

JUDGMENT WRITING

Haddy Roche (PhD)

Justice of Appeal, The Gambia

DOI: 10.46609/IJSSER.2022.v07i05.017 URL: <https://doi.org/10.46609/IJSSER.2022.v07i05.017>

Received: 29 April 2022 / Accepted: 15 May 2022 / Published: 30 May 2022

Introduction

If courts were not obliged to give judgments, they would not be useful institutions, and they would have been redundant by now. People take their disputes to the courts because they want the courts to make a decision to resolve them. There will be no motivation for people to take their disputes to the courts if the courts were not obliged to give judgments. Judgments then, are the conduits to justice. The only way courts can serve justice is through their judgments, and so Neuberger¹ (2012), was right to observe that, without judgments there would be no justice. Quality judgments are therefore sine quibus non of democratic states.

Everyone knows that the judgment of a court is the decision of the court. This however, is a simplistic view of a judgment. For such view does not take into account the basic characteristics and requirements of a judgment that makes it the sacred document it is supposed to be. Today we talk about judgment writing, but the Lebovits² (2010) highlights that:

Judgments, traditionally, were oral rather than written. In England, until not long ago, judgments were reports of what the judges said orally in court...As written reports became more accessible to the public, to lawyers, and to judges, England experienced a shift from oral to written judgments. The increasing number of written judgments led to the creation of a cohesive body of law known as the common law...

The Common law's reliance on written judicial decisions has grown since the 18th century... (pp219-220)

¹ Lord David Neuberger Former President of the UK Supreme Court in his First annual BAILLI Lecture 2012

² Honourable Justice G. Lebowits, in his paper: "Judgment Writing in Kenya and the Common-Law-World" (2009)

McLachlin's³ (2003) advice is that judges should approach their task of judgment writing, not only with an open mind, and be willing to adjust preconceptions and predispositions based on the facts and the evidence, but also with a healthy and serene mind. Without a balanced and healthy mind, the judge cannot engage in the introspection, objectivity, and openness the task requires. A judge must be free from physiological and psychological stress before embarking on the task of judgment writing. Judges must learn to recognize the signs of stress which might affect their performance and deal with them before embarking on the task (McLachlin, 2003). Court judgments require physical and mental preparation on the part of the judge, because they can affect lives, liberties, identity, dignity, finances, property, and the stability of society. They have a valuable role in society.

The benefits of judgment writing

The fact that a judgment is written ensures the transparency and accountability of the judge. It gives judges more time to get their thoughts together to explain and reason better. Indeed, Kirby⁴ (1990) tells us that the written judgment is a test of conscience for the judge, for it provides the opportunity for the judge to demonstrate to "his or her own conscience a worthiness to be a participant in such a high tradition or moral integrity and social utility" (p.11). Judgment writing therefore inspires high standards and provides judges the opportunity to produce well considered and high quality judgments. The litigants, law reporters, lawyers, other judges, the appellate courts, the media, and the general public will know exactly how the judge reached the decision in the judgment, and will therefore have the necessary information to approve or disapprove the judgment fairly and objectively.

Judgments are written so that the reasons for the decision can be expressed and precedent can be set Kitto (2003)⁵. And in our case, because English is the language of the court⁶, the judgment must be written in the English language, which means that the judge must have a very good command of the English language. When judgments are written, they are for posterity and are physically available to be studied and criticized. A judgment is what a judge is judged by for now and for many generations to come, which is a very good reason why the judge should be

³ The Right Honourable Beverley McLachlin PC Chief Justice of Canada

⁴ Hon. Justice Michael Kirby CMG, the then President of the New South Wales Court of Appeal

⁵ The Right Honourable Sir Frank Kitto AC KBE, in his paper: "Why Write Judgments?"

⁶ Rule 46 of the Rules of the High Court First schedule, Vol 2 Laws of The Gambia

really careful, collected, and competent when writing them. Judgments are reported to form binding precedents for lower courts. But even if they are not reported (for some jurisdictions do not have vigorous law reporting systems), they are generally delivered in public, which keeps the judge on trial and guards against impropriety. Thus, it was observed by Mahoney (2013), that a judgment by its nature, is a public act or instrument of communication exercised with professional skill. Judges who never forget that they are being tried and judged by the public and the legal profession as they try and judge others, will inevitably be honest and will strive to do their best. Judgment writing therefore inspires the required judicial diligence, efficiency, and ethics required for quality justice and confidence in the administration of justice.

Some characteristics and challenges

Other basic characteristics and requirements of a judgment can be found in the various definitions of a judgment offered in Black's Law Dictionary⁷ as follows:

- The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination
- Conclusion of law upon facts found or admitted by the parties or upon their default in the course of the suit
- Decision or determination on issues in any proceedings at law
- Decision or sentence of law pronounced by the court or other competent tribunal upon the matter
- A determination by a court of competent jurisdiction upon matters submitted to it
- The term 'judgment' is also used to denote the reason which the court gives for its decision

From the above definitions, we can gather that a judgment is an official document formally prepared by the court or judge (not any other person) with judicial power to determine the matter. And the judgment must be authentic, meaning there must be an indication on it that it was prepared by the court or judge. Therefore, it will bear the name of the court, the number of the case, the title of the case, the name and signature of the judge, the date it was delivered, and

⁷ 4th Edition pp.976-977

the stamp and seal of the court. The above definitions also show that a judgment must be based on the facts before the judge and on the relevant issues and law applicable in the case, and it must be supported by reasons.

Another basic, but significant characteristic of a judgment, is that it is the exercise of judicial power constitutionally vested in our courts by section 120(2) of the 1997 Constitution to determine criminal and civil matters within their jurisdiction. This means that courts have a constitutional duty to deliver judgments. And even more significant, is that a judgment is an integral part of the fundamental constitutional right to access the courts and have a fair hearing, as guaranteed by section 24 of the 1997 Constitution. Judges when writing their judgments are bound by all the rights of the litigant (especially the fundamental rights) set out in the Constitution. A judgment is therefore, both a constitutional privilege and duty of the judge.

