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

Pristine, 11 June 2012
Ref. No.: RK249/12

RESOLUTION ON INADMISSIBILITY

Case No. KI43/11

Applicant

Jeton Sefer KIQINA

Constitutional Review of the Judgment of the District Court of Pristina P. No. 628/2004 dated 8 March 2007, Supreme Court of Kosovo in Pristina Judgments Ap. No. 84/2009 dated 3 December 2009 and PKL-KZZ No. 31/2010 dated 1 November 2010

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of:

Enver Hasani, President
Kadri Kryeziu, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Ivan Čukalović, Judge
Gjyljeta Mushkolaj, Judge and
Iliriana Islami, Judge

The Applicant

1. The Referral was filed by Jeton Sefer Kiqina, a Kosovo national and Swedish citizen, born in the village of Baice, Municipality of Gllogoc, through his authorized representative, Ibrahim Z. Dobruna, Lawyer from Gllogoc. The facts and allegations contained in this Referral registered under KI43/11 are substantially identical to the facts and allegations set out in the Referrals KI46/10, KI52/10, KI78/11 and KI81/11.

Legal basis

2. Article 113.7 of the Constitution, Article 22 of Law No. 03/L-121 on the Constitutional Court of the Republic of Kosovo of 16 December 2008 (hereinafter: the "Law") and Rule 56(2) of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter: the "Rules of Procedure").

Subject matter

3. The Applicant filed the Referral on the grounds that the District Court of Prishtina Judgment P. No.628/2004 dated 8 March 2007, and the Supreme Court of Kosovo Judgments Ap.No.84/2009 dated 3 December 2009 and PKL-KZZ No.31/2010 dated 1 November 2010, have resulted in the violation of his constitutional right to a fair trial under Article 31 [Right to a Fair and Impartial Trial].

Proceedings before the Court

4. On 29 March 2011, the Applicant filed a Referral with the Court which was registered on the same date under no. KI 43/11.

5. Prior to that, on 25 June 2010 Mrs. Sebahate Shala from Krajkovë Gllogovc had filed a Referral based on the authorization of the Organizational Council "Justice for the Kiqina case" which was registered under reference no. KI 46/10.

6. Also, prior to that, on 29 June 2010, Arben Kiqina filed a Referral with the Court which was registered on the same date under reference no. KI52/10. On 1 June 2011, the Applicant filed additional documents with the Court.

7. On 7 June 2011 Burim Ramadani, Arsim Ramadani, Arben Kiqina and Blerim Kiqina submitted to the Court a Referral registered under no. KI 78/11.

8. On 13 June 2011, Burim Ramadani and Arsim Ramadani submitted to the Court a Referral registered under no. KI 81/11.

9. On 11 November 2010, the President, appointed Judge Snezhana Botusharova as Judge Rapporteur in Referral, KI 46/10. On the same date, the President appointed the Review Panel composed of Judges Robert Carolan (Presiding), Altay Suroy and Ivan Čukalović.

10. On 19 July 2011, the President, by order BK-46/10, joined all of these separate Referrals KI46/10, KI52/10, KI43/11, KI78/11 and KI81/11, due to the relationship of one another as to subject matter and as to the persons making the Referrals. The Judge Rapporteur and the Review Panel remained the same for all the Referrals.

11. On 14 May 2012, due to the temporary unavailability of Judge Ivan Cukalovic, the President appointed himself, Enver Hasani, as a replacement Judge on the Review Panel.

12. On 15 May 2012 the Review Panel considered the Preliminary Report of the Judge Rapporteur and made a recommendation to the Court on the inadmissibility of the Referral.

Summary of facts according to the Applicant's documents filed with the Court

13. In the evening of 20 August 2001, H H together with his wife and children attended a wedding in the village of Baicë. After leaving the wedding, later that night his vehicle was ambushed and he, his wife, his son and two daughters were shot to death. One young daughter survived.

14. The following day Blerim Kiqina and Jeton Kiqina met Burim Ramadani, Arsim Ramadani, Arben Kiqina and another outside the Era restaurant in Gllogoc. Burim Ramadani told him that the action went very well and that S K had given or was going to give him money. There was a discussion about how to split the money.

15. On 4 July 2002, Blerim Kiqina turned himself into the police station. He was then arrested, advised of his rights and then interviewed. Blerim Kiqina waived his rights to silence and to legal counsel and continued with the interview. Blerim Kiqina confessed to the murders and implicated other participants in the crime. Those he implicated were Burim Ramadani, Arsim Ramadani, Arben Kiqina, Jeton Kiqina, and others.

