IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: KILEO, J.A., JUMA, J.A., And MWARIJA, J.A.)

CRIMINAL APPEAL NO. 340 OF 2015

JOSEPH STEPHEN KIMARO .....1ST APPELLANT
ROBERT RAPHAEL KIMARO.....2ND APPELLANT
VERSUS
THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Massengi, J.)

Dated the 4th day of February, 2015
In
Criminal Session No. 1 of 2014

JUDGMENT OF THE COURT

5th &13th October, 2015

JUMA, J.A.:

This is an appeal from the judgment of the High Court at Arusha (Massengi, J.) dated 24th February, 2015 wherein the appellants, Joseph Steven Kimaro (1st appellant) and Robert Raphael Kimaro @ Mtukuka (2nd appellant), were convicted and subsequently sentenced to suffer death by hanging as provided for under section 197 of the Penal Code. The particulars of the offence indicated that these two appellants had on the 25th day of November, 2012 at Bohora Farm within the Municipality of Arusha, jointly murdered Susan Patricia Wells, a Canadian national.

Briefly the background facts leading up to the discovery of the body of the deceased can be traced back to 26/11/2012 at about 6.30 in the morning. Athumani Hassan Sombi (PW10), a watchman employed by the Bondeni Seed Company was walking along a path to guard a farm, 'Bohora Farm", where the seed the company employing him was engaged in some activities. From a distance along his way, he saw a body of a dead woman. Her hands were tied together to her right leg, throat was slashed, and her fore head had a cut wound. PW10 immediately phoned his office to inform his employers about the body of a dead woman lying on an open space of the farm. The office called the police.

An Assistant Superintendent of Police, Faustin Jackson Mwafele (PW2) was at his desk when a call came through from an informer. Along the road towards the National Service Camp at Oljoro at Bohora farm, he was informed, there was a dead body of a woman. PW2 and other police officers rushed to the scene where they found the half-naked body of a deceased woman of European descent. The body was taken to Mount Meru Hospital for examination. During the post mortem examination the deceased body was identified by Dominique Lomberd and Emmanuel Mathew to be that of a Canadian national, Susan Patricia Wells.

It is not disputed from the evidence that the 1st appellant and the deceased were known to each other well before the deceased met her violent death. The 1st appellant testified that Susan had been a regular visitor in Tanzania in the months before her death. They became friends and lovers since 2000. Sometime in November of 2012, Susan called the 1st appellant to inform him that she would be arriving by plane in the evening of 25/11/2012 at Kilimanjaro International Airport (KIA) and, she would like him to pick her up. The 1st appellant asked his cousin, Robert Raphael Kimaro (the 2nd appellant), to accompany him to the airport.

At around 5 p.m. on 25/11/2012 a taxi driver, one Francis Fredrick Moshi (PW1), had just dropped a passenger and was returning to his usual parking bay to wait for customers when a potential customer hailed his taxi to stop, which he did. This customer, who turned out to be the 1st appellant, needed a taxi to take him to the airport to receive his guest later in the evening. The 1st appellant and PW1 exchanged mobile phone numbers to arrange where to begin their journey to the airport.

The 1st appellant was together with the 2nd appellant when they boarded the hired taxi to the airport. After clearing the airport formalities Susan was received by the 1st appellant and they drove in the same taxi

back towards Arusha. The two appellants, and the taxi driver (PW1), were the last people to see Susan Patricia Wells alive.

It is not clear what happened after Susan had entered the taxi cab to Arusha for there are the two appellants and the taxi driver (PW1) gave three versions of evidence on the last moments of her life. According to the version of evidence offered by the 1st appellant, the taxi stopped at Maji ya Chai to drop the 2nd appellant at Maji ya Chai. And while still at Maji ya Chai, the 1st appellant also got out of the taxi for he and Susan had agreed that the 1st appellant should go and visit the person he described as "our sick client" who had delivered by caesarean operation and to later proceed on to Mererani. So the 1st appellant alighted from the taxi at Maji ya Chai. The 1st appellant admitted that he took with him the entire luggage belonging to Susan. According to the 1st appellant, he and Susan had agreed to meet a week later. The 1st appellant insisted that it was the taxi driver (PW1) who drove Susan on to Arusha.

