

A PAPER PRESENTED AT THE JANUARY 2016 ANNUAL JUDGES CONFERENCE BY HON. JUSTICE M.S.ARACH AMOKO

TOPIC: THE ART OF DECISION MAKING IN TRIAL COURTS.

My fellow distinguished participants

Introduction

I may well preface this paper by asserting the fact that the last time I was a trial judge was way back in August 2010. Therefore what I am about to tell you is based on my knowledge, information and belief! I will rely on trial judges among us to fill us in on the latest trend.

Decision means: *"a conclusion reached after an evaluation of facts and the law."*

As a generic term, decision refers to:

*"Both administrative and judicial determinations. It includes final judgments. Rulings and interlocutory or provisional orders made by court pending the outcome of the case."*¹

Art in a classical sense refers to working with sounds, words, colours, forms or movements to create beauty. The word can also apply to principles and methods of a trade or craft, such as *"the art of baking"* or *"building"* or *"designing"*. For our purpose the term art is used to mean the principles and method of making judicial decisions.

The art of judicial decision making is the cornerstone of the justice system. It has baffled and intrigued scholars, lawyers and litigants for centuries. It is a broad subject and I do not intend to cover it within the scope of time allotted to me. I have thus restricted my paper to the following areas: **(1) *The relationship between judges and artists.* (2) *Judging as an art.* (3) *The art of judging in trial courts.***

¹[http:// legal-dictionary. thefreedictionary.com/Decision](http://legal-dictionary.thefreedictionary.com/Decision)

1. The relationship between judges and artists

There are some differences between the two: Artists begin with a creative impulse. Judges do not begin at all until someone starts a law suit or criminal prosecution. Even the most activist judges do not create causes of action or initiate criminal prosecution, but must wait for someone else to start the process.

Once the process begins, most judges depend on the adversarial system to shape the case. The process is inherently rational and controlled.

Artists enjoy greater subjectivity and latitude in creating a work of art; Each activity emphasizes different values. Judges concern themselves with rights and justice. Although artists may share those concerns, they express them in different ways².

Most importantly, the judicial process ends in a decision enforceable by law. The artistic process ends with a work of art that may be inspiring, even transforming, but does not command any penalty or sanctions.

The judge wields an immense power unknown to the artist.

*"A judge's legal figure picture is enforced, directly and often drastically altering the lives of the persons who inhabit the social canvas."*³

Differences between the disciplines, however, do not undermine the justification for comparing artists and judges. It is important to note, that obvious remoteness of law and art permits focusing more clearly on the specific useful comparison between them.⁴

Awareness of the differences between artists and judges may present inappropriate subjective opinions from creeping into judicial decisions.

²See John Russell, *The Meanings of Modern Art* 225 (1981).

³See Laura S. Fitzgerald, *Towards a Modern Art of Law*, 96 *Yale U. L. J.* 2051, 2052 n.4 (1987)

⁴See Levinson & Balkin, *supra* note 5, at 1653.

“Characterisation of law with real leads to denial of one’s own passions and prejudices by clothing them with the ‘garb’ of reason.”⁵

To deny the similarities between artistic and judicial endeavors, however, would ignore the reality that judging, particularly in hard cases, is unavoidably creative.

The comparison may also lend legitimacy to the proposition that judges may *“think feelingly”*.⁶

Does one really want judges to be devoid of imagination, good sense, courage and passion?

2. Judging as an art

Stated most simply, judging consists of analyzing the facts of a case, selecting the law and applying that law to the facts.

The process, however, is more complex, requiring myriad choices at every step. Making these choices is an art as well as a science.

If law were purely scientific, judges analyzing the same set of facts and applying the same rules of law would reach the same result for the same reasons. Often however, a single case will produce several opinions. The differing results and rationales reveal the obvious; the most often overlooked point that judging is not a science.⁷

The judge’s art extends also to the description of the dispositive legal principles; the selection of authorities and the holding of the case. At each stage the judge makes choices that reflect his or her perception of the judicial role.

⁵See J.M. Balkin, *The Domestication of Law and Literature*, 14 L & Soc. Inquiry 787, 794 (1989)

⁶Paul Gewirtz, *On “I Know It When I See It,”* 105 Yale L.J. 1023, 1032 (1996)

⁷See Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman’s The Impartial Judge: Detachment or Passion?*, 45 DePaul L. Rev. 633, 641 (1996).

A judge's perception of community values influences such basic choices as the existence of constitutional rights, the interpretation of a statute or the application of common law.⁸

Similarly, the tone and breadth of a judgment reflect a judge's "style". Some judges paint in "bold"; while others paint in "pastels".

