



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CRIMINAL APPEAL NO. 409 OF 2010**

*(From Original Conviction and Sentence in Criminal Case No. 1302 of 2010 of the Chief Magistrate's Court at Mombasa: R. Mutoka – C.M.)*

**HASSAN ABDALLA YUSUF ..... APPELLANT**  
**VERSUS**  
**REPUBLIC ..... RESPONDENT**

**JUDGEMENT**

The Appellant herein one **HASSAN ABDALLA YUSUF** has filed this appeal against his conviction and sentence by the learned Senior Resident Magistrate sitting at Mombasa Law Courts. The Appellant had been arraigned before the trial court on 26<sup>th</sup> April 2010 charged with the offence of **TRAFFICKING IN NARCOTIC DRUGS CONTRARY TO SECTION 4 (a) OF THE NARCOTICS ACT**. The particulars of the charge were that:

***“On the 23<sup>rd</sup> day of April 2010 at Mwandoni in Kisauni District within the Coast Province was found trafficking in narcotic drug by way of selling 2 grammes of heroin with a street value of Kshs.4,000/- in contravention of the said Act”***

The Appellant initially entered a plea of **‘not guilty’** to the charge and a hearing date was allocated. However before the trial could commence the accused on 18<sup>th</sup> May 2010 made an application to change his plea. The charges were read out to the Appellant afresh and he admitted the charge by saying:

***“It is true”***

The court prosecutor then read out the facts of the charge as required by law. The Appellant maintained his plea of guilty saying:

***“The facts are correct”***

The trial magistrate then proceeded to convict the Appellant based on his own plea of guilty. After listening to the mitigation offered by the Appellant and after obtaining and considering a Probation Report, the learned trial magistrate placed the Appellant on probation for a period of three (3) years.

I will pause at this point to consider the correctness or otherwise of the conviction of the Appellant at this point. **MR. MAGOLO**, Advocate who represented the Appellant, submitted that this conviction of the Appellant was invalid because certain crucial factors were left out. **MR. ONSERIO**, who appeared for the State did concede this point. I have myself carefully perused the proceedings up to this point. I

have no quarrel with the procedure followed by the trial magistrate in recording these guilty facts. However a close look at the narration of the facts reveals that there was a crucial omission by the prosecution. In his narration of the facts at page 6 line 7 the learned court prosecutor states as follows:

***“Later an exhibit memo form was prepared and used to forward the 2 grammes of heroin to the government chemist for analysis. I do not have any report from the government chemist in court. I also do not have the 2 grammes of heroin in court. I however have the exhibit memo form in court. I wish to produce it as an exhibit Pexb1”.***

The prosecutor failed/omitted to produce before the court the 2 grammes of heroin allegedly recovered on the appellant and also failed to produce the government analyst’s report confirming that the substance recovered on the Appellant was actually heroin. Without the production of these crucial exhibits the charge cannot be deemed to have been proved. Notwithstanding the plea of guilty by the accused the prosecution was still under an obligation to avail these crucial exhibits in court. To merely produce an exhibit memo form will not suffice as this does not prove any of the facts in issue. If these exhibits were not available on that day the prosecutor ought to have sought an adjournment to enable him obtain the requisite exhibits. Failure to produce these exhibits leaves a doubt as to whether any heroin was actually recovered on the Appellant as alleged. The law places an onus on the prosecution to prove its case beyond all reasonable doubt. The fact that the Appellant sought to enter a plea of guilty does not remove the obligation on the prosecution to so prove its case. I therefore find that failure to produce these crucial exhibits renders the charge unproven and in such circumstances the trial magistrate ought not to have convicted the Appellant. The charge with the facts as read out was invalid and therefore a nullity. Any sentence premised upon such an invalid charge is also a nullity and cannot stand. For this reason alone this appeal must succeed.

However even if this court was to proceed on the assumption that the Appellant’s conviction was sound (which as I have demonstrated above was not the case) the record reveals further disheartening anomalies which this court cannot ignore. **HON. KIZITO** who was the trial magistrate sentenced the Appellant to serve three (3) years probation. Then on 20<sup>th</sup> July 2010 the matter was mentioned up again before Hon. Chief Magistrate Ms Rosemelle Mutoka and a probation officer known as Musyimi addressed the court and indicated that the Appellant was in violation of his probation terms and requested that a warrant of arrest be issued for the Appellant. The court obliged. Presumably in so doing the court was relying on S. 8 of the Probation of Offenders Act Cap 64 Laws of Kenya. S. 8(1) of this Act provides:

***“8(1) If after hearing information on oath [emphasis mine] it appears to any judge or magistrate that a probationer has failed to comply with any of the provisions of the probation order, he may issue a summons to the probationer requiring him to appear at the place and time specified therein or may issue a warrant for his arrest”***

It is clear from the record that the procedure specified in S. 8(1) was not complied with. The probation officer did not give information **on oath** before the Hon. Chief Magistrate regarding the Appellant’s alleged violation of his probation terms. He merely appeared in court and made an unsworn statement based upon which the court proceeded to issue a warrant of arrest.

