Maina vs. Wakil (2004), CA, unreported, Appeal No. CA/J/194S/2003[1]

[Ed. note: Question decided: whether the Sharia Courts of Borno State were duly established and existed in law. Holding: They were.

This issue arose out the early struggles in Borno State between the Chief Judge of the High Court and the Grand Kadi of the Sharia Court of Appeal over control of the new inferior Sharia Courts. The Sharia Courts were just the old Area Courts 'converted' to Sharia Courts. The Chief Judge had controlled the Area Courts, and although the new Sharia Courts Law put control of the Sharia Courts in the hands of the Grand Kadi, including the power to establish them, the Chief Judge refused to hand over to the Grand Kadi (and still had not in 2016), and the new Sharia Courts were 'established' by 'conversion' by the Judicial Service Commission. In the ruling appealed from here, the Sharia Court of Appeal had therefore held that the Sharia Courts had not been duly established. The Court of Appeal held otherwise.]

IN THE COURT OF APPEAL
HOLDEN AT JOS ON THURSDAY, THE 15TH DAY OF APRIL, 2004

Before their lordships:

Muhammad S. Muntaka Coomassie
Justice, Court of Appeal
Dalhatu Adamu
Justice, Court of Appeal
Amiru Sanusi
Justice, Court of Appeal

Appeal No. CA/J/194S/2003

Between:

Zarami Maina)
……Appellant

and

1. Ya Mairam Wakil
2. Wakil Fannami
)……Respondents

JUDGMENT

(Delivered by Dalhatu Adamu, JCA)

The appellant sued the respondents before the Sharia Court, Gubio [in Borno State] on 17/12/2002 claiming to be the father of a child born by the 1st respondent who had been his wife but who upon their separation (on divorce) married another man without observing the three [month] *iddah* period and gave birth to the child now claimed by the second husband. The appellant also claimed that before their divorce, he had been taking his wife (1st respondent) to the hospital for pre-natal treatment on the pregnancy. The 2nd respondent is the father of the 1st respondent.

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[1] Photocopy of certified true copy of the judgment in the possession of the editor.

On the above claim, the Sharia Court, Gubio (hereafter called "the trial court") heard the parties and after confirming or finding that the 1st respondent only observed a two months *iddah* period before contracting the second marriage after leaving the appellant and her refusal to subscribe to an oath that the child in dispute actually belonged to the second (or new) husband, decided in its judgment (dated 7/1/2003) that the child belonged to the appellant (i.e. the 1st or old husband) who was consequently declared and vested with the paternity of the said child. The respondents who were aggrieved by the judgment of the trial court appealed against it at the Upper Sharia Court, Gubio (hereinafter called "the intermediate appellate court"). This court heard the parties on 23/1/03 and on hearing the evidence of the new husband by name Alhaji Ligali Kyaribe, in its judgment dated 27/1/03 reversed the judgment of the trial court and declared the child in question or dispute to the new husband. The appellant who was dissatisfied with the judgment of the intermediate appellate court lodged an appeal against it at the Sharia Court of Appeal of Borno State sitting at Maiduguri (hereinafter called "the lower court"). When the appeal came up for hearing on 26/5/03, the lower court summarily disposed of the appeal by striking it out on the ground that it had no jurisdiction to hear appeals from courts that do not exist in law (see page 10 of the record of proceedings). It held that both the trial and the intermediate Sharia Courts were not in existence by law (as they were not established) and consequently the judges who were not given any authority or warrant to preside over such courts and hear cases had no required jurisdiction to hear and determine the case as they did. The appellant who was aggrieved with the lower court's decision appealed against it in this court.

In his notice of appeal at page 11 of the record, the appellant filed only one ground of appeal with its two particulars. The appeal was heard without brief of argument filed by either of the parties. Therefore the only material to refer to in the determination of the appeal are the record of proceedings and the notice of appeal. In the light of this, it is pertinent to reproduce the only ground of appeal filed by the appellant in his notice of appeal which with its particulars reads as follows:

GROUND OF APPEAL

The learned Kadis of the Sharia Court of Appeal erred in law by striking out the appeal on the grounds that the Sharia Court and Upper Sharia Court in Borno State were not legally constituted courts.

PARTICULARS OF ERROR

(a) Area Courts in Borno State were converted and named Sharia Courts by the Borno State Government sequel to the introduction of Sharia Court legal system in the State in the year 2000.
(b) The Borno State Government has enacted and passed into law the Sharia Courts Administration of Justice Law 2000 which empowered the State Grand Kadi to appoint and convert the Area Courts to Sharia Courts in the State.

