

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOI

CRIMINAL APPEAL NO. E054 OF 2025

CYRIL MCHANA.....
APPELLANT

=VERSUS=

REPUBLIC.....
RESPONDENT

**(Being an appeal from the Conviction and Judgment of Hon.
Wangeci (SPM) in Wundanyi SPMCR Case No. E378 of 2023
delivered on 21st January 2025)**

JUDGMENT

1. The Appellant was charged with three charges as follows:-

Count I - Resisting lawful arrest contrary to Section 253(a) of the Penal Code and 2 counts of assault as follows: Count II and Count III - Assaulting a police officer in execution of her/his duty contrary to Section 103(a) of the National Police Service Act No. 11A of 2011.

2. The particulars of the three counts were that on 8th August 2023 at 1230hours at Mwakilemba village, Kishushe Location within Wundanyi Sub-County within Taita Taveta County, the Appellant

with intent to resist arrest willfully obstructed PC/W DORCUS WANZA and PC IBRAHIM ISAAC from arresting the Appellant for the offence of being in possession of illicit brew commonly branded bangara to wit 20 litres.

3. Further that the Appellant in the same material particulars as in Count 1 above, assaulted the two police officers causing them actual bodily harm.
4. The Appellant pleaded not guilty to the charges. The prosecution called a total of three (3) witnesses.
5. The prosecution evidence in summary was that the Appellant bit PW1, PC Ibrahim Isaac on the right hand while PW1 was attempting to handcuff him.
6. The Appellant also hit PW2 PC/W Dorcas Wanza with a stick. He was handcuffed finally and arrested by Sergeant Bashora and PC Batiany.
7. PW1 and PW2 said they had gone with PC Batiany and Sergeant Bashora to Mwakilemba village where they were told and illicit brew called Bangara was being sold.
8. They said the Appellant ran away leaving behind 20 litres of the illicit brew.
9. They ran after the Appellant and caught up with him and interrogated him.

10. They said the Appellant took a stick and hit PW2 on the left hand and right leg below the knee and he also bit PW1 on the right hand.
11. PC Bitiany managed to restrain the Appellant and to arrest him. They went to his house and did a search and recovered bhang from one Joseph Katoa.
12. The Appellant was taken to Kishushe dispensary and the P3s were filled at Wesu Sub County Hospital.
13. **PW3 DR RUKIA MKAMBURI** produced the P3 forms on behalf of her colleague **DR WINNIE** who was on study leave.
14. In his defence, the Appellant said he was on relieving duties at joint selling alcohol. He said he saw a lady on a panya route signalling a man in civilian clothes. He said since the two were not in uniform, he fled in fear thinking they were robbers since the area was bushy.
15. He said the two ran after him and caught up with him and a struggle ensued.
16. He said the area was sloppy and they fell down and rolled down and landed on a flat section. He said 20 litres of Bangara was recovered.
17. He was escorted to Kishushe police station and charged at Wundanyi Court.

18. The trial court found the Accused Person guilty as charged and convicted him and sentenced him as follows:-

Count I - 3 years imprisonment

Count II - 5 years imprisonment

Count III - Five (5) years imprisonment

19. The sentence were to run concurrently.

20. The Appellant has appealed against the said conviction and sentences on the following grounds:-

(i) THAT the trial court erred in law in failing to comply with the Provisions of Article 50 (2) (g) & (h) as envisaged in the Constitution being that I was a first offender, the trial court was supposed to verify before passing the verdict. Kindly consider.

(ii) THAT the trial Magistrate erred in both law and facts in not considering that the Charge as was framed by the Prosecution was and is defective. The section referred by the police in Count II is Null and Void. May this be considered.

(iii) THAT I have learned a lesson in prison since my arrest and not only a lesson but seriously taught of how I can be living with the citizens there outside hence praying for your intervention for further consideration.

(iv) THAT I was arrested while young and being the first born in our family of six siblings, may the court consider my long term in prison may result some difficulties in the family due to the tribalism culture.

21. The parties filed written submissions as follows:- The appellant, Cyril Mchana, in his submissions challenges his conviction and five-year prison sentence for assaulting a police officer and resisting arrest.
22. He argues that the trial magistrate erred by not considering that the investigating officer was never called to testify, leaving the court with only the testimony of the two arresting officers who were in civilian clothing.
23. He claims that because they approached him like thugs, he believed they were robbers and fled into a thicket, leading to a struggle during which they allegedly stole Kshs. 12,800 from him.
24. He asserts that no independent witness from the public was called to support the officers' account, and that under established case law, the failure to call crucial witnesses should weaken the prosecution's case.
25. He further stated that the officers claimed they went to arrest a "Bangara" (illicit brew) seller and even allegedly recovered a 20-litre jerrycan of the brew, yet he was never charged with any

offence related to Bangara, nor was the brew or the stick he supposedly used to assault the officers produced in court.

26. He contends that this gap shows the officers' real intention was robbery, not a lawful arrest.
27. On the legal framing of the offence, he argues that he lacked the intent to commit a felony as required under Section 253(a) of the Penal Code, because the confrontation was sudden and he was merely defending himself.
28. Regarding his lost money, he points out that the court noted his complaint but the prosecution never properly resolved it, and the investigating officer only communicated through the prosecutor without ever appearing in the witness box.
29. He maintains that his defence, that he mistook the officers for criminals and acted out of fear, was sufficient for acquittal, and that the trial court ignored his plight.
30. He therefore prays that his appeal be allowed, the conviction quashed and the five-year sentence set aside, and he be set at liberty.
31. The Respondent opposes the appeal, arguing that the charge sheet was not defective as it complied with Section 134 of the Criminal Procedure Code by clearly stating the offence, citing the relevant law, and providing sufficient particulars to inform the Appellant of the allegations against him.

32. The Respondent further contends that the sentence imposed on January 21, 2025, should not be set aside because the Appellant has not demonstrated that it was manifestly excessive or that the trial court overlooked any material factor, acted on a wrong principle, or took into account improper considerations.
33. Citing the principles in *Bernard Kimani Gacheru v Republic*, the Respondent maintains that sentencing is within the trial court's discretion and that appellate intervention is unwarranted here.
34. The Respondent notes the Appellant's lack of remorse and highlights that the penalties prescribed by law for the offences are up to five years for resisting arrest and up to ten years for assaulting a police officer, making the actual sentence reasonable.
35. Reference is made to *Ochieng v Republic*, where a three-year sentence for resisting arrest was upheld.
36. In conclusion, the Respondent urges the court to uphold the trial court's sentence and dismiss the appeal.
37. The following issues fall for determination in this appeal;
- (i) Whether the charge sheet was fatally defective, particularly concerning Count II, thereby rendering the entire trial a nullity.**
 - (ii) Whether the prosecution proved its case against the appellant on the charges of resisting arrest and**

assaulting a police officer beyond a reasonable doubt.

(iii) Whether the appellant's defence was improperly rejected by the trial court.

(iv) Whether the sentences imposed on the appellant were manifestly excessive and warrant interference by this court.

38. On the first issue concerning the alleged defectiveness of the charge sheet, the appellant specifically argued that the section referred to by the police in Count II is null and void.

39. The respondent countered that the charge sheet was proper as it complied with Section 134 of the Criminal Procedure Code.

40. Section 134 of the Criminal Procedure Code (Cap. 75) provides that every charge or information shall contain a statement of the specific offence with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

41. The Court of Appeal has established that the test for whether a charge sheet is defective is substantive rather than formalistic.

42. The key consideration is whether the defect, if any, prejudiced the appellant to the extent that he was not aware of or was confused about the nature of the charges preferred against him, and as a result, was unable to put up an appropriate defence.

43. In this case, the appellant was charged in Count II with assaulting a police officer in execution of her duty contrary to Section 103(a) of the National Police Service Act No. 11A of 2011.
44. The particulars of the charge stated that on 8th August 2023 at Mwakilemba village, he assaulted PC/W Dorcas Wanza by hitting her with a stick, causing her actual bodily harm, while she was in the execution of her duty.
45. The law is therefore clear, Section 103(a) of the National Police Service Act is a valid and operational provision.
46. The appellant did not demonstrate how the citation of this section was null and void.
47. Furthermore, minor defects in a charge sheet that do not prejudice the appellant are curable under Section 382 of the Criminal Procedure Code.
48. The appellant was fully aware of the nature of the charge he was facing, as it was read to him in a language he understood, and he conducted his defence accordingly.
49. Consequently, this ground of appeal fails and is hereby dismissed.
50. Turning to the second issue, which is whether the prosecution proved its case beyond a reasonable doubt, this court has re-evaluated the evidence on record as is its duty as a first appellate court.

51. The prosecution called three witnesses. PW1, PC Ibrahim Isaac, testified that on 8th August 2023 at about 1230 hours, he and three other police officers, including PC/W Dorcas Wanza (PW2), proceeded to Mwakilemba village based on information that illicit brew called "Bangara" was being sold there.
52. Upon arrival, the appellant, who was at the scene, fled, leaving behind a 20-litre jerrycan of the brew.
53. The officers pursued the appellant, and when they caught up with him and attempted to effect an arrest, the appellant took a stick and hit PW2 on her left hand and right leg below the knee.
54. Further, when PW1 attempted to handcuff the appellant, the appellant bit him on his right hand, causing a visible injury. PW2, PC/W Dorcas Wanza, corroborated PW1's testimony in its entirety, adding that the blow she received from the appellant's stick caused her actual pain and she had to seek medical treatment.
55. PW3, Dr. Rukia Mkamburi, produced the P3 forms for both PW1 and PW2, which confirmed that the injuries sustained by the two police officers were consistent with an assault and classified the harm as actual bodily harm.
56. The injuries included a bite mark on PW1's right hand and soft tissue injuries on PW2's left hand and leg.
57. The evidence of the three prosecution witnesses was consistent, credible, and corroborated on material particulars.

58. It is well established that the evidence of police officers is not inadmissible merely because of their profession, and the court can safely convict based on such evidence if it is found to be trustworthy.
59. The appellant's assertion that the investigating officer was not called to testify does not weaken the prosecution's case, as the law does not require a multiplicity of witnesses.
60. The testimonies of the two victims of the assault, who were also the arresting officers, was direct and sufficient to prove the assault and the resistance to arrest.
61. This court finds that the prosecution discharged its legal burden of proving all the elements of the offences charged beyond any reasonable doubt.
62. On the third issue regarding the appellant's defence, the appellant argued that the trial court erred by failing to consider his defence that he mistook the police officers for robbers because they were not in uniform, and that he was merely defending himself.
63. As a first appellate court, it is my duty to re-evaluate the evidence. The appellant's defence was that he was selling alcohol and saw a lady on a "panya route" signalling a man in civilian clothes, and he fled because he feared they were robbers.

64. He admitted that a struggle ensued and that the 20 litres of "Bangara" was recovered.
65. The trial court considered this defence but found it unconvincing in light of the prosecution's overwhelming evidence.
66. The court reasoned that the officers identified themselves as police officers before attempting the arrest, a fact the appellant denied.
67. However, the presence of Sergeant Bashora and PC Batiyany, who were in uniform, was not specifically denied, and their role in the eventual handcuffing of the appellant lends credence to the prosecution's case.
68. Furthermore, the doctrine of necessity dictates that a police officer in the due execution of their duty may use reasonable force to apprehend a suspect.
69. The appellant's actions of biting PW1 and hitting PW2 with a stick were disproportionate responses to any perceived threat and went far beyond self-defence.
70. I am satisfied that the trial court properly evaluated the defence of the appellant and gave cogent reasons for rejecting it.
71. This ground of appeal therefore lacks merit.
72. The final issue relates to the sentence. The appellant was sentenced to serve three years imprisonment on Count I for resisting arrest contrary to Section 253(a) of the Penal Code, and

five years imprisonment on each of Counts II and III for assaulting a police officer contrary to Section 103(a) of the National Police Service Act.

73. The trial court ordered that the sentences run concurrently. The appellant has pleaded with this court to consider that he has learned a lesson, that he is a young first offender, and that he is the firstborn in a family of six siblings.

74. The respondent argues that the sentence is not manifestly excessive, as the law prescribes a maximum sentence of five years for resisting arrest under Section 253 of the Penal Code and up to ten years for assaulting a police officer under Section 103(a) of the National Police Service Act.

75. The Court of Appeal has consistently held that sentencing is a matter of judicial discretion, and an appellate court will only interfere with a sentence if it is shown that the trial court acted on a wrong principle, overlooked a material factor, or that the sentence is so manifestly excessive as to be an injustice.

76. In the present case, while the sentences of three and five years were within the legal parameters, I have carefully considered the appellant's mitigation before the trial court, his status as a first offender, his youthful age, and his expression of remorse in this appeal.

77. The injuries inflicted, though classified as actual bodily harm, were not grievous. The concurrent running of the sentences is a favourable factor, but a total effective sentence of five years for a youthful first offender who panicked and reacted poorly to a lawful arrest appears, in the circumstances of this case, to be on the higher side.
78. Therefore, while I uphold the conviction, I will interfere with the sentence.
79. I hereby set aside the sentence of five years imprisonment on Counts II and III and substitute it with a sentence of three years imprisonment on each of those counts.
80. The sentence of three years on Count I is upheld. All three sentences will continue to run concurrently from the date the appellant was first arraigned in court. That is from 11th August 2023.
81. Consequently, the appellant's total effective sentence is reduced from five years to three years imprisonment.
82. The appeal against sentence partially succeeds.
83. Orders to issue accordingly.

Dated, signed and delivered this 29th day of April 2026 in open court at Voi High Court.

ASENATH ONGERI

JUDGE

In the presence of:-

Court Assistant: Millicent/Mabishi

State Counsel:.....

Appellants:

ORIGINAL