

Municipal Court of Prizren  
P no. 917/10  
7 October 2010

IN THE NAME OF THE PEOPLE

THE MUNICIPAL COURT OF PRIZREN

*composed of:*

EULEX Judge Witold Jakimko as Presiding Judge,  
EULEX Judge Jonathan Welford-Carroll and  
Kosovo Judge Emrush Kastrioti,

*assisted by:*

Christin Nilsson, Robert Abercrombie and Robina Struthers, as court recorders and by  
Iltir Ejupi, Leke Nimani and Albina Ruli as interpreters,

*in the criminal case against:*

Ektrem Agushi, father's name Sali, mother's name Xhemile (maiden name Bytyqi), born  
on 25 January 1958, in village Gadinla e Epërme/Gorrije Gadinlje, Municipality of  
Lipjan/Lipjan, currently residing at Village Gadinla e Epërme/Gorrije Gadinlje,  
Albanian ethnicity, lawyer and working in two companies, married, father of four  
children, of average economic status, ID no. 1011062993,

*charged as*

per in the Indictment PP no. 524/09 filed 03 August 2009 with the criminal offence of  
Issuing unlawful judicial decisions contrary to Article 346 of Criminal Code of Kosovo  
(hereinafter CCK),

*as described below:*

On 04 June 2008, the Defendant acting as a Judge at the District Court of  
Prishtinë/Prishtina, intended to obtain unlawful material benefit for another person,  
causing damage to third party issued an unlawful judicial decision, respectively Ruling  
547/2008 dated 04 June 2008. After receiving the documents of the case file upon  
inheritance through an appeal, the Defendant issued an unlawful decision where he  
decided on the appeal based on a final Ruling allegedly issued by Municipal Court of  
Prishtinë/Prishtina T. no. 136/2002 dated 14 October 2002; supposedly the Ruling was  
issued by Judge Zlatije Stanishić who was not selected pursuant to UNMIK provisions by  
United Nations Special representative. The Ruling was verified with a circled seal where  
it was written an inscription *Republic of Serbia, Autonomous Province of Kosova and  
Metohia, Municipal Court of Prishtinë/Prishtina*, a parallel court body.

*having held the trial sessions*



on 6 and 7 October 2010, in the presence of the Defendant Ekrem Agushi, his Defence counsel, Hamit Gashi, the Municipal Public Prosecutor of Prizren, Ariana Shajkovci,

*pursuant to*

Article 390 Kosovo Criminal Procedure Code (hereinafter KCCP), issues the following:

### **JUDGMENT**

1. The Defendant, Ekrem Agushi, whose personal data is abovementioned, is found **NOT GUILTY** of the criminal offence described above,
2. Pursuant to Articles 99 and 103, para 1 of KCCP, the costs of the criminal proceeding shall be paid from the Kosovo budgetary resources.

### **REASONING**

#### **1. Procedural background**

On 10 November 2008, a ruling on initiation of investigation PP no. 5105-15/2008 was issued by the Municipal Public Prosecutor of Prizren against Bashkim Latifi and Sylejman Nuredini for reasonable suspicion that they have committed the criminal offence of Issuing unlawful judicial decisions contrary to Article 346 of CCK.

The following day, the Municipal Public Prosecutor initiated an investigation against Ekrem Agushi on the same suspicion (PP no. 5105-15/2008).

The Public Prosecutor issued a Ruling terminating the investigation against Bashkim Latifi and Sylejman Nuredini on 22 January 2009.

On 03 August 2009, the Municipal Prosecutor of Prizren filed an Indictment PP no. 524/09 dated 30 July 2009 against Ekrem Agushi charged with the criminal offence of Issuing unlawful judicial decisions. The prosecutor did not point out an injured party in the case. The charge against the defendant did not contain any information on damaged persons.

A confirmation hearing was held by a Kosovo judge on 15 September 2009. Upon the Defence counsel's proposal, the session was postponed.

On 24 October 2009, the Defence counsel notified the Public Prosecutor of his intent to present a ground for excluding criminal liability of the Defendant, pursuant to Article 308 para 1 item 2 of KCCP. The Defence counsel further requested the judge to return the indictment for amendments to the Public Prosecutor given it has not drafted pursuant to Article 305 of KCCP.

On the same day the Defence counsel filed an application for disqualification of the Kosovo Public Prosecutor in the case and requested EULEX judges and prosecutor to take over the case.



