, quote, "What do you ..." -- "What do you  
24 think we assist you? I say, me, I said. I don't know. What do you think? He  
25 says to me, he said, yes, we are trying to think, and what we are doing for others ... for

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1 others, I suggest we give you 1.5 to 2 million. You continue ... your life."

2 1.5 to 2 million what, sir? Sorry, unquote. 1.5 to 2 million what?

3 A. Kenyan shillings.

4 Q. And what were you to do in return for that?

5 A. Withdraw as an ICC witness.

6 Q. Thank you.

7 Now, my learned friend also went through (Redacted)

8 (Redacted)

9 (Redacted) I'll have to check that.

10 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, are these materials on the -- they

11 are now part of the evidence or will be, will they not be; isn't that the case?

12 MR STEYNBERG: Yes, your Honours, we have submitted a filing to admit -- I'm not

13 sure about all of these documents. Certainly the (Redacted).

14 PRESIDING JUDGE EBOE-OSUJI: And the Defence are not opposing?

15 MR STEYNBERG: No, your Honours.

16 PRESIDING JUDGE EBOE-OSUJI: Yes. The reason I say that there's so much you

17 can do with a witness on the stand, taking the witness through portions of material

18 that's on record; isn't that the case, especially if your proposition is that there are other

19 parts of the materials that may relate to the part that the Defence have taken the

20 witness to in a pointed way, but it it's up to you.

21 MR STEYNBERG: Yes.

22 PRESIDING JUDGE EBOE-OSUJI: You don't have a lot of time.

23 MR STEYNBERG: I understand the proposition, your Honours, and what I will do

24 is concentrate on those areas which I require a comment from from the witness or an

25 interpretation.

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1 Q. Let me then proceed straight to the (Redacted)

2 (Redacted) do

3 you recall that?

4 A. Yes.

5 Q. And for the record, your Honours, this is KEN-OTP-0135-0430, tab 24,

6 Prosecution bundle, at 0432.

7 I'd just like to read to you from (Redacted) and ask you one question about that.

8 (Redacted)

9 (Redacted)

10 (Redacted)

11 (Redacted)

12 (Redacted)

13 (Redacted)

14 (Redacted)

15 (Redacted)

16 (Redacted)

17 MS ALAGENDRA: Your Honours, I'm not seeing where that's coming out of the

18 (Redacted) that's been disclosed to us where this explanation is coming

19 from.

20 MR STEYNBERG: Your Honours, I've asked the witness about his understanding of

21 what was being discussed at the time.

22 PRESIDING JUDGE EBOE-OSUJI: It's all right. You can -- some of these things

23 you cannot resolve with a witness on the stand and there's matters that are best dealt

24 with in submissions, Ms Alagendra.

25 MS ALAGENDRA: Indeed, your Honour.

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1 MR STEYNBERG:

2 Q. And finally on these -- (Redacted) it was put to you that the only  
3 mention of the offer of 1.5 million Kenyan shillings was mentioned by you, not by  
4 (Redacted); do you recall that?

5 A. Yes.

6 Q. When you -- the times when you mentioned the 1.5 million, (Redacted)  
7 (Redacted)  
8 (Redacted) What was (Redacted)  
9 response to that? Did he ever deny that such an offer was made?

10 A. He did not deny that 1.5 had been offered.

11 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, the record has to speak for itself  
12 on that, don't you think?

13 MR STEYNBERG: As the Court pleases, your Honour. I'll move on.

14 MS ALAGENDRA: But, your Honours, can I also ask my learned friend to look at  
15 (Redacted), your Honour.

16 PRESIDING JUDGE EBOE-OSUJI: You can do submissions later.

17 MR STEYNBERG:

18 Q. You were questioned regarding the -- your evidence about the robbery of  
19 certain cell phones from you on 8 July 2013 and it was suggested to you, if  
20 I understand correctly, that you fabricated this because you wanted to hide things on  
21 (Redacted); do you  
22 recall?

23 A. Yes.

24 Q. And you were confronted with a report from the VWU alleging that one of their  
25 employees had observed you in possession of three phones after this robbery; do you

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1 recall that?

