Chapter 6 Part III
Proceedings and Judgments in the Amina Lawal Case

1.

Proceedings and judgment in the Sharia Court Bakori

Translated from the Hausa by Sama'ila A. Mohammed

(a) Proceedings 15th January 2002

Comp. No. - 11/2002
Case No. - 9/2002
Date - 15/1/2002

Sharia Court Bakori
Judge: Alhaji Nasuru Lawal Bello Dayi
Prosecutor: Commissioner of Police, Katsina State
Accused: Amina Lawal and Yahayya Muhammed[54]
Complaint: *Zina* contrary to section 124 Katsina State Islamic Law[55]

I, Police Prosecutor, Corporal Idris Adamu of the Nigeria Police Command, on behalf of the Katsina State Commissioner of Police, do hereby charge Amina Lawal and Yahayya Muhammed, both of them residing in Kurami, of committing the offence of *zina*. Both of the accused persons were arrested on 14/1/2002 by Police Constable Rabi'u Dauda and one other policeman, both of the Nigeria Police Criminal Investigations Department, Bakori Divisional Command. The accused are being charged jointly with committing the offence of *zina* from the time their courtship began, that is about eleven months ago, and continuing up until quite recently. As a result of their commission of this offence the 1st accused, Amina Lawal, has given birth to a baby girl. As this is contrary to Katsina State Sharia Law, we are hereby charging them before this court.

Court to Amina Lawal: Did you hear the charge against you by the police? What do you have to say?

Amina Lawal: Yes. It is true. I committed the offence of *zina* as a result of which I gave birth to a baby girl about nine days ago, on 8/1/2002.

Court: With whom did you commit this offence?

Amina Lawal: I committed this offence of *zina* with Yahayya.

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[54] This is the spelling of Yahayya Muhammed's name used in the record of the Bakori court. We have used it throughout, although in the appellate courts the spelling 'Yahaya Mahmud' is sometimes also used.

[55] Sic. The reference is to section 124 of the Katsina State Sharia Penal Code Law No. 2 of 2001, which provides: "Whoever, being a man or a woman fully responsible has sexual intercourse through the genital of a person over whom he has no sexual rights and in circumstances in which no doubt exists as to the illegality of the act, is guilty of the offence of *zina*."

Court to Yahayya Muhammed: Did you hear the charge against you? What do you say?

Yahayya Muhammed: I heard the charge. It is not true. I did not commit the offence of *zina* with her. I know that I approached her for marriage but I never committed *zina* with her. It was when she delivered that I was called to the palace of the village head of Kurami and I was confronted with the allegation that I committed the offence of *zina* with her. I denied this allegation. They then brought me to the police station where they threatened me that I should accept to have committed the offence of *zina* or else they would break my bones. So, I have not committed this offence.

Court to Cpl. Idris Adamu: Did you hear the response of the 2nd accused? What do you have to say?

Cpl. Adamu: I heard what the 2nd accused said. It is not true and I have witnesses. I pray the court to allow me to bring my witnesses.

Court ruling: The court grants the prosecution's request to bring its witnesses. The hearing of this matter is adjourned to 29/1/2002 to enable the police to conclude their investigations. Court further directs the accused to be remanded in prison custody.

(b) Proceedings 30th January 2002[56]

Today, 30/1/2002, the court recognises the prosecutor, Cpl. Idris Adamu, and the two accused persons, Amina Lawal and Yahayya Muhammed, so that the trial can continue.

Court to Cpl. Idris Adamu: Do you have witnesses you intend to bring; have you come with them?

Cpl. Adamu: Yes. There is a witness. That is the baby delivered 25 days ago who is the product of that *zina*. The baby has not yet been given any name.

Ruling: The court takes note of the baby of 25 days who is in the hands of the 1st accused. The court also takes note of the baby as the first evidence presented by the police prosecutor in this matter.

Court Amina Lawal: Have a look at the baby in your hands and confirm to the court whether it is the baby that was delivered by you and whose delivery was as a result of *zina*.

Amina Lawal: I have looked at her and she is the one.

Court: Do you agree that both of you committed *zina* which resulted in you giving birth to this baby?

Amina Lawal: Yes. It was Yahayya who deceived me by saying that he would marry me. He had been courting me for the past eleven months.

Court to Yahayya: Have you seen this baby who was born 25 days ago?

Yahayya Muhammed: Yes. I have seen her.

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[56] The hearing set for 29th January 2002 evidently could not hold on that day and was postponed to the next. This happened again later in the proceedings.

Court: Do you agree that she is the baby that was delivered as a result of the *zina* you committed?

Yahayya Muhammed: No. I do not agree. This is an attempt to tarnish my image.

Court: Is it true that you courted Amina Lawal for eleven months?

Yahayya Muhammed: Yes. It is true. I wanted to marry Amina for the past eleven months.

Court: Do you have witnesses who knew that you were not committing the offence of *zina* with Amina during the period of your courtship?

Yahayya Muhammed: No. I do not have any witness.

Court: Will you take an oath by the Holy Qur'an to the effect that you did not commit the offence of *zina* with Amina, which resulted in the birth of this child?

Yahayya Muhammed: Yes. I will take an oath.

Ruling: The court has accepted Yahayya's request to take an oath by the Holy Qur'an, in its presence, to the effect that he did not commit the offence of *zina* with Amina Lawal and that he was not responsible for her pregnancy. He also states that her allegation that he was responsible was an unwarranted defamation.

[Evidently the oath-taking followed: no record of it was made.]

Ruling: The court has accepted the oath Yahayya Muhammed took by the Holy Qur'an, in its presence, as valid.

Court to Cpl. Idris Adamu: The 2nd accused has taken an oath by the Holy Qur'an to the effect that he did not commit the offence of *zina*. In view of this, what do you have to say?

Cpl. Adamu: I agree, since he has taken an oath by the Holy Qur'an.

Ruling: Based on what has transpired above, the court having given the 2nd accused person an option to take an oath by the Holy Qur'an in obedience to Sharia as provided for in *Tuhfa* as translated by Usman Daura… [the text here becomes illegible at the bottom of a page.]

[The page of the transcript that should follow here is missing from the only copy obtainable for purposes of this translation. The contents of that page can be gleaned from the summary of the proceedings in the Bakori Court made by the Upper Sharia Court, Funtua in its ruling on Amina Lawal's appeal, as follows:[57]

> After he took the oath, the court discharged the 2nd accused. The court then charged the 1st accused. The court said:
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> > The court charges you Amina Lawal with the offence of *zina* to which you confessed before this court on 15/1/2002 where you said you committed the offence and as a result thereof you delivered a baby girl which the prosecutor tendered in evidence today 30/1/2002. Therefore this court is

[57] The complete ruling of the Upper Sharia Court Funtua is reproduced below.

> satisfied and is convinced that you committed this offence of *zina* based on your confession before the court. The verse states that proof by admission is better than proof by evidence.[58] The other additional evidence is the daughter you delivered.

The court proceeded to say:

> Since you accepted that you committed *zina* following which you give birth to this baby while you are sane and a Muslim, a divorcee not a virgin, therefore court accepts and is satisfied that you committed the offence. Therefore the charge is very strong against you Amina Lawal Kurami.

The court asked her whether she understood the meaning of the charge. She said she understood and she agreed.]

Court to Cpl. Idris Adamu: Has the 1st accused ever before been found guilty of the offence of *zina*?

Cpl. Adamu: No. This is the first time that the 1st accused is being found guilty of the offence of *zina*.

Court: Court is adjourned till 13/2/2002 so that hearing in this matter will continue.

(c) Proceedings 13th February 2002

Today 13/2/2002 the court recognises the prosecutor, Cpl. Idris Adamu and the 1st accused person, Amina Lawal. But the court again adjourns hearing in this matter until 27/2/2002, to allow Amina Lawal to complete the traditional 40 days maternity hot bath, associated with delivery of new-born babies. Also, the court has granted bail to Amina Lawal with Idris as surety.

(d) Proceedings 20th March 2002

Today, 20/3/2002 the court recognises the prosecutor, Cpl. Idris Adamu, and the 1st accused person, Amina Lawal, so that the court can go ahead and sentence her according to Sharia.

Court to Amina Lawal: Have you named this baby of yours?

Amina Lawal: I have named the baby Wasila.

Finding of Guilt

I, Nasuru Lawal Bello Dayi, the judge of this Sharia Court Bakori, have charged, and I find you, Amina Lawal Kurami, guilty of the offence of *zina* of which the Commissioner of Police of Katsina State complained against you and Yahayya Muhammed to this court on 15/1/2002. The COP complained that both of you committed the offence of *zina* in

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[58] No authority is here given for this proposition. But see the Court of Appeal (Kaduna)'s statement in *Alhaji Umaru Haruna Mai-Aiki v. Danladi Mai-Daji* [2006] 3 Saranniya Law Reports Pt. II pp. 39-60 at 53-54: "In another context it was stated that an admission is more preferable to witnesses' testimony – *Al iqrar minal shuhud*. See Ruxton *Maliki Law* Ch. XXII para 7." The book of Ruxton referred to is a translation of much of *Mukhtasar Khalil*, as to which see the "Bibliography of Islamic Authorities" given in part IV of this chapter. (Thanks to Ahmed S. Garba for this citation.)

the town of Kurami for the past eleven months and as a result of this act, you gave birth to a baby girl. You confessed to the act and pleaded guilty of the offence without wasting the time of the court while the 2nd accused person, Yahayya Muhammed, denied committing the offence. This court finds you guilty based on the charge I preferred against you and your confession to this court to the effect that you committed the offence of *zina* and the prosecutor's physical evidence of the baby girl you delivered, by name Wasila, which you confirmed to this court was a product of *zina*.

