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

Prishtina, 2 June 2017
Ref. No.:RK 1080/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI68/16

Applicant

Fadil Rashiti

Constitutional Review of the Judgment Pml. No. 249/2015 of the Supreme Court of Kosovo, of 3 December 2015

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Arta Rama-Hajrizi, President
Ivan Čukalović, Deputy President
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Bekim Sejdiu, Judge
Selvete Gërxhaliu-Krasniqi, Judge and
Gresa Caka-Nimani, Judge.

Applicant

1. The Referral was submitted by Fadil Rashiti, from village of Velekincë, municipality of Gjilan, (hereinafter: the Applicant), represented by Shemsedin Pira, lawyer from Gjilan.

Challenged Decision

2. The Applicant challenges the Judgment (Pml. No. 249/2015 of 3 December 2015) of the Supreme Court of Kosovo (hereinafter: the Supreme Court) in connection with the Judgment (P. Nr. 286/2014 of 10 February 2015) of the Basic Court in Gjilan (hereinafter: the Basic Court) and the Judgment (PA1. no. 570/2015 of 8 July 2015) of the Court of Appeals in Prishtina (hereinafter: the Court of Appeals).

3. The judgment of the Supreme Court was served on the Applicant on 31 December 2015.

Subject Matter

4. The subject matter is the constitutional review of the challenged judgment which has allegedly violated the Applicant's right guaranteed by Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

5. The Referral is based on Article 113.7 [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 29 [Filling of Referrals and Replies] of the Rules of Procedure of the Constitutional Court (hereinafter, the Rules of Procedure).

Proceedings before the Constitutional Court

6. On 20 April 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

7. On 28 April 2016 the Applicant submitted additional documents to the Court.

8. On 11 May 2016, the President of the Court appointed Judge Snezhana Botusharova as Judge Rapporteur and the Review Panel composed of Judges, Robert Carolan (presiding), Altay Suroy, and Gresa Caka Nimani.

9. On 19 July 2016 the Court notified the Applicant of the registration of the Referral and sent a copy of the Referral to the Supreme Court of Kosovo and requested from the Applicant and the Supreme Court to submit evidence of the date of service of the Judgment (Pml. No. 249/2015) of the Supreme Court.

10. On 28 July 2016 the Court received confirmation on the date when the Applicant was served with the above judgment.

11. On 13 January 2017, the President of the Court appointed Judge Ivan Čukalović as a member of the Review Panel replacing Judge Robert Carolan, who had resigned from the position of the Judge of the Court on 9 September 2016.

12. On 13 January 2017 the representative of the Applicant submitted the Authorization that proves that he is authorized to represent the Applicant before the Court.

13. On 31 March 2017, 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

14. On 28 February 2014 the Prosecutor of the Basic Prosecution in Gjilan (hereinafter: the Prosecutor) filed in Indictment [PP. II. No. 159/2014] against the Applicant based on suspicion that he had committed the criminal offences under Articles 186 [Harassment] and 185 [Threat] of the Criminal Code of Kosovo (CCK) towards the injured party H.D.

15. On 10 February 2015, the Basic Court (Judgment P. Nr. 286/2014) found the Applicant guilty of committing the criminal offence under Article 186 [Harassment] of the CCK and was given a suspended sentence of 180 days imprisonment which would not be executed if the Applicant during the verification period of 1 year and 6 months does not commit another criminal offence. The Applicant was acquitted of the charge regarding the criminal office under Article 185 [Threat] of the CCK.