2 A. Yes.

3 Q. And your explanation was that the VWU person had mistaken (Redacted)

4 (Redacted) for cell phones; do you remember

5 that?

6 A. Yes.

7 Q. Can you describe these (Redacted) for the Court please?

8 A. (Redacted) -- the colour of -- one of the -- one of the phones I had and the

9 (Redacted) had the same colour. It was -- had the same colour. And also the

10 other -- the other phone was -- was black in colour and the other one also was -- the

11 (Redacted)

12 (Redacted) had like this colour of this --

13 Q. You're pointing to the grey --

14 A. Somehow grey.

15 Q. -- microphone in front of you, yes?

16 A. Yes.

17 Q. And my -- my --

18 PRESIDING JUDGE EBOE-OSUJI: He was not pointing at the microphone.

19 MR STEYNBERG: Your Honours, it's the housing of -- from which the microphone

20 appears to be -- from where I'm standing --

21 PRESIDING JUDGE EBOE-OSUJI: Yes.

22 MR STEYNBERG: -- emerging.

23 PRESIDING JUDGE EBOE-OSUJI: That's correct. That's a more accurate --

24 MR STEYNBERG: Yes.

25 PRESIDING JUDGE EBOE-OSUJI: -- description of it.

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- 1 MR STEYNBERG: It's a grey metal box, is --
- 2 THE WITNESS: Yes. And --
- 3 PRESIDING JUDGE EBOE-OSUJI: As it were, yes.
- 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 (Redacted)
- 19 (Redacted)
- 20 (Redacted)
- 21 (Redacted)
- 22 (Redacted)
- 23 (Redacted)
- 24 (Redacted)
- 25 (Redacted)

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1 (Redacted)  
2 (Redacted)  
3 (Redacted)  
4 (Redacted)  
5 (Redacted)  
6 (Redacted)  
7 (Redacted)  
8 (Redacted)  
9 (Redacted)  
10 PRESIDING JUDGE EBOE-OSUJI: Fair enough. Noted.  
11 Mr Steynberg, proceed.  
12 MR STEYNBERG: Thank you, your Honour.  
13 Mr Court Officer -- Miss Court Officer.  
14 MR KHAN: Mr President, can I just clarify? The objection actually has another  
15 basis: The Prosecution were on notice by the disclosure that they provided to the  
16 Defence that an officer of this Court from the Victim and Witness Unit had said that  
17 this witness had put forward a story of denying an account of a conversation  
18 regarding six phones and that this was something in issue. They did not deal with  
19 that in examination-in-chief when it was clearly foreseeable. For the Prosecution  
20 now to seek to adduce evidence that was not on their list of their -- their list of  
21 evidence to be used for this witness when it was clearly foreseeable that it was an  
22 issue in the case militates in favour of excluding now in re-examination evidence that  
23 they could have led in chief. It wasn't an issue arising in the course of proceedings  
24 to surprise the Prosecution, it's something the Prosecution provides to the Defence  
25 and decided not to deal with until the issue blew up in their face. Your Honours, we

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1 object on that basis.

2 PRESIDING JUDGE EBOE-OSUJI: Objection overruled.

3 There was a lot of materials conversed in this case with this witness. We have to be  
4 fair to parties on both sides. It will be too much to have expected the Prosecutor to  
5 anticipate every question that might have arisen from the cross-examination of the  
6 Defence counsel.

7 MR STEYNBERG: As the Court pleases.

8 MR KHAN: And, your Honour, the only other matter, I wonder where is (Redacted)  
9 (Redacted)

10 (Redacted)

11 (Redacted)

