

**SUPREME COURT OF NIGERIA**  
FRIDAY 24TH FEBRUARY, 1995. SC. 152/1993  
**CORAM:- A. B. WALI, M. E. OGUNDARE, E. O. OGWUEGBU,**  
**S. U. ONU, Y. O. ADIO, JJSC**

ALHAJI SAIDU USMAN (Deceased)

(To be substituted by

ALHAJI ISAALABI USMAN)

..... APPELLANT

AND

ALHAJI SALIHU KAREEM

..... RESPONDENT

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***APPEALS*** - Islamic Law - Where applicable - Whether appeal was rightly directed to the Sharia Court of Appeal.

***CLAIMS*** - Proof - Appellant's failure to prove his counter claim - When plaintiff's claim is held to have succeeded.

***ISLAMIC LAW***- Applicability - Of Islamic Law - When parties are deemed to know that Islamic Law is applicable - From the constitution of the Area Court.

***ISLAMIC LAW***- Evidence - Allowing plaintiff and defendant to give evidence - Is contrary to Islamic Law.

***ISLAMIC LAW***- Oral Evidence - Where maker of a document is available - His viva voce evidence is preferable.

***ISLAMIC LAW***- Procedure - Adopted by the trial Area Court - In respect of calling of witnesses - Whether proper.

***LAND LAW***- Registration - Document affecting interest in land - Where not registered as stipulated by law - Whether it will serve any useful purpose.

***SUCCESSION*** - Islamic Law - Death of respondent's father - Cannot debar his heirs from claiming his share of gift of land.

**FACTS**

The Fulanis donated the land in dispute to the family of the litigants. The plaintiff/respondent filed an action before Area Court Grade II florin, claiming share of the land though plaintiff's father had died. The defendant/appellant denied the plaintiff's claim, stating that the land was donated to only himself and his brother, Alhaji Issa. The plaintiff gave evidence and called two witnesses. The defendant also gave evidence and called one witness in the person of his sister. Defendant tendered Exhibit A towards confirming that the gift of the land was only to himself and his brother.

The trial judge opined that the case was governed by Islamic Law. He dismissed the plaintiff's case. The plaintiffs appeal to the Sharia Court of Appeal, Florin was allowed. Defendant appealed to the Court of Appeal, Kaduna Division, which dismissed his appeal and affirmed the judgment of the Sharia Court of Appeal. The defendant has further appealed to the Supreme Court to determine inter alia, whether it was proper to modify the contents of document orally.

**HELD** (Unanimously dismissing the appeal per lead judgment of **WALI JSC**)

***Document affecting interest in land - Where not registered***

1. Before any document affecting any interest in land is admitted in evidence, it must have been registered first. Exhibit A is no doubt a document affecting interest in the land in dispute and since it was not registered as stipulated in section 15 supra, it would not servny useful purpose hi resolving the dispute in this case. The learned trial judge did not even make any use of it in coming to his decision. (p. 491 B)

***Islamic Law - Oral evidence is preferable to document***

2. Under Islamic Law, where a maker of a document is available, his evidence viva voce is preferable to that contained in a document written by him. It is therefore a correct statement of the law contained in the Sharia Court of Appeal judgment that - "*Islamic Law prefers and lays emphasis on personally given oralevidence.*"

So even under Islamic Law Exhibit A did not qualify as an admissible document. (p. 491 G)

***Applicability of Islamic Law - Appeal rightly directed***

3. So from the moment the constitution of the court was known, i.e. a single

judge, and learned in Islamic Law, both parties were aware that the applicable law is Islamic Law. Section 54(1) of the Area Court Edict 1967 (as amended) provides that an appeal from a decision of Area Court Grade I or II or Upper Area Court shall lie to the Sharia Court of Appeal. (p. 493 B)

***Islamic Law - Procedure for calling witnesses***

4. As regards the procedure adopted by the trial court in this case, in my view, h followed the proper and correct Islamic procedural law in so far as it allowed litigating parties to call witnesses to prove their respective cases since aid as correctly stated by the Sharia Court of Appeal, that the dispute as to whether the gift is personal to the appellant or to the family of the appellant and respondent involved a claim and a counter-claim (p. 493 D)

