

# LEGAL CONSEQUENCE OF ILLEGALLY ACQUIRED PROPERTIES BY DECEASED PUBLIC OFFICER UNDER ISLAMIC LAW

By

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## ABSTRACT

Under the common law, properties illegally acquired by a Muslim while holding public office formed part of his inheritable assets after death. However, such illicit properties are excluded from the estate of a deceased Muslim under Islamic law. This paper examines the basis for the exclusion of illicit properties from the assets of a deceased Muslim. The study adopted the doctrinal method of legal research by conducting a qualitative content analysis of primary and secondary sources of materials. The primary sources include the Nigerian 1999 Constitution, Quran, hadith and the sunnah. The secondary sources include books, journals and other text such as articles from newspapers, magazines and computer aided electronic research (internet) like Westlaw International and Lexis Nexis. The paper found that the practice of excluding illicit properties from the estate of a deceased Muslim in Islam will eradicate corruption of public fund by people holding public office in Nigeria. The paper concludes that corruption by public officer is endemic in Nigeria. The paper recommends the amendment of the 1999 Constitution and other legislation in line with the Islamic practice on illegally acquired assets.

**Keywords:** Public office, Corruption, inheritance, illicit property

## 1.0.0: INTRODUCTION

This Article discusses how to establish the status of illegally acquired property and its consequence under the Islamic law. This means the instruments set up by Islamic law

for the purpose of determining illegally acquired assets without falling into the act of spying on another person without just cause.<sup>1</sup> This Article would dwell on the ways of ascertaining that a property or asset left by the deceased is pure and acceptable in accordance with Islamic law to be inheritable by the heirs of the deceased. It also examines the method approved by Islamic law to establish the nature of illegal assets and essentials of each method as a means of proving the illegalities embedded in each system. Though, Nigerian constitution does not allow criminal aspect of Islamic law to be implemented,<sup>2</sup> some states in Northern Nigeria have taken the bull by the horn by passing Islamic criminal law through their respective state houses of assembly.<sup>3</sup>

Moreover, means of proving a crime such as confessional statement of the person himself or the beneficiary of the estate or through a conviction by court by proof of evidence as recognised by the law and in accordance with the rules and regulations laid down by the Islamic law of evidence, such as by oath, by competent witness or witnesses. The proof could also be through circumstantial evidence, and through factual proof. All the aforementioned are discussed thoroughly in this paper. The essence of Islamic criminal law is for deterrent, reformation, retaliation and forgiveness<sup>4</sup> for the society to be in peace and also to rehabilitate the offender. This is done in a desirable way with a standard of evidence required by the law.

Crime in Islamic law is of two categories: (i) Public wrong, which is the wrong that affects the public peace and harmony; and (ii) Moral wrong, which is the wrong that concerns one's moral or personal effects of someone. A public wrong may affect individual's right in the society and at the same time be harmful to the society in general. This crime cannot be remedied or redressed by compensating the injured party but could have its devastating harmful effects on the society in general. It is

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<sup>1</sup> Interpretation of the Meaning of the Noble Qur'an in the English Language, p.675. see *Qur'an Al-Hujraat* (49):12.

<sup>2</sup> Section 272 CFRN 1999 as amended.

<sup>3</sup> See Zamfara State Shari'ah Court of Appeal Law No.1 Vol.2. Cap 133 Amendment Law, 2000. See also Shari'ah Court of Appeal (Amendment) Law No.13, 2001, Kaduna State.

<sup>4</sup> *ibid.* p. 46. see *Qur'an Al-Baqarah* (2):178.

sometimes referred to as a state crime. For example, killing an innocent soul is not only a crime against the deceased and his family but also against the society in general through a breach of the laws.<sup>5</sup> In such crime, any concerned person can initiate a criminal prosecution against the accused person.<sup>6</sup>

The moral aspect of punishment of crime is one which safeguards the morality of a society. Such are the acceptable moral behaviour according to Islamic law principles and violation of which call for punishment, a crime such as adultery, fornication, lewdness, drinking of alcohol, etc. are all morally wrong while moral is seen as essential part of Muslim society.<sup>7</sup>

However, before the accused person could be convicted of the offence charged, there must exist three essential elements of crime which could be simplified as follows:

1. There must be plain section in the Qur'an or Sunnah, where it is expressly mentioned that it is a crime. This is what is referred to as legal element;
2. The action which amounts to the crime must have been defined as a crime. This is also known as a substantial element of criminal responsibility;
3. The person must be certified as mature (*Mukhalaf*), sane as prescribed by Islamic law. It is also known as cultural element.

On these three conditions stated above, it is not enough that a crime be spelt out in the book of Allah and Sunnah but the punishment for such crime must be spelt out as well. Thus, punishment is always prescribed expressly when it concerns the *Hudud*, *Qisas* and *Diyat* punishment while it is left to the discretion of the judge in the cases of *Ta'azir*.

Therefore, all these means of proof are discussed as they relate to murder, hurt and *Ta'azir* as the case may be. The offence of murder is proved firstly by *Iqrar* (confession), *As-Shahadah* (Witness) and *qasamah* (Joint Oaths) 50 oaths.<sup>8</sup> The means of proving offence of hurt is always by confession. It is a crime liable to

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<sup>5</sup> Anwarullah 'The Criminal way of Islam' (Kitab Bhavan, India 2006), 3.

<sup>6</sup> Interpretation of the Meaning of the Noble Qur'an in the English Language, p.152. see *Qur'an Al-Maidah* (5):8.

<sup>7</sup> *ibid.* p.98. see *Qur'an Al-Imraan* (3):110.

<sup>8</sup> *The Criminal Way of Islam*, p.76.

*Qisas* (retaliation) but in some cases, it could also be established by testimonies of 2 adults, of sane mind an impeccable character. It could also be established through circumstantial evidence or any other means which is acceptable by the court.

## **2.0.0: CONFESSIONS BEFORE DEATH**

In Islamic law, confession is one of the most reliable means of evidence available to the litigant to establish the case against the defendant. Where a matter is before a court and both parties are present. The judge can start by asking the claimant to present his case, he then asks the defendant to reply. If the defendant admits the claim, the *Qadi* or Judge gives judgement in favour of the plaintiff and the matter is thereby closed.

Similarly, admission is a confessional statement of one's guilt and it is acknowledgement by a person binding himself of the offence charged or the allegation levelled against his person. Confession binds only the person making it and it is not transferable. So if a man makes confessional statement on behalf of another man, it is not admissible in Islamic law. Therefore, confessional statement is one of the strongest means of proof available for the establishment of defendant's guilt in Islamic law.

Moreover, confessional statement and giving testimony as witness is legal and it is encouraged in the Glorious Qur'an when Allah (SWT) says;

O ye who believe! When you deal with each other in contracting a debt for a fixed time, then write it down; and let a scribe write it down between you with fairness; and the scribe should not refuse to write as Allah has taught him, so he should write; and let him who owes the debt dictate, and he should be careful of (his duty to) Allah, his lord, and not diminish anything from it; but if he who owes the debt is unsound in understanding, or weak, or (if) he is not able to dictate himself, let his guardian dictate with fairness; and call in to witness from among your men two witnesses; but if there are not two men, then one man and two women from among those whom you choose to be witnesses, so that if one of the two errs, the second of the two may remind the other; and the witnesses should not refuse when they are summoned; and be not averse to writing it (whether it is) small or large with the time of its falling due; this is more equitable in the sight of Allah and assures greater accuracy in testimony, and the nearest (way) that you may not entertain doubts

(afterwards), except when it is ready merchandise which you give and take among yourselves from hand to hand, then there is no blame on you in not writing it down; and have witnesses when you barter with one another, and let no harm be done to the scribe or to the witness; and if you do (it) then surely it will be a transgression in you, and be careful of (your duty) to Allah, Allah teaches you, and Allah knows all things.<sup>9</sup>

Similarly, in Hadith reported by Abi Tharry, he said that the Prophet (SAW) told him that ‘Speak the truth even if it is bitter’<sup>10</sup>. However, there are conditions which must be fulfilled for the confessional statement to be admitted and binding. The confession must be direct and should not be based on future happening and should be clear and precise, free from ambiguity. It could be made orally or in written form as encouraged by the Qur’an,<sup>11</sup> which directs Muslims to make sure that their transactions by all means is reduced into written form. The admonition of the Prophet (SAW) on writing down a Will by any Muslim who has anything to will in his property not to sleep overnight before sharing the same to the beneficiaries amongst his relatives is a sign of its importance.<sup>12</sup>

Moreover, confession can also take the form of gesture, where the person making same is found to be a deaf and dumb, his confessional statement is admissible in evidence. This is the view of the majority of the jurists of Islamic schools of law. Hanafi, Maliki, Hambali and Shafi’i schools unanimously agree on this point except that the Hanafi school of law rejects confessional statement of the deaf and dumb in a matter involving criminal prosecution and punishment of *hadd*<sup>13</sup>

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<sup>9</sup>Interpretation of the Meaning of the Noble Qur’an in the English Language, p.75-76 and 140. see *Qur’an Al-Baqarah* (2): 282, *Qur’an Al-Nisai* (4): 135.

<sup>10</sup> Muhammad, M.K., *Sahih Bukhari* (Darussalam Riyadh Saudi Arabia 1997) Hadith No.1532. The Prophet was reported to have said in another narration “speak the truth though it is against your own self”

<sup>11</sup>Interpretation of the Meaning of the Noble Qur’an in the English Language, p.75. see *Qur’an Al-Baqarah* (2):282.

<sup>12</sup> *Sahih Bukhari* Vol.4 Book 51 Hadith No.1

<sup>13</sup> *Hadd* is an offence defines in the Qur’an and the punishment stipulated therein while other offences neither specifically mentioned nor its punishment stipulated is called *Al-Ta’azir* which was left to the discretion of the judge.

Furthermore, confessional statement has to be made in court if it relates to criminal case punishable with *hadd* but in all other cases, it could be made anywhere without necessarily restricted to the four corners of the court. Hence, a person making a confessional statement must be an adult and sane,<sup>14</sup> while confessional statement of a psychiatric patient is not allowed, likewise a coerced person. In the case of *Alhaji Ali Wakili v. Haruna Daudu Gumel*<sup>15</sup> where the Court of Appeal held that admission once voluntarily made binds its maker.

The court also alluded to a popular maxim that ‘Admission is a better form of evidence than calling of witnesses.’ The court stated further that ‘since the appellant had clearly made admission of the liability upon his neck, the best way for him is to redeem such liability. No more, no less’.

Furthermore, this same principle applies to a young person who has not reached the age of puberty or adulthood. The child could not make a voluntary confession. This fact is established by the Prophet’s tradition which emphasised that sin is not to be recorded for 3 persons, the one who is unconscious until he regains his consciousness, the one who is a child until he becomes adult and the one who is forced or compelled to commit crime.<sup>16</sup>

In a similar vein, the subject matter in which a person making confessional statement about should be lawful things, that is, it should not be a forbidden (*Haram*) property. It should be a valuable asset since all assets which are not lawful in Islamic law have no value and such property should be known and in existence as at the time of confession. The person making a confessional statement however, need not repeat same again once it is made. This is the views of *Maliki* and *Shafi’i* schools of law. Though *Hanafi* and *Hambali* schools of law also concur with this view but with exception that confessional statement in the case of adultery (*Zina*) should not be admitted as valid unless it is repeated four times, relying on the provision of the *Qur’an*.<sup>17</sup> In another instance, the confession of a person cannot be withdrawn. All

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<sup>14</sup> *Hamza v. Yusuf* [2013] 1 SQLR (Pt.II) 55 at 65 p.4.

<sup>15</sup> [2006] 3 SLR (Pt.1) 106 at 107.

<sup>16</sup> Ibn Majah Hadith No 2043. see also Wayb Islam ‘Sharhu Arbain Al-Nawawiyah’ (2007).

