



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

Pristina, 18 October 2013
Ref.No.: RK482/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI36/13

Applicant

Mursel Kosumi

Constitutional Review
of the Decision of the Supreme Court of Kosovo, Pkl.no.120/2012,
dated 29 November 2012

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge, and
Arta Rama-Hajrizi, Judge

The Applicant

1. The Applicant is Mursel Kosumi, resident of Podujevo.

Challenged decision

2. The Applicant challenges the Decision of the Supreme Court, Pkl.no.120/2012, dated 29 November 2012.

Subject matter

3. The Applicant alleges that the aforementioned Decision violated his rights guaranteed by the Constitution, namely Article 32 [Right to Legal Remedies], Article 53 [Interpretation of Human Rights Provisions], and Article 54 [Judicial Protection of Rights].

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Article 22 of the Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (hereinafter: the Law), and Rule 56, paragraph 2, of the Rules of Procedure (hereinafter: the Rules).

Proceedings before the Constitutional Court

5. On 12 March 2013, the Applicant submitted the Referral to the Court.
6. On 25 March 2013, the President appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Arta Rama-Hajrizi.
7. On 29 March 2013, the Referral was communicated to the Supreme Court, which to this date has not submitted any comments.
8. On 12 September 2013, the Review Panel considered the Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

The facts of the case

9. It appears from the file that, on or around 09 August 2011, the Applicant introduced FB to BB, of the construction supply company N.P.SH. "Zhitija com" of Obiliq. The Applicant claimed, or supported the claim, that FB was a foreign resident and the owner of a hotel in Podujevo, and that FB wished to purchase cement paving tiles for his hotel.
10. On 09 August 2011, FB signed a contract with BB for the purchase of 1,500 square meters of cement tiles, at a total price of 9,000.— EUR. The Applicant gave to BB a verbal guarantee for the payment of the purchase price in the event that FB failed to pay. BB had done business with the Applicant before, and therefore trusted him at his word.
11. The cement tiles were subsequently delivered to the Applicant, who used them to pave the grounds around the hotel and house owned by MI of Podujevo. The

paving of the grounds around the hotel with cement tiles was the result of an earlier agreement between the Applicant and MI, and intended as compensation for the transfer to the Applicant of six vehicles belonging to MI, at a value of 11,600.—EUR.

12. On 26 August 2011, FB approached BB with a request to purchase an excavator. BB asked the Applicant if FB could be trusted to pay, and the Applicant apparently responded that FB had money and would pay. BB signed a contract with FB for the purchase of an excavator at a price of 12,000.— EUR. Thereupon, FB paid an initial 2,000.— EUR and took delivery of the excavator.
13. On 04 September 2011, FB sold the excavator to a scrap metal company in Fushe Kosove for 4,200.—EUR.
14. At some point, BB asked the Applicant when he would be paid for the cement tiles. Allegedly, the Applicant replied that FB had fled the country. BB then went to visit the location where the cement tiles had been delivered. There, he met MI and discovered that FB was not the owner of a hotel. At this point, BB apparently reported the Applicant and FB to the proper authorities, accusing them of fraud.
15. On 29 September 2011, the Municipal Public Prosecution Office in Pristina submitted an indictment against the Applicant and FB as co-perpetrators of the crime of fraud.
16. On 14 October 2011, the Municipal Court in Pristina confirmed the indictment against the Applicant.
17. On 05 December 2011, the Municipal Court of Pristina (P.no.2840/11) convicted the Applicant as co-perpetrator of the crime of fraud. The Applicant was sentenced to one (1) year of imprisonment, but execution of this sentence was suspended provided that the Applicant pays the sum of 9,000.—EUR to the victim (BB) within six months of this verdict becoming final, and provided that the Applicant does not commit any new criminal offences within two (2) years from the day this verdict becomes final.
18. The Applicant submitted an appeal against both the conviction and sentence to the District Court in Pristina. The appeal alleged that the first instance court had committed substantive violations of law, *inter alia*, in relation to the criminal offence, and had not correctly determined the facts. The Applicant claimed that he had been engaged in regular business transactions and had not had the required intent to commit fraud. He also claimed that he had not benefitted from the alleged fraud.
19. In support of his claim the Applicant filed new evidence, namely a contract, signed on 10 August 2011, between himself and co-accused FB. This contract provides that the Applicant has possession of five (5) vehicles, which shall be given in exchange for the 1,500 square meters of concrete tiles possessed by FB. The agreement is accompanied by a declaration, signed by FB and dated 20 December 2011. This declaration states that the value of the exchanged items was jointly assessed at 9,000.—EUR, and that the terms of the agreement have

been fulfilled in full by the parties. Both the contract and the declaration were witnessed by an attorney.

