



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

Prishtina, 24 September 2020
Ref. no.: RK 1619/20

This translation is unofficial and serves for informational purposes only.

RESOLUTION ON INADMISSIBILITY

in

Case No. KI137/19

Applicant

Arlind Morina

**Constitutional review of Judgment K. No. 6-1022/18 of the Basic Court in
Peja, of 18 July 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 Arlind Morina, from village Grabanica, Municipality of Klina, who is represented by Sefer Desku, a lawyer from Klina (hereinafter: the Applicant).

Challenged decision

2. The Applicant challenges Judgment K. No. 6-1022/18, of the Basic Court in Peja – Division for Minor Offences, of 18 July 2018 (hereinafter: the Basic Court). The Applicant also challenges the actions of the Regional Police in Peja (hereinafter: the Regional Police) and of the Basic Prosecution in Peja (hereinafter: the Basic Prosecution), which, according to him, have not initiated criminal proceedings against a third person.

Subject matter

3. The subject matter of the Referral is the constitutional review of the challenged decision and the actions of the Regional Police in Peja and of the Basic Prosecution, which allegedly violate the Applicant's rights guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

4. The Referral is based on paragraph 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution, Articles 22 [Processing Referrals] and 47 [Individual Requests] of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 32 [Filing of Referrals and Replies] 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 2 September 2019, the Constitutional Court of the Republic of Kosovo (hereinafter: the Court) received the Applicant's Referral, which he submitted by mail service on 28 August 2019.
6. On 10 September 2019, the President of the Court appointed Judge Bekim Sejdiu as Judge Rapporteur and the Review Panel composed of Judges: Gresa Caka Nimani (Presiding) Bajram Ljatifi and Safet Hoxha (members).
7. On 23 September 2019, the Court notified the Applicant's representative about the registration of the Referral and requested him to submit to the Court the power of attorney indicating that he represents the Applicant in the proceedings before the Court.
8. On 4 October 2019, the Court received from the Applicant's representative the power of attorney for representation, which was invalid for the Constitutional Court.
9. On 17 October 2019, the Court again requested the Applicant's representative to submit to the Court the valid power of attorney, indicating that he represents the Applicant in the proceedings before the Court.

10. On 30 October 2019, the Court received from the Applicant's representative the power of attorney requested by the Court.
11. On 31 October 2019, the Court notified the Basic Court about the registration of the Referral.
12. On 2 September 2020, the Review Panel considered the report of the Judge Rapporteur and unanimously recommended to the Court the inadmissibility of the Referral.

Summary of facts

13. On 29 June 2018, on "Eliot Engel" street in Peja, the person A.N., while driving her vehicle, hit the Applicant in the left part of the body, causing him bodily injuries.
14. On 12 July 2018, the Traffic Police Station in Peja, submitted to the Basic Court the request DR03004-396-18, for the initiation of minor offence proceedings against person A.N., requesting that she be found responsible and punished for the traffic accident, according to legal provisions under Article 149 [Obligations of drivers towards pedestrians], paragraph 1, of Law No. 05/L-088 on Road Traffic Provisions (hereinafter: Law on Road Traffic).
15. On 18 July 2018, the person A.N., appeared in the Basic Court and admitted the minor offense which she was charged with.
16. On the same date, the Basic Court, by Judgment K. No. 06-1022/18, declared the person A.N. responsible for the minor offense, according to Article 149 [Obligations of drivers towards pedestrians], paragraph 1, of the Law on Road Traffic and sentenced her with a fine in the amount of 200.00 euro (two hundred). In the legal advice of the abovementioned Judgment, it was stated that: *"Against this Judgment the Applicant [which in this case was the Traffic Police Station in Peja] has the right to appeal to the Court of Appeals - Minor Offenses Division in Prishtina, through this court within 8 days after receiving this Judgment"*.

Applicant's allegations

17. The Applicant alleges before the Constitutional Court that through the challenged decision and the actions of the Regional Police and the Basic Prosecution, his rights guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution have been violated.
18. In this regard, he complains that the Regional Police, the Basic Prosecution and the Basic Court - Minor Offenses Division *"in cooperation with each other, have violated the right of [the Applicant] to the legal qualification of the criminal offense where at the same time [the person A.N.] has committed the criminal offense under Article 378 [Endangering Public Traffic]"* of the Criminal Code of Kosovo No. 04/L-82 (hereinafter: the CCK). Therefore, he states that against the person A.N., a criminal indictment should have been

filed and to be criminally liable for the serious bodily injuries caused to the Applicant. He points out that as a result of these injuries he has remained “*in serious incurable health condition*”.

19. The Applicant states that the Regional Police, the Basic Prosecution Office sent the case as a minor offense to the Court, where the person A.N. was fined in order for her not to answer for a criminal offense. He adds that the Basic Court has also committed a legal violation which has treated this case as a minor offense even though it was not a minor offense but a criminal offense and that due to these actions the Applicant’s right guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution has been violated.
20. The Applicant also alleges that the Basic Court did not summon the Applicant to the hearing when deciding on the minor offence against the person A.N. and by the Judgment of the Basic Court the opportunity to file appeal has not been given to him.
21. Finally, the Applicant requests the Court to annul the challenged Judgment of the Basic Court and to oblige the Basic Prosecution to file an indictment for a criminal offense against the person A.N.

Relevant legal provisions

Criminal Procedure Code No. 04/l-123

“Article 78

Criminal Report by Public Entities

1. *All public entities have a duty to report criminal offences prosecuted ex officio of which they have been informed or which they have learned of in some other manner.*

[...]

Article 79

Criminal Report by Persons

1. *Any person is entitled to report a criminal offence which is prosecuted ex officio and shall have a duty to do so when the failure to report a criminal offence constitutes a criminal offence.*

[...]”

Law No. 05/L-087 on Minor Offences

“Article 6

Minor offences and criminal offences

Against a minor offence perpetrator which by a final judgement on a criminal procedure, including features of a minor offence, has been found guilty, the minor offence procedure cannot be held. If the minor offence procedure has started or is in progress, than the procedure cannot continue and nor be completed.

[...]

Article 73

The injured party

- 1. In terms of this law, the injured person is the person who's personal or property rights are violated or threatened by the minor offence.*
 - 2. The injured party is entitled that itself or through a legal or authorized representative to:*
 - 2.1. submit and present the claim for initiation of minor offence proceedings;*
 - 2.2. present evidence, make proposals and exercise the legal property claim for compensation of damages or the return of the item;*
 - 2.3. submit an appeal against the decision regarding its claim for initiation of minor offence proceedings;*
 - 2.4. present evidence based on which the court may prohibit the defendant, during the proceeding, to approach the damaged object or the place where the minor offence is committed.*
- [...]*

Article 86

Submission of Claims

- 1. The minor offence proceeding commences based on a claim filed, whereby it is requested to commence the minor offence proceeding.*
 - 2. The claim requesting the commencement of the minor offence proceeding may be submitted by the competent bodies as well as the injured party.*
- [...]*

Article 89

Rejection of the claim

- 1. A claim for commencing minor offence proceeding shall be rejected by a decision, if it is ascertained that there are no conditions for initiation of an offence procedure as follows:*

[...]
- 2. The decision from paragraph 1 of this Article shall be submitted to the claimant, whereas the injured party will be informed that he/she may realize his/her legal property claim in a civilian dispute.*

[...]

Article 135

Right to appeal

- 1. Against the judgement and ruling on the minor offence made in the first instance can be lodged an appeal to the Appeal Court (hereinafter: Court of second instance) .*
- 2. Against a judgement on the offence by which a defendant is pronounced liable, an appeal can be lodged by the defendant or claimant. [...]"*

Admissibility of the Referral

22. The Court first examines whether the Referral has fulfilled the admissibility requirements established in the Constitution, and further specified in the Law and foreseen in the Rules of Procedure.
23. 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”.

24. The Court also refers to Articles 47 [Individual Requests], 48 [Accuracy of the Referral] and 49 [Deadlines] of the Law, which stipulate:

Article 47 of the Law [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. In all other cases, the deadline shall be counted from the day when the decision or act is publicly announced [...].”.

25. The Court also examines whether the criteria set out in and Rule 39 [Admissibility Criteria] are met, namely paragraphs (1) (a) and (b) of the Rules of Procedure, which establish the following:

Rule 39 of the Rules of Procedure

[Admissibility Criteria]

“(1) The Court may consider a referral as admissible if:

- (a) the referral is filed by an authorized party;*
- (b) all effective remedies that are available under the law against the judgment or decision challenged have been exhausted;*
- [...]”.*

26. In this regard, the Court first clarifies that the Applicant challenges the Judgment of the Basic Court of 18 July 2018, as well as the fact that the Basic Court, the Regional Police and the Basic Prosecution did not address the actions of the person A.N., who caused to the Applicant the bodily injuries with her vehicle, as a criminal offense but as a minor offense. Therefore, the Applicant alleges that as a result of this, the rights guaranteed by Article 54 [Judicial Protection of Rights] of the Constitution have been violated.