From my above exposition of the facts of the present case and its antecedents, it is pertinent to observe that the learned Kadis of the lower court raised the issue of the non-existence of both the trial and intermediate courts *suo motu* and without calling upon the parties to address it on it or making effort to find an answer, it simply terminated the appeal *in limine*. Thus the substance and merit of the case were not considered by the lower court which struck out the appeal before it on the ground it stated in its decision or judgment of 26/5/03. It is rather unfortunate that the learned Grand Kadi of Borno State was amongst the panel who

heard the present appeal and struck it out without hearing its merits on the ground that the Sharia Courts were non-existent. It seems that the learned Kadis and the Grand Kadi were not aware of the law establishing the Sharia administration in Borno State which was actually promulgated in or under the Borno State Sharia Administration of Justice Law (No. 11) of 2000. Under section 3 of the said law Sharia Courts and Upper Sharia Courts were established in place of the Area Courts and Upper Area Courts which were converted for the purpose of introducing Sharia legal system in Borno State. It is expressly provided under section 11 of the law (supra) – as follows:

The courts established under the Law shall be under the supervision of the Grand Kadi.

It is my humble view that it is incredible for the learned Grand Kadi under whose supervision the new Sharia Courts were placed and who played a vital and promotional role in their creation to be amongst the panel which decided on their non-existence. It is therefore clear that the decision or judgment of the lower court was arrived at *per incuriam* and in total and unjustified disregard of an existing and applicable law. This has resulted in a denial of hearing or fair hearing against the appellant [citations omitted]. It is also important to observe that from the facts of the case before the trial and intermediate court, the case raised a very substantial and triable issue in an area where Sharia law is recondite (i.e. paternity of a child) making it desirable to hear the appeal and decide it on its merit rather than terminating it *in limine* on a technical ground or reason which was also wrong in law. It is trite that the proceedings of Area, Customary or Sharia Courts as in the instant case are treated by or regarded by an appellate court with a liberal attitude and the avoidance of technicalities with the aim of seeing that substantial justice is achieved [citations omitted].

Apart from denying the appellant his constitutional right to fair hearing the lower court also in its decision made an error amounting to substantial or gross miscarriage of justice in its decision of 26/5/03. Such a decision should not therefore be allowed to stand by this court as an appellate court but should be reversed. Consequently and in view of my above consideration I hereby allow the appellant's appeal under his single or lone ground of appeal. The decision of the lower court dated 26/5/03 is hereby set aside. It is hereby ordered that the case should be remitted to the lower court (the Sharia Court of Appeal of Borno State) for it to rehear the appeal before it from the Upper Sharia Court on its merit. Under the circumstances of the case I make no order as to costs.

(sgd) Dalhatu Adamu, Justice, Court of Appeal

[Concurring opinion by Muhammad Saifullahi Muntaka-Coomassie, JCA:]

I have had the privilege of reading the lead judgment just delivered by my learned brother Adamu, JCA. I am quite satisfied that my Lord has thrashed out the live issues presented to us for our consideration. I adopt his reasoning and conclusions as mine. I have nothing more useful to add. The appeal in my view is pregnant with merit same is hereby allowed. I abide by the consequential order made by my learned brother Adamu, JCA in the lead judgment. I make no order as to costs.

(sgd) Muntaka-Coomassie, Justice, Court of Appeal

[Concurring opinion by Amiru Sanusi, JCA:]

I had the opportunity of reading before now the judgment just delivered by my learned brother, Adamu JCA. I agree entirely with his reasoning and conclusion. By way of emphasis, I wish to add a few words of mine.

The learned Kadis of the lower court i.e. Sharia Court of Appeal, Borno State *suo moto* raised the issue of constitutionality of the creation of the new courts namely the Sharia Court and Upper Sharia in Borno State. This is a very fundamental issue bordering on constitutionality and therefore the Sharia Court of Appeal should have invited counsel to the parties in the appeal before it to address it on the competence or otherwise of the State government to create them or on the validity of the law creating the said courts as promulgated by the House of Assembly of Borno State. Had that been done by the lower court, the learned counsel for the parties would have aired their views on such a vital constitutional matter which would no doubt assist the lower court in its determination on the constitutionality or otherwise of the establishment of the said courts, rather than jumping unto conclusion that the creation of the said courts was unconstitutional. The issue of the creation of the courts was not raised and also none of the issues canvassed by the parties' counsel in the appeal before the lower court touched on that, similarly the competence of the House of Assembly, Borno State to promulgate the law creating the courts was also never raised by the parties. The Sharia Court of Appeal (i.e. lower court) was therefore wrong in *suo motu* striking out the appeal on the ground of alleged non-existence of the law establishing the courts without affording the parties the opportunity to address it on the issue. By so doing the parties are denied their constitutional right to fair hearing by the lower court as enshrined in section 36(1) of the 1999 Constitution of the Federal Republic of Nigeria [citation omitted]. Definitely the action of the lower court as stated above must have occasioned substantial or gross miscarriage of justice to the parties especially the appellant.

Thus, for the fuller and more detailed reasoning contained in the lead judgment of my learned brother, I too adjudge the appeal meritorious. It ought to be allowed and I accordingly do the same. I set aside the decision of the lower court and order that the appeal be remitted to the lower court i.e. Sharia Court of Appeal, so that it be heard on the merits. I shall also decline to award any cost.

(sgd) Amiru Sanusi, Justice, Court of Appeal