REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ANTI-CORRUPTION CRIMINAL APPEAL NO. E007 OF 2025

CHARLES CHEGE MBUTHIA.....APPELLANT/APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

Background

1. The Appellant/Applicant herein (together with others including **Testimony Enterprises Limited**) was convicted in Anti-Corruption Case No. 22 of 2019 of fraudulent acquisition of public property contrary to Section 45(1)(a) as read with Section 48 of the Anti-Corruption and Economic Crimes Act.
2. The amount in issue was stated to be Kshs 147,274,055.40 in relation to a road upgrading tender awarded by the Kiambu County Government to Testimony Enterprises Limited where the Applicant is Director.

The Application

3. The Applicant filed the Application dated 2nd December 2025 seeking, *inter alia*, leave to adduce additional evidence in the pending appeal. The additional evidence sought to be introduced is an audit report titled: **"Report**

of Findings on the Upgrading of Various Gravel Roads to Bituminous Surface in Kiambu County, Contract No. CGK/RTPW&U/142/2017/2018" dated 25th September 2019**.**

4. The Motion is supported by the Applicant's affidavit sworn on 2nd December 2025 and a supplementary affidavit.
5. The Applicant contends that the audit report demonstrates that the contractor was owed Kshs 113,688,757 by Kiambu County Government and that the prosecution's narrative of fraudulent acquisition is inconsistent with the financial findings contained in the said report.
6. The Applicant further states that the report directly addresses the charges forming the basis of conviction and contradicts the evidence relied upon by the prosecution.
7. It is the Applicant's case that the said report, which was prepared at the instance of the EACC, is credible and was in the possession of the prosecution during trial but was not disclosed or produced. He states that the omission prejudiced the defence and may have affected the outcome of the case.
8. The Applicant further disputes the Respondent's contention that the report was served upon him or his advocates, arguing that the audit report did not form part of what was actually served, and that no affidavit of service was annexed to prove service.
9. The Applicant relied on Section 358 of the Criminal Procedure Code (CPC) and Articles 22, 23, 28, 35, 50(2)(c), (j) & (k), 157(10 & 11) and 165 of the Constitution**.**

The Respondent's Opposition

10. The Respondent opposed the Motion through a Notice of Preliminary Objection dated 2nd February 2026 and a Replying Affidavit sworn by **Ms. Faith Mwila**, Principal Prosecution Counsel. The Preliminary Objection raises three grounds, namely; that the application is res judicata, that this court is functus officio having ruled on a similar application on 26th November 2025 and that the application is an abuse of the Court process**.**

11. The Respondent's deponent avers that the Applicant previously filed an application dated 3rd September 2025 seeking admission of additional documents including the same audit report, and that the Court ruled on it on 26th November 2025**.**

12. The Respondent further contends that the audit report is not new evidence as it is said to have been served in a related civil matter on 6th February 2020 upon the Applicant's advocates, who also acted in the criminal matter.

13. The Respondent submitted that the power to allow additional evidence is discretionary and is exercised sparingly. It was submitted that the Applicant has not shown probative value sufficient to affect the trial outcome and that allowing the application would delay the appeal and prejudice the Respondent.

14. The Application was canvassed by way of written submissions.

The Applicant's Submissions

15. On res judicata, the Applicant cited Section 7 of the Civil Procedure Act (CPA) and submitted that the earlier application was struck out for want of annexures and was not finally decided on merit.

16. The Applicant argued that the audit report contradicts the prosecution's case as states that he is owed **Kshs 113,688,757**, and would have influenced the trial decision.

Respondent's Submissions

17. The Respondent submitted that the application is barred by res judicata, that the Court is functus officio and that the Applicant has not met the threshold to adduce additional evidence.

