Mohammed vs. Commissioner of Police (2007), HC Niger State, unreported, Appeal No. NSHC/KG/9CA/20042[1]

[Ed. note: Question decided: whether the Sharia Courts of Niger State can lawfully apply the State's Penal Code Law. Holding: They cannot.

This issue arose from the way in which Niger State initially attempted to reinstate Islamic criminal law. Instead of adopting a whole new Sharia Penal Code, for application in the Sharia Courts, Niger simply amended its old Penal Code, adding a new section 68A specifying *hudud* or *qisas* punishments for specified crimes if the defendant was a Muslim and the evidence was of certain sorts. The entire Niger State Penal Code (Amendment) Law 2000 is reprinted in *Sourcebook,* IV, pp. 140-143. The ruling reprinted here held that the Sharia Courts, being empowered to apply Islamic law only, could not apply the Penal Code even as amended, since it was not Islamic law. This problem was fixed in 2014 when Niger State enacted new Sharia Penal and Criminal Procedure Codes, bringing Niger into line with the other sharia states.]

IN THE HIGH COURT OF JUSTICE OF NIGER STATE, APPELLATE DIVISION
HOLDEN AT MINNA ON THE 27TH DAY OF MARCH, 2007

Before their lordships:
The Honourable Justice, Jibrin Ndatsu Ndajiwo (OFR): Chief Judge
The Honourable Justice, Aliyu M. Mayaki: High Court Judge

Appeal No. NSHC/KG/9CA/2004

Between:
Musa Mohammed
). ……Appellant
vs.
Commissioner of Police
)……Respondent
(Delivered by Honourable Justice Aliyu M. Mayaki)

JUDGMENT

This is an appeal against the decision of the Sharia Court, Mariga delivered on 20th September, 2004. One ground of appeal was filed on 2/12/2004 and with the leave of the court following two applications filed by the appellant on 21/7/2006 and 20/3/2007 respectively five additional grounds were filed. In arguing the appeal, learned counsel to the appellant, Ahmed S.T., formulated three issues for determination. These are:

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

1) whether or not the trial judge was right to have convicted and sentenced the appellant based on the Penal Code which is a common law principle;
2) whether or not the trial judge was right to have convicted and sentenced the appellant despite the fact that the prosecution has failed to prove its case; and
3) whether or not the trial judge was right to have awarded the sum of N36,000.00 for the destruction of the complainants' items, N5,000.00 as expenses for the complainant and N3,000.00 as police expenses.

On the first issue appellant's counsel submitted that from the First Information Report (FIR) on which the appellant was arraigned and tried, it is clear that the offences are contrary to sections 79, 349 and 288 of the Penal Code respectively and that since the applicable law in all the Sharia Courts is Islamic law by virtue of the provisions of the Sharia (Administration of Justice) Law 2001 applicable in Niger State, the trial, conviction and sentence of the appellant is a nullity. He therefore urged the court to discharge and acquit the appellant.

* * *

Adamu Panti (DDCL)[2] made an unambiguous submission on the first issue. He contended that there is no law precluding the Sharia Courts from applying the Penal Code. Consequently, the appellant in his view was properly arraigned before the trial court, convicted and sentenced under the Penal Code, the provisions of the Sharia (Administration of Justice) Law 2001 notwithstanding. * * *

* * *

We have carefully examined all the grounds of appeal filed by the appellant and found that from the arguments canvassed by the appellant's counsel ground two, which is the first ground of the additional grounds filed on 21/7/2006, is concerned with whether or not the whole trial conducted by the trial Sharia Court judges was a nullity. This is a very important ground because if the appeal succeeds on this ground it may not be necessary to consider all the other grounds. It is for this reason of its fundamental and jurisdictional nature that we will take the first issue first which is based on this ground. Although the issue was formulated by the appellant's counsel as whether or not the trial judge was right to have convicted and sentenced the appellant based on the Penal Code, he made a broad submission that the Sharia Court was supposed to conduct the trial under Islamic law principles and that where this was not done, the whole trial would be a nullity. The law the learned counsel relies on is the Niger State Sharia (Administration of Justice) Law 2001 (hereinafter referred to as the Sharia Law 2001) which came into force on the 5th day of November 2002. The appellant was arraigned before the trial court sometime in September 2004, so it is safe to assume that the Sharia Law 2001 had come into force nearly two years earlier. It has not been contended that both the complainant whose property was stolen and the appellant are not Muslims. It is therefore safe

[2] DDCL: Deputy Director, Civil Litigation, in the Niger State Attorney-General's office.

