

SUPREME COURT OF NIGERIA
13TH JANUARY, 2012. SC. 147/2003
CORAM: - A. M. MUKHTAR, F. F. TABAI, S. GALADIMA, B.
RHODES-VIVOUR, N. S. NGWUTA, JJSC

TASIU RABIU APPELLANT
AND
AISHATU AMADU RESPON-
DENT

ISLAMIC LAW - Paternity - Confirmation of - Paternity under Sharia
is quite important - And it is confirmed by marriage - Or by acknowl-
edgment or evidence (H1)

ISLAMIC LAW - Legitimacy - Child born outside wedlock is not
considered legitimate - And if the illicit relationship is established -
Appropriate sanctions are given to parties involved (H2)

ISLAMIC LAW - Gestation period - Determination of - Generally a
period of six months less five days after consummation of marriage
- Is the minimum period of gestation - And the maximum period is
five years (H3)

EVIDENCE - Islamic law - Expert evidence - Meaning - It is the
opinion which an expert gives - In relation to some scientific or
professional matters (H4)

APPEALS - Findings of courts - Supreme Court will not interfere
with findings made by lower courts - Including the refusal of Court
of Appeal to act on the medical report (H5)

FACTS

Plaintiff/respondent commenced this action under the Islamic
law at the Area Court No. 3 Katsina in Katsina State. She brought a
claim against defendant/appellant on grounds of lack of maintenance
since delivery, removal and retention of her personal properties,
denial of paternity of her child. Accordingly, she sought to know her

relationship with appellant. Following those claims, the court decided to take the issue bordering on the child’s paternity while stepping aside the other claims. The court summoned respondent’s mother and took her evidence. Respondent later produced one witness to confirm to the court the actual date of her delivery. Appellant appeared to be reluctant in calling any witness to confirm the date of respondent’s delivery. After having considered the statement made by the parties and the evidence adduced, the judge delivered his judgment and gave paternity of the baby to appellant.

Dissatisfied, appellant lodged an appeal before the Upper Area Court 1, Katsina. After reviewing the evidence adduced at the trial court, the court allowed appellant to call his witness as he had claimed the trial Court did not afford him opportunity to do so. Subsequently however, the court held that appellant consummated or was presumed to have consummated the marriage and that the Islamic principle of “LIAN”; was not applicable in the circumstance of the case. Aggrieved further, appellant appealed to Sharia Court of Appeal, Katsina. After hearing the appeal and carrying out further investigations, the court affirmed the decision of the Upper Area Court. Being not satisfied, appellant filed a further appeal to the Court of Appeal, Kaduna Division. The court also affirmed the decision of the Sharia Court of Appeal and refused to act on the medical report adduced by appellant to show that respondent was above 22 weeks pregnant as at the time they had barely married. The court dismissed the appeal. Embittered, appellant has appealed to Supreme Court.

ISSUE FOR DETERMINATION

“WHETHER the Court below was justified in granting paternity of the child in issue to the Appellant notwithstanding the fact that the Marriage between the parties hereto was void ab initio.”

HELD (Unanimously dismissing the appeal per GALADIMA JSC)

ISLAMIC LAW - Paternity - Confirmation of

1. In Islamic Law, paternity of a child is confirmed by any of the three ways viz:

- (a) Marriage
- (b) Acknowledgment
- (c) Evidence

The first is the most important. From the marriage, then comes

the offspring. It presupposes that the child has parent from the valid marriage. Paternity of a child therefore under Sharia is quite important. A child without traceable father does not command respect and honour from eyes of the public. He suffers psychological debasement in the society for no just fault of his. This is why legitimacy is viewed with all seriousness in Sharia legal system. (p. 426 C)

ISLAMIC LAW - Legitimacy

2. That is why the Great Prophet of Allah Muhammad (Peace Be Upon Him) admonished thus:

“A woman who ascribes a child’s legitimacy to someone who is not responsible for its conception has committed a grave offence, thereby alienating herself from God and will be denied the bliss of eternity. Likewise, a father who obscures his child’s legitimacy by denying his responsibility for its conception has offended God and inflicted on himself, universal disgrace.”

