



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

Prishtina, 10 shkurt 2017  
Ref. no.:RK 1039/17

## RESOLUTION ON INADMISSIBILITY

in

Case no. KI45/16

Applicants

**Muhamet Nikqi and Arbnor Nikqi**

**Constitutional review of Judgment Pml. no. 222/2015 of the Supreme  
Court of Kosovo, of 17 November 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 Gërzhaliu-Krasniqi, Judge, and  
Gresa Caka-Nimani, Judge

#### **Applicant**

1. The Referral was submitted by Muhamet Nikqi and Arbnor Nikqi from Peja (hereinafter: the Applicants).

## **Challenged decision**

2. The Applicants challenge a Judgment (Pml. no. 222/2015 of 17 November 2015) of the Supreme Court, which rejected their joint request for protection of legality as ungrounded.

## **Subject matter**

3. The subject matter is the constitutional review of the challenged decision which allegedly violated the Applicants' rights guaranteed by Article 31 [Right to Fair and Impartial Trial], Article 32. [Right to Legal Remedies] and Article 54 [Judicial Protection of Rights] of the Constitution of the Republic of Kosovo (hereinafter: the Constitution).

## **Legal basis**

4. The Referral is based on Article 113.7 of the Constitution, Articles 47 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**

5. On 3 March 2016, the Applicants submitted the Referral to the Constitutional Court of the Republic of Kosovo (hereinafter: the Court).
6. On 13 April 2016, the President of the Court appointed Judge Ivan Čukalović as Judge Rapporteur and the Review Panel composed of Judges: Altay Suroy (Presiding), Arta Rama-Hajrizi and Gresa Caka-Nimani.
7. On 3 May 2016, the Court notified the Applicants about the registration of the Referral, and sent a copy of the Referral to the Supreme Court of Kosovo.
8. On 14 December 2016, after having considered the report of the Judge Rapporteur, the Review Panel made a recommendation to the full Court on the inadmissibility of the Referral.

## **Summary of facts**

9. On 20 February 2012, the Basic Court in Peja (Judgment P. no. 833/09) found the Applicants guilty of having committed a criminal offence in co-perpetration, and sentenced them to imprisonment of six (6) months.
10. The Applicants filed an appeal against the Judgment of the Basic Court in Peja with the District Court in Peja on the grounds of essential violation of the criminal procedure provisions, violation of the substantive law, erroneous and incomplete determination of the factual situation. The Applicants requested from the District Court to acquit them of the charges or to remand the case for retrial.

11. The Judgment of the Basic Court in Peja was appealed to the District Court in Peja by the injured party as well, due to the decision on punishment, with a proposal that the second instance court modify the first instance judgment and impose on the accused the punishment based on the law.
12. On 20 February 2012, the District Court in Peja (Decision AP. no. 63/12) approved the Applicants' appeal, annulled the first instance judgment and remanded the case for retrial. As regards the appeal filed by the injured party, it was not taken into consideration because the injured party was given the possibility to present his allegations in the repeated proceedings.
13. In the reasoning, the District Court in Peja *inter alia* stated:

*"[...] the first instance court did not have jurisdiction to adjudicate this criminal matter, but the District Court was competent for this case, therefore, it results that the challenged Judgment contains essential violation of the criminal procedure provisions as mentioned above. [...] Given that the abovementioned judgment contains substantial violation of the criminal procedure provisions, this court did not assess other appealing allegations filed in the appeals of the defense counsels of the accused, as well as in the appeals of the representative of the injured party, as they can submit these allegations in the retrial. [...]"*
14. On 19 December 2014, the Serious Crimes Department of the Basic Court in Peja [Judgment P. no. 206/13] found the Applicants guilty of having committed a criminal offense in co-perpetration and sentenced them to imprisonment of one (1) year.
15. In the reasoning, the Basic Court in Peja *inter alia* stated:

*"[...] When deciding on the punishment, by assessing within the meaning of the principle "reformatio in peius" under Article 395 of the CPCK, the Court concludes that the principle was not violated because in the present case there was appeal to the detriment of the accused by the authorized representative of the injured party and due to fact that this case was decided by the incompetent court [...]"*
16. The Applicants filed an appeal with the Court of Appeal against the Judgment of the Basic Court in Peja.
17. On 16 July 2015, the Court of Appeal [Judgment PARK. no. 107/2015] rejected the Applicants' appeal as ungrounded and upheld the Judgment of the Basic Court in Peja.
18. The Applicants filed a request for protection of legality with the Supreme Court against the first and second instance judgment.
19. On 17 November 2015, the Supreme Court (Judgment Pml. no. 222/2015) rejected the Applicants' request for protection of legality. In the reasoning, the Supreme Court *inter alia* stated:

*“[...] The fact that the convicts consider that the appeal submitted by the injured party should have been rejected, because from its content is seen that the appeal was also submitted on the ground of violation of the criminal law, is a question which was not reviewed at all, and the second instance court decided ex-officio to annul the Judgment due to essential violation of the criminal procedure provision. In this case the appeals of the convicts and of the representative of the injured party have not been reviewed, therefore, we cannot say that there was an appeal only in the favor of the accused, on the contrary, we had also the appeal to the detriment of the accused.*

*The basic condition for prohibition of implementation of the reformatio in peius is the existence of the appeal or the existence of another legal remedy only in favor of the accused and when in addition to the appeal in his favor the appeal in his disfavor also exists, the Judgment can be modified in disfavor of the accused, as it has been decided in the present case [...].”*

### **Applicants’ allegations**

20. The Applicants allege violation of the right to a fair and impartial trial, the right to a legal remedy and judicial protection, rights which are guaranteed by the Constitution.

