

1 International Criminal Court
2 Pre-Trial Chamber II - Courtroom I
3 Presiding Judge Ekaterina Trendafilova, Judge Hans-Peter Kaul and
4 Judge Cuno Tarfusser
5 Situation in the Republic of Kenya - ICC-01/09-02/11
6 In the case of the Prosecutor versus Francis Kirimi Muthaura,
7 Uhuru Muigai Kenyatta, and Mohammed Hussein Ali
8 Confirmation of Charges Hearing
9 Monday, 3 October 2011
10 The hearing starts at 9.31 a.m.
11 (Open session)
12 COURT USHER: All rise. The International Criminal Court is now
13 in session.
14 PRESIDING JUDGE TRENDAFILOVA: Please be seated.
15 Good morning to everyone who is today in the courtroom and in the
16 public gallery. I believe that everyone could relax during the beautiful
17 weekend we had, and we shall proceed with a lot of energy, because we
18 have five sessions today.
19 Court Officer, would you be kindly calling the case.
20 COURT OFFICER: Good morning, Madam President, your Honours.
21 This is the Situation in the Republic of Kenya, in the case of the
22 Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and
23 Mohammed Hussein Ali, case reference ICC-01/09-02/11. Thank you,
24 Your Honours.
25 PRESIDING JUDGE TRENDAFILOVA: Thank you very much.

1 Now I would like to ask for new faces in the teams of the
2 Prosecutor.

3 MS. ADEBOYEJO: Good morning, Madam President, your Honours. We
4 don't have any new faces today. Thank you.

5 PRESIDING JUDGE TRENDAFILOVA: Next I turn to you, Mr. Khan. I
6 think you have some new faces.

7 MR. KHAN: Your Honours, good morning. I'm delighted to welcome
8 and announce into Court our case manager sitting behind me, Lilian Njue.

9 PRESIDING JUDGE TRENDAFILOVA: Yes, thank you.

10 Then I will turn to Mr. Kay.

11 MR. KAY: No new faces, your Honour.

12 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Kay.

13 Finally to the team of Mr. Ali.

14 MR. MONARI: Madam President, good morning. No new team, except
15 the entire time is consolidated and they're all present in court.

16 PRESIDING JUDGE TRENDAFILOVA: Thank you.

17 MR. MONARI: Yes.

18 PRESIDING JUDGE TRENDAFILOVA: On behalf of the Chamber, just we
19 have again Eva Maria Witschnig with us. And we shall proceed as, you
20 know, pursuant to our schedule. The team of Mr. Ali has the full
21 responsibility regarding the two days, and we shall proceed with you
22 presenting during the first sessions, two sessions, morning sessions, the
23 case of Mr. Ali.

24 MR. KEHOE: Yes, Madam President. Thank you.

25 PRESIDING JUDGE TRENDAFILOVA: So it will be up to you how you

1 distribute the tasks amongst the members of the team. Will you start
2 yourself, Mr. Kehoe?

3 MR. KEHOE: Yes, your Honour. I will begin, and I will be
4 followed by my colleague Mr. Gershom Otachi, who is over to my far right.
5 Then when Mr. Otachi has completed, Mr. Monari will step in for some
6 comments, and then I will briefly sum up at the conclusion before we move
7 to the first witness.

8 PRESIDING JUDGE TRENDAFILOVA: Yes. Then we shall move to the
9 witness. Who is going to be for -- the first one to testify from the two
10 witnesses?

11 MR. KEHOE: The first witness is Witness 0002. We notified the
12 court staff and my learned friends across the well that we will be going
13 with Witness 0002 first.

14 PRESIDING JUDGE TRENDAFILOVA: Well, thank you. So, Mr. Kehoe,
15 the floor is over to you. You have one hour and a half, and after the
16 break another session.

17 MR. KEHOE: Madam President, thank you.

18 Madam President, your Honours, my learned colleagues on the
19 Defence side, as well as my learned colleagues across the well on the
20 Prosecution side, good morning.

21 Your Honours, I have the pleasure along with my colleagues to
22 represent an extraordinary man, General Mohammed Hussein Ali, a man of
23 quiet dignity, honour, and respect, a man who has given almost 35 years
24 of his life to his country. He joined the Kenyan Armed Forces in 1977,
25 rose through the ranks. As an officer, he became a special forces

1 officer and soldier and travelled around the world representing his
2 country in that capacity. In 2004 -- excuse me, 2003, he became a
3 brigadier, a flag officer in the Kenyan armed forces. In 2004, as your
4 Honours know, he became commissioner of police for Kenya. And in 2005,
5 based on his work over the years for his country, both with the police
6 and the armed forces, he was promoted to Major-General. A distinguished
7 honourable career of -- and achievement does not come without honour,
8 dedication, and hard work. And it was into this, this man was thrust
9 into some of the most horrific events, if not the most horrific series of
10 events, in Kenyan history, the post-election violence in 2007 and 2008.
11 A time when neighbour was fighting neighbour, not just in Nakuru and
12 Naivasha and the Rift Valley, but in all over Kenya, from Eldoret in the
13 north to Mambasa on the coast to the city of Nairobi to every village and
14 township throughout the land.

15 It was to these events that the Kenyan police, in conjunction
16 with the other services in Kenya, were faced and what they needed to
17 address. And with General Ali at the helm, the Kenyan police and these
18 other security forces brought the country back from the brink of complete
19 anarchy. By all accounts, the nation of Kenya was saved from the
20 post-election violence in 2008 because of the efforts of General Ali, the
21 Kenyan police, and the other security services operating in conjunction
22 with each other. That fact runs through all of the documents that have
23 been brought forth by the Prosecution, all the records of the Kenyan
24 government, and virtually everything that you will see that has been
25 presented in this case demonstrates that unquestionable fact, that

1 without his efforts there is no saying where this country would have
2 ended up.

3 So I said at my outset -- at the outset of my opening statement,
4 why are we here? Why is this man here? I can hasten a few guesses. I
5 think my learned friends for the Muthaura team have raised some serious
6 issues that haven't been investigated, as did my learned friends for the
7 Kenyatta team, things like meetings at the State House in November -- the
8 26th of November, 2007, that never existed, never happened; buses and
9 *matatus* bringing Mungiki in and out of the State House, as Mr. Kay
10 likened it to buses of Mungiki coming in and out of Buckingham Palace;
11 meetings at safari -- the Nairobi Safari Club or the Nairobi Members Club
12 that simply didn't happen. I think my colleagues for the Muthaura team
13 has adequately demonstrated that no such meeting existed.

14 And there is a misappreciation of much of the evidence that has
15 been presented by the Prosecution that we will get into, but I think the
16 most difficult thing to absorb is the evidence that was ignored. It is
17 one thing to say that evidence wasn't investigated pursuant to Article 54
18 or it wasn't followed for any number of reasons, but there is a plethora
19 of evidence, reams of documents in the possession of the Prosecution that
20 was simply ignored.

21 The government of Kenya, the police, the NSIS, the military, all
22 of these entities operate as structures that have documentation, that
23 follow what they do and how they do it, and orders moving down the chain
24 of command. Suffice it to say all of this documentation that was in the
25 possession of the Prosecution was simply ignored, and somehow the

1 realities of that documentation have been put aside in favour of
2 believing, accepting, and relying on a series of, in this instance, three
3 witnesses whose credibility defies belief. Their patent inconsistencies,
4 inherent inconsistencies, and this is without even having them testify
5 here, there are inherent inconsistencies and the probabilities of their
6 statements render what they told the Prosecution completely, completely
7 unreliable.

8 And one would ask how these things happen, and we will
9 demonstrate as we go through this, Madam President and your Honours, what
10 was overlooked throughout all this. And I can only surmise,
11 Madam President, and your Honours, that when such improbabilities and
12 inconsistencies were confronted or faced or given to the Prosecution,
13 they decided to ignore them. They blinked. They blinked because for
14 reasons known only unto them they wanted to accept what these people had
15 to say, and they blinked once and they blinked twice and they continued
16 to blink. And I'm afraid in life, Madam President and your Honours, when
17 you blink like that over and over again, you just don't see it any more.
18 You just don't see what is directly in front of you, and in this instance
19 it is the documentary evidence that we will present to you as we go
20 through this presentation.

21 My presentation will break down into three separate areas. The
22 first area is the evidence that no evidence -- there is no evidence that
23 General Ali ever received any instructions from Ambassador Muthaura or
24 anyone else to orchestrate failure or to permit violence.

25 The second prong to that is there's no evidence that General Ali

1 ever implemented any such instructions.

2 And the third and last is there's no evidence that the police
3 failed to act. To the contrary, the Kenyan police were responsive and
4 worked diligently, long hours for weeks at a time to suppress violence
5 not only in the Rift Valley but throughout the country.

6 I will address the last issue on a global level, and when we move
7 into the specifics of Naivasha and Nakuru my colleague Mr. Otachi will
8 address those.

9 I keep going back to the evidence as to why we are here. We are
10 here essentially because of the statement to the OTP of one person, and
11 to a lesser extent two others, which would be Witness 0004.
12 Witness 0004, Prosecution Witness 0004, who, Madam President, your
13 Honours, I believe was quoted more often in the OTP's presentation than
14 the Rome Statute. And the other two to the lesser extent, Witness 0011
15 and Witness 0012, are the two extortionists that Mr. Kay and Ms. Higgins
16 spoke to you about last week.

17 We will go through their evidence, and we will go through their
18 phone calls, and we will go through this alleged instruction that was
19 given to General Ali, and we will take apart that evidence piece by piece
20 even without putting these people in the witness box to have -- to see
21 their demeanour and take their testimony for the Court itself.

22 Now, we recognise, as all my colleagues recognise,
23 Madam President and your Honours, that this is a confirmation hearing and
24 is not a full trial. We recognise that a full trial that the burden of
25 proof is significantly higher. That being said, there is a significant

1 burden of proof here for the Prosecution. Article 61(5) clearly says
2 that each charge must be supported with sufficient evidence of
3 substantial grounds. And what does that mean? The evidence according to
4 the Lubanga Court says there has to be a clear line of reasoning. You
5 have to be able to put these items together with each other, that in
6 conjunction with a full assessment of the evidence.

7 Now, I'm glad to see that in -- last week the Prosecution said
8 that they're in -- have complete confidence in the credibility of their
9 witness and present that witness as such to this Chamber. That being
10 said, certainly the Prosecution is not advocating that this Court accept
11 this evidence if it doesn't believe it was true.

12 The issue here is substantial, substantial grounds, sufficient
13 evidence. As my colleague Mr. Khan mentioned last week, substantial
14 evidence doesn't mean thousands of pages of documentation which is
15 meaningless. It is not the quantity of evidence that is repeated over
16 and over that brings us to substantial evidence, it's the quality of that
17 evidence.

18 That being so, this Court per the Lubanga decision of 15 June
19 2009, allows this Court and asks this Court to evaluate each and every
20 witness coming before the Chamber, albeit in written form. And that
21 evaluation, I submit and suggest to your Honours, is doubly necessary
22 given the patent and inherent inconsistencies in the testimony of these
23 conditions that have been put off by the OTP. So let us begin.

24 As I said at the outset, the first point that I would want to
25 address to your Honours is that there was no phone call from

1 Ambassador Muthaura, and General Ali never received any instructions from
2 Ambassador Muthaura or anybody else to orchestrate failure or to allow
3 the -- to allow -- to tell the police to stand down, instructions to
4 allow the Mungiki to move into the Rift Valley, nothing.

5 Why are we here? Why is General Ali here? General Ali is here
6 in large part because of Witness 0004. Witness 0004, who gave a series
7 of statements to the Office of the Prosecutor and other entities, the
8 commission on -- investigating post-election violence as well as the
9 Kenyan Human Rights Commission.

10 The first that we will address before we go into them is the
11 statement given to the Prosecutor. That is EVD-PT-OTP-00248. And we get
12 a glimpse of who this man is, self-professed member of Mungiki at one
13 according to himself, which has been called into question by yet other
14 witnesses, a man who has been arrested numerous times by the police, and
15 a man who has a severe and embedded dislike for the Kenyan police.

16 I point your Honours to one page in his testimony -- excuse me,
17 in his statement, and this is his 2010 statement to the Office of the
18 Prosecutor at EVD-PT-OTP-248 at 0006, and he says, talking about the
19 police:

20 "I don't think they are human beings."

21 Think about that. Think of a statement by a person talking about
22 an entity, the Kenyan police department, that is run by General Ali,
23 where the witness brought before the Chamber says he doesn't think the
24 police are human beings. Nevertheless, this is the man who talks about
25 the meeting on the 27th at the -- excuse me, the 26th of January, 2000 --

1 the 3rd of January, 2008, or the meeting on the 26th of November of 2007.
2 He's the one who talks about the meeting in the Safari Club, the Nairobi
3 Members Club, and he's the one, he's the one upon which the Prosecution
4 has come up with this comment of a free zone. I don't know how many
5 times we heard this statement "free zone," but it was consistently put
6 forth by the Prosecution that based on this, based on what this witness
7 said, that a free zone was established to allow the Mungiki to go to the
8 Rift Valley and wreak havoc. And based on this conversation, they allege
9 that General Ali engaged in this common plan. But, your Honours, it
10 doesn't make a difference how many times you say "free zone." That
11 doesn't establish that anything remotely resembling that became or was a
12 reality.

13 And let us look at this interesting fellow, Witness 0004. I
14 described him in my opening statement with some levity as a clairvoyant
15 whose memory gets better over time, and perhaps there was some degree of
16 levity in that, but at this stage, Madam President and your Honours, we
17 are confronted with a very serious set of allegations based on these
18 series of fictions brought forth by this witness. We have a series of
19 statements made by this witness.

20 The first is January 16th, 2008. According to his own testimony,
21 and this is at EVD-PT-OTP-0248 at 0054, he gave a written-type statement
22 to the Kenyan Human Rights Commission. We don't have that statement.
23 Don't exactly know where it is. It certainly, to my knowledge, was not
24 in the disclosures, but we know about it because he mentions it during
25 the course of his statement to the OTP. But let us focus, if you will,

1 on his next statement, the one we do have, and that statement is the
2 statement that is EVD-PT-OTP-0084 at 0532 and 0533. Very interesting
3 statement. A statement given by this man where the subject is death
4 threats, and he says in the statement -- this is dated to the Open
5 Society of East Africa, which he says is really the Kenyan Human Rights
6 Commission.

7 The other interesting aspect to this statement is the date. He
8 maintains that this is being -- that albeit dated 7 January 2008, it was,
9 in fact, signed on the 27th of January, 2008. Well, the only person that
10 we have to take that evidence in is from the witness himself, because
11 there's no other supporting information as to when this information came
12 in or when this statement was done. But let's presume for a second it
13 was, in fact, done on the 27th of January, 2008. And by the way, he
14 admits signing this at this time.

15 The statement itself is a fascinating initial glimpse of this
16 witness. At the bottom of the page, if I may quote, and I will try to do
17 it slowly, Madam President, because while the translators do have a copy
18 of this, I understand the difficulties.

19 He begins to talk about what is presumptively the
20 26 November 2007 meeting in the State House, and he's talking about
21 Mungiki members, and he says:

22 "I know them very well. I know them by name and faces. I also
23 know that three weeks before the election, they visited the State House
24 and talked with the president together with Muthaura and put their
25 demands to the government. The demands were Maina Njenga be released, to

1 incorporate them in the armed forces," incorporate the Mungiki in the
2 armed forces, "and the uneducated sect members be allowed to control the
3 matatu terminus again, and Mr. Michuki to apologise for killing them."

4 Now, think of this meeting. This was his initial salvo.

5 Approximately three weeks after this alleged meeting at, be it the
6 Safari Club or the Nairobi Club, where he's saying they went to the State
7 Department to ask that the Mungiki be taken into the armed forces of the
8 government of Kenya. Implausible? Worse than implausible. Ridiculous.

9 What is also interesting in that statement is, and if you look at
10 it he says:

11 "Three weeks before the election they visited the State House."

12 They visited the State House, not him, they. He wasn't even
13 there, which frankly, frankly, his nonappearance at the 26 November 2007
14 meeting at the State House is probably true, is unquestionably true. You
15 heard Mr. Khan and Mr. Kay and even Mr. Kenyatta talk about that meeting,
16 had a meeting with the president and the youth. Hardly a meeting among
17 the Mungiki and the president of the country where the president is being
18 beseeched to allow the Mungiki to join the armed forces. He's not even
19 there.

20 Now, let me read you the next sentence:

21 "After --" and this is on 00533 of the same document.

22 "After the election results were announced and chaos erupted,
23 they were called by Muthaura for a meeting at the Nairobi Members Club
24 near Kenyatta Hospital."

25 Now, remember this. This is three weeks before. He's talking

1 about a meeting at the Nairobi Members Club near the hospital. He goes
2 on:

3 "After that meeting, I met one of the leaders, and he disclosed
4 that they were asked to go to Nakuru to defend their tribe and after two
5 weeks the killings started in Nakuru and now in Naivasha."

6 Again:

7 "After the meeting I met one of the leaders, and he disclosed
8 they were asked to go to Nakuru."

9 What does that tell you? He wasn't at any meeting at the Nairobi
10 Members Club with Ambassador Muthaura. Were he at such a meeting, why
11 would he need to be told by one of his colleagues that they had been
12 asked to go to Naivasha and Nakuru?

13 Now, suffice it to say, and I shouldn't overlook this fact, of
14 course in this conversation that he relates there's no discussion of
15 Mr. Kenyatta. There's no discussion of my client, General Ali, and
16 there's no discussion of any phone call allegedly made to General Ali.
17 And that's, of course, with good reason: Because he wasn't there.

18 Now, this conversation becomes more interesting when we look at
19 this particular statement in conjunction with the questioning by the
20 Office of the Prosecutor.

21 Investigators for the Office of the Prosecutor asked Witness 0004
22 about this scenario. "Well, it looks like you weren't at this meeting in
23 the State House." He says, "Oh, well, that has to be changed." And that
24 is at, if I may, EVD-PT-OTP-00248 -- 00248, 0054 to 55.

25 What he says, Madam President and your Honours, is that:

1 "Oh, that was a mistake. The reason why I didn't want to tell
2 them I was at the State -- at the State House was because I was a Mungiki
3 and I didn't want everybody to know."

4 Meanwhile, this is a statement, number one, about death threats
5 by the Mungiki and him dealing with these guys, but put that aside. The
6 more important thing is he never corrects that aspect of the statement
7 where he is never at some meeting at the members club or the Safari Club
8 with Ambassador Muthaura or anybody else. He never corrects that. Why?
9 Why? When he's given the opportunity to do so, he doesn't say a thing.
10 And mind you, mind you, this is a two-page statement. It's not exactly
11 an epic or opus that goes on for hundreds of pages. This was a very
12 direct question given to him that he failed to correct.

13 Now -- I mean, one can only think that when he's talking to
14 people about this that he is operating in conjunction with others that
15 are trying to get this story together, because that's the only
16 explanation for this constant expansion and change of the operative facts
17 as we move forward. And let's -- as an example of that, let's look to
18 the next statement, which is EVD-PT-OTP-00041, beginning at 494.

19 Now, what this is is the next statement by Witness 0004, and this
20 is done on 2 September 2008, nine months after the events, maybe a little
21 bit less. Approximately eight months from his first statement. And as
22 opposed to a 2-page statement at this juncture, we in fact move to a
23 13-page statement. And he talks about this meeting that is now at the
24 Safari Club.

25 Now, let us talk about this. And we want to look at this, I

1 believe, Madam President and your Honours, in a clear line of reasoning
2 with the connection between events.

3 What this witness is putting before this Chamber is a meeting
4 that takes place, in this instance in the Safari Club, that is -- that he
5 alleges is going to place the armed forces, the police, the security
6 forces of the government of Kenya in the same place as an outlawed
7 criminal organisation, the Mungiki. A startling event, an event that has
8 repercussions that are tremendous. Clearly, clearly, were it true, an
9 extremely, extremely significant event in anybody's life.

10 Now, we all have events in our lives that we remember. Our first
11 job, when we asked our wives to marry them, or when we were asked to be
12 married, or children, or a death in the family. We all remember events.
13 And unfortunately, throughout our lives as we get older there are tragic
14 events, politically, throughout. And somehow we remember those things.
15 We remember where we were, we remember who we were with. We remember.
16 Not everything, but certainly those. It's just part of the nature of our
17 existence.

18 Now in this potentially cataclysmic event, Witness 0004 can't
19 even remember where this meeting took place. Simple, simple fact with
20 enormous ramifications.

21 In January 2008 he said it was in the Members Club. In September
22 2008, he said it was in the Safari Club. Two completely different
23 arenas. The Safari Club being a club in a building downtown, the Nairobi
24 Members Club being an exclusive club outside of town on a bluff.

25 How could he not remember? If this meeting actually took place,

1 how could he actually not remember where it took place?

2 The second issue in this statement is the one that is consistent
3 with his first statement, is the absence - excuse me - of Mr. Kenyatta.
4 Again, with all due respect to Mr. Kenyatta, he is not an easy man to
5 miss. His name carries great weight in the country. His father is in,
6 as Mr. Kay said, has his face on virtually every bill in Kenya. There
7 are streets named after him. The airport's named after him. He himself
8 as a member parliament, and a distinguished member of the cabinet now,
9 has a long history in politics in Kenya, yet when Witness 0004 is
10 recounting these events, Mr. Kenyatta is nowhere to be found.

11 What else is the problem in this? Well, what we know quite
12 clearly is in his statement to the commission, he places this meeting at
13 11.00 a.m., 11.00 a.m. on the 3rd of January, 2008. Where was
14 Ambassador Muthaura at 11.00 a.m. on 3 January 2008?

15 Now, my learned friends from the Muthaura team have put the
16 minutes in for the National Security Advisory Committee, and those
17 documents reflect two things, that the meeting was listed for 9.15 in the
18 morning, and on page 2 of that document, you will flip and see that the
19 meeting was called to order at 9.50. Ambassador Muthaura was there
20 throughout with no indication that he left until shortly afternoon.

21 So again, this statement given eight months after these events
22 allegedly took place where he places Ambassador Muthaura in a meeting in
23 a place away from Harambee House is simply impossible to substantiate.

24 Now, let us go the next aspect of this, because as I addressed
25 your Honours at the outset, in the first statement in January of 2008,

1 Witness 0004 was not at any meeting, be it at the safari house or -- or
2 excuse me, the Safari Club or the Members Club. He's not there. But
3 here for the first time he says he is there. Not only is there no
4 Mr. Kenyatta, there's no phone call by Ambassador Muthaura to
5 General Ali.

6 What does he say? He talks about this meeting, and again this is
7 EVD-PT-OTP-0041 at 494, and he talks about this meeting which is -- and
8 this one it's in the Safari Club, but we'll go back to the Members Club
9 for the next meeting, but be it as it may:

10 "The meeting was for about an hour. They were so angry. Cell
11 phones were going all the time. The president's PA even called the
12 police commissioner from that meeting. He called him by name, Ali,
13 Commissioner Ali, asking what is happening in the Rift? What are police
14 doing there? I overheard this. The phone calls were all over the
15 place."

16 Now, he describes the president's personal assistant as
17 George Thuo, T-h-u-o. He wasn't the president's personal assistant, he
18 was a Member of Parliament, but suffice it to say, in this conversation
19 the person he maintains made the call was not Ambassador Muthaura at all.
20 And if we look at the content of the conversation, I know your Honours
21 from a review of a simple thing such as the Waki Commission report, that
22 in early January there was violence going on in various places in the
23 Rift Valley. Not necessarily in Nakuru and Naivasha but up through
24 Eldoret and other places in the Northern Rift. A completely logical
25 conversation, assuming it even took place, that someone would be calling

1 the Chief of Police as to what was going on, and certainly there can't be
2 anything nefarious or infused with any type of evil in a conversation by
3 Mr. Thuo when he's simply asking General Ali, what's going on in the
4 Rift.

5 So where are we after these telephone calls, after the telephone
6 call -- excuse me, after these two interviews, the one on the 27th of
7 January of 2008 and the one on the 2 September 2008? What we have is --
8 and by the way, before I get too far into this, if there's any -- any
9 question that the witness read through these statements -- the first
10 statement was initialled, and the 13-page statement by Witness 0004 was
11 initialed and on every page, and at the last page before he signed his
12 name, he attested to the truth of the contents. So where are we at the
13 end of these two meetings?

14 We have a meeting, assuming it took place, where he's not at from
15 the first statement, and at best we have his all of a sudden coming to
16 the fore in the second meeting where a conference call goes to --
17 allegedly goes to General Ali simply about what is going on in the
18 Rift Valley, nothing more, nothing less.

19 Now, during the course of these investigations, and we have all
20 done investigations on both sides of the well, when you receive
21 information that is significantly different from the information that a
22 witness is currently giving you, the first step generally is to call the
23 prior investigator or the prior lawyer and ask whether or not this
24 witness told you these various details. So the question, albeit
25 rhetorical at this point, is that when the Prosecution was taking the

1 next statement from Witness 0004, two years later in September of 2010,
2 did the Prosecution call the commission investigator who took the 13-page
3 statement in September of 2008 and ask whether or not Witness 0004 said
4 the things that are in that 13-page, single-spaced statement? Whether
5 that was done or not, there's simply no indication in the record that
6 that was -- that that was brought to the fore at all.

7 Now, let's go to the last statement, the one upon which the OTP
8 relies, and that is the statement two years down the line,
9 September 2010, and that is, pardon me, EVD-PT-00248 (* sic).

10 And now at this meeting for the first time Mr. Kenyatta appears,
11 for the first time. What also happens in this statement is we are now no
12 longer at the Safari Club. We're now at the Members Club. I think
13 you've heard the testimony of Mr. Kenyatta of the possibility that
14 several members of the Mungiki strolled into the Members Club and sat
15 down and had breakfast among Ambassador Muthaura and Mr. Kenyatta and
16 others. It just -- it defies -- it simply defies credulity that such a
17 thing would transpire, but be that as it may, that's what he says.

18 Again here's the problem: Let's put aside what Mr. Kenyatta said
19 about the Members Club and the ability or inability to get in. The stark
20 reality of the evidence is that the staff both at the Safari Club and at
21 the Members Club have both given statements that no such meeting ever
22 took place.

23 The other aspect, the other crucial aspect the Prosecution's case
24 is this alleged phone call to General Ali by Ambassador Muthaura. Now, I
25 suspect most investigations would try to at least attempt to get toll

1 records that would reflect such a call. Frankly, we're in the
2 21st century, and pulling those types of records is routinely done and
3 quite easy to do. Not only were those records not produced, counsel for
4 Ambassador Muthaura did, in fact, present them to the Chamber, and what
5 do they reflect? They reflect that no such phone call existed.

6 So what do we have? We have nobody in the Safari Club, nobody in
7 the Members Club saying such a meeting existed; Mr. Kenyatta telling us
8 that no meeting existed; Ambassador Muthaura being at a National Security
9 Advisory Council; and this all-important phone call where this alleged
10 free zone was set up, the phone records reflect no such phone call. Now,
11 where does that leave us, Madam President and your Honours? Where it
12 leaves us is a recounting of the facts that is remarkably similar to what
13 Witness 0004 said in his first statement, which was, "Other people told
14 me these things," because the stark reality from the evidence is that he
15 at no such meeting and there is evidence to substantiate that he was.

16 Again, Madam President, your Honours, we go back to the stark
17 reality of the documentary evidence before the Chamber, and the
18 documentary evidence before the Chamber reflects that no such meeting
19 ever happened, and there has been nothing put forth by the Prosecution to
20 undercut that position.

21 What's even more remarkable about Witness 0004, and I stay with
22 this because it -- it is the central feature of the Prosecution's
23 submissions against General Ali, and Witness 0004 when confronted with
24 these -- with these various stories, virtually the only thing he
25 corrected was that he was at the 27 November meeting at the State House

1 and that the meeting was at -- was in fact at the Members Club as opposed
2 to the Safari Club.

3 After putting them all together, these mutually inconsistent,
4 irreconcilable stories concerning my client, he said, and I quote:
5 "These statements were accurate and consistent with the things he
6 remembered." That's at EVD-PT-OTP-00248 at 0054 and 55.

7 How can that possibly be true? How can that possibly be
8 accurate? How can that possibly be the basis upon which this man is
9 being brought before this Chamber?

10 Needless to say, bringing Ambassador Muthaura and Mr. Kenyatta
11 here with these mutually inconsistent, irreconcilable stories that have
12 no bearing in the documentary evidence but that the Prosecution has
13 accepted as true. There is nobody else that levels those type of
14 accusations against these three men, and in my case specifically against
15 my client.

16 And what they have tried to do is corroborate, corroborate such a
17 meeting with the statement of Witness 0012. Now, Witness 0012, lest we
18 forget, was one of the extortionists that was extorting both Mr. Kay and
19 Ms. Higgins.

20 And I'm given a note by my learned friends from the Muthaura team
21 and my colleague that I made a mistake on page 12 -- 20 of the
22 transcript, that I noted that the State House meeting, I said it was on
23 the 27th. It's in fact on the 26th, and I do appreciate that, and if I
24 do it in the future I welcome any corrections in that regard.

25 But who is Witness 0012? He is an anonymous and confidential

1 witness, and accepting the Bemba pre-trial assessment of such witnesses.
2 They have a "rather low probative value," but this -- given what he has
3 done with this extortionist conduct, I submit to the Chamber that his
4 credibility sinks yet further. But this is the witness that the
5 Chamber -- that the OTP has used to support or to corroborate what
6 Witness 0004 is telling -- saying, excuse me. Number one, what this
7 witness says has nothing to do with the Rift Valley; and number two, I
8 must say that reading through this witness's statement, talking about
9 meetings at the State House he didn't attend or the Safari Club meetings
10 he didn't attend, he names virtually every person in the Kenyan
11 government, including President Kibaki, as a Mungiki member.

12 His story changed so frequently as you read through it,
13 Madam President and your Honours. I read with some -- with a smile on my
14 face when this first issue came up about some alleged phone call from
15 Mr. Michuki to Mr. Muthaura to General Ali, and when the investigator
16 says this -- this bit -- and this is at EVD-PT-OTP-660 at 0298, lines 877
17 to 884. The investigator, when he starts talking about this, is
18 surprised because he's telling him something that he never told him
19 before, and the investigator says:

20 "Well, this bit in relation to Kibera and everything is quite new
21 to me. It's not something you'd mentioned in the screening."

22 So here is a comment coming from Witness 0012 that he's never
23 said before. And this is a comment about General Ali going to Kibera and
24 calling back to Minister Michuki because Mungiki are allegedly wearing
25 police uniforms and Kibera, and then Ambassador Muthaura calls back and

1 says, "Oh, those are -- layoff. Keep off, those are our guys."

2 Let's take this one by one. Number one, there is simply no
3 corroboration whatsoever for this phone call. None. No toll records, no
4 place, no meeting, no nothing.

5 Number two, just on the hard realities of the press in Kenya, one
6 might suspect that if General Ali went down himself to Kibera, somebody,
7 somebody in the media or some other witness might know that. What do we
8 have in that regard? Nothing.

9 Number three, the most startling thing about this, if it's used
10 as corroboration, is this: Witness 0012 says he wasn't even at the
11 meeting. He heard this from somebody else.

12 Let us look at Witness 0012's statement to the OTP at
13 EVD-PT-OTP-661 at 371.

14 "My brothers were called to this meeting there."

15 And then when asked, "Well, how do you know this?"

16 "Because the people that we used, the people, they told me."

17 And that's at EVD-PT-OTP-0661 at 0317.

18 So the statement of this extortionist who has put the president
19 and virtually everybody else in the Mungiki recounts some conversation
20 about Minister Kibera, Ambassador Muthaura, and General Ali, and he's not
21 even there. The OTP has tried to use this conversation and to say that
22 this is a conversation in mid-January and it's a reminder by
23 Ambassador Muthaura to General Ali. Well, that doesn't even withstand
24 scrutiny either. Why? If you read Witness 0012's statement, he said
25 these phone calls and this conversation took place immediately after or

1 while the Kibera violence was going on. That's the first week of
2 January 2008. So contrary to the position of the Prosecution that this
3 conversation took place in mid-January, it's not supported by its own
4 witness.