<sup>17</sup> Interpretation of the Meaning of the Noble Qur’an in the English Language, p.459. see *Qur’an Al-Noor* (24):4-6.

schools unanimously agree with this position, but if it involves the offence punishable with *Hadd*, it could be withdrawn.<sup>18</sup>

However, some scholars of *Maliki* school of law gave an exception to the general rule of withdrawal of confessional statement that if the withdrawal is for the purpose of doubt in the confessional statement, it would be allowed. Ibn Arabi also supported this view.<sup>19</sup>

Therefore, this procedure above could be used to establish the status of illegally acquired assets and thereby prevent the court from admitting the assets to probate or in other word, this principle would guide the court on the assets to be admitted in to probate according to the Islamic law of inheritance. This is because this form of evidence is a first-class evidence on which the court decision may be based and which is unanimously accepted by all the *sunni* Muslim schools of law based on the Qur'anic injunction that Muslims faithful should stand firm on justice even if it is against their interest.<sup>20</sup>

Moreover, in the case of *Alhaji Abdulkadir Sarkin Jushi Wagie v. Alhaji Tukur Jushi*<sup>21</sup> the Court of Appeal held that it is trite under Islamic law that admission/confession (*Iqrar/I'tirāf*) of a party in a proceeding need no proof as it is binding and enforceable against the party making admission/confession. The Court of Appeal followed this decision of the Supreme Court in the case of *Hada Malumfashi and Alhaji Inuwa Baba v. Hajia Gambo Baba*.<sup>22</sup>

Moreover, confessional statement should be voluntarily made and should be précise. The court in the case of *Addulummini Ibrahim v. A. Dahiru Ciroma*.<sup>23</sup> Dimissing the appeal, the Court of Appeal unanimously held inter alia that the Appellant who withdrew his claim voluntarily before the trial is a *Mukallaf*, i.e., a responsible person

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<sup>18</sup> *Minhaj Ul-Muslim* p.514.

<sup>19</sup> Ibn. Al-Arabi, '*Ahkam al-Qur'an*' (ND) 1880) vol. 4.

<sup>20</sup> Interpretation of the Meaning of the Noble Qur'an in the English Language, p.140. see *Qur'an Al Nisaai* (4):135

<sup>21</sup> [2006] 3SLR (Pt.1) 153 at 164.

<sup>22</sup> [1991] 9NWLR (Pt.214) 248 p.254 -255.

<sup>23</sup> [2007] 3SLR (Pt.IV) 149 at 153.

who is an adult and sane. He made the admission under free atmosphere and possessed full rights to dispose the property or interest at stake. Under Islamic law, great importance is laid on confessional statement because it is usually known that a person making it would not ordinarily lie against himself on something that may harm him.’

The confessional statement must also be clear and devoid of ambiguity.<sup>24</sup> All schools of Islamic law unanimously agree that an accused cannot be forced to confess or admit guilt. Ibn Al-Hazm opines that neither the Qur’an nor Sunnah of the Prophet or *Ijma’a* (Consensus of opinion) allows anyone to compel the suspects by beating, threat or using any means of torture to get his confession of the crime. However, some of the contemporary jurists of the Hanafi school of law permit coercive method to obtain confession or admission if such coercion does not inflict bodily injury on the suspect in which neither his flesh nor bone is affected. They are of the opinion that, nowadays, with the wide-scale corruption, it would be very difficult to obtain confession without some level of force during interrogation.<sup>25</sup> Though, the believers in this system of inflicting harm or injury to obtain confession from the suspect limit it to notorious suspects.

In the similar vein, confession obtained by deceit is admissible in the opinion of Ibn Hazm who argues that since no coercion is involved and no bodily harm is inflicted on the suspect in order to obtain such confession, it is valid in Islamic law. Moreover, a suspect may be compelled to make confession if the stolen property is found in his possession. His confession is admissible notwithstanding how the confession is obtained but if the property is not found in his possession, the confession is not valid due to the coerced manner it was obtained from him.<sup>26</sup>

However, if the deceased died before his confession, could any of the beneficiary of his estate make confession on his behalf? The jurists unanimously agree that a confession binds only the maker in respect of his own share of the property left by the deceased person and that nobody can confess on behalf of another person. Therefore, if the deceased confessed before he died on the status of his estate, it is binding on

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<sup>24</sup> *Hadsa v. Malumfashi* [2003] 1SCLR (Pt.IV) 1 at 5.

<sup>25</sup> Anwarullah D. ‘Principles of Evidence in Islam’ (A.S Noordeen, Kuala Lumpur 1999), 85.

<sup>26</sup> *ibid.*

him and on all the heirs and the estate could not be admitted into probate but if he did not, nobody could confess on his behalf on the status of the estate. In such a situation, the other mode of evidence is used to prove the status of the estate in Islamic law of inheritance.

However, at this point the status of the assets is determined either before or after his death. A person may make a confessional statement on the status of his assets. It is agreed in *Maliki*, *Shafi'i* and *Hambali* schools of law that a person may make extra judicial confession by two witnesses in all cases. But the *Hanafi* School of law refused the confession made outside the court. However, since we follow the *Maliki* school of law in Nigeria, a confessional statement of the deceased person is admissible if the condition is present and such confession would define the status of the deceased estate before admitting same into probate.<sup>27</sup> The practical case was Baba Aji Mamman who ordered his family and his heirs to return all the money paid to him by the Rural Electrification Board in Damanturu Yobe State during his sickness to the coffers of the Yobe State Government. It was gathered that during his sickness for 11 years, he only went to the office twice or three times a week instead of 5 days expected of a civil servant to be in the office. The family after his death complied with his order and refunded the total sum of 11million Naira being the money paid for services not rendered by him.<sup>28</sup>

### **3.0.0: CONVICTION BY PROOF OF EVIDENCE**

In Islamic law of evidence, for a man to be convicted of any offence, there must exist a condition which is known as a cardinal principle of adjudication. Though it is unfortunate that the *Shari'ah* court jurisdiction is not extended to criminal jurisdiction in Nigeria due to the provisions of the Nigerian Constitution<sup>29</sup>. However, the Islamic law principle known as cardinal principle of adjudication could be used by the Area Court and other courts saddled with the responsibilities of adjudication of Islamic criminal law by the court conferred with the jurisdiction by their respective state

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<sup>27</sup> *ibid.*

<sup>28</sup> 'Family of late Yobe State govt staff, Aji Mamman, returns N11m of unearned pay' P.M news available at [www.newnigerianpolitics.com](http://www.newnigerianpolitics.com) accessed 15 January 2022.

