



REPUBLIKA E KOSOVËS - РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO  
**GJYKATA KUSHTETUESE**  
**УСТАВНИ СУД**  
**CONSTITUTIONAL COURT**

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Prishtina, 19 August 2019  
Ref. No.:RK 1413/19

## **RESOLUTION ON INADMISSIBILITY**

in

**Case No. KI95/18**

Applicant

**Nexhmedin Mazrek**

**Constitutional review of Judgment PML. No. 247/2017  
of the Supreme Court of 6 February 2018**

### **THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO**

composed of:

Arta Rama-Hajrizi, President  
Bajram Ljatifi, Deputy-President  
Bekim Sejdiu, Judge  
Selvete Gërxhaliu-Krasniqi, Judge  
Gresa Caka-Nimani, Judge  
Safet Hoxha, Judge  
Radomir Laban, Judge  
Remzije Istrefi-Peci, Judge, and  
Nexhmi Rexhepi, Judge

#### **Applicant**

1. The Referral was submitted by Nexhmedin Mazrek from Mamusha (hereinafter: the Applicant), represented by Miftar Qelaj, a lawyer from Prizren.

## **Challenged decision**

2. The Applicant challenges Judgment PML. No. 247/2017 of the Supreme Court of 6 February 2018. The challenged judgment was served on the Applicant on 28 March 2018.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged Judgment of the Supreme Court, which allegedly violated the Applicant's rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 29 [Right to Liberty and Security], Article 30 [Right of the Accused], Article 31 [Right to Fair and Impartial Trial], Article 32 [Right to Legal Remedies], Article 33 [The Principle of Legality and Proportionality in Criminal Cases] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), in conjunction with Article 6 (Right to a fair trial) and Article 13 (Right to an effective remedy) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the ECHR).

## **Legal basis**

4. The Referral is based on Article 113 (7) of the Constitution, Article 47 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

## **Proceedings before the Constitutional Court**

5. On 25 July 2018, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 16 August 2018, the President of the Court appointed Judge Selvete Gërxhaliu-Krasniqi as Judge Rapporteur and the Review Panel, composed of Judges: Radomir Laban (Presiding), Remzije Istrefi-Peci and Nexhmi Rexhepi.
7. On 7 September 2018, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court.
8. On 27 May 2019, after considering the report of the Judge Rapporteur, the Review Panel made a recommendation to the Court on the inadmissibility of the Referral.

## **Summary of facts**

9. On 16 June 2015, when establishing the factual situation in the contested proceedings before the Basic Court in Prizren, between the Applicant and several other persons who were parties to the civil proceedings, a physical conflict took place in which several persons suffered severe and minor injuries, and one person lost his life due to injuries resulting from this fight.

10. On 17 August 2015, the Basic Prosecutor's Office in Prizren filed an indictment PP. No. 1569/2015-II against the Applicant and several other persons for participating in the physical clash, causing serious and minor physical injuries and death.
11. On 16 March 2017, the Basic Court in Prizren by Judgment P. No. 145/15 found the Applicant guilty for the commission of the criminal offense of murder and commission of serious bodily injury and consequently sentenced him to an aggregate punishment of imprisonment for a period of 10 years and 4 months. In the reasoning, the Basic Court states:

*“it is indisputable fact that the accused Nexhmedin twice stabbed with a knife, and caused to A. M. severe injuries on the left side of the chest, as well as on the left side of the back, this is confirmed by the statement of the injured A.M., reports of forensic expertise of Dr. [...] and also is confirmed by the defense of the accused Nexhmedin Mazreku, who stated that he was lost, and that he acted in such a way as to protect his brother”.*
12. On an unspecified date, the Applicant, the Basic Prosecutor's Office in Prizren and the injured party filed an appeal against the judgment of the Municipal Court in Prizren with the Court of Appeals, and that:
  - The Basic Prosecutor's Office in Prizren and the injured parties, due to the decision on the criminal sanction and
  - Applicant „on the grounds of serious violations of the provisions of the criminal procedure, incorrect and incomplete determination of factual situation, violation of the Criminal Code and decision related to the criminal sanction”.
13. On 12 June 2017, the Court of Appeals by Judgment PAKR. No. 248/17 rejected the appeal of the Basic Prosecutor's Office and the injured party as ungrounded, while it partly approved the Applicant's appeal and in that part modified the judgment of the Basic Court, and as for other appealing allegations of the Applicant, the Court of Appeals rejected them as ungrounded. In the relevant part of the Judgment, the Court of Appeals states:

