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Judgment Writing in Kenya and the Common-Law World

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Foreword

I will first discharge a burden of apology and gratitude that I owe to the authors of the various papers contained in this edition for the delay in having it published. We have re-engineered our editorial approach, which we will keep constantly under review, to ensure that the journal is published timeously while preserving its breadth of scope and quality of content.

This edition marks the second installment of Kenya's first official law journal, the inaugural edition having been published in 2007. As my predecessor, Mrs. G.B. Shollei stated in the foreword to the inaugural edition, the Kenya Law Review Journal is a platform for the scholarly analysis of Kenyan law and interdisciplinary research on the law. In this edition, we have the opportunity to look at certain aspects of Kenya's legal and justice system through the eyes of three international writers – Mr. Barry Walsh on case studies in the development of the justice sector in sub-saharan Africa, Professor Brett Shadle's very empirical analysis of judicial approaches in analyzing the evidence and sentencing in sexual offence cases and Judge Gerald Lebovits on judgment writing. They are complemented, of course, by distinguished authors from our ever-expanding stable of Kenyan authors.

We remain committed to providing an authoritative platform for scholarly inquiry into legal systems and analyses of contemporary cross-jurisdictional legal issues with particular emphasis on every paper making a substantive contribution to understanding some aspect of the country's legal system.

Michael M. Murungi
Editor

Judgment Writing in Kenya and the Common-Law World

The Honourable Gerald Lebovits[1]

2009.

1. INTRODUCTION

A judgment is a formal, law-based decision. Judgments in Kenya are rendered by Magistrates, who preside not in a court of record but who nevertheless hear cases of great import; by the Justices of the High Court, who hear cases in first instance and appeals from the Magistrates; and by the Justices of the Court of Appeal, Kenya's highest court, who hear appeals from the High Court. Judgment writing, also called "opinion writing" and "decision writing,"[1] refers to a court's written determination on a matter submitted to it.[2] A judgment results from the court's application of law to fact.[3]

Judgment writing is the hardest of the legal arts to master, in Kenya and in the entire common-law world. Required are a mastery of legal method and pure writing skills, not merely integrity, wisdom, learning, good temperament, common sense, devotion to duty, and hard work. Required are an appreciation of the readers' needs and the litigants' wants, not merely an appreciation of fact, law, and justice.

It is within a judge's discretion to decide when to write and, if so, how expansively to write. This article is designed for those judgments that, in the court's proper exercise of discretion, require a full-dress written explanation. This article is not intended to suggest that there is only one way to write a judgment. This article suggests only that judges everywhere, in Kenya and beyond, recognize that judicial style in judgment writing is as important as judicial content — that tone can never be divorced from substance. The goal of style is to write for the ear and not the eye, to affect no pretense, to feign no eloquence, to let the reader overcome the florid, the overblown, and the

1 Judge, New York City Civil Court, Housing Part, in Manhattan and Adjunct Professor of Law at St. John's University School of Law and Columbia Law School. For their research, the author thanks Linda Awuor, an attorney with the Kenya Law Reports, and Kirsten Orr, a New York Law School student. This article is based on a lecture the author gave in August 2009 to their Lordships of the Republic of Kenya — the Justices of the High Court and the Court of Appeal — at the Kenya Judicial Training Institute in Nairobi at the 2009 Kenya Judicial Colloquium. For their generous invitation and exceptional hospitality in wishing the author a warm jambo and karibu Kenya, the author thanks the entire judiciary of Kenya and, in particular, The Honourable The Chief Justice of the Republic of Kenya, Johnson Evan Gicheru; the Honourable Mr Justice Paul Kihara Kariuki, the director of the Judicial Training Institute; and Madame Gladys Boss Shollei, the Editor of the Kenya Law Reports, and her entire staff.

lawyerism to reach content. And, using sources from English-law-based sources[4] other than American sources,[5] that is the goal of this article.

No one way to write a judgment exists in Kenya or in any democracy with a free and vibrant judiciary like Kenya's. Once we recognize, however, that there are different ways to write a judgment, we must also recognize that some ways are better than others. To judges, who face many choices about their judgments and how to write them, this article offers some suggestions. To some judges, the suggestions will be modest and correct; to others, extreme and wrong. To those who will inevitably disagree with my suggestions, I offer this thought, in Kiswahili: hakuna matata. If the reader of this article walks away with only a renewed vigor in the importance of judgment writing, I will be satisfied.

Not including the introduction and the conclusion, this article is divided into seven sections. The first explains why judicial writing is important. The second articulates the essence of an effective judgment. The third describes the necessary preparation before writing. The fourth offers ideas on structuring a written judgment. The fifth addresses the importance of style in reaching content. The sixth, written at the Kenya Law Reports' suggestion, focuses on grammar and punctuation. The seventh discusses editing and proofreading.

2. THE IMPORTANCE OF WRITTEN JUDGMENTS

Not every decision must be written. Not every written decision must be elaborate. Most decisions should be oral or, when written, brief and to the point. A judge's duty, above all else, is to decide cases. Oral decisions or brief written ones are the norm for judges everywhere, not only in Kenya. Oral and brief writings are required because of the litigants' desire and the public's expectation that judges decide cases quickly; because of the pressures of decision making; and because nearly every court in nearly every jurisdiction is understaffed, underfunded, and overworked, with an enormous and ever-rising backlog of cases.

Judgments, traditionally, were oral rather than written. In England, until not long ago, judgments were reports of what the judges said orally in court, with a focus on how the case was decided, not on the rule of law. 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. In his *Commentaries on the Laws*

of England, William Blackstone noted that the common law is found in books of reports and judicial decisions handed down from ancient times.[6] Blackstone described the reports and decisions as "laws which give rise and origin to the collection of maxims and customs which is now known by the name of common law."[7]

The common law's reliance on written judicial decisions has grown since the 18th century. The emergence of written law and the common law's formation have shaped the Kenyan legal system into what it is today. Kenya's continued reliance on the common law demonstrates the importance of written judgments in a jurisdiction that, like the rest of the world in our electronic age, is rapidly moving from an oral tradition to a writing-centered tradition.

Judges have many duties in the courtroom, but a judge's writing extends outside that domain. The litigants and their attorneys affected by a judge's decision are not a judgment's only consumers. Judgments are read, and often criticized, by attorneys, other judges, and the public. A display of strong writing skills is essential for judges, who are and must be professional writers. These skills are necessary to maintain respect for the judgment and the judiciary and to show the readers — litigants, their attorneys, the bar, other judges, and the public — that judges are doing their job.

