

THE STATE  
versus  
SININI GUMBO

HIGH COURT OF ZIMBABWE  
MUZENDA J  
MUTARE, 21, 24 and 30 September 2021

**Criminal Trial (Murder)**

ASSESORS: 1. Mr Magorokosho  
2. Mrs Mawoneke

*Ms T. L Katsiru*, for the State  
*P Nyakureba*, for the accused

MUZENDA J: Accused is charged of Murder as defined in s 47(1)(a) or (b) of the Criminal law (Codification and Reform) Act, [*Chapter 9:23*] and the State alleges that on 12 September 2019 at Muchiti area, Greendale Farm, Leopard Rock, Vumba, accused unlawfully caused the death of Shadreck Derera by shooting him once in the stomach with a 303 rifle intending to kill him or realising that there was a real risk or possibility that his conduct might cause death and continued to engage in that conduct despite the risk or possibility resulting in injuries from which the said Shadreck Derera died.

Accused pleaded not guilty to the charge.

In his defence outline he states that he acted in self defence when he shot at the now deceased and he aimed at the lower body intending to immobilise him as deceased was fast approaching accused while armed with a machete and an axe. Accused is an ex-member of the army and refers to himself as a professional marksman. On the day in question he says that he was on a routine night patrol in the company of fellow security guards. Accused suddenly fell under imminent unlawful attack of the now deceased who was dangerously armed. He first fired a warning shot and when deceased continued advancing towards him. He carefully aimed at the lower part of the body of deceased and shot at him. His colleagues were denied the opportunity to assist deceased as they faced an army of determined illegal settlers who wanted to attack them and all of them had to tactically retreat in order to save more lives. Accused added that death was caused by the negligence of both deceased and his brother who shunned

medical attention by going to a spiritual healer for a prayer. Accused pleads guilty to assault and prayed that he be found not guilty of the offence of murder.

The state outline, Annexure A, shows that accused is employed at Leopard Rock Hotel Resort as a security guard. Deceased was a settler at Greendale Farm, Muchiti area. On 12 September 2019 and at 12 midnight, deceased was asleep at his residence with his second wife, Mary Nemaramba. Deceased's first wife, Mariam Marangwana was in her hut when she noticed a team of security guards as she intended to go outside her hut to relieve herself. She shouted for help and the team passed her hut. A few minutes later she heard two shots being fired. First one being towards her hut and the second one towards deceased's hut. She later heard the second wife shouting that their husband had been killed. She proceeded to Mary Memaramba's hut to render first aid. Neighbours gathered and helped her to make a stretcher to carry the deceased. Deceased was driven to faith healer's residence in Mafararikwa area where he subsequently died on the same day. A post-mortem examination concluded that death was due to haemorrhage shock and haemopneumo thorax due to a gun shot.

The state opened its case by applying that the evidence of state witnesses 3-15 be admitted in court in terms of s 314 of the Criminal Procedure and Evidence Act, [*Chapter9:07*] and the defence did not oppose the application. Later at the end of oral testimony the evidence of the pathologist Dr T. Manyara was also produced by consent in terms of s 314 of the Criminal Procedure and Evidence Act. The following exhibits were produced by consent. The confirmed warned and cautioned statement of the accused, a photo album of indications, a sketch plan, CID Forensic Ballistic Report, 303 4MK1 rifle and the post-mortem report.

In his confirmed warned and cautioned statement accused admitted shooting the now deceased but did so in self defence after firing a warning shot in the air. He then fired and shot at deceased aiming at the legs of deceased in order to immobilise him. Thereafter he ran away together with five other guards as the illegal settlers mobilised each other in order to attack them as had happened before.

The sketch plan, exh 3 contains both indications made by the defence as well as made by the state witnesses. Accused made indications at the scene to Assistant Inspector Machiva on 24 September 2019. He indicated point G where he stood on guard whilst his workmates were carrying their operation to evict deceased and his family. Point H is where accused first saw deceased standing armed with a machete and an axe. Point J indicates point where deceased was standing and shot by the accused.

On the other hand, Miriam Marangwana and Mary Nemaramba also made indications at the scene on 24 September to Assistant Inspector Machiva. Point B shows the position when Miriam Marangwana was standing when she first saw the guards standing next to her kitchen hut and called out alerting deceased and Mary Nemaramba who were asleep in the bedroom next to hers. Point D indicates where Miriam Marangwana and now deceased were sleeping and where deceased was shot. The arrows on the sketch plan shows the direction of deceased crawling from the bedroom after being shot. Point F also indicated position of when he was shot. Critical to note from the indications is that accused indicates positions where deceased was standing and not moving. It is also clearly demonstrated that by the indications that accused and his fellow guards had specifically gone to where deceased was in a bid to evict the family of deceased from the settlement.