20. On 10 May 2012, the District Court of Pristina (AP.no.15/2012) declared the Applicant's appeal ungrounded and confirmed in full the decision on conviction and sentence of the Municipal Court (P.no.2840/11). Regarding the alleged violations of the provisions of criminal law, the Court stated:

"[...] the challenged judgment is concrete and clear, does not contain internal contradictions, nor with respect to the reasoning given in the judgment. [...] the court of first instance has described the factual situation, which is upheld [by this court], and gave clear and convincing reasons for such a determination of the facts, gave its evaluation on the elaborated evidence by justifying why it takes some facts as certified, it evaluated the arguments of the accused and then justified clearly why it does not accept the version of their defence, and this reasoning is also accepted by this court. [...]"

In evaluating the grounds of appeal [of the accused], that the challenged judgment made an erroneous and incomplete evaluation of the factual situation, this court finds these claims to be ungrounded. The approach of the first instance court towards the administered evidence, as well as regarding crucial facts, was correct and lawful, and is accepted by this court. [...]"

21. The Applicant submitted a request for protection of legality with the Supreme Court against the final judgment of the Municipal Court (P.no.2840/11) and against the judgment of the District Court (AP.no.15/2012). The Applicant claimed, *inter alia*, that the decisions of the first and second instance courts had violated substantive provisions of the criminal code. In particular, the Applicant claimed that the District Court had failed to take into consideration the new evidence demonstrating his innocence which he had submitted.
22. On 29 November 2012, the Supreme Court (Pkl.no.120/2012) rejected as ungrounded the Applicant's request for protection of legality. The Supreme Court considered that the request did not present any reasons justifying his allegation of a violation of criminal law provisions, but instead it found that *"[...] the entire text of the request is oriented more in relation to segments of facts that the adjudicated party has not undertaken any action to deceive the injured party."*

23. In this regard, the Supreme Court stated:

"In this legal-criminal matter the court of first instance, and also the court of second instance, correctly and completely evaluated all incriminating offences of the adjudicated and correctly assessed that in his actions are constituted the elements of the criminal offence for which he was found guilty, and this court admits them as correct and well-grounded. The element of will in actions of the adjudicated are manifested that now the adjudicated [party] [...], by previous agreement agreed to deceive and induce the injured [party] to act to the detriment of his property, by

representing falsely FB as the owner of a hotel., who by trusting [the adjudicated party], whom he knew previously, signs a contract with FB to sell the cement tiles at the amount of 1,500 m² (one thousand and five hundred square meters) in the value of €9,000, and which tiles [the adjudicated party] paves in front of hotel of MI, and for this signs a contract with MI for purchasing of six vehicles at the amount of €11,600 (eleven thousand and six hundred Euros), in which case caused damage to the injured [party] to the amount of €9,000 (nine thousand Euros).

The Supreme Court of Kosovo admits in entirety the legal stance of the court of first instance and the second instance, as expressed in their judgments, with regard to criminal responsibility of the accused and that through his actions constitute objective and subjective elements of the criminal offence of fraud pursuant to Article 261 paragraph 1 in conjunction with Article 23 of the CCK, since the actions he undertook clearly had a deceiving purpose in relation to the injured [party].”

The legal arguments presented by the Applicant

24. The Applicant alleges that the District Court on appeal, and the Supreme Court of Kosovo on the request for protection of legality, violated his right to judicial protection of his rights as guaranteed by Article 54 of the Constitution.
25. The Applicant contends that the courts are required to review and assess all evidence submitted by the parties, and to include reasons in their judgments as to how the evidence has been evaluated.
26. The Applicant argues that the new evidence that he submitted at the District Court, namely the contract with the co-accused and the declaration of the co-accused, were crucial new facts that neither the District Court nor the Supreme Court took into account in their decisions. The Applicant asserts that this constitutes a denial of justice.
27. Furthermore, the Applicant insists that the evidence shows that he had neither the required intent to commit fraud, nor did he gain any material benefit from the alleged fraud, and that, therefore, he could not reasonably have been found guilty of this offence.

