

Mai Tangaram vs. Mai Taxi (2002), HC Borno State, unreported, Appeal No. BOM/5A/2002¹

[Ed. note: This was the first case, as far as the editor can determine, to decide two important questions raised by the Sharia Courts Laws: (1) Whether state High Courts in sharia states still had jurisdiction to entertain appeals from Sharia Courts, notwithstanding the new statutes directing all appeals from Sharia Courts to Sharia Courts of Appeal; and (2) Whether, in any event, the sharia states could by statute expand the jurisdiction of their Sharia Courts of Appeal, beyond questions of Islamic personal law only, to all questions decided in their Sharia Courts under Islamic law. Like all other High Courts and divisions of the Court of Appeal that have considered these questions, the High Court of Borno State held that (1) it did have jurisdiction to entertain appeals directly to it from Sharia Courts, and (2) the House of Assembly of Borno State could not constitutionally expand the jurisdiction of the state Sharia Court of Appeal beyond questions of Islamic personal law.]

IN THE HIGH COURT OF JUSTICE OF BORNO STATE OF NIGERIA
IN THE HIGH COURT OF MAIDUGURI JUDICIAL DIVISION
HOLDEN AT MAIDUGURI

Before Their Lordships:

Hon. Justice K.M. Kolo, Chief Judge

Presiding

Hon. Justice A.G. Kwajaffa

Assisting

This Friday, the 28th day of June, 2002

Between:

Garba Mai Tangaram

).....Appellant

vs.

Abdullahi Mai Taxi

).....Respondent

RULING

(Delivered by Kolo, C.J.)

Effective from 1st January, 2002 the existing Area Court judges and Upper Area Court judges were respectively converted Sharia Court judges and Upper Sharia Court judges. They were accordingly sworn in on 2nd January, 2002. The Appellate Registry of the High Court at the request of the litigants or their lawyers filed notice and grounds of appeal at the High Court challenging certain decisions of the Upper Sharia Court judges. Ordinarily one would have thought that appeals challenging the decisions of the Upper Sharia Court judges lie to the Sharia Court of Appeal but the lawyers' insistence in filing certain appeals at the High Court

¹ Apparently unreported. Photocopy of certified true copy of the ruling in the possession of the editor. No case number is given.

prompted this panel to look into the issue of jurisdiction. When this appeal, where the decision of the Upper Sharia Court No. 2, Maiduguri is being challenged, came up for hearing this panel thought it wise to invite the two counsel to address the court on the issue of jurisdiction at the onset before delving into the merit or demerit of the appeal. That was on 6th June, 2002. The two counsel sought and obtained adjournment to 7th June, 2002 to enable them to prepare their submissions.

First to address the court was the counsel for the appellant Mr. M.B. Usman. He referred us to the suit No. BUAC 11/CUS/148/2001 dated 3rd October, 2001 and the nature of the claim which was seeking an order to set aside the sale of a house. The suit was disposed of on 6th February, 2002 and the presiding judge being Alkali Lawan Gana Musa signed the judgment as Judge Upper Sharia Court No. 2, Maiduguri. The learned counsel for the appellant referred the court to the case of *Tumfaji v. Meroson* (1993) 1 N.W.L.R. (Part 269) 378 at 383 and submitted that it is the plaintiff's claim before the trial court that determines the jurisdiction of the court. He submitted that the claim of the plaintiff did not fall under section 277 of the 1999 Constitution which is in respect of the jurisdiction of the Sharia Court of Appeal.² He referred us to section 8(1), (2) and (3) of the Borno State Sharia Administration of Justice Law 2000³ and submitted that subsection 3 does not add any jurisdiction in civil matters to the Sharia Court of Appeal rather it followed the provisions of section 277 of the 1999 Constitution. He, therefore, submitted that this court has jurisdiction to hear and dispose of this appeal.

Mr. A.A. Sani, the learned counsel for the respondent, on the other hand, submitted that this court has no jurisdiction and hence urged the court to strike out the appeal. He referred the court to section 6(1) and (2)⁴ and section 8(3) of the Borno State Sharia Administration of Justice Law 2000 and submitted that by virtue of section 8(3) appeals from Upper Sharia Courts both in criminal and civil matters lie to the Sharia Court of Appeal in addition to the jurisdiction stated under section 277 of the 1999 Constitution.

Mr. A.M. Aji of Kanem Chambers who was present when the arguments were canvassed as a Friend of the Court wrote and submitted that it is wrong in law for the Borno State House of Assembly to enact a law which is in conflict with the provisions of the 1999 Constitution of the Federal Republic of Nigeria and that if any law is inconsistent with the provisions of the Constitution, the Constitution shall prevail and that other law shall to the extent of the inconsistency be void. Mr. Aji further submitted that by the combined effect of section 272⁵ and section 277 of the 1999 Constitution, the Sharia Court of Appeal shall only exercise jurisdiction over matters involving questions of Islamic personal law while matters

² §277 is quoted in full later in the judgment.