Secondly the probation order relating to the Appellant was made by **HON. KIZITO** Senior Resident Magistrate yet the file was later taken before the Hon. Chief Magistrate for the issuance of the warrant of arrest. Here again the laid down procedure has been flouted. S. 8(2) of Cap 64 provides:

***“8(2) A summons or warrant brought under this section shall direct the probationer to appear or be brought before the court by which the probation order was made” [emphasis mine]”***

The court by which the probation order was made was the court presided over by Hon. Kizito. In the event any issue arose concerning that probationer (the Appellant herein) then the matter ought to have been referred back to Hon. Kizito’s court for any further action. This was not done. It is not clear why the

matter instead went before a different court. In any event this action was clearly against S. 8(2) of the Probation of Offenders Act and cannot be upheld by this court.

The allegation made before the Hon. Chief Magistrate was that the Appellant had violated the conditions of the probation order made against him. S. 8(3) of Cap 64 deals with such a situation and it provides:

**“(3) If it is proved to the satisfaction of the court by which the probation order was made that the probationer had failed to comply with any of the provisions of the probation order then –**

- (a) .....**
- (b) .....**”

Once again the Act gives to the court by which the probation order was made the mandate to hear and deal with any alleged violation of the probationary terms. Secondly Mr. Musyimi the probation officer in his first address to the court on 20<sup>th</sup> July 2010 states:

**“The offender is serving 3 years on probation. However I now have a report from the community policing agents that the offender has been violated [sic] the probation terms and has been arrested for trafficking in narcotic drugs. Hence I apply for a warrant of arrest in this respect”**

The probation officer appears to have no personal knowledge of any violations by the Appellant. He appears to rely on reports from community policing agents. It is alleged that whilst out on probation the Appellant was arrested for trafficking in narcotic drugs. No evidence is tendered to prove this allegation – no OB report is produced and no charge sheet from any court to indicate the Appellant did truly commit such an offence. Later on 30<sup>th</sup> July 2010 the same probation officer appeared before the Chief Magistrate and made a more comprehensive statement (still not on oath as required by S. 8(1) of the relevant Act). This time Mr. Musyimi said:

**“The accused was placed on probation on 9/6/2010 for the offence of trafficking in narcotic drugs. One month later members of urban policing and council of Imams lodged a complaint in our office saying to her [sic] was involved in trade of narcotics. We did a post placement social inquiring [sic] and questioned the community policing agency. The council of Imams and neighbours even though there was no evidence he was found in possession of any. The complainants are stakeholders in the criminal justice agency. On the basis of their concerns we have decided to ask the court to use its discretion to take action on the offender ....”[emphasis mine]**

This statement is indeed very troubling. The Probation Department is a large, crucial and well staffed department in the Ministry of Home Affairs yet it would appear that in this case they were acting at the behest of the community policing and Council of Imams Mr. Musyimi admits yet again that he has **no proof** that the Appellant was still engaged in the narcotics trade, yet on the basis of reports from the Community Policing and Council of Imams he is ready to drag the Appellant back into court. It appears that the Probation Department made no effort to make their own enquiry or carry out their own investigations to establish if the reports being made by the two bodies were infact accurate. As stated above no proof was tendered that the Appellant was continuing with illegal activities.

In her ruling dated 26<sup>th</sup> August 2010 the learned Chief Magistrate seemed to place great emphasis on the fact that the Appellant had failed to secure a job whilst out on probation. With respect given the current state of the economy in Kenya and the endemic shortage of jobs in our society a young man cannot be blamed for his failure to secure a job. This in my view cannot be said to amount to a violation of his probation terms.

Again at page 61 line 22 of her ruling the learned Chief Magistrate referred to the Probation Officer’s Report which stated:

**“It was the local community policing and members of the Council of Imams who stated that the probationer was still involved in the narcotics trade despite their warning him to desist ...”**

Yet again no attempt was made to confirm the veracity of these allegations. The probation officer simply acted on rumours and innuendo supplied by the Community Policing and Council of Imams. I am very alive to the fact that the drug menace here in Mombasa and indeed countrywide is endemic and it is quite understandable that all right thinking members of society including community policing and the Council of Imams are ready to do all that it takes to eliminate the menace and save the youth from its horrific effects. However all parties must respect the fact that court decisions need to be based on tangible evidence. The Community Policing and/or the Council of Imams are without a doubt important players in the legal justice system, but they cannot act in ways that attempt to influence or jeopardize the proper administration of justice. Any concerns raised must be received, investigated and if verified carried forward. The Probation Department and indeed the courts must be left to do their work without any outside influence. It was wrong for the probation officer to rely on unsubstantiated reports from outside bodies as a basis of concluding that the Appellant had violated his terms of probation. On the basis of the forgoing I find that the subsequent sentence of the Appellant to a term of seven (7) years imprisonment was without basis and I do hereby set aside the same. This appeal succeeds. The Appellant is to be set at liberty forthwith unless he is otherwise lawfully held.

**Dated and Delivered in Mombasa this 7<sup>th</sup> day of June 2011.**

**M. ODERO**  
**JUDGE**

In the presence of:

Mr. Onjoro holding brief for Mr. Magolo

Mr. Onserio for State