On 28 October 2009, another confirmation hearing was held at the Municipal court of Prizren. The Defence counsel petitioned for the Public Prosecutor to review of the indictment. He further mentioned the application filed to EULEX Judges. The confirmation judge granted the Defence counsel's motion and postponed the session to an indefinite date.

The case was assigned to EULEX judges following a hearing held at Prizren Municipality Court on 21 January 2010.

On 26 February 2010, the confirmation hearing organized by a EULEX judge was postponed due to the absence of the Municipal Public Prosecutor.

Another confirmation hearing took place at the Municipal court of Prizren on 2 March 2010. The EULEX confirmation Judge, by ruling KA no. 116/09, dismissed the indictment PP no. 524/09, pursuant to Article 316, para 1, item 4 KCCP. The prosecutor admitted that he had not mentioned the damaged party in the indictment. Moreover he explicitly stated that the damage had been caused to the Republic of Kosovo.

Against the ruling of dismissal, the Municipal Public Prosecutor filed an appeal on 10 March 2010. On 15 April 2010, a panel composed of a majority of EULEX judges granted the appeal and confirmed the indictment (Ruling KP no. 26/10).

On 1 July 2010, the Supreme Court of Kosovo by Ruling PKL-KZZZ 47/10 dismissed as inadmissible the request for protection of legality filed by the Defence counsel against the confirmation ruling dated 15 April 2010.

## 2. Main trial

### a/ Evidentiary proceedings.

A preliminary hearing was held in the case no. 917/10 on 6 October 2010. The main trial commenced on the same day and continued on 7 October 2010.

During the trial sessions, Sylejman Nuredini and Bashkim Latifi testified on 6 October 2010. The Defendant was heard by the panel on the following day.

The trial panel admitted as evidence the following documents:<sup>1</sup>

1. Exhibit A1 Minutes of hearing of Bashkim Latifi, dated 26 September 2008 (two translations).
2. Exhibit A2 Minutes of hearing of Sylejman Nuredini, dated 6 November 2008.
3. Exhibit A3 Minutes of hearing of Sylejman Nuredini, dated 26 September 2008.
4. Exhibit B1 Ruling of the Municipal Court of Prishtinë/Prishtina (Branch Graçanicë/Gračanica) no. 136/2002, dated 14 October 2002.
5. Exhibit B2 Ruling of the Municipal Court of Prishtinë/Prishtina T no. 24/08, dated 31 March 2008 on determination of the composition of a legacy.
6. Exhibit B3 Ruling of the District Court of Prishtinë/Prishtina, AC no. 547/2008 dated 04 June 2008.
7. Exhibit B4 Ruling of the Supreme Court of Kosovo, MLC no. 12/2008, dated 11 September 2009, upon application for protection of legality.

<sup>1</sup> Minutes of main trial, case P no. 917/10, 7 October 2010, pages 1 and 2; page 11.



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8. Exhibit B5 Ruling of the District Court of Prishtinë/Prishtina, AC no. 1103/2009 dated 8 October 2009.
9. Exhibit C1 Original version of the Ruling of the Municipal Court of Prishtinë/Prishtina, (Branch Graçanicë/Gračanica), O no. 136/2002, dated 14 October 2002.

Noting that the parties had no objections, the minutes of witnesses' hearings dated 26 September 2008, 6 November 2008 and 26 September 2008 were considered as read according to Article 364 KCCP *a contrario*. The parties did not file any objection to consider the other exhibits as read out.

During the preliminary hearing, the Defence counsel submitted a motion to admit as evidence,<sup>2</sup> the Ruling of the Prishtinë/Prishtina Municipal court, T no. 645/09, dated 5 January 2010 (relating to the termination of inheritance procedure); as well as the criminal reports filed with the Public Prosecution office in Prishtinë/Prishtina, BPN 142-10-10 dated 14 May 2010, filed by the police. The criminal reports concern two individuals, namely Musli Xhamali and Jovica Miliivojević, who attempted to manipulate the court in relation to the contested inheritance proceeding. Defence counsel and Ekrem Agushi also mentioned the request of protection of legality filed by the Kosovo Public Prosecutor upon the application of the inheritor Novica Miliivojević.

The presiding judge requested the Defence counsel to provide the Municipal Public Prosecutor and the court with copies of these documents.

