

**SUPREME COURT OF NIGERIA**  
FRIDAY 11TH APRIL, 2014. SC. 373/2011  
**CORAM:- S. GALADIMA, B. RHODES-VIVOUR,**  
**N. S. NGWUTA, K. B. AKA'AH, J. I. OKORO, JJSC**

JOSEPH ADELU ..... APPELLANT  
V.  
THE STATE ..... RESPONDENT

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MURDER - Defence - Consideration of - Court must consider all defence available to an accused charged with murder - Whether or not such defence is specifically put up by him (H1)

CRIMINAL PROCEDURE - Insanity - Proof - Accused who put up the defence - Must show that he is suffering either from mental disease - Or from natural infirmity (H2)

MURDER - Insanity - Proof - Court may accept evidence of insanity from family history - Conduct of accused immediately preceding the killing - And finding of medical officer who examined accused (H3)

MURDER - Conviction - Validity - As appellant suffered from insanity at the time of committing the murder - His conviction and sentence cannot stand (H4)

**FACTS**

Before the High Court of Ogun State, accused/appellant was arraigned for murder. Appellant prior to the ugly incident was a barber by profession. He suddenly became agitated on a day and insisted on going home to meet with his parents in his village. Upon his arrival at the village, appellant displayed certain abnormal behaviour. It was reported that appellant was seen moving along the village with cutlass. In a bid by some villagers to retrieve the cutlass from him, appellant dealt several cutlass blows on some persons including his younger sister, who later died as a result of injuries sustained from the cuts. The attack on the persons was without provocation and no visible reason was given for the violent act.

Appellant was eventually arrested and arraigned before the

court. At the trial, prosecution/respondent presented its case against appellant. However, the defence counsel failed to raise the defence of insanity in favour of appellant. In his judgment, the learned trial Judge did not consider the defence of insanity. He went ahead to hold that respondent has proved its case beyond reasonable doubt. Consequently, appellant was convicted and sentenced to death by hanging. Aggrieved, appellant appealed to the Court of Appeal Ibadan Division. The court affirmed the judgment of the trial court and dismissed the appeal. Aggrieved further, appellant appealed to Supreme Court, appearing with a different counsel.

**ISSUE FOR DETERMINATION**

*“Whether there is sufficient evidence on record to sustain a finding of insanity and an acquittal of the Appellant.”*

**HELD** (Unanimously allowing the appeal per

**GALADIMA JSC)**

*MURDER - Defence - Consideration of*

**1. However, the fact that the appellant killed his junior sister indeed is not in dispute. This is a finding of fact concurrently established by the two Courts below. That notwithstanding, I must say that the two courts failed to properly consider defence of insanity raised by the Appellant. This court has decided in a number of cases that a court has a sacred duty to consider all defences available to an accused charged with murder, whether or not such defences are specifically put up by him.** (p. 3532 B)

*CRIMINAL PROCEDURE - Insanity - Proof*

**2. I have critically analysed the foregoing pieces of evidence. These pieces of evidence create doubt on the soundness of the mind of the Appellant, which negates the conclusion of IKYEGH JCA in his lead judgment that the pieces of testimony of the witness confirmed “the presumption of sanity or soundness of mind under section 27 of the Criminal Code Law of Ogun State.”**

**It has been stated in a number of decisions of this court**

***that an accused person who has put up defence of insanity must show that he is suffering either from mental disease or from natural infirmity.*** (p. 3536 B)

*MURDER - Insanity - Proof*

***3. As I have already observed, there was overwhelming evidence in the prosecution's case, through the evidence of PW2, PW3 and PW4 indicative of Appellant's mental abnormality and imbalance. The relevant period is the time of doing the act or making omission but the state of mind is not always provable by direct, positive evidence. Invariably, it is a question of inference from other facts proved in evidence. Thus the court may accept evidence of insanity from family history; evidence of conduct of accused immediately preceding the killing and finding of medical officer who examined the accused after the event if that finding is consistent with earlier evidence of insanity.*** (p. 3536 F)

*Conviction - Validity*

***4. The evidence of some of the family members in this case suffices to conclude that the Appellant suffered from a disease of the mind at the time of committing the offence. In the circumstance, I shall allow this appeal as it succeeds. The conviction and sentence of the Appellant by the trial court cannot stand. The judgment of the Court of Appeal which affirmed the conviction and sentence of the trial court is hereby set aside.*** (p. 3537 B)

## NOTABLE POINT OF INTEREST

### **RHODES-VIVOUR JSC**

***1. Defence counsel must explore all options available to accused***

Turning to the defence counsel I must observe that it is the duty of counsel representing an accused person, especially one facing a capital offence to use all resources at his disposal, by that I mean his knowledge of the Law to ensure that the accused person has the best defence possible. For counsel not to put forward the defence of in-

sanity on these facts is unbelievable. It is clear that the defence was handled in a shoddy manner devoid of seriousness, and this attitude is condemned in the strongest terms. This fortunately is not the case with learned counsel for the respondent, Mr. J.M.M. Majiyagbe. On 23/1/14 we heard this appeal and fixed judgment for 11/4/14. At conference we ordered a rehearing for 6/2/14 for counsel to address us on the sanity or insanity of the appellant. At the hearing, learned counsel for the respondent, observed that the appellant did not have the best services he could have had. He urged this court to set aside the judgment of the Court of Appeal and discharge the appellant. Learned counsel for the respondent, J.M.M. Majiyagbe has by his observation demonstrated the high standards expected of counsel at the bar. I commend him. Counsel for the prosecution, once satisfied that there is really nothing to urge in favour of the judgment of the court below owes this court a duty to boldly say so, thereby keeping the streams of justice pure, with the resultant effect that the reasonable man would applaud the courts for doing substantial justice, and that would be very good for the judiciary. (p. 3539 H)