"Some view their judgments as the 'Sistine Chapel'; others are satisfied with a 'Mona Lisa'".⁹

Several distinguished judges have commented on the relationship between artistic endeavors and judging. In *The Nature of the Judicial Process*, Justice Cardozo writes:

"I have grown to see that the judicial process in its highest reaches is not discovery, but creation..."¹⁰

In the same vein, Judge Learned Hand wrote:

"I like to think that the work of a judge is an art...It is what a sculptor does. He has some vague purposes and he has an indefinite number of what you might call frames of preference among which he must chose; for chose he has to, and he does."¹¹

Justice Brennan tacitly accepted the analogy:

"The range of emotional and intuitive responses a given set of facts or arguments are responses which often spread into our consciousness far ahead of the lumbering syllogisms of reasons ... sensitivity to one's intuitive and passionate responses and awareness of the range of human experience, is therefore not only an inevitable but

⁸Stewart G. Pollock, THE ART OF JUDGING, Page 595

⁹ Supra

¹⁰Benjamin N. Cardozo, *The Nature of the Judicial Process* 166 (1921).

¹¹The Art and Craft of Judging- The Decisions of Judge Learned Hand at xiii (Hershel Shanks ed., 1968).

desirable part of the judicial process, and aspect more to be nurtured than feared."¹²

3. The art of judging in trial courts

Supported by such authority, my endeavor is to expose the analogy between art and judging, particularly in the trial courts.

Decision making is part of everyday life, yet some people have difficulty in making the everyday decisions of life e.g. marriage, divorce etc.

The major responsibility of a judge is to make significant decisions affecting the freedom, lives, reputation, and fortunes of others.

The trial judge's role is to make a decision promptly and efficiently as possible. The tired and worn-out expression "*justice delayed is justice denied*" remains undisputable.

Judges must be sensitive to the destructive effect of delay to ensure that the contending parties do not find themselves ruined by delay than they could have been by the injustice of the decision.

The trial court is the public's principal contact with the judicial system. How these courts perform is critical; their success or failure inspires or undermines confidence in our entire judicial system. Today, respect for our judicial system has been seriously eroded, and trial court proceedings are now seen as unnecessarily time and money consuming.

The trial judge has the responsibility to manage the trial proceedings from filing to final disposal. The judge must therefore be prepared to preside and take appropriate action to ensure that all parties are prepared to proceed; that the trial commences as scheduled; all parties have a fair opportunity to present their evidence and the trial proceeds to the end without unnecessary adjournments.

¹²Byron R. White, Tribute to the Honorable William J. Brennan, Jr., 100 Yale

According to Chief Justice Robert French, the art of judging involves the deployment of experience and skills some of them not consciously realized as they are exercised.¹³

Trial Courts are Courts of first instance. It is therefore important for a trial judge to comprehend the facts clearly, properly evaluate the evidence and apply the applicable law to the facts and the evidence so as to arrive at a well reasoned and just decision. Richard A. Posner argues that the dominant model of judicial decision-making is an outgrowth of rational choice theory: the judge is a rational actor who reasons logically from facts, previous decisions, statutes, and constitutions to reach a decision¹⁴.

The first stage of decision making by a trial judge is to determine from the pleadings the real issues the parties are contending with which may not always be obvious from the pleadings. According to Hon. Justice Susan Kiefel AC of the High Court of Australia:

“The starting point for any judge is the identification of the real issues. A trial judge will have analysed the parties' pleadings prior to trial, but the issues may have taken on a different complexion in the course of a trial, and the judge will in any event need to assess which of them are likely to be determinative of the case. The issues to be decided will determine what facts need to be found. A starting point may be the facts which are not in dispute and the development of a chronology of events by reference to them. Within that framework, areas of controversy may be identified and then resolved. Resolution of factual controversy usually requires a judge to consider what is more likely to have taken place. This may be akin to detective work and requires a deal of common sense”¹⁵

This statement is further fortified by Sir Harry Gibbs who said:

¹³ Opening Address of Chief Justice Robert French at a Conference on Judicial Reasoning: Art or Science? At Australian National University, National Judicial College of Australia & Australian Academy of Forensic Science, 7th February 2009- Canberra.

¹⁴ Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 865 (1988); see Dan Simon, *A Third View of the Black Box: Cognitive Coherence in Legal Decision Making*, 71 U. CHI. L. REV. 511, 512 (2004).