During the main trial, Defence counsel reiterated his motion.<sup>3</sup> The Public prosecutor did not object to the Defence counsel's proposal but requested to get familiarized with the criminal report. The presiding judge partly granted the motion and entered the Ruling of the Supreme Court of Kosovo NLC 12/2008 as Exhibit B4 and the Ruling of the District court of Prishtinë/Prishtina AC no. 1103/2009 as Exhibit B5 into the trial records.<sup>4</sup> The panel denied the rest of the motion as irrelevant to the main matter of the trial pursuant to Article 154, para 1 KCCP.<sup>5</sup>

#### **b/ Closing statement of the Municipal Public Prosecutor of Prizren<sup>6</sup>**

The Public Prosecutor stands by the indictment PP no. 524/09 filed 03 August 2009. The Prosecutor claims that it is not contestable in the light of the evidence administered during the trial that the Ruling AC no. 457/2008 was issued on 04 June 2008, by which the proposal of Miliivojević from Caglavica was rejected as unacceptable. The Ruling T no. 136/2002 dated 14 October 2002 issued by a parallel Court is not legitimate.

<sup>2</sup> Minutes of preliminary hearing, case P no. 917/10, 6 October 2010, pages 2-3.

<sup>3</sup> Minutes of main trial, case P no. 917/10, 7 October 2010, page 2.

<sup>4</sup> *Ibid*

<sup>5</sup> Minutes of main trial, case P no. 917/10, 7 October 2010, pages 2-3.

<sup>6</sup> *Ibid*, pages 13-14.



The Public Prosecutor supports that all the elements of the criminal offence under Article 346 CCK are met in this case. She therefore proposes the court to find the Defendant guilty and to sentence him accordingly.

**c/ Closing statement of the Defence counsel and the Defendant<sup>7</sup>**

The Defence counsel avers that there is no evidence regarding all the ingredients of the criminal offences under Article 346 CCK. He mentions the application for the case to be taken over by EULEX judges and the intervention of the Public Prosecutor's Office in this case. He refers to the lack of preciseness of the indictment and to its dismissal following the confirmation hearing.

The Defence counsel considers that the specific intent of the Defendant to profit unlawfully, for himself or the others, or to cause damage to a third party under Article 346 CCK is not mentioned in the indictment. According to Hamit Gashi's opinion, the law foresees that that the first benefit should be to the Defendant; if the material benefit is for another person, the subject matter of the commission of the criminal offence is intertwined with the act itself. He alleges that even if a right of the party to the civil proceeding was violated, it has been fixed at the second instance level. The case was sent for retrial to the Municipal court of Prishtinë/Priština and the inheritance proceeding is still ongoing.

He stresses out that the commission of the criminal offence has not been established. The specific intent of the accused has not been confirmed. He thus proposes the court to acquit the Defendant.

Ekrem Agushi refers to the ongoing proceeding in the civil dispute. He mentions the inheritance Ruling that could not be verified in the public registers of immovable property, because of the property dispute. He states that he is innocent and that the essential elements of the criminal offence are not met. The Public Prosecutor fails to prove that he benefited or secured profit from the issuance of the incriminating decision or enabled a third party to benefit from his act. He finally mentioned the impact of this criminal proceeding on his professional and personal life.

**3. Findings of the court**

**a/ Witness statement of Sylejman Nuredini**

During the session of 6 October 2010, Sylejman Nuredini testified before the court:

Sylejman Nuredini stood fully by the statement he gave before the Municipal Public Prosecutor. He referred to the provisions found between articles 200 to 230 of the Law of Contested Procedure (hereinafter LCP). He stated that the inheritance case was assigned without any dispute to Ekrem Agushi who was also the presiding judge.

<sup>7</sup> Ibid, pages 14-16.