Significantly, time is of the essence in the delivery of judgments (Gidudu⁸, 2013). “Parties come to Court because they are aggrieved. Delay in handing down the decision increases their agony and frustration” (n.p). In our case, the Constitution also provides that judgments must be delivered within three months (ninety days) after the conclusion of the evidence, or arguments of appeal, or final addresses⁹. While Gidudu (2013) highlights that the time limit for writing judgments in many jurisdictions (including Australia, Nigeria, and The Philippines), is within ninety days, he pointed out that the time limit given by the Ugandan Constitution is sixty days, which emphasizes the respect for speed in the delivery of justice in that jurisdiction. In the United Kingdom, the Business and Property Courts and the Court of Appeal¹⁰ also have a time limit of ninety days to deliver judgments.

A written judgment must explain why and how the judge reached its decision. Lebovits (2010) explains that judges must be honest, respectful, persuasive, clear, and memorable in the process of their explanation:

Judgments must be honest because judges, more than anyone else, and courts, more than all other institutions, must be ethical and impartial...Judges have no power except through

⁸ Honourable Judge Lawrence Gidudu of Uganda

⁹ See section 124 (1) (b) thereof

¹⁰ See the case of Bank St Petersburg PJSC & Anor v Vitaly Arkhangelsky & Anor [2020] EWCA Civ 408 where there was 22 months’ delay between the trial and judgment, and also Bond v Dunster Properties Ltd [2011] EWCA Civ 455

their moral authority, and their moral authority derives from an honest, restrained, exercise of power...

Honesty in judgment writing means writing neutrally, without fear or favour. Honest writing for judges means a balanced consideration of issues, arguments, facts, and law, especially the losing side's serious of fact and law...Judges must be trusted... They must render courageous and independent decisions... Honestly written decisions are respected, admired, and complied with. Decisions plagued by biased writing rather than dispassion, bring into disrepute the fair administration...(p.221).

And, it must be said that, an honest judgment does not cite and rely on nonexistent statute or case law precedent, neither should it rely on a case that has no bearing or relevance to the facts and issues of the case at hand. And, if while writing the judgment the judge aims at all costs for the evidence to align or not align with the claim or charge and tries desperately at all costs to get the evidence to align or not to align with the claim or the charge, the judgment will not be honest. A judgment that manipulates the facts, law and evidence to get a result desired by the judge is not honest.

Some judgments are deterred from being honest simply by the fear that an appellate court will reach a different conclusion and overturn them. We are however advised that, the best judges perform their evaluation and reasoning functions honestly and to the best of their ability without concern that an appellate court will overturn their decision¹¹. This advice was effectively conveyed by the Indian Supreme Court¹²as follows:

A judge entrusted with the task of administering justice should be bold and feel fearless while acting judicially and giving expression to his views and constructing his judgment or order. It should be no deterrent to formation and expression of an honest opinion and acting thereon so long as it is within the four- corners of law that any action taken by a subordinate judicial officer is open to scrutiny in judicial review before a superior forum with which its opinion may not meet approval and the superior court may upset his action or opinion. The availability of such fearlessness is essential for the maintenance of judicial

¹¹ By Kirby (1990)- ibid 4

¹² Per Honourable R.C. Lahoti, Justice of the Supreme Court, in the case of In the Matter of: 'K' a Judicial Officer v In the matter of 'K' a judicial officer Appeal (crl.) 165 of 2001, which is also mentioned by Justice Sunil Ambwani, Judge of the Allahabad High Court, Allahabad India in his paper "The art of writing judgments".

independence. However, sobriety, cool, calm and poise should be reflected in every action and expression of a judge (n.p)

An honest judgment will relay exactly what was said and done at the trial without fear or favour, affection or ill will. Meaning that, exaggerations, omissions, additions, inventions, suppositions and assumptions of the facts and evidence must be excluded. Presumptions and Judicial Notices must only be applied and relied on within the confines of the law. Imagine this scenario in a judgment in a case about substituted service:

Plaintiff: I went to the defendant's house twice but did not find him, so I decided to take matters in my hands

And the judge in his judgment narrated this statement by the plaintiff as follows:

The plaintiff said he searched for the defendant relentlessly many times but to no avail

Clearly, the narration by the judge is an exaggeration and is inaccurate. What he said was not what the plaintiff said. And what he said the plaintiff said makes the plaintiff's case stronger and more meritorious, meaning that he is helping the plaintiff's case.

Or another scenario:

Plaintiff: I don't know where to find the defendant, I searched for him at his last known address, and I was informed that he travelled, but I don't know where he is

And the judge wrote:

The plaintiff admitted that the defendant travelled, what is admitted need not be proved. Therefore, there was evidence that the defendant travelled

Again, what the judge reported as said by the plaintiff was not what the plaintiff actually said. Also, the judge gave the impression that the plaintiff was sure that the defendant had travelled outside the jurisdiction when that was not the impression the plaintiff gave. Thus, the judgment did not accurately report the facts. If the judgment does not have the correct facts, then obviously it cannot be a correct judgment. The evidence, facts, and law must guide the decision in the judgment-not the aims and desires of the judge. A judge can hold a particular view, but if the evidence before him proves his view to be wrong, he should follow the evidence not his view. Without humility on the part of the judge to accept that his view is wrong, the judgment cannot

be honest. The judge when writing the judgment must be flexible, and must be willing to change his mind based on the direction of the evidence.

Judicial honesty therefore, cannot be achieved without judicial humility. Judicial humility is an integral and inextricable part of judicial honesty. And, unless the principle of law has become well settled and elementary, the judge must acknowledge sources relied upon to reach the decision. Honesty means giving credit where credit is due, and not taking away some ones' glory. Thus, Lebovits (2010)also observed that:

Along with honest writing, judgments must be respectful. A judgment should address the merits of the case in an appropriate, professional tone and without being self-protective... judgments should never insult the attorneys or the litigants or display traces of sarcasm whether directly or indirectly ...Respect shows readers that the litigants will be treated equally on the merits...