The 2nd appellant's version of the evidence is starkly different from the 1st appellant's. He claims that their taxi to Arusha arrived at Maji ya Chai at around 10.30 p.m. where he dropped off to see his girlfriend, Jacqueline. The 1st appellant gave him Tshs. 100,000/= for his own use,

and another Tshs. 150,000/= to take to their grandmother. According to the 2nd appellant, the taxi driver, Susan and the 1st appellant continued on in the taxi to Arusha.

Testifying as PW1, the taxi driver gave a third version of evidence on what transpired along their journey from the airport to Arusha. After picking Susan, the 1st appellant and his guest (Susan) sat in the back seat of the taxi. At Tengeru the 1st appellant asked the 2nd appellant to show PW1 the directions he should drive to where they had prepared a place for Susan to spend the night. According to PW1, as he drove his taxi on, he could not see any houses over the area he was directed to drive to. At some distance, the 1st appellant asked PW1 to stop his vehicle. When he stopped, the 2nd appellant left his front seat where he was and joined the back seat where Susan and the 1st appellant sat. Soon after that change of seats, PW1 heard commotion at the back seat; the 1st appellant seemed to be quarreling with Susan. PW1 was directed to drive on before he was ordered him to stop. The 1st appellant took the car ignition keys as he and the 2nd appellant dragged Susan to the bush on one side of the dirt road.

A few minutes later the two appellants returned to the taxi, but without Susan. They gave him back the ignition keys and ordered him to

drive to another place where PW1 was again ordered to stop. As they disembarked, the two appellants once again took the car ignition keys, and collected all Susan's belongings which they took to a nearby house.

When they returned, PW1 was ordered to drive on to Arusha his fare was thrown to his face before the two appellants disappeared into the night. The following day, PW1 informed the police.

The post-mortem examination was conducted by Dr. Ahmed Makata (PW6) on 30/12/2012. PW6 who said that the body of the deceased had suffered from multiple slash cut wounds involving the bone of the skull, face and a deeply cut throat which destroyed major blood vessels and trachea. PW6 also found a bite mark on her left arm and her anal orifice was dilated. Dr. Makata formed an opinion that the cause of death was loss of blood through the major veins which were ruptured. He tendered his report which was accepted as exhibit P10.

Each of the appellants filed a separate memorandum of appeal. The 1st appellant filed his memorandum of appeal containing four grounds of appeal and written submissions thereon. The four grounds stated:

1. That, the learned trial Judge erred in law and in fact by failing to give proper determination of the evidence of PW1 for he had interest to serve.

2. That, the learned trial Judge erred in law and in fact by failing to observe that he PW1 was not the first to alarm the concerns of the demise.

3. That, the learned trial Judge erroneously acted upon exhibit P.9 extra judicial statement obtained off prescribed time as required by the law.

4. That, the learned trial Judge erroneously acted upon exhibit P. 12 the caution statement which was obtained outside prescribed time contrary to section 50 and 51 of the Criminal Procedure Act, Cap 20 [R.E. 2002].

In his memorandum of appeal the 2nd appellant sets out the following grounds:-

1. That, the learned trial Judge erred in law and in fact by failing to scrutinize PW1's evidence of identification conducted in court against the 2nd appellant was a mere dock identification.

2. That, the learned trial Judge erred in law and in fact by failing to take into account that nowhere did PW1 described the identity, features, face or attire of the 2nd appellant to third parties immediately after the incident.

3. That, the learned trial Judge erred in law and in fact by failing to analyse that the record does not implicate where about of the arrest as to how and who arrested the 2nd appellant.

4. That, the learned trial Judge erroneously acted upon Exhibit P8 the caution statement which was obtained off prescribed time contrary to section 50 and 51 of the Criminal Procedure Act, Cap. 20 [RE. 2002].

5. That, the prosecution did not prove their case against the 2nd appellant beyond reasonable doubt.

When this appeal came up for hearing before us on 5th October, 2015, Dr. Ronilick Mchami, learned Advocate, appeared for the 1st appellant while Mr. Samson Rumende, learned Advocate, appeared for the 2nd appellant. Ms. Adelaide Kassala, learned State Attorney, appeared for the respondent/Republic.