5 So if you look at paragraph 54 in the DCC, the document
6 containing charges, it simply doesn't support it, and it's simply wrong.

7 The next witness that they use is the other extortionist,
8 Witness 0011. Now, his conversation is more remote than the others.
9 This is a guy who says basically that the police -- well, it's kind of
10 interesting, and I read for you EVD-PT-OTP-0319 at 1468, line 650 to 660,
11 and he says before this:

12 "Well, the police, the Kenyan police, would never do any deal
13 with the Mungiki. Why? Because there were too many Kalenjin and Luos in
14 the Kenyan police for the Mungiki to work with the police."

15 Now, where do we square that with the corroboration from the OTP,
16 I'm not quite sure. But be that as it may, when we get down to the hard
17 facts and when the investigator asks this witness, Witness 0011, the
18 extortionist, did a conversation, did a telephone go from either Kibera
19 or Ambassador Muthaura to General Ali, this is the question and this is
20 the answer, EVD-PT-OTP-0320 at 1486. When asking about that question
21 he's asked:

22 "So you believe, but you don't know."

23 To which Witness 0011 responded:

24 "I believe. I believe," because he didn't know.

25 So let us wrap up point one. Did a phone call, did a

1 communication go from Ambassador Muthaura to General Ali giving him
2 instructions to allow the Mungiki to pass through and go through this
3 free zone up to the Rift Valley? I submit to you, Madam President and
4 your Honours, that based on this evidence, this information that has been
5 brought forth by the Chamber, there's nothing close to substantial
6 grounds to support this unreliable, ever-changing inconsistent witness
7 and evidence such that it can be used by any judicial body to bring
8 General Ali or any of these gentlemen before this Chamber. Why? Because
9 it's simply not true.

10 The documentary evidence gets yet stronger, because once again as
11 you move through this, even if you take the Prosecution's position at --
12 without question that some phone call was made, what happened? What
13 happened? Surely, surely the documentary evidence -- surely the
14 documentary evidence would reflect that the police did something to bring
15 about such free zone. Surely that there is something to show that
16 General Ali and the police implemented these instructions. Certainly
17 there has to be some causation evidence to reflect that. Again, we go
18 back to the documentary evidence, the documentary evidence which is there
19 at the time, the documentary evidence that was written at the time, and
20 it will show you a pattern of conduct by the police in conjunction with
21 other security forces that demonstrate a police department faced with a
22 cataclysmic series of events, not only just in the Rift Valley but
23 throughout the country, that with limited means and limited forces was
24 trying to bring under control. But let's look first before we go in
25 there at the Kenyan police department and General Ali's participation as

1 the commissioner of police.

2 As I said at the outset of my remarks, General Ali, almost 35
3 years of service, most of that being as an armed -- in the armed forces
4 of Kenya, rising to the rank of a brigadier in 2003 before he took over
5 the commission -- excuse me, as commissioner in 2004.

6 He imposed order and respect and dignity to a police department
7 that was by all accounts in some difficulties. With 40.000 officers, he
8 took over a troubled institution where anti-corruption measures were
9 taken into place. Anti-corruption measures were put in place, police
10 were disciplined, and police began to enforce law and order, so much so
11 that if we look at the Kenyan crime report, and this -- for 2007, and
12 this is EVD-PT-OTP-0217 at 1276. Shortly after he took over and by 2007,
13 there had been a reduction in crime throughout the country of 13 per
14 cent. An enormous stride, an enormous stride for a police department not
15 only in Kenya, but I hasten to say in the metropolitan police department
16 in London or the New York City Police Department or any other major
17 police department that could have those types of advances in that short
18 period of time. And the person that was -- changed, the person
19 responsible that, in large part, was General Ali, in conjunction with the
20 colleagues he was working with.

21 Now, part of those efforts of bring down crime was an effort that
22 was very close to General Ali, and that was the opposition to an outlawed
23 group in Kenya known as the Mungiki. This splintered street criminals
24 who were harassing, stealing, killing, maiming people throughout Kenya in
25 their own personal interest.

1 There's not one shred of evidence to demonstrate that General Ali
2 did anything but prosecute, investigate, and hunt down people such as the
3 Mungiki committing criminal acts violating the rights and privileges of
4 the Kenyan citizens.

5 One need only turn to Major-General Gichangi's statement, and
6 Major-General Gichangi was the head of the NSIS, an entity that you've
7 heard quite a bit about. And EVD-PT-D12-00053 at 0408, General Gichangi
8 says this:

9 "One thing I can say is that General Ali has what I would
10 describe as almost pathological dislike for the Mungiki due to what it
11 stands for, the threat it poses, and the crimes it commits, and the
12 methods it uses to terrorise citizens."

13 Even Witness 0011, one of the extortionists, told the OTP that
14 whenever a policeman is seen by the Mungiki, he is seen as the enemy.
15 EVD-PT-OTP-00320 at 1475.

16 And let me say, Madam President, your Honours, that the Kenyan
17 police under the helm of General Ali pursued the Mungiki before the
18 elections, during the elections, and after the elections, and we will
19 demonstrate that with the documents we will bring before the Court
20 shortly.

21 If we look at an NSIS situation report, EVD-PT-OTP-00013 at
22 pass -- through 19 -- 2007, the Kenyan police worked to crack down on the
23 Mungiki. In June 2007, six months before the 2000 elections, the Kenyan
24 police arrested 2.464 suspected Mungiki dealers in reaction to violent
25 acts. That's EVD-PT-OTP-0177 -- if I might have one moment. And also

1 the UNH report reflecting the same data, EVD-PT-OTP-0275, 0019.

2 General Ali's sitrep reports himself, 14 November, 2007:

3 General Ali ordered the arrest of two Mungiki members and a crackdown on
4 the sect members, and that's a sitrep of 14 November, 2007,
5 EVD-PT-OTP-00115 at 0591.

6 Put simply, put simply, the evidence reflects - and the witness
7 testimony reflects - that the Kenyan police viewed from the outset and
8 through all the time that General Ali was a commissioner of the police as
9 something that needed to be hunted as an illegal group. Even one of the
10 Prosecution witnesses, Witness 0010, reflects the same at
11 EVD-PT-OTP-00674 at 550.

12 I'm reminded, Madam President, your Honours, that oftentimes when
13 you operate in this *milieu*, if you will, that you speak in a language
14 that is -- you become used to and that those that may not, be it the
15 Court or the public, may not be familiar with, and I've talked at some
16 length at several times so far about sitreps. That is just an
17 abbreviation of a situation report. I know your Honours might understand
18 that, but I figured I'd clarify that. One of my colleagues raised that
19 issue, so I'd hasten to clarify it so there is no mistake as to what I'm
20 talking about because I will be talking about situation reports as we
21 move through.

22 The allegation by the Prosecution is that, certainly with regard
23 to my client, on the 3 January of 2008, he agreed to engage in some type
24 of illicit arrangement with the Mungiki. The plausibility of that is so
25 remote it defies belief. But I would like to present to the Chamber a

1 video put together by the Kenyan police specifically directed towards the
2 Mungiki, and the timing of this video, Madam President and your Honours,
3 is crucial. This video was made between approximately December 20th to
4 December 23rd, 2007, days before the election and ran daily on the
5 television in Kenya from the 23rd of December through the 30th of
6 December, 2007. Approximately four days before this illicit arrangement
7 allegedly took place. It is called "Behind the Scenes," and it's about
8 the Mungiki.

9 Now, Madam President, I would ask your guidance in this regard,
10 and if I can make a minor *ore tenus* motion to the Chamber. This is a
11 very significant tape outlining not only what General Ali had in mind at
12 the time but also what the police were actually doing. What happened
13 during the course of our uploading this, apparently several minutes at
14 the end of this video became corrupted. Ringtail corrupted the document
15 and we found out sometime after the fact. Be that as it may, Madam
16 President and your Honours, I would like to play the entire video because
17 I believe it's very instructive and very helpful for the Chamber to not
18 only understand the threat that Mungiki confront -- or faced -- or made
19 to the entire Kenyan population but also the steps taken by the police to
20 confront them. I believe there will be no prejudice to the Prosecution.
21 I do believe they have a copy of the entire matter, and I ask that we
22 move forward and play the entire tape.

23 PRESIDING JUDGE TRENDAFILOVA: Unfortunately, Mr. Kehoe, we
24 cannot make any exception, because on Friday, the Prosecution's Office
25 was requesting the Chamber also to present some documents that they found

1 after the expiration date of the disclosure, so we cannot make
2 exceptions. I'm very much sorry. You have plenty of --

3 MR. KEHOE: Yes, your Honour, I can play the initial portion
4 which is approximately 20 minutes. The only matter that I would
5 footnote, and I'm not re-litigating or re-arguing the point, is that this
6 is a situation a tad bit different because the attempt was made to
7 disclose it but it was simply corrupted by the Ringtail system. But be
8 that as it may, your Honour, I will gladly move consistent with
9 your Honours' instructions.

10 PRESIDING JUDGE TRENDAFILOVA: A number of decisions were taken
11 in this regard --

12 MR. KEHOE: Yes.

13 PRESIDING JUDGE TRENDAFILOVA: -- and we have granted some of
14 your requests, others we didn't based on the reasoning as presented in
15 the decisions taken. So thank you.

16 I'm sorry, there is something wrong with the screen, so ...

17 (Trial Chamber and Registrar confer)

18 PRESIDING JUDGE TRENDAFILOVA: I'm sorry, but there is a problem
19 that has to be fixed by a technician. So I'm sorry, we have to wait a
20 little bit.

21 Could you proceed, Mr. Kehoe, and thereafter you will play the
22 video.

23 MR. KEHOE: Yes, Madam President. I can come back to this issue
24 another time.

25 PRESIDING JUDGE TRENDAFILOVA: In order not to lose time. Thank

1 you.

2 MR. KEHOE: No problem.

3 Madam President and your Honours, we move at this point to the
4 actual election period. And were we to just accept the arguments put
5 forth by the Prosecution, one would think not only did the
6 Commissioner Ali or General Ali not take any steps to prevent violence
7 beforehand, didn't -- one would think from their arguments that he took
8 no steps while it was going on or after that. So what we would like to
9 do is take you through some of the steps, even prior to the election,
10 that General Ali took.

11 Now, General Ali was aware of difficulties in prior elections.
12 He was aware of some of the role -- that the role that the media had
13 taken during these periods of time and some of their, what he would
14 describe as hate rhetoric or fiery rhetoric, and in 5 November 2007, at a
15 breakfast meeting with the chief executives at the -- at the Grand
16 Regency Hotel in Nairobi, and this is EVD-PT-OTP-0048 at 8587 to 8590,
17 General Ali cautioned the media about hate rhetoric and called their
18 responsibility -- called in their responsibility to not augment such
19 problems as a result of such rhetoric. Now, this is 5 November, more
20 than a month prior to the elections, and he issued a challenge to the
21 media saying that you have a responsibility to act responsibly, to report
22 responsibly, and not to generate hate rhetoric. As Mr. Mwangi testified
23 last week, that General Ali cautioned him to avoid abusive language
24 during campaigns.

25 As we move to the election times, there were 55.000 polling

1 centres in Kenya for the elections, 55.000. Every one of those polling
2 centres had to have two law enforcement officers assisting. As a result
3 of that, General Ali exercised his powers to bring in 4.000 prison guards
4 for election day to ensure that election day was peaceful. And it was.
5 Election day was, in fact, peaceful. If we look at the commission to
6 investigate post-election violence, EVD-PT-OTP-0054 at 9355, 9356, the
7 evidence clearly reflects that polling day itself was, by and large,
8 peaceful. Let's look at the time immediately following the election and
9 what efforts did General Ali and the police employ to ensure that peace
10 continued to flourish throughout the country prior to the results?

11 December 27th, 29th, police patrols were increased in majority of
12 the areas. EVD-PT-OTP-00004 at 434.

13 December 28th, 2007, police deployed to Nakuru where they
14 "separated the warring groups and created a buffer zone between Luo and
15 Kikuyu." Waki report, EVD-PT-OTP-00004 at 0475.

16 December 29th, police and military deploy to clear blocked
17 highways and streets in the Northern Rift Valley. Police were also
18 deployed to guard IDP camps and escort public service vehicles and
19 tankers from the Eldoret to the Kenya-Uganda border, Waki report
20 EVD-PT-OTP-0004 at 4 -- 0416 and 17.

21 I raise -- point to that particular issue on the 29th of
22 December, 2007, to make a point that you will see, Madam President,
23 throughout the situation reports both from the -- the security reports
24 from the NSIS as well as General Ali's situation reports that there was
25 violence taking place all over the country, that the Kenyan police were

1 confronted with violence all over the country, not just in the
2 Rift Valley. So when we see the situation reports coming through, you'll
3 see any number of orders going in various locales, and General Ali while
4 he is looking at all this in conjunction with his other commanders have
5 to make decisions on where to deploy forces.

6 I will take a case in point, one of the situation reports
7 coming -- that the Prosecution highlighted from the 21st of September of
8 2008.

9 In this one report coming from the national -- NSIS on the 21st
10 of January, 2008, on the issue where they accuse General Ali of ignoring
11 information about attacks that were supposed to take place in Naivasha,
12 over 20 entries are in that NSIS report for one day concerning violence
13 all over the country. Based on that information, you have a commander,
14 Commissioner General Ali, having to make decisions in conjunction with
15 his other subordinates as to where to deploy their forces. So simply to
16 pluck one piece of information out of an intelligence report upon which
17 to make a claim, fails to take into account all the information that was
18 taking place throughout the country.

19 Now, the allegation has been presented, Madam President and your
20 Honours, that when violence broke out that the police didn't do anything,
21 that they weren't ready for it, that they stood by and allowed this to
22 happen. The -- once again let us go back to the documentary evidence,
23 documentary evidence that was in possession of the Prosecution, and what
24 does it reflect? It reflects that when violence broke out, it broke out
25 in a fashion and in places never seen before not only by the police force

1 but by the country of Kenya. They were simply overwhelmed by the
2 magnitude and within that fact frame the police, in conjunction with
3 other security agencies, had to bring peace and security and law -- and
4 lawfulness to the area. But again, I -- we go back to the documentary
5 evidence. What do the people that were there at the time say happened?
6 And let's just go down and tick through a few of these.

7 The Nakuru DSIC minutes of January 30, 2008, EVD-PT-OTP-00072 at
8 1885. When the post-election violence did break out "security officers
9 responded to control the violence despite being overwhelmed at times."
10 Naivasha OCPD Willy Lugusa referred to the violence in Naivasha and he
11 told the commission:

12 "My Lords, my officers appropriately handled the situation as it
13 came when the violence broke out."

14 And he talks about -- and if you read -- if you read Mr. Lugusa's
15 testimony, and he's talking about violence breaking out in various places
16 at the same time, and of trying to get to various places at the same
17 time, and roads being blocked, and the police doing the best they can
18 notwithstanding a limited amount of vehicles and roadblocks, that despite
19 what they were trying to do, human rights reports reflect that the police
20 "were hopelessly outnumbered facing hundreds, if not thousands, of armed
21 criminals in Naivasha and Nakuru." EVD-PT-OTP-00002 at 301.

22 Police, two, three, four, five policemen maybe facing thousands,
23 thousands of people at the same time. Is it conceivable that if the
24 police -- is it conceivable that a small number of policemen can take on
25 thousands of people wielding weapons? I suggest to you, your Honours,

1 that a police under those circumstances have to find a way to work around
2 that and bring peace and bring stability in another fashion, not a direct
3 confrontation in a method and means that you're bound to lose, and that's
4 in fact what they did.

5 Now, if we look at the Rift Valley, it's not only the Kikuyu that
6 are attacking the Kalenjins, information is coming across that it's the
7 other way around. Look EVD-PT-OTP-00041 at 2181. So not only was the
8 Kikuyu attacking -- not only the Kikuyu were attacking others, in one
9 case police officers faced 1.500 Kalenjin youth who attacked Kikuyu with
10 bows and arrows. EVD-PT-OTP-00107 at 452.

11 And another case, five police officers - and this is what I was
12 referring to previously - faced a crowd of more than 2.000 rioters.
13 EVD-PT-OTP-00341 at 2181.

14 And it was not just the violence, Madam President and your
15 Honours, it was the magnitude of the violence that was so shocking to
16 everyone. Let's look just at -- I'll list this, and I know this is --
17 this seems like a lot of information, but I have to tell you,
18 Madam President and your honour, this is just a sampling of the
19 information. This is just a sampling of the documentary evidence
20 reflecting not only what happened but what the police did consistently
21 and sacrifices they made to stop this violence.

22 Let's look at the meeting of the town hall at Nakuru. The
23 district commissioner of Molo stated that:

24 "We did not anticipate --" and he's talking about the violence
25 would be of that -- of the magnitude that occurred. "We expected

1 disruption of the elections but not the masses." EVD-PT-OTP-00126 at
2 25 -- 250 and 251.

3 A report given to the commission on post-election violence on the
4 violence in Nakuru noted that the violence was "of such a magnitude and
5 scale it overwhelmed." A person you've heard from before, Mr. Munguti,
6 the Nakuru OCPD similarly stressed the overwhelming nature of the
7 fighting, but he also gave a different wrinkle to it. He says, and I
8 quote:

9 "My Lords, I could not predict such violence have occurred. We
10 could see neighbours -- we could see neighbours raising against
11 neighbour." EVD-PT-OTP-0072 at 1885.

12 Munguti continues to talk about the same events on the same page,
13 and this is EVD-PT-00127 at -- excuse me, 00127 at 0719 where he notes
14 that we were "being overwhelmed at times."

15 The Rift Valley -- the Rift Valley provincial commissioner, what
16 does he know? And this is at EVD-PT-OTP-00052 at 9265. He notes that
17 the attacks were overwhelming and simultaneous. Overwhelming and
18 simultaneous. This was all going on at the same time with a limited
19 amount of police officers to cover this, in most cases on a scale never
20 before witnessed in the province.

21 General Ali himself in talking to -- to the committee commission
22 investigating the post-election violence noted at EVD-PT-OTP-00127 at
23 0179 that this violence was unprecedented. It had never happened before.
24 Now, it's easy to say as the Prosecution level, that the police didn't
25 have enough equipment, didn't have enough personnel, that's all true. If

1 your Honour looks at the Kenyan police 2004/2008 strategic plan
2 EVD-PT-OTP-D00015 at 132 and 133, they talk about the difficulty with the
3 scarcity of resources, and they note:

4 "The principal cause of dysfunctional policing is the severe
5 scarcity of resources which with the police must contend."

6 Now, the police in Kenya are like police everywhere else in the
7 world. They do not direct how much or how many resources they get. That
8 is a government allocation decision. Has it been a continuous problem
9 highlighted in this report by the commissioner of police? Absolutely.
10 Notwithstanding that, notwithstanding that, the police, a heterogeneous
11 group of policemen in all of these stations made of Kalenjin, Kikuyu,
12 Luo, and Luhya and other tribes came together with these limited
13 resources to quell this violence that was -- had the possibility of
14 wrecking this country. So were there difficulties they faced throughout?
15 Yes, there were. Did they do their best to confront those? Yes, they.
16 Did they do that being cautioned consistently by General Ali to do
17 everything you can to stop criminality? Situation report
18 EVD-PT-OTP-00103 at 0415, and EVD-PT-OTP-0018 at 450.

19 And in the midst of all this, Madam President and your Honours,
20 what is General Ali telling his troops? Yes, you have to stop
21 criminality, but don't take sides. If we look at the situation report of
22 January the 28th, 2008, General Ali:

23 "Police officers are to reminded of their core function, the
24 maintenance of law and order and to be discouraged from taking sides."

25 He recognised the difficulty facing these men and women. He

1 recognised what they had to do with limited manpower and limited
2 resources, but throughout it all he's telling them: Do their job,
3 enforce the law, bring in law and order, but whatever you do, you are
4 policemen first and do not take sides while we're trying to quell this
5 violence and bring peace and stability to this country.

6 I'm about to go into another area, Madam President. This may be
7 a good area to break as opposed to break in between.

8 PRESIDING JUDGE TRENDAFILOVA: Yes. Thank you, Mr. Kehoe. I
9 think it's good to take the break now, and we shall resume our hearing at
10 11.30.

11 COURT USHER: All rise.

12 Recess taken at 10.57 a.m.

13 On resuming at 11.31 a.m.

14 (Open session).

15 COURT USHER: All rise.

16 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

17 Now, following your suggestion, Mr. Kehoe, you will -- we are
18 going to play the video up until 322, following the decision of the 15th
19 of September, dealing with these matters.

20 MR. KEHOE: If I can just have one moment, Madam President.

21 PRESIDING JUDGE TRENDAFILOVA: Yes, of course.

22 MR. KEHOE: If I can just correct. I believe that I misspoke and
23 I early on called Mr. Michuki, Mr. Kibera. I will try to get that
24 correct on the record, but it's a minor point, but I just wanted to bring
25 it to the Chamber's attention.

1 PRESIDING JUDGE TRENDAFILOVA: Thank you. Thank you.

2 COURT OFFICER: Your Honours, just a brief procedural matter.

3 Just before the video is played, I would like to remind everyone to

4 switch to the "PC 1" channel right in front of you to be able to hear

5 this video. Thank you.

6 (Video-clip played)

7 "These gangs have used all manner of excuses to preposition the

8 public to tolerate their existence."

9 MR. KEHOE: If I may, Madam President, could we wind this back --

10 (* overlapping speakers).

11 PRESIDING JUDGE TRENDAFILOVA: Just a moment.

12 MR. KEHOE: If we can wind it back from the beginning, I think he

13 came -- the general came up in mid-sentence there, so.

14 PRESIDING JUDGE TRENDAFILOVA: Could you play, Court Officer,

15 from the very beginning the video.

16 (Video-clip played)

17 "While now, the Kenyan police has grappled with the challenges

18 posed by criminal gangs. These gangs have used all manner of excuses to

19 preposition the public to tolerate their existence, but underneath all

20 the misleading arguments, some of which have been laced with religious

21 undertones, is a harsh reality. Over the years, these criminal gangs

22 have engaged in such serious crimes as murder, robbery, extortion,

23 blackmail. Their actions have trampled on the legal and moral rights of

24 Walengi (* phon), violated the sanctity of life, and desecrated the

25 individual's right to hold property. Their main calculation is to use

1 fear to exploit other Kenyans economically, and they are willing to kill
2 to do this. The feature you're about to watch takes us beyond the
3 headlines of one such group. It has been prepared with the contribution
4 of many ordinary citizens who have volunteered information in keeping
5 with the strategy of community policing. This feature is real and
6 contains some footage of our crime archives. Some of this footage is
7 shocking.

8 "A look at 50 year old Mama Mary Waithera Njenga tells the story
9 of her shattered life. On the outside, her well-kept rural compound in
10 Kigoro village, Banana, in Kiambu District, shows a self-reliant,
11 hard-working peasant farmer struggling to keep her farm going with a host
12 of mixed farming activities. But the story of her life is tied to the
13 two graves next to her cow shed. One belongs to her husband, who died of
14 diabetes six years ago, a fact she has stoically taken in her stride as
15 she assumed the role of head of family.

16 "(* Speaking foreign language)

17 "For six years since her husband's death, she raised her four
18 children as only a mother can giving room for growth of non-mainstream
19 talent as she encouraged her last born child, Nicholas Mark Mbugua Njenga
20 to become a budding artist, a career he took to a formal level when he
21 joined a Nairobi based school of fine art.

22 "(* Speaking foreign language)

23 "But all these hopes and hard work and dreams lie in a second
24 grave next to the young artist's father. One morning as she arrived back
25 home from a friend's funeral, she found her homestead in mourning.

1 "(* Speaking foreign language)

2 "Her last-born son Nicholas who was home for the holidays was
3 dead, but there was more.

4 "(* Speaking foreign language)

5 "Her son wasn't just dead. He had been murdered. And not just
6 murdered. His body had been mutilated. Fully aware of her dangerously
7 fragile state and the affection she had towards her last born son, the
8 neighbours and relatives would not let Waithera see her son's body.

9 "(* Speaking foreign language)

10 "Pictures and memories are all that are left to Waithera and her
11 family. Two years later, her calloused hands still cradle her son's
12 paintings, showing them to anyone who visits her forlorn home, hanging
13 desperately on to the memory of a young man she loved. Still, it is
14 obvious, residents of Banana Division know more than she does, but they
15 still don't tell her much. She loved her son too much to know truth, a
16 neighbour confesses.

17 "(* Speaking foreign language)

18 "As Waithera struggles to understand the fear and pain her son
19 encountered before his life was snuffed out, another family in
20 Duberi (* phon), of Kiambu District, still struggles to come to terms
21 with another death that occurred in the same period.

22 "(* Speaking foreign language)

23 "Mzee Njino Njuguna of Kiambu still wrecks of bitterness and pain
24 as he recalls the murder of his grandson. His relationship with
25 Dominic Mzee Njino was personal. The young man, as per Kikuyu tradition,

1 was named after him, and his violent death has left a deep scar that the
2 old man in his sunset years still struggles to come to terms with.

3 (* Speaking foreign language)

4 "A morning of terror that shocks both Kiambu residents and
5 provincial administrators alike:

6 (* Speaking foreign language)

7 "Sixty kilometres away in Muranga District, Robert Kiunjuri, a
8 schoolteacher in Kjongdugu (* phon) in Kahura (* phon) Division is a
9 witness to another blood curdling occurrence.

10 "When I woke up at 3.00 a.m. in the morning for a short call,
11 and during that time when I shone my torch, I found that there was a
12 human head on my (* indiscernible) pen. And on going closer, I realised
13 that that -- the human head belonged to a person whom I knew.

14 "Totally different security situation, not mere theft or robbery.
15 A reign of terror.

16 "When night comes, in fact, we cannot even move out of the door
17 because of the fear.

18 (* Speaking foreign language)

19 (* Speaking foreign language)

20 "Mourning relatives, scared residents reported for two years in
21 the news media as news briefs and TV clips, but underneath it all a
22 horrible reality and a torturous path still yet to be navigated in a
23 tricky effort to understand and contain a group of killers.

24 "May 2007, a security threat looms over five districts in the
25 expansive Central Province of Kenya and some parts of Nairobi. Several

1 incidents of violent murders are reported. The unique aspect of this
2 situation is that nothing is stolen from the victims, but the method
3 employed in the murders is chilling. The victims, mostly male, have
4 their heads cut off, their private parts dismembered, and their body
5 parts recovered in different locations.

6 (* Speaking foreign language)

7 "The media and government security forces links the killings to a
8 well-known but little understood group known as the Mungiki, a
9 quasi-religious organisation banned in 2002. For almost three years,
10 Mungiki's activities appeared confined within its secret membership until
11 2006 when a trail of bodies started being linked to its activities.
12 Unknown to the public, Mungiki had changed its tactics.

13 "Mary Waithera, whose student son, a self-made fine artist, was
14 beheaded in June 2006, is still bewildered as to why her son was
15 targeted.

16 (* Speaking foreign language)

17 "It is a story confirmed by neighbours and family. Her son
18 Nicholas Mark Mbugua Njenga, self-driven, enterprising, and firm in his
19 Catholic faith, had opened a stall in Nairobi's Kenyatta market to sell
20 his drawings and complement his mother's earnings that paid for his
21 studies. His dream, however, is cut short. And he is not the only young
22 man who pursued self-reliance who ended up as a Mungiki target. Mungiki
23 was recruiting members. Unlike earlier when membership was voluntary,
24 the new tactic was forced recruitment.

25 (* Speaking foreign language)

1 "Dominic Njino, a matatu conductor on the Nairobi-Kiambu road,
2 was also a target. Working in the matatu industry which was infiltrated
3 by the Mungiki, he was given an ultimatum to join the group.

4 "(* Speaking foreign language)

5 "He used to say no. He always made it clear that he would not
6 join them. He used to tell me, 'Mom, these people want me to join them
7 and I will not. Whatever happens, I will not join them. If they want to
8 kill me, let them do, but I will not join them.' He told me every time
9 he met him.

10 "(* Speaking foreign language)

11 "Mungiki sect members burst into the national limelight in the
12 1990s with unorthodox habits that included tobacco sniffing, trademark
13 dreadlocks, and praying while facing Mount Kenya. In less than a decade,
14 they presented a fearful force that no longer drew curiosity but fear.
15 Dr. Mutuma Ruteere, a political scientist at the University of Nairobi
16 and a human rights activist, recently released a book that attempts to
17 dissect the politics of Mungiki violence in Kenya.

18 "It's criminal. There's a section within that believed that, you
19 know, this actually is the route to go back to a different way of life,
20 you know, you get baptised in the traditional way.

21 "There is a group within it that sees this an opportunity to earn
22 a daily life.

23 "But to the grieving Mzee Njino, religion cannot be used to
24 describe the Mungikis' activities.

25 "(* Speaking foreign language)

1 "A religion can be positive, a religion can be negative. When a
2 religion begins to undertake negative trends that threaten security and
3 stability of peace-loving communities, it becomes an issue.

4 "To the Kenya police, the connection between Mungiki and religion
5 masks the dangerous reality that is a direct threat to law and order.

6 "We have not gone to look for people in their place of worship.
7 We come for you if you have started interfering with the rights of other
8 Kenyans.

9 "More worrying to law enforcement officials is Mungiki's
10 involvement in activities that mirror an organised crime syndicate.

11 "We get very interested when you threaten people on their own
12 private property, that you either give me this percentage of your income
13 daily, or I harm you or I commit murder.

14 "Several districts of Central Province have borne the brunt of
15 Mungiki's economic exploitation.

16 "(* Speaking foreign language)

17 "Muranga was worst affected. From *matatus* to petty traders,
18 Mungiki included peasant farmers in their list of targets. In Molem
19 village in Nakuru, Esther Wairimu is surrounded by fresh memories,
20 painful memories of one rainy night that drastically altered the course
21 of her life.

22 "(* Speaking foreign language)

23 "Her husband, Frederick Kamau, was added to a growing list of
24 victims of Mungiki whose form of violence had now extended to shooting
25 their victims. Wairimu's husband Kamau was operating a new *matatu*. As

1 was customary with Mungiki's mode of operation, a toll fee was demanded.

2 He did not pay. He got killed.

3 "(* Speaking foreign language)

4 "Still in Muranga District, we encounter an elderly couple still

5 mourning the death of their, son John, a budding young entrepreneur whose

6 savings had been channeled into the boda boda business.

7 "(* Speaking foreign language)

8 "John was pronounced dead at 11.00 a.m. the next day. Being old

9 did not provide any safety from Mungiki. Seventy-year-old

10 Danson Muiruri Mwangi has the scars to prove it.

11 "There came two thugs wielding machetes. They asked me for

12 money. They were Mungiki. In the ensuing argument they cut off my left

13 hand from the wrist down. They then fled as this whole place was

14 littered with blood.

15 "And these are the brave ones, the few willing to talk. In this

16 place, too much talk about this terror gang can earn you a death

17 sentence. From Muranga, which for years has been one of their key

18 operating points, Mungiki is being felt in Kenya's capital Nairobi.

19 "Beginning the late 1990s, their members started a systematic and

20 forcible takeover of management of commuter service vehicles,

21 specifically the matatu industry. Those standing in the way were

22 ruthlessly dealt with.

23 "(* Speaking foreign language)

24 "The growth of Mungiki's economic empire has extended to

25 Nairobi's city's slums; notably, Mathare, Kariobangi, and Kioli (* phon)

1 in the east of the capital. It is in these --"

2 PRESIDING JUDGE TRENDAFILOVA: Please proceed, Mr. Kehoe.

3 MR. KEHOE: Thank you, Madam President. We played this -- played
4 this video because we wanted to demonstrate to the Chamber exactly with
5 whom the Prosecution alleges that the Kenyan police were allegedly
6 operating in concert with, a criminal gang that preys on the poor, the
7 rural, undefended farmers, matatu drivers, the poor and the downtrodden.
8 That's who these guys are, just a group of criminal thugs. Not some
9 sophisticated organisation. It's exactly what the witness said at the
10 end of last week. Groups, two, three, splintered groups committing crime
11 for their own benefit. And to think that the police, who used their
12 resources all of these years - and if Your Honours so choose, I invite
13 you to look at the rest of the tape at some point - that used all their
14 resources fighting these organisations to bring peace and stability to
15 poor people in the rural areas and in the cities, to think that the
16 Kenyan police were operating in concert with them is not only
17 unthinkable, it brings grave, grave dishonour to the brave police
18 officers who were shot and killed at the hands of these criminals and
19 certainly grave dishonour to the Kenyan police as a whole. It's simply,
20 simply unthinkable. It's unthinkable, and it didn't happen.