Issues for Determination

18. Having considered the Motion, the Preliminary Objection, affidavits, and submissions, the Court frames the following issues for determination:

a) ***Whether the Motion is barred by res judicata****;*

b) Whether this Court is functus officio on the question of admission of the audit report;

c) ***Whether the Applicant has satisfied the legal threshold for admission of additional evidence on appeal under Section 358 CPC and the cited principles;***

Analysis and Determination

Res Judicata

20. The Respondent argued that the application is barred by res judicata, the Respondent cited Black's Law Dictionary which defines res judicata as: -

> ***"An issue that has been definitely settled by judicial decision; an affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transaction and that could have been but was not raised in the first suit."***

21. The Respondent relied on ***Uhuru Highway Development vs. Central Bank*** **(1996) LLR CAK 2126** where the test of a matter that is res judicata was discussed as follows: -

> ***i. There must be a previous suit in which the matter was in issue;***
> ***ii. The parties must be the same or litigating under the same title;***
> ***iii. There must be a competent court which heard the matter in issue;***
> ***iv. The issue must have been raised once again in a fresh suit.***

22. In the instant case, I note that the earlier ruling rejecting a similar application stated, in part, as follows: -

> ***"I have perused the application in the body of the application the applicant has sought for production of the documents dated 18th February 2019. In his Submissions he sought for admission and adoption as evidence in the form of an audit report dated 25th September 2019. The applicant has also asked the court to rely on certified copies of proceedings in ACEC No 1 of 2020 under section 33,34 and 77 of the Evidence Act.***
>
> ***From the applications and submissions, it is not clear the documents that the application is seeking to have produced. He has not even affixed them on his affidavit for the court and Respondent to see and appreciate the relevance of those documents. He is not a party to ACEC Suit no 1 of 2025 that he has referred to. It is trite law that a party is bound by its pleadings***
>
> ***In the end, and for reasons that the court has given hereinabove the application is hereby struck out."***

23. The Respondent also relied on Richard Kuloba, **Judicial Hints on Civil Procedure, 2nd Edition**, which states as follows on res judicata: -

"The plea of res judicata applies not only to points upon which the first Court was actually required to adjudicate but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for res judicata to apply"

24. The Respondent also cited ***Stanley Kiplangat Cheruiyot & 12 others vs. DPP & Another*** **(2017) eKLR** referencing ***Mburu Kinyua vs Gachini Tuti*** **[1978] KLR 69-82**, where it was held:

"… where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which

the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

25. Reference was also made to ***John Florence Maritime Services Limited & Another vs. Cabinet Secretary for Transport and Infrastructure & 3 Others*** **[2015] eKLR**, where the court held:

"The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in

danger of unravelling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature. The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013."

26. The Applicant countered the Respondent's arguments on Section 7 of the Civil Procedure Act and submitted that the earlier application was struck out which means that it was not finally determined on the merits, and stated that the matter was therefore not "heard and finally decided".

27. Section 7 of CPA stipulates as follows:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or

between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

28. A perusal of the extract of the earlier ruling, as stated elsewhere in this ruling, reveals that the Court concluded as follows: -

"In the end, and for reasons that the court has given hereinabove the application is hereby struck out."

29. My finding is that a striking out, particularly on the basis that documents were not annexed and the application was unclear, does not amount to a final determination on the substantive merits of admission of the audit report. This is consistent with the decision in ***First Nigerian Bank Plc vs. Mr. Nkemka N. Agbakuwu*** **(2025) CA/L/227M/2018(R)** where it was held that:-

"Where a motion has been struck out, the applicant can either file a fresh motion or bring an application to relist the same depending on circumstances that led to its being struck out or the nature of the order".

30. My finding is that in the circumstances of this case and on the material presented to the Court in this record, the Court is not persuaded that the doctrine of res judicata, as anchored in the requirement that the issue must have been "heard and finally decided" as stated under Section 7 CPA has been established so as to bar the present Motion.