to assume that they are Muslims. In the definition section of this law (section 2) "Sharia Court" is said to mean "a court established under or in pursuance of this law or deemed to have been so established." By virtue of the aforesaid Sharia Law 2001 all Sharia Courts in Niger State can be said to have been established by the Grand Kadi or deemed to have been established in pursuance of the law. See *Haruna Ibrahim Kuta vs. Ahmadu Galadima*, Appeal No. NSHC/MN/6A/2003 (unreported). Again, by virtue of §9(1) the Sharia Courts are competent to hear and determine civil and criminal causes and matters where the parties involved are all Muslims, like in the present case. Because of the importance and relevance of sections 10 and 11 of the Sharia Law 2001 they are reproduced as follows:

> 10. The applicable law in both civil and criminal proceedings in the Sharia Courts shall be the Sharia law.
> 11. The practice and procedure to be applied by the Sharia Courts shall be:
> (a) the principles and practice of Islamic law procedure; and
> (b) such other rules of practice and procedure as may be made by the Grand Kadi.

Having regard to sections 10 and 11 of the Sharia Law 2001 in both substantive and procedural law the Sharia Courts have no option other than to apply Islamic law or Sharia law. Under section 2 of the law "Sharia law" means "the Islamic law as prescribed by Qur'an, Hadith, Ijma, Qiyas, Istihsan, Istihab and other such sources of Islamic law as are recognized by Muslims." The words of the statute must be given their ordinary meaning. *Adisa vs. Oyinwola* (2000) 10 NWLR (Pt. 674) 116.

The pertinent questions at this juncture are: Are the provisions of the Penal Code and the Criminal Procedure Code such Islamic law and procedure as are contemplated under the Sharia Law 2001? If they are not, will the Sharia Courts be competent to apply them? And finally, if the Sharia Courts do not have the power to try any person or matter under the two codes, what will be the effect of such trial conducted under the codes? In other words, is the trial null and void?

Before the foregoing questions are answered it must be appreciated that the necessary intendment of the legislature by passing into law the bill for the administration of Sharia law is to abolish the Area Courts which were established under the Area Court Law 1968 and replace them with Sharia Courts which are to be manned by men learned in Islamic law and to which Islamic law therefore strictly applies. See sections 7 and 31 of the Sharia Law 2001. Under section 31(1) of the Law the Area Court Law 1968 was repealed. Similarly, section 30 of the law provides:

> Notwithstanding the provisions of any law, the statutes of general application of the common law and the doctrines of equity shall not apply in the Sharia Courts.

Suffice it to say that by the provisions of the Sharia Law 2001 the Sharia Courts and the Sharia Court of Appeal as the apex court in the hierarchy of Sharia Courts in the State are expected to strictly apply Islamic law as defined in section 2 of the law such that all authorities parties or their counsel and the Sharia Courts may rely on should be derived from principles of Islamic law not common law or equity, as is always the case, as if this law does not exist or apply.

Going back to the questions posed earlier on, the answers are simple and straightforward. Although it cannot be denied that certain provisions of the Penal Code have some elements of Islamic law, the provisions are not generally and strictly Islamic law in terms of the ingredients of the offences, procedure and proof as well as punishments as are known and prevalent under Islamic law. In particular, the offences of joint act, house trespass and theft contrary to sections 79, 349 and 288 of the Penal Code for which the appellant was arraigned respectively cannot be tried under the Penal Code by the Sharia Court, Mariga or any other Sharia Court as the Penal Code cannot by any stretch of imagination be said to be the Sharia law the Sharia Courts are by law empowered and restricted to apply. What we have said about the non-applicability of the Penal Code in Sharia Courts also applies to the Criminal Procedure Code and the Evidence Act. Under the Sharia law there are ways and means of proof in both civil and criminal matters which may not necessarily be the same as under the CPC and the Evidence Act. This is a grave error into which both trial judges and counsel often fall. Having found that the Sharia Court cannot apply the Penal Code and the Criminal Procedure Code, both of which were applicable in the then Area Courts, it automatically follows that the trial Sharia Court judge fell into a fundamental error when he tried the appellant under a law other than Islamic law contrary to the law under which the court itself was established, with the effect that the trial must be held to be null and void *ab initio*, since as far as the Sharia Courts and the appellant are concerned the Penal Code, Criminal Procedure Code and common law principles bear no relevance to the proceedings. The error thus committed by the trial court is incurable. This ground of appeal should be allowed. The trial judge lacked jurisdiction to apply the two laws.

We have already observed at the beginning of this judgment that if this appeal succeeds on the ground we have just considered, there might be no need to go into the other grounds of appeal. We are satisfied that because of the fundamental nature of this ground of appeal under which this appeal should be allowed, we need not delve into the remaining grounds. Consequently, the conviction and sentence of the appellant are set aside; so are the awards of compensation. On this ground alone the appeal succeeds.

(SGD)

(Aliyu M. Mayaki)

Judge

26/03/07

(SGD)

(Jibrin N. Ndajiwo) (OFR)

Chief Judge

26/03/07