

TOPICAL ISSUES IN ARABIC AND ISLAMIC STUDIES

ESSAYS IN MEMORY OF ABUBAKAR ALIYU GWANDU 

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38. Wael B. Halaq..., p.21.
39. *ibid.*
40. Schacht Joseph, *Introduction to Islamic Law*, ... pp.70-71.
41. Quoted by Wael B. Halaq..., p.22.
42. Wael B. Halaq..., p.20.
43. <http://www.mideastweb.org/middle.east-encyclopedia/Ijtihad.ht>, (2008), Retrieved on 29th March, 2012.
44. Wael..., p.22.
45. Recorded by Bukhari, vol.3, Book 48, Hadith number 819
46. M. Iqbal, *The Reconstruction of Religious Thought in Islam*, Ashraf, Lahore, 1988, p.178.
47. Wael B. Hallaq, p.22.
48. K. S. Vikor, "The Development of *ijtihād* and Islamic Reform: 1750-1850", <http://www.smi-uib.no/paj/vikor.htm>. Retrieved on 29th March, 2012; see also *ijtihād*, <http://www.newworldencyclopedia.org/entry/Ijtihad>; see also Wael B. Hallaq..., p.32. These scholars had written a lot of books in supporting the re-opening of the gate of *ijtihād* if at all it was closed.
49. Al-Amidi, *al-Ihkam fi 'Usūl-il-Ahkam*..., vol. 3; Ghulam Nabi Falahi, ..., p.4.

CHAPTER TWELVE

AN EXAMINATION OF THE TRIAL OF AMINA LAWAL UNDER THE sharī'ah PENAL CODE OF KATSINA STATE

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Introduction

Katsina State is one of the nineteen Northern states of Nigeria that adopt adjudication with the penal code years before 1999. However, the year 1999 marked a turning point in the history of sharī'ah with twelve out of the nineteen Northern states of Nigeria re-introducing the application of Islamic Criminal Law in the Sharī'ah Courts.¹ The twelve states with Zamfara as the pioneer state expanded the jurisdiction of the States' Sharī'ah Courts to hear, among others, matters of Islamic Criminal Law according to the Maliki school of law.² The Sharī'ah Penal Codes are subsequently enacted in some of the concerned states to provide for offences that attract *hadd* (deterrent punishments), *Qisās* (retaliatory punishments) and *ta'zīr* (discretionary punishments).

The application of Islamic Criminal Law by the Sharī'ah states has generated tension, debate, controversy and to some extent, condemnation at both local and international levels especially from the non Muslims. The case of Amina Lawal who was convicted for the offence of *zina* in view of the pregnancy she bore out of wedlock, and sentenced to death by stoning (*rajm*) in Katsina state in January 2002, was one of such cases. This paper examines among other things:

- i. the provision of the Islamic law under which the judgment was passed
- ii. the judgment of the Lower Sharī'ah Court of Bakori, Katsina state.
- iii. the judgment of the Upper Sharī'ah Court of Funtua, and
- iv. the judgment of the Katsina State Sharī'ah Court of Appeal, Katsina.

The more reason why the case of Amina Lawal is of great interest for study is the need to re-examine confession and pregnancy as proofs for conviction of *zina* under Islamic law. As a background, a general survey of the case is presented in the next part.

The Trial of Amina Lawal³

Amina Lawal, a Nigerian woman, gave birth to a child out of wedlock. She was charged on January 18, 2002 in Bakori town of Katsina state and was subsequently convicted of *Zina* (adultery) on 20th January, 2002 under the Sharī'ah Penal Code Law (SPCL) of Katsina State. When the trial court asked

Amina Lawal to enter her plea, she confessed to have committed the offence of adultery while Yahya Muhammad who was allegedly considered to have impregnated her denied the allegation and after taking an oath with Qur'an, he was acquitted.

