Volume V: Two Famous Cases

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CHAPTER 6

TWO FAMOUS CASES

I.

Introduction to Chapter 6

Philip Ostien, Sama'ila A. Mohammed and Ahmed S. Garba

1. What this chapter comprises.

The primary purpose of this chapter is to make generally available carefully edited English translations of the records of the proceedings and the judgments of the courts in the two *zina* cases of Safiyatu Hussaini and Amina Lawal. Other parts of the chapter give various collateral information which we hope will be of interest to students of the cases.

These cases attracted worldwide attention in 2001-2003 when they were pending. Some scholarly work has been done respecting them;[1] but for information about the cases most authors have had to rely primarily on news reports, and therefore do not deal with the details of the actual proceedings and judgments themselves: the laws under which the cases were brought, heard, and decided; who brought them and why; what happened during the trials; who the lawyers and judges were; how the lawyers argued the appeals; the facts and the reasoning upon which the different courts decided them; the authorities relied on by the courts; and so on. The only exception we are aware of is Ruud Peters's valuable study of Safiyatu's case, which does go into such details.[2] For his study Peters worked with a translation from the Hausa of the records of proceedings and judgments of the courts in Safiyatu's case. Unfortunately the translation he used leaves a great deal to be desired;[3] and, as far as we know, no English translation of the records

[1] For a sampling in English see: S.V. Barrow, "Nigerian Justice: Death by Stoning Sentence Reveals Empty Promises to the State and the International Community", *Emory International Law Review*, 17 (2003), 1203-49; S. Crutcher, "Stoning Single Nigerian Mothers for Adultery: Applying Feminist Theory to an Analysis of Gender Discrimination in International Law", *Hastings Women's Law Journal*, 15 (2004), 239-62; C.E. Nicolai, "Islamic Law and the International Protection of Women's Rights: The Effect of Shari'a in Nigeria", *Syracuse Journal of International Law and Commerce*, 31 (2004), 299-326; Note, "Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism", *Harvard Law Review*, 117 (2003-04), 2365-86; K.N. Roberts, "Constitutionality of Shari'a Law in Nigeria and the Higher Conviction Rate of Muslim Women Under Shari'a Fornication and Adultery Laws", *Southern California Review of Law and Women's Studies*, 14 (2004-05), 315-36; S. Saifee, "Penumbras, Privacy, and the Death of Morals-Based Legislation: Comparing U.S. Constitutional Law With the Inherent Right of Privacy in Islamic Jurisprudence", *Fordham International Law Journal*, 27 (2003-04), 370-454; and V. von Struense, "Stoning, Shari'a, and Human Rights Law in Nigeria", *William & Mary Journal of Women and the Law*, 11 (2004-2005), 405-25.

[2] R. Peters, "The Re-Islamization of Criminal Law in Northern Nigeria: The Safiyyatu Hussaini Case", in M. K. Masud, R. Peters and D.S. Powers (eds.) *Dispensing Justice in Islamic Courts: Qadis, Procedures and Evidence* (Leiden: Brill, 2006), 219-243.

[3] *Safiyyatu's Case* (Enugu: Women's Aid Collective, 2003). Peters: "The English…is defective and sometimes incomprehensible. Moreover, the [translation] omits the Arabic texts of legal sources

and judgments in Amina Lawal's case has yet been published at all. In this chapter we remedy both those defects. We have tried to do much better with the translations presented here; this is discussed further below. And we have added Amina Lawal's case to Safiyatu's. The cases are interestingly different from start to finish. Together they will give readers a great deal of insight into the social and legal contexts and the work of Northern Nigeria's Sharia Courts at all levels.

To the translations themselves we have added five things:

- a bibliography of Islamic authorities cited in the two cases – to which bibliography we have added Islamic authorities cited elsewhere in this work;
- a glossary of Islamic legal terms used;
- brief biographies of all the judges who sat in the two cases; this will also be of interest in the chapter on "Judges of the Sharia Courts", forthcoming;
- an essay "On Defending Safiyatu Hussaini and Amina Lawal", by Aliyu Musa Yawuri, who second-chaired Safiyatu's appeal and first-chaired both of Amina Lawal's; and
- the remainder of this introduction, in which the materials translated, the translations, and the two cases themselves are discussed in further detail.

2. The materials translated.

The materials translated are of two kinds: (a) records of proceedings in both trial and appellate courts; the records of the appellate proceedings include records of the oral arguments of counsel (written argument – "briefs" – in the American style not being used); and (b) the written judgments of both trial and appellate courts.

a. The records of proceedings. Records of proceedings in most of Nigeria's courts – including all those that heard the Safiyatu and Amina Lawal cases – are still being taken down in long-hand while the proceedings are under way. This contributes significantly to the slow pace of the proceedings, and the judges, who usually themselves make the records, complain about all the writing they must do. But this is not a culture that is in a great hurry, and the old ways, more or less unchanged since the British colonial masters put them in place, are still serving reasonably well.

There is a large official record-book, in which someone, usually the presiding judge but sometimes the court registrar, writes down what is happening and what is being said while proceedings are in session before the court. The official language of the Sharia Courts in all Sharia States is Hausa. This implies that the records are always made in Hausa (with intersprinklings of Arabic), although the actual proceedings are sometimes conducted in local languages, then being summarised in Hausa for record purposes.[4] The record made is usually not verbatim; it is usually better called summary of what is being said, although sometimes care is taken to get something word-for-word. But it is

quoted in the Hausa original, and gives only references to these sources, although often in a virtually unrecognisable form (e.g. "Bahjah fi – sharit – tufimam" for *al-Bahja fi sharh al-Tuhfa*)."

[4] This was observed by Ostien in a Sharia Court in Konduga, Borno State, east of Maiduguri, where the proceedings were conducted mostly in Kanuri but recorded in Hausa.

quite detailed and accurate and as has been said its being made slows down the proceedings quite considerably. There is not a different record-book for each case, but rather the same record-book is used, page after page, to keep track of all cases coming before the court one after the other for as long as it takes until the record-book is used up and another is begun. Therefore, since almost every case adjourns and resumes, adjourns and resumes, time and again over the course of months or years before it concludes, the record of any particular case is always distributed through several scattered pages of one or more record-books.

If an appeal is taken, then someone – usually the registrar – must go through the record-books of the court appealed from and copy out the record of the case from the pages where it may be found, into one consolidated document. This copied-out consolidated record, after certification by the judge of the court appealed from as a true copy of the actual record, is transmitted to the appellate court for its consideration. The parties and their lawyers have no role in this process, except to request that the record be made up and to pay for it (usually the responsibility of the appellant). Of the texts we are publishing here, the records of proceedings in both trial courts (Gwadabawa Upper Sharia Court (Safiyatu); Bakori Sharia Court (Amina)) were copied out in the court registrar's hand-writing, certified as true by the judges, and sent along. But the records of proceedings before all the appellate courts (Sokoto State Sharia Court of Appeal (Safiyatu); Upper Sharia Court Funtua and Katsina State Sharia Court of Appeal (Amina)) were typed up, evidently by the court registrars or under their supervision, and certified as true copies by the judges who made the actual records. Of course no appeals were taken from the judgments of the two Sharia Courts of Appeal, so the records of proceedings before them would ordinarily not have been made up; but in these cases the interest was so intense that the records were ordered and paid for, evidently by counsel for the appellants, and translations of the certified copies are included in this chapter.

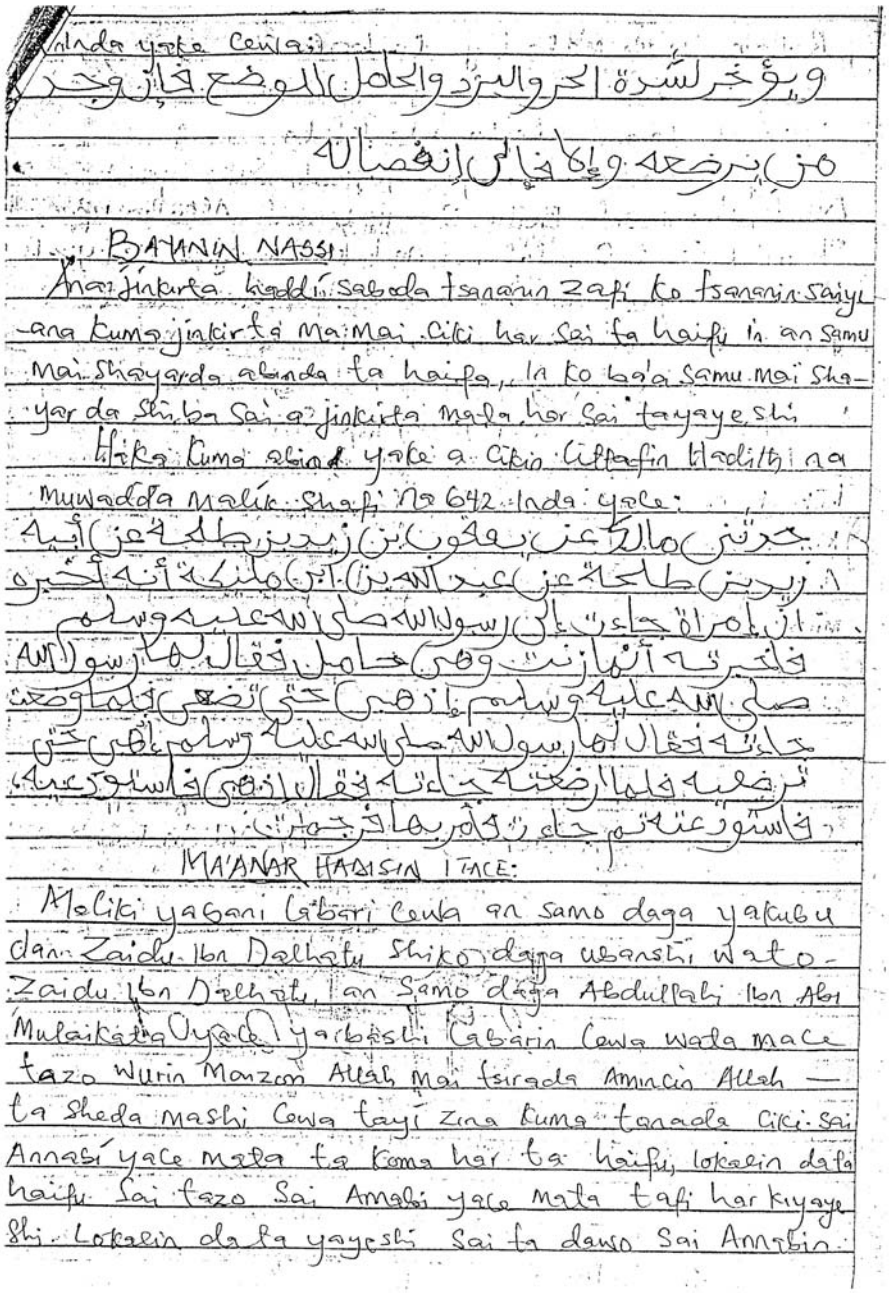
The summaries in these records of the arguments of counsel before the appellate courts are far from transcripts: they are what the judges who made the records managed to hear, comprehend, and get down while the arguments were being made. One gets a fuller sense of what the oral arguments might have been like from A.M. Yawuri's paper "Issues in Defending Safiyyatu Hussaini and Amina Lawal",[5] delivered at a conference just weeks before he argued Amina Lawal's case in the Katsina State Sharia Court of Appeal: the paper is fuller, more nuanced, and more passionate than what comes through of his argument in the record of proceedings made by the court and published here.

b. The court judgments. The judgments of the inferior courts which handled these cases appear to have been prepared in advance, read out in open court on the day of judgment, and copied or inserted into the courts' record-books; they were then copied into the consolidated records prepared and sent along when the cases went up on appeal (see Illustration 1, next page). The final judgments of the two Sharia Courts of Appeal were typed up as separate documents, read out on judgment day, and subsequently photocopied and distributed to people who wanted copies. It is perhaps worth noting

[5] In J. Ibrahim, ed., *Sharia Penal and Family Law in Nigeria and in the Muslim World: A Rights Based Approach* (Nigeria: Global Rights, 2004), 183-204.

Illustration 1

A page from the record of proceedings in Safiyatu's case, giving part of the judgment of the Upper Sharia Court Gwadabawa. The quotation in Arabic at the top is from *As'halul Madarik*; the meaning is then given in Hausa; then there is a longer quotation in Arabic from *Muwatta Malik*, followed again by its meaning in Hausa. Translation at pp. 24-25 infra.



Inda yake Cewa:

وبؤخر لسترة الحر والبرد والحامل الوضع فإن وجد

من يرضعه وإلا فإلى انفصاله

BAYANIN NASSI

Ana jinkirta kaddi sabada tsananin zafi ko tsananin sanyi ana kuma jinkirta ma mai ciki har sai ta haifi in an samu mai shayarda abinda ta haifa, in ko ba'a samu mai shayarda shi ba sai a jinkirta mata har sai tayayeshi

Hikka kuma abinda yake a cikin littafin Hadithi na Muwadda Malik Shafi No 642 inda yace:

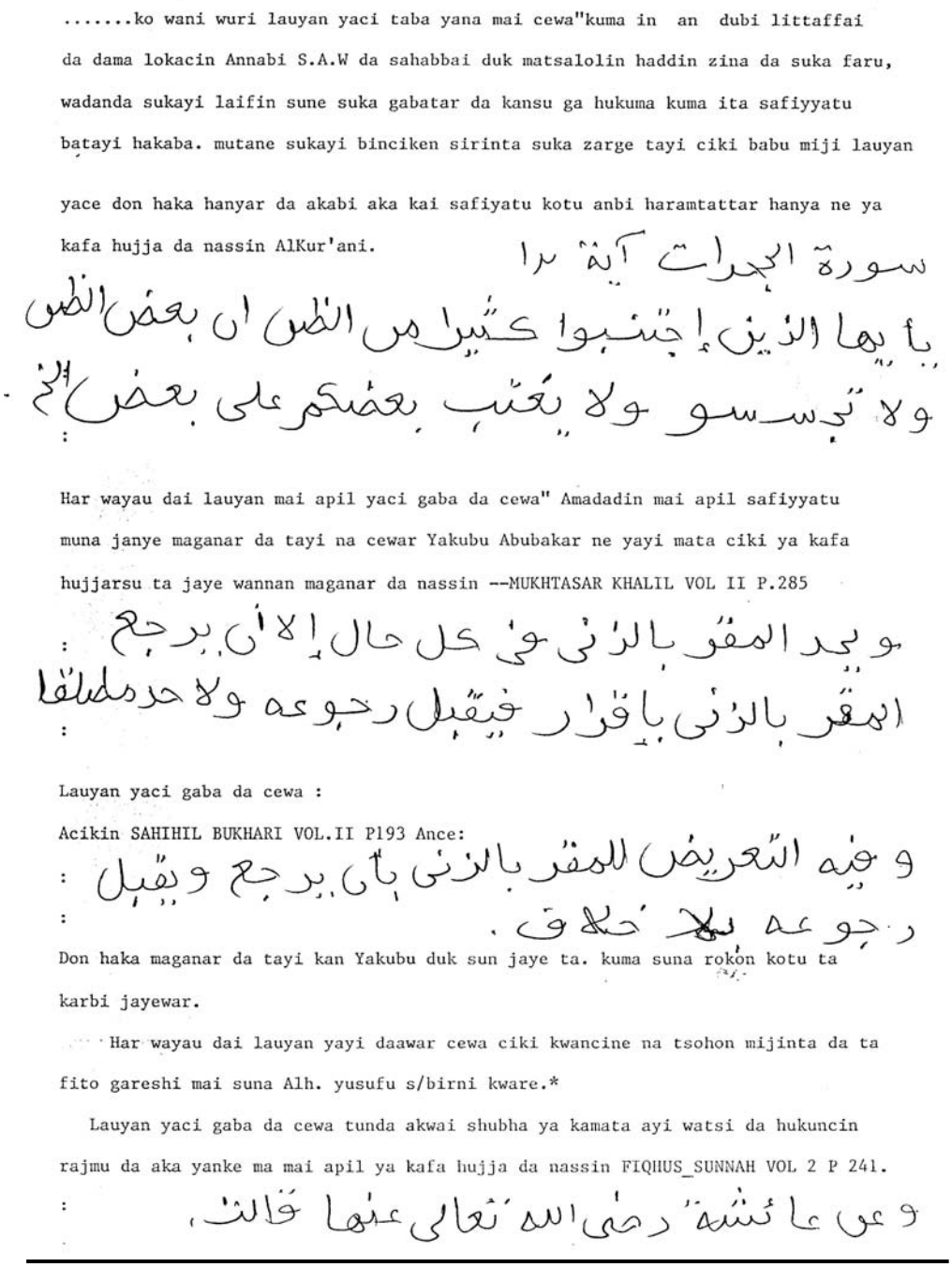
حدثني مالك عن يعقوب بن زيد بن طلحة عن أبيه
أن زيد بن طلحة عن عبد الله بن ابن مليكة أنه أخبره
أن امرأة جاءت إلى رسول الله صلى الله عليه وسلم
فذكرت له أنها زنت وهي حامل فقال لها رسول الله
صلى الله عليه وسلم اذهبي حتى تضعي فلما وضعت
جاءته فقال لها رسول الله صلى الله عليه وسلم اذهبي حتى
ترضعيه فلما رضعته جاءته فقال إنها قد رضعته فاستوصى به
فاستوصى عنه ثم جاء وقد فطمه فأخرجه

MA'ANAR HADISIN ITACE:

Malaiki yagani Gabari Cewa an samo daga yakubu dan Zaidu Ibn Dalhatu Shiko daga ubansu Wato Zaidu Ibn Dalhatu, an Samo daga Abdullahi Ibn Abi Mulaikatta Uyace yarbasu Gabarin Cewa wada mace tazo Wurin Manzon Allah Mai tsirada Aminci Allah ta sheda mashi Cewa tayi zina kuma tanada ciki sai Annasi yace mata ta koma har ta haifi, lokacin da ta haifu sai tazo Sai Annabi yace mata tafi har kiyaye shi. Lokacin da ta yayeshi sai ta dawo Sai Annabin

Illustration 2

A page from the judgment of the Sokoto State Sharia Court of Appeal in Safiyatu's case, in which the court is summarising the arguments of appellant's counsel. Translation at p. 35 infra.



.....ko wani wuri lauyan yaci taba yana mai cewa"kuma in an dubi littaffai da dama lokacin Annabi S.A.W da sahabbai duk matsalolin haddin zina da suka faru, wadanda sukayi laifin sune suka gabatar da kansu ga hukuma kuma ita safiyyatu batayi hakaba. mutane sukayi binciken sirinta suka zarge tayi ciki babu miji lauyan yace don haka hanyar da akabi aka kai safiyatu kotu anbi haramtattar hanya ne ya kafa hujja da nassin AlKur'ani.

سورة الحجرات آية ١٢

يا ايها الذين اجتنبوا كثيرا من الظن ان بعض الظن
ولا تجسسو ولا يغتب بعضكم على بعض الخ .

Har wayau dai lauyan mai apil yaci gaba da cewa" Amadadin mai apil safiyyatu muna janye maganar da tayi na cewar Yakubu Abubakar ne yayi mata ciki ya kafa hujjarsu ta jaye wannan maganar da nassin --MUKHTASAR KHALIL VOL II P.285

ويبدء المقر بالزنى في كل حال إلا أن يرجع
المقر بالزنى بإقرار فيقبل رجوعه ولا حد مطلقا

Lauyan yaci gaba da cewa :

Acikin SAHIHIL BUKHARI VOL.II P193 Ance:

وفيه التعريض للمقر بالزنى بأن يرجع ويقبل
رجوعه بلا خلاف .

Don haka maganar da tayi kan Yakubu duk sun jaye ta. kuma suna rokon kotu ta karbi jayewar.

Har wayau dai lauyan yayi daawar cewa ciki kwancine na tsohon mijinta da ta fito gareshi mai suna Alh. yusufu s/birni kware.*

Lauyan yaci gaba da cewa tunda akwai shubha ya kamata ayi watsi da hukuncin rajmu da aka yanke ma mai apil ya kafa hujja da nassin FIQHUS_SUNNAH VOL 2 P 241.

وعن عائشة رضي الله تعالى عنها قالت،

that although in the judgment of the Sokoto State Sharia Court of Appeal (Safiyatu's case) the passages in Arabic are written in by hand in spaces left for them in the typescript (see Illustration 2, previous page), in the judgment of the Katsina State Sharia Court of Appeal (Amina's case) the passages in Arabic are type-written, evidently on a computer.

3. The translations.

As is discussed more fully in A.M. Yawuri's paper in Part VII of this chapter, various groups were involved in the appeals of Safiyatu Hussaini and Amina Lawal. Prominent among these was the Women's Rights Advancement and Protection Alternative (WRAPA), a Nigerian NGO headquartered in Abuja. After the cases were won, WRAPA undertook to make English translations of the proceedings and judgments in both of them – no doubt because of the intense interest in them all over the world. Yawuri himself did the translations. We are most grateful to WRAPA for giving us permission to publish Yawuri's translations here. His work has been gone over carefully by us and clarified and corrected in many particulars with his assistance and approval. We are grateful also to him for his kind cooperation.

Unfortunately, by the time we contacted WRAPA about publishing the translations, some parts of them could no longer be found – either by WRAPA or by Yawuri. This necessitated fresh translations of those parts, which we undertook ourselves: some were done by S.A. Mohammed and some by A.S. Garba, as indicated in the texts which follow.

The translations are fairly free: the effort has been accurately to convey the sense in unstilted English, without attempting to reproduce the Hausa word for word. Sometimes repetitiveness in the Hausa texts has been eliminated or compressed. In the few places where we were not sure we had grasped the sense of the Hausa text we did our best, and then gave the Hausa in a footnote. Very occasionally we have inserted bracketed language which amplifies the Hausa a bit in order to bring out the sense more clearly. We have also inserted some bracketed headings to mark different sections of some of the texts; unbracketed headings are in the originals. A selection of Arabic or Hausa-ised Arabic words – most of them technical terms of the Sharia – have been left untranslated and italicised. Such words are often not isomorphic to single English words – e.g. *zina* is not quite adultery. We felt it would be instructive for readers to see how these words are used in the texts; the glossary in Part V explains their meanings.

Citations in the original materials to Islamic authorities have presented particular problems. Often the same work is referred to by several different names. Sometimes the same name is used for several different works. In one or two cases names of authors are used without saying which of the author's works is referred to. Spellings vary wildly. In the translations we have eliminated most of this confusion. For each Islamic authority cited, we have selected what we considered to be the short title by which it is most commonly known in the northern parts of Nigeria. These short titles have been used consistently in our translations, with uniformity of spelling rigidly imposed. The bibliography in Part IV then gives the correct titles of the works in transliterated Arabic along with other information about them. Other problems with the citations, and how we have approached them, are discussed more fully in the introduction to the bibliography and in scattered footnotes to the texts themselves.

Quotations in the original materials from Islamic authorities have presented different problems. One is that in their judgments, after giving the quotation in Arabic, the courts often give the meaning, the *ma'ana*, in Hausa (see Illustration 1). So in translating the quoted text one has a choice whether to translate the Arabic, or the *ma'ana* as understood by the court in Hausa, or both: the senses can be somewhat different. We never found the differences to be material and we have consistently translated the Arabic and left the *ma'ana* out. For translations of quotations from basic Islamic sources we have relied on standard authorities as much as possible, in the case of four important ones, as follows:

- *Al-Qur'an*: we have used the English translations of the verses quoted in our texts found in the English edition of *Tafsir Ibn Kathir*, see bibliography. However, in referring to chapters of the Qur'an, we have retained the Hausa usages found in the texts, rather than those found in *Tafsir Ibn Kathir*. E.g. *Suratul Nahli* rather than *Surah Al-Nahl*.
- *Muwatta Malik*: these hadiths are referred to in our texts by page number in the Arabic edition of this work commonly in use in Nigeria, see bibliography. We have left these page references in the texts, but have used Aisha Abdurrahman Bewley's English translations of the hadiths, see bibliography.
- *Sahihul Bukhari*: these hadiths are referred to in our texts by volume and page number in the Arabic/English edition of this work commonly in use in Nigeria, see bibliography. Our quotations in English are from the same work.
- *Arba'una Hadith*: these hadiths are referred to in our texts by hadith number. We have used the English translations of the hadiths that are found in the English edition of *Arba'una Hadith*, see bibliography.

As is indicated in the bibliography there are English editions of other Islamic authorities cited in our texts as well; where possible we have consulted and followed them in the translations from the Arabic used here.

Besides eliminating the redundant *ma'ana*s, we have also abbreviated the translations in another way. Appellate judges in Nigeria tend to rehearse in their judgments all the proceedings in the lower court(s) (working from the records sent up to them) and all the issues raised and arguments made before them by counsel (working from the records of the oral arguments which they themselves have made), before proceeding to explain how they are ruling and why. This is true even of judges writing minority opinions, as in the Amina Lawal case in the Katsina State Sharia Court of Appeal. If all one has to study are the judgments of the appellate courts, this extended recapitulation of the proceedings below and of the arguments made in the appellate court can be useful as providing information not otherwise available. Even if one has the actual records of the proceedings below, and of the arguments made before the appellate court, as we do here, the appellate judges' recapitulations can be useful by way of giving insight into their ways of dealing with the information before them, and, in some cases, their different constructions of the facts, the issues, or the arguments. The reader will observe that in the translations presented here we have sometimes left the recapitulations of the appellate courts in, and we have sometimes taken them out, depending on our assessment of their marginal value as additional sources of information.

Possibly someone will wish to check our translations against the Hausa originals or even consider publishing full versions of the latter. The materials we worked with are to be kept in the Documents Section of the library of the University of Jos, where they will be available to interested scholars.

4. Observations on the cases.

The cases of Safiyatu Hussaini and Amina Lawal deserve and no doubt will receive detailed study by scholars from many fields. Ruud Peters, in his study of Safiyatu's case already referred to, has begun this process. We add here four observations of our own; much more of course remains to be said.

a. In which courts capital cases may be brought. From the early days of colonial rule in Northern Nigeria the power to impose the death sentence was limited to the High Court and to Grade "A" Native Courts – the courts of the Emirs and the Chiefs.[6] The same rule applied under the Criminal Procedure Code of 1960 (CPC) as first enacted.[7] Less exalted Native Courts – in the Muslim North, the ordinary courts of the alkalis – were never entrusted with the power to sentence anyone to death. Since the abolition of the courts of the Emirs and Chiefs in 1967-68, jurisdiction of capital cases under the CPC has been limited to the High Courts only; the Area Courts, descendants of the ordinary Native Courts of earlier days, are excluded.[8] In the High Courts, representation by counsel of defendants charged with capital offences is mandatory.[9] There is authority that in capital cases a plea of guilty cannot be entered: the court must enter a plea of not guilty and put the prosecution to its proof.[10] These and other rules meant to safeguard persons on trial for capital crimes are administered by High Court judges who are qualified legal practitioners and who have had substantial experience as such.[11]

Things are different under the new Sharia Criminal Procedure Codes (SCPCs). They allow trial of all offences under the Sharia Penal Codes, including capital offences, in the new Sharia Courts – direct descendants of the old alkalis' courts and Area Courts (with a heavy carry-over of judges from the latter), which never had this power.[12] It is true that the power is limited to the Upper Sharia Courts only. But even the judges of the Upper

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[6] See E.A. Keay and S.S. Richardson, *The Native and Customary Courts of Nigeria* (London: Sweet & Maxwell; Lagos: African Universities Press, 1966), 26 and 29.

[7] Criminal Procedure Code, Cap. 30 Laws of Northern Nigeria 1963, Appendix A, "Tabular Statement of Offences", among other things stating the court with least powers by which each offence is triable.

[8] See e.g. Kano State Criminal Procedure Code, Cap. 37 Laws of Kano State 1991, Appendix A.

[9] CPC §186: *Defence in capital cases*: "Where a person is accused of an offence punishable with death if the accused is not defended by a legal practitioner the court shall assign a legal practitioner for his defence."

[10] *Sanmabow v. State*, (1967) NMLR 314.

[11] On the qualifications required of High Court judges see Nigerian Constitution 1999 §271(3).

[12] The descent of the new Sharia Courts from the old Native Courts via the Area Courts will be documented and discussed in the chapter of this work on "Court Reorganisation", forthcoming. As to the power of the Sharia Courts to try capital offences see the Harmonised Sharia Criminal Procedure Code, Chapter 5 (Vol. IV), §§12-16 and notes thereto.

Sharia Courts need not be qualified legal practitioners, and most are not.[13] There is no requirement under the SCPCs that defendants charged with capital offences be represented by counsel, and neither Safiyatu nor Amina was represented during her trial. When this was raised in Safiyatu's appeal – her lawyer arguing that she should at least have been advised of her right to counsel – the Sharia Court of Appeal said no:

> It is not the responsibility of the court to inform the accused to engage the services of a lawyer on a matter before the court. Therefore, we will not say anything further about this ground of appeal.[14]

Nor did either of the courts that tried these cases refuse what were in effect Safiyatu's and Amina's guilty pleas to capital charges: their pleas, or "confessions", were accepted and used as one basis for convicting and sentencing them to death.

The position was even worse in Amina's case than in Safiyatu's, because Katsina State, unlike Sokoto, had not at the time of Amina's trial enacted any Sharia Criminal Procedure Code at all – and still has not, for that matter. So in default of a different rule Amina was charged with *zina* and sentenced to *rajm* in the lowest grade of Sharia Court in Katsina State. This meant an intermediate (unsuccessful) appeal to an Upper Sharia Court before she reached the Sharia Court of Appeal which finally discharged and acquitted her.

The general idea, in all the Sharia States, is that Muslims should be charged and tried for all crimes in the Sharia Courts under the Sharia Penal and Criminal Procedure Codes. In fact this is not happening: in all Sharia States most offences carrying heavy penalties – armed robbery and homicide, for example – are being taken to the High Courts for trial under the old Penal and Criminal Procedure Codes, even when the accused persons are Muslims.[15] This means that the specifically Islamic rules of procedure and evidence applicable in such cases in the Sharia Courts, and the specifically Islamic punishments for such crimes – double amputations or even crucifixion for armed robbery; *qisas* for homicide, for example – are being foregone – evidently in the belief that notwithstanding the losses to the programme of Sharia implementation it is better to try such serious crimes, for which the punishments may still be very severe (including death), under the Penal Code, in better-qualified courts, with more safe-guards for the accused, under more modern rules of procedure and evidence.[16] Unfortunately there are a number of offences treated as less serious under the Penal Code – *zina*, for instance – for which the penalties have gone to the limit under the Sharia Penal Codes, and which

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[13] The qualifications required of judges of the Sharia Courts are laid down in the Sharia Courts Laws, to be documented in the chapter on "Court Reorganisation". A sense of the qualifications of the judges of the Sharia Courts at all levels can be gained from the brief biographies of the judges who ruled on Safiyatu's and Amina's cases given in Part VI of this chapter; see also the chapter of this work on "Judges of the Sharia Courts", forthcoming.

[14] Judgment of the Sokoto State Sharia Court of Appeal in Safiyatu's case, infra. p. 42.

[15] To be documented and discussed in the chapter on "Court Reorganisation", forthcoming.

[16] One exception to this generalisation: Sani Yakubu Rodi was tried and convicted of homicide in a Sharia Court in Katsina State and sentenced to die in the same way in which he had killed his victims, i.e. by stabbing using the same knife. In the end he was however not stabbed to death, but hanged. See e.g. *BBC World News*, 4th January 2002, Internet edition.

are still viewed as properly brought in the Sharia Courts.[17] Thus these courts, whose qualifications to do so are questionable, are trying people for their lives.

b. Whether the Sharia Courts are bound by the Constitution of the Federation and the laws of the States. This question was raised very clearly, in several different ways, in Amina Lawal's appeals to the Upper Sharia Court Funtua and to the Sharia Court of Appeal of Katsina State.

Section 4(1) of Katsina State's Sharia Courts Law provides that "A Sharia Court shall be properly constituted if presided over by an alkali sitting with two members." The "members" are there to observe the proceedings and to advise the alkali, but they have no formal say in the final decision of the case, which is for the alkali alone. But the Katsina State alkali who tried Amina Lawal sat without any members to assist him. This defect was raised in Amina's appeals, first to the Upper Sharia Court Funtua and then to the Katsina State Sharia Court of Appeal. Amina's lawyer argued that because the trial court had not been properly constituted under the statute, the entire proceeding in which Amina was convicted and sentenced was a nullity. In the Upper Sharia Court Funtua State Counsel responded to this point as follows:

> Counsel [for appellant] further argued that only one judge heard and determined the case [in contravention of §4(1)]. We contest this on the following grounds. To begin with, the Hadiths of the Holy Prophet do not provide that a judge must sit with members. So section 4(1) is contrary to the provision of section 3(1) of Katsina State Law number 6 of 2000 [the Islamic Penal System (Adoption) Law] which enjoins that a judge shall base his judgment on the Qur'an and Hadiths…. Where a judge adjudicates according to the rules set down by Allah, it is not befitting for a Muslim to raise objection. We urge this Honourable Court to consider our submissions and affirm the sentence passed by the Bakori trial court.[18]

In response to a series of points made by Amina's lawyer based on the constitutional right to fair hearing, State Counsel also said:

> This court should not be intimidated by counsel's citation of the provisions of the Constitution. This case is based on the laws of Allah (SWT). The laws of Allah take precedence over any argument that may be proffered in this case.[19]

In its ruling on the §4(1) question, the Upper Sharia Court Funtua agreed with State Counsel:

> On their ground number 11 [counsel for appellant] contended that the judgment of the Sharia Court Bakori is contrary to section 4(1) of the Katsina State Sharia Courts Law because only one judge heard the matter without the assistance of court members. Counsel for appellant should know that judges in Katsina State base their judgments on the rule of Sharia and Islamic Law as provided by section 8 of the Sharia Courts Law which provides that the courts

[17] See the table on p. 15 of Chapter 4 (Vol. IV), listing five offences in addition to *zina*, punishable only lightly under the Penal Code, but punished under the Sharia Penal Codes with death.
[18] P. 72 infra.
[19] P. 71 infra.

> are bound by the following laws [The Qur'an, Hadiths, *Ijma*, *Qiyas, Ijtihad, al-Urf*]. The Sharia Court Bakori based its judgment on the above and the law of Allah takes precedence over any other law.[20]

The last statement would seem to dispose also of the Nigerian Constitution, along with §4(1) of the Sharia Courts Law of Katsina State.

State Counsel returned to his theme of the supremacy of the Sharia, and expanded it further, in the proceedings before the Katsina State Sharia Court of Appeal, when he opposed the use of an affidavit filed in support of Amina's application for stay of execution pending the outcome of her appeal. He said:

> Based on the principles of Islamic law, once a *qadi* has decided a case in accordance with the principles of Sharia laid down in the Qur'an and the Hadiths of Prophet Muhammad (SAW), then it is inappropriate for a Muslim to appeal the judgment as doing so is akin to disputing Allah's judgment and Allah has prohibited that in the Holy Qur'an. This court may only entertain this appeal because doing so will be in accordance with the laws and procedures of Nigeria and of Katsina State which allow appeals as a matter of right. Based on these laws, this court has the right to entertain the appeal. If this court, in its wisdom, decides to hear this appeal, we do not intend to challenge the prayers of appellant's counsel in this application [for stay of execution].
>
> However, I will request this court to dismiss the affidavit evidence filed in support of the application. Evidence in the form of affidavit is an imported European device and is foreign and unknown to Islamic law. If this Honourable Court is going to entertain this appeal, then the records of the proceedings and judgments of the Sharia Court Bakori and the Upper Sharia Court Funtua, and the submissions of appellant's counsel that they have appealed those judgments to this court, are sufficient to support the application currently before the court. But I submit that affidavit evidence has no place under the Sharia.[21]

The Sharia Court of Appeal granted Amina's application for stay of execution without addressing the question of the affidavit.[22] But later, in its ruling on the question of whether the trial court was bound by §4(1) of the Sharia Courts Law, or rather was free notwithstanding the statute to hear cases sitting alone just as the *qadis* of old had done, the Sharia Court of Appeal firmly rejected the idea that "Sharia implementation" would mean full-scale reversion to Islamic rules of procedure without regard to the laws of the modern State.

> [Appellant's] ground of appeal complaining about [the §4(1) violation] was dismissed by the USC Funtua…when the judge maintained that he had nothing to do with laws enacted by the State House of Assembly. The judge said he was only bound by Hadiths and Qur'an – even though it was the Sharia Courts Law enacted by the House of Assembly which enjoined the court to apply the Hadiths and Qur'an in proceedings before it…. The fact that a single judge sat

[20] Pp. 78-79 infra.
[21] P. 88 infra.
[22] P. 89 infra.

> over the case and passed judgment shows that this provision of the law that established the courts and the judges was not complied with. It is not possible to apply one section of the law and reject other sections simply because their provisions do not conform with one's wishes. It is clear that when a single judge hears a matter, he is in breach of the law…. The non-compliance with this law renders the judgment null and void.[23]

The Sharia Court of Appeal's holding is consistent with the position taken by the Governors and Houses of Assembly of all the Sharia-implementing States, that they aim to implement as much of the classical Sharia as they possibly can, but within the Constitution and laws of the Nigerian Federation.[24] It is encouraging to see this position taken and applied also by the Sharia Courts of Appeal; one sees other examples of it in the mixed application of Constitution, statutory law, and *fiqh* in the two Sharia Court of Appeal judgments reproduced in this chapter.

c. Constitutional issues not raised. We find the following provisions of the Nigerian Constitution relied on by counsel for Safiyatu Hussaini and Amina Lawal:

> 36(1): right to fair hearing, in general
>
> 36(5): presumption of innocence
>
> 36(6)(a): right to be informed promptly in a language the accused understands and in detail of the nature of the offence
>
> 36(6)(b): right to adequate time and facilities to prepare defence
>
> 36(6)(c): right to defend oneself in person or by legal practitioners of one's own choice
>
> 36(8) and 4(9): no retroactive criminal legislation
>
> 36(12): criminal offences to be defined and the penalties therefor prescribed in written law.

So all constitutional defences raised were drawn from essentially one article of the Constitution, on the Right to Fair Hearing; all pointed to procedural problems in these two proceedings only, which might easily be avoided in future cases founded on similar charges; and no constitutional issue was raised that might draw in question the very proceedings themselves or the programme of Sharia implementation from which they arose. Several such issues exist: we mention just two but there are more:[25]

- the constitutionality of applying parallel Penal Codes in the same jurisdiction under which different punishments are inflicted on different people depending solely on their religion, in apparent violation of Article 42 (right to freedom from discrimination on grounds of religion among others);

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[23] P. 103 infra.

[24] See P. Ostien, "Ten Good Things About the Implementation of Sharia in Some States of Northern Nigeria", *Swedish Missiological Themes*, 90 (2002), 163-174, "good thing" no. 2, "The implementing states have conceded the supremacy of the federal constitution and laws." For further discussion of this point see also the introduction to Chapter 5, 190-191.

[25] See the literature cited in n. 1 supra.

- the constitutionality of inflicting archaic punishments like *rajm* in possible violation of Article 34 (right to dignity of human persons, including right not to be subjected to torture or to inhuman or degrading treatment).

It is an interesting question why the lawyers for Safiyatu and Amina did not raise such issues, which might have been winners for these cases and the decision of which by the courts might have set valuable precedents for other cases. We asked Aliyu Musa Yawuri to address this question in his essay for this chapter, and he has done so in some detail in his essay in Part VII of this chapter. We hope this will stimulate further discussion of an issue that must frequently confront Muslim lawyers working in the Sharia States.

d. Who may bring charges of *zina*. Although not founded on the Nigerian Constitution, precedents were nevertheless set in these two cases – founded in Islamic law – that should strictly limit the bringing of charges of *zina* in future. One of the most important of these relates to who may bring such charges.

The cases against Safiyatu and Amina were brought by the local police, who in both cases, after receiving information from unspecified sources that the women had become pregnant out of wedlock, went to investigate, and subsequently brought charges of *zina*, not only against the women, but also against the men who, according to the information received by the police, had impregnated the women.

One of the very interesting things about the judgment of the Sharia Court of Appeal in Safiyatu's case is its clear holding that charges of *zina* may not, in Islamic law, be brought in this way.

> State Counsel quoted the hadith of Abu Huraira from the English translation of *Sahihul Bukhari*, vol. 8 p. 536, citing it as authority for the proposition that a person can be convicted of *zina* even if he does not submit himself for punishment but is brought before the court by the authorities.[26]

But:

> We agree with appellant's counsel that based on [*Suratul Hujurat* verse 12], it is *haram* to initiate an action against a person for *zina* based on other people's reports. Imam Shafi'i said that a leader does not even have the right to summon a person accused of *zina* for the purpose of investigating the accusation: he supported this position with reference to the same verse of the Qur'an quoted above…. The way the police went to Safiyatu's house just because they heard that she had committed *zina* is contrary to Islamic law….[27]

It is interesting to compare this holding with the Criminal Procedure Code of 1960, whose provisions were negotiated in detail with the North's leading *ulama* in 1959-60 before it was enacted.[28] Section 142 of the CPC provides that:

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[26] P. 47 infra.
[27] P. 48 infra.
[28] See Chapter 1 (Vol. I), 59-61.

> **142**. (1) No court shall take cognizance of an offence under sections 387-388 of the Penal Code [adultery by a man; adultery by a woman] except:
>
> (a) upon a complaint made by the husband of the woman or in his absence by some person who had care of such woman on his behalf at the time when the offence was committed; or
>
> (b) in the case of the woman being unmarried upon a complaint made by her father or guardian or in his absence by some person who had care of such unmarried woman on his behalf at the time when the offence was committed.
>
> (2) Where the husband, father or guardian referred to in subsection (1) is under the age of eighteen years, or is an idiot or lunatic or is from sickness or infirmity unable to make a complaint some other person may, with the leave of the court, make a complaint on his behalf.

In other words, even when the charge could only be adultery (not *zina*), and the punishment could at most be up to two years imprisonment or fine or both (not *rajm*), the class of persons who could bring such charges was strictly limited – in keeping, so it seems, with Islamic law.

Unfortunately, although the Sharia Criminal Procedure Codes adopted by the Sharia States in 2000-2001 copied the provisions of the old CPC almost in full, for some reason they left this provision out. This is what made it possible, under the Sharia Criminal Procedure Code of Sokoto State, for the police themselves to bring the charge of *zina* against Safiyatu, without reference to her ex-husband, her father, or her guardian. But the Sharia Court of Appeal said no. In the latest draft of the Harmonised Sharia Criminal Procedure Code made available to us by the Centre for Islamic Legal Studies, §142 of the CPC has been restored, now appearing, suitably adapted, as §141 of the CILS model code.[29] If the Sharia States follow CILS in restoring this provision to their own Sharia Criminal Procedure Codes, and follow the Sokoto State Sharia Court of Appeal in restricting prosecutions for *zina* even further, to persons who voluntarily submit themselves for punishment, we are unlikely to see many further prosecutions for *zina*.

With that we conclude this introduction and commend the reader to the other materials to be found in the chapter.

[29] See Chapter 5.

Chapter 6 Part II

Proceedings and Judgments in the Safiyatu Hussaini Case

1.

Proceedings and judgment in the Upper Sharia Court Gwadabawa

Translated from the Hausa by Aliyu M. Yawuri

(a) Proceedings 3rd July 2001

CASE NO. USC/GW/F1/10/2001

Date: 3/7/2001

COURT:	Upper Sharia Court Gwadabawa
JUDGE:	Muhammadu Bello Sanyinnawal
COMPLAINANT:	Commissioner of Police
ACCUSED:	1. Yakubu Abubakar Tungar Tudu
	2. Safiyatu Hussaini Tungar Tudu[30]
COMPLAINT:	Allegation of *zina*

STATEMENT OF COMPLAINT:

I, Police Sergeant Idrisu Abubakar No. 125816 hereby on behalf of the Commissioner of Police arraign you Yakubu Abubakar Tungar Tudu and you Safiyatu Hussaini Tungar Tudu, Gwadabawa Local Government Area, on the allegation of committing *zina* contrary to sections 128-129 Sokoto State Sharia Penal Code 2000[31] in that on 23/12/2000, at around 2:00 p.m., the Gwadabawa police under the office of the Area Commander received a complaint that you, Safiyatu Hussaini, committed *zina* with you, Yakubu Abubakar, as a result of which you, Safiyatu Hussaini, became pregnant when each of you is known to have once married. That the police arrested you and interrogated you and were satisfied with the allegation levelled against you. I therefore arraign you before this court so that you will be tried accordingly.

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[30] In some of the texts translated here and in much of the scholarly literature the 'y' is doubled in Safiyatu's name. We have used the spelling used by the Sharia Court of Appeal. Tungar Tudu is the name of the village where Safiyatu lived.

[31] "dokar Shariar Musulunci ta Jihar Sokoto ta shekara 2000": this seems to be a usual way of referring to the Sharia Penal Codes, as opposed to the Sharia Criminal Procedure Codes, which are usually referred to by that name. The sections of the Sokoto State Sharia Penal Code referred to here provide that: "**128**. Whoever, being a man or a woman fully responsible, has sexual intercourse through the genital of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act, is guilty of the offence of *zina*. **129**. Whoever commits the offence of *zina* shall be punished: (a) with caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for a term of one year; or (b) if married, with stoning to death (*rajm*)."