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The witness explained that the reporting judge is accountable for the accuracy and genuineness and legality by law and based on professional trust.<sup>8</sup> The Defendant, as reporting judge made a case assessment and presented the case to the panel during the hearing.<sup>9</sup>

Sylejman Nuredini declared that in this civil dispute, Ekrem Agushi “stated that the first instance court ruling contained serious breaches”<sup>10</sup> and that the case had been ruled on. The witness was convinced that both rulings of Prishtinë/Prishtina Municipal court were from a legal court.<sup>11</sup> The court ruled on this matter twice (*res iudicata*) and the recent ruling is normally quashed and the earlier dated one remains.<sup>12</sup> It was a case of an essential breach of an absolute nature and the ruling had to be quashed.<sup>13</sup>

According to his testimony, Ekrem Agushi did not report that the ruling was issued from a parallel court. The ruling was not presented to the other panel members, or any other evidence. Later on when the criminal proceedings were initiated the Defendant would have told him he had missed out on noticing that the ruling was of such a Parallel Court.<sup>14</sup>

According to his testimony, a declaration of accountability of the reporting judge for the correctness and lawfulness of the decision was signed by panel members after the incident occurred. It was drafted in the view of the huge backlog of cases and based on mutual trust and legal provisions.<sup>15</sup> He stated that after this case separate panels were established and the members completely changed their method of work.

Sylejman Nuredini declared that he never noticed any irregularity or ever had any suspicion<sup>16</sup> and that he does not know the parties in the civil dispute as he decided 400 cases a year.<sup>17</sup> The witness mentioned the possibility to have recourse to an extraordinary legal remedy and the outcome of the request for protection of legality filed before the Supreme Court of Kosovo (annulling the District court Ruling).<sup>18</sup>

#### **b/Witness statement of Bashkim Latif**

Witness Bashkim Latif testified on 6 October 2010 before the court: In 2007 he was appointed at the District Court of Prishtinë/Prishtina as civil judge at the appellate level, due to the large number of disputes to be solved.<sup>19</sup>

<sup>8</sup> Minutes of main trial, case P no. 917/10, 6 October 2010, page 5.

<sup>9</sup> Ibid, page 3.

<sup>10</sup> Ibid, page 4.

<sup>11</sup> Ibid, page 10.

<sup>12</sup> Ibid, page 6.

<sup>13</sup> Ibid, page 6.

<sup>14</sup> Ibid, page 4.

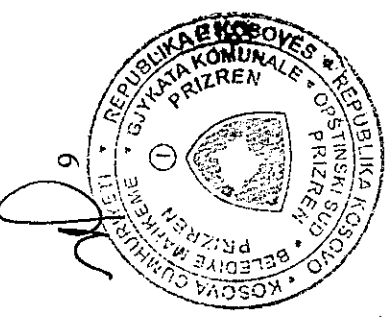
<sup>15</sup> Ibid, page 5.

<sup>16</sup> Ibid, pages 7-8.

<sup>17</sup> Ibid, page 10.

<sup>18</sup> Ibid, pages 10-11.

<sup>19</sup> Ibid, page 11.



He mentioned that “the Reporting Judge was obliged to examine the case documents and to refer the case professionally by examining all of the documents and by submitting a proposal.”<sup>20</sup> There was a belief in each other’s professionalism. The cooperation among the panel members was correct.<sup>21</sup>

The witness recalled that in the civil dispute, since it was referred as *res iudicata* and there was an essential violation, the panel members had no dilemmas and signed the minutes of the voting.<sup>22</sup> The Ruling was not presented to the other panel members.<sup>23</sup> He did not know that the case had been adjudicated by an illegal court. He heard of this violation afterwards.<sup>24</sup>

Witness Bashkim Latifi stated that they had a large number of cases at the relevant time. He never suspected that an irregularity has occurred in this case or any other case or never had any problems before.<sup>25</sup>

The witness stated that he does not know the parties to the civil dispute and had never been in contact with them.<sup>26</sup>

Bashkim Latifi mentioned the declaration which was signed by panel members he worked with after this incriminating decision was issued because it was impossible to examine all the documentation when a colleague acted as Reporting Judge. It has become a general practice in the future. After this civil case, he did not want to adjudicate cases with Ekrem Agushi; so another panel was formed.<sup>27</sup>

#### **c/Statement of the Defendant**

The Defendant, Ekrem Agushi, was heard by the court on 7 October 2010:

Ekrem Agushi stated that in the inheritance case in question, as presiding Judge, he summoned his colleagues, Sylejman Nuredini and Bashkim Latifi to his office in order to deliberate and vote. He was obliged to create the conditions for the panel to decide and vote in relation with cases which were prepared for adjudication (maybe 10 cases).

When opening the session on this case, Sylejman Nuredini asked him to report the case in a more academic manner due to the lack of knowledge of the other two panel members as well as their inexperience in adjudication of inheritance cases. The panel members requested that the discussion referred to the documents page by page.<sup>28</sup>

<sup>20</sup> Ibid, page 11.