The Lower *Shari'ah* Court found Amina Lawal guilty as charged based on her confession to the offence. The court sentenced her to death by stoning under section 127 of the *Shari'ah* Penal Code Law (SPCL) of the State on 20/03/2002 and 20/09/2009 was set for the execution of the judgment.

Aggrieved with the judgment made on 20/03/2002, Amina Lawal appealed at Upper *Shari'ah* Court (USC) Funtua under the guidance of her Counsel Aliyu Yawuri, Hauwa Ibrahim and Maryam Inabanobe. The counsel filed the appeal under the following grounds:

- that the charge was vague and that pregnancy of an unmarried woman cannot be a conclusive proof of *zina*;
- that the word '*zina*' was not explained to Amina Lawal in the language she understood;
- that Amina Lawal was not given the opportunity to call witnesses
- that under the Islamic law, in such cases of *zina* where there is doubt, it should be settled in favor of the accused;
- that the trial of Amina Lawal was not conducted in accordance with the law;
- that the police do not have authority to arrest and prosecute a person charged with *zina*
- that the alleged confession was given under duress and
- that the burden of proof in capital offences is on the prosecutor.⁵

The state counsel, Ismail Danladi disagreed with the withdrawal of confession made by learned counsel to the appellant on her behalf.⁶ Upon the conclusion of the hearing and submissions made by the counsel, Upper *Shari'ah* Court of Funtua passed judgment upholding the decision of the trial *Shari'ah* Court.⁷ Amina Lawal was still not satisfied with the judgment of the Upper *Shari'ah* Court in Funtua. In view of this, she appealed against the decision of the court to the *Shari'ah* Court of Appeal, Katsina. The counsel to the appellant filed seven grounds of appeal among which are:

- that the Upper *Shari'ah* Court of Funtua erred in law when it held that the appellant, Amina Lawal had no right to withdraw her confession made in *Shari'ah* Court, Bakori

that *Shari'ah* Court of Funtua erred when it held that pregnancy in a woman who is unmarried or who was once married is an evidence against her when in Maliki school of jurisprudence, a divorced woman who remained unmarried may likely carry pregnancy for the period of five (5) years before birth from the date of divorce.⁸

Upon hearing the grounds of appeal of Amina Lawal who is being represented by her counsels and having gone through the records of the trial *Shari'ah* Court Bakori and Upper *Shari'ah* Court Funtua and upon hearing the response of learned state counsel led by Muhammad Nurul Huda Muhammad, the Grand *Qadi* of the *Shari'ah* Court of Appeal rendered the court's opinion on 29th September, 2003 by deciding:

- that for an offence of *zina* to be proved, both accused person must be seen performing the act of *zina* openly by at least four responsible male adults;
- that discharging the man accused of being with Amina Lawal without establishing that four witnesses had seen the act of *zina*, was an error and cannot be sustained before the court;
- that since Amina Lawal (first accused) was not the wife of Yahya Muhammad (the second accused) at the trial, under the *Shari'ah* law, she cannot be charged with adultery;
- that anyone who accuses another of *zina* and cannot prove it, should be flogged eighty times;
- that where four witnesses have not been established, the accused must be discharged and acquitted;
- that it was an abuse of the *Shari'ah* Penal Code law for a judge to sit alone at the trial when the law provided for a three judge panel
- that the confession of the appellant was not valid;
- that the trial court failed to give Amina Lawal the opportunity to withdraw or recant her confession at least four times;
- that the trial court's record concerning Amina Lawal's confession was unclear, and where such a doubt existed, doubt must be resolved in the favour of the accused person;
- that the burden of proof of *zina* is borne by the prosecutor and not the accused. Amina lawal's pregnancy and childbirth could have been the product of the former husband;
- that an accused can withdraw a confession at anytime before judgment and the trial court must accept this; and
- that withdrawing or recanting a confession is not punishable.⁵

The *Shari'ah* Court of Appeal stated that the *Shari'ah* provides for freedom, protection and justice and for all the reasons presented above, the Court dismissed all the charges against Amina Lawal.