12 PRESIDING JUDGE EBOE-OSUJI: Mr Khan, let's not do that.

13 MR KHAN: Your Honour, so be it.

14 MR STEYNBERG: Thank you. Give it to the witness, please.

15 Q. Do you recognize that device, sir?

16 A. It looks like exactly this one.

17 Q. Thank you.

18 A. Or is it?

19 Q. That's not for me to say, sir. You say it looks like the one you had?

20 A. Yes.

21 Q. Thank you.

22 Can I have it back, please?

23 PRESIDING JUDGE EBOE-OSUJI: And he asked "Or is it?"

24 MR STEYNBERG: Your Honour, I will not give evidence here today.

25 PRESIDING JUDGE EBOE-OSUJI: Definitely. The question is not for you to

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- 1 answer. I'm reflecting it on the record what happened.
- 2 (Redacted)
- 3 (Redacted)
- 4 (Redacted)
- 5 (Redacted)
- 6 PRESIDING JUDGE EBOE-OSUJI: It has to be in evidence now, you know, you're
- 7 not going to take it back to your office.
- 8 MR STEYNBERG: Your Honour, then I will tender it into evidence and my
- 9 colleagues at IT will have to buy another one.
- 10 May I admit this as the next in the Prosecution physical exhibits? Thank you, your
- 11 Honour.
- 12 PRESIDING JUDGE EBOE-OSUJI: Defence?
- 13 MS ALAGENDRA: Your Honour, we have no objections (Redacted)
- 14 (Redacted)
- 15 (Redacted) That we do, your Honour.
- 16 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa?
- 17 MR KIGEN-KATWA: Mr President, we take the same position as Mr Ruto's team.
- 18 PRESIDING JUDGE EBOE-OSUJI: The document will be marked as the next in the
- 19 Prosecution exhibits.
- 20 MR STEYNBERG: Not a document, the item.
- 21 PRESIDING JUDGE EBOE-OSUJI: Sorry, the item. Did I say "document"? Sorry.
- 22 MR STEYNBERG: As the Court pleases.
- 23 PRESIDING JUDGE EBOE-OSUJI: The item, yes.
- 24 MR STEYNBERG: And for the record, your Honour, I didn't say (Redacted)
- 25 (Redacted)

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1 (Redacted)

2 PRESIDING JUDGE EBOE-OSUJI: Let's -- let's -- let's not push it.

3 THE COURT OFFICER: The item which was presented today in court, which no  
4 ERN reference is available so far and will need to be uploaded later in the Ringtail  
5 software, will be attributed reference EVD-T-OTP-00247 and will be classified as  
6 confidential as we are in private session so far, unless otherwise instructed by the  
7 Chamber.

8 MR STEYNBERG: I request that it stay confidential, your Honours.

9 I've only one or two matters to finish up, so let me move on.

10 Q. You were confronted at a certain stage with an analysis report -- (Redacted)  
11 analysis report by my learned friend for the Ruto team. Do you recall that?

12 A. Yes.

13 Q. If I can just find that report.

14 One second, please, your Honours. Thank you.

15 Before I get to the report, you were also asked at a certain stage how many SIM cards  
16 you had while you were in the protected location. You couldn't recall how many,  
17 but can I ask you this: Was it one SIM card or more than one SIM card?

18 A. More than one.

19 Q. And did you just use one SIM card in one phone? Did you use more than one  
20 SIM card in one phone? Did you switch SIM cards between phones, or how did it  
21 work?

22 A. Every SIM card had a phone. (Redacted)

23 (Redacted)

24 (Redacted)

25 Q. I'm referring now to your private SIM cards and your private phones. Did you

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1 have more than one private SIM card or only one private SIM card?

2 A. For my private SIM cards, two; I had different phones for different SIM cards.

3 Q. (Redacted)

4 (Redacted)

5 (Redacted)

6 MS ALAGENDRA: Your Honours, the witness had testified in cross that he didn't  
7 recall those details, so I don't think it's fair.

8 MR STEYNBERG: I don't recall that question being asked, your Honour.

9 Q. Do you know?

10 A. No, I don't recall how many in number it could save.

11 MR STEYNBERG: Your Honour, I think perhaps the remaining matters are best  
12 dealt with in argument, but since this -- since part of this document was put to the  
13 witness, I would request that this document be admitted as an exhibit so that the  
14 Court can at least have access to the entire document and the entire conclusions in  
15 context, in particular I refer to the finding at the bottom of page 10 of the report.

16 PRESIDING JUDGE EBOE-OSUJI: Where is this material again?

17 MR STEYNBERG: Your Honours, this is the document that my learned friend  
18 handed up at the beginning of proceedings today. They were loose items handed to  
19 your Honours. The ERN is KEN-OTP-0108-0234. And you recall my learned friend  
20 read into the record a conclusion that (Redacted)  
21 were observed.

