



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

Prishtina, on 03 May 2019
Ref. no.:RK 1357/19

RESOLUTION ON INADMISSIBILITY

in

Case No. KI12/19

Applicant

Arben Mërxha

**Constitutional review of Decision Pml. No. 313/2018 of the Supreme
Court of 10 December 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 Arben Mërxha, residing in Peja (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Decision Pml. No. 313/2018 of the Supreme Court of the Republic of Kosovo (hereinafter: the Supreme Court) of 10 December 2018.

Subject matter

3. The subject matter is the constitutional review of the challenged decision, which allegedly violates the Applicant's rights and freedoms guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Right to Fair and Impartial Trial], 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution), and Article 6 [Right to a fair trial] of the European Convention on Human Rights (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 (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

5. On 23 January 2019, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's referral, which he submitted by mail service on 21 January 2019.
6. On 28 January 2019, the President of the Court appointed Judge Bajram Ljatifi as Judge Rapporteur and the Review Panel composed of Judges: Bekim Sejdiu (Presiding), Selvete Gërxhaliu-Krasniqi and Gresa Caka-Nimani.
7. On 15 February 2019, the Court notified the Applicant about the registration of the Referral and requested him to submit to the Court the Judgment of the Basic Court (P. No. 72/2016) and the Judgment of the Court of Appeals (PA1. No. 595/2018).
8. On the same date, the Court sent a copy of the Referral to the Supreme Court.
9. On 13 March 2019, the Court received the documents requested by the letter of 15 February 2019, which were submitted by mail service, on 9 March 2019.
10. On 10 April 2019, the Review Panel considered the Report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral and with the majority of the votes, that the Referral is *ratione materiae* incompatible with the Constitution.

Summary of facts

11. On 7 May 2012, the Applicant, acting as a subsidiary prosecutor, initiated criminal lawsuit in the Basic Court in Peja against person G.D., accusing him of committing the criminal offense under Article 219 [Irresponsible Medical Treatment] of the Provisional Criminal Code of Kosovo, of 6 July 2003 (hereinafter: PCCK).
12. On 28 December 2012, the Code. Nr. 04/L-123 of the Criminal Procedure Code (hereinafter: CPC) was published in the Official Gazette.
13. On 20 October 2015, the Basic Court in Peja, by Judgment P. No. 882/2012, acquitted the person G.D. of charges for the criminal offense of irresponsible medical treatment.
14. The Applicant filed an appeal against the Judgment [P. no. 882/2012] of the Basic Court in Peja with the Court of Appeals of Kosovo (hereinafter: the Court of Appeals).
15. On 22 March 2016, the Court of Appeals by Judgment [PA1. No. 1423/2015] approved the Applicant's appeal and remanded the case for retrial to the Basic Court.
16. On 8 March 2018, the Basic Court in Peja - Branch in Deçan (hereinafter: the Basic Court), by Judgment P. No. 72/2016, acquitted person G.D. of charges filed by the Applicant, as a subsidiary prosecutor, for the criminal offense of irresponsible medical treatment. In order to realize the property claim, the Basic Court instructed the Applicant in civil dispute.
17. The Applicant filed an appeal against the Judgment of the Basic Court [P. No. 72/2016] at the Court of Appeals.
18. On 23 August 2018, the Court of Appeals, by the Judgment (PA1, No. 595/2018), rejected as ungrounded the Applicant's appeal and upheld the Judgment (P. No. 72/2016) of the Basic Court.
19. On 9 October 2018, the Applicant submitted to the Office of the Chief State Prosecutor of the Republic of Kosovo (hereinafter: the Office of the Chief Prosecutor) the proposal for filing a request for protection of legality against the Judgment P. No. 72/2016) of the Basic Court and the Judgment (PA1. No. 595/2018) of the Court of Appeals.
20. On 10 October 2018, the Office of the Chief Prosecutor (Notification A. No. 361/18) advised the Applicant that the request for protection of legality, as foreseen by the provisions of the CPCCK, be submitted to the Basic Court, *"in that order that the latter is considered under the proceedings"*.
21. On an unspecified date, the Applicant filed a request for protection of legality against the Judgment (P. No. 72/2016) of the Basic Court and Judgment (PA1. No. 595/2018) of the Court of Appeals on the grounds of essential violations of the provisions of the criminal procedure and violation of criminal law. The State Prosecutor, by submission KMLP. II. No. 219/2018, filed a response to

the Applicant's request for protection of legality by proposing that it be rejected as inadmissible.