<sup>29</sup> Section 277 (3) CFRN 1999 as amended.

houses of assembly to use this procedure. The principles are six, and they are enumerated as follows:

*Al-qadiy*: (Competent judge), *Al- maqdiy bihi* (The applicable laws), *Al-maqdiy fihi* (Subject matter of litigation), *Al-muda'iy* (The complainant or the Plaintiff), *Al-muḍḍā'ā alayhi* (The suspect/Defendant), *Kayfiyyah* (The practice and procedures). The combination of all the above mentioned is referred to as *Arkanu –qadai* (The pillars of Justice) in Islamic law of Evidence.<sup>30</sup> These cardinal principles will be discussed one after the other.

The ways justice was dispensed in pre-Islamic period was called *Al-Tahkim* (Arbitration). This is the process of choosing an arbiter through the consent of the litigating parties to adjudicate on the dispute between the parties. In this procedure, his judgement is not absolutely binding on the parties. The other way is referred to as adjudication on the matters between parties to disputes. There are various types of administration of justice, the study can identify many ways by which justice was being dispensed in pre-Islamic era which are through *Sheikh* who were appointed because of their experience and knowledge of the local rules and customs operating within their domain.<sup>31</sup> Though, their duties were to settle disputes using the rules, and in the absence of any rules, they would apply their wisdom. They only have power to administer justice but not to impose punishment. The parties were at liberty to choose whether to be bound by the rules. A party may disagree with the final judgement. The other way identified was *a Kahin* (Diviner) which is used in the Qur'an when Allah (SWT) describes the Qur'an as not the 'word of a soothsayer'.<sup>32</sup> This system denotes using the supernatural powers to adjudicate, or having the knowledge of the hidden. When the case is referred to them, their decision is final. Another way and the last one is called *Al-Tahaluf* (Mutual Alliance). This procedure occurs where the tyrant is warned to desist from an act of oppression against the other party, in a situation where

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<sup>30</sup> The Practice of Muslim Family Law in Nigeria, p.123.

<sup>31</sup> *ibid.*

<sup>32</sup> Interpretation of the Meaning of the Noble Qur'an in the English Language, p.752. see *Qur'an Al-Haaqqa* (69): 40-42.

he refuses to desist, he may be faced by the communal punishment such as boycott or other sanctions.<sup>33</sup>

However, at the advent of the Prophet era, Islamic law prescribed the meaning, qualification, functions, characters and appointment of a judge in Islamic state. These prescriptions will be discussed in the subsequent sections.

A judge according to Islamic law is a person given a responsibility to judge according to Islamic law. The position of judgeship is a delicate one. This is because the pronouncement is enforceable by a public authority.<sup>34</sup> Despite that, Muslims are enjoined not to reject the position if appointed, since it is a collective responsibility of Muslims as it is imposed on Muslim community especially on the leader who has the responsibility of delegating the power to his subjects. The task is a religious duty imposed on all Muslims (*Fardul Kifayah*).<sup>35</sup> It is like a prayer for the dead. If a section of the community carries out the duties, it is not a sin on others who did not accept the responsibility. In the olden days, people always avoided the position of a judge. This is because of the delicate nature of its functions. It was reported that the Prophet once said that whoever is appointed to judge between the disputed parties, that person has been slaughtered without a Knife.<sup>36</sup> This pronouncement of the Prophet discouraged some Islamic scholars during the Abbasid caliphate from taking up the responsibility when he appointed Imam *Maliki bn Anas* and *An –Nu’uman bn Thabit* Imam *Abu Hanifa* as judges; both of them declined the offer based on the fact of the *Hadith* reported above.<sup>37</sup> Some Islamic scholars view accepting the responsibility of being a judge as a way leading to hell-fire.

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<sup>33</sup>*ibid.* p. 675 see *Qur’an Al- Hujuraat* (49):9.

<sup>34</sup>*Introduction to Islamic Constitutional and Administrative Law*, p.69.

<sup>35</sup>*Fardul Kifayah* in Islamic law means an obligatory act that could be carried out by some group in Islamic State, which if carried out it satisfied the presence of all Muslims who did not present in such act.

<sup>36</sup> *Imam Hafiz Abu E’isa Muhammad bn E’isa At-Trimidhi Al- Jami’I Al-Sahih Sunan –At-Trimidhi (Darul Kitab Al- Alamiyah Bairut Lebanon 1357) (2002) vol.3 Hadith 1325. Dar ul Qutniy Book of Hadith* p. 44.

<sup>37</sup>*The Practice of Muslim Family Law in Nigeria*, p.101.