The now deceased had two wives Miriam Marangwana senior wife and Mary Nemaramba junior wife. It was the junior wife's duty to spent the night with the now deceased. Miriam told the court that around 12 midnight on that day she woke up to answer to the call of nature and when she got to the exit, she peeped through pole gaps of her hut and saw three men standing near her kitchen hut. These three men happened to be accused and his colleagues. Upon further checks she discovered that there were in addition to the first three, three more, to make them 6, one of them was holding a gun. She assumed that they were thieves and gave a loud shout to alert others of the thieves' presence. She heard a gunshot.

After hearing Miriam Marangwana's shouting, the now deceased instantly woke up and responded by also shouting "thieves". At that moment she saw 3 men destroying the dagga and pole hut where Mary and deceased used as a bedroom hut. She then heard a shot and immediately few moments after Mary shouted that deceased had been killed. She got out of the hut and went where deceased was lying. She observed an open wound on the deceased's back and called out for help from neighbours.

The witness, Mary Nemaramba was adamant that the first shot was into her hut, she saw a flash and the bullet missed her. The defence submitted that Mary Nemaramba's version as per state summary Annexure A is distinct from her evidence in chief. In the state summary the defence contend that the witness heard two gun shots, it's true that there were two gun shots, but the witness, Miriam clarified that the first was fired at her hut. We see no discordance on that aspect. In any case, the court looks more at oral testimony than at a summary of state case and to us there is no material discrepancy which should detain us. The defence also submitted that it is not clear whether deceased crawled out of the hut where he was shot or

bolted out of the hut. Miriam told the court that she heard the second shot. She was still inside her hut and only proceeded towards where deceased was after hearing a distress call from Mary Nemaramba. She found deceased already lying unconscious injured outside the temporary shelter. Mary's evidence is that of an eye witness and court is at liberty to prefer her cogency than Miriam who knitted the events together and link them to the second gunshot.

The second witness Mary Nemaramba told the court that on 12 September 2019 at midnight she was awoken by Miriam's yelling and deceased simultaneously woke up as well. Deceased also shouted "thieves". The witness saw people standing outside her bedroom hut and all of a sudden she heard a gunshot and deceased shouted that he had been shot and was lying on his stomach. She also perceived objects hitting the walls of her bedroom hut. Deceased crawled out of the hut and she noticed that deceased was bleeding from the back and blood was oozing from an open wound. She alarmed Miriam Marangwana and Miriam immediately came to assist the deceased. The wives were assisted by neighbours to ferry deceased to a faith healer.

Both wives denied that the deceased was armed with a machete and an axe. Both witnesses denied that deceased attacked the accused or any of the guards. Mary Nemaramba was adamant that deceased was shot whilst standing beside a bed inside the bedroom hut. Both witnesses stated that accused and his colleagues had come to evict deceased and his fellow settlers from Leopard Rock Hotel property. Accused's indications confirm this version. Both witnesses deny the presence of menacing settlers at the scene who caused accused to flee the scene. Contrary to the submissions of the defence that the state evidence is discordant, the two witnesses' evidence intertwine on material aspects and even though the two witnesses were thoroughly cross-examined, their evidence crystallises to the effect that the security guard, (accused) shot deceased whilst he was inside his second wife's bedroom hut and there was no immediate danger from the deceased. In fact it appears from the facts and indications made by the accused that accused's fellow guards had time to demolish deceased's structures at the scene without being harmed or interfered with by the deceased's family.

In his defence, accused persisted with his defence of self. In his defence outline and evidence in chief accused stated that he and his fellow guards were suddenly under imminent unlawful attack of the deceased who was dangerously armed. He added that when he arrived at deceased's homestead, the deceased rushed into the kitchen bedroom and came out armed with a machete and an axe. He later buckled during cross-examination and clarification by the bench that deceased emerged from the hut he was sleeping and charged towards the accused. He then aimed at the lower part of the deceased and shot him. Mr Themba Sibanda was called