Dr. Mchami placed reliance on written submissions already filed and gave additional oral submissions in respect of grounds Nos. 1 and 4.

In his oral and written submissions on the first ground of appeal, Dr. Mchami faulted the trial Judge for failing to evaluate the nature and extent of evidence leading her to a wrongful conviction of the 1st appellant. He

gave an example of the suggestion by the trial Judge that the case before her was built on circumstantial evidence yet, there was evidence of PW1, an eye witness who was present from the time the deceased was picked from the airport till when her body was thrown at Kwamrombo area.

Dr. Mchami contends that the trial Judge should not have given credence to the evidence of PW1 who was an accomplice to the crime for which the appellants were convicted. The learned Advocate further faulted the credibility of PW1 manifested by his failure to alert the police in the night of murder but to wait till the following day, and after being counseled to do so.

As to the second ground of appeal, Dr. Mchami faulted the learned trial Judge for accepting the version of evidence of PW1 who claimed to have been the first person to alert the police about the incident before anyone else. According to Dr. Mchami it was Athumani Hassan Sombi (PW10) who should get the credit for discovering the body and subsequent alerting the police. He urged the Court to disregard the evidence of PW1 as highly suspicious and self-serving by its design.

On the third and fourth grounds of appeal, Dr. Mchami claims that the trial Judge should not have relied on the extra-judicial statement

(exhibit P.9) and cautioned statement (exhibit P12) because they were respectively recorded by a Justice of the Peace (Prince Gideon, PW5) and a police officer (Detective Station Sergeant Kaitira, PW9), outside the period prescribed by sections 50 and 51 of the Criminal Procedure Act.

In his submissions Mr. Rumende dealt with the first and second grounds together and fourth ground separately. He abandoned the third and fifth grounds. On the first and second grounds which dwell on identification of the 2nd appellant, Mr. Rumende submitted that the record of appeal shows that the 2nd appellant was generally without specificity identified in the evidence of PW1. He faults the trial Judge for relying on the generalized and dock identification to convict the 2nd appellant without an earlier identification parade to determine if indeed he was involved in the murder of the deceased. He referred to the Identification Parade which the Police conducted on 4/12/2012 where while the 1st appellant was picked out by PW1 from the parade, the 2nd appellant was not even part of that parade.

Mr. Rumende then moved on to attack the cautioned statement of the 2nd appellant (exhibit P8) which Detective Sergeant Richard recorded on 20/08/2013. He submitted that the trial Judge should not have relied on

this confessional statement which was taken outside the four hour period after his arrest as provided under section 50 and 51 of the CPA. And after discarding the cautioned statement, the learned Advocate submitted, there is no other evidence linking the appellant with the crime.

Ms. Kassala learned State Attorney for the respondent opposed the appeal. On the 1st appellant's grounds attacking the credibility of Francis Fredrick Moshi (PW1), the State Attorney submitted that this was a witness of truth without whose evidence the two appellants may not have been identified and arrested. Ms. Kassala further submitted that PW1 could not report the incident earlier during night because the appellants invariable took away the car's ignition keys. She agreed with the finding of the trial Judge that the evidence of PW1 to be credible.

Ms. Kassala submitted that there is no prescribed time within which to record an extra-judicial statement. She rejected the submission that the cautioned statement (exhibit P12) was recorded outside the prescribed period. Submitting to show why the cautioned statement was not taken outside the prescribed period, Ms. Kassala referred us to pages 46 and 47 of the record showing that the 1st appellant was arrested at Mererani Police Post which was not handling the case on 03/12/2012 at 15:00, then his

house was searched before he was transported to Arusha that same day where his cautioned statement was recorded by PW9 from 20:00 to 22:00. The timelines, Ms. Kassala submitted, were within the boundaries set by section 50 (2) (a) of the Criminal Procedure Act. Ms. Kassala urged the Court that in counting the number of hours for purposes of recording the 1st appellant's caution statement, the time spent to search his house and the time to transport him from his house at Mirerani to arrive at the office of the Regional Police Commander (RPC) in Arusha, should be discounted from the minimum periods within which to record a the cautioned statement. In other words, the 1st appellant's cautioned statement (exhibit PE12) was recorded within the prescribed period.