16. The judgment of the Basic Court reasoned, among others, as follows:

> *"In the case at hand, based on the examined pieces of evidence, it was confirmed that the [Applicant], during 2013 but also 2014 [...] even when he was not performing his official duties, wearing civilian clothes, has gone to the workplace in the field, where the Injured person [H.M] was performing her official duty, and then in the Police Station, by blocking the way of the [H.M] to enter the Police Station in Gjilan, by making uncontrolled and unwanted behaviour in relation to [H.M] – blocking her way with his body then speaking in her ear, as [H.M] rightfully witnessed: "I will bite your ear", [...] by making repeating phone calls that were unwanted for [H.M], then sending SMSs and calling her with the affectionate name "BIBUSH", all these actions were made by the [Applicant] in order to harass, intimidate, and cause substantial emotional distress to her, since she is married and has children, and such behaviour might reasonably cause great family, especially marital, problems to the [H.M], and also insecurity for her private free and calm life. Such incriminating behaviour of the [Applicant] toward the [H.M] have, from time to time, and repeatedly caused anxiety and insecurity to her [...]*
>
> *Based on what is mentioned above, it was confirmed that the actions of the [Applicant] contain all the characteristics of the criminal offence of "Harassment", provided by Article 186, paragraph 1 as read in conjunction with Paragraph 4 of the CCK, whereof the Court found him guilty and sentenced him as stated in the enacting clause of the present Judgment."*

17. The Defence Counsel of the Applicant filed an appeal against the judgment of the Basic Court with the Court of Appeals due to *"essential violation of the provisions of criminal procedure, violation of the criminal code, erroneous and incomplete determination of the factual situation, and decision on the sentence"*, proposing that the judgment of the Basic Court be *"amended and the [Applicant] be acquitted of the criminal charge of [Harassment]."*

18. The Prosecutor also filed an appeal against the Judgement of the Basic Court with the Court of Appeals due to *"erroneous and incomplete determination of the factual situation"*, proposing that the challenged judgment, as regards criminal offence under Article 185 [Threat] of the CCK, whereby the Applicant was released from culpability, be annulled and the criminal matter be remanded to the Basic Court for retrial and reconsideration. Regarding criminal offence under Article 186 [Harassment] of the CCK, the Prosecutor requested that the judgment of the Basic Court be amended and a more severe punishment be imposed on the Applicant.

19. The Injured Party - H.M also filed an appeal against the Judgement of the Basic Court with the Court of Appeals with regard to the sentence given regarding criminal offence under Article 185 [Threat] of the CCK, proposing that a more severe punishment be imposed on the Applicant.

20. On 8 July 2015, the Court of Appeals (Judgment, PA1. no. 570/2015) rejected all the appeals as ungrounded and held as follows:

> *"[...]as regards the essential violation of the provisions of the criminal procedure, under Article 394, paragraph 1, item 1.1, of the CPCK [Criminal Procedure Code of Kosovo], [the Court of Appeals] reached the conclusion that the judgment of the first instance court does not contain the violations alleged in the appeal of the Defense Counsel of the [Applicant], because the enacting clause of the [judgment of the Basic Court] is clear, intelligible, and coherent with itself and the reasoning and it contains the decisive facts that characterize the nature of the criminal offence of "Harassment".*
> *[...]*
> *the factual situation was fairly and completely determined, because the [Basic Court] has proceeded with all the necessary pieces of evidence and confirmed the facts that characterize the criminal offence of "Harassment", provided by Article 186, paragraph 4, as read in conjunction with paragraph 1 of the CCK, which results from the statement of the Injured person – [H.M], and the statements of Witnesses – [I.R], [L.B], [E.R], [S.R], and the examination of the SMSs, wherefrom it results that the [Applicant] has committed the criminal offence wherewith he is charged, because he has repeatedly harassed the [H.M] with various words, hence the factual situation was fairly and completely determined"*

21. The Defence Counsel of the Applicant filed a request for protection of legality with the Supreme Court alleging essential violation of the provisions of criminal procedure, namely Article 384 of the CPCK since *"[t]The Court [of Appeals] neither notified the parties and the Defense Counsel of the [Applicant] for the hearing nor mentioned in the minutes of the hearing*

whether the parties and the Defense Counsel of the [Applicant] were notified of the hearing or not".

22. The Prosecutor, by submission (KMLP. II. no. 186/15, of 11 November 2015), proposed that the request be rejected as ungrounded.