21 Now, let us go back, Madam President, and go back where we left
22 off previously, and that was the -- the post-election violence period of
23 time that some of the documentary evidence that was -- will be presented
24 that was created at the time by the various agencies. And this is
25 directed to the argument by the Prosecution that while all of this

1 violence was taking place and information coming across the transom from
2 entities like the National Security Information Service or any other
3 entity that the police did nothing, that they had prior knowledge of
4 attacks and they did nothing. Well, nothing, nothing, can be further
5 from the truth. And how do we know this? Again, as I stress,
6 Madam President and your Honours, let's go back to the documentation.
7 Let's go back to the papers that doesn't lie. Let's go back to the
8 historical record, all of which was in the possession of the Prosecution
9 and ignored.

10 One of the -- one of the features or one of the items stressed by
11 the Prosecution on several occasions is the 21 January 2008 NSIS report
12 warning of an impending attack in Naivasha. Now, we will get into that,
13 but it warns of the -- an impending attack. However, number one, it
14 doesn't give the exact date, but number two, as your Honours, know that
15 things weren't just going on in Naivasha, they were going on in various
16 locations. In fact, violence erupted just up the road on the 24th of
17 January in Nakuru.

18 But be that as it may, with regard to the allegation by the
19 Prosecution that when General Ali received this information from the NSIS
20 on the 21st that he did nothing, well, they could not have examined the
21 documentary evidence at the time. And let us turn to the documentary
22 evidence at the time, and this is a situation report from General Ali.
23 So let's keep the date sequence in mind. 21 January, 2008, information
24 from NSIS concerning a possible confrontation in Naivasha.

25 The next day, 22 January 2008, General Ali notified his officers,

1 and I quote:

2 "In Naivasha, Kikuyu youth plan to attack the Maasai, Luhya, Luo
3 residing in the area to protest violence meted out to their kinship in
4 some other parts of the country."

5 That is EVD-PT-OTP-00108 at 046970. Another document in the
6 possession of the OTP at the time this case and investigation was ongoing
7 that they chose to ignore.

8 In addition to that in that same sitrep he orders the provincial
9 police officers to beef up security, work closely with provincial
10 administration and local leaders to warn off the youth, and to ensure the
11 security personnel were deployed on a 24-hour basis.

12 I have to say going through this, and again just a sampling of
13 this, and I go through this simply because the allegations levied by the
14 Prosecution are -- border on outrageous given the documentary evidence
15 that we have before us, that it's incumbent upon us to go through this
16 and just give your Honours a sampling of exactly what transpired and what
17 type of steps were taken by General Ali, his officers, and others at the
18 provincial level.

19 We need only go to EVD-PT-OTP-00109 at 477. General Ali's
20 issuance of action orders to police -- from police headquarters to the
21 provincial police officers on 23 January -- January 2008, and this is a
22 letter from General Ali to the PPOs.

23 The restriction of movements by the potential commissioner in
24 the Rift Valley, 27 January 2008, by Hasan Noor Hasan, the provincial
25 commissioner, EVD-PT-OTP-0052 at 9266.

1 The deployment of officers by the Nakuru OCPD to create barrier
2 zones between warring groups on 24, 26 January 2008, EVD-PT-OTP-00127 at
3 page 0725.

4 Mr. Mwanza told you previously, and he's also told the
5 Waki Commission, that Naivasha had a rapid mobilisation of his security
6 team in a response to demonstrations on the 27th of January. You
7 remember Mr. Mwanza's testimony that when he went to the area and said
8 that these police entities should be deployed, the police were already
9 deployed confronting the crowds on the morning of the 27th of January,
10 2008.

11 The action taken by Mr. Lugusa's troops in Naivasha where over
12 150 people were arrested. That's EVD-PT-OTP-0063 at page 9910.

13 We will go through a bit more and we want to respond even more
14 directly to what the Prosecution has levied with regard to the
15 intelligence reports, and if I could just digress for -- momentarily on
16 what intelligence reports are. What we find through this entire matter
17 is that the NSIS consistently and judiciously gathered intelligence from
18 a variety of sources and passed them out to the field. These are
19 intelligence reports and the idea of an intelligence agency is that they
20 given entities, law enforcement entities, military, whomever, an idea of
21 what could possibly happen so they could be on notice.

22 No intelligence agency infallible. Sometimes the events don't
23 take place. Sometimes the events don't take place in the time that they
24 hear about it because what an intelligence agency is designed to do is to
25 gather information and to do the best they possibly can to pass it on.

1 And this -- in this instance what you'll find is that the NSIS diligently
2 tried to do that as well as possible, but frankly, sometimes the
3 information doesn't occur, doesn't pan out for any number of reasons.
4 But I think it's important to understand all of these pieces of
5 intelligence in that context, because when you begin to review these NSIS
6 reports, you'll see any number of items in these reports. As I said
7 previously, on the 21st of January alone, there are over 20 entries of
8 various things happening not just in the Rift Valley but all over the
9 country. But let's just look at a few samples of this so I can
10 demonstrate the point.

11 And I direct your attention to the NSIS sitrep of 4 January 2008,
12 and in that particular sitrep that the NSIS sent out they opine that the
13 Mungiki sect plans to assassinate Raila Odinga and William Ruto. That's
14 EVD-PT-OTP-00013 at 0071. Well, we know that doesn't happen. In fact,
15 Mr. Odinga is the Prime Minister as we speak and Mr. Ruto, in fact, was
16 in this court the other day, but that's just a piece of information that
17 they pass on to the police.

18 Another one on the same situation report reported ODM supporters
19 and NSIS reported that ODM reporters plan to set ablaze the churches in
20 Kabira and Nairobi. Again, EVD-PT-OTP-0013 at 0070. That didn't happen
21 either. Again, consciously and judiciously NSIS passes the information
22 along, but in this instance we know it didn't occur.

23 Now, sometimes you get intelligence information and, for whatever
24 reason, the date may be incorrect. Maybe the human intelligence that the
25 NSIS is dealing with happens to get a particular date and that person is

1 wrong. Be that as it may, NSIS gets the information and passes it out to
2 the field, and that's in fact what happened in the 9th of January NSIS
3 report, EVD-PT-OTP-0013 at 65.

4 In that report, the NSIS opined that the Mungiki attacks in
5 Nakuru were going to take 9th, 11th January 2008. Well, we know that
6 wasn't the correct date. It was, in fact, later than that.
7 Nevertheless, they passed the information on but it was a different date.

8 It happened again on the 14th of January. The NSIS informed the
9 security entities of a possible Mungiki attacks in Nakuru on 16 January
10 2008, and of course we know that those attacks didn't take place in --
11 until several days later, the 24th.

12 Nevertheless when, this information comes to the police, this
13 information is sifted through by the police and they have to make a
14 decision, as I mentioned earlier, on the allocation of resources.
15 Passing the information on and what are they going to do to respond to
16 the threat, keeping in mind the threat is not only just in Naivasha, not
17 just in Nakuru, not just in the Rift Valley, but, frankly, it's going on
18 all over the country.

19 What General Ali and his staff do is they take this information,
20 absorb this information, and the information moves down to the chain of
21 command, moves from the headquarters sometimes to a senior deputy to a
22 provincial police commissioner to the district police commissioner to the
23 office in charge of the police district and the constables on the street.
24 That's how the chain of command goes. My colleague, Mr. Otachi will go
25 through that chain of command in a little bit more detail in his

1 presentation on Nakuru and Naivasha. But that's how the structure, in
2 fact, works. But not withstanding that, and I have to answer this
3 allegation by the Prosecution which they made several days ago. This was
4 September the 23rd, at page 43, lines 6 to 3, citing EVD-PT-OTP-004 at
5 0046, they noted the fact that the violence erupted in the manner
6 predicted, especially by the NSIS, discloses a failure on the part of the
7 police and the provincial administration who showed no signs of being
8 proactive.

9 Now, I will say to you, your Honour, not only is that completely,
10 completely wrong, completely wrong, it shows a blatant disregard of the
11 documentary record. It shows -- it is a statement that can only be made
12 had they not perused these documents in a fashion that we will do to some
13 degree here; that is, looking at information coming from NSIS, and in
14 some instances coming from the National Security Advisory Council, and
15 what General Ali and his staff did by putting it out in the field. And
16 what I have done, Madam President and your Honours, with your permission,
17 is I put together a series of slides, or my staff put them together, I
18 can't take credit for something that I didn't do specifically, so I have
19 to give them credit for this, but it is -- these are excerpts from
20 documents that you have, but we laboured to go through these,
21 Madam President and your Honours, to show what was happening, how this
22 information was coming in, how it was going out to the field, and in what
23 fashion it was going out to the field, which completely, completely
24 defies any position presented by the Prosecution that somehow the police
25 commissioner and his staff were back in Nairobi doing nothing and were

1 not responding to this threat that was taking on -- taking place all over
2 the country.

3 So with your Honours' permission, I would ask to just briefly go
4 through these series of slides that we have, and I have a gentleman at
5 the front row that, with the assistance of your court office, can move
6 through these slides quite quickly.

7 Now, what we have done here, Madam President, this is NSIS NSAC
8 sitrep plus the sitreps coming from the police. And the first slide --
9 if we go to the first slide, this is in fact a letter that General Ali or
10 message sent to his officers at Christmas of 2007, and as you see, given
11 the fact that this is happening at election time -- I'm reminded of one
12 issue, Madam President, this is not a particularly sensitive document,
13 but these documents have a confidential tag to them, so it may be that as
14 we move through these NSIS reports and the sitreps it may be best to put
15 them in a confidential fashion. I don't think it needs to be closed
16 session, but the documents themselves are confidential.

17 PRESIDING JUDGE TRENDAFILOVA: Do you request a private session?
18 Do you suggest a private session?

19 MR. KEHOE: If we can just go through them, I'm not going to
20 mention any -- any names in there that are of some sensitivity, but -- so
21 as long as these particulars documents aren't shown to the public.

22 PRESIDING JUDGE TRENDAFILOVA: Just a moment.

23 MR. KEHOE: And not show them on the monitor.

24 PRESIDING JUDGE TRENDAFILOVA: Okay. So as the Court Officer
25 clarifies they will not be broadcasted to the public so let us proceed.

1 MR. KEHOE: That will be fine.

2 As I said, and I apologise for the interruption Madam President
3 and your Honours, the first slide is a slide of General Ali's Christmas
4 message to his officers on the cusp of these elections that take place on
5 the 27th. Anyhow, first let me remind you that this is election time.

6 "I am directing all officers to be loyal to the government of the
7 day and be completely impartial in the performance of duty. It is my
8 expectation that all officers will redouble their efforts to facilitate a
9 free, fair, and democratic election devoid of violence and intimidation
10 of any kind. Extra vigilance will also be required in the immediate
11 post-election period to ensure that the tensions created by the election
12 hearing do not explode into lawlessness, especially in the more volatile
13 areas of the republic."

14 Let us go back. Let us continue on and go to the next slide, and
15 this is a situation report from NSIS from 4 July 2008. And now we will
16 go through a sequence of exactly what General Ali did with this
17 information. And as you can see from this information in entry 324, it
18 says:

19 "Some sect members, Mungiki sect members, are assembling in
20 undisclosed locations in Nairobi with a view to carrying out revenge
21 attacks on Luos/Kalenjins travelling along the Nairobi highway on an
22 undisclosed date."

23 From this -- from this 4 January 2008 NSIS sitrep let us go to
24 slide 3, and what does General Ali do about this? Well, as you see at
25 the top he begins to discuss this, and says:

1 "Meantime some sect members," obviously the sect members are
2 Mungiki members, "are assembling in undisclosed location in Nairobi with
3 a view to carrying out revenge attacks on Luos/Kalenjins travelling along
4 Nairobi-Naivasha road on an undisclosed date."

5 Action 4 January 2008:

6 "Crack down on the sect members must be sustained. PPO
7 Rift Valley to intensify patrols on the Naivasha-Nairobi highway to avert
8 the intended attacks."

9 Now, this is 4 January 2008. The next day following this meeting
10 that Witness 0004 allegedly says took place at the Nairobi Members Club.
11 So if that is to be believed, on 3 January this meeting or conversation
12 takes place where General Ali is allegedly allowing in free zone to
13 take -- to allow Mungiki to go to the Rift Valley, yet the next day, 4
14 January, he's giving this order to crack down on the Mungiki.

15 This is the documentary evidence that doesn't change, and it
16 continues.

17 Let us go to 7 January 2008. This is an NSIS intelligence report
18 indicating in Nakuru Kalenjin youth are planning to evict Kikuyu, and
19 Kalenjin youth are receiving combat training. There is this next slide,
20 slide 5, information coming from NSAC, the 7 January 2008 meeting. It's
21 a -- it's a recommendation by the NSAC to the commissioner to deal with
22 the violence.

23 Slide 6. This is all happening the same day. General Ali passes
24 the intelligence related to the Kalenjin youth to evict Kikuyu in receipt
25 of combat training by Kalenjin youth. In the next slide of the next day

1 he orders Rift Valley provincial police officers and others to arrest any
2 person engaged in acting in lawlessness. Now, I do apologise that some
3 of these slides are a little sketchy, but this is how it was disclosed
4 and I'm sure this is how the Prosecution had it as well because these are
5 all OTP documents, every one of these documents that I have read to you.
6 The last one, for instance, is EVD-PT-OTP-0013 at 412.

7 Let's continue on. Slide 8, this is another NSIS sitrep. They
8 report that:

9 "Mungiki elements are reportedly meeting at Stem Hotel in Nakuru
10 with a view to attacking ODM."

11 This is 10 January 2008, EVD-PT-OTP-00013 at 0064.

12 The same day, the same day, 10 January 2008, General Ali orders
13 PPOs, the provincial police officers and others, to "ensure that
14 intensive security surveillance and patrols is maintained on a 24-hour
15 basis." And he orders his officers "to storm the Stem Hotel in Nakuru
16 with a view to making as many arrests as possible." And he orders that
17 security be beefed up to contain the situation and avert any possible
18 fresh attacks. This is EVD-PT-OTP-00105 at 0438.

19 There's more. 14 January, 2008, slide 10, if I may. The bottom
20 of the page in the highlighted section. This is a report intelligence --
21 intel report related to possible Mungiki attacks in Nakuru on 16 January
22 stating that:

23 "Mungiki plans to attack members of the Luo community in Nairobi
24 and Nakuru on the evening of 16 January 2008."

25 Same NSIS report notes that leaflets were dropped on the

1 Baha'i (* phon) Oasis Academy in Nakuru, wanting Kalenjin and Luo to quit
2 their jobs or "be eliminated."

3 General Ali's actions, slide 12, the same day, 14 January, 2008.

4 He passes on the intelligence related to the planned attack in Nakuru on
5 January 16th. That is an event, even though he passed it on, that never
6 took place; nevertheless, exercising his discretion, he passed the
7 information on. The same day Ali also passes on intelligence related to
8 the use of leaflets to threaten Luo and Kalenjin. Slide -- that's in
9 slide 13.

10 Slide 14, again the same day. To follow-up on these reports,
11 General Ali directs his provincial police officers to ensure "to ensure
12 security surveillance and patrols and maintain -- are maintained within
13 all areas affected by the post-election violence." He lists reasons for
14 summoning and warning named persons "who are inciting members of the
15 public to violence" and orders that "custodians and distributors of the
16 mentioned leaflets be sought and arrested." Again, those are all in
17 EVD-PT-OTP-00106 at 0042, 044, and 045.

18 And it goes on like this throughout the month NSIS reports, NSAC
19 reports, response by the police department. Let's turn to slide 15, 16
20 January, 2008. Now, there are 11 topics covered in this NSIS report, and
21 one relate to Nakuru and Naivasha. Again, this is emblematic of a
22 typical NSIS report where the people at NSIS are passing on intelligence
23 not only for the Rift Valley but for the entire country, and because
24 frankly there is violence going on in many different quarters in the
25 country and not just in the Rift. But in this -- on this one note

1 concerning Nakuru and Naivasha, it's a note that Kalenjin are threatening
2 to barricade the Molo-Nakuru road and that violence is likely.
3 EVD-PT-OTP-00013 at 00057.

4 Now, this is an interesting slide -- or -- or sitrep and we are
5 not going to go through all of it, but General Ali has this sitrep on the
6 16th of January and he responds, he responds to this information that
7 Kalenjin are going to barricade the road, and he responds to ten other
8 pieces of information in that same sitrep all in the same day. So we
9 look at -- he gets this information on the 16th, and he -- if you look in
10 slide 16 is a response. He directs that the PPO, the provincial police
11 officer in Rift Valley generally "beef up security patrols and
12 surveillance in the Rift and order that the Molo-Nakuru road be manned to
13 avert any acts of lawlessness."

14 21 January, 2008, and there are some in between, but time
15 permitting, Madam President, your Honours, it doesn't allow us to go
16 through every day but there are other examples and I invite the Chamber
17 to go through these other dates in between and show the sequence of
18 events and pieces of information being passed down the line. But slide
19 17 is the 21 January sitrep that was cited by the Prosecution in its oral
20 argument, talking about the Kikuyu youth in Naivasha were planning
21 revenge attacks against Maasai, Luo, and Luhya in Naivasha and also
22 planned to block the Nakuru-Naivasha and Gilgil-Mai-Mahui roads stated
23 that "vigilance by security personnel remains crucial in an effort to
24 bring normalcy to the area." That's EVD-PT-OTP-00013 at 0052.

25 Next slide. The NSAC minutes, they recommend "that security be

1 beefed up further with every administrative division in the affected
2 areas getting a minimum of 30 security officers and a vehicle to ensure
3 mobility." EVD-PT-OTP-D12-00019 at 134. General Ali's actions are based
4 on this.

5 And mind you, when we go through here except -- when we go
6 through all these actions by Ali, these are all Prosecution documents.
7 They all have Prosecution EVD numbers.

8 Slide 19, the next day. General Ali relays the NSIS's
9 information related to the planned revenge attacks against the Maasai,
10 Luo, and Luhya in Naivasha. EVD-PT-OTP-00108 at 469.

11 Slide 20, he ordered his officers to work closely with the
12 provincial administration leaders to warn off the Kikuyu youth.

13 And slide 21. Slide 21 is -- is not directly on point with
14 regard to Naivasha and Nakuru, but it's emblematic of a commander who
15 knows how difficult it is to be in the field under these circumstances.
16 He knows. He's in communication with these people. The Prosecution said
17 during their -- their -- during their presentation that General Ali was
18 in constant communication with the PPOs in the field. That's true.
19 That's true. He's that kind of commander, to find out what's going on in
20 the field. And what is his response to that in slide 21 that's on the
21 screen? He orders all the PPOs to "ensure that the officers are
22 encouraged and appreciated for their job well done and noted that more
23 security personnel should -- should be deployed on a shift basis to
24 relieve those who have worked. EVD-PT-OTP-00109 at 0742. Now, why is he
25 doing that? Why is he doing that? And my colleague Mr. Otachi will go

1 into this at some length with regard to Naivasha and Nakuru,
2 Madam President and your Honours, but the reason is that these police
3 officers are working around the clock, barely eating, barely sleeping,
4 trying to bring order to the area with thousands, literally thousands of
5 IDPs at the police station.

6 Now, think about this: The allegation of the -- of the -- the
7 OTP is that the police officers are supposed to stand down to allow
8 Mungiki and the Kikuyu to kill or burn or drive out Luhya, Kalenjin,
9 Luhya -- Luo. But at the same time, they're policing the area and
10 they're literally taking thousands and thousands in to protect, feed,
11 clothe, and just take care. I mean, the irony borders of that borders
12 on, frankly, Madam President and your Honours, the absurd because it just
13 didn't happen.

14 January -- 23 January, 2008, NSIS sitrep. They indicate that
15 "former Nakuru MP ... was allegedly organising Mungiki members to attack
16 non-Kikuyu ... in Nakuru..." EVD-PT-OTP-00013 at 0048.

17 Go down to the next slide, 23. It's still part of the NSIS
18 report. The report continues and notably the similar information appears
19 in the NSIS brief to the Rift Valley PSIC on 22 January. That's
20 EVD-PT-OTP-00215 and OTP-00013 at 0047.

21 What is General Ali's response? Again this same day, 23 January,
22 slide 24, Ali -- this is General Ali's response: He immediately relays
23 this information to his officers the same day and orders officers to warn
24 off the member of parliament and it instructs the officers to arrest
25 anyone engaged in lawlessness, EVD-PT-OTP-00108 at 0477.

1 The 24th, 25th January 2008. Let's go to the 24th January sitrep
2 of NSIS. They report that "tension is high between Kikuyu and non-Kikuyu
3 communities within Nakuru due to the alleged presence of Mungiki." The
4 same situation report, if we go to slide 26. They advise that -- "States
5 that the current insecurity arising from the disputed presidential poll
6 has given room to interested groups and individuals to push for their
7 hidden agenda." EVD-PT-OTP-00013 at 00046.

8 Slide 27, the NSAC minutes of that day, 25 January, 2008 --
9 excuse me, the next day. Members of the committee "informed the minister
10 that the matter had been addressed by beefing up security, deploying 210
11 officers, dispatching 25 rovers, to provincial police commissioner in
12 Rift Valley, and temporarily deploying military personnel in Molo."

13 With respect to the situation in Nakuru, the members agree that
14 "efforts must be made to avert clashes between the communities in
15 Nakuru." That is EVD-PT-D12-00021 at 0152.

16 The next day, the same day as the NSAC minutes, the day after the
17 NSI minutes, 25 January, 2008, General Ali noted that certain politicians
18 in Naivasha have resolved to evict the Maasai, Luo, and Luhya and
19 Kalenjin communities in the town and ordered his police to respond, to be
20 on high alert for violence in Nakuru. EVD-PT-OTP-00110 at 0484.

21 I just have a few more left, and I just pause for a second. I
22 mean, as we go through this, and again there -- there are so many of
23 these, it -- it -- again, it defies logic that the Prosecutor could take
24 the position that information concerning violence was coming into the
25 police commissioner's office and the police commissioner stood by and did

1 nothing. One needs to ask how the OTP accounts for this massive series
2 of documents that reflect something to the contrary. Not something to
3 the contrary, a story that is 180 degrees different.

4 28 January, 2008, NSIS sitrep. Two hundred Kalenjin youth arrive
5 in Nakuru in January and are regrouping at Sewale Mwariki B. If you go
6 down a little further, "there are plans to ferry Mungiki sect members to
7 Nakuru on 28 January to fight the Kalenjin." This is EVD-PT-OTP-00013.

8 There is also information in this -- this sitrep that -- that
9 provided intelligence that "some Kalenjin youth are allegedly regrouping
10 Menengai Crater in Nakuru district with a view to attacking the Kikuyu."
11 His response, General Ali's response, the same day he relays the relevant
12 intelligence and orders the PPO to ambush the Menengai Crater with a view
13 to making as many arrests as possible. Ali orders that residences of
14 those alleged to be supporting Kalenjin raiders "be searched with a view
15 of recovering illegal weapons."

16 Now, he knows that this is going to be a conflict between the
17 Kalenjin and the Kikuyu potentially, and so what does he do? He reminds
18 police officers of their core functions of maintaining law and order and
19 be discouraged from taking sides.

20 The last one for the month is 30 January 2008, an NSIS sitrep.
21 It states that: "Tensions has persisted in Naivasha where youth have
22 embarked on burning abandoned houses of those fleeing the skirmishes."
23 This is at EVD-PT-OTP-00013 at 0039, and it describes threats from ODM
24 allies to attack IDPs at the police station in Naivasha. What is
25 General Ali's response? He passes on the intel related to the burning of

1 abandoned houses and planned attacks on the police station's IDPs and
2 directs that actions must be taken against all who break the law and
3 orders that those inciting the violence must be arrested.

4 So here are IDPs in the police -- in the police station hiding
5 being protected in the police station that General Ali is telling his
6 PPOs in the field to make sure these people are protected.

7 Now, I ask this question rhetorically, and I don't think we need
8 to go any further on this, but there are more, I mean, which of these
9 orders -- which of these instructions coming down from General Ali after
10 he received information from NSIS or NSAC, which of these pieces of
11 information did he ignore? Which he -- did he use to establish this free
12 zone that the OTP consistently brings out based on the testimony of
13 Witness 0004? The answer, Madam President, your Honours, is none. The
14 paper that is before the Chamber doesn't lie. This is information as I
15 say that was in the possession of the OTP for all this period of time
16 which for some reason known only unto them they chose to ignore. But
17 what it reflects is a historical record that a police department
18 besieged, overworked, with not enough resources was getting information,
19 passing it through the police commissioner's office, from the police
20 commissioner's offices out to the provinces, the districts, and the
21 officers in the field, for them to bring law and order to the community
22 which is what they did. Were their problems, were their difficulties,
23 was it hard? The answer to all of the above is yes, but did they do
24 their job pursuant to this historical record as best as they possibly
25 could with these terrible, terrible conditions, the answer is yes.

1 The point three -- the point three is, as I said we had
2 instructions, General Ali doing -- what General Ali didn't do with those
3 instructions, and point three is there's simply no evidence in the record
4 that the police failed to act. I'm going to talk about it on a -- a
5 larger level, Mr. Otachi's going to talk about it on the level with
6 regard to Naivasha and Nakuru, but what you see throughout all of this is
7 a commander, Commissioner Ali, issuing orders to arrest the wrong-doers.
8 In a newspaper article towards the latter part of -- of January 2008,
9 when he's talking about bringing people to court, he notes that 28 -- 24
10 people were going to be brought to court for murders all over the
11 country. That's EVD-PT-OTP-000 -- 00680 at 0054. And that article
12 appeared in the "Daily Nation," 29 January 2008.

13 The police did nothing? Well, let's look to some evidence being
14 presented to the OTP, one of their own witnesses, and this is
15 EVD-PT-OTP-00624 at 0053. And this witness notes that major highways
16 near Nakuru were blocked during the post-election violence until the
17 police arrived to clear them.

18 Another witness coming from the OTP, EVD-PT-OTP-00627 at 00116.
19 The Kenya police arrested members of an armed gang and the owner of the
20 house where a meeting of the gang was taking place. Now, was this easy?
21 This wasn't easy. If you look at Mr. Mwanza's testimony before Waki,
22 they worked very, very long hours, as he says, with only brief, brief
23 naps to keep on going. Evidence of the Waki Commission, many officers
24 didn't leave their post for days and were subjected to the same witness
25 that the IDPs were undergoing while they were at those station.

1 What they -- what the OTP has presented to you through all of
2 this to rebut this undisputed documentary evidence is one BBC article
3 from an unidentified policeman who maintains that Mungiki -- or
4 individuals, it doesn't even say Mungiki, that vehicles were allowed to
5 drive through and they were not to be stopped. Who gave that order,
6 where that order came from, who this person is? It's unidentified, it's
7 anonymous, and it's inherently unreliable.

8 Now what's remarkable throughout all this, remarkable is that
9 when all of this is going on - and let's just -- let's just put the
10 overview on this just a bit - General Ali is enforcing discipline within
11 the police when all of these events are going on. Now, think of the
12 proposition that is being advanced by the -- by the Prosecution that
13 General Ali, in conjunction with his police force, is allowing this free
14 zone for Mungiki to go up into the Rift Valley while at the same time he
15 is enforcing discipline with his officers and holding them accountable
16 and in some instances firing them. I mean, the irony of that situation
17 is appalling, and there's no officer to come forward and say General Ali,
18 how dare you discipline and fire me if you're in fact in bed with these
19 criminals and allowing them to commit crimes. If that had happened, I
20 suggest to your Honours that that would have been front and centre not
21 only in the "Daily Nation" but in the Prosecution's case, and it didn't
22 happen.

23 What does he do in -- as opposed to that? Just an example, in
24 January 2008, General Ali received a letter from the US Ambassador
25 Michael Ranneberger where he made serious allegations that police

1 officers had been given orders to use deadly force against protesters,
2 and that is at EVD-OTP-00298 at 0356.

3 General Ali responds and he responds right away at
4 EVD-PT-D14-0012 at 0116, and he not only denies the allegations, he -- he
5 denies that any orders were given to use deadly force against protesters,
6 he asks Ambassador Ranneberger for follow-up information. He says:

7 "The seriousness of the allegation warrants immediate
8 investigation, and I will appreciate if you could forward to me, under
9 urgent confidential cover, all the detailed information and evidence, if
10 possible, to enable me to take immediate disciplinary and legal steps.
11 Kindly indicate the name and station of the officer and the date when
12 this incident took place.

13 Again, that letter is 28 February 2008, following up on
14 Ambassador Ranneberger's letter. And what happens? No response is given
15 to General Ali by Ambassador Ranneberger. So General Ali rights back 16
16 May 2008 saying:

17 "I am compelled to bring your attention -- to your attention that
18 I have not received any responses from your office to my urgent request
19 concerning this unlawful use of force."

20 Nothing happens. He sends him another letter 23 May 2008,
21 EVD-PT-D14-00014 asking for additional information from the ambassador
22 which is never forthcoming.

23 Now, one might say if one were to look at General Ali's conduct
24 cynically that that was just a show. That was just a show to
25 Ambassador Ranneberger that this was the American ambassador and that I

1 was just passing this information on trying to diffuse his letter and
2 show that I'm trying to do something. Nothing can be further from the
3 truth.

4 There is a report that we received from the Prosecutor, "Ballots
5 to Bullets," EVD-PT-OTP-0002 at 312, where they note that the police had
6 opened 142 investigations into the conduct of police officers during and
7 after the post-election violence. Excuse me, during the post-election
8 violence period. In the same report, "Ballots to Bullets," and this is
9 at -- again at page 312, dated 27 January, 2008:

10 "Twenty officers were fired for demanding bribes for escorting
11 vehicles -- excuse me, for escorting vehicles. In another case, five
12 police officers were charged with crimes for shooting of unarmed
13 protesters in Kisumu," and it goes on.

14 There is any number of disciplinary measures taken by General Ali
15 in the midst of everything that's going on so when one looks at
16 General -- at Ambassador Ranneberger's letter and General Ali's response,
17 it is completely in concert with how he has been conducting himself and
18 controlling his troops.

19 One looks at this record and not only does it defy logic, but it
20 violates probably a premise that we all live our lives by which is
21 probably -- probably something that -- that is something that we carry
22 through out on a daily basis, and it's probably -- and it's termed as
23 Occam's Razor, and what it notes is that all things being equal, the
24 simplest explanation is the best, is the correct one.

25 As opposed to going through some conspiratorial theory engulfing

1 Ambassador Muthaura, engulfing Mr. Kenyatta, and engulfing General Ali,
2 one needs to look at what the reality as what happened. It was that the
3 fighting in Kenya throughout the country at the time was neighbour
4 against neighbour, and the simple reality borne out by this paper is that
5 the law enforcement authorities, the police in conjunction with other
6 entities, did all they possibly could to prevent this country from
7 falling into complete anarchy. There were horrific events without any
8 question, but clearly the police, with General Ali at the helm, did their
9 best to contain it, and by all accounts, as I said at the outset, that is
10 the reason why the Republic of Kenya survived this terrible sequence of
11 events.

12 One last issue that I need to discuss with you that was levied
13 but not charged by the Prosecution are these supposed death squads. What
14 the allegation of the Prosecution is that the DCC in paragraph 49 was
15 that there was -- Mungiki was prosecuted before the post-election
16 violence, that they had agreement with them during the -- during the
17 election period time, and that after that period of time they went back
18 to prosecuting them. There is nothing, nothing to support that
19 allegation. No fact, no circumstances, no nothing. What they -- what
20 they give us for that is newspaper articles, of which there were seven,
21 and the old reliable Witness 0004 and Witness 0012. Those are the two
22 people they support. Witness 0004, by the way, who notes, rather
23 casually, Well, of course, you know, the police were killing the Mungiki.
24 He then states thereafter that he wasn't even in the country at the time.
25 And Witness 0012, he recounts a sequence of events where a Mungiki were

1 killed by the police department, and thankfully the Muthaura team and the
2 Kenyatta team interviewed this person who was supposedly a Mungiki and
3 supposedly being killed by the police and says that he was never a member
4 of the Mungiki. *A fortiori*, what is Witness 0012, the extortionist,
5 talking about? And these are at EVD-PT-D12-00228 and EVD-PT-D13-00052,
6 820.