The obligation to have respect for the litigants means that the judge must avoid humour where the issues between the parties are too serious and vital interests are at stake. Humour must be used appropriately if it is to be used. Kirby (1990) warns that a judge tempted to engage in humour must consider the permanency of the record and the potential harm to the reputation of the subject of the humour. Lebovits (2010) emphasized that judges must also show respect for each other:

In their writing, judges should respect not just the litigants but also each other... Collegiality is a hallmark of civility and professionalism, qualities judges must themselves possess and encourage in others. Instead of attacking a judge when writing an appellate decision... the appellate judge should address the judge's incorrect reasoning...

Judges also show respect and an absence of bias or prejudice when they rise above it all, and well above the litigants, despite any provocation hurled at them...(p.222)

There will be instances when during the proceedings, lawyers or litigants might be disrespectful and insulting to the court. For example, they might attack the court with allegations of unfairness and bias, or might ridicule the court with sarcasm. Those wrongs can be addressed by the judge according to the rules. However, they must not be the reason to decide the case against the offending person, for that will be an infringement of the right to fair hearing, which requires that the decision of the court must be based on the evidence, facts, and relevant law. But the judge is a human being. Therefore, if the judge is too affected to be impartial a recusal will be appropriate. A judgment must not be used as an opportunity for vengeance against lawyers,

judges of lower courts, or colleagues. Nor must it be used to criticize and condemn lawyers, junior judges, and colleagues unnecessarily due to a grudge or to “put them in their place”. A judgment is not meant to be personal-it is meant to be professional. As human beings we are often driven to display the full extent of our powers in our judgments. However, without restraint, the judgment will appear to infringe the right to fair hearing.

Lahoti J¹³ reminds us that while permanent damage may be done to the reputation and dignity of the lawyer or judge being unnecessarily criticized and condemned in a judgment, the judgment doing the criticizing and condemning may itself contain fundamental embarrassing errors which equally haunt the criticizing and condemning judge. Call it karma or subsequent situations of the “pot calling the kettle black” or “those in glass houses throwing stones”, but it is one very good reason for judges to show restraint in their criticisms and condemnations, for they might find themselves in the very same position as the lawyer, judge, or litigant they criticized and condemned in their judgment. Judges when writing their judgments should not put themselves on a pedestal. They should bear in mind that they are human beings who are also not perfect in their lives and work. Lahoti J therefore advised that:

The wisdom of a superior judge itching for making observations on a subordinate judge [or counsel] before ventilating into expression must pause for a moment and read the counsel of Cardozo-‘write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes the fault is truly yours, in which event you can pray for deliverance thereafter’....

The courts do have power to express opinion, make observations and even offer criticism on the conduct of anyone coming within their gaze of judicial review but the question is one of impelling need, justification and propriety... (n.p)

The point being made is that, even the highest courts are not infallible because no one is perfect. Justice Brown of the United States Supreme Court famously informed us that even the Supreme Court judges are not infallible when he observed that¹⁴ Supreme Court decisions are not final

¹³ In the same case in 9 ibid

¹⁴ In Brown v Allen, 344 U.S. 443, 540 (1953)

because they are infallible, that rather, Supreme Court decisions are infallible only because the Supreme Court is the final court. Therefore, judgments should strive for compliance with the law, facts, and conscience rather than with infallibility. Sarcasms and derogatory remarks must be avoided even where they are deserved. For the judge must rise above behavior such as pettiness, vindictiveness, and maliciousness. Indeed, such behavior will interfere with the principles of impartiality and the right to fair hearing. Lahoti J argued that:

...The strength of [judicial] power is not displayed solely in cracking a whip on errors, mistakes or failures; the power should be so wielded as to have propensity to prevent and to ensure exclusion of repetition if committed once innocently or unwittingly...criticisms and observations touching a subordinate judicial officer incorporated in judicial pronouncements have their own mischievous infirmities. Firstly, the judicial officer is condemned unheard which is a violation of principles of natural justice... Secondly, the harm caused by such criticism or observation may be incapable of being undone... Thirdly, human nature being what it is, such criticism of judicial officer contained in the judgment of a higher court gives the litigating party a sense of victory not only over his opponent but also over the judge who decided the case against him. This is subversive of judicial authority of the deciding judge...

We are reminded that, the higher the forum and the greater the powers, the greater the need for the judgment to show restraint, understanding, kindness, and a mellowed reproach. But the judgment must not only be honest and respectful, it must also resonate with the reader. An honest judgment which does not resonate with readers will not be fully appreciated. As Lebovits (2010)puts it:

Judgment writing must also be memorable or be doomed for history's ash heap... to be memorable, decisions must be infused with respect but not excessive adulation...

To achieve immortality, judgments must trigger the emotion without emotional writing. To achieve immortality, judgments must pierce a man's heart without striking fear in the hearts of men. To achieve immortality, judgments must deliver on the promise of justice... (p.223).

The exercise of restraint should not prevent the judgment from resonating and from being interesting. Burrows¹⁵ (2021) suggests that judgments should be interesting- that judges should

¹⁵ Lord Burrows, Justice of the Supreme Court of the United Kingdom in a paper at the Annual Conference of Judges of the Superior Courts in Ireland

stamp their own personality on judgments and converse with the audience as opposed to relying heavily on quotations and unnecessary details. He however recognizes that it is all a matter of style and that some judgments prefer the familiar to the unfamiliar. They prefer to stick rigidly to conventions and political correctness. However, if a judgment is boring and does not resonate, it will make the reader disinterested, and the justice it serves will not stand out to be properly appreciated, and it will not properly educate and raise awareness. Lebovits (2010) explains that:

Judgments must also be essays in persuasion. They need not, ought not, be dreary, dry, or dull recitations of precedent and procedure...fanciful, fancy, or fractious explorations of society's ills unrelated to the case at hand. Readers unpersuaded that a judgment is correct will reject it and the judge who delivered it... judicial writing must persuade, not by agenda or trickery, but by complying with the rule of law... Judicial persuasion comes from preferring constitutional principles to artifice, device, and exaggeration. Judgments are meant to be followed, not discarded ...

