IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ONYANGO OTIENO, AZANGALALA & KANTAI, JJ.A)

CRIMINAL APPEAL NO. 11 OF 2011

BETWEEN

JJW ……….……………………………..............................…………APPELLANT

AND

REPUBLIC ………………………….………………………..………RESPONDENT

(An appeal from a judgment of the High Court of Kenya at Kisumu (Karanja, J.) dated 2nd November, 2010

in

H.C.CR.A. NO. 91 OF 2010)

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JUDGMENT OF THE COURT

The deceased, ***POA*** was, as on 2nd December, 2007, the second wife of the appellant in this second and most probable last appeal of ***JJW***. One ***SOO***, was a brother to the appellant. Apparently, the first wife of the appellant had died sometime before the incident, the subject of this appeal. The deceased and the appellant lived with their child ***IP*** (PW2) and the deceased's niece ***LA*** (PW1). They lived at an estate within the Kisumu Municipality.

On 2nd December, 2007 at about 9.00 a.m. **LA** was washing clothes outside the house. **IP** and the deceased were also there with **IP** washing clothes outside the same house as well. The appellant arrived at the house and was served with tea and what **LA** called *githeri* but which **IP** called *nyoyo* in Luo. In general these two versions mean boiled maize mixed with beans. Immediately after the appellant was served tea and *nyoyo*, the landlord ***Sam Odongo*** (PW4) joined the appellant and the two took tea and *nyoyo* together. After taking tea, the landlord left and as **LA** and **IP** were cleaning the table, the appellant's mobile phone rang and he went into the bedroom talking to whoever telephoned. After that, ***Samson Otieno Ondiek*** arrived, greeted **PI** and **LA** and entered the house. This time **LA** and **IP** had cleared the table and were outside as the deceased, the appellant and Otieno were inside the house. **LA** and **IP** then heard the deceased crying as if in pain. **LA** and **IP** pushed the door and on the door being opened, they found the appellant holding the deceased by the hair and hitting her head against the wall as Otieno was kicking her randomly all over the body. **LA** said appellant was also beating the deceased with a hockey stick while P**I** said he was strangling the deceased. **LA** and **IP** started screaming. This

prompted appellant to fetch a whip with which he chased the two who went into hiding. As he chased the two away, the deceased got a breathing space and ran away as the appellant and Otieno, still armed with a hockey stick and whip tried to trace her. As he was doing so, **LA** and **IP** who were at their hiding place but observing the events heard the appellant utter words to the effect that the deceased had to learn a lesson and that one of them would go to the mortuary as the other goes to the cell. **LA** and **IP** understood these words to refer to the appellant and the deceased.

Thereafter, on a Monday following the incident **LA** said deceased complained of severe pain and headache. She called her sister in Sweden and told her, according to both **LA** and **IP**, that Baba **IP** had beaten her badly and she feared for her life. On Tuesday 4th December, 2007, the deceased went to St Teresa Girls High School for training as in-service for early childhood training was going on there. She returned home and again went to the school for training on Wednesday 5th December, 2007.

Seline Akoth Abuto (PW5) a nursery school teacher at Sharon Star Nursery School was also attending the same training at St. Teresa's Girls High School, together with the deceased. She met the deceased at the school. At 2.00 p.m. the deceased told her she was having severe headache. They continued with classes till 4.00 p.m. when they went to the toilet in a group. While there, the deceased said she was feeling dizzy and she grabbed the nearby fence for support but fell down unconscious. Seline and another lady called ***Lilian*** carried her to a shade where she regained consciousness. She then called another woman ***Madam Waguana*** and told her she was sick. Seline later confirmed the same to Madam Waguana and Seline was advised by Waguana to rush the deceased to hospital. Seline hired a *tuk tuk* at Kibuye stage and the deceased was taken to Kisumu District Hospital. Seline also called the appellant and informed him of Pamela's condition. On arrival at the district hospital a nurse examined the deceased and confirmed her dead.

The appellant and the deceased's colleagues arrived at the hospital and Seline gave the appellant the deceased's phone and her documents. The appellant informed .***POAO*** (PW3), the deceased's brother of her death by mobile call at around 7.00 p.m. and O went to the mortuary and saw the deceased. He thereafter identified the body of the deceased to ***Dr. James Wagude*** for postmortem examination. Later, the matter was reported to the police as the siblings of the deceased suspected foul play. Dr. James Wagude performed postmortem on the deceased on 10th December, 2007 and formed the opinion that the cause of death was cardio respiratory arrest due to internal bleeding due to abdominal, chest and head trauma secondary to assault. The appellant was not happy with that report as he alleged it was carried out in his absence and thus sought another postmortem to be done. This was granted and ***Dr. Margaret Oduor*** carried out a second postmortem on 18th December, 2007. She put the cause of death as cardio respiratory arrest secondary to possible metabolic changes complicating physical trauma. Both reports were at the hearing produced by ***Doctor Claris Onyango*** (PW9) a Medical Officer at Nyanza Provincial Hospital who confirmed having worked with both Dr. Wagude and Dr. Oduor and knew their signatures.