**E REPRESENTATION**

Musibau Adetunbi Esq (with him: T. Y. Oke Esq; R. O. Muraina (Miss) and I. T. Idowu Esq) for Appellant.

J. M. Majiyagbe Esq (with him: S. Madagwu Esq) for Respondent.

**F CASES REFERRED TO**

Enitan v. State (1986) 3 NWLR (pt. 30) 604

Arum v. State (1979) 11 SC 58

Ejinima v. State (1991) 6 NWLR (pt. 200) 627

G Oladele v. State (1993) 1 NWLR (pt. 269) 294

Ukadike v. State (1973) 6 SC 14

Agbi v. Ogbah (2006) 11 NWLR (pt. 990) 65

Olalomi Ind. Ltd. v. NIDB Ltd. (2009) 12 NWLR (pt. 1167) 266

Loke v. State (1985) 1 NWLR (pt. 1) 1

H Yusuf v. State (1988) 7 SC (pt. 11) 175

Uwaehinya v. State (2005) (pt. 930) 227

State v. Akinbamiwa (1967) NMLR 355

William v. State (1992) 8 NWLR (pt. 261) 515

R. v. Fadina (1958) SCNLR 250

Udofia v. State (1984) 12 SC 139

Onuchukwu v. State (1998) 4 NWLR (pt. 547) 576

**STATUTES REFERRED TO**

Criminal Code, ss. 27, 28

Evidence Act 2011, s. 135(1)

B

**LEAD JUDGMENT BY GALADIMA JSC**

This is an appeal against the affirmation of the conviction and sentence to death of the Appellant by the Court of Appeal; Ibadan Division, in its judgment delivered on the 26<sup>th</sup> day of May, 2011. C

The basic facts of this case which led to the trial of the Appellant for murder, borne out of the records, are set out as follows: The appellant who had a strong sense of vocation of being, a barber was undergoing apprenticeship under his first cousin, one Timothy Abioro at Odogbolu, in Ogun State of Nigeria. By 19<sup>th</sup> July, 2003, he became agitated and insisted on being taken home to join his parents at a village called Agada.

After much insistence, Timothy Abioro obliged him and took him to the village on the 22<sup>nd</sup> day of July, 2003. Shortly after their arrival, the appellant displayed strange behaviour. He was seen brandishing a cutlass and this act forced people in the village to run helter skelter for safety while some tried to wrest the cutlass from the Appellant. In the process he dealt a cut on Timothy Abioro and shortly after dealt several cutlass blows on his junior sister, Miss Dorcas Adelu, who later died as a result of the cuts. His mother, who was also inflicted by the cutlass blows, narrowly escaped death. F

The learned trial judge in his judgment agreed with the prosecution counsel that the charge of murder had been proved against the appellant beyond reasonable doubt. He did not consider defence of insanity. As earlier stated, the trial Court convicted the Appellant for the offence of murder and sentenced him to death by hanging. The Court of Appeal in its judgment also affirmed the conviction and sentence imposed on the Appellant by the trial Court and consequently dismissed the Appellant's appeal. H

Dissatisfied, the Appellant has further appealed to this Court against the judgment of the Court of Appeal Ibadan Division delivered on 26<sup>th</sup> day of May, 2011. In his Notice of Appeal, he set out

two grounds, shorn of their particulars thus:

*“1. The learned Justices of Court of Appeal erred in law when they held that defence of insanity is not available to the accused person.*

*2. The learned Justices of Court of Appeal erred in law when they affirmed the conviction of the accused Person for the offence of murder.*

In the brief of argument filed on 14/5/2011 but deemed filed on 21/11/2012, the Appellant’s Counsel, *MUSIBAU ADETUNBI Esq.* formulated two issues as follows:

*“1. Whether the Court of Appeal was right in affirming that there was no evidence before the trial Court to avail the appellant of defence of insanity.*

*2. Whether the Court of Appeal was right in confirming and affirming the conviction and sentence of the appellant by the trial Court.”*

On the other hand, the learned Counsel for the Respondent, *M. M. Majiyagbe Esq.* in his brief filed on 3/10/13 formulated a sole issue for determination thus:

*“Whether there is sufficient evidence on record to sustain a finding of insanity and an acquittal of the Appellant.”*

On 23/1/2014, we took this appeal and scheduled a conference on 29<sup>th</sup> January, 2014, to consider our judgment. In the course of that conference we found and agreed that the thrust of the Appellant’s appeal is that evidence of insanity before the Court below should have propelled the Court to set aside the conviction of the Appellant and sentence. In the circumstance we deemed it necessary to further invite the learned counsel in this appeal to address this Court on the issue of the said defence of insanity, the said issue having been raised suo motu, by this Court.

