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.]