However, some jurists view the decision of not accepting the responsibility as a matter taken too far and does not represent the true position of Islamic law or that of the Prophet's intention. They posit that responsibility as a judge is an enviable task which should be accorded the respect it deserves rather than relegating it to a sinful act. They equate it to a person whose Allah (SWT) bestowed with abundance wealth and should spend it in the way of Allah. It is the same with him who Allah endowed with wisdom to function as a judge among people without bias.<sup>38</sup> Based on the evidence of the early jurists turning down the position of judge, can we now say it is not befitting a Muslim to occupy that position? I believe that the position of a judge should be given to those who are qualified to hold it as stipulated by the Islamic law<sup>39</sup> bearing in mind the tradition of the Prophet who said that the judge are of three categories, two of these categories will go to hell-fire while only one of them will go to paradise. The first one is the one who knows the law but refused to apply it. The second is he who does not know the law and does not apply will also go to hell fire while the one who knows the law and applies it justly will go to paradise.<sup>40</sup>

Furthermore, qualification of a judge in furtherance of the discussion above should be restricted to *Shari'ah* Court. This is because it is only *Shari'ah* Court that is saddled with the jurisdiction of adjudicating in matters involving Islamic personal Matters in Nigeria.<sup>41</sup> Therefore, the qualification of a judge is as stated in the constitution of the Federal Republic of Nigeria.<sup>42</sup>

Generally speaking, qualifications of a judge under Islamic law include but not limited to the fact that the person should be a Muslim, free-born (*Huran*), Adult (*Mukallaf*) and of sound mind (*'Aaqillan*). A judge to be appointed must be a Muslim, though, this qualification has not been considered by the Nigerian law, as people hardly differentiate between Islamic law and Arabic. While Arabic is a lingua franca,

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<sup>38</sup> Ali bn. Abdulsalam, At-Tasuli 'Al –Bahjah, Commentary on Tuhfah' (Mustapha Al-Babi Al-Halabi & sons. Cairo 1951) Vol. 1 P.13.

<sup>39</sup> *Introduction to Islamic Constitutional and Administrative Law*, p. 70.

<sup>40</sup> Al- Jami'I Al-Sahih Sunanul –Trimidhi Hadith No. 782. see also Al-Amir, M.I., *Subul al-Salam Sharh bulugh al-muramy*, (*Dar Ihya Al-turath al- Arabi*, Beirut, 1966), Vol. iv, p.115. Hadith 3568.

<sup>41</sup> See sections 262 and 277 of the Constitution of Federal Republic of Nigeria 1999 as amended.

<sup>42</sup> *ibid.* See sections 261 (3)(a)(b)(i)(ii) and 276 (3)(a)(b)(i)(ii)

to study, *Shari'ah* is not a prerogative of Muslim alone as non-Muslim could study Arabic as a language and have vast knowledge of Arabic without being a Muslim. In this regard, how would a person who does not believe in the law apply such law correctly and justifiably? This is absurd.

Moreover, there are different opinions on the fact that a female could be appointed a judge. This is the opinion of *Maliki* School of law while Hanafi school of law supports the appointment of a female judge. They relied on the attribute of leadership demonstrated by Queen *Balkis* in the *Qur'an*.<sup>43</sup> However, the office of a judge should be reserved for the those who have the qualities of that office, e.g., knowledge, wisdom and piety. If these three qualities are combined in a person, such person is qualified to be appointed a judge.<sup>44</sup>

Furthermore, the other aspect of the cardinal principle of adjudication is the applicable laws. This comprises the applicable laws in existence at the time the offence or infraction is committed. However, in relation to the laws operational on the Muslim Estate which is Islamic personal law of that State,<sup>45</sup> it is the law of that State that is applicable in such circumstances. Therefore, all the sources of Islamic law are applicable laws here with emphasis on the primary sources, which is the Qur'an and the Sunnah of the Prophet, followed by the consensus (*Ijma'a*) the analogical deduction (*Qiyas*), Public Interest (*Al-Maṣāliḥ al-Mursalah*) practices of the Companions (*Aqwalu Sahabah*) and the followers of companions of the prophet (*At-Tabi'u'un*) and the jurists of Islamic schools of law, whichever is applicable in the jurisdiction in which Islamic law is sought to be applicable, and striving in order to get the intendment of the law (*Ijtihad*). It also includes the Penal Laws of each state that applies Islamic Law in their jurisdiction. All these laws are applicable in determining the legality and inheritability as well as status of the deceased estate in Islamic law.

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<sup>43</sup>Interpretation of the Meaning of the Noble Qur'an in the English Language, p.561. see *Qur'an Al-Sabai* (34):15.

<sup>44</sup> Aliy bn Abdulsalam At-Tasali 'Al-Bahjah, Commentary on Tuhfah' (Mustapha Al-Babi Al-Halabi & Sons, Cairo 1951) p.20.

<sup>45</sup> Kwara State Property Laws.

Similarly, the third category in this principle is the subject matter of litigation, i.e., the estate of the deceased Muslim to be inherited. It is important that the estate which is the subject of litigation should be in existence at the time of litigation and it should not be a forbidden (*Haram*) property. If the subject matter of the claim is money, it must be precise and the amount must be stated, if it is a land, the exact description of the land, boundaries and location must be specified in order to allow the court to arrive at just conclusion in the judgement.<sup>46</sup>

Moreover, the fourth aspect of these principle is the Claimant. This is also referred to as Plaintiff in some jurisdiction as well as the complainant in criminal matters. For the purpose of this article, the claimant in this case could be said to be a whistle blower, the Agency of government such as Economic and Financial Crime Commission (E.F.C.C), Independent Corrupt Practice Commission (I.C.P.C), etc. The claimant in this circumstance must have interest in the property being claimed. This could be through representation or by personal interest. Therefore, the representative of government or government agency saddled with the responsibility of recovery of stolen and embezzled assets could at any rate be the claimant or the prosecuting authority and could take action on behalf of government and people of Nigeria. This principle is in tandem with the *Sunah* of the Prophet (SAW) when it was reported that the Prophet said:

‘All of you are shepherd and you are to be questioned on how you direct the affairs of your flocks’<sup>47</sup>

In addition, the fifth one is the Defendant who is the person accused of infringement or misappropriating the public fund. He could be a government agent or an employee of the government. In this study, the defendant would include a person whose estate is the subject of litigation. In this situation, he may have confessed misappropriation during his life time or the beneficiary of his estate may have admitted liability. In any of such cases, it would be treated as admission or confession and it is admissible with

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<sup>46</sup> Salih Abdulsami’i Al-Azhariy ‘*Jawahirul Ikliil, Sharh Muktasar ul-Khalil*’ (Darul Fikr, Lebanon ND), 226.