Judges write decisions for many reasons. The primary purpose of judgment writing is to tell the litigants why the case was decided the way it was. A judgment should show why the judge considered some facts more important than others and how the judge's applied law to fact. A judgment should also show the litigants that the judge considered their positions and that justice was rendered.

Judgments do not communicate the law only to the litigants before them. Judgments allow judges to communicate with the public as well. Judgment writing is a chance for judges to explain the law to the public. Written decisions are an inside look at a judge's reasoning. Written decisions assure the public that justice is being served — that judges are not making decisions arbitrarily. Judgments are also important in the appellate process. Written judgments provide findings of fact and legal reasoning that a higher court might consider on appeal.[8] Additionally, written judgments become part of the common-law system; judges in other courts will consider written judgments when making their decisions, as will students when they study the law. Finally, judgment writing lets judges clarify their thoughts.[9] It allows judges to review their legal reasoning to ensure that they have reached the

right decision for the right reasons.

3. THE EFFECTIVE WRITTEN JUDGMENT

At its best, a written judgment is an honest, respectful, persuasive, clear, and memorable explanation why one side won and one side lost, all with a defined statement of the legal rule on which the decision turns.

Judgments must be honest because judges, more than anyone else, and courts, more than all other institutions, must be ethical and impartial. Primary is the directive for judicial integrity, whether the judge presides in a courtroom or wields a pen in chambers. Judges have no power except through their moral authority, and their moral authority derives from an honest, restrained exercise of power. Judges, courts, and the system of justice must be honest and seen as honest.

Honesty in judgment writing means writing neutrally, without fear or favor. Honest writing for judges means a balanced consideration of issues, arguments, facts, and law, especially the losing side's serious contentions of fact and law. Judges must be trusted. They must render courageous and independent decisions that hone to principles of customary law and equal justice without regard to language, tribe, community, status, gender, religion, race, wealth, or any other characteristic, class, or factor. Honestly written decisions are respected, admired, and complied with. Decisions plagued by biased writing, rather than dispassion, bring into disrepute the fair administration of justice, the firmest pillar of good government.

To write honestly, the judge must explain how the law applies to the facts so that readers understand how the court reached its decision. But the judge must never describe the efforts it took to reach a fair decision or the amount of research that went into reaching a decision. Readers assume that judges are fair; the judge need not brag. Nor should judges reveal their personal thoughts or opinions on an issue. Doing so creates dictum, and readers will believe that the judge's personal views, not the law, dictated the result. Issues should be decided objectively, and neutrality should be reflected in the judge's writing.

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. Judges should not personalize their opinions when referring to themselves or to others. Judgments should never insult the attorneys or the litigants or display traces of sarcasm, whether directly

or indirectly such as through false emphasis like bold, italics, underlining, or quotation marks. Respect shows readers that the litigants will be treated equally on the merits and that they have full access to the courts. Along the same lines, judgments should address the litigants' arguments without naming the attorney who raised the argument: Arguments belong to the litigants, not their attorneys.

In their writing, judges should respect not just the litigants but also each other, without being obsequious, ostentatious, or overly effuse in praise toward their learned brothers and sisters. 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 opinion reversing a judgment below, the appellate judge should address the judge's incorrect reasoning. Appellate dissents and concurrences should be written only when a judge has something important to add.

Judges 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. They show respect when they avoid humour. Humour in a decision is not only disrespectful but will make the litigants believe that the judge did not take the case seriously. Judges are in a position of authority. The community relies on judges to settle disputes. Judges should not use their power to tell a joke or use their judgments as vehicles for self-congratulation. Humour, which can be humiliating, does not strengthen a judge's reasoning.

Judges also show respect when they exclude from their judgments references to pop culture, such as music, movies, or literature. In a common-law system, judgments serve as precedent. It is unlikely that these references will be relevant in future cases in any event. These references will show unnecessary and unwelcome erudition and add nothing to legal analysis.

Judgments must also be essays in persuasion. They need not, ought not, be dreary, dry, or dull recitations of precedent and procedure. They need not, ought not, be 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. Unlike a lawyer's argument, judicial writing must persuade, not by agenda or trickery, but by complying with the rule of law through readable storytelling, compelling logic, rigorous citation of authority, and gentle understatement. Judicial persuasion comes from preferring constitutional principles to artifice, device, and exaggeration.
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, the official language of Kenya. Judgments are meant to be understood, not confuse. Judgments are meant to be followed, not discarded.

The holy function of justice is to resolve disputes. Justice is divine, even as those who dispense it are not. But by resolving disputes, judges bring peace and thus join hands with God. Muddled judicial writing disserves the holy function of justice. Muddled judicial writing festers old disputes and fosters new ones.

Judgment writing must also be memorable or be doomed for history's ash-heap. In the marketplace of ideas, only the memorable survive. To be remembered, people must do something worth writing about — or they must write about it. Otherwise, people will be forgotten even by their own great-grandchildren. So, too, judges and their judgments. Not every case, but the important case, those worthy of deep analysis and destined for publication, must be written for posterity. Such is the common law's dependence on precedent: Precedent unrecalled is precedent ignored. To be memorable, decisions must be infused with respect, but not excessive adulation, for the law, the litigants, and the judiciary's high standing.

Quick mortality arises when the judgment contains mixed metaphors, hackneyed phrases, citation and quotation from unacknowledged sources (plagiarism), and clichés. Dead on arrival is the rambling judgment, the judgment that cites every authority in a vain hope for scholarship, the careless judgment that contains typographical and design errors, the judgment that incorporates lengthy text or footnotes that embellish ambiance and atmosphere and nothing else.

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 without under delivering or overpromising.

The promise of justice in judgment writing further demands that judges tell the litigants why they won or lost. The reasons for that requirement begin with due process. Due process, an essential trait of a fair proceeding, requires the court to assure all sides that they will get notice of everything the court might consider and that all sides will have an opportunity to be heard before the court decides anything.

Consistent with due process, litigants, appellate courts, and the public need to know how and why the court decided an issue. Explaining the reasons for the decision avoids the possibility that litigants, especially the losing litigant, might resort to vigilante justice to settle their disputes.

