'Developments in appellate advocacy: An appellate judge's perspective'*

By Justice Mumba Malila**

Introduction

I am pleased to make this presentation on a subject that should be of immense interest to advocates who spend time in appellate courts attempting to persuade judges to accept their preferred positions. From the title of my presentation it is clear that the subject of this discussion is a huge one which, I concede, I cannot do justice to in the limited time allocated to me. What I propose to do, if this discussion is to be meaningful to both you and I, is to limit the conversation to some only of the many identifiable features of legal practice that have, in recent years, changed fundamentally the procedures in appellate courts. These developments have significantly affected advocacy skills in appellate courts. Using examples from Zambia, I will give my own reflections from the perspective of an appellate court judge as to what advocates should and should not do if they are to avoid squandering forever, the opportunity to persuade judges and succeed in their appeals in this changing appellate advocacy environment.

In an article written for the *Australian Bar Review*[1] the Hon. Justice Michael Kirby of the High Court of Australia properly, in my view,

* A paper presented at the Commonwealth Law Conference, Livingstone, Zambia, April 2019

lists six of the many features of legal practice that are ominously calling for adaptive change in the skills required of appellate advocates as follows:

1. The move from oral to written persuasion;
2. The introduction of time limits on advocates;
3. The use of new technology, such as video links, the internet and power points, to illustrate submissions and CD-ROMs with hyperlinks to cite references and trial evidence;
4. The potential of voice recognition and other devices to access relevant statutes and decisions;
5. The coming on the scene comparative and international law to supplement traditional sources; and
6. The long-term potential of artificial intelligence.

Focus on two of the developments

I cannot of course attempt any commentary of all of these even if I could. The focus of my discussion is on two of these procedural changes that have occurred in the last 20-30 years within appellate courts. The first is the growing use of written submissions. The second which goes hand-in-hand with the first, is the introduction of time limits for oral submission. These two features have suggestively impacted appellate advocacy by altering in an

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[1] Hon. Justice Michael Kirby AC. 'The future of appellate advocacy,'142(2006) 27 Australian Bar Review

unprecedented way the environment in which appellate advocates present their cases.

One challenge for advocates in appellate courts is to maximise the time available to them in making their case heard and possibly appreciated by the judges. They should thus understand how to most effectively do so given that written submissions will already have been furnished to the court. These two developments have affected appellate advocates' opportunities for persuasion.

There is a sense in which the vitality of a bench of appellate judges rests in large measure on the vitality of the advocates appearing before it. And the liveliness of the advocates is at its most significant time during oral adversary argument in public, especially in appeals. Effective court room presentation normally reveals great skills, often honed over years of practice. Good oral arguments are a pleasure for an appellate judge - any appellate judge - to behold. Yes, if there is one thing that is thoroughly pleasing to a panel of appellate court judges, and no doubt to the instructing client if present in court, it is to see the work of a really skilled and prepared advocate on display in the court room. Many appellate court judges, including yours truly, relish seeing lawyers who come to court absolutely prepared to connect the facts and the law and present them in a logical and convincing fashion.

In most commonwealth countries, including my own, the system of justice has long been one that historically places emphasis on oral advocacy performed in open courts. Less reliance has been traditionally placed on written submissions unlike in other jurisdictions such as the United States of America. Appellate court rules in many commonwealth countries direct that in an appeal, both written and oral arguments be made. In my jurisdiction, for example, the rules require that in addition to the record of appeal which contains all the documents produced in pleadings and evidence in the lower court, the advocate for the appellant must file some heads of argument (outline of main argument). Likewise, counsel for the respondent has to file heads of argument in response. A list of authorities, if necessary, must accompany the heads of argument.

My understanding of heads of argument, as the name suggests, is that they are highlights or outlines of the main arguments, in point form; some kind of talking notes. The Advocate is then expected to expatiate on those heads of argument and list of authorities in his/her oral submissions in open court. This is where the advocate must display oral advocacy skills, carefully expounding the law, analyzing the evidence and persuasively explaining the legal principles and authorities.

The shifting focus from oral advocacy to written persuasion

This position has, however, progressively changed over the years. Not only has the idea of heads of argument been transformed to mean detailed submissions, there is increasing reliance on such written submissions in lieu of heads of argument, properly so called, by parties to appeals with the advocates of the parties in many instances making little or no additional oral arguments at the hearing of the appeal.

In lower courts, in Zambia for example, orders for directions now invariably require parties to file written submissions at the conclusion of the trial. Rules of the appellate courts too, direct that heads of argument should be filed together with the record of appeal. What this means in practice is that it is not just good oral advocacy that is diminishing; appellate courts are deciding more and more cases based on the written submissions.

But why has this new trend taken root in many jurisdictions? Why has this emphasis on written submissions developed? Well various reasons can be offered to explain this change. One reason generally touted for this trend has to do with pressure of work in appellate courts against the limited time available to the decision makers. Oral hearings generally involve considerable amounts of time. Many appellate courts have thus adopted a filter involving written argument simply to cope with the case load. Where written submissions are filed, the parties are saved the costs and time of arranging appearance in court to make oral arguments. The courts

are equally spared the burden of spending time sitting in open court to hear oral submissions and the preparations that forerun such sittings. Reliance on written submissions has, in this regard, the obvious advantage of saving scarce judicial resources.