The Trial of Amina Lawal under the Katsina State *Shari'ah* Penal Code

Amina Lawal (the first accused) was arraigned on January 18, 2002 for giving birth to a baby girl out of wedlock and her baby was nine days old at the date of arraignment while the Katsina State *Shari'ah* Penal Code Law was promulgated on June 20, 2002, nearly five months after the arraignment. The Penal Code in use at the time the offence was committed, even though not a true representation of Islamic law, states;

Whoever being a woman subject to any customary law in which extra-marital sexual intercourse is recognized as a criminal offence, has sexual intercourse with a person who is not and whom she knows or has reason to believe is not her husband is guilty of the offence of adultery and shall be punished with imprisonment for a term which may extend to two years or with fine or with both.⁹

Courts.

Notwithstanding the provision of the Northern Nigeria Penal Code provided above, we shall examine trials on Amina Lawal under the definition of *Zina*, proving the offence of *zina* and an examination of the trials of the *Shari'ah*.

Examination of the Trials on Amina Lawal

1. *Zina* under the *shari'ah*

Zina (Adultery or Fornication) is defined as the sexual intercourse that occurs outside wedlock or lawful ownership.¹⁰ The Maliki school gives the offence a wider scope when it considers it to include sodomy, carnal intercourse with a dead body other than one's wife or with an immature girl, connection with a slave girl hired for the purpose, connection with a woman related by affinity, marrying the fifth wife, cohabiting with a woman who has been irrevocably divorced, having intercourse with a woman whom one has freed without having her consummation, intercourse with a slave whom one has freed without marrying her and a woman having intercourse with her male slave without having married her.¹¹ This definition established that any sexual intercourse that is committed out of wedlock or through wedlock but with a person one is legally disallowed to have such affairs with, is considered *zina*.

Regarding proving the offence of *zina*, jurists agree that *zina* is proved through confession and testimony¹² and the testimony must be made by four men in line with the injunction of the Qur'an. Allah says:

If any of your women are guilty of lewdness, take the evidence of four (Reliable) witnesses from amongst you against them ... (Qur'an 4:15).

Conditions are however, laid down for acceptance of the evidence, these include that the witnesses must be up to four, they must be males who actually witness the activity of the sexual intercourse and would be able to give clear and unambiguous description of the sexual contact and the testimony should not be contradictory with respect to time or place.¹³ As for proving the offence through confession, jurists disagree over the number of times a culprit will confess before the offence would be established on him, while Imam Abu Hanifah stipulated four confessions at different times, Imam Malik, Imam Shafi'i and Imam Ahmad were all of the opinion that confession made once is sufficient for conviction of the offence.¹⁴ Those who uphold making confession four times relied on the case of a man from the tribe of Aslamy who was made to confess on himself by the Prophet (SAW) four times before being convicted, while those who uphold one confession for conviction relied on the precedence of a woman who was ordered to be stoned by Unays on conviction through a single confession.¹⁵

Pregnancy is equally considered a proof for conviction of *zina*¹⁶ except that it might be difficult to establish whether the pregnancy is from the former husband or not if the woman is once married because even when a divorced woman will have to stay for three Quru' (i.e. three menstrual waiting period) to confirm the position of her womb before getting out of the husband's house, the gestation period may extend beyond the three months as established in Islamic law thus: The duration of pregnancy is more than five years as provided in the book of Allah. However, some scholars opined that the duration is seven years and that where a child is begotten, he/she is referred back to the immediate preceding husband and there shall be no punishment against the woman.¹⁷

