

entered the house of the deceased because it was dark. Further that she could not tell who was beating the deceased although she saw the 1st accused carry the hot iron rod in and out of the hut. PW4 admitted in cross-examination that she had been arrested in connection with the death of the deceased and that in her statement, she had admitted having caused the death of the deceased.

PW3 Mercy Chemtai said that on the 29/08/2004 around 9.00 a.m, she met the 1st and 2nd accused on her way to church. The 1st accused was holding some stacks of sugarcane and sticks while 2nd accused had a panga and also some sugarcane. It is when she was in church that she learnt that the deceased's body had been recovered from a coffee plantation. She was also arrested in connection with the death of deceased. She denied having been at the scene of crime on the 27/08/2004.

In this case, the investigating officer and the doctor did not testify. The prosecution were given several adjournments failed to avail the other witnesses whose evidence was crucial in this case.

The only witness who witnessed the incident is PW4 the girlfriend of the deceased. It came out during cross-examination that in her statement she said that she had not recognized the people who killed the deceased. She said it was dark and that the attackers had crept into the hut quietly. She was present during the murder of the deceased and followed the accused persons (as she put it) to the coffee plantation where the body was dumped. The following morning, PW4 did not report the matter to the police. She said she went on with her household chores as usual until police arrested her. Having said that the people who killed the deceased also raped her, it beats reason why PW4 did not report the rape incident to the police. The other girl namely C who was said to have been present during the incident was not called as a witness. PW4 was not a reliable witness. Her credibility was put in question by her change of story. In her testimony in court, she completely departed from what she had told the police. She told the story of the murder in vivid details and said she saw and recognized the 1st, 2nd and 3rd accused as they came in the hut and that she saw them torture the deceased and beating him up till he died. She also saw accused 4 come inside the hut at a later stage and accused 5 stand at the door. If PW4 knew all these things, the best time to say them was when she recorded the statement to the police. Her memory at that time was still fresh. I find the evidence of PW4 unreliable. It must be treated with caution since it appears that she was an accomplice to the murder of her boyfriend. The police ought to have charged her alongside other suspects.

PW3 did not witness the incident and was not at the scene on the material day. I found her evidence worthless in this case.

It raises questions why the investigating officer did not testify and why he failed to avail other important witnesses. From the few witnesses who testified, it can be rightly concluded that the investigations were shoddy and that there was a lot of cover-up in this case. Whatever the outcome of the case, this court will not be giving a licence of innocence to the five accused persons. It will be lack of sufficient evidence resulting from poor investigations and the cover-up which may favour them.

In the absence of the doctor's evidence to even certify the death of the deceased and the cause of it, I find that the charge cannot stand. Having no reliable evidence, whether direct or circumstantial, it is my finding that the evidence on record does not support the charge.

The five accused persons have no case to answer. I hereby acquit them under section 210 of the Criminal Procedure Code. They are hereby set at liberty unless otherwise lawfully held.

F. N. MUCHEMI

JUDGE

Dated, delivered and signed at Bungoma this 20th day of July, 2010 in the presence of the accused persons, Mr. Kituyi for defence and the State Counsel Mrs. Leting.

F. N. MUCHEMI

JUDGE