Of course, there is a whole range of benefits that written submissions offer to the parties and to the court. One of these is that they provide the court with the practical means to be fairly content in deciding the appeal with no doubts. Written submissions offer the court something in the form of relevant authorities and appropriate quotations from those authorities that can direct the judges to what may be relevant material in deciding the appeal; material which may be included in the court's opinion because it takes into account relevant authorities on the point. Additionally, because there is now far too much material readily available for advocates to use in their written arguments, judges will find written submission quite useful from the point of view of verifying the materials relied upon by the advocate to make his/her case. Increasingly judges are reading written submissions electronically instead of in paper form, and will often access the portion of the record or case that the advocate cites with a simple tap of the finger on the citation, and are instantly taken to the factual or legal material referred to; it instant verification.

In my jurisdiction, the increasing reliance on written submissions and the dearth of advocacy is compounded by rule 69 of the

Supreme Court Rules, chapter 27 of the laws of Zambia. This rule allows a party to an appeal that wishes to dispense with attendance by himself or his advocate to file a notice of non-appearance. By filing such notice, the filing party in effect signals to the court to go ahead and determine the appeal based solely on the record of appeal and the written submissions without the court hearing orally from such party. In other words the whole case for the notice filing party is as submitted. It will not be supplemented by oral arguments. Such party is, in a sense, saying they do not wish to engage in an oral conversation with the court.

Unprepared advocates or ones who, for any reason, not least the composition of the bench, would wish to avoid orally engaging the court in a discourse, will find the rule 69 notice as a useful way out. It is true that rule 69 is doubtless a very useful facility in avoiding the incursion of unnecessary costs and time. Yet, it is difficult to ignore the plain truth that although in theory, 'argued' cases and 'submitted' cases get the same level of attention and scrutiny by the judges assigned to deal with it, the practical reality of it is not so. During oral arguments, the advocate has the chance to capture the attention of the judges and to answer their particular questions and address their concerns. It is also an opportunity to interest the judges in the written submissions.

There is something different if judges won't get to hear counsel emphasising key points or dispelling misimpressions; or where they

do not engage counsel to clarify unclear points. I think advocates should always see themselves as an invaluable resource to the judges, and that they are there to help the court. The presentation of oral arguments should in general be taken as if the court has invited the advocate to come and answer the court's questions and resolve its concerns. It is the last opportunity to influence the court's decision-making process.

The rule 69 notice, and I want to believe a similar rule exists in some other Commonwealth jurisdictions as well, could thus grossly disadvantage the absent party where clarification on any issue to do with the appeal may be necessary. The opportunity to tell the court why a particular case authority is distinguishable, irrelevant or otherwise inapplicable or why some other case is applicable is allowed to go begging for good.

There are a number of worrisome issues about the heavy reliance on written submissions in appellate courts and with it, the change, probably forever, of the skills of advocacy which this new development entail. One such bothersome phenomenon is the decay of eloquence at the Bar. Increasing reliance on written submissions has invariably led to the degeneration in articulacy by advocates. I think every advocate must be familiar with the art of persuasion and must know something of the secret of great communication namely, stand up; speak up; shut up; and sit down! What reliance on written heads of argument has the potential of doing is killing

advocacy and replacing good advocacy skills with good writing skills.

Another issue of concern is that written submissions are becoming more and more copious. It has now trendy for lawyers to produce long-winded submissions, sometimes running into tens of pages. The issues for determination become obfuscated in the process, making the submission less helpful to the appellate court.

Make no mistake; appellate courts in general like being assisted through counsel's written arguments in directing themselves to the legal principles relevant to the dispute. But the value of such written arguments is significantly diminished if the arguments are bulky and entwined with irrelevant details. This is so particularly where the advocate misuses or forgoes the opportunity of making oral submissions. In the process of deciphering what is relevant to the issues before them, judges will not only spend considerable amounts of time, they will also plough through the irrelevant arguments raised, deliberately or thoughtlessly, by one party to the dispute. They may thus be induced to spend valuable time explaining in their judgment why a particular argument is irrelevant and why it should be lost rather than why an argument is good and should win the case for a party. This might be reflected in the overall result. The point I am making is that imprecise or confusing written arguments or submissions merely invite nasty concerns from an exasperated appellate court.

Another source of considerable discomfiture for me with regard to written submissions is the seeming inability or unwillingness on the part of the advocate to engage the court orally away from the written submissions even where they avail themselves of the opportunity to do so. I have earlier pointed out that it has become fashionable for lawyers to turn up at the hearing of an appeal only to declare that they place reliance entirely on the written arguments that will have been filed prior to the hearing. That may not always be good enough. Most members of the appellate courts are prone to ask many questions, and good advocates must be prepared to answer them directly and as correctly as possible, bearing in mind always that some questions are asked for more than one purpose. For example, a judge that may be siding with the advocate may sometimes use questions directed at such counsel to convince another judge whose mind on an issue may be wavering.

