



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

Prishtina, on 2 November 2015
Ref. No.:RK 853/15

RESOLUTION ON INADMISSIBILITY

in

Case No. KI38/15

Applicant

Kolë Puka

**Request for constitutional review of Judgment PML.-KZZ. No. 170/2014
of the Supreme Court of Kosovo of 19 February 2015**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge, and
Bekim Sejdiu, Judge

Applicant

1. The Applicant is Mr. Kolë Puka, currently serving an imprisonment sentence in Dubrava prison, who is represented by his son Mr. Driton Puka from the village Renoc, Municipality of Klina.

Challenged decision

2. The challenged decision is Judgment PML.-KZZ. No. 170/2014, of the Supreme Court of Kosovo, of 19 February 2015, which was served on the Applicant on 2 March 2015.

Subject matter

3. The subject matter is the constitutional review of the challenged Judgment which, according to the Applicant, violated his rights guaranteed by the Constitution of the Republic of Kosovo (hereinafter: the Constitution), under Article 31 item 1, 3 and 5 (Right to Fair and Impartial Trial).

Legal basis

4. Article 113.7 of the Constitution, Article 47 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law) and Rule 56 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 24 March 2015, the Applicant's representative submitted the Referral to the Constitutional Court (hereinafter: the Court).
6. On 22 April 2015, the President of the Court, by Decision GJR. KI38/15, appointed Judge Robert Carolan as Judge Rapporteur and the Review Panel, composed of Judges: Snezhana Botusharova (Presiding), Kadri Kryeziu and Bekim Sejdiu.
7. On 1 July 2015, by Decision of the President of the Court, Judge Arta Rama-Hajrizi was appointed as member to the Review Panel, replacing Kadri Kryeziu, whose mandate as a judge ended on 26 June 2015.
8. On 29 July 2015, the Court informed the Applicant about the registration of the Referral and a copy of the Referral was sent to the Supreme Court.
9. On 11 September 2015 the Review Panel considered the report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral

Summary of facts

10. On 24 May 2012, the Applicant, as one of 4 (four) accused by Judgment P. no. 477/11, of the District Court in Peja, was found guilty of the criminal offence of "Abuse of Official Position or Authority", and he was punished with a sentence of 5 (five) years in prison. In addition, the Judgment also imposed the accessory punishment of "Prohibition on Exercising Public Administration or Public Service Functions" for a period of 3 (three) years.

11. The District Court, as a court of first instance, in the reasoning of the Judgment stated that it had been proven that between 12 September 2007 and 8 April 2008, in Klina, the Applicant in the capacity of a judge of the Municipal Court, together with a lawyer from Klina, prepared and executed a plan to file a submission for compensation for damage caused in a traffic accident without the knowledge or consent of the injured person. Then the Applicant, as a judge performing his official duty, issued a court decision that decided to allocate material compensation to a certain person without any evidence to support this compensation award to the detriment of an insurance guarantee fund.
12. On 15 July 2012, the Applicant filed an appeal against the Judgment of the District Court in Peja, as mentioned above.
13. On 25 April 2013, the Court of Appeal rendered Judgment PAKR 1122/2012, which rejected the Applicant's appeal as ungrounded, while it modified *ex officio* the part of the judgment that had to do with the Applicant, by re-qualifying the criminal offense. So instead of the criminal offense of "*Abuse of Official Position or Authority*" the Applicant was found guilty of the criminal offense of "*Issuance of Unlawful Judicial Decisions.*" The Court of Appeal then imposed on him the imprisonment sentence in the same duration of time as the District Court in Peja, but, by applying the most favorable law for the Applicant, it removed the accessory punishment imposed by the court of first instance.
14. The Court of Appeal, reasoned its Judgment as it follows: "*In the opinion of the Appeals Panel, contrary to the findings of the First Instance Court, a comparison of the legal elements of the criminal offences of Abusing Official Position or Authority and Issuing Unlawful Judicial Decisions leads to the conclusion that the latter is the more specific crime which subsumes the criminal offence of Abusing Official Position or Authority by application of the principle *lex specialis derogate lex generali**".
15. The Court further reasoned that "*This misapplication of criminal law by the Trial Panel is detrimental to the accused because it might have influenced the determination of punishment as both criminal provisions provide for different punishments: the criminal offence of Abusing Official Position or Authority foresees a punishment of imprisonment of one to eight years whereas the criminal offence of Issuance of Unlawful Judicial Decisions foresees a punishment of six month to five years.*" And "*For these reasons, the Appeals Panel modifies the Judgment of the District Court of Peja and finds the accused Kole Puka guilty for the criminal offence of Issuing Unlawful Judicial Decisions*".
16. On 4 February 2014, the Applicant filed a request for protection of legality with the Supreme Court of Kosovo.
17. On 19 February 2015, the Supreme Court decided the Applicant's request, and after receiving the opinion from the Office of the Chief State Prosecutor it rendered Judgment, PML.-KZZ. No. 170/2014. The request for protection of