Clarity, also, is a principal component of a good written judgment. Clear writing reflects clear thinking clarity comes from organization, precise writing, and simple, succinct, concise and plain English...Judgments are meant to be understood, not confuse...(pp.222-223).

Clarity, coherence, and conciseness, Burrows (2021) tells us, are the hallmarks of a good judgment. It is contended that the readability of a judgment improves “if the opening paragraph answers three questions namely what kind of case is this, what roles plaintiffs and defendants had..., and what are the issues...”¹⁶. However, sometimes (most times), the facts and complexity of the case are such that these three questions cannot be answered in a single paragraph. The number of opening paragraphs should therefore not be restricted to one or any number. What is important is that the relevant facts (not irrelevant facts) are stated while these three questions are being answered in the opening paragraph(s), so that the reader is properly guided.

Pearson's (2013) study about (Court of Appeal judgments) suggests that with the improvements in judicial training and education judgments are getting much clearer and readable. He however emphasizes that there is still room for improvement because many judgments are still not as clear as they should be. He argues that judgments have to be clear because they “are the law...if we cannot understand judgments we cannot understand the law “(p. 72). Therefore, a vague or

¹⁶ By Honourable Justice Sunil Ambwani, Judge of the Allahabad High Court, India. In his paper “The art of writing judgments”. Para. 15

ambiguous judgment can exacerbate a dispute, and can lead to instability, chaos, and even anarchy. Pearson (2013) argues that judgments need to be clear because they have immense power; they “can take away a person’s freedom, children, money, reputation or business” (p.8). And even more serious, is that fact that a judgment can take away a person’s life. Judges pass life or death sentences, and they can decide who lives and who dies by claiming to respect wishes of people who are not able to decide for themselves due to serious health problems¹⁷.

A vague judgment cannot serve justice because execution will be difficult if not impossible. For example, if the identity or dimensions of a suit land is vague, the judge cannot enter a clear judgment for the plaintiff, and any judgment given will be in vain (see the case of *Fatou Badgie v Joseph Bassen& Ors*¹⁸ where this principle of law was adequately explained). Of course judges can review and amend their decisions within the confines of the law, and appellate courts can interpret the judgments of lower courts for the purposes of execution. However, these processes will lengthen the proceedings even more, and will delay justice that could have been served if the judge simply exercised care and clarity. And it really does not tell well on the judge whose judgment is so vague that it has to be reviewed.

Judges have to be vigilant because in many cases the lack of clarity is caused by a litigant who prayed for a vague relief or produced vague evidence. But sometimes judges can cause the uncertainty by using complicated words or language. Consider for example the following words used by a High Court judge in the Indian case¹⁹:

The learned counsel appearing for the judgment debtor/petitioner herein submits qua the impugned pronouncement made by the learned Executing Court upon the apposite objections preferred theretofore by JD/tenant manifesting therein qua the decree put to execution theretofore not warranting recording of affirmative orders thereon, its standing fully satisfied, standing stained with vice arising from the factum of its palpably slighting the factum of unfoldments occurring...

¹⁷ See for example, the UK Court of Appeal decision in the case of the conjoined twins-Re A (conjoined twins) [2001] 2 WLR 480, and the articles by Gibb, F. (2016).” Who decides matters of life or death?” and by Ford, A.R. (2020). “Judges do it better: why judges can and should decide life or death”

¹⁸ 2 GLR, 141

¹⁹Shri Pawan Kumar Sharma Petitioner/Jd v. Sarla Sood and Others S/Dh C.R. No. 184 of 2011

However, the learned counsel appearing for the tenant/JD/petitioner herein cannot derive the fullest succour from the aforesaid acquiescence occurring in the testification of the GPA of the decree holder/landlord, given its sinew suffering partial dissipation from imminent pronouncement hereat...

The summum bonum of the aforesaid discussion is that all the aforesaid material which existed before the learned Executing Court standing slighted besides their impact standing untenably undermined by him whereupon the ensuing sequel there from is of the learned Executing Court while pronouncing its impugned rendition overlooking the relevant and germane evidence besides its not appreciating its worth...

This judgment was clearly plagued by complicated and unnecessary words and sentences from start to finish. Needless to say, the Supreme Court could not understand its contents and had to remit it back to the High Court. Thus, judgments using complicated and unnecessary language can cause delay and denial of justice, which can lead to dissatisfaction in the administration of justice.

In our case, English is not our mother tongue- it is our second language, and it is well known that a large number of the population is not literate in English or not fluent in English, which begs for simplicity of the English used in court judgments. Also, it can be observed that the judgment has no punctuation, which makes it even more difficult to understand. Indeed, the growing number of self-represented lay litigants makes it even more necessary for judgments to be more clear, simple, and open. Judgments will not be accessible to the public and self-represented litigants if they are not clear and comprehensible²⁰. Self-represented litigants in particular and the public in general, will not believe that justice is served, and will not have confidence in the courts if they cannot understand the decision of the courts.

Judges are constantly advised to avoid verbosity in their judgments. This is a good advice. However, it does not mean that the judge should not say what he has to say to properly and transparently explain how the decision was reached. Therefore, the length of the judgment should be determined by the facts, evidence, and law, not by the desire for brevity or verbosity. The judgment should be brief when the facts, evidence, and law in the case dictates brevity, and it should be more detailed and thorough when the facts, evidence, and law so dictates. The need for brevity or detail should be guided by the facts, evidence, and the law that has to be explained, analyzed, and reasoned. Brevity cannot be at the expense of reasons or adequate reasons. It is

²⁰ See also Lord Neuberger 2012

important to remember that, each case is to be judged on its own particular facts and circumstances. Therefore, one style does not fit all. Accuracy, transparency, and thoroughness should be more important than the need for brevity. I will certainly not recommend over killing and repetition, but I will recommend transparency, so that the losing party can understand how the decision was reached. It must be emphasized that, all the relevant legal and factual issues raised in the case must be addressed in the judgment. Otherwise the judgment can be set aside for infringing the right to fair hearing.