<sup>47</sup> Jāmiu At-Trimidhy Kitabu Al-Jihad Hadith No.1705. see also Zarqani M., *Sharh uz-Zarqani Ala-Muata Imam Maliki*, (NP) (Cairo ND), vol. 3, Hadith 123 An-Nawawys. P.160.

all intent and purpose in Islamic law, while the claimant needs no proof to establish his case.<sup>48</sup>

Moreover, another item is the procedure of claiming a right in Islamic law but for the purpose of this article, the study will discuss the practice and procedure as it relates to a deceased public officer. It is trite under the *Maliki* School of law that a person can make a claim against the deceased by taking an oath after the production of evidence.<sup>49</sup> However, the issue of oath and its admission as well as how the evidence is tendered and admitted in Islamic law are discussed in this article.

Obviously, it is trite in Islamic law principle that the onus of proof is on the claimant while the oath is on the defendant. This principle is based on the tradition of the Prophet that if people's claims are accepted on their face value, some people would claim other people's blood and property. But the onus of proof is on the claimant while the oath is incumbent on him who denies.<sup>50</sup>

In Islamic law, *As-Shahadah* is known as evidence while *Al-Bayyinah* is known as proof. Therefore, the highest form of evidence generally acceptable to all the jurists of Islamic schools of law is confession and admission which are known as *Iqrar/I'tirāf* as discussed earlier in section 4.1.0 page 131 of this thesis

However, evidence in Islamic law is described as clear information given by an eye-witness based on his personal knowledge. This type of evidence is encouraged by the Qur'an.<sup>51</sup> Evidence in Islamic law is so significant to the extent that it is wrong for a judge to adjudicate based on the facts within his personal knowledge except with the aid of evidence.<sup>52</sup> This evidential laws is the most preferable in Islamic law as the Prophet (SAW) warned Muslims that no witness should give false testimony on any

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<sup>48</sup> *Alhaji Ali Wakili v. Haruna Daudu Gumel* [2006] 3 SLR (Pt.1) 106 at 107.

<sup>49</sup> *Aisha M Kotangora & Ors v. Hajiya Ladi Kotangora & 10 Ors* [2014] 2 SQLR (Pt. iii) 427 at 430.

<sup>50</sup> Sahih Muslim Book 18 Hadith No. 4244. see Al-Asqalani H.B.H, '*Bulugh Murami, Min Adilati-Al-Ahkaami*' (Mustapha Al-Bany & sons Cairo 1351) 178.

<sup>51</sup> Interpretation of the Meaning of the Noble Qur'an in the English Language, see Qura'an Al-Nisai (4):135 p.131.

<sup>52</sup> *Munhajul-al-Muhmin* p. 513.

fact except that person finds himself in the hell fire in the day of resurrection.<sup>53</sup> The Witness should make sure that the facts is within his personal knowledge by means of what he sees , hears, smells, touches and perceives. This stance is based on the facts that, specifically a witness should make sure the facts in issue is as clear as the sun rays before giving testimony on it. The prophet (SAW) then advised him to make sure the evidence is clear as the sun before giving testimony on any matters, otherwise he should refrain from it.<sup>54</sup>

Evidence in Islamic law is classified into 5 categories, these are cases where four witnesses are required by the law before the evidence could be admitted, these are applicable in cases of adultery, fornication and other matters related to it.<sup>55</sup> The second one is where the law requires two male witnesses as in the matter that involves personal status like claim of consanguinity, marriage, fixed punishment and retributive punishment. The third category is where two female witnesses are allowed such as in the matter that involves gynecological issues which is peculiar to womenfolks. The fourth category is where expert witness opinion is required, such as where the medical, chemical or mechanical expert is the only witness to the issue in question. Expert opinion is admissible in such a situation. However, *Maliki* school of law admits the evidence of one witness who is an expert in that field as enough for conviction. The fifth category is an evidence of a male and two female witnesses<sup>56</sup> or a male witness with an oath.<sup>57</sup> This applies to such cases as financial liability and loans and property cases.

However, the last category is relevant to our discussion in this article, which involves the issue of the estate of the deceased which is being tried to ascertain the status of his wealth under the Islamic law of inheritance due to the circumstance surrounding how such estate was acquired. In this regard, a witness is required to prove the case of fraudulent acquisition against the defendant. While we are concerned about the

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<sup>53</sup> Sunan Abu-Dawud Kitab Al-Aiman wa An-Nudhur. Hadith No.3236

<sup>54</sup> *ibid.*

<sup>55</sup> Interpretation of the Meaning of the Noble Qur'an in the English Language, p.459. see *Qur'an Al-Noor* (24):4.

<sup>56</sup> *ibid.* p.75-76 see *Qur'an Al-Baqarah* (2):282.

<sup>57</sup> *Minhaj Muslim* p.514.

competency of a witness, it is also important to have recourse to the types of witness required in the case.

Typically, Islamic law places a great burden on a witness to prove any case. He should have some qualities such as being a Muslim, sane, adult, just and not a tainted witness.<sup>58</sup> All these qualities are required to be possessed by a witness testifying on behalf of the claimant in Islamic law. *Imam Al-Sayuti*<sup>59</sup> posited that a witness may testify on twenty-two grounds if he is certain in his evidence. They are consanguinity, death, marriage, divorce, guardianship, headship of a community, breastfeeding, punishment of spouse, gift, former drunkard, *waqf*, probity, Islam, disbelieve, guidance of imbecility, pregnancy, parentage, will, trust, character, freeborn person and Oath. In all these situations mentioned above, it is manifestly right for a witness to testify to the fact of the matter if he witnessed the incidence by means of hearing it.<sup>60</sup>

Moreover, a witness may be Muslim or non-Muslim, there are differences of opinions among the jurists of the Islamic schools of law about the admissibility of testimony of a non-Muslim witness. According to *Hambali* school of law, a non-Muslim could be a witness in all cases relying on the verse of the Qur'an<sup>61</sup> which does not discriminate on the religion of a witness, while majority of Hanafi, *Maliki* and *Shafi'i* schools of law are of the opinion that the evidence of non-Muslim is not admissible. They relied on the Qur'anic verse<sup>62</sup> where Allah (SWT) mentions those who believe in Allah and later counter the *Hambali* school of law position that the particular verse referred to by them had been abrogated. However, the Hanafi school of law added that evidence of a non-Muslim is only admissible against a non-Muslim.