7 They levy this allegation for killings by the police involving an
8 organisation that kills itself in its splinter and power group and every
9 death that comes to a Mungiki individual is laid at the feet of the -- of
10 the police. There's simply no evidence. Now, with no supporting
11 evidence and no evidence to substantiate it, it is good reason why the
12 OTP did not incorporate this into their charges, and the reason they
13 didn't do it is because they know they can't prove it. They know they
14 didn't prove it. There is no evidence in these articles, in any of this
15 testimony, to support this outrageous allegation.

16 If we may move on briefly in the time I have remaining,
17 Madam President, and I know that your Honour -- Madam President and your
18 Honours, you noted that you're going to deal with the organisation issues
19 on a legal level in a separate pleading in -- once the OTP has a chance
20 to respond, and I'd just like to touch on a few issues that go to the
21 factual aspects of this organisation. And I find with -- with some
22 degree of shock in this regard, Madam President and your Honours, the
23 change in position concerning the OTP and their organisation under
24 Article 7. Their organisation and the organisational policy has changed
25 dramatically since the inception of this case. At the very outset your

1 Honours allowed this case to move forward based on an organisation, not a
2 state organisation but organisational policy where the organisation was
3 the Mungiki.

4 Thereafter, the OTP put their Document Containing Charges
5 together and included in this organisation a hodgepodge of people which
6 included the Mungiki, and this is at paragraph 86; the PNU, which is at
7 paragraph 18; the PNU youth, which is at paragraph 27; and local
8 businessmen, which is in paragraph -- which is likewise in paragraph 27.
9 For the first time since we came here, we now have an organisation,
10 according to the Prosecution, that is an *ad hoc* organisation, an *ad hoc*
11 organisation. Never described in the DCC and certainly never, never
12 permitted by this Chamber. And they have presented no facts. In all of
13 their evidence prior to trial, that was this thousands of pages that
14 Ms. Higgins talked about the other day to establish some *ad hoc*
15 organisation. Again, with some levity, I described this organisation
16 during my opening statement, being somewhat alarmed that such an
17 organisation could arguably be put together, and yet it has changed
18 again. There is no notice about the *ad hoc* organisation. There is no
19 description of this *ad hoc* organisation. There is nothing.

20 I suspect, I suspect that the Prosecution was unhappy with the
21 Chamber's decision where the Chamber ruled that this was not a state
22 organisation with state policy and has attempted to drift back to that.
23 I suspect. But be that as it may, whatever it is, the facts supporting
24 and describing some *ad hoc* organisation are completely absent from the
25 OTP's disclosures and completely absent in their arguments until last

1 week when they made the presentations to this Chamber. But let's go
2 through, let's even accept what they're saying. Let's, for the sake of
3 argument, say that this is something that we need to address. Let's go
4 into what this organisation is and break it down.

5 The Prosecution argued the following: The core question to be
6 determined whether or not an organisation existed is, "Does the group
7 have the capability to perform acts which infringe on basic human
8 values?" And that is in the transcript of the 22nd of September, page
9 17, lines 14 to 16. This is clearly not the case. Your Honour, madam --
10 Madam President and your Honours, you set forth six conditions, six
11 conditions to determine whether or not the organisation exists, and
12 this -- your Honours, this is your decision of 31 March 2010 at
13 paragraphs 92 and 93. Six various conditions, virtually none of which
14 are addressed by the Prosecution. There are six questions. We're not
15 going to go through all of them, but they are -- this organisation, is it
16 under a responsible command with an established hierarchy? Does this
17 organisation possess, in fact, the means to carry out widespread or
18 systematic attack against a civilian population? Does this organisation
19 exercise control over a part of a territory or a state? Does this
20 organisation have criminal activities against the civilian population as
21 the primary purpose? Does the group articulate explicitly or implicitly
22 an intention to attack the civilian population? And does this
23 organisation, is it part of a larger group which fulfils some or all of
24 the above-mentioned criteria?

25 Now, we're not going to address all of those but let's just talk

1 about a few, the ones that the Prosecution doesn't talk about.

2 Has the Prosecution's facts established that the police, this
3 *ad hoc* organisation, the police and the Mungiki together, were under a
4 responsible command or established hierarchy. Have they remotely come
5 close to addressing that issue? The answer unquestionably is no. What
6 they have you believe is that they're -- Mungiki is an organisation, and
7 we've heard the Mungiki is a disparate organisation, but let's accept for
8 the sake of argument that Mungiki is a monolith, so we have the Mungiki
9 and the Kenyan police, this *ad hoc* organisation, this *ad hoc* organisation
10 that came and combined themselves together. Now, when did that happen?
11 When did that happen? When did they come forward with a responsible
12 command together? Let's not talk about two disparate groups. I must say
13 that -- that even their own witnesses, the two extortionists,
14 Witness 0011 and Witness 0012, they even say that the Mungiki and the
15 police don't even work in unison with each other. That's EVD-PT-OTP-3 --
16 00320 at 1475 and EVD-PT-OTP-0027 at 1593.

17 How about the how about the element on the exercise control over
18 some type of territory? Your Honours mentioned in -- that your order, a
19 description of exercising control of a territory, and your Honours are
20 cited to Additional Protocol II of the Geneva Conventions, to demonstrate
21 and explain exercise of control over an area. They don't even argue that
22 there was some exercise of a control over territory, by whatever
23 organisation this is going to be. Have they -- they -- they presented
24 any evidence that the primary purpose of this *ad hoc* organisation was
25 criminal activities against a civilian population as its primary purpose?

1 No. They forgot about that one. Might be a little essential, that --
2 that somehow they got together and this organisation's idea was the, you
3 know, attacks on the civilian population, but there's no evidence in that
4 regard.

5 Has the Prosecution proven that -- that this group, whatever
6 happens to be, has articulated explicitly or implicitly, an intention,
7 intention to attack the civilian population. Clearly, clearly it did
8 not. Clearly it did not. I mean, let's be honest. I mean, they give
9 this evidence that the Mungiki have got to go under the cover of darkness
10 and travel into Naivasha and hide in the woods and then come into through
11 trucks into town. My heavens, Madam President and your Honours, if the
12 police and the Mungiki are working together, why are they hiding? Why
13 are they trying to sneak into the woods and then come in the cover of
14 darkness if, in fact, these two *ad hoc* -- or this *ad hoc* organisation is
15 working in conjunction with one another? It's simply ridiculous and
16 doesn't bear the light of day or scrutiny.

17 And how about the existence of a policy? I mean, the case law is
18 more than just throwing up this *ad hoc* organisation on the wall and
19 hoping it will stick. What's the policy here? You know, the elements --
20 ICC elements are pretty clear about policy. You have to have an
21 organisation, and then our organisation has to develop a policy. And the
22 organisation in this case, if it's going to be attacks, this
23 organisation, according to the ICC Elements of the Crimes, saying that
24 this has got to actively promote and encourage such attacks, and these
25 attacks can't just be a one-off. They have to be a regular pattern. And

1 this is a policy. This is not just some individual crime. It's got to
2 be some type of pattern. And what's the evidence of planning direction
3 or organisation? When did these guys get together and say, Okay, we're
4 going to come forward, and this is what we're going to do, and this is
5 how we're gonna plan this out, and we're going to go up to the Rift
6 Valley, and we're going to kill everybody that is anti-Kikuyu so we can
7 take over this area or whatever we're going to do, or we can stay in
8 power even though we won the election already.

9 Where was that planning and direction? I suppose that planning
10 and direction comes from the 3 January, 2008, meeting from W4, the
11 meeting that didn't exist, but be that as it may -- or did it come from
12 this 26 November 2007 meeting at the State House with the president, and
13 he's inviting the youth in on youth day, or is it somewhere in between?
14 The fact of the matter is that there isn't any of the elements set forth
15 in the Prosecution's facts, and I don't want to deal with the law here.
16 I know you -- I don't want to stray into that area, Madam President and
17 your Honours. We are just simply talking about the facts. What are the
18 facts to establish a policy as opposed to some willy-nilly street crime
19 which was evidenced on the ground when the witnesses that came before,
20 not only will have come before you here, and that you will hear from --
21 from Mr. Otachi and have heard from Mr. Kay and counsel -- and from
22 Mr. Khan, that these were street crimes committing street criminal acts
23 against others, neighbour against neighbour.

24 If I might just have one moment, your Honour.

25 (Defence counsel confer)

1 MR. KEHOE: As evidence of some type of -- of policy that the
2 Prosecution has insisted -- once again, defying the documentary evidence
3 and once again defying the testimonial evidence of people on the National
4 Security Advisory Council that you've seen here today, that somehow
5 General Ali answers to Ambassador Muthaura. Well, legally we know that
6 has no bearing in reality, but the Prosecution points to the testimony of
7 General Ali before the Waki Commission, and I think it's instructive once
8 again to look at that testimony not only for what the Prosecution points
9 to but what they leave out and what they fail to discuss and what they
10 fail to point out.

11 Your Honour, with the limited time left I'll just read it. I
12 think that might be easier. In the Waki testimony -- and this is at
13 EVD-PT-OTP-00338 at 980, the Prosecution has attempted to use general's
14 testimony alleging that because general said he reported information to
15 the head of the public service and Muthaura was the head of the NSAC that
16 Muthaura had control over. Well, let's just piece this apart.

17 Number one, in a democracy people get together and they talk
18 about information everywhere. They have to. People have to know what's
19 going on in the security services or the country's going to break down.
20 Simply because Ambassador Muthaura ran that, there's no indication that
21 he was reporting to him in the sense of saying that, Oh, he's giving me
22 orders. And if the Prosecution read down a few more lines in the same --
23 Prosecution, what they neglect to cite is the paragraph where General Ali
24 says, and I quote:

25 "The Kenyan police and its management do not take instructions on

1 a day-to-day basis on things to be done or not to be done." That's at
2 EVD-PT-OTP-000 -- excuse me 00338 at 980.

3 The question is then asked thereafter:

4 "So you do not receive any instructions on security operational
5 matters?"

6 And General Ali says:

7 "We do not receive instructions on that matter."

8 Well, they're in meetings with Ambassador Muthaura and others and
9 consulting with a variety of entities within the government, but when it
10 comes down to security and operational matters, General Ali was very
11 clear to the Waki Commission that he does not answer to
12 Ambassador Muthaura and takes direction from no one.

13 And let's just take one last hypothetical in this regard. The
14 national security advisory commission that is a number of individuals in
15 there. General Jeremiah Kianga, he's the Chief of Staff of the Kenyan
16 armed services. Is the Prosecution seriously arguing that
17 Ambassador Muthaura, with all due respect, Mr. Ambassador, is giving
18 orders to the Chief of Staff of the Kenyan Armed Forces and telling him,
19 Well, why don't you just employ a few mechanised divisions on the border
20 of Uganda or some such thing. And how about how about the director of
21 the NSIS General Gichangi, is he seriously arguing that he likewise is
22 giving orders to General Gichangi on NSIS. Ambassador Muthaura, "Oh,
23 General, I think you should deploy some of your human intelligence forces
24 and some of your wire intercept areas into these particular locals in the
25 area because we think we can get information from there, and we know you

1 can get human intel and electronic surveillance there." That is just
2 ridiculous.

3 No such person - and Ambassador Muthaura, with all due respect,
4 Mr. Ambassador - as the coordinator of the group would dare to take such
5 a step. Nevertheless, nevertheless the Prosecution has seen fit to say
6 and argue that the ambassador ordered and gave instructions to
7 General Ali and he had the power to do so. Nothing, Madam President,
8 nothing is further from the truth and defies not only the law but it
9 defies the paper trail as we have been talking about the entire morning.

10 I am going back to -- I'm going to one last issue before I hand
11 this over, but I do think it's propitious to --

12 PRESIDING JUDGE TRENDAFILOVA: Mr. Kehoe, yes, we have approached
13 the end of this session, and I would like to remind you he have just one
14 hour left for the team to present the case after the break.

15 MR. KEHOE: Madam President, what we -- our witness, itself, that
16 we have is going to be somewhat limited, so --

17 PRESIDING JUDGE TRENDAFILOVA: It's your decision.

18 MR. KEHOE: Yes, yes.

19 PRESIDING JUDGE TRENDAFILOVA: It's your strategic approach, but
20 still within the timing that is allocated to your team.

21 MR. KEHOE: Yes, we are conscious of that Madam President. So we
22 shall resume our session at 2.30 in the same courtroom.

23 COURT USHER: All rise.

24 Luncheon recess taken at 12.59 p.m.

25 On resuming at 2.30 p.m.

1 (Open session)

2 COURT USHER: All rise.

3 PRESIDING JUDGE TRENDAFILOVA: Please be seated. We resume our
4 hearing, and the floor is over to you, Mr. Kehoe.

5 MR. KEHOE: Thank you, Madam President, your Honours.

6 Madam President, I am going to turn the floor over to my colleague,
7 Mr. Otachi, for the next presentation.

8 MR. OTACHI: Good afternoon, your Honours. Good afternoon,
9 colleagues on both sides and everyone in the courtroom.

10 Your Honours, as Mr. Kehoe has just indicated, my name is Otachi,
11 but just for the record, you might note that the filings in this case
12 indicate three names, Otachi is my middle name, but because everyone
13 finds it easiest to pronounce, everyone calls me Otachi, and if the
14 Chamber is comfortable with that, I'd be more than happy.

15 PRESIDING JUDGE TRENDAFILOVA: If you do not oppose, we will call
16 you Mr. Otachi.

17 MR. OTACHI: Thank you, Madam President.

18 Your Honours, my colleague Mr. Kehoe this morning demonstrated to
19 you that the story of the Muthaura/Ali phone call is pure fiction. Your
20 Honours, I shall be dealing with the second part of that tale, and that
21 has to do with the implementation of the alleged orders. And, your
22 Honours, my task this afternoon is to demonstrate to you that that, too,
23 is pure fiction.

24 The Prosecution has alleged that General Ali received a phone
25 call ordering him to let Mungiki travel from Nairobi and other parts of

1 Central Province to Nakuru and Naivasha and attack people of various
2 communities.

3 The logical questions to ask to determine whether there is any
4 basis in these allegations are the following: One, did General Ali
5 actually issue orders to any of his subordinates to permit violent
6 criminal attacks? If so, to whom did he issue the orders and how?

7 Second question: Did these alleged orders actually reach the
8 policemen on the ground? That is to say, the policemen who would
9 ordinarily take action.

10 Three, does any alleged police in action actually relate to
11 General Ali's orders?

12 Your Honours, the last question can be broken into two, and the
13 first bit is: Was there actually police in action? Did the police fail
14 to act as alleged, and if there was such failure, is it linked to any
15 orders from General Ali?

16 Your Honours, the Prosecution has failed to answer these
17 questions. Instead, the Prosecution has presented you with an argument
18 that is both factually and legally deficient, and we shall be
19 demonstrating that.

20 Your Honours, unlike the Prosecution, we will answer all these
21 questions. We will provide evidence from people who actually experienced
22 these events first-hand. Critically, we will present evidence from the
23 policemen on the ground who is alleged failed to act. And the evidence,
24 your Honours, which is already filed, we submit is reliable, credible,
25 and consistent.

1 The first question I asked was whether General Ali actually
2 issued orders to permit the commission of crimes. Now, in order to
3 answer this question, firstly let me describe the ordinary chain of
4 command within the police force. In other words, if General Ali were to
5 issue orders that were trickle down to the ordinary policeman on the
6 beat, how would that happen.

7 Your Honours, after the commission of police, at the provincial
8 level you have the provincial police officers. That is abbreviated as
9 PPO. Now, the provincial police officers, you have a provincial police
10 officer in each province, and here we are discussing the provinces as
11 they existed before changes last year. And each PPO would have various
12 divisions under him, and for each division the person in charge would be
13 the officer commanding the police division, in short, OCPD. Under the
14 OCPD, there would be various stations, and those stations would be manned
15 by officer commanding station, in short, OCS. Now, ordinarily the OCS
16 would be the last person to pass on orders to his juniors at the police
17 station level, but some stations are pretty large, they cover a very wide
18 area - and one example is Nakuru central police station - and under the
19 police station you would have police posts or patrol bases.

20 Now, this structure in terms of how orders would flow would be
21 found in EVD-PT-D14-00036, 0019. So your Honours will see there are at
22 least four levels through which any order would need to pass to reach the
23 policeman on the street. For any of the orders to be effectively
24 implemented, it logically much reach the lowest level.

25 Now, General Ali, and I think this has come out from the -- from

1 the presentation by my colleague Mr. Kehoe, is a man who believes in the
2 value of a well-organised force, a force that takes chain of command
3 seriously. He likes matters handled in an orderly manner. Again you
4 will see this in EVD-PT-D14-00036, at 0019.

5 Therefore, any orders to let criminals pass through roadblocks
6 would have to pass down from the PPOs -- from the police commissioner,
7 the PPOs, to the OCPDs, and then to the OCS. Indeed, even the
8 Prosecution, through one of their witnesses, has indicated that
9 General Ali is a leader who takes a centralised approach to the chain of
10 command, and that would be found in OTP Witness 0008, EVD-PT-OTP-00219 at
11 00218.

12 Now, given that context then, your Honours, any orders being sent
13 out from the commissioner's office would certainly be widely known. It
14 is completely improbable, for example, that one anonymous policeman,
15 speaking to a BBC reporter, would know of certain orders that various
16 officers above him don't know about. Additionally, such orders, if they
17 were issued within the station, would be known to his colleagues at the
18 police station.

19 Your Honours, not one police officer from Naivasha or from Nakuru
20 at any level has come forward and indicated to this Court that they
21 either received or learned of any orders to cooperate with or to be
22 lenient with Mungiki. If I put it another way, your Honours, the
23 evidence of the Prosecutor as stands, even without our evidence, is not
24 sufficient to demonstrate the serious aspect of *actus reus* of these
25 crimes. But nevertheless, we have proceeded to present to you evidence

1 confirming that no such orders existed. And contrary to the Prosecutor's
2 allegations, the evidence that we have put before you demonstrates that
3 the police were very robust in their response to the crimes committed and
4 they were very actively engaged in measures to prevent or to minimise
5 crimes and the effect.

6 Your Honours, two factors indicate that it's not only unlikely
7 but virtually impossible for the police to have ever worked with or
8 facilitated attacks by the Mungiki. The first is the ethnic make-up of
9 the Mungiki. Now, that is to say the fact that the Mungiki are
10 essentially Kikuyu. The second is the diverse ethnic make-up of the
11 Kenya police.

12 Your Honours, Mungiki is a secret sect and ordinary Kenyans know
13 it as such, and you'll see that in this evidence of the Prosecutor,
14 EVD-PT-OTP-00248 at 009 to 11.

15 Your Honours, Witness number 0004, a witness who has been totally
16 discredited by my learned colleagues Mr. Kehoe, Mr. Karim, and Mr. Kay,
17 makes certain interesting remarks about the Mungiki, whose structure he
18 appears to know well. He says the following, I quote:

19 "The Mungiki always use the Kikuyu language."

20 That is EVD-PT-OTP-00248. And then describing a meeting of the
21 Mungiki again:

22 "The meeting was in the Kikuyu language. Most Mungiki members
23 are illiterate and cannot even speak English."

24 Now, that is found in EVD-PT-OTP-00248, at 0017.

25 Your Honours, the Kenya police by contrast is composed of members

1 of all ethnic groups in Kenya. Your Honours have only heard of a few
2 ethnic groups in Kenya in these proceedings. The ones that feature most
3 are the Kikuyu, the Luo, the Kalenjin, the Luhya, and for personal
4 reasons I won't forget the Kisii as well, but there are actually 40-plus,
5 more than 40, ethnic groups in Kenya, and the Kikuyu are just one of the
6 40-plus ethnic groups. Furthermore, your Honours, the Kikuyu language is
7 not a national language officially, nor is the Kikuyu language widely
8 spoken by the non-Kikuyus, and that, your Honours, is very important.

9 Now, I don't have an EVD number for these very basic facts, but I
10 suppose the court can take judicial notice of these facts. They can be
11 found anywhere on the internet, but I believe they will be scattered in
12 most of the disclosures that we have from the Prosecutor.

13 Now, given this context, your Honours, why would a non-Kikuyu
14 policeman help Mungiki achieve its criminal objectives against another
15 tribe, another ethnic group, which will often be his ethnic group?

16 Now, as an illustration, your Honours, picture this: A group of
17 Mungiki killers who are not distinguishable from other people -- and
18 perhaps before I went to this, let me also quote another OTP witness on
19 the aspect of ability to distinguish the Mungiki. Or to recognise the
20 Mungiki. Again we have, I think, again, it's Witness number 0004, the
21 famous Witness 0004, and he says describing particularly the Mungiki who
22 are used to kill. He says there is no distinctive mark for the
23 militants. That is found in EVD-PT-OTP-00248 at 0017.

24 Your Honours, so picture these Mungiki killers who, going by the
25 Prosecutor's theory, let us say have left Thika town in Central Province.

1 They have travelled to Nakuru with the objective of attacking maybe the
2 Luo or the Kalenjins. They arrive at Kaptembwa police base. Now,
3 Kaptembwa police post is in Kaptembwa area of Nakuru. Now, as your
4 Honours can see in the police nominal roll which we have filed, and that
5 will be found in EVD-PT-D14-00028, EVD-PT-D14-00006 -- sorry, your
6 Honours, let me just --

7 Let me take that over again, your Honours. EVD-PT-D14-00028,
8 EVD-PT-D14-000067, and EVD-PT-D14-00068.

9 Now, your Honours will notice that we have filed the nominal
10 rolls of the Kenyan police force, particularly for -- for Nakuru Division
11 and Naivasha Division. Those nominal rolls indicate the names and the
12 particulars of the various policemen who, at various police stations,
13 police patrol bases, and so on and so forth, and the particulars of those
14 policemen, including their ethnicity.

15 Now, if you look at the example I'm providing, the officers at
16 Kaptembwa are an interesting ethnic mix of police. You have one Nande,
17 you have one Tugen, you have one Kamba, you have one Somali, you have one
18 Luo. This would be of interest to counsel for victims. You have one
19 Maasai. You have two Geriamas, and, yes, notably, only one Kikuyu out of
20 those nine policemen. That, your Honours, is in the records.

21 Now, again for clarity, the first two that I mentioned, the Nande
22 and Tugen, most Kenyans would know are sub-tribes of the Kalenjin. So,
23 your Honours, picture the scenario: These thugs have travelled from
24 Thika, they have come (* indiscernible) Nakuru. They are new in Nakuru.
25 They are on mission. Your Honours, do they walk to Kaptembwa patrol base

1 and approach the policemen on the desk and tell them, "Listen, you know,
2 we are so-and-so, we have come around, of course, you know our mission,
3 you know -- you remember that General Ali received a call from Muthaura
4 and you know why we're here. We need to identify the Luos and Kalenjins
5 around here and maybe kill or maim them." Are they supposed to do that?

6 Or picture this: They have arrived in the same area. They
7 are -- they have gone about their job of killing and maiming. These
8 policemen, any group of these policemen who are in that area come across
9 them committing these crimes, and they want to take action. Policeman
10 wants to shoot him. Then they will say, "Please, please, hold on. Don't
11 shoot. You know who I am? I am so-and-so, and I'm here to commit these
12 offences." And of course he's saying all that in the Kikuyu language to
13 these policemen, your Honours.

14 Your Honours, this hypothetical scenario is just an illustration
15 of the absolute absurdity of the proposition that police would be roped
16 into any criminal -- any Mungiki criminal plan.

17 I'll move on, your Honours, and stress a little bit more about
18 these Mungiki.

19 My colleague Mr. Kehoe has clearly demonstrated that the police
20 position on the Mungiki prior to the PEV, during the PEV, and after the
21 PEV is consistent. The police opposed the Mungiki. And as seen from the
22 video played by my colleague this morning, this was not a group that the
23 police would ever want to be associated with.

24 Your Honours, it's clear that the very fact of the making of that
25 video by General Ali to be aired to all Kenyans continually is in itself

1 a clear demonstration of his position against the Mungiki.

2 The Prosecution witnesses as well, a number of them, acknowledged
3 that the police would never work with Mungiki. Examples are to be found
4 in EVD-PT-OTP-00659, at 0268, and EVD-PT-OTP-00320, at 1477, 1475, and
5 1473.

6 So what is clear, your Honours, then is that there's clearly no
7 love lost between the police and Mungiki. It would require a lot, a lot
8 more than just a one-minute conversation between Mr. Muthaura and
9 General Ali to change this perspective, and this, your Honours, is
10 mutual. Something very drastic must happen for the Mungiki to realise
11 and say, "Well, the police are now our friends. We can work with them,"
12 and for the ordinary policeman to be convinced that the Mungiki criminal
13 gangs are people they can now work with.

14 So, your Honours, it appears then that the Prosecution sadly
15 views the Kenya police as nothing more than mindless robots who obey any
16 order, however unlawful, without question. This portrayal is not one
17 that the Kenyan policeman would find very attractive. More importantly,
18 this portrayal is completely untrue. These are dedicated men and women
19 of the force, but, your Honours, they are also husbands, wives, and
20 brothers. Many, if not all of the police officers in Nakuru and
21 Naivasha, actually lived in Nakuru and Naivasha at their station of work.
22 Is it even imaginable, then, that after receiving orders not to stop
23 Mungiki from attacking their own towns, they would follow orders that
24 placed their own families in danger, your Honours? Is it possible that
25 not one police officer would warn their loved ones, evacuate them from

1 the cities, or take measures to prevent their deaths? In fact, why would
2 a Kalenjin policeman hang around in Nakuru could be killed by that same
3 Mungiki? It is inconceivable, your Honours.

4 The police officers interviewed that those we have talked to,
5 both in Nakuru and Naivasha, are all very clear and in complete agreement
6 on the following: None of them ever received orders or instructions to
7 work the Mungiki or facilitate their commission of offences. None ever
8 heard of the existence of orders or instructions, even from their own
9 colleagues, to that effect. Again, it was practically impossible to
10 identify Mungiki in the circumstances so as to assist them in the
11 commission of the offences. And then finally, there was no division
12 within the police force along ethnic lines that would have made it
13 practicable for police to help Mungiki or for PNU youth to take sides in
14 the conflict in the manner suggested by the Prosecutor.

15 And in this regard, your Honours, we have lots of examples. We
16 started by interviewing a police officer who works as a signaller. That
17 is someone who deals with flow of messages back and forth at the
18 Rift Valley provincial headquarters, police headquarters. And your
19 Honours will find the nature of the duties of this witness, who happens
20 to be a Kalenjin, in EVD-PT-D14-0053. Therein, you will find the -- an
21 explanation of how messages pass back and forth. And that witness states
22 there was no message received either to favour a particular community or
23 (b), lenient to Mungiki. And your Honours would imagine, given the
24 ethnicity of that police officer, if it ever came across as a message,
25 that it's not something they would forget.

1 We did not stop there. We proceeded to Lanette (* phon) -- we
2 proceeded to Lanette police post and interviewed a Luo policeman who
3 said, "I did not even hear about any orders to be lenient on Mungiki or
4 to assist them in any way."

5 Another one at Bondeni police station in Nakuru also states:

6 "I never received instructions to treat a Mungiki or another
7 group of persons in some special way. I never heard of such an order or
8 such instructions from any of my colleagues either."

9 The references for the last two, EVD-PT-D14-00057, at 0023, and
10 EVD-PT-D14-00054 at 0012.

11 Would it have been possible to implement such orders if at all?

12 Another witness, again, this one is a Kalenjin who heads a large number
13 of troops, as a platoon, of the ASTU. ASTU is a wing of the police force
14 Anti-Stock Theft Unit, and he had led a platoon to reinforce the Nakuru
15 police, and this policeman says:

16 "At no point did we receive instructions to cooperate with the
17 Mungiki. It would have been impossible to enforce such an unlawful order
18 in view of the ethnic mix of the ASTU platoons."

19 His statement is in EVD-PT-D14-00063, at 0042.

20 Again, further illustration before I leave this topic of the
21 Mungiki and the police. In Lanette police post, there was only one
22 Kikuyu out of nine that were posted there. The others were from varying
23 ethnicities, Meru, Kalenjin, Luo, Kisii, and so on. Yet this area,
24 Lanette, is a Kikuyu dominated area in the sense that most of the local
25 residents are Kikuyus.

1 A witness who headed these nine officers was very clear that he
2 worked harmoniously with all the officers of different ethnic groups
3 without a problem.

4 Another witness, again a Kalenjin, who also leads a platoon of 40
5 officers in an area where Kikuyus are alleged to have attacked perceived
6 ODM supporters, again is clear in his mind. He says:

7 "My officers were not biased. Furthermore, we worked closely
8 together. So if any of my officers were ethnically biased I would have
9 known."

10 That be found in EVD-PT-D14-00059, at 0028 and 0030.

11 This assertion is further corroborated by another witness who
12 recounts that despite the multi-ethnic composition of the police:

13 "There was no division among officers along ethnic lines. I
14 personally letted (* phon) well with all the officers in the force."

15 That is to be found in EVD-PT-D14-00053 at 0009.

16 Your Honours, I will now move on to a related topic in that same
17 series, that is, the neutrality of the police force.

18 Now, the police force was neutral and was actively engaged in
19 quelling violence from both sides of the divide. Two examples from
20 Nakuru serve to show the neutrality of the police in this conflict.

21 Your Honours, the first example, in Nakuru town is an area called
22 Githima. Githima is a suburban area about 3 or 4 kilometres west of
23 Nakuru as one drives out of Nakuru town towards Eldoret.

24 Now, towards the end of January, pro-ODM attackers invaded
25 Githima, and that is an area that is primarily inhabited by the Kikuyu.

1 Houses were burnt and there was widespread looting, although fortunately
2 there were no deaths reported. When the police intervened and aware of
3 the large number of attackers - these attackers were in their hundreds
4 with bows and arrows - the police were overwhelmed, and from the
5 statements we have, they believe most of these attackers were Kalenjin
6 attackers. The attackers taunted and mocked the nine policemen who
7 arrived there to intervene. They were shouting at them, "Kill them."
8 Those are the attackers shouting at this police. "We'll kill you. No
9 Raila, no peace," and so on and so forth. These policemen were very few,
10 nine policemen against hundreds of attackers armed to the teeth. They
11 had to retreat. They retreated, but fortunately quickly enough they got
12 enforcements from the ASTU, but wonder of wonders, your Honours, one ASTU
13 policeman was actually shot with an arrow on the foot by these attackers.
14 They were that daring. These attackers were clearly not friendly to the
15 police at all.

16 Now, that is in the west of Nakuru. In the east, in Lanette --
17 now, the EVD number for that Githima attack is EVD-PT-D14-00055, at 0015
18 and 0016.

19 Now, towards the east, another part of Nakuru, some 10
20 kilometres, in an area inhabited again largely by the Kikuyu, that is
21 Lanette police post which we've just referred to a short while ago, the
22 mainly Kikuyu residents in their hundreds tried to overrun the police
23 station. Why? Because Luos and Kalenjins numbering between 200 and 400
24 were in that police post. The Kikuyus felt that the police were pro the
25 other side. They were wondering whether the police should be hosting

1 these IDPs at the police station. Why are they keeping the Luo and the
2 Kalenjin? Why is it that you let our people be killed and be uprooted
3 from the North Rift from other parts of Nakuru, yet you are keeping them
4 at the police station. Your Honours, it was quite a fight. The nine
5 policemen guarding 300 refugees had to try and scare off these attackers.
6 Fortunately they succeeded, but they had to use tear gas and so on and so
7 forth.

8 Now, these are local Kikuyus who feel the police are favourable
9 to the other side. Yet around the same time, those on the other side
10 think the policemen are pro-PNU.