In the light of the foregoing on the 6<sup>th</sup> day of February 2014, the respective counsel in the appeal having been so invited adequately addressed this court on the issue of whether there was sufficient evidence on record to sustain a finding of insanity and an acquittal of the Appellant. In the circumstance, in determining this appeal, I am of the respectful view that the sole issue formulated by the Respondent and the relevant arguments and submissions of the respective Counsel in their brief and those proffered at the invitation of this

Court, shall be well considered.

In his argument in support of the issue of whether the Court of Appeal was right in affirming that there was no evidence before the trial Court to avail the appellant of defence of insanity, learned counsel for the Appellant M. Adetunbi Esq. has made the following submissions. Firstly, that the strategy of not calling evidence in defence of obvious insanity adopted by the learned counsel at the trial of the appellant put him in a serious disadvantage and deprived him of not getting justice, which he would have got had he been able to secure the services of a more capable and a diligent counsel. It is contended that the two Courts below failed to appreciate inferences from the totality of evidence led at the trial, although the court of Appeal could just barely consider the defence of insane delusion only and yet came to the conclusion that the defence is not available to the appellant. He placed reliance on the commendation by Oputa JSC, of a Senior Counsel; AKINRELE SAN in the case of ENITAN v. THE STATE (1986) 3 NWLR (Pt 30) 604 at 612, who really knew when not to hit his head against a brick wall, where there is obvious defence in a case. It is therefore contended that from the evidence led at the trial the prosecution clearly knew that appellant put up two sets of delusions namely:

(1). *The fact that he saw a “red doll” and thereby creating an impression that he was matcheting a “red doll” and he believed he inflicted matchet cuts on it.*

(2). *That a spirit directed him to go out to kill.*

Relying on the classical case of ARUM v. STATE (1979) 11 SC 58, on insane delusion, learned Counsel has submitted that it was apparent that the Appellant in this case saw a red doll and the spirit directed him to go and kill it. Thus there is no dispute whatsoever that the Appellant killed the deceased. However, that notwithstanding, it is submitted that the Court below duly considered the defence of insane delusion but it did not consider the defence of insanity as provided for by the first limb of section 28 of the Criminal Code.

Learned Counsel submitted that the totality of evidence led at the trial discloses a defence of wider scope of insanity under section 28 of Criminal Code, which put the prosecution on Notice to do more than has been done. He refers to the case of EJINIMA v. STATE (1991) 6 NWLR (pt 200) 627 at 644, which he contended, in some

aspect is similar to this case, as the evidence of the family member may be relied upon to come to the conclusion that an accused suffered from a disease of the mind at the time of committing the offence. Other cases relied upon are *OLADELE v. STATE* (1993) 1 NWLR (pt.269) 294 at 307; *UKADIKE v. STATE* (1973) 6 SC 14 and *AGBI v. OGBEH* (2006) 11 NWLR (pt.990) 65 at 135.

It is submitted that in the case at hand there was no iota of evidence that the appellant was a man easily spurred to violence. That there was evidence from all witnesses that he was calm and normal man until a day to the incident. In such a situation, any suggestion or finding that the Appellant possess certain traits such as 'irascibility, irritability, eccentricity, and quarrelsomeness' it is contended, would amount to speculation and this court cannot do that as it leads to injustice. See *AGBI v. OGBEH* (supra), *OLALOMI IND. LTD v. NIDB LTD* (2009) 12 NWLR (pt.1167) 266 at 303-304.

Relying on the case of *LOKE v. STATE* (1985) 1 NWLR (pt.1) page 1, it is submitted that the issue of motive is a vital consideration where a defence of insanity is raised, and that this must be taken into consideration as in the cases of *YUSUF v. STATE* (1988) 7 SC (pt.11) page 175, *UKADIKE v. STATE* (supra), *R v. INYANG* 12 WACA 5.

In conclusion, Learned Counsel has submitted that no Court of Law and equity would fail to consider the totality of evidence and to draw inferences from the facts that the appellant was cutting an electric pole, not a human being; his acts of brandishing a cutlass in an unprovoked circumstance and inflicting matchet cuts on his cousin, who knew him from birth and had been his master for four years. More importantly, the act of celebrating his murderous act when he claimed to have killed two people and not one. That if all these acts are considered along side with the evidence of witnesses it would be clear that the appellant was not normal or he was insane at the time of committing the offence and therefore, the inference that he was actually insane is not a remote possibility. In such a situation, the burden has to be shifted to the prosecution to prove facts or circumstances that can rebut inference of reasonable possibility of insanity that was put up even by the prosecution witnesses. Reliance was placed on the case of *Tafida v. State* (1969) NSCC 77 at 273, (1969) 2 SCNLR 80. Submitted that the totality of evidence led by prosecution coupled with lack of motive on the part of the appellant cast a



serious doubt on his sanity at the time of committing the offence. It is urged on this court to so hold and discharge the accused on the ground of insanity.