22 PRESIDING JUDGE EBOE-OSUJI: This is the material that both parties wanted to  
23 come in, isn't it?

24 MR STEYNBERG: Indeed, your Honours. I don't know that my learned friend was  
25 suggesting that it should be admitted. I think she was merely providing it to the

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1 Chamber. But I'm now requesting that it be admitted since it has been referred to  
2 with this witness.

3 PRESIDING JUDGE EBOE-OSUJI: I cannot find mine.

4 MR STEYNBERG: Your Honours, I --

5 MS ALAGENDRA: Your Honours, I have more copies.

6 MR STEYNBERG: So do I.

7 Your Honours, I draw your attention to the last paragraph of page 11, which is ERN  
8 0243.

9 PRESIDING JUDGE EBOE-OSUJI: All right, now, let me correct myself. I now  
10 remember this material. When you brought it up this morning, I didn't know  
11 exactly what you were -- I thought you -- you were talking about the same sort of  
12 analysis that we've had issues with in the past. But this is something different.  
13 Now I remember this.

14 So any objection?

15 MS ALAGENDRA: No, your Honours, we don't object, except the caveat that this is  
16 a report prepared by an investigator in the OTP. It is not independent, your Honour.  
17 That was the objection.

18 PRESIDING JUDGE EBOE-OSUJI: Mr Kigen-Katwa, any objection?

19 MR KIGEN-KATWA: Same -- with the same caveat, Mr President.

20 PRESIDING JUDGE EBOE-OSUJI: The document will be admitted as the next in the  
21 Prosecution exhibits.

22 MR STEYNBERG: Thank you, your Honour.

23 THE COURT OFFICER: Mr President, the document KEN-OTP-0108-0234 in its  
24 redacted version number 1, which everybody has so far, confidential document, will  
25 be attributed reference EVD-T-OTP-00248.

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1 MR STEYNBERG: And just one slight correction, your Honour. It's prepared by  
2 one of the forensic analysts at the scientific response unit of the OTP, so not an  
3 independent out-of-OTP analyst, but not part of the investigation team.

4 PRESIDING JUDGE EBOE-OSUJI: But a member of the OTP?

5 MR STEYNBERG: Correct, your Honour.

6 PRESIDING JUDGE EBOE-OSUJI: Thank you.

7 MR STEYNBERG: I'd like to in the brief time available to me move on then to  
8 certain issues raised by my learned friend for Mr Sang.

9 Q. Firstly, do you recall that you were asked certain questions about the screening  
10 note where it was -- in fact, I think we can go back into public session for this.

11 PRESIDING JUDGE EBOE-OSUJI: And also watch the time. How much more  
12 time?

13 MR STEYNBERG: Your Honours, there's this question and then just the audio that  
14 I'd asked my learned friends to find, but that should be very brief.

15 PRESIDING JUDGE EBOE-OSUJI: All right. Let's go back to the open session.  
16 (Open session at 5.03 p.m.)

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

18 PRESIDING JUDGE EBOE-OSUJI: Thank you.

19 MR STEYNBERG: Thank you, your Honour.

20 Q. Mr Witness, you were asked by my learned friend about something recorded in  
21 your screening note where investigators recorded you as saying that you had  
22 monitored Kass FM I think it was during 2005 and 2007. But what I'm interested in  
23 is the word "monitored." What did you mean by that? Or, firstly, did you use that  
24 word "monitored"?

25 A. I don't remember if I used that word, but what I meant was that I listened to

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1 Kass FM and even got information from other people on issues that were discussed if  
2 I did not listen to.

3 PRESIDING JUDGE EBOE-OSUJI: Mr Steynberg, one second, please.

4 (Trial Chamber confers)

5 PRESIDING JUDGE EBOE-OSUJI: We hope the Court staff would bear with us.

6 We know that people had made their own arrangements, but Mr Steynberg you will  
7 have to wrap this thing up in ten minutes.

8 MR STEYNBERG: Your Honours, I will be less than that.

9 PRESIDING JUDGE EBOE-OSUJI: Good. That's good to know.

10 Q. Sorry, you were finishing. What did you mean by -- you did answer that  
11 question.

12 My next question was: And when you were listening to Kass FM in this manner,  
13 was this part of your -- one of your jobs, not mentioning those particular jobs, or was  
14 this something you were doing in your private capacity?