*“By partially approving the appeals of the lawyers of the defendants Nexhmedin Mazrek and S.M., the judgment of the Basic Court in Prizren P. No. 145/15 of 16.03.2017 is MODIFIED only in regard with the decision on the sentence for this criminal offence in the way that the Court of Appeals sentences Nexhmedin for the criminal offence of murder under Article 178 of CCRK to eight years in prison whereas for the criminal offence of grievous bodily injury under Article 189, paragraph 1, subparagraph 1.3 in conjunction with paragraph 3 of the CCRK, sentences him to one year and three months in prison and in compliance with Article 80 of the CCRK, imposes on him an aggregated sentence to 8 (nine) years”.*
14. On 29 August 2017, against the judgment of the Basic Court and the judgment of the Court of Appeals, the Applicant filed a request for protection of legality with the Supreme Court:



*“due to serious violations of the provisions of the criminal procedure and violation of the criminal law, with the proposal that the latter be modified so that the convict is acquitted of charges for the criminal offense of Murder or to be annulled and in this part to be remanded to the first instance court for retrial”.*

15. On 6 February 2018, the Supreme Court (by Judgment Pml No. 247/2017) rejected as ungrounded the request for protection of legality.

### **Applicant's allegations**

16. The Applicant alleges that the challenged decision violated his rights guaranteed by Articles 24, 29, 30, 31, 32, 33 and 54 of the Constitution, and Article 6 of the ECHR.

17. The Applicant reasons the abovementioned violations:

- *Article 24 of the Constitution of the Republic of Kosovo - equality before the law because in the same criminal offense the accused person was not treated same as other accused persons, by violating the law to his detriment.*

- *Article 29 of the Constitution of the Republic of Kosovo - right to liberty and security, the Applicant explains this violation with the allegations that the Basic Court in Prizren was obliged during the determination of the factual situation in the contested proceedings to ensure the presence of the police in order to prevent the possible physical conflict and, consequently, the Applicant himself to commit a criminal offense for which the Applicant was convicted.*

- *Article 30 of the Constitution of the Republic of Kosovo, the right of the accused has been violated due to the fact that the proposals for evidence were rejected without any reason and was adjudicated based on the Decision with inadmissible evidence.*

- *Article 31 of the Constitution of the Republic of Kosovo - right to a fair and impartial trial, due to the fact that the courts of three instances did not give the opportunity to the accused person to public, fair and impartial review that are related to the rights and obligations of the court on the occasion of issuing the decisions and also every person accused for criminal offense has the right to have the opportunity to clarify the facts.*

- *Article 32 of the Constitution - right to legal remedy was violated by the three instances of the court, which contains in itself the right of the accused to present all the facts, evidence and to give explanations for the facts by a legal remedy, three court instances denied to the accused Nexhmedin Mazrek this right by rendering unfair judgments and selective decisions that seriously violated the right of the accused in the criminal proceedings.*

- *Article 33 - principle of legality, as a guaranteed right and right to legal certainty was violated by the courts of three instances due to the fact that*

*the accused could not realize his rights that he has in the criminal proceedings for the issuance of a fair Judgment.*

*- By the violations of these constitutional provisions due to the above mentioned reasons, there has been a violation of the provisions of the European Convention on Human Rights, namely Article 6 of the Convention.*

18. The Applicant finally addresses the Court with the request “to declare invalid (annuls) Judgment P. No. 145/15, of the Basic Court in Prizren, of 16 March 2017, Judgment PAKR. No. 248/17, of the Court of Appeals of Kosovo, of 12 June 2017 and Judgment Pml. No. 247/17, of the Supreme Court of Kosovo, of 6 February 2018”.