As a result of your confession to this court and the evidence of the prosecutor of your new-born baby, by name Wasila, your offence is contrary to Sharia as Allah (SWT) stated in the Holy Qur'an in *Suratul Bani Isra'il* verse 32:

> And come not near to unlawful sex [*zina*]. Verily, it is *fahishah* (immoral sin) and an evil way.

So, this court has found you guilty of this offence which is contrary to Sharia in your capacity as a Muslim, sane, adult and even once married as you explained to this court. As a result, this court will judge you according to the provisions of Sharia in *Risala* at p. 128, where it is stated that:

> A *muhsinat* who commits *zina* is to be stoned until she is dead.

And the commandment of Prophet Muhammad (SAW) in *Arba'una Hadith*, no. 14, where it is stated thus:

> Abdullah bin Mas'ud (may Allah be pleased with him) narrated that the Prophet (peace be upon him) said, "It is impermissible to take the life of a Muslim who bears testimony that there is no God but Allah, and I am the Messenger of Allah, except in one of three cases: the adulterer, a life for a life, and the renegade Muslim [apostate], who abandons the Muslim community."[59]

The verse of the Qur'an, the passage from *Risala*, and the hadith of Prophet Muhammad (SAW) which have been quoted agree exactly with the provision of Section 125(b) of the Sharia Penal Code Law of Katsina State.[60]

The court has discharged the 2nd accused, Yahayya Muhammed, who Amina stated was responsible for her pregnancy and therefore her co-partner in the commission of the offence of *zina*. This is because he denied committing the offence and there are no eye-witnesses to the offence or to his culpability. Moreover, he took an oath by the Holy Qur'an. The court has based its decision on the provision of Sharia law which provides for only three instances where an individual can be convicted: one, the confession of a sane Muslim; two, witnesses who confirm the commission of the offence; and three, the emergence of pregnancy in an unmarried woman or a woman without a husband.

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[59] The quoted text is given first in Arabic, then in Hausa. We use here the translation of the Arabic into English given in Ibn Rajab, *Jami Al-Ulum Wal-Hikam*, *A Collection of Knowledge and Wisdom,* rendered into English by Muhammad Fadl (Umm Al-Qura: Al-Mansura, Egypt: 2002), p. 175.

[60] Section 125(b) provides that: "Whoever commits the offence of *zina* shall be punished: … (b) if married, with stoning to death (*rajm*)."

Because of this, since you, Amina Lawal, have confessed and you have come with the baby you delivered and presented her to the court to take notice of, this conviction has become imperative on you under section 125(b) of the Katsina State Islamic Law.

Court to Amina Lawal: Do you have anything you wish to say to the court?

Amina Lawal: No. I do not have anything to say to the court except that I ask for forgiveness.

Court: As at today, state when you delivered the baby.

Amina Lawal: I delivered the baby two months and eight days ago.

Court: In how many days will you wean your baby, Wasila?

Amina Lawal: In the next eighteen months.

Court to Cpl. Idris Adamu: Was this the first time or are there other times in which you found the accused committing this offence?

Cpl. Adamu*:* This is the first time she is committing the offence.

Judgment and Sentence

Based on what transpired above, I, Alhaji Nasuru Lawal Bello Dayi, Judge of this Sharia Court Bakori, have convicted you, Amina Lawal Kurami, of committing the offence of *zina* and have accordingly found it lawful that you be sentenced to death by stoning in accordance with the provision of section 125(b) of the Sharia Penal Code Law of Katsina State.

The sentence of this court is with effect from today, 20/3/2002 but the sentence will not be carried out until on 20/9/2003, that is, after you have weaned the baby you are carrying, by name Wasila.

Appeal

If you are not satisfied with this judgment you have the right to appeal against it to the Upper Sharia Court Funtua within thirty days.

Court to Amina Lawal: Do you have anybody to bail you so that you will not be under prison custody in view of your new-born baby?

Amina Lawal: Yes. I have somebody who will bail me and that person is Musa.

Court to Musa: Did you hear the judgment delivered by this court? Do you undertake to be bringing the convict to this court every two weeks?

Musa: Yes. I agree to be bringing her to court.

Ruling: The court has accepted to grant bail to Amina on the condition that Musa will bring her to court every two weeks. This bail is bail after sentencing. The court grants this bail on the compassionate consideration of Amina's new-born baby.

(e) Proceedings 21st March 2002

Today, 21/3/2002, the court recognises the Musa who received Amina Lawal on bail.

Court to Musa: Musa, what do you have to tell the court?

Musa: I am here to inform the court that here is Amina Lawal. I have brought her back to the court. I will not continue to bail her.

Court to Amina Lawal: Did you hear? What do you have to say?

Amina Lawal: Yes I heard. And I appeal to the court to allow Idi Mai Yankan Farce Kurami to bail me.

Court to Idi Mai Yankan Farce Kurami: Will you agree to receive Amina Lawal into bail on the condition that every two weeks you will bring her to court?

Idi: I agree. I will receive her into bail. And I will be bringing her to court every two weeks.

Ruling: The court has accepted the plea and has granted the request of Idi Mai Yankan Farce Kurami to take Amina Lawal into bail and to be bringing her to court every two weeks up to the time she has weaned her baby so that the sentence of the court can be carried out.

2.

Proceedings and judgment in the Upper Sharia Court Funtua

Translated from the Hausa by Aliyu M. Yawuri

(a) Notice of appeal filed 28th March 2002

IN THE UPPER SHARIA COURT FUNTUA

BETWEEN: CASE NO. US/FT/CRA/1/002

AMINA LAWAL

VS.

C.O.P., KATSINA STATE

The Registrar
Upper Sharia Court
Funtua

NOTICE OF APPEAL

Please be informed that Amina Lawal has appealed the judgment and sentencing to *rajm* passed on her by the Sharia Court, Bakori on 20th March 2002 in the case number 9/2002 between C.O.P. KTS Vs. AMINA LAWAL AND YAHAYYA MUHAMMED.

GROUNDS OF APPEAL

1. The judgment of the Sharia Court, Bakori is contrary to the provisions of Islamic law and procedure.
2. The appellant will provide additional grounds of appeal as soon as she receives record of proceedings from the Sharia Court Bakori.

[signed]
A.M. Yawuri, Esq.
Appellant's Solicitor
C/O A.A. Machika & Co.
UBA Building
Funtua

FOR SERVICE ON:
C/O Ministry of Justice,
Funtua

(b) Proceedings 15th April 2002

Appeal No. 1/2002
Case No. 1/2002
Date: 15/4/2002

Upper Sharia Court Funtua
Before: Alhaji A. Abdullahi
Members: 1. Alhaji Umar Ibrahim
2. Alhaji Bello Usman
3. Alhaji Mamuda Suleiman
Appellant: Amina Lawal Kurami
Respondent: The State

Grounds of appeal: [none stated][61]
Counsel for the appellant: Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe.[62]
Counsel have instructions of Amina Lawal to represent her.

Court to Appellant's Counsel: You filed your appeal on 28/3/2002 but up to now the trial court records are not ready. What happened?

Appellant's Counsel (Aliyu Musa Yawuri): That is true, but we will try to obtain the records very soon God willing.

Court: What do you want now?

Appellant's Counsel: We have an application.

Court: What is the nature of your application?

Appellant's Counsel: We wish to file additional grounds of appeal against the judgment of the Sharia Court Bakori together with some grounds we intend to rely on with regards to some errors committed by the Sharia Court Bakori in this case.

Court: Counsel for the State is not in court. We received their application seeking for adjournment of this appeal to 23/5/2002. The date is not convenient, but 27/5/2002 is convenient. Is this date convenient to you?

Appellant's Counsel: The date is convenient. We hope the Attorney-General will be informed of the new date.

Court: The matter is adjourned to 27/5/2002 for appellant to move her application to file additional grounds and for State Counsel to appear. Mal. Babangida Shehu who is in court is ordered to inform the resident State Counsel of the new date.

(c) Additional grounds of appeal[63]

1. The Sharia Court Bakori erred when it convicted the appellant and sentenced her to *rajm* without interpreting and explaining to her the offence of *zina* even when the appellant did not understand what was meant by *zina*.
2. The Sharia Court Bakori convicted and sentenced the appellant even before the court heard her defence.
3. The Sharia Court Bakori sentenced the appellant to *rajm* without taking her plea and without giving the appellant the opportunity to present her defence.
4. The judgment of the Sharia Court Bakori is a nullity in that the court convicted and sentenced the appellant without observing the *i'izar*, which is a mandatory requirement.

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[61] The Hausa transcript has here: "50.00 R VNo. 901997. Date 25/3/2002".
[62] Mariam Imhanobe is the Head of WRAPA's Legal Department.
[63] Caption omitted. The date of filing of these additional grounds is unclear from the only copy available to us. From the record of proceedings on 27th May 2002 we conclude that they were filed before then.

5. The judgment of the Sharia Court Bakori is null and void because under the Sharia, the police or any other authority does not have the power to arrest or prosecute Muslims for the offence of *zina*.

6. The Sharia Court Bakori erred in convicting and sentencing the appellant to *rajm* when there was no evidence before the court that the appellant was a *muhsinat*.

7. The Sharia Court Bakori erred when it convicted and sentenced the appellant to *rajm* upon a meaningless charge.

8. The Sharia Court Bakori erred when it convicted and sentenced the appellant to *rajm* based on the appellant's purported confession whereas the appellant never confessed before the court.

9. The Sharia Court Bakori erred when it convicted and sentenced the appellant based on the fact that the appellant delivered a baby without a husband whereas this does not constitute a conclusive proof of *zina* against the appellant.