***Islamic Law - Allowing plaintiff and defendant to give evidence***

5. Both the appellant and the respondent were shown in the record to have given evidence. This is contrary to Islamic Law. A plaintiff cannot be a witness in his own case. He can only state his case and then call independent witnesses to prove h. The same principle applies to a defendant He can state his defence and, where the law permits, be allowed to call independent witnesses to support that. Also D W 1 .being a sister to the appellant is not ordinarily a competent witness in support of this case. Her competence is dependent on two conditions precedent -

- (i) She is of an unquestionable character and integrity, and
  - (ii) no manifest suspicion that by her evidence, she will derive some benefit.
- (p. 493 H)

***Appellant's failure to move his counter claim***

6. In this case in hand, the appellant, apart from stating his own case, did not support it by sufficient admissible evidence. In other words, he did not prove his counter-claim. The Sharia Court of Appeal is right in its findings that on evidence adduced and accepted, die gift was made to the family of the appellant and the respondent and therefore the respondent has a share in it. These findings were rightly affirmed by the Court of Appeal in its judgment.(p.494 F)

***Succession - Death of respondent's father***

7. The death of Abdulkarim, the father of the respondent, has no effect on the validity of the gift made and his share thereof can be claimed by his heirs to form part of his estate.(p. 495 A)

**NOTABLE POINTS OF INTEREST**

**OGUNDARE JSC**

*1. Striking out of issue raised without leave*

B This issue was not raised in the Court of Appeal nor did it form the basis of the judgment of that court. Appellant has not sought nor obtained the leave of this court to argue the Issue for the first time in the court. Issue (i) and original ground of appeal on which it is premised are therefore struck out. (p. 496 E )

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**ONU JSC**

*2. Ignorantia juris non excusat*

The appellant and respondent not having been left in doubt as to which procedure the trial court was adopting in the conduct of the case, any D assertion by the appellant herein on appeal, late in the day as it is, that he was not aware of the procedure being followed, would be of no avail because ignorance of the law is no excuse: ignorantia juris non excusat. (p. 500 A)

**REPRESENTATION**

E J. O. Ijadaola for the Appellant  
Y. K. Saidu for the Respondent.

**CASES REFERRED TO**

Akpene v. Barclays Bank of Nigeria Ltd. & or. (1977) 1 SC 47  
F Djukpan v. Orovuyovbe & or. (1967) ALL NLR 144  
Pam Gyang v. Nyam Gyang (1969) NNLR 99 at p.100  
Usman Waziri v. Musa Ugye & ors. (1977) NNLR 129 at page 130

**STATUTES REFERRED TO**

G Land Registration Law Cap 58, Laws of Northern Nigeria s.15.  
Area Court Edict of 1967 ss.53, 4(2), (3)b, 54(1)  
Constitution of the Federal Republic of Nigeria 1979 s.242 (2) (c)

**BOOKS REFERRED TO**

H Ashalul Madarik Vol.3 page 222  
Zargani (Commentary on Mukhtasar) Vol.7 page 183  
Ihkamul - Amkam (Commentary on Tukhfatul Hukkam) page 32  
Ihkamul - Amkam (Commentary on Tukhfah)  
Al-Mugni (by Ibn Quddamah) Vol.6 p.2

Hashiyatul - Adawi Vol.11 p.240

Fathul Bari (Commentary on Buhari) Vol.4 p. 10

### **LEAD JUDGMENT BY WALI JSC**

The plaintiff, Alhaji Salihu Kareem sued the defendant, Alhaji B Saidu Usman, before Area Court Grade II Oja, Ilorin presided over by Alhaji S.O. Ahmed claiming share of the land donated to the family of the litigants by the Fulanis.

The defendant denied the plaintiff's claim. He said the Fulanis did not donate the land in dispute to the family but only to two of them- C himself and his brother Alhaji Issa.

The case proceeded to trial. The plaintiff gave evidence and called two witnesses. The defendant also gave evidence and called one witness in the person of his sister Nafi Akande. Exhibit A was put in evidence by the defendant to confirm that the gift of the land was made to only himself D and his brother.