as a defence witness. He heard the sound of two gun shots but could not tell as to what caused accused to fire them since he was at a distance. When he got to the scene deceased was lying on the ground. He did not see deceased charging towards accused. He does not know how the machete and axe ended up at his work place and does not know as to who handed the axe and machete allegedly recovered from deceased to the police. According to the defence witness he observed some women roaming near the scene and assumed that they were organising to attack the security guards. He did not support accused's version that an army of illegal settlers armed with assorted weapons came from all directions to attack the guard. The defence witness placed accused's defence into doldrums and resulted in irreconcilable inconsistencies about the events at the odd hours of the morning. By the time the defence case closed, accused had not ironed the creases and features borne out of his and his defence witness. To say the least the court was least impressed by the accused when he took the witness box. Assuming that accused's first version is plausible, that upon arrival he saw deceased standing outside as if anticipating the arrival of the security guards, it is not clear why accused did not flee from the scene if he knew that the settlers were generally dangerous and volatile? From the indications he made to the police, he was at a remarkable distance from the time he discerned the presence of the deceased armed. That version was abandoned by the accused downstream and brought a further dimension that deceased bolted out of the hut where he was sleeping and charged at the accused. It is again not clear why deceased would charge at an armed guard, fully aware that he was dangerously in possession of a firearm. At that particular moment accused was standing on guard whilst his colleagues were demolishing the structures. Why would the deceased attack a guard on standby leaving those demolishing his property? Why would the accused misrepresent to the court the purpose of the visit and tell us that their mission was to patrol the farm and disarm the settlers, yet the indications are clear that they were demolishing the structures in order to evict the settlers.

Section 253 of the Criminal Law (Codification and Reform) Act, [*Chapter9:23*] sets out the requirements to be met by an accused raising self-defence, the unlawful attack must have commenced or is imminent or the accused believed that the attack had commenced. The conduct opted for by the accused was necessary to avert the unlawful attack and accused could not have escaped or averted the unlawful attack. The means used to avert the unlawful attack was reasonable in all circumstances and fourthly that any injury caused by accused's conduct was caused on the attacker and not a third party and was not grossly disproportionate to that

liable to be caused by the unlawful attack. All the requirements mentioned in s 253 should be met and the wording of the section is conjunctive and not disintegrative.

*In casu* we have concluded that accused had a wide berth to make good of his escape. If accused had fled and had been pursued by the deceased exposing the accused to danger being struck and accused had undertaken all precautionary measures to avert risk that will then be another story. Accused did not fire a warning shot. He shot directly into a hut where he had heard deceased yelling out “thieves”. When accused directed the shot into the hut he was definitely aware that deceased was in that structure. We do not buy accused’s version that deceased was attacking him. We accept Mary Nemaramba’s version that deceased was shot at whilst standing besides his bed inside the hut. He only crawled out injured and lay unconscious outside the hut. This is the evidence of an eye witness which is directly relevant to the matter before us and as such very relevant to the court. Mary Nemaramba did not prevaricate on this point and we have no hesitation in accepting her evidence beyond reasonable doubt. Accused and his colleagues came prepared to forcibly evict the deceased and his family without a court order. They expected resistance from the settlers and approached them armed and prepared to attack them. Accused directed the firearm into a hut where they were people and wants to justify his conduct on the defence of self. Unfortunately accused failed dismally to lay a foundation of such a defence. We reject it. Accused may not have had an intention to kill deceased. If he had, the state did not manage to establish but from the facts accused should have seen the real risk and possibility that aiming towards the occupants of the hut there was a real possibility that he would cause death and he did. (See the matter of *State v Blessing Chimpira* HH 558/15)

We are satisfied that the state has proved its case against the accused beyond reasonable doubt and accordingly accused is found guilty of murder with constructive intent.

## SENTENCE

In assessing the appropriate sentence, the court will take into account what has been submitted on behalf of the accused and the aggravatory features of this matter.

This court is obviously deeply perturbed by the frequency and convictions of cases involving use of firearms by security guards. Land disputes have sprouted and aggrieved parties must avoid self help and use lawful means to get relief.

I call for the sanctity of rule of law in order to avoid unnecessary shedding of blood. By all means parties must use courts to unlawfully eject illegal settlers not to use guns to

intimidate otherwise legally settled farmers. Deceased died unnecessarily leaving a young family and the moral blameworthiness of the accused is very high, for he killed deceased in front of his family. That event will remain in the mind of the wives forever.

Accused is sentenced as follows:

10 years imprisonment.

*National Prosecuting Authority, state's legal practitioners*  
*Mesrs Maunga Maanda & Associates, accused's legal practitioners*