### **Assessment of the admissibility of the Referral**

19. The Court first examines whether the Applicant has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and the Rules of Procedure.
20. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which establish:

*„1. The Constitutional Court decides only on matters referred to the court in a legal manner by authorized parties.*

*(...)*

*7. Individuals are authorized to refer violations by public authorities of their individual rights and freedoms guaranteed by the Constitution, but only after exhaustion of all legal remedies provided by law.”*

21. The Court further examines whether the Court has fulfilled the admissibility requirements as prescribed by the Law. In this regard, the Court refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which establish:

#### **Article 47 [Individual Requests]**

*“1. Every individual is entitled to request from the Constitutional Court legal protection when he considers that his/her individual rights and freedoms guaranteed by the Constitution are violated by a public authority.*

*2. The individual may submit the referral in question only after he/she has exhausted all the legal remedies provided by the law.”*

#### **Article 48 [Accuracy of the Referral]**



*“In his/her referral, the claimant should accurately clarify what rights and freedoms he/she claims to have been violated and what concrete act of public authority is subject to challenge”.*

Article 49  
[Deadlines]

*“The referral should be submitted within a period of four (4) months. The deadline shall be counted from the day upon which the claimant has been served with a court decision...”.*

22. Regarding the fulfillment of these requirements, the Court considers that the Applicant is an authorized party; that he exhausted available legal remedies; that he referred to the act of a public authority that he challenges before the Court and submitted the Referral in a timely manner.

23. In addition, the Court refers to Rule 39 (2) of the [Admissibility Criteria] of the Rules of Procedure, which establishes that:

*„(2) The Court may consider a referral as inadmissible if the referral is manifestly ill founded because the Applicant has not sufficiently proved and substantiated the claim.“*

24. The Court considers that the applicant's allegations can be reduced to:

- (i) violation of Article 29 of the Constitution in conjunction with Article 5 of the ECHR;
- (ii) violation of Articles 30 and 31 of the Constitution in conjunction with Article 6 of the ECHR;
- (iii) violation of Article 33 of the Constitution in conjunction with Article 6 of the ECHR and
- (iv) violation of Articles 24, 32 and 54 of the Constitution.

**(i) As regards the allegations of violations of Article 29 of the Constitution in conjunction with Article 5 of the ECHR**

25. The Court notes that the Applicant refers to a particular situation that has occurred in civil proceedings and which he links to a violation of the rights guaranteed by Article 29 of the Constitution, which refers to the deprivation of liberty for committing the criminal offense.
26. In that regard, the Court recalls that, pursuant to Article 29 [Right to Liberty and Security] of the Constitution, *“Everyone is guaranteed the right to liberty and security. No one shall be deprived of liberty except in the cases foreseen by law and after a decision of a competent court”.*
27. The Court recalls that in conformity with the ECtHR case law, which held that the overall purpose of Article 5 of the ECHR is to ensure that no one should be

dispossessed of his liberty in an arbitrary fashion (*see, Assanidze v. Georgia*, Application no. 71503/01, Judgment of 8 April 2004).

28. The Court notes that the Applicant states that the regular courts violated Article 29 of the Constitution in conjunction with Article 5 of the ECHR, because they did not secure the scene of crime when determining the factual situation in the contested proceedings. Accordingly, Article 29 of the Constitution in conjunction with Article 5 of the ECHR is not applicable to a situation which the Applicant refers to.

**(ii) As regards the allegations of violation of Articles 30 and 31 of the Constitution in conjunction with Article 6 of the ECHR**

29. As noted above, the Applicant had the opportunity to challenge the charges at all instances of the regular courts, which he did, using his right to present his defense and the right to regular and extraordinary legal remedy. In addition, the Court considers that the reasoning provided by the Supreme Court, responding to the Applicant's allegations, is clear and fair.
30. The Court, analyzing allegations of violations of Articles 30 and 31 of the Constitution, notes that the Applicant had the benefit of the conduct of the proceedings based on adversarial principle; at the various stages of those proceedings he was enabled to submit the arguments he considered relevant to his case; that he was given the opportunity to challenge effectively the arguments and evidence presented by the responding party; and that all the arguments, viewed objectively, that were relevant for the resolution of his case, were heard and reviewed by the regular courts; that the factual and legal reasons against the challenged decision were presented in detail; and that, in accordance with the circumstances of the case, viewed in their entirety, the proceedings were fair (*see, for example, the case of the ECtHR, Garcia Ruiz v. Spain*, application no. 30544/96, judgment of 21 January 1999, 29; and, *see, mutatis mutandis*, the case of the Constitutional Court No. KI42/16, Applicant: *Valdet Sutaj*, Resolution on inadmissibility of 7 November 2016, paragraph 40).
31. Concerning the Applicant's allegation as to the assessment of evidence and the examination of witnesses, the Court emphasizes that it is not the task of the Constitutional Court to deal with errors of fact or law (legality) allegedly committed by the regular courts, unless and in so far as they may have infringed rights and freedoms protected by the Constitution (constitutionality).
32. In this regard, the Court reiterates that the requirement of "fairness" as guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR covers the proceedings as a whole, and the question whether a person has had a "fair" trial is looked at way by cumulative analysis of all the stages, not merely of a particular incident or procedural defect; as a result, defects at one level may be put right at a later stage (*see, for example: Monnell and Morris v. the United Kingdom*, submission No. 9562/81; 9818/82, Judgment of 2 March 1987, paragraphs 55-70).



