

1 International Criminal Court
2 Appeals Chamber
3 Situation: Central African Republic II
4 In the case of The Prosecutor v. Maxime Jeoffroy Eli Mokom
5 Gawaka - ICC-01/14-01/22
6 Presiding Judge Solomy Balungi Bossa
7 Appeals Judgment - Courtroom 3
8 Tuesday, 19 July 2022
9 (The hearing starts in open session at 3.31 p.m.)
10 THE COURT USHER: [15:31:22] All rise.
11 The International Criminal Court is now in session.
12 Please be seated.
13 PRESIDING JUDGE BOSSA: [15:31:59] This is the summary of the judgment of the
14 Appeals Chamber in the case of The Prosecutor versus Maxime Jeoffroy Eli Mokom
15 Gawaka, and it is read by me as the Presiding Judge.
16 My name is Solomy Balungi Bossa. Good afternoon.
17 Would the court officer please call the case, please.
18 THE COURT OFFICER: [15:32:28] Good afternoon, Madam President.
19 This is the situation in the Central African Republic II, in the case of The Prosecutor
20 versus Maxime Jeoffroy Eli Mokom Gawaka, case reference ICC-01/14-01/22.
21 And for the record, we are in open session.
22 PRESIDING JUDGE BOSSA: [15:32:48] I've already introduced myself. I'm
23 Presiding Judge in this appeal arising from the case of The Prosecutor versus Maxime
24 Jeoffroy Eli Mokom Gawaka.
25 My fellow judges in this appeal are Judge Piotr Hofmański, Judge Luz del Carmen

1 Ibáñez Carranza, Judge Marc Perrin de Brichambaut and Judge Gocha Lordkipanidze.

2 May I ask the parties to introduce themselves for the record, please, starting with the
3 Defence.

4 MR TOWNSEND: [15:33:25] Good afternoon, your Honour. Good afternoon to
5 everyone in and around the courtroom. Gregory Townsend, duty counsel,
6 appearing for Mr Mokom. I'm joined by Julien Maton, legal assistant.

7 Mr Mokom, as you'll see, is present in court following through interpretation.

8 I'd like to thank the Chamber for fixing the hearing today, including staff, Registry,
9 court management, including the Chamber staff, Messrs Zehnder and Abato.

10 So thank you so much.

11 PRESIDING JUDGE BOSSA: [15:33:52] Thank you, counsel.

12 The Office of the Prosecutor, please.

13 MS BRADY: [15:33:59] Good afternoon. Good afternoon, your Honour.

14 My name is Helen Brady. I'm the senior appeals counsel for the Prosecution. And

15 I'm here today with Mr Kweku Vanderpuye, the STL, senior trial lawyer in the case,

16 as well as Ms Priya Narayanan, appeals counsel. Thank you very much.

17 PRESIDING JUDGE BOSSA: [15:34:17] Thank you, counsel.

18 For the record, I note that Mr Mokom is present in the courtroom and is represented
19 by duty counsel, as introduced.

20 Today, the Appeals Chamber will deliver its judgment in the appeal of Mr Mokom

21 against the 25 March 2022 decision of Pre-Trial Chamber II entitled "Order to the

22 Registry concerning the appointment of Mr Nicholas Kaufman as counsel for Mr
23 Maxime Jeoffroy Eli Mokom Gawaka".

24 This is a non-authoritative summary of the Appeals Chamber's written judgment in

25 the appeal. The authoritative text is the written judgment, which will be notified

1 after this hearing.

2 I will first briefly outline the procedural history of this appeal before turning to the
3 merits.

4 On 16 March 2022, Mr Mokom arrived at the Court's detention centre in The Hague
5 under a warrant of arrest. Pursuant to Mr Mokom's request, the Registry appointed
6 Mr Kaufman as counsel for him.

7 On 17 March 2022, the Pre-Trial Chamber invited observations from the parties and
8 the Registry on whether a conflict of interest would arise from Mr Kaufman's
9 appointment in light of his role in other proceedings before the Court.

10 On 25 March 2022, the Pre-Trial Chamber ordered the Registry to revoke its
11 appointment of Mr Kaufman as counsel for Mr Mokom, finding that Mr Kaufman's
12 representation of other clients in substantially related investigative proceedings
13 constituted a conflict of interest under articles 12 and 16 of the Code of Professional
14 Conduct for counsel.

15 I will refer to this as the impugned decision.

16 On 8 April 2022, Mr Mokom, assisted by duty counsel, submitted an application to
17 the Pre-Trial Chamber seeking leave to appeal the impugned decision.

18 Having been granted leave to appeal, the Defence challenges the Pre-Trial Chamber's
19 conclusions that grounds existed for removing Mr Mokom -- Mr Kaufman as counsel
20 in these proceedings due to his representation of two clients, other than Mr Mokom,
21 in relation to The Situation in the Central African Republic II and The Prosecutor v.
22 Alfred Yekatom and Patrice-Edouard Ngaissona.

23 In support of this challenge, the Defence raises arguments against the Pre-Trial...

24 One... Against, one, the Pre-Trial Chamber's determination that the interests of
25 Mr Mokom necessarily diverged from those of Mr Kaufman's two other clients to

1 such a degree that Mr Kaufman was unable to provide effective representation; and
2 two, the Pre-Trial Chamber's decision to deny Mr Kaufman the opportunity to take
3 sufficient steps to cure the purported conflict of interest.