Indeed, a good revision and editing of the judgment will determine the proper length of the judgment, and will make the judgment easy to read however detailed or brief it turns out to be. Therefore, revision and editing of the judgment is very important. Revision and editing entails proof reading to correct clerical, grammatical, punctuation, citation, paragraphing, page numbering, and formatting errors. It includes the elimination of repetitions and erroneous or unnecessary words, sentences, and paragraphs. The judge must structure the judgment in such a way that its message will be easily understood and appreciated. My experience is that, most judgments are structured with headings/titles bearing the name of the court, number of the case, and names of the parties. Then there is the introduction where the judge sets the scenes and explains how the case got to court and briefly introducing the facts and issues, followed by the evidence of the parties, an evaluation and analysis of the issues, facts, evidence, and law, followed by a conclusion where the judge makes the final determination and issues orders to that effect (see also Gidudu (2013).

The decision or conclusion of the judgment is arrived at by what Mahoney (2013) terms as “psychological processes”²¹ broken down into three processes:

- Syllogistic processes
- Inferential processes
- Intuitive processes

With the syllogistic process, the reasoning and conclusion is compelled by the premises. For example, when the evidence is that the murder was committed by a person with a blood type O and, the accused is of blood type A, then the accused could not have committed the murder. Inference is drawn from the established facts in the inferential process. For example, the judge

²¹ At p.104

can infer that a victim of rape consented to sexual intercourse if the evidence is that the victim invited the accused in the bedroom and undressed. Intuition can guide a judge in deciding whether or not to believe the parties and their witnesses. This is largely based on insights, and so the witness's body language and manner of speaking or dressing might guide a judge's views about the veracity or objectivity of their evidence (Mahoney, 2013). My experience is that these three processes especially the inferential and intuitive processes are interconnected so that many judgments can include the three processes depending on the quantity of the facts and evidence. Indeed, there appears to be little or no difference between the three processes. For example, inference can be guided by intuition and vice versa, and both inference and intuition can guide the syllogistic process.

What is clear from all the above, is that, judgment writing is no easy task. Burrows(2021)provide even more resonant reasons to confirm this, and I have expanded and developed on his reasons as follows:

- I. The judgment is for a very wide and varied audience which goes beyond the parties, the lawyers and legal profession, academics, students, every possible sector in society, and in particular "must strive to achieve the right balance between those involved in the litigation and those not involved" (p.4). And the fact that the judgment is permanent and for posterity, and is a reflection of the judge can put additional pressure on the judge to cause mental anguish that affects the quality of the judgment.
- II. A judgment has to be decisive and cannot sit on the fence-the judge must make a decision and it is not always easy to make or reach a decision let alone make it. The judge does not have all the answers, his subjectivity will be competing with his objectivity, he will have to strike a balance between his values and the overall expectations of society, and that balance is difficult to achieve. If the judge realizes that he did not get the balance right, he might be hounded by his conscience and many sleepless nights and even mental break down, to avoid that, he keeps going round and round in circles with the thoughts in his mind, which can be akin to some form of mental torture.
- III. The judgment must be appealable unless the court that delivers it is the final court, and most judges don't like being overturned on appeal and are bothered about being overturned on appeal, which is a heavy burden to carry. Even a judge who did his best and has a clear conscience, will not like to be overturned on appeal. In fact, the hurt and disappointment will be even deeper if the judge overturned genuinely believes that their

decision was the right one, because then that judge will be demotivated from performing more professionally, and will be questioning their worth in the administration of justice.

- IV.** The emphasis on clarity and brevity puts pressure on judges to express themselves more clearly with fewer words, which can be very difficult-especially in our case where English is not our first language. My opinion is that, the calls for clarity are always justified and should be underscored. When the judgment is clear enough, the losing client might feel disappointed, and might not agree with it, but will nonetheless be more willing to be respectful, understanding, and accepting of it. However, the calls for brevity often don't take account of the context. Some cultures thrive on many words and more communication, and some cultures have very low literacy rates, low rates of rights awareness and low rates of knowledge about the law and how it works. If the judgment is to be trusted, if it is to resonate and connect with the audience, and if it wants to increase trust in the administration of justice, it must be fully understood. The judge who wants to be understood, to be transparent, to connect and resonate with the audience, will feel restricted and isolated by the demands for brevity, which can demotivate them. Kirby (1990) aptly recognized this problem in the checklist he offered to guide judges.

Modern trends and suggested checklists

Kirby (1990) observed a modern trend in judgment writing-that it is now common to see judgments with the following:

- I. Opening words or passage expressing the key issues to be decided
- II. Subheadings which take the reader efficiently to a section of the judgment they wish to find, and to display the logical progression of the reasoning of the judgment
- III. The gradual abandonment of Latin and the elimination of Greek, for they are no longer useful in the learning of law
- IV. Gender neutrality-the avoidance of gender specific language when unwarranted. Now, instead of using "he" when speaking in general terms, "he or she" is used. Also, now, the appropriate (politically correct) words are used to describe the physically and mentally challenged (for example, we now also use words such as "person(s) with disability" to describe the condition of such persons).
- V. Schedules and footnotes –some judges now use appended schedules or footnotes of cases or other material relied upon in their judgment

- VI. Summary and index to guide readers through the judgment (especially long judgments)
- VII. While brevity, simplicity, and clarity are the watchwords for effective judicial writing, brevity at the expense of a mechanistic value free view of the law is unacceptable to many judges today. Intellectual honesty in response to the issues raised by lawyers may require a more detailed response and hence a more detailed judgment. And now, the requirement for written submissions creates the opportunity for lawyers to raise even more issues for judges to determine, thus making judgments lengthier.

Another suggested checklist is offered by Mahoney²² (2003). He suggests that the judge must ensure that the judgment covers the following:

- (a) A statement of the questions to be determined
- (b) The relevant law
- (c) The facts
- (d) The conclusions
- (e) The orders to be made

Dessau & Wodak (2003)²³ also offer seven steps to writing judgments:

Step 1: Start before the beginning. In this step, while they recognize that a judgment cannot be concluded until the case is heard, they argue that “that does not preclude a judge from working on a draft judgment during the hearing...[as] This will help the judge recall material if, for any reason a case is adjourned part-heard or the judgment needs to be reserved for delivery at a later time...(p.119).