It follows from the above Hadith therefore that, if a child is born outside wedlock is not considered legitimate. But if the illicit relationship is established, appropriate sanctions on the parties involved are given. (p. 426 E)

ISLAMIC LAW - Gestation period - Determination of

3. However, where a child is born in wedlock, the delivery must have been within the generally acceptable periods of gestation, being the minimum or maximum. The general view of majority of Islamic Jurists is that a period of six months less five days after consummation of the marriage or possibility of consummation of marriage, is regarded to be the minimum period of gestation. Imams Maliki, Shafi and Ibn Hanbal agree to this view, Imam Hanifah; on the other hand, considers the child legitimate six months after the conclusion of the marriage contract not necessarily consummation of the marriage. There is no consensus regarding the maximum period of gestation among the generality of jurists. Other jurists such as Muhammad Ibn Abd Al-HAKAM, opined that a child does not remain in its mother’s womb for more than one year. The Hanafi School holds the view that a child may remain in its mother’s womb for two years. The Zahiri School holds a liberal view that a child may remain in its mother’s womb for only NINE months.

Taking the general view of the majority of the Islamic jurists into consideration, where a child is born, in a legal wedlock, but under a period of six lunar months less five days, from the date of marriage, then the child cannot be attached to that husband. The authority for this statement is to be found in the JAWA HIR ALIKLIL. It is stated
 B at page 381:-

“Under no circumstance shall pregnancy or child (of marriage) be denied where the wife, delivers complete baby within a period lesser than six months five or six days less, from the date, of the
 C marriage contract. In that situation paternity can be denied without the necessity of having resource to Lian (mutual imprecation) as there exists a legal barrier (between the child and its suspected father)”.

Therefore by way of summary for the purposes of Islamic Law, paternity is presumed where:-

(a) Marriage contract exists between the spouses either de
 D jure or de facto.

(b) There is actual consummation or possibility of consummation between the spouses without any hindrance. This includes seclusion between the spouses (Kha-Iwah); sleeping together (ma-beet); letting loose the curtain.

(c) The child is born between the minimum or maximum
 E period of gestation.

(d) There is no legal denial, lian by the spouses.

In the instant case, having taken all the circumstances into consid-
 F eration, I shall apply that principle of Islamic jurisprudence. It is accepted that a child born within 6 months or 5 months and 25 days is legitimate child since the maximum period of gestation is 5 years while the minimum period is 6 months. (pp. 426 H/432 H)

Islamic law - Expert evidence - Meaning

G 4. However, since matter like this rarely comes before us, I shall go the whole hog to explain carefully the knotty areas of Islamic law. Medical report or opinion or what is generally regarded as expert evidence is one of such areas in Sharia Law of evidence (Shahada) and very clearly laid down. For our purpose here, expert evidence is referred to
 H as alshahada tu bil qafah. This is often the testimony or opinion which an expert gives in relation to some scientific, specialised technical or professional matters. It is the person qualified to speak with some

amount of authority by reason of their special training skill, mastery or familiarity with subject matter in question that can be allowed to give an opinion. Quran 16:43 recognises expert evidence. It states:-

“And before thee also, the Messengers we sent were but men to whom we granted inspiration: If ye realize this not ask of these who possess knowledge and wisdom.” (p. 429 G) B

APPEALS - Findings of courts

5. I have no cause to interfere with the findings of the lower Courts including the Court of Appeal in refusing to act on Medical Report in question. (p. 433 C) C

NOTABLE POINT OF INTEREST

GALADIMA JSC

1. Couple should understand each other before marriage D

In the light of the unfortunate circumstances that culminated into this case, I shall say in passing, that suitors should have wide consultations and full understanding of each other during courtship. This is to avoid unpleasant and ugly circumstances that will result in the abrupt termination of their nuptial tie. Couple should look very well before they leap. Since in this case the appellant cannot substantiate any allegation of misbehaviour levied against his wife, he must live with any short-comings perceived by him. (p. 433 A) E

REPRESENTATION

T. O. Oladoja, for the Appellant

B. Bassey with P. Ashuikaka, for the Respondent F

CASES REFERRED TO

Jatau v. Mai-Lafiya (1998) 1 NWLR (pt 555) 682 G

Cameroon Airlines v. Otutuizu (2011) 1-2 SC (Pt.111) 200

BOOKS REFERRED TO

Bidayatul Mujtahid vol. 2 p. 59 H

The Holy Quran, chapter 2 verse 253

IN FATHULRAHEEM vol.2 p. 44

Hughe's Dictionary of Islam p. 293

MISHKAT BK 13 Chap. 15

LEAD JUDGMENT BY GALADIMA JSC

This is further appeal against the judgment of the Court of Appeal, Kaduna Division delivered on 19/11/2002. This suit has a chequered history. It has had a tortuous and intriguing journey through 4 courts of various jurisdictions and finally to the Apex Court herein. The background facts tell the whole story. The Appellant herein was the Appellant at the Court below. The Respondent as plaintiff had brought a claim against the Appellant as Defendant on grounds of lack of maintenance since delivery, removal and retention of her personal properties, denial of paternity of the child. Accordingly, she sought to know her relationship with the Appellant.