Responding to the submissions by Mr. Rumende contending that the evidence of PW1 does not identify the 2nd appellant as a participant in the murder of the deceased, Ms. Kassala agreed that PW1's identification of the 2nd appellant was dock identification, and no identification parade was conducted to enable PW1 to identify the 2nd appellant. She agreed that the generalized descriptions which PW1 used in his evidence to identify the 2nd appellant cannot safely be relied upon. However, Ms. Kassala was quick to point out that there is other evidence which is sufficient to convict

the 2nd appellant. This other evidence is, the 2nd appellant's cautioned statement (exhibit P8), the 1st appellant's extra-judicial statement (exhibit P9) and the 1st appellant's caution statement (exhibit P12) which prove that the second appellant also participated in the murder of the deceased. Ms. Kassala further submitted that the trial Judge warned herself under the terms of section 33 (1) of the Evidence Act before she took the confessional statements into account.

In their respective rejoinders, while Dr. Chami continued to doubt the credibility of PW1 and possibility that the real murderers of the deceased may still be at large; Mr. Rumende reiterated that except for illegal confessional statements, there is no other evidence linking the 2nd appellant to the unlawful death of the deceased.

This being a first appeal, this Court is obligated to re-evaluate and analyse the facts and evidence that resulted in the judgment of the trial High Court and then arrive at its own decision. The trial Judge accepted the evidence of the taxi driver (PW1) to be credible because it forms part of unbroken chain of events linking up the 1st and the 2nd appellant to the murder of the deceased. In convicting the appellants the trial Judge believed the evidence that it was the two appellants before us, who

received the deceased when she landed at KIA. She then boarded a taxi which the 1st appellant had earlier arranged PW1 to provide. She also believed the evidence that somewhere along the road from the airport to Arusha, the appellants stopped the car and dragged the deceased outside the car. **The trial court also found as proved through the evidence of PW1 that only the 1st and the 2nd appellants returned back to the taxi.** The trial judge also noted that, the body of the deceased was discovered the following day in the same area. Further, the trial Judge pointed out that on his arrest, the 1st appellant was found in possession of the deceased's property. All these instances when linked, the trial Judge concluded, proved that it was the two appellants who murdered the deceased after picking her up from the airport.

The cautioned and extra-judicial statements were other pieces of evidence which according to the trial Judge proved that it was the appellants who murdered the deceased.

There is no doubt in our minds that the appellants received the deceased at the airport. In his own testimony during his defence, the 1st appellant (DW1) testified about her arrival in Tanzania and the bag which was found in his house at Sokoni One:

"...Suzan arrived and I met her, we were all happy. Suzan had a big black bag with red colour which has a flying tag with her name. I took her luggage which included a small bag which had ..., laptop and mobile phone to the taxi..."

The 1st appellant offered no convincing reason why he was found in possession of items which belonged to Susan who, after her arrival in Tanzania, met a violent and unlawful death. In his defence as DW1, he explained:

"...The exhibits which were found in my room, I agree I had those things and they belong to Suzan who was my lover. I was the one who kept all her belongings when she came to Tanzania. Those exhibits belong to Suzan and she gave them to me..."

There is undisputed evidence of items recovered after the search of two houses belonging to the 1st appellant. The Certificate of Seizure (exhibit P1) which the 1st appellant signed when the police searched his house at Mererani, found him in possession of very personal properties like

Blackberry mobile phone, VISA CREDIT card, credit cards etc., which should have been with the deceased but not with the 1st appellant at Mererani. There is also the evidence of F. 1416 Station Sergeant Richard (PW4) who searched the 1st appellant's other house at Sokoni One area. With his mother as a witness, more very personal items belonging to the deceased were found in his room, including:

> *"..one big black bag, 2 jackets, 4 small bags, one travelling passport, 3 T-shirts, 2 jeans trousers, one pad box and various books..".*

Mr. Mwanga, the learned advocate who represented the 1st appellant during his trial, had no objection when the PW4 tendered record of that search which was admitted as exhibit PE6.