11 Your Honour, both of these two areas are under one command, that
12 is the OCS central police station. OCS central -- that's OCS Nakuru
13 central police station. This is the OCS who is supposedly following
14 orders -- supposed to be following orders not to intervene if one side is
15 attacked. Now, again, this is -- again, the EVD number for Lanette,
16 EVD-PT-D14-00057 at 0022 to 0024.

17 Again, your Honours, talking specifically about this attempt by
18 the local Kikuyu to attack Luo and the Kalenjin IDPs at a police post in
19 Lanette. Your Honours, what would have been easier in terms of getting
20 potential people to kill? Why would Mungiki have to go around looking
21 for Mungiki -- for -- for Luos and Kalenjins in their houses when you
22 have them here huddled together, 300 of them? What's easier than that?
23 What's easier than for those policemen to facilitate that attack by
24 inaction, to go away? They can always explain, "No, we are few. We
25 could not handle it." What's easier than that, your Honours? Not only

1 is -- that is to demonstrate how ridiculous these allegations of police
2 inaction are.

3 These police who are inactive struggled to ensure the lives of
4 those 300 Luos and Kalenjin in the police post are safe. They go out of
5 their way. And how many Kikuyus are there in that team? One Kikuyu
6 policeman, your Honours.

7 Your Honours, may I just pause for a minute?

8 PRESIDING JUDGE TRENDAFILOVA: Please.

9 MR. OTACHI: Your Honours, with your leave, I would now move on
10 to a brief discussion of the events in Naivasha town. We will be playing
11 a short video, but by way of introduction, your Honours, we are going to
12 try and explain exactly what occurred in Naivasha and exactly what the
13 police force did to intervene.

14 The fact that the Prosecutor has put forth -- the Prosecutor has
15 put forth bold unsupported claims about police inaction, but when you
16 speak to the people on the ground, the police, the civilians, you get a
17 different picture. For a start, your Honours, may we play a video. This
18 is a Prosecution disclosure, EVD-PT-OTP-00119, and with the kind
19 assistance of the Court Officer and our case manager, may we start
20 with -- from the beginning -- first of all from the beginning to 00:26.

21 (Video-clip played)

22 "It's a shocking situation that presented itself on arrival here
23 in Naivasha. The open defiance to the military and police showing a
24 part (* phon) in we've seen in most towns that have erupted in violence,
25 a breakdown in law and order."

1 MR. OTACHI: Your Honours, let's stop there for a minute. Your
2 Honours have heard for yourselves. That is a Prosecution disclosure of
3 the Naivasha event. It is a contemporaneous video recording of the NTV
4 TV station in Nairobi, and the introduction is about open defiance by the
5 public to both police and the army. This clearly contradicts the
6 Prosecution theory, your Honours, but if we move further, we will play
7 from 01:24 to the end.

8 (Video-clip played)

9 "... very far, but here no one is apologetic.

10>(* Speaking foreign language)

11>(* Speaking foreign language)

12>(* Speaking foreign language)

13 "Very indicative of what this country has become. Again, signs
14 that the government is not in control of the situation. We follow the
15 military for almost 2 miles as they clear the road into Naivasha town.
16 Minutes later, the rock blocks are back on. Even military presence does
17 not scare them. Frustrated, the military leave.

18 "In the town's estates, an overwhelmed police force evacuate the
19 targeted, some too young to know what is going on. All over the town the
20 youth are gathered in groups watching their perceived enemy leave. But
21 as word gets out that Naivasha is burning, hundreds of youth are at
22 roadblocks along the Nairobi-Naivasha road. Here, if you're the wrong
23 tribe, you're dead.

24 "Behind the scenes, leaders are calling for an end to the
25 violence.

1 "Let us stop the mayhem that we have seen. The innocent are
2 dying, properties are lost.

3 "Whoever is facilitating that, we urge them to stop it in the
4 interest of peace and the loss of life that we have seen in this town.

5 "Whether that works or not remains to be seen.

6 "In the province in, generally, we've arrested close to 400
7 people so far, for the last one -- one -- one month.

8 "The ground is alight and burning. Robert Magilla, NTV, Weekend
9 Edition, Naivasha."

10 MR. OTACHI: Your Honours, there are a number of important
11 aspects in that video disclosed by the OTP, and like I emphasised,
12 contemporaneously shot during the events. One is the open defiance of
13 that public, not only the police but to the military, and that the
14 reporter emphasises is what is happening across the country.

15 Your Honours, this will remind you of the testimony of
16 Witness Katee Mwanza last week when he explained to you how, in certain
17 circumstances, any demonstration would lead to a riot and how chaotic it
18 was to handle the public at that time.

19 Again, consistent with the testimony of Mr. Katee Mwanza and our
20 witnesses, you see the soldiers. You don't see the policemen there, but
21 of course that exists that -- we have that in our testimony. You see
22 them struggling to remove huge boulders, huge stones, from the road that
23 have been placed there by civilians. And again as Mr. Mwanza explained
24 last week, they would remove the stones, they move on, and as soon as
25 they have moved on, those civilians put back the stones. Exactly what

1 you have seen in that video, your Honours. But more importantly, your
2 Honours, is the interview of those people the presenter terms as
3 unapologetic, those three people representative of the local -- the
4 locals in Naivasha. These are clearly people who live in Naivasha, and
5 he's trying to interview them, the locals, what is happening.

6 Your Honours, I've been posing this question to myself and I'm
7 hoping the Prosecutor would make an effort to find out. That old man you
8 saw in that video, is he likely to be Mungiki? That lady you saw in that
9 video, is she likely to be Mungiki?

10 The Prosecutor has had this evidence for a while. Have they --
11 have they bothered to talk to that NTV reporter? Have they bothered to
12 trace those three people who boldly state that we are revenging? Have
13 they bothered to interview them to find out if those people are Mungiki
14 from Thika or from Nairobi? That is a question I've been grappling with,
15 and I hope your Honours will get an answer in the course of these
16 proceedings.

17 I have my doubts. I have my doubts, and an average Kenyan will
18 have their doubts as to whether that old man and that lady you saw are
19 Mungiki. For the middle-aged gentleman, he might pass, but he doesn't
20 either quite look to me like Mungiki. More importantly, are these people
21 from outside of Naivasha?

22 Now, another important aspect you have seen in that video
23 consistent with our testimony is the police rescuing people. You saw a
24 bit of that in the video. Another aspect is the arrests. You heard a
25 senior official who, could be known to many Kenyans, who was talking

1 about having arrested no fewer than 400 people in a period of one week.

2 Now, if it's not the police arresting those people, then I don't
3 know who it is.

4 Your Honour, a summary of the Naivasha event, and the Naivasha
5 event I must emphasise, your Honours, as was testified to by Mr. Mwanza,
6 was essentially a one-day event, and that was the 27th of January, 2008.

7 Before that date, the town was relatively calm and peaceful, and
8 you'll hear this from many witnesses. EVD-PT-D14-00062, at 0038. That's
9 an example.

10 But then again, many witnesses will tell you that the arrival in
11 droves of IDPs from other parts of the country changed that picture. The
12 harrowing tales from those who had escaped death and were now temporarily
13 settled at the Naivasha stadium whipped up the emotions of the local
14 Kikuyu residents. You have that testimony in Witness EVD-PT-D14-00050 at
15 0071. And again, your Honours, that is what you've just seen in that
16 video.

17 When this now infamous event started unfolding on the morning of
18 the 27th January 2008, the local OCPD, unaware that there was trouble
19 brewing in its backyard, went to Nakuru for an official function only to
20 learn on arrival in Nakuru that there was trouble back home. He quickly
21 rushed back. You heard from the district commissioner Mr. Katee Mwanza
22 what he also did. Your Honours, I need not repeat what version of the
23 events that Mr. Katee Mwanza gave. They are very consistent with all the
24 versions of events that we have obtained from our witnesses, and you will
25 find that in EVD-PT-D14-00046, 00045, and 00062.

1 Your Honours, I will briefly turn to the allegation of the
2 Naivasha events having been organised at the highest level possible, that
3 is, at the State House in Nairobi. Again, your Honours, looking at that
4 video and the responses you get from those civilians, you should be --
5 you could be asking yourself whether those are the people that were
6 organised -- these are the Mungiki that went to feast at the State House
7 Nairobi and were subsequently transported to Naivasha under cover of
8 darkness to commit these crimes.

9 The evidence that we have largely corroborated is clear that
10 these are events that took place in broad daylight, and it was a scenario
11 of the locals just going crazy, nothing more, nothing less. And again,
12 your Honours, if this attack was so well-organised at this highest level
13 of state, it's surprising that it could last only one day and be
14 quickly -- quickly be put to rest. But more importantly, your Honours,
15 there are two aspects relating to reinforcement that clearly demonstrate
16 that this attack would not have been organised as is alleged.

17 Now, one -- one is that the ASTU were called in very swiftly.
18 What is the ASTU? The ASTU is short for Anti-Stock Theft Unit. That is
19 a police detachment. It is a specialised police detachment that deals
20 with cases of stock theft and prevention of stock theft. These units are
21 usually positioned in areas where there are problems of theft of
22 livestock, and in this instance we had one platoon that was stationed at
23 a place known as Nyakinua near Mai-Mahui town. That is a distance of 30
24 to 40 kilometres east of Naivasha.

25 A policeman leading a platoon ASTU says he received a call as

1 early as 10.00 a.m. on at that day. That was soon after the trouble
2 erupted. This clearly demonstrates intention to counter the problem.
3 All the accounts we have demonstrate that this problem started from
4 around 8.00, 9.00. By 10.00, a detachment of ASTU is being called in.
5 They took time to prepare, but by midday they were in Naivasha.

6 Now, these are both -- this is a unit that is under the command
7 of General Ali. If General Ali surely had received a call to let the
8 Naivasha attack take place as it should have, why would he go out of his
9 way to get a whole different unit that does not ordinarily deal with
10 ordinary claim to travel 40 kilometres to come and help? Why would he do
11 it?

12 Another aspect of reinforcement. Now, for -- with regard to that
13 ASTU, the enforcement, you will find the testimony EVD-PT-D14-00056, at
14 0018.

15 Again, as the ASTU is being called in, the Kenya Army as well is
16 being called in. Again, your Honours, picture this: The Mungiki have
17 been feasting at State House in Nairobi the evening before. That is the
18 residence of the Commander-in-Chief of the armed forces of the
19 Republic of Kenya. And they leave that residence in military trucks, in
20 army uniform, and they proceed to Naivasha to launch an attack.

21 Your Honours, when this attack has been launched, again around
22 the same time the ASTU's being called in, an army detachment from
23 Gilgil -- that is to the west. Nairobi is the east of Naivasha. Gilgil
24 is to the west of Naivasha. So you have trucks coming in, military
25 trucks carrying people to come and launch attacks, coming from Nairobi.

1 Simultaneously you have army trucks coming from the opposite direction to
2 come and put an end to that attack. If that is not a case of the left
3 hand knowing what the right is doing, I don't know. In fact, that's not
4 even a case of the left hand not knowing what the right is doing. The
5 same hand. It is the same army command that sends one unit from Nairobi
6 to launch attacks, another unit from the opposite direction to quell
7 those attacks.

8 Your Honours, is that an invention of the Defence? It is not.
9 You have just seen a video-clip of a contemporaneous news report divulged
10 to us by the Prosecutor. It's not ours.

11 Your Honours, now I will -- because of time, I will quickly move
12 to -- let me just consult, your Honours.

13 (Defence counsel confer)

14 MR. OTACHI: Your Honours, the reference for the Kenyan Army, you
15 have that in EVD-PT-D14-00046, at 0058. Your Honours, you also had
16 Mr. Mwanza testifying about the arrival of the army units from Gilgil,
17 which he said was 40 kilometres from Naivasha, transcripts of 26th
18 September, at page 54. We also have another reference, EVD-PT-D14-00064
19 at 0045.

20 So, your Honours, we cannot overemphasise the fact that if the
21 security forces, and here I'm referring to the Kenya police, and the
22 Kenya Army that came to beef up the Kenya police, as well as the
23 administration police as per Mr. Katee Mwanza's explanation, if they did
24 not react as swiftly and as intensely as they did, the mayhem would have
25 lasted much longer and maybe hundreds or maybe thousands of lives would

1 have been lost.

2 Now, another indicator that many of these people involved in the
3 mayhem -- in the mayhem were local residents of Naivasha -- sorry, your
4 Honours. I'm having a fairly dry throat. I'm sorry for having to --

5 PRESIDING JUDGE TRENDAFILOVA: If you need a little bit of rest?

6 MR. OTACHI: Pardon me?

7 PRESIDING JUDGE TRENDAFILOVA: If you need some rest or a sip of
8 water.

9 MR. OTACHI: Okay. Thanks, your Honour.

10 Yes. Another indication, your Honours, is that contrary to the
11 allegations that there were no arrests of the perpetrators of this
12 violence, we have presented a case file -- actually, there are several
13 cases, but let me start with one that involves 156 people. This is the
14 case of Patrick Nyoto Mbugua and 155 others. You will find that,
15 your Honour, in EVD-PT-D14-00080, at 0145 to 0179.

16 Now, these are people who were arrested that same day, the same
17 day of the 27th. They were arrested by the police, and they were
18 ultimately charged in court. Now, the offence they were charged with was
19 the offence of carrying weapons with the intent to commit a felony.

20 Now, let me emphasise here, your Honours, that that is what the
21 police could possibly charge them with. The police could not charge them
22 with murder if they didn't find them committing murder. And,
23 your Honour, the Kenya police, unlike some prosecutors, first of all
24 investigate, gather evidence, and once they are sure of the offence, then
25 they charge someone. So in this case, what they could only charge them

1 with was carrying weapons to commit with intent to commit a felony
2 because they found them carrying *pangas, runqus*, and other such weapons.

3 Now, what would be of interest in these records at
4 EVD-PT-D14-00080 at 0145, at 0164, you have someone who has come to stand
5 surety. In other words, to guarantee that an accused will comply with
6 bail terms. So this is someone who has come forth to say, "I want to
7 stand surety for X who has been charged in this case so that he can get
8 bail." Now in that -- and that is from the court record, your Honour.
9 In that court record, it's clear the person standing surety states that,
10 "So-and-so is my cousin, and he resides at Kabati." Kabati is one of
11 those troubled areas. In fact, Kabati is the area where some 19 people
12 were burnt in a house. So this -- the court record reflects that that
13 person is from Kabati. Kabati is a Naivasha town. It's not in Nairobi.
14 It's not in Thika.

15 Another one, EVD-PT-D14-00080, 0145 at 0166. Similarly, another
16 person turns up. "I want to stand surety for X," and he says X is from
17 Kihoto. Kihoto, again, is a suburban -- it's a residential area within
18 Naivasha town. So you have two -- those -- I list those two examples
19 demonstrating that.

20 We have another case, a different case altogether,
21 EVD-PT-D14-00078, at 0126, and EVD-PT-D14-00079, at 0141. More
22 particularly at 0142. Again, this is another person who was arrested
23 with an offensive weapon, a panga, and he was charged in connection with
24 these offences.

25 Now, at the page I've mentioned, 0142, there is a probation

1 report. That is a report by a probation officer that has been requested
2 by the court to determine whether -- how they should sentence him, and
3 that report is very detailed, but again it gives you the background of
4 that person, born and brought up in Naivasha town.

5 Your Honour, these are just examples to illustrate, and there is
6 a lot of evidence to this effect. So many examples to demonstrate that
7 these were local residents who did this. But, your Honours, like I said
8 before, the most powerful one is the video that you saw of those people
9 speaking themselves, that, "We decided to do this."

10 Your Honours, I will briefly move now to Naivasha -- sorry, to
11 Nakuru, and before I summarise the police response in Nakuru, I want to
12 make some comments about the Prosecution evidence on Nakuru.

13 We examined the evidence put forward to demonstrate the alleged
14 police inaction in Nakuru, and frankly, your Honours, we are astonished
15 that the Prosecution continues to base its case for Nakuru on a single
16 BBC news article quoting three sentences from an anonymous police
17 officer. That is EVD-PT-D14-00036 at 0019.

18 Now, the Prosecution frequently cites EVD-PT-OTP-00341 as a
19 summary of instances of gender-based violence in Nakuru and Naivasha
20 during the PEV.

21 Now, what is interesting in these reports, on page 2180 cited by
22 the Prosecution at paragraph 24 of the DCC, describes the brutal attack
23 and rape of a Kikuyu woman and her daughter. Those are the victims in
24 this case, interestingly.

25 Now, at page 2180 through to 2182, similarly you have numerous

1 incidents that involve individual Kalenjins committing acts of violence
2 against individual Kikuyus. So if the Prosecution's allegation is that
3 the policy involved assisting the Mungiki, who are primarily Kikuyu, it
4 is unclear how an attack upon Kikuyus fits into that claim. I only hope
5 that the Prosecutor did not make a mistake and he intended to use,
6 perhaps, some of this evidence in case I and not in case II. It suddenly
7 does not fit here, your Honours.

8 Again, your Honours, it's difficult to understand how attacks
9 carried out on December 29th, December 30th of 2007 - those are described
10 on page 2181 - could have been facilitated as a result of instructions
11 that were allegedly not given to the police until the next week. That
12 was the 4th -- the 3rd of January. That is the evidence that we have
13 about attacks in Nakuru.

14 But having said that, your Honours, we have provided evidence,
15 and you have it, in our submissions, of the efforts by the police in
16 various areas of Nakuru. I will not go into each and every aspect of the
17 evidence, but by way of highlighting, we have discussed -- we have
18 evidence from policemen on the ground in Lanette, in free area where you
19 have Mwariki police posts, in Bondeni, in Ponda Mali, in Baruti, in
20 Rhonda, Kaptembwa, Manyani, Kanu Street, Lake View, Pangani,
21 Kwembeni (* phon), and Freehold.

22 Your Honours, the Prosecutor does not give you a full picture of
23 what happened in Nakuru. We did not have to do that, your Honours, but
24 we decided to do it so that you have the full picture.

25 Your Honours, I'm just trying to see how I can move faster so

1 that we conclude this in this session.

2 Now, one victim of the attacks in free area of Nakuru describes
3 how he was miraculously saved by a policeman from a large group of rowdy
4 civilians. The two policemen, who he did not know, were patrolling on
5 foot. And, your Honours, that was the norm, patrolling on foot. They
6 scared away the large angry mob. They rescued the witness and his
7 friend, and they ultimately took them to Mwariki police post where there
8 were many other IDPs. You will find that in EVD-D14-00061 at 0034.

9 This account is corroborated by a Prosecution disclosure, a
10 report by Human Rights Watch, EVD-PT-OTP-0002 at 033 -- sorry, let me
11 repeat that. EVD-PT-OTP-00042 at 0300. And I quote that report:

12 "In the free area suburb, the police in the face of large crowds
13 appeared to have done what they could to fulfil their responsibility to
14 protect members of the public."

15 Again --

16 (Defence counsel confer)

17 MR. OTACHI: Your Honours, I'm advised that I wrongly quoted the
18 EVD number for the Human Rights Watch report. Let me -- let me take it
19 again. EVD-PT-OTP-00002 at 0300.

20 Your Honours, there was -- there are issues relating to IDPs, the
21 internally displaced persons. There is a lot to be said about this, but
22 I will just summarise this for the purposes of our discussion today.

23 It's common ground that Naivasha Policed Station sheltered about
24 10.000 or so IDPs. This is actually stated in the DCC, and you heard
25 evidence -- you heard evidence from Mr. Katee Mwanza, and we also have

1 other evidence, EVD-PT-D14-00046, EVD-PT-D14-00049.

2 Now, an issue has been raised in the DCC regarding the conditions
3 of the IDPs at the police station, like lack of water and amenities. The
4 Prosecution would have you believe that during the PEV IDPs suffered at
5 police stations while police officers stood by and watched, but, your
6 Honours, the IDPs ran to the police stations because they sensed danger
7 and because they knew they would be safer at the police stations. It is
8 bizarre that you have a scenario where vulnerable people have been saved,
9 they have run for safety, yet we are raising issues about basic
10 amenities. "Oh, we are safe, we escaped death, but where is the water?"

11 In all fairness, I think, your Honours, this is a ridiculous
12 assertion by the Prosecutor. I don't know why that kind of thing would
13 possibly fit in the DCC.

14 PRESIDING JUDGE TRENDAFILOVA: Mr. Otachi, you have 15 minutes,
15 and thereafter is Mr. Monari going to take the floor himself and you have
16 a witness?

17 MR. OTACHI: Yes, your Honour. Actually, that's why I'm
18 consulting about the time, but I just wanted to be clear, because the
19 witness we have today will be very short.

20 PRESIDING JUDGE TRENDAFILOVA: But then do not forget that the
21 Prosecutor has to have the time allocated.

22 MR. OTACHI: Yes, your Honours, we have taken that into
23 consideration as well.

24 PRESIDING JUDGE TRENDAFILOVA: Fine, fine.

25 MR. OTACHI: So the proposal is that I conclude my presentation

1 in this session. Mr. Monari may present very briefly in the next
2 session, and the witness will start. It will be very short.

3 PRESIDING JUDGE TRENDAFILOVA: It's my duty just to remind you.
4 Proceed, Mr. Otachi, please.

5 MR. OTACHI: Thank you very much, your Honour. Thank you very
6 much.

7 Your Honours, so because of the time-limits I will -- I'm just
8 trying to summarise the issues. I will talk very briefly about the
9 challenges faced by the police in these very difficult tasks.

10 The policemen had challenges in enforcing arrests, because each
11 time they accosted a mob of people -- in fact, most of the time it was
12 difficult to identify the perpetrators of the violence. They had
13 problems like you've seen on that video of the roads being barricaded by
14 stones. They had limited resources. They had to work long distances at
15 times. They used to do patrols on foot. And there are many, many other
16 challenges. Hostility from the civilians, I've just shown you examples
17 this afternoon. There were very, very many challenges that these
18 policemen faced.

19 Your Honour, in -- like I said, maybe I need to emphasise this:
20 That most police stations only had one motor vehicle. You will see that
21 through the statements. One police vehicle covering very vast areas.
22 Spending sleepless nights walking up and down. Those were really many
23 challenges, but because of time, your Honours, I'll not go into details,
24 but in summary, your Honours, I have this to say: These brave,
25 dedicated, and self-less men and women of honour representing, as I said,

1 the 40-plus ethnic groups in Kenya, and whom the Prosecutor seeks to
2 discredit before your Honours, put all their hearts in their job without
3 regard to ethnicity or political affiliation. You see that in the
4 statements we have put in. You will note their great efforts even with
5 grossly inadequate resources, on patrols on foot, without sleep, day and
6 night. Some of them, ladies with young ones left at home. Trudging on
7 in the dark streets not knowing where the next cry for help will come
8 from. Many times they were frustrated, they were taunted, they were
9 mocked, they were injured, and some, yes, were killed in the course of
10 their duty serving their countrymen.

11 Your Honours, these policemen speak to you and tell you their
12 story through their statements. I hope you will have time to read them.

13 They saved hundreds of thousands of lives across the country, no
14 fewer than 10.000 lives alone in one day in Naivasha, never turning away
15 any soul that turned to them in trust.

16 Your Honours, Kenya today could be one huge graveyard were it not
17 for the efforts of these gallant men and women.

18 These men and women, your Honours, most of them still in service
19 and serving with the same dedication today stand before you in the image
20 of this brave general who was their leader then. They are here in the
21 image of this general to answer for the loss of the lives of the few they
22 could not save due to no fault of their own because they were not
23 superhuman. They are now accused of working with the same criminals from
24 whose jaws they saved most.

25 This general was not on the ground in a Naivasha or Nakuru. They

1 were.

2 Your Honours, this is the tragedy of international criminal
3 justice, when a prosecutor dismally fails in his job and is hasty in his
4 conclusions. Yet, your Honours, the hundreds of policemen, policemen and
5 women, that I have talked to, that we have talked to, believe the truth
6 will prevail. Hundreds of thousands of Kenyans trusted in them in a dark
7 moment of madness, and those Kenyans were not disappointed.

8 Today in their turn, they're in your hands. They hope and trust
9 you will understand what they went through. I trust that they will not
10 be disappointed, for this general here represents those men and women.

11 Thank you.

12 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Otachi.

13 Now we have some time until the break. Mr. Monari, the floor is
14 over to you.

15 MR. MONARI: Madam President and your Honours, I will just start
16 now, and hopefully I will complete my presentation right after the break
17 so that we can give the very short witness that we have time to tell you
18 what happened in our country.

19 Learned counsel Gregory Kehoe and learned counsel Gershom Otachi
20 have given you factual presentations what have happened in Kenya, and
21 specifically in Nakuru and Naivasha. They've given you factual evidence
22 of what General Mohammed Hussein Ali did. They've given you factual
23 evidence of what individual police officers in their locale underwent,
24 the actions they took.

25 I myself believe that they can talk to you days on end on real

1 facts about what happened, but we have limited time. I restrict myself
2 to what the law provides for.

3 The Prosecutor's allegations of General Ali's individual criminal
4 responsibility for the crimes that he's been charged with rests entirely
5 upon Article 25(3)(d) of the Rome Statute. This Article sets forth the
6 standard for indirect contribution as a form of individual criminal
7 responsibility. I will not quote it, because we don't have time.

8 This Court has held that Article 25(3)(d) is a residual form of
9 accessory liability. Principally, I'm referring to the Lubanga
10 confirmation decision at para 337 and also the recent decision in the --
11 in the Ruto decision on summonses of the 8th March 2011, at paragraphs 37
12 to 38. I also refer to the case of Mbarushimana, paragraph 38.

13 This particular article requires a substantial contribution to
14 the commission of crimes by a group of persons acting within the common
15 purpose. The Prosecution has the duty to show a causal nexus -- a causal
16 nexus between the contribution and the crimes. As established in the
17 Mbarushimana arrest warrant decision, the pre-trial court set out the
18 objective and subjective elements of a contribution under the Rome
19 Statute. In order to be held responsible under this article, every
20 single element must be satisfied. The elements are as follows, and I
21 give out the objective elements and the subjective elements: The
22 objective elements are that a crime within the jurisdiction of the court
23 is attempted or committed.

24 Two, the commission or attempted commission of such a crime was
25 carried out by a group of persons acting within a common purpose.

1 Three, that the individual contributed to the crime in any other
2 way other than as set out in 25(3)(a) to (c).

3 The subjective elements which are that the contribution by the
4 individual shall be intentional, and this intention shall either be made
5 with the aim of furthering the criminal activity or criminal purpose of
6 the group, or, (b) in the knowledge of the intention of the group to
7 commit the crime.

8 We submit that the Prosecution, unfortunately, has proven none of
9 these elements. It has simply argued that General Mohammed Hussein Ali's
10 contribution was a positive one. The Prosecution has said at transcript
11 39, 14 to 15, Mr. Ali actively furthered the common purpose through
12 positive actions. There is no evidence to support that assertion. And
13 the Prosecution ought not to be allowed to get away with it.

14 Madam President, your Honours, we have addressed you on how the
15 Prosecution theory has undergone metamorphosis since the DCC was filed.
16 We have addressed you further on the insufficiency of evidence to prove
17 the existence of an alleged *ad hoc* organisation. We deem it necessary to
18 make further submissions on the full nature of the legal interpretation
19 applied by the Prosecutor in charging General Mohammed Hussein Ali under
20 Article 25(3)(d) against the backdrop of this alleged *ad hoc* organisation
21 which we have shown did not exist, could not have existed, and did not
22 have a life of its own.

23 Number 58 of the Regulations for the Prosecution clearly require
24 that the Prosecution define the mode of liability which it deems to
25 tackle the alleged and impugned conduct. Indeed, clarity and precision

1 of the charges is simply a matter of adequate notice and fairness to the
2 suspect. When one reviews the DCC and the Prosecutor's oral
3 presentations, what is clear, your Honours, is that the Office of the
4 Prosecutor are charging General Ali under 25(3)(d), but what is patently
5 not clear is the presence of a clear, traceable argument to substantiate
6 their claim that all the legal requirements of 25(3)(d) have been met.

7 In attempting to conceal the absence of legally supported
8 evidence, the Prosecutor has, unfortunately, as discussed above, created
9 a concept of an *ad hoc* organisation in an overtly panicked attempt to
10 salvage his case.

11 Subparagraph (d) is a form of accomplice or accessory liability,
12 and in contrast to subparagraph (a), the forms of perpetration is
13 intended to cover those persons, and I emphasise, those persons who do
14 not belong to the inner circle of the common purpose.

15 As noted by Professor Kai Ambos whom your Honours all know and
16 are aware of, and who really is one of the fathers, one of the drafters
17 of the Rome Statute, only two weeks ago before another Pre-Trial Chamber
18 of this very court said subparagraph (d) was introduced into the Statute
19 for those cases in which a person contributes to a criminal enterprise,
20 to common purpose without being a member of this very common purpose.

21 The distinction between belonging to the inner circle and not belonging
22 to the inner circle is a crucial distinction in the delimitation of
23 subparagraph (d) and (a). 20th September in the Prosecutor versus
24 Mbarushimana, the open session.

25 I'm informed -- if I could stop there and proceed on after the

1 break.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Monari.

3 We shall proceed now with the break, and we shall resume our
4 session at 4.30, and you will proceed with your presentation.

5 Now we adjourn the hearing.

6 COURT USHER: All rise.

7 Recess taken at 3.59 p.m.

8 On resuming at 4.30 p.m.

9 (Open session)

10 COURT USHER: All rise.

11 PRESIDING JUDGE TRENDAFILOVA: Please be seated.

12 Mr. Monari, please proceed.

13 MR. MONARI: Thank you, Madam President.

14 PRESIDING JUDGE TRENDAFILOVA: We resume the hearing, and
15 Mr. Monari, the floor is yours.

16 MR. MONARI: Thank you, Madam President, your Honours.

17 I will start again by repeating Professor Kai Ambos, just to
18 reiterate what he said two weeks ago in the Mbarushimana case, on the
19 20th of September, 2011. He said subparagraph (d) was introduced into
20 the Statute for those cases in which a person contributes to a criminal
21 enterprise to common purpose without being a member of this very common
22 purpose. The distinction between belonging to the inner circle and not
23 belonging to the inner circle is a crucial distinction in the
24 delimitation of subparagraph (d) and (a).

25 If the Office of the Prosecutor is now trying to see to it

1 General Ali within this new *ad hoc* organisation effectively placing him
2 in the inner circle and common purpose to which Ambos refers, then as
3 Ambos notes it follows then that he cannot be responsible under
4 subparagraph (d).

5 It is respectfully submitted that under 25(3)(d), a member of an
6 alleged organisation, be it an *ad hoc* or otherwise, cannot be held liable
7 for contributing to crimes of that organisation. The legally correct
8 mode of liability would be Article 25(3)(a). Charging otherwise would
9 amount to misunderstanding the provisions of (d).

10 Ultimately, (d) is a form of individual criminal responsibility,
11 not common purpose liability. And the Prosecution has failed to credibly
12 demonstrate, much less meet the burden of substantial grounds. The
13 presence of a contribution on behalf of General Mohammed Hussein Ali
14 within the meaning of 25(3)(d). It has also utterly failed to showed any
15 modicum of knowledge of the intent of the common purpose to commit a
16 crime. And this is a mandatory requirement of (d).

17 I will stop there as far as 25(3)(d) is concerned.

18 Madam President, your Honours, I now turn to Article 7(1) of the
19 Statute.

20 Article 7(1) defines a crime against humanity as one of a number
21 of defined acts committed as part of a widespread or systematic attack
22 directed against any civilian population when committed with, and this is
23 important, with knowledge of the attack. The requirements of this
24 Statute have been spoken about in length by both myself and my
25 co-counsel, but there remains one important point to be made regarding

1 the widespread or systematic attack. The Prosecution has not
2 demonstrated that any organisation involving General Ali possessed the
3 means to carry out a widespread or systematic attack against a civilian
4 population. The Prosecution has only shown that widespread and
5 systematic attacks were perpetrated by the Mungiki and pro-PNU youth,
6 while failing to draw any clear connection between these perpetrators and
7 General Ali. The widespread and systematic attacks we -- were undertaken
8 by a group of thugs in their locale, group of thugs that were dangerous
9 to society and rioters by all means. Not General Ali, not the Kenya
10 police.