<sup>21</sup> Ibid, page 17.

<sup>22</sup> Ibid, page 11.

<sup>23</sup> Ibid, page 11.

<sup>24</sup> Ibid, pages 11 and 12.

<sup>25</sup> Ibid, pages 12-13.

<sup>26</sup> Ibid, page 13.

<sup>27</sup> Ibid, pages 13-14.

<sup>28</sup> Minutes of main trial, case P no. 917/10, 7 October 2010, page 4.



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The Defendant declared that as a reporting Judge he considered the appeal as completed. He was holding the Ruling O no. 136/02 dated 14 October 2002 in his hand and since his colleagues knew Serbian language better than him, he gave the floor to them.<sup>29</sup>

Ekrem Agushi declared he thought that the appeal panel was dealing with a decision from an institutionalized court, Gračanice/Gračanica branch.<sup>30</sup> Ekrem Agushi stated that he read the Ruling.<sup>31</sup> Ekrem Agushi stated that the mention *Republic of Serbia* on the stamp apposed on the Ruling was impossible to read. It was a copy of the ruling which has not been certified; not an original. The stamp is dated March 2004 whereas the decision was taken on 14 October 2002. The legality of the document was evaluated in accordance with Article 230 of the LCP with this stamp.

The parties to the civil dispute could have requested the original of the Ruling; but they failed to do so, as they did not suspect the content and validity of the document. However the Supreme Court of Kosovo instructed to request the original version.<sup>32</sup>

He believed that the stamp came from a regular Court. The evidence was assessed in accordance with Articles 8 and 230 of the LCP. The panel members unanimously decided that the decision TNR 24/2008, dated 31<sup>st</sup> March 2008 of Prishtinë/Prishtina Municipal court was a consequence of essential violations as per in Article 354 para 2 item 12 of the LCP. Indeed the Municipal Court Gračanice/Gračanica branch took a final decision in this inheritance case; therefore the case was *res iudicata*.<sup>33</sup>

The Defendant mentioned the procedure before the disciplinary commission of the Kosovo Judicial Council initiated against him. A hearing was held by the Commission members, Živojin Gojko Jokanović, Hari Katara and Gabriele Walentich. The commission did not find any element to decide on any disciplinary measures against Ekrem Agushi. The Defendant continued working until he was eliminated from the vetting procedure since he was not proposed for reappointment.<sup>34</sup>

Ekrem Agushi mentioned the request for protection of legality by the Public Prosecutor upon the proposal of Novica Milivojević against the ruling of Prishtinë/Prishtina Municipal court. The Supreme Court of Kosovo decided to send back the case to the second Instance Court for re-Trial. A panel of Prishtinë/Prishtina District court composed of the Defendant as Presiding Judge and reporting judge, Rahman Rakoceri and Zhabide Gjonaj adjudicated the case on 8 October 2009. The panel instructed the first Instance court to act in accordance with the remarks and instructions of the Supreme Court of Kosovo.<sup>35</sup>

<sup>29</sup> Ibid, page 5.

<sup>30</sup> Ibid, page 5.

<sup>31</sup> Ibid, page 8.

<sup>32</sup> Ibid, pages 9-10.

<sup>33</sup> Ibid, page 5.

<sup>34</sup> Ibid, page 6.

<sup>35</sup> Ibid, page 8.



In the Ruling MLC 12/2008 dated 11 September 2009, the Municipal court suspended the legacy proceedings and instructed the parties to file a property claim. The inheritance procedure is still ongoing.<sup>36</sup>

The Defendant declared that he does not know the parties to the civil dispute, only by name.<sup>37</sup> Ekrem Agushi stated that no one has ever intervened in order to influence the proceedings.<sup>38</sup> He has never been in the premises of Graçanicë/Gračanica branch. He did not know it existed although he heard about parallel courts.<sup>39</sup>

**d/Assessment of evidence.**

A three-judge panel of Prishtinë/Prishtina District court, adjudicating upon an appeal in an inheritance matter, issued a Ruling Ac no. 547/2008, on 04 June 2008.<sup>40</sup>

The civil case relates to the inheritance of Vojin Vitko Miliivojević. The panel decided upon on the appeal filed by the inheritor Jovica Miliivojević against the Ruling O no. 24/08 dated 31 March 2008. By this Ruling O no. 24/08, the Prishtinë/Prishtina Municipal court announced the heirs of the deceased (Stanimirka Miliivojević, Novica Miliivojević, Jovica Miliivojević and Gorica Djimovic).<sup>41</sup>

The appellate panel decided to annul the Ruling T. no. 24/2008 on the basis that the issue was *res iudicata*; because it was already determined by a decision O. 136/2002 dated 14 October 2002 issued by the Municipal Court of Prishtinë/Prishtina sitting in Graçanicë/Gračanica. The District court panel found that the first instance court made a substantial violation of the provisions as per Article 354 para 2 item 12 of LCP.