Pc. Stephen Bisienei (PW8) investigated the entire saga and as a result of his investigations the appellant was arrested on 10th December, 2007 by ***Sgt. Joseph Wendo*** (PW6) whereas O was arrested on 12th December, 2007. Both were charged in the High Court with the charge of murder and they pleaded not guilty. Later the offence was, for some unexplained reasons, reduced to that of manslaughter and although the Information prepared even for that charge of manslaughter was prepared for the High Court, the matter was eventually taken to the Chief Magistrate's Court at Kisumu as **Criminal Case No. 168 of 2008**.

At the hearing of the case, the prosecution called nine witnesses. On their being put on their defence the appellant and Otieno both gave sworn evidence and called two witnesses. The appellant denied killing the deceased saying on 2nd December, 2007, the deceased woke him up and informed him that ***SO***, had come. He woke up and took tea together with SO, as the deceased washed clothes. He then left to his other house having told deceased to send **IP** to collect Kshs.100/= which deceased had asked for. He came to know about the deceased's death in the afternoon of 5th December, 2007. ***J O O***, (DW3) was a defence witness. He said that appellant's house was in front of his house but on that fateful day 2nd December, 2007, he was in his house from 8.00 a.m. to mid day but did not hear any commotion from

appellant's house. ***WOO*** (DW4) was another defence witness. All he said was that at 10.00 a.m. SO went to his barber's shop and they stayed there waiting for somebody up to 3.00 p.m. and that is when O went away. The learned Senior Principal Magistrate (A.C. Onginjo) after considering the entire case in a judgment dated 18th May, 2010 found both appellant and O guilty of the offence of manslaughter and convicted them of the offence as charged. That judgment was read by the Senior Resident Magistrate Mr. S.A. Atonga on 7th June, 2010 as by the time the Senior Principal Magistrate had prepared it she was on transfer to another station. Mr. Atonga, after hearing and considering the mitigating factors sentenced the appellant and O each to serve imprisonment term for seven (7) years.

Both the appellant and O felt dissatisfied with that conviction and sentence. They appealed to the High Court. That appeal was opposed by the State but the State neither filed Cross-Appeal nor sought enhancement of the sentence during the hearing of the appeal. We observe further that the court also did not warn the appellants that the sentence of seven years would be enhanced. Be that as it may, the appeal came up before Karanja, J. and in a well considered judgment dated and delivered on 2nd November, 2010, the learned Judge dismissed the appeal but went further on sentence as regards the appellant and addressed himself thus: -

> **"With regard to the sentence of seven (7) years for imprisonment imposed by the learned trial magistrate, the same was neither harsh nor excessive considering that the sentence provided under Section 205 of the Penal Code is life imprisonment. If anything, the sentence was too lenient and calls for enhancement in accordance with Section 354 (3) of the Criminal Procedure Code and more so, against the second appellant who bore the greatest responsibility for the offence. To that extent, the sentences as regards the said appellant shall be enhanced to ten (10) years imprisonment. Other than that alteration in the sentence respecting the second appellant, this court finds no tangible reason to interfere with the conviction of the two appellants and the sentence respecting the first appellant."**

That is the judgment that has provoked this appeal before us filed by the appellant only. He was the second appellant in the High Court.

He filed Notice of Appeal dated 23rd December, 2010 in January, 2011. For reasons that will be apparent later, we reproduce the salient parts of that Notice of Appeal. It reads: -

> *"REPUBLIC OF KENYA*
>
> *NOTICE OF APPEAL*
>
> *TAKE NOTE that J J W appeals to the Kenya Court of Appeal against the decision of the High Court Judge Mr. Justice J.R. Karanja (J) delivered on 2nd day of November, 2010 in the High Court of Kenya at Kisumu in H.C.CR.A. N0. 91 of 2010.*

1. *That the appeal is against sentence only.*
2. *That the appellant wishes to be present at the hearing of the appeal.*

> *Dated this 23rd day of December, 2010.*

……………….LTD

KMU/304/10lS

J J W "

Having filed that Notice of Appeal which clearly stated that the appeal was against sentence only, the appellant, who is conducting his appeal in person, proceeded and filed a Memorandum of Appeal and an

amended Memorandum of Appeal containing twenty five grounds of appeal all against conviction.

At the hearing, the appellant put in written submissions which he highlighted before us by submitting that his rights were violated as he was kept in custody for 48 days without being produced in court; that the postmortem done by Dr. Oduor did not support the evidence of **LA** and that of **IP**; that neither the P3 nor the treatment notes were produced at the hearing to support evidence of assault adduced by the two main witnesses, **LA** and **IP**; that there were three death certificates and thus it was not possible to rely on any of the three; that two postmortem reports were produced in court and one stated blood samples were taken to Nairobi yet no results had been received to know the cause of death; that postmortem report had no rubber stamp, as is required by law; that the alleged hockey stick used in killing the deceased was never produced as exhibit at the hearing and that as his rights were violated he was seeking assistance.