Explaining also compels judges to do their thinking at its hardest: through writing, in a non conclusory way, by showing and not just telling, by offering supportive facts and not simply declaring it so because the opinion comes from a judge, and by forcing the judge to acknowledge fact and law at war with the judge's initial, reflexive, and result-driven impressions on how to rule. Acknowledging, and then fairly rebutting, the losing side's major contentions, without being defensive, additionally enhances the persuasive power of the decision and makes it more honest, clear, and memorable.

Telling litigants why they won or lost, moreover, makes judges articulate and defend their statement of the legal rule on which the decision turned. In common-law jurisdictions, in which the law develops not only by statute, rule, and regulation but also by case-law precedent that expands the unwritten law and interprets ambiguous or contradictory statutes, rules, and regulations, justice and prosperity depend on judicial decision making. Common-law judges must declare what the law is. They do so, and not simply resolve the matter before them, when they say, in writing, what the law is.

4. PREPARING TO WRITE

Before writing, judges must understand the basics of the case. If parties submit written documents, judges should read them before the case begins or before oral argument.[10] These documents will prepare judges for what they are going to hear in court and allow them to identify issues. Thinking before writing is important, explained Brian Dickson, the late Chief Justice of Canada: planning "minimizes snap judgments and casual theorizing" and "compels thinking at its hardest."[11] It is unnecessary for judges to know everything about the law before the case begins, however, or before the judge begins to write the judgment. Knowing everything will lead to writing paralysis, and judges cannot afford to delay: Judgments must be rendered promptly. It is sufficient that judges know everything by the time the case is done and the judgment is rendered.

At the conclusion of the proceeding, but after tempers have cooled, the judge should begin to write the judgment. The goal is to start early, before the judge starts to forget, but to edit late so that the judge will have time to reflect and correct. The judge should first identify all issues. Although

attorneys identify issues in briefs or oral arguments, judges must identify issues themselves. In doing so, the judge might learn that the litigants have wrongly identified issues. The judges might also identify additional issues that need to be resolved that the litigants did not mention.

Then judges should identify the relevant facts. Relevant facts are those that affect the analysis of a case. In fact-rich cases, judges must take good notes, in any form with which they are comfortable, to recall the facts when necessary.[12] Familiarity with the facts makes it easier to analyze and apply the law and to reach a conclusion.

The next step is to find and sort out the applicable law. Judges should perform their own research on the law. Although the statutes and cases the attorneys cite or discuss are a good starting point, judges must assure themselves that the authorities on which they rely in their judgments are good law. Unless the case raises issues of law of relative first impression, a judgment should only cite statutes and cases on point or close to it.

After reviewing the issues, facts, and applicable law, the judge should reach a conclusion. At this point, it will be helpful in a complicated case to write an outline to help organize thoughts. By creating an outline, judges can see the decision's strengths and weaknesses, make sure it covers all that must be discussed, assure no repetitions, and improve the quality of the decision before it is drafted. Once reaching a conclusion, it can also be helpful to discuss the case with a colleague or a Kenya Law Reports staff attorney. Mulling over facts, arguments, and conclusions gives judges the opportunity to review and clarify their thoughts before putting them on paper.

5. THE STRUCTURE OF A JUDGMENT

A judgment's structure will vary based on the judge's preferences. But all judgments contain the following information in one form or another: caption, introduction, findings of fact, statement of issues, legal analysis, and conclusion. Judges may use headings and subheadings in longer judgments. Headings make it easy for readers to find a particular part of a judgment, and they guide the reader through the decision. They also help judges ensure that they have covered all the necessary points.

5.1 Caption or Heading

Every case is identified by a caption, located at the top of the judgment. The caption should contain the court's name, the number and title of the case being decided, the parties' names, the judge's name, and, if not in the caption

then at the bottom of the judgment, the date the judgment is delivered.[13]

5.2 Introduction

The introduction is an opening paragraph designed to explain the basics of the case. It introduces the parties, summarizes the determinative facts and essential procedure, and briefly states the issues. The introduction lays the foundation for the analysis that follows. It is important for judge and reader that the introduction state the essentials of the case clearly. Introductions can, if the judge wishes, also state the conclusion. In this way, written judgments are different from oral judgments. In oral judgments, judges save the conclusion for the end of the decision, as a climax, to keep the audience in suspense. A written judgment that gives the conclusion in the introduction makes it easier for the reader to follow the judge's legal analysis throughout the judgment.

5.3 Findings of Fact

It is unnecessary to describe facts in detail. It is boring, and inconsistent with storytelling techniques of theme and perspective, to explain that "this witness said this, while that witness said that." It is sufficient to mention the relevant facts and to leave the details out until the discussion of the issues.[14] Sometimes it is necessary to include the history of the litigation or a more complete narrative of the facts, but usually it is not. Only the facts and history that affect the analysis and decision of the case need be discussed. A simple rule in determining whether to include facts, dates, places, people, or procedural history is as follows: "if nothing ultimately turns upon it, it should be left out."[15]

The facts can be discussed in three parts of the judgment: in the introduction; as part of a narrative to establish time or place; and in deciding issues of fact or law, including credibility.[16]

Facts must be discussed accurately, precisely, and impartially. The law belongs to the court, but the facts belong to the litigants. Because of the common law's reliance on precedent, facts are an essential part of the decision-making and writing process. Judges should tell a story and bring the characters to life, but they may not exaggerate or overstate the facts or omit facts on which the losing side fairly relies. Judges cannot decide cases objectively if the facts are inaccurate or biased.
To ensure accuracy, judges should consult the record and their notes. Facts are often in dispute; litigants rarely agree on the facts or their meaning.

When factual disputes arise, judges must look at both sides' facts to find the best and most complete version of the facts. When making findings on disputed facts, judges must briefly explain why, based on weighing the evidence, they regard certain disputed facts as proven. The same applies for findings of credibility. Judges who hear conflicting testimony must determine which testimony and witness is credible and why. In doing so, judges should offer a clear explanation of their findings.

Facts should be written in chronological order. It is easiest for a reader to understand facts in the order they occurred. Judges can organize facts by theme when a chronological order would be confusing. A theme-based organization of facts is appropriate when the litigants raise multiple claims or counter-claims.

5.4 Statement of Issues

After stating the facts of the case, the judge should identify the issues to be addressed, if relevant in the context of the burden of proof or the appellate standard of review. Issues must be phrased neutrally. They should show bias toward neither side. When identifying the issues, judges should not give too much detail; detail at this stage will overwhelm the reader. But they must give the reader enough information to understand the dispute. The issues should be raised in a logical order, usually in the order of importance to the conclusion, although threshold issues go first. Threshold issues include service of process, jurisdiction, or statute of limitations. If a threshold issue resolves a case, the judge should go no further: Attorneys, but not judges, may argue in the alternative and in the conjunctive.

5.5 Application of the Law

After identifying the issues, the judge should analyze them by applying law to fact. Because the court's objective is to declare what the law is, the judgment must state without hesitation the rule on which the decision depends. What counts, moreover, is the rule. Little in judgment writing frustrates earnest readers more than lengthy discussions of cases, droning on for paragraph after paragraph. The writing judge might be satisfied with that learned discourse, but the earnest reader, to say nothing of the losing litigant, will be baffled at what the rule is and will believe that the judge engaged in the discourse to show off research skills and, worse, to hide behind a mechanical opinion and unjustifiable result no one can understand.

Judges must provide clear reasons for the decision. The reasoning should

demonstrate to both sides that their positions were considered, why some facts are more important than others, and how the court applied the law. The judgment must state the rule and support it by citing authorities, but without citing an excessive number of cases. The judgment must always cite the majority opinion from the highest court, whose decision will be binding if on point. If no cases in the court's jurisdiction are on point, judges may cite from other courts. But case law from other jurisdictions are not binding. They are merely persuasive.

Justice, the reasons for a decision, and the writing process are closely linked.[17] Judges should create a narrow proposition that relates to the particular facts of a case. If the proposition is too narrow, however, it will seem as if the judge hurried the decision, and the dispute will likely continue. Judges must also state workable rules — rules both theoretically correct and easy to apply. When judges apply rules, they set precedents on which other courts will rely. Judges should also decide only the issues in dispute. No comprehensive explanation of an area of law is required or appropriate. It is hard enough for judges to decide cases before them. They should not decide cases not before them. Nor should a written judgment address every issue the litigants raise. It should address only those necessary to decide the case.

5.6 CONCLUSION

The conclusion should state the court's holding clearly. A conclusion is the court's final decision. There is no need to repeat the facts or issues in the conclusion. The conclusion should be brief and pointed.

6. THE IMPORTANCE OF STYLE IN REACHING CONTENT

All judges have a writing style, whether they know it or not. There are many rules to follow, as this section explains. While keeping these rules in mind, judges can still write interesting judgments. Lord Denning, known for his attention-grabbing judgments, is the perfect example. He described his approach to judgment writing as follows: "I start my judgment, as it were, with a prologue — as the chorus does in one of Shakespeare's plays — to introduce the story . . . . I draw the characters as they truly are — using their real names . . . ." Lord Denning continued: "I avoid long sentences like the plague, because they lead to obscurity. It is no good if the [reader] cannot follow them . . . ." Lord Denning then acknowledged the importance of precedent, but without string citations that show off research: "I refer sometimes to previous authorities — I have to do so — because I know

that people are prone not to accept my views unless they have support in the books. But never at much length. Only a sentence or two. I avoid all reference to pleadings and orders — They are mere lawyer's stuff. They are unintelligible to everyone else." Lord Denning then explained, "I finish with a conclusion — an epilogue — again as the chorus does in Shakespeare. In it I gather the threads together and give the result."[18]

Judges should never try to imitate other writers. They should write in a style with which they are comfortable. But Lord Denning demonstrates that judges can write effectively while entertaining their readers.

Not all can compose like Lord Denning. For the rest of us, I write this next section.

Good judgment writing is good professional writing. It must be formal; it may not be colloquial; it may not be vulgar; it may not contain abbreviations except in citations; it may not include contractions.

Like all good writing, good judgment writing must be clear, and clarity comes not only from sentence structure and organization but also from introducing things before they are discussed, by identifying characters before telling us what they said or did, by making sure that readers understand things on their first read, and by stating rules before stating exceptions.

Good judgment writing in a democracy makes the reader feel smart by making litigants understand the judgment and the reasons for it. Judges beholden to a dictatorship have masters other than the litigants who appear before them. In a democracy like Kenya, clarity for judges consistent with the rule of law means citing authority — law — to support a contention. The authority cited should contain a pinpoint citation to refer the reader to the exact page or pages where in the case cited the exact proposition is contained. For example, judges may cite *Bayusuf Brothers Ltd v Kyalo* [1981] KLR 407, at p. 408 (High Court at Mombasa) to show readers that they are referencing page 408. Pinpoint citing supports the proposition, enables the reader to find the reference immediately, enhances the judgment's persuasive power, and proves that the judge did not make things up. So does including the name of the court that rendered the judgment. For example: *Farah v Republic* [1986] KLR 1 (High Court at Nairobi).

Good judgment writing must also be simple writing, free of jargon, in plain, modern English, not archaic or opaque English, Latin, or the romance languages. Some legal expressions like "*habeas corpus*" are terms of art.

For these expressions there is no English equivalent, or if there is an equivalent it might take too long to explain it. When an English equivalent is available, however, the judge should use it — for example, "among other things" instead of "*inter alia*" and "will" instead of "testament." There is no difference between these phrases and words, and the simple Anglo-Saxon term increases the judgment's readability.

Legal jargon is not the only obstacle in the use of plain language. Judges must also be careful in their use of lawyerly words like "such" and "said." Ordinary people do not say, "Thank you for your advice. Such advice was helpful." They do not say, "This is John Doe, hereinafter, Doe." Judges ought not write in this wordy style, with the lawyer's "prior to" instead of "before" or "earlier" or the lawyer's "herewith," which should deleted altogether. Judges' thoughts should be conveyed to their readers in clear, ordinary language, not the language that lawyers use to dominate the less-educated.

One way for judges to ensure that their writing is plain and clear is for them to ask themselves, "How would I say this if I were speaking formally, but to a smart teenager?" The answer to this question will be an explanation, in few syllables, a non-lawyer can understand.

Concision issues often result from lawyerisms. Lawyers love to repeat themselves; they think that overlap adds precision, but overlap adds only confusion. Judges should not use words with overlapping meaning in the same sentence. *Incorrect:* "On appeal, the appellant argues." *Correct:* "The appellant argues." Other examples of redundancies include "brief summary," "could possibly," "rest, residue, and remainder," and "advance planning."

