



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CRIMINAL APPEAL NO. 80 OF 2004**

**(From original conviction and sentence of the Chief Magistrate's court at  
Kisii in criminal case No.3214 of 2001.)**

**SAMUEL MAOBE SERETI ..... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

**JUDGEMENT:**

Appellant was convicted for the offence of assault occasioning actual bodily harm c/s 251 of the Penal Code. He was sentenced to one year imprisonment.

Though the appellant had appealed against both the conviction and sentence he abandoned the appeal against conviction and canvassed the one against sentence. It was submitted that the magistrate erred for sentence appellant to one year instead of putting him on probation. He had called for a probation report, which was presented to him.

The state counsel conceded to the appeal.

The court after conviction adjourned the case to a wait for a probation report. The report was presented to court on 13th April 2004. Court adjourned for sentencing on 20th April 2004 when appellant was jailed for one year. The report is in court file and I have gone through it. The probation officer recommended appellant to be put on probation.

Of course the court is not bound by the recommendations of the probation officer but having called for the report and the report being favourable the court should have stated why it felt that it was not proper to place the appellant on probation.

The appellant was a first offender and there were no new facts discovered between the day the report was called for and sentence was passed.

I feel the trial magistrate did not take into account all factors when passing the sentence. I allow the appeal, set aside the sentence of one year imprisonment and substitute it with one of probation for one year.

It is so ordered.

**Dated at Kisii on 30th July 2004.**

**KABURU BAUNI**

**JUDGE**

**30/7/04**