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

Prishtina, 18 September 2017
Ref. No.:RK 1124/17

RESOLUTION ON INADMISSIBILITY

in

Case No. KI116/16

Applicant

Asrije Muçolli

Constitutional review of Judgment Rev. No. 68/2016, of the Supreme Court of Kosovo, of 19 April 2016

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 Asrije Muçolli (hereinafter: the Applicant) from Podujeva.

Challenged decision

2. The Applicant challenges Judgment Rev. No. 68/2016 of the Supreme Court of 19 April 2016 in conjunction with Judgment No. 2017/2015, of the Court of Appeal, of 21 December 2015 and Judgment C. No. 2934/11 of the Basic Court in Prishtina of 27 February 2015.

3. The Applicant was served with the Judgment of the Supreme Court on 8 June 2016.

Subject matter

4. The subject matter is the constitutional review of the challenged Judgment Rev. No. 68/2016 of the Supreme Court of 19 April 2016.

5. The Applicant alleges violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

Legal basis

6. The Referral is based on Article 113.7 of the Constitution, Articles 47 and 48 of the Law No. 03/L-121 on Constitutional Court of the Republic of Kosovo (hereinafter: the Law), and Rule 29 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the Rules of Procedure).

Proceedings before the Constitutional Court

7. On 22 September 2016, the Applicant submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).

8. On 19 October 2016, the President of the Court appointed Judge Altay Suroy as Judge Rapporteur and the Review Panel composed of Judges: Almiro Rodrigues (Presiding), Ivan Čukalović and Arta Rama-Hajrizi (judges).

9. On 29 November 2016, the Court notified the Applicant about the registration of the Referral and sent a copy of the Referral to the Supreme Court. On the same date, the Court requested the Applicant to submit an evidence (acknowledgment of receipt) indicating the date when the challenged decision was served on her.

10. On 6 December 2016, the Basic Court in Prishtina submitted to the Court the acknowledgment of receipt indicating that the Applicant received the challenged decision of the Supreme Court on 8 June 2016.

11. On 3 July 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

12. On 9 December 2003, the Kosovo Energy Corporation (hereinafter: KEK) by Decision No. 5594 established that the Applicant is recognized the right to compensation for medical expenses for recovery abroad due to workplace injury.

13. On 17 December 2003, KEK by letter of urgency requested the German Office in Kosovo to allow the Applicant to obtain a visa for Germany because of the medical treatment as she was injured in the working place.

14. On 7 July 2005, the Applicant filed a claim against KEK with the Municipal Court in Prishtina for compensation of damage from employment relationship. The Applicant at that time had sought, *inter alia*, compensation in the amount of € 69,000 due to physical and mental anguish, reduction of life activity, reduction of working ability-invalidity, bodily disfigurement and medical costs. The Applicant also attached evidence of her health status issued by medical experts.

15. On 19 July 2007, the Municipal Court in Prishtina by Judgment C1. No. 230/2005 partially approved the Applicant's claim and obliged the respondent KEK to compensate the Applicant, among the other, in the name of the physical and mental anguish, reduction of life activity- invalidity and bodily disfigurement, within 15 days from the day the Judgment was received.

16. The Municipal Court, among other things, found that among the parties is not disputable that the Applicant was injured in the workplace and that this finding is also supported by the documents issued by KEK itself and medical experts. The Municipal Court, among other things, also added that KEK did not take adequate measures to protect the Applicant at her workplace and that based on the relevant legal provisions and the objective right it was responsible for her injury in the workplace.

17. KEK filed an appeal against the aforementioned judgment with the District Court in Prishtina with the proposal that the challenged judgment be modified or quashed and the case be remanded for retrial.

18. On 11 March 2009, the District Court in Prishtina by Judgment Ac. No. 771/2008 found that:

> *"I. The appeal of the respondent Kosovo Energetic Corporation in Prishtina is REJECTED as ungrounded whereas paragraph 1 of Judgment C1. No. 230/05, of the Municipal Court in Prishtina, of 19 July 2007,which is related to the compensation of the damage for physical pain in amount of 7.000 Euros, reduction of life activity in amount of 15.000 Euros, bodily disfigurement in amount of 14.000 Euros, for the foreign help and care in amount of 200 Euros, for enriched food in amount of 300 Euros, with legal interest rate which is paid by the bank for money deposited for one year, starting from the day of medical expertise, 20 December 2006, until the final payment and paragraph III which is*

related to the compensation of costs of the contested procedure in amount of 1.366.00 Euros, is UPHELD.

II. The appeal of the respondent is PARTLY approved and paragraph 1 of the enacting clause of the appealed Judgment which is related to the compensation of the damage for mental anguish in amount of 7.000 Euros, for the reduction of working ability – invalidity in amount of 15.000 Euros, is QUASHED and the case is remanded to the Court of the first instance for retrial.