After each party had closed his case, the trial Judge accompanied by the plaintiff and the defendant inspected the land in dispute at the end of which he reserved judgment.

In the considered judgment delivered, the learned trial Judge opined E that the case was governed by Islamic Law and after a painstaking and compassionate consideration of the evidence adduced, he dismissed the plaintiff's claim.

The plaintiff appealed to the Sharia Court of Appeal, Ilorin, where that court in a well considered judgment, allowed the appeal and ordered F that the land in dispute:-

*"be divided for the family head/caretakers, Abdulkareem, the father of the plaintiff/appellant: Saidu Usman defendant/respondent and his brother, Alhaji Issa according to the express wish of the family donor which does not run counter to the law."* G

Aggrieved by the Sharia Court of Appeal decision, the defendant appealed to the Court of appeal, Kaduna Division, against it.

The Court of Appeal dismissed the defendant's appeal and affirmed the judgment and order of the Sharia Court of Appeal. The defendant has now further appealed to this Court against that judgment. H

In compliance with the rules of this Court, parties filed and exchanged briefs of argument. In the brief of argument filed by the appellant, the following two issues were identified for determination-

*"(i) Was it proper to alter, vary amend or modify the contents of document*

*orally; and*

*(ii) Was the appeal to the Sharia Court of Appeal validly brought."*

*The respondent also raised in his brief, the following three issues for determination-*

*"(i) Whether the applicable law was applied to the case.*

B *(ii) Whether the appeal to the Sharia Court of Appeal Ilorin was valid and that therefore the decision of the Court of Appeal was also valid.*

*(iii) Whether any document was ever altered, varied or modified in anyway whatsoever."*

C Issues i and ii of the respondent are adequately covered by Issue (ii) of the appellant's brief, while Issue (iii) of the respondent is equally covered by Issue (i) of the appellant's brief...

D Before I proceed to consider the arguments presented in this case, I consider it pertinent at this stage to reproduce, with some minor modifications, the facts of this case as stated in the judgment of the Court of Appeal. These are-

The appellant's claim was that the land at Alagbede Village Ita Alamu, Ilorin was given to him as a gift in his personal capacity by the Fulanis who were its owners.

E Both the appellant and the respondent belong to the same family. The appellant is the uncle to the respondent. The Fulanis own a parcel of land in Alagbede Village which they put under the caretakership of the appellant's and respondent's family. The heads of the appellant and respondent family had been discharging this duty of the caretakership of the land in succession until it finally fell on the appellant who was then the family head. It was then that the Fulanis decided to dispose of the land and F in recognition of the services rendered by the appellant's and respondent's family, they donated part of the land to the said family.

G The respondent being a member of the family demanded from the appellant his father's share of the piece of land donated, but the appellant told him that the gift was made to him alone.

In the scanty brief filed by the appellant, his learned counsel submitted that oral evidence must not be allowed to vary, amend or modify the contents of a document, since the law relating to that is universal and applicable to both common law and non-common law courts.

H Under this issue, the court drew attention of learned counsel to the provision of the Land Registration Law and whether Exhibit A (the document being referred to by learned counsel) was admissible in evidence. Learned counsel did not offer any explanation other than that he did not expect that the issue would be raised by this court.

Section 15 of the Land Registration Law Cap. 58. Laws of Northern Nige

ria, applicable in Kwara State, provides thus:-

*"15. No instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall have been registered in the proper office as specified in S. 3"*

The provision is devoid of any ambiguity that before any document affecting any interest in land is admitted in evidence, it must have been registered first. Exhibit A is no doubt a document affecting interest in the land in dispute and since it was not registered as stipulated in section 15 supra, it would not serve any useful purpose in resolving the dispute in this case. The learned trial Judge did not even make any use of it in coming to his decision. This led to the statement by the Sharia Court of Appeal that-

*"We therefore reject the extraneous findings of the trial court at page 12 lines 10 - 12 that the plaintiffs/appellant's father had reaped the fruits of his caretakership on the land."*

Although the Sharia court of Appeal made reference to Exhibit A in its judgment, it is evident from that judgment that it was not based on Exhibit A. It stated

