



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CRIMINAL DIVISION**  
**CRIMINAL REVISION NO.660 OF 2012**

SAMUEL MBOTE GITAU.....APPLICANT

**VERSUS**

REPUBLIC.....RESPONDENT

**RULING**

The Applicant, Samuel Mbote Gitau was charged in **Nairobi Chief Magistrate's Court Criminal Case No.1430 of 2011** with the offence of **breaking into a building with intent to commit a felony** contrary to **Section 307** of the **Penal Code**. The particulars of the offence were that on 23<sup>rd</sup> October 2011 at 6.00 a.m. at the then Prime Minister's Office along Harambee Avenue in Nairobi, the Applicant with the intent to commit a felony namely **stealing**, broke and entered into the said Prime Minister's Office. After the close of the prosecution's case, the Applicant made submission on no case to answer. The prosecution made submission to the effect that it had proved its case on the charge brought against the Applicant to the required standard of proof. After considering the evidence on record and the submission made, the trial court held that the prosecution had established a *prima facie* case to enable the Applicant be put on his defence. The Applicant was aggrieved by this Ruling and moved to this court by invoking this court's jurisdiction under **Section 362** of the **Criminal Procedure Code**. He sought orders of this court to revise and set aside the said Ruling and instead substitute it with an order of this court making a finding to the effect that the Applicant had no case to answer.

In his application, the Applicant challenged the decision of the trial magistrate's court to put him on his defence essentially on the grounds that the complainant in the charge sheet had not testified, and further that the prosecution had not established the ingredients of the charge to enable the Applicant to be put on his defence. The Applicant was of the view that the trial magistrate's court erred in putting the Applicant on his defence when there was no sufficient evidence adduced by the prosecution. Prior to the hearing of the application, the Applicant and the Respondent agreed by consent to file written submission in support of their respective opposing positions. The submissions were duly filed.

During the hearing of the application, Mr. Kimathi for the Applicant reiterated the contents of the application and the written submission. He submitted that the prosecution had not established a *prima facie* case to enable the court put the Applicant on his defence. He stated that the Applicant was found in the parking lot of the Prime Minister's Office and was drunk at the time. Although a prosecution's witness testified that the Applicant had been seen in CCTV footage, such footage was not produced into evidence. He argued that the evidence adduced by the prosecution witnesses clearly was not sufficient to warrant the trial court to put the Applicant on his defence. He was of the view that in putting the Applicant to his defence, the trial court in actual fact wanted the Applicant to fill in the gaps in the prosecution's case. He submitted that the prosecution failed to establish that the Applicant had the *mens*

rea to commit the offence. He relied on the case of **Ramanlal Trambaklal Bhatt –vs- R [1957] EA 332** in support of his case. He urged the court to revise the decision of the trial court and acquit the Applicant.

Ms. Nyauncho for the State opposed the application. She submitted that the application was premature and in abuse of the due process of the court. She stated that **Sections 362 and 364** of the **Criminal Procedure Code** cannot be invoked in the circumstances of this case. The Applicant should have waited until after the conclusion of the case to either make a similar application or to appeal against the decision, if he is convicted. She was of the view that the current application was made specifically to frustrate and delay the conclusion of the criminal case facing the Applicant. She reiterated that the Applicant will not be prejudiced in any way by being put on his defence in the case. If convicted, the Applicant can still raise the same issues on appeal. Further, the Applicant was not barred from canvassing the same issues in his defence. Learned counsel for the State insisted that the evidence adduced by the prosecution's witnesses established a *prima facie* case to entitle the court put the Applicant to his defence. In particular, she stated that the Applicant was arrested at the scene of crime. The CCTV cameras on site had captured the Applicant breaking into the Prime Minister's Office. In the premises therefore, she urged the court to dismiss the application.

This court has carefully considered the rival submission made by the parties to this application. **Section 362** of the **Criminal Procedure Code** grants this court jurisdiction to ***“call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court.”*** **Section 364(1)** of the **Criminal Procedure Code** sets out the orders that this court may issue when exercising its jurisdiction under **Section 362**.

In the present application, it is the Applicant's case that he should not have been put on his defence because, in his view, the prosecution had failed to establish a *prima facie* case. On the other hand, it was the prosecution's case that it had adduced sufficient evidence to enable the trial court place the Applicant on his defence. Having evaluated the facts in issue in this application, this court formed the view that the present application was prematurely brought before this court. The issues that the Applicant ventilated before this court were issues which he should have ideally presented to the trial magistrate's court after the close of his defence. This court cannot, in an application for revision, delve into the merits or otherwise of the prosecution's case unless the Applicant establishes serious miscarriage of justice in the manner in which the trial magistrate's court handled the evidence that was adduced by the prosecution witnesses.

The fact that the Applicant has been placed on his defence does not mean or imply that he will be convicted upon the trial magistrate's court evaluating the entire evidence adduced in the case. This court agrees with the decision of the Court of Appeal in **Ramanlal Trambaklal Bhatt –vs- R [1957] EA 332** **at page 334** where the court held thus:

***“Remembering that the legal onus is always on the prosecution to prove its case beyond reasonable doubt, we cannot agree that a prima facie case is made out if, at the close of the prosecution, the case is merely one***

***“which on full consideration might possibly be thought sufficient to sustain a conviction”***

***This is perilously near suggesting that the court would not be prepared to convict if no defence is made, but rather hopes the defence will fill the gaps in the prosecution case. Nor can we agree that the question whether there is a case to answer depends only on whether there is***

***“some evidence, irrespective of its credibility or weight, sufficient to put the accused on his defence”***

*A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true, as WILSON J, said, that the court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by a “prima facie case”, but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”*

In the present application, having considered the facts of this application and the applicable law, this court is unable to reach a finding that the proceedings before the trial magistrate’s court exhibits any incorrectness, illegality or impropriety to entitle this court to invoke its jurisdiction under **Sections 362 and 364** of the **Criminal Procedure Code**. The trial magistrate’s court properly exercised its discretion when it placed the Applicant on his defence. The Applicant still has his legal right to impeach the prosecution’s evidence adduced against him when he makes his closing submission after the close of the defence case.

The upshot of the above reasons is that the application filed by the Applicant seeking this court to invoke its revisionary jurisdiction lacks merit and is hereby dismissed. The Chief Magistrate’s court file that is the subject of this application is hereby returned back to the trial magistrate’s court where the court shall proceed with the case from where it had reached to its conclusion. It is so ordered.

**DATED AT NAIROBI THIS 14<sup>TH</sup> DAY OF OCTOBER 2015**

**L. KIMARU**

**JUDGE**