Court: The court takes cognizance of this offence under Chapter III section 12(1), and section 139(b), Sharia Criminal Procedure Code 2000.[32] The complaint was read to the accused persons.

Court: 1st accused Yakubu Abubakar, do you understand the complaint made against you by the police?

1st Accused: I heard and understood the complaint they made against me.

Court: 1st accused, do you agree that you have committed this offence alleged against you?

1st Accused: I did not commit this offence. I did not commit *zina* with her.

Court: 2nd accused Safiyatu Hussaini, do you understand the complaint made against you by the police?

2nd Accused: I heard and understood the complaint they made against me.

Court: 2nd accused Safiyatu, did you commit the offence alleged against you?

2nd Accused: It is indeed true that Yakubu Abubakar committed *zina* with me. He impregnated me and I delivered a baby girl aged six months today.

Court: Prosecutor, did you hear that the 1st accused Yakubu Abubakar denied the complaint you made against him? Do you have evidence to prove this allegation?

Prosecutor: We have two civilian and two police witnesses. We apply for a date to open our case.

Court: The case is hereby adjourned to 17/7/2001 for hearing. The accused persons are hereby granted bail. The 1st accused Yakubu Abubakar is granted with Sarkin Fawa Duka Chimmola as his surety, the 2nd accused with Muhammadu Tungar Tudu as her surety.

[Signed by the judge.]

(b) Proceedings 17th July 2001

Court: The court again sits today 17/7/2001 for hearing. The pleas of the accused persons have already been taken. Prosecutor have you come with your witnesses?

Prosecutor: I came with two people. They are Abdullahi Tungar Tudu and Attahiru Tungar Tudu, they are outside.

Court: Prosecution Witness 1 (PW1) Abdullahi Tungar Tudu, a Muslim, Hausa, farmer and 64 years old of T/Tudu Gwadabawa Local Government is called into the court. He swore to tell the truth in the matter.

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[32] The text has "karkashin Chapter III Section 139(b) 12(1) na Sharia Criminal Procedure Code Law 2000". Section 12(1) is in Chapter III; it provides that "Subject to the other provisions of this Sharia Criminal Procedure Code, the Upper Sharia Court shall have the exclusive jurisdiction to try any or all the offences listed in 'Appendix A' of this Code". This excludes the lower Sharia Courts from trying serious offences like *zina*, which is among the offences listed in Appendix A. Section 139(b) provides that: "Subject to the provisions of Chapters XIII and XIV, a court may take cognizance of any offence committed within the local limits of its jurisdiction: … (b) upon receiving a First Information Report under section 115, or from any other court."

Court: Abdullahi: Now what do you know about the 1st accused: Yakubu Abubakar?

PW1: I Abdullahi Tungar Tudu, what I know in this matter is that, sometime ago, two policemen came and met us at Tungar Tudu. One of them is called Ali but I do not know the name of the other. They called Safiyatu in my presence and said to her that, "we heard that you are pregnant even though you do not have a husband. Who impregnated you?" She told them that it was Yakubu Abubakar that impregnated her.

They later called the said Yakubu in my presence and said to him that Safiyatu said, "You are the one that impregnated her. Is that true?" He said, "Safiyatu, by Allah, have you not known any other person apart from me alone?" Safiyatu answered by saying that, "By Allah, I have never had intercourse with anybody apart from you alone."

Then, the policemen asked Yakubu on how many times he had had intercourse with Safiyatu. He said, "Three times only." From there, Safiyatu objected and said it was four times. Then they continued that exchange of words with him saying three times and her saying four times. Then the policemen said okay, three times should be considered. This is what I know and that he did it three times and not four times.

Court: 1st accused Yakubu Abubakar: Do you have any objection or question on this evidence?

1st Accused: I have heard all that he said but I do not agree with him because as at the time the policemen called me, he was not there. I did not see him.

Court: Prosecution Witness 1: Yakubu said you were not there when the police called him. How can you convince the court that you were there?

PW1: The police that called him know that I was present.

Court: The 1st witness is hereby discharged. Prosecution Witness 2 (PW2), namely Attahiru Tungar Tudu, Muslim, aged 45, Hausa, a farmer residing at Tungar Tudu, Gwadabawa Local Government, is called into the court. He swore to tell the truth.

Court: What do you know about these accused persons?

PW2: I, Attahiru, what I know in this matter is that one day Ali, a policeman came to Tungar Tudu together with another policeman. He asked me about the village head. I told him that the village head was not around. He asked me about the person who is acting on his behalf. I answered that I am the one. He then asked me to take him to Safiyatu's house. On reaching there he sent for Safiyatu. He said that they had heard that she was pregnant and that she was a divorcee, and asked her, "Now who impregnated you?" She answered that it was Yakubu Abubakar who impregnated her. Yakubu was called in my presence. Ali the policeman told him that Safiyatu said he was responsible for her pregnancy, and asked, "Is that true?" He kept quiet. Ali asked him again. Yakubu then said to Safiyatu "By Allah, have you not known any other person apart from me?" Safiyatu said, "By Allah, you are the only one that I know I had sex with." From there the police asked Yakubu how many times he had sex with Safiyatu. Safiyatu said it was four times but Yakubu maintained that it was three times. That is all that I know.

Court: Yakubu: you heard the evidence of Attahiru. Do you agree with his evidence or do you wish to impeach it or do you have any question?

1st Accused: I heard it but I do not agree with his evidence because Attahiru is a friend to Abdullahi who is a brother to Safiyatu. He is also her neighbour. This is my objection.

Court: PW2: Is it true that you are a friend to Abdullahi?

PW2: I am not a friend to Abdullahi but he is my in-law.

Court: PW1 (Abdullahi): Is it true that you are a brother to Safiyatu and that you are her neighbour?

PW1: I am not a brother to her but I am her neighbour. But if Yakubu knows of any relationship that I have with her he can tell the court.

Court: Yakubu: What is the relationship existing between Abdullahi and Safiyatu, as you earlier stated?

1st Accused: Their parents or their grand-parents are of the same father. The grand-parents of their parents are from the same father.

Court: Abdullahi is that true?

PW1: It is not true. We are not in any way related.

Court: 1st accused Yakubu do you have any witness who knows what is the relationship between their parents?

1st Accused: I don't have any evidence in this regard.

Court: Both witnesses are hereby discharged. The case is hereby adjourned to 14/8/2001. The prosecutor is hereby ordered to come with his remaining witnesses. The accused are to continue on their bail.

[Signed by the judge.]

(c) Proceedings 14th August 2001

Today 14/8/2001, the court sits again for continuation of hearing. The two accused persons are both present in court.

Court: Prosecutor, have you come with your remaining witnesses?

Prosecutor: I wish to inform this court that the two police officers that were supposed to come and give evidence today were sent to Sokoto by the Area Commander. I therefore apply for a date to enable me bring them to court after they have come back.

Court: Case is hereby adjourned to 11/9/2001 to enable the prosecutor to bring his remaining witnesses. Accused persons are to continue on their bail.

[Signed by the judge.]

(d) Proceedings 11th September 2001

Court: The court sits today 11/9/2001. Both the accused persons are in court. Prosecutor have you come with your remaining witnesses?

Prosecutor: I have come with them. Both of them are policemen: Corporal Aliyu Yusuf and Constable Joseph U.T.

Court: Prosecution Witness 3 (PW3), namely Corporal Aliyu Yusuf No. 113724 a Muslim attached to the Area Commander's Office, Gwadabawa, aged 32, Hausa, is called into the court. The witness affirmed that he would tell the truth.

Court: Corporal Aliyu Yusufu what do you know about these accused persons?

PW3: What I know between Safiyatu and Yakubu is that on 23/12/2000 we were told that one Yakubu Abubakar had impregnated one Safiyatu Hussaini out of wedlock. The incident occurred at Tungar Tudu Chimmola Gwadabawa Local Government. We informed our boss the Area Commander who instructed us to go and investigate. We went but the village head was not around. However, his representative took us to the accused persons. During our interrogation Safiyatu confessed that indeed Yakubu Abubakar committed *zina* with her on four occasions. But Yakubu Abubakar denied ever committing *zina* with her. But he said she is his cousin[33] and he used to joke with her. That is all that I know.

Court: 1st accused Yakubu Abubakar: you heard the evidence of Cpl. Aliyu. Do you agree with it or do you wish to impeach it or do you have any questions?

1st Accused: I heard his evidence, I accept it, I do not wish to ask him any questions.

Court: 2nd accused Safiyatu Hussaini: you heard the evidence of Cpl Aliyu. Do you agree with it or do you wish to ask him any question?

2nd Accused: Indeed, the evidence given by the Corporal affecting me is the truth. I said Yakubu did have sexual intercourse with me on four occasions, but Yakubu said he had sex with me on three occasions. Therefore the Corporal did not tell the truth with respect to Yakubu.

Court: Prosecution Witness 4 (PW4) is called into the court. He is Joseph U.T. He is a Christian, a policeman with No. 113600, aged 38, attached to the Area Commander's Office Gwadabawa Local Government. He affirmed to tell the truth.

Court: Joseph what do you know about the accused persons?

PW4: I Joseph U.T., what I know between Safiyatu and Yakubu is that on 23/12/2000 at about 2.00 p.m. when we were at our office we received a complaint that one Yakubu Abubakar had impregnated one Safiyatu Hussaini Tungar Tudu. We went to Tungar Tudu to investigate. We met them and we interrogated them. Safiyatu said that it was true. It was Yakubu who impregnated her. We asked Yakubu and he denied being responsible for the pregnancy. That is all that I know.

Court: 1st accused: you heard the evidence of Joseph. Do you agree with it or do you wish to ask questions?

1st Accused: I heard the evidence and I agree with it.

Court: 2nd accused Safiyatu: you heard the evidence of Joseph. Do you agree with it or do you wish to ask questions?

[33] "He said she is his *taubashiyarsace*." A *taubashi* (m) has a special relationship with his *taubasiya* (f) in Hausa culture, permitting certain freedoms.

2nd Accused: I heard it. Joseph did not say the truth concerning Yakubu, but he said the truth concerning me.

Court: Prosecutor do you have more witnesses?

Prosecutor: I don't have any more witnesses.

Final address

Court: 1st accused Yakubu Abubakar: Do you have any other defence or any reason which you wish to state before the court passes its judgment?

1st Accused: My defence is that the evidence given by the police is true and correct. I never said I committed *zina* with her even once. The first witnesses were being mischievous. I don't agree with their evidence.

Court: 2nd accused Safiyatu Hussaini: Do you have any other defence or reason which you wish to state before the court passes its judgment?

2nd Accused: The police did not tell the truth. It was Yakubu who impregnated me.

Court: Question to the 2nd accused Safiyatu before judgment. For how long did you remain unmarried before you committed *zina* with Yakubu Abubakar who impregnated you?

2nd Accused: I was divorced two years ago.

Court: Safiyatu, did not you have a sleeping pregnancy for your former husband before you committed this *zina*?

2nd Accused: To my knowledge it was Yakubu who impregnated me because after my divorce I observed my menses. I became clean from the impurity before Yakubu started having sex with me.

Witnesses to the confession

Court: Alhaji Mode, court messenger, a Muslim aged 70 years: do you witness the confession of Safiyatu Hussaini that she had committed *zina* with Yakubu Abubakar and that as a result she conceived and gave birth to a baby girl?

Alh. Mode: I do witness this confession of Safiyatu made before this court.

Court: Sarkin Fawa, Muslim, aged 75: do you witness the confession of Safiyatu that she had committed *zina* and that she gave birth to a baby girl through *zina*?

Sarkin Fawa: I do witness this confession made by Safiyatu.

Court: This case is adjourned to 9/10/2001 for judgment. Accused are to continue on their bail.

[Signed by the judge.]

(e) Proceedings 9th October 2001

Court: The court sits today 9/10/2001 for judgment. Both the accused persons are present in court.

Charge

I, Muhammadu Bello Sanyinnawal, the Judge, Upper Sharia Court Gwadabawa, do hereby charge you Yakubu Abubakar and you Safiyatu Hussaini with the offence of *zina* based on the complaint made against you by the police, alleging that you committed *zina*

whereby you Safiyatu became pregnant and gave birth to a baby girl when you are not married. This is called *zina* as defined by Section 128 of the Sharia Criminal Procedure Code Law 2000 of Sokoto State [sic: Sharia Penal Code Law], which is punishable under section 129(b). Its punishment is death by stoning with moderate size stones.

Court: Accused persons Yakubu Abubakar and Safiyatu Hussaini, do you understand the meaning of the charge?

Accused Persons: We do not understand.

Explanation of the charge

Court: The charge means that the court is charging you with committing this offence of *zina*. If it is proved against you, you will be punished by stoning to death since you are Muslims and each one of you had once married.

Court: Accused persons do you understand the meaning of the charge?

1st Accused Yakubu Abubakar: I understand the charge very well.

2nd Accused Safiyatu Hussaini: I also have understood what it means.

Court: Since both of you have understood the punishment prescribed for this offence for which you are standing trial, do you have any defence so that the court will not find you guilty of this offence punishable by *rajm*?

1st Accused: My defence is that I never had sex with her. The 1st and 2nd witnesses are her relations. But the two police witnesses told this court the truth when they said that I did not say I had sex with her.

2nd Accused: I know I was pregnant and gave birth but I was not the one that impregnated myself. It was Yakubu Abubakar who impregnated me. He had said that before, that he was responsible and now he is denying being responsible. So I don't agree.

Conviction

I, Muhammadu Bello Sanyinnawal do hereby find you Safiyatu Hussaini guilty of the offence of *zina* since you are a Muslim and had once been married. I find you guilty of this offence based on your confession, your pregnancy and your subsequent birth of a child. The offence carries the punishment of *rajm* under section 129(b) of the Sharia Criminal Procedure Code Law 2000 of Sokoto State [sic: Sharia Penal Code].

Judgment

Considering this case No. USC/GW/CR.F1/10/2001 which was presented by Police Sergeant Idrisu Abubakar No. 122816, which was filed on 3/7/2001, where he arraigned you Yakubu Abubakar and you Safiyatu Hussaini Tungar Tudu that you be punished for the offence of *zina* under Section 129(b). After the complaint was read to them, 1st accused Yakubu Abubakar denied it, but the 2nd accused Safiyatu Hussaini confessed to the commission of the offence. Based on this the court asked the prosecutor to prove the case against the 1st accused since he had denied the allegation.

The prosecutor produced four witnesses. The first two witnesses testified that the 1st accused did confess to the offence of *zina* on three occasions with the 2nd accused. The two remaining witnesses did not confirm that this confession was made. They were the ones who interrogated him and as such are in a better position to know the statement made by the accused, since their job was to investigate the case and they took down his statement. Therefore according to Islamic law the evidence of the two witnesses to the effect that the 1st accused did confess to the offence is not sufficient proof that he committed the offence since the last two witnesses did not give similar evidence. The offence of *zina* is proved by the evidence of four witnesses or by the manifestation of pregnancy. See *Risala* p. 592 where it says:

> The prescribed punishment of *zina* will only be inflicted on the one who confesses to it, or the manifestation of pregnancy or the evidence of four witnesses, who must be male, freeborn, adult and just and they must witness the commission of the offence clearly as a stick enters into a container, and they must witness the offence at the same time.

From this authority we can see that the offence has not been proved against the 1st accused Yakubu Abubakar. Even if it were proved that he made the confession he could retract it and the punishment will not be inflicted. See *Mukhtasar* vol. 2 p. 285 where it says:

> The *hadd* punishment should be inflicted on the one who confesses to the commission of *zina* in all circumstances save where he later retracts such confession. Such retraction should be accepted and the *hadd* punishment would then not be inflicted.

With respect to the 2nd accused Safiyatu Hussaini, this court has found her guilty of committing *zina* based on the manifestation of pregnancy on her and the subsequent birth of a child. See *Mukhtasar* vol. 2 p. 285 where it says:

> The offence of *zina* is proved against a woman, based on the manifestation of pregnancy on her, if she is not married. This is whether the woman is free-born or a slave.

Based on this authority the offence of *zina* is proved against Safiyatu Hussaini. She will be stoned to death as provided for in *As'halul Madarik* vol. 3 p. 163 where it says:

> A married person who commits *zina* shall be stoned until he dies. A group of Muslims shall witness the stoning.

The book describes the part of the body to be stoned, see vol. 3 p. 163 where it says:

> The part of the body of an *azzani*[34] to be stoned is the back and the stomach and not the face and the chest.

She will be stoned until she dies. She will then be bathed and clothed in a shroud and the Muslim funeral rites should be observed on her, and then she shall be buried in the Muslim cemetery. The execution on Safiyatu Hussaini will be suspended until she weans her child as provided for in *As'halul Madarik* vol. 3 p. 169 where it provides:

[34] *Azzani*: person who has committed *zina*.

> The punishment can be suspended due to condition of extreme heat or extreme cold. It is also suspended for a nursing mother until she has weaned her child.

See *Muwatta Malik* p. 642 where it says:

> Malik related to me from Ya'qub ibn Zayd ibn Talha from his father, Zayd ibn Talha, that Abdullah ibn Abi Mulayka informed him that a woman came to the messenger of Allah, may Allah bless him and grant him peace, and informed him that she had committed adultery and was pregnant. The Messenger of Allah, may Allah bless him and grant him peace, told her, "Go away until you give birth." When she had given birth she came back to him. The Messenger of Allah, may Allah bless him and grant him peace, told her "Go away until you have suckled and weaned the baby." When she had weaned the baby, she came to him. He said, "Go and entrust the baby to someone." She entrusted the baby to someone and then came to him. He gave the order and she was stoned.

Based on the above reasons I, Muhammadu Bello Sanyinnawal, the Judge, Upper Sharia Court, Gwadabawa, do hereby order that you Safiyatu Hussaini Tungar Tudu of Gwadabawa Local Government be stoned to death with stones of moderate size until you die. She will be stoned in the manner described herein. The execution shall however be suspended until she weans her child. She will then produce herself for the execution of the judgment made against her. I further order that she will not be under the supervision of anybody nor will she be under bail and she will not be remanded in prison custody. However, if she refuses to come back for execution after she has weaned her child, then the Muslim community have the right to bring her. The court did not find Yakubu Abubakar guilty and he is hereby discharged and acquitted.

Right of Appeal

There is the right of appeal to the Sharia Court of Appeal, Sokoto within 30 days from today 9/10/2001.

[Signed by judge and dated 9/10/2001.]

2.

Proceedings and judgment in the Sharia Court of Appeal of Sokoto State

(a)-(c) translated from the Hausa by Aliyu M. Yawuri

(d) translated by Ahmed S. Garba

(a) Notice of appeal filed 26th October 2001

IN THE SHARIA COURT OF APPEAL OF SOKOTO STATE
HOLDEN AT SOKOTO

APPEAL NO. _____

BETWEEN:

SAFIYATU HUSSAINI T/TUDU …… APPELLANT
and
THE STATE …… RESPONDENT

NOTICE AND GROUNDS OF APPEAL

I, Safiyatu Hussaini T/Tudu do hereby appeal against the decision of the Upper Sharia Court Gwadabawa in case No. USC/GW/CR/TR/010/001 dated 9/10/01 wherein the court sentenced me to *rajm* for committing *zina*.

The following are my grounds of appeal:

1. The Upper Sharia Court Gwadabawa erred when it convicted me of the offence of *zina* on the grounds that I confessed to the offence when indeed I did not make such confession.

2. The Upper Sharia Court Gwadabawa erred in law when it convicted and sentenced me to *rajm* on the grounds that I delivered a child when I am not married. This is wrong since delivering a child by a divorced woman is not a conclusive proof of *zina* against her.

Particulars:

i. I am a divorcee.
ii. It is not up to five years since I was divorced.
iii. My pregnancy and the child I delivered are affiliated to my former husband in accordance with Islamic law.

3. The Upper Sharia Court Gwadabawa erred in law when without first explaining the meaning of the offence of *zina* it convicted me of that offence. The decision is contrary to Islamic law and the Constitution. It is null and void and liable to be set aside.

Particulars:

i. The trial court judge never interpreted the word *zina* to me.
ii. The trial court judge never explained the offence of *zina* to me.
iii. I did not understand the meaning of the offence for which I was charged.

4. The Upper Sharia Court Gwadabawa erred when it failed to explain to me my right to defend myself in person or by a lawyer of my own choice. This resulted in breach of my right to fair hearing.

Particulars:

i. I was never informed of my right to be defended by a lawyer of my choice.
ii. I did not understand the meaning of the offence I was charged with. I was therefore unable to defend myself.
iii. The failure to explain to me the right to engage the services of a lawyer to defend me prejudiced me seriously.

5. I will present my additional grounds upon receipt of the records of proceedings.

On notice to	Safiyatu Hussaini T/Tudu
Attorney-General	c/o A.M. Yawuri
of Sokoto State.	(Her Solicitor)

(b) Proceedings 14th January 2002[35]

Before:

Honourable Grand Kadi	Alhaji Muhammad Bello Silame
Honourable Kadi	Alhaji Bello Muhammad Rabah
Honourable Kadi	Alhaji Abdulkadir Saidu Tambuwal
Honourable Kadi	Alhaji Muhammad Tambari Usman

Court: Counsel to appellant: would you proceed to argue your appeal or do you wish to present additional grounds of appeal?

Appellant's Counsel (Abdulkadir Imam Ibrahim): I have additional grounds of appeal:

1. The Upper Sharia Court (USC) Gwadabawa had no jurisdiction to hear the case.
2. The USC Gwadabawa erred when it relied on the statement of the appellant only and without hearing defence witnesses.
3. The charge drafted by the court did not define *zina.*
4. The court did not hear evidence that the appellant is a *muhsinat* and that she had sexual intercourse.
5. The court did not allow for *i'izar* before it sentenced the appellant.
6. The court did not realise that pregnancy is not in itself a conclusive proof of *zina*.

1. Going through the record of the lower court, the police said they received information that the appellant was pregnant and they received this information on 23/12/2000. It is not indicated when the appellant committed the *zina.* Assuming she committed the *zina* before this date, then there was no law that prescribed the punishment of *rajm*. The Sharia Penal Code and the Sharia Criminal Procedure Code commenced operation on 25/1/2001 that is the day the State Governor signed them into law. Under Islamic law a person cannot be punished for an offence that is not

[35] Caption omitted.

provided for by a law. It was section 277(1) [sic: 4(7)] of the Nigerian Constitution that empowers State Houses of Assembly to enact laws. Section 4(9)[36] also refers.

2. On the issue of *i'izar*, from the beginning of the proceedings to the last the USC Gwadabawa did not observe *i'izar*. The failure to observe *i'izar* nullifies the judgment. See *Ihkamul Ahkam* p. 14 where he said "Before judgment, mitigating considerations, supported by two unimpeachable witnesses, can be accepted." In *Bahjah* pp. 64-65 of vol. 1 it states that a judgment is nullified where the judge fails to observe *i'izar*.

3. The lower court did not prove that the appellant was a *muhsinat* before the court sentenced her to *rajm*. There was no evidence that she had previously married. See *Bidayatul Mujtahid* vol. 2 p. 326, where it is stated that before a person is convicted of *zina* evidence must prove that she is *muhsinat*. Imam Malik enumerated the conditions to include adult, Muslim, free-born and having had sexual intercourse during a valid marriage.

4. The USC Gwadabawa at p. 13 lines 18-23 of the record[37] relied on the fact that the appellant was pregnant when she is not married. A woman can carry a pregnancy for up to seven years after her divorce, that is a sleeping embryo. The appellant was divorced about three years ago. See *Sharhin Sahihul Muslim* by An-Nawawi, vol. 2 p. 192.

5. It was not the appellant who submitted herself to the court. But a perusal of the various authorities will show that during the time of the Holy Prophet it was those who committed *zina* who voluntarily submitted themselves to the Holy Prophet and confessed that they committed *zina*. In this case it was the people who suspected that she had become pregnant without a husband who reported Safiyatu. Therefore her prosecution was illegal. See *Suratul Hujurat* verse 12.

6. On behalf of the appellant we hereby retract her statement that it was one Yakubu Abubakar who impregnated her. See *Mukhtasar* vol. 2 p. 285: "A person who confesses to the offence of *zina* shall receive the prescribed punishment save where he retracts; in that case his retraction shall be accepted and he will not receive the punishment." See also *Sahihul Bukhari* vol. 2 p. 193. I urge this court to accept this retraction. The child is that of her former husband Alhaji Yusufu Sabon Birni Kware.

Therefore I urge this court to set aside this punishment of stoning to death. See *Fiqhus Sunnah* vol. 2 p. 241. We urge the court to allow the appeal and discharge the appellant.

Court: State Counsel will you reply to the submissions of counsel?

State Counsel (Muhammadu Barau Kamarawa): I will reply. However since he has just filed additional grounds of appeal I need some time to enable me prepare for my reply.

Court: The appeal is adjourned to 18/03/2002 at the instance of State Counsel.

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[36] Prohibiting, in relation to any criminal offence, the making of "any law which shall have retrospective effect".

[37] References to pages and lines of the lower court records: we have not inserted the page and line numbers from the original records in the translations given here; we trust that the reader will be able to locate the relevant passages without them.

(c) Proceedings 18th March 2002

Court: State Counsel are you ready with your reply?

State Counsel: I am ready.

1. It is not correct to say that the lower court did not explain *zina* to the appellant. See p. 1 lines 15-20 and line 31, p. 2 lines 1-7. I urge this court to discountenance this argument.

2. On the issue of jurisdiction: sections 4(6) and (7) of the 1999 Constitution empower the State Houses of Assembly to enact laws for the security and good governance of their States. The Sokoto State House of Assembly has enacted Law No. 2 which established the Sharia Courts with the jurisdiction to hear this case.[38] The Governor has signed this law. Anyone who violates this law will be punished. The courts have jurisdiction over Muslims.

3. Section 38 of the 1999 Constitution guarantees freedom of expression and religion. The Constitution recognises the Sharia that is why the State House of Assembly enacted the Sharia Criminal Procedure Code and the Sharia Penal Code.[39] Section 36(12) of the Constitution provides that a person shall only be punished for an offence that is defined by a written law. The offence of *zina* is provided by sections 128-129 Sharia Penal Code Law 2000. This offence is also provided for in section 12(1)-(3) of the Sharia Criminal Procedure Code. See also Appendix A of the code. Therefore the lower court has jurisdiction to hear this case and I urge the court to reject the submission on this ground.

4. On the issue of *i'izar*, we note that the lower court did observe it. After it heard the prosecution's evidence the court asked the appellant to open her defence, see p. 8 of the records at line 24 to the end of that page. See also p. 9 lines 5-15. For example: "Court to the 2nd accused: you heard the evidence of Joseph: do you agree with it or do you wish to impeach it?" Answer "I heard and I accept the evidence against me but he did not tell the truth with respect to Yakubu". Therefore I urge this court to dismiss this ground of appeal.

5. On the issue of the failure of the lower court to satisfy itself that the appellant is a *muhsinat*. The appellant told the court that she was divorced two years ago, see p. 9 lines 8-15. This ground of appeal is therefore baseless. The lower court gave the appellant all the opportunities usually given to an accused person. The court investigated the matter fully before it delivered its judgment as required by Sharia. See Al-Adawi's commentary on *Risala* [*Adawi*] vol. 1 p. 280; see also *Sahihul Bukhari* vol. 1 p. 528, hadith no. 806. Therefore the lower court had evidence before it that the appellant was a *muhsinat*.

6. Counsel for the appellant submitted that a woman may carry a pregnancy for upward of seven years. Minimum period for pregnancy is six months and the maximum is five years. Muslim jurists agree on this; you will find this authority in *Qawaninul*

[38] Referring to Sokoto State's Sharia Courts Law, No. 2 of 2000, assented to by the Governor on 22nd February 2000.

[39] Both assented to by the Governor on 25th January 2001.

Fiqhiyyah p. 204. The author said a woman can carry a sleeping embryo for five years. Decisions of courts are based on this opinion.

7. Appellant's counsel submitted that the appellant did not voluntarily submit herself to the court and accuse herself of *zina*, while during the period of the Prophet it was the accused persons who submitted themselves voluntarily to the court. Counsel argued that there is therefore no basis in law for arraigning the accused as the police did. On the contrary: we submit that a court can take cognizance of an offence, even if the accused does not submit himself. See *Suratul Nahli* verse 90. Therefore the authorities must warn people against transgression and where transgression is committed the law must punish the transgressor. See *Arba'una Hadith*, no. 34.

8. Appellant's counsel submitted that the charge drafted by the lower court is meaningless. Counsel did not show to the court in what way the charge was meaningless. We refer to section 170 of Sharia Criminal Procedure Code subsections (1)-(3). See also sections 171 and 172 of the same code. See also p. 11 lines 3-27 and p. 12 lines 1-4 of the lower court record. We urge the court to dismiss this ground.

9. We submit that the appellant cannot withdraw or retract her confession. Her pregnancy is sufficient evidence of *zina* against her. In that case she cannot retract her confession. If she were not pregnant she could retract her confession. We refer to section 153 of Sharia Criminal Procedure Code (SCPC) where it is provided that the appellant shall make the retraction, not her lawyer. Therefore the retraction made on her behalf by her lawyer is not valid. See *Jawahirul Iklili* vol. 2 p. 284.

10. We concede that the prescribed punishment (*hadd*) should not be inflicted in cases of a doubt. However, this is applicable in cases of *qisas* (retaliation). It is not applied in a case of this nature. I refer to sections 166 and 188(1) and (2) of SCPC. There are three conditions to be fulfilled before the punishment of *zina* is inflicted. See also *Qawaninul Fiqhiyyah* pp. 305-306. The conditions are:

1. Confession by the accused provided he is sane, adult and free-born.
2. Four male witnesses who must be just and they must have witnessed the offence clearly.
3. A free-born unmarried woman who becomes pregnant will receive the punishment even if she claims she was raped save if she has a possible defence like she is seen crying.

Out of these conditions, if one of them is proved against an accused, the punishment will be inflicted. See *Risala* p. 592. The lower court convicted the appellant on two of these requirements, that is (i) her confession and (2) pregnancy. See also *Bidayatul Mujtahid* vol. 2 p. 328.

Finally, I submit that *rajm* as punishment for *zina* is provided for in the Qur'an, the prophetic traditions and the practices of the rightly guided companions. See *Bulughul Marami* p. 257 hadith no. 1235 where Umar ibn Khattab said while delivering Friday sermon that the punishment of stoning to death is there in the Qur'an; though the text has been abrogated, the punishment is preserved. Therefore nobody should claim that the punishment is not supported by the Qur'an. Indeed the punishment will be inflicted on a Muslim who has married and who commits *zina*. The punishment awarded by the

lower court ought to be affirmed, see *Sahihul Bukhari* vol. 8 p. 536. We urge the court to affirm the decision.

Court: State Counsel, the appellant's counsel contended that the lower court had no jurisdiction over the case because as at the time the offence was alleged to have been committed the Sharia Penal Code Law 2000 had not commenced. Do you wish to reply to this?

State Counsel: Islamic law has been in existence. However, the punishment of *rajm* was not being inflicted. At any time the opportunity arose Islamic law would be applied. Such opportunity arose now, the State Governor signed the bill into law on 25-1-2001 and the commencement date of the law is 31-1-2001.

Court: Counsel for the appellant, do you wish to say anything before the court adjourns for judgment?

Appellant's Counsel: The lower court failed to explain the meaning of *zina* to the accused. The word is Arabic and the accused is a villager and she is not an Arab. The lower court ought to have explained the term to her as is explained or defined in the Sharia Penal Code Law section 128. We will recall that in *Hadith Ma'iz*, the Prophet ignored Ma'iz four times and Ma'iz was asked if he knew the meaning of *zina* and its punishment. This is a serious error. Section 36(6)(a) of the 1999 Constitution requires that the court should explain the offence and its punishment to the accused.[40] Based on this ground alone this appeal should be allowed. See p. 10 lines 21-22: the court charged the appellant under section 128 Sharia Penal Code. That section does not explain the offence. Therefore based on our submissions we urge this court to allow this appeal and discountenance the arguments of the State Counsel which are misconceived.

Court: State Counsel, do you wish to say anything before the court adjourns for judgment?

State Counsel: In the event this court holds that at the time the offence took place this Sharia Penal Code did not commence operation we shall urge the court to find the appellant guilty of defaming the co-accused Yakubu Abubakar. We note that the lower court did not charge the appellant with this offence however this court has the power to convict her of the offence. We rely on section 183 of the Sharia Criminal Procedure Code.[41]

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[40] Section 36(6)(a) of the 1999 constitution provides: "Every person who is charged with a criminal offence shall be entitled to—(a) be informed promptly in the language that he understands and in detail of the nature of the offence."

[41] Section 183 of Sokoto State's Sharia Criminal Procedure Code allows conviction of a lesser offence where a greater offence is charged, if (1) a combination of some only of the elements of the greater offence constitute a complete lesser offence, and such combination is proved, or (2) the facts proved reduce the greater to the lesser offence. The offence of *qadhf* is defined and the punishment prescribed in §§141 and 142 of Sokoto State's Sharia Penal Code, as follows: "**141**. Whoever by words either spoken or reproduced by mechanical means or intended to be read or by signs or by visible representations makes or publishes any false imputation of *zina* or sodomy concerning a chaste person (*muhsin*), or contests the paternity of such person even where such person is dead, is said to commit the offence of *qadhf*. Provided that a person is deemed to be chaste (*muhsin*) who has not been convicted of the offence of *zina* or sodomy. **142**. Whoever

Court: Case adjourned for judgment.

(d) Judgment of the Sharia Court of Appeal of Sokoto State[42]

25th March 2002

Court: Appellant, her counsel and counsel to the respondent are all in court for the reading of the judgment.

JUDGMENT

This matter comes from the Upper Sharia Court (USC) Gwadabawa, in Suit No. USC/GW/CR/F1/10/2001, filed on 3/7/2001 and decided on 9/10/2001. The judgment was appealed to this court on 26/10/2001.

[Summary of proceedings below]

[The Sharia Court of Appeal here rehearses in considerable detail the proceedings and judgment in the Gwadabawa court, following the record reproduced above very closely.]

[Summary of grounds of appeal]

Safiyatu Hussaini, not being satisfied with the judgment of USC Gwadabawa, appealed against it to this court. Her Notice of Appeal stated four grounds of appeal:

[The four grounds of appeal stated in the Notice of Appeal reproduced above, including the particulars supporting grounds 2, 3, and 4 are quoted verbatim.]

[The matter came on for hearing before this court on 14/1/2002.] The appellant, Safiyatu Hussaini Tungar Tudu, and State Counsel representing the Attorney-General, both appeared before us. We read to the appellant her grounds of appeal and asked if she was satisfied with them or whether she had any additional grounds to state. She answered by saying that her lawyer, Abdulkadir Imam Ibrahim, was present with her in court. Barrister Ibrahim confirmed that he had agreed to represent Safiyatu in the matter, and stated that several co-counsel were appearing with him, whom he asked the court to recognise, as follows:[43]

1. Malam Aliyu Musa Yawuri
2. Malam Sadiq Abubakar
3. Malama Ladidi Abubakar
4. Malam Mohammed Saidu Sifawa

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commits the offence of *qadhf* shall be punished with eighty lashes of the cane; and his testimony shall not be accepted thereafter unless he repents before the court."

[42] Caption omitted. The style of the case is *Safiyatu Hussaini Tungar Tudu vs. Attorney-General Sokoto State*, Appeal No. SCA/GW/28/2001.

[43] The co-counsel listed were associated respectively with the following organisations which together were supporting Safiyatu Hussaini's appeal: 1. Women's Rights Advancement and Protection Alternative (WRAPA). 2. National Human Rights Commission. 3. Office of the Federal Attorney-General. 4. National Human Rights Commission. 5. Federal Ministry of Women Affairs. 6. Nigerian Bar Association. 7 and 8. Baobab for Women's Human Rights. 9. ??. 10. ??. Lead counsel, Abdulkadir Imam Ibrahim, was brought in by Baobab. The involvement of these various groups is discussed further in Aliyu Musa Yawuri's essay in part VII of this chapter.

5. Mrs. O. Omo-Osagie
6. Mr. Bola Odugbesan
7. Malama Hauwa Ibrahim
8. Malama Ndidi Ekekwe
9. Malam Isa Muhammed
10. Mr. Victor Dadieng

After recognising these co-counsel, we repeated to Barr. A.I. Ibrahim, as lead counsel for the appellant, our question whether appellant had additional grounds of appeal or any further particulars to state. He answered that they did have additional grounds of appeal, and stated them as follows:

1. The USC Gwadabawa had no jurisdiction to hear the case or to convict the appellant on the charge.
2. The USC Gwadabawa erred in law when it relied solely on the statements of the appellant without hearing her defence witnesses.
3. The charge drafted by the court did not disclose the meaning of *zina*.
4. The court did not call for evidence to establish that the appellant is a *muhsinat* and that [during her marriage] she had coitus complete with penetration.[44]
5. The court did not give the appellant opportunity for *i'izar* before it sentenced her.
6. The court did not consider the fact that pregnancy is not a conclusive proof of *zina*.

[Summary of the arguments of appellant's counsel]

Appellant's counsel continued with the following further submissions in support of appellant's grounds of appeal:

1. According to the record of proceedings of the trial court, the police stated that they got the information that the appellant had become pregnant on 23/12/2000. But the date she allegedly committed *zina* was not indicated. Assuming she committed *zina* before 23/12/2000, then there was at the time the offence was committed no law that prescribed the punishment of stoning to death for this offence. The Sokoto State Sharia Penal and Sharia Criminal Procedural Code Laws 2000 both came into effect on 25/1/2001, as it was on that day they were signed into law by the Governor.

Appellant's counsel submitted that under Islamic law a person is not punished for an act he committed at a time when there was no law prohibiting that act. Furthermore, the Sharia laws of Sokoto State were established under the Nigerian Constitution 1999, particularly section 277(1) [sic: 4(7)] which empowers the State Houses of Assembly to make laws which they think appropriate in their States. It was based on this that the Sharia laws were passed in Sokoto State in 2000. But section 4(9) of the Constitution provides that no one shall be punished for an offence he committed before the coming into operation of the law that punishes that offence.

[44] "Kotu bata nemi shedun cewa mai apil muhsina ceba, anyi ingantaccen dukhuli da wada'i da itaba."

2. Appellant's counsel next submitted that if one reviews the record of proceedings in the USC Gwadabawa, one will see that at no time did the trial court observe *i'izar* with respect to the accused. Relying on *Ihkamul Ahkam* p. 41, he argued that failure to observe *i'izar* is fatal to the proceeding in its entirety. The authority cited provides that:

> Before judgment, mitigating considerations, supported by two unimpeachable witnesses, can be accepted. This is the preferred opinion.

Counsel also cited *Bahjah*, vol. 1 pp. 64-65:

> Before judgment, legitimate excuses supported by two unimpeachable witnesses, can be accepted.

3. Appellant's counsel submitted that the trial court did not establish that the appellant was a *muhsinat* before it passed judgment of *rajm* on her. It was nowhere shown in the proceedings that Safiyatu Hussaini had once been married. But, according to counsel, before a person is convicted of the offence of *zina*, it must be established that she is a *muhsinat*. Counsel based his submission on the authority of *Bidayatul Mujtahid* vol. II p. 326:

> Previous marriage is one of the conditions for imposition of a sentence of *rajm*.

Counsel also cited Imam Malik's enumeration of the conditions that must be established before a person can be sentenced to *rajm* for the offence of *zina*: the person must be proved to be an adult free-born Muslim who has had sexual intercourse during a valid marriage.

4. The USC Gwadabawa at p. 13 lines 19-23 of the record based its decision on the fact that Safiyatu was found to be pregnant when she was not married. Appellant's counsel submitted that this alone cannot be evidence that Safiyatu committed *zina*, because a woman can carry a pregnancy, that is a sleeping embryo, for up to seven years without delivery; but Safiyatu was divorced only about two years ago. The lawyer relied on the authority of *Sharhin Sahihul Muslim,* An-Nawawi's commentary on *Sahihul Muslim*, vol. 2 p.192:

> Imam Shafi'i, Abu Hanifa and the vast majority of *ulama*s are of the view that a woman should not be given *hadd* punishment merely because she is found pregnant when she has no husband or is a spinster or a divorcee. Equally, if she is found pregnant and claims compulsion, or even if she just keeps quiet, there should never be *hadd* on her.

Counsel submitted that in view of this it was improper for the lower court to base its judgment on the fact of Safiyatu's pregnancy.

5.[45] Counsel next submitted that Safiyatu never confessed or was shown to have confessed to *zina* either before the trial court or elsewhere.

On this point, counsel first argued that a perusal of the authorities will show that during the time of the Prophet (SAW) and his Companions, in all the cases in which the

[45] This is the last number given in the judgment to the points of appellant's counsel's argument. The numbering restarts subsequently with the points of State Counsel's argument.

hadd punishment for *zina* was imposed, it was the offenders who voluntarily submitted themselves to the authority. But Safiyatu did not do so. Rather, others suspected her of becoming pregnant when she was not married, and they brought her involuntarily before the authorities. Her subsequent arraignment and prosecution was therefore illegal, her counsel submitted, relying on the authority of this passage of Qur'an *Suratul Hujurat* verse 12:

> O you who believe! Avoid much suspicion; indeed some suspicion is sin. And spy not, neither backbite one another….[46]

As to appellant's statement that it was her co-accused Yakubu Abubakar who impregnated her, counsel withdrew it on behalf of the appellant. As authority for the right of a person to withdraw a confession he relied on *Mukhtasar* vol. 2 p. 285:

> A person who confesses to committing *zina* should be punished with *hadd*, unless he retracts his confession, in which case the retraction should be accepted and he should not be punished with *hadd*.

Counsel also relied on *Sahihul Bukhari* vol. 2 p. 193 where it is stated that:

> The confessor should be given the opportunity to retract his confession. If he retracts it, the retraction should be accepted. There is no dissent on this opinion.

In view of this, appellant's counsel said, "her statement regarding Yakubu is hereby retracted, and we urge this court to accept this retraction." Counsel submitted that Safiyatu's pregnancy was not attributable to Yakubu but was a sleeping embryo attributable to her former husband, by name Alhaji Yusufu Sabon Birni Kware. At least, since there is doubt, counsel urged the court to set aside the judgment of *rajm* passed on the appellant. He cited *Fiqhus Sunnah* vol. 2 p. 241:

> Narrated by Aishat (may Allah the exalted be pleased with her). She said that the Prophet (SAW) said: Defend Muslims against *hadd* punishment whenever you can do it. If there is a way out, it should be followed, for it is better for the Imam to err on the side of caution than to err on the side of punishment.

Counsel further cited *Fiqhus Sunnah* at the same place where it says:

> Abu Huraira said: Defend against *hudud* if you can ever find any defence whatsoever.

Counsel therefore urged the court to allow the appeal and discharge and acquit the appellant.

[Summary of the arguments of State Counsel]

After these submissions, State Counsel, representing the Attorney-General of Sokoto State, made his own submissions as follows:

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[46] The English as per *Ibn Kathir*. A less ambiguous interpretation might be: "O you who believe! Avoid too much suspicion. Indeed sometimes suspicion is sinful. Spy not on one another…." See M.M. Ahsan, "The Islamic Attitude to Social Relations in the Light of Sura Al-Hujrat verses 10-12", *Seminar Papers 3* (Leicester, UK: The Islamic Foundation, 1979).

1. State Counsel submitted that in the record of proceedings of the lower court, p. 1 lines 15-20 and line 31, the USC Gwadabawa explained to the appellant the meaning of *zina*. In view of that, State Counsel urged the court to discountenance the submission of appellant's counsel that throughout the proceedings, the meaning the offence the was charged with was not explained to her.

2. State Counsel further submitted that the Gwadabawa court had jurisdiction to entertain the matter. Under Section 4(6) of the Constitution 1999, the State Houses of Assembly have power to make laws for the peace, order and good governance of their State based on democratic principles. When they enact any bill, the Governor is to sign it; this gives it the efficacy of law so that anybody who violates it will be punished. It is based on this that the Sokoto State House of Assembly passed a law called the Sokoto State Law No. 2 of 2000 which provides for the establishment of Sharia Courts.[47] Part 3 section 5(1) of that law confers jurisdiction on Sharia Courts to try this type of case and to convict violators of the law provided they are Muslims.

3. Section 38(1) of the 1999 Constitution guarantees freedom of thought and religion. The Constitution itself recognises Sharia and that is why the Sokoto State House of Assembly, after passing a law establishing Sharia Courts in the State, went further to pass into law the Sharia Penal Code and Sharia Criminal Procedure Code Laws 2000, which define offences, provide for their punishment, and define the procedure to be followed in criminal prosecutions based on section 36(12) of the Constitution, which provides that no one shall be punished for an offence unless that offence is defined under a written law. The offence for which the appellant is being charged is contrary to sections 128 and 129 of the Sharia Penal Code Law 2000 of Sokoto State. State Counsel added that the offence is also provided for under section 12(1)-(3) of the Sharia Criminal Procedure Code and Appendix A thereof. He submitted that in view of that, the lower court had jurisdiction to try the matter. He urged this court to discountenance this ground of appeal of the appellant.

4. State Counsel submitted that the USC Gwadabawa did in fact observe *i'izar* after hearing the prosecution witnesses, and gave the appellant opportunity to put in any defence that would prevent the court from convicting her. Counsel referred to p. 8 of the record of proceedings of the lower court. He further submitted that at p. 9 the appellant made it clear that she agreed with the evidence of the fourth prosecution witness as it related to her, but disagreed with his evidence as it related to Yakubu. He therefore urge this court to dismiss this ground of appeal.