Since we are in a multi-religious country, to infer that a non-Muslim evidence against a Muslim is not admissible could not be appropriate. This is because the prevailing

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<sup>58</sup> *ibid.*

<sup>59</sup> Jalaludeen, A.S.A.S. '*Al-Ashbahu Wal- Nathair*' (Al-Qudus Publication Cairo 2011),724.

<sup>60</sup> *ibid.*

<sup>61</sup> Interpretation of the Meaning of the Noble Qur'an in the English Language, p. 173. see *Qur'an Al-Maidah* (5):106.

<sup>62</sup> *ibid.* P.737. see *Qur'an Al-Talaq* (65):2.

corruption in the country and the effort of the government agencies in curbing corruption would not make any progress. Therefore, as Muslims, we are free to choose between the four basic *Sunni* schools of Islamic law, adopting the opinion of *Hambali* school of law would be safe and would enhance the achievement of the Federal Government objective in using this method to fight endemic corruption in Nigeria.

However, relating this fact to the matter under discussion in this article, a claimant who claims that the defendant's estate is as a result of proceed of corruption should produce evidence that such estate is not to be admitted to probate in Islamic law. At this juncture, the status of the assets of the deceased person is determined.

### **1.3.0: AL-YAMIN (OATH)**

The second mode of testimony in Islamic procedural law is by oath, (*Al-Yamin*), which is divided into four categories. One is oath of denial which is the oath expected to be taken by the defendant in a case where the plaintiff could not establish prima facie evidence against the defendant. In such case, if the defendant refuses to take the oath, the plaintiff would be asked to take such oath and the judgement would be entered in favour of the plaintiff. The second category is known as Oath in support of evidence (*Yamin Ma'a Shahid*), which is recommended for a plaintiff to support his case in a situation where he fails to prove his case at the balance of probability or by supplying the number of witnesses required by the law. This type of oath is also referred to as oath of perfection (*Yamin Ut-Takmilah*). The third category of oath is required where the defendant is being suspected of having committed an offence which no one or no witness is able to give cogent evidence to link the defendant with the offence charged. In such case, the defendant is required to take the oath of exoneration (*Yamin Tuhmah*).<sup>63</sup> If taken, the case would be dismissed against him and would be discharged and acquitted but where he refuses to take the oath, he is presumed to be guilty of the offence as charged. The fourth and the last in this category is the oath taken against the deceased person. This is called *Yamin Al-Qādiy*. This is directly related to our discussion in this research. However, Islamic law does not allow just a required witness in any case as the case may be. In the case of a

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<sup>63</sup> *Sharh Az-Zurquany Ala Muwata' Imam-Al-Aimat Wa'alim Al-Madinat Imam Malik Bn. Anas*'p.125.

deceased person, after satisfying all the requirements of Islamic law as related to the evidence, it is a requirement of Islamic law that the plaintiff or a claimant claiming a right in the estate is required to take the oath of assurance after which the judgement would be entered in his favour and such estate could be adjudged the proceed of crime which is liable for confiscation by the authority according to the Islamic law.<sup>64</sup> Oath taking is part of evidence in Islamic law. The hadith '*Al- Bayyinat al- mudda'iy wa al-yamin 'ala man ankar*'. This hadith becomes a universal legal maxim which means the onus of proof is upon the plaintiff and if he fails to prove his case, the defendant should take the oath to clear himself. In the above scenario, the plaintiff may be government agencies such as EFCC, ICPC and others as the case may be while the defendant may be beneficiaries of the estate or heirs.

In the case of *Maigari & ors v. Bida*,<sup>65</sup> the court held inter alia that explaining the meaning of *YAMIN-UL-KALAL* (Oath of absence) as a situation where the plaintiff claims a debt against a deceased person or a person who is away and after establishing the claim by calling two unimpeachable witnesses, he would be required to take the oath in addition to the two witnesses in the absence of the debtor. In all the procedures, the distributors of estate are saddled with the authority of making enquiries on the viability of the asset before distribution.

#### **4.0.0: CIRCUMSTANTIAL EVIDENCE (*QARINATU AL-HAL*)**

Circumstantial evidence is another way of ascertaining a claim under the Islamic law of evidence. The word is called *Qarain* in Arabic which translates to mean a situation that suggests an incident did or did not take place.

The basis of circumstantial evidence took its root from the holy *Qur'an* where Allah (SWT) was narrating the incidence of Prophet *Yusuf* to Prophet *Muhammad* in the *Qur'an* as follows:

And they both raced to the door and in the struggle, she tore his shirt from behind and they met her husband at the door and a witness of her own family bore witness: if his

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<sup>64</sup> The Rightly Guided Caliph & Great Reviver 'Umar Bin 'Abd Al-'Aziz, p.173.

<sup>65</sup> [2001] LPELR 7024 (C.A).

shirt is rent from front, she speaks the truth and he is one of the liars. And if his shirt is rent from behind, she tells a lie and he is one of the truthful.<sup>66</sup>

In the incident reported in the verses of the *Qur'an* above, the circumstantial evidence was used to prove that *Yusuf* was innocent of the crime which he was accused of because of the place where his cloth was torn supports the facts of his innocence. Therefore, the tradition of the Prophet also supports using circumstantial evidence as real evidence and admissible; alluding to where he advised a founder of a lost property to go to the market to announce the content of the lost and found property, its containers and full description of the property for a term of one calendar year.<sup>67</sup> In that circumstance, the description of the lost and found property becomes the probable evidence (*mazanatu*) because market is overt and conspicuous place for publicity and far reaching for its return. This development is also emphasised by *Sayyid Sabiq* when he averred that the founder of the lost property should give the description of its containers, types, values and all related matters that distinguished it from its kinds.<sup>68</sup> This tradition of the Prophet (SAW) as stated in the book of authentic *Ahadith* makes it legal in Islamic law to use circumstantial evidence.