¹⁵ On being a judge, public Lecture, 15 January 2013 at the Chinese University of Hong Kong

“More injustices are created by erroneous findings of fact than by errors of law. Even where a case appears to depend only on a question of law, it will often be found that the question ... will depend on the way in which the facts have been found.”¹⁶

The trial Judge having determined the issues upon which facts are to be found will now have to evaluate the evidence constituting the existence of these facts. He/she must give reasons why he/she accepts one piece of evidence and rejects another. He must give logical and well reasoned decisions.

In evaluating evidence, it is important that the judge is not taken by his/her emotions in decision making for example the demeanor of the witness which can create bias in the mind of the trial judge as a result of external impression. Demeanour can on occasions be telling, but it is not always a reliable guide to such an important question. Trial judges have to be careful about reaching conclusions about people's credibility based upon matters of impression, not the least because findings adverse to a person's credit can be damaging beyond the outcome of the trial.¹⁷

In any trial civil or criminal, evidence is a critical factor. A trial judge's reasoning cannot be in a vacuum. It must be based on empirical evidence therefore how the Judge applies the law to the facts and the evidence will be critical in determining the decision he/she arrives at.

In decision making, a trial judge will have regard to judicial legal history(law of precedent) he/she will need to look at how similar issues and facts were resolved in the past however in reality, not all cases will be similar therefore, the trial judge will inevitably have to distinguish the past and the present case he/she is handling. Whether he/she decides to take the precedent or distinguish it, he/she has to give reasons for his findings. It is an established principle that a case must be decided on its own merit.

¹⁶Gibbs, "Judgment Writing," (1993) 67 Australian Law Journal 494 at 497.

¹⁷ On being a judge, public Lecture, 15 January 2013 at the Chinese University of Hong Kong, address by Hon Justice Susan Kiefel AC, High Court of Australia at page 6.

Most trial judges will however be persuaded by judicial precedents especially if those precedents have been handed down by superior courts. In applying judicial precedents, it is important for the judge to appreciate the facts of the case and relate them to the precedent. If the facts are similar, he/she will be persuaded but if distinguishable, he/she will not apply the precedent. A judge must explain why the ratio of a previous decision is appropriate to be applied or is to be distinguished.

Further, in deciding cases, a trial judge may be influenced by how other jurisdictions have decided similar issues. There are time when a trial judge is faced with an issue where the law relating to such an issue is more developed in another jurisdiction for example information technology is more developed in USA than in Uganda and so is the law on patents and trademarks therefore a judge may have recourse to a decision made in such other jurisdiction. Although in principle foreign precedents are not binding on Ugandan courts, they are highly persuasive and nevertheless the trial judge is obliged to give reason for the persuasion.

"A trial judge is obliged;

*to make, or cause to be made, a note of everything necessary to enable the case to be laid properly and sufficiently before the appellate Court if there should be an appeal [including] not only the evidence, and the decision arrived at, but also the reasons for arriving at the decision."*¹⁸

Conclusion

Several conclusions emerge from the foregoing:

The art of decision making is more of an art than science. The skills required by a judge in a court, include but is not limited to that of analysis and determination of issues, finding of facts, evaluation of evidence,

¹⁸*Carlson v King* (1947) 64 WN (NSW) 65, 66 (Jordan CJ) cited in *Soulemezis v Dudley(Holdings) Pty Ltd* (1987) 10 NSWLR 247, 257 (Kirby P), referred to with approval by Hayne J (McHugh and Gummow JJ agreeing) in *Waterways Authority v Fitzgibbon; Mosman Municipal Council v Fitzgibbon; Middle Harbour Yacht Club v Fitzgibbon*[2005] HCA 57; (2005) 79 ALJR 1816 (*Waterways Authority*) [129].

application of the law and other minor issues like style, language and composition. In all cases it is important for the trial judge to give his reasoning in arriving at any decision. This is important since today judgments are published online and therefore exposed to a much wider audience hence exerting pressure on trial judges to be more thorough, clear and brave in decision making. Judges cannot escape from their backgrounds, experience and basic beliefs about law and society in decision making .It therefore requires continuous training.

My personal experience shows that a judge will be effective if he/she does the following;

1. Studies the file thoroughly and makes appropriate notes before hearing.
2. Acquaints himself/herself with the rules of procedure. A working knowledge of the commonly applied rules helps in expeditious disposal of cases.
3. Conducts an effective pre-trial conference.
4. Checks statutory and case laws relevant to the case before hearing if possible.
5. During the hearing, seeks clarification from Advocates where necessary.
6. Makes a rough draft Judgment soon after hearing when the facts are still fresh.
7. Consults other judges in case of doubt.
8. Endeavours to deliver the judgment within the 60days prescribed by the code of conduct.

THANK YOU FOR LISTENING TO ME