5. State Counsel contested appellant's claim that the trial court did not establish that the appellant was a *muhsinat*. The court inquired into this and appellant herself testified that she was once married and that she had been divorced for two years. She stated this at p. 9 lines 8-15 of the record of proceedings of the lower court. Counsel submitted that the appellant had been given all opportunities required under Islamic law with respect to this type of offence. He cited Al-Adawi's commentary on *Risala* vol. 2 p. 280:

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[47] The reference is to the Sokoto State Sharia Courts Law 2000, signed into law on 22nd February 2000.

> Any married free-born Muslim, male or female, who commits *zina*, should be stoned to death with medium size stones.

State Counsel further submitted that this type of punishment is provided for in *Sahihul Bukhari* vol. 8 p. 528, hadith no. 806.

> Narrated Abu Huraira: A man came to Allah's Apostle while he was in the mosque, and he called him, saying, "O Allah's Apostle! I have committed illegal sexual intercourse." The Prophet turned his face to the other side, but that man repeated his statement four times, and after he bore witness against himself four times, the Prophet called him, saying, "Are you mad?" The man said, "No." The Prophet said, "Are you married?" The man said, "Yes." Then the Prophet said, "Take him away and stone him to death." Jabir bin Abdullah said: "I was among the ones who participated in stoning him, and we stoned him at the Mussala. When the stones troubled him, he fled, but we overtook him at Al-Harra and stoned him to death."

Counsel submitted that the lower court investigated the matter fully and had evidence before it that the appellant was a *muhsinat*. Therefore, she deserves this type of conviction and sentence.

6. Responding to the submission of appellant's counsel that a woman may carry a pregnancy for a period of up to seven years without delivery, State Counsel said that this position is not correct; that Muslim jurists unanimously agree that the maximum period of gestation is five years without delivery. He said that authority for this can be found in *Tuhfa* p. 134 and *Qawaninul Fiqhiyyah* p. 204. Many *fatawa* are based on these authorities and they should be followed.

7. On the argument of appellant's counsel that the appellant did not submit herself to the authorities but was brought before them by others, contrary to the practice during the time of the Prophet (SAW) and his Companions, when all those who were punished for *zina* submitted themselves to the Prophet: State Counsel argued that under Islamic law, it is not necessary that an offender must first submit himself to the authorities before he is punished. He cited verse 90 of *Suratul Nahli*, which says:

> Verily, Allah orders justice and kindness, and giving (help) to the relatives, and He forbids immoral sins, and evil and tyranny….

He further cited a hadith of the Prophet (SAW), namely hadith no. 34 of *Arba'una Hadith*:

> Abu Sa'id Al-Khudry (may Allah be pleased with him) said: "I heard the Prophet (peace be upon him) saying, 'Whosoever of you sees an evil action, he must change it with his hand. If he is not able to do so, then (he must change it) with his tongue. If he is not able to do so then (he must change it) with his heart and this is the weakest (manifestation) of faith."

8. On the submission of appellant's counsel that the charge drafted against the appellant by the lower court is meaningless, State Counsel submitted that appellant's counsel did not show in what way the charge was meaningless. He drew the attention of this court to sections 170, 171 and 172 of the Sharia Criminal Procedure Code, which

deal with what charges should contain and the effect of defective charges. He further drew the attention of the court to the record of proceedings of the lower court p. 11, lines 3-27 and p. 12 lines 1-4, where, he said, the nature of the offence charged was explained to the appellant. Based on these authorities, State Counsel urged the court to dismiss this ground of appeal.

9. State Counsel submitted that the attempted retraction of appellant's confession by her counsel is not appropriate under Islamic law. He also submitted that where a pregnancy is physically evident, retraction of a confession to the offence of *zina* is not acceptable, because the pregnancy itself is a conclusive proof of the offence. Only in the absence of pregnancy would the court allow retraction of the confession. Counsel drew the attention of the court to section 153 of the Sharia Criminal Procedure Code which provides that the appellant can retract her confession anytime before judgment. But according to State Counsel, only the appellant herself, not her counsel, is competent to retract her confession. He cited *Jawahirul Iklili* vol. II pp. 284-285:

> A confession can be retracted before judgment, and if it is, punishment for *zina* cannot be imposed.

10. On the submission of appellant's counsel that *hadd* punishments should be waived in cases of doubt, State Counsel submitted that this principle is only applied in *qisas* cases. He cited *Suratul Baqarah* verses 178 and 179:

> Oh you who believe! *Al-Qisas* (the Law of equality) is prescribed for you in cases of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives) of the killed (against blood money), then it should be sought in a good manner….
>
> And there is (a saving of) life for you in *Al-Qisas* (the Law of equality in punishment)….

According to State Counsel, these verses show that no mercy is allowed in the application of the prescribed punishment (*hadd*) for *zina*. He drew the attention of the court to sections 166 and 188(1)-(2) of the Sharia Criminal Procedure Code which he said are in concordance with the above quoted verses of the Qur'an. He further asked the court to consider the three circumstances in which the *hadd* punishment for *zina* is imposed, according to *Qawaninul Fiqhiyyah* pp. 305-306: where the accused confesses; where there are four just male witnesses; or where the woman becomes pregnant out of wedlock, even if she says she was raped, unless she brings witnesses to that effect. Where *zina* is established by any of the above, *rajm* can be inflicted. Counsel referred us to *Thamaruddani* p. 592. He submitted that the lower court based its judgment against the appellant on two of the relevant circumstances: the appellant's confession and her pregnancy. He also cited *Bidayatul Mujtahid* vol. 2 p. 328:

> Malik and Shafi'i both said that *hadd* must be imposed on the person who confesses once.

Based on this, State Counsel submitted that even if a person confesses once, it is sufficient, based on the Maliki school of jurisprudence, which we practise here. He reiterated that the punishment of *zina* is *hadd*. He said that it is contained in the Qur'an and that the Prophet (SAW) and his Companions all practised that type of punishment.

He cited *Bulughul Marami* p. 357 hadith no. 1230. He further submitted that although the Qur'anic verse on stoning to death has been abrogated, the punishment is nevertheless preserved. He supported this with the saying of Umar ibn Khaddab while delivering his Friday Sermon:

> Stoning is established in the Qur'an once there is status of being married and there is evidence of pregnancy.

He submitted that in view of this, the conviction and sentencing of the appellant is valid.

State Counsel argued that it is not necessary for the offender to submit himself to the court before he is punished. He cited a hadith in *Sahihul Bukhari*, at vol. 8 p. 536 of the English translation:

> Narrated by Abu Huraira and Zaid bin Khalid. While we were with the Prophet (SAW) a man stood up and said (to the Prophet (SAW)) "I beseech you by Allah, that you should judge us according to Allah's Laws." Then the man's opponent who was wiser than him, got up, saying, (to Allah's Apostle (SAW)) "Judge us according to Allah's Law and kindly allow me (to speak)." The Prophet (SAW) said, "Speak." He said "My son was a labourer working for this man and he committed an illegal sexual intercourse with his wife, and I gave one hundred sheep and a slave as a ransom for my son's sin. Then I asked a learned man about this case and he informed me that my son should receive one hundred lashes and be exiled for one year, and the man's wife should be stoned to death." The Prophet (SAW) said, "By Him in Whose Hand my soul is, I will judge you according to the Laws of Allah (SWT). Your one hundred sheep and the slave are to be returned to you and your son has to receive one hundred lashes and be exiled for one year. O Unais! Go to the wife of this man and if she confesses, then stone her to death." Unais went to her and she confessed. He then stoned her to death.

In this hadith, State Counsel said, the matter was taken before the Prophet by others, not by the offenders, and the Prophet gave judgment. This shows that it was not necessary that the appellant in this case should have brought herself before the authorities. It is permitted for the authorities to go to her. He urged the court to affirm the judgment of the lower court.

[Summary of final arguments]

We asked State Counsel to comment on the submission of appellant's counsel that the lower court had no jurisdiction to entertain the matter at all, even assuming that Safiyatu committed the offence of *zina*, because the Sharia Penal Code Law 2000 had not come into operation at the time the offence was committed. We noted that State Counsel had not said anything on this aspect of the case. State Counsel responded that Sharia has long been in existence. But for some time infliction of the *hadd* punishment of *rajm* had not been permitted. Whenever it is permitted, it can be applied. Counsel conceded however that the Governor signed the Sharia Penal Code into law on 25/1/2001 and it came into operation that same day.

We next called on appellant's counsel to address further the question whether the trial court had adequately explained the meaning of *zina* to the appellant. He said that

the word *zina* is an Arabic word and the appellant is Hausa and not an Arab; furthermore she is a villager. The lower court ought to have explained to her the term *zina* and other things related to *zina*, including how it is defined in section 128 of the Sharia Penal Code Law of Sokoto State. He asked us to recall the hadith of Ma'iz, who went to the Prophet (SAW) and said that he had committed *zina*. The Prophet (SAW) ignored him four times. When Ma'iz persisted, the Prophet asked him – even though he was an Arab – whether he understood the meaning of *zina*, and whether he knew the punishment for it. Counsel said that Safiyatu does not even understand Arabic. She did not know the meaning of *zina*. He further pointed out that section 36(6)(a) of the 1999 Constitution provides that every person charged with a criminal offence is entitled to be informed in the language he understands and in detail of the nature of the offence. Counsel said this was not done in this case, and on this ground alone, the appellant should be discharged and acquitted.

[The court's rulings on the various grounds of appeal]

1. Appellant's first ground of appeal is that the USC Gwadabawa erred in law when it convicted and sentenced her on the ground that she had confessed to committing *zina*, when in fact she did not confess. Appellant's second additional ground of appeal[48] is that the USC Gwadabawa erred in law when it based its decision on her confession, without listening to her defence. In our view these two grounds of appeal are the same.

We hold that the confession which the USC Gwadabawa believed the appellant made and upon which it convicted and sentenced her is speculative and is invalid. A confession warranting conviction must be to a clear and valid complaint which states as mandatory requirements the date, the time and the place the alleged offence was committed. But the complaint in this case, upon which the Gwadabawa court based its decision, is lacking in these aspects. The only thing contained in the complaint as shown in p. 1 of the record of proceedings of the trial court is that on 23/12/2000 at about 2 p.m. the police got information that one Safiyatu Hussaini committed *zina* with one Yakubu Abubakar and as a result, she became pregnant. This complaint only states the date and time the police got their information. It says nothing about the date, time and place Safiyatu Hussaini allegedly committed the offence. These are mandatory requirements in a complaint. Therefore, there was not a proper case before the court to which the appellant Safiyatu Hussaini could have made a valid confession warranting her conviction and sentencing.

The trial court, we observe, did not satisfactorily explain to the appellant that she was being accused of committing *zina*. It is mandatory that this is contained in the record of proceedings. Furthermore, it is mandatory that a court satisfactorily explain to the accused person the nature of the offence he is being accused of committing. See *Subulus Salam* vol. 5 p. 1676, where it is stated that:

> It is mandatory on a judge to explain satisfactorily to a person accused of committing an offence the punishment of which is *hadd*, the meaning and nature of that offence.

[48] "First ground of appeal": as stated in the Notice and Grounds of Appeal filed on 26th October 2001. "Second additional ground of appeal": as stated orally by appellant's counsel at the beginning of the hearing held on 14th January 2002. This distinction between grounds of appeal and additional grounds of appeal continues subsequently.

In addition see *Al-Tashri'u al-Jina'i* vol. 2 p. 434, where it is stated thus:

> Based on the foregoing, a confession by a person accused of *zina* is not accepted as a matter of course as a basis for sentencing him to *rajm*. The judge must ascertain the validity of the confession so as to find out whether the person confessing is sane, as the Prophet (SAW) did when dealing with Ma'iz. Where the judge finds out that the accused is sane, he should go further to ask him of what *zina* is, how it is done, to whom it is done, with whom the accused committed *zina* and at what time he committed it. Where all these are manifest by way of questioning the accused person, the judge again should ask the accused who confesses, "are you a *muhsin*? or not?" If the accused says he is a *muhsin*, then the judge should ask him, "what is *ihsan* in Sharia?"

In the record of proceedings and the findings of the trial court in this case, we find none of those things which a court ought to do in such an instance. We have not seen where the court asked the appellant whether she was sane or not. We have also not seen where the court asked the appellant the date, the place and the time she committed *zina*. It is mandatory that a court establish these ingredients before it convicts an accused based on his confession. Failure to do so is contrary to Sharia as shown above. In this case there was no proper complaint before the court, to talk less of concluding that the appellant confessed. The confession upon which the trial court based its conviction and sentencing of the appellant Safiyatu Hussaini did not satisfy the necessary conditions.

Furthermore, as a matter of pride under Islamic law, even if a person accused of committing *zina* validly confesses, he can retract his confession at any time before judgment and if he does his retraction will be accepted. See *Jawahirul Iklili* vol. 2 p. 283 where it is stated that:

> He who confesses to the commission of *zina* is to be punished by *hadd* unless he retracts his confession. If he retracts his confession, the retraction should be accepted unconditionally and he is not to be punished based on his confession.

To the same effect, section 153 of the Sharia Criminal Procedure Code of Sokoto State provides that before a court convicts a person charged before it, based on his confession, it is mandatory that the court inform the accused that he has a right to retract his confession before judgment. But in this case, throughout the record of proceedings in the trial court, we find no place where the court informed the appellant that she had a right to retract her confession. Failure in this regard is fatal to the case under Islamic law.

For these reasons, we do not accept this confession. But even if Safiyatu Hussaini had validly confessed before the trial court, when she appealed her conviction and sentence, and stated as her first ground of appeal that she had not in fact confessed to the commission of the offence before the trial court, this in our opinion would count as a retraction of her confession. Furthermore appellant's counsel, Abdulkadir Imam Ibrahim, stated before us that on behalf of the appellant he retracted her confession, and they have this right as shown above. We do not agree with the submission of State Counsel that Safiyatu did not retract her confession and that her counsel could not do so on her behalf. Her counsel is her representative (*wakili majauwali*) and as such has the right to do so. See *As'halul Madarik* vol. 2 p. 381, where it is stated that:

> A representative with unlimited power to represent can confirm on behalf of the person he is representing.

Therefore, he has the right to confess and also the right to retract a confession.

2. Appellant's third ground of appeal is that "the USC Gwadabawa erred in law when it convicted me of *zina* and sentenced me to *rajm* without first explaining to me the meaning of the offence of *zina*. The conviction and sentence are contrary to Islamic law and the Constitution and should be set aside."

We agreed with this argument also. Looking through the record of proceedings of the trial court, we do not see any place where the court explained to the appellant the meaning of the word *zina*. We are satisfied that the court never did explain it. We are also satisfied that the appellant did not understand the nature of the offence for which she was standing trial. The trial court never explained it to her and nothing in the record convinces us that she understood it – particularly when we consider the lengths to which the Prophet (SAW) went with Ma'iz. See *Al-Tashri'u al-Jina'i* vol. 2 p. 434, which states thus:

> The Prophet (SAW) continued to question Ma'iz about *zina* and Ma'iz continued to answer, until the Prophet asked Ma'iz: "Did you put what you have into what she has?" He answered "Yes." "Just like a bucket enters a well?" Ma'iz answered "Yes." The Prophet (SAW) still asked him again "Do you know the meaning of *zina*?" Ma'iz answered, "I went to her with *haram* just like a husband goes to his wife with *halal*."

Taking the meaning of this hadith into consideration, we conclude that the trial court did not explain satisfactorily to the appellant the meaning of the offence for which she was standing trial. But it is mandatory that a court explain fully to an accused person the offence he is charged with. See *Subulus Salam* vol. 1 p. 1676:

> All that has been mentioned indicates that it is mandatory to seek details and clarification.

The USC Gwadabawa did not do that. This is contrary to Islamic law. It also contravenes section 36(6)(a) of the 1999 Constitution of Nigeria.

3. Appellant's fourth ground of appeal is that throughout the proceedings the trial court never informed appellant of her right to engage the services of a lawyer. It is not the responsibility of the court to inform the accused to engage the services of a lawyer on a matter before the court. Therefore, we will not say anything further about this ground of appeal.[49]

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[49] Section 186 of the Criminal Procedure Code (CPC) that from 1960 governed all criminal trials in the northern states provides that: "Where a person is accused of an offence punishable with death if the accused is not defended by a legal practitioner the court shall assign a legal practitioner for his defence." This is one of the sections of the CPC omitted from the Sharia Criminal Procedure Codes enacted in the Sharia States in 2000-2001, see Chapter 5. It is an open question whether Supreme Court caselaw makes representation of the accused by a legal practitioner mandatory in all capital cases; this point is discussed further in the introduction to this chapter.

4. Appellant's third additional ground of appeal is that the charge preferred against the appellant did not define the meaning of *zina*. We hold that this ground of appeal also succeeds. Examining the charge preferred by the USC Gwadabawa against the appellant, we see that it does not contain any explanation of the meaning of *zina*, nor does it indicate the date, time and place where Safiyatu Hussaini allegedly committed the offence. This is insufficient, particularly if what happened in the hadith of Abu Huraira, between the Prophet (SAW) and Ma'iz, is anything to go by. See *Subulus Salam* vol. 4 pp. 1211 and 1213, where it states as follows:

> In the hadith of Abu Huraira the accused person Ma'iz was asked whether he and the woman with whom he said he had committed *zina* had engaged in foreplay. He answered yes. The Prophet (SAW) asked him again whether he had put what he had into what she has, as a *maciyi* enters into *tandun kwalli*[50] and as a bucket enters into a well? Ma'iz answered yes. The Prophet (SAW) asked him again whether he knew the meaning of *zina*. He said "Yes: I went to her with *haram* like a husband goes to his wife with *halal*." The Prophet (SAW) continued to question him, asking what he wanted out of this discussion. Ma'iz said, "I want you to purify me." Upon this, the Prophet of Mercy instructed that he be stoned to death.

Al-Tashri'u al-Jina'i vol. 2 p. 434 is to similar effect:

> After the judge has determined that the accused is sane, he should go further to ask him the meaning of *zina,* how it is done, to whom it is done, with whom did he do it and at what time, etc.

Based on the foregoing we see that in a charge against a person accused of committing *zina*, it is mandatory that full explanation of the offence he is charged with be made to the accused, such that any sane person, after hearing the explanation, will unquestionably understand what the charge means. If this is done, Islamic law will be seen to be judicious, giving the accused person every possible opportunity to defend himself.

The charge preferred against Safiyatu Hussaini by the USC Gwadabawa did not contain the full explanation required. In addition, the charge is contrary to Section 170 of the Sharia Criminal Procedure Code, which provides that every charge must contain sufficient explanation of the offence charged with the date, time and place of commission of the offence. But we have seen that the charge preferred by the court in this case does not contain these things.

Furthermore, sections 128 and 129 of the Sharia Criminal Procedure Code, under which the court said it charged the appellant, does not define the meaning of *zina* let alone prescribe its punishment. However, section 128 of Sharia *Penal* Code does define the offence of *zina*, and section 129 lays down its punishment. In any case, we are satisfied with the appellants ground of appeal that the charge preferred by USC Gwadabawa against the appellant did not explain the meaning of *zina*.

5. Appellant's fourth additional ground of appeal is that the trial court did not inquire whether the appellant was *ihsan*. Having reviewed the record of proceedings in

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[50] *Tandun kwalli*; *maciyi*: a small jar (*tandu*) of eye-shadow (*kwalli*: antimony), with its brush (*maciyi*) projecting into the *tandu*. Compare a jar of fingernail polish with its brush projecting into it.

the trial court, we indeed find no place where the court established whether the appellant was a *muhsinat*. But before a person charged with committing *zina* is convicted and sentence to *rajm*, it is mandatory that the court make an enquiry as regards *ihsan* and its conditions. See *Fiqhu ala Madhahibil Arba'a* [vol. 5 p. 45]:

> There is consensus among the *ulama*s that *ihsan* has the following conditions:
>
> 1. the person must be a free-born and not a slave;
> 2. the person must be a *mukallaf*,[51] not a small boy;
> 3. the person must be sane, not insane;
> 4. the person must be married to a *muhsinat* like himself and the marriage must be one that is valid in every respect;
> 5. the person must seclude himself with his wife and have sexual intercourse with her at a time when this is appropriate. Husband and wife must both be *muhsinai*.
>
> The Hanafi and Maliki schools of jurisprudence add that the person must be a Muslim. According to them, Islam is one of the conditions of *ihsan*, because *ihsan* is a kind of attribute and where there is no Islam there is no such attribute.

It is apparent from the record of proceedings in the trial court that the court did not investigate whether the appellant satisfied any of these conditions. But before a sentence of *rajm* is passed on a person, it is mandatory to establish that all the conditions are met, whether the accused is a man or a woman. Islamic jurists agree that a person accused of *zina* must be shown to meet all the conditions, whether the person is a man or a woman. In sum, when it comes to passing a sentence of *rajm* on a person accused of *zina*, there is no difference between a man and a woman: both must be shown to meet the above conditions of *ihsan* before the sentence can be passed. See *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 59:

> The jurists agree that whether the person accused of *zina* is a man or a woman, it is mandatory that he or she fulfil the condition of *ihsan* before *rajm* can be imposed.

Accordingly this ground of appeal is also acceptable to us. We are satisfied that the trial court did not make proper enquiry as regards the issue of *ihsan* and its conditions. This is despite State Counsel's assertion that Safiyatu Hussaini stated before the court that she was a divorcee. A woman can be a divorcee and not necessarily a *muhsinat*. Her marriage might have been invalid, so that even if it was consummated, when she divorced she would not be a *muhsinat*.

6. Appellant's fifth additional ground of appeal is that the trial court did not observe *i'izar* before convicting and sentencing her. This ground of appeal is worth looking into.

As shown at p. 8 of the record of proceedings, the trial court did in fact observe *i'izar* with respect to the appellant. However, after that, the court continued with the hearing of the matter. There is a rule that whenever *i'izar* is observed in a contested case,

[51] The Hausa word *baligi* is used in the text; this is Hausa for the Arabic *mukallaf*, defined in the Sharia Penal Codes as "a person possessed of full legal and religious capacity."

and hearing of the matter continues after that, the first *i'izar* becomes invalid, and a new one must be done. If the court convicts the accused without observing another *i'izar*, the conviction is null and void even before the court imposes sentence. See *Bahjah* vol. 1 p. 64:

> Conviction without *i'izar* is invalid before judgment.

Again at p. 65 of the same authority it is stated that:

> Any conviction by a judge without *i'izar* is invalid.

Therefore, we agree with the contention of appellant's counsel that *i'izar* was not observed with respect to the appellant. Any conviction passed without *i'izar* is null and void, and this conviction was passed without it. Accordingly, we do not agree with the submission of State Counsel on the issue of *i'izar*.

8.[52] Appellant's second ground of appeal with the particulars stated in support of it, and her sixth additional ground of appeal as argued before us by appellant's counsel, both rely on the claims that Safiyatu's pregnancy and the child delivered of it were for her former husband, from whom Safiyatu says she was divorced not more than two years ago. This is why they are claiming that the pregnancy was for her former husband.

The question of when the appellant was divorced from her former husband was not inquired into by the trial court, nor was the question whether Safiyatu's child was for her former husband. These are new claims that were not raised in the trial court and upon which there is no evidence in the record. Accordingly we are unable to determine whether the claims are true or not. It is not proper for us, as an appellate court, to determine new factual issues that would require us to call for fresh evidence. The claim that Safiyatu's child was for her former husband because she left his house with the pregnancy is a fresh matter. The trial court is the proper court to call for evidence on it and it has not done so.

What we can say is that under Islamic law, it is possible for a woman to marry, get pregnant and deliver her baby within six months. It is also possible for a woman, after divorce, to spend up to five years carrying a pregnancy before delivering. See *Tuhfa* p. 47, where it states that:

> Five years is the maximum period of gestation of a woman. And the minimum period of gestation of a woman is six months.

But as we have said, whether the child delivered by Safiyatu was for her former husband or not is an issue raised for the first time before us, and we are not the proper court to call for evidence to establish the truth about it.

Nevertheless, we believe that Safiyatu Hussaini's claims that she was divorced only two years ago, and that the child to which she gave birth was for her former husband, raise a *shubha* – a doubt – which provides sufficient ground upon which the *hadd* punishment to which she was sentenced may be remitted. See *Mugni*, vol. 9 p. 52:

> Ad-Daru Qudni reported this hadith with *isnad* from Abdullahi bin Mas'ud and Mu'azu bin Jabal and Uqbatu bin Amir. The Prophet (SAW) said: Where a *hadd*

[52] Sic: the number seven is skipped.

> matter becomes doubtful to you, do your best to avoid the *hadd*. There is no dissent on this opinion.

For this reason, Safiyatu Hussaini's conviction of *zina* and sentence to *rajm* must be set aside.

As to the child, Safiyatu can if she wishes file a paternity action against her former husband, who she claims is the child's father, in a competent court of law.

9. In arguing that Safiyatu's conviction and sentence should be set aside because of the doubt raised by the possibility that her former husband was responsible for her pregnancy, appellant's counsel cited the authority of *Fiqhus Sunnah* vol. II p. 241, which provides:

> Narrated by Aishat (may Allah the exalted be pleased with her). She said, the Prophet (SAW) said: Defend Muslims against *hadd* punishment whenever you can do it. If there is a way out, it should be followed, for it is better for the Imam to err on the side of caution than to err on the side of punishment.

The same source again states:

> Defend against *hudud* if you can ever find any defence whatsoever.

In his response to this part of appellant's argument, State Counsel Muhammadu Barau Kamarawa submitted that authorities just quoted are inapplicable to *hadd* matters such as the *zina* case that is before us, but apply in *qisas* cases only. In support of this submission State Counsel cited the provision of the Qur'an in *Suratul Baqarah*, verses 178-179:

> Oh you who believe! *Al-Qisas* (the Law of equality) is prescribed for you in cases of murder: the free for the free, the slave for the slave, and the female for the female. But if the killer is forgiven by the brother (or the relatives) of the killed (against blood money), then it should be sought in a good manner….
>
> And there is (a saving of) life for you in *Al-Qisas* (the Law of equality in punishment)….

The verses quoted by State Counsel are not applicable to the type of case that is before us and do not have any relation to the provisions of *Fiqhus Sunnah* cited by appellant's counsel. The verses deal with cases in which a person is killed, the person responsible is found guilty, and the decedent's relatives are then given the following options:

1. To kill the person who killed their relation; or
2. To forego killing him and accept *diyah* from him instead; or
3. To forgive the killer wholeheartedly, foregoing both killing him and taking *diyah* from him.

This is the meaning of *Suratul Baqarah* verses 178-179.

On the other hand, the hadith of Aishat in *Fiqhus Sunnah*, cited by appellant's counsel, deals with offences, like *zina*, in which a *hadd* punishment is prescribed. If an accused person is found guilty of such an offence, then the *hadd* punishment must be

imposed, and no person is competent to withdraw or forgive it: it is Allah's sole right. See *As'halul Madarik* vol. 3 p. 188, which provides thus:

> It is not permissible for any person to ask for forgiveness on behalf of a person accused of committing an offence that relates to theft or *zina*. It is mandatory to inflict *hadd* on them if they are found guilty, even if they repent and validate their repentance and become good people.

This is why in *hadd* cases the only way out is before the accused is found guilty, and why any doubt about his guilt must be entertained. As the hadith indicates, if there is a way out, it should be followed; it is better to err on the side of caution than to err on the side of punishment. But in a *hadd* case, once the Imam has found the accused guilty, then the matter becomes the sole right of Allah, and it is not permissible for any person to ask for forgiveness on behalf of the accused or to remit the prescribed *hadd* punishment. *Qisas* cases are not like that. Even after a person accused of murder has been found guilty of committing the offence, the relations of the deceased can still forgive the killer to the extent of accepting *diyah* in place of the *qisas* punishment of killing him in return, or they can even forgive him completely and wholeheartedly, waiving even *diyah*. This is impossible in *hadd* cases.

In sum, State Counsel misconceived the authorities cited by counsel for the appellant, and he also misconceived the application of the verses he quoted.

10. State Counsel quoted the hadith of Abu Huraira from the English translation of *Sahihul Bukhari*, vol. 8 p. 536, citing it as authority for the proposition that a person can be convicted of *zina* even if he does not submit himself for punishment but is brought before the court by the authorities.

According to the hadith in question, the Prophet instructed Unais to go to a woman who had been accused of *zina* and ask her if she had committed the offence, saying that if she answered in the affirmative, she should be stoned to death. The Prophet (SAW) sent Unais to the woman because someone had accused her, and the Prophet wanted to give her the opportunity to deny the allegation and maintain an action against the accuser for *qadhf* if she wished. See *Subulus Salam*, the commentary on *Bulughul Marami*, vol. 4 p. 1671, which states:

> Know that the Prophet (SAW) was not sent by Allah for the reason of imposing *hadd* punishments on people. The Prophet commanded that vile deeds should not be exposed and he prohibited spying. Instead, when a woman was accused of committing *zina*, he invited her to deny it and to demand the *hadd* punishment for *qadhf* against her accuser. But should she confess to committing *zina* she would be subjected to the *hadd* punishment. She chose to confess, and therefore brought upon herself the punishment of *rajm*.

Therefore, it is far from the meaning of this hadith that the Prophet (SAW) sent Unais to the woman in order to impose the *hadd* punishment for *zina* on her. He sent him to give the woman an opportunity to deny the accusation and have her accuser punished for *qadhf*. But if she admitted the accusation, then the accuser would be exonerated and her own confession would warrant subjecting her to the *hadd* for *zina*. The Prophet (SAW) commanded that we should not spy on each other. So contrary to the misconception of

State Counsel, the hadith he cited does not permit spying out offenders for the purpose of bringing them before the courts for prosecution.

As to the case at hand, we agree with the submission of appellant's counsel that it was other people who spied on Safiyatu Hussaini and reported to the authorities that she had committed *zina*. Counsel submitted that this sort of spying on people to establish offences against them is *haram*, citing *Suratul Hujurat* verse 12, which says:

> O you who believe! Avoid much suspicion; indeed some suspicion is sin. And spy not, neither backbite one another. Would one of you like to eat the flesh of his dead brother? You would hate it….

We agree with appellant's counsel that based on this verse, it is *haram* to initiate an action against a person for *zina* based on other people's reports. Imam Shafi'i said that a leader does not even have the right to summon a person accused of *zina* for the purpose of investigating the accusation; he supported this position with reference to the same verse of the Qur'an quoted above. See *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 233:

> Indeed Imam Shafi'i said it is not permissible for a leader to initiate investigation upon a person simply because he receives information that that person has committed *zina*.

Based on these authorities, we agree with the submission of appellant's counsel that the procedure followed in initiating the action against Safiyatu is *haram*. It is not permissible for a leader to order somebody's arrest, in order to investigate him for allegedly committing *zina*, based simply on what other people report. The way the police went to Safiyatu's house just because they heard that she had committed *zina* is contrary to Islamic law.

We disagree with State Counsel's argument to the contrary. State Counsel based his argument on *Suratul Nahli* verse 90, which states:

> Verily, Allah orders justice and kindness, and giving (help) to the relatives, and He forbids immoral sins [*al-fasha*], and evil and tyranny [*al-munkar*] ….

This verse does not command that a person who commits *zina* be investigated and prosecuted. Rather, the verse, besides saying that we should do justice and be kind and helpful, forbids people to commit *zina* [or do other things that are *fasha* or *munkar*]. But this does not mean that anybody who commits *zina* [or does other things that are *fasha* or *munkar*] should be arrested and prosecuted. See *Tafsirin Qurtabi* vol. 10 p. 167, where it states that:

> The phrase 'prohibition from *alfasha*' covers any immoral act, including for example using abusive language or any other wrongful act. Ibn Abbas interpreted *alfasha* to cover *zina*. The word *munkar* covers any thing unacceptable under Sharia, that is any action that is contrary and degrading to Sharia. Other scholars have said that *al-munkar* means associating Allah with another thing in the area of worship.

In sum, *Suratul Nahli* verse 90 does not sanction bringing persons suspected of committing *zina* involuntarily before the courts for investigation and prosecution. The

submission of State Counsel to the contrary is rejected. We agree rather with the submission of appellant's counsel on this issue.

11. State Counsel submitted that if this court should find itself unable to affirm Safiyatu's conviction of *zina*, we should still convict and punish her for *qadhf*, under section 183 of the Sharia Criminal Procedure Code Law 2000, for the accusation of *zina* she levelled against Yakubu Abubakar. This application by State Counsel is not acceptable to us. Yakubu, against whom State Counsel says the appellant committed *qadhf*, has not sought to prosecute her for it. It is he that has the right to do so; if *qadhf* was committed against him, he also has the right to forgive. See *As'halul Madarik*, commentary on *Irshadus Salik*, vol. 3 p. 174, which states that:

> An action for *qadhf* belongs to the person against whom the offence was committed, who must pursue it or let it go. When he dies the action dies with him, and his heirs cannot pursue it. This is what Malik said according to a famous opinion.

Since the person against whom State Counsel says *qadhf* was committed has not appeared before us to prosecute any such claim, we cannot proceed on it. Therefore, we do not accept this submission by State Counsel and it is hereby dismissed.

12. We come to the question of the jurisdiction of the USC Gwadabawa to sentence the appellant to *rajm* for the offence of *zina*. Appellant's counsel argues that even if the trial court properly convicted Safiyatu of *zina*, it did not have the authority to sentence her to *rajm*. This is because the Sokoto State Sharia Penal Code Law, which, as part of the implementation of Sharia in the state, prescribes the punishment of *rajm* for the offence of *zina*, and under which the USC Gwadabawa sentenced Safiyatu, was not in operation at the time Safiyatu must have committed the offence. But the Sharia Penal Code Law was enacted under powers granted to the Sokoto State House of Assembly by section 4 of the 1999 Constitution, subsection (9) of which provides that:

> … the National Assembly or a House of Assembly shall not, in relation to any criminal offence whatsoever, have power to make any law which shall have retrospective effect.

Based on this, appellant's counsel argues that the punishment of *rajm* cannot be applied retrospectively to acts of *zina* that may have been committed before the Sharia Penal Code Law came into operation, as is the case with Safiyatu. Therefore the USC had no authority to sentence Safiyatu to *rajm*. We have carefully considered these arguments as well as the submissions of State Counsel on this issue

We have examined the Sharia Penal Code Law 2000 and the Sharia Criminal Procedure Code Law 2000, both enacted by the Sokoto State House of Assembly. Both were signed into law by the Executive Governor of Sokoto State on 25/1/2001. Pages 1 of both laws indicate that they both commenced operation on 31/1/2001. Section 7 of the enacting provisions of the Sharia Penal Code Law, at p. 3, provides as follows:

> No act or omission committed by a person shall be an offence under the provisions of this law unless such act or omission was committed on or after the commencement date of this law.

In short, the law specifically provides that only offences committed on or after its commencement date can come under it. Therefore, any person who may have done anything contrary to the provisions of this law before its commencement date cannot be punished under it even if his action is an offence as defined by the law.

According to the record of proceedings of the USC Gwadabawa in this case, it was on 3/7/2001 that the police arraigned the appellant Safiyatu Hussaini Tungar Tudu, along with Yakubu Abubakar Tungar Tudu, of Gwadabawa Local Government Area of Sokoto State, for the offence of *zina* contrary to Section 128 of Sokoto State Sharia Penal Code Law 2000. The police stated the reason for initiating the action as follows:

> [O]n 23/12/2000, at around 2:00 p.m., the Gwadabawa police under the office of the Area Commander received a complaint that you, Safiyatu Hussaini, committed *zina* with you, Yakubu Abubakar, as a result of which you, Safiyatu Hussaini, became pregnant when each of you is known to have once married. That the police arrested you and interrogated you and were satisfied with the allegation levelled against you. I therefore arraign you before this court so that you will be judged accordingly.

It can be seen that this statement by the police contains only the date the police were informed about the commission of the alleged offence. It does not state the time or the date the offence was allegedly committed. But even the date the police were informed about the commission of the alleged offence – 23/12/2000 – came before the date the Sharia Penal Code Law, under which the USC Gwadabawa sentenced Safiyatu Hussaini to *rajm*, commenced operation. The date the offence was committed must have come even earlier.

Based on the section of the Sharia Penal Code Law quoted above, which is guided by the principles of Sharia, we must therefore agree with the submission of appellant's counsel that the USC Gwadabawa did not have jurisdiction to sentence Safiyatu to *rajm*. This is because even if Safiyatu did commit the offence of *zina* as charged, she did not do so on or after the day the Sharia Penal Code Law came into operation, but before; but no one can be punished under a law that was not in force when the offence was committed. This principle of Sharia is also embodied in section 36(8) of the 1999 Constitution, which provides that:

> No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence heavier than the penalty in force at the time the offence was committed.

Section 36(12) of the 1999 Constitution provides that:

> … [A] person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection, a written law refers to an Act of the National Assembly or a Law of a State, any subsidiary legislation or instrument under the provisions of a law.

The Sharia Penal Code Law was enacted by the Sokoto State House of Assembly, under the powers given to it by section 4 of the 1999 Constitution, in compliance with section 36(12).

[State Counsel submitted that the USC Gwadabawa had jurisdiction to hear this case under section 12 of the Sokoto State Sharia Criminal Procedure Code Law.] Like the Sharia Penal Code, the Sharia Criminal Procedure Code came into effect on 31/1/2001. Section 12 gives Upper Sharia Courts exclusive jurisdiction to try the offences listed in Appendix A; Appendix A in turn refers to offences defined by specified sections of the Sharia Penal Code. Nothing in this changes the principle that a person may not be punished under a law that was not in effect when the offence was committed. Section 14 of the Sharia Criminal Procedure Code further provides that an Upper Sharia Court "may pass any sentence authorised by law." The sentence passed by the USC Gwadabawa in this case was not authorised by a law in effect at the time the alleged offence was committed. For this reason we agree with appellant's counsel that the court did not have the jurisdiction to pass the sentence of *rajm* on the appellant. Nothing in sections 12 or 14 of the Sharia Criminal Procedure Code changes this result.

[Judgment]

For the reasons stated and based on the authorities cited above, we the Sharia Court of Appeal, Sokoto State, under section 187(2) of the Sokoto State Sharia Criminal Procedure Code Law 2000,[53] hereby quash the conviction of Safiyatu Hussaini for the offence of *zina* and her sentence to *rajm*. We do not agree with that judgment. We hereby quash it. The appellant Safiyatu Hussaini Tungar Tudu is hereby discharged and acquitted.

The appeal is allowed.

Signed: HON. ALH. MUHAMMAD BELLO SILAME – G/KADI

Signed: HON. ALH. BELLO MUHAMMAD RABAH – KADI

Signed: HON. ALH. ABDULKADIR SAIDU TAMBUWAL – KADI

Signed: HON. ALH. MUH'D TAMBARI USMAN – KADI

[53] Section 187(2) provides: "If [an appellate court] is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts it shall quash the conviction."

Chapter 6 Part III
Proceedings and Judgments in the Amina Lawal Case

1.

Proceedings and judgment in the Sharia Court Bakori

Translated from the Hausa by Sama'ila A. Mohammed

(a) Proceedings 15th January 2002

Comp. No. - 11/2002
Case No. - 9/2002
Date - 15/1/2002

Sharia Court Bakori
Judge: Alhaji Nasuru Lawal Bello Dayi
Prosecutor: Commissioner of Police, Katsina State
Accused: Amina Lawal and Yahayya Muhammed[54]
Complaint: *Zina* contrary to section 124 Katsina State Islamic Law[55]

I, Police Prosecutor, Corporal Idris Adamu of the Nigeria Police Command, on behalf of the Katsina State Commissioner of Police, do hereby charge Amina Lawal and Yahayya Muhammed, both of them residing in Kurami, of committing the offence of *zina*. Both of the accused persons were arrested on 14/1/2002 by Police Constable Rabi'u Dauda and one other policeman, both of the Nigeria Police Criminal Investigations Department, Bakori Divisional Command. The accused are being charged jointly with committing the offence of *zina* from the time their courtship began, that is about eleven months ago, and continuing up until quite recently. As a result of their commission of this offence the 1st accused, Amina Lawal, has given birth to a baby girl. As this is contrary to Katsina State Sharia Law, we are hereby charging them before this court.

Court to Amina Lawal: Did you hear the charge against you by the police? What do you have to say?

Amina Lawal: Yes. It is true. I committed the offence of *zina* as a result of which I gave birth to a baby girl about nine days ago, on 8/1/2002.

Court: With whom did you commit this offence?

Amina Lawal: I committed this offence of *zina* with Yahayya.

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[54] This is the spelling of Yahayya Muhammed's name used in the record of the Bakori court. We have used it throughout, although in the appellate courts the spelling 'Yahaya Mahmud' is sometimes also used.

[55] Sic. The reference is to section 124 of the Katsina State Sharia Penal Code Law No. 2 of 2001, which provides: "Whoever, being a man or a woman fully responsible has sexual intercourse through the genital of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act, is guilty of the offence of *zina*."

Court to Yahayya Muhammed: Did you hear the charge against you? What do you say?

Yahayya Muhammed: I heard the charge. It is not true. I did not commit the offence of *zina* with her. I know that I approached her for marriage but I never committed *zina* with her. It was when she delivered that I was called to the palace of the village head of Kurami and I was confronted with the allegation that I committed the offence of *zina* with her. I denied this allegation. They then brought me to the police station where they threatened me that I should accept to have committed the offence of *zina* or else they would break my bones. So, I have not committed this offence.

Court to Cpl. Idris Adamu: Did you hear the response of the 2nd accused? What do you have to say?

Cpl. Adamu: I heard what the 2nd accused said. It is not true and I have witnesses. I pray the court to allow me to bring my witnesses.

Court ruling: The court grants the prosecution's request to bring its witnesses. The hearing of this matter is adjourned to 29/1/2002 to enable the police to conclude their investigations. Court further directs the accused to be remanded in prison custody.

(b) Proceedings 30th January 2002[56]

Today, 30/1/2002, the court recognises the prosecutor, Cpl. Idris Adamu, and the two accused persons, Amina Lawal and Yahayya Muhammed, so that the trial can continue.

Court to Cpl. Idris Adamu: Do you have witnesses you intend to bring; have you come with them?

Cpl. Adamu: Yes. There is a witness. That is the baby delivered 25 days ago who is the product of that *zina*. The baby has not yet been given any name.

Ruling: The court takes note of the baby of 25 days who is in the hands of the 1st accused. The court also takes note of the baby as the first evidence presented by the police prosecutor in this matter.

Court Amina Lawal: Have a look at the baby in your hands and confirm to the court whether it is the baby that was delivered by you and whose delivery was as a result of *zina*.

Amina Lawal: I have looked at her and she is the one.

Court: Do you agree that both of you committed *zina* which resulted in you giving birth to this baby?

Amina Lawal: Yes. It was Yahayya who deceived me by saying that he would marry me. He had been courting me for the past eleven months.

Court to Yahayya: Have you seen this baby who was born 25 days ago?

Yahayya Muhammed: Yes. I have seen her.

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[56] The hearing set for 29th January 2002 evidently could not hold on that day and was postponed to the next. This happened again later in the proceedings.

Court: Do you agree that she is the baby that was delivered as a result of the *zina* you committed?

Yahayya Muhammed: No. I do not agree. This is an attempt to tarnish my image.

Court: Is it true that you courted Amina Lawal for eleven months?

Yahayya Muhammed: Yes. It is true. I wanted to marry Amina for the past eleven months.

Court: Do you have witnesses who knew that you were not committing the offence of *zina* with Amina during the period of your courtship?

Yahayya Muhammed: No. I do not have any witness.

Court: Will you take an oath by the Holy Qur'an to the effect that you did not commit the offence of *zina* with Amina, which resulted in the birth of this child?

Yahayya Muhammed: Yes. I will take an oath.

Ruling: The court has accepted Yahayya's request to take an oath by the Holy Qur'an, in its presence, to the effect that he did not commit the offence of *zina* with Amina Lawal and that he was not responsible for her pregnancy. He also states that her allegation that he was responsible was an unwarranted defamation.

[Evidently the oath-taking followed: no record of it was made.]

Ruling: The court has accepted the oath Yahayya Muhammed took by the Holy Qur'an, in its presence, as valid.

Court to Cpl. Idris Adamu: The 2nd accused has taken an oath by the Holy Qur'an to the effect that he did not commit the offence of *zina*. In view of this, what do you have to say?

Cpl. Adamu: I agree, since he has taken an oath by the Holy Qur'an.

Ruling: Based on what has transpired above, the court having given the 2nd accused person an option to take an oath by the Holy Qur'an in obedience to Sharia as provided for in *Tuhfa* as translated by Usman Daura… [the text here becomes illegible at the bottom of a page.]

[The page of the transcript that should follow here is missing from the only copy obtainable for purposes of this translation. The contents of that page can be gleaned from the summary of the proceedings in the Bakori Court made by the Upper Sharia Court, Funtua in its ruling on Amina Lawal's appeal, as follows:[57]

> After he took the oath, the court discharged the 2nd accused. The court then charged the 1st accused. The court said:
>
> > The court charges you Amina Lawal with the offence of *zina* to which you confessed before this court on 15/1/2002 where you said you committed the offence and as a result thereof you delivered a baby girl which the prosecutor tendered in evidence today 30/1/2002. Therefore this court is

[57] The complete ruling of the Upper Sharia Court Funtua is reproduced below.