*"This claim was supported by evidence of P.W.1 and P.W.11 at pages 3 - 4. We quote P.W.1 at page 3 lines 33-34 where he said: the land given to the (sic) belongs to the three of them, the defendant, one Alhaji Issa and one late Abdulkarim (sic).*

P.W.11 at page 5 lines 4 - 8 said inter alia

*"Although we did not say the land should be shared among the three people (sic) but (sic) our aim was that three of them were going to share it since the three of them had been taken (sic) care of the land i.e. late Abdulkarim, the defendant standing before the court and his brother called Issa until now they drage (sic) themselves to court."*

*"We consider plaintiff's/appellant's claim that the gift was made by the landlords and we are satisfied that the legal provisions of section 1563 of Maliki Law by Ruxton page 300 had been fully discharged by the unchallenged pieces of evidence of P.W.1 and P.W.11."*

Under Islamic law, where a maker of a document is available, his evidence viva voce is preferable to that contained in a document written by him. It is therefore a correct statement of the law contained in the Sharia Court of appeal judgment that-

*"Islamic Law prefers and lays emphasis on personally given oral evidence."*

See PAGE 222 Vol. 3, Ashalul Madarik where it is stated-

*"It is not permissible to admit in evidence statement reduced into writing when the maker is physically available to testify."*

See also Page 183 Vol. 7 of Zaqani (Commentary on Mukhtasar) which states-

*"It is not permissible to rely on a statement of a witness reduced into writing when the maker is available to testify, because in that situation the written statement is weak and less credible as evidence and it is not permissible for the Judge to base his decision on it when oral evidence is available."*

In Ihkamul- Amkam page 32 (Commentary on Tukhfatul Hukkam) it states thus

*"A Judge is permitted to rely on a document written by a man of unimpeachable integrity who is dead or has travelled a distance long enough to warrant shortening of prayers; or had somehow disappeared and his whereabouts is unknown, provided that two witnesses of unimpeachable character, familiar with the handwriting of the maker, testify that the document in question is in fact the writing of the maker (absentee witness)."*

So even under Islamic law Exhibit A did not qualify as an admissible document.

The opinion expressed by the learned Justices of the Sharia Court of Appeal that Exhibit A "is classifiable as *"informal instrument"* and distinguishable from *"formal instrument"* which requires the technicalities of registration" and not improve the status of Exhibit A to make it admissible in evidence under either of the two legal systems, that is, Islamic law or Common law, for the purpose of this case.

Issue 1 therefore fails.

Under Issue II, learned counsel for the appellant submitted that the applicable law to the dispute is hearing Customary Law and not Islamic Law and then concluded-

*"It follows therefore that the proper court to appeal to was the Upper Area Court under section 53 of the Area Court No.2 of 1967 and not the Sharia Court of Appeal under the Area Courts (Amendment) Edict of 1986."*

In reply to the submissions (supra) learned counsel for the respondent referred to subsections 4(2) and (3)(b) of the Area Courts Edict 1967 (as amended) and submitted that from the foregoing provisions both the appellant and the respondent were left in no doubt that the trial court was adopting Islamic law in trying the case. He therefore submitted that the Sharia Court of Appeal was the proper court to appeal to from the trial court's decision; relying on section 54 of the Area Court Edict, 1967 (as amended), in support.

He finally submitted that the issue before the trial court is one of a gift between Muslims, a question of Islamic Personal Law covered by Section 242(2)(c) of the 1979 Constitution of Nigeria.



From the facts of this case and the parties involved thereto, the issue involved is a gift between Muslims, an issue coined in section 242 (2)(c) of the 1979 Constitution as Islamic Personal Law. As regards the proper forum for the trial of the case. Section 4(2) of the Area Courts Edict 1967 (as amended) states in clear words that where the case involves Islamic Personal Law, it shall be heard and determined by a member of an Area Court learned in Islamic law and sitting alone in cases other than this, the Area Court shall be constituted by a panel of three members. B

So from the moment the constitution of the court was known, i.e. a single Judge, and learned in Islamic Law, both parties were aware that the applicable law is Islamic law. Section 54(1) of the Area Court Edict, 1967 (as amended) provides that an appeal from a decision of Area Court Grade I or II or Upper Area Court shall lie to the Sharia Court of Appeal. It states thus- C

