

IN THE NAME OF THE PEOPLE

The Appellate Court of Kosovo – Serious Crimes Department, in a panel composed of the following judges: Hajnalka Veronika Karpati, as Presiding Judge, Xhevdet Abazi, Reporting Judge and Abdullah Ahmeti as the panel members, assisted by the EULEX legal officer Anna Malmstrom, as recording officer, in the criminal case against **NV** from in village, municipality of , due to the criminal case of Aggravated Murder, pursuant to Article 147, par. 1, subpar. 4 of the CCK and Unauthorized Ownership, Control, Possession or Use of Weapons, pursuant to Article 328, par. 2 of the CCK, upon deciding on appeals filed by the injured parties **DB, DO, JK** as well as Defense Counsels of the accused – lawyers Flamur Kelmendi and Gëzim Kollçaku, from Peja, against Judgment of the District Court of Peja, P. No. 68 / 2012, dated 04.07.2012, in a panel session held in conformity with provisions of Article 390 of the KCCP on 19 September 2013, issued the following:

J U D G M E N T

Appeals filed by the authorized representative of the injured parties **DO, DB, JK** as well as those filed by the Defense Counsel of the accused **NV** are hereby **REJECTED** as unfounded, while Judgment rendered by the District Court of Peja P. No. 68 / 2012, dated 04.07.2012, is **AFFIRMED**.

R E A S O N I N G

With Judgment P. No. 68 / 2012, dated 4 July 2012, the District Court of Peja found the accused **NV** guilty for the criminal offence of Aggravated Murder, pursuant to Article 147, par. 1, subpar. 4 of the CCK and Unauthorized Ownership, Control, Possession or Use of Weapons, pursuant to Article 328, par. 2 of the CCK, and sentenced to 15 (fifteen) years and 6 (six) months in prison for the first criminal offence

and one (1) year imprisonment for the second criminal offence, resulting in aggregate punishment of 16 (sixteen) years imprisonment, including the time spent in detention from 21 October 2011 onwards. The accused was also made to pay an amount of 400 (four hundred) euros on behalf of costs of criminal proceedings and an additional sum of 100 (one hundred) euros on behalf of scheduled amount, all these within 15 days of the judgment entering into force. Apart from this, an accessory punishment was ordered against the accused, namely an automatic rifle AK – 47 with serial number XXXXXXXX was seized along with two magazines and 36 rounds of ammunition of caliber 7.62 x 39 mm, being the means used for commission of the crime in question.

Injured parties were instructed to pursue a civil proceeding for fulfillment of the property claim.

Appeals against this judgment were filed within the legally prescribed period of time by the following parties:

- Injured party **DO**, through his authorized representative – lawyer Ljubomir Pantoviq, due to decision on punishment, proposing to the court to amend the impugned judgment by pronouncing higher imprisonment punishment against the accused;

- Injured party **JK**, due to decision on punishment, proposing to the court to amend the impugned judgment by pronouncing higher imprisonment punishment against the accused;

- Injured party **DB**, due to decision on punishment, proposing to the court to amend the impugned judgment by pronouncing higher imprisonment punishment against the accused;

- Defense Counsels of the accused, lawyers Flamur Kelmendi and Gëzim Kollqaku, due to decision on punishment proposing to the court to amend the impugned judgment by pronouncing lower imprisonment punishment against the accused;

The Appellate Court, based on its function competences, pursuant to Decision rendered by the President of the Assembly of EULEX Judges No. 2013 OPEJ 0386 – 0001 in reference to this criminal matter, decided in a panel composed of a EULEX Judge as Presiding Judge and two local judges as the members of the panel.

The Appellate Court of Kosovo, in a session held in conformity with provisions of Article 390, par. 1 of the KCCP, having duly informed the Appellate Prosecutor, the accused and his counsels as well injured parties with exception of **JK**, who failed to respond in spite of being duly notified. Present from the EULEX Appellate Prosecutor's Office was the Prosecutor Claudio Pala who entirely stood by his submission in writing

dated 15 May 2013, proposing rejection of appeals filed by both the accused and injured parties, as unfounded and approval of the first instance judgment. Injured parties **DO** and **DB**, as well as authorized representatives of the injured party **DO**, lawyer Ljubomir Pantoviq entirely stood by their appeal allegations, proposing to amend the first instance judgment and to impose more severe imprisonment punishment against the accused. Defense Counsels of the accused, lawyer Flamur Kelmendi and Gezim Kollqaku also entirely stood by their appeal allegations, proposing rejection of appeals filed by the injured parties and approval of appeal of the accused, filed by his Defense Counsel and much more lenient imprisonment punishment imposed against the accused. The accused himself stood by submissions filed by his Defense Counsels and expressed his regret and remorse with respect to what happened on the critical day.

The Appellate Prosecutor from the EULEX Appellate Prosecutor's Office, in her submission PPA / I. No. 89 / 2013, dated 15 May 2013 proposed that appeals filed by the accused and injured party **JK** be rejected as unfounded, while the ones filed by injured parties **DB** and **DO**, respectively be dismissed as belated and rejected as unfounded, while the first instance court judgment be affirmed.

