



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Criminal Appeal 67 of 2010**

**DAVID OYE ASHIOYA.....APPELLANT**

**~VERSUS~**

**REPUBLIC.....RESPONDENT**

(Appeal from the judgment of the Senior Resident Magistrate Hon. F. Kyambia in Bungoma court in cr. case no.841 of 2009)

**RULING**

The Appellant was charged with two counts of offensive conduct conducive to breaches of the peace contrary to section 94 (1) of the Penal Code. In count 1 the particulars were that on 29/4/2009 at about 11.00 a.m. at Busia Law Courts in court no.2 he used abusive words to Peter Maingi to wit “*We Shoga*” meaning “*You Homosexual*” whereby a breach of the peace was likely to be occasioned. In count 2 he was charged that at the same law courts at 1.10 p.m he used abusive words to Peter Maingi to wit “*Wacha Ujinga*” meaning “*Do not be stupid*” whereby a breach of peace was likely to be occasioned.

The prosecution called seven witnesses including Inspector Peter Maingi (PW1), the complainant. The case was that PW1 was prosecuting a criminal case before a Principal Magistrate at Busia in which the accused was represented by the Appellant, an advocate. It was during the proceedings that the Appellant allegedly uttered the words in the charges. The case was adjourned to call the last witness. Subsequent to this there were several adjournments at the instance of either the prosecution or the defence. When the witness could not be availed and the court had given the prosecution two last adjournments, the prosecutor successfully applied and the charges were withdrawn under section 87 (a) of the Criminal Procedure Code and the Appellant was discharged. It is against this discharge that the Appellant appealed to this court.

Mr. Ogoti (Assistant DPP) filed a preliminary objection to the appeal. His contention was that since there was no conviction or acquittal by the subordinate court the Appellant had no right of appeal under either sections 347 or 348A of the Criminal Procedure Code. The Appellant’s response that he had the right to appeal against the order of the court, and that in any case the appeal had been admitted to hearing.

A right of appeal in a criminal case must be specifically conferred by statute (**Azolozo v. Republic [1986] KLR 585**). Under section 347 an accused convicted on a trial by a subordinate court may appeal to the High Court. This may be on a matter of fact as well as on a matter of law. Under section 348 no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence. And under section 348 A (which was introduced by an amendment to the law) where the accused has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney General (now the DPP) may appeal to the High Court from the acquittal or order on a matter of law.

It is clear that the Criminal Procedure Code does not allow any other appeal. It does not allow the Appellant to appeal against the order that was made to discharge him under section 87 (a) of the Criminal Procedure Code as that was neither a conviction nor an acquittal.

With respect, the admission of appeal does not confer jurisdiction where none exists in law.

I find the preliminary objection by the ADPP sustainable. The appeal is incompetent and is struck out.

Dated, signed and delivered at Bungoma this 22<sup>nd</sup> day of October, 2012.

**A. O. MUCHELULE**  
**JUDGE**