

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
(CORAM: R. MWONGO, J.)
CRIMINAL APPEAL NO. E004 OF 2025

CONSETA MUTHONI KITHAKAAPPELLANT/APPLICANT
-VERSUS-
REPUBLIC.....RESPONDENT

R U L I N G

Background

1. The applicant was charged in Siakago MCCR E430 of 2020, with causing malicious damage to property contrary to section 339(1) of the Penal Code. The particulars were that on 7th July, 2020 at Makima area Makima Sub location in Mbeere South sub county within Embu County, jointly with others not before court, willfully and unlawfully damaged a house which was under construction valued at Kshs.2.1 m the property of Peter Mwendo Wambua.
2. She was convicted alongside 2 others and they were each sentenced to pay a fine of Kshs.300,000/= or in default, to serve 3 years imprisonment.
3. She lodged an appeal before this court and the same is pending hearing. In the meantime, she has filed the present application.

The Application

4. The applicant's notice of motion dated 29th September 2025 seeks the following orders:
 - 1) That this Honourable Court be pleased to grant the Appellant leave to admit new and additional evidence on Appeal, specifically the letter dated 7.04.2025 from the Office of the County Attorney, Embu County and the Internal Memo of the Department of Lands, Mining, Physical Planning, Housing and Urban Development, Embu County dated 25.03.2020; and
 - 2) That there be no order as to costs.
5. The applicant avers that the letter and memo which she seeks leave to produce will enable determination of ownership of the land, which issue is one element of the offence of malicious damage to property. That her advocate during trial failed to inform her of the importance of the letter and its relevance in rebutting the complainant's

claim of ownership of the land. She understood that it was not possible to adduce evidence on appeal without seeking leave, hence the prayers made.

6. In her supporting affidavit, she stated that she had weak legal representation and after her conviction and sentencing, she sought a different advocate who insisted that the ownership documents produced by the complainant be verified by the county government departments.
7. When she requested for such verification, she learned that the documents were not authentic yet the trial court had relied on them in making its decision. In the process, she also obtained the documents that she now seeks to produce as new evidence on appeal. She stated that the order sought should be granted in the interest of justice since she enjoys an inalienable right to a fair hearing.

Grounds of Opposition

8. The respondent opposed the application stating that the applicant is attempting to create new evidence and reopen the prosecution's case. That if the application is allowed, the respondent would not have a chance to examine the intended new evidence and verify their authors. That in any event, the issue of determining ownership is beyond this court's jurisdiction.
9. It stated that the prosecution produced PEXH.2,3 and 4 to prove ownership of the property and at the time, the applicant did not object. That the intended new evidence would be prejudicial to the respondent if allowed as it would not have an opportunity to interrogate and challenge it. It was the respondent's argument that the said evidence could have been obtained by the applicant through reasonable diligence during the trial but she did not obtain it. It urged the court to find the application unmeritorious.

Parties' Submissions

10. In her submissions, the applicant relied on section 358(1) of the Criminal Procedure Code and stated that the court is able to allow the application if it sees it fit. She also relied on the cases of **Ladd v Marshall [1954] 1 WLR 1489**, **Wilson Gathungu Chuchu v Republic [2018] KEHC 9710 (KLR)**, **Simon Kiama Ndiangui v Republic [2017] KEHC 8332 (KLR)** and **Lazarus Estates Ltd v Beasley [1956] 1 All ER 341**. She argued that at the trial court, she could not reasonably have tendered the evidence she seeks to produce on appeal. She argues that proof of ownership is a key ingredient of the offence she was charged with and through the new evidence, she can prove that the complainant did not own the property lawfully in the first place.

11. On its part, the respondent relied on the case of **Ngugi v Republic [2024] KEHC 7061 (KLR)** where the court cited **Mahamud v Mohamad & 3 others [2018] KESC 62 (KLR)** in which the Supreme Court laid down principles for adducing additional evidence on appeal. It also placed reliance on the case of **Owuor v Republic [2025] KEHC 7938 (KLR)** and **Samuel Kungu Kamau v Republic [2015] KECA 249 (KLR)** and argued that the application does not satisfy the considerations for admittance of new evidence at the appeal stage.

Issue for Determination

12. The issue for determination is whether the application has merit.

Analysis and Determination

13. Section 358 of the Criminal Procedure Code provides:

“358. Power to take further evidence

(1) In dealing with an appeal from a subordinate court, the High Court, if it thinks additional evidence is necessary, shall record its reasons, and may either take such evidence itself or direct it to be taken by a subordinate court.

(2) When the additional evidence is taken by a subordinate court, that court shall certify the evidence to the High Court, which shall thereupon proceed to dispose of the appeal.

(3) Unless the High Court otherwise directs, the accused or his advocate shall be present when the additional evidence is taken.

(4) Evidence taken in pursuance of this section shall be taken as if it were evidence taken at a trial before a subordinate court.”

14. An appellate court may allow additional evidence under restricted circumstances. The guidelines were laid down by the Supreme Court as follows in the case of **Mahamud v Mohamad & 3 others (supra)**:

“We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

(a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

(b) it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

(c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or

could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

(e) the evidence must be credible in the sense that it is capable of belief;

(f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other.

We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.” [Emphasis added]

15. In addition, in **Martin Kibisu v R [2014] eKLR** the Supreme Court stated as follows on “new and compelling evidence”:

“new evidence” means “evidence which was not available at the time of trial and which, despite exercise of due diligence, could not have been availed at the trial”; and “compelling evidence” implies “evidence that would have been admissible at the trial, of high probative value and

capable of belief, and which, if adduced at the trial would probably have led to a different verdict.” A Court considering whether evidence is new and compelling for a given case, must ascertain that it is, prima facie, material to, or capable of affecting or varying the subject charges, the criminal trial process, the conviction entered, or the sentence passed against an accused person.”

16. In the present case, the applicant is seeking leave to produce a letter dated 7.04.2025 from the Office of the County Attorney, Embu County and an Internal Memo of the Department of Lands, Mining, Physical Planning, Housing and Urban Development, Embu County dated 25.03.2020. According to her, these 2 documents will prove that the complainant is not the owner of the property which the applicant was accused of maliciously damaging.
17. Looking at the facts deposed in the applicant’s supporting affidavit, the documents are not so bulky such that the respondent would suffer much in analyzing and verifying. They are critically relevant to the case and may even influence the overall outcome. The applicant has proved that the documents could not have been obtained even with reasonable diligence particularly the letter of 07.04.2025. If they are allowed, they will most likely clarify any vagueness in the case as to identity of the property owner. The evidence will not make a fresh case for the applicant who is the appellant neither will it be used to fill gaps in the defense case, but will merely clarify facts that were previously vague and in dispute.

Disposition

18. In light of the foregoing and in the interest of justice and also to allow the applicant enjoy her inalienable right to fair hearing as accorded to her under Article 50(1) of the Constitution, I am inclined to allow the application. It is so allowed.
19. The two documents sought to be admitted shall be admitted in the appeal within 14 days of today’s date.
20. Orders accordingly.

Delivered, dated and signed at Embu High Court this 05th day of March, 2026.

**R. MWONGO
JUDGE**

Delivered in the presence of:

1. Appellant not produced

2. Malanda holding brief for Kivuva for Appellant
3. Francis Munyao - Court Assistant