REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CRIMINAL APPEAL NO 104 OF 2019

EZEKIEL BARONGO alias MAGENZE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From Original Conviction and Sentence in Ogembo SPM Criminal Case No. 880 of 2019 dated 18th July 2019 before Hon. D. Mikoyan– S.P.M)

JUDGMENT

1. This is an appeal regarding sentence only as the appellant, **EZEKIEL BARONGO alias MAGENZE**, was convicted for the offence of causing grievous harm contrary to **section 234 of the Penal Code (Chapter 63 of the Laws of Kenya)**. The charge against him was that on 1st March 2019 at Machoge Chache location within Gucha sub-county in Kisii County unlawfully did grievous harm to Benedict Bosire. He was sentenced to serve 2 years' imprisonment.

2. The facts of the case were that Benedict Bosire Nyatobe (Pw2) on 1st March 2019 met the appellant fighting with a lady and 2 children who were at the scene sought refuge in him. The appellant stopped fighting the lady, approached him and punched him on the mouth. He started bleeding because his tooth got loose and he eventually fell down. Jamel Koboi Oantiri (Pw3) testified that he saw the appellant beat Pw1 and he intervened. The clinical officer, Gilbert Simba (Pw3), testified that Pw2 had a fracture on interior upper tooth number 11 and an extraction was done. He concluded that the injury was caused by a blunt object and the nature of the injury was grievous harm.

3. Mr. Otieno for the State submitted that the offence attracts a maximum of life imprisonment and that the trial magistrate after considering all the circumstances properly exercise his discretion in sentencing the appellant.

4. Since this is an appeal on sentence, an appellate court will not review or alter a sentence imposed by the trial court on the mere ground that if the appellate court had been trying the appellant it would have passed a somewhat different sentence, and will not ordinarily interfere with the discretion of a trial judge unless the judge acted on some wrong principle or overlooked some material factors or issued a sentence that was manifestly excessive. (See **Macharia vs. Republic [2003] EA 559**)

5. The appellant in his mitigation, admitted that he had assaulted the complainant and asked for a lenient sentence on account that he is the breadwinner of the family.

6. The trial court after considering the appellant's mitigation sentenced the appellant to 2 years' imprisonment. The evidence is that the assault was deliberate and the resultant injuries were serious. Having considered the circumstances leading to the assault and I do not find any reason to interfere with the otherwise lawful sentence of 2 years' imprisonment. The appeal is dismissed.

Dated, signed and **delivered** at **Kisii** this **25th** day of June **2020.**

R.E. OUGO

JUDGE

In the presence of:

Appellant **In Person**

Mr. Otieno **Senior Prosecution Counsel Office of DPP**

Ms. Rael **Court Assistant**