Repetition, however, has its place in judgment writing. Judges should repeat words instead engaging in inelegant variation. Inelegant variation is the use of different words to mean the same thing. Repetition, rather than elegant variation, is a powerful rhetorical that does not confuse readers.

Just as lawyerisms subjugate others and obscure content, sexist language degrades and obscures content. Judges must consider parallel gender-neutral language like "husband and wife," not "man and wife." They should avoid masculine terms and consider "chair" instead of "chairman." They should eliminate gendered pronouns by cutting the antecedent or by making the antecedent plural. Instead of writing, "The judge likes his courtroom to be orderly," the judge can write, "A judge likes an orderly courtroom" or "Judges like orderly courtrooms." Gender-neutral language keeps readers focused on the content of the decision rather than on a discriminatory

style.

Good judgment writing is succinct and concise, not merely inoffensive. The longer the judgment, the more mistakes; the less read and remembered; the likelier it will ramble. Judges should consider their readers busy professionals. It is impolite to keep them waiting through a ponderous tractate. Accuracy and precision are more important than succinctness and concision; when in doubt, judges must always prefer accuracy and precision. But the well-written judgment is all those things: accurate and precise, and succinct and concise.

To be succinct is to include only relevant issues, law, and fact and to avoid repetition through thought-out organization. To be concise is to make every word count.

Judges make every word count not only by counting syllables. They also practice concision by rejecting metadiscourse. Metadiscourse consists of announcing what the writer is going to write before the writer writes it. *Examples:* "Having heard all the testimony, the court concludes that . . . ." "It is clear that . . . ." "It is well-settled that . . . ." "After careful consideration, this court finds that . . . ." Metadiscourse takes up unnecessary space in a judgment. And judges should be confident. An introduction to the analysis detracts from the judge's authority and raises ethical issues. Litigants already assume that judges "carefully considered" their cases. The judge need not remind them. Instead of writing that the court "carefully considered" their cases, the judge should consider their case carefully by discussing fact and law.

Another substitute for analysis is the large block quotation. Most readers skip over block quotations. Readers hope to comprehend the main point by reading what precedes or follows. Consider this block quotation:

> "The plaintiffs argued that the defendant made rampant withdrawal of moneys from the first plaintiff's bank accounts thereby subjecting them (the plaintiffs) to irreparable loss. They alleged that the actions of the defendant were illegal, null and void. They prayed for an injunction restraining the defendant from acting as director and operating the bank accounts.
>
> The defendant averred that her actions were in order, lawful and valid. She contended that the applicants had not

> established a *prima facie* case with a probability of success. It was further contended that the plaintiffs had not shown that in the event of the prayers being refused, they stood a chance to suffer injury that an award of damages may not made good. The defendant therefore asked the Court to dismiss the application."[19]

It would have been more effective if this article had paraphrased the court's discussion about the parties' arguments and requested relief.

When possible, judges should paraphrase the law or use short quotations. They should use large, block quotations only when they interpret a statute or contract or rely on important language. Quotations can be helpful in proving that an argument is reliable, but overuse demonstrates lack of analysis.

Judges may be concise, moreover, by keeping sentences and paragraphs short, but not too short. A succession of short paragraphs can demonstrate decisiveness,[20] but it is important to write with variety, because too much drama and bureaucratic writing results from clipped phrasing. Each sentence, which should average 15-18 words and not exceed 25 words, and each paragraph, which should not exceed 1/3 of a page single spaced, should express only one idea — a small idea for a sentence, a large idea for a paragraph. Instead of using long sentences, judges can find ways to divide their thoughts into two. A judge who cannot avoid a long sentence can write a sentence preceded and followed by shorter sentences to maintain the reader's attention.[21]

Sentences move from short to long, from simple to complex, and from old to new, with the greatest emphasis at the end, the second greatest at the beginning, and the least great in the middle. While the climax is at the end, persuasive judges use the middle to bury information they must include but which they want to de-emphasize.

Sentences convey small-scale information, but paragraphs are the building blocks of thought. Paragraphs begin either with topic sentences that introduce what is to come in the paragraph or with a transition sentence to link one paragraph to the next, when a paragraph gets too long and the mind needs a break. Paragraphs conclude with thesis sentences, which finish what the opening topic sentence began. In between the topic and the thesis sentences are sentences that relate to one another and to both the topic and the thesis sentences.

To link ideas, judges, like all writers, should transition between sentences and paragraphs. The best way to segue sentences and paragraphs is to start the new sentence or paragraph with a word or concept from the end of the preceding sentence or paragraph.

Another concision technique is to use the active voice. In the active voice, the subject performs the action. In passive voice, the subject receives the action. *Incorrect (single passive voice):* "The judge was contradicted by the lawyer." *Correct (active voice):* "The lawyer contradicted the judge." The double passive voice, like metadiscourse, raises ethical issues. The double passive hides the subject and focuses on the action. *Incorrect (double passive voice):* "The judge was contradicted." Unknown from this example is who contradicted the judge. Single passives are acceptable in judgment writing when the judge for good reason inverts a sentence to end in emphasis so that the beginning of the next sentence can segue from the end of the preceding sentence. Double passives are acceptable in judgment writing when the actor is known, unknown, or irrelevant.

Like metadiscourse and the passive voice, adjectives and adverbs are verbose and sometimes unethical. Adjectives and adverbs, especially adverbial excesses like "clearly" and "obviously," exaggerate; they are conclusory; they generate suspicion; they raise the bar by requiring the court to explain why something is obvious rather than why it is merely so; and they cover for lazy writing. Instead of adjectives and adverbs, judges should dwell on concrete nouns and, better, forceful verbs. Choosing nouns over verbs causes nominalizations, which make phrases and sentences wordy. *Incorrect:* "The plaintiff made the argument that the defendant committed a violation of the law." *Correct:* "The plaintiff argued that the defendant violated the law." One form of the nominalization arises from an excessive use of prepositions. When that occurs, the judge may turn the preposition into a possessive. *Incorrect:* "The argument of the plaintiff . . . ." *Correct:* "The plaintiff's argument . . . ."

Judges who use adverbial excesses tend also to use wordy, cowardly adverbial qualifiers like "generally" or "usually." It is better to be wrong than cowardly. The judge who is wrong might be reversed; a cowardly, tentative judge will be ignored and misunderstood — and then possibly reversed, too. Unless the judge will soon refer to a particular exception, in which case the judge should state the rule in general terms followed by the exception, the judge should write so precisely that no qualifier is needed.