Functus Officio

31. The Respondent referred to Black's Law Dictionary definition of functus officio which states that:

> ***"Having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished."***

32. Reference was also made to ***Raila Odinga & others vs. IEBC & others*** **[2013] eKLR**, where it was held:

> ***"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter…. The principle is that once such a decision has been given, it is (subject to any***

right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

33. The Respondent also cited ***Telkom Kenya Limited vs. John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited)*** **[2014] eKLR** as referenced in ***Re Estate of Kinuthia Mahuti (Deceased) Miscellaneous Application*** **P&A No. 158 of 2017 [2018] eKLR**, where the court held that: -

"… Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long as the latter part of the 19th Century…"

34. While this Court accepts the functus officio doctrine as an expression of finality, as stated in the quoted authorities, the question that begs an answer is whether the prior decision finally determined the merits of admitting the audit report, thereby exhausting the Court's jurisdiction on that question.

35. As I have already observed elsewhere in this ruling, the earlier ruling shows the earlier application was struck

out because the documents were not annexed and the application was unclear. On that basis, and consistent with the decision in ***First Nigerian Bank Plc vs. Mr Nkemka N. Agbakuwu*** case (supra)**,** I find that the present Motion is not necessarily an invitation to the Court to sit on appeal against a concluded merits determination. It is my finding that the Court is not functus officio merely because the earlier Motion was struck out for procedural deficiencies.

36. On whether the threshold set for admission of additional evidence has been met, the Respondent cited Section 358(1) of the Criminal Procedure Code which stipulates that:

> **"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."**

37. Reliance was also placed on ***Elgood vs. Regina* (1968) E.A. 274** adopting Lord Parker C.J. in ***R. vs. Parks* (1969) All ER 364**, where the principles to be considered in determining if additional evidence should be admitted were stated as follows: -

> ***"a) That the evidence that is sought to be called must be evidence that was not available at the trial.***

b) That it is evidence that is relevant to the issues.

c) That it is evidence that is credible in the sense that it is capable of belief.

d) That the court will after considering the said evidence go on to consider whether there might have been a reasonable doubt created in the mind of the court as to the guilt of the appellant if that evidence had been given together with other evidence at the trial."

38. The Respondent further relied on ***Samuel Kangu Kamau vs. Republic*** **[2015] eKLR** and the excerpt from ***Wanje vs. Saikwa*** **[1984] KLR 275**, where it was held:

"This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh

case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

39. A core requirement running through the above cited authorities is whether the evidence was not available at trial and could not have been obtained with reasonable diligence**,** and whether it is needful and not meant to fill gaps.

40. The Applicant asserted that the report was not within his knowledge, was not disclosed, and was not served upon him or his advocates.

41. The Respondent, however, maintained that the audit report was served, in the EACC civil suit bundle on 6th February 2020, upon the Applicant's advocates, and that the Applicant had the opportunity to use it during the trial, including by summoning the relevant EACC officer if necessary.

42. On the record placed before the Court in this application, the Respondent's position is supported by deposition that the Applicant's advocates received the bundle in 2020. The Applicant however disputed service and faulted lack of an affidavit of service. The court must still weigh whether the Applicant has demonstrated the strict requirement that the report **"could not have been obtained with reasonable diligence."**

43. The principles governing admission of additional evidence were stated by the Supreme Court in ***Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others*** **[2018] eKLR** where the court held that:

> ***"(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."

44. Article 50(2)(j) of the Constitution guarantees an accused person the right ***"to be informed in advance of the evidence the prosecution intends to rely on,***

and to have reasonable access to that evidence." This right includes access to material evidence in possession of investigative agencies whether or not the prosecution intends to rely on it.

45. In the present case, it was not disputed that the audit report was prepared during investigations into the impugned contract. The Respondent does not dispute the existence of the report during the trial period but contends that the report was served in civil proceedings in 2020.

46. I note that no affidavit of service or documentary proof of such service has been produced. Most importantly, disclosure in criminal proceedings cannot be substituted by alleged service in unrelated civil proceedings. My take is that the duty of disclosure is a constitutional obligation resting on the prosecution and is not displaced by the possibility that the accused might independently obtain the evidence.