Dated this ____ day of _____ 2002.

___[signed]_____
A.M. Yawuri
Aliyu Musa & Co.
[etc.]

For Service On:
Attorney-General of Katsina State
A.G.'s Chambers, Funtua

(d) Proceedings 27th May 2002

Court: Today is 27/5/2002. The appellant together with her counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. State Counsel Babangida Shehu and Isma'ila Ibrahim Danladi are also in court. The appeal was adjourned to this date for counsel for the appellant to move their application to file additional grounds of appeal against the judgment of Sharia Court Bakori.

Court: Appellant's counsel will move his application.

State Counsel (Isma'ila Ibrahim Danladi): I am Isma'ila Ibrahim Danladi. Appearing with me is Babangida Shehu.

Court: Appellant's counsel what are your grounds of appeal?

Appellant's Counsel: We are appealing against the judgment of Sharia Court Bakori. We are dissatisfied with it. We are ready to move our application.

Court: State Counsel any objection?

State Counsel: We have no objection. We will reply later on.

Court: Move your application, counsel.

Appellant's Counsel: We are applying for: (1) an order granting the appellant leave not to attend the court pending the weaning of her child, and only thereafter to report herself to court for execution of the sentence in case her appeal fails; (2) an order setting aside the order of the trial court which directed the appellant to report herself to the trial

court every two weeks up to the time she has weaned her child; and (3) any further or other orders the Honourable Court may deem fit and just to grant.

We shall rely on two grounds in support of this application: the trial court lacked jurisdiction to make the order we seek to set aside [, and the order is contrary to Islamic law][64].

The Katsina State Sharia Courts Law, Law No. 5 of 2000, commenced operation on 1/8/2000. It appears that the order that is in question was made by the trial court on 21/3/2002. This was after the commencement of Sharia Courts Law. Sections of the aforesaid law provide that upon its commencement the Sharia courts shall be bound by its provisions in both civil and criminal proceedings.

The law further provides that the courts shall rely in their proceedings on (1) the Qur'an, (2) the Hadiths of the Holy Prophet (SAW), (3) *ijma*, (4) *qiyas*, (5) *ijtihad*, and (6) *urf*. Although section 9 of the law provides that the Grand Kadi may make rules of practice for the Sharia Courts, the Grand Kadi is yet to make such rules. Even if he eventually did make such rules section 9 says such rules must comply with Islamic law.

Page 13 lines 22-28 and p. 14 lines 1-5 of the Bakori Sharia Court records show that Amina was granted bail after the court's judgment. One Musa was her surety. He was required to produce Amina in court every two weeks pending the time she weaned her baby girl, whereupon she would receive the punishment of *rajm*. Musa later refused to stand as Amina's surety, on the ground that she might run away. See p. 14 lines 9-17. Fearing she might be sent to prison, Amina obtained the consent of one Idi to stand for her. She was released on bail to Idi on the same conditions given to Musa, i.e. he was to bring her to court every two weeks. The court termed the bail as "bail after judgment".

We went through the Qur'an but fail to find any authority empowering a court to grant such bail after judgment. Therefore the court did not rely on any Qur'anic authority in making this order. The Hadiths of the Holy Prophet also do not provide for this power. Indeed the traditions of the Prophet provide otherwise. We rely on the hadith on p. 642 in *Muwatta Malik*. In that hadith it is reported that a woman came to the Holy Prophet and confessed to having committed *zina*. The Prophet told her to go away until she had delivered. After she delivered she went back to the Prophet. He asked her to go back again until she had weaned her child. After she weaned the child she went back to the Prophet once again. The Prophet told her to go back once more until she got somebody to look after the child. It was only after she got somebody to take care of the child that she was stoned to death. Therefore, the order given by the Sharia Court Bakori is contrary to the provision of Islamic law.

Furthermore, once a court has passed judgment, it ceases to have any jurisdiction over the matter. It becomes *functus officio*. It is only a higher court that can then exercise jurisdiction over the case. Section 3(1) of the Sharia Courts Law 2000 provides for two classes of courts – Sharia Courts and Upper Sharia Courts. Section 32 gives Upper Sharia Courts jurisdiction to hear appeals from Sharia Courts. In section 32 there is nothing that empowers the trial court to exercise jurisdiction over a case after it has passed its

[64] The second ground is not articulated in the transcript at this point; we insert it for the guidance of the reader.

judgment. Any application for bail ought to have been entertained by this court not the lower court. Section 271(3) of the Criminal Procedure Code, which was the applicable law before the enactment of the Sharia Courts Law, provides that where a pregnant woman is sentenced to death, such sentence shall be substituted with life imprisonment. It does not provide for bail. Any order made by a court must be supported by law. Therefore since the trial court did not act according to the law, we urge this court to set aside its order.

In all the *zina* cases tried by the Holy Prophet, he never granted bail. Refer to *Sahihul Muslim* p. 201 where a woman came to the Prophet and said "I have committed *zina*, I want you to purify me". The Prophet drove her away. She said "Oh Prophet of Allah, do you wish to drive me away as you drove Ma'iz?" Therefore, the practice of granting bail after conviction is not recognised by the Sharia. We urge this court to set aside this order. Whenever Amina reports to the court the people of Bakori swarm around her looking at her. This is insulting to Islam.

Court: State Counsel, you heard their submissions. What is your reply?

State Counsel: We object to the application. Firstly, counsel submitted that the order made is contrary to the Hadiths of the Holy Prophet (SAW). I believe it is not contrary to the Qur'an and Hadiths. The hadith in *Muwatta Malik* is distinguishable from the present case. In that hadith it was the woman who voluntarily submitted herself to the Holy Prophet with a request that he should purify her. In the case at hand the appellant was arraigned before the court. In the case before the Holy Prophet there was no fear that the lady would run away. In this case there is such fear. It is not certain that if she is released the appellant would report back to the court. The Bakori Sharia Court judge relied on his *ijtihad*.

On their ground number 2, counsel submitted that the trial court had no jurisdiction to grant bail after judgment. This court does not know this and even though the law provides for two categories of courts – the Sharia and Upper Sharia Court – we still ask this court to affirm the order of Bakori Sharia Court.[65]

Court: Counsel to the appellant, did you hear the submission of State Counsel?

Appellant's Counsel: Yes. State Counsel misconceived the issues involved. Islamic law does not provide for forceful execution of the punishment of *rajm*. In *Hadith Ma'iz*, when Ma'iz felt the pains of the stoning he ran away. People pursued him and caught him and executed the judgment on him. The Holy Prophet queried them, saying why did they not let him be? It is therefore wrong to rely on any fear that Amina might run away from justice. The State did not cite any Qur'anic authority or hadith to support the ruling of the trial court. Islamic law unlike English law does not rely on personal opinion. Therefore this is an error. Only Islamic jurists can perform *ijtihad*. See p. A84 Sharia Courts Law of Katsina State.[66]

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[65] Sic. It is not clear what the gist of this argument is.

[66] The reference is to the gazetted version of the Sharia Courts Law, Katsina State of Nigeria Gazette No. 5 Vol. 11, 10th August 2000, pp. A83-A95. On p. A84 *ijtihad* is defined as follows: "'Ijtihad' means and shall include analogical deductions of an Islamic Jurist".

Court: State Counsel, you heard the final address of appellant's counsel?

State Counsel: I heard. It is not correct to say that Islamic law will not enforce the punishment of *zina*. It is the law that made *zina* a crime and provided for punishment of offenders. The law provides that *zina* is proved against a pregnant woman who is known not to be married, so long as she was not raped. Where a woman is found guilty of this offence there is a prescribed punishment. On the issue of *ijtihad*, a court is enjoined to rely on Qur'an, Hadiths, *qiyas*, *ijmah*, *ijtihad* and *urf*.

Court: Court adjourns to 3/6/2002 to rule on the application of counsel for the appellant.

(e) Proceedings 3rd June 2002

Court: Today, 3/6/2002, the appellant and her counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. State Counsel Isma'ila Danladi is also in court for the continuation of the hearing.

Appellant's counsel sought for three orders. First, an order allowing Amina Lawal leave not to attend the court pending the time she weans her child and thereafter to report back for the punishment to be inflicted in case her appeal fails. Counsel relied on a hadith in *Muwatta Malik* at p. 642. In the hadith the Prophet allowed a woman who became pregnant by *zina* to go away and come back for her punishment after she had weaned her child. She was not detained.

Appellant's counsel are also praying this court to set aside the order of the Sharia Court Bakori which directed Amina to be reporting to that court every two weeks pending the time she weans the child she is breast feeding. Counsel contended that the Sharia Court Bakori lacked the jurisdiction to make such order, having become *functus officio*. He maintained that the Bakori court had no right to grant bail to a convict. Counsel relied on the Katsina State Sharia Courts Law, No. 5 of the year 2000, which commenced operation on 1/8/2000. Amina was convicted on 21/3/2002, after commencement of the Sharia Courts Law. Section 8 of the law provides that upon its commencement, courts shall apply provisions of the Holy Qur'an, Hadiths, *qiyas*, *ijma* and *urf* in all their civil and criminal proceedings. Even though section 9 empowers the Grand Kadi to make rules of practice, he is yet to make any such rules. Counsel submitted that on p. 14 lines 4-5 of the records, the Sharia Court Bakori granted bail to Amina. Malam Musa stood as her surety. The condition attached to the bail was that Musa should bring Amina to court every two weeks up to the time she weans her child. After that she is to report herself back to the court for the punishment of *rajm* to be carried out. Later on, Musa said he could not continue to act as surety for Amina. The court granted Amina bail once again to one Idi on the same condition as before, that is that he would produce Amina every two weeks. The Bakori court did not rely on any law or authority in making this order. *Hadith Ma'iz* is reported in *Muwatta Malik* p. 642.[67]

[67] Sic. The reference is in error; *Hadith Ma'iz* is not in *Muwatta Malik*. It can be found in both *Sahihul Bukhari* vol. 8 p. 529, hadith no. 806, and *Sahihul Muslim* vol. 1 pp. 112-13, hadith no. 1692.

In their third prayer, counsel for appellant seek for any other order this Honourable Court may deem just in the circumstances.[68]

Amina Lawal delivered her baby girl who is suspected to be illegitimate on 8/1/2002, see p. 1 of the trial court record.

State Counsel objected to appellant's application. He submitted that the order made by the Bakori Sharia Court is not in breach of the Qur'an or Sunnah. The hadith in *Muwatta Malik* is distinguishable from the matter at hand. The lady in the hadith voluntarily took herself to the Holy Prophet. She was not arrested and arraigned before the Prophet. She arraigned herself without any fear of the *hadd* punishment. But Amina was arrested and arraigned involuntarily. Counsel therefore submitted that the Bakori judge relied on his *ijtihad* in making the order. On the submission of appellant's counsel that the Bakori court was *functus officio*, State Counsel argued that no one knows whether if Amina was granted bail she would be attending court or whether she would jump bail. State Counsel submitted that the Bakori judge did not breach the provision of any law.

Appellant's counsel in his final address submitted that State Counsel misconceived the position of Islamic law. Islamic law is not out to forcibly execute the punishment of *rajm*. In *Hadith Ma'iz*, when Ma'iz started feeling pains from the stoning he ran away. People caught him and killed him. When the episode was narrated to the Holy Prophet he queried why Ma'iz was not let alone since he had run away. Appellant's counsel observed that State Counsel did not rely on any hadith throughout his argument.

State Counsel replied by saying that Allah (SWT) prohibited *zina*. He said an unmarried woman found to be pregnant who does not claim to have been raped, must have committed *zina*. Sharia law provides that a court shall rely on the Qur'an, Hadiths, *qiyas*, *ijma* or *ijtihad*. The trial judge relied on his *ijtihad*.

Ruling

The Court grants the first prayer of the appellant. She is given leave to go and to stay away until she has weaned her child and thereafter to produce herself before this Upper Sharia Court Funtua. The court relies on the hadith in *Muwatta Malik* at p. 642 which shows that the court can allow a person convicted of the offence of *zina* to go his way without detaining him. Another authority for allowing her to stay at her house until she weans her child is to be found in Qur'an *Suratul Baqarah* verse 233: "The mothers should suckle their children for two whole years…." However, the court requires Amina Lawal to bring her guardian who will act as a surety on her behalf and produce her after she has weaned her child or at any time the court needs her. We rely on *Bulughul Marami* p. 258 hadith no. 1238.

On the second prayer seeking the setting aside of the Bakori Sharia Court order requiring Amina to be reporting to that court every two weeks until she weans her child,

[68] In the transcript, following this sentence, there is a short paragraph as follows: "**Court:** Amina Lawal delivered her baby girl who is suspected to be illegitimate on 8/1/2002. See p. 1 of the record of the Sharia Court Bakori." The transcript then goes on as above. The short paragraph seems to have been misplaced; the thought is repeated at the end of the court's ruling, below.

this prayer is also granted since the matter is now pending before this court not the Bakori court.

Under the third prayer the court hereby allows Amina not to be reporting to the court until she has weaned her child. See verse 233 of *Suratul Baqarah* which says: "Nursing mothers shall breastfeed their babies for two full years." The records of appeal show that Amina delivered her child on 8/1/2002. Relying on this verse she will wean her child on 8/1/2004. After she has weaned the child she will produce herself in this court for the purpose of hearing her appeal and the possibility of executing her sentence.[69]

This is the decision which I, Alhaji Aliyu Abdullahi Katsina, Upper Sharia Court Judge Funtua, together with my court members Alhaji Umar Ibrahim, Bello Usman and Mamuda Suleiman reached in respect of the application.

Court: Counsel for the appellant, have you heard the ruling of this court in respect of your application?

Appellant's Counsel: We have heard all that the court has said and are very happy with the just decision reached by the court.

Court: State Counsel, have you heard the ruling of this court on the application brought by counsel for the appellant?

State Counsel: Yes, the ruling is correct. We ask for a date for the appeal. This will enable me prepare for my reply.

Court: Counsel for the appellant, you heard what the State Counsel said, what do you say?

Appellant's Counsel: We are satisfied with this ruling. Any date given by the court for argument of the appeal is convenient. We apply for a certified copy of the order just made by this court, which we can file in the Bakori Sharia Court, so that that court will know that its order requiring Amina to be appearing before it every two weeks has been set aside.

Court: This matter is adjourned to 8/7/2002, for appellant's counsel to argue his appeal. The court also orders that the Sharia Court Bakori should be informed that its order requiring Amina to be reporting every two weeks has been set aside. The court hands over Amina Lawal to her guardian one Idris Ibrahim of Kurami village, who has undertaken to produce Amina Lawal after she has weaned her child or at any time the court needs her.

(f) Proceedings 8th July 2002

Court: Today, 8/7/2002, the appellant Amina Lawal and her counsel Malam Aliyu Musa Yawuri, Hauwa Ibrahim, Mrs Osabuohien Omo-Osagie and Ramatu Umar[70] are in

[69] Sic. In fact the hearing of the appeal continued the next month, and was not delayed until 2004.
[70] The organisational affiliations of Hauwa Ibrahim and Mrs Osabuohien Omo-Osagie have been noted, see n. 43 supra. Ramatu Umar was with the International Human Rights Law Group, Abuja.

court. State Counsel Malam Isma'ila Ibrahim Danladi apologised for coming to court late.

Court: Counsel to the appellant, are you ready to argue your appeal?

Appellant's Counsel: Yes we are ready.

The appellant was charged with the offence of *zina* contrary to Sharia. The court at Bakori sentenced her to *rajm* on 20/3/2002. She filed her appeal before this court on 28/3/2002, when she stated the general ground of the appeal; later she filed nine additional grounds, making ten altogether. We are filing two more grounds of appeal today being 8/7/2002, namely:

1. At the time of the judgment of the Bakori court,[71] the Katsina State Sharia Penal Code, Law No. 2 of 2001, had not yet commenced operation.

2. The decision is contrary to section 4(1) of Katsina State Sharia Court Law 2000, in that only one judge sat, heard and tried the case.

The appellant has a total of twelve grounds of appeal.

We have received the instruction of the appellant to retract her confession before the Bakori court. Her reason for the retraction is that at the time she made the confession nobody explained the offence to her and she did not know the meaning of *zina* which is an Arabic word. Also, she had never been to court before. It was in this confused state that she made the confession. Likewise, she is a village woman who is not familiar with courts and their proceedings. She relies on *Mukhtasar* vol. 2 p. 285 and *Fiqhus Sunnah* p. 423 and *Fiqhu ala Madhahibil Arba'a* vol. 1 as authorities for making this retraction. We also rely on *Jawahirul Iklili* and *Mugni* vol. 10 p. 188.

We will argue our grounds numbers 7, 2, and 3 together. A charge must of necessity be comprehensive. It must incorporate the date, time and place of commission of the offence; it must indicate the co-accused. For these we rely on *Subulus Salam*, a commentary on *Bulughul Marami*, vols. 3-4 p. 6. When Ma'iz went to the Prophet (SAW) and confessed that he had committed *zina*, the Prophet said perhaps you mean you kissed her. The Prophet explained the meaning of *zina* fully to Ma'iz. However, the charge stated against Amina Lawal on p. 5 lines 25-30 and p. 6 lines 1-25 fails to incorporate this comprehensive explanation of *zina*. The word *zina* is an Arabic term while the appellant is Hausa by tribe. Even though Ma'iz was an Arab, the Prophet (SAW) asked him to define *zina*. Ma'iz gave a comprehensive definition of the word. Furthermore, the charge failed to indicate the place where offence was committed. Instead the court on p. 6 lines 1-22 stated in its charge that it was fully satisfied that the appellant had committed the offence of *zina* as charged. "This court agrees and it is satisfied that Amina has committed *zina*."

We next draw the attention of the court to p. 6 lines 20-22 of the trial court record where the court passed its judgment without giving the appellant an opportunity to

[71] Sic. Of course the Katsina State Sharia Penal Code Law had commenced operation at the time of the judgment of the Bakori court (20th March 2002). What appellant's counsel must have intended to say, and perhaps did say, was "at the time the offence was committed…." This point is confused subsequently as well.

defend herself. See also p. 13 lines 3-18 where the court passed judgment for a second time. This means that the court passed two separate judgments – the first before the appellant was given the opportunity to defend herself, and the second in explaining the sentence. But it is necessary for the court to hear prosecution witnesses and to give the accused person the right to defend himself before it passes its judgment. This error committed by the court has resulted in the breach of the appellant's fundamental right to a fair hearing as granted by section 36(1) and (6) of the 1999 Constitution. Furthermore, the appellant's plea was not taken, see p. 6 lines 26-28 and p. 7 line 1. The court failed to take the appellant's plea. This is contrary to what occurred in *Hadith Ma'iz* where the Holy Prophet (SAW) ask Ma'iz whether he knew the meaning of *zina*. "Did you commit this offence?" "Are you a *muhsin*?" The Prophet did not convict Ma'iz until he had given him all possible opportunities to defend himself. In the matter at hand, contrary to the practice adopted by the Prophet, the court passed its judgment without hearing the appellant in her defence. We rely on *Al-Tashri'u al-Jina'i*. We submit that it is necessary that the court should ask Amina all the questions the Holy Prophet asked Ma'iz, notwithstanding Amina's alleged confession. The Bakori court judge failed to ask these questions. After the Prophet was satisfied that Ma'iz was sane, all the same he asked the above questions. Amina was not asked these question. This error has also resulted in the breach of section 36(5) of the 1999 Constitution.

Section 36(6)(b) of the 1999 Constitution gives the appellant the right to receive every assistance and sufficient time to prepare for her defence. She was denied this right to defend herself.

As to our grounds of appeal numbers 6 and 9: at [page number omitted] line 20-25, the trial court held that Amina was a mature woman, a Muslim, sane, and one who had previously been married. It was based on this finding that the court sentenced her to *rajm*. However, throughout the record, Amina never said she was previously married. The record does not show that Amina is an adult or sane. The court based its judgment on mere speculation not on evidence. It is a mere speculation. In *Ihkamul Ahkam* it is stated that a judge shall base his judgment on the evidence adduced before him. No evidence on these points was adduced in this case.

Besides, the law is not concerned with evidence of previous marriage. What is required is evidence of *ihsan* – i.e. that the accused is a sane, adult Muslim who had contracted a valid marriage which was validly consummated. It is possible to have a valid marriage but if it is consummated under conditions not approved by Islam the parties thereto will not possess the status of *ihsan*. Therefore there is a difference between marriage and *ihsan*. We rely on *Subulus Salam* vol. 3-4 pp. 6-7; *As'halul Madarik* vol. 3 p. 189; and *Bidayatul Mujtahid* vol. 2 p. 326. We also rely on *Adawi* vol. 2 p. 58. It is necessary to adduce evidence on every element of *ihsan*. The failure to do that has occasioned a serious error. Because of this error it is necessary for this court to reverse the judgment of the trial court.

The lower court relied heavily on the fact that the appellant delivered a baby when she was not married. The child was tendered in evidence, see p. 8 lines 11-14, p. 9 lines 2-28, p. 10 lines 1-29, and p. 12 lines 1-13. In the first place the law refers to pregnancy not the birth of a child. Therefore, the child tendered does not prove the offence of *zina*. Furthermore, pregnancy itself is evidence only against a woman who is not under the

authority of a husband. Therefore, before pregnancy becomes relevant, the court must investigate whether the accused had contracted a previous marriage. If she did, the court must find out when the marriage was dissolved. According to Imam Malik, if the marriage was dissolved within the last five years, then the pregnancy can be affiliated to the accused's former husband. We rely on *Fiqhu ala Madhahibil Arba'a* vol. 5 p. 459. There is a presumption that the former husband of a pregnant woman whose marriage was dissolved within five years is responsible for the pregnancy. The trial court found that Amina delivered her child in the tenth month of her divorce. Therefore we ask this court to set aside the judgment of the Bakori court.

On ground of appeal number 8: In the complaint appearing on p. 1 lines 14-21 and 24-25, and in the charge, p. 5 lines 1, 6, 8, 17 and 22, the lower court used the term *zina* eleven times. However, throughout the proceedings this Arabic term was never interpreted to the appellant. Likewise, the offence of *zina* was never interpreted or explained to her. It is necessary that the accused person fully understand the charge he is facing before he is convicted thereon. See section 36(6)(a) of the 1999 Constitution. It is true that Amina confessed to committing *zina*, see p. 1. However, at p. 5 of the record, when the court asked Amina whether it is true that she committed *zina*, she said yes, somebody deceived her into believing that he was going to marry her. Here it is clear that she could not have made any confession since she claimed she was deceived into the act by false promises of marriage. She committed the act following this deception. We rely on *Fiqhus Sunnah* vol. II p. 371. Amina assumed that since there was a promise of marriage it was not wrong to commit the act.

The trial court failed to observe the mandatory *i'izar*. See p. 7 line 22. We rely on *Ihkamul Ahkam* p. 25. We also rely on *Bahjah* vol. I p. 65.

We will now argue our additional ground of appeal number 1 which was filed today. Section 1 of the Katsina State Sharia Penal Code Law, Number 2 of 2001, provides that the code shall commence operation on 20/6/2001. The appellant was sentenced to *rajm* pursuant to section 124 of the Sharia Penal Code. She was arraigned on 15/1/2002. Page 1 lines 30-35 of the record indicate that the appellant delivered her child eight days before she was arraigned, on 8/1/2002. However, the date of birth cannot be the date of commission of the offence. Birth of the child is not itself a criminal offence, it is the act of *zina* that is an offence. There was no evidence before this court showing that at the time the appellant committed the offence the Sharia Penal Code Law had commenced operation. We know that normal human pregnancies take nine months. If we subtract nine months from 8/1/2002, it will give us somewhere between March and April of the year 2001, that is about three months before the Katsina State Sharia Penal Code Law commenced operation. Section 4(9) of the 1999 Constitution provides that neither the National Assembly nor a House of Assembly shall, in relation to any criminal offence, have power to make any law which shall have retrospective effect. Similarly, the Qur'an also says that no one can be guilty of an offence until and unless a messenger has been sent to him.

On our second additional ground of appeal which we filed today: Section 4(1) of the Katsina State Sharia Court Law 2000 provides that in any trial before a Sharia Court, a judge shall be assisted by two court members: that is when a proper quorum is formed. The trial court was presided over by one judge throughout the proceedings without the

assistance of any court member. Therefore we ask this Honourable Court to set aside the judgment of the Bakori court.

We realise that Katsina State does not have any Sharia Criminal Procedure Code. It is the Criminal Procedure Code that shows to the accused person the steps he has to take in defending himself against the charge he is facing. Therefore, the appellant did not know what procedure to adopt to defend herself. We submit that it is extremely difficult to have a fair hearing in the circumstances.

Section 36(6)(b) of the 1999 Constitution requires that an accused be given adequate time and facilities for the preparation of his defence. Amina was denied this right. It is clear that a lot of errors were committed in the proceedings before the Bakori court. A lot of procedural rules and constitutional provisions were breached. We urge this court to allow this appeal and set aside the judgment of the Bakori court and discharge the appellant.

Court: State Counsel, have you heard the argument of appellant's counsel?

State Counsel: Yes I did. I am asking for time within which to prepare my reply.

Court: Counsel to appellant what do you say?

Appellant's Counsel: We have a great distance to travel to come here, we urge the court to reconsider this application.

Court: State Counsel what do you say?

State Counsel: I am not ready with my reply. I therefore need time.

Court: The matter is adjourned to 5/8/2002, to give State Counsel time to prepare his reply.

(g) Proceedings 5th August 2002

Court: Today 5/8/2002 the appellant Amina Lawal together with her three lawyers Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. State Counsel Isma'ila Danladi is also in court. The matter was adjourned for State Counsel to prepare his reply.

Court: State Counsel are you ready with your reply?

State Counsel: Yes, I am ready.

Counsel for the appellant informed the court that they were retracting the confession made by the appellant before the Bakori court based on the following grounds.

First, he explained that the appellant did not understand the word *zina* which is an Arabic term. To the best of our understanding this is not a very good ground. Although the word *zina* is Arabic, a careful perusal of the record of the lower court will show that the appellant understood the meaning of *zina*, even though it is an Arabic term. See p. 1 lines 7-32, p. 6 lines 27-28 and p. 7 line 1. This will satisfy the court that the appellant understood the meaning of *zina*. Furthermore, throughout the proceedings the appellant did not inform the court that she did not understand the meaning of *zina*.

On their second ground they argued that Amina had never been before a court before she was arraigned, that she was confused, and it was amidst this confusion that

she confessed to the offence. Again I think this is merely the opinion of appellant's counsel. The fact that this was her first appearance in court cannot be a ground for any confusion. Her co-accused answered his charges even though it is not indicated that he had ever before appeared before a court.

Finally, counsel argued that the appellant is a villager. The fact that a person is a villager cannot be a defence in law, especially as the village of Kurami is not far away from Funtua. It has a school and other utilities. In sum, there is no ground for retraction of appellant's confession.

Appellant's counsel submitted that the accused should be informed of the charge he is facing, the date and place of the offence, and so on. He relied on *Hadith Ma'iz*. We submit that *Hadith Ma'iz* is not relevant authority: it is distinguishable from the facts of this case. Ma'iz reported himself to the Holy Prophet (SAW), without waiting for anybody to arrest and arraign him. Ma'iz's conduct was strange: that is why the Prophet asked him whether he was sane. The Prophet also asked him about the offence he said he had committed and the date and the place he committed it. That is why when the Holy Prophet (SAW) heard all this he ordered Ma'iz to be stoned to death. I refer also to *Bulughul Marami* hadith no. 1232 where an Arab came to the Holy Prophet and offered him a female slave and one hundred goats so that his son would not be killed for committing *zina* with a woman. Since the boy had not contracted a previous marriage he was given one hundred strokes of the cane. The Prophet (SAW) did not accept the goats or the female slave. What I want to emphasise from this hadith is that the Prophet then ordered that they should go back to the woman and enquire if she had committed the offence, and said that if she had done so, she should be stoned to death. See also hadith no. 1236 in *Bulughul Marami*. In short all the reasons adduced for the retraction of the appellant's confession are not supported by the law.