Negatives in judgment writing, like cowardly qualifiers, are cowardly,

imprecise, and wordy. Judges must write in the positive, not the negative. *Incorrect:* "The Magistrate's judgment is reversed, and this proceeding is remanded for proceedings not inconsistent with this opinion." *Correct:* "The Magistrate's judgment is reversed, and this proceeding is remanded for proceedings consistent with this opinion." *Or:* The Magistrate's judgment is reversed, and this proceeding is remanded for a retrial." The exception to using negatives is for quiet emphasis or understatement. *Correct:* "How are you? Not bad." *Or:* "*Si kila mwenye makucha huwa simba*."[22]

7. GRAMMAR AND PUNCTUATION

Grammar and punctuation are two important aspects of judgment writing. Using proper grammar and punctuation shows professionalism and makes writing easier to understand. The following addresses some common grammar and punctuation issues.

7.1 Pronouns.

Pronouns substitute for nouns. Examples include "he," "her," "it," "me," "our," "their," "us." Pronouns can be reflexive ("I said that to myself") or intensive ("I myself said that"). Reflexive and intensive pronouns only refer back to a pronoun.

When writing a sentence with two or more pronouns, a trick helps decide which pronoun is appropriate. Delete the first pronoun and ask yourself which pronoun should remain in the sentence. *Incorrect*: "The lawyer and me discussed the issue." Delete "The lawyer and." The sentence should not read "Me discussed the issue." It should read "I discussed the issue." *Therefore*: "The lawyer and I discussed the issue."

Pronouns should agree with their antecedents in gender, person, and number. *Correct*: "John [singular antecedent] brought a case against his [singular, male pronoun] landlord." *Correct*: "John and Jane [plural antecedent] brought a case against their [plural pronoun] landlord."

Indefinite pronouns do not refer to a specific person or thing. Examples include "all," "everybody," "everything," "each," "someone." These indefinite pronouns are singular. *Incorrect:* "Someone submitted their brief." *Becomes:* "Someone submitted his brief." To eliminate sexist language, rewrite the sentence. *Correct:* "Someone submitted the brief." Some indefinite pronouns, however, can be plural. *Incorrect:* "All judges hears arguments." *Correct*: "All judges hear arguments."

7.2 Modifiers

There are four main types of modifier problems. A modifier is misplaced when it is separated from the word it describes. When a modifier is misplaced, it can change the meaning of the sentence. *Example:* "The lawyer told his client when the meeting was over he would speak to her." The sentence is ambiguous. It could mean that the lawyer spoke to his client when the meeting was over. Or it could mean that the lawyer told his client he would speak to her after the meeting. *Therefore:* "The lawyer told his client he would speak to her when the meeting was over." *Or*: "When the meeting was over, the lawyer told his client he would speak with her."

Phrases can also be misplaced. *Example:* "He wrote notes for the judge on a legal pad." The writer is not trying to say, "The judge is on a legal pad." *Therefore:* "He wrote notes on a legal pad for the judge."

A squinting modifier creates confusion because it might refer to a preceding or a following word. Squinting-modifier issues often arise with adverbs, which modify a verb, adjective, or another adverb. Examples include "slowly," "badly," already," "often," "only," "too," "where," "almost." The solution is to place the adverb next to the word it modifies. *Example:* "He almost argued all his points." The writer is not trying to say, "He almost argued." *Therefore:* "He argued almost all his points."

A modifier dangles when a noun or pronoun to which a phrase refers is in the wrong place or missing. This can occur at the beginning or end of a sentence. *Example of a dangling modifier:* "After editing for two hours, the judgment was finished." This sentence implies that the judgment was editing. *Therefore:* "After I edited the judgment for two hours, the judgment was finished."

Finally, an awkward separation can be confusing. *Example:* "Many students think they know, after attending the Kenya School of Law, how to draft judgment better than a real judge." *Becomes:* "After attending the Kenya School of Law, many students think they know how to draft judgment better than a real judge." *Or:* "Many Kenya School of Law graduates think they know how to draft a judgment better than a real judge."

7.3 Agreement

A verb must always agree with its subjects. *Incorrect:* "The length of the

papers are important. *Correct:* "The length of the papers is important. ("Length is important.") When using "neither . . . nor," "either . . . or," or "not only . . . but also," the verb must agree with its nearest subject. *Incorrect:* "Neither the lawyer nor the litigant are in court." *Correct:* "Neither the lawyer nor the litigant is in court." *Incorrect*: "Neither the lawyer nor his clients was in court." *Correct:* "Neither the lawyer nor his clients were in court."

7.4 Parallelism

For a sentence, especially one with a list, to be parallel, nouns should match nouns, verbs should match verbs, and so on. *Incorrect:* "The judge called for the lawyer, litigants, and for the Registrar of the Court." *Correct*: "The judge called for the lawyer, litigants, and the Registrar of the Court."

Parallel coordinates should form matching pairs. Examples are "although/yet," "both/and," "neither/nor," "not only," "but also." *Incorrect:* "The lawyer was neither on time or prepared." *Correct:* "The lawyer was neither on time nor prepared."

7.5 Sentence Fragments

A complete sentence contains a subject and a verb. The sentence is a fragment if a subject or verb is missing. *Incorrect:* "The judge listening to the argument." To make the fragment a complete sentence, change "listening" from a participle to a main verb or add a main verb. *Correct:* "The judge listened to the argument." *Or:* "The judge is listening to the argument." Sometimes sentence fragments are used for effect. *Example*: "The victim was strong. Strong enough to defend herself."

7.6 Run-on Sentences

Run-on sentences are ungrammatical and hard to read. There are three types of run-on sentences. The first forms when a conjunctive adverb separates two clauses and when a semicolon or period does not precede the adverb. *Incorrect:* "The judge liked the style of the brief, on the other hand, he did not like the content." *Correct:* "The judge liked the style of the brief; on the other hand, he did not like the content." *Or:* "The judge liked the style of the brief. On the other hand, he did not like the content."
The second type of run-on sentence forms when no punctuation separates two clauses. *Incorrect:* "I read the judgment I should understand the case." *Correct*: "I read the judgment. I should understand the case." *Or*: "I read

the judgment; I should understand the case." *Or:* "I read the judgment. Therefore, I should understand the case." *Or:* "I read the judgment; therefore, I should understand the case."