> satisfied and is convinced that you committed this offence of *zina* based on your confession before the court. The verse states that proof by admission is better than proof by evidence.[58] The other additional evidence is the daughter you delivered.

The court proceeded to say:

> Since you accepted that you committed *zina* following which you give birth to this baby while you are sane and a Muslim, a divorcee not a virgin, therefore court accepts and is satisfied that you committed the offence. Therefore the charge is very strong against you Amina Lawal Kurami.

The court asked her whether she understood the meaning of the charge. She said she understood and she agreed.]

Court to Cpl. Idris Adamu: Has the 1st accused ever before been found guilty of the offence of *zina*?

Cpl. Adamu: No. This is the first time that the 1st accused is being found guilty of the offence of *zina*.

Court: Court is adjourned till 13/2/2002 so that hearing in this matter will continue.

(c) Proceedings 13th February 2002

Today 13/2/2002 the court recognises the prosecutor, Cpl. Idris Adamu and the 1st accused person, Amina Lawal. But the court again adjourns hearing in this matter until 27/2/2002, to allow Amina Lawal to complete the traditional 40 days maternity hot bath, associated with delivery of new-born babies. Also, the court has granted bail to Amina Lawal with Idris as surety.

(d) Proceedings 20th March 2002

Today, 20/3/2002 the court recognises the prosecutor, Cpl. Idris Adamu, and the 1st accused person, Amina Lawal, so that the court can go ahead and sentence her according to Sharia.

Court to Amina Lawal: Have you named this baby of yours?

Amina Lawal: I have named the baby Wasila.

Finding of Guilt

I, Nasuru Lawal Bello Dayi, the judge of this Sharia Court Bakori, have charged, and I find you, Amina Lawal Kurami, guilty of the offence of *zina* of which the Commissioner of Police of Katsina State complained against you and Yahayya Muhammed to this court on 15/1/2002. The COP complained that both of you committed the offence of *zina* in

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[58] No authority is here given for this proposition. But see the Court of Appeal (Kaduna)'s statement in *Alhaji Umaru Haruna Mai-Aiki v. Danladi Mai-Daji* [2006] 3 Saranniya Law Reports Pt. II pp. 39-60 at 53-54: "In another context it was stated that an admission is more preferable to witnesses' testimony – *Al iqrar minal shuhud*. See Ruxton *Maliki Law* Ch. XXII para 7." The book of Ruxton referred to is a translation of much of *Mukhtasar Khalil*, as to which see the "Bibliography of Islamic Authorities" given in part IV of this chapter. (Thanks to Ahmed S. Garba for this citation.)

the town of Kurami for the past eleven months and as a result of this act, you gave birth to a baby girl. You confessed to the act and pleaded guilty of the offence without wasting the time of the court while the 2nd accused person, Yahayya Muhammed, denied committing the offence. This court finds you guilty based on the charge I preferred against you and your confession to this court to the effect that you committed the offence of *zina* and the prosecutor's physical evidence of the baby girl you delivered, by name Wasila, which you confirmed to this court was a product of *zina*.

As a result of your confession to this court and the evidence of the prosecutor of your new-born baby, by name Wasila, your offence is contrary to Sharia as Allah (SWT) stated in the Holy Qur'an in *Suratul Bani Isra'il* verse 32:

> And come not near to unlawful sex [*zina*]. Verily, it is *fahishah* (immoral sin) and an evil way.

So, this court has found you guilty of this offence which is contrary to Sharia in your capacity as a Muslim, sane, adult and even once married as you explained to this court. As a result, this court will judge you according to the provisions of Sharia in *Risala* at p. 128, where it is stated that:

> A *muhsinat* who commits *zina* is to be stoned until she is dead.

And the commandment of Prophet Muhammad (SAW) in *Arba'una Hadith*, no. 14, where it is stated thus:

> Abdullah bin Mas'ud (may Allah be pleased with him) narrated that the Prophet (peace be upon him) said, "It is impermissible to take the life of a Muslim who bears testimony that there is no God but Allah, and I am the Messenger of Allah, except in one of three cases: the adulterer, a life for a life, and the renegade Muslim [apostate], who abandons the Muslim community."[59]

The verse of the Qur'an, the passage from *Risala*, and the hadith of Prophet Muhammad (SAW) which have been quoted agree exactly with the provision of Section 125(b) of the Sharia Penal Code Law of Katsina State.[60]

The court has discharged the 2nd accused, Yahayya Muhammed, who Amina stated was responsible for her pregnancy and therefore her co-partner in the commission of the offence of *zina*. This is because he denied committing the offence and there are no eye-witnesses to the offence or to his culpability. Moreover, he took an oath by the Holy Qur'an. The court has based its decision on the provision of Sharia law which provides for only three instances where an individual can be convicted: one, the confession of a sane Muslim; two, witnesses who confirm the commission of the offence; and three, the emergence of pregnancy in an unmarried woman or a woman without a husband.

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[59] The quoted text is given first in Arabic, then in Hausa. We use here the translation of the Arabic into English given in Ibn Rajab, *Jami Al-Ulum Wal-Hikam*, *A Collection of Knowledge and Wisdom,* rendered into English by Muhammad Fadl (Umm Al-Qura: Al-Mansura, Egypt: 2002), p. 175.

[60] Section 125(b) provides that: "Whoever commits the offence of *zina* shall be punished: … (b) if married, with stoning to death (*rajm*)."

Because of this, since you, Amina Lawal, have confessed and you have come with the baby you delivered and presented her to the court to take notice of, this conviction has become imperative on you under section 125(b) of the Katsina State Islamic Law.

Court to Amina Lawal: Do you have anything you wish to say to the court?

Amina Lawal: No. I do not have anything to say to the court except that I ask for forgiveness.

Court: As at today, state when you delivered the baby.

Amina Lawal: I delivered the baby two months and eight days ago.

Court: In how many days will you wean your baby, Wasila?

Amina Lawal: In the next eighteen months.

Court to Cpl. Idris Adamu: Was this the first time or are there other times in which you found the accused committing this offence?

Cpl. Adamu*:* This is the first time she is committing the offence.

Judgment and Sentence

Based on what transpired above, I, Alhaji Nasuru Lawal Bello Dayi, Judge of this Sharia Court Bakori, have convicted you, Amina Lawal Kurami, of committing the offence of *zina* and have accordingly found it lawful that you be sentenced to death by stoning in accordance with the provision of section 125(b) of the Sharia Penal Code Law of Katsina State.

The sentence of this court is with effect from today, 20/3/2002 but the sentence will not be carried out until on 20/9/2003, that is, after you have weaned the baby you are carrying, by name Wasila.

Appeal

If you are not satisfied with this judgment you have the right to appeal against it to the Upper Sharia Court Funtua within thirty days.

Court to Amina Lawal: Do you have anybody to bail you so that you will not be under prison custody in view of your new-born baby?

Amina Lawal: Yes. I have somebody who will bail me and that person is Musa.

Court to Musa: Did you hear the judgment delivered by this court? Do you undertake to be bringing the convict to this court every two weeks?

Musa: Yes. I agree to be bringing her to court.

Ruling: The court has accepted to grant bail to Amina on the condition that Musa will bring her to court every two weeks. This bail is bail after sentencing. The court grants this bail on the compassionate consideration of Amina's new-born baby.

(e) Proceedings 21st March 2002

Today, 21/3/2002, the court recognises the Musa who received Amina Lawal on bail.

Court to Musa: Musa, what do you have to tell the court?

Musa: I am here to inform the court that here is Amina Lawal. I have brought her back to the court. I will not continue to bail her.

Court to Amina Lawal: Did you hear? What do you have to say?

Amina Lawal: Yes I heard. And I appeal to the court to allow Idi Mai Yankan Farce Kurami to bail me.

Court to Idi Mai Yankan Farce Kurami: Will you agree to receive Amina Lawal into bail on the condition that every two weeks you will bring her to court?

Idi: I agree. I will receive her into bail. And I will be bringing her to court every two weeks.

Ruling: The court has accepted the plea and has granted the request of Idi Mai Yankan Farce Kurami to take Amina Lawal into bail and to be bringing her to court every two weeks up to the time she has weaned her baby so that the sentence of the court can be carried out.

2.

Proceedings and judgment in the Upper Sharia Court Funtua

Translated from the Hausa by Aliyu M. Yawuri

(a) Notice of appeal filed 28th March 2002

IN THE UPPER SHARIA COURT FUNTUA

BETWEEN: CASE NO. US/FT/CRA/1/002

AMINA LAWAL

VS.

C.O.P., KATSINA STATE

The Registrar
Upper Sharia Court
Funtua

NOTICE OF APPEAL

Please be informed that Amina Lawal has appealed the judgment and sentencing to *rajm* passed on her by the Sharia Court, Bakori on 20th March 2002 in the case number 9/2002 between C.O.P. KTS Vs. AMINA LAWAL AND YAHAYYA MUHAMMED.

GROUNDS OF APPEAL

1. The judgment of the Sharia Court, Bakori is contrary to the provisions of Islamic law and procedure.
2. The appellant will provide additional grounds of appeal as soon as she receives record of proceedings from the Sharia Court Bakori.

[signed]
A.M. Yawuri, Esq.
Appellant's Solicitor
C/O A.A. Machika & Co.
UBA Building
Funtua

FOR SERVICE ON:
C/O Ministry of Justice,
Funtua

(b) Proceedings 15th April 2002

Appeal No. 1/2002
Case No. 1/2002
Date: 15/4/2002

Upper Sharia Court Funtua
Before: Alhaji A. Abdullahi
Members: 1. Alhaji Umar Ibrahim
2. Alhaji Bello Usman
3. Alhaji Mamuda Suleiman
Appellant: Amina Lawal Kurami
Respondent: The State

Grounds of appeal: [none stated][61]
Counsel for the appellant: Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe.[62]
Counsel have instructions of Amina Lawal to represent her.

Court to Appellant's Counsel: You filed your appeal on 28/3/2002 but up to now the trial court records are not ready. What happened?

Appellant's Counsel (Aliyu Musa Yawuri): That is true, but we will try to obtain the records very soon God willing.

Court: What do you want now?

Appellant's Counsel: We have an application.

Court: What is the nature of your application?

Appellant's Counsel: We wish to file additional grounds of appeal against the judgment of the Sharia Court Bakori together with some grounds we intend to rely on with regards to some errors committed by the Sharia Court Bakori in this case.

Court: Counsel for the State is not in court. We received their application seeking for adjournment of this appeal to 23/5/2002. The date is not convenient, but 27/5/2002 is convenient. Is this date convenient to you?

Appellant's Counsel: The date is convenient. We hope the Attorney-General will be informed of the new date.

Court: The matter is adjourned to 27/5/2002 for appellant to move her application to file additional grounds and for State Counsel to appear. Mal. Babangida Shehu who is in court is ordered to inform the resident State Counsel of the new date.

(c) Additional grounds of appeal[63]

1. The Sharia Court Bakori erred when it convicted the appellant and sentenced her to *rajm* without interpreting and explaining to her the offence of *zina* even when the appellant did not understand what was meant by *zina*.
2. The Sharia Court Bakori convicted and sentenced the appellant even before the court heard her defence.
3. The Sharia Court Bakori sentenced the appellant to *rajm* without taking her plea and without giving the appellant the opportunity to present her defence.
4. The judgment of the Sharia Court Bakori is a nullity in that the court convicted and sentenced the appellant without observing the *i'izar*, which is a mandatory requirement.

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[61] The Hausa transcript has here: "50.00 R VNo. 901997. Date 25/3/2002".
[62] Mariam Imhanobe is the Head of WRAPA's Legal Department.
[63] Caption omitted. The date of filing of these additional grounds is unclear from the only copy available to us. From the record of proceedings on 27th May 2002 we conclude that they were filed before then.

5. The judgment of the Sharia Court Bakori is null and void because under the Sharia, the police or any other authority does not have the power to arrest or prosecute Muslims for the offence of *zina*.

6. The Sharia Court Bakori erred in convicting and sentencing the appellant to *rajm* when there was no evidence before the court that the appellant was a *muhsinat*.

7. The Sharia Court Bakori erred when it convicted and sentenced the appellant to *rajm* upon a meaningless charge.

8. The Sharia Court Bakori erred when it convicted and sentenced the appellant to *rajm* based on the appellant's purported confession whereas the appellant never confessed before the court.

9. The Sharia Court Bakori erred when it convicted and sentenced the appellant based on the fact that the appellant delivered a baby without a husband whereas this does not constitute a conclusive proof of *zina* against the appellant.

Dated this ____ day of _____ 2002.

___[signed]_____
A.M. Yawuri
Aliyu Musa & Co.
[etc.]

For Service On:
Attorney-General of Katsina State
A.G.'s Chambers, Funtua

(d) Proceedings 27th May 2002

Court: Today is 27/5/2002. The appellant together with her counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. State Counsel Babangida Shehu and Isma'ila Ibrahim Danladi are also in court. The appeal was adjourned to this date for counsel for the appellant to move their application to file additional grounds of appeal against the judgment of Sharia Court Bakori.

Court: Appellant's counsel will move his application.

State Counsel (Isma'ila Ibrahim Danladi): I am Isma'ila Ibrahim Danladi. Appearing with me is Babangida Shehu.

Court: Appellant's counsel what are your grounds of appeal?

Appellant's Counsel: We are appealing against the judgment of Sharia Court Bakori. We are dissatisfied with it. We are ready to move our application.

Court: State Counsel any objection?

State Counsel: We have no objection. We will reply later on.

Court: Move your application, counsel.

Appellant's Counsel: We are applying for: (1) an order granting the appellant leave not to attend the court pending the weaning of her child, and only thereafter to report herself to court for execution of the sentence in case her appeal fails; (2) an order setting aside the order of the trial court which directed the appellant to report herself to the trial

court every two weeks up to the time she has weaned her child; and (3) any further or other orders the Honourable Court may deem fit and just to grant.

We shall rely on two grounds in support of this application: the trial court lacked jurisdiction to make the order we seek to set aside [, and the order is contrary to Islamic law][64].

The Katsina State Sharia Courts Law, Law No. 5 of 2000, commenced operation on 1/8/2000. It appears that the order that is in question was made by the trial court on 21/3/2002. This was after the commencement of Sharia Courts Law. Sections of the aforesaid law provide that upon its commencement the Sharia courts shall be bound by its provisions in both civil and criminal proceedings.

The law further provides that the courts shall rely in their proceedings on (1) the Qur'an, (2) the Hadiths of the Holy Prophet (SAW), (3) *ijma*, (4) *qiyas*, (5) *ijtihad*, and (6) *urf*. Although section 9 of the law provides that the Grand Kadi may make rules of practice for the Sharia Courts, the Grand Kadi is yet to make such rules. Even if he eventually did make such rules section 9 says such rules must comply with Islamic law.

Page 13 lines 22-28 and p. 14 lines 1-5 of the Bakori Sharia Court records show that Amina was granted bail after the court's judgment. One Musa was her surety. He was required to produce Amina in court every two weeks pending the time she weaned her baby girl, whereupon she would receive the punishment of *rajm*. Musa later refused to stand as Amina's surety, on the ground that she might run away. See p. 14 lines 9-17. Fearing she might be sent to prison, Amina obtained the consent of one Idi to stand for her. She was released on bail to Idi on the same conditions given to Musa, i.e. he was to bring her to court every two weeks. The court termed the bail as "bail after judgment".

We went through the Qur'an but fail to find any authority empowering a court to grant such bail after judgment. Therefore the court did not rely on any Qur'anic authority in making this order. The Hadiths of the Holy Prophet also do not provide for this power. Indeed the traditions of the Prophet provide otherwise. We rely on the hadith on p. 642 in *Muwatta Malik*. In that hadith it is reported that a woman came to the Holy Prophet and confessed to having committed *zina*. The Prophet told her to go away until she had delivered. After she delivered she went back to the Prophet. He asked her to go back again until she had weaned her child. After she weaned the child she went back to the Prophet once again. The Prophet told her to go back once more until she got somebody to look after the child. It was only after she got somebody to take care of the child that she was stoned to death. Therefore, the order given by the Sharia Court Bakori is contrary to the provision of Islamic law.

Furthermore, once a court has passed judgment, it ceases to have any jurisdiction over the matter. It becomes *functus officio*. It is only a higher court that can then exercise jurisdiction over the case. Section 3(1) of the Sharia Courts Law 2000 provides for two classes of courts – Sharia Courts and Upper Sharia Courts. Section 32 gives Upper Sharia Courts jurisdiction to hear appeals from Sharia Courts. In section 32 there is nothing that empowers the trial court to exercise jurisdiction over a case after it has passed its

[64] The second ground is not articulated in the transcript at this point; we insert it for the guidance of the reader.

judgment. Any application for bail ought to have been entertained by this court not the lower court. Section 271(3) of the Criminal Procedure Code, which was the applicable law before the enactment of the Sharia Courts Law, provides that where a pregnant woman is sentenced to death, such sentence shall be substituted with life imprisonment. It does not provide for bail. Any order made by a court must be supported by law. Therefore since the trial court did not act according to the law, we urge this court to set aside its order.

In all the *zina* cases tried by the Holy Prophet, he never granted bail. Refer to *Sahihul Muslim* p. 201 where a woman came to the Prophet and said "I have committed *zina*, I want you to purify me". The Prophet drove her away. She said "Oh Prophet of Allah, do you wish to drive me away as you drove Ma'iz?" Therefore, the practice of granting bail after conviction is not recognised by the Sharia. We urge this court to set aside this order. Whenever Amina reports to the court the people of Bakori swarm around her looking at her. This is insulting to Islam.

Court: State Counsel, you heard their submissions. What is your reply?

State Counsel: We object to the application. Firstly, counsel submitted that the order made is contrary to the Hadiths of the Holy Prophet (SAW). I believe it is not contrary to the Qur'an and Hadiths. The hadith in *Muwatta Malik* is distinguishable from the present case. In that hadith it was the woman who voluntarily submitted herself to the Holy Prophet with a request that he should purify her. In the case at hand the appellant was arraigned before the court. In the case before the Holy Prophet there was no fear that the lady would run away. In this case there is such fear. It is not certain that if she is released the appellant would report back to the court. The Bakori Sharia Court judge relied on his *ijtihad*.

On their ground number 2, counsel submitted that the trial court had no jurisdiction to grant bail after judgment. This court does not know this and even though the law provides for two categories of courts – the Sharia and Upper Sharia Court – we still ask this court to affirm the order of Bakori Sharia Court.[65]

Court: Counsel to the appellant, did you hear the submission of State Counsel?

Appellant's Counsel: Yes. State Counsel misconceived the issues involved. Islamic law does not provide for forceful execution of the punishment of *rajm*. In *Hadith Ma'iz*, when Ma'iz felt the pains of the stoning he ran away. People pursued him and caught him and executed the judgment on him. The Holy Prophet queried them, saying why did they not let him be? It is therefore wrong to rely on any fear that Amina might run away from justice. The State did not cite any Qur'anic authority or hadith to support the ruling of the trial court. Islamic law unlike English law does not rely on personal opinion. Therefore this is an error. Only Islamic jurists can perform *ijtihad*. See p. A84 Sharia Courts Law of Katsina State.[66]

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[65] Sic. It is not clear what the gist of this argument is.

[66] The reference is to the gazetted version of the Sharia Courts Law, Katsina State of Nigeria Gazette No. 5 Vol. 11, 10th August 2000, pp. A83-A95. On p. A84 *ijtihad* is defined as follows: "'Ijtihad' means and shall include analogical deductions of an Islamic Jurist".

Court: State Counsel, you heard the final address of appellant's counsel?

State Counsel: I heard. It is not correct to say that Islamic law will not enforce the punishment of *zina*. It is the law that made *zina* a crime and provided for punishment of offenders. The law provides that *zina* is proved against a pregnant woman who is known not to be married, so long as she was not raped. Where a woman is found guilty of this offence there is a prescribed punishment. On the issue of *ijtihad*, a court is enjoined to rely on Qur'an, Hadiths, *qiyas*, *ijmah*, *ijtihad* and *urf*.

Court: Court adjourns to 3/6/2002 to rule on the application of counsel for the appellant.

(e) Proceedings 3rd June 2002

Court: Today, 3/6/2002, the appellant and her counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. State Counsel Isma'ila Danladi is also in court for the continuation of the hearing.

Appellant's counsel sought for three orders. First, an order allowing Amina Lawal leave not to attend the court pending the time she weans her child and thereafter to report back for the punishment to be inflicted in case her appeal fails. Counsel relied on a hadith in *Muwatta Malik* at p. 642. In the hadith the Prophet allowed a woman who became pregnant by *zina* to go away and come back for her punishment after she had weaned her child. She was not detained.

Appellant's counsel are also praying this court to set aside the order of the Sharia Court Bakori which directed Amina to be reporting to that court every two weeks pending the time she weans the child she is breast feeding. Counsel contended that the Sharia Court Bakori lacked the jurisdiction to make such order, having become *functus officio*. He maintained that the Bakori court had no right to grant bail to a convict. Counsel relied on the Katsina State Sharia Courts Law, No. 5 of the year 2000, which commenced operation on 1/8/2000. Amina was convicted on 21/3/2002, after commencement of the Sharia Courts Law. Section 8 of the law provides that upon its commencement, courts shall apply provisions of the Holy Qur'an, Hadiths, *qiyas*, *ijma* and *urf* in all their civil and criminal proceedings. Even though section 9 empowers the Grand Kadi to make rules of practice, he is yet to make any such rules. Counsel submitted that on p. 14 lines 4-5 of the records, the Sharia Court Bakori granted bail to Amina. Malam Musa stood as her surety. The condition attached to the bail was that Musa should bring Amina to court every two weeks up to the time she weans her child. After that she is to report herself back to the court for the punishment of *rajm* to be carried out. Later on, Musa said he could not continue to act as surety for Amina. The court granted Amina bail once again to one Idi on the same condition as before, that is that he would produce Amina every two weeks. The Bakori court did not rely on any law or authority in making this order. *Hadith Ma'iz* is reported in *Muwatta Malik* p. 642.[67]

[67] Sic. The reference is in error; *Hadith Ma'iz* is not in *Muwatta Malik*. It can be found in both *Sahihul Bukhari* vol. 8 p. 529, hadith no. 806, and *Sahihul Muslim* vol. 1 pp. 112-13, hadith no. 1692.

In their third prayer, counsel for appellant seek for any other order this Honourable Court may deem just in the circumstances.[68]

Amina Lawal delivered her baby girl who is suspected to be illegitimate on 8/1/2002, see p. 1 of the trial court record.

State Counsel objected to appellant's application. He submitted that the order made by the Bakori Sharia Court is not in breach of the Qur'an or Sunnah. The hadith in *Muwatta Malik* is distinguishable from the matter at hand. The lady in the hadith voluntarily took herself to the Holy Prophet. She was not arrested and arraigned before the Prophet. She arraigned herself without any fear of the *hadd* punishment. But Amina was arrested and arraigned involuntarily. Counsel therefore submitted that the Bakori judge relied on his *ijtihad* in making the order. On the submission of appellant's counsel that the Bakori court was *functus officio*, State Counsel argued that no one knows whether if Amina was granted bail she would be attending court or whether she would jump bail. State Counsel submitted that the Bakori judge did not breach the provision of any law.

Appellant's counsel in his final address submitted that State Counsel misconceived the position of Islamic law. Islamic law is not out to forcibly execute the punishment of *rajm*. In *Hadith Ma'iz*, when Ma'iz started feeling pains from the stoning he ran away. People caught him and killed him. When the episode was narrated to the Holy Prophet he queried why Ma'iz was not let alone since he had run away. Appellant's counsel observed that State Counsel did not rely on any hadith throughout his argument.

State Counsel replied by saying that Allah (SWT) prohibited *zina*. He said an unmarried woman found to be pregnant who does not claim to have been raped, must have committed *zina*. Sharia law provides that a court shall rely on the Qur'an, Hadiths, *qiyas*, *ijma* or *ijtihad*. The trial judge relied on his *ijtihad*.

Ruling

The Court grants the first prayer of the appellant. She is given leave to go and to stay away until she has weaned her child and thereafter to produce herself before this Upper Sharia Court Funtua. The court relies on the hadith in *Muwatta Malik* at p. 642 which shows that the court can allow a person convicted of the offence of *zina* to go his way without detaining him. Another authority for allowing her to stay at her house until she weans her child is to be found in Qur'an *Suratul Baqarah* verse 233: "The mothers should suckle their children for two whole years…." However, the court requires Amina Lawal to bring her guardian who will act as a surety on her behalf and produce her after she has weaned her child or at any time the court needs her. We rely on *Bulughul Marami* p. 258 hadith no. 1238.

On the second prayer seeking the setting aside of the Bakori Sharia Court order requiring Amina to be reporting to that court every two weeks until she weans her child,

[68] In the transcript, following this sentence, there is a short paragraph as follows: "**Court:** Amina Lawal delivered her baby girl who is suspected to be illegitimate on 8/1/2002. See p. 1 of the record of the Sharia Court Bakori." The transcript then goes on as above. The short paragraph seems to have been misplaced; the thought is repeated at the end of the court's ruling, below.

this prayer is also granted since the matter is now pending before this court not the Bakori court.

Under the third prayer the court hereby allows Amina not to be reporting to the court until she has weaned her child. See verse 233 of *Suratul Baqarah* which says: "Nursing mothers shall breastfeed their babies for two full years." The records of appeal show that Amina delivered her child on 8/1/2002. Relying on this verse she will wean her child on 8/1/2004. After she has weaned the child she will produce herself in this court for the purpose of hearing her appeal and the possibility of executing her sentence.[69]

This is the decision which I, Alhaji Aliyu Abdullahi Katsina, Upper Sharia Court Judge Funtua, together with my court members Alhaji Umar Ibrahim, Bello Usman and Mamuda Suleiman reached in respect of the application.

Court: Counsel for the appellant, have you heard the ruling of this court in respect of your application?

Appellant's Counsel: We have heard all that the court has said and are very happy with the just decision reached by the court.

Court: State Counsel, have you heard the ruling of this court on the application brought by counsel for the appellant?

State Counsel: Yes, the ruling is correct. We ask for a date for the appeal. This will enable me prepare for my reply.

Court: Counsel for the appellant, you heard what the State Counsel said, what do you say?

Appellant's Counsel: We are satisfied with this ruling. Any date given by the court for argument of the appeal is convenient. We apply for a certified copy of the order just made by this court, which we can file in the Bakori Sharia Court, so that that court will know that its order requiring Amina to be appearing before it every two weeks has been set aside.

Court: This matter is adjourned to 8/7/2002, for appellant's counsel to argue his appeal. The court also orders that the Sharia Court Bakori should be informed that its order requiring Amina to be reporting every two weeks has been set aside. The court hands over Amina Lawal to her guardian one Idris Ibrahim of Kurami village, who has undertaken to produce Amina Lawal after she has weaned her child or at any time the court needs her.

(f) Proceedings 8th July 2002

Court: Today, 8/7/2002, the appellant Amina Lawal and her counsel Malam Aliyu Musa Yawuri, Hauwa Ibrahim, Mrs Osabuohien Omo-Osagie and Ramatu Umar[70] are in

[69] Sic. In fact the hearing of the appeal continued the next month, and was not delayed until 2004.
[70] The organisational affiliations of Hauwa Ibrahim and Mrs Osabuohien Omo-Osagie have been noted, see n. 43 supra. Ramatu Umar was with the International Human Rights Law Group, Abuja.

court. State Counsel Malam Isma'ila Ibrahim Danladi apologised for coming to court late.

Court: Counsel to the appellant, are you ready to argue your appeal?

Appellant's Counsel: Yes we are ready.

The appellant was charged with the offence of *zina* contrary to Sharia. The court at Bakori sentenced her to *rajm* on 20/3/2002. She filed her appeal before this court on 28/3/2002, when she stated the general ground of the appeal; later she filed nine additional grounds, making ten altogether. We are filing two more grounds of appeal today being 8/7/2002, namely:

1. At the time of the judgment of the Bakori court,[71] the Katsina State Sharia Penal Code, Law No. 2 of 2001, had not yet commenced operation.

2. The decision is contrary to section 4(1) of Katsina State Sharia Court Law 2000, in that only one judge sat, heard and tried the case.

The appellant has a total of twelve grounds of appeal.

We have received the instruction of the appellant to retract her confession before the Bakori court. Her reason for the retraction is that at the time she made the confession nobody explained the offence to her and she did not know the meaning of *zina* which is an Arabic word. Also, she had never been to court before. It was in this confused state that she made the confession. Likewise, she is a village woman who is not familiar with courts and their proceedings. She relies on *Mukhtasar* vol. 2 p. 285 and *Fiqhus Sunnah* p. 423 and *Fiqhu ala Madhahibil Arba'a* vol. 1 as authorities for making this retraction. We also rely on *Jawahirul Iklili* and *Mugni* vol. 10 p. 188.

We will argue our grounds numbers 7, 2, and 3 together. A charge must of necessity be comprehensive. It must incorporate the date, time and place of commission of the offence; it must indicate the co-accused. For these we rely on *Subulus Salam*, a commentary on *Bulughul Marami*, vols. 3-4 p. 6. When Ma'iz went to the Prophet (SAW) and confessed that he had committed *zina*, the Prophet said perhaps you mean you kissed her. The Prophet explained the meaning of *zina* fully to Ma'iz. However, the charge stated against Amina Lawal on p. 5 lines 25-30 and p. 6 lines 1-25 fails to incorporate this comprehensive explanation of *zina*. The word *zina* is an Arabic term while the appellant is Hausa by tribe. Even though Ma'iz was an Arab, the Prophet (SAW) asked him to define *zina*. Ma'iz gave a comprehensive definition of the word. Furthermore, the charge failed to indicate the place where offence was committed. Instead the court on p. 6 lines 1-22 stated in its charge that it was fully satisfied that the appellant had committed the offence of *zina* as charged. "This court agrees and it is satisfied that Amina has committed *zina*."

We next draw the attention of the court to p. 6 lines 20-22 of the trial court record where the court passed its judgment without giving the appellant an opportunity to

[71] Sic. Of course the Katsina State Sharia Penal Code Law had commenced operation at the time of the judgment of the Bakori court (20th March 2002). What appellant's counsel must have intended to say, and perhaps did say, was "at the time the offence was committed…." This point is confused subsequently as well.

defend herself. See also p. 13 lines 3-18 where the court passed judgment for a second time. This means that the court passed two separate judgments – the first before the appellant was given the opportunity to defend herself, and the second in explaining the sentence. But it is necessary for the court to hear prosecution witnesses and to give the accused person the right to defend himself before it passes its judgment. This error committed by the court has resulted in the breach of the appellant's fundamental right to a fair hearing as granted by section 36(1) and (6) of the 1999 Constitution. Furthermore, the appellant's plea was not taken, see p. 6 lines 26-28 and p. 7 line 1. The court failed to take the appellant's plea. This is contrary to what occurred in *Hadith Ma'iz* where the Holy Prophet (SAW) ask Ma'iz whether he knew the meaning of *zina*. "Did you commit this offence?" "Are you a *muhsin*?" The Prophet did not convict Ma'iz until he had given him all possible opportunities to defend himself. In the matter at hand, contrary to the practice adopted by the Prophet, the court passed its judgment without hearing the appellant in her defence. We rely on *Al-Tashri'u al-Jina'i*. We submit that it is necessary that the court should ask Amina all the questions the Holy Prophet asked Ma'iz, notwithstanding Amina's alleged confession. The Bakori court judge failed to ask these questions. After the Prophet was satisfied that Ma'iz was sane, all the same he asked the above questions. Amina was not asked these question. This error has also resulted in the breach of section 36(5) of the 1999 Constitution.

Section 36(6)(b) of the 1999 Constitution gives the appellant the right to receive every assistance and sufficient time to prepare for her defence. She was denied this right to defend herself.

As to our grounds of appeal numbers 6 and 9: at [page number omitted] line 20-25, the trial court held that Amina was a mature woman, a Muslim, sane, and one who had previously been married. It was based on this finding that the court sentenced her to *rajm*. However, throughout the record, Amina never said she was previously married. The record does not show that Amina is an adult or sane. The court based its judgment on mere speculation not on evidence. It is a mere speculation. In *Ihkamul Ahkam* it is stated that a judge shall base his judgment on the evidence adduced before him. No evidence on these points was adduced in this case.

Besides, the law is not concerned with evidence of previous marriage. What is required is evidence of *ihsan* – i.e. that the accused is a sane, adult Muslim who had contracted a valid marriage which was validly consummated. It is possible to have a valid marriage but if it is consummated under conditions not approved by Islam the parties thereto will not possess the status of *ihsan*. Therefore there is a difference between marriage and *ihsan*. We rely on *Subulus Salam* vol. 3-4 pp. 6-7; *As'halul Madarik* vol. 3 p. 189; and *Bidayatul Mujtahid* vol. 2 p. 326. We also rely on *Adawi* vol. 2 p. 58. It is necessary to adduce evidence on every element of *ihsan*. The failure to do that has occasioned a serious error. Because of this error it is necessary for this court to reverse the judgment of the trial court.

The lower court relied heavily on the fact that the appellant delivered a baby when she was not married. The child was tendered in evidence, see p. 8 lines 11-14, p. 9 lines 2-28, p. 10 lines 1-29, and p. 12 lines 1-13. In the first place the law refers to pregnancy not the birth of a child. Therefore, the child tendered does not prove the offence of *zina*. Furthermore, pregnancy itself is evidence only against a woman who is not under the

authority of a husband. Therefore, before pregnancy becomes relevant, the court must investigate whether the accused had contracted a previous marriage. If she did, the court must find out when the marriage was dissolved. According to Imam Malik, if the marriage was dissolved within the last five years, then the pregnancy can be affiliated to the accused's former husband. We rely on *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 459. There is a presumption that the former husband of a pregnant woman whose marriage was dissolved within five years is responsible for the pregnancy. The trial court found that Amina delivered her child in the tenth month of her divorce. Therefore we ask this court to set aside the judgment of the Bakori court.

On ground of appeal number 8: In the complaint appearing on p. 1 lines 14-21 and 24-25, and in the charge, p. 5 lines 1, 6, 8, 17 and 22, the lower court used the term *zina* eleven times. However, throughout the proceedings this Arabic term was never interpreted to the appellant. Likewise, the offence of *zina* was never interpreted or explained to her. It is necessary that the accused person fully understand the charge he is facing before he is convicted thereon. See section 36(6)(a) of the 1999 Constitution. It is true that Amina confessed to committing *zina*, see p. 1. However, at p. 5 of the record, when the court asked Amina whether it is true that she committed *zina*, she said yes, somebody deceived her into believing that he was going to marry her. Here it is clear that she could not have made any confession since she claimed she was deceived into the act by false promises of marriage. She committed the act following this deception. We rely on *Fiqhus Sunnah* vol. II p. 371. Amina assumed that since there was a promise of marriage it was not wrong to commit the act.

The trial court failed to observe the mandatory *i'izar*. See p. 7 line 22. We rely on *Ihkamul Ahkam* p. 25. We also rely on *Bahjah* vol. I p. 65.

We will now argue our additional ground of appeal number 1 which was filed today. Section 1 of the Katsina State Sharia Penal Code Law, Number 2 of 2001, provides that the code shall commence operation on 20/6/2001. The appellant was sentenced to *rajm* pursuant to section 124 of the Sharia Penal Code. She was arraigned on 15/1/2002. Page 1 lines 30-35 of the record indicate that the appellant delivered her child eight days before she was arraigned, on 8/1/2002. However, the date of birth cannot be the date of commission of the offence. Birth of the child is not itself a criminal offence, it is the act of *zina* that is an offence. There was no evidence before this court showing that at the time the appellant committed the offence the Sharia Penal Code Law had commenced operation. We know that normal human pregnancies take nine months. If we subtract nine months from 8/1/2002, it will give us somewhere between March and April of the year 2001, that is about three months before the Katsina State Sharia Penal Code Law commenced operation. Section 4(9) of the 1999 Constitution provides that neither the National Assembly nor a House of Assembly shall, in relation to any criminal offence, have power to make any law which shall have retrospective effect. Similarly, the Qur'an also says that no one can be guilty of an offence until and unless a messenger has been sent to him.

On our second additional ground of appeal which we filed today: Section 4(1) of the Katsina State Sharia Court Law 2000 provides that in any trial before a Sharia Court, a judge shall be assisted by two court members: that is when a proper quorum is formed. The trial court was presided over by one judge throughout the proceedings without the

assistance of any court member. Therefore we ask this Honourable Court to set aside the judgment of the Bakori court.

We realise that Katsina State does not have any Sharia Criminal Procedure Code. It is the Criminal Procedure Code that shows to the accused person the steps he has to take in defending himself against the charge he is facing. Therefore, the appellant did not know what procedure to adopt to defend herself. We submit that it is extremely difficult to have a fair hearing in the circumstances.

Section 36(6)(b) of the 1999 Constitution requires that an accused be given adequate time and facilities for the preparation of his defence. Amina was denied this right. It is clear that a lot of errors were committed in the proceedings before the Bakori court. A lot of procedural rules and constitutional provisions were breached. We urge this court to allow this appeal and set aside the judgment of the Bakori court and discharge the appellant.

Court: State Counsel, have you heard the argument of appellant's counsel?

State Counsel: Yes I did. I am asking for time within which to prepare my reply.

Court: Counsel to appellant what do you say?

Appellant's Counsel: We have a great distance to travel to come here, we urge the court to reconsider this application.

Court: State Counsel what do you say?

State Counsel: I am not ready with my reply. I therefore need time.

Court: The matter is adjourned to 5/8/2002, to give State Counsel time to prepare his reply.

(g) Proceedings 5th August 2002

Court: Today 5/8/2002 the appellant Amina Lawal together with her three lawyers Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. State Counsel Isma'ila Danladi is also in court. The matter was adjourned for State Counsel to prepare his reply.

Court: State Counsel are you ready with your reply?

State Counsel: Yes, I am ready.

Counsel for the appellant informed the court that they were retracting the confession made by the appellant before the Bakori court based on the following grounds.

First, he explained that the appellant did not understand the word *zina* which is an Arabic term. To the best of our understanding this is not a very good ground. Although the word *zina* is Arabic, a careful perusal of the record of the lower court will show that the appellant understood the meaning of *zina*, even though it is an Arabic term. See p. 1 lines 7-32, p. 6 lines 27-28 and p. 7 line 1. This will satisfy the court that the appellant understood the meaning of *zina*. Furthermore, throughout the proceedings the appellant did not inform the court that she did not understand the meaning of *zina*.

On their second ground they argued that Amina had never been before a court before she was arraigned, that she was confused, and it was amidst this confusion that

she confessed to the offence. Again I think this is merely the opinion of appellant's counsel. The fact that this was her first appearance in court cannot be a ground for any confusion. Her co-accused answered his charges even though it is not indicated that he had ever before appeared before a court.

Finally, counsel argued that the appellant is a villager. The fact that a person is a villager cannot be a defence in law, especially as the village of Kurami is not far away from Funtua. It has a school and other utilities. In sum, there is no ground for retraction of appellant's confession.

Appellant's counsel submitted that the accused should be informed of the charge he is facing, the date and place of the offence, and so on. He relied on *Hadith Ma'iz*. We submit that *Hadith Ma'iz* is not relevant authority: it is distinguishable from the facts of this case. Ma'iz reported himself to the Holy Prophet (SAW), without waiting for anybody to arrest and arraign him. Ma'iz's conduct was strange: that is why the Prophet asked him whether he was sane. The Prophet also asked him about the offence he said he had committed and the date and the place he committed it. That is why when the Holy Prophet (SAW) heard all this he ordered Ma'iz to be stoned to death. I refer also to *Bulughul Marami* hadith no. 1232 where an Arab came to the Holy Prophet and offered him a female slave and one hundred goats so that his son would not be killed for committing *zina* with a woman. Since the boy had not contracted a previous marriage he was given one hundred strokes of the cane. The Prophet (SAW) did not accept the goats or the female slave. What I want to emphasise from this hadith is that the Prophet then ordered that they should go back to the woman and enquire if she had committed the offence, and said that if she had done so, she should be stoned to death. See also hadith no. 1236 in *Bulughul Marami*. In short all the reasons adduced for the retraction of the appellant's confession are not supported by the law.

Appellant's counsel also argued that the Sharia Court Bakori failed to give the appellant the opportunity to defend herself. He said this was contrary to section 36(1)and (6) of the 1999 Constitution. This is also not correct. The appellant was asked whether she heard the charge against her. She said she heard the charge and she pleaded guilty to it. The question asked afforded the appellant the opportunity to bring forth her defence if she had one. Instead she said she had no defence. This court should not be intimidated by counsel's citation of the provisions of the Constitution. This case is based on the laws of Allah (SWT). The laws of Allah take precedence over any argument that may be proffered in this case.[72]

Counsel for the appellant submitted that the appellant was an adult and a divorcee, that the lower court failed to consider this.[73] At p. 1 line 19 of the record it is shown that she had previously contracted a marriage, but she was later divorced. When she was arraigned before the court she did not claim that she was insane. It is the appellant who ought to have raised this defence, it is not for her counsel to raise it now.

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[72] "Don haka ina ganin babu wata barazana da za'ayi ma wannan kotu da Constitution, wanda wannan Sharia ta Allah (SWT) ce kuma abinda yace shine mafi karfi da girma da duk wata magana da za'a kawo akan ita wannan Sharia."

[73] This sentence accurately translates the Hausa. What State Counsel evidently meant to say was that appellant's counsel submitted that there was no evidence before the trial court that the appellant was an adult, sane, divorced, etc.

Counsel submitted that the appellant's pregnancy is irrelevant. I believe this is wrong. It is contrary to human nature for a woman to conceive without a man. Counsel said it is possible that the pregnancy is for the appellant's former husband. This is a mere allegation, because it is not the former husband who named the baby. Even if he didn't take the child into his custody he is supposed to be responsible for its upkeep and other things.[74]

Appellant's counsel also submitted that Amina was deceived with false promises of marriage by the person accused jointly with her, Yahayya Muhammed. This is also not a good reason for reversal of the judgment. It only explains why she committed the offence. In Islamic law ignorance does not excuse an offence.

Counsel also submitted that the lower court did not observe *i'izar*. This is also not correct. Careful perusal of the record at p. 11 line 11 will show what actually transpired.

Counsel for the appellant argued that at the time the appellant was tried [sic], the Sharia law[75] had not yet commenced operation. This is not true because this case was filed on 15/1/2002. It is not true that the trial commenced eleven months before the commencement of Sharia [sic], this is also not true. The Sharia law commenced operation in August 2000.[76] Therefore it is not correct to say that the appellant committed the offence before the commencement of Sharia law.

Counsel further argued that only one judge heard and determined the case [in contravention of section 4(1) of the Sharia Courts Law]. We contest this on the following grounds. To begin with, the Hadiths of the Holy Prophet do not provide that a judge must sit with members. So section 4(1) is contrary to the provision of section 3(1) of Katsina State Law number 6 of 2000 [the Islamic Penal System (Adoption) Law] which enjoins that a judge shall base his judgment on the Qur'an and Hadiths. The Sharia Courts Law also does not provide that where one judge sits and hears a case, his decision is null and void.

In summary, the position of Islamic law is that a criminal case is proved by evidence or by the confession of the accused person. The appellant made a voluntary confession. Relying on hadiths no. 1232 and 1236 of *Bulughul Marami* we submit that the appellant received a fair hearing. That is if the appellant has faith in Allah and in the day of judgment. We are only interested in seeing that justice is done to a Muslim as enjoined by Allah (SWT). Where a judge adjudicates according to the rules set down by Allah, it is not befitting for a Muslim to raise objection. We urge this Honourable Court to consider our submissions and affirm the sentence passed by the Bakori trial court.

Court: Counsel for the appellant, you heard the reply of the State Counsel?

Appellant's Counsel: Yes. We ask for a last address.

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[74] The sense of this argument seems to be that if Amina's pregnancy had been for the former husband she would have informed him, and he would then have come and named the baby and assumed his other duties toward it.

[75] "*Shariar musulunci*".

[76] This is the date on which the Katsina State Sharia Courts Law and Islamic Penal System (Adoption) Law, Nos. 5 and 6 of 2000 respectively, both came into effect.

State Counsel misconceived the law. It is the duty of the court to explain to the accused the charge he is facing. It is not for the accused to beg the court for these explanations.

Be that as it may, the appellant wishes to withdraw her confession. Based on *Fiqhus Sunnah* vol. 3 p. 423, an accused has a right to withdraw his confession, and does not have to adduce any reason for the retraction. Another view of some Muslim jurists is that the accused must adduce reasons for his retraction. Even if that view is adopted, the failure of the court to explain to appellant the meaning of the offence she was charged with is sufficient reason for her retraction. The need to explain a charge to an accused is supported by both Islamic and English law. The State Counsel misconceived this.

It is also wrong to insist that the precedent set in *Hadith Ma'iz* should not be applied; that is that the appellant needed not to be asked if she was sane. The hadith in *Bulughul Marami* relied upon by the State Counsel answered a different question: may the court accept material property from a convict in substitution of the prescribed punishment? This was the issue before the Holy Prophet who ruled that a judge shall not accept any property but must inflict or award the prescribed punishment on the convict. That being the case the principle enunciated in *Hadith Ma'iz* must be applied. The case before the court involved the commission of *zina*. Failure to apply one out of the many procedural steps is sufficient to render the whole trial a nullity.

