

1 International Criminal Court

2 Appeals Chamber - Courtroom 1

3 Judge Daniel David Ntanda Nsereko

4 *Situation in the Democratic Republic of Congo -

5 ICC-01/04-01/07

6 In the case of The Prosecutor v. Germain Katanga and

7 Mathieu Ngudjolo Chui

8 Monday, 12 July 2010

9 (The hearing starts at 10.00 a.m.)

10 (Open session)

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

13 JUDGE NSEREKO: Good morning. Court officer, please call
14 the case.

15 THE COURT OFFICER: (Interpretation) Thank you,
16 Mr President. Case: Germain Katanga, number ICC-01/04-01/07.

17 JUDGE NSEREKO: May I ask the parties and participants to
18 introduce themselves for the record. Defence?

19 MR O'SHEA: Yes. Good morning, Mr President. I am Andreas
20 O'Shea; I am associate counsel for Mr Katanga, and I will be representing
21 him today. Thank you.

22 JUDGE NSEREKO: Thank you. Office of the Prosecutor?

23 MR GUARIGLIA: Good morning, your Honour. For the
24 Prosecution, Fabricio Guariglia, senior appeals counsel, and Mr
25 Reinhold Gallmetzer appearing with me, appeals counsel.

Case No.: ICC-01/04-01/07

1 JUDGE NSEREKO: Thank you. Today the Appeals Chamber is
2 delivering its judgment in the appeal of Mr Germain Katanga against
3 the decision of Trial Chamber II entitled "Decision on the Motion of
4 the Defence for Germain Katanga for a Declaration on Unlawful Detention
5 and Stay of Proceedings."

6 The Appeals Chamber decides by majority (Judge Erkki Kourula
7 and Judge Ekaterina Trendafilova dissenting) as follows:

8 The decision of Trial Chamber II of 20 November 2009
9 dismissing Mr Katanga's motion for a declaration of unlawful detention
10 and a stay of proceedings is confirmed. The appeal is dismissed.

11 I shall now summarise the reasons for the Appeals Chamber's
12 judgment. Please note that the actual judgment which will be filed
13 and notified to the parties and participants shortly is the
14 authoritative version.

15 Now, the relevant procedural history. On 30 June 2009,
16 Mr Katanga filed a motion requesting a declaration for unlawful
17 detention and a stay of proceedings against him for his alleged unlawful
18 arrest and detention in the Democratic Republic of the Congo prior
19 to his surrender to the Court. This is what we call the "Defence Motion"
20 hereafter.

21 Mr Katanga also stated that the declaration of unlawful
22 arrest and detention would serve as the basis of a request for
23 compensation and mitigation of sentence in the case of conviction at
24 the appropriate stage.

25 On 20 November 2009, Trial Chamber II dismissed the Defence

1 Motion without considering its merits because the Trial Chamber
2 considered that the motion was filed too late. Mr Katanga sought leave
3 to appeal the Trial Chamber's decision on 30 November 2009, which was
4 granted on 11 February 2010. Mr Katanga filed his document in support
5 of the appeal to which the Prosecutor filed a response.

6 Now, arguments of the parties.

7 As his first ground of appeal, Mr Katanga argues that in
8 the absence of an express time limit in the Statute, Rules of Procedure
9 and Evidence and the Regulations of the Court, the Trial Chamber erred
10 in law when it dismissed the Defence Motion as too late without
11 considering its merits. For his second ground of appeal, Mr Katanga
12 submits that the Trial Chamber, in finding that the Defence Motion
13 was filed too late, relied on irrelevant factors and failed to consider
14 relevant factors. The Prosecutor contends that the Trial Chamber did
15 not commit any error of law, fact or procedure when it decided that
16 the Defence Motion was filed too late.

17 Given the link between the two grounds of appeal advanced
18 by Mr Katanga, the Appeals Chamber will address them together.

19 The question arising in this appeal is whether, in the absence
20 of an express time limit in the Court's legal instruments, the Trial
21 Chamber erred when it dismissed the Defence Motion as having been filed
22 too late and without consideration of the merits. I shall now address
23 the principal arguments of Mr Katanga on appeal.