legality, submitted by the Applicant, was found partly grounded. Thus, the judgments of the District Court of Peja and of the Court of Appeal were modified in terms of the criminal sanction, so that the Applicant's punishment was reduced by six (6) months less than the original imposed sentence.

18. The Supreme Court based the modification of the Judgment primarily on the assessment of aggravating and mitigating circumstances for the Applicant by the regular courts, and in that case, among others reasoned: *"Therefore, the Supreme Court considers that the Court of Appeal has violated criminal law when imposing maximal punishment for the criminal offense by rendering unlawful judicial decision. Pursuant to Article 438 paragraph 1 subparagraph 1.1, the Supreme Court, agreeing with all the aggravating and mitigating circumstances mentioned in the Judgment of the Court of Appeal, modifies the judgment and determines that the sentence of four (4) years and six (months) is proportional"*.

Applicant's allegations

19. The Applicant alleges that his rights guaranteed by the Constitution of Kosovo to a fair and impartial trial (Article 31 of the Constitution) have been violated because his criminal case had been unlawfully separated into five criminal cases, even though all five cases were about the same issue. The Applicant alleges that procedure resulted in a violation of Article 31.5 of the Constitution, which refers to the presumption of innocence.
20. The Applicant further alleges that the composition of the trial panel in the Supreme Court was not appointed in accordance with Law No. 03/L-053 on the jurisdiction of judges and prosecutors of EULEX.
21. The Applicant requested the Court to annul all judgments of regular courts and to remand the case for re-trial.

Assessment of the Admissibility of the Referral

22. In order to adjudicate the Applicant's Referral, the Court needs to first examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution and further specified in the Law and the Rules of Procedure.
23. In this respect, the Court refers to Article 113.7 of the Constitution, which provides:

"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 Rule 36 of the Rules of Procedure of the Constitutional Court, which provides:

"(1) The Court may only deal with Referrals if:

2. b) the Referral is not manifestly ill-founded.”

25. The Court notes that the Applicant alleges that the challenged decision violated his right to a fair and impartial trial under Article 31.1, 2 and 3 of the Constitution.
26. The Court recalls that the Constitution of Kosovo in the provisions, challenged by the Applicant, provides:

Article 31 of the Constitution [Right to Fair and Impartial Trial]

1. Everyone shall be guaranteed equal protection of rights in the proceedings before courts, other state authorities and holders of public powers.

2. 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 within a reasonable time by an independent and impartial tribunal established by law.

[...]

5. Everyone charged with a criminal offense is presumed innocent until proven guilty according to law.

27. In order to decide the merits of the Referral, the Court also takes into account the provisions of the Law on Courts, 2010/03-L-199, decreed on 9 August 2010, where it is provided:

Article 21, the Supreme Court

1. The Supreme Court is the highest judicial authority in Kosovo and shall have territorial jurisdiction over the entirety of the Republic of Kosovo.

[...]

and

Article 22, Competencies of the Supreme Court

1.3. defines principled attitudes and legal remedies for issues that have importance for unique application of Laws by the courts in the territory of Kosovo;

[...]

28. By assessing the constitutionality of the challenged judgment in light of the allegations for constitutional violations and the facts that have supported these allegations, and by comparing these facts with the content of the above_

mentioned provisions, the Court holds that it has not found the arguments that the constitutional provisions have been violated. Moreover, when such allegations are of a mere legal character and not of constitutional character, and are subject of review also in the Judgment of the Supreme Court, and that court provides effective responses to those allegations this Court cannot act as a fourth instance court with respect to the correct interpretation of the law.