State Counsel pointed out that the appellant was asked "Do you understand the charge?" This does not satisfy the requirement of section 36(1) and (6) of the Constitution. Counsel also submitted that the appellant was an adult person because she had contracted a previous marriage. This is not the issue we raised. We asked for the determination of whether the appellant was a *muhsinat*. There is difference between *ihsan* on the one hand and the status of marriage on the other. It is possible for a woman to contract a valid marriage but still fail to be a *muhsinat*. The trial court did not make any finding on whether the appellant is a *muhsinat*. This failure rendered the proceeding a nullity. See *Bidayatul Mujtahid* vol. 2 p. 326. There is no evidence that the appellant is a *muhsinat*. Also, a judge cannot base his judgment on speculation. It has to be based on evidence. A judgment must be based on proper inquiries and evidence.

According to our submission, the Katsina State House of Assembly is the organ vested with the powers to enact laws. The Assembly enacted the Sharia Court Law 2000 which requires a Sharia Court judge to sit with two court members. We rely on Section 4(1) of the law. To our knowledge this is the present law; it has not been amended.

In the circumstances this court should set aside the judgment of Bakori Sharia Court.

Court: Counsel for the appellant Hauwa Ibrahim.

Mrs Ibrahim: I wish to make further explanations. In our research on Sharia law, we went to Ahmadu Bello University Zaria. We obtained this law from other available laws which Professor Na'iya Sada said exist. He listed the following:[77]

[77] "We obtained this law …"; "He listed the following …": sic: it is unclear what law or what authority are being referred to.

CONDITIONS OF PROOF OF ADULTERY[78]

1. The accused is an adult.
2. He or she is sane.
3. He or she is a Muslim.
4. The act was done voluntarily and without coercion.
5. The act was committed with a human being not an animal.
6. The accused has reached the required age.
7. The persons accused had no right or authority over each other; the man is aware that the woman is *haram* to him.
8. The accused is not a trusted unbeliever.
9. The woman accused is alive not dead.

These conditions can be found in *Risala*, *Mukhtasar* and other books.

For my second comment, I wish to comment on the submission of State Counsel. No law is above the law of Allah. State Counsel should examine Katsina State Sharia Law No. 5 of 2000. This talk of one law having precedence over another, we didn't mention that.[79]

Finally, where a person is charged with an offence, what does the law require from the court in the case? Section 10 of the Sharia Law provides the jurisdiction of the court over the accused person. The section states the date of the commencement of the law; did we cite a different date?[80] We urge the court to consider this so as to do justice in this case.

State Counsel: I wish to reply. Where an accused confesses to the offence, is it necessary to explain the charge to him? I did not say the appellant understood the charge. The record will show what I said.

Court: Case adjourned to 19/8/2002 for judgment.

(h) Proceedings 19th August 2002

Court: Today is 19/8/2002. The appellant Amina Lawal, her counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. State Counsel Isma'ila Danladi is also in court. The appeal was adjourned to today 19/8/2002 for judgment.

The appeal is from the decision of Sharia Court Bakori. The case before the court was between the police prosecutor, one Cpl. Idris Adamu, and Amina Lawal and Yahayya Muhammed. The prosecutor arraigned the accused persons who reside at Kurami on an information alleging the offence of *zina* against them. The information

[78] The heading, including the word 'adultery', is given in English in the judgment.
[79] This is the best we can make of the Hausa transcript, which reads as follows: "A bayani na biyu ina so in tofa yawu akan abinda lawyer na Gwamnati yace to babu doka da ta fi dokar Allah to amma in ya duba Sharia Law No. 5 2000 Katsina State, saboda haka maganar doka ce take gaban wata doka, to mu bamu ambaci haka ba."
[80] Sic. The words "Sharia Law" are in English. Which law is intended is not clear. Section 10 of neither Katsina State's Sharia Courts Law No. 5 of 2000 nor its Sharia Penal Code Law No. 2 of 2001 has anything to do with Sharia Court jurisdiction, nor does either state the date of commencement of the statute.

stated that on 14/1/2002 a police officer named Rabiu Daudu and one other, of the investigation department of the Nigeria Police Bakori, arrested the accused persons on allegations of committing *zina* with each other. It was alleged that they committed the offence right from the time when they began courting some eleven months ago. As a result of the *zina* they committed Amina Lawal delivered a baby girl. Their act is contrary to Katsina State Sharia Law.

The trial court asked the appellant whether the information read against her was true. She answered, "Yes I heard, and it is true I committed this offence of *zina* because this is the girl I delivered about nine days ago i.e. on 8/1/2002." The court asked Amina Lawal, "With whom did you commit this offence?" Amina replied, "I committed the offence with Yahayya Muhammed". The court turned to the 2nd accused Yahayya Muhammed and asked, "Yahayya Muhammed, you heard the information against you, what do you say?" Yahayya Muhammed replied, "I heard the information against me but it is not true, I did not commit *zina* with Amina Lawal." He further stated, "I know I was seeking her hand in marriage but I never had sex with her. It was after she delivered that I was summoned to the house of the village head of Kurami where it was alleged that I committed *zina* with her. I denied it. I was taken to the police station. The police said I either accept the offence or they will break me into pieces. I did not commit the offence."

The court then turned to the prosecutor. "You heard what Yahayya Muhammed said, what do you say?" He replied, "I heard what he said but that is not true. I have witnesses and I want the court to allow me to call them." The court granted the application and adjourned the case to 29/1/2002 for the police to complete their investigation. The accused were remanded in prison custody.

On 30/1/2002 the prosecutor together with the accused persons were in court for hearing. The court asked the prosecutor whether he was ready with his witnesses. He said, "Yes I have one evidence, that is the baby girl which was born following the *zina* they committed. It is yet to be given a name." The court admitted the baby girl aged 25 days into evidence as Exhibit 1. The court asked the appellant, "Amina, is this the girl you delivered following the *zina* you committed?" She said yes. The court asked her again, "Do you agree that you committed *zina* as a result of which you delivered this girl?" She said "Yes that is so. It was Yahayya Muhammed who deceived me with false promises that he would marry me about eleven months ago when he started courting me." The court then asked the 2nd accused, "Yahayya Muhammed, have you seen the child now aged 25 days?" He replied, "Yes I see her." "Is she the girl you fathered through *zina*?" He replied, "I don't agree. She is being mischievous." The court asked him, "Is it true you were courting Amina?" He said, "That is correct. I courted her some eleven months ago." "Do you have witnesses who know you did not commit *zina* with Amina?" He replied, "I don't have witnesses." The court said, "Are you prepared to swear with the Qur'an that you did not commit *zina* with Amina Lawal as a result of which you fathered this girl?" He said "I will swear." He swore by the Qur'an that he did not commit *zina* with Amina Lawal. The Bakori court turned to the prosecutor. "I saw the 2nd accused take the oath. What do you say?" He replied, "I agree. Since he swore with the Qur'an I have no objection." The Sharia Court Bakori administered the oath relying on the *Tuhfa* as translated into Hausa by Malam Usman Daura, p. 89. It is called

the "oath of *tuhuma*".[81] After he took the oath, the court discharged the 2nd accused. The court then charged the 1st accused. The court said:

> The court charges you Amina Lawal with the offence of *zina* to which you confessed before this court on 15/1/2002 where you said you committed the offence and as a result thereof you delivered a baby girl which the prosecutor tendered in evidence today 30/1/2002. Therefore this court is satisfied and is convinced that you committed this offence of *zina* based on your confession before the court. The verse states that proof by confession is better than proof by evidence. The other additional evidence is the daughter you delivered.

The court proceeded to say:

> Since you accepted that you committed *zina* following which you give birth this baby while you are sane and a Muslim, a divorcee not a virgin, therefore court accepts and is satisfied that you committed the offence. Therefore the charge is very strong against you Amina Lawal Kurami.

The court asked her whether she understood the meaning of the charge. She said she understood and she agreed. The court asked the prosecutor whether the accused had committed similar offences before. He answered that to the best of this knowledge it was her first offence. The court adjourned pending the time Amina Lawal completed the traditional maternity hot bath and granted her bail to one Idris.

On 20/3/2002 the court sat for judgment. The court asked Amina Lawal if she had named the baby girl. She said she had named the baby girl Wasila. The court thereafter convicted her based on her confession to the offence and the evidence of the baby which she delivered following the commission of *zina*. The judge relied on *Suratul Bani Isra'il* verse 32 which prohibits the act of *zina* and enjoins Muslims not to come near it. The judge also relied on *Risala* p. 128, which provides that for a *muhsin* who is convicted of *zina*, the punishment is *rajm*. He also relied on hadith no. 14. The trial court judge convicted and sentenced Amina Lawal to be stoned to death based on the aforementioned authorities. This punishment is provided under section 125(b) of the Katsina State Sharia Penal Code. The sentence was to be executed after Amina had weaned her baby girl. The court gave Amina the opportunity to appeal if she was not satisfied with the judgment.

Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe were the lawyers who filed the appeal on behalf of Amina Lawal. They filed the following grounds of appeal:

1. That the appellant allegedly did not understand the word *zina*, which is an Arabic word, and the Bakori court did not explain it to her.

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[81] The relevant passage of Usman Daura's Hausa *Tuhfa* says (as translated by Sama'ila A. Mohammed): "The oaths upon which an alkali may make judgment are divided into four. (i) **Oath of tuhuma**. This oath is administered on a person brought before a court on an allegation of commission of a crime, when the accused denies he committed the crime and the prosecutor cannot bring witnesses to support the accusation. The alkali shall offer the accused the opportunity to take an oath, and if he does shall discharge him…." At p. 92 of the same authority the following appears: "This is the oath which is offered to an accused upon an unproven allegation."

2. That the Bakori court convicted the appellant before the offence was proved against her.
3. That the Bakori court sentenced the appellant to *rajm* without taking her plea on the charge and also did not give the appellant the opportunity to defend herself. They relied on Section 36(1) and (6) of the 1999 Constitution.
4. That the Bakori court convicted the appellant without observing *i'izar*.
5. That the judgment of the Bakori court is baseless because neither the police nor any other authority has the competence to initiate criminal proceedings against a Muslim for the offence of *zina*.
6. That the Sharia Court Bakori erred when it convicted the appellant when there was no evidence before it that the appellant was a *muhsinat* meaning that she had contracted a previous valid marriage.
7. That the Sharia Court Bakori sentenced the appellant to *rajm* on a charge that is meaningless.
8. That the Sharia Court Bakori erred when it convicted the appellant based upon the appellant's confession when the appellant did not make any confession before the court.
9. That the Sharia Court Bakori erred when it sentenced the appellant to *rajm* relying on the ground that the appellant delivered a baby when she was not married, when this is not an evidence of *zina* since the appellant's former husband may be the one responsible for the pregnancy.
10. That at the time the Sharia Court Bakori passed its judgment on appellant [sic], Sharia Law No. 2 had not commenced operation.[82]
11. That the judgment of the Sharia Court Bakori is contrary to section 4(1) of Katsina State Sharia Law because a single judge tried the case.

The State Counsel Isma'ila Danladi replied to these grounds of appeal as follows.

Ground of appeal number 1 alleges that Amina Lawal did not understand the word *zina* because it is an Arabic term. To the best of our understanding this is not a strong argument, especially if regard is given to p. 1 lines 7- 32 and pp. 6 to 7 lines 27-28 of the record. This will show to this court that the appellant knew the meaning of *zina*. Furthermore, throughout the proceedings the appellant did not say she did not understand the meaning of *zina*, nor did she complain to the Court that she did not understand the meaning of *zina*.

Ground number 2 alleges that the lower court convicted the appellant before the offence was proved against her. This is also not true. The offence was indeed proved against her, see p. 1 line 5 where the appellant confessed to the offence.

On ground number 3, they submitted that the court sentenced the appellant to *rajm* without first taking her plea, and that the court failed to allow the appellant to adduce evidence in her own defence. Here the need to call defence witness does not arise, because she had already confessed to the offence. See the record of the trial court p. 1 line 3.

[82] The reference is to the Katsina State Sharia Penal Code Law, No. 2 of 2001.

On ground number 4, they complained that the court convicted the appellant without first observing *i'izar*. This is not true. See p. 12 line 14 of the record of the Bakori court.

On ground number 5, they submitted that the judgment of the Sharia Court Bakori is null and void because neither the police nor any other authority had the competence to arraign a Muslim on the offence of *zina*. This is also not correct, because Islam enjoins Muslims to stop the commission of any offence, either in person or by reporting to the relevant authority so that action can be taken.

They submitted on ground number 6 that the Sharia Court Bakori erred when it sentenced the appellant to *rajm* in the absence of evidence that the appellant was a *muhsinat*. This is not true, it is the mere opinion of the lawyer.

On ground number 7, they submitted that the Sharia Court Bakori erred by sentencing the appellant to *rajm* on a meaningless charge. The court was dealing with Islamic law. If the accused person confesses to the offence that is all that is required.

On ground number 8, they argued that the trial court erred when it convicted the appellant in reliance on the appellant's confession when the appellant did not confess before the court. This also is not true. See p. one line 3 of the record of proceedings of the lower court. You will see where Amina confessed to the offence.

On ground number 9, they said the Sharia Court Bakori erred when it sentenced the appellant to *rajm* based on the fact that she gave birth to a baby when she was not married, when this is not evidence of *zina* against the appellant since it is possible her former husband is responsible for her pregnancy. If that is so, why did she not give the child to the former husband? Instead when the matter was brought to the court she claimed that it was Yahayya Muhammed who was responsible. She further stated that she was together with Yahayya Muhammed for eleven months committing the offence.

On ground number 10, they argued that at the time the Sharia Court Bakori passed it judgment against the appellant [sic] Sharia Law No. 2 had not commenced operation. This is not true because the case was filed on 15/1/2002 while the law commenced operation in August 2000.[83]

On their ground number 11, they contended that the judgment of the Sharia Court Bakori is contrary to section 4(1) of the Katsina State Sharia Courts Law because only one judge heard the matter without the assistance of court members. Counsel for appellant should know that judges in Katsina State base their judgments on the rule of Sharia and Islamic Law as provided by section 8 of the Sharia Courts Law which provides that the courts are bound by the following laws:

1. The Qur'an;
2. Hadiths of the Holy Prophet;

[83] Again the reference to "Sharia Law No. 2" is presumably to the Katsina State Sharia Penal Code Law, No. 2 of 2001. It commenced operation on 20 June 2001, see §1 thereof. As has previously been noted two other laws, the Sharia Courts Law, No. 5 of 2000, and the Islamic Penal System (Adoption) Law, No. 6 of 2000, both came into operation on 1st August 2000. These various laws are confused throughout.

3. *Ijma*;
4. *Qiyas;*
5. *Ijtihad;*
6. *Al-Urf.*

The Sharia Court Bakori based its judgment on the above and the law of Allah takes precedence over any other law.

Judgment

We are of the view that the grounds of appeal complaining that the appellant did not understand the word *zina* which is an Arabic term is not a strong ground. Reference to p. 3 line 16 will show where the appellant confessed that she conceived and delivered the child through *zina*. This is clear confession on her part. We refer to *Muwatta Malik* p. 731 where it is stated:

> The son of Hattab said, "The book of Allah provides for the stoning to death of a Muslim adulterer or adulteress provided they posses the status of *ihsan"*,

that is, provided they have once contracted a valid marriage. For conviction of *zina*, any one of the following three conditions must be satisfied:

> 1. Evidence of four witnesses as required by Sharia. The witnesses must be: (a) Muslim, (b) adult, (c) sane, (d) just, and (e) they must have witnessed the actual act at the same time.
> 2. The manifestation of pregnancy in a woman who is not married.
> 3. *Ikirari* – confession i.e. voluntary admission of the offence.

The appellant confessed to the offence at p. 3 line 16 of the record.

Another authority can be found in [*Sahihul Bukhari* vol. 8 p. 536 of the English translation]:[84]

> The Prophet (SAW) said: "By Him in Whose Hand my soul is, I will judge you according to the Laws of Allah (SWT). Your one-hundred sheep and the slave are to be returned to you, and your son has to receive one-hundred lashes and be exiled for one year."

From there the Prophet instructed Unaiz Al-Aslam to go to the wife of the master of the young man who received the punishment to ask her if indeed she had committed *zina* with her servant; if she confessed she would be subjected to *rajm*. Here the Holy Prophet gave a directive to Unaiz al-Aslam. When the lady was confronted she confessed to committing *zina* with her servant. This authority clearly shows that a *muhsin* male or female will receive *rajm* once he confesses to committing *zina*. See also *Muwatta Malik* p. 730 which is a similar authority with the one of [*Sahihul Bukhari* vol. 8 p. 536].[85]

In their ground of appeal number 2, counsel for the appellant contended that the appellant was convicted before she pleaded to the charge. This is not correct. The court

[84] The Hausa text has "can be found in *Ibn Kathir* p. 381". We cannot locate this hadith in the works of Ibn Kathir, although it is in the place we have cited.
[85] Again the Hausa text refers to *Ibn Kathir*; see previous note.

asked her whether she agreed that she had committed the offence of *zina*. She said she agreed. She pleaded guilty to the offence. See p. 1 line 5 of the record.

In their ground number 3, counsel contended that the trial court sentenced the appellant to *rajm* without taking her plea, and furthermore, that the trial court did not give the appellant the opportunity to defend herself. This is not correct. The trial court did all that it was required to do. See pp. 1 and 3 of the record. Since she had already confessed to the offence there was no need for appellant to enter her defence.

On ground number 4, counsel argued that the trial court convicted the appellant without first conducting the *i'izar*. This is not so. See p. 17 line 14 of the record. The trial court conducted proper *i'izar* when it asked her whether she had anything she wanted to say, and she replied that she had nothing to say but she was seeking for forgiveness.

On ground number 5, counsel argued that the judgment of the trial court was null and void because neither the police nor any other authority has the competence to initiate criminal proceedings for the offence of *zina* against a Muslim. Katsina State has fully implemented Sharia, and the police prosecutor is a Muslim. See the hadith of the Prophet which says whoever witnesses an abomination being committed should stop it by his hand; if he has no power to do that, he should stop it by his tongue; and if he has no power to do that he should show that he disapproves it.

On ground number 6, they argued that the trial court erred in sentencing the appellant to *rajm* when there was no evidence the appellant was a *muhsinat*. This is not correct, because appellant's counsel did not bring any evidence to prove that the appellant was not a *muhsinat*. Therefore this is a mere opinion of counsel.

On ground number 7, they contended that the trial court erred in sentencing the appellant to *rajm* on a charge that is meaningless. The proceedings of the trial court were conducted according to the procedure under Islamic law. Whenever an accused person is convicted for the offence of *zina*, he is convicted immediately he confesses to the commission of the offence. See *Subulus Salam* vol. IV p. 1207 where it states: "An adulterer or an adulteress who is a *muhsin* who confesses to the offence even if it is only once shall receive the punishment of *rajm*."

On ground number 8, appellant's counsel argued that the trial court erred in convicting appellant based upon her confession when she did not confess before the court. Did counsel note pp. 1 and 3 of the record? If he did he will see where appellant confessed.

On ground number 9, counsel submitted that the lower court erred in sentencing the appellant to *rajm* on the ground that she gave birth to the baby when she was not married, when this is not an evidence of *zina* against the appellant. Counsel said it was possible the appellant's former husband is responsible for the pregnancy. However, the pregnancy and birth of the baby are evidence of *zina* against the appellant. We say so based on *Subulus Salam* p. 1213 where it is stated: "Pregnancy is an evidence of *zina* against a woman who is not married nor under the authority of any master." Furthermore, Amina did not claim that her former husband is responsible for her pregnancy nor did the former husband accept responsibility for the pregnancy. Therefore counsel's argument that the pregnancy is not a proof of *zina* goes contrary to this authority in *Subulus Salam*. See also the authority in *Fiqhus Sunnah* p. 346: "Evidence,

confession, or manifestation of pregnancy in an unmarried woman are the means of proof of the offence of *zina*."

On ground number 10, counsel contended that when the appellant was convicted Katsina State Sharia Court Law No. 2 [sic] had not yet commenced operation. Could it be that counsel forgot that the criminal complaint was filed before the trial court on 15/1/2002, and that the Katsina State Sharia Law No. 2 [sic] commenced operation in August 2000 [sic]? Therefore the contention that Law No. 2 had not commenced operation is not true.

On their ground of appeal number 11, they argued that the judgment of the trial court against the appellant was contrary to section 4 of the Katsina State Sharia Courts Law in that only one judge tried the appellant without the assistance of court members. However, the trial was conducted under Sharia law and procedure. Section 8 of the Katsina State Sharia Courts Law provides that courts are bound by the following laws in their trials:

1. The Qur'an;
2. The Hadiths of the Holy Prophet;
3. *Ijmah;*
4. *Qiyas;*
5. *Ijtihad;*
6. *Al-Urf.*

This provision is in due compliance with the requirements of Islamic law. All Sharia Courts are bound by the provisions of above-stated laws. The judgment of the trial court is not in conflict with the aforesaid laws.

Furthermore, the punishment for *zina* is *rajm* once the accused is free and a *muhsin*. In *Risala* of Abu Zayd it is stated that the prescribed punishment is *rajm*. See *Risala* p. 128, where it is stated: "A free-born person who is a *muhsin* who commits *zina* shall receive the punishment of *rajm*. Where the accused are not *muhsin* each shall receive 100 strokes of the cane." See also Qur'an *Suratul Nur* verse 2 where it is stated that:

> The *zaniyah* and the *zani*, flog each of them with a hundred stripes.

We have been talking of *zina* on several occasions. The offence of *zina* is defined in *Jawahirul Iklili* vol. 2 p. 283 as follows:

> *Zina* is committed when a Muslim who is a *mukallaf* has sexual intercourse with a person over whom he or she has no sexual rights.

For example, voluntary intercourse even if it is between a man and a man.

Appellant's counsel also submitted that they had retracted the confession of the appellant. This is not possible. See [*Sahihul Bukhari* vol. 8 p. 512 of the English translation][86] where is stated that:

> Intercession is not recommended in the matter of legal punishment after the case has been filed with the authorities.[87]

[86] The Hausa text has "See *Ibn Kathir* p. 319". We cannot locate this statement in Ibn Kathir, although it is in the place we have cited.

See also the hadith in *Misbahuzzujaj*. Implementing Allah's prescribed punishment is worthier than receiving a forty day rain in towns of Allah.

I'izar

Court: Counsel to the appellant, before the court passes its judgment, do you want to say anything?

Counsel: We have nothing to say. However, if we are not satisfied with the judgment we shall file an appeal.

Court: State Counsel, do you wish to say anything before the court passes its judgment?

Counsel: I have nothing to say.

Judgment

Based on the aforementioned grounds and the aforementioned authorities from various books that we relied on, I, Alhaji Aliyu Abdullah, Katsina Upper Sharia Court Judge Funtua, together with my three court members Alhaji Umar Ibrahim, Alhaji Bello Usman and Alhaji Mamuda Sulaiman do hereby affirm the judgment of the Sharia Court Bakori. We confirm the sentence of *rajm* on you Amina Lawal Kurami and the sentence shall be carried out the moment you wean your child. You shall stay with your guardian Malam Idris Ibrahim Kurami pending the time the judgment shall be executed.

Right of Appeal

Anyone who is dissatisfied with this judgment has the right to appeal to the Sharia Court of Appeal Katsina commencing from today 19th August 2002.

[Signed by judge and dated 19/8/2002.]

[87] This is Bukhari's heading, after which a hadith follows.

3.

Proceedings and judgments in the Sharia Court of Appeal of Katsina State

All except (b), (d) and (e) translated from the Hausa by Aliyu M. Yawuri

(b), (d) and (e) translated by Sama'ila A. Mohammed

(a) Notice of Appeal filed 21st August 2002

GROUNDS OF APPEAL

IN THE SHARIA COURT OF APPEAL OF KATSINA STATE OF NIGERIA

THE REGISTRAR
SHARIA COURT OF APPEAL
KATSINA STATE
KATSINA

Presentation of Notice of Appeal against the decision of: UPPER SHARIA COURT FUNTUA
Date of decision: 19/08/2002
Date of filing: 21/08/2002
Names of Parties: AMINA LAWAL Vs THE STATE
Claim: THAT THE JUDGMENT OF THE LOWER COURT BE SET ASIDE
Judgment: USC FUNTUA AFFIRMED THE JUDGMENT OF THE S.C. BAKORI OF *RAJM*

GROUNDS OF APPEAL:

The judgment of the Upper Sharia Court Funtua dated 19/8/2002 wherein it affirmed the judgment of Sharia Court Bakori which sentenced Amina Lawal Bakori to *rajm*, is unjust and is in conflict with Islamic law.

EXHIBIT A: ADDITIONAL GROUNDS OF APPEAL:[88]

1. The Upper Sharia Court Funtua erred when it dismissed the contention of the appellant that at the time she committed the offence of *zina* the Katsina State Sharia Penal Code Law had not commenced operation.
2. The Upper Sharia Court Funtua erred when it dismissed the contention of the appellant that she did not make any valid confession of the offence upon which she could have been sentenced to *rajm*.
3. The Upper Sharia Court Funtua erred when it placed the burden of proving that the appellant was a *muhsinat* upon the appellant instead of placing the burden on the prosecutor.
4. The Upper Sharia Court Funtua erred when it dismissed the appellant's ground of appeal complaining that the trial court sentenced her to *rajm* without first affording her the opportunity to defend herself.

[88] Exhibit A was evidently attached to the Notice of Appeal filed on 21st August 2002 and filed with it.

5. The Upper Sharia Court Funtua erred when it ignored the submissions and authorities presented by the appellant before it. This error occasioned miscarriage of justice.
6. The USC Funtua erred when it dismissed the contention of the appellant that the trial court in its proceeding failed to observe the mandatory *i'izar*.

On notice to:	A.M. Yawuri
A.G. Katsina State	Attorney for Appellant
A.G.'s Chambers Funtua	Wuse Zone 5 Abuja

(b) Further additional Grounds of Appeal filed 22nd August 2002[89]

1. The Upper Sharia Court Funtua erred when it dismissed the contention of the appellant that she could withdraw the confession that she is claimed to have made at the Sharia Court Bakori: the error occasioned injustice in the sentence of *rajm* pronounced on her.

   Particulars:

   i. Islamic jurists of the Maliki school are all agreed that any person who confesses to *zina* in a trial of *zina* can withdraw such confession at any time.
   ii. The text of the book of Ibn Kathir which the judges relied upon is inapplicable as it does not state that the confession of *zina* by a person accused of *zina* cannot be withdrawn by that person.
   iii. The holding of the court has no basis in Sharia.

2. The Upper Sharia Court, Funtua, erred when it failed to understand the duty placed on it in confirming evidence that the appellant was a *muhsinat* before passing a judgment of *rajm* on her.

   Particulars:

   i. Ground of appeal number 6 of the Additional Grounds of Appeal[90] states that there was no evidence before the Sharia Court to the effect that the appellant was a *muhsinat*.
   ii. The Upper Sharia Court, Funtua, stated that the appellant failed to adduce credible evidence to the effect that she was a *muhsinat*.
   iii. Under Sharia, it is the duty of the prosecutor to prove that the accused person was not a *muhsinat* rather than on the accused person.

3. The Upper Sharia Court, Funtua, erred when it dismissed the contention of the appellant that the trial court in its proceeding failed to observe the mandatory *i'izar,* which failure rendered the judgment a nullity.

   Particulars:

   i. In the Additional Grounds of Appeal number 4, the appellant stated that the Sharia Court, Bakori, failed to observe *i'izar* before it sentenced her.

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[89] Caption omitted.

[90] "Additional Grounds of Appeal": i.e. those filed as Exhibit A to the Notice of Appeal filed on 21st August 2002.

ii. In the entire judgment of the Sharia Court, Bakori, the court refused to take this ground of appeal into account.

4. The Upper Sharia Court, Funtua, erred when it dismissed the contention of the appellant that the Sharia Court, Bakori, was not properly constituted in that only one judge sat and decided her case.

   Particulars:

   i. Section 4 (1) of the Katsina State Sharia Law states that a judge with his other members shall sit and pass judgment in such a suit.
   ii. The appellant stated this in her Additional Grounds of Appeal.
   iii. The Upper Sharia Court, Funtua, dismissed the contention of the appellant by stating that the court is only guided by (the) Hadiths and Qur'an instead of the Katsina State Sharia Law.

5. The Upper Sharia Court , Funtua, erred when it held that pregnancy is conclusive evidence of *zina* for any woman when the correct position is that pregnancy cannot be conclusive evidence of *zina* for a woman that was once married, as the appellant.

   Particulars:

   i. At the Sharia Court, Bakori, it was shown that the appellant was once married.
   ii. The period from the time she was divorced to the time she put to bed was less than 3 years.
   iii. Under the Maliki *madhab*, a divorced woman's pregnancy can last up to five years before she delivers.
   iv. The appellant contends that she carried a sleeping embryo.
   v. The Upper Sharia Court, Funtua, dismissed this contention of the appellant when it held that Amina had no husband and therefore she had committed *zina*.

6. The Upper Sharia Court, Funtua, erred when it dismissed the contention of the appellant that she was not properly charged before she was sentenced. The USC, Funtua, maintained the error when it affirmed the judgment of the Sharia Court, Bakori, which sentenced the appellant based upon a defective charge.

   Particulars:

   i. Under Islamic law, it is mandatory for a charge to disclose the date, time, name of the co-accused (of *zina*) and so on.
   ii. The charge prepared by the Sharia Court, Bakori, failed to disclose above details.
   iii. The Upper Sharia Court, Funtua, dismissed this ground of appeal.

7. We shall apprise the court of further grounds of appeal as soon as we obtain the copy of the court proceedings.

DATED 22nd of August 2002

A.M. Yawuri

For service on:
AG Katsina State, Funtua

Aliyu Musa & Co.
Counsel for Appellant

(c) Application for stay of execution and affidavit in support thereof, filed 22nd August 2002[91]

APPLICATION FOR STAY OF EXECUTION

TAKE NOTICE that the Honourable Court shall be moved on the 28th day of August 2002 at 9:00 in the forenoon as the applicant shall be heard praying the following:

1. AN ORDER of the Honourable Court staying the execution of the judgment of the Upper Sharia Court in Funtua in Case No. USC/FT/CRA/1/2002, Amina Lawal vs. The State, delivered on 19/8/2002 pending the determination of her appeal No. SCA/FT/25/2002 filed on 21/8/2002.
2. Any such further or other orders the Honourable Court may deem fit and appropriate to make in the circumstances.

Dated this 22nd day of August 2002.

Respondent's Address:
The Attorney-General of Katsina State
A.G.'s Chambers, Funtua

Aliyu Musa Yawuri Esq.
Aliyu Musa & Co.
Solicitors to the Applicant

AFFIDAVIT IN SUPPORT

I Yakubu Mohammed, male, businessman Nigerian residing at Wuse II Abuja do hereby make oath and state as follows:

1. That I am the litigation secretary to Messr. Aliyu Musa & Co., counsel representing the Applicant and I have the consent and authority of both my employers and the Applicant to swear to the affidavit.
2. That I was before the Upper Sharia Court Funtua on 19/8/2002 when the court dismissed the appeal filed by the Applicant and the court affirmed the judgment of the Sharia Court Bakori which sentenced the Applicant to die by stoning.
3. That I know the Applicant was dissatisfied with the judgment and that she filed an appeal at Sharia Court of Appeal Katsina. The copy of the notice of appeal attached and marked as exh. A.[92]
4. That self and counsel to the Applicant Mr. Aliyu Musa Yawuri were at Funtua on 22/8/2002 where additional grounds of appeal were filed. A copy of the grounds attached and marked exh. B.
5. That it was in my presence that the USC Funtua held that as soon as the Applicant concluded weaning her child the judgment of stoning to death will be executed.
6. That if the judgment is executed before the Applicant's appeal is heard, the appeal would be rendered nugatory.
7. That I know as a fact that the Applicant's counsel had concluded arrangements to obtain the records of proceedings of USC Funtua.

[91] Captions omitted.
[92] See item (a) above.

8. That the grant of this application will not prejudice the Respondent but will afford the Applicant the opportunity to prosecute her appeal.

9. That I swear to this affidavit in good faith believing its contents to be true and correct.

_____
Deponent

Sworn to before the
Commissioner for Oaths
Today 22/8/2002

_____
Commissioner for Oaths

(d) Proceedings 28th August 2002

Court: Where is Amina Lawal's counsel?

Appellant's Counsel: I am here. My name is Aliyu Musa Yawuri. I am counsel to Amina Lawal.

Court: Where is the Katsina State Government Counsel?

State Counsel: Here I am. My name is Isma'ila Ibrahim Danladi.

Court: Appellant's counsel: What are your prayers in this case before this court?

Appellant's Counsel: We have two prayers before this court:

1. We are seeking an order of this court staying enforcement of the judgment of the Upper Sharia Court, Funtua in its case No. USC/FT/CRA/1/2002, Amina Lawal vs. The State, which was decided on 19/8/2002, in which the court confirmed the judgment of *rajm* passed by the Sharia Court Bakori on the appellant, based on the offence of *zina*. We are praying this court for an order staying enforcement of this judgment pending the determination of our appeal, No. SCA/FT/25/2002, filed on 21/8/2002.

2. We are further seeking any equitable order or orders which this court may grant in the circumstances.

We filed our Application for Stay of Execution, containing these prayers, on 22/8/2002, together with a nine-paragraph affidavit in support. We have been given an official receipt for the nine-paragraph affidavit instead of the other affidavit attached as Exhibit A and the additional grounds of appeal as Exhibit B. The appellant will rely on all the averments contained in the affidavit, particularly paragraphs 3, 4, 5 and 6.

The reason for this application is to enable the appellant to present her appeal before this Honourable Court. We are concerned that if the application for stay is not granted, the lower court's judgment of *rajm* may be carried out against the appellant before the appeal can be argued and decided. It is a cardinal principle that where there is an appeal from a sentence of death, the execution of the sentence should be stayed pending determination of the appeal. We refer the court to section 241 of the Sokoto State Sharia Criminal Procedure Code and to [section 250 of] the Zamfara State Sharia Criminal

Procedure Code which both provide that if a person sentenced to death appeals against the judgment, the execution of the sentence is to be stayed pending the determination of the appeal. But the Katsina State House of Assembly has not enacted a Sharia Criminal Procedure Code for the State as in Sokoto and Zamfara States. It is necessary therefore for this court to ensure that the subject-matter of this appeal is not destroyed.

The appeal is historic. It brings before this Honourable Court important points which the lower courts have refused to entertain. Right now, we do not know when this court will hear the appeal. Human weakness, either the appellant's own or the lower court's, could delay the proceedings. Right now, for instance, the appellant is sick and she is in Abuja receiving medication. This could lengthen the time it takes to determine the appeal even if the record of proceedings is obtained promptly from the lower court. The author of *Tuhfa* says that after judgment is passed on the accused, the appellant still owns her life. It will, therefore, be proper and fair to spare her life pending the conclusion of the hearing of her appeal.

Court: State Counsel: What do you have to say?

State Counsel: I have listened to the arguments of appellant's counsel. I have some few comments to make.

Based on the principles of Islamic law, once a *qadi* has decided a case in accordance with the principles of Sharia laid down in the Qur'an and the Hadiths of Prophet Muhammad (SAW), then it is inappropriate for a Muslim to appeal the judgment as doing so is akin to disputing Allah's judgment and Allah has prohibited that in the Holy Qur'an. This court may only entertain this appeal because doing so will be in accordance with the laws and procedures of Nigeria and of Katsina State which allow appeals as a matter of right. Based on these laws, this court has the right to entertain the appeal. If this court, in its wisdom, decides to hear this appeal, we do not intend to challenge the prayers of appellant's counsel in this application.

However, I will request this court to dismiss the affidavit evidence filed in support of the application. Evidence in the form of affidavit is an imported European device and is foreign and unknown to Islamic law. If this Honourable Court is going to entertain this appeal, then the records of the proceedings and judgments of the Sharia Court Bakori and the Upper Sharia Court Funtua, and the submissions of appellant's counsel that they have appealed those judgments to this court, are sufficient to support the application currently before the court. But I submit that affidavit evidence has no place under the Sharia.

(e) Notice to Upper Sharia Court Funtua of Stay of Execution, 28th August 2002

KATSINA STATE JUDICIARY

Telephone: Katsina 065-30230
Telegram: SHARIAREG

Ref No. KTS/SCA/FT/86/2002
Office of the Chief Registrar
Sharia Court of Appeal
Private Mail Bag 2089
Katsina, Katsina State
Date: 28/08/2002

The Registrar
Upper Sharia Court
Funtua

RE: AMINA LAWAL BAKORI
VS
THE STATE

Reference is made to the above-named parties whose case came before the Sharia Court of Appeal in its sitting of today, 28/08/2002. I have been directed to inform your court as follows:

1. This court has ordered a stay of the execution of the judgment of your court in this case.
2. Any further matters relating to this case should be referred to this court.

May Allah assist Sharia. Amin.

[signed and dated]
Ahmed Mamman Yandaki
for: - Chief Registrar

(f) Proceedings 23rd January 2003

Before:

Honourable Grand Kadi	Aminu Ibrahim Katsina
Honourable Kadi	Sulaiman Mohammed Daura
Honourable Kadi	Ibrahim Mai Unguwa Umar
Honourable Kadi	Shehu Mu'azu Dan-Musa
Honourable Kadi	Sule Sada Kofar Sauri

The appellant together with her counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. On the part of government, State Counsel present in court are Hamza Kurfi, Mal. Isah Bature Gafai, Mal. Lawal Hassan Safana, Abdussalam Sabiu Daura and Nurul Huda Muhammed Darma.

Appellant's Counsel (Aliyu Musa Yawuri): We wish to inform the court that we are ready to proceed with the appeal.

State Counsel (Hamza Kurfi): We wish to inform the court that we received the hearing notice just yesterday 22/1/2003. We did not appear before the lower courts. We

need time to study the case and make consultations with Muslim jurists, and I may have to travel out of Katsina to obtain some books. We need to be well prepared and we are very busy during this time. The appellant is not being detained, she is free. They filed the appeal since August 2002. We were served with the hearing notice five months after the appeal was filed. They had wide consultations. I am asking for a date in July 2003.

Appellant's Counsel: I want this Honourable Court to consider the fact that the appellant is in a state of mental trauma and uncertainty following which she is now sick. In the event I am asking for three weeks so that the appeal will be heard on time.

Court: The appeal is adjourned to 25/3/2003 to enable State Counsel to study the records.

(g) Proceedings 25th March 2003

[The proceedings were adjourned without further hearing until 3rd June 2003.][93]

(h) Proceedings 3rd June 2003

[The proceedings were again adjourned without further hearing, until 27th August 2003.][94]

(i) Proceedings 27th August 2003

Court: Amina Lawal, her counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe together with Yunus Ustaz Usman, who is representing the Nigerian Bar Association, are all in court. Counsel representing the State is Barr. Nurul Huda Muhammed Darma.

State Counsel (Nurul Huda Muhammed Darma): I am objecting to the appearance of the counsel representing the Nigerian Bar Association. I wish to draw the attention of this Honourable Court to the fact that the Association is not a party to this case. Counsel ought to have instructions from the appellant, see *Tuhfa*, chapter on agency, verse 277 which states "it is a party to a case that can appoint an agent". The Nigerian Bar Association is not representing any of the parties in the appeal, so I ask this court to deny him audience.

Barr. Ustaz Usman: Amina Lawal had not instructed any counsel to represent her in this appeal. We come into this appeal bearing in mind its religious importance and its importance for Nigerian law. The Bar Association has the right to send a counsel to any important case so that the counsel will assist the court. The State Counsel is a member of this association and he knows this is the practice.

Ruling: Since counsel for the Nigerian Bar Association is not a member of the legal team representing the appellant, he can only be an observer, he cannot appear for Amina Lawal.

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[93] The court could not sit on this date because the Grand Kadi was ill and had traveled to Germany for treatment. Per Kogelmann/Gaiya/Awal trip report 23rd-27th March 2003.

[94] On this date two of the court's judges were on national assignment, serving on election tribunals adjudicating disputes arising from the elections held in April and May 2003. See UN Integrated Regional Information Networks 3rd June 03: "Stoning Death Appeal Postponed Again".

[Argument of Appellant's Counsel Aliyu Musa Yawuri]

We have already filed six grounds of appeal, we again filed notice filing six additional grounds of appeal. We have therefore filed a total of twelve grounds of appeal.[95]

We will argue our grounds of appeal number 4 first. Section 4 of the Sharia Courts Law provides that a judge shall sit with two court members before he tries any case. Nasiru Lawal Bello Dayi, judge of the trial court, heard this case alone from the beginning to its end. This is contrary to the provisions of this law. We challenged this before the Upper Sharia Court Funtua in our grounds of appeal number 2. At p. 38 lines 15-28 of the records of USC Funtua, the appellate judge stated that he was not concerned with the laws enacted by the State legislature, the applicable laws were the Qur'an and Hadiths. This is wrong, because his power to hear the appeal derives from the laws enacted by the legislature.

We will argue our grounds 1 and 8 together. The trial court sentenced the appellant to death on the ground that she confessed to *zina* before the court. In our ground number 8 before the USC we argued that the appellant made no such confession. Even if she did it is not a valid one according to Islamic law. However, USC Funtua at p. 38 lines 30-34 of its record dismissed this ground of appeal.

Section 124 of the Sharia Penal Code provides the offence of *zina*. The section provides that any person who is a *mukallaf* and who had sex through the genital had committed *zina*. Before a person is convicted for the offence of *zina* five things have to be proved. The court did not explain to Amina the meaning of *zina*. Any confession which is made without first explaining these five requirements will not amount to a proper confession.

When Amina was asked whether she committed the offence of *zina* she replied that it was Yahayya who deceived her with false promises of marriage. See p. 3 lines 12-20. When she stated that she was deceived it must be taken that she had retracted her confession. Section 63(2) of the Sharia Penal Code provides that before a person is convicted of *zina* it must be proved that he did the act intentionally. Where a person states that he was deceived it will not be taken that he did any of the acts following the deception intentionally. Even if Amina had confessed, this section has nullified such confession because she did not do the act complained of intentionally. Under Islamic law confession will not be accepted until its validity has been proved, we rely on *Subulus Salam* p. 6 also *Al-Tashri'u al-Jina'i* vol. 2 p. 434. We further rely on *Hadith Ma'iz*. At any rate assuming the appellant had made a valid confession she retracted such a confession before USC Funtua. We rely on p. 22 lines 4-15 of the record of USC Funtua. The appellant presented her grounds for the retraction. However USC Funtua rejected the retraction made by the appellant contending that she had no right to retract her confession. This position is in conflict with Islamic law which provides that a confession can be retracted at any time. See *Fiqhus Sunnah* vol. 2 p. 285; see also *Mugni* vol. 10 p.

[95] In what follows, appellant's counsel gives the second set of "additional grounds of appeal", filed on 22nd August 2002, the numbers 1-6, and the first set, filed as Appendix A to the Notice of Appeal filed on 21st August 2002, the numbers 7-12.

1188. USC Funtua held that Ibn Kathir said that the moment a person confesses to a crime he will be convicted thereon. Ibn Kathir did not make any such statement.

Section 36(6)(c) and (d) of the 1999 Constitution provide that an accused person should be afforded the opportunity to defend himself. The proceedings of the Bakori court is in conflict with this provision.

On our grounds numbers 2 and 9 the Bakori court sentenced Amina to *rajm* on the ground that she conceived and delivered a child when she was not married. We argued before the USC Funtua that that position was wrong. In our ground of appeal number 6 before the court, we submitted that pregnancy and subsequent birth of the baby is not an evidence upon which an accused can be convicted and sentenced to *rajm*. According to Islamic law it must be proved that the accused was a *muhsinat*. There is no evidence adduced on *ihsan*. We are relying on *Fiqhu ala Madhahibil Arba'a* p. 245, *Adawi* vol. 2 p. 280 and *Subulus Salam* pp. 6-7. The USC Funtua dismissed this ground see p. 40 lines 29-31 and p. 41 lines 1-2.

The reason for dismissing this ground of appeal, as held by the court, was that the appellant did not adduce evidence to show that she was not a *muhsinat*. The burden of proving an offence according to Islamic law is placed upon the prosecutor. A court can not rely on speculation, see *Tuhfa* verse 42 at p. 14. Furthermore section 36(5) of the 1999 Constitution places the burden of proving the guilt of an accused person on the prosecutor. We also rely on *Ramatu Aduke Issa vs. Issa Alabi* 2 SLR vol. I p. 114.

In our ground of appeal number 5, the trial court sentenced the appellant to *rajm* on the ground that she delivered a baby when she was not married. Responding to our submission on ground 9 of our appeal the court observed that if the appellant was indeed carrying a sleeping embryo why did she not hand over the child to her former husband. On p. 3 lines 25-30 of the trial court records the court held that the appellant had contracted a previous marriage. According to the *madhab* of Imam Malik a woman can carry a pregnancy from the date of her divorce up to five years thereafter. If she delivers the child within this period the child is attributed to her former husband. The former husband of the appellant divorced her less than two years ago. According to the presumptions of the law the child is for the former husband. Therefore, the police have no *locus standi* to arraign the appellant and the court has no jurisdiction to hear the case. According to Islamic law, it is only the former husband that can contest the paternity of the child. Under Islamic law she doesn't have to make the plea of sleeping embryo. Once the court realises that she was a divorcee the presumption shall automatically apply. Therefore, the court erred in assuming jurisdiction to try her.