In a similar case, the Islamic jurisprudence made some inputs on the use of circumstantial evidence as a means of proving a case against anybody. In the contemporary world of Islam, it is possible for anybody to use media such as Radio and Television to find the owner of the lost property. This is what is called probable evidence (*mazanatu*) because Radio and Television are enough for publicity and far reaching. The owner may be requested to describe the said lost property which he claims. It also normal to use circumstantial evidence of odour from the mouth of a person who was accused of drinking alcohol while pregnancy is used as circumstantial evidence against a single lady accused of an offence of fornication (*Zina*).<sup>69</sup>

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<sup>66</sup>Interpretation of the Meaning of the Noble Qur'an in the English Language, p.308. see *Qur'an Al-Yusuf* (12):25-27.

<sup>67</sup> Sunan Abu Dawud Hadith 1710.

<sup>68</sup> Sahih Bukhari, ASahih Muslim, Ibn Majah, Abu Dawud , At-Trimidhi and An-Nisai.

<sup>69</sup> The Practice of Muslim Family Law in Nigeria, p.181.

Circumstantial evidence could be inferred by the court *suo-moto* when it appears that all the circumstances surrounding the events in question is in favour of the person claiming the right. However, in the case of *Amudatu Adunni v. Fasasi Atanda*,<sup>70</sup> the Appellant before the Kwara State Shari'ah Court of Appeal, Ilorin was plaintiff at the Area Court 1, Ilorin to claim N930.00 as damages from defendant/respondent for using acid water to destroy her belongings. As she did not have any witness to support her allegation, the trial court dismissed her claim. On appeal to the Upper Area Court, the court gave judgment in favour of the plaintiff/appellant. Dissatisfied with the judgement, defendant/respondent appealed to Shari'ah Court of Appeal. The court agreed that plaintiff/appellant did not prove the allegation against the defendant/respondent. It however, imposed the oath of exoneration (*Yamin Tuhmah*) on the defendant/respondent because the court observed that there was a valid marriage between them and that the incident happened when she wanted to divorce him. The court also found that the incident happened where the defendant/respondent was dwelling and at the time when the plaintiff/appellant was not around. The room where the damaged cloths were was forced opened and that the cloths were destroyed as a result of acid water poured on the clothes and that the defendant/respondent was a commercial driver.

Moreover, the *Shari'ah* Court of Appeal based its decision on the facts that the Defendant/Respondent who was accused of destroying the property of his wife with acid. The court relied on the facts that the respondent is the husband of the appellant who has the key to where the property was kept and also that he, being a taxi driver, has unfettered access to acid from the battery of his car coupled with the facts that he refused to take an oath of exoneration. The combined effects of the highlighted circumstantial evidence prompted the *Shari'ah* Court of Appeal to hold the view that the judgement of the Upper Area Court asking the respondent to pay the sum of N936.00 as damages for the property destroyed is valid.

Another instance of application of this principle of circumstantial evidence is the case of a man who was at level 7 or level 10 in the state ministry, department or parastatal;

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<sup>70</sup> *Amuda Adunni v. Fasasi Atanda* (Unreported)KWS/SCA/CV/3/84.

who earned less than a million in a year with a N150 Million worth of property.<sup>71</sup> The prosecutor stated that:

The investigation further revealed that the respondent who is a civil servant that earns less than one hundred thousand naira in a month cannot afford to build the house known as *Asmau Plaza* between 2010 and 2012.<sup>72</sup>

The status of the said asset was determined at that stage. However, not all the jurists of the Islamic schools of law accept circumstantial evidence as good evidence to convict in Islamic law. These jurists based their decisions on the prophetic tradition and interpretation of ‘the onus of proof lies on the plaintiffs’ in which they restricted the word *Al-Bayyinah* (proof) to eye witness alone which does not cover any other thing like signs, incidents and circumstances that may further prove or disprove a fact.

On the other hand, some jurists of *Hanafi*, *Maliki* and *Hambali* schools of law accept the circumstantial evidence as tangible and admissible evidence which is suitable for conviction. Some scholars like *ibn Farhun*<sup>73</sup> of the *Maliki* school of law, *Ibn Hajar*<sup>74</sup> of *shafi'i* school of law and *Ibn Al-Qayyim*<sup>75</sup> of the *Hanbali* school of law are unanimous in their opinions that circumstantial evidence is admissible in Islamic law of evidence to prove the guilt of an accused person.

Furthermore, in using circumstantial evidence for conviction, the said evidence should be conclusive evidence. This is because Islamic law does not prohibit evidence such as marks, incidents that link the matters together, documents or testimony of a perfect witness in order to prove the guilt or otherwise of a person but it must be conclusive evidence.<sup>76</sup>

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<sup>71</sup> Okoroafor, C. ‘Court orders forfeiture of Kwara civil servant N150 M property’ *The Nation* (Nigeria 28 May 2020) <http://thenationonlineng.net> accessed 28 May 2020.

<sup>72</sup> *ibid.*

<sup>73</sup> Ibn Farhun, ‘*Tabsiratul-Hukam in Fathul al-Malik* (Dar-Fikr), 202.

<sup>74</sup> Hajar, A.A. ‘*Fathul.Baary commentary on Sahih Bukhari*’ (Dar-al-Ma’arfah Lebanon), 160.

<sup>75</sup> *Fiqhul –Sunnah* p. 22.

<sup>76</sup> *The Practice of Muslim Family Law in Nigeria*, p.187.

### **5.0.0: CONCLUSION**

This article centres on ascertaining the status of illegally acquired property under the Islamic law. Topical issue such as conviction through confession, proof of evidence which could take a form of oath and witness as well as circumstantial evidence constitute the focus of this article. Therefore, anybody convicted through any of the process discussed above should have the property in question forfeited by the authority and if the person dies the property cannot be inherited by his heir.