³ §8: "(1) Appeals in all matters from the decision of the Sharia Courts established under this law shall be filed within 30 days of the decision of the Upper Sharia Court. (2) The time allowed may be extended upon oral application or by motion on notice. (3) In addition to the powers conferred by Section 277 of the Constitution, the Sharia Court of Appeal shall have the jurisdiction and power to hear and determine appeals in criminal matters from the decisions of the Upper Sharia Courts."

⁴ §6: "(1) The courts established under this Law shall have, in addition to any other jurisdiction conferred by other enactment, original jurisdiction in civil and criminal matters where the parties are Moslem. (2) In any civil or criminal matter before the courts where any of the parties or one of the accused is a non-Moslem, and such party or accused consents to jurisdiction, such consent shall be given to the court in writing."

⁵ §272 is quoted in full later in the judgment.

not involving Islamic personal law can only be entertained by the State High Court. He cited the case of *Efunmope Okulate & 4 others vs. Gbadamosi Anosanya & 2 others* (2000) 1 SCNQR 149 at 162 to 164 and (2000) 1 SCNJ 75 at 86 to 87. He submitted, therefore, that the State High Court has jurisdiction over appeals emanating from the Upper Sharia Court if it does not involve questions of Islamic personal law.

In *Okulate vs. Anosanya* cited supra it was held as follows:

An examination of the provisions of the 1999 Constitution reveals that the Constitution has been positive and clear, and loud not silent or secretive in the language used in granting jurisdiction to the courts it has created and the courts to be enacted by law passed by a State House of Assembly.... It is the people of the Federal Republic of Nigeria who granted unlimited jurisdiction to the High Court they established for the State and not the people of the State.

In conclusion the Supreme Court held as follows:

The Federal Revenue Act, 1973 having lost the pre-eminence it had...was incapable of excluding the jurisdiction of the State High Courts, and therefore to the extent that it still purported to do so was in conflict with the 1979 Constitution and void.

It must be appreciated that both the High Court and the Sharia Court of Appeal are creatures of the 1999 Constitution of the Federal Republic of Nigeria and their jurisdictions are clearly without any ambiguity spelt out respectively under sections 272 and 277 of the said 1999 Constitution. Section 272 of the 1999 Constitution reads as follows:

- (1) Subject to the provisions of section 251 [on the jurisdiction of the Federal High Court] and other provisions of this Constitution, the High Court of a State shall have jurisdiction to hear and determine any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interest, obligation or claim is in issue or to hear and determine any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by any person.
- (2) The reference to civil or criminal proceedings in this section includes a reference to the proceedings which originate in the High Court of a State and those which are brought before the High Court to be dealt with by the court in the exercise of its appellate or supervisory jurisdiction.

From the foregoing provisions it can safely be stated that the High Court of a State is conferred with both original and appellate jurisdictions in all matters within its competence save cases within the exclusive jurisdiction of the Federal High Court and within the exclusive jurisdiction of the Sharia Court of Appeal. But can it be said that the Sharia Court of Appeal equally enjoys wide unlimited jurisdiction in all matters as an appellate court provided the parties are Muslims? Has the 1999 Constitution made provisions conferring original jurisdiction in the Sharia Court of Appeal? The answer in both cases is in the negative. To start with, the Sharia Court of Appeal per the provisions of section 277 of the 1999 Constitution is basically an appellate court and its jurisdiction is limited to civil appeals as spelt out under subsection (2) of section 277 of the said 1999 Constitution. It has no original jurisdiction and it has no powers to exercise jurisdiction on criminal appeals. In civil appeals its powers are limited to matters which involve questions of Islamic personal law.

Section 277 reads as follows:

- (1) The Sharia Court of Appeal of a State shall in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving questions of Islamic personal law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.
- (2) For the purposes of subsection (1) of this section, the Sharia Court of Appeal shall be competent to decide—
 - (a) any question of Islamic personal law regarding a marriage concluded in accordance with that law, including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant;
 - (b) where all the parties to the proceedings are Muslims, any question of Islamic personal law regarding a marriage, including the validity or dissolution of that marriage, or regarding family relationship, a foundling or the guardianship of an infant;
 - (c) any question of Islamic personal law regarding a *naqf*, gift, will or succession where the endower, donor, testator or deceased person is a Muslim;
 - (d) any question of Islamic personal law regarding an infant, prodigal or person of unsound mind who is a Muslim or the maintenance or the guardianship of a Muslim who is physically or mentally infirm; or
 - (e) where all the parties to the proceedings, being Muslims, have requested the court that hears the case in the first instance to determine that case in accordance with Islamic personal law, any other question.