4 The Prosecution does not take a position on the factual issues raised in the Defence
5 appeal.

6 Turning to the merits of the appeal, the Appeals Chamber recalls in today's judgment
7 that Article 67(1)(d) of the Statute guarantees that, in the determination of any charge,
8 the accused shall be entitled to conduct his or her defence through legal assistance of
9 the accused's choosing.

10 Nevertheless, one of the justifications that may compel a chamber to intervene in the
11 appointment of a counsel is if that counsel has a conflict of interest.

12 A chamber is required to carefully balance a person's right to appoint counsel of his
13 or her choosing with its duty to ensure fairness of the proceedings and the attendant
14 discretion to intervene with the appointment or removal of counsel.

15 In particular, if a chamber intervenes with a person's choice of counsel, it must clearly
16 set out its reasons for doing so and explain why it is in the interests of justice to
17 remove counsel. This is especially so given that, in addition to curtailing an
18 accused's right to choose counsel, removing counsel of choice may constitute a
19 significant interruption to the proceedings.

20 Turning to the present case, the Appeals Chamber notes that the impugned decision
21 came after several days of correspondence involving the Registry and the parties
22 regarding the potential conflict of interest in question.

23 Following this correspondence, the Pre-Trial Chamber determined that the conflict of
24 interest was one that could not be cured by the written consent of the clients involved,
25 nor by the withdrawal of Mr Kaufman from his representation of any or all of those

1 clients.

2 The majority of the Appeals Chamber, Judge Ibáñez and Judge Bossa dissenting, finds
3 that, due to the Pre-Trial Chamber's intimate familiarity with the underlying
4 circumstances, that Chamber is best placed to assess the consequences of
5 Mr Kaufman's continued representation of Mr Mokom and the likelihood that one or
6 more of Mr Kaufman's other clients may become materially involved in this or a
7 substantially related case.

8 Moreover, the Appeals Chamber observes that Mr Kaufman himself should have
9 brought the matter to light even before it was raised by the Pre-Trial Chamber. The
10 Appeals Chamber considers that such a course of action would have aligned with
11 counsel's ethical obligations under articles 12 and 16 of the Code of Professional
12 Conduct.

13 Thus, the majority of the Appeals Chamber, Judge Ibáñez and Judge Bossa dissenting,
14 rejects the Defence's arguments that the Pre-Trial Chamber erred in finding that
15 Mr Kaufman was unable to provide effective representation and that it erred in failing
16 to allow reasonable time to cure the conflict of interest.

17 Moreover, the Appeals Chamber notes that even if, as the Defence argues, the
18 proceedings in which the two other clients were involved are not substantially related
19 to the present proceedings, this does not necessarily preclude the existence of a
20 conflict of interest.

21 Nevertheless, the Defence also submits that the Pre-Trial Chamber erred in failing to
22 provide a sufficiently reasoned opinion.

23 The majority of the Appeals Chamber agrees, Judge Ibáñez and Judge Bossa
24 dissenting, that the Pre-Trial Chamber could have been more precise in explaining
25 why Mr Kaufman's prior representation of the two clients would necessarily be

1 fundamentally incompatible with his present representation of Mr Mokom, given the
2 uncertainty of whether those other clients will testify in these proceedings.

3 The Pre-Trial Chamber also could have made clearer its reasons for concluding that
4 Mr Kaufman's withdrawal from representation of those clients and the procurement
5 of the consent of those clients would have no effect on its conclusion that the only
6 possible remedy is his removal as counsel for Mr Mokom.

7 Indeed, the Appeals Chamber finds that the reasons underlying the determination of
8 the Pre-Trial Chamber are not fully set out in the impugned decision. Accordingly,
9 the majority of the Appeals Chamber, Judge Ibáñez and Judge Bossa dissenting,
10 considers that remanding the matter to the Pre-Trial Chamber is the appropriate
11 remedy in the present circumstances.

12 The impugned decision is reversed and the issue is remanded to the Pre-Trial
13 Chamber to provide further reasons for its decision as directed in today's judgment.
14 Judge Ibáñez and Judge Bossa agree with the majority that the impugned decision
15 should be reversed, but they disagree as to the appropriate relief.

16 In our partially dissenting opinion accompanying today's judgment, we explain that
17 the deference usually assigned to decisions of a chamber appointing or removing
18 counsel is not determinative here. Indeed, a chamber must not displace the choice of
19 counsel - protected internationally in human rights law - absent compelling reasons.

20 In our view, the reasons given in the impugned decision - thus sparse - still disclose
21 an error in the weighing exercise conducted by the Pre-Trial Chamber.

22 Judge Ibáñez and I consider that the potential conflict of interest described in the
23 impugned decision is merely speculative. We would find that the Pre-Trial
24 Chamber erred in concluding that the risk of such a conflict of interest was so great
25 that immediate removal of Mr Mokom's counsel was justified.

- 1 This brings us to the end of today's session.
- 2 I would like to thank the court reporters, interpreters, security and other Registry staff
- 3 for their valuable assistance today in holding this hearing.
- 4 I would also like to thank counsel, my colleagues, the judges, and the team for their
- 5 assistance with the judgment.
- 6 The hearing is adjourned.
- 7 THE COURT USHER: [15:45:24] All rise.
- 8 (The hearing ends in open session at 3.45 p.m.)