11 A plain reading of the Article in conjunction with the facts
12 before the Chamber show that there was absolutely no action by either
13 General Ali or the Kenya police that was part of the widespread and
14 systematic attack. It was the actions of separate groups of people whom
15 we call thugs who took the law into their hands and who acted in their
16 own accord and not at the behest of either the Kenya police or
17 General Ali. Crucially, the Prosecution has not shown with a single
18 piece of credible evidence that General Ali possessed the requisite
19 knowledge of the attacked -- of the planned attacks, and this is a
20 mandatory requirement of Article 7, as well as Article 25(3)(d).

21 In the instant case, the Prosecutor has failed to cite what
22 positive action was taken. There's no phone call, there's no direction
23 by Ali to any junior officer, no order for any junior officer through the
24 ranks to the men on the ground. This positive action theory relies only
25 on an inference. Because bad things happened that involved the police,

1 some order must have come from above, but this is not proof,
2 Madam President, your Honours. This is a hypothesis offered by the
3 Prosecution, which has not a shred of evidence to back it up. The only
4 piece of evidence offered by the Prosecution, that they allege indicates
5 a failure on the part of General Hussein Ali, is a witness statement of a
6 single man who had watched a television report and alleged that only 19
7 arrest were is made. This is in the DCC, paragraph 73. However, even a
8 casual review of the Prosecution's own evidence would have revealed that
9 the Kenya police made numerous arrests as my learned co-counsel have
10 already discussed before me.

11 The meeting minutes of one NSAC meeting on January 21st, for
12 example, shows that at one point 324 people in the Rift Valley had been
13 arrested and charged in court and that investigations were going on.
14 This is at EVD-PT-D12-0019 at 1 -- at 0133. It is a confidential
15 document.

16 The "Ballots to Bullets" report similarly attests to the fact
17 that in only one day, and Counsel Otachi did show that, in only one day
18 the Kenya police arrested 156 criminals in Naivasha, that is at
19 EVD-PT-OTP-00002 at 312. It's a public document.

20 The Prosecution in the DCC has dishonestly, Madam President, said
21 at paragraph 72 to 73 that only 19 people were arrested during the height
22 of the post-election violence in Naivasha. The reason for this
23 dishonesty goes to the Prosecution theory of ensuring that we will throw
24 mud at the accused persons whatever mud it is. Something may stick.
25 This is not surprising.

1 This witness's account, your Honours, found at EVD-PT-OTP-00329
2 at 092 is based upon what he later gathered. He had no valid basis for
3 what was essentially a guess.

4 It is not clear why the Prosecution did not use the detailed and
5 substantiated accounts of the Waki Commission or the Human Rights Watch,
6 the latter of which specifically discusses having examined court records.
7 Had the Prosecution done so, it will have found that there were not only
8 19 but 156 arrests in Naivasha. It will also have found out that the
9 Prosecution, that is principally the police, would post bail so that they
10 could carry out further instructions. It was the Court itself that
11 released these people from custody. Now, were the police to be concerned
12 themselves at this period with prosecutions or rescuing people who needed
13 help within or around Naivasha? Good sense only dictates that they help
14 people first, and their attempt to keep these people in custody did not
15 succeed.

16 The Prosecution, your Honours, in its disclosure included only 6
17 of the 36 pages of this case. Another form of dishonesty. They included
18 only 6 pages of the total 36 pages of this case. Fortunately, we have
19 disclosed them.

20 In another high-profile case, more than 22 Mungiki adherents were
21 arrested by the police in early February 2008 after they attacked women
22 in Naivasha and Nakuru for wearing trousers. This is at EVD-PT-OTP-0075
23 at 3290.

24 All told, between December 29, 2007, and 12th February 2008, 938
25 arrests were made; 501 criminal cases were finalised in the Rift Valley

1 alone. This is at EVD-PT-D14-00025 at 0294.

2 In this particular case, the Prosecution ignores the plain fact
3 that the decision to prosecute or not to prosecute rests not with the
4 police. In our law, the decision rests with the office of the Attorney
5 General. The police, when they prosecute, they do it at the behest of
6 the Attorney General and are controlled by the provincial state council.

7 My learned colleagues have already dealt with the issues of the
8 free zone, and just to conclude, the Prosecution was required by the
9 Statute to provide you with substantial grounds to believe that
10 General Ali committed the crimes with which he has been charged. That
11 burden, your Honours, has not been discharged.

12 Neither the Prosecution's legal arguments nor its evidentiary
13 support are substantial. Quite to the contrary, they are flatly
14 nonexistent. The evidence adduced by the OTP cannot sustain a conviction
15 if this matter proceeds to trial. General Ali ought not to be -- ought
16 to be excused from a long, expensive, and stressful trial.

17 I conclude by saying that my colleagues and my -- our -- our
18 total contribution to the law which stands over a hundred years leaves us
19 one conclusion, that General Ali is innocent. We believe that the Court
20 will see the same.

21 Thank you.

22 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Monari.

23 MR. MONARI: Madam President, your Honours, we had said that my
24 learned colleague Gregory was going to conclude at this stage. Because
25 of time, we want to call our witness now, and then we will speak -- what

1 he has to say will be said as part of the closing remarks.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you. Yes. That is the way
3 you're organising the presentation of your case, so we shall proceed with
4 the witness. Of course, I have just to make the point that this Chamber
5 is not going to decide on the guilt or the innocence of the person, but
6 just whether the threshold as provided in Article 61(7) is satisfied.

7 Now let us go ahead with the examination of your witness. Who is
8 going to be your first witness, Mr. Monari?

9 MR. MONARI: Madam President, your Honours,
10 Mr. Gershom Otachi Bw'Omanwa is ready and present to take witness through
11 the examination. He's right at the front.

12 PRESIDING JUDGE TRENDAFILOVA: Yes. Thank you. Let us now
13 invite the witness. Court Officer. Court Usher, I'm sorry, would you
14 kindly invite the witness.

15 And who is going to be the first witness, Mr. Monari? That is my
16 question. You have two witnesses? Number 0002.

17 MR. MONARI: Number 0002.

18 PRESIDING JUDGE TRENDAFILOVA: This should be Mr. Peter Otieno.

19 MR. MONARI: Yes, Peter Otieno.

20 (Trial Chamber and Registrar confer)

21 PRESIDING JUDGE TRENDAFILOVA: We just have to wait for the
22 witness, who is on his way to the courtroom.

23 (The witness entered court)

24 WITNESS: WITNESS KEN-D14-PPPP-0002

25 PRESIDING JUDGE TRENDAFILOVA: Please be seated, Mr. Witness.

1 Welcome. Take a seat. You know that you're before Pre-Trial Chamber II
2 at the International Criminal Court, and you have been called by the
3 Defence team of Mr. Ali to give your testimony in the case of the
4 Prosecutor against Mr. Ali. You will be first examined or questioned by
5 a representative of the Defence team of Mr. Ali. Thereafter the floor
6 will be given to the Office of the Prosecutor. The Legal Representative
7 for Victims, if authorised by the Chamber, could also pose some questions
8 to you. The Judges could also ask you to give -- ask you to give answers
9 to some questions if we have. And finally, it will be again a
10 representative of the Defence team of Mr. Ali to ask you the final
11 questions.

12 You have been familiarised by the Victims and Witnesses Unit
13 about the proceedings before the court, about your rights and
14 obligations, but still on behalf of the Chamber, I have to point out your
15 most important obligation, that you make a solemn undertaking as to the
16 truthfulness of the evidence that you're going to provide to the Chamber.
17 And just to inform you that the Chamber and the court, the Chamber in
18 this particular case, has jurisdiction pursuant to Article 70(1)(a) of
19 the Rome Statute in case you give false testimony to the Court. We have
20 to inform you about your right against self-incrimination as provided in
21 Rule 74 of the Rules of Procedure and Evidence, which means that you may
22 object to make any statements that might tend to incriminate you. And
23 the Bench has to assure you that the evidence that you're going to
24 provide will not be used directly or indirectly -- will not be used
25 against you in any subsequent proceedings by the court, and of course an

1 obligation to respect the rulings of the Chamber, hoping that we are not
2 going to apply the provision of Article 70(1)(a), offences against the
3 administration of justice, but I have just to inform you in order for you
4 to be aware what the expectations of the Chamber are regarding your
5 testimony.

6 Now, I would ask you, please, to stand up just for the purposes
7 of the swearing in, and you will proceed being assisted by the
8 Court Officer.

9 COURT OFFICER: Please repeat after me. I solemnly declare.

10 THE WITNESS: I solemnly declare.

11 COURT OFFICER: That I will speak the truth.

12 THE WITNESS: That I will speak the truth.

13 COURT OFFICER: The whole truth.

14 THE WITNESS: The whole truth.

15 COURT OFFICER: And nothing but the truth.

16 THE WITNESS: And nothing but the truth.

17 PRESIDING JUDGE TRENDAFILOVA: Please be seated. Now before you
18 proceed with the testimony, I would ask you to identify yourself by
19 stating your full name, your date and place of birth, your nationality,
20 your education, marital status, and current occupation.

21 THE WITNESS: My names are Peter Otieno Kombude (* phon). I was
22 born on 25th June 1966, in Kenya, Migori county, south sapa (* phon)
23 location, Oradi (* phon) village. I'm married with two children, but now
24 my current occupation, I'm the branch secretary of Kenya Plantation,
25 Agricultural Workers Union based in Naivasha. I represent mostly workers

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1 in the flower industry in Naivasha.

2 PRESIDING JUDGE TRENDAFILOVA: Thank you. Thank you. Otieno is
3 your middle name?

4 THE WITNESS: Yes.

5 PRESIDING JUDGE TRENDAFILOVA: Would you be comfortable if we
6 address you by this name, Mr. Otieno.

7 THE WITNESS: I am comfortable.

8 PRESIDING JUDGE TRENDAFILOVA: Thank you. Now the floor is over
9 to the Defence team of Mr. Ali to proceed.

10 MR. OTACHI: Thank you, Your Honours.

11 Questioned by Mr. Otachi:

12 Q. Mr. Otieno, I shall be asking you a serious of questions. Kindly
13 address your answers to the Presiding Judge and speak slowly so that we
14 can all follow what you're saying. And in the event I'm not clear in any
15 question that I ask you, please do not hesitate to ask me to repeat the
16 question. Okay? Yes.

17 Mr. Otieno, what is your ethnicity?

18 A. Your Honour, I'm a Luo.

19 Q. You have told us where you were born. Can you very briefly tell
20 us your history, how you went to school and where -- how you ended up
21 where you are now, very briefly.

22 A. I started primary school in 1977. I did my primary education at
23 Olanda (* phon) primary school in Nyanza. Then I proceeded to
24 Oreli (* phon) high school, and after that in 1987, after my secondary
25 school, I came to Naivasha where I am up to now.

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1 Q. Thank you. So have you been in Naivasha from the date that you
2 moved there in 1987?

3 A. I came to Naivasha in 1989, October.

4 Q. Sorry. 1989, October.

5 A. Yes.

6 Q. Have you been there since, or have you moved elsewhere?

7 A. No. I've been there since.

8 Q. What took you to Naivasha?

9 A. After my secondary school, my father was -- I could not proceed
10 with my education, and therefore I went to Naivasha to look for
11 employment in the flower sector there.

12 Q. So when you got to Naivasha, what work did you do and where?

13 A. When I went Naivasha, I was employed in 1990 in Soma Company
14 Limited. It was the only flower farm during that time, and I was a
15 fumigator. I was treating the soil before planting of the flowers take
16 place.

17 Q. And have you done any other sort of work since then?

18 A. I have done -- within the industry there were a lot of work to
19 do, and you -- we were being transferred from one section to the other.
20 You might be -- I was a fumigator, as I said before. I was also at
21 (* indiscernible) once. I was also in charge of irrigation sometimes in
22 the field. And also, I was elected as a shop steward in 1994. Shop
23 steward is the representative of workers at the workplace, the lowest
24 cadre of the trade union at the industry level. So I was working and I
25 was also representative until I became -- I was elected fully in 2006 as

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1 a branch secretary, now fully employed by the union.

2 Q. Thank you. So you told us that you are now the branch secretary
3 of the Kenya Plantation Agricultural Workers Union; is that right?

4 A. Yes.

5 Q. And then -- do I understand then from your answer that gave, so
6 we can move faster, that you have been in the trade union movement in
7 this context since 1994?

8 A. Your Honour, that's true.

9 Q. That's true. Now, tell us something -- a few things about the
10 trade union. What is the membership of this trade union?

11 A. Your Honour, Kenya Plantation and Agricultural Workers Union is a
12 big union in Kenya. It's the union that represent tea and tea
13 processing, coffee and coffee processing industry, and (* indiscernible)
14 and (* indiscernible) processing industry, cut flower industry, mixed
15 farming, fishing, and a number of activities that goes with agriculture,
16 and we have 15 branches in Kenya, and every branch is headed by the
17 branch secretary. We had a general secretary who is the overall overseer
18 of the union nationally. So I'm the branch secretary of Naivasha. Upon
19 me we have the general secretary who is the overseer of all the 15
20 branches, your Honour.

21 Q. So then I take it then that you are the local boss in Naivasha of
22 that union?

23 A. Your Honour, that's true.

24 Q. Right. And you said you were elected when and for what period?

25 A. I was re-elected again in 2011 January 18.

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1 Q. For how long?

2 A. For five years.

3 Q. For five years. Thank you. Now, what is the membership in terms
4 of numbers of your branch?

5 A. In terms of membership, we have about -- in Naivasha alone we
6 have about 30.000 membership.

7 Q. And what is the ethnic make-up of the members of your union?

8 A. Almost (* indiscernible) of cosmopolitan, that all tribes area
9 in -- now in the union. Majority of Kikuyus, Luhyas, Luos, Kalenjins.
10 All the tribes are formed in Kenya Plantation and Agricultural Workers
11 Union and they are members.

12 Q. Yeah, now, just talking about your branch in Naivasha, in very
13 approximate terms can you give us the ethnic makeup, very approximately,
14 how many Kikuyu, very approximately, how many Luos?

15 A. Kikuyu forms the bigger part of the membership, because in total
16 the Kikuyus in Naivasha is about 75 per cent apart from other tribes, and
17 therefore in the trade union there are about 20 per cent. Luos are about
18 15 per cent. Luos are roughly 15 per cent, and the other tribes. So --

19 Q. Do you have some Kisiis there?

20 A. Kisiis? Sorry.

21 Q. Kisiis?

22 A. Yes, we have other Kisiis, Kalenjins, and even people from the
23 coastal province.

24 Q. Okay. Thank you. Now, do you have a problem of ethnicity within
25 that union?

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1 A. We don't have. That's why because I was elected again in January
2 this year by all the tribes in the trade union.

3 Q. So very specifically, do you have a problem with Kikuyus, you, as
4 Mr. Otieno?

5 A. Your Honour, I don't have a problem with Kikuyus.

6 Q. Thank you. Again, very briefly, what are your duties as the
7 branch secretary of this union?

8 A. Your Honour, my duties generally is to protect and safeguard the
9 interests of the workers against unfair labour practices. Especially in
10 the cut flower industry.

11 Q. Now -- now, let's move to the events closer to what has brought
12 us here today. Before the 2007 elections, how did the different ethnic
13 groups in Naivasha relate for the period that you were there? It seems
14 like it's a long period.

15 A. Your Honour, before the general election of 2007, all tribes were
16 relating very well. There was a very strong co-existence among the
17 tribes in Naivasha.

18 Q. Did you participate in any manner in the 2007 elections?

19 A. Yes, your Honour. I was an observer in one of the polling
20 stations, that's Mwatari (* phon) primary school in Naivasha.

21 Q. And how did you end up being an observer?

22 A. I -- I was selected by one of the local observers organisations,
23 it was a local organisation observing the election, to observe in my old
24 primary school.

25 Q. So this was some group that was monitoring the elections?

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1 A. Yes.

2 Q. An NGO or --

3 A. Yes. I think it was an NGO.

4 Q. What the name?

5 A. I cannot remember.

6 Q. Okay. Let's move on. Now, after the elections, was there any
7 problem in Naivasha after you had voted? Can you just give us a rough
8 idea as to life continued on in Naivasha after you had voted?

9 A. Your Honour, after the elections, people were keen, listening
10 to -- that's the second day, on 28th. People were keen. Most of the
11 people converged in hotels, in the clubs. Others were at home listening
12 to the news of the tallying of the election votes, and there was no
13 problem.

14 Q. Okay. Did any sort of problems subsequently come up in Naivasha?

15 A. It went on until 30th at around 5.00 -- at about 5.30 p.m., when
16 the presidential election results were announced. I was in Naivasha
17 town. And the locals, after the announcement immediately people started
18 celebrating, and as people celebrate, it was -- there were a lot of
19 people in the town celebrating. They celebrated up to sometime around
20 8.00 p.m. in the night. During those celebrations, because the majority
21 was big, people were throwing words saying some people might be evicted,
22 some people might be circumcised, but they were just mere threats,
23 because after that there was nothing that happened. There was nobody who
24 was beaten. I was in town. I walked up to my house. Nobody beats me.
25 And the next day things were okay.

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1 Q. Okay. You talked about the 30th, but you did not specify the
2 month and the year. Can you please do that for us.

3 A. 30th of December, 2007.

4 Q. Okay. You say that there was talk about people being harassed
5 and so on. Where was that?

6 A. I say as -- because the whole town, people were many. The whole
7 streets were jammed with people celebrating the election results, and
8 among the crowd you could hear -- you could not identify who was speaking
9 but those people were many. But you could hear someone throwing word
10 like that ODM or other tribes, the Luos, should be circumcised, such like
11 things, but there was no actual action that it was taken. There was no
12 action that took place, because during that things went so smoothly.
13 They celebrated. They went back to their houses. We went back to our
14 houses, and the night was peaceful.

15 Q. Now, did some event of significance subsequently occur in
16 Naivasha that -- that you recall?

17 A. After that, people started -- from the first week after the
18 election -- announcement of the election result, some people who were
19 evicted from other places started arriving in Naivasha, and they were
20 coming in numbers, children, men, young people, women, and they were
21 camping in Naivasha. And this created a lot of tension among the people
22 who had been in Naivasha and the new people were coming from other areas,
23 your Honour. It went on. Many people were coming. By the first week,
24 around -- those people had come from outside to Naivasha were about
25 10- to 15.000, and some of them were camping. The locals were donating

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1 food. I remember some of them were taken in to the churches. But the
2 tension was high, because they came and they were narrating stories how
3 they had been treated from the areas that they have come from. And that
4 tension was building up. I remember also at some level the Rift Valley
5 PC announcing a (* indiscernible) party both in Naivasha and Nakuru, and
6 after that the prison officers were mobilised with the police officers
7 from Naivasha town. So things went on. Tension was building, people
8 were leaving. People -- there was no incident of somebody who was
9 beaten, your Honour, somebody who was killed, but these tensions were
10 building up slowly by slowly. The number was swelling because they keep
11 on coming, those IDPs from (* indiscernible) to Naivasha.

12 Q. Now, you have given us an approximate number of 10- to 15.000.
13 These are the displaced people who are coming into Naivasha from
14 elsewhere.

15 A. Yes, your Honour.

16 Q. And what was the ethnicity of these people?

17 A. Well, most of them or all of them were Kikuyus.

18 Q. Kikuyus.

19 A. Yeah.

20 Q. Now on this issue -- I just want a short answer because we can
21 move on. When you give this number of 10- to 15.000, are you giving it
22 at some time frame?

23 A. Yes, your Honour. I'm giving it at a time frame.

24 Q. Okay.

25 A. That was the first two weeks in the first -- in January 2008.

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1 Q. Now, where --

2 A. The first two weeks.

3 Q. -- were these people settled in some specific place or were they
4 all over town?

5 A. Your Honour, they're coming, and their entry point was just at
6 the KANU office which is at the centre of the town, so from there the
7 locals might bring food there when they arrived. Then they will decide.
8 Some of them were on transit. Some of them were after that passing up to
9 Nairobi, the Central Province, but the majority of them remained there.
10 Churches also were involved in helping them during that time.

11 Q. Okay. Did you -- again on this, I want just brief answer, sir.
12 Did you personally interact with any of these IDPs that had come into
13 Naivasha? Any sort of discussion with them?

14 A. Your Honour, I interacted with them. I used to go to the KANU
15 office where some of them were, and we also used to talk to a number of
16 them.

17 Q. Okay. And when you talk about tension building up, can you
18 explain what you mean by that?

19 A. Your Honour, when these people came, most the people in Naivasha
20 wanted to know what had happened, what had made them to come to Naivasha,
21 and they have to tell the locals. They have to tell the people their
22 story. Some of them talked of their husband been killed. Others said
23 their children had been killed, their houses had been burnt, their
24 animals had been taken away. So this -- these were the stories that
25 brought tension to the people who were hearing, the locals who were

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1 hearing these stories from the IDPs who had come to Naivasha.

2 Q. Thank you. Now, did this tension ultimately build up to
3 anything, anything significant?

4 A. Yes. Your Honour, this tension built up and on 27th of January,
5 2008. Before that, around four days to 27th there was a talk that the
6 locals wanted to demonstrate against the prison officers who were helping
7 the police officers to patrol the town at night.

8 Q. Where did you -- sorry. Yes, please proceed.

9 A. What we just hear -- me, I hear from most of them. They were
10 saying the prison officers are harassing them, but that -- there was no
11 specific reason. What they were saying is the prison officers were
12 harassing them, and they wanted to demonstrate against the prison
13 officers. That's what I hear.

14 Q. Okay. So when do you hear this -- when do you hear this talk
15 about wanting to demonstrate?

16 A. Around 20th, 20th, 21st of January, 2008.

17 Q. From the talk you had, was there any indication as to when they
18 would want to demonstrate?

19 A. Your Honour, there was no indication of when and why. The reason
20 was they were just saying that the prison officers are harassing them and
21 they want to demonstrate.

22 Q. Okay. Thank you. Now -- so what ultimately happened?

23 A. So on 27th January 2008, the talk become real, that they -- the
24 talk of demonstrating against prison officers was real, because on that
25 day me myself, I can -- your Honour, I waked up real early in the

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1 morning, and I was to attend a church. When I was leaving the house,
2 your Honour, people are not many on the streets as they used to be, and,
3 your Honour, I proceeded up to the church. When I arrived at the church,
4 there was no first mass. I was going for the first mass, which starts at
5 8.30. So I proceeded up to town. And, your Honour, when I arrived at
6 town, I found a group of people, a group who were converging at the
7 Nairobi station. I took my newspaper, and I was looking at it, just like
8 those people in the (* indiscernible) there. There was no incident.
9 They were just talking as people waiting for vehicles. The vehicles were
10 few, and so that's the start of everything.

11 So a friend of mine also came down and told me that at the
12 supermarket only one door is opened, and so we started to walk with him
13 back to my house because we are sensing probably whether it's a
14 demonstration or something of -- like that, we might find ourselves in a
15 problem. So we walked with him up to my house.

16 When we reached just next to my house, behind us people -- we
17 were seeing people running and stones being thrown on the road. We
18 entered my house with him and my wife and my children. Immediately the
19 gates were opened, and a group of people entered the plot. It's not --
20 it's a rented plot, and in that plot, your Honour, we have 20 doors and
21 15 of them are my neighbour's, the Kikuyus. I was a Luo, there was a
22 Luhya, and there was a Kalenjin. And the group entered. They were
23 asking where the Luos are staying. And your Honour, unfortunately or
24 fortunately, just next to our gate, a group of another Luos were being
25 followed from down, passing outside, and a group which had ventured into

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1 our plot saw that those were being chased, they were on the road, and a
2 bigger group left our compound and goes to chase the other. Those were
3 our side. After that a few group remained behind. I could not leave the
4 house. So the bigger group that went never came back for a period of
5 about 1.5 hours. They went ahead. And the smaller group that remained
6 behind never broke the door. They were just outside walking.

7 I tried not to call friends for help because it was very risky.
8 You could not reach the police station. You could not walk out from your
9 house, so I tried to phone the police for help. I called a friend whom
10 we are working with within Kenyan Plantation Agricultural Workers Union.
11 He was in Nakuru. He told me because I told her that I am calling
12 another friend at the police station, but it seems the phones are busy.
13 I'm not getting through. The phones are not getting through. So he
14 told -- she told me there is a cousin, Mr. Michuku (* phon), who is also
15 a police officer in Naivasha. He gave me the number, your Honour. I
16 called Michuku. It was now approaching 12.00, midday. Michuku asked me
17 where I am. I told him I am in trouble. I am in the house. He asked me
18 whether I can just walk from my house to a petrol station called
19 Foma (* phon), which is next to Loham Place (* phon). I told him I could
20 not because these people are outside. My wife told me she had a number
21 of our neighbour who is a Kikuyu man. She could call her to inform the
22 police where they can locate us, and she did that and immediately we --
23 outside a big group was gathering. We hear the police Land Rover. The
24 signal man came on the window with the -- from the window and told us
25 that the police are outside there. The police stopped. We walked from

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1 the house, me, my two children, and the wife, and we entered a GK white
2 Land Rover of the police.

3 Some metres from my house some other people were besieged, they
4 were other Luo people. The police went there. I remember they were also
5 searched and they entered the police Land Rover, and we entered the
6 police station.

7 That's what happened to me on 27th, your Honour.

8 Q. Thank you, Mr. Otieno. Thank you for that concise explanation.
9 I would just ask you a few short questions so that we -- we have the full
10 context of what happened before we move on.

11 Can you put some time frames to all this? What time did you get
12 up and what time did you arrive at the church?

13 A. I left the house -- I was up at 6.00. I prepared myself and left
14 the house by 8.00, because the church is -- the Catholic church is not
15 far from my house. It's about a kilometre, half a kilometre. I'm not
16 sure, but it's not far. It's just a 15 minutes' walk from my -- my
17 house.

18 Q. So you were at the church at about what time?

19 A. About 8.30.

20 Q. 8.30?

21 A. Yeah.

22 Q. Now, from the time you wake up and get to the church, were you
23 anticipating any trouble?

24 A. Your Honour, to me, since I stayed in Naivasha for all those
25 years, I did not, and I was not -- I was not sure that such a thing can

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1 happen. To me, I took them as rumours, and even when the wife was
2 telling me that when you are going to town people might demonstrate, be
3 very careful, I took them normal, because I have stayed there. I have
4 not seen such a kind of thing happening. And even the day before, on
5 26th, we were with the Kikuyu friends, and we drink up to 11.00. I was
6 not sensing any problem. I took a motorbike up to their house. So to
7 me, it came to my realisation that it's true when it was happening, and
8 that's when I started to realise that truly it was --

9 Q. Thank you.

10 A. Yeah.

11 Q. Then you leave the church when you find the mass is not on. You
12 stroll to town and back to your house. Can you also give us some time
13 frames?

14 A. It was now 9.30, around 9.30, because exactly by 9.30 I was --
15 looked at my watch, by 9.30 the first group which were from Nairobi stage
16 within Naivasha town started coming up and it's when the attacks started,
17 almost about 9.30 there.

18 Q. Was there any attempt to get into your house?

19 A. Your Honour, I immediately -- as I immediately entered my house,
20 I said I entered my house with that friend who has come from
21 (* indiscernible). Two children were washing clothes in the -- outside
22 the rest of the house, and the wife was inside the house. So entering
23 the house there was no problem.

24 When the group enters, also the neighbours who were Kikuyus were
25 being pushed out to go and help them. The men were being pushed out to

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1 go and also join them. So that's what was happening. So outside the men
2 Kikuyus were being forced to go and join the demonstration, to go and
3 join the -- whatever was happening, while the other tribes were being
4 targeted.

5 Q. So was there any attempt to get into your house?

6 A. By the attack --

7 Q. By the attackers.

8 A. Your Honour, they tried. No, they did not try, because when I
9 entered my house, they came to the door, which was door 15. At door 15
10 there was a Makamba (* phon) who was staying there. And so after
11 realising he was a Makamba they did not touch him, and they said it's
12 here, door 16. But unfortunately, before any attempt to break the door
13 to do anything, those people who were being chased were just passing. I
14 think some -- some metres from the house. So I think a bigger group
15 seized an opportunity that it is easier to find those ones outside than
16 fighting -- getting here. So they moved out and followed that group.
17 After that, a bigger group never came back. They just went until around
18 6.00, 12.30, when now I was trying to call friends for help is when a
19 bigger group now again comes from the highway but now back to town. Now
20 they were again coming back to town. But it was very difficult to visit
21 the police station, because --

22 Q. Okay.

23 A. -- or not to.

24 Q. So approximately what time did the police come?

25 A. I was -- I left the house at about 1.00.

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1 Q. At about 1.00.

2 A. Yeah.

3 Q. And what -- that -- just for clarity, for the record, it was
4 yourself and someone else from your house?

5 A. Yes. It was me, wife and children, and other two people whom we
6 also took on the way.

7 Q. Okay. Let's get this clear. From your house there is a
8 yourself, your wife, and how many children?

9 A. Two children.

10 Q. Two children. Aged?

11 A. Aged between -- one is 9. One was 9, and the other was 7.

12 Q. Okay. Now, you get into the police vehicle; right?

13 A. Yes, your Honour.

14 Q. These other people you are saying who were saved, where were
15 they?

16 A. Can you -- can you repeat the question.

17 Q. Apart from you and your wife, you and your family, did you say
18 there were two other people?

19 A. Yes. I said there were two other people who were helped by the
20 police.

21 Q. Where? Where was that?

22 A. They were staying in another plot some metres from our plot. So
23 from -- after taking us, the police went up to the plot and saved them, a
24 woman and a man.

25 Q. What was the ethnicity of those people?

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1 A. They were Luos.

2 Q. They were Luos. Did you know how the police ended up at that
3 house again after picking you?

4 A. I think were -- they also have a car.

5 Q. Hmm.

6 A. Yeah, because during that time outside many people were gathering
7 and people gathered. There were (* indiscernible) -- by the time the
8 police were picking us up, the youths were not running away very far.
9 They were just sat there after a big pick and I hear them. They also
10 said they should go to Pandela (* phon) which means they should be taken
11 to Kisumu. They were not running away very far.

12 Q. Who are these people you are describing, this youth? Clearer --
13 the youth you are saying who were gathering in groups, do you know the
14 ethnicity or who they were?

15 A. I cannot -- what I know is they were Kikuyus --

16 Q. Mm-hmm.

17 A. -- and that's why other tribes were being saved, because --
18 that's why, they were Kikuyus.

19 Q. Okay. Now after you were rescued and these other two people
20 rescued, where were you taken?

21 A. The police station, your Honour.

22 Q. Now, arriving at the police station, what was the situation like?
23 Did you find other people there?

24 A. The police station I found a big number of people arrived there,
25 your Honour. And the police was to drop you and then move out again.

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1 That was what was happening. There was no one coming. There was no how
2 we are going to stay. The only purpose was to reach the police station
3 and then the police moves out, because many people were trapped. Many
4 people were -- could not access the police station, and therefore the
5 police were just coming, they drop you, and then they move out. And I
6 found many people (* indiscernible), then we joined the group that's
7 there, and a few policemen who are now keeping security.

8 Q. Now, so when you were at the police station, did you get to know
9 if the other -- there were other people at the police station who had
10 been rescued by the police the way you had been?

11 PRESIDING JUDGE TRENDAFILOVA: Mr. Otachi, just to remind you to
12 make a pause after the answer of the witness so that the interpreters
13 could proceed with their job.

14 MR. OTACHI: So shall I take the question again?

15 PRESIDING JUDGE TRENDAFILOVA: Yes, please.

16 MR. OTACHI:

17 Q. Mr. Otieno, when you arrived at the police station, did you come
18 across -- the people you found there, did you get to learn if there were
19 other people at the police station who had been saved by the police the
20 way you had been?

21 A. At the police station, many people talked about being saved by
22 the police. And when -- we also there, we saw -- I saw police bringing
23 people in and going again, coming with people and going again.

24 Q. Thank you. Now, how long did you stay at the police station?

25 A. It was about a week, because I left the police station on 31st --

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1 about 31st of January, 2008.