Admissibility of the Referral

28. The Court notes that the Applicant alleges a violation of his right to judicial protection of his rights, and he cites Articles 32, 53 and 54 of the Constitution. Based on the substance of his allegations, however, the Court finds that the Applicant is, in fact, complaining of a violation of his right to a fair and impartial trial as guaranteed by Article 31 of the Constitution. Consequently, the Court will review this Referral under that provision.
29. First of all, in order to be able to adjudicate the Applicant's Referral, the Court has to examine whether the Applicant has met all the requirements of admissibility, which are foreseen by the Constitution and further specified by the Law and the Rules.

30. Article 113 of the Constitution establishes the general frame of legal requirements for a Referral being admissible. It provides:

“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.”

31. Article 48 of the Law on the Constitutional Court also establishes that

“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 a public authority is subject to challenge”.

32. In addition, Rule 36 (2) of the Rules provides that

“The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

[...]

(b) [...] the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

[...], or

(d) [...] the Applicant does not sufficiently substantiate his claim;”

33. In this connection, the Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by the regular courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see *Avdyli v. Supreme Court of Kosovo*, KI 13/09, 18 June 2010; see *mutatis mutandis García Ruiz v. Spain [GC]*, no. 30544/96, para. 28, European Court of Human Rights 1999-1).
34. The Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in their entirety, have been conducted in such a way that the Applicant had a fair trial (see, *inter alia*, European Commission of Human Rights, *Edwards v. United Kingdom*, App. No. 13071/87, 10 July 1991).
35. In the present case, the Applicant was afforded ample opportunities to present his case and to contest the interpretation of the facts and the law which he considered incorrect, before the District Court and the Supreme Court. The Court notes that the text of the decisions of the District Court on his appeal, and

the Supreme Court on his request for protection of legality, do not explicitly mention the pieces of evidence on which the Applicant bases his Referral. However, the Court finds that the decisions of both courts are reasoned and adequately address the Applicant's allegations in substance.

36. Having examined all of the criminal proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECtHR App. No. 17064/06, 30 June 2009).
37. The Court considers that there is nothing in the Referral which indicates that the courts hearing the case lacked impartiality or that the proceedings were otherwise unfair. The mere fact that the Applicant is dissatisfied with the outcome of the case cannot raise an arguable claim of a breach of Article 31 of the Constitution (see *Memetoviq v. Supreme Court of Kosovo*, KI 50/10, 21 March 2011; see *mutatis mutandis* *Mezotur-Tiszazugi Tarsulat v. Hungary*, ECtHR App. No. 5503/02, 26 July 2005).
38. Based on these considerations, the Court finds that the Applicant has not been a victim of a denial of judicial protection of his rights.
39. Therefore, the Constitutional Court finds that the Applicant's claims have not been substantiated and must be dismissed as manifestly ill-founded.
40. Consequently, for the reasons outlined above, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113 (7) of the Constitution, Article 46 of the Law and Rule 36 (2) of the Rules, on 12 September 2013, unanimously,

DECIDES

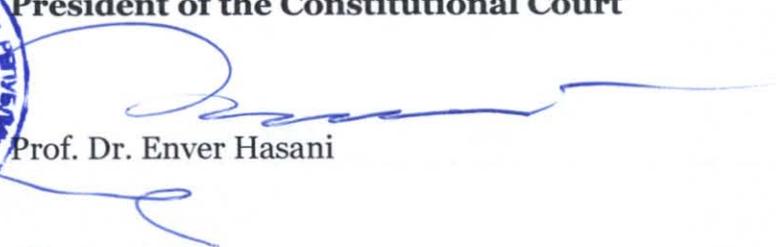
- I. TO REJECT the Referral as Inadmissible;
- II. TO NOTIFY this Decision to the Parties;
- III. TO PUBLISH this Decision in the Official Gazette, in accordance with Article 20 (4) of the Law;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur


Robert Carolan



President of the Constitutional Court


Prof. Dr. Enver Hasani