Step 2: Use the first page. They argue that since the first page of the judgment sets the foundation and maps the course of the judgment, it must be clearly and soundly constructed to draw in the reader and keep the reader interested.

²² The Honourable Dennis Mahoney, in his paper Judgment Writing: form and function (2003)

²³ The Honourable Justice Linda Dessau and His Honour Judge Tom Wodak, in their paper Seven Steps to a Clearer Judgment Writing (2001)

Step 3: Deal with the history and the facts. For this step, they argue that the narration of the facts should not include no more than is necessary because a sound grasp is best demonstrated by distilling the facts to those that are necessary in the reasoning process and to explain the ultimate decision in the judgment.

Step 4: Set out the law. They believe that while it is essential and an obligation for the judge to identify and put forward the legal principles used in arriving at the decision, there is generally no need for a lengthy dissertation at first instance judgment. Therefore, although courts of first instances must set out the principles of law relied upon in their decisions, they should only do so briefly. This is because it is at the appellate level that the law is discussed in more detail. The law must however be applied to the facts and the evidence before the court. This is when the judge engages in the analysis and evaluation of the evidence, and it requires a careful combing through of the facts and evidence, as well as a careful study, understanding, and application of the relevant law.

Step 5: State the conclusion. Here they argue that since the introduction had introduced all the relevant matters, the conclusion should not introduce any new matter-factual or legal not previously discussed. They explain that although traditionally, the decision of the court is contained in the conclusion, there are some judgments which announce the decision from the beginning. Irrespective the approach, they believe that how the decision was reached must be evident in the judgment.

Step 6: Choose an appropriate style. They argue that judges must use normal and sensible words and phrases, and must avoid technical legal language and jargon. However, they explain that a judge must use a style which they are comfortable with. Since a judgment must be honest, and is a reflection of the judge, judges should be encouraged to be authentic in their style of writing.

Step 7: Edit the judgment. They advise that editing should include the following:

- making a checklist of topics or issues in the judgment that should be covered
- Checking on dates, names, figures, and other data for accuracy
- Eliminating repetitious material and irrelevant findings of fact
- Scrutinizing the length and content to paragraphs and pruning lengthy paragraphs, sentences, and statements. I find that putting certain words or sentences in bold letters can make the judgment easier to read. For example, important evidence, names, venues, cases, and statutes referred to in the judgment can be put in bold letters, capital letters,

different font size and style. I also find that using very small font size, very short line spacing, and long paragraph spacing makes the judgment difficult to read.

- Removing Latin expressions, jargons and inappropriate words
- Eliminating explanations of the obvious
- Using the active voice rather than the passive voice where appropriate
- Checking the use of punctuation to avoid ambiguity and to facilitate comprehension

The judge's duties

The judge must decide the issues in dispute. Sometimes the issues are not properly distilled by the parties, and the judge's obligation will then be to distill the issues which should be raised for the proper determination of the dispute. Therefore, judges are not bound to accept the issues raised by the parties if those issues are not relevant or are unhelpful to the determination of the dispute. However, the judge must state the issues he raised and determined to reach his conclusion about the dispute. And if a new issue was raised by the judge, the parties should have been given the opportunity to respond to those issues before the court embarked on the judgment writing (see also the *Fatou Badjie* case supra).

The hard reality we must face is that, a judgment does not always respond to the needs and expectations of the parties and the public, and does not always serve justice. To serve justice, a judgment must contain a proper analysis of the facts and evidence, and must be supported by good reasoning. It is through reasoning that the parties, lawyers, the public, and the appellate courts can scrutinize the judgment to determine if the judgment is fair, impartial, and correct. Reasoning allows for the judge to respond to the issues and arguments of the parties, it ensures transparency so that justice is seen to be done. It also gives the judge the opportunity to justify the decision and be accountable for the decision.

A judgment without reasoning or inadequate reasons is an infringement of the right to fair hearing, because a judgment which contains no explanation or does not sufficiently explain how it reached its decision cannot be considered fair, especially by the losing party. Apart from insufficient reasoning, failing to take into account material facts and evidence, going outside the

evidence and facts, as well as bias, are all infringement of the right to fair hearing²⁴. However, the reasoning must be clear, and must make sense- a reason will not be accepted just because it is given. A reason must be logical, unambiguous, transparent, and relevant to the issues in the case at hand. The issues might be legal or factual in nature, but they must all be addressed if they are raised and are relevant to the justice of the case. The reasoning should validate the judgment by giving the judgment the appearance of fairness and impartiality.

The judge must be impartial. This is the only way the perception of fairness and actual fairness can be achieved. However, McLachlin²⁵(2004) observed that:

...impartiality does not require that we adopt a ‘view from nowhere’. On the contrary, it relies on our close connection with the community in which we judge and its core values [and cultures]. It requires us to cultivate a detachment only in the sense that we must try always to increase our awareness of our own preconceptions, and to see that our minds are open to other perspectives and amenable to persuasion (p.22).

This confirms that judgments should be responsive. They should not ignore the values and cultures in the society in which it is given. McLachlin(2003)underscores that, in addition to applying and interpreting the law, the judgment must be responsive to the social context and the different perspectives of the parties. The judgments should be sensitive to age, gender, social status, tribe, race, religious belief, orientation, physical or mental challenges, and any other factor that might have the potential to re-victimize and re-traumatize any of the parties, or to trivialize, aggravate, or perpetuate the distress of any of the parties-in particular parties who allege to be victims of any kind. It must be borne in mind that the judgment is supposed to make the parties feel better-not worse or confused. Even the loser should receive all the necessary reasoning and explanation to feel better and informed, rather than be incited to confusion, anger, conflict, and hatred.

