

# An Analysis of Probation Service Order and Its Application in Kenya

**John Onyango Omboto**

Security and Correction Science, Kenyatta University, Nairobi, Kenya

Email: omboto.john@ku.ac.ke, ombotojohn2014@gmail.com

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## Abstract

Punishment of offenders is one of the societal forms of reaction to crime. Probation Service Order as a punishment is among the most commonly used alternatives to imprisonment. It is a form of community based judicial penalty meant for minor and first-time offenders. This paper which is a product of a library research is a detailed exploration of this form of punishment in respect to Kenya. The paper dwells on the origin the origin of probation service as a punishment, conditions that convicts must meet to serve on probation, and merits of this form of punishment. The paper also covers the techniques employed in rehabilitation of convicts, the history of Probation Service in Kenya, application of Probation Service in Kenya, and challenges facing Probation Service in the country. It concludes with a recommendation on how Probation Service can be made more efficient and effective in Kenya.

## Keywords

Probation Service Order, Rehabilitation Strategies, Challenges Facing Probation Service, Kenya

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## 1. The Origin, Conditions and Merits of Probation Service

Historically, probation service as it is known today originated from the efforts of Mr. John Augustus (1785-1859). Augustus also known as the “Father of Probation”, is recognized as the first true probation officer. He was a Boston shoemaker who in early 1840s accepted to stand surety for minor offenders in exchange of the judges postponing prison sentences. He offered to supervise the offenders and report back to the judges on their behaviour in the community. Charges for the well-behaved convicts were dropped while those who continued to deviate were imprisoned. Augustus’ efforts resulted into enactment of the first formal probation laws in Massachusetts, US in 1878, and by 1957 all states in

America had enacted the probation laws (Bohm & Halley, 1997).

In Britain, according to a publication by the Government of Kenya, GOK (2009), probation service began in 1943 under the Probation of Offenders Ordinance of 1943 which was based on the British ordinance of 1907. The first courses for assistant probation officers were then conducted in 1947 and 1948. By 1954, the Probation Service in Britain was responsible for approved schools and juvenile remand homes which previously had been attached to prisons department. This development of Probation Service was influenced by the need for Juvenile Justice System, and the need to manage the juveniles outside the Criminal Justice System (Klus, 1998). After its full development and spread world over, probation service became a court awarded penalty in which a convict is set free into the community under the supervision of a probation officer who ensures that the convict abides by certain conditions for a specific duration.

The viewpoint of probation service is that the offenders have the capacity to change for the better. Probation officers as a result facilitate the reformation and rehabilitation of such convicts (Robinson, Burke, & Millings, 2015). In placing the offenders on probation, the court files a probation service order detailing the duration and other conditions of the probation sentence. It then becomes the duty of the probation officers to ensure that the probationer abides by the conditions until the successful completion of the sentence. One of the conditions is that the offender must not commit any crime during the period of probation (Musyoka, 2013). If the probationer fails to comply with the probation order, the officer applies for revocation by charging the probationer in court with violation of the probation conditions. If this happens, the offender is sentenced to prisons.

Whether or not a convict can be sentenced to probation service is based on several factors. One, it is dependent on the facts of the offenders' criminal case in question. For instance, in the US, eligibility for probation is based on facts such as use or possession of a gun when committing a crime. Offenders who possess guns when committing crimes are never sentenced to probation, because they are considered a danger to the society (King & Brynn, 2014). The decision is also influenced by the risk a particular offender poses to the society (Milgram, Holsinger, Vannostrand, & Alsdof, 2015). On this risk principle, the convicts awarded probation service are those that require minimal supervision, because they are not a danger to public. The convicts' criminal history also determines their sentence on probation (Cornish & Whetzel, 2014). For instance, a recidivist convict is normally sentenced to prisons as they are considered dangerous thus not deserving probation service order. Further, the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules) of 14<sup>th</sup> December 1990 also provide that the decision to put an offender on a non-custodial penalty such as probation should be based on the nature and gravity of the offence, personality and background of the convict, the purposes of sentencing and the rights of the victims of crime.

Probation service has several merits over institutional rehabilitation. First, as a community-based rehabilitation approach, it assists the offender to avoid many

disadvantages associated with imprisonment, such as learning more serious crimes due to contamination of minor offenders by the hardcore criminals. In terms of the costs to governments, probation is also cheaper in comparison to imprisonment. It also assists the offender to avoid stigmatization and labeling normally associated with imprisonment that may lead to recidivism.