Equally, the moment the culprit did not confess or confessed but retraced her confession and four impeccable witnesses could not be produced to testify seeing her having an intercourse with an illegitimate husband, Islamic law does not make it obligatory that those who have the knowledge of the offence must inform the authority. There is the report of Ma'iz ibn Malik al-Aslami who committed *zina* and went to the Prophet(SAW) on the advice of Hazza' ibn Nu'aim and confessed his guilt. The Prophet(SAW) ordered him stoned to death but said to Hazza' "would that you had kept the matter hidden; this would have been better for you".¹⁸

ii. An Examination of Trials of the Shari'ah Courts on Amina Lawal

What has probably attracted the attention of the whole world on the case of Amina Lawal is her being sentenced to death by the trial *shari'ah* court at the early period of the re-introduction of the application of Islamic Criminal Law in Nigeria. The punishment for *zina* in the early days of Islam was confinement or corporal punishment as contained in the Qur'an thus:

واللاتي يأتين الفاحشة من نسائكم فاستشهدوا عليهن أربعة منكم فإن شهدوا فأمسكوهن في البيوت حتى يتوفهن الموت أو يجعل الله لهن سبيلا

If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them, and if they testify, confine them to houses until death do claim them or Allah ordain for them some other way. (Qur'an 4:15).

Allah later revealed the verse for giving stripes as an abrogate to confinement thus:

الزانية والزاني فاجلدوا كل واحد منهما مائة جلدة

For the woman and the man guilty of *zina* (fornication and adultery) flog each of them with one hundred stripes; (Qur'an 24:2)

This verse of the Qur'an has a general application because the adjective '*zina*' includes sexual intercourse between a man and a woman either married or not married to each other. It therefore applies both to adultery (which implies that one or both of the parties are married to a person or persons other than the one concerned) and to fornication, which, in its strict signification, implies that both parties are unmarried.¹⁹ A tradition was however reported to remove the married fornicators from the ambit of the verse of one hundred stripes. The said tradition as reported by Ubaidah bn Sa'mit states that:-

The Messenger, (may the peace and blessing of Allah be on him) said "Take (this) from me, take (this) from me, verily Allah has ordained for them a way. The virgin fornicating with a virgin (should be given) a hundred stripes and one year exile, and a married person (fornicating) with a married person should be given one hundred stripes and pelting with stones."²⁰

The *Shari'ah* Penal Code of Katsina State in adherence to the provision of Qur'an 24:2 and the tradition quoted above provides thus: -

- a. Whoever commits the offence of *zina* shall be punished with caning of one hundred lashes if unmarried and shall also be liable to imprisonment for a term of one year; or

- b. if married, with stoning to death.²¹

However, even with the above tradition, some scholars still contend the validity of the punishment of stoning to death²² giving the argument that there is no evidence to show that the *hadith* came after the revelation of Q24:2. Their reliance is the tradition:

Is-haq informed me that Khalid narrated from Ash-shaybani : I asked Abdullah ibn Abi Awfa' did the Prophet carry out *rajm* penalty? he said 'yes' I said 'before the revelation of *suratulnuhur* or after it'? He replied 'I don't know'.²³

The interpretation of this *hadith* is that; if *Suratul Nur* precedes the practice of the Prophet (SAW), *rajm* remains a valid punishment. Otherwise, it will be considered abrogated with *Suratul Nur*.

The trial *Shari'ah* Court, Bakori, charged Amina Lawal based on her confession in court that she has committed the offence of adultery and consequently, she gave birth to a baby girl, based on the aforementioned, the trial *Shari'ah* Court convicted her for the offence of adultery and sentenced her to death by stoning based on her confession in compliance with the provision of the *hadith* and the Katsina State *Shari'ah* Penal Code Law because confession is a strong evidence. Areas that however need to be looked into in the judgment are:

1. the Alkali sat alone to decide a case of capital punishment even when section 4(1) of the Katsina State *Shari'ah* Court Law provides that *Shari'ah* Court shall be duly constituted with an Alkali sitting with two members but not otherwise;
2. the trial *Shari'ah* Court did not ask Amina to make *izar* (submission to ask for leniency) as required by Islamic law. Reference could be made to the precedence of the man who came to the Prophet (SAW) when he was in the mosque to confess committing *zina*. The Prophet asked him if he were insane and he answered in the negative. The Prophet (SAW), in trying to allow him escape the penalty, suggested that he might have kissed the woman but the culprit answered he had sexual intercourse with her. He (the Prophet) further asked if he knows *zina* but he answered in affirmative. It was only after giving him the chance to avert the punishment that he was punished;
3. the trial court record indicated that Amina Lawal was arraigned under a law not promulgated at the time the offence was committed.