22. On 10 December 2018, the Supreme Court by Decision (Pml. No. 313/2018), rejected as inadmissible the Applicant's request for protection of legality against the Judgment (P. No. 72/2016) of the Basic Court and the Judgment (PA1, No. 595/2018) of the Court of Appeals, after finding that under Article 433 of the CPC, the request for protection of legality may be filed by the State Prosecutor and the defendant or his defense counsel, but not the subsidiary prosecutor.

Applicant's allegations

23. The Applicant alleges that the challenged decision violated his constitutional rights and freedoms, guaranteed by Articles 22 [Direct Applicability of International Agreements and Instruments], 31 [Right to Fair and Impartial Trial], 46 [Protection of Property] and 54 [Judicial Protection of Rights] of the Constitution, and Article 6 [Right to a fair trial] of the ECHR.
24. The Applicant alleges that the Supreme Court, finding that his request for protection of legality against the Judgment [P. No. 72/2016] of the Basic Court and the Judgment [PA1. No. 595/2018] of the Court of Appeals is not allowed, as only the State Prosecutor and the defendant have the right to file a request for protection of legality and not a subsidiary prosecutor, has incorrectly applied the CPC.
25. His argument based on this allegation is based on the fact that according to Article 65 of the Provisional Criminal Procedure Code of Kosovo (hereinafter: the PCPC), applicable at the time the subsidiary lawsuit was filed, the subsidiary prosecutor enjoys the same rights as the public prosecutor enjoys. Although the CPC does not foresee the possibility of a subsidiary lawsuit, the continuation of the proceedings regarding subsidiary lawsuits initiated under the PCPC was foreseen, as Article 543 [Continuation of Private Prosecution] of the CPC foresees that for the criminal offenses for which the perpetrator is prosecuted by private lawsuit or subsidiary lawsuit, such proceedings continue within the general department of the relevant Basic Court and apply *mutatis mutandis* to the provisions of the CPC.
26. In this respect, the Applicant alleges that the Supreme Court by erroneously applying the CPC in conjunction with the PCPC violated the Applicant's right of access to justice under Article 31 of the Constitution, as it did not enter into the merits of the case to assess the violations that have been committed by the Basic Court and the Court of Appeals, according to the subsidiary lawsuit filed by the Applicant.
27. The Applicant also alleges that notification of the Office of the Chief State Prosecutor [A. No. 361/18] by which the Applicant was instructed to file the request for protection of legality was erroneous, and the failure to initiate a request for protection of legality by the State Prosecutor in favor of the Applicant, as requested by the Applicant, caused irreparable essential damage to the Applicant.

28. The Applicant in relation to the Judgment (P. No. 72/2016) of the Basic Court and the Judgment (PA1. No. 595/2018) of the Court of Appeals states that the Basic Court and the Court of Appeals: a) have violated the right to a reasoned court decision and the constitutional principle of the prohibition of arbitrariness in decision-making; and b) have not correctly assessed the facts presented by him and the experts' expertise. In support of his allegations, the Applicant cited several cases of ECtHR case law related to the right to a reasoned decision.
29. The Applicant finally requests the Court to declare the Referral admissible, to hold that there has been a violation of the right to fair trial and to annul the decisions of the Basic Court, the Court of Appeals, the Supreme Court and the Notification 361/18 of the Office of the Chief Prosecutor.

Admissibility of the Referral

30. The Court first examines whether the admissibility requirements established by the Constitution, as further specified by the Law and by the Rules of Procedure have been met.
31. 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".

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

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..."

33. Regarding the fulfillment of these requirements, the Court notes that the Applicant is an authorized party, challenging the act of a public authority, namely the Decision [Pml. No. 313/2018] of the Supreme Court of 10 December 2018, after exhaustion of all legal remedies provided by law. The Applicant also clarified the rights and freedoms he claims to have been violated in accordance with the requirements of Article 48 of the Law and submitted the Referral in accordance with the deadlines of Article 49 of the Law.

34. In addition, the Court examines whether the Applicant has met the admissibility criteria set out in Rule 39 [Admissibility Criteria] of the Rules of Procedure. Rule 39 (3) of the Rules of Procedure stipulates that:

“[...]”

(3) The Court may also consider a referral inadmissible if any of the following conditions are present:

“[...]”

(b) the Referral is incompatible ratione materiae with the Constitution”.

35. The Court notes, first of all, that the Applicant refers to the violation of several articles of the Constitution, however, the essence of these allegations relates to the right of access to justice, the arbitrary application of law and the right to a reasoned decision as an integral part of the right to a fair trial, guaranteed by Article 31 of the Constitution in conjunction with Article 6 of the ECHR.