15 A. I was doing in my private capacity.

16 Q. All right. Now, I'd like to go to two portions of one of the transcripts that was  
17 put to you by my learned friend for Mr Sang. And perhaps we can firstly see if we  
18 can do it without the audio. Perhaps I can inquire whether my learned friend has  
19 found the time stamp for me?

20 MR KIGEN-KATWA: May I indicate, Mr President, that I very much regret I would  
21 have to be outside court to get the time stamp, because I have to manually do it using  
22 a laptop, Mr President, and so I'm not in a position to get the time stamp right here in  
23 court. May I also indicate the time stamp that my learned colleague is asking for is  
24 not one of the time stamps we played, so I didn't anticipate that and so I am  
25 completely unable to give him the time stamp, much as I would very much have

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1 wished to.

2 MR STEYNBERG: Your Honours, I will see if I can do without it, but I would kindly  
3 request in future that either we be given a time stamp version or at least a transcript  
4 so that we can follow on the Kalenjin. It is easier for us then to identify a particular  
5 portion.

6 But can I ask the court officer to call up KEN-D11-0019-0252 at 0259. And if you  
7 could zoom in please on the middle paragraph on that page starting with the word  
8 "Sang."

9 MR KIGEN-KATWA: Mr President, I would object to that. If my learned friend  
10 wants to make reference to that paragraph, which I have looked at, I would pray that  
11 he situates it by making reference to the earlier call, starting from the last part of the  
12 previous page number, 258, so that the context of what he wants to zoom in is  
13 appreciated, Mr President. I would --

14 PRESIDING JUDGE EBOE-OSUJI: But the material is already part of the exhibit,  
15 isn't it?

16 MR KIGEN-KATWA: It is. And, in fact, Mr President, I thought you said a while  
17 ago in view of the fact that these documents are part of the exhibits -- the point I'm  
18 making, Mr President, is I object to the selective way of picking a statement or part of  
19 the conversation --

20 PRESIDING JUDGE EBOE-OSUJI: That is the essence of what the Prosecution is  
21 saying you've done. He's saying you've been selective. He hasn't said that, but  
22 going to another part of the transcript, that's the point. Objection overruled.

23 Mr Steynberg?

24 MR STEYNBERG: Thank you. Your Honour, I wasn't indeed about to place it in  
25 context without going through the entire page.

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1 Q. But this paragraph, Mr Witness, Mr Sang is responding to a caller who goes by  
2 the name of Mzalendo. Firstly is -- Mzalendo, is that a Kalenjin name that you  
3 know?

4 A. No.

5 Q. What does that mean?

6 PRESIDING JUDGE EBOE-OSUJI: Well, you are the one who asked him a  
7 double-barrelled question.

8 THE WITNESS: Mzalendo in Kiswahili means a patriot.

9 MR STEYNBERG:

10 Q. A patriot. So from your understanding is that -- is that the person's real name  
11 or is the person using perhaps a pseudonym?

12 A. It's not a real name.

13 Q. Before we get to the contents, is this the first time you've heard a caller on  
14 Mr Sang's show using a pseudonym?

15 A. No.

16 Q. Can you recall any other pseudonyms that persons phoning in have used?

17 A. Yes.

18 Q. Can you give some examples, please?

19 MR KIGEN-KATWA: Mr President, I'm just wondering if this is an issue that arose  
20 from the cross-examination. I submit, Mr President, that it doesn't arise and it's not  
21 fair to go this direction because then Mr Sang will not have an opportunity to  
22 respond.

23 PRESIDING JUDGE EBOE-OSUJI: But he can make submissions.

24 MR STEYNBERG: Your Honours, I -- it actually arises from something contained in  
25 this transcript which was only disclosed to us yesterday, I might add.

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1 Q. Can you answer that, do you -- can you recall any other pseudonyms that you  
2 remember being used?

3 A. Kiptindinyo.

4 Q. What does that mean?

5 A. If I say that to -- a Kalenjin will understand that this is a bad person who may be  
6 like a rapist, like a -- that is ind -- indication of a -- of a bad person.