Paragraph II of the enacting clause of the same Judgment remains unchanged."

19. Meanwhile, KEK filed a request for revision against the abovementioned judgment with the Supreme Court on the grounds of substantial violations of the contested procedure provisions and erroneous application of the substantive law by proposing that the two lower instance court judgments be modified and the Applicant's statement of claim be rejected as unfounded.

20. On 8 November 2011, the Supreme Court by Decision Rev. No. 289/2009 approved KEK revision as grounded, quashed the judgments of the lower instance courts and remanded the case to the first instance court for retrial. The Supreme Court reasoned, *inter alia*, that the lower instance courts erroneously applied the substantive law and that it was not established whether the Applicant had requested protective measures at the workplace; and whether it was necessary for KEK to provide her the necessary equipment for protection at work.

21. On 1 January 2013, began the implementation of the Law on Courts (No. 03/L-199) to: *"Article 2.1.1.2 Basic Court - the court of first instance comprised of seven geographic areas as established by this Law; Article 17.1 The Court of Appeals is established as the second instance court with territorial jurisdiction throughout the Republic of Kosovo."*

22. On 27 February 2015, the Basic Court in Prishtina by Judgment C. No. 2934/11 rejected as unfounded the Applicant's statement of claim that in the name of material and non-material damage be compensated the amount of 69,000 euro. The Basic Court administered the evidence provided by the medical experts and heard three witnesses regarding the Applicant's injury at the workplace.

23. On 10 April 2015, the Applicant filed an appeal against the aforementioned Judgment of the Basic Court with the Court of Appeal on the grounds of substantial violations of the contested procedure provisions, erroneous and incomplete determination of the factual situation and erroneous application of the substantive law. The Applicant, *inter alia*, complained that the Basic Court had not given proper and convincing reasoning why it did not accept the statements of the witnesses that she was injured in the workplace based on the absurd reasoning that no minutes nor a report of the accident at work was compiled.

24. On 21 December 2015, the Court of Appeal by Judgment Ac. No. 2017/2015 rejected the Applicant's appeal as ungrounded and upheld the Judgment of the Basic Court. The Court of Appeal, *inter alia*, found that the Applicant failed to prove with concrete evidence that she was injured in the workplace.

25. On 3 February 2016, the Applicant filed a request for revision against the Judgment of the Basic and the Court of Appeal with the Supreme Court due to substantial violations of the provisions of the contested procedure and erroneous application of the substantive law. The Applicant stated that: (i) the lower instance courts did not act according to the remarks of the Supreme Court because they did not establish the fact if the KEK as an employer, had an obligation to secure the protective equipment at work; (ii) the lower instance courts did not justify why the statements of witnesses that indicated that the Applicant was injured in the workplace were unreliable, and that (iii) the injury at work is not proved only with a work accident report; but this can be proved even with witnesses who know and have shown that the Applicant was injured in the workplace.

26. On 19 April 2016, the Supreme Court by Judgment Rev. No. 68/2016 rejected the Applicant's revision against the Judgment of the Court of Appeal as ungrounded. The Supreme Court, *inter alia*, argued that (i) the lower instance courts have reasoned why they did not take into account the statements of the heard witnesses, (ii) on the basis of the administered evidence it was not established that the Applicant was injured in the workplace, and (iii) since it has not been established that the claimant was injured in the workplace, then there is no need to prove the fact whether the respondent KEK provided the means for protection at work.

27. The relevant part of the abovementioned Judgment of the Supreme Court reads:

> *"The of the second instance court found that in this legal matter the first instance court correctly applied the substantive law when it ascertained that the accident happened on 4 November 2002, the original of report of the accident does not exist neither in the professional service of the respondent nor in the health record of the claimant in the health institute of KEC, it results that the claimant was injured in March of 2003 whereas the health institute of KEC was informed 6 months after the injury. Based on the written report of expert Dr. Ing. Hamit Nuredini, it has been ascertained that the claimant was not injured at work.*
>
> *In order to exist the obligation of compensation for the damage there are 4 conditions that should be fulfilled: 1. To exist the objects of the obligational relationship and the responsibility for the caused damage, the one who caused the damage and the one who suffered the damage, 2. To exist the damaging fact which derives from the damage, 3. To exist the caused damage, 4. To exist the connection between the action and the caused damage, 5. To exist the illegality of the action, respectively, the inaction which caused the damage. In the present case, it has not been confirmed that the injury was caused at the workplace for which the respondent would be responsible.*

The statements in the revision that the first instance court did not act in accordance with the remarks of the Supreme Court of Kosovo made by Judgment Rev. no. 289/2009, of 8 November 2011, whether the respondent provided the protection equipments for work due to the reason that by the examined evidence it was not confirmed that the claimant was injured at work and also that it is not necessary to confirm the fact whether the respondent provided the equipments for work, do not stand. The first instance court reasoned the fact that it did not consider as basis the statement of heard witnesses because they are not trustful for confirming the fact that the claimant suffered injuries at work, therefore, the statements in the revision that the first instance court did not take into account the statements of heard witnesses upon deciding on this legal matter, do not stand."