The offenders on probation also continue with their lives in the community without much interruption. This enables them to offer socio-economic and emotional support to their families and loved ones. In addition, by rehabilitating minor offenders in the society, probation helps in decongesting penal institutions.

## **2. Techniques Employed in Rehabilitation of Convicts under Probation Service**

Worldwide, probation service employs several techniques to rehabilitate the convicts. The methods include supervision, resettlement, reintegration, counseling, and, where necessary, reconciliation of the offenders and their victims. Probation service also strives to secure vocational training and employment opportunities for the offenders in need based on the offenders' capacities and qualifications respectively. In supervision, the probation officer acts as a guide and counselor thus helping the convict to get out of criminality. He or she ensures that the probationer adheres to the strict supervision guidelines. The probation officers also make sure that the probationers abide by the laws, and do not commit crime during the probation period. In Kenya, this control is achieved by liaising with the area chiefs under the government provincial administration structure, and the police officers (GOK, 2014).

The other technique is enforcement of probation obedience that aims to curtail recidivism. It is achieved through frequent appointments between the probationer and his or her probation officer. This enables the professional to detect any negative changes in the convict, and take remedial measures. Besides, in developed countries such as USA and UK, probation surveillance is also conducted by the use of electronic monitoring gadgets such as biometric reporting where finger printing technology is employed to enable the probationer to log on, and access and provide information (Travis, 2015). Nevertheless, it has been observed that the use of such gadgets poses more challenges. For instance, according to Padmore (2015), electronic gadgets cannot deal with the various complex human issues that probationers face which require the help of trained probation officers in person. Some of the problematic issues are occasionally detected by the officers during their face-to-face interactions with the offenders under their care and must not be officially reported by them.

Counseling by the officers assists the offenders to make conscious decisions to discard criminality. This is based on the awareness created in them on the negative effects of crime on themselves and the society in general. Above all, it also assists them to be aware of opportunities open to them for honest living. Cognitive counseling also assists the offenders to abandon faulty beliefs and attitudes

on which their criminality may be grounded on. It also empowers the offender to handle internal feelings such as anger, frustrations, despair, and uncontrolled desires that may have led them to crime.

On job placement and training is also another strategy employed by probation service. Under these, the probation officers can recommend the offenders under their care to potential employers, and for training in government institutes based on their need. This gesture has the potential to prevent recidivism in the offenders who might have gotten in crime because of poverty that was occasioned by lack of capacities to earn a living by honest means. In the case of the convicts who are drug and substance addicts, the probation officers are mandated to refer them for treatment in government hospitals.

In Kenya for instance, at Nairobi County the probationers with drug dependency problems are always referred to Mathari Mental Hospital which is a government institution for treatment. Finally, reconciliation of the offender with his or her victim by the probation staff is helpful in ensuring acceptance for the probationer by the society. This is a key function in reducing the chances of revenge against the offenders by the victims and or their loved ones given that some members of the public do not always consider probation service to be punitive enough for the convicts.

However, it is important to point out that the control needs and rehabilitation strategies vary from one probationer to another. It is the responsibility of probation officers to determine what is appropriate based on need and risk assessment for each probationer. In addition, [Shapland et al. \(2012\)](#) postulate that for probation service to bear results, there must be a motivating, caring and encouraging relationship demonstrated by the probation officer to the probationer and not merely monitoring and surveillance. The need for these relations and correct assessment is emphasized by an observation that regulations forced on the offenders by the probation as they seek to decriminalize them are not sufficient to bring about life long change if the officers are not sensitive to the individual offenders' personal priorities, values, aspirations and relationships ([Weaver, 2014](#)).

### **3. The History of Probation Service in Kenya**

According to [GOK \(2009\)](#), the history of Probation Service in Kenya dates back to 1943 when the Peterson Commission recommended to the British Colonial Government for its formation, and it became operational in 1946. Kenya Probation Service therefore owes its origin to Probation Ordinance in Britain. The formation arose out of a desire to solve the problem of congestion in prison institutions. During the formative stages, the service was confined to the then Nairobi Municipality and it only handled juveniles and women offenders.

Administratively, probation service in Kenya is currently headed by the Director of Probation Service assisted by two deputies and several senior probation officers. The counties are headed by the Assistant Directors while the sub-counties are under Chief Probation Officers. In the year 2015, there were about six hun-

dred and fifty (650) probation officers and five hundred (500) support staff (Okech, 2015). Over the years, probation has been under different ministries with minimal changes on its statutes. Its services have grown and expanded from Nairobi where it began to all parts of the country; currently, there is a probation department in all the courts in Kenya.