Following those claims, the trial Area Court No.3 Katsina, Katsina State decided to take the issue bordering on the child's paternity while stepping aside the other claims. The Court summoned the plaintiff's mother and took her evidence. The plaintiff later produced one witness to confirm to the Court the actual date of her delivery. The defendant, it would appear was reluctant in calling any witness to confirm the date of plaintiff's delivery. After having considered the statement made by the parties and of the single witness, the trial Area Court Judge delivered the judgment wherein he gave paternity of the baby to the defendant. He was dissatisfied and lodged an appeal before the Upper Area Court 1-, Katsina (hereinafter referred to as "U.A.C"). After reviewing the evidence of witness at the trial Court, the UAC Judge allowed the appellant to call his witness he had claimed the trial Court did not afford him opportunity to do so. The learned Judge of the UAC however, held that the Appellant consummated or was presumed to have consummated the marriage and that the Islamic principle of "LIAN"; was not applicable in the circumstance of the case. Aggrieved, the Appellant further appealed to Sharia Court of Appeal, Katsina. After hearing the appeal and carrying out further investigations, the Court affirmed the decision of the Upper Area Court. On further appeal to the Court of Appeal, it also affirmed the decision of the Sharia Court of Appeal and dismissed the appellant's appeal. It is the dismissal of this appeal that has necessitated the present appeal to this Court, filing his Notice of Appeal on 23/1/2003, which contained 6 grounds of appeal. A single issue raised by the Appellant encompassing the six grounds

of appeal in his brief of argument dated 3rd but filed on 4th May, 2011, is as follows:-

“WHETHER the Court below was justified in granting paternity of the child in issue to the Appellant notwithstanding the fact that the Marriage between the parties hereto was void ab initio.”

In her brief of argument dated 7th and filed on 7th October, 2011, the Respondent adopts the lone issue as formulated by the Appellant for determination of the appeal. On 17/10/2011, the appeal was heard. Learned Counsel having identified the Appellant’s brief of argument urged this Court to allow the appeal and set aside the decision of the Court below. In the brief learned Counsel for the Appellant, TAJUDEEN O. LADOJA Esq., relied on the medical examination conducted on the Respondent on 15/9/1991, showing that she was 20-22 weeks pregnant. He contended therefore that as at the time the medical examination was conducted the marriage contracted by the parties was less than 50 days old; and that by simple arithmetic, a pregnancy which was 20-20 weeks between 140-154 days as at 15th February, 1991- certainly pre-dated the 20th day of December, 1990 when the marriage was contracted.

Against this background, relying on a book called BIDAYAT-UL MUJTAHID Vol. 2 at page 59 learned Counsel has submitted that a contract of marriage is like a contract of sale, if there exists a vitiating element, therein, it is rendered void. Relying further on chapter 2 verse 253 of THE HOLY QURAN and IN FATHULRAHEEM Vol.2 page 44 and supplying both the Arabic and English transliteration therein, learned Counsel submitted that it is forbidden to contract a marriage when a woman is carrying pregnancy of another man. That the marriage between the Appellant and the Respondent is clearly susceptible to outright annulment and it is not subject to rectification because its voidability touches and concerns the marriage contract itself, and such nullification must either be done before or after consummation. Further reference was made to IHKAMUL AHKAM, ALA TUHFATUL HUKKAM page 98, on this point.

