

THE STATE

Versus

JOHN BHIDI

IN THE HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO 14 & 15 FEBRUARY AND 18, 19 AND 20 JULY 2012

T. Makoni for the state
H. Shenje defence counsel

Criminal Trial

KAMOCHA J: The 66 years old accused pleaded not guilty to the crime of murder. The allegation being that on 27 January 2011 at Redwing Mine, Filabusi, he unlawfully caused the death of Sidumiso Ndlovu by shooting him with a rifle.

The state outline was read and produced as exhibit one and the defence outline which was also read was produced as exhibit 2. The rifle which the accused used to shoot the deceased with was produced as exhibit 3. It is a point 22 rifle whose serial number is 80662 weighing 2.795 kg; its barrel is 40 cm long and its full length is 1.9 metres.

In his defence outline the accused moved that he be acquitted of murder and averred that the following events took place at his mine Redwing 31 Mine, Filabusi:-

- “1. At about 21:30 hours, he was in the company of Derrick Gamba and two others, all of whom were his employees, guarding his mine from illegal gold panners. The four were seated around a fire.
2. The accused is the owner of the said mine, Redwing 31, Filabusi as well as Redwing 26, 46 and 47, Filabusi.
3. As they sat around the fire unidentified people started throwing stones at the four.

4. The accused will state that the stones were directed at them and meant to inflict harm, force them to abandon their security duties and flee paving way for the advancing intruders to enter the mine shaft and extract gold without his consent.
5. The accused will state that his team fled in different directions as the stone throwing intruders advanced in the dark.
6. Having taken cover in the nearby bushes the accused then fired two warning shots in the air with the intention of scaring away the stone throwing intruders and thereby preventing them from either approaching his property illegally for purposes of gold panning or causing any physical harm to the accused or any of his security men.
7. Despite the two warning shots the intruders did not retreat, neither did they stop their aggressive acts of throwing stones.
8. On realizing that the intruders would neither be scared, nor stop their acts of aggression the accused person fired two shots in the direction from where the intruders were advancing. His intention was not to kill, but harm the aggressor with the view to effecting an arrest.
9. The accused pointed his gun at an angle facing the ground in the hope that he would hit the aggressive intruders' legs or any lower part of the body, which would not result in fatal or life threatening injuries.
10. He heard a scream in the direction from where he had fired a shot at which point the rest of the stone throwing aggressors fled in different directions.
11. The accused searched for and found the injured assailant (now deceased). He noticed that the now deceased had been shot and sustained an injury on the waist as he was lying on the ground.
12. The accused informed a relative of the developments and requested her to inform and call the police to attend the scene. The police did not respond with speed and after about an hour without the police appearing on the scene, the

accused walked to the station to inform the police of the shooting as well as asking for assistance to take the deceased to hospital.

13. The accused will state that with the assistance of his men, he carried the injured young man to the police car. He was then ferried to hospital.
14. The accused will therefore state that the now deceased was shot in circumstances where:-
 - 14.1 the accused was defending his person as well as those of his men guarding the mine; and
 - 14.2 the accused was protecting his private property from illegal intrusion.

His subsequent death was unfortunate, as it was not designed in the first place. He therefore prays for his acquittal.”

The evidence of the following witnesses was accepted as it appears in the state outline in terms of section 314 of the Criminal procedure and Evidence Act [Chapter 9:07] Ernest Someka, Stanslous Maronga, William Nyandoro, A. Mutizwa, Dr Wadzanai Chikwanda and Dr Michael Mboko.

Viva voce evidence was led from three witnesses namely Owen Ndlovu, Gugulethu Ndlovu and Dr Sanganaï Pesanaï.

Dr Sanganaï Pesanaï read the post mortem report compiled by an expatriate doctor who has since returned to her home country. The report is very detailed and was marked as exhibit 4. According to the report the cause of death was septic shock and peritonitis due to a gunshot wound. The doctor opined that the accused could have inflicted the gunshot wound from the front.

The evidence of Owen Ndlovu and Gugulethu Ndlovu was identical. They told the court that the deceased who was employed at Comber Rodger Mine, had told them that his employers were in the process of hiring new workers. Three of them decided to go with the deceased and seek to be employed there.

They left with the intention of sleeping at the deceased place and present themselves for employment the following day. Both witnesses had not been to Comber Rodger Mine before but the deceased showed them the way.

Instead of taking them along the main road which led to the mine he led them through a path which cuts through the accused's mine. The path appeared to have been used like a thoroughfare. As they walked along the path in a single file they passed near a tent which turned out to be the mine shaft. The deceased told them that the mine belonged to one Bhidi – the accused but the witnesses did not know him.

After they had walked for about 100m from where they had seen the tent two people suddenly emerged from the bush on their side. One of them was brandishing a firearm pointed at them. The two people were advancing towards them. They got terrified and scattered in different directions. Without saying anything the person who had a gun fired a shot. The members of the group went in different directions and did not know where each one went to. The two witnesses said they thought the deceased had proceeded to Comber Rodger Mine. They however learnt latter that the deceased had been shot. They said no more than four shots were fired.