33. The Constitutional Court reiterates that it does not act as a court of fourth instance, when considering the decisions taken by regular courts. It is the role of regular courts to interpret and apply the pertinent rules of both procedural and substantive law (see: *mutatis mutandis*, *Garcia Ruiz v. Spain*, no. 30544/96, ECHR, Judgment of 21 January 1999, see also case of the Constitutional Court no. 70/11, Applicants: *Faik Hima, Magbule Hima and Bestar Hima*, Resolution on Inadmissibility of 16 December 2011).
34. The Constitutional Court can only consider whether the proceedings before the regular courts, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see: *inter alia*, *Edwards v. United Kingdom*, no. 13071/87 Report of the European Commission on Human Rights, adopted on 10 July 1991).
35. The Court considers that proceedings before the regular courts, including the proceedings before the Supreme Court, were fair and reasoned (see: *Shub v. Lithuania*, No. 17064/06, ECtHR, decision of 30 June 2009).
36. In that regard, the Court considers that the Applicant was given the necessary opportunity to exercise his rights to defend himself within the meaning of Articles 30 and 31 of the Constitution in conjunction with Article 6 of the Convention.

**(iii) As to the allegations of violation of Article 33 of the Constitution in conjunction with Article 6 of the ECHR**

37. The Court notes that the Applicant only cited and described the content of the constitutional provisions that guaranteed the principle of legality and proportionality in the criminal proceedings. However, the Applicant did not clearly state how the principle of legality and proportionality was violated.
38. The Court also notes that the Court of Appeals in its judgment (PAKR No. 248/17) of 12 June 2017, reasoned in detail and based on the law the amount of the imposed sentence.
39. In this regard, the Court reiterates that dissatisfaction with the decision or mere reference of articles and provisions of the Constitution, is not sufficient for the Applicant to raise an allegation of constitutional violation. When alleging Constitutional violations, the Applicant must present convincing and indisputable arguments to support the allegations, for the referral to be grounded. (see: Case No. KI198/ 3 Applicant: *Privatization Agency of Kosovo*, resolution on inadmissibility of 13 March 2014).
40. In this respect, the Applicant has not filed any convincing argument to establish that the alleged violations mentioned in the Referral represent constitutional violations (see: *Vanek v. Republic of Slovakia*, ECtHR, Decision as to the Admissibility, No. 53363/99, of 31 May 2005), nor did he specify that the said articles of the Constitution, the ECHR and the UDHR substantiate his allegation under Article 113.7 of the Constitution and Article 48 of the Law.



**(iv) As to the allegations of violation of Articles 24, 32 and 54 of the Constitution**

41. As regards the other allegations of the Applicant relating to a violation of rights and freedoms guaranteed by Article 24 [Equality Before the Law], Article 32 [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution, because the Applicant has not sufficiently proved and substantiated the claim.
42. The Court notes that it is the Applicant's obligation to substantiate his constitutional allegations, and submit *prima facie* evidence indicating a violation of the rights guaranteed by the Constitution and the ECHR (see: case of the Constitutional Court No. K119/14 and KI21/14, Applicants *Tafil Qorri and Mehdi Sylá*, of 5 December 2013).
43. Therefore, the Applicant's Referral is manifestly ill-founded on constitutional basis and is to be declared inadmissible in accordance with Rule 39 (2) of the Rules of Procedure.

## **FOR THESE REASONS**

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, and Rule 39 (2) of the Rules of Procedure, in the session held on 27 May 2019, unanimously

## **DECIDES**

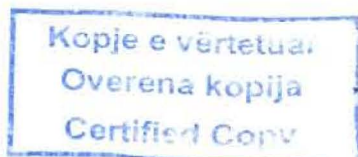
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette in accordance with Article 20.4 of the Law; and
- IV. This Decision is effective immediately

**Judge Rapporteur**

**President of the Constitutional Court**

Selvete Gërxhaliu-Krasniqi

Arta Rama-Hajrizi



***This translation is unofficial and serves for informational purposes only.***