23. On 3 December 2015, the Supreme Court (Judgment, Pml. no. 249/2015) rejected the Applicant's request for protection of legality and held as follows:

> *"[...]In the provision of Article 390, paragraph 1 of the CPCK, it is stated that: "When an imprisonment sentence was imposed on the accused, the notification of the session of the appeal panel shall be sent to the state prosecutor, to injured party, and to the accused and his/her defense counsel." In the concrete case by the judgment of the [Basic Court], no sentence by imprisonment was imposed; instead, a conditional release was imposed, hence the Court of Appeals had no obligation to notify the [Applicant], his defense Counsel or other persons mentioned above, of the hearing of the [Court of Appeals] trial panels and by not notifying them, it did not make any essential violation of the provisions of the criminal procedure, as alleged in the Request for Protection of Legality."*

Applicant's allegations

24. The Applicant alleges that the regular courts violated his right under Article 31 [Right to Fair and Impartial Treatment] of the Constitution.

25. The Applicant alleges that: *"by no piece of credible and complete evidence, neither of witnesses nor material evidence was confirmed that the actions of [the Applicant] contained the characteristics of this criminal offence [...]".*

26. The Applicant also alleges that" *[...] the summary contained in the enacting clause of the judgment [of the Basic Court], is obviously unintelligible, ambiguous and contradictory to the reasoning, [...]"*

27. The Applicant further considers that: *"judge [A.SH], in the Basic Court in Gjilan, rendered a decision declaring me guilty of "sexual harassment", by modifying/altering the statements of witnesses and the [injured party- H.M], and considering as witnesses even persons who do not meet the criteria to be witnesses"* claiming that the above judge has a family connection with the H.M.

28. The Applicant claims that: *"the Court of Appeals, when considering the judgment of the [Basic Court] as fair, and, especially, the [Supreme] Court that decided upon [...] the Request for Protection of Legality, has flagrantly violated the provisions of the law and the constitutional rights of the [Applicant]."*

29. The Applicant finally claims that his defence Counsel in the closing statement at the Basic Court *"did not mention any violation made by [the] Judge [of the Basic Court], against me. In addition, he did not mention any piece of evidence that would go to my defence, [...] to the Court of Appeals and the Supreme Court."*

30. Thus, the Applicant requests the Court to:

- *declare the Referral admissible.*
- *declare the challenged Judgment of the Supreme Court unconstitutional, and*
- *order that the final decision P. no. 286/2014 of the Basic Court be remanded for retrial.*

Assessment of the admissibility of the Referral

31. The Court first examines whether the Referral has fulfilled the admissibility requirements established by the Constitution, and as further provided by the Law and foreseen by the Rules of Procedure.

32. In this respect, the Court refers to paragraphs 1 and 7 of Article 113 [Jurisdiction and Authorized Parties] of the Constitution which provide that:

> *"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."*

33. The Court also refers to Article 48 [Accuracy of the Referral] of the Law, which 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 public authority is subject to challenge."*

34. Furthermore, the Court refers to Rules 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, which provide that:

> *"(1) The Court may consider a referral if: (d) the Referral is prima facie justified or not manifestly ill-founded."*
>
> *(2) The Court shall declare 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, [...]*
> *(d) the Applicant does not sufficiently substantiate his claim;"*

35. As referred to above, the Applicant complains before the Court that: *(i)* the regular courts have taken decision to sentence him without sufficient evidence and did not take into account all the circumstances of case when deciding on the sentence; *(ii)* the summary contained in the enacting clause of the judgment of the Basic Court is obviously unintelligible, ambiguous and contradictory to the reasoning; *(iii)* the decision to sentence him was based on the testimonies of witnesses whose statements were modified by the judge of

the Basic Court who also had a conflict of interest in the case; *(iv)* the Court of Appeals did not notify the Applicant or his Defence Counsel about the session held at the Court of Appeals regarding his case; and *(v)* his lawyer did not raise some of the allegations raised by the Applicant before this Court before the regular courts.