By Ruling O no. 136/2002 of Prishtinë/Prishtina Municipal court, the list of heirs of Vojin Vitko Miliivojević (Stanimirka Miliivojević, Novica Miliivojević, Jovica Miliivojević) was announced and the division of properties agreed upon. It was verified by a circular seal inscribed with the words *Republic of Serbia Autonomous Province of Kosovo and Metohia, Municipal Court in Prishtinë/Prishtina*.<sup>42</sup>

There is no dispute between the parties that the court sitting in Graçanicë/Gračanica was a parallel court adjudicating in Kosovo and has been not legally established. The judge

<sup>36</sup> Ibid, page 8.

<sup>37</sup> Ibid, pages 11-12.

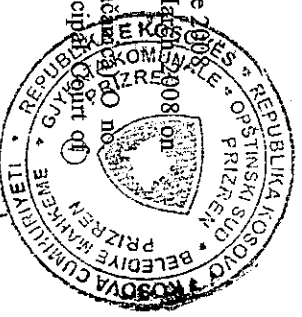
<sup>38</sup> Ibid, page 12.

<sup>39</sup> Ibid, pages 11-12.

<sup>40</sup> Exhibit B3 Ruling of the District Court of Prishtinë/Prishtina AC no. 547/2008 dated 04 June 2008.

<sup>41</sup> Exhibit B2 Ruling of the Municipal Court of Prishtinë/Prishtina no. 24/08, dated 31 March 2008.

<sup>42</sup> Exhibit B1 Ruling of the Municipal Court of Prishtinë/Prishtina (Branch Graçanicë/Gračanica) O no. 136/2002, dated 14 October 2002; Exhibit C1 Original version of the Ruling of the Municipal Court of Prishtinë/Prishtina, (Branch Graçanicë/Gračanica) O no. 136/2002, dated 14 October 2002.



who issued the decision, Zllatija Stanisnić, was not appointed in accordance with the relevant UNMIK regulations.<sup>43</sup>

The panel of the District court of Prishtinë/Priština was composed of Ekrem Agushi acting as Presiding judge and reporting judge (*juge rapporteur*), and Sulejman Nuredini and Bashkim Latifi as panel members.<sup>44</sup>

As reporting judge, the Defendant was responsible for the assessment and presentation of the case. He was in addition in charge of scheduling the session and presenting a report to the other panel members.<sup>45</sup> He admitted this fact during the trial.

The witness Sylejman Nuredini recalled the report of the case by Ekrem Agushi: “*he stated that the first instance court ruling contained serious breaches.*” According to his testimony, the Defendant stated that the case had already been ruled on, that there was a judgment that had been reached on this and there were serious essential breaches and he ruled on it. The other panel members did not examine the documentation in the case and relied on the report made by the Defendant. Ekrem Agushi mentioned that the issue in the appeal was *res iudicata*; but the Defendant did not mention that the decision was issued by a parallel court. Ekrem Agushi recalls that he referred to the existence of a final decision regarding the inheritance (Ruling O. no 136/2002).

The Defendant heard about the existence of parallel courts. He declared that he read the decision and he believed that the decision was issued by the Municipal court of Prishtinë/Priština as lawfully established court. Sylejman Nuredini testified that the Defendant told him later on that he had missed out on noticing that the ruling was of such a Parallel Court.

According to Sylejman Nuredini’s statement the practice is that “when a judge indicates there are breaches in a judgment then we stay away from any comments on it and we simply quash straightforward such a ruling.”<sup>46</sup>

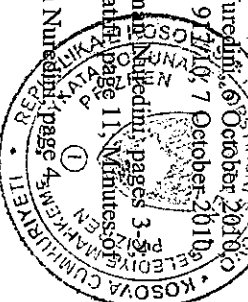
The court perused the evidence in the light of Article 346 CCK that states as follows: “A judge or a lay judge or a minor offence court judge who, with the intent to obtain an unlawful material benefit for himself, herself or another person or cause damage to another person, issues an unlawful decision shall be punished by imprisonment of six months to five years.”