The witnesses said they were not carrying anything and were not armed in any way, let alone throwing stones at the accused and his workers. They were merely passing through the accused's mining area and never did anything aggressive. They were emphatic that they had already walked past the mine shaft when the accused and another person emerged from the bush and ran towards them pointing a rifle at them. They were frightened, panicked and scattered in different directions. It was their evidence therefore that the suggestion by the accused that they threw stones and continued to do so even when the shots were fired was clearly false.

I pause to observe that the suggestion does not merit any serious consideration. It is inconceivable that people armed with stones can continue to advance at a person armed with a rifle especially after the first shot was fired. That would be suicidal.

The witnesses said they did not even know that there was gold ore at the mine.

Under cross-examination Owen said the shots were not fired at intervals but were fired in succession. They were both emphatic that the shooting took place after 5pm and was still day light but the area had a lot of trees and bushes. The firing took place about 100 metres

from the shaft. It came out clearly in cross examination that the accused never said anything other than emerging from the bush brandishing the rifle which pointed at them.

It was suggested to the witnesses that they should have heard the deceased screaming after he had been shot as the accused had heard him scream but they said they had not heard any screams. It was also suggested that they had gone there for gold panning but the witnesses said they did not have any tools with them such as picks and shovels to pan with.

The state witnesses gave their evidence in a clear fashion and their story is very easy to follow. They were truthful and credible witnesses. They are worth to be believed. The same cannot be said about the accused.

His story was that on the fateful day he was sitting around a fire with his employees around 9pm when suddenly a volley of stones was being thrown at them. They ran away into the bush. He fired into the air twice to scare the assailants away but the assailants were not deterred. They continued throwing stones at the accused leading him to conclude that they would eventually surround him, get hold of him, disarm and dispossess him of the rifle. He then put the rifle against his waist and pointed it to the ground so that if he hit someone it would be on their feet or legs. He then fired two shots.

Thereafter he went far away from the mine for fear of being surrounded by his attackers. On his return he found that his employees had picked up the deceased from where he was and brought him to the fire. He was in excruciating pain. On examining him he discovered that the entry wound was on the depressed part of the buttock on the side i.e. the point where the femur goes into the socket on the pelvic girdle. He also noticed that the thigh was grazed and swollen.

The police were phoned but were unable to go to the mine until the accused had to walk to the police station and returned with the police to the scene. The deceased was then ferried to the police station and subsequently to hospital.

The accused said he did not hear anyone screaming. He accused his legal practitioner for suggesting to the state witnesses that he had heard the deceased screaming. He said he had not told his legal practitioner to write that in his defence outline. The accused also contradicted what is in paragraph 11 of the defence outline. He said he never searched for and found the deceased as he had gone far away from the mine for fear of being apprehended by the assailants. He said the deceased was found by his employees who took him to the fire

while he was far away from the mine. He also accused his lawyer for writing in the defence outline paragraph 10 that the aggressors fled in different directions.

The accused was very evasive and prevaricated under cross examination. What he was bent on was to tell the court how his mines had been subjected to a spate of robberies. His evidence was aimed at telling the court how the robberies are usually carried out at the mines. For instance he was telling the court that the robbers usually throw stones at the guards to scare them away. In the main, his evidence did not relate to the crime that he was facing. The court had to remind him on a number of occasions that he should tell his story about the charge he was facing.

He performed very badly and is not worth to be believed. His story relating to this matter must be rejected. Where ever his evidence conflicts with the well presented evidence of the state witnesses I prefer that of the state witnesses.

The accused chose not to call any of his employees who were present when he was allegedly being attacked with stones.

The court makes a specific finding that the accused was not defending himself from anything. The allegation that stones were thrown at him is false and rejected. The court further finds that the deceased and his colleagues were not armed in any way and were not carrying tools with which they could pan gold on the accused's mine.

The court finds that the accused had suffered a spate of robberies at his mine hence his reaction when he saw these 4 people walking through his mining area. The court also finds that without saying a word to them he opened fire and fatally injured the deceased. He did that with a full realization that there was a real risk or possibility that his conduct might cause death but continued to engage in the shooting. I would in the result convict the accused of murder with constructive intent.

Sentence

The accused had suffered a spate of robberies at his mines. He gave a number of about 20 robberies. Reports were made to the police with no satisfactory results. But that does not give the accused a licence to kill although it will be taken into account when assessing an appropriate sentence.

He is 66 years old and one expected him to exercise restraint. He should have exhibited maturity. Should have even tried to first ask the people what they wanted in his mining area. He should not have just opened fire before even talking to them. These people were not armed. They posed no danger to him and his employees. They never threatened him. His story that they threw stones at him is false. He was just trying to mislead the court. He shot at wrong people whose mistake was just to pass through his mining area.

A young life was unnecessarily lost. This court always guards jealously the sanctity of human life. Had it not been for the fact that he is 66 years and has been in custody since January he would have been sent to prison for no less than 18 years.

In the circumstance today he is sentenced to **FIFTEEN YEARS IMPRISONMENT.**