The Appellate Court, having reviewed all the case files of this criminal matter, and careful examination of appealed judgment pursuant to provisions of Article 384 of the KCCP, found the following:

Appeals are unfounded.

Even though judgment of the first instance court has not been appealed against any essential violation of provisions of the criminal procedure, nonetheless, the Appellate Court has reviewed this judgment ex officio, in conformity with provisions of Article 394 of the KCCP and found that this judgment does not contain any essential violation of the criminal procedure nor any other violation of the criminal law which would go to the detriment of the accused that would have sought its annulment.

Also the factual state was not subject to Court evaluation and it could not be appealed since during a session at the main trial the accused pleaded guilty on each count of the Indictment therefore the appealed Judgment is assessed only in aspect of appeal allegations respectively decision on punishment.

After reviewing the matter for the decision on sentence, the Court of Appeals finds that the appeal allegations related to the grounds of appeal, do not stand. Representative of the injured parties and themselves injured parties, through their appeals claim that the first instance Court unjustly evaluated the mitigating circumstances namely overestimated them and that some of these should not be considered at all mitigating circumstances and as a result of such evaluation, a very lenient punishment was imposed on the accused. Subsequently this punishment is not

in accordance to the degree of criminal liability of the accused, the seriousness of the criminal offence and degree of social danger. In the appeals of the injured parties, the above mentioned allegations are reasoned with the following facts: expressed brutality of the accused, the deceased **K** was killed in his land, on two other injured parties was shot behind their back - thus at the time when mentioned injured parties were leaving the scene, the accused planned in advance the murder, the first instance Court erroneously considered as mitigating circumstance the guilty plea, regret of the accused, victims' behavior, provocative behavior of the deceased – pulling out the weapon by shooting twice on the accused, age of the accused and the dispute related to transaction of the land. Hence all these circumstances should not be taken into account for which the first instance Court erroneously imposed a much more lenient punishment on the accused instead of imposing the right one. In the appeals of the Defense of the accused, it is emphasized that the first instance Court found most of the circumstances to be lenient however they are evaluated neither rightly nor appropriately for what in particular should be taken into consideration the fact that the accused acted in circumstances of diminished mental capacity as a consequence of provocation by the deceased and injured parties, then it should be considered the guilty plea, his regret, that the late **K** first shot on the accused, and family status of the accused – he is the sole holder of family; these circumstances necessarily determine the imposition of a more lenient prison punishment than the sentence already ordered in the appealed Judgment.

When imposing the punishment the first instance Court completely and extensively evaluated all circumstances, as provided for by provisions of Article 73 of the CCK, namely applicable (old) Code, Article 64 of the CCK which also were accepted by this Court. Accordingly the appeals do not indicate any other circumstance of specifically mitigating character which particularly would influence imposing a more lenient punishment on the accused but apart from mitigating circumstances that mainly are of family nature they only repeat most of the mitigating circumstances as found by the first instance Court though given the nature and seriousness of the criminal offence, they still do not have any direct impact on imposing a more lenient punishment on the accused comparing to the sentence imposed by the first instance Court. The appeals of injured parties yet have not stressed out any particular aggravating circumstance which would have an impact on imposing a more severe sentence against the accused as claimed by the representative of injured party and itself injured party but merely circumstances already mentioned in general by the first instance Court, considering explicitly as an aggravating circumstance the intensity of bodily injury of the victim. In this regard, the appeal allegations in terms of mitigating circumstances, do not stand as the respective circumstances in the appealed Judgment not only are justly found but they also are rightly evaluated.

Nevertheless, the Court of Appeals amends the mitigating circumstances as established by the first instance Court by excluding the following; old age, as 53 is not an age that can be considered mitigating, the alleged insult on **MV** as this has not been proven and lastly the escalating dispute about the property of the neighboring land as the pulling of a gun to solve a dispute shall not be encouraged.

However, taking into account all circumstances, these mentioned in the appealed Judgment, circumstances of the case at hand, the way the critical event occurred – apart from other circumstances found - the fact the accused went armed with automatic gun to the scene being same time provoked as the injured party shot on him, caused prohibited consequence – after depriving a person of his life, he has injured two others causing thus serious bodily injury when both injured parties were leaving the scene, thus the injured party was then shot in the back, it outcomes that the punishment imposed on accused is a just and legal in accordance with the intensity of social danger of committed criminal offence and degree of criminal liability of the accused; it is also in the function of common and individual prevention and by imposed punishment the purpose of sentence as provided for by provisions of Article 41 of the CCK is achieved.

In light of the above it is decided as in enacting clause of this Judgment pursuant to Article 401 of the KCCP.

Done in Albanian, an authorized language.

COURT OF APPEALS OF KOSOVO

PAKR.nr.1400/2012, dated this 19.09.2013

Legal officer

Anna Malmstrom

Panel member

1. Xhevdet Abazi

2. Abdullah Ahmeti

Presiding judge

Hajnalka Veronika Karpati,