The third type of run-on sentence forms when a comma splices two independent clauses. *Incorrect:* "I read the opinion, I should understand the case." Correct this sentence the same way as in the preceding example.

7.7 Verb Tenses

Verbs have six tenses: present, past, future, present perfect, past perfect, and future perfect. The present refers to actions occurring when the writer is writing ("listen"). The past refers to actions written before the writer wrote ("listened"). The future refers to actions that will occur after the writer writes ("will listen"). The present perfect refers to actions that began in the past and were completed before the present ("have listened"). Use the past perfect when one past action was completed before another past action began ("had listened"). Use the future perfect when an action that started in the past will end in the future ("will have listened").

7.8 Moods

There are three moods: indicative, imperative, and subjunctive. Use the indicative for statements of facts or questions. *Example:* "The clerk helps all day." Use the imperative for commands. *Example:* "Listen to the attorney." The subjunctive expresses a wish, requirement, suggestion, or idea contrary to fact. *Examples:* "The attorney requested more time." "Tom would have understood if he had listened." "If I were [not *was*] rich, I would spend more time in Mombasa."

7.9 "That" versus "Which"

Although the difference between "that" and "which" is often unappreciated in British English, American English differentiates the two to good effect.

"That" is a demonstrative pronoun ("that paper"). "That" introduces a restrictive clause. A restrictive clause is necessary to the sentence's meaning. *Example*: "The document that proved my innocence was missing." If you deleted "that proved my innocence," the sentence would lose its meaning.

"Which" is an interrogative pronoun ("which paper?"). "Which" introduces a nonrestrictive clause. A nonrestrictive clause is not necessary to the

sentence's meaning. "Which" is used to define, add to, or limit information. "Which" is usually set off with a comma. Use "which" if you can drop the clause without losing the meaning of the sentence. *Example: "*The document, which was printed on white paper, was missing." If you deleted "which was printed on white paper," the sentence's meaning remains intact.

7.10 Periods

Use a period at the end of a declarative sentence. A declarative sentence states an argument, fact, or idea. *Example:* "The judge is ready." Use a period at the end of a command. *Example*: "Arrive on time." Use a period at the end of a citation before a new sentence begins. *Example*: "*Mundia v Republic* [1986] KLR 623 (High Court at Nairobi). In *Mundia*, the court held that . . . ." Use a period after an indirect question. *Example*: "The lawyer asked me to bring him the documents."

Do not use periods after degrees or metric abbreviations. *Examples:* "cm" for "centimeter" and "C" for "Centigrade."

Do not use periods for acronyms. *Examples*: "GOK" stands for "Government of Kenya." "NATO" stands for "North Atlantic Treaty Organization." Use periods for abbreviations, which are different from acronyms. When using abbreviations, you pronounce each individual letter. *Example*: "U.S.A."

7.11 Colons

Colons push readers forward. Use a colon after a formal salutation. *Example*: "Dear Mr Smith:" Use a comma for an informal salutation. *Example*: "Dear John," Use a colon to tell time. *Example:* "12:00 p.m." Use a colon to separate book titles from subtitles. Use a colon to introduce a definition. *Example:* "Colon: a sign used in a sentence."

Use a colon after an independent clause to introduce a list or quotation or to show that something will follow. *Examples*: "The court considered three factors: injury, causation, and redressability." "The factors the court considered were injury, causation, and redressability." In the second example, there is no colon; no independent clause appears before the list.

7.12 Semicolons

Semicolons have the opposite function of colons. They slow readers down. Use a semicolon to avoid run-on sentences. Use a semicolon to separate independent clauses if the second independent cause starts with

a conjunctive verb ("accordingly," "also," "furthermore," "however," "on the other hand"). Use a semicolon in a list with internal commas or an "and" or "or." *Example:* "On the first day of trial, please bring the original bills and receipts; copies of time cards and pay stubs; and pictures of the house and yard." Use a semicolon to replace commas and conjunctions. *Example:* "The client asked the lawyer to listen, but the lawyer was busy." *Becomes:* "The client asked the lawyer to listen; the lawyer was busy."

7.13 Commas

Commas are another way to slow down readers. Adding a comma creates a pause. Use a comma before a title. *Example*: "John Doe, Esq." Use commas to separate dates and parts of addresses. *Examples*: "The court date is Monday, October 12, 2009." "Send inquiries to Mr. Smith, P.O. Box 1234, Nakuru, 20100, Kenya." Use a comma to separate digits. *Example*: "100,000."

Use a comma to set off interruptive phrases or transitions. *Example*: "The attorney tried, for example, to bring a motion." Use a comma after an introductory word or clause. *Examples*: "Fortunately, it was time to begin." "Although her argument was strong, she lost the case."

Use a comma to set off a tag question. *Example:* "He understood the question, did he not?" Use a comma to separate coordinate adjectives. *Example:* "She was a smart, hardworking attorney." Use a comma before a coordinating conjunction ("and," "or," "but,") that joins two independent clauses. *Example:* "He worked hard, and he won the case." Use a comma to enclose appositives. Appositives are nouns or pronouns that rename of explain the nouns or pronouns that follow. *Example:* "Joe, the plaintiff, argued that Anne, the defendant, caused the accident."

Use a comma to separate a series of three or more words or phrases. The last, or serial, comma in a series is optional, but consistency is important. If you choose to use the last comma, use it throughout the entire decision. *Example:* "The lawyer represented John, Joe, and Jane."

Use a comma to set off nonrestrictive clauses, clauses unessential to the sentence's meaning. *Example:* "The photographs, which were black and white, showed evidence at the crime scene." Use a comma before "because" only when a sentence is long. *Example:* "The attorney wanted to end the case before lunch, because he knew that he needed to be back at the office for a meeting."

8. EDITING AND PROOFREADING

Revision requires patience. Judges, like all writers, must forgo their ego and revise their work for the only one who counts: the reader. The best way for judges to revise is for them to put their judgment aside for a few hours, or even a few days, between drafts. They can pick it back up when they are in a fresh state of mind and ready to continue, but they should not let too much time pass, or they will become lazy and forgetful.

The revision process begins with editing. Editing addresses large issues like content and organization. Editing assures readability. It identifies areas in which judges can improve coherence and structure.