Applicant's allegations

28. The Applicant alleges violation of Article 31 [Right to Fair and Impartial Trial] of the Constitution.

29. The Applicant alleges that: *"in a judgment dated 19.07.2007 it is obvious that the respondent has not contested my injury at the workplace and has also received the report with protocol number 547 of 08.05.2003, but has contested the type of damage and the amounts claimed by the claimant, and the court by judgment CI. no. 230/2005 of 19.07.2007 partially approved the statement of claim of the claimant, which was partially upheld by the District Court in Prishtina AC. no. 77112008 of 11 March 2009 by quashing only the part relating to the adjudicated part of mental anguish and the reduction of working ability".*

30. The Applicant alleges that: *"The Court in its Judgment C.nr.2934/2011 of 27.02.2015 did not take into account the visits to the Physician at Podujeva Health Center, the testimonies of the witnesses who were present at the time I suffered the injuries, as well as the report of injury with no. 547, registered on 08.05.2003, which was issued and signed by the supervisor respectively Director Musa Jusufi on 10.11.2002."*

31. The Applicant alleges that: *"The representative of KEK Osë Kuqi who during the main trial on 23.12.2014 stated that there is a grounded suspicion that the claimant was injured outside the workplace, with this statement of the respondent's representative it is seen what treatment have the workers who suffer injuries at their place of work at KEK, namely in the Elektro Kosova, because Osë Kuqi was previously aware of my injury at the workplace and was authorized by KEK to go to the German Office in Pristina, to urgently obtain my German visa as soon as possible, and this is see in the power of attorney with protocol no. 5882 of 19.12.2003".*

32. The Applicant alleges that the Supreme Court and the Court of Appeal rendered unreasoned judgments: *"The Court of Appeal, in addition that it did not justify its decisions/conclusions, it even did not repeat the reasoning of the first instance court - it did not explain why it agrees with the reasoning of the*

first instance court... The Supreme Court of Kosovo has silently repeated all violations of the previous instances, turning them into a constant violation of fundamental rights and freedoms by the state's judicial power. The court, among other things, does not reasonably justify its decisions that there has been no violation of the formal right and that there has been no violation of the substantive law".

33. Finally, the Applicant requests the Court to declare invalid the Judgment C. No. 2934/2011 of the Basic Court in Prishtina of 27 February 2015, Judgment Ac. No. 2017/2015 of the Court of Appeal of 21 December 2015 and Judgment Rev. No. no. 68/2016 of the Supreme Court of 19 April 2016 and that the case be remanded for retrial in order that she is provided the opportunity for fair and impartial trial.

Admissibility of Referral

34. The Court first examines whether the Applicant has met the admissibility requirements laid down in the Constitution, and, as further specified in the Law and foreseen in the Rules of Procedure.

35. In this respect, the Court refers to Article 113.7 of the Constitution which establishes:

"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".

36. The Court refers to Articles 48 and 49 of the Law, which stipulate:

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. [...]".

37. The Court also refers to Rule 36 (2) d) of the Rules of Procedure which specifies:

"(2) The Court shall declare a referral as being manifestly ill-founded when it is satisfied that:

d) the Applicant does not sufficiently substantiate his claim".

38. In the present case, the Court notes that the Applicant is an authorized party to submit the Referral, that she has exhausted all legal remedies in accordance with Article 113.7 of the Constitution and submitted the Referral within the 4 (four) month legal deadline as defined in Article 49 of the Law.

39. The Court must also ascertain whether the Applicant has presented and substantiated her allegations filed in accordance with Article 48 of the Law.

40. The Applicant essentially claims that the regular courts did not take into account the evidence presented by her to ascertain that she was injured in the workplace and to determine the obligation of KEK as an employer to compensate her for material and non-material damage she suffered when she was injured in the workplace.

41. The Constitutional Court recalls that it is not a fact-finding Court and the correct and complete determination of the factual situation is within the full jurisdiction of the regular courts. The role of the Constitutional Court is to ensure compliance with the constitutional standards during the court proceedings before the regular courts and cannot, therefore, act as a "fourth instance court" (See case, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, see also *mutatis mutandis* case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012 and case No. KI86/16, Applicant *"BENI" Trade Company*, Resolution on Inadmissibility, of 11 November 2016).

