DISTRICT COURT OF PRIZREN
AP no. 160/2011
18 November 2011

IN THE NAME OF THE PEOPLE

The District Court of Prizren in the Three-Judge Panel comprising of EULEX Judge Tore Thomassen as Presiding Judge and local Judges Vaton Durguti and Kujtim Pasuli as panel members, in the criminal case against:

Sh. Sh father's name , mother's name , born on in in the municipality of , currently residing in , citizen of the Republic of Kosovo, accomplished law faculty, former judge of the Municipal Court of Prishtina,

Sh. has been charged as per in the indictment PP no. 1122/10 dated 2 September 2010 with the criminal offence of Issuing unlawful judicial decisions in violation of article 346 of the Criminal Code of Kosovo (CCK):

> Because Sh. on 04.05.2006, in the capacity of presiding judge with the municipal court of Prishtina, in the civil case of the claimants G.K and M.K , both from Prishtina, with the intent to obtain an unlawful material benefit for herself or another person, thereby issues an unlawful decision in holding that according to the assertion of the representative of the respondent party R.S from Prishtina, issues Ruling C.no.802/2004 and C.no.812/2004, without the presence of claimant in the main trial, affirms that the claimants G.K and M.K , have purchased business premises no. 55, consisting of 22.82 m2 surface area and the other business premise, no. 54 consisting of 22.82m2 surface area, each business premise in the amount of 57.050.00 DM (fifty seven thousands fifty DM), those business premises are situated in the trade business centre in the quarter "Dardania" in Prishtina, south zone, level B. Additionally, regardless her duty to affirm and corroborate the facts as given below she failed to perform the following; to present any evidence or fact in order to affirm the genuine owner of the subject to sale premises, to confirm the right of ownership over the social and public ownership in Kosova, to ascertain as to the person who was in possession of those business facilities at the moment of sale, to confirm about concluded contracts between parties in order to affirm if they were valid and legitimate, to consider the fact whether the social or public ownership are to be alienated or to be sold to the natural persons.

The three-Judge Panel of the Municipal Court of Prizren aquitted Sh. the charge on 3 June 2011 (P no. 955/10).

The Panel, deciding upon the duly filed appeal by the Public Prosecutor against the mentioned judgment and Sh. response to it and after having held session pursuant to article 410 of the Kosovo Code of Criminal Procedure (KCCP) on 18 November 2011 and after deliberation, unanimously decided the following.

JUDGMENT

Pursuant to article 420, paragraph 1 (2) of KCCP the appeal is rejected as unfounded and the judgment of the Municipal Court of Prizren, P no. 955/10, dated 3 June 2011, is hereby affirmed.

REASONING

**I. Procedural background**

On 11 November 2009 the District Public Prosecution office of Prishtina issued a ruling on initiation of investigation against Sh. , Q.F and E.D

On 28 January 2010 the District Public Prosecution office of Prishtina issued a ruling on termination of investigations against Sh. egarding the criminal offence of Abusing official position or authority.

On 29 January 2010 the District Public Prosecution office of Prishtina filed indictment PP no. 192/09 to the District Court of Prizren. The indictment was never confirmed.

On 30 March 2010 the case was taken over by the EULEX following the request of Sh. At the same time Sh. case was separated from F. and D. case.

On 6 September 2010 the indictment dated 2 September 2010 was filed in to the Municipal Court of Prizren and on 27 September 2010 the Municipal Court of Prizren confirmed the indictment.

On 27 October 2010 Sh. filed to the Supreme Court of Kosovo a request for the protection of legality. On 14 January 2011 the Supreme Court issued a ruling in which it rejected Sh. request.

On 3 June 2011 the Municipal Court of Prizren with a Judgment aquitted Sh. of the charges.

## II. Appeal

**The Public Prosecutor** has demanded that the judgment should be annulled and the case returned to the first instance court for re-trial because of essential violation of provisions of criminal procedure and because of erroneous and incomplete determination of the factual situation.

In the specific cases (C. no. 802/04 and C. no. 812/04) the KTA (Kosovo Thrust Agency) was not informed and the decision was issued contrary to the provisions that regulate ownership of socially owned enterprises. Enterprise R.S. was a socially owned enterprise and it was administered by the KTA. In the case involving claimants G.K. and M.K. Sh. acted contrary to the regulation no. 2000/13 on the establishment of the Special Chamber of the Supreme Court of Kosovo on issues related to the KTA. The claimant didn't have free choice to determine which the respondent shall be. Failure to notify the KTA on the civil proceedings against the respondent R.S. and issuance of the judgments suggest that the claim of G. and M.K. was granted and it was confirmed that they benefited the right of ownership over the property through the judgments.