We think, the learned trial Judge was fully justified to wonder aloud as she did in her judgment, why the deceased, should surrender all her properties to the 1st appellant which she had planned to use during her stay in Tanzania:

> *"...Looking at the contents of what was found with, some things are of daily use such as iPod, medicine. I find no*

reason for the deceased to give such things to [the] accused so he could keep them. I don't find any logic as to why deceased decided to leave 1st accused with her things..... After a thorough consideration I find 1st accused defence is a mere fabricated story which has no leg to stand....."

The trial Judge was similarly entitled to find the evidential link between the properties found in possession of the 1st appellant to the unlawful death of the deceased.

Next, we would like to re-evaluate the contentions that confessional statements were recorded out of the prescribed time. Dr. Mchami for the 1st appellant, and Mr. Rumende for the 2nd appellant, both attacked confessional statements for having been recorded by a Justice of the Peace and police officers outside the period prescribed by sections 50 and 51 of the Criminal Procedure Act. Upon our perusal of the record we think Ms. Kassala is correct to submit that the cautioned statement of the 1st appellant was recorded by PW9 within the time-frame provided under section 50 (2) (a) of the CPA which states:

50.-(2) In calculating a period available for interviewing a person who is under restraint in respect of an offence, there

shall not be reckoned as part of that period any time while the police officer investigating the offence refrains from interviewing the person, or causing the person to do any act connected with the investigation of the offence–

(a) ***while the person is, after being taken under restraint****, being* ***conveyed to a police station or other place for any purpose connected with the investigation****;* [Emphasis added]

We think after his arrest at about 15:00 hours on 03/12/2012 by D/CP Edwin (PW3) of Mererani Police Post, there was time which was spent to search his house at Songambele area of Mererani. After the search and recovery of items relevant for further investigation, the appellant was transport to Arusha where his case file was. We think, in compliance with the exclusion of certain period under section 50 (2) (a), the period that was spent at Mirerani Police Post and later on to search his house should be discounted because it was the period the 1st appellant was under restraint, in the course of an investigation of an offence of murder whose case file was in Arusha where he was finally transported to.

According to Ms. Kassala, the evidence of F.147 D/SGT Kaitira (PW9), the 1st appellant was brought to the office of the RPC at about 19:50 hrs. and ten minutes later at 20:00 hrs PW9 began to record his cautioned statement for two hours up to 22:00 hrs. Ms. Kassala submitted the time spent from the search of his house to the time the 1st appellant was finally taken to the office of RPC is excluded under the terms of section 50 (2) (a) of the Criminal Procedure Act.

With regard to the contention that the 2nd appellant's cautioned statement (exhibit P8) was taken outside the prescribed period, we failed to find the basis of this line of submission. In his cautioned statement, the 2nd appellant stated that he was arrested on 20/08/2013 but did not specify the time of his arrest. According to the evidence of PW4, he recorded the cautioned statement of the 2nd appellant on 20/08/2013 from to 21:00 to 22:30 hours. We cannot assume, as Mr. Rumende would like us to. At any rate, there is no law that prescribes the time limit within which an accused person may be taken before a Justice of the Peace invariably a Magistrate to record his extra-judicial statement. This came out clear in **Steven s/o Jason and Two Others vs. R.,** Criminal Appeal No. 79 of 1999

(unreported) where the extra-judicial statement was taken five days after the police had recorded the cautioned statement. The Court stated:

> *"...When extra-judicial statement was taken... it was about five days after the cautioned statement. This in our view was sufficiently long for the appellant to cool down and appreciate that he was before a magistrate and not a police officer. He had no cause for fear particularly after the explanation and questions by the Justice of the Peace. We reject the allegation that the first appellant was still haunted by fear when the first appellant made the extra-judicial statement. In our view, he was a free agent..."*

In other words, unlike cautioned statements whose time to be recorded is prescribed under sections 50 and 51 of the CPA, no such limitation is imposed in extra-judicial statements recorded before Justices of the Peace whose concern is to make sure that an accused person before him is a free agent and is not under any fear, threat or promise when recording his statement.