Probation Service mainly draws its mandate from the Probation of Offenders Act Cap 64 Laws of Kenya, and the Community Service Order Act No. 10 of 1998. However, because probation officers deal with broad categories of offenders such as juveniles, the mentally sick, convicted prisoners, and also due to the fact that their work overlaps to other agencies, there are other relevant laws that guide probation service in the country. These laws include Prisons Act Cap 90 laws of Kenya, the Borstal Institutions Act Cap 92, the Mental Health Act Cap 248, the Children's Act of 2001, the Penal Code Cap 63, and the Criminal Procedure Code Cap 75 Laws of Kenya.

#### 4. Application of Probation Service Order in Kenya

In Kenya, like in other jurisdictions, probation service personnel conducts investigations on the background of offenders then compile and submit their reports on the same in courts of law. These reports guide the judges and magistrates in their rulings and judgments in the cases over the convicts. However, the core function of probation in Kenya is in reformation and rehabilitation of minor and first-time convicts. As a punishment, the laws in Kenya allows the courts to sentence offenders to serve a minimum of six months and a maximum of three years after considering the salient issues in the pre-sentence investigation reports prepared by the probation staff, and the evidence adduced in courts.

Like elsewhere, the process of rehabilitation of convicts in Kenya through probation as a punishment involves supervision of offenders serving noncustodial sentences; that is probation service and Community Service Order. Probation officers also ensure reconciliation of the convicts and the victims of their crimes, and facilitate integration of offenders in the community. The offenders occasionally interact with the probation officers who ensure compliance with the probation conditions, and implementation plan for rehabilitation.

According to Okwara (2013), in Kenya, the Probation Department as a government agency involved in the administration of criminal justice is specifically charged with the responsibility of implementing correctional services within the community. To this end, it ensures crime prevention, peace building and conflict resolution. The scholar postulates that Probation rehabilitates offenders through social modeling, problem solving, counseling and functional family therapy. GOK (2011) posit that the success in rehabilitation through probation depends heavily on the ability to consistently and reliably categorize the offenders based on their needs such that those with special needs can be identified and given appropriate services. The special needs offenders deserve extra rehabilitation strategies in order to prevent recidivism. Such strategies may be sex offenders' treat-

ment programmes, drug and alcohol treatment, and anger management among others.

According to GOK (2006), probation in Kenya go an extra mile in rehabilitating juvenile offenders by offering them material assistance such as school uniforms and miscellaneous fees for those in school. They are also given admission in technical and vocational institutions; those with skills are provided with tools as well as being assisted to start small-scale businesses; or encouraged to be self-employed. Probation also empowers women convicts by assisting them to set up income generating projects such as selling groceries, operating kiosks, tailoring and dressmaking among others to prevent them from re-offending.

According to Kenya National Bureau of Statistics (KNBS, 2020), between the year 2014 and 2018 the courts in Kenya sentenced to probation service 64,429 male and female offenders. To ensure that it is effective, the probationers who come from home environments that are hostile to their proper rehabilitation, are normally taken into institutions called Probation Hostels that are run by the Kenya Probation Service. These hostels are places of temporary residence for probationers as probation officers make efforts to have them accepted and resettled at home. There are five probation hostels with a capacity for over two hundred residents. Only one of the hostels is for females. These hostels are Kimomo Junior and Seniouir hostels in Eldoret, Shanzu hostel in Mombasa, Makadara Boys hostel in Nairobi, Nakuru girls' hostel in Nakuru County, and Siaya hostel in Siaya County (Okech, 2015) (Table 1).

## 5. Challenges Facing Probation Service in Kenya

Generally, as discussed earlier, the work of probation officers is broad and involving. For instance, they supervise offenders who have been placed under them by the courts as an alternative to imprisonment, and at the same time conduct social investigations for the pre-sentence reports. To achieve the objectives, probation officers must therefore handle complex paperwork that demands a lot of time, as well as handle huge caseloads. Their daily work is thus characterized by strain and stress that may result into burn out.