Appellant's counsel also argued that the Sharia Court Bakori failed to give the appellant the opportunity to defend herself. He said this was contrary to section 36(1)and (6) of the 1999 Constitution. This is also not correct. The appellant was asked whether she heard the charge against her. She said she heard the charge and she pleaded guilty to it. The question asked afforded the appellant the opportunity to bring forth her defence if she had one. Instead she said she had no defence. This court should not be intimidated by counsel's citation of the provisions of the Constitution. This case is based on the laws of Allah (SWT). The laws of Allah take precedence over any argument that may be proffered in this case.[72]

Counsel for the appellant submitted that the appellant was an adult and a divorcee, that the lower court failed to consider this.[73] At p. 1 line 19 of the record it is shown that she had previously contracted a marriage, but she was later divorced. When she was arraigned before the court she did not claim that she was insane. It is the appellant who ought to have raised this defence, it is not for her counsel to raise it now.

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[72] "Don haka ina ganin babu wata barazana da za'ayi ma wannan kotu da Constitution, wanda wannan Sharia ta Allah (SWT) ce kuma abinda yace shine mafi karfi da girma da duk wata magana da za'a kawo akan ita wannan Sharia."

[73] This sentence accurately translates the Hausa. What State Counsel evidently meant to say was that appellant's counsel submitted that there was no evidence before the trial court that the appellant was an adult, sane, divorced, etc.

Counsel submitted that the appellant's pregnancy is irrelevant. I believe this is wrong. It is contrary to human nature for a woman to conceive without a man. Counsel said it is possible that the pregnancy is for the appellant's former husband. This is a mere allegation, because it is not the former husband who named the baby. Even if he didn't take the child into his custody he is supposed to be responsible for its upkeep and other things.[74]

Appellant's counsel also submitted that Amina was deceived with false promises of marriage by the person accused jointly with her, Yahayya Muhammed. This is also not a good reason for reversal of the judgment. It only explains why she committed the offence. In Islamic law ignorance does not excuse an offence.

Counsel also submitted that the lower court did not observe *i'izar*. This is also not correct. Careful perusal of the record at p. 11 line 11 will show what actually transpired.

Counsel for the appellant argued that at the time the appellant was tried [sic], the Sharia law[75] had not yet commenced operation. This is not true because this case was filed on 15/1/2002. It is not true that the trial commenced eleven months before the commencement of Sharia [sic], this is also not true. The Sharia law commenced operation in August 2000.[76] Therefore it is not correct to say that the appellant committed the offence before the commencement of Sharia law.

Counsel further argued that only one judge heard and determined the case [in contravention of section 4(1) of the Sharia Courts Law]. We contest this on the following grounds. To begin with, the Hadiths of the Holy Prophet do not provide that a judge must sit with members. So section 4(1) is contrary to the provision of section 3(1) of Katsina State Law number 6 of 2000 [the Islamic Penal System (Adoption) Law] which enjoins that a judge shall base his judgment on the Qur'an and Hadiths. The Sharia Courts Law also does not provide that where one judge sits and hears a case, his decision is null and void.

In summary, the position of Islamic law is that a criminal case is proved by evidence or by the confession of the accused person. The appellant made a voluntary confession. Relying on hadiths no. 1232 and 1236 of *Bulughul Marami* we submit that the appellant received a fair hearing. That is if the appellant has faith in Allah and in the day of judgment. We are only interested in seeing that justice is done to a Muslim as enjoined by Allah (SWT). Where a judge adjudicates according to the rules set down by Allah, it is not befitting for a Muslim to raise objection. We urge this Honourable Court to consider our submissions and affirm the sentence passed by the Bakori trial court.

Court: Counsel for the appellant, you heard the reply of the State Counsel?

Appellant's Counsel: Yes. We ask for a last address.

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[74] The sense of this argument seems to be that if Amina's pregnancy had been for the former husband she would have informed him, and he would then have come and named the baby and assumed his other duties toward it.

[75] "*Shariar musulunci*".

[76] This is the date on which the Katsina State Sharia Courts Law and Islamic Penal System (Adoption) Law, Nos. 5 and 6 of 2000 respectively, both came into effect.

State Counsel misconceived the law. It is the duty of the court to explain to the accused the charge he is facing. It is not for the accused to beg the court for these explanations.

Be that as it may, the appellant wishes to withdraw her confession. Based on *Fiqhus Sunnah* vol. 3 p. 423, an accused has a right to withdraw his confession, and does not have to adduce any reason for the retraction. Another view of some Muslim jurists is that the accused must adduce reasons for his retraction. Even if that view is adopted, the failure of the court to explain to appellant the meaning of the offence she was charged with is sufficient reason for her retraction. The need to explain a charge to an accused is supported by both Islamic and English law. The State Counsel misconceived this.

It is also wrong to insist that the precedent set in *Hadith Ma'iz* should not be applied; that is that the appellant needed not to be asked if she was sane. The hadith in *Bulughul Marami* relied upon by the State Counsel answered a different question: may the court accept material property from a convict in substitution of the prescribed punishment? This was the issue before the Holy Prophet who ruled that a judge shall not accept any property but must inflict or award the prescribed punishment on the convict. That being the case the principle enunciated in *Hadith Ma'iz* must be applied. The case before the court involved the commission of *zina*. Failure to apply one out of the many procedural steps is sufficient to render the whole trial a nullity.

State Counsel pointed out that the appellant was asked "Do you understand the charge?" This does not satisfy the requirement of section 36(1) and (6) of the Constitution. Counsel also submitted that the appellant was an adult person because she had contracted a previous marriage. This is not the issue we raised. We asked for the determination of whether the appellant was a *muhsinat*. There is difference between *ihsan* on the one hand and the status of marriage on the other. It is possible for a woman to contract a valid marriage but still fail to be a *muhsinat*. The trial court did not make any finding on whether the appellant is a *muhsinat*. This failure rendered the proceeding a nullity. See *Bidayatul Mujtahid* vol. 2 p. 326. There is no evidence that the appellant is a *muhsinat*. Also, a judge cannot base his judgment on speculation. It has to be based on evidence. A judgment must be based on proper inquiries and evidence.

According to our submission, the Katsina State House of Assembly is the organ vested with the powers to enact laws. The Assembly enacted the Sharia Court Law 2000 which requires a Sharia Court judge to sit with two court members. We rely on Section 4(1) of the law. To our knowledge this is the present law; it has not been amended.

In the circumstances this court should set aside the judgment of Bakori Sharia Court.

Court: Counsel for the appellant Hauwa Ibrahim.

Mrs Ibrahim: I wish to make further explanations. In our research on Sharia law, we went to Ahmadu Bello University Zaria. We obtained this law from other available laws which Professor Na'iya Sada said exist. He listed the following:[77]

[77] "We obtained this law …"; "He listed the following …": sic: it is unclear what law or what authority are being referred to.

CONDITIONS OF PROOF OF ADULTERY[78]

1. The accused is an adult.
2. He or she is sane.
3. He or she is a Muslim.
4. The act was done voluntarily and without coercion.
5. The act was committed with a human being not an animal.
6. The accused has reached the required age.
7. The persons accused had no right or authority over each other; the man is aware that the woman is *haram* to him.
8. The accused is not a trusted unbeliever.
9. The woman accused is alive not dead.

These conditions can be found in *Risala*, *Mukhtasar* and other books.

For my second comment, I wish to comment on the submission of State Counsel. No law is above the law of Allah. State Counsel should examine Katsina State Sharia Law No. 5 of 2000. This talk of one law having precedence over another, we didn't mention that.[79]

Finally, where a person is charged with an offence, what does the law require from the court in the case? Section 10 of the Sharia Law provides the jurisdiction of the court over the accused person. The section states the date of the commencement of the law; did we cite a different date?[80] We urge the court to consider this so as to do justice in this case.

State Counsel: I wish to reply. Where an accused confesses to the offence, is it necessary to explain the charge to him? I did not say the appellant understood the charge. The record will show what I said.

Court: Case adjourned to 19/8/2002 for judgment.

(h) Proceedings 19th August 2002

Court: Today is 19/8/2002. The appellant Amina Lawal, her counsel Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe are in court. State Counsel Isma'ila Danladi is also in court. The appeal was adjourned to today 19/8/2002 for judgment.

The appeal is from the decision of Sharia Court Bakori. The case before the court was between the police prosecutor, one Cpl. Idris Adamu, and Amina Lawal and Yahayya Muhammed. The prosecutor arraigned the accused persons who reside at Kurami on an information alleging the offence of *zina* against them. The information

[78] The heading, including the word 'adultery', is given in English in the judgment.
[79] This is the best we can make of the Hausa transcript, which reads as follows: "A bayani na biyu ina so in tofa yawu akan abinda lawyer na Gwamnati yace to babu doka da ta fi dokar Allah to amma in ya duba Sharia Law No. 5 2000 Katsina State, saboda haka maganar doka ce take gaban wata doka, to mu bamu ambaci haka ba."
[80] Sic. The words "Sharia Law" are in English. Which law is intended is not clear. Section 10 of neither Katsina State's Sharia Courts Law No. 5 of 2000 nor its Sharia Penal Code Law No. 2 of 2001 has anything to do with Sharia Court jurisdiction, nor does either state the date of commencement of the statute.

stated that on 14/1/2002 a police officer named Rabiu Daudu and one other, of the investigation department of the Nigeria Police Bakori, arrested the accused persons on allegations of committing *zina* with each other. It was alleged that they committed the offence right from the time when they began courting some eleven months ago. As a result of the *zina* they committed Amina Lawal delivered a baby girl. Their act is contrary to Katsina State Sharia Law.