Having disposed of the issue of time within which to record the confessional statements, we now wish to deal with other equally important

issues on probity or weight which should be attached to the confessional statements. This Court has on several occasions insisted that a confessional statement must be both voluntary and must provide a true account. This was restated in **Juma Magori @ Patrick and Four Others vs. R.,** Criminal Appeal No. 328 of 2014 (unreported):

> *"...We take it to be trite law that for a confessional statement to be proof of commission of an offence by its maker, it must not only have been made freely and voluntarily but must also be nothing but true."*

There are many ways through which courts assure themselves of probity or the weight to be attached to confessional statements, be it cautioned recorded by a police officer or extra-judicial recorded by a Justice of the Peace. For example, the Supreme Court of Nigeria in **Ikechukwu Okoh v. The State** (2014) LPELR-22589 (SC) while underscoring the need for a confessional statement to be voluntary, it also placed reliance in a case from UK, **R. v. Sykes** (1913) 1 Cr. App. Report 233, which highlights some basic questions which courts are advised to ask themselves while determining the probity and the weight to be attached to the confessional statements:

"The questions the court must be able to answer before it can rely on a confessional statement to convict an accused person were set out in the case of ***R. v. Sykes*** *(1913) 1 Cr. App. Report 233 are as follows: (a) Is there anything outside it to show that it is true? (b) Is it corroborated? (c) Are the factors stated in it true as far as can be tested? (d) Was the accused the man who had had the opportunity of committing the offence? (e) Is the confession possible? (f) Is it consistent with other facts which have been ascertained and proved?"*

In Tanzania, this Court has on several occasions taken similar cautionary stance in determination of the probity of confessional statements. For instance, in **Emmanuel Lohay and Udagene Yatosha vs. R.**, Criminal Appeal No. 278 of 2010 (unreported) the Court described the essence of confessional statements. They must shed some light on how the deceased concerned met his death, role played by each of the accused person, such details as to assure the courts concerned that the person making the statement must have played some culpable role in the death of the deceased. The Court stated:

"...cautioned and extra-judicial statements..... have one common feature. All of them ***describe the circumstances and the manner in which the deceased met his death.*** *They are so detailed that the events described therein* ***could have only been given by people who had the knowledge of how the deceased met his death.*** *The statements also show* ***the role played by each one of them."*** [Emphasis added].

In the instant appeal before us, the cautioned statements (exhibits P8, 12) and the extra-judicial statement (exhibit P9) were objected to, before the trial court conducted trial within trial and their exhibition as evidence after being satisfied of their voluntariness. As this Court stated in **Steven s/o Jason and Two Others vs. R.,** Criminal Appeal No. 79 of 1999 (unreported), the admissibility of evidence during the trial is one thing and the weight to be attached to it is a different matter. The Court went further:

*"...****a court is put on notice*** *to analyze evidence closely* ***as long as the appellant had objected***

to the admission of cautioned and extra-judicial statements." [Emphasis added].

The 1st appellant was arrested on 03/12/2012 at Mirerani and transported to Arusha that same day where his cautioned statement (exhibit P12) was recorded by PW9. The following day on 4/12/2012 he was taken to the Justice of the Peace (PW5) where his extra-judicial statement was recorded. In his defence testifying as DW1, claimed that all the time when he made his confessional statements he was under threat from several people, some tall, some coloured and some black. He said:

"...I had never given Extra-Judicial Statement. I only signed after being threatened even the cautioned statement."

Likewise, testifying as DW2 in his defence, the 2nd appellant insisted that his cautioned statement (exhibit P8) which he made to D/SSGT Richard (PW4) was not voluntarily. That he was forced to sign a statement which was not his own. He only signed after he was beaten up.

