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Reflections on the Case of Amina Lawal

by Hauwa Ibrahim

A NIGERIAN WOMAN, AMINA LAWAL GAVE BIRTH TO A child out of wedlock and was charged and convicted of *Zina* (adultery) under the Sharia Penal Code law. The trial court ruled that her conviction was based on her confession and the fact that she was pregnant out of wedlock. These are two of the grounds on which adultery can be proven in Sharia law, provided the procedures for establishing the validity of the grounds are properly adhered to. The lower Sharia courts found Ms. Lawal guilty as charged and sentenced her to death by stoning. Sharia law had been adopted in some northern states of Nigeria since 1999. The principal question presented was: What procedural due process rights are available to an accused person under the Sharia Penal Code Law?

BACKGROUND AND CONTEXT

NIGERIA WAS GRANTED INDEPENDENCE from Great Britain in 1960. Absent a body of law of its own creation, Nigeria inherited the British common law and applied it until 1999. The Penal Code of Northern Nigeria (PC) applies mainly to the northern states of the Nigeria. Sections 387 and 388 of the PC define the offense of adultery and the penalty as two years in prison or payment of a fine. Southern Nigeria does not have a comparable provision in its criminal code. Under a federal system with an ethnically diverse population of 132 million people, the regional variation in the local penal code was not unusual or impermissible as long as the code did not violate the Federal Constitution. The long-standing question was whether states could adopt the Sharia system, which provided for substantially more severe penalties than the penal code, such as capital punishment and amputation of limbs.

For the purpose of this article, the Sharia Penal Code law of Zamfara state (SPCL) will be used to illustrate the case of Ms. Lawal. The SPCL was promulgated in January 2000. According to SPCL, Section 41, *Zina* includes adultery and fornication. Chapter VIII, Section 126 defines *Zina* as, "Whoever, being a man or 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 offense of *Zina*." Section 127 provides for the punishment of *Zina*: "Whoever commits the offense of *Zina* shall be punished as with Caning of one hundred lashes if unmarried, and shall also be liable to imprisonment for a term of one year; or if married, with stoning to death."

ARGUMENTS IN THE AMINA LAWAL CASE

MS. AMINA LAWAL WAS CONVICTED by the Sharia trial court at Bakori in Katsina State (Ms. Lawal's State) on March 20, 2002. The only evidence was an alleged confession and the fact that she was pregnant out of wedlock. Sharia law accepts these two facts as proof of adultery. The lower Sharia court sentenced Ms. Lawal to death by stoning based solely on this evidence.

The Sharia Penal code Law of Katsina State permits appeals to an Upper Sharia Court, and the lower court's judgment was appealed to the Upper Sharia Court Funtua, but the appeal was denied. On appeal

to the Sharia Court of Appeal in Katsina, the judgment was rendered in favor of Ms. Lawal.

The principal arguments focused on procedural rights of the accused under the SPCL. First, Ms. Lawal had no legal representation at her trial. Legal representation is provided for under the provision of the SPCL, and also Section 36(1) of the Nigeria Constitution. Second, a defendant charged with *Zina* must be tried before a panel of three judges, as provided for by the Sharia Court law of Katsina, Section 4 (1). In this case, a single judge heard the case and rendered judgment. Third, the law under which Ms. Lawal was being tried was not in effect at the time the alleged *Zina* was committed. The trial court record indicated that Ms. Lawal was arraigned on January 18, 2002, that her baby was nine days old on the date of arraignment, and that the baby was born out of wedlock. The Sharia Penal Code Law of Katsina State was promulgated on June 20, 2002, nearly five months after the arraignment. Assuming no evidence to the contrary and a normal pregnancy of a nine-month gestation period, Ms. Lawal could not have committed the alleged offense because there was no law of *Zina* in the state when the alleged *Zina* occurred.

In the Upper Sharia Court Funtua, Katsina State, counsel for Ms. Lawal argued that the charge was vague and that pregnancy of an unmarried woman can not be conclusive proof of *Zina*. Counsel argued other procedural due process issues, for example, that the word *Zina* (an Arabic word) was not explained to Ms. Lawal in the language she understood; that Ms. Lawal was not given the opportunity to call witnesses; that under Islamic law in such cases of *Zina*, where there is doubt, it should be settled in favor of the accused; that the trial of Ms. Lawal was not conducted in accordance with the law; and that the police do not have authority to arrest and prosecute a person charged with *Zina*.

Ms. Lawal's counsel invoked the Nigerian Federal Constitutional guarantee of a fair trial, argued that the alleged confession was given under duress, and noted that the burden of proof in capital offenses is on the prosecution.

Counsel for the State countered all the arguments and asked that the judgment of the Upper Sharia Court of Appeals be upheld. However, the State Counsel added that Sharia is for justice and that if the court had any doubt about the evidence or procedure, then the court should resolve the case in favor of Ms. Lawal.