36. In regard to the first and second allegations, the Court also recalls the reasoning of the Court of Appeals in answering the Applicant's allegation which, among others, states:

> *"the judgment of the first instance court does not contain the violations alleged in the appeal of the Defense Counsel of the [Applicant], because the enacting clause of the [judgment of the Basic Court] is clear, intelligible, and coherent with itself and the reasoning and it contains the decisive facts that characterize the nature of the criminal offence of "Harassment".*
> *[...]*
> *the factual situation was fairly and completely determined, because the first instance court has proceeded with all the necessary pieces of evidence and confirmed the facts that characterize the criminal offence of "Harassment", provided by Article 186, paragraph 4, as read in conjunction with paragraph 1 of the CCK, which results from the statement of the Injured person – [H.M], and the statements of Witnesses – IR, LB, ER, SR, and the examination of the SMSs[...]"*

37. As to the third allegation of the Applicant, there is nothing in the Referral that suggest that this issue was raised by the Applicant during the course of regular proceedings. This question is being raised for the first time before the Constitutional Court. However, the Constitutional Court – in accordance with the principle of subsidiarity – cannot assess this question without it having been raised and assessed in the regular proceedings beforehand.

38. The principle of subsidiarity requires that the Applicant exhausts all procedural possibilities in the regular proceedings, in order to prevent the violation of the Constitution or, if any, to remedy such violation of a fundamental right. Thus, the Applicant is liable to have his case declared inadmissible by the Constitutional Court, when failing to avail himself of the regular proceedings or failing to report a violation of the Constitution in the regular proceedings. That failure shall be understood as a giving up of the right to further object the violation and complain. (See: *Resolution in case KI139/12, Besnik Asllani, Constitutional review of Judgment PKL. no. 111/2012 of the Supreme Court, of 30 November 2012, paragraph 45; and see, mutandis mutandis, Selmouni v. France [GC], § 74; Kudla v. Poland [GC], § 152; Andrasik and Others v. Slovakia (dec.).*

39. In relation to the fourth allegation, that the Court of Appeals did not notify the Applicant or his Defence Counsel about the session held at the Court of Appeals, the Court recalls the reasoning of the Supreme Court which argued that since no sentence by imprisonment was imposed, the Court of Appeals had no obligation under Article 390, paragraph 1 of the CPCK to notify the Applicant or his defense Counsel of the hearing of the Court of Appeals trial panels.

40. In addition, the Court observes that the entitlement to a "public hearing" as guaranteed by Article 31.2 of the Constitution and Article 6.1 of the European Convention on Human Rights (hereinafter, the Convention) necessarily implies a right to an "oral hearing". (See, *mutatis mutandis*, ECtHR Judgment of 12 November 2002, *Döry v. Sweden*, application no. 28394/95, paragraph 37).

41. The principle of an oral and public hearing is particularly important in the criminal context, where the accused person of a criminal offence in general, must be provided an opportunity to be physically present in the session of a Court, which fully meets the requirements of Article 31 of the Constitution and Article 6 of the Convention. At this Session that Applicant must have the opportunity to have his case "heard", and, inter alia, to give evidence in his own defence, hear the evidence against him, and examine and cross-examine the witnesses. (See ECtHR Judgment of 23 Noveember 2006 *Jussila v. Finland*, application no. 73053/01, paragraph 40).

42. The personal attendance of the defendant does not take on the same crucial significance for an appeal hearing as it does for the trial hearing. The manner of application of Article 31 of the Constitution and Article 6 of the Convention to proceedings before courts of appeal depends on the special features of the proceedings involved; account must be taken of the entirety of the proceedings in the legal order and of the role of the appellate court. (See ECtHR Judgment of 18 October 2006, *Hermi v. Italy*, application no. 18114/02, paragraph 60).

43. However, where an appellate court has to examine a case as to the facts and the law and make a full assessment of the issue of guilt or innocence, it cannot determine the issue without a direct assessment of the evidence given in person by the accused for the purpose of proving that he did not commit the act allegedly constituting a criminal offence (see ECtHR Judgment of 9 June 2009, *Sobolewski (no. 2) v. Poland*, Application No. 19847/07 , para. 35, and ECtHR Judgment of 6 July 2004, *Dondarini v. San Marino*, Application No. 50545/99, para. 27).

44. The Court notes that, in the proceedings at the Basic Court, the Applicant was heard orally regarding the criminal offense which he is charged with. Subsequently, the court conducted the evidence procedure in which it heard the witnesses and the other evidence was presented. The Applicant also benefitted from legal assistance of a lawyer and was able to present his evidence and arguments and to oppose and challenge the evidence presented against him and the criminal charges.