*"54(1) Any party aggrieved by a decision or order of an Upper Area Court or any Area Court, Grade I or II in an Islamic Personal Law matter may appeal therefrom to the Sharia Court of Appeal."* D

As regards the procedure adopted by the trial court in this case, in my view, it followed the proper and correct Islamic procedural law in so far as it allowed the litigating parties to call witnesses to prove their respective cases, since and as correctly stated by the Sharia Court of Appeal, that the dispute as to whether the gift is personal to the appellant or to the Family of the appellant and respondent involved a claim and a counter-claim. The Sharia Court of Appeal went to state that- E

*"While plaintiff/appellant claimed it was to the family, defendant/respondent claimed it was personal to him and his living brother Isa. We regard this claim as a claim and counter claim. We apply the principle of Sharia as in page 228 of Volume III of Ashalul Madarik. It says* F

*"If two claimers differ: one makes a claim and the other makes a counter-claim..... and they bring evidence to support their respective claims, the judgment should be based on who had better proof."* G

I entirely agree with the above statement of the law and I endorse it.

Since both the appellant and the respondent are claiming ownership or part ownership of the land in dispute, each is a plaintiff in his own case, and each has a duty to prove his case. The respondent called P.W.1 and P.W.2 who testified in support of his claim. The appellant called his sister to support his claim and put in Exhibit A. I have already shown that Exhibit A is not an admissible evidence. H

Both the appellant and the respondent were shown in the record to have given evidence. This is contrary to Islamic Law. A plaintiff cannot be a witness in his case. He can only state his case and then call indepen-

dent witnesses to prove it. The same principle applies to a defendant. He can state his defence and where the law permits, be allowed to call independent witnesses to support that.

Also D.W.1, being a sister to the appellant is not ordinarily a competent witness in support of his case. Her competence is dependent on two

B conditions precedent

- (i) She is of an unquestionable character and integrity and;
  - (ii) no manifest suspicion that by her evidence, she will derive some benefit.
- See Ihkamul-Ahkam (Complementary on Tukhfah) page 29 Arabic and P.10 English translation by Bello Daura where the law is stated thus-

C *"A man who excels his peers in integrity can give evidence in favour of a brother of his except where suspicion becomes manifest.*

The other snag that relates to the evidence of D.W. 1 is that her testimony alone even if the conditions for its reception are satisfied would not help the appellant's case since in a matter like this one, it can only be proved by the

D evidence of

- (i) two unimpeachable male witnesses; or
- (ii) An unimpeachable male witness and two or more unimpeachable female witnesses; or that of a male witness or two or more female witnesses plus the plaintiff's complimentary oath.

E See page 23 Ihkamul-Ahkam (Complimentary on Tukhfah) and its English Translation page 13 which states -

*"One male witness re-inforced by the evidence of two female witnesses, shall be sufficient proof in a case where some property is being contended (contested).*

F In the case in hand, the appellant, apart from stating his own case did not support it by sufficient admissible evidence. In other words, he did not prove his counter-claim. The Sharia Court of Appeal is right in its findings that on the evidence adduced and accepted, the gift was made to the family of the appellant and the respondent and therefore the respondent G share in it. These findings were rightly affirmed by the Court of Appeal in its judgment where it stated-

*"The evidence of P.W.1 on page 3 paragraphs 2 and 3 and that of P.W.2 on page 5 lines 4-9 show that the gift was given to three named members of the family who had been taking care of the land. that is the late Abdul H Karimu, the defendant and his brother Alhaji Issa.....*

*From the foregoing, it is clear that the issue here relates to a gift. The question that arises from the argument of the parties is whether under Islamic law a gift can be made to a family or specific member of the family. It is clear that under Islamic law a gift can be made to a family or named*

*members of a family by the donor as it had happened in the instant case."*

The death of Abdulkarim, the father of the respondent, has no effect on the validity of the gift made and his share thereof can be claimed by his heirs to form part of his estate. In *Al Fiqhul Islam*, Vol. 5 page 10 (by Dr. Azzahili) the law relating to a gift of an identifiable and divisible thing to a group of people is stated thus:-