At the Upper *Shari'ah* Court of Funtua where Amina Lawal filed her first appeal through her counsel, the first step taken by the counsel was the withdrawal of her confession. Retracting confession is allowed in Islamic law even when the

confession is up to four times. Reference is usually made to the case of *Ma'iz* who confessed four times before the Prophet (S.A.W.) and was ordered to be stoned to death but when he felt the pains of stoning, he ran away pleading with his executioners to take him back to the Prophet (S.A.W.) to retract his confession but was denied and the Prophet (S.A.W.) was angry when told about the episode querying the executioners for not leaving *Ma'iz* alone.²⁴ The Upper *Shari'ah* Court of Funtua denied Amina Lawal this golden opportunity.

The Katsina State *Shari'ah* Court of Appeal, after further investigating into the matter, submits thus:

We hold that Upper *Shari'ah* Court Funtua erred when it refused admission made by Amina Lawal. The said court based its judgment on a weak foundation when it relied on an erroneous judgment passed by *Shari'ah* Court Bakori. Consequently, this judgment can not stand accordingly, upon the foregoing, the *Shari'ah* Court of Appeal, Katsina state hereby set aside the judgments of *Shari'ah* Court Bakori and Upper *Shari'ah* Court Funtua. We allow the appeal of Amina Lawal and she is hereby discharged and acquitted from today the 25th day of September, 2003.²⁵

The Katsina State *Shari'ah* Court of Appeal quashed the judgments of the Lower *Shari'ah* Court of Bakori and the Upper *Shari'ah* Court of Funtua in view of the following facts:

- the practice of the Prophet (S.A.W.) is to allow confession to be made up to four times as earlier mentioned in the case of *Ma'iz* and this is the position of most of the jurists;
- there is the tendency that the pregnancy found in Amina Lawal could not stand as a proof because of the tendency of having dormant pregnancy of up to seven years as already explained and Amina Lawal was divorced barely two years to the time she gave birth to her baby girl.
- It is lawful for Amina Lawal to withdraw her admission even if it was after the judgment of the trial court and such withdrawal shall be accepted as earlier discussed. Imam Maliki was reported to have said:

He who admits committing adultery as well as he who retracts it will be accepted from him. So is repentance from it. The punishment shall not be inflicted on such person ... Islam loves protection of dignity and abhors exposing indecency.²⁶

Conclusion and Suggestion

This paper upholds that what is contained in the Holy Qur'an and authentic traditions of the Prophet are divine and must be adhered to strictly. However, human interpretation of these sources may be diverse due to human error and fallibility. It is the contention of this paper that there is no infallibility in a judgment passed by any judge. As far as this paper is concerned, the stand of the Katsina State *Shari'ah* Court of Appeal is justified by a tradition reported by Abu Hurayrah:

Put off the *hudud* punishment on Muslims as much as you can. If the suspect has a way out then let him off. Verily it would be better for the leader (or judge) to err in pardoning the suspect than to err in punishing him.²⁷

The purpose of punishment should be handled with care in *Shari'ah* Courts especially in matters of *hadd* punishment where the Prophet (S.A.W.) specifically mentioned that culprits should be allowed a way out if possible. In the case of Zina where the second accused denied having any intercourse with the first accused, and evidences could not be established against him, such a case must be handled with extra care especially if the woman is a divorcee who have the tendency of carrying about a dormant pregnancy because the evidence of pregnancy as a third proof for the offence of Zina is itself questionable in Islamic law.²⁸