The learned counsel for the respondent, M.M. Majiyagbe Esq. had urged strenuously on 23/1/2014 when we heard the appeal, that this appeal should be dismissed on the grounds that there were absolutely no tenable grounds for the concurrent findings of the lower courts to be disturbed by this court. However, on 6/2/2014 when the counsel for the parties were invited to further address this court on the defence of insanity raised by the appellant, he commendably urged this court to sustain the appeal as there was miscarriage of justice in all the circumstances of this case.

The main thrust of this appeal is that the piece of evidence of insanity, led at the trial, which the Appellant relied heavily on to raise the defence of insanity, should have propelled the court below to set aside the conviction and sentence of the Appellant. The peculiar nature of this case and inelegant handling of this case by the Appellant's Counsel a Legal Aid Officer, at the trial High Court, must have led to the bizarre findings of the two lower courts. At the trial court, the learned counsel adopted a strategy of not calling evidence, notwithstanding the obvious defence of insanity from pieces or evidence leading to the same.

With due respect the learned trial judge and Justices of the Court below, failed to appreciate and to make inference from the totality of evidence led at the trial. Hence when the Appellant was convicted he had to secure some more diligent counsel both in the court below and this court. In the court below when leave was granted the Appellant to file and argue two additional grounds of appeal, his counsel poignantly set out the two grounds with their particulars thus:

*"3. The learned trial Judge erred in law by holding that the defence of insanity was not raised and or proved at all and that the prosecution did not adduce any evidence in proof of the defence of insanity"*

*Particulars of Error:*

(i). *The evidence of PW2 demonstrated that the Appellant's action of killing his sister arose from a "mental problem" which ought to have been investigated further by the trial court.*

(ii). *The evidence of PW3 also demonstrated that the actions*

of the Appellant was caused by a “mental illness” which the Appellant suffered from and which ought to have been investigated further by the trial Court.

(iii). The evidence of PW4 that “the accused was wild when he held the cutlass” also showed that Appellant was not in a normal state of mind at the time he attacked his sister and his mother and this fact ought to have been further investigated by the trial court”

4. The learned trial judge failed to take into consideration the surrounding circumstances of this case and which error resulted in the denial of the defence of insanity.

*Particulars of Error:*

The nature of the killing by the Appellant and the conduct of the Appellant before, at the time of the killing and thereafter was sufficient to infer mania and the invocation of the defence of Insanity.

Dissatisfied with the decision of the court in his further appeal the Appellant pointedly set out two grounds in his Notice of Appeal with their particulars as follows:

“1. The learned Justices of the Court of Appeal erred in law when they held that defence of insanity is not available to the accused person.

*PARTICULARS OF ERROR:*

i. It is obvious from the evidence of prosecution that the defence of insanity is available to the accused person in this trial,

ii. From all surrounding circumstances of this suit it is obvious that the probability that the accused was insane is reasonable.

2. The learned justices of Court of Appeal erred in law when they affirmed the conviction of accused person for the offence of murder.

*PARTICULARS OF ERROR*

i. It is obvious that the accused committed the crime without the requisite mens rea.

ii. Facts of this case show that the intention to commit murder was lacking by the accused person at the time of committing the crime.”

The learned trial judge out rightly rejected the defence of insanity with waive of hand and stated inter alia, thus at page 64 of the record.

“It is not every form of mental disorder that can relieve an

*accused person from Criminal responsibility. Before a mental disorder can avail an accused person as a defence, it must fall within the statutory provision of the Criminal Law. (Section 28 of the Criminal Code)... ”*

Curiously enough the court below considered the defence of insane delusion but came to the conclusion that it is not available to the Appellant. This conclusion is easily faulted by the fact that the evidence led at the trial court on pp.10 and 37 of the records, the prosecution clearly showed that the accused put up two sets of delusion as follows:

(a) *The fact that he saw a red doll and thereby creating an impression that he was matcheting a red doll or that he believed he inflicted matchet cuts on a red doll.*

(b) *That a spirit directed him to go out and kill.*

The court below appeared to have overlooked the second delusion stated above. In his lead judgment IKYEGH JCA exhaustively discussed and considered the first delusion the appellant put up. With due respect to the learned justice, he erred when he concluded that second delusion could not have constituted a valid clearance under S.28 of the Criminal Code of Ogun State.

One of the classical cases on insane delusion, is ARUM v. STATE (1979) 11 SC 58 in which His Lordship Obaseki JSC came to the conclusion that the provision of the second limb of section 28 of the Criminal Code of Ogun State is similar to the Rules in famous McNaughton's case, as to issue of delusions; specifically Rule 4 which was set out thus:

*“If a person under an insane delusion as to the existence of facts commits an offence in consequence thereof, is he thereby excused?”*

*ANSWER: The answer must of course depend upon the nature of the delusion, but making the same assumption as we did before that he labours under such partial delusion only, and is not in other respect insane, we think he must be considered in the same situation as to responsibility as if the facts with respects to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life and he kills that man, as he supposes in self defence, he would be exempted from punishment if his delusion was*

*that the deceased had inflicted a serious injury to his character and fortune and he killed him in revenge for such supposed injury he would be liable to punishment". See R. V TOWNLY 3 F & F 839)*

From the above Rule 4, quoted above learned counsel for the Appellant, rightly submitted that neither the delusions that the Appellant herein saw a red doll nor the one that a spirit had directed him to go and kill fell within the scope of the said Rule 4. It therefore matters little, if the court below did not consider the latter delusion.