It is further submitted that since the Respondent’s pregnancy pre-dated her marriage with the Appellant she was not free to have contracted a valid marriage with the Appellant and in the circumstances therefore her marriage is void ab-initio and of no legal consequences. Reliance was placed on the following Sharia authorities:

1. FATHUL JAWAD vol. 1 page 242.
2. FATHHUL RAHEEM (supra) at page 47.
3. THAMARUDDANI (commentary) on RISALAT p. 90 &

444,

4. DASUKI ON MUKHTASAR (chapter on IDDAH).
5. BIDAYATUL MUJTAHID PAGE 117.

B

On the principle of Alwalad Lifirash learned Counsel has submitted that, the presumption of legitimacy is applicable only where there is no proof to the contrary and the existence of valid marriage; but in the absence of a legal marriage the principal of presumption of legitimacy will not be applied and relied upon. That if there exists

C

a legal evidence to displace the presumption, the principle would not apply and the child would be attached to the mother. Submitting further learned Counsel conceded that where there is a valid marriage and there is dispute on whether or not a husband had sexual intercourse with his wife, the assertion of the wife that it took place, would be relied upon. Referred to JAWAHIRUL IKLIL on MUKHTASAR KHALIL page 308. It is submitted that medical report was not meant to establish paternity but the age of the pregnancy. Learned Counsel contended that even if the opinion of a psychologist is not accepted to establish paternity, Islamic jurisprudence is not against expert opinion on period of gestation. He relied on TABSIRATUL HUKAM Vol..2 page 99-101 and IHKAMUL AHKAM (supra) at page 118.

E

In the premises of the foregoing submissions the learned

F

Counsel has urged this Court to reverse the concurrent findings of the appellate Courts. In her submission, the Respondent's counsel, has likened the Islamic marriage contract to the simple law of contract in which the essential elements must be met to make it valid. Learned Counsel has submitted that there was no proof of the fact that the marriage contracted between the parties was void as a result of the Respondent's pregnancy. In as much as the respondent would agree that if her pregnancy had predated her marriage with the appellant, it would have been void ab initio and a bar to the marriage, she does however not concede to same as there was no such situation, as submitted by the Appellant. It would, have been very difficult to hide a pregnancy of between 20-22 weeks as alleged by the Appellant without those present at the Nikkah observing same, she argued.

H

It is contended by the Learned Counsel for the Respondent

that the Appellant and no one else, was responsible for the pregnancy which resulted in the birth of the child of a valid marriage. That by pages 1, 2 and 3 of the records of the Upper Area Court, the Appellant got married to the Respondent on 20th December, 1990. The respondent's baby was delivered on 5th July, 1991. The Appellant had lived with the Respondent for about 46 days without contact with an outsider; this facts having been admitted by the Appellant himself. It is contended by the learned Counsel that the allowable period of gestation in Sharia Law is about 7 months and the Respondent was delivered of the child of the marriage within 7 months and some days, from the date of marriage.

Agreeing with the decision of the Court below, learned Counsel has submitted that a child born of a lawful wedlock, like in the case at hand, in which there was actual consummation or a possibility of consummation between the spouses without any legal hindrance in the form of seduction between the spouses, sleeping together and "letting loose the door curtain" between either in the minimum of 6 months or maximum period of 5 years of gestation ought to be the Appellant's child and he should not be allowed to renege. Reliance was placed in the case of JATAU v MAI-LAFIYA (1998) 1 NWLR (pt 555) 682 at 693.

It is the contention of the Respondent that since the Qu'ran 16:43 recognises expert opinion if the appellant was interested in knowing the actual period of conception or birth of the child in dispute all he could have done was to investigate from the Hospital where the child was delivered, the actual gestation period. This is to show whether the birth was premature or not within the allowable periods of gestation. Learned Counsel has placed reliance on TABSIRATUL HUKAM vol.2 pages 99-101 and IBN QAYYIM'S ALTURQ ALHUKUMIYYAH FI ASSIYASAH ASSHAR'IYYAH (1996 edition). It is further submitted that since the Court below holds in favour of the respondent that the marriage between her and the Appellant was legal, then the child of the union is legitimate, moreso that there presumption of legitimacy since the child was born within the minimum period prescribed and accepted for a normal birth.

In sum, the argument of the Respondent on the 2nd issue is to the effect that the child of the marriage though born during a minimum period of gestation between the appellant and the Respon-

dent cannot be said to be an illegitimate child having been born in the course of a lawful wedlock whose marriage was consummated or presumed to be consummated as a result of the presence of all the necessary conditions for a lawful marriage to be consummated.

B On the 3rd issue, learned Counsel for the Respondent has submitted that this is not an appropriate case for Li'an to be invoked, as all through the 4 Courts below, the Appellant had never presented a case for Li'an to be invoked. As such, this will amount to introducing a fresh issue on appeal without first seeking and obtaining leave of this Court.