And it is argued that, a judge can make reference to current events, literature or popular culture to illustrate a point in issue²⁶. This is of course with an obvious caveat that, quotations made by

²⁴ See *Flannery v Halifax Estate Agencies Ltd t/a Colleys Professional Services* [2000] 1 WLR 377; *English v Emery Reimbold & Strick Ltd* [2002] 1WLR 2409; *Re A (children) (Judgment: Adequacy of Reasoning)* [2012] 1 WLR 595

²⁵ The Honourable Justice Beverley McLachlin former Chief Justice of Canada

²⁶ Per Supreme Court Judge Mr. Justice Nicholas Kearns in his paper *Some Thoughts on Judgment Writing* (2000)

the judge must be correct. McLachlin (2003) emphasizes that the judge must not turn a blind eye to his or her humanity. She believes that good judges acknowledge their humanity and embrace it. "Being human does not prevent judges from being impartial. Rather, it is the precondition of impartiality...the humanity of judges is what makes good judging possible" (p.26). It is a myth that the humanity in judging interferes with the principle of judicial independence because despite the principle of judicial independence, judges can exercise their discretion in both civil and criminal cases.

The myths

It is also a myth that there is legal certainty-that there is a law to cover every situation and there is always one legal answer to an issue in dispute. It is true that judges are bound by the principle of precedents (or stare decisis), meaning that they must follow the decisions of higher courts on a point of law. However, a judge is not bound to follow the decision of a higher court if the facts of that decision are distinguishable from the present facts. Each case is determined by its own particular facts and circumstances, and no two cases are exactly the same. The principle of precedent is more to ensure stability of the law than inflexibility of the law. Indeed, some precedents have been found inflexible, erroneous, and out of touch with reality²⁷. Therefore, there is always room for humanity in judging.

It is also a myth that judges approach cases with blank minds, value free and without preconceptions. As McLachlin²⁸(2004) advised:

It is true that judges must guard against preconceptions and prejudices influencing their findings of fact and law. It is equally true that they must be neutral as between the contesting parties. However, this does not mean that the judge's mind must be a blank slate. Indeed, to demand this is to demand the impossible; no human being can free herself from the mental constructs that allow her to make sense of the world and conceptualize the problem before her...

To insist that the judge purge all preconceptions and values from the mind is to place an impossible burden on the judge and induce impossible expectations in the public. The best a judge can do is to become aware of his or her mind-set and guard against errors it may engender. What is required is not mechanical passivity, but human impartiality (n.p).

²⁷ See for example the article on the subject by Kuzenski, W.F. (1922)

²⁸ Ibid

Human impartiality means being able to relate to the parties, their issues, and the applicable law as a human being, bearing in mind that the judge is also a son, daughter, husband, wife, parent, brother, sister, aunty, uncle, and friend. That the judge also laughs, cries, cooks, cleans, queues at the airports, and has personal issues like everybody else. This is what makes the humanity of the judge inevitable, even if some judges fall short in the exercise of their humanity.

Judges are invaluable members of society and deserve great respect. But they are human. Therefore, it is also a myth that a judgment will be perfect. We know by now that, no human being is perfect. Striving for perfection might direct the judge's focus towards technicalities which restricts the judge's humanity. McLachlin (2004)reminds us that:

...judges are not living Oracles. They are human beings...judges must learn to live with being wrong. As human beings, judges learn early in their career to deal with criticism. Every new judge dons the judicial robes resolved never to make a mistake. And every new judge fails. Decisions must sometimes be made without the opportunity of full reflection. The law may not be entirely clear. The truth may be elusive. In the result, even the best judges inevitably are found to have erred (n.p.)

Because judges are not perfect, they should not be expected to have all the answers. "The judge is not a high priest with a direct line to heaven, down which the right answers come tumbling. The judge is a human being"²⁹. Therefore, the judge should not feel pressured to have answers in every situation, and the pressure to have answers should not deter a judge from exercising humanity. The judge cannot have all the answers-indeed, the judge was not present when the dispute arose. Therefore, in many instances, apart from being guided by the evidence and the law, the judge will be guided by instinct based on their experiences as human being-not by knowledge of all the answers to the questions and issues raised in the case.

Conclusion and recommendations

It must therefore be emphasized that, judgment writing is strive for justice not perfection. This means that it has room for the expression and demonstration of humanity. It is true that judgment writing can be stressful, challenging, and difficult to master. Many judges with experience still struggle with it. Therefore, rather than speaking from the perspective of someone who has mastered the art, oras an expert who never erred, this paper is merely sharing information and ideas, hoping to inspire more research about the topic, and hence more quality judgments. In

²⁹ Ibid n.p.

fact, choosing to speak about the topic provides the opportunity to do some more research and revision, and to learn more about it.

However, judgment writing can also be easy, for it does not require judges to be other than themselves; each case is decided on its own particular facts and circumstances; judges exercise discretion in many instances; and judges are privileged to be the interpreters of the law. As a result, judgment writing allows for some freedom-it allows for the use of imagination, creativity, and empathy albeit within the confines of the facts, evidence, and law. This means that, a good judgment fundamentally requires a judge with the right values, worldview, and personality. For example, a racist judge will be expected to deliver a racist judgment or be insensitive to race.

With the invention of computers and the internet, judgment writing is much easier. Research can be done on the internet without having to go to a library or bookshop to get books or law reports. Information is easily available in all areas of the law. Access to precedents is much easier, and there are countless templates and samples of judgments in the courts and on the internet to guide judges all over the world. Snow (1992) however cautions that, the complexities of cases, pressures on judges to deal with backlogs of cases, and the aggressive nature of the adversarial system remain threats to good judgment writing (especially humanistic judgments). Indeed, poor working conditions, lack of security of tenure, and lack of continuing education and training for judges can be obstacles to good judgment. Therefore, a lot needs to be done to ensure the prevalence of quality judgments.

The suggestion by Pearson (2013) is in respect of achieving greater clarity of judgments. He suggests a method for measuring the clarity of judgments, which he calls the "Clarity Test". This works in the same way as a teacher's marking scheme. The tester looks for certain elements of readability by referring to a number of set questions in a written framework to guide the tester's analysis of the judgment. Court clerks trained in the law can be good testers, which is one good reason why it is necessary for court clerks to be trained in the law. At present, court clerks in our jurisdiction are not trained in the law, so that the judge writes and edits his own judgment, which apart from being laborious, can potentially restrict the objectivity of the judgment.