16. On 7 July 2002, when Blerim Kiqina was taken before the investigating judge and he repeated almost verbatim what he had told the police in the interview on 4 July 2002.

17. Notwithstanding the evidence provided to police on 4 and 7 July 2002, on 11 October 2002, Blerim Kiqina subsequently retracted his account of events on the basis that he had fabricated the story.

18. Following indictment and subsequent trial in the District Court of Gjilan (Judgment P. No. 162/03 dated 7 April 2005) Burim Ramadani, Arben Kiqina, Arsim Ramadani, Blerim Kiqina and others were convicted of murdering the five members of the H family.

19. On 9 July 2002, investigations commenced against Jeton Kiqina and the other suspects. Jeton Kiqina was living in Sweden while the investigations were taking place. Jeton Kiqina returned to Kosovo in 2004 purportedly to give evidence on behalf of S H and other defendants who were being tried for the murders. Jeton Kiqina was arrested on 9 November 2004 under the warrant of 11 July 2002. Jeton Kiqina has been in custody since that time because he was under investigation and one of the suspects for the murder of H family.

20. On 8 March 2007, by judgment P. No. 628/04, the District Court of Pristina found Jeton Kiqina guilty of committing the criminal offences of murder, attempted murder (in respect of the daughter who survived the shooting) and agreement to conduct the criminal offence of murder. As a result, he was sentenced to 16 years imprisonment.

21. Jeton Kiqina's lawyer filed an appeal on 3 March 2008 against the verdict alleging: essential violations of the provisions of criminal procedure (including substitution of a Judge in the trial panel), erroneous and incomplete determination of the factual situation; violation of the criminal law and the incorrect decision on the punishment.

22. On 3 December 2009, by judgment Ap.Kz.No.84/2009, the Supreme Court of Kosovo partially granted the appeal. Jeton Kiqina was acquitted of the criminal offence of agreement to conduct a criminal offence. However, the verdicts in relation to the offences of murder and attempted murder were unchanged.

23. On 4 March 2010, Jeton Kiqina's lawyer submitted a request for protection of legality on his behalf in the Supreme Court.

24. On 1 November 2010, the Supreme Court by judgment Kzz.No.31/2010, rejected the request for protection of legality on the basis that it was ungrounded. The Supreme Court, in its reasoning, addressed each of the following allegations:

a. Substantial violation of the criminal law, namely:

i. Improper composition of the first instance trial panel;

ii. Exemption for the Kiqina family members from the duty to testify in court;

iii. Admissibility of Blerim Kiqina's evidence of 4 and 7 July 2002;

iv. Admissibility of the minutes of the hearing of the international police officer and of the list of mobile phone calls; and

v. Lack of motive due to the acquittal of S K.

b. Erroneous and incomplete determination of the factual situation

c. Decision on the punishment.

25. In relation to the allegation referred to in paragraph (a) (i) above, the Supreme Court, in the third instance, rejected this point of appeal as ungrounded given Article 305 of the Law on Criminal Procedure [or the relevant provision of the Criminal Procedure Code] provides that if a panel has changed the trial panel may decide not to conduct re-examination of witnesses or conduct a site examination but may consider the recorded testimony of the witnesses.. The Supreme Court noted that the new Judge was given all trial records prior to the resumption of the trial. The Supreme Court also found no evidence of any influence exercised by the other judges on the new Judge.

26. Furthermore, the replacement of the international Judge on the trial panel was permitted by law and the conditions for replacement were met. In this regard the Constitutional Court refers to the case of P.K. v. Finland, Application no. 37442/97, where the European Court of Human Rights (ECtHR), sitting on 9 July 2002, decided that notwithstanding the replacement of a Judge during the course of the trial of P.K. *"The Court's task is to ascertain whether the proceedings as a whole, including the way in which the evidence was taken, were fair. ... Even so, the Court considers that in the specific circumstances of the present case this defect does not alone constitute a violation of Article 6. First, while the presiding judge was changed the three lay judges remained the same throughout the proceedings. Secondly, the credibility of the witness in question has at no stage been challenged, nor is there any indication in the file justifying doubts about her credibility. In these circumstances the fact that the new presiding judge had at his disposal the minutes of the session at which the witness had been heard (cf. Karjalainen v. Finland, application no. 30519/96, Commission decision of 16 April 1998, unreported) to a large extent compensates for the lack of the immediacy of the proceedings. Thirdly, the applicant's conviction was not based only on the evidence of witness H. Finally, there is nothing suggesting that the presiding judge was changed in order to affect the outcome of the case or for any other improper motives. ... The conclusions drawn by the domestic court in the present case do not appear arbitrary so as to raise an issue under Article 6..."* And further, other case law of the ECtHR indicates that the mere fact of the replacement of a Judge during the course of a hearing, of itself, does not amount to a violation of Article 6 of the Convention (*see Barbera, Messegue and Jabardo v. Spain, Application no. 10590/83, dated6 December 1988, Moiseyev v. Russia, (Application no. 62936/00), dated 9 October 2008, and Ocalan v. Turkey, (Application no. 46221/99),*

dated 15 may 2005.) Bearing all that in mind this Court is of the view that the Supreme Court was correct in finding no violation of the right to a fair and impartial on account of the replacement of the international Judge.

27. Another aspect of the appeal related to the admissibility of the evidence relied upon by the lower courts, as referred to in paragraph (a) (iii) above. The lower courts gave significant reliance on the evidence given by: Blerim Kiqina in the investigating stage, witnesses "MB" and the daughter who survived the shooting. These sources of evidence were challenged on the basis that they were unreliable. The Supreme Court rejected the appeal and noted the following:

    a. Having examined the video recordings of the Blerim Kiqina witness interviews, his confession was genuine and there was no reason to believe that he fabricated the evidence. The detailed account of the murders could only have come from somebody who had intimate knowledge of the event.

    b. Having scrutinized the statements of Blerim Kiqina dated 4 July 2002, 7 July 2002 and 11 October 2002, some inconsistencies were identified particularly in relation to Blerim Kiqina's movements on 20 August 2001. It was held that his entire testimony cannot and should not be discounted simply because it is not reliable in part. Having considered the admissible portions of his evidence, the Supreme Court noted that it was abundantly clear that he and those he implicated had planned and executed the murders. The credibility of the statement given by Blerim Kiqina given before the investigating judge on 7 July 2002 was corroborated by the motives of his confession, the accuracy and consistency of his statements, the absence of significant discrepancies and the inconsistency of the alibi of the other defendants.

    c. The judgments also took into account the corroborative evidence of the confession such as Blerim Kiqina's accurate description of the other accused, the existence of the compound from where the weapons were sourced, the timing of the H family's departure from the wedding, the sequence of events on the bridge and the position of the car at the bridge. It was corroborated by the evidence of the daughter who survived the shooting, witness evidence of "MB", RK, SK, EK, SK, GK, YK and BK, telephone call records as well as ballistics examinations of the bullets which verified Blerim Kiqina's evidence on the type of gun used to commit the crime.

    d. The claim that the evidence of "MB" was inadmissible was rejected on the basis that it was ungrounded. "MB" gave evidence that Burim Ramadani disclosed to her that he had carried out the murders. It was argued in the appeal that: 1) "MB" was not advised of the right not to testify given she had cohabited with Burim Ramadani; 2) the public were unlawfully excluded from her oral testimony during the hearing and the panel did not issue a written ruling regarding the protective measures given to "MB"; and 3) Burim Ramadani was denied the right to put questions to "MB" resulting in a violation of Article 314 of the of the relevant provisions of the Criminal Procedure Code.

    e. In response to these claims, the Supreme Court noted that the exemption to testify only applied to spouses and that "MB" was not exempt as she was not the spouse of Burim Ramadani. Pursuant to sections 2 and 3 of UNMIK Regulation 2001/20, the trial panel applied protective measures to "MB" as she was a witness well known to the defendant and had an intimate relationship with him. The ruling contained the decision to exclude the public from the hearing when "MB" was due to provide oral evidence. Lastly, Burim Ramadani was not denied the

opportunity to put questions to "MB" during her testimony. Overall, the evidence of "MB" was considered reliable particularly in light of the fact that she was summoned by the police to give evidence, she was reasoned in her account of events and she maintained her evidence despite threats from family members of the defendants.

f. The appeal contained an argument that criminal procedure was breached by the court in the manner in which the testimony of the daughter who survived the shooting was given. The court held there were no violations of criminal procedure by excluding the public during the testimony of the daughter who survived the shooting given she testified by video link. Also, at the main trial, defence counsel had the possibility to examine her.

g. The claim that there was an incomplete determination of the factual situation due to the disappearance of important material evidence was rejected by the court on the basis that this did not prevent the correct establishment of the factual situation. The appeals referred to the paraffin handle taken from F K and Arben Kiqina on 21 August 2001 and to the examination of some exhibits collected on the investigated spots which had to be examined in order to find finger prints or DNA samples.

28. The Supreme Court, in the third instance, affirmed the judgment of the second instance court in its entirety.

Applicant's allegations

29. The general complaint contained in the Referral is that lower courts have made only general findings, assessements and conclusions thereby violating the procedural provisions which require the courts to honestly assess each piece of evidence separately and in relation to other evidence. Therefore, on this basis the Applicant claims the judgment cannot stand.