C The pith of this matter is the denial of paternity by the Appellant, the father of the child in controversy.

In Islamic Law, paternity of a child is confirmed by any of the three ways viz:

- (a) Marriage
- D (b) Acknowledgment
- (c) Evidence

E The first is the most important. From the marriage, then comes the offspring. It presupposes that the child has parent from the valid marriage. Paternity of a child therefore under Sharia is quite important. A child without traceable father does not command respect and honour from eyes of the public. He suffers psychological debasement in the society for no just fault of his. This is why legitimacy is viewed with all seriousness in Sharia legal system. That is why the Great F Prophet of Allah Muhammad (Peace Be Upon Him) admonished thus:

“A woman who ascribes a child’s legitimacy to someone who is not responsible for its conception has committed a grave offence, thereby alienating herself from God and will be denied the bliss of eternity. Likewise, a father who obscures his child’s legitimacy by denying his responsibility for its conception has offended God and inflicted on himself, universal disgrace.”

H It follows from the above Hadith therefore that, if a child is born outside wedlock is not considered legitimate. But if the illicit relationship is established, appropriate sanctions on the parties involved are given. See AL-TAJU AL-JAMIU LIL USULI FI AHADITH AL-RASUL of Ustaz M. A. NASIF.

However, where a child is born in wedlock, the delivery must have been within the generally acceptable periods of gestation, being the minimum or maximum. The general view of majority of Islamic Jurists is that a period of six months less five days after consummation of the marriage or possibility of consummation of marriage, is regarded to be the minimum period of gestation. Imams Maliki, Shafi and Ibn Hanbal agree to this view, Imam Hanifah; on the other hand, considers the child legitimate six months after the conclusion of the marriage contract not necessarily consummation of the marriage. See AL DASUKI'S HASHIYAT 'ALA AL SHARH AL-KABIR Vol.2 page 459 And IBN RUSHD.S BIDAYAT ALMUJTAHID WA NIHAyat AL-MUQTASID Vol.2 page 352. There is no consensus regarding the maximum period of gestation among the generality of jurists. Other jurists such as Muhammad Ibn Abd Al-HAKAM, opined that a child does not remain in its mother's womb for more than one year. The Hanafi School holds the view that a child may remain in it's mother's womb for two years. The Zahiri School holds a liberal view that a child may remain in its mother's womb for only NINE months.

Taking the general view of the majority of the Islamic jurists into consideration, where a child is born, in a legal wedlock, but under a period of six lunar months less five days, from the date of marriage, then the child cannot be attached to that husband. The authority for this statement is to be found in the JAWA HIR ALIKLIL. It is stated at page 381:-

“Under no circumstance shall pregnancy or child (of marriage) be denied where the wife, delivers complete baby within a period lesser than six months five or six days less, from the date, of the marriage contract. In that situation paternity can be denied without the necessity of having resource to Lian (mutual imprecation) as there exists a legal barrier (between the child and its suspected father)”.

Therefore by way of summary for the purposes of Islamic Law, paternity is presumed where:-

(a) Marriage contract exists between the spouses either de jure or de facto.

(b) There is actual consummation or possibility of consummation between the spouses without any hindrance. This includes seclusion between the spouses (Kha-lwah); sleeping together (ma-

beet); letting loose the curtain.

(c) The child is born between the minimum or maximum period of gestation.

(d) There is no legal denial, lian by the spouses.

As I have earlier observed the main issue involved in this appeal is predicated on the claim on that the child delivered by the respondent was within a period under the minimum gestation period and that the medical report confirmed that. I am constrained to deal in great detail the issue of medical Report and its probative value, in due course because the issue of medical report forms one of the grounds of appeal by the Appellant.

Denying the paternity of the child, the Appellant asserted that he never had sexual intercourse with the Respondent's wife. He made an assertion, which in law he must prove. The prophet (P.B.U.H) in the Hadith has explained this principle of law thus:

"Burden of proof is on the one who alleges. Oath is on the (denier) defendant."