Each judge is however free to research and receive more training about how to write good judgments in a way that best suits them, because when it comes to judgment writing, no one size fits all. What is certain is that the more research and discussions on the topic, the more likely we are assured of improvements to ensure the prevalence of quality judgments. We might not have perfect judgments, but we can have responsive judgments that meet the needs of litigants,

lawyers, judges, and the public at large. With responsive judgments, access to justice and confidence in the justice system is significantly boosted.

References

Ambwani, S. (n.d.). The art of writing judgments. http://www.ijtr.nic.in/webjournal/3.htm#_ftnref6

Atkinson, R. (2002). Judgment writing. *Speech delivered at Magistrates Conference, Gold Coast*. <https://www.fja.gov.pk/files/articles/JudgmentWriting.pdf>

Black, H.C. (1968) *Black's Law Dictionary* (Revised 4th Ed.) St. Paul., Minn. West Publishing Co.

Burrows, A. (2021). Judgment writing: a personal perspective. *A speech delivered at the Annual Conference of Judges of the Superior Courts in Ireland*.

<https://www.supremecourt.uk/docs/judgment-writing-a-personal-perspective-lord-burrows.pdf>

Dessau, L., & Wodak, T. (2003). Seven steps to clearer judgment writing. In Sheard, R. (Ed.) (2003) *A matter of judgment, judicial decision-making and judgment writing*. (Pp.117-126). Judicial Committee of New South Wales.

Ford, A.R. (2020). Judges do it better: why judges can (and should) decide life or death. *124 Dick.L. Rev.* 463

Gibb, F. (2016). Who decides matters of life or death? *The times UK*. <https://www.thetimes.co.uk/article/who-decides-matters-of-life-or-death-162rr5mw6>

Gidudu, L. (2013). Judgment writing. A presentation to the 4th Magistrates' Conference at Colline Hotel K Mukono.

<http://www.judiciary.gp.ug/files/downloads/JUDGMENT%20WRITING.pdf>

Kearns, N. (2008). Some thoughts on judgment writing. *The Irish Times* <https://www.irishtimes.com/news/crime-and-law/some-thoughts-on-judgment-writing-1.907813>

[Kirby, M. \(1990\). On the writing of judgments. The Australian Law Journal \[https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/829-Aus_Conf on Literature and the Law - On the Writing of Judgments.pdf\]\(https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/829-Aus_Conf_on_Literature_and_the_Law_-_On_the_Writing_of_Judgments.pdf\)](https://www.michaelkirby.com.au/images/stories/speeches/1980s/vol21/829-Aus_Conf_on_Literature_and_the_Law_-_On_the_Writing_of_Judgments.pdf)

Kirby, M. (2003). Judging: reflections on the moment of decision. In Sheard, R. (Ed.) (2003) *A matter of judgment, judicial decision-making and judgment writing*. (Pp.43-58) Judicial Committee of New South Wales

Kitto, F. (2003). Why write judgments? In Sheard, R. (Ed.) (2003) *A matter of judgment, judicial decision-making and judgment writing*. Judicial Committee of New South Wales pp. 69-80

Kuzenski, W.F. (1922). Stare Decisis. *Marquette Law Review*, 6(2), 65-70

Lebovits, G. (2010). Judgment writing in Kenya and the Common Law world. *Kenya Law Review*, March 2010/ *Colombia Law School* https://works.bepress.com/gerald_lebovits/169/

Mahoney, D. (2003). Judgment writing: form and function. In Sheard, R. (Ed.) (2003) *A matter of judgment, judicial decision-making and judgment writing*. (Pp.103-116). Judicial Committee of New South Wales.

McLachlin, B. (2003). Judicial impartiality: the impossible quest? In Sheard, R. (Ed.) (2003) *A matter of judgment, judicial decision-making and judgment writing*. (Pp.12-26). Judicial Committee of New South Wales.

McLachlin, B. (2004). Judging in a democratic state. *Supreme Court of Canada*. <https://www.scc.csc.ca/judges-juges/spe-dis/bm-2004-06-03...>

Neuberger, D. (2012). No judgment no justice. *Speech delivered at the First annual BAILLI Lecture*. <https://www.bailii.org/bailii/lecture/01.html>

Pearson, W.C. (2013). Clarity in the Court of Appeal: measuring the readability of judgments. *A dissertation submitted in partial fulfillment of the degree of Bachelor of Laws (with Honours) at the University of Otago*. <https://www.otago.ac.nz/law/research/journals/otago065280.pdf>

Sheard, R. (Ed.) (2003). *A matter of judgment, judicial decision-making and judgment writing*. Judicial Committee of New South Wales

Skujeniec, V.(2003). *The quality of court judgments*. Center for Public Policy

Snow, S. (1992). The judge as healer: a humanistic perspective. *Denver Law Review*, 69(3), 713.

United States Courts (2022). Judge Tanya Chutkan ‘Developed Thick Skin’ to overcome Race-based comments. Author. <https://www.uscourts.gov/news/2022/02/24/judge-tany...>

Statutes

The Constitution of the Republic of The Gambia 1997

The Gambia High Court Rules, First Schedule Volume 2 Laws of The Gambia

Cases

English v Emery Reimbold & Strick Ltd [2002] 1WLR 2409

Bank St Petersburg PJSC & Anor v Vitaly Arkhangelsky & Anor [2020] EWCA Civ 408

Bond v Dunster Properties Ltd [2011] EWCA Civ 455

Fatou Badjie v Joseph Bassen. 2 GLR, 141-213

Flannery v Halifax Estate Agencies Ltd t/a Colleys Professional Services [2000] 1 WLR 377

In the Matter of: ‘K’ a Judicial Officer v In the matter of ‘K’ a judicial officer Appeal (crl.) 165 of 2001

Re A (conjoined twins) [2001] 2 WLR 480

Re A (children) (Judgment: Adequacy of Reasoning) [2012] 1 WLR 595

Shri Pawan Kumar Sharma Petitioner/Jd v. Sarla Sood and Others S/Dh C.R. No. 184 of 2011