



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

Prishtina, 24 June 2013
Ref.No.:RK429/13

RESOLUTION ON INADMISSIBILITY

in

Case No. KI 109/12

Applicant

Kumrije Maloku and others

**Constitutional review
of the Judgment of the Supreme Court Rev.nr. 466/2009, dated 07 June
2012**

THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

composed of

Enver Hasani, President
Ivan Čukalović, Deputy-President
Robert Carolan, Judge
Altay Suroy, Judge
Almiro Rodrigues, Judge
Snezhana Botusharova, Judge
Kadri Kryeziu, Judge, and
Arta Rama-Hajrizi, Judge.

Applicants

1. The Applicants are Kumrije Maloku, and Aida, Edina, Idriz, Remzije, Muhamet, Shaip, Ajete and Myrvete Maloku, represented by attorney Vahide Braha.

Challenged decision

2. The Applicants challenge the Judgment of the Supreme Court of Kosovo, Rev.nr. 466/2009, dated 07 June 2012, which was served on them on 02 August 2012.

Subject matter

3. The Applicants allege that that Judgment, rejecting their request for revision against the decision of the District Court of Pristina (AC.nr. 281/2008, of 23 June 2009), violated their rights as guaranteed by the Constitution, namely Article 31 of the Constitution and Article 6.1 of the European Convention on Human Rights (hereinafter, ECHR).

Legal basis

4. The Referral is based on Article 113.7 of the Constitution, Articles 47, 48 and 49 of the Law on the Constitutional Court of the Republic of Kosovo of 15 January 2009 (No. 03/L-121), (hereinafter, the "Law"), and Rules 28, 29 and 30 of the Rules of Procedure of the Constitutional Court of the Republic of Kosovo (hereinafter, the "Rules of Procedure").

Proceedings before the Court

5. On 01 November 2012, the Applicants submitted the Referral to the Court.
6. On 14 December 2012, the Constitutional Court informed the Applicants, the Supreme Court and the Municipal Court of Pristina of the registration of the Referral.
7. On 06 December 2012, the President appointed Judge Almiro Rodrigues as Judge Rapporteur and the Review Panel composed of Judges Snezhana Botusharova (presiding), Kadri Kryeziu and Enver Hasani.
8. On 12 February 2013, the Constitutional Court requested the Applicants to inform the Court of the date on which the Judgment of the Supreme Court, Rev.nr. 466/2009, was served on them.
9. On 20 February 2013, the Applicants informed the Court that the Judgment of the Supreme Court, Rev.nr. 466/2009, dated 07 June 2012, was served on them on 02 August 2012.
10. On 13 May 2013, 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 the facts

11. On 29 August 2001, at approximately 18:20 in the evening, Hakif Hoti, his son-in-law Dalip Maloku and a friend, Islam Musliu, were returning to Pristina from

a walk in Germija park. Upon passing by the open-air swimming pool 'Germija', Dalip Maloku reportedly expressed an interest in seeing the pool from close up.

12. At this time of day, the swimming pool was closed. The pool was surrounded by a closed fence, which was guarded by personnel of "Balkan International Security LLC". Dalip Maloku recognized one of the security guards and requested to be admitted to the pool area, allegedly "just to take a look". The guard admitted Dalip Maloku and his companions.
13. Thereupon, without seeking permission, Dalip Maloku removed his clothes, entered the water and began to swim. After swimming for some distance, Dalip Maloku reportedly raised his arms and called for help. Neither his companions nor the Balkan International Security guards apparently knew how to swim. No one entered the water to assist Dalip Maloku.
14. The Kosovo Police and KFOR were alerted and arrived on the scene. At approximately 19:45 hours, a diver was able to recover the body of Dalip Maloku from the bottom of the pool. On 30 August 2001, an autopsy determined that Dalip Maloku had died as a result of drowning.
15. Dalip Maloku was survived by his wife, Kumrije Hoti-Maloku and their two minor children, Aida and Edina Maloku. Dalip was the son of Idriz and Remzije Maloku, and the brother of Muhamet, Shaip, Ajete and Myrvete Maloku. These nine persons are the Applicants in this referral. The Applicants were all dependent on the income of the deceased Dalip Maloku.
16. On 28 January 2003, the Applicants submitted a claim for compensation for material and immaterial damages with the Municipal Court of Pristina, based on the Law on Obligational Relationships (LOR). The respondents in the statement of claim were the Directorate for Sport Marketing of Pristina Municipality, and Balkan International Security LLC. The respondent 'Directorate for Sport Marketing' was later identified in the court judgments to be the 'Municipal Public Company for Sport Marketing'. This Municipal Public Company was the responsible authority of Germija swimming pool and had lawfully contracted with Balkan International to provide security for the premises. The Applicants claimed that the respondents were liable to ensure the safety of the swimming pool and their negligence had caused the death of Dalip Maloku.
17. On 27 September 2005, the Municipal Court of Pristina delivered its judgment (C.no. 67/03). The Municipal Court found that the respondent 'Municipal Public Company for Sport Marketing' was objectively liable for the 'dangerous object', meaning the swimming pool, within the meaning of Article 173 LOR. In awarding compensation, the court took into account the actions of the deceased in entering the water without permission, which the court characterised as 'deception'. The court ordered the respondent 'Municipal Public Company for Sport Marketing' to pay 600 EUR for funeral expenses, as well as 541 EUR compensation for legal costs. In addition, the court awarded immaterial compensation of 5,000 EUR for mental distress to the wife, their two minor children and the mother of the deceased. The court rejected the further claims to higher amounts, as well as the compensation claims of the other Applicants.