21. The Applicants also allege that the decisions of the regular courts are in contradiction with the principle “*refarmatio in peius*.”

22. The Applicants request the Court:

*“to take into account Judgment P. no. 833/09 of the Municipal Court in Peja, so that the criminal matter for Muhamet and Arbnor Nikqi is remanded for retrial, in order that the accused are imposed more favourable punishments.”*

### **Relevant legal provisions**

#### **CRIMINAL PROCEDURE CODE**

#### **No. 04/L-123**

#### *Article 395*

#### *The Restriction Reformatio in Peius*

*Where only an appeal in favour of the accused has been filed, the judgment may not be modified to the detriment of the accused with respect to the legal classification of the offence and the criminal sanction imposed.*

### **Admissibility of the Referral**

23. The Court first examines whether the Applicants have met the admissibility requirements, laid down in the Constitution, and as further specified in the Law and Rules of Procedure.

24. In this respect, the Court refers to Article 113.1 and 113.7 of the Constitution, which establish:
- “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.”*
25. The Court also refers to Article 48 of the Law, which foresees:
- “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.”*
26. In addition, the Court refers to Rules 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure, which provide:
- “(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.”*
27. As mentioned above, the Applicants essentially complain that the regular courts allegedly violated their rights to fair and impartial trial, the right to legal remedy and the right to judicial protection, as guaranteed by the Constitution.
28. The Court notes that the Applicants did not provide any procedural or substantive reasoning in support of their allegations. They only mention Articles of the Constitution related to these rights, without further explaining how and why the alleged constitutional violations occurred.
29. The Applicants further allege that regarding their appeal the regular courts modified the decision on punishment to their detriment, namely the Applicants refer to a violation of the principle *refarmatio in peius*.
30. In that regard, the Court notes that the first instance judgment was quashed by the District Court as it was rendered by an incompetent court. With regard to other complaints of both parties, they were not taken into consideration because both parties were given the possibility to present their allegations in the repeated proceedings.
31. In addition, the Court notes that following the Applicants’ appeal and their request for protection of legality, the Court of Appeal and the Supreme Court rejected their allegations of violation of the Criminal Code and Criminal



Procedure Code, by upholding the Judgment of the Basic Court in Peja in its entirety. The Court of Appeal and the Supreme Court responded to all Applicants' allegations for violations of the Criminal Code and the Criminal Procedure Code and gave clear reasoning and correct conclusions based on the factual situation that was determined in the court proceedings.

32. In this regard, the Court finds that the allegations filed by the Applicants before this Court are questions of legality, not of constitutionality.
33. The Court reiterates that it is not its role to deal with errors of facts or law (legality), allegedly committed by the Supreme Court or any other lower instance court, unless and in so far as they may have infringed the rights and freedoms protected by the Constitution (constitutionality).
34. 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, *Akdivar v. Turkey*, No. 21893/93, ECtHR, Judgment of 16 September 1996, para. 65, also: *mutatis mutandis*, see: case KI86/11, Applicant *Milaim Berisha*, Resolution on Inadmissibility of 5 April 2012). The mere fact that the Applicants do not agree with the outcome of the proceedings in their case does not give rise to an arguable claim of a violation of their rights as protected by the Constitution.
35. 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 Applicants had a fair trial (see: Case *Khan v. the United Kingdom*, Application no. 35394/97, Judgment of 12 May 2000).
36. In this regard, the Court refers to the reasoning of the Supreme Court in response to the Applicants' allegation of violation of the Criminal Code and the Criminal Procedure Code allegedly committed by the Court of Appeal when it rejected their appeal as ungrounded and upheld the Judgment of the Basic Court in Peja. The Applicants claimed before the Supreme Court *"Since the judgment of the first instance court is annulled and there was no appeal by the claimant, while the appeal of the representative of the injured party was inadmissible, then the Basic Court in Peja, deciding as a first instance court in the retrial of this matter had to apply the principle reformatio in peius stipulated by Article 395 of CPCK, by which the accused is protected from any action that is more unfavorable with respect to more serious classification of the criminal offence or decision on punishment, in cases where the appeal was filed only in his favor."*
37. In response to those allegations, the Supreme Court reasoned the following:

*"[...] Having assessed the allegation that the convicts were sentenced in contradiction with the principle reformatio in peius by the Basic Court in Peja, this court finds that in the present case there was no appeal only in favor of the convicts, but there is appeal also to the disfavor of the*

*convicts, since the appeal of the representative of the injured party was submitted due to the decision on punishment, which is allowed in cases dealing with criminal offences against life and body. The fact that the convicts consider that the appeal submitted by the injured party should have been rejected, because from the content is seen that the appeal was filed also on the grounds of violation of the Criminal Code, is a question that was not considered at all, and the second instance court decided ex-officio to annul the judgment on the grounds of essential violation of the criminal procedure provisions. In this case, the appeals of the convicts and of the representative of the injured party have not been considered, therefore, we cannot say that there was an appeal only in favor of the accused, on the contrary, there was an appeal also to the detriment of the accused.”*

38. Therefore, in this case, the Court considers that the facts presented by the Applicants do not in any way justify the alleged violations of the constitutional rights invoked, and they did not sufficiently substantiate their claim.
39. Consequently, the Referral is manifestly ill-founded and is to be declared inadmissible in accordance with Rules 36 (1) (d) and 36 (2) (b) and (d) of the Rules of Procedure.

### **FOR THESE REASONS**

The Constitutional Court of Kosovo, in accordance with Article 113.1 and 7 of the Constitution, Article 48 of the Law and Rule 36 (1) (d) and (2) (b) and (d) of the Rules of Procedure, in its session held on 14 December 2016, 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**

Ivan Čukalović



**President of the Constitutional Court**

Arta Rama-Hajrizi