24 The Appeals Chamber notes that the Court's legal instruments
25 don't expressly regulate the timing of motions seeking a declaration

1 of a stay of proceedings on the basis of alleged pre-surrender arrest
2 and detention. As held previously by this Chamber, such motions are
3 of a sui generis character, and are thus not governed by the legal
4 instruments of the Court. Consequently, the Appeals Chamber is of
5 the view that under Article 64(2) of the Statute, the Trial Chamber
6 has the discretion to regulate such motions and to rule on their
7 timeliness.

8 In the Impugned Decision, the Trial Chamber held that motions
9 challenging pre-surrender arrest and detention must be brought before
10 the Pre-Trial Chamber. However, the Trial Chamber recognised the need
11 for flexibility in the application of this principle and went on to
12 consider the specific facts and circumstances of the case.

13 (Microphone not activated)

14 We apologise for problems with the technology.

15 I repeat what I stated, that the Appeals Chamber agrees with
16 the approach taken by the Trial Chamber in relation to the timing of
17 motions seeking a stay of proceedings for alleged unlawful
18 pre-surrender arrest and detention. This approach is in keeping with
19 considerations of efficiency and judicial economy within the procedural
20 framework of the Court. One of the aims of the confirmation process
21 before the Pre-Trial Chamber is to filter out cases that should not
22 go to trial.

23 Moreover, the Pre-Trial Chamber is primarily responsible
24 for the protection of the rights of suspects during the investigation
25 stage of the proceedings. For these reasons, it is reasonable to

1 require, as a general rule, that motions such as the Defence Motion
2 should be brought before the Pre-Trial Chamber.

3 The Appeals Chamber observes that the Court's legal
4 instruments underscore the need for diligence and expeditiousness in
5 the proceedings. Thus, these instruments impose a duty on the Chambers
6 of the Court as well as on the parties and participants who appear
7 before it to act expeditiously.

8 The Appeals Chamber further points out that the complex
9 nature of the cases adjudicated by the Court calls for the efficient
10 management of cases at the outset to avoid undue delays. It is in
11 the overall interest of the proper administration of justice that cases
12 are managed expeditiously.

13 Mr Katanga submits that the Trial Chamber, in opining that
14 the Defence Motion should, as a general rule, be filed before the
15 Pre-Trial Chamber applied a time limit retroactively to the motion.
16 The Appeals Chamber, however, is not persuaded by this argument. The
17 Appeals Chamber notes that the Trial Chamber did not reject the Defence
18 Motion because it had not been filed before the Pre-Trial Chamber,
19 but because of its assessment of the circumstances obtaining at the
20 trial phase.

21 The Appeals Chamber now turns to the Trial Chamber's analysis
22 of the facts and circumstances at the trial phase of the proceedings
23 so as to determine whether the Trial Chamber committed any error in
24 its conclusions.

25 The Trial Chamber found that the Defence Motion was filed

1 too late, having been filed seven months after the Trial Chamber's
2 invitation to the parties to submit any relevant issues for which they
3 sought a ruling of the Chamber, and despite the other opportunities
4 subsequently offered to Mr Katanga to do so.

5 Article 64(2) of the Statute mandates the Trial Chamber to
6 conduct the trial in a fair and expeditious manner, giving full respect
7 to the rights of the accused and the protection of victims and witnesses.
8 Full respect for the rights of the accused, however, does not mean
9 that the Trial Chamber may not control the manner in which an accused
10 person acts in the proceedings, particularly where such conduct might
11 cause undue delay.

12 In the view of the Appeals Chamber, a party to proceedings
13 who claims to have an enforceable right, must exercise due diligence
14 in asserting that right. In this respect, the Appeals Chamber agrees
15 with the Trial Chamber's determination that the parties must act "in
16 a timely manner" or within reasonable time. What is reasonable time
17 depends on the -- turns on the context and the circumstances of each
18 case.

19 The question is whether the Trial Chamber's conclusion that
20 Mr Katanga had not acted in a timely manner was justified or whether
21 it infringed his right to a fair hearing under Article 67(1) of the
22 Statute in a breach of its duty under Article 64(2).

23 Mr Katanga contends that the Trial Chamber violated the
24 principle of legality because he had no notice of a time limit to file
25 the Defence Motion during the trial phase. The Appeals Chamber

1 emphasises that the Trial Chamber did not apply a time limit but, rather,
2 determined whether Mr Katanga filed the Defence Motion in a timely
3 manner. The question then is whether Mr Katanga was adequately put
4 on notice that he should have raised the issue of his alleged unlawful
5 pre-surrender arrest and detention earlier.