Another way the Appellant could have disown the paternity of the child was to subscribe to the oath of LIAN (mutual imprecation or cursing) to the effect that the child was not his and he suspected his wife to have had illicit relations with other men, See Quran 24:6; Muwatta Imam Maliki (Hadith Nos.1155 and 1156); see the procedure in Hughe's Dictionary of Islam p.293. See also MISHKAT BK 13 Chap.15. At the, end of the oath, without necessity of the intervention of the Judge making an order, the child remain the sole responsibility of the mother. See TABSIRATU AL-HUKKAM Vol.1 page 275, BADRU AL-ZAUJAINI p.207.

It must be noted that one of the grounds of appeal of the Appellant at the Upper Area Court (UAC) was that the trial Court did not allow him to call evidence. The UAC remedied this complaint and allowed him to call the witnesses that he required, which he did. Consequently, the UAC affirmed the decision of the trial Court. It is further noted that at the lower Court one of the grounds of appeal was that appellant never had sexual intercourse with the respondent throughout the 42 days period they spent together. The finding of the Sharia Court of Appeal on that issue adequately and aptly answered Appellant's contention that he had never had sexual contact with the respondent. The Court found that:

“There is nothing to relied (sic) on that he did not any (sic) any sexual intercourse with her when the Court turned to Aisha she informed the Court that had (sic) sexual intercourse several times. Therefore, the Court was convinced that he has no any right to dis-owned (sic) the child delivered.”

The findings of both Upper Area Court (UAC) and Sharia Court of Appeal (SCA) were firm and solid and cogent enough to have settled the issue of whether the child born by the respondent was conceived by her within the minimum period of gestation as a result of her marital relationship with the appellant. The Court of Appeal aptly put the issue and concluded at p .46 of the records thus:

“It is foolhardy and I think immoral, illegal, despicable, shameful and incredible under SHARIA dispensation for a person (husband) who has contracted a marriage between himself and woman (wife) and she, having spent the required minimum period of gestation in his wedlock and without him proving his inability to cohabit with her or subscribes to LIAN procedure will now turn round to disown the pregnancy conceived or child born within that period of time. SHARIA will certainly not allow that kind of cheap scape-goatism or abdication of responsibility. In Islamic Law, no one shall bear the responsibility of another (See Quran 6:164; 17:15; 35:18) Even if it is for argument sake, the appellant should note that even where it is proved that the wife so long as she remains in his marital tie, misbehaved herself and went to have sexual intercourse with another person, he (husband) and no one else shall own the child and bear its responsibility.”

The above passage sums it all. How else can the appellant escape these strong words of admonition by my Learned Justice of the Court below. Even without consideration of the Medical Report the findings of the Courts below so far makes this appeal liable to dismissal.

However, since matter like this rarely comes before us, I shall go the whole hog to explain carefully the knotty areas of Islamic law. Medical report or opinion or what is generally regarded as expert evidence is one of such areas in Sharia Law of evidence (Shahada) and very clearly laid down. For our purpose here, expert evidence is referred to as alshahada tu bil qafah. This is often the testimony or opinion which an expert gives in relation to some scientific, specialised

technical or professional matters. It is the person qualified to speak with some amount of authority by reason of their special training skill, mastery or familiarity with subject matter in question that can be allowed to give an opinion. Quran 16:43 recognises expert evidence.

It states:-

B ***“And before thee also, the Messengers we sent were but men to whom we granted inspiration: If ye realize this not ask of these who possess knowledge and wisdom.”***

C Besides, there are quite a number of Hadith of the prophet (P. B. U. H) which recognise expert opinion or evidence involving questions of techniques. Companions of the prophet (PBUH) and his followers such as AL-Lith, Bn Saad, Malik bn’Anas all recognized and relied on the evidence of experts whenever it was necessary. However, Islamic jurists are not unanimous in their views as to the application of expert opinion See Ibn Qayyum’s AL TURUQ, AL-HUKUMIYYAH D ASSIYASAH ASSHAR’IYYAH, 1996, Ibn FARHUNS TABSIRAT ALHUKKAM (supra).