30. In summary, the Applicant contests the reliability of the evidence used by the lower courts in formulating the judgments and alleges that there was improper consideration of the evidence. The Applicant asserted the following in the Referral:

a. The courts did not corroborate the claims of key witnesses with sufficient evidence such as forensic material.

b. The witness evidence of "MB" should not have been considered by the courts given she had been in a relationship with Burim Ramadani until the time of his arrest and sought revenge on Burim Ramadani for not marrying her.

c. Blerim Kiqina's evidence, which was given high priority by the courts, was contradictory and flawed because he was minor when the murder occurred, he was enticed by the investigators with the opportunity to move abroad and he was threatened by the police to change his evidence.

d. The evidence of the daughter who survived the shootingshould not have been taken into account due to inconsistency with other evidence.

e. Based on Article 157 of the Criminal Procedure Code of Kosovo, the courts should not have declared the defendants guilty based only one piece of evidence.

f. The District Court violated criminal procedure (Articles 354-359 and 403 of the Criminal Procedure Code of Kosovo) because after the appointment of a new judge in the panel during the proceeding, the trial did not re-start from the beginning.

Assessment of admissibility

31. In order to be able to adjudicate the Applicant's Referral, the Court needs to examine whether the Applicant has fulfilled the admissibility requirements laid down in the Constitution, the Law and the Rules of Procedure.

32. In this relation, the Court refers to Article 113.7 of the Constitution, which stipulates that:

> *"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 Constitutional Court notes that it is not a fact verifying Court, the Constitutional Court wishes to reiterate that the correct and complete determination of the factual situation is a full jurisdiction of regular courts and that the role of the Constitutional Court is solely to ensure compliance with the rights guaranteed by the Constitution and other legal instruments and cannot, therefore, act as a "fourth instance court" *(see, mutatis mutandis, i.a., Akdivar v. Turkey, 16 September 1996, R. J. D, 1996-IV, para. 65, also see Resolution on Inadmissibility in Case. NO. KI86/11 – Applicant Milaim Berisha – Request for Constitutional Review of Judgment of the Supreme Court of Kosovo, Rev. nr. 20/09, dated 1.3.2011 – issued by the Court on 5 April 2012).*"

34. From the facts submitted with the Referral, the Applicant has used all legal remedies available, and that the regular courts have taken into account and indeed answered his appeals on the points of law in relation to admission of evidence and their veracity, determination of the factual situation and the flow of the criminal procedure.The Court, therefore, considers that there is nothing in the Referral which indicates that the courts hearing the case lacked impartiality or that proceedings were otherwise unfair.

35. In this regard, the Applicant has not substantiated his claim, explaining how and why a violation has been committed, or furnished evidence to prove that a right guaranteed by the Constitution has been violated.

36. Moreover, the Referral does not indicate that the Supreme Court acted in an arbitrary or unfair manner. It is not within the province of the Constitutional Court to substitute its own assessment of the facts for that of the regular courts and, as a general rule, it is for these courts to assess the evidence before them. The Constitutional Court's task is to ascertain whether the regular court's proceedings were fair in their entirety, including the way in which evidence was taken *(see Judgment ECHR App. No 13071/87 Edwards v. United Kingdom, para 34, of 10 July 1991).*

37. The fact that the applicant is dissatisfied with the outcome of the case cannot of itself raise an arguable claim of a breach of Article 31 [Right to Fair and Impartial Trial] of the Constitution *(see mutatis mutandis Judgment ECHR Appl. No. 5503/02, Mezotur-Tiszazugi Tarsulat vs. Hungary, Judgment of 26 July 2005).*

38. In these circumstances, the Applicant has not substantiated his claim nor the violation of Article 31 of the Constitution [Right to Fair and Impartial Trial] because the facts presented by him do not show in any way that regular courts of the three instances had

denied him rights guaranteed by the Constitution. The Referral, therefore, is manifestly ill-founded and should be rejected as inadmissible pursuant to Rule 36 of the Rules.

FOR THESE REASONS

The Court, following deliberations on 15 May 2012, pursuant to Articles 113.7 of the Constitution, Articles 20 of the Law and Rule 56.2 of the Rules, unanimously

DECIDES

I. TO REJECT the Referral as inadmissible,

II. This Decision is to be notified to the Applicant, and

III. This Decision shall be published in accordance with Article 20(4) of the Law and is effective immediately.

Judge Rapporteur

Snezhana Botusharova

President of the Constitutional Court

Prof. Dr. Enver Hasani