6 The Appeals Chamber notes that in an Order issued on 13
7 November 2008, the Trial Chamber invited the parties to answer specified
8 questions and to highlight in their written responses any other relevant
9 issues and observations for which they sought a ruling from the Trial
10 Chamber. These issues were to be further discussed at status
11 conferences scheduled for 27 and 28 November 2008.

12 The Trial Chamber sought to resolve all pending issues before
13 the commencement of the hearing of the substantive case. The record
14 of the case indicates that Mr Katanga understood this to be the case.
15 At the status conference of 28 November 2008, he notified the Trial
16 Chamber of his intention to challenge the admissibility of the case,
17 but did not inform the Trial Chamber of the issue of the unlawfulness
18 of his pre-surrender arrest and detention, a matter that he had
19 consistently raised before the Pre-Trial Chamber.

20 The Appeals Chamber finds that the Order of 13 November 2008
21 adequately put Mr Katanga on notice that he had to raise the issue
22 of his alleged unlawful pre-surrender arrest and detention in his
23 written response to the Trial Chamber's Order or at the subsequent
24 status conference.

25 Mr Katanga further submits that the Trial Chamber's decision

1 not to consider the merits of the Defence Motion was disproportionate
2 to the fundamental nature of the issues raised in that motion. The
3 Appeals Chamber, however, finds that the Trial Chamber properly
4 balanced Mr Katanga's right to a fair trial with the need for
5 expeditiousness in this case.

6 The Appeals Chamber takes the view that in issuing the Order
7 of 13 November 2008, the Trial Chamber was discharging its duty under
8 Article 64(2) of the Statute to respect Mr Katanga's rights, in the
9 sense of giving him an opportunity to raise, *inter alia*, the issues
10 of his alleged unlawful pre-surrender arrest and detention. At the
11 same time, the Trial Chamber sought to ensure that the trial proceeded
12 expeditiously.

13 Mr Katanga further argues that the Impugned Decision was
14 disproportionate because it failed to consider that he would be seeking
15 a request for compensation and mitigation of sentence at the appropriate
16 time. The Appeals Chamber agrees with the Prosecution that since the
17 Trial Chamber did not consider the merits of the Defence Motion, the
18 request for remedies was moot.

19 Mr Katanga asserts that the Trial Chamber should not have
20 considered the reviews of his detention at the Court and the status
21 conference held on 3 February 2009 in its assessment of the facts of
22 this case. In relation to reviews, Mr Katanga argues that he was under
23 no obligation to raise the issue of the lawfulness of his pre-surrender
24 arrest and detention, since the reviews had a different purpose.

25 The Appeals Chamber notes that Mr Katanga argued in the

1 Defence Motion that "there has been no clean break from the initial
2 and continuing illegality of the detention." Given this argument,
3 the Appeals Chamber finds it reasonable that the Trial Chamber
4 considered the detention reviews as a relevant factor in its assessment
5 of the case.

6 Similarly, the Trial Chamber's consideration of the status
7 conference held on 3 February 2009 as a relevant factor was also
8 reasonable in the circumstances. This status conference was meant
9 to address issues still outstanding and set a date for trial. As such,
10 the Trial Chamber gave the parties the opportunity to raise any issues
11 that they needed resolved before the hearing of the case. The Appeals
12 Chamber, therefore, sees no error in the Trial Chamber's reliance on
13 this factor as relevant to its determination of the issue.

14 Mr Katanga asserts that the Democratic Republic of the
15 Congo's statement on 1 June 2009 that it had not carried out any
16 investigations against Mr Katanga prompted the filing of the Defence
17 Motion. In his response, the Prosecutor contends that up until March
18 2008, he had disclosed to Mr Katanga all the relevant information on
19 the proceedings against him in the Democratic Republic of the Congo.

20 The Trial Chamber found that the information supporting the
21 Defence Motion was largely based on information available to Mr Katanga
22 at the pre-trial phase and that he received the information he had
23 requested from the Democratic Republic of the Congo on 28 August 2008.