***However, the fact that the appellant killed his junior sister indeed is not in dispute. This is a finding of fact concurrently established by the two Courts below. That notwithstanding, I must say that the two courts failed to properly consider defence of insanity raised by the Appellant. This court has decided in a number of cases that a court has a sacred duty to consider all defences available to an accused charged with murder, whether or not such defences are specifically put up by him.*** See UWAEHINYA v. STATE (2005) (pt. 930) 227 at 248 where Musdapher JSC (as he then was) in his lead judgment stated the law thus:

*"Now, it is settled law that in a trial of murder, it is the duty of the court to consider all the defences raised by the defence whether the person charged specifically put up such defences or not. See APHISHE v. THE STATE (1971) 1 ALL NLR 50. And no matter how weak or stupid a defence raised by an accused may appear, it must be properly and adequately considered. See TAKIDA v. THE STATE (1969) 1 ALL NLR 270 where it was held that it is the duty of the court to consider the defence of provocation once there is evidence even if not raised specifically" (emphasis supplied)"*

In this case it is hard to fathom why the court below only considered the defence of insane delusion but not the defence of insanity as provided for by the first limb of section 28 of the Criminal Code. Hence in his lead judgment His Lordship IKYEGH JCA stated at page 123 of the records thus;

*"Appellant's defence was anchored on the second limb of Section 28 of the Criminal Code dealing with insane delusion, which is momentary mental incapacity in contradistinction to the wider scope of insanity under the first limb of section 28 of the same Code possessing historical antecedent of the mental incapacity. I would agree*

*with appellant's learned counsel that there is no confusion between the first limb and the second limb of section 28 of the Criminal Code and, his client is entitled to build his defence on the second limb thereof."* See *Yusufu v. The State* (supra) at pages 115-116 thus:

*"It is my view that the second limb of S.28 above does not contemplate general and absolute delusion which will, of course, be indistinguishable from insanity. It rather contemplates an otherwise normal person but who in respect of certain matter or matters behaves abnormally because his mind is affected by delusion with regard to that specific matter or to those specific matters. It is like someone who is not totally blind but who is unable to distinguish between certain colours, who is always taking a particular colour for another. Incidents abound where people suffer from, say, persecution mania. Such people are deluded and they fight against an imaginary persecution. The important thing to note about the second limb of section 28 above is not so much the general definition of delusion but the fact that the mind of the accused during the material time when he did or omitted to do the act leading to the death of his victim, was affected by delusion and it must be delusion on some specific matter or matters."*

It is my view that the totality of evidence led at the trial discloses a defence of "wider scope of insanity" under section 28 of Criminal Code. Under our Criminal Law, all possible defence raised by an accused person must be considered for him. In the case of *Karimu v. State* (1989) 1 NWLR (pt. 96) 124, which is similar to the instant case, appellant hacked his mother to death and his defence of insanity was rejected at the trial court and in the Court of Appeal. The Supreme Court allowed his appeal and stated at page 135 thus:

*"As can be seen, the defence of insanity was not put by the Appellant in either his statement to the police, exhibit 'E' or his testimony. It was his counsel that raised the defence in his address to the trial court by submitting that the appellant was not guilty of the offence charged since the Appellant suffered from unsoundness of mind and could not have formed a mens rea to commit the offence."*

At page 147 the court stated further as follows:

*"It is settled law that the question whether an accused who sets up a defence of insanity is in fact insane is a question of fact to be determined by a trial Judge. In determining the defence, the trial*

*judge is enjoined to take into consideration any admissible medical evidence and the whole facts and surrounding circumstances of the case, which will include the nature of killing, the conduct of the accused before and, at the time of as well as after the killing and history of mental abnormality."*

B In the instant case the pieces of evidence before the trial court have shown that the appellant was not with his faculties when he murdered the deceased, his junior sister. These pieces of evidence were obvious and weighty. These are as follows:

C The fact that the Appellant was seen brandishing cutlass without any motive and in a manner that suggested insanity.

PW2 (Appellants mother put it this way) at pp.36 - 37 of the records.

*"I know the accused person Joseph Adelu and Dorcas Adelu. I am their mother. Dorcas is dead. I remember 22/7/03. On the said day, the accused person came home from Odogbolu where he was an apprentice barber. In fact, he was responsible for our upkeep - Dorcas and I. On getting home he informed me that he did not know how he was feeling, I cooked local herbs and food for him. He ate. Thereafter he decided to clear the grass around the house as his father who could have done same was ill. Suddenly, he started running with cutlass one of his uncles observe him and followed him with the aim of taking the cutlass from him. He hit that uncle with the cutlass thereby inflicting injury on him. The uncle is Timothy Dosumu; he is the same as Timothy Abioro. The accused started running, he ran into the house, met Dorcas his junior sister sleeping, and inflicted machet cuts on her, thereby killing her. When I got to the house, the accused told me not to enter saying he saw a red doll in the house. The accused person also inflicted cuts on me."*

PW3 on his own testimony stated at page 38 of the records thus:

*"The accused is my relative and an apprentice with me. The accused said he wanted to go to his parents, when he persisted I took him to Makuta Agada Village via Idiroko. I handed him over to his parents and went to our house. About an hour later, I heard noise. I went out of the house to enquire what happened, I saw people running and they told me that the accused held a cutlass and was running with cutlass, I ran after, caught up with him and I tried to take*

*the cutlass from him he hit me on the head thereby inflicting cut on my head, I then went to the hospital for treatment.”*

PW4 on his part stated at page 39 of the records thus:

*“I remember on 22/7/2003, I was at home when PW3 brought the accused person came back to the village. I asked the accused, why he wanted to come home, he answered that it was time for him to be on his own, I then left him and went back to my house. Suddenly, I heard noise outside; I came out and saw the accused person threatening people with a cutlass. I scolded him and asked him to release the cutlass to me. He warned me not to move close to him as he was dangerous. PW3 too came out and saw him, he tried to collect the cutlass from him, the accused hit him on the fore-head with the cutlass and PW3 started bleeding.”*

Secondly, the fact that the accused was cutting electric pole. He stated at page 10 of the records thus:

*“When I was cutting down an electric pole along Gude Road and it did not fall, I then ran back shouting that anybody who did not leave the road that I will kill the person, the people saw me and were running from me until I got to our house and I kill my sister (junior) and my mother. I am now informed that my mother is now in the hospital. The evil spirit has left me; it is no longer with me now I have calmed (sic) down,*

On the whole, in the light of the foregoing pieces of evidence given at the entire trial Appellant clearly demonstrated unusual behaviours prior to the killing of his junior sister. He put up unnecessary pressure on his cousin, PW3, to take him home. PW3 stated that the Appellant had never behaved like that in the past. PW2 stated in Exhibit ‘B’ admitted by the trial court, that

*“On the way coming to Sango to board the vehicle going to Idirioko, the said Joseph Adelu took to his heel on the process (sic), his uncle alerted the people in the area just to enable him get hold of him.”*

Furthermore, evidence reveals that the accused was wild when he was brandishing the cutlass. This is so stated by PW4. It is noteworthy that there is nothing on record to suggest that the Appellant was under any form of artificial influence be it alcohol or drug when he was observed to be wild. Without any motive the Appellant murdered his blood sister and inflicted machet cuts on his own mother

both of whom he had been responsible for their upkeep. Certain expressions in the Appellant's statement to the police portrayed him as somebody whose soundness of mind is doubtful. He stated thus:

*"It was the police that arrested me on the allegation that I killed somebody. I killed my mummy and I also killed my junior sister named Dorcas."*

*I have critically analysed the foregoing pieces of evidence. These pieces of evidence create doubt on the soundness of the mind of the Appellant, which negates the conclusion of I.KYEGH JCA in his lead judgment that the pieces of testimony of the witness confirmed "the presumption of sanity or soundness of mind under section 27 of the Criminal Code Law of Ogun State."*

*It has been stated in a number of decisions of this court that an accused person who has put up defence of insanity must show that he is suffering either from mental disease or from natural infirmity. See UKADIKE v. STATE (1973) 6 SC 14.*

In the case at hand the court below rightly noted that evidence shows that the appellant herein had no previous history of insanity so also was it held in the UKADIKE v, STATE (supra). In the two cases, the accused persons suddenly developed uneasiness. In Adelu's case he (Adelu) attempted running away, when he was being taken by his cousin to the village. The Appellant herein for no motive howsoever, inflicted machet cuts on his mother and cousin (a master for four years) for daring to stop him when he went wild. In both cases, however, there was no history of insanity in their respective family or that of the mother of the accused persons.

*As I have already observed, there was overwhelming evidence in the prosecution's case, through the evidence of PW2, PW3 and PW4 indicative of Appellant's mental abnormality and imbalance. The relevant period is the time of doing the act or making omission but the state of mind is not always provable by direct, positive evidence. Invariably, it is a question of inference from other facts proved in evidence. Thus the court may accept evidence of insanity from family history; evidence of conduct of accused immediately preceding the killing and finding of medical officer who examined the accused after the event if that finding is consistent with earlier evidence*



**of insanity.** See KARIMU v. THE STATE (supra) 140.

In the court below their Lordships were of the view that the surest way to establish insanity is by medical evidence. It may be and it may not. In EJINIMA v. STATE (supra) 627, the Courts below relied on evidence of family member to come to the conclusion that Ejinima was not suffering from any disease of the mind at the time of committing the offence. B

***The evidence of some of the family members in this case suffices to conclude that the Appellant suffered from a disease of the mind at the time of committing the offence.*** See: ARUM v. STATE (Supra) REX v. WANGARA 10 WACA 236; REX v. ASHIGUFUWO 12 WACA 389; and REX v. INYANG 12 WACA 5. C

***In the circumstance, I shall allow this appeal as it succeeds. The conviction and sentence of the Appellant by the trial court cannot stand. The judgment of the Court of Appeal which affirmed the conviction and sentence of the trial court is hereby set aside.*** D

It is instructive to note that on the 6<sup>th</sup> day of February, 2014, when this court recalled the respective counsel to address it on the issue of defence of insanity, learned counsel for the Respondent was also of the candid view that the verdict of murder cannot stand. We appreciate his courage and assistance in arriving at the just conclusion of this case. E

Having allowed the appeal, I hereby order that the appellant shall remain in prison custody at the pleasure of Ogun State Governor. While in custody, he shall be treated at a reputable Psychiatric Hospital until he is finally pronounced well and fit to live with people of his community. F

G

### **RHODES-VIVOUR JSC**

I have had the advantage of reading in draft the leading judgment of my learned brother Galadima, JSC, and I agree with his lordship that this appeal should be allowed. This court is faced with concurring findings of the two courts below. To reverse such findings involves a very detailed review of the facts and circumstances of the case. H

Fortunately, there is no dispute about the facts, consequently

there is no need to reverse any findings on facts. The issue boils down to the proper orders this court should make in the absence of a specific finding on a fundamental fact. Whether the appellant was sane or insane when he killed his sister.

The prosecution's case was that on the 22<sup>nd</sup> day of July, 2003  
 B the appellant's behaviour was strange and unusual. Several people took to their heels when he was seen waving a matchet in an aggressive way. He proceeded to strike Timothy Abioro who survived, but his younger sister was not so lucky as she died after being struck  
 C several times with the matchet. His mother survived a similar attack, the attack on all of them was without provocation and there does not seem to be any reason for the violent act.

It is so clear from the above facts that the real Issue is the state of mind of the appellant, yet counsel who defended the appellant at  
 D the trial court never raised the defence of insanity and the learned trial judge also did not consider the defence of insanity.

Section 27 of the Criminal Code presumes all persons to be sane. It reads:

*"27. Every person is presumed to be of sound mind, and to  
 E have been of sound mind at any time which comes in question until the contrary is proved."*

The interpretation of the above is that every person (children excluded) are presumed to be sane at the time of commission of the  
 F act (in this case murder). The onus is on the accused/appellant to prove that he was insane at the time he committed the offence. The burden of proof of the defence of insanity is on the accused person.

Section 28 of the Criminal Code states that:

*28. A person is not criminally responsible for an act or omission  
 G sion if at the time of doing the act or making the omission he is in such a state of mental disease or natural mental infirmity as to deprive him of capacity to understand what he is doing, or capacity to control his actions, or of capacity to know that he ought not to do the act or make the omission."*

H To show that the accused person is insane it must be shown that:

(a) at the time the offence was committed the accused person was suffering from mental disease;

(b) that the mental disease was so serious that at the relevant

time the accused person did not know what he was doing, or/and could not control his actions, or that he should not do what he did. See R. v. Thamu (1953) 14 WACA p.372, State v. Akinbamiwa (1967) NMLR p.355, Arum v. State (1979) 11 SC p.58.

Intention, which is the state of mind of the accused/appellant in most cases is inferred from the facts established in court. See S. Selvanayagan v. R. (1951) AC p.83. B

I am satisfied that at the time appellant struck his mother, Timothy Abioro and killed his sister with a matchet in a frenzied attack he did not know what he was doing as he was suffering from some form of mental disease. In the circumstances he is not criminally responsible for the death of his sister and so not liable for any offence. C

It seems clear to me in the absence of Medical evidence, but on the evidence led and established in court that the appellant was suffering from some form of insanity when he attacked three persons and killed the third with a matchet in unexplainable circumstances. This conduct falls within the ambit of section 28 of the Criminal Code. In the absence of Medical evidence on the sanity of the appellant it is safe to infer the intention of the appellant on the day he killed his sister and inflicted matchet cuts on his mother and Timothy Abioro. His intention was to kill a red doll, and the spirit directed him to kill it. In the absence of medical evidence and any incriminating statement from the appellant to show that he knew what he was doing when he committed murder it is safe to infer unsoundness of mind. E

Finally, I must make some observations on the trial and role played by learned counsel for the respondent in the appeal before this court. F

In a criminal trial, especially where the accused person is charged for a capital offence, which carries the death penalty the trial judge must consider all defences available especially those not considered by counsel. From the evidence available the need to consider the defence of insanity cannot be overemphasized. It is most unfortunate that the learned trial judge failed to consider the defence of insanity. G

Turning to the defence counsel I must observe that it is the duty of counsel representing an accused person, especially one facing a capital offence to use all resources at his disposal, by that I mean his knowledge of the Law to ensure that the accused person has the best defence possible. For counsel not to put forward the defence of H

insanity on these facts is unbelievable. It is clear that the defence was handled in a shoddy manner devoid of seriousness, and this attitude is condemned in the strongest terms. This fortunately is not the case with learned counsel for the respondent, Mr. J.M.M. Majiyagbe. On 23/1/14 we heard this appeal and fixed judgment for 11/4/14. At  
 B conference we ordered a rehearing for 6/2/14 for counsel to address us on the sanity or insanity of the appellant. At the hearing, learned counsel for the respondent, observed that the appellant did not have the best services he could have had. He urged this court to set  
 C aside the judgment of the Court of Appeal and discharge the appellant. Learned counsel for the respondent, J.M.M. Majiyagbe has by his observation demonstrated the high standards expected of counsel at the bar. I commend him. Counsel for the prosecution, once satisfied that there is really nothing to urge in favour of the judgment of  
 D the court below owes this court a duty to boldly say so, thereby keeping the streams of justice pure, with the resultant effect that the reasonable man would applaud the courts for doing substantial justice, and that would be very good for the judiciary.