Cases of a man denying a woman in the court are common in most of the adultery cases decided in *Shari'ah* Courts of Nigeria of which that of Amina Lawal is one. Instead of allowing only women to face the wrath of the law, this paper will suggest that courts should adopt one of the two views; the view of Imam Abu Hanifah which says: "where a woman made confession of adultery four times before a leader/ruler and she mentioned the name of her partner, who after wards denies, none of them shall be punished"²⁹ or the view of Imam Malik which says: "Notwithstanding that there is evidence against the other party, a woman who commits adultery shall face the wrath of the law."³⁰

Imam Abu Hanifah's view might be for the fear of a woman having dormant pregnancy. If however, the view of Imam Malik should be adopted, with the present day scientific advancement, the man or the baby should be subjected to DNA test to bring the accused person to book and to further establish the status of the child.

Notes and References

1. See section 11 of the 1960 Constitution of the Federal Republic of Nigeria.
2. The twelve states are; Zamfara, Kano, Sokoto, Kaduna, Bauchi, Katsina, Jigawa, Niger, Yobe, Borno, Kebbi and Gombe.
3. See section 5 of the Zamfara State Shāri'ah Penal Code Law, 2000.
4. Law Report of Northern Nigeria (2003 NNLR) Pp. 491 – 492.
5. See Record Book of the Upper Shāri'ah Court Funtua, Pp. 21 – 26.
6. See pages 26 – 30 of the Upper Shari'ah Court Record Book
7. See Law Report of Northern Nigeria (2003 NNLR), pp. 493 – 494
8. Ibid pp. 494 – 495.
9. See section 388 of the Northern Nigeria Penal Code Law.
10. I. A. Nyazee. *The Distinguished Jurist Primer. A Translation of Ibn Rushd's Bidāyatul-Mujtahid*. Lebanon: Garment Publishing. (1996), Vol.II, P.521.
11. F. X. Ruxton. *Maliki Law. Being a summary from French Translation of the Mukhtasar of Sidi Khalil*. London; Luzac and Company (1974) P. 330.
12. A. A. Al-Mawardi. *Al-Ahkāmul-Sultāniyya*. Beirut: Dārul Kitābal Ilmiyyah, (N.D.), P. 280.
13. F.X.Ruxton; Maliki Law ... p. 329
14. Ibid
15. Anwārullah. *The Criminal Law of Islam*. New Delhi: Kitāb Bhavan, (2006), p. 142 – 143
16. F. X .Ruxton. *Maliki Law* ... p. 330
17. A. Aljuza'ri. *Al-Fiqhu alal Madhāhibil arba'*. Cairo: Dārul Fajri lil-turāth, (2000), p. 523.
18. Anwarullah. *The Criminal Law of Islam* ... p. 147.
19. See Footnote 2954, a Commentary on Qur'an 4:2 in "*The Holy Qur'an, English Translation of the Meaning and Commentary*. Kingdom of Saudi Arabia.
20. I, Muslim. *Al-Jāmi'u s-sahih*. Beirut: Dārul Arabiyyah, (n.d.), Vol. V p.115.
21. See section 127 of Katsina State Shāri'ah Penal Code.

22. A.Y. Imam, "The application of Hudud in Nigeria: A Review of Judgments on 'Zina'" *Ayingba journal of Arabic and Islamic Studies*, Kogi State University, Vol II No. 1. 2005, Pp.42-60.
23. Ibid. Quoting from M.I. Al-Bukhari. *Sahih Al-Bukhari*.
24. Anwārullah. *The Criminal Law of Islam*..., p. 502.
25. See Katsina State Shāri'ah Court of Appeal Record Book Suit KTS/SCA/FT./26/2002.
26. A. Al-Juzayri. *Al-fiqhu alal madhāhibil arba'*, vol. V, p. 73.
27. Ibid. Vol. V, p. 92.
28. A.Y. Imam, "The application of Hudud in Nigeria:..." Pp.42-60.
29. A. Al-Juzayri, Vol. V, p. 72
30. Ibid.