24 The Appeals Chamber discerns no error in the Trial Chamber's
25 factual findings. The Appeals Chamber observes that the Document in

1 Support of the Appeal has not substantiated how the information received
2 on 1 June 2009 from the Democratic Republic of the Congo was new to
3 Mr Katanga or how, prior to that hearing, he was unable to file the
4 Defence Motion at an earlier stage. In this respect, the Appeals
5 Chamber defers to the Trial Chamber's findings of fact on this issue.

6 And what about Defence strategy? Mr Katanga argues that
7 the Trial Chamber did not give sufficient weight to the discretion
8 that a party should enjoy as to when to file a motion. The Appeals
9 Chamber disagrees with this argument and finds that the Trial Chamber
10 took this factor into account, but concluded that it was outweighed
11 by other relevant considerations.

12 In the Appeal Chamber's view, while a party has a discretion
13 to organise and conduct his or her case in a manner that he or she
14 deems appropriate, that discretion may be circumscribed, bearing in
15 mind the Trial Chamber's duty to regulate the proceedings in a fair
16 and expeditious manner. The Appeals Chamber notes that having failed
17 to inform the Trial Chamber of a potential motion for a stay of
18 proceedings when given the opportunity to do so, Mr Katanga, for the
19 sake of his strategy, took the risk that the Trial Chamber may later
20 reject his motion for a stay of proceedings based on his alleged unlawful
21 arrest and detention in the Democratic Republic of the Congo.

22 Mr Katanga further argues that the Trial Chamber was wrong
23 to have considered as relevant Mr Ngudjolo Chui's right to be tried
24 expeditiously. He submits that his rights must be respected regardless
25 of whether he was in a joint or separate trial.

1 The Appeals Chamber observes that the reference to
2 Mr Ngudjolo Chui's rights would have been improper had this factor
3 been considered to the detriment of Mr Katanga's rights. The Trial
4 Chamber's analysis of this case, however, indicates that the Defence
5 Motion was rejected on the basis of Mr Katanga's failure to avail himself
6 of opportunities afforded to him to raise the issue of the lawfulness
7 of his pre-surrender detention and not because of Mr Ngudjolo Chui's
8 rights. Thus, the Trial Chamber did not err in respect of this factor.

9 As to the appropriate relief, on an appeal pursuant to Article
10 82(2)(d) of the Statute, the Appeals Chamber may confirm, reverse or
11 amend the decision appealed. In the present case, the Appeals Chamber
12 has not identified any error in the Impugned Decision. It is, therefore,
13 appropriate to confirm that decision and to dismiss the appeal.

14 This concludes my summary of the judgment of the Appeals
15 Chamber. I now turn to the summary of the dissenting opinion of Judge
16 Erkki Kourula and Judge Ekaterina Trendafilova. Please note that the
17 actual dissenting opinion is the authoritative version of that opinion.

18 The dissent considers that the Trial Chamber erred when it
19 ruled that the Defence Motion was inadmissible for having been filed
20 at too advanced a stage in the proceedings. In reaching this conclusion,
21 the dissent finds that the Trial Chamber erred, number 1, in
22 establishing for the first time in the impugned decision requirements
23 applicable to the timing of the filing of the Defence Motion, including
24 a requirement that such motions must be filed at the pre-trial stage;
25 2, in applying the requirements in the same decision retroactively

1 to the Defence Motion to the detriment of Mr Katanga; and 3, in the
2 exercise of its discretion, by failing to properly balance the factors
3 embodied in Article 64(2) of the Statute by placing too much emphasis
4 on the requirement of expeditiousness at the expense of the rights
5 of Mr Katanga.

6 The dissent finds that Mr Katanga was ultimately prejudiced
7 by the dismissal of his motion. Accordingly, Judge Erkki Kourula and
8 Judge Ekaterina Trendafilova find that the Impugned Decision should
9 be reversed and remitted to the Trial Chamber for a consideration on
10 the merits.

11 The full text of the dissenting opinion will be filed shortly,
12 after the filing of the Appeals Chamber's majority judgment.

13 This concludes the hearing. Thank you. And this session
14 is closed.

15 (The hearing ends at 10.31 a.m.)

16 CORRECTION REPORT

17 * On page 1 line 4: Situation in the Central African Republic"" has
18 been corrected by: "Situation in the Democratic Republic of Congo"