Regarding Judgment K. No. 6-1022/18 of the Basic Court

27. Regarding Judgment K. No. 6-1022/18 of the Basic Court which convicted the person A.N., with a minor offense, the Court will initially assess whether the Applicant is an authorized party to challenge the abovementioned Judgment.
28. The Court notes that this procedure was initiated by the Traffic Police Station in Peja, through the request DR03004-396-18, against the person A.N., requesting that the latter be declared responsible for minor offenses and punished for a traffic accident according to the legal provisions of Article 149 [Obligations of drivers towards pedestrians], paragraph 1, of the Law on Road Traffic. The Basic Court by Judgment K. No. 06-1022/18 declared person A.N. responsible for the minor offense, according to Article 149 [Obligations of drivers towards pedestrians], paragraph 1 of the Law on Road Traffic and fined her in the amount of 200.00 euro.
29. In this regard, the Applicant states that the Basic Court did not assess the actions of A.N. as a criminal offense but as a minor offence, despite the fact that A.N. by her actions committed a criminal offense. Furthermore, the Applicant states that he was late in learning about the abovementioned Judgment and was not notified by the Basic Court in order to be able to file an appeal.
30. The Court notes that in this procedure, the Basic Court did not assess whether the person A.N. committed a criminal offense or not, as the commission of the criminal offense was not the subject of this procedure. The Basic Court - Minor Offenses Division, has only assessed whether the person A.N., has committed a minor offense according to the abovementioned law and for this has declared the person A.N. responsible for minor offenses.

31. In this regard, according to paragraphs 3 and 4 of Article 86 [Submission of Claims] of the Law on Minor Offenses, *"The minor offence proceeding commences based on a claim filed, whereby it is requested to commence the minor offence proceeding"*. Whereas *"The claim requesting the commencement of the minor offence proceeding may be submitted by the competent bodies as well as the injured party."*
32. Whereas according to Article 135 [Right to appeal], of the Law on Minor Offenses, *"Against the judgment and ruling on the minor offence made in the first instance can be lodged an appeal to the Appeal Court (hereinafter: Court of second instance."*
33. The Applicant in this case was not notified by the Basic Court that he could file an appeal against the Judgment of the Basic Court as he had not initiated the minor offence procedure, but the procedure was initiated by the Traffic Police in Peja. Consequently, the Applicant was not a party to this procedure and the Basic Court was not obliged by law to notify the Applicant.
34. According to Article 89 [Rejection of the claim], of the Law on Minor Offenses, the Basic Court has the obligation to notify the injured party in case it rejects the request in order to inform the injured party that the property-legal claim can be realized in the civil dispute. In the present case, the Basic Court found the person A.N. responsible for a minor offense and sentenced the latter with a fine and in this procedure the Applicant was not a party as the request was not initiated by the Applicant.
35. The Court notes that the only issue that could affect the Applicant's rights in this case was his legal property claim, which was not the subject of review before the Basic Court. The Applicant had the opportunity to initiate proceedings regarding the legal property claim, namely the civil dispute before the regular courts, including the ground of the declaration of responsibility of the person A.N., through the challenged decision of the Basic Court.
36. In this context, the Court notes that the Applicant does not complain before the Court regarding the legal property claim as a result of the accident caused by the person A.N. and does not raise any allegations in this regard, but complains about the legal qualification of the minor offense made by the Basic Court against the person A.N.
37. Therefore, in the circumstances when the Referral was filed by an unauthorized party, the Court cannot assess the merits of the case and consequently, in the present case, the Court does not assess the Applicant's allegations whether during the minor offence proceedings initiated at the request of the Traffic Police, against the person A.N., the rights of the Applicant have been violated.
38. Therefore, for the abovementioned reasons, the Court finds that the request for constitutional review of Judgment K. No. 6-1022/18, of the Basic Court, was not filed by an authorized party as established in Article 113, paragraph 1 and 7 of the Constitution, Article 47 of the Law, Rule 39 (1) (a) of the Rules of Procedure, and as such is inadmissible.

Regarding the initiation of criminal proceedings against person A.N.