*"Both the Maliki, the Shafii and the Hanbali Schools approved the gift en bloc of identifiable and divisible portion of an object or a thing to a group of people as they did in sale transaction. The acceptance and taking possession of the object donated en bloc by a member of the donees is recognised as a valid and constructive acceptance by other beneficiaries to the gift and the receiver holds their shares in trust. The three schools justified and rested their statement of the law on the Hadith which is narrated thus-*

*"When a delegation from Huwazan came to the Holy Prophet (SAW) demanding the return of a portion by their property received by him as a booty, the Holy Prophet (SAW) said:*

*'What is given to me and to the descendants of Abdul-Muttalib is for you' (given back to you) (The words in brackets supplied by me for clarity).*

*See also Vol. 6 p. 23 of Al-Mugni (by Ibn Quddamah) where a hypothetical issue was raised as regards making a will in favour of a dead man and the Maliki School advanced the view that-*

*"If the testator is aware of the demise of the legatee, the gift in the Will is permissible and valid. The heirs of the legatee can claim and enforce the legacy on the death of the donor after the payment of the latter's proven debts and other legacies. The purpose of making a Will in favour of a known dead person by the testator is to pass its benefit to the deceased notwithstanding his death. They compared this with a situation where the legatee is alive."*

See Hashiyatul- Adawi Vol. II p. 240 where it states as follows:-

*"Even where the donee died before taking possession of the thing donated, his heirs can claim it as part of his estate."*

Issue two also fails.

The family of the Holy Prophet (SAW) can accept gift, but not alms. See *Fathul Bari* Vol. 4 P.10 (Commentary on Buhari).

The appeal fails and it is dismissed. The judgment and orders of the Sharia Court of Appeal which was affirmed by the Court of Appeal is hereby confirmed.

Respondent is awarded N1,000.00 costs against the appellant.

**OGUNDARE JSC**

I have had a preview of the lead judgment of my learned brother Wali, J.S.C. delivered. I agree with his conclusion that this appeal be dismissed. As I have different reason for resolving Issue (i) against the appellant, I have a few words of my own to say.

The two issues put before us by the appellant as arising for determination in this appeal have been set out in the lead judgment, I need not set them out again. The terse argument submitted in the appellant's Brief on Issue (i) reads:

C *"Issue No. 1*

1.1 *It is humbly submitted my Lords that it is now trite law that oral evidence must not be allowed to vary, amend or modify (sic) the contents a document.*

D 1.2 *Even though the provisions of the Evidence Act do not apply to non-common law courts, the law on documents is universal.*

1.3 *I therefore pray my Lords to sustain issue No. 1 and to allow the original Ground."*

The respondent in his Brief has argued that this issue is not available to the appellant in this appeal because it does not arise out of the judgment of the court below on appeal to this Court and no leave of this Court has been sought nor obtained to raise it.

I agree entirely with the respondent. This issue was not raised in the Court of Appeal nor did it form the basis of the judgment of that court. Appellant has not sought nor Obtained the leave of this Court to argue the Issue for the first time in the court. Issue (i) and original ground of appeal on which it is premised are therefore struck out.

The jurisdiction of the Sharia Court of Appeal of a State is well set out under section 242(2) of the Constitution. Paragraph (c) of subsection (2) of section 242 provides:

G (2) *For the purposes of subsection (1) of this section, the Sharia Court of appeal shall be competent to decide -*

(a) *xx*

(b) *xx*

H (c) *Any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a moslem;"*

It is not in dispute that the issue in this case is one of a gift where the donors are moslems. The appeal from the Area Court Grade II Oja, Ilorin properly lay to the Sharia Court of Appeal of Kwara State and issue (ii) in the

appellant's Brief will be answered in the positive.

Consequently, I too dismiss this appeal and abide by the orders for costs made in the lead judgment of Wali, J.S.C.

**OGWUEGBU JSC**

B

I had had the preview in draft of the judgment just read by my learned brother Wali, J.S.C. and I agree that this appeal should be dismissed.