**Table 1.** Offenders sentenced to probation service in Kenya in the year 2014-2018.

Year	Actual number of offenders serving Probation Orders sentences between 2014 and 2018 by sex		
	Males	Females	Total
2014	9329	2511	11,840
2015	10,756	2666	13,422
2016	8933	2353	11,286
2017	11,816	2523	14,339
2018	11,176	2366	13,542

Source: KNBS (2020) economic survey data, 2015-2019.

In Kenya, for instance; the probation service is stretched and has limited resources to supervise work placements. This makes the effectiveness of this form of punishment in country uncertain and ineffective thus leading to recidivism (Hannah, 2012). In concurrence, Wanjugu (2012), in a study that among others sort to find out how the challenges facing probation service in Kenya can be alleviated established that 70% of the respondents felt that adequate funding would accelerate utilization of programmes by offenders and help in training of supervisors. That inadequate funding to probation service in Kenya is a major problem was further confirmed by Aben (2011) who also established that 60% percent of probation officers were of the opinion that the key challenge faced by them was lack of adequate resources for supervision of probationers. Another problem established by this study conducted in Kilifi County was non-co-operation of offenders which was at 20%. Difficult probationers who do not cooperate with the probation officers become recidivists since they end up not benefiting from the rehabilitation measures offered.

On his part, Okech (2015), established that the other challenges facing probation service in Kenya are absconding by the probationers, recidivism, and poor supervision. The researcher observes that supervision of convicts on short sentences against inadequate personnel and finances is a major problem. Lack of offender reentry programmes also negates rehabilitation through probation. The situation is made worse by the presence of few probation hostels in the country, lack of halfway homes, and weak legislative support.

The problem of inadequate financial resources is caused by insufficient funding from the exchequer. This results in probation service officers lacking resources that would help them to conduct visits for social inquiry reports. In the end, the resultant reports may be incorrect in content thus misleading the courts. High caseloads for individual officers due to understaffing also lead to poor and insufficient work quality in terms of pre-sentence investigation reports and convicts' supervision.

Finally, in Kenya, among the other impediments to the success of probation according to Okoth-Opondi (n.d.) is the problem of corruption. This may take the form of some probation officers colluding with criminals to write fake social inquiry reports favourable for noncustodial sentences. These probation officers and magistrates benefit themselves from such deals which, in the end, make hardcore offenders such as robbers, manslaughter suspects, and violent convicts to benefit from noncustodial sentences like probation. When such offenders are not adequately punished, thus not deterred; they may become serial recidivists.

However, challenges to probation are not unique to Kenya, O'Beirne, Denney and Gabe (2004) posit that probation officers at times fear dealing with probationers who commit violent offences. They also fear visiting isolated estates to see probationers, and dread when violent probationers establish where they live. This fear of danger is a serious predicament in the work of probation officers.

In Britain, Weaver (2014) observed that the major challenge facing probation service is staffing. This leads to work overload and delays in commencement in

engagement between the convicts and probation officers. This observation is in concurrence with earlier findings of UNICJRI (1997) that absence of the needed personnel, support structures and funds are the greatest impediments to utilization of probation as a noncustodial sentence.

## 6. Conclusion

Probation sanction in Kenya is primarily for minor offenders. For example, according to National Crime and Research Centre (2019), between 2014 and 2018 the annual average of offenders on Probation service was 12,886 with the offences committed ranging from general stealing at 23.9%, assault causing actual bodily harm 17.3%, possession of illicit/illegal brew and drugs 15.7%, malicious damage to property 8.6%, creating disturbance 8.2% and being drunk and disorderly 6.8%.

As per Owino (2016), in the year 2016, of the convicts sentenced to probation 27.9% were convicted for selling alcohol without licenses, 25.0% created disturbances, while 2.9% were convicted of petty theft. Therefore, the fact that probation service is key in reformation and rehabilitation of minor offenders is not in doubt. It is therefore significant for the Kenyan government to put measures in place to mitigate the problems facing this form of punishment. This should involve increased funding to the probation department from the exchequer, training and capacity building for existing probation officers, and employment of more probation staff to reduce work overload.

The Kenyan government should also expand probation training centers and hostels for hosting the probationers who come from home environments that are hostile thus not conducive for their reformation and rehabilitation. There is also a need to build halfway homes for the minor convicts sentenced to probation service. In addition, effective measures should be instituted to tackle the problem of corruption which has seen probation service order awarded to un-deserving convicts by the courts of law on false pre-sentence investigation reports prepared by compromised probation officers. It is only when the challenges are controlled that probation service in Kenya can successfully serve as an effective alternative to imprisonment.

## Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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