39. With regard to the initiation of criminal proceedings against person A.N., the Applicant challenges the actions of the Regional Police and consequently the Basic Prosecution that did not file an indictment against the person A.N., linking them to the allegation that as a result of injury of the Applicant, person A.N. has committed the criminal offence under Article 378 [Endangering Public Traffic] of the CCK.
40. In this regard, the Court, before assessing the other admissibility criteria, will first assess whether the Applicant challenges any concrete act of the public authorities, as well as whether he has exhausted the legal remedies provided by law to protect his rights established in the Constitution.
41. The Court notes in this respect that the criminal proceedings commence with the filing of a criminal report by the authorized parties. In this case, according to Article 78 of the CCPK, Criminal report are filed by public entities, but in accordance with Article 79 of the CCPK, *“any person is entitled to report a criminal offence which is prosecuted ex officio [...]”*.
42. In this regard, the Applicant does not challenge any concrete act of either the Regional Police or the Basic Prosecution, which dismissed the criminal report or closed the investigation by the Basic Prosecution.
43. Furthermore, the Court notes that the Applicant, apart from some medical reports, has not submitted any evidence before the Court proving that he has filed a criminal report against the person A.N., which would initiate criminal proceedings against the person A.N. He also did not initiate any proceedings against the Regional Police or the Basic Prosecution, for the fact that they did not initiate criminal proceedings against the person A.N.
44. In this regard, the Court recalls that the rule for exhaustion of legal remedies under Article 113.7 of the Constitution, Article 47 of the Law and Rule 39 (1) (b) of the Rules of Procedure, obliges those who wish to bring their case before the Constitutional Court, that they must first use the effective legal remedies available to them in accordance with law, against a decision or an action of the public authorities.
45. In that way, the public authorities, including the regular courts, are afforded the opportunity to correct their errors through a regular judicial proceeding before the case arrives to the Constitutional Court. The rule is based on the assumption, reflected in Article 32 of the Constitution and Article 13 of ECHR that under the domestic legislation there are available legal remedies to be used before the regular courts in respect of an alleged breach regardless whether or not the provisions of the ECHR are incorporated in national law (see, *inter alia*, the ECtHR case *Aksoy v. Turkey*, Judgment of 18 December 1996, paragraph 51).

46. The principle of exhaustion of legal remedies is that the protection mechanism of the constitutional rights established by the Constitutional Court is subsidiary to the regular system of judiciary safeguarding human rights (see, *mutatis mutandis*, ECtHR case *Handyside v. United Kingdom*, Judgment of 7 December 1976, paragraph 48).
47. Under Article 113.7 of the Constitution, the Applicant should have legal remedies which are available and sufficient to ensure the possibility to put right the alleged violations. The existence of such legal remedies must be sufficiently certain not only in theory but also in practice, and if this is not so, those legal remedies will lack the requisite accessibility and effectiveness (see, *mutatis mutandis*, ECtHR case, *Vernillo v. France*, Judgment of 20 February 1991, paragraph 27, and *Dalia v. France*, ECtHR Judgment of 19 February 1998, paragraph 38).
48. It falls to the Court to examine whether the legal remedies have been exhausted, and whether the legal remedy was effective, available in theory and practice at the relevant time, that is, that the remedy was accessible, and that it could redress the violations in relation to the objections of the Applicant and that it enables reasonable prospect for success (see, *mutatis mutandis*, *Civet v. France* paragraphs 42-44, of the ECtHR Judgment of 28 September 1999).
49. However, when a legal remedy is provided by law, it is up to the Applicant to prove that the legal remedy provided by law has in fact been exhausted, or that for any reason it was not available and effective in the particular circumstances of the case, or that there have been special circumstances due to which he or she is exempted from the requirements of exhaustion of legal remedies.
50. In the circumstances of the present case, the Court notes that the Applicant has not submitted any evidence that he has taken any action to file a criminal report against the person A.N., or whether related to the actions or omissions of the Regional Police and the Basic Prosecution related to the possible criminal charge against the person A.N. had taken any legal action. Therefore, the Court considers that this part of the Referral is declared inadmissible, due to non-exhaustion of legal remedies in accordance with paragraph 7 of Article 113 of the Constitution, paragraph 2 of Article 47 of the Law and further specified through item (b) of paragraph (1) of Rule 39 of the Rules of Procedure.
51. In conclusion, the Court considers that with respect to Judgment K. No. 6-1022/18 of the Basic Court, the Applicant is not an authorized party to file a Referral with the Court, while with regard to the initiation of criminal proceedings against person A.N. by the Regional Police and the Basic Prosecution, the Applicant has not exhausted the legal remedies provided by law.

FOR THESE REASONS

The Constitutional Court, in accordance with Article 113.7 of the Constitution, Articles 47 of the Law and Rule 39 (1) (a) and (b) of the Rules of Procedure, on 2 September 2020, 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

Bekim Sejdiu

Arta Rama-Hajrizi



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