<sup>43</sup> Minutes of main trial, case P no. 917/10, 6 October 2010, pages 10 and 15; page 16; Minutes of main trial, case P no. 917/10, 7 October 2010, pages 5, 9 and 10.

<sup>44</sup> Exhibit B3; Minutes of main trial, case P no. 917/10, testimony of Sylejman Nuredini, 6 October 2010, pages 3-4, testimony of Bashkim Latifi, page 12; Minutes of main trial, case P no. 917/10, 7 October 2010, statement of Ekrem Agushi, page 12.

<sup>45</sup> Minutes of main trial, case P no. 917/10, 6 October 2010, testimony of Sylejman Nuredini, pages 3-5; Minutes of main trial, case P no. 917/10, 6 October 2010, testimony of Bashkim Latifi, page 11; Minutes of main trial, case P no. 917/10, 7 October 2010, statement of the Defendant, page 4.

<sup>46</sup> Minutes of main trial, case P no. 917/10, 6 October 2010, testimony of Sylejman Nuredini, page 4.



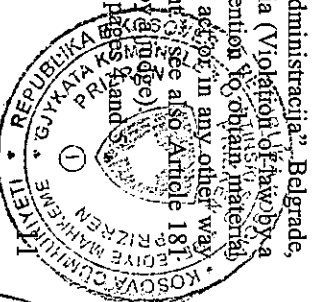
Commentaries of this provision can be found under the Serbian criminal law.<sup>47</sup> Mention is made that as for the other forms of criminal offences involving an abuse of office, intent to obtain material gain or to inflict damage has to be proven. It is necessary to establish that the perpetrator had an intention of obtaining material gain for another person or of inflicting damage on another person. Further “a criminal act is completed when an illegal document is issued or the law is violated in any other way. Thereby, it is not necessary to obtain material gain for or inflict damage upon another person, but for a criminal act to exist it is necessary that the violation of law is committed with such intention in mind. If material gain is obtained or damage caused, the criminal act shall still exist. The criminal act may be committed with premeditation only. As intention act to obtain material gain or cause damage is prerequisite for this criminal act, only immediate premeditation is possible.”

The law under Article 346 CCK requires more that the demonstration of basic *mens rea* of the Defendant. It has to be proven that at the time of the criminal offence, the Defendant intended to obtain an unlawful material benefit for himself, herself or another person or cause damage to another person as a result of his/her actions. Whether the material benefit was successful and/or the damage was caused, a particular intent of the perpetrator for which the threshold is higher than the basic intent under Article 15 CCK has to emerge from the available evidence. The court considers that it has been proven during the trial that an unlawful judicial decision, namely a ruling at the appeal stage, was issued in the inheritance case by Ekrem Agushi acting as presiding judge and reporting judge of Prishtinë/Prishtina District court on 4 June 2008, within the meaning of Article 346 CCK.

The prosecutor in the indictment did not point out an injured party in the case. The charge against the defendant did not contain any information on damaged persons. During the confirmation hearing held at the Municipal court of Prizren on 2 March 2010 when the EULEX confirmation Judge dismissed the indictment the prosecutor admitted that he had not mentioned the damaged party in the indictment. Moreover he explicitly stated that the damage had been caused to the Republic of Kosovo.<sup>48</sup> However neither the intent of Ekrem Agushi at the time of the commission of the offence nor any unlawful material benefit or damage was revealed during the trial.

Both witnesses testified that they do not have any information regarding a relationship between the parties to the civil dispute and Ekrem Agushi. The Defendant stated the same. The court finds that the evidence presented during trial has not ascertained the existence of such relationship between Ekrem Agushi and the parties to the civil proceeding. Further, the Prosecution has not introduced any element that tends to prove

<sup>47</sup> Commentary of the Criminal Code of Serbia, 1995, 5th Edition, “Savremena Administracija”, Belgrade, Srzentic Nikola – Ljubisa Lazarevic under Article 243 of Criminal Code of Serbia (Violation of law by a judge): “A judge or a lay judge, during the court proceedings, who with the intention to obtain material gain for another person or to inflict damage on another person passes an illegal act in any other way violates the law, shall be punished with six months to five years of imprisonment. (See also Article 181 Criminal Code of the Socialist Federal Republic of Yugoslavia (Violation of law by a judge)”.  
<sup>48</sup> See minutes of Confirmation hearing, KA Number 116/09, dated 2 March 2010, pages 4 and 5.



that Ekrem Agushi has gained any material benefit from the issuance of the impugned decision (for example, favor/promise to the defendant, money transfer etc.).