2 Q. Now, when you left the police station, where did you go to?

3 A. Yes. Your Honour, the situation at the police station was
4 becoming more difficult, and even before I leave I remember the district
5 commissioner of Naivasha calling a meeting, and he told us as opinion
6 leaders that we attend a meeting in his office. A plan was that people
7 should be -- the women and the children should go to the Catholic church
8 hall because there was water, running water, and also there was a hall so
9 that they should be kept from the cold. A decision that was not received
10 well by our people. They said we want them to go to the church to be
11 burnt because people were burnt in (* indiscernible) Eldoret. So it was
12 not (* indiscernible).

13 Q. Okay. So let's get this clear. You're saying there was a
14 proposal that because of the conditions at the police station some people
15 should be taken to the Catholic church?

16 A. Yes, your Honour.

17 Q. Yeah. Let's take it slowly. And what was the reason for that?

18 PRESIDING JUDGE TRENDAFILOVA: I'm sorry, Mr. Otachi, you forgot.
19 Please make the pause.

20 MR. OTACHI: I'm sorry, your Honour.

21 Q. And Mr. Otieno, what was the reason the idea came up of
22 transferring these people to the Catholic church?

23 A. Because of the suffering they were undergoing, your Honour.

24 Q. What do you mean by the suffering?

25 A. At the police station there was no water. There was no food.

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1 There was no shelter. So it was day and night in the field, both
2 children, men, and women. I so I think the suggestion was to help these
3 people have at least somewhere they can sleep at night.

4 Q. Now, then you say --

5 MR. OTACHI: Am I too fast, your Honour?

6 Q. Then -- then you say that that proposal was rejected.

7 A. The proposal was rejected, your Honour.

8 Q. Who rejected the proposal.

9 A. The people who were at the police station, mostly the Luos.

10 Q. Mr. Otieno, why would people refuse a proposal to move to a more
11 comfortable place?

12 A. I think what they were telling us is that because they have heard
13 that people have been burnt in the church, so that they will be burnt in
14 a church. I think that that was the reason they were leaving. And both
15 men and their wives and children could not have -- did not accept that
16 proposal. Some people went on to stay at the police station.

17 Q. So these IDPs felt they could not be safe at the church.

18 A. They felt they could not be safe at the church, your Honour.

19 Q. Mr. Otieno, did these people feel safe at the police station?

20 A. Your Honour, I think they were safe at the police station and
21 that's why they went to the police station, for their safety.

22 Q. Did you personally feel safe at the police station?

23 A. Myself, I felt safe at the police station.

24 Q. Were you ever attacked by anyone at the police station?

25 A. Your Honour, nobody attacked me at the police station.

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1 Q. Did the police provide you with security at the police station?

2 A. There was security at the police station. The police were there
3 at night. The armed officers also, after the (* indiscernible), they
4 were there. Further, there was the police and the armed officers.

5 MS. ADEBOYEJO: Your Honour, I'm reluctant to interrupt my
6 learned friend, but I just wanted to, with all respect to him, if he
7 could just not ask the questions in a leading manner. That's just our
8 observation. I'm really reluctant to interrupt him.

9 PRESIDING JUDGE TRENDAFILOVA: Fine. Be cautious about what we
10 decided in the beginning, Mr. Otachi.

11 MR. OTACHI: Thanks, your Honour. My learned colleague
12 Ms. Adeboyejo and myself have done this quite a way and at the ICTR, you
13 know, it's a very thin line between a leading question and -- but we
14 returned -- you know, this issue of common law and civil law sometimes
15 it's tricky. I'll try --

16 PRESIDING JUDGE TRENDAFILOVA: Try not to give the answer into
17 the question.

18 MR. OTACHI: I will try, your Honour.

19 Q. Now, I will ask the question without leading. How did you feel
20 at the police station?

21 A. I felt secure at the police station.

22 Q. Why did you feel secure at the police station?

23 A. Your Honour, because that was -- first, it was the own place safe
24 for me.

25 Q. Now, by the time you left the police station, about how many

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1 people were there?

2 A. Well, at the time I left the police station, about 10.000 people
3 were at the police station.

4 Q. Do you know if there were other IDPs who had been -- who -- from
5 the same -- let's say from the events of the 27th, who were elsewhere
6 in -- in Naivasha?

7 A. Your Honour, all the IDPs from non-Kikuyu community were either
8 at the police station or at prison's ground. We -- in Naivasha we also
9 have IDPs who were come from other areas, and they were at the central
10 IDP camp within the town. And after two weeks, there was a plan to
11 construct an IDP camp for the non-Kikuyu IDPs Naivasha, and an IDP camp
12 was constructed at Kendal Ranch (* phon), some 6 kilometres from Naivasha
13 town, and it was mostly for the non-Kikuyu IDPs. And another camp was in
14 town for the Kikuyu IDPs who had come up from other areas
15 (* indiscernible). So we had two IDP camps. Me myself, I did not go to
16 IDP camp. I was integrated by one of my friends in home Grown Kenya
17 Limited where I lived at the -- so but I used to go visit the IDP camp.
18 I used to talk to the people, because most of them are -- were workers
19 and they are members. They used to tell me how their condition are. I
20 used to also talk to Red Cross, how they were helping them. So it was a
21 normal routine. But me myself, I never stayed in the IDP camp. I was
22 integrated, and I was staying with a friend who was working at Home
23 Grown.

24 PRESIDING JUDGE TRENDAFILOVA: Mr. Otieno, I very much hate to
25 interrupt you, but there is a request from the interpreters that you come

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1 a little bit closer to the microphone, because they cannot hear you
2 properly and translate what you're saying.

3 THE WITNESS: Thank you, your Honour.

4 PRESIDING JUDGE TRENDAFILOVA: Yes.

5 MR. OTACHI: Thank you, Madam President.

6 Q. Mr. Otieno, you have talked about this IDP camp where you say
7 some of your colleagues were transferred to. Where was it, and what was
8 it called?

9 A. It was called Kedong IDP camp. Kedong.

10 Q. Where in Naivasha was it?

11 A. Kedong was along Moi South Lake Road from Naivasha town some 6
12 kilometres from Naivasha town.

13 Q. Do you know why that camp was set up?

14 A. Purposely -- your Honour, the camp was set up for the workers and
15 for the purpose of supplying the cut flower industry, which is a high
16 economic asset for the government of the Kenya.

17 Q. Thank you. Mr. Otieno, did you ever relocate from Naivasha?

18 A. Your Honour, I have never relocated from Naivasha.

19 Q. And do you know if you're -- the other IDPs relocated from
20 Naivasha?

21 A. Can you repeat the question again?

22 Q. Okay. You have these people who were potential victims of the
23 attacks on 27th who were at the -- who ended up at the police station.

24 Do you know if many of them were permanently relocated from Naivasha or
25 left Naivasha?

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1 A. Your Honour, a number of people left Naivasha.

2 Q. Mm-hmm. Did others remain?

3 A. Yeah. A good number also remains, they had stayed at Naivasha,
4 your Honour.

5 Q. In your view, how do you compare the number of those who
6 relocated permanently and those who stayed back, who are there now?

7 A. Those who stayed back are many.

8 Q. Okay. Now, let's go back a little bit to the time you had been
9 saved and you were at the police station. Before you left and moved to
10 stay with another person as you've explained, in between after you had
11 been rescued and you were at the police station, did you ever leave the
12 police station for some purpose or other?

13 A. I -- your Honour, I never left the police station. I only left
14 the police station on 31st, and I went to Home Grown, and even when I was
15 going to Home Grown together with my wife and children, the farms, the
16 Kartoui (* phon) Limited, a flower farm, offered a lorry to carry some of
17 the people at the police station to Kartoui primary school because they
18 were their workers, and so the police also was escorting that lorry.
19 They took them, the workers, to their ground at Kartoui Limited and I
20 also went with that group being escorted by the police.

21 Q. Did you ever go back to your place -- your place of residence,
22 that is, where you were rescued from?

23 A. I've never gone back my place of residence, but I'm always in
24 Naivasha, and I also met my neighbours, and we -- and I have a good
25 relationship with them. We don't talk much about what had happened.

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1 They are very happy. We are just friends, and we are -- I do met them
2 every day, because my work is for the people, and most of the people we
3 met are workers, and they were the people also whom we stayed with
4 (* indiscernible). So we do met them. There's no problem.

5 Q. Now, this morning of the 27th when you were going to church and
6 then subsequently there's an attack, did you ever become aware of -- or
7 notice military trucks in Naivasha that morning?

8 A. On 27th there was no military trucks in Naivasha, your Honour.

9 Q. Did you see men in military uniform that morning in Naivasha
10 town?

11 A. I did not see anybody in military uniform, your Honour.

12 Q. Did you ever see men in military uniform at any point during the
13 event?

14 A. I did not see men in military uniform except the policemen who
15 were rescuing us.

16 Q. Did you ever get the feeling in the course of these events that
17 the police were allowing people to be attacked?

18 A. I didn't get any such information. I was in the house, and I was
19 rescued from the house to the police station, so I'm not aware of that,
20 your Honour.

21 MR. OTACHI: Your Honour, just a minute. Let me consult for --
22 (Defence counsel confer)

23 MR. OTACHI:

24 Q. Mr. Otieno, have you ever met Mr. Mohammed Hussein Ali?

25 A. I've never met Mr. Mohammed Hussein Ali, your Honour.

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1 Q. And the very final question -- before the very final question.

2 This period you were at the police station, how would you describe the
3 activities of the police and the overall reaction of the police to those
4 people who had problems like yourself?

5 A. Generally the police were overwhelmed. The situation was very
6 difficult to control, but the police tried to save lives of many people,
7 though most of the people were expecting the police to save lives and
8 property. But most of the people's lives were saved by the police, so
9 generally the police tried, though they were overwhelmed by the situation
10 in Naivasha.

11 Q. When you say they were overwhelmed by the situation, what do you
12 mean by that? Are you able to explain further?

13 A. They -- first the facilities at the police station were few,
14 because I remember people were offering their private vehicles for the
15 police to go and rescue other people. I remember an ODM candidate who
16 was also at the police station and who was also a Kikuyu offering his
17 vehicle to go and rescue a man who was trapped from Manu (* phon) to
18 around 8.00 in the evening. And the police went, he was found in the
19 latrine, and he was brought to the police station. Some people, their
20 vehicles were not there, and the policemen were also few. Everybody
21 wanted help. The number was not enough. So that was the problem,
22 where -- why I'm saying they were overwhelmed, because the number was not
23 enough. You cannot ask a police officer and you get it immediately. You
24 wait. Another group comes back, they go -- goes with you. So that's --
25 I am saying that. And the attack was in seven estates, which is a larger

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1 group, a large area. The (* indiscernible) was attacked, so it was
2 difficult to -- for the number which was at Naivasha that time to control
3 the situation.

4 Q. How many police vehicles do you recall seeing at the police
5 station while you were there?

6 A. I recall -- can you repeat this question?

7 Q. How many police vehicles do you recall seeing at the police
8 station when you were there?

9 A. I recall seeing --

10 Q. Apart from the one that rescued you.

11 A. I recall seeing three lorries which were ferrying people in and
12 out, and two Land Rovers. But there was no vehicles stationed. They
13 were coming in, going out, come in, going out.

14 Q. Mr. Otieno, one final question. Why did you agree to come and
15 testify in this court today?

16 A. Yes. Your Honour, I agreed to come and testify because I believe
17 what I'm telling this Honourable Court is true, and I have also testified
18 to some of the commissions in Kenya, and I also always repeat the same,
19 and therefore I don't have fear, and also I hope if my testify can help
20 this Honourable Court to reach amicable justice on the matter before
21 them.

22 Q. Thank you very much, Mr. Otieno.

23 MR. OTACHI: Your Honours, that is all in chief.

24 PRESIDING JUDGE TRENDAFILOVA: Thank you, Mr. Otachi.

25 I thank Mr. Otieno.

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1 Now we shall make a break. We shall resume our hearing at 6.25,
2 and then the Prosecutor's Office will proceed with their questioning. So
3 now we shall make the break, and we shall reconvene at 6.25.

4 COURT USHER: All rise.

5 Recess taken at 5.53 p.m.

6 On resuming at 6.27 p.m.

7 (Open session)

8 COURT USHER: All rise.

9 PRESIDING JUDGE TRENDAFILOVA: Please be seated. And please
10 accept our apologies for being late, but this clock is fast.

11 So, Court Officer -- Court Usher, would you so kind to invite the
12 witness into the courtroom.

13 (The witness takes the stand)

14 PRESIDING JUDGE TRENDAFILOVA: Mr. Otieno, you're still under
15 oath.

16 THE WITNESS: Yes.

17 PRESIDING JUDGE TRENDAFILOVA: Are you fine to proceed with the
18 questioning on behalf of the Prosecutor's Office?

19 THE WITNESS: I'm fine, your Honour.

20 PRESIDING JUDGE TRENDAFILOVA: Yes. So now the floor is over to
21 the team of the Prosecutor.

22 MS. ADEBOYEJO: Thank you, Madam President, your Honours. My
23 colleague Ms. Desiree Lurf will be posing the questions to the witness,
24 but just before she does that, I just quickly wanted to put on the record
25 that we've have had our legal reviewer Ms. Orla Cronin and one of our

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1 interns, Thomas Chingeta (* phon) who have been with us since the second
2 session. They weren't here in the morning but they've been with us --
3 yes.

4 PRESIDING JUDGE TRENDAFILOVA: For the record, thank you very
5 much.

6 MS. ADEBOYEJO: Thank you.

7 PRESIDING JUDGE TRENDAFILOVA: Thank you, Ms. Adeboyejo.

8 Now, Ms. Lurf, would you proceed, please.

9 MS. LURF: Good evening, your Honours.

10 PRESIDING JUDGE TRENDAFILOVA: Thank you. Good evening.

11 Questioned by Ms. Lurf:

12 Q. Good evening, Witness.

13 A. Good evening.

14 Q. How do you feel?

15 A. I'm okay.

16 Q. My name is Desiree Lurf, and I will be asking you some questions
17 on behalf of the Prosecution this evening, and I would ask you to listen
18 to my questions carefully and to answer them clearly and as precisely as
19 possible, and if you do not understand me, please let me know and I will
20 clarify. Is that okay?

21 A. That's okay.

22 Q. I will also be pausing before I ask you a question and after I
23 hear your answer just to give the translators a bit of time to capture
24 the answers and the questions, and if you could do the same, that would
25 be very helpful?

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1 A. That's okay.

2 Q. Thank you, Witness. I hope you don't mind if I refer to you as
3 "Witness." That makes it easiest for me. Is that okay?

4 A. Yes.

5 Q. You told us that you lived in Naivasha for 18 years and that you
6 worked in the flower farms. Can you tell the Court where you worked
7 during the post-election violence?

8 A. During the post-election violence, I was a branch secretary in a
9 plantation of the agricultural workers union. I was not working on a
10 flower farm.

11 Q. And, Witness, you also mentioned that you're a trade unionist.
12 Can you tell me us what are the major challenges you face as such?

13 A. As trade unionist, the challenges we face are numerous, but just
14 to mention a few that do happen every time and again, is unfair
15 terminations, issues of health and safety for the workers, issues of
16 redundancy, issues of outsourcing, and issues of sexual harassment,
17 issues of low wages, which normally -- among a number issues that we
18 normally face.

19 Q. That's enough. Thank you. And as a trade unionist, are you
20 affiliated with any political party?

21 A. No, we are not affiliated to any political party.

22 Q. Are you sometimes interviewed by journalists or have you spoken
23 to journalists about your role in your work as a trade unionist?

24 A. We do talk to journalists about our roles and work of trade
25 unions.

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1 Q. And can you tell me have you been interviewed by anybody in
2 relation to the post-election violence?

3 A. I have -- I've been interviewed by a number of people about
4 post-election violence.

5 Q. Can you tell us who you have spoken to and when?

6 A. I spoke to Waki Commission. That was around July 2008. I cannot
7 remember other people whom I spoke to and when, but I've also spoke to
8 other people.

9 Q. Have you spoken to any of the Defence teams, Witness?

10 A. I've spoke to the Defence team of Mr. Mohammed Ali, your Honour.

11 Q. Witness, I have before me the statement you gave to the Defence
12 of Mr. Mohammed Ali, and I also have before me a statement you gave to
13 the Defence -- excuse me, the statement you gave to the Defence of
14 Mr. Mohammed Ali was on the 2nd of September; is that correct?

15 A. That's correct.

16 Q. And you also gave a statement to the Defence of Mr. Muthaura,
17 which was on the 5th of August; is that correct?

18 A. That's correct, your Honour.

19 Q. If I refer you, and I would ask -- I would like the statement to
20 be shown on the screen if that is okay, if the confidentiality level
21 permits. I would like to have EVD-PT-D14-00048 on the screen at page
22 number 0065. This is on the second page of the statement, the second
23 last sentence.

24 COURT OFFICER: Your Honour, would I like to mention that for the
25 record, this statement is confidential, so if counsel would probably

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1 clarify if this should be published for the witness to -- to see in
2 public.

3 MS. LURF: Is the Defence of Mr. Ali -- do they -- do they give
4 their consent that this could be shown on the screen? If I could have --

5 MR. OTACHI: Yes, your Honours. Just for the record, this
6 statement was initially filed confidentially, but since the witness
7 elected to testify publicly, I don't suppose there is a problem.

8 PRESIDING JUDGE TRENDAFILOVA: So we can proceed in public
9 session.

10 MR. OTACHI: I believe so.

11 PRESIDING JUDGE TRENDAFILOVA: Are there some objections on
12 behalf of the other members of the Defence team? No.

13 So proceed, Ms. Lurf, with your question.

14 MS. LURF: Yes, please. If the page 0065 could be shown, and the
15 second last paragraph. If that could be shown. Thank you very much.

16 Witness, I will tell you what it reads. It says:

17 "Prior to the recording of this statement, I had not been
18 contacted by anyone in connection with the proceedings at the ICC."

19 Is this correct?

20 A. That's correct.

21 Q. And you signed this statement, didn't you, Witness?

22 A. I signed the statement.

23 Q. And did you read the statement before signing it?

24 A. I read the statement before signing, your Honour.

25 Q. And you signed it and you confirmed not having been contacted by

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1 anyone, although you knew that this wasn't true.

2 A. Your Honour, I signed the statement.

3 Q. Witness, you signed the statement on 2nd of September, although
4 you were contacted and gave a statement to another Defence team on the
5 5th of August; is that correct?

6 A. I signed the statement on 2nd of September, your Honour.

7 Q. Can you tell me how many times and on which occasions have you
8 spoken to the Defence of Mr. Ali or the Defence of Mr. Muthaura?

9 A. Your Honour, I spoke with the Defence of Mr. Ali sometimes in
10 August. We never recorded a statement. It was when I was introduced by
11 a friend to them. We just talked and they went and they said they would
12 consult me later. Later, they called me at the offices, your Honour, and
13 we recorded a statement with them on 2nd September.

14 Q. And what about the Defence of Mr. Muthaura?

15 A. I've also talked with the Defence -- they also called me, and I
16 talked with them. I've talked with the Defence of Mr. Muthaura through
17 Mr. Ken Ogetto.

18 Q. Do you remember when and on how many occasions?

19 A. I cannot remember exactly when.

20 Q. And on how many occasions, do you remember that?

21 A. Just on two occasions.

22 Q. Thank you, Witness. When you were interviewed by either of the
23 Defence teams -- well, let me start with the Defence team of
24 Mr. Muthaura, did you try to provide information that was helpful to
25 Mr. Muthaura's Defence?

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1 A. I recorded a statement, and to me, I did not -- what I recorded
2 is statement about my testimony and whatever I saw. I did not know
3 whether it was useful to them or not useful to them.

4 Q. Witness, were you aware of the charges against Mr. Muthaura or
5 Mr. Ali before you provided a statement to them?

6 A. Yes, I was aware.

7 Q. And, Witness, the same question I asked you before. For the
8 Defence team of Mr. Ali, did you try to provide information that was
9 helpful for Mr. Ali?

10 A. Your Honour, I recorded a statement which is my testimony. I --
11 to me I do not know whether it is useful to Mr. Ali or not, but what I
12 know is that I recorded a statement, a testimony of what I saw and what I
13 (* indiscernible).

14 Q. That is clear, Witness. Thank you. If I could now turn to the
15 post-election violence. And, Witness, if you could please, when you
16 provide your answers, look to the Bench, that would be very helpful.

17 A. Thank you.

18 Q. Thank you. I would like to turn to the evening of the 30th of
19 December which you have spoken about and the celebrations that were going
20 on. You mentioned today that you heard threats against Luo and that they
21 should be circumcised. How did that make you feel, witness, as a Luo?

22 A. On 30th when the celebrations were going on, such words were
23 coming from a crowd, and normally where a crowd had gathered, many issues
24 come up. They were throwing those words, but nobody was circumcised,
25 nobody was beaten, but it was being thrown from this crowd. But I felt

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1 guilty of myself if such a thing might happen, but on that day it was
2 celebration. It went up to the night, and everybody went back to their
3 house.

4 Q. Did you feel comfortable being in town that evening, Witness?

5 A. Celebration, the whole thing -- people are going about their
6 businesses. People are going about their activities when the
7 announcement were made, and for most people it found people in town, both
8 the locals -- most of the people were in town. Me, I was in town. And
9 so I never knew the announcement will be made so that I can just be in
10 the house. I never knew there would be a celebration and there would be
11 some words. I never knew there would be a problem. So I was just -- it
12 just normal to me.

13 Q. Witness, if I could take you to the statement you gave to the
14 Waki Commission.

15 MS. LURF: And I would ask that this be brought to the screen.
16 It is a public document. It is EVD-PT-OTP-00045, at 7149. And I would
17 ask that document to be left on the screen, because I will be citing from
18 it more often.

19 Q. You said to the commission that:

20 "After the celebrations, we had to retreat back to our houses, My
21 Lords."

22 MR. KHAN: I do apologise. Madam President, perhaps there's been
23 an error in the documents being shown. It doesn't relate to this
24 witness.

25 PRESIDING JUDGE TRENDAFILOVA: I referred to the EVD number?

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1 MR. KEHOE: I think it needs to be scrolled down several pages.

2 MS. LURF: I referred to page number 7419. Yes, it's --

3 PRESIDING JUDGE TRENDAFILOVA: The number of the document is
4 OTP-0005 and you said 45.

5 MS. LURF: I was referring to the EVD number, but this one we can
6 see is the ERN number. And now it should be at the correct page, it's
7 7149.

8 PRESIDING JUDGE TRENDAFILOVA: Yes, okay.

9 MS. LURF: Thank you, Counsel, for pointing that out.

10 Q. I was referring to a section on the bottom, and Witness said
11 that:

12 "After the celebrations we had to retreat back to our houses, My
13 Lords."

14 And you were asked by Mr. David Majanja:

15 "Did you retreat back to your house for any particular reason?"

16 And you answered:

17 "Yeah, for fear."

18 And when asked:

19 "What exactly did you fear and why?"

20 You answered:

21 "What I was fearing is that because I am a Luo and since I was
22 hearing the Luos should be circumcised, I had a reason to fear, My
23 Lords."

24 Is that your statements?

25 A. That's true. That's my statement, your Honour.

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1 Q. Witness, were you afraid of being attacked?

2 A. That's because I'm a Luo, and the -- the words were being
3 expressed to reflect that probably the Luos can be circumcised. So being
4 a Luo, I was afraid.

5 Q. And you also mentioned today during your testimony that Naivasha
6 was peaceful until the arrival of refugees, and you also mentioned that
7 somebody was killed. Can you tell the Court who was killed?

8 A. Can you come up again with the question?

9 Q. Yes, Witness. You mentioned today that tensions arose in
10 Naivasha because refugees arrived, and you also mentioned that somebody
11 was killed. Can you tell the Court who was killed? If you remember.

12 A. I don't remember saying somebody was killed on 30th --

13 MR. MONARI: Madam President, I too -- sorry to interrupt. If
14 the reference can be given where the witness said those words that
15 somebody had been killed, because we do not recall that evidence coming
16 from this witness. But it would be nice if it is precisely pointed out
17 so that we -- the witness can remember what he said rather than trying to
18 confuse him.

19 PRESIDING JUDGE TRENDAFILOVA: Of course make the reference. The
20 witness said this, because we have studied very, very properly all the
21 witness prior statement, so but still make reference to the specific
22 page.

23 MS. LURF: I remember hearing clearly that a person was killed,
24 not somebody, but I'm afraid I do not have the transcript in front of me
25 right now. I will ask a team member to look for the reference if that is

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1 okay, but if I could refer the witness back to the statement he gave to
2 the Waki Commission. He mentions --

3 MR. PHILPOT: I'd like to clarify, John Philpot. There's no
4 testimony to that effect today. That is a statement in Waki.

5 PRESIDING JUDGE TRENDAFILOVA: Yes.

6 MR. PHILPOT: There was no testimony to that effect today.

7 PRESIDING JUDGE TRENDAFILOVA: This is absolutely correct.

8 MS. LURF: I will return to the line of questioning then, your
9 Honours. If a colleague can dig up the exact line and page number where
10 it was mentioned, and I shall proceed with another set of questions.

11 PRESIDING JUDGE TRENDAFILOVA: Please.

12 MS. LURF: Thank you.

13 Q. Yes. Witness, you mentioned that there were rumours in Naivasha
14 around that time. Can you clarify and tell me more about the rumours you
15 heard?

16 A. The rumours, your Honour, we're hearing is that there was
17 tension. There was rumours that people might be attacked. It was
18 rumours, street rumours, and every day there were different kinds of
19 rumours coming up, which it was difficult to know which one is true,
20 which one is false, your Honour. But the rumours were up, tension were
21 building up, people were coming, and so most of the activities as from
22 21st up to the 27th, a number of things were happening. So that was what
23 was happening.

24 Q. Thank you, Witness. Thank you. Have you heard about the
25 Mungiki, Witness?

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1 A. I've heard about the Mungiki.

2 Q. What are they or who are they?

3 A. Me, I don't know about them. What I know is that Kikuyuan
4 youths, people refer to them Mungiki, but they are just young Kikuyu
5 youths like any other young persons in any community, but we don't have a
6 label. We cannot chat with the Mungiki, the Mungiki (* indiscernible)
7 because they're just young youths.

8 Q. Are they really only young youths like any other, or is there
9 something that distinguishes them?

10 A. To me I just know that they are youths, jobless youths among the
11 Kikuyu community.

12 Q. Did the rumours of an impending attack in Naivasha concern the
13 Mungiki in any way?

14 A. Your Honour, I just hear that during the Waki Commission and
15 after the attack. I just hear it, but to me I was not aware.

16 Q. So you are saying that before the attack, you have not heard
17 about any Mungiki being involved.

18 A. Before the attack, I never heard about Mungiki involved.

19 Q. Witness, I would like to take you to the evening of the 26th of
20 January. Today you said that you were out drinking with friends on that
21 evening. Witness --

22 MR. MONARI: Again, I'm sorry. I'm very sorry.

23 PRESIDING JUDGE TRENDAFILOVA: Mr. Monari, what is the problem?

24 MR. MONARI: There was no mention of drinking. He said he was
25 out with friends. There was no mention of drinking.

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1 PRESIDING JUDGE TRENDAFILOVA: Well, are you referring --
2 Ms. Lurf, are you referring to the previous statements? I have the three
3 of them, or to today's?

4 MS. LURF: No, your Honours, with all due respect, I am only
5 referring to words the witness mentioned today in the course of his
6 testimony. I'm very sorry that I don't have the transcript before me. I
7 would have to ask my colleagues, again, to scroll back or to do a word
8 search, but to my recollection, and that's why I am putting the words to
9 the witness and not to use my own, the witness said that he was out on
10 the night of the 26th with friends, but maybe the witness can tell us
11 what he did, and my question actually relates to the curfew, whether or
12 not there was a curfew in place that night and how that affected him.

13 PRESIDING JUDGE TRENDAFILOVA: Mr. Monari, there was a mentioning
14 about -- about drinking, party, or meeting with someone.

15 MR. MONARI: I do recall that --

16 PRESIDING JUDGE TRENDAFILOVA: And what is -- what is the point,
17 as Judge Tarfusser asks?

18 MR. MONARI: Well, I understand possibly --

19 PRESIDING JUDGE TRENDAFILOVA: Why do you object to this question
20 being asked?

21 MR. MONARI: Madam President, the witness said there was party
22 and drinking.

23 PRESIDING JUDGE TRENDAFILOVA: Yes.

24 MR. MONARI: But did he not relate it to himself.

25 PRESIDING JUDGE TRENDAFILOVA: Well, let us not investigate

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1 whether he had --

2 MR. MONARI: Madam, I won't deliver the point. I don't want -- I
3 will not interrupt. I won't deliver the point.

4 PRESIDING JUDGE TRENDAFILOVA: Okay. Please do not interrupt any
5 more.

6 MR. MONARI: Yeah.

7 PRESIDING JUDGE TRENDAFILOVA: Ms. Lurf, proceed, please.

8 MS. LURF: Yes, thank you.

9 Q. Witness, can you tell the Court just to clarify, were you out
10 until late on the night of the 26th although there was a curfew in place?

11 A. Your Honour, I want to repeat myself. I said on 26th we were
12 with friends after work. I did not say we slept outside. What I said, I
13 was with friends up to around -- sometimes around 8.00 to 9.00, and I
14 went home. And I said I went home (* indiscernible), and I never had any
15 problem, because on that same day, the 26th, then the next day was the
16 day of the attack. I -- I was with them.

17 Q. Excuse me to interrupt you. At what time did you just say you
18 went home?

19 A. I went home at around 9.00.

20 MS. LURF: Your Honours, just for the record, would I like to go
21 back to the transcript, because I did find the precise quotation. It is
22 at page 129, lines 1 to 2, and it is recorded on the transcript at least
23 that the witness said, and I quote from line 1:

24 "And even the day before, on 26th, we were with the Kikuyu
25 friends, and we drink up to 11.00."

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1 That is recorded in the transcript.

2 Q. Thank you for your answer, Witness. I will move to the next
3 question. Can you tell me how the atmosphere was in Naivasha on the
4 morning of the 26th -- excuse me, on the morning of the 27th, when the
5 attacks occurred? I would like to know what for you felt different from
6 normal.

7 A. On the morning of 27th, there were no -- there were no -- people
8 were not many on the streets, vehicles were few, but a few people were
9 walking. People moved to town and back, but there was no -- people were
10 few unlike there used to be on any other Sunday, and also the vehicles
11 were few. I think that was in early morning of 27th, that was what was
12 there. I also walked to town, but people were few on the road. The
13 vehicles were not many. The motorbikes were not as many as they used to
14 be.

15 Q. Mm-hmm.

16 A. Yeah.

17 Q. And, Witness, you then mention getting your paper and seeing a
18 group of people when you bought your newspaper. Can you tell me how big
19 the group of people was, how many persons you saw?

20 A. People. I saw about -- about 300 --

21 Q. Thank you, Witness.

22 A. -- your Honour.

23 Q. Can you tell me more about the group of people you saw, what
24 ethnicity they were, for instance?

25 A. I think most of them, because I did not go close to them, but I

1 think most of them were Kikuyu community.

2 Q. Could you tell me whether there were any Mungiki among them?

3 A. I cannot tell that, your Honour.

4 Q. Is it possible that any Mungiki would have been among them?

5 A. There were -- I cannot tell that because what I was seeing was
6 just normal youths from Kikuyu community, and there was no strange or
7 something to identify that there's a Mungiki there. What I saw are young
8 people who were -- like they were talking, your Honour.

9 Q. Could you tell me whether any of the people in the group were
10 armed?

11 A. I'm not aware about that, your Honour.

12 Q. You then mention people chasing you to your plot. Can you tell
13 me more about that group?

14 A. Your Honour, the group that was at this stage, I never see, they
15 weren't guarding anything, but when people -- or they started chasing
16 people. Now you -- I was seeing people with *pangas* and rods running up
17 from every side of the town, your Honour, but at this -- at the stage
18 they were just silent. They were just talking. I could not see anything
19 that (* indiscernible).