When asked questions, particularly outside their written submissions advocates, especially those who make wordy written submissions, sometimes give answers that often times expose their limited readiness for the appeal. It is concerning to us in the appellate courts that sometimes lawyers who submit world class written arguments are not able to engage the court orally at the same level as those written arguments. The quality of the oral discourse with the court is often far less satisfactory, thus exposing a serious disconnect. When the advocate appearing in court has

not absorbed the written submission entirely it matters little that he is a skilled advocate. Unprepared advocates perpetually face the dreadful risk of being unable to confidently and authoritatively answer the court's questions, most hauntingly when their client is present in court.

Something terrible must have happened to advocacy at the Bar over the years.

Managing time limits

Time is always a scarce resource which must be managed properly. The increasing use of written submissions has been accompanied by the introduction of time limits on oral hearings. The challenge for the advocate is to use that limited time effective to persuade the court. The increasing importance of written submissions coupled with the imperious need to keep to time limits impacts on the way that an appellate advocate typically approaches the task at hand.

When advocates appear in appellate courts they will have prepared and filed written submissions argument which the judges will have had for a sometime preceding the hearing of the appeal and which they will have read and considered. The judges will have invariably discussed these arguments with each other. By their nature, oral arguments are not designed as a further opportunity to present submissions to the court already stated in writing. What the oral

argument does is to presents an advocate with an opportunity to focus the attention of the court on the most important aspects of the case. More importantly it provides an opportunity to engage in a discussion with the decision makers about the central issues and to clarify matters that may be troubling to the appellate judges. A good advocate will use the oral argument to complement and strengthen the written submissions, not just to state them again in a slightly different way. Reading written submissions aloud to the court does nothing to advance the argument. It tends to frustrate judges who, for most part, will already be familiar with the material before them. Presentation of oral arguments at the hearing of the appeal is merely an opportunity for the lawyer to attempt to persuade the court to apprehend the case from the advocate's point of view and to clarify unclear points, emphasise some and avail the court such additional information as may be necessary to the decision-making process.

In practice, however, there are many instances when lawyers appear before us in the appellate court either totally unprepared or not nearly as prepared as they ought to be. Sometimes lawyers just do not have their tackle in order. This kind of insouciance could sometimes sadden the court a little bit but it invariably harms the client's case. The oral argument may be utterly unhelpful when the advocates take to aping written submissions, or simply repeating themselves.

In the time allocated for oral argument the advocate should try to make the key points that he/she really wants to raise for the judges.

Two of the many things that advocates should do in view of the increased reliance on written submissions and tight timeframes is to spend more time reflecting on how to frame an issue or issues in a way that makes the issue or issues 'sell' to the Court'; issues that appeal to the panel of judges hearing the appeal.

The art of formulating winning issues comes with experience or brilliance, or could be by creativeness, and for the advocate who lacks all of these, by hard work and meticulous preparation. One issues are appropriately framed, it is easy for the judges to buy into the argument. It attracts fewer concerns and fewer questions from the court. This in turn makes it easy for the advocate to manage the limited time available. It is thus important for the advocate to pick an issue or a couple of issues central to the success of the appeal to get oral argument on.

When the advocate is unprepared, it is difficult for him/or to manage time effectively. Heedlessness or unpreparedness of the advocate may lead him/her to spend considerable time arguing their weakest issues. They may wrongly cite the record or authorities. When asked questions, they do not answer directly, completely and immediately.

The point to always note about appeals is that often times, the fact that an appeal has been launched at all or has any reason to be defended by the respondent entails that there is some arguable justification to belong to either side of the appeal; it is because the authorities are available on each side of the argument in the hands of any really competent advocate. The real question then becomes which view between these two, is the appellate court going to accept? Granted that the controlling authorities are multifarious, advocate ought to be careful in the manner in which he/she approaches such a manipulable quantity of authorities.

Conclusion

Lawyers representing parties to litigation in appeals in appellate court should always bear in mind that to be effective they ought to understand and faithfully follow all applicable rules, grasp the narrative of the case and impress the appellate panel with written and oral submissions that eventually found a good legal precedent. They should, as much as humanly possible, lessen the risks inherent in appellate practice and enhance their client's prospects for success in their appeals. In other words, there is no substitute for the need for any appellate court advocate to scrupulously know their client's case. This requires thorough preparation. Preparedness for both written and oral presentation is the inevitable priority in enhancing the prospects for a successful outcome.

As regards oral arguments counsel can, with industry, careful organisation and attention to detail, prevent what would truly be donations to the opposition, such as slovenly looking or sounding submissions, a thoughtless list of authorities and reliance on overruled, limited or denigrated authorities. The advocate should use *viva voce* arguments as the last opportunity to influence the court's decision making process. It is the time to raise unanswerable question or to rattle the court.