It appears that the Applicants had waived their claim against the second respondent 'Balkan International Security'.

18. The Applicants appealed to the District Court of Pristina, seeking approval of the full amount of the original claim, and approval of the claims of the additional Applicants. The respondent 'Municipal Public Company for Sport Marketing' also submitted an appeal, requesting that all claims of the Applicants be rejected as unfounded, or that the case be returned to the Municipal Court for retrial. Both appeals were handled together by the District Court.
19. On 06 June 2006, the District Court of Pristina (Ac.no. 41/2006) quashed the judgment of the Municipal Court and returned the case for retrial. The District Court found that the judgment of the first instance court was not sufficiently clear and lacked adequate reasoning to justify its conclusions. The District Court also found that the first instance judgment was contradictory in its assessment both of the height of claims to be awarded, the number of the claims to be awarded, and the determination of liability of the respondent. The Municipal Court was ordered to evaluate all of the evidence filed by the parties and to:

"[...] make a fair conclusion of the factual situation as regards to the evaluation of liability of the respondent for causing the damage and in compliance with a determination and evaluation of all criteria and the fair application of material provisions [to] adjudicate in relation to the statement of claim of the claimants."
20. On 29 May 2007, the Municipal Court of Pristina (C.no. 1191/06) issued its judgment in the retrial. The Municipal Court found that the respondent 'Municipal Public Company for Sport Marketing' was objectively liable as the possessor of the 'dangerous object' within the meaning of Article 173 LOR. Furthermore, the court ordered the respondent company to pay 900 EUR for the funeral expenses, as well as 793 EUR in legal costs. The court increased the awards for immaterial compensation to the Applicants to 13,000 EUR, including awards for the previously excluded Applicants. The Municipal Court rejected as unsubstantiated the arguments of the respondent that it should be exempted from responsibility.
21. Both the Applicants and the respondent Municipal Public Company for Sport Marketing submitted appeals against this decision with the District Court of Pristina. The Applicants requested the appeal court to increase the awards for compensation to the level contained in their statement of claim, or for the Municipal Court judgment to be quashed and returned for retrial. The respondent requested the appeal court to find the claims for compensation to be unfounded, or to quash the Municipal Court judgment and return the case for retrial.
22. On 23 June 2009, the District Court of Pristina (Ac.nr. 281/2008) delivered its judgment. The District Court refused the appeal of the Applicants and declared the judgment awarding compensation to be unfounded. The District Court approved the appeal of the respondent Municipal Public Company for Sport

marketing as founded, and amended the judgment of the Municipal Court. The District Court found that the deceased Dalip Maloku had died as a result of his own actions, and that therefore the respondent was not 'objectively liable' to provide compensation for the damages caused by his death.

23. The Applicants submitted a request for revision to the Supreme Court. The Applicants requested the Supreme Court to find that the District Court had committed errors in the application of the material law.
24. On 07 June 2012, the Supreme Court (Rev.nr. 466/2009) refused the revision as unfounded. The Supreme Court found that the appeal court had correctly applied the material law, given that the death of the deceased was entirely caused by his own actions. The Supreme Court found that the Applicants had failed to prove that the death was attributable to any fault of the respondent Municipal Public Company for Sport Marketing. Furthermore, the Supreme Court found that under Article 177(1) and (2) LOR, the owner of the 'dangerous object' is released from liability where it is proven that the damage occurred from a cause external to the 'object', *in casu* the actions of the deceased.

Legal arguments presented by the Applicants

25. The Applicants allege that the District Court in the second appeal, and the Supreme Court in the Revision, violated their rights to a fair and impartial trial as guaranteed by Article 31 of the Constitution and Article 6, para. 1, of the European Convention on Human Rights.
26. The Applicants contend that, by finding that the death of Dalip Maloku was exclusively caused by his own actions, where the responsible authorities over the swimming pool Germija did nothing to save him when it became clear that he was in trouble, the courts have incorrectly found that the Applicants were not entitled to compensation for the damage that they suffered. The Applicants consider that the liability of the authorities over the swimming pool was engaged as a consequence of their admitting the deceased to the pool area, knowingly in violation of their own security protocols.
27. The Applicants assert that the courts interpreted the question of liability as if it were a matter of establishing criminal responsibility for the death, whereas their claims only concerned a determination of objective liability in a civil case of death caused by a dangerous object.
28. As a consequence of the courts' interpretation, the Applicants allege that the civil panel that adjudicated their case was neither independent nor impartial. The Applicants argue that they have a right to compensation for the death of their family member.
29. The Applicants request the Constitutional Court to make an accurate assessment of the liability of the Municipal Public Company for Sport Marketing, and eliminate the violations of material law allegedly committed by the District and Supreme Courts. The Applicants request recognition of their right to compensation for their moral suffering.

Admissibility of the Referral

30. The Court first examines whether the Applicants have fulfilled the admissibility requirements set out in the Constitution, and as further specified in the Law and the Rules of Procedure.

31. The Court refers to Article 113 of the Constitution, which establishes 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."

32. The Court takes into account Article 48 of the Law, which provides 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 a public authority is subject to challenge".

33. In addition, the Court takes into consideration Rule 36 (2) of the Rules, which foresees that:

"The Court shall reject a Referral as being manifestly ill-founded when it is satisfied that:

[...], or

(b) when the presented facts do not in any way justify the allegation of a violation of the constitutional rights, or

[...], or

(d) when the Applicant does not sufficiently substantiate his claim;"

34. In this connection, the Constitutional Court reiterates that it is not its task under the Constitution to act as a court of appeal, or a court of fourth instance, in respect of the decisions taken by the regular courts. It is the role of the latter to interpret and apply the pertinent rules of both procedural and substantive law (see *Avdyli v. Supreme Court of Kosovo*, KI 13/09, 18 June 2010; see *mutatis mutandis* *García Ruiz v. Spain* [GC], no. 30544/96, para. 28, European Court of Human Rights 1999-1).

35. In fact, the Constitutional Court can only consider whether the evidence has been presented in such a manner and the proceedings in general, viewed in the entirety, have been conducted in such a way that the Applicants had a fair trial

(see, *inter alia*, European Commission of Human Rights, Edwards v. United Kingdom, App. No. 13071/87, 10 July 1991).

36. In the present case the Applicants were afforded ample opportunities to present their case and to contest the interpretation of the law which they considered incorrect, before the District Court and the Supreme Court. Having examined all of the civil proceedings as a whole, the Constitutional Court does not find that the relevant proceedings were in any way unfair or tainted by arbitrariness (see *mutatis mutandis*, Shub v. Lithuania, ECtHR App. No. 17064/06, 30 June 2009).
37. Thus, the Court considers that there is no evidence showing that the regular courts hearing the case lacked impartiality or that the proceedings were otherwise unfair. The mere fact that the Applicants are dissatisfied with the outcome of the case cannot raise an arguable claim of a breach of Article 31 of the Constitution (see Memetoviq v. Supreme Court of Kosovo, KI 50/10, 21 March 2011; see *mutatis mutandis* Mezotur-Tiszazugi Tarsulat v. Hungary, ECtHR App. No. 5503/02, 26 July 2005).
38. Therefore, the Constitutional Court finds that the Applicants' claims have not been substantiated and must be dismissed as manifestly ill-founded.
39. Consequently, for the reasons outlined above, the Referral is inadmissible.

FOR THESE REASONS

The Constitutional Court, pursuant to Article 113.7 of the Constitution, Article 46 of the Law and Rule 36.2 (b) of the Rules of Procedure, on 24 June 2013, unanimously:

DECIDES

- I. TO REJECT the Referral as 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;
- IV. TO DECLARE this Decision effective immediately.

Judge Rapporteur


Almiro Rodrigues

President of the Constitutional Court


Prof. Dr. Enver Hasani