DECISION ON APPEAL

ON SEPTEMBER 25TH, 2003, THE SHARIA COURT of Appeal, Katsina State, rendered an opinion and judgment that settled a number of fundamental issues. The Honorable Khadi of the court, reading the concurrent judgment of three others, ruled that the police should not have charged Ms. Lawal with the offense of *Zina* because it was not within their constitutional responsibility. The court also decided:

1. *That, for an offense of Zina to be proved, both accused persons must be seen performing the act of Zina openly by at least four responsible male adults;*
2. *That discharging the man accused of being with Ms. Lawal without establishing that four witnesses had seen the act of Zina, was an error and cannot be sustained before the court;*

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3. That since Ms. Lawal (first accused) was not the wife of Yahaya Mohammed (the second accused) at the trial, under the Sharia Law, she cannot be charged with adultery;
4. That anyone who accuses another of Zina and cannot prove it should be flogged 40 times;
5. That where four witnesses have not been established, the accused must be discharged and acquitted;
6. That it was an abuse of the Sharia Penal Court law for a judge to sit alone at the trial when the law provided for a three judge panel;
7. That the confession of the Appellant was not valid;
8. That the trial court failed to give Ms. Lawal the opportunity to withdraw or recant her confession at least four times;
9. That where one accused person allegedly confessed and the second accused refused to confess, then that cannot be Zina;
10. That the accused person cannot swear by the Quran but can only take an oath in the name of God;
11. That the trial court record concerning Ms. Lawal's confession was unclear, and where such a doubt existed, doubt must be resolved in the favor of the accused person. The court recounted the entire story of Ma'is (a person that allegedly committed Zina) to buttress this point;
12. That the burden of proof of Zina is borne by the prosecutor and not the accused. Ms. Lawal's pregnancy and childbirth could have been the product of the former husband;
13. That an accused can withdraw a confession at any time before judgment, and the trial court must accept this; and
14. That withdrawing or recanting a confession is not punishable.

The Sharia Appeal Court stated that Islam and Sharia provide for Freedom, Protection and Justice, and for all the reasons presented above, the court dismissed all the charges against Ms. Lawal.

DEFENSE STRATEGY

THIS CASE WAS SUCCESSFULLY TRIED UNDER SHARIA LAW before Sharia courts. It is important for counsel representing an accused under Sharia to understand the dynamics of the Sharia legal system itself, the court procedures, the judges' understanding and perceptions of the issues, and the lawyers' attitude and understanding of the people, the culture, the traditions, and values. Since "new" Sharia was a law that had just been adopted in some northern states of Nigeria at the time of this proceeding, jurisdictional issues and lack of procedural rules presented unique challenges to counsel.

Section 277 of the Nigerian Constitution 1999, which provides for the Jurisdiction of the Sharia Court of Appeal, appears to limit the jurisdiction of that court. It states that "the Sharia Court of Appeal of a State shall in addition to such other jurisdiction as may be conferred upon it by the law of the State, exercise such appellate and supervisory jurisdiction in civil proceedings involving the question of *Islamic personal law* which the Court is competent to decide in accordance with the provisions of subsection (2) of this section" (*emphasis added*). Subsection 2 defines issues of Islamic personal Law as including gifts, successions, wills, donations, and issues regarding infants and guardianship of a Moslem who is physically or mentally deformed.

The absence of clear, constitutionally adequate procedural rules for the Sharia courts posed a serious challenge, particularly since the Sharia had functioned for over four decades with jurisdiction on civil

matters (Islamic personal law). Given the nature of the punishment, applying customary civil law procedure for arguing this case may not be appropriate. These are, therefore, issues of law that legislators should address in the near future. It may have to be one of the issues lawyers in emerging application of new laws will have to learn more about also.

It is a recognized principle that international law can be applied to national laws, particularly in the context of protecting human rights. Within this general framework, remedies exist under the Sharia law respecting the rights of the victims, respect for the rule of law and due process. By the same token, the top priority in this case was saving a human life through the law. Counsel's successful defense relied on learning and working within the framework of the Sharia law while also applying principles of human rights, laws of the Federal Constitution, and international law.

It was essential to rely on local custom and tradition. The Holy Quran and Islamic authoritative sources like the *Hadith and the Sunnah of the Holy Prophet (SAW)*, *Ijmah*, *Qiyas*, *Ijtihad* and *A-Urf* were essential resources. The provisions of the Nigerian Constitution governing fundamental human rights and fair trials were also intro-

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duced to ensure that the rule of law existed under the Sharia Penal Code. The strategy was intentionally non-confrontational to garner the trust, respect, and confidence of the judges.

Although the culture, tradition, and values do not accept a woman having a child out of wedlock, the lawyers concentrated on protecting and promoting respect for the rule of law and due process of law. The temptation was always high to join issues with those who accuse defense lawyers of disrespecting values, culture, and tradition.

IMPORTANCE OF THIS CASE

THIS CASE WAS A VICTORY FOR THE LAW, human rights, human dignity, and freedom. It also established numerous important precedents that will help ensure procedural and substantive due process rights to persons accused of crimes under the Law of Sharia.