The trial court asked the appellant whether the information read against her was true. She answered, "Yes I heard, and it is true I committed this offence of *zina* because this is the girl I delivered about nine days ago i.e. on 8/1/2002." The court asked Amina Lawal, "With whom did you commit this offence?" Amina replied, "I committed the offence with Yahayya Muhammed". The court turned to the 2nd accused Yahayya Muhammed and asked, "Yahayya Muhammed, you heard the information against you, what do you say?" Yahayya Muhammed replied, "I heard the information against me but it is not true, I did not commit *zina* with Amina Lawal." He further stated, "I know I was seeking her hand in marriage but I never had sex with her. It was after she delivered that I was summoned to the house of the village head of Kurami where it was alleged that I committed *zina* with her. I denied it. I was taken to the police station. The police said I either accept the offence or they will break me into pieces. I did not commit the offence."

The court then turned to the prosecutor. "You heard what Yahayya Muhammed said, what do you say?" He replied, "I heard what he said but that is not true. I have witnesses and I want the court to allow me to call them." The court granted the application and adjourned the case to 29/1/2002 for the police to complete their investigation. The accused were remanded in prison custody.

On 30/1/2002 the prosecutor together with the accused persons were in court for hearing. The court asked the prosecutor whether he was ready with his witnesses. He said, "Yes I have one evidence, that is the baby girl which was born following the *zina* they committed. It is yet to be given a name." The court admitted the baby girl aged 25 days into evidence as Exhibit 1. The court asked the appellant, "Amina, is this the girl you delivered following the *zina* you committed?" She said yes. The court asked her again, "Do you agree that you committed *zina* as a result of which you delivered this girl?" She said "Yes that is so. It was Yahayya Muhammed who deceived me with false promises that he would marry me about eleven months ago when he started courting me." The court then asked the 2nd accused, "Yahayya Muhammed, have you seen the child now aged 25 days?" He replied, "Yes I see her." "Is she the girl you fathered through *zina*?" He replied, "I don't agree. She is being mischievous." The court asked him, "Is it true you were courting Amina?" He said, "That is correct. I courted her some eleven months ago." "Do you have witnesses who know you did not commit *zina* with Amina?" He replied, "I don't have witnesses." The court said, "Are you prepared to swear with the Qur'an that you did not commit *zina* with Amina Lawal as a result of which you fathered this girl?" He said "I will swear." He swore by the Qur'an that he did not commit *zina* with Amina Lawal. The Bakori court turned to the prosecutor. "I saw the 2nd accused take the oath. What do you say?" He replied, "I agree. Since he swore with the Qur'an I have no objection." The Sharia Court Bakori administered the oath relying on the *Tuhfa* as translated into Hausa by Malam Usman Daura, p. 89. It is called

the "oath of *tuhuma*".[81] After he took the oath, the court discharged the 2nd accused. The court then charged the 1st accused. The court said:

> The court charges you Amina Lawal with the offence of *zina* to which you confessed before this court on 15/1/2002 where you said you committed the offence and as a result thereof you delivered a baby girl which the prosecutor tendered in evidence today 30/1/2002. Therefore this court is satisfied and is convinced that you committed this offence of *zina* based on your confession before the court. The verse states that proof by confession is better than proof by evidence. The other additional evidence is the daughter you delivered.

The court proceeded to say:

> Since you accepted that you committed *zina* following which you give birth this baby while you are sane and a Muslim, a divorcee not a virgin, therefore court accepts and is satisfied that you committed the offence. Therefore the charge is very strong against you Amina Lawal Kurami.

The court asked her whether she understood the meaning of the charge. She said she understood and she agreed. The court asked the prosecutor whether the accused had committed similar offences before. He answered that to the best of this knowledge it was her first offence. The court adjourned pending the time Amina Lawal completed the traditional maternity hot bath and granted her bail to one Idris.

On 20/3/2002 the court sat for judgment. The court asked Amina Lawal if she had named the baby girl. She said she had named the baby girl Wasila. The court thereafter convicted her based on her confession to the offence and the evidence of the baby which she delivered following the commission of *zina*. The judge relied on *Suratul Bani Isra'il* verse 32 which prohibits the act of *zina* and enjoins Muslims not to come near it. The judge also relied on *Risala* p. 128, which provides that for a *muhsin* who is convicted of *zina*, the punishment is *rajm*. He also relied on hadith no. 14. The trial court judge convicted and sentenced Amina Lawal to be stoned to death based on the aforementioned authorities. This punishment is provided under section 125(b) of the Katsina State Sharia Penal Code. The sentence was to be executed after Amina had weaned her baby girl. The court gave Amina the opportunity to appeal if she was not satisfied with the judgment.

Aliyu Musa Yawuri, Hauwa Ibrahim and Mariam Imhanobe were the lawyers who filed the appeal on behalf of Amina Lawal. They filed the following grounds of appeal:

1. That the appellant allegedly did not understand the word *zina*, which is an Arabic word, and the Bakori court did not explain it to her.

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[81] The relevant passage of Usman Daura's Hausa *Tuhfa* says (as translated by Sama'ila A. Mohammed): "The oaths upon which an alkali may make judgment are divided into four. (i) **Oath of tuhuma**. This oath is administered on a person brought before a court on an allegation of commission of a crime, when the accused denies he committed the crime and the prosecutor cannot bring witnesses to support the accusation. The alkali shall offer the accused the opportunity to take an oath, and if he does shall discharge him…." At p. 92 of the same authority the following appears: "This is the oath which is offered to an accused upon an unproven allegation."

2. That the Bakori court convicted the appellant before the offence was proved against her.
3. That the Bakori court sentenced the appellant to *rajm* without taking her plea on the charge and also did not give the appellant the opportunity to defend herself. They relied on Section 36(1) and (6) of the 1999 Constitution.
4. That the Bakori court convicted the appellant without observing *i'izar*.
5. That the judgment of the Bakori court is baseless because neither the police nor any other authority has the competence to initiate criminal proceedings against a Muslim for the offence of *zina*.
6. That the Sharia Court Bakori erred when it convicted the appellant when there was no evidence before it that the appellant was a *muhsinat* meaning that she had contracted a previous valid marriage.
7. That the Sharia Court Bakori sentenced the appellant to *rajm* on a charge that is meaningless.
8. That the Sharia Court Bakori erred when it convicted the appellant based upon the appellant's confession when the appellant did not make any confession before the court.
9. That the Sharia Court Bakori erred when it sentenced the appellant to *rajm* relying on the ground that the appellant delivered a baby when she was not married, when this is not an evidence of *zina* since the appellant's former husband may be the one responsible for the pregnancy.
10. That at the time the Sharia Court Bakori passed its judgment on appellant [sic], Sharia Law No. 2 had not commenced operation.[82]
11. That the judgment of the Sharia Court Bakori is contrary to section 4(1) of Katsina State Sharia Law because a single judge tried the case.

The State Counsel Isma'ila Danladi replied to these grounds of appeal as follows.

Ground of appeal number 1 alleges that Amina Lawal did not understand the word *zina* because it is an Arabic term. To the best of our understanding this is not a strong argument, especially if regard is given to p. 1 lines 7- 32 and pp. 6 to 7 lines 27-28 of the record. This will show to this court that the appellant knew the meaning of *zina*. Furthermore, throughout the proceedings the appellant did not say she did not understand the meaning of *zina*, nor did she complain to the Court that she did not understand the meaning of *zina*.

Ground number 2 alleges that the lower court convicted the appellant before the offence was proved against her. This is also not true. The offence was indeed proved against her, see p. 1 line 5 where the appellant confessed to the offence.

On ground number 3, they submitted that the court sentenced the appellant to *rajm* without first taking her plea, and that the court failed to allow the appellant to adduce evidence in her own defence. Here the need to call defence witness does not arise, because she had already confessed to the offence. See the record of the trial court p. 1 line 3.

[82] The reference is to the Katsina State Sharia Penal Code Law, No. 2 of 2001.

On ground number 4, they complained that the court convicted the appellant without first observing *i'izar*. This is not true. See p. 12 line 14 of the record of the Bakori court.

On ground number 5, they submitted that the judgment of the Sharia Court Bakori is null and void because neither the police nor any other authority had the competence to arraign a Muslim on the offence of *zina*. This is also not correct, because Islam enjoins Muslims to stop the commission of any offence, either in person or by reporting to the relevant authority so that action can be taken.

They submitted on ground number 6 that the Sharia Court Bakori erred when it sentenced the appellant to *rajm* in the absence of evidence that the appellant was a *muhsinat*. This is not true, it is the mere opinion of the lawyer.

On ground number 7, they submitted that the Sharia Court Bakori erred by sentencing the appellant to *rajm* on a meaningless charge. The court was dealing with Islamic law. If the accused person confesses to the offence that is all that is required.

On ground number 8, they argued that the trial court erred when it convicted the appellant in reliance on the appellant's confession when the appellant did not confess before the court. This also is not true. See p. one line 3 of the record of proceedings of the lower court. You will see where Amina confessed to the offence.

On ground number 9, they said the Sharia Court Bakori erred when it sentenced the appellant to *rajm* based on the fact that she gave birth to a baby when she was not married, when this is not evidence of *zina* against the appellant since it is possible her former husband is responsible for her pregnancy. If that is so, why did she not give the child to the former husband? Instead when the matter was brought to the court she claimed that it was Yahayya Muhammed who was responsible. She further stated that she was together with Yahayya Muhammed for eleven months committing the offence.

On ground number 10, they argued that at the time the Sharia Court Bakori passed it judgment against the appellant [sic] Sharia Law No. 2 had not commenced operation. This is not true because the case was filed on 15/1/2002 while the law commenced operation in August 2000.[83]

On their ground number 11, they contended that the judgment of the Sharia Court Bakori is contrary to section 4(1) of the Katsina State Sharia Courts Law because only one judge heard the matter without the assistance of court members. Counsel for appellant should know that judges in Katsina State base their judgments on the rule of Sharia and Islamic Law as provided by section 8 of the Sharia Courts Law which provides that the courts are bound by the following laws:

1. The Qur'an;
2. Hadiths of the Holy Prophet;

[83] Again the reference to "Sharia Law No. 2" is presumably to the Katsina State Sharia Penal Code Law, No. 2 of 2001. It commenced operation on 20 June 2001, see §1 thereof. As has previously been noted two other laws, the Sharia Courts Law, No. 5 of 2000, and the Islamic Penal System (Adoption) Law, No. 6 of 2000, both came into operation on 1st August 2000. These various laws are confused throughout.