The appellant identified two issues for determination in the appeal. They read:

C

*"(i) Was it proper to alter, vary, amend or modify the contents of a document orally, and*

*(ii) Was the appeal to the Sharia Court of Appeal validly brought."*

The learned respondent's counsel Submitted in his brief of argument filed on 26:11:93 that the appellant's issue number one was in respect of an issue which the respondent herein abandoned in the court below.. The said issue and the arguments on it were struck out by the court below. As the ground of appeal and the issue formulated from it did not arise from the judgment of the court below, it was not competent for the appellant to canvass the said issue in this court.

E

The court below made the following comments in its judgment in respect of the said issue:

*"I shall now consider the issues one after the other vis-a-vis the records and the prevailing law. As to whether the Sharia Court of Appeal based its judgment on unproven facts and contrary to evidence in the pointed (sic) F records, the learned appellant's counsel in an application at the beginning of his submission abandoned this issue which is based on ground one. Since there was no objection from the learned respondent's counsel this ground along with the issue based on it was struck (sic). We are therefore left with ground 2....."*

G

From the above passage of the judgment of the Court of Appeal. it is clear that issue number one in the appellant's brief did arise from judgment of that court and cannot therefore be raised in this court without leave.

The general rule adopted in this court is that an appellant will not be allowed to raise on appeal a question which was not raised or considered by the court below but where the question involves substantial points of law, substantive or procedural and it is plain that no further evidence could have been adduced which could affect the decision of them, the

H

court will allow the question to be raised and the points taken and prevent an obvious miscarriage of justice. See Akpene v. Barclays Bank of Nigeria Ltd. & Ors. (1977) 1 S.C. 47 and Djukpan v. Orovuyovbe & ors. (1967) All NLR 144 (Reprint)

Since no leave was sought or obtained, the issue as well as the argument on it are struck out.

B The complaint of the appellant in issue number two is that the case was tried under non-Muslim procedure as provided under Orders 10 and 11 of the Area Courts (Civil Procedure Rules), 1971 of Kwara State; that Moslem Law was applied by the trial court in the determination of the case instead of Ilorin Native Law and Custom and this misled the respondent herein to appeal to the Sharia Court of Appeal, Ilorin instead of the Upper Area Court, Ilorin.

D The cause of action in this appeal involves a gift and the donors are Moslems. Section 242(2)(c) of the Constitution of the Federal Republic of Nigeria, 1979 as amended by Decree No. 26 of 1986 vests the Sharia Court of Appeal with jurisdiction to exercise appellate and supervisory jurisdiction in civil proceedings involving question of Islamic Law which the court is competent to decide in accordance with the provisions of subsection (2) of that section. Subsection (2) (c) of section 242 provides:

E *“(2) For the purposes of subsection (1) of this section. the Sharia Court of Appeal shall be competent to decide -*

*(a) .....*

*(b) .....*

*(c) any question of Islamic law regarding wakf, gift, will or succession where the endower, donor, testator or deceased person is a moslem:*

F From the foregoing, the proper court to appeal against the decision of Grade II Area Court, Ilorin on a question of Islamic law relating to gift as in this case is the Sharia Court of Appeal, Kwara State. The answer to issue two in the appellant's brief is answered in the affirmative.

G I therefore dismiss the appeal and abide by the order as to costs made in the lead judgment of my learned brother Wali, J.S.C.

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### ONU JSC

H Having before now read the reasons for judgment of my learned brother Wali, J.S.C. I agree with his conclusion that this appeal lacks merit and ought to fail. My learned brother has so carefully and elaborately considered and disposed of the intricate issues agitated and argued under Issue (i) more especially in relation to its Islamic setting, that I can do no better than adopt the same in its entirety as mine with nothing further to add

thereto.

I wish, however, to add a word or two of mine in elaboration in respect of only Issue (ii) wherein the appellant's contention is: Was the appeal to the Sharia Court of Appeal validly brought?

It is common ground that upon the dismissal of the plaintiff/respondent's case by the Area Judge of the Ilorin Grade II Area Court on 27th December, 1989, the former appealed to the Sharia Court, where he succeeded in reversing the decision of the trial Area Court. The question is, was the choice by the plaintiff/respondent of the venue of appeal, to wit: the Sharia Court, right?