The case established that all judicial proceedings, including the proceedings before the Sharia courts, must comply with the principles

of the Constitution of Nigeria. The Court defined the role of police as maintaining law and order and limited their authority to arbitrarily search and prosecute individuals who may have committed adultery. The Court concluded that the prosecutor, not the accused, always bears the burden of proof which reflects fundamental tenets of justice, the rule of law, and democracy.

This decision encouraged the development of a human rights movement within Nigeria and beyond. It sensitized lawyers and judges, helped to clarify how the new Sharia legal system related to other United Nations, African, and international human rights laws, and provided a model for using existing tools and laws to advance human rights within national societies. The case highlighted the need to develop regional and international coalitions to advance issues of equality and non-discrimination before the law. It enhanced the role of the non-governmental organizations (NGOs) in promoting human rights and increased their access to national and international human rights institutions and processes while increasing their accountability and transparency. The case called attention to massive and urgent human rights issues, in particular discrimination against women, and gave greater focus and attention to issues of economic, social, and cultural rights as they relate to vulnerability, poverty, illiteracy, powerlessness, and voicelessness of these women.

LOOKING AHEAD

THERE IS A TREMENDOUS OPPORTUNITY to use the Amina Lawal judgment of the Sharia Court Katsina to reform the Nigeria legal system in ways that will ensure equality and non-discrimination for all before the law. To this end, there is a need to provide a greater understanding of how international instruments, treaties, conventions and protocols protect the rights of individuals and apply under national law. Nigerian lawyers and judges will need continuing education to improve the administration of the criminal justice system. This judgment of the Court provides a powerful tool for positive change.

The coalition of credible NGOs, community based organization (CBOs), and persons of like minds could help accelerate this process by helping to review and propose reforms of some of the provisions of the new legal system to ensure equality before the law. Such groups will need to enlist allies among opinion leaders, especially religious and traditional leaders, and State and federal legislators.

Cases such as Amina Lawal, which had the temporary focus of the world press, could lose much substance to issues that are not related to the struggle for saving human life or ensuring fairness, justice, and upholding fundamental human rights and human dignity. In the courtroom, there is danger in losing a clear sense of direction, particularly if a local group changes focus in response to a well-meaning (or even a not well-meaning) donor. NGOs, CBOs, and individuals can provide substantial resources to advance the rights of individuals. Any such entity willing to give resources, however, should insist and demand transparency and honest accountability. Donors must be creative in their mechanisms for checking how resources are utilized to ensure proper accountability.

QUESTIONS

THE AMINA LAWAL CASE RAISED A NUMBER OF ISSUES relating to the supremacy of law; certainty of law; separation of powers; respect for human rights and human dignity; Sharia as State legislation and its application as criminal law; separation of state and religion; cruel,

inhumane, or degrading punishment; equality and non-discrimination before the law; and plurality of legal systems.

Other questions raised include: What happens when the international spotlight is off Nigeria in such matters? Will the rule of law prevail? What effect did the national and international media have in this case? Did the media and other national and international pressure encourage the courts to be responsive to procedural and due process issues?

OBSERVATIONS

LAWYERS AND JUDGES, AS WELL AS COURT supporting staffs involved in litigation and adjudication, should be sensitized to the application of the Sharia legal system as well as understanding the usefulness of international human rights laws as a tool to advance human rights within national societies.

NGOs and CBOs should become involved in the promotion of human rights, have access to courts (where necessary), and become more accountable and transparent.

Efforts should be made to educate local groups and lawyers about widespread and deeply entrenched discrimination against women and how this violates human rights law.

The international diplomatic community in Nigeria should familiarize itself with local conditions and non-confrontational intervention in the interest of judicial reform and adherence to equality under the law.

Through the media, the international community became aware of the process and the potential for injustice. Such media coverage may have had a positive impact, but it also had its negative aspects.

When people have not experienced justice and freedom, they have had only the material reality of injustice and lack of freedom. When freedom and justice do not exist, they are but a dream and a vision, an abstract idea longed for. You cannot really know what justice would be like or what freedom would feel like. You can only know how it feels not to have them, and what it feels like to hope, to imagine, and to desire them with a passion.

Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice, and peace in the world. Nigeria is a signatory to international instruments, conventions, treaties, and protocols, including the Universal Declaration of Human Rights; International Covenant on Economic, Social and Cultural Rights; International Covenant on Civil and Political Rights; Optional Protocol to the International Covenant on Civil and Political Rights. Others are, United Nations Declaration on the Elimination of All Forms of Racial Discrimination; International Convention on the Elimination of All Forms of Racial Discrimination; Declaration on the Elimination of All Forms of Discrimination against Women; Convention on the Elimination of All Forms of Discrimination against Women; Declaration on the Elimination of Violence against Women; Convention on the Political Rights of Women; and the Optional Protocol to the Convention on the Elimination of Discrimination Against Women, among others, all of which may be tools to create positive change for humanity in our communities. *HRB*