In our grounds of appeal numbers 6 and 10, we submitted in our ground 7 before USC Funtua that the Bakori court did not properly charge the appellant and could not therefore have properly convicted her. The court charged the appellant on p. 3 lines 17-21. In the charge the court stated that it was satisfied that the appellant had committed *zina*. The court found the appellant guilty before hearing her in her defence. A charge must incorporate a comprehensive statement of the offence, the place the offence was committed, the co-accused and the circumstances under which the offence was committed, thereafter the accused shall be asked to plead to the charge. It is after these conditions are satisfied that the accused shall be given full opportunity to defend herself.

The court shall hear her witnesses if she has any and any other defence she may have before the court finally passes its judgment. A court cannot convict a person in a charge. It can only do so after hearing the accused person in his defence. We rely on section 36(6)(c) of the 1999 Constitution. In *Hadith Ma'iz* the Holy Prophet (SAW) gave Ma'iz full opportunity to defend himself. We rely on *Hadith Ma'iz*. We urge this Honourable Court to allow our appeal as the Holy Prophet allowed Ma'iz the full opportunity to defend himself. We rely on the case of *Safiyatu Hussaini Tungar Tudu vs. A.G. of Sokoto State*, SCA/GW/28/2001 decided on 25/3/2002.

We refer to pp. 21-22 and p. 3 line 36 of the record of the trial court. The court asked the appellant whether she understood the charge. She said "I agree". The question is, with what did she agree? The appellant never said she agreed that she committed the offence or that she understood the charge. All the same the trial court convicted her upon her confession. This is erroneous. Throughout the proceedings the appellant never admitted to the offence.

On our ground of appeal number 7 we contended before the USC Funtua that at the time the appellant allegedly committed the offence, the Sharia Penal Code had not commenced operation and it was therefore wrong to convict her under the provisions of that law. Section 1 of the Sharia Penal Code provides the exact date of commencement of the law to be 20/6/2001. The trial court did not state the date on which the appellant committed the offence. However it was stated that on 14/1/2002 the police received information that she had committed the offence. She was arraigned before the court on 15/1/2002 on a charge of *zina*. On the same day it was stated in court that she had given birth to her baby some nine days ago. That means she delivered the girl on 6/1/2002. From 20/6/2001 to 6/1/2002 is not up to the normal nine months human beings naturally conceive and deliver a child. She should not have been convicted under the provisions of the Sharia Penal Code. We rely on section 36(8) of the 1999 Constitution. All that the appellant is required to do under the law is to raise a doubt about her guilt. It is based on this that the court shall discharge her. Mostly human beings conceive and deliver a child within nine months although in rare occasions a child may be delivered within six months of its conception. However the period of nine months creates a defence in her favour. Muslim jurists agree that an accused person should not be convicted in cases in which there is doubt. We rely on *As'halul Madarik* vol. 3 p. 189. It is stated there that it is better for a judge to err on the side of forgiveness than to err on the side of punishment.

Finally the trial court did not observe *i'izar*. We rely on p. 12 line 14 where the trial court asked Amina the age of her child. She answered 2 months and 8 days. From there the court convicted her. It is clear that *i'izar* was not observed. Stating the birthday of the child is not *i'izar*. According to Islamic law *i'izar* is mandatory and any judgment in which *i'izar* was not observed is a nullity. We ask this Honourable Court to set aside the judgment of the lower courts in which they sentenced the appellant to *rajm* and to discharge her.

[Argument of State Counsel Nurul Huda Mohammed Darma]

Counsel for the appellant expressed his dissatisfaction with the judgment of USC Funtua. The court affirmed the *hadd* punishment on Amina Lawal. She was convicted on

two grounds. First on the manifestation of pregnancy which she later delivered and secondly on her confession. Appellant's counsel challenged the evidence of pregnancy on the following grounds: (1) pregnancy is not a conclusive proof against a divorcee like Amina Lawal, and (2) even if the pregnancy amounts to evidence against her, it is the duty of the court to inquire whether she was a *muhsinat* or not. That is, whether she was a Muslim and had previously contracted a valid marriage. According to the school of Imam Malik a woman can carry a sleeping embryo for a period of five years and the child born shall be affiliated to the former husband. We reply as follows:

Manifestation of pregnancy in a virgin or a divorcee like Amina Lawal who is known not to be married is a conclusive evidence of *zina*. She is a resident of the town not a visitor who came on and off. It was for her to raise the defences available to her when the court read the charge to her or during *i'izar*. Throughout the proceedings Amina never claimed not to be a *muhsinat* or that she was carrying a sleeping embryo.

In the record of the trial court the appellant stated that it was Yahayya who deceived her and committed *zina* with her some eleven months previously. I refer to p. 3 line 12 and p. 1 line 22. This does not leave any doubt as to how she became pregnant. We rely on *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 89. A well-known lady who is not a visitor or stranger will have no defence to the charge. However if she is a stranger the court will accept her defence based on the doubts created. Counsel argued that pursuant to section 36(5) of the Constitution the prosecution had to prove that the appellant was a *muhsinat* and that she was carrying a sleeping embryo. This is not so. She had to plead that she was not a *muhsinat* or that she was carrying a sleeping embryo. Allah (SWT) in *Suratul Qiyama* verse 13 [sic: verse 14] stated that "Nay! Man will be well informed about himself", and the Holy Prophet (SAW) said: "he who claims must prove; he who denies must take the oath."[96] Section 36(5) of the 1999 Constitution provides that the accused person shall prove those things which he alone knows.

Counsel contended that the trial court passed its judgment on personal knowledge. If that is so, it is allowed by Islamic law, see *Al-Sultanul Qada'iyya fil Islam* chapter 1 which states that a judge can pass his judgment based on his personnel knowledge. See p. 230 where it is stated, "he can base his judgment on what he knows". This is based on the saying of the Holy Prophet who said that whoever sees a distasteful act being committed should strive to stop it by his hands.

On the second issue of confession, counsel contended that an accused person has the right to retract his confession, contrary to the holding of USC Funtua. He stated that retraction would create doubt in the confession, in which case a court will not act on it. Secondly he said that Amina did not confess to the charge since she claimed she was deceived into the act. He submitted that there is a doubt as to whether she committed the act intentionally. He relied on the Sharia Penal Code and submitted that the law requires intention to be proved. We agree that the appellant could retract her confession. However, according to the Maliki school of thought for the retraction to be valid it has to be supported by a *shubha* – a possible justification or defence, see *Fiqhu ala Madhahibil Arba'a* vol. II p. 85 under the chapter on confession. The jurists stated that it is permissible to retract a confession. However if a *shubha* does not support the retraction,

[96] No source for this quotation given in the text. One is *Arba'una Hadith,* no. 33.

such retraction shall not be accepted. What we mean is that a *shubha* will arise where a confession is invalid for example, if she claimed that she was coerced into making the confession. However, her ground before the USC Funtua was only that she was in a state of anxiety. Therefore the retraction is not valid.

It is also not correct to say that she did not confess to the charge because *zina*, the term used in the charge, is Arabic. We know that it is a Hausa term, which the Hausa people borrowed from the Arabic with the introduction of Islam. The Hausa people do not have a substitute word, which will give the meaning of *zina*, which means sexual intercourse through the genitals and the birth of a baby through this act. This is clear from her confession at p. 1 line 22. She said "it is true I committed *zina* because this is the girl I delivered". This shows that she knows how the act was committed. She knows that *zina* is committed with a man through the genitals followed by pregnancy. Therefore, all the requirements of the charge are met. Her claim that she was deceived with false promises of marriage is not a ground that will nullify the judgment because Islamic law does not permit pre-marital intercourse. She could have claimed that she was tricked into the act through illegal means. Her claim that she was deceived with false promises of marriage shows that she had the intention to commit *zina*. It is the intention which she formed that she is now denying.

Counsel attacked the procedure adopted in the trial court. He argued firstly that the charge did not follow the procedure set for Ma'iz, in that the appellant was not told to raise a defence, and secondly that *i'izar* was not observed and that the appellant was therefore not given the right to defend herself. On these we submit:

Firstly, showing the accused person charged with *zina* the way to raise possible defences is not a requirement. Some jurists said it is recommended but Imam Malik said it is not allowed. In *Subulus Salam* vol. IV pp. 10-11 which is the commentary on *Bulughul Marami* the jurist relied on the hadith of Unaiz where a woman committed *zina* with her servant. Unaiz was sent with the order that if the woman confessed she should be stoned to death. They relied on other numerous hadiths including that of Gadiyatu. The Prophet (SAW) never said that the accused should be told to raise all possible defences or that the confession should be repeated many times. The author of *Subulus Salam* said that the Holy Prophet (SAW) used his discretion but he did not make it obligatory.

Counsel for the appellant submitted that the judge convicted Amina Lawal before he observed *i'izar*. Probably counsel did not understand the procedure adopted in these courts. We submit that the charge drafted by the judge was proper. The first step was for the judge to be satisfied that there was ground upon which to charge. He heard her confession, he was satisfied, he read the charge and finally convicted her. Therefore, the judge did observe *i'izar*. We refer to p. 4 line 17 and p. 13 line 17. Counsel submitted that the appellant should have been given the opportunity to call witnesses in her defence before she was convicted. He relied on the case of *Ramatu Aduke Issa vs. Issa Alabi* and section 36(6) of the 1999 Constitution which he said was breached. We submit that the section was not breached. According to Islamic law, and contrary to English law, if the charge is proved with credible witnesses the defendant will not be called upon to open his defence and this procedure is not contrary to the principles of human rights or the Constitution. See the case of *Abdu Biye vs. Dan Asabe Mai Citta*, NCH/25A/74, NSNLR

70 SLR p. 44 holding number three. The case of *Ramatu Aduke Issa vs. Issa Alabi*, relied upon by counsel, supports our position.

Counsel for the appellant submitted that at the time the offence was committed the Sharia Penal Code had not commenced operation. He discussed the issue of pregnancy and urged the court to take nine months as the normal period of gestation.

On the argument that the Sharia Penal Code had not commenced operation, we submit that the Islamic Penal System Law[97] commenced operation on 1st August 2000. This law provides that judgment shall be based on Qur'an and Hadiths. The appellant was arraigned on 15/1/2002. On that date she indicated that Yahayya Muhammed had been courting her for the past eleven months. See p. 4 lines 19-20. If it is carefully calculated it will be seen that they started their interaction which led to the birth of Wasila from the year 2001 up to 2002 when she was arrested. At this time Islamic law had commenced operation under the Qur'an and Sunnah. A look at the record of the Sharia Court Bakori will show that the court based its judgment on the Qur'an and Sunnah despite the fact that it cited the provisions of the [Sharia Penal Code], which was then in operation. Furthermore section 3(1) of the Islamic Penal System Law placed the Qur'an and the Sunnah above the Penal Code Law. The Penal Code Law was merely to assist in understanding the law. We therefore submit that the provision of the Constitution was not breached although counsel tried to prove otherwise by saying that a criminal law shall not have retrospective effect and by maintaining that an accused can only be convicted for an offence defined by law.

Counsel also contended that the number of judges who sat over the case fell below three. This failure will not affect the judgment. The authority which is saddled with the responsibility for appointing judges knowingly failed to send the required number of members to the case. Furthermore, under Islamic law a single judge can be appointed who will alone assume jurisdiction. This is contrary to what obtains in higher courts. The question we must consider is whether the trial court's failure to sit with members, and

[97] Referring to the Katsina State Islamic Penal System (Adoption) Law, No. 6 of 2000, signed into law on 31st July 2000 and coming into operation the next day. This law, containing only four brief sections, provided in relevant part that: "3(1) Notwithstanding any provision contained in the Penal Code and the Criminal Procedure Code [of 1960], proceedings for the determination of any civil or criminal matter before any Sharia Court shall be governed in accordance with the primary sources of Islamic Law, that is to say: (a) Qur'an; and (b) Hadith. (2) Subject to the provisions contained in the texts mentioned in subsection (1) of this section, a Sharia Court is empowered, in any proceedings before it to refer to and utilise the texts of the Maliki School of Law: Provided that they are in consonance with the Qur'an and Hadith. 4. Offences committed on or after the date of commencement of this Law shall be tried in accordance with the provisions of this Law." As an attempt to bring Islamic criminal law into operation in Katsina State this law was considered by many to be unconstitutional under section 36(12) of the 1999 constitution, which provides that "a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefor is prescribed in a written law; and in this subsection a written law refers to an Act of the National Assembly or a Law of a State…." Katsina State's Sharia Penal Code Law, No. 2 of 2001, which came into operation on 20th June 2001 and under which Amina Lawal was convicted and sentenced, was enacted to repair the constitutional defect in the Islamic Penal System (Adoption) Law. See the following note and accompanying text.

the fact that he passed judgment alone, led to a miscarriage of justice in the case. Because according to section 39 of the Establishment of Sharia Courts Law 2000, a breach of procedure will not nullify a judgment. As we earlier submitted, section 3(1) of this law provides that these courts will hear their cases according to Islamic law alone. I rely on the case of *Ochoko Mamman vs. Ibrahim Mai Yaye*, NCH 222A/71, SCR p. 57. In this case it was held that every judgment must be based on Islamic law. *Al-Sultanul Qada'iyya fil Islam* shows that a single judge shall sit and adjudicate. See pp. 131-153. There is no law that provides that where a single judge sits over a case his judgment shall be nullified. We ask this court to affirm the judgment of the lower courts. I note however, Islamic law is not interested in the infliction of *rajm*. I have no objection if the court discharges Amina Lawal if there exists a doubt as to her guilt.

[Rebuttal argument of Appellant's Counsel]

The position of Imam Malik that a pregnant woman shall be stoned to death is contrary to section 63(2) of the Katsina State Sharia Penal Code which provides that nobody shall be convicted of an offence unless his intention to commit the offence is proved. The appellant was charged under section 124 of the Sharia Penal Code. Section 4 of this law provides that the provisions of the Sharia Penal Code shall be binding, not the opinion of Imam Malik. Also section 36(12) of the 1999 Constitution provides that a person shall only be convicted of an offence defined by a written law. The section further provides that "a written law" refers to a law validly made by a State House of Assembly or by the National Assembly. Similarly section 118 of the Constitution[98] also says that the "law" referred to in the Constitution means a law made by a State House of Assembly or the National Assembly. Therefore, the Islamic Penal System (Adoption) Law 2000 is in conflict with the provisions of the 1999 Constitution. Section 4 of the 1999 Constitution provides that any law that is inconsistent with the provisions of the Constitution is null and void. Therefore, the Islamic Penal System (Adoption) Law 2000, which is in conflict with the provisions of the Constitution, should be disregarded. Indeed among all the states that introduced Sharia law it is only Katsina State that is yet to enact a Sharia Criminal Procedure Code Law. Therefore it is not surprising that so many mistakes were committed because that is the law that guides the prosecutor and the judge in the criminal trial. As to the constitution of the Bakori trial court, it is wrong to submit that section 4(1) of the Sharia Court Law 2000 was referring to procedure only. This section provides that a court can only assume jurisdiction where the judge sits over a case with two court members. In the absence of this, the court will not assume proper jurisdiction of the matter and cannot proceed at all.

We further refer to p. 434 of *Al-Tashri'u al-Jina'i* vol. 2 to submit that it is necessary for a judge to inquire into the mental status of a confessor as the Holy Prophet (SAW) did with Ma'iz. It is incompetent for any book or other authority to provide otherwise. Finally, Islamic law is interested in public policy and justice among the community. It is lenient to the community. It is in this spirit that I urge this Honourable Court to set aside the judgment of the lower courts and discharge Amina Lawal.

[98] Sic. The intended reference is probably to section 318, which defines "act" as a law made by the National Assembly and "law" as a law enacted by the House of Assembly of a State. As to counsel's entire line of argument here, see the previous footnote.

[Reply of State Counsel]

I want to reply on the argument of the appellant's counsel that a person will not be convicted on the provisions of any law except the Sharia Penal Code. This is clearly wrong. Even though the Sharia Penal Code was promulgated after the Islamic Penal System (Adoption) Law the former did not repeal the provisions of the latter. Section 3(1) of Islamic Penal System (Adoption) Law shows the status of Sharia Penal Code by providing that the provisions of the Qur'an take precedence over the Sharia Penal Code Law. And this is not in conflict with section 32(12) of the Constitution. Counsel for the appellant failed to understand legal drafting. We concede that section 36(12) of the Constitution refers to a written law duly enacted by a State House of Assembly or by the National Assembly. The Islamic Penal System (Adoption) Law was enacted by the State House of Assembly pursuant to section 36(12) of the Constitution. This is to incorporate provisions of the Holy Qur'an and Sunnah and vest them with the status of a written law. Therefore, this is not outside the contemplation of that section. Even if there is no law which incorporates the provisions still that will not be contrary to section 36(12) of the Constitution if regard is had to the reason why the Europeans inserted the aforesaid section in the countries they colonised. It is clear that they did it so as to avoid punishment based on native law and custom which is diversified and keeps on changing. Finally, I submit that even without the procedure which we explained above the decision is sustainable.

Court: The appeal is adjourned to 25/9/2003 for judgment *in sha* Allah.

[Here follow the names and places for the signatures of the five honourable kadis hearing this appeal.]

(j) Judgments delivered in the Sharia Court of Appeal of Katsina State[99]

25th September 2003

(1) The lead judgment

by Hon. Grand Kadi A.I. Katsina, Hon. Kadi I.M. Umar,
Hon. Kadi S.M. Daura, Hon. Kadi S.M. Dan-Musa

[Summary of the proceedings below]

This case started before the Sharia Court Bakori where the police prosecutor Corporal Idris Adamu on behalf of the Commissioner of Police filed an information alleging that Amina Lawal Bakori and Yahayya Muhammed committed the offence of *zina*. The information stated that on 14th January 2002 some police officers at Bakori arrested Amina Lawal and Yahayya Muhammed on the charge of committing *zina*. It is stated that they have been committing the *zina* since some eleven months ago. He further stated that the two conspired and committed several acts of *zina*; that following this offence, Amina Lawal gave birth to a baby girl; and that their action was contrary to Katsina State Islamic Law. When the court turned to the 1st accused Amina Lawal, she said it is true she committed the offence of *zina*. When the court turned to the 2nd accused, he denied

[99] Caption omitted. The case is styled *Amina Lawal vs. The State*, Case No. KTS/SCA/FT/86/2002.

the information, stating that he had never committed *zina* with Amina Lawal. Thereafter the court asked the prosecutor to open his case against the 2nd accused who denied the information. The prosecutor said he had witnesses. The court adjourned the case to 29th January 2002. On that date the prosecutor tendered the daughter of Amina Lawal in evidence as Exhibit 1. From there the trial court asked the 2nd accused whether he had witnesses who knew he did not commit *zina* with Amina. He said he did not have witnesses. The court asked him to swear with the Qur'an that he had never committed *zina* with Amina Lawal. He accepted to swear. He took oath with the Holy Qur'an, see the trial court record p. 5. The judge relied on *Tuhfa*, translated by Usman Mohammed Daura, p. 89. He called the oath "the oath of suspicion". From there the 2nd accused, Yahayya Muhammed, was discharged. The judge charged Amina Lawal on the ground that she confessed to the offence before him on 15th January 2002. The judge stated that he was satisfied that the appellant had committed the offence of *zina* based on her confession before the court.

After the Bakori trial court had charged Amina Lawal, it convicted her. The court cited the Holy Qur'an *Suratul Bani Isra'il* verse 32 which says "Come not near to *zina*", and he cited p. 128 of *Risala* which says "A *muhsinat* who commits *zina* is to be stoned until he is dead". The Sharia Court Bakori also cited *Arba'una Hadith* no. 14: "The blood of a Muslim is permitted to be taken in three circumstances". See p. 8 of the Bakori court record.

After conviction, the court stated: "This Sharia Court Bakori hereby sentences you Amina Lawal to die by *rajm* pursuant to section 125(b) of the Sharia Penal Code." The Court sentenced the appellant on 20th March 2002 and stated that the sentence should be executed on 20th September 2003.

Amina Lawal was dissatisfied with this decision. She appealed to the Upper Sharia Court Funtua through her lead counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe. They filed twelve grounds of appeal. In their grounds they contended that when Amina Lawal was convicted, Katsina State Law No. 2, 2001, the Sharia Penal Code Law, had not commenced operation, and that the proceeding is against the provision of section 4(1) of Sharia Courts Law, 2000 because the court sat over the case without two court members as required by the law. They retracted the confession made by Amina Lawal before the Sharia Court Bakori. Their reason for the retraction was that at that time the confession was made the court did not explain to the appellant the meaning of the offence of *zina*. They relied on *Mukhtasar* vol. 2 p. 285. They also relied on *Fiqhus Sunnah* vol. 3 p. 331 and *Mugni* of Ibn Hunama vol. 10 p. 1888. They argued that it is necessary for a charge to be comprehensive showing the accused, the date and time the offence was committed. They cited *Subulus Salam* commentary on *Bulughul Marami* pp. 6-7 vols. 3-4 arguing that the trial court did not give Amina the opportunity to defend herself. They contended that the trial court failed to observe the provisions of sections 36(1) and (6) of the Constitution. They also argued that there was no evidence on which to convict the appellant as required by the Qur'an and other grounds relied upon as indicated in the records of USC Funtua at pp. 21-26. The court heard appellant's counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe. Thereafter, it also heard the State Counsel, Isma'ila Danladi, in reply. He stated that counsel for Amina Lawal cannot retract her confession. He said the case of Ma'iz was distinguishable with the one at

hand. This is because Ma'iz voluntarily surrendered himself. Nobody had to arrest and arraign him. He relied on hadiths number 1232 and 1236 of *Bulughul Marami*. He also relied on other authorities as is reflected on pp. 26-30 of the records of the USC Funtua.

After the USC Funtua had listened to the lawyers' arguments it delivered its judgment, affirming the decision of the trial court. The USC Funtua relied on *Subulus Salam* p. 1214 to hold that pregnancy is evidence of *zina*. It relied on *Fiqhus Sunnah* vol. 2 p. 346 to further hold that evidence, confession and pregnancy in a woman who is not married are all means of proof of *zina*. He stated that Law No. 2 commenced operation in August 2000, before the appellant was arraigned before the trial court on 15th January 2002, and that the applicable law is Islamic law and procedure and that any other law is inapplicable. He maintained that the fact that the trial judge failed to sit with court members does not affect the judgment. He relied on *Suratul Nur* verse 1, *Jawahirul Iklili* vol. II p. 283 and *Ibn Kathir* p. 319.[100] The judgment, which was concurred in by his court members, was delivered on 19th August 2002.

Amina Lawal was also dissatisfied by this decision. She appealed therefrom to this court, the Sharia Court of Appeal Katsina, through her lawyers Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe. They filed seven grounds of appeal with their particulars. They submitted that the USC Funtua erred when it held that the appellant Amina Lawal had no right to retract the confession made before the Sharia Court Bakori. They argued that jurists of the school of Imam Maliki agree that a person who has confessed to an offence can retract the confession. They cited *Fiqhus Sunnah* and *Jawahirul Iklili*. They submitted that the USC Funtua erred when it rejected their argument that the judgment of the Bakori court was a nullity since the court failed to observe *i'izar*. They argued that USC erred when it held that a single judge can try a case contrary to the provisions of the Sharia Courts Law which requires a judge to sit with two court members. They submitted that USC Funtua erred when it held that pregnancy is evidence of *zina* against a woman who is not married but who, like the appellant, had previously been married. They pointed out that the records of the Sharia Court Bakori showed that the appellant had previously contracted a marriage. They argued that according to the school of Imam Malik a divorcee can carry a pregnancy for a period of five years from the date of her divorce, and that the appellant Amina Lawal informed the USC Funtua that she had been carrying a sleeping embryo but the court rejected her claim. They said it was erroneous of the USC to hold that it was not necessary to draft a charge against the appellant. They submitted that under Islamic law a charge must state the date, time and place the offence was committed. The trial court failed to comply with this requirement. They argued other grounds as we indicated initially.

We heard the grounds of appeal argued by Amina Lawal's lawyers Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe. We also read the records of the Sharia Court Bakori and of the Upper Sharia Court Funtua. We heard the State Counsel Nurul Huda Muhammed in reply. We heard the parties in their final addresses.

In his final address, counsel for Amina Lawal stated that section 4(1) of the Katsina State Sharia Courts Law provides that a judge shall sit with two court members, but that the judge of the Sharia Court Bakori sat alone and tried the case. Their ground of appeal

[100] As to the reference to *Ibn Kathir*, see nn. 84-86.

complaining about this was dismissed by the USC Funtua at p. 38 line 18 of the record of proceedings when the judge maintained that he had nothing to do with laws enacted by the State House of Assembly. The judge said he was only bound by Hadiths and Qur'an – even though it was the Sharia Courts Law enacted by the House of Assembly which enjoined the court to apply the Hadiths and Qur'an in proceedings before it. Counsel further pointed out that it was wrong for a court to rely on a confession if it was made without allowing Amina Lawal to have a rethink on the confession. A court must first explain the offence against the accused before his confession thereto becomes valid. That pursuant to section 124 of the Sharia Penal Code five ingredients of the offence must be proved before an accused is convicted. The lower courts failed to comply with this requirement. The appellant claimed that she was deceived. See p. 3 lines 12-20. Section 63(2) of the Sharia Penal Code states that an offence is committed only where intention is proved. Counsel pointed out that before a court can rely on a confession, it must first of all inquire into its validity. He cited p. 6 of *Subulus Salam* and *Hadith Ma'iz*. If we look at p. 22 lines 4-15 where the appellant retracted her confession, and *Fiqhus Sunnah* and *Mukhtasar*, it is clear that the USC Funtua erred when it held, especially in this type of case, that immediately a confession is made the accused should be convicted and sentenced. Counsel relied on section 36(6)(c) of the Constitution to argue that the Constitution guarantees the right of defence. He submitted that the Sharia Court Bakori erred when it convicted Amina Lawal on ground of pregnancy alone which is not evidence of *zina*. The prosecution must prove that the accused person is *muhsinat*. He cited *Fiqhu ala Madhahibil Arba'a* pp. 72-73, *Adawi* vol. 2 p. 365 and the case of *Ramatu Aduke vs. Issa Alabi* vol. 1-2 SLR 114. Counsel further submitted that the USC Funtua erred when it asked why the appellant hadn't handed over the child after its birth to her former husband. They referred to p. 3 lines 25-30 of the trial court records. They submitted that Imam Malik said that a divorcee who does not contract a subsequent marriage could carry a pregnancy for five years. They submitted that the police had no power to challenge Amina on her pregnancy, it was only her former husband who can do so. That the trial court ought to have discharged Amina Lawal when it found out that she was a divorcee. They finally argued that the Bakori court did not allow Amina a final statement in *i'izar*. They referred to p. 6 line 18. They urged this court to allow their appeal, set aside the judgments of the lower courts and discharge the appellant.

State Counsel Nurul Huda Muhammad Darma replied as follows:

A conviction in this case can be grounded on either of two classes of evidence:

1. Amina Lawal's pregnancy and the subsequent birth of her child; and
2. Amina Lawal's confession before the court.

He submitted that pregnancy is evidence of *zina* although it is the duty of the court to find out whether the accused is married or not, and whether the pregnancy is a sleeping embryo or not. He submitted that manifestation of pregnancy in a unmarried girl, or in a divorcee who is known not to be married, is conclusive evidence of *zina* and such a woman has no defence provided that she is residing in the town. If there was any complication arising from her former marriage it was for the appellant to raise it during the *i'izar*. Counsel observed that in the lower courts the appellant did not claim that she was carrying a sleeping embryo or that she was not a *muhsinat*. He said that Amina Lawal stated before the lower court that she become pregnant following the deception

practised on her by Yahayya. This does not leave any doubt. He cited *Fiqhu ala Madhahibil Arba'a* vol. 6 pp. 89, section 36(5) of the Constitution and the hadith of the Holy Prophet which said proof lies with the claimant and the defendant shall take the oath. He submitted that the trial court complied with due procedure. He relied on *Al-Sultanul Qada'iyya fil Islam* pp. 196-230 on the issue whether a judge can base his judgment on his personal knowledge. In reply to the argument of appellant's counsel that Amina's retraction of her confession created a doubt and that the confession should be rejected, State Counsel referred to the opinion of Imam Malik who required *shubha* before a confession can be retracted. He cited *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 82, the chapter on confession. He submitted that the appellant's claim that she did not understand the term *zina* is not acceptable. He argued that the retraction of the confession was not done at the Sharia Court Bakori or before the USC. Therefore the appellant cannot raise the issue now. He further submitted that the appellant's claim that she was deceived was not a ground at all. He submitted further that it was not necessary for the court to encourage the accused to raise a *shubha*. Some jurists said that is merely recommended. He cited *Subulus Salam*, the commentary on *Bulughul Marami* pp. 10-11 vol. 4. He submitted there is no law in Katsina State providing that where a judge fails to sit with two court members, his judgment is to be treated as null and void. He finally urged the court to accept his arguments, affirm the judgment of the lower courts and dismiss the appeal.

[The majority opinion]

After we listened to the arguments of counsel for the appellant Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe and of State Counsel Nurul Huda Muhammad Darma, we read all the records of the Sharia Court Bakori and the Upper Sharia Court Funtua and we allowed the parties opportunity to deliver their final addresses. We have studied the appeal.

We observe that the arraignment of the appellant by Cpl. Idris before the trial court, on behalf of the Commissioner of Police of Katsina State, is difficult to understand given the importance of a case which alleges the offence of *zina*. The prosecutor stated that it was one PC Rabiu and another police officer who arrested the accused persons who were committing *zina* for a period of eleven months. The questions here are:

- Why didn't the police arrest the accused persons initially until they had been committing the offence for 11 months?
- Did the police not know that Amina and Yahayya had been committing this offence for the past 11 months until now?
- Did those who arrested them witness the actual commission of the offence or were they told about it by others?
- When Yahayya denied the charge why didn't Cpl. Idris call Rabiu and the other officer to testify? On what ground did the trial court offer the oath to a person accused of *zina* with a woman who is not his wife?

Allah (SWT) stated in *Suratul Nur* verse 4:

> And those who cast it up on women in wedlock, and then bring not four witnesses, scourge them with eighty stripes and do not accept any testimony of theirs ever, they are the ungodly …

There is no authority that says a person accused of *zina* should take an oath in the absence of evidence. The Sharia Court Bakori erred when it administered the oath on Yahayya Muhammed. It is wrong to administer the oath of suspicion in this type of case. It was wrong to cite the authority in *Tuhfa* p. 89.

The judge also sat without court members as required by Law No. 5 of 2000 [the Sharia Courts Law] which introduced this type of courts. Section 4(1) provides that the court shall be properly constituted where a judge sits with two court members. Section 8 of the same law provides that the applicable law shall include the Qur'an, Hadiths, *ijma*, *qiyas*, *ijtihad* and *urf*. The law commenced operation on 1st August 2000 and this case was filed on 15th January 2002. The non-compliance with this law renders the judgment null and void.

Cases like the one under consideration are proved by the evidence of four witnesses, confession or pregnancy. In the absence of any of these, the charge is not proved and the informants or complainants shall receive punishment for *qadhf*. Therefore it was wrong to administer an oath in this case. See *Fiqhu ala Madhahibil Arba'a* p. 72 where it is stated:

> Where a woman confesses to *zina* four times and she mentions the name of her co-adulterer, and the co-adulterer denies the charge, Imam Abu Hanifa said the two shall not be punished. Imam Malik said the woman who confesses may be punished but the co-adulterer will not be punished.

The trial court erred when it ordered that the accused should swear by the Qur'an. A person swears by Allah and not by the Qur'an. Taking the Qur'an during oath is to instil the fear of Allah. A person is to swear by Allah and not by any other being.

Counsel for Amina Lawal challenged the competence of the trial court on the ground that only one judge sat over the case contrary to the provision of Law No. 5 of the year 2000. State Counsel said that there is no such law. Law No. 5 commenced operation on 1st August 2000. Section 4(1) provides that a court shall be properly constituted if presided over by a judge and two court members. Section 8 of the same law provides that a judge shall be bound by the Qur'an, Hadiths, *ijma*, *qiyas ijtihad* and *urf*. The fact that a single judge sat over the case and passed judgment shows that this provision of the law that established the courts and the judges was not complied with. It is not possible to apply one section of the law and reject other sections simply because their provisions do not conform with one's wishes. It is clear that when a single judge hears a matter, he is in breach of the law. Where a judgment is passed in breach of the law, the breach may operate to nullify the judgment.

We believe the Sharia Court Bakori erred when it relied on the single confession of Amina Lawal without proper explanation of the offence she was accused of. There are a lot of hadiths especially those of Ma'iz and Gadiyatu which show that full explanation was the practice of the Holy Prophet (SAW). All the authorities relied on by the Sharia Court Bakori are authorities relevant to a situation where the offence has been proved. The trial court relied on *Suratul Bani Isra'il* verse 32, *Risala* p. 128, hadith no. 14 of *Arba'una Hadith* and Katsina State Sharia Penal Code Law section 125. The aforesaid are only relevant after conviction.

Counsel for Amina Lawal contended that the Sharia Court Bakori failed to observe *i'izar* as required by law. They relied on *Tuhfa* chapter on *i'izar* verse 80 where ibn Asim said:

> Before a judgment is passed the accused shall be asked whether he has a final statement to make.

We note on p. 8 of the trial court record that after finding her guilty, the court asked Amina Lawal whether she had anything to say. She replied that she was only asking for forgiveness.

We observe from the trial court record that the court stated that it was basing its judgment on section 125 of the Sharia Penal Code. Because of this the question whether the court is bound by that law, and other laws of Katsina State, does not even arise.

The record of the Sharia Court Bakori shows that the court relied on the initial confession of Amina Lawal and sentenced her to *rajm* for committing *zina*. This is contrary to the teaching of the Holy Prophet. *Bulughul Marami* hadith no. 1234 and *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 73 show that Ma'iz confessed to *zina* four times to the Holy Prophet: the Holy Prophet asked him four times before he inquired whether he was insane. He further asked Ma'iz whether he had contracted a previous marriage. It was after Ma'iz answered in the affirmative that the Holy Prophet ordered him to be stoned to death. When Ma'iz felt the pain when he was being stoned, he ran away. Some people pursued him and overtook him. He asked that he should be taken to the Holy Prophet; they refused and proceeded to stone him to death. When they related these events to the Holy Prophet, he was annoyed and asked why they did not let Ma'iz be.

As we pointed out above, relying on a single confession to convict an accused person as the trial court did is to go contrary to the teaching of the Holy Prophet. The Upper Sharia Court Funtua based its judgment upon the confession made by Amina Lawal before the Bakori court. The judgment of the Sharia Court Bakori is in turn based upon this confession. All the authorities relied on by USC Funtua are only relevant after conviction; they are not relevant authorities in procedure. The USC Funtua relied on the authority in *Muwatta Malik* p. 731 where it was stated:

> Stoning to death of one who commits *zina* is established in the book of Allah.

The judge relied on another hadith of the Holy Prophet in the same book on p. 730, which states:

> Anyone among you who witnesses the commission of a distasteful act should try to stop it by his hand, if he cannot do so, then by his tongue, if he cannot do so then by his heart and this is the lowest grade of *iman*.

The above hadith was misapplied. The judge also relied on *Suratul Nur*:

> The fornicatress and the fornicator scourge each one of them a hundred stripes…

The judge also relied on other verses and hadiths, but all the authorities were dealing with punishment.

The lower courts were unanimous that Amina Lawal is a divorcee who is yet to contract another marriage and she was divorced less than two years ago. From her divorce up to the subsequent birth of her baby girl is not up to two years. These are issues that required careful consideration, before the Bakori court could rely on and act upon any confession. That she was pregnant was not a surprise, see *Fiqhu ala Madhahibil Arba'a* p. 523 where it is stated:

> That five years is not the limit set by the book of Allah; a section of the jurists said that seven years is the maximum gestation period for a pregnancy. If the woman delivers within this period the child is affiliated to the former husband and the prescribed punishment shall not be inflicted on her.

When she was before the USC Funtua, Amina Lawal attempted to retract the confession she made at the Sharia Court Bakori. The USC Funtua held that at that stage Amina Lawal had no right to retract her confession; it asked why she did not retract it before the Sharia Court Bakori. In considering this matter we raise the following issue: can a person who has confessed to a crime which involves the right of Allah, retract his confession after judgment or not?

We refer to *Fiqhus Sunnah* vol. 3 p. 330, where it is stated:

> If the confession relates to offences involving the rights of Allah, for example *zina* and the consumption of alcohol, it is permissible to retract it, this is because the Holy Prophet was reported to have said you should not inflict the *hadd* punishment in cases of doubt.

Also in *Jawahirul Iklili* pp. 384-385 the chapter on *zina* it was stated that:

> The punishment is inflicted upon anyone who confesses to *zina* or any other offence if he does not retract his confession. But if he retracts it such retraction shall be accepted and the punishment shall not be inflicted.

This shows that if a person is convicted for an offence, he can retract his confession before the sentence is executed and such retraction shall be accepted and he shall not be punished. Also, in *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 72 it states:

> Where somebody confesses, whether a man or a woman, and he or she later on retracts the confession, such retraction of the man or woman shall be accepted and he or she shall not be punished.

If the USC Funtua thinks that Amina Lawal could not retract her confession after her conviction and sentencing in the Bakori court, we refer to the last page of *Fiqhu ala Madhahibil Arba'a* where Imam Malik says:

> That it was proved that the Holy Prophet (SAW) repeated the words four times to Ma'iz and others like Gadiyatu hoping that they would thereby retract their confession.

This is the teaching of the Holy Prophet which we are expected to emulate. Furthermore, on p. 43 of the aforementioned book Imam Malik stated:

> If the accused retracts his confession with a plea of *shubha* his retraction should be accepted and the punishment shall not be inflicted on him.

Also in commentary on *Muwatta Malik* at p. 147 the Imam was reported to have said:

> Any person who confesses to the offence of *zina* and who later on claims that he made the confession due to lack of understanding or any other ground he may mention, his retraction shall be accepted and the punishment shall not be inflicted.

See also *Fiqhu ala Madhahibil Arba'a* p. 73 where Imam Malik stated thus:

> From what is reported concerning confession to the offence of *zina* and the like from the rights of Allah if such a confession is retracted it shall be accepted. Because the retraction amounts to seeking for forgiveness for the person who makes the retraction and therefore the prescribed punishment shall not be inflicted.

He went on further to state that Islam aims at concealing the secrets of the believer and it hates the disclosure of his offences or his defects. Therefore we are of the opinion that the USC Funtua erred when it refused to allow Amina Lawal to retract the confession she made before the Sharia Court Bakori. The USC Funtua based its judgment on a shaky foundation. From what we have already stated, the judgment of the Sharia Court Bakori is a nullity, therefore when the USC Funtua affirmed that judgment it was affirming something that was not existing. Therefore the Sharia Court of Appeal Katsina State, based on the reasons stated above, do hereby set aside the judgments of the Sharia Court Bakori and the Upper Sharia Court Funtua. Based on the aforementioned grounds we allow the appeal of Amina Lawal. She is successful in her appeal. We hereby discharge and absolve her of that of which the lower courts accused her, i.e. that she allegedly committed *zina*, from today the 25th day of September, 2003.

[Here follow the names and signatures of the four honourable kadis who joined in the majority judgment.]

(2) The minority judgment:

Hon. Kadi Sule Sada Kofar Sauri

> [The minority judgment again rehearses the proceedings and judgments in the Bakori and Funtua courts and summarises the arguments of counsel for both parties in the Sharia Court of Appeal. Kadi Sauri's opinion and judgment follow.]

We listened to the argument of Amina Lawal through her counsel Aliyu Musa Yawuri. We also listened to State Counsel Nurul Huda Muhammed Darma, we read the judgments of the lower courts, we listened to the grounds relied upon by counsel as is reflected in the records. We listened to the authorities from the Qur'an and Hadiths cited by counsel. We also considered the authorities from the Qur'an and Hadiths relied upon by the lower courts. Amina Lawal and her child Wasila who is now aged 20 months and seven days as of today, 25th September 2003, are in court.

To the best of my understanding, I can see no place in the records of the lower courts where Amina Lawal retracted her confession. It is also not shown in the records that Amina Lawal is not a *muhsinat*. No evidence was adduced in these regards. On the issue of charge, Amina Lawal herself stated that she understood the charge against her and she agreed. See p. 6 line 13 of the records of the Sharia Court Bakori. *zina* is proved in the following 3 ways:

(1) The confession of a sane Muslim;
(2) Evidence of witnesses;
(3) Manifestation of pregnancy in an unmarried woman.

See p. 8 lines 18-20 of the trial court's records.

At p. 15 lines 1-5 of the records of the USC Funtua counsel for Amina Lawal relied on *Muwatta Malik* p. 642 in respect of a woman who came to the Holy Prophet and confessed that she had committed *zina*. She was asked to go and come back after she had delivered her child, nursed and weaned it and found a guardian for it. It was thereafter that she was stoned to death. This case applies exactly to the case of Amina Lawal. She shall go and conclude nursing Wasila, find a guardian for her and then the sentence shall be executed.

On the issue of *i'izar,* see the records of the Sharia Court Bakori p. 8 line 29: you will see where the court observes *i'izar*.

Confession is a better means of proof than evidence, see *Mukhtasar* chapter on confession: "the confession of a legally responsible person shall be binding on him".

Amina Lawal did not claim that she was carrying a sleeping embryo, otherwise the trial court would have summoned her former husband to contest her claim.

On the issue of retraction of confession, it was submitted based on *Jawahirul Iklili* vol. 2 p. 283 that a confession may be retracted before the execution of the sentence or even during the execution of the sentence. Amina Lawal did not retract her confession. See p. 22 lines 4-15 of USC Funtua's record, where appellant's counsel said: "We have the instructions of Amina Lawal to retract her confession before Bakori Court." This is contrary to the provisions of Islamic law. Therefore Amina did not retract her confession. All the authorities relied on including *Mukhtasar*, *Fiqhus Sunnah* and *Jawahirul Iklili* provide that one who confesses to *zina* has a right to retract without stating his reasons and he shall not be forced to state his reasons for the retraction. However it is never stated in these authorities that counsel can retract the confession on behalf of his client. Therefore Amina Lawal did not retract her confession since she did not personally utter the retraction. If it is assumed that appellant's counsel made the retraction on her behalf then what is the ground for doing so? What is the position of the law on this?

Therefore I, Kadi Sule Sada Kofar Sauri, based upon my understanding and the authorities stated above, do hereby affirm the judgment of the Sharia Court Bakori and the Upper Sharia Court Funtua which convicted and sentenced you Amina Lawal to stoning to death. The judgment shall be carried out the moment you have weaned your daughter Wasila and you have obtained a guardian for her. This is in accordance with the authority in *Muwatta Malik* at p. 642.

There is a right of appeal to any one who is dissatisfied.

[Here follows the name and signature of the honourable kadi who wrote the minority judgment.]

Chapter 6 Part IV

Bibliography of Islamic Authorities Cited in the Judgments and Elsewhere in this Work

Compiled by Ahmed S. Garba and Philip Ostien

Introduction

1. Principles of selection for inclusion in the bibliography. This bibliography began with the list of Islamic authorities cited by counsel and courts in the Safiyatu Hussaini and Amina Lawal cases – which we compiled to assist us in verifying citations and quotations as we edited the proceedings and judgments in those cases for this chapter. It then occurred to us that it would be helpful to readers of the two cases who are unfamiliar with Islamic law, to provide some information about the authorities relied on. But there are also other lists of Islamic authorities given in this work – in Chapter 2 (Vol. II), where several lists of books are given which, in someone's opinion, should be in the library of every Sharia Court;[101] and in Chapter 5 (Vol. IV), where two lists of books consulted by committees working on Sharia Criminal Procedure Codes are given.[102] Although there is much overlap, there is also much divergence among all these lists. We decided to include all the books on all the Chapter 2 and Chapter 5 lists in this bibliography, along with the authorities relied on in the proceedings and judgments presented in this chapter. That is what has determined which works have been included and which left out. The bibliography certainly does not include all Islamic authorities used by Nigerian courts or scholars or available from the booksellers. It is also not a bibliography of Islamic scholarship produced in Nigeria,[103] although some such works are included.

2. Problems encountered in compiling the bibliography. We have encountered a number of problems in compiling the bibliography and in verifying the citations and quotations in the judgments, which are worth mentioning because they suggest some needed reforms in the way these works are cited particularly in court judgments.

a. Too many titles for the same work. As the bibliography shows, most of the Islamic authorities referred to have at least two titles: long ones – their full titles in Arabic – and short "Hausa-ised" ones by which they are almost always referred to in Northern Nigeria, even in court judgments. The problem is that the short titles are not standardised. Sometimes the same work has more than one short title, e.g. *Adawi* (aka *Hashiyatul Adawi*) or *Irshadus Salik* (aka *Askari*). But an equally serious problem is that spellings vary wildly. For instance, the work entered in our bibliography under the title

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[101] See Chapter 2 (Vol. II), 56, 123, 183 and 211. See also the list of Recommended Text Books for the Basic Judiciary Course offered by the A.D. Rufa'i College for Legal and Islamic Studies, Misau, Bauchi State, Chapter 2 p. 28.

[102] See Chapter 5, 211 and 213.