20 Q. Did you recognise any of the people that were chasing you?

21 A. I did not recognise any of them, your Honour, because another
22 thing is that during that particular moment, the third week of January,
23 the population of people who have come to Naivasha from other areas was
24 so big that knowing those who are visitors and those who are IDPs and
25 those who are -- I mean, it was becoming a problem. Unless people -- we

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1 stayed in a plot, we might know all of them, and they were also in their
2 houses during that time. They were being pulled out by the people group
3 that come to come out and help them. Those ones I know, and they
4 never -- I never saw them participating.

5 Q. And, Witness --

6 A. Of my house.

7 Q. And the same group was the one that was threatening your
8 neighbours and asking where the Luo was?

9 A. My neighbours were -- most of them were Kikuyus, yeah, the
10 people.

11 Q. But the group that was threatening your neighbours.

12 A. They were telling them to come out and help them and join them.
13 They are telling their fellow Kikuyus who were men, who were my
14 neighbours and their wives, to come out and help them.

15 Q. And this was the same group that was chasing you?

16 A. They just entered the plot. Those were the group that entered
17 the plot.

18 PRESIDING JUDGE TRENDAFILOVA: Ms. Lurf, I would ask you to
19 pause, because you do not recall that you -- and I would ask Mr. Otieno
20 to look at the Chamber, to address the Chamber. We do not sit over
21 there.

22 THE WITNESS: Thank you, Madam President.

23 MS. LURF:

24 Q. Witness, were you afraid?

25 A. Your Honour, I was afraid.

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1 Q. Were you afraid that the persons could kill you?

2 A. Your Honour, I was afraid that they could kill me.

3 Q. Witness, may I ask you again what time was it when you reached
4 your house?

5 A. That morning of 27th? Can you repeat?

6 Q. Yes, please.

7 A. It was now around 9.00 -- about 9.45, 10.00.

8 Q. Witness, in your testimony before the Waki Commission, you
9 mentioned at page 7155 that it was around 8.30. Is that also possible?

10 A. No, your Honour, because when I talked to the Waki Commission,
11 me, I have never seen that report again, but I remember telling them that
12 the mass at the Catholic church, the first mass starts at 8.30 a.m. So I
13 don't see that it could have been possible for me to go to town and to go
14 back to, and I state that very clearly. Though, I cannot remember
15 everything I told Waki Commission, but I remember telling them that the
16 mass, the first mass, which I was going to attend, starts at 8.30. I
17 think that there was a problem in that. But when I reach my house now
18 from town on the 27th, it was around 9.30, 9.45.

19 Q. Thank you, Witness. And can you tell the Chamber how long you
20 were in your house before you were rescued that day?

21 A. Around four hours. About four hours.

22 Q. I would again like to go back to your statement that you gave
23 before the Waki Commission, and I don't know if the document is still on
24 the screen. At page 7157. And there you say -- if it could be enhanced
25 from the third paragraph from the bottom. You said:

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1 "It took about six hours in my house, My Lord ..."

2 Witness, could that be correct?

3 A. Your Honour, I'm saying because I can't remember everything I
4 told the Waki Commission, but I'm seeing it here, and because also,
5 your Honour, I never saw the Waki Report, me, since, but there were some
6 errors in that report. Here it has, as you were saying, six hours,
7 your Honour.

8 Q. Thank you. Witness, while you were in the house, did you see or
9 hear crimes committed against others?

10 A. I hear about them. I saw people who also were injured during
11 that ruckus.

12 Q. More particularly regarding the Kabati estate, did you see or
13 hear any crimes being committed there while you were in your house?

14 A. Your Honour, I remember well when we are at the police station.
15 There is a lady who lost five children. They were burnt. There's also
16 another man who lost nine family members. There are people who were
17 hacked to death. And all these when I was at the police station, I will
18 hear them. And many people were inquiring about their relatives, because
19 some people had left the house, and they did not go back. They ended up
20 in a police station. Now somebody wanted to trace my -- the child, the
21 wife, from colleague within the police station. So the stories were
22 there.

23 Q. Witness, if I could take you back to my question again. How far
24 was the house in which people were burnt in Kabati estates? How far was
25 that from the house you were staying in?

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1 A. I cannot remember exact kilometres, but it was not that far. It
2 was about 3 kilometres from where I was staying.

3 Q. Thank you, Witness. Did you also hear of crimes of a sexual
4 nature?

5 A. At the police station on that day, I never hear that,
6 your Honour, but when people were now at Kedong camp, then there are
7 issues that were coming about sexual violations, your Honour, and I was
8 asking whether they reported to the police, because I thought they should
9 have reported. But they were -- at the camp, there were issues about
10 that, but at the police station, I never hear about people talking about
11 it.

12 Q. Thank you, Witness. Have you heard of crimes committed by the
13 Mungiki?

14 A. Can you come up again?

15 Q. Witness, that day you said you heard of crimes being committed
16 against people. Did you hear that somebody suffered a crime at the hand
17 of a Mungiki?

18 A. Your Honour, I hear that people suffered, people were killed,
19 people were burnt. Nobody -- I never, because all the group that were --
20 these were all people who were participating in this. I never hear from
21 Mungiki, because the whole -- the whole town, the whole -- young Kikuyu
22 men were participating in the attack. I had never known whether the
23 Mungiki particularly was the people doing this, but all the young Kikuyu
24 men and those who did not want were being forced to join the group. So I
25 could not tell, because from my house I went to the police station, so I

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1 don't know more what was happening in the field.

2 Q. Witness, thank you. That answers my question. I will now turn
3 to the next set of questions. I would like to know have you ever worked
4 as a police officer.

5 A. I've never worked as a police officer, your Honour.

6 Q. And before January 27, did you have any contact with the police?

7 A. Before January 27th, what -- as a leader, what normally happens
8 is an OCPD was brought to the station, or a doctor. I do ask for their
9 number. It is normal, I -- because they are also leaders of the -- and
10 most -- in Naivasha, most of the leaders are real concerned with issues
11 of the flowers. So they do also ask me my number, because I'm a branch
12 secretary at a constituency that I led. So in case of any problem, in
13 case there is a strike, workers go on strike, I normally inform the
14 police, because that's the procedure.

15 Q. Thank you.

16 A. So I do have their number.

17 Q. And have you had -- excuse me. Have you had access to police
18 information such as police reports, police intelligence, or police plans
19 through your connections with the police?

20 A. No, your Honour.

21 Q. Can you tell the Court how many police officers were present in
22 Naivasha before January 27?

23 A. I don't know the exact number, but it's about -- about 30.

24 Q. And, Witness, was that the normal number of policemen --
25 policemen present in Naivasha?

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1 A. Your Honour, I'm not a police officer. I'm not a government
2 official. I don't know which number every station of the police should
3 have. So I cannot -- I'm not aware about that question.

4 Q. Witness, on the 27th, on the day of the attacks, how many police
5 officers were present in Naivasha on that day?

6 A. In Naivasha station or Naivasha town?

7 Q. Naivasha town.

8 A. I cannot -- I don't know how many were present in Naivasha town.

9 Q. Thank you, Witness. And can you tell me anything about the
10 removal of the prison guards from Naivasha?

11 A. Your Honour, the prison officers were working hand-in-hand with
12 the police officers, and what I hear is that there were -- the locals
13 wanted to demonstrate against them, but they continued to work together
14 with the police officers until on that 27th when we were at the police
15 station. Now we have been taken there by the police, is when I hear
16 people saying that the prison officers were removed from patrolling. So
17 I don't -- I'm not sure on exact date they ceased to patrol with the
18 police officers.

19 Q. Thank you, Witness. Witness, have you ever met the Officer
20 Commanding Police Division of Naivasha?

21 A. Which one? Which officer? Your Honour, can you repeat that
22 question again so that I can understand?

23 Q. Yes. I will ask you whether you have ever met, maybe you know
24 him under his name, Willy Lugusa.

25 A. Your Honour, I was meeting Willy Lugusa even before the clashes.

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1 I used to go to the station if workers had problem or if some were
2 arrested, and we used to meet.

3 Q. Thank you, Witness. Did you ever speak to him about the removal
4 of the prison guards?

5 A. Your Honour, I never spoke to him about the removal of prison
6 guards.

7 Q. Witness, did you never wish to know why the prison guards were
8 removed from Naivasha?

9 A. Your Honour, I will also -- I will wish to know, but because to
10 me I was not aware, I am saying I'm not a police officer, I'm not a
11 government official, so on matters of security, I cannot -- I'm unable --
12 I cannot be able to answer.

13 Q. Witness, I would like to take you back again to your statement
14 before the Waki Commission.

15 MS. LURF: If page number 7173 could be shown. And I will
16 introduce this to the witness.

17 Q. Witness, at Waki you were asked a question and you never had time
18 to finish your entire sentence because you were interrupted by counsel
19 for Mr. Ali, Mr. Monari, and I would like to put the question to you
20 again and see how you would finish the sentence. It is -- yes, it is on
21 the screen, and the question posed to you was:

22 "Let me ask you something else. As a citizen of this country,
23 what can you say about the performance of the police during this period,
24 in Naivasha, what you witnessed, how did they perform according to your
25 expectations? You are very honest feeling about that."

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1 And you answered, and I will read the first part to you and ask
2 how you would have finished your sentence. You said:
3 "I can say the degree of protection that was needed was not
4 100 %. In the morning on Saturday in Karaktar, when one employee was
5 killed there, and on Sunday, there was no police persons in town from 7
6 to around 9. Then it left a lot of questions, My Lord, because
7 already --"

8 Witness, would you remember how you would have finished that
9 sentence had you been given the opportunity?

10 A. Your Honour, that's what -- as I said before, that I cannot
11 remember everything I told the Waki Commission, but this is what I said,
12 that I did not finish this statement -- I thought I finished this
13 statement, and I don't know why it was left hanging.

14 Q. Very well, Witness. Thank you. I would like to take you now to
15 the police station and the conditions you had mentioned there.

16 How were the conditions at the police station?

17 A. Your Honour, the condition at the police station was bad. There
18 was no water, there was no food, there was no shelter. There was only
19 one latrine which was to be shared by all those people.

20 Q. Witness, did you feel that the police received you at the police
21 station and took care of your needs?

22 A. We were received at the police station. There was no provision
23 of food. The only people who came after, around 29th, was the Red Cross
24 people who issued some foodstuffs, but which was also not enough.
25 People, they also issued some utensils because people had nothing, but

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1 many did not get --

2 Q. Thank you, Witness. I will ask another question. Were people at
3 the police station still exposed to violence?

4 A. No, your Honour. They were not exposed to violence, but there
5 was fear, because the fear -- what they wanted is that they wanted how
6 they could reach their home, rural homes in Nyanza and Western and that
7 was the problem that was now at the police station. They wanted
8 transport to take them to their rural home, but at the police station,
9 there was no fear. Nobody was attacked.

10 Q. Witness, I would like to put a specific statement to you again
11 from your statement from the Waki Commission?

12 PRESIDING JUDGE TRENDAFILOVA: I'm sorry. Mr. Otieno, don't you
13 understand the question? Since the Prosecutor's Office is questioning
14 you, you're constantly looking to the right of the Defence, and the Bench
15 is concerned about this. If you do not understand the question as posed
16 by the representative of the Prosecutor, I would ask Ms. Lurf to slow
17 down.

18 THE WITNESS: Thank you, Madam President.

19 MS. LURF:

20 Q. Witness, my question only related to the fear that the displaced
21 persons felt at the police station. Can you provide the Court any
22 examples of the fear that people had then and there?

23 A. Your Honour, at the police station, one fear was that how they
24 will reach their rural homes. Another fear was the fear because they
25 have no food. Another fear is that because there was no shelter, it was

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1 raining, the children. So all these were fears that the people had at
2 the police station. There was no attack that happened at the police
3 station.

4 Q. Witness, if I could put a statement to you.

5 MS. LURF: And I would ask that page 7160 of the Waki Commission
6 be shown. It's at the second half of the page.

7 Q. And you were asked about the police condition -- excuse me, the
8 conditions at the police station, and you answer:

9 "It was pathetic, My Lords, because there was latrine, people
10 were many, and even at nights you could hear a person waking up and start
11 making noise. People could run and trend on each other and fighting each
12 other because somebody could wake up and cry that the Mungiki have
13 arrived at the station, My Lords."

14 I will stop here. Witness, why would somebody expect the Mungiki
15 to attack?

16 A. Your Honour, Mungiki -- the issue of Mungiki was coming up
17 because for everybody, they were talking about Mungiki, and whatever
18 people saw during daytime was making these happenings at night. I
19 remember a (* indiscernible) police officer telling us that, "If you see
20 people making noise, do not run, because people are seeing images."
21 Because there was a bigger problem at -- that's the problem. People were
22 seeing images. People can -- somebody can just start crying, and if
23 somebody start crying, people were just start running, because you don't
24 want to listen and look at what is happening. People will say, "They
25 have arrived, they have arrived," and people will trod on one another.

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1 So that was the fear. The fear was so large on that level that the armed
2 forces tried to tell people that if you see, if you hear somebody making
3 noise, do not run. Confirm what is happening, because many people are
4 being traumatised. That was the problem at that station. And one night
5 that happened. People trodden on one another, children suffered. It
6 was -- because it's a big number and they start running. If you are
7 lying down, then they will just step on you when they are running. So
8 there was a bigger problem. But the police and the army was telling
9 people, "Do not run. We are here in case of when if -- if you hear your
10 colleague making noise, listen to him before you start running and see
11 what's happening."

12 So that -- those were the fears at the police station.

13 Q. Thank you very much, Witness. I would like to turn back to the
14 issue of sexual crimes. Did you hear anything about sexual crimes being
15 committed at the police station?

16 A. Your Honour, I did not hear of any sexual crime committed at the
17 police station, but later when Waki Commission was there, I hear about
18 crimes of sexual offences.

19 Q. Witness, would it have been possible for a woman to report a
20 sexual crime committed against her at the time?

21 A. Your Honour, it would have not been possible.

22 Q. Can you tell the Court why?

23 A. It -- your Honour, the police, there was -- normally we have a
24 desk at the police station for gender-based violence and where people do
25 report, but on that day most of the officers were in the field, and me, I

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1 was there. I talked with Grace Kakai about the situation. The situation
2 was -- because everybody was out trying to help people who were trapped,
3 people who were besieged, people who were in trouble. So it was
4 possible, because as long as they will have wished to report, there was
5 nobody to -- at that particular moment to -- to listen to them properly.

6 Q. Witness -- excuse me. Witness, did that improve after time?

7 A. It improved, and that's why when now Waki Commission was sitting,
8 some of the incidents have been reported to the police, because
9 Waki Commission was in July.

10 Q. Witness, today you were asked when you were displaced whether you
11 ever relocated. Can you repeat your answer for the Court?

12 A. I relocated from Kabati where I used -- I was staying during the
13 post-election violence to Okara (* phon) ward some kilometres from
14 Naivasha town but it is within Naivasha District.

15 Q. Did you at any time after the post-election violence relocate to
16 anywhere else?

17 A. I also -- after post-election violence, after coming from police,
18 I asked for leave. I also went to my rural home in Migori District for
19 one month because coming back.

20 Q. And where do you live now?

21 A. Now I'm living at Okara location. It is within Naivasha. I'm
22 still working in Naivasha. And I normally deal with issues at the
23 (* indiscernible) office within Naivasha town, so I am normally in
24 Naivasha town.

25 Q. And, Witness, can you tell the Court where your family is now?

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1 A. My family is at home in Migori still. They do come see me and go
2 back.

3 Q. Thank you, Witness. I have one final question. In the statement
4 you provided to the Defence team of Mr. Muthaura, you mention --

5 MS. LURF: I would ask the Court Officer to bring up the
6 documents. That is EVD-PT-D12-00105, and on page 0110. At paragraph 25,
7 to be precise. Thank you.

8 Q. You mention that you were surprised that Ambassador Muthaura was
9 charged by the International Criminal Court. I'm sorry, I'll read this
10 part. You say that:

11 "I have never heard that Ambassador Muthaura was involved in any
12 manner whatsoever in the violence that took place in Naivasha. The first
13 time I heard of this allegation was from the International Criminal Court
14 charges. I must say that, like many people, I was utterly surprised by
15 this, because he is generally known as a person who does not involve
16 himself in politics."

17 Do you remember saying this, Witness?

18 PRESIDING JUDGE TRENDAFILOVA: Don't you understand the question?
19 Repeat it.

20 THE WITNESS: (* Overlapping speakers)

21 PRESIDING JUDGE TRENDAFILOVA: Repeat it to --

22 THE WITNESS: Can you repeat it (* indiscernible), your Honour?
23 Thank you.

24 MS. LURF:

25 Q. Yes, Witness. The statement you made --

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1 PRESIDING JUDGE TRENDAFILOVA: Listen to Ms. Lurf. Please
2 concentrate, Witness.

3 THE WITNESS: Thank you.

4 MS. LURF:

5 Q. -- that Mr. Muthaura is not -- or is generally known as a person
6 who does not involve himself in politics. Can you explain that statement
7 further? What do you mean by that?

8 A. Your Honour, what I mean by that, in most cases I have never
9 heard him in politics. I don't know him. I've never met Mr. Muthaura.
10 Those politicians, we normally hear them every time on TV, on radios,
11 talking about politics, and that's as people we know them, but I've never
12 heard much about Muthaura, though in any (* indiscernible) politics. I
13 think that that was what I meant.

14 Q. Witness, can you tell the Court what position Mr. Muthaura
15 currently holds in the government, if you know?

16 A. I know he's -- Mr. Muthaura is permanent secretary to the
17 cabinet.

18 Q. Is that your answer, Witness?

19 A. That's what I know, because I've never met Mr. Muthaura. I just
20 read on papers, yeah.

21 Q. But you would agree that he is a politician; is that right,

22 Mr. --

23 MR. KHAN: Madam --

24 PRESIDING JUDGE TRENDAFILOVA: Witness, you're not to answer this
25 question.

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1 And your time is over. You said that this is your last question.

2 MS. LURF: This was indeed my last question, your Honour. I
3 would also like to take just a moment to clarify. My colleagues had the
4 time to check the transcript, and I was referring to page 123, line --
5 line 10, but I have to admit that it was an error on my part. I had
6 misread the sentence the witness gave, because in totality, he said in
7 the beginning of the sentence that there was no violence and that no one
8 was killed, but the way I read it, I misread it. So my apologies for
9 that.

10 PRESIDING JUDGE TRENDAFILOVA: Thank you very much. Thank you.

11 MS. LURF: Thank you.

12 PRESIDING JUDGE TRENDAFILOVA: Now I see Mr. Anyah.

13 MR. ANYAH: Madam President, your Honours, with leave of the
14 Chamber, I would respectfully make an application to ask a few questions
15 of the witness.

16 PRESIDING JUDGE TRENDAFILOVA: Well, just a moment.

17 (The Trial Chamber confers)

18 PRESIDING JUDGE TRENDAFILOVA: Mr. Anyah, of course the Chamber
19 in order not to lose time wouldn't ask you to thoroughly substantiate
20 your request. Please in 15 minutes, but very much focused on the victims
21 issue.

22 And I would like once again to remind the witness, Mr. Otieno,
23 that the Chamber was quite embarrassed, you all the time looking to this
24 part of the courtroom. Would you be so kind to address the Chamber, and
25 if you are to follow someone, this is the participant who is posing

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1 questions on you.

2 THE WITNESS: Thank you, Madam President.

3 PRESIDING JUDGE TRENDAFILOVA: I asked you, and you proceeded as
4 you used to behave since the very beginning of the questioning, and we're
5 not very much pleased about this.

6 (The Trial Chamber confers)

7 PRESIDING JUDGE TRENDAFILOVA: Well, Judge Tarfusser insists I
8 make the point you are constantly looking to your left regardless of me
9 twice reminding to you to address the Chamber and the Office of the
10 Prosecutor.

11 Mr. Anyah, the floor is over to you.

12 MR. ANYAH: Thank you, Madam President.

13 Questioned by Mr. Anyah:

14 Q. Good evening, Mr. Otieno. My name is Morris Anyah. I represent
15 the victims in this case and I have a few questions for you. If you do
16 not understand any question I ask, can you ask me to repeat myself. Do
17 you follow me?

18 A. Yes, sir.

19 Q. You told us about how you were taken to the police station by
20 police officers, and you said at page 136, lines 20 through 21 of the
21 transcript, that all the IDPs from non-Kikuyu community were either at
22 the police station or at the prison ground. Do you remember telling us
23 that earlier this evening?

24 A. That's true, your Honour.

25 Q. The prison ground that you were referring to, that is the

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1 Government of Kenya prison in Naivasha, true?

2 A. No, your Honour.

3 Q. Do you know the number of persons, IDPs, that were taken to the
4 prison ground?

5 A. I cannot remember the number, exact number of the people who were
6 at prison grounds, but I remember those were at the police station.

7 Q. Very well. We will come to the police station in a minute. Do
8 you know anything about the conditions of those who were taken to the
9 prison ground?

10 A. I don't know the condition at the prison, your Honour.

11 Q. Do you know whether any of those who went to the prison ground
12 were assisted in getting there by the police?

13 A. Those were at the prison ground, I am not aware whether they were
14 assisted I don't know.

15 Q. Now, let's go to the police station. You said to the Court that
16 by the time you left the police station on the 31st or thereabouts of
17 January, 2008, there were approximately 10.000 people at the police
18 station. Yes?

19 A. Yes.

20 Q. This is at page 136, lines 15 through 16 of the transcript. Ten
21 thousand people at the police station. How many of those 10.000 did you
22 speak to?

23 A. Your Honour, about a half of the people who were at the police
24 station were workers. I speak with them.

25 Q. You spoke to about half of the people that were at the police

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1 station. Is that your evidence?

2 A. That's what I say, your Honour.

3 Q. And the other half that you did not speak to, do you know whether
4 they were assisted to the police station by the police, whether the
5 police were the ones who brought them to the station?

6 A. Your Honour, most of the people I spoke to told me that they had
7 been helped to reach the police station by the police.

8 Q. Yes, we understand that. I am not asking you about those that
9 you spoke to. Do you know whether the police were the ones who brought
10 the group that you did not speak to the police station?

11 A. I don't know.

12 Q. You mentioned at some point in time that there was a proposal to
13 take some of the IDPs to a Catholic church, and your words were:

14 "The decision that was not received well by our people. We said
15 you want them to go to the church to be burnt, because people were burnt
16 in Eldoret."

17 Was there an incident in Eldoret before the time you went to the
18 police station in which Kikuyus were burnt in a church?

19 A. Your Honours, there was an incident in Eldoret where Kikuyus were
20 burnt in a church.

21 Q. And so when the Luos at the police station in Naivasha were
22 offered the sanctuary of a church and they refused, in reference to what
23 incident were they referring when they said they did not want to go to
24 the church?

25 A. Your Honour, that's what they told us.

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1 Q. What did they tell you?

2 A. They told us that they cannot go to the church because they will
3 be burnt in the church as people had been burnt in Eldoret, because they
4 had heard the story of Eldoret, and I think they were thinking of the
5 same when they go to the church. That is what they told us. They said
6 they would remain at the police station until a vehicle comes to take
7 them home.

8 Q. You told us you don't know what happened at the prison. You've
9 told us some of what you know that happened at the police station.

10 A. Yes.

11 Q. How about the IDP camps? You mentioned two IDP camps. The first
12 one you said was for Kikuyus. What is the name of that IDP camp?

13 A. Central IDP camp.

14 Q. Now, the Kikuyu IDPs you said arrived somewhere within the first
15 two weeks the January. At least that is when they began to arrive. And
16 you gave us a figure of about 15.000. Approximately when during the
17 early part of 2008 was the Central IDP camp opened?

18 A. Both camps were opened approximately about mid of February, about
19 mid of February, because when the clashes -- when the clashes broke out
20 in Naivasha, still even the Kikuyus who have come from other regions have
21 not been given -- there was no IDP camp constructed. They were -- just
22 stayed within Naivasha town. So most of -- the two IDP camps were
23 constructed around mid of February.

24 Q. The second one is the Kedong IDP camp.

25 A. Yes, your Honour.

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1 Q. Where did the Kikuyu IDPs who arrived or started arriving in the
2 middle of January stay or were kept until the Central IDP camp was
3 opened? Where were they kept?

4 A. Some were at the KANU, local KANU office there, outside there.
5 Some were taken by churches, and also others were integrated to some of
6 their relatives, because others were coming and seeing here their
7 relative. So -- within Naivasha. So that's where they were before the
8 IDP camp was constructed.

9 Q. You referred to KANU. What does KANU refer to?

10 A. The -- KANU is a political party, and they had an office in
11 Naivasha, which is at the centre of the town. So it was easy for people
12 to reach there when they were coming from other areas, because some of
13 them proceeded with their journey to Central Province. Others were going
14 to Nairobi, others were remaining there in Naivasha.

15 Q. With respect to the Kedong IDP camp, did you ever visit that
16 camp?

17 A. Kedong IDP camps I was visiting regularly, your Honour. And at
18 Kedong -- and I was asking how they were going on. I was getting
19 information that after every fortnight the Red Cross provide them with 6
20 kilograms of cereal, or maize flour, 300 grams of cooking fat, 1 kg of
21 porridge flour, and 1.2 of yellow peas, beans. Those information they
22 are telling me because they -- they are workers. They are telling me
23 they are also being provided with utensils. They were also telling me
24 they were also given blankets, and they were given mosquito nets. This
25 information I was more conversant with Kedong, because that -- most of

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1 them were workers, and they normally tell me when there's a problem.
2 There was also running water, the police were there, and the army was
3 manning the whole during day and night. So most of the information from
4 Kedong I was getting.

5 Q. Mr. --

6 A. (* Overlapping speakers)

7 Q. I apologise for interrupting. I have limited time, and I'm
8 grateful for your response, but a few questions flowing from your
9 response. And please remember to look at the Judges, please, and -- yes,
10 just observe the admonition of the Bench.

11 A few questions. The provisions provided to the IDPs at Kedong
12 came from the Red Cross; correct?

13 A. Your Honour, that's correct.

14 Q. Not from the government of Kenya?

15 A. They were telling me most of the provisions were coming from
16 Red Cross.

17 Q. How many persons were housed at that IDP camp?

18 A. I cannot remember exact number, your Honour.

19 Q. Were they in the hundreds or in the thousands?

20 A. They were in the thousands.

21 Q. And approximately what percentage of those did you speak to?

22 A. About -- I was speaking to about 60 per cent of them.

23 Q. Sixty per cent.

24 A. Yeah.

25 Q. Now, a couple of additional questions. You mentioned previously

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1 that the attacks were in seven estates in Naivasha, and you said,
2 referring to the estates, it was a very large area. Now, save for your
3 own estate and where you were, you do not know what transpired in the
4 remaining estates where attacks occurred, do you?

5 A. Your Honour, I do not know what happens in other estate, but we
6 all met at the police station is when every -- each and every individual
7 was telling their story when we were at the police, but I don't know what
8 happened right at the estates there.

9 Q. You said at page 141, lines 5 through 8:

10 "The policemen were also few. Everybody wanted help. The number
11 was not enough."

12 When you made that remark, were you referring to the number of
13 police in Naivasha town, or the number of police at the Naivasha station,
14 or both?

15 A. Your Honour, I was referring to the number of police at Naivasha
16 station.

17 MR. ANYAH: Madam President, I think my time is up. I'm
18 grateful.

19 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Mr. Anyah.

20 Now the floor is over to you, Mr. Monari, or to -- to the
21 distribution of the tasks amongst all of you.

22 MR. MONARI: Mr. Otachi, will --

23 PRESIDING JUDGE TRENDAFILOVA: Mr. Otachi, please, you have the
24 final --

25 MR. MONARI: Yeah.

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1 MR. OTACHI: Thank you, your Honour.

2 PRESIDING JUDGE TRENDAFILOVA: -- questioning of the witness.

3 MR. OTACHI: I have a question that I wanted to ask, but I
4 thought I should -- I need to get direction from the Chamber,
5 particularly in the context of -- it was about leading questions and so
6 on. The Prosecutor lead onto the record a portion of the Waki report,
7 question and answer, and got an answer from the witness but left it at
8 some point, and what I propose to do for the completeness of the record
9 is to read the rest of the portion and then ask my question, if that is
10 okay with the Chamber.

11 PRESIDING JUDGE TRENDAFILOVA: It is fine. Proceed.

12 MR. OTACHI: Thank you.

13 Further Questioned by Mr. Otachi:

14 Q. Mr. Otieno, when counsel from the Prosecution side was asking you
15 a question, she read a portion of what is reflected as having been
16 question and answer before Waki. I want to read through that portion and
17 a bit more before I ask you a question.

18 Mr. Monari asked you --

19 MR. OTACHI: Now, your Honours, this is on the same document, at
20 7173. The same document that the Prosecutor was using. I'll start from
21 the beginning so that we have clarity.

22 "MR. MONARI: Okay. Let me ask you something else. As a citizen
23 of this country, what can you say about the performance of the police
24 during this period in Naivasha, what you witnessed? How did they perform
25 according to ... expectations? You are very honest -- you are very

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1 honest feeling about that."

2 Then you answer as recorded:

3 "I can say the degree of protection that was needed was not
4 100 %. In the morning on Saturday in Karaktar when one employee was
5 killed there and on Sunday, there was no police person in town from
6 7 to 9 a.m. Then it left a lot of questions, My Lord, because
7 already --"

8 That was left hanging, and then Mr. Monari said:

9 "You have wanted to see more police persons before the violence
10 erupted?"

11 And your answer:

12 "It is true, My Lord, for security purposes, My Lord.

13 Mr. Monari:

14 "Okay. After the violence erupted, what is your feeling about
15 the police and their conduct in terms of getting people to the police
16 station and the IDP camps?

17 Answer:

18 "They did a good job, My Lord, to get people to the police
19 station, because it was believed that you could not survive when you run
20 to the police station. It was not a matter of staying in the house,
21 because you cannot stay in the house. So those who helped people to
22 reach the police station, those who helped them to go to the IDP camp,
23 they did a got job, My Lord."

24 Now --

25 PRESIDING JUDGE TRENDAFILOVA: What is your question, Mr. Otachi?

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1 MR. OTACHI: Yes. That's what I'm coming to, your Honour.

2 Q. Now, my question is this: Mr. Otieno, do you remember if that
3 corresponds to the discussion you had before Waki?

4 A. That's what I told the Waki Commission.

5 Q. I did not get the answer.

6 PRESIDING JUDGE TRENDAFILOVA: That is what Mr. Otieno told the
7 Waki Commission.

8 MR. OTACHI: Thank you.

9 Q. Now, you were asked some questions about the prison guards doing
10 patrols in Naivasha at some point in time. Do you recall if these
11 patrols were in the day, in the night, or day and night?

12 A. Your Honour, the patrols were in the night.

13 Q. You were asked some questions about your knowledge or
14 understanding of Mungiki. Witness, for clarity, what do you say is your
15 understanding of Mungiki?

16 A. Your Honour, my understanding of Mungiki is that Mungiki are
17 young Kikuyu youths, most of them jobless.

18 Q. Do you know if -- from your understanding again, if women are
19 members of Mungiki?

20 A. No, your Honour.

21 Q. What about old men?

22 A. I don't -- I don't know, your Honours.

23 MR. OTACHI: Thank you, your Honours. Those are all of my
24 questions, and thank you for your patience.

25 PRESIDING JUDGE TRENDAFILOVA: Thank you very much, Mr. Otachi.

1 This brings us to the end of the questioning of the first witness
2 of the Defence team of Mr. Ali.

3 Mr. Otieno, we thank you for coming all this way to testify
4 before Pre-Trial Chamber II and to bring your recollections of the
5 post-election violence so that the Chamber could take its decision
6 whether to confirm or not the charges. I would ask the Court Usher to
7 escort you out of the courtroom, to usher out of the courtroom, and we
8 wish you a safe back -- a safe trip back home.

9 THE WITNESS: Thank you, madam.

10 (The witness withdrew)

11 PRESIDING JUDGE TRENDAFILOVA: If there are no other issues to --
12 to be raised by any of the parties, we shall proceed tomorrow at 2.30
13 with the second witness of the Defence team of Mr. Ali.

14 We adjourn the hearing for tomorrow. I wish everyone a good
15 evening.

16 COURT OFFICER: All rise.

17 The hearing ends at 7.53 p.m.

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