The appeal succeeds. The appellant is not guilty, as at the time  
 E he killed his sister it was clear that he was of unsound mind. The judgment of the Court of Appeal which affirmed the conviction and sentence of the trial court is hereby set aside.

I agree with the order in the leading judgment that the appellant shall remain in prison custody at the pleasure of the State governor. While in prison, he shall be treated at a Psychiatric Hospital until he is pronounced mentally fit to live with same people.  
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G **NGWUTA JSC**

Having read and considered in draft the exhaustive judgment just delivered by my learned brother, Galadima, JSC, I am in agreement with the views expressed and the conclusion arrived at. I desire to add only a few observations.

H The facts of this case constitute a sad commentary on the over-confident attitude exhibited by some trial lawyers. In a trial in court, a lawyer who takes anything for granted does so at the expense of his client.

The strategy adopted by learned Counsel before the trial Court

did not yield the expected result. To prove that the appellant was insane at the time he went on a killing spree, learned Counsel needed to elicit more facts from prosecution witnesses or call a witness or witnesses to give evidence tending to the mental incapacity of the appellant at the material time.

The Courts below did not help matters. The evidence on record if short of proof on balance of probabilities that the appellant was insane, was definitely enough to put the Court on alert as to the mental capacity of the appellant. Section 28 of the Criminal Code, Law of Ogun State, 1978, on insanity, provides:

*“S.28: A person is not criminally responsible for an act or omission if at the time of doing the act or making the omission he is in such a state of mental illness or natural mental infirmity as to deprive him of capacity to understand what he is doing or of capacity to control his actions or of capacity to know that he ought not to do the act or make the omission.*

*A person whose mind, at the time of doing or omitting to do an act is affected by delusion in some specific matter or matters but who is not otherwise entitled to the benefit of the foregoing provisions of this Section, is criminally responsible for the act or omission to the same extent as if the real state of things had been such as he was induced by the delusion to believe to exist.”*

On the facts of this case, which are not disputed, the two limits of Section 28 of the Criminal Code should have been considered in determining the criminal liability of the appellant. In any case, the Court has a duty to consider any defence open to the accused, whether such defence is specifically raised or not. See *Uche William v. The State* (1992) 8 NWLR (Pt. 261) 515 at 522; *R. v. Fadina* (1958) SCNLR 250; *Udofia v. The State* (1984) 12 SC 139.

Appellant in my humble view is entitled to have the facts of his case scrutinized under both limbs of Section 28 of the Criminal Code and the Courts below erred in failure to do so.

A conviction stands only if there is proof beyond reasonable doubt. See *Augustine Onuchukwu & Anor v. The State* (1998) 4 H NWLR (Pt. 547) 576 ratio 5. See also Section 135 (1) of the Evidence Act 2011.

There can be no proof beyond reasonable doubt unless the mental capacity of the accused at all times material to the act or omis-

sion constituting the offence charged is established once raised or is apparent from materials before the trial Court.

Absence of motive, by itself, is not a sufficient ground to infer mania but where there is evidence indicative of insanity rather than the opposite, the absence of motive, as in this case, ought to be considered material to the determination of the mental capacity of the appellant at the material time. See *R v. Inyang* (1946) 19 WACA 5; *R. v. Ashigifuwo* (1948) 12 WACA 389.

Murder is an intimate act predicated on a simple motive of passion, be it of hatred, love or greed. It involves a degree of control and calculation and it is doubtful that at the material time the appellant possessed either or both.

Based on the above and the fuller reasons in the lead judgment, I also allow the appeal, set aside the conviction and sentence of murder passed on the appellant.

I order that the appellant be confined in prison and treated and released when the State Governor is satisfied that it is safe for the appellant and the society to do so.

E

### **AKA'AH S JSC**

I had a preview of the judgment of my learned brother Galadima JSC. I agree that the conviction and sentence of the appellant for murder cannot stand. At the time of his arrest and before his arraignment on the charge of murder, the appellant ought to have been taken to a psychiatric hospital to ascertain his mental state but the prosecution failed to do this. The defence counsel did not fare better. The defence of insanity should have been raised considering the behaviour of the appellant shortly before he dealt the fatal machet cuts on his sister and thereafter after his arrest when he made a statement claiming that a spirit was directing him to go and cut an electric pole and if he could not he should kill anybody he came across.

I endorse the order allowing the appeal and ordering that the appellant be kept in prison custody at the pleasure of the State Governor and be regularly sent for psychoanalysis at the Psychiatric Hospital until he is certified to be medically fit to live in the community.