45. The Court notes that, in the appeal proceedings, the Court of Appeals only confirmed the judgment of the Basic Court based on the facts determined by the Basic Court.

46. Thus, the Court finds that he Applicant was not deprived of the rights and guarantees foreseen by Article 31.2 of the Constitution and Article 6.1 of the ECHR as regard to a to an "oral hearing". He had the opportunity to defend himself in person, he had legal assistance and he was able to participate in the proceedings at the stage where the Basic Court found him guilty.

47. As to the fifth allegation, the Court notes that the Applicant blames his lawyer for not raising some of the allegations at the regular courts which the Applicant now raises before this Court, which, in fact, is not a valid argument for consideration before the Constitutional Court.

48. The Court reiterates that the Applicant is responsible for the conduct of his lawyer or any other person representing him before the Court. Any procedural action or inaction on the representative's part are in principle attributable to the applicant himself (See *Bekauri v. Georgia, No. 14102/02 ECHR, Judgment of 10 April 2012, §§ 22-25; and see, mutatis mutandis, Migliore and Others v. Italy, No. 58511/13 ECHR, Decision of 27 January 2014*).

49. Thus, the Court notes that following the Applicant's appeal and his request for protection of legality, the Court of Appeals and the Supreme Court, have rejected his allegations of violation of CCK and CCPK by fully supporting the judgment of the Basic Court and Court of Appeals, respectively. Both instances have responded to all allegations of violations of CCK and CCPK raised by the Applicant.

50. The Court recalls that the Constitutional Court does not have the jurisdiction to decide whether an Applicant was guilty of committing a criminal offence or not. Nor does it have jurisdiction to assess whether the factual situation was correctly determined or to assess whether the judges of the regular courts have had sufficient evidences to determine the guilt of an Applicant.

51. In relation to this, the Court emphasizes that it is not its task to deal with errors of fact of law (legality) allegedly committed by the Supreme Court or any other court of lower instances, unless and in so far as such errors may have infringed rights and freedoms protected by the Constitution (constitutionality).

52. The Constitutional Court further reiterates that it is not its task under the Constitution to act as a court of "fourth instance", in respect of the decisions taken by the regular courts. The role of the regular courts is to interpret and apply the pertinent rules of both procedural and substantive law. (See case *Garcia Ruiz vs. Spain*, No. 30544/96, ECHR, Judgment of 21 January 1999; see also case KI70/11 of the Applicants *Faik Hima, Magbule Hima and Bestar Hima*, Constitutional Court, Resolution on Inadmissibility of 16 December 2011).

53. The mere fact that the Applicant is not satisfied with the outcome of the proceedings in his case does not give rise to an arguable claim of a violation of his rights as protected by the Constitution.

54. The Constitutional Court can only consider whether the evidence has been presented in a correct manner and whether 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* case *Edwards v. United Kingdom*, Application No 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991).

55. In relation to this, the Court notes that the reasoning in the regular courts referring to Applicant's allegations of violations of the criminal law and criminal procedure law is clear and, after having reviewed all the proceedings, the Court has also found that the proceedings before the regular courts have not been unfair or arbitrary (See case *Shub vs. Lithuania*, no. 17064/06, ECHR, Decision of 30 June 2009).

56. Therefore, in the present case, the Court considers that the facts presented by the Applicant do not in any way justify the alleged violations of the constitutional rights invoked by him and that the latter has not sufficiently substantiated his claim pursuant to Article 113.7 of the Constitution, Article 48 of the Law and Rules 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure.

57. Consequently, the Referral is manifestly ill-founded on constitutional basis and it should be declared inadmissible.

FOR THESE REASONS

The Constitutional Court of Kosovo, pursuant to Article 113.1 and 113.7 of the Constitution, Article 48 of the Law and Rules 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, in the Session held on 31 March 2017, 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; and

IV. TO DECLARE this Decision effective immediately;

Judge Rapporteur **President of the Constitutional Court**

Snezhana Botusharova Arta Rama-Hajrizi