None of the witnesses (previously other panel members) has ever noticed any irregularity or potential misconduct committed by the Defendant during the adjudication of civil cases.

It has to be noted that the District court of Prishtinë/Prishtina had, at the relevant time a huge backlog of cases and a shortage of judges, which explains the transfer of several judges from the District commercial court to the District court of Prishtinë/Prishtina to work on civil cases. Bashkim Latifi declared that the old cases were given to the judges proportionally and that they adjudicated approximately 100 cases per month.<sup>49</sup> Witness Sylejman Nuredini stated that “one panel may sometimes report several cases, in this case during one month, we handled 120 cases.”<sup>50</sup> The witness also mentioned that he had to deal with a large volume of work and had to read up to 40 cases. Both witnesses recognized that there was a lot of pressure at the court due to the workload. The Defendant mentioned this fact as well and it is not contested by the trial panel.

In the court’s opinion, errors or mistakes may occur during a case adjudication, notably when the judges have a high workload and work under pressure. Even Bashkim Latifi admitted that there “were instances when my colleague signed some of my rulings which contained mistakes and then we would issue an amended ruling. It was technical errors due to the large volume of work.”<sup>51</sup>

Any mistake or error made of a judge during the exercise of his/her functions can not necessarily lead to the initiation of criminal investigation under Article 346 CCK. Such misinterpretation or wrongful application of legal provisions may be settled by the second instance court during the appeal procedure.

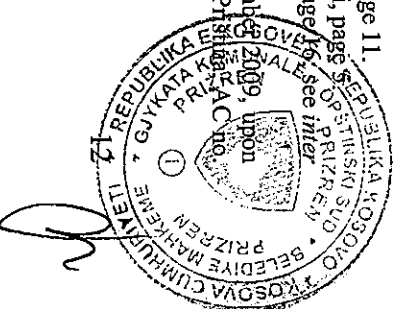
This is what happened in this instance. Upon a request for protection of legality the Supreme Court of Kosovo annulled the ruling of the District Court of Prishtinë/Prishtina dated 4 June 2008 and sent back the case for re-trial in September 2009.<sup>52</sup> In addition disciplinary proceeding can be initiated to decide upon the issuing of an unlawful decision by a member of the Kosovo judiciary, as it was in the Defendant’s case.

In the present instance, it has not been established that Ekrem Agushi has acted with the intent to obtain an unlawful material benefit for himself, herself or another person or cause damage to another person, as required in Article 346 CCK.

<sup>49</sup> Minutes of main trial, case P no. 917/10, 6 October 2010, testimony of Bashkim Latifi, page 11.

<sup>50</sup> Minutes of main trial, case P no. 917/10, 6 October 2010, testimony of Sylejman Nuredini, page 5. <sup>51</sup> Minutes of main trial, case P no. 917/10, 6 October 2010, testimony of Bashkim Latifi, page 16. <sup>52</sup> See *inter alia* page 17.

<sup>52</sup> Exhibit B4 Ruling of the Supreme Court of Kosovo, MLC no. 12/2008 dated 11 September 2009, upon application for protection of legality; Exhibit B5 Ruling of the District Court of Prishtinë/Prishtina, MLC no. 1103/2009, dated 8 October 2009.



Taking into consideration the abovementioned arguments and the content of Article 396 para 9 KCCCP the court is obliged to point out in the reasoning Article 390 para 3 KCCCP as the direct reason of acquittal. It has not been proven that the accused had committed the act for which he has been charged.

The defendant has, therefore, been found not guilty.

**4. Legal remedy**

Pursuant to Article 398, para 1 and Article 399 of KCCCP, authorized persons may file an appeal against a judgment rendered at first instance within fifteen (15) days of the day the copy of the judgment has been served.

Witold Jakimko  
Presiding judge



Christin Nilsson  
Court recorder