In the ruling of the Municipal Court of Pristina (C. no. 2422/08, dated 27.10.2009) Sh. declared the court without subject matter jurisdiction to decide on the case and instructed the claimant to file a separate claim to the Special Chamber of the Supreme Court of Kosovo. The content of the decision shows that the claimant had satisfied all obligations deriving from the contract no. 2/102 dated 1.6.1989.

The Municipal Court of Prizren failed to take into account the reasons why Sh. acted the way she did and the benefit of the claimants G. and M.K.

## III. Response to the appeal

Sh. has demanded that the appeal should be rejected as ungrounded and the judgment of the Municipal Court of Prizren should be confirmed.

Based on the contents of the appeal it is incomprehensive what kinds of violations of criminal procedure have been made according to the prosecutor. The judgment doesn't contain essential violations of provisions of criminal procedure and the factual situation was also justly confirmed. Sh. had on the case of the claimants G. and M.K. against respondet R.S. rendered the judgment based on the provisions of the LCP. Through the judgment it was affirmed that the claimants purchased the commercial premises. The said judgment had only declarative character and they had no obligation neither for the claimant nor the other party. In Pristina hundreds of such judgments had been issued.

There was no evidence that Sh. rendered unlawful decisions because they were not confirmed as illegal and the prosecutor has no right to assess if judge's decisions are unlawful or not. There is no evidence that Sh. had rendered the decision for any benefits or that she

had caused material damage to someone. Eventhe representative of the KTA explained in the main trial that they were not supposed to be involved in the procedure. This could only be a procedural issue but not the element of criminal offence under Article 346 of the CCK.

**IV. Legal reasoning**

The appeal has been duly filed pursuant to articles 398-400 of the KCCP. The Court has held session pursuant to articles 409 and 410 of the KCCP, of which all the parties had been given notice. The defense counsel of Sh. informed the Court via phone before opening of the session that neither he nor Sh. will be present in the session. Also the prosecutor was absent from the session.

Firstly the prosecutor has claimed that the first instance court has made essential violation of provisions of criminal procedure. The prosecutor hasn't however in any way specified this claim in the appeal. Therefore this appeal panel has to examine ex officio if criminal procedure was violated as specified in article 415, paragraph 1 of the KCCP

After reviewing the case file, the Panel considers that the criminal procedure of the first instance court doesn't contain any violation of the provisions of criminal procedure under article 403, paragraph 1 (subparagraphs 1, 2, 6 and 8-12) of the KCCP and that there hasn't been any violation of the issues stated in the article 415, paragraph 1 (subparagraphs 2-4) of the KCCP. Therefore the panel finds the appeal on this part unfounded.

Secondly the prosecutor has claimed that the first instance court has made an erroneous and incomplete determination of the factual situation.

According to article 346 of the CCK, a person can be found guilty for the criminal offence of issuing unlawful judicial decisions if he/she as "A judge or a lay judge or a minor offence court judge who, with the intent to obtain an unlawful material benefit for himself, herself or another person or cause damage to another person, issues an unlawful decision shall be punished by imprisonment of six months to five years."

In this case, it is clear that Sh. was a judge when making the decisions mentioned in the indictment. So this requirement is fulfilled.

The panel has further to consider two additional requirements according to art 346, 1) to obtain an unlawful material benefit for herself or another person, or cause damage to another person, and 2) this has to be done with a criminal intent.

There is no evidence as to a material benefit for the defendant Sh. or to another person. As to the damage done to a party in a dispute, this inevitably follows from a civil law suit where by the judge's decision one party will be considered the winner and the opposing party the loser. But such a loss or damage as a result of a judge's ordinary deciding function cannot in itself establish criminal "damage" according to article 346 of CCK.

On this background it has not been established beyond reasonable doubt that a criminal act according to article 346 has been committed.

In addition no criminal intent by the defendant Sh. has been proven, or even tried to be proven, by the prosecution beyond reasonable doubt.

After the above mentioned it is needless to go any deeper into the issue of unlawfulness of the decisions. At this point can however be stated that decisions made by Sh. cannot undisputedly said to have been unlawful in the sense of article 346 of the CCK. Judges regularly make wrong decisions. As a consequence, an appeal system is established to rectify the wrong decisions of the lower courts.

In this case, which unfortunately is not uncommon, the other parties of the two cases should have used the means provided by the KCCP if they considered the decisions to be wrong or against the law. Filing an indictment in these kinds of cases without establishing the specific intent of the alleged perpetrator, can even be considered as wrongful interference to the independence of the judiciary.

Therefore it is decided like in the enacting clause.

Tore Thomassen
EULEX Presiding Judge

Kujtim Pasuli
Panel member

Vaton Durguti
Panel member

Matti Aalto
Recording clerk

LEGAL REMEDIES

This judgment cannot be appealed. Authorized persons may use extraordinary legal remedies according to the chapter XXXIX of the KCCP.