47. My finding is that where investigative material exists and is not shown to have been disclosed, the Court must lean in favour of protecting the right of an accused person to a fair trial. This court is not satisfied that the audit report was disclosed during trial.

48. The Respondent argued that the Applicant could have obtained the report with reasonable diligence. I however find that due diligence requirement cannot be applied in a manner that diminishes the constitutional duty of disclosure.

49. Where material evidence is within the knowledge or possession of investigative agencies, failure to disclose the same cannot be attributed to lack of diligence by the accused. The record shows that the audit report was prepared in 2019 during the investigative process and the Applicant has demonstrated that the report was not reasonably available for use at trial. I find that the due diligence requirement has been satisfied.

50. On relevance and the potential impact of the additional evidence, it was not disputed that the audit report addresses contract execution, payments made, financial reconciliation and outstanding contractual obligations. The Applicant was convicted of fraudulent acquisition of public property arising from payments made under the impugned contract. The report therefore directly relates to the financial transactions underlying the conviction.

51. The principles set out in ***Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 Others*** case (supra) require only that the evidence may influence the result**,** not that it must necessarily be decisive.

52. The trial court rendered itself as follows on convicting the Appellant on Count 9:

> ***"Count 9: Charles Chege Mbuthia, 4th accused Beth Wangeci Mburu, 5th accused and Testimony Enterprises limited (11th accused) are convicted of fraudulent acquisition of***

public property contrary to Section 45(1) (a) as read with Section 48 of the Anti Corruption and Economic Crimes Act No 3 of 2003. The benefit derived is kshs 147,274,055.40".

53. I find that the audit report is relevant and potentially influential as it will assist the court in determining the loss suffered by the Complainant, the financial analysis and the credibility of the financial evidence.

54. The appellate court must determine whether the evidence is needful for a just determination as the appeal challenges a conviction founded substantially on financial evidence. The audit report concerns the same financial transactions and my view is that it is useful in the determination of the appeal. My take is that without consideration of the report the court would risk an incomplete evaluation of the evidence.

55. While it is not in doubt that the admission of additional evidence will require further proceedings, I am alive to the fact that the Respondent will have full opportunity to respond to it and cross examine its author, if need be.

56. I find that the prejudice to the Applicant if the evidence is excluded is substantially greater than any prejudice to the Respondent if it is admitted. I find that the balance of justice favours admission of the additional evidence.

57. My finding is based on the following determinative findings:

i) The audit report is directly relevant to the subject matter of the conviction;

ii) The report was prepared during investigations and existed at the time of trial;

iii) Disclosure of the report during criminal proceedings has not been demonstrated;

iv) The constitutional right to disclosure under Article 50(2)(j) of the Constitution requires that potentially exculpatory investigative material be available to the defence;

v) Failure to disclose investigative material cannot be attributed to lack of diligence by the accused;

vi) The audit report is credible and potentially influential;

vii) Admission of the report is necessary for a just determination of the appeal.

Disposition

58. Having regard to the findings and observations that I have made in this ruling, I make the following final orders: -

a) The Preliminary Objection dated 2nd February 2026 is dismissed.

b) The Notice of Motion dated 2nd December 2025 is allowed.

c) ***Leave is granted to the Applicant to adduce as additional evidence:***

"Report of Findings on the Upgrading of Various Gravel Roads to Bituminous Surface in Kiambu County, Contract No. CGK/RTPW&U/142/2017/2018" dated 25th September 2019.

4. ***The audit report shall be admitted as part of the record of appeal.***
5. ***The Respondent shall have liberty within thirty (30) days to file any response or rebuttal evidence.***
6. ***I make no orders as to costs.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MARCH, 2026.

HON. W. A. OKWANY

JUDGE

5/03/2026

FOR APPELLANT MUTINDA

FOR THE RESPONDENT MWILA

COURT ASSISTANT ADAN