[103] As to writing in Arabic in the Nigerian region, see J. Hunwick, "The Arabic Literary Tradition of Nigeria", *Research in African Literatures*, 28 (1997), 210-223, and authorities there cited, which include Hunwick's larger work *Arabic Literature of Africa, Volume 2: The Writings of Central Sudanic Africa* (Leiden: Brill, 1995).

of *Al-Sultanul Qada'iyya fil Islam* is spelled thus in the original versions of our texts: *Alsultul kala'iya fil islam*; *aisultatu kalaiya fil Islam*; *Al-suldatul Ada Iyya*. Some of the variations in spellings in the original documents are due to different soundings-out, but a lot of them are due to the carelessness of typists and proofreaders.

The reader of this work will see none of these variations. For each Islamic authority referred to, we have selected what we considered to be the short title by which it is most commonly referred to in the northern parts of Nigeria. The authorities are listed in the bibliography in alphabetical order by these short titles. The same short titles have been read back into the records of proceedings and judgments in the Safiyatu Hussaini and Amina Lawal cases reproduced in this chapter, and into the lists of authorities given in Chapters 2 and 5, with uniformity of spelling rigidly imposed. If the full Arabic title of the work is different from its usual short title in Northern Nigeria, the full title, transliterated into the Latin alphabet (without most diacritical markings), is then given in the bibliography, followed by the name of the author or compiler and other information about the book. Alternative short titles are also given in some cases.

b. Sometimes-ambiguous titles. The short titles – even when the same one is used consistently – can be ambiguous. Take for example *Ibn Kathir*, a short title used several times in the Amina Lawal case. Ibn Kathir was a scholar of the 14th century. The brief biography of him given in volume 1 of the English edition of *Tafsir Ibn Kathir* (see bibliography) lists twelve works by him; possibly there were others. Which of these works was relied on in the Amina Lawal case? We do not know.[104] A similar problem is presented by *Ibn Ashir*, a short title used in Chapter 2.[105] A different sort of example is presented by the short title *Ihkamul Ahkam*, used in both the Safiyatu Hussaini and Amina Lawal cases.[106] As the note to the entry under this title in our bibliography shows, there are at least three works referred to by this same short title in circulation in Northern Nigeria. We were only able to determine which one was relied on in the cases by looking up the citations. The reference to the same work in Chapter 2 dis-ambiguates the title by making it fuller: *Ihkamul Ahkam ala Tuhfatul Hukkam*.[107]

c. Which edition? Many of the works, even in the original Arabic, are in circulation in Northern Nigeria in many editions, differently divided into volumes and differently paginated. Citations to them in court judgments never refer to specific editions. This makes it difficult to look up passages cited. Similarly, some of the works – especially the most important ones – have been translated into Hausa and/or English. For example, Hausa editions of *Risala* and *Tuhfa* are in wide circulation, and new Hausa editions of *Bulughul Marami* and *Sahihul Bukhari* are coming out. There are English editions of *Arba'una Hadith*, *Bidayatul Mujtahid, Bulughul Marami, Fiqhus Sunnah, Tafsir Ibn Kathir, Mukhtasar, Muwatta Malik,* and *Risala*, in addition to *Sahihul Bukhari* and *Sahihul Muslim*,

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[104] For the citations to Ibn Kathir in the Amina Lawal case, see nn. 84-86 and 100 supra and accompanying text. The one work of Ibn Kathir included in our bibliography, a commentary on the Qur'an, is there because it has been translated into English and we have used its English versions of Qur'anic verses throughout this text.

[105] See Chapter 2, 183. We do not know if the work of Ibn Ashir included in this bibliography is the one intended in the Kebbi State White Paper.

[106] See pp. 28, 34, 68 and 69 supra.

[107] Chapter 2, 211.

all in wide circulation. Citations to all these works are by the same short titles and seldom indicate whether it is an Arabic, Hausa or English edition that is being referred to.

d. Authorities not in circulation. A number of the authorities listed in Chapter 2 are very difficult to lay hands on in contemporary Northern Nigeria. Indeed, as to fully half of the twenty works listed on p. 56 of Chapter 2, which the Sharia Implementation Committee of Bauchi State was urged "in the name of Allah…[to] supply…in each Sharia Court because of their importance", we could not find any copy among the Islamic scholars or booksellers of Jos or Kano whom we consulted. The same is true of one of the authorities relied on by the Upper Sharia Court Funtua in Amina Lawal's case: *Misbahuzzujaj*. These works have fallen out of print and out of circulation, and it is only by happenstance that any given judge or scholar will have a copy in his possession; yet these neglected works can still be cited as good authority in the courts.

The last point may not be perceived to raise any problem: the Islamic law canon remains open and continues to grow. But the other points could be addressed, by standardisation of short titles, spellings, and citation forms, and enforcement of the rules via more careful proofreading of texts before they are released for public consumption, all with the goal of increasing the professionalism of judges and scholars and improving the quality of their work-product.

3. Misc. information about the bibliography. All works included in the bibliography are in Arabic unless otherwise noted. All dates given are Gregorian. We have given publication information about the editions which Mr. Garba believes are most widely used in the northern parts of Nigeria, but as has been noted there are often many editions of the same work available in Nigeria and we have not undertaken any study of which are "most widely used".

4. Acknowledgements. For their generous assistance in the considerable work of creating this bibliography we extend our heartfelt gratitude to Sheikh Alhassan Sa'id Jos, the leader of *Izala B* in Plateau State; Justice Kabiru Adam, Kadi of the Sharia Court of Appeal of Plateau State; Justice Isma'ila Adam, Kadi of the same court (rtd.); Sheikh Balarabe Daud, Deputy Chief Imam of the Jos Central Mosque; Imam Khalid Aliyu, lecturer in the Department of Religious Studies, University of Jos; Sheikh Abdulrahman Lawal, *Murshid Jama'atul Nasril Islam* Jos North and lecturer in the Department of Religious Studies, University of Jos; Sheikhs Na'annabi and Mukhtari Adam, Islamic scholars residing in Jos; Ramzi Ben Amara, a post-graduate student of the University of Bayreuth; and Malam Ibrahim dan Niger, a bookseller who travels frequently to Sudan, Egypt, and other places in the Middle East in connection with his business and was of great help in Kano in our efforts to track down some of the works included in the bibliography. Finally, we thank Professor Muhammad S. Umar, lately of Arizona State University, now of Northwestern University, who encouraged, advised and assisted us in many ways both in Jos and from abroad. He provided much information we could not get ourselves, and saved us from many errors. Sometimes differences of opinion remained; there are also some unsettling differences between our work and that of others regarding dates and other matters which we have not been able to resolve; we can only say in conclusion that responsibility for all remaining errors rests with us.

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Al-Jarima Wal-Uquba. Al-Jarima wa al-Uquba fi al-Fiqh al-Islami, a book of *fiqh* by Imam Muhammad Abu Zahra (Abu Zahra) (d. 1974), discussing offences and punishments under Islamic law. Edition widely used in Nigeria published by Dar al-Fikr al-Arabi (Cairo, 1998, 2 vols).

Al-Mawrid al-Qarib: Qamus Jayb Arabi-Inkilizi, by Ruhi Al-Baalbaki. A pocket Arabic-English dictionary (Beirut: Dar al-Ilm lil-Malayin, 2004, 1 vol). See also *Qamus*

Al-Qur'an. The sacred scripture of Islam, revealed to the Prophet Muhammad over the years 610-632. A canonical text was established in 651-52. There are many Arabic editions available in Nigeria, the most common coming from publishing houses in Saudi Arabia. There is one complete translation into Hausa, by Sheikh Abubakar Gumi, the long-time Grand Kadi of the Sharia Court of Appeal of the Northern Region of Nigeria: *Al-Kur'ani Mai Girma da kuma Tarjaman Ma'anoninsa Zuwa ga Harshen Hausa* (Medina: sponsored by late King Fahd, 1991, 1 vol; reprinted many times since). A fresh translation into Hausa has been started by a group of scholars based in Kano, led by Basheer Ahmed Mohyidin: *Alkur'ani Mai Girma* (*Fassara da Bayani*). The first volume, comprising *Suratul Baqara* through *Suratul Anfal*, came out in 1986 (Madras, India: Continental Book Centre); no subsequent volume has appeared. Several English versions of the Qur'an are available in Nigeria, including *The Holy Qur'an: Text,*

Translation and Commentary by Abdullah Yusuf Ali (1st ed. Lahore, 1934; 3rd ed. London: The Islamic Foundation, 1975); *The Meaning of the Glorious Qur'an*, translation by M.M. Pickthall (New York: Muslim World League, c. 1977), and *Tafsir Ibn Kathir* (see bibliography).

Al-Sultanul Qada'iyya fil Islam. Al-Sultah al-Qada'iyyah fi al-Islam: Dirasah Mawdu'iyyah Maqarinah, a work on judicial authority in Islam, by Shawkat Muhammad Alyan (dates unknown) (Riyad: Matabi al-Sufara, 1982).

Al-Tashri'u al-Jina'i. Al-Tashri' al-Jina'i al-Islami, by Abdulkadir Oudah (Oudah) (d. 1953). This is a comparative study of Islamic and Western criminal laws with particular reference to Egypt. Edition available in Nigeria published by Dar Kitabi al-Arabi (Beirut, n.d., 2 vols). English edition available in Nigeria: *Criminal Law of Islam*, translated by S. Zakir Aijaz (New Delhi: Kitab Bhavan, 1999, 4 vols.).

Al-Tawudi. Hula al-Ma'asim li-Fikr ibn Asim: wa Huwa Sharh Urjuzat Tuhfat al-Hukkam, by Imam Abu Abdallah Muhammad ibn Muhammad al-Tawudi (al-Tawudi) (d. 1795), a commentary on *Tuhfa* q.v., published on the margins of *Bahjah* q.v., which is also a commentary on *Tuhfa*.

Aqrabul Masalik. Aqrab al-Masalik li Madhab Imam Malik, by Ahmad ibn Muhammad ibn Ahmad Addadiri (Addadiri) (d. 1787). This is a work of *fiqh* covering various issues in *ibadat* and *mu'amalat*. The only text of this work we have found in Nigeria is embedded in *Bulghatus Salik* q.v. which is a commentary on it.

Arba'una Hadith, forty hadiths collected by Sheikh Imam Abu Zakariya Yahya ibn Sharf al-Din al-Shafi'iyyi al-Nawawi (Al-Nawawi) (d. 1277). This is available in Nigeria in Arabic in at least two editions, both published by Dar Arabiyya, Kano, each 1 vol. One of these, undated, gives only the hadiths. The other, titled *Sharh Arba'una al-Nawawi*, dated 1989, gives the hadiths with commentary by Sheikh Abdul Wahhab Azouz Isa (dates unknown). Both are commonly referred to in Nigeria as *Arba'una Hadith* and the numberings of the hadiths in both are the same. There is an English translation of Al-Nawawi's forty hadiths (with ten additional ones numbered 41-50, and with commentary by Abd al-Rahman ibn Ahmad ibn Rajab (d. 1393)) also available in Nigeria: *Gami al-Ulum wa al-Hikam (A Collection of Knowledge & Wisdom*), rendered into English by Muhammad Fadel (Al-Mansura, Egypt: Umm Al-Qura: 2002, 1 vol).

As'halul Madarik. As'hal al-Madarik Sharh Irshad al-Salik fi Fiqh Imam Malik, by Abubakar ibn Hassan al-Kashnawi (Al-Kashnawi) (dates unknown). This is a commentary on *Irshadus Salik* q.v. Edition widely used in Nigeria published by Dar al-Fikr (Beirut, n.d., 3 vols).

As'halul Masalik. As'hal al-Masalik fi Madhhab al-Imam Malik, by Muhammad Bashshar (dates unknown). This is a work of *fiqh* in the form of a poem, explained and vocalised by Abd al-Rahman al-Barquqi, and published in Cairo by Maktabat al-Tijariyya in 1935. We have found no separate edition of the work in Nigeria, but its text appears in two commentaries on it, *Misbahu* and *Sirajus Salik* qq.v.

Askari. See *Irshadus Salik.*

Badru al-Zaujaini. Badr al-Zaujaini wa Nafhat al-Harin ala Madhab al-Sadat al-Malikiyya, a book of *fiqh* by Abubakar ibn Hassan al-Kashnawi (Al-Kashnawi) (dates unknown).

Mainly discusses family law. Edition widely used in Nigeria published by Dar al-Fikr (Beirut, 1947, 1 vol).

Bahjah. Al-Bahjah fi Sharh al-Tuhfah ala al-Urjuzah al-Musamah bi Tuhfat al-Hukkam, by Abu al-Hasan Ali ibn Abd al-Salam al-Tusuli (Al-Tusuli) (d. 1842/3). This is a commentary on *Tufah* q.v. One edition available in Northern Nigeria published by Mustafa Babi al-Halabi (Beirut, 1951, 2 vols.).

Bidayatul Mujtahid. Bidayat al-Mujtahid wa Nihayat al-Muqtasid, a book of *fiqh* by Muhammad b. Ahmad al-Qurtabi al-Maliki ibn Rushd (Ibn Rushd; Averroës) (d. c. 1198). Edition widely used in Nigeria published by Dar al-Kitab al-Ilmiyya (Beirut, 1988, 2 vols). Published in English, in a translation by Imran Ahsan Khan Nyazee, as *The Distinguished Jurist's Primer and the Intermediate Jurist's Goal* (UK: Garnet, 2003, 2 vols). Deals with selected points in *ibadat*, *mu'amalat* and *usul*. On points covered, analyses the positions of the four main Sunni *madhahib*.

Bukhari. See *Sahihul Bukhari*

Bulghatus Salik. Bulghat as-Salik Li Aqarabi al-Masalik ila Madhab al-Imam Malik, by Sheikh Ahmad ibn Muhammad Sawi al-Maliki (Sawi) (d. 1825/6). This is a commentary on *Aqrabul Masalik* q.v., whose text is embedded in it. Edition widely used in Nigeria published by Mustafa al-Babi (Beirut, 1952, 2 vols.).

Bulughul Marami. Kitab Bulugh al-Maram min Adillat al-Ahkam, a collection of hadiths made by Hafiz Ahmad ibn Aliyu ibn Hajar al-Askalani (Al-Askalani) (d. 1448). Many editions are available in Nigeria. One widely used in the North is published by Maktabatu Abubakar Ayyub Kano (Kano, 2002, 4 vols in 1). A new Hausa edition has just come out: *Fassarar Bulugul Maram*, translated by Sunusi Muhammadu Kani, Almajirin Gidan Shehu Mai Hula (Kano: Alh. Hadi A. Zakari Salga, 2006, only vol. 1 so far available). English edition: gives the title as above in Arabic followed by its English translation, *The Attainment of the Objective According to the Evidences of the Ordinances*, translated by Muhiddin al-Selek (Beirut: Dar al-Fikr, 2005, 4 vols in 1).

Dasuqi. Hashiyat al-Dasuqi ala Sharh al-Kabir, by Shams al-Din Muhammad ibn Ahmad ibn Arafah al-Dasuqi (Dasuqi) (d. 1815). This is a supercommentary on the *Sharh al-Kabir* ("The Great Commentary") of Abu al-Barakat Ahmad ibn Muhammad ibn Ahmad al-Dardir (d. 1786), itself a commmentary on Khalil's *Mukhtasar* q.v. Edition widely used in Nigeria published by Dar al-Fikr (Cairo, n.d.).

Diya'ul Hukkami. Diya al-Hukkam Fima Lahum wa Alayhim Min al-Ahkam, by Sheikh Abdullahi Muhammad ibn Fodi (Abdullahi Dan Fodio; Abdullahi Na-Gwandu; Mai-Gwandu; Mai-Bodinga) (d. 1828). This is a book on government in accordance with the principles of Sharia, i.e. *al-Siyasa al-Shar'iyyah*, written in 1808 at the request of the then-leaders of the Kano community, in which the author focusses principally on hereditary systems of government and principles of accountability to which those in power shall adhere. Edition available in Nigeria published by Dar al-Arabia Li Diba'ati wa al-Nashar (Cairo, n.d., 1 vol). A translation of this work into Hausa was published by Gaskiya Corporation (we do not know the date), and reprinted in 1984 by Sidi Umaru Press, Sokoto.

Diya'ul Ta'wili. Diya al-Ta'wil, by Sheikh Abdullahi Muhammad ibn Fodi (Abdullahi Dan Fodio; Abdullahi Na-Gwandu; Mai-Gwandu; Mai-Bodinga) (d. 1828). This is *tafsir*, a commentary on the Qur'an. Edition available in Nigeria published by Dar al-Arabia Li Diba'ati wa al-Nashur (Cairo, 1961, 2 vols).

Fatawa. Majmu' al-Fatawa, a collection of the *fatawa* issued by Sheikh al-Islam Taqiyyi al-Din Ahmad ibn Taimiya (Ibn Taimiya) (d. 1328). Many editions are available in Nigeria. One is edited by Abd. Al-Rahman ibn Muhammad al-Qassim and published by Al-Maktab al-Ta'limi al-Sa'udi bi al-Maghrib (Rabat, n.d., 36 vols).

Fathu Aliyu Malik. Fath al-Aliyy al-Malik fi al-Fatwa ala Madhab al-Imam Malik, by al-Sheikh Abu Abdallah Muhammad ibn Ahmad Alaysh (variant spelling Ulaysh) (d. 1882). This is a collection of fatwa issued by the author. Edition used in Nigeria published by Matba'a al-Taqaddum al-Ilmiya (Cairo, 1902-1903, 2 vols).

Fathul Bari. Fath al-Bari, by Hafiz Ahmad ibn Ali ibn Hajar al-Askalani (Ibn Hajar) (d. 1448). This is a commentary on *Sahihul Bukhari* q.v. Edition widely used in Nigeria published by Dar al-Diyana Litturath (Cairo, 1988, 15 vols).

Fathul Jawadi. Fath al-Jawad fi Sharh al-Irshad, a wide-ranging book of *fiqh* by Alh. Yahuza ibn Saeed ibn Muhammad ibn Abdullah al-Zakzaki al-Tijjani (dates unknown). Edition widely used in Nigeria published in 1964 by Alh. Sani Adam, Kano, Nigeria, by permission of the son of the author Alh. Muhammad Mukhtar al-Zakzaki al-Tijjani.

Fawakihud Dawani. Al-Fawakih al-Dawani ala Risalat ibn Abi Zayd al-Qirawani, by Sheikh Ahmad ibn Ghunaym ibn Muhanna an-Nafarawi al-Malikkiyyi al-Azhariyyi (Ibn Ghunaym) (d. 1714). This is a commentary on *Risala* q.v. Edition widely used in Nigeria published by Al-Thakafat al-Diniyya (Cairo, 2004, 3 vols).

Fiqhu ala Madhahibil Arba'a. Kitab al-Fiqh ala Madhahib al-Arba'ah, a book of comparative *fiqh* by Abdurrahman ibn Muhammad Awadun al-Juzairi (Al-Juzairi) (d. 1979). Editions widely used in Nigeria published by Al-Mansoura (Egypt, n.d., 5 vols) and Dar al-Ghad al-Gadeem (Egypt, 2005, 5 vols). States the positions of the four main Sunni *madhahib* on a wide number of points in all aspects of Sharia.

Fiqhus Sunnah. Fiqh al-Sunnah by Sayyid Sabiq (d. 2000). A modern work of *fiqh* based on fresh readings of the traditions of Prophet Muhammad instead of simply following the old rulings of the four Sunni *madhahib*. Edition widely used in Nigeria published by Dar al-Fikr (Beirut, 1978, 4 vols.). English edition available in Nigeria translated by Muhammad Sa'id Dabas and Jamal al-Din M. Zarabozo (Cairo: Dar al-Fath Lil-Ilam al-Arabi, 2003, 5 vols.).

Hashiyatul Adawi; Adawi. Hashiyat al-Adawi ala Sharh (Ibn al-Hassan al-Musamma) Kifayat al-Talib al-Rabbani li Risalat ibn Abi Zayd, by Allamah al-Muhaqqiq Sheikh Aliyu ibn Ahmad ibn Mukram al-Sa'idi al-Adawi (Adawi) (d. 1775). This is a supercommentary on a commentary of Ibn al-Hassan al-Musamma (d. 1532) on *Risala* q.v., all three packaged together in one text. Edition widely used in Nigeria published by Dar al-Fikr (Cairo, n.d., 2 vols).[108]

[108] There is a second commentary on *Risala* by the same author, *Khirshi* q.v.

Ibn Ashir. *Al-Murshid al-Mu'in ala al-Daruri Min Ulum al-Din*, by Abu Muhammad Abdullah ibn Ahmad ibn Ali ibn Sa'ad al-Ansari al-Andalus (Ibn Ashir) (d. 1631). This work, in the form of a poem, treats many issues of *ibadat*, based on the Maliki *madhab*. Edition available in Nigeria published by Dar al-Haya al-Kutubi (Cairo, n.d., 1 vol).

Ibn Kathir. See *Tafsir Ibn Kathir*.

Ihkamul Ahkam. *Ihkam al-Ahkam ala Tuhfat al-Hukkam*, a book of *fiqh* by Sheikh Muhammad ibn Yusuf al-Kafi (Al-Kafi) (d. 1426). This is a commentary on *Tuhfa* q.v. Edition widely used in Nigeria published by Dar al-Kutub al-Ilmiyya (Beirut, 1994, 1 vol).[109]

Irshadus Salik. *Irshad al-Salik ila Ashraf al-Masalik fi Fiqhi al-Imam Malik*, a work of *fiqh* covering a variety of issues in *ibadat and mu'amalat*, by Shihab al-Din Abdurrahman ibn Muhammad ibn Askar al-Maliki al-Baghdadi (Askari) (d. 1332). Edition available in Nigeria published by Dar al-Fikr (Beirut, n.d., 1 vol).

Irwa'ul Ghalil. *Irwa'u al-Ghalil fi Takhrij Ahadith Manar as-Sabil*, a book of *fiqh* by Muhammad Nasiruddeen al-Bani (Al-Bani) (dates unknown). A commentary on a collection of hadiths made by Muhammad ibn Muhammad ibn Duyan (d. 1934/5) relating to basic jurisprudential matters entitled, *Manar as-Sabil*. The commentary covers a wide range of matters including worship, family law, criminal law, etiquette of judges, lawyers and litigants, the law of evidence, etc. Edition available in Nigeria supervised by Zahir Shawish and published by Al-Maktabat al-Islam (Beirut, 1985, 9 vols).

Jawahirul Iklili; *Lauwalli da Sani*. *Jawahir al-Iklil: Sharh Mukhtasar al-Allama Sheikh Khalil fi Madhab al-Imam Malik*, by Sheikh Salih Abd al-Sami al-Abi al-Azhari (dates unknown). This is a commentary on *Mukhtasar* q.v. Edition widely used in Nigeria published by Dar al-Fikr (Cairo, 1976, 2 vols).

Khirshi. *Sharh al-Khirshi ala Risala*, by Allamah al-Muhaqqiq Sheikh Aliyu ibn Ahmad ibn Mukram al-Sa'idi al-Adawi (Adawi) (d. 1775) This is further commentary on *Risala* by Adawi, printed on the margins of *Hashiyatul Adawi* q.v. (Cairo: Dar al-Fikr, reprinted many times, 2 vols).[110]

Lamiyyat al-Zaqqaq; Zaqqaqi. *Matn Lamiyyat al-Zaqqaq fi Fiqh al-Malikiyya*, a book of *fiqh* by Ibn al-Hassan Aliyu ibn Qasim ibn Muhammad al-Maghribi, al-Fasi, al-Tajibiyyi, famously known as al-Zaqqaq (d. 1506). This is a short poem on judicial procedure. Edition widely used in Nigeria published by Alhaji Muhammad Dan Age (Sokoto, n.d., 1 vol).

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[109] There are two other books used in Nigeria that go under the name of *Ihkamul Ahkam*: *Al-Ihkam fi Usul al-Ahkam,* by Abu Muhammad Ali Ibn Ahmad Ibn Hazm (Ibn Hazm), edited by Ahmad Muhammad Sahkir and published by Dar al-Afaq al-Jadidah (Beirut, 1980, 4 vols); and *Al-Ihkam fi Usul al-Ahkam,* by Ali bn Muhammad Sayf al-Din al-Amidi (Al-Amidi), edited by Abd al-Razzaq Afifi and published by Al-Maktab al-Islam (Beirut, 2nd ed. 1982, 4 vols). These are both books of *fiqh* giving guidance for judges in arriving at and giving judgments in cases. Neither of these is referred to in the texts printed in this chapter or elsewhere in this work.

[110] There is a second commentary on *Risala* by the same author, *Adawi* q.v.

Lauwalli da Sani. See *Jawahirul Iklili*.

Mawahibul Jalili. Mawahib al-Jalil li-Sharh Mukhtasar Khalil, by Abi Abd Allah Muhammad ibn Muhammad ibn Abd al-Rahman al-Ṭarabulusi al-Maghrabi al-ma'ruf bi-al-Hattab (Hattab) (d. 1547). A commentary on *Mukhtasar* q.v. Edition available in Nigeria published by Maktabat al-Najah (Tarabulus, Libya, 1969, 6 vols).

Mawahibul Khallaq. Mawahib al-Khallaq ala Sharh al-Tawudi li-Lamiyat al-Zaqqaq, a book of *fiqh* by Abu al-Shita' ibn al-Hasan al-Ghazi al-Sinhaji (d. 1946). This is a super-commentary on the commentary of Muhammad al-Tawudi (d. 1795) on *Lamiyyat al-Zaqqaq* q.v. of Ali ibn Qasim (d. 1506). It discusses judicial procedure. Edition available in Nigeria published by Al-Maghrib al-Aqsa Matba'at al-Umniyya (Rabat, Morocco, 1955, 2 vols.) and Dar al-Fikr (Cairo, n.d., 1 vol).

Mayyara. Sharh al-Mayyarat al-Fasi ala Tuhfat al-Hukkam fi Nukt al-Uqud wa al-Ahkam, by Abi Abdullahi Muhammad ibn Ahmad ibn Muhammad al-Malikiyyi al-Mayyara (Mayyara) (d. 1426). This is a commentary on *Tuhfa* q.v. Edition widely used in Nigeria published by Dar al-Kutub al-Ilmiyah (Beirut, n.d., 2 vols).

Misbahu. Misbah al-Salik fi Madhab Imami Malik, by Sheikh Abdulwaseef Muhammad (dates unknown). Contains the text of a different work, *As'halul Masalik* q.v. and commentary thereon. Edition available in Nigeria published by Dar al-Fikr (Beirut, n.d., 1 vol).

Misbahuzzujaj. Misbah al-Zujaja fi Zawa'id ibn Majah by al-Hafiz Shihab al-Din Abu al-Abbas Ahmad ibn Abi Bakr ibn Isma'il ibn Salim ibn Qaymaz al-Busiri al-Kinani al-Misri (d. 1436). A supplement to the collection of hadiths, entitled *Sunan Ibn Majah* made by Muhammad ibn Yazid ibn Majah (d. 887).

Mudawwanah; Mudawwanatul Kubra. Al-Mudawwana al-Kubra, a work of *fiqh* ascribed to Imam Malik ibn Anas (d. 795), transmitted through a chain of narrators ending with Imam al-Sahnun ibn Sa'id al-Tanuki (d. 854) who made the extant compilation. This is the original work of Maliki *fiqh*. Edition widely used in Nigeria published by Dar Sader (Beirut, n.d., 6 vols).

Mughni. Kitab al-Mughni wa Sharh al-Kabir, two books of *fiqh* from the Hanbali *madhab*, apparently always published together. *Al-Mughni* is by Muwaffaq al-Din Abdullahi ibn Ahmad ibn Muhammad ibn Qudama (d. 1223) and *Sharh al-Kabir* is by Ibn Qudama's junior brother Shams al-Din Abi al-Faraj Abd al-Rahman ibn Muhammad ibn Ahmad ibn Qudamah al-Maqdisi (also known as Ibn Qudama) (d. 1283). Discuss a wide variety of issues in *fiqh* (*ibadat, mu'amalat* etc.). Edition widely used in Nigeria published by Dar al-Hadith (Cairo, 1996, 16 vols). Although these are Hanbali works they are often consulted in Nigeria; they are felt not to be in conflict with Maliki law in most instances.

Mukhtasar; *Mukhtasar Khalil. Mukhtasar al-Allama Khalil fi Fiqh al-Imami Malik*, a book of *fiqh* by Sheikh Khalil ibn Ishaq ibn Musa ibn Shu'aib al-Ma'ruf bi al-Jundiyyi (Khalil) (d. 1365). Discusses a wide range of issues in both *ibadat* and *mu'amalat*. It is often regarded as the most advanced text in Maliki law. Edition widely used in Nigeria published by Dar al-Fikr (Beirut, reprinted 1999). Much of *Mukhtasar* was translated into English in 1916, "by order of Sir F.D. Lugard", for the use of colonial officials in

Northern Nigeria: F. H. Ruxton, *Maliki Law, Being a Summary from French Translations of the Mukhtasar of Sidi Khalil* (London: Luzac, 1916; Westport: Hyperion reprint edition, 1980).

Muslim. See *Sahihul Muslim.*

Muwatta Malik; al-Muwatta. This is a collection of hadiths by Imam Malik ibn Anas (d. 795), the founder of the Maliki *madhhab.* The Arabic edition commonly used in Nigeria has the hadiths plus commentary by Sheikh Jalal al-Din Al-Suyuti (d. 1505) and is entitled *Tanwir al-Hawalik Sharh ala Muwatta Imam Malik* (Egypt: Maktabat al-Thaqafa al-Diniyya, 2004). There are two English editions of the hadiths (without commentary) readily available in Nigeria: *Al-Muwatta of Imam Malik ibn Anas: The First Formulation of Islamic Law*, translated by Aisha Abdurrahman Bewley (Inverness, Scotland: Madinah Press, 2001, 1 vol), and *Al-Muwatta by Imam Malek b. Anas*, rendered into English by F. Amira Zrein Matraji, corrected and revised by Dr. Mahmoud Matraji (Beirut: Dar al-Fikr, 2001, 1 vol).

Qamus. The word '*qamus*' means 'dictionary'. There are two frequrently referred to as such in Nigeria: *Al-Qamus al-Asriyya*, an Arabic/English English/Arabic dictionary by Elias A. Elias and Ed. E. Elias (Cairo: Elias Modern Press, 1962, 1 vol), and *Al-Qamus al-Muhid*, an Arabic/Arabic dictionary by Al-Mujaddaddin Muhammad ibn Yakub al-Firuzi Abadi al-Shairazi (Cairo: Al-Amiriyya, 1981, 1 vol). See also *Al-Mawrid al-Qarib.*

Qawaninul Fiqhiyyah. Qawanin al-Ahkam al-Shar'iyyah wa Masa'il al-Furu al-Fiqhiyyah, by Abu Abdallah Muhammad ibn Muhammad ibn Ahmad ibn Juzayy al-Qalbi (Ibn Juzayy) (d. 1340). This is a commentary on the jurisprudence of five Sunni *madhahib* – Maliki, Hanafi, Shafi'i, Hanbali and Dhahiri) with emphasis on the Maliki. Edition widely used in Nigeria published by Dar al-Ulum Lilmalabin (place of pub. not given, 1974, 1 vol).

Risala. Matn al-Risala, a work of *fiqh* by Abu Muhammad Abdullahi ibn Abdurrahman ibn Abi Zayd al-Qayrawani (Ibn Abi Zayd) (d. 996). Discusses various issues in *ibadat* and *mu'amalat.* Arabic edition available in Nigeria is in 1 vol. but gives no publication information. There are also Hausa and English editions of *Risala* in use in Nigeria. Hausa: *Fassarar Matanin Littafin Risala Tare da Darasi*, translated by Malam Bello Muhammad Andalus Dausayi Kano (showing the *Risala* in Arabic on facing pages) (Kano: Sani Muhammad Danjiniri, n.d., 1 vol). English: *Matn ar-Risala* by Ibn Abi Zayd Al-Kairawani, rendered into English by F. Amira Zrein Matraji, corrected and revised by Mahmoud Matraji (Beirut: Dar al-Fikr, 1994, 1 vol).

Sahihul Bukhari; Bukhari. Sahih al-Bukhari, a collection of hadiths by Abu Abdullah Imam Muhammad ibn Ismail ibn Ibrahim ibn al-Mughirah al-Bukhari (Bukhari) (d. 870). Arabic edition widely used in Nigeria published by Al-Maktabah al-Islamiyya (Istanbul, 1981, 8 vols.). English edition widely used in Nigeria (with facing Arabic) is *Sahih Al-Bukhari*, translated by Dr. Muhammad Muhsin Khan (Beirut: Dar al-Arabia, 1980, 8 vols.). The first volume of a Hausa edition was brought out in 2005: *Fassarar Sahihul Bukhari Juzu'i Na 1*, published (and apparently translated) by Kwamitin Talifi da Ilmantarwa (Committee for Publications and Education) established by the Kano State Government under Governor Ibrahim Shekarau.

Sahihul Muslim; Muslim. Sahih al-Muslim, a collection of hadiths by Imam Muslim ibn al-Hajjaj al-Qushayri al-Naysapuri (Muslim) (d. 875). There are many editions used in Nigeria; two are published by Dar al-Fikr (Beirut, 2004, 1 large vol) and Muhammad Muhammad Tamir (no publication info given, 3 vols). An English edition widely used in Nigeria is translated by Dr. Ahmed Zidan and Mrs. Dina Zidan and published by Islamic Inc. Publishing and Distribution (Cairo, n.d., 2 vols). Another English edition now available in Nigeria is published by Dar al-Kutub al-Ilmiyya (Beirut, 2005, 4 vols).

Sharhin Sahihul Muslim. Sahih al-Muslim Sharh al-Nawawi, by Sheikh Imam Abu Zakariya Yahya ibn Sharf al-Din al-Nawawi al-Shafi'iyyi (Al-Nawawi) (d. 1277). This is a commentary on *Sahihul Muslim* q.v. Edition widely used in Nigeria published by Dar al-Diyan Litturath (Cairo, 1987, 5 vols).

Sirajus Salik. Siraj al-Salik Sharh As'hal al-Masalik, by Uthman ibn Hasanayn al-Barri al-Ja'ali al-Maliki (Ja'ali) (dates unknown). This is a commentary on *As'halul Masalik* q.v. Edition available in Nigeria published by Mustafa al-Babi al-Halabi (Cairo, 1963, 2 vols.).

Subulus Salam. Subul al-Salam Sharh Bulugh al-Maram, by Imam Muhammad ibn Isma'il al-Kahlani al-Amir al-San'ani (Al-San'ani) (d. 1769). This is a commentary on *Bulughul Marami* q.v. Edition widely used in Nigeria published by Dar al-Diyan li al-Turath (Cairo, 1987, 4 vols).

Tabsiratul Hukkami. Tabsirat al-Hukkam fi Usul al-Aqdiya wa Manahij al-Ahkam, a book of *fiqh* by Al-Qadi Burhan al-Din Ibrahim ibn Aliyu ibn Abi Qasim ibn Muhammad ibn Farhun al-Maliki al-Madani (Ibn Farhun) (d. 1397). Deals primarily with judicial procedure. Edition widely used in Nigeria published by Maktabat al-Kulliyyat al-Azhariyya (Cairo: 1986, 2 vols).

Tafsir Ibn Kathir. Al-Misbah al-Munir fi Tahdhib Tafsir Ibn Kathir, or *Tafsir al-Qur'an al-Azim*, by Imam Abu al-Fida' ad-Din Isma'il ibn Umar ibn Kathir al-Qurayshi (Ibn Kathir) (d. 1373). This is a commentary on the Qur'an. Edition widely used in Nigeria published by Dar al-Fikr (Cairo, n. d., 4 vols). Also available in English under the title *Tafsir Ibn Kathir (Abridged)* (Riyadh, Houston, New York, Lahore: Darussalam: 2nd ed. 2003, 10 vols). The English edition goes verse by verse through the Qur'an, among other things giving an English translation or "interpretation" of each verse and commentary on it.

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Thamaruddani. Thamar al-Dani fi Taqrib al-Ma'ani, also known as *Thamar al-Dani: Sharh Risala ibn Abi Zayd al-Qayrawani*, by Sheikh Salih Abd al-Sami al-Abi al-Azhari (Al-Azhari) (dates unknown). This is a commentary on *Risala* q.v. Editions used in Nigeria published by Dar Haya'i al-Kutub al-Arabiyya (Cairo, n.d., 1 vol) and Dar al-Fikr (Cairo, n.d., 1 vol).

Tuhfa; Tuhfatul Hukkam. Matn al-Asimiyya al-Musamma (Tuhfat al-Hukkam fi Nukat al-Uqud wa al-Ahkam), a work of *fiqh* by Al-Imam Qadi al-Jama'at Abubakar ibn Muhammad

ibn Muhammad ibn Asim al-Andalusi al-Gharnadi (Ibn Asim) (d. 1427). Discusses judicial procedure in Sharia courts according to the Maliki *madhab*. Arabic edition used in Nigeria published by Alh. Muhammad Dan Age (Sokoto, n.d., 1 vol). There is also a Hausa edition in wide use in Nigeria's Sharia courts, translated from the Arabic by Alhaji Usman Muhammad Daura, who served as Native/Area Court judge from 1960 to 1978, then as a Kadi on the Sharia Court of Appeal of the then-Kaduna State from 1978-1987, and finally as the Grand Kadi of the Sharia Court of Appeal of Katsina State from 1987 to 1991: *Jagorar Masu Hukunci* (Zaria: Hudahuda Publishing Co. Ltd., 1996, 1 vol).

Zaqqaqi. See *Lamiyyat al-Zaqqaq*.

Analytical outline of the bibliography

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- *Tafsir Ibn Kathir* (Ibn Kathir, d. 1373)
- *Diya'ul Ta'wili* (A. Dan Fodio, d. 1828)

Collections of the traditions of the Prophet (*ahadith;* hadiths) and commentaties on them

Muwatta Malik (Imam Malik, d. 795)

- *Tanwir al-Hawalik* (Al-Suyuti, d. 1505)

Sahihul Bukhari (Bukhari, d. 870)

- *Fathul Bari* (Ibn Hajar, d. 1448)

Sahihul Muslim (Muslim, d. 875)

- *Sharhin Sahihul Muslim* (Al-Nawawi, d. 1277)

Sunan Ibn Majah (Ibn Majah, d. 887)

- supplemented in *Misbahuzzujaj* (al-Misri, d. 1436)

Arba'una Hadith (Al-Nawawi, d. 1277)

- *Gami al-Ulum wa al-Hikam (A Collection of Knowledge & Wisdom*) (Ibn Rajab, d. 1393)
- *Sharh Arba'una al-Nawawi* (Azouz Isa, dates unknown)

Bulughul Marami (Al-Askalani, d. 1448)

- *Subulus Salam* (Al-San'ani, d. 1769)

Manaru as-Sabil (Ibn Duyan, d. 1934/5)

- *Irwa'ul Ghalil* (Al-Bani, dates unknown)

Collections of *fatawa*

Fatawa (Ibn Taimiya, d. 1328)

Fathu Aliyu Malik (Alaysh, d. 1882)

Books of *fiqh* and commentaries on them

Mudawwanatul Kubra (Imam Malik, d. 795)

Risala (Ibn Abi Zayd, d. 996)

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- *Fawakihud Dawani* (Ibn Ghunaym, d. 1714)
- *Hashiyatul Adawi* and *Khirshi* (Adawi, d. 1775)

Al-Ahkam al-Sultaniyyah wa al-Wilayah Al-Diniyyah (Mawardi, d. 1058)

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Bidayatul Mujtahid (Ibn Rushd = Averroës, d. c. 1198)

Mughni (the brothers ibn Qudama, dd. 1223 and 1283)

Irshadus Salik (Askari, d. 1332)

- *As'halul Madarik* (Al-Kashnawi, dates unknown)

Qawaninul Fiqhiyyah (Ibn Juzayy, d. 1340)

Mukhtasar (Khalil, d. 1365)

- *Jawahirul Iklili* (Al-Azhari, 15th century (?))
- *Mawahibul Jalili.* (Hattab, d. 1547)
- *Sharh al-Kabir* (Al-Dardir, d. 1786)
    - *Dasuqi* (Al-Dasuqi, d. 1815)

Tabsiratul Hukkami (Ibn Farhun, d. 1397)

Tuhfa (Ibn Asim, d. 1427)

- *Ihkamul Ahkam* (Al-Kafi, d. 1426)
- *Mayyara* (Mayyara, d. 1426)
- *Al-Tawudi* (Al-Tawudi, d. 1795)
- *Bahjah* (Al-Tusuli, d. 1842/3)

Lamiyyat al-Zaqqaq (Al-Zaqqaq, d. 1506)

- *Sharh al-Tawudi li Lamiyat al-Zaqqaq* (al-Tawudi, d. 1795)
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As'halul Masalik (Bashshar, dates unknown)

- *Misbahu* (Muhammad, dates unknown)
- *Sirajus Salik* (Ja'ali, dates unknown)

Badru al-Zaujaini (Al-Kashnawi, dates unknown)

Fathul Jawadi (al-Zakzaki al-Tijjani, dates unknown)

Chapter 6 Part V

Glossary of Islamic Technical Terms Used in the Judgments and Elsewhere in this Work

Compiled by Sama'ila A. Mohammed

alfasha. Immoral acts disapproved by Islamic law.

al-siyasa al-shar'iyya. Literally sharia of politics/policy, but more technically "administrative law" or ordinances of government.

azzani. Hausa for the Arabic *zani* q.v.

diyah. Blood money payable in respect of either homicide, wounding or assault, should the injured person, or his heirs in cases of homicide, agree to forego retaliation in kind (*qisas*) and accept *diyah* instead. The amounts payable for various types of injuries have been worked out in detail by the Muslim jurists and are specified in the Sharia Penal Codes adoped in Nigeria.

fatwa. Religious ruling on a particular issue given by an Islamic jurist.

fiqh. Science of application of Sharia or Islamic jurisprudence or legal doctrine. Compare *usul al-fiqh.* An expert in *fiqh* is a *faqih* (pl. *fuqaha*).

hadd (pl. *hudud*). Literally, boundary or limit. The limits or bounds laid down by law. In the criminal law, it means an unalterable punishment prescribed by Allah for certain specific offences, namely, in Maliki law, *zina*, *qadhf*, *sariqah*, *shurb, hirabah and ridda.* The punishments for these offences are regarded as the right of Allah, so that once an accused has been duly found guilty of the offence, the punishment may not be waived or commuted by anyone else, including the victim.

hadith (pl. *ahadith*, although in this work 'hadiths' has been used). A narrative or report of deeds, sayings and approvals of the Prophet Muhammad (SAW).

halal. Permissible in Islamic law or Sharia. Compare *fard* or *wajib* (obligatory), *manduh* (commendable), *makruh* (reprehensible or abominable) and *haram* (forbidden).

haram. Forbidden by Islamic law or Sharia. Harmful. Evil. Compare *fard* or *wajib* (obligatory), *manduh* (commendable), *halal* (permissible), and *makruh* (reprehensible or abominable).

hirabah. Armed or highway robbery or banditry. It belongs in the category of *hudud* offences.

hukm (pl. *ahkam*). In jurisprudence, this means a rule or ruling, such as a command or a prohibition, as provided for in the Qur'an or the Sunnah, or derived by the process of *ijma.* It has also come to mean the final sentence of a judge.

ibadat. That part of the Sharia which regulates matters of religious belief and worship.

i'izar. Hausa for the Arabic *i`dhar.* Opportunity provided by the judge to the party against whom evidence is introduced during trial to challenge that evidence.

ihsan. The state of being a freeborn, sane, adult person who is or was a partner in a lawful marriage, lawfully consumated, with a person who is (was) also in the state of *ihsan*.

ijma. Consensus of opinion. Technically, it is the consensus of Islamic jurists – whether within a period of time after the death of the Prophet (SAW) or during some other period – on a point of law.

ijtihad. Literally, exertion, striving or struggle, and technically the effort a jurist makes to deduce the law from its sources. It is the effort invested in interpretation according to a prescribed methodology.

ikirari. Hausa for the Arabic *iqrar*: acknowledgement, admission or confession of having done some wrongful deed, whether made in or out of court, formally or informally.

imam. The leader of *salah* – congregational prayer or worship.

iman. Faith; belief in the existence and omnipotence of Allah, the Prophets, the angels, the hereafter and predestination, whether for good or ill.

in sha Allah Literally, Allah willing. Common phrase usually invoked by Muslims when making undertakings, promises or commitments. It underlines the centrality of Allah in the schemes of Muslims.

isnad. The chain of transmission of a hadith, beginning with the person who witnessed the saying or act of the Prophet in question, up to the one who wrote it down.

madhab (pl. *madhahib*). A school of *fiqh*, that is, a school of Islamic jurisprudence. There are four main Sunni *madhahib*: Hannafi, Maliki, Shafi'i and Hanbali. The one most widely followed in Nigeria is the Maliki.

mu'amalat. "Transactions": that part of the Sharia which regulates the conduct of Muslims in social life and defines their duties towards other members of society. It is from this part of the Sharia that the body of rules enforced in the courts is drawn.

muhsin. A man (or *muhsinat*, woman) who is in the state of *ihsan*.

mukallaf. A person having full legal and religious capacity; that is, legally liable for all kinds of obligations or duties.

munkar. Forbidden, strange or evil acts under Islamic law.

qadhf. Literally, calumny or defamation. Technically, it means the *hadd* offence of an unfounded allegation or accusation of *zina*.

qisas. Retaliation in kind: an eye for an eye, a tooth for a tooth, etc. The legal sanction in cases of homicide and wounding, unless waived in favour of either *diyah* or complete forgiveness by the decedent's heirs or the wounded party.

qiyas. In its ordinary dictionary meaning, *qiyas* means, 'to guess', 'to estimate', 'to measure', or 'to compare'. In Islamic jurisprudence, *qiyas* means reasoning by analogy: the extension of a rule established by the texts to new circumstances on the basis of a common underlying cause, by means of analogical deduction.

rajm. Lapidation; stoning to death. The fixed punishment for *zina* commited by a person who is *ihsan*.

ridda. Apostasy from Islam; in Maliki law one of the *hudud* offences.

sariqah. Theft; one of the *hudud* offences. *Sariqah* is specifically forbidden in the Qur'an and its commission may attract the *hadd* punishment of amputation of the hand.