42. The Court reiterates that it is its duty to consider whether the proceedings before the regular courts, in general, including the way the evidence was taken were fair (See case *Edwards v. United Kingdom*, No. 13071/87, Report of the European Commission on Human Rights adopted on 10 July 1991.

43. The Court also notes that it is not its duty to deal with the errors of fact or law allegedly made by regular courts when assessing evidence or applying the law (legality), unless this may have resulted in a violation of the rights and freedoms protected by the Constitution (constitutionality).

44. It is the role of the regular courts to interpret and apply the pertinent rules of both procedural and substantive law (See *mutatis mutandis*, *Garcia Ruiz v. Spain,* [GC] No. 30544/96, para. 28, European Court of Human Rights [ECtHR] 1999-I).

45. As to the allegation of admissibility of evidence, the Court considers that although Articles 31 of the Constitution and 6 of the Convention guarantee the right to a fair trial, they do not lay down any rules on admissibility of such evidence, which under the applicable law in Kosovo is primarily a matter of legality. In particular, it is not the function of the Court to deal with errors of fact or law allegedly committed by regular courts unless and in so far as they may have infringed rights and freedoms protected by the Constitution (Constitutional Court of the Republic of Kosovo: Case no. KI114/15, Applicant *Feride Aliu-Shala*, Constitutional Review of the Judgment of the Supreme Court of Kosovo Pml. Nr. 95/2015, of 12 May 2015, Resolution on Inadmissibility of 17 May 2016, paragraph 39 with further references).

46. In addition, the Court notes that the Applicant had the benefit of adversarial proceedings; that she was able, at various stages of those proceedings, to adduce the arguments and evidence she considered relevant to her case; that she had the opportunity of challenging effectively the arguments and evidence adduced by the opposing party; and that all the arguments that were relevant to the resolution of the case were duly heard and examined by the regular courts; that the factual and legal reasons for the impugned decisions were set out at length. Accordingly, the proceedings taken as a whole were fair. (See case *Garcia Ruiz v. Spain*, application no. 30544/96, [GC], Judgment of 21 January 1999, paragraph 29).

47. It is not for the Court to speculate whether the testimonies of witnesses invited by the Applicant are stronger evidence compared to the evidence provided by the opposing party and the conclusions issued by the regular courts. There is no element which might lead the Court to conclude that the regular courts acted in an arbitrary or unreasonable manner in establishing the facts or interpreting the domestic law. (See Case *Alimuçaj v. Albania*, ECtHR, Application no. 20134/05, Judgment of 7 February 2012, paragraph 176).

48. In this respect, It should be borne in mind, since this is a very common source of misunderstandings on the part of applicants - that the "fairness" required by Article 31 of the Constitution and Article 6 of the Convention is not "substantive" fairness (a concept which is part-legal, part-ethical and can only be applied by the trial judge), but "procedural" fairness. This translates in practical terms into adversarial proceedings in which submissions are heard from the parties and they are placed on an equal footing before the court (Constitutional Court of the Republic of Kosovo: Case no. KI42/16 Applicant *Valdet Sutaj*, constitutional review of the Decision Rev. No. 201/2015, of the Supreme Court of Kosovo, of 8 September 2015, Resolution on Inadmissibility of 7 November 2016, paragraph 41 and other references referred to in that decision).

49. Article 31 of the Constitution does not guarantee favorable outcome to the Applicants' case nor does it allow the Court to question the substantive fairness of the outcome of a civil dispute, where more often than not one of the parties wins and the other loses (Constitutional Court of the Republic of Kosovo: Case no. KI142/15 Applicant *Habib Makiqi*, Constitutional Review of the Judgment of the Supreme Court of Kosovo, Rev. No. 231/2015, of 1 September 2015, Resolution on Inadmissibility of 1 November 2016, paragraph 43).

50. The fact that the Applicant disagrees with the outcome of the case cannot serve her as a right to raise an arguable claim on violation of Article 31 of the Constitution (See Case No. KI125/11, *Shaban Gojnovci*, Resolution on Inadmissibility of 28 may 2012, paragraph 28).

51. In these circumstances, the Court considers that the Applicant failed to substantiate her allegations of a violation of fundamental human rights as guaranteed by the Constitution and the Convention. The facts of the case do not show that the regular courts have acted contrary to the procedural guarantees established by the Constitution and the Convention.

52. Accordingly, the Referral, on constitutional basis, is manifestly ill-founded and is to be declared inadmissible as established in Article 113.7 of the Constitution, foreseen by Article 48 of the Law and further specified in Rule 36 (2) d) of the Rules of Procedure.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 47 and 48 of the Law and Rule 36 (2) (d) of the Rules of Procedure, on 3 July 2017, 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; and

IV. This Decision is effective immediately.

Judge Rapporteur **President of the Constitutional Court**

Altay Suroy Arta Rama-Hajrizi