E It is instructive to note that the learned Counsel for the Appellant has argued that even under Islamic law the Medical Report is relevant to show that at the time respondent got married to the appellant she was already pregnant. That at the time and date of the examination and issuance of the Medical Report on 15/2/1991, the marriage was only days and the pregnancy was certified to be 20-22 weeks old. The learned Counsel came about this conclusion from F the Verbatim account of the Appellant, reproduced herewith as his testimony:

G “I took her to Hospital at Kaduna, where they examined her and found out that she got five months pregnancy while she spent only 45 days in my house. I collected the report from the doctor for record purposes. I got worried that material time then I spent (sent) H her to Katsina and informed her parents her condition at that juncture her father asked me to wait till tomorrow as to go to hospital together when I came in the morning her father told me that he won’t go but he accompanied me with Umma to go to Katsina General Hospital with her where she was examined and found that she was pregnant, and we were directed to go to Dr, Bello Sada Clinic situated along Kofar Kwaya road Katsina this was done in the month of February, 1991, they also examined her that she was pregnant, from Dr. Bello

Sada's clinic they directed us to go to Okmos clinic as they use to abort pregnancy there I paid N20.00 for the test, there at Okmos clinic a file was opened for her, Aisha and her mother entered Doctors office when the doctor examined her he found that she has 7 months pregnancy, from there, I came back home as to know the way we are going to solve the issue somebody was telling us that his daughter was once got pregnant and she was taken to Ajiwa and the pregnancy was aborted. He then said let Aisha be taken to Ajiwa while some said lets us go back to Okmos clinic I order to abort the pregnancy there they told us if the abortion be made there is a possibility of her to die, instantly. At that juncture, I went where I gave the N300.00 her mother was asking me when should I bring her belongings, I told her anytime I came back, it was on my way back they were telling me that the pregnancy is not my own."

Of all the witnesses called by the Appellant at the Upper Area Court, none could give better account of the Medical Report apart from what the appellant informed them. The Upper Area Court received documents in examinations after the respect of the Medical evidence of PW1-, Alhaji Rabiu. The Court note reads:

"Court received the documents. The first document was a card from Okomos clinics on which Aisha's name was written dated 16/2/91, then Lumane clinic also dated 16/2/91 when (sic) name was cancelled and replaced with Aisha Ahmed, name that they examined her and found she was pregnant 20-22 weeks."

Curious enough, and unfortunately too, the U.A.C. made no reference to the so-called Medical Report in its judgment. However, in its findings the trial Court at p.4 of the Records had made the following observations:

"The defendant Tasiu refused the ownership of the baby child delivered by Aisha, he brought her back home - Katsina and divorced her, he informed the Court that he took her to hospital for several times and she was examined by different doctors whom confirmed that she was pregnant, which he relied on. What this Court observed here the Court of first instance ignored the investigation and report made by the medical doctors where the Court refused to relied (sic) on as Islamic law does not allowed (sic) to use doctor's report anyhow. With regard to this lets drop the doctors' report and rely on what Islamic Law said: see the book of TUHUFAL-WUHAMI

page 39 of paragraph 2.”

I had earlier observed that Islamic jurists are not unanimous in their views as to the application of experts opinion on some matters. Although, Imam Maliki School of Islamic Jurisprudence recognizes and relies on the evidence of experts on some matters whenever
B necessary, medical report in determining paternity is considered unreliable. The following passages translated from Arabic text in the TABSIRATU AL-HUKKAM vol. II, p.100 will attest to this statement:-

“The popular view is that the opinion of an expert cannot
C be relied upon to ascertain paternity in relation to children of free woman but (same can be relied upon) to establish paternity in case of children of a slave woman whose two masters had intercourse with her in one and the period of purity.”

Little further on the same page of the book referred to above, it is stated that:

“The child of a free woman cannot be disowned except by
D LIAN (mutual imprecation). The child of a slave woman can however be disowned without taking the LIAN oath of mutual imprecation. Disowning a child by relying upon the opinion of physiognomist is purely based on UTIHAD i.e. exertion of one’s mind. It follows
E therefore that there cannot be reliance (sic) upon something known to be pure exertion of the mind in disowning a child.”

The contents of the above passages are very clear. In the instant case, it is not shown that the respondent was a slave. There was
F therefore no need for any medical examination to establish paternity. Besides, the time when the marriage was concluded between the parties was said to be 20/12/90. Both the trial Court and the upper Area Court and, the Sharia Court of Appeal as well found that the Respondent herein delivered her baby on 5/7/91. Clearly, the baby was delivered within wedlock period of gestation. By the prophetic
G Hadith, the legitimacy of the child founded in wedlock, otherwise the adulterer is liable to stoning as punishment. The medial examination has shown that as at 15/2/91, the Respondent was 20-22 weeks. The law presumed, in the circumstance, the appellant had sexual intercourse with his wife. Where a child was born within the
H minimum period prescribed and accepted for a normal birth, going by the Islamic jurisprudence, there is the presumption of legitimacy.