Now, section 242 of the 1979 Constitution provides inter alia as follows:

*"242(1) 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 questions of Islamic Law which the court is competent to decide in accordance with the provisions of subsection (2) of this section.*

*(2) For the purposes of subsection (1) of this section, the Sharia Court shall be competent to decide-*

*(a) xxxxxxxxx*

*(b) xxxxxxxxx*

*(c) Any question of Islamic personal law regarding a wakf, gift, will or succession where the endower, donor, testator or deceased person is a Moslem,*

*(d) xxxxxxxxx*

*(e) xxxxxxxxx*

(Italics above mine for emphasis).

It has been established at the trial that the dominant issue in this case is one of a gift where the Fulani donors of the piece of land in dispute are moslems hence the appeal from the Area Court Grade II Oja, Ilorin Validly lay to the Sharia Court of Appeal of Kwara State. The appellant's contention, therefore that the case was tried under the non-Moslem procedure as provided under Orders 10 and 11 of the Area Court's (Civil Procedure) Rules, 1971 of Kwara State whereas Moslem Law was applied to the cause by the trial court, thus misleading the respondent of the Upper Area Court, Ilorin, is in my view non-sequitur.

The Area Judge of the trial Court having sat as a single Judge, the provisions of section 4(2) of the Area Courts Edict 1967 which provides that all questions of Moslem Personal Law shall be heard and determined by any member of an Area Court learned in Moslem Law sitting alone, has

sway here. In other cases where Moslem Laws does not apply, an Area Court shall be constituted with three members vide Section 4(3) (b) of the Area Courts Edict, 1967 of Kwara State (ibid) as amended by Edict No.6 of 1975, Laws of Kwara State. The appellant and respondent not having been left in doubt as to which procedure the trial Court was adopting in the conduct of the case, any assertion by the appellant herein on appeal, late in the day as it is, that he was not aware of the procedure being followed, would be of no avail because ignorance of the law is no excuse: ignorantia juris non excusat. Furthermore, Section 20(1) (a) of the Area Courts Edict, 1967 (ibid) empowers an Area Court in civil causes to administer the native law and custom prevailing in the area of jurisdiction of the Court or binding between the parties. The local Area Court is moreover, presumed to know the local law and custom although the presumption is rebuttable vide Pam Gyang v. Nyam Gyang (1969) NNLR 99 at page 100. As Belgore, C.J. (as he then was) indeed pointed out in Usman Waziri v. Musa Ugye & ors. D (1977) NNLR. 129 at page 130.

*"The Area Court of the area of action is presumed to know the native law and custom of that area; it is rebuttable presumption and until it is rebutted its statement of the law must not be interfered with."*

Section 54 of the Kwara State Area Courts Edict 1967 as amended by the Area Court (Amendment) Edict No.5 of 1986, Laws of Kwara State, puts the seal on the matter in that it provides as follows:-

*"54(1). Any party aggrieved by a decision or order of any Upper Area Court or any Area Court Grade I or II in an Islamic Law matter may appeal therefrom to the Sharia Court of Appeal.*

F *(ii) any party aggrieved by a decision or order of an Area Court Grade 1 of Grade II in a civil matter other than Islamic Law may appeal therefrom to the Upper Area Court having jurisdiction in the Area in which such Area Court is situated.*

(iii)      X      X      X      X

G      (Italics above is also mine)

As in the instant case on appeal, the Grade II Area Court, Ilorin applied Islamic Law relating to gift to the cause of action, the appeal therefrom validly lay to the Sharia Court of Appeal of Kwara State. Afortiori, my answer to issue (ii) in the appellant's appeal is accordingly answered in H the positive.

The result of my foregoing comments is that I too dismiss this appeal and endorse the orders for costs contained in the lead judgment of my learned brother Wali, J.S.C.



***ADIO JSC***

I have had the opportunity of reading, in advance, the judgment just read by my learned brother, Wali, J.S.C. and I agree with it. The appeal does not succeed and it is accordingly dismissed by me. I abide by B the consequential orders, including the order for costs.

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