SAW. *Sallallahu alaihi wasallam:* "May the blessings of Allah be upon him"; used when the Prophet is mentioned.

shubha. Uncertainty regarding the unlawfulness of an act; doubt.

shurb; *shurb al-khamr*. Drinking wine, and by implication, any alcoholic beverage.

sunnah (pl. s*unnan*). Literally, a form or pattern. The customary practice of a person or a group of people. It has come to refer almost exclusively to the practices of Prophet Muhammad (SAW) as disclosed in the Hadith.

SWT. S*ubhanahu wa ta'ala*: "Glory be to Him"; used when Allah is mentioned.

tuhuma. In Hausa: suspicion; interrogation. Cf. the "oath of *tuhuma*": the oath offered to an accused upon an unproven allegation, by which he may swear to his innocence; sometimes called "oath of innocence".

urf. Literally, that which is known. The recurring practices that are acceptable to people of sound nature. It represents those customs of a community, not prescribed by the Sharia, that however do not contravene the principles of Sharia and that are valid and authoritative for that group.

usul (derived from '*asl*'). Root, origin, source, proof.

usul al-fiqh. The part of Islamic jurisprudence which is concerned with understanding the sources of Islamic law, their order of priority and the methodology and procedure to be employed for deriving specific legal rules from the Qur'an and Sunnah.

wakil; *wakili majauwali*. Representative.

zani. A man (or *zaniyah*, woman) who has committed *zina*.

zina. Unlawful sexual intercourse, that is intercourse outside the bounds of a lawful marriage. One of the *hudud* offences.

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Chapter 6 Part VI

Brief Biographies of the Judges Who Ruled on the Cases

Compiled by Philip Ostien

Safiyatu Hussaini's case

The judge of the Upper Sharia Court Gwadabawa:

Muhammadu Bello Sanyinnawal. No information available.

The judges of the Sokoto State Sharia Court of Appeal:[111]

Hon. Alhaji Muhammad Bello Silame, Grand Kadi. Born in Silame town in the year 1937. After early Qur'anic education, continued his Arabic and Islamic studies at Silame *nizammiyya*.[112] From there he was employed by the then Native Authority to serve as a primary school teacher. Spent the years 1957-1960 studying at the Kadi School, Sokoto. Subsequently became a *mufti* (scribe) in the Native Courts system, and then an Area Court Judge in his own right in 1974. After his appointment as an Area Court Judge he attended the Basic and Advanced judicial courses at the Institute of Administration, Ahmadu Bello University, Zaria (three months and one month, respectively). Was promoted to Upper Area Court Judge in 1984; to Kadi of the Sharia Court of Appeal in 1992; and to Acting Grand Kadi 2000. He has subsequently retired.

Hon. Alhaji Bello Muhammad Rabah, Kadi. He was born in Sokoto in the year 1950. After early Qur'anic education, continued his studies at *nizammiyya* Islamic school, obtaining his Higher Islamic Studies certificate to prepare him for Kadi School, Sokoto, where he obtained his certificate in Basic Judicial Studies. He was employed by the Judicial Service Commission Sokoto State to as an Area Court Judge in 1968 and gradually rose to the post of Kadi of the Sharia Court of Appeal in 1996.

Hon. Alhaji Abdulkadir Saidu Tambuwal, Kadi. Born in Tambuwal. Holds a Diploma in Sharia and Civil Law from ABU Zaria. Was employed by the Judicial Service Commission of Sokoto State, to serve as an Area Court Judge, on 1st July 1981. Rose through the ranks, being appointed a Kadi of the Sharia Court of Appeal on 12th December 1998. On 6th August 2004 he was appointed the Honourable Grand Kadi, which position he still holds.

Hon. Alhaji Muhammad Tambari Usman, Kadi. Born in Yabo Local Government in the year 1955. Attended "Western" primary and secondary schools. After his

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[111] Source: Malam Idris Adamu, Acting Chief Registrar, Sharia Court of Appeal, Sokoto. In the case of Alhaji Silame the material received from the Ag. Chief Registrar has been supplemented with information from an interview with Alhaji Silame conducted by the compiler on 24th February, 2003 in Sokoto. There are some conflicts in the information received from the two sources; in such cases the interview material has been used.

[112] *Nizammiyya*: school of higher Arabic and Islamic studies, attended by students beginning in late adolescence and ranging upward in age without limit. Subjects of study include Arabic, *adab al-Arabiyya* (Arabic literature), *mantiq* (logic), *ma'lumat* (geography), the Qur'an and Hadith, *tauhid* (theology), *fiqh*, etc. Various certificates may be obtained, including the Higher Islamic Studies Certificate (HIS).

nizammiyya Islamic school he proceeded to what is now Usman Dan Fodio University, Sokoto, where he obtained his B.A. in Arabic. He was employed as an Area Court Judge by the Sokoto State Judicial Service Commission in 1976. In 1998 he was appointed a Kadi of the Sharia Court of Appeal, a position he still holds. It was Alh. Usman who read the leading judgment in Safiyatu Hussaini's case.

Amina Lawal's case

The judge of the Sharia Court Bakori:[113]

Alhaji Nasuru Lawal Bello Dayi. The officer was born in 1957 at Dayi, in what is now Malumfashi Local Government Area, Katsina State. He obtained Diploma in Law in 1984 from Hassan Usman Katsina Polytechnic. He joined the Judiciary as an Assistant Registrar on G.L. 06 with effect from 16th April, 1988. His cadre was changed from Registrar on G.L. 07 to Area Court Judge II on G.L. 07 with effect from 1st August, 1990. He was promoted to Area Court Judge I on G.L. 08 with effect from 1st January, 1991. His salary was reviewed from G.L. 08 to G.L. 09 with effect from 1st January, 1992 as Higher Area Court Judge in accordance with Federal Civil Service Commission's circular No. B. 63279/S.43/349. He was promoted to Senior Area Court Judge on G.L. 10 with effect from 1st January, 1994, Principal Area Court Judge I on G.L. 12 with effect from 1st January, 1997, Principal Area Court Judge I on G.L. 13 with effect from 1st January, 2000.[114] He was appointed as an Upper Shari'a Court Judge II on G.L. 14 with effect from 5th August, 2004. He is presently an Upper Shari'a Court Judge II at Kankara Upper Shari'a Court.

The judge of the Upper Sharia Court Funtua:[115]

Alhaji Aliyu Abdullahi. The officer was born in 1944 at Katsina in what is now Katsina Local Government Area, Katsina State. Obtained Diploma in Shari'a and Civil Law in 1977 from Ahmadu Bello University Zaria. He joined the Judiciary as an Assistant Registrar on G.L. 06 with effect from 8th July, 1977. His cadre was changed from Assistant Registrar on G.L. 06 to Area Court Judge I on G.L. 07 with effect from 1st July, 1981. He was promoted to Higher Area Court Judge on G.l. 08 with effect from 1st April, 1985, Senior Area Court Judge on G.L. 09 with effect from 1st October, 1987, Principal Area Court Judge II on G.L. 10 with effect from 1st August, 1989. His salary was reviewed from G.L. 10 to G.L. 12 with effect from 1st January, 1992 in accordance with Federal Civil Service Commission's circular No. B 63279/S. 43/349 of 20th July, 1990. He was promoted to Principal Area Court Judge I on G.L. 13 with effect from 1st January, 1993, Upper Shari'a Court Judge II on G.L. 14 with effect from 1st January, 1996, Upper Shari'a Court Judge I on G.L. 15 with effect from 1st January, 2000. The officer retired from the services of Katsina State Judiciary as Upper Shari'a Court Judge I at Funtua with effect from 6th May, 2005.

[113] Source: Justice S.A. Mahuta, Chief Judge, High Court of Katsina State.
[114] Alhaji Dayi appears to have been on this same level, although now a Principal Sharia Court Judge, when he tried Amina Lawal's case.
[115] Source: Justice S.A. Mahuta, Chief Judge, High Court of Katsina State.

The judges of the Katsina State Sharia Court of Appeal:[116]

Hon. Aminu Ibrahim Katsina, Grand Kadi. Born 1941. Primary and secondary schooling in Kankara, Malumfashi and Katsina 1949-57. Attended School for Arabic Studies, Kano 1958-62, receiving Final Certificate in 1962, then studied for one year at Al-Azhar University in Cairo. Served as an Assistant Alkali (*mufti*) in Katsina Native Authority 1963-66, then as an Inspector of Area Courts 1966-73 in what in 1967 became North Central State and included what is now Katsina State. During years of service as Inspector also completed Diploma in Law and LL.B. at Ahmadu Bello Univesity, Zaria (1966 and 1972, respectively), and his year at the Nigerian Law School, Lagos, being admitted to practise at the bar in 1973. Served as a Magistrate in North Central State 1973-74; as Company Secretary/Legal Advisor to the Broadcasting Company of Northern Nigeria 1974-76; and as Chief Registrar of the Sharia Court of Appeal of Kaduna State (which then included what is now Katsina State) in 1976-77. Moved to Lagos as Secretary to the Public Complaints Commission 1977-82, and then undertook duties as Special Assistant to President Shagari 1982-83. Was Secretary to the Nigerian Law Reform Commission 1984-89. Appointed Kadi of the Sharia Court of Appeal, Katsina State, 1989; Acting Grand Kadi 2000, and Grand Kadi, 2001. Died in office 22nd January 2004.

Hon. Sulaiman Mohammed Daura, Kadi. Born 1944. Junior and senior primary school in Kano 1954-60. Studied Qur'an and Hadith with malams in Zangon Daura 1961-62, then attended Arabic Teachers College, Sokoto 1963-67, finishing with Grade II Certificate. Was the first Headmaster of the Islamiyya Primary School in Daura beginning in January 1968, but left later the same year to read Islamic Studies at Bayero College, ABU Kano Campus, receiving B.A. in 1973. Then became teacher at GSC Kallungo (in what is now Bauchi State) 1973-74; Vice-Principal, Arabic Teachers College Katsina 1974-75; Vice-Principal, Government Secondary School Daura 1976-77, and Principal, Government Day Secondary School Daura 1977-81. Switched over to judicial service in 1981, serving as Area Court judge 1981-87, Upper Area Court judge 1987-90, and finally Kadi of the Sharia Court of Appeal from 1990.

Hon. Ibrahim Mai Unguwa Umar, Kadi. Born 1942 in Katsina's Unguwar Alkali. Early education included elementary school in Dutsin-Ma 1949-52, Qur'anic school in Maiduguri 1953-56, and Islamic law school in Katsina 1957-59. Taught Arabic and Islamic Studies in Musawa Primary School 1960-67; left to attend Arabic Teachers College Sokoto 1968-70, finishing with Grade III Certificate. Taught Arabic and Islamic Studies in Mani during 1971, before again leaving to attend the Teachers College Katsina 1972-73, finishing with a Grade II Certificate. Was then Headmaster of the Magaji Abu Primary School for several months in 1973; left to do his Diploma in Sharia and Civil Law at ABU Zaria 1973-75. Began judicial service in 1976, serving as Registrar of Area, then Upper Area Court in Daura 1976-78, Area Court judge 1978-87, Upper Area Court judge 1987-90, and Kadi of the Sharia Court of Appeal from 1990.

Hon. Shehu Mu'azu Dan-Musa, Kadi. Born 1953 in Dan-Musa. Attended primary school in Dan-Musa and Safana 1960-66. Then attended the Arabic Teachers College,

[116] Sources: CVs provided by the Sharia Court of Appeal, Katsina.

Katsina 1967-69, obtaining Grade III teaching cerficate, and taught as a Grade III teacher for all of 1970. Returned to Arabic Teachers College 1971-72, obtaining Grade II certificate; taught as a Grade II teacher 1972-74. Left teaching to do Diploma in Sharia and Civil Law at ABU Zaria 1974-76. Began judicial service in 1977, serving as Area Court Assistant Registrar 1977-81, Area Court judge 1981-89, Upper Area Court judge 1989-95, Acting Director of Area Courts for seven months in 1995, and became Kadi of the Sharia Court of Appeal from November 1995.

Hon. Sule Sada Kofar Sauri, Kadi. Born 1948 in Katsina. Attended primary school in Katsina 1954-60, then Islamic law school also in Katsina 1961-64. Taught Arabic in Kayalwa Primary School 1965. Attended Arabic Teachers College, Katsina 1966-68, obtaining Grade III teaching certificate, then taught as Grade III teacher 1969-70. Returned to Arabic Teachers College 1971-72, obtaining Grade II certificate; taught as Grade II teacher in Abuttai Primary School 1973-74. Became Court Clerk at Area Court in Funtua 1974. Did the Basic Judicial Course at the Institute of Administration, ABU Zaria in 1975, and returned to ABU to do Diploma in Sharia and Civil Law 1977-80. Continued service in the Area Courts as Assistant Registrar 1980-82, Area Court judge 1983-91, Upper Area Court judge 1991-95, Assistant Director of Area Courts for some months in 1995, and became Kadi of the Sharia Court of Appeal from November 1995.

Chapter 6 Part VII

On Defending Safiyatu Hussaini and Amina Lawal

*Aliyu Musa Yawuri**

Introduction

Several years ago, shortly before I argued Amina Lawal's case before the Sharia Court of Appeal of Katsina State, I presented a somewhat technical conference paper discussing the facts and the legal issues involved in the two cases of Safiyatu Hussaini and Amina Lawal.[117] Much of what I then discussed can be read in the proceedings and judgments published earlier in this chapter, which include summaries made by the appellate courts of the arguments of the lawyers. In this paper, I discuss less technical aspects of these two cases and the circumstances surrounding them.

How I became involved

My involvement with the cases of Safiyatu Hussaini and Amina Lawal came through my association with the Women's Rights Advancement and Protection Alternative (WRAPA). WRAPA is a Nigerian NGO, headquartered in Abuja, which is devoted to the promotion and protection of the human rights of women through education, political advocacy, and the provision of legal services. Its Secretary General, Mrs. Saudatu Shehu Mahdi, is a leading women's rights activist in Nigeria. She became one of the key coordinators of the appellate efforts in the two cases. I myself had been involved in human rights work for some years, mostly by way of doing pro bono criminal defence work, trying to ensure that accused persons were accorded their constitutional rights within the criminal justice system. When, sometime in 2001, a friend introduced me to WRAPA, I offered to assist in its work by providing pro bono legal services in the area of human rights; this gave me a singular opportunity to continue and expand my practice of human rights law. The agreement proceeded on this basis until recently when we agreed that I might charge fees for legal services rendered.

Safiyatu Hussaini's case

I first heard of the case of Safiyatu Hussaini Tungar Tudu when I read a newspaper report on her prosecution and conviction for the offence of *zina*. She had been sentenced by the Upper Sharia Court sitting in Gwadabawa, Sokoto State, to die by stoning. This judgment was pronounced on 9th October 2001; I must have read the news

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[117] A.M. Yawuri, "Issues in Defending Safiyyatu Hussaini and Amina Lawal", presented at the conference on Sharia Penal and Family Law in Nigeria and in the Muslim World: A Rights Based Approach, sponsored by the International Human Rights Law Group, Abuja with support from the German Embassy and held in Abuja on 5th-7th August, 2003. The conference papers, conference report, and list of participants are all published in J. Ibrahim, ed., *Sharia Penal and Family Law in Nigeria and in the Muslim World: A Rights Based Approach* (Nigeria: Global Rights, 2004); my essay is at pp. 183-204. The Amina Lawal appeal was argued in the Katsina State Sharia Court of Appeal on 27th August 2003.

of it shortly thereafter. I called the attention of Mrs. Mahdi to the report. WRAPA immediately instructed me to travel to Gwadabawa – a town situated about 70 km to the northwest of Sokoto City – to conduct preliminary enquiries on the proceedings leading to Safiyatu's conviction. It was decided further that I should travel to Safiyatu's village, Tungar Tudu – about 15 km to the east of Gwadabawa – to consult with Safiyatu and brief her on her constitutional right to appeal against the conviction and sentence.

When I got to Gwadabawa, I received maximum cooperation from the registrar of Upper Sharia Court there, who allowed me to go through the record of proceedings. This was still in its original form: written out by hand while the proceedings were in progress, probably by the judge who tried the case (although sometimes the record is written by the registrar instead), in a large record book also containing the records of many other cases, all interspersed together. I also met with the police prosecutor and discussed the details of the prosecution's case with him. While I was there I met a female lawyer from the Federal Ministry of Women's Affairs, Abuja, who told me that she too had come to make preliminary inquiries on Safiyatu's case. My findings at the court convinced me instantly that Safiyatu had an arguable appeal. I arranged with the registrar for a certified true copy of the record of proceedings to be made up.

I proceeded to Tungar Tudu, a typical Hausa village in the semi-desert of Nigeria's far northwest, where the people support themselves largely by farming. As tradition demanded, I called first on the village head. I explained my mission to him and asked him to accompany me to meet Safiyatu and her family. He obliged. I explained my mission to Safiyatu and her family and asked if she would like WRAPA to take up the appeal on her behalf. Safiyatu and her family accepted the offer and expressed deep appreciation and gratitude. I collected her written instruction to represent her in the appeal. Tungar Tudu is a very small village and its people are hospitable. I could feel the excitement in the air, and sensed the furtive glances directed at me by the villagers. I may mention that I myself am from Kebbi State, which was formerly part of Sokoto State, and I had much of my education in Sokoto, so I was very much at home with the people of Tungar Tudu, and they with me: we all spoke Hausa in much the same way and shared the same culture, even though I had acquired a university education and gone off to practise law in the nation's capital.

On my way back to Abuja from Tungar Tudu and Gwadabawa, I stopped in Sokoto, where, on 26th October 2001, I filed a notice of appeal against the Gwadabawa judgment at the Sharia Court of Appeal, Sokoto, listing four grounds of appeal. We later learnt that the National Human Rights Commission, an agency of the Federal Government, had instructed Mr. Sadik Umar Esq. from Birnin Kebbi to file an appeal against the judgment. It also developed that BAOBAB for Women's Human Rights, a Lagos-based NGO, had similarly instructed my friend and classmate at the university, Mr. Abdulkadir Imam Ibrahim, a Sokoto-based legal practitioner, to file another appeal. At this time the case had started to attract both national and international notoriety. Such Nigerian NGOs as the Women's Aid Collective (WACOL), the Women's Advocate Research and Documentation Centre (WARDC), the Legal Defence and Assistance Project (LEDAP), the International Human Rights Law Group (Nigeria) and quite a number of others, began to make contact with us. The Federal Ministry of Women's Affairs, Abuja, the Federal Ministry of Justice, and a number of other federal ministries and agencies also

began to show interest and sought (and were given) periodic briefings on the case from WRAPA.

In late 2001 Mrs. Mahdi, the Secretary General of WRAPA, called a stakeholders' meeting at Abuja with the aim of evolving a common stand on Safiyatu's appeal. The "stakeholders" included a wide range of organisations and individuals (lawyers, academicians, scholars and activists) interested in two main things: first, saving the life of Safiyatu, and second, handling the appeal in such a way that the eventual judgment of the Sharia Court of Appeal would serve as a useful precedent for future *zina* cases. The stakeholders group continued its work during the subsequent appeal of Amina Lawal; in her press statement after the victory in Amina's case, Mrs. Mahdi said this about the group:

> Special mention must be made of BAOBAB for Women's Human Rights, the National Human Rights Commission, the International Human Rights Law Group, Nigeria, Centre for Islamic Legal Studies, Institute of Administration Ahmadu Bello University, Zaria, the Federal Ministry of Women Affairs & Youth Development, and the Federal Ministry of Justice. Others are national women groups and community-based organisations that through sensitisation were able to assist the understanding of Nigerians on the rationale for the appeal of Amina. Individuals we must acknowledge for their sustained legal support include A.B. Mahmood SAN, Mrs. Maryam Uwais, Dr. Kole Shettima, Dr. Nnana Tanko, Barr. A.A. Machika, Hauwa Kulu Inuwa, Chinonye Obiagwu, Abdulkadir Imam (lead counsel to Safiyatu Hussaini Tungar Tudu). Others are Mal. Mustafa Hussain Isma'il and Amina Salihu. Another important group we must thank are the learned *ulamas* who individually and sometimes collectively supported the appeal and in many instances research to support the arguments of the grounds of appeal. These organisations and individuals brought in resources and logistic support to the process and WRAPA remains indebted to them.[118]

In short, a great many individuals and groups, Muslims and non-Muslims alike, contributed to the successful prosecution of both appeals. At the initial meeting of the stakeholders group in late 2001, I briefed those present on the steps I had taken in Safiyatu's appeal so far; others did so as well; and there was a general discussion about how we would proceed. Unfortunately we did not get clear at this meeting who was to argue the appeal when the time came; this was only resolved on the day of the argument.

Safiyatu's case was set for argument before the Sharia Court of Appeal in Sokoto on 14th January 2002. On that day, I appeared in court ready to argue the appeal on behalf of Safiyatu. My friend Abdulkadir Imam Ibrahim also appeared prepared to argue the case. The two of us approached Safiyatu to clarify her position as to who should represent her. Safiyatu said she wanted the two of us to appear for her. We pointed out that one of us must lead the team and actually argue the case. Safiyatu instructed Abdulkadir Imam do so, which he did very ably. During his argument he added six

[118] "Text of Address by the Secretary General at a Press Conference on the Successful Outcome of the Appeal of Amina Lawal Held Tuesday September 30, 2003, WRAPA Headquarters, Abuja." Copy in the possession of the author.

grounds of appeal to the four I had filed – two of which, however, were essentially the same as two of my own. I will observe that three of the four grounds of appeal I filed succeeded. However, the one relating to the denial of her fundamental right to a fair hearing, because the trial court had not explained to Safiyatu her right to have a lawyer to represent her, failed.[119]

The judgment of the Sokoto State Sharia Court of Appeal – finding a number of errors in the proceedings and judgment of the Upper Sharia Court Gwadabawa, overturning Safiyatu's conviction, and discharging and acquitting her – was handed down on 25th March 2002. As we had hoped, besides freeing Safiyatu the judgment set excellent precedents for any future *zina* cases. It held that only persons guilty of *zina* can submit themselves, if they feel they must, for prosecution and punishment, but that it is improper under Islamic law for the police or indeed any third party to initiate *zina* proceedings against persons suspected of this offence; it set very strict standards for the acceptability of confessions to *zina*; it held that a confession, even if valid, may be retracted, either by the accused or by his or her authorised representative, right up to the moment of execution of the judgment, and that after such retraction the confession is null and void and of no further effect; and it held that the pregnancy of an unmarried woman who has been divorced from her former husband for less than five years should presumptively be deemed a "sleeping pregnancy" ascribable to her former husband rather than being deemed evidence of *zina*.[120] All of these rulings, and the others made by the court, were grounded firmly in the Qur'an, the Hadith, and the books of *fiqh* in use by Muslim jurists in Nigeria and throughout the world, with references as appropriate also to the Nigerian Constitution and the laws of Sokoto State. I recall that immediately after the judgment, the Executive Governor of Sokoto State addressed a press conference at which reporters from print, radio and television news organisations from all over the world were in attendance. The Governor noted that his government had in no way interfered with the proceedings at any stage. He said that the Sharia legal system had vindicated itself. It had shown its capacity for self-correction and self-sustenance. I too felt this way about the judgment.

After her discharge, Safiyatu returned to live in her village of Tungar Tudu. She was briefly in the news again in September 2002 when she was taken to Rome and made an honorary citizen of the city. With this event neither WRAPA nor I had anything to do, as I will discuss further below.

Amina Lawal's case

As has been indicated, the judgment acquitting and discharging Safiyatu was handed down on 25th March 2002. It was immediately after the judgment was read, as I was travelling back to Abuja, that I received information that five days previously, on 20th March 2002, Amina Lawal Kurami had been convicted of *zina* by the Sharia Court in the town of Bakori, Katsina State and sentenced to die by stoning. I immediately called the Secretary General WRAPA and informed her of this development. She herself was

[119] Ed. note: the issue of right to counsel is discussed further in the introduction to this chapter.
[120] See my paper "Pregnancy as a Proof of Zina: A Study of Recent Cases in Sokoto and Katsina", presented at the 5th Annual Judges Conference held at the Centre for Islamic Legal Studies, Ahmadu Bello University, Zaria, 19th-20th December 2003.

travelling from Sokoto to Katsina; she proceeded to Amina Lawal's village, Kurami, in Katsina State where she met with Amina. Amina sought for and obtained WRAPA's commitment to support her appeal. Mrs. Mahdi instructed me to file the appeal immediately. Within days I met with Amina Lawal at Kurami and visited the trial court in Bakori where I made preliminary inquiries on the trial and ordered a certified true copy of the record to be made up. In this case the appeal lay, not directly to the Sharia Court of Appeal of Katsina State, but to the Upper Sharia Court in Funtua, where I filed a notice of appeal on 28th March 2002. Additional grounds of appeal were filed subsequently, as well as an application to relieve Amina Lawal of bail conditions which the Bakori court had imposed on her. The Funtua court granted the application on 3rd June 2002.

WRAPA again convened a stakeholders' meeting at Abuja. Almost everyone who had attended the earlier meeting was also present at this second one, and the discussions were along similar lines. I recall that during the meeting someone suggested that instead of pursuing the appeal through the Sharia courts of Katsina State, we should instead file a summons for declaratory judgment in the State High Court, seeking to nullify Amina's conviction and sentence on the ground that the application of Islamic criminal law by Katsina State was per se unconstitutional; this might have been based on any one or more of several grounds. There was a lengthy deliberation on this suggestion. I disagreed with it. My reaction was based on personal and professional reasons. As a Muslim, I am proud of Islam and its legal system. It is incompatible with my personal convictions to act in any way calculated to derail the application of Sharia. Secondly, at my initial and subsequent meetings with Amina Lawal, she had persistently maintained that she had no quarrels with the Sharia law per se. Her hope was that her appeal would succeed on grounds of misdirection, misapplication, or some technical or procedural flaws in the trial. Amina Lawal is a Muslim; she lives in a Muslim community. She believed that the Sharia, under which she was convicted and sentenced to death, should contain some mechanism that could allow her appeal and set her free. In other words, she yearned for legitimacy. I know as a matter of fact that the implementation of Sharia in the Muslim north enjoys tremendous support among the people. It is conceivable that had the High Court declared the application of Islamic criminal law to be in itself unconstitutional, and nullified Amina's conviction and sentence on that ground, there would have been an uproar. Amina Lawal would have become an outcast, a disgrace to her family and the society at large. Such judgment would have woefully failed in erasing the stigma of *zina*. So besides my own personal convictions in the matter, the suggestion to attack Sharia itself on constitutional grounds was against the express instructions of my client. All the same, and to be fair to the meeting, I suggested that should the sense of the meeting be otherwise, I could withdraw as a counsel and another lawyer could be appointed to argue the appeal in my place. In the end the meeting decided to drop the suggestion to approach the High Court, and I continued as lead counsel for Amina Lawal. The meeting continued with further discussion of strategy and legal issues to be raised in the appeal.

The Upper Sharia Court Funtua held hearings in the matter over several months, finally delivering its judgment on 19th August 2002. Although we raised many of the same issues (and some more) that had won the case for Safiyatu in Sokoto, the court rejected our arguments and upheld the judgment of the Sharia Court Bakori against

Amina Lawal. On the day the judgment was delivered the courtroom was crowded and the atmosphere was tense. A group of Muslim radicals numbering about fifty were present to see whether Sharia law would be enforced. There was a considerable presence of police and other security agents. Whenever the judge made a finding or a ruling which went against Amina Lawal, the group of radicals would chant the *takbir* (*Allahu akbar!* – Allah is the Greatest!). After the judgment the group broke into jubilation, chanting that Islam had overcome *kufr* (unbelief). Amina was shaken, though she maintained her outward appearance of calm. After the judgment WRAPA brought Amina to Abuja, to secure her safety, and secondly to complete some treatment that had begun at the National Hospital.

After deliberating on the judgment of the Funtua court and considering the grave errors committed therein, WRAPA instructed me to file an appeal against the decision before the Katsina State Sharia Court of Appeal, which I did on 21st August 2002. I also drew the attention of WRAPA to the fact that Amina Lawal was liable to be executed by stoning as per the judgment of the trial court as soon as she weaned her child, and that the child might be weaned before the appeal process was completed. This was especially worrisome because Katsina State, unlike most of the other Sharia States, had not adopted a Sharia Criminal Procedure Code laying down the steps to be gone through before a sentence of death could be executed, and what the effect of a pending appeal would be.[121] Consequently, WRAPA instructed me to file an application before the Sharia Court of Appeal seeking for an explicit order of the court staying the execution of Amina Lawal pending the determination of her appeal. This was duly granted.

After many further delays due to various factors, including on one occasion the absence of the Grand Kadi due to illness, and on another the absence of two of the other kadis who had been called to serve on election tribunals adjudicating disputes arising from the nationwide elections held in April and May 2003, the case was finally argued in the Sharia Court of Appeal in Katsina on 27th August 2003. I announced myself, Mariam Imhanobe and Hauwa Ibrahim as counsel representing the appellant, and State Counsel Muhammed Darma announced himself. Then an interesting thing happened. Like Safiyatu's case, this case had attracted both local and international attention – perhaps even more so. From early in the proceedings in the Sharia Court of Appeal a Senior Advocate of Nigeria (SAN) had appeared and said that he was representing Nigerian Bar Association (NBA). I had announced him as an observer on all the dates he appeared in court. However on 27th August 2003, when the appeal was to be argued, the learned SAN insisted he was not there merely to observe but would make his own separate submissions on behalf of Amina Lawal after I had completed mine. State Counsel objected, submitting that the NBA was not a party to the matter and therefore the learned SAN had no right of audience. Surprisingly the learned SAN insisted that Amina Lawal had not appointed any lawyer to represent her in the appeal and that all lawyers were appearing only as persons interested in seeing that justice was done. The Honourable Court asked the learned SAN not to press the issue, pointing out that at previous court sittings I had appeared as the counsel for the appellant. In the end the court ruled that the learned SAN had no right of audience and that he might choose

[121] Ed. note: for the relevant provisions of the Sharia Criminal Procedure Codes, see §§254 and 260-67 of the Harmonised Sharia Criminal Procedure Code Annotated in Chapter 5.

to stay and observe the proceedings or he might go his way. He stayed, but said nothing further.

I proceeded to argue the twelve grounds of appeal that I had filed on behalf of Amina Lawal. Counsel for the State responded and the matter was adjourned for judgment. The judgment was delivered one month later, on 25th September 2003. To our great relief the appeal was allowed, the judgments of the two lower courts convicting the appellant for the offence of *zina* were set aside, and Amina Lawal was discharged and acquitted. Again we obtained a strong judgment from the Katsina State Sharia Court of Appeal giving valuable guidance to the lower Sharia courts and setting valuable precedents for the future.

On the decorum with which the appeals were conducted, and some breaches thereof

As pointed out earlier, the two cases assumed both national and international importance. The nature of the sentences caused uproar and condemnation in many quarters. However, to the ordinary northern Nigerian Muslim, the judgments were seen as the success of Islam against unbelief (*kufr*). They raised the hopes and aspirations of Muslims that the Sharia would purge the society of all evils. The two principal NGOs that were involved in the prosecution of the appeals – WRAPA and BAOBAB – agreed from the start that the sensibilities of the Muslims must be recognised and respected. Every effort was made to avoid misinformation, sensationalism, or provocation that could prove counterproductive to the two cases. Even in our choice of legal strategy, as I noted above, we respected the need to tread softly and to balance many competing interests – the interests of the accused/appellant, the interests of Muslim individuals, groups and communities, the interests of the Federal Government of Nigeria, the interests of the NGOs both national and international involved in the prosecution of the appeals, and the interests of the international community. Naturally the interests of Safiyatu and Amina came first. But in the complex situation in which we found ourselves many other factors had to be taken into consideration in our conduct of the cases and in the way we also conducted ourselves.

It was out of this overriding need for proper decorum that WRAPA refused to participate in – indeed distanced itself from – the decision to take Safiyatu Hussaini to Rome where she was invested with the honorary citizenship of the city. Safiyatu herself surely had little understanding of what she was in for on this trip and seems not to have gotten the benefit she expected.[122] At the same time the spectacle predictably outraged many of Nigeria's Muslims and probably set back, in their hearts and minds at least, the very pro-women and pro-human rights agendas the sponsors of the trip said it was meant to advance.

It was for the same reason that WRAPA had cause to complain to BAOBAB about the conduct of Hauwa Ibrahim, one of the lawyers who associated herself with the cases. Hauwa Ibrahim attended the first stakeholders meeting on Safiyatu's case, in late 2001, as a consultant to BAOBAB, and then continued her involvement in both cases

[122] See *Daily Trust*, 21st Nov 2002: "I Didn't Receive Money From Rome – Safiya", where Safiyatu is reported as saying on the BBC Hausa Service that she was promised money which she never received.

thereafter. She got into difficulty the first time in late 2002, when the London *Economist* identified her as one source of a story in which the *Economist*

> alleged that Chinonye [Obiagwu, the National Coordinator of the Legal Defence and Assistance Project (LEDAP)] visited Sweden in October 2002 in a fund-raising drive and did receive an undisclosed amount of money from the Swedish public while claiming to be Amina's lawyer. The magazine further claimed that the duo of Hauwa and Sindi [Meder-Gould] who are "real" lawyers of Amina granted it interview wherein they denied knowing Chinonye as a human rights activist in Nigeria nor his alleged involvement in the defence of the poor woman during her trying moment.[123]

Obiagwu, who is well-known in Nigeria and internationally as a human rights activist and legal practitioner, and who of course had been involved in the Safiyatu/Amina stakeholders group throughout, promptly sued the *Economist*, Hauwa Ibrahim and Sindi Meder-Gould in the Lagos High Court, seeking a retraction, an apology, and damages, all of which he won from the *Economist* in an out-of-court settlement.[124] How the case was concluded with the other defendants is unknown to me. Then, while Amina Lawal's appeal was still pending in the Sharia Court of Appeal, and contrary to our collective decision, Hauwa Ibrahim granted an interview to the Hausa Service of the BBC. This is listened to regularly by millions of people in northern Nigeria, and Hauwa Ibrahim's statements elicited hostile reactions from many in the Muslim community. I believe honestly that Hauwa Ibrahim's action had the potential to jeopardise the process and the outcome of the then-pending appeal. WRAPA had to intervene to control the situation, among other things presenting a formal complaint to BAOBAB about Hauwa Ibrahim's behaviour and pleading that the organisation should call her to order. In their response to the complaint, BAOBAB indicated that as at the date when the complained-of behaviour occurred, Hauwa Ibrahim had ceased to be their consultant. It is interesting to note that Hauwa Ibrahim appeared in the cases of Safiyatu Hussaini and Amina Lawal on the platform of BAOBAB. At various times during the two appeals many lawyers attended court as part of the defence team on the platform of other bodies. For example, the International Human Rights Law Group, the Federal Ministry of Women Affairs, the Human Rights Commission, etc. sent in their lawyers to appear in the court.[125] Even private legal practitioners appeared in court in show of solidarity to the cause of women's human rights. But on the 25th of September 2003, when the Sharia Court of Appeal, Katsina sat to deliver its judgment in Amina Lawal's case, contrary to my earlier practice, I refused to announce the appearance of Hauwa Ibrahim – my reason being that Hauwa Ibrahim had no platform.

The case of Hauwa Ibrahim

Both WRAPA and I became aware from time to time of various publications in which Hauwa Ibrahim was reported to have claimed to be the lead counsel in the appeal of Amina Lawal. In one it was also reported that she had argued the case, and moreover that the court had attempted to deny her audience

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[123] *Vanguard*, 23rd May 2003: "How Amina Lawal Divides Human Rights Community".

[124] Ibid.

[125] Ed. note: for the names and institutional affiliations of some of the lawyers who appeared see nn. 43 and 70, supra and accompanying text.

> because a woman could not address the court as a defender. But since she held her ground, Ibrahim said, she was finally allowed to begin Lawal's defence.[126]

A recent very brief check on the Internet indicated that Hauwa Ibrahim has in fact acquired a great name in America and Europe, based largely on similar misconceptions about her involvement with the appeals of Safiyatu Hussaini and Amina Lawal.[127] She is said to have been

> propelled [sic: but who propelled her?] into the media and international limelight while representing Safiya Hussaini…. Ms. Ibrahim and her team [sic] obtained an acquittal based upon substantive and procedural due process arguments, sparing the young mother's life. While returning home from the Hussaini case, Ms. Ibrahim learned of another case of alleged adultery and a sentence of death by stoning. Ms. Ibrahim accepted the case [sic].[128]

She is further reported to have been "Amina Lawal's lawyer" or the "lead counsel" in Amina's appeal;[129] to be "the first female lawyer from northern Nigeria";[130] and to be "one of the top defenders of women's rights in Nigeria".[131] Evidently based on these reported accomplishments Hauwa Ibrahim has recently done a year-long Humphrey Fellowship at the American University College of Law,[132] been a visiting professor at St. Louis University School of Law,[133] been a Yale World Fellow,[134] and won the European Parliament's Sakharov Prize. The European Parliament said this about her in its report of the award:

> Hauwa Ibrahim is the only lawyer in her country opposed to Sharia (Islamic law) law [sic]. As a woman, however, she does not have the right to appear before the Islamic courts [sic]. Her colleagues have to speak in her place [sic: a different account than before]. As a Muslim she has been accused of betraying her religion. But who, other than her [sic], can defend people (mainly women)

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126 http://usinfo.state.gov/dhr/human_rights/women.html: USINFO > Topics > Human Rights > Women in the Global Community: December 2003: "Nigerian Lawyer Saved Client by Confronting Issues, Not Shari'a Court", by Jim Fisher-Thompson, Washington File Staff Writer.

127 Ed. note: all websites cited in the following were last accessed on 28th November 2006.

128 http://www.abanet.org/women/bios/ibrahm.html: The ABA Commission on Women in the Profession: Past Margaret Brent Honorees: Hauwa Ibrahim.

129 "Amina Lawal's lawyer": http://www.pbs.org/frontlineworld/stories/nigeria/voice01.html: "The Road North: Women Speak Out: Hauwa Ibrahim". "Lead counsel": http://www.news.cornell.edu/Chronicle/04/5.6.04/Ibrahim_cover.html: "The winning lawyer discusses death-by-stoning adultery case". The Cornell story also says among other things: "Ibrahim… described how she came to take on the case and the strategies that she and her team used to defend Lawal."

130 http://www.pbs.org/frontlineworld/stories/nigeria/voice01.html.

131 http://www.yale.edu/opa/newsr/05-10-28-01.all.html: "Yale World Fellow Hauwa Ibrahim Wins Top Human Rights Award".

132 http://www.abanet.org/women/bios/ibrahm.html.

133 http://www.upenn.edu/pennnews/article.php?id=1043: University of Pennsylvania Office for Communications, also showing Hauwa Ibrahim scheduled to give a lecture at the University of Pennsylvania on 9th November 2006.

134 http://www.yale.edu/opa/newsr/05-10-28-01.all.html: "Yale World Fellow Hauwa Ibrahim Wins Top Human Rights Award".

> [sic] condemned under Sharia law to horrifying punishments (lashing, stoning and amputation) for "deviant behaviour"? In a country where half the population is Muslim, and where deep divisions remain between the two communities, her Christian colleagues have little inclination to become involved in matters to do with Islam [sic]. Muslim lawyers, who are in the minority, are not particularly keen to experience the fate that has befallen her [sic]: harassment, threatening phone calls, being insulted in leaflets and a formal charge of libelling the judiciary.
>
> But she won't be silenced. Revolt has given way to a determination to show that those sentenced to unjust punishments, or who are incapable of defending themselves, can be defended in a legal and peaceful manner.… The Constitution says that every citizen has the right to be defended before a court. Hauwa Ibrahim wants it to be applied, and she dares to question the Nigerian authorities directly about the constitutionality of applying Sharia law.
>
> The activities of this lawyer who refuses to buckle down are a source of huge embarrassment to the authorities [sic]. It is especially thanks to her [sic] that cases of women condemned to inhuman treatment are known throughout the world. It was her ability to arouse international public opinion [sic] that made it possible to save the life of Amina Lawal, who was condemned to be stoned to death for having given birth outside of marriage. Death sentences continue to be handed down but they are not carried out – for the moment anyhow. However, the situation needs to be kept under close watch.[135]

I am amazed at so many misconceptions and mistakes, and wonder how so many prestigious institutions in the developed world got these ideas. I wish to correct at least those mistakes that concern me directly. As has been shown in the preceding pages, the truth is that Hauwa Ibrahim was not the lead counsel in either Safiyatu Hussaini's or Amina Lawal's appeals and the defence teams were not "her" teams. As pointed out earlier her appearance in the appeals was as a matter of professional courtesy and show of solidarity. To the extent that she did any legal work at all she did so as part of teams led by others. Nor, as the records of the proceedings show, did she argue the appeal in Amina's case. This was not because female lawyers are not permitted to appear or to speak in the Sharia courts – they are and do – but because other lawyers argued Safiyatu's and Amina's cases instead. In fact, Hauwa Ibrahim did speak briefly before the Upper Sharia Court Funtua, when at the end of my argument, out of courtesy and respect for the other lawyers on the defence team, I asked if they had anything to say to the court in addition to my submissions. Ms. Ibrahim took up this invitation. Whether she strengthened Amina's case by what she said, the reader may determine from the record.[136]

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[135] http://www.europarl.europa.eu/news/public/focus_page/008-1530-293-10-42-901-20051017FCS01528-20-10-2005-2005/default_p001c004_en.htm: European Parliament - News - Headlines - Focus - Ladies, Ibrahim and Reporters joint Sakharov prize winners.

[136] Ed. note: see pp. 73-74 supra.

Concluding reflections

Nigerian Muslims are deeply committed to their religion; that explains the massive support the Muslims gave to the recent implementation of the Sharia criminal justice system in the North. Multiplicity of culture, ethnicity and religion created a divide, which in turn created mutual suspicion largely between the Muslims and Christians. I think it is this suspicion that moved a section of the Christians in the North to view the introduction of Sharia as a holy *jihad* designed to culminate in the eventual dethronement of the secular nature of Nigeria. The Muslim on the other hand nurses a certain fear of concerted designs by some persons within and outside the country to truncate the implementation of Sharia. The result being, when the Christian opines that the implementation of Sharia is unconstitutional, the Muslims view this opinion as a move to destroy Sharia. The two *zina* cases must be viewed within this context of mutual suspicion. I remember an incident at the Upper Sharia Court Funtua. I went to the court shortly after the court had delivered its judgment. I was there to arrange for a certified true copy of the record of the appeal to that court for purposes of the further appeal to the Sharia Court of Appeal. I went into the chambers of the presiding judge to exchange pleasantries as is the normal tradition. I met four persons in the chambers. The judge introduced me to these people as the lawyer to Amina Lawal. I left for the office of the registrar and while there these four people met me and proceeded to remind me that I am a Muslim and that it was a clear betrayal of my religion to allow myself to be used by western countries to destroy my religion. That when I decided to collect money and fight Sharia in the case of Amina Lawal, I thereby became a betrayer of my religion. This happened in the presence of the registrar and the registry staff. I received similar admonitions from family members, friends and other colleagues. These people have a fixed mindset. They are not ready to ponder, even if the facility is available to them, that the aim of Sharia is not to cut the hands and limbs of persons or to stone people to death. Allah is the most forgiving and merciful. It is within this spirit that the Sharia sets strict rules of procedure and evidence that must be complied with before a Muslim can be convicted of a crime. These people would often refuse to reason with you that the appeals filed against the two sentences were not meant to be indictments of the Sharia but rather challenges to the human errors committed during the trials. It is settled that the Sharia had long ago evolved an appellate system to review cases with a view to rectifying these human errors, and the results of the appeals in these two cases show that the system is working in Nigeria. I personally hold the opinion that despite the human deficiencies in the implementation of Sharia, the Sharia has brought a lot of positive changes in the society. But it is being implemented under the circumstances of mistrust that I have mentioned. It behoves a responsible counsel involved in the application of the laws and the correction of errors in their application to be circumspect. It is in view of this that we at WRAPA resolved not to sensationalise these two cases. Every day, all over Nigeria, thousands of lawyers, women and men, Muslims and Christians, working for government agencies, NGOs, and private law firms, under very difficult conditions, are doing their quiet best to make the legal systems of the Federation and of the States work the way they are supposed to work, and they are often succeeding. They do not occupy the media and international limelight, but they are the true heroes of the fight for the rule of law in Nigeria.