3. *Ijma*;
4. *Qiyas;*
5. *Ijtihad;*
6. *Al-Urf.*

The Sharia Court Bakori based its judgment on the above and the law of Allah takes precedence over any other law.

Judgment

We are of the view that the grounds of appeal complaining that the appellant did not understand the word *zina* which is an Arabic term is not a strong ground. Reference to p. 3 line 16 will show where the appellant confessed that she conceived and delivered the child through *zina*. This is clear confession on her part. We refer to *Muwatta Malik* p. 731 where it is stated:

> The son of Hattab said, "The book of Allah provides for the stoning to death of a Muslim adulterer or adulteress provided they posses the status of *ihsan"*,

that is, provided they have once contracted a valid marriage. For conviction of *zina*, any one of the following three conditions must be satisfied:

> 1. Evidence of four witnesses as required by Sharia. The witnesses must be: (a) Muslim, (b) adult, (c) sane, (d) just, and (e) they must have witnessed the actual act at the same time.
> 2. The manifestation of pregnancy in a woman who is not married.
> 3. *Ikirari* – confession i.e. voluntary admission of the offence.

The appellant confessed to the offence at p. 3 line 16 of the record.

Another authority can be found in [*Sahihul Bukhari* vol. 8 p. 536 of the English translation]:[84]

> The Prophet (SAW) said: "By Him in Whose Hand my soul is, I will judge you according to the Laws of Allah (SWT). Your one-hundred sheep and the slave are to be returned to you, and your son has to receive one-hundred lashes and be exiled for one year."

From there the Prophet instructed Unaiz Al-Aslam to go to the wife of the master of the young man who received the punishment to ask her if indeed she had committed *zina* with her servant; if she confessed she would be subjected to *rajm*. Here the Holy Prophet gave a directive to Unaiz al-Aslam. When the lady was confronted she confessed to committing *zina* with her servant. This authority clearly shows that a *muhsin* male or female will receive *rajm* once he confesses to committing *zina*. See also *Muwatta Malik* p. 730 which is a similar authority with the one of [*Sahihul Bukhari* vol. 8 p. 536].[85]

In their ground of appeal number 2, counsel for the appellant contended that the appellant was convicted before she pleaded to the charge. This is not correct. The court

[84] The Hausa text has "can be found in *Ibn Kathir* p. 381". We cannot locate this hadith in the works of Ibn Kathir, although it is in the place we have cited.
[85] Again the Hausa text refers to *Ibn Kathir*; see previous note.

asked her whether she agreed that she had committed the offence of *zina*. She said she agreed. She pleaded guilty to the offence. See p. 1 line 5 of the record.

In their ground number 3, counsel contended that the trial court sentenced the appellant to *rajm* without taking her plea, and furthermore, that the trial court did not give the appellant the opportunity to defend herself. This is not correct. The trial court did all that it was required to do. See pp. 1 and 3 of the record. Since she had already confessed to the offence there was no need for appellant to enter her defence.

On ground number 4, counsel argued that the trial court convicted the appellant without first conducting the *i'izar*. This is not so. See p. 17 line 14 of the record. The trial court conducted proper *i'izar* when it asked her whether she had anything she wanted to say, and she replied that she had nothing to say but she was seeking for forgiveness.

On ground number 5, counsel argued that the judgment of the trial court was null and void because neither the police nor any other authority has the competence to initiate criminal proceedings for the offence of *zina* against a Muslim. Katsina State has fully implemented Sharia, and the police prosecutor is a Muslim. See the hadith of the Prophet which says whoever witnesses an abomination being committed should stop it by his hand; if he has no power to do that, he should stop it by his tongue; and if he has no power to do that he should show that he disapproves it.

On ground number 6, they argued that the trial court erred in sentencing the appellant to *rajm* when there was no evidence the appellant was a *muhsinat*. This is not correct, because appellant's counsel did not bring any evidence to prove that the appellant was not a *muhsinat*. Therefore this is a mere opinion of counsel.

On ground number 7, they contended that the trial court erred in sentencing the appellant to *rajm* on a charge that is meaningless. The proceedings of the trial court were conducted according to the procedure under Islamic law. Whenever an accused person is convicted for the offence of *zina*, he is convicted immediately he confesses to the commission of the offence. See *Subulus Salam* vol. IV p. 1207 where it states: "An adulterer or an adulteress who is a *muhsin* who confesses to the offence even if it is only once shall receive the punishment of *rajm*."

On ground number 8, appellant's counsel argued that the trial court erred in convicting appellant based upon her confession when she did not confess before the court. Did counsel note pp. 1 and 3 of the record? If he did he will see where appellant confessed.

On ground number 9, counsel submitted that the lower court erred in sentencing the appellant to *rajm* on the ground that she gave birth to the baby when she was not married, when this is not an evidence of *zina* against the appellant. Counsel said it was possible the appellant's former husband is responsible for the pregnancy. However, the pregnancy and birth of the baby are evidence of *zina* against the appellant. We say so based on *Subulus Salam* p. 1213 where it is stated: "Pregnancy is an evidence of *zina* against a woman who is not married nor under the authority of any master." Furthermore, Amina did not claim that her former husband is responsible for her pregnancy nor did the former husband accept responsibility for the pregnancy. Therefore counsel's argument that the pregnancy is not a proof of *zina* goes contrary to this authority in *Subulus Salam*. See also the authority in *Fiqhus Sunnah* p. 346: "Evidence,

confession, or manifestation of pregnancy in an unmarried woman are the means of proof of the offence of *zina*."

On ground number 10, counsel contended that when the appellant was convicted Katsina State Sharia Court Law No. 2 [sic] had not yet commenced operation. Could it be that counsel forgot that the criminal complaint was filed before the trial court on 15/1/2002, and that the Katsina State Sharia Law No. 2 [sic] commenced operation in August 2000 [sic]? Therefore the contention that Law No. 2 had not commenced operation is not true.

On their ground of appeal number 11, they argued that the judgment of the trial court against the appellant was contrary to section 4 of the Katsina State Sharia Courts Law in that only one judge tried the appellant without the assistance of court members. However, the trial was conducted under Sharia law and procedure. Section 8 of the Katsina State Sharia Courts Law provides that courts are bound by the following laws in their trials:

1. The Qur'an;
2. The Hadiths of the Holy Prophet;
3. *Ijmah;*
4. *Qiyas;*
5. *Ijtihad;*
6. *Al-Urf.*

This provision is in due compliance with the requirements of Islamic law. All Sharia Courts are bound by the provisions of above-stated laws. The judgment of the trial court is not in conflict with the aforesaid laws.

Furthermore, the punishment for *zina* is *rajm* once the accused is free and a *muhsin*. In *Risala* of Abu Zayd it is stated that the prescribed punishment is *rajm*. See *Risala* p. 128, where it is stated: "A free-born person who is a *muhsin* who commits *zina* shall receive the punishment of *rajm*. Where the accused are not *muhsin* each shall receive 100 strokes of the cane." See also Qur'an *Suratul Nur* verse 2 where it is stated that:

> The *zaniyah* and the *zani*, flog each of them with a hundred stripes.

We have been talking of *zina* on several occasions. The offence of *zina* is defined in *Jawahirul Iklili* vol. 2 p. 283 as follows:

> *Zina* is committed when a Muslim who is a *mukallaf* has sexual intercourse with a person over whom he or she has no sexual rights.

For example, voluntary intercourse even if it is between a man and a man.

Appellant's counsel also submitted that they had retracted the confession of the appellant. This is not possible. See [*Sahihul Bukhari* vol. 8 p. 512 of the English translation][86] where is stated that:

> Intercession is not recommended in the matter of legal punishment after the case has been filed with the authorities.[87]

[86] The Hausa text has "See *Ibn Kathir* p. 319". We cannot locate this statement in Ibn Kathir, although it is in the place we have cited.

See also the hadith in *Misbahuzzujaj*. Implementing Allah's prescribed punishment is worthier than receiving a forty day rain in towns of Allah.

I'izar

Court: Counsel to the appellant, before the court passes its judgment, do you want to say anything?

Counsel: We have nothing to say. However, if we are not satisfied with the judgment we shall file an appeal.

Court: State Counsel, do you wish to say anything before the court passes its judgment?

Counsel: I have nothing to say.

Judgment

Based on the aforementioned grounds and the aforementioned authorities from various books that we relied on, I, Alhaji Aliyu Abdullah, Katsina Upper Sharia Court Judge Funtua, together with my three court members Alhaji Umar Ibrahim, Alhaji Bello Usman and Alhaji Mamuda Sulaiman do hereby affirm the judgment of the Sharia Court Bakori. We confirm the sentence of *rajm* on you Amina Lawal Kurami and the sentence shall be carried out the moment you wean your child. You shall stay with your guardian Malam Idris Ibrahim Kurami pending the time the judgment shall be executed.

Right of Appeal

Anyone who is dissatisfied with this judgment has the right to appeal to the Sharia Court of Appeal Katsina commencing from today 19th August 2002.

[Signed by judge and dated 19/8/2002.]

[87] This is Bukhari's heading, after which a hadith follows.

3.

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.]