29. The Court recalls that the Applicant believes that the separation of a criminal case into several categories results in a substantial violation of the criminal proceedings, the criminal law and the rights of defendants. The Supreme Court in its judgment in paragraph 60, specifically rejected this argument as ungrounded.
30. Regarding the alleged unlawful composition of the Supreme Court's trial panel that ruled on the request for protection of legality, the Court notes that this issue has to do with the correct application of the law which is the exclusive competence of the regular courts.
31. In addition, the Supreme Court itself in its Judgment in paragraphs 50-57 in an extensive and convincing manner has explained the composition of the trial panel considering all domestic legal acts, the International Agreement with the Mission of the European Union ratified by the Law, 04 L-274, promulgated by the President on 7 May 2014, and the Vienna Convention.
32. In order to be treated as a constitutional issue in relation to Article 31 of the Constitution and Article 6 of the European Convention of Human Rights (ECHR), the composition of the judicial panel should be a clear indicator of bias in the adjudication. But in this case the bias of the trial panel has been neither challenged nor substantiated by the Applicant. Therefore, in these circumstances, there is no proof of a violation of Article 31 of the Constitution or Article 6 of the ECHR.
33. The Court notes that the simple description of the provisions of the Constitution and the allegation that they have been violated, without presenting evidence of the way they were violated, without specifying the circumstances of the alleged violations, or without specifying the actions of the public authority that are contrary to fair and impartial trial, do not constitute sufficient ground to convince the Court that there has been a violation of the Constitution or of the Convention regarding a fair and impartial trial.
34. The Court further holds that the judgments of the regular courts, challenged by the Applicant, substantially respected the Applicant's human rights, by providing all procedural and substantive possibilities to the Applicant to be an equal and active party in all stages of the court proceedings. In addition, the Court of Appeal, specifically relied upon the case law of the ECHR and of other international courts, as well as cases from domestic case law in reviewing the Applicant's appeal.

35. In conclusion, the Court further holds that it is not a fact finding court, it does not adjudicate as a court of fourth instance, and it is not merely a higher instance court. It is essential for the Court that the issues on which it decides depend on the assessment of possible violations of the Constitution and not clearly legal issues. (See, *mutatis mutandis, l.a., Akdivar v. Turkey*, 16 September 1996, R.J.D, 1996-IV, para. 65). In this case, the Applicant mainly presented allegations of legal violations, not Constitutional violations.
36. The Court notes that it is the task of the courts of regular jurisdiction to decide on the ranking of the importance of evidence and to appreciate what evidence pursuant to the correct application of the applicable law prevails. In the present case it was undoubtedly up to the Supreme Court to decide how fair is the legal stance of the first instance court or of the Court of Appeal, and to sanction this by it's final court decision.
37. It should be noted that the Constitution of Kosovo, in Article 103.2 has provided that the Supreme Court is the highest judicial authority, whereas the Law on Courts has given the authority to the Supreme Court for "*unique application of Laws by the courts in the territory of Kosovo*" and, consequently, the unification of the case law of the regular courts.
38. In this respect, the Court has not found that different reasoning of the courts of two judicial instances have resulted in violation of Article 31 of the Constitution, because the final Judgment of the Supreme Court has concluded the determination of the factual situation and of the application of legality, and the Applicant has not substantiated in any way that the challenged Judgment is an indicator of an evident arbitrariness requiring it's annulment on a constitutional basis.
39. In these circumstances, the Court could not find that the right to fair and impartial trial has been violated (See also, Resolution of the Constitutional Court, Case, KI128/12, of 12 July 2013, of the Applicant *Shaban Hoxha*, in the request for constitutional review of the Judgment Rev. no. 316/2011, of the Supreme Court of Kosovo).
40. In sum, the Court concludes that the facts presented by the Applicant do not in any way justify the allegation of a violation of his constitutional rights or of rights guaranteed by the ECHR. Therefore, the challenged decision did not violate the Applicant's human rights. Therefore, the Court finds that the Referral is to be declared inadmissible, as manifestly ill-founded.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 48 of the Law and Rule 36 (1) (c), 36 (2) (b) and (d) and Rule 56 (2) of the Rules of Procedure, on 11 September 2015, unanimously

DECIDES

- I. TO DECLARE the Referral inadmissible;
- II. TO NOTIFY the Parties of this Decision;
- 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



Robert Carolan

President of the Constitutional Court



Arta Rama-Hajrizi