Mr. Abele, the learned Assistant Director of Public Prosecutions submitted that as the Notice of Appeal clearly stated that the appeal was only against sentence, the court had no jurisdiction to entertain the memorandum and submissions challenging conviction as that aspect is not appealed against. On sentence, Mr. Abele submitted that the State would concede the appeal against the enhanced sentence as the court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant. He therefore asked us to interfere with that aspect of the matter and reinstate the sentence to the term as ordered by the trial court.

We have anxiously considered this appeal, the submissions, the record and the law. In our view Mr. Abele is plainly right that the appellant having chosen to appeal only against sentence and having conveyed that choice vide Notice of Appeal which we have reproduced above, could not in law proceed to challenge conviction. ***Rule 59 (1)*** and ***(2)*** of this Court's Rules states: -

> **"59 (1) Any person who desires to appeal to the court shall give notice in writing, which shall be lodged in sextuplicate with the registrar of the superior court at the place where the decision against which it is desired to appeal was given, within fourteen days of the date of that decision, and the notice of appeal shall institute the appeal.**
>
> **(2) Every notice of appeal shall**

a. **state shortly the nature of acquittal, conviction, sentence or finding against which it is desired to appeal; and**

b. **contain the address at which any documents connected with appeal may be served on the appellant."**

The Notice of Appeal shall constitute the appeal and then what it specifically states it is appealing against in ***Rule 59 (2)*** is what the appellant is bound to pursue as that is what the appeal is instituted on and not any other. There are no clear decided cases on this aspect, particularly in respect of criminal cases but a decision of the Court of Appeal in England may be of some help. That is the decision of Lord Parker, CJ, Widgery L.J and Lawton J. in the case of **R. vs. Bardoe** **(1960) 1 ALL ER page 948,** where a matter had been referred to that court for review of sentence only as appeal against conviction had been rejected but the appellant's age was found to be under 18 years, when the appellant sought to introduce the appeal against conviction, the court held: -

> **"…. Since in the present case the part that was referred was the review of sentence the court would not hear argument in regard to conviction."**

It is clear to us that as the Notice of Appeal clearly stated that the appeal was only against sentence, we cannot entertain arguments against conviction. However, even if we were to consider the arguments against conviction, it being that the appellant is conducting his appeal in person and may not be aware of the legal technicalities, still, in our consideration of the recorded evidence, we are not persuaded that both the trial court and the first appellate court misdirected themselves in any points of law that may

necessitate an intervention. Both **LA** and **IP** were eye witnesses to what happened in their presence and they too screamed and were chased away by the appellant who had a whip at the time he was chasing them away. They saw the appellant holding the deceased by the hair and hitting her head against the wall. They also saw him hit her with a stick whether hockey or mere stick, thus injury was inflicted on the deceased. They saw Ondiek who has not appealed to this Court kicking the deceased randomly all over the body. They heard the appellant saying that one of them would go to the mortuary as the other goes to the cell which could have meant the action on the deceased was premeditated. All that evidence was accepted by the trial court and the first appellate court, on revisiting that evidence afresh, analyzing and evaluating it, also accepted it. Both doctors agreed that cause of death was as a result of cardio respiratory and physical trauma. By *dint* of the provisions of ***Section 361 (1) (a)*** of the Criminal Procedure Code, we have no jurisdiction to entertain those aspects which were matters of fact. The issue of violation of appellant's rights under the Constitution, was raised in the first appeal and in our view, was dealt with according to law as the trial court also dealt with it and both found that the offending delay in producing the appellant to court within the time stated in the Constitution, was well explained by the prosecution and in any case the appellant still has civil channels to raise the same matter in another forum. In our view, both postmortems clearly supported the evidence of **LA** and **IP** that the deceased was assaulted and that was the cause of her death. Thus on conviction, the totality of the evidence on record leaves no doubt that the appellant, together with Ondiek killed the deceased and were indeed lucky not to have faced a murder charge for the evidence on record could have sustained a murder charge.

We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under ***Section 354 (3) (ii)*** and ***(iii)*** of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Oftentimes this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal.

In this appeal, the prosecution did not urge enhancement of sentence and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any was issued, yet all of a sudden, in the judgment, the learned judge enhances the sentence from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, the enhancement of the appellant's sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the Memorandum of Appeal that was before the first appellate court and we note that save for a small part in passing, the appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence.

We agree with Mr. Abele that the enhanced sentence was unlawful. It calls for our interference. The appeal on conviction is dismissed. The appeal on sentence is allowed to the extent that the enhanced sentence of ten (10) years imprisonment is set aside and in its place the original sentence awarded by the subordinate court of seven (7) years is reinstated with effect from the date the subordinate court awarded it.

Dated and delivered at Kisumu this 12th day of July, 2013.

J.W. ONYANGO OTIENO

……………………..

JUDGE OF APPEAL

F. AZANGALALA

……..……………….

JUDGE OF APPEAL

S. ole KANTAI

………..…………….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR