



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT SIAYA**  
**CRIMINAL APPEAL NO. 4 OF 2014**  
**(CORAM: J. A. MAKAU – J.)**

**ERICK ODHIAMBO WAYOGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against both the conviction and sentence dated 12<sup>th</sup> October, 2014,*

*in Criminal Case No. 371 of 2014 in Criminal Case No. 850 of 2014*

*in Bondo Law Court before Hon. M. OBIERO – P.M.)*

**JUDGMENT**

1. The Appellant **ERICK ODHIAMBO WAYOGA** was charged with Six (6) counts of **Robbery with violence contrary to Section 296 (2) of the Penal Code**. The six (6) counts of robbery with violence are as follows:-

*Count I: Robbery with Violence Contrary to Section 296(2) of the Penal Code. The particulars of the offence are that on the 14<sup>th</sup> August 2014 at about 0057 Hrs at Switel Hotel in Bondo Town within Siaya County jointly with others not before court and being armed with a dangerous weapon namely gun robbed ALOICE OMONDI OGOYE one mobile phone make Techno valued at KSh.3000/= and at or immediately before or immediately after the time of such robbery used personal violence against the said ALOICE OMONDI OGOYE*

*Count II: Robbery with Violence Contrary To Section 296 (2) of the Penal Code. The Particulars of the Charge are that on 14<sup>th</sup> August 2014 at about 0057 Hrs at Switel Hotel in Bondo Town within Siaya County jointly with others not before court and being armed with a dangerous weapon namely gun robbed of EZEKIEL LWABE one mobile phone make Techno T390 valued at KSh.4,500/=, a brown wallet containing the following documents NHIF card, payslips, ID card No. 20791533 and cash 2000/= all valued at KSh.6,500/= and at or immediately before or immediately after the time of such robbery injured the said EZEKIEL LWAMBE.*

*Count III: Robbery with Violence Contrary to Section 296 (2) of the Penal Code. The particulars of the charge are that on the 14<sup>th</sup> August, 2014 at about 0057 hrs at Switel Hotel in Bondo Town within Siaya County jointly with others not before court and being armed with a*

***dangerous weapon namely gun robbed of JULIET OTIENO AKOTH one mobile phone make Nokia Usher 200 valued at KSh.3,500/= and at or immediately before or immediately after the time of such robbery used personal violence against the said JULIET ATIENO OKOTH.***

***Count IV: Robbery with Violence Contrary to Section 296(2) of The Penal Code. The particulars of the charge are that on the 14<sup>th</sup> August, 2014 at about 0057 Hrs at Switel Hotel in Bondo Town within Siaya County jointly with others not before court and being armed with a dangerous weapon namely gun robbed of WALTER OMONDI OTUKA one mobile phone make Techno T501 valued at KSh.4,500/=, cash of KSh.3000 all valued at KSh.7,500/= and at or immediately before or immediately after the time of such robbery injured the said WALTER OMONDI OTUKA.***

***Count V: Robbery with Violence Contrary to Section 296(2) of the Penal Code. The particulars of the charge are that on the 14<sup>th</sup> August, 2014 at about 0057 hrs at Switel Hotel in Bondo Town within Siaya County jointly with others not before court and being armed with a dangerous weapon namely gun robbed of GEDION AMONDI OMONDI two mobile phones make Techno valued at KSh.35,000/= and Nokia valued at KSh.6000 a Torch red and black in colour, cash of KSh.30,000 all valued at KSh.71,000/= and at or immediately before or immediately after the time of such robbery used personal violence against the said GEDION AMONDI OMONDI.***

***Count VI: Robbery with Violence Contrary to Section 296 (2) of the Penal Code: The particulars of the Charge are that on the 14<sup>th</sup> August 2014 at about 0057 Hrs at Switel Hotel in Bondo Town within Siaya County jointly with others not before court and being armed with a dangerous weapon namely gun robbed of PAMELA ACHIENG one mobile phone make Techno P5 valued at KSh.13,000/= and cash of KSh.2000/= all valued at KSh.15,000/= and at or immediately before or immediately after the time of such robbery used personal violence against the said PAMELA ACHIENG.***

2. After full trial the appellant was found guilty on counts 1 and IV, convicted and sentenced to suffer death.

3. Aggrieved by both the conviction and sentence the appellant preferred this appeal through a petition date stamped 18<sup>th</sup> January, 2016, however, at the hearing of the appeal he filed an amended grounds of appeal abandoning the earlier grounds of appeal. The amended grounds of appeal are as follows:-

***a. That the trial court erroneously convicted the appellant to death without considering that there was an irregularity in the charge sheet hence defective.***

***b. That he was not accorded a fair trial since the prosecution failed to comply with the provisions of article 50(2)(c) and (j).***

***c. That the evidence relied upon by the trial magistrate was insufficient to prove positive identification hence unlawfully convicted.***

***d. That the prosecution failed to prove their case by not producing the real motor vehicle (reg. no. KBE 660L) in court for viewing Contrary to Section 63 (1) (3) of the evidence Act.***

***e. That the trial court erred in law by relying on contract book tendered in court and yet they were not authentic.***

***f. That the trial magistrate erred in law by failing to give my defence testimony due consideration.***

4. At the hearing of the appeal the appellant appeared in person whereas Mr. E. Ombati Learned State

Counsel appeared for the State.

5. The appellant put in written submission in support of his appeal and urged that he is relying on the grounds of appeal as set out in the amended grounds of appeal. He urged in his submissions that the charge sheet was defective, that the trial was not fair, that he was not properly identified, that the motor vehicle KBE 660L was not produced before court as an exhibit, that the produced contract book was not authentic and that the appellant's defence was not given due consideration.

6. Mr. E. Ombati Learned State Counsel opposed the appeal both against the conviction and sentence. He submitted that the appellant was identified and his description given to the police in the first report, that he was identified in an identification parade, that in addition to that there was circumstantial evidence connecting the appellant with the offence of robbery, that the ingredients of the offence of robbery with violence was proved beyond reasonable doubt and lastly that the sentence meted was within the provisions of the law.

7. I am the first appellate court and as such I have subjected the entire evidence adduced before the trial to a fresh evaluation and analysis and will draw my own conclusions. I am alive to the fact I neither saw nor heard any of the witnesses and so cannot comment on their demeanor. I am guided on the duties of a first appellate court by the Court of Appeal decision of **Kiilu & Another V. R (2005) 1 KLR 174** where the Appeal held thus:-

***“an appellant in a 1st appeal is entitled to expect the whole evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellate Court's own decision in the evidence. The 1st appellate Court must itself weigh conflicting evidence and draw its own conclusions.”***

***It is not the function of a 1st appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and conclusions; only then can it decide whether the magistrates finding should be supported. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”***

8. The facts of the prosecution case are forming part of the record of appeal and I need not reproduce the same herein. I shall however give a brief summary of the prosecution case and the defence.

9. The prosecution case is that on 14<sup>th</sup> August 2014 at 11.00 p.m. the appellant in company of two others while armed with dangerous weapon namely gun proceeded to Switel Hotel and upon the gate being opened for there by the Security Officers they proceeded to guards offices and ordered them to lie down, they assaulted them and at gun point they took one by one of the three guards to be shown where the money was, Switel Hotel had guests on the material time. The appellant and his company robbed the guests and searched guests while their gate away vehicle registration number KBE 660L was parked outside the hotel's gate. Meanwhile at around 12.57 p.m. the officers at Bondo Police Station got information of the ongoing robbery at Switel Hotel, and proceeded to the Hotel, only to find the gate closed and the place quiet. The gate watchman was not at the gate. That after five (5) minutes four men emerged from the Hotel. The Police Officers ordered them to stop but instead they started shooting at the Police Officers who then responded. The four men managed to run to the back of the hotel and escaped. The Police noticed the vehicle KBE 660L, Toyota Premio, white in colour, that was parked outside the Hotel and suspected it to belong to the robbers and was taken to Bondo Police Station. The Police Officers at the scene were joined by other Police Officers, all entered the Hotel searched for the robbers but did not find them. The customers complained of having been robbed. That the matter was then taken over by C.I.D, and after investigations the owner of the vehicle KBE 660L was traced, he informed the police, they had hired the vehicle to the appellant and produced contract book which had identity number, motor driving licence number, and telephone number of the appellant. That after investigation the appellant was traced and arrested and arraigned before court with this offence.

10. The appellant denied the charge and put forward an alibi as his defence and narrated circumstances leading to his arrest. The appellant testified that on 14<sup>th</sup> August 2014 at about 12.57 p.m. he was in the house in Kisumu. That on 2.9.2014 he was arrested while at Nyamasaria stage at around 6.00 p.m. That

upon his search he was found with rolls of bhang and a pliers. That he was arrested with the others who were released. That on 7.9.2014 at Bondo Police Station an identification parade was conducted and the appellant was thereafter charged with this offence.

11. I have very carefully considered the submissions by both the appellant and State Counsel as well as the proceedings and the judgment.

12. The Appellant under grounds No. 1 of his appeal contends that the charge sheet was defective. He urges that the charge is defective in Count 1 and IV saying the complainants evidence was in variance with the particulars of the charge as PW1 and PW2 in their testimonies did not mention whether actual violence was used against them and that no medical report was produced to prove any injuries. That particulars and full details of the alleged stolen Techno phones were not given notwithstanding the values of the allegedly stolen phones were given. That as the charge as laid before the court was at variance with the evidence adduced and that rendered the charge defective referring to the case of **Yongo V. Republic (1983) KLR**.

13. In this case the appellant was convicted on counts 1 and IV. In count I and count IV the complainants gave evidence as PW1 and PW2. PW1 testified that the attackers who entered in their office, were numbering three (3) one of whom had a gun, they forced them to lie down, they beat them one and took them by one to be shown where the money was. That the robbers robbed PW1 of his phone make Techno. PW2 testified that one of the attackers slapped him ordering him to kneel down as he was armed with as gun. He complied and the attacker took his phone make Techno and 3000/= from his pocket. That the colleague of the attackers came and stepped on PW2 asking him where the money was. That at the bar the attackers used a bottle to hit PW2's colleague on the head. He later heard three gun shots.

14. I have very carefully perused the charge sheet in respect of Count 1 and IV and the particulars in support of the charge as well as the evidence by PW1 and PW2. The particulars in support of the charge are that the attackers were armed with dangerous weapons namely a gun. That PW1 Aloise Omondi Ogoje, was robbed a mobile phone Techno valued KSh.3000/= whereas PW2 Walter Omondi Otuka, was robbed a phone Techno T501 valued at KSh.3000/= and at or immediately before or immediately after the time of such robbery, personal violence was used against PW1 and PW2. The charges laid before the court are not at variance with the evidence given by PW1 and PW2. PW1 and PW2 gave evidence which demonstrates that the attackers were three in number and one of them was armed with a dangerous weapon namely gun. That PW1 was robbed of a mobile phone make Techno valued at KShs.3000/= and PW2 robbed of a mobile phone Techno T501 valued Ksh.4500/= and cash Ksh.3000/=. PW1 and PW2 testified that actual violence was used against themselves on their customers.

15. I will now turn to what constitutes an offence of robbery with violence. **Section 295 of the Penal Code** defines robbery as follows:

**“295. Any person who steals anything, and, at or immediately before or immediately after the time of stealing it, uses or threatens to use actual violence to any person or property in order to obtain or retain the thing stolen or to prevent or overcome resistance to its being stolen or retained, is guilty of the felony termed robbery.”**

16. In this case the appellant faced a charge of robbery with violence contrary to **section 296 (2) of Penal Code**. A charge under this Section has three (3) essential ingredients that must be proved by the prosecution before conviction can be sustained. In the case of **Johana Ndungu V R, Criminal Appeal No. 116 of 1995**, the ingredients for the charge of robbery with violence were stated to be:-

a. **If the offender is armed with any dangerous or offensive weapons or instruments or:**

c. **If he is in company with one or more other person or persons or:**

c. **If at or immediately before or immediately after the time of robbery he wounds, beats, strikes, or uses any other violence to any person.”**

17. I wish to add that and at such time he steals something capable of being stolen. In view of the above medical Report is not necessary nor is it an ingredient that is essential in proving an offence of robbery with violence. In this case I note the evidence by PW1 and PW2 is not in variance with the charges of Robbery with violence, the charges are proper, the particulars are not in variance with the charge nor is the evidence. I therefore find the charge is proper and not defective as urged by the appellant.

18. The appellant contends that he was not accorded a fair trial, as **Article 50 (2) (a) and (j) of the constitution of Kenya 2010, were not complied with. Article 50 (2) (c) and (j) of the constitution of Kenya 2010**, provides:

*“Section 50 (2) (a) and (j) of the Constitution of Kenya 2010 provides:-*

*(2) Every accused person has the right to a fair trial, which includes the right—*

*a. to be presumed innocent until the contrary is proved;*

*(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;”*

19. The Appellant’s contention is that he was not provided with all the relevant materials that were in the hands of the prosecution to ensure a fair **determination. Under Article 50 of the constitution of Kenya 2010** every accused person has the right to a fair trial which includes the right to have adequate time and facilities to prepare a defence and to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to the evidence.

20. In the instant case the appellant was arraigned before court on 3.9.2014 when the charges were read and explained to him in Kiswahili language which he understands. The appellant was granted bond and matter set down for hearing. The hearing commenced on 22.12.2014 over three months since plea was taken. I have perused the trial court’s record and it is not clear whether the appellant was supplied with copies of witnesses statements or not. The record do not show whether the appellant sought any material from the prosecution and was not supplied with the same. Under this ground he states generally that the prosecution did not supply him with the relevant materials without disclosing what were the relevant materials which were not supplied. The trial of this case started three months after plea was taken and the appellant did not raise any objection to the hearing of the case on the hearing date. I find that three months down the line was more than adequate time to prepare for defence. The appellant did not raise issues of lack of facilities to prepare for the appeal before trial. I have perused the proceedings and noted that the appellants was able to cross-examine witnesses at great lengths without any problems and as such he was not prejudiced. That if he had no materials from the prosecution there was nothing stopping him from asking for the same. From the proceedings at the lower court, I find that the appellant was not prejudiced nor was his constitutional rights violated in anyway. He was unable to demonstrate what constitutional rights were violated by who and in what manner. I find no merits in this ground of appeal.

21. The Appellant contends that he was convicted without having been identified. He relied on the case of **Walter A. Omolo V R (1991) 2 KLR 254**. In the instant case the robbery took place at 11.00 p.m. Regarding identification I am guided by the case of **Paul Etole and Another V. Republic CA 24 of 2000 (UR) Pg. 2 and 3** thus:-

*“The prosecution case against the second appellant was presented as one of recognition or visual identification. The appeal of the second appellant raises problems relating to evidence and visual identification. Such evidence can bring about miscarriages of justice. But such miscarriages of justice occurring can be much reduced if whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused, the court should warn itself of the special need for caution, before convicting the accused. Secondly, it ought to examine closely the circumstances in which the identification by each witness came to be made. Finally, it should remind itself of any specific weaknesses which had appeared in the identification evidence. It is true that recognition may be more reliable than*

***identification of a stranger; but, even when the witness is purporting to recognize someone whom he knows, the court should remind itself that mistakes in recognition of close relatives and friends are sometimes made.”***

22. I have very carefully examined evidence adduced by PW1 and PW2 both complainant. PW1 Aloise Omondi Ogoye, testified that they were in the office when the gangsters stuck and who removed them from the office to go to show them where the money was. PW1 testified there was electricity light in their office and he was able to recognize the person who had the gun. PW1 gave Police the description of the person who had the gun as a black medium size and wearing a black jacket but he was not called to the identification parade. PW2 Walter Omondi Ochuka testified that he was able at the time of robbery to see the attackers at the material time as the Hotel had electricity light which was sufficient to enable him recognize the attackers. He had a close encounter with the appellant who slapped him as he was beating him. He testified the person who had the gun was the appellant. He gave the description of the attacker to the police. PW2 took part in the identification parade and was able to identify the appellant PW3 No. 233456 C.Ip Kiran Tarus, who conducted the identification parade produced identification parade form as exhibit 4. The appellant was identified in the parade by three witnesses, thus PW2 Walter Omondi Ochuka, who had seen him at the time of robbery, PW4 Erick Otieno Ogembo, the owner of motor vehicle KBE 660L who had his car hired to the appellant, and PW6 Victor Otieno Ogutu who hired (PW4's car) to the appellant and to whom the appellant gave his identity card and driving licence particulars before signing contract book and payment for hiring motor vehicle KBE 660L Toyota Premio White in Colour on 13.8.2014. PW3 testified that the identification parade was conducted in accordance with law. I have perused the contents of the identification parade exhibit 4. I have also considered that the appellant did not raise any issue with the identification parade during cross-examination or in his defence. I find the same was properly conducted and in accordance with the judges Rules.

23. In the case of **James Mwangi V Republic (1983) KLR 522 the Court of Appeal** set out clear guidelines regarding the circumstances when circumstantial evidence will suffice as proof of the guilt of an accused person. In the case the Court of appeal held:-

***“In a case depending exclusively in circumstantial evidence, the court must, before deciding upon a conviction, find that the inculpatory facts are incompatible with the innocence of the accused and incapable of explanation upon by other hypothesis than that of guilt. It is also necessary before drawing the inference of the accused's guilty from the circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference -----“***

24. In the instant case, PW1 saw motor vehicle Registration No. KBE 660L stopping at a distance from the gate to Switel Hotel, three people came out, he opened the gate for them before they attack PW1 and his fellow Security Officers. That after the attacker PW2 went with Police Officers and found motor vehicle KBE 660L parked outside the gate. PW8 upon receipt of report of ongoing robbery at Switel Hotel he with other Police officers proceeded to the said Hotel and found motor vehicle Registration No. KBE 660L Toyota Premio white in colour parked near the gate to Switel Hotel. They later took the vehicle to C.I.D. Offices at Bondo Police Station. PW4 testified that on 13.8.2014 he authorized PW6 to hire his motor vehicle registration KBE 660L Toyota Premio white in colour to the appellant who he saw at the parking area and completed the transaction with PW6. PW4 identified the car through the photograph MFI 5 (a) and (c). PW6 testified that on 13.8.2014 at 8.00 a.m. he proceeded to the office found, the appellant Erick whom he had dealt with previously and who told him he wanted to hire a vehicle. He hired motor vehicle KBE 660L Toyota Premio white in color after PW6 had received all necessary documents from the appellant being identity card, and driving licence. He entered all details in the contract book which Appellant signed and paid the agreed fees of KSh.3,500/=. The vehicle was released to the appellant and was to be returned on 14.8.2014 at 9.00 a.m. The appellant claimed he was going to a funeral at Bondo but the vehicle was not returned as agreed. PW6 had contract book serial number 244, a copy of car hire book marked – MFI 7. Both PW4 and PW6 identified the car hirer as the appellant. PW5 No. 86640 P.C. Douglas Wangoma of scene of crime at Siaya, a gazette officer by DPP vide gazette Notice No. 217 of 28.2.2012 took photographs of the motor vehicle registration number KBE 660L Toyota Premio white in colour being photographs numbers 1 – 3 being general front view and

general rear view and general side view respectively. He produced photograph and certification of photograph as exhibit 5 (a) and (c) and certificate as exhibit 6. PW7 produced copy of the logbook of motor vehicle KBE 660L as exhibit 3, produced contract book which she obtained from the office of Motrex Car Hiring Company Serial No.244 showing the name of the client as Erick Odhiambo Wayoga, the appellant, motor vehicle KBE 660L, his identity card number 24534486, contract book produced as exhibit 7. PW7 testified that she sent the identity card number to the Bureau and received results which were positive. The identification record produced as exhibit 8. PW7 identified the appellant in the court.

25. PW1 and PW2 identified the appellant as the person who attacked them at Switel Hotel. The arrest and identification of the appellant took place after a few days of robbery with violence. PW4 and PW6 identified the appellant as the person who they hired the vehicle KBE 660L Toyota Premio white in colour. PW3 conducted the identification parade in which PW2, PW4 and PW6 identified the appellant. PW4 identified KBE 660L Toyota Premio white in colour as his vehicle which PW6 hired to the appellant, PW5 a gazetted scene of crime Police Officer produced photographs of the motor vehicle KBE 660L as exhibits 5 (a) and (c) and certificate as exhibit 6. PW7 produced the logbook of KBE 660L as exhibit 3 showing the vehicle belonged to PW4, produced contract book from motrex company prepared by PW6 serial No. 244, showing KBE 660L was on 14.8.2014 hired to Erick Odhiambo Wayoga, identity card no. 24534486. PW7 produced the contract book as exhibit 7 and appellant identification records as exhibit 8. In my considered view, the chain of events from the time of the hire of motor vehicle registration No. KBE 660L Toyota Premio white in colour from PW4 and PW6 to the time the car was parked outside Switel Hotel and from the time of the attack to the time of the arrest of the appellant was not broken, the events from the time of the hire of the vehicle and the short period between the attack and the arrest are circumstantial evidence that the lower court properly took into account in arriving at the conclusion that the appellant was one of the persons who attacked the complainants. I have very carefully perused the lower court record, and from the record I have not found any other co-existing circumstances that would weaken or destroy the inference that the appellant was one of the persons who attacked the complainants. The record show that there is strong link of the appellant with the offence committed. He was arrested following the details he had given to PW6 when he was hiring the vehicle. He was identified not only by PW2, a complainant but by PW4 and PW6 immediately upon arrest following an identification parade. PW6 had dealt with the appellant before so he was well known to PW6 before the incident. PW4 saw the appellant at parking yard when he hired his car. The motor vehicle registration No. KBE 660L Toyota Premio, white in colour was on material time parked outside Switel Hotel and PW1 saw three people coming out of the car who included the appellant, that puts the appellant squarely at the scene of the crime. I see no basis of finding otherwise and faulting the trial court for its findings.

26. The appellant contends that the prosecution failed to prove their case beyond reasonable doubt by failing to produce the motor vehicle Registration number KBE 660L in court contrary to section 63 (1) (3) of the Evidence Act provides:

***“63. (1) Oral evidence must in all cases be direct evidence.***

***(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit require the production of such material thing for its inspection.”***

27. The above section is not couched in a mandatory manner and it therefore means the trial court has a discretion if it think fit to require the production of such material thing for its inspection. The appellant did not at the trial raise the issue that the said vehicle did not exist or that the same as of that time was not capable of being driven or moving to warrant the court making an order for its production. The appellant has not demonstrated how the failure to produce the vehicle before the court has prejudiced him. I have perused the evidence produced before court and the photographs taken and produced by PW5 a gazetted scene of crime police officer, through gazette number 217 of 28.12.2012 as exhibit 5 (a) (b) and (c) and the exhibit 6. The evidence was sufficient to enable court make its decision without calling for physical production of the vehicle. I do not find any prejudice that the appellant suffered by failure of the production of same. I find no merits in this grounds.

28. The Appellant contends that the court erred in relying on the contract book tendered in court which the appellant contends was not authentic. **Section 65 (1) (2) (3) of Evidence Act** provides:

***“65 (1) Primary evidence means the document itself produced for the inspection of the court.***

***(2) Where a document is executed in several parts, each part is primary evidence of the document.***

***(3) Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.”***

The contract book exhibit 7 was the primary evidence. It was the book used by Motrex Travels in cause of the booking of hiring motor vehicle. It runs from serial No. 207 to 297. PW6 identified the same as the document that he received in respect of the transaction with the appellant. The appellant did not raise any question as regards its authenticity to PW6 through cross-examination. PW7 who received the contract Book from motor Travels was not challenged on its authenticity nor did the Appellant object to its production. The appellant in this appeal has failed to demonstrate that the contract Book is not authentic. I find no merits in this ground of appeal.

29. The Appellant contends the trial court erred in failing to give his defence testimony due consideration. The appellant's defence was a defence of alibi. In his defence he stated that on 14<sup>th</sup> August, 2014 at about 12.57 p.m. he was at his home in Kisumu. The trial court considered his defence and found that the appellant failed to offer defence that would have exonerated him by demonstrating that he was not one of the people who were in the motor vehicle. In cases where defence of alibi is raised the accused person does not assume the burden of proving the defence of alibi. In criminal cases burden lies within the prosecution, except in those cases where the section creating the offences specifically places some evidential burden on the accused to establish a fact or rebut a presumption or prove a defence of a particular kind. It is the duty of the prosecution to disapprove of alibi defence an accused puts forward unless it appears to the court that alibi cannot be sustained or was raised at the time which did not give room for the prosecution to check it out and disapprove it (See the case of **Njuki and 4 others V. R (2002) 1 KLR 771**) I have on evaluation of the Appellant's defence of alibi found that the prosecution disapproved the Appellant alibi defence. The prosecution witnesses PW1 and PW2, dislodged the appellant's defence of alibi. PW1 and PW2 placed the appellant at the scene of crime as from 11.00 p.m. upto the time the police came. The evidence of PW1, PW2, PW4, PW6 and PW8 and the presence of the hired vehicle KBE 660L being at the scene of robbery and having been left there after exchange of fire with Police Officers when the robbers disappeared placed the appellant at the scene of robbery. The evidence of the prosecution witnesses therefore dislodged the appellant's defence of alibi. I therefore find the appellant's defence of alibi was considered and rightly rejected. I find that the defence was not raised early enough to give the prosecution room to check on it and as such was an afterthought.

**30. The upshot is that the appeal is without merits, the conviction is upheld and sentence confirmed.**

DATED AND SIGNED AT SIAYA THIS 13<sup>TH</sup> DAY OF OCTOBER, 2016.

**J. A. MAKAU**

**JUDGE**

**DELIVERED IN OPEN COURT THIS 13<sup>TH</sup> DAY OF OCTOBER, 2016.**

**IN THE PRESENCE OF:**

**APPEALANT IN PERSON**

**MR. E. OMBATI FOR STASTE**

**C.C. 1. K ODHIAMBO**

**2. L. ATIKA**

**J. A. MAKAU**

**JUDGE**