7 MR KIGEN-KATWA: Mr President, may I very strongly object, Mr President. That  
8 is very adverse, Mr President, and we do not have an opportunity to contest that.  
9 We do not agree that is the meaning.

10 And the mere fact that we have an opportunity to respond by way of submissions we  
11 submit is not licence for my colleague to go outside what was raised in  
12 cross-examination.

13 I understand the latitude that the Court may have given to him to probably call out  
14 the other names, but not to go as far as that, Mr President. It introduces very  
15 adverse comments and to the prejudice of Mr Sang.

16 MR STEYNBERG: Your Honour, let me go straight to the point then because this  
17 arises directly from the material used in cross-examination, and may I refer -- if we  
18 just turn over one page to KEN-D11-0019-0262, halfway down the page, indeed, we  
19 see a caller who states this is Kiptindinyo.

20 Can I just spell that for the record: K-I-P-T-I-N-D-I-N-Y-O.

21 Q. Is that the name, Mr Witness, that you just said?

22 A. Yes.

23 MR STEYNBERG: Your Honour, I raise this because my learned -- the tenure of my  
24 learned friend's cross-examination today, as I understood it, was that this witness was  
25 not a listener to -- to Kass FM. And indeed this is a name he has recognized and I

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1 see it, low and behold, in the transcript which my learned friend produced today in  
2 cross-examination.

3 MR KIGEN-KATWA: And which, for the record, Mr President, was given to the  
4 witness and could have been seen by the witness from the transcript.

5 PRESIDING JUDGE EBOE-OSUJI: Noted. Now --

6 MR STEYNBERG: Your Honours, if I may, on that, I refer my learned friend to the  
7 witness preparation schedule, which was provided to the Defence prior to the  
8 beginning of this -- of the witness's evidence at which he specifically mentions this  
9 name. So this is not something which he would have tailored in respect of this  
10 evidence.

11 And I can refer my learned friends to the -- it's actually contained in the Defence  
12 bundle.

13 PRESIDING JUDGE EBOE-OSUJI: All right. Mr Steynberg, we've noted the points.  
14 Now, what's your question to the witness.

15 MR STEYNBERG: Very well.

16 Q. Going back to the paragraph in front of you -- sorry, if we can go back to the  
17 previous page, 0259, in the middle of the page, what I -- what I'm interested in  
18 your -- your explanation of, please, is this paragraph where Mr Sang says "Mzalendo  
19 has raised a very important and truthful issue because Kalenjin people are  
20 accommodative and that is why our home lands have been inhabited by all  
21 communities and you do not find people leaving ..." - L-E-A-V-I-N-G, I believe it  
22 should be living - "... this way in other areas, thus affirming the fact that our people  
23 are people who are receptive to all, and that is why I believe it is important that we  
24 uphold unity ..." - and this is the portion I'm interested in - "... but that does not mean  
25 you leave the house wide open."

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1 What do you understand by that phrase, Mr Witness, "... that does not mean you  
2 leave the house wide open"?

3 A. That we should not always be so loose to welcome other people in our locality.

4 MR STEYNBERG: Thank you, your Honours. No further questions.

5 PRESIDING JUDGE EBOE-OSUJI: We will have to leave it there.

6 And, Witness, thank you for coming. We know it has been long sessions for you, but  
7 we thank you for coming and answering the questions asked of you and we thank the  
8 Court staff for staying late to accommodate us.

9 Thank you for coming again, Witness, and you are released from your obligations as a  
10 witness in this case.

11 The Court will adjourn, but we'll do that -- we'll go into closed session to usher the  
12 witness out of the room.

13 \*(Closed session at 5.16 p.m.) Reclassified as Open session

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

15 (The witness is excused)

16 PRESIDING JUDGE EBOE-OSUJI: The Court will rise.

17 THE COURT OFFICER: All rise.

18 \*(The hearing ends in closed session at 5.16 p.m.) Reclassified as Open session

19 RECLASSIFICATION REPORT

20 Pursuant to Trial Chamber V(a) 's Decision, ICC-01/09-01/11-981, dated 24 September  
21 2013, the version of the transcript with its redactions becomes Public.