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.