Each part of a judgment must fulfill its purpose. The introduction must introduce parties to the reader, the issues that brought them before the court, the relevant facts and essential procedure, and, perhaps, the conclusion. The conclusion must be consistent with the introduction. The statement of facts must include all the relevant facts that influence the analysis. The reader must understand the judgment. For that to happen, the judgment must be written in plain English.

The revision process continues with proofreading. Proofreading includes correcting typographical errors, grammar, and format, all while double checking citations and quotations. Sometimes it is easier to divide proofreading into stages: first grammar, then spelling, then formatting, then cite-checking. Judges should also always use their word processing grammar and spell-checking feature.

The revision process continues with fiddling over the judgment's appearance. A well-designed format will enhance readability. Many courts have format guidelines. If the court does not have its own rules, and Kenya's court system does not, use 12-14 type size with a standard font, preferably Century, not Times New Roman, and especially not anything dramatic or peculiar. Single-space, but double-space between paragraphs. Add one space between sentences. Always use page numbers, but suppress numbering for the first page. Use right-ragged, not full, justification. Every page must have plenty of white space to make the judgment easy to read.

The final draft should always be proofread on a hard copy. The human eye cannot spot all errors on a computer screen.

9. CONCLUSION

The judge's goal in writing a judgment is to put reason onto paper. Not merely the litigants and their attorneys but also the entire common-law system of precedent depend on honest, reasoned, and well-written judgments. Judgment writing is challenging. But writing clearly, with an effective structure and style, lets judges leave a lasting trail.

Endnotes

1 Although in Kenya and the British Commonwealth judges and attorneys call it "judgment writing," the term is imperfect. Not every opinion a judge writes results in a judgment, which often is the final resolution of a case. The phrase "opinion writing" is the better one: the opinion explains the judgment. "Decision writing" is also inaccurate. Some opinions are orders and decrees, not decisions.

2 Jehangiri, MB., *Judgment Writing* p 1 (Pakistan). Available at http://www.fja.gov.pk/judgment.htm.

3 Justice Mohammad Rafiq, *Judgment Writing and Communicating Effectively Through Judgements*, at p. 1 (Pakistan) (speech delivered at the 10th West Zone Regional Workshop organized by National Judicial Academy at Jaipur, May 25, 2008). Available at http://www.hcraj.nic.in/rafiq-judgment-effective.pdf.

4 For more on judgment writing from Commonwealth jurisdictions, see. Berry., EI (Ed) (2007) *Writing Reasons - A Handbook for Judges* Victoria: E-M Press 3rd Edn. (Canada); Mailhot,L., Carnwath, JD (Eds) (1998) *Decisions, Decisions: A Handbook for Judicial Writing* Yvon Blais Edn (Canada); Kirby, M., 1990. *On the Writing of Judgments*. Australian Law Journal Vol 64 p 691 (Australia); Gibbs, SH., 1993 *Judgment Writing* Australian Law Journal Vol 67 p 494 (Australia); Kitto, SF., 1992 *Why Write Judgments* Australian Law Journal Vol 66 p 787 (Australia); and *A Matter of Judgment: Judicial Decision-Making and Judgment Writing* (Judicial Commission of New South Wales 2003) (with articles from various authors, including Justice Dennis Mahoney, *Judgment Writing: Form and Function*).

5 For a piece on American opinion writing, see Lebovits, G.,*et al*. 2008 *Ethical Judicial Opinion Writing*, Georgetown Journal of Legal Ethics Vol 21 237. Available at http://ssrn.com/abstract=1299767.

6 Morrison, W., (Ed) (1765) *Blackstone's Commentaries on the Laws of England* London: Cavendish Publishing Vol I section III p 64. Available at the Online Library of Liberty: http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=2140&Itemid=99999999.

7 *Id*. at p. 67.

8 Atkinson, R., 2002. *Judgment Writing* p 1 (Australia) (speech delivered to Magistrates Conference, Gold Coast, Mar. 21, 2002). Available at http://archive.sclqld.org.au/judgepub/2002/atkin210302.pdf.

9 *Id.* at p. 2.

10 Dessau,L., Wodak,T., 2003. *A Matter for Judgment,* Seven Steps to Clearer Judgment Writing (Judicial Commission of New South Wales 2003) p 2 (Australia). Available at http://www.highcourt.sabah.sarawak.gov.my/apps/highcourt/sabah/modules/highcourt_cap/components/publishing/index_judgment_showfile.php?id=415.

11 Sharpe, R., Dickson, B., 2002. *The Supreme Court of Canada, and the Charter of Rights: A Biographical Sketch*, Windsor Yearbook of Access to Justice Vol 21 p 603 at p. 617 (Canada) (quoting Canadian Chief Justice Brian Dickson, *Address to the Canadian Institute for the Administration of Justice Seminar on Judgment Writing*, July 2, 1981, NAC vol. 138, file 28). Chief Justice Dickson stressed the importance of organization, brevity, and persuasion and explained, with the rhetorical devices of alliteration, triplets, and a metaphor, that poor judgment writing is often a product of careless judicial thinking: "Thoughts straggle across the printed page like a gaggle of geese, without form, without beginning or end, lacking in coherence, conciseness, convincingness." Id.

12 Justice Dessau and Judge Wodak, *supra* note 10, at p 2.

13 Justice Rafiq, *supra* note 3, at p. 2.

14 Rahman, S., *Decision and Judgment* p 16 (Pakistan). Available at http://www.fja.gov.pk/judgment.htm.

15 Justice Dessau and Judge Wodak, *supra* note 10, at p. 4.

16 *Id.*

17 Morden, JW., 2005. *The "Good" Judge*. The Advocates Society Journal, Vol 13, p 20 (Canada).

18 Denning, A., (Ed) (1991) *The Family Story* London: Butterworths pp 207, 208 (England).

19 *Tricor Enterprises Ltd v Mwok-Handa* [1990] KLR 475 (High Court at Nairobi).

20 Rodger, A., 2002. *The Form and Language of Judicial Opinions*. Law Quarterly Rev, Vol 118 226 at p 237 (England).

21 Justice Dessau and Judge Wodak, *supra* note 10, at p 10.

22 Kiswahili, meaning: "Not all that have claws are lions." English: "All that glisters is not gold." (William Shakespeare, *The Merchant of Venice*, Prince of Morocco, reading Portia's note, Act II, scene vii.)