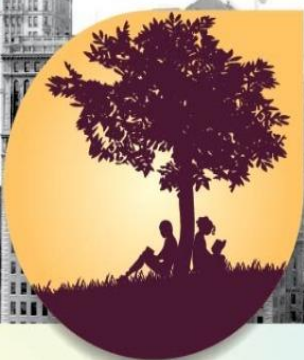


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A Passive Observer or an Active Participant: Role of the
Judicial Officer in the Criminal Trial in Kenya

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A Passive Observer or an Active Participant: Role of the Judicial Officer in the Criminal Trial in Kenya

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Introduction

The Judge or Magistrate¹ is comparable to a referee in a football match. He or she² is the umpire, ensuring a level playing field, within the preserves of the law, for the competing parties. Active Case Management (hereinafter ACM) is the term used to refer to the Magistrate's role of conducting cases in a just and expeditious manner. This is referred to as the 'overriding objective'.³ The goal of the overriding objective includes;

1. Acquitting the innocent and convicting the guilty,
2. Dealing with the prosecution and defence fairly,
3. Respecting the interests of witnesses, and
4. Dealing with the case expeditiously and efficiently.⁴

The main legal instrument that enjoins Judicial Officers to be proactive in the management of cases in their courtrooms is the Constitution of Kenya, 2010. Article 159 establishes judicial authority and sets out the principles to guide Judicial Officers as they exercise this authority. The principles include that, justice should be done to all, irrespective of their status; justice should

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¹ The Words 'Judge', 'Magistrate', 'Judicial Officer' and 'Court' have been used interchangeably.

² The terms 'he/she/him/her' are used to connote persons of all genders. The terms have been used interchangeably, and where one appears, it includes the others.

³ Guideline 1.1 of the Active Case Management Guidelines, available at https://www.unodc.org/documents/easternafrika/Criminal%20Justice/Active_Case_Management_Guidelines_Kenya.pdf (Accessed 17/2/2022). The Guidelines were gazetted in Gazette Notice 1340 of 2016 (ACM Guidelines)

⁴ Andrew Hall (2010), Where do Advocates Stand When the Goalposts are Moved, *International Journal of Evidence & Proof* 14 E&P 109. This mirrors the provisions in Guideline 1.2 of the ACM Guidelines, Kenya.

be administered without undue delay; alternative modes of dispute resolution should be promoted; and justice should be administered without undue regard to procedural technicalities.

In criminal trials, ACM is guided by among others, the Judiciary Active Case Management Guidelines,⁵ which were gazetted in exercise of the Chief Justice's power to make rules of procedure of courts.⁶ The Guidelines were developed during the tenure of the Honourable Chief Justice Willy Mutunga, pursuant to the Judiciary Transformation Framework (JTF Framework);⁷ which was a reform program to address, among others, delay and corruption in the Judiciary.⁸ The JTF was structured around four goals, one of which was, (to achieve) a people-centred delivery of justice; through access to justice, simplification of court procedures and creation of a case management system.⁹

The foundations laid by the JTF were built upon by the succeeding Chief Justice David Maraga, who launched his strategic blueprint, based on 6 pillars, dubbed Sustaining Judiciary Transformation: A New Service Delivery Agenda (SJT). One of these pillars was registry and case management, calendaring and citizen-centric communications; all aimed at enhancing delivery of justice.¹⁰ Chief Justice Martha Koome, has also unveiled her vision for the Judiciary, dubbed Social Transformation through Access to Justice (STAJ), comprising of 8 principles, including accessibility and efficiency.¹¹ Active case management is a key component of these blueprints.

⁵ The Active Case Management Guidelines do not take precedence over specific rules that govern ACM. See Para 2 Page 4 of the ACM Guidelines.

⁶ Section 10 Judicature Act, Cap 8 Laws of Kenya.

⁷ 2012-2016, launched in May 2012.

⁸ Maya Gainer, *Transforming the Courts: Judicial Sector Reforms in Kenya 2011-2015*, *Innovations for Successful Societies*, Princeton University, <http://successfulsocieties.princeton.edu/> (Accessed 14/3/2022).

⁹ Maya Gainer (2015) page 8.

¹⁰ The SJT ran from 2016-2021. Judiciary of Kenya website, Available at <https://www.judiciary.go.ke/highlight-of-the-chief-justice-blueprints/> (Accessed 15/3/2022).

¹¹ Kenya Judiciary website supra.

Background

The Kenyan criminal justice system draws from the English criminal justice system, and is adversarial. Ed Johnson¹² traces the role of a Judge in the English criminal justice system from the ‘accused speaks’ system,¹³ where a lawyer-free trial was held; through the development of the adversarial trial¹⁴ to the modern system, which focuses on active case management.¹⁵ He explains the changing roles of the judge through the transitions, stating that initially the judge took an active role, examining and cross-examining witnesses; later he took a passive role, required of an adversarial system, and that currently, he takes a managerial role.¹⁶ Further that the changing role of judges has caused difficulties in ascertaining boundaries of what is the acceptable and unacceptable intervention.¹⁷ He further states that the managerial role poses a great threat to adversarialism and fundamental fair trial rights.¹⁸

David Neubauer¹⁹ states that the traditional role of a passive judge is changing, and the view that the Court has no interest in moving the case along because it belongs to lawyers is no longer acceptable. The question however is the acceptable degree of management.²⁰ Perez and Javier state that, it is necessary to manage (the cases) without breaching the guarantees

¹² Ed Johnson, All rise for the Interventionist: The Judiciary in the 21st Century, *Journal of Criminal Law* (2016) Vol. 80 (3) 201-213

¹³ Ed Johnson (2016) 202.

¹⁴ Ed Johnson (2016) 203.

¹⁵ Ed Johnson (2016) 208.

¹⁶ Ed Johnson, (2016) 212.

¹⁷ Ed Johnson (2016) 212.

¹⁸ Ed Johnson, *The Role of the Defense Lawyer: Conceptions and Perceptions Within a Changing System*, (2021) Lexington Books, Rowman & Littlefield Publishing Group, Inc. 4.

¹⁹ David Neubauer, *Judicial Role and Case Management*, *The Justice System Journal*, Vol. 4 No. 2 (1978) 223-232.

²⁰ David Neubauer (1978) 223.

of fair trial.²¹ According to Jenny McEwan,²² Judges take a new role in active case management which represents a redefinition of the judicial role from neutral umpire to interventionist.²³ Andrew Hall²⁴ argues that this role is a sacrifice of the presumption of innocence, in the interests of perceived efficiency. Hughes and Bryden²⁵ explore the possible boundaries between permissible and impermissible interventions by Judges, as does Freya Kristjanson²⁶ This paper explores the role of the Judicial Officer and the acceptable degree of ‘active intervention’ by Judicial Officers at each stage of criminal trial in Kenya.

Pre-trial stage

The function of a Judicial Officer in a criminal trial begins at the plea-taking stage, except where the accused is presented to court for an application for continued detention. Applications for continued detention are based on Article 49(1) (a) and (f) of the Constitution of Kenya, which provides for the rights of an arrested person to be informed of the reason for his arrest, and to be brought before court within 24 hours of arrest. Section 36A of the Criminal Procedure Code provides their procedural modalities.²⁷ The

²¹ Pérez-Ragone, Alvaro Javier, An Approach to Case Management from the Horizontal and Vertical Structure of Court Systems (2018). ZZPInt 23 (2018), Available at SSRN: <https://ssrn.com/abstract=3422441> (Accessed 18/3/22).

²² Jenny McEwan, Changing Face of Criminal Litigation in England and Wales, Exeter University 14-15 International Journal of Evidence and Proof (2010) 89-95.

²³ Jenny McEwan (2010) 90.

²⁴ Andrew Hall, Where do the Advocates Stand When the Goalposts are Moved International Journal of Evidence and Proof, (2010) 14 E&P 107.

²⁵ Jula Hughes & Phillip Bryden, Implications of Case Management and Active Adjudication for Judicial Disqualification, Alberta Law Review Vol 54, No. 4 (2017) page 859 (Hughes & Bryden).

²⁶ Freya Kristjanson & Naipaul Sharon, Active Adjudication or Entering the Arena: How Much is Too Much. 2011 Canadian Journal of Administrative Law and Practice; Toronto Vol. 24 Iss. 2 June (2011).

²⁷ Cap 75 Laws of Kenya. The period of such detention should not be more than 30 days per Section 36A(7).

Judicial Officer, in determining such applications must balance the rights the arrested person, public interest, public order and security.²⁸

When the accused is presented before the Judicial Officer, the Judicial Officer must correctly take down the proceedings; ensure that the charges and particulars are stated correctly to the accused person, in a language the accused understands. The Court must record the language used, and the accused's answer to the plea in as close as possible to the words the accused uses. This procedure is provided in Section 207 of the Criminal Procedure Code and was set out in the case of *Adan Vs Republic*.²⁹ The Judicial Officer must ensure that the rights of the accused are safeguarded, which includes listening and resolving any complaints or concerns that the accused might have, to the extent of the Judicial Officer's jurisdiction.³⁰

The practice of some courts has been to take a passive role during plea-taking, only recording the proceedings, without making any interventions. Other courts are more active, making observations and addressing issues, whether raised by the parties or not. One of the issues that the Court can inquire into at this stage is the age and or mental status of the accused, whether it is disclosed by the parties or not. Following the inquiry, if the accused is found to be a child or a person with mental disabilities; the course of trial changes and the Court is able to enforce the legal provisions

²⁸ See the Holding by Justice Professor Joel Ngugi in Nakuru Criminal Revision No. 208 of 2020 Sudi Oscar Kipchumba Vs Republic (Through National Cohesion and Integration Commission) (2020) eKLR.

²⁹ [1973] EA 445, the Court of Appeal laid down the procedure of taking pleas, to be as follows:

- (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
- (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
- (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
- (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
- (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

³⁰ Applications for redress for violations of an arrested person's rights are determined by the High Court, as provided in Article 23 of the constitution.

guaranteed for children in conflict with the law or persons with mental disabilities as the case may be.³¹ In *James Muriuki Vs R*,³² the High Court sitting in revision quashed a conviction meted on an accused person and stated as follows:

“The trial magistrate should have had the accused assessed as to the mental capacity and age. Full investigation ought to be done before trial or after conviction to give a balanced decision.”

During the first arraignment of the accused in Court, the Judicial Officer also sets bail or bond terms, unless the Prosecution presents compelling reasons why the accused should not be released on bail or bond pending trial. Compelling reasons for denial of bond have been set out in the Judiciary Bail and Bond Policy Guidelines to include:

1. Nature of charge and seriousness of the likely punishment,
2. Strength of the prosecution case,
3. Character and antecedents of the accused,
4. Accused’s failure to observe bail or bond terms on previous occasion,
5. Likelihood of interfering with witnesses,
6. Need to protect victims of the crime,
7. Relationship between the accused and potential witnesses,
8. Child offenders,
9. Where the accused is a flight risk,
10. Whether the accused is in gainful employment,
11. The need to maintain public order, peace or security, and
12. Protection of the accused.³³

³¹ In *Weldon Kiprono Ngeno Vs R Kericho Criminal Revision no. 181 of 2012*, The High Court quashed the conviction and sentence of the trial Magistrate who had sentenced the accused to 7 years imprisonment. The accused was a minor of 17 years. The High Court stated that the trial magistrate should have made an informed decision regarding the age of the accused.

³² *James Muriuki Vs R* (1993) eKLR

³³ Judiciary Bail and bond Policy Guidelines. Available at

The Judicial Officer must fix the matter for mention for pre-trial conference, within 14 days of a entering a plea of guilty against an accused person.³⁴ There is a requirement that cases involving accused persons in custody must be mentioned every fortnight, which is a safeguard for the accused, who are unable to raise the bond terms. During these mentions, the accused is able to apply for bond review and make any complaints or requests to the Court. The Court is also able to see the accused and ensure he is of good health as well as address his or her concerns. Conducting a pre-trial conference is mandatory; a Judicial Officer who does not conduct one must record the reasons for not doing so.³⁵

Pre-trial conference is also important as it ensures that the parties are prepared for trial, thus minimising adjournments. During the pre-trial conference, the Judicial Officer ensures that the following has happened,

1. The accused and the court³⁶ have been supplied with the evidence that the prosecution intends to rely on;
2. Disputed issues are identified;
3. Issues of admissibility of evidence are determined, as well as need for facilitation for instance for interpreters and technical support such as need for video links to enable witnesses to testify;
4. The number and needs witnesses to be called during trial are identified, including vulnerable witnesses;
5. The length of trial is determined;
6. The timetable for progress and conclusion of the case is set;
7. The question is answered whether the case is suitable for Alternative Dispute Resolution or Plea Bargain;

http://kenyalaw.org/kl/fileadmin/pdfdownloads/Bail_and_Bond_Policy_Guidelines.pdf (Accessed 22/2/2022).

³⁴ Guideline 5.1 of the ACM Guidelines.

³⁵ Guideline 5.2 of the ACM Guidelines.

³⁶ The practice has been that statements and documentary exhibits are usually only supplied to the accused or his counsel except in murder trials. The ACM Guidelines recognise however, that such evidence should also be supplied to the court. See Guideline 3.1(a).

8. Parties are encouraged to cooperate to ensure the case is concluded expeditiously;
9. Other relevant issues prior to the trial are discussed and resolved.

The guidelines provide not only for disclosure, but also for the conduct of the entire case. They also maintain the autonomy of the Court to conduct those proceedings how it deems fit, while observing the overriding objectives. In *Director of Public Prosecutions Vs Peter Aguko Abok & 35 Others* (2020) eKLR,³⁷ the High Court, noted that:

“The only relevant document addressing the issue of disclosure is the Judiciary Guidelines for active case management of criminal cases in Magistrates and High Courts of Kenya... A court of law is not a mechanical machine to operate within strict and fixed parameters. Each court has a case management strategy executed within the confines of the law to ensure optimal results and attainment of the overriding objective that criminal cases be dealt with justly and expeditiously...”

The importance of the pre-trial conference cannot be overstated; hence, the Judicial Officer must always interrogate the issues above and satisfy him or herself that the issues are addressed effectively and conclusively before setting the trial dates. The ACM Guidelines do not contain timelines within which particular events should occur during trial, hence it is the role of the Judicial Officer to conceive a timetable for expeditious disposal of the case.³⁸ The court has power to give any directions for effective proceeding of the case, whether on its own motion, or on application by parties.³⁹ In the *DPP Vs Peter Aguko Abok*⁴⁰, the court found that, *“A trial court can suo moto give directions to ensure efficient and smooth running of court business... I would regard (them) as powers which are inherent in its jurisdiction.”*

³⁷ Nairobi Criminal Revision Application No. 42 of 2019 from the Ruling of Hon. D. Ogoti (CM).

³⁸ This was held in *R Vs Omar Mwinyi Musimba* (2017) eKLR as quoted in *Director of Public Prosecutions Vs Chief Magistrates Court Milimani Anti Corruption and Kioko Mike Sonko Mbuvi & 18 Others* Nairobi Revision Application No 8 of 2020.

³⁹ Guideline 6.3 ACM Guidelines.

⁴⁰ Ibid note 17. Paragraph 60 & 61 of the Ruling by Justice JN Onyiego.

Judges take on new responsibilities in ACM in criminal trials; including setting a timetable for the trial, asking parties to cooperate and exchange information, identifying key issues and agreeing on non-contentious issues.⁴¹ In promoting the overriding objective, the Judge or Magistrate must deal with a case justly, which constitutes; taking into account the gravity of the offence, complexity of the subject, severity of consequences for the accused and others and the needs of other cases.⁴²

In giving pre-trial directions however, the Judicial Officer must be careful, not to overstep his or her jurisdiction. In *Director of Public Prosecutions Vs Chief Magistrate's Court Milimani Anti-Corruption and Kioko Mike Sonko Mbuvi*,⁴³ the anti-corruption court had issued directions on its own motion that;

"Henceforth, the relevant agencies to ensure that at the time of filing of the charge (s) in the anti-corruption Court, they simultaneously file a copy of a duly executed inventory... It is upon the satisfaction of the above requirement that the plea will be accepted for registration and only then will a matter be fixed for hearing."

The High Court Justice sitting on Revision acknowledged that the decision was well-intended, as it sought to ensure full disclosure by the prosecution and in effect expediting cases. The Court however found that the directions were irregular as they were in effect orders *in rem* and outside the jurisdiction of the Court.

In addition, the Judicial Officer should not be seen to sacrifice the fair trial safeguards of the accused at the altar of expeditiousness. It has been argued that the requirement for the accused to cooperate, identify issues and exchange information with the state is inconsistent with the accused's right to remain silent and flies in the face of legal professional privilege, where

⁴¹ Jenny McEwan, Changing Face of Criminal Litigation in England and Wales, Exeter University 14-15, 2010, page 90 (Jenny McEwan 2010).

⁴² Jenny McEwan, 2010, page 91.

⁴³ Nairobi Revision Application Number 8 of 2020.

the accused is represented.⁴⁴ It is worth noting here that the ACM guidelines do not place a burden on the accused to disclose his documents. Such a requirement is only on the state.⁴⁵ This is except in the case of alibi, where the state is allowed to rebut the evidence.⁴⁶

Therefore, the Judicial Officer must always promote ‘equality of arms’ by promoting the constitutional safeguards of an accused, pitted against a powerful and well-resourced state.⁴⁷ The ACM guidelines should be only be applied subject to the legal and constitutional provisions that protect the rights of the accused to fair trial, which form the basis for the adversarial system of criminal trial. At the pre-trial stage, the Judicial Officer is indeed the ‘driver’ of the process, ensuring that the case is ripe for trial.

During the Hearing

When the case comes up for hearing, on top of the Judicial Officer’s obvious role of taking complete and accurate proceedings, he or she plays the role of ensuring that the parties do not delay the hearing. The Judicial Officer must only grant adjournments as a last resort, only when good reasons have been given.⁴⁸ The Judicial Officer must treat the parties fairly, uphold impartiality and protect the rights of the accused and those of the victim (if any).

The Judicial Officer must accord each party adequate time to present their case; to examine and re-examine their witness and to cross-examine opponents. He or she must also ensure adherence of parties with the Evidence Act as to examination of witnesses and admissibility of evidence.⁴⁹

⁴⁴ Andrew Hall (2010) page 115.

⁴⁵ Article 50(2)(j) of the Constitution of Kenya. In Thomas Patrick Gilbert Cholmondeley Vs R (2008) eKLR, it was held that the duty to supply evidence is not reciprocal.

⁴⁶ Section 212 Criminal Procedure Code.

⁴⁷ The right to fair hearing is non-derogable and cannot be limited as per Article 25 (c) of the Constitution.

⁴⁸ Guideline 5.5 ACM Guidelines provides that adjournments should only be granted in exceptional circumstances.

⁴⁹ The Judicial Officer also superintends and determines objections where Sections 145,146, 150 and 151 of the Evidence Act, Cap 80 Laws of Kenya, have been offended.

It has been noted that a Judge (or Magistrate) is not required to sit silent as the sphinx while the trial rolls on.⁵⁰ He or she is not only entitled, but also required to make appropriate intervention by posing relevant questions to a witness when the witness is giving evidence; especially when the evidence is technical.⁵¹ The questions that the Judge or can ask should be geared to:

1. Clear up a point which is overlooked or left obscure;
2. Ensure that advocates behave themselves properly;
3. Keep to the rules laid down by law;
4. Exclude irrelevancies and repetition;
5. Follow the points being made by advocates and assess their worth so that he is able to make up his mind on where the truth lies.⁵²
6. Dispense with proof of obvious or agreed matters;
7. Ensure that the way a witness is answering or not answering questions does not hamper the progress of trial.⁵³

Where the Court is faced with unrepresented accused persons, it is also the role of the Judicial Officer to guide them through the trial process. The guidance should be kept to a minimum level to ensure fair trial, so as not to assist the unrepresented party to the disadvantage of the represented party. The assistance should not amount to advice that a counsel would otherwise give.⁵⁴ There is a thin line between facilitating the participation of an unrepresented accused and advocacy.⁵⁵ The Judicial Officer must stick to

⁵⁰ Mackenzie Thomson, *Traditional Approach of the Judiciary in Adversarial Proceedings*. Available at http://www.cba.org/CBA/cle/PDF/JUST13_Paper_MackenzieThompson.pdf (Accessed 1/3/2022).

⁵¹ Mackenzie Thomson *ibid*.

⁵² *Jones Vs National Coal Board* (1957) QB 65 (Jones 1957). Hughes & Bryden hold a contrary opinion, that the Judicial Officer should not seek to test the validity of evidence by posing questions to a witness as this may give rise to apprehension of bias. Hughes & Bryden (2017) 859.

⁵³ Canadian case of *Chippewas of Mnjikaning First Nation Vs Ontario* (Minister of Native affairs) 2010 O.J No. 212 para 223 (Chippewas 2010).

⁵⁴ Canadian case of *Barret Vs Layton* (2004) Can LII 32185.

⁵⁵ *Michell Flaherty, Self Represented Litigants, Active Adjudication and the Perception of Bias; Issues in Administrative Law* (2015) 38: 1 Dal LJ 119.

facilitating the participation of the accused and not take the role of examining or cross-examining witnesses, as this could give rise to apprehension of bias. A criminal trial is an adversarial process and not an investigation by the trial Court, hence the court should not usurp the role of counsel to make out their cases.⁵⁶

The Judicial Officer must not compensate for real or perceived failings of counsel, as this would amount to ‘descending into the arena of dispute’ and adopting an inquisitorial mode of hearing.⁵⁷ As stated by Lord Denning in *Jones Vs National Coal Board*:

*“If a judge should himself conduct the examination of witnesses, he so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict”.*⁵⁸

The interventions should be kept at a minimum and should apply to equally to both parties.⁵⁹ It is also desirable that the Court should reserve its questions for when counsel have finished their questions.⁶⁰

The Judicial Officer may make interventions, but they should be limited, more so during cross-examination. This is because, excessive intervention during cross-examination allows the witness time to think through answers to difficult questions, which may go contrary to the strategy of the defence counsel. It also disrupts the counsel’s train of thought.⁶¹ It therefore affects fairness of the trial and may lead to apprehension of bias by the parties.⁶² Improper interventions by a trial Judicial Officer may lead to quashing of convictions, examples of which are:

⁵⁶ R Vs Valley (1986) CCC (3d) 207

⁵⁷ Hughes & Bryden page 863.

⁵⁸ (1953) J No. 136 2QB

⁵⁹ Hughes & Bryden, page 857.

⁶⁰ Freya Kristjanson & Sharon (2011) page 17.

⁶¹ Jones (1957) p. 65.

⁶² Freya Kristjanson & Sharon (2011) 21.

1. Questioning an accused in a way that gives the impression that the Court is siding with any of the parties;
2. Unnecessary interventions;
3. Interventions that preclude the accused from telling his or her story in his or her own way;
4. Numerous sarcastic comments;
5. Questions to unearth additional evidence than that which has been presented;⁶³
6. One-sided interventions, cutting-off questions, speculation to fill in gaps in evidence.⁶⁴

The Court can also intervene to prohibit indecent and scandalous questions⁶⁵ or insulting questions.⁶⁶ Such prohibition is done to protect the privacy of the victim, and must be done with regard to the right of the accused to fully cross-examine the witness.⁶⁷ In the Canadian case of *R. Vs Schmaltz*,⁶⁸ the Court of Appeal found that intervention of a judge in a sexual assault case infringed on the accused's right to make full answer and defence. The trial judge had intervened where the witness was asked if she had flirted with the accused.⁶⁹ Therefore, while the Judicial Officer must ensure respect and decorum is upheld during proceedings, he/she should only make intervention when it is necessary, as when protecting a complainant from overly aggressive or irrelevant cross-examination.⁷⁰

It has been argued that ACM redefines the role of the Judge or Judicial Officer from that of a neutral umpire to either interventionist participant or

⁶³ Canadian case of *R Vs Stucky* (2009) OJ No. 600. According to the Judge, the court may put questions to bring out a relevant matter which was omitted, but in so-doing, the Judge should be careful not to leave his or her position of neutrality to become the cross-examiner.

⁶⁴ Hughes & Bryden page 865.

⁶⁵ Section 159 Evidence Act.

⁶⁶ Section 160 Evidence Act.

⁶⁷ Hughes & Bryden page 862.

⁶⁸ (2015) ABCA CCC 3d 159.

⁶⁹ Hughes & Bryden, page 852.

⁷⁰ Hughes & Bryden, page 862.

administrative bureaucrat, or both.⁷¹ It has also been argued that some of the principles underpinning ACM, especially the emphasis on pre-trial processes raise the possibility of a shift from an adversarial to an inquisitorial mode of inquiry.⁷² Further, that the developments in case management will substantially dilute the quality of the criminal justice system, and hack at its adversarial foundations.⁷³

The foundations of an adversarial trial lie in the fact that a criminal prosecution is a coercive process undertaken by the state against an individual.⁷⁴ The situation inevitably pits one extremely powerful, authoritative and resourced party against another, not so powerful and less resourced accused person.⁷⁵ This underpinned the ‘equality of arms’ doctrine that gave rise to the protections afforded to accused persons faced with criminal trials. The protections that ensued are entrenched in our Kenyan Constitution and other National and International Laws. They include:

1. Provision of legal representation at the state’s expense,
2. A high standard and burden of proof by the state,
3. Right to silence,
4. Prohibition against hearsay evidence,
5. Non-admission of bad-character evidence,
6. Prohibition of self-incrimination,
7. Judicial discretion to quash charges, dismiss them or acquit an accused person for want of evidence, and
8. The requirement for the prosecution, not the defence, to disclose their case in detail at the beginning of the trial, except where the accused presents alibi as his defence.⁷⁶

⁷¹ Jenny McEwan, 2010, page 90.

⁷² Jenny McEwan, 2010, page 90. Also See, Andrew Hall, Where do Advocates Stand When the Goalposts are Moved, International Journal of Evidence & Proof (2010) 14 E&P 107.

⁷³ Jenny McEwan, 2010 page 94.

⁷⁴ Andrew Hall, 2010 page 109.

⁷⁵ Andrew Hall, 2010, page 110.

⁷⁶ Andrew Hall, 2010, page 111

Ruling on Case to Answer

At the close of the prosecution case, the Judicial Officer invites parties to make submissions, and proceeds to write the Ruling on case to answer. This is also referred to as a Ruling on a *prima facie* case. In *Ramanlal Bhatt Vs R*⁷⁷ a *prima facie* case was defined as:

“...one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence.”

When making this Ruling, the Court does not need to give its reasoning, and it does not to determine with finality the weight of the evidence; unless it is acquitting the accused.⁷⁸ The Court only states that it has found that the accused has a case to answer.

If no case has been made out against the accused, the Judicial Officer should acquit the accused.⁷⁹ The Judicial officer should not place the accused on his defence just to clarify doubts in the prosecution case or to fill any evidentiary gaps.⁸⁰ The onus of proving all the ingredients lies on the prosecution, and it is only when the burden has sufficiently been discharged that the accused is found to have a ‘case to answer’.

Defence case

Where the Judicial Officer places the accused on his defence, he or she explains Section 211 of the Criminal Procedure Code, where the accused should elect his mode of defence.⁸¹ The Judicial Officer then records the mode of defence and proceeds to fix the case for defence hearing. The Judicial officer should afford the accused adequate time and resources to

⁷⁷ 1957 (EA)332.

⁷⁸ Anthony Njue Njeru Vs R. Criminal App. No. 77 of 2006 (2006) eKLR.

⁷⁹ Section 210 Criminal Procedure Co.de Cap 75 Laws of Kenya.

⁸⁰ Justice Odunga in R Vs Robert Zippor Nzilu (2020) eKLR while quoting the Malayan case of Public Prosecution Vs Zainal Abidin B. Maidin & Another Criminal Appeal No. 41LB-202-08/2013.

⁸¹ These include giving Sworn Evidence with or without witnesses, giving unsworn evidence with or without witnesses and choosing to remain silent.

prepare for his defence, while at the same time upholding the principle of expeditiousness. The Judicial Officer should not give the accused leeway to unnecessarily delay conclusion of the case.

In *Manchester Outfitters Limited Vs Pravin Galot & 4 Others (2020)eKLR* the Court noted that sometimes parties fail to carry out their duty to assist the court to deliver justice without delay. Instead, they “...take advantage of the court procedures and processes to delay determination of disputes...” The matter involved numerous cases, both civil and criminal, involving similar parties, and which had complicated the trial issues. The Court of appeal exercised its power to manage the cases, listed all the applications for hearing, heard them back-to-back and rendered a consolidated Ruling determining 10 applications. In rendering the ruling, the Court emphasised that:

“It is the combined responsibility of the parties, their advocates and the courts to ensure disputes are resolved in a more efficient and cost-effective manner... Counsel, particularly being officers of the court, must never be seen to deliberately prolong the cases they have the conduct of indefinitely, by resorting to delaying tricks and tactics.”

When hearing the defence case, the same principle of limited intervention discussed above should be applied. The Judicial Officer should not appear to have adopted a position on the facts, issues or credibility of the accused or his witnesses.⁸² The test of this is not whether the accused was in fact prejudiced by the intervention by the Judge, but that a reasonably minded person, sitting throughout the trial would consider that the accused had not had a fair trial. The appearance of fairness is crucial, especially when the accused takes the stand.⁸³

⁸² In the Canadian Case of *R Vs Stucky*, (2009) O.J No. 600 (CA), a decision was challenged because the judge had cross-examined the accused and some of his witnesses in a dismissive manner. The decision was overturned as it gave rise to an apprehension that the Judge had pre-judged the credibility of the accused.

⁸³ Canadian Case of *R Vs Valley* (1986) CCC (3d).

Judgment

Once the accused person presents his or her case and closes the defence case, the Judicial Officer then invites the parties to make submissions and reserves a date for Judgment. Although there is no stipulated period within which the Judicial Officer should write the judgment in criminal cases, he or she should unreasonably delay it. Once the judgment is ready, the Judicial Officer reads it out to the parties in open court, and signs it.

The Judgment should contain a summary of the evidence presented by the parties, the law applicable, the finding of the court and the reasons for the finding.⁸⁴ The Judicial Officer may use relevant cases to explain legal principles. After pronouncing the Judgment, the Judicial Officer should remind the parties of their right to appeal, within 14 days. The Court should also make orders on application of the parties regarding typing of proceedings, leave to appeal, refund of cash bail, disposal or dealing with exhibits etc. The outcome of criminal cases is either conviction or acquittal of the accused and the Judgment should state as such.⁸⁵

Sentencing

Where the Judicial Officer convicts the accused, he or she and invites the Prosecution to state whether the accused is a first or a repeat offender. The Court also takes mitigation from the accused, and proceeds to sentence him or her. At this stage, the Court may hold a sentencing hearing,⁸⁶ where the Prosecution may present a Victim Impact Statement⁸⁷ on the impact of the crime. In issuing the sentence, the Court considers the penalty as provided

⁸⁴ Section 169 of the Criminal Procedure Code Cap 75 Laws of Kenya provides that the judgment shall contain the section under which the accused was charged, that the accused is convicted (or acquitted) as well as the sentence. If acquitted, the judgment should state that the accused be set at liberty.

⁸⁵ Section 215 of the Criminal Procedure Code Cap 75 Laws of Kenya.

⁸⁶ Section 216 Criminal Procedure Code.

⁸⁷ Provided for in Section 12 of the Victim's Protection Act No. 17 of 2014 and Section 329C of the Criminal Procedure Code.

for by law-both statute and case law,⁸⁸ as well at mitigating and aggravating factors.⁸⁹

The Court may, on its own initiative, call for a Pre-Sentence Report⁹⁰ from the Probation and Aftercare Services, which enables the Court determine whether the accused is suitable for a non-custodial sentence. The factors to be considered in making this decision include;

1. Gravity of the offence;
2. Accused's previous records
3. Where the accused is a child in conflict with the law
4. Character of the accused
5. Protection of the Community and
6. Accused's responsibilities to third parties.⁹¹

A Judicial Officer can issue the following sentences; imprisonment, probation order, community service order, fine or compensation.⁹² Where he or she has convicted the accused of more than one count, the Judicial Officer determines whether the sentences will run concurrently or consecutively. He or she must also take into account the period the accused person has stayed in remand during the pendency of the trial.⁹³ Where the law provides for a minimum sentence, the Judicial Officer cannot give a lower sentence and cannot substitute the sentence with a fine.⁹⁴

⁸⁸ Case law clarifies otherwise problematic terms, such as 'is liable' to which has been held to mean the maximum sentence. This was held in R Vs Sarah Mutete Matheka (2018) eKLR, quoting the Ugandan case of Opoya Vs Ug (1967) EA 752.

⁸⁹ See the Judiciary Sentencing Guidelines (Available at http://kenyalaw.org/kl/fileadmin/pdfdownloads/Sentencing_Policy_Guidelines_Booklet.pdf - accessed 21/2/2022) Pages 49-51.

⁹⁰ Rule 4(1)(a) Probation of Offenders Rules under Probation of Offenders Act Cap 64 Laws of Kenya.

⁹¹ See Guideline 7.19 of the Sentencing Guidelines.

⁹² Chapter VI of the Penal Code Cap 63 Laws of Kenya.

⁹³ Section 333(2) of the Penal Code.

⁹⁴ Section 26 (3) (i) Penal Code.

Conclusion

It might seem that the safest course for a Judicial Officer is to avoid any intervention during trial, hence avoiding complaints about impartiality. This paper argues that this is not a viable strategy,⁹⁵ given that evolution of the role of the Judge in light of the ACM guidelines. Indeed, the Judge or Magistrate must manage his or her Court, according the appropriate time to cases according to their needs. The Judge or Magistrate must therefore make the relevant interventions, especially during the pre-trial stage. The interventions must be limited during examination-in-chief and cross-examination of witnesses, both for the prosecution and defense. The Judge must safeguard the rights of the accused, more so the unrepresented ones. He or she must jealously protect and guard the Constitutional protections and fair hearing rights of the accused.⁹⁶ The Judicial Officer, in promoting shorter trials, must enhance participation of self-represented litigants and compensate for vulnerabilities of third parties,⁹⁷ including victims of crime. The Judicial Officer is anything but a passive observer in the management of cases. It is no longer possible for the Judicial Officer to sit passively in ‘monk-like silence as Counsel call the case in whatever fashion they please’.⁹⁸ He or she must take charge of his or her court, discharge the expected mandate, and reach the determined individual targets set by his or her employer. The Judicial Officer therefore has no choice but to be an active manager in the disposal of cases, at all stages of the trial, from pre-trial to sentencing.

Further to this, the Court should endeavour to maintain a calm demeanour and avoid expressions of annoyance, impatience and sarcasm.⁹⁹ This is in appreciation of the fact that some parties’ conduct causes the Court to be frustrated, especially when such conduct undermines the overriding objectives of ACM; but the Court should not display such frustration in a

⁹⁵ Bryden & Hughes page 868.

⁹⁶ Provided in Article 50 of the Constitution of Kenya on fair hearing.

⁹⁷ Bryden & Hughes page 869.

⁹⁸ Quoted in the Canadian case of R Vs Federhof (2003) 68 OR 3d 481 at paragraph 40. Also in Quoroo Vs

Canada (Minister of Citizenship and Immigration) 2005 FC 271.

⁹⁹ Chippewas 2010 para 240.

way that leaves the impression that it has pre-determined an important aspect of the case.¹⁰⁰ The Judicial Officer should be open to persuasion throughout the trial and maintain neutrality so as not to give rise to apprehension of bias.¹⁰¹

The Judicial Officer is also guided by the Bangalore Principles of Judicial Conduct,¹⁰² which are; independence,¹⁰³ impartiality,¹⁰⁴ integrity,¹⁰⁵ propriety,¹⁰⁶ equality,¹⁰⁷ competence and diligence.¹⁰⁸ The fact that our judicial system is adversarial makes it a delicate balance for the Judicial

¹⁰⁰ Bryden & Hughes page 866.

¹⁰¹ Bryden & Hughes page 857.

¹⁰² The Bangalore Draft Code of Judicial Conduct 2001 adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices held at the Peace Palace, The Hague, November 25-26, 2002). Available at https://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf (Accessed 17/2/2022).

¹⁰³ Meaning to exercise judicial functions without regard for extraneous influences, but based on the Judicial Officer's assessment of the law and facts.

¹⁰⁴ Meaning that the Judicial Officer must conduct herself and issue decisions without favour, bias or prejudice. The process of issuing decisions, as well as the decisions themselves should show that the Judicial Officer does not lean on one side.

¹⁰⁵ Meaning that the Judicial Officer's conduct must be above reproach to a reasonable observer. The Judicial Officers must, in all their duties, maintain both their personal integrity as well as protect the image of the Judiciary.

¹⁰⁶ Meaning the conduct of a Judicial Officer must befit the stature of the office, which he/she holds. To this end, the Judicial Officer accepts personal restrictions otherwise not imposed on other people so as to protect their own image and that of the Judiciary. Includes managing their financial obligations and that of their family to avoid embarrassment, avoiding perception of bias, avoiding conflict of interest, not disclosing confidential information, avoiding favors and gifts by virtue of his or her office and those calculated to influence his or her decision.

¹⁰⁷ Meaning that the Judicial Officer treats all persons equally, avoids bias and discriminating on any of the parties that appear before him/her. In addition to practicing equality, the Judicial Officer must also require parties before her to avoid discriminating on any other party.

¹⁰⁸ Meaning that the Judicial Officer must give priority to the performance of his or her duties, and must take steps to keep abreast of developments in the law (including international law) that enable him or her to make timely and proper decisions. It also includes delivering the decisions promptly and maintaining order and decorum in the courtroom.

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Officer; to be impartial and to expedite cases, while treating all parties fairly. This balance is achievable, and the ultimate result will be reduction of backlog and increased confidence of the public in the institution of the Judiciary, which is a pillar in promoting democracy.

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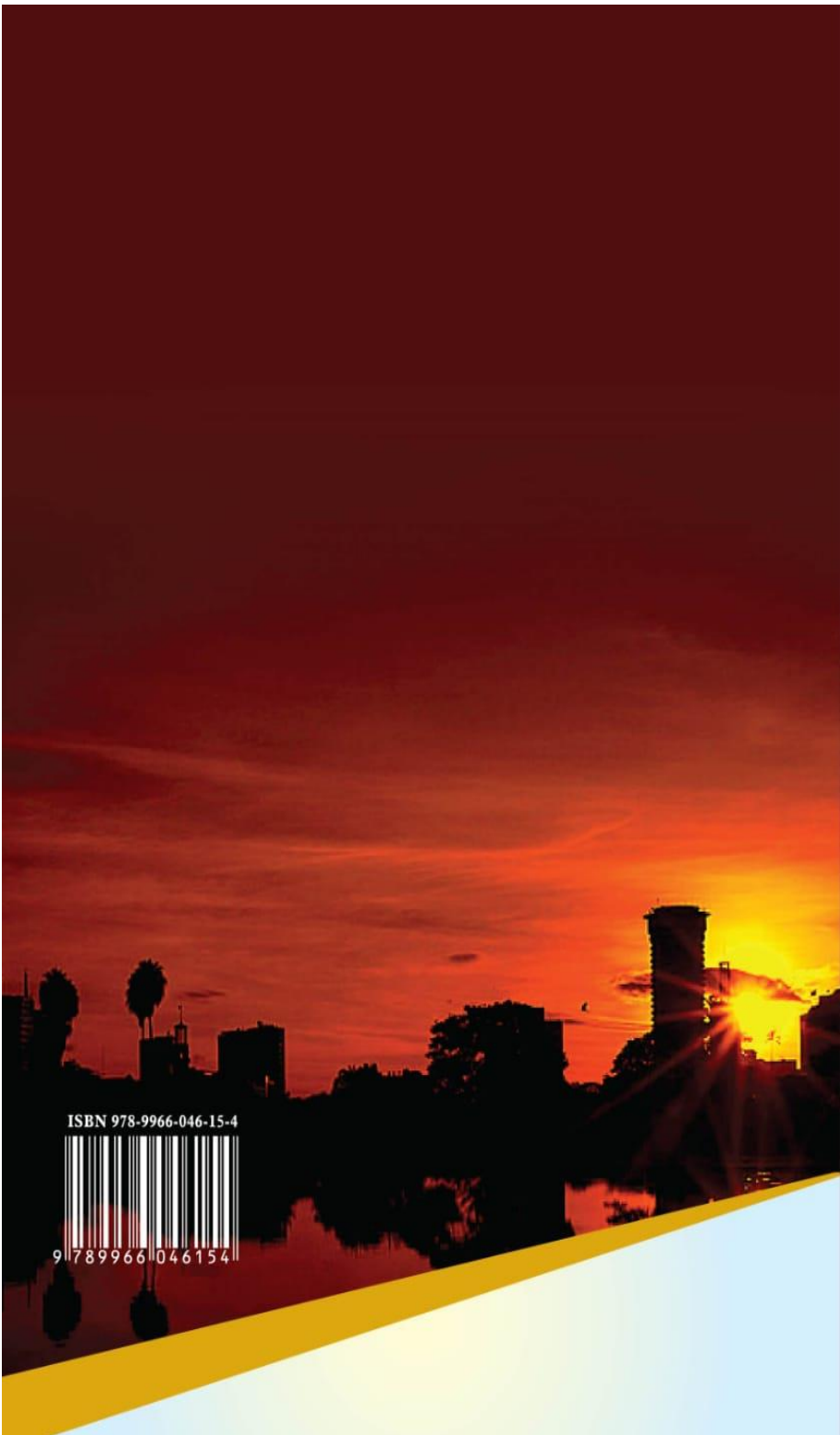
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