36. In this regard, the Court recalls that Article 31 [Right to Fair and Impartial Trial] of the Constitution, in the relevant part of its second paragraph establishes,:

“Everyone is entitled to a fair and impartial public hearing as to the determination of one's rights and obligations or as to any criminal charges [...]”.

37. Article 6 (Right to a fair trial), paragraph 1 of the ECHR, in the relevant part, provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law [...]”.

38. The Court refers to the case law of the ECHR in accordance with which the Court, in accordance with Article 53 [Interpretation of Human Rights Provisions] of the Constitution, is obliged to interpret the fundamental rights and freedoms guaranteed by the Constitution, according to which the ECHR “does not guarantee the right to pursue criminal proceedings against third persons, [and] Article 6 of the ECHR does not apply to proceedings aimed at instituting criminal proceedings against third persons (see, Decision of the Commission István Rékási v. Hungary, Application No. 31506/96 of 25 November 1996).

39. The Court also refers to its case law, where it concluded that the ECHR “*does not provide a right to have a third party prosecuted or sentenced for a criminal offence. The Constitution also does not confer such a right*”. (see, Resolution on Inadmissibility in Case KI97/14, *Velibor Jokić*, of 8 December 2015, para. 38, Resolution on Inadmissibility in Case KI52/18, *Zoran Stanišić*, 16 January 2019, paragraph 51).
40. Accordingly, the Court considers that when reading Article 31 of the Constitution, in the light of Article 6, paragraph 1, of the ECHR, it results that the phrase “*as to any criminal charges*”, as used in Article 31, must be understood to mean “*as to any criminal charges brought against the Applicant*” (see Resolution on Inadmissibility in Case KI52/18, *Zoran Stanišić*, 16 January 2019, paragraph 49).
41. In addition, with regard to “*rights and obligations*”, the Court recalls that the ECtHR stated that although the ECHR does not provide for the “*right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently: it must be in dissociable from the victim's exercise of a right to bring civil proceedings in domestic law, even if only to secure symbolic reparation or to protect a civil right [...]*”. (See, ECtHR case, *Perez v. France*, no. 47287/99, Judgment of 12 September 2004, para. 70. See also, *mutatis mutandis*, the case of the ECtHR, *Rekić v. Bosnia and Herzegovina* No. 39894/11, Decision of 29 March 2018, para. 24).
42. The Court notes that in the present case, the main allegations of the Applicant relate to the criminal proceedings he initiated against the third party, namely the person G.D., accusing him of committing the criminal offense under Article 219 [Irresponsible Medical Treatment] of the CPCK, where the Applicant was in the capacity of the subsidiary prosecutor.
43. The Applicant's criminal charge against the third party was rejected by the Basic Court and the Court of Appeals, on the grounds that it was not proven that the accused had committed the criminal offense which he was accused of, whereas the Supreme Court declared the Applicant's request as inadmissible, since it considered that the request for protection of legality under Article 433 of the CPC may be filed only by the State Prosecutor and the defendant or his defense counsel, but not by the subsidiary prosecutor.
44. In this way, the Applicant's allegation of a violation of the right to fair trial, during the conduct of proceedings against a third person, G.D. does not fall within the scope of the title “*as to any criminal charges*” contained in Article 31 of the Constitution.
45. Therefore, the Court considers that the Applicant's complaint regarding the criminal proceedings against the third party, in this case G.D., does not fall within the scope of the right to a fair trial under Article 31 of the Constitution and Article 6, paragraph 1 of the ECHR, therefore the Applicant's request is not *ratione materiae* in compliance with the Constitution.

46. The Court also notes that the Applicant in the regular courts filed a legal property claim related to the right to protection of property.
47. In this regard, the Basic Court in Judgment P. No. 72/2016, instructed the Applicant in a regular civil procedure regarding the property claim against the person G.D.
48. The Court notes that the Applicant did not raise the issue of his property claim specifically before the Court and did not specify in the Referral whether, in order to realize his property claim, he had exercised the legal remedies available to him.
49. In conclusion, the Court finds that the Applicant's Referral is to be declared inadmissible, pursuant to Rule 39 (3) (b) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court of the Republic of Kosovo, in accordance with Article 113 paragraph 7 of the Constitution, Article 47 of the Law and Rule 39 (3) (b) of the Rules of Procedure, on 10 April 2019, unanimously

DECIDES

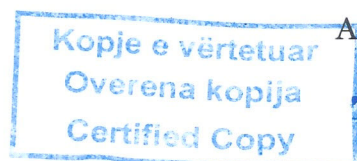
- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20.4 of the Law;
- IV. This Decision is effective immediately.

Judge Rapporteur

President of the Constitutional Court

Bajram Ljatifi

Arta Rama-Hajrizi



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