Since both the 1st and the 2nd appellant have objected their respective confessional statements, courts are put to notice and are expected to marshal up all possible tests to determine voluntariness and truthfulness of the cautioned statements. Further, there is an established principle settled by this Court to the effect that extra-judicial and cautioned statements cannot mutually corroborate. This came out from the decision of the Court in **Mashimba Dotto @ Lukubanija vs. R.**, Criminal Appeal No. 317 of 2013 (unreported):

> *"..In this sense, the cautioned statement in the case before us could not corroborate the extra-judicial statement. We say so because in an ideal case each one of the two required independent corroboration before a conviction could safely lie."*

Upon our closer re-evaluation of the confessional statements which the two appellants, there can be no denial that these statements were nothing but a true account of what happened to the deceased. It is only the 1st appellant who can look back to the earlier days in 2009 when he met the deceased at the Centre of Children for Future (CCF). He remembered other foreign Social Workers as well who were at CCF. But

Suzan Wells was his closest friend who even assisted him to build a house for himself and his family. He even recalled how in November 2012 Susan Wells returned to Tanzania, this time alone and the 1st appellant met her at KIA.

In their respective confessional statements, the 1st appellant and the 2nd appellant recalled how a day before the deceased arrived, they and planned how to receive Susan at the airport and kill her and steal the money she carried. In their statements, they both state that it was the 2nd appellant who brought a sharpened bush knife (machete) to kill Suzan. Although they tried to down play their respective roles, but their statements were on common ground that the machete was used to slash Susan's throat, then the 2nd appellant took the bush knife which he used to slash Susan's head. They made sure she was dead before they left the scene of murder.

For instance, in his cautioned statement (exhibit P8), the 2nd appellant recalled that when the taxi driver arrived to take them to KIA, the 1st appellant directed him to go at Baraka's shop to collect a bag containing a machete before driving to the airport to meet the deceased. The 2nd

appellant's recollection in his statement that it was the 1st appellant who asked him to assist in tie up Suzan's legs and hands together which he did whilst in the car, is consistent with the state of the body of the deceased when it was discovered by the watchman (PW10): *"I saw a human being body and both hands were tied together and right leg. Also I saw that body was slaughtered and on the fore head there was a cut wound...."*

It seems to us clear that there is no evidential room for the 1st and the 2nd appellants to wriggle themselves out!

In so far as the corroboration of the 1st appellant's extra-judicial statement (exhibit P9) and his cautioned statement (exhibit P12) are concerned, there is the evidence of E 4006 Detective Corporal Edwin (PW3) who upon searching of his house at Mirerani, found properties belonging to the deceased. PW3 prepared a Certificate of Seizure (exhibit P1) which the 1st appellant signed. There is also the corroborative evidence of Station Sergeant Richard (PW4) who after searching the 1st appellant's other house at Sokoni One area, found several items belonging to the deceased. Neither the 1st appellant nor his learned counsel resisted when PW4 tendered record of that search which was admitted as exhibit PE6. There is also the evidence of the taxi driver (PW1) who not only gave a very

detailed account of the final moments of the deceased's life, but also identified the 1st appellant in an Identification Parade.

In conclusion, we propose to consider the question of credibility of the taxi driver (PW2) whose evidence corroborates the confessional statements which the two appellants made.

On the question of credibility of PW1, we shall begin from the legal premise which this Court restated in **Goodluck Kyando vs. R.,** Criminal Appeal No. 118 of 2003 (unreported) that:-

> *... It is trite law that every witness is entitled to credence and must be believed and his testimony accepted unless there are good and cogent reasons for not believing a witness...*

Like the learned trial Judge, we could in our re-evaluation of evidence of PW1 find any convincing reasons to support the two appellants' submission casting doubt in the credibility of this witness. On the contrary, there are several pieces of evidence which in fact strengthen the credibility of PW1. Far from being an accomplice to murder, the 1st appellant's cautioned statement (exhibit PE12) exonerates PW1 by stating that only the two appellants knew of the plan to kill the deceased and the taxi driver

was not aware of their plans. When the two appellants began to execute the plans, the taxi driver was but an unwilling participant. In exhibit PE12 the 1st appellant stated that they forced the driver to take the route towards Tengeru right up to Duluti up to Chekeleni. In his cautioned statement, the 2nd appellant said that during all this time they were executing their plan, the taxi driver was under their tight watch!

In upshot of the foregoing, the appeals of both appellants against their convictions and sentences are accordingly dismissed. We order accordingly.

Dated at **Arusha** this 12th day of October, 2015.

I. H. JUMA
JUSTICE OF APPEAL

A. G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL