



REPUBLIKA E KOSOVËS – РЕПУБЛИКА КОСОВО - REPUBLIC OF KOSOVO

GJYKATA KUSHTETUESE
УСТАВНИ СУД
CONSTITUTIONAL COURT

Pristina, 26 February 2013
Ref.No.:MKM380/13

CONCURRING AND DISSENTING OPINION

In

Case No. KI 41/12

Applicants

Gëzim and Makfire Kastrati

against

Municipal Court in Prishtina, Kosovo Judicial Council

In this case, D. K., the daughter of the Applicants, submitted a request to the Municipal Court of Prishtina for an emergency protection order on 26 April 2011. The Municipal Court in Prishtina never acted upon D. K.'s request to receive an order for protection. Tragically, 22 days later, on 18 May 2011, D. K. was murdered by the person who she was asking the municipal court to restrain from hurting her or her child. Her surviving parents, and the Applicants in this case, now ask this Court to declare that the municipal court's failure to act upon their daughter's request violated their daughter's rights pursuant to the Constitution.

In this case the Applicant's daughter made the following specific request to the Municipal Court of Prishtina:

Request: D. K., "...." Str. No. ../B P.

Tel. ...

Counter-request: A.J. "....." no... P.

Tel. ...

Tel. ...

Pursuant to Law no. 03/L-182 on Domestic Family submit:

Request for issuing EMERGENCY protection order

I, D. K. and A. J. were in the extramarital union since 02.02.2000 until 26.11.2010. From this extramarital union we have a daughter A. J.2, born on 2 August 2003 in Prishtina. During all the time of the extramarital union I have suffered pressure and violence against me and I have endured only for the sake and for the good of our daughter A., in order she does not remain without parents and in order she does not suffer other traumas. Also after giving birth of our daughter A., he started to put pressure and use different kinds of violence starting from physical harm, insults of different kinds, not only against me, but also against my family. Later he started to make debts and escaped for some time from Kosovo, not knowing where he was. I did not have any telephone contact. During the time he was outside Kosovo, I was threatened in different ways by the people whom he owed debts, which I do not even know where he invested. After his return to Kosovo, he continued again with violence and irresponsibility towards our daughter and being under the influence of alcohol almost all the time and always avoiding responsibilities towards his family and by escaping from time to time. His violence against me was even bigger when he insisted to receive a loan at the amount of €1500. I was forced to sign the contract on loan. I have initiated a case in the municipal court (e-75/11) and since 26 November I do not live with A.J. due to fear that the worse may come. On 19 April 2011 I met with A.J. and his parents, while I was with my father and grandfather to talk and try to solve the problem. He did not accept our break in any way and in presence of all started to insult and threaten me in the lowest ways, by being supported also by his father S.J., and by threatening me with murder and by blaming me that I have affairs. Due to the fear and physical violence against me I have reported the case to police (unreadable text).

Such behaviors of my ex-partner and ex-husband are making my life more difficult and also are endangering my life. This is also worsening emotional situation of our daughter. Therefore, according to what I have stated above, and pursuant to Article no. 03/L-182, I also request that pursuant to Articles 1, 5, 6 and 9 of this law that the Municipal Court in Prishtina to review this emergent request and I propose to hold a hearing where it would render this

DECISION

Protection ORDER is ISSUED, by which the responsible person A.J. with his address in "...." Str. No... in P...(unreadable text) for threatening that he will commit a violent deed against the protected party D. K. with the address in "..." Str. No. ... in P. At the same time, A.J. is ORDERED to allow the protected party D. K. to continue with her life without any obstacle together with their daughter A. and consistent to the Law No. 03/L-182 on Domestic Violence, respectively of the Article 1, 6, 7 and 9 of this law.

As it is provided by law, the appeal does not stop the execution of this ruling.

Prishtina, 22.04. 2011

The applicable law, No. 03/L-182, Protection Against Domestic Violence, requires the court to hold a hearing within 24 hours of receiving a petition for protection to decide whether there is sufficient evidence to issue a court order ordering the person who is alleged to have committed threatening behavioral acts and who may be an immediate threat to the petitioner or family members of the petitioner to be restrained from contacting the petitioner and to be restrained from visiting the petitioner's residence and other places, such as place of employment, that the petitioner frequently visits. A violation of the court order, if issued, is a crime. Under the law, the court order is an additional tool to help the police prevent certain persons from committing a crime against the petitioner by simply making it a crime for that person to have contact with the petitioner. It makes criminal behavior that which would otherwise not be a crime but for the court making a finding that under the evidence now received there is a justifiable fear that the person to be restrained will harm the petitioner if further measures to help the police to protect the petitioner are not implemented. Indeed, the law allows the police to also make such an immediate order for up to 24 hours if they receive such a request at a time when the court is not in session.

In this case, although she did not specifically state what type of an order she wanted the municipal court to issue, she did inform the court of the behavior that was reasonably causing her to have an immediate fear for herself and her daughter and asked that she be given some protection pursuant to the law. Is the court's failure to act upon her request within the 24 hours required by the law, or even within the following 22 days, a violation of her rights under the Constitution?

Article 54 of the Constitution provides:

Everyone enjoys the right of judicial protection if any right guaranteed by this Constitution or by law has been violated or denied and has the right to an effective legal remedy if found that such right has been violated.

In this case, D.K. had a lawful right to have her petition heard by the municipal court. If the municipal court had held the hearing and had found sufficient evidence to issue a protection order for her, the police would have had an additional legal tool to help them protect her from possible future harm. She never got that order much less even a hearing on her lawful request of the municipal court. She never received a reasoned explanation why her request was not granted. She never received a legal remedy which she may have been entitled to receive under the Constitution. Therefore, I agree with the majority that D.K.'s Constitutional right to an effective legal remedy was violated.

The Applicants also allege that D.K.'s rights pursuant to Article 25 of the Constitution were violated. They further allege that the courts and state institutions violated D.K.'s rights under Article 25. Article 25 provides:

1. Every individual enjoys the right to life.
2. Capital punishment is forbidden.

There is no question that D.K. was denied her right to life. Did the courts and state institutions deny her life as that term is used in the Constitution?

It is clear that Article 25 of the Constitution prohibits the State from inflicting the death penalty upon anybody convicted of any type of crime. Article 25 does not prohibit the State or its officers and employees from using deadly force to protect the peace and security of the population as well as the security of the State. Chapter XI of the Constitution is replete with many articles that clearly authorize State officials to use force, even deadly force in extreme but reasonably appropriate situations. Indeed, it is not disputed that the police, if necessary, may use deadly force to protect the citizens against imminent and immediate deadly force being inflicted upon other citizens.

In this case, the Applicants concede that no State official did anything to cause the death of D.K. The Applicants' impliedly claim that if the municipal court judge had acted upon D.K.'s request for a protection order she would not have been murdered, and that this inaction by the municipal court caused her to be murdered. This is an erroneous conclusion. A protection order would have given the police an added tool to help keep D.K.'s killer away from her. But it could not guarantee that he would not execute the crime, which he tragically did. Just as the threat of the severe punishment under the law that could or will be imposed if D.K.'s killer is caught and convicted of this murder did not deter him from murdering D.K., it is speculative to assume that a court order for protection in this case would have been enough to deter him from committing the murder or that the police would have been able to catch him in forbidden contact with D.K. before he committed the murder.

Because there is no claim, much less evidence, that the failure of the municipal court judge as a state official, was a proximate cause of D.K.'s death or aided in the commission of her murder, her rights pursuant to Article 25 of the Constitution were not violated by the state or any state official.

The Applicants are attempting to invoke the authority of this Court to act on behalf of D.K.'s Constitutional rights pursuant to Article 113.7 of the Constitution. Article 113.7 provides:

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.

There is no question that the Applicants have personally suffered and will continue to suffer for the rest of their lives an indescribable loss with the untimely and tragic death of their daughter. They have not, however, suffered a violation of their

individual Constitutional rights. The Constitution does not allow them to assert the individual Constitutional rights of another person. In contrast, the Constitution specifically allows other public officials to submit questions about the interpretation of the Constitution to the Court. Therefore, the Applicants' referral cannot be considered by the Court pursuant to Article 113.7.

The Applicants argue that Article 53 of the Constitution allows any individual who claims a human right has been violated to file a referral with the Court even though Article 113.7 restricts such a referral to only those cases where the right of the individual has allegedly been violated. Article 53 provides:

Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.

The provisions of the Constitution addressing fundamental freedoms and human rights are contained in Chapter II (Articles 21 through 56) of the Constitution. Article 53 expressly provides that this Court, in interpreting those Articles of the Constitution, shall look for guidance from decisions of the European Court of Human Rights. It does not require this Court to follow decisions of the European Court of Human Rights with respect to other articles of the Constitution such as those relating to the form of government, security and the specific jurisdiction of this Court as set forth in Article 113 of the Constitution. Article 53 recognizes that this Court is a state court while the European Court of Human Rights is an international court charged specifically with adjudicating the European Convention on Human Rights. Because the roles of the two courts are different, Article 53 limits its application to interpreting those human rights and freedoms in the Constitution that could be similar to those established in the European Convention on Human Rights. It does not apply to an interpretation of Article 113 of the Constitution. Therefore, the Applicants do not have the authority to file their referral with this Court.

Respectfully submitted,



Robert Carolan
Judge