In the instant case, having taken all the circumstances into

consideration, I shall apply that principle of Islamic jurisprudence. It is accepted that a child born within 6 months or 5 months and 25 days is legitimate child since the maximum period of gestation is 5 years while the minimum period is 6 months.

In the light of the unfortunate circumstances that culminated into this case, I shall say in passing, that suitors should have wide consultations and full understanding of each other during courtship. This is to avoid unpleasant and ugly circumstances that will result in the abrupt termination of their nuptial tie. Couple should look very well before they leap. Since in this case the appellant cannot substantiate any allegation of misbehaviour levied against his wife, he must live with any short-comings perceived by him.

I have no cause to interfere with the findings of the lower Courts including the Court of Appeal in refusing to act on Medical Report in question.

In the light of the foregoing, I find no merit in this appeal, and is hereby dismissed. The judgment of the Court of Appeal is affirmed. I make no order on costs. We quite appreciate the in-depth research and deep inquiries and consultations with the leading Islamic jurists in resolution of this matter by both Learned Counsel for the parties.

MUKHTAR JSC

The journey of this case began from the Area Court, Katsina, proceeded to the Upper Area Court, and the Sharia Court from which there was an appeal to the Court of Appeal. The instant appeal is from the said Court of Appeal Kaduna Division, wherein the Court dismissed the appeal of the appellant on each occasion and proceedings in these lower Courts, the decisions were against the appellant. In this appeal, only one issue for determination was distilled from the grounds of appeal, and the issue as contained in the appellant's amended brief of argument is as follows:-

“Whether the Court below was justified in granting paternity of the child in issue to the Appellant notwithstanding the fact that the marriage between the parties hereto was void ab-initio.”

The issue was adopted by the respondent in his brief of argument. The argument covering the issue has been thoroughly dealt

with in the lead judgment, and to deal with the issues would be to unnecessarily over flog the issue. All the lower Courts have in their judgments thoroughly dealt with the facts and law applicable to the matter in controversy, in accordance with Islamic jurisprudence and authorities. Their judgments are consistent and cannot be faulted. This
B appeal is against concurrent findings, which this Court is enjoined not to disturb.

I have had the privilege of reading in advance, the lead judgment delivered by my learned brother, Galadima JSC, and I
C am in complete agreement with the reasoning and conclusion that the appeal lacks merit, and should be dismissed. I also dismiss the appeal.

TABAI JSC

D I have read the lead judgment of my learned brother, Galadima, JSC. I agree entirely with his reasoning and conclusion that the appeal be dismissed and is accordingly dismissed.

RHODES-VIVOUR JSC

I read in draft the leading judgment delivered by my learned brother, Galadima, JSC. I entirely agree with it and, for the reason given, I too would dismiss the appeal. The appellant married the
F respondent on the 20th of December, 1990, and the respondent had a baby on the 5th of July, 1991. The appellant denies paternity. He says he is not the father of the child born by his wife on the 5th of July, 1991. The position under Islamic Law is that a period of six months, less five days is the minimum period of gestation. There is the presumption of regularity that a child born after six months after
G marriage is legitimate. In this case, marriage was concluded on 20th of December, 1990, while the respondent delivered on the 5th of July, 1991. The child was born after six months of marriage. The child is thus, legitimate. Accepted practice is that this Court rarely disturbs concurrent findings of fact, but would be compelled to interfere if
H satisfied that the findings are perverse, or cannot be supported by the evidence before the Court, or there is/was a miscarriage of justice or violation of some principle of law or procedure, See Cameroon

Airlines v. Otutuizu 2011 1 - 2 SC Pt.111 p.200. The findings of the Courts below are that:

(a) The marriage between the appellant and respondent is legal;

(b) The child was born in lawful wedlock;

(c) The child was born within the minimum period required; B

(d) The child is legitimate.

These are not concurrent findings but quadruple findings of facts.

These are findings by:

C

(i) The Area Court.

(ii) Upper Area Court

(iii) Sharia Court of Appeal

(iv) Court of Appeal

Quadruple findings of fact are unassailable, and this Court D would not interfere because they are true and correct findings of fact.

In the light of this and the exhaustive reasoning in the leading judgment, I too dismiss the appeal.

E

F

G

H