From the foregoing provisions it can be safely argued that the jurisdiction of the Sharia Court of Appeal is appellate in nature and is limited to Islamic personal law as listed under subsection (2) of section 277 of the 1999 Constitution save under paragraph (e) even if the question for determination is not Islamic personal law provided at the court of first instance the parties to the suit being all Muslims requested the court to adjudge their case in accordance with Islamic personal law.

Now the question is can a State House of Assembly banking on the words “in addition” enact a law and confer jurisdiction on the Sharia Court of Appeal outside the provision of sections 272 and 277 of the 1999 Constitution? Evidently, when the Borno State House of Assembly enacted the Borno State Sharia Administration of Justice Law 2000 and made a provision under section 8(3) the House of Assembly was banking on the words “in addition” stated under section 277 of the 1999 Constitution.

Subsection (3) of section 8 of the said Borno State Sharia Administration of Justice Law 2000 reads as follows:

- (3) In addition to the powers conferred by Section 277 of the Constitution, the Sharia Court of Appeal shall have the jurisdiction and power to hear and determine appeals in criminal matters from the decisions of the Upper Sharia Courts.

While we cannot question the power of the House of Assembly to enact a law and establish or convert the existing Area Courts and Upper Area Courts to Sharia Courts as per section 6(4)(a) of the 1999 Constitution (“nothing in the foregoing provisions of this section shall be construed as precluding the National Assembly or any House of Assembly from establishing courts other than those to which this section relates with subordinate jurisdiction to that of a High Court”), we would, however, in line with the decision of the Supreme Court

in *Okulate vs. Anosanya* supra question the propriety of the provisions under subsection (3) of section 8 of the Borno State Administration of Justice Law 2000. In our view the said subsection (3) is in conflict with the provisions of sections 272 and 277 of the 1999 Constitution. The words “in addition” stated under section 277 of the 1999 Constitution, in our view, do not give a blanket or blank cheque to the State House of Assembly to confer jurisdiction which [was] not envisaged or provided for by the 1999 Constitution. The words “in addition” are tied down and subjected to the provisions of section 277(2) of the 1999 Constitution. In giving effect to section 277 of the 1999 Constitution regard must be had to other sections of the Constitution and more especially to section 272 which deals with the jurisdiction of the State High Courts and section 251 which deals with the jurisdiction of the Federal High Court. Section 277 ought not to be read in isolation.

In our view, the State House of Assembly cannot vary, add or take away directly or indirectly jurisdiction already conferred on superior courts of record as listed under section 6(5) of the 1999 Constitution. Such jurisdictions can only be tampered with when the 1999 Constitution is duly amended. So amendment of the Constitution and not legislation is the answer.

So in our view, the State House of Assembly cannot enact a law and confer an appellate jurisdiction in criminal matters on the Sharia Court of Appeal. When it comes to civil matters the Sharia Court of Appeal in exercising its appellate jurisdiction cannot go outside section 277(2) of the 1999 Constitution. There is no law which empowers it to do that. So viewed in that light we come to the conclusion that section 8(3) of the Sharia Administration of Justice Law 2000 is void and therefore of no effect as it is in conflict with the provisions of section 272 and 277 of the 1999 Constitution. The State House of Assembly did not add and in our view, cannot add to the jurisdiction of the Sharia Court of Appeal provided for by the 1999 Constitution under section 277.

Now the question is whether it is proper for this court to assume jurisdiction when the parties to the suit are evidently Muslims. We agree with the submission made by Mr. M.B. Usman that the determinant factor is the nature of the claim and in the instant appeal the nature of the claim is not touching or pertaining to Muslim personal law as the issue for determination is the sale of a house, i.e. title to a landed property. We are aware that section 277(2)(e) allows a civil appeal to lie to the Sharia Court of Appeal even though the issue is not touching or pertaining to Muslim personal law provided the parties to the suit being Muslims requested that the suit be adjudged in line with Muslim personal law. But in the instant appeal there is no such a request reflected in the record of proceedings before the court of first instance. This being the case, we are of the view that this court has jurisdiction. This panel would therefore hear and dispose of the appeal at the next appeal session. The hearing of this appeal is therefore adjourned to the next appeal session.

(sgd)
K.M. Kolo
Chief Judge
28/6/2002

(sgd)
A.G. Kwajaffa
Judge
28/6/2002